

TWILIGHT OF LIBERTY II

**Psychiatric Outpatient Supervision and Control and Diminished
Spheres of Personal Autonomy -- an Expanding Front in the War for
Personal Liberty**

Continuum of Rights

Right to Privacy

Personal Privacy

(Brandeis)

Information (physical form)



Pan-optic surveillance

(Bentham)

Information (electronic form)

Continuum of Rights

Louis D. Brandeis and Samuel D. Warren, **THE RIGHT TO PRIVACY**, Harvard Law Review, Vol. IV, No. 5, December 1890.

Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the new demands of society...; liberty meant freedom from actual restraint... Later,...came a recognition of man's spiritual nature, of his feelings and his intellect. Gradually the scope of these legal rights broadened ; and now the right to life has come to mean the right to enjoy life, — the right to be let alone....

Continuum of Rights

Theory of Surveillance: The PANOPTICON

The PANOPTICON was proposed as a model prison by Jeremy Bentham (1748-1832), a Utilitarian philosopher and theorist of British legal reform.

The Panopticon ("all-seeing") functioned as a round-the-clock surveillance machine. Its design ensured that no prisoner could ever see the 'inspector' who conducted surveillance from the privileged central location within the radial configuration. The prisoner could never know when he was being surveilled -- mental uncertainty that in itself would prove to be a crucial instrument of discipline.

Source: <http://cartome.org/panopticon1.htm>

Continuum of Rights



Continuum of Rights

Right to Make Treatment Decisions

Personal (Autonomous)  State Directed (Coerced)

Continuum of Rights

Right to Personal Liberty from Restraint

In community

In community with restrictions

In custody

Background presumption

Conditional Release
or Outpatient Commitment

Civil confinement

Constitutionally required

Proof of mentally ill,
history of dangerousness,
has capacity, deteriorate w/o treatment

Mentally ill and dangerous,
does not recognize need for treatment

TRENDS IN INFORMATION

- Increased Transferability and Speed of Information
- Increased Accumulation of Health Information
- Electronic Health Records
- Increased Use and Capabilities of Patient Monitoring Technology

TRENDS IN OUTPATIENT PSYCHIATRIC TREATMENT AND SUPERVISION

Increased length in periods of outpatient commitment

Re-confinement based on non-compliance (civil parole)

Increased forensic use in place of, or in addition to, parole supervision

Increased onerousness of conditions

Increased collateral consequences of civil commitment

Expanded use of treatment providers as state prosecutorial/enforcement

Increased length in periods of outpatient commitment

New York Safe Act (2013):

Increased the initial period of outpatient commitment from six months to one year (Amending MHL 9.60 (J)(2))

Re-confinement based on non-compliance (without pre-deprivation hearings)

AOT Kendra's Law - 9.60 (n) (provides for a pick up order for noncompliance, civil arrest and being transported for a period of observation at a psychiatric ward of a hospital to determine whether in patient commitment is warranted.)

MHL Article 10 (Sex Offender Management and Treatment Act) - MHL 10.11 (d) (permitting revocation of community based strict and intensive supervision and treatment (SIST) if condition of SIST violated)

Matter of Allen B. v. Sproat & Matter of Robert T. v. Sproat, 2014 NY Slip Op 03427 (NY Ct of Appeals May 13, 2014)(permitting in an order of conditions, a provision allowing the New York State Office of Mental Health (OMH) to seek judicial approval of a mandatory psychiatric evaluation in a secure facility when a defendant found not responsible by reason of mental disease or defect fails to comply with the conditions of his release and refuses to undergo voluntary examination.)

Increased forensic use in place of, or in addition to, parole supervision

Sex Offender Management and Treatment Act - MHL Article 10 permitting confinement or civil management after completion of prison term based on Mental Abnormality;

Persons so confined include those with ASPD which is synonymous with past offenses and with ill defined diagnoses created for the purposes of civil confinement of sex offenders, such as paraphilia NOS coercive disorder. [1]

[1] See, First and Halon, Use of DSM Paraphilia Diagnoses in Sexually Violent Predator Commitment Cases, J. Am Acad Psychiatric Law, 36:443-454 (2008); Frances and First, Hebephilia Is Not a Mental Disorder In DSM-IV-TR and Should Not Become One in DSM-5, J. Am. Acad. Psychiatry Law 39:78-85 (2011)

Increased onerousness of conditions

SOMTA MHL Article 10 - general template includes some 70 conditions for the person subject to SIST in the community

330.20 - Discharge (NRMDD) on Order of Conditions - includes pick up order for non-compliance and numerous provisions requiring disclosure of highly sensitive and confidential psychiatric information and discussions with treatment providers

Jackson Orders upon conversion of criminal status to civil status (based on finding unlikely to attain capacity) - now includes numerous provisions requiring disclosure of highly sensitive and confidential psychiatric information and discussions with treatment providers

AOT orders - go beyond treatment and have included impounding person's mother's automobile and confiscation of guns (although no indication that their use was at issue)

Increased collateral consequences of civil commitment

Gun Control Act of 1968: 18 USCS §922(g)(4)-(g): “It shall be unlawful for any person”:...“who has been adjudicated as mentally defective or who has been committed to a mental institution”... “to...possess...any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce”

Proposed Change In Federal regulations January 2014

27 CFR § 478.11 Meaning of terms.

....

Committed to a mental institution.

(a) A formal commitment of a person to a mental institution...The term includes an involuntary commitment to a mental institution for inpatient or outpatient treatment...It also includes a commitment to a mental institution for other reasons, such as for drug use...

(b) The term does not include a person in a mental institution solely for observation or evaluation, a voluntary admission to a mental institution, or voluntary outpatient treatment...

Increased collateral consequences of civil commitment

New York Safe Act (2013):

Penal law 400

1. Eligibility....No license shall be issued or renewed except for an applicant...

(j) who has not been involuntarily committed to a facility under the jurisdiction of an office of the department of mental hygiene pursuant to article nine or fifteen of the mental hygiene law, article seven hundred thirty or section 330.20 of the criminal procedure law, section four hundred two or five hundred eight of the correction law, section 322.2 or 353.4 of the family court act, or has not been civilly confined in a secure treatment facility pursuant to article ten of the mental hygiene law;

Expanded use of treatment providers as Prosecutorial/enforcement agents

New York Safe Act (2013):

MHL 9.46 (a) & (b) (requires that physicians, psychologists, registered nurse or licensed clinical social workers “ currently providing treatment services to a person”...“to report, as soon as practicable, to the director of community services, or the director's designee, who shall report to the division of criminal justice services whenever he or she agrees that the person is likely to engage in such conduct.”)

Court Orders in Jackson relief/330.20 cases allowing District Attorney's perpetual access to persons treatment providers and records

Disclosure of Confidences Undermines Therapeutic Relationships

Effective psychotherapy...depends upon an atmosphere of trust and confidence in which the patient is willing to make frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.

Jaffee v. Redmond, 518 U.S. 1, 10 (1996).

Disclosure of Confidences Undermines Therapeutic Relationships

[C]ourts have recognized the extremely sensitive nature of material revealed to his therapist...[There is a] strong privacy interest in records prepared by [a patient's] treating therapists. Courts have unequivocally recognized the need for trust and open communication in order for psychological therapy to be successful and that disclosure of information gained from the relationship may impede people from seeking treatment...There is a substantial danger that disclosure of a treating therapist's notes about his patient...will significantly undermine the patient-therapist relationship.

.....

[Disclosure of confidential treatment information to the Court and District Attorney] turns the rehabilitative therapist-patient relationship ... on its head by enlisting the treating therapist as a prosecutorial agent. The harm flowing from such a practice is particularly serious because it undermines the purpose behind ... providing psychiatric treatment.

Hirschfeld v Stone, 193 F.R.D. 175, 190 (SDNY 2000)(emphasis added)

TRENDS IN MEDICAL INFORMATION

Ehealth

- Electronic Health Records
- Personal Health Records
- Health Information Exchanges

Increased Use and Capabilities of Patient Monitoring
Technology

Ehealth

eHealth - "Involves simplifying and handling processes relating to information, communication and transactions within and between health care institutions and professionals by utilizing information and telecommunications technologies"

(www.interimreport.telekom.de/site0106/en/co/glossar/index.php).

source: <http://www.ncbi.nlm.nih.gov/books/NBK36292/>

Ehealth

“Components of eHealth include electronic health records (EHRs) and personal health records (PHRs). There are also a number of new consumer-facing applications, some of which are not referred to as PHRs but which serve a similar purpose as they provide patients with access to their own health information as they move among providers and health plans. Health information exchange is another major component of eHealth. This refers to the electronic exchange of data across organizations and disparate information systems, including data from laboratories, pharmacies, plans, physicians, or hospitals....”

source: <http://www.ncbi.nlm.nih.gov/books/NBK36290/>

Increased Use and Capabilities of Patient Monitoring Technology

As stated by one consulting group:

Electronic health records (EHR) will be the key component in building an integrated healthcare IT framework....Data privacy, data interoperability and information exchange issues will have to be addressed in consultation with government. But the advantages make overcoming these challenges worthwhile. Some potential benefits are:

.....

Data will reveal patient trends (for example, medication consumption, level of adherence, and intervention points in treatment)

source: http://www.capgemini.com/resource-file-access/resource/pdf/Patient_Adherence__The_Next_Frontier_in_Patient_Care.pdf

Increased Use and Capabilities of Patient Monitoring Technology

Patient adherence requires timely, unobtrusive interventions, which will nudge patients towards taking their medication as prescribed, without making them feel that they are being manipulated or coerced. ..

....

Some pharma companies have invested in the manufacturing of smart pills, containing a chip inside the pill. The chip records the time of ingestion and brings about patient adherence by informing the patient of the next medication period by communicating through a sensor (usually worn as a skin patch or embedded under the skin). This information can be uploaded to a smart phone or sent to the physician via the internet.

source: http://www.capgemini.com/resource-file-access/resource/pdf/Patient_Adherence__The_Next_Frontier_in_Patient_Care.pdf

Increased Use and Capabilities of Patient Monitoring Technology

FDA clears first "smart pill" that senses when it's been taken, sends data to wearable patch, by Deanna Pogorelc, July 30, 2012

Just cleared by the U.S. Food and Drug Administration, Proteus Digital Health's tiny ingestible sensor is used with a companion wearable patch and mobile app to improve medication adherence.

The sensor...is about 1 square millimeter and made out of silicon and ingredients found in food, can be embedded in a pill and swallowed. Fluids in the stomach act as a power source to activate the sensor, which communicates a signal to the wearable patch that marks the timing of ingestion. The battery-operated, wearable patch can also measure heart rate, temperature and activity but must be changed every seven days.

Data collected by the sensors is relayed to a mobile phone application where it can be accessed by caregivers and clinicians. The system was tested in many different therapeutic areas including...mental health.....

Source: <http://medcitynews.com/2012/07/fda-clears-first-smart-pill-that-senses-when-its-been-taken/>

Increased Use and Capabilities of Patient Monitoring Technology

Section 2703 of the Protection and Affordable Care Act codified at Sec. 1945 [of the Social Security Act] 42 U.S.C. 1396w-4 (managed care program):

....

(f) Monitoring.—A State shall include in the State plan amendment—

.....

(2) a proposal for use of health information technology in providing health home services under this section and improving service delivery and coordination across the care continuum (including the use of wireless patient technology to improve coordination and management of care and patient adherence to recommendations made by their provider).

(g) Report on Quality Measures....When appropriate and feasible, a designated provider shall use health information technology in providing the State with such information.

.....

Increased Use and Capabilities of Patient Monitoring Technology

Section 2703 of the Patient Protection and Affordable Care Act codified at Sec. 1945 [of the Social Security Act] 42 U.S.C. 1396w-4 (managed care program):

....

(h) Definitions.—In this section:

(1) Eligible individual with chronic conditions.—

(A) In general.—Subject to subparagraph (B), the term “eligible individual with chronic conditions” means an individual who—

(i) is eligible for medical assistance under the State plan or under a waiver of such plan; and

(ii) has at least—

(I) 2 chronic conditions;

(II) 1 chronic condition and is at risk of having a second chronic condition; or

(III) 1 serious and persistent mental health condition.

Increased Use and Capabilities of Patient Monitoring Technology

Section 2703 of the Protection and Affordable Care Act codified at Sec. 1945 [of the Social Security Act] 42 U.S.C. 1396w-4 (managed care program):

....

(h) Definitions.—In this section:

4) Health home services

...

(B) Services described.—The services described in this subparagraph are-

(i) comprehensive care management;

....

...; and

(vi) use of health information technology to link services, as feasible and appropriate

Increased Use and Capabilities of Patient Monitoring Technology

The Office of Mental Health (OMH) previously issued interim guidance stating that health home care management programs will be serving people with mental illness who are under court orders to receive outpatient mental health and related services under the Assisted Outpatient Treatment Program (AOT). Health Homes and their Care Management programs should accordingly be familiar with the statutory basis of the AOT Program (Section 9.60 of the New York Mental Hygiene Law (MHL)), and all associated reporting requirements detailed in the law.

OMH, Revised Interim Guidance Effective November 18, 2013, Assignment of Persons with Assisted Outpatient Treatment Court Orders to Care Management in a Health Home Environment

The Potential Danger:

**A Decentralized Architecture of Panoptic
Surveillance and Control**

Strategies to Prevent Loss of Liberty and Autonomy

Privacy and confidentiality

Constitutionally protected 4th amendment (search; and civil arrest)

5th amendment (John P. Issue)

1st amendment (Hirschfeld v Stone)

Statutorily protected by Federal Law: HIPAA (Miguel M.)

State Laws and Common Law: Doctor-patient and other privileges; MHL 33.13, Subpoena and process provisions, common law fiduciary duty of confidentiality, etc.

State constitutional rights to autonomous treatment Decision
(Rivers; K.L.)

Limitation on reach of statutes (Raymond G.)