

## Summary and Discussion: The Second Day of the Symposium

HON. JOSEPH R. WEISBERGER \*

Dr. Westlake, ladies and gentlemen; in the spirit of Dean Langdell, I shall attempt to find the common thread that runs through all of these papers, though there may seem to be some degree of inner inconsistency. It was, of course, the theory of Dean Langdell that judicial opinions, though seemingly inconsistent, if read and analyzed, could always be brought into some degree of symmetry. I think there is a common thread running throughout the papers of today, as there was yesterday. First of all, we had the interesting presentation of Professor Dershowitz, who indicated rather forcefully that the only basis for deprivation of liberty, by way of an involuntary commitment, arose out of two factors, that is, the presence of mental illness, together with the presence of the quality of dangerousness—dangerousness to the person himself, or dangerousness to others. He further suggested to us that on the basis of studies of the ability of psychiatrists and other professionals to predict, the enormity of false positive results indicated a complete unreliability of such predictions, and therefore he strongly suggested that involuntary commitments might be wholly unjustified. Now that view, if fully implemented and accepted, would probably terminate all of the problems of the symposium, because then no patients would be in any mental hospitals against their will.

Then Professor McGarry came on—Doctor McGarry—and suggested to us, I think, very much in accordance with Professor Dershowitz's presentation, that we attempt to use empiricism in the determination of judicial decisions and legislative decisions affecting the field of mental health. Now, it is pretty familiar to all of us that particularly in the judicial area and in the legislative area, we tend to rely upon intuitive judgments, such widely accepted truths as the fact that woman's place is in the home, that motherhood is a desirable occupation, that patriotism is a fine quality—these are intuitive judgments which, I must say, have recently been called into significant question, but they are the type of intuitive judgments upon which legislators and judges frequently rely whether they articulate them or not. Dr. McGarry suggested to us that we should be more empirical than intuitive, but he was suggesting a type of *post hoc* empiricism in which, after a decision is rendered, we check up on it to see whether it has accomplished that which it was designed to accomplish. He illustrated this very well with the landmark case of *Baxtrom*, pursuant to which many thousands of mental patients have been discharged from mental facilities throughout the country, some of whom have met a fate which is perhaps no better and, to some degree, worse than that which they would have encountered had they remained in the institutions. He also mentioned the effect of zoning or restrictive legislation, or ordinances by various communities that were tending to reverse the community treatment trend.

Now, we put together the difficulties of prediction and the use of empiricism, and then finally our last speaker, Mr. Ennis, emphasized the emerging rights of the mentally handicapped. He emphasized the right to counsel, the privilege against self-incrimination, and the right to release if no effective treatment is available, and indicated very forcefully that the pressures on the mental health system or establishment will probably

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\* See note to the first day's summary and discussion.

intensify and accelerate in the next few years. Well, I tend to agree with Mr. Ennis that if the privilege against self-incrimination with its full Miranda-type implementation were applied to the mental health field, that application, like Professor Dershowitz's suggestion, would probably bring all problems to an end. If the patient could not be interviewed without warnings as to rights, which he would probably be unable to waive, at least under the standards of *Johnson v. Zerbst*, which requires an intentional abandonment of a known right, and has the connotation of intelligence, it would certainly seem that waiver of the privilege against self-incrimination would be very, very difficult to accomplish. I might suggest to you in this area, as I mentioned to you yesterday, I believe, that the adversary system was not the result of a development of jurisprudential philosophers coming to an informed decision, but the result of a haphazard growth of a somewhat unstructured political system in the early days of the Plantagenet monarchy. However, I would also suggest to you that the privilege against self-incrimination suddenly came forth from the forehead of Zeus and was recognized by the justices under King Charles II, as a result of, let us say, the reaction to the excesses of the Court of Star Chamber, and the privilege has probably never been thought through very well in the criminal area, so it should offer an interesting application in the mental health area. I suppose the only person who really thought the privilege through thoroughly and incisively was the gentleman who dedicated, in part, his work, as was mentioned by Dr. Quen yesterday, to Chief Justice Doe of New Hampshire. I am referring to John Henry Wigmore. Wigmore's observations on the privilege against self-incrimination have been largely repudiated by the Supreme Court of the United States, as it is presently constituted. I suggest to you that you can expect some interesting developments if the privilege against self-incrimination is fully applied.

But, again to pursue the common thread, it appears that all speakers are in substantial agreement this morning that the dangers of involuntary commitment may outweigh the empirical basis for its utilization as an effective tool, and that empiricism is a tool which should be used not only for the initial commitment or certification, but also for continuing checks upon judicial, legislative and, presumably, psychiatric determinations and decisions in this field. Now, faced with that empiricism. I suspect that the intuitive judgment of most psychiatrists begins at this point to rebel a little bit, and that you may take the position that some took upon hearing the famous argument of Zeno the Stoic, who said that you could not move from point A to point B because it is commonly known that there are an infinite number of points on a straight line, and consequently you could never live long enough to go to an infinite number of places. Now, therefore, it may be that your instinctive judgments may rebel at hearing empiricism and the inability to predict scientifically being carried, as Cardozo would have put it, to their dryly logical extremes. And with that you may sally forth and do battle with the speakers.