Recent Legal-Psychiatric Developments in California

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Growth and ferment continue to be evident in the relationship of psychiatry to law in the State of California. The mental health system and the field of psychiatry share the social and economic turmoil of contemporary society as well as the specific problems of medical practice.

In addition there are special ingredients that go to make up the potpourri of legal ferment about mental health and the practice of psychiatry. Three stand out:

(1) Concern about civil rights and the abuse of psychiatry for social control purposes;

(2) Antagonism against psychiatry expressed by many groups; and

(3) Concern about the psychiatrist's professional responsibility to the patient, to maintain the patient's right to privacy and to the confidentiality of his psychotherapeutic communications, versus the psychiatrist's professional obligation to expose confidential data insofar as public interest and public peril are concerned.

(1) Concern about civil rights has been largely involved with the public sector of psychiatry. Legislative and judicial actions protecting the civil rights of the committed mentally ill patient have been directed mainly at checking administrative authority and professional decision-making in this area. Much of this professional decision-making demonstrated either an abuse of psychiatry for social control purposes or the psychiatrist's exercise of what has been called "abusive paternalism."

The California Mental Health Act of 1967, the Lanterman-Petris-Short Act implemented in 1969, expressly outlined constitutional safeguards for the involuntarily detained and involuntarily treated mentally ill patient in state hospitals and community mental health centers.

The alleged mentally disturbed patient, provided with legal counsel, is entitled to have the question of his involuntary detention and treatment decided by court or full jury. The burden is on the State to convince a court or an unanimous jury with proof by a preponderance of the evidence** that this patient is so physically dangerous by

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** The State Legislature has not specified the standard of proof for involuntary commitment of persons under the LPS Act (Welfare and Institution's Code Sections 5000 *et seq.*) but has provided that such proceedings shall be conducted "in accordance with constitutional guarantees of due process of law, etc." No case law exists, as yet, on the standard of proof necessary to comport with these "constitutional guarantees, etc." It is possible to infer, however, in light of *Burnick* (see cit. below) that this standard may henceforth be a burden of proof beyond a reasonable doubt. Such a high burden of proof was also expressly stated by the 1972 Wisconsin Supreme Court in *Lessard v. Schmidt* (349 F. Supp. 1078).

If this standard of proof were to be enforced, in my opinion, no mentally ill patients could any longer be involuntarily confined and treated, even for emergency care, because of psychiatry's present incapacity to identify dangerous mentally ill patients in accord with such a high evidentiary burden of proof. At psychiatry's present level of operation, this standard is unworkable. A 1975 legislative amendment to the California Welfare and Institutions Code (AB 1422) has directed itself to increasing the burden of proof for the 72-hour emergency detention and treatment of the suspected dangerous or gravely disabled mentally ill person. Whereas previously this level was designated as reasonable cause, the amendment raises the level of this burden of proof to probable cause.

virtue of his mental disturbance that community safety is at risk. Involuntary electroshock treatment and psychosurgery are proscribed. Mentally disordered persons who are identified objectively as so gravely disabled that they are unable to feed, clothe or house themselves are eligible for a one-year renewable conservatorship. Regular periodic judicial review assures the release of mentally disordered patients in accordance with reduction in their physical dangerousness or their grave disability.

This California scheme for civil commitment does not provide for indefinite commitment of persons who are either potentially dangerous to themselves or others, or who are gravely disabled. Basically the State's interest in such involuntary treatment dissipates when the patient no longer presents a demonstrable risk to himself or to public safety.

Concern about the civil rights of the committed mentally ill person has extended to include concern about the civil rights of the mentally ill offender.

Following a 1972 United States Supreme Court ruling in *Jackson v. Indiana* (406 US. 715), the California Supreme Court in 1973 in *In re Davis* (8 Cal. 3d 798) held that these same constitutional due process safeguards applied to the mentally ill criminal defendant awaiting trial. The court ruled that if there was no reasonable likelihood that such a defendant would regain his competency to stand trial in the foreseeable future, he must either be released or subjected to civil commitment proceedings under the Lanterman-Petris-Short Act.

In September, 1974, the California legislature amended the California Penal Code and the Mental Health Act (Welfare and Institutions Code) to remedy this problem within the guidelines of the *Jackson* and *Davis* rulings. Pursuant to the State's interest to bring the mentally ill defendant to trial with minimum delay, the mentally incompetent accused party is accorded involuntary treatment to facilitate his recovery. Under a recent (1975) amendment to the Welfare and Institutions Code (AB 1229), implemented on January 1, 1976, non-dangerous mentally incompetent defendants may be treated in the community.

Jury trials are provided, with the burden on the presumedly competent defendant to prove his mental incompetence to stand trial to a Court or unanimous jury by a preponderance of the evidence.** After three years, all defendants still found mentally incompetent to stand trial must be dealt with under procedures of the amended Lanterman-Petris-Short Act. A new provision to this Act provides a one-year renewable conservatorship for that mentally ill incompetent defendant who has a pending criminal indictment or information on a felony charge involving serious physical harm or threat to another person. Until the statute of limitations for a crime has expired, felony charges for that crime may be refiled after a defendant has regained his mental competency to stand trial.

For misdemeanor and non-physically dangerous felony charges, after confinement for the maximum sentence term, the mentally incompetent defendant is free to rejoin the open community or is processed under provisions of the Lanterman-Petris-Short Act.

Here we see that considerations for the civil rights and freedom of the mentally ill defendant outweigh the State's interest in bringing a criminal defendant to trial. Given this significant change in balance of the scales of justice, we can anticipate, in the foreseeable future, an increase in the number of defendants seeking to be found mentally incompetent to stand trial in order to avoid criminal prosecution for their offenses. We can anticipate, with this increase, a definite spur to the field of forensic psychiatry.

These same concerns about the civil rights of the mentally ill offender were expressed by the 1975 California Supreme Court in two landmark cases, *People v. Burnick* (14 Cal. 3d 306) and *People v. Feagley* (14 Cal. 3d 338). These opinions dealt with the identification of the mentally ill offender as a mentally disordered sexual offender

** See previous footnote.

(MDSO) for the purpose of indefinite commitment to a state hospital for treatment. The court ruled that such identification must be made by a unanimous jury with a burden of proof beyond a reasonable doubt; and the court held that such persons may not be involuntarily detained in a prison setting without treatment.

1975 Statutory changes in the Welfare and Institutions Code (AB 1228), to be implemented on January 1, 1976, allow the non-dangerous mentally disordered sex offender to be treated in the community after a preliminary period of hospitalization. Also pursuing these same concerns for the civil rights of the mentally ill offender, a companion bill (AB 1229), amending the California Welfare and Institutions Code, authorizes the community treatment of the non-dangerous mentally ill party found not guilty by reason of insanity.

Finally, another recent landmark ruling is concerned with the mentally ill offender in penal custody. The 1975 California Supreme Court in *In re Rudolfo A. Rodriguez* (Slip opinion, Crim 18044, Calif. Sup. Ct. June 30, 1975) held that the Adult Authority (California Parole Board) cannot sentence a mentally ill criminal offender to a longer penal sentence because of his alleged high risk of dangerousness by virtue of his mental illness.

All of these legislative actions and judicial rulings highlight continuing concern about protecting civil rights. They show the fear that exists about abuses of social control which may be promoted under the mantle of psychiatry. They underscore the growing public distrust of administrative and professional decision-making which may control the freedom and liberty of the mentally ill person, in either hospital or a prison. The thrust of all of these legislative actions and judicial rulings, I believe, is to reduce the possibility of the abuse of psychiatry for social control purposes by means of legal monitoring and legal procedure.

(2) Related to the challenges to psychiatry and to psychiatry and law already mentioned above is a growing antagonism toward psychiatry as a branch of medicine. Such antagonism has become more visible in the past twenty-five years. Many groups have mounted political campaigns against what they consider to be the abusive power of psychiatry. This political pressure, in fact, was partially responsible for the California Mental Health Act of 1967, with its proscription of involuntary psychosurgery and electroshock treatment and its increased regulation of the practice of psychiatry in the public sector.

Pressure from such groups, combined with changes in psychiatry's professional attitudes about the positive value of hospitalization of the mentally ill, has led to the treatment of the mentally ill in community mental health centers rather than in state hospitals. This change, however, has not reduced the antagonistic thrust of anti-psychiatry forces that are also intent upon regulating the practice of psychiatry in the private sector.

Recent legislative restrictions have now been extended in California to psychiatric practice in the private sector of psychiatry. In January, 1975, legislation amended the Welfare and Institutions Code to proscribe even voluntary electroshock treatment of the mentally ill except under rigorous conditions of informed consent and professional review. Unanimous agreement is required by three physicians, other than the patient's personal physician, that such electroshock treatment is critically needed and that all other treatment modalities have been exhausted. This bill originally contained similar restrictions controlling the psychiatrists' use of psychotropic medications, but these restrictions were subsequently deleted before passage of the bill.

In addition to growing public disillusionment with psychiatry, passage of such legislation is indicative of the great degree of divisiveness that exists among California mental health practitioners. A plethora of medical and non-medical theories about mental illness abound. There is an incredible hodgepodge of treatment philosophies and practices; and many mental health practitioners themselves fully support such restrictions

upon the psychiatrist to limit his practice because of his continued use of the medical model.

(3) Recent years have witnessed a sharp rise in the psychiatrist's concern about social, governmental, administrative, industrial, as well as legal pressures to abridge the confidentiality of his patient's psychotherapeutic communications. In California the Lanterman-Petris-Short Act served as a bulwark against this thrust. The 1970 landmark California Supreme Court ruling in *In re Lipschutz* (85 Cal. Rptr. 829) was a major blow to psychiatrists who hoped that public interest in supporting psychotherapy would supercede public interest in resolving legal disputes. This hope did not materialize.

In December 1974, the California Supreme Court in *Tarasoff v. Regents of University of California* (118 Cal. Rptr. 129) enunciated the rule that the psychotherapist has a legal obligation to give warning to third parties in order to avert danger arising from the medical or psychological condition of his patient, when a doctor or a psychotherapist, in the exercise of his professional skill and knowledge, determines that such warning is essential to avert the danger.

This legal obligation imposes upon the psychiatrist the same mandatory duty to notify public authorities of danger as specified in statutes for reporting of gunshot wounds, contagious diseases, and child abuse. Breach of this duty exposes the psychiatrist to malpractice action.

The majority of the Court, in a 5 to 2 decision, held that the special doctor-patient relationship may support the psychiatrist's affirmative duty to warn third parties endangered by the conduct of his patient. In this case the therapist, a psychologist, failed to warn a specified individual, not related to the patient, of a direct threat to her life; and she was subsequently killed by this patient.

The parents of the victim brought suit against the University of California and its agents for failure to warn them or the victim. The trial court dismissed the suit as non-actionable; but the California Supreme Court returned the suit to the trial court with directions to amend the complaint so that a proper cause of action could be brought against the principals for breach of duty to warn the victim of her danger.

The opinion held that "public interest in safety from violent assault" outweighed the need to protect the patient's right to privacy and exceeded the public interest in supporting effective treatment of the mentally ill person by protecting his protective privilege of confidentiality. The court stated, "[T]he protective privilege ends where [the] public peril begins." Although many psychiatrists considered this ruling as one that impresses the psychiatrist into the role of social control agent, the legalist looks upon the opinion as one that increases the psychiatrist's professional responsibility to the public sector with respect to community safety.

This ruling is moot at present because the California Supreme Court, reacting to an appeal supported by numerous *amicus curiae* briefs, has agreed to rehear the question. Nevertheless, many legal scholars believe that the Tarasoff ruling will be sustained.*

It is likely that other state courts will follow California's lead in mandating a duty for psychiatrists to warn third parties of serious danger posed by their patients. This situation accentuates the existing problem for psychiatrists in identification of the dangerous mentally ill person, when psychiatrists generally maintain a professional inability reliably or accurately to predict a patient's real potential for physical violence and physical danger, except by massive over-prediction with major positive error.

In conclusion, the influence of these three factors, individually and collectively, can be perceived in legislative and judicial actions affecting the field of psychiatry and psychiatric practice. These are not isolated actions but represent a trend in legal-psychiatric developments in California. This trend is also discernible throughout the United States.

* It should be noted that a lawyer has a similar duty to warn or report if his client discloses a fixed intention to commit a serious crime.

I believe it is also significant that almost all of these matters involve two basic questions, both concerned with reliability: (1) the reliability of the definition of mental illness; and (2) the reliability of the identification of dangerousness of the mentally ill. The high level of unreliability in both of these areas poses major problems for psychiatry and law. Special education and training in psychiatry and law are obviously and urgently needed to improve professional skills in applying psychiatry to legal issues. In California, a recent statute (AB 1422) directs the State Department of Health to plan for the development of programs to train psychiatrists and psychologists with forensic skills. This recognition by the State that special forensic skills are required by mental health professionals involved with psychiatric-legal matters is an initial legislative step toward the promotion and recognition of psychiatric-legal expertise in California.