Mental Health - *United States ex rel. Mathew v. Nelson* - Civil Commitment of the Mentally Ill Based on a Finding of Dangerousness Is Constitutional, Even Though Dangerousness Is Not Inferred from a Recent, Overt Dangerous Act

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The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it. Each is the proper guardian of his own health, whether bodily, or mental and spiritual. Mankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest.¹

In United States ex rel. Mathew v. Nelson,² the United States District Court for the Northern District of Illinois held the provision of the Illinois Mental Health Code³ permitting involuntary commitment of a person in need of mental treatment constitutional.⁴ Section 1-11 bases commitment of a mentally ill person on the grounds of dangerousness to himself or others, or the inability to care for himself. The statute was challenged as violative of due process in the absence of a recent overt act, attempt, omission or threat from which the basis for commitment could be inferred. In upholding the Illinois civil commitment procedure, the Mathew court rejected decisions by two other district courts which required that reasonable expectation of dangerousness or inability to care for oneself be proved by a recent overt act, threat or omission on the part of the patient.⁵ This article examines Mathew in light of recent trends in

¹. JOHN STUART MIL, ON LIBERTY 18 (Regnery ed. 1955).
³. ILL. REV. STAT. ch. 91½ (1973).
⁴. Id. § 1-11 provides:

“Person in Need of Mental Treatment,” when used in this Act, means any person afflicted with a mental disorder, not including a person who is mentally retarded, as defined in this Act, if that person, as a result of such mental disorder, is reasonably expected at the time the determination is being made or within a reasonable time thereafter to intentionally or unintentionally physically injure himself or other persons, or is unable to care for himself so as to guard himself from physical injury or to provide for his own physical needs. This term does not include a person whose mental processes have merely been weakened or impaired by reason of advanced years.

civil commitment and focuses on judicial reliance on psychiatry in commitment proceedings.

THE FACTUAL CONTEXT

The plaintiffs in Mathew had been committed to mental institutions under section 7 of the Illinois Mental Health Code. None of the plaintiffs engaged in any overt acts of a dangerous nature. The activities of the plaintiffs were not of such seriousness that dangerousness could be inferred.

The plaintiffs initiated a habeas corpus proceeding under the Civil Rights Act in the District Court for the Northern District of Illinois. In addition, they sought declaratory and injunctive relief, which would have required defendants to produce evidence of a recent overt act, threat or omission before a mentally ill person can be committed on the grounds of dangerousness or inability to care for oneself. The parties stipulated that the only issue before the court was:

the issue of the constitutionality of the [Illinois] mental health code and as applied, in that it permits the involuntary commitment of a person without any finding by the court that there has

6. ILL. REV. STAT. ch. 91 1/2, § 7-1 (1973). See generally 6 LOY. CH. L.J. 208, 210 (1975), for a discussion of emergency commitment in Illinois. Involuntary commitment can be made upon the certificate of a physician, emergency admission and admission upon a hearing and court order. ILL. REV. STAT. ch. 91 1/2, §§ 6-1 through 8-8 (1973).

7. No. 72 C 2104, slip opinion, at 5. Strand was arrested because he tried to personally deliver a message from God to Senator McGovern. On the basis of her neighbor's complaint, Marshall was arrested for moving furniture around her room. She had also moved furniture up and down the street and admitted to hearing voices. The other plaintiffs were Weiland, Schmidt, Fant, Serritella, Baker and McDonald, who were also committed to mental institutions under section 7-1.

8. 42 U.S.C. § 1983 (1970). This section provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

9. Although the complaint was denominated "Third Amended Petition for Writ of Habeas Corpus and Suit for Injunctive Relief," only the claim for equitable relief was before the court.

10. The defendants included the Superintendent of the Chicago-Reed Mental Health Center, the Director of the Illinois Department of Mental Health, the Public Defender of Cook County, two judges of the Circuit Court of Cook County and the Presiding Judge of the County Division of the Circuit Court.

11. Record, Transcript of Proceedings at 25. The plaintiffs' attorney, Mr. Grippando, clarified the injunctive relief sought in response to a question by Judge Tone: "Whether plaintiffs' sought to have the Statute declared invalid and enjoin its enforcement. So there won't be any Statute under which people could be committed." Id. Copy available at Loyola University of Chicago Law Journal Office.
been a recent overt act, attempt, omission, or threat by the person from which the person’s dangerousness to themselves [sic] or others or the inability to care for themselves [sic] may reasonably be inferred.  

Recognizing the state’s interest in preventing the mentally ill from harming themselves or others, the Mathew court held that Illinois had not formulated an irrational basis for the statute.  

The court emphasized:

There must always be a first dangerous act in any series of dangerous acts . . . and the due process clause does not render the state powerless to protect against that first dangerous act, provided it establishes a test for determining dangerousness that is based on a rational appraisal of the scientific knowledge that is available.

The parties offered into evidence depositions of five medical experts.  All five experts agreed that predicting future behavior with a high degree of certainty was impossible. Each of the plaintiffs’ four experts testified that an overt act should be a prerequisite to involuntary commitment or that a prediction of dangerousness which is not based on an overt act would be of questionable accuracy. The defendants’ expert testified that an overt act should not be a prerequisite for a determination that a person is in need of mental treatment. However, he admitted it was more likely that an individual would be found dangerous if he had committed specific acts of a dangerous nature.

The conflicting testimony reveals a basic disagreement on the ability of psychiatrists to predict dangerousness. The frequency of disagreement is amplified when the prediction is not based on a prior overt act. It is doubtful, therefore, that section 1-11 is based

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13. No. 72 C 2104, slip opinion, at 18.

14. Id. at 19-20.

15. The plaintiffs’ offered the depositions of four expert witnesses: Dr. Bernard Rubin, a Board Certified Psychiatrist and Associate Professor at the University of Chicago; Dr. George Magner, Assistant Director of the School of Social Work, the University of Illinois; Dr. Jon Fawcett, a Board Certified Psychiatrist, and Chairman of the Department of Psychiatry at the Rush-Presbyterian-St. Lukes Medical Center; Steven Goldberg, Assistant Professor at the University of Illinois, Department of Psychology. The defendants offered the deposition of one expert witness, Dr. Kelleher. The depositions of four employees of the Department of Mental Health were also offered by the plaintiffs.

16. No. 72 C 2104, slip opinion, at 16. The court did not distinguish which of plaintiffs’ experts testified as to which point.

17. Id. at 17.

on a rational appraisal of scientific knowledge.

The United States Supreme Court has not decided whether commitment based on a prediction of dangerousness or inability to care for oneself without the requirement of a recent overt act comports with due process. However, the expansion of due process rights in juvenile and deportation hearings indicates that civil proceedings which result in a deprivation of fundamental rights are not immune from constitutional limitations. Lessard v. Schmidt, and Lynch v. Baxley, have expanded the constitutional rights of the mentally ill by requiring proof of a recent overt act, threat, or omission. This requirement incorporates an objective manifestation of dangerousness or inability to care for oneself, rather than relying merely upon the subjective judgments of psychiatrists, to justify commitment.

CIVIL COMMITMENT

The Basis

Civil commitment is based on the state's inherent role as parens patriae or on its authority under the police power to protect society against the threat of dangerous acts. These two justifications encompass different state interests. The underlying premise of a state's parens patriae role is that the individual derives benefit from the commitment, regardless of the diminution of liberty entailed. Commitments exercised under the police power are intended to protect the welfare of society. Inherent in the sovereignty of a state is the authority to regulate the public health, safety and welfare.

21. 349 F. Supp. 1078 (E.D. Wis. 1972). This was a three-judge court decision.
22. 386 F. Supp. 378 (M.D. Ala. 1974). This was a three-judge court decision.

The exercise of a state's police power must be in furtherance of the public's interest in such a manner as is "reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals." Goldblatt v. Town of Hempstead, 369 U.S. 590, 595 (1962). See Civil Commitment of the Mentally Ill, supra note 23, at 1222-45, for a discussion of commitment under the police power.
Generally, a mentally ill person cannot be involuntarily confined unless the state demonstrates that the individual is: (1) dangerous to others; (2) dangerous to himself; or (3) in need of treatment. The Illinois Mental Health Code, section 1-11, embodies these three bases for involuntary civil commitment. These three criteria for commitment have different justifications. Dangerousness to oneself and the inability to care for oneself reflect the parens patriae notion. Commitments based on dangerousness to others are predicated on the police power of a state.

**Determination of Dangerousness or Inability to Care for Oneself**

The courts have experienced difficulty in constructing a test for determining dangerousness or inability to care for oneself. The *Lessard* court recognized that civil confinement can be justified on the basis of a prediction of dangerousness. However, the court required that the prediction be based on a finding of a recent overt act, attempt or threat to do substantial harm to oneself or another. The *Lynch* court also demanded a manifestation of dangerousness based on a recent overt act, attempt or threat before an individual could be committed.

Both *Lynch* and *Lessard* relied on *Cross v. Harris*, which involved a habeas corpus attack on confinement under the District of Columbia Sexual Psychopath Act. The court recognized that in
certain instances a determination of dangerousness based on a propensity to commit crimes is permissible:

If so, such detention would have to be based on a record that clearly documented a high probability of serious harm, and circumscribed by procedural protections as comprehensive as those afforded criminal suspects.34

The petitioner in Cross had been arrested for various acts of indecent exposure. The Mathew court emphasized that the issue of whether an overt act was necessary under either the Sexual Psychopath Act or the Mental Health Code of the District of Columbia was not before the court in Cross.35 Therefore, Mathew found the reasoning of the District of Columbia Court of Appeals unconvincing.36

Instead, the Mathew court relied on Humphrey v. Cady37 to support its holding that future dangerousness need not be proved on the basis of a recent overt act. In Humphrey, the petitioner argued that his commitment under the Wisconsin Sex Crimes Act38 was essentially equivalent to commitment under the state’s Mental Health Act.39 The Court, in discussing the policy underlying the Wisconsin Mental Health Act and similar legislation in other states, reasoned:

Wisconsin conditions such confinement not solely on the medical judgment that the defendant is mentally ill and treatable, but also on the social and legal judgment that his potential for doing harm, to himself or to others, is great enough to justify such a massive curtailment of liberty.40

The Mathew court considered the Court’s statement to indicate approval of mental health codes in general. In addition, the court interpreted it as an acknowledgement of the validity of a state’s social and legal judgment that an individual has potential for doing harm.

Lessard involved the same Wisconsin Mental Health Act construed by the Court in Humphrey. The Lessard court interpreted the Supreme Court’s emphasis on the potential to do substantial harm as requiring proof of a recent overt act, attempt or threat.41

34. Cross v. Harris, 418 F.2d 1095, 1102 (D.C. Cir. 1969) (dictum).
35. No. 72 C 2104, slip opinion, at 24.
36. The court relied on Chief Justice Burger’s (then Judge Burger) dissent. 418 F.2d at 1109. Judge Burger urged judicial restraint and cautioned against substituting the court’s opinions for those of the fact-finding body.
37. 405 U.S. 504 (1972).
41. 349 F. Supp. 1078, 1093 (E.D. Wis. 1972). The court interpreted Humphrey to indicate:
Lynch interpreted the Humphrey dicta as justifying commitment only where the conduct poses a serious threat of substantial harm to self or to others.\textsuperscript{42}

The split between the three-judge courts on whether dangerousness or inability to care for oneself can be determined without proof of a recent overt act represents different interpretations of the rights of the mentally ill. The Lessard-Lynch doctrine requires that commitment be based on a material demonstration of dangerousness or inability to care for oneself. This reasoning was rejected in Mathew, which held that the reliance upon the diagnosis of a psychiatrist was sufficient to satisfy due process.

The Balancing Requirement

In commitment proceedings, the courts have applied a balancing test to determine whether commitment is justified. An individual’s interest in his freedom is balanced against society’s interest in protecting the individual and others from harm.\textsuperscript{43} The interests of an individual are retaining his liberty and avoiding unwarranted civil commitment. Prevention of the mentally ill from harming themselves or others, concern with antisocial conduct, caring for the mentally ill, and its role as parens patriae are the primary state interests.\textsuperscript{44} In People v. Sansone,\textsuperscript{46} the court determined that “the paramount factor is the interest of society which naturally includes the interest of the patient in not being subjected to unjustified confinement.”\textsuperscript{48}

Although the courts agree on the interests to be evaluated, they disagree on the relative weight to be attributed to each. Both Lynch and Lessard held that the state must demonstrate that commitment is necessary because the individual poses a threat of serious danger of substantial harm to himself or society.\textsuperscript{47} Further, the court in In

\footnotesize{\textsuperscript{42} Lynch v. Baxley, 386 F. Supp. 378, 390 (M.D. Ala. 1974).}
\footnotesize{\textsuperscript{45} 18 Ill. App. 3d 315, 309 N.E. 2d 733 (1974).}
\footnotesize{\textsuperscript{46} 18 Ill. App. 3d 315, 323, 309 N.E.2d 733, 739 (1974).}
re Ballay stated that an individual who had never been convicted of a crime did not present a substantial threat of harm. Therefore, the state’s interest in confinement of such an individual is not overwhelming.49 In contrast, Sansone and Mathew applied a rational basis test.50 These courts considered the legislative judgment that dangerousness need not be predicated on evidence of a prior overt act, threat or omission, to be a determination which was properly within the state’s power. Neither court, in applying the balancing test, imposed a heavy burden on the state to justify the individual’s loss of liberty.

A major inadequacy of the balancing doctrine is the assumption that an individual’s liberty and his personal welfare are severable and antagonistic.51 The state’s interest under its parens patriae role sanctions certain commitments as beneficial to the person. However, that asserted interest ignores the problem caused by commitment: whether the state’s paternalism justifies the accompanying loss of liberty. Whenever a balance is struck between liberty and personal welfare, a presumption has been made that the state is better equipped than the individual to decide what constitutes that person’s well-being. It has been suggested that, “If a balance is to be struck at all, then it is a balance between coercion and liberty.”52

**Standards of Due Process in Civil Commitment Proceedings**

Traditionally, individuals subject to the civil commitment process have not been afforded the stringent safeguards required in criminal proceedings.53 The imposition of a less demanding

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49. Id. at 656.
51. Friedman and Daly, supra note 43, at 515.
52. Id. at 516. The mentally ill have been regarded as an exception to the compelling justification test imposed on a state whenever it attempts to interfere with certain civil liberties. In other contexts, such as the freedom of association, Shelton v. Tucker, 364 U.S. 479 (1960), or freedom of travel, Shapiro v. Thompson, 394 U.S. 618 (1969), the Court has provided strict safeguards for fundamental rights.
53. Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972). The court in Mathew was not confronted with certain issues addressed by the court in Lessard, such as notice and opportunity to be heard, right to counsel, privilege against self-incrimination, and hearsay evidence.
standard has been primarily justified on two grounds: the proceedings are civil and not criminal; and the parens patriae rationale that
the commitment actually benefits the individual. However, the validity of these arguments is eroding because of society's changing attitude toward the mentally disturbed.

Irrespective of the designation given a commitment proceeding, the consequence for the person affected is involuntary confinement. The Lessard court opined that the argument for the imposition of different due process safeguards in civil and criminal proceedings, had been laid to rest by the Supreme Court. The Court in In re Gault\(^5\) and In re Winship,\(^6\) rejected different standards of due process for juveniles in delinquency proceedings. The Winship Court, in discussing the argument for different standards, held that "[c]ivil labels and good intentions do not themselves obviate" the need for criminal due process safeguards in juvenile proceedings which could result in the loss of liberty.\(^7\) Gault-Winship reasoning has been applied to civil commitment of the mentally ill.\(^8\) The District of Columbia Court of Appeals in Ballay,\(^9\) in comparing the implications of civil commitment and juvenile proceedings, concluded that "the loss of liberty—the interest of 'transcending value'—is obviously as great for those civilly committed as for the criminal or juvenile delinquent."\(^10\)

The Appellate Court of Illinois, in People v. Sansone,\(^11\) interpreted the Illinois Mental Health Code as affording an individual a

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55. Frankel, Preventive Restraints and Just Compensation: Toward a Sanction Law of the Future, 78 Yale L.J. 229, 234 (1968) [hereinafter cited as Frankel]. The author criticizes the designation of commitment proceedings of deviant individuals as either criminal or civil for being "conclusionary rather than analytical and cannot meaningfully be used to justify differences in the constitutional standards applied." Id. at 235-36. See Note, Hospitalization of the Mentally Ill: Due Process and Equal Protection, 35 Brooklyn L. Rev. 187, 202-03 (1969). The article concluded:

It is apparent that as long as the courts engage in legal semantics, and fail to consider the true nature of the admission proceeding, protection of the patient's legal rights will be hampered.

Id.

58. Id. at 365-66 (1970). The Court restated the Gault logic that loss of liberty in a juvenile proceeding is comparable in seriousness to a felony prosecution.
60. In re Ballay, 482 F.2d 648, 668 (D.C. Cir. 1973).
full panoply of due process protections, even though civil labels were utilized. Sansone stated that the Code satisfied the reasoning of Winship and Gault because it recognized the need for due process safeguards regardless of the language used to describe the process. The court held that the protection provided by the Illinois Code reflected a rational balance between the interests of the individual and society in the administration, treatment, and hospitalization of the mentally ill.62

Although the issue of procedural due process was not raised, the Mathew court summarized certain statutory provisions relating to due process protection.63 The court’s discussion indicates its acceptance of the due process notions implemented in the Mental Health Code.64 The Mathew court recognized that involuntary commitment of the mentally ill imposes such a substantial infringement of basic liberties that it requires a full range of constitutional protections.65

The parens patriae justification for relaxing due process requirements in the procedure is premised on the presumption that an individual derives benefit from civil commitment. However, this reasoning has been questioned in recent cases in the mental health area.66 The Lessard court considered the argument that the parens patriae role permits the lifting of procedural safeguards. The court observed that the validity of the argument “appears to rest in part on the realities of better treatment for the person subjected to incarceration in a civil proceeding.”67 Recognizing the uncertainty of the effectiveness of the treatment for mental disturbance, the Lessard court found the parens patriae argument unconvincing.68 The effectiveness of the treatment and the institutional conditions raise serious doubts about the benefit being provided to the confined individual. Commitment premised on the benefit derived therefrom by the individual is hardly justified if the means undertaken to secure that benefit are inadequate.69

63. No. 72 C 2104, slip opinion, at 3.
64. The Illinois Mental Health Code provides for initial commitment on the certificate of a physician and, under emergency conditions, without such a certificate, but requires that in either case a qualified psychiatrist must examine the patient within 24 hours. Ill. Rev. Stat. ch. 91 1/2, §§ 6-1, 7-1 et seq. (1973). The statute also provides for the right to a prompt judicial hearing on the issue of whether the person is subject to commitment. Ill. Rev. Stat. ch. 91 1/2, §§ 6-4, 8-1 et seq., 9-1 et seq., 10-1 et seq. (1973).
65. The court refused to require the state to prove beyond a reasonable doubt that a person is in need of treatment. See text accompanying notes 70 through 86, infra.
68. Id.
69. See Illinois Legislative Investigating Comm’n, Patient Deaths at Elgin State
Burden of Proof

While due process safeguards have been greatly extended in civil commitment proceedings, the courts have not imposed a uniform burden of proof requirement. Four standards of proof have been applied to commitment proceedings: (1) beyond a reasonable doubt;70 (2) clear, unequivocal and convincing;71 (3) clear and convincing;72 and (4) preponderance of the evidence.73 In determining the appropriate standard of proof the courts have looked to standards applied in deportation and juvenile proceedings.

The Supreme Court held in a leading deportation case that the government must establish the facts supporting deportation by clear, unequivocal and convincing evidence.74 By contrast, in juvenile proceedings the Court has required proof beyond a reasonable doubt.75 The stringency of the standard of proof reflects the value society places on a particular individual's liberty.76

The Lessard court held that the state must prove beyond a reasonable doubt all facts necessary to show that an individual is mentally ill and dangerous. The court determined that a civil commitment occasioned an even greater deprivation of liberty than either a deportation or juvenile hearing.77 The heavy burden on the state was justified because to do otherwise would deprive individuals of basic civil rights and would impose a stigma resulting from the lack

HOSPITAL (1974) for a thorough report on the inadequate facilities and organization of a state institution.


73. Tippet v. Maryland, 436 F.2d 1153, 1159 (4th Cir. 1971).


To be sure, a deportation proceeding is not a criminal prosecution. But it does not syllogistically follow that a person may be banished from this country upon no higher degree of proof than applies in a negligence case.

Id.

75. In re Winship, 397 U.S. 358, 365 (1970). The court emphasized the necessity for caution because of the possibility of the individual losing his freedom, and the certainty of stigmatization by the conviction. Id.

76. Id. at 370 (Harlan, J., concurring). Justice Harlan defined a standard of proof as "an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication."

Id.

of confidentiality of the adjudication.\textsuperscript{78}

The \textit{Lynch} court rejected the reasonable doubt standard announced in \textit{Lessard}, in favor of a clear, unequivocal and convincing standard of proof.\textsuperscript{79} The court expressed reasoning similar to that pronounced by the Illinois Appellate Court in \textit{People v. Sansone}.\textsuperscript{80} The \textit{Sansone} court applied the nearly identical clear and convincing standard.\textsuperscript{81} Both courts refused to require proof beyond a reasonable doubt primarily because of the difficulties in proving a subjective state of mind.\textsuperscript{82} In addition, the \textit{Sansone} court rejected the reasonable doubt standard because that requirement would impede access to care and treatment. The court reasoned that under this stringent standard fewer individuals would be committed, thereby depriving them of care and treatment. The issue of the proper standard of proof was not before the court in \textit{Mathew}.\textsuperscript{83} Nevertheless, the court addressed this issue, and adopted the \textit{Sansone} standard of clear and convincing.\textsuperscript{84}

Although Illinois has recognized a right to treatment,\textsuperscript{85} the United States Supreme Court has yet to rule on the constitutional basis of such a right.\textsuperscript{86} It is therefore questionable whether the presumed benefits of commitment support the imposition of a standard of proof less strict than the reasonable doubt test.

Two interests must be considered and weighed in determining the state's burden of proof: the individual's interest in his basic freedoms, and the state's interest in protecting the individual and others from dangerous conduct. The determination is complicated by the difficulties encountered in the evaluation of an individual's subjective mental processes, and by the nebulous concept of a right

\textsuperscript{78} Id.
\textsuperscript{80} 18 Ill. App. 3d 315, 309 N.E.2d 733 (1974).
\textsuperscript{81} Id. at 325-26, 309 N.E.2d at 740-41.
\textsuperscript{82} Lynch v. Baxley, 386 F. Supp 378, 393 (M.D. Ala. 1974). The court stated that subjective questions of the subject's mental condition and the likelihood that he will be dangerous in the future cannot ordinarily be made with the same degree of certainty that might be achieved where purely objective facts and occurrences are at issue. In \textit{People v. Sansone}, 18 Ill. App. 3d at 326, 309 N.E.2d at 741, the court stated:

\textit{[T]he difficulty in proving an individual's state of mind, combined with a stringent reasonable-doubt standard, may work a hardship on the individual who has a right to treatment and society which has a right to protection.}
\textsuperscript{83} No. 72 C 2104, slip opinion, at 14. Plaintiffs were tried by a judge, and there is no indication in the record of the standard of proof used in their commitments. The issue would be clear in a jury trial where instructions were given or in a bench trial where the court indicates the standard used. Motion to Amend Stipulation as to Issue and to Dismiss One of the Actions, at 2.
\textsuperscript{84} No. 72 C 2104, slip opinion, at 14.
\textsuperscript{85} See ILL. REV. STAT. ch. 91 ½, §§ 1-9 and 12-1 (1973).
to treatment. Since the result of involuntary commitment is the loss of freedom, the state must be required to prove beyond a reasonable doubt the facts necessary to support commitment. The criminal standard of proof is appropriate for a civil proceeding where the individual's freedom is at issue.

Least Restrictive Alternatives

Courts have applied the principle of the least restrictive alternative to the civil commitment area.\(^7\) In accordance with this doctrine, a state is limited in the means by which it pursues a governmental purpose. Even though it is exercising a legitimate and substantial function, a state must seek means by which the end can be more narrowly achieved without stifling fundamental personal liberties.\(^8\) The doctrine was not discussed in Mathew. However, its use by other courts indicates its importance in the determination of whether viable alternatives to institutional confinement are feasible.

The Lessard court held that the party recommending full-time involuntary hospitalization must bear the burden of proving: (1) what alternatives are available; (2) what alternatives were investigated; and (3) why the investigated alternatives were not deemed suitable.\(^9\) Examples of alternatives to confinement include: outpatient treatment, day or night treatment in hospitals, placement in the custody of a willing and able friend, placement in a nursing home and referral to a community health clinic.\(^10\) The Lessard court found the concept especially attractive in situations where a mentally disturbed individual has not committed any crime. An individual who has not displayed his dangerousness or inability to care for himself by an overt act such as a criminal offense, should not suffer a serious infringement of his personal liberties merely on the subjective analysis of a psychiatrist.

Commitment and Psychiatry

The consequence of not requiring evidence of a recent overt act, threat or omission is to place nearly total reliance on the opinion of

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the testifying physician in the commitment proceeding. Mathew upheld this procedure as a rational exercise of a state's power. However, in respect to the present state of the psychiatric art, it is questionable whether psychiatrists and physicians are capable of accurately predicting dangerousness. Thus, an individual whose commitment is not predicated on evidence of dangerousness inferred from an overt act is vulnerable to the predilections of the testifying physician. 91

The Mathew court recognized that the medical profession is in agreement on the difficulty of accurately predicting dangerousness or inability to care for oneself. However, the court conceded that the profession is in disagreement on its ability to satisfy the commitment criteria in the absence of an overt act. 92 Nevertheless, the court sustained commitments based on a psychiatric prediction that did not rely on a prior overt act to infer dangerousness. It reasoned that the commitment procedure reflected a rational appraisal of the scientific knowledge then available. In light of the conflicting evidence submitted by the parties, the court's reasoning is suspect. 93 The Mathew court upheld a procedure which is highly speculative, and which does not provide constitutional safeguards commensurate with those in criminal cases, where the deprivation of liberty is identical. 94

Commitment—Medical v. Legal Viewpoints

The Mathew court, in rejecting the argument that doctors become triers of fact, maintained that persons are not committed solely on the basis of the doctor's prediction. 95 The respective roles of the legal and medical professions in the commitment procedure has been the
focal point of vehement disagreement between and within those professions. This conflict centers on the language to be employed, the legal safeguards to be afforded the individual, and the proper party to make the commitment decision.

According to a certain segment of the medical profession, the legal procedures governing commitment hinder treatment of the patient. Moreover, the medical profession argues that the similarity of the proceedings to criminal trials perpetuates the stigma attached to the mentally ill. The use of a jury trial in commitment proceedings is abhorred by certain physicians and psychiatrists. Essentially, the argument maintains that the open airing of a patient's mental condition will do positive harm to the individual.

In certain instances these medical criticisms of the legal position reflect a misinterpretation of the underlying intent of the commitment procedure. It is fundamental that procedural due process...
safeguards are employed whenever an individual is threatened with an involuntary loss of freedom.\textsuperscript{101}

The great fear of the legal profession, of course, is that without adequate procedural safeguards perfectly sane members of society may be "railroaded" into mental institutions by unscrupulous relatives or business associates.\textsuperscript{102}

The hesitancy of the law to consider only the medical ramifications of commitments is influenced by other important effects on the committed individual, \textit{e.g.}, degree of confinement, loss of civil rights, limitation of communications and social ostracism.\textsuperscript{103} Members of the legal profession have concluded:

Despite the impatience of medical men and others with legal practices, it is nevertheless true that legal "technicalities" represent the lawmakers' effort to apply principles of fairness and justice in dealing with human rights which have been established only by the blood and sweat of bygone generations who saw and suffered the effects of more summary methods.\textsuperscript{104}

The difficulty in reconciling the legal and medical positions centers on misinterpretation by each profession of the other's intentions. The commitment procedure should not be constructed by the legal sector in a medically unreasonable manner; conversely, a reasonably determined legal procedure must be fully observed by the medical profession.\textsuperscript{105} The commitment process will be acceptable to medical opinion when the criminal aspects of the procedure are eliminated. This goal can be achieved by discontinuing the use of criminal terminology, removing the police from the commitment process and implementing informal hearings.\textsuperscript{106} Nevertheless, de-

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\textsuperscript{[O]ne of the important differences between the psychiatrist and the lawyer is in their respective attitudes toward the admission of the mentally ill person to a hospital. The psychiatrist urges that the dignity of the patient be respected and that the obstacles to his admission be no greater than those experienced by the physically sick person. This statement was criticized by Dr. Thomas Szasz, a physician, in T. Szasz, \textit{Law, Liberty, and Psychiatry} 42 (1963): This view, though often held by psychiatrists, is not only propagandistic and self-congratulatory but also false . . . . The history of Anglo-American law is one of unremitting striving for liberty and dignity in human affairs. 101. Thomas, \textit{Procedures for Involuntary Commitment on the Basis of Alleged Mental Illness}, 42 U. Colo. L. Rev. 231, 249 (1970) [hereinafter cited as Thomas]. 102. Kutner, \textit{The Illusion of Due Process in Commitment Proceedings}, 57 Nw. U.L. Rev. 383, 387 (1962) [hereinafter cited as Kutner]. 103. \textit{Id.} at 386. 104. Weihofen and Overholser, \textit{Commitment of the Mentally Ill}, 24 Tex. L. Rev. 307, 336-37 (1946). 105. Kutner, \textit{supra} note 102, at 388. 106. \textit{Id.} at 393.
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spite the removal of the criminal trappings, the substantive rights of the mentally disturbed cannot be subordinated to matters of formality.

The medical profession has objected to the legal system’s interference with the doctor-patient relationship. This objection has been criticized by Dr. Thomas Szasz for ignoring the conflicting roles played by the psychiatrist in the proceedings.\textsuperscript{107} He maintains that the psychiatrist, by testifying in the proceedings, fulfills a special social role of enforcing compliance with certain social rules. Szasz acknowledges that this role may be “legitimate and morally defensible,” but contends it is a social role similar to that performed by policemen and judges, and is quite dissimilar from the therapeutic role.\textsuperscript{108} Therefore, the social role performed by the psychiatrist is unrelated to his technical knowledge.

\textit{Mental Illness}

The courts’ complete reliance on medical judgments in commitment proceedings is misguided.\textsuperscript{109} It has been suggested “that mental illness is not a fact in the same sense that a broken leg is, it is a theory used to explain deviant behavior.”\textsuperscript{110} Further, the contention that the psychiatrist is the most qualified person to decide commitment\textsuperscript{111} has been disputed.

A major criticism of the courts’ abdication of their function as the ultimate decision-maker in commitment proceedings is centered on the inability of the psychiatric discipline to reach a consensus on a definition of mental illness.\textsuperscript{112} The numerous definitions in the diagnostic manual of the American Psychiatric Association\textsuperscript{113} reveal the

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\item \textsuperscript{107} Szasz, \textit{Commitment of the Mentally Ill: Treatment or Social Restraint?}, 125 J. NERVOUS AND MENTAL DISEASE 293, 296 (1957) [hereinafter cited as Szasz]. Dr. Szasz is a Professor of Psychiatry at the State University of New York Upstate Medical Center in Syracuse, N.Y. See Thomas, supra note 101, at 248; Ross, \textit{Commitment of the Mentally Ill: Problems of Law and Policy}, 57 Mich. L. Rev. 945 (1959) [hereinafter cited as Ross].
\item \textsuperscript{108} Szasz, supra note 107.
\item \textsuperscript{109} Ross, supra note 107, at 961. He argues that exclusive reliance upon the psychiatrist or physician arises in part from the assumption that the diagnostic aspect of psychiatry is a branch of medicine. Psychiatry is primarily an art rather than a science.
\item See T. Scheff, \textit{Being Mentally Ill} (1966), for a discussion of legal and psychiatric screening of incoming patients. The study found a pre-existing policy of summary action, minimal investigation and avoidance of responsibility.
\item \textsuperscript{111} Ross, supra note 110.
\item \textsuperscript{112} Id. at 961. Ross views commitment as depending on social value judgments. “[A]ny decision will draw a line between the conflicting policies of individual liberty and state sanctions against self-destruction. Clearly this is not a medical or even a psychiatric judgment.”
\item \textsuperscript{113} American Psychiatric Association, Diagnostic & Statistical Manual of Mental
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elusiveness of the concept of mental illness.\textsuperscript{114} The definitional imprecision has created a situation where

the diagnostician has the ability to shoehorn into the medically diseased class almost any person he wishes, for whatever reason, to put there.\textsuperscript{115}

The notion that the mentally disturbed are afflicted with a disease is not universally accepted by the medical profession. It has been suggested that the concept of mental illness is a myth.\textsuperscript{116} Critics of the disease model recognize that personal unhappiness and socially deviant behavior do exist. However, it is proposed “that we categorize them as diseases at our own peril.”\textsuperscript{117} Those commentators who distinguish between physical and mental “diseases” emphasize that in the former something happens to us, whereas in the latter it is something we do.\textsuperscript{118}

Critics of the mental illness concept assert that the failure to address deviancy in terms of public and social policy has resulted in commitment of individuals because they are different, not because they are ill. This result is not considered a coincidence:

In view of the role played by subjective factors and vagueness of psychiatric labels, it is not surprising that diagnoses of mental illness may often focus on various subgroups and minority groups which are under-represented in the psychiatric profession.\textsuperscript{119}

One solution is to pose the commitment inquiry in terms of “who annoys or disturbs whom.”\textsuperscript{120} The response to this question, it is suggested, will reveal that commitment is a social procedure, which

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\item \textsuperscript{114} Livermore, \textit{supra} note 91, at 80. The definitions of the concept range from
\item \textsuperscript{115} The massive functional inhibition characteristic of one form of catatonic schizophrenia to those seemingly slight aberrancies associated with an emotionally unstable personality, but which are so close to conduct in which we all engage as to define the entire continuum involved.
\item \textsuperscript{116} \textit{SZASZ, LAW, LIBERTY, AND PSYCHIATRY} 11-17 (1963).
\item \textsuperscript{117} \textit{SZASZ, LAW, LIBERTY, AND PSYCHIATRY} 11-17 (1963).
\item \textsuperscript{118} \textit{SZASZ, LAW, LIBERTY, AND PSYCHIATRY} 11-17 (1963).
\item \textsuperscript{119} Roth, \textit{supra} note 115, at 407.
\item \textsuperscript{120} Szasz, \textit{supra} note 107, at 299.
\end{itemize}
is dependent on a social hierarchy organized in terms of power.\footnote{121} Although the psychiatric profession has recognized the serious defects in earlier treatment methods, it is confident that psychiatry has advanced to a socially acceptable stage.\footnote{122} Therefore, it is contended, psychiatry believes it necessary “‘to modify legal procedures which will facilitate and not hinder prompt access to treatment by all citizens.’”\footnote{123} This analysis of psychiatric progress has not received universal acceptance.\footnote{124} One review of systematic studies of the public’s attitude toward mental health observed:

The evidence of the failure to convince the public to adopt the mental illness myth together with the logical and humanistic arguments against the myth, demand a reevaluation of the whole enterprise concerned with informing the public on the issue of inappropriate and improper behavior.\footnote{125}

The study concluded that “‘the moral enterprise embodied in the well-intentioned work of mental health professionals has failed.’”\footnote{126}

The conflict within the psychiatric profession on the concept of mental illness, \textit{i.e.}, whether it is a disease, how should it be defined and even whether it exists at all, creates serious problems in commitment proceedings.\footnote{127} Before the questions of dangerousness or inability to care for self can be addressed, the initial question of whether the individual is mentally ill must be resolved. As presently defined, the concept of mental illness is flexible and tends to vary with the individual diagnostician. Consequently, the individual is subjected to the varying attitudes of particular psychiatrists. Since the medical profession is currently unable to resolve the mental illness question, the judicial system must protect the individual in the second inquiry, \textit{i.e.}, whether the individual is dangerous or un-

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  \item \footnote{121} Id. See Shah, \textit{Dangerousness and Civil Commitment of the Mentally Ill: Some Public Policy Considerations}, 132 Am. J. Psych. 501, 504 (1975) [hereinafter cited as Shah].
  \item \footnote{122} Id.
  \item \footnote{123} Id.
  \item \footnote{124} Id.
  \item \footnote{125} Id.
  \item \footnote{126} Id.
  \item \footnote{127} Id.
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able to care for himself. Otherwise, the individual may be committed on the basis of two inquiries, neither of which has been clearly resolved by the medical profession.

Predictions of Dangerousness

Section 1-11, as interpreted in Sansone and Mathew, places the major responsibility of determining dangerousness or inability to care for oneself on the examining physician. An accurate prediction is more difficult to obtain without a requirement of a recent overt act, threat or omission.\(^{128}\) If the prediction is not certain, the individual is committed on a psychiatric speculation.

The ability to assess and predict dangerous behavior is dependent upon the behavior being understood in reference to its social, situational, and environmental context.\(^{129}\) Before an individual is committed as dangerous it should be demonstrated that the probabilities are very high that a dangerous act will be committed.\(^{130}\) In Millard v. Harris,\(^{131}\) the court delineated the factors to be evaluated in predicting dangerousness:

Predictions of dangerousness, whether under the Sexual Psychopath Act or in some other context, require determinations of several sorts; the type of conduct in which the individual may engage; the likelihood or probability that he will in fact indulge in that conduct; and the effect such conduct if engaged in will have on others.\(^{132}\)

A major criticism of predictions of deviant conduct is the tendency to overpredict.\(^{133}\) "Operation Baxstrom" is a prime example of overprediction. In 1966, the Supreme Court's decision in Baxstrom v. Herold\(^ {134}\) resulted in the New York State Department of Correction transferring over 900 patients committed to the state's hospital for the criminally insane to New York's civil mental hospitals. A

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128. Rubin, Prediction of Dangerousness in Mentally Ill Criminals, 27 ARCH. OF GEN. PSYCH. 397, 400 (1972). The author suggests "the difficulty in the prediction of dangerousness is immeasurably increased when the subject has never actually performed an assaultive act."


130. Livermore, supra note 91, at 89. The author suggests that the magnitude of the probability of danger will depend on two factors: the seriousness of the probable dangerous act, and the likelihood that the mental condition can be changed by treatment. See Civil Commitment of the Mentally Ill, supra note 23, at 1238 for a discussion of the probability of harm and the calculations involved in determining the magnitude of harm.

131. 406 F.2d 964 (D.C. Cir. 1968).

132. Id. at 973.


follow-up study revealed the inaccuracy of labelling these individuals too dangerous to be placed in hospitals for the civilly committed. The incidence of overprediction indicates that testimony of an expert must be thoroughly examined "so that the people and not the pundits may decide how much deprivation of individual liberty should be permitted to a tolerable level of safety." Studies of the potential dangerousness of the mentally ill indicate they deviate slightly from the general population. Those studies which found the mentally ill slightly more dangerous than the norm did not discover any substantial incidence of a higher crime rate in the sample group. Therefore, no prediction of dangerousness based upon the presumption that the mentally ill are more dangerous than the general population is supported by the evidence.

135. Hunt and Wiley, Operation Baxstrom After One Year, 124 Am. J. Psych. 974, 977 (1968). The authors conclude:

Most of them had been examined by experienced psychiatrists from the Department of Mental Health and had been denied transfer (to a civil commitment hospital) on the grounds that they were too disturbed or potentially dangerous (before the Court's decision). Yet over 99% of them did well in civil hospitals when the Court's decision compelled the move. Id.


138. Giovannoni, supra note 137, at 146-52. The article reports on the examination of the incidence of socially disruptive acts committed by patients in the Veterans Administration's Psychiatric Evaluation Project. The patients surveyed were under 60 years of age. The study revealed a higher patient rate than the general population for certain crimes against persons: homicide, aggravated assault, and robbery. Conversely, the general population rate exceeds that for patients in crimes against property: larceny, burglary, and auto theft. The report concluded that the data did not substantiate the view of the "... average mental patient as an unusually and predominantly dangerous person." Id. at 152. See also Rappeport, supra note 137, at 776-79, the subjects of this study were all male patients over 16 years of age, discharged during fiscal 1947 and fiscal 1957 from all Maryland psychiatric hospitals. The crime rate for the whole state was used for the comparison because the limited size of the sample group was not conducive to categorizing the hospital population into urban and rural, and negro and white as is done in the Uniform Crime Reports. The report found a significantly higher arrest rate for both hospital groups for the offense of robbery. However, the authors were equivocal about the other offenses. The findings did not support the contention "[T]hat the hospital experience had a definite effect on reducing the total arrest rate . . ." Id. at 779.

The limitations of these studies are apparent. The subject group is not categorized by its socio-economic background. A comparison to the general population is not an accurate measure of deviance by the mental hospital group. The exclusion of women from the study is another factor which disputes the accuracy.
CONCLUSION

A disagreement exists between the federal district courts on whether a civil commitment process, which does not require dangerousness or inability to care for oneself to be inferred from a recent overt act, threat or omission, comports with due process. Those courts which require overt acts emphasize the need for objective manifestations of dangerousness, rather than the subjective opinions of psychiatrists, to justify commitment. The total reliance on psychiatry in the commitment process is misplaced because of the confusion within that discipline on the ability to predict dangerousness and even on the definition of mental illness. Therefore, civil commitment of the mentally disturbed should be based on objective criteria because of the nature of the individual's interest in his freedom and the difficulty in accurately making this determination.

MICHAEL J. HOLLAHAN

Author's Note: United States ex rel Mathew v. Nelson, No. 75-1995, was argued February 23, 1976 in the Seventh Circuit before Judges Swygert, Bauer and Perry.