A HISTORY OF CIVIL AND CRIMINAL COMMITMENT STATUTES IN NEW HAMPSHIRE:

By Alexander de Nesnera, M.D., DFAPA

New Hampshire has statutes delineating the treatment of individuals suffering from mental illness since 1714, and established a facility to care for the mentally ill in 1842. A history of the development of these laws has been described,\(^1\) as well as their benefits.\(^2,\!^3\) Currently, statutes allow for the civil commitment, known legally as a non-emergency involuntary admission, of individuals deemed to be a danger to themselves or others as a result of mental illness for a maximum of five years.\(^4\) This maximum five-year time frame is one of the unique features of New Hampshire law; other states in the United States do not allow for such an extended period. No literature on the historical development of this distinctive New Hampshire five-year commitment time has been found. Furthermore, the maximum commitment times for individuals in New Hampshire has varied greatly over the years, depending on whether individuals' cases were in the civil or criminal justice system. In this article, I describe the evolution of this statutory development, delineating the changes in the time frames for civil and criminal commitments (along with their legal thresholds), and culminating with the merging of commitment time frames into a single, maximum five-year time for all New Hampshire citizens.

DEVELOPMENT OF THE CIVIL COMMITMENT STATUTES

Prior to the founding of the New Hampshire Asylum for the Insane in 1842, varying statutes allowed for patients suffering from mental illness to be cared for by families or friends (in the community) or by the state (in jails or prison). Up to that point, there were no civil commitment laws. An example of the laws prevailing at the time was one in 1822 that allowed the superior court to commit a person acquitted of a crime by reason of insanity or mental derangement to prison “to be detained till he or she be restored to his or her right mind” if the court believed the person was a danger to citizens or the peace of the state. The superior court could discharge the person if it believed they were no longer dangerous. This law also gave the superior court the authority to commit a lunatic person to the custody of friends, provided they gave bonds with surety for payment of all damages which any individual may sustain by any acts and doings of the lunatic person.\(^5\)

The opening of the asylum led to statutes pertaining to civil commitment of mentally ill individuals. Twelve trustees, appointed by the governor, were charged with making regulations pertaining to the admission and care of patients. Any person deemed insane could be sent to the asylum by family, guardian, or friends with the consent of three trustees. Discharge from the asylum was possible by agreement of three trustees, by the Board of Lunacy, or by a justice of the Supreme Court whenever a further detention at the asylum was deemed no longer necessary. Persons under sentence of imprisonment whose term had not expired were sent back to prison.\(^7\)

In 1901, statutes still allowed for the commitment of a person to the asylum by parents, friends or guardians with the trustees’ consent. Discharge from the asylum was possible by agreement of three trustees, by the Board of Lunacy, or by a justice of the Supreme Court whenever a further detention at the asylum was deemed no longer necessary. Persons under sentence of imprisonment whose term had not expired were sent back to prison.\(^7\)

In 1942, 100 years after the founding of the asylum (now known as New Hampshire State Hospital) commitment by a probate judge was instituted. If an individual was felt to be dangerous, a petition to commit the individual, filed by any person or selectmen of the town, could be heard by the probate court. The court could commit the individual to the state hospital, but no time frame for commitment was set forth. Discharge of the individual could
occurred by the Board of Lunacy, the hospital trustees, or by an order of the superior court, whenever further detention at the hospital was, in their opinion, unnecessary. There were no clear procedures on how or when the Board of Lunacy, the trustees, or the superior court became involved in discharge decisions.  

In 1961, the legislature dissolved the hospital’s board of trustees, replacing them with the director of the New Hampshire Division of Mental Health. Also dissolved was the Board of Lunacy, replaced with the superintendent of the New Hampshire State Hospital. These changes allowed a person to be committed to the hospital with the consent of the director of the Division of Mental Health (not the trustees), and to be discharged by the superintendent (not the Board of Lunacy or the trustees), or a justice of the superior court whenever further detention was in their opinion unnecessary.

Major changes to the commitment law occurred in 1973. Time frames for voluntary patient stays in the hospital were clarified, and the involuntary admission process was revised. Due process frames for voluntary patient stays in the hospital were clarified, and the involuntary admission process was revised. Due process requirements were codified, physician participation in legal procedures delineated, and an order for involuntary admission to the hospital was valid for no longer than two years. This was the first instance where legislation limited the amount of time a person could be civilly committed to the state hospital.

In 1977, the New Hampshire Supreme Court ruled, in State v. Hudson, that the legal threshold for civil commitment was beyond a reasonable doubt, a ruling reaffirmed in 1981 in State v. Hudson. However, in 1988, the Supreme Court ruled in In re Sanborn that the burden of proof that the state or other petitioner must satisfy in civil commitment proceedings is clear and convincing evidence, thus overruling the stricter “beyond a reasonable doubt” standard of Proctor. The Sanborn commitment threshold remains the one used by all New Hampshire probate courts today.

In 1982, legislators increased the time limit for civil commitment from two years to five, as they grappled with issues pertaining to the variations in commitment times that existed between civilly committed patients and individuals who were mentally ill and being treated in the criminal justice system.

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**A Legal Perspective: Decisions and Deference**

**The author asked retired Supreme Court Justice Joseph P. Nadeau to review the accompanying article. Justice Nadeau agreed to the publication of his comments.**

In this detailed and thoughtful description of the evolution of the time frames for civil and criminal commitment of individuals suffering from mental illness, and the legal thresholds required for their commitment, Dr. de Nesnera also provides a look at an aspect of government that we seldom see or appreciate: the respectful interaction of the legislative and judicial branches of government, and the supremacy of the constitution.

When the New Hampshire Supreme Court ruled that proof beyond a reasonable doubt was required to support the commitment of a person found not guilty by reason of insanity, it did so based upon the New Hampshire Constitution. So when the legislature passed legislation to change the threshold to a preponderance of the evidence, it is not surprising that the Supreme Court declared the law unconstitutional.

As judges and lawyers know, supreme courts do not declare laws unconstitutional lightly. Our supreme court makes every effort to defer to the legislature. That deference is demonstrated here by the court’s opinion, in response to the Senate request, that there was no constitutional impediment to the enactment of a law increasing the commitment period of two years that the court had set, to five years, as long as the term applied both civilly and criminally. But for something as fundamental as the burden of proof required to deprive citizens of their liberty, our system of justice gives the judicial branch of government the responsibility of assuring compliance with the constitution.

Under our system, however, the people have the right to amend the constitution. The beauty of the system was shown vividly when New Hampshire voters, in 1984, exercised that right and voted to change the constitutional threshold for commitment from proof beyond a reasonable doubt to proof by clear and convincing evidence, once again demonstrating the supremacy of the constitution.

Based upon history and the issues society faces today, it is probably safe to say our legislature is not finished dealing with policy decisions involving the treatment of individuals suffering from mental illness, and courts are not finished dealing with the difficult legal questions that arise as a result. Dr. de Nesnera has given us an excellent framework with which to understand the struggle.

Hon. Joseph P. Nadeau is a retired Associate Justice of the New Hampshire Supreme Court, and a former Chief Justice of the New Hampshire Superior Court. He served as a judge on all three levels of the state courts, beginning with tenure on the Durham District Court from 1968 to 1981, when he was appointed to the Superior Court. He was appointed the 100th justice of the NH Supreme Court in 2000, and he retired five years later.
DEVELOPMENT OF THE CRIMINAL COMMITMENT STATUTES

The opening of the hospital in 1842 did not eliminate the incarceration of mentally ill individuals in prison and jails. Persons incarcerated but insane and still felt to be dangerous would stay in prison for extended periods of time until the court felt they could be safely released to the community. Persons deemed to be sexual psychopaths or dangerous sexual offenders could be committed to the state hospital for life, with the intended goal of protecting both society and the sexual psychopath/offender.\(^{10, 17}\)

In 1975 the legislature established the not guilty by reason of insanity option for individuals prosecuted for an offense.\(^ {18}\) It then allowed persons found not guilty by reason of insanity (NGRI) to be transferred to the state hospital under a two-year commitment. Persons incarcerated but insane, and persons civilly committed for the same reason, and the court then found that the person would be dangerous to go free. Legislation also reiterated that a person could also be criminally committed to prison for life when maximum commitment time is decided. The Court ruled that equal protection exists for persons deemed NGRI,\(^ {24}\) v. Miller\(^ {23}\) stating that it had set the standard of beyond a reasonable doubt in NGRI proceedings, and still felt this was the appropriate standard.

In 1976, the Supreme Court ruled in Gibbs v. Helgemoe that a commitment hearing determining dangerousness and potential re-committal for a person found NGRI must be held every two years, and that the legal threshold was beyond a reasonable doubt.\(^ {21}\)

In 1979, the New Hampshire Supreme Court ruled in \textit{In the Matter of the Commitment} of O.,\(^ {24}\) that despite the U.S. Supreme Court opinion, the threshold in New Hampshire should still be beyond a reasonable doubt, opining that despite the U.S. Supreme Court opinion, the threshold in New Hampshire should still be beyond a reasonable doubt, opining that states are free to interpret their own constitutions and adopt stricter due process standards as long as they meet the federally prescribed minimum.\(^ {25}\) The legal threshold issue was resolved in 1984 when Part 1, article 15 (the due process clause) of the New Hampshire Constitution was amended, changing the legal threshold of proof from beyond a reasonable doubt to clear and convincing evidence in insanity hearings determining whether a person is potentially dangerous to himself or others and that they suffer from a mental illness.

In 1982, the New Hampshire Senate asked the Supreme Court’s opinion on changing the legal threshold from beyond a reasonable doubt to clear and convincing in criminal commitment hearings. The New Hampshire Senate stated that the U.S. Supreme Court had ruled that clear and convincing evidence was a sufficient standard for civil commitments.\(^ {24}\) The New Hampshire Supreme Court ruled that despite the U.S. Supreme Court opinion, the threshold in New Hampshire should still be beyond a reasonable doubt, opining that states are free to interpret their own constitutions and adopt stricter due process standards as long as they meet the federally prescribed minimum.\(^ {25}\) The legal threshold issue was resolved in 1984 when Part 1, article 15 (the due process clause) of the New Hampshire Constitution was amended, changing the legal threshold of proof from beyond a reasonable doubt to clear and convincing evidence in insanity hearings determining whether a person is potentially dangerous to himself or others and that they suffer from a mental illness.

For an order of commitment to be renewed, another judicial hearing had to be held. When this legislation was passed, there was no mention of the legal threshold needed to find a person NGRI.\(^ {19}\) A person could also be criminally committed to prison for life when a grand jury failed to indict due to insanity, or a petit jury acquitted for the same reason, and the court then found that the person would be dangerous to go free. Legislation also reiterated that a court, upon finding that a person who was incarcerated but insane was still dangerous, could commit the person to the state hospital for life until or unless earlier discharged, released, or transferred by due course of law.\(^ {20}\)

CONVERGENCE OF MAXIMUM COMMITMENT TIME AND LEGAL THRESHOLD

Toward the end of the 1970’s, it was clear that there were significant problems that existed with varying commitment times for individuals in different circumstances. Civilly committed individuals had a two-year maximum commitment; NGRI individuals also had a maximum commitment of two years; persons incarcerated but insane and still felt to be dangerous (such as sexual psychopaths or dangerous sexual offenders) could be committed for life to the state hospital; and others could be criminally committed for life to the state prison. Discussions ensued regarding building a forensic psychiatric unit to care for most of these individuals in one setting (excluding the civilly committed patients).

At the same time, the Supreme Court and the legislature differed on the legal threshold needed to commit individuals criminally. In 1976, the Supreme Court ruled in Gibbs v. Helgemoe that a commitment hearing determining dangerousness and potential re-committal for a person found NGRI must be held every two years, and that the legal threshold was beyond a reasonable doubt.\(^ {21}\)

In 1977, the legislature changed the legal threshold for the NGRI renewal hearing from beyond a reasonable doubt to preponderance of the evidence.\(^ {22}\) The Supreme Court struck down this law in 1978,\(^ {23}\) stating that it had set the standard of beyond a reasonable doubt in NGRI proceedings, and still felt this was the proper standard.

In 1982, the New Hampshire Senate asked the Supreme Court’s opinion on changing the legal threshold from beyond a reasonable doubt to clear and convincing in criminal commitment hearings. The New Hampshire Senate stated that the U.S. Supreme Court had ruled that clear and convincing evidence was a sufficient standard for civil commitments.\(^ {24}\) The New Hampshire Supreme Court ruled that despite the U.S. Supreme Court opinion, the threshold in New Hampshire should still be beyond a reasonable doubt, opining that states are free to interpret their own constitutions and adopt stricter due process standards as long as they meet the federally prescribed minimum.\(^ {25}\) The legal threshold issue was resolved in 1984 when Part 1, article 15 (the due process clause) of the New Hampshire Constitution was amended, changing the legal threshold of proof from beyond a reasonable doubt to clear and convincing evidence in insanity hearings determining whether a person is potentially dangerous to himself or others and that they suffer from a mental illness.

In 1979, the New Hampshire Supreme Court ruled in Hudson v. Miller that equal protection exists for persons deemed NGRI, persons incarcerated but insane, and persons civilly committed when maximum commitment time is decided. The Court ruled that lifetime commitments given to persons incarcerated but insane and still felt to be dangerous (such as dangerous sex offenders) was unconstitutional, and that they were entitled to similar protection
as a matter of constitutional right set forth by the New Hampshire Constitution due process clause [Part 1, article 15].

In 1982, the Legislature increased the maximum commitment time for NGRI individuals and civilly committed patients from two years to five years. The Senate requested an opinion of the justices on the constitutionality of the five-year commitment provision. The Supreme Court opined that the increase in the commitment period was not constitutionally barred since individuals could petition before the end of the five-year period for a hearing to determine if the commitment can be terminated.

In 1985, legislation established the Secure Psychiatric Unit (SPU) at the New Hampshire State Prison. This allowed individuals who were deemed NGRI as well as those incarcerated but insane to be treated in the same psychiatric unit. Court orders for commitment of persons incarcerated but insane were valid for up to five years, and they were committed to the SPU. Thus, lifetime commitment of persons incarcerated but insane were valid for up to five years, and the same legal threshold for commitment time for NGRI individuals and civilly committed patients was increased to one year or to 90 days. Over the years, attempts to change the maximum time for civil commitments to one year or to 90 days have been unsuccessful. The merging of commitment time and legal threshold is a tribute to the myriad individuals who have worked throughout the years to balance the civil liberties of New Hampshire citizens with the safety of the general public.

CONCLUSION

Years of legislative initiatives and Supreme Court rulings in New Hampshire have led to all persons committed in the civil and criminal setting having the same possible maximum commitment time of five years, and the same legal threshold for commitment (clear and convincing). Over the years, attempts to change the maximum time for civil commitments to one year or to 90 days have been unsuccessful. The merging of commitment time and legal threshold is a tribute to the myriad individuals who have worked throughout the years to balance the civil liberties of New Hampshire citizens with the safety of the general public.

ENDNOTES

5. 1822 NH Laws. Title LXXXVI: An act extending the powers of the justices of the superior court of judicature in certain cases. Sections 1 and 3. Passed July 2, 1822.
6. 1842 NH Revised Statutes: Chapter 9: An act for the asylum for the insane: Section 17. Passed December 23, 1842.

ABOUT THE AUTHOR

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