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AN EXAMINATION OF THE PURPOSES OF INVOLUNTARY CIVIL COMMITMENT

JOHN Q. LA FOND*

Society is increasingly ambivalent about the propriety of coercive intervention by the state in the lives of the mentally ill.¹ Litigation concerning the standards and procedures for involuntary civil commitment² and the scope of the state's authority following commitment³ has virtually exploded in the last two decades and shows no sign of abating. This explosion has caused a re-examination of whether the state interests purportedly furthered by coercive hospitalization of the mentally ill justify the loss of liberty and other adverse consequences suffered by involuntary patients.

Recently many legislatures⁴ and courts⁵ have limited coercive

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1. See, e.g., Szasz, *Theology of Therapy: the Breach of the First Amendment through the Medicalization of Morals*, 5 N.Y.U. REV. L. & SOC. CHANGE 127 (1975); Chambers, *Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives*, 70 MICH. L. REV. 1107 (1972).

2. See, e.g., *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded*, 414 U.S. 473 (1974), *order on remand*, 379 F. Supp. 1376 (1974), *vacated and remanded on other grounds*, 421 U.S. 957 (1975), *order reinstated on remand*, 413 F. Supp. 1318 (1976).

3. See, e.g., *Rennie v. Klein*, 462 F. Supp. 1131 (D.N.J. 1978) and *Rogers v. Okin*, 478 F. Supp. 1342 (D. Mass. 1979), *aff'd in part and rev'd in part*, 634 F.2d 650 (1st Cir. 1980), *vacated and remanded sub nom. Mills v. Rogers*, 50 U.S.L.W. 4676 (U.S. S. Ct. June 18, 1982).

4. ALA. CODE § 22-52-1, 10 (Supp. 1982); ARIZ. REV. STAT. ANN. §§ 36-501, 520 (Supp. 1980); CAL. WELF. & INST. CODE § 5150 (West Supp. 1980); CONN. GEN. STAT. ANN. §§ 17-176, 183 (West Supp. 1981); GA. CODE ANN. § 88-501 (Supp. 1981); HAWAII REV. STAT. §§ 334-59, 60 (Supp. 1980); IDAHO CODE ANN. §§ 66-317, 329 (Supp. 1981); ILL. REV. STAT. ch. 91 ½, § 1-119 (Supp. 1980); IND. CODE ANN. § 16-14-9.1-1 (Burns Supp. 1981); IOWA CODE ANN. § 229.11 (West Supp. 1980); KAN. STAT. ANN. §§ 59-2908, 2909 (Supp. 1980); KY. REV. STAT. ANN. §§ 202A.030, .040 (Baldwin Supp. 1980), LA. REV. STAT. ANN. §§ 28-2, 28-54 (West Supp. 1980); ME. REV. STAT. ANN. tit. 34, §§ 2332A, 2333 (Supp. 1981); MD. ANN. CODE art. 59, §§ 12, 22 (1981), MASS. GEN. LAWS ANN. ch. 123, § 12 (West Supp. 1980); MICH. COMP. LAWS ANN. § 330.1401 (Supp. 1980); MINN. STAT. ANN. § 253A.04 (West Supp. 1980), MONT. REV. CODE ANN. §§ 53-21-102, 129 (Supp. 1979); NEB. REV. STAT. §§ 83-1009,

state intervention to police power commitment of mentally ill individuals who pose a threat of harm to themselves or others. In so doing, they have prevented the state from exercising its traditional *parens patriae* authority to care for those mentally ill persons unable to act in their own best interest. Commentators have generally approved of this emerging limitation on the state's commitment authority and, thus, on the purposes which can properly be furthered by such state action.⁶

This article will examine the purposes sought to be served by the involuntary commitment of the mentally ill. It will argue that: (1) police power commitments based solely on dangerousness to self or others should not be permitted unless predicated on a recent dangerous act; and (2) commitments solely for a therapeutic purpose should, under limited circumstances, be permitted.

1020, 1037 (Supp. 1978); NEV. REV. STAT. §§ 433.194, 433A-170, 200 (1979); N.H. REV. STAT. ANN. §§ 135-B: 19, 20 (Supp. 1978); N.J. STAT. ANN. §§ 30: 4-23, 25, 26.3 (West Supp. 1979); N.M. STAT. ANN. § 43-1-10 (1979); N.Y. MENTAL HYG. LAW §§ 9.37, 9.39, 9.41, 9.43 (McKinney Supp. 1978); N.C. GEN. STAT. §§ 122-58.2, 58.3 (Supp. 1981); N.D. CENT. CODE §§ 25-03.1-02, 09 (Supp. 1979); OKLA. STAT. ANN. tit. 43A, § 3 (West Supp. 1980); ORE. REV. STAT. § 426, 175 (Supp. 1979); PA. STAT. ANN. tit. 50, §§ 7301, 7302, 7303 (Purdon Supp. 1981); S.D. CODIFIED LAWS ANN. § 27A-10-1 (Supp. 1981); TENN. CODE ANN. § 33-604 (Supp. 1981); UTAH CODE ANN. § 64-7-36 (Supp. 1981); VT. STAT. ANN. tit. 18, §§ 7101, 7504 (Supp. 1981); W. VA. CODE § 27-5-2 (Supp. 1981); WIS. STAT. ANN. §§ 51.15, 51.20 (West Supp. 1981); WYO. STAT. §§ 25-3-101, 110, 112 (1981). Many states define "gravely disabled" as an inability to provide essential human needs such as food, clothing or shelter. See, e.g., CAL. WELF. & INST. CODE § 5008(h) (Supp. 1980). Failure to provide these necessities will inevitably cause serious physical harm to the individual making him dangerous to himself. This aforementioned catalogue includes those states which define "gravely disabled" in this restrictive manner or effectively require the state to establish the same functional facts.

5. See, e.g., *Stamus v. Leonhart*, 414 F. Supp. 439 (S.D. Iowa 1976); *Bension v. Meredith*, 455 F. Supp. 662 (D.D.C. 1978); *Suzuki v. Yuen*, 438 F. Supp. 1106 (D. Haw. 1977), *modified*, 617 F.2d 173, (1980); *Lynch v. Baxley*, 386 F. Supp. 378 (M.D. Ala. 1974), *rev'd*, 651 F. 2d 387 (1981); *Warren v. Harvey*, 472 F. Supp. 1061 (D. Conn. 1979), *cert. denied*, 449 U.S. 902 (1980). These cases have generally held that *parens patriae* commitments violate substantive due process or are unconstitutionally vague. See notes 77-97 *infra* and accompanying text.

6. See, e.g., Comment, *Overt Dangerous Behavior as a Constitutional Requirement for Involuntary Civil Commitment of the Mentally Ill*, 44 U. CHI. L. REV. 562 (1977) [hereinafter cited as Comment, *Overt Dangerous Behavior*], and DuBose, *Of the Parens Patriae Commitment Power and Drug Treatment of Schizophrenia: Do the Benefits to the Patient Justify Involuntary Treatment?*, 60 MINN. L. REV. 1149 (1976) [hereinafter cited as DuBose, *Parens Patriae Commitment*].

I. THEORIES OF INVOLUNTARY COMMITMENT: A BRIEF OVERVIEW

A. *Police Power Commitment*

The state possesses authority under its police power to prevent harm to the community.⁷ Thus, the legislature has wide latitude to enact laws designed to protect the public health, safety and welfare. Courts have traditionally given great deference to legislative judgments concerning the appropriate exercise of this power.⁸

The power of the state to confine mentally ill persons who pose imminent danger to themselves or to third persons was established early at common law.⁹ The common law has since been superseded by statutory codification of the state's commitment power. Currently, most states authorize temporary emergency commitment of persons deemed mentally ill and dangerous to self or to others.¹⁰ Some states permit non-judicial temporary commitment

7. The state in its sovereign capacity has authority to enact laws which will protect the public health, safety, morals, and welfare. *See, e.g.,* *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). In order to meet constitutional requirements, a state must exercise this authority to further legitimate public interests by means which are rationally related to achieving that purpose and which do not unduly intrude upon individual rights. When the state action significantly intrudes upon fundamental liberties or creates a suspect classification the state interest sought to be advanced must be compelling and the means used must be necessary to achieve the objective. *See* *Developments in the Law, Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1223, 1224 (1974) [hereinafter cited as *Developments—Civil Commitment*].

8. *See Williamson v. Lee Optical*, 348 U.S. 483 (1955), *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

9. *See* S. Brakel & R. Rock, *The Mentally Disabled and the Law*, 34 (1971) and *Developments—Civil Commitment*, 1222-45. Commitment of a mentally ill person as dangerous to himself because he may commit suicide, inflict serious physical damage on himself, or be unable to sustain a basic life support system is considered to be an exercise primarily of the state's police power to prevent harm to the community. It can also be considered to be an exercise of the state's *parens patriae* authority since the state is implicitly acting on behalf of a person incapable of seeking his own best interest.

10. Most states authorize temporary emergency commitment of persons determined to be mentally ill and dangerous to others. *See* ALASKA STAT. § 47.30.030 (Supp. 1979); ARIZ. REV. STAT. ANN. § 36-526 (Supp. 1980); ARK. STAT. ANN. § 59-1406 (Supp. 1981); CAL. WELF. & INST. CODE § 5150 (West Supp. 1980); COLO. REV. STAT. § 27-10-105 (Supp. 1980); CONN. GEN. STAT. ANN. § 17-183 (West Supp. 1978); DEL. CODE ANN. tit. 16, § 5122 (Supp. 1978); FLA. STAT. ANN. § 394.463 (West Supp. 1981); GA. CODE ANN. § 88-504.2 (Supp. 1981); HAWAII REV. STAT. § 334-59 (Supp. 1980); IDAHO CODE ANN. § 66-326 (Supp. 1981); ILL. REV. STAT. ch. 91 ½, § 3-600 (Supp. 1981); IND. CODE ANN. § 16-14-9.1-7 (Burns Supp. 1981); IOWA CODE ANN. § 229.22 (West Supp. 1980); KAN. STAT. ANN. § 59-2908 (Supp. 1980); KY. REV. STAT. ANN. § 202A.040 (Baldwin Supp. 1980); LA. REV. STAT. § 28: 53 (Supp. 1981); ME. REV. STAT. ANN. tit. 34, § 2332-A (Supp. 1981); MD. ANN. CODE art. 59, § 22 (Supp. 1981); MASS. GEN. LAWS ch. 123, § 12 (West Supp. 1981); MICH. COMP. LAWS ANN. § 330.1427

by order of a mental health professional¹¹ after the professional has diagnosed an individual as suffering from mental illness and as being dangerous to self or others.¹² Some states additionally require the state to prove that the individual has committed a recent overt act which manifests his dangerousness in a concrete manner.¹³ A few courts have also imposed this requirement.¹⁴ Not all

(Supp. 1980); MINN. STAT. ANN. § 253A.04 (West Supp. 1980); MISS. CODE ANN. § 41-21-71 (Supp. 1980); MONT. REV. CODE ANN. § 53-21-129 (1979); NEB. REV. STAT. §§ 83-1020, 1021 (Supp. 1978); NEV. REV. STAT. § 433A.160 (Supp. 1979); N.H. REV. STAT. ANN. § 135-B: 19 (Supp. 1979); N.J. STAT. ANN. § 30.4-26.3 (West Supp. 1981); N.M. STAT. ANN. § 43-1-10 (Supp. 1978); N.Y. MENTAL HYG. LAW § 9.39 (McKinney Supp. 1978); N.C. GEN. STAT. § 122-58.18 (1981); N.D. CENT. CODE § 25-03.1-25 (Supp. 1979); OHIO REV. CODE ANN. § 5122.10 (Page Supp. 1981); OKLA. STAT. ANN. tit. 43A § 52.1(B) (West Supp. 1980); OR. REV. STAT. §§ 426.175, .215 (1979); PA. STAT. ANN. tit. 50, §§ 7301, 7302 (Purdon Supp. 1981); S.C. CODE § 44-17-410 (Supp. 1980); S.D. CODIFIED LAWS § 27A-10-3 (Supp. 1977); TENN. CODE ANN. § 33-603 (Supp. 1981); TEX. REV. CIV. STAT. ANN. art. 5547-28 (Vernon Supp. 1980); UTAH CODE ANN. § 64-7-34 (Supp. 1981); VT. STAT. ANN. tit. 18, §§ 7504, 7505 (Supp. 1981); WASH. REV. CODE ANN. § 71.05.150 (Supp. 1981); WIS. STAT. ANN. § 51.15 (West Supp. 1981); WYO. STAT. § 25-3-110 (1977).

11. The term "mental health professional" as used in this article refers to any person with training in the field of human behavior who is authorized by statute to commit or recommend commitment of persons to mental health facilities. The term includes persons with a wide range of competence and training in the mental health field. See, e.g., WASH. REV. CODE ANN. § 71.05.020 (1975) which includes within the definition such diverse professionals as psychiatrists and persons holding a master's degree in social work.

12. See, e.g., FLA. STAT. ANN. § 394.467 (West Supp. 1980).

13. See ALA. CODE § 22-52-10 (Supp. 1979); GA. CODE § 88-501(v) (1981); HAWAII REV. STAT. § 334-1 (1976); IDAHO CODE § 66-317(1) (1981); MICH. STAT. ANN. § 330.1401 (West Supp. 1980); MONT. CODE ANN. § 53-21-102(14) (1981); NEB. REV. STAT. § 83-1009 (Supp. 1978); NEV. REV. STAT. § 433.194 (Supp. 1979); N.H. REV. STAT. ANN. §§ 135-B: 19, 20 (1979); N.Y. MENTAL HYG. LAW §§ 9.37, 9.39 (McKinney 1979); N.C. GEN. STAT. §§ 122-58.2, 58.3 (Supp. 1981); N.D. CENT. CODE §§ 25-03.1-02(11), 25-03.1-09 (Supp. 1979); OHIO REV. CODE ANN. §§ 5122.01(B), 10, 11 (Supp. 1981); OKLA. STAT. ANN. tit. 43A, § 3(o) (West Supp. 1980); PA. STAT. ANN. tit. 50, § 7301 (Purdon Supp. 1981); TENN. CODE ANN. §§ 33-603, 604 (Supp. 1981); VT. STAT. ANN. tit. 18, § 7101(17) (Supp. 1981); WIS. STAT. ANN. §§ 51.15, 51.20 (West Supp. 1981). As of 1980 only eighteen states require the state to prove that the individual has committed a recent act manifesting dangerousness or has threatened to do so, thereby creating a reasonable apprehension of such act being committed.

14. *Lynch v. Baxley*, 386 F. Supp. 378 (M.D. Ala. 1974), *rev'd*, 651 F.2d 387 (5th Cir. 1981); *Suzuki v. Yuen*, 438 F. Supp. 1106 (D. Haw. 1977), *modified*, 617 F.2d 173 (9th Cir. 1980); *Doremus v. Farrel*, 407 F. Supp. 509 (D. Nev. 1975); *Warren v. Harvey*, 472 F. Supp. 1061, 1069 (D. Conn. 1979), *cert. denied*, 449 U.S. 902 (1980), *Colyar v. Third Judicial Dist. Court*, 469 F. Supp. 424 (D. Utah 1979). *But see United States ex rel. Mathew v. Nelson*, 461 F. Supp. 707 (N.D. Ill. 1978); *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded*, 414 U.S. 473 (1974), *order on remand*, 379 F. Supp. 1376 (1974), *vacated and remanded on other grounds*, 421 U.S. 957 (1975), *order reinstated on remand*, 413 F. Supp. 1318 (1976). For an excellent analysis of the merits of requiring recent overt behavior that manifests dangerousness, see Comment, *Overt Dangerous Behavior supra* note 6.

courts limit the concept of dangerousness to probable conduct which will seriously harm the individual or other persons. Indeed, the range of behavior over which courts have permitted the state to assert its police power is quite broad, ranging from the seriously harmful¹⁵ to the almost mundane.¹⁶

In theory, a person committed pursuant to the police power of the state can be confined against his will until he is no longer dangerous to others or to himself.¹⁷ A few courts have recently indicated that a person committed as mentally ill and dangerous to others or to self is entitled to treatment designed to alleviate his condition, but it is unlikely that this view will be accepted as the majority view.¹⁸

15. See, e.g., *Goldy v. Beal*, 429 F. Supp. 640 (M.D. Pa. 1976) (The court, in a stay order, established attempted suicide as one possible criterion for involuntary commitment.). A statutory provision for involuntary commitment including this criterion was enacted in 1976. PA. STAT. ANN. tit. 50, § 7301 (Purdon Supp. 1979).

16. In *People v. Williams*, 47 Ill. App. 3d 861, 869, 365 N.E.2d 404, 411 (1977), the court seemingly included within the definition of dangerous a mentally ill person who would be unable to "function within the community, rent an apartment, or hold a job."

17. Perhaps the classic statement of the inherent limitation on the state's power to confine is contained in the frequently cited case of *In re Oakes*, 8 Law Rep. 122 (Mass. 1845):

[T]he right to restrain an insane person of his liberty is found in that great law of humanity which makes it necessary to confine those whose going at large would be dangerous to themselves or others And the necessity which creates the law creates the limitation of the law. The question must then arise in each particular case whether a patient's own safety, or that of others, require that he should be restrained for a certain time, and whether restraint is necessary for his restoration or will be conducive thereto. The restraint can continue as long as the necessity continues. This is the limitation and the proper limitation.

Id.

18. *People v. Sansone*, 18 Ill. App. 3d 315, 309 N.E.2d 733 (1974), *leave to appeal denied*, 56 Ill. 2d 584; *People v. Sharkey*, 60 Ill. App. 3d 257, 376 N.E.2d 464, *in accord is In re Ottolini*, 73 Ill. App. 3d 971, 392 N.E.2d 736 (1979). Another court has concluded that a dangerous person whose mental illness is not amenable to treatment can be committed even though no treatment will be available provided that, should treatment subsequently become available, it will be afforded to such a person. *Lynch v. Baxley*, 386 F. Supp. 378 (M.D. Ala. 1974), *rev'd*, 651 F.2d 387 (5th Cir. 1981). In *Robinson v. California*, 370 U.S. 660 (1962), the Court intimated that treatment for such individuals might be required by the Constitution. In striking down a California statute which made it a criminal offense to be addicted to the use of narcotics, the Court said:

A state might impose criminal sanctions, for example against the unauthorized manufacture, prescription, sale, purchase, or possession of narcotics within its borders. In the interests of discouraging the violation of such laws, or in the interest of the general health or welfare of its inhabitants, a state might establish a program of compulsory treatment for those addicted to narcotics. Such a

B. *Parens Patriae* Commitment

Under its *parens patriae* power,¹⁹ the state is empowered to act on behalf of mentally ill individuals who are incapable of protecting their own welfare. This power was recognized quite early in English Common Law.²⁰ Traditional legal devices for discharging this power are readily found in the law.²¹ States have chosen to exercise this commitment authority over a wide range of mental disabilities. Most *parens patriae* statutory schemes typically authorize involuntary commitment of persons who are mentally ill and as a consequence of such illness are: unable to make responsible treatment decisions;²² gravely disabled;²³ or unable to care for their personal safety.²⁴

When a person has become mentally incapacitated to the extent that he is unable to make important decisions concerning his

program of treatment might require periods of involuntary confinement.

But see Speece, *Preserving the Right to Treatment: A Critical Assessment and Constructive Development of Constitutional Right to Treatment Theories*, 20 *Ariz. L. Rev.* 1 (1978). It appears likely that the state can constitutionally commit against their will mentally ill persons who cannot provide the basic requirements of food, shelter and clothing by their own efforts or with the assistance of friends even though successful treatment of these individuals is very unlikely. Thus, in some cases purely custodial confinement without a therapeutic objective is probably constitutional even though no effective treatment is medically available. *See* O'Connor v. Donaldson, 422 U.S. 563 (1975) (Burger, J., concurring). *Compare* *In re Oseing*, 296 N.W.2d 797 (Iowa 1980).

19. Under its *parens patriae* authority, the sovereign, as the father of the country, acts in the best interest of all persons who have lost the capacity to act in their own best interests. *See* *Developments—Civil Commitment, supra* note 7, at 1207-22.

20. For an excellent scholarly opinion reviewing the history of the *parens patriae* power of the state in early English Common Law, *see* J. Neeley's opinion in *State ex rel. Hawks v. Lazaro*, 202 S.E.2d 109 (W. Va. 1974). Judge Neeley expresses skepticism concerning whose interest historically was really served under this authority. *Id.* at 118-19. *Cf.* *Kendall v. True*, 391 F. Supp. 413 (W.D. Ky. 1975) (The court held that the state should not have the unchecked power to commit involuntarily a person simply because he is mentally ill and has reduced capacities for reasoning and making choices. *Id.* at 417-18).

21. For example, guardianships of property of an incompetent who can no longer act in his own behalf is provided for by many states. *See* BRAKEL & ROCK, *supra* note 9, at 273.

22. DEL. CODE ANN. tit. 16, § 5003 (Supp. 1978).

23. CAL. WELF. & INST. CODE § 5200 (West 1972); IND. CODE ANN. § 16-14-9.1-3 (Burns Supp. 1979); NEV. REV. STAT. § 433.194 (1979); ARK. STAT. ANN. § 59-1404 (Supp. 1979). The Arkansas definition of gravely disabled is typical. "Gravely disabled refers to a person who is unable to provide for his or her own food, clothes, or shelter by reason of mental illness, disease, or disorder." ARK. STAT. ANN. § 59-1401 (Supp. 1979).

24. Louisiana's statutory scheme authorizes involuntary commitment of an individual if, as a result of mental illness, the person cannot "survive safely in freedom or protect himself from serious harm . . ." LA. REV. STAT. ANN. § 28: 54 (West Supp. 1980).

own welfare,²⁵ some states would terminate that person's right to liberty and his autonomous decision-making power and substitute a third person's judgment (usually that of a state mental health employee) for that of the mentally ill individual.²⁶ Substitution of one person's judgment for another's in deciding what environment and treatment will best serve the individual's interest confers substantial discretionary power on the surrogate decision-maker. This power frequently includes the authority to select the place in which the disabled person is to live,²⁷ what treatment, including medication, the person is to receive,²⁸ and, in certain situations, what civil and other legal rights the individual may exercise.²⁹

Emerging legal doctrines limit the scope of the substitute decision-maker's power to impose drastic treatment,³⁰ to administer

25. There is controversy over whether a mentally ill person is truly unable to make a responsible decision concerning his condition by selecting rationally from among available alternatives. See Livermore, Malmquist & Meehl, *On the Justifications for Civil Commitment*, 117 U. PA. L. REV. 75, 88 (1968) [hereinafter cited as Livermore, Malmquist & Meehl, *On Justifications*]. Some state statutes have set forth as criteria for commitment the inability to make responsible treatment decisions. See note 22 *supra*. The potential for circular reasoning in such a requirement is obvious since the refusal to accept treatment can be used as conclusive evidence of irresponsibility, which in turn justifies coerced treatment. *But see text & accompanying notes 132-47 infra*.

26. See text & accompanying notes 19-24 *supra* and Developments—Civil Commitment, *supra* note 7, at 1210-11.

27. A court appointed guardian, for example, may determine where the person adjudged mentally incompetent shall live, as long as the choice is made in good faith and with the welfare of the incompetent in mind. See *In re Spengler*, 282 Ill. App. 607 (1935); *Roberts v. Coffey*, 198 Kan. 695, 426 P.2d 30 (1967); *Grier v. Grier's Estate*, 252 Minn. 143, 89 N.W.2d 398 (1958); *Kuphal v. Kuphal*, 177 Misc. 255, 29 N.Y.S.2d 868 (1941); *Wilson v. Bearden*, 59 S.W.2d 214 (1933). The majority of state statutes do not explicitly confer such authority on a guardian. Thus, it is generally governed by the common law.

28. *But see* WASH. REV. CODE ANN. § 71.05.370 (1975) which limits such authority by conferring on involuntarily detained patients the right "[n]ot to consent to the performance of shock treatment or surgery, except emergency life-saving surgery, upon him, and not to have shock treatment or non-emergency surgery in such circumstances unless ordered by a court pursuant to a judicial hearing . . ." *Id.* at § 71.05.370(7). The statute further provides that the patient has the right "[n]ot to have psychosurgery performed on him under any circumstances." *Id.* at § 71.05.370(9). WASH. REV. CODE ANN. § 71.05.360(2) (1975) provides that "[e]ach person involuntarily . . . committed . . . shall have the right to adequate care and individualized treatment." *Id.* Thus, except for limitations on exceptionally intrusive treatment such as electroshock therapy or psychosurgery, broad treatment discretion is generally accorded treatment personnel. *But see notes 31 & 47 infra*.

29. See, e.g., WASH. REV. CODE § 71.05.360 and § 71.05.370 (1974).

30. See, e.g., *Kaimowitz v. Dept. of Mental Health* Civil No. 73-19, 434-AW (Cir. Ct. Wayne Co., Mich., July 10, 1973), reported in part in 2 *Pris. L. Rep.* 433 (1973) and 42 *U.S. L.W.* 2064 (1973). The opinion is reproduced in A. BROOKS, LAW, PSYCHIATRY, AND THE MENTAL HEALTH SYSTEM 902-24 (1974). The court refused to permit experimental psycho-

anti-psychotic medication to a patient who refuses it,³¹ to curtail the exercise of civil or other legal rights³² or to restrict unnecessarily the freedom of the individual.³³ These doctrines have generally not challenged the fundamental right of the surrogate decision-maker to act on behalf of the patient. They have simply limited the scope of his authority.

II. EARLY CRITICISMS OF BOTH POLICE POWER AND PARENS PATRIAE COMMITMENTS

Early criticisms of both police power and *parens patriae* commitments focused primarily on the alleged failure of most state commitment schemes to afford persons adequate procedural due process.³⁴ There was serious concern that the procedures employed in commitment proceedings did not result in accurate fact-finding and did not constitute appropriate adversarial decision-making. Most courts have concluded that involuntary civil commitment deprives an individual of his liberty and that the due process clause of the Fourteenth Amendment therefore requires that procedures employed to effect commitment must satisfy the fundamental requirements of procedural due process.³⁵ Over the last several de-

surgery to be performed on an involuntarily committed patient.

31. *Rennie v. Klein*, 462 F. Supp. 1131 (D.N.J.) and *Rogers v. Okin*, 478 F. Supp. 1342 (D. Mass. 1979), *aff'd in part and rev'd in part*, 634 F.2d 650 (1st Cir. 1980), *vacated and remanded sub nom. Mills v. Rogers*, 50 U.S.L.W. 4676 (U.S. S. Ct. June 18, 1982) (Involuntarily committed patients may refuse psychotropic medication in non-emergency situations.).

32. The general rule is that a guardian may not exercise a purely personal elective right of his ward. *Howard v. Imes*, 265 Ala. 298, 90 So. 2d 818 (1956); *Hendricks v. Grant County Bank*, 379 P.2d 693 (Okla. 1963).

33. Perhaps the most clearly articulated doctrine imposing such a limitation is the "least restrictive alternative" doctrine frequently imposed by courts. This doctrine requires that the freedom of a mentally ill individual be restricted no more than is necessary to achieve the purpose of the commitment. It can be grounded either in statute or in equal protection and substantive due process theories mandated by the Constitution. *See Lake v. Cameron*, 364 F.2d 657 (D.C. Cir. 1966); *Lynch v. Baxley*, 386 F. Supp. 378 (M.D. Ala. 1974), *rev'd*, 651 F.2d 387 (5th Cir. 1981); *Developments—Civil Commitment, supra* note 7, at 1240-49 and *Hoffman and Foust, Least Restrictive Treatment of the Mentally Ill: A Doctrine in Search of its Senses*, 14 SAN D.L. REV. 1100 (1977).

34. *See, e.g., Prochaska v. Brinegar* 251 Iowa 834, 102 N.W.2d 870 (1960); *Fhagen v. Miller*, 29 N.Y.2d 348, 278 N.E.2d 615 (1972); and *Logan v. Arafah*, 346 F. Supp. 1265 (D. Conn. 1972), *aff'd sub nom. Briggs v. Arafah*, 411 U.S. 911 (1973).

35. *See, e.g., Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded*, 414 U.S. 473 (1974), *order on remand*, 379 F. Supp. 1376 (1974), *vacated and remanded on other grounds*, 421 U.S. 957 (1975), *order reinstated on remand*, 413 F. Supp.

cedes, courts have consistently rejected the contention that since a *parens patriae* commitment was for the benefit of the patient and had a therapeutic objective, procedural due process was not required.³⁶ Supreme Court cases in analagous contexts persuaded courts to reject this argument.³⁷

In 1979 the Supreme Court, in *Addington v. Texas*,³⁸ explicitly held that the due process clause of the Fourteenth Amendment is applicable to involuntary commitment proceedings and that it requires states to establish the criteria for involuntary civil commitment by proof that is "clear and convincing."³⁹ It is not the purpose of the commitment or the theory under which the state seeks commitment that determines whether procedural due process must be afforded; rather, it is the nature of the interest affected—namely, the loss of liberty—that imposes the requirement.⁴⁰

1318 (1976); *Fhagen v. Miller*, 29 N.Y.2d 348, 278 N.E.2d 615 (1972). Until 1979, the Supreme Court had not specifically considered whether the due process clause of the Fourteenth Amendment was applicable to state commitment action. It had, however, considered it applicable to state action in analogous areas. *See, e.g., McNeil v. Director, Patuxent Inst.*, 407 U.S. 245 (1972) (holding procedural due process applicable to indeterminate commitment of alleged defective delinquent) and *In re Gault*, 387 U.S. 1 (1966) (procedural due process applicable to juvenile commitment). In *Addington v. Texas*, 441 U.S. 418 (1979), the Supreme Court held specifically that procedural due process under the Fourteenth Amendment is applicable to state involuntary commitment, and that, accordingly, the "clear and convincing" standard of proof must be used in such proceedings.

36. *See, e.g., Lessard v. Schmidt*, 349 F. Supp 1078, 1088 (E.D. Wis. 1972), *vacated and remanded*, 414 U.S. 473 (1974), *order on remand*, 379 F. Supp. 1376 (1974), *vacated and remanded on other grounds*, 421 U.S. 957 (1975), *order reinstated on remand*, 413 F. Supp. 1318 (1976).

37. *See, e.g., In re Gault*, 387 U.S. 1 (1967) (procedural due process must be afforded juveniles in delinquency proceedings, despite allegedly beneficent purposes of state action) and *Specht v. Patterson*, 386 U.S. 605 (1967) (procedural safeguards are required when the state seeks to commit a sexual offender to an indeterminate term).

38. 441 U.S. 418, 433 (1979).

39. The specific question before the Court in *Addington* was "what standard of proof is required by the Fourteenth Amendment in a civil proceeding brought under state law to commit an individual involuntarily for an indefinite period to a state mental hospital." *Id.* at 418.

40. In deciding which particular standard of proof is constitutionally required, the Court in *Addington* assessed both the individual's interest in liberty and the state's interests in providing care to mentally ill citizens who cannot care for themselves and in protecting the community. This balancing of interests was not necessary to decide whether procedural due process is applicable in the first instance to involuntary commitment proceedings. Rather, it was necessary to decide which party was to bear the risk of error in the fact-finding process and, consequently, which standard of proof must, as a constitutional minimum, be used. Seemingly, the Court requires the same standard of proof regardless of the

However, the Court also noted that not all procedural safeguards available to criminal defendants need be accorded persons being committed since there are differences between criminal prosecutions and civil commitment.⁴¹ Many state statutes governing involuntary civil commitment currently provide that persons whom the state seeks to commit must be afforded prior notice,⁴² an opportunity to be heard,⁴³ the right to a judicial hearing,⁴⁴ the right to counsel,⁴⁵ and the right to judicial review of an initial commitment.⁴⁶

In concluding that procedural due process must be afforded in commitment proceedings regardless of the type of authority being asserted by the state, it can be argued that courts have in effect legitimated the fundamental assumptions underlying involuntary commitment; *i.e.*, that the state may forcibly deprive a mentally ill person of his liberty in order to prevent harm to the community or himself, or to safeguard the welfare of the individual.⁴⁷ Increasingly, courts are re-examining the legitimacy of the underlying state objectives in involuntary civil commitments.⁴⁸

Both kinds of commitments have also been criticized for alleg-

purpose or theory of the commitment.

41. In *Addington v. Texas*, 441 U.S. 418 (1979), the Supreme Court concluded that involuntary commitment differs from criminal prosecution because "in a civil commitment state power is not exercised in a punitive sense." *Id.* at 428.

42. *See, e.g.*, WASH. REV. CODE § 71.05.150 (1975) (which provides for serving a summons on a person whose commitment is being sought requiring that person to appear for an examination but dispensing with such notice in emergency situations).

43. *See, e.g.*, ALA. CODE § 22-52-3 (Supp. 1979).

44. *See, e.g.*, WASH. REV. CODE § 71.05.310 (providing for a jury trial if a commitment is sought for any substantial period).

45. *See, e.g.*, WASH. REV. CODE § 71.03.300. *But see* *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded*, 414 U.S. 473 (1974), *order on remand*, 379 F. Supp. 1376 (1974), *vacated and remanded on other grounds*, 421 U.S. 957 (1974), *order reinstated on remand*, 413 F. Supp. 318 (1976) and *Heryford v. Parker*, 396 F.2d 393 (10th Cir. 1968).

46. *See, e.g.*, ALASKA STAT. § 47.30.060; ARIZ. REV. STAT. ANN. § 36-546 (Supp. 1969); MICH. COMP. LAWS ANN. § 330.1482.

47. Procedural due process is concerned, in part, with insuring that facts are determined accurately. *In re Winship*, 397 U.S. 358 (1970). Thus, once the fact of mental illness and resulting incapacity to act rationally on one's own behalf have been accurately determined, the legitimacy of the state's purpose in responding to the condition of the individual as factually determined has been affirmed. In *Addington v. Texas*, 441 U.S. 418 (1979), Justice Burger, in dicta, said that "[t]he state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of emotional disorders to care for themselves." *Id.* at 462.

48. *See* text & accompanying notes 56-57 & 82-100 *infra*.

edly violating the equal protection clause of the Fourteenth Amendment. Essentially, the claim was that classifications based on "mental illness" were "suspect" and, consequently, strict scrutiny of the state's objective was required.⁴⁹ This argument has been rejected by most courts.⁵⁰ It is unlikely, moreover, that an equal protection argument will prevail as long as mental illness is accepted by courts as a condition manifested by significant cognitive, emotional or behavioral impairments which ought to have legal significance.⁵¹ Thus, courts will probably find mental illness to be a relevant personal characteristic for distinguishing among persons in order to achieve legitimate state objectives. Otherwise, an application of the equal protection clause might well preclude other special legislation which affects only the class of individuals af-

49. See Comment, *Wyatt v. Stickney and the Right of Civilly Committed Mental Patients to Adequate Treatment*, 86 HARV. L. REV. 1281, 1294 (1973); Comment, *Mental Illness: A Suspect Classification*; 83 YALE L.J. 1237 (1970). This argument also challenges the constitutionality of police power commitments since such commitments also depend on a finding of "mental illness." It is interesting to note how some critics of coercive civil commitment are themselves inconsistent in their view of whether mental illness really exists. Bruce Ennis, for example, seems to concede that many citizens recognize their own mental illness and seek treatment from mental health professionals for their condition. See *Hearings on the Constitutional Rights of the Mentally Ill Before the Subcommittee on Constitutional Rights*, 91st Cong., 1st and 2d Sess. 273 (1969) (statement of Bruce J. Ennis). Subsequently, however, Ennis has seemingly questioned the ability of mental health professionals to diagnose mental illness accurately and consistently and, by implication, has questioned the reality of mental illness. See Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693, 711 (1974) [hereinafter cited as Ennis & Litwack, *Psychiatry and Expertise*].

50. Equal protection analysis has always been more fruitful when urged as a basis for requiring that persons acquitted of criminal charges by reason of insanity must, after a reasonable period of detention, be processed in substantially the same manner as other persons whose involuntary commitment is being sought. *People v. McQuillan*, 392 Mich. 511, 221 N.W.2d 569 (1974) and *State v. Krol*, 67 N.J. 432, 344 A.2d 289 (1975). *But see Alter v. Morris*, 85 Wash. 2d 414, 536 P.2d 630 (1975) and *United States v. Ecker*, 543 F.2d 178 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1063 (1977).

51. See generally T. SZASZ, *THE MYTH OF MENTAL ILLNESS* (1969). Some legal commentators argue that mental illness is a legal construct having no referent in medical terminology. See, e.g., Hardisty, *Mental Illness: A Legal Fiction*, 48 WASH. L. REV. 735 (1973). *But see* Weihofen, *The Definition of Mental Illness*, 21 OHIO ST. L. J. 1 (1960). For excellent analysis of this problem, see Shapiro, *Therapeutic Justification for Intervention into Mentation and Behavior*, 13 DUQ. L. REV. 673 (1975) and Moore, *Some Myths about Mental Illness*, 32 ARCH. GEN. PSYCH. 1483 (1975). Michigan defines "mental illness" statutorily as "a substantial disorder of thought or mood which significantly impairs judgement, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of daily life." MICH. COMP. STAT. ANN. § 330.1400a.

flicted with mental illness.⁵²

III. AN EXAMINATION OF POLICE POWER COMMITMENTS

A. *Current Criticism of Police Power Commitments*

Involuntary commitment of the mentally ill as dangerous to self or others has been criticized more recently on different grounds. Some critics have characterized such commitments as preventive detention.⁵³ They claim that police power commitments effectuate a loss of liberty not to punish a harmful act already committed by the individual but rather to prevent possible future harm.⁵⁴ There is also a serious question whether the individual by his own deeds deserves the loss of liberty inflicted on him and, thus, whether any semblance of distributive justice is in fact being furthered.⁵⁵

Though most courts have not accepted the argument,⁵⁶ a strong case can also be made that the standards under which such commitments are made are unconstitutionally vague. Many state statutes do not define "dangerousness" with any specificity.⁵⁷ This lack of specificity fails to provide adequate notice to individuals as to what personal behavior will justify the state's assertion of the commitment power. In addition, state officials are given extraord-

52. For example, the insanity and diminished capacity defenses in criminal law, testamentary capacity in the law of trusts and estates and the capacity to enter into contracts in contract doctrine are but a few of the legal doctrines which assume that mental illness exists and that it can have an adverse impact on human behavior which ought to have legal consequences. See Brakel & Rock, *supra* note 9.

53. Herman, *Preventive Detention, a Scientific View of Man, and State Power*, 1973 U. ILL. L.F. 673, 682 (1973). Dershowitz, *Preventive Confinement: A Suggested Framework for Constitutional Analysis*, 51 TEX. L. REV. 1277, 1286 (1973).

54. Commentators have noted that the concept of "future harm" must be analyzed more carefully. For example, Dershowitz has pointed out that not every possible harm might justify commitment and, that, in addition, attention must be given to the probability that harm will occur and the frequency with which it might occur. See also Millard v. Harris, 406 F.2d 964 (D.C. Cir. 1968) in which Judge Bazelon also considered the extent of the harm to the victim.

55. See generally H.L.A. HART, PUNISHMENT AND RESPONSIBILITY (1968) and H.M. Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401 (1958).

56. See, e.g., Goldy v. Beal, 429 F. Supp. 640 (M.D. Pa. 1976). On the other hand, some courts have invalidated involuntary commitment statutes for their failure to meet due process requirements. See, e.g., Kendall v. True, 391 F. Supp. 413 (W.D. Ky. 1975); Lynch v. Baxley, 386 F. Supp. 378, 390 (M.D. Ala. 1974), *rev'd*, 651 F.2d 387 (1981); Bell v. Wayne County General Hospital at Eloise, 384 F. Supp. 1085 (E.D. Mich. 1974).

57. See, e.g., COLO. REV. STAT. § 27-10-102(7) (Supp. 1980).

inary discretion as to whom they may confine. Judicial review of such state action is thereby rendered extremely difficult.

Commentators have noted that psychiatrists are extremely inaccurate in predicting dangerous behavior. After reviewing empirical studies of psychiatric predictions of dangerous behavior, Ennis and Litwack concluded that psychiatrists overpredicted dangerous behavior by an extremely wide margin.⁵⁸ Another commentator concluded that the highest ratio of accurate predictions of dangerousness is only 35%; i.e., only 35 out of every 100 persons determined to be dangerous by mental health experts subsequently engaged in explicitly dangerous behavior.⁵⁹ The unfortunate but inevitable conclusion which must be drawn from this data is that the police power commitment authority permits the state to deprive many persons of their liberty who in fact do not pose any danger to themselves or to the community. It thereby raises a serious substantive due process question, since the purpose of the state in effecting such commitments—the prevention of harm to

58. In Ennis & Litwack, *Psychiatry and Expertise*, *supra* note 49, for example, the authors cite the famous "Operation Baxstrom" studies which evaluated approximately 1000 prisoner-patients held in New York State Department of Correction hospitals as mentally ill and dangerous who became eligible for release after their prison term had expired because of the Supreme Court's decision in *Baxstrom v. Herold*, 383 U.S. 107 (1966). Follow-up studies indicate that only one percent (approximately) of these individuals could be considered dangerous. Ennis & Litwack, *Psychiatry and Expertise*, *supra* note 49, at 712. Studies indicating psychiatrists are poor predictors of dangerousness have been criticized on several grounds, including measuring only subsequent violent acts that resulted in legal proceedings, not taking into account treatment received by the subjects prior to release and using sample populations composed of persons convicted of crime, many of whom were not mentally ill. See U.S. *ex rel. Mathew v. Nelson*, 461 F. Supp. 707 (N.D. Ill. 1978). Even though the empirical evidence may be criticised for methodological deficiencies, almost all of the evidence indicates the absence of expertise and the occurrence of a large number of false positives. A strong argument can be made that, since individual liberty is at stake, the state should bear the burden of establishing the claimed expertise which purportedly establishes the factual basis for the state action by proffering adequate empirical evidence before police power commitments are permitted. The argument becomes even stronger once the preliminary empirical evidence negates the claimed expertise, thus casting the burden of production and rebuttal on the state.

59. Comment, *Overt Dangerous Behavior as a Constitutional Requirement for Involuntary Civil Commitment of the Mentally Ill*, 44 U. CHI. L. REV. 562, 583 (1977), citing Kozol, Boucher & Ganofali, *The Diagnosis and Treatment of Dangerousness*, 18 J. CRIME & DELINQUENCY 371 (1972). Compare Coccozza & Steadman, *The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence*, 29 RUTGERS L. REV. 1084 (1976); Steadman, *Some Evidence on the Inadequacy of the Concept and Determination of Dangerousness in Law and Psychiatry*, 1 J. PSYCH. & L. 409 (1973); Rubin, *Prediction of Dangerousness in Mentally Ill Criminals*, 27 ARCH. GEN. PSYCH. 397 (1972).

society or the committed individual—is most often not furthered by a particular individual's commitment. Consequently, the means adopted to achieve the state's purpose are open to criticism as being far broader than necessary.⁶⁰

In addition to resulting in an inordinate number of mistakes,⁶¹ police power commitments suffer from other serious deficiencies. Under the rationale of police power commitments, a person can be deprived of his liberty for as long as he is considered dangerous.⁶² The duration of such a confinement is, consequently, indeterminate. Moreover, it has not yet been determined whether a person who is committed as mentally ill and dangerous to self or others is constitutionally entitled to treatment.⁶³ Absent some reasonable prospect that treatment will be afforded such individuals so as realistically to permit their timely release back into society, such commitments effectuate a complete loss of liberty without conferring any benefit on the individual⁶⁴ and, at the same time, confine

60. In *U.S. ex rel. Mathew v. Nelson*, 461 F. Supp. 707 (N.D. Ill. 1978), the court implicitly validated police power commitments even though available empirical evidence indicated that *in the aggregate* most predictions of subsequent violent behavior were incorrect. The court seemingly concluded that so long as there were *some instances* in which psychiatrists, based on a clinical examination, could determine (successfully predict?) that a subject "is reasonably expected to injure himself or another within a reasonable time" coercive confinement was proper. *Id.* at 711. The constitutionality of pervasive state action ought to be assessed primarily on its typical impact on the broad class of citizens affected and not on the unusual and exceptional instance. This is even more appropriate if there is strong indication that even stringent procedures and rigorous fact-finding will not compensate for the absence of claimed expertise and, consequently, substantial error occurs. Compare *Ennis & Litwack, Psychiatry and Expertise*, *supra* note 49.

61. *Ennis & Litwack* offer several possible explanations for such a wide range of mistaken judgements by psychiatrists. These include, for example, the orientation and training of the medical model which induces error on the side of safety (*i.e.*, finding illness rather than finding no illness), the context of the diagnosis and prediction, and the personal bias of the evaluator. *Id.* at 719-34.

62. In *Jackson v. Indiana*, 406 U.S. 715 (1972), the Supreme Court concluded that substantive due process required that a rule of reason apply to the length and conditions of commitment. See note 117 *infra*. This analysis suggests that a mentally ill person who continues to be dangerous and is not treatable can be held indefinitely. See also note 17 *supra*.

63. Some courts have indicated that such individuals have a right to treatment. See, *e.g.*, *People v. Sansone*, 18 Ill. App. 3d 315, 309 N.E.2d 733 (1974) which seemingly grounded the right in the state's Mental Health Code.

64. The "quid pro quo" theory would permit that state to involuntarily confine a person with reduced procedural protection in exchange for conferring the benefit of treatment on him. The Court of Appeals for the Fifth Circuit adopted this theory. On appeal, however, it was rejected by the Supreme Court. See *Donaldson v. O'Connor*, 493 F.2d 507 (1974), *vacated and remanded*, 422 U.S. 563 (1975).

many individuals who in fact do not satisfy the commitment criteria.⁶⁵

Such commitments are not necessarily even a state response to the present status or behavior of an individual.⁶⁶ When a police power commitment is effectuated without a showing of a recent dangerous act, the state has responded not to a present demonstrated harm based on the person's conduct but rather to contingent future harm which may or may not occur.⁶⁷ In effect, a person loses his liberty not because of who he is now or what he did in the past but because of who he might become or what he might do in the future. Arguably, the state's purported purpose is far too speculative to be judicially recognized as "compelling" under the Fourteenth Amendment.

B. Recommendations

Strong arguments can be made that police power commitments of the mentally ill because they are dangerous to self or others should be completely prohibited. These commitments raise very serious constitutional concerns⁶⁸ and empirical evidence indicates that in a vast majority of cases the compelling purpose proffered by the state is not furthered.⁶⁹ Furthermore, serious questions concerning the justice of these confinements remain.⁷⁰

Nonetheless, it must be acknowledged that virtually every federal and state court which has considered such challenges to the basic validity of police power commitments has sustained this ex-

65. See text & accompanying notes 58-61 *supra*.

66. See *Robinson v. California*, 370 U.S. 660 (1962) and notes 53-55 *supra*.

67. It is not unusual for psychiatrists to predict harm based on generalizations made about a type of disease rather than the particular patient. Compare *Hough v. U.S.*, 271 F.2d 458 (D.C. Cir. 1959) (Miller, J., concurring in part and dissenting in part). Absent some specific conduct which manifests dangerousness, it is difficult to argue that a particular person presents a clear and present danger or that he is even dangerous.

68. See text & accompanying notes 56-65 *supra*. Cf. *U.S. ex rel. Mathew v. Nelson*, 461 F. Supp. 707 (N.D. Ill. 1978) (The court, in refusing to require the state to prove that a mentally ill person has committed a recent dangerous act before it could commit him under its police power, stated that "the evidence relied on by plaintiffs in support of their position indicates that there is a high degree of error in predicting dangerousness, regardless of whether the subjects are mentally ill and regardless of whether the patient's history includes a recent overt act. Plaintiffs, in view of their position as to the predictive or diagnostic capacity of psychiatrists, might be expected to argue that no commitment based on dangerousness is permissible, but they do not go that far." *Id.* at 710.).

69. See text & accompanying notes 58-61 *supra*.

70. See text & accompanying notes 53-55 *supra*.

ercise of state authority.⁷¹ And, though the Supreme Court has not yet considered a case which explicitly raised the question of whether such commitments are constitutional, the Court has intimated that it would sustain the constitutionality of police power commitments.⁷² Since most states permit such commitments and most courts have upheld the exercise of state power in this manner, abolition of police power commitments seems highly unlikely.

Given this recent history, the most appropriate and realistic recommendation that can be made in light of the telling criticisms of police power commitments is that such commitments should only be permitted upon a showing that the mentally ill individual has committed a recent overt act clearly manifesting that he is dangerous to himself or others.⁷³ Such a requirement has several advantages.

The fundamental authority of the state to act adversely to the liberty interest of the individual would be established by the past conduct of the individual himself and not by his present status or contingent future behavior.⁷⁴ The individual would at least have

71. See notes 55 and 56 *supra*.

72. See *Donaldson v. O'Connor*, 422 U.S. 563 (1975). In the opinion Justice Stewart, in dicta, stated that "assuming that the term [mental illness] can be given a reasonably precise content and that the mentally ill can be identified with reasonable accuracy, there is still no constitutional basis for confining such a person involuntarily if they are dangerous to no one and can live safely in freedom." *Id.* at 575.

73. The formulation of such a behavior requirement has varied. Alabama defines it as follows: "That the threat of substantial harm has been evidenced by a recent overt act." 1975 ALA. ACTS 2566 (Act 1266, § 10). Michigan is less demanding: "A person who is mentally ill, and as a result of that mental illness can reasonably be expected within the near future to intentionally or unintentionally seriously physically injure himself or another person, and who has engaged in an act or acts or made significant threats that are substantially supportive of the expectation." MICH. COMP. LAWS ANN. § 330.1401(a). Serious consideration should be given to defining the overt conduct requirement in terms substantially equivalent to those used in the statutory definition of criminal attempt. This would preclude the state from intervening until the actor has passed the threshold of criminal responsibility. Not only would this protect conduct which by itself is not prohibited; it would also justify the state's authority to interfere with the liberty interest of the individual since assumedly the behavior would also justify the state's arresting the individual. Moreover, the act should have occurred within the "recent" past. Though it may be impracticable to set an arbitrary time limit, the primary focus ought to be on recent behavior that is symptomatic of an ongoing mental illness. In *U.S. ex rel. Mathew v. Nelson*, 461 F. Supp. 707 (1978), the court held that the state could commit mentally ill persons who were dangerous to themselves or others without establishing that the individual committed a recent dangerous act. "Recent" was defined as "meaning within the past year." *Id.* at 709, n.5. It should be the unusual case in which such "stale" behavior would satisfy this requirement.

74. See text & accompanying notes 66-67 *supra*.

deserved state attention by virtue of his own action.

Furthermore, requiring a recent dangerous act would provide greater notice as to what behavior would subject an individual to state control and would confine the discretion of state personnel within reasonable and traditional limits. It would also enhance judicial supervision of the commitment process.

Requiring proof of recent dangerous acts might improve the predictive ability of the experts. Though no empirical evidence is available to establish this surmise conclusively, there seems to be a consensus that one of the best indicators of future human behavior is the past behavior of the individual.⁷⁵ Such a requirement would, therefore, reduce the unacceptably large number of erroneous commitments that now occur.

The ability of the experts to respond effectively and to take steps to ameliorate a patient's condition would be enhanced by such a requirement because of their better knowledge of the precise danger posed by the individual. And, perhaps the individual himself would be more accepting of his confinement and amenable to treatment if confronted with his specific recent behavior. This increased amenability to treatment would also reduce the danger posed by the individual.

Limiting police power commitments in this fashion may result in some additional harm being inflicted by mentally ill persons on themselves or others that might otherwise not occur without such a requirement. However, such harm would be more than offset by eliminating the clearly established damage caused by mistakenly committing a large number of individuals to mental health facilities who do not in fact belong there.⁷⁶

75. See Comment, *Overt Dangerous Behavior*, *supra* note 59.

76. Such calculations are empirical questions that are difficult to resolve by adequate empirical inquiry. Some studies, however, do suggest that mentally ill persons are not as dangerous as experts generally consider them to be. See notes 58-59 *supra*. On a purely utilitarian calculus, a strong case can be made that restricting involuntary civil commitment to cases of explicit dangerous conduct effects a net saving in harm (*i.e.*, unnecessary loss of liberty through inappropriate confinement minus harm actually committed by mentally ill individuals not committed.). It may also be that most acts committed by the mentally ill which cause serious harm are not sudden and without preparatory acts which would themselves satisfy the recent manifest act requirement set forth herein. See note 73 *supra*. If this is the case, then the state might well have ample opportunity to intervene and to prevent the ultimate harm anticipated. In any event, distributional justice is served since individuals will not be committed until they have in fact engaged in behavior which causes harm and is itself a valid basis for the loss of liberty.

IV. AN EXAMINATION OF PARENS PATRIAE COMMITMENTS

A. *Current Criticisms of Parens Patriae Commitments*

The *parens patriae* commitment authority of the state has been severely criticized over the past decade. In recent years, some courts have struck down *parens patriae* commitment statutes because they are unconstitutionally vague.⁷⁷ In *Goldy v. Beal*,⁷⁸ the court concluded that Pennsylvania's Mental Health Act,⁷⁹ which permitted the state to involuntarily commit mentally ill persons who needed care and treatment, was "unconstitutionally vague."⁸⁰ In particular, the court concluded that the statute did not provide adequate and fair warning to individuals as to what conduct would lead to an individual's commitment. Moreover, the statute, according to the court, conferred too much discretion on persons charged with administering the commitment scheme, thus inviting arbitrary and discriminatory enforcement.⁸¹

The logic of the court's holding in *Goldy* does not lead inexorably to the conclusion that any *parens patriae* commitment scheme is necessarily unconstitutional. Conceivably, the criteria for commitment could be drawn with sufficient specificity so as to give adequate notice and to confine administrative discretion within acceptable limits. Accordingly, cases which apply this particular constitutional analysis do not necessarily vitiate the constitutionality of the basic state objective sought to be advanced by *parens patriae* commitment schemes under scrutiny. They simply require the legislature to draft the commitment statutes with greater skill and precision.

Occasionally a court will reach what is essentially a substan-

77. See *Goldy v. Beal*, 429 F. Supp. 640 (M.D. Pa. 1976); and *Colyar v. Third Judicial District Court, Etc.*, 469 F. Supp. 424 (D. Utah 1979).

78. 429 F. Supp. 640 (M.D. Pa. 1976).

79. § 406 of this statute permitted the state to commit indefinitely any person "in need of care and treatment because of their mental disability." *Id.* at 646. § 102 defined "mental disability," in part as "any mental illness, mental impairment, mental retardation, or mental deficiency which so lessens the capacity of a person to use his customary self-control, judgment and discretion in the conduct of his affairs and social relations as to make it necessary or advisable for him to be under care . . ." *Id.* at 647.

80. *Id.*

81. The court was influenced by the application of the "void for vagueness" doctrine in the analogous criminal law context. It cited the Supreme Court's opinion in *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), which struck down a city vagrancy ordinance as overly vague.

tive due process conclusion⁸² by striking down a state commitment scheme as vague and overly broad. Thus, in *Colyar v. Third Judicial District Court, Etc.*,⁸³ a federal district judge struck down as unconstitutional a state statutory scheme that authorized involuntary civil commitment of an individual who is "mentally ill" and "in need of custodial care or treatment in a mental health facility, and because of illness . . . (i) lacks sufficient insight to make responsible decisions as to the need for care and treatment"⁸⁴ The court decided that this language was overly broad and vague because it equated "inability to make a 'responsible' decision with an unwillingness to follow through with treatment."⁸⁵ It determined that this provision authorized commitment upon finding that an individual refused to accept indicated treatment without requiring the committing authority to ascertain whether that refusal was the result of a "rational choice."⁸⁶ The court seemingly determined that a person can make a rational decision if he can "weigh the costs and benefits of commitment or treatments."⁸⁷ It insisted that the primary inquiry of the committing authority should be into the process of the individual's decision to refuse treatment, not into the wisdom or outcome of that decision.

82. See text & accompanying notes 94-100 *infra*.

83. 469 F. Supp. 424 (D. Utah 1979). Plaintiff was involuntarily committed under Utah's statutory scheme even though the committing court specifically found that the patient "was not an immediate danger to himself or others and that he did not lack sufficient capacity to provide himself with the basic necessities of life." *Id.* at 427. See also *Lynch v. Baxley*, 386 F. Supp. 378 (M.D. Ala. 1974), *rev'd*, 651 F.2d 387 (5th Cir. 1981).

84. UTAH CODE ANN. § 64-7-36(6) (1978). The statute has since been amended. It permits commitment if the court finds that the proposed patient is "mentally ill and a danger to self or others" and because of this illness "[t]he patient lacks the ability to engage in a rational decision-making process regarding the acceptance of mental treatment as demonstrated by evidence of inability to weigh the possible costs and benefits of treatment" UTAH CODE ANN. § 64-7-36(6) (Supp. 1979) (emphasis added).

85. 469 F. Supp. at 432.

86. *Id.* A very similar approach had previously been espoused by commentators. See *Developments—Civil Commitment, supra* note 7, in which it was argued that incompetency to make treatment decisions cannot be conclusively presumed from the presence of mental illness since many forms of mental illness do not substantially impair reasoning or decision-making capacity. *Id.* at 1214. Consequently, the authors urge that only those mentally ill persons "who are incapable of evaluating the desirability of psychiatric care can constitutionally be committed under the *parens patriae* power." *Id.* at 1215. These authors would not limit such commitments to instances where the individual posed a serious threat of physical harm to himself.

87. 469 F. Supp. at 433-34. It would be interesting to ascertain what sort of patient insight would satisfy this legal standard.

The court, however, went beyond its own analysis and concluded that the state may involuntarily commit a mentally ill person only if it first establishes that the person is a danger to himself.⁸⁸ Only when the state has established that predicate fact is the inability of a mentally ill person to take steps to ameliorate his condition (*i.e.*, his mental illness and its impact on his life) relevant. In effect, the decision precluded the state from exercising its traditional *parens patriae* authority and limited it to the exercise of its police power.

As noted earlier,⁸⁹ courts had concluded in earlier cases that protecting the community against harm from mentally ill persons and providing care and treatment for such individuals were legitimate state objectives and that involuntary commitment schemes were rationally related to such purposes. Accordingly, these schemes were invariably considered to be constitutional.⁹⁰ Gradually, however, judicial emphasis has shifted from assessing the state's specified objectives in enacting commitment legislation to assessing the impact of such state action on the individual.⁹¹ There is now a firm consensus that involuntary civil commitment results in a substantial loss of liberty for an individual which may be of indeterminate duration.⁹² Consequently, courts have concluded

88. Since the person was providing himself with the basic necessities of life, presumably food, shelter and clothing, and was not suicidal, or likely to maim himself, the court concluded that he posed no danger to himself. The court was influenced by dicta in Justice Stewart's opinion which expressed grave doubt about the propriety of committing a mentally ill person who is not dangerous to himself and who can survive safely in freedom simply to raise his standard of living. *Id.* at 431.

89. See notes 17, 18 & 56 *supra*.

90. See, *e.g.*, *Prochaska v. Brinegar*, 251 Iowa 834, 102 N.W.2d 870 (1960); *Chavannes v. Priestly*, 80 Iowa 316, 45 N.W. 766 (1890); *Darnell v. Cameron*, 48 F.2d 64 (D.C. Cir. 1965).

91. See, *e.g.*, *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded*, 414 U.S. 473 (1974), *order on remand*, 379 F. Supp. 1376 (1974), *vacated and remanded on other grounds*, 421 U.S. 957 (1975), *order reinstated on remand*, 413 F. Supp. 1318 (1976).

92. See *Addington v. Texas*, 441 U.S. 418 (1979) and *Developments—Civil Commitment*, *supra* note 7 at 1210-12. In addition to losing the freedom to come and go as he pleases, an involuntary patient may suffer additional deprivation. For example, he may be subjected to intrusive treatment, such as the administering of psychotropic drugs without his consent. See *Parham v. J.L. and J.R.*, 442 U.S. 584 (1979) (Brennan, J., concurring in part and dissenting in part). *But see Rennie v. Klein*, 462 F. Supp. 1131 (D.N.J. 1978) in which the court held that involuntarily committed mental patients possessed a qualified right to refuse psychotropic medication which requires certain due process procedures prior to the forced administration of drugs; *Cf. Rogers v. Okin*, 478 F. Supp. 1342, 1371 (D. Mass. 1979), *aff'd in part and rev'd in part and vacated and remanded*, 634 F.2d 650 (1st Cir. 1980),

that such a loss of liberty is a deprivation of a fundamental right through state action which can only be justified upon a showing of a compelling state interest.⁹³

Under traditional Fourteenth Amendment substantive due process analysis a state must demonstrate a compelling state interest before it can substantially impair the fundamental rights of individuals through state action.⁹⁴ Moreover, the means adopted to further the state objective must be no broader than necessary to accomplish the state interest.⁹⁵ There can be little doubt that confinement in a mental health facility with the resulting loss of freedom constitutes a loss of liberty under the Fourteenth Amendment of the Constitution. The almost total loss of personal autonomy and its potentially indefinite duration are fairly drastic means to achieve the state's goal.⁹⁶

Recently, courts have been much less reluctant to evaluate the validity of the stated objectives sought by mental health commitments and to assess the constitutionality of such objectives and the means adopted to achieve them. This increased willingness to examine basic assumptions underlying these statutory schemes and to weigh on judicial scales the relative worth of the interests involved has yielded inconsistent judicial results.

Some courts have concluded that *parens patriae* commitments violate substantive due process because they do not further a compelling state interest. They have reached this result with minimal analysis and in a rather conclusory fashion.⁹⁷ Other courts

vacated and remanded sub nom. Mills v. Rogers, 50 U.S.L.W. 4676 (U.S. S. Ct. June 18, 1982) (involuntarily committed mental patients cannot be forcibly medicated except in emergency circumstances).

93. It is not a facetious argument to assert that the liberty interest of a mentally ill person unable to make rational choices concerning his life may not be deserving of the same weight as the liberty interest of a fully rational individual. See *Developments—Civil Commitment*, *supra* note 7. However, accurate fact-finding should establish this crucial fact. There appears to be no overwhelming reason why the interest of the community in insuring that all of its members have a realistic opportunity for meaningful participation in the community and the individual's own interest in having his capacity to act rationally in his own behalf safeguarded cannot be considered as a "compelling state interest" under current constitutional analysis. See text & accompanying notes 137-40 *infra*.

94. See *Roe v. Wade*, 410 U.S. 113, 155 (1973).

95. *Griswold v. Connecticut*, 381 U.S. 479 (1965) (Privacy); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (Equal Protection); *Sherbert v. Verner*, 374 U.S. 398 (1963) (Free Exercise of Religion).

96. The same observation is applicable to police power commitments.

97. See, e.g., *Doremus v. Farrell*, 407 F. Supp. 509 (D. Neb. 1975) in which the court, in

have upheld the constitutionality of a state's exercise of its *parens patriae* power.⁹⁸ Such commitments, in addition to benefiting the individual, were considered to further general societal interests either by protecting the community from potentially dangerous individuals or by restoring a person as a productive member of society.⁹⁹ These conclusions, like those of the courts which reached the opposite result,¹⁰⁰ are supported by minimal evidence and analysis.

There have been other criticisms of *parens patriae* commitments. Each has influenced to a varying degree the emerging attitude of resistance to these commitments. Some critics have alleged that involuntary commitment of persons to a mental health facility is merely a subterfuge for controlling the behavior of individuals whom society will not tolerate.¹⁰¹ This view of *parens patriae* as serving the distasteful social engineering task of reinforcing majoritarian values has influenced some courts. In *Doremus v. Farrell*,¹⁰² the court, in striking down Nebraska's *parens patriae* commitment scheme, stated:

To permit involuntary civil commitment on a finding of mental illness and the need for treatment alone would be tantamount to condoning the State's commitment of persons deemed socially undesirable for the purposes of indoctrinating or conforming the individual's beliefs to the beliefs of the state.¹⁰³

The court neglected to demonstrate with substantiating evidence its conclusion that the purpose of the Nebraska scheme in theory

striking down a Nebraska statute which permitted the state to commit mentally ill persons in need of treatment, said simply:

Considering the fundamental rights involved in civil commitment, the *parens patriae* power must require a compelling interest of the state to justify the deprivation of liberty. In the mental health field, where diagnosis and treatment are uncertain, the need for treatment without some degree of imminent harm to the person or dangerousness to society is not a compelling justification.

Id. at 514.

The court did not clarify whether it considered diagnosis too uncertain or the objective of treatment too uncertain or both. If diagnosis is too uncertain, then arguably police power commitment is also unconstitutional since it also requires a diagnosis of mental illness.

98. See, e.g., *People v. Sansone*, 18 Ill. App. 3d 315, 309 N.E.2d 733 (1974), *leave to appeal denied*, 56 Ill. 2d 584 (1974); *In re Valdez*, 88 N.M. 338, 540 P.2d 818 (1974).

99. *In re Valdez*, 88 N.M. at 342, 540 P.2d at 822.

100. See note 97 *supra*.

101. Szasz is probably the most prolific and strident critic espousing this view. See generally, T. Szasz, *PSYCHIATRIC JUSTICE* (1965).

102. 407 F. Supp. 509 (D. Neb. 1975).

103. *Id.* at 514.

or as applied to the particular case before it was to insure the social conformity of citizens.¹⁰⁴

This concern also influenced the Supreme Court in *Donaldson v. O'Connor*,¹⁰⁵ the only case in which the Supreme Court examined at any length the constitutionality of the state objectives purportedly served by state commitment schemes. In *Donaldson*, the Court held that depriving a mentally ill individual of his liberty pursuant to a state involuntary commitment statute for the purpose of providing him with treatment and then failing to provide any treatment to that person during confinement violated his constitutional rights.¹⁰⁶ In essence, the Court concluded that the state had made no attempt to accomplish the purported purpose of the confinement. The Court explicitly avoided deciding whether a *parens patriae* commitment for treatment or for a custodial purpose was constitutionally permissible.¹⁰⁷ There is, therefore, no Supreme Court case which explicitly precludes the exercise by government of its *parens patriae* authority for the purpose of affording treatment to mentally ill individuals who are not dangerous to others or to themselves.¹⁰⁸ Justice Stewart, in dicta, stated that the state may not commit persons simply to homogenize society or to protect the sensibilities of the majority. He said:

May the State fence in the harmless mentally ill solely to save its citizens from exposure to those whose ways are different? One might as well ask if the State, to avoid public unease, could incarcerate all who are physically unattractive or socially eccentric. Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty.¹⁰⁹

104. The court did relate briefly the case history of one of the involuntary patients who initiated the litigation. It hardly justified the court's general conclusion concerning the purpose of such commitments.

105. *O'Connor v. Donaldson*, 422 U.S. 563 (1975).

106. *Id.* at 575-76.

107. *Id.* at 575. Here Justice Stewart stated:

We need not decide whether, when or by what procedures, a mentally ill person may be confined by the state on any of the grounds which, under contemporary statutes are generally advanced to justify involuntary confinement of such a person—to prevent injury to the public, to insure his own survival or safety, . . . or to alleviate or cure his illness.

108. *Id.*

109. Despite dicta in *Donaldson* which indicates skepticism concerning the constitutionality of *parens patriae* commitments, the holding of the case may implicitly affirm that the state may constitutionally exercise its *parens patriae* authority for a therapeutic purpose. Specifically, the Court could have reached the same result as it did simply by holding that the *parens patriae* ground under which Kenneth Donaldson was committed—mental

Other critics contend that mental illness is either not an empirical reality,¹¹⁰ or if it is, that the science of identifying and treating mental illness is too inaccurate to form a permissible basis for the loss of individual liberty.¹¹¹ Ennis and Litwack, after an extensive review of the professional literature, argue that psychiatric judgments (in particular, psychiatric evaluations and predictions) are unreliable¹¹² and invalid.¹¹³ They argue that mental health professionals do not attain a sufficient degree of agreement among themselves in diagnosing mental illness and that, in any event, the purported diagnosis by a mental health professional simply does not describe accurately the empirical reality of the patient's condition. Since the necessary expertise of mental health professionals is lacking, Ennis and Litwack argue that courts ought not to receive such evidence into commitment proceedings.¹¹⁴

More importantly, these authors suggest that the lack of consistency among diagnoses may well induce inaccurate fact-finding and thus result in an unacceptable rate of "false positives;" persons who are not mentally ill and/or do not need treatment who are, nonetheless, committed mistakenly.¹¹⁵ In short, these critics are concerned that the therapeutic net thrown by involuntary civil commitment will catch too many persons who do not in fact satisfy the commitment criteria.

Some critics have decried the open-ended delegation to, and occasional usurpation by, experts of control over individual liberty which results from involuntary civil commitment for a therapeutic purpose.¹¹⁶ The significant influence of experts together with the indeterminate duration of this type of commitment¹¹⁷ has gener-

illness and his alleged need for treatment—was an impermissible exercise of the state's authority. The Court, however, did not base its decision on this ground. *Id.* at 567.

110. Perhaps the most vocal opponent of accepting mental illness as an empirical reality is Thomas Szasz. See, e.g., Szasz, *The Myth of Mental Illness*, 15 AM. PSYCH. 113 (1960).

111. See Ennis & Litwack, *Psychiatry and Expertise*, *supra* note 49.

112. By "reliable" Ennis & Litwack mean that "other psychiatrists would agree with those conclusions." *Id.* at 695.

113. By "valid" these authors mean that their evaluations accurately reflect reality. *Id.*

114. The authors argue, in effect, that this evidence is not entitled to be characterized as "expert" and should not, therefore, be given special status in commitment proceedings. *Id.* at 694-95.

115. See generally Ennis & Litwack, *Psychiatry and Expertise*, *supra* note 49.

116. See, e.g., Dershowitz, *Psychiatry in the Legal Process: A Knife That Cuts Both Ways* in *THE PATH OF THE LAW FROM 1967* (A. Sutherland ed. 1968).

117. Under the traditional *parens patriae* power, the state is authorized to confine an

ated apprehension that the courts are not really capable of supervising the institutionalization process.¹¹⁸

Another cause for concern is the tendency of some mental health professionals or committing authorities to disregard the asserted refusal of a mentally ill person to accept treatment. Mental health professionals occasionally claim that the true message contained in the refusal is a hidden plea for aid.¹¹⁹ Courts conclude on occasion that such a refusal must be irrational because treatment appears to be urgently required.

There is also concern that the states simply do not allocate adequate resources to achieve the purposes of *parens patriae* commitments; namely, reasonable care and treatment of mental illness. Various courts have addressed this problem by invoking the doctrine of a "right to treatment" in order to require states to provide adequate treatment.¹²⁰ The *Donaldson* case can be read as affirming that a person involuntarily committed for treatment is

individual for as long as the person is mentally ill and needs care or treatment. There is, at the moment, no outer limit set on the duration of confinement. See note 62 *supra*. In *Jackson v. Indiana*, 406 U.S. 715 (1972), the Court concluded that "due process requires that the nature and duration of commitment [here the commitment of a mentally defective deaf mute determined to be incompetent to stand trial] bear some reasonable relation to the purpose for which the individual is committed." *Id.* at 738.

118. The facts of *Donaldson* present a rather severe example of how an individual can be confined by experts without effective judicial supervision or redress. Kenneth Donaldson was confined in a mental health facility against his will for 15 years even though he was not dangerous to himself or to others, could survive adequately on his own, was not receiving treatment and could have been placed with individuals or institutions which would have provided him with care, supervision and treatment. He was unable to obtain effective judicial redress during that entire period. 422 U.S. at 563, 65. For another graphic example of abuse by experts, see *U.S. ex rel. Schuster v. Harold*, 410 F.2d 1071 (2d Cir. 1969), *appeal dismissed*, 440 F.2d 1334 (2d Cir. 1971).

119. See, e.g., Chodoff, *The Case for Involuntary Hospitalization of the Mentally Ill*, 133 *Am. J. Psych.* 496 (1967). The author, in arguing for *parens patriae* commitment of severely mentally ill persons in need of treatment, states that "[t]heir verbal message that they will not accept treatment may at the same time be conveying more covert messages—that they are desperate and want help even though they cannot ask for it." *Id.* at 498. See also Katz, *The Right to Treatment—an Enchanting Legal Fiction*, 36 *U. Chi. L. Rev.* 755 (1969). But see *Colyar v. Third Judicial District Court, Etc.*, 469 F. Supp. 424 (D. Utah 1979) (The court intelligently insisted that the proper focus is on the process whereby the patient makes his decision and not on its content or on the merits of the decision as perceived by the mental health professional or by the court.).

120. 344 F. Supp. 373 (M.D. Ala. 1972). In *Wyatt*, the court set forth objective resource standards which specified "minimum Constitutional standards for adequate treatment of the mentally ill." *Id.* at 379.

constitutionally entitled to some minimum level of treatment.¹²¹ But the Supreme Court also rejected in no uncertain terms the right to treatment rationale enunciated by the Circuit Court in the decision below.¹²² Thus, it is clear that at this moment there is no affirmative constitutional right to treatment for mentally ill individuals who need therapeutic help. Of course, the costs of providing adequate care and treatment may militate in favor of abolishing *parens patriae* commitments. Many states have initiated programs designed to reduce drastically the population of their mental health facilities.¹²³

The movement to abolish *parens patriae* commitment is gaining strength. Some states have revised their commitment statutes so as to eliminate such commitments entirely.¹²⁴ And, as mentioned earlier, some courts have concluded that such commitments are constitutionally impermissible.¹²⁵

Courts which have struck down *parens patriae* involuntary commitment schemes invariably postulate individual liberty as a superior value whenever balanced against the interests of the state.¹²⁶ Commentators¹²⁷ who agree with such judicial invalidation of the power of the state to coercively treat those mentally ill individuals unable to help themselves seem to fix upon John Stuart Mill as having stated their case best:

121. Because there was substantial agreement that the plaintiff received virtually no treatment during his confinement, the Court in *Donaldson* was not faced with the difficult question of how much treatment satisfies the minimal constitutional imperative. 422 U.S. at 574.

122. *Id.* at 572-73.

123. Beginning in the 1950's mental institutions began extensive and systematic use of tranquilizers which would minimize anti-social behavior and allow patients to function adequately outside mental health institutions. This treatment made possible wholesale discharge of patients and resulted in thousands of chronically mentally ill patients being released from state hospitals into dilapidated quarters in neighborhoods reluctant to accept them. A population of 550,000 in state mental hospitals in 1955 had been reduced to 190,000 by 1978. *N.Y. Times*, May 21, 1978, § 6 (Magazine), at 17. For an interesting account of how de-institutionalized mental health patients survive, see *N.Y. Times*, May 21, 1978, § 6 (Magazine), at 14. Critics of wholesale release of such patients from mental health facilities characterize such de-institutionalization as "dumping." See also *Mental Health System Act of 1979: Hearings on § 1177 Before the Senate Labor and Human Resources Committee*, 96th Cong., 1st Sess. 55 (1979) (statement of Secretary Joseph A. Califano).

124. See note 84 *supra*.

125. See notes 80 and 83 *supra*.

126. See note 83 *supra*.

127. See, e.g., note 1 *supra*.

The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it. Each is the proper guardian of his own health, whether bodily or mental and spiritual. Mankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest.¹²⁸

As an abstract proposition, it may be difficult to disagree with Mill's paean to self-determination as the ultimate social value. However, it seems callous to ignore the effect mental illness can have on the quality of human liberty and on the ability to pursue one's own good. A mentally ill individual may suffer from extreme emotional disturbance such as acute anxiety or depression.¹²⁹ Mental illness can also result in acute impairment of an individual's cognitive and volitional capacities, substantially limiting a person's ability to pursue his own good.¹³⁰ Without concern for the actual quality of liberty enjoyed by mentally ill persons and their capacity to choose from among alternatives, abstract statements of the relative values of "freedom" and "loss of liberty" may be of minimal legal significance.¹³¹ Indeed, in particular cases, Mill's axiom that every person should always pursue his own good without interference may be a condemnation to a life of severe deprivation and suffering without any prospect for self-initiated change.

128. J. MILL, ON LIBERTY 18 (Regney ed. 1955).

129. Commentators arguing in favor of involuntary civil commitment frequently discuss in anecdotal style individual case histories of persons who are mentally ill and suffering severely from their illnesses. See, e.g., the case histories described in Chodoff, *The Case for Involuntary Hospitalization*, 133 AM. J. PSYCH. 496 (1967), and Slovenko, *Civil Commitment in Perspective*, 20 J. PUB. L. 3, 19-20. For a well reasoned theoretical argument on behalf of limited coercive treatment of the mentally ill, see Katz, *The Right to Treatment—An Enchanting Legal Fiction*, 36 U. CHI. L. REV. 755 (1969).

130. For an interesting perspective on persons (many of whom may be mentally ill) who live in rather stark conditions, see Beck & Marden, *Street Dwellers*, NATURAL HISTORY, VOL. 86 No. 9, (1977). This article describes persons who live on the streets of New York City, including "bag ladies" who carry all of their possessions in shopping bags, forage in garbage cans for food and frequently reside in public buildings.

131. This debate over relative values may be resolved adequately by devising a commitment scheme that in close cases resolves uncertainty in favor of liberty. This can be accomplished by using appropriate standards and procedures. Abolishing *parens patriae* commitment in effect creates a conclusive presumption in favor of liberty without regard to its quality or to the countervailing state interests. Coercive intervention in the lives of mentally ill persons who have substantially reduced capacity for rational choice may also enhance "freedom." Gerald Dworkin argues that "Paternalism is justified only to preserve a wider range of freedom for the individual in question." See Dworkin, *Paternalism*, in MORALITY AND THE LAW 107 (R.A. Wasserstrom ed. 1971).

B. Recommendations

Coercive intervention in the lives of mentally ill persons for an essentially therapeutic purpose is a permissible state objective when mental illness has so severely affected the individual that he is no longer capable of making a rational choice as to whether to continue in his present state or to seek treatment for his mental illness. This principle is, of course, not a novel proposition. Courts,¹³² legislatures,¹³³ and commentators¹³⁴ have considered state intervention in such situations to be both a humane and permissible state objective despite the loss of liberty resulting from such state action. Though some critics have disputed the propriety of even commitments which are truly therapeutic,¹³⁵ most critics are concerned that the *parens patriae* authority of the state is presently used to impose choices on individuals who are in fact capable of making sufficiently autonomous and rational choices.¹³⁶

Authorizing the state to act coercively in these circumstances raises the problem of paternalism and requires philosophical justification. The primary argument in favor of such state paternalism is that of implied consent. That is, each of us impliedly authorizes the state to act on our behalf should we become too incapacitated to act in our own self-interest. Some philosophers have considered that each of us has given this implied consent prospectively. Rawls, for example, argues that each of us in the "original position"¹³⁷ would acknowledge that others could act for us, even against our expressed wishes, if we lacked the capacity to act rationally for our own good.¹³⁸ There is some anecdotal evidence that substantiates this philosophical justification. Psychiatrists and commentators indicate that many patients who refused treatment are subsequently grateful for being involuntarily hospitalized after treatment has restored their rationality.¹³⁹ In effect, some of those committed sub-

132. See notes 90 and 99 *supra*.

133. See, e.g., DEL. CODE ANN. tit. 16, §§ 5001, 5122 and FLA. STAT. ANN. § 394.367 (West).

134. See, e.g., Developments—*Civil Commitment*, *supra* note 7, at 1212-19.

135. See note 1 *supra*.

136. See Livermore, Malmquist & Meehl, *On Justifications*, *supra* note 25 at 87-88.

137. By the "original position" Rawls means a position in which individuals must choose principles of association ignorant of their specific characteristics and position within the group. J. RAWLS, A THEORY OF JUSTICE 17-22 (1971).

138. *Id.* at 248-51.

139. See Slovenko, *Civil Commitment in Perspective*, 20 J. PUB. L. 3, 19-23 (1971).

sequently acknowledged that their prior incapacitated condition justified the state's ignoring their refusal of treatment. These patients, in effect, have given their consent retroactively.¹⁴⁰

Put in simple terms, would most citizens wish to live in a society which was absolutely powerless to act in their own best interest should they become unable to do so themselves because of mental illness? Though there appears to be no empirical data as to society's feelings, one intuitively senses that this question would be answered overwhelmingly in the negative. Simple prudence indicates that most individuals would wish for assistance should they become gravely incapacitated.

The state objectives sought to be furthered by *parens patriae* commitment schemes ought to be compatible with their philosophical justification. In order to insure that this is so, the standards for therapeutic commitment by the state under its *parens patriae* authority must be refined and narrowed so as to indicate quite clearly that only those mentally ill persons who need treatment and as a result of their illness are incapable of exercising a rational choice between seeking treatment or continuing in their present situations would be amenable to coercive commitment. At the very least, persons whose cognitive ability is so impaired by mental illness as to render them unable to perceive the essential symptoms of their illness, the significant impact it has on their lives, the treatment alternatives available to them, and the relative costs and benefits of such treatment ought to be amenable to coercive civil commitment.¹⁴¹ Such individuals simply are not able to assess ra-

140. This concept is analogous to what Gerald Dworkin terms "parental paternalism." See Dworkin, *Paternalism*, in *MORALITY AND THE LAW* 107 (R.A. Wasserstrom ed. 1971). He states that:

Parental paternalism may be thought of as a wager by a parent on a child's subsequent recognition of the wisdom of the restrictions. There is an emphasis on what would be called future-oriented consent—on what the child will come to welcome, rather than on what he does welcome.

Id. at 119.

141. Whether persons whose affective or volitional capacities are impaired by mental illness so as to preclude the exercise of treatment choice ought also to be amenable to coercive commitment is a more difficult question. If they possess relevant knowledge of the nature of their incapacity and know it may dramatically affect their decision, then perhaps their refusal to accept treatment should be respected. At the very least it can be cogently argued that relevant knowledge is a necessary and indispensable condition for meaningful choice. Washington considers severe volitional impairment resulting from mental illness which threatens the health of the individual as a sufficient ground for involuntary civil commitment. See *WASH. REV. CODE ANN.* § 71.05.020 (Supp. 1979). Permitting mentally ill per-

tionally the choices available to them or to seek their own best interest. Just as it makes no sense to conclusively presume incompetence from mental illness, it also makes no sense to conclusively presume that all mentally ill persons are competent to pursue their own best interest in a rational manner. Insuring that its citizens have a minimal opportunity to assert their human autonomy and freedom in a rational and meaningful fashion should be recognized as a compelling state interest justifying the use of the state's power of coercion.

Statutory criteria for *parens patriae* commitments which focus on the incapacity of a mentally ill person to make competent treatment decisions should be constitutionally acceptable. An exclusive formulation of such criteria should be avoided lest it impede the development of clear and appropriately circumscribed standards which can evolve in light of empirical knowledge. Several states have adopted, at one time or another, standards which seem to satisfy this general criterion. Delaware has enacted a statutory formulation which would permit hospitalization of a mentally ill individual who is "unable to make responsible decisions with respect to his hospitalization."¹⁴² Such a formulation poses some risk that any patient decision which differed from that recommended by a mental health professional is by definition "irresponsible." However, if this standard is construed to focus on the process of decision-making by the patient based on his possession of relevant knowledge, it should be an acceptable statutory formulation.

sons to be treated against their expressed wishes because of volitional or affective impairment may permit treatment personnel to characterize a patient's express refusal of treatment based on the possession of relevant knowledge as a symptom manifesting volitional or affective disability which would itself justify commitment. Standards should be drawn so as to minimize the opportunity for circular reasoning or for redefining the content of human communication. See notes 25 and 119 *supra*. This issue—whether volitional incapacity caused by mental illness should also support coercive commitment—parallels the debate in the insanity defense. The A.L.I. insanity defense permits substantial volitional impairment resulting from mental illness to excuse a person from criminal responsibility while the traditional M'Naghten test does not. For a recent discussion resolving this debate in favor of the A.L.I. test, see *People v. Drew*, 22 Cal. 3d 333, 583 P.2d 1318, 149 Cal. Rptr. 275 (1978). Feinberg would limit coercive intervention into the lives of the mentally ill to cases in which mental illness causes cognitive impairment. He would not permit such intervention if mental illness causes only emotional or volitional disability. See J. FEINBERG, *What is so Special About Mental Illness?*, in *DOING AND DESERVING* (1970).

142. DEL. CODE ANN. tit. 16, §§ 5001, 5003 (Supp. 1980).

Missouri had at one time adopted commitment criteria which are preferable and should clearly be considered constitutional. This scheme permitted coercive confinement of any one who was "mentally ill and in need of care or treatment in a mental hospital, and because of his illness lacked sufficient insight or capacity to make a rational treatment choice."¹⁴³ Presumably, this standard would require a mental health professional to ascertain the competency of an individual to make a rational treatment choice. Involuntary commitment would not be permitted under this scheme unless the professional could demonstrate to the committing authority the specific manner in which a patient lacked relevant insight or capacity for rational choice.

Some states are now requiring the commitment authorities to demonstrate that a patient poses a serious threat of physical harm to himself if he is not treated before commitment for treatment is permitted.¹⁴⁴ Thus, Arizona currently requires the state to show that a mentally ill person's physical condition has severely deteriorated due to an inability to provide the basic life supports of food, clothing, or shelter.¹⁴⁵ Such a scheme is extremely harsh in that it appears to define mental competency to make a rational treatment decision exclusively in terms of physical condition. Not only does it seem to focus solely on the incorrect legal concern—physical well-being rather than competency to make a treatment decision—but it also increases the risk to the patient by postponing coercive state intervention until the stakes are extraordinarily high. Not only must a patient's mental health be gravely impaired, but his very life must also be substantially at risk.

It is not that difficult to identify persons who might fall within appropriately drawn standards. Psychotic individuals who are out of touch with reality would usually qualify since they are generally not aware of their mental illness, are frequently not functionally relating to their environment or to persons in their environment, and are usually not aware of treatment alternatives available to

143. MO. REV. STAT. § 202.123 (repealed 1955 Mo. Laws, p.656, § A). It permitted involuntary civil commitment of persons who are "mentally ill, . . . in need of treatment in a mental hospital, and because of . . . illness lacks sufficient insight or capacity to make responsible application therefore." See MO. REV. STAT. § 202.797 (repealed 1978 Mo. Laws p. 511, § 2).

144. See, e.g., IDAHO CODE §§ 66.317, .329 (Supp. 1981).

145. ARIZ. REV. STAT. ANN. §§ 36-501, 36-520 (Supp. 1981-82).

them.¹⁴⁶ It is also possible to identify mentally ill persons who would not fall within the reach of this commitment standard. Persons who are aware of their symptoms and the impact their illness may have on the quality of their lives and are also aware of treatment alternatives, including the risks and benefits of such alternatives, would not satisfy the criteria for commitment.¹⁴⁷ Such persons have sufficient insight into their condition and into ways to change it if they so desire and, consequently, their exercise of personal autonomy ought to be respected.

Substantive due process requires that the state in fact have the ability to achieve its specified purpose.¹⁴⁸ Thus, the state, in confining individuals against their will for treatment purposes, must be able to demonstrate that appropriate and effective treatment is available to achieve that objective.¹⁴⁹ Presently, the psychiatric profession appears to possess sufficient treatment expertise to afford most persons who would be subject to commitment pursuant to this proposed model a reasonable chance to attain the capacity for making rational treatment choices.¹⁵⁰ The criteria for commitment should, therefore, also require the state to make a preliminary showing, after an initial diagnosis, that effective treatment is in fact available for the person whose involuntary commitment is sought.¹⁵¹ This would help insure that, before a person suffers a loss of liberty, there is a reasonable prospect that the state's

146. See generally THE ENCYCLOPEDIA OF HUMAN BEHAVIOR: PSYCHOLOGY, PSYCHIATRY, AND MENTAL HEALTH 1078-79 (R. Goldenson ed. 1970); F. REDLICH & D. FREEDMAN, THE THEORY AND PRACTICE OF PSYCHIATRY 252-53 (1966); DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 367-68 (3d ed. 1980).

147. See Developments—*Civil Commitment*, *supra* note 7, at 1212-14. For an interesting case of this type see the case history of Quinton Roger Adams in Ennis, C. L. U. CLINICAL "Crazy But Competent" in LAW, PSYCHIATRY AND THE MENTAL HEALTH SYSTEM 334 (1974). Compare *Lake v. Cameron*, 364 F. 2d 657 (D.C. Cir. 1966). Such persons might well be encouraged to seek therapy and treatment voluntarily. But see Note, *District of Columbia Hospitalization of the Mentally Ill Act*, 65 COLUM. L. REV. 1062 (1965).

148. See text & accompanying notes 94-98 *supra*.

149. Cf. DuBose, *Parens Patriae Commitment*, *supra* note 6, at 1153 (The author concludes that whether the state can in fact afford the required efficacious treatment depends on whether the proffered treatment will benefit the patient, what percentage of a treated sample will improve, the degree of improvement and the danger, if any, to the patient from the proposed treatment.).

150. See, e.g., Davis, *Recent Developments in the Treatment of Schizophrenia*, 6 PSYCH. ANN. 33 (1976). But see DuBose, *Parens Patriae Commitment*, *supra* note 6.

151. A tentative diagnosis should be required as well as a statement of which treatment is preliminarily indicated by the diagnosis.

purported objective—the restoration of rational choice—can be achieved.¹⁵² Requiring an initial showing that the indicated treatment is available and is reasonably likely to succeed would also inject more visibility into the treatment process conducted by treatment professionals, thereby enhancing the ability of the courts to effectively monitor and review the appropriateness and progress of treatment. It would also provide a more timely opportunity for courts to impose limitations on treatment modalities.¹⁵³

Most *parens patriae* statutory commitment schemes which permit involuntary confinement of mentally ill persons generally do not set limits on permissible treatment objectives.¹⁵⁴ Rather, the implicit permissible objective of such schemes invariably is to make the patient “well.”¹⁵⁵ In fact, once a person is determined to lack the competence to make rational treatment decisions, most such schemes simply substitute the judgment of a surrogate decision-maker (usually a mental health professional) to make such decisions as he deems will serve a patient’s best interest in obtaining full recovery. Consequently, wide discretion has frequently been accorded treatment personnel. This discretion includes not only

152. *Donaldson* indicated that some treatment effort was constitutionally required under a *parens patriae* treatment rationale though it did not indicate whether such treatment had to be effective.

153. Recently, some federal courts have held that involuntarily committed patients have a constitutional right to refuse medication in non-emergency situations. *Rennie v. Klein*, 462 F. Supp. 1131 (D.N.J. 1978) and *Rogers v. Okin*, 478 F. Supp. 1342 (D. Mass. 1979), *aff’d in part and rev’d in part*, 634 F.2d 650 (1st Cir. 1980), *vacated and remanded sub nom. Mills v. Rogers*, 50 U.S.L.W. 4676 (U.S. S. Ct. June 18, 1982). It makes more sense to determine at the outset whether effective treatment is probably available and whether the state may, subject to broad limitations, be able to choose the treatment best suited to the patient’s illness including psychotropic medication. It would be a fruitless expenditure of time and effort to permit involuntary commitment for treatment purposes but then determine that a patient may refuse even indicated and effective medication.

154. Most statutory schemes set limits on treatment modalities. Thus, for example, exceptionally intrusive treatment modalities such as electroshock or psychosurgery are either not permitted or can be administered only in exceptional instances and in compliance with stringent procedural and substantive safeguards. *See, e.g., WASH. REV. CODE ANN. § 71.05.370(7)*.

155. Very few *parens patriae* statutes specify with substantial particularity the objective of such commitments. Many of the schemes simply require or permit periodic judicial review to ascertain if the patient is still committable: *i.e.*, if he still satisfies the criteria for initial commitment set forth in the statutory scheme. *See Note, Procedural Safeguards for Periodic Review: A New Commitment to Mental Patients’ Rights*, 88 *YALE L.J.* 850 (1979). These schemes typically do not require immediate release once a person’s condition improves sufficiently so as to take the individual out of the class which qualifies for initial commitment.

what treatment modality will be attempted,¹⁵⁶ but also (and perhaps more importantly) when the tacitly understood treatment objective of full recovery has been achieved. Put differently, treatment personnel are frequently permitted to determine, usually subject to periodic administrative or judicial review,¹⁵⁷ when a patient is well enough to be released. As a consequence, a patient might be committed because he is unable to make rational treatment decisions but continue in confinement without his consent even after initial treatment has restored his capacity for rational choice.

The treatment objective, and thus the administration of a specific treatment modality, should be limited to the goal of restoring an individual's capacity for making rational treatment decisions. Such a limitation would insure that the "nature and duration of the confinement" is in fact compatible with the legitimate purpose of *parens patriae* commitment.¹⁵⁸ Moreover, it would require that treatment have as its objective not complete restoration to full mental health of the patient as determined by mental health professionals, but rather the restoration of the patient's capacity to engage in rational choice.

This limitation would also help insure that the means employed by the state to accomplish a legitimate objective are no broader than necessary, thereby complying with an important requirement of substantive due process.¹⁵⁹ Once sufficient autonomy has been restored, a patient would be free to terminate hospitalization or, if he chooses, to continue treatment as a voluntary patient.¹⁶⁰ Such a model would eliminate the arbitrary substitution of the treatment professional's values or society's values for those of the individual being treated, thereby meeting the criticism of some

156. This may include, for example, milieu therapy, medication, psycho-therapy, and other forms of recognized mental health treatment.

157. See Note, *Procedural Safeguards for Periodic Review*, *supra* note 155.

158. See notes 62 and 117 *supra*.

159. See text & accompanying notes 92-93 *supra*.

160. Safeguards may be required to insure that undue influence is not used by treatment personnel to coerce patients to stay in the facility on a "voluntary" status. There is some basis for such concern. See Gilboy and Schmidt, "Voluntary" Hospitalization of the Mentally Ill, 66 Nw. U. L. Rev. 429 (1971) and *In re Buttonow*, 23 N.Y.2d 385, 244, N.E.2d 677 (1968). These safeguards might include, for example, mandatory release with reapplication required or that a change in status be accomplished only after a patient has been able to consult with counsel.

courts¹⁶¹ and commentators.¹⁶² This scheme would also enable an individual to make a rational decision concerning the quality of his individual liberty. He would be aware of his condition and of opportunities to change it if he so desired. He would not simply be conclusively presumed to have chosen his present environment, lifestyle and condition.

An absolute limit should be set on the period during which the state could retain an involuntary patient.¹⁶³ This maximum retention period should probably not exceed thirty days though it might be adjusted in light of additional empirical data.¹⁶⁴ A limit should also be set on the frequency of such coercive intervention. At a minimum six months should have elapsed from a prior commitment before an individual could be subjected to subsequent commitment proceedings. This would insure that the mental health involuntary commitment system does not become a "revolving door" which would undermine the objectives of the model.

The proposed commitment model would have significant advantages over most *parens patriae* schemes currently in effect. Most importantly, it would assure congruence between the justification for such state action and its implementation. Also, the narrow criteria for commitment would provide specificity in delineating the class of individuals subject to commitment, give clear "notice," and limit substantially the discretion of persons administering the scheme.¹⁶⁵ In addition, the standards would permit more intelligent and careful judicial review of administrative decisions. No longer would courts have to "second-guess" a mental health professional's decision as to what is in the best interests of the committed individual. Essentially, the court would inquire as to whether a mentally ill individual was in fact rationally aware of his

161. See note 103 *supra*.

162. See generally Livermore, Malquist & Meehl, *On Justifications*, *supra* note 25.

163. Judicial review during the initial confinement period should be available prior to the expiration of such period. While virtually all states allow the patient to petition for a review of his status by *institutional* authorities, only a handful allow for a *judicial* review. See, e.g., ARIZ. REV. STAT. ANN. § 36-546 (Supp. 1981-82); IDAHO CODE § 66-343 (Supp. 1981); IOWA CODE ANN. § 229.22 (West Supp. 1981-82); MICH. COMP. LAWS ANN. § 330.1482.

164. Setting any maximum retention period involves a degree of arbitrary line-drawing. Future empirical data may suggest that in most cases restoring a mentally ill person's capacity for rational choice can generally be accomplished within a specified time period.

165. See text & accompanying notes 116-18 *supra*. The discretion as to who should be committed, how such persons should be "treated" and when they should be released would be narrowed considerably.

condition and of choices available to him which might change it if he so desired.¹⁶⁶

This model would also reduce substantially the ratio of false positives; the number of individuals who are mistakenly swept into the mental health system. The commitment criteria are applicable to a smaller number of individuals and the incapacity which satisfies the criteria is relatively pronounced. Since fewer persons can be committed under this scheme and since retention of such persons within the system is to be of limited frequency and duration, the scheme should increase the likelihood that adequate treatment resources are, in fact, made available to persons who lose their liberty on the implied promise of effective treatment.¹⁶⁷

This *parens patriae* commitment model would be an appropriately limited state response to the present factual reality of patients' conditions and their current disability. Unlike many current police power commitment models, it is not a state response to the mere possibility of dangerous future conduct. Moreover, psychiatric expertise would be used in an appropriate manner by the legal system. The essential expertise of psychiatrists consists of diagnosing and treating mental illness as it presents itself, not of predicting future dangerous behavior.

Requiring the state at the outset of the commitment process to indicate a tentative diagnosis and to demonstrate that effective treatment is available improves the ability of courts to exercise meaningful and timely judicial control over the detention and treatment phase of the process.¹⁶⁸ The permissible treatment objective is limited to restoring a person's ability to engage in autonomous decision-making in a manner that is consistent with traditional and meaningful concepts of freedom and liberty. The limited duration and frequency of state intervention would encourage respect for individual autonomy and would sensitize treat-

166. A judge might well be able to ascertain whether the individual is capable of exercising such choice by questioning him personally.

167. It is possible, of course, that the proposed model would result in the confinement of only the most severely mentally ill and that, consequently, the advantages achieved by allocating the presently available resources to fewer individuals would be offset by the severity and intractability of the mental illness being treated.

168. Since the coercive power of the state is being exercised by treatment personnel under authority delegated by the state, effective judicial control of this phase is especially imperative yet often neglected.

ment personnel to their appropriate roles and objectives in the process.

CONCLUSION

There is legitimate concern as to whether coercive psychiatric intervention by the state in the lives of its mentally ill citizens should be tolerated either to protect the community or an individual from harm, or to help an individual unable to help himself. Many courts and legislatures, applauded by many commentators, would resolve this doubt by permitting police power commitments of the mentally ill upon a minimal claim of dangerousness while not permitting *parens patriae* commitments which have a therapeutic purpose. A better resolution is to permit both types of involuntary civil commitments under the narrow commitment criteria suggested herein. This would permit the state to protect the community from those mentally ill citizens who pose a substantial risk of serious harm to themselves or others and whose own conduct merits such state intervention. Moreover, the state would not be forced to abandon many citizens afflicted with serious mental illness to a lifetime of abject suffering based on a conclusive presumption of rational choice. Surely such an alternative *parens patriae* model should be tried before taking the drastic step of abolishing the power. In short, the commitment scheme herein proposed would insure that compelling state objectives would be furthered by carefully crafted means that afford a very reasonable prospect of accomplishing legitimate and humane state purposes.

