Duquesne Law Review

Volume 5 | Number 4 Article 5

1966

Involuntary Commitment of the Mentally Ill in Pennsylvania

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COMMENTS

INVOLUNTARY COMMITMENT OF THE MENTALLY ILL IN PENNSYLVANIA

HISTORY

Processes for the involuntary hospitalization of the mentally ill are of ancient origin. At common law, detention was sanctioned if necessary to prevent injury to the person or property.[1] The state's power to authorize such restraint was considered to be an emergency right and:

> could be exercised only during the time necessary to obtain legal authority. In addition, when the question of confinement came before a judicial officer, the allegedly insane person was considered simply as too dangerous a person to be at large. He might be put in jail, a poorhouse, pen, strong room or any secure place.[2]

Once committed, the inmate was subjected to ignominious and barbarous treatment. The nature of the confinement has been characterized as follows:

> The problem of administration, so far as the inmates were concerned, was limited to guarding them and preventing their escape. Whipping, chaining to the wall or floor; and restraint in handcuffs, bedharnesses, or in the strait jacket or "madd shirt" were generally the devices used at the time.[3]

Since the ultimate effect of mental illness is the inability of the individual to adapt within the social milieu,[4] the area eventually received legislative recognition. At its inception legislation was rooted in the preventive essence of the police power, and was enacted as a prophy-

1. "The right to restrain an insane person against his will without legal authority existed at common law whenever confinement was necessary to prevent personal or property damage." *Comment*, 56 YALE L.J. 1178, 1185 (1947). This student work is well recognized by writers in the field of mental health.

2. *Ibid.*

3. Weihofen and Overholser, *Commitment of the Mentally Ill*, 24 TEXAS L. REV. 307, 311 (1946).

4. "Whether the illness results from organic causes . . . or is one of the diseases for which no organic cause can be found, the symptoms of serious mental illness are those of release, or regression to an uninhibited state. The social controls, including the individual's inability to work within a complex human relationship, are usually the first to suffer deterioration. This failure may result in the inability of the individual to care for himself, or it may be expressed in anti-social conduct directed at others. In either case, the problems are no longer medical, but have social and legal consequences." Bowman, *Presidential Address*, 103 AM. J. PSYCHIATRY, 1, 12 as quoted in Kutner, *The Illusion of Due Process In Commitment Procedures*, 57 N.W.L. REV. 383, 388 (1962).

lactic measure for the protection of persons and property.[5] However, as psychiatric and psychological techniques became more sophisticated and possibilities of care and treatment were unveiled, legislation incorporated therapeutic considerations.[6] The preventive essence of the police power was thought insufficient to sustain this absorption, and despite objection,[7] justification was eventually founded upon the sovereign's duty to care for his subjects, *i.e., parens patriae.*[8]

Pennsylvania was one of the first to acknowledge the potentiality of therapy.[9] In the famous case of *Hindman v. Richie,*[10] Judge Burnside instructed the jury as follows:

> If wrong has been done, they (the defendants) are open to the examination of the civil courts, and the question will be in each particular case whether the safety of the person himself or that of his family or friends or neighbors require that he be restrained for a time, and whether restraint is necessary for his restoration or will be conductive thereto. In considering the question of restraint . . . if confinement or restraint with regular medical treatment are necessary for the restoration of such a person to a perfectly sane mind, they are the best friends of the party who enforce it.[11]

The doctrine of *parens patriae* was echoed in the case of *Hammon v. Hill.*[12] In upholding the involuntary hospitalization of an individual, the court stated that "the state restrains the lunatic, not only for his own protection, and the safety of the public, but its duty extends so far as to include every provision known to medical skill and science for the treatment of the diseased mind."[13]

The therapeutic aspect of commitment has been reflected in Pennsylvania's most recent endeavor to cope with the problem of mental illness; The Pennsylvania Mental Health and Mental Retardation Act of 1966 established procedures for the involuntary hospitalization of anyone believed to be mentally disabled and in need of care.[14]

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5. Ross, *Commitment of the Mentally Ill: Problems of Law and Policy,* 57 MICH. L. REV. 945 (1959).

6. PA. STAT. ANN. tit. 50, § 4401 (Supp. 1966).

7. Currans, *Hospitalization of the Mentally Ill,* 31 N. CAR. L. REV. 274 (1953).

8. Bassiouni, *The Right of the Mentally Ill,* 15 DEPAUL L. REV. 291, 300 (1966).

9. Massachusetts was the first state to acknowledge this. Matter of Oakes, 8 Law Rep. 122 (Mass. 1845).

10. Brightly's Reports 143 (1849).

11. *Id* at 161.

12. 228 F. 999 (1915).

13. *Ibid.*

14. PA. STAT. ANN. tit. 50, § 4401 (Supp. 1966).

Mental Health Legislation: A Timely and Challenging Area

The area of mental health constitutes a grave societal problem; it demands peculiarly unique legislative action.[15] From 1903 to 1953 American hospitals showed a two-fold increase in the ratio of patients suffering from a mental disorder to the general population.[16] These statistics assume additional significance after one realizes that they do not include those who had received extra-mural care or the many whose "silenced" hospital records conceal the stigma of a mental disability.[17] Recent statistics for Pennsylvania reveal that 54,276 mentally and emotionally disturbed persons were treated in state mental hospitals alone in the past year.[18]

State involvement in the area is extensive; governmental institutions service approximately 97.5% of the nation's mental patients.[19] For the past fiscal year, Pennsylvania's financial commitments totaled $88,914,-757; federal contributions were comparatively small.[20]

A statistical survey indicates the magnitude of the problem and highlights the demand for legislation; the demand is not easily satisfied however. The legislative task is a difficult one requiring a delicate reconciliation of the dictates of due process with the popular insistence on cure and treatment. The popular demand for treatment has manifested itself in a deprecation of the requirements of (1) a jury trial, (2) notice, and (3) the presence of the alleged mentally ill person at a hearing.[21] The extent to which Pennsylvania has deferred to those demands and the constitutionality of such an accommodation is worthy of examination.

INVOLUNTARY COMMITMENT UNDER THE PENNSYLVANIA MENTAL HEALTH AND MENTAL RETARDATION ACT OF 1966

The Pennsylvania Mental Health and Mental Retardation Act of 1966 has established three procedures for the civil commitment of a person alleged to be mentally disabled:

15. The legislature must take cognizance of the fact that legal formality may harm the mentally ill individual, and must try to avoid this while satisfying due process requirements. Kutner, *supra*, note 4 at 368.

16. Bourdeau, *Mental Health, The New Public Frontier*, 286 ANNALS 9 (1953).

17. *Id.* at 9.

18. *Public Welfare Report*, 1965-1966 Dept. of Welfare, p. 52 (1966).

19. Currans, *Hospitalization of the Mentally Ill*, 31 N. CAR. L. REV. 274 (1953).

20. *Public Welfare Report, supra*, note 18 at p. 7.

21. "Many, especially psychiatrists and the allied profession, have argued over the years that the introduction of these legal formalities made treatment less accessible and retarded the development of mental health. Others argued that the introduction of legal principles into the insanity field was of great importance . . .". Kittrie, *Compulsory Mental Treatment and the Requirements of Due Process*, 21 OHIO ST. L.J. 28, 34 (1960).

1. Section 4404 provides that:

a. A written application for commitment to a facility may be made in the interest of any person who appears to be mentally ill and in need of care . . .

b. Such application shall be accompanied by the certificates of two physicians who have examined the person whose commitment is sought within one week of the date of the certificates and who have found, in their opinion, such person to be mentally disabled and in need of care . . .

c. The director may receive the person named in the application and detain him until discharge . . .

d. Every commitment shall be reviewed at least annually.

2. Section 4405 provides for the emergency detention of an individual:

a. Whenever a person appears by reason of his acts or threatened acts to be so mentally disabled as to be dangerous to himself or others and in need of immediate care, he may be taken into custody for purposes of examination provided that:

1. . . .

2. The acts or threats which give cause to believe the person to be mentally disabled and in need of care are overt, demonstrate a clear and present danger to self or others and are set forth in the application.

b. Immediately upon being taken into custody, such person shall be taken with the approved application of a physician or designated for examination on an emergency basis.

c. . . .

d. . . .

e. . . .

f. Any person committed under this section may be detained for a period of not more than ten days. If during this period, the director finds that such person requires further care, he may admit the person on a voluntary commitment or notify the applicant . . . to make further application for such person's commitment under other provisions of this act.

3. Section 4406 provides for the commitment of an individual via court order:

a. Whenever any person is believed to be mentally disabled

> and in need of care or treatment by reason of such mental disability . . . , a petition may be presented to the court of common pleas in the county in which the person resides or is for his examination or commitment . . .
>
> 1. . . .
>
> 2. . . .
>
> 3. Said court shall upon consideration of such petition shall:
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> (i.) issue a warrant requiring that such person be brought before said court, (ii.) fix a date for a hearing . . . , and (iii.) notify the parties in interest.
>
> b. If upon examination, it is determined that such person is in need of care at a facility, the examining physician . . . shall immediately report to said court which may order the commitment of such person for care and treatment.

While sections 4404 and 4405 mark a complete accommodation to the popular opposition to traditional safeguards of due process, the civil court procedure embodies the requirements of notice and presence.

THE CONSTITUTIONALITY OF THE PROCEDURES

Any procedure for the involuntary commitment of the mentally ill has been assailed as a deprivation of due process.[22] Dr. Thomas P. Szaz[23] has stated that "I oppose mental hospitalization . . . because in a free society, I do not believe that mental illness is a morally legitimate ground for the loss of liberty. Only conviction for law breaking is."[24] While such a view would clearly invalidate the aforementioned procedure, it is devoid of judicial authority; the law, in the main, has sustained procedures for the commitment of the mentally ill.

Although the commitment by an application supported by the certificates of two physicians lacks those constitutional safeguards deemed rudimentary to the criminal proceeding, ample authority exists to uphold its constitutionality. An earlier Pennsylvania procedure requiring only a medically supported affadavit was sustained in *Hammon v. Hill*.[25] Although it is uncertain whether a modern court would adhere without qualification to the philosophy of that case, more recent decisions in other jurisdictions have upheld the constitutionality of *ex parte* procedures

22. Dr. Szaz is a controversial psychiatrist, and was early recognized as one of the bright young men of psychiatry. Slovenko, *The Psychiatric Patient, Liberty and the Law*, 13 KANSAS L. REV. 59 (1962).

23. *Ibid.*

24. Szaz, "What People Can and Cannot Do," Harper's Apr. 1964, p. 50.

25. 228 Fed. 999 (1915).

similar to that provided for in the Pennsylvania Mental Health and Mental Retardation Act of 1966. In 1963, The Supreme Court of Maine sustained a procedure greatly similar to that established in the Pennsylvania statute.[26] The salient factor in that decision was the availability of a prompt review of the detention.[27] Perhaps persuaded by the idea that a prompt review of the detention minimized the possibilities of railroading, Massachusetts,[28] Rhode Island,[29] Iowa,[30] Arkansas,[31] and Indiana[32] have adopted the rationale.

The saving aspect of prompt review would undoubtedly sustain the Pennsylvania commitment by application procedure; the recent legislation makes a judicial review available.[33] However, that rationale is by no means universally accepted.

In *Barry v. Hall*,[34] a federal court struck down a statute which authorized commitment upon an application by the Secretary of the Treasury. The language of the court was compelling: an individual "is entitled to his day in court and the right to be heard before he is condemned. No mere *ex parte* procedure can affect personal rights."[35]

Ex parte procedures were also struck down as a deprivation of due process in *State v. Mullinax*.[36] Expressly rejecting the line of cases upholding the validity of such procedures, the court states that "the constitutional requirement of due process made notice a prerequisite to any judgment of insanity, or which otherwise deprived the person of liberty or property . . ."[37] This position has been gaining impetus and has resulted in greater legal and popular opposition to summary commitments.[38] The effect of the position is to void the Pennsylvania provision for *ex parte* commitment.

The refusal of the *Barry* and *Mullinax* courts to sustain an *ex parte* procedure is not an indication that a similar position would be taken with the procedure established for emergency detention. Dicta in the *Barry* case suggests that emergency, temporary detentions would be approved;

26. In Re Opinion of the Justices, 170 A.2d 660 (Maine 1961).

27. *Id.* at 672. The court stated a commitment proceeding was saved by "a prompt and effective method for institution of proceedings for release."

28. In Re Dowdle, 160 Mass. 387, 47 N.E. 1033 (1897).

29. In Re Croswell, 28 R.I. 137, 66 Atl. 55 (1907).

30. Heath v. Soucek, 240 Ia. 300, 36 N.W.2d 432 (1949).

31. Payne v. Robinson, 190 Ark. 614, 8 S.W.2d 76 (1935).

32. In Re Mast, 217 Ind. 28, 25 N.E.2d 1003 (1940).

33. Habeas corpus is available to an inmate of a mental institution. PA. STAT. ANN. tit 50, § 4426 (Supp. 1966).

34. 98 F.2d 222 (1938).

35. *Id.* at 230.

36. 269 S. W.2d 72 (Sup. Ct. 1954).

37. *Id.* at 76.

38. Cohen, *The Function of the Attorney and Commitment of the Mentally Ill*, 44 TEXAS L. REV. 424 (1966).

"it is settled that the detention for a brief period . . . while proper proceedings are being instituted to determine insanity as a matter of law is not unlawful."[39]

Whereas, the *ex parte* procedures established in the act are devoid of judicial safeguards, the civil court commitment mechanism proffers greater procedural advantage to the mentally disturbed individual. In providing for a judicial decree ordering commitment, the legislature has exempted the provision from the basic objections levied against the *ex parte* procedure, *i.e.*, the absence of a hearing prior to detention. The provision fails to require a jury decision on the question. It is unlikely, however, that this absence will subject the provision to an invalidating constitutional objection. The possible adverse effect of a jury hearing on a mentally disturbed individual and the psychiatric complexities of a judicial commitment have obviated the demand for a jury trial.[40]

In addition, the absence of a requirement for the assistance of counsel has been recognized to be of constitutional import. In *Dooling v. Overholser*,[41] the court stated:

> In construing the provisions (of a commitment procedure) together, any doubt as to their meaning may be resolved so as to avoid any question of their failure to meet due process requirements . . . This leads to a construction . . . That at hearings before the commission, the court or the court and jury, the alleged insane person has the right to be represented by counsel and if not so represented, independently, the court shall appoint counsel.[42]

Despite the fact that the *Dooling* court acknowledged the fact that representation by counsel may be required, the right to counsel at a commitment proceeding has received only cursory attention.[43] The non-adversary character of the proceeding may be a primary reason for this inattention.

THE REALITIES OF AN EX PARTE PROCEDURE

Although there is ample authority to sustain the *ex parte* procedure established in the Pennsylvania Mental Health and Mental Retardation Act of 1966, the ramifications of that rationale present factors which should inhibit its adoption. Once an individual is committed, an examination is required only annually;[44] any other release mechanism is contin-

39. 98 F.2d at 230.

40. Kutner, *The Illusion of Due Process*, 57 N.W.L. REV. 383 (1962).

41. 243 F.2d 825 (1957).

42. *Id.* at 827.

43. Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill*, 44 TEXAS L. REV. 424, 425 (1966), states that "it is rare to find even a cursory exposition on the role and function of legal counsel."

44. See *Comment*, 5 DUQUESNE L. REV. (1966).

gent upon the discretion of the director of the hospital, or the patient's initiative in seeking medical or judicial review.[45] Such an arrangement seems inconsistent with the tenets of a legal system which has generally insisted that the State and not the individual employ judicial process to justify a detention. In addition, the successful review of and release from a mental institution is poor recompense for the time spent in an institution and for the social stigma which attends such a detention.

The realities of a system which relies on the uncontested opinions of a medical examiner also renders the *ex parte* procedure vulnerable to criticism. The function of a physician in a commitment proceeding has been characterized as follows:

> . . . they (legal tests for commitment) are linguistic devices which in part designate and in part explain deviant forms of behavior. They imply that the deviant behavioral events can be explained as the result of a deficient judgment as the layman (and legal test) would say, or as the result of poor ego or superego functioning as the psychiatrist would say. The psychiatrist's testimony, therefore, serves the purpose of presenting scientific jargon which gives the appearance of being facts about causes, but which are actually explanations which serve to justify the legal fact of commitment.[46]

The role of the psychiatrist is then tantamount to that of a judge and jury; he gathers basic facts from which he concludes that commitment is required. Scientifically, he proposes no true element of causality, and therefore performs a function which could be executed by a judicial officer. Thus, the *ex parte* procedure assumes a character of an unnecessary delegation of a judicial prerogative—the power to deprive an individual of his liberty.

The physician's exercise of the power to restrain an individual casts further doubt upon the wisdom and validity of the delegation. The vitality of any fact finding procedure depends upon its ability to arrive at the truth.[47] This essential does not inhere in a procedure which has authorized the unfettered conclusion of a physician to constitute grounds for the hospitalization of an individual. Statistics indicate that confinement is recommended in 77% of the cases brought before a physician, and that papers authorizing hospitalization are signed as a matter of course.[48] Instead of acting as an objective appraiser of fact, "the physi-

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45. *Ibid.*

46. Leifer, *The Competence of the Psychiatrist to Assist in the Determination of Insanity: A Skeptical Analysis*, 14 SYRA. L. REV. 564, 569 (1963).

47. Application of Gault, 87 S. Ct. 1428 (1967).

48. Kutner, *The Illusion of Due Process In Commitment Proceedings*, 57 N.W.L. REV. 383 (1962).

cian acts as the so-called patient's adversary. Sometimes he represents the family, sometimes the court, but never the individual suspected of mental illness."[49] Thus, it is submitted that the inability of the *ex parte* procedure to arrive at objective conclusions of fact saps it of any vitality as a legitimate vehicle for effecting commitment.

CONCLUSION

Recently, the Supreme Court of the United States reversed the order of a civil proceeding which resulted in the detention of a juvenile.[50] Speaking for the majority, Justice Fortas stated that:

> . . . It is of no constitutional consequence—and of limited practical meaning—that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a "receiving home" or an "industrial school" for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes a "building with whitewashed walls, regimented routine and institutional laws . . . ."[51]

In striking down the procedure used to effectuate the detention, Justice Fortas stated that the methods used by the presiding judge were comparable to those employed in the criminal case, and that a "kangaroo court" could not be utilized to deprive an individual of liberty.[52] The court also emphasized that the realities of juvenile penal administration necessitated that the individual be better protected, and thus penetrated the facade of a "civil procedure."[53]

Analogously, the reality of the *ex parte* procedure, *i.e.*, the inability of a physician to function as an objective appraiser of fact, should result in a judicial repudiation of *ex parte* commitments. It is submitted that any procedure which authorized the involuntary hospitalization of an individual should contain some mechanism which would enable the court to examine the basic facts upon which the medical determination of mental disability has been made. Such an examination could be made by the judge, but it is suggested that counsel is better suited to function in such a role, and thereby enable the judge to maintain an objective status. Regardless of the inquisitor's office, however, cross-examination of the physician would insure that commitment was ordered not as a matter of convenience or course.

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49. SZAZ, PSYCHIATRIC JUSTICE, 74 (1965).
50. Application of Gault, 87 S. Ct. 1428 (1967).
51. *Id.* at 1443.
52. *Id.* at 1445.
53. *Ibid.*