Empiricism in Mental Health Law

A. LOUIS McGARRY, M.D.*

Introduction

Justice Louis Brandeis wrote in 1932, "It is one of the happy incidents of the federal system that a single. . . State may, if its citizens choose, serve as a laboratory. . . ."[1] Brandeis was writing here in the context of statutory change. Experiments, however, mean little unless meaningful data are collected which establish the results or effects brought about by changes in the law or in any other arena. Brandeis, of course, knew this, and consistent with it, in a brief which he prepared for the State of Oregon before the U.S. Supreme Court regarding the limitation to a ten-hour work-day for women, he presented two pages of legal argument and over 100 pages of empirical data relating to working conditions and legislative responses to them.[2] His distinguished contemporaries, Roscoe Pound and Felix Frankfurter, shared this view and produced, for example, a large-scale empirical study of the criminal justice system in Cleveland in 1922.[3]

Given the intensive legal activism and changes in mental health law in recent years, it is my view that empirical follow-up of the impact of these changes on the health and quality of people's lives is essential. Mental health law, after all, governs people's lives in a very direct and telling fashion, and the people affected are already disabled and often helpless.

These ideas of Brandeis, Pound and Frankfurter were a reaction to, or at least are in contradistinction to the prevailing American legal philosophy of the fifty years prior to their writing. The so-called "Harvard School" had dominated American legal theory and education during the last quarter of the nineteenth and first quarter of the twentieth centuries.[4] The central figure of this school had been Dean Langdell of the Harvard Law School. He taught that the law was a science, internally consistent and with a growing body of principles and rules articulated in particular in the evolution of the Common Law and derived from the study of printed judicial opinions.[5]

Actually, related themes go back to the beginnings of American law. Perry Miller, in his brilliant historical account of post-colonial and nineteenth century American legal thinking, describes the considerable battle that took place with respect to the adoption here of English Common Law.[6] In 1823, William Sampson, an exiled Irish patriot, exhorted this noble new country to stop treading "the degrading paths of Norman treachery."[7] On the other hand, equity-chancery law, which was generally regarded as less bound by precedent, more pragmatic, permitting greater discretion for the judiciary and more empirical, also had its vigorous opponents in this country. Chancery was not

---

* A. Louis McGarry, M.D., is Massachusetts' director of legal medicine for the department of mental health, and co-principal investigator, National Institute of Mental Health research project "Assessment of Adequacy of Treatment."

A graduate of Harvard College and Boston University Medical School, he is lecturer on psychiatry at Harvard Medical School's Laboratory of Community Psychiatry.

His most recent publications include "Overview: Current Trends in Mental Health Law," "1971 Massachusetts Mental Health Code: Promise and Performance," and "Conditional Voluntary Mental Hospital Admission."

adopted in Massachusetts until 1877.[8] Charles Dickens's novel *Bleak House*, first published in 1852, savagely attacked the English Chancery Courts and cannot have helped the cause of those who espoused them in this country. More recently, in Jerome Frank's classic book, *Law and the Modern Mind* (1930),[9] the contention is made that case law is governed not so much by precedent, logic or equity as it is by the psychoanalytic unconscious of the judge.

In case law, nevertheless, especially in recent years, there is evidence that appellate courts have been persuaded by the empirical, or at least have found it to be a relevant factor. Thus in *Brown v. Board of Education of Topeka*[10] the U. S. Supreme Court, persuaded in part by sociological and other empirical data, found that racially segregated education was unequal. In *Powell v. Texas*[11] Justice White of the U. S. Supreme Court rejected the view that alcoholism is an illness and therefore drunkenness ought not to be prosecuted as a crime, and he added the observation that such an interpretation of the Constitution would accomplish little in improving the lot or treatment of the alcoholic. Finally, in a recent decision of the Burger Court, *Jackson v. Indiana*,[12] empirical studies were cited. This case related to a deaf-mute retardate accused of minor larcenies who had been found to be incompetent to stand criminal trial. The court found that the State could detain Jackson only for a "reasonable" period of time subject to criminal prosecution in the absence of progress toward a competent status by the defendant. This case has very important implications for prospective change in mental health law. Justice Blackmun, writing for a unanimous court in this decision, observed, "Considering the number of persons affected, it is perhaps remarkable that the substantive constitutional limitations on this power [to involuntarily commit the mentally disabled] have not been more frequently litigated."[13] This would clearly suggest that the Burger Court is ready to respond in a substantive fashion to mental health law issues.

My central purpose here is to review briefly those empirical studies which have taken place regarding the empirical follow-up of changes in mental health law and to examine their implications with a view toward a more rational formulation of social policy in this area.

Case law is tied to precedent, not performance. I do not mean to maintain that the empirical has been a dominant theme in appellate or case law. It has surfaced occasionally, and as I've indicated, its advocates have very distinguished forebears. A search of the more recent legal literature, however, yields few proponents,[14] and the empirical approach does involve its own risks. Thus, in 1927, in the case of *Buck v. Bell*, upholding the constitutionality of sterilizing the retarded and reasoning from simplistic Mendelian genetics, Justice Holmes made the empirical observation that "three generations of imbeciles are enough."[15]

It seems to me that empirical yardsticks have greater applicability to legislative change. Happily—and I will give an accounting below—some of my own empirical research in the area of competency to stand trial found its way to statutory articulation and was also cited by the U. S. Supreme Court in the *Jackson* decision.

Empirical Studies of the Impact of Change in Mental Health Law

Empirical studies of the results of changes in mental health law are still rare. In a closely related area integral to the involuntary commitment of the mentally ill, Dershowitz found that of hundreds of studies relating to the prediction of dangerousness, fewer than twelve followed up their predictions of antisocial conduct, and these suggest that psychiatrists are inaccurate in such determinations and prone to over-prediction.[16] Despite their scarcity, follow-ups of the impact of changes in mental health law are beginning to appear and to yield important data which begin to guide us in the more pragmatic and rational shaping of social policy in this area. A spectrum is beginning to emerge. It ranges from studies which demonstrate that large numbers of mentally ill persons, par-

ticularly those who are also tainted with alleged criminality, have been involuntarily detained for excessive and unnecessary periods in inhumane institutions, to studies which indicate that increasing numbers of chronically mentally ill persons, particularly in New York and California, who have been, in some instances, pushed out of mental institutions, are being required to survive in even worse, sub-standard and exploitative environments. These results are not exclusively a product of changes in mental health law. In some such results we can see a clear cause-and-effect relationship; in others, the change in law is an important factor among other important factors.

The follow-up studies of Steadman and his associates in New York of the impact of the U. S. Supreme Court decision in *Baxstrom v. Herold*[17] are well known. In a four-year follow-up of a random sample of the 967 men and women abruptly transferred out of the special security institutions for the criminally insane in New York as a result of *Baxstrom*, he found that the sample had a much higher ultimate release rate to the community than other chronic adult mental patients in New York State and that despite their former status as "criminally insane," their subsequent criminal activity was extremely low. In an as yet unpublished follow-up of Massachusetts' *Baxstrom* releases from Bridgewater, our own findings duplicated Steadman's.[18] Clearly the *Baxstrom* decision, from an empirical point of view, has had a very constructive impact on the lives and freedom of many hundreds of men and women in New York and Massachusetts and prospectively for many thousands. A disturbing foot-note to the case, however, is that Baxstrom himself was, as predicted, dead within weeks of his release. I would think that counsel for Baxstrom and the clinicians involved must have been given pause by this empirical result.

If I may be permitted an aside here, given the lessons of *Baxstrom* in New York and in Massachusetts, it is astonishing to me, as I travel about the country, how few of the States have implemented the *Baxstrom* decision. To the best of my knowledge, only Pennsylvania, in addition to the above, has implemented *Baxstrom*. This decision is now nine years old and clearly is applicable in many other states. Such delay can only speak for a rather somnolent bar in these states. On the other hand, I remind myself that at this writing the *Brown* decision is twenty years old and has yet to be implemented in the schools of the City of Boston. Such a lapse of time, now the better part of a generation, hardly indicates compliance at "deliberate speed."

With the help of colleagues, I conducted a series of follow-up studies in the 1960's on the operation of Massachusetts' statutes governing the processing of criminal defendants for whom the issue of their competency to stand trial had been raised and decided. These are written up extensively elsewhere.[19] Let me summarize our findings briefly. We found that under the competency rubric excessive and anti-therapeutic incarceration had been the case, and serious breaches of due process, equal protection and cruel and unusual punishment safeguards were obvious. We found, further, that an excessive paternalism and protectionism on the part of institutional clinicians had led to such absurd cases as that of a man who was locked up at Bridgewater and died there after more than fifty years, having been incarcerated on the basis that he had been found incompetent to stand trial for the alleged crime of "walking on the railroad tracks." We concluded that allegedly mentally ill criminal offenders were far better off returning to trial as expeditiously as possible, unless their charges could be otherwise disposed of.

It was my good fortune to participate in the complete recodification of the mental health commitment laws in Massachusetts in the late sixties. This gave us an opportunity to carry our empirical research on competency for trial into statutory reform. We developed a statutory formula, for example, which limited the length of time a criminal defendant found to be incompetent for trial could be held and still be subject to prosecution. The formula was based on the seriousness of the alleged crime. Further, we provided for procedures whereby a defense could be brought forward for an incompetent defendant and, if the defense were compelling, charges could be dismissed. Finally, we

provided for screening psychiatric examinations before a court had the authority to commit defendants to our mental hospitals.

What was to be called the Massachusetts Mental Health Reform Act of 1970 became effective on November 1, 1971.[20] A global statistical follow-up seems to show that some of the excesses and abuses of competency for trial procedures have been significantly corrected. Thus, during the last year under the old law, there were 1,888 admissions to Massachusetts mental hospitals (including 501 to Bridgewater, our security mental hospital operated by the Department of Correction). During the first twelve months under the new Act, there were only 940 such admissions. This reduction was gratifying, since we knew from our research that the very great majority of these stigmatizing admissions had been unnecessary. I will not go into greater detail here, having dealt with these matters extensively elsewhere.[21] To summarize, I would suggest that the history of this Act is an example of empirical research which *led* to statutory change with apparent empirical success.

On the civil side of our new Massachusetts Mental Health Code, Professor William J. Curran, now at the Harvard Medical and Public Health Schools, directed the field and empirical research which led to statutory articulation. The results here too would also appear, at least from global statistical indices, to have been successful. Thus, for example, the percentage of involuntary admissions, 77% during the last year under the old Act, very sharply declined to only 27.7% during the first year under the new Act. Only 325 patients (out of approximately 11,000 admitted in the first year of the new Act) arrived at prolonged involuntary civil commitment (1.9% of all admissions) as compared to 815 in the last year of the old law. The census of our public mental health facilities has declined in an accelerated fashion under the new law. Thus from a census of 10,456 at the end of fiscal year 1971, the census in 1973 was down to 7,179. Total admissions, both new and readmissions, have declined significantly. There are other factors operating in the direction of these changes, but I think it reasonable to suggest that the new statute has accelerated these reductions.

What I've reported to you here with regard to the impact of the new Massachusetts Mental Health statute must be regarded as preliminary and suggestive of positive empirical change in the quality of the health and freedom of the lives of the mentally ill in Massachusetts. From New York and California, however, where similar, even greater decreases in the census of mental hospitals have been in great measure brought about by new commitment statutes, come distressing reports of chronic mental patients being housed in sub-standard, ghetto environments. A "mush-rooming of exclusionary zoning ordinances" which reject half-way houses for former mental in-patients has been alleged in New York State. In this context, the very recent U. S. Supreme Court decision *Village of Belle Terre v. Boraas*,[22] upholding the constitutionality of zoning restrictions against communes, has a serious negative impact for the community placement of the mentally ill as well.

Urmer has studied the impact of the Lanterman-Petris-Short mental health act which has been in effect in California since July of 1969.[23] Here too, the census in mental hospitals has very sharply declined, as has the length of stay. A significant reason for these declines is the very strict standard for involuntary commitment. Lanterman-Petris-Short changed the civil side of the California mental health statutes, but left untouched the criminal side as it applies to mentally ill offenders. Thus it appears that in Los Angeles, because mentally ill persons who are nuisances or disturb the peace of the community do not meet L.P.S. civil commitment standards, the police have been excessively burdened in managing them, and increasingly, out of frustration, the courts and jails of Los Angeles are being resorted to for such citizens in lieu of mental hospitalization. In addition, there are reports that the courts are increasing their use of competency-to-stand-trial procedures to bring about mental hospitalization for alleged minor offenses which in the past would have been dealt with by civil procedures.

The focus in this paper has been the importance of the empirical assessment and monitoring of changes in mental health law. What should be apparent from the above is that such research can be complex and should not rest content with the simplistic.

I should like to close with an appeal to the legal profession along the lines of the empirical approach which I have espoused. New precedent, points of law, and individual cases in which mentally ill patients are discharged into the community can be constructive and progressive. Certainly *Baxstrom* had these virtues—but not for Baxstrom himself. Analogous to the criminal law, in which counsel often will have developed a viable dispositional alternative to incarceration for a convicted client to present to the court, procedures in mental health law might appropriately involve such alternatives for the patient. There is no conflict between psychiatry and the law about the utlimate goals in helping the mentally ill person to be free, to be as self-determining and autonomous as possible, to be well and to be secure. We can work together for such goals. We must, however, be mindful about what we really do for and *to* people.

References

1. New State Ice Co v Liehmann, 285 US 262 (1932)
2. Brief for the State of Oregon in Muller v Oregon, 208 US 412 (1908)
3. Pound R, Frankfurter F: Criminal Justice in Cleveland. Cleveland, Cleveland Foundation, 1922
4. Ackerman BA: Law and the Modern Mind by Jerome Frank, reviewed in Daedalus, twentieth-century classics revisited. Journal of the Amer Acad of Arts and Sciences 103: 119–130, 1974
5. Excerpted in Sutherland AE: The Law at Harvard. Cambridge, Mass, Belknap Press, 1967, p 175
6. Miller P: The Life of the Mind in America from the Revolution to the Civil War. Harcourt, Brace and World, Inc, New York, 1965
7. Ibid, p. 108–8
8. Ibid, p 173
9. Frank J: Law and the Modern Mind. 1930
10. Brown v Board of Education of Topeka, 349 US 294 (1954)
11. Powell v Texas, US
12. Jackson v Indiana, 406 US 715 (1972)
13. Ibid, p 737
14. Maviand Jones: Legal-policy decision process: alternative thinking and the predictive function. Geo Wash L Rev 33:316–456, cf especially pp 443–456
15. Buck v Bell, 274 US 200 (1927)
16. Dershowitz A: The law of dangerousness: some fictions about predictions. Jour of Leg Educ 23:24–47, 1970, at p 46
17. Baxstrom v Herold, 383 US 107 (1966)
18. McGarry AL, Parker L: Massachusetts' Operation Baxstrom. Massachusetts Journal of Mental Health, in press
19. McGarry AL et al: Competency to Stand Trial and Mental Illness. Crime and Delinquency Series, National Institute of Mental Health, DHDW Publication No. (HSM) 73–9105, US Govt Printing Office, 1973
20. Mass. G.L. Chapter 123
21. McGarry et al: Competency. . . . op cit
22. Village of Belle Terre v Boraas 42 LW 4475, US, April 1, 1974
23. Urmer AH et al: A study of California's new mental health law (1969–1971). BNNI Research Institute, Chatsworth, California, 1972; Urmer AH et al: The burden of the mentally disordered offender on law enforcement. BNNI Research Institute, Chatsworth, California, 1973