
Albert Broderick O.P.

Follow this and additional works at: https://scholarship.law.edu/lawreview

Recommended Citation
Available at: https://scholarship.law.edu/lawreview/vol18/iss1/7

Ten percent of all Americans have a personal brush with mental disturbance so serious as to require hospitalization. Far greater numbers suffer from lesser degrees of mental illness. To these and to all thinking citizens, the system of admission to hospitals for the mentally ill is an immediate and pressing problem.¹

[A] law designed to insure justice by saving a mentally incompetent defendant from the risk of wrongful imprisonment on a charge he does not understand, can result in having that defendant—untried, unconvicted and presumed innocent under the law—spend the rest of his life in a maximum-security institution . . . .²

The first of the above statements capsules the chief concern of the 1962 report of this special Bar Association Committee: the involuntary admission and retention of “civil” patients in mental hospitals. The second sounds the chief note of this 1967 report of the Committee: due process for “criminal law patients.” That term, loosely used, includes those patients compulsorily restrained in mental hospitals who (1) are already under sentence; (2) have been found incompetent to stand trial (some of these already indicted, others not); (3) have been tried and found not guilty by reason of insanity; or (4) former prisoners whose sentences have expired and others who are allegedly “dangerously” ill.

This volume, like its predecessor, is a blue-ribbon exhibit of fruitful collaboration between a conscientious Bar Association Committee (numbering judges, public health and corrections administrators, and private attorneys among its members) and the faculty of a law school. Visibility is given to a critical area in which courts, legislators, administrators and attorneys have failed to make the accepted contemporary standards of procedural due process into a living reality. Few Bar Association Committees enjoyed such immediate and outstanding success in stimulating legislative change as did this Committee in its 1962 report, a collaboration with Cornell Law School. The present report, with Fordham Law School furnishing the staff, was initiated in 1965,

1. MENTAL ILLNESS AND DUE PROCESS v (1962).
the year following the passage by the New York State legislature of significant parts of the 1962 Committee's recommendations with respect to "civil" patients.

In its 1962 report the Committee had successfully argued for the establishment of a publicly supported Mental Health Information Service in each judicial department. The legislation\(^3\) provided that the Service's duties are: (a) to study and review the admission and retention of involuntary patients; (b) to inform patients, and others interested in their welfare, concerning admission and retention procedures and their rights to judicial review, representation by counsel, and independent medical opinion; (c) to provide the court with all relevant information as to the patient's case; and (d) to provide services and assistance to patients and their families. This new Service was keyed to a program of periodic judicial review of involuntary patients. A chief thrust of the 1967 report is to extend the functions of this Mental Health Information Service to the "criminal law patient." It further distinguishes among the categories listed above, insisting that all patients not actually under sentence should be treated as "civil" patients and accorded their hard-won rights of periodic judicial review, outpatient status where feasible, counsel, and independent medical assistance. The Committee argues its case impressively, furnishing both historical background and empirical data.

Many of the complaints against existing arrangements explained in this 1967 report are mirrored in a current experiment in the District of Columbia which has enjoyed the full cooperation of the administration and psychiatrists at St. Elizabeths' Hospital. For the past year and a half, faculty members and law student members of the Legal Aid Society of the Catholic University Law School have been interviewing patients in the maximum security wards of St. Elizabeths', the largest government mental hospital in the United States. Where interviews indicate viable legal claims by individual patients (who fit into the four categories of "criminal law patients" covered by this 1967 report), they are referred to volunteer private lawyers for representation or are handled by the faculty members themselves. At its outset, the interviewing program contemplated merely civil claims, but emphasis soon reached the area of alleged undue detention, pending detainers elsewhere, and stimulation of parole. The tentative conclusion from this experience is that while, as in New York, further legislation may be necessary, the chief and perhaps unavoidable systematic shortcomings of inertia and excruciating delay will not be overcome by legislation alone. Some dynamic institutionalized goad seems critically needed to protect individuals from being overlooked or mislaid in a huge labyrinth (embracing hospital, Mental Health Commission, bar and courts) that is often notoriously undermanned and overworked. Embraced is the borderland between two professions—law and medicine—in which each is groping for clarification of its basic premises and responsibilities and whose shortcomings have particular impact upon those members of society who are poorest, friendless, and least capable of defending their basic right to personal freedom. The problem is rendered more complex by the undoubted fact that this freedom is often in conflict with a prime right of society to protect its members from the predictably "dangerous." The charge has often been made—which the institutional psychiatrists plausibly deny

\(^3\) N.Y. Mental Hygiene Law § 88 (McKinney Supp. 1967).
—that the labyrinthine actors overreact in defense of this latter social interest. The Bar Association Committee, both in 1962 and in 1967, reacted conservatively in face of these two interests of freedom and safety but insisted upon the minimum of "open" and "adversary" process, frequently renewed, and upon actors to put this process in motion realistically on behalf of those restrained.

As this Report points out, for those caught in the mental illness web, "[latter-day procedural reforms can in most instances be traced directly to the need [of the hospital administration and lower courts] immediately to accommodate an adverse judicial decision in a habeas corpus proceeding brought by one of the patients." This almost "by chance" stimulus is hopelessly inadequate, it is argued, in a nation now existentially committed to realistic (not merely formal) full hearing, equal protection, and right to counsel guarantees, as fundamental citizens' rights.

The prospect is not totally one of despair. One may wince (a gentle word) at lost files (and thus mislaid men), at well-motivated but one-sided psychiatric presentations in (admittedly) medically disputable clinical situations, at the lack of follow-through on the part of some court-appointed (but inadequately compensated, or uncompensated) attorneys, and at the lack of broad bar association or law school curiosity in this despised area that falls often between the stools of two professions. But one may well be encouraged by the exceptional concern of many dedicated public psychiatrists, attorneys and judges, at the extreme professional sensitivity evidenced by committee reports such as these of the Association of the Bar of the City of New York, and of the Judicial Conference of the District of Columbia Circuit, and by the extensive conferences jointly sponsored by the University of Southern California Schools of Medicine and Law (involving psychiatrists, lawyers, administrators and judges) which have contributed so much to bringing California to the front rank among the states in this field.

The Report reviewed here, and the experiences in the District of Columbia and California, should make clear that further legislation is required to spell out minimum procedures, to implement requirements for periodic judicial review, and to provide compensation to attorneys and psychiatrists realistically adequate to insure competent personal legal and psychiatric advice to indigents confined in mental hospitals, whether on "civil" or "criminal" commitments. But these data also point up that a sustaining professional person, persons, or group (whether from the private or public sector) is imperative to give day-to-day impetus and follow-through to whatever norms are currently agreed on for protection both of individual freedom and of public safety. It might be in the form of a New York-type Mental Health Information Service, an independent ombudsman operating within major mental hospitals or judicial units, a continuing bar association committee, or a sustaining committee established

5. Cf. REPORT OF THE COMMITTEE ON PROBLEMS CONNECTED WITH MENTAL EXAMINATION OF THE ACCUSED IN CRIMINAL CASES BEFORE TRIAL—JUDICIAL CONFERENCE OF D. C. CIRCUIT (1965) (privately printed). A further empirical study is in progress which will deal with the functioning of counsel in mental health cases, among other things.
6. Professor Weihofen writes me that a private attorney is being established on an experimental basis in a mental hospital in New Mexico.
by a judicial conference to oversee the quality of representation by counsel and the de
facto operation of a system of periodic review of those whose freedom is restrained by
"medical incarceration" ("hospitalization" often being an unreal term here).

This book is unlikely to directly produce as much legislation as its predecessor. For
one thing, the United States Supreme Court's decision in Baxstrom v. Herold7 (re-
quiring equal treatment of all patients held on a civil commitment, whether hold-
overs from an expired sentence or not), which came midway in the Committee's
deliberations, imposed certain requirements which the Committee had already de-
termined to recommend. Further, New York State's Temporary Commission on Re-
vision of the Penal Law was contemporaneously working on areas overlapping those
being investigated by the Committee. This volume, then, may not be as influential as
its predecessor; it is, nonetheless, instructive, clear, thorough and persuasive in pointing
up significant defects in the present public operations within the borderland of mental
illness and crime. It is well footnoted, and compiles substantial informative empirical
data, although one can hardly resist questioning its somewhat superfluous appendices,
and bemoaning its lack of an index. If pressed, we would concede that its specialized
matter would make it strictly a must only for the New York practitioner. Neverthe-
less, it takes a place with its predecessor, Mental Illness and Due Process, (1966),
with the American Bar Foundation's The Mentally Disabled and the Law, (1961),
and the remarkable Katz-Goldstein-Dershowitz volume, Psychonalysis, Psychiatry and
Law, (1967), as a basic library for lawyers, doctors, mental health administrators,
legislators and judges engaged in, or prepared to be outraged by, this field of inter-
disciplinary challenge.

ALBERT BRODERICK, O.P.*

* Associate Professor of Law, Columbus School of Law, Catholic University of
America.