Disability Rights OHIO

"Fostering" Institutions and People with Disabilities
Presentation to the Education, Public Institutions, and Local Government Committee of the Ohio Constitutional Modernization Commission

Michael Kirkman, J.D.
Executive Director
Disability Rights Ohio

Disability Rights Ohio
50 W. Broad St., Suite 1400
Columbus, Ohio 43215-5923

614-466-7264 or 800-282-9181
FAX 614-644-1888
TTY 614-728-2553 or 800-858-3542

Ohio Disability Rights Law and Policy Center, Inc.

I. Introduction

The Ohio Constitution, at section 1 of Article VII, states:

> Institutions for the benefit of the insane, blind, and deaf and dumb, shall always be fostered and supported by the state; and be subject to such regulations as may be prescribed by the general assembly.

This section has been interpreted many times, most significantly in the case of *State ex rel. Price v Huwe*,[1] where the Ohio Supreme Court specified that the language is not self-executing. Subsequent cases have also limited the reach of the language, for example not allowing a court to order payment for private institutional care when state care is not available or adequate,[2] or to provide payments for individuals for their benefit. Reduced to its basic level, as interpreted by the state's courts, the provision provides a basis for the state to create a system of state hospitals.

In reviewing this language and its place in a modern Ohio Constitution, it is important for the Committee to have some understanding of the history of institutions and the impact, often horrific and negative, of state institutions on the lives of those involuntarily detained in them. This paper is a high level overview of how institutions for people with disabilities have evolved in the United States and Ohio, and some of the impact institutions have had on the lives of citizens with disabilities.

II. Early history

The earliest attempts to "care for" people with disabilities reflected the lack of understanding of their conditions, and often led to their living in horrible conditions. In the late 18th Century:

> [T]he lunatics [sic] were kept in gloomy, foul smelling cells and were ruled over by 'keepers' who used their whips freely. Unruly patients, when not being beaten, were regularly 'chained to rings of iron, let into the floor or wall of the cell … restrained in hand-cuffs or ankle irons," and bundled into Madd-shirts that "left the patient an impotent bundle of wrath."[3]

Individuals such as Benjamin Rush of Pennsylvania and Dorthea Dix in Massachusetts led campaigns to provide more humane "treatment" to "lunatics" and "maniac" during the period from the 1770s to the 1850s. Dix in particular was able to convince state lawmakers to increase appropriations for care for those labeled as mentally ill. As a result of those efforts, twenty states expanded their mental hospitals, and the

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Disability Rights Ohio is the federally mandated system to protect and advocate the rights of people with disabilities in Ohio. See 42 U.S.C. § 15041, 42 U.S.C. § 10801, and R.C. § 5123.60

[1] 105 Ohio St. 304, 137 N.E. 167 (1922)

[2] *In re Hamil*, 69 Ohio St.2d 97, 431 N.E.2d 317 (1982)

[3] Whitaker, Mad in America at 4 (Perseus 2004), quoting Thomas Morton, *The History of the Pennsylvania Hospital* (Times Printing House 1895)

number of people who received care there grew from 2,561 in 1840 to approximately 74,000 in 1890.[4]

Ohio had a similar experience. The General Assembly had been providing for the care and treatment of the "insane" since the early 1800's,[5] although most of the cost and responsibility for care fell to families, the church, or counties. After the passage of the 1851 language, the number of institutions grew and the population grew from 3,300 in 1880 to 10,226 by 1900.[6]

The changes reflected not just a call for hospitals but also a change in how therapy for this group was provided, to one of "moral" or "humane" treatment that had prospered in England and in parts of the United States. Such treatment was premised on small, family like settings and recreational and education programs, however, and a combination of expansive growth, blending of populations, and political patronage resulted in a steady decline in treatment outcomes.[7]

III. Eugenics and Institutions in the 20th Century

By the early 20th Century, however, this attempt to humanize treatment for those in institutions turned ugly based on the faux science of Eugenics. Fueled by plant research conducted by Gregor Mendal, American psychologist Henry H. Goddard and others quickly declared that the same natural selection could be applied to the human animal. Goddard is particularly notorious for his 1912 story of the Kallikak family (a pseudonym), in which he concluded that feeble-mindedness could be transmitted genetically.[8]

While Goddard later expressed regret for the inaccuracies in his research (indeed, it has been completely debunked) and the abuses that followed, the idea had taken hold in the scientific and political communities of the time. Numerous states passed laws mandating compulsory sterilization of "feeble-minded" people. This resulted in hundreds if not thousands of people in institutions throughout the nation being sterilized, often without their knowledge and consent.

This issue also gained legal notoriety in the case of *Buck v Bell*,[9] in which the Supreme Court of the United States denied a constitutional challenge to Virginia's compulsory sterilization law. Justice Oliver Wendell Holmes is famously quoted:

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[4] *Ibid.* p. 34
[5] Eagle and Kirkman, Ohio Mental Health Law (2d Ed. Banks-Baldwin), Section 1.11 p 41, *Rone v Fireman*, 473 F. Supp. 92(N.D. Ohio 1979)
[6] *Ibid.*
[7] Whitaker, n. 3, p. 36
[8] The Kallikak Family: A Study in the Heredity of Feeble-Mindedness (McMillan 1912) The book was also translated into German in 1914 and 1932, Die Familie Kallikak. Earnest Kraepelin, a psychiatrist known for his attempts to create a nosology or classification structure for mental illness, and Earnst Rudin, who worked closely with the National Socialists beginning in 1933, were reportedly influenced by the work. See also Smith et al. *Who Was Deborah Kallikak?*, 50 Intellectual and Developmental Disabilities 169-178.
[9] 274 U.S. 200 (1927)

> [Carrie Bell] … is the daughter of a feeble-minded mother in the same institution, and the mother of an illegitimate feeble-minded child... Three generations of imbeciles are enough.[10]

Years later, anthropologist Steven Jay Gould would conduct an investigation into the circumstances surrounding that quote and conclud that neither Carrie Bell, her mother, nor her grandmother were imbeciles. Rather, Carrie's mother became pregnant while unwed in rural Virginia and was sent to the institution because she was pregnant.[11]

The *Buck* case also highlights a convergence of poverty, gender, and disability as hallmarks of the nation's institutional population in the early 20th Century. A similar convergence occurred largely but not exclusively in the American South with people of color.[12] These individuals involved were largely poor, many had no mental disability to speak of, but were sent to state institutions or schools because they were deaf, had other disabilities, such as epilepsy, or simply were unruly.

Ohio has its own legal chapter in this story. In *Wade v Bethesda Hospital*,[13] Judge Holland M. Gary sought immunity after being sued in federal court for ordering the sterilization of a minor who was alleged to be feeble-minded, relying on Ohio's statutes allowing the practice. Unfortunately for Judge Gary, the statues had been rescinded and the federal court denied immunity for his actions.

IV. "Almost a Revolution"[14]

Eugenics and other laws that segregated and discriminated against people with behavioral or intellectual disabilities, such as "Ugly Laws"[15] remained on the books in most states into the mid-20th Century. Other practices such as non-consensual lobotomy or electro-shock therapy (ECT) added to the list of "treatments" that were sometimes visited on individuals in the name of therapy, but ultimately proved abusive and unsupportable.

Two trends emerged in the 1960's that completely changed how institutions were viewed and used. Debate related to these trends continues in the current legal, medical, and political debate.

Psychiatry has long sought to shore up its credibility within the medical profession. The "Kraepelinian dichotomy" developed by Emil Kraepelin in early 20th

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[10] *Ibid. at* 207

[11] Gould, Carrie Buck's Daughter, 7 National History 14 (1984). See Lombardo, Three Generations, No Imbeciles: Eugenics, the Supreme Court and Buck v. Bell (Johns Hopkins 2002)

[12] Burch & Joyner, Unspeakable: The Story of Junius Wilson (North Carolina Press 2007)

[13] 337 F.Supp. 671 (1971) *aff'd on reconsideration* 356 F.Supp. 380 (S.D. 1973) Judge Gary had previously ordered other sterilizations in Muskingum County, including one involving a physically attractive feeble-minded young woman, *In re Simpson*, ___Ohio Misc.___, 180 N.E.2d 206 (Muskingum Co. P. Ct. 1962). Citing to *Buck*, the judge ordered the sterilization as incidental to his authority to institutionalize people, relying on the general equity powers of the court.

[14] Applebaum, Almost a Revolution: Mental Health Law and the Limits of Change

[15] Schwiek, The Ugly Laws: Disability in Public (New York University Press 2009) Columbus, Ohio, had one of the first such laws, passed as part of the vagrancy code in 1894.

century Germany was one such attempt at a psychiatric nosology. The American Psychiatric Association's Diagnostic and Statistical Manual (currently in version 5) sought to classify mental disease with the scientific precision that the International Statistical Classification of Diseases and Related Health Problems, or ICD, brought to physical disease. Most recently, the National Institute of Mental Health has created its own system, the Research Domain Criteria or RDoC, seeking to guide its funding towards research that will lead to new nosology based in biology.[16]

In the mid 1960's, advances in psychopharmacology allowed psychiatrists to prescribe neuroleptic or "anti-psychotic" drugs to tranquilize and mitigate the worst of many patient's symptoms. This meant that many individuals did not need to be segregated from society because of their symptoms.

Based in part on reports of the success of patients on neuroleptics, the Kennedy administration proposed a community mental health act in 1962. "The state hospital, relics from a shameful past, would be replaced by a matrix of community care, anchored in neighborhood clinics."[17] That system is still roughly in place, though it was never fully funded and funding, now a block grant, has lagged for many years.

The second trend was an onslaught of federal litigation attacking the use of state institutions on two fronts: first, unconstitutional conditions, including abuse, lack of hygiene, and lack of adequate treatment and training in the institutions; and a lack of due process, both procedural and substantive, in state laws providing for involuntary commitment. The former culminated in the U.S. Supreme Court case of *Youngberg v Romeo,*[18] which held that the 14th Amendment requires a state to provide adequate training to those who are held in state institutions to protect them from harm and address the reasons for confinement.

As to the second issue, starting with the Wisconsin case of *Lessard v Schmidt,*[19] people subject to involuntary commitment were guaranteed procedural due process rights including right to counsel in those hearings. Various other rulings established a higher evidentiary standard (clear and convincing),[20] and a requirement that the individual must present a danger of harm to self or others to justify involuntary confinement.[21] In Ohio

[16] Director's Blog: Transforming Diagnosis, April 29 2013, www.nimh.nih.gov/about/director/2013/transforming-diagnosis.shtml
[17] Whitaker, note 1, p. 155-6
[18] 457 U.S. 307 (1982). In Ohio, the Northern District of Ohio required the state to improve conditions at the state psychiatric hospital in Lima, *Davis v Hubbard*, 506 F. Supp. 915 (N.D. Ohio 1980). Cases were filed in Ohio against Orient State School (*Barbara C. v. Moritz* No. C-2-77-887, Order and plan for relief October 19, 1981 (S.D. Ohio) and Apple Creek Developmental Center (*Sidles v. Delaney*No. C75-300A, Consent Judgment April 26, 1976, modified January 6, 1981(N.D. Ohio), resulting in rulings that provided comprehensive standards for the management of the institutions. A consent order also settled a case against the Central Ohio Psychiatric Hospital, *Doe v Hogan*.
[19] 349 F. Supp. 1078 (E.D. Wis. 1972)
[20] *Addington v Texas*, 441 U.S. 418 (1979)
[21] *O'Connor v Donaldson*, 422 U.S. 563 (1975)

these reforms followed from the case of *In re Fisher*,[22] and subsequently appeared in statute in the Mental Health Act of 1976.[23] Other cases clarified when medication could be administered without the consent of the individual, an area where "the controversy between a 'therapeutic' versus a 'rights' oriented approach to mental health policy" was particularly acrimonious.[24]

The combination of these two trends, combined with the always relentless pressure on state budgets and a lack of federal dollars for inpatient psychiatric treatment, resulted in significant depopulation of state hospitals. Without adequate funding in the community system, many individuals were unable to access treatment. Some became homeless or were imprisoned.

This situation and the different narratives describing it, remain with us today. One narrative describes the situation as a tragedy,[25] or even as "a psychiatric *Titanic*."[26]At the same time, others recognize that the situation is less than black and white. "That deinstitutionalization has generally failed to deliver appropriate services to ex-mental patients or other persons in need of them is hardly debatable," writes Professor David Rothman, but "[t]he question is why the outcome . . . should have been so grim, and what should be done to remedy the situation."[27] And as noted by Professor Sam Bagenstos, the debate is not simply historical, as federal courts are actively involved in deciding cases under the Americans with Disabilities Act as interpreted by the U.S. Supreme Court in *Olmstead v L.C. ex rel. Zimring*[28] recognizing that unjustified institutionalization can violate the Americas with Disabilities Act.[29]

Perhaps the key difference, as pointed out by Professor Bagenstos, is that the litigation theories under the ADA are necessarily focused forward on the receipt of quality services in a home like environment. *Ball v Kasich*, filed earlier this year by Disability Rights Ohio,[30] challenges the undue segregation of people with intellectual and developmental disabilities in large state and private institutions (ICFs), but the relief requested in the case actually is focused on provision of residential and vocational services for class members in community based settings which already are in use in the state. Similar results have been achieved in other cases.[31]

V. The Current Situation in Ohio

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[22] 39 Ohio St.2d 71, 313 N.E.2d 851 (1974)
[23] 1976 H 244, eff. August 26, 1976. See generally, Eagle and Kirkman, Ohio Mental Health Law, Chapter 7(2d Edition, Banks-Baldwin 1990)
[24] Eagle and Kirkman, supra n. 5 p. 294. *Steele v Hamilton County Board*, 90 Ohio St.3d 176, 736 N,E,2d 10 (2000)
[25] Applebaum, *Crazy in the Streets*, Commentary, May 1987, at 34, 39
[26] E. Fuller Torrey, Out of the Shadows: Confronting America's Mental Illness Crisis 11 (1997)
[27] Rothman, The Rehabilitation of the Asylum, Am. Prospect, Sept. 21, 1991, http://prospect.org/article/rehabilitation-asylum
[28] 527 U.S. 581 (1999)
[29] Bagenstos, The Past and Future of Deinstitutionalization Litigation, 34 Cardoza L. Rev. 1 (2012)
[30] No. 2:16-cv-282, filed May 31, 2016
[31] See *Disabilities Advocates, Inc. v Paterson*, 598 F. Supp. 2d 289 (E.D.N.Y. 2009) vacated on other grounds, 675 F.3d 149 (2d Cir. 2012)

Against this back drop, Ohio continues to provide institutional care in state hospitals. There are six physical facilities (Athens, Heartland, Northern Ohio, Northcoast, Summit, and Twin Valley)[32] with 1,067, available beds. A portion of the facility at Twin Valley is the Moritz Forensic Center, a high security facility for individuals judged as particularly at a high risk of violence or flight. As of September 6, 2016, the total census is 1,040 patients.[33]

Significantly, of these patients, the state department estimates that 70% of admissions are "forensic" or committed as a result of a criminal court proceeding and found incompetent to stand trial or not guilty by reason of insanity. Although there is no clear data on this, it is generally assumed that the length of stay for forensic patients is longer due to stricter controls in the law and the involvement of the trial judge from the criminal case.[34] Length of stay for civil commitments average 10-12 days, with some variation between hospitals.[35]

Under the Mental Health Act of 1988, commitment to the hospital is generally initiated and is paid for by the local mental health and addiction board. These boards are considered the 'gatekeepers' of the beds.[36] Many boards operate short term "three day" emergency centers or small hospitals to control the flow into the more expensive state hospitals. Recent changes in the law favor court ordered outpatient treatment as an alternative to long term or repeated hospitalization.[37]

V**I. The Growth of Self Advocacy and Concerns about Language**

While some might consider it a minor point, language and particularly the labeling of people who have lived experienced with psychiatric disabilities has become a major focus in the mental health world. Those who have experienced involuntary commitment or forced treatment now regularly speak out against those practices, instead recognizing the need for community based services, peer supports, housing, and employment. The Substance Abuse Mental Health Services Administration (SAMHSA) [38] in the United States Department of Health and Human Services, which administers the mental health block grant to the states, has recognized the need to focus on recovery based services,[39] and this approach is incorporated into many of Ohio MHAS' programs.

VI. Conclusion

There are many reasons why the Committee may want to consider removal or modification of the language in Article V, section 1. The most apparent concern is the antiquated language, which not only is not descriptive of current clinical nomenclature or

[32] A comprehensive description of the services provided by the Ohio Department of Mental Health and Addiction Services can be found at http://mha.ohio.gov, and the hospital system at http://mha.ohio.gov/Default.aspx?tabid=96.
[33] http://reports.mha.ohio.gov/pcs/dailycensus.pdf
[34] Eagle and Kirkman, supra note 5 at section 7.12, p. 236-8
[35] http://reports.mha.ohio.gov/pcs/losdischarged.pdf
[36] Rev. Code § 5122.10 et seq.
[37] See R.C. §§ 5122.01(B)(5), 5122.15 as amended by 130 SB 43 (2014)
[38] http://www.samhsa.gov/
[39] https://recoverymonth.gov/

more acceptable ‘people first’ language, but is offensive and discriminatory. The trend in both the Revised Code and other regulatory matters is to identify people first, in other words the person first, the disability second. Advocates in this area go even farther, asking that the clinical labels not be applied to them at all.

Second, there is no real need for a separate provision of the Constitution to allow the General Assembly to perform this function, as evidenced by the provision for institutions prior to its enactment. In the politics of 1851, the height of progressive reform and the addition of therapeutic care as advocated by Dorthea Dix, such a provision certainly seemed enlightened. But the need for services, and the competition for funding, is for evidence based practices such as Assertive Community Treatment, which is proven to help individuals comply with treatment and avoid re-hospitalization. Providing funding for state institutions actually takes away from community based, integrated, and recovery based services that provide support to the many individuals who voluntarily seek treatment and contribute to society, as well as payment to private hospitals which are less costly. Provision for treatment of those in the criminal justice system is both constitutionally mandated, and inherent in the authority of the General Assembly and the State to fashion criminal laws. All of these points suggest that the section could be eliminated.