Michigan Law Review

Volume 82 | Issue 4

1984

The Theory and Practice of Civil Commitment

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THE COURT OF LAST RESORT: MENTAL ILLNESS AND THE LAW. By *Carol A.B. Warren* with contributions by *Stephen J. Morse* and *Jack Zusman.* Chicago and London: The University of Chicago Press. 1982. Pp. xii, 265. $25.

On a sweltering day in London, towards the end of June, 1849, a curious throng of spectators jammed into a special sitting of the Court of the Exchequer to hear the Lord Chief Baron, Sir Frederick Pollock, and a special jury decide the case of *Nottidge v. Ripley and another*.[1] For three days, the court remained "crowded to suffocation," while a still larger audience followed the proceedings at a distance, devouring successive installments of the real-life soap opera at breakfast, in the blow-by-blow account provided in the legal columns of *The Times.* At the conclusion of the trial, after a brief retirement, the jury found for the plaintiff, awarding her fifty pounds and costs.

The object of this unwonted celebrity, Miss Louisa Nottidge, was a quiet and retiring "maiden lady . . . at the meridian of life," and her suit was an action for damages against her brother and brother-in-law for wrongful confinement in a madhouse.[2] As the trial testimony revealed, shortly after her father's death, in May 1844, Louisa and three of her unmarried sisters (all rather advanced in years) had become enamored of the doctrines of an obscure and tiny religious cult, the Lampeter Brethren, and of the preaching of the sect's leader, a defrocked Anglican curate named Prince. Within a matter of months, they had left their maternal home to follow Prince, taking with them their private fortunes — amounting to some six thousand pounds each. Three of the ladies promptly married, in the same cer-

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1. Unless otherwise noted, my account of the trial is drawn from the daily law reports in The Times (London), June 25, 1849, at 7, col. 4; *id.,* June 26, 1849, at 7, col. 2; *id.,* June 27, 1849, at 7, col. 4.

2. The meagerness of the damages she received was sharply criticized in some quarters. *See, e.g.,* The Times (London), June 30, 1849, at 5, col. 1. Apparently the jury was reluctant to impose heavier damages because they believed that the defendants were not actuated by mercenary or other improper motives.

emony, much younger (and penniless) members of the religious commune, not troubling to take the usual Victorian precaution of protecting their property through pre-nuptial settlements. Louisa, apparently unable to find even so unsatisfactory a suitor, nevertheless joined her sisters in Agapemone, or the Abode of Love, the country house which the sect now occupied in Somerset.

Here she lived for six weeks with the other fifty or sixty members of the commune, "dazzled by its luxury, charmed with its games and pastimes, and sustained by glorious assurances of judgment being past, and heaven to come;"[3] till at length her mother learned of her whereabouts. Convinced that her daughter "was not a free agent," that her mind was deranged, and that her continued presence in this den of sin and iniquity was "endangering her happiness in this and her welfare in a future life," Mrs. Nottidge determined to rescue her from such "a low, degrading, and disgusting association." Accordingly, she dispatched her son and son-in-law to Somerset. Gaining access to the house by stealth, they first tried to persuade Louisa to come with them to visit her sick mother. When she declined, however, they seized her, "dragged her out of the house, notwithstanding her struggles and screams, and forced her into a carriage without either bonnet, or shawl, or shoes . . . and then off they drove as fast as the horses could put their feet to the ground." Two medical men were readily found to certify that her reckless disregard of her reputation and property, and her peculiar religious beliefs — or delusions, as they were now held to be — constituted clear evidence of insanity, and she was promptly carted off to Dr. Stillwell's madhouse, Moorcroft House.

The spectators at the trial listened to this gothic tale with rapt attention, occasionally mixed with gales of laughter when revelations of the goings-on at the Abode of Love provided a measure of comic relief. Miss Nottidge had remained under confinement for some fourteen months, still insisting that Prince was "God manifest in the flesh," that the day of judgment had come, and that she had been rendered immortal and should shortly "be taken up to heaven in the twinkling of an eye" — and still diagnosed by the asylum superintendent and by the Lunacy Commissioners, the official inspectors of all asylums, as a religious monomaniac. Then she managed to escape. She was rapidly recaptured and brought back to the asylum, but not before she had succeeded in alerting her co-religionists to her whereabouts. After a protracted struggle, they secured her release (at which point, she promptly returned to Agapemone and handed over all her assets to Prince).

The medical witnesses at the trial were uniformly convinced that

3. J. CONOLLY, A REMONSTRANCE WITH THE LORD CHIEF BARON, TOUCHING THE CASE OF NOTTIDGE V. RIPLEY 16 (1849).

Louisa Nottidge had been and still was deranged, and thus in need of protection and treatment in an institution. Their lay audience was not persuaded. As *The Times* put it in its editorial on the case: "We must not stretch a harmless hallucination into legal insanity. . . . The shades and gradations of error and folly are so insensibly blended that we could not incarcerate and coerce such an [sic] one without danger to others, . . ."[4] And in summing up the evidence for the jury, the Lord Chief Baron all but directed a verdict for the plaintiff: "It is my opinion that you ought to liberate every person who is not dangerous to himself or others . . . and I desire to impress that opinion with as much force as I can."[5]

Periodic moral panics over the issue of the improper commitment of the sane to asylums were endemic in the nineteenth century in both England and the United States, and attempts like Pollock's to limit the criteria justifying involuntary commitment to the narrowest possible compass reflect one possible response to these spasms of anxiety.[6] But alienists fiercely resisted attempts to constrict the definition of madness within such narrow confines, and for the most part they succeeded. In the *Nottidge* case, the Lord Chief Baron's dictum drew forth an impassioned critique from John Conolly, the leading authority of his generation in matters psychiatric.[7]

Notwithstanding its "apparent conformity . . . to the liberty of the subject, and to the dictates of humanity,"[8] argued Conolly, the attempt to restrict the asylum population to lunatics who were a danger to themselves or others was thoroughly mistaken and mischievous:

> If the liberty of an insane person is inconsistent with the safety of his property or the property of others; or with his preservation from disgraceful scenes and exposures; or with the tranquility of his family, or his neighbours, or society; — if his sensuality, his disregard of cleanliness and decency, make him offensive in private and public, dishonouring and injuring his children and his name; — if his excessive eccentricity or extreme feebleness of mind subject him to continual imposition, and to ridicule, abuse, and persecution in the streets, and to frequent accidents at home and abroad; — his protection and that of society demands that he should be kept in a quiet and secluded residence, guarded by watchful attendants and not exposed to the public.[9]

Similarly, with young women "of ungovernable temper,. . . sullen,

4. The Times (London), June 30, 1849, at 5, col. 1.

5. The Times (London), June 27, 1849, at 7, col. 5.

6. On the issue of improper confinement in the nineteenth century, see generally McCandless, *Liberty and Lunacy: The Victorians and Wrongful Confinement*, in MADHOUSES, MAD-DOCTORS AND MADMEN 339-362 (A. Scull ed. 1981).

7. On Conolly, see Scull, *A Brilliant Career? John Conolly and Victorian Psychiatry,* 24 VICT. STUD. __ (1984) (forthcoming).

8. J. CONOLLY, *supra* note 3, at 5.

9. *Id.* at 7.

wayward, malicious, defying all domestic control; or who want that restraint over the passions without which the female character is lost."[10] and young men "whose grossness of habits, immoderate love of drink, disregard of honesty, or general irregularity of conduct, bring disgrace and wretchedness on their relatives; . . . People of this kind may not endanger their lives or those of others, but their being at large is inconsistent with the comfort of society, and their own welfare; . . ."[11] "To forbid the placing of such persons in asylums because they are not dangerous. . . . would be to forbid their being protected and cured,"[12] and furthermore would "bring affliction on a thousand families, and even throw society into confusion."[13] The case of Louisa Nottidge was of exactly this sort: "[I]t belonged to a class in which the patient is unequal, from feebleness and unsoundness of mind, to take care of herself or her property; . . . "[14] Confinement preserved "her money . . . from legalized robbery, and her person from the possibility of legalized prostitution . . . ."[15] Consequently, "[t]hose who exult in her liberation from the salutary control of an asylum are exulting over her ruin."[16]

While perhaps shrinking from endorsing the full measure of Conolly's attempt to equate insanity with any deviation from conventional social and moral standards, it is clear that over the next century and more, the civil commitment codes of all Anglo-American jurisdictions by and large embraced the claims made by psychiatrists to be the arbiters of the boundary between sanity and insanity. These laws accepted the need for a broad standard for committability, based on the state's paternalistic interest in securing protection and treatment for the loosely defined class of the mentally unbalanced. Sir Frederick Pollock's attempt to narrow the criteria for individual commitment, although symptomatic of a widespread distrust of psychiatrists' character and competence,[17] had only a limited impact on the development of mental health law.

Beginning in the late 1960's, however, in the context of a virtual explosion of law and litigation in the United States relating to the mental health system, there has been a marked trend away from traditional commitment codes, with their typically loose standards

10. *Id.* at 9-10.

11. *Id.* at 9.

12. *Id.* at 12.

13. *Id.* at 9.

14. *Id.* at 12.

15. *Id.* at 18.

16. *Id.* at 13.

17. *See, e.g.,* McCandless, *supra* note 6, *passim.*

and protections and broad grants of discretionary authority.[18] One of the earliest and most influential manifestations of this trend was the passage of a new commitment law in California, widely known as the Lanterman-Petris-Short Act (LPS).[19] Under LPS, the emphasis in involuntary commitment decisions shifted away from a *parens patriae* concern with "protecting" those unable to care for themselves, towards a much greater stress on the issue of danger to others and on procedural rights. Commitment for anything more than an emergency 72-hour period could be achieved in only two ways: (1) through a conservatorship subject to mandatory yearly judicial review and jury trial for those persons found to be "gravely disabled" — that is, on the basis of clear and convincing evidence, mentally unable to provide for their "basic personal needs for food, clothing, or shelter"; or (2) through commitments lasting no more than ninety days for persons who are mentally ill and who, as evidenced by recent overt acts, attempts, or threats of violence, are found to be "imminently dangerous." Such 90-day commitments can only be renewed if it is shown that the patient, while confined, again acted violently. Under either standard of commitment, the person alleged to be mentally ill has the right to be notified of all proceedings against him or her and to be present at all hearings; and the right to be represented by an attorney during all judicial review proceedings.[20] Thus, the California commitment law in a number of crucial respects now corresponds quite closely to the standard articulated in *Nottidge v. Ripley;* indeed, from some points of view, it is even stricter.

Carol Warren's new book, *The Court of Last Resort*, presents a wide-ranging analysis of court administration of this new mental health law. The book's particular focus is an empirical examination of judicial decisionmaking about whether to release or retain those involuntarily committed under LPS, based on extensive first hand research and observation in "Metropolitan Court" (a pseudonym for a Los Angeles mental health court). Though she attempts to place her findings in a broader sociological context, to see courtroom decisions as to some degree conditioned by large-scale economic, political, and historical forces, the results of this effort are rather thin and insubstantial.[21] The book's real strength lies in its documentation of

18. *See generally,* A. BROOKS, LAW, PSYCHIATRY, AND THE MENTAL HEALTH SYSTEM (1974); D. WEXLER, MENTAL HEALTH LAW: MAJOR ISSUES (1981); Wexler, *The Structure of Civil Commitment,* 7 LAW & HUM. BEHAV. 1 (1983).

19. CAL. WELF. & INST. CODE §§ 5000-5464 (West 1972). On the passage of LPS, see E. BARDACH, THE SKILL FACTOR IN POLITICS (1972).

20. For a review of commitment law in California, including some subsequent modifications of LPS, see Estate of Hofferber, 28 Cal. 3d 161, 616 P.2d 836, 167 Cal. Rptr. 854 (1980).

21. For example, her discussion in Chapter Seven of decisionmaking by the court on habeas corpus writs is hampered rather than helped by a clumsy and heavy-handed attempt to structure the analysis around an examination of certain abstract "theories" of the decision-

the gap between the formal wording of the statute and the practical application of the law and in its contribution to the current debate about the appropriate standards for involuntary commitment.

The Metropolitan Court Routine

Theoretically, LPS sets up an adversarial system in the courtroom, designed (on an analogy with an idealized portrait of the criminal justice system) to protect the patient's rights. Lawyers seeking commitment confront other lawyers representing those alleged to be in need of confinement, and psychiatric personnel face questioning and cross-examination about the grounds for their conclusions. In practice, however, as Warren demonstrates in a variety of contexts, the norm is rather one of cooperation and mutual accommodation among a group of actors who routinely play out the same roles day after day, and who have all developed a working consensus around a "commonsense" model of madness (p. 138). The practical effect of a common culture and a set of shared organizational imperatives is a recognition that "we all work together here" (p. 140) and a conviction that such a state of affairs is both natural and desirable. Thus, though courtroom procedures are dominated by elaborate rituals designed "to demonstrate compliance with procedural rules as well as with substantive law" (p. 147), public defenders "generally refrained from vigorous advocacy of their clients' legal rights under LPS" (p. 165). Instead, they chose to work "together with the other participants in the hearing to come to what all could agree was the 'right decision' for the individual and for society" (p. 172). Notwithstanding an apparent conflict between "the medical and legal frames of reference," the practical convergence on "an underlying commonsense and a taken-for-granted perspective on mental illness" smoothed the way for an easy and tension-free collaboration. Just as "attorneys view their clients as crazy and therefore refrain from standing firmly in the way of their involuntary incarceration" (p. 140), so too the psychiatrists — mostly state hospital personnel who appear regularly in the same courtroom — adapt readily to "legal practices" and to the existence of "a stable release rate" (p. 191). The judge, meanwhile, justifies "the smooth, rapid, and routine method of processing" in the courtroom, and

> the lack of an adversary approach to justice in mental health law on the grounds that the role of the defense attorney was to be 'a reflection of the client's personality' rather than a vigorous advocate. If the client was crazy, then this should not be concealed by the defense attorney. [P. 191].

As Warren notes, this emphasis on assembly line justice closely cor-

making process (conflict, legal, organizational, and individual decision-maker) and their supposed implications.

responds with the pattern that obtains in the criminal courts — on whose allegedly "adversarial" procedures the reformers who wrote LPS modeled the new law.[22]

Where outside intervention in the system threatens this pattern of mutual accommodation, the main actors in the carefully staged drama move quickly to minimize its impact. Thus, in the face of the challenge posed by potentially disruptive higher court rulings, the judge, district attorneys, public defenders, and mental health counsellors, "members of the organization cooperating as a whole — embarked on a search for a legal way to evade the problems attendant upon [implementation]" — as one participant put it, " 'tinkering with' the new precedent until it 'came out right' " (p. 189). A more frequent source of disturbance was the arrival of a "new, aggressive, advocate defense attorney," full of idealism, intent on implementing the letter of the law and defending the "rights" of his clientele (p. 195). Such callow youths were quickly disabused, and most "would learn the ropes, and would become socialized to the way things are done" (p. 195). The occasional nonconformist aroused anger and then protective action: Mr. Simmons, for example, refused to "settle down." Instead,

> he persuaded a number of his conservatee clients to ask for jury trials, thus tying up Department 2 for days on end. He also spent hours studying and arguing on habeas corpus hearings, committing what was probably the most egregious organizational faux pas, talking at length to clientele. Unlike his predecessors, Mr. Simmons did not modify this behavior over time, let alone cease and desist. After a few weeks, the judge became angry. . . . Bill Simmons was fired from his job after about three months; when I asked another public defender why, he replied, "Oh, that guy — because he was stupid." [Pp. 195-96].

As this suggests, while the formal requirements of the law do, to a limited extent, constrain decisionmaking, they are far from determining outcomes. For example, "long-term commitment based on the need for care and treatment, the standard overturned by LPS, has been restored through the use of conservatorships" (p. 43). Patients admitted on an emergency 72-hour hold as "dangerous" are subsequently relabeled as "gravely disabled" (p. 40), in part because of the difficulty of demonstrating dangerousness. Indeed, the LPS provision allowing a ninety-day commitment on grounds of danger to others "is almost never used in California" (p. 27). Moreover,

> [g]rave disability standards dealt less with food, clothing, shelter, and finances — functioning within the community — than with functioning inside the family and the mental health system. This suggests that con-

22. *See generally*, Sudnow, *Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office*, 12 SOC. PROBS. 255 (1965); Rovner-Pieczenik, *Labeling in an Organizational Context: Adjudicating Felonies in an Urban Court*, in THE RESEARCH EXPERIENCE (M.P. Golden ed. 1976).

> siderations of individual rights and the protection of society are displaced in this court by considerations of the relief of family tensions and the smooth functioning of the mental health system. [P. 175].

Perhaps even more ironic, conservatorship hearings under LPS take even less time than the five minute average prior to the act, "the statistic which had prompted legislative interest in involuntary civil commitment in the first place" (p. 42).

In the courtrooms Warren studied, therefore, "decision making is particularistic, situational, and arbitrary rather than universal and fair; medical theories posture as proven facts, and organizational needs take precedence over legal and psychiatric requirements" (p. 211). And there is every reason to believe that this is not an atypical pattern. At the very least, this should caution us to be wary of becoming caught up in abstract debates on the issue of civil commitment, and to be skeptical about the practical impact of any given set of "reform" proposals. Still, of course, it scarcely renders irrelevant the question of what in principle constitutes appropriate grounds for involuntary commitment, and Warren's book devotes considerable space to precisely this issue.

The Debate Over Abolition

At one extreme, in recent years a small but vocal minority has urged that compulsory commitment is never justified, so that "[t]he goal [of mental health policy] should be nothing less than the abolition of involuntary hospitalization."[23] Such proposals have attracted a considerable following among the legal community, though their most visible and tireless proponent has been the renegade psychiatrist, Thomas Szasz, for whom "[i]nvoluntary mental hospitalization is like slavery. Refining the standards for commitment is like prettifying the slave plantations. The problem is not how to improve commitment, but how to abolish it."[24] The antithesis to this position, from one perspective, is the extraordinary array of behaviors and conditions John Conolly urged us to accept as justifications for involuntary commitment in his *Remonstrance* over the *Nottidge v. Ripley* case[25] — except that few would now defend such a stance, at least in public. Realistically speaking, therefore, the alternative to abolitionism turns out to be a much more limited, eclectic, and qualified defense of compulsory commitment, which urges involuntary hospitalization as preferable, on balance, to the likely alternatives.

In *The Court of Last Resort*, these two competing positions are defended with considerable zeal by Stephen Morse (pp. 69-109), a

23. B. ENNIS, PRISONERS OF PSYCHIATRY 232 (1972).

24. T. SZASZ, THE SECOND SIN 89 (Anchor Books ed. 1972).

25. J. CONOLLY, *supra* note 3; *see* text accompanying notes 8-16 *supra*.

lawyer and psychologist,[26] and Jack Zusman (pp. 110-113), a psychiatrist, with Warren joining in to argue for the retention of certain forms of involuntary commitment. Morse's arguments for the abolitionist position closely resemble those previously developed by Thomas Szasz,[27] and rest upon a shared commitment to the overriding importance of what they both term "liberty"[28] — though it should be noted at the outset that Morse's brief is less overtly polemical and consciously eschews the vituperative tone, name-calling, and attribution of base motives to one's opponents in which Szasz seems to revel. As one would expect from a skilled attorney, the abolitionist position is persuasively made, with logic and force that threaten to demolish the opposition's more cautious eclecticism. By contrast, Zusman and Warren's uneasy compromises among competing values, and rueful confessions of both psychiatrists' limitations and the dangers inherent in the exercise of *parens patriae* powers, give their arguments a necessarily more vulnerable and compromised appearance.[29] And yet, I shall suggest that in the final analysis, it is precisely the moral absolutism of Morse's position that is its decisive weakness, rendering "it impotent to calculate the complex relations between means and ends, risks and benefits which hold in real life."[30]

Morse notes that "the deprivation of liberty authorized by involuntary commitment laws is among the most serious restrictions on individual freedom the state may impose," and that, unlike incarceration for criminal acts, "it may be imposed on the basis of predictions, without the prior occurrence of legally relevant behavior such as dangerous acts" (p. 72). He begins his assault on this practice by denying the validity of the widespread belief in our culture that the irrational behavior of the mentally ill is compelled, while the behavior of "normal" people is freely chosen. Recent social scientific research has indeed cast some doubt on this belief, as a blanket contention, demonstrating that in some contexts, in certain restricted ways, the psychotic can exercise a measure of control over their be-

26. A fuller version of this argument appears in Morse, *A Preference for Liberty: The Case Against the Involuntary Commitment of the Mentally Disordered*, 70 CALIF. L. REV. 54 (1982).

27. *See* T. SZASZ, LAW, LIBERTY, AND PSYCHIATRY (1963); Szasz, *Involuntary Psychiatry*, 44 U. CIN. L. REV. 347 (1967).

28. For analysis and critiques of this term as used by Szasz, see P. SEDGWICK, PSYCHOPOLITICS 149-184 (1982); Goldstein, *The Politics of Thomas Szasz: A Sociological View*, 27 SOC. PROBS. 570 (1980).

29. The plausibility of Zusman's contribution is further undermined by his reliance upon the highly dubious claim that the commitment process is now sufficiently adversarial to "ensure" that the weaknesses underlying psychiatric opinion will be adequately considered, p. 116, a contention that, as we have seen, flies in the face of the evidence presented elsewhere in Warren's book.

30. P. SEDGWICK, *supra* note 28, at 154.

havior.[31] Indeed, from the early nineteenth century to the present, control of inmate behavior within the mental hospital has perforce rested on precisely this presumption "that it made some sort of sense to hold the lunatic responsible for his actions, and that by doing so his behaviour could be manipulated."[32] Morse seizes on this evidence. The mentally ill, he contends, "often . . . have as much control over their behavior as normal persons do;" and "we cannot be sure that the person was incapable, as opposed to *unwilling,* to behave rationally or to control him or herself" (p. 75, emphasis in original). Moreover, "the assertion that the irrationality or other behavior of mentally disordered persons is compelled . . . is a belief that rests on common sense intuitions and not on scientific evidence" (p. 75).

But these are disingenuous arguments. "Often" is a very long way from always, and few observers would dispute that much psychotic behavior remains uninterpretable in any ordinary sense as intentional behavior. Indeed, we cannot be *sure* that a madman's actions were uncontrollable, but it may well be more sensible (*i.e.,* in accordance with the preponderance of the evidence) to act on that presumption than to assume that he *was* capable of control and treat him accordingly. And of course the claim that action is free or determined ultimately rests on common sense intuitions and not science: how could it be otherwise when (as Morse himself concedes but a few moments later) "empirical evidence cannot definitely prove or disprove that *anyone* has or lacks free will" (p. 75, emphasis added)? But what Morse neglects to note is that we may have very good grounds indeed for this common sense presumption.[33]

Moreover, were we to adopt Morse's position, we would be committed to holding "nearly all persons, including crazy persons, responsible for their behavior" (p. 100). Necessarily, then, we would have no grounds for objecting if substantial numbers of discharged mental patients were to end up in prison. To his credit, Morse does not try to duck this issue: instead, he meets it head on, asserting that this result is "more respectful of the dignity and autonomy of crazy persons" than the alternative of confining them in a mental hospital (p. 101). One cannot help admiring his audacity, even as one is dismayed by the Orwellian use of language. Fortunately, despite the advent of 1984, we do not all (yet) inhabit a Humpty-Dumpty world in which "a word . . . means just what I choose it to mean — neither

31. *See, e.g.,* B. BRAGINSKY, D. BRAGINSKY & K. RING, METHODS OF MADNESS: THE MENTAL HOSPITAL AS A LAST RESORT (1969).

32. A. SCULL, MUSEUMS OF MADNESS 202 (1979); *see also* E. GOFFMAN, ASYLUMS 361-62 (1961).

33. *See generally,* J. COULTER, APPROACHES TO INSANITY (1973).

more nor less."[34] And until we do, it is unlikely that many of us will view consigning someone to jail as anything but a singularly odd way of respecting his dignity and autonomy.[35] Of equal importance, while Morse may not balk at the prospect of sending the mentally ill to prison, a common law system of justice built around the concept of criminal responsibility almost certainly will.[36] Zusman is thus assuredly correct when he points out that "to eliminate state control as a preventive measure and allow the mentally ill to be accountable for any law-breaking and mistakes, is completely unacceptable without a massive shift in law and public opinion." On the other hand, it is equally plain that "[c]omplete disregard of rule breaking by the mentally disordered — that is, freedom to do whatever they please without any consequences — is a politically unacceptable alternative" (p. 132).

Morse's second argument against involuntary commitment is that the mental health system "is unlikely to identify accurately those persons who should arguably be committed" (p. 73). He is on much stronger ground here. The tendency of psychiatrists to overpredict dangerousness is pervasive and (given the structural pressures operating on them) both unsurprising and unlikely to change.[37] Thus, legitimizing commitment on the basis of dangerousness necessarily involves accepting that a high proportion of those preventively detained would not in fact have behaved violently: the most authoritative available review suggests that inaccurate predictions will range as high as sixty or seventy percent.[38] Unquestionably, such statistics should give anyone pause. Whether they should also lead us entirely to abandon "dangerousness" as a ground for involuntary commitment is, however, more debatable. There is the obvious objection about the political possibility (or rather impossibility) of such a move (p. 127). But quite apart from these purely practical concerns, the question remains as to whether we *ought* to wait until the predicted harm occurs (if indeed it does) before we attempt to intervene. For those who share, with Morse, an absolute and overriding commitment to "liberty" — conceived of as a presocial attribute of atomized individuals — no dilemma exists.[39] By contrast, if liberty is

34. L. CARROLL, THROUGH THE LOOKING GLASS, AND WHAT ALICE FOUND THERE 123 (Peter Pauper Press ed. 1941).

35. *See* J. JACOBS, STATEVILLE (1977).

36. Compare the discussion in Wexler, *supra* note 18, at 11-14.

37. On these pressures, see generally T. SCHEFF, BEING MENTALLY ILL (1966); Shah, *Dangerousness: A Paradigm for Exploring Some Issues in Law and Psychology,* 33 AM. PSYCHOLOGIST 224 (1978).

38. *See* J. MONAHAN, THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR (1981).

39. Note Morse's confession that "even if a commitment system could be devised that accurately identified very crazy and clearly dangerous people and limited commitments to those who could be successfully treated only in a hospital. . . I would still oppose involuntary commitment." P. 96.

seen as a vital, but not always controlling value, and as an inextricably social phenomenon,[40] decisionmaking becomes much more complex, with no ready-made and all-embracing solution. One is forced to recognize, for example, that the social costs (including the costs to the liberty of a sizable number of other people)[41] imposed by the continued presence in society of a seriously disruptive and potentially violent crazy person (to use Morse's terminology) may be so great as to justify commitment, even if more than half the time the threat of violence remains merely a threat. The choices here are obviously very difficult; but I suspect that the best pragmatic resolution is to follow Monahan and Wexler's[42] suggestion, and require an inverse relation between the probability and the seriousness of the harm, so that the greater the harm predicted, the lower the probability of its occurrence needs to be in order to justify involuntary commitment.

What of those "who are mentally unable to fend for themselves" (p. 111) and who need to be confined for their own good? Morse denies that such cases exist:

> Of course, there are cases of disordered persons that *seem* to cry out for intervention: the delusional person who seems on the verge of a violent outburst or who appears to be destroying the fabric of his or her family; or the terribly disorganized person whose life is apparently in jeopardy because the person seems unable to cope with minimal food, shelter, clothing, or medical needs; or the person in the throes of a manic episode who appears to be jeopardizing a career or reputation; or, perhaps most compellingly, the person on the verge of suicide who appears clearly to be making a mistake in judgment about his or her own helplessness and the hopelessness of his or her life situation. [P. 97, emphasis added].

Not to worry, they only *seem* that way: Morse has "an intuitive hunch" that "even the craziest person has substantial control over his or her behavior;" and if that does not seem sufficiently persuasive, he reminds us that crazy persons, like the rest of us, possess "an inalienable right to liberty" (p. 97).

Doubtless, the inalienable right to liberty must have been a great comfort to the severely impaired 89-year-old woman whom Warren observed, slowly starving to death in her home, wandering around a room with "barely a sign of habitation. . . . bumping into things and alternately mumbling softly and shouting phrases from frag-

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40. "Freedom is an achieved, not an inherent condition: it is to be measured by the development of the individual's powers in self-determination, not assumed to exist as an all-or-nothing quality whatever one does." P. SEDGWICK, *supra* note 28, at 176.

41. *See* Sainsbury & Grad de Alarcon, *Evaluating a Service in Sussex*, in ROOTS OF EVALUATION 239 (1973); Yarrow, Schwartz, Murphy & Deasy, *The Psychological Meaning of Mental Illness in the Family*, 11 J. SOC. ISSUES 12 (1955).

42. Monahan and Wexler, *A Definite Maybe: Proof and Probability in Civil Commitment*, 2 LAW & HUM. BEHAV. 37 (1978).

ments of a past life" (pp. 28-29). Or to a Mrs. Simmons, of whom counsel testified:

> She was found on the floor of her apartment, where she had not gotten up for three months. She was malnourished. Maggots had eaten away part of her leg. She cannot be moved from the hospital until her leg is healed and she gains some weight. A neighbor had fed her on the floor for three months. She was lying in her own feces for three months. [P. 29].

In the future, if such persons "really" disliked their situations, why then, they could always exercise the "autonomy" Professor Morse had so sedulously and kindly preserved for them when he blocked their involuntary commitment.

On the whole, I think we ought to prefer the common sense view that among the things people like this *lack* is autonomy, even if, as Morse is quick to remind us, such perceptions rest on "little more than an intuitive hunch" (p. 97). Indeed, since the contrary view seems more than a trifle perverse, one wonders what can have led intelligent and thoughtful persons to adopt it. In part, the answer seems to lie in a continuing attachment to the Szaszian position that mental illness is simply a "myth."[43] As Warren points out, sociology made its own distinctive contribution to this belief that "mental illness was merely a matter of labeling of undesired behaviors and persons" (p. 5), and Morse, like others skeptical of psychiatry's pretentions, seems to have adopted substantial portions of this analysis. Hence his preference for "crazy" rather than "mentally ill," "because it is more descriptive and carries fewer connotations about disease processes that beg important questions about self-control" (p. 73 n.3); and his penchant for minimizing the distinctiveness of the psychotic and the claims to expertise of their custodians, the psychiatrists.

For almost a quarter of a century, an intense and often acrimonious debate has raged about the medical model and the appropriate conceptualization of mental disorder, with no agreement yet in sight.[44] But whatever the final outcome of the controversy, it surely cannot alter the social reality that there exists a substantial number of people — be they victims of endogenous disease processes or of "problems in living" — who lack basic social capacities and who manifest extreme helplessness and dependency. Moreover, while I share the assessment that on balance the data at our disposal "suggest that expert psychiatric knowledge is a well-managed 'appear-

43. T. SZASZ, THE MYTH OF MENTAL ILLNESS (rev. ed. 1974).

44. For a defense of medicine's claims, see generally J. WING, REASONING ABOUT MADNESS (1978); for alternative views see Ingleby, *Mental Health and Social Order*, in SOCIAL CONTROL AND THE STATE: HISTORICAL AND COMPARATIVE ESSAYS 141 (S. Cohen & A. Scull eds. 1983); Morgan, *Explaining Mental Illness,* 15 EUR. J. SOC. 262 (1975); Sedgwick, *Mental Illness* Is *Illness,* 20 SALMAGUNDI 196 (1972).

ance of objectivity' rather than a set of 'objective facts,' "[45] I would suggest that this provides an argument for lessening the role of doubtfully "expert" testimony in the commitment process, not for abolishing commitment altogether.[46] Nor do I think that the evidence supports Morse's attempts to play down the damage associated with psychosis, an essential prop for his contention that commitment is "a simple, although unfair, answer to interpersonal, family, and comparatively *mild* social problems" (p. 81, emphasis added). In this connection, it is surely significant (though of course in no sense conclusive) that Carol Warren, who began her observations in "Metropolitan Court" sharing this assumption "as an article of faith (although I saw it then as sober scientific reasoning, not belief)" (p. 51), found herself compelled by what she experienced to recognize the existential reality of "mental disorder . . . independent of labeling" (p. 202) and the necessity for compulsory hospitalization.

Care, Treatment, and Liberty

Morse is certainly correct, however, to worry about the potentially repressive consequences of allowing people to be confined "for their own good." As Conolly's remarks on the *Nottidge* case demonstrate,[47] the range of behaviors that might render one subject to such intervention (in the eyes of at least some psychiatrists) has in the past been extraordinarily wide: adolescent rebelliousness, harmless eccentricity, violation of conventional standards of morality or of sexual propriety, extreme carelessness with one's money or property.[48] It is this, I suspect, that has prompted the claim that "psychiatric opinions are essentially political judgments."[49] Yet the fact that "benevolent" concern for the welfare of others has served to legitimize egregious violations of some people's freedom does not invalidate the claim that there are occasions when we may indeed be justified in intervening in others' lives "for their own good."

It may be objected, however, that mental hospitals "rarely cure, nor do they decrease the stigma" (p. 89). Worse, "even in 'advanced' states that supposedly maintain the best services" all too often one encounters "revelations of . . . inadequate and sometimes inhumane care and treatment" (p. 92). Again, there is a good deal of truth to

45. S. PFOHL, PREDICTING DANGEROUSNESS 230 (1978).

46. This, incidentally, is also the conclusion Pfohl reaches, S. PFOHL, *supra* note 45, at 228-230, and Morse himself agrees that involuntary commitment decisions could be taken on grounds independent of "the vagaries, unreliability, and internecine disputes of mental health science." P. 84 n.12.

47. *See* text accompanying notes 8-16 *supra*.

48. For recent examples, see R. LEIFER, IN THE NAME OF MENTAL HEALTH (1969); Ennis & Litwack, *Psychiatry and the Presumption of Expertise,* 62 CALIF. L. REV. 693 (1974).

49. S. PFOHL, *supra* note 45, at 229.

both claims, though once more I shall suggest that this does not compel us to embrace Morse's chosen alternative of abolishing involuntary confinement.

The critique of the mental hospital's structural deficiencies has a very long history.[50] In the late nineteenth century, for example, neurologists — then in the process of constituting themselves as a medical specialty — provoked a bitter internecine conflict with institutional psychiatry by urging the asylum's total unsuitability for the treatment of mental disorders.[51] A long series of exposés by muck-raking journalists provided further ammunition for the mental hospital's critics.[52] And, most notably of all, a mass of social scientific research in the 1950's and 1960's was devoted to the elaborate documentation of the irredeemable deficiencies of what Erving Goffman dubbed "total institutions."[53]

Such apparently objective findings have been widely disseminated, serving as one of the major ideological supports for the movement to deinstitutionalize the mental hospital population.[54] In the process, mental hospitals have been stigmatized as inevitably providing a disabling, counter-productive environment, one which exacerbates any pre-existing pathology through an "organizational tyranny [calculated to produce] the thwarting of human possibilities."[55] Unquestionably, the historical record demonstrates that most mental hospitals have more closely resembled warehouses for the storage of the unwanted than institutions providing treatment and cures.[56] But this is a far cry from the more extravagant claims made by Goffman

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50. *See* A. SCULL, DECARCERATION: COMMUNITY TREATMENT AND THE DEVIANT: A RADICAL VIEW 105-133 (2d ed. 1984).

51. *See* Blustein, *"A Hollow Square of Psychological Science": American Psychiatrists and Neurologists in Conflict*, in MADHOUSES, MAD-DOCTORS AND MADMEN, *supra* note 6, at 241-270; Scull, *The Social History of Psychiatry in the Victorian Era*, in *id.* at 17-20.

52. The most famous of this genre is Albert Deutsch's THE SHAME OF THE STATES (1948); for a more up-to-date example, see W. RAWLS, COLD STORAGE (1980).

53. E. GOFFMAN, *supra* note 32, at 4; *see also* R. BARTON, INSTITUTIONAL NEUROSIS (2d ed. 1965); I. BELKNAP, HUMAN PROBLEMS OF A STATE MENTAL HOSPITAL (1956); A.H. STANTON & M.S. SCHWARTZ, THE MENTAL HOSPITAL: A STUDY OF INSTITUTIONAL PARTICIPATION IN PSYCHIATRIC ILLNESS AND TREATMENT (1954); R. PERRUCCI, CIRCLE OF MADNESS: ON BEING INSANE AND INSTITUTIONALIZED IN AMERICA (1974).

54. *See* Scull, *The Decarceration of the Mentally Ill: A Critical View,* 6 POL. & SOCY. 173 (1976); *see also* Rose, *Deciphering Deinstitutionalization: Complexities in Policy and Program Analysis,* 57 MILBANK MEMORIAL FUND Q. 429 (1979).

55. Perry, *The Two Cultures and the Total Institution*, 25 BRIT. J. SOC. 343, 353 (1974).

56. G. GROB, MENTAL ILLNESS AND AMERICAN SOCIETY 1875-1940 (1983); D. ROTHMAN, THE DISCOVERY OF THE ASYLUM (1971); D. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA (1980); G. GROB, MENTAL INSTITUTIONS IN AMERICA: SOCIAL POLICY TO 1875 (1973); A. SCULL, *supra* note 32; Walton, *The Treatment of Pauper Lunatics in Victorian England: The Case of Lancaster Asylum, 1816-1870*, in MADHOUSES, MAD-DOCTORS AND MADMEN, *supra* note 6, at 166; Tomes, *A Generous Confidence: Thomas Story Kirkbride's Philosophy of Asylum Construction and Management*, in *id.* at 121.

and his epigones. It is these more extreme "findings" that Morse and others rely on when they urge us to abolish involuntary hospitalization altogether; and yet the research which purports to document these effects is so methodologically flawed and empirically inadequate[57] that one must seriously question the wisdom of depending upon it.

Of at least equal significance in the present context, those social scientists who have criticized the mental hospital have almost entirely neglected to consider what the alternatives to it are, preferring to make the bland (and untested) assumption that "the worst home is better than the best mental hospital."[58] In practice, this has proved to be a tragically mistaken belief. A growing volume of research[59] has demonstrated that community "care" for the chronically crazy is in fact community neglect, and that "the effective meaning of liberty for the involuntarily committed is social marginality, deprivation, and despair" (p. 203). So far from being the grand reform of mental health care its ideologues have proclaimed, the practical implementation of community treatment has created "a system which, daily and quietly, harms and kills the sick."[60]

At least Morse recognizes that the problem exists: "The condition of many 'deinstitutionalized' ex-patients in the community is a national disgrace" (p. 95). But he immediately seeks to evade its implications:

> One should not compare the all-too-questionable benefits of hospitalization to complete or near-complete neglect in the community. The only fair comparison is to community living and treatment where society meets its moral obligations rather than cynically avoiding them. [P. 100].[61]

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57. *See* McEwen, *Continuities in the Study of Total and Non-Total Institutions,* 6 ANN. REV. SOC. 143, 147-148 (1980); Scull, *The Asylum as Community/ The Community as Asylum: Paradoxes and Contradictions of Mental Health Policy* in, MENTAL ILLNESS: CHANGES AND TRENDS 329 (P. Bean ed. 1983).

58. E. CUMMING & J. CUMMING, CLOSED RANKS (1957).

59. A. DAVIS, S. DINITZ & B. PASAMANICK, SCHIZOPHRENICS IN THE NEW CUSTODIAL COMMUNITY (1974); GENERAL ACCOUNTING OFFICE, THE MENTALLY ILL IN THE COMMUNITY: GOVERNMENT NEEDS TO DO MORE (1977); UNITED STATES SENATE COMMITTEE ON AGING, THE ROLE OF NURSING HOMES IN CARING FOR DISCHARGED MENTAL PATIENTS (1976); Emerson, Rochford & Shaw, *Economics and Enterprise in Board and Care Homes for the Mentally Ill,* 24 AM. BEHAV. SCIENTIST 771 (1981); Kirk & Thierren, *Community Mental Health Myths and the Fate of Former Hospitalized Patients,* 38 PSYCHIATRY 209 (1975); Rose, *supra* note 54; A. SCULL, *supra* note 50; Scull, *A New Trade in Lunacy: The Recommodification of the Mental Patient,* 24 AM. BEHAV. SCIENTIST 741 (1981); Scull, *Deinstitutionalization and the Rights of the Deviant,* 31 J. SOC. ISSUES 6 (1981); Warren, *New Forms of Social Control: The Myth of Deinstitutionalization,* 24 AM. BEHAV. SCIENTIST 724 (1981); Wolpert & Wolpert, *The Relocation of Released Mental Patients into Residential Communities,* 7 POLY. SCI. 31 (1976).

60. P. SEDGWICK, *supra* note 28, at 229-230.

61. In parallel fashion, Morse insists on comparing the reality of a psychiatric commitment process (focusing especially on the most egregious misuses of "expertise") with a wholly idealized portrait of the law as a routinely adversarial system offering clear-cut and uncompromis-

I find this an astonishing claim. Such a comparison is "fair" only in the sense that it supports the argument Morse is advancing — but at the unacceptable price of leaving behind the social realities we must confront. Discharged mental patients do not live in a society that "meets its moral obligations." The alternatives they (and we) must face are inadequate and underfunded mental hospitals or a grossly underdeveloped and often nonexistent system of community care. Here the choices are tougher and the answers less clear-cut than those Morse provides us with; but they have the distinct merit of being the real ones. And when we confront them, I think we must conclude, as Warren does, that for a substantial proportion of the chronically crazy,

> care in a profit-making institution at a cost of $14.50 a day seems more treacherous and less human than care in a state institution at $31 a day. And the confines of the state hospital, for the dispossessed, seem to threaten effective liberty less vitally than the sidewalks, streets, and cheap hotels of the completely homeless. [P. 207, citation omitted].[62]

To suggest that the mental hospital is sometimes a defensible — indeed preferable — solution to the problems posed by mental disorder, and to argue that compulsory commitment is also an option we should retain, is not to deny the need to place a sharp check on psychiatric enthusiasms and to be properly skeptical of many of the claims psychiatrists advance. The legal system undoubtedly has an important role to play here. Yet we must beware lest we succumb equally blindly to legal enthusiasms, since these are no less capable of leading us astray. Indeed, when we debate the merits and demerits of compulsory commitment, we ought constantly to bear in mind that

> the real scandal of contemporary public psychiatry is not the particular section of the mental-health statutes under which patients get into hospitals, but the alternatives offered to these supremely weak members of society by our present social arrangements both inside and outside the mental institution.[63]

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ing protections of individual rights. That our legal system bears only the most superficial resemblance to his picture of it seems to discomfort him not one whit. But those who come before the courts populate the real world, and not this theoretical heaven. One must compare reality with reality, not with some pretty fantasy that better suits the case one wants to make.

62. *See also* J. RUBIN, ECONOMICS, MENTAL HEALTH, AND THE LAW (1978); Borus, *Deinstitutionalization of the Chronically Mentally Ill,* 305 NEW ENG. J. MED. 339 (1981).

63. P. SEDGWICK, *supra* note 28, at 180.