

THE DISCHARGE OF LUNATICS BY
HABEAS CORPUS PROCEEDINGS *

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The constitution of the United States¹ provides that "the privilege of the writ of habeas corpus shall not be suspended unless when in cases of rebellion or invasion the public safety may require it."

It is important at the outset that we have clearly before us in the consideration of this paper a precise idea of the legal significance and aim of the great writ to which it relates. A concise definition, which has generally been accepted as a most complete one, is that given in "Hurd on Habeas Corpus:"²

The writ of habeas corpus is that legal process which is employed for the summary vindication of the right of personal liberty when illegally restrained.

It is along the line of this definition that I proceed to a discussion of the application of the writ respecting a single class of individuals, namely, the insane. Reverting to the historical, it may be of importance to recall that the original necessity for the writ of habeas corpus arose from a great many conditions which demanded remedy, one of the least of which was lunacy confinements. One of these conditions, as will be remembered, and a most important one, was the practice of imprisoning for debt. By far the large majority of habeas corpus cases in the old reports, both English and American, relate to restraint of liberty for reasons other than alleged or adjudged lunacy. We find, at the present day, however, that this writ, designed more particularly for divers other necessities, is being used to an astounding extent in lunacy cases. The increase in its use within the memory of living men has been so marked that it may well be inquired whether it has not become an abuse of privilege. The increase of the popularity of habeas corpus proceedings in lunacy cases has been due to several causes, to some of which I think it highly important that we give thoughtful attention. It is only by a full appreciation of the causes, taken with an intelligent comprehension of the effects that we can proceed properly and with well-founded hope toward a reform.

Let me emphasize that it is not the purpose of this paper to argue for one moment for a suppression of the writ as such. The writ of habeas corpus came into use by reason of a recognized necessity for such a process, and it has undoubtedly become an invaluable part of our judicial system. It is my desire to point out, if I may, the abuse of privilege in the obtaining of this writ by lunatics and those acting in behalf of such persons. In so far as applies to the issuance of the writ in cases of lunatics, I argue for a limitation of such use. In using the word "lunatic" I am not unmindful of the efforts of some of the medical profession to abandon the word, to substitute for it some word or phrase less harsh, something which signifies illness. This position taken by medical men is based, of course, on the modern view of insanity, and is at once both in keeping with that enlightened view and of kindly intent to the patient and his family. With these efforts I am in full sympathy, but as this paper treats the legal side of the subject, I use the term "lunatic," a word which the statutes and

the decisions have given a distinct place in medical jurisprudence.

In the first place, in the case of every applicant there must have been an actual incarceration, either as a preliminary act under general police or public health regulations, or by decree of a court in confirming a due inquisition. Few persons apply for a writ of habeas corpus during the period of temporary detention. The applicants for the writ are in practically every instance, those who have been adjudged insane. Time was, we all remember, when persons supposed to be insane were taken to the nearest jail or prison and there confined without examination, without hearing, and without day, and it was the suffering of those thus confined that brought about through Pinel and others the recognition of the great fact that there is nothing of the criminal about an insane person, but that he is simply a sick man. This truth has come to have so firm a place in the mind of society that no longer is it possible—nor indeed is it the desire—to incarcerate an alleged lunatic without a full and fair hearing. It means a great deal, therefore, when we realize that the lunatics applying for discharge by habeas corpus are, as I said before, in nearly every case adjudged lunatics. They are not suspected individuals who have been summarily confined, but are those who have had their day in court, and have been found, in orderly manner by competent tribunals, to be in need of treatment for mental disease. As to these hearings in the several jurisdictions, it may be said that they have at least one feature in common, namely the fairness with which they are conducted toward the alleged lunatic. An examination of the widely differing proceedings throughout our country must convince one that in every instance the man whose sanity is in question has a fair opportunity in the presentation of his case. The variance in these hearings extends all the way from the admirable practice under the New York and Massachusetts laws which treat the patient as a sick man, to that in the District of Columbia which requires his examination before a jury of twelve laymen. A great deal has been spoken and written and much more can be said about the system which gives a jury of laymen the right to determine whether there should be commitment for mental disease. If all hospitals were private institutions conducted for gain, and the superintendents thereof were under lax regulations and without inspection laws, there might be some reason for placing twelve laymen between liberty and confinement. My own opinion, based on a study of European laws and those of some of our own states, and a practice specializing in such matters, is that the commitment may be safely entrusted to a judge. Be the hearing conducted in whatsoever manner, it must be conceded that the practice of committing sane persons to insane hospitals is a relic of ancient days or a creation of vivid imagination. Such being the case, the burden shifts, after adjudication, and it is, or certainly it ought to be, incumbent on the adjudged lunatic to show that he is sane if he is to secure discharge by habeas corpus. This burden should extend further. It should require, as suggested by a committee of the New York State Bar Association, a showing of *prima facie* sanity before the issuance of the writ of habeas corpus. The report of the special committee on the commitment and discharge of the criminal insane, presented at the meeting of that association held in Rochester in January, 1910, recommended that a person confined in any state hospital for the insane might make application for a writ of habeas corpus only on a written verified petition accompanied

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1. Constitution, Art. 1, Sec. 9, par. 2.

2. Hurd on Habeas Corpus, p. 143

by a certificate made under oath by two qualified medical examiners in lunacy. It further recommended that the examiners in lunacy be required to give the reasons on which they based their belief as to the sanity of the applicant. A requirement such as this would do much to reduce the number of hearings on writs of habeas corpus, for it would operate to prevent the issuance of a large number of such writs.

Certain "leeches" of the legal profession exist in every community, and there is a form of this species which fastens itself on hospital patients. Through the efforts of these shysters, patients who would not otherwise think of such a thing, and who really do not desire freedom, are led to apply for discharge on writs of habeas corpus. Petitions in such cases are not infrequently signed by the attorney as next friend of the patient. The next step, often followed, is to file the proceeding *in forma pauperis*. Thus the attorney after one short conversation or after receiving a letter or a postal card from the patient, is enabled without further consultation or a medical examination, and without taking up the matter with the hospital physicians, to indulge in what may be properly called a "fishing expedition." On the hearing if the patient is remanded, the attorney has lost simply the questionable value of his time, but if the patient is discharged the attorney demands substantial compensation. In a recent case which came under my observation the discharged patient had \$600 accumulated savings, of which he complained that the attorney took \$135 as a fee and borrowed \$300. It is important to add that the remainder supported the patient two months and he was then recommitted to the hospital from which he had been discharged! As to his mental condition, it must be said that while at the time of his discharge he was quiet and contented, the strenuous life which he led during his two months' freedom, with attendant excesses and indulgences, changed him greatly and he returned with his mental disorder aggravated to an alarming degree. This practice, encouraged and fostered by the unrestricted issuance of writs of habeas corpus, has grown in some jurisdictions until it is nothing less than a cruel wrong on the patients and an outrage on justice. One remedy lies, as above suggested, in a requirement that the patient submit with his petition *prima facie* evidence of his sanity, or, in other words, that before burdening the court and hospital authorities, he obtain a substantial showing of reputable medical evidence as a basis for his petition.

Another class of patients seeking freedom through the great writ are the paranoiacs. As is commonly known, paranoia is a most dangerous type of mental disorder. The paranoiac invariably possesses cunning, usually in a marked degree. These patients differ from those to whom I have referred as being preyed on by unscrupulous attorneys, in that the personal activity of the patient is conspicuous in his efforts to obtain discharge. At Dannemora (the New York Hospital for Criminal Insane) the superintendent recently reported that the majority of his patients who were seeking writs of habeas corpus were paranoiacs, and that during five years four such patients who had been thus discharged had committed suicide. The records of many courts also show that in such cases the termination of one proceeding by the remanding of the patient simply marks the beginning of a new proceeding. Many patients suffering from this form of mental disorder have obtained six and eight writs; and as long as the writs are procured so easily, they will doubtless continue—to the

retardation of the proper business of the courts, the disheartenment of hospital authorities, and the physical and mental detriment of the patients themselves. The court proceedings in such cases are unnecessary, quite as much so as those in the class of cases earlier discussed. It is self-evident that a requirement of medical evidence in support of a petition for a writ of habeas corpus would perforce prevent oft-recurring applications from the same patient.

In a paper prepared in 1909, Dr. Robert B. Lamb, superintendent of the Matteawan State Hospital, reported the subsequent history of forty-one patients for whom during a given period writs of habeas corpus had been obtained. Seven were remanded to the hospital and thirty-four were discharged. Of these thirty-four, fourteen found their way either to prison or asylum, eight were troublesome to their families because of mental disturbances, three were unable to earn their living and were cared for by relatives, six disappeared from view, two committed suicide, and one succeeded in becoming partially self-sustaining.

In the District of Columbia between given dates in 1905 and 1909, fifteen patients secured their discharge from the Government Hospital for the Insane on writs of habeas corpus. By reason of nearly all of these men having been soldiers and sailors and not residents of the District of Columbia it has been impossible to trace the subsequent history in every case. Of the number thus discharged, however, four were later taken in custody and recommitted to the hospital, one committed suicide, one committed a violent assault in a northern city and was placed in another hospital where he is now confined, one was admitted to a New York State hospital for the insane, and one became an inmate of an institution in the West and by his recent correspondence with a prominent government official has given evidence of profound mental disorder.

It is well worthy of note that during this same period 1,256 patients at the Government Hospital for the Insane were discharged by the superintendent without any proceedings whatsoever, and approximately 900 more were similarly released by the superintendent on parole to relatives and friends.

In an early case³ in this country it was held that:

"No principle of right is violated in putting a reasonable and salutary restriction on the liberty of a person who, from the loss of reason and judgment, is unable to provide means for his own cure or who is liable to use freedom from restraint in such way as to increase or prolong his malady."

In the light of this very sensible doctrine, it is clear that after a proper adjudication the patient in confinement is not being deprived by illegal restraint of the right of personal liberty—to use the language of Hurd's definition—and should not, therefore, be entitled to a writ of habeas corpus except on a proper advance showing of mental capacity.

As we consider the rights of the patient, so must we not overlook the rights of society. The men, women and children who are daily on the streets and in other public places have distinct rights which are of as much importance and value to them as any rights of the adjudged lunatic. "Man," says Montesquieu, "is born in society and there he remains." The incompetent is a component part of society and it is therefore necessary that certain restrictions be placed on him that he may not do violence to the welfare of the greater number. To be sure, the insane, as wards of the court, are pecu-

3. Matter of Josiah Oakes, 8 Law Reg. 122.

liarily entitled to the most jealous protection of the court, but it is equally true that the great body social is entitled to the protection of the institutions of justice in the interests of the general welfare of the race. The welfare of the adjudged lunatic, then, should be considered, not of itself, but coordinately with—I am tempted to say, subordinately to—that of society. On the one hand, the discharge of an adjudged lunatic on evidence lacking clear proof of restoration to reason may for the moment please and satisfy the patient, and, on the other hand, it may harass and endanger his fellow citizens without number. In recent years the Rhode Island Supreme Court has spoken on this point with a fearlessness that is refreshing. In the case of *Ex parte Palmer*⁴ the court after hearing the evidence of nine or ten physicians—several of whom were of wide reputation—to the effect that the petitioner was not insane, and on the other side that of four physicians of known probity and experience that it was dangerous to the community for petitioner to be at large, remanded him with these words:

"Charged as we are with the high and imperative duty of protecting the people of the state, as far as lies in our power, from physical injury and violence at the hands of irresponsible persons, we are of the opinion that in order to warrant us in discharging the petitioner from his confinement he must show by a clear and strong preponderance of evidence that he is not insane and that his going at large will not be dangerous to the public peace. That so strict a rule does not obtain in all cases of this sort, that is, in petitions under the statutes of the various states, for the release of persons confined in insane asylums, we are well aware. But we think it should be the rule in a case like the one before us, and we therefore adopt it and shall be governed by it."

In this decision the protection of the court was extended to the community, the court declining, as you have noted, to take the responsibility of discharging because of a lack of "a clear and strong preponderance of evidence that he is not insane and that his going at large will not be dangerous to the public peace."

One needed reform, as I have tried to indicate, is the establishment by the petitioner of a *prima facie* case at the filing of the petition. Another is a uniformity of practice which will result in habeas corpus cases being heard before the nearest judge of competent jurisdiction without the questionable aid of a jury. Some time ago attention was directed by the superintendent of one of the New York state hospitals to a growing practice of the courts of granting writs returnable before other justices in distant parts of the state. The necessity for such a proceeding is purely imaginary; the burden that it puts on a disinterested and honorable institution and its officers is at once harsh and absurd. A striking instance of this abuse was that of a patient in the Willard (N. Y.) State Hospital, who, in September, 1909, after having been remanded in three or four habeas corpus proceedings, secured a writ returnable before a justice in Brooklyn nearly four hundred miles distant. A criminal in California⁵ who wanted discharge on a writ of habeas corpus tried this plan of going beyond his own jurisdiction but in that case the supreme court of the state laid down a doctrine of common sense which ought to be appreciated by all who read it. The court said:

"The legislature can never have intended that a party imprisoned under sentence of conviction for a misdemeanor should have the privilege of selecting from the judiciary of the

whole state the individual to whom he prefers to make his application, however distant from the place of his detention, and compel the officer having him in charge to convey him, at the expense of the county, it may be from San Diego to Klamath, in order that he might avail himself of a remedy which the local judge of his county was equally authorized to grant. Nor need he stop here; the refusal to discharge by one judge is not a bar to another application before a different judge. After failing in his first application, the party may sue out another writ before a different officer, and thus the term of his imprisonment may be passed in traveling from one part of the state to another, at the expense of the county in which he was convicted, to the entire subversion of justice."

Hearings on writs of habeas corpus, by reason of the supposed exigencies requiring their issue, should be conducted by a judge without a jury. The practice has grown, however, of courts referring the issues raised in such hearings to a jury. This is not because a hearing by the court would amount to a violation of the right of jury trial, for the right of jury trial in habeas corpus cases has never existed. Going back to Blackstone's Commentaries we find the learned author commenting on the fact that the right of trial by jury was not recognized as existing in favor of an alleged lunatic under the common law.⁶

An alleged lunatic cannot be committed it is true, and cannot be tried to determine his mental condition, except by "due process of law," but as Judge Cooley points out in his work on "Constitutional Limitations,"⁷ "The term 'due process of law' is by no means confined to trial by jury, but the term covers a variety of judicial proceedings."

There ought to be no room for doubt as to the proper legal method of conducting such inquiries. In the first place, the federal law provides⁸ that in habeas corpus cases "the court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require."

You will note that the court is required to proceed summarily, and Bouvier⁹ defines a summary proceeding to be "a form of trial in which the ancient established course of legal proceedings is disregarded, especially in the matter of trial by jury."

Still another recognized authority on the subject, Professor Church, in his work on "Habeas Corpus,"¹⁰ confirms this doctrine, using this language:

"There is no provision in the Constitution of the United States, neither is there in any state constitution, which gives the right to have these issues of fact tried by a jury in such proceedings. The constitutions, federal and state, provide substantially, that the right of jury trial shall not be violated, but it is no violation of this inestimable privilege to deny it in chancery proceedings, preliminary examinations and proceedings by habeas corpus."

This matter becomes one of great moment when we observe, as has sometimes been alleged, the judge taking an open and positive position as to the mental condition of the patient while the jury takes an opposite view and the court confirms the jury's verdict. The judge in such cases, by reason of his ability to weigh evidence and his unbiased attitude, can render a verdict just to both the patient and the state, while a jury of laymen, torn by conflicting emotions and personal equations may, and

6. Blackstone's Commentaries, i, 304.

7. Cooley's Constitutional Limitations, p. 431.

8. Sec. 761 U. S. Rev. Stat.

9. Bouvier's Law Dictionary, ii, 683.

10. Church on Habeas Corpus, p. 173.

4. *Ex parte Palmer*, 26 R. I. 486.

5. *Ex parte Ellis*, 11 Cal. 222.

frequently will, decide a mental question on any ground except that of the evidence.

It is the abuse of privilege which leads to corrective measures. A reform must come when an abuse becomes too flagrant. In these cases, we are coming, very generally, to a recognition that the petitioners are getting not only what a humane law and practice afford them, but certain so-called privileges not warranted by the intent of the law and of infinite harm to public institutions, to judicial procedure and to the patients themselves. The time is ripe, therefore, for an enforcement of the rights of the community at large, and if we concur in this view we are brought face to face with the question of how the existing abuses are to be corrected. I have endeavored to outline some needed changes in our laws as well as in our practice under existing laws. There remains to be brought to attention at least one other important method of correcting the evil. I refer to a dissemination of knowledge among the people at large as to present-day methods and management of public institutions for the care of the insane. A growing movement in such hospitals of giving publicity and of inviting medical cooperation is doing much to bring closer sympathy between physicians in charge and those in private practice. For two years past the government hospital at Washington has conducted each winter a series of staff meetings to which the physicians of the city have been urgently invited, and which invitation, it is gratifying to know, has been accepted by a large number of active practitioners. At these meetings, methods used in the examination, the care, the amusement, and the varied treatment of the insane, are discussed fully and freely. By such means the hospital physicians are getting the confidence of the people at large through the family physicians, and the old horror of hospitals—born and nurtured in ignorance—is being replaced by an intelligent idea of the work which the hospitals are striving to perform. This labor of the institutions—I speak with particular reference to the large government and state hospitals—is full of discouraging aspects. The trials incident to the work are materially reduced by cooperation and appreciation such as I have just mentioned, but a further step will be attained when in addition is added the confidence of the legislators, the bench, the bar and the jury box. It may be a far cry to the time when such universal confidence will exist. It ought not to be, for the cause is that of the people. The people have rights which the legislators ought to respect and will respect when they are insistently and persistently presented. As for the bench, the bar and the jury, I believe that a uniform stand by the courts for the protection of the many will be a guidance to the attorneys, as it must be a rule of action for the jury. In all the literature of the law no safer, saner or more fearless decision stands out than that of Judge Ludlow of Philadelphia.¹¹ This distinguished jurist, reviewing the evidence in a habeas corpus case, and remanding the patient to the hospital, said:

"To take a proper and just responsibility in such a case as this, requires not bravery but courage—not that quality which sometimes degenerates into temerity, and is reckless of danger, but rather that other quality which is the result of reflection and is always cool and collected. Where our path of duty is plain we ought judicially to be courageous, not brave."

It was nearly forty years ago that Judge Ludlow uttered these words. He was the precursor of other

jurists, who have maintained in positive terms their determination to protect society from those who would do it violence, as well as to protect those who would do violence to society. The goal which we seek is the better protection of society, without the releasing of any of the proper privileges and safeguards extended by the law to the mentally deficient. The difficulties in our way are numerous. Although the path of progress at times seems clear, there are ever present obstacles. Some of these are founded on honest bases and must be overcome by a campaign of education; others have their support neither in the law nor in righteousness and must be dealt with vigorously. Until medical science can cure all mental ills, those who suffer from such affliction must be cared for and directed, in ways that are pleasant, if you please, but always in paths that do not permit these unfortunates to be of danger to themselves or to their fellows. The great agencies of the law must be wide open to them, but with the limitations that are essential for the proper administration of justice, and the safety of all the people.

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SALVARSAN AND SODIUM CACODYLATE *

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The object of this paper is to present the results obtained by applying to sodium cacodylate the experiments which demonstrated the wonderful destructive action of salvarsan on the spirochetes of syphilis. These experiments are laid down in Ehrlich and Hata's recently issued monograph,¹ and, in brief, they consist, first, of the determination of the tolerated dose of a given substance for normal rabbits, and, second, of the determination of the curative dose for rabbits infected with *Spirochæta pallida*. The results are expressed in the form of a ratio, C:T. Hata has shown that the ratio for salvarsan is at least 1 to 10 with a single intravenous injection.

Interest among clinicians of this country in sodium cacodylate in the treatment of syphilis seems to date from an article by Murphy,² who gave a summary of the status of salvarsan at that time and then said:

It has been announced that this drug will not be given to the profession for a number of months, a fact which forced us to try other preparations of arsenic. The one with which I have been most familiar is the sodium cacodylate, which we have been using for seven years to allay the pain of metastatic, osseous carcinomata.

He mentioned three cases in which the drug, given intramuscularly, seemed to have had a high spirillicidal power. Murphy's lead has been followed by a number of clinicians, and while few published reports have as yet appeared, it has become evident that the results are not uniform. Sodium cacodylate is, of course, not related to salvarsan in any way, except that it contains arsenic, and it would be very surprising if one could substitute, off-hand, a stock preparation for a highly refined product like salvarsan. Still, in view of our

* From the Bacteriological Laboratory of the Army Medical School, Washington, D. C. Published with permission of the Surgeon-General, U. S. Army.

1. Ehrlich and Hata: Die experimentelle Chemotherapie der Spirochæten, 1910.

2. Murphy: The Arsenical Treatment of Syphilis, THE JOURNAL A. M. A., Sept. 24, 1910, p. 1113.