THE MENTALLY DISORDERED DEFENDANT IN LIMBO: HIS RIGHT TO TREATMENT IN THE CRIMINAL PROCESS

by

Gerald A. Toner*

Since Judge Bazelon first explored the possibilities of a constitutional right to treatment for the mentally disordered patient in Rouse v. Cameron,[1] the discussion of a right to treatment for the criminal defendant has been judicially extended to include patients hospitalized both after an acquittal by reason of insanity and after an adjudication of incompetency to stand trial.[2] As yet unnoticed by the courts, however, is the plight of the mentally disordered criminal defendant who, during a lengthy pretrial period, may not be considered sick enough to have been adjudged incompetent to stand trial, and yet who, because of his special status as an accused, is prevented from obtaining the same care and treatment which a similarly disordered, but civilly committed, patient would receive as a matter of course. For the mentally disordered accused who has not been admitted to bail, the problem is especially acute. Suspended in limbo by the denial of civil commitment on one hand, and the unavailability of criminal commitment on the other, the disordered defendant, who may have been competent to stand trial at the time

---

*State University of New York at Buffalo, School of Law. Currently Mr. Toner is associated with the U.S. Department of Justice, Washington, D. C.

of arrest, may soon become unfit to proceed any further in the criminal process because of the normal anxieties which face any accused awaiting trial in confinement. The legislative failure fully to perceive this problem in New York State and the efforts of one community to deal with it -- with a view toward assisting the mentally disordered accused to actually retain his competency to stand trial -- is the subject of this paper. Because the circumstances presented here are not confined to New York, it is hoped that a discussion of the New York experience will be helpful to those in other jurisdictions who are faced with problems of what can be called the mentally disordered defendant in limbo.

Traditionally, the criminal law's primary concern with a defendant's mental state during the pretrial period has been with his competency to stand trial. Since 1828 the criminal defendant in New York has been denied the right to speedy trial, for his own benefit, by a statutory codification of the common law principle that no "insane person" should be tried, sentenced, or punished "while he continues in that state."[3] Subsequent judicial construction of this language, however, limited the suspension of proceedings to only those cases in which the defendants were so mentally incapacitated as to be incapable of understanding the nature and object of the proceedings against them, or incapable of making a defense in a rational manner.[4] This language was later incorporated and remained in the Code of Criminal Procedure[5] until last year when the new Criminal Procedure Law adopted the Federal criminal standard of "fitness to proceed," that is, whether a defendant "has sufficient

present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him."[6] The adoption of this language was advisedly appropriate since the United States Supreme Court in 1966 made incompetency to stand trial a question of Federal constitutional law when it held that the conviction of an accused person while he is legally incompetent violates his right to due process of law under the Fourteenth Amendment.[7]

The present statutory scheme requires that for an accused person who has been adjudged incompetent and unfit to proceed, both local criminal courts (proceeding by information) and superior criminal courts (proceeding by indictment) must commit the defendant to the custody of the State Commissioner of Mental Hygiene for "care and treatment" in an "appropriate institution."[8] At present the phrase "an appropriate institution" envisions commitment either to a State mental hospital operated by the Department of Mental Hygiene, or commitment to the Matteawan State Hospital operated by the Department of Correction (in the case of a defendant adjudicated as either dangerous to the safety of other patients or staff in the mental hygiene hospitals, or dangerous to the community at large).[9]

The medical disposition of the incompetent defendant, therefore, is similar to the medical disposition of the defendant who has been acquitted after trial by reason of mental disease or defect in that both are initially committed to the

custody of the Commissioner of Mental Hygiene to be placed in "an appropriate institution."[10] Unlike the acquitted defendant, however, who must be cared for and treated to the degree such that the Commissioner of Mental Hygiene and the committing court are of the opinion that he may be "safely discharged" or released "without danger to himself or others,"[11] the incompetent defendant must be cared for and treated only to the degree such that the superintendant of the institution in which he is confined determines that he is no longer unfit to proceed.[12] In neither case does the law require that the defendant be "cured" of his illness in the sense that he be restored to whatever pattern of behavior that society regards as the norm for its "sane," nonmentally ill members. The law requires only that he be given such care and treatment as will enable him to perform those minimum functions which the law requires him to perform upon his release. The acquitted defendant must meet the standards required of a civilly committed patient who is discharged back onto the street; that is, if he is not "recovered" or is still "mentally ill," then at least his release must not be "detrimental to the public welfare, or injurious to the patient" himself.[13] The incompetent defendant, on the other hand, must be fit to proceed as a participant in the criminal action against him.

Nevertheless, for both categories of defendants, actually committed to an institution for psychiatric reasons, there exists both statutory mandate and judicial precedent for a right to at least some form of ameliorative care and treatment. Admittedly, the judicial precedents for an affirmative, substantive

right to treatment are few, probably because most mentally ill petitioners before the courts are seeking to resist the State's imposition of "care and treatment."[14] The leading case espousing the acquitted defendant's right to review the adequacy of his treatment is Rouse v. Cameron[15] wherein Chief Judge Bazelon of the District of Columbia Court of Appeals indicated (although deciding the case on the basis of a statutory rather than a Constitutional right) that involuntary confinement without treatment is tantamount to a denial of due process.[16] Likewise, the Federal Court of Appeals for the Fourth Circuit has held that whenever persons sentenced under a Maryland "defective delinquent" law to indeterminate periods in state hospitals are not provided with actual treatment, they are denied the equal protection of the law which would have sentenced the same persons, convicted of the same crimes, to determinate sentences.[17]

At least favorable reference to a Federal, Constitutional right of treatment has been made recently in New York cases involving the rehabilitation of narcotic addicts [18] and adjudicated sexual psychopaths.[19] In People v. DeLong the Greene County Court ruled that in view of the State's statutory burden to provide treatment, an adjudicated sexual psychopath is "not simply to be committed to custodial limbo....if detention of the legally insane without treatment is constitutionally suspect" (citing Rouse v. Cameron).[20] Of course, it should be noted that the reluctance of the courts to actually formulate a constitutional rule as to treatment may be due in part to the United States Supreme Court's language in Powell v. Texas wherein the Court

refused to formulate a constitutional rule as to the psychopathology of alcoholism (on the basis of the cruel and unusual punishment clause), and instead announced through Justice Marshall that "this Court has never held that anything in the Constitution requires that penal sanctions be designed solely to achieve therapeutic or rehabilitative effects..."[21]

In view of the presently uniform grounds for a constitutional, substantive right to treatment and the necessity of relying on statutory authority, therefore, where does the mentally ill defendant fit into the New York statutory scheme when he has neither been acquitted by reason of insanity, and thus entitled to treatment by virtue of a "civil" commitment, nor adjudicated incompetent and entitled to treatment under the Criminal Procedure Law? The Erie County Forensic Psychiatry Service of Buffalo, New York was presented with just this problem in the case of Tommy R.

Tommy R., a twenty-five-year-old white male, was arrested on a charge of assault with a dangerous weapon. The accused had a history of mental illness and drug abuse, having spent several months in state mental hospitals in the Buffalo area. Within a short time after his confinement in the Erie County Jail to await the disposition of the charges against him, Tommy became violent and unruly, whereupon the jail authorities removed him to the prisoner unit at the local county hospital for emergency attention. After approximately a week's stay at the hospital, Tommy was transferred back to the jail infirmary where he remained for several months, continuing to receive regular medication in the form of relatively strong tranquilizing drugs.

After arraignment on an indictment for felonious assault, bail was set at a relatively high amount which the accused's family was unable to provide. Three months after the arrest, Tommy's assigned counsel moved for an examination to determine his competency to stand trial. Two weeks later, without a hearing, the court ordered confirmation of the reports of the examining psychiatrists who were of the opinion that the defendant was psychotic and suffering from schizophrenia, paranoid type, but that he retained sufficient mental capacity to understand the nature of the charges pending against him and that he was able to assist in his own defense. Nevertheless, the psychiatrists were also of the opinion that Tommy's continued confinement was likely to have only a deteriorating effect on his mental state, and shortly thereafter attempted to civilly admit Tommy under a two-physician certificate to a local state hospital for treatment.

The attempt at effective hospitalization failed, apparently because of the hospital's policy against receiving pretrial criminal defendants -- especially where the hospital director considers the defendant dangerous to other patients, or not amenable to treatment. As a resident physician at that state hospital explained, the hospital at present has only one locked ward with a capacity of 25 to 30 patients and no provision for full-time guard personnel. This policy stands in marked contrast to the statutorily mandated commitment to this same hospital of those adjudicated incompetent defendants who have also been adjudged "dangerously incapacitated" and who may therefore be transferred from this civil hospital to the

Matteawan State Hospital under Article 730 of the Criminal Procedure Law. It also differs strikingly from the mandatory commitment of defendants acquitted by reason of insanity who, once they are determined to be dangerously mentally ill, may be transferred to Matteawan.[22]

The policy of the state civil hospitals not to admit pre-trial defendants denied Tommy the only effective therapeutic hospitalization available to him in Erie County. The only other available psychiatric facility was the prisoner unit at the County Hospital which, at that time, consisted of a seven-bed male section without access to recreational or occupational therapy and which was intended only to maintain patients referred to the hospital for examination, or those jail inmates suffering from disorders which render them almost totally uncontrollable.[23] This policy, as we shall see, is supported not only by the lack of statutory provision for the treatment of defendants in Tommy's position.

Consequently, Tommy's assigned counsel, who was still of the opinion that the stress of a trial would render an already reluctantly cooperative defendant unable to assist in his defense, was left only the option of moving for a second competency examination. Because the two psychiatrists who re-examined Tommy were also agreed that he was still suffering from paranoid schizophrenia, but was competent, the only treatment available to ameliorate his condition was (and remained for several months thereafter) medication in a crowded jail infirmary and group therapy afforded by the forensic psychiatry service once or

twice a week. The novel concept that the service has been compelled to evolve in practice, therefore, but for which the law makes little or no provision, is treatment of the mentally ill defendant with a view toward assisting him to become and remain fully competent to stand trial without an adjudication of incompetency and subsequent hospitalization. The problem was that for Tommy R., the practice did not seem to meet his need for treatment.

Availability of Treatment Under the New York Criminal Procedure Law:

In 1961 Section 870 of the Code of Criminal Procedure (dealing only with defendants not under indictment) was amended to allow the defendant to receive medical or therapeutic treatment while being examined for competency in a hospital at the discretion of the hospital director.[24] Even this relatively short period of treatment during the maximum sixty-day period allowed for examination.[25] was opposed by those who felt that a defendant not convicted of crime of judicially declared mentally ill should not be given treatment against his will.[26]

Section 730.20(4) of the Criminal Procedure Law (hereinafter CPL) carries over the above provision where hospitalization is deemed necessary for purposes of the competency examination, but with the added limitation that the hospital director may administer only "such emergency psychiatric, medical or other therapeutic treatment as in his judgment should be administered" (underlining added). Furthermore, because of the revisors' concern with the unnecessary burden imposed on defendants, courts,

and already crowded mental hospitals by the Code's emphasis on an in-patient examination for up to sixty days,[27] Section 730.20(4) authorizes hospitalization only where examination at the place of detention is not effective and then only up to thirty days subject to a thirty-day extension by the court. CPL Section 730.20(3), moreover, makes clear that the period of hospital confinement during which treatment may be administered is intended to continue only until such time as the examination is completed.

In New York City some post-arraignment defendants are administratively moved without court order to local psychiatric prison wards (penitentiaries for sentenced prisoners) whenever jail inmates are in need of immediate care and treatment. A New York City Bar Association study in 1968, however, could find no statutory authority for this practice.[28]

Availability of Treatment Under the Correction Law:

Section 408 of the Correction Law (as amended 1970) provides for the transfer of mentally ill prisoners in county jails to state hospitals operated by the Department of Correction (admittedly a result to be avoided if Tommy R. was to stand trial); but, the section's own language applies the provision only to persons "undergoing a sentence of imprisonment." In like fashion, Section 23 of the Correction Law (as amended 1970) provides for the treatment of inmates in outside hospitals where medical services within the correctional facility are inadequate; but again, the language "correctional facility" limits

Section 23's applicability to persons under sentence of imprisonment.[29]

Section 508 of the Correction Law, on the other hand, refers generally to the removal of all sick prisoners from a county jail to a hospital for treatment when a physician certifies the need for hospitalization in writing. Unfortunately for Tommy R., however, the language of the statute limits such transfers for conditions of "bodily health" which require "immediate medical or surgical treatment." Although New York City's Judge Levy has construed Section 508 as to "apply in its broadest possible fashion to give a prisoner urgently needed medical attention in whatever aspect that care might be required" and has rejected the theory that Section 508 is applicable only to "emergency occasions involving hurried removal of the prisoner from jail because of illness demanding prompt hospitalization,"[30] no reported decision seems to have applied the section to mental disorders. (And, Judge Levy's ruling was confined to the case of a toothache).

Nor are the administrative regulations of the Department of Correction very helpful. Pursuant to the rule-making authority of Section 46 of the Correction Law, the State Commissioner of Correction has promulgated _minimum_ standards and regulations for the detention of insane persons which provide in part that:

> If any person...duly committed to the jail, either to await court action, or under sentence..._acts in a manner that would indicate to a layman_ that the person is insane, the sheriff should notify the district attorney of the

facts without delay, requesting the officer to initiate necessary procedures to examine the prisoner so he may be removed to a State hospital if he is, in fact, insane. (Mental Hygiene Law, Article 5, Section 74)[31]

(Underlining added)

Although the language of the regulation seems at first blush more appropriate to Tommy R.'s situation that the statutory material previously considered, a closer reading reveals that the regulation arguably refers solely to the traditionally "frenzied" inmate whose mental disorder would be obvious to a "layman." Yet, the prisoner's right to medical treatment under Section 46 of the Correction Law has been construed broadly by the New York Appellate Division, Fourth Department, to require "the employment and rendition of commonly and authoritatively accepted modern medical theories and procedures which are reasonably necessary and adequate, unaffected by budgetary considerations."[32] The court used this language when it held that the failure of the State to administer cortisone treatments, because of budgetary limitations, for an arthritic condition which worsened while the prisoner was confined in Attica, was negligence as a matter of law. However, the above regulation also refers specifically to Section 74 of the Mental Hygiene Law, which provides for the judicial review of civil commitments under Article 5 of that law.

Availability of Treatment Under the New York Mental Hygiene Law:

The problem with admissions and commitments from confinement to mental hospitals under Article 5 of the Mental Hygiene Law (a civil commitment beyond mere "removal" of persons for observation or examination under Section 78(4)) is that the language of Section 70 of the Mental Hygiene Law expressly excludes persons "in confinement on a criminal charge" from admission and retention as a civilly committed patient under Article 5. Although this language was inconsistent with Section 662-b of the former Code of Criminal Procedure which authorized the use of Article 5 as the vehicle for the adjudicated incompetent defendant, Section 70 had been construed by the State Supreme Court for Erie County as no obstacle to such commitments.[33] To hold otherwise, it was said, would have eliminated from the Code of Criminal Procedure part of the protective procedures which the Legislature had evolved on behalf of the adjudicated incompetent. Although unmentioned by the Court, Section 876 of the Code (as amended in 1943) had provided that the Code provisions should supersede any inconsistent provisions of the Mental Hygiene Law. The current Criminal Procedure Law lacks any such sweeping language, but provides in Section 730.60(3) that the Commissioner of Mental Hygiene may treat or transfer an adjudicated incompetent in the same manner as if he were a patient not in confinement under a criminal court order.

Nevertheless, absent similar saving language in the Criminal Procedure Law with reference to mentally ill defendants who have <u>not</u> been adjudged incompetent, Tommy R. can find little solace in Article 5 despite the opinion of one commentator that

the clear intent of paragraph 4 in Section 78 of the Mental Hygiene Law is to afford treatment to any person awaiting disposition of a criminal charge. Dr. Daniel Schwartz, a physician with considerable experience with psychiatric problems before the New York City Criminal Court, has pointed to the language in Section 78(4) to the effect that "in all other criminal actions" (that is, whenever criminal charges are not dismissed and a civil order for admission to a hospital is not issued) a magistrate may direct the removal of a criminal defendant to a receiving hospital for examination and treatment in lieu of a competency proceeding under the Criminal Procedure Law.[34] The primary reason for the New York City Criminal Court's failure to use Section 78(4) in this manner in the past, says Dr. Schwartz, has been that while the incompetency provisions of the Code of Criminal Procedure spoke in terms of "idiocy, imbecility, or insanity," Section 78(4) speaks in terms of an examination to determine "mental illness."

However, there are problems with viewing Section 78(4) as establishing a statutory right to treatment for the mentally ill defendant. First, the language of Section 78(4) applicable to criminal defendants refers only to "removals" to receiving hospitals for examination and treatment, if necessary, for periods not exceeding 30 days. Consequently, it can be argued that 78(4) is analogous to the language of Section 730.20(4) of the Criminal Procedure Law which, as we have seen, provides for treatment only until the completion of the examination for competency. Moreoever, even if treatment could be viewed as

more than ancillary to the examination, hospitalization for more than 30 days must be pursuant to an order of retention under Sections 78(2) and 72 of the Mental Hygiene Law -- a procedure expressly denied the criminal defendant in confinement by Section 70.

Finally, as a practical consideration in the case of Tommy R., admission and retention for treatment under Section 78(4) is limited to those hospitals which are approved by the Commissioner of Mental Hygiene for such purpose[35] and which are "willing to receive" the patient for observation and treatment.[36] Although the Commissioner had approved only the county-operated Meyer Memorial Hospital in Buffalo for this purpose,[37] transfer to a nearby state mental hospital with adequate therapeutic facilities was possible by virtue of the reference within Section 78(2) of the Mental Hygiene Law to the judicially scrutinized procedure of transfer and retention for six-month periods under Section 72. Accordingly, _if_ a confined defendant like Tommy R. could have been retained for treatment at all, he could have been retained at a state hospital.

The second part of the last problem is more crucial in view of the fact that where anything beyond observation and examination is required, the scheme of Article 5 is to permit only judicial _review_ of actions initiated by physicians, hospital directors, and public health officers. Section 81(2) gives the receiving hospital the primary responsibility of setting the treatment machinery of Article 5 in motion when it provides that:

> Notwithstanding the foregoing provisions of this subdivision of the provisions of any other law... the director, person in charge of admitting or an examining physician of a hospital entitled to receive under Section 78(1) may refuse to admit such person to the hospital, if in his judgment the condition of the person is not of such character as to require <u>immediate hospitalization</u>.

(Underlining added)

The phrase "immediate hospitalization" or "immediate, observation, care and treatment" is nowhere defined in the Mental Hygiene Law. Although the State Supreme Court of New York County has defined "immediacy" under Section 78 as requiring less than "dangerous mental illness" in the sense of a likelihood to commit suicide or inflict substantial physical injury on other persons, the language was construed to require at least a situation where "...immediate action is necessary for the protection of society and the welfare of the allegedly mentally ill person."[38] In the case of Tommy R., it could be argued that immediate action was very much needed for his own welfare; but, unfortunately, it would seem only too easy to argue that immediate action had been already taken under the above test for the protection of society by his confinement in the county jail.

Therefore, it would seem that the sweeping language of Section 86 of the New York Mental Hygiene Law, under which the

Commissioner of Mental Hygiene may resort to the courts, if necessary, to redress the cruel, negligent, or improper treatment of any person alleged to be mentally ill, is limited by other language in the very article wherein the statutory "right to treatment" is found. We ought to conclude, therefore, that the often-proclaimed right of the mentally ill defendant to procedural due process whereby he tests the legality and propriety of his confinement is meaningless without a substantive right of treatment by which the propriety of such confinement can be measured. We can agree with Justice Marshall that nothing in the Federal Constitution requires that "penal sanctions be designed solely to achieve therapeutic or rehabilitative effects." But, without trial, without so much as an adjudication of dangerousness, by what right does the State impose penal sanctions on Tommy R. in the first instance? Penal sanctions have been imposed in his case arguably under the constitutional aphorism announced by the United States Supreme Court that "even one day in prison would be cruel and unusual punishment for the 'crime' of having a common cold."[39]

FOOTNOTES

1. 373 F.2d 451 (D.C. Cir. 1966) (patient acquitted after trial by reason of insanity).

2. Nason v. Superintendant, 353 Mass. 604, 233 N.E. 2d 908 (1968) (patient adjudicated incompetent to stand trial).

3. 2 N.Y. Rev. Stat. 679 (1828) as cited in Association of the Bar of the City of New York and Fordham University School of Law, Mental Illness Due Process and the Criminal Defendant 79-80 (2d Report 1968).

4. Freeman v. People, 4 Den. (N.Y.) 9, 25 (1847).

5. N.Y. Code of Crim. Proc. Sections 658, 870 (McKinney 1958).

6. Dusky v. U.S., 362 U.S. 402 (1960); see Commission Staff Comment, N.Y. Crim. Proc. Law Section 730.10 (Consol. Laws Serv. 1971).

7. Pate v. Robinson, 383 U.S. 375 (1966).

8. N.Y. Crim. Proc. Law Sections 730.40(1), 730.50(1) (McKinney 1971).

9. Id., Section 730.10(2)

10. Id., Section 330.20(1)

11. Id., Section 330.20(2)

12. Id., Section 730.60(2)

13. N.Y. Mental Hygiene Law Section 87 (McKinney 1971).

14. See, for example, Baxtrom v. Herold, 383 U.S. 107 (1966) and People ex rel. Brown v. Johnston, 9 N.Y. 2d 482 (1961).

15. 373 F. 2d 451 (D.C. Cir. 1966).

16. Id., at 455

17. Sas v. Maryland, 334, F. 2d 506 (4th Cir. 1964).

18. People v. Fuller, 24 N.Y. 2d 292 (1969).

19. People v. DeLong, 64 Misc. 2d 999 (1970).

20. Id.

21. Powell v. Texas, 392 U.S. 514 at 530 (1968).

FOOTNOTES (Cont'd.)

22. See N.Y. Criminal Procedure Law Section 330.20(6) and N.Y. Mental Hygiene Law Section 85.

23. See 1970 Annual Report, Erie County Forensic Psychiatry Service, Buffalo, New York.

24. N.Y. Code of Crim. Proc. Section 870, as amended, (McKinney Supp. 1971).

25. Id., Section 660.

26. Association of the Bar of the City of New York and Cornell University Law School, Mental Illness and Due Process 226-7 (1st Report 1962).

27. Mental Illness Due Process and the Criminal Defendant, supra at note 1, 89; see 1970 Commission Staff Comment to Section 730.10 N.Y. Crim. Proc. Law (Consol. Laws Serv. 1971).

28. Mental Illness Due Process and the Criminal Defendant, supra at note 1, 86 at footnote 44.

29. N.Y. Corr. Law Section 2(4) (McKinney Supp. 1971).

30. Matter of Bender v. People, 203 Misc. 627 at 630 (1952).

31. 7 N.Y.C.R.R. 5100.7, as amended, 1970.

32. Pisacano v. State of New York, 8 App. Div.2d 335 (1959).

33. People v. Hyatt, 187 Misc. 1031 (1946).

34. Daniel W. Schwartz, Psychiatry and Criminal Law in New York City (Prepared for the New York Academy of the Judiciary) (April, 1968); also published in 160 N.Y.L.J. Nos. 21-24 (1968).

35. N.Y. Mental Hygiene Law Section 78(1) (McKinney 1971).

36. Id., Section 78(4).

37. 14 N.Y.C.R.R. 62.1 (Mental Hygiene Regulations), as amended 1970.

38. Fhagen v. Miller, 65 Misc. 2d 163 at 170 (1970).

39. Robinson v. California, 370 U.S. 660 at 667 (1962).