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Commitment of the Mentally Ill in Ohio

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NOTES

Commitment of the Mentally Ill in Ohio

INTRODUCTION

At 11:30 p. m., on the fifth of July, 1958, Everett M. Kern was awakened in his home by a knock on the door. He was apprehended by four policemen who, upon inquiry, informed him that a warrant had been issued for his detention. Kern was immediately taken to a state hospital for the mentally ill. On July seventh, he was informed that a hearing concerning his competency had been set for July eleventh. Kern was examined by a court appointed psychiatrist on the ninth, at which time it was suggested that further tests be conducted. On July eleventh the hearing was rescheduled for the twenty-second of July, seventeen days after Kern had been taken into custody. At that time Everett Kern was declared mentally competent and discharged by the probate court.[1]

This incident occurred in Cuyahoga County in the State of Ohio. Unknown to Kern, his wife had filed an affidavit with the probate court, stating that she believed her husband to be mentally ill. The warrant for his detention was then issued.

The actual effect of this incident on Kern cannot be completely determined. But it is known that since that time he has lost his business and his children are no longer living with him. Also his name will remain on the probate court records as having been in a hospital for the mentally ill.

The Kern incident indicates what can happen in Ohio under the present detention and commitment statute.[2] Similar incidents[3] which have been made public clearly illuminate the grave shortcomings in this area of the law. Undoubtedly other incidents have also occurred which, for one reason or another, have remained undisclosed. Only by a careful examination of each individual case in the records of the probate court could the true magnitude of this problem be realized.[4]

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1. Cleveland Plain Dealer, Aug. 18, 1960, p. 15, col. 1.

2. See OHIO REV. CODE §§ 5123.18-.23.

3. Mrs. Mary Ropjack, a resident of Cleveland's west side, was detained at a mental hospital overnight upon a warrant issued by the probate court. Hospital officials refused to let her daughter see her that night. The following noon she was released to the custody of her daughter and their attorney. At the hearing she was discharged by the court as being mentally competent. Apparently a neighbor, Mrs. Goda, had sought revenge as a result of a neighborhood feud. Cleveland Plain Dealer, Aug. 13, 1960, p. 1, col. 5.

Robert Vale, a machinist who had worked steadily for fifteen years, was detained in a hospital upon the filing of an affidavit by his wife. He too was discharged by the court at the commitment hearing. There was a pending divorce between Vale and his wife. Cleveland Plain Dealer, Aug. 16, 1960, p. 10, col. 5.

4. The Cuyahoga County Probate Court does not keep a cumulative record of the number

The defects in the statutory provisions are well known to legislators, attorneys and to the probate court and its administrative officers.[5] The purpose of this note is to examine this problem objectively, not to criticize any of the aforementioned groups.

HISTORY OF COMMITMENT PROVISIONS

Provisions for the commitment of the mentally ill were unknown in American law until the first part of the nineteenth century.[6] Prior to that time, the law took little notice of the distinctive character of the mentally ill as a class. Only after mental institutions became prevalent was a system developed for commitment of the mentally ill to such institutions.

The original legislative acts on commitment procedures were very informal. In Illinois, for example, a law was passed in 1851 which provided that married women or infants who were evidently insane or distracted could be placed in a state asylum at the request of a husband or guardian.[7] The final decision rested with the superintendent of such asylum.

With the passing years, there was a great increase in the number of commitments which, in the absence of supervision, resulted in numerous abuses. As a result, in the early part of this century, most states established procedural steps with which a court was made to comply in the commitment of the mentally ill. These procedures continue in force in a majority of those states today.[8] Only a few states, such as Illinois, Pennsylvania and New York, have seen the defects in their procedures and in recent years have made substantial efforts to modernize their commitment laws.

The European countries have been more progressive. Most of those countries, including Russia, have revised their commitment procedures, abandoning practices similar to those which prevail in the United States today.[9]

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of individuals who are ordered detained as a result of someone filing an affidavit, and then discharged as mentally competent at a hearing.

5. Cleveland Plain Dealer, Sept. 2, 1960, p. 12, col. 7. A meeting was held at the request of Judge Frank J. Merrick of the Cuyahoga County Probate Court to discuss problems arising under the present commitment law. Present were Robert Fasciano, Chief Deputy Clerk of that probate court, Alexander Anderson, Executive Director of the Mental Health Association, and Mr. Edmund J. Durkin, a member of the Mental Health Association's Legislative Committee.

6. See DEUTSCH, THE MENTALLY ILL IN AMERICA 426 (2d ed. 1949).

7. Ill. Laws 1851, at 96, 98.

8. See text, pp. 606-07 *infra.*

9. See Patterson, *Hospitalization Procedures for The Mentally Ill in the USSR and Other European Countries,* 21 OHIO ST. L.J. 111 (1960). In many European countries including Russia, the care of the mentally ill is considered a health problem rather than a legal one. Consequently the procedures followed are carried out primarily by health officers or physicians.

History in Ohio

Despite several attempts at renovating its commitment law, Ohio is among those states where archaic procedures remain in force. In 1937 the General Assembly adopted an act[10] which, for all intents and purposes, is still in existence today. This act superseded former General Code sections 1953, 1954 and 1957, which dealt with the admission of insane persons to state hospitals. The new sections[11] provided for the formal commitment by a court order of a class of persons called the "mentally ill." With few exceptions the court commitment procedures adopted in 1937 are still in existence and are now set forth in sections 5123.18, 5123.19 and 5123.23 of the Revised Code.

Besides formal court commitments, there are several other commitment and admission procedures for the mentally ill in Ohio. They are: detention without warrant followed by formal commitment by court order,[12] involuntary temporary admission, and voluntary admission.[13] This note will deal primarily with the ramifications of the present court commitment law.

OHIO COMMITMENT AND ADMISSION PROCEDURES ANALYZED

Formal Court Commitment

Formal commitment by a court order is initiated by filing an affidavit in the probate court of the county in which the person thought to be mentally ill "has legal residence or is temporarily residing."[14] The complainant must be a next-of-kin of the person alleged to be mentally ill, or a resident of the county where the affidavit is filed. The affidavit must contain specific information concerning the person alleged to be mentally ill, his next-of-kin, and personal physician.[15]

The filing of the affidavit invokes the jurisdiction of the probate

10. 117 Ohio Laws 550 (1937).

11. Ohio Gen. Code §§ 1890-23 to -27.

12. OHIO REV. CODE § 5123.22.

13. OHIO REV. CODE §§ 5123.44, .45, 5125.31-.38 (Supp. 1960).

14. OHIO REV. CODE § 5123.18.

15. OHIO REV. CODE § 5123.18 requires that an affidavit contain the following information: "(1) The name and present place of abode of such person, also the place of his legal residence, if known, or information that may be necessary to determine his legal residence; (2) A statement that said person is believed to be mentally ill or in need of specialized observation or treatment, or both; (3) A statement as to whether or not such person is violent or dangerous or has suicidal or homicidal tendencies; (4) A statement whether by reason of the mental illness of such person, his being at large is dangerous to the community; (5) The names and addresses of the competent adult next of kin; (6) A statment whether such person had ever been committed to an institution for mental illness or a penal institution, or either, inside or outside the state; (7) The name and address of the patient's last physician and the personal or family physician."

court.[16] The probate judge is then required,[17] under section 5123.19 of the Code, to issue a warrant of detention. This warrant is issued summarily, ordering any police officer, or other suitable person named in the warrant, to take the person alleged to be mentally ill to the place designated in the warrant. Some discretion is allotted to the probate judge with regard to where the person is to be taken and detained. The designated place may be a receiving hospital, state hospital, psychiatric hospital, or perhaps the county jail, depending on the existing facilities within the county at that time.

The person so apprehended is detained at the place designated in the warrant until the time of hearing, unless the probate judge states otherwise. Section 5123.19 directs that the detained person be given a hearing within a reasonable period of time, this period to be determined by the court within its discretion. This procedure, however, allows a detained person, or any other person acting on his behalf, to demand an immediate hearing. Upon such demand the probate court *must* proceed with a hearing within forty-eight hours, in the manner set forth in section 5123.23 of the Revised Code.

At some time prior to the commencement of the hearing an examination of the person alleged to be mentally ill must be made[18] by at least one court appointed physician.[19] A report of this examination is made part of the court record.

Section 5123.21 requires that notice of the hearing be given to the person alleged to be mentally ill as well as to other specified parties.[20] This is the only section of the act for which there is any appreciable amount of case law. In the leading case of *In re Wertz*,[21] the court stated that notice was an essential prerequisite for commitment proceedings in Ohio. When there is no indication in the record that notice of a hearing was given to the detained person, it has been held that the probate court is without jurisdiction to hold a hearing and that, therefore, any commitment made by the court without prior notice of hearing to the detained person is void.[22]

16. 1949 OPS. ATT'Y GEN. (OHIO) 893. The probate court is without authority to inquire into questions of mental illness on its own motion. To invoke the jurisdiction of the court an affidavit is required to be filed pursuant to the statute.

17. OHIO REV. CODE § 5123.19 states in part that "when the affidavit is filed the probate judge shall issue a warrant of detention. . . ."

18. OHIO REV. CODE § 5123.23 (Supp. 1960).

19. The examining physician must have three years' experience as a doctor and be registered to practice in Ohio. OHIO REV. CODE § 5123.23 (Supp. 1960).

20. OHIO REV. CODE § 5123.21 (Supp. 1960). Notice must be mailed, or conveyed by other means, as the court directs, to the detained person, his spouse, and a person selected by the person alleged to be mentally ill. If it would be ineffectual or detrimental to give notice to the detained person, the court may dispense with such notice.

21. 118 N.E.2d 188 (Ohio Ct. App. 1954).

22. *Id.* at 190. See also *In re* Bartlett, 108 Ohio App. 93, 161 N.E.2d 76 (1958); State *ex rel.* Parsons v. Bushong, 92 Ohio App. 101, 109 N.E.2d 692 (1945).

On the hearing date, either the probate judge, or a deputy clerk of the probate court who has been named referee,[23] holds the hearing at the place within the county designated by the probate judge. Proceeding under authority granted in section 5123.23, the judge or referee conducts the hearing, examining the person alleged to be mentally ill and other witnesses called by the court.

Upon completion of the hearing, and after studying the examining physician's report, the probate judge has broad authority under the statute to commit or discharge the person. If he determines that the person is mentally ill and in need of care and treatment, the probate judge may commit the person to a state hospital for the mentally ill, or to the Department of Mental Hygiene and Correction, or to a Veteran's Administration hospital.[24] Also the judge has discretion to order that such person be placed in a receiving hospital, a private hospital, home or institution, a county home, or he may remand the person to the custody of a friend until ordered elsewhere.[25]

Temporary Custody Provision[26]

If it is determined after the hearing that it is not practicable to make a final disposition of the case, the court may order the mentally ill person into the temporary custody of the Department of Mental Hygiene and Correction for a period not to exceed ninety days.[27] During this period the person is re-examined and treated.

Prior to the expiration of the ninety days, if the department finds the person to be mentally competent, he is released to the custody of the court. This release may be considered as evidence of his sanity at the time the court makes final disposition of the case. If at this disposition the probate judge determines that the person is not mentally ill, then an order is issued for his discharge.

When a person is committed pursuant to section 5123.23, he remains under the complete control of the superintendent of the hospital until he is discharged or dies.[28]

Under section 5123.24, the superintendent is given certain powers.

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23. OHIO REV. CODE § 2315.37 allows for such appointment of a referee.

24. When committed to the care of the Department of Mental Hygiene and Correction, the superintendent will have exclusive custody and control of the person. OHIO REV. CODE § 5123.03.

Provisions in OHIO REV. CODE § 5905.02 are applicable when a person is committed to a veteran's hospital.

25. OHIO REV. CODE § 5123.23 (Supp. 1960).

26. See Ross, *Hospitalizing the Mentally Ill — Emergency and Temporary Commitments*, 1955-56 CURRENT TRENDS IN STATE LEGISLATION 461, for an excellent analysis of temporary commitment procedures in the several states.

27. OHIO REV. CODE § 5123.23 (Supp. 1960).

28. While in a state hospital, the patient can not enter into a contract or execute an agreement without approval of the adjudicating body. 1956 OPS. ATT'Y GEN. (OHIO) 662.

He may request the court to order a rehearing or, with the approval of the Director of Mental Hygiene and Correction, he may discharge a person as (1) "not mentally ill" or as (2) "recovered." Such discharge operates as a restoration to competency. The superintendent may also discharge a person as (3) "improved" or (4) "unimproved," neither of which operates as a restoration to competency.[29]

The propriety of the person's original or continued confinement is always subject to review by an appropriate court on a writ of habeas corpus[30] or under certain statutory review provisions.

Emergency Detention[31]

A second Ohio commitment procedure is closely related to the methods just discussed. Under this second type a person may be apprehended and detained *without* warrant by a law enforcement officer, a public health officer, or by some other individual named in section 5123.22. The detaining person must have reasonable cause to believe that the person is mentally ill *and* that he is violent, or dangerous, or has suicidal or homicidal tendencies.[32]

After apprehension the person is taken without unnecessary delay to a receiving hospital, or to the county sheriff, who may detain him without a warrant for a reasonable period of time not exceeding five days. If the patient is to be held longer than five days an affidavit must be filed with the probate court and a warrant of detention issued.[33] The procedure in the probate court then goes forward in the same manner as in the other formal court commitment cases, following the provisions in sections 5123.18 through 5123.23, inclusive, of the Code.

The detention without warrant provisions of section 5123.22 are not unique with Ohio. In many other states, including Illinois,[34] Massachusetts,[35] Michigan,[36] Pennsylvania,[37] and California,[38] there are comparable statutory provisions allowing the emergency detention of deranged persons who are violent or dangerous.

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29. OHIO REV. CODE § 5123.50 (Supp. 1960).

30. 1956 OPS. ATT'Y GEN. (OHIO) 662.

31. See Ross, *Hospitalizing the Mentally Ill — Emergency and Temporary Commitments,* 1955-56 CURRENT TRENDS IN STATE LEGISLATION 461, 485, for an excellent study of emergency detention procedures in the various states.

32. OHIO REV. CODE § 5123.22.

33. *Ibid.*

34. ILL. REV. STAT. ch. 91½, §§ 6-1 to 6-6 (1956).

35. MASS. ANN. LAWS ch. 123, § 78 (1957).

36. MICH. STAT. ANN. § 14.809 (1956).

37. PA. STAT. ANN. tit. 50, § 1184 (Supp. 1960).

38. CAL. W & I CODE § 5050.3 (Supp. 1959).

Admission Provisions

In addition to these commitment procedures, there are two methods for *admission* into a mental hospital in Ohio: (1) *Voluntary admission.* Under this method a person believing himself to be mentally ill presents to a hospital superintendent a written application and a certification[39] by a reputable physician as to his mental competency.[40] (2) *Involuntary temporary admission.*[41] Under this method, upon request of a relative, friend, or law enforcement officer, accompanied by a medical report and written certification by two or more physicians,[42] a person may be admitted into a state hospital.[43] When the patient who has been admitted under either procedure serves notice of his desire to leave, the superintendent may file an affidavit in proper form seeking the commitment of this person for further observation and treatment.[44]

STATISTICAL STUDY OF COMMITMENT

During the period between 1954 and 1959, approximately 5,100 men and 4,300 women were brought before the Probate Court of Cuyahoga County for commitment hearings or rehearings to determine their mental competency.[45] The number has been increasing each year. In 1959, out of 1,960 persons who were brought before the court, 584 men and 663 women were commited to hospitals[46] for the mentally ill located within the county. Another seven persons were ordered by the court to state hospitals outside the county for treatment and care. The court did not make a final determination in 275 cases. Some 412 persons were discharged by the court as being mentally competent.

The Probate Court of Cuyahoga County does not keep a running total of the number of persons who have been detained and later discharged at the original commitment hearings as being mentally competent. Consequently, it is difficult to say how many of the discharged had been "rail-

39. OHIO REV. CODE § 5123.44.

40. OHIO REV. CODE § 5123.45 says that once admitted the voluntary patient may be detained no longer than ten days after he gives notice of his desire to leave the hospital.

41. See OHIO REV. CODE §§ 5125.31-.38 (Supp. 1960).

42. OHIO REV. CODE § 5125.32 provides that the physicians must state that upon examination of the person within ten days prior to his admission they had reasonable cause to believe that he was mentally ill.

43. The person can not be detained longer than four days after he has filed a written request for discharge. OHIO REV. CODE § 5125.312 (Supp. 1960).

44. *Ibid.*

45. Statistics obtained from the psychiatric department of the Cuyahoga County Probate Court.

46. These hospitals are: Veterans Hospital, Cleveland State Hospital, Hawthornden State Hospital, Cleveland Psychiatric Institute, and Columbus State Hospital. The greatest number of persons are ordered to Cleveland State Hospital.

roaded" into receiving hospitals by revenge-seeking complainants who were able to take advantage of the present law.[47]

Whatever the number may be, the fact remains that there are known instances,[48] under the present laws, of persons having been summarily detained and then discharged upon a commitment hearing. These cases have precipitated considerable controversy as to the merits of the present commitment procedure in Ohio.[49] The views of both the supporters and opponents of the law[50] will be presented.

ARGUMENTS FOR THE PRESENT COMMITMENT LAW

Whenever a law comes under the critical attack of a mass medium such as the press, there are few who will openly defend it on its merits for fear of reprisals from the criticizing medium. This rationalization may account for the negligible support of the present commitment procedures in Ohio.

Robert Fasciano, Chief Administrative Deputy of Cuyahoga County Probate Court, stated the case in support of the present law when he said that

> the law is in existence to protect the community as well as the patient. If we [the court] do not detain someone when we are given notice [in the form of an affidavit], what if that person later commits a crime?[51]

It has been further argued that the number of "mistakes"[52] made by the probate court are insignificant in comparison to the general service this law performs for society as a whole.

Less populous rural counties appear to be satisfied with the administration of the present law by their probate courts. During the recent attacks upon the law they have remained conspicuously silent. One reason for their apparent satisfaction is that the courts' administrative officers are acquainted with most of the residents within their jurisdictions and thus they have some personal knowledge of the veracity of an affidavit. In the more populous Ohio counties, however, such as Cuyahoga, Hamilton, Franklin, Mahoning and Summit, it is virtually impossible to know the intent of the complainant.

47. OHIO REV. CODE §§ 5123.18, .19, .21 and .23 (Supp. 1960).

48. See notes 1 and 3 *supra.*

49. There is little controversy over the emergency detention section, 5123.22, or over those provisions which allow a superintendent of a mental hospital to institute formal court-commitment proceedings against a person who has voluntarily entered the hospital or who has been involuntarily taken to the hospital by a relative or friend.

50. OHIO REV. CODE §§ 5123.18, .19, .21, and .23 (Supp. 1960).

51. Cleveland Plain Dealer, Aug. 14, 1960, p. 9-B, col. 5.

52. The Vale and Ropjack incidents are examples of such "mistakes."

RATIONALE OF THE DISSATISFIED

Judges, probate court officers, legislators, attorneys, and private citizens have criticized the present court commitment procedures in Ohio.

The Courts' Criticism

The crux of the problem in the commitment statutes, according to Judge Frank J. Merrick, Cuyahoga County Probate Judge, lies in section 5123.19 of the Revised Code. This section states that "when an affidavit is filed . . . the probate judge *shall* issue a warrant of detention." (Emphasis added.) Judge Merrick has stated that under the present law, once an affidavit is filed, the court has no choice but to issue a warrant to hospitalize a person until a hearing can be held.[53]

It has been suggested that clerks of the psychiatric departments of the probate courts question the complainant before he files his affidavit. Should the clerks do this, according to Judge Merrick, they would be exceeding their authority under the present law.[54] And even when the clerks disregard this fact and try to screen out frauds, they are still helpless in the face of the law to prevent the affidavit from being filed by the demanding complainant.

Thus the law has created a rather strange situation. The probate court's hands are tied until the jurisdiction of the court is invoked by the filing of an affidavit.[55] But when the court's power to act does come into existence, it is bound by law to issue a warrant of detention.

In the past, the Ohio commitment law has been employed by the following classes of persons, among others, to effect the detention of persons not mentally ill: (1) people seeking revenge after domestic or neighborhood quarrels; (2) adults who believe a child is mentally ill merely because he is handicapped; and (3) persons who seek admittance to mental institutions in order to avoid criminal prosecution.[56]

Such complainants are free from any liability, according to section 5123.22 of the Revised Code, if they have acted in good faith in executing the affidavit. Because of the victim's difficulty, in the first two instances, of proving lack of good faith, the courts have seldom allowed him to recover damages for malicious prosecution.[57]

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53. Cleveland Plain Dealer, Aug. 23, 1960, p. 1, col. 4.

54. Cleveland Plain Dealer, Aug. 16, 1960, p. 1, col. 4, indicates that the Cuyahoga County probate clerks do attempt to screen out frauds.

55. 1949 OPS. ATT'Y GEN. (OHIO) 893.

56. Cleveland Plain Dealer, Aug. 25, 1960, p. 1, col. 5.

57. There is no case law in Ohio, but for an example of the rulings in other states see Guzy v. Guzy, 184 N.Y.S.2d 161 (Sup. Ct. 1959).

Criticism by the Civil Liberties Union

The Cleveland chapter of the American Civil Liberties Union, through several of its spokesmen, attorneys Jack G. Day and Stanley Kent, has viewed with quiet alarm the present procedural provisions in the Ohio commitment law.[58] They are especially concerned as to whether the constitutional protections afforded by the due process clause[59] have been violated. Mr. Day has referred to some incidents which have arisen under the present state laws as "spite incarcerations of sane persons." He believes that the detention of an individual for any length of time deprives him of his legal rights to the same extent as if he had been placed in jail.[60]

Mr. Day's statement raises the interesting question as to the constitutionality of commitment laws in general, and in particular, the one in effect in Ohio.

THE CONSTITUTIONALITY OF THE LAW[61]

Toward the end of the nineteenth century the United States Supreme Court recognized that a jury trial was not a constitutional requisite of due process, despite prior dictum to the contrary.[62] Later the Court declared that it was not a constitutional necessity to have a regular trial before some judicial body. It concluded, furthermore, that due process was not necessarily "judicial process."[63]

However, the Supreme Court has specified that two elements are essential for procedural due process. First, notice must be given and, second, a hearing must be held at which time a person may defend himself.[64] The Court promulgated a rule to the effect that substantial rights could not be impaired without an opportunity for the individual to present his case.[65] Certain deviations from this rule have been countenanced, particularly in juvenile delinquency cases.[66] In many of these latter cases, courts have ruled that provisional commitment of a child may precede

58. Cleveland Plain Dealer, Aug. 26, 1960, p. 10, col. 4.

59. U.S. CONST. amend. XIV, § 1.

60. Cleveland Plain Dealer, Sept. 24, 1960, p. 9, col. 1.

61. See Ross, *op. cit. supra* note 26, at 542, for a discussion of the constitutionality of emergency detention and temporary commitment procedures.

62. *Ex parte* Wall, 107 U.S. 265 (1883).

63. United States v. Ju Tay, 198 U.S. 253 (1905).

64. Simon v. Craft, 182 U.S. 427, 437 (1901). See Barry v. Hall, 98 F.2d 222 (D.C. Cir. 1938); State *ex rel.* Fuller v. Mullinax, 364 Mo. 858, 269 S.W.2d 72 (1954).

65. McGregor v. Hogan, 263 U.S. 234 (1923); Twining v. New Jersey, 211 U.S. 78 (1908).

66. *In re* Sharp, 15 Idaho 120, 96 Pac. 563 (1908); Farnham v. Pierce, 141 Mass. 203, 6 N.E. 830 (1886); State *ex rel.* Bethell v. Kilvington, 100 Tenn. 227, 45 S.W. 433 (1898); DeWitt v. Brooks, 143 Tex. 122, 182 S.W.2d 687, *cert. denied,* 325 U.S. 862 (1945).

notice and hearing. In upholding the prior commitment procedures these courts have said that the parents' right to due process is adequately protected if a hearing is provided at subsequent proceedings.

In addition to the juvenile delinquency cases, there are many other legislative and quasi-judicial determinations in which it has been said that due process is satisfied if notice and a hearing are provided for at *some* stage of the proceedings.[67] Should the constitutionality of Ohio's formal court commitment law ever come under attack it would appear that the exception allowed in the juvenile delinquency cases would apply. Section 5123.23 requires that a hearing be held within a reasonable period after detention of the person alleged to be mentally ill. Also, section 5123.21 requires that written notice be mailed to the patient once the hearing date has been set by the probate court. Clearly these statutory requirements meet the test for due process as stated above, for at some stage of the court commitment proceedings notice of a hearing is given to the detained person and he is afforded the opportunity to defend.

Unfortunately, there is no case law in Ohio to support this rationalization. But a federal district court recently stated as dictum, in *Bartlett v. Duty*,[68] that the patient had been fully protected under the Ohio commitment law and had been "granted due process of law in its fullest meaning."[69]

STATUTORY COMPARISON

General Pattern of Procedure

Present-day commitment procedures vary widely in the several states. If a general pattern can be said to have developed, it consists of the following steps: (1) a petition for examination of the person alleged to be mentally ill is filed in the local probate court by a relative or a police officer; (2) notices of the date of the hearing are sent to the allegedly mentally-ill individual and others; (3) one or more physicians are appointed by the court to examine the patient and file a report with the court; (4) a hearing is held; (5) if the judge concludes that the person is mentally ill an adjudication is issued; (6) a commitment to an appropriate institution is ordered; (7) the sheriff's department is ordered to transport the person to a receiving hospital.[70]

The fact that many states have commitment procedures similar to

67. *Ibid.*

68. 174 F. Supp. 94 (N.D. Ohio 1959). Plaintiff sued under sections 1983 and 1985 of title 42 of the U.S. Code, contending that his rights had been invaded by being detained in a mental institution for six days.

69. *Id.* at 98. The court did not consider the constitutionality question because there was no claim that the Ohio commitment statutes were unconstitutional.

70. Patterson, *op. cit. supra* note 9, at 111.

those stated above does not imply that the states have copied commitment procedures from one another. On the contrary, few states have adopted the commitment procedures of sister states. It must be said, however, that six states in recent years have used as a basis for their commitment law the provisions in the Federal Security Agency's Draft Act for the Hospitalization of the Mentally Ill.[71]

Approximately thirty-four states, including Ohio, require a hearing before a judge and the issuance of a court order before commitment may be effectuated.[72] In seventeen of these states, not including Ohio, the law provides for a jury trial on demand of the patient or at the discretion of the judge. Seven states provide that the hearing prior to commitment be made before a special non-judicial tribunal consisting of legal and medical experts and law representatives.

In fifteen states, commitment may be effected without a prior hearing before an independent tribunal. These states merely require that an application for commitment be prepared by a relative or a public official, and that it be accompanied by a certificate from a medical examiner. Both are submitted to hospital authorities at the time the patient is present. The hospital may then hold the patient for an indeterminate period on the basis of these documents. In these states the patient has the right, if he requests it, to a hearing subsequent to his commitment.[73]

Several populous industrial states have commitment procedures which afford greater protection to persons alleged to be mentally ill than do Ohio's procedures. The following analysis of their laws will point out the various modern statutory provisions enacted by these states to provide guarantees of the individual's right to due process of law. It will also emphasize the differences in the commitment procedures adopted by other major industrial states in comparison to those in effect in Ohio.

California

In the preliminary phase of commitment proceedings in California, the petitioner files a verified petition with the court,[74] and not a mere affidavit as in Ohio. The superior court judge upon receipt of the petition is not required by law, as are Ohio probate judges, to order the detention of the person alleged to be mentally ill. Rather, the statute[75] gives the judge broad discretion which enables him to make suitable

71. U.S. Public Health Service, A Draft Act Governing Hospitalization for the Mentally Ill (Pub. No. 51, 1951).

72. AMERICAN BAR FOUNDATION, THE MENTALLY DISABLED AND THE LAW (A DRAFT REPORT OF THE PROJECT ON THE RIGHTS OF THE MENTALLY ILL) (1958).

73. Kittrie, *Compulsory Mental Treatment and the Requirements of Due Process*, 21 OHIO ST. L.J. 28, 39 (1960).

74. CAL. W & I CODE § 5047.

75. CAL. W & I CODE § 5050 (Supp. 1959).

arrangements for a mental examination by two court-appointed medical examiners.

Contrary to Ohio, California requires that the patient be given notice[76] of the medical examination, and that he be permitted to be accompanied to it by a relative or friend. Also, California provides for a hearing if one is demanded by the person thought to be mentally ill. If no hearing is requested, the judge may proceed summarily to determine the person's mental status.

Where the person is detained at, or committed to a hospital as being mentally ill, and he is dissatisfied with the preliminary adjudication, he may demand that the question of mental illness be tried by a judge and jury.[77] In a jury trial, if less than three-fourths of the jury find him mentally ill, he must be discharged.[78] None of these latter provisions as to trial by jury are found in the Ohio Revised Code.

Pennsylvania

In order to secure judicial commitment of an individual in Pennsylvania, an application must be made to any court having jurisdiction. The application must contain a petition and the sworn statements of two qualified physicians. The statements must indicate that the person has been examined by them within two weeks prior to the petition.[79] They must also certify that commitment is necessary. Ohio, unfortunately, does not require that a physician's certificate as to the person's competency be filed with the affidavit. In Ohio, no examination of the person is made prior to his being detained at a hospital.

The Pennsylvania court may effect commitment of the person immediately upon receipt of the petition and a certification by two physicians. Habeas corpus proceedings may be brought by a friend or relative of the committed person at any time. After the petition is filed the court has broad discretionary authority. The judge *may* appoint a commission to inquire into the facts of the case.[80] Upon receiving a report of such commission, the court *may* hold a hearing, and at its conclusion, order the individual committed or discharged.

The Pennsylvania statute,[81] unlike Ohio's,[82] will allow a person to be

76. CAL. W & I CODE § 5050.5.

77. CAL. W & I CODE § 5125 (Supp. 1959).

78. CAL. W & I CODE § 5128 (Supp. 1959).

79. See Note, 107 U. OF PA. L. REV. 668, 674 (1959) for a general discussion of commitment procedure in Pennsylvania.

80. PA. STAT. ANN. tit. 50, §§ 1201-03 (1954).

81. PA. STAT. ANN. tit. 50, § 1206 (1954).

82. Ohio provides for a 90-day temporary commitment period if the judge is unable to make a final determination. This differs from the Pennsylvania law which provides that the *final* order can only be for 90 days.

committed for ninety days after which he must either be discharged or the court must make further provision for his care.

New York

The New York Mental Hygiene Law is quite explicit in outlining the procedure for committing a person to an institution.[83] The statute provides for various methods of temporary, voluntary, and involuntary admission,[84] but none of them can become permanent without court certification. The same principle applies in Ohio.

Section 74 provides that any relative, friend, or public welfare officer may apply to a court of proper jurisdiction for an order directing that the alleged mentally-ill person be placed in an institution for care and treatment. As in Pennsylvania, the application must include a petition plus a certificate[85] of two examining physicians stating that the person examined is in need of care and treatment in a mental institution.

There is a requirement in the statute[86] that notice of such application is to be served personally, at least one day before making such application, upon the person alleged to be mentally ill, unless the judge exercising lawful discretion dispenses with it.[87] In Ohio a person alleged to be mentally ill is not given any notice that his mental competency has been questioned until the court's issuance of the warrant of detention.

In New York the judge may, upon his own motion, or must, upon demand by the patient's friend or near relative, order that a hearing be held. If it is determined that such a person is in need of observation or treatment, he will issue an order directing the patient's admission to a mental institution for a period not longer than sixty days. Such added protection to the allegedly mentally-ill person is not provided for in Ohio, although there is a new provision[88] allowing for temporary commitment not to exceed ninety days when the court is unable to make a final determination of the person's competency.

Within sixty days, if the medical officer in charge of the mental institution to which the person has been admitted feels that the person is in need of continued care and treatment, he may file a certificate setting forth his findings. At this time the court will issue a final order and the person will remain in the institution until discharged.

83. See Comment, 44 CORNELL L. Q. 76, 87 (1958) for a general discussion of New York commitment procedure.

84. See section 70 for different types of procedure.

85. N.Y. MENTAL HEALTH LAW § 70.3.

86. N.Y. MENTAL HEALTH LAW § 74.3.

87. If the judge has dispensed with personal notice he is required under section 74.3 to serve the petition on a friend or relative of the person alleged to be mentally ill.

88. OHIO REV. CODE § 5123.23 (Supp. 1960).

Illinois

The procedure for court commitment in Illinois was revised in 1951. To initiate court commitment proceedings in Illinois, a verified petition is filed with the clerk of the county having jurisdiction.[89] Within fifteen days after the filing of the petition, the judge must set a date for a hearing and give notice to the person alleged to be mentally ill. Unlike the provision in Ohio, only when there is a need for immediate restraint may the court detain a person upon the filing of a petition by another. A physician's certificate must be included, requesting such restraint for the protection of the person.[90]

Prior to the hearing date, the person alleged to be mentally ill may demand[91] that the question of his mental illness be tried by a jury rather than be determined at a hearing.[92] Ohio grants no such right to a person thought to be mentally ill.

If no jury trial is demanded, the court may appoint a commission of two qualified physicians to make a personal examination of the person alleged to be mentally ill. The commission may inquire into the mental condition of the person at a non-judicial hearing.[93]

Where there was no demand for a jury trial and the court has deemed no trial by commission necessary, the court will hold a hearing upon the petition and the certificates of the two qualified physicians who have examined the patient. The court will then order the person discharged, or committed to a mental institution.

PROPOSED CHANGES IN THE LAW

A brief re-reading of the statutory provisions described above indicates the manner in which leading industrial states have met the problem of committing the mentally ill. There have been numerous proposals for revision of the Ohio procedures by probate judges, court administrators, attorneys and legislators. Some of them merit discussion.

Probate Judge Frank J. Merrick has urged a two point revision in the Ohio law.[94] First he suggests that an enabling statute be passed giving the court legal authority to investigate complaints before the taking of an affidavit and the issuance of a warrant of detention. This statute would give the court the authority to employ psychiatrists and social workers who would have the right to question neighbors, relatives, and

89. ILL. REV. STAT. ch. 91½, § 5-1 (1956).
90. ILL. REV. STAT. ch. 91½, § 5-3 (1956).
91. ILL. REV. STAT. ch. 91½, § 5-4 (1956).
92. ILL. REV. STAT. ch. 91½, § 4-5 (1956).
93. ILL. REV. STAT. ch. 91½, § 5-6 (1956).
94. Cleveland Plain Dealer, Aug. 17, 1960, p. 9, col. 5.

the family physician in order to get a more complete picture of the situation. Judge Merrick believes that this enabling statute should contain the right of subpoena so that the investigator could compel the appearance in court of witnesses who might supply the court with valuable information. As his second point of revision the Judge advocates a statute which would make the filing of an affidavit in bad faith a misdemeanor and would subject the party to a thirty-day jail sentence and a fine.[95] Several states have adopted this second proposal. It is difficult to determine its value in those states, however, because of the inability to calculate its deterrent effect upon potential complainants.

Several Ohio legislators who wish to curb the "easy" detention of sane persons in mental institutions have spoken out for the adoption of certain safeguards found in the procedures of the more progressive states.[96] One proposal has been that a certificate from a physician stating his belief that the person is mentally ill should be placed with the court before the complainant is allowed to file an affidavit. Another proposal would establish the right of the person alleged to be mentally ill to communicate with relatives or an attorney while he is detained at a receiving hospital. In early November, 1960, a committee of these legislators ordered the Ohio General Assembly's Legislative Reference Commission to determine how other states have coped with this problem.

Members of the Cleveland Civil Liberties Union have also made several cogent suggestions for the adoption in Ohio of certain provisions which have been in effect in other progressive jurisdictions for some time. Certainly the adoption in Ohio of any of the following proposals would aid in alleviating the infringements on an individual's rights: (1) Upon filing of an affidavit or complaint, the person should not be immediately detained, but rather should be ordered to appear for an examination at some registered psychiatric facility in the community. (Section 5123.22 dealing with the emergency detention of persons with homicidal or suicidal tendencies, etc. should be kept intact as an exception.) (2) If the first proposal is not accepted, the law should then require: (a) that every person who is detained be clearly and specifically informed of his rights by handing him upon detention a written summary of the procedure laws and the name of some court or hospital official who will answer questions for him; (b) that detained persons be allowed reasonable access to telephones; (c) that a specific time limit between original detention and date of hearing be established.[97]

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95. With the adoption of this proposal it would be possible to question the neighbors, relatives, family minister and physician of the person alleged to be mentally ill. This could all occur before the affidavit is taken by the court.

96. Cleveland Plain Dealer, Aug. 19, 1960, p. 1, col. 4.

97. Cleveland Plain Dealer, Aug. 26, 1960, p. 10, col. 4.