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THE LANTERMAN-PETRIS-SHORT ACT: A REVIEW AFTER TEN YEARS

INTRODUCTION

Individuals who are involuntarily committed to mental institutions comprise one of the most disadvantaged groups in the nation. Their legal rights have been sorely neglected by legislatures, the courts and by private citizens.[1] More than half of the nation's hospital beds are occupied by mental patients.[2] In California, approximately eighty-four percent of all persons in state hospitals are under involuntary commitment.[3] Nationwide, four-fifths of those entering public mental hospitals are involuntarily committed.[4] The sheer number of persons affected warrants inquiry into existing commitment laws to determine whether they adequately protect the rights of the involuntarily committed.

In 1967, the California legislature enacted the Lanterman-Petris-Short Act (LPS Act).[5] The primary motivations for its enactment were the abolition of indeterminate commitment and the removal of legal disabilities suffered by individuals adjudged mentally disordered.[6] Although the stated legislative intent of the

1. *Hearings on the Constitutional Rights of the Mentally Ill Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 91st Cong., 1st & 2d Sess. 2 (1969-70).

2. N. KITTRIE, THE RIGHT TO BE DIFFERENT 54 (1971). The author also estimates that one out of every twelve Americans will be hospitalized for mental problems at some time during his or her life. *Id.* at 55. At the time the book was published, three million persons in American suffered from acute mental illness, five million from mental deficiency and some fifteen million had other serious personality disturbances. *Id.*

3. SUBCOMMITTEE ON MENTAL HEALTH SERVICES, CALIFORNIA LEGISLATIVE ASSEMBLY INTERIM COMMITTEE ON WAYS AND MEANS, THE DILEMMA OF MENTAL COMMITMENTS IN CALIFORNIA 2 (1966) [hereinafter cited as THE DILEMMA]. This figure was obtained from the Subcommittee's one-day survey of California's psychiatric hospitals. The survey also revealed that the involuntarily committed made up 37% of V.A. hospital residents, 9% of the county hospital psychiatric residents, 17% of the private or proprietary hospital residents and 21% of convalescent hospital residents. *Id.* at 2-3.

4. *Hearings on S. 935 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 88th Cong., 1st Sess. 61 (1963).

5. The LPS Act is codified at CAL. WELF. & INST. CODE §§ 5000-5401 (West 1972 & Supp. 1977). The Act deals with the mentally disordered and persons impaired by chronic alcoholism. The latter group will not be discussed in this Note. For a comprehensive appraisal of the Act see Green, *California's New Mental Commitment Legislation: Is It Legally Sufficient?*, 6 CAL. W.L. REV. 146 (1969).

6. *See* CAL. WELF. & INST. CODE § 5001(a) (West 1972), which is recited at note 7 *infra;*

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LPS Act was to end inappropriate, indefinite and involuntary commitment of mentally disordered persons,[7] there are provisions for the commitment of persons who refuse voluntary treatment. A peace officer or an individual designated by the Act may take persons into custody for seventy-two hours upon probable cause that, as a result of mental disorder, they are gravely disabled or a danger to themselves or others.[8] After an evaluation as directed by the Act, any person who has been detained for seventy-two hours may be released or certified for not more than fourteen additional days of involuntary intensive treatment. This extended commitment is justified if: (1) the person, as a result of a mental disorder, is a danger to others, to himself, or is gravely disabled; (2) the person has been advised of, but has not accepted voluntary treatment; and (3) the facility is equipped and staffed to provide treatment, and agrees to admit the person.[9] At the expiration of the fourteen-day period, there are provisions for a further fourteen day commitment if the person is suicidal[10] or a ninety-day commitment if the person is considered an imminent threat of substantial physical harm to others.[11] A conservator may be appointed if a person is gravely disabled as a result of a mental

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ENKI RESEARCH INSTITUTE, A STUDY OF CALIFORNIA'S NEW MENTAL HEALTH LAW (1969-1971) 13-14 (1972); THE DILEMMA, *supra* note 3, at 180.

7. CAL. WELF. & INST. CODE § 5001 (West 1972) provides that
> the LPS Act shall be construed to promote the legislative intent as follows:
>
> (a) To end the inappropriate, indefinite, and involuntary commitment of mentally disordered persons and persons impaired by chronic alcoholism, and to eliminate legal disabilities;
>
> (b) To provide prompt evaluation and treatment of persons with serious mental disorders or impaired by chronic alcoholism;
>
> (c) To guarantee and protect public safety;
>
> (d) To safeguard individual rights through judicial review;
>
> (e) To provide individualized treatment, supervision, and placement services by a conservatorship program for gravely disabled persons;
>
> (f) To encourage the full use of all existing agencies, professional personnel and public funds to accomplish these objectives and to prevent duplication of services and unnecessary expenditures.

8. CAL. WELF. & INST. CODE § 5150 (West Supp. 1977).

9. CAL. WELF. & INST. CODE § 5250 (West 1972).

10. *Id.* § 5260.

11. *Id.* § 5300.

disorder.[12] If authorized by court order, a conservator may place the conservatee in a mental hospital.[13]

At the time of its enactment, the LPS Act was considered progressive because it afforded the mentally disordered more legal rights than most other states had.[14] Since its passage in 1967, however, the law in the field of mental health has evolved toward even greater legal rights for mentally disordered individuals.[15] Thus, the LPS Act needs to be examined in light of these recent developments. This Note will argue that the present standards for involuntary commitment in California are vague in that they set no measurable standard for commitment. The vagueness of the terms "mentally disordered," "gravely disabled" and "dangerous" leads to arbitrary and discriminatory confinement, which strikes most often at nonconformists, the poor and the aged.[16] This Note will also contend that the failure to provide effective treatment undermines the state's resort to the *parens patriae* power to justify confinement of those who are not dangerous to others. This Note will conclude with proposals that take into account these problems and which attempt to better accommodate the state's interest in commitment while maximizing freedom for those subject to commitment.

I. DUE PROCESS AND CIVIL COMMITMENT

The fifth and fourteenth amendments of the Constitution provide that "no person shall be deprived of life, liberty, or property without due process of law." California's Constitution contains an identical guarantee.[17] Although the term "due process" escapes definitional precision,[18] its importance in the American system of justice is often expressed as follows: "Due process of law

12. CAL. WELF. & INST. CODE § 5350 (West Supp. 1977).

13. *Id.* § 5358.

14. For an overview of the differing standards for civil commitment in various states see *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1202 (1974) [hereinafter cited as *Developments*].

15. A right to treatment has been evolving. *See* text accompanying notes 109-14 *infra*. In many jurisdictions, commitment standards are being narrowly construed. *See* note 156 *infra*. The expansion of procedural rights set into motion by Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded on other grounds*, 414 U.S. 473 (1973), has proceeded apace.

16. *See* notes 50-54 & 74-76 *infra* and accompanying text.

17. CAL. CONST. art. I, § 13.

18. "The very nature of due process . . . is not a technical conception with a fixed content. . . ." Cafeteria & Restaurant Workers Union Local 473 v. McElroy, 367 U.S. 886, 895 (1961) (citations omitted).

is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of individual freedom."[19] Due process protection is required for deprivations of liberty in the criminal process[20] and in circumstances where fundamental rights are involved.[21] It is applicable whenever the interest of a person is within the contemplation of the "liberty or property" language of the fourteenth amendment[22] and is determined by "the extent to which an individual will be 'condemned to suffer grievous loss.'"[23] In view of the "massive curtailment of liberty,"[24] the deprivation of many civil rights[25] and the enormous stigma[26] surrounding committed individuals, both the United States and the California Supreme Courts have extended due process protections to those subject to civil commitment.[27]

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19. *In re* Gault, 387 U.S. 1, 20 (1966).

20. *See, e.g.*, Chessman v. Teets, 354 U.S. 156 (1957) (due process requirements must be satisfied no matter how heinous the crime).

21. *See, e.g.*, Bolling v. Sharpe, 347 U.S. 497, 499 (1954) ("liberty" under the fourteenth amendment extends to the full range of conduct which an individual can pursue—segregation based on race is a deprivation of "liberty"); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (first amendment rights are within the concept of "liberty" embodied in the fourteenth amendment).

22. Morrissey v. Brewer, 408 U.S. 471, 482 (1972).

23. *Id.* One of the issues in *Morrissey* was whether due process is applicable to parole revocation proceedings, since parole revocation is not part of a criminal prosecution. The Court found that parole revocation poses a sufficient deprivation of liberty to require due process protection. *Id.* at 481.

24. Humphrey v. Cady, 405 U.S. 504, 509 (1971).

25. For specific instances of denial of civil rights see *Developments, supra* note 14, at 1198-1201. *See also In re* Ballay, 482 F.2d 648, 651-52 (D.C. Cir. 1973) (possible restriction on voting rights, rights to serve on federal juries, to obtain a driver's license or a gun license). There are potentially 16 legal disabilities a court-committed patient may suffer, seven more than those imposed on a convicted felon. *See* THE DILEMMA, *supra* note 3, at 52.

26. *See* Board of Regents v. Roth, 408 U.S. 564 (1972), wherein the Court recognized that stigmatization constitutes a deprivation of liberty in a constitutional sense. *Id.* at 573. *See also* People v. Burnick, 14 Cal. 3d 306, 323, 535 P.2d 352, 363, 121 Cal. Rptr. 488, 499 (1975).

27. *See, e.g.*, Specht v. Patterson, 386 U.S. 605 (1967): "[C]ommitment proceedings whether denominated civil or criminal are subject both to the Equal Protection Clause . . . and to the Due Process Clause." *Id.* at 608. In O'Connor v. Donaldson, 422 U.S. 563 (1975), a case involving an involuntarily committed person, the Court found the issue presented concerned "every man's constitutional right to liberty." *Id.* at 573. For a more detailed discussion of *Donaldson* see notes 78-79 *infra* and accompanying text. California's mentally disordered sex offender proceedings "are subject to the 'full panoply' of the protections of the due process clause. . . ." People v. Burnick, 14 Cal. 3d 306, 324, 535 P.2d 352, 364, 121 Cal. Rptr. 488, 500 (1975).

A. VAGUENESS

In order to satisfy the demands of due process, a law which serves as a basis for confining individuals must not be vague. The void for vagueness doctrine can be divided into two elements, either of which will render a statute invalid.[28] First, a statute must be sufficiently explicit so as to give fair warning of the conduct that is prohibited by law.[29] Additionally, a statute is constitutionally vague unless it sets forth a definite enough standard to enable factfinders to apply it uniformly to those being adjudged:[30] "It is established that a law fails to meet the requirement of the Due Process Clause if it is so vague and standardless that it leaves . . . judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case."[31]

When the language of a particular statute is found vague, courts attempt to construe the terminology to save it from constitutional attack.[32] However, a court may not pervert the purpose of a statute in order to preserve it.[33] Thus, courts will look to a statute's legislative intent to help in its construction.[34] The statutory language may be construed by reference to a technical or special meaning,[35] a well settled common law meaning, or by common understanding and practices.[36]

Although the vagueness doctrine has been most widely ap-

28. *See generally* Comment, *The Void for Vagueness Rule in California,* 41 CALIF. L. REV. 523 (1953); Note, *Due Process Requirements of Definiteness in Statutes,* 62 HARV. L. REV. 77, 77 (1948).

29. *See* Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939) (statute using the term "gangster" found to be uncertain, giving no warning to those who may come within its ambit); A.B. Small Co. v. American Sugar Ref. Co., 267 U.S. 233 (1925) (provision using the terms "unreasonable and excessive" held fatally uncertain).

30. *See* Champlin Ref. Co. v. Corporation Comm'n of Oklahoma, 286 U.S. 210 (1932) (an individual cannot be penalized for disobedience to a rule or standard which is so vague that it is not a rule or standard at all). *Champlin* involved a penal statute, but modern courts have extended application of the vagueness doctrine to fundamental rights and civil statutes. *See* notes 37-39 *infra.*

31. Giaccio v. Pennsylvania, 382 U.S. 399, 402-03 (1966).

32. *See* Shapiro v. United States, 335 U.S. 1, 31 (1948).

33. *See generally* Note, *supra* note 28, at 83.

34. *See* Connally v. General Constr. Co., 269 U.S. 385, 394 (1926); People v. Grubb, 63 Cal. 2d 614, 620, 408 P.2d 100, 105, 47 Cal. Rptr. 772, 777 (1965).

35. *See* Connally v. General Constr. Co., 269 U.S. 385, 391 (1926); People v. Barksdale, 8 Cal. 3d 320, 327, 503 P.2d 257, 262, 105 Cal. Rptr. 1, 6 (1972).

36. *See* United States v. Petrillo, 332 U.S. 1, 8 (1947); People v. Barksdale, 8 Cal. 3d 320, 327, 503 P.2d 257, 262, 105 Cal. Rptr. 1, 6 (1972).

plied in the criminal area, courts have also applied it in civil areas when statutory violations may result in deprivations of important rights.[37] Civil commitment statutes have been subjected to vagueness analysis.[38] In regard to such statutes, one court remarked: "A statute sanctioning such a drastic curtailment of the rights of citizens must be narrowly, even grudgingly construed in order to avoid deprivations of liberty without due process."[39] The three commitment standards of "mental disorder," "gravely disabled" and "dangerous" contained in the LPS Act[40] have not been construed in such a fashion.

"Mental Disorder"

The term "mental disorder" presents severe definitional problems. For the purpose of the LPS Act, a mental disorder is any disorder set forth in the *Diagnostic and Statistical Manual of Mental Disorders (Diagnostic Manual)* of the American Psychiatric Association.[41] Instead of the general term "mental disorder or illness," the *Diagnostic Manual* supplies more specific diagnoses and nomenclature.[42] However, reference to the *Manual* accomplishes nothing in overcoming the inherent vagueness in the phrase "mental disorder."

Using the *Diagnostic Manual* as a commitment standard obscures the fact that the mental health profession does not agree on the nature or utility of these diagnostic designations.[43] One

37. *See, e.g.*, Giaccio v. Pennsylvania, 382 U.S. 399 (1966) (imposition of trial costs); Cramp v. Board of Public Instruction, 368 U.S. 278 (1961) (freedom of speech); Smith v. California, 361 U.S. 147 (1959) (freedom of press); Jordan v. DeGeorge, 341 U.S. 223 (1951) (deportation statute); *see also* Winters v. New York, 333 U.S. 507 (1948) (statutes which bear on protected rights require a higher degree of certainty than others do).

38. *See, e.g.*, Covington v. Harris, 419 F.2d 617 (D.C. Cir. 1969); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded on other grounds*, 414 U.S. 473 (1973).

39. Covington v. Harris, 419 F.2d 617, 623 (D.C. Cir. 1969).

40. *See* CAL. WELF. & INST. CODE §§ 5150, 5250 (West 1972 & Supp. 1977). *Id.* § 5008(h) defines gravely disabled as "a condition in which a person, as a result of a mental disorder, is unable to provide for his basic personal needs for food, clothing or shelter."

41. *See* CAL. ADM. CODE, tit. 9, § 813 (1976).

42. The *Manual* lists such categories as schizophrenia, major affective disorders, involutional melancholia, and gives characteristics of each disorder.

43. *See* Beck, Ward, Mendelsohn, Mock & Erbaugh, *Reliability of Psychiatric Diagnosis: A Study of Consistency of Clinical Judgments and Ratings*, 119 AM. J. PSYCHIAT. 351 (162); Goldberg, *The Effectiveness of Clinicians' Judgments: The Diagnosis of Organic Brain Damage from the Bender-Gestalt Test*, 23 J. CONSUL. PSYCHOL. 25 (1959); Goldberg & Werts, *The Reliability of Clinicians' Judgments: A Multitrait-Multimethod Approach*, 30 J. CONSUL. PSYCHOL. 199 (1966); Gough, *Clinical vs. Statistical Prediction*

study reveals that the likelihood of agreement among psychiatrists' diagnoses is only slightly better than chance.[44] Other studies have found that when the categories in the *Manual* were used to diagnoses individuals, clinicians were equally divided as to which category applied to any given individual.[45] The *Manual* itself acknowledges the controversy of certain positions that it has adopted.[46] Its diagnostic labels are not based upon scientific methodology at all.[47]

Psychiatric judgments of a patient are usually formed after one or several brief clinical interviews.[48] Studies indicate that during clinical observation, psychiatrists base their decisions, in part, on such criteria as the sex[49] and the socioeconomic class[50] of

in Psychology, in PSYCHOLOGY IN THE MAKING 526-84 (L. Postman ed. 1962); Oskamp, *The Relationship of Clinical Experience and Training Methods to Several Criteria of Clinical Prediction*, 76 PSYCHOL. MONOGRAPHS 28 (1962) (Whole No. 547); Zuben, *Classification of Behavior Disorders*, 18 ANN. REV. PSYCHOL. 343 (1967); *see generally* J. ZISKIN, COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY 11-37 (1970).

44. *See* Little & Schneidman, *Congruencies Among Interpretations of Psychological Testing and Anamnesia Data*, 73 PSYCHOL. MONOGRAPHS 6 (1959) (Whole No. 746).

45. *See, e.g.*, Katz, Cole & Lowery, *Studies of the Diagnostic Process: The Influence of Symptom Perception, Past Experience, and Ethnic Background on Diagnostic Decisions*, 125 AM. J. PSYCHOL. 937 (1969).

46. *See* A. BROOKS, LAW PSYCHIATRY AND THE MENTAL HEALTH SYSTEM 26 (1973). The author notes that "not all psychiatrists accept the diagnoses [of the *Manual*] at all." *Id.*

47. *See* Roth, Dayley & Lerner, *Into the Abyss: Psychiatric Reliability and Emergency Commitment Statutes*, 13 SANTA CLARA LAW. 400 (1973) [hereinafter cited as Roth & Dayley], which analyzes the experimental method employed in scientific theory and research and how that method is futile when used in psychiatric settings because of the conceptual ambiguity of diagnostic terminology. *Id.* at 402-11. *See also* J. ZISKIN, *supra* note 43, wherein the author challenges the validity of clinical examinations, psychiatric evaluation and psychological tests, *id.* at 1-26; Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693 (1974), which contains an excellent discussion of the meanings of "validity" and "reliability" in the psychiatric context.

48. *See* THE DILEMMA, *supra* note 3, at 29.

49. Broverman, Broverman, Clarkson, Rosenkrantz & Vogel, *Sex-Role Stereotypes and Clinical Judgments of Mental Health*, 34 J. CONSUL. & CLINICAL PSYCHOL. 1 (1970) (clinicians had the same standards for "healthy male" category as for "healthy adult;" however, the description of "healthy female" was not the same as for "healthy adult"); Roth & Lerner, *Sex-Based Discrimination in the Mental Institutionalization of Women*, 62 CALIF. L. REV. 789 (1974).

50. A. HOLLINGSHEAD & F. REDLICH, SOCIAL CLASS AND MENTAL ILLNESS: A COMMUNITY STUDY (1958); Haase, *The Role of Socioeconomic Class in Examiner Bias*, in MENTAL HEALTH OF THE POOR (2d ed. F. Riessman, J. Cohen & A. Pearl eds. 1965); Kahn, Pollock & Find, *Sociopsychologic Aspects of Psychiatric Treatment in a Volunteer Mental Hospital*, 1 A.M.A. ARCHIVES GEN. PSYCHOL. 565 (1959); Lee & Temerlin, *Social Class, Diagnosis, and Prognosis for Psychoterapy*, 7 PSYCHOTHERAPY: THEORY, RESEARCH & PRAC. 181 (1970). The above studies reveal that diagnostic and prognostic ratings for persons in low socioeconomic groups were significantly different from those in middle or upper socioeconomic groups. Poverty was strongly correlated with findings of mental illness.

the interviewee, his or her position of powerlessness in society[51] and the psychiatrist's own expectation of the interviewee.[52] The results of one study demonstrate that neuroses and psychoses are equated with inefficacious social behavior; *i.e.*, psychological health was evaluated in terms of effective social behavior.[53] If unconventional conduct is the primary basis for the determination of mental disorder, then the designation of an individual's behavior as mentally disordered will depend on the lifestyle preferences and value judgments of the observer,[54] and not on any objectively verifiable data. This appears to be borne out by one well known study which indicates that psychiatrists cannot tell the difference between those who are "sane" and those who are "insane".[55] Moreover, other studies demonstrate that psychiatrists are predisposed to assess behavior as indicating mental illness and are inclined to recommend commitment.[56]

The inaccuracy of psychiatric diagnosis has raised doubts for the California legislature[57] and a number of courts[58] as to the

51. *See* Linsky & Rushing, *Letter*, 78 AM. J. SOC. 684 (1972) (strong relationship between powerlessness and commitment); Scheff, *The Labelling Theory of Mental Illness*, 39 AM. SOC. REV. 444 (1974) (nonwhites were committed more frequently than whites).

52. Huguenard, Sager & Ferguson, *Interview Time, Interview Set, and Interview Outcome*, 31 PERCEPTUAL & MOTOR SKILLS 831 (1970) (when the interviewer was told whether the interviewees were "cold" or "warm" persons, it significantly affected post-interview ratings); Temerlin, *Diagnostic Bias in Community Mental Health*, 6 COMMUNITY MENTAL HEALTH J. 110 (1970) (after hearing a renowned mental health professional characterize a healthy man as psychotic, both mental health professionals and nonprofessionals who observed an interview with the same man tended to diagnose him as mentally ill); Temerlin, *Suggestion Effects in Psychiatric Diagnosis*, 147 J. NERVOUS & MENTAL DISEASE 349 (1968) (when it was suggested that persons were mentally ill, they were found to be so).

53. *See* Lee & Temerlin, *supra* note 50.

54. *See* T. SZASZ, LAW LIBERTY AND PSYCHIATRY 1-17 (1963). It has been recognized that the determination that one suffers mental illness is strongly influenced by middle class bias. *See* THE DILEMMA, *supra* note 3, at 34-35.

55. Rosenhan, *On Being Sane in Insane Places*, 13 SANTA CLARA LAW. 379 (1973), describes an experiment in which eight sane people gained secret admission to twelve different mental hospitals. These "pseudopatients" were never detected and were discharged with diagnoses of schizophrenia "in remission." *Id.* at 384.

56. *See* THE DILEMMA, *supra* note 3, at 40-43.

57. "The term 'mental illness' does not describe any particular condition . . . nor does it suggest any specific course of remedial action." *Id.* at 10-11.

58. *See, e.g.*, Greenwood v. United States, 350 U.S. 366 (1955), wherein the Court stated: "The only certain thing that can be said about the present state of knowledge and therapy regarding mental disease is that science has not reached finality of judgment." *Id.* at 375. The court in Fleuti v. Rosenberg, 302 F.2d 652 (9th Cir. 1962), *vacated and remanded on other grounds*, 374 U.S. 449 (1963), held the term "psychopathic personality" void for vagueness, relying in great part on the divergent standards of the two testifying doctors in determining a psychopathic personality. *Id.* at 658.

validity of the term "mental disorder." Federal courts have referred to the ambiguity of the *Diagnostic Manual* and its resulting lack of utility as a measure of mental disorders.[59] It is time for California courts to recognize the *Manual's* deficiencies and to abandon it as a source which purportedly cures vagueness in the term "mental disorder."[60]

"Gravely Disabled"

For an individual to be involuntarily committed, there must be a causal relationship between the "mental disorder" and either grave disability or dangerousness.[61] "Gravely disabled" means a "condition in which a person as a result of a mental disorder, is unable to provide for his basic personal needs for food, clothing, or shelter. . . ."[62] The term suffers from the same impermissible vagueness as the term "gravely impair," which the California Supreme Court held unconstitutional in *People v. Barksdale.*[63] In examining a statute which partially restricted therapeutic abortions to those instances in which "[t]here is a substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother,"[64] the *Barksdale* court found that the word "impair," defined as "to make worse," does not indicate the nature of the diminished health required to legitimate an abortion.[65] The term "disabled"

59. *See, e.g.*, Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), wherein the court observed that "because of the unavoidably ambiguous generalities in which the American Psychiatric Association describes its diagnostic categories, the diagnostician has the ability to shoehorn into the mentally diseased class almost any person he wishes, for whatever reason, to put there." *Id.* at 1094, *quoting* Livermore, Malmquist & Meehl, *On the Justification for Civil Commitment*, 117 U. PA. L. REV. 75, 80 (1968) [hereinafter cited as Livermore & Malmquist].

60. *Contra,* Conservatorship of Turner, 136 Cal. Rptr. 64 (1977) *(rehearing granted but deferred, see* Conservatorship of Chambers, 71 Cal. App. 3d 277, 280 n.3, 139 Cal. Rptr. 357, 359 n.3 (1977)), which held that "mental disorder" was not vague since "it possessed an established technical meaning" as set forth in the *Diagnostic Manual. Id.* at 67. The court neither questioned the validity of the diagnostic labels nor inquired into any scientific evidence to support their continued use.

61. CAL. WELF. & INST. CODE §§ 5150, 5250 (West 1972 & Supp. 1977).

62. CAL. WELF. & INST. CODE § 5008(h)(1) (West Supp. 1977).

63. 8 Cal. 3d 320, 503 P.2d 257, 105 Cal. Rptr. 1 (1972).

64. *See* CAL. HEALTH & SAFETY CODE § 25951(c)(1) (West Supp. 1977) (legislature has yet to repeal the statute). Abortions are also authorized for pregnancies which are the result of rape or incest. *Id.* § 25951(c)(2). Even had *Barksdale* not invalidated subsection (c)(1) on vagueness grounds, it would appear that the entire section, which requires the unanimous approval of a medical committee prior to any abortion, was implicitly invalidated by Roe v. Wade, 410 U.S. 113 (1973).

65. 8 Cal. 3d at 330, 503 P.2d at 263, 105 Cal. Rptr. at 7.

means "incapacitated by or as if by illness, injury, or wounds."[66] But what is the nature of an incapacitation that would justify commitment? The court in *Barksdale* also found that the word "gravely" made it impossible to ascertain the *degree* of impairment which must exist before an abortion was approved.[67] The same infirmity applies to "gravely" when it modifies "disabled," inasmuch as it provides no standard to guide a factfinder in determining the degree of disability which would necessitate confinement.

The apparent refinement supplied by the phrase "unable to provide his basic person needs for food, clothing, or shelter" does not serve to illuminate the standard. This wording does not indicate the extent of the inability which would warrant involuntary commitment. Since the statute refers to food, clothing *or* shelter, does this mean that the inability to provide for any one of these needs will render a person gravely disabled? Moreover, the phrase "basic personal needs" lends itself to totally subjective application. Does a person who eats one meal a day or eats only bananas or sleeps in a tent or wears bermuda shorts in cold weather necessarily fail to provide for his or her personal needs?

In sum, the term "gravely disabled" sets no objective guidelines by which factfinders can determine: (1) the *nature* of the inability to provide for one's basic personal needs; (2) the *degree* of inability to provide for such needs; or (3) *what basic needs are.* The vagueness of the "gravely disabled" criterion allows the state to commit persons merely because their status or habits are not in conformity with normative expectations.[68] Such abuse was pre-

66. WEBSTER'S NEW INTERNATIONAL DICTIONARY 642 (3d unabr. ed. 1976).

67. 8 Cal. 3d at 328-30, 503 P.2d at 263-64, 105 Cal. Rptr. at 7-8. A similar problem was encountered in Aden v. Younger, 57 Cal. App. 3d 662, 129 Cal. Rptr. 535 (1976). The *Aden* court found a requirement that psychosurgery be "critically" needed was unconstitutionally vague. *Id.* at 678, 129 Cal. Rptr. at 545.

68. However, in a recent challenge to the LPS Act's use of the term "gravely disabled" in conservatorship proceedings, the California Court of Appeal refused to find the standard vague or overbroad. Conservatorship of Chambers, 71 Cal. App. 3d 277, 285, 139 Cal. Rptr. 357, 362-63 (1977). The *Chambers* court acknowledged that "the entire field of mental health is still an emerging and controversial one," *see id.* at 284, 139 Cal. Rptr. at 362, and that courts of other jurisdictions had held "that civil commitment requires a finding that an individual be an immediate danger to himself or to others, as evidenced by an overt act, *see id.* at 282, 139 Cal. Rptr. at 360-61, *citing* Lynch v. Baxley, 386 F. Supp. 378 (M.D. Ala. 1974); Bell v. Wayne County Gen. Hosp., 384 F. Supp. 1085 (E.D. Mich. 1974); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded on other grounds,* 414 U.S. 473 (1973).

cisely the basis upon which the United States Supreme Court, in *Papachristou v. City of Jacksonville,*[69] held a vagrancy ordinance unconstitutionally vague.[70] Under the ordinance,

> [r]ogues and vagabonds, or dissolute persons who go about begging, common gamblers, . . . common drunkards, common night walkers, . . . common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business, . . . persons able to work but habitually living upon the earnings of their wives or minor children . . .

were vagrants subject to arrest and conviction.[71] The ordinance's language was held so vague as to transform normally innocent activities into crimes, depending on the whim of those charged with enforcing it: "Those generally implicated by the imprecise

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Nevertheless, the *Chambers* court, in an extraordinary display of abdication of the judiciary's function to interpret the Constitution, deferred entirely to legislative judgment:

> The enactment of the LPS and with it the substitution of "gravely disabled" for "in need of treatment" as the basis for commitment of individuals not dangerous to themselves or others reflects a legislative determination to meet the constitutional requirements of precision. The term "gravely disabled" is sufficiently precise to exclude unusual or nonconformist lifestyles. It connotes an inability or refusal on the part of the proposed conservatee to care for basic personal needs of food, clothing and shelter. It also provides fair notice of the proscribed conduct to the proposed conservatee who must be presumed to be a person of common intelligence for the purpose of determining the sufficiency of the statute.
>
> . . . We hold that in the context of the LPS, the gravely disabled standard is constitutionally precise and, as it requires a causal link between a specifically defined and diagnosed mental disorder and an inability to care for one's basic personal needs, the term is neither vague nor overbroad.

71 Cal. App. 3d at 284-85, 139 Cal. Rptr. at 362-63 (footnote omitted). The court also declined to require a substantive finding of dangerous to self or others as necessary to satisfy the mandates of procedural due process. *Id.* at 285, 139 Cal. Rptr. at 362. To the court, the procedural safeguards afforded by the legislature in "gravely disabled" conservatorship proceedings, *see id.* at 282-83, 139 Cal. Rptr. at 361-62, the LPS Act's distinction between the dangerous and nondangerous mentally ill, and the "short-term nature of civil commitment and the provision for automatic review" were sufficient. *See id.* at 285, 139 Cal. Rptr. at 362.

69. 405 U.S. 156 (1971).

70. The ordinance failed to give fair warning of the conduct that was forbidden and "it encourage[d] arbitrary and erratic arrests and conviction." *Id.* at 162.

71. *Id.* at 156-57 n.1.

terms of the ordinance—poor people, non-conformists, dissenters, idlers—may be required to comport themselves according to the lifestyles deemed appropriate by the Jacksonville police and the courts."[72]

In a similar fashion, the term "gravely disabled" allows fact-finders, guided by psychiatrists, to determine what is a normal living standard; in so doing, they inevitably refer to their own conception of what is normal and abnormal.[73] The majority of persons who are involuntarily committed are poor,[74] aged[75] or members of racial minorities.[76] This record is not surprising, given the predilection of psychiatrists in diagnosing lower socioeconomic persons as mentally ill.[77] This bias is exacerbated by the indefiniteness of the "gravely disabled" standard, which by its wording discriminates according to wealth. Persons with money are obviously more able to feed, clothe and shelter themselves. Despite the fact that in *O'Connor v. Donaldson,*[78] the United States Supreme Court stated that the nondangerous mentally ill may not be confined merely to ensure them a living standard superior to what they may have enjoyed in the private community nor incarcerated solely to save them from exposure to ways that are different,[79] the lack of precision in the term "gravely disabled" leads to commitment for these very reasons.

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72. *Id.* at 170.

73. *See In re* Ballay, 482 F.2d 648, 665 (D.C. Cir. 1973); *see also* notes 48-50 & 52-53 *supra* and accompanying text.

74. *See* THE DILEMMA, *supra* note 3, at 33-35; Schneider, *Civil Commitment of the Mentally Ill,* 58 A.B.A.J. 1059, 1061 (1972); note 49 *supra.*

75. *See* THE DILEMMA, *supra* note 3, which indicates that 28% of the resident population in state hospitals are over 65 years old. *Id.* at 78. *See also* AMERICAN BAR FOUNDATION, THE MENTALLY DISABLED AND THE LAW 39 (rev. ed. S. Brakel & R. Rock eds. 1971).

76. *See* note 50 *supra.*

77. *See* note 49 *supra.*

78. 422 U.S. 563 (1975).

79. *Id.* at 575. Donaldson, who was confined in a state hospital for 15 years, filed suit under 42 U.S.C. § 1983, seeking damages for deprivation of liberty. Evidence indicated that Donaldson was not dangerous and that he had not received treatment.

In the recent decision of Conservatorship of Chambers, 71 Cal. App. 3d 277, 139 Cal. Rptr. 357 (1977), the California Court of Appeal avoided application of *Donaldson. Id.* at 285, 139 Cal. Rptr. at 363. The court took notice of Chambers' argument that absent an organic source, mental disorders as defined by the LPS Act, *see* text accompanying note 41 *supra,* "are ultimately defined by behavioral deviations from the social norm." *Id.* at 285 n.12, 139 Cal. Rptr. at 363 n.12. It also noted the California Supreme Court's recognition of the "limited state of the art of the diagnosis of mental disorders by mental health professionals." *Id.* at 285, 139 Cal. Rptr. at 363, *citing* People v. Burnick, 14 Cal. 3d, 306, 326-27, 535 P.2d 352, 365-66, 121 Cal. Rptr. 488, 501-02 (1975). However, the court found that Chambers had submitted the question of his grave disability to the trial court solely on the basis of the papers filed with the court. *Id.* at 287, 139 Cal. Rptr. at 364. Since

In *Conservatorship of Turner,*[80] the California Court of Appeal found the term "gravely disabled" sufficiently precise to exclude lifestyles which are merely unusual or nonconformist.[81] Yet, the court cited no cases nor any other evidence to substantiate this statement. The court found that the determination of whether one can care for his or her personal needs is based on the common experience of the jury.[82] However, jury members have stereotypes about "mentally ill" persons,[83] and psychiatrists, as expert witnesses, have strong middle class biases.[84] Thus, the decision to commit someone who is "gravely disabled" will be the product of personal judgments and beliefs as to what constitutes basic needs.

"Dangerousness"

The meaning of the term "dangerous" is extremely elusive and is nowhere defined in pertinent sections of the Act.[85] The

Chambers was represented by counsel at the time of the submission and the LPS Act did not then require the trial court to voir dire the proposed conservatee as to his or her procedural rights, the court found that Chambers had knowingly and intelligently waived any more probing inquiry by the trial court than its consideration of the petition for conservatorship and other affidavits. *Id.*

From the finding of waiver, the *Chambers* court concluded that it was proper to defer the question of whether a psychiatric finding of grave disability, without evidence of recent conduct of self-neglect, was sufficient to justify involuntary hospitalization. *Id.* at 285 & n.13, 139 Cal. Rptr. at 363 & n.13. The court apparently believed that Chambers' waiver relieved it of the duty to apply *Donaldson* to the LPS Act's provisions for commitment of the "gravely disabled." However, even assuming Chambers could not challenge the trial court's finding that he was "gravely disabled," waiver would seem immaterial to the question of whether the "gravely disabled" standard was in conformity with *Donaldson.*

Perhaps the court's reluctance to address the *Donaldson* issue was predicated on the fact that conservatorship proceedings incorporate much of the qualifying language of *Donaldson.* That is, *Donaldson* forbids involuntary commitment of nondangerous persons when they are capable of surviving outside an institution with the help of responsible friends or relatives. 422 U.S. at 575. CAL. WELF. & INST. CODE § 5358 (West Supp. 1977) provides for placement in the conservatee's home or that of a relative as a preferred alternative. The facts in *Chambers* indicated that Chambers was not welcome in the home of either his mother or his father. 71 Cal. App. 3d at 281, 139 Cal. Rptr. at 360. This line of reasoning, however, was not employed by the *Chambers* court but was discussed by the same judicial panel in a later decision. *See* discussion of Conservatorship of Buchanan, 1 Civ. No. 41256 (Cal. App. Ct., 1st Dist. Mar. 7, 1978), at note 138 *infra.*

80. 136 Cal. Rptr. 64 (1977) *(rehearing granted but deferred, see* Conservatorship of Chambers, 71 Cal. App. 3d 277, 280 n.3, 139 Cal. Rptr. 357, 359 n.3 (1977)).

81. *Id.* at 67. *Accord,* Conservatorship of Chambers, 71 Cal. App. 3d 277, 284, 139 Cal. Rptr. 357, 362 (1977).

82. 136 Cal. Rptr. at 67.

83. *See, e.g.,* J. NUNNALLY, POPULAR CONCEPTIONS OF MENTAL HEALTH (1961) (public has stereotyped impressions of the mentally disordered, such as dangerous, dirty, unpredictable and worthless).

84. *See* notes 49-50 & 53 *supra* and accompanying text.

85. *See* Thorn v. Superior Court, 1 Cal. 3d 666, 669, 464 P.2d 56, 58, 83 Cal. Rptr.

term has at least four component parts: (1) magnitude of the harm threatened (including whether the harm is physical, psychological or harm to property); (2) probability that the harm will occur; (3) frequency (whether the harm is likely to occur once, twice or more); and (4) imminence of the harm.[86] However, none of these four factors are considered in the LPS Act. One federal court of appeals[87] noted the problems which attend the imprecision of the term "dangerousness:" "Remaining largely undefined, application of these concepts by judge and jury may unduly reflect clinical definitions and conclusions rather than the appropriate judicial exegetics and community values."[88]

The police power serves as the basis for committing those who are "dangerous to others" as well as for the incarceration of

600, 602 (1970). However, the court in People v. Kirk, 49 Cal. App. 3d 765, 122 Cal. Rptr. 653 (1975), did not find the term "dangerous" vague for the purposes of determining commitment for mentally disordered sex offenders. *Id.* at 769-70, 122 Cal. Rptr. 655-66 (dictum) (retrial ordered because jury given improper instruction as to the state's burden of proof). A mentally disordered sex offender is one "who by reason of mental defect, disease, or disorder, is predisposed to the commission of sexual offenses to such a degree that he is dangerous to the health and safety of others." CAL. WELF. & INST. CODE § 6300 (West 1972). The *Kirk* court noted that "dangerous" is defined by the dictionary as able or likely to inflict injury, and such a meaning is commonly understood by people of reasonable intelligence." 49 Cal. App. 3d at 769, 122 Cal. Rptr. at 656.

The court dismissed the California Supreme Court's suggestion that Welfare and Institutions Code section 6300 may be unconstitutionally vague. *Id.* at 769 n.3, 122 Cal. Rptr. at 655-56 n.3, *citing* People v. Burnick, 14 Cal. 3d 306, 329 n.20, 535 P.2d 352, 367 n.20, 121 Cal. Rptr. 488, 503 n.20. The *Kirk* court found *Burnick* distinguishable, since "the court there was also concerned about the reliability of psychiatric evaluations of an accused's predisposition to commit [dangerous] acts in the future. 49 Cal. App. 3d at 769 n.3, 122 Cal. Rptr. at 656 n.3. It is difficult, however, to understand the distinction perceived by the *Kirk* court, since Kirk was alleged to be predisposed to committing sexual offenses against adolescent and pre-adolescent boys. The court was sufficiently impressed with the testimony of the three psychiatrists at trial to conclude that "there is no real doubt in the record that [Kirk's] sexual predilection for young males will continue." *Id.* at 770, 122 Cal. Rptr. at 656. The *Kirk* court not only misconceived some distinction between the facts in *Burnick* and *Kirk* but also misapprehended the thrust of *Burnick.* The *Burnick* court refrained from discussing possible vagueness because Burnick's only challenge was directed to the proper standard of proof for confining mentally disordered sex offenders. 14 Cal. 3d at 310, 329 n.20, 535 P.2d at 354, 367 n.20, 121 Cal. Rptr. at 490, 503 n.20. In contrast, Kirk argued the vagueness of section 6300 and the court, albeit in dictum, disposed of the issue by relying on the same type of evidence that the *Burnick* court found so dubious as to warrant proof beyond a reasonable doubt—psychiatric prediction. The *Kirk* court's dictum was ill-advised, at best.

86. *See* A. BROOKS, *supra* note 46, at 680-82.

87. *In re* Ballay, 482 F.2d 648 (D.C. Cir. 1973). Ballay, committed to a mental hospital, appealed his commitment, alleging there must be a strict burden of proof in commitment proceedings. The court held that proof of mental illness and dangerousness must be beyond a reasonable doubt, rather than by a preponderance of the evidence. *Id.* at 669.

88. *Id.* at 665.

those who violate the criminal law. However, in a criminal action, a convicted defendant has already committed a clearly defined act which is deemed inimical to society's interests; when a state imprisons a convict, it is not only "protecting society," but also effectuating a state's interests in retribution, rehabilitation and deterrence.[89]

In contrast, in a California civil commitment proceeding, since "dangerousness" is undefined, an individual may be legally committed for any number of acts, beliefs or thoughts that a psychiatrist may consider to be dangerous. Absent clear guidelines, persons may be confined if they threaten harm to others, destroy property, scream at others or act in any manner which might seem inappropriate to the circumstances of a situation. This raises a number of constitutional questions, not the least of which is preventive detention, which have not escaped recognition by the courts: "When a determination of 'dangerous' will result in a deprivation of liberty, no court can afford to ignore the very real Constitutional problems surrounding incarceration predicated only upon a supposed propensity to commit criminal acts. . . . Incarceration for a mere propensity is punishment not for acts but for status. . . ."[90]

If preventive detention is permissible at all, it must be based on a high probability of serious harm.[91] However, the grave injustice of committing individuals under the vague "dangerous" standard has been recognized by some judges who acknowledge that

89. *See id.* at 657-58. The *Ballay* court compared the criminal model with civil commitment, finding that although an individual's loss of liberty is similar, the criminal system provides more due process safeguards. *Id.*

90. Cross v. Harris, 418 F.2d 1095, 1101 (D.C. Cir. 1969). *See also* Robinson v. California, 370 U.S. 660, 666 (1962) (California statute construed in such a manner as to make criminal the status of drug addict held to be cruel and unusual punishment in violation of eighth and fourteenth amendments).

91. The harm threatened must be serious enough to justify an indefinite deprivation of liberty. *See* Whitney v. California, 274 U.S. 357, 377-78 (1927) (Brandeis & Holmes, JJ.) (concurring); Cross v. Harris, 418 F.2d 1095, 1103 (D.C. Cir. 1969). The probability that the harm will occur must be sufficiently high to avoid arbitrariness and capriciousness proscribed by the due process clause. *See id.; see also* Leary v. United States, 395 U.S. 6, 36 (1969); United States v. Barker, 514 F.2d 208 (D.C. Cir. 1975), *cert. denied*, 421 U.S. 1013 (1975), where, in a criminal case, the court stated: "[T]o determine guilt or innocence of an individual on the basis of a prediction of future dangerousness involves the making of an assumption about individuals without a sound empirical basis, and would thus be inconsistent with modern notions of due process." 514 F.2d at 231 (footnotes omitted).

psychiatrists' predictions of dangerousness are even less reliable than their diagnoses:

> Perhaps the psychiatrist is an expert at deciding whether a person is mentally ill, but is he an expert at predicting which of the persons so diagnosed are dangerous? Sane people, too, are dangerous, and it may legitimately be inquired whether there is anything in the education, training, or experience of psychiatrists which renders them particularly adept at predicting dangerous behavior. Predictions of dangerous behavior, no matter who makes them, are incredibly inaccurate, and there is a growing consensus that psychiatrists are not uniquely qualified to predict dangerous behavior, and are, in fact, less accurate in their predictions than other professionals.[92]

Extensive research indicates that psychiatrists consistently err; they predict violence which does not occur, resulting in the labeling of persons as "dangerous" who are, in fact, completely innocuous.[93] These findings are substantiated by other studies which demonstrate that most persons committed as "dangerous" do not present serious difficulties when released from maximum security mental institutions.[94] Moreover, although the mentally disabled

92. People v. Burnick, 14 Cal. 3d 306, 326, 535 P.2d 352, 365, 121 Cal. Rptr. 488, 501 (1975), *quoting* Murel v. Baltimore City Criminal Court, 407 U.S. 355, 364-65 n.2 (1972) (Douglas, J.) (dissenting from dismissal of certiorari).

93. *See* Diamond, *The Psychiatric Prediction of Dangerousness*, 123 U. PA. L. REV. 439, 451 (1974); Dix, *Civil Commitment on the Mentally Ill and the Need for Data on the Prediction of Dangerousness*, 19 AM. BEHAV. SCIENTIST 318 (1976) (quotes studies which indicate the lack of reliable predictors for dangerousness); Kozal, Boucher & Garofalo, *The Diagnosis and Treatment of Dangerousness*, 18 CRIME & DELINQUENCY 371, 391 (1972) (clinicians predicted assaultive behavior by adult offenders under the state's Dangerous Persons Act and found 61% of individuals who they identified as potentially violent were not so); Laves, *The Prediction of Dangerousness as a Criterion for Involuntary Civil Commitment: Constitutional Considerations*, 3 J. PSYCHIAT. & LAW 291 (1975) (civil commitments based on predictions of psychiatrists are a denial of fourteenth amendment safeguards since science does not qualify psychiatrists as experts); Livermore & Malmquist, *supra* note 59, at 81-86 (behavioral scientists cannot identify those who will commit violent, destructive acts); Steadman, *Some Evidence on the Inadequacy of the Concept & Determination of Dangerousness in Law and Psychiatry*, 1 J. PSYCHIAT. & LAW 409 (1973) (psychiatrists have insufficient predictive expertise to justify preventive detention). For further research indicating that predictions of dangerousness are invalid see Ennis & Litwack, *supra* note 47.

94. In Baxstrom v. Herold, 383 U.S. 107 (1966), the Court held that without a judicial determination of dangerous mental illness, it was a denial of equal protection to commit the criminally insane beyond the expiration of their prison terms. *Id.* at 110. As a result of *Baxstrom*, New York state officials undertook what came to be known as "Operation Baxstrom," a rapid transfer program of nearly 1000 inmates confined in two maximum

as a group has been statutorily singled out for preventive detention, it has been established that other groups in the community, such as ex-felons, ghetto residents and teenage males, are far more likely to commit dangerous acts.[95]

While the state has an undeniable interest in protecting its citizens from violent acts, confinement based on inaccurate predictions of "dangerousness" does not bear a rational relationship to the accomplishment of that police power goal. The failure to acknowledge the vagueness in the criterion "dangerous to others" and the concomitant reliance on inaccurate predictions of psychiatrists have led to widespread abuse of the police power which accounts for the unnecessary commitment of a significant proportion of those involuntarily hospitalized.[96] As one court warned: "Without some [analytical] framework, 'dangerous-

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security mental hospitals in New York.

> Of those nearly 1000 ex-prisoners whom the appropriate state authorities had prior to *Baxstrom* determined to be too dangerous to be placed in a civil hospital, . . . [during the following year] only seven have had to be returned to [maximum security] after a judicial determination that they were dangerous. As one author has noted, the Baxstrom patients were almost as pure as Ivory Snow; they were 99 28/100 percent free from dangerous mental illness.

United States *ex rel.* Schuster v. Herold, 410 F.2d 1071, 1086 (2d Cir. 1969), *noting* Morris, *The Confusion of Confinement Syndrome: An Analysis of the Confinement of Mentally Ill Criminals and Ex-Criminals by the Department of Correction of the State of New York,* 17 BUFFALO L. REV. 651, 672 (1968). Four years afterward, "[l]ess than three percent of the Baxstrom patients had acted out in a 'dangerous way' and were in a correctional facility or a hospital for the criminally insane." Steadman & Keveles, *The Community Adjustment and Criminal Activity of the Baxstrom Patients:* 1966-1970, 129 AM. J. PSYCHIAT. 80 (1972), *reprinted in* A. BROOKS, *supra* note 46, at 326. Followup studies of the *Baxstrom* case "are often cited to illustrate the extent to which psychiatrists overpredict dangerousness." A. BROOKS, *supra* note 46, at 326. *See also* Hunt & Wiley, *Operation Baxstrom After One Year,* 124 AM. J. PSYCHIAT. 974 (1968); White, Krumholz & Fink, *The Adjustment of Criminally Insane Patients to a Civil Mental Hospital,* 53 MENTAL HYGIENE 34 (1969).

95. *See* Ennis, *Civil Liberties and Mental Illness,* 7 CRIM. L. BULL. 101, 107 (1971).

96. Dix, *supra* note 92 (as many as half of involuntary patients are unnecessarily institutionalized using a dangerousness criterion). In Dershowitz, *The Psychiatrist's Power in Civil Commitment,* PSYCHOL. TODAY, Feb. 1969, at 43, the author discusses studies indicating that the great majority of committed persons based on a dangerousness standard do not engage in dangerous behavior following release; studies show mixed results in comparing arrest rates for discharged mental patients versus the general public. *Id.* at 47. *See also* Pollack, *Is the Paroled Patient a Menace to the Community?,* 712 PSYCHOL. Q. 236 (1938) (lower arrest rates for discharged mental patients). *But see* Rappeport & Lassen, *Dangerousness—Arrest Rate Comparisons of Discharged Patients and the General Population,* 121 AM. J. PSYCHIAT. 776 (1965) (arrest rates higher for discharged mental patients).

ness' could readily become a term of art describing anyone whom we would, all things considered, prefer not to encounter on the streets."[97]

The "dangerous to self" category is designed primarily for the protection of the suicidal person.[98] The definitional vagueness of the term "dangerous" allows persons to be confined based solely on predictions of future acts. Because very few of those who are severely depressed or who express suicidal thoughts actually commit suicide,[99] an effective predictor of suicide has not been developed.[100] Psychiatrists consistently overpredict potential suicide in order to be on the "safe side."[101] California courts need to reconsider the commitment process with some regard for these empirical findings. The California Supreme Court itself stated: "In light of recent studies it is no longer heresy to question the reliability of psychiatric predictions."[102]

II. *PARENS PATRIAE* AND THE RIGHT TO EFFECTIVE TREATMENT

When a state acts to prevent injury or harm to those who cannot protect themselves, it exercises authority under the doctrine of *parens patriae,* which is inherent in the supreme power of every state.[103] The use of *parens patriae* for the commitment of the mentally disordered originated in an 1845 decision of the Massachusetts Supreme Judicial Court[104] in which Chief Justice Shaw stated that the "great law of humanity" justified depriving an insane person of his liberty whenever his own safety or that of others required it for his own restoration.[105] In California, the power to commit those who are "gravely disabled" or those dangerous to themselves stems from this doctrine. Although the state possesses this capacity, its exercise must comport with due pro-

97. Cross v. Harris, 418 F.2d 1095, 1099 (D.C. Cir. 1969).

98. *See* A. BROOKS, *supra* note 46, at 699; THE DILEMMA, *supra* note 3, at 152.

99. Rosen, *Detection of Suicidal Patients—An Example of Some Limitations in the Prediction of Infrequent Events,* 18 J. CONSUL. PSYCHOL. 397 (1954).

100. *Id. See* Cohen, Motto & Seiden, *An Instrument for Evaluating Suicide Potential,* 122 AM. J. PSYCHIAT. 366 (1966) [hereinafter cited as Cohen & Motto].

101. *See* Cohen & Motto, *supra* note 100 (studies indicated overprediction occurred 50% of the time, even when based on past overt acts).

102. People v. Burnick, 14 Cal. 3d 306, 325, 535 P.2d 352, 365, 121 Cal. Rptr. 488, 501 (1975).

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

104. *In re* Oakes, 8 Law Rep. 122 (Mass. 1845).

105. *Id.* at 124 (dictum) For a discussion of the development of *parens patriae* in a social and political context see N. KITTRIE, *supra* note 2, at 8-11. For the nature and origins of the power see generally *Developments, supra* note 14, at 1207-10.

cess.[106] In the past, laws that provided for the confinement of mentally disordered persons for custody and care were deemed acceptable.[107] Recently, however, courts have found that custody or care are insufficient reasons for confinement, and if persons are committed for their own benefit under the *parens patriae* rationale, they have a right to receive adequate treatment.[108]

The right to treatment was first explicated in 1960 in an article by Morton Birnbaum.[109] Birnbaum derived this right from notions of substantive due process. If a person is institutionalized for care and treatment, he or she is entitled to adequate medical treatment; otherwise, the institution becomes nothing more than a mental prison.[110] The judicial recognition of the right to treatment was given impetus in *Jackson v. Indiana,*[111] wherein the Supreme Court stated: "At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."[112] Later cases extended this rationale in holding that if the state is confining a person for his or her benefit, the government must offer a quid pro quo in the form of *adequate treatment.*[113]

106. *See In re* Gault, 387 U.S. 1, 12-21 (1967) *(parens patriae* does not justify a lack of due process safeguards in juvenile proceedings). In Heryford v. Parker, 396 F.2d 393 (10th Cir. 1968), the court stated that in proceedings for juveniles and mentally deficient persons undertaken by a state acting in *parens patriae,* due process must be satisfied. *Id.* at 396.

107. *See, e.g.,* Higgins v. United States, 205 F.2d 650, 652-53 (9th Cir. 1953) (state acting in *parens patriae* has general duty of caring for insane persons but may restrain and confine such people for their own welfare, as well as for the protection of the public).

108. The leading case is Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966), wherein the court found the right to treatment to be statutorily mandated, *id.* at 453-55, although in dicta, it discussed the constitutional dimensions, *id.* at 458-59. The court declared that government is obliged to offer an "overwhelmingly compelling reason" for its failure to provide adequate treatment. *Id.* However, a bona fide attempt to cure and improve a patient is all that is required to satisfy the duty of furnishing adequate treatment. *Id.* at 456. In Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974), the court held that there was a constitutional right to treatment. *Id.* at 1312-14. Mere custodial care was found insufficient to justify confinement. *See id.* at 1314. Other courts have held treatment to be a statutory or constitutional right. *See, e.g.,* Donaldson v. O'Connor, 493 F.2d 507 (5th Cir. 1974), *aff'd on other grounds,* 422 U.S. 563 (1975) (the Supreme Court did not reach the issue of whether there is a constitutional right to treatment); *In re* Ballay, 482 F.2d 648 (D.C. Cir. 1973); Covington v. Harris, 419 F.2d 617 (D.C. Cir. 1969).

109. Birnbaum, *The Right to Treatment,* 46 A.B.A.J. 499 (1960).

110. *Id.* at 503.

111. 406 U.S. 715 (1972).

112. *Id.* at 738 (person indefinitely committed under an incompetency-to-stand trial statute).

113. *See, e.g.,* Wyatt v. Aderholt, 503 F.2d 1305, 1314 (5th Cir. 1974); Donaldson v. O'Connor, 493 F.2d 507 (5th Cir. 1974).

"Without some form of treatment, the state justification for acting as *parens patriae* becomes a nullity."[114]

In California, there is a statutory right to treatment for persons in a mental hospital.[115] This right to treatment must be interpreted as a right to *effective* treatment[116] or the right is rendered meaningless. Yet, given the level of psychiatric knowledge and methodology,[117] and the conditions and understaffing of hospitals,[118] effective treatment is not the norm.[119] Mounting evidence indicates that hospitalization and treatment are not only ineffective[120] but are often deleterious to residents.[121] In many instances, treatment cannot possibly justify confinement, since individuals diagnosed as untreatable have also been committed.[122]

The "dangerous to self" criterion has the same constitutional problems as the "gravely disabled" standard—lack of effective treatment vitiates the *parens patriae* rationale. However, an additional question is presented with respect to suicidal persons: whether the state should have the power to prevent individuals

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114. *In re* Ballay, 482 F.2d 648, 659 (1973).

115. Both emergency detention and fourteen day certification expressly require intensive treatment. *See* CAL. WELF. & INST. CODE §§ 5150, 5250 (West 1972).

116. *See, e.g.*, Wyatt v. Stickney, 344 F. Supp. 373, 374 (M.D. Ala. 1972), *aff'd sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974) (patients have a constitutional right to treatment which will give them a "realistic opportunity to be cured or to improve. . . ."); Schwitzgebel, *The Right to Effective Mental Treatment*, 62 CALIF. L. REV. 936 (1974) (right to treatment means treatment which will effectively change the behavior of patients).

117. *See* text accompanying notes 44-59 & 92-94 *supra*.

118. *See, e.g.*, Wyatt v. Aderholt, 503 F.2d 1305, 1310-12 (5th Cir. 1974); Dixon v. Attorney General, 325 F. Supp. 966, 969 (M.D. Pa. 1971); *see also* Roth & Dayley, *supra* note 51, wherein the authors discuss the punitive nature of institutionalization. *Id.* at 433.

119. *See* Wyatt v. Stickney, 325 F. Supp. 781, 784 (M.D. Ala. 1971), *aff'd sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974); Knecht v. Gillman, 488 F.2d 1136 (9th Cir. 1973) (administering a drug which caused vomiting as part of an involuntary treatment program constituted cruel and unusual punishment); Rouse v. Cameron, 373 F.2d 451, 458 (D.C. Cir. 1966); Ennis & Litwack, *supra* note 47; Schwitzgebel, *supra* note 116 (indicating treatment in institutions does not effectively change behavior).

120. *See* notes 117-19 *supra*.

121. *See* Coleman & Soloman, *Parens Patriae "Treatment": Legal Punishment in Disguise*, 3 HASTINGS CONST. L.Q. 345 (1976), wherein the authors assert that treatment is a fiction; it involves physical pain and suffering, as well as psychological pain and, in fact, is indistinguishable from punishment. *Id.* at 351. *See also* THE DILEMMA, *supra* note 3, where hospitalization was found to be harmful, rather than helpful. *Id.* at 70-77.

122. *See In re* Ballay, 482 F.2d 648, 659 (D.C. Cir. 1973); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972). For a full discussion on the untreatable patient see Note, *Conditioning and Other Technologies Used to "Treat?" "Rehabilitate?" "Demolish?" Prisoners and Mental Patients*, 45 S. CAL. L. REV. 616 (1972).

who choose to die from taking their own lives. In California, there is no law against suicide or attempted suicide,[123] yet an individual may be confined if he or she is designated suicidal.[124] It may be argued that because persons who attempt suicide are not making rational choices, the state, acting as *parens patriae,* may protect them.[125] However, such protection raises the same spectre of preventive detention that is present with regard to those labeled "dangerous to others." Moreover, even if the state has a compelling interest in preventing suicide, it does not appear that commitment furthers that end. There is no evidence that detention and hospitalization will prevent a suicidal act.[126] In fact, it has been shown that hospitalization is harmful to a potentially suicidal person.[127]

The "dangerous to self" criterion allows confinement of persons who may or may not be suicidal;[128] persons committed under either the "gravely disabled" or "dangerous to self" rubric are supposedly confined for the purpose of treatment, yet at the present time, treatment is ineffective. The courts have already repudiated the idea that when a state acts as *parens patriae,* normal procedural safeguards may be relaxed.[129] In light of the failure to provide adequate treatment and opportunities for rehabilitation, a number of courts have begun to doubt whether the *parens patriae* doctrine serves as a justifiable basis for involuntary com-

123. The only law concerning suicide in California is CAL. PENAL CODE § 401 (West 1970), which provides that "every person who deliberately aids, or advises, or encourages another to commit suicide, is guilty of a felony."

124. Aside from emergency and fourteen day certification, CAL. WELF. & INST. CODE § 5260 (West 1972) permits a further fourteen day commitment for suicidal persons.

125. *See Developments, supra* note 14.

126. *See* THE DILEMMA, *supra* note 3, which states:

> Even if the state were to hospitalize suicidal patients for their own protection, there is no evidence that it is possible to prevent people from killing themselves if they are determined to do so. In fact, patients in state hospitals commit suicide and patients released from state hospitals commit suicide.

Id. at 154; Greenberg, *Involuntary Psychiatric Commitments to Prevent Suicide,* 49 N.Y.U.L. REV. 227, 256-59 (1974) (psychiatrists do not have an effective treatment for suicidal persons).

127. *See* THE DILEMMA, *supra* note 3, at 152-53.

128. *See* notes 98-99 *supra* and accompanying text.

129. *See, e.g., In re* Gault, 387 U.S. 1 (1966); "The Latin phrase proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme; but its meaning is murky and its historic credentials are of dubious relevance." *Id.* at 16 (juvenile proceedings must be attended by procedural protections of due process). *See also* Heryford v. Parker, 396 F.2d 393 (10th Cir. 1968).

mitment.[130] One court aptly remarked: "Notoriously, [the] promise of treatment has served only to bring an illusion of benevolence to what is essentially a warehousing operation for social misfits."[131]

III. PROPOSED SOLUTIONS

The primary problem with the commitment scheme embodied in the LPS Act is that it places undue reliance upon psychiatric knowledge, techniques and testimony. The commitment standards are based, in part, on a medical model[132] of "mental disorder" despite criticism by both commentators and courts that it is inaccurate and without scientific validity. Since the commitment standards are vague, a factfinder's decision to commit will more than likely be determined by the testimony offered by psychiatrists. Often, such testimony is based on mere predictions of future behavior, which research has demonstrated are wholly in-

130. *See, e.g., In re* Ballay, 482 F.2d 648, 659-60 (D.C. Cir. 1973); Kendall v. True, 391 F. Supp. 413, 417-18 (W.D. Ky. 1975); *see also* Note, *The Nascent Right to Treatment*, 53 VA. L. REV. 1134, 1140 (1967).

131. Cross v. Harris, 418 F.2d 1095, 1107 (D.C. Cir. 1969).

132. The "medical model" is a phrase by which a number of psychiatrists and sociologists explain the misconceptions of "mental illness." Briefly stated, proponents of this point of view suggest that the concept of mental illness or disease is "based on an inappropriate analogy to physical disease." *See* Hardisty, *Mental Illness: A Legal Fiction*, 48 WASH. L. REV. 735, 737 n.11 (1973). Unlike physical disease or ailments, which are the product or physiological disturbances, mental illness represents an expression of behavioral deviation from psychosocial, ethical and legal norms. *See* Szasz, *The Myth of Mental Illness*, 15 AM. PSYCHOL. 113, 113-15 (1960). Szasz, the leading spokesman challenging the use of the "medical model," has argued that the model's use promotes abuses of psychiatry, the deprivation of patients' civil liberties and the imposition of coercive and dangerous techniques in order to restore "sanity." *See* T. SZASZ, *supra* note 54, *passim*.

Those who oppose Szasz's viewpoint argue that diagnosis entails not only a recognition of inappropriate behavior, but also of manifest disturbances in psychological functioning, which are as valid as the pathological criteria associated with the diagnosis of physical illness. *See* D. MECHANIC, MENTAL HEALTH AND SOCIAL POLICY 13-33 (1969). "The problem which leads to such great controversy is that in the psychiatric area assessments of pathology depend almost exclusively on the clinician's judgment, while in physical medicine more objective investigatory procedures are frequently available in making such assessments." A. BROOKS, *supra* note 46, at 62. It has been contended that use of the "medical model" allows medically trained professionals to dominate a large part of the field of behavioral deviancy. *See, e.g.*, T. SCHEFF, BEING MENTALLY ILL: A SOCIOLOGICAL THEORY 14, 25-26 (1966); Albee, *The Relation of Conceptual Models to Man-power Needs*, in EMERGENT APPROACHES TO MENTAL HEALTH PROBLEMS 63, 68-72 (E. Cowen, E. Gardner & M. Zaz eds. 1967).

Perhaps the most disappointing observation concerning the LPS Act is that one year prior to its enactment, THE DILEMMA, *supra* note 3, set forth the belief that the deficiencies in California's mental health care system were due largely to excessive reliance on "the psychiatric medical model and a limited notion of 'treatment'." *Id.* at 75. Unfortunately, the LPS Act has done nothing to alter this situation.

accurate.[133] Whenever there is doubt as to a person's mental health, psychiatrists tend to err on the "safe" side and to recommend commitment.[134] Some commentators feel that psychiatrists should not qualify as expert witnesses and that admission of their testimony is itself a denial of due process.[135]

The LPS Act's dependence on psychiatric expertise disregards the general uncertainty in the state of knowledge of the field and the serious questions as to whether psychiatrists can effectively treat persons for their mental disorders. Perhaps the most serious problem in relying so heavily on the psychiatric community is that mental health professionals do not have a proper regard for the legal rights and entitlements that are sacrificed whenever involuntary commitment takes place. Civil commitment is a legal proceeding, and commitment standards should be phrased in legal terminology which satisfies the rigorous requirements of due process.

Those who are currently committed as "gravely disabled" may be hungry or poorly clothed, but many are capable of surviving.[136] In light of the recent Supreme Court decision in *O'Connor*

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133. *See* notes 91-93 *supra* and accompanying text.

134. *See* text accompanying note 55 *supra.*

135. *See* Ennis & Litwack, *supra* note 47, wherein the authors contend that psychiatric judgments do not convey relevant information in a civil commitment proceeding and the admission of a psychiatrist's testimony denies prospective patients due process, *id.* at 743; Laves, *supra* note 93, wherein the author asserts that science does not qualify psychiatrists as expert witnesses and therefore admission of their testimony is a denial of rights safeguarded by the fourteenth amendment.

CAL. EVID. CODE § 720 (West 1966) provides:

> (a) A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert.
>
> (b) A witness' special knowledge, skill, experience, training, or education may be shown by an otherwise admissible evidence, including his own testimony.

In view of the available research, it appears psychiatrists do not have such special knowledge, skill, experience, training or education. *See* notes 44-47 *supra* and accompanying text.

136. Interviews with Morton P. Cohen, American Civil Liberties Union, Jonathan S. Chasan, Counsel for Network Against Psychiatric Assault (NAPA), and several legal service attorneys working in the field of mental health law, in San Francisco (Feb. 1977). For a court's endorsement of this position see State *ex rel.* Hawks v. Lazaro, 202 S.E.2d 1090 (W. Va. 1974).

v. Donaldson,[137] it is clear that "a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends."[138] Inadequate clothing or eating habits are not constitutionally sufficient to confine involuntarily one who has committed no wrong. Rather, the standard for committing the gravely disabled should be the capacity for survival outside a mental institution. The measure of this standard should incorporate the notion of imminent and substantial physical harm:

> [a] person may be properly committable . . . if it can be shown that he is mentally ill, that his mental illness manifests itself in neglect or refusal to care for himself, that *such neglect or refusal* possesses a real and present threat of substantial

137. 422 U.S. 563 (1975). For further discussion of *Donaldson* see notes 78-79 *supra* and accompanying text.

138. *Id.* at 576. It should be noted, however, that the California Court of Appeal recently held that under the LPS Act, one can be confined as "gravely disabled" regardless of the availability of aid by willing and responsible third parties. In Conservatorship of Buchanan, 1 Civ. No. 41256 (Cal. App. Ct., 1st Dist. Mar. 7, 1978), the court dismissed three contentions based on the notion of assistance of third parties.

Buchanan first asserted that the trial court had erred by refusing his proferred jury instruction "that one is not gravely disabled if capable of surviving with the help of willing relatives, friends or other third parties [including community agencies and board and care facilities]. *Id.*, slip op. at 8 n.7. The court cited the statutory language of Welfare and Institutions Code section 5008(h)(1) and that of its own construction of "gravely disabled" in Conservatorship of Chambers, 71 Cal. App. 3d 277, 139 Cal. Rptr. 357 (1977) (discussed at note 79 *supra)* and concluded that "the pertinent inquiry on the issue of grave disability is whether the conservatee *himself* is able to provide for his basic needs and not as Buchanan maintains, whether he can do so with the assistance of third parties." 1 Civ. No. 41256, slip. op. at 9 (footnotes omitted) (emphasis in original).

Buchanan also contended that the LPS Act's legislative intent, as expressed in Welfare and Institutions Code section 5001, mandates a jury instruction which includes the issue of third party aid. The court disposed of this argument by declaring that under the LPS Act, the decision as to treatment alternatives was committed solely to the court, and not the jury. *Id.*, slip op. at 10.

Relying on *Donaldson*, Buchanan also maintained that the trial court violated his constitutional right to liberty by involuntarily committing him despite his showing of a capacity to survive in society with the aid of third parties. The court found *Donaldson* distinguishable, since Donaldson had not received treatment: [*Donaldson*] is inapposite, as it did not reach the specific question here presented, namely, the power of a state to confine an individual *for meaningful treatment." Id.*, slip op. at 11 (emphasis added). In so holding, the court completely ignored the absence of "meaningful" treatment in institutional settings. *See* notes 117-21 *supra* and accompanying text. Unless questioned by other courts, *Buchanan* will eviscerate *Donaldson* as an important force in reducing unnecessary institutionalization and restraint of those deemed "gravely disabled." A petition for rehearing *Buchanan* has been filed.

For a discussion of the *Buchanan* court's application of the least restrictive alternative approach see note 145 *infra*.

> harm to his well being, and that he is incompetent to determine for himself whether treatment for his mental illness would be desirable.[139]

Those seeking commitment should bear the burden of proving by at least clear and convincing evidence[140] that without institution-

139. Lynch v. Baxley, 386 F. Supp. 378, 391 (M.D. Ala. 1974).

140. In the recent case of *In re* Roulet, 143 Cal. Rptr. 893 (1978), the California Supreme Court held that the proper standard of proof for "grave disability" conservatorship proceedings was that of clear and convincing evidence. *Id.* at 897. The majority of the court arrived at this determination by considering: (1) the nature and the purpose of the proceedings; (2) the potential deprivation of liberty; and (3) the stigma incurred. *Id.* at 896. The majority opinion found that: (1) grave disability proceedings "are essentially civil, their nature and purpose being remedial . . . ," *id.* at 897; (2) potential confinement entails certain statutory safeguards, such as two hearings during the year following the initial conservatorship hearing, the right to immediate release at the end of one year, release within one year upon notice by the conservator, *id.;* and (3) the stigma attaching to one adjudged gravely disabled is different in kind and degree from that following either a criminal conviction or commitment of a mentally disordered sex offender—"[a] gravely disabled person is far more likely to be viewed by society with compassion instead of fear [giving rise to opprobrium] . . . ," *id.* Weighing the benefits and purposes of the LPS Act against the adverse consequences to the potential conservatee, the *Roulet* majority found both the preponderance of the evidence standard and the beyond a reasonable doubt standard inappropriate. *Id.* The former "would fail to adequately safeguard the individual's rights," *i.e.,* a higher standard is necessary to minimize risk of error, *id.,* while the latter "may . . . prevent individuals from receiving sorely needed aid. . . . Application of the criminal standard would threaten the beneficial statutory purpose while increasing the stigma," *id.* at 897-98.

Based on its characterization of conservatorship proceedings as civil, the *Roulet* majority also found that a verdict by a three-fourths majority of the jury satisfied the constitutional right to a jury. *Id.* at 898. The mere fact that the LPS Act provides for a unanimous jury verdict in imminently dangerous proceedings, *see* CAL. WELF. & INST. CODE § 5303 (West 1972), did not give rise to an equal protection challenge. The *Roulet* majority observed that those subject to involuntary commitment because they may be imminently dangerous are not similarly situated to those who may be gravely disabled. *Id.* For the person who may be committed as imminently dangerous "the government's actions are motivated not only by benevolence . . . , but also by an interest in protecting others from the individual's behavior. . . . The proceedings may be misused as a substitute for criminal prosecution, justifying the additional safeguard of jury unanimity to protect the individual against the risk of error." *Id.* at 898-99.

In an opinion which concurred in result but dissented as to the majority opinion's reasoning, Chief Justice Bird sharply criticized the civil-criminal distinction as an "exalt[ation] of form over constitutional substance." *Id.* at 908. The distinction had been consistently repudiated in People v. Burnick, 14 Cal. 306, 535 P.2d 352, 121 Cal. Rptr. 488 (1975) (incarceration of mentally disordered sex offenders requires proof beyond a reasonable doubt), People v. Feagley, 14 Cal. 3d 338, 535 P.2d 373, 121 Cal. Rptr. 509 (1975) (unanimous jury verdict for mentally disordered sex offenders), and People v. Thomas, 19 Cal. 3d 630, 566 P.2d 228, 139 Cal. Rptr. 594 (1977) (beyond a reasonable doubt standard for confinement of narcotics addicts). To Chief Justice Bird,

> [t]he combined effect of the difficulty of defining mental illness, the factfinder's deference to psychiatric testimony, the tendency of psychiatrists to overdiagnose, and the parternalistic attitude of some appointed counsel . . . lends strong sup-

alization the person to be committed is faced with a real and immediate risk of suffering substantial physical harm. This could only be satisfied by evidence of *present* severe malnourishment or exposure.

A proper finding that an individual is committable would not relieve the state of the burden of providing a less restrictive alternative than institutionalization. In 1966, the District of Columbia Court of Appeals held that in civil commitment cases, an individual is entitled to the least restrictive alternative that would meet his or her needs.[141] Since that time, a number of decisions have held that a court conducting a commitment proceeding must be satisfied that there are no less onerous dispositions that would serve the purposes of commitment *before* it orders institutionalization or hospitalization.[142] These decisions are based on a principle of substantive due process which declares that

> even though the governmental interest be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.[143]

In view of the severe consequences of involuntary commitment and especially in light of the present failure to provide effective treatment to the mentally ill,[144] full-time hospitalization should be an option of last resort.[145] The person or agency recommending

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> port to the conclusion that proof beyond a reasonable doubt and jury unanimity are constitutionally mandated standards necessary to assure the fairness of the decisionmaking process by which the LPS Act conservatorships are established.

Id. at 908. A petition for rehearing *Roulet* has been filed.

141. Lake v. Cameron, 364 F.2d 657, 660 (D.C. Cir. 1966).

142. *See, e.g.*, Covington v. Harris, 419 F.2d 617 (D.C. Cir. 1969); Lynch v. Baxley, 386 F. Supp. 378, 392 (M.D. Ala. 1974); Welsch v. Likens, 373 F. Supp. 487, 502 (D. Minn. 1974) (due process clause requires the state to make good faith attempts to place persons in less restrictive settings suitable and appropriate to their needs); Lessard v. Schmidt, 349 F. Supp. 1078, 1096 (E.D. Wis. 1972).

143. Shelton v. Tucker, 364 U.S. 479, 488 (1960).

144. *See* notes 119-21 *supra* and accompanying text.

145. *See* Lessard v. Schmidt, 349 F. Supp. 1078, 1095 (E.D. Wis. 1972). *But see* Conservatorship of Buchanan, 1 Civ. No. 41256 (Cal. App. Ct., 1st Dist. Mar. 7, 1978), in which the California Court of Appeal rejected the contention that the LPS Act's statutory scheme, as expressed in CAL. WELF. & INST. CODE §§ 5001, 5120, 5358 (West 1972 & Supp. 1977), mandates the placement of those adjudged gravely disabled in less restrictive

hospitalization must bear the burden of proving: (1) what alternatives are available; (2) what alternatives have been investigated; and (3) why the investigated alternatives were deemed unsuitable.[146] The various alternatives might include voluntary or court-ordered out-patient treatment, day or night treatment in a hospital, custodial placement with a friend or relative, placement in a nursing home, referral to a community mental health clinic or halfway house, or home health-aid services.[147] The adoption of the least restrictive alternative approach is absolutely necessary to ensure adequate protection of the substantive due process rights of California citizens.[148]

Regarding those who may be subject to commitment because they are dangerous, either to themselves or others, the United States Supreme Court, in *Humphrey v. Cady*,[149] noted that an individual's potential for doing harm to himself or others must be

environments than institutions, such as with friends or relatives or in community-based facilities, whenever such alternatives were available. While acknowledging that the LPS Act establishes certain preferences and priorities for such placement, the *Buchanan* decision declared that "the application of these preferences and priorities [for alternative placement] is to be determined in light of the overriding governing principle which should guide the court . . . , namely, the best interests of the conservatee." *Id.*, slip op. at 12. The *Buchanan* court held that the trial court, having considered the alternative of placement with family members, had not abused its discretion in appointing a public conservator. *Id.*, slip op. at 12-13. Thus, *Buchanan* not only abrogated the impact of *O'Connor v. Donaldson*, *see* note 138 *supra*, but vested virtually complete authority in the trial court to disregard proffered alternatives to institutional confinement. This will necessarily lead to a continuation of unnecessary commitment of individuals at public expense without any assurance that conservatees will receive anything more than bed and board. *See* notes 119-21 & 131 *supra* and accompanying text.

146. Lessard v. Schmidt, 349 F. Supp. 1078, 1096 (E.D. Wis. 1972).

147. *Id. See* Chambers, *Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives*, 70 MICH. L. REV. 1107 (1972), which extensively discusses the constitutional demands of least restrictive alternatives and suggests that the decisions embracing this approach are not sufficient to ensure that a meaningful search for alternatives will take place. *Id.* at 1198. The courts have had problems in mandating that suitable alternatives be found. *Id.* at 1199. The author concludes that it is perhaps preferable for the legislature to provide for alternatives to hospitalization. *Id.*

148. In THE DILEMMA, *supra* note 3, the Subcommittee recognized the extent of abuse of the current system and proposed various voluntary services (such as community emergency service units) to replace the commitment court. *Id.* at 84-85. However, in most instances, because of the lack of voluntary or less restrictive services, the state institution is the only available placement, even though the individual could survive safely in less restrictive settings. The solution to this problem lies in governmental appropriation of sufficient funds to build places where individuals could receive the assistance they need while retaining their freedom and human dignity. Although the Subcommittee recommended such services, apparently very little has been done to implement those recommendations.

149. 405 U.S. 504 (1972).

great enough to justify the massive curtailment of liberty entailed by involuntary commitment.[150] The Court has not addressed itself directly to the probability or degree of danger which must exist before commitment becomes appropriate. Yet, *Humphrey* seems to imply a balancing test which imposes on the state the burden of proving that there is an extreme likelihood that the person subject to commitment will do immediate and substantial harm if not confined.[151] In *Cross v. Harris,*[152] a District of Columbia Court of Appeals decision, the court apparently adopted this position. The *Cross* court acknowledged the problems of preventive detention and the inaccuracy of psychiatrists' predictions and held that "dangerousness" must be construed to mean a high probability of serious or substantial harm.[153] However, since no one, "experts" included, seems capable of accurately predicting future conduct, determining that such a high probability exists is still problematical. The commission of a specific act is required in order to justify the incarceration of a criminal.[154] Why require any less for the confinement of noncriminals? Several federal district and circuit courts have required such a showing as a means of discharging the burden of proof that commitment is necessary:

> Although attempts to predict future conduct are always difficult, and confinement based upon such prediction must always be viewed with suspicion, we believe civil confinements can be justified in some cases if the proper burden of proof is satisfied and dangerousness is based upon a finding of a *recent* overt act, attempt, or threat to do substantial harm to oneself or another.[155]

Many states, either by judicial construction or statutory revision,[156] have similarly altered the "dangerousness" standard. The

150. *Id.* at 509.

151. *See* Lessard v. Schmidt, 349 F. Supp. 1078, 1093 (E.D. Wis. 1972).

152. 418 F.2d 1095 (D.C. Cir. 1969).

153. *Id.* at 1097; *see* Millard v. Harris, 406 F.2d 964 (D.C. Cir. 1968).

154. *See* Powell v. Texas, 392 U.S. 514 (1968): "Evidence of propensity can be considered relatively unreliable and more difficult for a defendant to rebut; the requirement of a specific act thus provides some protection against false charges." *Id.* at 543 (Black & Powell, JJ.) (concurring).

155. Lessard v. Schmidt, 349 F. Supp. 1078, 1093 (E.D. Wis. 1972) (emphasis added). *See* Lynch v. Baxley, 386 F. Supp. 378 (M.D. Ala. 1974); Bell v. Wayne County Gen. Hosp., 384 F. Supp. 1085 (W.D. Mich. 1974).

156. *See* cases cited at note 155 *supra;* Suzuki v. Quisenberry, 411 F. Supp. 1113 (D. Haw. 1976); Commonwealth *ex rel.* Finken v. Roop, 234 Pa. Super. Ct. 155, 339 A.2d 740 (1975) (court required commission of an overt act because standard held impermissibly

virtue of requiring a showing of recent manifest behavior[157] to establish a high probability of immediate and substantial harm is that it reduces the inaccuracy of psychiatric prediction. California courts should give effect to the legislature's resolve to end the inappropriate commitment of the mentally disabled by requiring such a showing.

For those individuals who are found to represent a danger to themselves or others, the least restrictive alternative approach should be followed. The doctrine especially applies to those com-

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vague); *In re* Levias, 83 Wash. 2d 253, 517 P.2d 588 (1975).

In response to Lynch v. Baxley, 386 F. Supp. 378 (M.D.Ala. 1974), which struck down Alabama's commitment scheme as unconstitutional, Alabama's legislature enacted ALA. CODE tit. 45, §§ 230(1)-(15) (Interim Supp. 1975) which, in part, requires that a finding of threat of substantial harm be evidenced by a recent overt act. *Id.* § 230(10). Following Doremus v. Farrell, 407 F. Supp. 509 (D. Neb. 1975), Nebraska passed the Nebraska Mental Health Commitment Act, NEB. REV. STAT. §§ 83-1001 to -1078 (Cum. Supp. 1976), which defines a mentally ill dangerous person as one who presents:

> A substantial risk of serious harm to another person or persons within the near future, as manifested by evidence of recent violent acts or threats of violence or by placing others in reasonable fear of such harm. . . .

Id. § 83-1009(1). Pennsylvania recently enacted the Mental Health Procedures Act, 50 PA. CONS. STAT. ANN. §§ 7101-7503 (Purdon Supp. 1977-1978). *Id.* § 7301(b) provides in pertinent part:

> (1) Clear and present danger to others shall be shown by establishing that within the past 30 days the person has inflicted or attempted to inflict serious bodily harm on another and that there is a reasonable probability that such conduct will be repeated. . . .
>
> (2) Clear and present danger to himself shall be shown by establishing that within the past 30 days.
>
> (i) the person has acted in such a manner as to evidence that he would be unable, without care, supervision and the continued assistance of others, to satisfy his need for nourishment, personal or medical care, shelter, or self-protection and safety, and that there is a reasonable probability that death, serious bodily injury or serious physical debilitation would ensue within 30 days unless adequate treatment were afforded under this act; or
>
> (ii) the person has attempted suicide . . . ; or
>
> (iii) the person has severely mutilated himself or attempted to mutilate himself severely. . . .

For another example of a statute requiring a recent overt act to warrant commitment as a "mentally ill person subject to hospitalization by court order" see OHIO REV. CODE ANN. § 5122.01 (Page Supp. 1976).

157. While the LPS Act incorporates the notion of attempted or inflicted physical harm to another, *see* CAL. WELF. INST. CODE § 5300(b) (West 1972), or a threat or attempt to take one's one life, *see id.* § 5260(d), it does not specify when such behavior must have been manifested to warrant involuntary commitment. In order to minimize predictive error, only recent acts should be considered.

mitted because they are potentially suicidal. First, there are serius constitutional questions of whether the state may confine these persons at all. This was recognized by the California Subcommittee that conducted hearings which preceded the passage of the LPS Act. It opined that since attempted suicide was not a violation of California law, "any extended involuntary incarceration of a potentially suicidal person poses serious civil liberty problems."[158] The Subcommittee made no recommendation of any involuntary treatment of persons because they may be dangerous to themselves.[159] In light of the demonstrated failure of hospitalization to prevent suicides,[160] extended hospitalization for this group is not viable. Evidence indicates that the most effective "treatment" for such persons is intervention services which provide acutely suicidal persons with enough emotional support to pass through critical periods during short stays in hospitals.[161] This should be the most onerous restriction on those who are potentially suicidal.

A more radical approach to eliminating the abuses of involuntary civil commitment would be the abandonment of the *parens patriae* doctrine and the refusal to commit anyone who does not threaten the physical safety or property rights of others. While governmental concern for those who are poorly fed, clothed or sheltered, or who threaten to take their lives springs from benevolent impulses, the inadequacy of current therapeutic techniques, as well as the overcrowding and understaffing of mental institutions, vitiates the very foundations of the rationale for exercises of the *parens patriae* capacity.[162] Under these circumstances, the unjustified deprivation of individual freedom which often accompanies involuntary commitment seems too high a cost for merely assuaging the paternal instincts of the public at large. Although it may at first seem philosophically repugnant, a recognition that living in a state of privation or choosing to

158. THE DILEMMA, *supra* note 3, at 154.

159. *See id.* at 152.

160. *See* notes 126-27 *supra* and accompanying text.

161. *See* THE DILEMMA, *supra* note 3, at 153; Greenberg, *supra* note 126, wherein the author argues that state interference is justified only to the extent that a potentially suicidal person is held for no more than 24 hours. *Id.* at 243.

162. Fifty years ago, Justice Brandeis warned: "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachments by men of zeal, well-meaning but without understanding." Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J.) (dissenting).

terminate existence is within the range of rational judgment may represent an advance in individual autonomy. In fact, California has already taken a halting step in this direction by its authorization of "living wills," which allow individuals to direct physicians to withhold or withdraw life-sustaining procedures in certain situations.[163] In time, perhaps, California's laws will extend individual freedom of choice beyond that which is generally thought to be wise.

CONCLUSION

Recent developments in the field of mental health law cast serious doubt on whether the LPS Act's commitment scheme affords adequate protection of the rights of the mentally disabled. Because the Act's commitment standards are vague, many persons are unjustly committed by factfinders whose decisions depend on personal opinions or psychiatric judgments that are neither reliable nor free of normative cultural biases. Once committed, most residents of mental institutions do not receive effective treatment. In many instances, the basic justification for commitment does not apply precisely because effective treatment is unavailable. While there are more radical solutions to the abuses of

163. *See* Natural Death Act, CAL. HEALTH & SAFETY CODE §§ 7185-7195 (West Supp. 1977). *Id.* § 7186 sets forth the legislative finding and declaration as follows:

> The Legislature finds that adult persons have the fundamental right to control the decisions relating to the rendering of their own medical care, including the decision to have life-sustaining procedures withheld or withdrawn in instances of a terminal condition.
>
> The Legislature further finds that modern medical technology has made possible the artificial prolongation of human life beyond natural limits.
>
> The Legislature further finds that, in the interest of protecting individual autonomy, such prolongation of life for persons with a terminal condition may cause loss of patient dignity and unnecessary pain and suffering, while providing nothing medically necessary or beneficial to the patient.
>
> The Legislature further finds that there exists considerable uncertainty in the medical and legal professions as to the legality of terminating the use or application of life-sustaining procedures where the patient has voluntarily and in sound mind evidenced a desire that such procedures be withheld or withdrawn.
>
> In recognition of the dignity and privacy which patients have a right to expect, the Legislature hereby declares that the laws of the State of California shall recognize the right of an adult person to make a written directive instructing his physician to withhold or withdraw life-sustaining procedures in the event of a terminal condition.

current involuntary commitment procedures, a moderate approach would require that: (1) the phrase "gravely disabled" be interpreted to mean incapable of surviving without hospitalization as evidenced by current severe malnourishment or exposure; and (2) the term "dangerousness" be construed as a real and imminent threat of substantial harm as evidenced by recent acts or omissions to act. Furthermore, a person who is subject to any form of involuntary civil commitment should be entitled to the least restrictive alternative available.

Almost a decade ago, the California Subcommittee Report which was prepared prior to the enactment of the LPS Act declared the Act's intention as follows:

> A citizen of California, the victim of sickness of mind or spirit, shall, without stigma or loss of liberty, receive prompt assistance to match his need.
>
> A mentally ill citizen may be confined, and have his liberties abridged, only when proven dangerous to the community by due process of law.[164]

California has not yet accomplished its stated purpose. It is time to narrowly construe the commitment statutes and follow the more humanitarian path that other courts have forged.

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164. THE DILEMMA, *supra* note 3, at 180.