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The Civil Commitment Process

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The Palestinian people's resistance and "struggle for self-determination and liberation," and that of its representative organ, the P.L.O., is thus accorded a status in international law. In addition, their right to self-determination is declared to be a "basic human right." This right may be most constructively interpreted as embracing a wide variety of methods including the implementation of Palestinian rights through political-legal techniques. It is significant that the resolution calls upon those states which are committed to the ideals of freedom and peace to provide both moral and material assistance. Consequently, such assistance may not be interpreted as illegal acts of intervention.

These resolutions of the U.N. General Assembly provide the recognition of the rights of the Palestinian people and the basis in international legal authority for the Palestinians themselves and other concerned members of the world community to take steps toward their implementation.

A workable conception of international law requires not only the formulation of legal principles based upon justice, but also their effectuation. In this respect, international law operates very much in the same way that an individual operates in taking steps from ideas to words and then to actions. The words set forth in international legal principles will remain as vacuous and as misleading as Nixon's pre-1968 political rhetoric unless they are recognized as applicable to particular entities and then practically implemented through specific enforcement and sanctions. Yet, whether or not effective sanctioning processes can be applied to achieve the recognized rights of the Palestinian people through peaceful means based upon justice under international law is another question. The impending Geneva Peace Conference may render this justice to the Palestinian people, but not unless they are represented by the P.L.O. as a principal to any negotiations or treaties.

But if this justice does not come to the Palestinian people, whose tragic plight has already challenged the integrity and credibility of the United Nations and the legal principles which its Charter embodies, not only will there be oil shortages, but also continual bloodbaths, arising from recurrent instances of terror and violence, will befall Israel and its sympathetic allies in the world community.

STEFAN TOLIN

The Civil Commitment Process

The Practising Law Institute has published a handbook entitled *Legal Rights of the Mentally Handicapped*.¹ The work, as stated in its foreword, strives to organize the most significant written materials avail-

¹ B. J. ENNIS & P. R. FRIEDMAN, *LEGAL RIGHTS OF THE MENTALLY HANDICAPPED* (Criminal Law and Urban Problems No. 57, 1973).

able on a class that is one of society's most oppressed groups—the mentally ill.

It is important that a lawyer, who is interested in the plight of the mentally disturbed, understand the civil commitment process and the rights of these people.

Herbert Silverberg states in *The Civil Commitment Process: Basic Considerations*,² that standards for civil commitment vary with the purposes it is thought to serve. In other words, any mental commitment action on the part of the state must be reasonably related to the achievement of a legitimate and substantial governmental purpose. If the standards are not reasonably related to the purposes to be served—if the law as designed cannot achieve its stated objective—then the law may be unconstitutional.³ In speaking of the legal status of patients, Silverberg points out that “voluntary, informal, and non-protesting status implies either a desire on the patient's part or at least some degree of willingness on the patient's part to be a patient.”⁴ Hence, as stated in the case of *Shelton v. Tucker*, “even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.”⁵

In referring to the legal procedures involved in commitment, Silverberg points out that a few states provide for prompt judicial hearings into the reasonableness of the seizure when one has been detained for commitment. He cites the case of *In re Barnard*,⁶ which held that a patient was entitled to an early judicial finding of probable cause in determining whether he should be committed. The author also states that the sooner an attorney makes his presence known to the patient and the authorities, the less likely the patient will ultimately be committed. Silverberg notes that when maximum-lawyer attention was devoted to testing the validity of the early stages of hospitalization, the commitment rate dropped substantially. It is important that the lawyer inform the client and the client's relatives of the alternatives available; that the hospital personnel know of the lawyer's involvement in the patient's case; that the patient's lawyer take advantage of inspecting hospital records available to him and thoroughly question hospital authorities as to his client's mental state.

Five significant due process rights will be discussed here, based on Lawrence Schwartz's *Civil Commitment Process: Established and Emerging Rights*.⁷ The rights to be discussed are: the right to counsel, the

² *Id.* at 103-112.

³ *Id.* at 105.

⁴ *Id.* at 106.

⁵ 364 U.S. 479, 488 (1960).

⁶ 455 F.2d 1370 (D.C. Cir. 1971).

⁷ LEGAL RIGHTS OF THE MENTALLY HANDICAPPED, *supra* note 1, at 113-29.

right to independent expert examinations, the right against self-incrimination, proof beyond a reasonable doubt, and the right to trial by jury.

Due process, in relation to persons subject to civil commitment, means that one is entitled to notice, a hearing, and the right to be present and establish a defense.⁸ The court in *Lessard v. Schmidt* held that mere notice of the date, time, and place of a full hearing in a civil commitment proceeding is not satisfactory. The person should be informed of the basis for his detention, his right to jury trial, the standards upon which he may be detained, the names of examining physicians and all other persons who may testify in favor of his continued detention, and the substance of their proposed testimony.⁹

Regarding the right to counsel, *Lessard v. Schmidt* stated that a person detained on grounds of mental illness has a right to counsel and to have counsel appointed if the individual is indigent.¹⁰ Counsel is essential at each stage of the proceeding in order to:

1. Explain and humanize the proceedings for the patients,
2. Investigate the case,
3. Assist and speak for the patient at hearings,
4. Exercise the right to jury trial and preliminary hearings,
5. Line up expert witnesses, produce evidence and attack false assertions by the government,
6. Cross-examine government witnesses,
7. Prepare the patient and patient's witness to testify,
8. Advise the patient whether to contest the proceeding,
9. Prepare the patient for a commitment,
10. Investigate the government plan for treatment and suggest alternatives.¹¹

In relation to waiver of the right to counsel, *Johnson v. Zerbst* stated that "the sixth amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel."¹² Lawrence Schwartz in his *Civil Commitment Process*,¹³ states that "the argument against waiver of counsel is stronger in civil commitment proceedings than in criminal indictments, given the allegations of mental instability intrinsic to the proceedings." The court in *Dooling v. Overholser* noted that "such a person (mentally ill) cannot be deemed by the courts to have intelligently waived the statutory right to be represented by counsel."¹⁴

⁸ *Id.* at 115.

⁹ *Lessard v. Schmidt*, 349 F. Supp. 1078, 1092 (E.D. Wis. 1972).

¹⁰ *Id.* at 1097.

¹¹ LEGAL RIGHTS OF THE MENTALLY HANDICAPPED, *supra* note 1, at 117-18.

¹² 304 U.S. 458, 463 (1938).

¹³ LEGAL RIGHTS OF THE MENTALLY HANDICAPPED, *supra* note 1, at 119.

¹⁴ 243 F.2d. 825, 829 (D.C. Cir. 1957).

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Important to the patient and to the patient's counsel is the assistance of an independent expert psychiatrist or psychologist. Where the patient is an indigent, the expert should be provided at the expense of the government. If there is a trial or hearing of the patient's case, the independent expert is helpful in aiding the lawyer in effectively cross-examining the government's experts; presenting testimony that the patient is not mentally ill, or if ill not dangerous; and pointing out the difficulty in predicting dangerousness. The case of *Dixon v. Attorney General of the Commonwealth of Pennsylvania* held that the client is entitled to independent expert examinations and assistance in preparation for the hearing, through court appointment where the subject cannot afford to retain these services.¹⁵ Also, the court stated in *Whalen v. U.S.*, "it may sometimes be impossible for counsel to render effective assistance without an opportunity to consult psychiatric experts in order to understand the requisites of examination and to assess the meaning and reliability of diagnosis."¹⁶

Regarding the right against self-incrimination, the *Lessard* case stated, "the patient should be told by counsel and the psychiatrist that he is going to be examined with regard to his mental condition, that the statements he may make may be the basis for commitment, and that he does not have to speak to the psychiatrist."¹⁷ The question should be asked, "can it be assumed that an individual subject to involuntary commitment is competent to waive these rights?"

Schwartz notes that the majority of courts recently considering the question of the government's burden of proof in civil commitment have held that "beyond a reasonable doubt" is fundamental to due process.¹⁸

Furthermore, Schwartz points out that a few state statutes make provisions for a right to jury trial in civil commitment, but the author is unaware of any judicial holding that this right is constitutional. Schwartz states: "most of the arguments in support of this right can be adapted from the dissenting opinion of Justice Douglas in *Mackeiver v. Pennsylvania*: 1. Deprivations of liberty in civil commitments are usually no less and often greater in length than minor misdemeanors, for which there is a constitutional right to jury trial, 2. The penal non-rehabilitative nature of mental institutions are often indistinguishable or even worse than criminal incarceration, necessitating the availability of all criminal rights protections, 3. A jury would protect an individual from the bias and prejudice of an individual judge and reduce the margin of error."¹⁹

¹⁵ 325 F. Supp. 966, 974 (M.D. Pa. 1971).

¹⁶ 346 F.2d. 812, 823 (1965).

¹⁷ 349 F. Supp. at 1101.

¹⁸ LEGAL RIGHTS OF THE MENTALLY HANDICAPPED, *supra* note 1, at 127.

¹⁹ *Id.* at 128.

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CONCLUSION

Although existing statutes and court decisions grant to the mentally ill: the right to counsel, the right to independent expert examinations, the right to the privilege against self-incrimination, proof beyond a reasonable doubt, and the right to trial by jury; these privileges are often abused by indifferent parties. Contemporary lawyers have an obligation to make sure that the mentally ill are accorded those rights deserving them.

LABAT YANCEY

Municipal Liability Under Section 1983 of the Civil Rights Act.

Local administrative and governmental units of the several states in recent years have found themselves party defendants in litigation involving alleged violations of § 1983 of the Civil Rights Act.¹ Most cases have been concerned with school desegregation,² discrimination in hiring or firing by local school boards,³ denial of due process,⁴ and police brutality in which the plaintiffs seek to hold the city or county ultimately liable.⁵

Whether these public entities are proper defendants, and if so, for what forms of relief is one of the most unsettled technical problems in such litigation.

The Supreme Court of the United States in an opinion by Justice Rehnquist⁶ has attempted to settle the issue in its recent decision of the *City of Kenosha v. Peter G. Bruno*.⁷

The issue has been whether the word "person" in § 1983 of the Civil Rights Act includes a municipality, or governmental agency, or unit thereof for legal or equitable relief. The Supreme Court in *Bruno* stated an emphatic "no!"

¹ 42 U.S.C. § 1983 (1964) provides:

Every person who under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

² *Wheeler and Spaulding v. Durham City Board of Education No. 5*, Civil Nos. D-60 and C-116-D-60 (M.D.N.C.).

³ *Harkless v. Sweeney, Ind. School Dist.*, 300 F. Supp. 794 (S.D. Tex. 1969), *rev'd* 427 F.2d 319 (5th Cir. 1970), *cert. denied* 91 S.Ct. 451 (1971).

⁴ *City of Kenosha, Wisconsin v. Peter G. Bruno* 93 S.Ct. 2222 (1973).

⁵ *Carter v. Colson* 477 F.2d 358 (D.C. Cir. 1971).

⁶ For connotation of this statement see Washington, *Essays in Repression: First Term Opinions of Mr. Justice Rehnquist*, 4 N.C.C.L.J. 53 (1972).

⁷ 93 S.Ct. 2222 (1973).