

Substantive Constitutional Rights of the Mentally Ill

There is today a silent but growing trend in this country toward confining people who have not committed crimes but who are thought to be dangerous.¹

I. INTRODUCTION

In *Robinson v. California*,² the Supreme Court noted in dictum that:

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 . . .³

As this passage suggests, states have the power to confine mentally ill persons for treatment.⁴ This power has and will affect many individuals.

It has been estimated that one out of every ten or twelve children born in this country will at one time in his life be treated in a mental institution.⁵ An even larger portion will be subject to some form of mental care.⁶ The absolute figures are equally striking. At the start of fiscal year 1966, there were about 580,000 resident patients in mental hospitals⁷ and around 557,000 persons were receiving care through outpatient clinics.⁸ During that fiscal year, there were nearly

¹Dershowitz, *Law of Dangerousness: Some Fictions About Predictions*, 23 J. LEGAL ED. 24 (1971) [hereinafter cited as Dershowitz].

²370 U.S. 660 (1962).

³370 U.S. at 666 (1962).

⁴Carpenter, *Civil Commitment of Narcotic Addicts*, 76 YALE L. J. 1160 (1967) [hereinafter cited as Carpenter].

⁵AMERICAN BAR FOUNDATION, *THE MENTALLY DISABLED AND THE LAW*, xv (rev. ed. 1971) [hereinafter cited as ABF].

⁶*Hearings on the Constitutional Rights of the Mentally Ill before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 87th Cong., 1st Sess., at 1 (1969-70) [hereinafter cited as 1969 Hearings].

⁷ABF, *supra* note 5, at xv.

⁸*Id.*

922,000 persons admitted to the inpatient clinics⁹ and almost 630,000 persons admitted to the outpatient clinics,¹⁰ a large majority of which were involuntary.¹¹ As compared to the criminal system, this equals, if not exceeds, the number of persons sentenced and imprisoned in the United States during the same period.¹²

Despite the prevalence of mental illness and civil commitments, the rights of the mentally ill have been one of the most neglected areas of American law. Senator Ervin, when convening a series of hearings on the constitutional rights of the mentally ill, commented about this deficiency:

Certainly the loss of freedom, of property, and civil and personal rights solely because of mental illness is a process which should disturb every American concerned with the blessings of liberty. It is tempting to say that the problems of the mentally ill and their families are of no concern to the rest of the population . . . [T]he testimony we heard in 1961¹³ supported the charge that this was one of the most neglected areas of American law — neglected by most private citizens, by the courts, by the state legislatures and generally by politicians.¹⁴

The courts have responded with recent attacks that have centered mainly on procedural aspects of civil commitment statutes,¹⁵ and at least one state legislature has completely revamped its procedure for civil commitment.¹⁶

For the most part, however, the substantive requirements of the statutes have been infrequently litigated.¹⁷ This fact was pointed out by Justice Blackman in his majority opinion in *Jackson v. Indiana*:¹⁸

⁹*Id.*

¹⁰*Id.* This represents a sharp increase from the approximately 250,000 persons committed and the 800,000 cared for during 1963. See S. REP. NO. 925, 88th Congress, 2d Sess. 10 (1964).

¹¹ABF, *supra* note 5, at 17.

¹²PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 171-72 (1967).

¹³Referring to *Hearings on S. 3261 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 87th Cong., 1st Sess. (1961) [hereinafter cited as *1961 Hearings*].

¹⁴1969 *Hearings*, *supra* note 6, at 1-2.

¹⁵See, e.g., *Jackson v. Indiana*, 406 U.S. 715 (1972); *Humphrey v. Cady*, 405 U.S. 504 (1972); *Baxstrom v. Herold*, 383 U.S. 107 (1966); *In re Ballay*, 482 F.2d 648 (D.C. Cir. 1973); *United States v. Brown*, 478 F.2d 606 (D.C. Cir. 1973); *Waite v. Jacobs*, 475 F.2d 392 (D.C. Cir. 1973); *Heryford v. Parker*, 396 F.2d 393 (10th Cir. 1968); *Bolton v. Harris*, 395 F.2d 642 (D.C. Cir. 1968); and *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded*, 94 S. Ct. 713 (1974).

¹⁶Lanterman-Petris-Short Act, CAL. WELF. & INST. CODE § 5000 *et seq.* (West Supp. 1968). See *Thorn v. Superior Court of San Diego*, 1 Cal. 3d 666, 464 P.2d 56, 83 Cal. Rptr. 600 (1970).

¹⁷*Cf. Powell v. Texas*, 392 U.S. 514 (1968); *Robinson v. California*, 370 U.S. 660 (1962).

¹⁸406 U.S. 715 (1972).

The states have traditionally exercised broad power to commit persons found to be mentally ill . . . Considering the number of persons affected, it is perhaps remarkable that the substantive constitutional limitations on this power have not been more frequently litigated.¹⁹

There is a definite need to examine the constitutional limitations on the substantive requirements of the civil commitment statutes. "Indeed, it may not be totally inaccurate to observe that the recent surge of interest in civil commitment may occasionally focus on procedure to the ultimate detriment of substance."²⁰

The substantive part of a civil commitment statute is the criteria the statute sets forth as being necessary for commitment. For example, some states require the individual be dangerous.²¹ Others require he be in need of care and treatment.²² A few require he be both dangerous and in need of treatment.²³ Finally, states require an individual be mentally ill before he can be committed.²⁴

The need to examine these substantive requirements is exemplified by the following passage from an article written by a psychologist,²⁵ a psychiatrist,²⁶ and a lawyer:²⁷

One need only glance at the diagnostic manual of the American Psychiatric Association to learn what an elastic concept mental illness is . . . [T]he definition of mental illness is left largely to the user and is dependent upon the norms of adjustment that he employs. Usually the use of the phrase "mental illness" effectively masks the actual norms being applied. And because of the unavoidably ambiguous generalities in which the American Psychiatric Association describes its diagnostic categories, the diagnostician has the ability to shoehorn into the mentally diseased class almost any person he wishes, for whatever reason, to put there.²⁸

This passage indicates that almost anyone can be diagnosed mentally ill under contemporary psychiatric standards. The *Robinson* dictum notes that states have the power to commit those who are mentally ill for compulsory treatment. And "mental illness" is the sole criterion for commitment in some states.²⁹ Apparently, in these states almost anyone could be involuntarily committed.

This article will discuss substantive constitutional limitations on state action in the civil commitment area. It will first examine the

¹⁹*Id.* at 736-37.

²⁰*In re Ballay*, 482 F.2d 648, 654 (D.C. Cir. 1973).

²¹*E.g.*, MONT. REV. CODE ANN. § 38-201 (1968).

²²*E.g.*, MO. ANN. STAT. § 202.807(5) (1959).

²³*E.g.*, N.M. STAT. ANN. §§ 34-2-5(g)(2), 34-2-5(g)(3) (1953).

²⁴*E.g.*, N.J. STAT. ANN. § 30:4-27 (Supp. 1970).

²⁵Carl R. Malmquist, University of Minnesota Associate Professor.

²⁶Paul E. Meehl, University of Minnesota Professor.

²⁷Joseph M. Livermore, University of Minnesota Associate Professor.

²⁸Livermore, Malmquist, and Meehl, *On the Justifications for Civil Commitment*, 117 U. OF PA. L. REV. 75, 80 (1968-69) [hereinafter cited as Livermore].

²⁹ABF, *supra* note 5, at 36.

compelling state interest test which is a major limitation imposed on deprivations of liberty.³⁰ Then, in light of this test, it will discuss the validity of the substantive requirements of the civil commitment statutes. Finally, it will explore the implications of three federal court decisions which have departed from traditional cases in the area of constitutional rights of the mentally ill.

II. THE COMPELLING STATE INTEREST TEST

A. EVOLUTION OF THE TEST

Beginning with *Skinner v. Oklahoma*,³¹ the Supreme Court has applied a stringent test to state action which deprives individuals of fundamental rights. The statute involved in *Skinner* was Oklahoma's Habitual Criminal Sterilization Act.³² That act defined an habitual criminal as a person who has been convicted two or more times for crimes "amounting to felonies involving moral turpitude".³³ Machinery was provided for a proceeding against such a person in the Oklahoma courts for a judgment that such person shall be rendered sterile.³⁴ The Court held that the Act was invalid, because it denied Skinner equal protection of the laws.³⁵ In this context the Court noted:

Marriage and procreation are fundamental to the very existence and survival of the race . . . There is no redemption for the individual whom the law touches. He is forever deprived of a basic liberty. We mention these matters . . . in emphasis of our view that strict scrutiny of the classification which a state makes in a sterilization law is essential . . .³⁶

In *Skinner* the Supreme Court speaks of the Equal Protection Clause³⁷ requiring more than just a reasonable exercise of the legisla-

³⁰There are other constitutional limitations on deprivations of liberty. For example, the doctrine of overbreadth. *Lessard v. Schmidt*, 349 F. Supp. 1078, 1095 (E.D. Wis. 1972), *vacated and remanded*, 94 S. Ct. 713 (1974), notes:

Even if the standards for an adjudication of mental illness and potential dangerousness are satisfied, a court should order a full-time involuntary hospitalization only as a last resort. A basic concept in American justice is the principle that "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more easily achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose".

³¹316 U.S. 535 (1942).

³²OKL. STAT. ANN. Tit. 57, § 171 *et seq.*

³³OKL. STAT. ANN. Tit. 57, § 173.

³⁴OKL. STAT. ANN. Tit. 57, §§ 176-77.

³⁵316 U.S. at 541 (1942).

³⁶*Id.*

³⁷"No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST., Amend. XIV, § 1.

tive power.³⁸ The Court noted that because a basic liberty was involved the statute required strict scrutiny by the Court.

After *Skinner*, the Supreme Court applied the strict scrutiny test to statutes which had suspect classifications,³⁹ impinged on constitutional rights,⁴⁰ or infringed on fundamental rights.⁴¹ Thus, today there is a two layer equal protection test. For state action concerning non-fundamental rights, such as economic regulation, the Court has employed a relaxed review upholding the challenged action if it is sustained by some rational and legitimate state interest.⁴² For state action which substantially infringes upon fundamental rights and suspect classifications, however, the Court has subjected the state action to stricter scrutiny, requiring the state to show that its action is necessary to promote a compelling state interest.⁴³

In *Roe v. Wade*⁴⁴ the Supreme Court held the Texas criminal abortion statute unconstitutional.⁴⁵ The Court argued that: one, the right to privacy is protected by the Due Process Clause of the Fourteenth Amendment;⁴⁶ two, this right is broad enough to encompass a woman's decision whether or not to terminate her pregnancy;⁴⁷ and, three, this right to an abortion is fundamental and can, therefore, be

³⁸Note, *The Abortion Cases: A Return to Lochner, or a New Substantive Due Process?*, 37 ALBANY L. REV. 776, 790 (1972-73) [hereinafter cited as *Lochner*].

³⁹*Loving v. Virginia*, 388 U.S. 1 (1967). The Court notes:

[W]e deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race. 388 U.S. at 9 (1967).

⁴⁰*Shapiro v. Thompson*, 394 U.S. 618, 634 (1969). The Court notes:

[A]ppellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional.

⁴¹*Dunn v. Blumstein*, 405 U.S. 330, 336-37 (1972). The Court notes:

By denying some citizens the right to vote, such laws deprive them of a fundamental political right . . .

. . . [Therefore], [t]he Court must determine whether the exclusions are necessary to promote a *compelling* state interest.

⁴²*Marusco v. Taft*, 476 F.2d 187, 192-93 (1st Cir. 1973).

⁴³476 F.2d at 193 (1st Cir. 1973).

⁴⁴410 U.S. 113 (1973).

⁴⁵*Id.* at 166.

⁴⁶410 U.S. at 152 (1973). The Court is not entirely clear about which provision protects the right to privacy and its included right to an abortion.

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions on state action, as we feel it is, or as the District Court determined, in the Ninth Amendment's reservation of right to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. 410 U.S. at 153 (1973).

⁴⁷410 U.S. at 154 (1973).

regulated only on the basis of a compelling state interest.⁴⁸ In other words, in order for due process to be satisfied when a fundamental right is being denied, the state must show a compelling state interest. This case indicates a desire by the Court to leave the familiar precedent of equal protection behind and replace it with due process whenever fundamental rights are involved.⁴⁹

B. CIVIL COMMITMENT INFRINGES ON FUNDAMENTAL RIGHTS

The statutes used to incarcerate the mentally ill involve infringement of fundamental rights. In *Murel v. Baltimore City Criminal Court*,⁵⁰ the defendants challenged on constitutional grounds the criteria and procedures that led to their commitment under the Maryland Defective Delinquent Act.⁵¹ For various reasons the court declined to reach these questions.⁵² Justice Douglas, however, declared in his dissent that:

Petitioners were deprived of their most basic right — their personal liberty . . . without it, other Constitutionally protected rights such as the right to free expression and the right to privacy become meaningless.⁵³

And in his concurring opinion in *McNeil v. Director, Patuxent Institution*⁵⁴ Douglas noted that:

[T]here is harm . . . whenever there is a 'deprivation of liberty', and there is such a deprivation whatever the name of the institution, if a person is held against his will.⁵⁵

In *Murel* Douglas points out that personal liberty is the most fundamental right; in *McNeil* Douglas adds that there is a deprivation of this most fundamental right, whatever the institution, if a person is held against his will.⁵⁶

When a person is labeled mentally ill and incarcerated indefinitely in a mental institution he is being held against his will. His most fundamental right of personal liberty is being infringed. Under these circumstances, according to *Roe*, due process requires the state to show a compelling state interest in order to justify the commitment.

⁴⁸*Id.* at 155.

⁴⁹*Lochner*, *supra* note 38, at 793.

⁵⁰407 U.S. 355 (1972).

⁵¹MD. ANN. CODE ART. 31B, § 5 (1971).

⁵²407 U.S. at 357-58 (1972).

⁵³*Id.* at 363-64.

⁵⁴407 U.S. 245 (1972).

⁵⁵*Id.* at 257.

⁵⁶*See* text accompanying note 70, *infra*.

C. HISTORY OF THE TEST IN THE CIVIL COMMITMENT AREA

In the civil commitment area, the courts have traditionally used the 'reasonable exercise test' or relaxed standard of review.⁵⁷ For example, in *In re Crosswell's Petition*⁵⁸ the court upheld a Rhode Island civil commitment statute⁵⁹ by saying:

'The right of personal liberty is to be reasonably understood, and there are many restraints which are allowed as consistent with it' . . . We think that our own system is a reasonable exercise of the legislative power, and secures to the subject of its restraint all rights which the Constitution of the United States guarantees to him.⁶⁰

This reasonable exercise theme has been carried forward by modern courts.⁶¹ For example, in *Patuxent Institution v. Daniels*⁶² a Maryland court held that their Defective Delinquent Act⁶³ was constitutional, because it was "reasonably calculated to accomplish the Act's desired result . . . This is all the Federal Constitution requires".⁶⁴

Only recently has a court recognized that the compelling state interest test should be used when reviewing the civil commitment laws. *Lessard v. Schmidt*⁶⁵ was a class action contesting the validity of Wisconsin's civil commitment statute.⁶⁶ The issue of substantive validity was not raised.⁶⁷ However, in holding that the statutory scheme was procedurally defective because it denied petitioners due process of the law, the Court said:

The power of the state [in criminal proceedings] to deprive a person of the fundamental liberty to go unimpeded about his or her affairs must rest on a consideration that society has a compelling state interest in such deprivation . . . In civil commitment proceedings the same fundamental liberties are at stake . . . [therefore], the resulting burden on the state to justify civil commitment must be correspondingly high.⁶⁸

In re Balley,⁶⁹ in which a federal Court of Appeals struck down the District of Columbia's civil commitment statute for being pro-

⁵⁷E.g., *Holm v. State*, 404 P.2d 740 (Wyo. 1965); *People v. Niesman*, 356 Ill. 322, 190 N.E. 668 (1934); *State v. Sanches*, 80 N.M. 438, 457 P.2d 370 (1969).

⁵⁸66 R.I. 137, 66 A. 55 (1907).

⁵⁹R.I. GEN. LAWS 1896, c. 82, § 11.

⁶⁰66 R.I. at —, 66 A. at 58 (1907).

⁶¹See cases cited at note 57, *supra*.

⁶²243 Md. 16, 221 A.2d 397 (1966).

⁶³MD. ANN. CODE ART. 31B, § 5 (1971).

⁶⁴243 Md. at —, 221 A.2d at 413 (1966).

⁶⁵349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded on other grounds*, 94 S. Ct. 713 (1974).

⁶⁶WIS. STAT. ANN. §§ 51.02(1), 51.03, 51.04 (1-3) (1957).

⁶⁷349 F. Supp. at 1082 (E.D. Wis. 1972).

⁶⁸*Id.* at 1084-90.

⁶⁹482 F.2d 648 (D.C. Cir. 1973).

cedurally defective, is in accord with the *Lessard* position. The *Ballay* court says:

There can no longer be any doubt that the nature of the interests involved when a person sought to be involuntarily committed faces an indeterminate and, consequently, potentially permanent loss of liberty and privacy . . . is one within the contemplation of the 'liberty and property' language of the Fourteenth Amendment.⁷⁰

Since fundamental rights were involved, the court concluded that the state must meet the same burden of proof required in criminal trials by saying:

We align ourselves with those courts that have held that proof of mental illness and dangerousness in involuntary civil commitment proceedings must be beyond a reasonable doubt.⁷¹

Although the majority of American jurisdictions have applied the reasonable standard of due process in the civil commitment area,⁷² *Lessard* and *Ballay* point in a new direction. They indicate that the courts have become aware of the substantial loss of freedom which accompanies civil commitments, and that this loss of freedom is a fundamental right encompassed in the Fourteenth Amendment's concepts of 'liberty and property'. Consequently, to satisfy due process, the states must show a compelling state interest as justifying civil commitments.⁷³

III. APPLYING THE COMPELLING STATE INTEREST TEST TO THE STATUTES

When the Supreme Court applies the standard of a compelling state interest, it is actually balancing the harm done to individual rights against the benefit to society. The more substantial the harm the greater the benefit must be.⁷⁴ In order to justify civil commitment of the mentally ill, therefore, the state must show that the benefit which accrues to society outweighs the harm that occurs to individual rights.⁷⁵

⁷⁰*Id.* at 655.

⁷¹*Id.* at 650. Other courts holding similarly are: *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded on other grounds*, 94 S. Ct. 713 (1974); *In re Pickles' Petition*, 170 So. 2d 603 (Fla. Ct. App. 1965); *Denton v. Commonwealth*, 383 S.W.2d 681 (Ky. 1964); and *Ex parte Perry*, 137 N.J. Eq. 161, 43 A.2d 885 (1945).

⁷²See cases cited at note 57, *supra*.

⁷³*Cf. Roe v. Wade*, 410 U.S. 113, 152-55 (1973).

⁷⁴See Ely, *The Wages of Crying Wolf: a comment on Roe v. Wade*, 82 YALE L. J. 920 (1973) [hereinafter cited as Ely]. *Dunn v. Blumstein*, 405 U.S. 330, 335 (1972). *Lessard v. Schmidt*, 239 F. Supp. 1078, 1093 (E.D. Wis. 1972), *vacated and remanded on other grounds*, 94 S. Ct. 713 (1974).

Although Mr. Ely and the cases cited suggest that the Court uses a balancing test when it applies the compelling state interest test, the Court rarely, if ever, finds such an interest.

⁷⁵See note 74, *supra*.

A. THE HARM

The state deals a severe blow to an individual's rights by confining him to a mental institution.⁷⁶ This state action detracts from a man's community standing by branding him mentally ill, causes him to lose many civil rights, increases his chance of dying, and subjects him to prolonged confinement requiring complete dominance over his psyche in order to receive mental therapy.⁷⁷

There is a strong public feeling that mental illness is a disgrace to a person so afflicted and to everyone connected with him.⁷⁸ This stigma which accompanies any hospitalization for mental illness has been brought to public attention by the recent withdrawal of a vice presidential candidate.⁷⁹ Furthermore, there is substantial evidence that a former mental patient will have a harder time finding a job, signing a lease, or buying a house.⁸⁰ One commentator has noted that "former mental patients do not get jobs" and insists that, "[in] the job market, it is better to be an ex-felon than an ex-patient".⁸¹

Stigma is a double-edged sword. Aside from strong public opinion regarding committed persons, what the mental patient thinks of himself is also important.⁸² The patient forcefully committed suddenly faces the regimented routine of ward life and daily confrontation with hospital employees rather than family and friends. "These and other factors often cause him to 'demean himself and to magnify social ostracism'."⁸³

A person found to be mentally ill loses many civil rights in some states.⁸⁴ For example, in Wisconsin hospitalization for mental illness results in restrictions on making contracts and limitations on the right to sue and be sued.⁸⁵ Persons found mentally ill are unable to vote.⁸⁶ There are restrictions on licenses required to engage in certain professions.⁸⁷ And there are also prohibitions on driving cars,

⁷⁶*In re Ballay*, 482 F.2d 648, 667-69 (D.C. Cir. 1973).

⁷⁷See text accompanying notes 94-95, *infra*.

⁷⁸*Hearings on S. 935 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 88th Cong., 1st Sess., at 67 (1963) [hereinafter cited as *1963 Hearings*].

⁷⁹Referring to Senator Thomas Eagleton.

⁸⁰*Lessard v. Schmidt*, 349 F. Supp. 1078, 1089 (E.D. Wis. 1972), *vacated and remanded on other grounds*, 94 S. Ct. 713 (1974).

⁸¹Testimony of Bruce J. Ennis, A.C.L.U., N.Y. City, 1969 *Hearings*, *supra* note 6, at 284.

⁸²*In re Ballay*, 482 F.2d 648, 669 (D.C. Cir. 1973).

⁸³*Id.* at 669. See, e.g., E. GOFFMAN, *ASYLUMS* 354-56 (1962); Comment, *Due Process for All - Constitutional Standards for Involuntary Civil Commitment and Release*, 34 U. CHI. L. REV. 633, 637-38 (1966-67).

⁸⁴*Lessard v. Schmidt*, 349 F. Supp. 1078, 1088 (E.D. Wis. 1972).

⁸⁵WIS. STAT. ANN. §§ 319.215, 260.22, 262.06 (2)(b) (1972 Supp.), 296.02, 893.33 (1958).

⁸⁶WIS. STAT. ANN. §§ 6.03(1), 12.59 (1967); WIS. CONST. Art. 3, § 2.

⁸⁷Registered and practical nurses: WIS. STAT. ANN. § 441.07 (1972 Supp.); Den-

serving on juries, or getting married.⁸⁸ "It is obvious that the commitment adjudication carries with it an enormous and devastating effect on an individual's civil rights. In some respects, . . . the civil deprivations which follow civil commitment are more serious than the deprivations which accompany a criminal conviction."⁸⁹

Another harm to an individual who is involuntarily committed is that he has a much greater chance of dying.⁹⁰ Statistics show that the death rate each year per 1000 persons in the general population in the United States is 9.5, while the rate among resident mental patients is 91.8.⁹¹ Part of this difference may be due to the higher percentage of elderly people in mental institutions,⁹² but studies indicate that other factors are also involved. One such factor is the smaller number of physicians per patient in public mental institutions as compared to the ratio of doctors to individuals in the general population.⁹³

Finally, an individual involuntarily committed is subjected to prolonged confinement requiring complete dominance over his psyche in order to receive mental therapy.⁹⁴ One writer noted that "civil commitment for mental therapy is by all odds the gravest of all legally sanctioned deprivations of liberty, imposing as it does both prolonged confinement and a pervasive invasion of privacy".⁹⁵

Thus, the harm to individual rights which accompanies civil commitment is severe. It weighs very heavily on the scales of the compelling state interest test.⁹⁶

B. THE BENEFIT

The courts have expressed two justifications for civil commitment of the mentally ill. One, it is a valid exercise of the state's police power, because it results in benefit to the public at large.⁹⁷ Two, it is

tists: WIS. STAT. ANN. § 477.04 (7) (1972 Supp.); Attorneys: WIS. STAT. ANN. § 256.286 (1971).

⁸⁸Driving: WIS. STAT. ANN. §§ 343.06(5), (7), 343.25(4) (1971); Jury Service: WIS. STAT. ANN. § 255.01 (1971); Marriage: WIS. STAT. ANN. § 245.03 (1957).

⁸⁹Lessard v. Schmidt, 349 F. Supp. 1078, 1089 (E.D. Wis. 1972), *vacated and remanded on other grounds*, 94 S.Ct. 713 (1974).

⁹⁰*Id.*

⁹¹Furman and Connors, *The Pennsylvania Experiment in Due Process*, 8 DUQUESNE L. REV. 32, 65-66 (1970).

⁹²Lessard v. Schmidt, 349 F. Supp. 1078, 1089 (E.D. Wis. 1972), *vacated and remanded on other grounds*, 94 S. Ct. 713 (1974).

⁹³*Id.*

⁹⁴T. SZASZ, LAW, LIBERTY, AND PSYCHIATRY 53 (1963).

⁹⁵Carpenter, *supra* note 4, at 1160.

⁹⁶See *In re Ballay*, 482 F.2d 648, 669 (D.C. Cir. 1973); Lessard v. Schmidt, 349 F. Supp. 1078, 1090 (E.D. Wis. 1972), *vacated and remanded on other grounds*, 94 S. Ct. 713 (1974).

⁹⁷The real foundation for the commitment of the mentally ill is the protection and safety of the general public. This foundation is predicated upon the general

a valid exercise of the state's power of *parens patriae*,⁹⁸ because it results in benefit to the individual who is being committed as well as society.⁹⁹ The original case establishing these justifications is *In re Josiah Oakes*.¹⁰⁰ In that case, Chief Judge Shaw wrote:

[I]t is a principal of law that an insane person has no will of his own. In that case it becomes the duty of others to provide for his safety and their own.¹⁰¹

Another court similarly concluded that:

The work of the state in caring for the demented within her borders is at once protective in character and highly humanitarian.¹⁰²

A modern case expressing these views is *Salinger v. Superintendent of Spring Grove State Hospital*.¹⁰³ The court notes that:

It is generally held that states, in their character as *parens patriae*, have both the general power and the duty to care for insane persons, and that in the exercise of the police power, insane persons may be restrained or confined . . . for the protection of the public, without violation of Constitutional Rights; provided extractions of due process are met.¹⁰⁴

The validity of each justification will be discussed separately.

1. THE POLICE POWER

The police power gives a state the authority to make laws which it judges to further the general welfare, protection, and safety of the community.¹⁰⁵ Pursuant to this power, legislatures passed civil commitment laws.¹⁰⁶ The states argue that these laws are a valid exercise of the police power, because society is being protected from the violent acts of the mentally ill.¹⁰⁷ The alternative is to let deranged

Police Power of the state. *In re Hinkle*, 33 Idaho 605, 611-12, 196 P. 1035, 1037 (1921).

⁹⁸ Referring to the sovereign power of guardianship over persons under disability. *In re Turner*, 94 Kan. 115, 145 P. 871, 872 (1915). For power over minors, insane, and incompetent persons, *McIntosh v. Dill*, 86 Okl. 1, —, 205 P. 917, 925 (1922).

⁹⁹ Carpenter, *supra* note 4, at 1166-68.

¹⁰⁰ 8 Law Rept. 123 (Mass. 1845).

¹⁰¹ 8 Law Rept. at 125 (Mass. 1845).

¹⁰² *Hammon v. Hill*, 228 F. 999, 1001 (W.D. Pa. 1915).

¹⁰³ 206 Md. 263, 112 A.2d 907 (1955).

¹⁰⁴ 206 Md. at —, 112 A.2d at 910 (1955).

¹⁰⁵ *Drysdale v. Prudden*, 195 N.C. 722, — 143 S.E. 530, 536 (1928). For other definitions see *Stone v. Mississippi*, 101 U.S. 814 (1879); *In re Clark*, 65 Conn. 17, 31 A. 522 (1894).

¹⁰⁶ ABF, *supra* note 5, at 36.

¹⁰⁷ Comment, *Civil Commitment of the Mentally Ill: Theories and Procedures*, 79 HARV. L. REV. 1288, 1289 (1966) [hereinafter cited as *Theories*].

[I]t is said that the individual may be deprived of his liberty under the police power because of society's need to protect itself against the potential dangerous acts of persons who, because of mental ill-

people roam free in society where they may seriously injure, even kill, innocent people.¹⁰⁸ Many states have listed "dangerousness to others" as a substantive requirement for civil commitment.¹⁰⁹ For example, a statute in the District of Columbia provides:

If the court or jury finds that the person is mentally ill and, because of that illness, is likely to injure . . . other persons if allowed to remain at liberty, the court may order his hospitalization for an indeterminate period.¹¹⁰

Thus, the only justification for civil commitment under the police power is that it acts as a form of preventive detention.¹¹¹

In terms of the compelling state interest test, there is some doubt if preventive detention is a legitimate state interest. This doubt is often raised by the many opponents of preventive detention in the criminal system.¹¹² They maintain that preventive detention is not a legitimate state interest and conviction for a past crime is the only justification for confinement.¹¹³ "Yet, tens of thousands of persons who have committed no criminal act are confined indefinitely without their consent on the basis of a diagnosis — that they are mentally ill — and a prediction that unless confined they might cause harm to themselves or others."¹¹⁴

One claim for preventive detention as a legitimate state interest in the civil commitment area is based on the assumption that hospitalizing someone who is mentally ill may benefit him even if he is

ness, are likely to act irrationally. *Lessard v. Schmidt*, 349 F. Supp. 1078, 1084 (E.D. Wis. 1972), *vacated and remanded on other grounds*, 94 S. Ct. 713 (1974).

¹⁰⁸ An analogy can be drawn to the quarantining of tuberculars. See *Moore v. Draper*, 157 So.2d 648 (Fla. Sup. Ct. 1952).

¹⁰⁹ ALAS. STAT. § 47.30.070(i)(1) (1962); ARIZ. REV. STAT. ANN. § 36-514c (Supp. 1970); ARK. STAT. ANN. § 59-234 (Supp. 1967); CAL. WELF. & INST. CODE § 5304 (West Supp. 1968); CONN. GEN. STAT. § 17-178 (Supp. 1969); D.C. ENCYCL. CODE ANN. §§ 21-544, 21-545(b) (1967); FLA. STAT. ANN. § 394.22(11)(a) (1960); GA. CODE ANN. §§ 88-505.2(a)(1), 88-505.2(b)(1) (Supp. 1969); IDAHO CODE § 66-329(h) (Supp. 1969); ILL. ANN. STAT. 91½ § 1-11 (Supp. 1969); KY. REV. STAT. § 202.135(6)(b) (1969); ME. REV. STAT. ANN. 34, § 2334 (1964); MONT. REV. CODES ANN. § 38-201 (1961); NEV. REV. STAT. § 433.685 (1967); N.H. REV. STAT. ANN. § 135:19 (1964); N.M. STAT. ANN. § 34-2-5(g)(2) (1953); N.C. GEN. STAT. § 122-61 (1964); OHIO REV. CODE ANN. § 5122.11 (1964); R.I. GEN. LAWS § 26-2-1 (1968); UTAH CODE ANN. § 64-7-36H(2) (1967); VT. STAT. ANN. 18 § 7607(2)(A) (1968); WASH. REV. CODE ANN. § 71.02.090 (1962); WYO. STAT. § 25-60(j)(ii) (1967).

¹¹⁰ 21 D.C. ENCYCL. CODE ANN. § 545 (b) (1967).

¹¹¹ See Dershowitz, *supra* note 1, at 32.

¹¹² *Id.* at 31.

¹¹³ They are fearful that the acceptance of this 'novel' approach to crime prevention might be an opening wedge leading to widespread confinement of persons suspected on the basis of untested predictions of dangerous propensities. And they reject the idea of confining anyone on the basis of statistical likelihood that he "may" be dangerous. Dershowitz, *supra* note 1, at 31.

¹¹⁴ Dershowitz, *supra* note 1, at 32.

not actually dangerous. Thus, his imprisonment is not as unjust as that of an innocent person being detained in the criminal system where no beneficial treatment is given.¹¹⁵ The assumption involved in this explanation is somewhat unrealistic, however, when the present benefits of mental therapy are taken into account.¹¹⁶ Assuming for sake of argument, however, that preventive detention of the mentally ill is a legitimate state interest, the question then becomes, "Is it a compelling state interest?"

For preventive detention to be a compelling state interest the state must prove that the committed person is somewhat dangerous.¹¹⁷ In *Humphrey v. Cady*¹¹⁸ the Supreme Court was reviewing the Wisconsin civil commitment procedure. It concluded that a person's potential for doing harm, to himself or others, is "great enough to justify such a massive curtailment of liberty".¹¹⁹ While commenting on this interpretation, the court in *Lessard* noted:

The [Supreme] Court did not directly address itself to the degree of dangerousness that is constitutionally required before a person may be involuntarily deprived of liberty. However, its approval of a requirement that the potential for doing harm be 'great enough to justify such a massive curtailment of liberty' implies a balancing test¹²⁰ in which the state must bear the burden of proving that there is an extreme likelihood that if the person is not confined he will do immediate harm to himself or others.¹²¹

According to *Lessard*, therefore, in order for this justification to be a compelling state interest the state must prove that there is an extreme likelihood that the individual committed if not confined will be dangerous to others.¹²² Although *Lessard* is a district court case, it provides a hopeful approach to the area. For, whatever the level of 'potential for doing harm' implied by the Supreme Court in *Humphrey* is, it can not be proven by a state.

In a recent newspaper article Dr. Bernard Diamond, a psychiatrist and professor of law and criminology at the University of California, noted that forecasting an individual's potential for murder or violence is still largely a matter of guesswork.¹²³ He stated that "it is unfortunate that the false impression has been created that a psychi-

¹¹⁵ *Theories*, *supra* note 107, at 1290.

¹¹⁶ Roth *et al.*, *Into the Abyss: Psychiatric Reliability and Emergency Commitment Statutes*, 13 SANTA CLARA L. REV. 400 (1973) [hereinafter cited as *Abyss*].

¹¹⁷ See *Theories*, *supra* note 107, at 1291.

¹¹⁸ 405 U.S. 504 (1972).

¹¹⁹ *Id.* at 509.

¹²⁰ Referring to the compelling state interest test.

¹²¹ 349 F. Supp. 1078, 1093 (E.D. Wis. 1972), *vacated and remanded on other grounds*, 94 S. Ct. 713 (1974).

¹²² All through the opinion the court stresses that the danger must be imminent. *E.g.*, 349 F. Supp. at 1094 (E.D. Wis. 1972).

¹²³ *Sacramento Bee* May 7, 1973, § A, at 6, col. 5-8.

atrist can x-ray a man's mind and forecast his behavior, because this is not possible". "I have no way to fortell a person's murderous impulses," he added, "I certainly cannot vouch for your potential for violence, nor my own".¹²⁴ In the same article, Dr. Alfred Rucci, acting director of Atascadero State Hospital, concluded that "most of this work [predicting violent behavior] is a matter of an educated guess".¹²⁵

There are two reasons why it is impossible to predict what an individual's potential for harm is. One, the potential to be violent has no easily recognizable symptoms.¹²⁶ Therefore, predictions become a matter of developing statistical correlations between observed characteristics of offenders and subsequent criminal conduct.¹²⁷ These attempts at separating the violent from the nonviolent have been futile.¹²⁸ A typical study concludes that:

There is little doubt that the known offender in general and the known violent offender in particular are more likely than members of the public at large to commit an assaultive act . . . [yet] the best prediction available today, for even the most refined set of offenders,¹²⁹ is that any particular member of that set will not become violent.¹³⁰

In this study a test was developed for segregating the violent from the nonviolent by making classifications using the following criteria: one, the individual's case history of past violent behavior; two, his past or present diagnosed clinical conditions; three, his current measure of mental and emotional functioning; and, four, prognostic judgments made by his custodians. The best classification for segregating the violent from the nonviolent resulted in "sounding a false alarm nineteen times in twenty"¹³¹ which prompted the conclusion that "the quest for an operational practical predictor of violence from simple classifications appears to be futile".¹³²

Similarly, attempts to develop regression equations¹³³ that can predict violent behavior have been unsuccessful. For example, using such an equation, one study correctly identified only eight out of

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ VonHirsch, *Predictions of Criminal Conduct and Preventive Confinement of Convicted Persons*, 21 BUFFALO L. REV. 717, 733 (1971-72) [hereinafter cited as VonHirsch].

¹²⁷ *Id.* at 733.

¹²⁸ Dershowitz, *supra* note 1, at 32.

¹²⁹ 'Refined set' means a class of potential offenders with the same characteristics.

¹³⁰ Wenk, *et al.*, *Can Violence be Predicted?*, 18 CRIME AND DELINQUENCY 393, 394 (1972) [hereinafter cited as Wenk].

¹³¹ *Id.* at 397.

¹³² *Id.* at 400.

¹³³ An equation with one or more variables usually preceded by a fixed modifier. For example, $x = 22a + .5b - 3c$.

fifty-two persons expected to be violent.¹³⁴ This is a typical result from regression equations.¹³⁵

Clinical predictions¹³⁶ of violence are also inaccurate:

First, one should not assume that individual prediction is fundamentally different than actuarial prediction. Second, one should not assume that intensive, clinical psychological understanding of the individual leads generally to more trustworthy forecasts of behavior than a more behavioristic-actuarial approach to the predictive task . . . of some 60 published and unpublished research studies known to us, there is only one showing a clear-cut superiority of clinical judgment over actuarial prediction.¹³⁷

The second reason why it is impossible to accurately predict if a person will be violent is because extreme violence is rare.¹³⁸ There is a theoretical impediment to predicting infrequent events.¹³⁹ This impediment results in high numbers of false positives.¹⁴⁰ A false positive is a person who is predicted by a testing method to be potentially violent but in reality will not be violent.¹⁴¹ And any test which attempts to predict that a person is likely to do serious harm to another will yield large numbers of false positives regardless of the test's ability to segregate the violent from the nonviolent.¹⁴²

For example, assume a test that can separate from the general population 90% of those who will actually kill if not confined.¹⁴³ Further assume that only 5% of the non-killers in the population will be classified by the test as killers. Finally, assume that one out of a thousand will kill if not confined. If 100,000 were to be tested, out of the 100 who would kill 90 would be isolated, but out of the 99,900 who would not kill 5%, or 4,995 people, would be isolated by the test as potential killers. For every future killer isolated, 55 false positives — future non-killers — would be isolated too.¹⁴⁴ The probability that any one person isolated by the test will kill would be

¹³⁴ Wenk, *supra* note 130, at 400.

¹³⁵ *Id.*

¹³⁶ For further elaboration about clinical and actuarial predictions, see Meehl & Rosen, *Antecedent Probability and the Efficiency of Psychometric Signs, Patterns, or Cutting Scores*, 52 PSYCHOL. BULL. 194 (1955).

¹³⁷ Livermore, *supra* note 28, at 85 n. 4.

¹³⁸ VonHirsch, *supra* note 126, at 733.

¹³⁹ *Id.*

¹⁴⁰ Rosen, *Detection of Suicidal Patients: An Example of Some Limitations in the Prediction of Infrequent Events*, 18 J. CONSULT. PSYCHOL. 397 (1954) [hereinafter cited as Rosen].

¹⁴¹ VonHirsch, *supra* note 126, at 730.

¹⁴² Rosen, *supra* note 140, at 398.

¹⁴³ As of yet there is no such test. Of all the tests devised to predict violence, the most accurate seems to be one made up by Justin and Birkman. See Justin & Birkman, *An Effort to Distinguish the Violent from the Nonviolent*, 65 SOUTHERN MED. J. 703 (1972), where the authors describe a test which could segregate 77% of those who were violent from the test population and only misclassify 23% of those who were not violent.

¹⁴⁴ Rosen, *supra* note 140, at 399-400.

one out of 56 or 1.8%. This low potential for doing harm had nothing to do with the test's accuracy. It could separate 90% of the killers from those that were tested while it only misclassified 5% of the non-killers. The poor result was due to the many more non-killers than killers in the test's population,¹⁴⁵ a factor which corresponds with reality.¹⁴⁶

As a result of the false positive problem coupled with the lack of accurate predictors, Professor Alan M. Dershowitz has concluded that any system of predicting future crimes results in large numbers of erroneous confinements, *i.e.*, confinements of persons predicted to engage in violent crime who would not, in fact, do so.¹⁴⁷ "Indeed, all the experience with the predicting of violent conduct suggests that in order to spot a significant proportion of future violent criminals, we would have to reverse the traditional maxim of criminal law and adopt a philosophy that it is 'better to confine 10 people who would not commit predicted crimes, than to release one who would'."¹⁴⁸

Since it is impossible to predict who will be violent in the future with any degree of certainty, a state cannot meet the *Lessard* compelling state interest burden of "proving that there is an extreme likelihood that if the person is not confined he will do immediate harm to himself or others".¹⁴⁹ The argument could be made, therefore, that the state cannot justify civil commitment on police power grounds, because preventive detention is not a compelling state interest.

There is no case supporting this view; however, two lower federal courts have addressed the issue. In *Cross v. Harris*¹⁵⁰ the appellant had been committed to a hospital under the Sexual Psychopath Act¹⁵¹ of the District of Columbia. He argued that his confinement was unconstitutional, because he was not afforded the same procedural safeguards as a person committed under the District of Columbia's Hospitalization of the Mentally Ill Act of 1964.^{151a} The case was remanded to see if appellant was a sexual psychopath within the statutory definition, however, the court declared that:

Only a blind court could ignore the intense debate, in and out of Congress, over the extent to which the Constitution can tolerate preventive detention It may be that in some circumstances

¹⁴⁵ *Id.* at 401-02.

¹⁴⁶ 1973 STATISTICAL ABSTRACT OF THE UNITED STATES 149.

¹⁴⁷ Dershowitz, *supra* note 1, at 32.

¹⁴⁸ *Id.*

¹⁴⁹ *Lessard v. Schmidt*, 349 F. Supp. 1078, 1093 (E.D. Wis. 1972), *vacated and remanded on other grounds*, 94 S. Ct. 713 (1974).

¹⁵⁰ 418 F.2d 1095 (D.C. Cir. 1969).

¹⁵¹ 22 D.C. ENCYCL. CODE § 3503-11 (1967).

^{151a} 21 D.C. ENCYCL. CODE § 501-91 (1967).

preventive detention is in fact permissible. If so, such detention would have to be based on a record that clearly documented a high probability of harm.¹⁵²

And in *Lessard* the court noted that:

Although attempts to predict future conduct are always difficult, and confinement based upon such prediction must always be viewed with suspicion, we believe civil confinement can be justified in some cases if the proper burden of proof is satisfied and dangerousness is based upon a finding of a recent overt act, attempt or threat to do substantial harm to oneself or another.¹⁵³

Thus, in *Cross* a federal circuit court claims that in order to justify civil commitment on police power grounds the prediction of dangerousness must be based on a record that clearly documents a high probability of harm. And in *Lessard* a federal district court notes that this prediction of dangerousness must be based on recent past acts. These past acts cannot be minor infractions. They must be attempts or threats to do substantial harm to oneself or others. The majority of American jurisdictions still maintain that individuals can be indefinitely confined without their consent on the basis of a diagnosis that they are mentally ill and a prediction that they are dangerous to others unless confined.¹⁵⁴ Although minority views, *Cross* and *Lessard* are possible tools for challenging such commitments.

2. PARENS PATRIAE RATIONALE

Some mentally ill persons are not dangerous to others.¹⁵⁵ If the individual poses no danger to society, civil commitments must be justified on the state's status as *parens patriae*.¹⁵⁶ The idea behind this rationale is that the law assumes a mentally ill person lacks an operative rational will;¹⁵⁷ consequently, he is a danger to himself and is unable to decide if he needs treatment.¹⁵⁸ It then becomes the right and duty of the state, acting under the power of *parens patriae*, to step in and make the decision for him.¹⁵⁹

¹⁵² 418 F.2d at 1102 (D.C. Cir. 1969).

¹⁵³ *Lessard v. Schmidt*, 349 F. Supp. 1078, 1093 (E.D. Wis. 1972), *vacated and remanded on other grounds*, 94 S. Ct. 713 (1974).

¹⁵⁴ See Dershowitz, *supra* note 1, at 32.

¹⁵⁵ "Most mental patients are too passive, too silent, too withdrawn to be dangerous." Statement by Albert Deutsch, 1969 *Hearings*, *supra* note 6, at 43.

¹⁵⁶ *In re Ballay*, 482 F.2d 648, 658 (D.C. Cir. 1973).

¹⁵⁷ See text accompanying note 101, *supra*.

¹⁵⁸ Carpenter, *supra* note 4, at 1168. For the purposes of analysis, this rationale will also incorporate confinement for beneficial treatment. Although the courts tend to speak of the police power and *parens patriae* rationale as joint grounds for commitment, for purposes of analysis, these two justifications will be discussed separately.

¹⁵⁹ Carpenter, *supra* note 4, at 1166-68. *Lessard v. Schmidt*, 349 F. Supp. 1078

Many statutes¹⁶⁰ make 'dangerousness to self' a ground for civil commitment. For example:

If the court . . . finds that the person is mentally ill and, because of that illness, is likely to injure himself . . . the court may order his hospitalization.¹⁶¹

In order for this justification to be a basis for commitment, however, it has been argued that the state must provide meaningful treatment to the individual who is civilly committed.¹⁶² One commentator has said:

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.¹⁶³

There is some case law supporting this view. In *In re Ballay* the court notes that:

Without some form of treatment the state justification for acting as *parens patriae* becomes a nullity . . . The issue upon which the *parens patriae* rationale must either stand or fall — [is] whether meaningful treatment is available.¹⁶⁴

By providing meaningful treatment, benefit will accrue to the individual, because he will be able to function in society.¹⁶⁵ Also, benefit will accrue to the state.¹⁶⁶ By restoring the mentally ill person to a normal and useful life he will no longer be a burden upon the public coffers, and his risk of future antisocial conduct is reduced.¹⁶⁷ Thus,

(E.D. Wis. 1972), *vacated and remanded*, 94 S.Ct. 713 (1974). The Court notes that:

Dangerousness to self became an additional criterion upon which commitment could be based. This criterion apparently rested on the assumption that a state could proceed as *parens patriae* to protect the interests of the person involved. 349 F. Supp. at 1085 (E.D. Wis. 1972).

¹⁶⁰ ALA. CODE 45 § 205 (1958); ARK. STAT. ANN. § 59-234 (Supp. 1967); GA. CODE ANN. §§ 88-505.2(a)(1) and (b)(1) (Supp. 1969); LA. REV. STAT. ANN. § 28:53(A) (Supp. 1969); MINN. STAT. ANN. § 253A.07(17)(a) (Supp. 1969); R.I. GEN. LAWS ANN. § 26-2-1 (1968).

¹⁶¹ 21 D.C. ENCYCL. CODE § 545(b) (1967).

¹⁶² See text accompanying notes 163-167, *infra*.

¹⁶³ Note, *The Nascent Right to Treatment*, 53 VA. L. REV. 1134, 1140 (1967).

¹⁶⁴ *In re Ballay*, 482 F.2d 648, 659 (D.C. Cir. 1973); *cf.* *Kent v. United States*, 383 U.S. 541, 555 (1966); *In re Curry*, 452 F.2d 1360 (D.C. Cir. 1971).

¹⁶⁵ When faced with an obviously aberrant person, we know, or we think we know, that he would be happier if he were as we. Livermore, *supra* note 28, at 87.

Certainly it is in the interest of the individual if it permits him to return a free man capable of functioning in society. *In re Ballay*, 482 F.2d 648, 658 (D.C. Cir. 1973).

¹⁶⁶ *In re Ballay*, 482 F.2d 648, 658 (D.C. Cir. 1973).

¹⁶⁷ *Id.*

for compelling state interest purposes, it could be argued that the harm to individual rights is sufficiently outweighed by the benefits which accrue to the individual and society as a result of meaningful treatment. Therefore, civil commitments are justifiable under the *parens patriae* rationale.

This argument fails, however, because a state is incapable of supplying meaningful treatment for mental patients.¹⁶⁸ Despite the many innovative therapeutic techniques¹⁶⁹ used today, despite the increasing number of trained personnel with their good intentions and efforts,¹⁷⁰ statistics show that even in the most up-to-date therapy centers the number of persons who have been successfully rehabilitated is small.¹⁷¹ The rate of cure among mental patients receiving treatment is the same as the rate of cure among mentally ill persons who receive no treatment whatsoever.¹⁷²

This long history of failures has caused some psychiatrists to blame the hospitals, saying they are overcrowded and understaffed.¹⁷³ As a result of this criticism, group therapies have been started, but it has never been shown that they are any more effective than the hospitals.¹⁷⁴ Furthermore, "there is substantial evidence that lengthy hospitalization, especially involuntary, increases the symptoms of mental illness and makes adjustments to society more difficult".¹⁷⁵ And, as stated before, hospitalization actually increases a mental patient's chance of dying.¹⁷⁶

Thus, current mental therapy probably hurts more than it helps.¹⁷⁷ Instead of helping a mental patient return to society as a normal citizen, present mental therapy aggravates his symptoms causing him to remain a financial burden on the state and increasing his chance of antisocial conduct. In terms of the compelling state interest test, therefore, it can be argued that civil commitments cannot be justified on a *parens patriae* basis, because the harm to individual rights is high while the benefits to society are nonexistent.

The majority position among the federal courts remains that state

¹⁶⁸ F. ALLEN, *THE BORDERLAND OF CRIMINAL JUSTICE* 32-41, 57-58 (1964); S. GLUECK, *LAW AND PSYCHIATRY* 159-70 (1962); GRIMES, *WHEN MINDS GO WRONG* 35-65 (1954).

¹⁶⁹ *Abyss*, *supra* note 116, at 433-39.

¹⁷⁰ BRAGINSKY, *METHODS OF MADNESS: THE MENTAL HOSPITAL AS A LAST RESORT* 179 (1969) [hereinafter cited as BRAGINSKY].

¹⁷¹ *Id.* at 179.

¹⁷² *Id.*

¹⁷³ *Id.* at 180.

¹⁷⁴ *Id.*

¹⁷⁵ *1969 Hearings*, *supra* note 6, at 214-15, 319, 409.

¹⁷⁶ See text accompanying notes 90-93, *supra*.

¹⁷⁷ Contrary to the impact hospitalization is normally expected to have upon patients, involuntary mental hospitalization may cause or exacerbate rather than alleviate the 'illness' it is intended to cure. *Abyss*, *supra* note 116, at 435.

mental hospitals are not constitutionally required to give their patients adequate treatment.¹⁷⁸ As previously noted, however, the court in *Ballay* concludes that without meaningful treatment "the state justification for acting as *parens patriae* is a nullity".¹⁷⁹ Although it is a minority view, *Ballay* can be used as a tool to challenge those commitment statutes which provide for incarceration of mentally ill persons who are found to be dangerous to themselves or in need of care or treatment.¹⁸⁰

Even if meaningful treatment were available, the court in *Lessard* noted that:

Persons in need of hospitalization for physical ailments are allowed the choice of whether to undergo hospitalization and treatment or not. The same should be true of persons in need of care or 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.¹⁸¹

Evidence shows that most mentally ill can make a rational decision about hospitalization.¹⁸² Psychiatric studies conclude that there is nothing radically different about a mentally ill person¹⁸³ or his ability to rationalize.¹⁸⁴ His illness should not be viewed as a disease process but as a "not-altogether-irrational attempt to cope with the problems of daily life".¹⁸⁵ Whether or not he is capable of deciding if he needs treatment,

[D]epends on what kind of mental illness is present. Some mentally ill people may be unable to comprehend and, in these instances, forced treatment may be appropriate. But this group is a small proportion of the total committable population. Most understand what the clinician is saying though they often disagree with his views.¹⁸⁶

The fact that many mentally ill choose to refrain from treatment does not indicate that they are unable to make a rational decision.¹⁸⁷

¹⁷⁸ E.g., *New York St. Ass'n. For Retard. Child., Inc. v. Rockefeller*, 357 F. Supp. 752 (N.D.N.Y. 1973).

¹⁷⁹ *In re Ballay*, 482 F.2d 648, 659 (D.C. Cir. 1973).

¹⁸⁰ See also Bassiouni, *The Right of The Mentally Ill to Cure and Treatment: Medical Due Process*, 15 DE PAUL L. REV. 291 (1966); Birnbaum, *The Right to Treatment*, 46 A.B.A.J. 499 (1960).

¹⁸¹ *Lessard v. Schmidt*, 349 F. Supp. 1078, 1094 (E.D. Wis. 1972), *vacated and remanded on other grounds*, 94 S. Ct. 713 (1974).

¹⁸² Livermore, *supra* note 28, at 88.

¹⁸³ BRAGINSKY, *supra* note 170, at 182. See Rosenham, *On Being Sane in Insane Places*, 179 SCI. MAGAZINE 250 (1973), where the author discusses an imaginative experiment. Eight sane people were admitted to various mental hospitals. Once in the hospital, they conducted themselves normally. Despite this public show of sanity, the pseudo-patients were never detected. At least in psychiatric hospitals, one cannot readily distinguish the sane from the insane.

¹⁸⁴ BRAGINSKY, *supra* note 170, at 39-40.

¹⁸⁵ *Id.*

¹⁸⁶ Livermore, *supra* note 28, at 88.

¹⁸⁷ *Lessard v. Schmidt*, 349 F. Supp. 1078, 1094 (E.D. Wis. 1972), *vacated and*

It is not difficult to see that the rational choice in many instances would be to forego treatment, particularly if it carries with it the stigma of incarceration in a mental institution, with the difficulties of obtaining release, the curtailments of many rights, the interruption of job and family life, and the difficulties of attempting to obtain a job, driver's license, etc., upon release from the hospital.¹⁸⁸

(Not to mention the fact that as cure centers, hospitals are failures).

On the other hand, for some mentally ill persons who elect to undergo treatment it is the rational thing to do.¹⁸⁹ Eric Hoffer wrote regarding the plight of the mentally ill that:

Drastic change creates a population of misfits. As the jetsam of a changing society they have available only a single possibility: to find a way to live outside society. There could be fewer prospects more inviting to persons caught in such circumstances than to take up residence in a 'mental' institution.¹⁹⁰

It follows from *Lessard* and the above discussion that even if the state could provide meaningful treatment, involuntary civil commitment is rarely justified on *parens patriae* grounds, because most mentally ill can rationally decide if they want to undergo treatment.

In the past courts have ordered treatment for adults over the adult's objection even though the person was not mentally incompetent.¹⁹¹ The state's right to quarantine the potentially contagious,¹⁹² to confine tuberculars,¹⁹³ to vaccinate against smallpox,¹⁹⁴ and to treat for venereal disease¹⁹⁵ has been upheld as a right to protect the community. These cases may be distinguished, however, on the ground that meaningful treatment was available.¹⁹⁶

IV. . SUMMARY

Due process requires a state to show that civil commitments are necessary to promote a compelling state interest. Arguably, a state cannot show that the police power or *parens patriae* rationale supply compelling state interests in the civil commitment area.

Most courts have not gone this far. One federal circuit court claims that civil commitments can be justified under the police power only if the prediction of dangerousness is based on a record that clearly

remanded on other grounds, 94 S. Ct. 713 (1974).

¹⁸⁸ *Id.*

¹⁸⁹ BRAGINSKY, *supra* note 170, at 167.

¹⁹⁰ *Id.*

¹⁹¹ See text accompanying notes 192-95, *infra*.

¹⁹² *Compagnie Francaise de Navigation a Vapeur v. La. Board of Health*, 186 U.S. 380 (1902).

¹⁹³ *Moore v. Draper*, 57 So. 2d 648 (Fla. Sup. Ct. 1952).

¹⁹⁴ *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

¹⁹⁵ *People ex rel Baker v. Strautz*, 386 Ill. 360, 54 N.E.2d 441 (1944).

¹⁹⁶ See *Theories*, *supra* note 107, at 1291.

documents a high probability of harm. A federal district court notes that this prediction of dangerousness must be based on recent past acts. Another circuit court believes that civil commitments can be justified under the *parens patriae* rationale only if meaningful treatment is provided. At present, these cases are minority positions, but they can be used as tools to attack existing civil commitment statutes in the hope that a change in judicial approach is underway.

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