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establishments, to prevent discrimination by interpreting the meaning of business establishments in a broad manner. Thus, it has been held that the following transactions involve business establishments: the sale of a private home by a real estate broker;[48] a real estate transaction made by the owner.[49]

Conclusion

While the law has recently begun to recognize that discrimination in housing is an evil to be eradicated, the enforcement of such a policy, as indicated above, may sometimes frustrate the efforts to accomplish this. For example, in *Redd* v. *Zier*[50] a finding by the Commission for Human Rights that the defendant did discriminate, was of no value to the plaintiff. During the course of the fact finding the defendant was free to lease to another. Because it narrowly interpreted Section 300 of the New York Executive Law as granting *exclusive* jurisdiction to the Commission, the court refused to issue a preliminary injunction. However, it could have justified the granting of such an injunction by a broad construction of the first sentence of section 300 which provides: "The provision of this article shall be construed liberally for the accomplishment of the purposes thereof."[51] If the injunction were phrased to permit the defendant to lease all apartments but the one in question, it would have subjected him to no economic hardship.

In conclusion it can fairly be stated that statutes prohibiting discrimination in housing are justified on both constitutional and moral grounds. But the passage of statutes alone will not solve the problem. Because of the real conflict between personal and property rights which this area presents, there will still remain a difficult problem of enforcement.

[48] Vargas v. Hampson, 20 Cal. Rep. 618, 370 P.2d 322 (1962); *accord,* Lee v. O'Hara, 20 Cal. Rep. 617, 370 P.2d 321 (1962).

[49] Burks v. Poppy Constr. Co., 20 Cal. Rep. 609, 370 P.2d 313 (1962).

[50] 229 N.Y.S.2d 582 (Sup. Ct. 1962).

[51] N.Y. EXECUTIVE LAW § 300.

Recent Decision: Mandatory Commitment Under Insanity Statutes

Recently, in *Lynch v. Overholser,*[1] the United States Supreme Court reversed a Court of Appeals decision which denied an application for a writ of habeas corpus instituted by one acquitted of a crime by reason of insanity and subsequently committed under Section 24-301(d) of the District of Columbia Code.[2] At the trial of the petitioner, who was indicted for issuing checks with the intent to defraud, the issue of insanity was raised by the prosecution over petitioner's objection. The petitioner contended that the statute was unconstitutional because it required commitment of persons acquitted of crimes on the ground of insanity without a determination of the accused's present state

[1] 369 U.S. 705 (1962).

[2] D.C. CODE ANN. § 24-301(d) (1961). "If any person tried upon an indictment or information for an offense . . . is acquitted solely on the ground that he was insane at the time of its commission, the court shall order such person to be confined in a hospital for the mentally ill."

of mind. The Court found it unnecessary to consider the constitutional question but *held* that the statute did not apply to the petitioner since at no time during his trial did he raise or plead the defense of insanity. Discussing the fact that the statute was not applicable, the Court found that if section 24-301(d) were applicable to the petitioner there would be "an anomalous disparity between what section 24-301(d) commands and what section 24-301(a) forbids."[3] Whereas section 24-301(d) would compel post-trial commitment merely on evidence of the government which raised a reasonable doubt of the accused's sanity, section 24-301(a) would prohibit pretrial commitment unless the government were able to prove, by a preponderance of the evidence, that the accused is presently insane.[4]

The District of Columbia did not provide for mandatory commitment of persons acquitted of any crime on the ground of insanity until 1955. There is little doubt that the primary cause of its adoption was the decision of the Court of Appeals in *Durham v. United States,*[5] which set up a new standard to determine the criminal responsibility of allegedly insane defendants in the District of Columbia. There the court held that if a defendant's unlawful act is the product of a mental disease or mental defect, he is not criminally responsible. The effect of the decision was to create fear and speculation that many criminals, who were not insane, would be acquitted on grounds of insanity and thus be set free to prey upon the public.[6]

New York did not provide for mandatory commitment until as recently as 1960.[7] Previous to the amendment of Section 454 of the Code of Criminal Procedure, New York required commitment of an acquitted only if the court was of the opinion that to release him would be dangerous to the public peace and safety.

In order to be able to discuss the constitutional validity of committing a person without a hearing to determine his present sanity, it is necessary to examine what the jury determines when it acquits an accused on the ground of insanity. Both the District of Columbia and New York require that the burden of proving the sanity of the defendant, once it is brought into issue in a criminal proceeding, is always on the prosecution since sanity is one of the elements necessary for the conviction of the accused.[8] In *Tatum* v. *United States,*[9] the Court of Appeals for the District of Columbia held that it is the trial court's function to determine whether or not the question of sanity has been put in issue. If it has, then it should be submitted to the jury with the instruction that if the

[3] Lynch v. Overholser, *supra* note 1, at 713-14; D.C. CODE ANN. § 24-301(a) (1961).

[4] Lynch v. Overholser, *supra* note 1, at 714.

[5] 214 F.2d 862 (D.C. Cir. 1954).

[6] Halleck, *The Insanity Defense in the District of Columbia—A Legal Lorelei,* 49 GEO. L.J. 294, 306 (1960); Krash, *The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia,* 70 YALE L.J. 905, 941-42 (1961).

[7] N.Y. CODE CRIM. PROC. § 454(1). "When the defense is insanity of the defendant the jury must be instructed, if they acquit him on that ground, to state that fact in their verdict and if the defendant is so acquitted the judgment shall so state. In the event of such acquittal, the court shall order the defendant to be committed to the custody of the commissioner of mental hygiene to be placed in an appropriate institution. . . ."

[8] Tatum v. United States, 190 F.2d 612 (D.C. Cir. 1951); Walker v. People, 88 N.Y. 82 (1882).

[9] Tatum v. United States, *supra* note 8.

jury has a reasonable doubt of the defendant's sanity, there must be an acquittal.[10] It would seem to follow that if the jury is to acquit because of a reasonable doubt as to the accused's sanity, the defendant has not been adjudged to be insane either at the time of the trial or at the time the crime was committed.[11]

The fact that the accused is committed on the basis of a jury's verdict, which is not an affirmative finding that the accused is insane or ever was insane, has not been considered to be a due process objection which requires a pre-commitment hearing. In *Ragsdale* v. *Overholser*,[12] a petitioner who had been committed pursuant to section 24-301(d) instituted a writ of habeas corpus proceeding seeking his release. The petitioner contended, *inter alia*, that (1) the statute was not applicable to him because the jury's verdict did not establish that he was insane and therefore a hearing to establish insanity is required prior to his commitment; and (2) that if the statute is held to be applicable then it is a deprivation of due process as it does not require a hearing to determine his insanity.[13]

In answering the first contention, the court found that the reasonable doubt entertained by the jury as to the petitioner's sanity at the time of committing the illegal act is a continuing doubt of present sanity which justifies the applicability of the statute.[14] Dismissing the second contention, the court held that the statute was not unconstitutional because Congress had only provided a reasonable method for protecting the public interest which is superior to the right of the petitioner to be free pending a determination of his present sanity.[15] Furthermore, the petitioner could contest the legality of his detention by recourse to habeas corpus.[16]

While New York as yet has had no judicial interpretation of section 454 since its amendment, the Appellate Division in *People* ex rel. *Peabody v. Chanler*[17] held that commitment without a hearing was a valid exercise of the police power of the state for the protection of the public.[18] It was the opinion of the court that the right of the petitioner to institute a habeas corpus proceeding is a sufficient protection of the liberty of the committed to meet constitutional requirements.[19]

However, in *In re Boyett*,[20] the Supreme Court of North Carolina reached a different result. That court found that an order committing a person to a mental institution was essentially a judgment by which a person is deprived of his liberty, and that such

[10] *Id.* at 616. The same rule applies in New York. People v. Egnor, 175 N.Y. 419, 67 N.E. 906 (1903).

[11] For a contrary view see Orencia v. Overholser, 163 F.2d 763 (D.C. Cir. 1947) where the court of appeals ruled that when a defendant is committed pursuant to an acquittal on grounds of insanity, there is no need for a second trial to determine his present sanity especially since the jury has already tried that issue. *Id.* at 764. The Appellate Division in New York seems to reach the same result in People *ex rel.* Peabody v. Chanler, 133 App. Div. 159, 161, 117 N.Y. Supp. 322, 323 (2d Dep't), *aff'd mem.*, 196 N.Y. 525, 89 N.E. 1109 (1909).

[12] 281 F.2d 943 (D.C. Cir. 1960).

[13] *Id.* at 946.

[14] *Id.* at 947.

[15] *Id.* at 949.

[16] *Id.* at 948.

[17] 133 App. Div. 159, 117 N.Y. Supp. 322 (2d Dep't), *aff'd mem.*, 196 N.Y. 525, 89 N.E. 1109 (1909).

[18] *Id.* at 162-63, 117 N.Y. Supp. at 325.

[19] *Id.* at 163, 117 N.Y. Supp. at 325.

[20] 136 N.C. 415, 48 S.E. 789 (1904).

a judgment cannot be pronounced unless there is a trial of the issue upon which it is given.[21]

Habeas corpus is not the only means available to a person who seeks release from the institution to which he has been committed. In the District of Columbia, the committed can obtain a certificate from the superintendent of the hospital to the effect that the committed has recovered his sanity and if released will not be dangerous to the public or himself. When filed with the committing court, this certificate will secure the committed's release unless either the court or the Government objects. Upon such objection, the court will order a hearing at which the person seeking release must prove the contents of the certificate.[22] In the event that the certificate is denied by the superintendent and the committed must rely on habeas corpus,[23] he must not only prove his right to be released but must also show that the denial of the superintendent was arbitrary or capricious.[24] The attempts to sustain this burden have been many and the successes few.

In New York the procedure is quite different. Release of the committed can be obtained in either of two ways:

(1) Upon application to the court which ordered the commitment by the Commissioner of Mental Hygiene along with his report that the committed, if released, will not be dangerous to himself or to the public.[25] The court, if satisfied with the report, will order the release of the committed on conditions which it deems necessary. If not satisfied, the court will order a hearing at which the committed may introduce evidence showing his right to be released.[26]

(2) Upon direct application to the court by the committed. The court will then require a report from the Commissioner as to the committed's right to be released. The court will then either order the release or a hearing at which the procedure outlined in the first method will be followed.[27]

It is interesting to note that New York, unlike the District of Columbia, does not require a showing that the committed has recovered his sanity in order to qualify for release; all that is necessary is a showing that, if released, the committed will not be dangerous to himself and others. Also, in New York a committed seeking release by direct application to the court does not have to prove any arbitrary or capricious acts of the Commissioner in order to be successful in his action.

The procedure of not requiring, and not even providing for, a hearing prior to commitment is in sharp contrast with the policy which the legislatures of both jurisdictions have adopted in civil commitment proceedings. Section 76 of the New York Mental Hygiene Law and Section 21-312 of the District of Columbia Code provide that allegedly insane persons have upon request a right to a jury trial before they can be committed to an institution. Such request does not have to be made by the

[21] *Id.* at 420, 48 S.E. at 791; see also Morgan v. State, 179 Ind. 300, 101 N.E. 6 (1913), where the court upheld the constitutionality of a commitment statute because it contemplated a hearing to determine the present sanity of the accused before he could be committed.

[22] D.C. CODE ANN. § 24-301(e) (1961).

[23] D.C. CODE ANN. § 24-301(g) (1961).

[24] Overholser v. Russell, 283 F.2d 195 (D.C. Cir. 1960).

[25] N.Y. CODE CRIM. PROC. § 454(2).

[26] N.Y. CODE CRIM. PROC. § 454(3).

[27] N.Y. CODE CRIM. PROC. § 454(5).

allegedly insane person but can be made on his behalf by a relative or friend. In New York this right to a jury trial is unqualified and upon request the court must summon a jury and try the issue.[28]

Undoubtedly, the legislatures by guaranteeing a jury trial in civil commitment proceedings were insuring the allegedly insane person's right to liberty which cannot be deprived without due process of law. If this be so, the question then arises whether a person who has been acquitted of a crime because of insanity should be treated differently than the ordinary citizen who may also be insane? The Court of Appeals in *Overholser v. Leach*[29] held that mandatory commitment applies to an exceptional class of people who are treated differently by Congress than persons who have somewhat similar mental conditions, but who have not committed offenses and obtained verdicts of not guilty by reason of insanity.[30]

Although the great weight of authority has held that commitment statutes, both mandatory and discretionary, are constitutional notwithstanding the absence of prior hearings, some commentators have expressed doubts as to their constitutionality where the commitment is for long periods. Judge Fahy in his concurring opinion in *Ragsdale* felt that society should not be able to continue to deprive a person of his liberty simply upon a jury's mere doubt as to his sanity.[31] Such a situation would transform hospitals into penitentiaries where a person could be held indefinitely for no convicted offense.[32] Judge Fahy thought that the constitutionality could be saved if civil commitment proceedings are instituted if the committed person does not respond to treatment within a reasonable time.[33]

The report of a special committee of the Association of the Bar of the City of New York,[34] which studied commitment procedures in New York, made no mention of constitutional doubt where commitment is for long periods. However, the committee did express the view that if any constitutional vice does exist,

> it probably lies less in the automatic commitment as such than in a possible insufficient guaranty that the patient will receive good medical treatment, will be followed up with the continuing solicitude for his freedom, and will be released as soon as his welfare and that of the community allow.[35]

The committee recommended that a system be provided for periodic court review of the retention of defendants in mental hospitals, not only those acquitted by reason of insanity but any other person being detained by a hospital pursuant to an order of a criminal court.[36]

The position of the committee seems to

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[28] Sporza v. German Sav. Bank, 192 N.Y. 8, 84 N.E. 406 (1908).

[29] 257 F.2d 667 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 1013 (1959).

[30] *Id.* at 669-70. *But see* In re Boyett, *supra* note 20, where that court said that a person acquitted on grounds of insanity is entitled to all of the protection and constitutional rights as if acquitted on any other ground.

[31] Ragsdale v. Overholser, 281 F.2d 943, 950 (D.C. Cir. 1960).

[32] *Ibid.*

[33] *Ibid.*

[34] SPECIAL COMM. OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK TO STUDY COMMITMENT PROCEDURES, MENTAL ILLNESS AND DUE PROCESS (1962).

[35] *Id.* at 243.

[36] *Ibid.*

be that there is nothing constitutionally improper with commitment without a hearing provided the purpose of the commitment is to allow an opportunity for examination of the committed in order to determine his sanity. The evil which the committee fears is that once committed, a person may not receive the treatment necessary to secure his eventual release. The possibility that such would occur is not at all unlikely in light of the overcrowded conditions of the state's mental hospitals.

However, the suggestion that a system of periodic review be established does not seem very practicable. No doubt, the implementation of such a system would be extremely burdensome on the judiciary which is already heavily laden with work. Of the two proposals which would overcome the constitutional shortcomings of the commitment statutes, Judge Fahy's suggestion would seem to be the more desirable since it would not be as burdensome on the judiciary as would a system requiring periodic review of all patients. In any event, both positions point out that some action is necessary to prevent the detention of persons in mental hospitals unless founded upon some type of judicial authority.

However, notwithstanding the fact that the District of Columbia has held that its mandatory commitment statute is constitutional, the Supreme Court, when squarely faced with the question of commitment without a prior hearing, may hold to the contrary. In the present case the Court was only required to pass on the applicability of the District of Columbia statute. Nonetheless, it is interesting to note that the Court found that if mandatory commitment were applicable to one who did not plead insanity, an anomalous disparity would exist—section 24-301(d) would compel post-trial commitment on the mere doubt of the jury, while section 24-301(a) would prohibit pretrial commitment unless the Government could prove the insanity of the accused by a preponderance of the evidence.[37]

Therefore, the question of the validity of a statute requiring commitment of those acquitted of crimes by reason of insanity when *insanity is pleaded as a defense* is still in doubt. The Supreme Court may well find that a jury's mere doubt as to sanity as the basis for commitment without a pre-commitment hearing is, with respect to due process requirements, unconstitutional.

[37] Lynch v. Overholser, 369 U.S. 705, 713-14 (1962).