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Note: Commitment of the Mentally Ill: Due Process for the Aged?

NOTES AND COMMENTS

NOTE: COMMITMENT OF THE MENTALLY ILL: DUE PROCESS FOR THE AGED?

The increasing public awareness of the problem of mental illness has prompted many state legislatures to provide often overly facile means of confining alleged incompetents for the purpose of care and treatment. The extent to which the rights of the mentally ill are being affected by such procedures in the fifty states is currently the subject of an extensive research project of the American Bar Foundation. The detailed nature of the statutes in this area precludes such a study here. The commitment procedures used in the State of New York therefore are presented in some detail in an effort to point out the problem which exists, in varying degrees, throughout the United States.

Few areas of social endeavor have received such attention in recent years as has the problem of the care and treatment of the mentally ill. The increasing awareness that an unbalanced state of mind is in fact an illness,[1] to be recognized and treated as such, rather than evidence of demoniac possession,[2] has caused modern society to expend huge sums for the creation and maintenance of mental institutions and facilities.[3] The methods by which an alleged incompetent, innocent of any crime, can be committed in New York State are set forth in the Mental Hygiene Law.[4] Since there is an extremely high incidence of psychosis in persons of advanced years[5] and therefore a high rate of commitment among this segment of society, an examination of the current law from their point of view alone seems justified.

With a particular mind to the aged incompetent, therefore, this article shall investigate in some detail the provisions of the Mental Hygiene Law pertinent to his commitment. Its purpose shall be to determine, from an analysis of the rights and remedies afforded, the consequences of a certification of incompetency, and from the reported cases bearing on the subject, whether society, in its anxiety to provide an increasing amount of *medical* protection, has in fact encroached upon the *legal* protections of the individual.

General Background

The state's authority over the insane is deeply entrenched in the law[6] and its justifi-

[1] N.Y.S. LEG. ANN., Governor's Messages to the Legislature, Mental Health 448, 450 (1960).

[2] See Weihofen and Overholser, *Commitment of the Mentally Ill,* 24 TEXAS L. REV. 307, 309 (1946).

[3] See *N.Y.S. Executive Budget* 1960-61, LEG. DOC. NO. 80, p. 26 (1960).

[4] N. Y. MENTAL HYGIENE LAW §§ 70-75.

[5] See 1957 NEW YORK STATE DEP'T OF MENTAL HYGIENE ANN. REP., LEG. DOC. NO. 104, p. 37 (1958).

[6] See Sporza v. German Savings Bank, 192 N.Y. 8, 14, 84 N.E. 406, 408 (1908).

cation is said to lie in any of the following: (1) the police power of the state to alleviate a danger to society; (2) the nature of the sovereign as *parens patriae* for the personal and proprietary protection of his subjects; (3) the state's jurisdiction over the poor.[7]

Old English law made a precise distinction between the "natural fool" *(writ de idiota inquirendo)* and the "lunatic" *(writ de lunatico inquirendo)* whose mental condition arose later in life.[8] In the former case the king had the right to all the profits from the idiot's land while in the latter the king was entitled only to possession and could not take the profits.[9] In both cases, however, it appears that the determination of mental deficiency was left to a jury.[10]

The State of New York, however, while recognizing the inherent jurisdiction of the Chancellor in this area, apparently left the necessity of a jury trial to his discretion.[11] The Chancellor, as a matter of custom, summoned a jury in doubtful cases[12] and the early statutes dealing with insanity expressly gave the alleged incompetent, or someone in his behalf, the right to a jury trial, if such was requested within a specified time after the court's decision.[13]

Section 76 of the Mental Hygiene Law provides for a jury trial upon request if the request is made within thirty days after the final order of commitment. While the right to a jury trial in a proceeding such as this is not guaranteed by the federal constitution,[14] the provisions of section 76 have been held to constitute an absolute right guaranteed by the state constitution.[15] A minority of the states today likewise provides a jury trial only upon request; the majority has dispensed with it altogether, possibly[16] on the theory that the nature of this proceeding is such that a criminal atmosphere should be avoided.

Notice and Hearing

In a case involving an alleged incompetent,[17] the United States Supreme Court has held that "the essential elements of due process of law are notice and opportunity to defend."[18] Most states, however, provide for a waiver of this notice to the alleged incompetent if it would be ineffective or harmful to him.[19] The general feeling in this area is perhaps best summed up by the statement that:

> [I]f in any case notice of application for an order of commitment is injurious to the insane, such notice should not be held to be a constitutional requirement; for while as a rule notice and hearing is of the essence of due process of law, this is so simply because in nearly all conceivable cases it is a requirement of justice which can do no harm, whereas in this case it would result in harm to the person intended to be bene-

[7] Kittrie, *Compulsory Mental Treatment and the Requirements of "Due Process,"* 21 OHIO ST. L. J. 28, 32-33 (1960). See Ross, *Commitment of the Mentally Ill: Problems of Law and Policy,* 57 MICH. L. REV. 945, 955-60 (1959).

[8] I BLACKSTONE, COMMENTARIES 302-05 (6th ed. 1774).

[9] *Id.* at 303.

[10] *Ibid.*

[11] See Sporza v. German Savings Bank, *supra* note 6.

[12] *Id.* at 17, 84 N.E. at 409.

[13] See, *e.g.,* Laws of New York 1842, ch. 135, § 21; Laws of New York 1874, ch. 446, art. 1, § 11; Laws of New York 1896, ch. 545, § 63.

[14] See Simon v. Craft, 182 U.S. 427 (1901).

[15] In the Matter of Coates, 9 N.Y.2d 242, 173 N.E.2d 797, 213 N.Y.S.2d 74 (1961) *affirming* 8 App. Div. 2d 444, 188 N.Y.S.2d 400 (4th Dep't 1959). The court, in fact, held the right to a jury trial as provided for in § 76 so essential that "nothing short of *actual* personal service upon the allegedly ill person can suffice to commence the running of the 30 day period." 9 N.Y.2d at 252, 173 N.E.2d at 803, 213 N.Y.S.2d at 82.

[16] See Ross, *Commitment of the Mentally Ill: Problems of Law and Policy,* 57 MICH. L. REV. 945, 970 (1959).

[17] Simon v. Craft, *supra* note 14.

[18] *Id.* at 436.

[19] See Ross, *supra* note 16, at 969.

fitted. The constitutional requirement should be held to be satisfied if there is substituted for actual previous notice every other safeguard which is possible under the circumstances.[20]

This concern with the "traumatic effects" of notice and hearing upon an alleged incompetent apparently forms one of the strongest obstacles to the adherence to the usual forms of due process. The understandable desire on the part of the medical profession to treat this problem as a medical one has brought about the charge that subjecting the alleged incompetent to a hearing, wherein he is forced to sit and listen to the testimony of his friends and relatives about his incompetence, tends only to confuse him further and hinder his eventual cure.[21] In point of fact, however, most states provide for hearings of an extremely informal nature, where the judge, or someone appointed by him,[22] will go right to the hospital room of the patient and talk very informally with the patient, his relatives and the psychiatrists.[23] If the proceedings should become too trying on the alleged incompetent, the hearing can be concluded in a separate room. Moreover, the "traumatic effects" of "bundling a patient off" to an institution without a hearing must also be considered.

It should be noted that this desire to focus attention upon the medical nature of mental illness has effected several changes in the commitment laws and procedures in recent years. Thus today the term "insanity" bows to "mental illness," an "asylum" becomes a "mental institution"[24] and, in New York, the term "certification" is used instead of "commitment."[25] Despite the changed terminology a certain stigma still attaches to a determination of incompetence and obviously no mere euphemism will suffice to set aside the traditional judicial safeguards of due process.[26]

A more detailed analysis of the adequacy of the procedural safeguards provided in this area will be undertaken by a close inspection of the provisions in the New York Mental Hygiene Law concerning certification of the mentally ill to state and licensed private institutions.

Commitment Procedure in New York

The law, in its present form, provides six methods[27] by which an alleged incompetent can be confined to a mental institution. In general outline they are:

(a) Voluntary admission;
(b) Admission on certificate of a public health officer;
(c) Admission by certificate of one physician accompanied by a petition;

[20] FREUND, POLICE POWER § 254 (1904).

[21] See Hoch, *Commitment of Senile Aged to Mental Hospitals,* 139 N.Y.L.J. 4 (Jan. 29, 1958). Doctor Hoch, Commissioner of Mental Hygiene of the State of New York, said that "the stigma of the mental hospital will never be removed, however, if admission procedures continue to suggest criminal proceedings."

[22] See, *e.g.,* N. Y. MENTAL HYGIENE LAW § 74(5).

[23] In the Matter of William R. "Jones," 9 Misc. 2d 1084, 172 N.Y.S.2d 869 (Sup. Ct. 1958).

[24] For an excellent discussion of the advances in this area of terminology in recent years see Ross, *supra* note 16, at 949-53.

[25] For example, N. Y. MENTAL HYGIENE LAW § 74 provides for admission on court *certification.* The title of Article 5 of this law, however, (the article covering admissions) still uses the term "commitment."

[26] See In the Matter of Neisloss, 8 Misc. 2d 912, 171 N.Y.S.2d 875 (Westchester County Ct. 1957). The court, in a virulent opinion demanded stricter adherence to the customary forms of due process, saying, "incarceration, whether called hospitalization or by other euphemism, means depriving a person of liberty. No matter how sweetly disguised or delicate the language, involuntary confinement is a loss of freedom." *Id.* at 913, 171 N.Y.S.2d at 876.

[27] N. Y. MENTAL HYGIENE LAW §§ 70, 73-a. Sec-

(d) Admission by certificate of two psychiatrists (or one psychiatrist and one physician) accompanied by a petition;
(e) Admission by court certification, with or without a hearing;
(f) Emergency admission on incomplete court order.

While there are many differences between the requirements of the various sections, ranging from the type and number of examining physicians and the general tests for admission to the length of confinement, there are points common to all of them which should be kept in mind.[28] There is no distinction made between the "senile incompetent" and any other alleged incompetent.[29] The importance of this deficiency will be brought out later. A more important facet of the current law, however, is the fact that admission to state institutions without the certification of "mental incompetency" is impossible.[30] Thus "helpless old people who have suffered physical and mental impairment" but who are not truly mentally ill must be certified so by the courts "since denial of custodial care and hospitalization to these people would probably result in their death. . . ."[31]

Voluntary Admission

As the term connotes, section 71[32] provides for the detention for the purpose of care and treatment of a person who makes voluntary application therefor. The applicant can be detained for a period not exceeding fifteen days and, after he has given written notice of his intention to leave, he can be detained for an additional ten days.[33]

It will be observed that a certain period of involuntary confinement can result after the patient has made voluntary application for admission. Despite the fact that the patient signs himself in with knowledge of this provision, such a statute requiring a period of involuntary detention has been held unconstitutional in the State of New Mexico, where it was stated by the highest court that "obviously, it does not require citation of authority that one may not enforce such a contract made with a person he knows to be so disordered in mind as to require treatment in an institution for the treatment of mental diseases."[34] This view, however, appears to be in the extreme minority,[35] and in New York, by opinion of the Attorney-General,[36] such a provision is constitutional. It should be noted that before a 1958 amendment[37] to the Mental Hygiene Law the detention and waiting periods were sixty and fifteen days respectively.

tion 73-a, which was added to the law in 1960, provides the sixth method.

[28] See Appendix.

[29] N. Y. MENTAL HYGIENE LAW § 2(8) states that "a 'mentally ill person' means *any person* afflicted with mental disease to such an extent that for his own welfare or the welfare of others, or of the community, he requires care and treatment. . . ." (emphasis added). Section 2(11) does define as a "dotard" a person of advanced years whose mental processes have been weakened or impaired, but who shows no delusional formation, hallucinations, behavior or emotional variations characteristic of mental illness. Such person is not suitable for admission to a mental institution. Thus, a distinction is made but it does not appear to be very meaningful since ofttimes "dotards" are certified as mentally ill anyway. See note 30 *infra*.

[30] See In the Matter of "Anonymous #1" to "Anonymous #12," 206 Misc. 909, 138 N.Y.S.2d 30 (Sup. Ct. 1954).

[31] *Id.* at 910, 138 N.Y.S.2d at 31.

[32] N. Y. MENTAL HYGIENE LAW § 71.

[33] *Ibid.*

[34] *Ex parte* Romero, 51 N.M. 201,–, 181 P.2d 811, 813 (1947).

[35] See Curran, *Hospitalization of the Mentally Ill*, 31 N.C.L. REV. 274, 278 (1953).

[36] 1923 N.Y. ATT'Y GEN. ANN. REP. 332.

[37] N. Y. MENTAL HYGIENE LAW § 71, as amended, N.Y. Sess. Laws 1958, ch. 108, § 1.

That this section is providing an increasingly satisfactory means of coping with the problem of mental illness can be seen from the recent statement of the Governor to the legislature:

> The public's growing acceptance of [mental disease as a medical matter] . . . is reflected in the rapidly increasing proportion of voluntary admissions. As recently as five years ago fewer than 7 percent of the patients entered state hospitals on a voluntary basis; today 30 percent use a voluntary procedure.[38]

Admission on Certificate of a Public Health Officer

Under section 72[39] a person determined by a mental health officer or his designee to be *"dangerous to himself or others and who needs immediate care and treatment because of mental illness"* may be received and cared for by the director of the mental institution for not more than sixty days.[40] Moreover, if the patient has not signed himself voluntarily into the hospital during this time and the director deems further care and treatment necessary, the mental health officer will have the alleged incompetent examined by *"one or two"* physicians and if they agree on the need for further care he shall be admitted under the provisions of sections 73 or 74.[41] This section also provides that the police shall take the alleged incompetent into custody if the mental health officer so requests.[42]

No provision is made for notice and hearing under this section. Moreover, since the right to request a jury trial exists only after the final order of commitment,[43] it would seem that the only remedy left to the alleged incompetent is that of habeas corpus.[44] The difficulties attendant upon the attempt by an institutionalized incompetent to initiate such a proceeding are many.[45] Why an alleged incompetent can be confined for up to sixty days in such an ex parte proceeding as this, while the maximum length of detention under the emergency commitment section is but ten days,[46] does not seem quite clear.

Admission by Certificate of One Physician

Commonly referred to as a "pink form" procedure[47] (a reference to the Department of Mental Hygiene form which must be filled out in accord with this section) this method[48] has come under heavy fire from the judiciary.[49] All that is required under this section is a petition (the exact

[38] N. Y. S. LEG. ANN., Governor's Messages to the Legislature, Mental Health 448, 450 (1960).

[39] N. Y. MENTAL HYGIENE LAW § 72.

[40] N. Y. MENTAL HYGIENE LAW § 72(1)(a) (emphasis added).

[41] N. Y. MENTAL HYGIENE LAW § 72(1)(c) (emphasis added).

[42] N. Y. MENTAL HYGIENE LAW § 72(2).

[43] N. Y. MENTAL HYGIENE LAW § 76; In the Matter of Gurland, 286 App. Div. 704, 146 N.Y.S.2d 830 (2d Dept), *appeal dismissed,* 309 N.Y. 969, 132 N.E.2d 331 (1955).

[44] N. Y. MENTAL HYGIENE LAW § 204 specifically grants the right to apply for a writ of habeas corpus and, upon the return of such writ, a determination of competence will be made. This right to apply for discharge at any time has been held to satisfy the requirements of due process in the absence of an initial hearing. People *ex rel.* Peabody v. Chanler, 133 App. Div. 159, 117 N.Y. Supp. 322 (2d Dept), *aff'd,* 196 N.Y. 525, 89 N.E. 1109 (1909); FREUND, POLICE POWER § 255 (1904).

[45] For examples of the obstacles facing the alleged incompetent in his quest for a writ of habeas corpus see Hoff v. State, 279 N.Y. 490, 18 N.E.2d 671 (1939); People *ex rel.* Jacobs v. Worthing, 167 Misc. 702, 4 N.Y.S.2d 630 (Sup. Ct. 1938).

[46] N. Y. MENTAL HYGIENE LAW § 75.

[47] See Brenner, *Commitment of Senile Aged to Mental Hospitals,* 139 N.Y.L.J. 4 (Jan. 29, 1958). Justice Brenner is a Justice of the New York State Supreme Court.

[48] N. Y. MENTAL HYGIENE LAW § 73.

[49] See Brenner, *supra* note 47. See also In the Matter of William R. "Jones," 9 Misc. 2d 1084, 172 N.Y.S.2d 869 (Sup. Ct. 1958).

requirements of which are set forth in section 74) stating the facts upon which commitment is sought, accompanied by a certificate of one examining physician that the patient is mentally ill. Thereupon the director of the institution *may* accept the alleged incompetent *"who does not object thereto"* for up to sixty days and *thereafter* until fifteen days from the time the patient or someone in his behalf gives written indication of his intent to leave.[50]

The statute is apparently justified on the theory that lack of positive objection is tantamount to consent.[51] This section, however, has been particularly instrumental in effecting the transfer of the senile aged to mental institutions "without judicial sanction and with a minimum of public notice or criticism."[52] Although it has been recognized that the institution has no right to accept a patient who does object[53] and the Department of Mental Hygiene has stated that the transfer agents have been instructed not to accept such patients,[54] the precise meaning of "positive objection" is still apparently unclear.[55]

A more cogent point to consider would seem to be the condition of those patients from whom "positive objection" is required if they are to be spared the stigma of mental incompetence. In one case,[56] although it arose under a section 74 proceeding, four of the alleged incompetents included: a seventy-eight year old woman, unable to walk because of a permanent hip injury, overtalkative and almost blind; a seventy-eight year old man who had suffered several strokes and loss of memory; an eighty-four year old man growing progressively senile; and a sixty-four year old man with a speech difficulty due to aphasia. Considered in this light more force is instilled into the remark made by Justice Brenner before the legislative committee last year: "Imagine a positive objection from an old man or an old woman, sometimes in very advanced years, 80 or 90 years of age. I feel rather badly about this."[57]

As has already been stated,[58] it may be the case that a court is virtually forced to certify certain unwanted helpless seniles. Nonetheless such a commitment procedure as provided in this section has been held to be objectionable "because the possibility of private care, often provided at a judicial hearing, is denied to them and, of course, they cannot thereafter effect their own release."[59] The distinct possibility of judicial hearings providing more preferable alternatives than commitment is not to be doubted.[60] The section does provide for

[50] N. Y. MENTAL HYGIENE LAW § 73 (emphasis added).

[51] See In the Matter of William R. "Jones," *supra* note 49.

[52] Brenner, *supra* note 47.

[53] 1946 N.Y. ATT'Y. GEN. ANN. REP. 265.

[54] See Hoch, *Commitment of Senile Aged to Mental Hospitals,* 139 N.Y.L.J. 4 (Jan. 29, 1958).

[55] *Ibid.* See also Brenner, *supra* note 47.

[56] In the Matter of "Anonymous #1" to "Anonymous #12," 206 Misc. 909, 138 N.Y.S.2d 30 (Sup. Ct. 1954).

[57] *Hearing Before N.Y. Joint Leg. Committee on Problems of the Aging,* at 21 (March 10, 1960).

[58] See text accompanying note 31 *supra.*

[59] In the Matter of William R. "Jones," 9 Misc.2d 1084, 1085, 172 N.Y.S.2d 869, 870 (Sup. Ct. 1958).

[60] The extent to which this is true was graphically illustrated by Justice Brenner of the New York Supreme Court in an interview granted the author on February 24, 1961. Justice Brenner told of an instance in November, 1960 when he had occasion to deny certification of nine alleged incompetents because they were not considered truly mentally ill. A follow-up of the fortunes of these alleged incompetents revealed the following information: two were placed in private nursing homes; two were discharged to the custody of their sons; one was discharged to the custody of his wife; one died one week later; three were subsequently certified incompetent by other judges.

release after the initial sixty days upon presentation of written request therefor either by the patient or someone in his behalf.[61] It seems obvious, however, that in the case of the unwanted senile there is no reason to expect positive action at this later date either.

Admission on the Certificate of Two Physicians Accompanied by Petition

The Governor, in requesting the passage of this section[62] last year stated that "such an arrangement emphasizes the medical nature of hospitalization procedures, preserves the Constitutional rights of the patient and provides any necessary protection to society at large."[63] One bill proposed but not acted upon by the legislature advocated its outright repeal;[64] another, likewise killed in committee, would have continued it in force with insignificant amendments.[65]

Admission under this section requires a petition on prescribed forms, as in the foregoing section, accompanied by a certificate of two psychiatrists *or* one psychiatrist and one physician.[66] The director of the institution, however, if he is satisfied of the need for care and treatment and admits the alleged incompetent, must give him written notice of the application within three days after admission *except* when the two physicians state that the notice would be ineffective or detrimental to him.[67] Whether or not notice to the patient is dispensed with, it must be given to the nearest relative of the alleged incompetent other than the petitioner, or, if there be no one else, then to the patient's community health officer.[68] The length of detention under this section is limited to sixty days, and if the director of the institution deems further care necessary he must attempt to get a voluntary commitment or a commitment under the provisions of section 73.[69] If either of these methods fails, the director must apply for court certification under the provisions of section 74.[70]

Clearly, a primary difference between sections 73 and 73-a is the fact that the latter ostensibly requires that notice be given to the alleged incompetent or someone in his behalf. Since, however, even in proceedings seeking court certification, it is almost a matter of course to state that such notice would be harmful to the patient,[71] this section would seem to parallel section 73 as a "legally authorized solution for continuing to admit *aged* and *docile* seniles to state mental institutions without judicial sanction and with a minimum of public notice or criticism."[72]

Admission by Court Certification

As the title implies section 74[73] is the

[61] N. Y. MENTAL HYGIENE LAW § 73.
[62] N. Y. MENTAL HYGIENE LAW § 73-a.
[63] N.Y.S. LEG. ANN., Governor's Messages to the Legislature, Mental Health 448, 450 (1960).
[64] S. Int. 60, Pr. 60 (1961).
[65] A. Int. 1454, Pr. 1454 (1961).
[66] N. Y. MENTAL HYGIENE LAW § 73-a(1).
[67] *Ibid.*
[68] *Ibid.*
[69] N. Y. MENTAL HYGIENE LAW § 73-a(2). If the latter procedure is used it would seem that there would be even less chance of "positive objection" since the alleged incompetent will already be in the institution.
[70] *Ibid.*
[71] In the Matter of Neisloss, 8 Misc. 2d 912, 171 N.Y.S.2d 875 (Westchester County Ct. 1957). "Invariably the court is requested to dispense with personal service on the alleged incompetent for the stereotyped reason that 'to do so would unduly disturb the patient'." *Id.* at 912-13, 171 N.Y.S.2d at 876.
[72] Brenner, *Commitment of Senile Aged to Mental Hospitals,* 139 N.Y.L.J. 4 (Jan. 29, 1958) (emphasis added).
[73] N. Y. MENTAL HYGIENE LAW § 74.

only section which provides for any sort of judicial sanction in the first instance. Basically it requires a petition executed by a close relative or any person who resides with the alleged incompetent, a certificate of need of care and treatment by two examining physicians, and a hearing.[74] Notice to the alleged incompetent or someone in his behalf is also required.[75] The notice to the incompetent may be dispensed with if the court feels it would be ineffective or detrimental to the alleged incompetent and it *must* be dispensed with if the two physicians so state in writing.[76] The hearing itself *may* be dispensed with at the discretion of the court if no specific application for a hearing is made on behalf of the patient.[77] If there is a certification of mental incompetence following a hearing, the person is admitted to the mental institution and detained for a period not exceeding sixty days. If there is no hearing the length of detention is the same.[78] However, if, during that time the director of the institution determines a need for further care and treatment *the mere filing of this determination in the county clerk's office will make the order final.*[79] It should be emphasized again that the director of the institution, here, as in all the other sections,[80] may refuse to accept the patient if he finds him mentally competent.

The scarcity of the reported cases in this area of certification is clearly no indication of the staggering volume of applications handled by the courts.[81] The great number of applications has indeed caused one court to remark:

> There is always the danger of allowing the judicial process to become a matter of rote and routine. We have perhaps reached that unhappy state in these proceedings. . . . Speed is not necessarily synonymous with justice; nor is it desirable that our courts degenerate into assembly lines.[82]

The reported cases do, however, point up the problems existent throughout the area. As has already been seen, admission to a mental institution without the certification of mental incompetence is impossible.[83] In order to effect the admission of an aged unwanted senile, therefore, an attempt is made to stretch mental deterioration, due solely to old age, into the psychosis necessary for certification.[84] Witness the remark of Justice Brenner to the legislative committee in this regard:

> I may say to you that I have had dozens and dozens of experiences, doctors sitting right next to me at the time that I certify a person into a mental institution, telling me very candidly that this person is just old, his mind is tired just the same as many other parts of his body. They call him senile. As a doctor, he says, I cannot say he is disturbed or mentally ill. Physically he is tired and the brain tissue is tired out.[85]

This observation is echoed by several

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74 N. Y. MENTAL HYGIENE LAW § 74(1).
75 N. Y. MENTAL HYGIENE LAW § 74(3).
76 *Ibid.*
77 N. Y. MENTAL HYGIENE LAW § 74(4).
78 N. Y. MENTAL HYGIENE LAW § 74(7).
79 *Ibid.*
80 N. Y. MENTAL HYGIENE LAW §§ 74(8), 71, 72(1)(a), 73, 73-a(1), 75.
81 See In the Matter of Neisloss, 8 Misc. 2d 912, 171 N.Y.S.2d 875 (Westchester County Ct. 1957). "[D]uring the past year approximately 50 to 60 petitions were presented to me [Garrity, J.] each month for the commitment of allegedly mentally ill persons." *Id.* at 912, 171 N.Y.S.2d at 876.
82 *Id.* at 913-14, 171 N.Y.S.2d at 877.
83 See In the Matter of "Anonymous #1" to "Anonymous #12," 206 Misc. 909, 138 N.Y.S.2d 30 (Sup. Ct. 1954).
84 In the Matter of Anonymous No. 13, 6 Misc. 2d 596, 159 N.Y.S.2d 842 (Sup. Ct. 1957); *accord,* In the Matter of "Anonymous #1" to "Anonymous #12," *supra* note 83.
85 *Hearing Before N.Y. Joint Leg. Committee on Problems of the Aging,* at 13 (March 10, 1960).

judges who come into constant contact with the problem.[86]

Emergency Admission on Incomplete Court Order

Section 75[87] permits the director of a mental institution to receive a patient upon presentation of a certificate by two physicians and of a petition as required under section 74, but prior to the court certification, when the director believes *either* that the patient's condition is such that it would be for his benefit to receive immediate care and treatment *or* that he is dangerous by virtue of his condition so that public safety makes his confinement necessary.[88] Detention is for a maximum of ten days unless certification is effected through one of the other sections.[89]

The state clearly has the right to temporarily confine a person dangerous to society,[90] and a mental ward for an obviously deranged person is certainly to be preferred to a jail cell while awaiting a hearing.[91] Some have questioned the test of benefit to the patient as a ground for immediate confinement. The argument has been presented that there are many other instances where a person might benefit by a certain course of action, yet society does not impose it upon him.[92] Nonetheless, the very factor in question in this area is the alleged incompetent's inability to make a responsible decision and realize what is beneficial for him. Under such circumstances the general trend is for the state to provide the immediate care and treatment for the short period before the hearing[93] on the assumption that the patient is incapable of making a responsible decision, although this assumption could be proven wrong at the subsequent hearing.

Some Consequences of the Certification of Incompetence

The rights and powers of persons certified to mental institutions throughout the fifty states have not been clearly defined.[94] In New York it appears that persons certified to mental institutions without formal adjudication of incompetence are, technically, *alleged* incompetents and the deeds and contracts made by such persons are voidable, not void.[95] The courts have distinguished between the formal adjudication of incompetence resulting from a proceeding under Article 81 of the Civil Practice Act which provides for the appointment of a committee over one's person and property,[96] and the certification to a mental institution under the provisions of the Mental Hygiene Law.[97] As a practical matter,

[86] *Id.* at 10-13.

[87] N. Y. MENTAL HYGIENE LAW § 75.

[88] *Ibid.*

[89] *Ibid.*

[90] See Note, *Comments on a Draft Act for the Hospitalization of the Mentally Ill,* 19 GEO. WASH. L. REV. 512, 521 (1951).

[91] See Ross, *Commitment of the Mentally Ill: Problems of Law and Policy,* 57 MICH. L. REV. 945 (1959). The author mentions an unreported instance where an alleged incompetent was arrested by a sheriff, with a warrant, and placed in a jail cell prior to a hearing the following morning. His legal rights were preserved. He hanged himself during the night. *Id.* at 966.

[92] *Id.* at 959.

[93] See, *e.g.,* ILL. ANN. STAT. ch. 91½, §§ 6-1 – 6-6 (Smith-Hurd 1960); PA. STAT. ANN. tit. 50, § 1184 (Supp. 1960); TEX. MENTAL HEALTH CODE art. 5547-27 – 5547-30 (1958).

[94] See Ross, *supra* note 91, at 981.

[95] Finch v. Goldstein, 245 N.Y. 300, 157 N.E. 146 (1927); *accord,* In the Matter of Lugo, 10 Misc. 2d 576, 172 N.Y.S.2d 104 (Ct. of Claims 1958) (dictum), *rev'd on other grounds,* 8 App. Div. 2d 877, 187 N.Y.S.2d 59 (3rd Dep't 1959) (memorandum decision).

[96] N.Y. CIV. PRAC. ACT §§ 1356-1384.

[97] Finch v. Goldstein, *supra* note 95; *accord,* McCabe v. State, 208 Misc. 485, 144 N.Y.S.2d 445 (Ct. of Claims 1947). The latter case points out just how close certification under the Mental Hy-

however, the regulations of the Department of Mental Hygiene provide a substantial deterrent to any commercial transactions contemplated by alleged incompetents.[98]

Prescinding from any questions of legal capacity to make contracts, wills, or deeds, the social consequences of commitment of, for example, a borderline senile of advanced years are not to be taken lightly. Incompetence is but a synonym for insanity.[99] Yet, in many of the instances mentioned above, helpless old persons, very often invalids at the point of death, are sought to be certified to mental institutions.[100] It has also been pointed out that a certain stigma follows the members of the family of an incompetent who are very often required to state the existence of mental illness in the family when applying for insurance policies or even when seeking employment.[101] The proper forum for the balancing of these various interests would seem to be the court, and yet, as has been pointed out, this judicial supervision is initially provided for in only one of the various involuntary commitment procedures.

Conclusions

The inherent medico-legal nature of the problem of commitment of the mentally ill must be recognized. It is an area wherein a delicate balance must be struck between the anxiety over the person's physical health and the respect for his legal rights. Several aspects of the present law, it is submitted, are deficient in the legal safeguards they provide. In the case of helpless aged persons, due process, although provided for in the language of the statute, is often denied in reality.

Although it might be considered a manifestation of extreme naiveté to mention the term "railroading" in this day and age, yet, albeit in a different sense from that originally used, the term is descriptive of a very real problem. This is so, it is submitted, because to deny judicial supervision in the first instance to confused aged seniles, very often confined to bed, is little different, practically speaking, from denying it altogether. Granted the medical safeguards are many, with the final decision concerning admission contingent upon the psychiatric examination conducted by the director of the institution, such protection, as one court has pointed out,[102] is simply inadequate. Concededly, the state has no desire to detain those who are not truly mentally ill, yet two observations must be made. In the first place, if for no other reason than a genuine desire to provide some care for these helpless persons, it seems clear that

giene Law comes to a formal adjudication of incompetency. Although a jury trial is provided for in the first instance under the Civil Practice Act, if the director of a state institution, desirous of having any property a patient might own applied to the payment of his hospital bills, applies for the appointment of a committee, the mere fact that the patient has been certified to the institution will be sufficient proof of incompetence and no jury trial will be necessary. N.Y. CIV. PRAC. ACT § 1374. A committee thus appointed will continue with all the powers of a committee appointed under this article of the Civil Practice Act.

[98] See Rules and Regulations of the Commissioner of Mental Hygiene, General Order No. 10(b), appended to N. Y. MENTAL HYGIENE LAW § 34; *In re* Aliexieff's Will, 94 N.Y.S.2d 32 (Surr. Ct. 1949), *aff'd*, 277 App. Div. 790, 97 N.Y.S.2d 532, *leave to appeal denied*, 277 App. Div. 901, 98 N.Y.S.2d 582 (1950).

[99] In the Matter of Lugo, *supra* note 95.

[100] In this connection it will be noted that one of the persons sought to be certified before Justice Brenner in the instance mentioned in note 60, *supra*, died *one week* after the denial of the application.

[101] *Hearing Before N.Y. Joint Leg. Committee on Problems of the Aging*, at 12 (March 10, 1960).

[102] *Ex parte* Romero, 51 N.M. 201,–, 181 P.2d 811, 813 (1947).

the term "mental illness" has been broadly construed by many doctors. Secondly, and perhaps of greater import, is the fact that the determination of incompetence often involves a "social judgment" which doctors are not necessarily most qualified to make.

An illustration of the latter point is *In the Matter of Burke*[103] where the court refused to appoint a committee for a ninety-five year old man, admittedly suffering from senile debility, but who had already committed his money and property to a trust directing payment to himself for life and to charity after his death. Seeing that the alleged incompetent's affairs were in order, the court refused to disturb the "peaceful serenity" of his old age. The question immediately comes to mind as to the necessity, in the case of a non-ambulatory senile of advanced years, of shunting him off to his death in a mental institution. Custodial care, rather than psychiatric treatment, would seem to be his prime need and if this can be provided only at the cost of a certification of mental incompetency the price is altogether too high.

A major problem, of course, is the lack of such custodial facilities. Such a problem obviously will not be alleviated overnight, but a bill,[104] which died in committee before the 1961 legislature, proposed a definitely forward step. The bill sought to establish a division of geriatrics in the Department of Mental Hygiene, the setting aside of geriatric wings or wards in the existing state mental institutions, and the admission into such state mental institutions of *non-psychotic aged and infirm persons and other persons not mentally ill.*[105] Actually the bill would merely have given legal sanction to a practice which the department has been utilizing for some time, that is, caring for elderly persons not truly ill, in segregated quarters,[106] but it no longer would have required the certification of mental incompetence. Although several similar bills have failed to obtain passage in recent years,[107] the proposal provided a basic solution to the specific problem and should be given increased attention and support in the next session of the legislature.

Another bill[108] of lesser magnitude, also killed before a legislative committee this year, is worthy of mention. This proposed legislation would have made state institutions responsible for the care and treatment of *helpless aged persons* of the state as well as for the care of the mentally ill. A new subdivision would have been added to section 74 providing that:

> A helpless aged person or dotard may be admitted to a state hospital in the same manner as a person alleged to be mentally ill. . . .[109]

Such a provision, though narrower in scope than the first bill mentioned, is evidently to be preferred to the present situation where the court is often faced with the alternative of either providing no care for a helpless aged person or certifying him mentally ill when such is not the case.

The existing provisions for certification of the mentally ill in New York are confused and disoriented. They present a staggering and often overlapping variety of tests for admission and periods of detention. In only one section is there any true opportunity for judicial surveillance despite the expressed desire of members of the

[103] 125 App. Div. 889, 110 N.Y. Supp. 1004 (1st Dep't 1908).
[104] S. Int. 1563, Pr. 1604 (1961).
[105] *Ibid.*
[106] S. Int. 1563, Pr. 1604 (1961).
[107] See N.Y.S. LEG. ANN. 591 (1957).
[108] A. Int. 434, Pr. 434 (1961).
[109] A. Int. 434, Pr. 434 § 2 (1961).

judiciary to undertake such a burden. Such is the state of the law in an area where "the persons involved are usually incapable of asserting their rights and privileges in their own behalf."[110]

Section 71, insofar as people will voluntarily avail themselves of it, currently provides one very satisfactory method of treating the problems in the area. The shorter periods of detention and waiting after indicating a desire to leave serve both to encourage wider use of this procedure and diminish any possible constitutional objections.

Section 72, as we have already indicated, appears to have little justification. Provision could just as easily be made for the public health officer to apply under sections 74 or 75 depending upon the urgency of the situation. In any case there does not seem to be any reason for a sixty-day detention period when but ten days are permitted under section 75.

Section 73 is based on a fictional test of consent which, when applied to helpless old persons, offers the form of a legal safeguard without the substance. Since the alternatives in this area of the senile aged are often poor at best, the very minimum requirement should be that of placing the application before the courts so that they, as the guardians of the alleged incompetent's legal rights, will at least have a say in determining whether or not some other course is open in providing care for an individual who may not be mentally ill at all.

Section 73-a likewise provides little more than a speedy conduit for effecting the confinement of the confused and embarrassed senile. As a practical matter, notice to him is most often dispensed with, and if, as we hypothecate, he is alone and unwanted, it is not likely that any application for discharge will be made in his behalf so as either to bring about his release or, at least, a judicial inquiry. Serious consideration should be given to the revision of both of the above sections so as to provide adequate safeguards for the aged.

Section 74 is the basic section to which all of the other sections dealing with involuntary commitment ultimately look for fulfillment of the requirement of due process. Although a hearing is mandatory only upon application, the petition and physicians' certificates are before the court and the court can order a hearing or demand further proofs in its discretion. Some consideration at least is given to the legal aspects of the problem. This section would have been greatly enhanced by the passage of either of the above-mentioned bills allowing certification as helpless aged persons rather than as mental incompetents in all cases.

Section 75 makes the necessary provision for emergency care and treatment while awaiting the outcome of a section 74 proceeding. The tests of need for immediate care or public safety do not make it particularly applicable to the problem of the aged. The length of the detention period is reasonably short and the advantages of hospital confinement over imprisonment while awaiting a hearing need not be demonstrated.

The words of a prominent proponent for reform in this area serve as an appropriate conclusion:

> Until we remedy this situation we go counter to our Judaeo-Christian heritage and our American tradition which teaches us to up-

[110] In the Matter of Neisloss, 8 Misc. 2d 912, 171 N.Y.S.2d 875 (Westchester County Ct. 1957).

APPENDIX

COMMITMENT OF THE MENTALLY ILL IN NEW YORK

N. Y. MENTAL HYGIENE LAW SECTION:	ADMISSION BY:	TEST FOR ADMISSION	INITIAL MAXIMUM LENGTH OF DETENTION	METHOD OF EXTENDING DETENTION PERIOD
71	Voluntary Application	————[1]	15 days and thereafter until 10 days after patient gives written notice of his intent to leave	
72	Certificate of Public Health officer	Dangerous to himself or others and need for immediate care and treatment[1]	60 days	Health officer has patient re-examined by 1 or 2 physicians and, if found mentally ill, the patient's admission will be sought under Sections 73 or 74.
73	Certificate of one physician plus a petition	If the patient does not object thereto[1]	60 days and thereafter until 15 days after patient gives written notice of intent to leave	Director certifies need for further care to court. After notice is given or dispensed, the court may issue order forthwith (or hold a hearing).
73-a	Certificate of two psychiatrists or one psychiatrist and one physician plus a petition	————[1]	60 days but if during that time patient gives written notice of intent to leave Director has 5 days to effect his admission under Section 74.	Seek patient's admission under Sections 71 or 73. If that fails apply for court order under Section 74.
74	Certificate of two examining physicians plus a petition plus a hearing if specific application is made for one	Court[2] must be satisfied of the need for care and treatment[1]	60 days	Director files certificate of further need for care and treatment with county clerk. Upon filing the original order becomes final and patient is kept till discharged.
75	Certificate of two physicians plus petition	Public safety demands it or person's condition is such that he would benefit from immediate care and treatment[1]	10 days	Seek admission under Sections 71 or 73. If that fails apply for court order under Section 74.

1. *The Director of the mental institution must be satisfied of the need for care and treatment because of mental illness.*
2. *Any court of record.*

hold the dignity of man and avoid his being discarded as a human being simply because he is helpless and no longer productive.[111]