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IN THE NAME OF TREATMENT:
AUTONOMY, CIVIL COMMITMENT, AND RIGHT TO
REFUSE TREATMENT

*Brian M. Schwartz**

I. Introduction

In August, 1956, Kenneth Donaldson, a 48-year-old carpenter from Camden, New Jersey, went to Florida to visit his 80-year-old parents. A few months later, he began to feel unusually tired, and told his father that someone might have put a sedative in his food. He had a basis for such a fear, since, a few years earlier, he had become drowsy after eating lunch at a diner he frequented, and laboratory tests on his urine disclosed the presence of a large amount of codeine; Donaldson, a Christian Scientist, had not been taking medication that contained codeine. Donaldson's father filed a petition requesting that his son be committed to a mental hospital. Donaldson was taken to the county jail, where he received an examination that lasted less than two minutes from two physicians who were not psychiatrists. On the basis of this examination, the doctors concluded that Donaldson was a paranoid schizophrenic.

Shortly thereafter, a commitment hearing before a county judge was held. The hearing was completed in a matter of minutes. The judge agreed with the doctors' diagnosis and committed Donaldson to Florida State Hospital. This action violated Florida law, which limited involuntary commitment to persons resident in Florida for at least one year, whereas Donaldson had been in Florida for only four months. The examining physicians had erroneously reported that Donaldson had been in Florida for four years.

Donaldson was confined in Florida State Hospital for over 14 years. For religious reasons, he refused medication and ECT (electroshock therapy) and his wishes were honored. He was given little other treatment. He was allowed to speak to a psychiatrist for only three hours in 14 years; he was denied grounds privileges and occupational therapy. Yet the hospital continued to confine him, reasoning that he was mentally ill because he believed (1) that he had been in Florida for only four months prior to commitment, (2) that someone had put codeine in his food, and (3) that he was not mentally ill.¹

In 1971, Donaldson sued his attending physicians for denying him treatment in violation of his constitutional rights. A jury awarded him \$38,500 damages, and the Fifth Circuit upheld the verdict, reasoning that if "the 'purpose' of commitment is treatment, and treatment is not provided, then the 'nature' of the commitment bears no 'reasonable relation' to its 'purpose,' and the Constitutional rule [requiring due process] is violated."² The court declared

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¹ These facts are taken from B. ENNIS, *PRISONERS OF PSYCHIATRY* 83 et seq. (1972), a book written by one of Donaldson's lawyers, and from the opinion in *Donaldson v. O'Connor*, 493 F.2d 507, 511-14 (5th Cir. 1974).

² 493 F.2d at 521.

that "a person involuntarily civilly committed to a state mental hospital has a constitutional right to receive such individual treatment as will give him a reasonable opportunity to be cured or to improve his mental condition."³ This holding is now being considered by the Supreme Court.

The *Donaldson* opinion is troubling for several reasons. First, it does not deal with the fact that Donaldson probably should not have been committed at all. Besides ignoring the summary nature of Donaldson's commitment hearing, the opinion does not discuss why the state should have the power to confine a man whom no one thought dangerous,⁴ and who was not totally out of touch with reality.⁵ Second, by holding Donaldson's attending physicians liable for failure to treat him, the court makes it likely that mental hospitals, in order not to be liable for not providing treatment, will in the future force such modes of treatment as tranquilizers and ECT upon patients who, as Donaldson did, refuse them. The *Donaldson* opinion leaves unsettled the extent of the state's power to commit those deemed to be suffering from mental illness and the extent of the involuntarily committed patient's right to refuse treatment.

This article deals with these problems. The first section is factual: The diagnosis of mental illness is discussed to show that such diagnosis may be unreliable. The different forms of treatment for mental illness are then discussed in order to demonstrate both their limited effectiveness and their effect on the patient's beliefs and ability to think. It is shown that, whatever form of treatment may be used, confinement in a hospital may aggravate rather than cure mental illness. Finally, the workings of the commitment process in practice are explored to show why many people are committed who do not resemble the stereotype of the psychotic.

The second two portions of the article are legal: There is an extended discussion of the way in which and the extent to which the courts have given constitutional protection to individual autonomy. Commitment and forced treatment infringe the area of autonomy protected by the Constitution. The way in which the courts have dealt with the problems of the state's power to commit and the patients' right to refuse treatment is next examined.

Finally, recommendations are made in the conclusion as to how the courts should, based on the previous parts of the article, deal with these problems in the future. More important, however, than the article's specific recommendations are its presentation of facts which anyone attempting to make a realistic decision on the power to commit or the right to refuse treatment must consider and its exposition of a constitutional framework within which a court can implement such decisions.

II. Diagnosis and Treatment for Mental Illness

"Illness" and "treatment" are terms which the psychiatrist borrows from

3 *Id.* at 520.

4 *Id.* at 517.

5 B. ENNIS, *supra* note 1, at 87, describes him as "intelligent and articulate" and notes that the legal work he did while confined led to a legislative investigation of conditions at the hospital.

the medical profession.⁶ A growing number of psychiatrists and psychologists argue that the application of these concepts to psychiatry may be dangerously misleading, because it obscures vital differences between medical and mental ailments.⁷ Others disagree and believe that most of the psychoses will be traced to physical abnormalities in the brain.⁸ Both would agree that we know far less today about psychoses than we do about diseases like smallpox.

Many if not most physical ailments are classified on the basis of their etiology. Smallpox is considered a separate, discrete disease because it is caused by a discrete microorganism and not because all smallpox sufferers have the same symptoms, for this is not true of diseases like syphilis. Because we are ignorant about the etiology of most mental disorders, the classifications we use, such as paranoid schizophrenic, are shorthand descriptions of syndromes of behavior.⁹ The cause of this syndrome is unknown; indeed, the syndrome may have several possible causes and thus represent several diseases, much as the syndrome of "red spots on one's body" is now known to represent smallpox, chicken pox, and measles. Furthermore, because the etiology of mental diseases is unknown, a determination of whether a person is mentally ill, and what illness he has, must be made solely from an observation of his behavior and of his feelings as he reports them. One can make a bacterial culture to test for certain physical diseases because their etiology is known, but this cannot be done for mental illness.

Some commentators conclude that "mental illness may be more usefully considered to be a social status than a disease, since the symptoms of mental illness are vaguely defined . . ." ¹⁰ Even if we assume that there are some mental illnesses which in future will be shown to be caused by brain abnormality, the fact that present-day classifications of mental illness represent descriptions of behavior that

6 "Illness" originally meant a "bad moral quality" or "wickedness" and "depravity." OXFORD ENGLISH DICTIONARY. Mental illness still retains some of this connotation.

7 This argument is made in many books and articles, including T. SCHEFF, *BEING MENTALLY ILL* (1966); T. SZASZ, *IDEOLOGY AND INSANITY* 12-24 (1970); Albee, *Emerging Concepts of Mental Illness*, 125 AM. J. PSYCHIAT. 870 (1969); Leifer, *The Medical Model as Ideology*, 9 INT'L J. PSYCHIAT. 13 (1970). Much of the following discussion benefits from their ideas.

Observations paralleling those in the following discussion on the nature of classification of mental illness have also been made in the law reviews. See Blinick, *Mental Disability, Legal Ethics, and Professional Responsibility*, 33 ALBANY L. REV. 92, 94-95 (1968); Swartz, *Compulsory Legal Measures and the Concept of Illness*, 19 S.C. L. REV. 372, 376-78 (1967); Note, *Psychiatrists' Role in Determining Accountability for Crimes*, 52 MARQ. L. REV. 380, 382-84 (1969). Cf. *Leland v. Oregon*, 343 U.S. 790, 803 (1952) (Frankfurter, J., dissenting): "Sanity and insanity are concepts of incertitude. They are given varying and conflicting content at the same time and from time to time by specialists in the field."

8 See S. MARK & R. ERVIN, *VIOLENCE AND THE BRAIN* (1970). I have also profited from a discussion with Dr. Robert J. Wyman of Yale University.

9 Thus, in *AN INTRODUCTION TO PSYCHOPHARMACOLOGY* 322 (Rech & Moore eds. 1971) [hereinafter cited as Rech & Moore], Dr. Henry Payson states before describing a classification of depressive illnesses:

Each of the various syndromes described below refers to a group of signs and symptoms that often, but not always, occur together. Some of the names imply an explanation of the cause of the syndrome. In fact, the etiology, or causal mechanism, is not known. . . . [M]odern studies . . . are still in a descriptive rather than an explanatory phase.

A similar point is made in R. MONROE, *SCHOOLS OF PSYCHOANALYTIC THOUGHT* 297 (1955).

10 SCHEFF, *supra* note 7, at 128. Diverse views of the "labelling theory" of mental illness are expressed in the following articles: Gove, *The Labelling Theory of Mental Illness: A Reply to Scheff*, 40 AM. SOCIOLOGICAL REV. 242 (1975); Scheff, *Reply*, 40 AM. SOCIOLOGICAL REV. 252 (1975).

tacitly assume an undiscovered cause has important implications. For one thing, it means that a diagnosis of mental illness is more likely to be erroneous than one of physical illness. If a patient expresses irrational fears, it is difficult to tell whether these anxieties represent a short-term reaction to environmental stress, which reaction will disappear within a few weeks, or the beginnings of a condition that will lead to much more bizarre behavior in the future. The psychiatrist cannot take a blood test or (in most cases) an X ray; since the causes of paranoia are not understood, it becomes harder to tell whether they are responsible for a given symptom. This is not to say that diagnosis is impossible, for there are accurate diagnoses of diseases with unknown etiologies, such as cancer. It does mean that one should not put complete faith in a diagnosis, and that one's skepticism should increase the shorter the time span over which the symptoms are observed. This fact should be given even more weight since it has been suggested that many psychiatrists believe that "judging a sick person well is more to be avoided than judging a well person sick."¹¹

Another result of the lack of knowledge of the causal mechanism of mental disorder is that no behavior of an individual is inconsistent with the hypothesis that the individual is mentally ill. If a person has influenza, recovers and remains in perfect health for ten years, we know enough about the influenza virus to recognize that the virus is not still in his bloodstream. But if a patient manifests paranoia and then appears perfectly normal for a decade, this does not prove that the forces that caused the first attack of irrational fear are not still present, about to precipitate another incident. This means that a person who has been wrongly diagnosed will find it very hard to demonstrate the error.¹²

Furthermore, since so little is known about the causes of mental illness, there is a tendency to assume that any gross deviance from moral or societal norms has an organic cause or is, in some sense, a mental disorder.¹³ Thus, homosexual-

11 *Id.* at 105. These conclusions are bolstered by New York's experience following the Supreme Court decision in *Baxstrom v. Herold*, 383 U.S. 107 (1966), granting due process to prisoners committed to mental hospitals. Nine hundred sixty-seven patients who had been confined in two hospitals for the criminally insane, having been judged too dangerous for ordinary mental hospitals, were transferred to ordinary mental hospitals. A study made four and a half years later showed that less than three percent were returned to the hospitals of the criminally insane, about 20 percent were involved in some sort of assaultive incident, and 49 percent were released (although a few of these were readmitted). The author concludes that there is a "tendency to institutionalize many people who are not dangerous, rather than to inadvertently release the very few that are." Steadman, *Implications from the Baxstrom Experience*, 1 BULL. AM. ACAD. PSYCHIAT. & LAW 189, 193. A similar point is made in Wexler *et al.*, *The Administration of Psychiatric Justice: Theory and Practice in Arizona*, 13 ARIZ. L. REV. 1, 98-99 (1971) [hereinafter cited as Wexler]. A discussion both of the difficulties of predicting dangerousness and of psychiatrists' propensity to predict dangerousness may be found in Schreiber, *Indeterminate Therapeutic Incarceration of Dangerous Criminals*, 56 VA. REV. 602, 618-21 (1970).

12 Rosenhan, *On Being Sane in Insane Places*, 179 SCIENCE 250 (1973) reports a study in which the experimenters went to 12 different mental hospitals complaining of hearing voices saying "empty" and "hollow." Although no such psychotic symptoms had ever been reported in psychiatric literature, all 12 hospitals admitted the "pseudopatients." Upon admission, the pseudopatients behaved as normally as possible. None of the hospitals detected their mistake—the pseudopatients were discharged, on average, 19 days later, as "in remission"—in other words, their illness was thought to have abated temporarily.

13 Thus, Albee, *supra* note 7, at 872, points out that "we diagnose a mental disease when we observe an individual disregarding the property rights of others, as for example, the adolescent who steals cars. . . ." Leifer, *supra* note 7, at 17, asserts that the "concept of mental illness is . . . used to justify the detention and 'correction' of persons whose behavior is dis-

ity and other unusual sexual practices have been thought to be evidence of neuroses.¹⁴

Finally, the use of the concept of illness tends to make psychiatrists forget the possibility that for many patients who manifest personality disorders, especially those which fall short of psychosis, it may be much more fruitful to pay attention to "the hostile and damaging forces in his world"¹⁵ rather than to seek the cause of his disorder in his brain. Many of the current advocates of psychosurgery make this mistake.¹⁶

A. Chemotherapy

The drugs most often used to treat mental disorders may be classified into major tranquilizers, minor tranquilizers and antidepressants.¹⁷ Major tranquilizers, such as chlorpromazine "have been responsible for revolutionary changes in the treatment of psychotic disorders."¹⁸ They "have a significant salutary effect on a wide range of schizophrenic symptoms, including thought disturbance, paranoid symptoms, delusions, social withdrawal, loss of self-care, anxiety, and agitation."¹⁹ Although they do not interfere with the intellect if the correct dosage is given,²⁰ they will affect behavior of psychotics: "Combativeness disappears, and relaxation and cooperativeness become prominent,"²¹ and, at least at first, there is also "emotional quieting, and affective indifference."²² The proper administration of tranquilizers like chlorpromazine requires the close supervision of a physician, because the therapeutic dosage varies widely among different patients and even over time for the same patient.²³ Further, the drugs will not be fully effective if the physician doles them out impersonally; he must "communicate his interest in the patient," lest the medicine "be perceived as a rejection, and much of the potential benefit of the medication will be nullified."²⁴ More gen-

turbing . . . or unusual." SCHEFF, *supra* note 7, at 35-38, points to subtler societal norms, such as the taboo against mental emigration to an inward fantasy world when in public; and claims that we define what behavior qualifies as mental illness by whether it violates a social norm. *Id.* at 25. R. D. Laing also states that "sanity or psychosis is tested by the degree of conjunction or disjunction between two persons where the one is sane by common consent." *THE DIVIDED SELF* 36 (1959). The writings of many psychosurgeons also suggest a tendency to enforce societal and moral norms. See text accompanying note 68, *infra*.

14 See H. FENICHEL, *THE PSYCHOANALYTIC THEORY OF NEUROSIS* (1945) for a statement of the "orthodox" Freudian position. See *In re Sealy*, 218 So. 2d 765 (Fla. 1969) (adjudication of incompetency reversed as based solely on Sealy's hippie lifestyle).

15 Albee, *supra* note 7, at 870.

16 Thus, MARK & ERVIN, *supra* note 8, at 4, suggest that the patient's brain be given primacy because education and environment affect the patient's behavior because they affect his brain; "no matter from what point we start, we always come back to that organ's primary importance." This neglects the fact that it might be more fruitful to consider changing the environment. See also text accompanying note 67, *infra*.

17 See Rech & Moore, *supra* note 9, at 290.

18 *THE PHARMACOLOGICAL BASIS OF THERAPEUTICS* 167 (4th ed. Goodman & Gilman eds. 1970) [hereinafter cited as Goodman & Gilman].

19 *Id.*

20 Rech & Moore, *supra* note 9, at 299.

21 Goodman & Gilman at 167.

22 *Id.* at 156. Greater sedative effects on patients given major tranquilizers have been noted by empirical studies of mental hospitals, such as Wexler, *supra* note 11, at 203. This suggests that many hospitals may give too high a dose in order to make the patients manageable.

23 Rech & Moore at 305.

24 *Id.* at 305-06.

erally, the drugs do not provide a cure; though, by alleviating the thought disorders characteristic of psychosis, they may make a cure possible.²⁵ Finally, because of their potentially serious side effects, at least one author recommends that they be used for psychoses only.²⁶

Minor tranquilizers, such as Valium, are useless for treating psychoses, but relieve "excessive anxiety" of neurotics.²⁷ These drugs often cause "[i]mpairment of ego function and intellectual abilities, as well as somnolence."²⁸

Antidepressant drugs are useful in the treatment of many types of depression,²⁹ especially where prolonged depression has caused biochemical changes in the brain.³⁰ As with the major tranquilizers, the need for individualized treatment appears to be important because there are many different types of antidepressants, and different patients, as well as the same patient at different times, respond differently to each.³¹ Also, the tendency to adverse side effects varies from patient to patient.³² They may cause behavioral changes or intellectual impairment if given to normal persons,³³ and needless to say produce mood changes in depressed patients.³⁴

B. ECT

"Electroshock Therapy is a technique by which a current of from 70 to 130 volts of electricity is permitted to flow through the patient's brain, causing a convulsion equivalent to an epileptic seizure."³⁵ The convulsion is so violent that bone fractures often result,³⁶ although muscle-paralyzing drugs have lowered that risk. ECT has beneficial antidepressant effects in some, but not all, types of depression;³⁷ its benefits are less well established in other psychoses.³⁸ Despite this, a few hospitals use ECT for all disorders because it is cheap and renders the patient "noncombative, pliable, and above all, forgetful"; ECT is also sometimes used as punishment for disruptive patients.³⁹

There has been major controversy over whether ECT causes permanent brain damage. That ECT impairs memory at least temporarily is admitted by

25 *Id.* at 294-96.

26 *Id.* at 299. The side effects are described at 299-301, and in Goodman & Gilman at 165-67.

27 Rech & Moore at 309.

28 *Id.* at 307.

29 For a review of over 100 clinical studies done on these drugs, see Morris & Beck, *Efficacy of Antidepressant Drugs*, 30 ARCH. GEN. PSYCHIAT. 667 (1974).

30 Rech & Moore at 329.

31 Morris & Beck, *supra* note 29, at 671.

32 Goodman & Gilman, *supra* note 18, at 185, 189.

33 *Id.* at 183, 187.

34 *Id.*

35 Health and Hosps. Corp. v. Stein, 70 Misc. 2d 944, 945, 335 N.Y.S.2d 461, 463-64 (Sup. Ct. 1972).

36 See Farber v. Olkon, 40 Cal. 2d 503, 254 P.2d 520 (1953) (both legs broken; malpractice suit dismissed).

37 Rech & Moore, *supra* note 9, at 323-26.

38 See Furlong, *Mythology of ECT*, 13 COMPR. PSYCHIAT. 235 (1972); Wells, *ECT for Schizophrenia*, 14 COMPR. PSYCHIAT. 291, 297 (1973) (ECT viewed as bringing symptom relief, not cure).

39 Robitscher, *Psychosurgery and Other Somatic Means of Altering Behavior*, 2 BULL. AM. ACAD. PSYCHIAT. & LAW 7, 12-13. Even if these allegations are hard to prove, the fact remains that ECT is ideally suited to these purposes.

all; some have suggested that this is the basis of its therapeutic effects.⁴⁰ Some clinical studies found that the impairment disappears after a few days.⁴¹ However, a more recent study using more careful controls, a larger sample, and a sample that was given more ECT treatments than in previous studies, found that the "significantly greater error scores" of the ECT as contrasted with the control group on both memory and perception tests given "after a relatively long time period since the last course of treatment suggest that ECT causes irreversible brain damage."⁴² This is especially significant in the light of an earlier suggestion⁴³ that ECT works in the same way as a lobotomy does. The danger of brain damage is heightened by the fact, shown by a 1971 study,⁴⁴ that many ECT machines now in use are defective and deliver excessive voltage.

C. Psychosurgery

In 1937, Dr. Egas Moniz of Portugal discussed the operation he had invented a year earlier, the lobotomy, in which the frontal lobes of the brain are removed or severed.⁴⁵ It is, he said, "a simple operation, always safe, which may prove to be an effective surgical treatment in certain cases of mental disorder."⁴⁶ He emphasized that lobotomy is "not prejudicial to either physical or psychic life of the patient."⁴⁷ In the next twenty years, 50,000 lobotomies were performed.⁴⁸ The lobotomy declined in popularity as new tranquilizers were discovered.⁴⁹ Later studies on those lobotomized proved Moniz's claims wrong. A follow up of 229 lobotomies done in Pennsylvania concluded that the operation resulted in "impaired memory, diminished . . . sexual contacts, . . . a change in attitude toward one's self, increased repression and suppression of reflective thought"⁵⁰—in stronger terms, the creation of "semivegetables."⁵¹ The Pennsylvania study also suggests that the lobotomies did not even help the disorders for which they were performed, since only 19 percent of the lobotomized patients were discharged.⁵²

Psychosurgery⁵³ today is more refined. Stereotaxic devices enable surgeons to

40 Rech & Moore, *supra* note 9, at 335, analogizes these effects to "the antidepressant effects of alcohol." The way in which ECT works is not known with certainty.

41 See e.g., Miller, *Effects of ECT*, 43 BR. J. MED. PSYCHIAT. 57 (1970).

42 Goldman, Gomer, & Templer, *Long-Term Effects of ECT upon Memory*, 28 J. CLIN. PSYCHOL. 32, 33 (1972).

43 Roth & Garside, *Some Characteristics Common to ECT and Prefrontal Leucotomy*, 3 J. NEUROPSYCHIAT. 221 (1965).

44 Davies *et al.*, *ECT Instruments*, 25 ARCH. GEN. PSYCHIAT. 97 (1971).

45 When the nerves are severed but not actually removed the technical term is prefrontal leucotomy. See Robitscher, *supra* note 39, at 15.

46 Moniz, 93 AM. J. PSYCHIAT. 1379, 1385 (1937).

47 *Id.* at 1379.

48 The estimate of 50,000 comes from Breggin, *The Return of Lobotomy and Psychosurgery*, 118 CONG. REC. 5567, 8167-68, 8260-61 (1972) and is also cited in Holden, *Psychosurgery: Legitimate Therapy or Laundered Lobotomy*, 179 SCIENCE 1109 (1973) and Robitscher, *supra* note 39, at 15. The figure is for the United States alone.

49 Robitscher, *supra* note 39, at 15; Holden, *supra* note 48, at 1109.

50 Vosburg, *Lobotomy in Western Pennsylvania: Looking Backward over Ten Years*, 119 AM. J. PSYCHIAT. 503, 508 (1962).

51 Holden, *supra* note 48, at 1109.

52 Vosburg, *supra* note 50, at 504.

53 Defined as the destruction or removal of brain tissue for the purpose of treating a mental disorder.

focus much more precisely on small areas of the brain.⁵⁴ Of course, "[t]he trouble is there is still no conclusive evidence correlating specific brain structures with specific behavior."⁵⁵

In the past decade, interest in psychosurgery has been rising and a new wave of psychosurgery appears to have begun.⁵⁶ Editorials have appeared in *Lancet*⁵⁷ and the *Journal of the American Medical Association*,⁵⁸ and numerous articles report on the work of psychosurgeons throughout the country and the world.⁵⁹ At present, some 400 to 600 psychosurgical operations are performed each year in the United States.⁶⁰

Several characteristics of this new wave should be noted. Unlike the first wave of lobotomies, the newer operations are performed for mental disorders which are not traditionally classified as psychotic. Psychosurgery has been performed in the United States for anxiety, depression, tension and alcoholism.⁶¹ It is increasingly used both in the United States and other countries for hyperactive children as (in the words of Orlando Andy, the American surgeon most involved in this area) "preferable to . . . having a child with abnormal behavior continue under inadequate control during the formative and developmental years of his life."⁶²

54 An illustrated description is found in MARK & ERVIN, *supra* note 8.

55 Holden, *supra* note 48, at 1109. See also the statement of Dr. Brown, the Director of National Institute of Mental Health, in *Hearings on Quality of Health Care Before Senate Comm. on Labor and Public Welfare*, 93d Cong., 1st Sess. 341, 344 (1973) [hereinafter cited as *Hearings*].

56 Breggin, *supra* note 48, is the most comprehensive general survey of this new wave. Other general surveys are contained in Washington, *John Doe's Dilemma: Legal Resistance to Psychosurgery*, 5 N.C. CENT. L.J. 97 (1973) and Symposium, *Psychosurgery*, 54 B.U. L. REV. 215 (1974).

57 2 LANCET 69 (1972), which was favorable to the new psychosurgery and which was answered by critical letters in 2 LANCET 185 and 434 (1972).

58 226 J.A.M.A. 779 (1973).

59 Some of these articles, which will be discussed in greater detail below, and the number of patients operated on, are:

Andy, *Thalamotomy in Hyperactive and Aggressive Behavior*, 32 CONF. NEUROL. 322 (1970) (Mississippi, 5); Andy *et al.*, *Behavioural Changes Correlated with Thalamotomy Site*, 36 CONF. NEUROL. 106 (1974) (Mississippi, 34); Ballantine *et al.*, *Stereotaxic Anterior Cingulotomy for Neuropsychiatric Illness and Intractable Pain*, 26 J. NEUROSURG. 488 (1967) (Boston, 57 not including those operated on to alleviate pain); Balasubramaniam *et al.*, *Sedative Neurosurgery*, 53 J. INDIAN MED. ASSOC. 377 (1970) (India, 113); Chitanondh, *Stereotaxic Amygdalotomy in Treatment of Olfactory Seizures and Psychiatric Disorders with Olfactory Hallucinations*, 27 CONF. NEUROL. 181 (1969) (Thailand); Mark *et al.*, *The Destruction of Both Anterior Thalamic Nuclei in a Patient with Intractable Depression*, 150 J. NERV. MENT. DIS. 266 (1970) (Boston; detailed report of one case whose suicide following operation made brain dissection possible); Narabayashi *et al.*, *Long Range Results of Stereotaxic Amygdalotomy for Behavior Disorders*, 27 CONF. NEUROL. 168 (1966) (Japan, 27); Sano *et al.*, *Hypothalamotomy in Treatment of Aggressive Behavior*, 27 CONF. NEUROL. 164 (1966) (Japan, 22); Cf. Scoville, *Recent Thoughts on Psychosurgery*, 33 CONN. MED. 453 (1969) (a Yale professor supports psychosurgery).

60 Breggin, *supra* note 48, at 5567, and O. Andy, testifying in *Hearings*, *supra* note 49, at 355. Dr. Brown, Director of NIMH, suggests the number might be higher; he states he does not know "all the clinical practice" taking place. *Id.* at 343.

61 Breggin, *supra* note 48, at 5571.

62 Andy, in *Hearings*, *supra* note 55, at 351. Andy has performed thalamotomies on "13 or 14" children aged "six and seven through 19." *Id.* at 353. He describes a boy of nine who was hyperactive and sadistic and who had to be operated on four times between 1962 and 1965 because he remained hyperactive and sadistic. Now, the patient is "deteriorating" intellectually. Andy, *supra* note 59, at 324. In Japan amygdalotomies are performed on children as young as five who are "uncontrollable, of unsteady mood and of poor concentration." Narabayashi, *supra* note 59, at 169, and in Thailand on a nine-year-old with a "strong compulsion to smell engine oil." Chitanondh, *supra* note 59, at 192.

Psychosurgeons tend to evaluate the success or failure of their operations, not in terms of whether it cures the disorder of the patient, but in terms of whether it makes the patient "quiet and manageable."⁶³ Critics have charged that the operations are successful in these terms because they "produce . . . an overriding emotional blunting which just happens to eliminate the patient's problem, among other facets of his or her personality."⁶⁴ Operations for many dissimilar disorders aim at the same part of the brain and many different brain sites have been attacked to cure the same disorder.⁶⁵ It may well be impossible at the present time to perform psychosurgery that does not affect functions and behavior other than the behavior which the surgeon wishes to alter.⁶⁶

Many psychosurgeons tend to take the analogy between mental and physical illness too seriously and to assume that the best way of treating any mental disorder is to modify the patient's brain.⁶⁷ The writings of some psychosurgeons suggest that they assume an organic cause for any breach of society's moral codes.⁶⁸

63 Balasubramaniam, *supra* note 59, at 377, defines "sedative surgery," which he advocates, as that "aspect of neurosurgery where a patient is made quiet and manageable by an operation," and says that he succeeded in making some patients "very much docile." *Id.* at 380. Sano notes that his successful patients "became markedly calm, passive and tractable," *supra* note 59, at 167, and Narabayashi, *supra* note 59, at 169, reports in his study of 27 children that the five best cases now manifest "satisfactory obedience and of constant steady mood, which enabled the children to stay in their social environment."

64 Letter from two professors at Harvard Medical School in 2 LANCET 434 (1972). A startling example is the work of Chitanondh in Thailand. Incipient schizophrenics sometimes manifest their self-hatred by smelling an unpleasant odor on their bodies. See LAING, *supra* note 13, at 120-30. Chitanondh treats this by destroying the part of the brain responsible for smelling. Chitanondh, *supra* note 59, at 184-85.

65 Letter, *supra* note 64. Thus, hyperactive children have been treated by thalamotomy (Andy) and by amygdalotomy (Narabayashi). Scoville, *supra* note 59, recommends modified lobotomies for anxiety, phobias, obsessions and some schizophrenia and admits that: "All prefrontal lobe surgery *benefits* from a blunting of function" (emphasis added). In 1974, Andy published the result of a study which *attempted* to determine whether he could obtain different results by picking different parts of the thalamus. Andy, *supra* note 59.

66 Dr. Brown, Director of NIMH, stated that "even the best research in this field 'is unable' to pinpoint the exact locus of the undesirable behavior in the brain and destroy only these tissues and nerve cells leaving other functions and behaviors of the patient unaffected." Brown, in *Hearings*, *supra* note 55, at 344.

67 See text accompanying notes 15-16, *supra*. Thus, Balasubramaniam, *supra* note 59, at 379, describes a model in which stimuli act on the brain which sends out signals causing bad behavior and implicitly assumes that the best way of treating this is to interrupt the stimuli-receiving or signal-sending parts of the brain. Mark, *supra* note 59, discusses the case of a patient who became severely depressed after her sister committed suicide, her father (to whom she was passionately devoted) died a lingering death from cancer, and two of her best friends were hospitalized for serious illness. He treated her by destroying portions of her thalamus; she remained depressed after each operation. Finally she was released; she immediately killed herself. These scientists proceed from the truism that all mental disorders involve the brain to the more debatable conclusion that the best way of treating them is surgical treatment of the brain. It is true that many psychosurgeons try psychotherapy and chemotherapy first, but they usually do not give these techniques enough time.

68 See text accompanying notes 13-14 *supra*. Thus, Andy, in his 1974 article, *supra* note 59 at 110-11, devised a system for judging the effectiveness of his operations; he assigned a value from 1 to 4 to various undesirable behavioral traits and computed a score for his patients before and after operation. A decrease in score would represent an improvement. He assigns 4 points to stealing, forgery and being "wild," 3 points for cursing, 2 points for deceit and for being "mischievous," "restless," and "euphoric," and 1 point for being "sensitive." Andy later said it is up to society to decide who should undergo treatment. Andy, in *Hearings*, *supra* note 55, at 352. Scoville, *supra* note 59, considers lobotomy for "sexual . . . amorality" but concludes that such surgery would not cure it.

The concern that these facts must cause⁶⁹ is made greater by the fact that psychosurgery is, by definition, irreversible.⁷⁰

D. Hospitalization and Treatment

None of the treatments discussed above requires lengthy hospitalization; all can be administered on an outpatient basis. There is good reason to believe that long-term hospitalization and the institutional setting may be antitherapeutic. Thus, Congress heard testimony in 1969 and 1970 that "most mental illness can be treated more effectively . . . when the positive relationships between the individual and his family, his job, and his community are not severed."⁷¹ If a patient has been institutionalized for several years, "there are certain administrative procedures and processes which . . . act to condition the lives . . . and then it becomes very difficult to speak meaningfully of releasing people from these institutions because they readjust their lives to the routine of the institution."⁷² The depersonalized care, brutality aside, which mental patients too often receive at mental hospitals may be antitherapeutic.⁷³

E. Commitment Procedures: Theory and Practice

The statutory standards governing involuntary civil commitment vary widely from state to state.⁷⁴ All require a "mental illness," which is usually very vaguely defined. Some states allow commitment only if the individual is dangerous to himself or to others. Others (the majority) provide for commitment of nondangerous individuals found to be "in need of care and treatment."⁷⁵ Most states also have provisions for emergency short-term commitment based on dangerousness.⁷⁶ The procedures for commitment vary also—some states require a hearing before judge or jury; others permit commitment for an indefinite period following a

69 One Representative said that "'shocking' and 'frightening' are too mild to describe my reaction. . . ." 118 Cong. Rec. 5567 (1972) (remarks of Rep. Gallagher).

70 Dr. Brown, Director of NIMH, makes this point in *Hearings*, *supra* note 55, at 347.

71 Dr. S. Kieffer testifying in Hearings Before the Senate Subcomm. on Human Rights 319 (1969-70) [hereinafter cited as *Human Rights Hearings*].

72 A. Cohen, *id.* at 214. See Wexler, *supra* note 11, at 118 and sources cited therein. A later study, with a survey of more recent literature, is Bhaskaran *et al.*, *A Comparison of the Effects of Hospitalization on Long-Stay and Recently Admitted Female Schizophrenic Patients*, 20 INT'L J. SOC. PSYCHIAT. 72 (1974).

73 See Rosenhan, *supra* note 12, at 254-57 and Wexler, *supra* note 11, at 189-206, for graphic descriptions of the antitherapeutic aspects of life in a modern mental hospital. Cf. *Human Rights Hearings*, *supra* note 71, at 409 (psychiatrists often convince the patient that he is sick). See also Note, *Commitment to Fairview: Incompetency to Stand Trial in Pennsylvania*, 117 U. PA. L. REV. 1164-68 (1969) (antitherapeutic nature of Fairview Hospital). As many commentators have noted, the annual death rate in mental hospitals, ten percent, is over ten times the national rate. N. KITTRE, *THE RIGHT TO BE DIFFERENT* 96 (1971). This may be partly explained by the older average age of the mental hospital population.

74 Several recent publications discuss the statutes in detail, including AMERICAN BAR FOUNDATION, *THE MENTALLY DISABLED AND THE LAW* (rev. ed. S. Brackel & R. Rock 1971) [hereinafter cited as Brackel & Rock]; ACLU, *HANDBOOK: THE RIGHTS OF MENTAL PATIENTS* (B. Ennis & L. Siegel ed. 1973); Note, *Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190 (1974).

75 At present, 15 states require a finding of dangerousness to self or others; the rest allow commitment of those in need of care or treatment (29) or when necessary to protect the welfare of the individual (7). See Note, *supra* note 74, at 1203-04.

76 *Id.*

hearing by an administrative board or following certification by one or more physicians.⁷⁷

Empirical studies of how the commitment process works in practice⁷⁸ tend to suggest that these statutory differences in standards and procedure may not be as significant as they appear. Although one study was done in Arizona which has a statutory standard of dangerousness and requires a hearing before a judge with four witnesses, and another was done in Iowa which has a "care or treatment" standard and which provides for hearings before a board composed of a court clerk, a physician, and an attorney, both studies reached similar conclusions about how the systems work in practice.

Every commitment proceeding must be initiated by someone, usually a relative or acquaintance. In both Arizona and Iowa, this was often done for improper motives—because of the eccentric life-style of the respondent or out of malice.⁷⁹ Neither state had an effective mechanism for screening out these defective petitions before hearing, so that the respondents were detained for psychiatric examination and hearing.⁸⁰

The hearings themselves were often amazingly short—under five minutes.⁸¹ The patient—if present at all⁸²—may have been forcibly given tranquilizers before the hearing.⁸³ At the hearings, the judge or commissioners tend to follow the recommendations of the state examining psychiatrist virtually 100 percent of the time.⁸⁴ Often, the examination on which the diagnosis is based is almost as short and perfunctory as the hearing itself⁸⁵ and the psychiatrist's conclusion gleaned from his mere reading of the petition.⁸⁶ His testimony is often limited to conclusory diagnostic labels and even legal conclusions, such as that the patient

77 See Brakel & Rock, *supra* note 74, at 49-61.

78 See e.g., B. ROCK, S. JACOBSON, & T. JANOPAUL, HOSPITALIZATION AND DISCHARGE OF THE MENTALLY ILL 121-211 (1968); (Los Angeles, Chicago, Kansas, Pennsylvania); SCHEFF, *supra* note 7, at 130-55 (unnamed Midwestern state); Adelman & Chambers, *Effective Counsel for Persons Facing Civil Commitment: A Survey, a Polemic, and a Proposal*, 45 MISS. L.J. 43, 54-64 (1974) (Memphis, Chicago—empirical work is mostly on failure of appointed counsel); Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill*, 44 TEX. L. REV. 424, 427-31 (1966) (Texas) [hereinafter cited as Cohen]; Wexler, *supra* note 11 (Arizona); Project, *Facts and Fallacies About Iowa Civil Commitment*, 55 IOWA L. REV. 895 (1970) [hereinafter cited as *Iowa*].

Comparable studies on commitment through the criminal process are Broderick, *Justice in the Books or Justice in Action—An Institutional Approach to Involuntary Hospitalization for Mental Illness*, 20 CATH. U. L. REV. 547 (1971); Granucci & Granucci, *Indiana's Sexual Psychopath Act in Operation*, 44 IND. L.J. 555 (1969).

Support for my arguments is provided by all of these. I have also profited from a telephone interview with R. Gottlieb, deputy director of Mental Health Information Service, New York City. A few jurisdictions, e.g., New York (see note 316 *infra*), have more enlightened procedures than those described here.

79 Wexler at 18-23; *Iowa* at 904.

80 Wexler at 16-18; *Iowa* at 905-06.

81 Wexler at 38 (hearings in Maricopa County, where half of Arizona's population lives, average 4.7 minutes); SCHEFF, *supra* note 7, at 133 (1.6 minutes); Cohen at 430 (2 minutes); *Iowa* at 916 (15 to 30 minutes—but based on commission's estimates, not observation).

82 Patients in Iowa are present only 60 percent of the time (*Iowa* at 916) and are not always present in Arizona (Wexler at 39). See also Cohen at 429.

83 Wexler at 66-69; see also Note, *supra* note 74, at 1282 n.111.

84 97.9 percent in Maricopa County, Arizona (Wexler at 60); similarly SCHEFF, *supra* note 7, at 138-39, *Iowa* at 924, 936, 940.

85 SCHEFF, *supra* note 7, at 144-45 (10.2 minutes); *Iowa* at 912-13 (under 20 minutes, usually done by a physician not a psychiatrist); see also N. KITTRIE, *THE RIGHT TO BE DIFFERENT* 92 n.170 (1971).

86 Wexler at 61.

"suffers from a major psychiatric illness and would be dangerous to others."⁸⁷ The facts which led to this conclusion are often not brought out at all.

The patient's attorney almost never cross-examines the psychiatrist to lay bare the factual basis of the diagnosis or counterpose medical experts of his own.⁸⁸ As the commentators observe, lawyers are not afraid to cross-examine doctors and psychiatrists when they are fighting a personal injury action or contesting a will.⁸⁹ Their far more passive attitude in an area where a person's liberty is at stake may be explained by the tendency of lawyers to believe that the interests of their clients are best served if treatment is received; the fact that public defenders in commitment hearings are compensated by the case and not by the hour; and the fact that the lawyer may have met his client for only 15 minutes before the hearing, if that.⁹⁰

Another phenomenon recognized in the empirical studies is a tendency on the part of psychiatrists, judges, and commissioners consciously to ignore the statutory standards for commitment. Both doctors and judges in Arizona indicated that they would be willing to declare a person dangerous if they thought that treatment or custodial care would be good for him.⁹¹ In Iowa, this attitude leads the commissioners to commit people who are only questionably mentally ill, as they do not wish to deny treatment where it may be needed and they wrongly believe that the hospital will release anyone they erroneously send to it.⁹²

It would seem apparent that the end result of the commitment process is to put into the hospitals many people who do not belong there. This was the conclusion reached by those studies in which the judgment of independent observers was contrasted with the judgment of the commission or judge. Thus, the Arizona study found that one-quarter of the patients committed in the hearings observed were dangerous only in the sense of socially offensive, and concluded that "many individuals are committed who are really not dangerous by any common sense definition of the term."⁹³ Other studies reach similar conclusions.⁹⁴

III. Constitutional Protection of Autonomy

A. Historical Overview

There are several provisions of the Constitution from which a right to refuse

⁸⁷ Wexler at 40-41, 64-65; Cohen at 429.

⁸⁸ Wexler at 51-54; Cohen at 429.

⁸⁹ Wexler at 52.

⁹⁰ Wexler at 53-55; *Iowa* at 914, 921-22; Cohen at 446-50. The role of counsel is similarly discussed in Blinick, *supra* note 7, at 111-15 and in Litwack, *The Role of Counsel in Civil Commitment Proceedings: Emerging Problems*, 62 CALIF. L. REV. 816 (1974).

⁹¹ Wexler at 61, 100-01, 111, 117.

⁹² *Iowa* at 924, 939. The bending of statutory standards was also noted by Granucci, *supra* note 78, at 593-94 and stressed by Gottlieb, *supra* note 78.

⁹³ Wexler at 110-11.

⁹⁴ Scheff found that 63 percent were neither clearly dangerous nor severely mentally impaired, *supra* note 7, at 132. The Iowa study said that the commissioners themselves estimate that 52 percent of those that appear before them are capable of making a choice as to their need for treatment and only 29 percent are dangerous; yet over 90 percent are committed. *Iowa* at 918. The conclusion that many inmates do not belong in hospitals was supported by Gottlieb, *supra* note 78.

treatment might flow; among those suggested by cases⁹⁵ and commentators⁹⁶ are the first, fourth, and eighth amendments to the Constitution, the emerging right of privacy, and the due process clause. Our understanding of what protection the Constitution offers, however, is not furthered by an amendment-by-amendment analysis of the cases. Rather, it is more fruitful to view many of the cases decided under disparate amendments as forming two lines of cases, both of which carve out areas of individual autonomy. The first of these lines protects self-determination; the second, bodily integrity.

Self-determination may be defined⁹⁷ as the freedom of the individual to choose his own values and goals and to shape his life in conformity with these

95 See text accompanying notes 236-73 *infra*.

96 The literature in this area is extensive. Some of the more relevant articles are:

A. *Articles on the right to refuse treatment.* Bowers, *Prisoners' Rights in Prison Medical Experimentation Programs*, 6 CLEARINGHOUSE REV. 319 (1972); Kassirer, *Behavior Modification for Patients and Prisoners: Constitutional Ramifications of Enforced Therapy*, 2 J. PSYCHIAT. & LAW 245 (1974); J. Katz, *The Right to Treatment—An Enchanting Legal Fiction*, 36 U. CHI. L. REV. 755 (1969); Moya & Achtenberg, *Behavior Modification: Legal Limitations on Methods and Goals*, 50 NOTRE DAME LAWYER 230 (1974); Shapiro, *Legislating the Control of Behavior Control: Autonomy and the Coercive Use of Organic Therapies*, 47 S. CALIF. L. REV. 237 (1974); Note, *Compulsory Commitment: The Rights of the Incarcerated Mentally Ill*, 1969 DUKE L.J. 677, 711-15; Note, *Conditioning and Other Technologies Used to "Treat?" "Rehabilitate?" "Demolish?" Prisoners and Mental Patients*, 45 S. CALIF. L. REV. 616 (1972).

B. *Articles critical of present involuntary civil commitment: the standards and the procedures.* Chayet, *Legal Neglect of the Mentally Ill*, 125 AM. J. PSYCHIAT. 785 (1968); N. KITTRIE, *THE RIGHT TO BE DIFFERENT* (1971); Livermore, Malmquist & Meehl, *On the Justifications for Civil Commitment*, 117 U. PA. L. REV. 75 (1968); Note, *Civil Commitment of the Mentally Ill*, 30 U. PITT. L. REV. 752 (1969); Note, *Mental Illness: A Suspect Classification*, 83 YALE L.J. 1237 (1974); Postel, *Civil Commitment: A Functional Analysis*, 38 BROOKLYN L. REV. 1 (1971); Siegel, *Justifications for Medical Commitment—Real or Illusory*, 6 WAKE FOREST L. REV. 21 (1969); Taylor, *Critical Look into the Involuntary Civil Commitment Procedure*, 10 WASHBURN L.J. 237 (1971). *On particular state statutes:* Note, *California's New Mental Commitment Legislation: Is It Legally Sufficient?*, 6 CALIF. WEST. L. REV. 146 (1969); Note, *Civil Commitment Procedure in Louisiana*, 31 LA. L. REV. 149 (1970); Note, *Mental Illness and Due Process: Involuntary Commitment in New York*, 16 N.Y.L.F. 165 (1970).

See also Note, *Civil Commitment of the Mentally Ill*, 79 HARV. L. REV. 1288 (1966); Note, *Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190 (1974); Symposium, *Mental Disability and the Law*, 62 CALIF. L. REV. 671 (1974).

C. *Articles on relevant constitutional issues.* Comment, *The Constitutional Right of Privacy: An Examination*, NW. U.L. REV. 263 (1974); Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973); Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410 (1974); Note, *On Privacy: Constitutional Protection for Personal Liberty*, 48 N.Y.U.L. REV. 670 (1973); Ratner, *The Function of the Due Process Clause*, 116 U. PA. L. REV. 1048 (1962); Redlich, *Are There "Certain Rights . . . Retained by the People?"* 37 N.Y.U.L. REV. 787 (1962); Singer, *Privacy, Autonomy and Dignity in the Prison: A Preliminary Inquiry Concerning Constitutional Aspects of the Degradation Process in Our Prisons*, 21 BUFF. L. REV. 669 (1972); Tribe, *Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973).

97 When I define "self-determination," I do not mean to imply that everything falling under this broad definition is necessarily protected by the Constitution, any more than a definition of "speech" entails that everything so defined is protected by freedom of speech. Nor do I want to suggest that even this broad description of what state actions infringe self-determination would necessarily include regulations designed to help the individual implement his goals and values by correcting for the individual's poor risk evaluation (laws requiring motorcyclists to wear crash helmets) or insufficient knowledge (consumer protection laws) or by restraining the individual from acting on a very short term impulse that would destroy his prospects of fulfilling his goals in the future (erecting high fences on Golden Gate Bridge) or by correcting a situation of duress which superficially looks like freedom of choice (minimum wage laws).

values. From this concept it follows that a state action infringes on self-determination when:

- (1) It makes it harder for a specific individual to choose or act on a specific value; or
- (2) it makes it harder for a specific individual to choose or act on any values at all; or
- (3) it attempts to impose the values of one group upon another group.

The development of this idea antedates the Constitution. It finds expression in many leading Supreme Court cases. The Court, in forbidding West Virginia from requiring Jehovah's Witnesses to salute the flag, in *State Board of Education v. Barnete*,⁹⁸ reasoned that such salutes "require affirmation of a belief and an attitude of mind"⁹⁹ and stated that—

[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.¹⁰⁰

Many other cases express support for self-determination in this sense;¹⁰¹ such judges as Brandeis, Holmes, and Frankfurter have espoused it.¹⁰²

There has developed alongside this tradition of self-determination, another strand of autonomy, an individual's "interest in the integrity of his person."¹⁰³ The core concept of bodily integrity is that there should be no nonconsensual touching of an individual's body. The roots of this concept may antedate the

98 319 U.S. 624 (1943).

99 *Id.* at 633.

100 *Id.* at 642 (Black & Douglas, J. J., concurring). Jackson's opinion was joined by four Justices, one of whom wrote a separate opinion also, and "substantially" joined by two more in a separate opinion. The latter opinion contains language similar to that quoted in text. See *id.* at 644 (Murphy, J., concurring).

101 See e.g., *Kent v. Dulles*, 357 U.S. 116, 126 (1958) ("outside areas of plainly harmful conduct, every American is left to shape his own life as he thinks best," quoting Chafee); *Roe v. Wade*, 410 U.S. 113, 160-62 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); and *Stanley v. Georgia*, 394 U.S. 557, 565-66 (1969), all discussed at text accompanying notes 132, 195-204 *infra*. See also *Wheeler v. Goodman*, 306 F. Supp. 58, 62 (W.D.N.C. 1969), where the Court, in striking down a state vagrancy statute, said:

In the United States belief and noninjurious behavior are not punishable. A man is free to be a hippie, a Methodist, a Jew, a Black Panther, a Kiwanian, or even a Communist, so long as his conduct does not imperil others, or infringe upon their rights. In short, it is no crime to be a hippie.

Cf. Hughes v. Rizzo, 282 F. Supp. 881 (E.D. Pa. 1968).

102 *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis and Holmes, J.J., concurring): "Those who won our independence believed that the final end of the State was to make men free to develop their faculties"; *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring, discussing Holmes' belief in "the right to search for truth"). *Cf. Jacobson v. Massachusetts*, 197 U.S. 11, 29 (1905), where Justice Harlan, before finding that the state had a compelling interest in requiring smallpox vaccination to prevent epidemics, stated:

There is, of course, a sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government, especially of any free government existing under a written constitution, to interfere with the exercise of that will.

103 W. PROSSER, *TORTS* 34 (4th ed. 1971).

evolution of man.¹⁰⁴ It is the foundation of the torts of battery¹⁰⁵ and assault¹⁰⁶ and the doctrine of informed consent.¹⁰⁷

Protection of personal integrity has expanded from the core concept to cover intrusions which do not literally touch, such as photographs or wiretaps, and intrusions into the home. Such integrity is recognized in the colonial documents which were the first to advocate a right to be free of unreasonable searches. The first of these, drafted by Samuel Adams in 1772, complains that "our houses and even our bed chambers, are exposed to be ransacked" and that British officers may "under colour of law . . . break thro' the sacred rights of the Domicil . . ."¹⁰⁸ *Union Pacific Railway Co. v. Botsford*¹⁰⁹ appears to be the first Supreme Court case to recognize the "inviolability of the person."¹¹⁰ Justice Gray applied this "right to one's person"¹¹¹ to forbid a district court to order a surgical examination for the plaintiff in a tort case.¹¹² This decision was based on common law, but the Court has not hesitated to apply various provisions of the Constitution, especially the fourth amendment, to protect personal integrity. In fact, the Court has stated that "[t]he overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State."¹¹³ Many other fourth amendment cases also refer to personal integrity.¹¹⁴

Nor do all the cases granting constitutional protection to integrity rely on the fourth amendment. *Rochin v. California*¹¹⁵ relies upon due process to forbid policemen to pump the stomach of a suspected narcotics dealer seen to swallow two capsules; Justice Frankfurter spoke in terms of "illegally breaking into the privacy of the petitioner" and used the memorable phrase "conduct that shocks the conscience"¹¹⁶ to describe this violation of Rochin's bodily integrity. Other cases have used the eighth amendment¹¹⁷ or have suggested the use of the right of privacy¹¹⁸ to uphold personal integrity.

It is one thing to show that the courts often speak approvingly of autonomy and sometimes grant protection to it and another to show that many of the court decisions on the first, fourth, eighth and fourteenth amendments are better

104 R. ARDREY, *THE TERRITORIAL IMPERATIVE* (1966).

105 PROSSER at 34-35, 261 (liability beyond risk for impact on the person).

106 PROSSER at 37-38.

107 See text accompanying notes 274-78 *infra*.

108 B. SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 206 (1971).

109 141 U.S. 250 (1891).

110 *Id.* at 252.

111 *Id.* at 251.

112 The Court later allowed compulsory examinations of plaintiffs, in *Sibbach v. Wilson & Co., Inc.*, 312 U.S. 1 (1941), but said this did not interfere with "freedom from invasion of the person," *id.* at 14, apparently because he gives implied consent by bringing the action.

113 *Schmerber v. California*, 384 U.S. 757, 767 (1966); see *Wolf v. Colorado*, 338 U.S. 25, 27 (1949): "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society," and *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); see also text accompanying notes 170-71 *infra*.

114 See e.g., *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968); *Mapp v. Ohio*, 367 U.S. 643, 656 (1961); *Huguez v. United States*, 406 F.2d 366, 374 (9th Cir. 1968); *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963). The last two are discussed at text accompanying notes 217-21 *infra*.

115 342 U.S. 165 (1952).

116 *Id.* at 172.

117 See text accompanying notes 161-68 *infra*.

118 Cf. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

viewed as based on a constitutional protection of autonomy than as based on those specific amendments. Proof of the latter requires a closer analysis.

The Bill of Rights makes no mention on its face of self-determination, nor, except narrowly,¹¹⁹ of personal integrity. In its language, it is "a series of isolated points,"¹²⁰ of specific things which the state may not do. It would have been quite logical for the courts to have construed the Bill of Rights quite narrowly; in other words not only to limit the rights given constitutional protection to those expressly mentioned in the first eight amendments¹²¹ but to have interpreted these specific guarantees in the light of the plain meaning of the words and of their accepted meaning in 1791. Of course, the courts have not done so. If one adopts an amendment-by-amendment analysis, the way in which the specific provisions have evolved may seem arbitrary and even illegitimate. If, instead, one views the whole range of cases as a process in which the Supreme Court extends the scope allowed individual autonomy and protects self-determination and bodily integrity, then the "whole pageant of Anglo-American constitutional development"¹²² takes on new meaning.

If we adopt this methodology, we are faced with two questions. First, what strategies or techniques do the courts use to extend the specific guarantees of the first eight amendments to cover broader areas of autonomy? Second, since to view the cases as a process of developing protection for individual autonomy does not imply that the protection afforded autonomy is absolute or even that all actions involving autonomy are given some protection, which areas of autonomy are given protection and how strong must a conflicting interest be in order to override this protection?

Asking what strategy the court used in a case instead of what amendment decision was based on has heuristic advantages. If concepts such as substantive due process and the ninth amendment are each viewed as one of many techniques used to advance a trend deeply rooted in tradition, then some of the illegitimacy and novelty associated with their use will disappear, and the controversies concerning them¹²³ will be clarified; the issue will be whether due process or the ninth amendment is an effective and desirable means of granting protection to a given area of autonomy.

There are several strategies which the courts have used. First is the principle of effectiveness: A provision is interpreted broadly in order to make the right effective or to achieve the purpose of the provision. Courts are not compelled to do this; penal statutes are generally not broadly construed to make them more effective.¹²⁴ However, the Supreme Court normally has done so when self-determination or personal integrity is involved.¹²⁵ In holding that a state court could

119 The fourth amendment, of course, mentions the "right to be secure in their persons" but only in the context of searches by law officers.

120 *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

121 Black, of course, believed this. *See, e.g., Adamson v. California*, 332 U.S. 46, 68 (1947) (Black, J., dissenting).

122 B. SCHWARTZ, *supra* note 108, at v.

123 On the ninth amendment *see* Redlich, *supra* note 96.

124 *See* *United States v. Farber*, 306 F. Supp. 48, 53 (N.D. Cal. 1969), and the many cases cited therein.

125 The Supreme Court stated this philosophy of broad construction very early on in *Boyd v. United States*, 115 U.S. 616, 635 (1885): "illegitimate . . . practices get their first footing

not require the N.A.A.C.P. to produce its membership lists Justice Harlan observed that "[i]nviolability of privacy in group association may . . . be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."¹²⁶ The Court in *Mapp v. Ohio*,¹²⁷ extending the exclusionary rule to state trials, stated that "[t]o hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment."¹²⁸

Secondly, there is the principle that due process of law is a "summarized constitutional guarantee of respect for those personal immunities which . . . are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"¹²⁹ While this theory has been used to restrict the application of provisions of the Bill of Rights to the states,¹³⁰ it has also been employed to expand these provisions to give more protection to autonomy¹³¹ and even to cover areas of autonomy not falling under the eight amendments. It was used to create a right to travel in *Kent v. Dulles*¹³² and the right to marry the person of one's choice in *Loving v. Virginia*.¹³³ It was cited in three of the opinions in *Griswold v. Connecticut*¹³⁴ as authority for protecting the "right of marital privacy."¹³⁵ The Court in *Roe v. Wade*¹³⁶ used it "to encompass a woman's decision whether or not to terminate her pregnancy."¹³⁷

Thirdly, the ninth amendment shows that there are protected rights not enumerated in the first eight amendments. Although recommended by several commentators,¹³⁸ this strategy has not been given much support by the courts.¹³⁹

Fourthly, and finally, the major strategy which the Supreme Court has used to broaden constitutional coverage of individual autonomy is the expansion of the definitions of the words used in the first eight amendments to embrace new areas of autonomy. Referring to the eighth amendment in *Trop v. Dulles*,¹⁴⁰ Chief Justice Warren stated "the words of the Amendment are not precise, and . . . their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."¹⁴¹

. . . by . . . slight deviations. . . This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed."

126 *NAACP v. Alabama*, 357 U.S. 449, 462 (1958). Similar statements are found in *Bates v. Little Rock*, 361 U.S. 516, 523 (1960) and *Shelton v. Tucker*, 364 U.S. 479, 485-86 (1960).

127 367 U.S. 643 (1961).

128 *Id.* at 656.

129 *Rochin v. California*, 342 U.S. 165, 169 (1952), quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). See also *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) and *Adamson v. California*, 332 U.S. 46, 54 (1947). Black argued against this view, *id.* at 69-123.

130 This restrictive use is declining. Cf. *Duncan v. Louisiana*, 391 U.S. 145, 147-48 (1968).

131 As in *Rochin v. California*, 342 U.S. 165 (1952), and *Wolf v. Colorado*, 338 U.S. 25, 27 (1949). See also Harlan's dissent in *Poe v. Ullman*, 367 U.S. 497, 542-43 (1961).

132 357 U.S. 116, 125-26 (1958). The right to travel has also been based on other grounds. See *Shapiro v. Thompson*, 394 U.S. 618, 630 (1969), and cases cited there.

133 388 U.S. 1, 12 (1967).

134 381 U.S. 479 (1965).

135 *Id.* at 486 (Goldberg, J., concurring).

136 410 U.S. 113 (1973).

137 *Id.* at 153. See also *id.* at 167-68 (Stewart, J., concurring).

138 See e.g., Redlich, *supra* note 96.

139 Three of the judges in *Griswold* use it to bolster their due process arguments. 381 U.S. at 488-93 (1965). *Mapp v. Ohio* speaks of "[t]he right to privacy, no less important than any other right carefully and particularly reserved to the people." 367 U.S. 643, 656 (1961).

140 356 U.S. 86 (1958).

141 *Id.* at 100-01.

This philosophy has been used pervasively to change the Bill of Rights from "a series of isolated points" to "a rational continuum which . . . includes a freedom from all substantial arbitrary impositions and purposeless restraints."¹⁴² This strategy has been used in many areas.

1. Religion

Colonial documents that guarantee freedom of religion use a concept of religion that embodies the worship of God. The first document to protect freedom of religion, the Maryland Toleration Act of 1649, stated that it dealt with "matters concerning Religion and *the honor of God*"¹⁴³ and granted freedom only to those "professing to believe in Jesus Christ."¹⁴⁴ The 1772 *Rights of the Colonists* advocated freedom of religion because of its concern with "various attempts, which have been made and are now making, to establish an American Episcopate."¹⁴⁵ Recent cases have expanded the concept of religion to comprise, not only the worship of a divinity, but also some, if not all, deeply held moral convictions. In *United States v. Seeger*,¹⁴⁶ the Court interpreted the provision of the Universal Military Training and Service Act granting exemption from conscription to those who "by reason of religious training and belief," defined as "belief in relation to a Supreme Being," are "conscientiously opposed to participation in war in any form."¹⁴⁷ Seeger claimed a "devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed."¹⁴⁸ The Court construed the statute to apply to any "sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption."¹⁴⁹ While this holding rests on statutory interpretation, the interpretation is quite strained,¹⁵⁰ and the Court stated that to hold otherwise would "classify different religious beliefs, exempting some and excluding others."¹⁵¹

Later cases in this area also protect self-determination and respect the individual's intense moral values by including such convictions within the concept of religion. Thus, in *Welsh v. United States*,¹⁵² an applicant who "held deep conscientious scruples against taking part in wars,"¹⁵³ which were formed through his study of sociology and history,¹⁵⁴ was held to qualify for exemption, and the statutory definition of religion was said to include the case of "an individual [who] deeply and sincerely holds beliefs that are purely ethical or moral in

142 *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

143 B. SCHWARTZ, *supra* note 108, at 91 (emphasis added).

144 *Id.* at 93.

145 *Id.* at 210. The Senate eliminated the words "nor shall the rights of conscience be infringed" from the first amendment. *Id.* at 1146.

146 380 U.S. 163 (1965).

147 62 Stat. 604, 613 (1948).

148 380 U.S. at 166.

149 *Id.* at 176.

150 Harlan called it an "Alice-in-Wonderland" interpretation, concurring, in *Welsh v. United States*, 398 U.S. 333, 345-54 (1970).

151 380 U.S. at 176.

152 398 U.S. 333 (1970).

153 *Id.* at 337.

154 *Id.* at 341.

source and content but that nevertheless impose upon him a duty of conscience."¹⁵⁵

2. Punishment

Just as the scope of the word "religion" has been broadened to protect self-determination, so the meaning of the word "punishment" has expanded to protect personal integrity. When Colonial writers talked of inhumane punishments, what they had in mind were retributive sanctions imposed by the criminal process. The first document to ban barbarous punishments, the 1641 Massachusetts Body of Liberties, placed the prohibition of "bodilie punishments . . . that are inhumane Barbarous or cruel" in the section dealing with criminal justice; the one provision concerning specific punishments stated that "No man shall be beaten with above 40 stripes, nor shall any true gentleman . . . be punished with a whipping, unless his crime be very shamefull, and his course of life vitious and profligate."¹⁵⁶ Recent decisions, however, break down the distinctions between retribution and treatment, between criminal conviction and civil commitment. *Inmates of Boys' Training School v. Affleck*¹⁵⁷ dealt with a challenge to conditions, especially isolation for disciplinary reasons at a reformatory many of whose inmates had not violated the criminal law and were confined according to a statute providing for "custody, care and discipline" to achieve "instruction and reformation," not punishment.¹⁵⁸ It was held that the fact that the isolation was allegedly "for rehabilitative purposes, does not preclude operation of the Eighth Amendment."¹⁵⁹

The courts' scrutiny has been extended to the conditions of nonretributive confinement in a similar fashion in other cases.¹⁶⁰

¹⁵⁵ *Id.* at 340. Judge Wyzanski, in *United States v. Sisson*, 297 F. Supp. 902 (D. Mass. 1969), *appeal dismissed for want of jurisdiction*, 399 U.S. 267 (1970), held the Universal Military Training Act unconstitutional as applied to an applicant whose principles would not allow him to fight in the Vietnam war. In holding Sisson's views covered by freedom of religion, the court said:

Duty once commonly appeared as the "stern daughter of the voice of God." Today to many she appears as the stern daughter of the voice of conscience. It is not the ancestry but the authenticity of the sense of duty which creates constitutional legitimacy.

Id. at 909.

¹⁵⁶ *Gillette v. United States*, 401 U.S. 437 (1971), which refused to extend conscientious objector status to an applicant who thought the Vietnam war unjust, did not hold that such a belief was not religious, for the Court stated that "however 'political and particular' the judgment underlying objection to a particular war, the objection still might be rooted in religion and conscience." *Id.* at 458. Rather, it rested its decision on the fact that there were "neutral and secular" reasons for limiting the exemption, so the limitation did not "reflect a religious preference," *id.* at 454, and on the "substantial governmental interest," *id.* at 462, in overriding these religious beliefs. This overriding interest has been the traditional reason for denying constitutional status to religious objections to conscription. See *United States v. Macintosh*, 283 U.S. 605, 623-25 (1931).

¹⁵⁷ SCHWARTZ, *supra* note 108, at 76-77.

¹⁵⁸ 346 F. Supp. 1354 (D. R.I. 1972).

¹⁵⁹ *Id.* at 1363.

¹⁶⁰ *Id.* at 1366.

¹⁶⁰ *Nelson v. Heyne*, 355 F. Supp. 451 (N.D. Ind. 1973); *Lollis v. New York Dep't of Soc. Servs.*, 322 F. Supp. 473 (S.D.N.Y. 1970); *Martarella v. Kelley*, 349 F. Supp. 575, 585 (S.D.N.Y. 1972). In *Vann v. Scott*, 467 F.2d 1235 (7th Cir. 1972), the court said, "We have no doubt that well-intentioned attempts to rehabilitate a child could, in extreme circumstances, constitute cruel and unusual punishment proscribed by the Eighth Amendment." *Id.* at 1240.

3. Cruel and unusual

The definition of "cruel and unusual" has also changed to give protection to individual autonomy.¹⁶¹ The Massachusetts document mentioned earlier¹⁶² expressly permitted whippings and, under certain circumstances, torture.¹⁶³ A member of the congressional committee debating the Bill of Rights observed that "villains often deserve whipping, and perhaps having their ears cut off."¹⁶⁴ Such atrocities are forbidden today. The clause has evolved to prohibit those punishments which grossly violate bodily integrity, such as whipping,¹⁶⁵ or deprive one of his status as an individual whose right to have values and make choices is respected. This is why the Court has declared denationalization a cruel and unusual punishment,¹⁶⁶ why bodily pain is not the sole test of cruelty,¹⁶⁷ and why some opinions state that "a punishment must not be so severe as to be degrading to the dignity of human beings."¹⁶⁸

4. Searches

When the Framers sought to protect personal integrity with the fourth amendment, they were concerned more with the "insolence" of British officers who would "enter our houses, search, insult, and seize at pleasure"¹⁶⁹ than with intrusion by stealth or eavesdropping. Of course, they could not envisage the development of devices for long-distance communication and of devices for intercepting that communication. In 1927, the Supreme Court refused to extend the meaning of "searches" to encompass wiretapping; one cannot, said Chief Justice Taft, "justify enlargement of the language employed beyond the possible practical meaning of houses, persons, papers, and effects, or so to apply the words search and seizure as to forbid hearing or sight."¹⁷⁰ Brandeis, in a famous dissent, observed that the courts had already extended the concept of "search" to reach cases that "[n]o court which looked at the words of the Amendment rather than at its underlying purpose would hold" fall within its scope.¹⁷¹ And in *Katz v. United States*,¹⁷² the Supreme Court "departed from the narrow view on which [Taft's] decision rested." FBI agents had attached a microphone to the outside of a public telephone booth and listened to Katz's conversations on that tele-

Cf. *Landman v. Royster*, 333 F. Supp. 621, 645 (E.D. Va. 1971); *Knecht v. Gillman*, 488 F.2d 1136 (8th Cir. 1973).

161 *See* text accompanying note 141 *supra*; *Weems v. United States*, 217 U.S. 349, 373 (1910).

162 *See* text accompanying note 156 *supra*.

163 SCHWARTZ, *supra* note 108, at 76-77.

164 *Id.* at 1053.

165 In *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968), the court declared that the use of the strap in Arkansas jails, "irrespective of any precautionary conditions which may be imposed, offends contemporary concepts of decency and human dignity."

166 *Trop v. Dulles*, 356 U.S. 86, 101 (1958). *Cf.* *Afroyim v. Rusk*, 387 U.S. 253 (1967), holding Congress has no power to denationalize.

167 *Weems v. United States*, 217 U.S. 349, 372 (1910).

168 *Furman v. Georgia*, 408 U.S. 238, 271 (Brennan, J., concurring).

169 SCHWARTZ, *supra* note 108, at 488-89.

170 *Olmstead v. United States*, 277 U.S. 438, 465 (1928).

171 *Id.* at 476.

172 389 U.S. 347, 353 (1967).

phone.¹⁷³ In refusing to allow this evidence to be admitted, the Court affirmed the concept of bodily integrity in two ways. First, the concept of "search" was extended beyond physical intrusion¹⁷⁴ to cover the intrusion of "the uninvited ear."¹⁷⁵ Second, the Court emphasized that the primary value protected was personal integrity, not integrity of the home; "the Fourth Amendment," they said, "protects people, not places."¹⁷⁶ Following this logic, the Court has also held that a compulsory blood test intrudes upon the sphere of personal integrity and is thus a "search" within the fourth amendment.¹⁷⁷

5. Speech

Justice Brennan, in *N.A.A.C.P. v. Button*,¹⁷⁸ noted that the courts do not use "a narrow, literal conception of freedom of speech, petition or assembly."¹⁷⁹ In that case, freedom of speech was used to forbid Virginia to use its power of punishing malpractice by attorneys in order to prevent the N.A.A.C.P. from financing plaintiffs in civil rights actions; "litigation" said the Court, is "a form of political expression."¹⁸⁰ Freedom of speech has also been held to protect peaceful, silent sit-ins in segregated facilities.¹⁸¹ Nor has the reach of the first amendment been restricted to political speech, as it would have been if freedom of speech were based, not on self-determination, but on its relation to democratic government.¹⁸² Thus, "portrayal of sex" (though not obscenity) receives protection as "one of the vital problems of *human* interest."¹⁸³

6. Privacy

The Court, in *Roe v. Wade*,¹⁸⁴ stated that a long line of decisions recognize that a "right of privacy does exist under the Constitution."¹⁸⁵ Talk of a right of privacy may be confusing, however, since this phrase has been used to refer to several disparate issues since it was coined in 1890.¹⁸⁶ Warren and Brandeis employed the term in the sense of a right to prevent one's private life or writings

173 *Id.* at 348.

174 *Id.* at 353.

175 *Id.* at 352. Harlan's concurrence also speaks of "freedom from intrusion." *Id.* at 361.

176 *Id.* at 351. These holdings are not weakened by the more recent decision in *United States v. White*, 401 U.S. 745 (1971). White's confederate was a government informer who carried a concealed transmitter allowing government agents to hear conversations between the two. The Court said this was no different from a case in which a police informant testified against his confederate in court and in effect held this was no infringement because White had chosen to talk to the informant. *Katz* thus represents the borderline of protection today; *White* did not push this border back.

177 *Schmerber v. California*, 384 U.S. 757, 767 (1966), although the Court held that the search in that case was reasonable.

178 371 U.S. 415 (1963).

179 *Id.* at 430. He further said, "A State cannot foreclose the exercise of constitutional rights by mere labels." *Id.* at 429.

180 *Id.*

181 *Brown v. Louisiana*, 383 U.S. 131, 141-42 (1966), and cases cited therein at 133.

182 Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 20-35 (1971).

183 *Roth v. United States*, 354 U.S. 476, 487 (1957) (italics added).

184 410 U.S. 113 (1973).

185 *Id.* at 152.

186 Warren & Brandeis, *The Right to Privacy*, 4 *HARV. L. REV.* 193 (1890).

from being made public. The right of privacy may also refer to the right of bodily integrity,¹⁸⁷ and many cases have used it in this fashion,¹⁸⁸ including many of those cited in *Roe*. *Roe* and *Griswold* put the established concept of a right to privacy to an entirely new use—that of protecting areas of self-determination. The dissenting Justices were quick to note this redefinition.¹⁸⁹

B. Constitutional Protection of Autonomy Today

This article has discussed how the courts use a variety of strategies to protect personal autonomy. This does not imply that the courts will (or should) extend constitutional protection to all areas of autonomy; nor does it mean that autonomy, once protection is granted, cannot be overridden by a strong conflicting interest. The article has described the process of expansion of autonomy; it remains to delineate autonomy's present borders, and show to what regions the protection extends and how strong the protection is.¹⁹⁰

Any infringement of freedom of choice which is wholly arbitrary, capricious, and irrational will be held unconstitutional.¹⁹¹ But in many areas, all that the courts require to sustain an infringement is that the law have "a reasonable relation to a proper legislative purpose."¹⁹² In such a case "every possible presumption is in favor of its validity"¹⁹³ and the court will not closely investigate whether the judgment by the legislature that the regulation is a reasonable means of implementing their purpose is borne out by the facts.¹⁹⁴ At other times, the court will demand more; it will require a compelling, not just a proper, legislative purpose, and will be quicker to declare that the purpose is improper or that the law is an unreasonable means of reaching it. Although there are no formulae to predict with mathematical precision the measure of protection to be given in every instance, some rough indications may be gleaned from the cases. The courts are likely to demand more than a mere "reasonable relation" to override self-determination or bodily integrity when one or more of the following criteria are met:

1. The state action encroaches on the core of bodily integrity—that is, a nonconsensual touching of the body. The courts may also scrutinize an intrusion on personal integrity that does not involve touching although they are less likely to.
2. The state action imposes the values of one group of people upon another group.

187 *Id.* at 205. This right of privacy is distinct from intrusion on the body.

188 See text accompanying notes 109-18 *supra*.

189 381 U.S. 479, 508-10 (1965) (*Griswold*); 410 U.S. 113, 172 (1973) (*Roe*). It may be noted that when the Court in *Katz* said there is no general constitutional right to privacy, they were using the term in a Warren-Brandeis sense.

190 Recent cases in this area have received extensive discussion. See Comment, *The Constitutional Right of Privacy: An Examination*, 69 Nw. U.L. Rev. 263 (1974); Note, *On Privacy: Constitutional Protection for Personal Liberty*, 48 N.Y.U.L. Rev. 670 (1974).

191 *Nebbia v. New York*, 291 U.S. 502, 539 (1934); see *United States v. Carolene Products*, 304 U.S. 144, 152 (1938).

192 304 U.S. at 152 (*Carolene*); 291 U.S. at 537 (*Nebbia*); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937).

193 291 U.S. at 538 (*Nebbia*).

194 304 U.S. at 152 (*Carolene*).

3. The state action makes it impossible, or so costly as in practice to be impossible, for a specific individual legally to hold or act on a specific value or live a specific way of life.

4. The state action makes it harder for a specific individual to hold any values or goals at all, or to act on any values or goals at all.

In some recent cases, the laws declared unconstitutional met several of these criteria. The abortion statutes struck down by the Supreme Court fit within the second criterion because they imposed the values of some religious groups (as to when life begins) upon everyone,¹⁹⁵ just as a law forbidding the teaching of Darwin's theories is void because it imposed the doctrines of some religious sects upon nonbelievers.¹⁹⁶ The laws in *Roe* also meet the third criterion because they made it impossible for some pregnant women to remain childless.¹⁹⁷ And, as the Court noted, a prohibition of abortion approaches the fourth criterion because the responsibilities of motherhood foreclose many ways of life for the woman and "may force upon the woman a distressful life and future."¹⁹⁸

The anticontraception statutes reviewed in *Griswold* and *Eisenstadt* meet these criteria in a fashion similar to the antiabortion laws. The statutes in these two cases had the goal of "limit[ing] contraception in and of itself"¹⁹⁹ and made it impossible for the parties involved legally to procure contraceptives.²⁰⁰ The Court thus found these laws "unwarranted governmental intrusion [upon] the decision whether to bear or beget a child."²⁰¹

Another case which involved several of the criteria is *Stanley v. Georgia*.²⁰² There, state police acting under a search warrant found obscene films in Stanley's bedroom; he was convicted under Georgia's obscenity statutes. The statutes as applied, the Court found, imposed the state's moral code upon unwilling individuals (second criterion):

[A] state has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds . . . Georgia asserts the right to protect the individual's mind from the effects of obscenity. We are not certain that this argument amounts to anything more than the assertion that the state has the right to control the moral content of a person's thoughts. To some, this may be a noble purpose, but it is wholly inconsistent with the philosophy of the First Amendment.²⁰³

195 This point is made by (Professor) Tribe, *The Supreme Court 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 18-25 (1973). The Court makes it in *Roe v. Wade*, 410 U.S. 113, 160-62 (1973).

196 *Epperson v. Arkansas*, 393 U.S. 97 (1968).

197 The Georgia statute in *Doe v. Bolton*, 410 U.S. 179, 182-84 (1973), did not forbid all abortions, but presumably one reason that the Court scrutinized the requirements of hospital accreditation, *id.* at 194, and hospital committees, *id.* at 198, so carefully is that some women might find it impossible to get the necessary approval from the abortion committees of accredited hospitals.

198 410 U.S. at 153.

199 *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972).

200 Although they could have lied and said they needed them to prevent disease. *Id.* at 442.

201 *Id.* at 453.

202 394 U.S. 557 (1969).

203 *Id.* at 565-66.

The third criterion was also met, since by banning pornography everywhere, including in the individual's own home, the statute made it impossible for an individual legally to act on a scheme of values which affirmed pornography. Furthermore, although there was no touching of Stanley's body, personal integrity was also involved in *Stanley*, since police had ransacked Stanley's bedroom and seized the films acting under a warrant allowing a search for book-making records; three justices made this the basis of their concurrence.²⁰⁴

Recent cases have refused to extend the protection of *Stanley* to public theatres,²⁰⁵ to transportation of films in interstate commerce,²⁰⁶ or even to the importation of obscene matter for private use.²⁰⁷ These decisions may seem wrong, and the future development of protection for personal autonomy may sweep them aside. Nevertheless, they may be distinguished from *Stanley* on the basis of the four principles. Unlike *Stanley*, these cases do not involve an intrusion upon the privacy of the home, as the Court was quick to point out.²⁰⁸ Moreover, for that reason, they do not make it impossible for a person to pursue values which sanction obscenity, although it may be argued that to forbid the transport of films to one's home comes close to doing this. Because the regulations did not invade the home, the Court did not consider them as much an effort to "control the minds or thoughts of" or impose the state's values upon dissenting individuals, but, rather, a regulation of conduct in public places.²⁰⁹ Thus, the obscenity statutes upheld by the courts did not violate the first three criteria, as did the *Stanley* statute; and neither law violated the fourth criterion.

The third criterion does not apply to state actions which make acting on a specific value inconvenient, but only to those actions which make such action virtually impossible for a specific individual. This fact explains an apparent inconsistency between two recent cases. An act of Congress denying food stamps to any household containing an individual unrelated to any other member of the household was struck down in *U.S. Department of Agriculture v. Moreno*,²¹⁰ it was held that a desire to hurt "hippie" communes "cannot constitute a legitimate governmental interest."²¹¹ But a zoning regulation permitting houses in the village of Belle Terre to be occupied only by single families, or by two unrelated people, was upheld in *Village of Belle Terre v. Boraas*²¹² applying the rational relationship test used for ordinary economic and social legislation. There was an element of imposed morality present in *Moreno* and not in *Boraas* because the Belle Terre ordinance exempted unmarried couples from its reach, and this distinction was important to the *Boraas* court.²¹³ Equally important was the fact

204 *Id.* at 569-72. All nine Justices held Georgia's action unconstitutional.

205 *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973).

206 *United States v. Orito*, 413 U.S. 139 (1973).

207 *United States v. 12 200-Ft. Reels of Super 8MM. Film*, 413 U.S. 123 (1973).

208 *See* 413 U.S. at 65-66; 413 U.S. at 142; 413 U.S. at 126.

209 *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 67 (1973). The public-private distinction is also being implemented in other areas of sexual conduct as is noted in Comment, *supra* note 190, at 266-68. *See also* Note, *The Constitutionality of Laws Forbidding Private Homosexual Conduct*, 72 MICH. L. REV. 1613 (1974).

210 413 U.S. 528 (1973).

211 *Id.* at 534.

212 416 U.S. 1 (1974).

213 *Id.* at 8.

that denying food stamps might make it very burdensome indeed for poor, unrelated individuals to live together at all, whereas barring them from the one square mile of Belle Terre would not.²¹⁴ This is a troubled area: At some point to burden a way of life sufficiently is to prohibit. That point probably is to be found at regulations which hinder the ability of those who pursue certain goals to get a job or to earn a living.²¹⁵ In this area, the cases go both ways.²¹⁶

Other cases turn on their proximity to the core concept of bodily integrity. Thus, the Ninth Circuit has held unconstitutional in *Huguez* a rectal search, based on "mere suspicion," made at the Mexican border,²¹⁷ and has held in *York* that a female assault victim whom policemen forced to pose for nude photographs which they then circulated had her constitutional rights violated.²¹⁸ But the same court, in *Baker*, refused to hold that a person whom the police investigated and then made false statements about to a local radio station had had his constitutional rights infringed even though he lost his job because of the libel.²¹⁹ That "invasion of privacy," said the court, "is not . . . so flagrant that it calls for invocation of the Constitution."²²⁰ Although in both *Baker* and *York* (but not *Huguez*), plaintiff's privacy was infringed in the Warren-Brandeis sense, there was no invasion of bodily integrity in *Baker* as there was in *York*²²¹ and *Huguez*.²²²

Finally, the courts are more disposed to offer protection when the state makes it more difficult for a specific individual to hold or act on any values or

214 Of course, if a large city did this, or if all villages did, different problems would be presented. In *Appeal of Girsh*, 437 Pa. 237, 263 A.2d 395 (1970), Providence Township, Pennsylvania, was not allowed to implement a zoning scheme where "nowhere in the Township are apartments permitted," for this would "close its doors" to apartment dwellers. Providence was a town of 13,000; Belle Terre was a village of 700 people. See *Vickers v. Township Comm'n*, 37 N.J. 232, 252, 181 A.2d 129, 140 (1962) (Hall, J., dissenting).

215 See generally Reich, *The New Property*, 73 YALE L.J. 733 (1964).

216 Compare *Braunfeld v. Braun*, 366 U.S. 599, 606 (1961) (Sunday closing); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) (mandatory leave for pregnant teachers five months before expected birth overbroad; must be case by case determination of whether the teacher is incapacitated from teaching); *Gutierrez v. Laird*, 346 F. Supp. 289 (D.D.C. 1972) (discharge of pregnant officers by Army allowed; this does not prohibit having children, only being an Air Force officer at the same time).

217 *Huguez v. United States*, 406 F.2d 366 (9th Cir. 1968).

218 *York v. Story*, 324 F.2d 450 (9th Cir. 1963).

219 *Baker v. Howard*, 419 F.2d 376 (9th Cir. 1969).

220 *Id.* at 377.

221 Although the policemen in *York* did not tear the clothes from York's body, their ordering her to strip against her will is virtually the same thing.

222 In the recent case of *California Bankers Ass'n v. Schultz*, 416 U.S. 21 (1974), the Bank Secrecy Act of 1970, 12 U.S.C. §§ 1829b, 1730d, 1951-59, and 35 U.S.C. §§ 1051-62, 1081-83, 1101-05, 1121-22, which required banks to microfilm checks over \$100 and report domestic transactions over \$10,000, was held constitutional. There was no touching of the body here. The Act was not an attempt to impose a morality but to detect embezzlement and other crimes. Nor did the Act make pursuance of an identifiable way of life impossible, although, as the dissents pointed out, it was as much of a burden on unpopular causes as the state actions struck down in *NAACP v. Alabama*, 357 U.S. 449 (1958). What was involved was the Warren-Brandeis concept of privacy as the right not to have one's private affairs made public as in *Baker*. The Court also avoided the argument that the bank records could be used to disclose the identities of members of unpopular organizations, saying it was premature as there was no "concrete fact situation" in which such disclosure was sought by the Government. 416 U.S. at 55-57, 75-76. Similar reasoning is used with regard to Army data banks in *Laird v. Tatum*, 408 U.S. 1, 12-16 (1972). Of course, future trends could change these holdings, which have been likened to *Olmstead v. United States*, 277 U.S. 438 (1928). See Comment, *supra* note 190, at 292-93.

goals at all (fourth criterion). This was apparent in *Roe*.²²³ It is even more evident in cases where the state seeks to confine someone, for confinement makes virtually any way of life harder to pursue. Thus, in extending procedural safeguards to state proceedings to confine juvenile delinquents over the state's objection that it was acting in the child's interest, the Supreme Court stated:

[H]owever euphemistic the title, a receiving home or an industrial school for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes "a building with whitewashed walls, regimented routine and institutional hours. . . ."²²⁴

In the cases described above, the courts have granted protection to autonomy by many methods. They have often employed careful scrutiny of the facts to find that the intrusion bears no relation to the state's purpose,²²⁵ sometimes, they have held the state's purpose illegitimate.²²⁶ Often, the Supreme Court has used language which suggests that not every purpose which would legitimate economic action would be enough to allow infringement of autonomy, even if rationally calculated to advance it. Several cases say that a "compelling state interest"²²⁷ is required "where fundamental liberties are involved,"²²⁸ or "[w]here there is a significant encroachment upon personal liberty."²²⁹ Many cases state that a compelling interest is necessary to override the freedoms guaranteed by the first amendment,²³⁰ and, as language in many of these and other cases suggests,²³¹ this is because the first amendment is the portion of the Bill of Rights most essential to self-determination and the freedom to develop one's own values.

Several other important characteristics of the courts' protection of autonomy must be noted. First of all, any restriction on autonomy is analyzed *incrementally*: If there are alternative restrictions yielding similar benefits, the state will be required to utilize the least restrictive alternative, inasmuch as the incremental (marginal) gain in enacting a more drastic alternative would be outweighed by the marginal intrusion. The government's purpose,

223 See text accompanying note 195 *supra*.

224 *In re Gault*, 387 U.S. 1, 27 (1967). See also *Argersinger v. Hamlin*, 407 U.S. 25, 32-33 (1972) (right to counsel extended to misdemeanor); *In re Winship*, 397 U.S. 358, 363-64, 365-66 (1970); *Speiser v. Randall*, 357 U.S. 513, 525 (1958) (defendant in criminal cases has "an interest of transcending value," his liberty).

225 See e.g., *Doe v. Bolton*, 410 U.S. 179 (1973).

226 See e.g., *Stanley v. Georgia*, 394 U.S. 557 (1969); *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528 (1973).

227 The phrase comes from *NAACP v. Button*, 371 U.S. 415, 438 (1963).

228 *Griswold v. Connecticut*, 381 U.S. 479, 497 (1965) (Goldberg, J., concurring).

229 *Bates v. Little Rock*, 361 U.S. 516, 524 (1960). Compare *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (any classification which serves to penalize the exercise of a constitutional right is unconstitutional unless shown "necessary to promote a compelling governmental interest").

230 *Schneider v. State*, 308 U.S. 147, 161 (1939); *Board of Educ. v. Barnette*, 319 U.S. 624, 639 (1943); *Thomas v. Collins*, 323 U.S. 516, 530 (1945); *NAACP v. Button*, 371 U.S. 415, 438 (1963); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963); *People v. Woody*, 61 Cal. 2d 716, 40 Cal. Rptr. 69, 394 P.2d 813 (1964).

231 *Schneider v. State*, 308 U.S. 147, 161 (1939) (foundation of free government by free men); *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940) (shield under which "many types of life, character, opinion and belief can develop unmolested"); *Thomas v. Collins*, 323 U.S. 516, 530 (1945) ("indispensable democratic freedom"); cf. *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring). *Stone in United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938), hints that a preferred position is necessary to protect "discrete and insular minorities" and this may include those with unusual ways of life.

even if it is legitimate—cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.²³²

Indeed, the whole area of procedural due process may be derived from this incremental approach; in *Goldberg v. Kelly*,²³³ Justice Brennan said:

The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be "condemned to suffer grievous loss," . . . and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication.²³⁴

Furthermore, it would seem that a state intrusion, even in pursuit of a compelling interest, loses much of its justification if its effectiveness in achieving the state's goal is low or uncertain.²³⁵

IV. Civil Commitment and the Right to Refuse Treatment

This section will examine how the constitutional framework set out in the preceding section should be applied, using the facts in the first section, to a patient's right to refuse treatment and to civil commitment in general. Before this application is made it may be helpful to examine what the courts have already done in this area and in the closely related area of treatment of physical ailments.

A. What the Courts Have Done

The determination that an individual needs care or treatment has traditionally been held a proper state purpose, and one sufficiently important to justify involuntary commitment.²³⁶ The two other state interests usually cited are the individual's danger to others and his danger to himself.²³⁷ Need for treatment until very recently went virtually unchallenged as a legitimate basis for the state's power; indeed, the Supreme Court observed in this connection that "it is . . . remarkable that the substantive constitutional limitations on this power have not been more frequently litigated."²³⁸ However, in *Lessard v. Schmidt*,²³⁹

232 *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). See *Elfbrandt v. Russel*, 384 U.S. 11, 18 (1966); *Aptheker v. Secretary of State*, 378 U.S. 500, 512-14 (1964). See also discussion in *Ratner*, *supra* note 96.

233 397 U.S. 254 (1970).

234 *Id.* at 262-63 (citation omitted).

235 See *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528, 537 (1973) (justification of preventing fraud weakened because it could be evaded quite easily); *Griswold v. Connecticut*, 381 U.S. 479, 498 (1965) (Goldberg, J., concurring) (rationality of justification of preventing extramarital relations "dubious" because of the "admitted widespread availability" of contraceptives). See also *Eisenstadt v. Baird*, 405 U.S. 438, 448-49 (1972).

236 *Jackson v. Indiana*, 406 U.S. 715, 737 (1972). See also *Donaldson v. O'Connor*, 493 F.2d 507, 520 (5th Cir. 1974), and sources cited therein; Note, *Civil Restraint, Mental Illness, and the Right to Treatment*, 77 *YALE L.J.* 87, 92-93 (1967).

237 406 U.S. at 737; 493 F.2d at 520.

238 406 U.S. at 737.

239 349 F. Supp. 1078 (E.D. Wis. 1972), *judgment vacated sub nom.* *Schmidt v. Lessard*, 414 U.S. 473 (1974), because the terms of the injunctive relief granted were not specific enough. The district court entered a new judgment, which again required a finding of dangerousness. *Lessard v. Schmidt*, 379 F. Supp. 1376, 1379 (E.D. Wis. 1974).

a class action broadly contesting the validity of the Wisconsin civil commitment procedures, the district court construed the Wisconsin statutes to require "a finding of 'dangerousness' to self or others,"²⁴⁰ and suggested that need for treatment would not be a sufficient justification for depriving an individual of his liberty.²⁴¹ After *Lessard* the courts of three states have held that need for treatment is not a compelling enough interest to permit confinement and that commitment must be justified on a basis of dangerousness to self or to others.²⁴²

Because of the magnitude of the intrusion on autonomy, even those courts which have not dealt with the issue of whether need for treatment is a sufficient basis for commitment do not hesitate to examine the facts of confinement and treatment rather than accept the state's or hospital's characterization of the circumstances.²⁴³ Several courts have applied the least restrictive alternative test²⁴⁴ both to the decision whether to commit a person to a mental hospital²⁴⁵ and to "alternate dispositions *within* a mental hospital."²⁴⁶ There has also been an emphasis on requiring adequate procedural safeguards, in part because of fear of the "terrifying possibility that the [person] may not be mentally ill at all."²⁴⁷ This requirement reached the level of a constitutional right after *Gault* swept away the distinction between treatment and punishment and pointed out that such safeguards are needed because the state seeks to curtail the individual's freedom of choice.²⁴⁸ Thus, some cases have supplemented the statutory commitment procedure by requiring proof beyond a reasonable doubt at commitment hearings²⁴⁹ or by giving the individual the right to counsel.²⁵⁰ This protection given individuals whom the state seeks to commit has been extended in a number

240 349 F. Supp. at 1093; 379 F. Supp. at 1379.

241 349 F. Supp. at 1093-94. In *Dixon v. Attorney General*, 325 F. Supp. 966, 974 (M.D. Pa. 1971), in which the Pennsylvania procedures for civil commitment were found lacking in due process and a consent decree implemented by the court required a finding of dangerousness.

242 *People v. Sansone*, 18 Ill. App. 3d 315, 309 N.E.2d 733 (1974); *In re Levias*, 83 Wash. 2d 253, 517 P.2d 588, 591 (1973); *State ex rel. Hawks v. Lazaro*, 202 S.E.2d 109, 123 (W. Va. 1974).

243 *Donaldson v. O'Connor*, 493 F.2d 507, 526 n.47 (5th Cir. 1974). Compare text and cases accompanying notes 157-60 *supra*.

244 See text accompanying note 232 *supra*.

245 *Lake v. Cameron*, 364 F.2d 657 (D.C. Cir. 1966); *Lynch v. Baxley*, 386 F. Supp. 378, 392 (M.D. Ala. 1974); *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972); *Welsch v. Likins*, 373 F. Supp. 487, 501 (D. Minn. 1974); *Dixon v. Attorney General*, 325 F. Supp. 966, 973 (M.D. Pa. 1971).

246 *Covington v. Harris*, 419 F.2d 617, 623 (D.C. Cir. 1969); *Davis v. Watkins*, 384 F. Supp. 1196, 1206 (N.D. Ohio 1974); *Kesselbrenner v. Anonymous*, 33 N.Y.2d 161, 305 N.E.2d 903, 350 N.Y.S.2d 889 (1973).

247 *United States ex rel. Schuster v. Herold*, 410 F.2d 1071, 1078 (2d Cir. 1969). This movement for procedural safeguards dates back over one hundred years. See *Lessard v. Schmidt*, 349 F. Supp. 1078, 1086 (E.D. Wis. 1972).

248 See text accompanying note 224 *supra*. See *Quesnell v. State*, 83 Wash. 2d 224, 517 P.2d 568 (1974). The counterargument was that a full hearing would traumatize the patient.

249 *In re Ballay*, 482 F.2d 648, 650 n.6 (D.C. Cir. 1973). Cf. *Stachulak v. Coughlin*, 369 F. Supp. 628, 630 (N.D. Ill. 1973); *People v. Sansone*, 18 Ill. App. 3d 315, 309 N.E.2d 733 (1974).

250 *Sarzen v. Gaughan*, 489 F.2d 1076, 1086 (1st Cir. 1973); *Lynch v. Baxley*, 386 F. Supp. 378, 389 (M.D. Ala. 1974) (counsel must be made available "well before the day of the final commitment hearing"); *Heryford v. Parker*, 396 F.2d 393 (10th Cir. 1968) (counsel required to commit a person as mentally retarded); *Lessard v. Schmidt*, 379 F. Supp. 1376, 1381 (E.D. Wis. 1974); 349 F. Supp. 1078, 1097 (1972); *Dixon v. Attorney General*, 325 F. Supp. 966, 974 (M.D. Pa. 1971); *People ex rel. Rogers v. Stanley*, 17 N.Y.2d 256, 217 N.E.2d 636, 270 N.Y.S.2d 573 (1966); *In re Fisher*, 39 Ohio St. 2d 71, 313 N.E.2d 851 (1974).

of other cases to prisoners whose transfer to mental hospitals is sought,²⁵¹ to those acquitted of crimes by reason of insanity,²⁵² to those convicted under sexual psychopath laws,²⁵³ and to those found incompetent to stand trial.²⁵⁴ There has also been success with broad-based attacks on commitment statutes as failing to provide adequate procedures, and the opinions in these cases set forth in detail a whole panoply of required procedures.²⁵⁵

There has been some litigation on the rights of civilly committed mental patients and others confined by the state to refuse certain forms of treatment which the institution thinks will be therapeutic and beneficial for them. From the general discussion of autonomy, it would seem that the right to refuse treatment would be more likely to be recognized, the more drastic and the more destructive of self-determination the treatment, the more controversial and experimental the treatment (for this would make the benefits less certain) and the closer treatment seems to punishment (because such "treatment" would be more like the imposition of morality and would be viewed by the courts as less likely to be therapeutic). This pattern has been more or less followed.

In most states, mental patients may not refuse electroshock therapy or surgery.²⁵⁶ However, in *Kaimowitz v. Dep't of Mental Health*,²⁵⁷ a Michigan court held that psychosurgery on an involuntarily committed mental patient would violate his constitutional rights. The court noted that psychosurgery is "irreversible and intrusive, often leads to the blunting of emotions . . . and limits the ability to generate new ideas," and stated that "if the First Amendment protects the freedom to express ideas, it necessarily follows that it must protect the freedom to generate ideas. Without the latter protection, the former is meaningless." The court also took into account the fact that the surgery was experimental, posed unknown risks, and was not even known to be beneficial.

A few states have dealt with the problem of psychosurgery by statute.²⁵⁸ California and New York statutes now require consent for shock treatment if the patient is competent,²⁵⁹ and Massachusetts requires consent unless there is

251 *Baxstrom v. Herold*, 383 U.S. 107 (1966); *United States ex rel. Schuster v. Herold*, 410 F.2d 1071 (2d Cir. 1969).

252 *Bolton v. Harris*, 395 F.2d 642 (D.C. Cir. 1968).

253 *Millard v. Cameron*, 373 F.2d 468 (D.C. Cir. 1966); *State ex rel. Farrell v. Stovall*, 59 Wis. 2d 148, 207 N.W.2d 809 (1973). *Cf.* *Specht v. Patterson*, 386 U.S. 605 (1967).

254 *State ex rel. Haskins v. County Court*, 62 Wis. 2d 250, 214 N.W.2d 575 (1974); *State ex rel. Matalik v. Schubert*, 57 Wis. 2d 315, 204 N.W.2d 13 (1973).

255 *Kendall v. True*, — F. Supp. — (W.D. Ky. 1975); *Lynch v. Baxley*, 386 F. Supp. 378 (M.D. Ala. 1974); *Bell v. Wayne County Hosp.*, 384 F. Supp. 1085 (E.D. Mich. 1974); *Lessard v. Schmidt*, 379 F. Supp. 1376 (E.D. Wis. 1974), 349 F. Supp. 1078 (1972); *Dixon v. Attorney General*, 325 F. Supp. 966 (M.D. Pa. 1971). *Cf.* *Davis v. Watkins*, 384 F. Supp. 1196 (N.D. Ohio 1974); *Fhagen v. Miller*, 306 F. Supp. 634 (S.D.N.Y. 1969); *State ex rel. Fuller v. Mullinax*, 269 S.W.2d 72 (Mo. 1954).

256 *See* ACLU, HANDBOOK: THE RIGHTS OF MENTAL PATIENTS 69-70 (B. Ennis & L. Siegel eds. 1973).

257 42 U.S.L.W. 2063 (Cir. Ct. Wayne County, Mich., July 10, 1973). The factual background to *Kaimowitz* is found in *Robitscher*, *supra* note 39, at 20-24.

258 *See, e.g.*, CAL. WELF. & INST'NS CODE § 5325 (West Supp. 1974); N.Y. MENT. HYG. LAW § 15.03 (McKinney Supp. 1974). Both California and New York require the consent of the patient or his guardian for surgery. *See also* OHIO REV. CODE ANN. § 5123.03 (Page 1970), which requires the patient, his doctor, and his guardian to be notified prior to "any major operation"; and MASS. GEN. LAWS ANN. ch. 123, § 23 (1972).

259 CAL. WELF. & INST'NS CODE §§ 5325, 5326.4 (West Supp. 1974); N.Y. MENT. HYG. LAW § 15.03 (McKinney Supp. 1974). On December 30, 1974, a Superior Court in San

"good cause" for ECT and the patient's guardian or nearest relative consents.²⁶⁰ One New York case²⁶¹ decided just before the New York statutes went into effect, noted that ECT "is the subject of great controversy within the psychiatric profession, both as to its efficacy, and as to its dangers,"²⁶² and refused to issue an order authorizing ECT for a competent patient who refused consent. And the district court decree in *Wyatt v. Stickney*²⁶³ gave patients at Bryce Hospital a right "not to be subjected to treatment procedure such as lobotomy, electroconvulsive treatment without their express and informed consent"; the court referred to this decree as the constitutional minimum.²⁶⁴

The cases on nonconsensual chemotherapy are divided. In *Mackey v. Proconier*²⁶⁵ and *Knecht v. Gillman*,²⁶⁶ the courts dealt with the use of "aversive stimuli" for behavior therapy by mental institutions.²⁶⁷ In both cases, these programs involved the administration of drugs which produced great pain to inmates who misbehaved in order to change their behavior.²⁶⁸ The courts held these programs violated the constitutional rights of the patients.²⁶⁹ Other cases have held that the forcible use of tranquilizers to control behavior—*i.e.*, to sedate the patients—might violate the patient's constitutional rights.²⁷⁰ On the other hand, some courts have upheld such sedation in prison mental hospitals,²⁷¹ and one case has implied that hospitals have a duty to administer "modern tranquilizing drugs" even if the patient refuses them.²⁷² None of these cases question the hospital's power to force therapeutic drugs upon the patient.

The Second Circuit decision in *Winters v. Miller*²⁷³ is particularly significant. The court there held that it violated the constitutional rights of plaintiff, whose religious beliefs would not allow her to take medicines, when a hospital forced her to take medication, where she had been temporarily committed as mentally ill but not found incompetent. The court in *Winters* observed that "if we were dealing . . . with an ordinary patient suffering from a physical ailment, the hospital authorities would have no right to impose compulsory medical treatment against the patient's will, and . . . to do so would constitute . . . battery."²⁷⁴

Diego issued a restraining order on the California law on the grounds that it restricted the patient's freedom of choice. TIME, Jan. 20, 1974, at 56.

260 MASS. GEN. LAWS ANN. ch. 123, § 23 (1972). This law also applies to lobotomies.

261 *Health and Hosps. Corp. v. Stein*, 70 Misc. 2d 944, 335 N.Y.S.2d 461 (Sup. Ct. N.Y. County 1972).

262 *Id.* at 945, 335 N.Y.S.2d at 464.

263 344 F. Supp. 373, 380 (M.D. Ala. 1972) *aff'd sub nom.* *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974). The decree for Partlow Hospital was slightly different. It allowed ECT "in extraordinary circumstances to prevent self-mutilation . . . only after alternative techniques have failed." *Id.* at 387, 401.

264 *Id.* at 376.

265 477 F.2d 877 (9th Cir. 1973).

266 488 F.2d 1136 (8th Cir. 1973).

267 The institution in *Mackey* was a prison medical facility (Vacaville).

268 488 F.2d at 1137; 477 F.2d at 878 n.1.

269 *Mackey* was an appeal from a dismissal of plaintiff's complaint, so the court did not enjoin the program, as in *Knecht*, but rather remanded for trial.

270 *Welsch v. Likins*, 373 F. Supp. 487, 503 (D. Minn. 1974); *Nelson v. Heyne*, 355 F. Supp. 451, 455 (N.D. Ind. 1973).

271 *Haynes v. Harris*, 344 F.2d 463 (8th Cir. 1965); *Peek v. Ciccone*, 288 F. Supp. 329 (W.D. Mo. 1968); *Veals v. Ciccone*, 281 F. Supp. 1017 (W.D. Mo. 1968). *Peek* and *Veals* were decided by the same judge, and *Haynes* affirmed a decision by that judge.

272 *Whitree v. State*, 56 Misc. 2d 693, 290 N.Y.S.2d 486 (Ct. Cl. 1968).

273 446 F.2d 65 (2d Cir. 1971).

274 *Id.* at 68.

Indeed, in this closely related area, the courts have quite firmly upheld bodily integrity and self-determination. As one court put it:

[A] person . . . has the right, in the exercise of control over his own body, to determine whether or not to submit to lawful medical treatment. . . . [T]o the physician . . . the particular treatment which should be undertaken may seem evident, but it is the prerogative of the patient, not the physician, to determine for himself the direction in which he believes his interests lie.²⁷⁵

Many courts have upheld self-determination even when the patient refused life-saving treatment for religious²⁷⁶ or other²⁷⁷ reasons, although some courts have refused to do so, especially where minor children were involved.²⁷⁸

B. *Autonomy and Treatment*

Forcible treatment is characterized by those features which, as shown above, impel courts to grant protection to autonomy. First of all, coerced injection of tranquilizers or ECT are nonconsensual touchings of the patient's body and thus infringe the core of bodily integrity. Second, to compel treatment may be to impose values. For the state to declare that someone needs treatment when he does not agree is in itself an imposition of the state's value scheme. Even if this is untrue, treatment may still be the imposition of morality where, as is sometimes the case,²⁷⁹ the individual is picked for treatment because of his deviant or socially offensive way of life.

Third, imposed treatment may make it impossible for the patient to act on a specific value. This is clearly true if, for religious or other reasons, he believes that medication and treatment are evil.²⁸⁰ It is also true if the patient is picked for treatment because of his lifestyle and is prevented by confinement and treatment from shaping his life in the way he prefers. The effects of treatment may make a specific lifestyle impossible. Major tranquilizers, as well as ECT, may make the independent, questioning, and even combative patient pliable and cooperative.²⁸¹ Psychosurgery may make an exuberant, active child quiet and docile.²⁸²

Finally, it is clear that treatment may make it more difficult for the patient to hold or act on any values at all. Several forms of treatment impair ability to think, choose, and have goals. It has been shown that this is true of major tranquilizers, especially when large doses are given or when side effects like akathisia

275 *Cobbs v. Grant*, 8 Cal. 3d 229, 242, 104 Cal. Rptr. 505, 513-14, 502 P.2d 1, 9-10 (1972). See also *Natanson v. Kline*, 187 Kan. 186, 354 P.2d 670 (1960).

276 *In re Brooks' Estate*, 32 Ill. 2d 361, 205 N.E.2d 435 (1965); *Erickson v. Dilgard*, 44 Misc. 2d 27, 252 N.Y.S.2d 705 (Sup. Ct. Nassau County 1962).

277 *In re Nemster*, 51 Misc. 2d 616, 273 N.Y.S.2d 624 (Sup. Ct. N.Y. County 1966).

278 This area has received extensive comment. See, e.g., Cantor, *A Patient's Decision to Decline Life-Saving Medical Treatment: Bodily Integrity Versus the Preservation of Life*, 26 RUTGERS L. REV. 228 (1973) and Note, *Informed Consent and the Dying Patient*, 83 YALE L.J. 1632 (1974), for a comprehensive discussion of the case law in this area.

279 See text accompanying notes 13-14, 68, 79, 93-94 *supra*.

280 As in *Donaldson v. O'Connor*, 493 F.2d 507 (5th Cir. 1974), and *Winters v. Miller*, 446 F.2d 65 (2d Cir. 1971); both cases involving Christian Scientists.

281 See text accompanying notes 22, 39 *supra*.

282 See text accompanying notes 62-63 *supra*.

occur,²⁸³ of minor tranquilizers,²⁸⁴ and, less clearly, of antidepressant drugs.²⁸⁵ Very careful supervision of the patients is necessary to determine the correct dosage of all these drugs;²⁸⁶ if the wrong dosage is given, the impairment of intellect will be even greater. ECT also impairs the patient's ability to remember and thus to hold values or act on those values that he had chosen; this impairment may be permanent.²⁸⁷ Psychosurgery even more clearly may cause irreversible damage to the patient's capacity for feeling and thinking.²⁸⁸

Since forcible treatment meets all four criteria so clearly, the tradition of protection for autonomy mandates that the courts carefully scrutinize the reality of treatment and determine whether there is a state interest sufficiently compelling to allow this violation of autonomy. Those that have been suggested are the individual's need for treatment and his dangerousness.²⁸⁹ Both of these are made less compelling by (1) the uncertainty of diagnosis of mental illness and dangerousness;²⁹⁰ (2) the fact that psychiatrists in practice prefer to find sickness or dangerousness where none is present rather than risk letting a sick or dangerous person go untreated;²⁹¹ and (3) the all too summary nature of the commitment process in most states.²⁹² All of these factors indicate that only a fraction of those individuals who are committed need treatment or are dangerous.

The need-for-treatment rationale is further weakened by the ineffectiveness of the various treatments presently available. Some specific forms of depression may be helped by antidepressant drugs or ECT.²⁹³ Some of the more striking symptoms of schizophrenia may be helped by major tranquilizers.²⁹⁴ Outside of depression, ECT is of little benefit.²⁹⁵ The present state of knowledge of psychosurgery is such that its benefits in a specific case are uncertain and questionable.²⁹⁶ With these limited exceptions, chemotherapy, ECT, and psychosurgery will not benefit the patient or help repair the abnormality in his mental processes, although they will make him more docile and easier to manage.

In addition, need-for-treatment as a rationale for involuntary hospitalization is undermined because, first, none of the effective treatments require hospitalization. Tranquilizers, antidepressants and even ECT may be given on an out-patient basis. Secondly, hospitalization, especially if for longer than a year or two, is antitherapeutic. Instead of alleviating mental disorders, long term hospitalization may aggravate them.²⁹⁷ Even short term hospitalization, given the depersonalizing ambience that prevails in most mental hospitals, will too often aggravate rather than cure.²⁹⁸ Thirdly, even if the treatment given in a hospital

283 See text accompanying note 22 *supra*.

284 See text accompanying note 28 *supra*.

285 See text accompanying note 33 *supra*.

286 See text accompanying notes 23, 31 *supra*.

287 See text accompanying notes 40-44 *supra*.

288 See text accompanying notes 64-66, 70 *supra*.

289 See text accompanying notes 236-37 *supra*.

290 See text accompanying notes 9-12 *supra*.

291 See text accompanying note 11 *supra*.

292 See text accompanying notes 78-94 *supra*.

293 See text accompanying notes 29-30, 37 *supra*.

294 See text accompanying notes 18-19 *supra*.

295 See text accompanying note 38 *supra*.

296 See text accompanying notes 63-66 *supra*.

297 See text at note 72 *supra*.

298 See text accompanying note 73 *supra*.

were to cure the patient, the hospital staff would, given the uncertain state of diagnosis of mental illness and the conservatism of psychiatrists, too often be unaware that the patient should be released and would continue to confine him.²⁹⁹

It will, however, be objected that self-determination and freedom of choice presuppose an ability to choose. Mentally ill people do not have such ability; thus, for them, freedom of choice becomes meaningless.

It would, it is true, be a mockery to say that a person so overwhelmed by psychosis that he is totally unaware of what is going on around him cannot be treated without his consent. But it follows from the earlier discussion that many people who are committed have the capacity to understand the choice and make a meaningful decision. Clearly, those who are committed but who do not belong in a mental hospital have such capacity.³⁰⁰ Even those who are mentally ill do not ipso facto lose their ability to choose. To conclude otherwise would be, as an empirical matter, "far too simplistic."³⁰¹ This has been recognized by both courts and legislatures. Thus, the laws of most states distinguish between commitment and incompetence and state that the latter is not necessarily entailed by the former.³⁰² Courts have allowed mental patients to make wills³⁰³ and to refuse consent to lifesaving operations.³⁰⁴ The legislatures of New York, California, and Massachusetts have affirmed the ability of many mental patients to make choices in this very area, by requiring consent for ECT.³⁰⁵

Several factors militate against a strict standard of ability to choose which would impute capacity to relatively few patients and in favor of a lower standard. Because treatment is so often not only ineffective,³⁰⁶ but may even have destructive impact,³⁰⁷ the harm that will be done by denying treatment to a patient who is not competent to choose is far outweighed by the damage done by imposing treatment on a patient who is able to choose. Furthermore, the tendency in this area of appliers of standards to expand them³⁰⁸ suggests that a strict standard of ability to choose will become in practice so rigid as to subvert the right to refuse treatment entirely. This contention is strengthened by the fact that the psychoanalytic theory of resistance, in which the psychiatrists who would apply the

299 See text accompanying note 12 *supra*.

300 See text accompanying notes 195-98 *supra*. See also Iowa estimate that 52 percent were capable of choice, Iowa at 918, and KITTRE, *supra* note 73, at 79 (most people confined in mental hospitals are not psychotic).

301 Shapiro, *supra* note 96, at 308-09, and sources cited therein. Note, *supra* note 74, at 1214 and sources cited therein.

In *In re Buttonow*, 23 N.Y.2d 385, 394, 297 N.Y.S.2d 97, 104, 244 N.E.2d 677, 682 (1968), the court stated that even "[a]n adjudication of incompetency is in no way a decision or judgment that the person so adjudicated may not act in matters involving his personal status."

302 See Brakel & Rock, *supra* note 74, at 250-53; *Winters v. Miller*, 446 F.2d 65, 68 (2d Cir. 1971); *Davis v. Watkins*, 384 F. Supp. 1196, 1206 (N.D. Ohio 1974).

303 See Weihofen, *Mental Incompetency to Make a Will*, 7 NATURAL RESOURCES J. 89 (1967). Cf. Note, *Competency to Contract*, 45 N.Y.U.L. REV. 505 (1970).

304 *In re Yetter*, Civil No. 1973-533, Northampton County, Pennsylvania.

305 See text accompanying notes 259-60 *supra*. See also court decisions at text accompanying notes 261-63, 273.

306 See text accompanying notes 293-96 *supra*. For antidepressant drugs, which are quite effective and not as destructive, a stricter standard may be used.

307 See text accompanying notes 279-88 *supra*.

308 See text accompanying notes 91-92 *supra*.

standard are thoroughly trained, suggests that, because unconscious neurotic forces resist treatment, *no one* is capable of making a meaningful choice to refuse treatment.³⁰⁹

This article has sought to demonstrate that imposition of treatment on a patient who refuses it violates the core concepts of self-determination and bodily integrity and that the benefits obtained are often very uncertain. If there is, as this suggests, a right to refuse treatment, it follows that one cannot involuntarily commit a person because he is in need of treatment. Since he has refused treatment (for the commitment is involuntary), he cannot be forcibly treated, and the reason for his confinement disappears. This must, to be sure, be qualified to permit commitment for treatment of a person so overwhelmed by psychosis that he cannot comprehend the choice. But this exception must be strictly applied; otherwise, as is all too often the case with present statutory standards such as dangerousness, the exception may be used to cover almost all mental patients.

V. Conclusion

What Judge Bazelon recently said in another connection is appropriate to the subject discussed in this article:

The life of the law in this area is thus surely not logic. I would be less concerned if I were sure it was experience; however, surveying the field after twenty-five years of work, I have serious doubts that the experience . . . really [was] the cause of all this startling, even radical departure from our traditions.³¹⁰

The law governing civil commitment and treatment is grounded neither on logic nor experience. It is based upon a priori assumptions and post hoc rationalizations which accord neither with the medical realities of mental illness nor with the way in which commitment and treatment operate in practice. "Mental illness is mental illness," declares a federal court, "whether it afflicts the criminal or the king."³¹¹ As this article has shown, the constitutional issue is deeper than that of legal equality. The core question is that of protection of the autonomy of both criminal and king afflicted by mental illness. Constitutionally protected autonomy creates a zone of immunity from governmental constraint that, as has been shown, includes immunity from forcible mental treatment. The "liberty" secured by the Constitution may no longer mean Adam Smith; but, in this area at least, it still means John Stuart Mill.³¹²

It will be objected that the approach urged would sweep away a jurisprudence of centuries. By now, "The egg is too thoroughly scrambled for judicial unscrambling."³¹³ The alternative, it will be said, is a veritable "gaol delivery" that would all but empty mental institutions and strip society of its power to deal with the mentally ill.

This is the type of "scare" argument which has been used against most law reforms from *Beccaria* to *Miranda* and *Furman*.³¹⁴ The question is not that of

309 See S. FREUD, A GENERAL INTRODUCTION TO PSYCHOANALYSIS (1917).

310 Citizens Comm. v. FCC, 506 F.2d 246, 282 (D.C. Cir. 1974).

311 United States *ex rel.* Schuster v. Herold, 410 F.2d 1071, 1089 (2d Cir. 1969).

312 Compare Henkin, *supra* note 96 at 1425, 1417.

313 Citizens Comm. v. FCC, 506 F.2d 246, 282 (D.C. Cir. 1974).

314 *Miranda v. Arizona*, 384 U.S. 436 (1966); *Furman v. Georgia*, 408 U.S. 238 (1972).

how many people would be released from commitment or vested with the right to refuse treatment, but that of how many are committed or treated against their will improperly. According to a recent estimate, 250,000 people face commitment proceedings each year.³¹⁵ The previous discussion has shown that those proceedings are too frequently conducted without adherence to elementary procedural safeguards. In practice, commitment proceedings are virtually *ex parte*, with hearings discretionary, superficial, or summary. Even the elementary right to effective counsel is one that is most often honored in the breach.

Procedural reforms thus become a categorical imperative in commitment cases. These should be accompanied by a more explicit statutory definition of dangerousness, by a stricter burden of proof, and by a requirement that commitment be ordered only if there is no less restrictive alternative feasible. The flexibility with which the courts have used the guarantees of the Bill of Rights to protect personal autonomy suggests that such reforms could be implemented judicially by broad-based attacks on the constitutionality of state commitment statutes with the courts giving detailed relief in their decrees.³¹⁶

Reform of commitment proceedings will leave unresolved the problem of those subjected to mental treatment. The inadequate and inhumane conditions in too many hospitals and institutions, as well as the ineffectiveness of most forms of treatment, should caution against continuing a power of forcible treatment over those in commitment. Any harm to society if the right to refuse treatment is recognized is surely outweighed by the infringement of autonomy of those still having ability to choose, if not by the positive injury all too often caused to those subjected to forcible treatment.

The present system of commitment and treatment "is worse than a crime, it is a blunder." It not only violates basic constitutional rights; it does not even work. This is only a legal article, and a Dickens is needed to describe the miasma of inhumanity and injustice in which mental treatment is mired:

[I]t so exhausts finances, patience, courage, hope, so overthrows the brain and breaks the heart, that there is not an honourable man among its practitioners who would not give . . . the warning, "Suffer any wrong that can be done you rather than come here!"³¹⁷

But it does not take a Dickens to state the necessity for drastic legal changes to ensure that even mentally ill people remain people. Under the present system, they have become statistics. One thing, at any rate, is certain: While the commitment and treatment system remains unchanged, it is one which makes skeptics of us all.³¹⁸

315 Weiss & Villafane, *Abused by the System*, 5 JURIS DOCTOR 26 (1975).

316 Cf. cases in note 255 *supra*. One much-discussed procedural reform is New York's Mental Health Information Service, a state agency whose task is to ensure that patients are adequately represented in the commitment process. This agency is doing its job quite well and similar agencies could be set up in other states as part of a plan for making their commitment procedures constitutionally acceptable. This proposal is made in much greater detail by Adelman & Chambers, *supra* note 78, at 75-86. For empirical studies of the effectiveness of the MHIS, see *id.* at 64-72; Gupta, *New York's Mental Health Information Service: An Experiment in Due Process*, 25 RUTGERS L. REV. 405 (1971).

317 C. DICKENS, *BLEAK HOUSE*.

318 *Compare* Citizens Comm. v. FCC, 506 F.2d 246, 283 (D.C. Cir. 1974).