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CIVIL COMMITMENT AND THE DOCTRINE OF BALANCE: A CRITICAL ANALYSIS

Julian R. Friedman*
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INTRODUCTION

That form of political order which we call "liberal democracy" guarantees, as a matter of fundamental principle, that all citizens shall enjoy personal liberty under the full and equal protection of the law. Any exception to this principle constitutes a serious challenge to the principle itself. It is therefore necessary to justify any departure from the guarantees of liberty and equality by pointing to a clear and unassailable justification for suspending the liberty of the citizen and for denying him or her equal treatment under the law.¹

At present, the confinement and detention of persons without their consent is authorized by civil mental hygiene codes and by the courts in virtually every state and federal jurisdiction. We submit that such codes and court decisions are, in general, incompatible with the tenets of liberal democracy and more particularly with the constitutional order.²

Current codes and judicial decisions in the civil commitment area seek to balance the rights of individuals against the interests of society. But the balance is almost exclusively struck in favor

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1. While such a proposition is not contained *per se* in the Constitution, it is implicit in that document and in our form of constitutional government. See generally H. LASKI, *LIBERTY IN THE MODERN STATE* (1948); A.D. LINDSAY, *THE ESSENTIALS OF DEMOCRACY* (1929); C.B. MACPHERSON, *THE REAL WORLD OF DEMOCRACY* (1966); J. TUSSMAN, *OBLIGATION AND THE BODY POLITIC* (1960).

2. The authors wish to acknowledge the important contributions to this subject area by Dr. Thomas Szasz, author of *LAW, LIBERTY AND PSYCHIATRY* (1963) and *IDEOLOGY AND INSANITY* (1970), and Dr. Ronald Leifer, author of *IN THE NAME OF MENTAL HEALTH: THE SOCIAL FUNCTION OF PSYCHIATRY* (1969). The deliberations of the New York Civil Liberties Union Committee on the Liberties of Mental Patients, chaired by Dean George Alexander, helped shape the views of Professor Friedman.

of the state and its paternalistic role as protector of the mentally ill. The importance of the individual rights involved seems not to be recognized.

We assert that freedom from commitment to a mental institution is a fundamental civil liberty which must be protected by the courts as solicitously as are other civil liberties. Just as the Court has seen fit to safeguard freedom to travel³ or freedom of association⁴ from laws which restrict their full exercise, then, *a fortiori*, it must protect those rights and others from total obliteration through civil commitment. Still more basically, personal liberty itself—freedom from physical confinement—must be recognized as the most fundamental of all civil liberties.⁵

This article is an interdisciplinary evaluation of civil commitment of the mentally ill, jointly authored by a psychiatrist and a political scientist. While legal issues are and must be raised in this context, this article does not attempt a detailed analysis of the case law bearing on them. Its purpose is to challenge the assumptions behind traditional commitment theory and to propose a "civil libertarian" view of the rights of the mentally ill.

CONTEMPORARY CODES AND PRACTICES

There are a multitude of hopes and fears which animate the public officials, professionals, and inmates who are associated with mental health facilities. State and federal mental hygiene codes,⁶ however, allow involuntary hospitalization for persons:

1. mentally ill or "suffering from mental disability resulting from mental disease, alcoholism, or addiction to narcotics";
2. mentally ill and "in need of involuntary care and treatment";
3. mentally ill and requiring immediate inpatient care;

3. *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Dunn v. Blumstein*, 405 U.S. 330 (1972).

4. *NAACP v. Alabama*, 357 U.S. 449 (1958); *Shelton v. Tucker*, 364 U.S. 479 (1960).

5. For a thorough discussion of this argument and of Supreme Court cases which have in the past given some recognition to the fundamental importance of personal freedom, see Chambers, *Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives*, 70 MICH. L. REV. 1107, 1155-1168 (1972).

6. Different formulae are found in the statutes of different states. See F. MILLER, R. DAWSON, G. DIX, R. PARNAS, *THE MENTAL HEALTH PROCESS* (1971) 1510-1511 [Hereinafter cited as MILLER]; AMERICAN BAR FOUNDATION, *THE MENTALLY DISABLED AND THE LAW* (F. Lindman & D. McIntyre eds. 1961) [Hereinafter cited as LINDMAN & MCINTYRE]. For statutory definitions of "mental illness" in the various states, see AMERICAN BAR FOUNDATION, *THE MENTALLY DISABLED AND THE LAW* (S. Brakel & R. Rock eds. 1971) 66-71 [Hereinafter cited as BRAKEL & ROCK].

4. mentally ill and "behaving in a manner which, in a person who is not mentally ill, would be deemed disorderly conduct which is likely to result in serious harm to himself or others";

5. mentally ill and a danger to society;

6. mentally ill and a danger to himself.⁷

In practice, it is often the case that the individual is actually arrested or apprehended by a law enforcement or health officer and transported to a public safety building, jail, or hospital for a psychiatric examination. Such a person may find himself detained for a few hours or for life.⁸ In the midst of this bewildering experience, he is compelled to submit to physicians or other civil authorities who are charged by law with detaining him for brief or prolonged periods of time. In the various stages of incarceration in a mental hospital, he enjoys few if any of the constitutional safeguards commonly available to criminal defendants at the time of their arrest, booking, arraignment, indictment, preliminary hearing, trial, sentencing or imprisonment.⁹

The beleaguered, allegedly mad person may be treated gently and humanely in circumstances which are very trying and painful for all the concerned parties. Clearly, however, during these encounters and proceedings, his liberty, especially freedom of movement, stands in full jeopardy. As he is not formally charged with criminal conduct but is instead alleged to be mentally ill, the situation is rarely defined as involving any transgression of constitutional rights.¹⁰ In actual practice, for persons involuntarily committed, retention and restriction under the mental hygiene codes are as confining as imprisonment and parole under the criminal codes. It is *the person* who is hospitalized and not just the "sick" aspect of the individual. It is *the person* who is placed under the control and management of the police, the hospital director, and the therapeutic team. To become mad is to become almost a nonperson with respect to individual rights and freedom.

7. BRAKEL & ROCK, *supra* note 6.

8. *See* note 11 *infra*.

9. For a complete description of the process of commitment, see J. KATZ, J. GOLDSTEIN, & A. DERSHOWITZ, *PSYCHIATRY AND LAW* (1967). Involuntary civil commitment proceedings, properly viewed, raise serious questions of the denial of rights under the first, fourth, sixth and fourteenth amendments to the United States Constitution. However, courts have generally been reluctant to recognize these issues.

10. In *Jackson v. Indiana*, 406 U.S. 715, 736-737 (1972), the Court recognized the broad power traditionally exercised by the states to commit persons found to be mentally ill. The Court found it surprising that substantive constitutional limitations on this power had not been more frequently litigated, but did not attempt to deal with such limitations.

The recent use of informal and voluntary admissions and of community mental health centers has by no means eliminated the libertarian problem,¹¹ nor has it been alleviated by routine habeas corpus proceedings, by information sessions on the rights of patients following incarceration, or by recent judicial decisions which have, on equal protection grounds, invalidated procedures applicable to psychiatric patients held in hospitals for the criminally insane.¹²

Modern commitment and retention practices involve acts of legislators, findings of judges, and petitions of citizens; and the activities of police, members of the psychiatric profession, and mental health administrators. However, the question which is raised in this article is not whether contemporary commitment and retention practices are genuinely enlightened, progressive, or humane, but whether the practices authorized by these codes meet the test of constitutional guarantees.

CONSTITUTIONAL RESPECTABILITY OF THE MENTAL HYGIENE CODES

Mental hygiene codes and the administrative arrangements which they inspire continue to enjoy constitutional respectability despite their antilibertarian features. The state's paternalistic role is widely accepted—courts at all levels have consistently found it reasonable and legitimate for state and federal governments to use police power to protect their citizens' mental health by various means, including the detention of those persons allegedly suffering from "mental illness."¹³ Although it has not

11. At the present time in most jurisdictions, patients remanded to mental hospitals are released upon the discretion of the director of the hospital. The patient, or others acting on his behalf, may have recourse to a hearing should they choose to contest the hospital director's decision regarding retention. *See, e.g.,* NEW YORK MENTAL HYGIENE LAW §§ 31, 31.17, 31.31, 31.33 (McKinney Supp. 1972). The New York provisions indicate that even patients admitted under the informal or voluntary clauses of the law may find themselves incarcerated for life through a series of legal steps initiated by the hospital director or his agents. This means, of course, that any person seeking admission to a hospital of the Department of Mental Hygiene of the State of New York places himself in the hands of physicians with vast discretionary powers regarding his liberty. An informal or voluntary admission can be converted by hospital and court officials to a continuing involuntary admission.

The relative ease of commitment in many jurisdictions also creates the involuntary "voluntary" patient—"If you don't choose to go voluntarily, we will commit you." Hence, despite reforms, a libertarian problem continues.

12. *See* note 14, *infra*.

13. Under the American system of federalism, the states exercise this police power over their territories, while the federal government possesses an equivalent jurisdiction over the District of Columbia and "Territory and other Property belonging to the United States." U.S. CONST. art. I, § 8; art. IV, § 3. As to the reasonableness of the exercise of the police power by the states over the mentally ill, see *In re Colah* [The Parsee Merchant Case], 3 Daly 529, 11 Abb.

ruled directly on the constitutionality of civil mental hygiene codes, the Supreme Court has relied heavily on the procedures set forth in those codes as the standard for extending equal protection to those prisoners convicted of criminal offenses who are detained in hospitals for the criminally insane beyond the terms of their criminal sentences. In such cases, equal protection requires that the questions of the prisoner's sanity and dangerousness be determined in conformity with proceedings applicable to those civilly committed under state law.¹⁴ Recently, the Court reached an analogous result in *Jackson v. Indiana*.¹⁵ In that case Indiana authorities detained an individual for over three years in an institution for the criminally insane pending his highly improbable recovery of competence to stand trial. The Court held that, under equal protection, standards for commitment of those found incompetent to stand trial may be no less stringent than *general civil commitment standards*. These decisions, along with others upholding compulsory treatment for narcotic addicts,¹⁶ actually may have enhanced the constitutional respectability of civil commitment legislation. But it should be noted that the Supreme Court actions did not result from a direct challenge to the constitutionality of the civil mental hygiene codes as such. Delivering the opinion of the Court in the *Jackson* case and referring to

Pr. 209 (N.Y.C.P. 1871), and *Jackson v. Indiana*, 406 U.S. 715 (1972). For equivalent treatment of the exercise of police power over the District of Columbia by the federal government, see *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1966).

14. *Baxtrom v. Herold*, 383 U.S. 107 (1966); *United States ex rel. Schuster v. Herold*, 410 F.2d 1071 (2d Cir. 1969); *Gomez v. Miller*, 341 F. Supp. 323 (S.D.N.Y. 1972). In the *Baxtrom* case, the Court asserted the proposition that "there is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal sentence from all other civil commitments." 383 U.S. at 111-12. In *Gomez* the court stated that "[e]ven if we assume, *arguendo*, that the Constitution does not require a jury trial to determine dangerousness, New York, having granted it in all other cases, must justify the denial to plaintiffs and it has failed to do so." 341 F. Supp. at 329.

15. 406 U.S. 715 (1972). In the *Jackson* case the petitioner, Jackson, sought release from the state hospital for the criminally insane where he was subject to indefinite commitment solely on account of his lack of capacity to stand trial. The Court held that by subjecting the petitioner to a more lenient commitment standard and to a more stringent release standard than generally applicable to those not charged with criminal offenses, and by thus condemning him to permanent institutionalization without the showing required for civil commitment, Indiana deprived petitioner of equal protection of the laws under the fourteenth amendment. The Court also held that indefinite commitment of a criminal defendant solely on account of his lack of capacity to stand trial violates due process. Once it is determined that there is a substantial probability that the defendant will not attain competency in the foreseeable future, the state must either institute civil proceedings or release the defendant. For a more complete discussion of *Jackson*, see Comment, *An End to Incompetency to Stand Trial*, 13 SANTA CLARA LAWYER 560 (1973).

16. *Robinson v. California*, 370 U.S. 660 (1962).

the broad power of the state to commit persons alleged to be "mentally ill," Justice Blackmun observed: "Considering the number of persons affected, it is perhaps remarkable that the substantive constitutional limitations on this power have not been more frequently litigated."¹⁷ It is indeed remarkable that constitutional respectability still attaches to mental hygiene codes considering their obvious defects: vagueness, lack of substantive due process, denial of equal protection, and invasion of privacy.

Vagueness

The mental hygiene codes, because of uncertainty in the meaning of their terms, appear to be so vague as to preclude accurate determination of those who are subject to commitment under their provisions. Such terms as "dangerousness," "need for retention," and even "mental illness," are sufficiently ambiguous to permit divergent interpretations without limit. For example, the Wisconsin statute, adopting the model interstate compact on mental health, describes mental illness as "mental disease to such extent that a person so afflicted requires care and treatment for his own welfare, or welfare of others, or of the community."¹⁸ Unfortunately, such circular definitions of mental illness are common to most state statutes.¹⁹ Typically, those to be protected are identified by such vague terms as "society," "others," and "self." The meaning of "dangerousness" rests on open-ended phrases such as "likely to result in serious harm," and [placing others] in reasonable fear of serious harm." In a federal criminal case, Justice Douglas condemned vague statutes in no uncertain terms:

The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited. Words which are vague and fluid may be as much of a trap for the innocent as the ancient law of Caligula.²⁰

Just as due process of law requires that criminal statutes be sufficiently definite in their terms to provide an ascertainable guide to conduct, due process must also require more definite standards under the mental hygiene codes.²¹ Confinement and loss of liberty are the results in either case.

17. *Jackson v. Indiana*, 406 U.S. at 737 (footnotes omitted).

18. Wis. Stat. Ann. § 51.75, art. II(e) (West Supp. 1971).

19. For additional examples cf. LINDMAN & MCINTYRE, *supra* note 6.

20. *United States v. Cardiff*, 344 U.S. 174, 176 (1952) (citation omitted).

21. Cf. *In re Gault*, 387 U.S. 1 (1967). See also *Lee v. Habib*, 424 F.2d 891, 901 (D.C. Cir. 1970), where the court stated that, "[i]t is the importance of the right to the individual, not the technical distinction between civil and criminal, which should be of importance to a court in deciding what procedures are constitutionally required in each case."

Lack of Due Process

A person adjudged "mentally ill" may be detained on a mere probability that he *could be* dangerous; no showing of actual dangerousness is required. Persons are often detained under civil commitment codes in the absence of an actual assault or any evidence of preparation or conspiracy to commit a dangerous act. One can be committed simply on the basis of his state of mind—that is, for "dangerous tendencies" that are perceived by others as probably leading to acts of an unknown character or indeterminate consequence at an unspecified place and time, against an unspecified victim. This is simply preventive detention. Confinement on such a tenuous basis is an arbitrary and unreasonable deprivation of liberty contrary to the precepts of procedural due process. Unfortunately, the Supreme Court, although recognizing to some extent the danger of administrative abuses and of denial of procedural due process, has stated that there is nothing vague or patently defective in a statute which permits confinement on account of dangerous tendencies, at least where the statute requires evidence of past conduct to support any determination of dangerousness.²²

Denial of Equal Protection

The standards for determining dangerousness which lead to precautionary detention without safeguards are not only vague but are applied only to persons who are alleged to be mentally ill. Other citizens who are known to be potentially dangerous to themselves or others cannot be detained in this preventive way. For instance, reckless or drunken automobile drivers usually must have several convictions for actual crimes before they may be denied the privilege of driving, let alone their physical freedom. By comparison, the dangerousness of the "mentally ill" seems negligible.²³ It could be argued, therefore, that the civil detention of a "mentally ill" person for dangerousness is an invidious discrimination amounting to the denial of equal protection. Not even equal protection issues, however, have seriously tarnished the constitutional respectability of mental hygiene codes.

22. *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270 (1940).

23. Chambers, *Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives*, 70 MICH. L. REV. 1108, 1128 (1972). See also ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, SPECIAL COMMITTEE ON THE STUDY OF COMMITMENT PROCEDURES AND THE LAW RELATING TO INCOMPETENTS, MENTAL ILLNESS, DUE PROCESS AND THE CRIMINAL DEFENDANT 59 (1968); Ennis, *Civil Liberties and Mental Illness*, 7 CRIM. LAW BULL. 101, 110 (1971).

Invasion of Privacy

Just as the due process and equal protection issues inherent in these codes have generally remained uncontested, the issue of the right to privacy of the allegedly mentally ill person has been similarly neglected. Privacy in this sense includes privacy of the mind.

Two Supreme Court cases, *Griswold v. Connecticut*²⁴ and *Stanley v. Georgia*,²⁵ center attention on privacy within one's own home. The results in these cases were reached by different routes. In the former, the Court held that the police power of the state, as applied in a state penal statute, interfered with the right to marital privacy. This right was found to have its basis in the ninth amendment and in the penumbras of specific guarantees of the Bill of Rights. In the *Stanley* case the Court relied primarily on the first amendment. Justice Marshall, speaking for the majority, struck down a state obscenity statute which made the private possession of obscene material a crime on the rationale that such a statute amounted to governmental control of one's thoughts and intrusion upon the privacy of one's mind. The Court stated that "[O]ur whole constitutional heritage rebels at the thought of giving government the power to control men's minds."²⁶ Specifically, the Court held that the state "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts."²⁷ The reference to "men's minds" and "private thoughts" may be a significant indication that the Court is concerned with freedom of private thought as well as freedom of public expression of ideas, which the Court has often upheld under the first amendment. This decision potentially protects the mental activity of a person alleged to be mentally ill from government interference, particularly when his public behavior is otherwise socially tolerable. However, to our knowledge no court has passed on the freedom of private thought with respect to mentally ill persons.

Neither the first nor the fourth amendments has so far been accepted as a bar to government intervention in the lives of mentally ill persons, although courts insist constantly that the police power is subject to constitutional limitation.²⁸ Government intervention is most remarkable in those cases of "madness" which are manifested primarily in personal tensions and family con-

24. 381 U.S. 479 (1965).

25. 394 U.S. 557 (1969).

26. *Id.* at 565.

27. *Id.* at 566.

28. See *Gitlow v. New York*, 268 U.S. 652 (1925) and *Mapp v. Ohio*, 367 U.S. 643 (1961).

flicts. The present proclivities of the state to invade the privacy of mentally ill persons contrast sharply with the opinion regarding privacy offered by Justice Brandeis in his widely quoted dissent in *Olmstead v. United States*:²⁹

. . . [The framers of the Constitution] sought to protect Americans in their beliefs, their thoughts, their emotions, and their sensations. They conferred, as against the Government, the right to be left alone—the most comprehensive right and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.³⁰

Mental hygiene laws often have the effect of converting private and personal conflicts into public concerns, thereby trampling constitutional barriers to the invasion of privacy.

Lack of Constitutional Accountability

The mental hygiene system has escaped strict accountability by constitutional standards. Madness and the mad have traditionally been exempted from constitutional protection. The lack of freedom of choice implied in the judgment that one is, in some sense, "mentally ill," is made tangible by the law, which presumes that the person who is partially incapacitated is best assisted by depriving him of all liberty.

Some steps forward have been made in peripheral areas. For example, in 1972 New York State revised its mental hygiene code to include "rights" for mental patients.³¹ However, innovations in this area amount to procedural alterations rather than the addition of a substantive "bill of rights." Deviance is no longer a sanctioned excuse for depriving a person of all his rights under the law.³² But in a constitutional democracy this sort of progress begs the question. The true focus of concern should be whether mental hygiene codes regard the allegedly "mentally ill" person as a person to whom total constitutional guarantees apply. This leads us to an examination of the doctrine of "balance" underlying contemporary commitment procedures.

29. 277 U.S. 438 (1928).

30. *Id.* at 478.

31. N.Y. MENTAL HYGIENE LAW § 15 (McKinney 1972). The statute stipulates the protection of mental patients' civil rights including but not limited to voting and the right to possession and use of property. The statute also specifies a right to suitable, skillful, safe and humane treatment administered with full respect for a patient's dignity and personal integrity.

32. See *Lake v. Cameron*, 364 F.2d 657 (D.C. Cir. 1966).

THE DOCTRINE OF "BALANCE"

The key to understanding present handling of the mentally ill appears to use to be the doctrine of "balance." For example, Justice Rabin used the doctrine in justifying narcotics commitments:

The problem presented is one of balancing the interest of society [against] the rights of the individual . . . [I]n almost every case where the State exercises its police power in an attempt to meet and cure a condition that is found to be dangerous to society as a whole, there is some impingement on civil rights. . . . If the State acts reasonably in the exercise of its power and does not go beyond what is necessary to meet the condition presented, then we may say that its action may be sustained from a constitutional standpoint.³³

The authority of the state to restrict or abridge the civil liberties of citizens in our liberal democracy is generally constrained by our Constitution and by legal precedent. States must bear a heavy burden of justification when they attempt to interfere with certain civil liberties. The mentally ill, however, seem to have been regarded as an exception to these protections. Coercive powers of the state need only be exercised "reasonably"; no special burden of justification is placed on the states.

The difference in treatment stems in part from diametrically opposed views of criminal law and commitment law to which a substantial segment of the legal profession and the public subscribe.

The criminal law is reflective of western society's adherence to the idea of free will, the power of choice. As such it is particularly solicitous to afford the individual every opportunity to exercise that power, *i.e.*, to act in a manner other-

33. *In re Narcotic Addiction Control Comm'n*, 29 App. Div. 2d 72, 75, 285 N.Y.S.2d 793, 797 (1967), *rev'g In re James*, 54 Misc. 2d 514, 283 N.Y.S.2d 126 (Sup. Ct. 1967). This case involved a direct confrontation on constitutional grounds over the specific section of the 1966 mental hygiene law which provides for the compulsory treatment of narcotic addicts in New York. The lower court had declared the section unconstitutional. The appellate court, in an opinion by Justice Rabin, reversed. Cognizant of the civil liberties dimension, Justice Rabin discussed the powers of the state in the context of the balance doctrine (although the decision was based on other grounds). In a concurring opinion Justice Capozzoli stated:

It must be remembered that the purpose of the statute under consideration is not to punish those who come within its terms as narcotics addicts, but, rather, to concentrate on curing them. It is purely a civil proceeding and the rules applicable to the enforcement of criminal law should not apply to this type of proceeding. 29 App. Div. 2d at 79, 285 N.Y.S.2d at 801.

The outcome of the balancing test in this case was the usual, predictable one—the affirmation of compulsory treatment laws at the expense of the liberty of the patient.

wise than that suggested by all available indicia. Conversely, commitment law postulates an absence of any meaningful power of choice. Thus, commitment is viewed not as a deprivation of freedom, but rather as a means to prevent inevitable conduct. To allow an individual to remain in society once it is established that he suffers from a mental illness likely to make him a danger to himself or to his neighbors would be, it is assumed, both unwarranted and unconscionable. [footnotes omitted]³⁴

The failure of courts and legislators to recognize the fundamental rights which are denied one who is committed is also important. Parallels simply are not drawn from protection of other civil liberties to protection of the rights of involuntary mental patients. Courts are very solicitous of fundamental rights in other contexts, such as freedom of association or travel. In reviewing legislation which abridges those rights, courts require that the state show it has chosen the alternative least restrictive of these rights to accomplish its legitimate goals.³⁵ But no such requirement of minimal interference with civil liberties exists in the case of the mentally ill. Such persons are routinely committed to mental institutions even in cases where very minor infringements on their freedom would be sufficient to satisfy state interests.³⁶

It is not surprising, therefore, that those for whom the doctrine of balance has the greatest meaning (aside from the mentally ill) are those who are charged with making decisions regarding commitment in particular cases—policemen, health officials, judges, jurymen (occasionally), and psychiatrists. The art of “balancing” the needs of society and the needs of individuals by officials armed with relatively unqualified powers of detention, has contributed to the production of an authoritarian rather than libertarian mental hygiene system. The interests of society, or more correctly, the state, as interpreted by officials of the state, characteristically carry the day. Let us now examine the weighing scales more carefully in order to see more precisely what in fact is weighed.

The Weighing Scales

On one side of the scales are the “interests of society”—sought to be secured from the dangerousness or harmful activ-

34. *Projects Commitment of the Mentally Ill*, 14 U.C.L.A. L. REV. 820, 827 (1967).

35. *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Shelton v. Tucker*, 364 U.S. 479 (1960). For a thorough and excellent discussion of the principle of “least restrictive alternative” as applied in commitment of the mentally ill see Chambers, *Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives*, 70 MICH. L. REV. 1107, 1145-1154 (1972).

36. *Lake v. Cameron*, 364 F.2d 657 (D.C. Cir. 1967).

ity of the "mentally ill." But is it really "society" which the law attempts to protect?

The truth of the matter is that a specific person may be in conflict with other specific persons and individuals may endanger each other and one another's property. Among those designated as mentally ill are individuals who, like others in the population at large, are liable to and do inflict injury in various ways on family members, neighbors, working associates, and strangers. This is the "society" in danger, and the menace is precisely that posed by any criminal activity. Society in this sense is protected by the criminal law. Through diverse measures of law enforcement, the state endeavors to safeguard the lives and property of its inhabitants, but it cannot completely secure life and property. The most severe dictatorships have not eliminated simple human larceny. The criminal law neither eliminates criminal acts altogether nor gives criminals free rein. It rather strikes a balance between freedom and security which is tolerable to most of us. To insure a measure of security, the law proscribes various acts. It is these acts which can be explicitly prohibited to *all* persons, including those considered "mentally ill." Yet the mentally ill are the only category of potential offenders for whom preventive detention is accepted as a matter of course.

Although the problem is usually phrased in terms of "dangerousness," the triggering concern is really that the mentally ill are often just plain nuisances.³⁷ Like many other individuals, they generate family crises, disrupt classrooms in schools, generate tension in employment units, or pester and sometimes frighten pedestrians. Their activities touch raw nerves, and sometimes their antics are exhausting physically and emotionally, eliciting sharp and bitter reactions. The modern family, school, occupational setting, and neighborhood are so functionally specialized that the standards for correct social conduct and role performance are very detailed, specific and inflexible. Inefficiency, lack of discipline, nonproductivity, and other forms of deviance are poorly tolerated. It is against these rigid contexts that "mental

37. In a review article on dangerousness, Bernard Rubin states: "It is unlikely that dangerousness can be predicted in a person who has not acted in a dangerous or violent way." Rubin, *Prediction of Dangerousness in Mentally Ill Criminals*, ARCH. GEN. PSYCHIAT. 405 (1972). The knowledge that a person is *potentially* dangerous to himself or others is based on fact of violence or otherwise dangerous acts of the past. Mental illness *per se* is not indicative of dangerousness. We believe that the impact of mental illness is most often limited to private or interpersonal difficulties. This claim is based on fifteen years of experience in clinical practice (Dr. Daly) and on similar experiences recorded by other psychiatrists in psychiatric literature. A recent review of this literature can be found in the Rubin article, *Id.*

illness" or "need for retention" or "dangerousness" are tested. Commitment, rather than protecting society from the dangerous, merely enforces conformity to socially accepted roles.

The interests of society under the balance doctrine are, when carefully investigated, essentially familial and contractual interests.³⁸ Those injured have ample remedies available, including injunctions and restraining orders when warranted. Yet it is not these interests which physicians, hospital directors, legislators, judges, and policemen are asked to protect when considering whether or not to commit a person alleged to be mentally ill, but rather "society" in general.

On the other half of the balance—the second pan of the scales of justice—are the interests of the mentally ill—their liberty and their personal welfare. Freedom of choice is the hallmark of liberty. Civil commitment law presumes that the capacity to choose is impaired by mental illness and that the state may need to limit personal choice in order to protect the welfare of the individual. Commitment abrogates the right of the person committed to act as a free agent in a society of free agents, and empowers officials of the state to manage him as a nonagent.³⁹ Deprivation of rights, or permission to exercise rights, occurs in relation to the severity of the illness and the course of treatment, and in relation to other factors peculiar to mental hospitals. Restoration of certain liberties is often promised to induce cooperation with the authorities. The promise of the right to be at liberty is employed to manipulate and influence the patient who is regarded as an independent agent for the purpose of curing him within the hospital but as a nonagent for purposes of determining his own release.

Under the "balance" doctrine the individual's liberty and his personal well-being are treated as severable and antagonistic. The view taken is that, while the sacrifice of liberty may be a high price to pay for personal welfare, the sacrifice of that welfare may be an even more exorbitant price to pay for freedom.⁴⁰

38. See generally Alexander & Szasz, *From Contract to Status via Psychiatry*, 13 SANTA CLARA LAW. 537 (1973).

39. Even when the courts make every effort to scrupulously protect the rights of the individual, commitment delivers the person into the hands of other branches of government which are poorly staffed. While understaffing is also a problem in penal institutions, mental patients are more completely dependent on the institution staff for actualizing their rights since they have fewer legal protections. In this setting even sensitive officials are frequently prone to neglect the rights of detainees. Visits by magistrates to state hospitals to hear complaints by inmates do little to remedy the situation. See generally Szasz, *Justice in the Therapeutic State*, 3 IND. LEGAL F. 19 (1969).

40. Cf. *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. N.D. 1971) and *In re Narcotic Addiction Control Comm'n*, 29 App. Div. 2d at 75, 285 N.Y.S.2d at

Equally questionable is the assumption that welfare and liberty are antagonists. It is not welfare that demands concessions from liberty; it is coercion that confronts the liberties of citizens which are guaranteed by the Constitution and the Bill of Rights. Commitment and coercive treatment programs stand in contradiction to both liberty and faring well for the individual. By what measure has coercion a better claim than liberty to advancing the well-being of a person? If a balance is to be struck at all, then it is a balance between coercion and liberty. At present that balance is several degrees on the side of paternalism and the coercive authoritarian practices sanctioned by the law. The doctrine of "balance" does not rescue the mental hygiene system from constitutional limbo. Nor has it nurtured a just substitute for due process, equal protection, and the right to privacy. A few courts have tried to elevate a "right to treatment" thesis into a constitutional necessity for involuntary mental patients,⁴¹ but the findings in these cases beg the constitutional question as to whether such treatment can justify the concomitant deprivation of liberty. In addition, this thrust will almost certainly lose its cutting edge in the impasse between the judiciary that continues to order commitment and legislatures that control the flow of sufficient resources for the humane treatment of the hospitalized population.

While the doctrine of balance implies reasonableness, equity, and fair play, it has helped to produce imbalance and inequity with regard to the mentally ill. The scales are continually tipped against the involuntary detainee. Nothing is really weighed; the person alleged to be mad loses his liberty, other individuals are rid of a nuisance, and the result is often an increment in suffering.⁴² The solution must be to deal with behavior, not with thought processes, and to accord determinations of socially intolerable behavioral deviance the constitutional protections of the criminal prosecution.

797. In the *Wyatt* decision Justice Johnson states:

To deprive any citizen of his or her liberty upon the altruistic theory that the confinement is for humane therapeutic reasons and then fail to provide adequate treatment violates the very fundamentals of due process. 325 F. Supp. at 785.

Under the view expressed by Justice Johnson, deprivation of liberty would be justified if adequate treatment were given.

41. *Wyatt v. Stickney*, 334 F. Supp. 1341, 1343 (M.D. Ala. N.D. 1971). Cf. *Ragsdale v. Overholser*, 281 F.2d 943, 949 (D.C. Cir. 1960) (concurring opinion).

42. For introduction to the literature on the adverse effects of incarceration in mental hospitals and asylums, see JOINT COMMISSION OF MENTAL ILLNESS AND HEALTH, ACTION FOR MENTAL HEALTH 9-23 (1961), and E. GOFFMAN, *ASYLUMS* (1961).

CONCLUSION

The doctrine of "balance" as it is currently understood and applied to the mentally ill is unsound. It is used to deprive those adjudged to be mentally ill of liberty without sufficient justification.

The option still open to legislators and judges is to assume a "civil liberties" stance. In this mode of legislative and judicial thinking, the state shall detain no one except for the commission of a crime and then only in accordance with the procedural due process requirements applicable under the criminal law. No person shall be detained by the state without his consent merely because he is believed or diagnosed to be mentally ill and considered to be in need of treatment, harmful to himself, or dangerous to others. Surely it is the constitutional obligation of the state to ensure equal treatment under the law rather than to show favoritism towards those "normal" beings who stand to gain from the incarceration or restriction of others. Deference to social wisdom and common sense can lead to this solution no less than to any other one.

For a society that has habitually put away its mentally ill, the transition to a legal philosophy that affords constitutional guarantees for those alleged to be "mentally ill" will entail many awkward and uncomfortable moments. Such a change would call for sophisticated thinking about tolerance of bizarre behavior and about our social responsibilities pertaining to deviant persons and their activities. By adopting a strict constitutional stance with respect to the mentally ill, the United States can take a long step toward approximating the ideals of liberal democracy.⁴³

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