Some Recent Legal-Psychiatric Developments in the United States

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Recent legal decisions, legislative actions, and social-political review have had an increasing effect on the practice of psychiatry and the provision of mental health care in this country. Conflicting trends have led to some confusion in terms of social policy. Past inequities are being corrected, but as is true of all change, not all consequences are foreseen. Recent legal trends have focused on civil liberties and due process to the apparent detriment of provision of adequate services. At times, those trained and most knowledgeable in the mental health professions have been excluded from society's decision-making process.

This paper will review some recent significant legal-psychiatric events—significant because of their importance in reflecting new trends in social policy or in exemplifying the types of issues that come before the courts.

Bartley v. Kremens[1]

This federal court decision declared part of the Pennsylvania commitment code unconstitutional for lack of due process in the hospitalization of minors. The plaintiffs were institutionalized primarily for delinquent behavior and mental retardation, with a wide variety of acting-out behaviors and in a variety of institutions. The stated ages varied from 13 to 17.

Bartley v. Kremens represents an evolutionary development in the long line of lawsuits which have been directed towards state-imposed incarceration or deprivation of freedom and which therefore apply to any areas where loss of freedom is involved. Thus, the mentally ill, the retarded, juvenile delinquents, and criminals have been involved in suits to clarify both the bases for the deprival of freedom and the procedural means designed to prevent abuse. As Mr. Justice Frankfurter has said: "The history of American freedom is, in no small measure, the history of procedure."

Civil libertarians and others have pointed out that the interests of minors are not necessarily those of the parents, who, by law and by tradition, have had the authority to approve institutionalization and treatment of their children. In the Bartley case, the court implied one such abuse when it indicated that one of the plaintiffs, an educable mongoloid, was institutionalized for one-to-two week periods so that the other members of the family could go on vacation. Information from other sources, however, has indicated that this procedure was not the capricious act of cold-hearted parents but rather part of a specific program to keep such children at home while at the same time providing some relief from the burden of constant supervision by the parents.

The state contended that treatment and rehabilitation programs by the state should not require the full weight of procedural due process and that the rights of parents to the custody and care of their children should determine social policy. The *Bartley* court rejected these contentions and reasserted the view that civil deprivation of liberty is an involuntary incarceration requiring constitutional safeguards of due process which cannot be waived by parents.

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The Bartley case laid down the following requirements for such due process. A pre-commitment hearing is not required. Parents may authorize temporary detention up to 72 hours. If a preliminary hearing at that time indicates probable cause for the need for hospitalization, a final hearing must be held within two weeks. Written notice to the child must be provided. Similarly there must be a right to counsel and, if a petitioner is indigent, the right to free counsel. One wonders if a non-indigent family in such an adversarial proceeding might not be faced with having to provide two attorneys—one for the parents and one for the child. Presence at hearings may be waived by the child, if he is competent to do so, or by the attorney. A jury trial is not required, but clear and convincing proof of the need for hospitalization is necessary, and the right to confront and cross-examine witnesses is maintained.

The dissenting judge discussed what he considered to be the adequate flexibility of prior law in that children 13 to 17 previously had the right to protest institutionalization and that extension of an "overdose" of due process to those 12 and younger was unnecessary and injurious to parental rights and duties.

Pennsylvania now joins Nebraska and Tennessee in declaring unconstitutional statutes permitting the voluntary institutionalization of children. The rights of children have become of increasing concern.[2] New Jersey has changed its procedures (and its law) by administrative act of the Supreme Court, which has the authority to promulgate rules of practice for all the state courts.

The New Jersey Supreme Court rule has been in effect only since September 8, 1975. It states that:

> No minor shall be committed except temporarily to a mental institution for treatment and care of an alleged mental condition on the application of his parent or parents or other person in loco parentis except on court order after hearing pursuant to paragraph (e) hereof. A guardian ad litem who shall be a person other than the applicant for the commitment, shall be appointed by the court to represent the interests of the minor at such hearing.[3]

The guardian *ad litem* must be an attorney. The Supreme Court also has indicated that the lower court may direct an independent psychiatric examination of the patient, the cost of the examination and the psychiatrist's fee for testifying, if any, to be borne by the person or the public body charged with the patient's legal settlement.

In essence, in New Jersey the concept of voluntary admission of a minor with the power for the volition in the hands of the parent has been replaced by the concept that voluntary admission of a minor is in reality an involuntary commitment. In accordance with the other decisions mentioned, parents and children may be adversaries and therefore children must be independently represented.

The new procedure in New Jersey allows children from 14 to 17 to waive a hearing. The details of procedure are so new that the utility, practicality, and merit are unclear. In one university-run children's service, staff personnel are now required to attend court sessions almost weekly. The court-appointed attorney interviews the child and then presents the child at the hearing—obviously significant costs are involved, although to this point all hospitalizations have been upheld.

The future is unclear. What if a 14-year-old child is admitted for acting-out behavior and drug use? In New Jersey, the child may protest institutionalization. If he or she is younger, he cannot waive an objection to hospitalization. If the definition of mental illness is to be restricted to dangerousness to self or others, is he admissible at all?

A 12-year-old—psychotic and withdrawn, but not imminently dangerous—is admitted. A 10-year-old dyslexic is admitted for thorough work-up. A six-year-old with epilepsy has some behavior problems and recent loss of intellectual functioning. A nine-year-old eats too much and has a bedwetting problem. Can they be admitted? Do they all require the benefit of the full majesty of the law? Must all their parents hire attorneys? If voluntary admissions are really involuntary commitments, then is "dangerousness" to be the only

criterion for admission of children where its applicability is obviously ridiculous but the need for hospitalization medically appropriate? These questions are posed not to criticize the new system, whose merits remain to be weighed, but to pinpoint some problems which will require clarification.

The situation gives rise to other issues. Are rules for long-term state institutions for the retarded or the mentally ill to be applied to short-term, non-governmental institutions? In the past, a child would be admitted voluntarily by the parent without a formal legal record. Now the child may have a record of having been adjudicated "mentally ill." What will be the potential harm of the labeling process in such case? Is the concept of "mental illness" here really appropriate as a classification device?

Wyatt v. Aderholt

Wyatt v. Aderholt[4] is the long-awaited Fifth Circuit review of the now famous *Wyatt v. Stickney* (and its Georgia sister, *Burnham v. Georgia*[5,6]). To simplify greatly, the import of this decision is the support at an appellate court level of the concept that civilly committed patients have a constitutionally guaranteed right to treatment and that states cannot use the concept of states' rights to avoid the implication of this decision. Further, the decision ratified the rights of courts to establish minimal standards of care, such as were elaborated in great detail by the lower court decision.

O'Connor v. Donaldson[7]

In the now notorious O'Connor case, the plantiff claimed malicious deprivation of his constitutional right to liberty. Thus, one essential element of the case was a determination of public policy of involuntary hospitalization and its allowable justification. Despite the potential variety of issues relevant to the case, the Supreme Court restricted its opinion to a narrow determination of the facts relevant to Donaldson, namely the basis for incarceration of a non-dangerous mentally ill patient not receiving treatment. "Mental illness" alone cannot justify custodial confinement in such a case. In summary, the Court stated that "a State cannot constitutionally confine without more a non-dangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends."

The Court did not decide whether a mentally ill patient dangerous to himself or others had a right to treatment or whether a non-dangerous mentally ill patient could be confined for treatment. Thus many issues remain to be clarified by further decisions, including the possible liability of a government physician who claims reliance on existing state law as authorization for confinement. The case was remanded for further consideration by the lower courts with the caution that an official has no duty to anticipate unforeseeable constitutional developments. Thus for the moment, the status of the state hospital psychiatrist remains unclear.

Drope v. Missouri

The *Drope v. Missouri* Case[8] was an unusual one in that a man, charged in the rape of his own wife, attempted suicide on the second day of trial by shooting himself in the abdomen. The trial court ruled that he had voluntarily absented himself, and in his absence the defendant was found guilty and later sentenced to life imprisonment.

The U.S. Supreme Court pointed out that the question of competence could have been raised at three points—before trial, during the trial after the suicide attempt, and at the time of the motion for a new trial.

A pretrial report by a psychiatrist did not specifically direct itself to the medical facts bearing on the issue of competency. There was evidence of prior irrational behavior including an attempt by the defendant to kill his wife the week before trial. The Court assumed that a self-inflicted wound near vital organs was scarcely suggestive of malingering. Scrutinizing the totality of the information available, the Court felt that while a suicide attempt by itself is not determinative of incompetence, the overall situation was such that

the trial should have been suspended until an evaluation could be made. While it is difficult to obtain a clear generalization from this case, it does reflect the fact that due process requires adequate psychiatric exploration under many circumstances which cannot be ignored by means of arbitrary rejection of obvious problems at the trial court level.

Other Cases

Other recent cases can be alluded to only briefly. In *Lynch v. Baxley*,[9] a three-judge district court in reviewing Alabama commitment procedure held that the statute covering emergency detention in a county jail or state mental hospital was unconstitutional for lack of due process in that there must be a hearing for probable cause within seven days. This long and detailed case constitutes an extensive discussion of recent trends in civil commitment law. Of interest was the elaboration of the concept of dangerousness. Dangerousness to others includes not only physical injury but possibly emotional injury. Dangerousness to self includes both threat of physical injury and discernible physical neglect. Thus substantial neglect or refusal to care for self and inability by the person to determine desirability of treatment are pertinent factors to be considered—a flexibility not usually encountered in other jurisdictions. In the New Jersey case of *State v. Krol*,[10] the state continued to move away from the rigid stance of the Maik[11] case, which condemned those found not guilty by reason of insanity to permanent incarceration because of the requirement of complete cure of underlying illness for release. In *Krol*, the court has gone full circle to a rigid stance in the other direction, veering to the currently popular dangerousness criterion as the only justification for detention. Similarly, the decision tends to support the current equation of the civilly mentally ill and the criminally insane. ("The distinction between the standard for involuntary commitment for persons acquitted by reason of insanity and other persons lacks even a rational basis.") The Bell and Dalimonte cases[12] in Michigan placed such limitations on treatment of patients admitted on temporary detention that apparently such admissions are no longer feasible, particularly in view of the unrealistic restrictions on chemotherapy, which has been more or less stupidly equated by some courts and legislatures with brain surgery and EST.

Conclusion

The increasing crescendo of cases affecting the practice of psychiatry and the provision of mental health services is exemplified by this small selection of legal decisions of the last year—decisions which reflect the rapid change in law and social policy. The ultimate consequences of many of these events remain to be determined. Psychiatrists meanwhile must keep alert to changes and attempt to provide professional input into the decision-making process.

References

1. Bartley v Kremens, Civil Action No 72-2272 (E D Pa), July 24, 1975
2. Perr IN: Confidentiality, consent, and other issues in the psychiatric treatment of minors. Journal of Legal Medicine, publication pending
3. R 4:74-7 (j)
4. Wyatt v Aderholt, 503 F2d 1305 (USCA-5th Circ, Nov 8, 1974)
5. Wyatt v Stickney, 325 F Supp 781; 344 F Supp 373; 344 F Supp 387
6. Burnham v Department of Public Health of Georgia, 349 F Supp 1335 (1972)
7. O'Connor v Donaldson, 422 US 563, 1975
8. Drope v Missouri, 95 Sup Ct Rep 896 (Feb 19, 1975)
9. Lynch v Baxley, 386 F Supp 378 (USDC Ala, Dec 14, 1974)
10. State v Krol, Supreme Court of New Jersey, Aug 4, 1975
11. Perr IN: Problems surrounding release of persons found not guilty by reason of insanity. Journal Forensic Sciences, 20 (4):719-725 (Oct 1975)
12. Bell v Wayne County General Hospital, Dalimonte v Probate Court for the County of Chippewa (USDC Mich SD, Oct 26, 1974)