Ex Parte Civil Commitment, Family Care-Givers, and Schizophrenia: A Therapeutic Jurisprudence Analysis

Éva Szeli *

I. INTRODUCTION

Therapeutic jurisprudence is the study of the law as a social force that can produce therapeutic or anti-therapeutic consequences. While this approach to legal analysis is applicable in a wide range of areas, it is particularly well-suited to mental health law in areas such as civil commitment, incompetence, and insanity. This Article seeks to view one aspect of the civil commitment of individuals with mental illness through the lens of therapeutic jurisprudence. Specifically, using Florida law as a model, this Article will discuss so-called “ex parte” provisions in involuntary civil commitment statutes in order to examine potential therapeutic and anti-therapeutic consequences of this statutory power, which is available to families caring for persons with schizophrenia.

State civil commitment statutes vary widely in their provisions. Most of these laws vest law enforcement officers and/or mental health professionals with the authority to effect involuntary civil commitment directly. Many also include provisions that allow interested individuals to initiate the involuntary commitment process, but require a professional certificate or a hearing prior to the execution of a

---

* Ph.D., J.D. University of Miami. I would like to express my appreciation to Professor Bruce J. Winick for his scholarship, his mentorship, and his friendship.


2. Therapeutic jurisprudential analysis has been applied to a diverse range of legal fields, not all of which are inherently related to mental health. Examples include personal injury and tort law, labor arbitration law, and contract and commercial law. LAW IN A THERAPEUTIC KEY, supra note 1.

3. Id.
civil commitment order. However, this Article is applicable specifically to statutes that permit ex parte civil commitment to be effected by a nonprofessional, generally via a court order, with neither a legal hearing nor a clinical screening of the mentally ill person prior to the initial commitment period. Though they may be broadly written, such provisions are particularly applicable for care-giving family members of individuals with schizophrenia and other chronic mental illnesses that may periodically result in the need for involuntary hospitalization.

First, this Article will discuss schizophrenia and its impact on these individuals and their families. Family variables in the course of the disorder will be highlighted. Then, this Article will review the legal power afforded such families by ex parte provisions in civil commitment statutes using the involuntary examination portion of the Florida mental health code as a model. Finally, this Article will assess this system of civil commitment available to care-giving families in therapeutic jurisprudential terms, with recommendations for maximizing the therapeutic consequences and minimizing the anti-therapeutic consequences of ex parte procedures.

II. SCHIZOPHRENIA AND THE FAMILY

Schizophrenia is a mental disorder characterized by delusions, hallucinations, disorganized speech and behavior, "negative" symptoms, and social and/or occupational dysfunction. Delusions, hallucinations, and disorganization in speech and behavior are all considered "positive" symptoms; they are characterized by the presence, or production, of symptomatology. A delusion is generally defined as a "false belief, based on incorrect inference about external reality, not consistent with [the] patient's intelligence and cultural background, that cannot be corrected by reasoning." Delusions may include various forms of paranoia, including delusions of persecution, delusions of grandeur, and delusions of reference. A hallucination is a "false sensory perception not associated with real external stimuli." The most common hallucinations in schizophrenic patients are audi-
tory hallucinations; visual hallucinations are less common, but not rare.  

In contrast, the hallmark of "negative" symptoms is the absence, or deficit, of certain characteristics. Such negative symptoms include illogical thinking, disturbances in affective (emotional) expressiveness, and reduction in motivation or volition.

Lifetime prevalence rates of schizophrenia are generally estimated to fall between 0.5% and 1.0%. However, some estimates run as high as 1.5%, suggesting that approximately 3.7 million of the people alive in the United States today have developed, or will develop, schizophrenia at some point during their lives. About half of that estimate, or approximately 1.8 million individuals, are likely to be affected by the disorder at any given time. Genetic factors are strongly implicated in the etiology of schizophrenia, as evidenced by a ten-fold increase in risk for first-degree biological relatives of schizophrenic individuals as compared to the risk for development of the disorder in the general population.

Modern theories regarding the cause or causes of schizophrenia are generally based on genetic, neurobiological or biopsychosocial models, and widespread empirical support has established these models as central in schizophrenia etiology research. However, some early psychoanalytic and psychosocial theories implicated the family in the development of the disorder. For example, it was once posited that the child-rearing attitudes and practices of "schizophrenogenic" mothers were the central cause of schizophrenia, independent of genetic influence. Another perspective proposed a "double-bind" theory of schizophrenia as a disorder resulting from pathogenic communication within families. However, no systematic evidence has

9. Id. at 480.
10. AMERICAN PSYCHIATRIC ASS'N, supra note 4, at 285.
11. Lifetime prevalence is defined as "a measure at a point in time of the number of people who had a disorder at some time during their lives." KAPLAN & SADOCK, supra note 5, at 174.
12. AMERICAN PSYCHIATRIC ASS'N, supra note 4, at 282.
13. KAPLAN & SADOCK, supra note 5, at 457 (citing the NIH-sponsored Epidemiologic Catchment Area (ECA) study, which reported lifetime prevalence in the range of 0.6 to 1.9%); see also E. FULLER TORREY, SURVIVING SCHIZOPHRENIA: A MANUAL FOR FAMILIES, CONSUMERS AND PROVIDERS 6 (3d ed. 1995).
14. TORREY, supra note 13, at 6.
15. Id.
16. AMERICAN PSYCHIATRIC ASS'N, supra note 4, at 283.
17. For an overview of these modern theoretical approaches to schizophrenia research and the supporting evidence for these models, see IRVING I. GOTTESMAN, SCHIZOPHRENIA GENE-SIS 82-165, 214-47 (1991).
19. Gregory Bateson et al., Toward a Theory of Schizophrenia, 1 BEHAVIORAL SCI. 251,
supported the necessity or sufficiency of an intrafamilial etiology of schizophrenia, and these theories are generally considered obsolete.\textsuperscript{20}

While theories blaming the family as the origin or cause for the development of schizophrenia in a family member have been discredited by the research in genetics and neurobiology, other theories regarding the potential for a contributory role of certain familial variables to relapse or exacerbation of schizophrenia have found some empirical support in the research literature. Some of these theories have been criticized as being prone to distorted interpretations, perpetuating views of the family as pathogenic or otherwise carrying negative implications for families.\textsuperscript{21} This Article does not seek to evaluate such theories on these grounds; instead, this literature is reviewed simply to identify certain family variables in schizophrenia that may impact or be impacted by the family's direct involvement in the process of civilly committing a family member when necessary.

Current models of schizophrenia that emphasize genetic and neurobiological factors do not preclude the consideration of psychosocial and environmental variables in the onset and course of schizophrenia.\textsuperscript{22} As the family environment is clearly a significant variable in the life of a schizophrenic individual who resides at home, the impact of psychosocial stressors in the family merit examination. The "expressed emotion" literature has examined just such variables in the family.\textsuperscript{23} Rather than focusing on the etiology of schizophrenia, this research moved away from the earlier literature viewing family as causal, and therefore blameworthy, in the development of the disorder. This distinction between questions regarding etiology and those regarding influences on the course of the illness seemed to herald the end of a "cold war"\textsuperscript{°} between biogenetic and psychosocial-family systems researchers and clinicians.\textsuperscript{24}

The concept of "expressed emotion" (EE) was based on observations of increased likelihood of early relapse in schizophrenic patients who returned to close familial ties after discharge from psy-

\textsuperscript{20} Gottesman, supra note 17, at 149; Kaplan & Sadock, supra note 5, at 459-66; Torrey, supra note 14, at 165-72.


\textsuperscript{22} Gottesman, supra note 17, at 151.


\textsuperscript{24} Gottesman, supra note 17, at 155 (referencing The Transmission of Schizophrenia (D. Rosenthal & S.S. Kety eds. 1968); The Nature of Schizophrenia: New Approaches to Research and Treatment (L.C. Wynne et al., eds. 1978)).
chiatric hospitalization. Expressed emotion was characterized as a pattern of hostility and intrusiveness directed towards the mentally ill individual by the family. The disruptive force of high levels of EE in some families seemed to be a result of three variables identified by these researchers: familial over-involvement with the patient, criticism of the patient, and hostility toward the patient. The affective attitudes displayed by family members toward schizophrenic patients have been found to be strongly associated with the probability of relapse in those patients.

The school of thought that developed from the EE research sought to identify and address these variables in schizophrenia relapse as factors that would be detrimental to a good prognosis for an existing schizophrenic disorder (i.e., greater likelihood of relapse into symptomatic phases of the disorder). Identification of these factors can be viewed as a powerful asset to intervention in schizophrenia. Whereas the diathesis of schizophrenia may be unalterable, or modifiable only within narrow limits, the environmental stressors may be targeted in a variety of ways. Thus, the identification of familial variables, which are situational in nature, implies that these variables can be altered with appropriate support, education, and intervention, thereby improving the prognostic course of the schizophrenic disorder in the affected family member.

However, it is clear that schizophrenia is an interaction of underlying genetic factors and environmental stressors. The acknowledgment of this interaction is one of the primary reasons that theories of familial causation of schizophrenia have been discredited. Therefore, regardless of the role of familial variables, these factors can have no independent sufficiency for causality. Regarding the EE literature, "these findings indicate that the emotional attitudes measured represent non-specific stress factors in the pathogenesis of schizophrenia. The specificity must lie in the schizophrenic patient's reaction to stress; [the researchers] believe in the nature of the biologically determined vulnerability."

Negative familial factors, rather than necessarily being a source of blame on families of schizophrenic persons, may also be elicited by

26. Id. at 243.
the behavioral, symptomatic manifestations of the disorder itself. Some studies suggest that family members identified as high-EE may display negative attitudes toward schizophrenic patients, in part because those family members are exposed to higher levels of unusual or disruptive patient behavior (particularly the positive symptoms of delusions, hallucinations, and bizarreness) than their low-EE counterparts. Thus, the direction of causation between expressed emotion and patient relapse is questionable. That is, EE may be a result, rather than a cause, of the schizophrenic disorder. Even more likely perhaps, the relationship between EE in the family and poor prognostic variables in schizophrenia is correlative and cyclical. However, the implication is similar; from this perspective, when the cycle is broken, prognosis will improve.

Following the identification of EE factors by the aforementioned literature, the research began to focus on methods of intervention that could reduce these factors and thus reduce relapse rates. The results from these studies appear unequivocal. Protective effects of family-oriented interventions such as family psychoeducation, family behavioral therapy, and family support groups reduced relapse rates dramatically. In summary, familial conflict in the forms of overinvolvement, criticism, and hostility have an anti-therapeutic impact on the schizophrenic family member, and the absence of such conflict (or intervention that effects change by altering and improving familial interactions) appears therapeutic in its impact. Thus, the nature of schizophrenia and the familial variables that may affect its course have implications for situations in which the schizophrenic individual lives at home with the family in the primary caregiver role rather than in a structured facility.

III. THE FAMILY AND EX PARTE CIVIL COMMITMENT

Ex parte provisions in state mental health codes empower interested individuals to initiate involuntary civil commitment when they observe a mentally ill individual whose behavior satisfies statutory standards of dangerousness, grave disability, or other applicable criteria. Generally, such provisions permit a nonprofessional to appear before an officer of the court and swear out an affidavit stating the facts that form the basis for involuntary commitment. If the court

31. Rosenfarb, supra note 27.
32. For an overview of this research, see Angus M. Strachan, Family Intervention for the Rehabilitation of Schizophrenia: Toward Protection and Coping, 12 Schizophrenia Bull. 678 (1986).
33. Id.
finds these affirmations sufficient on their face without the examination of the mentally ill respondent, the court may issue an order for limited involuntary examination of the respondent, pending a hearing for further involuntary commitment. As provisions in state civil commitment statutes vary, this Article focuses on Florida statutory law as a prototype of those codes that include such an ex parte provision, since the Florida civil commitment statute clearly sets out the alternative avenues for initiation of the civil commitment process.

Florida's mental health statute is commonly referred to as the "Baker Act." The civil commitment provisions in the statute provide both for initial involuntary examination, which is limited to a 72-hour period, and for involuntary placement, which allows extended civil commitment beyond that period but requires a hearing. This Article focuses on the involuntary examination process and the family's power to initiate this process for their schizophrenic family member when civil commitment seems necessary. While the family may also play an extensive role in involuntary placement, particularly at the hearing stage, its role in that process is less direct. The "system" has taken over and the family's involvement, at least in the legal process itself, is more limited. While the family's role in prolonging civil commitment may raise compelling therapeutic jurisprudential concerns (e.g., "testifying" against a loved one at a commitment hearing), these issues are beyond the scope of this Article, which is limited to examining the family's power to initiate involuntary examination.

When an individual meets the statutory criteria, the Baker Act provides three alternative means of initiating the involuntary examination procedure: (1) an ex parte order entered by the court, (2) a

---

34. FLA. STAT. ANN. § 394.451 (West 1999).
35. FLA. STAT. ANN. § 394.463 (West 1999).
36. FLA. STAT. ANN. § 394.467 (West 1999).
37. A person may be taken to a receiving facility for involuntary examination if there is reason to believe that he or she is mentally ill and because of his or her mental illness:
   (a) 1. The person has refused voluntary examination after conscientious explanation and disclosure of the purpose of the examinations; or
        2. The person is unable to determine for himself or herself whether examination is necessary; and
   (b) 1. Without care or treatment, the person is likely to suffer from neglect or refuse to care for himself or herself; such neglect or refusal poses a real and present threat of substantial harm to his or her well-being; and it is not apparent that such harm may be avoided through the help of willing family members or friends or the provision of other services; or
        2. There is a substantial likelihood that without care or treatment the person will cause serious bodily harm to himself or herself or others in the near future, as evidenced by recent behavior.
FLA. STAT. ANN. § 394.463(1) (West 1999).
report filed by a law enforcement officer,\textsuperscript{39} or (3) a certificate executed by a statutorily designated mental health professional.\textsuperscript{40} Families may be involved in any or all of the three possible initiation procedures, but only the ex parte process confers the direct power to initiate civil commitment for involuntary examination of a family member. To illustrate, the police may be called if the family observes behavior that is out of control and potentially harmful to the schizophrenic family member or a third party, or a mental health professional may be consulted out of concern for the family member’s dramatically deteriorating condition. However, in such cases, the law enforcement officer or the mental health professional must document that the individual “appears to meet the criteria for involuntary examination ….”\textsuperscript{41} In such cases, the behavior of concern, which may have clearly met the statutory criteria at the time it was observed by the family, may not be evident in the presence of the law enforcement officer or the mental health professional. This may be due to various factors, including natural fluctuations in the mental status of the individual, or the individual’s capacity to modulate his or her behavior (for example, threats of violence toward family members) in the presence of an “outsider” whose very involvement may portend the possibility of commitment. This can be an extremely difficult and frustrating experience for families, particularly when the behavior recurs as soon as the individual is no longer being observed by a professional. Additionally, the behavior may even be exacerbated by the failed attempt to assess the need for hospitalization.

While options for initiating involuntary examination through law enforcement officers or mental health professionals constitute an added “step” in this process for the family, the ex parte procedure confers upon the family (or any other individual) the direct power to obtain a court order for involuntary examination:

A court may enter an ex parte order stating that a person appears to meet the criteria for involuntary examination, given the findings on which that conclusion is based. The ex parte order for involuntary examination must be based on sworn testimony, written or oral. If other less restrictive means are not available …, a law enforcement officer … shall take the person into

\textsuperscript{39} FLA. STAT. ANN. § 394.463(2)(a)(2) (West 1999).
\textsuperscript{40} A professional certificate may be executed by a physician, clinical psychologist, psychiatric nurse, or clinical social worker. FLA. STAT. ANN. § 394.463(2)(a)(3) (West 1999).
\textsuperscript{41} FLA. STAT. ANN. §§ 394.463(2)(a)(2) & 394.463(2)(a)(3) (West 1999).
Therapeutic Jurisprudence Analysis

Thus, a family member may appear before the court and testify in support of the necessity of civil commitment for the purpose of involuntary examination. As stated in the portion of the statute quoted above, as long as the testimony "appears to meet criteria," the court enters an ex parte order for involuntary examination to be executed by a law enforcement officer. The important distinction between this procedure of initiating involuntary examination and the other two methods is that, in this case, neither the court nor any other third party must actually observe the individual behaving in such a way as to meet the criteria set forth by the statute. While this may circumvent the difficulties posed in the examples above, where behaviors observed by the family are temporarily withheld before the evaluating eyes of third parties, it may also remove a procedural safeguard by omitting a potentially important intermediary step (for example, observation by a trained professional or an impartial party) in the civil commitment process. So, inasmuch as the Baker Act confers upon families the power to have a mentally ill family member involuntarily committed for examination, this power, as any power, comes with the potential for inappropriate application and even outright abuse.

IV. THERAPEUTIC JURISPRUDENCE: THE ANALYSIS

A. Potential Therapeutic Value of the Family's Ex Parte Civil Commitment Power

In evaluating the ex parte civil commitment power as a therapeutic agent, two perspectives may be taken. First, and most importantly, one must consider the potential and actual therapeutic impact of ex parte civil commitment on the schizophrenic individual. Second, one must consider the potential and actual therapeutic value of this power and this process on the family utilizing it. From both of these perspectives, the question may be asked, "Did it help?" Or at least, "Did it not harm?"

42. FLA. STAT. ANN. § 394.463(2)(a)(1) (West 1999).
43. As discussed previously, this also distinguishes such "pure" ex parte provisions from civil commitment statutes which would permit the family to initiate the process but would also require an intermediate step such as examination of the individual by a mental health professional.
1. Therapeutic Impact on the Person with Schizophrenia

The primary therapeutic potential of the family’s use of the ex parte process for the individual suffering from schizophrenia comes from the centrality of the family’s role in the process. First, the family has unique informational and observational access to the schizophrenic individual. Family members have lived with the mental illness in their home, have observed its course, and have been personally affected by it. Thus, they are often the first to become aware of signs of decompensation and, even if only because of extended and broad exposure to their schizophrenic family member over time and across situations, are likely to be the first to see the behavior that eventually necessitates civil commitment and demands treatment. The family may be uniquely suited to identify those forms of behavioral deterioration that indicate a need for treatment, and may imminently endanger the mentally ill family member (or others), and to initiate procedures that will presumably result in opportunities for appropriate treatment as well as prevention of harm. And, as discussed above, the family may have direct longitudinal experience with behaviors that meet criteria for civil commitment but are not evident during a law enforcement agent’s or mental health professional’s cross-sectional exposure to the schizophrenic person, and may thus preclude civil commitment via these other avenues of involuntary examination.

Second, the family’s direct involvement in the initiation of involuntary examination may arguably increase the likelihood of a humane effectuation of civil commitment. Direct family involvement in the process may have therapeutic value for the affected individual as there may be an opportunity for appropriate contextualization of the decision. An argument may be made that because civil commitment has traditionally been justified on “paternalistic” grounds regardless of who initiates the process (family member, mental health professional, or law enforcement official), who better to assume such a role for the individual than the care-giving family already likely to be engaged in such paternalism? While civil commitment on the basis of “paternalism” is sometimes viewed negatively as a form of potentially anti-therapeutic social control, in this context it may be more likely to be

44. Harriet P. Lefley, Mandatory Treatment from the Family’s Perspective, 75 NEW DIRECTIONS MENTAL HEALTH SERVICES 7, 9 (1997).

45. This is the general depiction of civil commitment under the state’s parens patriae authority. See, e.g., Proschaska v. Brinegar, 102 N.W.2d 870, 872 (1960) (characterizing restraint of liberty of the committed individual as “for his own protection and welfare. . .”).

46. See, e.g., THOMAS SZASZ, LAW, LIBERTY, AND PSYCHIATRY 240 (1963); Stephen Morse, A Preference for Liberty: The Case Against Involuntary Commitment of the Mentally Disordered, 70 CAL. L. REV. 54 (1982); David B. Wexler, Grave Disability and Family Therapy: The
perceived by the individual, if only in retrospect, as another form of "care-taking." Thus, if done in the spirit the term implies, paternalism, effected by the family, may be an appropriate, caring endeavor with therapeutic potential. Some of the literature in this area indicates that individuals who are involuntarily committed may retrospectively view their hospitalization positively because it provided them with necessary treatment\textsuperscript{47} or the motivation for recovery.\textsuperscript{48} These individuals may even express appreciation to family members for their involvement in initiating the process.\textsuperscript{49}

2. Therapeutic Impact on the Family of the Person with Schizophrenia

The power to initiate the involuntary examination process also has possible therapeutic implications for the family members to whom this power is available. The primary beneficial impact is in empowering the family to make decisions and intercede directly when the necessity to do so arises. Other statutory alternatives, which rely on a mental health professional or a law enforcement officer to initiate proceedings, require the family to "go through" a system (or set of systems) that it may not trust or that it may find unresponsive to its situation. One recent study found that although families are similar to professionals in the recognition of the mentally ill individual's pathology, disability, and need for commitment, the families "clearly lack confidence that the legal system will support their view."\textsuperscript{50} Therefore, in jurisdictions where an ex parte power is not available to families, these families may find themselves in a difficult bind: identifying factors that indicate the need for evaluation and civil commitment of their mentally ill family member, but feeling helpless and powerless to effect the necessary procedure through the available statutory means.

Additionally, unlike families, the professional concerns of mental health professionals and law enforcement officials may be a factor in the decision-making process for these initiators of involuntary evalu-
ations. Mental health professionals may have concerns about potential legal ramifications, particularly regarding their licensure, of inappropriately committing an individual. While such concerns may be appropriate and are likely to lead to an approach that is incidentally protective of the mentally ill individual’s civil rights, they may result in overly conservative decision-making, as these factors are external to the person being evaluated.

Law enforcement officials may feel ill-equipped or insufficiently educated about mental illness to make the appropriate evaluation. In fact, as compared to families and mental health professionals, police have been found to be the least likely to consider the mentally ill person to be committable, and less likely than families to commit on any grounds.\(^51\) Thus, for families attempting to initiate involuntary examination indirectly, either of these routes may be frustrating and serve as an additional source of stress as they seek to find a way of addressing the deteriorating condition of their mentally ill family member.

Finally, the family’s power to initiate involuntary examination may be essential for their own protection. While most mentally ill people, including schizophrenic individuals, may not be more dangerous than the general population, a small subgroup of patients may in fact be more dangerous.\(^52\) And while the research on the relationship between mental illness and violence has a long and controversial history in the literature, the “newer research casts the ‘no relationship’ position on the association between violence and mental disorder in serious doubt.”\(^53\) Families may find themselves resorting to legal tools such as restraining orders when clinical intervention is unavailable.\(^54\) Any propensity toward violent behavior on the part of the schizophrenic individual is particularly problematic for the family with whom the individual lives. Studies focusing on mentally ill persons and their families have found disturbingly high rates of violent incidents targeted at family members, particularly in those families living with the mentally ill individual.\(^55\)

---

51. Id. at 540.
54. Phyllis Solomon et al., The Use of Restraining Orders by Families of Severely Mentally Ill Adults, 23 ADMIN. POL’Y MENTAL HEALTH 157 (1995).
55. S.E. Estroff, The Influence of Social Networks and Social Support on Violence by Persons with Serious Mental Illness, 45 HOSP. & COMMUNITY PSYCHIATRY 669-79 (1994) (finding that more than half the targets of violent behavior by mentally ill inpatients were relatives, particularly mothers living with the patient); E.A. Skinner et al., Family Perspectives on the Service Needs of People with Serious and Persistent Mental Illness, 1 INNOVATIONS & RES. 23-30 (1992) (finding
family members are most likely to live in the same household with their families.\textsuperscript{56} In summary, cohabitation with a mentally ill family member places other family members at risk of violence.\textsuperscript{57}

The power to initiate civil commitment through the ex parte involuntary examination process may thus be an important one for the protection of the family if a schizophrenic family member becomes threatening or otherwise behaviorally unmanageable. The schizophrenic person's awareness of the family's power to initiate involuntary examination may itself be a deterrent to violence in the home. Also, as discussed above, observation of violent behavior in the home places families in a unique position to be able to initiate civil commitment because this behavior may not be evident once a law enforcement officer or mental health professional becomes involved. And direct intervention through the law enforcement system, either through its power to initiate involuntary examination or through a criminal arrest, may be much more disturbing and anti-therapeutic for both the family and the schizophrenic individual.

\textbf{B. Potential Anti-Therapeutic Consequences of the Family's Ex Parte Civil Commitment Power}

As in the evaluation of the possible therapeutic value of this statutory provision, two perspectives of potential adverse or anti-therapeutic consequences of the ex parte civil commitment power may be taken: one of the schizophrenic individual, and one of the family initiating the civil commitment. Here the question may be asked, "Did the process cause harm to either?" Or alternately, "Did it fail to do any good?"

1. Anti-Therapeutic Impact on the Person with Schizophrenia

From the perspective of the schizophrenic individual and his or her personal, social, and clinical needs, the family's power to initiate involuntary examination may have some profound implications. First is the general issue, nonspecific to family involvement in the civil

\textsuperscript{56} K.A. Straznickas et al., Violence Toward Family Caregivers by Mentally Ill Relatives, 44 HOSP. & COMMUNITY PSYCHIATRY 385-87 (1993).

\textsuperscript{57} Id. at 387.
commitment process, of whether mandating evaluation and treatment through involuntary means is effective, particularly relative to voluntary alternatives. The clinical and research literature has examined the implications of involuntary hospitalization and treatment, and there is much concern over potential anti-therapeutic effects of this approach. Therefore, it may be argued that involuntary examination in general, whether it is initiated by the family or by law enforcement officers or mental health professionals, has the inherent potential for anti-therapeutic consequences.

Second, and much more specific to situations in which the family takes an active and direct role in initiating hospitalization of a schizophrenic family member, there are the potential anti-therapeutic consequences that result from the interaction between this role assumed by the family and those familial variables that have been identified by the clinical literature as having poor prognostic indications for the schizophrenic individual. As discussed above, various family conflict factors, such as over-involvement, criticism, and hostility, are correlated with increased likelihood of relapse in schizophrenia. Familial involvement in the initiation of the civil commitment process may be related to these factors in various ways.

The schizophrenic individual, particularly in a psychotic state in which denial, cognitive distortions, and delusions may be common, may perceive even the most benevolently intended intervention from family members as manifestation of one or more of the factors identified in the EE literature. The individual may see the family as overly involved in his or her life, wishing family members would simply “mind their own business.” Any attempt to intervene may be perceived as a form of criticism or an expression of hostility toward the individual. In a full-blown psychotic state, paranoia and other persecutory delusions may become prominent. Thus, an intervention that is meant to be therapeutic in providing necessary treatment and protection for the individual may have anti-therapeutic consequences if it is initiated by the family and results in exacerbation of familial stressors and an increased likelihood for relapse. The impact of family involvement in the civil commitment process on these specific, clinically-studied variables is certainly above and beyond more obvious basic human issues. One such issue is the impact on the mentally ill

58. See, e.g., Bruce J. Winick, Mandatory Treatment: An Examination of Therapeutic Jurisprudence, 75 NEW DIRECTIONS MENTAL HEALTH SERVICES 27 (1997); Bruce J. Winick, Coercion and Mental Health Treatment, 74 DENVER U.L. REV. 1145 (1997); Lefley, supra note 45; NATIONAL ALLIANCE FOR THE MENTALLY ILL, POLICY ON IN VOLUNTARY COMMITMENT AND COURT-ORDERED TREATMENT (1995).
59. Brown, supra note 23, at 243; Rosenfarb, supra note 27.
person’s self-perceptions, and the possibility, or even likelihood, that the schizophrenic individual may view the situation as a profound violation of trust and confidence. Involuntary intervention may “not only have an adverse impact on the self-esteem and integrity of the individuals involved, but also may generate resentment and alienation against family members faced with impossible choices.”

While the perception of any well-intentioned initiation of civil commitment may be distorted by the mentally ill person, the reality of the situation may be that the family’s use of this process may actually be a reflection of these family conflict variables. The family may, in fact, become a setting for conflict that results in the need for treatment or protection of the family member or the protection of the family itself. This may occur due to the stresses of sharing a household with, and caring for the schizophrenic family member. Alternately, the distress of feeling compelled to involuntarily hospitalize the mentally ill family member may result in emotions in the family that increase the likelihood of continued over-involvement in the family member’s life (e.g., making sure that it does not happen again), criticism of the family member (e.g., pointing out those behaviors that the family feels portended the need for hospitalization), and hostility toward the family member (e.g., reflecting anger that may be a projection of the guilt felt by the family regarding their role in the process).

Outright abuses of the ex parte power, while unlikely, are certainly possible. One such example, involuntary hospitalization of the schizophrenic family member as a respite for the caregiving family, may be viewed in light of the extreme stress often experienced by the family living with a mentally ill family member. In this way, ex parte civil commitment of the schizophrenic family member meets one of the social goals of civil commitment in general, as conceptualized according to a “control” model: it relieves society and the family from accommodating the mentally ill individual who is bothersome and burdensome, but not necessarily dangerous. However understandable and natural such a need for relief may be, civil commitment statutes were not intended to be used in this manner. Alternatives for respite care are obviously needed.

The ex parte power may also be wielded as a sword to manage the behavior of, or even threaten, the schizophrenic family member.

60. Lefley, supra note 44, at 9.
61. ALAN STONE, MENTAL HEALTH AND THE LAW: A SYSTEM IN TRANSITION 45 (1975). According to Stone’s model, there are four social goals in a “control model” of commitment, in which civil commitment seeks to control, rather than punish, behavior. The other three include the provision of treatment, the prevention of self-harm, and the protection of society from anticipated dangerous acts.
In the author’s experience as a clinical psychologist working with chronic schizophrenic patients and their families, examples of such use of the ex parte power surfaced with some regularity in certain families. In one such situation, the elderly and physically frail mother of a physically imposing schizophrenic man would go before the court to request an ex parte order whenever her son would begin to manifest psychotic symptomatology. Based on her testimony to the court regarding his past history of physical aggression during psychotic episodes and her fear of such behavior, the order would generally be granted by the court, without further inquiry. She would then seal the order in an envelope and use it to threaten her son with commitment by “the men in white coats” whenever his behavior became difficult to manage. The court eventually became reluctant to grant the orders when it became clear that the manner in which they were being utilized was inconsistent with their purpose. The patient was never actually civilly committed pursuant to an ex parte order due to the mother’s averred reluctance to “actually put away” her son. When the situation became genuinely serious, the mother would call one of several mental health professionals to effect the civil commitment via a professional certificate or with the help of law enforcement. Once the court ceased granting the ex parte orders, she simply began using an envelope which contained a blank piece of paper to manage her son with the “threat” of civil commitment.

While on rare occasions the application of this authority may seem justifiable (for example, as above, when the family is threatened or perceives a threat), it is nevertheless a misuse of the statutory power. Rather than pointing to the likelihood of familial abuse of the ex parte power, such examples highlight areas in which weaknesses in the legal or clinical systems may result in desperate measures by families. The appellate case law in Florida yields very few examples of litigated abuses related to the ex parte civil commitment power under the Baker Act, and none of the cases include defendants who are family members of the plaintiff.

In Florida, malicious prosecution appears to be the most appropriate, the most frequently raised, and most successful claim brought for an abuse of the Baker Act’s ex parte provision. As discussed below, attempts at statutory reform of the provision to increase the protection against the potential for its misuse or abuse have failed. Therefore, the one seminal case in this area merits an overview, despite the absence of a fact pattern that involves family members of the civilly committed plaintiff; it provides an understanding of the
The most likely available judicial remedy for an abuse of the statutory ex parte power under the Baker Act.

The primary case in the Florida courts is *Pellegrini v. Winter*, in which an individual brought claims in the Brevard County Circuit Court against four individuals for malicious prosecution, abuse of process, and conspiracy in obtaining an ex parte order for his civil commitment for involuntary examination. The trial court dismissed the complaint, with prejudice. On appeal, the dismissal of the abuse of process charge (the second count) was summarily affirmed, as no act other than the wrongful filing of underlying lawsuit was alleged. Abuse of process requires an act that constitutes misuse of process after it issues, and maliciousness or lack of foundation of asserted cause of action itself was found to be irrelevant. The dismissal of the conspiracy charge (the third count) was also affirmed with little discussion; it was determined to be wholly redundant with the first count of malicious prosecution.

On first appearance of the case in the Florida District Court of Appeal, the court found that a cause of action for malicious prosecution had indeed been stated. The point of contention was the third element required for an action for malicious prosecution: a bona fide determination in favor of the plaintiff. The appellees (defendants) claimed that this element had not been met, since their motion for the ex parte order was in fact granted by the lower court. However, the appellate court held that the granting of this motion merely constituted the initial phase of the involuntary commitment process, such that this was not the ultimate determination in the plaintiff's case.

---

64. Nash v. Walker, 78 So. 2d 685 (Fla. 1955).
66. Wright v. Yurko, 446 So. 2d 1162 (Fla. Ct. App. 1984). Wright stated the six essential elements in an action for malicious prosecution:

1. A criminal or civil judicial proceeding has been commenced against the plaintiff in the malicious prosecution action;
2. the proceeding was instigated by the defendant in the malicious prosecution action;
3. the proceeding has ended in favor of the plaintiff in the malicious prosecution action;
4. the proceeding was instigated with malice;
5. without probable cause; and
6. resulted in damage to the plaintiff in the malicious prosecution action.

*Id.* at 1165.
Based upon wording of the [involuntary commitment] statute, we concur with the appellant's argument that the issuance of the ex parte order by the judge constituted the initiation of the proceeding, not the termination of a proceeding. The ultimate purpose of the petition signed by Winter, and the ex parte hearing, was the involuntary commitment of Pellegrini, not merely his examination. The interpretation urged by the appellees would lead to the unreasonable result that a person wrongfully detained for examination on the basis of false testimony would have no civil recourse, a result that would render the statute vulnerable to a due process challenge.

While the appellate court found that a cause of action for malicious prosecution would lie for the wrongful initiation of an involuntary civil commitment through the ex parte provision in the Baker Act, the plaintiff/appellant’s case was ultimately unsuccessful. The case was remanded for consideration of the malicious prosecution claim. The circuit court granted summary judgment for the defendants on remand, and the case came back up to the Fifth District on appeal. The appellate court again considered the third element of malicious prosecution to determine whether the involuntary commitment proceeding, rather than the previously considered ex parte motion, had been terminated in the plaintiff’s favor. The court concluded that Pellegrini’s discharge from the hospital to outpatient treatment for Bipolar Affective Disorder (sometimes referred to as manic-depressive illness) constituted a disposition that was not in his favor. Therefore, Pellegrini failed to meet an essential element for his claim of malicious prosecution, and the circuit court’s summary judgment in favor of the defendants was affirmed by the appellate court.

Thus, the one appellate case in Florida that grappled specifically with an alleged abuse of the ex parte civil commitment power was ultimately resolved in favor of the defendants. In this author’s opinion, any case brought against a family member would more likely fail for lack of proof of the fifth element of malicious prosecution, the element that essentially defines the cause of action: the presence of malice in instituting the proceeding. In general, arbitrary, trivial or malicious

67. FLA. STAT. ANN. § 394.463 (1) & (2) (West 1999).
68. Pellegrini, 476 So. 2d at 1366.
69. The court came to this conclusion after examining the relevant portion of the Baker Act, addressing disposition upon involuntary examination for outpatient treatment. Id. See FLA. STAT. ANN. § 394.463(2)(c)(2) (West 1999).
70. See Wright, 446 So. 2d at 1165.
use of involuntary hospitalization is "entirely contrary to most families' experience." 71

2. Anti-Therapeutic Impact on the Family of the Person with Schizophrenia

In terms of its potential anti-therapeutic impact on the family, the decision to commit a family member, even if only for a period of evaluation, is a difficult one for families. 72 The family experience of mental illness is eloquently described by Dr. Harriett Lefley, prolific author and expert in this area:

Mental illness in the family evokes love and concern, fear and rage, grieving, loss, empathic pain, and frustrations with patients' conflicted dependency need and rejection of treatment. Family members' experiences with involuntary interventions are painful and marked by ambivalence—the end result of a lack of viable options. Families are faced with a service delivery system that is unresponsive to their needs and a legal system that places them in an adversarial posture against a loved one. Families must balance their relative's right to autonomy against their own right to protect themselves from acute personal suffering and possible physical danger. If an involuntary intervention is the only option, they must balance the indignity to their loved one against his or her own self-destructive behavior, threats to themselves or others, and the very real possibility that their relative will be arrested, severely neglects himself or herself, or even die on the streets. Families feel coerced by a system that offers inadequate resources and makes it difficult to save persons during a critical period when they are perceived as incapable of saving themselves. 73

Any time the mental status of a schizophrenic family member deteriorates, the family's already existing emotional burden becomes even heavier. Direct involvement in the initiation of involuntary hospitalization is an even more difficult task for the family. Any necessity for such a role is unfortunate and alternatives for intervention and treatment should be readily available. These other avenues should support the family and be utilized before the situation attains crisis proportions and a "last resort" exercise of ex parte involuntary

73. Lefley, supra note 44, at 8-9.
examination becomes necessary for the mentally ill individual or the protection of the family.

Finally, if the need for involuntary hospitalization of a loved one is predicated by a family’s fear of violent behavior targeted at the family, initiation of this procedure may bring a fear of retaliation upon the discharge of their family member from the institutional setting. Families may be concerned that violence aimed at family members may be even more likely after the person is discharged if the period of commitment does not include adequate treatment or is otherwise insufficient or incapable of altering the patient’s propensity for violent behavior. This may be a particular concern if the patient perceives the family’s involvement as either persecutory or punitive. Continued civil commitment is predicated on the patient meeting the criteria required for examination or placement, and, if such criteria are no longer met, the patient must be discharged. However, if the behavior in question is limited to the family environment, or to family members as victims, it may not be observable again until the individual returns to the family.

V. SUMMARY AND GENERAL RECOMMENDATIONS

Ex parte provisions of civil commitment statutes allow families of schizophrenic individuals to directly initiate involuntary examination in the civil commitment process. Due to the complex difficulties encountered by families living with and caring for schizophrenic family members, this power may have significant therapeutic potential, but it also potentiates some anti-therapeutic consequences. Deficits in the mental health and legal systems make this an important, albeit problematic, power for families. Changes in both clinical and legal arenas may enhance the therapeutic potential of this statutory provision, while mitigating possible anti-therapeutic consequences.

A. Recommendations for Clinical Reform

From the clinical perspective, increased availability of patient and family education regarding the understanding and management of the course of schizophrenia and other serious mental illnesses may preclude some of the conflict situations that may result in relapse. A reduction in relapse rates would thus reduce the need for involuntary interventions overall. Community-based programs and humane alternative living arrangements for schizophrenic individuals are also

strongly indicated. Families should not be solely responsible for the care of their adult schizophrenic family members. Families should have widely available sources of social and clinical support, as well as maximal options in contributing to the care of their schizophrenic family member. Education and support are critical in maximizing the strengths of the family and providing information regarding alternatives of which they may not be aware. Organizations such as the National Alliance for the Mentally Ill (NAMI) and its community-based counterparts are incredibly valuable resources for families of persons with schizophrenia. These groups provide education, informational resources, emotional support and guidance, and a political forum for these families.

Mental health professionals also need to be educated and informed regarding mental health law and the necessary interaction between clinical and legal systems in areas such as civil commitment. This is essential to ensure that mental health professionals exercise their own statutory authority to commit in an appropriate manner. Additionally, clinician familiarity with the law in this area may facilitate their involvement either to preclude the eventuation of the need for involuntary hospitalization, or to relieve the family of this burden when it becomes unavoidable.

B. Recommendations for Legal Reform

From the legal perspective, statutory reform and the refinement of civil commitment codes are possible approaches to addressing therapeutic jurisprudential concerns. It has been suggested that with the availability of successful family interventions, so-called "civil libertarian" civil commitment codes, which require a showing of the person's inability to cope in the community, may have greater therapeutic potential than paternalistic laws, which allow commitment based on deterioration or need for treatment. However, in the case of involuntary examination, which often requires immediate action and does not generally involve lengthy commitment, any evidentiary obstacles to the power to commit may have negative consequences.

In Florida, one attempt at statutory reform was narrowly aimed at addressing acknowledged concerns regarding the state's ex parte civil commitment power. The "Robert Newman and Stuart Simon Act of 1997" was introduced in the Florida Senate as an amendment

---


76. S. REP. NO. 0930 (Fla. 1997) was sponsored by the Judiciary Committee and Senator Gutman.
to the Florida Mental Health Act (or Baker Act), specifically to amend the ex parte provision\textsuperscript{77} of the act. The bill was summarized as follows:

An ex parte order is one that is granted at the request of one party without notice to the affected party. The bill provides that upon a request for an ex parte order for involuntary examination of a person alleged to be mentally ill, the court:

- may order a hearing,
- may hold the hearing either before the order for involuntary examination is entered or anytime during the 72-hour period the person is being held at the receiving facility for examination, and
- must rescind the ex parte order upon a finding that the person does not meet the statutory criteria for involuntary examination and notify the receiving facility to release the person.\textsuperscript{78}

In terms of the fundamental effect of the proposed changes, "the bill [would have enabled] an individual for whom involuntary commitment [was] sought to have access to the court to oppose an order which currently can be issued without notice and can result in the individual being held involuntarily for up to 72 hours,"\textsuperscript{79} thus introducing an additional procedural due process safeguard for the individual being involuntarily committed.\textsuperscript{80} Additionally, the bill would have provided an explicit mechanism for the release of patients found at a hearing to be inappropriately held under the Baker Act, via rescission of the unfounded order and notification of the receiving facility to release the patient.

\textsuperscript{77} FLA. STAT. ANN. § 394.463 (West 1999).
\textsuperscript{78} S. REP. NO. 0930, SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT (Fla. 1997).
\textsuperscript{79} Id.
The bill further proposed to criminalize certain misuses and abuses of the involuntary examination provisions of the Baker Act. First-degree misdemeanors proposed by the bill included the provision of false information to obtain an ex parte order, use of (or conspiracy to use) the statute to obtain a commitment order "without a belief the person is mentally ill," and cause of (or conspiracy to cause) the denial of any right provided under the Baker Act. Although the proposed amendments sought specifically to impact changes to the ex parte civil commitment power, these penalty provisions would also have been generally applicable to inappropriate involuntary civil commitment executed by a law enforcement officer or by a licensed mental health professional.

Despite its commendable recognition of the potential for abuse of the ex parte provision of the Baker Act and its attempt to remedy some of the procedural pitfalls of this statutory authorization for involuntary civil commitment by nonprofessional third parties, the "Newman & Simon Act of 1997" died in committee (specifically the Committee on Children, Families and Seniors) less than two months after its introduction in the Florida Senate. It appears that the potential increase in demand on the judiciary's workload, as well as anticipated litigation against the imposition of the fines as criminal penalties on governmental entities, were sufficient to undermine this attempt at reforming the statutory ex parte civil commitment power. However, these are exactly the types of reforms that may address the various concerns regarding the ex parte implementation of involuntary examination. Future statutory reform should include both procedural due process safeguards for the subject of the ex parte commitment order and penalties for those who knowingly misuse or abuse the availability of such orders.

However, even within the limitations of the existing legal system, increasing the role of both patients and families in the procedural arena may have therapeutic effects. Specifically, findings in the "procedural justice" literature have been extrapolated to the civil commitment process in order to understand the potential impact of the procedures themselves on individuals' perceptions of the legal sys-
tem's control over their lives. For example, it has been suggested that enhancing an individual's perceptions of participation, dignity, and trust during commitment proceedings might increase the individual's acceptance and adherence to the resulting judicial order, thereby enhancing the likelihood of subsequent therapeutic outcomes. Unfortunately, ex parte procedures, by their very definition, limit the participation of the individual who is sought to be civilly committed and may detract from his or her dignity and undermine his or her trust in both the family and the law. So, to the extent that perceptions (if not the reality) of procedural justice may be enhanced, there may be a correlative increase in therapeutic potential of the procedure or at least a correlative decrease in its potential anti-therapeutic effects.

Advance directives may be another contribution of the legal system to alternatives to the current civil commitment process. Such instruments, exercised by individuals in a state of current mental health and competence, allow these individuals to evaluate their options and express their wishes in contemplation of future situations in which the deterioration of their mental health may demand intervention. These instruments may thus have great therapeutic potential by providing an alternative to current involuntary hospitalization practices and relieving families of the burden of making certain difficult decisions.

The law enforcement system may also be improved in order to address some of the issues of concern to seriously mentally ill individuals and their families. As discussed above, law enforcement officers may be reluctant to exercise their statutory power to initiate involuntary examination. Officers may feel ill-equipped to evaluate such emergency situations and to make an appropriate decision (for example, to arrest or to hospitalize). The arrest of mentally ill individuals for misdemeanors (such as loitering, disturbing the peace, and resisting arrest) that often result from behaviors associated with their illness, unnecessarily floods the courts with individuals who may not comprehend why they are appearing before a judge. These individuals are likely to further deteriorate during even brief incarcerations due to lack of psychiatric care, interruption of medication, and the

88. Winick, supra note 87, at 81.
sheer disruption of their lives. In South Florida, there are three times as many mentally ill individuals in county jails as there are in the state hospital; nationally, estimates suggest that between seven and ten percent of inmates in the jail and prison system are mentally ill.89

Specialized "mental health courts," such as the prototype founded in Broward County, Florida by Judge Ginger Lerner-Wren, seek to address some part of this issue specifically by providing an alternative forum to manage cases that involve misdemeanor offenses committed by individuals with mental illness or mental retardation.90 In the name of efficiency, but with humane intentions, these courts seek to divert this population of "criminals" from an overcrowded jail system toward available resources in the mental health system in order to treat, rather than punish, the individuals that come before its benches. The primary criticism of such courts is actually a criticism of the law enforcement system that procedurally precedes them. The diversion of these individuals should likely take place prior to their entry into the criminal justice system. That is, with proper training, law enforcement officers should be able to identify these individuals and either manage their behavior appropriately without the need for incarceration, or bring them to the mental health care system through civil commitment rather than to the legal system through arrest and detention.91 Clearly, education regarding mental illness and the behaviors that may result in the need for civil commitment is essential for law enforcement officers, as is training in appropriate interventions for possible situations arising from such behaviors.92

It is also important to note that law enforcement officers may frequently be involved in the involuntary examination process, both directly and indirectly. They may be called upon to exercise their power to initiate the civil commitment procedure and also to implement ex parte orders obtained by the family. Thus, education and


91. A second criticism may be that funneling these individuals through the courts (or even bypassing the courts) into an already under-resourced mental health system may be an ineffective way of "turfing" the responsibility from one overcrowded and under-funded system to another, perpetuating the "revolving door," while merely changing the sign over the entrance. However, this is another example of a criticism that reflects the inadequacies of another system (in this instance, mental health care) as it criticizes the system that is attempting to apply all available resources for the benefit of this marginalized and persecuted population.

92. In 1988, the Memphis Police Department in Tennessee developed a model plan for the training of law enforcement officers by mental health experts to deal with crisis situations involving individuals with mental illness in the community. In recent years, this crisis intervention approach has been adopted by several police departments (e.g., Portland, Oregon; Albuquerque, New Mexico; Seattle, Washington; San Jose, California; and Waterloo, Iowa).
training of law enforcement officers working in the community is critical to the legally and clinically appropriate, as well as humane, implementation of these duties.

While the potential anti-therapeutic consequences of ex parte civil commitment would indicate that it is often a power of last resort for families, elimination or restriction of such statutory provisions would not seem to be indicated—at least not until viable alternatives are found to address systemic deficits that otherwise disempower the family. The therapeutic potential of this power, both for the patient and the family, indicates the clinical and social value of ex parte provisions when they are appropriately applied. Such appropriate application, however, depends heavily on the development and refinement of legal and clinical systems that would provide a maximally therapeutic context for the support and care of schizophrenic individuals and their families.