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Involuntary Psychiatric Treatment and Other Coercive Behavioral Interventions as Criminal Sanctions: Reflections on Vitek v. Jones

Carl J. Circo
Benjamin N. Cardozo School of Law

INVOLUNTARY PSYCHIATRIC TREATMENT AND OTHER COERCIVE BEHAVIORAL INTERVENTIONS AS CRIMINAL SANCTIONS: REFLECTIONS ON *VITEK V. JONES*

CARL J. CIRCO*

The social rehabilitation of convicted persons has long been a goal of our criminal justice system.[1] This statement is so true that the term "corrections" has come into common usage in reference to the post-conviction phase of the system.[2] The rehabilitative process may embrace a wide array of corrective treatments, frequently including psychiatric treatments, behavior modification programs, and other forms of behavioral interventions.[3] Spurred by a recent United States Supreme Court opinion, which suggests but then virtually pretermits the issue, this Article inquires into the substantive limits on the power of government to impose coercive behavioral interventions on criminal offenders solely because of a criminal conviction and sentence.

* Assistant Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University. B.A., 1971, University of Nebraska; J.D., 1976, University of Nebraska College of Law (with high distinction).

1. *See* Allen, *Criminal Justice, Legal Values and the Rehabilitative Ideal*, 50 J. CRIM. L.C. & P.S. 226 (1959); Radzinowicz & Turner, *A Study of Punishment: Introductory Essay*, 21 CAN. B. REV. 91, 94-98 (1943). Rehabilitative and treatment ideals inhere in the historical development of the extended penitentiary sentence as well as in the modern theories of corrections which emphasize the socially beneficial alteration of the behavior of the offender through programs premised on a medical or treatment model. *See* THE AMERICAN CORRECTIONAL ASSOCIATION, MANUAL OF CORRECTIONAL STANDARDS 3-30 (3d ed. 1966). Dedication to these ideals undoubtedly has waned to some extent recently. That fact is probably not so much a sign of a philosophical change of direction as a frustrated sense that what should be done in the best of worlds seems to be beyond our present capacities. *See* Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949, 973-74 (1966).

2. The state of New York denominates its entire codification of statutes concerning this phase of the criminal justice system "The Correction Law." N.Y. CORREC. LAW (McKinney Supp. 1979). The governmental entity with responsibility over the post-conviction phase is the Department of Correctional Services. N.Y. CORREC. LAW § 5 (McKinney Supp. 1979).

3. Throughout this Article the phrase "behavioral interventions" will be used to refer to that entire range of responses to crime which is based on the therapeutic model of the behavioral sciences. *See generally* N. KITTRIE, THE RIGHT TO BE DIFFERENT: DEVIANCE AND ENFORCED THERAPY (1971); R.K. SCHWITZGEBEL, LEGAL ASPECTS OF THE ENFORCED TREATMENT OF OFFENDERS (1979).

In *Vitek v. Jones*[4] the United States Supreme Court held that a state could not transfer one of its convicted criminals from a prison to a mental hospital unless certain procedural protections attended the transfer. Justice White's opinion, which is the opinion of the Court on all but one issue, held on two distinct theories that the transfer implicated a liberty interest.[5]

First, the Court held that the Nebraska statute, which authorized the transfer, created an expectation amounting to a liberty interest that a prisoner would be transferred to a mental hospital only if he or she suffered from a mental disease, which could not be adequately treated in prison.[6] The statute, however, merely empowered the Director of Corrections to transfer a prisoner to a mental hospital based on the recommendation of a psychologist or physician.[7]

Second, the Court held that even absent any statutorily conferred liberty interest, "the transfer of a prisoner from a prison to a mental hospital must be accompanied by appropriate procedural protections"[8] because "involuntary commitment to a mental hospital is not within the range of conditions of confinement to which a prison sentence subjects an individual."[9] The opinion does not explain why this is so, nor do authorities relied on by Justice White provide any satisfactory basis for the conclusion.[10] The majority ultimately adopted, without significant discussion, many of the procedural safeguards that the district court determined should accompany any transfer of prisoners, including a notice provision and an adversary-type hearing.[11] The majority

4. 445 U.S. 480 (1980).

5. Justice White's opinion was joined by Justices Brennan, Marshall, and Stevens in all respects, and, as to be explained, by Justice Powell in all respects except one. *See* text accompanying note 12 *infra*.

6. 445 U.S. at 488-91.

7. [W]hen a physician or psychologist designated by the director finds that a person committed to the department suffers from a mental disease or defect, the chief executive officer may order such person to be segregated from other persons in the facility. If the physician or psychologist is of the opinion that the person cannot be given proper treatment in that facility, the director may arrange for his transfer for examination, study, and treatment to any medical-correctional facility, or to another institution in the Department of Public Institutions where proper treatment is available. A person who is so transferred shall remain subject to the jurisdiction and custody of the Department of Correctional Services and shall be returned to the department when, prior to the expiration of his sentence, treatment in such facility is no longer necessary.

NEB. REV. STAT. § 83-180(1) (1976).

8. 445 U.S. at 491.

9. *Id.* at 493.

10. *See* Part I *infra*.

11. 445 U.S. at 494-97.

could not agree, however, whether the state must provide an indigent prisoner with representation by an attorney. Mr. Justice Powell's opinion, in which no other Justice joined, stands as the controlling law on this point. Justice Powell determined that "qualified and independent assistance" must be provided, but not necessarily through an attorney.[12] Four Justices dissented on the ground that the only prisoner remaining as a plaintiff when the case was argued before the Court had already been released from the mental hospital, thus making the case moot.[13] The dissenters declined to comment on the merits.

This Article's central theme arises from the second of Justice White's theories concerning the constitutionality of the transfer process. In his words, the issue was whether a convicted person retains "a residuum of liberty that would be infringed by a transfer to a mental hospital without complying with minimum requirements of due process."[14] Part I of this Article considers the bases for the Court's holding and exposes some significant questions, which the opinion raises only tacitly. Part II presents an argument for a more coherent theory of substantive limitations on the power of government to utilize coercive behavioral interventions of any kind as the ordinary consequences of criminal conviction.

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12. *Id.* at 497.

13. Justice Stewart wrote a brief dissenting opinion in which Chief Justice Burger and Justice Rehnquist joined. 445 U.S. at 501 (Stewart, J., dissenting). Justice Blackmun authored his own dissenting opinion in which he argued that "the issue is not so much one of mootness as one of ripeness." *Id.* at 501-06 (Blackmun, J., dissenting). The question of mootness was complicated by the changing status of Jones. After the district court entered an order declaring the statute under which Jones had been transferred unconstitutional, Miller v. Vitek, 437 F. Supp. 569 (D. Neb. 1977), Jones, who had already been retransferred to the prison, was paroled "on condition that he accept psychiatric treatment at a Veterans' Administration hospital." 445 U.S. at 1260. At that point the Supreme Court vacated the judgment of the district court and remanded the case for consideration of mootness. Vitek v. Jones, 436 U.S. 407 (1978). The district court reinstated the judgment in favor of Jones. By the time the case came again before the Supreme Court, Jones had been reincarcerated in the prison on the basis that he had violated his parole. Throughout this time, the state, as well as Jones, argued that the case was not moot. The majority held:

> Against this background, it is not "absolutely clear," absent the injunction, "that the allegedly wrongful behavior could not reasonably be expected to recur." *United States v. Phosphate Export Assn.*, 393 U.S. 199, 203 (1968); *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979); *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). Furthermore, as the matter now stands, the § 83-180 determination that Jones suffered from mental illness has been declared infirm by the District Court. Vacating the District Court's judgment as moot would not only vacate the injunction against transfer but also the declaration that the procedures employed by the State afforded an inadequate basis for declaring Jones to be mentally ill. In the posture of the case, it is not moot.

445 U.S. at 487 (footnote omitted).

14. *Id.* at 491.

Although Part II explores both criminal and constitutional law theories, the principal focus is on the former. Furthermore, even though this Article has been written largely as a reflection on Justice White's opinion, the ultimate concern of the Article is much broader than the constitutional issue before the Court in *Vitek v. Jones*. Thus Part II seeks to identify substantive limits on the use of coercive therapy in corrections. The conclusion reached is that there are significant substantive limits on that power, and that the primary source of those limits is criminal law theory, rather than the constitutional principles involved in *Vitek v. Jones*. Although significant arguments for constitutional limits may be developed, they are more adaptations of the underlying objections which spring from an analysis based on criminal law principles than independent constitutional theories. Furthermore, the broad question examined in Part II is posed without reference to any specific institutional structure. Thus, the concern is as much with how the question ought to be analyzed by a state legislative body considering whether to authorize or restrict the use of behavioral interventions in corrections, as with the approach which should be taken by a federal court reviewing such legislation.

I. *VITEK V. JONES*

The first theory advanced by the Court in *Vitek v. Jones* is an application of the doctrine of *Morrissey v. Brewer*[15] and *Wolff v. McDonnell*.[16] Under *Wolff*, once a state statutorily confers on a prisoner a benefit in the nature of a liberty interest, the fourteenth amendment requires that the state employ appropriate safeguards in connection with any attempt to deprive the prisoner of that benefit.[17] In *Vitek v. Jones* the Court read the relevant Nebraska statute to create the interest of a reasonable expectation that transfer to a mental institution would occur only under limited circumstances.[18] Based on this construction of the statute, the conclusion that certain procedural safeguards had to be followed in any such transfer was, to use Justice White's word, "unexceptionable."[19]

Presumably, a similar result would be reached concerning the subjec-

15. 408 U.S. 471 (1972).
16. 418 U.S. 539 (1974).
17. *Id.* at 557.
18. 445 U.S. at 487-90.
19. *Id.* at 490.

tion of a prisoner to coercive behavioral interventions even without an accompanying transfer to a mental hospital provided that a statute created a reasonable expectation against intervention. One can easily imagine that this doctrine may become relevant if a state institutes certain correctional programs which can be utilized only under specified conditions. Special offender statutes commonly would constitute this type of program.[20] Moreover, the due process clause also may operate as a procedural limitation when the state has created a reasonable expectation in the nature of a liberty interest through an administrative regulation or practice of the correctional authority.[21]

This first theory relied on by the Court, however, is not likely to constitute a troublesome restriction on correctional authorities who seek to subject offenders to forms of behavioral intervention less intrusive than the kind involved in *Vitek v. Jones*. In most instances no statutory or other basis for inferring an entitlement to freedom from the proposed behavioral intervention will exist.

Even if the state-created entitlement doctrine does have significant potential application to the state's ability to utilize psychiatric interven-

20. *See* Specht v. Patterson, 386 U.S. 605 (1967). Special offender statutes are frequently enacted to deal with sexual offenses. THE MENTALLY DISABLED AND THE LAW, 366-73 (S. Brakel & R. Rock ed. 1971) (cataloguing twenty-eight states which have such laws). Although the laws differ greatly from jurisdiction to jurisdiction and from time to time, many provide that following conviction for any sexual offense (variously defined), an offender may be required to submit to a psychiatric evaluation and, depending on the professional recommendations made as a result of that evaluation, may be ordered confined in a psychiatric facility for treatment. *See, e.g.,* NEB. REV. STAT. §§ 29-2911-21 (Supp. 1979). Persons committed in this manner have been designated by a plethora of labels, for example, sexual psychopath, sexual sociopath, sexually dangerous person, sex offender, mentally disordered sex offender. *See* Note, *The Plight of the Sexual Psychopath: A Legislative Blunder and Judicial Acquiescence*, 41 NOTRE DAME LAW. 527, 528-29 (1966). Another kind of special offender scheme was created but later virtually abandoned by Maryland's controversial Defective Delinquents Act, ch. 476, 1951 Md. Laws 1343 (current version at MD. ANN. CODE art. 31B (Cum. Supp. 1979)), which extended to any person convicted of specified crimes (not limited to sexual offenses),

> who, by the demonstration of persistent aggravated antisocial or criminal behavior, evidences a propensity toward criminal activity, and who is found to have either such intellectual deficiency or emotional unbalance, or both, as to clearly demonstrate an actual danger to society so as to require such confinement and treatment under an indeterminate sentence, subject to being released only if the intellectual deficiency and/or the emotional unbalance is so relieved as may make it reasonably safe for society to terminate confinement and treatment.

Ch. 476, § 5, 1951 Md. Laws 1348 (amended Ch. 558, § 5, 1957 Md. Laws 935). *See generally* Tippett v. Maryland, 436 F.2d 1153 (4th Cir. 1971); *Patuxent Institution Symposium*, 5 BULL. AM. ACAD. PSYCH. & L. 116 (1977).

21. *Cf.* Perry v. Sindermann, 408 U.S. 593, 599-603 (1972) (entitlement to job tenure may be conferred by state administrative practices).

tion in the normal course of criminal justice administration, the state is ultimately in control of the extent to which the theory actually will be available. Expectations which amount to liberty interests merely because state action created them can be prospectively modified or even dispelled by appropriate state action. Presumably, a state could take the even more drastic measure of commitment of a prisoner to a mental hospital for treatment. The only change necessary would be a careful redrafting of the sentencing statutes to specify that the appropriate correctional authority has the power to assign or reassign the convicted person to any state institution or program solely by virtue of a conviction and sentence. Of course, there is a danger that any perceived limitation on that power might serve as a wedge to open the door to the state-created entitlement doctrine. For example, if the relevant statute provided that the state could make "appropriate" assignments or reassignments, or if a practice arose of assigning only mentally disabled prisoners to specific institutions or programs, a prisoner might argue for procedural safeguards under *Morrissey v. Brewer*[22] and *Wolff v. McDonnell*.[23]

Even though the first theory advanced in *Vitek v. Jones* may not bode significant limitations on the use of psychiatric and behavior techniques in the corrections field, a substantial impact may result from Justice White's second theory of the case.[24] Justice White recognized that the determination that a person has a mental disease and should be confined for treatment in a mental hospital normally is a most serious loss of liberty for the individual. Several recent decisions in the mental disability law field place that proposition beyond doubt.[25] The remaining question was whether that sort of state action was still to be so regarded when the individual involved was already subject to the wholesale loss of liberty inherent in a criminal conviction and sentence. A prisoner's loss of liberty interest, otherwise protected by the fourteenth amendment, is great, but not total:

> Undoubtedly a valid criminal conviction and prison sentence extinguish a defendant's right to freedom from confinement. *Greenholtz v. Nebraska Penal Inmates*, 442 U.S., at 7. Such a conviction and sentence sufficiently extinguish a defendant's liberty "to empower the state to con-

22. 408 U.S. 471 (1972).

23. 418 U.S. 539 (1974).

24. 445 U.S. at 491-94.

25. *See* Parham v. J.R., 442 U.S. 584 (1979); Addington v. Texas, 441 U.S. 418 (1979); O'Connor v. Donaldson, 422 U.S. 563 (1975).

> fine him in any of its prisons." *Meachum v. Fano*, 427 U.S., at 224. It is also true that changes in the conditions of confinement having a substantial adverse impact on the prisoner are not alone sufficient to invoke the protections of the Due Process Clause "as long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him." *Montanye v. Haymes*, 427 U.S., at 242."[26]

The state's argument was that "the transfer of a prisoner to a mental hospital is within the range of confinement justified by imposition of a prison sentence . . . ."[27] Justice White's response to that argument constitutes the alternative rationale of the opinion.

> None of our decisions holds that conviction for a crime entitles a State not only to confine the convicted person but also to determine that he has a mental illness and to subject him involuntarily to institutional care in a mental hospital. Such consequences visited on the prisoner are qualitatively different from the punishment characteristically suffered by a person convicted of a crime. Our cases recognize as much and reflect an understanding that involuntary commitment to a mental hospital is not within the range of conditions of confinement to which a prison sentence subjects an individual. *Baxstrom v. Herold*, 383 U.S. 107 (1966); *Specht v. Patterson*, 386 U.S. 605 (1967); *Humphrey v. Cady*, 405 U.S. 504 (1972); *Jackson v. Indiana*, 406 U.S. 715, 724-725 (1972). A criminal conviction and sentence of imprisonment extinguish an individual's right to freedom from confinement for the term of his sentence, but they do not authorize the State to classify him as mentally ill and to subject him to involuntary psychiatric treatment without affording him additional due process protections.[28]

The idea that involuntary civil commitment is outside the normal contemplation of a prison sentence may seem uncontroversial. The question with which the Court was concerned was not whether a criminal sentence normally authorizes involuntary psychiatric hospitalization, but whether the Constitution forbids that result. The Court fails to specify why this transfer was constitutionally different from the transfer of a convicted offender from one state prison to another which, under *Meachum v. Fano*,[29] is "within the normal limits or range of custody which the conviction has authorized the State to impose."[30]

It is interesting that Justice White, the author of *Vitek v. Jones*, also

26. 445 U.S. at 493.
27. *Id.*
28. *Id.* at 493-94.
29. 427 U.S. 215 (1976).
30. *Id.* at 225.

penned *Meachum v. Fano* and its companion case, *Montanye v. Haymes*.[31] These latter two cases establish that the transfer of a state prisoner from one correctional facility to another does not impinge on any liberty interest protected by the due process clause, even if the transfer results in significant adverse changes in the prisoner's conditions of confinement or even if the transfer constitutes a disciplinary action for misbehavior.[32] In *Montanye* the Court held that a transfer did not implicate a protected liberty interest "[a]s long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed on him."[33]

One could infer from *Meachum* and *Montanye* that whenever a prisoner raises a constitutional challenge to a transfer, a preliminary issue is whether the original sentence authorized confinement of the type that the prisoner must endure after the transfer. There is no suggestion in those two cases that the Constitution, rather than state law, determines the nature of the confinement authorized by a state criminal conviction and sentence. Yet, in *Vitek v. Jones*, the Court seems to assume that confinement and treatment in a psychiatric hospital is necessarily excluded from the possible authority of a state conviction and sentence unless Supreme Court precedent to the contrary can be found. "None of our decisions holds that conviction for a crime entitles a State not only to confine the convicted person but also to determine that he has a mental illness and to subject him involuntarily to institutional care in a mental hospital."[34] Surely there is no judicial principle which holds that the decisions of the United States Supreme Court are the source of, rather than a limitation on, the power of the states to formulate responses to criminal behavior.

These criticisms are not offered to prove that the Court erred in holding that a prisoner cannot be labeled mentally ill and subjected to involuntary psychiatric hospitalization simply because of the criminal conviction and sentence, but are offered only to show that the Court's opinion fails to articulate the logical steps necessary to support that

31. 427 U.S. 236 (1976).

32. In *Meachum* the Court held that the due process clause does not require a hearing when a state prisoner is transferred from one prison to another one where the conditions of confinement are less favorable, "absent a state law or practice conditioning such transfers on proof of serious misconduct or the occurrence of other events." Meachum v. Fano, 427 U.S. at 216. In *Montanye* the Court held that the *Meachum* rule controls even if the transfer is disciplinary in nature.

33. 427 U.S. at 242.

34. 445 U.S. at 493.

holding. The Court, in presenting this second theory of the case, eschewed all reliance on liberty interests created by state law. The Court assumed that no state law or practice created the expectation in a prisoner that a transfer to a mental hospital would occur only under limited circumstances.[35] The *Vitek* Court curiously felt obliged to deal with this alternative theory of the case. The briefs reveal that the parties did not thoroughly develop the theory, and the *Morrissey-McDonnell* analysis initially relied on by the Court was unquestionably adequate to dispose of the case.[36] Nonetheless, the Court clearly held that a state criminal conviction and sentence alone cannot constitutionally authorize the transfer of an offender from a prison to a mental hospital for involuntary treatment because involuntary psychiatric hospitalization "is not within the range of conditions of confinement to which a prison sentence subjects an individual," despite the state's argument that the sentence was intended to have such an effect.[37]

The Court's constitutional analysis fails to address several significant questions. For example, what constitutional principle prevents a state from responding to criminal behavior not only by depriving the offender of physical liberty, but also by subjecting the person to involuntary therapeutic interventions, which the correctional authorities may deem appropriate during the course of the sentence? And, if psychiatric hospitalization for mental illness is outside the range of permissible options available to the states, does the same constitutional principle restrict the power of the states to utilize within their correctional programs other involuntary psychiatric treatments and behavioral interventions? Was the transfer of Jones outside the sentence simply because the receiving institution was organized within the Department of Public Institutions rather than the Department of Corrections?[38] Would the transfer have been less objectionable if no express determi-

35. *Id.* at 491-93.

36. *See generally* Brief for Appellants at 29-30, Vitek v. Jones, 445 U.S. 480 (1980); Brief of Appellee at 24-37, Vitek v. Jones, 445 U.S. 480 (1980). If the Court had not held that Nebraska law created an objective expectation that prisoners would be transferred to the mental hospital only under limited circumstances, then the Court logically would have been required to determine, at least implicitly, whether a state could properly treat a criminal conviction and sentence as authority for the confinement and psychiatric treatment of the offender in a mental hospital. Under the *Morrissey-McDonnell* theory, however, that broad question could have been ignored once the Court found that state law conferred on prisoners an entitlement amounting to a protected liberty interest. *See also* notes 15-21 *supra* and accompanying text.

37. 445 U.S. at 493.

38. Brief for Appellants at 12, Vitek v. Jones, 445 U.S. 480 (1980).

nation of mental illness had been made,[39] or if the purpose was not to treat Jones for disease but to provide an environment more conducive to effective security?[40] One can only conclude from the brief discussion in *Vitek v. Jones*, together with the *Meachum* and *Montanye* opinions, that each of these factors may be of sufficient importance that the absence of any one of them from a future transfer case may be relevant.

The application of the holding to the coercive use of psychiatric treatment or other behavioral interventions which do not involve a transfer between institutions is even more unclear. Consider a large prison facility which contains within its walls a psychiatric infirmary where prisoners can be given the same kind of therapy provided in mental hospitals.[41] Would a reassignment of a prisoner from the general population of this type of a prison to the psychiatric infirmary following a diagnosis of mental illness fall within the prohibition of *Vitek v. Jones*? The answer to this question appears to lie in the Court's

39. It is apparent that the Court regarded the stigmatizing effect of the determination of mental illness as an important factor relevant to the second theory of the case. The finding of mental illness, made essential by the statute which authorized the transfer, see note 7 *supra*, was clearly relevant to the state-created entitlement theory on which the Court initially relied. The statute could be read as assuring every prisoner freedom from transfer to a psychiatric facility unless he or she became mentally ill. But, of course, the state could amend the statute so that a transfer to a mental hospital and involuntary psychiatric treatment could be authorized without any determination of mental illness, with the practical result for a prisoner like Larry Jones virtually the same.

With respect to the second theory of the case, the Court held that "the stigmatizing consequences of a transfer to a mental hospital for involuntary psychiatric treatment, coupled with the subjection of the prisoner to mandatory behavior modification as a treatment for mental illness constitute the kind of deprivations of liberty that require procedural protections." 445 U.S. at 494. Would the Court have reached the same conclusion if the transfer did not entail a determination that Jones needed involuntary treatment for a mental illness? Every transfer of a prisoner to a mental hospital for involuntary psychiatric treatment does not necessarily imply a finding that the prisoner is mentally ill. It might be argued, for example, that once a person has been convicted of a serious violation of the criminal law, the state, without regard to any diagnostic or labeling process, has legitimate interests in searching for possible causes of the offender's criminal behavior and employing the most appropriate techniques available to ensure that the individual is rehabilitated during the course of the sentence. Thus, while an ordinary civil commitment logically depends on the stigmatizing finding that the person committed is mentally ill, the transfer of a prisoner to a mental hospital may indicate merely a correctional decision, authorized by the original criminal sentence, that the rehabilitation of the offender would best be served by the special forms of therapy available at a mental hospital.

40. "Transfers between institutions, for example, are made for a variety of reasons and often involve no more than informed predictions as to what would best serve institutional security or the safety and welfare of the inmate." Meachum v. Fano, 427 U.S. 215, 225 (1976).

41. Jones was confined in "the psychiatric ward" of the prison for a time following his initial return to the prison, but not at the time the case was finally before the Supreme Court. Brief for Appellee at 11-12, Vitek v. Jones, 445 U.S. 480 (1980).

proposition that to declare a person mentally ill and subject the individual to involuntary psychiatric treatment are consequences "qualitatively different" from traditional criminal punishment. The truth of the proposition as an historical matter is unquestionable. The problem is in understanding the constitutional significance of this empirical fact.

Justice White's opinion does not supply the necessary link. He asserts that prior cases "reflect an understanding that involuntary commitment to a mental hospital is not within the range of conditions of confinement to which a prison sentence subjects an individual."[42] History again supports the conclusion that criminal incarceration and psychiatric hospitalization have been preserved as distinct responses to "socially disturbing" behavior. Because these two social institutions are creations of the state, each designed to serve valid state interests, a state should remain free to blur or even obliterate the distinctions between them if advances in science, evolving philosophical outlooks, or both suggest that a change would further relevant state interests. Of course, there are constitutional limitations concerning the interests which a state can legitimately pursue and the actions that can be taken to pursue those interests.[43] The opinion in *Vitek v. Jones*, however, fails to articulate any limitations which would prevent a state from including among the ordinary consequences of a criminal conviction any of the disabilities traditionally associated with a civil commitment decision.

The Court cites only four cases to support its central proposition. The first of the cases, *Baxstrom v. Herold*,[44] not only failed to establish an essential constitutional distinction between a prison sentence and a commitment to a mental hospital, but also actually may be hostile to that conclusion. Baxstrom had been convicted and sentenced to prison in the State of New York. While serving his term, he was "certified as insane by a prison physician"[45] and transferred to Dannemora State Hospital, a psychiatric facility maintained by the Department of Correction for the confinement of mentally ill prisoners and civilly committed "dangerous" persons.[46] A statutory procedure was invoked to effect his indefinite civil commitment.[47] Baxstrom's commitment was

42. 445 U.S. at 493.
43. *See* Robinson v. California, 370 U.S. 660 (1962).
44. 383 U.S. 107 (1966).
45. *Id.* at 108.
46. *Id.* at 113.
47. *Id.* at 108-09.

distinguishable from the usual civil commitment procedure in two important respects: First, a person committed at the end of a penal sentence did not have the right, available to all other persons civilly committed, to jury review of the decision that he or she was mentally ill and in need of hospitalization; second, this person could be held at Dannemora without the judicial determination of dangerousness, which was required in connection with other civil commitments to that institution.[48] The Supreme Court held that the commitment procedure violated the equal protection clause by denying to Baxstrom the jury review available to other committed persons.

> The director contends that the State has created a reasonable classification differentiating the civilly insane from the "criminally insane," which he defines as those with dangerous or criminal propensities. Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made. Classification of mentally ill persons as either insane or dangerously insane of course may be a reasonable distinction for purposes of determining the type of custodial or medical care to be given, but it has no relevance whatever in the context of the opportunity to show whether a person is mentally ill *at all*. For purposes of granting judicial review before a jury of the question whether a person is mentally ill and in need of institutionalization, there is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments.[49]

A crucial distinction between *Baxstrom* and *Vitek v. Jones* is that the state in *Baxstrom* sought to justify relaxed procedures for a civil commitment, concededly distinct from the criminal sentence, by reference to a past conviction. In *Vitek* the state asserted that a transfer to a mental hospital was not a distinct civil commitment, but merely a consequence authorized by a then operative criminal sentence. The validity of the original transfer of the prisoner to the mental hospital was not an issue in *Baxstrom*. Arguably, the case presumes the original transfer to have been valid for the duration of the criminal sentence.

Justice White also relied on *Specht v. Patterson*,[50] which required procedural safeguards to commit an individual under the Colorado Sex Offenders Act who had been convicted of a qualifying sexual offense. In *Specht* the criminal conviction standing alone did not authorize psy-

48. *Id.* at 110-13.
49. *Id.* at 111-12 (emphasis in original).
50. 386 U.S. 605 (1967).

chiatric intervention under state law. A criminal statute wholly distinct from the Sexual Offenders Act defined the sexual offense.[51] New factual determinations not pertinent to the criminal conviction had to be made to apply the Sexual Offenders Act.[52] In *Specht* the Court merely held that if a state statute authorized the commitment of a person who had been convicted of a specified kind of offense and who met certain other criteria, due process required standard procedural safeguards not only in the finding that the individual was guilty of the offense, but also concerning the determination that the additional facts existed which were statutorily required for commitment.[53] *Specht* is not authority for the proposition that some constitutional principle requires a state to maintain the traditional distinction between the consequences of a criminal sentence and those of a civil commitment. The Sex Offenders Act itself already honored the distinction.

The third case that Justice White relied on is *Humphrey v. Cady*.[54] By writ of habeas corpus, the petitioner challenged his commitment under the Wisconsin Sex Crimes Act, which provided for commitment in place of a prison sentence for persons convicted of any crime "probably directly motivated by a desire for sexual excitement."[55] The initial duration of the commitment was identical to the maximum sentence authorized for the crime, but the statute permitted additional five-year renewals on a judicial determination that the inmate's discharge would be "dangerous to the public because of mental or physical deficiency, disorders or abnormality."[56] One of the principal grounds for the petitioner's challenge to the procedure surrounding both the original and renewal commitments was that the Sex Crimes Act allowed commitment without the right to a jury trial, a right available to other persons civilly committed in Wisconsin.[57] The federal district court, without holding an evidentiary hearing, dismissed the petition both on the merits of the claims and on procedural grounds.[58] The court of appeals refused to certify probable cause for an appeal solely because the claims were without merit.[59] The Supreme Court, relying on *Baxstrom*

51. *Id.* at 607.
52. *Id.* at 607-08.
53. *Id.* at 610.
54. 405 U.S. 504 (1972).
55. *Id.* at 507.
56. *Id.*
57. *Id.* at 508.
58. *Id.* at 506.
59. *Id.*

v. Herold[60] and *Specht v. Patterson*,[61] remanded the case to the district court for an evidentiary hearing. Because the Supreme Court did not resolve the merits of the claims but merely held that they were "at least substantial enough to warrant an evidentiary hearing,"[62] the case does not add to the implications of *Baxstrom* and *Specht*. Moreover, the Court suggested a critical distinction between a case in which the state utilizes psychiatric intervention in place of traditional penal incarceration as the sanction for a crime, and a case in which the state uses a criminal conviction as a basis for a commitment which is not characterized by the state as a criminal sanction.

> Respondent seeks to justify the discrimination on the ground that commitment under the Sex Crimes Act is triggered by a criminal conviction; that such commitment is merely an alternative to penal sentencing; and consequently that it does not require the same procedural safeguards afforded in a civil commitment proceeding. *That argument arguably has force with respect to an initial commitment under the Sex Crimes Act, which is imposed in lieu of sentence, and is limited in duration to the maximum permissible sentence*. The argument can carry little weight, however, with respect to the subsequent renewal proceedings, which result in five-year commitment orders based on new findings of fact, and are in no way limited by the nature of the defendant's crime or the maximum sentence authorized for that crime. The renewal orders bear substantial resemblance to the post-sentence commitment that was at issue in *Baxstrom*. Moreover, the Wisconsin Supreme Court has expressly held that even the initial commitment under the Sex Crimes Act is not simply a sentencing alternative, but rather an independent commitment for treatment, comparable to commitment under the Mental Health Act.[63]

Thus, contrary to the suggestion of *Vitek v. Jones*, *Humphrey* reserves the possibility that a state may freely substitute involuntary psychiatric or behavioral programs for the traditional penal sentence.[64]

Finally, Justice White relied on *Jackson v. Indiana*,[65] which articulated the constitutional limitations on the power of the state to confine a person charged with a crime and found incompetent to stand trial. The *Jackson* Court first held that the equal protection clause, as applied in *Baxstrom v. Herold*, precluded the state from making arbitrary

60. 383 U.S. 107 (1966).
61. 386 U.S. 605 (1967).
62. 405 U.S. at 508.
63. *Id.* at 510-11 (footnote omitted) (emphasis added).
64. *See id.*
65. 406 U.S. 715 (1972).

distinctions between procedures and standards for commitment and discharge of incompetent defendants and those applicable to all other persons civilly committed.[66] The Court's second holding, which is premised on the due process clause, significantly states that:

> [A] person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future. If it is determined that this is not the case, then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant. Furthermore, even if it is determined that the defendant probably will be able to stand trial, his continued commitment must be justified by progress toward that goal.[67]

The *Jackson* Court recognized three traditional bases for psychiatric intervention in the form of commitment to a mental hospital: "[D]angerousness to self, dangerousness to others, and need for care or treatment or training."[68] The Court also acknowledged that "the substantive constitutional limitation on this power" remained largely unresolved.[69] The Court in *Jackson* did not deal with "these broad questions" concerning the civil commitment power.[70] A narrow rationale for the holding is stated succinctly: "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."[71] That proposition is relevant as a general legal principle to the issue presented in *Vitek v. Jones*. This principle ultimately may help to supply the necessary link between constitutional theory and the traditional distinction between a prison sentence and a civil commitment.

Except for the potential relevance of the general principle of *Jackson v. Indiana*, however, the case is not authority for the holding in *Vitek v. Jones*. Theon Jackson, unlike Larry Jones, had not been convicted of a crime. *Jackson* thus did not involve a criminal sentence that the state might rely on to authorize the psychiatric intervention. The state of Indiana also did not have any other justification for the "nature and

66. *Id.* at 723-30.
67. *Id.* at 738 (footnote omitted).
68. *Id.* at 737 (footnote omitted).
69. *Id.* at 736-37.
70. *Id.*
71. *Id.* at 738.

duration" of the proposed commitment. *Jackson v. Indiana* would have been an appropriate starting point for the analysis in *Vitek v. Jones*. *Jackson* was not, however, adequate as the controlling authority for the resolution of *Vitek*.

Thus, without developing or identifying any determinative legal theory, the Court in *Vitek v. Jones* held that the Constitution forbids a state from treating a criminal conviction as a sufficient basis for the offender's confinement and treatment in a psychiatric facility as a mentally ill person. The precise holding of the case may be limited to factual situations involving a determination that the prisoner is mentally ill, coupled with physical transfer for psychiatric treatment to a facility not under the jurisdiction of the correctional authority. The rationale of the case, however, does not justify this narrow reading. The Court held that finding a prisoner to be mentally ill and subjecting the person to involuntary psychiatric hospitalization is "qualitatively different"[72] from traditional punishment. Consider whether the following practices, which do in fact occur in modern correctional settings,[73] are not equally different in kind from the standard case of the penal sanction.

1. The defendant is sentenced to a three year prison term. After a year of incarceration in a traditional prison setting, the individual begins to exhibit bizarre behavior. The defendant is examined without consent by a psychiatrist, and administratively reassigned on the basis of the psychiatric report to a combined medical/psychiatric facility under the jurisdiction of the Department of Corrections. The defendant is placed, again without consent, in a program in which he or she is administered psychotropic drugs and subjected to daily therapeutic programs identical to those followed in many ordinary civil mental hospitals, and completely unlike traditional prison routines. Physicians, psychologists, psychiatric nurses, and social workers constitute the majority of the professional staff. The inmates are officially denominated patients rather than prisoners; the living units are called wards, not cellblocks; and the buildings and grounds are designated a hospital, not a penitentiary. Inmates who have not been administratively retransferred to a traditional setting by the expiration of their prison term either must be discharged or committed to a civil hospital in the usual way.[74]

72. 445 U.S. at 493.

73. *See generally* R.K. SCHWITZGEBEL, *supra* note 3.

74. 18 U.S.C. § 4241 (1976) creates a board of examiners for each federal penal institution.

2. A prisoner mutilates herself one night when alone in a cell. She is taken for emergency treatment to the prison infirmary. The next morning the prison psychiatrist interviews the woman and enters in the infirmary records a diagnosis of a mental disorder. The psychiatrist orders drug therapy and intensive monitoring of the prisoner's behavior. The prison classification committee reassigns her without her consent from her former cellblock to the prison's psychiatric care unit located in a portion of the infirmary.[75] Prisoners assigned to this unit are not allowed to work outside the unit and are always isolated from the general prison population. Meals are taken in the infirmary and a recreation period separate from that of the general population is provided. The prisoners in the psychiatric unit are not allowed to participate in the generally available programs and activities of the prison. The prisoners follow a daily routine, which is more rigid and restricted than that designated for the general population. Nurses chart the daily behavior of each prisoner and require each prisoner to participate in two weekly group therapy sessions. Although general prison programming is determined by a central administrative committee composed of correctional and counseling staff, the program in the psychiatric unit is under the direct control of the prison psychiatrist and his or her staff. Only a staff physician or psychologist may assign a prisoner to the psychiatric unit or release the prisoner from the unit.

3. A long term prisoner begins to display symptoms of delusion and depression. He is interviewed by the prison psychiatrist who prescribes a daily administration of an antidepressant drug.[76] The prisoner objects to the therapy, but accepts it under threat of disciplinary action.

The board is authorized to "examine any inmate of the institution alleged to be insane or of unsound mind or otherwise defective . . . ." Upon receiving a report from the board concerning an inmate, the Attorney General,

> may direct the . . . official having custody of the prisoner to cause such prisoner to be removed to the United States hospital for defective delinquents . . . there to be kept until, in the judgment of the superintendent of said hospital, the prisoner shall be restored to sanity or health or until the maximum sentence, without deduction for good time or commutation of sentence, shall have been served.

Under § 4241 federal prisoners frequently have been transferred to the Medical Center for Federal Prisoners at Springfield, Missouri, which is not a civil mental hospital, but a federal correctional facility under the authority of the Attorney General and similar in many respects to the kind of institution described in the text. *See generally* Garcia v. Steele, 193 F.2d 276 (8th Cir. 1951).

75. During a period of time throughout the course of the *Vitek v. Jones* litigation, Larry Jones was in such a unit at the Nebraska Penal and Correctional Complex. Brief for Appellee at 11-12, Vitek v. Jones, 445 U.S. 480 (1980).

76. *Cf.* Peek v. Ciccone, 288 F. Supp. 329 (W.D. Mo. 1968) (forced administration of tran-

4. A correctional facility for young and first time felons maintains two distinct programs. The Attorney General, who receives initial custody of all convicted felons, routinely assigns to the facility all male offenders in the state who are either between the ages of nineteen and twenty-six, or who have never served time for a felony conviction. The Attorney General's orders do not specify a particular program for an offender, but only the place of confinement.

Each prisoner on arrival at the facility is assigned to the Reception and Diagnostic Unit (R & D Unit) where he undergoes a three week period of orientation, testing, and evaluation. The director of the unit is a psychologist. Near the end of the three week period, the diagnostic staff prepares a detailed report and recommendation for the classification committee, composed of the warden, the R & D Unit director, and the deputy programming warden. This committee decides to assign the prisoner into one of the two programs. Under one program, the prisoner will join a work crew, which performs institutional service for a four hour period six-days-a-week (*e.g.*, laundry, kitchen, or grounds maintenance). Another four hours of the prisoner's day are devoted to educational or vocational training. The remaining time of each day is divided between lock-up in a two-man cell, a recreation period in the prison yard or gym, and routine activities (*e.g.*, meals, sick call, and visiting time).

If the prisoner is assigned to the second program, he will participate in a twenty-four-hour-a-day, seven-day-a-week token economy program designed and implemented by a staff of psychologists and professionally trained counselors.[77] During the first stage of the program the prisoner lives in a large simple dormitory, works ten hours per day, and performs menial institutional tasks (*e.g.*, garbage collection, cutting weeds). Every day the prisoner and staff combine to complete a written behavior inventory. At the end of each day, the staff rewards the prisoner with tokens for behavior which the staff has pre-identified as appropriate. Under certain circumstances the prisoner will be charged tokens for disapproved behavior. The prisoner can exchange the tokens or certain items or privileges. At the end of four weeks, the prisoner may use the tokens to buy his way into the next stage of the

quilizer to federal prisoner as part of treatment for mental disorder held not to constitute cruel and unusual punishment).

77. *Cf.* Clonce v. Richardson, 379 F. Supp. 338 (W.D. Mo. 1974) (challenge by federal prisoners to START (Special Treatment and Rehabilitative Training), a behavior modification program utilizing a progressive tier system).

program if he has accumulated the required number of tokens. Each successive stage involves improved work or training assignments and more comfortable living quarters. If a prisoner works his way into the penultimate stage of the program, he lives in a private room of a small cottage with three or four other inmates, and enjoys a job that pays real money, many opportunities for training and self-betterment programs, and regular furloughs. The final stage of the program is conditional release into the community. The program has been designed in accordance with behavior modification principles, and is intended to increase the frequency of designated approved behavior and decrease the frequency of designated disapproved behavior displayed by the prisoner.[78]

Possible variations on these themes are almost infinite.[79] A parole board may "suggest" to a candidate for parole that he or she enroll in the prison's alchoholic treatment program. An inmate may be directed to pay weekly visits to the psychologist or to participate in a group therapy program. A court may order a probationer to report weekly to a mental health clinic or to remain under the supervision of a mental health professional.

Is it not the case that to some degree all of these hypothetical situations involve the use of coercive behavioral interventions, which are "qualitatively different from the punishment characteristically suffered by a person convicted of a crime?"[80] *Vitek v. Jones* leaves open to speculation the probable outcome of challenges to practices similar to the suggested ones. The *Vitek* opinion simply does not give sufficient insight into its rationale to permit confident prediction. The broad ques-

78. For discussion of applications to criminal law of psychological principles in general, including behavior modification principles, see Singer, *Psychological Studies of Punishment*, 59 CALIF. L. REV. 405 (1970).

79. Many variations are suggested in R.K. SCHWITZGEBEL, *supra* note 3. Extreme examples of the coercive use of highly intrusive behavioral control techniques have occurred recently. *See, e.g.,* Knecht v. Gillman, 488 F.2d 1136 (8th Cir. 1973) (enjoining as cruel and unusual punishment the involuntary treatment of inmates in a program of "behavior modification by aversive stimuli," *id.* at 1138, in which inmates whose behavior was disapproved received an intra-muscular injection of apomorphine, a drug which induced a period of vomiting lasting from fifteen minutes to one hour); Mackey v. Procunier, 477 F.2d 877 (9th Cir. 1973) (allegation that as part of an experimental aversive conditioning program a prisoner coercively was given succinycholine, a drug which produces temporary paralysis and inability to breathe and which is normally used as a relaxant not to be administered to fully conscious patients). *See also* Note, *Conditioning and Other Technologies Used to "Treat?" "Rehabilitate?" "Demolish?" Prisoners and Mental Patients*, 45 CALIF. L. REV. 616 (1972).

80. 445 U.S. at 493.

tion raised by the hypothetical practices is an important one: To what extent may the state ever include involuntary psychiatric treatment or other coercive behavioral interventions among the actual ordinary consequences of a criminal conviction and sentence? As illustrated above, these interventions are not foreign to contemporary correctional programs.[81]

II. SUBSTANTIVE LIMITATIONS ON THE USE OF COERCIVE BEHAVIORAL INTERVENTIONS

A. *Introduction*

Notwithstanding the unsatisfactory analysis in *Vitek v. Jones*, it does seem that important limitations on the power of the state to introduce involuntary psychiatric and behavioral techniques into the system of criminal sanctions may be anticipated. Moreover, this seems to be the case precisely because the practices are "qualitatively different" from the standard instances of criminal punishment. Although Justice White's discussion may fail to disclose an adequate constitutional theory, his reaction against the unregulated power of the state to commit its prisoners to mental hospitals has intuitive appeal as a matter of criminal law policy. It also may be possible to identify principles which can elevate that intuition to constitutional stature. A more sensible approach, however, begins by exploring the intuition itself, which is related more to the premises underlying our criminal law than to the United States Constitution.

At the core of the objection to the use of behavioral techniques is a judgment that coercive efforts to cure, treat, or modify the mental or behavioral make-up of the criminal are not within the usual meaning of "punishment" in the context of the criminal law. The criminal law generally is viewed as a social structure designed to enforce specific behavioral norms through the official identification and punishment of violators. The feeling that the transfer of a prisoner from a prison to a mental hospital for treatment, and perhaps many other uses of behavioral technology in corrections as well, cannot be viewed simply as an administrative maneuver within the scope of the criminal sanction reflects the common understanding of the meaning of criminal punishment. What is that common understanding? H.L.A. Hart has offered a most appealing statement, which he calls the standard or central case of

81. *See* notes 73-79 *supra*.

punishment.[82]

Hart does not mean to identify any universal or necessary definition of punishment by this phrase, but rather to specify the elements that are crucial to the comprehension of the concept within the context of criminal law. There are five crucial elements:

(i) Punishment must involve pain or other consequences normally considered unpleasant.
(ii) Punishment must be for an offense against legal rules.
(iii) It must be of an actual or supposed offender for his offense.
(iv) It must be intentionally administered by human beings other than the offender.
(v) It must be imposed and administered by an authority constituted by a legal system against which the offense is committed.[83]

Using these guidelines, or some equally precise statement of our common understanding, we can consider whether particular instances of psychiatric or behavioral interventions are within the standard case of punishment.[84] We probably would conclude that many coercive applications of psychiatric and behavior technology to criminal offenders are not punishment in the usual sense. Those judgments might help to clarify the "qualitative difference" found critical in *Vitek v. Jones*. They would not conclude our analysis, however, of when psychiatric treatment or other behavioral interventions are appropriate aspects of the criminal sanction because ultimately the question is not one of definition (*i.e.*, what consequences are punishment?), but rather of justification (*i.e.*, what consequences are morally right responses to crime?). Thus, many uses of psychiatric interventions by prison authorities are not punishment in the usual sense precisely because they are not imposed on the prisoner for an offense, but rather are responses to the perceived needs of a person who also is a prisoner.[85] The first three of the above hypothetical situations involve psychiatric treatment of this

82. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 4, 6 (1968).

83. H.L.A. HART, *supra* note 82, at 4-5.

84. Other formulations of the common understanding may differ in significant respects from Hart's, and might well affect the analysis suggested in this Article. Hart's work enjoys sufficient recognition, however, to justify its use in constructing a framework which is essential before any thoughtful conclusions can be finally reached concerning the appropriate use of behavioral interventions as ordinary components of the criminal sanctioning system. *See* G. NEWMAN, THE PUNISHMENT RESPONSE 7-11 (1978).

85. One might also argue that many behavioral interventions are not punishment because they do not "involve pain or other consequences normally considered unpleasant." Such an objection seems strained because we are concerned only with interventions to which the offender has not consented.

kind. Some interventions, for example the behavior modification program of the fourth hypothetical case, and many less intrusive self-betterment programs imposed in varying degrees on many prisoners, arguably do fit within the standard case of punishment.

This would not mean, however, that the state ought to be free to utilize the latter type, but not the former. Why should not the state be permitted to broaden the consequences of a criminal sentence beyond the traditional concept by redefining, through its statutes or through particular sentences themselves, the common understanding of the criminal sanction? Alternatively, why must we accept the propriety of some psychiatric interventions, but not others, simply because some fall literally within the accepted definition of "punishment?" Perhaps reflection on the implications of these practices might lead to a redefinition of the core concept to exclude some or all of the practices. After all, modern psychiatric and behavioral technologies were unknown when our concept of criminal punishment became standardized. As Professor Hart makes clear, specifying a definition of the standard case of punishment does not settle, but rather highlights, the ultimate issue.

> Why do we prefer this [punishment in the usual sense] to other forms of social hygiene which we might employ to prevent anti-social behavior and which we do employ in special circumstances, sometimes with reluctance? No account of punishment can afford to dismiss this question with a definition.[86]

In summary, the intuitive reaction that some coercive behavioral interventions cannot be tolerated simply as permissible consequences of a criminal conviction and sentence may be explicated as a reflection of what is normally understood by "punishment." Whether or not any particular intervention falls inside or outside the accepted punishment concept, its availability within the criminal sanctioning system ought to depend on a justificatory analysis. It was this type of analysis that was missing in *Vitek v. Jones*.

Criminal sanctions in general typically are justified through philosophical defenses of the practice of punishment. These justifications are embedded in the traditions of criminal law theory. Students of the criminal law are familiar with the perennial debates concerning the theories that purport to give the criminal sanction its moral authority. The terms "retribution," "rehabilitation," "reform," and "deterrence" come to mind most readily as the trademarks of competing argu-

86. H.L.A. HART, *supra* note 82, at 6.

ments.[87] A related but distinct validating process is required when the forum for passing judgment on a criminal sanction is federal constitutional litigation.[88] The critical distinction between the criminal and constitutional justification processes is that although constitutional arguments are circumscribed by current Supreme Court construction of the Constitution, criminal law theory is responsive to a wider range of philosophic arguments within the context of the Anglo-American criminal law development, which predates our written Constitution by hundreds of years.

The following analysis is a brief excursion into the justification question, both in its criminal and constitutional law embodiments. This analysis is essential before any satisfactory response is made to the proposition that the state may sometimes utilize involuntary psychiatric treatment or other behavioral interventions as ordinary aspects of the criminal sanction. The issue at stake is more immediately important as a matter of criminal law theory than of constitutional law. Thus, primary attention will be paid to the former concern.

B. *Limitations Derived From Criminal Law Theory*

To derive limitations on the use of behavioral interventions as criminal sanctions from criminal law theory, it is necessary to begin with a clear notion of those aspects of criminal law theory that are directly concerned with the justifications for criminal sanctions. More than one viable analysis of criminal law theory, however, may be identified. Rather than attempting to juggle all the competing principles, which might be suggested as relevant after a comprehensive survey of criminal law theory, the current discussion relies on contemporary analyses of criminal law theory that embody principles which seem to enjoy great common acceptance.[89] Two components of those analyses are

87. *See, e.g.*, A. EWING, THE MORALITY OF PUNISHMENT (1929); H.L.A. HART, *supra* note 82, at 1-27; S. KADISH & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES 1-33 (3d ed. 1975); H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 35-61 (1968); Cohen, *Moral Aspects of the Criminal Law*, 49 YALE L.J. 987 (1940).

88. *See* Part II C *infra*.

89. The discussion of underlying principles draws most heavily from the following works from the mainstream of the contemporary literature on the subject: J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW (2d ed. 1960); H.L.A. HART, *supra* note 82; S. KADISH & M. PAULSEN, *supra* note 87; W. LAFAVE & A. SCOTT, JR., HANDBOOK ON CRIMINAL LAW (1972); H. PACKER, *supra* note 87; L. WEINREB, CRIMINAL LAW (3d ed. 1980). There is, however, no universally accepted analysis of criminal law. *Compare* J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW (2d ed. 1960) *with* G. FLETCHER, RETHINKING CRIMINAL LAW (1978). The particular analysis on

clearly critical to the justification of a criminal sanction.[90] The first involves the criminal law's view of the nature of human behavior. The second concerns the philosophical approach to be employed in determining whether a formal response to criminality is justified.

The first component entails a well-defined philosophical view of the nature of human behavior. Under that view, absent unusual circumstances, an individual actor presumably possesses a significant capacity to appreciate the circumstances under which he or she acts and the probable consequences of a course of action. Furthermore, the individual presumably knows and selects from among alternative courses of action.[91] The necessary conclusion is that the individual is an autonomous being, and thus is responsible for his or her conduct. The individual is both deserving of praise for good acts and blame for bad ones. This underlying concept of human action may be called the responsible agent doctrine.[92]

Most of the traditional justifications for criminal punishment apparently adopt this view of the nature of human action. Indeed, this view contributes to the need for a justifying theory. In the first place, because human beings are dignified, free creatures, the punishment of them without good cause would be wrong. Moreover, to punish someone for violating a specified social norm would be patently immoral, but for the fact that the actor is responsible for the behavior because he or she could have done otherwise.

The second and more complex component of the analysis is concerned with articulating specific arguments to justify criminal sanctions. The traditional theories for justifying the criminal sanction are well known to all students of criminal law theory.[93] The task of justifying official responses to criminality, however, entails a complexity

which one settles inevitably will affect profoundly one's conclusions concerning the proper role of coercive behavioral interventions in the criminal justice system. The analyses relied on in the text serve merely as models to aid in construction of an approach to the problem.

90. While other aspects of contemporary theories may also be relevant, they need not be considered for the limited purposes of this article.

91. *See, e.g.,* H.L.A. HART, *supra* note 82, at 28-53, 158-85; Kadish, *The Decline of Innocence*, 26 CAMBRIDGE L.J. 273 (1968). *See generally* THE NATURE OF HUMAN ACTION (M. Brand ed. 1970).

92. *See generally* Kadish, *supra* note 91, at 273, 287. For an in-depth commentary on the underlying distinctions between the legal and scientific perspectives on human behavior, see Morse, *Crazy Behavior, Morals, and Science: An Analysis of Mental Health Law*, 51 S. CAL. L. REV. 527 (1978).

93. *See* note 87 *supra*.

which is frequently overlooked as H.L.A. Hart recognizes in his collection of essays, *Punishment and Responsibility*.[94] In evaluating the propriety of resort to psychiatric and behavioral interventions, not only may distinct philosophical theories concerning justification exist (*e.g.*, utilitarian versus retributive theories), but also distinct kinds of questions about justification can be raised. On the one hand, we must consider the implications of the competing theories concerning the justification for imposing any consequences on criminals. These theories involve what Hart calls questions of general justifying aim.[95] Values, which operate as limitations on whether a specific consequence may be imposed on a particular individual in a given case, must also be taken into account. These are considerations involving what Hart calls questions of distribution, or distributive justice. A convincing argument may exist to justify the general practice of imposing sanctions on criminals. Yet the argument may neither establish that it is proper to execute each individual who is correctly identified as a criminal, nor will it necessarily show the justice of any other specific response to a particular criminal act and actor.

It is sufficient to consider the competing theories of general justification as stemming from either of two lines.[96] One line simply asserts that if the conduct of a responsible actor is criminal, punishment is not an evil, but is morally proper.[97] This may be identified as the retributive justification of punishment. The other line is based in utilitarian ethics. The utilitarian justifications assert that punishment is always an evil, which can be justified only if a countervailing utility is served.

Principles of distribution are at least as significant for our purposes as the more frequently examined principles of general justification. The chief relevant considerations, which stem from theories of distributive justice, relate to the proportionality limitation.[98] Distributive jus-

94. H.L.A. HART, *supra* note 82, at 3-13.

95. H.L.A. HART, *supra* note 82, at 4.

96 *See generally*, H.L.A. HART, *supra* note 82; H. PACKER, *supra* note 87, at 35-61; L. WEINREB, *supra* note 89, at 617-34. Professor Hart, while recognizing the retributive line, takes the position that the claims which comprise this line "all either avoid the question of justification altogether or are in spite of their protestations disguised forms of Utilitarianism . . . ." H.L.A. HART, *supra* note 82, at 9. *See also* THEORIES OF PUNISHMENT (S. Grupp ed. 1971).

97. *See, e.g.*, G. HEGEL, PHILOSOPHY OF RIGHT (T. Knox transl. 1942); I. KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE (J. Ladd transl. 1965).

98. The concept of proportionality itself is too complex to be categorized accurately as belonging solely to the principles of general justification or distributive justice. The most doctrinaire retributivist might argue that there can be no general justification for the practice of imposing

tice theories also may be contrasted as either retributive or utilitarian, and the proportionality concept itself has both retributive and utilitarian applications. For example, even if it is justifiable to punish an individual for an offense, notions of proportionality may be invoked to argue that a therapeutic sanction may be utilized only if, (1) the sanction is consonant with the retributive tenet that the punishment must fit the crime, or (2) the social benefits associated with the sanction outweigh the costs. In contemporary sentencing theory the principle of proportionality, whether on a retributive or utilitarian basis, gives rise to a principle that the nature of the punishment must be rationally related to the seriousness of the offense and must fit reasonably into a comprehensive scheme of graduated punishments for offenses of varying degrees of wickedness.[99]

Arguments about the propriety of including involuntary behavioral interventions within the arsenal of authorized criminal consequences should focus on the relationship of these practices to the theoretical foundations of contemporary criminal law analysis. If the practices cannot be assimilated coherently into the analysis, then either the analysis must be altered or the practices rejected.[100]

In testing the use of behavioral interventions against the theoretical analysis, one must initially consider whether the imposition of psychiatric treatment or other forms of behavioral therapy as a normal consequence of a criminal conviction is consistent with the responsible agent doctrine. Incorporation of psychiatric treatment or other behavioral interventions into the post-conviction branch of the criminal law certainly does not require a total and explicit rejection of the view that human action is generally the product of the actor's choice. There is, however, an implicit rejection of any fundamentalist position that humans must, or at least should, always be regarded as responsible for their behavior. Until conviction, the offender is capable of determining

therapeutic consequences on a criminal because the pain of such consequences never equals in kind or degree the evil done by a crime, and at least some utilitarians may argue that the costs incurred by the use of such consequences (or at least by some specific therapies) always outweigh their benefits.

99. With respect to the proportionality principle generally in criminal theory, see H.L.A. HART, *supra* note 82, at 161-73; S. KADISH & M. PAULSEN, *supra* note 87, at 157-67; H. PACKER, *supra* note 87, at 139-45.

100. As previously noted, a theorist is not bound to accept the philosophical foundations set out in the text. *See* note 89 *supra*. But even if a different set of foundations is posited, the method of analysis concerning the propriety of behavioral interventions is essentially the same. One must be concerned to know whether such consequences fit the theory one hypothesizes.

his or her own course of action. Thus the principles of criminal liability, which are the core principles of criminal law theory, are not altered by the introduction of behavioral interventions into the system of criminal sanctions. After conviction, however, that capacity is modified and thus denied. The offender is not merely deprived of some of those alternative courses of action, which would be present outside a prison, but his or her own free will to some greater or lesser extent is destroyed through the use of techniques designed to allow future behavior to be determined by factors not within his or her control. Initially, this implies that individual autonomy and responsibility can exist only in a relative sense; otherwise no such manipulation of behavior would be possible. Second, there is no absolute sanctity of individual autonomy, or else such manipulation would be morally intolerable even when the subject is a wrongdoer.

Consider the following comments directed against reform theories of criminal sanctions in general:

> It is often thought that . . . the reform theory is modern and humane compared with the retributive theory, which is primitive and barbaric. But the essential point about retributive punishment is that it treats the criminal as a man. A law is not, as the determinists would hold, a particular kind of cause (on a level with a drug or hypnosis or psychiatric treatment). It is not a cause at all, because it presents a choice and assumes freedom and responsibility. Retribution is the agent's own act. The law can *threaten*; but there is only one thing that can justify a punishment and that is something the legislator cannot bring about, namely, a free choice by the subject. . . . To be punished for reform reasons is to be treated like a dog. A sane adult demands to be held responsible for his actions. He rejects as an intolerable insult the well-meaning exculpations of the sympathetic scientist, whether presented on social or psychological grounds. Retributive punishment closes the account, reformative punishment opens it . . . .[101]

Currently, the responsible agent doctrine is not likely to be advanced to this extreme position. Contemporary criminal law theories undoubtedly can accommodate some incorporation of the behavioral sciences and their philosophical underpinnings. If the responsible agent doctrine is to enjoy its traditional level of influence concerning questions of criminal liability, however, there will be some conceptual inconsistency associated with significant abdication of control over the criminal law

101. Mabbot, *Freewill and Punishment*, in CONTEMPORARY BRITISH PHILOSOPHY, THIRD SERIES 289, 303 (H. Lewis ed. 1956).

to the disciples of scientific determinism. The vigorous and continuing debate over certain concrete proposals to integrate contemporary behavioral science theories into the criminal law illustrates this point most vividly. The proposals have taken many forms.[102] One of the most radical is frequently attributed to the contemporary British criminologist, Lady Barbara Wootton.[103] Relying on the proposition that the object of criminal law is prevention rather than punishment of harmful behavior, the proponents of this theory would divide the sanctioning process into two distinct operations.[104] The first would concern itself solely with the factual question of whether the accused caused the harm defined by a legislative prohibition. Traditional criminal intent questions would not be relevant to this preliminary inquiry. If it were determined that the person had caused the proscribed harm, a second, dispositional stage would occur to investigate the appropriate response to the harmful conduct. According to one related proposal, at least four dispositional alternatives should be available in every case without regard to traditional sentencing notions: Release the individual with no further intervention, punish the individual, merely confine for preventive purposes, or provide treatment services for the person.[105] Un-

102. Some, influenced by deterministic notions concerning the causes of criminality, have called for the elimination of the insanity defense with the result that a person deemed not criminally responsible under present standards because of mental disease or defect would be liable to conviction. Following conviction, evidence concerning the mental condition of the person would be considered in light of contemporary behavioral science theories in connection with the proper disposition of the offender. *See, e.g.,* Morris, *Psychiatry and the Dangerous Criminal*, 41 S. CAL. L. REV. 514 (1968); Weintraub, *Criminal Responsibility: Psychiatry Alone Cannot Determine It*, 49 A.B.A.J. 1075 (1963). *Cf.* NEW YORK STATE DEP'T OF MENTAL HYGIENE, THE INSANITY DEFENSE IN NEW YORK (1978) (recommending substitution of a rule of diminished capacity for the traditional insanity defense). On a more abstract level it has been suggested that the distinction we presently make between the punishment of criminals and the treatment of mentally disabled persons might best be discarded in favor of "an integrated theory of social sanctions . . . subsuming criminal and mental health law under a common and consistent set of principles." Monahan, *Social Accountability: Preface to an Integrated Theory of Criminal and Mental Health Sanctions*, in 1 PERSPECTIVES IN LAW AND PSYCHOLOGY: THE CRIMINAL JUSTICE SYSTEM 241-55 (1977).

103. *See* Kadish, *supra* note 91, at 273; Morris, *supra* note 102, at 514.

104. *See* B. WOOTTON, CRIME AND THE CRIMINAL LAW 52-53 (1963). *See also* J. MARSHALL, INTENTION—IN LAW AND SOCIETY 187-97 (1968); Campbell, *A Strict Accountability Approach to Criminal Responsibility*, FED. PROB., Dec. 1965, at 33.

105. *See* Waelder, *Psychiatry and the Problem of Criminal Responsibility*, 101 U. PA. L. REV. 378 (1952). According to Waelder, a psychoanalyst, punishment is appropriate if the offender is found to be deterrable, preventive custody if he or she is dangerous, treatment if he or she is treatable. In some cases more than one of those three alternatives will be proper, in others only release will be appropriate. *Id.* at 389-90.

derlying all these proposals, and at least to some extent the contemporary rehabilitation model of corrections, is the notion that a traditional criminal conviction is not only an authorization for the imposition of punishment, but also therapy for the offender.

The response of Professor Sanford Kadish to the Wootton proposal is both a reminder that the responsible agent doctrine does have current vitality and a warning that there are serious reasons to scrutinize any proposal which threatens the doctrine.

> Much of our commitment to the democratic values, to human dignity and self-determination, to the value of the individual, turns on the pivot of a view of man as a responsible agent entitled to be praised or blamed depending upon his free choice of conduct. A view of men "merely as alterable, predictable, curable or manipulatable things" is the foundation of a very different social order indeed. The ancient notion of free will may well in substantial measure be a myth. But even a convinced determinist should reject a government regime which is founded on anything less in its system of authoritative disposition of citizens. Whether the concept of man as responsible agent is fact or fancy is a very different question from whether we ought to insist that the government in its coercive dealings with individuals must act on that premise.[106]

Of course, proposals to introduce behavioral science learning into only the post-conviction stage of criminal law are not as threatening to the responsible agent doctrine as those designed also to modify the principles of criminal liability. But, absent a near abandonment of the notion of individual autonomy, the introduction of involuntary behavioral interventions as formal responses to crime can be regarded as affronts to the dignity of human beings, which transcend the evil visited by most other contemporary consequences of criminal conviction. The interventions are not merely unpleasant consequences. They are denials of the basic human status of the offender because they attempt to determine future behavior which would otherwise be within his or her control. Perhaps this analysis finally validates Justice White's conclusion that the transfer of Larry Jones was "qualitatively different" from traditional criminal punishment.[107] What was important was not that the facility to which Jones was transferred was outside the jurisdiction of the Department of Corrections, nor that the transfer effected serious and disadvantageous changes in the conditions of confinement endured by Jones, nor even that the transfer was based on a determination that

106. Kadish, *supra* note 91, at 287 (footnote omitted).
107. 445 U.S. at 493.

Jones was mentally ill; rather, it was that while he was incarcerated at the prison he was dealt with as a responsible agent, but while at the mental hospital he was not.[108]

Why should society ever respond to individual behavior by imposing involuntary psychiatric treatment or other involuntary behavioral interventions on the actor? Within this general justification category one must consider initially the retributive notion that the morally necessary response to crime is punishment. A possible corollary to the retributive position is that any consequentialist use of the criminal sanction is morally wrong.[109] The proposition was derived in earlier discussion from the argument that the introduction of therapeutic sanctions into the criminal law would be inconsistent with the responsible agent doctrine. For one who accepts a version of the retributive position which entails a doctrinaire commitment to antideterminism, the conclusion may seem inescapable that no involuntary behavioral interventions can be tolerated in the penal system. For this reason, it is justifiable, in fact morally necessary, that unpleasant consequences be visited on one who chooses criminal conduct. But it would not be allowable to try to control future behavior by altering the mental condition or behavioral make-up of the offender. If severe punishment is proper, complete physical destruction of the criminal, rather than dehumanization by scientific programming, might be the dignified and morally acceptable means.

Most retributive theories probably are not inextricably bound to such a pristine theory of self-determination. But even a more moderate adherent of the retributive line may conclude that therapeutic responses to crime are unjustified. Although therapeutic criminal sanctions may be consistent with the view taken by the criminal law regarding the nature of human behavior—indeed, even if the criminal law is not based on any particular presumptions about the nature of human behavior—there may be no basis on which society can justify the practice of responding to criminal behavior with coercive efforts to rehabilitate the offender. For instance, therapeutic responses may undermine the retributive principle that the consequence of crime must approximate, both in kind and degree, the evil which it has caused.[110] Alternatively,

108. This analysis is consistent with the special emphasis Justice White placed on the fact that after his transfer Jones was subjected to the stigma of mental illness and to a compulsory behavior modification program. *Id.* at 491-94.

109. *See* text accompanying note 101 *supra*.

110. "What kind and what degree of punishment does public legal justice adopt as its princi-

a retributivist might simply refuse to acknowledge the validity of any nonretributive theories concerning the justification of societal response to crime, and therefore reject therapeutic responses because no retributive theory justifies them. Many who feel that the need for retribution is a justification for the traditional punishment of criminals will not object, however, to supplementing punishment with constructive therapy. In fact, most who express a retributive view probably fall into this latter category.[111]

If, on the other hand, a utilitarian approach is posited toward the general justification of social response to criminal behavior, the use of involuntary behavioral interventions should be accepted if and only if the evil thereby created is less than the good it promises to achieve.[112] A system is necessary to weigh the costs involved, including the dehumanizing effects of determining the future behavior of a convicted prisoner through coercive psychiatric or behavioral technologies, against the social benefits that may be achieved by the therapies. Arguably, a legitimate utilitarian argument can be made to justify the general practice of imposing psychiatric and behavioral interventions on criminal offenders. It is important to recognize that because the evil visited on a prisoner by these new techniques is "qualitatively different" from the traditional penalty of simple physical incarceration, the proposed practice cannot be presumed proper under the rubric of criminal punishment, but must be independently justified.

An obvious utilitarian justification for the use of involuntary behavioral interventions would be an adaptation of the deterrence justification of criminal punishment. Under one form of the deterrence theory, the practice of criminal punishment is proper because it reduces the overall incidence of harmful behavior (crime) by inducing the person punished to avoid future criminal conduct.[113] Because the evil created by imposing unpleasant consequences on one individual presumably is outweighed by the corresponding benefit conferred on society at large,

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ple and standard? None other than the principle of equality. . . . Only the law of retribution (*jus talionis*) can determine exactly the kind and degree of punishment. . . ." I. KANT, *supra* note 97, at 10.

111. *See generally* S. KADISH & M. PAULSEN, *supra* note 87, at 6-21. This is true even of Mabbot, who seemed in the passage quoted earlier, *see* note 101 *supra*, to reject any formal response to crime which could not be justified on retributive grounds. *See* Mabbott, *Punishment*, in THEORIES OF PUNISHMENT 41 (S. Grupp ed. 1971).

112. *See* J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 158 (J. Burns & H.L.A. Hart ed. 1970).

113. *See* H. PACKER, *supra* note 87, at 39-58.

there is a general justification for the practice of criminal punishment. One might argue that effective psychiatric treatment and other valid forms of behavioral interventions imposed on offenders will reduce the incidence of crimes by those persons at least as much as would punishment.[114] One might respond, however, that the costs associated with the use of coercive behavioral interventions far exceed those created by the use of traditional punishments. The balance struck between the benefits and costs depends on one's views concerning such nonquantifiable values as human dignity and the sanctity of individual choice.

Consideration also must be given to matters of distributive justice. The chief distributive justice limitation on the use of behavioral interventions arises from the notion of proportionality. Some method for weighing the impact of the interventions is needed to determine whether a particular technique can be used as a criminal sanction, and if so, for which crimes and under what circumstances. Perhaps the balance should depend on the degree of intrusiveness of the intervention,[115] the seriousness of the crime, and the personal circumstances of the offender. Depending on the degree of one's commitment to the view that the autonomy of human conduct largely accounts for the dignity of the individual, one might contend that any coercive tampering with the individual's capacity to determine future conduct freely is a consequence of the harshest kind, and thus less likely to be justified than traditional punishment. No quantifiable standards can be expected, but, as in other contexts of proportionality, this should not prevent our efforts to identify roughly the demands of justice.

C. *Federal Constitutional Limitations*

Constitutional limitations on the use of involuntary behavioral interventions as criminal sanctions also can be identified. These limitations bear a strong resemblance to the considerations of criminal law theory, even though the method of constitutional litigation is more circumscribed.

The relevant constitutional restrictions may be distinguished as ei-

114. *See* Glueck, *Principles of a Rational Penal Code*, 41 HARV. L. REV. 453 (1928). *But see* Cohen, *Moral Aspects of the Criminal Law*, 49 YALE L.J. 987, 1012-14 (1940).

115. For an interesting attempt to classify common behavior control techniques according to their "coerciveness," see Note, *Conditioning and Other Technologies Used to "Treat?" "Rehabilitate?" "Demolish?" Prisoners and Mental Patients*, 45 S. CAL. L. REV. 616, 619-21 (1972).

ther procedural or substantive.[116] Although this Article deals primarily with the substantive limits on the power of the state, a significant relationship exists between procedural and substantive constitutional limitations, as illustrated by the distinct approaches of the state and the Court in *Vitek v. Jones*. The Court's analysis followed a procedural line.[117] Involuntary psychiatric treatment and confinement in a mental hospital was viewed as a deprivation of liberty, which could only be effected by the state under the due process clause of the fourteenth amendment[118] if adequate procedural safeguards against an erroneous decision were provided.[119] Because virtually no safeguards attended the transfer of Jones to the mental hospital, the requirements of procedural due process had been violated.[120]

The state, however, took the position that any deprivation of liberty suffered by Jones was the legitimate effect of his criminal conviction. The conviction completely took from Jones for the duration of his sentence both the right to physical freedom and the right to avoid unwanted psychiatric treatment.[121] The conviction, of course, had been accompanied by all the traditional procedural safeguards of the criminal justice system. Thus, no additional process was due in the state's view. This argument should have caused the Court to shift from the procedural issue of whether the Constitution qualified the state's power to make the transfer by requiring that Jones be afforded certain procedural safeguards to an in-depth analysis of a more fundamental substantive issue: Whether the state could constitutionally regard the criminal conviction and sentence as having divested Jones of his freedom from unwanted psychiatric treatment just as the sentence and conviction extinguished his right to physical liberty.

Justice White's forthright rejection of the state's argument indicates

116. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 8-1 to 8-4, 10-7 to 10-9, 11-1 to 11-4, and 16-1 to 16-9 (1978).

117. 445 U.S. at 491-94.

118. "No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

119. *See* Parham v. J.R., 442 U.S. 584 (1979); Addington v. Texas, 441 U.S. 418 (1979).

120. The statute under which Jones was transferred did provide for a marginal procedural safeguard in the form of a determination by a physician or psychologist that the prisoner to be transferred was suffering from a mental disease or defect and could not be given adequate treatment at the prison. *See* note 7 *supra*.

121. At least this is how the Court characterized the state's position. 445 U.S. at 491-94. The state's brief was not as explicit on the point.

unquestionably that the Court did decide the substantive issue.[122] Justice White's position can be conveniently restated in the form of a holding: The transfer of a prisoner to a mental hospital, even after certification by a qualified person that the prisoner suffers from a mental disease or defect, is not within the range of confinement justified by imposition of a prison sentence. The problem with the holding is that the Court does not precisely state any theory of substantive constitutional limitations. A significant case for substantive limitations on the power of the state to utilize behavioral interventions can be constructed from criminal law theory.[123] The task is to identify constitutional principles which also may lead to these limitations. At least for those who agree with Professor Tribe that the Constitution is "an intentionally incomplete, often deliberately indeterminate structure for the participatory evolution of political ideals and governmental practices,"[124] it will be no surprise that many of the theoretical arguments already suggested for substantive limitations based on criminal law theory have constitutional analogues.

Jackson v. Indiana[125] dimly outlines the essence of the pertinent constitutional limitation in terms of a substantive due process theory. "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."[126] The *Jackson* Court also vaguely employed a substantive principle that when state action interferes with an interest protected under the due process clause, the end for which the state acts must be a legitimate one.[127] A state may legitimately take steps to de-

122. *Id.*

123. *See* note 87 *supra*; Part II B *supra*.

124. L. TRIBE, *supra* note 116, at iii.

125. 406 U.S. 715 (1972).

126. *Id.* at 738.

127. The States have traditionally exercised broad power to commit persons found to be mentally ill. The substantive limitations on the exercise of this power and the procedures for invoking it vary drastically among the States. The particular fashion in which the power is exercised . . . reflects different combinations of distinct bases for commitment sought to be vindicated. The bases that have been articulated include dangerousness to self, dangerousness to others, and the need for care or treatment or training. Considering the number of persons affected, it is perhaps remarkable that the substantive constitutional limitations on this power have not been more frequently litigated.

We need not address these broad questions here. It is clear that Jackson's commitment rests on proceedings that did not purport to bring into play, indeed did not even consider relevant, *any* of the articulated bases for exercise of Indiana's power of indefinite commitment. . . . 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.

crease the incidence of criminal behavior. Psychiatric treatment and other behavioral interventions may clearly bear a relation to that purpose. Accordingly, no absolute ban on the use of such consequences in the criminal justice system can be anticipated.[128] Certainly *Vitek v. Jones* should not be read to establish any broad prohibition. The argument that behavioral interventions may constitute far heavier penalities for crimes than traditional punishment has been previously noted.[129] When that is the case it may be arguable that even though a traditional penalty under a specific circumstance would not offend due process, the more intrusive use of behavioral technology may not bear the necessary relation to the penal purpose.

Another tenet of the due process of law limitation is that;

> [E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.[130]

Arguably, traditional punishment sanctions are often less drastic means to achieve the same criminal law purposes than are involuntary behavioral interventions. In order to advance this kind of argument beyond the stage of generality, one must specify more precisely the aims of the criminal law and in what respect one type of response to crime is a more drastic means of achieving the same end as is some alternative

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Id. at 736-38 (footnotes omitted) (emphasis in original). *See also* Griswold v. Connecticut, 381 U.S. 479, 497 (1965) (Goldberg, J., concurring). As is reflected in the text which follows, the substantive constitutional limitations on the power of government to utilize involuntary behavioral interventions as criminal sanctions are more likely to be seen as grounded in specific rights concepts which have developed through gradual constitutional litigation than in the general concept of "liberty" expressly protected by the due process clause. *See generally* L. TRIBE, *supra* note 116, at 564-75.

128. "Since confinement itself may be regarded as a crude form of behavior modification, it seems clear that there can be no general prohibition against a governmental decision to subject persons who have caused harm to at least some such techniques." L. TRIBE, *supra* note 116, at 911.

129. *See* note 115 *supra* and accompanying text.

130. Shelton v. Tucker, 364 U.S. 479, 488 (1960). The least drastic means principle constitutes a limitation of wide application in many areas of constitutional litigation. *See, e.g.,* Hoffman & Foust, *Least Restrictive Treatment of the Mentally Ill: A Doctrine in Search of Its Senses*, 14 SAN DIEGO L. REV. 1100 (1977); Struve, *The Less-Restrictive-Alternative Principle and Economic Due Process*, 80 HARV. L. REV. 1463 (1967); Wormuth & Mirkin, *The Doctrine of the Reasonable Alternative*, 9 UTAH L. REV. 254 (1964). Thus, whether the constitutional limitation involved is grounded on substantive due process or some other theory, the least drastic means principle may become relevant.

response. In this manner, much of the philosophical exchange which is engendered directly by the criminal law theory debate, especially considerations of utility and proportionality, may be incorporated into the constitutional counterpart through the due process clause.

The argument for substantive limitations is strengthened by recent constitutional cases which recognize individual rights in terms more specific than those in *Jackson v. Indiana*.[131] These theories of rights of privacy,[132] freedom of expression[133] and mentation,[134] have been the main ones utilized in the controversial battle over the right of civilly committed persons against involuntary treatment.[135] Their application to the corresponding rights of prisoners will turn on whether a criminal conviction and sentence is viewed as leaving the offender with remnants of those rights sufficient to support the same kinds of arguments now being advanced on behalf of civilly committed individuals.[136] The resolution of that issue depends on the appropriate ends of the criminal justice system, and the extent to which those ends are served by particular behavioral interventions. Thus, the constitutional source of limitation may vary depending on which theory is posited, but the nature of the argument remains essentially unchanged from that suggested by *Jackson*.

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131. *See* note 127 *supra*.

132. *See, e.g.,* Roe v. Wade, 410 U.S. 113, 152-53 (1973).

133. The source of this right, of course, is the first amendment, which expressly addresses only the power of the Congress. The freedom of expression guaranteed by the first amendment also constitutes a limitation on the power of the state through judicial construction of the due process clause. *See* Fiske v. Kansas, 274 U.S. 380 (1927). The Supreme Court has held that prisoners do enjoy qualified first amendment freedoms. *See* Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974). *Cf.* Procunier v. Martinez, 416 U.S. 396 (1974) (holding prison mail censorship regulations unconstitutional, but grounding the holding primarily on the first amendment rights of outsiders wishing to communicate with inmates).

134. *See* Stanley v. Georgia, 394 U.S. 557, 565 (1969) ("Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds."); Kaimowitz v. Michigan Dep't of Mental Health, No. 73-19434 - AW (Mich. Cir. Ct. 1973) (holding that the first amendment protects a person's mental processes because they are essential to the generation and expression of ideas).

135. *See, e.g.,* Rogers v. Okin, 478 F. Supp. 1342 (D. Mass. 1979) (right to privacy); Rennie v. Kline, 462 F. Supp. 1131, 1142-45 (D.N.J. 1978) (considering each of the theories mentioned in the text but relying ultimately on the right to privacy); Kaimowitz v. Michigan Dept of Mental Health, No. 73-19434-AW (Mich. Cir. Ct. 1973) (first amendment rights, alternative holding); Plotkin, *Limiting the Therapeutic Orgy: Mental Patients' Right to Refuse Treatment*, 72 NW. U.L. REV. 461 (1978).

136. A recent Supreme Court opinion makes it clear that a criminal sentence of confinement does not extinguish all constitutional rights of the offender. *See* Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974).

A similar result can be anticipated from an analysis under the equal protection clause.[137] For the most part, the state does not impose coercive behavioral interventions unless the person to be affected is perceived, typically through a detailed civil commitment process, as severely disabled by an abnormal mental condition.[138] There is a kind of antithesis between the criminal and the involuntary mental patient which, if it were entirely accurate, would render a person included within one category exempt from the other.[139] The one is subject to extraordinary governmental action because his or her socially unacceptable behavior is the product of responsible choice; the other because his or her socially unacceptable behavior is the product of mental disability which is believed to preclude responsible choice. When the state, as a consequence of a criminal conviction, claims the authority to utilize coercive behavioral interventions without regard to whether the offender, as a responsible agent, meets the standards for ordinary civil

137. "No State shall . . . deny to any person within its jurisdiction the equal protection of laws." U.S. CONST. amend. XIV, § 1.

138. *See generally* THE MENTALLY DISABLED AND THE LAW (S. Brakel & R. Rock ed. 1971).

139. The contrast, however, is not at all complete in practice. Under the dominant form of the insanity defense "[a] person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law." MODEL PENAL CODE § 4.01(1) (Proposed Official Draft, 1962) (alternative language omitted). Standards for civil commitment, while they vary greatly among jurisdictions, see THE MENTALLY DISABLED AND THE LAW 36-41 (S. Brakel & R. Rock ed. 1971), do not describe a class of persons which corresponds even approximately to the class excluded from criminal responsibility by the insanity defense. For example, in the District of Columbia § 4.01(1) has been judicially adopted as the standard for the insanity defense. *See* United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972). The standard for involuntary civil commitment, however, is expressed in D.C. CODE § 21-545(b) (1973):

> If the court or jury finds that the person is mentally ill and, because of that illness, is likely to injure himself or other persons if allowed to remain at liberty, the court may order his hospitalization for an indeterminate period, or order any other alternative course of treatment which the court believes will be in the best interests of the person or of the public.

Under these standards taken together, a person who engages in otherwise criminal behavior may fall into one of the following categories: 1) Criminally responsible, not subject to civil commitment, 2) subject to commitment, not criminally responsible, 3) both criminally responsible and subject to commitment *(e.g.,* mentally ill and dangerous, but sufficiently able both to appreciate the criminality of his or her conduct and to conform to the requirements of the law), or 4) neither criminally responsible, nor subject to commitment. The last category arguably is illustrated by the case of a mentally disordered person who is charged with commission of a property offense but who has displayed no tendency "to injure himself or other persons." *Cf.* People v. Wetmore, 22 Cal. 3d 318, 583 P.2d 1308, 149 Cal. Rptr. 265 (1978) (defendant charged with burglary allegedly acted under a delusion that he owned the apartment which he was charged with entering unlawfully). In any event, the legal paradigms of the criminal and the involuntary mental patient are theoretical opposites.

commitment,[140] it makes a blatant differentiation between prisoners and nonprisoners concerning liability to coercive behavioral interventions. This is the kind of distinction at issue in *Baxstrom v. Herold*.[141] Under the *Baxstrom* equal protection pronouncement, "a distinction made [must] have some relevance to the purpose for which the classification is made."[142] Arguably, criminal offenders are distinguishable from ordinary citizens on several grounds that are relevant to the state's power to resort to coercive behavioral interventions. It should be anticipated, however, that, as in *Baxstrom*, these distinctions will not give the state carte blanche to subject convicted offenders to behavioral interventions. The most important step in the equal protection analysis will be to determine the legitimate purposes of a criminal conviction. To the extent that the social rehabilitation of offenders serves any of those purposes, the state may have a basis for utilizing coercive behavioral therapies in its correctional system without regard to the limitations which prevent their use against the population at large.[143]

140. As discussed in note 139 *supra*, the fact that the offender meets the test for criminal responsibility does not insure that he or she would not also meet the standards for civil commitment. Moreover, the criminal responsibility test is concerned with what the prisoner's mental capacity was in the past when the crime was committed, while the civil commitment standard is concerned with his or her mental condition at the time when involuntary commitment is to occur, and in the future. The topic of concern here, however, is the use of a criminal conviction (for past conduct) as authority for both punitive and involuntary therapeutic sanctions. If that practice is allowed, the offender is made to suffer the adverse consequences associated with both responsibility and nonresponsibility simply by virtue of commission of a crime and without regard to whether the otherwise applicable standard for the imposition of involuntary therapy is satisfied.

141. 383 U.S. 107 (1966). In *Baxstrom* the precise distinction challenged was that prisoners nearing the expiration of their sentences could be civilly committed without being afforded the same procedural safeguards as nonprisoners.

142. *Id.* at 111. The equal protection standard expressed in *Baxstrom* may be described as one of minimum rationality. More searching standards of review are frequently invoked when the challenged classification is viewed as "burdening fundamental rights, or suggesting prejudice against racial or other minorities." L. TRIBE, *supra* note 116, at 1000. *See generally* Gunther, *The Supreme Court 1971 Term—Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8-24 (1972). Although fixing on the precise equal protection standard to be employed is not essential for purposes of the summary analysis undertaken in this Article, it would be possible to argue for a more stringent standard whenever a governmental discrimination concerns the use of coercive behavioral interventions. *Cf.* Skinner v. Oklahoma, 316 U.S. 535, 546 (1942) (Jackson, J., concurring) ("There are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority—even those who are guilty of what the majority define as crimes.").

143. It is interesting that although the equal protection argument was initially utilized in the *Vitek v. Jones* litigation, it did not form a basis for the district court's opinion, Miller v. Vitek, 437 F. Supp. 569 (D. Neb. 1977), and was not pursued by Jones before the Supreme Court. *See* Brief for Appellee at 40-41, Vitek v. Jones, 445 U.S. 480 (1980). An equal protection theory based di-

The eighth amendment prohibits the infliction of cruel and unusual punishments.[144] Although the provision has not been invoked frequently to bar specific practices imposed as the result of otherwise valid criminal convictions, it does provide a viable check against extreme penalties.[145] To an even greater extent than is true of the other constitutional doctrines, the standards for testing a penalty against the eighth amendment are vague enough to allow participants in constitutional litigation to engage in the same kind of discourse as if the matter were to be debated simply as one of criminal law theory.[146] There is, however, a sense, probably attributable to the infrequency and discomfort with which courts have found a punishment to be cruel and unusual,[147] that the eighth amendment provides merely a weapon of last resort in all but the most egregious cases.

Former Chief Justice Warren's famous characterization of the prohibition in *Trop v. Dulles*[148] conveys the degree to which many of the fundamental concerns of criminal law theory, especially those relating to the proportionality principle, may achieve constitutional dimension under eighth amendment analysis.

> The exact scope of the constitutional phrase "cruel and unusual" has not been detailed by this Court. But the basic policy reflected in these words is firmly established in the Anglo-American tradition of criminal justice. The phrase in our Constitution was taken directly from the English Declaration of Rights of 1688, and the principle it represents can be traced back to the Magna Carta. The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. Fines, imprisonment and even execution may be imposed depending upon the enormity of the

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rectly on *Baxstrom v. Herold* had been successfully advanced before lower federal courts in earlier cases factually similar to *Vitek v. Jones*. *See* Matthews v. Hardy, 420 F.2d 607 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1010 (1970); United States *ex rel.* Schuster v. Herold, 410 F.2d 1071 (2d Cir.), *cert. denied*, 396 U.S. 847 (1969); Chesney v. Adams, 377 F. Supp. 887 (D. Conn. 1974), *aff'd*, 508 F.2d 836 (1975).

144. The cruel and unusual punishment clause of the eighth amendment has been held to apply to the states through the fourteenth amendment. *See* Robinson v. California, 370 U.S. 660 (1962).

145. *See* Rummel v. Estelle, 445 U.S. 263 (1980). *See also* Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989 (1978).

146. *See, e.g.*, Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 STAN. L. REV. 838 (1972); Note, *Aversion Therapy: Punishment As Treatment and Treatment as Cruel and Unusual Punishment*, 49 S. CAL. L. REV. 880 (1976).

147. See Radin, *supra* note 145, at 997, 1010, 1030-31.

148. 356 U.S. 86 (1958).

> crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect. . . . [T]he words of the Amendment are not precise, and . . . their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.[149]

Several distinct, but related, constitutional theories are available to impose substantive limitations on the use of behavioral interventions in the criminal justice system. In general, a two stage analysis will be necessary concerning the use of any particular behavioral interventions. First, it must be determined which governmental aims for the criminal justice system are relevant and legitimate. Second, the value to the state of serving those ends by the means proposed must be balanced against the individual interests affected by the particular intervention. These considerations inevitably call for resolution of the same value conflicts which are involved when the matter is treated from the more openly philosophical perspective of criminal law theory.

III. EPILOGUE

My central purpose has been to offer a tentative model for analyzing the substantive limitations on the state's power to respond to criminal behavior by imposing coercive behavioral interventions on the offender. The model is tentative in the sense that for the purpose of making the analysis I have accepted certain crucial propositions concerning both criminal and constitutional law, while recognizing that the validity of those propositions may legitimately be debated. The analysis is also tentative in that I have left unresolved many conflicts between important principles and values. It is a model in the sense that my purpose has not been to settle the issue raised here concerning governmental resort to coercive behavioral interventions, but to propose a prototype for debating that issue. No final answers are intended to be given here. I realize that participants in the debate may modify or add to the legal propositions employed here, or substitute propositions which are in conflict with those accepted here. Others may employ a different philosophical, or constitutional, as the case may be, approach toward the question of justifications for criminal sanctions. Clearly, the conclusions that one reaches will be profoundly affected by such alterations. I hope that because the analysis is a workable model, it will be adaptable to such changes.

149. *Id.* at 99-101 (footnotes omitted).

Ultimately, whether framed in criminal or constitutional terms, the issue is whether or to what extent the state may treat a criminal conviction as a sufficient basis for the psychological, as well as the physical, imprisonment of the offender. I have been unwilling to state in the body of this Article explicit conclusions about that issue because it seemed more important to outline the nature of the debate which must be fostered than to argue for the vindication of any particular set of values. I do, however, want to present briefly my present predilections. In the first place, I do not see how the same law which utilizes lengthy prison sentences as the standard sanction against behavior deemed seriously criminal, and which tolerates capital punishment in limited circumstances, can be expected to yield any complete bar against the use of behavioral interventions. Objections, which may be founded in adherence to the responsible agent doctrine alone or in retributive principles, seem merely academic. The operative considerations must almost certainly flow from the simple utilitarian principle that a criminal sanction which produces more harm than good cannot be tolerated.

With this in mind, it seems certain that at least some coercive uses of behavioral science technology in corrections will provide scant basis for objection. It has been noted that the practice of imprisonment is itself a form of aversive conditioning.[150] In addition, if there is any truth in the behaviorist's observation that virtually all responses to behavior have a conditioning effect, then it scarcely seems objectionable that prisons be structured so that the institutional responses to the behavior of inmates generally have intended and presumably socially constructive effects, rather than unintended and haphazard conditioning effects.[151]

Beyond these nearly trivial instances of coercive resort to behavioral interventions, I think there are sound reasons for a presumption against the wholesale use of behavioral interventions as criminal sanctions. In the first place, I think that the costs they entail in terms of lost human dignity and, if they are successful, reduced human autonomy, constitute heavy penalties to the individual affected. Thus, for the same reasons that we do not indiscriminantly impose severe traditional punishments on most lawbreakers, we should be wary of the use of coercive behavioral interventions. For a utilitarian, of course, an analysis of cost alone is never sufficient. The benefits of most involuntary psychi-

150. *See* note 128 *supra*.

151. *See generally* B.F. SKINNER, BEYOND FREEDOM AND DIGNITY (1971).

atric treatments and other coercive behavioral interventions are highly speculative. Few, and perhaps none that are likely to give rise to any significant controversy in a correctional context, are validated by the kind of respectable hard data which the law ought to demand.[152] Thus, at least until the state of psychiatric and behavioral science technology advances markedly, only in rare instances will the probability of benefit to society or individual even arguably outweigh the certainty of the costs.[153] Moreover, even if highly reliable and effective behavioral and psychiatric technologies now exist or are developed in the future, we should pause before employing them as powerful tools to enforce conformity to the many behavioral norms of a criminal justice system, which is not in all respects substantively just and procedurally fair, and which places an inequitable burden on individuals whose places in our society have been arbitrarily determined by the accidents of class, race, and disability.

The danger to be most feared is that the legal decisionmakers may be reluctant to attach concrete weight to the values of dignity and autonomy. Unless those values are made truly significant in the balancing calculation, the law's allegiance to the responsible agent doctrine is hardly more a shield for the individual against the abuses of government than is the determinism of the behavioral sciences.[154]

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152. The extent to which the available data is adequate to show that any practice is sufficiently effective to justify its coercive use in a correctional context may be subject to much argument. It is clear, however, that the behavioral science techniques are still at an early stage, with their effectiveness subject to serious doubt. *See generally* J. ZISKIN, COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY (2d ed. 1975); Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in Courtroom*, 62 CALIF. L. REV. 693 (1974). *See also* Morse, *supra* note 92, at 542 n.25. Even Dr. Alan Stone, one of the most careful and persuasive spokespersons for the use of coercive psychiatry, apparently does not claim that cogent data shows that existing psychiatric practices are sufficiently reliable and valid for legal purposes. Rather, he merely sketches an untested and incomplete model which he maintains could result in the successful separation of that portion of psychiatry which is sufficiently reliable and valid for legal purposes from that which is not. *See* A. STONE, MENTAL HEALTH AND LAW: A SYSTEM IN TRANSITION (1976). I shall not attempt to assess whether any particular aspects of psychiatric and behavioral science learning are adequate for application to legal questions. I do, however, stress that the final judgment must be a matter for the law, not science. *See* Morse, *supra* note 92.

153. I do not mean to imply that supposed benefits to the individual who is the subject of a behavioral intervention can ever justify the use of coercive intervention. The issue raised by that proposition has been regularly debated at least since the time of John Stuart Mill. *See* LIMITS OF LIBERTY: STUDIES OF MILL'S ON LIBERTY (P. Radcliff ed. 1966).

154. "[I]t is crucial to keep in mind . . . the positive side of the criminal law. It not only provides for the punishment of the guilty, it also protects the rest of us against official interference in the conduct of our lives . . . ." Kadish, *supra* note 91, at 273, 288.