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## NOTES

### **HELLER v. DOE: FREEDOM FROM BODILY RESTRAINT AND ASSOCIATED STIGMA—A FUNDAMENTAL INTEREST**

The Fourteenth Amendment of the United States Constitution provides, in part, that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>1</sup> This mandate is interpreted to apply to any abridgment of political or civil rights.<sup>2</sup> While a state may, in the creation and application of its laws, classify persons for differential treatment, the Fourteenth Amendment does not permit the classification to be based upon impermissible criteria or to be used arbitrarily to burden a class of individuals.<sup>3</sup>

The standards of review for determining whether criteria are impermissible or whether a classification is arbitrarily burdensome can depend on the nature of the interest affected.<sup>4</sup> Where the classification affects an interest deemed fundamental, it is subject to the strictest scrutiny.<sup>5</sup> To be upheld, not only must the state’s objective be so compelling that it justifies the limitation the classification places on the individual’s interest, but the classification itself must be absolutely necessary in order for the state to achieve its objective.<sup>6</sup> Interests considered fundamental include voting,<sup>7</sup> marriage,<sup>8</sup> procreation,<sup>9</sup> and freedom from bodily restraint and asso-

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1. U.S. CONST. amend. XIV, § 1.
  2. RALPH C. CHANDLER ET AL., CONSTITUTIONAL LAW DESK BOOK: INDIVIDUAL RIGHTS § 7.3, at 490 (2d ed. 1993).
  3. *Id.* at 497.
  4. *Id.*; see also *infra* notes 50-69 and accompanying text (discussing the determination of standards of review).
  5. 3 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 18.3, at 15 (2d ed. 1992).
  6. *Id.*
  7. See *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964) (“The right of suffrage is a fundamental matter in a free and democratic society. . . . [It] is preservative of other basic . . . political rights.”). Citizens have the right to “participate in elections on an equal basis with other citizens in the jurisdiction.” *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). However, that right is not absolute and government may impose voter qualifications as well as regulate access to franchises, as long as the purpose is compelling and the limitation is necessary. *Id.*

ciated stigma.<sup>10</sup>

Since ancient times, persons with mental retardation<sup>11</sup> have been subject to differential treatment.<sup>12</sup> Commonly labeled as fools, imbeciles, and idiots, the mentally retarded have been perceived to be demons and treated as "buffoons and court jesters."<sup>13</sup> In the United States, the Fourteenth Amendment's equal protection guarantee has not provided equality for the mentally retarded. During the Eugenics Movement<sup>14</sup> of the late nineteenth and early twentieth century, the mentally retarded were believed to be "a menace to civilization, . . . burdens to the school, . . . breeders of feebleminded offspring, [and] victims and spreaders of poverty, degeneracy, crime, and disease."<sup>15</sup> States enacted laws to segregate

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8. See *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) ("Marriage . . . [is] fundamental to the very existence and survival of the race."); see also *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) (reaffirming the "fundamental character of the right to marry").

9. See *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ("If the right to privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.").

10. See *Vitek v. Jones*, 445 U.S. 480, 492 (1980); see also discussion *infra* part IV.

11. The current definition of mental retardation, formulated by the American Association on Mental Retardation, refers to:

substantial limitations in present functioning . . . characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.

Brief of the American Association on Mental Retardation, The ARC, The ARC of Kentucky, The Association for Persons with Severe Handicaps (TASH), TASH of Kentucky, the American Association of University Affiliated Programs for the Developmentally Disabled, The American Orthopsychiatric Association, The Joseph P. Kennedy, Jr. Foundation, and The American Civil Liberties Foundation as *Amici Curiae* in Support of Respondents at 9 n.6, *Heller v. Doe*, 113 S. Ct. 2637 (1993) (No. 92-351) [hereinafter Br. of Am. Ass'n on Mental Retardation].

12. MARY BEIRNE-SMITH ET AL., *MENTAL RETARDATION* 28 (4th ed. 1994).

13. *Id.* Historical names for the mentally retarded also include moron, feebleminded, mental defect, and retardate. *Id.*

14. Eugenics is defined as "a science that deals with the improvement (as by control of human mating) of hereditary qualities of a race or breed." WEBSTER'S NEW COLLEGIATE DICTIONARY 390 (1981).

15. BEIRNE-SMITH ET AL., *supra* note 12, at 34 (quoting L.A. KANNER, *A HISTORY OF THE CARE AND STUDY OF THE MENTALLY RETARDED* 85 (1964)). This was a change in attitude from an earlier period of humanism (*i.e.*, a concern with people's worth as human beings and with their freedom to develop) and is thought to be the result of the "national disharmony" during the period ranging from 1860 to 1890 as well as the dramatic change towards urbanization and industrialization. *Id.* at 33. The idea that the mentally retarded could attain "normalcy" was wholly disregarded. *Id.*

the mentally retarded by institutionalizing them for "at least the reproductive years" to purify society "by cutting off its supply of defectives."<sup>16</sup> The mentally retarded were even subject to sterilization.<sup>17</sup> In the 1927 Supreme Court decision, *Buck v. Bell*,<sup>18</sup> the Court upheld a sterilization statute of the Commonwealth of Virginia.<sup>19</sup> Writing for the majority, Justice Holmes stated, "[i]t is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. . . . Three generations of imbeciles is enough."<sup>20</sup>

Since the 1970s, a more tolerant and protective attitude toward the mentally retarded has emerged. Through litigation and legislation, the mentally retarded have secured the right to education<sup>21</sup> and habilitative treatment.<sup>22</sup> For example, in *Penry v. Lynaugh*,<sup>23</sup> the Supreme Court

16. *Id.* at 35 (quoting KANNER, *supra* note 15, at 136).

17. *Id.* at 37. Indiana enacted the first sterilization law in 1907. BEIRNE-SMITH ET AL., *supra* note 12, at 37. By 1927, 23 states had enacted similar laws. *Id.* From 1900 through the 1960s, over 100,000 institutionalized persons were involuntarily sterilized. Debbie Goldberg, *Sterilization Case Has Become Fight over Rights of Retarded: Mother, Legal Guardian Divide on Best Interests of Woman*, 26, WASH. POST, Nov. 27, 1994, at A3.

18. 274 U.S. 200 (1927).

19. It should be noted that the plaintiff in the case, Carrie Buck, was most likely not mentally retarded. BEIRNE-SMITH ET AL., *supra* note 12, at 37. This case has not been overruled and the Supreme Court, on November 11, 1994, declined to block the sterilization of a 26 year old retarded woman with the mental capacity of a five year old. Estate of C.W., 640 A.2d 445 (Pa. 1991), *cert. denied*, 115 S. Ct. 1175 (1994). Her mother had sought sterilization because C.W. lives in an all female group home and is "vulnerable . . . because she does not understand the consequences of her affectionate behavior." *Souter Doesn't Block Sterilization of Retarded Woman*, WASH. POST, Nov. 12, 1994, at A2; Goldberg, *supra* note 17.

20. *Buck*, 274 U.S. at 207 (citation omitted).

21. *Lebanks v. Spears*, 60 F.R.D. 135 (E.D. La. 1973) (mandating that the state must strive to make every child self-sufficient or employable and provide educational opportunities to adults who were not taught as children); Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1400 (1988) (assuring all children with disabilities a free public school education in the least restrictive environment); Americans With Disabilities Act of 1990, 42 U.S.C.A. § 12112(a)-12213 (West Supp. 1991) (prohibiting discrimination based on disability). Congress has determined that individuals with disabilities for purposes of the Americans With Disabilities Act are:

a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society based on characteristics that are beyond the control of such individuals and resulting from stereotypical assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to society.

42 U.S.C.A. § 12101(7) (West Supp. 1991).

22. Habilitation pertains to "behavior change in the direction of those skills that cumulatively allow community [as opposed to institutional] living." BEIRNE-SMITH ET AL.,

held that mental retardation should be considered a mitigating factor when the death penalty is at issue.<sup>24</sup> In 1994, Congress passed a law prohibiting the imposition of the death penalty upon a mentally retarded person.<sup>25</sup> Also, in *City of Cleburne v. Cleburne Living Center*,<sup>26</sup> the Supreme Court found a zoning restriction prohibiting mentally retarded persons from establishing a group home to be a violation of equal protection.<sup>27</sup>

In the area of involuntary civil commitment, however, the mentally retarded are still subject to differential treatment. In June 1993, the Supreme Court held in *Heller v. Doe*<sup>28</sup> that Kentucky statutes providing disparate procedures for the institutionalization of mentally retarded adults and mentally ill adults did not violate the equal protection clause of the Fourteenth Amendment.<sup>29</sup> Involuntary commitment undeniably affects an individual's freedom from bodily restraint and associated stigma,<sup>30</sup> yet the Court refused to apply a strict scrutiny analysis because

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*supra* note 12, at 480 (quoting D. BAER, *THE NATURE OF INTERVENTION RESEARCH* 91 (1981)); *see also* *Youngberg v. Romeo*, 457 U.S. 307, 324 (1982) (holding that individuals with severe mental retardation involuntarily confined to state facilities have a constitutional right to habilitative services to ensure safety and freedom from undue restraint); *Wyatt v. Stickney*, 344 F. Supp. 373, 379-86 (M.D. Ala. 1972), *aff'd in part and rev'd in part*, *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974) (declaring that the constitutional right of institution residents had been violated under the Fourteenth Amendment and defining minimum standards for the state to adopt in areas including the right to treatment and habilitation, records and review, physical environment, medication, and admission policies).

23. 492 U.S. 302 (1989).

24. *Id.* at 319. On remand, Penry was found guilty and sentenced to death. *BEIRNE-SMITH ET AL.*, *supra* note 12, at 487, 489.

25. 18 U.S.C.A. § 3596(c) (West Supp. 1995).

A sentence of death shall not be carried out upon a person who is mentally retarded. A sentence of death shall not be carried out upon a person who, as a result of mental disability, lacks the mental capacity to understand the death penalty and why it is imposed on that person.

*Id.*

26. 473 U.S. 432 (1985).

27. *Id.* at 448. The City required a proposed group home for the mentally retarded to obtain a special use permit, when other care and multiple dwelling facilities were freely permitted. *Id.* at 447. The City then refused to issue the permit and the group filed suit. *Id.* at 447-48.

28. 113 S. Ct. 2637 (1993).

29. *Id.* at 2643-48; *see also* KY. REV. STAT. ANN. § 202B.160(2) (Michie/Bobbs-Merrill 1991) (designating the standard of proof to involuntarily commit a mentally retarded person to be clear and convincing evidence). *But see* KY. REV. STAT. ANN. § 202A.076(2) (Michie/Bobbs-Merrill 1991) (designating the standard of proof to commit a mentally ill person to be beyond a reasonable doubt).

30. *See* discussion *infra* part IV.

the request for strict scrutiny was not "properly presented."<sup>31</sup> Instead, the Court examined the statutes under a rational-basis review, and deferred to Kentucky's justifications for the disparate procedures.<sup>32</sup> The Court found the procedures rationally related to the State's objective of caring for the mentally retarded and protecting the community from dangerous persons.<sup>33</sup>

*Heller v. Doe* was the Supreme Court's first consideration of the constitutional issues surrounding involuntary commitment of mentally retarded adults.<sup>34</sup> The significance of *Heller v. Doe* is not in the substance of the majority opinion but, instead, that it was a five-to-four decision<sup>35</sup> in which the Court refused to consider a heightened form of scrutiny because the request for such scrutiny was not "properly presented."<sup>36</sup> Justice Souter, in his dissent, also declined to address the applicability of a heightened scrutiny, but only because he found the Kentucky statute irrational under a rational-basis standard of review.<sup>37</sup> Justice Blackmun stated explicitly in a separate dissent that laws infringing upon fundamental interests, such as those presented by the Kentucky statutes, are subject to heightened scrutiny.<sup>38</sup>

In addition to Kentucky, forty-one states currently provide disparate involuntary commitment procedures for mentally retarded and mentally ill adults.<sup>39</sup> Therefore, this issue may very well come before the Supreme

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31. *Heller*, 113 S. Ct. at 2642; see *infra* notes 89-91 and accompanying text (discussing the Court's determination that Doe's request was not properly presented).

32. *Id.* at 2643.

33. *Id.*

34. Br. of Am. Ass'n on Mental Retardation, *supra* note 11, at 8. The Supreme Court has determined that the due process rights of mentally retarded children are met where a statute provides for voluntary commitment on the recommendation/application of a parent or guardian, physician, pediatrician, or psychologist and there is an independent psychiatric examination and review by a mental health professional whose only concern is whether the mentally retarded child would benefit from institutionalization. *Secretary of Pub. Welfare of Pa. v. Institutionalized Juveniles*, 442 U.S. 640, 649-50 (1979).

35. The decision was five-to-four on the issue of the disparate burdens of proof. Justice Kennedy wrote for the majority and was joined by the Chief Justice and Justices White, Scalia and Thomas. The decision was six-to-three on the issue of participation of guardians and family members. Justice O'Connor joined the majority on this issue. *Id.* at 2650.

36. *Heller*, 113 S. Ct. at 2642.

37. *Id.* at 2651 (Souter, J., dissenting).

38. *Id.* at 2650 (Blackmun, J., dissenting). Justice Blackmun also joined in Justice Souter's dissent. *Id.*

39. *Id.* at 2646-47 n.2. The only states that provide a single commitment statute are Minnesota, Mississippi, North Carolina, Washington, West Virginia and Wisconsin. *Id.*

Court again on a properly presented request for heightened scrutiny based on the fundamental nature of the interest at stake.

Part I of this Note sets forth the criteria for a strict scrutiny; fundamental interest analysis under the equal protection clause of the Fourteenth Amendment. Part II discusses the Majority decision in *Heller v. Doe*. Part III discusses the dissenting opinions in *Heller v. Doe*. Part IV traces the development of the view that freedom from bodily restraint and associated stigma is among the most fundamental of liberty interests. Part V of this Note analyzes *Heller v. Doe* under a strict scrutiny, fundamental interest review. This Note concludes that where freedom from bodily restraint and associated stigma is threatened by the possibility of involuntary civil commitment, the equal protection clause commands that the mentally retarded be given the same protections under the law as the mentally ill.

#### I. EQUAL PROTECTION AND FUNDAMENTAL INTERESTS

The Fourteenth Amendment mandates that individuals shall not be denied "the equal protection of the laws."<sup>40</sup> Although equal protection cannot be precisely defined,<sup>41</sup> courts traditionally have guaranteed that all individuals be treated fairly in the exercise of their fundamental rights and have disallowed distinctions in treatment based on impermissible criteria.<sup>42</sup>

As part of the Fourteenth Amendment, the equal protection clause was ratified in 1868 to guarantee equality to the newly freed slaves in the exercise of their political and civil liberties.<sup>43</sup> Prior to World War I, its

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40. U.S. CONST. amend. XIV, § 1. This clause is imputed to the federal government through the due process clause of the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

41. CHANDLER ET AL., *supra* note 2, at 490.

42. 3 ROTUNDA & NOWAK, *supra* note 5, at 5; *see also* *Zablocki v. Redhail*, 434 U.S. 374, 387 (1978) (holding that a statute requiring court approval to marry if under a child support obligation by any court order or judgment unnecessarily infringes upon a fundamental right to marry and is, therefore, a violation of equal protection); *Eisenstadt v. Baird*, 405 U.S. 438, 454-55 (1972) (holding that a statute prohibiting single persons from obtaining contraceptives to prevent pregnancy violates equal protection); *Dunn v. Blumstein*, 405 U.S. 330, 360 (1972) (holding durational residency laws for voting violate equal protection because there is no compelling state interest behind such an impermissible criteria); *Reynolds v. Sims*, 377 U.S. 533, 566 (1964) (holding vote-diluting discrimination violates equal protection because it infringes upon a citizen's fundamental right to vote).

43. CHANDLER ET AL., *supra* note 2, at 490. In fact, the Court tried to limit use of the clause to situations where state laws "discriminated with gross injustice and hardship" against "newly emancipated negroes." *Id.* at 495 (quoting the *Slaughter-House Cases*, 83 U.S. 36 (1873)).

use was generally limited to cases involving economic rights.<sup>44</sup> Today, the equal protection clause is more expansively interpreted to include any abridgment of political and civil rights.<sup>45</sup>

In the creation and application of its laws, a state may classify persons for differential treatment.<sup>46</sup> Any such classification, however, "must be reasonable, not arbitrary, and must rest upon some ground or difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."<sup>47</sup> The focus of the analysis is whether the affected class is, in fact, dissimilar from other classes in terms of the promotion of a legitimate governmental objective.<sup>48</sup>

When evaluating an equal protection challenge, courts must first determine the standard of review required to adjudicate the particular controversy.<sup>49</sup> The Supreme Court has articulated three levels of scrutiny: minimal or rational-basis review, intermediate scrutiny, and strict scrutiny.<sup>50</sup> A rational-basis review is used in areas such as economic regulation and general social welfare,<sup>51</sup> where courts have no "institutional capability" to assess the scope of legitimacy of the governmental objective and are, therefore, willing to defer to the legislative judgment.<sup>52</sup> In such a case, courts must uphold a classification against an equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.<sup>53</sup> There is a presump-

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44. *Id.* at 490.

45. *Id.*

46. *Id.* at 497.

47. *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972).

48. 3 *ROTUNDA & NOWAK*, *supra* note 5, at 8; *see also* *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439-40 (1985); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

49. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973). The standard of review represents the degree of deference the court will afford the legislature. 3 *ROTUNDA & NOWAK*, *supra* note 5, at 13.

50. 3 *ROTUNDA & NOWAK*, *supra* note 5, at 14-16.

51. *Id.* at 14; *see, e.g., New York City Transit Auth. v. Beazer*, 440 U.S. 568, 593 (1979) (holding a public authority may deny employment to methadone users as a class because legislative concerns over safety and efficiency are rational); *United States v. Carolene Prod. Co.*, 304 U.S. 144, 145-46 (1938) (finding public health and the possibility of fraud on the public were rational concerns behind the Filled Milk Act which prohibited "shipment in interstate commerce of skimmed milk compounded with any fat or oil other than milk fat, so as to resemble milk or cream").

52. 3 *ROTUNDA & NOWAK*, *supra* note 5, at 14.

53. *F.C.C. v. Beach Communications, Inc.*, 113 S. Ct. 2096, 2101 (1993). The Cable Communications Policy Act of 1984 required cable television companies to be franchised by local governments unless it served "only subscribers in [one] or more multiple unit dwellings under common ownership, control, or management, unless such . . . facilities



tion of constitutionality in this level of scrutiny, and the state has no obligation to produce evidence to support its objectives.<sup>54</sup> The state is also not required to use the least restrictive means to achieve its objectives.<sup>55</sup>

Courts are not as deferential to the political branches of government under the intermediate and strict scrutiny standards of review as they are under the rational-basis standard of review. Intermediate scrutiny is used in cases involving gender classification.<sup>56</sup> It requires the classification "serve important governmental objectives and . . . be substantially related to achievement of those objectives."<sup>57</sup>

Strict scrutiny is employed when the classification involves either a suspect class<sup>58</sup> or a fundamental interest.<sup>59</sup> Courts will not defer to a legislature's rationale for such a classification, but will independently determine whether the governmental objective is so compelling or overriding that it justifies the limitation on fundamental constitutional values.<sup>60</sup> The determination as to whether an interest is compelling rather than merely legitimate is usually done by analogy because the Supreme Court has not provided much guidance.<sup>61</sup> Even if the state objective is found to be compelling, the classification still must be absolutely necessary (the least restrictive means available) to achieve the compelling objective.<sup>62</sup>

The range of interests considered fundamental, and therefore demanding of strict scrutiny, are not infinite<sup>63</sup> and must be explicitly or implicitly guaranteed by the Constitution.<sup>64</sup> Specifically, the nature of the interest (not just the weight of the interest to the individual) must be "within the

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us[e] any public right-of-way." *Id.* at 2099 (quoting 47 U.S.C.A. § 522(7)(B) (West Supp. 1993)). Finding two plausible bases for the common-ownership distinction, the Court upheld the statute. *Id.* at 2103.

54. *Id.* at 2101-02.

55. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 51 (1973).

56. 3 ROTUNDA & NOWAK, *supra* note 5, at 17. This level of scrutiny has also been used in cases involving illegitimacy classification. *Id.*; *see also* *Matthews v. Lucas*, 427 U.S. 495 (1976).

57. *Craig v. Boren*, 429 U.S. 190, 197 (1976) (holding that gender does not represent a legitimate proxy for the regulation of drinking and driving).

58. 3 ROTUNDA & NOWAK, *supra* note 5, at 15; *see also* *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (discussing the important judicial function in protecting "discrete and insular minorities"). A primary example of a suspect class is race. *See, e.g., Loving v. Virginia*, 388 U.S. 1, 11 (1967).

59. 3 ROTUNDA & NOWAK, *supra* note 5, at 15.

60. *Id.*

61. WILLIAM A. KAPLIN, *THE CONCEPTS AND METHODS OF CONSTITUTIONAL LAW* 142 (1992).

62. CHANDLER ET AL., *supra* note 2, at 498.

63. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 570 (1972).

64. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33 (1973).

contemplation of the 'liberty or property' language of the Fourteenth Amendment."<sup>65</sup> Although the Supreme Court has never defined all the interests included in the term liberty, "[w]ithout doubt, it denotes not merely freedom from bodily restraint but also the right . . . to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."<sup>66</sup> The identification of a liberty interest as fundamental is then a judicial determination as to whether the Constitution explicitly or implicitly evidences the existence of a value so essential to individual liberty that it should not be controlled by the political branches of government.<sup>67</sup> These are interests which are "implicit in the concept of ordered liberty"<sup>68</sup> and "deeply rooted in the Nation's history and tradition."<sup>69</sup>

## II. THE SUPREME COURT'S DECISION IN *HELLER V. DOE*

### A. Case History

*Heller v. Doe*<sup>70</sup> was filed in 1982 as a class action by Samuel Doe against the Secretary of the Cabinet for Human Resources for the State of Kentucky.<sup>71</sup> Doe filed the suit on behalf of all mentally retarded adults in Kentucky "who [had] been admitted or who face[d] admission to [a state] intermediate care facility for the mentally retarded."<sup>72</sup> The suit challenged the State's involuntary civil commitment statute for the mentally retarded, claiming it did not provide adequate procedural protections.<sup>73</sup> The history of the case is "long and complicated" and Kentucky has revised its civil commitment statute for the mentally retarded

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65. *Morrisey v. Brewer*, 408 U.S. 471, 494 (1972) (quoting *Fuentes v. Shevin*, 407 U.S. 67 (1972)).

66. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). Liberty also includes: the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of [one's] own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

*Id.*

67. JOHN E. NOWAK ET AL., *CONSTITUTIONAL LAW* 532 n.21 (3d ed. 1986).

68. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

69. *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977); see, e.g., *supra* notes 7-10 and accompanying text.

70. 113 S. Ct. 2637 (1993).

71. *Doe v. Cowherd*, 770 F. Supp. 354 (W.D. Ky. 1991), *aff'd in part, rev'd in part*, 965 F.2d 109 (6th Cir. 1992), and *rev'd sub nom. Heller v. Doe*, 113 S. Ct. 2637 (1993); Brief for Respondents at 1, *Heller v. Doe*, 113 S. Ct. 2637 (1993) (No. 92-351).

72. Brief for Respondents, *supra* note 71, at 1.

73. *Id.* at 1-2. In fact, at the time the suit was filed virtually every commitment to a

several times since the case was originally brought.<sup>74</sup> Each revision has been challenged by Doe.<sup>75</sup>

The statute for involuntary commitment of the mentally retarded, as it stands today, requires a finding that:

- (1) The person is a mentally retarded person;
- (2) The person presents a danger or a threat of danger to self, family, or others;
- (3) The least restrictive alternative mode of treatment presently available requires placement [in an institution]; and
- (4) Treatment that can reasonably benefit the person is available in [a state institution].<sup>76</sup>

These propositions must be proven by clear and convincing evidence.<sup>77</sup> The guardian and immediate family members of the mentally retarded person may participate in these proceedings as if a party.<sup>78</sup> This participation includes the right to be represented by separate counsel from that of the mentally retarded person, the right to cross-examine witnesses, and standing to appeal any adverse decision.<sup>79</sup> By comparison, Kentucky's involuntary civil commitment statute for the mentally ill provides that:

- No person shall be involuntarily hospitalized unless such person is a mentally ill person: (1) Who presents a danger or threat of danger to self, family or others as a result of the mental illness; (2) Who can reasonably benefit from treatment; and (3) For whom hospitalization is the least restrictive alternative mode of treatment presently available.<sup>80</sup>

These propositions must be established by the more rigorous standard of "proof beyond a reasonable doubt."<sup>81</sup> In contrast to the involuntary commitment procedures of the mentally retarded, the guardian and immediate family members of the mentally ill person are not permitted to participate as if a party to the proceedings.<sup>82</sup>

Doe argued before the Supreme Court that the lower standard of proof provided for commitment of the mentally retarded and the ability of the family to participate as if a party violates the equal protection clause of

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state institution was characterized as voluntary in order to avoid the existing involuntary commitment procedures altogether. *Id.* at 2.

74. *Heller*, 113 S. Ct. at 2640.

75. *Id.*

76. KY. REV. STAT. ANN. § 202B.040 (Michie/Bobbs-Merrill 1991).

77. KY. REV. STAT. ANN. § 202B.160(2) (Michie/Bobbs-Merrill 1991).

78. KY. REV. STAT. ANN. § 202B.160(3) (Michie/Bobbs-Merrill 1991).

79. *Id.*

80. KY. REV. STAT. ANN. §202A.026 (Michie/Bobbs-Merrill 1991).

81. KY. REV. STAT. ANN. § 202A.076 (Michie/Bobbs-Merrill 1991).

82. KY. REV. STAT. ANN. § 202A.006-.991 (Michie/Bobbs-Merrill 1991).

the Fourteenth Amendment.<sup>83</sup> In the lower courts, Doe claimed that there is no rational basis for the disparate procedures and both the United States District Court for the Western District of Kentucky and the United States Court of Appeals for the Sixth Circuit agreed.<sup>84</sup> Kentucky petitioned the Supreme Court for certiorari and its petition was granted.<sup>85</sup>

### *B. Justice Kennedy's Majority Opinion*

The majority of the Court reversed the lower courts. It recognized that Kentucky has a legitimate objective under its *parens patriae*<sup>86</sup> power to take care of those who cannot take care of themselves and under its police power to protect the community from those who are dangerous.<sup>87</sup> The Court then determined how much deference to afford Kentucky in the face of this constitutional challenge.<sup>88</sup> In his brief to the Supreme Court, Doe argued that some form of heightened scrutiny should apply.<sup>89</sup> However, because he had requested only a rational-basis review in the lower courts, and because those courts had decided the case utilizing that standard, the majority ruled that Doe's request for heightened scrutiny was "not properly presented."<sup>90</sup> The Court determined that even if heightened scrutiny should apply, it would be "imprudent and unfair to inject a new standard at this stage in the litigation."<sup>91</sup> The majority then outlined the requirements for a traditional rational-basis review<sup>92</sup> and stated that it had previously applied this standard to a situation involving

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83. Brief for Respondents, *supra* note 71, at 8; *Heller v. Doe*, 113 S. Ct. 2637, 2640 (1993). Doe also argued that the participation of a guardian or family members violates the due process clause as well. Brief for Respondents, *supra* note 71, at 9-10.

84. *Doe v. Cowherd*, 965 F.2d 109, 113 (6th Cir. 1992), *rev'd sub nom. Heller v. Doe*, 113 S. Ct. 2637 (1993).

85. *Heller v. Doe*, 113 S. Ct. 373 (1992).

86. *Parens Patriae* "refers traditionally to role of state as sovereign and guardian of persons under disability." BLACK'S LAW DICTIONARY 1114 (6th ed. 1990).

87. *Heller v. Doe*, 113 S. Ct. 2637, 2649 (1993).

88. *Id.* at 2642; *see also supra* notes 49-62 and accompanying text (discussing the standards of review and the deference to legislative judgment required by each).

89. Brief for Respondents, *supra* note 71, at 23.

90. *Heller*, 113 S. Ct. at 2642. Doe had not had an occasion to argue for heightened scrutiny. Since the latest hearing before the Court of Appeals for the Sixth Circuit, in March 1992, the Supreme Court had decided *Foucha v. Louisiana*, 112 S. Ct. 1780, 1786, 1788 (1992), which suggested a higher level of scrutiny for challenges to involuntary commitment procedures. In addition, the Americans With Disabilities Act had determined that individuals with physical and mental disabilities are a "discrete and insular minority." Brief for Respondents, *supra* note 71, at 23-24.

91. *Heller*, 113 S. Ct. at 2642.

92. *Id.* at 2649-50.

the mentally retarded in *City of Cleburne v. Cleburne Living Center*.<sup>93</sup>

1. *Rational-Basis Review Applied to Disparate Burdens of Proof*

The *Heller* majority held that the disparate burdens of proof for involuntary commitment of the mentally retarded and mentally ill have a rational-basis.<sup>94</sup> The initial focus of its discussion was on Kentucky's argument that mental retardation is easier to diagnose than mental illness<sup>95</sup> and that dangerousness is easier to determine in the mentally retarded.<sup>96</sup> The majority accepted Kentucky's assertion that mental retardation is easier to diagnose because it is a "developmental disability" that manifests itself before adulthood.<sup>97</sup> Mental illness, the State asserted, is extremely difficult to diagnose and its onset is often sudden and may not occur until later in life.<sup>98</sup> The majority also accepted the State's claim that dangerousness was easier to determine in cases involving the mentally retarded because there is an established history of such behavior.<sup>99</sup>

Although the majority recognized that the loss of liberty following the involuntary commitment of the two classes is similar, it justified the disparate burdens of proof based on the "nature and extent of the deprivation" of liberty.<sup>100</sup> The State proffered that postcommitment treatment of the two classes differed and the majority accepted the State's claim

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93. 473 U.S. 432, 446 (1985). *But see Heller*, 113 S. Ct. at 2651-52 (Souter, J., dissenting) (recognizing that the *Cleburne* Court looked into the record to determine whether the state's objectives were rational); *Cleburne*, 473 U.S. at 458 (Marshall, J., concurring in part and dissenting in part). It should be noted that *Cleburne* did not involve fundamental interests; rather, it involved zoning regulations similar to the general economic and social welfare type cases in which the court typically defers to the state. *See supra* notes 51-55 and accompanying text. Therefore, rational basis is not necessarily the standard for all cases involving the mentally retarded.

94. *Heller*, 113 S. Ct. at 2649-50.

95. *Id.* at 2643.

96. *Id.* at 2644.

97. *Id.* at 2643.

98. *Id.* at 2643-44.

99. *Id.* at 2644. Mental retardation is a "permanent, relatively static condition." Therefore, prior violent acts may be indicative of future behavior. *Id.*

100. *Id.* at 2645 (emphasis added). The majority states that the standards of proof may vary depending on the nature and extent of the deprivation. *Id.* In support of its rationale, the majority compared the beyond a reasonable doubt standard required to convict an alleged criminal to the lesser standard required to commit a mentally ill person. *Id.* at 2645-46. As incarceration is punitive, and therefore more oppressive than commitment to an institution, a higher standard is justified. *Id.* at 2645. *But see id.* at 2653 (Souter, J., dissenting) (stating that the determining factor is the value society places on the liberty interest at stake and this value is the same whether one is mentally ill or mentally retarded).

without looking into the record.<sup>101</sup> Additionally, the majority justified its deference to the State based on the history of differential treatment of the mentally ill and mentally retarded in Anglo-American law.<sup>102</sup> It also noted that a large majority of states currently provide disparate commitment procedures for the two classes of individuals.<sup>103</sup> Finally, the majority determined that the State, under a rational-basis review, was not "required to convince the courts of the correctness of [its] legislative judgments."<sup>104</sup>

## 2. Rational-Basis Review and Guardian/Family Participation

The majority found that Kentucky's statutory provision allowing a guardian or immediate family member to participate as if a party to the commitment proceedings of the mentally retarded, but not the proceedings of the mentally ill, was also rational.<sup>105</sup> As mental retardation manifests itself early in life and results in "deficits or impairments in adaptive functioning," the majority determined Kentucky "may have concluded" that guardians or family members have "intimate knowledge" of the mentally retarded person and can provide "valuable insights" to the commitment process.<sup>106</sup> By comparison, the majority continued, the onset of mental illness often occurs later in life so the guardian or family

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101. *Id.* at 2645. The majority determined that differing postcommitment treatment justified disparate commitment procedures. *Id.* It relied on the State's assertion that postcommitment treatment of the mentally ill is more invasive. *Id.* But see *id.* at 2655 (treatment of the mentally retarded includes behavior modification to correct "anxiety disorders, phobias, hyperactivity, and antisocial behavior, therapy that may include aversive conditioning as well as forces exposure to objects that trigger severe anxiety reactions"); *Brooks v. Flaherty*, 699 F. Supp. 1178, 1187 (W.D. N.C. 1988), *aff'd*, 902 F.2d 250 (4th Cir.), *and cert. denied*, 498 U.S. 951-52 (1990) (finding abuse of antipsychotic drugs where, of the mentally retarded who were administered antipsychotic drugs, less than 50% were also mentally ill); Robert Plotkin & Kay R. Gill, *Invisible Manacles: Drugging Mentally Retarded People* 31 *STAN. L. REV.* 637, 650 (1979) (drugs are often used in institutions for the mentally retarded to reduce the number of staff needed).

102. *Heller*, 113 S. Ct. at 2646. The majority discussed the "'marked distinction' in treatment accorded 'idiots' (the mentally retarded) and 'lunatics' (the mentally ill)" at English common law, finding this suggests a common sense distinction. *Id.* (quoting 1 F. POLLOCK & F. MATTLAND, *THE HISTORY OF ENGLISH LAW* 481 (2d ed. 1909)). But see *id.* at 2656 n.6 (Souter, J., dissenting) (questioning the majority's suggestion that the "irrational and scientifically unsupported beliefs of the pre-19th-century England can support any distinction in the treatment between the mentally ill and the mentally retarded today").

103. *Id.* at 2646. Forty-one states provide disparate commitment procedures for the mentally retarded and the mentally ill. *Id.* at 2646 n.2.

104. *Id.*

105. *Id.* at 2647.

106. *Id.*

members would not have the years of experience with such behavior to offer to the proceedings.<sup>107</sup> Additionally, it recognized that mentally ill adults, previously of sound mind, have a greater need for privacy.<sup>108</sup> This, it determined, also justifies prohibiting guardian or family participation as if a party to the commitment proceedings of the mentally ill.<sup>109</sup> The majority accepted that the guardian and family members of the mentally retarded could be useful in the commitment proceedings without being a party, but decided it would not require the State to choose the "least-restrictive means [to] achiev[e] its legislative end."<sup>110</sup>

### III. THE DISSENTING OPINIONS IN *HELLER V. DOE*

#### A. Justice Souter's Dissenting Opinion

Justice Souter expressed his disagreement with the majority's finding that Doe's request for heightened scrutiny was "not 'properly presented.'"<sup>111</sup> He determined, however, that he did not need to pursue that issue because, under the rational-basis review applied in *Cleburne*, the disparate procedures were irrational and therefore a violation of equal protection.<sup>112</sup> He noted that the rational-basis review employed in *Cleburne*, to which the majority looked for support, was different from the traditional rational-basis review.<sup>113</sup> In *Cleburne*, while purporting to apply a rational-basis review, the Court actually looked into the record to determine whether there was adequate support for the State's justifications for discriminating against the mentally retarded with respect to a zoning restriction.<sup>114</sup>

Applying the *Cleburne* heightened rational-basis review, Justice Souter found the disparate burdens of proof for commitment of the mentally ill and the mentally retarded to be irrational.<sup>115</sup> He opined that the princi-

107. *Id.* at 2643 (quoting AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS 28-29 (3d rev. ed. 1987)).

108. *Id.*

109. *Id.* at 2647-48. Again, the majority found the State "may have concluded" that guardians or family of the mentally ill could not add enough to the proceedings to justify the "additional burden and complications of granting party status." *Id.* at 2648.

110. *Id.* at 2648 (citation omitted).

111. *Id.* at 2650-51 (quoting *id.* at 2642).

112. *Id.* at 2651.

113. *Id.*; see also *supra* note 93 (discussing the rational-basis review standard as applied in *Cleburne*).

114. *Heller*, 113 S. Ct. at 2651-52. Justice Souter discusses the heightened rational-basis review as applicable to classifications on the basis of mental disability. *Id.*

115. *Id.* at 2653.

pal object in setting burdens is not merely to reflect the difficulty of diagnosis and establishment of dangerous behavioral patterns, as the State argued, but also to reflect the importance of the subsequent finding to all parties.<sup>116</sup> This requires a balancing of the interest of the community in being protected from potential danger and the interest of the individual in being cared for with the value society places on the individual's liberty interest.<sup>117</sup> This liberty interest is the freedom from bodily restraint and from the stigma that such restraint imposes on an institutionalized person.<sup>118</sup> The classification of the individual as mentally retarded or mentally ill bears no relation to these interests.<sup>119</sup> Justice Souter determined that the mentally retarded and the mentally ill, as subjects for involuntary commitment, may both need to be cared for and may both be dangerous.<sup>120</sup> Therefore, he claimed, the State's objectives are of "equal strength in each category of cases."<sup>121</sup> Accordingly, he could find no justification for placing a lower value on this liberty interest for the mentally retarded.<sup>122</sup>

Justice Souter determined that the "intimate knowledge" and "valuable insight" of the guardian and immediate family members of the mentally retarded may justify their participation as *witnesses*, but not as parties to the commitment proceedings.<sup>123</sup> He could not justify a greater role.<sup>124</sup> Justice Souter found the participation of the guardian or family member as parties, more often than not, imposes not only a "second advocate for institutionalization" on the mentally retarded person, but also a second prosecutor.<sup>125</sup> The right to participate as if a party carries with

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116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 2653-54; *c.f. supra* notes 101-03 (The majority determined that the classification was relevant due to (1) differences in postcommitment treatment, (2) prior differences in treatment in Anglo-American law, and (3) the fact that the majority of states currently provide disparate procedures for the two classes).

120. *Heller*, 113 S. Ct. at 2653.

121. *Id.*

122. *Id.*

123. *Id.* at 2656.

124. *Id.* at 2656-57.

125. *Id.* at 2657; *see also* Brief for Respondents, *supra* note 71, at 43 (the interests of parents of mentally retarded adults have often proven to be adverse to those of their child, "resisting placement in less restrictive settings deemed by mental retardation professionals to be more appropriate, either because of overprotectiveness, ignorance of [the child's] capabilities, [or] ignorance of the . . . community to provide appropriate services"); Mark Tausig, *Factors in Family Decision-Making About Placement For Developmentally Disabled Individuals*, 89 AM. J. MENTAL DEFICIENCY 352, 358 (1985) ("[s]tressors within the family



it the right to call and cross-examine witnesses, obtain experts, and appeal a decision not to institutionalize the mentally retarded person.<sup>126</sup> Justice Souter could find no rational justification for placing this additional burden on the mentally retarded.<sup>127</sup>

### B. Justice Blackmun's Dissent

In a very brief dissent, Justice Blackmun stated his view that "laws that discriminate against individuals with mental retardation or infringe upon fundamental rights are subject to heightened review."<sup>128</sup> This reiterated his position in *City of Cleburne v. Cleburne Living Center*<sup>129</sup> and *Foucha v. Louisiana*.<sup>130</sup> He also joined Justice Souter's dissenting opinion.<sup>131</sup>

## IV. THE FUNDAMENTAL RIGHT TO BE FREE FROM BODILY RESTRAINT AND ASSOCIATED STIGMA

### A. Freedom From Bodily Restraint

The Thirty-Ninth Article of England's Magna Carta, signed on June 15, 1215, declared that "[n]o freeman shall be taken, or imprisoned, . . . or outlawed, or banished, or any ways destroyed . . . unless by the legal judgment of his peers, or by the law of the land."<sup>132</sup> While the Magna Carta was the first written acknowledgment of these rights by a sovereign, these were rights that free Englishmen had long possessed.<sup>133</sup> "[C]onfirmed no less than thirty-two times by subsequent [English] monarchs[.]" these rights came to be considered birth rights.<sup>134</sup>

The Magna Carta was a plain statement of the most elementary rights to liberty which, in the "limited sense[,] signify freedom of the person or

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[including] the burden of care, and disruption of family relations contribute [ ] significantly to the placement request process. . . . [T]he impact of the older disabled family member on the . . . family must be seen as central to the decision-making process").

126. *Heller*, 113 S. Ct. at 2657.

127. *Id.*

128. *Id.* at 2650 (Blackmun, J., dissenting) (citations omitted).

129. 473 U.S. 432, 455-78 (1985) (Marshall, J., dissenting in part, concurring in part, joined by Brennan and Blackmun, JJ.).

130. 504 U.S. 71, 73-86 (1992) (White, J., plurality).

131. *Heller*, 113 S. Ct. at 2650 (Souter, J., dissenting).

132. Charles E. Shattuck, *The True Meaning of the Term "Liberty" In Those Clauses in the Federal and State Constitutions Which Protect "Life, Liberty, and Property."*, 4 HARV. L. REV. 365, 372 (1890). King John of England was compelled by English barons, under "point of sword," to sign the Magna Carta. *Id.* at 370.

133. *Id.* at 373. These were rights that had "theoretically always [been] possessed under the common law." *Id.*

134. *Id.* at 370.

body."<sup>135</sup> This concept of liberty is found in the Declaration of Independence<sup>136</sup> and in the Fourteenth Amendment of the United States Constitution.<sup>137</sup> Although the term "liberty" has not been defined with exactness in the United States, the Supreme Court, in *Meyers v. Nebraska*,<sup>138</sup> stated that "[w]ithout doubt, it denotes not merely freedom from bodily restraint."<sup>139</sup> Through prior and subsequent case law, the Supreme Court has determined that freedom from bodily restraint is essential to the liberty of the Declaration of Independence and the Constitution, both in the civil and criminal contexts.<sup>140</sup>

### B. Associated Stigma

In the criminal context, the Supreme Court has long considered freedom from bodily restraint accompanied by the loss of a "good name" a vital consideration in the determination of criminal guilt.<sup>141</sup> Webster's Dictionary defines the word "stigma" as "a mark of shame or discredit."<sup>142</sup> More recently, in the civil context, the Court has determined that the stigmatizing consequences of institutionalization, coupled with physical confinement, is a "grievous loss."<sup>143</sup>

### C. The Fundamental Interest and the Charged Criminal

#### 1. Freedom From Bodily Restraint

Freedom from bodily restraint, as applied to one facing criminal incarceration, has long been recognized as a fundamental liberty interest. A comment on the English Habeas Corpus Act, published in Boston in 1721, stated: "There are three things which the law of England . . . principally regards and taketh care of, viz., life, liberty, and estate. Next to a man's life the nearest thing that concerns him is freedom of his person;

135. *Id.* at 373. Freedom of the person was a mandatory provision in all confirmations of the 39th Article and from thereon was always found alongside rights of life and property. *Id.* at 376.

136. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (stating that "all men are created equal . . . with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness").

137. U.S. CONST. amend. XIV § 1 (stating "[n]o state shall deprive any person of life, liberty or property without due process of law"); U.S. CONST. amend. V (stating that "[no] person shall be . . . deprived of life, liberty, or property, without due process of law").

138. 262 U.S. 390 (1923).

139. *Id.* at 399.

140. See discussion *infra* parts IV.C-E.

141. *In re Winship*, 397 U.S. 358, 363-64 (1970).

142. WEBSTER'S NEW COLLEGIATE DICTIONARY 1134 (1981).

143. *Vitek v. Jones*, 445 U.S. 480, 488 (1980).

for indeed, what is imprisonment but a kind of civil death?"<sup>144</sup> The high degree of proof required for a criminal conviction demonstrates the value society places on this liberty interest.<sup>145</sup> As early as 1798, this higher standard was termed "beyond a reasonable doubt."<sup>146</sup>

In *Davis v. United States*,<sup>147</sup> the Supreme Court specifically recognized freedom from bodily restraint as a fundamental liberty interest.<sup>148</sup> The Court reversed a murder conviction where the trial judge had instructed the jury that a conviction was required "where the evidence [was] equally balanced."<sup>149</sup> The Court stated that the beyond a reasonable doubt standard is implicit in "constitutions [which] equally recognize the fundamental principles that are deemed essential for the protection of life and liberty."<sup>150</sup>

## 2. *The Stigma of a Criminal Conviction*

A criminal conviction carries with it collateral effects independent of incarceration. Upon release, a criminal is subject to civil disabilities.<sup>151</sup> Also, multiple convictions may brand the criminal a habitual offender, which can result in a stiffer sentence and can later be used to impeach credibility.<sup>152</sup> In addition, the stigma of the conviction is imposed on the criminal's reputation.<sup>153</sup> The word "felon" is defined by Webster's Dictionary as "villain."<sup>154</sup> The word "criminal" is defined as "disgraceful."<sup>155</sup>

In *In re Winship*,<sup>156</sup> the Supreme Court designated as fundamental the

144. Shattuck, *supra* note 132, at 378 (quoting *Care's English Liberties* (1721)).

145. *Addington v. Texas*, 441 U.S. 418, 423 (1979); see also *In re Winship*, 397 U.S. at 361 (stating that due to the potential for incarceration, criminal cases have traditionally demanded a higher degree of proof).

146. *In re Winship*, 397 U.S. at 361. Beyond a reasonable doubt was accepted at that time as the "measure of persuasion by which the prosecution must convince the trier [of fact] of all the essential elements of guilt." *Id.*

147. 160 U.S. 469 (1895).

148. *Id.* at 488.

149. *Id.* at 484.

150. *Id.* at 488.

151. Note, *Civil Disabilities of Felons*, 53 VA. L. REV. 403 (1967). Civil Disabilities are often "imposed as part of a regulatory statute setting qualifications to perform various acts" such as voting, running for public office, jury service, and occupations ranging anywhere from engineers to barbers. *Id.* at 403 n.1, 404-05.

152. *Benton v. Maryland*, 395 U.S. 784, 790-91 (1969); *Sibron v. New York*, 392 U.S. 40, 54-56 (1968).

153. *In re Winship*, 397 U.S. 358, 363 (1970).

154. WEBSTER'S NEW COLLEGIATE DICTIONARY 418 (1981).

155. *Id.* at 267.

156. 397 U.S. at 358.

right to be free from the stigma associated with a criminal conviction.<sup>157</sup> While considering procedures necessary to adjudge a juvenile as "delinquent," the Court noted that the accused in a criminal prosecution has not only the loss of his freedom at stake but also the imposition of the stigma associated with being labeled a criminal.<sup>158</sup> It stated that "a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt."<sup>159</sup>

In *Ball v. United States*,<sup>160</sup> the Supreme Court recognized that there are limits beyond which stigma by conviction may not be imposed.<sup>161</sup> Ball had been convicted by a lower court on two counts, both arising from the same action.<sup>162</sup> Regardless of the fact that his sentences were concurrent, the Court held that both convictions could not stand.<sup>163</sup> It recognized the additional adverse consequences of a second conviction, including the imposition of societal stigma associated with a criminal conviction.<sup>164</sup> The second conviction, the Court determined, was an "impermissible punishment."<sup>165</sup>

#### D. *The Convicted Criminal and Subsequent Institutionalization for Mental Illness*

Prior to 1975, there were only two Supreme Court cases addressing involuntary civil commitment and the rights of the mentally ill.<sup>166</sup> These cases were decided in 1872 and 1901 and dealt with the ability of an "insane" person to execute a power of attorney and the sufficiency of notice and opportunity to defend a petition of "lunacy," respectively.<sup>167</sup> There were, however, a string of landmark decisions in the 1960s and early 1970s addressing individuals charged with or convicted of a crime and thereafter committed to a mental institution.

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157. *Id.* at 359.

158. *Id.* at 363.

159. *Id.* at 363-64.

160. 470 U.S. 856 (1985).

161. *Id.* at 865.

162. *Id.* at 857-58.

163. *Id.* at 865.

164. *Id.* Two convictions may affect the convicted criminal's eligibility for parole, result in an increased sentence for a future offense and be used to impeach credibility. *Id.*

165. *Id.*

166. Grant H. Morris, *The Supreme Court Examines Civil Commitment Issues: A Retrospective and Prospective Assessment*, 60 *TUL. L. REV.* 927, 934 n.41 (1986).

167. *Dexter v. Hall*, 82 U.S. 9, 26 (1872); *Simon v. Craft*, 182 U.S. 427, 436-37 (1901).

In the first of these cases, *Baxstrom v. Herold*,<sup>168</sup> a unanimous Supreme Court held that it was a violation of equal protection for Baxstrom, a convicted criminal transferred to a mental hospital during his sentence, to be held after the expiration of his sentence without the statutory civil commitment procedures available to the noncriminal mentally ill.<sup>169</sup> The Court determined that once the state had made certain commitment procedures available to the noncriminal mentally ill, it could not, consistent with equal protection, arbitrarily withhold it from the criminally insane.<sup>170</sup> The state argued that the classification of "criminally insane," those with dangerous or criminal propensities, was a reasonable justification for the disparate procedures.<sup>171</sup> The Court found that commitment procedures are only to determine whether the person is mentally ill and in need of institutional care.<sup>172</sup> Using a traditional rational-basis review, the Court determined that the state's justification had no relevance with regard to the purpose for the classification.<sup>173</sup> Although the Court did not treat Baxstrom's liberty interest as fundamental and apply the strict scrutiny standard, it was not necessary for the Court to do so in this case because the issue could be dispensed with by using a lesser standard.<sup>174</sup>

In 1972, the Court in *Humphrey v. Cady*<sup>175</sup> dealt with a matter involving a convicted criminal who had been institutionalized rather than sentenced to prison.<sup>176</sup> At the end of the maximum sentence for his crime, the state petitioned the court for a five year renewal order.<sup>177</sup> As in *Baxstrom*, the state had provided different procedures for involuntary civil commitment. The state in *Humphrey* justified the denial of these procedures to the criminally insane based on the fact that commitment was an alternative to penal sentencing and the same procedural protections were

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168. 383 U.S. 107 (1966).

169. *Id.* at 110.

170. *Id.* at 111.

171. *Id.*

172. *Id.*

173. *Id.* The distinction between mentally ill and dangerously or criminally insane would be relevant for postcommitment treatment. *Id.*

174. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501 (1985) (stating one of the "two . . . cardinal rules governing the federal courts" is to "never formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied").

175. 405 U.S. 504 (1972).

176. *Id.* at 506. Humphrey had been convicted of "contributing to the delinquency of a minor" and, in lieu of his one year maximum sentence, he was committed to the "sex deviate facility" in state prison. *Id.* (quoting WIS. STAT. ANN. §947.15 (1958), as amended, c. 975 (1971)).

177. *See id.* at 507.

therefore not required.<sup>178</sup> The Court reiterated its holding in *Baxstrom* that, having made certain procedures available to those subjected to involuntary civil commitment, those same procedures could not be arbitrarily withheld from criminals facing involuntary commitment without violating equal protection.<sup>179</sup> Again, using the traditional rational-basis review, a unanimous Court found that the state's justifications, while relevant to the initial commitment, carried little weight with regard to renewal orders. As in *Baxstrom*, the Court did not treat the liberty interest as fundamental because it was not necessary to dispense with the issue. However, the Court did recognize that commitment to a mental institution is a "massive curtailment of liberty."<sup>180</sup>

That same year, the Supreme Court, in *Jackson v. Indiana*,<sup>181</sup> extended the *Baxstrom* holding to invalidate a statute that permitted a lifetime commitment of a charged criminal found incompetent to stand trial, finding it to be a violation of equal protection.<sup>182</sup> Jackson, a "mentally defective deaf mute with a mental level of a pre-school child,"<sup>183</sup> had been charged with robbery and was then found incompetent to stand trial.<sup>184</sup> The trial court committed him to a mental institution "until such time as [the Indiana Department of Mental Health] should certify to the court that 'the defendant is sane.'"<sup>185</sup> The Supreme Court unanimously determined that if a criminal conviction (as in *Baxstrom* and *Humphrey*) was insufficient to justify procedures less than those for civil commitment, "the mere filing of criminal charges surely cannot suffice."<sup>186</sup>

In *Vitek v. Jones*,<sup>187</sup> the Court recognized the stigma associated with commitment to a mental institution as separate and apart from that imposed by a criminal conviction.<sup>188</sup> The action was a procedural due process challenge to a state statute which allowed a prisoner to be

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178. *Id.* at 510.

179. *See id.* at 508, 511. Justices Powell and Rehnquist took no part in the consideration or decision of this case. *Id.* at 517.

180. *Id.* at 509.

181. 406 U.S. 715 (1972).

182. *Id.* at 730.

183. *Id.* at 717.

184. *Id.* at 717-19. It should be noted that Jackson was charged with two separate robberies. The first was the theft of a purse and its belongings with a total value of four dollars and the second was the theft of five dollars in cash. *Id.* at 717.

185. *Id.* at 719.

186. *Id.* at 724. Again, the Court did not use any form of heightened scrutiny as it was not necessary to dispense with the issue. *See supra* note 174 and accompanying text.

187. 445 U.S. 480 (1980).

188. *Id.* at 492.

transferred to a mental institution on the determination of a physician or psychologist that he was mentally ill and could not be given proper treatment in prison.<sup>189</sup> The Court held that the involuntary transfer of a convicted criminal to a mental institution implicates a liberty interest protected by the due process clause.<sup>190</sup> It recognized that a valid criminal conviction and sentence extinguishes a defendant's right to freedom from confinement, but that involuntary commitment to a mental institution is not within the range of conditions of confinement imposed by a criminal sentence.<sup>191</sup> The criminal convict retains a "residuum of liberty" that may not be infringed without proper procedures, including notice and hearing.<sup>192</sup> The Court determined that this liberty interest is more than a loss of freedom from bodily restraint, but also a loss of freedom from the stigma associated with commitment to a mental institution.<sup>193</sup> It recognized that this stigma can have a "very significant impact on the individual."<sup>194</sup>

In 1990, the Supreme Court, in *Foucha v. Louisiana*,<sup>195</sup> stated that freedom from bodily restraint is a fundamental right.<sup>196</sup> *Foucha* involved a substantive due process and equal protection challenge to a state statute requiring an insanity acquittee to be held in a mental hospital if he is found to be dangerous, even if he is no longer mentally ill.<sup>197</sup> The Court determined that where a statute infringes upon the fundamental right to be free from bodily restraint, the state's interest must be "particularly convincing."<sup>198</sup> The state did not meet this burden and the Court held that once the acquittee is no longer mentally ill it violates his fundamental liberty interest to be held as such.<sup>199</sup> The Court also reaffirmed its conclusion in *Vitek* that the liberty interest lost when one is involuntarily committed to a mental institution, even if already a convicted criminal, is

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189. *Id.* at 482-83.

190. *Id.* at 491.

191. *Id.* at 493.

192. *Id.* at 491, 495-96.

193. *Id.* at 492.

194. *Id.* (quoting *Addington v. Texas*, 441 U.S. 418, 425-26 (1979)). The Court again did not use any form of heightened scrutiny as it was not necessary to dispense with the issue. See *supra* note 174 and accompanying text.

195. 112 S. Ct. 1780 (1992).

196. *Id.* at 1788.

197. *Id.* at 1782.

198. *Id.* at 1788.

199. *Id.* at 1788-89. In addition, the Court noted that the purpose of imprisonment is deterrence and retribution. *Id.* at 1788. *Foucha* had been acquitted by reason of insanity and so he could not be punished. *Id.* at 1785.

not only a loss of freedom from bodily restraint but also a loss of freedom from the stigma imposed by the commitment.<sup>200</sup>

### E. Civil Commitment of the Mentally Ill

*O'Connor v. Donaldson*,<sup>201</sup> decided in 1975, marked the first time since 1901 that the Supreme Court had considered the rights of a mentally ill person in a purely civil context.<sup>202</sup> Donaldson had been involuntarily committed to a mental institution where he was kept against his will for fifteen years.<sup>203</sup> He was not considered dangerous, but the hospital did not feel he could make a "successful adjustment" outside the institution.<sup>204</sup> Donaldson brought his action claiming the hospital and its superintendent had intentionally and maliciously deprived him of his constitutional right to liberty.<sup>205</sup> The Court did not delve into the "difficult issues of constitutional law" but simply held that a finding of mental illness alone cannot constitutionally justify depriving Donaldson of his physical liberty.<sup>206</sup>

In *Addington v. Texas*,<sup>207</sup> a unanimous Supreme Court set the minimum standard of proof required by due process for an involuntary civil commitment.<sup>208</sup> It stated that in cases involving individual liberty interests the standard of proof reflects the value society places on those interests.<sup>209</sup> The Court, citing *Humphrey v. Cady* and *Jackson v. Indiana*, reiterated its view that civil commitment for any reason is a "significant deprivation of liberty,"<sup>210</sup> and recognized that it is "indisputable" that commitment can "engender adverse social consequences [*i.e.*, stigma]."<sup>211</sup>

While the *Addington* Court conceded that the state had legitimate interests as part of its *parens patriae* and police powers to provide care for the mentally ill and to protect the community from those who are dangerous,<sup>212</sup> it found that the individual interest in the outcome of the proceeding is "of such weight and gravity" that a standard of "preponderance of

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200. *Id.* at 1784-85.

201. 422 U.S. 563 (1975).

202. Morris, *supra* note 166, at 934 n.40.

203. *O'Connor*, 422 U.S. at 564.

204. *Id.* at 568. Dr. O'Connor could not remember the basis for this conclusion. *Id.*

205. *Id.* at 565.

206. *Id.* at 576.

207. 441 U.S. 418 (1979).

208. *Id.* at 433.

209. *Id.* at 425.

210. *Id.*

211. *Id.* at 426.

212. *Id.*



the evidence" is not sufficient.<sup>213</sup> The Court considered the imposition of the beyond a reasonable doubt standard.<sup>214</sup> However, the Court settled on applying a standard of clear and convincing evidence due in part to the fact that the "subtleties and nuances of psychiatric diagnosis" are such that a beyond a reasonable doubt standard might make commitment impossible altogether.<sup>215</sup>

V. *HELLER V. DOE* UNDER A STRICT SCRUTINY, FUNDAMENTAL INTEREST ANALYSIS

For the mentally retarded, like the mentally ill and the criminal, freedom from bodily restraint and from the stigma imposed by such restraint is among the most fundamental of liberty interests. Freedom from bodily restraint is at the "core of . . . liberty [interests]"<sup>216</sup> and can be traced through the English roots of our jurisprudence as far back as the Magna Carta.<sup>217</sup> Today, commitment for any purpose is considered a "significant deprivation of liberty"<sup>218</sup> and the Supreme Court is careful not to "minimize the importance and fundamental nature of [the individual's] right [to liberty]."<sup>219</sup> This liberty interest includes "an almost infinite range of life's freedoms, seemingly mundane and trivial in isolation but invaluable in the aggregate."<sup>220</sup> Such freedoms include walking "in the woods on a weekend afternoon or calling a friend."<sup>221</sup> There is no reason to believe that the mentally retarded think less of their freedom.<sup>222</sup> It would be

213. *Id.* at 427.

214. *Id.* at 428.

215. *Id.* at 430, 432. The beyond a reasonable doubt standard works in a criminal trial because "specific, knowable facts" are being addressed, whereas a psychiatric diagnosis is "based on medical 'impressions' drawn from subjective analysis and filtered through the experience of the diagnostician." *Id.*

216. *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982).

217. *See supra* notes 132-35 and accompanying text.

218. *Addington*, 441 U.S. at 425.

219. *United States v. Salerno*, 481 U.S. 739, 750 (1987).

220. Br. of Am. Ass'n on Mental Retardation, *supra* note 11, at 9 n.7.

221. *Id.*

222. *Id.* at 10. The impact of institutionalization on a mentally retarded person is "real, tangible, and is felt by that person in a number of varied ways." *Amicus Curiae* Brief of Focus on Community Understanding and Services, Inc. (FOCUS); People First of Nebraska; People First of Ruston, Louisiana; People First of Tennessee; and People First of Washington in Support of Respondents at 20, *Heller v. Doe*, 113 S. Ct. 2637 (1993) (No. 92-351). One mentally retarded person forced to live in an institution for 48 years stated:

No one should have to live in an institution. It's not home. Their home is right out here with everyone else.

I went to Rainer School when I was a small boy because my mom and dad couldn't take care of me. I did carpentry there. I missed a lot.

“constitutionally and philosophically unacceptable” to place a lesser value on their freedom because they are mentally retarded.<sup>223</sup>

Institutionalization not only results in a loss of physical freedom, but it carries with it associated stigma.<sup>224</sup> In relation to the mentally retarded, stigma can be defined as the “difference between how one actually is (e.g., retarded) and how one is expected to be (i.e., competent, independent).”<sup>225</sup> The label of “mental retardation” is stigmatizing in and of itself.<sup>226</sup> It is common for the mentally retarded to be obsessed with passing as normal or nonretarded.<sup>227</sup> The mentally retarded often have negative reactions to or low opinions of other retarded persons and try to associate with “nonretarded” persons in an effort to appear “normal.”<sup>228</sup> Institutionalization is even more stigmatizing for the mentally retarded. One study revealed that the mentally retarded try to conceal the reasons for their institutionalization with stories of mental illness, nerves, alcoholism, or even criminal offenses.<sup>229</sup>

Kentucky has a legitimate objective “‘under its *parens patriae* powers in providing care to its citizens who are unable . . . to care for themselves,’ as well as ‘authority under its police power to protect the community’” from dangerous persons.<sup>230</sup> Institutionalization, however, affects an individual’s fundamental right to be free from bodily restraint and associated

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Now, I can take the bus by myself and I like that. Nobody comes with me. When I was at the institution, no one would let me do anything by myself. I don’t feel so good that my friends are still there. I visit them and they visit me. They don’t belong there.

*Id.*

223. Br. of Am. Ass’n on Mental Retardation, *supra* note 11, at 11.

224. Addington v. Texas, 441 U.S. 418, 425-26 (1979).

225. S.E. Szivos & E. Griffiths, *Group Processes Involved In Coming To Terms With A Mentally Retarded Identity*, 28 MENTAL RETARDATION 333, 333 (1990) (citation omitted).

226. Steven Reiss, Ph.D. & Betsey A. Benson, Ph.D., *Awareness of Negative Social Conditions Among Mentally Retarded, Emotionally Disturbed Outpatients*, 141 AM. J. PSYCHIATRY 88, 88 (1984). “There are few labels more devastating psychologically than that of mental retardation.” *Id.* Many mentally retarded people are aware of the “negative social reality” and this may impede their psychological development. *Id.*

227. Frederick X. Gibbons, *Stigma Perception: Social Comparison Among Mentally Retarded Persons*, 90 AM. J. MENTAL DEFICIENCY 98, 99 (1985).

228. *Id.* at 98; see also Cindy Loose, *Changes Pose Downer For Hill Picker-Upper: 12-Year Elevator Operator Fears GOP Job Cuts*, WASH. POST, Dec. 11, 1994, at B1 (An elevator operator who lives in a “group house for those who need help living independently of their families” raves about her job. She says “‘I love this job. I love it. . . I [get to] meet friendly people. I meet congressmen. I get the opportunity to be with normal people.’”).

229. ROBERT B. EDGERTON, *THE CLOAK OF COMPETENCE* 134 (1993).

230. Heller v. Doe, 113 S. Ct. 2637, 2649 (1993) (quoting Addington v. Texas, 441 U.S. 418, 426 (1979)).

stigma. Therefore, it is a violation of equal protection for Kentucky to provide disparate involuntary civil commitment procedures for the mentally ill and the mentally retarded, unless its objective is compelling and the disparate procedures are necessary.<sup>231</sup> To be compelling, Kentucky's interest in exercising its *parens patriae* and police powers must be so great that it justifies limiting the right of the mentally retarded to be free from bodily restraint and associated stigma.<sup>232</sup> To be necessary, the differential procedures must be the only way the State can address its objective.<sup>233</sup>

The facial defect in Kentucky's case is its assignment of a higher burden of proof for commitment of the mentally ill, compared to that required to commit the mentally retarded. Burdens of proof reflect not only the difficulty of avoiding error but also reflect the importance or value society places on the liberty interest at stake.<sup>234</sup> The Supreme Court, in *Addington*, held that a preponderance of the evidence standard in a civil commitment proceeding for the mentally ill is not sufficient due to the weight and gravity of the interest at stake.<sup>235</sup> The Court found it so important to avoid an erroneous commitment that it considered the much higher standard of beyond a reasonable doubt.<sup>236</sup> However, due in part to the "subtleties and nuances of psychiatric diagnosis that render certainties virtually beyond reach in most instances," the Court settled on the standard of clear and convincing evidence as the minimum standard of proof for involuntary civil commitment procedures.<sup>237</sup>

Kentucky has determined that the fundamental interest of the mentally ill to be free from bodily restraint and the stigma imposed by such restraint is "so precious" that, despite the difficulty in diagnosing mental illness, it has set the burden of proof for involuntary commitment at beyond a reasonable doubt.<sup>238</sup> Equal protection and the *Baxstrom* holding dictate that Kentucky may not provide the beyond a reasonable doubt standard for commitment of the mentally ill and then arbitrarily withhold the standard from the mentally retarded.<sup>239</sup> The State justifies the lower

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231. 3 ROTUNDA & NOWAK, *supra* note 5, at 15; *see also supra* notes 58-62 and accompanying text (discussing the strict scrutiny standard of review).

232. *Id.*

233. *Id.*

234. *Addington*, 441 U.S. at 418.

235. *Id.* at 427.

236. *Id.* at 422-30.

237. *Id.* at 430.

238. *Heller*, 113 S. Ct. at 2652.

239. *Baxstrom v. Herold*, 383 U.S. 107, 111 (1966); *see also*, *Jackson v. Indiana*, 406 U.S. 717, 724 (1980) (affirming the *Baxstrom* holding); *Humphrey v. Cady*, 405 U.S. 504, 508 (1972) (affirming the *Baxstrom* holding).

burden of proof for involuntary commitment of the mentally retarded on the grounds that it is easier to diagnose mental retardation and that the determination of the dangerousness of a mentally retarded person may be made with more accuracy.<sup>240</sup> These justifications have no relevance to the State's objective.<sup>241</sup> The mentally retarded and the mentally ill, as candidates for involuntary civil commitment, may both need to be cared for and may both be dangerous. The State's objective in caring for the subject individual and protecting the community is of "equal strength in each category of cases."<sup>242</sup> As the State's objective in institutionalizing the mentally ill and mentally retarded is the same, it clearly cannot be compelling. The disparate procedures are, therefore, a violation of equal protection.

Regardless of whether the State's objective is compelling, the disparate burdens of proof still violate equal protection because the lower standard of proof is not necessary to promote the State's objective. If, as Kentucky proposes, mental retardation is easier to diagnose than mental illness, it will have less difficulty meeting a beyond a reasonable doubt standard in cases involving the mentally retarded than it does in cases involving the mentally ill.

As Kentucky's objective does not support disparate burdens of proof for the mentally retarded and the mentally ill, the State's objective does not support allowing the guardian or family of the mentally retarded to participate in the proceedings, as if a party. Again, the State's objective is to care for individuals who cannot care for themselves and to protect the community from those that are dangerous. The importance of this objective does not vary depending on whether the subject individual is mentally ill or mentally retarded. The State's objective is of "equal strength in each category of cases,"<sup>243</sup> and therefore, cannot be compelling.

Kentucky's statutory provision permitting participation of guardian and family, as if a party, is also unnecessary to promote the State's objective. Kentucky justifies the provision on the basis that the guardian or family member will have "intimate knowledge" of the mentally retarded person and will be able to provide "valuable insights" that the families of

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240. *Heller*, 113 S. Ct. at 2643-44.

241. *Baxstrom*, 383 U.S. at 111 (stating that where the purpose of classification is to determine whether institutional care is needed, distinctions between the two classes of commitment is irrelevant).

242. *Heller*, 113 S. Ct. at 2653.

243. *Id.*

the mentally ill would not.<sup>244</sup> The State's objective, however, can be achieved by parental participation on the interdisciplinary teams (which is already a part of the commitment process)<sup>245</sup> and the participation of guardians or family members as witnesses in the proceeding.<sup>246</sup>

In addition to being unnecessary, the interests of the guardian or family member are not always the same as those of the mentally retarded person. There are four recognized factors influencing a move toward institutionalization: characteristics of the disabled individual, characteristics of the family, outside influences on individuals and their families,<sup>247</sup> and parental perception.<sup>248</sup> In mentally retarded adults, "[s]tressors within the family, the burden of care, and disruption of family relations contribute [ ] significantly [to the decision-making process]."<sup>249</sup> Community attitudes also have been recognized as influencing the decision for institutionalization.<sup>250</sup> If the view of the community in which the mentally retarded person lives "reflects a fear of 'deviant' human beings, the parents [or guardians] will probably be under considerable social pressure—subtle or otherwise—to" institutionalize.<sup>251</sup> As Justice Souter recognized, where the guardian or parent desires institutionalization, participation as if a

244. *Id.* at 2647.

245. Br. of Am. Ass'n on Mental Retardation, *supra* note 11, at 19. The interdisciplinary team "makes service recommendations for the mentally retarded person facing involuntary commitment." *Id.* The Kentucky code states:

The interdisciplinary team shall: 1. Conduct a comprehensive evaluation of the individual, not more than three (3) months before admission, covering physical, emotional, social, and cognitive factors; and 2. Prior to admission define the need for service without regard to availability of those services. The team shall review all available and applicable programs of care, treatment, and training and record its findings . . . .

KY. REV. STAT. ANN. § 202B.045(1)(b) (Michie/Bobbs-Merrill 1991).

246. *Heller*, 113 S. Ct. at 2656-57.

247. Tausig, *supra* note 125, at 352 (discussing the often divergent interests of mentally retarded persons and their parents); *see also* BEIRNE-SMITH ET AL., *supra* note 12, at 501-03. Characteristics of the disabled individual that can lead to institutionalization include "medical needs, nonmedical needs, need for protection, and behavioral problems." *Id.* at 501. Characteristics of the family are analyzed in the form of family involvement which includes "[d]aily stressors, number of parents in the home, years of parental education, level of income and proximity to the out-of-home . . . facility." *Id.* at 501-02. Outside influences or nonfamily factors include the advice of physicians, clergy, other professionals, and even attitudes of the community. *Id.* at 502.

248. BEIRNE-SMITH ET AL., *supra* note 12, at 502. This is often erroneous as to "specific characteristics of their children in conjunction with the belief that the institutional setting is the best alternative possible." *Id.*

249. Tausig, *supra* note 125, at 358.

250. BEIRNE-SMITH ET AL., *supra* note 12, at 502.

251. *Id.* at 502-03.

party places both a second advocate for institutionalization and a second prosecutor on the mentally retarded.<sup>252</sup> There is no justification for this imposition on the fundamental interest of the mentally retarded where it is not imposed on the same fundamental interest of the mentally ill.

## VI. CONCLUSION

The *Heller* majority denied Doe's request for a heightened scrutiny review because it was not raised in the lower courts, and therefore was not properly presented.<sup>253</sup> Others seeking to challenge the disparate commitment procedures of the forty-one states with disparate laws are not likely to make the same mistake.

Mental illness and mental retardation are by no means alike. However, mere identification of differences is not sufficient under a Fourteenth Amendment analysis of involuntary civil commitment procedures, where a fundamental interest such as freedom from bodily restraint and associated stigma is at stake. Equal protection requires the distinctions between the proceedings to be supported by a compelling state objective and to be necessary.<sup>254</sup> The differences between the mentally retarded and the mentally ill may be relevant for the promotion of other state objectives. Prior to commitment, however, the mentally ill and mentally retarded are just two classes of individuals facing the loss of their fundamental right to be free from bodily restraint and associated stigma by involuntary commitment to a state institution. The State's objective to care for these people and to protect the community is of "equal strength in each category of cases."<sup>255</sup> In view of this equality, it is a violation of the equal protection clause of the Fourteenth Amendment of the United States Constitution to treat the mentally retarded differently than the mentally ill in involuntary civil commitment proceedings.

*Laura R. Biddle*

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252. *Heller*, 113 S. Ct. at 2657.

253. *Id.* at 2642.

254. *Baxstrom v. Herold*, 383 U.S. 109, 111 (1966).

255. *Heller*, 113 S. Ct. at 2653.

