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Chapter 6

LEGAL AUTHORITY AND LIMITATIONS

Phillip M. Lyons, Jr.
Karen C. Kalmbach

Statutory authority for law enforcement officers to detain against their will persons suffering from mental illness is reviewed in Chapter 3. Legislation varies little among the states. As noted in Chapter 3, the core element for emergency involuntary commitment is dangerousness to oneself or others. Statutes typically also mandate immediate or near immediate petition to the courts, and require immediate or near immediate professional psychiatric review. This chapter reviews the case law associated with civil commitment statutes, both historically and in terms of current issues.

Historical Roots of Civil Commitment

At the time of the colonization of the Americas, the responsibility for the care of persons with mental disabilities rested largely on their families. This was true both of immigrants and indigenous peoples. The picture was bleak for those individuals who lacked a support network; rarely, a community would provide for their care. Most often, though, communities simply banished such persons who often formed roving bands of drifters. Violence by such persons resulted either in traditional criminal prosecutions or, at least, traditional criminal sanctions, as no treatment was available (Brakel, Parry, and Weiner, 1985; Deutsch, 1949; Reisner, Slobogin, and Rai, 1999, Ch. 8).

Meaningful community involvement in the care for persons with mental illness or mental retardation did not occur until shortly before

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the Revolutionary War. In the 1750s, Pennsylvania enacted a statute to establish a hospital that would receive sick persons who were poor–including poor mentally ill people. A couple of decades later in Virginia the first mental hospital was built. At this same time, statutes authorizing the confinement of mentally ill people were springing up throughout the former colonies. These statutes were in existence at the time the Constitution was written and ratified (Brakel, Parry, and Weiner, 1985; Deutsch, 1949; Reisner, Slobogin, and Rai, 1999, Chap. 8).

Civil Commitment Rationales and Authority[1]

In the two centuries following the initial statutory developments authorizing civil commitment, despite substantial–at times, even intense–judicial scrutiny, the ability of the state to confine or otherwise restrict the liberty of mentally disabled persons has never been seriously called into question. This is likely so because the goal of civil commitment, at least early on, was always benevolent. Civil commitment was relied upon as a way of placing poor people into poorhouses to ensure their subsistence at a minimum (Katz, 1986). Mentally disordered persons with substantial financial means were served by a different legal mechanism, guardianship, which was relied upon to secure food and shelter through appointment of a paid guardian. Slowly over time, commitment came to be used as a means of confining persons with mental illness or mental retardation, irrespective of financial resources. Similarly, guardianship has come to be relied upon either as an alternative or as an adjunct to commitment, without regard for individuals' wealth.

POLICE AND *PARENS PATRIAE* POWERS. As suggested by the preceding discussion, civil commitment and guardianship have been entwined both conceptually and practically for quite some time. Civil commitments do and always have included some guardianship features. Guardianship does and always has included some of the deprivations associated with civil commitment. This same complementary relationship that we see relative to legal mechanisms also exists relative to the legal power that drives them.

The deprivation of liberty is typically premised on and accomplished through one–or both–of two types of government authority, namely, the state's police power or the state's *parens patriae* power.

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Police power commitments are generally said to be those that are based on a finding of dangerousness, whereas *parens patriae* commitments can be based on other criteria such as inability to care for oneself. Of course, it is often difficult to delineate precisely where one type of commitment ends and the other begins, just as it is difficult to determine where guardianship efforts begin and commitment efforts end. Whether through police or *parens patriae* powers, and whether through guardianship or commitment proceedings, ostensibly-benevolent paternalism is a guiding force–the state is seeking to help its charges who are believed to be unable to help themselves, in this case, due to mental disorder (theoretically, the same *parens patriae* rationale undergirds and drives the juvenile justice system.)

The state's police power essentially is the authority of the government to act in furtherance of public safety and it is one of the most important essential governmental functions. The enforcement of law and punishment of wrongdoers is, perhaps, the most familiar expression of this power. Likewise, it is the exercise of power about which there is most consensus; few people would argue that the state lacks the authority to deprive fairly convicted criminals of their liberty. However, much less agreement exists about the legitimacy of flexing the police power against persons who have not been accused, much less convicted, of crime, but rather, are suspected of having a mental disorder. This picture has become even murkier in recent years as Sexually Violent Predator Statutes have come into play resulting in commitments of convicted criminals who already have served their time and who lack the kinds of mental disorders that historically were thought to be necessary to justify commitment. The blurring of these boundaries is not trivial; because of differences in underlying motives (e.g., benevolence) and assumptions (e.g., competence, blameworthiness), deprivations of liberty premised on police powers are typically subject to greater safeguards than those premised on *parens patriae* authority.

Efforts at delineating the contours of police power commitments typically focus on the importance and meaning of "dangerousness" as a commitment criterion. This is not as straightforward as it might seem at first blush. As one of us noted elsewhere with others:

> Dangerousness is believed wrongly to be a condition, such as tuberculosis, that someone either does or does not have, and that can be detected (or "predict-

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> ed," if we are speaking of violence) with a certain degree of accuracy. We have argued that dangerousness is a moral attribution that can be made with varying degrees of fairness but not accuracy. (Melton, Lyons, and Spaulding, 1998, 104)

The moral dimension of the determination stems, at least in part, from the contextual variables that are at least separate from, if not altogether independent of, the individual and his or her mental illness. The determination of dangerousness must be made relative to a particular individual within a specific community. The availability of intensive monitoring within the community, for example, may lead to a determination that an individual is nondangerous and, therefore, noncommittable, in one community, whereas that same individual would be considered dangerous and, therefore, committable, in another that lacks such supervision. Thus, dangerousness is a moral judgment arrived at not through accuracy, but rather, through varying degrees of fairness.

CONTRACT LAW. As noted above, guardianship originally was intended to facilitate management of fiscal affairs of mentally disordered persons who had wealth. Some type of guardianship, thus, arguably may be necessary for the dual purposes of protecting the person from exploitation and ensuring that those who do business with such persons will not run the risk of having those transactions voided later for lack of contractual capacity. Insofar as the provision of services to mentally disordered persons involves contracts–implied or otherwise–it is useful to construe *parens patriae* power as inclusive of the authority to authorize the treatment of those who cannot consent to such treatment themselves. To the extent that the provision of mental health and mental retardation services involves a contract, it is not surprising that *parens patriae* power also should be relied upon to authorize treatment of a person who cannot give informed consent to (i.e., freely contract for) that treatment. It is worth noting that, although a commitment or guardianship occurs, such an event does not extinguish all of the rights possessed by the subject of the proceedings, even as relates to autonomy and decision making. Even committed persons, for example, retain rights to consent to–and, by definition, refuse to consent to–treatment. Of course, as with the other liberties involved, treatment can be coerced through state intervention. Absent such intervention, however, informed consent to treatment remains a

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requirement. Interest in guardianship as a means of facilitating mental health treatment for people who have been committed is increasing as concern intensifies about the liability that may attach to treatment without informed consent. Some courts have held that even combining commitment with guardianship is insufficient to force some treatments without specific approval of the courts (e.g., *Rogers v. Okin,* 1979).

Substantive Due Process Considerations

Neither *parens patriae* nor police powers are without limits. Indeed, many of the limitations imposed on commitment proceedings emanate from no less a powerful source of law than the Constitution itself. The practical consequence of these limitations is the clarification of commitment criteria. In order to comply with constitutional dictates relative to substantive due process (i.e., fundamental fairness in decision making), the criteria must be reasonably related to the powers being exercised (i.e., police and/or *parens patriae*). Additionally, the criteria have to be narrowly drawn so as to limit the discretion of the decision maker. These protections serve not only to provide the prospective committee with adequate notice as to the applicable standard but also to give appellate courts a standard against which to judge the fairness of decisions reached by lower courts.

Even if the criteria for commitment are articulated with sufficient precision that they adequately restrict discretion, they nevertheless may collide with another substantive due process principle, namely, overbreadth. If the criteria at issue facilitate the commitment of persons who are not legitimately subject to this exercise of government powers (i.e., people who should not be committed), then the criteria are unacceptable on ground that they are overbroad. In making this determination, courts have looked not only at the vagueness or specificity of criteria, but also at the scope of both police and *parens patriae* powers. Determining whether criteria are overbroad, courts have had to look both at questions of vagueness, and at the scope of the police and paternalistic powers. These inquiries are related; the broader the powers, the greater the substantive coverage involved and vice versa.

THE DANGEROUSNESS CRITERION. The first issue is *dangerous persons can be treated differently*. The dangerousness criterion was described above as being the chief catalyst for contemporary discussions about

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civil commitment. This is so because of its heavy influence on the exercise of police power in a variety of contexts. The United States Supreme Court has reviewed five such contexts, namely: (a) civil commitment of those not involved in criminal activity, (b) civil commitment of those found not guilty by reason of insanity in criminal court, (c) preventive detention of minors who have been accused of having violated criminal law, (d) the preventive detention of adults who have been accused of having violated criminal law, and (e) the imposition of the death penalty. In the first four of these contexts, a finding of dangerousness can lead to confinement based, at least in part, on preventive detention goals. In death sentencing, dangerousness is construed as an aggravating factor that allows for the imposition of the death penalty under some state statutory schemes (e.g., Tex Code of Crim Pro. art. 37.07, (2(b)(1) (West 1981)).

In light of the previous discussion about the benevolent goals of civil commitment, it may seem odd to characterize civil commitment as a form of preventive detention. Indeed, one of the rationales for commitment and guardianship proceedings is that they facilitate the acquisition of treatment services by those who are presumed to be incapable of accessing those services on their own. Such a position, though,

> depends . . . on limiting involuntary commitment to those patients who are treatable in the setting to which they are being sent, actually providing the indicated treatment, and detaining them only long enough to accomplish the needed intervention. If any of these conditions are absent, the mental health system is in fact being used for preventive detention purpose. (Appelbaum 1988, 780)

Clearly, civil commitment occurs regardless of the committee's treatment amenability; many people are committed whose conditions cannot be treated. Thus, at least some of the motivation behind commitment is the promotion of public safety through the incapacitation of dangerous people.

O'Connor v. Donaldson (1975) was the first case wherein the United States Supreme Court addressed the dangerousness criterion as it related to civil commitment. A few key points are worth considering before seeking to generalize O'Connor.

First, this ruling left unanswered more questions about civil commitment laws in existence at that time than it answered. Second, the

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decision led to substantial reform in civil commitment statutes, so much so that contemporary commitment statutes and procedures bear relatively little resemblance to those considered by the Court. As a consequence of that decision, and widespread legislative reform of the 1970s, most contemporary commitment laws are so different from the law by which Kenneth Donaldson was committed that the decision in his case tells us very little about what changes in contemporary commitment laws might be permissible. Finally, later decisions by the Court have made it clear that unfairness in commitment proceedings can obtain even with a dangerousness criterion. Before turning to the holding, a brief recitation of the relevant facts is in order.

Kenneth Donaldson was involuntarily committed to the Florida State Hospital. He remained there for 15 years against his will and, from time-to-time, demanded his release from the institution, claiming he was not mentally ill. He even had opportunities to be released to be cared for by a college classmate and a halfway house. In declaring Donaldson's confinement unconstitutional, the Court held: "A State cannot constitutionally confine without more a non dangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends" (1975, 576). The language, thus, suggests that a dangerous person would be committable under the circumstances even though a nondangerous person would not be. Given the apparent importance of dangerousness, it is important to know the scope of the construct.

The second issue is *dangerousness can be defined broadly. O'Connor* was followed by two cases that suggest that the definition of dangerous is wide open. *Jones v. U. S.* (1983) presented the Supreme Court with the question of the constitutionality of the commitment of a man acquitted of the crime of attempted shoplifting (of a jacket) by reason of insanity. By the time the case reached the Court, Jones had been in custody for a decade. *Jones* argued, among other things, that the crime at issue did not involve substantive dangerousness and, therefore, the commitment was improper. The Court rejected that argument and held that the states were free to define dangerousness as encompassing at least what is contained in the criminal code. The *Jones* decision largely left procedural questions unanswered and turned aside the plaintiff's argument that the ten-year period of confinement was impermissible because it was substantially longer than he would have received

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if he had been convicted of a crime.

In *Schall v. Martin* (1984), the Court addressed some of these issues more squarely in the context of the civil commitment of a minor. Justice Rehnquist, writing for a majority of the Court approved the practice that effectively constituted the preventive detention of juveniles detained on delinquency charges. The statute at issue was similar to those in effect at the time in all 50 states and the District of Columbia. When presented with the question of whether the commitment was "fundamentally fair," the Court said the answer hinges on a two-pronged inquiry. First, the loss of liberty associated with the commitment must be justified by the social benefit that results from the commitment. Second, unless the detention occurs in the context of a criminal conviction, that is, not a civil commitment, then the confinement cannot amount to punishment. In that particular case, the Court held that the social interests outweighed the plaintiff's liberty interests, in part, because his minority status entitled him to a diminished liberty interest in the first place as compared with that possessed by adults.

As noted above, many of the issues in *Schall* seemed to relate to the plaintiff's status as a juvenile. In *United States v. Salerno* (1987) the Court extended some of the reasoning in *Schall* to adults. In that case, it held that dangerousness could be used to justify the denial of bail to adult criminal defendants. The third issue is *dangerousness and other criteria.* As the foregoing analysis makes clear, applying the dangerousness criterion is fraught with conceptual and practical difficulties. As complicated as that is, though, it becomes more complicated when the criterion must be applied in the context of other criteria. "Dangerousness to self" is considered by some to be a particular instance of the dangerousness criterion. Still others, though, consider it to be a separate criterion. Sometimes formulated as "passive dangerousness," dangerousness to self or inability to care for oneself is often used as a commitment criterion. Of course, as with all commitment contexts, the dangerousness to self or inability to care for oneself must be the result of a mental disorder. Some jurisdictions take a more proactive stance and authorize commitment where there has been a significant deterioration in functioning even if it has not yet risen to the level of rendering one passively dangerous. The reasoning for these statutes is heavily weighted in the direction of *parens patriae* rationales; the statutes seek to intervene with help before the deleterious effects of the

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disorder become too pronounced.

Although the foregoing standards are important and must be satisfied for civil commitment, they are not the only criteria that must be met. Regardless of the reason that commitment is sought–whether it be dangerousness, inability to care for oneself, or serious deterioration–most civil commitment statutes require additional criteria also be met simultaneously (conjunctively). Specifically, as noted above, there must be evidence of a mental disorder or disability. In some jurisdictions there must also be evidence of treatment need, treatment amenability, and/or an inability or unwillingness to give informed consent to proposed treatment options.

In addition to the critical conjunctive and disjunctive criteria outlined, there are also somewhat less substantive requirements that must also be considered either in conjunction with, or as an alternative to, the dangerousness standard. These criteria are considered to be less substantive as they tend to focus more on *how* someone is to be committed, rather than *who* can be committed.

The "least restrictive alternative" is another common commitment criterion that is also less substantive and more of a procedural safeguard. It calls for the court to be apprised of all available less restrictive alternatives to institutional confinement before authorizing commitment of an individual. It does not, however, define or restrict who may be committed.

Right to Treatment

In *O'Connor,* the opinion appears to evade deliberately the more difficult issue of Donaldson's right to treatment. Quite possibly the Court's rationale may have been that as O'Connor did not have the right to treat Donaldson, he could not have had a duty to treat him, thus making treatment a moot point. Similarly, the Court did not address whether the commitment of a nondangerous person might be justified by the provision of treatment as Donaldson did not receive treatment.

The use of the phrase "without more" (1975, 576) in the Court's opinion, and the fact that Donaldson received no treatment from the hospital (in part due to respect for his religious convictions), left open the possibility that the provision of needed services might justify the commitment of nondangerous persons for purposes of treatment

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alone. However, the opinion in total, complete with Chief Justice Burger's concurring opinion is clear in its rejection of the Fifth Circuit's position that the provision of necessary treatment justifies the commitment of nondangerous persons.

The Supreme Court took a firm stance on the unacceptability of committing individuals who are simply "physically unattractive or socially eccentric" (575). Mental illness or disability does not, per se, "disqualify a person from preferring his home to the comforts of an institution" (575). Nonetheless, there are a number of circumstances under which nondangerous persons have mental disorders whose symptoms amount to more than mere "eccentricity," and for whom hospitalization may be the only means of survival. Such circumstances were not addressed in *O'Connor.*

In drafting *O'Connor,* the Court allowed state legislatures the latitude to create commitment statutes which, while avoiding vagueness and overbroad inclusion criteria, focused on treatment need, emphasizing the provision of services, at the same time downplaying or ignoring dangerousness criteria.

The Least Restrictive Alternative Criterion

As revealed by case law tracking commitment legislation, the problem of vagueness in definitional criteria is challenging. In particular, how do courts delineate the point at which self-neglect becomes an inability to care for self or dangerousness to self and/or others? Considering two criteria in tandem–inability to care for self and least restrictive alternatives–helps to clarify the issue and assist in decision-making. The least restrictive alternative requires that no other remediation short of commitment be available to negate the ill effects of possible self-harm. In other words, in the case of an individual who is no longer able to care for him or herself, it must be shown that there are no other available alternatives to care which impose less restriction upon freedom and autonomy as would commitment.

Although this approach helps to define, clarify, and restrict *parens patriae* criteria necessary for commitment, it does not specify or help quantify the amount or nature of the harm sufficient to justify commitment. The typical formulation of the least restrictive alternative criterion leaves unanswered the questions surrounding what other forms of treatment must be considered and how degrees of restrictiveness

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should be measured or conceptualized.

The modern day least restrictive criterion is anchored in First Amendment jurisprudence. In *O'Connor* Justice Potter Stewart cited the decision in *Shelton v. Tucker* (1960) reversing a requirement that public employees report all organizational memberships because there existed less drastic alternatives to this option. Relying on this reasoning, Justice Stewart notes: "while the State may arguably confine a person to save him from harm, incarceration is rarely if ever a necessary condition for raising the living standards of those capable of surviving safely in freedom, on their own or with the help of family or friends" (1975, 575). Implicit in the O'Connor ruling is a fundamental premise that the state may restrict an individual's liberty only when there are no lesser restrictive options available to prevent harm of self and/or others.

This newly-crafted least restrictive principle was soon widely adopted by states and incorporated into revised commitment codes. Some statutes simply required that a person be judged not "capable of surviving safely in freedom, on [his] own, or with the help of family or friends" (1975, 575; see also, *Thomas S. v. Flaherty,* 1988). Although we have attempted to make a distinction between procedural and substantive elements of the commitment process, it is sometimes not very useful to separate these goals or criteria. As can be seen, the least restrictive alternative standard is an example of one such element.

Conclusion

Police authority to intervene by emergency involuntary commitment of a person suffering from severe mental illness is premised upon dual consideration of *police* and *parens patriae* powers of the state. Such intervention is first closely circumscribed by statute, and further limited by case law. The dangerousness criterion is paramount in all discussion of legal authority and limitations. Despite the specificity of statutes, and despite carefully drawn case law, a judgment of dangerousness is still a subjective one, dependent as much upon the "common sense" of individual police officers as anything.

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ENDNOTES

1. The following sections are based largely on Melton, Lyons, & Spaulding, 1998, Chapters 3 & 4.

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