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Robert Weissbourd

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INVOLUNTARY COMMITMENT: THE MOVE TOWARD DANGEROUSNESS

ROBERT WEISSBOURD*

INTRODUCTION

The Facts

The National Institute for Mental Health estimates that in 1972 approximately 1,645,367 patients were treated at inpatient psychiatric facilities in the United States.[1] Taking into account an estimated 20% rate of duplicate admissions, approximately 1,316,294 individuals were treated at least once.[2] Of those patients admitted to state and county mental hospitals, 41.8% were involuntarily committed. Another 1.5% were admitted as transferees from prison, and 2.3% were admitted after being found incompetent to stand trial.[3] Thus, despite the policy shift over the last 15 years toward an emphasis on voluntary short term admissions, a tremendous number of people continue to be involuntarily committed.

Involuntary commitment and accompanying treatment have traditionally been considered protective and humane, with the potential to alleviate or cure mental illness and to help restore the mentally disabled to a self-respecting, functioning role in society. However, closer examination of involuntary commitment, its possible detrimental effects, and the quality of care in mental institutions has demanded that the practice of involuntary commitment be reevaluated, refined, and to some extent, rejected. The Supreme Court has noted that involuntary commitment and treatment are a "massive curtailment of liberty."[4] The right to physical liberty, rights of privacy, association, freedom of speech and belief, and freedom from unreasonable search and

* Associate with Pressman & Hartunian; former clerk to the Honorable George N. Leighton, United States District Court, Northern District of Illinois, 1979-1981; J.D. University of Chicago Law School, 1979; B.A. *cum laude*, political science, Yale University, 1976.

1. B. ENNIS & R. EMERY, THE RIGHTS OF MENTAL PATIENTS 197 (1978) [hereinafter cited as ENNIS & EMERY].

2. *Id.*

3. *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1193 n.3 (1974) [hereinafter cited as *Developments*].

4. Humphrey v. Cady, 405 U.S. 504, 509 (1972). *See* note 41 and accompanying text *infra*.

seizure, may be seriously infringed. Institutions are frequently overcrowded, understaffed, poorly maintained, and unsanitary. In addition to having their lives totally regulated, patients risk brutality from fellow patients and attendants. Treatment is frequently outdated, nonexistent, or inappropriate, and thus may aggravate, rather than alleviate, a patient's condition. Commitment often results in severe social and legal deprivations, including possible loss of custody of children, loss of the right to vote, to drive, to contract, and to retain public office.[5] Finally, the social and personal effects may include discrimination in education, housing and employment, as well as loss of self-confidence, and self-esteem.[6]

In the past decade, courts have begun to recognize the detriments of involuntary commitment, particularly the poor conditions and lack of treatment in many hospitals,[7] and the collateral consequences on civil rights.[8] Furthermore, commitment may aggravate a patient's illness[9] and result in even greater stigma and loss of liberty than criminal detention.[10]

This article addresses only the legal issues raised by involuntary commitment. Discussion of the difficult issues surrounding the proper diagnosis and treatment of mental illness is beyond its scope. It is assumed, however, that severe mental disorders do exist, that some can be successfully treated, and that many of those afflicted with such disorders would want treatment if able to evaluate it.[11]

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5. *See, e.g.*, ALA. CONST. art. VIII, § 182 ("all idiots and insane persons" disqualified from voting); IDAHO CONST. art. VI, § 3 (1973) (pilot's license denied); GA. CODE ANN. § 20-206 (1981) (incompetent to contract); VA. CODE ANN. § 46.1-360 (1950) (loss of right to obtain a driver's license). *See also In re* W., 29 Cal. App. 3d 623, 105 Cal. Rptr. 736 (Ct. App. 1972) (mother denied child custody due to mental deficiency).

6. E. GOFFMAN, ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES 354-56 (1961).

7. *See, e.g.*, Dixon v. Attorney General, 325 F. Supp. 966, 969-70 (M.D. Pa. 1971).

8. *In re* Ballay, 482 F.2d 648, 652 (D.C. Cir. 1973).

9. Lessard v. Schmidt, 349 F. Supp. 1078, 1088-90 (E.D. Wis. 1972), *vacated on procedural grounds*, 414 U.S. 473 (1974), *reinstated* 379 F. Supp. 1376 (1974), *vacated on procedural grounds*, 421 U.S. 957 (1975), *reinstated* 413 F. Supp. 1318 (1976).

10. Lynch v. Baxley, 386 F. Supp. 378, 393 (M.D. Ala. 1974) (because of the stigmatization and loss of liberty, due process demands a showing of a necessity for commitment by evidence having the highest degree of certitude reasonably attainable).

11. Of course, these issues cannot simply be assumed away. The tremendous disagreement concerning, and variable success with, the diagnosis and treatment of mental illness has major legal implications. However, the above assumptions avoid a mistake made by many courts and commentators: the mistake of concluding from presently poor conditions, inade-

The Issues

Mental illness is commonly viewed as a personal and medical problem, strictly within the ambit of psychiatrists and psychologists. Unlike many personal and medical problems, however, a principle characteristic of mental illness is the individual's inability to adjust to society and to function productively within complex human and social relationships.[12] Where maladjustment manifests itself as antisocial conduct, inability to care for oneself, or reduced social productivity, mental illness also becomes a social problem, and concomitantly, of legal significance.[13]

The most extreme intervention by the legal system is in the area of involuntary commitment. The laws providing for involuntary commitment are grounded on two notions: the state's responsiblity to protect society and its parental responsibility for the disabled. The state fulfills these responsibilities acting, respectively, under the police power[14] and in the role of *parens patriae*.[15] The use of these powers to involuntarily commit has engendered tremendous controversy. Broad criteria have permitted well intentioned laws to be used for control of deviant behavior, to substitute for social welfare programs, and to relieve society of the intolerable or untolerated.[16] Opponents of involuntary commitment, particularly civil libertarians, point to the great deprivations of personal freedom and intrusions into mental and emotional processes. Proponents, emphasizing psychiatric concerns, cite the need of some individuals for treatment, their inability to recognize their need and request help, and the prevention of injury which the mentally disabled may inflict on themselves or others, or which others may inflict on them.

During the past decade, a veritable revolution has taken place in the laws providing for involuntary commitment. Growing awareness of civil liberties concerns and of the poor state of diagnosis and treatment demanded a search for safeguards. Consequently, courts have restricted the use of *parens patriae*

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quate treatment, and diagnostic unreliability that it is impossible to define, diagnose, and treat mental illness.

12. Ross, *Commitment of the Mentally Ill: Problems of Law and Policy*, 57 MICH. L. REV. 945, 954-55 (1959) [hereinafter cited as Ross].

13. *Id.*

14. *See* notes 33-38 and accompanying text *infra* for discussion of the origin and history of the police power.

15. *See* notes 24-32 and accompanying text *infra*.

16. MENTAL DISABILITY LAW REPORTER, July-August 1977 at 77 [hereinafter cited as MDLR]. *See, e.g.*, Jacobson v. Massachusetts, 197 U.S. 11, 24-25 (1905).

as a justification for commitment, substituting instead a greater reliance on the police power and limiting commitment to the dangerous. As one commentator has noted, there has been a "move toward dangerousness" in civil commitment statutes.[17] In effect, courts have tried to resolve the tension between legal and psychiatric concerns by emphasizing a largely legal concept: dangerousness. Use of a narrow legal analytical framework, and emphasis on dangerousness, entails a substantial rejection of, or at least insensitivity to psychiatric concerns and ignores the reasons that a separate commitment scheme has been developed for the mentally ill. While major safeguards against abuse of involuntary commitment are necessary, other safeguards are more appropriate than the dangerousness requirement, either as substitutes or supplements. Through an examination of the *parens patriae* power, and the concerns which have led to its limitation, this article will focus on whether wisdom or the Constitution dictate that dangerousness be a necessary or sufficient condition for involuntary commitment of the mentally ill.

The flipside of the question is whether humane considerations indicate greater use of *parens patriae* to commit the *nondangerous* but treatable mentally ill. Of the commitments eliminated by the dangerousness requirement, it is this class of people, particularly if they are incompetent, which should be commitable.

The Constitutional question raised remains unsettled, at least by the Supreme Court. In one of its few recent decisions dealing with involuntary commitment, the Supreme Court explicitly declined to address the issue of "whether the state may compulsorily confine a nondangerous, mentally ill individual for the purpose of treatment."[18]

THEORETICAL AND HISTORICAL JUSTIFICATIONS FOR COMMITMENT

Introduction

Civil commitment is based on significantly different theoretical grounds than criminal confinement. Unlike the retribution-deterrance approach of the criminal system, civil commitment relies on a prediction-prevention model, a model notably more akin to the medical model for diseases.[19] The purposes of criminal incarceration, retribution, general deterrance, special deter-

17. DIAGNOSIS AND DEBATE, INSIGHT COMMUNICATIONS, 335 (R. Bonnie ed. 1977) [hereinafter cited as INSIGHT COMMUNICATIONS].

18. O'Connor v. Donaldson, 422 U.S. 563, 573 (1975).

19. *See* Ross *supra* note 12, at 954.

rance, and rehabilitation, have limited application to commitment of the mentally ill. Retribution is clearly inappropriate, since, in the case of civil commitment, no act deserving retribution has occurred. It is also commonly argued that general deterrance is an unacceptable purpose since at least a portion of the mentally ill, by definition, are less responsible and less able to adjust to social rules, *i.e.*, are less deterrable.[20] Special deterrance, incarceration to prevent the person incarcerated from inflicting harm or further harm, applies only to the extent that the grounds for commitment are dangerousness. As discussed below however, this justification presents equal protection problems because only the mentally ill are incarcerated for dangerousness.[21] Finally, rehabilitation is a major function of civil commitment. The criminal model, however, appears to be moving away from this justification.[22]

In addition to protecting others from the dangerous mentally ill (special deterrance), civil commitment is traditionally justified on the basis that it protects the mentally ill from harming themselves, and provides them with care, custody, and treatment.[23] State action to prevent harm to others is clearly an exercise of the police power, while state enforced treatment is clearly an exercise of the *parens patriae* power. Action to prevent harm to self partakes of both, although primarily in the role of *parens patriae*.

Parens Patriae

Courts and commentators have provided thorough descriptions of the history and development of the doctrine of *parens patriae*.[24] It is founded on the notion that certain individuals

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20. *Id.*

21. *See* note 50 and accompanying text *infra*.

22. *See Overt Dangerous Behavior as a Constitutional Requirement for Involuntary Civil Commitment of the Mentally Ill*, 44 U. CHI. L. REV. 562, 564 (1977); *In re* Ballay, 482 F.2d 648, 657-58 (D.C. Cir. 1973); *Social Accountability: Preface to an Integrated Theory of Criminal and Mental Health Sanctions*, Proceedings of the Biannual Conference on Psychology, Lincoln, Nebraska at 4 (1974).

23. In the landmark decision of *In re Oakes*, Chief Justice Shaw stated that "the great law of humanity" justified depriving an insane person of his freedom whenever his "own safety or that of others require[d] that he should be restrained for a certain time, and [when] restraint [was] necessary for his restoration, or [would] be conductive thereto." *In re* Oakes, 8 Law Rep. 122, 125 (Mass. 1845).

24. *See, e.g.*, 3 W. BLACKSTONE, COMMENTARIES *47. *See generally* N. KITTRIE, THE RIGHT TO BE DIFFERENT (1973 ed.).

Extensive discussion of the development of *parens patriae* may be found in *In re* Gault, 387 U.S. 1 (1967); Lessard v. Schmidt, 349 F. Supp. 1078, 1088-89 (E.D. Wis. 1972), *vacated on procedural grounds* 414 U.S. 473 (1974), *reinstated*, 379 F. Supp. 1376 (1974), *vacated on procedural grounds*, 421 U.S.

are unable to act for themselves and are incompetent.[25] This requirement, however, has been substantially emasculated,[26] and the doctrine, once described as "more a state fiscal policy than a humanitarian doctrine,"[27] has a long history of abuse.

The Supreme Court has suggested that the *parens patriae* power is inherent in the nature of the modern state, and is "a most beneficient function, and often necessary to be exercised in the interests of humanity."[28] The doctrine underlies state laws protecting minors, establishing guardianships, and providing for involuntary commitment. Its use to detain the mentally ill in order to provide for their rehabilitation is commonly traced to the landmark case of *In re Oakes*.[29] There, the Massachusetts Supreme Court held that the "great law of humanity" allows states to confine an insane person whenever his "own safety or that of others require that he should be restrained for a certain time, and [when] restraint [was] necessary for his restoration or [would] be conducive thereto."[30] The language of *Oakes* suggests that dangerousness to self or others is required. Josiah Oakes, however, was a nonviolent elderly individual who was

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957 (1975), *reinstated*, 413 F. Supp. 1318 (E.D. Wis. 1976); State *ex rel* Hawks v. Lazaro, 202 S.E.2d 109 (W. Va. 1974); Curtis, *The Checkered Career of Parens Patriae: The State as Parent or Tyrant*? 25 DE PAUL L. REV. 895 (1976) [hereinafter cited as *Checkered Career*].

25. The earliest recognition of the doctrine of *parens patriae* in English law is in the document known as *Prerogative Regis*, which either paralleled or was based on Roman law. *See* State *ex rel.* Hawks v. Lazaro, 202 S.E.2d 109, 117 (W. Va. 1974). *Parens patriae* expressed the *Prerogative Regis*, or king's prerogative, under which the king was considered to be personally sovereign and preeminent. *See Checkered Career*, *supra* note 24, at 895-98. This preeminance, is explained by Chitty:

> The king is in legal contemplation the guardian of his people and in that amiable capacity is entitled (or rather it is his majesty's duty, in return for the allegiance paid him) to take care of his subjects as are legally unable, on account of mental incapacity, whether it proceed from first, nonage (children); second, idiocy; or third, lunacy; to take proper care of themselves and their property. J. CHITTY, A TREATISE ON THE LAW OF THE PREROGATIVE OF THE CROWN 155 (1820).

26. *See* notes 142-45 and accompanying text *infra*.

27. State *ex rel.* Hawks v. Lazaro, 157 W. Va. 417, 202 S.E.2d 109, 118-19 (1974).

During the settling of the American colonies, the king had authority to act as "the general guardian of all infants, idiots, and lunatics." Hawaii v. Standard Oil Co., 405 U.S. 251, 257 (1972), *quoting* 3 W. BLACKSTONE, COMMENTARIES 47. While the law required that the king act to promote the best interests of his wards, the doctrine was generally not used to "protect," but to take, the property of the insane. After the American Revolution, the *parens patriae* power was vested in the legislatures, which often delegated their authority to the courts. *See* ENNIS & EMERY, *supra* note 1, at 36; *Developments*, *supra* note 3, at 1208.

28. Mormon Church v. United States, 136 U.S. 1, 57 (1890).

29. 8 Law Rep. 122 (Mass. 1845).

30. *Id.* at 124-25.

committed after threatening to engage in speculative financial ventures and becoming engaged to a woman of questionable character shortly after the death of his wife.[31]

Since *Oakes*, and until recently, courts and legislatures have exercised *parens patriae* for involuntary commitment of the mentally ill for the individuals' own benefit, not only when dangerous to themselves, but also for care and treatment. In essence the doctrine of *parens patriae* is meant to protect and help individuals who cannot protect and help themselves.

As discussed below, due process applies to *parens patriae* commitments and thus requires substantial limitations.[32] Indeed, when properly interpreted and applied, the doctrine has several built-in safeguards, including the requirements of incompetence and treatability. It has the advantage of focusing on mental illness and its treatment, rather than simply on dangerousness.

Police Power

The police power is the inherent power of the states as sovereigns to promote or protect the public health, safety, welfare, and morals.[33] Police power is distinguished from *parens patriae* by its purpose to protect or promote societal rather than individual interests. The state's police power is not, however, unlimited. State action must promote public interests that "require such interference" by reasonably necessary and "not unduly oppressive" means.[34] When state action either creates suspect classifications or infringes upon fundamental liberties, substantive due process and equal protection require that the public interests advanced be compelling, or at least outweigh the infringement of liberty. Furthermore, the action taken must be the least restrictive means of furthering those interests.[35]

The primary state interest asserted for police power commitments is the protection of society from the dangerous mentally ill.[36] This constitutes a valid state interest and, if an individual is sufficiently dangerous, this interest may be compel-

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31. *Id.* at 127-29.

32. *See* notes 39-49 and accompanying text *infra*. *See also* Curtis, *The Checkered Career of Parens Patriae: The State as Parens or Tyrant?*, 25 DE PAUL L. REV. 895 (1976).

33. *See, e.g.*, Jacobson v. Massachusetts, 197 U.S. 11, 24-25 (1905). For a general discussion of the police power, *see* Comment, *Police Power in Illinois: The Regulation of Private Conduct*, 1972 U. ILL. L.F. 158.

34. Lawton v. Steele, 152 U.S. 133, 137 (1894), *quoted in*, Goldblatt v. Town of Hempstead, 369 U.S. 590, 594-95 (1962).

35. *See* note 151 and accompanying text *infra*.

36. *See* Developments, *supra* note 3, at 1223.

ling enough to justify civil commitment.[37] The desire to protect the individual's health and welfare, particularly one who is suicidal, is also asserted as a state interest in police power commitment. Authorities suggest that suicidal behavior falls within the police power because suicide has direct and substantial consequences upon the lives of others, especially family members of the deceased.[38] More often, it is argued that protection of the individual's welfare generally is within the state's police power interest. Due process and equal protection analyses suggest, however, that the state's interest in protecting the individual is not compelling enough to justify use of the police power to commit.

PRESENT STATE OF THE LAW

Constitutional Tests and Limitations—Supreme Court Cases

Due Process

Indisputably, due process considerations apply to civil commitment. Indeed, most of the recent developments in the law of civil commitment have been based on the due process clause. The Supreme Court has indirectly addressed the issue of standards for commitment in several cases concerning the commitment of persons accused of criminal activity.[39]

In *Jackson v. Indiana*, the court considered commitment following a finding of incompetence to stand trial, and held that "due process requires that the nature and duration of the commitment bear some reasonable relation to the purposes for which the individual is committed."[40] In *Humphrey v. Cady*, the Court interpreted a Wisconsin provision authorizing commitment in the interest of the welfare of an individual or others to require a "social and legal judgment that his potential for doing harm, to himself or to others, [be] great enough to justify such a massive curtailment of liberty."[41] This suggestion of substantive due process interest-balancing, though barely articulated, was followed when the court directly addressed the standards for civil commitment outside the criminal context in *O'Connor v. Donaldson*.[42]

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37. *See, e.g.*, Jacobson v. Massachusetts, 197 U.S. 11, 24-25 (1905).

38. ENNIS & EMERY, *supra* note 1, at 49.

39. *See* Jackson v. Indiana, 406 U.S. 715 (1972); Humphrey v. Cady, 405 U.S. 504 (1972); Baxstrom v. Herold, 383 U.S. 107 (1966); Greenwood v. United States, 350 U.S. 366 (1956).

40. 406 U.S. 715, 738 (1972).

41. 405 U.S. 504, 509 (1972).

42. 422 U.S. 563 (1975); *see* Rogers v. Okin, 634 F.2d 650 (1st Cir. 1980), *aff'g in part* 478 F. Supp. 1342 (D. Mass. 1979), *cert. granted*, No. 80-1417

Kenneth Donaldson was involuntarily committed to a mental hospital for nearly fifteen years even though he was not dangerous to himself or others. He had friends willing to care for him, and refused professional treatment, probably on religious grounds. A jury, subsequently, awarded Donaldson damages for violation of his constitutional right to liberty. The court of appeals affirmed in a broad opinion, finding a constitutional right of a person, involuntarily committed, to receive treatment that will give him a reasonable opportunity to cure or improve his mental condition. The court implied, however, that given such treatment, it would be constitutionally permissable for a state to confine a mentally ill person against his will even if he is not dangerous to himself or others. The Supreme Court agreed that Donaldson's confinement was unconstitutional, but declined to consider, and disapproved of the appellate court's holding, concerning the right to treatment.

The Court considered and rejected the various state interests asserted, announcing that a mere finding of mental illness, an interest in providing minimal living standards,[43] and an interest in protecting citizens from exposure to the mentally ill were not sufficient grounds for commitment. The court phrased its holding in narrow terms and *expressly declined to decide*:

> whether, when, or by what procedures, a mentally ill person may be confined by the State on any of the grounds which, under contemporary statutes, are generally advanced to justify involuntary confinement of such a person—to prevent injury to the public, to ensure his own survival or safety, or to alleviate or cure his illness.[44]

The *Donaldson* case does, however, prescribe a due process interest balancing test and a least restrictive means analysis.[45] The test's flexibility is notable though it provides only limited guidance, requiring that this balancing be done on a case by case basis, accommodating the special interests—societal and individual—reflected by the specific factual context.[46] Various

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(April 20, 1981) (several balancing standards scrutinized before medication administered); Davis v. Hubbard, 506 F. Supp. 915 (N.D. Ohio 1980) (need to balance patient interests against legitimate interest of state); *see also* Comment, *Overt Dangerous Behavior as a Constitutional Requirement for Involuntary Civil Commitment of the Mentally Ill*, 44 U. CHI. L. REV. 562, 567-69 (1977) [hereinafter cited as *Overt Dangerousness*].

43. O'Connor v. Donaldson, 422 U.S. 563 (1975). The court did note that the state's "proper interest in providing care and assistance to the unfortunate goes without saying." *Id.* at 575.

44. *Id.* at 573-74 (footnote omitted).

45. *See* Jackson v. Indiana 406 U.S. 715 (1972); *Overt Dangerousness*, *supra* note 42, at 569.

46. *See, e.g.*, O'Connor v. Donaldson, 422 U.S. 563, 578 (1975) (Burger, C.J. concurring); Lessard v. Schmidt, 349 F. Supp. 1078, 1086 (E.D. Wis.

courts have identified and balanced these interests differently in the area of civil commitment.[47]

Although the Supreme Court, both generally and particularly in the mental health area, has interpreted substantive due process to require interest balancing, the court has also articulated a compelling state interest test. Due process requires that state action be reasonably related to valid state goals, but that action affecting fundamental interests be related to compelling state goals.[48] Commitment, as a "massive deprivation of liberty," clearly affects a fundamental interest, and several courts have analyzed commitment standards in terms of a compelling state interest test.[49] Since courts often engage in interest balancing to determine whether a given state interest is "compelling," the practical difference betweeen the two tests is frequently insignificant.

Void for Vagueness

Another aspect of due process which limits involuntary commitment is the vagueness doctrine. Most courts agree that the doctrine applies to civil commitment.[50] The void for vagueness doctrine requires that statutes providing for incarceration

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1972), *vacated on procedural grounds*, 414 U.S. 473 (1974), *reinstated*, 413 F. Supp. 1978, 1318 (1976).

47. Rogers v. Okin, 634 F.2d 650 (1st Cir. 1980), *aff'g in part*, 478 F. Supp. 1342 (D. Mass. 1979); *cert. granted*, No. 80-1417 (April 20, 1981) (physician's finding that antipsychotic medicine could cause harm outweighed by need to prevent violence); Davis v. Hubbard, 506 F. Supp. 915 (N.D. Ohio 1980) (administration of mood altering drugs to patient without informed consent violates due process unless patient is dangerous to himself or others); Lessard v. Schmidt, 349 F. Supp. 1078, 1086 (E.D. Wis. 1972), *vacated on procedural grounds*, 414 U.S. 473 (1974), *reinstated*, 379 F. Supp. 1376 (1974), *vacated on procedural grounds*, 421 U.S. 957 (1975), *reinstated*, 413 F. Supp. 1318 (1976) (even an overt attempt to substantially harm oneself cannot be the basis for civil commitment unless person is found to be mentally ill and in immediate danger at the time of the hearing of doing further harm to oneself). *See also* People v. Sansone, 18 Ill. App. 3d 315, 309 N.E.2d 733 (1974) (commitment of a person in need of medical treatment without evidence of harmful conduct is not a *per se* violation of due process); Commonwealth *ex. rel.* Finken v. Roop, 234 Pa. Super. 155, 339 A.2d 764, 771 (1975) (immense individual interests involved in civil commitment lead inexorably to analogy with the criminal justice system).

48. *See, e.g.*, Jackson v. Indiana, 406 U.S. 715, 738 (1972) (reasonable relation); Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923). *See also* Roe v. Wade, 410 U.S. 113, 155 (1973) (compelling interest required to justify infringement of fundamental interests).

49. *See, e.g.*, Lessard v. Schmidt, 349 F. Supp. 1078, 1084 (E.D. Wis. 1972), *vacated on procedural grounds*, 414 U.S. 473 (1974), *reinstated*, 379 F. Supp. 1376 (1974), *vacated on procedural grounds*, 421 U.S. 957 (1975), *reinstated*, 413 F. Supp. 1318 (1976).

50. Goldy v. Beal, 429 F. Supp. 640 (M.D. Penn. 1976); Stamas v. Leonhard, 414 F. Supp. 439 (D. Iowa 1976); United States *ex rel.* Mathew v. Nelson, No. 72 C. 2104 (N.D. Ill., filed Aug. 18, 1975).

be drawn with sufficient specificity to provide fair warning of what conduct is proscribed, and to restrict the discretion of authorities.[51] The doctrine thus serves two purposes: first, it requires fair notice of the forbidden conduct; second, it limits the possibility of arbitrary and discriminatory enforcement. The fair notice requirement probably does not apply to civil commitment, because commitment statutes focus on an individual's *status* as mentally ill and/or dangerous, and not on the individual's conduct.[52] However, the possibility of arbitrary and discriminatory enforcement in commitment determinations is substantial. While courts are split, several have found statutory definitions of mental illness and dangerousness so vague as to violate due process.[53] Some of these courts have sought to cure vagueness and safeguard against arbitrariness by requiring not only dangerousness, but an overt act.[54] While the dangerousness coupled with an overt act requirement may satisfy the void for vagueness doctrine, other safeguards are equally satisfactory.[55]

Equal Protection

Equal protection requires a reasonable and rationale basis for state classifications resulting in differential treatment. Where fundamental interests are affected or "suspect classifications" utilized, state action must be justified by a compelling interest.[56] The equal protection clause sets various limitations on commitment standards, particularly, the dangerousness requirement discussed later in this article.[57]

Punishment for Status: An Analogy

In *Jackson v. Indiana*, the court remarked that "considering the number of persons affected by involuntary commitment, it is perhaps remarkable that the substantive constitutional limitations have not been more frequently litigated."[58] The court cited

51. Papachristou v. City of Jacksonville, 405 U.S. 156, 162-63 (1972).

52. *See, e.g.*, Stamus v. Leonhardt, 414 F. Supp. 439, 451 (D. Iowa 1976); *See Overt Dangerousness*, *supra* note 42 at 588.

53. *See, e.g.*, Goldy v. Beal, 429 F. Supp. 640 (M.D. Penn. 1976); Stamus v. Leonhardt, 414 F. Supp. 439 (D. Iowa 1976). *Cf. In re* Salem, 31 N.C. App. 57, 228 S.E.2d 649, 651-52 (1976). *But see* Doe v. Gallinot, 486 F. Supp. 983, 991 (C.D. Cal. 1979); *In re* Beverly, 342 So.2d 481 (Fla. 1977); *In re* Williams, 297 So. 2d 458 (La. Ct. App. 1974); State v. O'Neill, 247 Or. 59, 545 P.2d 97 (1976).

54. *See, e.g.*, Lynch v. Baxley, 386 F. Supp. 378 (M.D. Ala. 1974).

55. *See Overt Dangerousness*, *supra* note 42, at 589.

56. *See Mental Illness: A Suspect Classification?*, 83 YALE L.J. 1202 (1974); *Developments*, *supra* note 3, at 1215.

57. See notes 105-137 and accompanying text *infra*.

58. Jackson v. Indiana, 406 U.S. 715, 737 (1972).

Robinson v. California,[59] which considered punishment for status as violative of the eighth amendment.[60] Referring to a California statute making it a criminal offense to "be addicted to the use of narcotics,"[61] the *Robinson* court held that imposition of punishment and imprisonment for the status of being an addict constituted cruel and unusual punishment in violation of the eighth and fourteenth amendments. At the same time, however, the *Robinson* court explicitly sanctioned civil commitment.[62] The *Jackson* court's reliance upon *Robinson*, as precedent for suggesting a restriction on the power to commit is therefore puzzling.

This legal labelling game—civil v. criminal—was condemned five years later in *In re Gault*.[63] The Court has since rejected the significance of labels, and instead looks to the substantive effect of confinement on protected interests. Despite certain similarities of incarceration and commitment, their practical effects may differ markedly. Commitment is not meant to be punitive in purpose and may be based on the need for treatment. The *Robinson* court's encouragement of civil commitment reflects support of state action to provide treatment for ill citizens. Commitment on the basis of dangerousness, focusing on protecting society and not on providing treatment, especially where no treatment is offered, is, however, akin to criminal incarceration and may constitute unconstitutional punishment for status.[64]

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59. Robinson v. California, 370 U.S. 660 (1960). The court also cited for the same proposition, Powell v. Texas, 392 U.S. 514 (1968). *Id.*

60. 406 U.S. 715, 737 n.23.

61. 370 U.S. 660 (1960).

62. It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease. A State might determine that the general health and welfare require that the victims of these and other human afflictions be dealt with by compulsory treatment involving quarantine, confinement, or sequestration.

Id. at 666. *See* Abramovsky & McCarthy, *Civil Commitment of Non-Criminal Narcotic Addits: Parens Patriae; A Valid Exercise of a State's Police Power; or an Unconscionable Disregard of Individual Liberty?*, 38 U. PITT. L. REV. 477 (1972) [hereinafter cited as *Disregard of Individual Liberty*].

63. *In re* Gault, 387 U.S. 1 (1967). *See* Dershowitz, *Preventive Confinement: A Suggested Framework for Constitutional Analysis*, 51 TEX. L. REV. 1277, 1321 (1973).

64. BRAKEL & ROCK, THE MENTALLY DISABLED AND THE LAW 40-41 (1971) [hereinafter cited as BRAKEL & ROCK]; Note, *Civil Commitment of the Mentally Ill: Theories and Procedures*, 79 HARV. L. REV. 1288, 1291 (1966).

Recent Developments in the Law—the Move Toward Dangerousness

During the past decade, several courts and legislatures have determined that *parens patriae* is an insufficient authority to commit the incompetent mentally ill for treatment. The same courts allow police power commitments of those dangerous to themselves. The legal grounds for rejecting *parens patriae* have varied and not always been well articulated, but include due process interest balancing, the compelling interest and vagueness doctrines, and statutory construction. The practical grounds emphasize: the unreliability of the diagnosis of mental illness;[65] the failure of statutes to adequately define mental illness;[66] the recognition that treatment is too rarely provided and often not successful; and recognition of the individual's non-treatment concerns such as loss of liberty, stigmatization, and invasions of privacy. Quite arguably, the real reason for rejecting *parens patriae* commitment is dissatisfaction with the result. Too often, the underlying premise of *parens patria*—that the individual will benefit from commitment—has been false.

The move toward police power/dangerousness commitments may also be perceived as a response to the arbitrary use of *parens patriae* authority in the past. When civil commitment was based upon *parens patriae*, the relationship between individual and state was not viewed as adversarial, and resulted in relaxed due process and nominal procedural protection.[67]

In re Gault, a Supreme Court reaction to the "procedural laxness" associated with *parens patriae*, rejected the ostensibly nonadversarial connotation of the "civil" label. The Court stressed the due process limitations to which *parens patriae* is subject,[68] and in tracing the history of the doctrine, concluded that its "meaning is murky and its historical credentials are of

65. *See, e.g.*, *In re* Ballay, 482 F.2d 648, 665 (D.C. Cir. 1973); Lessard v. Schmidt, 349 F. Supp. 1978, 1094 (E.D. Wis. 1972), *vacated on procedural grounds*, 414 U.S. 473 (1974), *reinstated*, 379 F. Supp. 1376 (1974), *vacated on procedural grounds*, 421 U.S. 957 (1975), *reinstated*, 413 F. Supp. 1318 (1976); Finken v. Roop, 234 Pa. Super. 155, 339 A.2d 764, 777-78 (1975).

66. ENNIS & EMERY, *supra* note 1, at 37.

67. *See* Note, *Mental Health-United States ex rel. Mathew v. Nelson—Civil Commitment of the Mentally Ill Based on a Finding of Dangerousness is Constitutional Even Though Dangerousness is Not Inferred from a Recent, Overt Dangerous Act*, 7 LOY. U.L.J. 507, 510 (1976) [hereinafter cited as *Constitutionality of Dangerousness*]. *See generally* Note, *Hospitalization of the Mentally Ill: Due Process and Equal Protection*, 35 BROOKLYN L. REV. 187 (1969) (author concluded that "as long as the courts engage in legal sematics and fail to consider the true nature of the admission proceeding, protection of the patient's legal rights will be hampered).

68. *In re* Gault 387 U.S. 1, 12-31 (1967).

dubious relevance."[69] Subsequent case law, discussed below, further develops and implements this proposition that exercise of *parens patriae* power had for too long escaped the requirements of due process.

In *Dixon v. Attorney General*,[70] a class action by state mental hospital patients, the district court held a provision of the Pennsylvania Mental Health and Mental Retardation Act authorizing commitment in the interest of any "person [who] is mentally disabled and in need of care"[71] unconstitutional on its face and as applied. The plaintiffs in *Dixon* had already served time for criminal offenses. They were recommitted under the Mental Health Act, for an indefinite period, without the benefit of counsel, independent psychological evaluation, or an authentic finding of mental disability.

The court first reviewed the conditions at the maximum security hospital, finding: treatment "grossly inadequate";[72] and confinement in a maximum security institution unnecessary for civil patients and not conducive to rehabilitation.[73] Relying on *Gault*, the court rejected the argument that *parens patriae* permitted this lack of procedural protection and held the relevant section of the act "almost completely devoid of the due process of law required by the fourteenth amendment."[74] The court did not consider whether the state could commit the nondangerous mentally ill for the purpose of treatment if procedural due process standards were satisfied. The consent agreement, however, required dangerousness to self or others for involuntary confinement.[75]

Lessard v. Schmidt[76] was a class action contesting the validity of Wisconsin commitment procedures. Though twice vacated

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69. *Id.* at 16. The doctrine's shortcomings were further expressed as follows:

> [t]he phrase was taken from chancery practice, where, however, it was used to describe the power of the state to act *in loco parentis* for the purpose of protecting the property interests and the person of the child. But there is no trace of the doctrine in the history of criminal jurisprudence.

Id. at 16-17. More recent cases have continued the discrediting of *parens patriae*. *See* Breed v. Jones, 421 U.S. 519 (1975); *In re* Winship, 397 U.S. 358 (1970).

70. 325 F. Supp. 966 (M.D. Pa. 1971).

71. *Id.* at 968, n.2.

72. *Id.* at 969.

73. *Id.* at 970.

74. *Id.* at 972.

75. However, the consent agreement required dangerousness to self or others for involuntary confinement. *Id.* at 974.

76. 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated on procedural grounds*, 414 U.S. 473 (1974), *reinstated*, 379 F. Supp. 1376 (1974), *vacated on procedural grounds*, 421 U.S. 957 (1975), *reinstated*, 413 F. Supp. 1318 (1976).

on procedural grounds by the Supreme Court, *Lessard* was reinstated by the district court, and has become one of the most frequently cited cases in this area. The lower court, in a fairly comprehensive opinion, held the Wisconsin commitment procedure violative of due process. Defects included: inadequate notice of charges and the right to a jury; forty-eight hour detention without a probable cause hearing and two weeks without a full hearing; lack of counsel; failure to adhere to the rules of evidence; and failure to require proof of mental illness and dangerousness beyond a reasonable doubt. Moreover, Wisconsin had not considered less restrictive alternatives.[77]

The court began its analysis by stating that a compelling state interest must be shown to justify deprivation of a fundamental liberty.[78] Noting that the same fundamental liberties are at stake in civil and criminal commitments, but that due process safeguards are much more limited in civil commitments, the *Lessard* court acknowledged that use of the dangerousness criterion for commitment results in differential treatment of the mentally ill and implied that equal protection problems might result from the dangerousness standard.[79] Unfortunately, the court never returned to the issue.[80]

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77. 349 F. Supp. at 1103.

78. *Id.* at 1084. However, later in the opinion, the district court employed the balancing test used in O'Connor v. Donaldson, 422 U.S. 563 (1975) (and implicit in *Humphrey v. Cody*, 405 U.S. 504 (1972)). *See* notes 48-53 and accompanying text *supra*.

79. Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated on procedural grounds*, 414 U.S. 473 (1974), *reinstated*, 379 F. Supp. 1376 (1974), *vacated on procedural grounds*, 421 U.S. 957 (1975), *reinstated*, 413 F. Supp. 1318 (1976).

> This has been justified on the premise that the state is acting in the role of *parens patriae*, and thus depriving an individual of liberty not to punish him but to treat him. Additionally, it is said that the individual may be deprived of liberty under the police power because of society's need to protect itself against the potential dangerous acts of persons who, because of mental illness, are likely to act irrationally. The fact that '[i]f a sociologist predicted that a person was eighty per cent likely to commit a felonious act, no law would permit his confinement,' but under the same circumstances a psychiatrist's recommendation of commitment is likely to be accepted, is sought to be justified on the basis of potential benefit to the confined in a mental institution. In effct, the present action challenges the validity of this difference in treatment.

Id. at 1084. This statement recognizes the equal protection problems stemming from the dangerousness requirement, and reveals the importance of focusing on treatment as potentially justifying differential classification of the mentally ill.

80. The court also declined to consider the issue of a constitutional right to treatment, but noted that the right would be hard to enforce, and the reality is that treatment is inadequate or unavailable, and hospitalization may be detrimental. In any event, the court suggested a person should not be treated against his will without due process safeguards. *See also* Note,

After extensive enumeration of the detrimental effects of commitment upon an individual, the court concluded, however, that stringent due process safeguards were necessary despite the civil label which attaches to commitment proceedings.[81] The court further held that dangerousness must be extremely likely, imminent, shown by a recent overt act, and proved beyond a reasonable doubt.[82] Imminent dangerousness was required because of the difficulty of predicting dangerousness and particularly because of the definitional ambiguity of mental illness.[83] Finally, the requirement of imminent danger was justified by comparing the mentally ill with the physically ill who may opt not to undergo treatment.[84]

It is difficult to see how requiring imminent dangerousness provides the best justification, or even an adequate justification, for differential treatment of the mentally ill. The *Lessard* analysis could be invoked in support of an incompetence requirement; incompetence could justify differential treatment of the

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The Nascent Right to Treatment, 53 VA. L. REV. 1134 (1967). "Accepting that due process does not forbid involuntary detention for the purpose of rendering care and treatment under the *parens patriae* role, it is still clear that such detention does not meet due process requirements if, in actual practice, treatment beneficial to the patient is not rendered." *Id.* at 1140. *See also* Wyatt v. Stickney, 334 F. Supp. 1341 (M.D. Ala. 1971). *Cf.* Kent v. United States, 383 U.S. 541, 543 (1966) ("Apart from raising questions as to the adequacy of custodial and treatment facilities and policies, some of which are not within judicial competence.").

81. In addition to citing numerous statutory disabilities associated with an adjudication of mental illness in Wisconsin at the time, the court also discussed the difficulties that a committed individual faces in attempting to adjust to life outside the institution following release.

> The stigma which accompanies any hospitalization for mental illness has been brought to public attention in the news stories surrounding the recent resignation of a vice-presidential aspirant from further candidacy. Evidence is plentiful that a former mental patient will encounter serious obstacles in attempting to find a job, sign a lease or buy a house. One commentator, noting that "former mental patients do not get jobs," has insisted that, "[in] the job market, it is better to be an ex-felon than an ex-patient." (cite omitted)

Lessard v. Schmidt, 349 F. Supp. at 1089 (E.D. Wis. 1972), *vacated on procedural grounds*, 414 U.S. 473 (1974), *reinstated*, 379 F. Supp. 1376 (1974), *vacated on procedural grounds*, 421 U.S. 957 (1975), *reinstated*, 413 F. Supp. 1318 (1976).

82. 349 F. Supp. at 1093-95.

83. *Id.* at 1094; *See, e.g.*, Livermore, Malmquist, & Miehl, *On the Justifications for Civil Commitment*, 117 PA. L. REV. 75, 80 (1968) [hereinafter cited as Livermore].

84. "The same should be true of persons in need of treatment for mental illness unless the state can prove that the person is unable to make a decision about hospitalization because of the nature of his illness." Lessard v. Schmidt, 349 F. Supp. at 1094. Indeed, considering the nontreatment effects of mental hospitalization, the court suggested that it is more likely to be rational to refuse mental treatment than to accept it. *See* note 80 *supra*.

mentally ill. The court did not, however, venture a departure from the familiar language of dangerousness.

In re Levias,[85] closely following and relying on *Lessard*, rejected the state's argument that its interest in providing care and treatment justified commitment of a nondangerous psychotic:

> The doctrine of parens patriae, rigorously discredited by the United States Supreme Court in *In re Gault*, . . . can no longer provide an adequate basis for the incarceration of individuals who had committed no crime, who are able to function reasonably well in society, and *who pose no threat to themselves or others*, despite some degree of mental illness. . . . Weighed against the fundamental interests at stake in commitment proceedings, the interest of the state in the commitment of nondangerous persons is less than compelling.[86] (emphasis in original)

The *Levias* court was not confronted with issues of treatment and incompetence. It reasoned that since *parens patriae* had been discredited, the remaining justification was the police power, which only applied to the dangerous. *In re Gault* did not, however, completely reject the *parens patriae* power, but rather held that it did not justify lack of due process. Thus, *Levias* suggests that dangerousness should precede commitment under *parens patriae*, as well as police power, authority. The case restricts, but does not preclude *parens patriae* commitment.

Parens patriae commitment was more fully evaluated in *State ex rel. Hawks v. Lazaro*,[87] where the Supreme Court of Appeals of West Virginia considered a *habeas corpus* challenge to the constitutionality of involuntary commitment statutes on their face and as applied. Most of the challenges were procedural. The court recognized these due process rights, rejecting the argument that the doctrine of *parens patriae* justifies relaxed procedures. After an extensive review of the doctrine,[88] suggesting that it "has been suspect from the earliest times,"[89] the court concluded that "the ancient doctrine of *parens patriae* is in full retreat on all fronts except in those very narrow areas where the state can demonstrate, as a matter of fact, that its care and custody is superior to any available alternative."[90] Examination of the care and custody of the mentally ill in Virginia revealed that treatment was poor, often detrimental, and certainly did not justify relaxation of due process standards. Thus, the section of the statute which permitted *parens patriae* commit-

85. 83 Wash. 2d 253, 517 P.2d 588 (1973).
86. *Id.* at 257, 517 P.2d at 591.
87. 202 S.E.2d 109 (W. Va. 1974).
88. *Id.* at 117-20.
89. *Id.* at 119.
90. *Id.* at 120.

ment for those in need of custody, care or treatment was held violative of due process. The court also relied on the vagueness doctrine, suggesting that commitment based on speculative benefits to the individual permits an "entirely subjective determination," and creates opportunities for abuse. Finally, the court suggested that the state could not demonstrate any compelling state interest under the police power for hospitalizing a person in his own best interests.[91]

In *Lynch v. Baxley*,[92] the court interpreted the cases above to require, along with various procedural safeguards, that commitment be based on findings of mental illness, a present threat of substantial harm to himself or others, a recent overt act, and treatment availability (if the illness is treatable).[93] The court also required that the commitment be the least restrictive alternative.[94] The court recognized that commitment predicated upon dangerousness to self was based on the "*parens patriae* notion that the State is the ultimate guardian of those of its citizens who are incapable of caring for their own interests"[95] and thus required an additional finding of incompetence. Given the difficulties of diagnosing mental illness and predicting dangerousness, a recent overt act was required to satisfy the due process requirement of showing substantial dangerousness.

The court in *Kendall v. True*,[96] relying in part on the vagueness doctrine, declared commitment of the incompetent mentally ill unconstitutional and required dangerousness. The case is notable for its explicit rejection of the significance of incompetence, thus following *Hawks* rather than *Lynch*. According to the *Kendall* court, those who can and prefer to survive outside an institution, regardless of incompetence, have the constitutional right to do so.[97] The court upheld the section of the statute providing for commitment of the dangerous incompetent mentally ill, and commented that "at worst the incapacity provision is superfluous."[98]

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91. *Id.* at 123.

92. 386 F. Supp. 378 (M.D. Ala. 1974).

93. The *Lynch* court analyzed and relied upon the following landmark cases: Jackson v. Indiana, 406 U.S. 715 (1977); Humphrey v. Cady, 405 U.S. 504 (1972); the court of appeals decision in Donaldson v. O'Connor, 493 F.2d 507 (5th Cir. 1974), *vacated and remanded*, 422 U.S. 563 (1974); Dixon v. Attorney General, 325 F. Supp. 966 (M.D. Pa. 1971); *In re* Oakes, 8 Law Rep. 123 (Mass. 1845).

94. Lynch v. Baxlay 386 F. Supp. 378, 392 (M.D. Ala. 1974).

95. *Id.* at 390.

96. 391 F. Supp. 413 (W.D. Ky. 1975).

97. *Id.* at 418.

98. *Id.* at 420.

Several other cases are consistent.[99] Often, dangerousness is required to safeguard against vagueness in the statutory definition of mental illness, while an overt act is required to safeguard against the vagueness of the dangerousness concept.[100] Several courts, however, have not required an overt act[101] and have held that the term "mental illness" is not vague or arbitrary.[102] In effect, the courts agree on the factors involved, but weigh them differently; the latter courts emphasize treatment and discuss "rational bases" rather than "compelling interests."[103]

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99. Rogers v. Okin, 634 F.2d 650 (1st Cir. 1980), *aff'g in part*, 478 F. Supp. 1342 (D. Mass. 1979) (nothing in statutory scheme suggests finding of mental incompetency equivalent to incapacity); Suzuki v. Yuen, 617 F.2d 173 (9th Cir. 1980) (invalidated civil commitment statute which authorized involuntary commitment based on danger to self or others, used more precise legal term of "imminent" danger); Goldy v. Beal, 429 F. Supp. 640 (M.D. Penn. 1976); Stamus v. Leonhard, 414 F. Supp. 439 (D. Iowa 1976); Bell v. Wayne County Hospital, 384 F. Supp. 1085 (E.D. Mich. 1974); Finken v. Roop, 234 Pa. Super. 155, 339 A.2d 764 (Pa. 1975); *In re* Gary Seefield, No. 454-255 (Wis. Oct. 31, 1977). *But see* Coll v. Hyland, 411 F. Supp. 905, 912 (D.N.J. 1976); Fhagen v. Miller, 29 N.Y.2d 348 278 N.E.2d 615, 328 N.Y.S.2d 393 (1972).

100. Regarding the requirement of an overt act, *see* Altman v. Hofferber, 167 Cal. Rptr. 854, 616 P.2d 836 (1980) (defendant can be indefinitely institutionalized upon showing he is charged with violent felony and is incompetent to stand trial, as long as there is a showing that defendant is currently dangerous beyond reasonable doubt); Ohlinger v. Watson, 652 F.2d 775 (1980) (two prisoners jailed for sex offenses had Constitutional right to type of treatment that would cure or improve mental condition); Comment, *Overt Dangerous Behavior as a Constitutional Requirement for Involuntary Civil Commitment of the Mentally Ill*, 44 U. CHI. L. REV. 562 (1977) (concludes that the overt act requirement may be sufficient, but not necessary, to satisfy the constitutional challenges).

101. Rogers v. Okin, 634 F.2d 650 (1st Cir. 1980), *aff'g in part*, 478 F. Supp. 1342 (D. Mass. 1979) (no overt act but individual estimation of possibility and type of violence); Suzuki v. Yuen, 48 U.S.L.W. 1170 (9th Cir. Apr. 16, 1980) (court mandated "imminent" danger standard); U.S. *ex rel.* Matthew v. Nelson, 461 F. supp. 707 (N.D. Ill. 1975), *reported in* Casenote, *Mental Health—United States ex rel. Matthew v. Nelson—Civil Commitment of the Mentally Ill Based on a Finding of Dangerousness is Constitutional, Even Though Dangerousness Is Not Inferred from a Recent, Overt Dangerous Act*, 7 LOY. CHIL. L.J. 507 (1976); People v. Sansone, 18 Ill. App. 3d 315, 309 N.E.2d 733 (1974); *In re* Salem, 31 N.C. App. 57, 228 S.E.2d 649 (1976).

102. People v. Taylor, 618 P.2d 1127 (Col. 1980), (Colorado permits involuntary short-term civil commitment of those "in need of medical supervision, treatment, care, or restraint," when such condition results in inability to take care of "basic personal needs," is not unconstitutionally vague); People v. Sansone, 18 Ill. App. 3d 315, 309 N.E.2d 733 (1974).

103. Davis v. Hubbard, 506 F. Supp. 915 (N.D. Ohio 1980); People v. Sansone, 18 Ill. App. 3d 315, 309 N.E.2d 733 (1974); *In re* Salem 31 N.C. App. 57, 228 S.E.2d 649 (1976); Casenote, *Mental Health—United States ex rel. Matthew v. Nelson—Civil Commitment of the Mentally Ill Based on a Finding of Dangerousness is Constitutional, Even Though Dangerousness Is Not Inferred from a Recent, Overt Dangerous Act*, 7 LOY. CHI. L.J. 507, 515 (1976). *See generally* L. Tancendi, *The Rights of Mental Patients: Weighing the Interests*, 5 J. HEALTH POLITICS POLICY L. 199 (1980).

The reasoning and present state of the law was fairly summarized in *Doremus v. Farrell*:[104]

> Considering the fundamental rights involved in civil commitment, the *parens patriae* power must require a compelling interest of the state to justify the deprivation of liberty. In the mental health field, where diagnosis and treatment are uncertain, the need for treatment without some degree of imminent harm to the person or dangerousness to society is not a compelling justification. . . . To permit involuntary commitment upon finding of "mental illness" and the need for treatment alone would be tantamount to condoning the State's commitment of persons deemed socially undesirable for the purpose of indoctrination or conforming the individual's beliefs of the State. Due process and equal protection require that (a) that the person is mentally ill and poses a serious threat of substantial harm to himself or to others; and (b) that this threat of harm has been evidenced by a recent overt act or threat. The threat of harm to oneself may be through neglect or inability to care for oneself.[105]

Thus, the lower courts have gone beyond *O'Connor v. Donaldson* and held that the Constitution requires that an individual be dangerous to be committed. These courts either implicitly or explicitly reject the need for treatment as grounds for commitment. The result would be more convincing if greater attention were given to the possibility of requiring incompetency as a distinguishing feature of *parens patriae* commitments. The courts have, instead, leaped from a concern over the lack of procedural safeguards to a dangerousness requirement and have failed to explore alternatives responsive to the problems of poor diagnostic reliability and treatment.

The dangerousness requirement is an appealing threshold condition, since it partially avoids the treatment controversies and is closer to the criminal model, with which the courts are comfortable. The constitutional argument is that unless an individual is dangerous, the state's interest in providing treatment does not outweigh the individual's interest in liberty. Nevertheless, the dangerousness requirement presents several legal and social problems. Considering the existence of alternative safeguards, legal and mental health concerns suggest that the dangerousness requirement should be replaced or supplemented.

Problems and Solutions

Critique of the Dangerousness Requirement

Even at first glance, major practical and policy reasons suggest that dangerousness is a poor basis for commitment. Psy-

104. 407 F. Supp. 509 (D. Neb. 1975).
105. *Id.* at 514-15.

chiatrists and sociologists are notoriously bad at predicting dangerousness, and are prone to overpredict.[106] The best methods, impossible under the conditions of commitment proceedings, yield 60 to 70% false positives (persons incorrectly predicted as dangerous).[107] It has been suggested that, at the very best, prediction will result in four errors for every correct prediction (80% false positives).[108] Similar limitations apply to predictions of suicide.[109]

Given that the general populace is not incarcerated because of dangerousness, the mentally ill must be singled out either because they are seen as more dangerous as a class or as treatable.[110] If it is because they are viewed as both dangerous and subject to treatment, an additional assumption is that their dangerousness *results from* their mental illness. The mentally ill, however, are not more dangerous as a class than the population as a whole, and are certainly less dangerous than various other classes, such as ex-felons, or even youths.[111] In addition, dangerousness has not been successfully treated. In fact, psychiatrists rarely claim to be able to treat dangerousness.[112] The notion that dangerousness results from mental illness and will disappear with treatment is largely unsubstantiated. Moreover, curability need not be proven for commitment.[113] In addition, many mental illnesses are presently untreatable.[114] If the stated basis for confinement is that the dangerous mentally ill

106. *See, e.g.*, Dershowitz, *The Psychiatrist's Power in Civil Commitment: A Knife that Cuts Both Ways*, 2 PSYCH. TODAY, 32, 33 (1969). *See also* Dershowitz, *The Law of Dangerousness: Some Fictions about Predictions*, 23 J. OF LEGAL ED. 24 (1970).

107. *See, e.g.*, Rubin, *Prediction of Dangerousness in Mentally Ill Criminals*, 27 ARCHIVES GEN. PSYCHIAT. 397, 397-98 (1972).

108. *Id.*

109. ENNIS & EMERY, *supra* note 1 at 49-50.

110. A third distinction sometimes suggested is that the mentally ill are not deterrable. *See* notes 135-37 and accompanying text *infra*.

111. Giovanni & Jurel, *Socially Disruptive Behavior of Ex Mental Patients*, 17 ARCHIVES GEN. PSYCH. 146 (1967); Rappeport & Lassen, *Dangerousness—Arrest Rate Comparisons of Discharged Patients and the General Population*, 121 AM. J. PSYCH. 776 (1965); Steadman & Keveles, *The Community Adjustment and Criminal Activity of the Baxstrom Patients: 1966-1970*, 129 AM. J. PSYCH. 304 (1972).

112. ENNIS & EMERY, *supra* note 1, at 46-47. Insorfar as behavioral conditioning may successfully treat dangerousness, there is no indication that it is any more successful with the mentally ill than with the general population.

113. Notably, courts have had great difficulty determining whether a past act results from insanity, let alone predicting whether a future act would be the product of present mental illness. *See, e.g.*, People v. Sansone, 18 Ill. App. 3d 315, 309 N.E.2d 733 (1974); ENNIS & EMERY, *supra* note 1, at 46; MDLR, *supra* note 16, at 83-84.

114. *Developments*, *supra* note 3, 1232.

are treatable, then commitment is based on a *parens patriae* justification, and should be restricted accordingly.[115]

From a psychiatric and general policy viewpoint, the dangerousness requirement is paradoxical. Its focus is the one element that the mental health system is least able to diagnose and treat. The requirement also contributes to the "revolving door" syndrome, since prediction of dangerousness becomes even more difficult as length of hospitalization increases.[116] The identification and incarceration of the dangerous with the mentally ill, aggravates the stigma of mental illness and interferes with treatment of the mentally ill. Furthermore, psychiatric facilities are not equipped or particularly competent to deal with the dangerous, and such commitments present a severe drain on resources which could be better used for treatment. Thus, if the dangerousness requirement is maintained, at least a finding of likely responsiveness to available treatment should be required. For the nontreatable dangerous, including the suicidal, these facts suggest that a recent overt dangerous act should be minimally required (to reduce prediction inaccuracy) and incarceration should be for short and finite time periods. Arguably, the facts suggest a much broader conclusion: that the nontreatable dangerous should be relegated to the criminal justice system, and that they should not be incarcerated at all unless society is willing to recognize and adopt a special system of preventive detention.

The emphasis on dangerousness, rather than incompetence and treatability, may tacitly result in preventive detention. In *Robinson v. California*,[117] for instance, a penal commitment was distinguished as one which did not purport to provide for or require treatment.[118] Incarceration based not on a criminal violation, but on a prediction of a violation, is preventive detention. Preventive detention is generally disfavored, and its use for the mentally ill raises both due process and equal protection problems. As presently applied, application of the dangerousness requirement results in incarceration without treatment since many mental illnesses are presently untreatable.

Also, there is growing recognition of the right of the competent mentally ill to refuse treatment,[119] a right which has, in

115. *See* notes 142-55 and accompanying text *infra*.

116. INSIGHT COMMUNICATIONS, *supra* note 17, at 336.

117. 370 U.S. 660 (1962).

118. *See* Logan v. Arafeh, 316 F. Supp. 1265, 1269 (D. Conn. 1972).

119. Although barely mentioned in *O'Connor v. Donaldson*, Donaldson rejected treatment on religious grounds. *See* ENNIS & EMERY, *supra* note 1, at 132-33; Szasz, *Involuntary Psychiatry*, 45 CINCINNATI L. REV. 350 (1975).

some instances, been codified.[120] Although the right to treatment is also receiving increased recognition,[121] and may be constitutionally mandated, the focus on dangerousness still permits incarceration of those who are either competent to refuse treatment or untreatable. The right of a competent individual to refuse treatment, unquestioned in the case of the physically ill[122] should, on equal protection grounds, be extended to the competent mentally ill.[123] Incarceration of the mentally ill, without treatment, constitutes preventive detention. Since competent[124] individuals have a right to refuse treatment, incompetancy and susceptibility to treatment should be required for all commitments to the mental health system.

Restraint and custody without treatment in mental hospitals is a waste of resources and poor public policy. Moreover, it may be unconstitutional, either as punishment for status,[125] as violative of the fundamental fairness guaranteed by the due process clause, or as a violation of the equal protection clause.[126] Whether incarceration of the dangerous mentally ill without treatment constitutes punishment for status has not been satisfactorily resolved by the courts. Two courts rejected the argument that dangerousness is a status, suggesting that rather, it is expected future conduct.[127] This reasoning is unconvincing since dangerousness, by itself, requires no conduct.[128]

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120. INSIGHT COMMUNICATIONS, *supra* note 17, at 324-30.

121. *See, e.g.*, Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971), 334 F. Supp. 1341, 344 F. Supp. 373 (1972), *aff'd sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974) (The subsequent history relates to hearings to determine the proper standards for treatemnt); Casenote, *O'Connor v. Donaldson*, 9 AKRON L. REV. 374, 376 (1975).

122. *See, e.g.*, Winters v. Miller, 446 F.2d 65, 68 (2d Cir. 1971).

123. Note, however, that at least one court has held that dangerousness itself justifies involuntary treatment of competent mentally ill patients who would otherwise be constitutionally entitled to refuse treatment. Davis v. Hubbard, 506 F. Supp. 915 (N.D. Ohio 1980). This limitation of the right to refuse treatment narrows, but does not eliminate, incarceration without treatment. Also, as discussed above, it should not be assumed that dangerousness results from mental illness, and available treatments for dangeousness, if any, apply to the mentally ill and nonmentally ill alike.

124. It is well established that a finding of mental illness does not raise even a presumption of incapacity. *See, e.g.*, Winters v. Miller, 446 F.2d 65, 68 (2d Cir. 1971); Dale v. Hahn, 440 F.2d 633 (2d Cir. 1971); Logan v. Arafeh, 316 F. Supp. 1265, 1269 (D. Conn. 1972); INSIGHT COMMUNICATIONS, *supra* note 17, at 324.

125. *See* notes 58-64 and accompanying text *supra*.

126. *See Developments*, *supra* note 3, at 1228.

127. U.S. *ex rel.* Matthew v. Nelson, 461 F. Supp. 707 (N.D. Ill. 1975); People v. Sansone, 18 Ill. App. 315, 309 N.E.2d 733 (1974).

128. *Overt Dangerousness*, *supra* note 42, at 590 n.126.

Preventive detention is usually considered an improper exercise of the police power,[129] partly because the inaccuracy of prediction renders preventive detention arbitrary and capricious.[130] Involuntary commitments based on the present dangerousness requirement should be acknowledged as a form of preventive detention and not falsely justified under the guise of providing for the mentally ill.[131]

The equal protection clause requires that disparate treatment—in this case preventive detention of only the mentally ill—be rationally based. Where disparate treatment affects fundamental interests or is based on a suspect classification, it must serve a compelling state interest or survive "strict scrutiny."[132] Clearly, commitment affects fundamental interests. Justifications offered for restricting preventive detention to the mentally ill include that, as a class, they are more dangerous, more treatable, or less deterrable by criminal sanctions. It has already been indicated that the first justification is unacceptable. The mentally ill as a class are not more dangerous, and incarceration of all mentally ill based on this stated purpose would create under and overinclusive classes.[133] The second justification, amenability to treatment, relies on the *parens patriae* power. Under the police power, requiring a competent individual to accept treatment is not a benefit but an additional deprivation of liberty.[134] If the class were limited to the *incompetent and treatable* it would survive equal protection scrutiny.

The third justification recognizes that society relies on the deterrent effect of the criminal justice system rather than upon preventive detention. Thus, assuming that the mentally ill are not deterrable, they are an arguably distinct class subject to preventive detention. It is questionable whether the state's interest is sufficient to justify a deterrence system.[135] Assuming its suffi-

129. *See* Cross v. Harris, 418 F.2d 1095 (1969); Millard v. Harris, 406 F.2d 964 (D.C. Cir. 1968); ENNIS & EMERY, *supra* note 1, at 45.

130. ENNIS & EMERY, *supra* note 1, at 46-47; Social Accountability: Preface to an Integrated Theory of Criminal and Mental Health Sanctions, Proceedings of the Biannual Conference on Psychology, Lincoln, Nebraska (1974).

131. *See* Dershowitz, *Preventive Confinement*, 51 TEX. L. REV. 1277 (1973); Note, *Mental Illness, A Suspect Classification?*, 83 YALE L.J. 1237, 1266 (1974) [hereinafter cited as *Mental Illness*].

132. *See* Note, *Mental Illness*, *supra* note 131 at 1239.

133. The dangerous mentally ill are no more dangerous than the dangerous nonmentally ill, so the grounds for incarceration creates a grossly underinclusive class. *Id.*

134. *Id. See* Dershwitz, *Preventive Confinement*, 51 TEX. L. REV. 1277, 1319 (1973).

135. *See* Chambers, *Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives*, 70 MICH. L. REV. 1108 (1972). *See, e.g.*, Minnesota *ex rel.* Pearson v. Probate Court, 309 U.S. 270 (1940); *Developments*, *supra* note 3, at 1233.

ciency, however, the class is overinclusive since many of the mentally ill can be deterred. The proper test would identify a class with substantially diminished responsibility, analogous or equivalent to the test of the insanity defense.[136] This test differs markedly from the one presently employed and may be constitutionally required for police power commitments. Finally, it has been convincingly argued that mental illness is a suspect classification, that police power commitments for dangerousness and treatment are bound to be over or underinclusive, and thus violate the equal protection clause.[137]

It should be noted that the above equal protection arguments do not question either the *parens patriae* or police powers to commit. Rather, they suggest that the police power cannot be invoked exclusively because an individual is mentally ill. The state may have power to preventively detain all dangerous individuals, or all dangerous and treatable individuals, or, insofar as the equal protection clause is concerned, all incompetent individuals. Treatability and incompetence are classifications which, unlike mental illness, may survive strict scrutiny, assuming the incompetent physically ill are also subject to compulsory treatment. Thus, although dangerousness may constitute sufficient grounds for incarcerating people, the requirement is particularly unsuited to the concerns of the mentally ill.

Alternative or Additional Safeguards

Throughout this article, several safeguards other than dangerousness have been suggested, including incompetence, susceptibility to treatment, and the least restrictive alternative. These safeguards merit further elaboration.

Incompetence

An individual is incompetent when he or she lacks the capacity to make treatment decisions.[138] The relevant considerations are whether the individual is able to understand the nature, purpose, and benefits of treatment. If he has lost the ability to make choices or is so confused that he cannot make a decision having any relation to the relevant factors bearing on his hospitalization, an individual is incompetent. This narrow definition focuses solely upon the issue of whether the patient is

136. *Developments*, *supra* note 3, at 1234 n.181.

137. *See generally*, *Mental Illness*, *supra* note 131.

138. Incompetencey and incapacity have frequently been defined. *See* INSIGHT COMMUNICATIONS, *supra* note 17, at 341, 343; Roth *et al.*, *Tests of Competency to Consent to Treatment*, 134 AM. J. PSYCH. 279-84 (1977); *Developments*, *supra* note 3, at 1217-19; MDLR, *supra* note 16, at 91-93.

able to evaluate the risks, benefits, and alternatives to treatment. It looks at the decision-making process, and not at the decision made, thus avoiding the circularity of adjudging an individual incompetent because he makes a decision other than the judge would have made. That the state may be better informed suggests only that its information should be provided to the patient. Considerations of liberty, privacy, and the recognition that myriad subtle factors may affect such a decision, demand that the state impose its judgment only where the individual is clearly incapable of making reasonable evaluations.

Based on common law principles as well as on the due process and equal protection clauses, proper *parens patriae* commitments require a finding of incapacity.[139] Incompetence is not required for police power commitments, although substantially diminished capacity may be.[140] At least some degree of incapacity, however, ought be required for public policy reasons. Those dangerous to others or themselves, who cannot or will not be treated, should not be relegated to the mental health system. If their incarceration is justified under the police power, then care and custody should be provided through guardianships, through a separate system for short term preventive detention, or through the criminal justice system. These proposals do not deny treatment to the competent mentally ill. Rather, they recognize that, like the competent physically ill, the mentally ill should be allowed a choice.

Moreover, incapacity need not always result in commitment. An additional safeguard is the balancing process the state must go through in its role as *parens patriae*. As substitute decision-maker, the state must objectively balance the factors related to promoting the ward's best interests.[141] Availability and likelihood of success of treatment, alternatives to treatment, likely length of confinement, social stigma, and general liberty and privacy interests should be considered and balanced. Clearly, a mentally ill individual might rationally choose to forego institutionalization. Indeed, the requirement by courts and legislatures that an individual must be dangerous to himself can be viewed as the outcome of this balancing process. This requirement recognizes that individuals who are not dangerous to themselves are not likely to benefit enough from available

139. O'Connor v. Donaldson, 422 U.S. 563, 578 (1975) (Burger, C.J., concurring); Winters v. Miller, 446 F.2d 65, 71 (2d Cir. 1971); MDLR, *supra* note 16, at 89-90.

140. *See* note 136 and accompanying text *supra*.

141. *See* ENNIS & EMERY, *supra* note 1, at 41, *Developments*, *supra* note 3, at 1220-22.

treatment to justify confinement. Recognition that the present diagnosis and treatment of mental illness makes beneficial commitment unlikely provides a better basis for requiring dangerousness than does the questionable legal argument that *parens patriae* has been discredited. This approach is preferable because it focuses on evaluation of the mental health system and the needs of the mentally ill. It does not foreclose the possibility that as the mental health system improves, dangerousness to self might no longer be required to strike a beneficial balance in favor of commitment.

It has been suggested that incompetence should also be required for commitment of those dangerous to others. A balancing process similar to that outlined above should be used. The extent of an individual's dangerousness to others would then be considered only in the context of the police power decision whether incarceration outside of the mental health system is appropriate. In determining whether to commit an incompetent individual to the mental health system, dangerousness would be considered only insofar as it impacts the best interests of the individual.

Susceptibility to Available Treatment

Several courts have held that involuntarily committed patients have a constitutional right to treatment.[142] Although *O'Connor* casts doubt upon the extent of this right,[143] it appears to be well established that when the state's main justification for incarceration is the need for treatment, such treatment is required.[144] Presently, police power commitments do not require treatment. *Parens patriae* commitments, at least insofar as they are based on the need for treatment rather than on preventing harm to self, clearly do.[145] The criteria for commitment proposed above suggests that only those who are likely to benefit from available treatment should be committed to the mental health system. The competent mentally ill who will not or cannot be treated, but for whom society wishes to provide custody, would be handled outside the mental health system.

142. Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971), 334 F. Supp. 1341, 344 F. Supp. 373 (1972), *aff'd sub nom*, Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974). *See* Casenote, O'CONNOR v. DONALDSON, 9 AKRON L. REV. (1975) and cases cited therein; Lynch v. Baxley, 386 F. Supp. 378, 391 (M.D. Ala. 1974).

143. O'Connor v. Donaldson, 422 U.S. 563, 578 (1975) (Burger, C.J., concurring).

144. *Id.* See note 141 *supra*.

145. O'Connor v. Donaldson, 422 U.S. 563, 578 (1975) (Burger, C.J., concurring); *In re* Ballay, 482 F.2d 648 (D.C. Cir. 1973); Lynch v. Baxley, 386 F. Supp. 378, 391 (M.D. Ala. 1974); *Developments*, *supra* note 3, at 1222.

Technically, susceptibility to available treatment is not an independent safeguard, but rather a major and often determinative factor in the state's balancing process when acting for an incompetent. Many courts, rejecting the state's power to act as *parens patriae*, have relied on the fact that treatment is often unavailable or grossly inadequate.[146] Rather than resulting in the rejection of *parens patriae* as a ground for commitment, this observation reveals why susceptibility to available treatment is a major requirement of *parens patriae* commitments. If the concern is that those committed are not getting proper treatment, a "treatability" requirement is a better, more appropriate safeguard than is the dangerousness requirement. Unlike the dangerousness standard, a treatability requirement would conserve available resources for those actually capable of benefiting from them.

Four factors concerning treatment may be identified: (1) likelihood of improvement of the patient; (2) degree of improvement; (3) dangers of treatment; and (4) dangers of failing to treat.[147] All of these factors must be weighed in determining whether an individual is "treatable." Since guaranteeing and predicting the success of treatment are very difficult, commitment should be short-term, allowing for periodic review of the treatment.[148] This may be constitutionally required by the reasonable relation test in *Jackson*.[149] If sufficient treatment guarantees are not presently possible, then no one should be involuntarily committed to the mental health system.

Least Restrictive Alternative

This constitutional doctrine has recently been applied to all types of commitment procedures.[150] Implicit in the least restric-

146. *See, e.g.*, Kent v. United States, 383 U.S. 541 (1966); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated on procedural grounds*, 414 U.S. 473 (1974), *reinstated*, 379 F. Supp. 1376 (1974), *vacated on procedural grounds*, 421 U.S. 957 (1975), *reinstated*, 413 F. Supp. 1318 (1976).

147. E.Z. DuBose, Jr., *Of the Parens Patriae Commitment Power and Drug Treatment of Schizophrenia: Do the Benefits to the Patient Justify Involuntary Treatment?*, 60 MINN. L. REV. 1149, 1157 (1976); MDLR, *supra* note 16, at 93-94.

148. INSIGHT COMMUNICATINS, *supra* note 16, at 235; MDLR, *supra* note 16, at 85.

149. Jackson v. Indiana, 406 U.S. 715 (1972); MDLR, *supra* note 16, at 85.

150. Scott v. Plante, No. 80-1314 (3rd Cir., Feb. 5, 1981); Rogers v. Okin, 634 F.2d 650 (1st Cir. 1980) (less restrictive course of action required); Dixon v. Weinberger, 405 F. Supp. 974 (D.D.C. 1975); Lynch v. Baxley, 386 F. Supp. 378, 392 (M.D. Ala. 1974); Lessard v. Schmidt, 349 F. Supp. 1078, 1095-96 (E.D. Wis. 1972), *vacated on procedural grounds*, 414 U.S. 473 (1974), *reinstated*, 379 F. Supp. 1376 (1974), *vacated on procedural grounds*, 421 U.S. 957 (1975), *reinstated* 413 F. Supp. 1318 (1976); ENNIS & EMERY, *supra* note 1, at 57-59; Casenote, *Mental Health—United States ex rel. Matthew v. Nelson Civil*

tive alternative doctrine is the argument that alternatives to institutionalization should be further developed. This doctrine is responsive to problems of diagnosis, treatment, and particularly loss of liberty, in a manner that is sensitive to both the concerns of the mental health system and those of the mentally ill.

CONCLUSION

The model suggested by the above discussion and analysis can be diagrammed as follows:

CATEGORY	RESULT
A. Dangerous to others:	
- incompetent and treatable**	Commitment to Least Restrictive Alternative (CLRA)
- not treatable*	New short term Preventive Detention system or Criminal Justice system (PD)
- treatable and competent*	Choice of PD or CLRA
B. Dangerous to self:	
1. Suicidal	
- incompetent and treatable**	CLRA
- not treatable	PD
- treatable and competent	Choice of PD or CLRA
2. Care and Custody	
- incompetent and not treatable***	PD
- incompetent and treatable**	CLRA
- competent and treatable	Choice of CLRA or no intervention
- competent and not treatable***	Choice of PD or no intervention
C. Not Dangerous:	
- not treatable	No intervention
- competent	Choice of no intervention or CLRA
- incompetent and treatable**	CLRA

* May also require substantially diminished responsibility.

** Findings of incompetence and susceptibility to treatment are meant to include a finding that the balance of interests justifies commitment. This is most likely to be true in cases where the individual is dangerous to himself, and least likely true where he is not dangerous.

*** For those unable to care for themselves, PD would be some form of guardianship (the least restrictive alternative).

Commitment of the Mentally Ill Based on a Finding of Dangerousness is Constitutional, Even Though Dangerousness Is Not Inferred From a Recent, Overt Dangerous Act, 7 LOY. CHI. L.J. 507, 519 (1976).

Once it is recognized that the mental health system is presently being used for preventive detention, this model does not differ radically from the commitment statutes. Nevertheless, the model illuminates the ramifications of a dangerousness requirement. There is no longer any doubt that in the past we have viewed the best interests of the mentally ill individual too narrowly. Commitment affects fundamental interests and must be subject to due process. Recognition of the nontreatment effects of involuntary commitment necessitates a search for safeguards. There is, however, grave doubt about both the sufficiency and necessity of a dangerousness safeguard. Due to narrow legal analysis and misunderstanding of *parens patriae*, the dangerous requirement has been ill applied.

Approaching the problem solely from the standpoint of societal interests, dangerousness to others may be a proper ground for incarceration of anyone, or of those with diminished responsibility, but not just of the mentally ill. The dangerousness requirement developed from concerns that the mentally ill not be unnecessarily depreived of liberty, but has little to do with the concerns of the mentally ill in particular. From the standpoint of the mentally ill, deprivation of liberty through commitment would be curtailed at least as much (both in numbers and length of time) and applied to a more appropriate class if incompetency, susceptability to treatment, and a best interests evaluation were required. These requirements are also more responsive to the problems of diagnosis and treatment. Indeed, given the present state of diagnosis and treatment, it may be that using the above criteria, individuals could not, presently be committed in their own best interests. Thus, these alternative safeguards would also create pressures to improve the mental health system.

These alternative safeguards are required for *parens patriae* commitments based on the need for treatment. If the present mental health system cannot provide sufficient treatment guarantees, then dangerousness to self must be required in order that commitment be in the individual's best interests. This is a difficult balance to strike, but it allows for the possibility that, at least at some future date, commitment of nondangerous mentally ill individuals who are incompetent may be beneficial. Case by case due process interest balancing does not warrant the categorical judgment that treatment benefits never outweigh liberty interests.[151]

151. Comment, *Overt Dangerous Behavior as a Constitutional Requirement for Involuntary Civil Commitment of the Mentally Ill*, 44 U. CHI. L. REV. 562, 582 (1977).

Since susceptibility to treatment and improvement are difficult to evaluate, commitment on this ground would necessarily be brief unless the state could meet the formidable burden of proving that the patient was improving. If beneficial treatment is available, there are very strong arguments for providing it to those who cannot make an independent decision. "Not committing a non-dangerous mentally ill individual who is incapable of making rational decisions and could benefit from treatment is analogous to not hospitalizing an unconscious accident victim who is unable to ask for help but is not dangerous."[152] Also, "[t]here is a large group of prospective patients who are not yet dangerous to themselves or others, who are not mentally able to realize their condition or make responsible decisions, but who need hospitalization before their condition deteriorates, as it may without treatment."[153]

The "move toward dangerousness" has to some extent entailed an abdication of responsibility for the care and treatment of those who are incompetent. Present commitment standards and the present use of the balancing doctrine, assume that liberty and personal welfare interests are severable and, at times, antagonistic. They ignore the fact that beneficial treatment, though involuntarily received, may ultimately increase personal welfare, options, freedom, and autonomy. Just as we compel our children (by definition, incompetent) to learn to read, we should impose available beneficial treatment on the clearly mentally incompetent. Requiring strong proof of incompetence and susceptibility to, availability of, and later, success of treatment, better safeguards against the abuse of involuntary commitment than does the requirement of dangerousness.

152. Peszke, *Dangerousness and Issues for Physicians in Emergency Commitment*, 132 AM. J. PSYCH. 825, 827 (1975), *quoted in* E.Z. DuBose, Jr., *Of the Parens Patriae Commitment Power and Drug Treatment of Schizophrenia: Do the Benefits to the Patient Justify Involuntary Treatment?*, 60 MINN. L. REV. 1149, 1158 (1976).

153. Ross, *supra* note 12, at 959.