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Constitutional Law—Due Process Requires that Limits Be Placed on Psychiatric Confinement Commensurate With the Procedural Safeguards Employed in Obtaining That Confinement.

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The majority's position is perhaps based on the conviction that the Court should not engage in a case-by-case analysis when an executive body has been delegated that task. By formulating a more realistic standard, or by placing some real limitations on the executive discretion, they would have accomplished the same result without denying the Court's own authority. The Attorney General, after this decision, is free to pursue virtually any policy he chooses, and can expect neither guidelines nor criticism from the Court.

SUSAN GINSBERG

CONSTITUTIONAL LAW—DUE PROCESS REQUIRES THAT LIMITS BE PLACED ON PSYCHIATRIC CONFINEMENT COMMENSURATE WITH THE PROCEDURAL SAFEGUARDS EMPLOYED IN OBTAINING THAT CONFINEMENT.

We'd like to know
A little bit about you
For our files.
We'd like to help you learn
To help yourself.
Look around you. All you see
Are sympathetic eyes.
Stroll around the grounds
Until you feel at home.

Paul Simon, "Mrs. Robinson"

In July 1966, Edward McNeil was sentenced to five years in a Maryland prison after having been convicted on two charges of assault. Prior to his actual imprisonment, the trial judge made an ex parte determination that there was reasonable cause to suspect that McNeil was a defective delinquent.[1] As a result, he was com-

Smith, Jr., Deputy Administrator, Bureau of Security and Consular Affairs, Department of State, Feb. 7, 1972, in *Developments in the Law—The National Security Interest and Civil Liberties,* 85 HARV. L. REV. 1153 n.97. It may be anticipated that any further changes in policy will be unreviewable, regardless of their effect on first amendment rights.

1. A defective delinquent is defined as:
an individual who, by the demonstration of persistent aggravated antisocial or criminal behavior, evidences a propensity toward criminal activity, and who

mitted to Maryland's Patuxent Institution for psychiatric evaluation, under the provisions of the Defective Delinquents Law.[2] On at least fifteen separate occasions, over the next six years, McNeil refused to cooperate with the examining psychiatrists, claiming a fifth amendment right to remain silent.[3] Upon conclusion of his criminal sentence, McNeil petitioned for his release on the ground that the State's power to hold him had expired. The trial court held that the Maryland law permitted the State to continue McNeil's confinement until the psychiatric examination was completed "without regard to whether or not [his] criminal sentence . . . has expired."[4] After the Maryland Court of Appeals denied appellant leave to appeal, his petition for certiorari was granted by the United States Supreme Court. *Held*: due process requires that the psychiatric confinement of an individual not be extended beyond limits commensurate with the procedural safeguards employed in obtaining or extending that confinement. *McNeil v. Director, Patuxent Institution,* 407 U.S. 245 (1972).

The involuntary commitment of persons with mental health problems is usually justified by one of two concepts: *parens patriae* or the state's police power.[5] The doctrine of *parens patriae* permits confinement by the state of those persons who, because of a mental disability, are unable to care for themselves.[6] A good example of this procedure embodied in legislation is contained in New York's newly revised Mental Hygiene Law, which defines a person "in need of involuntary care and treatment" as one who "has a mental illness for which care and treatment as a patient in a hospital is essential to such person's welfare and whose judgment is so impaired that he is unable to understand the need for such care and treatment."[7] Forty-three American jurisdic-

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is found to have either such intellectual deficiency or emotional unbalance, or both, as to clearly demonstrate an actual danger to society so as to require such confinement and treatment, when appropriate, as may make it reasonably safe for society to terminate the confinement and treatment.

Defective Delinquents Law, MD. ANN. CODE art. 31B, § 5 (1971).

2. *Id.* § 1 *et seq.* (1971).

3. Brief for Petitioner at 10-12, McNeil v. Director, Patuxent Institution, 407 U.S. 245 (1972).

4. Defective Delinquents Law, MD. ANN. CODE art. 31B, § 6(e) (1971).

5. R. ROCK, HOSPITALIZATION AND DISCHARGE OF THE MENTALLY ILL 6 (1968); Kittrie, *Compulsory Mental Treatment and the Requirements of "Due Process,"* 21 OHIO ST. L.J. 28, 32 (1960); Taylor, *A Critical Look into the Involuntary Civil Commitment Procedure,* 10 WASHBURN L.J. 237, 239-40 (1971).

6. Taylor, *supra* note 5, at 239.

7. N.Y. MENTAL HYGIENE LAW § 31.01 (McKinney Supp. 1972) (effective Jan. 1, 1973).

tions provide some form of judicially supervised involuntary hospitalization.[8] In eighteen of these, the need for care and treatment and the state's police power—the power of the sovereign to protect the state from breaches of the peace—are alternate grounds for such hospitalization.[9] In six jurisdictions, the sole ground for hospitalization is the need for care and treatment, while in nine others the only justification is the State's police power.[10] The statutes of the remaining ten jurisdictions tend to speak in broad generalities about "insanity," "feeblemindedness" and "mental illness."[11] An extreme example of this category was found in the Massachusetts law that, until it was recently revised, authorized the involuntary commitment of any person who is "likely to conduct himself in a manner which clearly violates the established laws, ordinances, conventions or morals of the community."[12]

In addition to these involuntary commitment statutes, twenty-four jurisdictions also have laws dealing specifically with psychopaths—primarily sexual psychopaths.[13] Such laws are often the result of a public uproar over a brutal sex crime, and represent attempts to protect the public from those individuals with proclivities toward sex offenses.[14] The aim of these statutes is twofold: to protect society, which is the primary goal, and to provide the psychopath with treatment.[15]

One of the recurring themes whenever involuntary commitment is discussed is the lack of due process involved in the commitment procedures.[16] One recent study by the American Bar Foundation found that

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8. S. BRAKEL & R. ROCK, THE MENTALLY DISABLED AND THE LAW 36 (1971) [hereinafter cited as BRAKEL & ROCK].

9. *Id.*

10. *Id.*

11. *See id.* at 39.

12. [1955] Mass. Laws ch. 637, § 1, *as amended,* MASS. GEN. LAWS ch. 123, § 1 *et seq.* (effective July 1, 1971). The amendment eliminated the definition of "mentally ill" entirely and now conditions involuntary commitment upon the finding of a "likelihood of serious harm" either to the patient himself or to others. The old definition is quoted only to show the extreme position taken by Massachusetts until last year.

13. BRAKEL & ROCK 362-65. Maryland's Defective Delinquents Law falls in this category. Only Connecticut, Maryland and Washington have definitions of psychopaths in their statutes that do not involve sex or sex crimes. *Id.*

14. *Id.* at 341.

15. *Id.* at 343. As yet, however, no truly effective method of treatment is recognized for the psychopathic personality and, although the statutes profess to have treatment as a goal, treatment is often ineffectual. *Id.* at 352. *See* J. COLEMAN, ABNORMAL PSYCHOLOGY AND MODERN LIFE 375 (4th ed. 1972).

16. *E.g.,* Kittrie, *supra* note 5, at 39-50; Note, *Mental Illness and Due Process: Involuntary Commitment in New York,* 16 N.Y.L.F. 165 (1970).

the rights of persons committed as mentally ill were not adequately protected by the statutes.[17] Thirty-one states presently allow involuntary hospitalization solely on the basis of certificates signed by one or two physicians,[18] a procedure that is the result of pressure from the psychiatric community to dejudicialize commitment proceedings.[19] Although this type of commitment is accomplished without a hearing, one is generally available if the patient later requests it. Even when such a hearing is held, however, due process is, in the main, illusory, since the courts cut corners under medical pressure and often become mere "rubber stamps" for psychiatric opinion.[20] For example, forty-three of fifty-one jurisdictions have statutory provisions granting an individual a right to retained counsel at this hearing, but only twenty-three make a court-appointed attorney mandatory if the patient does not have his own.[21] In light of the fact that a person can be involuntarily committed for an indefinite period in twenty-four states,[22] this lack of due process may seem surprising. Although these statutes have been attacked, the challenges have met with little success.[23]

Due process and other constitutional challenges to these statutes are usually rebutted by the State's arguing that the proceedings are civil, rather than criminal, in nature and that their purpose is to treat rather than punish.[24] The judicial origins of this distinction are obscure, but one of the earliest reported recognitions came in 1881 from the Supreme Court of Iowa.[25] There, a county sought to recover from a decedent's estate the cost incurred in maintaining him in a mental hospital. The executor argued that the adjudication of lunacy without notice, confrontation, a right to counsel, or a speedy and public jury trial, violated the provision of the Iowa constitution requiring due process "[i]n all criminal prosecutions, and in cases involving the life, or liberty of an individual . . . ."[26] However, the court construed

17. BRAKEL & ROCK 171.

18. *See id.* at 57-58, 60.

19. *Id.* at 60.

20. *Id.*

21. *See id.* at 125-27.

22. *See id.* at 91-95. Fourteen of those twenty-four jurisdictions also make a court-appointed lawyer mandatory at commitment proceedings. *Id.* at 125-27.

23. *See* Annot., 24 A.L.R.2d 350, 354 (1952).

24. Comment, *Civil Restraint, Mental Illness, and the Right to Treatment*, 77 YALE L.J. 87, 92-93 (1967).

25. County of Black Hawk v. Springer, 58 Iowa 417, 10 N.W. 791 (1881).

26. IOWA CONST. art. 1, § 10.

this provision to apply only to criminal prosecutions, where punishment is imposed through fine or imprisonment.[27] The court stated that

> [t]he inquest of lunacy . . . is in no sense a criminal proceeding. The restraint of an insane person is not designed as punishment for any act done. The insane are by the law taken into the care and custody of the state for treatment for their unfortunate infirmity.[28]

In effect, *parens patriae* was invoked to validate the state's confinement of the mentally ill decedent without due process. A few years later, the same court reaffirmed its holding in a case where an asylum inmate sought release through a writ of habeas corpus.[29] Thus, the court was not only willing to employ this distinction to compel an estate to pay a sum of money, but also to continue the confinement of an individual. In the 1940's and early 1950's, newly enacted sexual psychopath laws came under increasing attack and the courts revived the civil-criminal dichotomy to defend them.[30] Perhaps the most frequently cited case from this period came from the Supreme Court of Michigan, where the constitutionality of that state's sexual psychopath law was upheld on the ground that the proceedings were "not circumscribed by the constitutional and statutory limitations surrounding a person accused of, or tried for, a crime."[31] Today the distinction between civil and criminal proceedings persists as a device by which courts permit involuntary commitment without adequate procedural safeguards.[32]

Precedent has not been the sole defense of the civil characterization of commitment proceedings. The underlying reasons for this characterization are often explained. As one court put it:

> The purpose of a criminal proceeding is to punish. But this Act is but a civil inquiry to determine a status. It is curative and remedial in nature instead of punitive. One of its purposes is the treatment and

27. 58 Iowa at 417, 10 N.W. at 791.

28. *Id.* at 417-18, 10 N.W. at 791-92.

29. *In re* Bresee, 82 Iowa 573, 48 N.W. 991 (1891).

30. *See, e.g., In re* Keddy, 105 Cal. App. 2d 215, 223 P.2d 159 (1951); State *ex rel.* Sweezer v. Green, 360 Mo. 1249, 232 S.W.2d 897 (1950); *In re* Moulton, 96 N.H. 370, 77 A.2d 26 (1950); *In re* Kemmerer, 309 Mich. 313, 15 N.W.2d 652, *cert. denied,* 329 U.S. 767 (1946); People v. Sims, 382 Ill. 472, 47 N.E.2d 703 (1943); People v. Chapman, 301 Mich. 584, 4 N.W.2d 18 (1942).

31. People v. Chapman, 301 Mich. 584, 603, 4 N.W.2d 18, 26 (1942), *citing In re* Bresee, 82 Iowa 573, 48 N.W. 991 (1891).

32. *E.g.,* Rose v. Haugh, 259 Iowa 1344, 147 N.W.2d 865 (1967); *In re* Anonymous, 62 Misc. 2d 578, 309 N.Y.S.2d 13 (Sup. Ct. 1970).

> cure of a present and existing mental disorder. . . . The public policy of the State . . . is to treat and cure such persons, not to punish them. . . . [They] are merely made subject to restraint and treatment because of their condition and their acts . . . to prevent [them] from being punished for crimes they commit during the period of this mental ailment.[33]

Once it is found that the statute's aims are remedial, rather than punitive, the "civil" label is applied.

The refusal to require strict due process safeguards in commitment proceedings has been a result of the social and historical framework within which the decisions have been made. The history of the treatment of the mentally disabled has had a considerable impact on society's view of mental health problems and this, in turn, has been reflected in judicial opinion. The earliest theories of mental illness, formulated by Hippocrates and extended by Galen, postulated that an imbalance in the four body humors—blood, phlegm, yellow and black bile—caused aberrations of the mind.[34] By the Middle Ages, however, medicine had turned to superstition, demonology and sorcery. With the exception of a few learned men, it was generally believed that the mentally ill were possessed by spirits.[35] This belief may have reached its peak in the fifteenth century with the publication, by two Dominican inquisitors, of *Malleus Maleficarum* [*The Hammer of Witches*]. Two centuries of continuous and vigorous witch-hunting followed this definitive essay on the identification and punishment of witches.[36] By the seventeenth century, madmen were being placed in hospitals instead of being burned as witches, thus initiating "[t]he great confinement of the insane."[37] By the beginning of the nineteenth century, a movement had begun to improve conditions in these hospitals—conditions which had deteriorated to such an extent that they often rivaled the worst penal institutions.[38] The reform movement

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33. State *ex rel.* Sweezer v. Green, 360 Mo. 1249, 1253, 232 S.W.2d 897, 900 (1950).

34. G. KISKER, THE DISORGANIZED PERSONALITY 37-38 (1964).

35. *Id.* at 39-41.

36. T. SZASZ, THE MANUFACTURE OF MADNESS 7 (1970).

37. *Id.* at 13, *quoting* M. FOUCAULT, MADNESS AND CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON 39 (1961).

38. G. KISKER, *supra* note 34, at 45-49.

> I have seen them coarsely fed, deprived of fresh air, or water to quench their thirst . . . . I have seen them in squalid, stinking little hovels, without air or light, chained in caves where wild beasts would not have been confined. . . . There they remain to waste away in their own filth under the weight of chains

in the United States found its most vigorous proponent in Dorothea Dix, who in 1841 began her forty-year campaign in aid of the mentally ill. Miss Dix labored to transfer the insane out of the jails and almshouses and into hospitals where it was thought most could be cured.[39] It was largely through her efforts that the American public first became aware of mental illness as a medical phenomenon, and of the problems of the mentally ill.[40] One other influence in this field in the late nineteenth and early twentieth century that must be mentioned, if only in passing, is the contribution of Sigmund Freud.[41] It was his work, to a great extent, that brought psychology to its full maturity by developing the most comprehensive personality theory conceived until that time.[42] The position taken by the judiciary in the United States reflected the public awareness that hospitalization was necessary to help the mentally ill. This decriminalized their confinement and labeled it treatment. As evidence of their compassion for these unfortunate people, the courts, fully believing a cure was possible, endorsed a state policy which involuntarily confined the mentally ill for their own good (*parens patriae*). The revolutionary theories of Freud and others that were in the process of development at that time reinforced this idea, and allowed the judges to believe that they were benefiting the individual.

This, then, was the state of the law at the turn of the century, and it remained relatively unchanged until about twenty years ago. Since civil commitment was considered to be for the individual's welfare, the judicial attitude was that procedural safeguards need not be as strict as in purely criminal proceedings where the object was more punitive. The recent trend, however, is toward requiring the safeguards of a criminal trial, at least in sexual psychopath proceedings, an area that most closely resembles the criminal law.[43] The comparison of the confinement of the sexual psychopath to criminal penal sanc-

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which lacerate their bodies. Their faces are pale and emaciated; they await only the moment which will end their misery and conceal our disgrace.

Id. at 45, *quoting from* J. ESQUIROL, DES MALADIES MENTALES (1838).

39. G. KISKER, *supra* note 34, at 51. "No other individual did more in the nineteenth century to advance the idea of communal responsibility for the welfare of the mentally disabled." BRAKEL & ROCK 8.

40. G. KISKER, *supra* note 34, at 52.

41. Freud's THE NEURO-PSYCHOSES OF DEFENCE was published in 1894, THE INTERPRETATION OF DREAMS in 1900, and THE PSYCHOPATHOLOGY OF EVERYDAY LIFE in 1901. T SZASZ, *supra* note 36, at 356-57.

42. G. KISKER, *supra* note 34, at 64-65.

43. BRAKEL & ROCK 345, 356-57; *see* Annot., 24 A.L.R.2d 350 (1952).

tions is facilitated by some of the characteristics of psychopath legislation. Generally, such laws are not applicable to an individual unless he has been charged with a violation of some criminal law (particularly sex offenses).[44] Current psychiatric opinion defines as psychopathic, or antisocial, those "individuals who are basically unsocialized and whose behavior pattern brings them repeatedly into conflict with society."[45] Thus, diagnosis as a psychopath could cause an individual to be incarcerated for prior unrecorded and unconfirmed acts without an opportunity to defend himself.[46] The original rationale for calling the proceedings by which a person is involuntarily committed "civil" is substantially weakened if that person is confined on the basis of a past history of antisocial or criminal behavior for an indefinite term without any real prospect of effective treatment.[47] In such a case, the courts should find it more difficult to argue that the purpose of the statute "is curative and remedial in nature instead of punitive" and that the "public policy of the State . . . is to treat and cure such persons . . . ."[48]

The Supreme Court in *McNeil* looked at the practicalities of petitioner's confinement and saw a "stark and simple claim"[49] that the State was holding him beyond his sentence without legal justification. The State of Maryland raised three major arguments in defense of the continued confinement of McNeil. One reason was based on a syllogism that most individuals who do not cooperate with the authorities when committed for observation are in fact "defective delinquents"; McNeil did not cooperate; therefore, McNeil is a defective delin-

44. *See, e.g.*, ALA. CODE tit. 15, § 435 (Supp. 1969); COLO. REV. STAT. ANN. § 39-19-1 (1963); CONN. GEN. STAT. ANN. § 17-239(2) (1958); ILL. ANN. STAT. ch. 38, § 105-3 (Smith-Hurd 1970); IND. ANN. STAT. § 9-3402 (1956); IOWA CODE ANN. § 225A.1 (1969); MD. ANN. CODE art. 31B, § 6(a) (1971); MO. REV. STAT. § 202.710 (1972); N.H. REV. STAT. ANN. § 173-A:2 (Supp. 1971); N.J. STAT. ANN. § 2A:164-3 (Supp. 1971); OHIO REV. CODE ANN. § 2947.24 (Baldwin 1964); TENN. CODE ANN. § 33-1301 (Supp. 1972); UTAH CODE ANN. § 77-49-1 (Supp. 1971); WASH. REV. CODE ANN. § 71.06.020 (1962).

45. THE COMMITTEE ON NOMENCLATURE AND STATISTICS OF THE AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 43 (2d ed. 1968). This definition is listed under the heading, "Personality Disorders," which are recognized as life-long patterns of behavior. *Id.* at 41.

46. BRAKEL & ROCK 354.

47. *See id.* at 352.

48. State *ex rel.* Sweezer v. Green, 360 Mo. 1249, 1253, 232 S.W.2d 897, 900 (1950).

49. McNeil v. Director, Patuxent Institution, 407 U.S. 245, 248 (1972). This claim was distinguished by the Court from the more complex claims raised in the companion case to *McNeil*, Murel v. Baltimore City Criminal Court, 407 U.S. 355 (1972), in which the entire Defective Delinquents Law was challenged by inmates who had been adjudged defective delinquents.

quent and should be confined.[50] A second rationale analogized appellant's confinement to civil contempt on the ground that McNeil's refusal to cooperate in itself justified imprisonment.[51] A final reason was the orthodox idea that commitment had not been imposed as a criminal sanction, but only for observation purposes; thus the procedural safeguards of a final determination of defective delinquency were not required.[52] The Court disposed of the first two arguments rather summarily. The majority said that if Patuxent could infer that McNeil was a defective delinquent from his lack of cooperation, then he had not prevented the Institution from evaluating him and they should "have long been ready to make their report to the Court."[53] The contempt analogy was rejected on the ground that there had been no hearing to determine whether McNeil's conduct was in fact contemptuous.[54] In response to the State's third argument, the Court examined the realities of the situation and observed a confinement that had already lasted six years, with no indication when, or if, it would ever end. The Court did not deny the authority of the State to confine McNeil for an indefinite term, but held that procedural "safeguards commensurate with a long-term commitment" were prerequisites to such action.[55] If lesser safeguards are appropriate because the commitment is only intended to be of short duration, then the length of the confinement must in fact be strictly limited.[56] Although the Court was unwilling to set specific limits, it did indicate that the statutory limit of six months set in the Defective Delinquents Law[57] for the initial evaluation period was "a useful benchmark," even though the state courts permitted extensions.[58] Since Maryland did not have the power to confine McNeil indefinitely without a judicial determination that the confinement was warranted, he was entitled to be released.[59]

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50. 407 U.S. at 251.
51. *Id.* at 250.
52. *Id.* at 249.
53. *Id.* at 252.
54. *Id.* at 251.
55. *Id.* at 249.
56. *Id.* at 249-50.
57.

> [The examining officials at Patuxent] shall state their findings . . . not later than six months from the date said person was received in the Institution for examination, or three months, before the expiration of his sentence, whichever first occurs.

Defective Delinquents Law, MD. CODE ANN. art. 31B, § 7(a) (Supp. 1972).
58. 407 U.S. at 250.
59. *Id.* at 252.

In support of this holding, the Court cited a recent case in which a mentally defective deaf-mute had been charged with robbery but found to be incompetent to stand trial.[60] He was then involuntarily committed "until such time as [the] Department [of Mental Health] should certify to the court that 'the defendant is sane.' "[61] The Court found that the likelihood of improvement in his condition was so remote that his commitment amounted to life imprisonment and that, without the pending criminal charges, the state would be required to adhere to the higher standards of due process required in the commitment of all other mentally ill citizens. Since the nature of the proceeding alone permitted a lesser standard of procedural safeguards, the defendant had been denied equal protection of the law under the fourteenth amendment, even though the result would have been identical.[62] The majority went on to hold that, "[a]t the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."[63]

The one major argument which McNeil raised and the Court chose not to consider was his claim that the fifth amendment gave him the right not to cooperate.[64] In his concurring opinion, however, Mr. Justice Douglas indicated that he believed the fifth amendment gave petitioner this right, not only because some of the questioning took place while his appeal on the assault convictions was still pending, but also because the questioning involved many other prior antisocial or criminal acts.[65] One final point that was raised by McNeil and totally ignored by the majority was that he should have been afforded substantial due process safeguards because the proceedings by which he was to be committed were analogous to proceedings involving juveniles.[66] Mr. Justice Douglas agreed that such an argument was applicable here since juvenile delinquency proceedings result in similar deprivations of liberty and consequences to fifth amendment freedoms.[67]

The *McNeil* opinion is as important for what it does not say as for what it expressly holds. Significantly, the Court refrains from any

60. Jackson v. Indiana, 406 U.S. 715 (1972).
61. *Id.* at 719.
62. *Id.* at 729-30.
63. *Id.* at 738.
64. McNeil v. Director, Patuxent Institution, 407 U.S. 245, 250 (1972).
65. *Id.* at 254-57.
66. Brief for Petitioner at 50, McNeil v. Director, Patuxent Institution, 407 U.S. 245 (1972), *citing In re* Gault, 387 U.S. 1 (1967).
67. 407 U.S. at 257.

discussion of the civil-criminal distinction in the nature of the proceedings.[68] It would be difficult to argue that this omission by the Court indicates the demise of this distinction. Nevertheless, such a realistic approach would be entirely in accord with previous positions of the Court. In *Goldberg v. Kelly*,[69] drawing upon concepts enunciated by Mr. Justice Frankfurter in *Joint Anti-Fascist Refugee Committee v. McGrath*,[70] the Court announced that "[t]he extent to which procedural due process must be afforded . . . is influenced by the extent to which [the individual] may be 'condemned to suffer grievous loss . . . .' "[71] Thus, a concept originally conceived by Mr. Justice Frankfurter to encompass only the right to be heard was extended to the area of due process generally. The question remains whether commitment as a defective delinquent, or as a sexual psychopath, constitutes a "grievous loss." It is certainly arguable that confinement for an indefinite term, perhaps for life, in the absence of adequate treatment[72] is a "grievous" loss of liberty. As C. S. Lewis stated:

> To be taken without consent from my home and friends; to lose my liberty; to undergo all those assaults on my personality which modern psychotherapy knows how to deliver; to be re-made after some pattern of "normality" hatched in a Viennese laboratory to which I never professed allegiance; to know that this process will never end until either my captors have succeeded or I grown wise enough to cheat them with apparent success—who cares whether this is called Punishment or not.[73]

This loss of liberty is ostensibly justified by the need of society to confine the mentally ill for their own good or the good of the community. Even if one concedes that the societal need is great enough to

68. Mr. Justice Douglas, in his concurring opinion, refers to the distinction merely to say that it is of no importance to a claim under the self-incrimination clause of the fifth amendment. *Id.* at 257. This omission may be all the more significant in light of the fact that the State, in its brief, frequently referred to the distinction and based several of its arguments on the fact that defective delinquency proceedings were civil in nature. *See, e.g.*, Brief for Respondent at 32, 33, 38, 39, 41, 55, 58, 59, 67, 68, 80, 82, 84, McNeil v. Director, Patuxent Institution, 407 U.S. 245 (1972).

69. 397 U.S. 254 (1970).

70. 341 U.S. 123 (1951) (concurring opinion).

71. 397 U.S. at 262-63, *quoting* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

72. The Maryland statute provides for "such confinement and treatment, when appropriate, as may make it reasonably safe . . . to terminate the confinement and treatment." Defective Delinquents Law, MD. CODE ANN. art. 31B, § 5 (1971). Presumably, if there is no treatment, then it may never be safe to end the confinement.

73. Lewis, *The Humanitarian Theory of Punishment*, 6 RES JUDICATAE 224, 227 (1953).

justify a deprivation of personal liberty, that liberty is still a precious enough possession to command adequate due process safeguards before it may be taken away. If the *McNeil* decision is a bellwether, the fact that the confinement may not be punitive will be irrelevant.

The opposing position, taken by the American Psychiatric Association and the National Association for Mental Health, favors "a simple commitment procedure entailing an application to the hospital by a close relative or friend, and a certification by two qualified physicians that they have examined the subject and found him to be mentally ill."[74] They criticize the judicial procedures already in use for involuntary commitment and clearly would not support any increased legal controls.[75]

One psychiatrist who would not agree with this position is Thomas Szasz, who is totally opposed to involuntary commitment for psychiatric treatment.[76] In fact, it is his contention that there is no such thing as "mental illness," at least as conceived by modern psychiatrists.[77] The human body can be physically ill, but when one speaks of a "sick mind," one is using a metaphor, as when one speaks of a "sick economy" or a "sick joke."[78] Szasz sees modern Institutional Psychiatry as merely a means of protecting society's dominant ethic, a function served by the Inquisition between the fifteenth and seventeenth centuries.[79] People who deviated from socially accepted norms of behavior were described by the authors of *Malleus Maleficarum* as witches, while today the American Psychiatric Association's *Manual of Mental Disorders*[80] describes them as mentally ill.[81] Thus, people are stigmatized as mentally ill and offered as "psychiatric scapegoats" for

74. BRAKEL & ROCK 59-60, quoting from a statement made in behalf of the two associations before the Senate Subcommittee on Constitutional Rights in March, 1961, *reported in* AMERICAN PSYCHIATRIC ASSOCIATION & NATIONAL ASSOCIATION OF MENTAL HEALTH JOINT INFORMATION SERVICE, PSYCHIATRIC POINTS OF VIEW REGARDING LAWS AND PROCEDURES GOVERNING MEDICAL TREATMENT OF THE MENTALLY ILL (1962).

75. BRAKEL & ROCK 60. *See also* text accompanying notes 21, 22 *supra.*

76.

> If psychiatrists really wanted these things, all they would have to do is to unlock the doors of mental hospitals, abolish commitment, and treat only those persons who, like in nonpsychiatric hospitals, want to be treated. This is exactly what I have been advocating for the past fifteen years.

T. SZASZ, *supra* note 36, at 52.

77. Szasz, *The Myth of Mental Illness,* 15 AM. PSYCHOLOGIST 113 (1960).

78. Szasz, *A Psychiatrist Views Mental Health Legislation,* 9 WASHBURN L.J. 224, 226 (1970).

79. T. SZASZ, *supra* note 36, at 58-59.

80. *See supra* note 45.

81. T. SZASZ, *supra* note 36, at 28-41.

society's ills.[82] Once this is done, society, through its doctors, can strip them of their civil rights and privileges. By giving the doctors the authority to determine who will be incarcerated and when they will be released, too much judicial power is placed in their hands.[83] What ultimately evolves from this exercise of judicial power by doctors is, what Szasz calls, the Therapeutic State.[84] The ultimate Therapeutic State today is the Soviet Union, where patients are coerced into treatment, and the politically embarrassing individual is treated as mentally ill.[85]

One need not, however, accept the extreme position of Szasz to conclude that involuntary "civil" commitment should be surrounded by strict procedural safeguards. Perhaps the greatest stumbling block to providing these safeguards is the distinction between civil and criminal confinement. *McNeil* can hardly be considered a definite holding by the Supreme Court that this distinction is dead. However, there was no mention of the "civil" nature of Maryland's Defective Delinquents Law, nor was there a need to mention it. Any time a person faces the possible loss of his liberty for an indefinite period, the procedures whereby this is accomplished should allow for the least amount of error and provide him with the most protection possible. The loss of one's personal liberty for what may be a lifetime is indeed a "grievous loss" and, in that context, the civil-criminal dichotomy is rendered meaningless.

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82. *Id.* at 209.
83. *See* Szasz, *Justice in the Therapeutic State,* 3 IND. LEGAL F. 20 (1969).
84. *Id.*
85. T. SZASZ, *supra* note 36, at 217-18.