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Editor's Forward

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LAWYERS AND PSYCHIATRISTS IN THE COURT: EDITOR'S FOREWORD

In the past two years, judicial and legislative action has begun to bring Maryland into line with a national trend toward surrounding involuntary civil commitment to mental institutions with certain protections. The United States District Court for the District of Maryland provided impetus for the change when, in *Anderson v. Solomon,*[1] it refused to dismiss a claim that the Maryland commitment procedure, recodified but not substantially modified in 1970, denied due process by failing to provide for a hearing prior to or immediately after involuntary commitment. In 1971, the General Assembly provided for mandatory review of every involuntary commitment by a specially appointed official and for more scrupulous surveillance of patients' rights, through the establishment of a mental health information and review service in each appellate judicial circuit.[2] The latter move has been viewed by its prime backer, State Senator Rosalie S. Abrams, as

> an expression of a more significant shift in public policy toward persons suspected of mental disorders than any taken since we stopped viewing the treatment of mental illness as witchcraft. It is the first recognition by Maryland law that commitment is not simply a medical decision, but also a legal one involving the deprivation of the liberty of an individual, a step not to be taken without all the protection afforded by due process of law.[3]

It appears, however, that full due process of law may not be the ultimate prescription for the American system of confining persons with mental disorders. New York adopted substantial changes in civil

1. 315 F. Supp. 1192 (D. Md. 1970).

2. MD. ANN. CODE art. 59, § 54 (Supp. 1971).

3. Abrams, *Legislative Efforts to Reform Civil Commitment,* 1 MD. L. FORUM 12, 16 (Summer 1971).

commitment procedures six years before Maryland's more modest change. From the New York experience has come research that could prove disheartening to those who have labored so long for change. In *Lawyers and Psychiatrists in the Court: Issues on Civil Commitment,* an attorney and a psychiatrist reveal that the patient who has the benefit of counsel in a pre- or post-commitment hearing is not necessarily acquiring the services of an advocate, one apparent goal of reform efforts, but may simply be able to take advantage of a set of prejudices regarding his illness different from those of the examining or committing psychiatrist. Psychiatrist Yorihiko Kumasaka and attorney Raj K. Gupta report that in civil commitment hearings, as in determinations of criminal sanity, doctors and lawyers (including judges) do not communicate. In cases in which even an untrained layman or a patient's relative would agree with the decision to continue or to terminate hospitalization, the doctors and lawyers involved find themselves in accord; in "difficult" cases, the presence of a lawyer on the case may be of no practical significance to either the patient or society.

The conclusions made manifest by the authors of *Lawyers and Psychiatrists in the Court* have been suggested by authors of "traditional" law review works.[4] The Editors of the *Maryland Law Review* found it significant that an empirical study, relying on actual transcripts of commitment review hearings, would so dramatically make the same point. Although Maryland has ostensibly avoided some of the semantic traps in the New York legislation which formed the basis of the study,[5] no state can avoid the broader issues it raises.

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4. *See, e.g.,* Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill,* 44 TEXAS L. REV. 424 (1966); Morris, *"Criminality" and the Right to Treatment,* 36 U. CHI. L. REV. 784, 796 (1969); Schmideberg, *The Promise of Psychiatry: Hopes and Disillusionment,* 57 NW. U.L. REV. 19 (1962).

5. The definitions of mental illness and mental disorder in the New York and Maryland statutes [N.Y. MENTAL HYGIENE LAW § 2(8) (McKinney 1971) and MD. ANN. CODE art. 59, § 3(g) (1972)] are substantially the same.

The Maryland statute expressly incorporates the word "functioning," which seemed to give the professionals in the Kumasaka-Gupta study so much difficulty; that word is not used in the New York statute. Neither statute makes "dangerousness" an express condition of commitment. However, dangerousness has been made implicit in most statutes permitting involuntary confinement for psychiatric treatment. Humphrey v. Cady, 40 U.S.L.W. 4324 (U.S. Mar. 22, 1972). The Supreme Court has defined the word to encompass "the *social* and legal judgment that [the patient's] potential for doing harm, to himself or to others, is great enough to justify such a massive curtailment of liberty." *Id.* at 4325 (emphasis added).

The words "dangerousness" and "functioning" seem to play a role in involuntary civil commitment similar to that of "right and wrong" and "capacity" in criminal sanity determinations.

The difficulties that remain after one accepts the lack of communication between the professionals involved are stated in an *Afterword* by Irwin Brown who, while with the Legal Aid Bureau in Baltimore, served as co-counsel for the plaintiff in *Anderson v. Solomon,* and had a major role in the drafting of the new sections of the Maryland Mental Hygiene Law. Mr. Brown suggests that the ultimate conclusion of the Kumasaka-Gupta study and of the other research currently under way may be that involuntary civil commitment is not a valid method for determining whether persons are to be confined to mental institutions. If this is so, a new role must be posited for the attorney involved in a civil commitment proceeding.

Another possibility presents itself. "Dangerousness" and "functioning," the "magic words" in civil commitment proceedings, may serve the same purpose as the concept of proximate cause, giving the finder of fact leeway to do substantial justice within broad limits on which there should be general agreement. The Supreme Court indicated its faith in such a flexible standard when it stated that, in determining who should be confined for psychiatric treatment, "the jury serves the critical function of introducing into the process a lay judgment, reflecting values generally held in the community, concerning the kinds of potential harm that justify the State in confining a person for compulsory treatment."[6] If the infusion of lay opinions into the verdict is the function of the finder of fact, however, it seems clear that the role of the patient's lawyer must be as advocate, not as another lay participant.

The ultimate questions concerning civil commitment and the attorney's role therein are not answered in the two selections that follow. It is hoped, however, that because the questions are convincingly posed, the research and the policy decisions necessary to make the next important steps in treatment of the mentally ill will be forthcoming.

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6. Humphrey v. Cady, 40 U.S.L.W. 4324, 4325 (U.S. Mar. 22, 1972); *see* Millard v. Harris, 406 F.2d 964, 980 (D.C. Cir. 1968) (Skelly Wright, J., concurring).