INSTITUTE OF CURRENT WORLD AFFAIRS

JLS-26 In the Matter of Alberta Lessard -- V

29 West 17th Street
New York, New York 10011
September 30, 1976

Mr. Richard H. Nolte
Institute of Current World Affairs
535 Fifth Avenue
New York, New York 10017

Dear Mr. Nolte:

(Our story thus far: On November 24, 1971, Alberta Priscilla Lessard, a fifty-one year old former schoolteacher from West Allis, Wisconsin, was judged mentally ill in a hearing before the Honorable Christ T. Seraphim and committed to the Milwaukee County Mental Health Center, North Division. Three days after the hearing, Alberta's psychiatrist released her from the hospital provided she continue taking her medication and report regularly to the Day Care Hospital for talks with the staff. As her release was conditional, Alberta would live in fear of summary rehospitalization and subject to the lifelong deprivation of her civil rights--the right to vote, to drive her car and serve on a jury, to make a contract or a will, to sue or be sued, and to marry. Her best hope of regaining the full measure of freedom that once had been hers lay in a complex federal civil rights action already filed by two young poverty lawyers with the Milwaukee Legal Services Program, Bob Blondis and Tom Dixon. If federal district Judge John W. Reynolds accepted their contention that Wisconsin's commitment procedures raised serious Constitutional questions, he would convene a special three-judge federal court to hear the matter. And if two of the three judges agreed that the state law had violated Alberta's rights to due process under the Fourteenth Amendment, they would invalidate her commitment, restore her civil rights, and order a review of the case of every adult mental patient in Wisconsin.

On December 3, ten days after Judge Seraphim committed Alberta Lessard to North Division, Judge Reynolds announced that a three-judge federal court would be convened. Bob Blondis and Tom Dixon had four weeks to write their brief. No date for the hearing was set--in fact, it would not take place until the following May.)

Jeffrey Steingarten is an Institute Fellow interested in the relationship among psychoanalysis, psychiatry, and law.

Alberta was eager to testify at the federal hearing, whenever it might take place. In her view, the police had virtually kidnapped her when she came down off the window ledge at 9719 West Greenfield Street, and the hospital staff had falsely imprisoned her for the next thirty-five days. Only five years before, she had held down two good teaching jobs at the West Allis school and the Marquette Reading Center. Now she was forced to live on Social Security Income, a little more than fifty dollars a week. Alberta couldn't prove it for sure, but it seemed clear enough to her that Judge Seraphim had worked closely with the West Allis school and Marquette to discredit her as a lunatic and cover up the fact that she had been fired without any reason. From the witness stand in the federal courthouse, she would tell her story to the public. She would prove that she was not mentally ill and never had been.

Bob Blondis and Tom Dixon were sympathetic, but they explained to Alberta that there would be no opportunity for her to testify, that the federal court would not pass judgment on whether she were mentally ill or whether she belonged in North Division under Chapter 51, the state commitment law. The essential question was whether Chapter 51 itself were constitutional, whether the procedures it set down and its criteria for who could be forced into a mental hospital violated the Due Process Clause of the Fourteenth Amendment to the federal Constitution. The judges would reach their decision after reading both sides' briefs and listening to their oral arguments, but without a trial of the facts, because there was no real dispute about what had actually happened between October 29, 1971, when the police officers drove Alberta to North Division, and November 24, when Judge Seraphim found Alberta mentally ill and ordered her committed. Blondis and Dixon had made a motion for summary judgment in their federal complaint, asking the district court to strike down Chapter 51 on the basis of the legal issues alone, and they would work with George Rice, the Milwaukee County Deputy Corporation Counsel, to draft a joint stipulation of facts that would raise the constitutional issues they felt lay at the heart of the case.

Alberta understood her lawyers' explanation, but in the bitterness of her disappointment she was unwilling to go along with them. Dixon remembers how hard it was to persuade her. "There were times when we spent hours talking about the case to the point of complete frustration for Bob and me. Alberta wanted to get on the witness stand and be able to tie all these things together, the Marquette problem, the West Allis problem, her being committed, and all those things. There was nothing to be gained, and it could have blown the thing out of the water. And yet she had this consuming concern for having her story told. Not that I thought that that shouldn't happen, and in fact we tried to get a reporter to do it. It didn't work out very well because the reporter was a typical reporter who didn't know much about the problems involved and didn't know how to write the story without saying, this woman's really wacky.

We got into some very long and, God knows, anxiety-producing sessions with Alberta. She called both of us sometimes day and night, extremely upset. She felt that somehow her problem wasn't being adequately dealt with, and I guess to some extent she was right. Problem is, we couldn't."

In the four weeks available, Blondis and Dixon had to do their research, identify all the conceivable constitutional flaws in Chapter 51, strategically select the most glaring among them, write the brief, get it typed, have Alberta sign it, make some copies, and deliver them to the clerk at the Federal Building. Working every day from eight in the morning until midnight, they were relieved of their routine responsiblities at the Southside neighborhood office. Even so, four weeks seemed scarcely enough time to do the job.

Blondis and Dixon began as lawyers and judges often do, letting their intuitive ideas about justice suggest the positions they would take and leaving the legal documentation and argument for later. They set about constructing an ideal picture of how the forced hospitalization of the mentally ill ought to be handled. Behind it was one simple notion: just like the criminally accused, a person suspected of mental illness stands to lose his liberty, perhaps for a lifetime, and so whatever rights are accorded to criminal defendants by the Due Process Clause of the Fourteenth Amendment must also be accorded to prospective mental patients.

They had already identified five possible violations of Alberta's due process rights in the federal complaint they filed on November 12, against the doctors at North Division, the officials of the Wisconsin mental health department, Judge Christ T. Seraphim, and the two police officers. First, the law permitted the judge to postpone the final commitment hearing for up to one hundred forty-five days and to exclude Alberta from it, if he had wished. When the federal complaint was filed on the 12th, there was no way of telling how long Judge Seraphim would wait before holding the commitment hearing or whether he would let Alberta attend it. As it turned out, the hearing was scheduled for November 16, just a few days later and only eighteen days after the police picked up Alberta at the West Allis Trading Post. That eighteen days to a full hearing might seem a reasonable delay under the Fourteenth Amendment did not deprive Blondis and Dixon of this constitutional objection to Chapter 51. They could argue that since the judge was empowered to postpone the hearing for four months and to keep Alberta from attending it, the law was unconstitutional "on its face." Lessard v. Schmidt was a class action, brought on behalf of all persons eighteen years and older who were being held in the Wisconsin mental health system under Chapter 51. Whatever deprivations Alberta had not actually suffered, someone else in the class surely had.

Their second objection was that Chapter 51 had no provision for the appointment of adversary counsel. (Even whether to appoint a guardian ad litem was entirely up to the

judge.) Again, this was an attack on the statute "on its face," because Alberta was represented by Blondis and Dixon after November 9. But she might not have thought of calling them for help, and in any event, she had been at North Division for twelve days before her lawyers entered the picture--including the day Judge Seraphim visited her at her bedside and the day Drs. Schuele and Schaeffer interviewed her. Blondis and Dixon felt that if a person alleged to be mentally ill has the right to adversary counsel, then as in criminal cases, the lawyer must be present at all stages of the proceedings, even at the examination by the court-appointed physicians.

Third, the law had no provision for a probable cause hearing immediately after detention with Alberta and her lawyers in attendance to determine whether there were any grounds to confine her. Of course, Judge Seraphim had visited Alberta at the hospital on November 5, but the law didn't compel him to, and in any event, Alberta was given no time to prepare for the interview, no legal assistance, and no explanation of the reasons she was being held.

Fourth, the provision for notice in Chapter 51 seemed wholly inadequate, because it specified neither what information the notice must contain nor how far in advance of the hearing it must be delivered--and Chapter 51 permitted the judge to withhold all notice from the patient, entirely at his own discretion. Three days after the federal complaint was filed, Alberta was simply told that her permanent commitment hearing would take place early the next morning. She was not informed of the legal basis for her detention, the witnesses who would be called against her and the substance of their testimony, or even her right to request a jury. If Alberta had committed a crime, of course, she would have been supplied with all this information sufficiently in advance to allow her to mount a defense.

Finally, Blondis and Dixon had objected in their federal complaint to the vagueness of the commitment standards in Chapter 51. If a judge found that someone was "mentally ill" and "a proper subject for custody and treatment," he could order permanent commitment to a mental hospital. Under standards as loose as these, they felt a judge could send almost anyone he wished to a mental hospital as long as one doctor recommended it.

Besides these five possible constitutional defects Blondis and Dixon had already identified, the commitment hearing in Judge Seraphim's chambers suggested four more. One was the profusion of hearsay testimony. Hearsay is defined as the testimony of a witness (Officer Mejchar, say) about the out-of-court assertion of another person (the West Allis Trading Post manager's account of Alberta's behavior on the window ledge) introduced to prove the truth of that assertion (that Alberta had been about to jump to her death). Hearsay is first cousin to gossip and rumor, and with narrow exception it is routinely excluded from both civil and criminal trials in the United States. (In criminal cases its use violates the Sixth Amendment guarantee

that "the accused shall enjoy the right...to be confronted with the witnesses against him....") But hearsay has long been admitted in civil commitment hearings, and sometimes, when the examining physicians submit their report without appearing in court, all the evidence against a prospective patient may be second-hand.

The objection to hearsay is based on its notorious inaccuracy and the fraud that can be perpetrated with it; hearsay can't be tested in court because the eye-witness is not in court to be questioned. Was Alberta about to commit suicide on October 29, or did she carefully edge over the concrete rain gutter and lower herself on to the padded snowmobile? Officer Mejchar had arrived on the scene after Alberta was safely down from her perch, and the store manager was not in Judge Seraphim's chambers to be crossexamined about what he actually had seen Alberta doing. Officer Mejchar also testified about Alberta's two previous calls to the police as recorded in the day-book at headquarters, but the day-book itself was not introduced for inspection in court. The examining physicians had relied on the policemen's report in coming to a diagnosis--after all, they reasoned, the police don't pick up just anybody--and on their reading of the hospital records, which were never subjected to first-hand examination in Judge Seraphim's chambers. The judge himself relied on his own recollection of Alberta's repeated phone calls to Marquette University, which had only been alleged in the criminal action against her in 1970 and never proved, but the judge was, of course, completely beyond the reach of crossexamination.

Blondis and Dixon also felt that Chapter 51 should have given Alberta the right to a court-appointed, independent psychiatrist to act as a witness in her favor. If, as they believed, a prospective patient has the right to counsel, appointed by the court if he can't afford to hire one of his own, then surely he also has a right to his own expert witness. Given the commonplace deference by most judges to the testimony and conclusions of doctors, a legal defense may be of no avail in the absence of a psychiatric defense.

They were troubled, too, that much of the testimony against Alberta was derived from what she herself had said to the police, the examining physicians, and the hospital staff. If Alberta had been a criminal defendant, her Fifth Amendment privilege against self-incrimination would have required that their testimony be excluded unless they had warned her beforehand of her right to remain silent. Blondis and Dixon thought it was possible to demand the same privilege for persons suspected of mental illness, because the consequence of an adverse decision, the loss of liberty, is the same for both. By the same token, they could argue that the government must prove both mental illness and the need for commitment beyond a reasonable doubt. Chapter 51 was entirely silent on the burden of proof, and in Blondis and Dixon's view, Judge Seraphim had acted as if the burden was on Alberta to prove that she didn't belong in North Division. Forced hospitalization is the most extreme means

the government can employ as general guardian of the mentally ill; for many patients, outpatient treatment may be just as effective as forced hospitalization and considerably less painful. It seemed to Blondis and Dixon that before the state can resort to commitment, it ought to prove that the less restrictive means of protecting and healing the mentally ill will not do.

With their ideal vision of procedural rights and legislative standards in mind, Blondis and Dixon began to search through a century of American court decisions. They combed the federal and state indexes for direct precedents in the law of civil commitment, for criminal cases that seemed closely analogous, for civil cases invoking the Fourteenth Amendment. They wrote off to the National Clearinghouse, the central research service of the Legal Services Program in Washington, and asked for model briefs and research memoranda by poverty lawyers with similar cases in other parts of the country. Soon enough they realized that this was legal terrain through which few before them had charted a course.

There were precedents enough for George Rice and the defendants to commit a hundred Alberta Lessards to a hundred North Divisions. The highest courts in some states had quite unabashedly proclaimed that persons alleged to be mentally ill have no right at all to constitutional protection. "Plaintiff is a civilly committed mental patient and his restraint is not designed as punishment for any act done. He is in the care and custody of the State for treatment of his unfortunate infirmity. The constitutional provisions relating to due process are not applicable to a person restrained as insane," declared the Iowa Supreme Court in 1967, summing up many decades of unwavering principle. Most state courts conceded that some measure of due process is required before somebody can be forced into a hospital, but only a scant handful of cases specified just which safeguards are due.

Despite wide disagreement among the states on practically every question to do with the rights of mental patients, the Supreme Court of the United States had over the years steadfastly declined to resolve it. By 1971, the Court had taken only four commitment cases, all involving criminal defendants who had been hospitalized as sexual psychopaths or after successful insanity pleas. There were, though, some encouraging words in Mr. Justice Douglas's opinion for a unanimous court in the 1967 case of Specht v. Patterson. "These procedures," he wrote, " whether denominated civil or criminal are subject both to the Equal Protection Clause of the Fourteenth Amendment...and to the Due Process Clause." Blondis and Dixon could surely summon up this declaration that the "civil" label is no excuse for the denial of due process. But Mr. Specht had been convicted of a sexual offense and then sentenced for an indefinite term without a

further hearing to contest the psychiatric report that he was a mentally ill, habitual offender--facts so different from those of Alberta's case that the decision would have little precedential value. Otherwise, the annals of the Supreme Court were mute. In 1971, it was as though mental patients did not exist for the Court. As Senator Sam Irvin said at the convening of a series of hearings on the constitutional rights of the mentally ill in 1969, involuntary commitment was "one of the most neglected areas of American law--neglected by most private citizens, by the courts, by state legislatures, and generally by politicians.... It is tempting to say that the problems of the mentally ill and their families are of no concern to the rest of the population."

From the lower federal courts, there was one exception to Senator Irvin's general appraisal, the case of Heryford v. Parker, decided in 1968. Charles Parker was a nine-year-old boy committed without the assistance of counsel to the Wyoming Training School for the feeble-minded and epileptic. Years later, Charles' mother successfully appealed to the Tenth Circuit Court of Appeals, which released Charles, holding that despite the nominally "civil" nature of the commitment process, when "the state undertakes to act in parens patriae, it has the inescapable duty to see that a subject of an involuntary commitment proceedings is afforded the opportunity to the guiding hand of legal counsel at every step of the proceedings...." Heryford v. Parker was a holding without direct authority over the three-judge court in Wisconsin, and its reasoning had been followed nowhere else in the United States. But it was the most encouraging federal precedent Blondis and Dixon could find.

They were not surprised that American courts had refused to grant to mental patients all the rights of the criminally accused--the Fifth Amendment privilege against self-incrimination, the reasonable doubt standard of proof, the right to a probable cause hearing immediately after detention, and the right to have one's lawyer attend the psychiatric interview. But it seemed incredible to them that even the basics of due process in civil cases--adequate and timely notice, a speedy hearing with the patient present, and the right to adversary counsel--had been routinely abridged as soon as someone was alleged to be mentally ill. For over a century, the traditional rules of the American courtroom had been suspended, and always for the same set of reasons. The purpose of civil commitment is not punitive but benevolent, the argument ran; the proceedings are civil and not criminal. The state is acting in parens patriae, as the guardian of the unfortunate lunatic, and has only his best interests at heart. Commitment hearings are therefore not adversary proceedings. Even adequate notice and the patient's presence in the courtroom serve no purpose when the patient has lost his capacity to reason and to understand. Indeed, these barest of legal regularities can have a detrimental effect on the confused and disordered object of the state's solicitude.

To Blondis and Dixon this line of reasoning seemed clearly illogical. A prospective patient is, after all, only suspected of mental illness; the argument that notice, counsel, and a speedy hearing will traumatize him assumes from the start that he is mentally ill, but this is the very matter at issue. Without the rudiments of due process, how can anyone prove that he doesn't belong in a mental hospital? One lonely state court had made this point most forcefully. In 1896, a Topeka woman by the name of Ida Wellman was taken from her home by the local sheriff and held in the county jail while a probate court on the other side of town committed her to the state asylum. The Kansas Supreme Court released her with a pronouncement the likes of which would not be heard in another American courtroom for forty-three years:

> Notice and opportunity to be heard lie at the foundation of all judicial procedure. They are fundamental principles of justice which cannot be ignored. Without them no citizen would be safe from the machinations of secret tribunals, and the most sane member of the community might be adjudged insane and landed in a madhouse. It will not do to say that it is useless to serve notice on an insane person; that it would avail nothing because of his inability to take advantage of it. His sanity is the very thing to be tried.

Even for individuals who may well end up getting committed, the experience of being taken from their home and put into a hospital without a hearing, without a lawyer, without notification of their legal rights, without an understanding of the "charges" against them, without knowledge of the law under which they are charged--surely this experience is no less disturbing than being handed an eight-and-one-half by eleven inch piece of paper on arriving at the hospital and being visited by a lawyer a day or two later.

From their work in poverty law, Dixon and Blondis were confident about including these basic rights under the general rubric of due process. The Supreme Court's decision in Goldberg v. Kelly had established that before the government can terminate someone's welfare benefits, it must hold a fair hearing before an impartial decisionmaker with adequate notice of the allegations, the opportunity to present evidence, to cross-examine, and to be represented by counsel if the person can afford one. By 1971, the Court had imposed similar requirements in a range of other civil cases--disqualification for unemployment compensation, denial of a tax exemption, discharge from public employment, forfeiture of citizenship, and suspension of social security benefits. If these elements of due process had been held indispensable in civil proceedings where only money is at stake, surely they would not be denied to Alberta Lessard and the other members of her class. The deprivation of her liberty and her civil rights plainly demanded at least as much ceremonial care.

But Blondis and Dixon wanted much more than this from Judge Reynolds and his two colleagues. The civil due process cases said nothing about the exclusion of hearsay, the burden of proof, the privilege against self-incrimination, the right to court-appointed counsel, or whether the lawyer would be involved at all stages of the proceedings, including the psychiatric interview. There were, of course, Supreme Court cases granting comparable protections to criminal defendants in both federal and state courts. In 1957, for example, the case of U.S. v. Wade had held that a criminal defendant can demand to have his lawyer with him at a police line-up, because a mistaken identification at this early stage may render the lawyer's subsequent efforts mere formalities. Blondis and Dixon could compare a psychiatric interview with a police line-up and argue that the assistance of counsel is just as crucial in both. But they could find only one case holding that prospective mental patients deserve all the rights of criminals, the 1964 decision of the Kentucky Supreme Court in Denton v. Commonwealth.

Addie Lee Denton was committed to the Kentucky State Hospital in a lunacy inquest at which the only evidence of her mental illness was the affidavits of two physicians from the state hospital, which were read to the jury by the county attorney. As the doctors never appeared in the courtroom, Addie Denton had no opportunity to crossexamine them. The state supreme court reversed the jury's finding of lunacy, holding that whenever a person's liberty is at stake, he "should be afforded the same constitutional protection as is given to the accused in a criminal prosecution"--in this instance, the Sixth Amendment right to confront one's accusers. The words of the Kentucky court would surely find their place in Dixon and Blondis' brief, but the weight of one state decision in a federal court in Wisconsin would be small indeed, and even in Kentucky, lunacy inquests had been left pretty much unchanged by the sweeping language of the state's highest court. It was not until some years after Alberta Lessard's case was decided that due process would come in practice to Kentucky's mental patients.

Perhaps most discouraging of all was a 1963 Supreme Court decision that threw into question every criminal law analogy that Dixon and Blondis wished to summon up. Kennedy v. Mendoza-Martinez was the case of a young man whom the federal government sought to denaturalize after he left the country to evade the draft. His lawyers argued that the informal proceedings of the Immigration Service had not accorded their client all the procedural rights of criminal defendants, which were his due, given the gravity of the penalty that the government sought to impose on him. The Supreme Court disagreed and made a crucial distinction. If Congress did not intend a legal sanction to work as punishment, the Court held, if the sanction was not historically considered to be punishment, was not designed for the purpose of retribution and deterrence but was more in the nature of an administrative regulation, then the proceedings would not be viewed as criminal and the full panoply of criminal procedural rights

would not automatically apply. In non-criminal cases, due process is a flexible and changing ideal, molded on a case-by-case basis to fit each situation that presents itself. Procedural safeguards are then called for only to the extent that they insure the accuracy and fairness of the proceedings without frustrating more compelling state objectives, like efficiency in the law's administration.

But four years after the decision in Kennedy v. Mendoza-Martinez, the Supreme Court handed down a landmark due process decision that supported the claims Blondis and Dixon wished to urge in federal court. In Re Gault had been decided in 1967, just when Blondis was starting out at Marquette Law School, and his experience in juvenile law came in handy here. Before Gault, the legal plight of juvenile defendants and mental patients had been quite comparable.

Beginning with the passage of an Illinois statute in 1899, distinct juvenile justice systems had over the years been built alongside the criminal courts and jails of every state in the Union, Puerto Rico, and the District of Columbia. The early juvenile court planners, in the evils they discovered and the solutions they proposed, sounded much like the asylum builders and medical superintendents of the pre-Civil War era. It is society's duty, they argued, not simply to administer justice to the offending child, not simply to decide between guilt and innocence. The child should be made the object of the state's care and solicitude, not of its retributive impulses. Punishment should be abandoned for treatment, rehabilitation, and cure--usually through institutionalization. Court proceedings would be civil, not criminal, and incarceration would be labelled "commitment." As with the mentally ill, the state would proceed in parens patriae, as guardian when the natural parents had failed in their responsiblity to raise a peaceable citizen.

The child has no inherent right to liberty, it was argued, only a right to custody, to be cared for by those mature enough to know his best interests. Consequently, he has no right to remain silent, no right to a jury trial, no right to an adversary lawyer who will defend him. The rigidities and technicalities of the rules of criminal procedure will be relaxed and the juvenile defendant shielded from the harsh conflict of an adversary proceedings, from the glare of publicity that could disturb his tender mind. He will be encouraged to repose his trust and confidence in a fatherly judge who can take the youth's problem in hand, compassionately tailor the treatment to it, and save him from a downward career. It was a system unknown in other areas of the law--except, of course, in the forced hospitalization of the mentally ill.

By the 1930's, it had become apparent to many observers that the juvenile justice system had failed. "The powers of the Star Chamber were a trifle in comparison with those of our juvenile courts," wrote Dean Roscoe Pound in 1937. Autocratic and insensitive judges with unlimited discretion frequently meted out excessive

discipline for minor offenses and sometimes for no offense at all. (In the 1960's, civil rights demonstrators liable to no other punishment were often cared for in juvenile courts in the South.) Most reformatories were little better than state penitentiaries, and children guilty of petty misbehavior were mixed in with serious offenders, with the result that recidivism rates were high. As early as 1948, Mr. Justice Douglas declared that "neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law." But the juvenile justice system in most states remained as it was. Yes, it was recognized that some due process was required before a child can lose his liberty, but due process is an abstract ideal, and in most states the process thought due was meager enough indeed.

Then came the case of Gerald Francis Gault, a fifteen year old lad living with his parents in Gila County, Arizona, and his story bore some remarkable parallels to Alberta Lessard's. One morning in June of 1964, Gerald and his friend Ronald Lewis were taken into custody by the Gila County sheriff after a neighbor lady, Mrs. Cook, complained that the boys had made an indecent, lewd, irritatingly offensive phone call to her. Gerald's parents were at work when he was picked up by the sheriff, who left no notice at their house and took no other steps to get in touch with them. When Gerald's mother returned home that evening, she sent her other son to the Lewis' mobile home, where he learned that Gerald and Ronald had been taken to the Children's Detention Home. When Mrs. Gault arrived at the Home, the probation officer, a Superintendent Flagg, told her that Gerald's juvenile court hearing before Judge McGhee was scheduled the next day at three in the afternoon. Flagg refused to show her the petition he filed against the boy, but it wouldn't have helped her understand the charges, because like the petition against Alberta Lessard, it was entirely formal, reciting only that "said minor is...in need of the protection of the Honorable Court."

Two informal hearings were held a week apart, Gerald was not represented by counsel, and Mrs. Cook, the complainant, was absent from both. As the main factual issue was whether Gerald had dialed Mrs. Cook's number and handed the phone over to Ronald or had himself uttered the obscenity, Mrs. Gault asked that Mrs. Cook be summoned "so she would see which boy that done the talking, the dirty talking over the phone." Her request was denied. Could she have a look at Superintendent Flagg's report? Request denied. Judge McGhee committed Gerald as a juvenile delinquent to the State Industrial School until he turned twenty-one --a six year sentence. If young Gerald had been an adult, his maximum punishment under the state criminal code would have been two months in jail or a $50 fine.

The Gaults filed a writ of habeas corpus in a higher state court, where Judge McGhee was vigorously cross-examined. He couldn't name the particular statute under which he had incarcerated Gerald, but he figured it was probably something about lewd

language or maybe another section defining a delinquent child as one who is "habitually involved in immoral matters," actually not very close to the wording of the Arizona Juvenile Code. Like Judge Seraphim and the "forty, fifty phone calls" of Alberta Lessard, Judge McGhee conceded he'd been influenced by a police report two years back that Gerald stole another boy's baseball glove, then lied about it to the police--the charge was never pressed in court--and he was influenced too by a recollection that Gerald admitted making nuisance phone calls in the past, not indecent ones, just "silly calls, or funny calls, or something like that." Still the court refused to grant the Gault's plea, and they appealed to the Arizona Supreme Court, which affirmed Gerald's commitment. While conceding that the Due Process Clause of the Fourteenth Amendment applies to juvenile proceedings, it insisted that Gerald's incarceration in the State Industrial School fully met these requirements.

The Gaults appealed to the Supreme Court of the United States, and the Supreme Court released young Gerald, holding that the Fourteenth Amendment requires juvenile defendants be given adequate notice of the charges against them and the laws under which they are charged, the right to adversary counsel, either private or appointed, and notice of this right, the right to remain silent, and the right to confront and crossexamine their accusers--most of the criminal protections Blondis and Dixon felt were the entitlement of Alberta Lessard.

Mr. Justice Fortas, writing for the majority, noted that procedural safeguards like these have two essential purposes. One is to insure the fundamental fairness of the proceedings, a rather abstract notion.

> Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of an individual and delimits the power which the state may exercise. As Mr. Justice Frankfurter has said: "The history of American freedom is, in no small measure, the history of procedure."

The other goal of due process, Justice Fortas wrote, is a more pragmatic one--to insure the accuracy of the final judgment, to get at the truth.

> But in addition, the procedural rules which have been fashioned from the generality of due process are our best instruments for the distillation and evaluation of essential facts from the conflicting welter of data that life and our adversary methods present. It is these instruments of due process which enhance the possiblity that truth will emerge from the confrontation of opposing versions and

> conflicting data. "Procedure is to law what 'scientific method' is to science."

And he reasoned that juvenile defendants have no less need for fairness and accuracy in their trials than do adults.

Justice Fortas reviewed the traditional justifications for the relaxed procedures of juvenile hearings and concluded that the supposed benefits to young defendants are both lacking in actual performance and just as easily achieved with strict deference to procedural regularities. Indeed, he observed, the laxity long excused by the parens patriae doctrine can well have an adverse effect on the child, who may feel confused and deceived when a paternal judge in whom he has confided metes out the sternest of discipline. Justice Fortas referred to sociological studies suggesting that "the appearance as well as the actuality of fairness, impartiality and orderliness--in short, the essentials of due process" may in themselves have a therapeutic effect on a young defendant. That juvenile proceedings are labelled "civil" and the penalty labelled "commitment" is small reason for ignoring the Fourteenth Amendment. "Under our Constitution," he wrote, "the condition of being a boy does not justify a kangaroo court."

It was in the Gault case that Blondis and Dixon found the closest parallels to the situation of mental patients --the excuses of the parens patriae doctrine, the "civil" label, the substitution of "treatment" for punishment, the fancied benefits to defendants, the tremendous consequences of an unfair or erroneous judicial finding. As they wrote their brief, they relied more often on Gault than on any other single case. But in several important respects, the analogy was imperfect.

As the days passed, Blondis and Dixon went through their list of all the possible defects in Chapter 51, taking turns playing Devil's Advocate, asking the same questions again and again. How important is this particular claim to the fairness of commitment hearings, to the lives of patients? How can we demonstrate the connections to more settled areas of law? How far is the federal court likely to go on this issue? If we ask for too much, will the judges ignore our position entirely and give us nothing, or will they be inclined to give us something less than what we've asked for? If we ask for part of what we want, will we get that much or less?

Now they turned to Mark Wilson for advice. A lawyer at Milwaukee Legal Services with wide experience in constitutional litigation, Wilson didn't tell his younger colleagues how to run their lawsuit, but he did sound a note of caution. Many lawyers who ask the federal courts to strike down a state law, he pointed

out, prefer to keep their cases simple, limited to one or two central issues. Otherwise the judges may lose interest--or be so intimidated by the breadth of the issues that they'll shy away from them, dismissing the case on technical grounds or holding that whatever the defects in Chapter 51, Alberta was not so badly treated after all and lacked standing to press the claims she did. The federal judges would be less skittish about striking down a few provisions without expunging the entire involuntary commitment procedure from the Wisconsin statute books. If Blondis and Dixon treated the whole of Chapter 51 as indivisible, so that every provision should fall if one were defective, then the federal judges could well uphold the entire law. If they asked for too much, they might lose everything.

And then, there was the problem of enforcing the federal court's decree. Mark Wilson pointed out that the Wisconsin mental health system is a bulky and lumbering bureaucracy--five state hospitals and thirty-six county hospitals and hundreds of psychiatrists and administrators, seventy-one local probate and misdemeanor judges conducting four or five thousand commitment proceedings among them each year, seventy-one county attorneys with the job of prosecuting these cases, countless local police departments on the watch for outbreaks of mental illness--and all of them long accustomed to the procedures set out in Chapter 51. These people and institutions, Wilson argued, would be more willing to respect a federal court decision that disrupted their way of doing business in only a few regards, but not in all. The defendants were likely to appeal a sweeping decision, tying up the thing in litigation for years, and even if they didn't appeal, they might ignore the decision, follow it in only formal ways, pay it only lip service. How could so drastic a change as Blondis and Dixon proposed be enforced against all of them? Who would even know if they were all in compliance with it?

Some years later, Dixon and Blondis would remember their talks with Mark Wilson, and in light of the events that intervened, they'd wonder whether their strategy had indeed not been incautious, too dogmatic and absolute. But at the time, they were bent on challenging every provision of Chapter 51 that offended their sense of justice. The law seemed so blatantly unconstitutional, so outrageous, that it was worth the risk. How could the federal judges conceivably uphold all of Chapter 51 simply because two young lawyers had asked for too much? Even if the judges disagreed with them on some of the issues, surely they would agree on others--and the system would be improved many times over. The problem of compelling the police, courts, and hospitals to comply with a sweeping constitutional decree seemed so academic then, so far off in a distant future. For now the important thing was to win.

There was, though, one claim they had felt obliged to eliminate from the start. In their federal complaint, Blondis and Dixon asked the court to award Alberta $500,000 in money damages, but their reading of the available law convinced them that they didn't stand a chance of getting a penny. The defendants had no reason to think Chapter 51 unconstitutional under court decisions in Wisconsin or, for that matter, anywhere else in the

country, and there was no good evidence that any of them had used the law in bad faith, for the purpose of harassing Alberta Lessard. If Dixon and Blondis eliminated the claim for money, they would also eliminate two of the defendants--officer Mejchar and Schneider --and, more important, the policemen's lawyers. And if they kept the claim for damages, the central constitutional issues that so concerned them might get obscured in a debate over one peripheral question on which the odds of victory were slim.

It was quite a bit simpler for Blondis and Dixon to decide to drop the claim for damages than to persuade Alberta to go along and sign an amended complaint. First they had told her that to take the stand in her own defense was out of the question, that there would be no chance for public vindication, no proclamation of her sanity. Now they wanted her to give up any claim to recompense for all she had gone through. In her eyes, the defendants, Officers Mejchar and Schneider included, had had no purpose other than to harass her. In the end, Alberta agreed with her lawyers, but not without some hours of spirited debate.

Four weeks from the time they began, Dixon and Blondis had seventy heavily documented legal size pages asking the three-judge federal court to grant to persons at risk of commitment to a mental hospital virtually all the Fourteenth Amendment rights of criminal defendants. It was an unprecedented request. A favorable decision could mean the release of five thousand patients held against their will in mental hospitals throughout the state. As a precedent, it would challenge in principle every commitment law in the nation. Ever since the commitment of Josiah Oakes in Boston in 1845, the medical profession had been granted nearly unquestioned say to define mental illness and determine the fate of men and woman who fell within its definition. Blondis and Dixon had proposed a radical change. Under their constitutional claims, psychiatrists would become like all other expert witnesses; their views would be weighed in an adversary system of justice where the rules of evidence, the standards of proof, the rights of patients, and the skepticism of lawyers would set strict limits on their influence.

In Anglo-American law, there has perhaps never been a grant of legal power to one private individual over another as complete as that of the physician over the lives of those he judges mentally ill. But the power is not inherently his. It is ultimately possessed by the state alone, and since the Magna Carta's promise that "no freeman shall be taken or imprisoned or disseised or outlawed or exiled...without the judgment of his peers or the law of the land," the power to deprive a man of his liberty has been checked and qualified by elaborate safeguards--except for the mentally ill. Blondis and Dixon urged no less than that the state now reclaim its power.

Liberty is a value of transcending importance in our law, and incarceration is the most serious deprivation of liberty that one man--or the state--can impose on another. In theory at

least, liberty is a legal matter and not a medical one--and health, physical health, has never been accorded a value higher than that of liberty. It would be difficult to find a judicial decision in the United States forcing a physically ill man or woman to accept medical treatment for his own good. We are all permitted to act irrationally or, rather, to live according to our own set of preferences and values, as long as these do not interfere with the preferences of others. With the mentally ill, our laws have taken a different stance. To be mentally ill is to lack autonomy, the capacity for choice, for free will, for personal responsiblity, for self-determination. "It is a principle of law that the insane have no will of their own," wrote Justice Lemuel Shaw in 1845, and it becomes the duty of the state to supply that will. For a hundred and twenty-five years, the state had delegated this duty to the medical profession, only nominally checked by judges and the laws they administered. But who is to say when a man's will is free, a judge or a doctor? Who is to decide whether a man whose will is thought to be bound and deteriorated by his illness will be better off in the hospital than on the outside? A doctor may be able to predict the medical benefits of a stay in the hospital, but is he an expert in the benefits of freedom? Judge Reynolds and his two colleagues had been asked to decide whether doctors or judges would have prime claim to the souls of the mentally ill.

Sometime in late February, a few weeks after Blondis and Dixon finished their brief, the mailman brought them a copy of the defendants' reply brief, written by Milwaukee County Deputy Corporation Counsel George Rice.

Rice started out by attacking his adversaries' claims as a "shopping list of alleged lack of mandatory rights, which they manufacture to coincide with their concepts of due process for the mentally ill...." Yes, he admired their convictions. But he wondered "whether the result they hope to achieve is really aimed at helping or hurting those persons who experience the great tragedy of mental illness. We have, indeed, no quarrel with the broad statement that due process applies to people who are undergoing mental commitment proceedings. But the question is precisely how far must due process extend itself to an afflicted or disabled mind."

Rice's arguments against extending due process any farther than Chapter 51 already did were the traditional ones: the "civil" label, the non-adversarial character of the proceedings, compassion for the afflicted, the need for flexibility. He reproduced a lengthy excerpt from a 1947 report of the joint legislative committee responsible for the most recent verson of Chapter 51, which began:

> The committee has attempted to make procedures to determine mental condition as informal, and as unlike ordinary court procedures, as possible, in order that afflicted persons may not be made to feel that they are offenders against the law rather than ill persons, or that

> they are to receive punishment rather than care and treatment.... Throughout, the committee has followed the concept that mental disorder is a disease, and it has sought to make laws pertaining to it flexible and adaptable, so as to afford each individual the kind of care and treatment best suited to his particular case.

To justify the statute's failure to require that the prospective patient be notified of the proceedings against him and be permitted to attend his own hearing, Rice cited a 1961 report by the American Bar Foundation referring to the opinion of "numerous psychiatrists" and "some leading legal writers" that these legal niceties can have a harmful effect on the unfortunate subject of the proceedings. On the right to court-appointed adversary counsel, Rice argued that even though Chapter 51 provides only that the judge may appoint a guardian ad litem, a guardian is routinely appointed in every county in Wisconsin but one, and there is really no difference between a guardian and an adversary counsel because proceedings conducted in the patient's best interests are not adversary proceedings, even if the prospective patient wants to stay clear of the hospital.

Having demonstrated that persons suspected of mental illness and at risk of losing their liberty deserve less procedural protection than, say, a welfare mother whose payments have been cut off or a public employee who's been fired, Rice moved on to the plaintiff's more controversial claims. On the burden of proof, Rice pointed out that while Chapter 51 doesn't deal with the question, the Wisconsin Supreme Court had decreed that proof be by "a preponderance or greater weight of the evidence to a reasonable certainty," a rough approximation to the standard burden in civil cases and a considerably lighter burden than Blondis and Dixon had asked for. Commitment is a civil matter, Rice recited, and besides, the laws in over two-thirds of Wisconsin's sister states specify no burden of proof at all. "Is Wisconsin really that bad under the aforesaid circumstances?" asked Rice, rhetorically.

Rice warned that to grant the patient a court-appointed psychiatric witness for his defense would be impractical and even dangerous. It's hard enough to find psychiatrists to perform evaluations for the court, he wrote. "Most physicians are reluctant to perform this public service for a number of reasons, including the fear of lawsuit or personal reprisal by a deranged mental patient after remission." Rice made light of Blondis and Dixon's notion that someone suspected of mental illness has the right to remain silent in the psychiatric interview. "The very criteria which must be available to the court is to be denied to it if the physicians in examining the patient are confronted with the privilege against self incrimination. There absolutely is no support in the law for such a ridiculous theory and plaintiffs' attorneys should know it!" By the same token, Rice argued, the prospective patient should not be allowed to bring his lawyer to the psychiatric interview. Here Rice deployed his ultimate weapon, the terrible specter of madness unrestrained that Chief Justice Lemuel Shaw had conjured up in the Matter of Oakes in 1845, that Dr. Issac Ray and his medical colleagues had found so persuasive in 1863, and that would echo across the land after Lessard v. Schmidt was finally

decided: "If plaintiff is correct from a constitutional standpoint, then the commitment process may have to be abandoned and the mentally ill left to run at large."

In the end, Rice got personal. "It is easy for plaintiffs to ridicule or dismember the...Wisconsin Mental Health Act," he wrote. "They regularly do not have to deal with the daily problems confronting the police and courts involving a disabled or misfunctioning mind. Counsel opposed are both young, although able attorneys. However, they refuse or fail to perceive that unless the more humane Mental Health Provisions which are aimed at care and treatment are followed, the Police Officers will have to follow the more undesirable and intolerable use of the criminal charge to curtail or control conduct to protect society or the person afflicted with mental disease."

Blondis and Dixon were relieved and, it can be said, amused as they pored over George Rice's brief, for he had met very few of their constitutional claims with substantial legal arguments. Rice's method seemed to them a simple appeal to the fears and prejudices of the public, and the judges among them, at the prospect of the streets and avenues of America teeming with maniacs. But their own brief, so much if its reasoning drawn from the criminal process, scarcely settled the questions it raised.

In the years of the Warren Court since 1954, the procedural requirements of federal and state criminal trials had been steadily expanded to include all the claims that Blondis and Dixon made on Alberta's behalf. But the Kennedy v. Mendoza-Martinez case in 1963 made it clear that the due process rights of criminal defendants do not automatically apply in other kinds of proceedings, even if the consequence of an adverse decision, the loss of liberty, is the same. Blondis and Dixon relied so heavily on the 1967 Gault case because it had granted to juvenile defendants in nominally "civil" proceedings most of the rights they believed were owing to prospective patients. But Mr. Justice Fortas had taken pains to point out that the Court was not engaged in a wholesale transfer of criminal safeguards to juveniles; he specifically reserved judgment on the right to a jury trial and on prearraignment and sentencing procedures. His opinion was laden with references to empirical studies about juveniles--not about mental patients--demonstrating that the traditional informality of juvenile hearings served none of the purposes it was intended to. He considered each of the rights that Gerald Gault's lawyer had proposed, and he balanced the potential benefits to a defendant in exercising that right against the costs to the state of granting it.

Judge Reynolds and his two colleagues would apply the same balancing test to the case of Alberta Lessard and the other members of her class, and the nightmares that George Rice summoned up in his brief, for all its clumsiness and hysteria, were hardly so irrelevant as Blondis and Dixon believed. The three-judge court would consider each of their claims, balancing the costs to the government against the benefits to the individual. On the patient's side, the court would ask, in effect, whether the right really

matters--how significant is the interest being protected by the right and what is the importance of the right in protecting that interest? On the other side, the court would weigh the government's countervailing reasons for denying the asserted right, and these reasons can include the economy and efficiency of judicial administration and the substantive aims of the law in question, in this case committing people who need to be committed. Given whatever benefits in fairness and accuracy Alberta would have gained from, say, having a psychiatric witness on her behalf, the three-judge court would ask whether the state can afford to pay the witness fees and, more important, what proportion of cases will be dismissed and clearly disturbed individuals let go free simply because, as George Rice had warned, enough independent psychiatrists cannot be found in time.

Under this due process balancing test, Alberta and her lawyers were on safe ground with their claims for adequate and timely notice, counsel, and a speedy hearing with the patient present. These cost the state very little, they are the prerequisites for the exercise of all other rights, they are indispensible to the appearance of fairness, and rather than impede the state in protecting and treating the mentally ill, they in fact aid it by preventing erroneous commitments. The prospective patient is not alone in benefiting from procedures calculated to hospitalize only those who fall within the law. As Mr. Justice Jackson once wrote, "Let it not be overlooked that due process of law is not for the sole benefit of the accused. It is the best insurance for the government itself against those blunders which leave lasting stains on a system of justice."

In considerable more jeopardy was the right to remain silent in the psychiatric interview. As this right could conceivably cripple the commitment process, the three-judge court would need to find the benefits to prospective patients exceedingly weighty before it could agree. In criminal cases, the right serves several purposes. First, it insures against coerced confessions; since coerced confessions are likely to be unreliable, their exclusion will increase the accuracy of the trial, the truth of the final judgment. But psychiatric interviews will be less reliable if patients are permitted to remain silent, and without psychiatric testimony, commitment can become an arbitary affair. Second, the right to remain silent is thought to maintain a proper balance between the individual criminal defendant and the government, with its limitless investigative resources to track down witnesses and scour the countryside for evidence. But commitment proceedings are usually run on a shoestring. As long as a prospective patient has his own lawyer and psychiatrist and the right to subpoena witnesses and crossexamine them, the government's advantage in manpower and money will be slight. Finally, the right to remain silent protects the individual's privacy and dignity from government interference, ensuring him a "private enclave where he may lead a private life," as one court has put it. Someone suspected of mental illness surely has just as much interest in his privacy and dignity as a criminal defendant. But would the three-judge federal court let this abstract objective frustrate the commitment power by depriving the government of the very information it needs to identify those who come within the law? In relying so

heavily on criminal analogies in their brief, Blondis and Dixon hadn't offered the sort of factual evidence that the due process balancing test may require. Would the right to remain silent in fact make commitment impossible? How many prospective patients now refuse to speak to court-appointed psychiatrists even without having the right? How many more would actually take advantage of the right?

Several weeks after receiving the defendants' brief, Blondis and Dixon were sent a notice that the federal court had scheduled an argument for the beginning of May. When the hearing was held, there were few surprises, for each side made substantially the same arguments as it had in its brief. And after the oral argument, there was nothing to do but wait for a decision. The weeks passed and turned into months, and still no word from Judge Reynolds and his colleagues. Some of the delay, Blondis and Dixon felt, was a matter of logistics. Circuit Judge Sprecher regularly sat in Chicago, and his difficulty in getting together with the two Milwaukee judges and hammering out an opinion to suit at least two of them slowed the process. Then too, federal judges are reluctant to tell a state legislature how it should have written its laws, especially when there are no direct precedents from other courts to use as authority. And perhaps more than anything, it was the burden of grappling with the idea of human responsibility and will, with the question of how madness will be ethically and morally understood, that kept the judges from coming to a decision.

On the afternoon of October 18, Bob Blondis and Tom Dixon were attending a meeting at the downtown office of Milwaukee Legal Services. Five months had passed since they argued their case in federal court and almost a year since Alberta Lessard was picked up at 9719 West Greenfield Street for the trip to North Division. A call came for one of the lawyers at the meeting. It was a friend of his at the Federal Building with the news that Judge Reynolds had just filed an opinion in the case of Lessard v. Schmidt.

Blondis and Dixon dashed to the phone. Could he get ahold of the decision and read it to them, even just the part that said "Judgment for Plaintiff" or "Judgment for Defendants"? The friend said he'd do better than that--he would wangle a copy of the opinion out of the clerk and bring it over to their office when he got off work. It was already late in the afternoon. Dixon, Blondis, and Alberta Lessard had only one hour more to wait.

Jeffrey Steingarten

Received in New York on October 4, 1976