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## COMMENT

# Medical Treatment Demands Medical Assessment: Substantive Due Process Rights in Involuntary Commitments

Austin Baumgarten\*

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\* Copyright © 2011 Austin Baumgarten. Senior Articles Editor, UC Davis Law Review; J.D. Candidate, UC Davis School of Law, 2012; B.A. English, Santa Clara University, 2008. Many thanks to Brittany Sachs, Allison Sloan, Mina Kim, and Connor Boyd for their comments and editorial assistance. Special thanks to Brendon Hansen for his guidance throughout the writing process. Most importantly, thanks to my family and friends for helping me stay strong.

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## INTRODUCTION

"I'll kill my baby if I don't see my doctor!" Janet Valero screamed to the hospital staff.<sup>1</sup> Familiar with Ms. Valero and her diagnosis of schizoaffective disorder, the staff members quickly escorted her to an isolated room.<sup>2</sup> Once inside, the on-duty psychiatrist briefly interviewed Ms. Valero and quickly skimmed her patient history, but did not conduct a full psychiatric assessment.<sup>3</sup> Five minutes later, the psychiatrist called security and authorized Ms. Valero's involuntary commitment because she remained visibly agitated while in isolation.<sup>4</sup> After nurses forced Ms. Valero into the locked psychiatric ward, Ms. Valero refused medication and continued making threats unless she consulted her regular psychiatrist.<sup>5</sup> Consequently, the hospital staff sedated Ms. Valero with the antipsychotic medication Haloperidol against her will.<sup>6</sup>

Ms. Valero ultimately returned home after two weeks of involuntary hospitalization.<sup>7</sup> Her aunt later went to the hospital and explained that Ms. Valero recently discovered she was pregnant.<sup>8</sup> Worried about the

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<sup>1</sup> This hypothetical presents a variation on the facts in *Bolmer v. Oliveira*, 594 F.3d 134 (2d Cir. 2010), *Benn v. Universal Health System*, 371 F.3d 165 (3d Cir. 2004), and *Rodriguez v. City of New York*, 72 F.3d 1051 (2d Cir. 1995). All parties and events are fictitious. See *Bolmer*, 594 F.3d at 138; *Benn*, 371 F.3d at 168-69 (reflecting emotional presentations of plaintiffs in *Bolmer* and *Benn*); cf. *Bolmer*, 594 F.3d at 138 (creating *Bolmer*-like scenario where plaintiff has history with treatment center).

<sup>2</sup> See *Bolmer*, 594 F.3d at 138 (establishing similar factual scenario to *Bolmer*, where plaintiff acted agitated and frightened facility staff and reflecting plaintiff's isolation in small room). See generally AM. PSYCHIATRIC ASS'N, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS 319-23 (4th ed. 2000) (defining schizoaffective disorder as featuring concurrent symptoms of both mood disorders, i.e., major depression and/or bipolar disorder, and psychosis, i.e., schizophrenia).

<sup>3</sup> Cf. *Rodriguez*, 72 F.3d at 1065 (comparing alleged inadequate questioning of plaintiff during intake assessment at hospital).

<sup>4</sup> Cf. *Bolmer*, 594 F.3d at 138 (creating situation where doctors and staff base decision to order involuntary commitment on erroneous assumptions).

<sup>5</sup> See generally Stephen J. Morse, *A Preference for Liberty: The Case Against Involuntary Commitment of the Mentally Disordered*, 70 CALIF. L. REV. 54, 60 (1982) (describing how doctors and hospital staff generally view patients who refuse medication as delusional and incapable of rational decisions).

<sup>6</sup> See generally U.S. FOOD & DRUG ADMIN., HALDOL (BRAND OF HALOPERIDOL INJECTION) PRESCRIBING INFORMATION 1-12 (2008), available at [http://www.accessdata.fda.gov/drugsatfda\\_docs/label/2008/015923s082,018701s0571bl.pdf](http://www.accessdata.fda.gov/drugsatfda_docs/label/2008/015923s082,018701s0571bl.pdf) (detailing usage of intramuscular injection of Haloperidol as acute antipsychotic treatment).

<sup>7</sup> Cf. Edward Beis, *State Involuntary Commitment Statutes*, 7 MENTAL DISABILITY L. REP. 358, 358-69 (1983) (illustrating that many state statutes allow for extension of involuntary commitment past emergency period).

<sup>8</sup> Cf. *Bolmer*, 594 F.3d at 138 (comparing situation in hypothetical to situation in

effects of her medications on her unborn child, Ms. Valero had refused to take her medication two months prior to her involuntary commitment.<sup>9</sup> Ms. Valero went to the hospital to talk with her psychiatrist about how to manage her illness while pregnant.<sup>10</sup> However, Ms. Valero exhibited symptoms of decompensation — aggravation of symptoms without proper treatment — while her psychiatrist was on vacation.<sup>11</sup> Through only a cursory assessment, the hospital psychiatrist misinterpreted her statement that she would kill her baby as a real threat.<sup>12</sup>

Ms. Valero's involuntary commitment may give rise to a claim against the clinic doctor for violating her constitutional rights.<sup>13</sup> Specifically, Ms. Valero may allege that the doctor's decision to order her involuntary commitment violated her Fourteenth Amendment substantive due process right to liberty.<sup>14</sup> However, the jurisdiction where Ms. Valero files the claim will likely determine its success.<sup>15</sup> Federal Circuits disagree over whether involuntary commitment decisions made substantially below medical standards violate a patient's substantive due process rights.<sup>16</sup>

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*Bolmer* of revelation that hospital staff made incorrect assumption about plaintiff's truthfulness).

<sup>9</sup> *Cf. id.* (analogizing to *Bolmer* telling truth about relationship with case worker).

<sup>10</sup> *Cf. Benn v. Universal Health Sys.*, 371 F.3d 165 (3d Cir. 2004) (mirroring *Benn*'s desire seeking help).

<sup>11</sup> See ROBERT JEAN CAMPBELL, *CAMPBELL'S PSYCHIATRIC DICTIONARY* 168 (8th ed. 2004) (defining "decompensation" as aggravation of mental disorder due to deterioration of mechanisms used to continue basic level of functioning).

<sup>12</sup> *Cf. Bolmer*, 594 F.3d at 138 (suggesting that doctor's decision to order involuntary commitment without conducting full medical assessment can lead to deprivation of liberty).

<sup>13</sup> See, e.g., *Bolmer*, 594 F.3d at 136 (featuring Fourteenth Amendment and substantive due process claims under 42 U.S.C. § 1983); *Benn*, 371 F.3d at 165 (featuring procedural and substantive due process claims under 42 U.S.C. § 1983 and state tort claims); *Jensen v. Lane Cnty.*, 312 F.3d 1145, 1146 (9th Cir. 2002) (featuring due process claim under 42 U.S.C. § 1983); *James v. Grand Lake Mental Health Ctr.*, No. 97-5157, 1998 WL 664315, at \*7 (10th Cir. Sept. 24, 1998) (alleging violations of Fifth and Fourteenth Amendment rights under 42 U.S.C. § 1983).

<sup>14</sup> See *Bolmer*, 594 F.3d at 139; *Benn*, 371 F.3d at 170; *Rodriguez v. City of New York*, 72 F.3d 1051, 1054 (2d Cir. 1995).

<sup>15</sup> See *Bolmer*, 594 F.3d at 139; *Benn*, 371 F.3d at 170; *infra* Part II (describing differing approaches to substantive due process violations in involuntary commitments between Second, Third, Ninth, and Tenth Circuits).

<sup>16</sup> See *Bolmer*, 594 F.3d at 139; *Benn*, 371 F.3d at 170; *infra* Part II (explaining circuit split between Second and Third Circuits).

Historically, various conflicting agendas motivated the policies regulating persons with mental illness.<sup>17</sup> In colonial and early America, due to the unavailability of regulation or treatment, society placed persons with mental illness in jails and almshouses.<sup>18</sup> Then in the mid-nineteenth century, the English treatment model of state-sponsored asylums gradually replaced the colonial public safety model.<sup>19</sup> Next, state-funded treatment continued to expand as legislatures created civil commitment statutes supported by the policy of *parens patriae*, or the state's guardianship power.<sup>20</sup> However, during the 1960s and 1970s, a backlash against psychiatry and a greater interest in individual liberty forced wholesale regulatory changes regarding persons with mental illness.<sup>21</sup> Known as the deinstitutionalization movement, interest groups promoting individual liberty called for the closing of state-funded psychiatric hospitals.<sup>22</sup>

The issue of involuntary commitment of persons with mental illness eventually reached the Supreme Court in *O'Connor v. Donaldson*.<sup>23</sup> In *Donaldson* the Court held that states could subject individuals to involuntary commitment only if they posed a danger to themselves or

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<sup>17</sup> See *Bolmer*, 594 F.3d at 139; *Benn*, 371 F.3d at 170. See generally JAMES A. HOLSTEIN, COURT-ORDERED INSANITY: INTERPRETIVE PRACTICE AND INVOLUNTARY 19-25 (1993) (recounting history of involuntary commitment in United States from colonial era to era before deinstitutionalization); Stuart A. Anfang & Paul S. Appelbaum, *Civil Commitment — The American Experience*, 43 ISR. J. PSYCHIATRY & RELATED SCI. 209 (2006) (describing American involuntary commitment history).

<sup>18</sup> See HOLSTEIN, *supra* note 17, at 19-25 (summarizing history of involuntary commitment in early America); Anfang & Appelbaum, *supra* note 17, at 209 (detailing punitive system of using police power to regulate persons with mental illness).

<sup>19</sup> See HOLSTEIN, *supra* note 17, at 23-24 (recounting history of commitment in Victorian era asylums and methods of treatments used therein); Anfang & Appelbaum, *supra* note 17, at 209-10 (describing shift from colonial police power approach, to early development of private asylums, to adoption of English model).

<sup>20</sup> See HOLSTEIN, *supra* note 17, at 24-25 (detailing shift towards regulation of persons with mental illness through legal means and change of influence from doctors to courts); Anfang & Appelbaum, *supra* note 17, at 210-11 (presenting history of development of first civil commitment statutes and judicial procedures involved).

<sup>21</sup> See HOLSTEIN, *supra* note 17, at 24-27 (stating that pendulum regarding regulation of persons with mental illness swung back towards greater individual freedom from period of state protectionism); Anfang & Appelbaum, *supra* note 17, at 211 (describing rise of counter-culture movement in 1960s and its role in developing anti-psychiatry movement).

<sup>22</sup> See HOLSTEIN, *supra* note 17, at 24-27 (recalling effects of closure of state-sponsored asylums for persons with mental illness); Anfang & Appelbaum, *supra* note 17, at 211 (providing history of deinstitutionalization movement).

<sup>23</sup> See *O'Connor v. Donaldson*, 422 U.S. 563, 576 (1975).

others.<sup>24</sup> Consequently, the *Donaldson* decision forced states to modify their involuntary commitment laws to fit this new “dangerousness” model.<sup>25</sup>

Currently, under *Donaldson*, states generally allow involuntary commitment only in cases where individuals present an immediate danger to themselves or others.<sup>26</sup> Further, committed individuals have no procedural right to contest an emergency involuntary commitment.<sup>27</sup> An emergency involuntary commitment is a temporary period of hospitalization — between forty-eight to 120 hours — in which patients receive medical treatment against their will.<sup>28</sup> The purpose of an emergency involuntary commitment is to provide stabilizing medical treatment to patients who are a danger to themselves or others, and to allow physicians time to observe and assess if an extended civil commitment is necessary.<sup>29</sup> Therefore, patients only have the procedural right to a hearing to contest an official civil commitment after an emergency commitment.<sup>30</sup>

This Comment argues that an emergency involuntary commitment determination for psychiatric reasons made substantially below medical standards violates a patient’s substantive due process rights.<sup>31</sup> Part I provides the historical and legal context of involuntary commitment law and explains the relevant judicial dispute regarding involuntary commitment.<sup>32</sup> Part II details the circuit split between the

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<sup>24</sup> *Id.*

<sup>25</sup> See *id.*; HOLSTEIN, *supra* note 17, at 24-27; Anfang & Appelbaum, *supra* note 17, at 211 (reporting how state statutes changed to remain constitutional).

<sup>26</sup> See HOLSTEIN, *supra* note 17, at 25-27 (describing contemporary involuntary commitment laws); Anfang & Appelbaum, *supra* note 17, at 212-13 (detailing current legal landscape of short-term involuntary commitments due to danger to others, danger to self, or grave disability).

<sup>27</sup> See, e.g., CAL. WELF. & INST. CODE § 5152(a) (Deering 2010) (stating that once in effect, 72-hour hold can be ended only by facility medical director); N.Y. MENTAL HYG. LAW § 9.39(a) (Consol. 2009) (declaring 48-hour period for emergency involuntary commitment for patient examination purposes). See generally Joseph D. Bloom, *Thirty-Five Years of Working with Civil Commitment Statutes*, 32 J. AM. ACAD. PSYCHIATRY L. 430, 430-33 (2004) (relating experiences of working with Oregon’s involuntary commitment statutes from doctor’s perspective); Richard Van Duizend et al., *An Overview of State Involuntary Civil Commitment Statutes*, 8 MENTAL & PHYSICAL DISABILITY L. REP. 328, 329 (1984) (explaining that lack of procedural or administrative due process is defining characteristic of emergency commitments).

<sup>28</sup> See HOLSTEIN, *supra* note 17, at 25-27.

<sup>29</sup> See *id.*

<sup>30</sup> See sources cited *supra* note 27.

<sup>31</sup> See *infra* Part III (arguing that Supreme Court should adopt Second Circuit’s analysis).

<sup>32</sup> See *infra* Part I (detailing historical and legal approaches to involuntary

Third and Second Circuit Courts of Appeals in applying the “shocks the conscience” standard to involuntary commitments, as illustrated in *Benn v. Universal Health System, Inc.* and *Bolmer v. Oliveira*.<sup>33</sup> In *Benn*, the Third Circuit Court of Appeals held that even if a physician’s admitting assessment of a patient for an involuntary commitment is improper, that impropriety fails to shock the conscience.<sup>34</sup> In contrast, the Second Circuit Court of Appeals held in *Bolmer* that if a physician’s admitting assessment of a patient for an involuntary commitment falls below medical standards, the assessment can shock the conscience and qualify as a substantive due process violation. Part III argues that involuntary commitment decisions made below medical standards shocks the conscience and violates substantive due process rights.<sup>35</sup> First, the medical purpose of involuntary psychiatric treatment requires a medically based assessment procedure.<sup>36</sup> Second, medically unjustified involuntary commitments are an unreasonable and arbitrary exercise of governmental power.<sup>37</sup> Finally, the stigma of involuntary hospitalization has significant negative repercussions on individual liberty.<sup>38</sup> Thus, the Supreme Court should adopt the Second Circuit’s *Bolmer* analysis and require medically based evaluations before emergency involuntary commitments.<sup>39</sup>

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commitment).

<sup>33</sup> See *infra* Part II (comparing *Bolmer v. Oliveira*, 594 F.3d 134 (2d Cir. 2010), with *Benn v. Universal Health Sys.*, 371 F.3d 165 (3d Cir. 2004)).

<sup>34</sup> See *Benn v. Universal Health Sys.*, 371 F.3d 165, 174 (3d Cir. 2004).

<sup>35</sup> See *infra* Part III (arguing that Supreme Court should adopt Second Circuit’s analysis in *Bolmer*).

<sup>36</sup> See *infra* Part III.A (contending that medical context of involuntary commitment assessments warrants medical standard for challenges brought under Fourteenth Amendment).

<sup>37</sup> See *infra* Part III.B (asserting that not applying medical standard to involuntary commitment assessments would be arbitrary exercise of government power).

<sup>38</sup> See *infra* Part III.C (arguing that allowing for non-medical justifications for involuntary commitments creates potential for abuse). See generally Karen M. Markin, *Still Crazy After All These Years: The Enduring Defamatory Power of Mental Disorder*, 29 L. & PSYCHOL. REV. 155 (2005) (describing professional consequences of mental health diagnosis); Susan Stefan, “Discredited” and “Discreditable”: *The Search for Political Identity by People with Psychiatric Diagnoses*, 44 WM. & MARY L. REV. 1341 (2003) (describing political disenfranchisement of persons with mental illness); William Hoffman Pincus, Note, *Civil Commitment and the “Great Confinement” Revisited: Straightjacketing Individual Rights, Stifling Culture*, 36 WM. & MARY L. REV. 1769 (1995) (arguing that mental health stigma influenced legislative intent behind mental illness statutes).

<sup>39</sup> See *infra* Part III (arguing that Supreme Court should adopt *Bolmer*’s below medical standards test).

## I. BACKGROUND

The Fourteenth Amendment declares that states cannot deprive any person of liberty without due process of law.<sup>40</sup> In various contexts, the Supreme Court has used the Fourteenth Amendment to develop substantive due process rights.<sup>41</sup> The Court determined that substantive due process rights are so fundamental that they are inherent to the idea of ordained liberty.<sup>42</sup> Over time, the Court established that governments could not infringe upon such fundamental rights without sufficient justification.<sup>43</sup> Thus, in claims alleging substantive due process violations, courts now employ a balancing test that weighs the state's regulatory interest against the individual's fundamental rights.<sup>44</sup>

Civil commitments severely curtail personal liberty by restricting a person's movements through confinement against their will.<sup>45</sup>

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<sup>40</sup> See U.S. CONST. amend. XIV, § 1; *Gideon v. Wainwright*, 372 U.S. 335, 340-41 (1963); *Cantwell v. Connecticut*, 310 U.S. 296, 303-07 (1940).

<sup>41</sup> See, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494, 502-06 (1977) (holding that right to live with family is fundamental and city housing ordinance limiting occupancy of single family homes was unconstitutional); *Loving v. Virginia*, 388 U.S. 1, 13 (1967) (holding that marriage is essential and personal right and anti-miscegenation laws violated liberty without due process of law); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925) (holding that concept of fundamental liberty extended to right to attend private school, striking down state statute making public school compulsory).

<sup>42</sup> See *District of Columbia v. Heller*, 554 U.S. 570, 629 n.27 (2008); *United States v. Carolene Prod. Co.*, 304 U.S. 144, 153 n.4 (1938) (introducing idea of varying levels of scrutiny for judicial review, such as rational basis, intermediate scrutiny, and strict scrutiny); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (distinguishing rights fundamental to concept of liberty from non-fundamental yet still highly valued rights).

<sup>43</sup> See generally *Roe v. Wade*, 410 U.S. 113, 153-54 (1973) (discussing relationship of pregnant woman's right to privacy versus state interest to infringe upon such right to protect potential life); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (holding that right to privacy in marriage outweighs state interest in prohibiting use of contraceptives); *NAACP v. Alabama*, 377 U.S. 288, 307 (1958) (holding that state regulations must not be unnecessarily broad so to infringe upon constitutionally protected freedoms).

<sup>44</sup> See Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 325 (1993) (stating that courts employ balancing test in intermediate scrutiny review of substantive due process violations); see also *Washington v. Glucksberg*, 521 U.S. 702, 722 (1997) (stating that liberty rights deeply rooted in history and tradition that are clearly stated limit complex balancing tests in substantive due process cases); *Youngberg v. Romeo*, 457 U.S. 307, 321-23 (1982) (describing appropriate procedure for determining constitutionality of use of unreasonable restraint in involuntary commitments).

<sup>45</sup> See *Humphery v. Cady*, 405 U.S. 504, 509 (1972); see also *Best v. St. Vincent's*



Therefore, civil commitments are only justified when the state has a substantial interest to promote public safety.<sup>46</sup> In 1975, the Court held in *Donaldson* that states cannot involuntarily commit a non-dangerous individual able to survive safely in freedom.<sup>47</sup> Four years later, in *Addington v. Texas*, the Court raised the burden of proof for involuntary commitments to clear and convincing evidence.<sup>48</sup> In the involuntary commitment setting, the clear and convincing evidence standard requires the state to demonstrate that persons with mental illness are substantially more likely than not to be a danger to themselves or others.<sup>49</sup>

Involuntary commitments today require States to show that an individual meets the non-dangerous and the nongravely disabled criteria based on clear and convincing evidence.<sup>50</sup> States achieve these requirements by implementing the aforementioned practice of emergency involuntary commitments.<sup>51</sup> Emergency involuntary commitments serve the purpose of securing the individual and permitting medical observation before an official civil commitment hearing.<sup>52</sup> Although states have some discretion in implementing emergency involuntary commitments, the Supreme Court has limited

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Hosp., No. 03 Cv. 0365, 2003 U.S. Dist. LEXIS 11354, at \*1, \*21 (2d Cir. July 2, 2003); *Rockwell v. Cape Cod Hosp.*, 26 F.3d 254, 256 (1st Cir. 1994).

<sup>46</sup> See *Addington v. Texas*, 441 U.S. 418, 419 (1979); Donald H. Stone, *The Benefits of Voluntary Inpatient Psychiatric Hospitalization: Myth or Reality?*, 9 B.U. PUB. INT. L.J. 25, 37 (1999); Mary Lynn Krongard, Comment, *A Population at Risk: Civil Commitment of Substance Abusers After Kansas v. Hendricks*, 90 CALIF. L. REV. 111, 122-24 (2002).

<sup>47</sup> See *O'Connor v. Donaldson*, 422 U.S. 563, 576 (1975).

<sup>48</sup> See *Addington*, 441 U.S. at 427-433.

<sup>49</sup> *Id.*

<sup>50</sup> See *Addington*, 441 U.S. at 427; *In re Labelle*, 728 P.2d 138, 153 (Wash. 1986); HOLSTEIN, *supra* note 17, at 26.

<sup>51</sup> See Anfang & Appelbaum, *supra* note 17, at 211 (detailing deinstitutionalization movement in 1960s and movement towards dangerousness model for involuntary commitment); see also HOLSTEIN, *supra* note 17, at 25-27 (describing deinstitutionalization of treatment for persons with mental illness in 1960s and 1970s); H. Richard Lamb & Leona L. Backrach, *Some Perspectives on Deinstitutionalization*, 52 PSYCHIATRIC SERVICES 1039, 1039-40 (2001) (stating that deinstitutionalization movement has caused drastic reduction of percent of population that is institutionalized).

<sup>52</sup> See, e.g., CAL WELF. & INST. CODE § 5151 (Deering 2010) (stating medical evaluation must occur before formal hearing); N.Y. MENTAL HYG. LAW § 9.39(a)(2) (Consol. 2009) (requiring staff physician to conduct evaluation before hearing request); TEX. HEALTH & SAFETY CODE ANN. § 574.004(d) (West 2010) (requiring attorney to review medical assessment and records before hearing).

the scope of involuntary commitment statutes to protect against unlawful infringements on individual liberty.<sup>53</sup>

A. *The Shocks the Conscience Test for Substantive Due Process Violations*

In 1952 the Supreme Court, in *Rochin v. California*, announced the shocks the conscience test for determining violations of substantive due process rights.<sup>54</sup> In *Rochin*, Antonio Rochin swallowed two capsules of morphine as the police forcibly entered his residence without a search warrant.<sup>55</sup> The police grabbed him by the neck and shoved their fingers down Rochin's throat to force him to vomit.<sup>56</sup> Unable to obtain the capsules, the officers handcuffed Rochin and took him to a hospital where a doctor forced him to expel the capsules.<sup>57</sup> Prosecutors then used the capsules as evidence to convict Rochin of criminal possession of morphine.<sup>58</sup> Rochin appealed, and a unanimous Supreme Court overturned the conviction.<sup>59</sup>

The Court ruled that the conduct of the police violated Rochin's substantive due process right to liberty.<sup>60</sup> The Court noted that *Rochin* involved conflicting societal interests — investigating and apprehending criminals versus protecting individual liberty and privacy.<sup>61</sup> Without implanting its own interpretation of natural law into the Constitution, the Court necessarily created a balancing test to weigh the conflicting interests.<sup>62</sup> Thus the Court created the shocks the conscience test, defined as behavior so outrageous that it would offend even the most callous members of society.<sup>63</sup> Despite the significant public interest of apprehending criminals, the Court reasoned that this personal and physical invasion of Rochin's privacy

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<sup>53</sup> See, e.g., *Youngberg v. Romeo*, 457 U.S. 307, 319-20 (1982) (looking to extent and type of restraint as well as need for safety to determine violation of due process); *Addington*, 441 U.S. at 427 (deciding that importance of civil commitment proceeding and due process require state to prove case by more than preponderance of evidence); *O'Connor v. Donaldson*, 422 U.S. 563, 580-85 (1975) (acknowledging due process limitations on *parens patriae* power).

<sup>54</sup> See *Rochin v. California*, 342 U.S. 165, 172-73 (1952).

<sup>55</sup> *Id.* at 166.

<sup>56</sup> See *People v. Rochin*, 225 P.2d 1, 1-2 (Cal. Ct. App. 1950).

<sup>57</sup> *Rochin*, 342 U.S. at 166.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 174.

<sup>60</sup> *Id.* at 172-74.

<sup>61</sup> See *id.*

<sup>62</sup> See *id.*

<sup>63</sup> See *id.*

was not excusable under the state's policing interest.<sup>64</sup> In this particular case, the Court could not excuse such violent police behavior because the officers' actions came too close to torture.<sup>65</sup> As a result, the Court held that the police's conduct shocked the conscience, therefore violating Rochin's substantive due process right to liberty.<sup>66</sup>

After *Rochin*, the shocks the conscience test fell into disfavor due to its inherently subjective nature.<sup>67</sup> However, the Court resurrected the balancing test in 1998 in *County of Sacramento v. Lewis*.<sup>68</sup> In *Lewis*, a police officer pursued two suspects on a motorcycle in a high-speed chase.<sup>69</sup> The passenger fell off the motorcycle, and the police officer subsequently killed the passenger by accident.<sup>70</sup> The passenger's estate brought a Fourteenth Amendment claim alleging the deprivation of the passenger's substantive due process right to life.<sup>71</sup> The Ninth Circuit Court of Appeals reversed the district court's summary judgment ruling in favor of the officer.<sup>72</sup> The Ninth Circuit ultimately ruled for the passenger's estate, holding that deliberate indifference or reckless disregard for the right to life was necessary for a substantive due process violation.<sup>73</sup>

On appeal, the Supreme Court addressed the issue of substantive due process violations by executive actors.<sup>74</sup> The Court reestablished

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<sup>64</sup> See *id.*

<sup>65</sup> See *id.*

<sup>66</sup> See *id.*

<sup>67</sup> See, e.g., *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 860-65 (1998) (Scalia, J., concurring) (criticizing subjective nature of "shocks the conscience" test for executive substantive due process violations); see also Clifford B. Levine, *United Artists: Reviewing the Conscience Shocking Test Under Section 1983*, 1 SETON HALL CIRCUIT REV. 101, 108-10 (2005) (arguing that "shocks the conscience" test does not apply well to land use claims); Matthew D. Umhofer, *Confusing Pursuits: Sacramento v. Lewis and the Future of Substantive Due Process in the Executive Setting*, 41 SANTA CLARA L. REV. 438, 459 (2001) (arguing that Court incorrectly decided *Lewis* because "shocks the conscience" standard does not qualify as true test).

<sup>68</sup> See *Lewis*, 523 U.S. at 847-48; Robert Chesney, *Old Wine or New? The Shocks-the-Conscience Standard and the Distinction Between Legislative and Executive Action*, 50 SYRACUSE L. REV. 981, 1001-02 (2000); John T. Parry, *Constitutional Interpretation, Coercive Interrogation, and Civil Rights Litigation After Chavez v. Martinez*, 39 GA. L. REV. 733, 822 (2005).

<sup>69</sup> See *Lewis*, 523 U.S. at 836-37.

<sup>70</sup> See *id.*

<sup>71</sup> *Id.* at 837.

<sup>72</sup> *Id.* at 838.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 840.

the shocks the conscience test in holding that the police officer did not violate the decedent's substantive due process rights.<sup>75</sup> The Court explained that in the context of a high-speed automobile chase, where the police must make instantaneous judgments, only deliberate harms shock the conscience.<sup>76</sup> Although not a bright-line rule, the purpose of the test is to protect individuals from arbitrary government actions.<sup>77</sup> Further, the shocks the conscience test is highly context specific.<sup>78</sup> Thus, the Supreme Court resurrected the shocks the conscience test in overruling the Ninth Circuit's deliberate indifference or reckless disregard test.<sup>79</sup>

### B. Second Circuit Precedent

Prior to *Lewis*, the Second Circuit addressed the issue of substantive due process rights and involuntary commitments in *Rodriguez v. City of New York*.<sup>80</sup> In *Rodriguez*, Florangel Rodriguez voluntarily hospitalized herself to obtain sleeping pills fraudulently, but a doctor placed Rodriguez on an involuntary commitment after conducting a brief evaluation.<sup>81</sup> A staff psychiatrist interviewed Rodriguez, who demonstrated signs of depression, and concurred with the doctor that Rodriguez should remain in involuntary commitment.<sup>82</sup> After discharge, Rodriguez filed multiple claims, one of which was a Fourteenth Amendment claim against the evaluating physician.<sup>83</sup> The district court granted the defendant's motion for summary judgment on the Fourteenth Amendment claim because the hospital staff met the due process and state statutory requirements.<sup>84</sup>

On appeal, the Second Circuit vacated the district court's summary judgment determination.<sup>85</sup> The Second Circuit held that the proper medical standards for involuntary commitment were a question of fact for the jury and not a question of law as the district court stated.<sup>86</sup> The court then created a test for whether an involuntary commitment

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<sup>75</sup> *Id.* at 846-47, 855.

<sup>76</sup> *Id.* at 852-53.

<sup>77</sup> *Id.* at 846-47.

<sup>78</sup> *Id.* at 850.

<sup>79</sup> *Id.* at 852-54.

<sup>80</sup> See *Rodriguez v. City of New York*, 72 F.3d 1051, 1053-57 (2d Cir. 1995).

<sup>81</sup> *Id.* at 1054.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 1053.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 1053, 1066.

<sup>86</sup> *Id.*

violates a patient's substantive due process rights — the substantially below medical standards test.<sup>87</sup> Under this test, executive actors may not subject an individual to an involuntary commitment when the admissions evaluation does not conform to prevailing medical standards.<sup>88</sup> The Second Circuit vacated the grant of summary judgment against Rodriguez because genuine issues of material fact needed to be tried.<sup>89</sup> Specifically, the issues were: what constituted the general professional standards in the medical community regarding the circumstances permitting involuntary commitment; and, was the defendant's decision to commit Rodriguez proper under those standards.<sup>90</sup> Consequently, the court remanded the case to decide the factual issues.<sup>91</sup>

C. *Circuit Court Disagreement in Applying the Shocks the Conscience Test to Involuntary Commitments*

After *Lewis*, the circuit courts disagree over whether decisions to order involuntary commitments may ever constitute a substantive due process violation.<sup>92</sup> The Second Circuit follows the substantially below medical standards test established in *Rodriguez*.<sup>93</sup> The Ninth Circuit similarly adopted the substantially below medical standards test in *Jensen v. Lane County*.<sup>94</sup> In *Jensen* the court analyzed the level of certainty a doctor must possess to authorize an involuntary commitment.<sup>95</sup> The court ultimately found that the physician in *Jensen* acted pursuant to general medical standards described in the Oregon involuntary commitment statute.<sup>96</sup> Thus, the court held that Jensen

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<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 1065-66.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> Compare *Bolmer v. Oliveira* 594 F.3d 134, 148 (2d Cir. 2010) (citing *Rodriguez*, 72 F.3d at 1063) (holding that involuntary commitment decision made substantially below accepted standards of medical community violates substantive due process), with *Benn v. Universal Health Sys.*, 371 F.3d 165, 173-74 (3d Cir. 2004) (holding that accuracy or correctness of doctors' assessment for involuntary commitment does not shock conscience).

<sup>93</sup> See *Bolmer*, 594 F.3d at 148; *Jensen v. Lane Cnty.*, 312 F.3d 1145, 1147-48 (9th Cir. 2002) (citing *Rodriguez*, 72 F.3d at 1062).

<sup>94</sup> See *Jensen*, 312 F.3d at 1147-48.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

failed to allege sufficient facts to demonstrate that his treating physician acted in a manner substantially below medical standards.<sup>97</sup>

In contrast, the Tenth and Third Circuits have held that even if a doctor inadequately assesses the patient, such behavior does not shock the conscience.<sup>98</sup> The Tenth Circuit reasoned in *James v. Grand Lake Mental Health Center* that a physician's order to involuntary hospitalize a patient despite medical evidence to the contrary does not qualify as outrageous conduct.<sup>99</sup> Hence, *James* held that an involuntary commitment does not shock the conscience even when it allegedly lacks a strong medical basis.<sup>100</sup> Similarly, the Third Circuit held in *Benn* that inaccurately evaluating a patient's mental state does not violate substantive due process.<sup>101</sup> Thus, due to the conflicting approaches of the Federal Circuit Courts of Appeals over substantive due process violations in involuntary commitments in the aftermath of *Lewis*, the Second Circuit encountered a fragmented legal landscape upon rehearing the issue in *Bolmer*.<sup>102</sup>

## II. BENN AND BOLMER

The Third Circuit in *Benn v. Universal Health System* and the Second Circuit in *Bolmer v. Oliveira* disagreed regarding the application of the shocks the conscience test to involuntary emergency commitments.<sup>103</sup> *Benn* held that an improper involuntary commitment assessment does not always shock the conscience.<sup>104</sup> Conversely, *Bolmer* incorporated the below medical standards test from *Rodriguez* into the shocks the conscience analysis.<sup>105</sup> *Bolmer* held that assessments substantially below medical standards violate substantive due process rights.<sup>106</sup> Thus, *Benn* and *Bolmer* present disagreement between the Second and Circuits

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<sup>97</sup> *Id.*

<sup>98</sup> See *Benn v. Universal Health Sys.*, 371 F.3d 165, 174-75 (3d Cir. 2004); *James v. Grand Lake Mental Health Ctr.*, No. 97-5157, 1998 WL 664315, at \*7 (10th Cir. Sept. 24, 1998).

<sup>99</sup> See *James*, 1998 WL 664315, at \*9-10.

<sup>100</sup> *Id.*

<sup>101</sup> See *Benn*, 371 F.3d at 174-75.

<sup>102</sup> See *infra* Part II.B (noting circuit split over applying “shocks the conscience” test to involuntary commitment assessments).

<sup>103</sup> See *infra* Part II.A-B (describing circuit split).

<sup>104</sup> See *Benn*, 371 F.3d at 174-75.

<sup>105</sup> See *Bolmer v. Oliveira*, 594 F.3d 134, 142-45 (3d Cir. 2010).

<sup>106</sup> *Id.*

over applying the shocks the conscience test to emergency involuntary commitments.<sup>107</sup>

A. *Benn v. Universal Health System, Inc.: Improper Involuntary Commitments Do Not Violate Substantive Due Process Rights*

In *Benn*, Donald Benn contacted a mental healthcare facility to discuss obtaining treatment for his post-traumatic stress disorder.<sup>108</sup> While talking on the telephone to the crisis-line counselor, Benn exhibited behavior that the counselor interpreted as suicidal.<sup>109</sup> Upon the counselor's request, Benn arrived at the facility, where he participated in a forty-minute psychiatric interview.<sup>110</sup> After the interview, Benn left the facility, despite the interviewing counselor's request that Benn stay.<sup>111</sup> Still worried, the psychiatrist requested that doctors examine Benn for the possibility of an involuntary emergency commitment.<sup>112</sup> As a result, the police arrested Benn at his residence and escorted him in an ambulance to a different psychiatric hospital.<sup>113</sup> Another psychiatrist subsequently evaluated Benn for one hour, ultimately resulting in Benn's involuntary commitment to the clinic for three nights.<sup>114</sup> Benn then brought claims against numerous clinic employees for violations of his procedural and substantive due process rights.<sup>115</sup> The district court granted summary judgment for all defendants because they were not state actors and, thus, did not violate Benn's due process rights.<sup>116</sup>

On appeal, the Third Circuit held that the actions that led to Benn's commitment did not shock the conscience.<sup>117</sup> According to the Third Circuit, involuntary commitment itself does not violate an individual's substantive due process rights.<sup>118</sup> The court ruled that even erroneous evaluations for involuntary commitments may not be egregious or outrageous enough to shock the conscience.<sup>119</sup> Furthermore, the court

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<sup>107</sup> See *id.*; *Benn*, 371 F.3d at 174-75.

<sup>108</sup> See *Benn*, 371 F.3d at 168.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 168-69.

<sup>114</sup> *Id.* at 169.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 174-75.

<sup>118</sup> *Id.* at 174.

<sup>119</sup> *Id.* at 174-75.

held that even if the doctors made an inaccurate or inadequate evaluation, such actions were not sufficiently offensive to shock the conscience.<sup>120</sup>

B. *Bolmer v. Oliveira: Incorporating the Below Medical Standards Test into the Shocks the Conscience Test*

In *Bolmer*, the Second Circuit adopted the below medical standards test from *Rodriguez* into *Lewis*' shocks the conscience substantive due process analysis.<sup>121</sup> In *Bolmer*, Brett Bolmer received housing and outpatient care from the state agency Great Danbury Mental Health Authority ("GDMHA").<sup>122</sup> Bolmer developed a sexual relationship with his GDMHA case manager, Lisa Kaminski, whom he had known since childhood.<sup>123</sup> In September 2004, Bolmer placed roses on Kaminski's car, but Kaminski responded by ending the relationship.<sup>124</sup> Kaminski then notified GDMHA staff that Bolmer had placed roses on her car and called her twice.<sup>125</sup> Consequently, a GDMHA caseworker asked Bolmer to come to their facility.<sup>126</sup> Upon arriving at the facility, Bolmer was upset and speaking loudly.<sup>127</sup> Dr. Joseph Oliveira, a GDMHA psychiatrist unfamiliar with Bolmer, conducted a brief assessment of Bolmer's mental state.<sup>128</sup> Bolmer grew increasingly angry because no one appeared to believe his claims about his relationship with Kaminski.<sup>129</sup> In response, Oliveira summoned police and emergency medical technicians and ordered Bolmer's involuntary commitment.<sup>130</sup> At GDMHA's facility, staff members strapped Bolmer to a bed and injected him with antipsychotic medication.<sup>131</sup>

Bolmer subsequently alleged that GDMHA and its staff violated his substantive due process rights based on his involuntary commitment at the facility.<sup>132</sup> The district court, following the *Rodriguez* precedent,

<sup>120</sup> *Id.* at 175.

<sup>121</sup> *See Bolmer v. Oliveira*, 594 F.3d 134, 142-45 (2d Cir. 2010).

<sup>122</sup> *Id.* at 137.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 137-38.

<sup>127</sup> *Id.* at 138.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 136-37.



denied summary judgment.<sup>133</sup> Since the parties disputed material facts regarding whether the commitment decision fell substantially below medical standards, the court did not address whether Defendants were entitled to either qualified or Eleventh Amendment immunity.<sup>134</sup> The specific facts at issue were those surrounding Bolmer's commitment and the medical standards that regulated Oliveira's actions.<sup>135</sup>

The Second Circuit upheld the district court's denial of summary judgment and affirmed the district court's application of the substantially below medical standards test.<sup>136</sup> The court reiterated that the substantially below medical standards test is not an independent test, but is part of the shocks the conscience test articulated in *Lewis*.<sup>137</sup> Moreover, the Court emphasized that the shocks the conscience test is context-specific.<sup>138</sup> Because the emergency involuntary commitment context is inherently medical, the court reasoned that the substantially below medical standards test fits within the *Lewis* framework.<sup>139</sup> Thus, the court held that the substantially below medical standards test for involuntary commitment decisions is proper for determining whether such decisions shock the conscience.<sup>140</sup>

### III. ANALYSIS

Involuntary commitment decisions are inherently medical decisions, and involuntary commitment decisions made substantially below medical standards shock the conscience for the following reasons.<sup>141</sup> First, an involuntary commitment for medical treatment demands a medical justification.<sup>142</sup> Second, an involuntary commitment without a medical justification is an arbitrary exercise of government power with

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<sup>133</sup> *Id.* at 142-45.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 145.

<sup>136</sup> *Id.* at 145, 149.

<sup>137</sup> *Id.* at 142-45.

<sup>138</sup> *Id.* at 143.

<sup>139</sup> *Id.* at 144.

<sup>140</sup> *Id.* at 142-45.

<sup>141</sup> *See id.* at 141-46; *cf.* *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 853 (1998) (applying "shock the conscience" analysis to hurried decisions of prison officials); *Aguilar v. United States*, 510 F.3d 1, 22-23 (1st Cir. 2007) (applying "shock the conscience" analysis to detention by immigration officials).

<sup>142</sup> *See infra* Part III.A (arguing that medical context of involuntary commitment demands medical assessment).

no reasonable justification.<sup>143</sup> Finally, involuntary commitments demand medical assessments because the stigma associated with involuntary commitment is strong enough to deprive someone of their liberty.<sup>144</sup> Therefore, the Second Circuit in *Bolmer* properly incorporated the medical assessment requirement for emergency involuntary commitments into the shocks the conscience framework.<sup>145</sup>

A. *Involuntary Commitment for Psychiatric Treatment Without Medical Assessment Shocks the Conscience and Violates Substantive Due Process*

Courts use a balancing test to determine whether State action is sufficient to shock the conscience and violate an individual's substantive due process rights.<sup>146</sup> Courts weigh the State's interest in protecting public safety against the individual's liberty interest.<sup>147</sup> This balancing test is not applied identically in every case because courts apply this test to each case's specific facts.<sup>148</sup> For example, in the emergency involuntary commitment context, physicians perform evaluations to determine whether an individual is dangerous and/or incapable of survival based on medical standards.<sup>149</sup> Before extending

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<sup>143</sup> See *infra* Part III.B (arguing that conducting medical assessment below medical standards for involuntary commitments is arbitrary exercise of government power).

<sup>144</sup> See *infra* Part III.C (arguing that states can use stigma of involuntary commitment inappropriately for social control).

<sup>145</sup> See sources cited *supra* note 141.

<sup>146</sup> See *Lewis*, 523 U.S. at 847 n.8; see, e.g., *Aguilar*, 510 F.3d at 22-23 (applying *Lewis* balancing test to determine if government's conduct "shocks the conscience"); see also *Fallon*, *supra* note 44, at 317-27 (explaining application of balancing test for substantive due process prior to *Lewis* decision).

<sup>147</sup> See *Bolmer*, 594 F.3d at 142; see also *Krongard*, *supra* note 46, at 113 (stating that Court balanced individual liberty interests with state safety interests in substantive due process cases concerning involuntary commitments); cf. *Kansas v. Hendricks*, 521 U.S. 346, 356-57 (1997) (applying balancing test to involuntary commitment of sex offenders).

<sup>148</sup> See *Lewis*, 523 U.S. at 850; *Bolmer*, 594 F.3d at 143, 145; *Aguilar*, 510 F.3d at 22-23.

<sup>149</sup> See, e.g., CAL. WELF. & INST. CODE § 5151 (Deering 2010) (stating that there must be initial preadmission medical evaluation for involuntary commitment); N.Y. MENTAL HYG. LAW § 9.39(a) (Consol. 2009) (stating that there must be medical examination performed prior to admission for involuntary commitment); TEX. HEALTH & SAFETY CODE ANN. § 573.022 (West 2010) (stating that physician must provide written statement after preliminary evaluation that patient meets statutory requirements for admission). But see Nancy B. Engleman, et al., *Clinicians' Decision Making About Involuntary Commitment*, 49 PSYCHIATRIC SERVICES 941, 944-45 (1998) (studying factors influencing commitment decisions, which included statutory criteria, personality, and setting).

the emergency into an “official” involuntary commitment, however, physicians must reevaluate the patient to determine if he or she meets the criteria for a longer period of detention.<sup>150</sup> Consequently, in cases involving involuntary commitments, which are medical procedures, the shocks the conscience analysis occurs in a medical context.<sup>151</sup>

Further in *Lewis*, the Supreme Court effectively stated that the shocks the conscience test is not a bright-line rule.<sup>152</sup> The standards applied in the shocks the conscience test change based on the specific situation in which the executive action occurred.<sup>153</sup> Hence, the balancing test heavily depends on the circumstances of the alleged violation.<sup>154</sup> The circumstances of an involuntary commitment are purely medical.<sup>155</sup> Otherwise, executive actors violate an individual’s liberty interest protected by substantive due process to avoid arbitrary detention.<sup>156</sup> Thus, the circumstances of all involuntary commitments are purely medical.<sup>157</sup>

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<sup>150</sup> See, e.g., WELF. & INST. § 5152 (mandating that post-admission evaluation by treating psychiatrist required to determine if seventy-two hour detention necessary for treatment); MENTAL HYG. § 9.39(a) (requiring release of patient after forty-eight hours unless dangerousness confirmed by second staff psychiatrist); HEALTH & SAFETY § 573.023(b) (requiring facility administrator to release patient any time during section 573.021 forty-eight hour period if medical criteria of section 573.022(a)(2) ceases to apply).

<sup>151</sup> Compare *Bolmer*, 594 F.3d at 143-44 (finding that “shocks the conscience” test should be analyzed in medical context for involuntary commitments), with *Benn v. Universal Health Sys.*, 371 F.3d 165, 174-75 (3d Cir. 2004) (omitting discussion of context in “shocks the conscience” analysis), and *James v. Grand Lake Mental Health Ctr.*, No. 97-5157, 1998 WL 664315, at \*7 (10th Cir. Sept. 24, 1998) (ignoring context of “shocks the conscience” test).

<sup>152</sup> See *Lewis*, 523 U.S. at 853; *Williams v. Berney*, 519 F.3d 1216, 1220 (10th Cir. 2008); *Delgado v. Pawtucket Police Dep’t*, 747 F. Supp. 2d 341, 349 (D.R.I. 2010); *AFGE v. District of Columbia*, 689 F. Supp. 2d 30, 36 (D.D.C. 2009); *Slusarchuk v. Hoff*, 228 F. Supp. 2d 1007, 1015 (D. Minn. 2002).

<sup>153</sup> See *Lewis*, 523 U.S. at 850; *Bolmer*, 594 F.3d at 143-44; *Aguilar*, 510 F.3d at 22-23.

<sup>154</sup> See sources cited *supra* note 153.

<sup>155</sup> See sources cited *supra* note 153.

<sup>156</sup> Cf. *Lewis*, 523 U.S. at 852 n.12 (asserting that involuntarily committed patient’s total dependence on State creates duty of care to provide reasonable treatment); *Youngberg v. Romeo*, 457 U. S. 307, 319-325 (1982) (holding that patient with developmental disability could claim violation of substantive due process if institutional medical staff failed to exercise professional judgment); Rosalie Berger Levinson, *Reining in Abuses of Executive Power Through Substantive Due Process*, 60 FLA. L. REV. 519, 534 (2010) (stating that Supreme Court has held that constitutional requirement to care and protect is only found in situations where individual’s freedom is significantly limited).

<sup>157</sup> See *Bolmer*, 594 F.3d at 143-44. But cf. *United States v. Comstock*, 130 S. Ct. 1949, 1954 (2010) (upholding federal statute permitting involuntary commitment of

Accordingly, when analyzing whether an involuntary commitment shocks the conscience, courts must utilize a balancing test grounded in medical standards.<sup>158</sup> For example, if sufficient medical evidence suggests an individual will adversely affect public safety, then the individual's liberty interest is insufficient to prevent involuntary commitment.<sup>159</sup> Conversely, an individual's liberty interest to avoid involuntary commitment is sufficient when the state fails to provide a sufficient medical justification.<sup>160</sup>

As a result, *Bolmer's* substantially below medical standards test is the correct application of the shocks the conscience analysis to involuntary commitment decisions.<sup>161</sup> The Second Circuit recognized the context-specific quality of the shocks the conscience analysis and created an appropriate context-specific test.<sup>162</sup> However, the Third Circuit in *Benn* did not attempt to adapt the shocks the conscience test to the medical context of involuntary commitments.<sup>163</sup> Instead, *Benn* held that even an incorrect medical assessment cannot shock the conscience.<sup>164</sup> Therefore, due to the Second Circuit's willingness to

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persons with mental illness and sexually dangerous predators after end of criminal prison sentence); *Kansas v. Hendricks*, 521 U.S. 346, 350, 356-57 (1997) (holding that state statute authorizing involuntary commitment of convicted sex offenders did not violate substantive due process).

<sup>158</sup> See *Bolmer*, 594 F.3d at 143-44. Compare *Mongeau v. City of Marlborough*, 492 F.3d 14, 17-20 (1st Cir. 2007) (holding that "shocks the conscience" in context of land use disputes must rise above hostility and animus typical of such disputes), with *Aguilar*, 510 F.3d at 22-23 (stating that court might alter "shocks the conscience" analysis if large number of children endangered due to context-specific application of test).

<sup>159</sup> See *O'Connor v. Donaldson*, 422 U.S. 563, 582-83 (1975); see also *Anfang & Appelbaum*, *supra* note 17, at 211 (describing limitation of *parens patriae* power to situations of immediate danger). See generally Christyne E. Ferris, Note, *The Search for Due Process in Civil Commitment Hearings: How Procedural Realities Have Altered Substantive Standards*, 61 VAND. L. REV. 959, 966 (2008) (describing use of state police power as justification for involuntary commitment).

<sup>160</sup> See *Bolmer*, 594 F.3d at 143-44. But see *Benn v. Universal Health Sys.*, 371 F.3d 165, 174-75 (3d Cir. 2004); *James v. Grand Lake Mental Health Ctr.*, No. 97-5157, 1998 WL 664315, at \*7 (10th Cir. Sept. 24, 1998).

<sup>161</sup> See *Bolmer*, 594 F.3d at 143-44; cf. *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 850-53 (1998) (discussing context-specific nature of "shocks the conscience" test). But see *Benn*, 371 F.3d at 174-75; *James*, 1998 WL 664315, at \*7.

<sup>162</sup> See *Bolmer*, 594 F.3d at 143-44; *Rodriguez v. City of New York*, 72 F.3d 1051, 1064 (2d Cir. 1995); cf. *Lewis*, 523 U.S. at 850-53 (discussing context-specific nature of "shocks the conscience" test).

<sup>163</sup> See *Benn*, 371 F.3d at 174-75; see also *James*, 1998 WL 664315, at \*7. But cf. *Lewis*, 523 U.S. at 850-53 (discussing context-specific nature of "shocks the conscience" test).

<sup>164</sup> See *Benn*, 371 F.3d at 174-75; *James*, 1998 WL 664315, at \*7. But see *Bolmer*,

follow the *Lewis* precedent, the Supreme Court should adopt the medical assessment requirement in *Bolmer*.<sup>165</sup>

Some argue that even if assessments concerning involuntary commitments not rising to the level of medical standards are wrong, they do not shock the conscience.<sup>166</sup> Further, they argue that involuntary commitments performed pursuant to state statutes that meet the rationality test do not shock the conscience.<sup>167</sup> Under this logic, only an intentional violation of the statute would likely rise to the shocks the conscience standard because even a grossly negligence medical evaluation could potentially follow the statute.<sup>168</sup> Thus, involuntary commitments based upon assessments made substantially below medical standards are constitutionally permissible because they do not shock the conscience.<sup>169</sup>

However, this argument fails because behavior that shocks the conscience does not need to be intentional.<sup>170</sup> In *Lewis* the Court held that behavior that shocks the conscience could be unintentional depending on the circumstances, and lower courts have followed this precedent.<sup>171</sup> For example, extreme recklessness or gross negligence

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594 F.3d at 143-44.

<sup>165</sup> See *Bolmer*, 594 F.3d at 143-44; *Rodriguez*, 72 F.3d at 1064; cf. *Lewis*, 523 U.S. at 850-53 (discussing context-specific nature of “shocks the conscience” test).

<sup>166</sup> See *Benn*, 371 F.3d at 174-75; *James*, 1998 WL 664315, at \*7. *Contra Bolmer*, 594 F.3d at 143-44.

<sup>167</sup> See, e.g., *Benn*, 371 F.3d at 174-75 (stating that *Benn*’s commitment under Pennsylvania’s Mental Health Procedures Act satisfied requirements of substantive due process); *James*, 1998 WL 664315, at \*7 (stating that claimant should have brought claim under Fourth Amendment; nevertheless, claimed violation does not rise to “shocks the conscience” standard). *Contra Bolmer*, 594 F.3d at 143-44.

<sup>168</sup> Cf. *James*, 1998 WL 664315, at \*6 (stating that courts require deliberate indifference to shock the conscience, while gross negligence is insufficient); *Hovater v. Robinson*, 1 F.3d 1063, 1066 (10th Cir. 1993) (stating that deliberate indifference requires higher standard than gross negligence). *But cf. Lewis*, 523 U.S. at 850-53 (stating application of “shocks the conscience” test should be context specific).

<sup>169</sup> See *Benn*, 371 F.3d at 174-75; cf. *James*, 1998 WL 664315, at \*6 (reaching similar conclusion as *Benn* but not addressing whether medical assessment met standards). *But see Bolmer*, 594 F.3d at 143-44.

<sup>170</sup> See *Bolmer*, 594 F.3d at 142-43 (stating that gross negligence can satisfy “shocks the conscience” standard); cf. *Lewis*, 523 U.S. at 849 (citing *Daniels v. Williams*, 474 U.S. 327, 334 n.3 (1986)) (“Thus, in a due process challenge to executive action, the threshold question is whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.”). Despite the force of Court’s language in *Lewis*, there is nothing there which expressly and definitively states executive conduct must be intentional or purposive to rise to conscience-shocking levels. See *Lewis*, 523 U.S. at 849. *But see James*, 1998 WL 664315, at \*6.

<sup>171</sup> See *Lewis*, 523 U.S. at 849; *Porter v. Osborn*, 546 F.3d 1131, 1138 (9th Cir.

can shock the conscience.<sup>172</sup> Therefore, the shocks the conscience test could apply to unintentional deprivations of liberty.<sup>173</sup>

Further, the Second Circuit's medical standards test fits within the Court's *Lewis* framework.<sup>174</sup> If such involuntary commitment decisions fall substantially below medical standards, then the state actor violates the individual's liberty interest.<sup>175</sup> Due to the liberty interests at stake, a doctor who intentionally or recklessly violates a patient's substantive due process rights should be held liable.<sup>176</sup> Therefore, the Second Circuit's requirement of a medical evaluation for an involuntary commitment using the substantially below medical standards test is proper.<sup>177</sup>

*B. Involuntary Commitment Without Adequate Psychiatric Assessment  
is an Arbitrary Exercise of Government Power Without Any Reasonable  
Justification*

The State enjoys the power to order involuntary commitments in emergencies based on current public safety concerns.<sup>178</sup> However, the State may not arbitrarily and capriciously exercise its power to promote public safety.<sup>179</sup> Thus, in the context of involuntary

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2008); *Sanford v. Virginia*, No. 3:08cv835, 2009 U.S. Dist LEXIS 76041, at \*1, \*13 (E.D. Va. Aug. 25, 2009); *Irick v. City of Phila.*, No. 07-0013, 2008 U.S. Dist LEXIS 40496, at \*1, \*16 (E.D. Pa. May 19, 2008); *Hickey v. City of New York*, No. 01 Civ. 6506 (GEL), 2004 U.S. Dist LEXIS 23941, at \*1, \*48 (S.D.N.Y. Nov. 24, 2004).

<sup>172</sup> See *Lewis*, 523 U.S. at 849 (citing *Daniels v. Williams*, 474 U.S. 327, 334 n.3 (1986)); *Bolmer*, 594 F.3d at 142-43 (stating that gross negligence can satisfy "shocks the conscience" standard). *But see James*, 1998 WL 664315, at \*6 (rejecting gross negligence standard for "shocks the conscience" test).

<sup>173</sup> See sources cited *supra* note 172.

<sup>174</sup> See *Lewis*, 523 U.S. at 850-53; *Bolmer*, 594 F.3d at 143-44; *see also Rodriguez v. City of New York*, 72 F.3d 1051, 1063-64 (2d Cir. 1995).

<sup>175</sup> See sources cited *supra* note 174.

<sup>176</sup> See sources cited *supra* note 174.

<sup>177</sup> See sources cited *supra* note 174.

<sup>178</sup> See *Addington v. Texas*, 441 U.S. 418, 425-27 (1979) (holding that courts should balance individual's deprivation of liberty against State's *parens patriae* powers); *Doby v. DeCrescenzo*, 171 F.3d 858, 870 (3d Cir. 1999); *Project Release v. Prevost*, 722 F.2d 960, 974 (2d Cir. 1983); *Covell v. Smith*, No. 95-501, 1996 U.S. Dist LEXIS 19454, at \*1, \*13 (E.D. Pa. Dec. 30, 1996); *Luna v. Van Zandt*, 554 F. Supp. 68, 76 (S.D. Tex. 1982).

<sup>179</sup> See *Lewis*, 523 U.S. at 843; *Prevost*, 722 F.2d at 974; *cf. Doby*, 171 F.3d at 869-70 (agreeing in part, but also stating that in some emergency situations non-physicians may constitutionally order involuntary commitment).

commitments, the State must have a reasonable justification to impose an involuntary commitment on one of its citizens.<sup>180</sup>

Almost all states claim that promoting the public safety is a reasonable justification for an involuntary commitment.<sup>181</sup> Further, governmental actions without any reasonable justification are arbitrary when they deprive an individual of liberty.<sup>182</sup> However, the Supreme Court has held that dangerousness is the only reasonable justification for the deprivation of liberty involved in an involuntary commitment.<sup>183</sup> Thus, in the context of involuntary commitments, states must provide evidence that individuals are dangerous and/or incapable of survival to avoid arbitrary curtailments of individual liberty.<sup>184</sup>

No reasonable justification exists for involuntary commitment decisions that are made substantially below medical standards.<sup>185</sup> Such involuntary commitment decisions occur in the medical context because doctors make such decisions according to statute.<sup>186</sup> Decisions

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<sup>180</sup> See *Lewis*, 523 U.S. at 842-43; *Youngberg v. Romeo*, 457 U.S. 307, 323 (1982); *Bolmer v. Oliveira*, 594 F.3d 134, 144 (2d Cir. 2010); *Doby*, 171 F.3d at 871.

<sup>181</sup> See *Anfang & Appelbaum*, *supra* note 17, at 211 (explaining state involuntary commitment statutes changed after *Donaldson*); see also HOLSTEIN, *supra* note 17, at 19-25 (stating that nearly all states codified dangerousness model). See generally *Beis*, *supra* note 7, at 358-69 (summarizing involuntary commitment statutes).

<sup>182</sup> See *Lewis*, 523 U.S. at 845-47; see also Michael L. Perlin, *On "Sanism,"* 46 SMU L. REV. 373, 402-03 (1992) (stating that patients may only challenge most arbitrary and unreasonable involuntary commitment decisions); Brian Smith, Note, *Charles Demore v. Hyung Joon Kim: Another Step Away from Full Due Process Protections*, 38 AKRON L. REV. 207, 211 (2005) (stating that there must be some reasonable relationship between nature and duration of involuntary commitment with its purpose).

<sup>183</sup> See *Addington*, 441 U.S. at 425-27; *O'Connor v. Donaldson*, 422 U.S. 563, 576 (1975); see also HOLSTEIN, *supra* note 17, at 19-25 (noting that states adopted dangerousness model following *Donaldson*).

<sup>184</sup> See *Addington*, 441 U.S. at 425-27 (holding that burden of proof for involuntary commitments is clear and convincing evidence); *Bolmer*, 594 F.3d at 143-45; *Doby*, 171 F.3d at 869-70.

<sup>185</sup> See *Bolmer*, 594 F.3d at 143-45; see also Perlin, *supra* note 182, at 402-03 (stating that individual may only challenge most arbitrary and unreasonable involuntary commitment decisions); Smith, *supra* note 182, at 211 (stating that there must be some reasonable relationship between nature and duration of involuntary commitment with its purpose).

<sup>186</sup> See *supra* Part III.A (arguing that involuntary commitment decisions occur in medical context); see, e.g., CAL. WELF. & INST. CODE § 5151 (Deering 2010) (stating that professional in charge of facility must perform initial preadmission evaluation); N.Y. MENTAL HYG. LAW § 9.39(a) (McKinney 2010) (stating that examiners must be physicians); TEX. HEALTH & SAFETY CODE ANN. § 573.022 (West 2010) (requiring physician to provide written statement after preliminary evaluation that patient meets

that are substantially below medical standards fail to serve a medical purpose.<sup>187</sup> Because the purpose of involuntary commitment decisions is inherently medical, commitment decisions made without an underlying medical purpose are inherently arbitrary.<sup>188</sup> Therefore, with the Supreme Court holding that involuntary commitments are severe curtailments of liberty, such decisions arbitrarily violate an individual's substantive due process rights.<sup>189</sup>

The Court should adopt the *Bolmer* test based on these principles because involuntary commitments below medical standards are an arbitrary exercise of executive power.<sup>190</sup> The substantially below medical standards test from *Bolmer* defines the context of the analysis as medical.<sup>191</sup> In such a context, executive actors would be liable for assessments made substantially below medical standards due to the

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statutory requirements for admission).

<sup>187</sup> See *Bolmer*, 594 F.3d at 143-45 (applying *Rodriguez's* language of no reasonable justification to civil commitment decisions made without medical basis); *Rodriguez v. City of New York*, 72 F.3d 1051, 1063 (2d Cir. 1995).

<sup>188</sup> *Lewis* grappled with the question of whether liability for certain executive law enforcement conduct fell under a Fourth Amendment "reasonableness" analysis or a Fourteenth Amendment "arbitrariness" analysis. See *Lewis*, 523 U.S. at 842-43. The Court decided that a more concrete and specific Constitutional provision, where applicable to the claim, must form the basis of that claim instead of the more slippery, indefinable Due Process standard. Involuntary commitment is meant to serve an inherently medical purpose because it is designed to safeguard an individual's physical and mental well-being. Therefore, if involuntary commitments that serve no underlying medical purpose are allowed to take place, those commitments become arbitrary within the meaning of that word under the Court's Fourteenth Amendment jurisprudence. See *id.* at 847. This leads to the conclusion that such commitments are "offensive" or "egregious" enough to shock the conscience, thus constituting a violation of substantive Due Process. See *id.* (noting that "arbitrary" executive action is in turn "conscience-shocking" which is standard for determining violation of one's substantive Due Process rights); Perlin, *supra* note 182, at 402; Smith, *supra* note 182, at 211.

<sup>189</sup> See sources cited *supra* note 188; cf. *Lewis*, 523 U.S. at 852 n.12 (discussing *Youngberg v. Romeo*, 457 U.S. 307, 73 (1982) and substantive due process violation by mental institution professionals for failing to exercise professional judgment by restraining and physically injuring patient with developmental disabilities).

<sup>190</sup> See *Bolmer*, 594 F.3d at 143-44; see also *Rodriguez*, 72 F.3d at 1064.

<sup>191</sup> *Bolmer*, 594 F.3d at 148.



arbitrariness of their decisions.<sup>192</sup> Thus, the *Bolmer* medical standards test restricts arbitrary State action.<sup>193</sup>

In contrast, the Third Circuit's approach in *Benn* gives the impression of permitting the arbitrary exercise of State power.<sup>194</sup> The court in *Benn* ignores the Supreme Court's context-specific precedent from *Lewis* in limiting the reasonable justifications for involuntary commitment to the dangerousness standard.<sup>195</sup> In fact, the court clearly states that whether or not the doctors in the case preformed a proper medical analysis of *Benn*, their conduct did not violate substantive due process.<sup>196</sup> The court does not provide an extensive analysis as to why performing an improper medical analysis does not shock the conscience.<sup>197</sup> By failing to explain why a medical assessment made below medical standards does not shock the conscience, the Third Circuit appears to potentially enable involuntary commitment without a medical basis.<sup>198</sup> Therefore, *Benn* does not apply the shocks the conscience standard in a context-specific manner, and as a result the court seems to open the door to arbitrary governmental action in involuntary commitments.<sup>199</sup>

Some legal scholars and mental health professionals use the medical context of involuntary commitments to argue that the current

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<sup>192</sup> See *Bolmer*, 594 F.3d at 143-45; see also Perlin, *supra* note 182, at 402-03 (stating that individual may only challenge most arbitrary and unreasonable involuntary commitment decisions); Smith, *supra* note 182, at 211 (stating that there must be some reasonable relationship between nature and duration of involuntary commitment with its purpose).

<sup>193</sup> See *supra* note 192.

<sup>194</sup> See *Benn v. Universal Health Sys.*, 371 F.3d 165, 174-75 (3d Cir. 2004); see also Perlin, *supra* note 182, at 402-03 (stating that individual may only challenge most arbitrary and unreasonable involuntary commitment decisions); Smith, *supra* note 182, at 211 (stating that there must be some reasonable relationship between nature and duration of involuntary commitment with its purpose).

<sup>195</sup> See *Benn*, 371 F.3d at 174-75 (ignoring context specific standard for "shocks the conscience" analysis in *O'Connor v. Donaldson*, 422 U.S. 563, 577 (1975) by failing to consider why improper medical assessment for involuntary commitment is not arbitrary exercise of government power); see also HOLSTEIN, *supra* note 17, at 19-25 (stating that dangerousness model is codified by statute in nearly all states). See generally Anfang & Appelbaum, *supra* note 17, at 211 (explaining that state involuntary commitment statutes revised to conform to *Donaldson's* dangerousness standard); Beis, *supra* note 7, at 358-69 (summarizing involuntary commitment statutes).

<sup>196</sup> See *Benn*, 371 F.3d at 174-75.

<sup>197</sup> See *id.*

<sup>198</sup> See *id.*

<sup>199</sup> See *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 850 (1998); *Bolmer*, 594 F.3d at 143-45. But see *Benn*, 371 F.3d at 174-75.

dangerousness model is ineffective.<sup>200</sup> They claim that the dangerousness model is insufficient to provide adequate medical care.<sup>201</sup> Further, the limited duration of an emergency involuntary commitment does not afford doctors enough time to provide adequate medical assessment and treatment.<sup>202</sup> Therefore, some legal scholars developed model involuntary commitment codes aiming to increase the volume of patients and the duration of treatment for the persons with mental illness.<sup>203</sup> Proponents of these commitment codes suggest that such changes will provide better treatment of persons with severe mental illness and avoid unsubstantiated involuntary commitments.<sup>204</sup>

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<sup>200</sup> See, e.g., Jonathan Stanley, *Important Aspects of the Model Law*, TREATMENT ADVOCACY CENTER MODEL LAW, TREATMENT ADVOCACY CENTER, [http://www.treatmentadvocacycenter.org/index.php?option=com\\_content&task=view&id=49&Itemid=78](http://www.treatmentadvocacycenter.org/index.php?option=com_content&task=view&id=49&Itemid=78) (last visited Oct. 2, 2011) (advocating for stricter involuntary commitment standards); E. Fuller Torrey & Mary T. Zdanowicz, *Introduction*, TREATMENT ADVOCACY CENTER MODEL LAW, TREATMENT ADVOCACY CENTER, [http://www.treatmentadvocacycenter.org/index.php?option=com\\_content&task=view&id=49&Itemid=78](http://www.treatmentadvocacycenter.org/index.php?option=com_content&task=view&id=49&Itemid=78) (last visited Oct. 2, 2011) (arguing that current involuntary commitment statutes are too lenient to protect public safety).

<sup>201</sup> See sources cited *supra* note 200.

<sup>202</sup> See Mary L. Durham & John Q. La Fond, "Thank You, Dr. Stone": A Response to Dr. Alan Stone and Some Further Thoughts on the Wisdom of Broadening the Criteria for Involuntary Therapeutic Commitment of the Mentally Ill, 40 RUTGERS L. REV. 865, 870-83 (1988) (advocating for broadening standards for involuntary commitment beyond dangerousness standard); Pincus, *supra* note 38, at 1776-83 (exposing bias against mental illness because involuntary commitment statutes are based on future assumptions not present fact); Sarah E. Barclay, *Increasing the Temporary Detention Period Prior to a Civil Commitment Hearing: Implications and Recommendations for the Commonwealth of Virginia Commission on Mental Health Law Reform*, at 10-12 (Apr. 2008), available at [http://www.courts.state.va.us/programs/cmh/2008\\_04\\_tdo\\_period\\_barclay\\_report.pdf](http://www.courts.state.va.us/programs/cmh/2008_04_tdo_period_barclay_report.pdf) (concluding that Virginia's two-day detention period is inadequate and should be extended).

<sup>203</sup> See Stanley, *supra* note 201; Torrey & Zdanowicz, *supra* note 201; cf. Henry A. Dlugacz, *Involuntary Outpatient Commitment: Some Thoughts on Promoting a Meaningful Dialogue Between Mental Health Advocates and Lawmakers*, 53 N.Y.L. SCH. L. REV. 79, 90 (2009) (presenting results of study suggesting that involuntary outpatient commitment is most effective when longer than six months).

<sup>204</sup> See, e.g., Dora W. Klein, *Involuntary Treatment of the Mentally Ill*, 27 VT. L. REV. 649, 680 (2003) (arguing that decision to order involuntary commitment based upon benefits to patient is better than autonomy standard); see also Stefan, *supra* note 38, at 1350-72 (arguing that improvements could counter fact that stigma against persons with mental illness discredits group's political influence); Pincus, *supra* note 38, at 1782-83 (exposing bias against mental illness because involuntary commitment statutes are based on future assumptions not present fact); Stanley, *supra* note 201 (suggesting involuntary commitment law reform); Torrey & Zdanowicz, *supra* note 201 (explaining why such reform would benefit both patients with mental illness and society).

However, such challenges to the current dangerousness model harm individual rights and ignore Supreme Court precedent.<sup>205</sup> Such a massive change to involuntary commitment laws would require the Supreme Court to overrule *O'Connor v. Donaldson*.<sup>206</sup> In *Donaldson* the Court rejected involuntary commitments based solely on the purpose of providing treatment for persons with mental illness because this would infringe on their individual liberty.<sup>207</sup> Therefore, any calls to abandon the dangerousness model are unconstitutional.<sup>208</sup> Interestingly, advocates for patients' rights, physicians, and advocates for greater deference to state power have all criticized this model.<sup>209</sup> Yet the Supreme Court rejected such justifications because only dangerousness justifies involuntary commitment.<sup>210</sup> Thus, states may impose involuntary commitments on persons with mental illness if they are a danger to themselves or others.<sup>211</sup>

C. *The Stigma of Involuntary Hospitalization Has Tremendous Negative Effects on Individual Liberty*

The stigma surrounding mental illness presents itself in ways that severely curtail individual liberty.<sup>212</sup> For example, federal law and most state laws prohibit the sale of a firearm to someone who has

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<sup>205</sup> See *Youngberg v. Romeo*, 457 U.S. 307, 322-23 (1982); *Mills v. Rogers*, 457 U.S. 291, 298-99 (1982); *O'Connor v. Donaldson*, 422 U.S. 563, 577 (1975).

<sup>206</sup> See sources cited *supra* note 205.

<sup>207</sup> See sources cited *supra* note 205.

<sup>208</sup> See sources cited *supra* note 205. *But see* *Cooper v. Oklahoma*, 517 U.S. 348, 368 (1996) (admitting that Court has not explored outer limits of involuntary commitments).

<sup>209</sup> See, e.g., Bloom, *supra* note 27, at 433-38 (arguing for reform of contemporary involuntary commitment laws); Durham & La Fond, *supra* note 202, at 870-83 (advocating for broadening standards for involuntary commitment beyond dangerousness standard); Klein, *supra* note 204, at 649-53 (arguing that standard for involuntary commitment should not be focused on individual autonomy).

<sup>210</sup> See *Donaldson*, 422 U.S. at 576-77; see also HOLSTEIN, *supra* note 17, at 19-25 (stating that nearly all states codified dangerousness model); cf. Anfang & Appelbaum, *supra* note 17, at 211 (explaining state involuntary commitment statute changes after *Donaldson* to require dangerousness or provision of treatment). See generally Beis, *supra* note 7, at 358-69 (summarizing involuntary commitment statutes).

<sup>211</sup> See *Youngberg v. Romeo*, 457 U.S. 307, 319-20 (1982); *Mills v. Rogers*, 457 U.S. 291, 299 (1982); *Donaldson*, 422 U.S. at 576.

<sup>212</sup> See, e.g., Markin, *supra* note 38, at 181-85 (investigating defamation law in context of allegations of mental illness); Stefan, *supra* note 38, at 1350-72 (arguing that stigma against persons with mental illness discredits their political influence); Pincus, *supra* note 38, at 1782-83 (exposing bias against mental illness because involuntary commitment statutes are based on assumptions not present fact).

recently been committed to a mental institution.<sup>213</sup> Moreover, an involuntary commitment may impede or prevent an individual from pursuing various professions, such as serving in the military or practicing as an attorney.<sup>214</sup> Certainly involuntary commitments have great potential for infringement on individual liberty interests and may affect persons with and without mental illness.<sup>215</sup>

Furthermore, the possibility of governmental abuse of involuntary commitments for social control demands strong protections against such a significant deprivation of liberty.<sup>216</sup> For example, the United States abused involuntary psychiatric treatment between 2003 and 2008 by administering injections of antipsychotic medications to immigrant deportees.<sup>217</sup> In fact, between those years, the Government

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<sup>213</sup> See 18 U.S.C. § 922(g)(4) (2006); *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3047 (2010) (citing *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008)) (declaring that holding does not cast doubt on long-standing prohibitions against gun ownership by persons with mental illness); see also Eve Bender, *Most States Say Mental Illness Reason to Bar Gun Ownership*, 41.17 PSYCHIATRIC NEWS 6, 6 (2006) (reporting that in 2005, 43 states, Washington, D.C., and Puerto Rico prohibited persons with mental illness from obtaining firearm licenses).

<sup>214</sup> See, e.g., U.S. DEP'T OF ARMY, REG. 40-501, STANDARDS OF MEDICAL FITNESS 14-15 (AUG. 4, 2011), available at [http://armypubs.army.mil/epubs/pdf/r40\\_501.pdf](http://armypubs.army.mil/epubs/pdf/r40_501.pdf) (declaring that applicant with history of inpatient treatment or residential facility does not meet standard); Melanie C. Scott et al., *Character and Fitness to Take the Bar Exam*, 37 J. AM. ACAD. PSYCHIATRY & L. 111, 111-13 (2009) (examining *In re Application of Blackwell*, 880 N.E.2d 886 (Ohio 2007), where court upheld denial of bar membership due to applicant's psychological evaluation); see also David Baum, *Suffering in Silence: The Tension Between Self-Disclosure and a Law School's Obligation to Report*, 18 AM. U. J. GENDER SOC. POL'Y & L. 121, 124-25 (2010) (describing consequences of author's decision to disclose civil commitment to bar examiners).

<sup>215</sup> See *Vitek v. Jones*, 445 U.S. 480, 491-92 (1980); *Parham v. J.R.*, 442 U.S. 584, 601 (1979); *Humphrey v. Cady*, 405 U.S. 504, 509 (1972); see also Stone, *supra* note 46, at 49 (arguing that outpatient treatment would reduce stigma of involuntary inpatient commitment).

<sup>216</sup> See *Humphrey*, 405 U.S. at 509 (utilizing juries to further protect liberty interests of committed persons). See generally John Q. La Fond, *Washington's Sexually Violent Predator Law: A Deliberate Misuse of the Therapeutic State for Social Control*, 15 U. PUGET SOUND L. REV. 655, 662 (1992) (arguing that evidence shows that most sex offenders do not have mental illnesses, despite state statute labeling them as such); Justin Engel, Comment, *Constitutional Limitations on the Expansion of Involuntary Civil Commitment for Violent and Dangerous Offenders*, 8 U. PA. J. CONST. L. 841, 847-72 (2006) (exploring social control possibilities of expanding use of civil commitment in place of traditional criminal punishments).

<sup>217</sup> See Amy Goldstein & Dana Priest, *Some Detainees Are Drugged For Deportation: Immigrants Sedated Without Medical Reason*, WASH. POST, May 14, 2008, at A1; Dianne Solis, *U.S. Cuts Back on Sedating Deportees with Haldol*, SEATTLE TIMES, Jan. 5, 2009, at A5; Rob Schimtz, *Two Immigrants Say U.S. Agents Drugged Them*, NPR (May 13, 2007), <http://www.npr.org/templates/story/story.php?storyId=10158522>.

sedated 384 deportees, 356 of which with the antipsychotic Haloperidol, a strong sedative with severe side effects.<sup>218</sup> Through these actions, even recent history suggests that the United States may use involuntary commitments for social control.<sup>219</sup> Thus, strong judicial protection is necessary to prevent governmental abuse and eliminate the debilitating stigma of the “mentally ill” label.<sup>220</sup>

As the Supreme Court noted in *Donaldson*, involuntary commitments are tremendous infringements on individual liberty.<sup>221</sup> In no other context may executive actors detain American citizens against their will without due process of law.<sup>222</sup> Moreover the stigma of mental illness creates additional potential infringements upon individual liberty.<sup>223</sup> For these reasons, courts must curtail the promulgation of life-altering, unnecessary involuntary commitments by requiring higher standards in involuntary commitment assessments.<sup>224</sup> Additionally, not only should courts strictly enforce the dangerousness standard for involuntary commitments, but such

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<sup>218</sup> See sources cited *supra* note 211.

<sup>219</sup> See sources cited *supra* note 217.

<sup>220</sup> See *Addington v. Texas*, 441 U.S. 418, 427 (1979) (noting that stigma of involuntary hospitalization can have significant adverse social effects). See generally Markin, *supra* note 38, at 182-85 (describing professional consequences of mental health diagnosis); Stefan, *supra* note 38 (describing political disenfranchisement of persons with mental illness); Pincus, *supra* note 38, at 1781-84 (arguing that mental health stigma influences legislative intent behind mental illness statutes).

<sup>221</sup> See *O'Connor v. Donaldson*, 422 U.S. 563, 575-76 (1977); see also Stephen J. Morse, *A Preference for Liberty: The Case Against Involuntary Commitment of the Mentally Disordered*, 70 CALIF. L. REV. 54, 68 (1982) (citing *Donaldson*, 422 U.S. at 576) (arguing that right of people not to be harassed is less weighty than right of harassers to be free); Adam Faulk, Note, *Sex Offenders, Mental Illness and Criminal Responsibility: The Constitutional Boundaries of Civil Commitment after Kansas v. Hendricks*, 25 AM. J.L. & MED. 117, 125-28 (1999) (citing *Donaldson*, 422 U.S. at 576) (stating that Court held that involuntary commitment was significant restriction on individual liberty).

<sup>222</sup> See, e.g., *Donaldson*, 422 U.S. at 575-76 (indicating government cannot constitutionally deprive someone of physical liberty due to “mere public intolerance or animosity”); *Rubenstein v. Benedictine Hosp.*, 790 F. Supp. 396, 403 (N.D.N.Y. 1992) (indicating due process protection necessary for any civil commitment). *But see* Stephen R. McAllister, *Sex Offenders and Mental Illness: A Lesson in Federalism and the Separation of Powers*, 4 PSYCHOL. PUB. POL’Y & L. 268, 273-74 (1998) (explaining how states have expanded definition of mental illness to include sex offenders to civilly detain convicts after expiration of criminal sentence).

<sup>223</sup> See sources cited *supra* note 220.

<sup>224</sup> See *Bolmer v. Oliveira*, 594 F.3d 134, 148-49 (2d Cir. 2010). *Contra* *Benn v. Universal Health Sys.*, 371 F.3d 165, 174-75 (3d Cir. 2004); *James v. Grand Lake Mental Health Ctr.*, No. 97-5157, 1998 WL 664315, at \*7 (10th Cir. Sept. 24, 1998).

evaluations of dangerousness should be medical in nature.<sup>225</sup> If commitment evaluations fall below a medical standard, courts should find such evaluations to shock the conscience due to the resulting infringement of liberty.<sup>226</sup>

The Second Circuit's substantially below medical standards test in *Bolmer* accomplishes these goals by forcing state actors to follow state involuntary commitment statutes.<sup>227</sup> Courts have found such state statutes constitutional if they serve the purpose of promoting public safety.<sup>228</sup> Some courts, such as in *Benn*, have held that even when the State uses an improper assessment to involuntarily commit an individual, the State's interest in promoting the public safety outweighs the individual's liberty interest.<sup>229</sup> However, due to the vulnerability of individual liberty in the context of involuntary commitments, courts should hold state actors to a higher standard than a mere balancing of public safety and infringement upon individual liberty.<sup>230</sup> Nevertheless, even under such a balancing, the weight of individual liberty significantly outweighs any public safety concerns because involuntary commitment is not the only treatment available for persons with mental illness.<sup>231</sup> Thus, *Bolmer*'s substantially below medical standards test appropriately protects against infringing on a person's liberties.<sup>232</sup>

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<sup>225</sup> See *supra* Part III (arguing that medical context of involuntary commitments requires medical standard for applying "shocks the conscience" test).

<sup>226</sup> See *supra* Part III (arguing that involuntary commitment decisions made below medical standards violates substantive due process rights due to arbitrariness).

<sup>227</sup> See *Bolmer*, 594 F.3d at 148-49.

<sup>228</sup> See *Doby v. DeCrescenzo*, 171 F.3d 858, 870 (3d Cir. 1999); *Project Release v. Prevost*, 722 F.2d 960, 974 (2d Cir. 1983); *Covell v. Smith*, No. 95-501, 1996 U.S. Dist. LEXIS 19454, at \*1, \*4 (E.D. Pa. Dec. 30, 1996); *Luna v. Zandt*, 554 F. Supp. 68, 75-76 (S.D. Tex. 1982). See generally *O'Connor v. Donaldson*, 422 U.S. 563, 576 (1977) (creating dangerousness standard that modern involuntary commitment statutes are based upon).

<sup>229</sup> See *Benn*, 371 F.3d 165 at 174-75; *James*, 1998 WL 664315, at \*7.

<sup>230</sup> See *Humphrey v. Cady*, 405 U.S. 504, 509 (1972); *Best v. St. Vincent's Hosp.*, No. 03 Cv. 0365, 2003 U.S. Dist. LEXIS 11354, at \*1, \*21-22 (2d Cir. July 2, 2003); *Rockwell v. Cape Cod Hosp.*, 26 F.3d 254, 256 (1st Cir. 1994).

<sup>231</sup> See sources cited *supra* note 204.

<sup>232</sup> See *Vitek v. Jones*, 445 U.S. 480, 491-92 (1980); *Parham v. J.R.*, 442 U.S. 584, 601 (1979); cf. *Jensen v. Lane Cnty.*, 312 F.3d 1145, 1146-47 (9th Cir. 2002) (adopting Second Circuit's below medical standards test).

## CONCLUSION

The Fourteenth Amendment prohibits state infringement on an individual's procedural and substantive due process rights.<sup>233</sup> The Supreme Court has extended these procedural and substantive protections to civil involuntary commitments.<sup>234</sup> Consequently, states modified their involuntary commitment statutes to include short-term emergency holds or involuntary commitments.<sup>235</sup> These short-term involuntary commitments allow for medical assessment of the psychiatric patient prior to the civil commitment procedural hearing.<sup>236</sup> Some legal scholars and mental health professionals claim that the State's interests in promoting general safety and providing medical treatment outweigh the deprivation of individual liberty resulting from these involuntary commitments.<sup>237</sup> In contrast, others argue that the individual liberty interests of persons with mental illness should be strongly protected in the context of involuntary commitments.<sup>238</sup> Both *Bolmer* and *Benn* reflect these conflicting views on which standard should apply for involuntary commitment decisions.<sup>239</sup>

Given the medial nature of involuntary commitments, courts should utilize *Bolmer's* substantially below medical standards test in determining substantive due process violations for involuntary commitments.<sup>240</sup> First, involuntary commitments fundamentally occur in the medical context and, thus, should require a medical assessment to deprive an individual of liberty.<sup>241</sup> Second, involuntary commitments without medical justification are arbitrary exercises of

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<sup>233</sup> See U.S. CONST. amend. XIV, § 1.

<sup>234</sup> See generally Joanmarie Ilaria Davoli, *Still Stuck in the Cuckoo's Nest: Why do Courts Continue to Rely on Antiquated Mental Illness Research?*, 69 TENN. L. REV. 987, 1046-49 (2002) (arguing that courts have not adapted to contemporary psychiatric measurements of mental illnesses); Ferris, *supra* note 159, at 963-68 (explaining historical background of Supreme Court's application of procedural and substantive due process to civil commitments).

<sup>235</sup> See Anfang & Appelbaum, *supra* note 17, at 211.

<sup>236</sup> See generally Van Duizend et al., *supra* note 27, at 330-34 (providing summary of involuntary commitment statutes for every state).

<sup>237</sup> See sources cited *supra* notes 201- 204 and accompanying text.

<sup>238</sup> See sources cited *supra* note 38.

<sup>239</sup> See *Bolmer v. Oliveira*, 594 F.3d 134, 148-49 (2d Cir. 2010); *Benn v. Universal Health Sys.*, 371 F.3d 165, 173-74 (3d Cir. 2004).

<sup>240</sup> See *supra* Part III (arguing that Second Circuit properly fits substantially below medical standards test into "shocks the conscience" analysis).

<sup>241</sup> See *supra* Part III.A (stressing medical context to creating "shocks the conscience" test for involuntary commitments).

state power.<sup>242</sup> Finally, the stigma of mental illness is incredibly strong, and courts should restrain states in ordering involuntary commitments through utilization of *Bolmer's* substantially below medical standards test.<sup>243</sup> Therefore, the Supreme Court should adopt the *Bolmer* substantially below medical standards test to measure what shocks the conscience for involuntary commitment decisions.<sup>244</sup>

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<sup>242</sup> See *supra* Part III.B (arguing that involuntary commitment decisions made without medical justification are arbitrary exercise of government power).

<sup>243</sup> See *supra* Part III.C (arguing that societal stigmas against mental illness and involuntary commitment can have significant negative impact on individual liberty).

<sup>244</sup> See *Bolmer*, 594 F.3d at 148-49; *supra* Part III (arguing in favor of Second Circuit's substantially below medical standards test when assessing substantive due process violations in involuntary commitment decisions).