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HABEAS CORPUS AND THE INDIGENT MENTAL PATIENT IN NEW YORK

Both the New York court of appeals and the state legislature have shown a new and wholesome concern for the rights of institutionalized mental patients. A recent landmark decision, *People ex rel. Rogers v. Stanley*,¹ indicates that the court of appeals is moving toward a position which will require counsel to represent mental patients at all legal proceedings affecting their institutionalized status.² In *Rogers*, the relator-mental patient brought a writ of habeas corpus to establish his sanity and gain release from a mental institution. His request as an indigent³ that the court appoint counsel was denied, the writ was dismissed after a hearing, and the patient was remanded to the custody of the hospital. The court of appeals reversed both the supreme court and a unanimous appellate division,⁴ proscribing the system of discretionary appointment of counsel in cases of this kind and making such appointment "a matter of constitutional right."⁵

The *Rogers* decision was handed down in the context of the sweeping new article 5 of the New York Mental Hygiene Law, which went into effect on September 1, 1965. In addition, the *Rogers* holding has been recognized by the legislature in that it has allocated funds for the system of mandatory appointment of counsel in all cases of this type.⁶ Interesting problems come to the surface when one contrasts the concepts and approach of the new article 5 with *Rogers* and the trend which it would seem to foretell.

I. UNDERSTANDING *Rogers* AND ITS CONSEQUENCES

Prior to *Rogers*, the system of discretionary appointment of counsel was mandated by statute,⁷ and the case law did not require the appointment of counsel in a court of original jurisdiction in every habeas corpus proceeding.⁸ Nonetheless, in the light of the overall trend toward counsel for the indigent,⁹

1. 17 N.Y.2d 256, 217 N.E.2d 636, 270 N.Y.S.2d 573 (1966) (memorandum decision).

2. See text accompanying notes 36-46 infra.

3. When speaking of an institutionalized mental patient, the term "indigent" would not necessarily have the same meaning as it would in other contexts. A situation could arise where the patient has money, but is unable to reach it to use for obtaining counsel and for other litigation expenses because of the very fact that the patient is institutionalized. *Rogers* came from a wealthy family and, nevertheless, was indigent. Brief for the New York Civil Liberties Union as Amicus Curiae, pp. 4, 5, 11; cf. N.Y. Mental Hygiene Law §§ 101, 103, 106, 109-13 (Supp. 1966).

4. 21 App. Div. 2d 965, 252 N.Y.S.2d 398 (2d Dep't 1964) (memorandum decision).

5. 17 N.Y.2d at 259, 217 N.E.2d at 636, 270 N.Y.S.2d at 574.

6. N.Y. Sess. Laws 1966, ch. 761, § 35.

7. N.Y. Mental Hygiene Law § 88(c) (Supp. 1966).

8. *Dillon v. United States*, 307 F.2d 445, 446-48 (9th Cir. 1962); *United States ex rel. Wissenfeld v. Wilkins*, 281 F.2d 707, 715 (2d Cir. 1960); *People ex rel. Simpkins v. Director of Pilgrim State Hosp.*, 22 App. Div. 2d 699, 253 N.Y.S.2d 782 (2d Dep't 1964).

9. See, e.g., *People v. Witenski*, 15 N.Y.2d 392, 207 N.E.2d 358, 259 N.Y.S.2d 413 (1965).

and in the light of precedents in analogous areas of the law,¹⁰ the *Rogers* decision was by no means surprising.¹¹ It rests on the combination of the due process and equal protection clauses of the fourteenth amendment,¹² but, whether considered as a due process decision or as an equal protection decision, the holding presents analytical difficulties.

Gideon v. Wainwright,¹³ the only due process precedent cited by the majority, established the indigent's right to counsel in a state court, at least upon the trial of a felony.¹⁴ The fourteenth amendment was there interpreted as requiring a literal application of the sixth amendment guarantee of counsel¹⁵ to the states.¹⁶ The sixth amendment speaks of "criminal prosecutions," whereas a habeas corpus proceeding brought by a mental patient is clearly a civil proceeding.¹⁷ Thus it is not by a literal application of the sixth amendment to the states, but rather by analogy that the due process requirement and the sixth amendment could be expanded to guarantee the indigent's right to counsel at a habeas corpus proceeding.

The fourteenth amendment also requires that each person receive the same benefit of the law as is accorded to others in similar circumstances.¹⁸ This re-

10. Right to counsel in a habeas corpus appeal has been upheld. *People v. Hughes*, 15 N.Y.2d 172, 204 N.E.2d 849, 256 N.Y.S.2d 803 (per curiam), cert. denied, 384 U.S. 980 (1965). The amicus curiae brief in *Rogers* argued that, a fortiori, the right to counsel should be upheld in the court of original jurisdiction. Brief for the New York Civil Liberties Union as Amicus Curiae, p. 16; see *Howard v. Overholser*, 130 F.2d 429 (D.C. Cir. 1942). It has been held that due process requires representation in a habeas corpus action by either counsel or guardian. *Id.* at 434; see *Dooling v. Overholser*, 243 F.2d 825, 827 (D.C. Cir. 1957).

11. See *People ex rel. Kamisaroff v. Johnston*, 13 N.Y.2d 66, 72, 192 N.E.2d 11, 14, 242 N.Y.S.2d 38, 42 (1963) (Fuld, J., dissenting).

12. It is often difficult to determine precisely which of these two clauses provides the basis for a particular holding, or whether both clauses complement one another and combine to enable the court to reach decisions. See Comment, 55 Mich. L. Rev. 413, 416-17 (1957). On the other hand, the facts that equal protection applies only to the states, and that both the states and the federal government must observe due process requirements, lead to the conclusion that equal protection is wholly subsumed within due process, since it is unlikely that any arbitrary action would be denied to the states but allowed to the federal government.

13. 372 U.S. 335 (1963).

14. *Id.* at 339. See generally Beaney, *The Right to Counsel in American Courts* 193 (1955); Brant, *The Bill of Rights* 481 (1965); Lewis, *Gideon's Trumpet* 220 (1964); Redlich, *Are There "Certain Rights . . . Retained by the People"?*, 37 N.Y.U.L. Rev. 787 (1962).

15. "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

16. 372 U.S. at 339-40.

17. *United States ex rel. Wissenfeld v. Wilkins*, 281 F.2d 707, 715 (2d Cir. 1960); *People ex rel. Curtis v. Kidney*, 225 N.Y. 299, 304, 122 N.E. 241, 242 (1919); Brief for Respondent, p. 12, *People ex rel. Rogers v. Stanley*, 17 N.Y.2d 256, 217 N.E.2d 636, 270 N.Y.S.2d 573 (1966) (memorandum decision). But cf. *Smith v. Bennett*, 365 U.S. 708 (1961), where the Court stated: "We shall not quibble as to whether in this context it [habeas corpus] be called a civil or criminal action . . . it is 'the highest remedy in law, for any man that is imprisoned.'" *Id.* at 712.

18. See *Kentucky Fin. Corp. v. Paramount Auto Exch. Corp.*, 262 U.S. 544, 550 (1923); *Gardner v. Michigan*, 199 U.S. 325, 333-34 (1905); 79 Harv. L. Rev. 847 (1966); 19 Wash. & Lee L. Rev. 73, 76 (1962).

quirement, traditionally discussed under the equal protection clause, has a two-fold test.¹⁹ First, is the purpose of the law under review consistent with legitimate government objectives?²⁰ Secondly, if so, does the classification objected to relate reasonably to the purpose of the law?²¹ A negative answer to either inquiry in a case where it has been alleged that the classification made by the law in question infringes upon someone's personal rights²² would result in a holding that the equal protection clause was not satisfied. Under this test, an unjustified discrimination against an indigent, made precisely because of indigency, is unconstitutional. A further test, however, is needed where the action of the state is neutral, where the twofold test is satisfied and there is still present an unintended rich-poor discrimination.²³ In this situation, the courts have employed a balancing approach, considering all the circumstances in the particular case and weighing the benefit to society reasonably to be accomplished by the state against the harm or deprivation imposed upon the individual discriminated against by the resultant classification of the law.²⁴ In cases where the indigent seeks positive assistance to make him equal, there is a direct relationship between the cost of equalizing the indigent and the economic benefit to society if the court refuses to require equalization.²⁵ Different cases requiring the same general balancing test may result in different holdings because of particular circumstances in each case.²⁶

The *Rogers* case was a situation where the law of the state was neutral, and the classification resulted from state action which was pursuant to legitimate government objectives. The court of appeals could have employed the balancing test as discussed above and held that a proper exercise of discretion required that counsel be appointed for Rogers.²⁷ The court instead held that counsel must be appointed in every such case, thereby indicating that it balanced the cost of a system of mandatory appointment of counsel against the need for such a system in all cases, and it found the scales weighted more heavily for the latter.

On a practical level, the *Rogers* decision is an extremely important one. When one speaks of the right to counsel, there is ordinarily implied a corresponding right to elect not to have counsel by an effective waiver.²⁸ However, where the fact in issue is the very mental capacity which would be required for an effective waiver, the right to counsel is tantamount to mandatory appointment

19. See The Supreme Court, 1955 Term, 70 Harv. L. Rev. 83, 126 (1956).

20. See *Truax v. Raich*, 239 U.S. 33, 40-42 (1915).

21. See *Power Mfg. Co. v. Saunders*, 274 U.S. 490, 493 (1927).

22. The courts have been more permissive in upholding statutes which infringe upon economic activities. Note, 16 Stan. L. Rev. 394, 397-98 (1964).

23. The Supreme Court, 1955 Term, 70 Harv. L. Rev. 83, 128 (1956); Note, 16 Stan. L. Rev. 394, 398-414 (1964).

24. *Ibid.*

25. *Ibid.*

26. *Id.* at 414. Compare *Griffin v. Illinois*, 351 U.S. 12 (1956), with *Norvell v. Illinois*, 373 U.S. 420 (1963).

27. Such a result would have left the law unchanged. However, no facts stated in the briefs or in the opinions in the court of appeals indicate that there were any particular circumstances in the *Rogers* case requiring the appointment of counsel.

28. See *Gideon v. Wainwright*, 372 U.S. 335, 339-40 (1963).

of counsel.²⁹ Mandatory appointment, if it leads to more litigation in this area, could place a very heavy burden on the attorney general's staff. Whereas the number of habeas corpus petitions from mental patients in the past³⁰ has been relatively small in the light of the number of resident patients,³¹ it was not insignificant in terms of the time and effort required of the attorney general's office in defending against them.³² There is additionally the problem of repeat writs. The repeat petitioner is virtually unlimited in the frequency with which he can exercise his right to habeas corpus.³³ A fairly common practice among the repeaters is to withdraw the writ before the hearing, or at the hearing but prior to adjudication, when it has become clear that the ruling would be for retention, thereby avoiding any limitation upon future petitions.³⁴ The *Rogers* holding, if literally applied, would disenable any discretionary non-appointment of counsel in such cases.³⁵

29. See *Pate v. Robinson*, 383 U.S. 375, 384 (1966); *Dooling v. Overholser*, 243 F.2d 825, 829 (D.C. Cir. 1957).

30. The following statistics are from the New York State Department of Law, Attorney General's Annual Reports, for the years and at the pages indicated:

Year	Number of Writs	Annual Report Page
1957	233	43
1959	260	51
1961	221	51
1962	433	60
1963	756	74
1964	842*	65
1965	437**	54

* Brief for Appellee, p. 15, *People ex rel. Rogers v. Stanley*, 17 N.Y.2d 256, 217 N.E.2d 636, 270 N.Y.S.2d 573 (1966) (memorandum decision), states that this number was for the Second Judicial Department alone, thereby casting some doubt on the accuracy of the published figures above. It is suggested that they are low.

** The number may have decreased as a result of *Baxtrom v. Herold*, 383 U.S. 107 (1966), which held that the denial of a jury trial to one bringing a habeas corpus petition seeking release from a criminal mental institution at the end of his sentence, when jury review is allowed civil patients seeking release, is a denial of equal protection. This has resulted in the state being more reluctant to oppose the request of a patient to be transferred from a criminal to a civil institution once his time is served. Another reason for the decline is the alternative procedures available under the new article 5 of the N.Y. Mental Hygiene Law. Cf. note 68 *infra*.

31. According to the State of New York Executive Budget for the fiscal year April 1, 1966, to March 31, 1967, at 493, the actual number of institutionalized civil patients at state institutions for the year 1965-66 was 83,042. The projected number for 1966-67 was 82,980.

32. The New York State Attorney General's Bureau of Mental Hygiene consists of 10 attorneys, and the Bureau has requested that its allowance be increased by two additional experienced attorneys. Interview with Isadore Siegel, Assistant Attorney General in charge of the Bureau of Mental Hygiene of the State of New York, in New York City, Dec. 16, 1966.

33. N.Y. C.P.L.R. 7003; see N.Y. Mental Hygiene Law § 426 (Supp. 1966). In the case of the repeat petitioner, any testimony or exhibits concerning the patient's condition which were in the record from a previous habeas corpus proceeding may be offered by the district attorney into evidence without calling the witness who gave the testimony, and it will be as effective as if the witness were called.

34. Interview with Isadore Siegel, Assistant Attorney General in charge of the Bureau of Mental Hygiene of the State of New York, in New York City, Dec. 16, 1966.

35. 17 N.Y.2d at 259-60, 217 N.E.2d at 636, 270 N.Y.S.2d at 574 (dissenting opinion). Rogers was a repeat petitioner himself. Brief for Appellee, p. 4.

Judge Bergan wrote a strong, well-considered dissent to the *Rogers* holding. The decision was seen as resting on an implicit (and, according to the dissent, erroneous³⁶) equation between jail and confinement in a mental institution.³⁷ The amicus curiae brief for *Rogers* argued that if habeas corpus is by nature an adversary proceeding,³⁸ it follows that right to counsel should be provided the indigent petitioner seeking release from either prison or a mental institution.³⁹ It would seem, then, that to the extent that it may be shown that they are essentially adversary proceedings, an indigent should also be entitled to counsel at involuntary commitment (or "certification") proceedings⁴⁰ and at any hearing on periodic review of his status as an involuntary patient.⁴¹ Further, counsel would be necessary to protect the rights of the senile indigent,⁴² and the indigent narcotics addict and alcoholic⁴³ at proceedings involving their freedom if these procedures could be shown to be adversary in nature. The *Rogers* decision might also apply to an indigent criminal defendant's proceeding to determine competency to stand trial.⁴⁴ To the extent that any of these proceedings become a "battle of experts,"⁴⁵ must not the right to expert testimony

36. 17 N.Y.2d at 260, 217 N.E.2d at 637, 270 N.Y.S.2d at 575 (dissenting opinion).

37. Contrary to the dissent, it may be argued that, to the extent that there is a difference between jail and a mental institution, it is the mental patient who should get the greater procedural protection because of the greater likelihood that he will be unable to understand the nature and consequences of the proceedings. Lindman & McIntyre, *The Mentally Disabled and the Law* 29 (1961). It should be noted that it is the patient who has the burden of proving that he is competent.

38. Cf. *Friedel v. Board of Regents*, 296 N.Y. 347, 352, 73 N.E.2d 545, 547 (1947) (memorandum decision); *People ex rel. Cole v. Johnston*, 22 App. Div. 2d 893, 255 N.Y.S.2d 388 (2d Dep't 1964).

39. Brief for the New York Civil Liberties Union as Amicus Curiae, pp. 14-17.

40. See N.Y. Mental Hygiene Law §§ 72-73 (Supp. 1966); *Is Counsel Needed at Commitment Hearings?—A Symposium*, 23 *The Legal Aid Brief Case* 13 (1964).

New York is encouraging voluntary commitment under the new article 5 of the Mental Hygiene Law. See note 64 *infra* and accompanying text. However, an indeterminate length of time for involuntary commitment represents the more general practice in this country. Lindman & McIntyre, *op. cit. supra* note 37, at 17. For a recent statutory summary by states of the legal counsel situation at commitment see Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill*, 44 *Texas L. Rev.* 424, 460 (Appendix A) (1966). For a general summary of the rationale of commitment see Ross, *Commitment of the Mentally Ill: Problems of Law and Policy*, 57 *Mich. L. Rev.* 945, 953-64 (1959); Note, *Civil Commitment of the Mentally Ill: Theories and Procedures*, 79 *Harv. L. Rev.* 1288 (1966).

41. See Lindman & McIntyre, *op. cit. supra* note 37, at 129; N.Y. Mental Hygiene Law §§ 72-73 (Supp. 1966).

42. See *Lake v. Cameron*, 364 F.2d 657 (D.C. Cir. 1966); Brenner, *Denial of Due Process and Civil Rights Under Sections 73 and 73a of the Mental Hygiene Law to Aged Seniles Without Major Medical Impairment*, 34 *N.Y.S.B.J.* 19 (1962).

43. N.Y. Sess. Laws 1966, ch. 761, § 35(1)(a), provides counsel for indigent narcotic addicts and alcoholics as well as indigent mental patients.

44. In New York, an indigent might not always have an attorney appointed at a proceeding where his competency to stand trial is being determined. Cf. Szasz, *Psychiatric Justice* 19-36 (1965). Compare N.Y. Code Crim. Proc. § 662 (Supp. 1966), with N.Y. Code Crim. Proc. §§ 872-73 (Supp. 1966).

45. See Szasz, *op. cit. supra* note 44, at 58-61; Cohen, *The Function of the Attorney*

also be incorporated into the indigents' right to counsel in order that representation by counsel be meaningful?⁴⁶ By implication, the right to free expert witnesses as well as counsel may be recognized, and these rights could well be extended to protect the mental patient, the senile indigent, the drug addict or alcoholic at "commitment" hearings, and at competency-to-stand-trial proceedings.

The legislature, in accord with the *Rogers* decision,⁴⁷ has enacted a statute providing the indigent mental patient in a habeas corpus proceeding with funds for counsel and for independent expert psychiatric testimony.⁴⁸ By virtue of the *Rogers* holding, the habeas corpus petitioner has the *right* to counsel in the court of original jurisdiction for which the new statute provides funds. However, the appointment of independent psychiatric opinion remains *discretionary* with the court,⁴⁹ with the statute allocating funds for this purpose when the court chooses to exercise its discretion.

II. THE NEW ARTICLE 5

Although prior to the enactment of the new article 5⁵⁰ of the New York Mental Hygiene Law, there was some provision for the rights of the mental patient,⁵¹ many attorneys and judges were dissatisfied with the old law.⁵² Specifically, examining physicians frequently and routinely certified that it would be detrimental for a patient to be given notice of his right to a hearing before being certified by the court to be mentally ill. The result was, particularly in upstate New York, that there was often systematic without-hearing deprivation and the Commitment of the Mentally Ill, 44 *Texas L. Rev.* 424 (1966). But see Tanny, Book Review, 64 *Mich. L. Rev.* 763 (1966).

46. See *United States ex rel. Smith v. Baldi*, 344 U.S. 561 (1953); *United States v. Brodson*, 241 F.2d 107 (7th Cir.) cert. denied, 354 U.S. 911 (1957); *United States v. Hines*, 148 F. Supp. 73 (E.D.N.Y. 1957), rev'd on other grounds, 256 F.2d 561 (2d Cir. 1958); Goldstein & Fine, *The Indigent Accused, the Psychiatrist, and the Insanity Defense*, 110 *U. Pa. L. Rev.* 1061 (1962); Note, 47 *Minn. L. Rev.* 1054 (1963); cf. *Bush v. Texas*, 372 U.S. 586 (1963).

47. Legislative Memorandum of the Governor, in N.Y. Sess. Laws 3006-07 (McKinney 1966).

48. N.Y. Sess. Laws 1966, ch. 761, § 35. This statute allocates funds to pay for appointed counsel in proceedings to commit or transfer an indigent to a civil mental institution of the state or to retain him in such an institution when the judiciary uses its discretion to appoint an attorney.

49. N.Y. Sess. Laws 1966, ch. 761, § 35(3).

50. N.Y. Mental Hygiene Law art. 5 (Supp. 1966). See generally Chaikin, *Commitment by Fiat: New York's New Mental Hygiene Law*, 1 *Colum. J. of L. and Soc. Prob.* 113 (1965); Geller, *The New Mental Health Law*, N.Y.L.J., June 6-8, 1966, p. 4, col. 1 [hereinafter cited as Geller]; Comment, 17 *Syracuse L. Rev.* 671 (1966); Comment, 114 *U. Pa. L. Rev.* 1067 (1966). Although the new article 5 did not apply to those committed before its effective date, it is being applied retroactively by administrative order of the Department of Mental Hygiene. Geller, June 8, 1966, p. 4, cols. 2-3; cf. *People ex rel. Kaminsteln v. Brooklyn State Hosp.*, 49 *Misc. 2d* 57, 266 N.Y.S.2d 916 (Sup. Ct. 1966).

51. See *In the Matter of Coates*, 9 N.Y.2d 242, 173 N.E.2d 797, 213 N.Y.S.2d 74, appeal dismissed, 368 U.S. 34 (1961).

52. Proceedings of the Seminar of Supreme Court Justices, First & Second Dep'ts, on the Subject of Hospitalization of the Mentally Ill, N.Y.U. School of Law, May 15, 1965, at 8-9 (remarks of J. Kenneth Campbell) [hereinafter cited as Proceedings]; Geller, June 6, 1966, p. 4, cols. 1-2.

of the patient's liberty.⁵³ In New York City, where hearings were more frequent, they were perfunctory, with the judge having to rely almost entirely on the information supplied by the hospital's physicians, which may or may not have represented the results of careful examination on their part.⁵⁴ Although judicial certification was formally "temporary" when made, it usually became final when the director of the hospital filed the appropriate papers.⁵⁵ The patient was entitled to seek release via a writ of habeas corpus, but in fact this right was seldom exercised.⁵⁶ For their part, the physicians were also dissatisfied with the old law.⁵⁷ They felt that the certification of a patient was a medical question and disapproved of any judicial interference.⁵⁸ They also complained that "the necessity for obtaining court orders frequently delayed the commencement of prompt treatment at the onset of a patient's illness—the very time when treatment was needed most."⁵⁹ A five year study of the Association of the Bar of the City of New York struck a compromise⁶⁰ between the medical and legal interests and proposed a complete revision of the law.⁶¹ These proposals were enacted on April 22, 1964. The new law provides for medical commitment, without hearing,⁶² of involuntary patients for the first sixty days in a state hospital, but with compulsory prompt notice of the right to a hearing and of the availability of a new service, the Mental Health Information Service.⁶³ By the end of the period of medical commitment, wherever possible, the patient is converted to a "voluntary" or an "informal"⁶⁴ status enabling the patient to leave the hospital within a reasonably short period after expressing a desire to do so in the case of the "voluntary" patient, or at will in the case of an "informal" patient. It has been suggested that one of the virtues of the new

53. Id. at 4, col. 1.

54. Id. at 4, cols. 1-2.

55. Id. at 4, col. 2.

56. See notes 30-31 *supra* and accompanying text.

57. Proceedings 10 (remarks of J. Kenneth Campbell); Geller, June 6, 1966, p. 4, col. 2.

58. *Ibid.*

59. *Ibid.*

60. Proceedings 13 (remarks of J. Kenneth Campbell); Geller, June 6, 1966, p. 4, col. 3. The legislation which was passed had wide support in both the legal and medical worlds, but the New York Civil Liberties Union refused to support it. Proceedings 13 (remarks of J. Kenneth Campbell).

61. See Association of the Bar of the City of New York, *Mental Illness and Due Process* (1962).

62. N.Y. Mental Hygiene Law § 72 (Supp. 1966). This is the main reason for the dissatisfaction of the New York Civil Liberties Union with the new law. See Proceedings 13 (remarks of J. Kenneth Campbell).

63. N.Y. Mental Hygiene Law § 88 (Supp. 1966).

64. N.Y. Mental Hygiene Law § 71(5) (Supp. 1966); see *People ex rel. Kaminstein v. Brooklyn State Hosp.*, 49 Misc. 2d 57, 63-64, 266 N.Y.S.2d 916, 923-24 (Sup. Ct. 1966), wherein the court was critical of the new law's attempt to place people in a voluntary rather than an involuntary status because of the diminution in procedural safeguards for the voluntary patient. Compare N.Y. Mental Hygiene Law § 71(4) (Supp. 1966), with N.Y. Mental Hygiene Law § 73 (Supp. 1966). It has recently been held that a hospital's reclassification of an involuntary patient, making her a voluntary patient, is unconstitutional as a denial of due process and equal protection. The court said that voluntary patients are denied some of the procedural protections given the involuntary patient, and the voluntary patient's right to release 10 days after he gives notification of his intention to leave is merely

law is that it is therapeutic to alleviate the fears of the patient for his liberty and thereby better enable him to respond to treatment.⁶⁵ In order for the hospital to retain an involuntary patient, the hospital must request a retention order and the patient and those designated by him must be given notice of the right to a hearing. Whether or not a hearing is requested, the Service marshalls all available information and gives it to the court in order that the court may be able to make an intelligent decision on the question of retention. Successive applications for retention by the hospital are periodically required;⁶⁶ each time the patient is entitled to a hearing. He and those designated by him are told of this right, and the Service aids the court to correctly decide the application. The patient is entitled by law to a jury review of any order of retention by the court,⁶⁷ and the patient still has his constitutional right to habeas corpus.⁶⁸

a theoretical right, since the patient can be reclassified to an involuntary status if he attempts to leave. *Matter of Buttonow* (Sup. Ct. Jan. 5, 1967) in N.Y.L.J., Jan. 6, 1967, p. 20, col. 5.

65. New York State Dep't of Mental Hygiene, Office of Legal Affairs, Memorandum No. 58, at 14 (Dec. 3, 1954); Geller, June 8, 1966, p. 4, col. 1. But see Editorial, 40 *Psychiatric Q.* 150 (1966).

66. N.Y. Mental Hygiene Law § 73(3) (Supp. 1966).

67. N.Y. Mental Hygiene Law § 74 (Supp. 1966).

68. The effect of the new article 5 may be seen in terms of the following statistics from the New York State Attorney General's office:

"The following report of days in Court is exclusive of all regular Special Term days for motions and proceedings in all Counties which must be covered daily in New York County, in Kings County and weekly in Queens County and at least once a week and sometimes several times a week in Westchester County.

Beginning with January 1, 1967 a new Special Term for Incompetency Proceedings will begin to function in Nassau County to cover Nassau and Suffolk Counties and this will take an attorney away from the office one day a week additionally and there are reports that the latter may be split into Nassau and Suffolk as separate areas which will then require an additional day in Court and the additional Special Term set up.

The following figures are from January 1, 1966 to December 1, 1966 and only in connection with writs and retentions:

QUEENS COUNTY

In this County we used to average about six days a year to try writs.

January 1 to December 1, 1966 writs and retention hearings consumed _____ 55 days

ORANGE COUNTY and DUTCHESS COUNTY

We used to average one day a month at Matteawan and about eight days a year in the other Counties.

January 1 to December 1, 1966 writs and retention hearings consumed _____ 46 days

SUFFOLK COUNTY

We previously had hearings one day a month, consumed twelve days a year.

January 1 to December 1, 1966 writs and retention hearings consumed _____ 48 days

KINGS COUNTY

We used to have an occasional hearing, nothing over five days a year.

From January 1 to December 1, 1966 writs and retention hearings consumed _____ 43 days

NEW YORK COUNTY

We used to have an occasional hearing, nothing over six or seven days a year.

From January 1, to December 1, 1966 writs and retention hearings consumed _____ 45 days

Total 237 days"

Memorandum from Isadore Siegel, Assistant Attorney General, in charge of Bureau of Mental Hygiene of the State of New York, to Hon. Samuel A. Hirshowitz, First Assistant Attorney General, December 13, 1966, at 1-2.

There has also been an increase in the number of jury trials involving mental patients. During the twenty-two year period prior to January 1, 1966, there were two such reviews in New York State. During the past two months there have been three such trials, and another is pending. *Id.* at 3. The tremendous increase in the number of hearings and in the

III. *Rogers* AND THE ARTICLE 5 APPROACH

The strong advocate of the rights of the institutionalized mental patient could find the new article 5 wanting in that it provides for the discretionary appointment of counsel;⁶⁹ it provides for commitment in some cases completely apart from any judicial proceeding;⁷⁰ it permits a waiver of jury review of court authorization to retain a patient;⁷¹ and it perpetuates a system where independent expert psychiatric opinion is seldom made available to the indigent patient.⁷² Realistically, however, there can be no question that the *Rogers* approach to the problems in this area of the law would have made a great deal more sense under the old statute. To the extent that the new article 5 provides important additional procedural safeguards for the patient's rights while at the same time providing for the medical needs of the patient,⁷³ the practical wisdom of *Rogers* at this time may be criticized.

According to the dissent, the *Rogers* decision favors an adversary approach where this approach could often prove detrimental to the patient if the patient is in fact mentally ill.⁷⁴ Apparently the decision rejects or at least de-emphasizes to a great extent the view that in a proceeding involving an alleged mentally ill person the judge fulfills the role of *parens patriae*. It is this view which is at the very heart of all of the new article 5,⁷⁵ including the provision for the discretionary appointment of counsel. At a time when the gladiatorial adversary approach to litigation is on the wane⁷⁶ and when there is a clear recognition that counsel has an ethical responsibility to the court, not merely to his client,⁷⁷ this strictly adversarial approach seems to be a step backward. The ethical responsibility of appointed counsel need not be seen strictly in terms of gaining freedom from the institution for his client.⁷⁸ Freedom from disease is also important.⁷⁹ Any appointed counsel should strive to do what is best for the patient while, of course, seeing that the rights of his client are not violated in a sham proceeding. The *Rogers* decision merely automatically adds another guardian of the rights of the patient, when this might not be necessary, as in the case of the obviously mentally ill repeat petitioner.

time consumed by such hearings is attributed to three factors: the procedural requirements of the new article 5; the zealotry of the attorneys being assigned as a result of the *Rogers* decision; and the injection of the Service into writ and retention hearings, sometimes causing "long hearings unnecessarily." *Id.* at 2-3; cf. note 30 *supra*.

69. See note 7 *supra*.

70. See note 62 *supra*.

71. N.Y. Mental Hygiene Law § 74 (Supp. 1966); see text accompanying note 29 *supra*.

72. Interview With Isadore Siegel, Assistant Attorney General in charge of the Bureau of Mental Hygiene of the State of New York, in New York City, Dec. 16, 1966.

73. See text accompanying notes 50-68 *supra*.

74. 17 N.Y.2d at 262-63, 217 N.E.2d at 638, 270 N.Y.S.2d at 577.

75. Proceedings 24-25 (remarks of Markowitz, J.).

76. See, e.g., N.Y. C.P.L.R. 3026; Fed. R. Civ. P. 8(f).

77. See, e.g., Canons of Professional Ethics, Canon 32.

78. See 17 N.Y.2d at 263-64, 217 N.E.2d at 639, 270 N.Y.S.2d at 577-78 (dissenting opinion); Lewin, *Mental Disorder and the Federal Indigent*, 1966 S.D.L. Rev. 198, 201, 203.

79. See *People ex rel. Anonymous No. 1 v. La Burt*, 17 N.Y.2d 738, 217 N.E.2d 31, 270 N.Y.S.2d 206 (memorandum decision), cert. denied, 87 Sup. Ct. 299 (1966); Bassiouni, *The Right of the Mentally Ill to Cure and Treatment: Medical Due Process*, 15 De Paul L. Rev. 291 (1966).

The Service, which is the key to a realization of the spirit of the new article 5, was created as a watchdog to close the gap between a statute which merely appears to provide for due process, and a truly meaningful protection of the rights of the mental patient.⁸⁰ One of its explicit duties is "*in any case before a court* to assemble and provide the court with . . . information from which the court may determine the need, *if any*, for the appointment of counsel . . . or the obtaining of additional psychiatric opinion"⁸¹ The proponents of the *Rogers* decision would add to article 5 the right to representation by counsel. In light of the fact that article 5 attempts to secure through the Service the effective right to a meaningful hearing before an informed judiciary, such an addition seems extraneous. It would seem that the *Rogers* decision and the consequences portending from it may require a functional reorientation of the Service. At its inception there were already limitations upon the Service in that it was clearly not established to review any medical judgment nor to perform any judicial function.⁸² There already seemed to be some overlap with the Department of Mental Hygiene in notifying the patient of his rights and seeing that the desires of the patient are effectively communicated to the courts.⁸³ Some conceived of the Service in a legal aid capacity,⁸⁴ but the *Rogers* holding mandates legal aid (or its equivalent) completely apart from the Service. This would seem to leave the Service in the position of an informational intermediary only. Its other functions can be adequately performed by the Mental Hygiene Department and appointed counsel. The professional staff of the Service⁸⁵ would seem to be left with little to do if the *Rogers* decision is extended to other proceedings involving mental patients.⁸⁶ In any case, the function of the Service should be critically re-examined.

IV. CONCLUSION

To insure that both rich and poor mental patients receive the benefits of adequate representation at hearings determining the liberty of the patient is certainly a worthwhile end. To accomplish that objective by requiring the appointment of counsel in all cases of indigency would only be a proper means if other procedural safeguards did not discount the possibility of continued retention of those patients in fact sane. The holding of the *Rogers* case is valid, therefore, only if the Mental Health Information Service and the procedures in article 5 were inadequate to protect the patient. In the absence of evidence of such inadequacy, the mandatory appointment of counsel seems needless.

80. See text accompanying notes 50-68 *supra*.

81. N.Y. Mental Hygiene Law § 88(c) (Supp. 1966). (Emphasis added.)

82. Proceedings 33 (remarks of Simon Rosenzweig). Geller, June 7, 1966, p. 4, col. 1.

83. Proceedings 30 (remarks of E. David Wiley). However, whereas the Mental Hygiene Department is an arm of the keeper, the Service is an arm of the court.

84. Proceedings 27 (remarks of Geller, J.).

85. The Service in the New York City area clearly favors the hiring of attorneys, while in upstate New York the Service is comprised mainly of social workers. According to the Service, their professional staff is as follows: in the First Dep't, 12 attorneys; in the Second Dep't, 20 attorneys and 3 social workers (2 of whom are law students); in the Third Dep't, 2 attorneys and 3 social workers; and in the Fourth Dep't, 2 attorneys and 8 social workers.

86. See text accompanying notes 40-44 *supra*.