Denver Law Review

Volume 31 | Issue 3 Article 1

January 1954

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IMPROVING LEGAL PROCEDURE FOR HOSPITALIZING THE MENTALLY ILL

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It is a very good and very hopeful thing that a meeting such as this should be taking place—a meeting attended by the officers and committee chairmen of the legal and medical professional organizations, as well as members of the legislature and civic leaders interested in medical-legal problems. I am very flattered to be permitted to participate.

This kind of meeting is so very important because doctors and lawyers usually find it difficult to get together, not only literally around a luncheon table, but also in their thinking about problems they are forced to share. Their training and methodology differs so much that they have difficulty in understanding each other's viewpoints . . . and also that of other groups, social workers and volunteers.

The lawyer is likely to regard the doctor as a man who knows a lot about the human organism, but who is sadly unaware of the complexities of social organization and who therefore is likely to be naively impatient with the red tape and the delays that legal and political action involves. The doctor is inclined to think of the lawyer as too much absorbed in petty formalities and technicalities. Because the doctor has probably never had pointed out to him the distinction between an advocate's function and a scientific investigator's, he is likely to regard the lawyer's willingness to take almost any kind of case as somewhat venal. That kind of eyebrow raising is reciprocated by lawyers who have observed too many medical experts displaying on the witness stand a conscious or unconscious partisanship unbecoming representatives of the scientific tradition. These lawyers may not stop to reflect that it is the established legal procedure that forces expert testimony into a partisan mold.

This lack of rapport is at least as apparent in the particular medical-legal field I want to talk about today as in any other. The subject I should like to discuss is the procedure by which persons who are mentally ill are admitted to a mental hospital. The fundamental problem here is how to eliminate needless legalistic formality and at the same time maintain adequate legal safeguards against error and abuse.

The impulse of the lawyer is to emphasize the need for adequate procedure to make sure that sane persons will not be "railroaded" into institutions. They therefore stress the importance of a fair trial, with adequate personal notice, and a chance to be heard

*An address before the Colorado Mental Health Association, November 20, 1953.

and to confront the witnesses against one, before being deprived of one's liberty. Medical men, on the other hand, are likely to emphasize the harmful results of too much legal formality. They advocate informal procedure designed to minimize the psychic traumatization that a judicial trial frequently entails. They want to eliminate the use of archaic legal phraseology carrying connotations of criminal prosecution and guilt, and set up methods that encourage voluntary hospitalization and maximum patient participation. They urge that the patient should be recognized to have not only legal rights, but also what we might call medical rights. For example, the right to private confidences and sympathetic handling. They condemn as a violation of this concept of "medical due process" the public exposure by courts of a psychotic individual's behavior and his confidential communications, and the public disclosure of the diagnosis and prognosis in the presence of the patient.

The impatience of medical men with unduly formalized commitment procedures is understandable. But it's worth remembering that these procedures represent the application of principles of fairness and justice in dealing with human rights that have been established by generations who saw and suffered the effects of more summary methods. It is a precious heritage that enables us to insist that a man be served with notice of the pendency of any legal action in which his rights may be affected, and that he have opportunity to be present, to confront and cross-examine the witnesses against him, and to introduce any testimony he may have in his own defense, instead of having his rights decided in a secret star chamber proceeding and his life or liberty taken a *lettre de cachet* calling for his confinement or liquidation without notice or hearing. The terms "star chamber" and "lettre de cachet" don't describe imaginary evils dreamed up by overcautious lawyers, but real practices rampant not so many hundreds of years ago and hardly exceeding practices current in various parts of the world in our own time.

On the other hand, it is necessary for lawyers to recognize that commitment to a mental institution involves peculiar considerations not present in ordinary legal cases. A sane person can usually be left to decide for himself whether he needs hospital care for his physical ills. But a mentally ill person may not realize that he is ill; more often than not, he will rationalize all his symptoms and explain the urgings of his family and physician as evidence of a gigantic plot against him. For the same reason that he is incapable of reaching a decision to be hospitalized voluntarily, legal safeguards such as notice and hearing may do him no good, and he may only be harmed by them. The problem is to devise procedures that will protect the sane without needlessly subjecting the sick to heartless and harmful mental torture.

Present practices in many states are not only heartless and harmful, but cumbersome and expensive as well, without having

any demonstrable justification as safeguards against arbitrariness or error.

You are interested specifically in the Colorado procedures. It is, I feel, somewhat presumptuous for me to come here to tell you about your law. But I think you prefer me to talk about Colorado law specifically, rather than to stick to safe generalities. Perhaps you will let me talk as a member of the family. After all, I lived in Colorado for nine years, teaching at the University of Colorado, School of Law in Boulder. And I never had any intentions of leaving. In the fall of 1941, I left the state on what was distinctly understood to be merely a one-year leave of absence, to do some government work in Washington. I was prevented from returning by the Japanese Government. It took me seven years to get out of Washington and back to this part of the country. So I hope I may be allowed to speak, if not as a Coloradoan, at least as one whose Colorado citizenship was a war casualty.

Shortly before the war, while still at the University of Colorado, I wrote an article for the Rocky Mountain Law Review, which that school publishes, entitled, "Commitment of Mental Patients—Proposals to Eliminate Some Unhappy Features of Our Legal Procedure." Not a very good title, but the article wasn't as bad. In that article, I said the Colorado procedure was "cumbersome, expensive and heartless." I recently checked on the statute to see to what extent it had been improved in the intervening years. I'm afraid that what I said then still holds true.

Colorado still retains the device of a county "lunacy commision" to determine whether a person should be ordered hospitalized. There are only perhaps two or three other states still using this device, e.g., Wyoming and Georgia.

I need hardly point out to you the quaint and utter obsoleteness of the word "lunacy" which the statute still retains. The word harks back to the medieval belief that phases of the moon influenced diseases of the brain. Distempered persons were supposedly "at the height of their distemper" in the full and change of the moon, especially about the equinoxes and summer solstice; between times, they ordinarily had "lucid intervals." Other states have long ago discarded not only this word, but also other words having criminal or other unfortunate connotations, like "complaint" "apprehension" and "commitment."

At the time the Colorado law was first adopted, that was the accepted language for the purpose. The Colorado law-makers weren't trying to stigmatize the unfortunate victim of mental disorder. But today, what effect do you think it has to describe the proceeding as an "adjudication of lunacy," and the person as an "adjudged lunatic?" Words are important. People who wouldn't have any objection to being sent or having their relatives sent to a mental hospital, are repulsed and even horrified at the idea of being "adjudged a lunatic." Using this kind of terminology is a wholly gratuitous outrage, which only leads people to shun as an

unholy curse the healing and care that the State of Colorado offers in its excellent hospitals.

When a lunacy complaint is filed, the Colorado statute provides it must be served on the person. I don't know whether some of your back counties still entitle this document "Complaint in Lunacy" in big black letters, but I know they used to. I need hardly point out that if a person is somewhat unstable mentally, his condition is not going to be helped by being handed such a paper—by a sheriff. In California, New York and a half dozen other states, if the court, upon certificate of a physician or otherwise concludes that service of notice on the patient would be harmful to him, the judge can order it served on a next friend or relative, other than the one who signed the application.

The sheriff, when he serves the complaint, must promptly "apprehend" the person and take him into custody. This provision dates from older times, when the only persons recognized as needing confinement were those who were violent and dangerous. But most of the people ordered into mental hospitals today are not raving maniacs who must promptly be handed over to the sheriff. Why not eliminate the arrest except for those cases that actually are violent or otherwise dangerous.

Some time after the arrest, the person is interviewed by the physicians making up the lunacy commission and at a still later time an informal hearing is held. At this hearing, two quite distinct questions are tried. The first is the person's mental condition. The complaining witness and others are required to testify as to the person's mental condition. The patient *must* be present at the first session and has the right to be present at all. Needless to say, it is likely to be a distressing and even tragic ordeal to the patient and to his family for them to have to testify to his condition and all the irrational acts. A good many of the mentally ill, especially the paranoid types, already feel that people dislike them and are persecuting them and for good reason. Requiring them to sit in a courtroom and listen to their trusted physician and nearest and dearest relatives testify to the facts regarding their mental condition is likely to confirm their worst suspicions. The result may be dangerous to the others as well as harmful to the patient's self preservation. Other states, including our neighboring Utah, have long since given the judge discretion to waive the requirement of the patient's presence where it might be detrimental.

The other question that this commission of doctors must decide is whether he owns any property, so that he is able to pay for the cost of his care in the hospital himself. Why this should be put to a commission of doctors I can't see. The sensible way would be to have that question determined administratively, rather than by a trial. That would not only be simpler, but you would be much more likely to get the truth, and the money, by hiring a couple of investigators than using doctors sitting in a hearing. Most other states do it that way; why not Colorado.

If the commission reports that the person is insane or distracted so as to endanger his own or another's life or property, it is the duty of the court to order commitment. But if the patient or someone in his behalf is dissatisfied with the commitment order, he may demand a trial before a jury of six.

Most states have abolished jury trials in commitment cases. The objections to jury trials are several:

1. The traumatic effects on the patient are serious. As Dr. Manfred Cuttmacher and I said in a recent book, "There is hardly a more powerful device conceivable for convincing a person with delusions of persecution that his suspicions are true than subjecting him to a jury trial."

2. The reluctance of relatives to expose before a jury what they regard as the shame and disgrace of having "insanity" in the family, and to testify against their own kin in such a public performance, cause many relatives to postpone taking this step until the condition has become hopeless. The result is that the state has to support perhaps for a long lifetime, someone whom it could have cured in a year or two, if treatment had started early enough. People have spent their life savings to get private care rather than suffer the ordeal and the publicity of court commitment proceedings.

3. A jury of laymen is obviously not well qualified to pass on a question calling for a highly specialized medical diagnosis. There is even statistical evidence that juries make *more* mistakes than judges or medical commissions. And I don't suppose there is any reason to be surprised at that. The person who is most likely to demand a jury is the mentally ill person with a persecution complex. And if he is articulate and quick-witted, as such types very frequently are, he may convince a jury that his story of a nefarious plot to railroad him is true. Persons unskilled in psychiatry are likely not to realize that even a seriously mentally disordered person does not exhibit his symptoms all the time. Especially on such a special occasion as a trial, he may be able to cover up temporarily his abnormal ideas and attitudes, and appear quite normal. Only the phychiatrist who has observed him over a period of time may realize that he has all the characteristic symptoms of a major phychosis.

WHETHER INSTITUTION IS REQUIRED TO ADMIT

Miss Woodhouse has called my attention to the recent decision of the Colorado Supreme Court holding that the superintendant of the State Home at Ridge is not required to accept mental defectives ordered committed to that institution by the court, if there is no room in the institution.

This is a problem that plagues many states. The institution is overcrowded; should the courts be allowed to continue to commit persons without regard to whether there is room available. Or, on the other hand, should persons who the courts have found need institutional care be denied it. In New Mexico, our legislature

has given two different answers. The state hospital is required to accept all commitments; the state school for mental defectives is not. The result is bad in each case. The hospital is overcrowded, and the staff has no power to object, no matter how many new cases are sent to it. On the other hand, the state school has a filing cabinet full of applications which it is unable to accept because it is full.

The *right* answer of course is to build more hospitals. But there are always competing uses for the state's money, and the mental patients are not the most powerful lobby working on the legislature. So in the meantime we have to meet the problems that the shortage causes.

In Massachusetts, my friend Dr. Winfred Overholser, superintendent of St. Elizabeth's Hospital in Washington, tells me, they have an informal arrangement by which the judges do not commit to the state school unless the school can assure the judge that the child can be received. Something of the sort also operates in the District of Columbia. While the situation is deplorable for children who cannot be sent to the state school because there is no room, yet the courts could jam the place hopelessly if the institution did not have power to prevent it.

COMMITMENT OF NON-RESIDENTS

I have more doubt about the soundness of another Colorado decision, *Kendall v. People*, in which the court held that the courts in Denver County did not have jurisdiction to commit a person whose residence is in another county—even if the court of the home county consented. The problem arises this way: A person whose home is on the western slope, let us say, is suspected by his family or others of being mentally disordered. They obtain his admission to the Colorado Psychopathic Hospital, or to the Veterans Hospital, or some other institution or clinic in Denver, for examination and observation. It appears that he should be hospitalized. It seems an outrageous imposition on the patient to have to transport him all the way back home, have a commitment hearing in his home county, and then bring him back to Denver or to Pueblo.

To avoid this useless expense and trouble, it has apparently been the practice in some cases to obtain the consent of the court in the home county to permit the Denver court to conduct the commitment proceedings. This practice now has apparently been held invalid by the State Supreme Court.

This seems to me unfortunate. It is true, as the Supreme Court says, that loose procedure may lead to abuse. There was a case some years ago that illustrates this. It was not a Colorado case. It involved a Wichita, Kansas, dentist. His brother, Bernard, who lived in Missouri, decided that the dentist was losing his mind. He arranged for them to drive to Indiana together. While driving through his home town in Howard County, Missouri, Bernard asked his brother to stop at the courthouse, where he had some business to attend to. The dentist waited downstairs, while Bernard trans-

acted his business, which turned out to be the filing of an information alleging that the dentist was insane. A notice was prepared on the spot by the obliging judge, setting a date for a hearing. A deputy sheriff thereupon arrested the dentist as he stood on the street waiting for his brother to return. He was taken to jail and from there to a hospital. Although the notice has stated that he was entitled to be present at the hearing, and to be represented by counsel, the asylum to which he had been sent had a rule that inmates could not be released for that purpose, and so he was found insane *without* his being present. His brother Bernard was appointed guardian. Bernard then proceeded to get court permission to sell and otherwise control the dentist's property. It took some time for news of the dentist's incarceration to reach friends, who retained counsel for him. It took a habeas corpus proceeding in the federal court to obtain his release. The federal court held that his commitment and confinement were all illegal, because he was not even a resident of Howard County, or even of the state of Missouri.

The Colorado court is therefore quite right in being careful about permitting people to be ordered committed elsewhere than in their home county. Nevertheless, I think proper safeguards could be devised and insisted on, and the practice permitted with such safeguards. The safeguards should be:

1. That the court of the county of residence give its consent;
2. That the court agrees that the county of residence will bear the expense; and
3. That investigation of whether the person owns property in the county of residence has been determined or will be determined by the court of that county.

I even venture to suggest that the *Kendall* case may not foreclose this result. That case may perhaps be distinguished, and the court induced to limit it to its own facts. Those facts present several other reasons for the holding. Thus, the complaint alleged that the patient was "a resident of the county jail in the City and County of Denver." The commission report was confusing in that it answered all three of the statutory questions regarding mental conditions in the affirmative. The commission and the committing court had also ignored the fact that the patient owned property in Montezuma County, and reported that "said person has no estate out of which his care and maintenance can be made." If in a new case these objections or errors are not present, and a strong argument is presented to the court, pointing up that it is both humane and economical to permit the practice—with adequate safeguards—there is a chance that the court might be willing to re-examine the question. It is quite clear in my own mind that the statute itself does not forbid the practice. On the contrary, it clearly indicates that the court of a county may have jurisdiction to commit at person who is "found" in that county, even though he may be

a non-resident of the county, and even though he may be a non-resident of the state.

I shall not presume to tell you what you ought to do about improving the Colorado law. Instead, let me tell you what we did in New Mexico.

Our law was definitely worse than Colorado's. It provided for a "charge" being filed against a person alleged to be insane. A peace officer was thereupon ordered to "apprehend and detain" him under a "warrant of apprehension." The "defendant," as he was called, was thereupon "arraigned" before a judge, who was required to "inform him that he is charged with being insane" and to "inform him of his rights to make a defense to such charge." He wasn't required to plead guilty or not guilty, but the connotation of a criminal accusation was certainly there.

We succeeded in having that law repealed this year, and a model law substituted. And by we, I mean a group just like this. namely, the New Mexico Conference on Social Welfare and the Mental Hygiene Society in Albuquerque. Actually, the bill was pushed through by a handful of individuals.

Remember that this isn't a controversial issue, in the political sense. It doesn't require any new tax or any appropriation. There is no pressure group whom it would hurt and who will oppose it. You can get it considered strictly on the merits. We found that it is not too difficult to convince a few key members of the House and Senate committees that the bill will improve the existing procedure. I understand you tried to amend your statute.

Nor do you have to start from scratch to draft a wholly new act. A committee of psychiatrists and lawyers working under the auspices of the National Institute of Mental Health has drafted a model act for the hospitalization of the mentally ill. This draft represents the most modern thinking on the subject, translated into concrete legal procedures. You can simply have the legislature adopt this model, with such slight adaptations as local law might require. That is what we did in New Mexico.

This act permits hospitalization in the great majority of cases without judicial proceedings. A person can be admitted upon application by someone on his behalf, plus certification by two "designated examiners" (that is, physicians registered as specially qualified under standards to be set up by a state agency such as a board of health).

A judicial hearing is required only for compulsory hospitalization of someone who refuses to go peacefully where there is no emergency and no danger of injury. The act also provides for emergency admission, and for voluntary hospitalization.

It also has a novel "bill of rights" for patients, including not only general rights such as the right to "humane care and treatment," and to the highest standards of medical care possible with the facilities and personnel available, but also the right to communicate by sealed mail, to receive visitors and to exercise civil

rights, including the right to dispose of property, make contracts and to vote, except insofar as one may have been declared incompetent to exercise such rights. Mechanical restraints are not to be applied except where found necessary by the head of the institution, and every use of such a restraint and the reasons therefor is to be part of the clinical record of the patient.

This model act offers an immense improvement over older legal procedures. It is ingeniously devised to allow volüntary or involuntary hospitalization without needless red tape, and yet to provide the fullest kind of judicial hearing in any case where the person wants it.

I have mentioned the importance of early treatment. Even more important is prevention. One of the most useful functions an organization like this can serve is educating the public in what we ought to know about mental illness, its causes and how to prevent or cure it. Reforming the commitment law is a specific objective, which it is to be hoped won't take you too long and which when achieved, won't have to be done again for a while.

But educating parents, teachers and others in what we should know about human personality is an unending job. Especially 3 truths, it is important to get over:

1. Mental disorder is *caused.*
2. The causes of most mental disorders start much farther back in early childhood, in infancy, than we formerly realized.
   Wrongdoers—Can usually find were symptoms a long time. Gluecks' 500—Over half had manifested significant signs of anti-social behavior before they were 8. 9/10 before 11. Causes—Insecurity, or uncertainty in love and affection. Overstrict, domineering parents—or overindulgent.
3. Most can be cured if caught early enough, as T. B. and cancer. That's why it is important to have procedure to encourage that. Save these long expensive *custodial* commitments. Teach parents and teachers to spot the over-aggresive or the *too* passive child.

Of course, to provide the individual with *all* the favorable factors for healthy personality development, to allow him to realize and express his own personality, we'd pretty much have to rebuild the world. And create a world that satisfies the individual's need for *economic security,* for affection, for status, prestige and group identification—a world stable enough to afford a feeling of security and yet flexible enough to adapt itself to change.