NEW YORK LAW SCHOOL

NYLS Journal of Human Rights

Volume 1
Issue 1983 *Symposium-The Enforcement of Human Rights Norms: Domestic and Transnational Perspectives*

Article 6

1983

A Comparison of Norms-Rights of the Mentally Ill and Allegedly Mentally Ill

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A COMPARISON OF NORMS—RIGHTS OF THE MENTALLY ILL AND ALLEGEDLY MENTALLY ILL

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"Everyone has the right to recognition everywhere as a person before the law."[1]

This article will discuss the legal rights of both mentally ill and allegedly mentally ill persons. Existing legal norms will be analyzed and compared to certain proposed norms. In the ensuing three-part analysis, the first section will deal with how the law in the United States treats mental illness litigation as concerns civil commitment, criminal commitment, and the right to refuse treatment. The second section will describe the corresponding procedures in the Union of Soviet Socialist Republics (with the exception of the right to refuse treatment—no such right is recognized there). The third section proposes three sets of guidelines for the treatment of the mentally ill, for the purpose of identifying in each the points most desirable in the protection of rights.

I. UNITED STATES

A. Civil Commitment

There are two traditional bases of authority invoked to justify involuntary civil commitment.[2] The first is the police power. Justifications for the invocation of this power include protection of citizens from harm (physical, mental, emotional, and sometimes financial) caused by the mental illness of others.[3] The second ground of authority is *parens patriae,* or the role of the state as guardian. Functions of the state in this area include pre-

*J.D. cum laude, New York Law School 1983.

1. Universal Declaration of Human Rights, Art. 6, 3 U.N. GAOR, G.A. Res. 217, U.N. Doc. 1/777 (1948).

2. Silverberg, *The Civil Commitment Process: Basic Considerations,* in 1 LEGAL RIGHTS OF THE MENTALLY HANDICAPPED 105 (1974) [hereinafter cited as LEGAL RIGHTS].

3. *Id.*

vention of self-inflicted harm, treatment of an individual for the purposes of curing the illness or of rehabilitation, and custodial care of those considered to be untreatable.[4]

In the United States, the responsibility for mental health care lies for the most part with the individual states and not with the federal government.[5] Thus, varying standards are applied to determine whether an individual is an appropriate subject for commitment. Under one standard, certain state statutes allowed involuntary commitment on the basis of a need of care and treatment for mental illness.[6] This standard required no showing of dangerousness or harm to the individual or to others. It was possible that a judicial interpretation might find an implied requirement of dangerousness in the statute, but this was by no means certain. The problem of vagueness is further exacerbated by the various definitions offered for the term "mental illness." One typical statute defines a "mental disorder" as merely "any organic, mental, or emotional impairment which has substantial adverse effects on an individual's cognitive or volitional functions."[7]

A second, and more enlightened, standard of commitment requires some showing of dangerousness, such as "danger to himself or others" due to mental illness.[8] While this element may be considered a greater obstacle to commitment, obvious problems remain. Often, neither "danger" nor "mental illness" is

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4. *Id.*

5. *See generally Developments in the Law—Civil Commitment of the Mentally Ill,* 87 HARV. L. REV. 1190 (1974) (survey and analysis of American case law and statutes regarding civil commitment) [hereinafter cited as DEVELOPMENTS].

6. Maycock v. Martin, 157 Conn. 56, 63, 245 A.2d 574, 577-78 (1968), *cert. denied,* 393 U.S. 1111 (1969) (upheld constitutionality of state statute which required for confinement only that subject be "mentally ill and a fit subject for treatment"; plaintiff was confined to a state mental hospital as one requiring treatment for his own welfare); Fhagen v. Miller, 29 N.Y.2d 348, 355, 278 N.E.2d 615, 617, 328 N.Y.S.2d 393, 397 (1972), *cert. denied,* 409 U.S. 845 (1972) (one afflicted by mental disease as defined by state statute need not be violent or dangerous to justify a short confinement prior to notice and an opportunity to be heard).

7. WASH. REV. CODE ANN. § 71.05.020(2) (1979).

8. *Ex parte* Romero, 51 N.M. 201, 204, 181 P.2d 811, 815 (Sup. Ct. 1947) (to continue to detain inmate of sanitorium, who entered voluntarily for alcoholism treatment, without a hearing to determine whether he is dangerous to himself or others, violates Constitution). *See also* Cross v. Harris, 418 F.2d 1095 (D.C. Cir. 1969) (court must determine whether subject is likely to injure himself or other persons if allowed to remain at liberty).

defined, leaving even a well-intentioned evaluator with little guidance, and an ill-intentioned evaluator with dangerous discretion. There may be many motivations for abusing such discretion, such as the public pressure for "justice" after the arrested party to a notorious crime has been declared incompetent to stand trial.[9] In some jurisdictions, such political motives as the desire to suppress dissent may prompt commitment.[10]

What constitutes an appropriate standard for initial commitment is only the first question to arise. Once the relevant standard has been identified, the commitment decision must be made. In most states, a certificate of commitment is required,[11] but the actual certifying party varies widely from state to state. Certifying parties can range, in an emergency situation, from a mental health professional, to a police officer,[12] or to a range of other persons.[13] In nonemergency situations it may be possible for any individual to initiate commitment proceedings.[14] In some other situations this initiation may be limited to a close relative or a person with whom the individual lives.[15] In still other jurisdictions, any individual may set the initial commitment process in motion, whether an emergency exists or not, but commitment itself may not occur until there has been an administrative evaluation of the mental illness by the relevant mental health agency.[16]

Many state commitment statutes have been sharply criticized in recent years as unconstitutional violations of due process.[17] There is also a rapidly growing body of case law on mental illness issues.[18] These cases concern the application of

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9. *See* note 55, *infra*.

10. *See* notes 83-93 and accompanying text, *infra*.

11. *See, e.g.*, WASH. REV. CODE ANN. § 71.05.160 (1979).

12. WASH. REV. CODE ANN. § 71.05.150(4)-.150(5) (1979).

13. N.Y. MENTAL HYG. LAW § 9.27(b) (McKinney 1973).

14. IOWA CODE § 229.6 (1976).

15. N.Y. MENTAL HYG. LAW § 9.27(b) (McKinney 1973).

16. IOWA CODE 229.6 (1976).

17. U.S. CONST. amend. V provides, in pertinent part, that no person shall "be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV provides, in pertinent part, that no state shall "deprive any person of life, liberty, or property, without due process of law." *Id.* at § 1.

18. It is not the purpose of this paper to detail the inhumane treatment typically accorded the mentally ill. Others have chronicled the conditions in mental hospitals. *See, e.g.*, D. ROBINSON, PSYCHOLOGY & LAW (1980); T. SZASZ, PSYCHIATRIC SLAVERY (1977).

the entire panoply of rights now held by criminal prisoners in penal institutions[19] to the mental illness field. Relatively recent developments have led one commentator to conclude that "[t]here is no question that basic due process and equal protection are applicable to the civil commitment of the mentally ill. . . . The issue is what elements of due process are necessary and applicable."[20]

This article will briefly sketch some of the battlegrounds in mental illness litigation which center on procedural due process. The Supreme Court of the United States has not yet addressed these issues; it has been left to the lower courts to discuss the various rights that may exist.

Initially, the rights of notice, a speedy hearing, the right to counsel, and the privilege against self-incrimination were accorded judicial recognition.[21] As early as 1938, at least one court[22] recognized the necessity of such protection to a just commitment system, and held that any deprivation of these rights would violate the "liberty" section of the due process clause of the fifth amendment.[23] In later years, the privilege against self-incrimination was again deemed to be a part of constitutionally

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19. The group of potentially affected persons is large. "In the year 1972, state and county mental hospitals admitted 403,924 patients, of whom 169,032, or 41.8%, were involuntarily committed." *Developments, supra,* note 5, at 1193 n.3 (citing a letter from the National Institute of Mental Health to Harvard Law Review, May 4, 1974). The text discusses the significant number of individuals civilly committed. Another source estimated that, as of 1967, "[a]n estimated 24 million people suffered from some form of mental illness or mental defect. . ." out of a total national population numbering 197.8 million persons. N. KITTRIE, THE RIGHT TO BE DIFFERENT 4-5 (1971).

20. Schwartz, *The Civil Commitment Process: Established and Emerging Rights,* in 1 LEGAL RIGHTS 115 (1974).

21. Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded* 414 U.S. 473 (1974), 379 F. Supp. 1376 (E.D. Wis. 1974) (three-judge court) (court entered specific judgment in accordance with the prior opinion), *vacated and remanded,* 421 U.S. 957 (1975), 413 F. Supp. 1318 (E.D. Wis. 1976) (reinstated prior judgment of the three-judge district court) (civil commitment procedures did not provide adequate due process rights to those committed, including adequate notice, the right to counsel, the availability of the privilege against self-incrimination, and the right to a speedy hearing).

22. Barry v. Hall, 98 F.2d 222 (D.C. Cir. 1938) (habeas corpus proceeding by a man confined on the basis of a letter from a non-medical public official).

23. U.S. CONST. amend. V provides, in pertinent part, that no person shall "be deprived of life, liberty, or property, without due process of law." The court in *Barry* found that "confinement in a mental hospital is as full and effective a deprivation of personal liberty as is confinement in jail." 98 F.2d at 225.

mandated due process,[24] as was the right to counsel[25] and the right to present one's own independent expert testimony.[26]

The question of the existence of a privilege against self-incrimination[27] arose in the context of civil commitment proceedings, when a person subject to civil commitment (perhaps as a result of a finding of incompetency to stand trial)[28] was later faced with a criminal charge, based in part on evidence obtained at a civil commitment hearing. At least one court found this privilege applicable at the civil commitment hearing.[29]

B. Criminal Commitment

Commitment in the criminal context invariably raises different issues, but as with civil commitment, it has been the subject of much litigation. In this area the lower federal and state courts have been active; thus, rights existing in some jurisdictions are not necessarily recognized in others.[30] In the criminal commitment context, however, the Supreme Court has made major pronouncements on the first two topics discussed below: competency to stand trial[31] and the "indefinite" period of commitment.[32]

In *Drope v. Missouri*,[33] the Supreme Court held that a defendant in a criminal proceeding cannot be tried unless he is competent. This issue of competency concerns the defendant's mental capacity at the time of trial and preparation of trial, as opposed to the defendant's mental state at the time of the commission of the crime. This latter time is the key to the defense of

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24. People v. English, 31 Ill. 2d 301, 201 N.E.2d 455 (1964) (defendant not guilty of contempt of court in refusing to submit to psychiatric examinations on the grounds that he was protected by the privilege against self-incrimination). The court held that the defendant could be compelled to submit to an examination, but not to answer incriminating questions.

25. *Lessard*, 349 F. Supp. at 1097.

26. Dixon v. Attorney General, 325 F. Supp. 966, 974 (M.D. Pa. 1971) (class action brought by inhabitants of state mental hospital).

27. U.S. CONST. amend. V provides, in pertinent part, that no person "shall be compelled in any criminal case to be a witness against himself."

28. *See* notes 33, 36, 37 and accompanying text, *infra*.

29. *Lessard*, 349 F. Supp. at 1100.

30. D. ROBINSON, *supra* note 18, at 127-42.

31. Drope v. Missouri, 420 U.S. 162 (1975).

32. Jackson v. Indiana, 406 U.S. 715 (1972).

33. 420 U.S. 162 (1975).

insanity,[34] and perhaps to other mitigating factors,[35] but it is a completely separate issue from triability. As the court found in *Drope*, "[i]t has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial."[36] The Court went on to note that its approved test of incompetence "[s]eeks to ascertain whether a criminal defendant 'has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.' "[37]

The *Drope* principle does not govern those situations which arise after a criminal suspect has been found incompetent to stand trial. In considering this situation in the case of *Jackson v. Indiana*,[38] the Supreme Court held that for the individual to be detained, he must be subject to the same civil commitment process as any non-criminal defendant.[39] In the view of the Court, this procedure was demanded not only by due process, but also by the equal protection clause of the fourteenth amendment.[40] In this context, equal protection prohibited the state from denying the incompetent the privileges available under a civil commitment procedure merely on the basis that he had criminal charges filed against him.[41] This decision resulted in a prohibition of the previously widespread practice of detaining a nontriable defendant by administrative decision for an indefinite period of time. Such commitment could have lasted a lifetime, even if the criminal charge only mandated a short sentence.[42]

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34. *See* text accompanying notes 52-58, *infra*.

35. *See, e.g.*, People v. Henderson, 60 Cal. 2d 482, 386 P.2d 677, 35 Cal. Rptr. 77 (1963) (diminished responsibility).

36. 420 U.S. at 171.

37. *Id.* at 172 (citing Dusky v. U.S., 362 U.S. 402 (1960)).

38. 406 U.S. 715 (1972).

39. *Id.* at 730.

40. *Id.*

41. *Id.* at 723.

42. *See, e.g.*, United States *ex. rel.* von Wolfersdorf v. Johnston, 317 F. Supp. 66 (S.D.N.Y. 1970) (incarceration among the "criminally insane" for 20 years because of status as insane defendant, presumed innocent, named in an untriable indictment, violated protection against cruel and unusual punishment as it is enforceable against the states under the fourteenth amendment).

The potential for indefinite commitment existed at another stage in a criminal proceeding as well: the diagnostic commitment. The diagnostic commitment, necessary to determine either the issue of triability or whether the defendant came within a certain statutory category, could continue indefinitely.[43] In *McNeil v. Director, Patuxent Institution,*[44] the Supreme Court held that a brief diagnostic commitment to determine triability is permissible, but the period of detention may not be unreasonably long.[45] The Court has yet to define precisely what constitutes an "unreasonably" long time, but it noted with approval the Maryland statutory limitation of six months.[46] This is a major improvement over the situation in which commitment to determine triability could be tantamount to life imprisonment.

The right to an evidentiary hearing has been required by state courts.[47] Thus, the basis for the recommended confinement must be revealed and the potential confinee given the opportunity to dispute it.[48] A prepared plan of treatment for the benefit of detained individuals, as well as periodic progress reports, are required if the individual has been found incompetent to stand trial.[49] In relation to the incompetency-detention issue, the right to a speedy trial has been accepted by at least one court as a limitation on the length of the detention period.[50] The right to a speedy trial is impaired if the defendant is held for an unreasonably long time as incompetent to stand trial.[51]

Also provoking litigation has been the actual procedure to be followed after a defendant has been acquitted by reason of

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43. *See, e.g.*, McNeil v. Patuxent Institution, 407 U.S. 245 (1972) (state lost the power to hold detainee, convicted of two assaults and incarcerated in mental institution awaiting examination and determination of his case, past the expiration of his five-year sentence).

44. *Id.*

45. 407 U.S. at 250.

46. *Id.* (The court approved the Maryland statute, MD. ANN. CODE art. 31(b), § 7(a) (1957 & Supp. 1966) (amended 1971).)

47. People v. English, 31 Ill. 2d 301, 201 N.E.2d 455 (1964).

48. Lessard v. Schmidt, 349 F. Supp. 1078, 1092 (D. Wis. 1972) (the potential confinee must be given notice setting forth the basis of detention and given a reasonable opportunity to prepare for trial). *Id.* at 1092.

49. *Ex parte* Kent, 490 S.W.2d 649, 651 (Mo. 1973).

50. United States v. Pardue, 354 F. Supp. 1377, 1382 (D. Conn. 1973).

51. *Id.* at 1382.

insantity.[52] Acquittal by reason of insanity or mental illness is a result of insanity at the time of the criminal act, and is separate from the issue of whether the defendant is competent to stand trial at a later date.[53] The plea of insanity typically is available as a defense raised in the pleading stage of the trial.[54] Previously, a defendant could be automatically committed after such an acquittal.[55] Under *Jackson*,[56] however, automatic commitments are prohibited; the acquitted individual can be committed only under the statutory civil commitment procedures.[57]

After a person has been civilly committed, even after an acquittal by reason of insanity, he cannot be transferred to a mental institution within the penal system, notwithstanding a showing of dangerousness.[58] Once an individual has been committed, however, other controversies arise.

C. *Right to Refuse Treatment Once Within the Institution*

Inspiring much debate has been a deceptively simple issue: can involuntarily committed patients refuse the treatment which mental health professionals believe to be in the patients' best interests?[59] The United States Supreme Court granted certiorari

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52. 420 U.S. 162 (1975).

53. *Id.* at 181, 182.

54. *See, e.g.*, N.Y. PENAL LAW § 30.05 (McKinney 1981-82).

55. *See, e.g.*, Daniel M'Naghten's Case, 8 Eng. Rep. 718 (H.L. 1843), *reprinted in* J. HALL, B.J. GEORGE & R. FORCE, CRIMINAL LAW AND PROCEDURE (3d ed. 1976) at 433-34. This is one of the most famous and enduring cases recognizing the defense of insanity. This case gave rise to the M'Naghten rule:

> To establish a defense on the ground of insanity, it must be clearly proved that at the time of committing the act, the party accused was laboring under such a defect of reason from disease of mind as not to know the nature and quality of the act; or, if he did know it, that he did not know he was doing what was wrong.

Id. at 435. M'Naghten's defense was successful, and he was acquitted. In spite of his acquittal, however, M'Naghten was never again free. He spent the remainder of his life, first in the notorious Bethlehem ("Bedlam") Hospital and later in an institute for the criminally insane. T. SZASZ, THE MANUFACTURE OF MADNESS at 295, 305-6 (1970).

56. Jackson v. Indiana, 406 U.S. 715, 738 (1972).

57. *Id.* at 738. *See also* Wilson v. State, 287 N.E.2d 875 (1972). *Cf.* Humphrey v. Cady, 405 U.S. 504 (1972) (court may not commit rather than sentence a convicted sex offender without observing civil commitment statutory guidelines); Baxstrom v. Herold, 383 U.S. 107 (1966) (prisoner at end of sentence entitled to a jury trial prior to civil commitment, because all others civilly committed are so entitled).

58. Kesselbrenner v. Anonymous, 33 N.Y.2d 161, 305 N.E.2d 903, 350 N.Y.S.2d 899 (1973).

59. N.Y. Times, March 21, 1982, § 6, at 46, col. 3.

to consider precisely this question in *Mills v. Rogers.*[60]

The defendants, doctors who forcibly administered psychotropic or "mind-altering" drugs[61] to protesting patients, argued that the permissibility of such treatment was implicit in commitment, under the commitment standard which existed in that jurisdiction.[62] They further argued that halting treatment would turn hospitals into warehouses, where untreated patients would stay indefinitely.[63]

The plaintiffs, a group of mental patients and former mental patients who had been forcibly subjected to these drugs, sued for the restriction of the drugs' administration to situations where necessary to prevent imminent injury from the patient's behavior.[64] Plaintiffs also argued that the drugs had painful and damaging side effects.[65]

Both the district court[66] and the court of appeals[67] upheld the plaintiffs' right to refuse the treatment. As the court of appeals stated, it is an "intuitively obvious proposition: a person has a constitutionally protected interest in being left free by the state to decide for himself whether to submit to the serious and potentially harmful medical treatment that is represented by administration of antipsychotic drugs."[68]

The court had more trouble delineating the source of constitutional protection, but concluded that it must be found somewhere in the due process clause of the fourteenth amendment, "most likely as part of the penumbral right to privacy, bodily

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60. Rogers v. Okin, 634 F.2d 650 (1st Cir. 1980), *vacated and remanded sub nom.* Mills v. Rogers, 457 U.S. 291 (1982).

61. Anti-psychotropic drugs are designed to reduce the level of psychotic thinking, and include the drugs Thorazine and Haldol. *See* Rogers v. Okin, 478 F. Supp. 1342, 1359-60 (D. Mass. 1979), *aff'd in relevant part,* 634 F.2d 650, 653 (1st Cir. 1980).

62. *See* MASS. GEN. LAWS ANN. ch. 123, § 50 (West 1969), which provides for the involuntary commitment of "any mentally ill person . . . who in his [the judge's] opinion is a proper subject for [institutional] treatment or custody."

63. 457 U.S. at 291, 293.

64. *Id.* at 293.

65. *Id.* These effects included muscle spasms, tremors and retarded volitional movements. *Id.* at 293 n.1. According to one observer the damage may be even more fundamental: patients subject to this forced treatment not only suffered physically, but also felt that, "their humanity was being offended" [and experienced] "a loss of self respect and a feeling of powerlessness." N.Y. Times, March 21, 1982, § 6, at 46, col. 3.

66. Rogers v. Okin, 478 F. Supp. 1342 (D. Mass. 1979).

67. Rogers v. Okin, 634 F.2d 650 (1st Cir. 1980).

68. *Id.* at 653.

integrity, or personal security."[69]

The Supreme Court vacated the decision of the court of appeals and remanded the case for further consideration in light of *In re Guardianship of Roe*,[70] a recent decision by the Massachusetts Supreme Court.[71] The Supreme Court assumed, arguendo, that "involuntarily committed mental patients do retain liberty interests" which are protected by the federal Constitution.[72] The Court concluded, however, that it was unnecessary to define those interests, or to identify and balance the interests of the state, due to the Massachusetts decision.[73] Justice Powell, writing for the Court, stated that "it would be inappropriate for us to attempt to weigh or even to identify relevant liberty interests that might be derived directly from the Constitution, independent of any state law."[74] Since the Massachusetts State Constitution provided greater protection, the federal constitutional issue would not necessarily settle the dispute between the parties.

In Re Guardianship of Roe,[75] which prompted the Supreme Court's remand in *Miller*, involved a mentally ill individual whose permanent legal guardian had authorized forcible administration of antipsychotic medication after the individual had repeatedly refused such treatment.[76] The court held that the mentally ill individual, who had not been committed to an institution, could not be forced to submit to antipsychotic medication except in accordance with a court order to do so, issued only after certain determinations had been made by the presiding judge.[77] These required determinations include either: 1) that the affected individual would, if competent, accept antipsychotic medication *or* 2) that there is a sufficiently important state interest which would override the individual's refusal.[78] The court based its analysis on three separate grounds: the constitutional right to privacy, the inherent power of the court to

69. *Id.*
70. 383 Mass. 415, 421 N.E.2d 40 (1981).
71. *See* Mills v. Rogers, 457 U.S. at 299 n.16 (1982).
72. *Id.* at 305.
73. *Id.*
74. *Id.*
75. 383 Mass. 415, 421 N.E.2d 40 (1981).
76. *Id.* at 426, 421 N.E.2d at 50-51.
77. *Id.*
78. *Id.* at 61.

regulate the practices of guardians, and the common law right to make decisions regarding one's own body.[79]

The Supreme Court in *Mills v. Rogers*[80] stated that the *Roe* analysis may affect the substantive protection of liberty interests in Massachusetts as well as afford greater procedural safeguards to mentally ill persons.[81] In this light, the Supreme Court vacated the circuit court's decision and remanded the action for further consideration.[82] This decision, however, left unanswered questions in the areas of civil and criminal commitment procedure.

II. UNION OF SOVIET SOCIALIST REPUBLICS

A. Issues and Problems

While attempts to protect the rights of mentally ill people in the United States have centered mainly on the process by which people are committed and adjudged mentally ill, efforts in the Soviet Union have focused on a different issue: the state's motive for commitment. Western attention has been drawn to allegations of Soviet abuse of psychiatry in punishing and subduing people who express unorthodox and politically unacceptable ideas.[83] This has been called one of the "most cynical reprisals" against Soviet dissidents.[84]

One outspoken individual is Zhores Medvedev, a scientist and dissident, who was diagnosed as having a split personality reportedly because of his intellectual activity in the two different activities of gerontology and politics.[85] This diagnosis gave rise to a popular characterization of the alleged condition as

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79. *Id.* at 51 n.9.

80. 457 U.S. at 291.

81. *Id.* at 303.

82. *Id.* at 306. (The court in *Mills* failed to define the liberty interests or protections afforded to mentally ill persons by the due process clause of the fifth amendment, but the federal Constitution may still be invoked to protect state-created liberty interests through the due process clause of the fourteenth amendment). *Id.* at 304. *See, e.g.*, Johnson v. Brejle, No. 81-2798, slip op. at 4. (7th Cir. Feb. 18, 1983) (upholding a due process claim of a defendant incompetent to stand trial, based on a "state created liberty interest that is entitled to the protection of the federal due process clause"). *Id.* No. 81-2798, slip op. at 12. (7th Cir. Feb. 18, 1983).

83. N.Y. Times, Jan. 30, 1983, § 6, at 20, col. 2.

84. J. RUBENSTEIN, SOVIET DISSIDENTS 135 (1980).

85. *See generally id.* at 137-47.

"the Da Vinci Syndrome."[86] Another unusual diagnosis was reported in the case of a thirty-five year old man who had persistently but unsuccessfully applied for permission to emigrate and was committed in 1980 due to "emigration delusions."[87] One source places the number of documented cases of individuals "known to have been forcibly confined for political and not genuine medical reasons" since 1969 at 305.[88] Eighty-five of these cases have occurred since 1979.[89] According to another source:

> Since 1962, at least four hundred perfectly sane men and women have been declared insane by Soviet mental-health authorities and committed to mental hospitals because of religious or political opinions. These dissidents are not sentenced to a term of imprisonment, but are "treated" until they "recover"—that is, until they recant the offending beliefs. They are surrounded by the genuinely—often violently—insane. They are treated with powerful tranquilizers that cripple the memory, lump the emotions, scramble the powers of concentration, and undermine the ability to think.[90]

The Soviet Union denies any such activity, and recently withdrew from the World Psychiatric Association in response to a pending motion to expel the country for abusing the practice of psychiatry to crush political dissent.[91] The letter of withdrawal stated that "there are no grounds for such slanderous attacks."[92] There is, however, evidence to substantiate these allegations.[93] The following analysis focuses on existing norms in the Soviet Union.

B. Civil Commitment

Guidelines governing the compulsory civil commitment procedures in the Soviet Union are not available in complete form,

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86. S. BLOCH & P. REDDAWAY, PSYCHIATRIC TERROR 177 (1977).
87. AMNESTY INTERNATIONAL, POLITICAL ABUSE OF PSYCHIATRY IN THE U.S.S.R. 23 (March 9, 1983).
88. *Id.* at 3.
89. *Id.*
90. Frum, *Who's Crazy Now?*, 35 NAT'L REV. 44 (Jan. 21, 1983).
91. N.Y. Times, Feb. 11, 1983, § 1, at 8, col. 3.
92. N.Y. Times, Feb. 12, 1983, § 1, at 4, col. 1.
93. *See, e.g.*, S. BLOCH & P. REDDAWAY, RUSSIA'S POLITICAL HOSPITALS 150-58 (1977).

either to Soviet citizens or to those in the West. Some directives, however, have reached the West in partial form.[94] The danger of deprivation of human rights seems to lie mainly in the extremely vague definition of "mental illness," a problem that, as can be seen, also haunts some American statutes.[95] The basic authorization for commitment is expressed in the following directive:

> If there is a clear danger from a mentally-ill person to those around him or to himself, the health organs have the right (by way of immediate psychiatric assistance) to place him in a psychiatric hospital without the consent of the person who is ill or his relatives or guardians.[96]

As in many of its American counterparts, the Soviet standard for compulsory commitment requires a showing of dangerousness.[97] The authority to commit lies with the public health agencies, although their attention may be drawn to an individual by the individual's relatives, or by any other interested citizen.[98]

The Soviet equivalent to a certificate of commitment must be signed by a psychiatrist. In remote areas where there are no psychiatrists available, a non-psychiatrist medical doctor may authorize the commitment.[99] The committing doctor must provide full details, medical and social, for the commitment.[100] Within twenty-four hours after the patient has been committed, he must be examined by a panel of three psychiatrists, which decides the appropriateness as well as the duration of the commitment. Close relatives must be informed of the decision. The patient must receive treatment and must be examined by a panel of three psychiatrists at least once a month. When the patient's mental condition has improved, or when the social danger has passed, the patient is to be released.[101]

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94. *Id.* at 153.

95. An example of this definitional vagueness is illustrated by KY. REV. STAT. ANN. § 202.010 (1) (Baldwin 1972).

96. Directives on the Immediate Hospitalization of Mentally Ill Persons Who Are a Social Danger (1970), *partially reprinted in* 28 KHRONIKA TEKUSHCHIKH SOBYTII 28-29 (1971) [hereinafter cited as KHRONIKA].

97. *Id.*

98. S. BLOCH & P. REDDAWAY, *supra* note 86; *see also* AMNESTY INTERNATIONAL, *supra* note 87 at 3-4.

99. S. BLOCH & P. REDDAWAY, *supra* note 86 at 152.

100. *Id.*

101. *Id.* at 153.

After release, the former patient may be required to report for outpatient care and/or have a guardian appointed.[102] In addition, a civil release may be subject—unknown to the released individual—to a secret "rating" of dangerousness by a psychiatrist, on a scale of one to five.[103] In turn, the security organs (the police and the KGB) may use this and other information to arrive at their own dangerousness rating.[104] If this rating is high in a certain area, for example, "a propensity to demonstrate, [the former patient] will henceforth be liable to short internments during big public holidays."[105]

As mentioned earlier, an ill-defined standard of "mental illness" is conducive to the violation of human rights. In the U.S.S.R., the health organs have promulgated a "catalogue of indications" such as delirium, pathological impulsiveness, and other symptoms generally recognized by the psychiatric profession in various states.[106] The catalogue also includes some psychiatric phenomena which apparently are uniquely Soviet, such as "hypochondriacal delirious conditions producing incorrect aggressive attitudes to . . . official institutions."[107] According to one source, this description may be used against people who are too persistent when pressing their claims against a public agency.[108]

The directives on civil commitment further state that the enumerated conditions in the catalogue of indications may exist "with externally correct conduct and dissimulation."[109] The meaning is plain and ominous: a psychiatrist may commit an individual on the basis of the observation of a "mental illness" that has no symptoms.[110]

It must be noted finally that the word of the psychiatrist is final. There is no judicial review of civil commitments. This reflects, as one commentator has observed, "[t]he narrow notion

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102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.* at 154.
108. *Id.*
109. KHRONIKA, *supra* note 96, at 40.
110. This argument was made in the case, e.g. of Natalya Gorbanevskaya. Samizdat, *Sud'nad Natalya Gorbanevskaya*, 15 KHRONIKA TEKUSHCHIKH SOBYTII 1-17 (1970).

that persons with significant mental illness are not subject to or protected by the law. . . ."[111]

C. Criminal Commitment

Although the promulgation of criminal codes in the U.S.S.R. is controlled by the constituent republics, there is a federal model code. The following excerpt from the Criminal Code of the Russian Republic is fairly representative of the codes of the various republics.

Article 11 of the Criminal Code of the Russian Soviet Federated Socialist Republic provides as follows:

> A person shall not be subject to criminal responsibility who at the time of committing a socially dangerous act is in a state of non-responsibility, that is, cannot realize the significance of his actions or control them because of a chronic mental illness, temporary mental derangement, mental deficiency or other condition of illness. Compulsory measures of a medical character may be applied to such a person by order of the court.[112]

Thus, a showing of non-responsibility involves two elements. First, the defendant must have actually committed criminal acts. Second, while committing the acts, the defendant must have been suffering from a mental illness which prevented him from appreciating their significance and/or prevented him from controlling his behavior.

The right to initiate the psychiatric examination rests solely with the court and the investigating organs. Although the defendant may request a psychiatric consultation, the court is free to refuse the request.[113] In all cases, a defendant has no right to call a chosen psychiatrist for the examination or for later testimony.[114]

The examination, upon court order, is conducted by a commission of three to four psychiatrists who make a report to the

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111. V. CHALIDZE, TO DEFEND THESE RIGHTS 274 (1974).

112. CRIM. CODE OF THE RUSSIAN REPUB. art. 11, *reprinted in* S. BLOCH & P. REDDAWAY, *supra* note 86, at 98.

113. S. BLOCH & P. REDDAWAY, *supra* note 86, at 99.

114. *Id.*

court.[115] The court is free to accept or reject this report.[116] If the court finds the defendant non-responsible, it has the discretion to have the defendant committed to a mental hospital, or released to the custody of relatives or a guardian.[117] Relatives or others may petition for an end to the compulsory hospitalization, but again the court may refuse the request.[118] The patient, as in a civil commitment setting, has no right of appeal, apparently on the reasoning that since he has been classified as non-responsible, he is unfit to submit legally valid documents.[119] The defendant is committed for an unspecified time period until recovery occurs. This situation could involve lifetime commitment.

If the criminally committed patient is later released, the court may order the patient to be "put on the psychiatric register."[120] Under this procedure, the individual has the legal obligation to obey the orders of the local psychiatric clinic.[121] There may also be a "dangerousness rating" applied to the former patient, as discussed under civil commitment.[122]

III. Attempts to Develop International Norms

Various organizations have produced draft guidelines for the protection of rights of the mentally ill. For purposes of comparison, this article will discuss material from three sourses: the *International Commission of Jurists Draft Guidelines for the Protection of Persons Suffering from Mental Disorder* [*Draft Guidelines*],[123] the *Proposed Standards for Adequate Treatment of the Mentally Ill of Amici Curiae, American Orthopsychiatric Association, American Civil Liberties Union* [*Proposed Standards*],[124] and the *Opinion of the Moscow Human Rights*

115. *Id.*
116. *Id.* at 100.
117. *Id.* at 101.
118. *Id.*
119. *Id.*
120. *Id.* at 102.
121. *Id.*
122. *Id.*
123. Draft Guidelines for the Protection of Persons Suffering from Mental Disorder (1980) (on file with the Int'l Commission of Jurists), *reprinted in* 10 ICJ Newsletter 44 (1981) [hereinafter cited as Draft Guidelines].
124. Proposed Standards for Adequate Treatment of the Mentally Ill of Amici Curiae, American Orthopsychiatric Association, American Civil Liberties Union (1973), Wyatt v. Stickney, 344 F. Supp. 373 (M.D. Ala. 1972) and 344 F. Supp. 387 (M.D. Ala. 1972)

Committee Concerning the Problem of Persons Declared Mentally Ill [Moscow Human Rights Committee].[125]

A. Standards for Involuntary Commitment

The *Draft Guidelines* and the *Proposed Standards* substantially agree as to what must be demonstrated before involuntary commitment is permissible. The *Draft Guidelines* call for a showing that the patient be: 1) suffering from a severe mental disorder which requires his admission for treatment or care; 2) a substantial risk of serious harm to himself or another person exists if he is not admitted; and 3) that he be unable or unwilling to consent to voluntary hospitalization.[126]

The *Moscow Human Rights Committee* formulates the standard that "legal restrictions on the rights of persons declared mentally ill or incompetent are permissible only to the extent absolutely necessary for the protection of their rights, for the protection of the rights of others, or for the safety of the public."[127] It must be noted that this standard applies to "persons declared mentally ill," and not to those yet to be declared mentally ill. Presumably, those not yet declared mentally ill would enjoy at least as many rights under this standard as those already declared mentally ill.

The requirements suggested by the *Proposed Standards* are that the individual be: 1) suffering from a mental disorder; and 2) that he represent a danger to himself or others as a result of the mental disorder.[128] The *Proposed Standards* adds a requirement not mentioned in the other two sources that the "facility to which he is to be committed is equipped and staffed to provide adequate treatment."[129] It seems likely, however, that the *Draft Guidelines* accomplished substantially the same result by

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(on file with the ACLU), *partially reprinted in* SILVERBERG *supra* note 2, at 243 [hereinafter cited as Proposed Standards].

125. Opinion of the Moscow Human Rights Committee Concerning the Problem of Persons Declared Mentally Ill (July 3, 1971) (on file with the Int'l League for Human Rights, United Nations), *reprinted in* V. CHALIDZE, *supra* note 111, at 281 [hereinafter cited as Moscow Human Rights Comm.].

126. Draft Guidelines, *supra* note 123, art. 13.

127. Moscow Human Rights Comm., *supra* note 125, at 282.

128. Proposed Standards, *supra* note 124, at 243.

129. *Id.*

a careful definition of "care centre"[130] to include, among other things, "the staff, equipment and space needed to provide patients with a programme of active therapy."[131] No such provision exists in the *Moscow Human Rights Committee* formulation, although it does express "the right to humane treatment."[132] In this context, however, the word "treatment" is ambiguous, and could mean either medical or therapeutic treatment, or simply being treated in a humane way. The first two formulations consider the problem of "warehousing" people, or keeping patients in custody despite a total lack of treatment.

B. Authority to Commit

According to the *Moscow Human Rights Committee,*

> only those agencies are competent to establish the fact of mental illness which: are empowered by law to decide questions concerning the restriction of legal competence and the capacity to act; are protected by law from subordination to the executive power; and are not organs of the executive power.[133]

This expresses the general principle that the power to commit should not be left in the hands of a wide range of individuals or agencies, and that it should not be subject to arbitrary and inconsistent exercise.

The *Draft Guidelines* envision a limitation of the power of commitment to "a judicial or other authority prescribed by law which is independent of the hospital and the detaining authority. . . ."[134] Again, the independence of the committing authority from the detaining (or, using the *Moscow Human Rights Committee*'s term, the "executive") authority is explicit.

The *Proposed Standards* version differs slightly, yet is attentive to the same problem in affirming the "right to a judicial hearing prior to commitment."[135]

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130. Draft Guidelines, *supra* note 123, art. 6.
131. *Id.*
132. Moscow Human Rights Comm., *supra* note 125, at 288.
133. *Id.* at 285.
134. Draft Guidelines, *supra* note 123, art. 14.
135. Proposed Standards, *supra* note 124, at 243.

C. Burden of Proof

Although the *Draft Guidelines* are silent on the question of the burden of proof, other works attempt to deal with this difficult area. It seems important to establish a fundamental principle that, in the words of the *Moscow Human Rights Committee*, "[a]t no stage of a proceeding for determination of the fact of mental illness or mental deficiency of an individual . . . can the burden of proof of mental soundness be placed on the individual or his representative."[136] In other words, no one should be placed in the position of having to prove a negative: that he is *not* mentally ill.

The *Proposed Standards*, assuming the existence of this basic doctrine, offers a more detailed version: involuntary commitment based on dangerousness cannot be made unless that dangerousness is demonstrated beyond a reasonable doubt.[137] This standard is generally mandated for criminal conviction and is, of course, the highest evidentiary standard in the American justice system.

On a related point, the *Moscow Human Rights Committee* states a desired presumption not considered by the *Draft Guidelines* and the *Proposed Standards*: "[e]veryone has the right to be considered mentally healthy and mentally sound as long as lawful procedure has not determined to the contrary."[138] This is analogous to the presumption of innocence in a criminal proceeding, and is a prerequisite for a rational and just burden of proof rule.

D. Specific Procedural Protections

There is substantial agreement among the three documents on several necessary procedural guarantees. In the context of the United States the *Proposed Standards* would recommend that all existing due process protections be applied to the mentally ill. The *Proposed Standards* enumerate certain rights of "[e]very person subject to commitment," with the reminder that the list of rights is not exhaustive.[139] The first right is the right

136. Moscow Human Rights Comm., *supra* note 125, at 285.
137. Proposed Standards, *supra* note 124, at 243.
138. Moscow Human Rights Comm., *supra* note 125, at 284.
139. Proposed Standards, *supra* note 124, at 243.

to counsel, with a provision for appointed counsel for poor people.[140]

The *Moscow Human Rights Committee* also affirms the right of a person to "qualified legal counsel."[141] It does not mention appointment, probably because all attorneys in the Soviet system are employees of the state. The *Moscow Human Rights Committee* goes on to state that the "right of a person or his representative to become familiar with all case material concerning determination of the fact of mental illness"[142] must be recognized, as well as the right to a "reasonable opportunity for participation"[143] in the case, the right to be present during consideration of the case, and the right to public disclosure of the case.[144]

The *Proposed Standards* phrases the above protections in terms of the right to prior notice, the right to subpoena and cross-examine witnesses, and to present evidence, including expert testimony (at public expense if necessary).[145] In addition, protection against self-incrimination in a criminal proceeding from anything said during a commitment hearing is included among the enumerated rights.[146] Another provision in the *Proposed Standards,* absent from the *Draft Guidelines* or the *Moscow Human Rights Committee,* provides that a "person subject to commitment may waive assigned counsel, but only if he does so . . . knowing[ly] and intelligent[ly]."[147]

According to the *Draft Guidelines,* "the patient shall be entitled to be represented by a lawyer" who shall be "entitled to be present throughout the hearing and to see all documents. . . ."[148] This right is especially important in light of the specific provision of the *Draft Guidelines* that the court may exclude a person subject to commitment from attending the hearing and seeing documents when the court "considers it would

140. *Id.*
141. Moscow Human Rights Comm., *supra* note 125, at 287.
142. *Id.*
143. *Id.*
144. *Id.*
145. Proposed Standards, *supra* note 124, at 244.
146. *Id.*
147. *Id.* at 243.
148. Draft Guidelines, *supra* note 123, art. 27.

pose a substantial risk of harm to the patient."[149] This section, which is unique to the *Draft Guidelines*, adds that "[t]he patient shall be entitled to be heard personally by the court."[150] While the *Moscow Human Rights Committee* proposal guarantees "public disclosure" of the case,[151] the *Draft Guidelines* states that "[i]f the patient requests that a particular person be present at the hearing the court shall admit that person. . . ."[152] This proposed guarantee is, however, subject to the court's discretion: "unless [the court] considers that there is no justification for his presence or that it would be prejudicial to the patient's state of health."[153] The *Proposed Standards* limits the individual's right to have requested persons at the hearing to "all persons recommending hospitalization."[154]

E. The Right to Appeal

All three sets of proposals agree on the right of review. The *Proposed Standards* guarantees "an expedited appeal,"[155] and is the only proposal to mandate a *speedy* review. The *Moscow Human Rights Committee* states that "the right to initiate proceedings for review of a decision" should be recognized.[156] This existing right, however, is not the same as a right to the review itself, since there is no requirement that the proceedings, once initiated, be accepted, responded to, or completed. The reviewing authority is also not specified. The formulation, however, is an apparent attempt to express two concepts: that there be established by law an independent mechanism for purposes of review, and that the patient be recognized as an appropriate party to set the review machinery in motion.

The *Draft Guidelines* also raises related issues. Under this proposal, "the patient, assisted by a court-appointed counselor, or any interested person shall have the right to appeal to a court against the decision to admit him to a hospital as an involuntary

149. *Id.*
150. *Id.*
151. Moscow Human Rights Comm., *supra* note 125, at 287.
152. Draft Guidelines, *supra* note 123, art 27.
153. *Id.*
154. Proposed Standards, *supra* note 124, at 244.
155. *Id.*
156. Moscow Human Rights Comm., *supra* note 125, at 284, 285.

patient."[157] The first issue that arises concerns the rationale in allowing the court to appoint counsel. The *Draft Guidelines* may merely be attempting to ensure counsel for those who could not otherwise afford it. It is possible, however, that the court's choice might not be the most beneficial to the patient.[158]

The second issue concerns the statement that "any interested person shall have the right to appeal. . . ."[159] The goal of this section seems to be to allow third parties to intervene on behalf of the patient or to act in the patient's interest when he is is unable to do so himself. The words themselves are not so limited, however, and they might allow antagonistic parties to intervene (e.g., a prosecuting authority in a criminal matter who would like the patient to be tried on criminal charges). The former interpretation is more desirable from a human rights perspective, and should be made explicit.

IV. CONCLUSION

A synthesis of the three sets of proposals would produce a highly desirable international norm concerning the rights of the mentally ill. Specifically, the *Draft Guidelines* would offer appropriate and necessary protection to the mentally ill if the following changes were made. Primarily, the relevant committing authority must be required to bear the burden of proving an individual to be mentally ill, against a presumption of mental health.[160] Secondly, the right of the potential committee[161] and/or that person's representative to be present at the judicial proceeding must be mandated.[162] Finally, it should be made explicit that the person subject to the commitment proceedings be entitled to select counsel, or to the right to contest the court's choice, if appointment is necessary.

Many atrocities have taken place in the past concerning the mentally ill, including castration, neglect, sexual abuse, and solitary confinement of victims too deficient to protect themselves.

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157. Draft Guidelines, *supra* note 123, art. 26.
158. V. CHALIDZE, *supra* note 111, at 3-4.
159. Draft Guidelines, *supra* note 123, art. 26.
160. Moscow Human Rights Comm., *supra* note 125, at 284, 285.
161. Proposed Standards, *supra* note 124, at 244.
162. Moscow Human Rights Comm., *supra* note 125, at 287; Draft Guidelines, *supra* note 123, art. 27.

Other situations are less violent, but no less tragic. Involuntary commitment with no opportunity to refute the evidence, or bring in expert testimony, not only causes human suffering, but also pits the power of the state against the individual, without providing adequate legal recourse. Both judicial and popular attention to these issues is vital in order to prevent future abuses. Detailed prescriptions are a necessary safeguard in this area.

The promulgation of such norms as those examined in this article is necessary as an important step in the protection of the mentally ill. Even if individual states refuse to recognize any given norm as binding, the existence of that norm would supply individuals with *something* to substantiate their demands. In addition, they provide a useful basis of comparison and help to stimulate discussion and elevate expectations. Although the ultimate goal is the formulation of actual restraints on the states' authority to commit persons, the development of these and comparable norms is an important first step.