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THE RIGHT OF THE MENTALLY ILL TO CURE AND TREATMENT: MEDICAL DUE PROCESS

M. CHERIF BASSIOUNI*

INTRODUCTION

Few patients committed to mental institutions read the Bill of Rights, yet those honored principles are intimately related to the problems of mental health, particularly commitment and treatment.

The hospitalization of a sick person in need of mental treatment or care results in their confinement and in restraint upon their freedom. Inalienable rights without which no citizen would consider living are denied mental patients, and these patients with various mental maladies become referred to as "inmates" who are "institutionalized" in "mental prisons." A person's right to liberty is guaranteed by the fourteenth amendment of the United States Constitution. A person committing a crime is given great procedural safeguards to protect his liberty and to prevent its abridgement without due process. A person who is mentally ill is given some procedural safeguards for hospitalization, but not substantive rights once inside the institution. Treatment of the illness is the purpose for institutionalizing the person, and this "right to treatment would appear [to be] the rational conditio sine qua non of enforced hospitalization."

This article is devoted to the right of such patients to be treated,

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1 U.S. CONST. amend. XIV, § 1: "No state shall . . . deprive any citizen of life, liberty, or property, without due process of law . . ."


3 These safeguards consist of admission procedures, hearings, right of counsel, habeas corpus, and the right to administrative review. For an exhaustive discussion of these safeguards, see Lindman and McIntyre, The Mentally Disabled and the Law, 56-59, 63-65, 68-69, 100-102 (1961). For Illinois procedural safeguards, see Mental Health Code, ILL. REV. STAT. ch. 914, §§ 1-1-20-1 (1965).

4 Association of the Bar of the City of New York, Mental Illness and Due Process 243 (1962).
cured and restored to their place in society. It is time for society to realize that a "right to treatment" must be recognized, and that without such right, a patient is in fact deprived of life, liberty and the pursuit of happiness because of the state's unwillingness to provide adequate cure and treatment, while at the same time forcibly detaining those in need of such treatment.

THE PROBLEMS IN THE RELATION OF LAW TO MEDICINE IN MENTAL HEALTH

The relationship between law and medicine arises from the possible alienation of an individual's rights which the law jealously protects. Some basic postulates governing this relationship are the following. Every mentally ill person needs care and treatment, and it must be provided even at the cost of forcing body and mind. Secondly, a sick person is not a criminal and a hospital is not a prison; a hospital is a place of care and treatment for which procedures of admission are only stepping stones to treatment and not to detention. Thirdly, every man, whether sick or sound, is entitled to his constitutional rights and to their protection.5

Mental illness is considered a failure in the socio-adaptability of the individual, and breakdown in the inter-personal and social relationship. At the present, one-half of the hospital beds in this country are occupied by persons afflicted with mental disorders, and the medical profession informs us that one in every 12 persons will sometime during his lifetime be hospitalized with a mental condition.6

There are three million persons in the United States suffering from a mental illness, with an additional seven to eight million persons being afflicted with some other personality problem which could be a potential illness.7 Other estimates are that six out of every hundred persons

5 Baur, Legal Responsibility on Mental Illness, 57 Nw. L. Rev. 12 (1962). The author states that while society must protect itself against those who have demonstrated that they are a threat to its safety, the constitutional rights of those committed must be guarded, and the treatment and rehabilitation of the person must be regarded as ultimately to society's best interest, as well as humane requirements. See also Dashiell, Fundamentals of General Psychology (1937); Hart, The Psychology of Insanity (4th ed. 1931); Jacoby, The Unsound Mind and the Law (1918).


in the United States suffer from some form of mental illness. Moreover, approximately 379,000 persons receive service in out-patient psychiatric clinics.

The total number of persons who may be committed in mental institutions at one time or another is estimated at 18 million people. At any time, well under a half-million persons are patients in such institutions. These staggering figures reflect only a portion of the people who will be directly or indirectly affected by the legal consequence of hospitalization. The inter-relation of law and medicine will be sharply marked when therapeutic considerations will have to be weighed against legal considerations. Thus, procedure and admission in hospitals may sharply conflict with prescribed therapy, and the problem of post hospitalization rehabilitation may be impaired by the legal consequences of incompetency which may continue to afflict the former patient.

WHAT IS MENTAL ILLNESS?

The types of mental illness are classified in various ways without uniformity or unanimity among the medical profession. Classifications of mental illness are usually qualified in some manner similar to the following: "The following list is not intended to be schematic but merely tabulates the most commonly recognized forms of disorders." Even when an agreement is reached among the medical profession as to classifications, their results, conclusions and effects are decidedly different. The problem facing medicine, and the public as well, was succinctly stated as follows by one commentator:

The intelligent public has the right to know that, today, psychiatry is in ferment—many concepts held for decades to be firmly established are being increasingly challenged, and fundamental divergencies are developing amongst its leading exponents on almost every issue of psychiatric diagnosis, therapy, and prophylactic recommendation. This holds true to an even greater degree for legal psychiatry. The popular picture painted by its propagandists is sometimes totally unrealistic and irresponsible. Attempts to present a united front

8 Felix and Kramer, Extent of the Problem of Mental Disorders, 268 ANNALS 5, 8 (1953). See also Bowman, 103 A.M. J. PSY. 1, 5 (1946); Public Health Service, Department of Health, Education, and Welfare, Facts on Mental Health and Mental Illness 2 (1960).

9 Kittrie, Justice for the Mentally Ill, 41 J. AM. JUD. SOC'y. 46 (1957).

10 Hearings, supra note 6 at 11.

11 Weihofen and Overholser, Commitment of the Mentally Ill, 24 Texas L. Rev. 307 (1946).
to outsiders neither further the cause of psychiatry nor are they socially and scientifically justifiable.

It is equally fallacious to give the impression that all that is needed is more psychiatrists providing more treatment, implying that therapy invariably gets good results. The hard fact remains that, unlike other medical specialties, psychiatry lacks adequate statistics and followups, because psychiatrists have not seriously attempted to check on their methods. . . .\textsuperscript{12}

An opposite view has been expressed by a leading authority in psychiatry:

Any experienced psychiatrist knows that results are achieved only in a portion of cases. We have all seen many patients with whom psychiatric treatment has failed and it would be unduly optimistic to assume that all the patients from whom we do not hear are invariably cured. Thus, actually, there are few statements that can be adequately validated. Yet, for the past decade or two, we have been "indiscriminate" and often "irresponsible."\textsuperscript{13}

WHAT IS LEGAL INSANITY?

Mental illness is a disease of the mind and is defined according to medical standards. "Insanity," on the other hand, is a legal term inherited from our legal system, and it has no medical connotation. Both medicine and law recognize the uncertainty in defining these terms. However, a judge's functions in a hearing or trial on the question of a person's sanity cannot be delegated to the medical profession. Hence, legal tests have been established to enable the judge to determine judicially the social standards of sanity to which individuals are accountable. Principles of law and accountability require that established standards and defined tests be provided\textsuperscript{14} so that an effective accusatorial system with impartial judges may exist.

Scientific and medical progress in determining the elements and classifications of mental illness are not ignored, and the medical-legal relationship is strengthening as science resolves the problems of the aberrations of the mind. The mystic definition of insanity enunciated by Lord Hale\textsuperscript{15} has given way to such tests as the Durham Product or


\textsuperscript{13} Menninger, \textit{The Unitary Concept of Mental Illness}, 22 Menninger Clinic Bull. 4 (1958).

\textsuperscript{14} See Morse and Bassiouni, \textit{Cases and Materials on Criminal Law and Criminal Procedure} 313-16 (1965). See also, Cook, \textit{Insanity and Mental Deficiency in Relation to Legal Responsibility} (1921); Jacoby, \textit{op. cit. supra} note 5.

\textsuperscript{15} Hale, \textit{Pleas of the Crown} 31 (1847): "The moon hath a great influence on all diseases of the brain, especially dimentia. Such persons, commonly in the full or change of the moon, especially about the equinoxes and summer solstice, are usually at the
Result Test and the American Law Institute Standard, partially adopted in Illinois, which is based on the person's lack of substantial capacity to appreciate the criminality of the act and to conform his conduct to the requirements of the law. Modern statutes deal with mental and physical incapacity. The inability to stand trial, to understand the purpose and nature of the criminal charges, or to participate in the defense and assist counsel are prime examples. The law takes into account dangerous sexual behavior that relates to persons suffering from a mental disorder. Most areas of our modern law recognize and follow closely the advancement of psychiatry, and gradually make its tests dependent upon it. The law looks to psychiatry to define mental illness. Legal rules and decisions must be based on the understanding of modern psychiatry, which is a young and experimental growing science. Its concepts have changed fast and they will change even faster, so that what is current today will no longer be current in a few years. As mentioned above, there is no unanimity in this field of science or even major agreement as to the types of disease, diagnosis, cures and social effects.

That the law should not adhere, without reserve, to such unstable and undefined standards and delegate the functions of judgment to doctors or psychiatrists is obvious. The language barrier that has developed between the legal and medical professions is best illustrated by the following exchange between an expert witness and counsel. The defendant was charged with murder, and he pleaded temporary insanity. The expert, a psychologist, testified that the defendant had a psychopathic personality caused by alcoholic psychosis or pathological height of their distemper. . . . But, such persons have their lucid intervals (which ordinarily appear between the full and change of the moon) and are left with complete use of reason."

17 Morse and Bassioumi, op. cit. supra note 14 at 316.
20 Ibid.
21 Ibid.
intoxication. The questioning that followed concerned whether this meant he was insane:

Q. Does the term psychopath mean that the defendant is not sane?
A. No.
Q. Then a psychopathic person or a psychotic can still not be insane?
A. Yes.

The expert witness thought the question to mean insane as synonymous with psychotic and meant that a psychopath could still not have a major psychosis. The questioning continued:

Q. Doctor Burnhill, you are familiar with this case, and you have examined the defendant previously. Would you say he is insane?
A. I'm sorry, but I don't understand the meaning of the word insane. It's not a psychological term.
Q. Legally, it means unsound, incapable of judging the results of one's actions. Is the defendant unsound, or is he normal?
A. Well, now, I've never yet met a completely normal person.
Q. What I mean is, was the defendant aware of what he was doing when he committed murder?
A. Probably, since he was conscious at the time.
Q. But was his state of mind such that he was able to choose between right and wrong?
A. I'm sorry, but I don't know the difference between right and wrong myself. I only know that certain actions are socially acceptable, and others are unacceptable.
Q. Was he able to differentiate between a socially acceptable and an unacceptable act?
A. Oh, yes.
Q. Then he was fully capable of choosing between one and the other?
A. Not at all. He is given to impulsive action, and is therefore not completely subject to rational inhibition.
Q. You agree with the defense contention that he committed this act while in an unnormal state of mind?
A. Certainly, since persons in a so-called normal state of mind don't commit murder.
Q. But is it possible he has recovered his lucidity since then?
A. Certainly, since he doesn't murder people every day.
Q. In your opinion, is this man guilty or not guilty?
A. I'm afraid I don't know what the word guilty means. The only question is whether this man is capable of becoming a useful member of society, or whether it is necessary that he be restrained.
Q. Dr. Burnhill, do you agree with the prosecution's contention that this man committed this deed while in a normal state of mind and should therefore be condemned? Or do you agree with the defense contention that he committed the act while temporarily unstable, and therefore should be found innocent?
A. I admit that I am confused. The prosecution seems to believe that this is a person who is fully capable of becoming a useful member of society, and
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therefore he should be incarcerated. The defense seems to believe that this man is given to temporary spells of emotional instability, and for that reason he should be released.

Q. You've qualified as an expert. Will you please state your opinion clearly, Doctor Burnhill?

A. In my opinion, to express the matter in your own terms, I believe that the defendant should be found guilty by reason of temporary insanity, and should therefore be placed under restraint.

Q. That will be all Doctor Burnhill. Your Honor, I move that this testimony be stricken from the record as ambiguous.24

The word “insane” has no technical meaning, whether in law or in medicine. It is used in a very indiscriminate manner. The meaning generally attributable to “insanity” or “insane” is the following: All mental defects or diseases of any type or degree, or all mental defects or diseases in such a degree that it is a bar to all legal consequences, namely, legal responsibility.

For a branch of learning such as law, which consists of such careful wording and precise definition, such definitions are grossly inadequate. We cannot overlook the fact that jurists have a definite orientation in their approach to problems. The search is for facts, and they are used in adversary proceedings. The cases always result in clear-cut choice or defense. Their end is knowing the verdict, guilty or not guilty.

The medical profession, on the other hand, does not attempt to arrive at such precise definitions. Medical terms are made of shades of greys, and disorders or disease are only in degrees.

"IN VOLUNTARY HOSPITALIZATION"

The removal of a person, judged to be mentally ill, from his normal surroundings to a hospital empowered to detain him is involuntary hospitalization. Presently, there are 37 jurisdictions providing judicial hospitalization, and only four of these base hospitalization on the individual’s danger to himself or others.25 There are twelve jurisdictions which mention the need of care and treatment as alternative bases for involuntary hospitalization.26 Eight states provide no other basis than the particular need for care and treatment.27 Some statutes mention the phrase “for the welfare of others.”28

Whether the State acts by virtue of its police power or in its capac-

24 Morse and Bassiou, op. cit. supra note 14 at 317.

25 Lindman and McIntyre, op. cit. supra note 3 at 68–9.

26 Ibid.

27 Ibid.

28 Ibid.
As parens patriae, it exercises a sovereign right. This right is based on various effects of a similar criteria, to wit, that the sovereign acts in the best interests of the people for its self-preservation and the maintenance of a civilized, organized, social order. In this capacity, and for that purpose, it restrains people who are dangerous to themselves or to others. It is able to maintain public peace by preventing disturbance by those incapable of its respect due to their legal irresponsibility. While the state validly exercises a restraint upon those persons who are a detriment to its social or public order, there exists a corresponding duty to those persons detained to give them care, cure and treatment. Many states, in the enactment of mental health codes or statutes, refer to persons in need of cure and treatment.

It is not stretching the rules of interpretation too far to conclude that if the statute is applicable to a person who is in need of mental treatment, that individual is entitled to receive that cure and treatment for which he is being detained.

Unfortunately, very little mention or reference is made by the authors about the rights of the mentally ill to receive adequate treatment. We are satisfied with segregating and literally “parking away” thousands of mental patients with no more than tranquilizers. One observer has stated that while there are over 15,000 psychiatrists, sev-

29 Baur, supra note 5.

30 See supra note 25.


32 For discussion of the rights of the mentally ill, see Glueck, Law and Psychiatry (1962); Arens, Due Process and the Rights of the Mentally Ill. The Strange Case of Frederick Lynch, 13 Catholic U.L. Rev. 3 (1964); Blumes, The Commitments, Detention, Care and Treatment of the Insane in America, 4 Kan. L. Rev. 350 (1956); Curtin, Hospitalization of the Mentally Ill, 31 N.C.L. Rev. 274 (1953); Goffman, Asylums (1961); Kritter, Compulsory Mental Treatment and the Requirements of Due Process, 21 Ohio St. L.J. 28 (1960); Richardson, Legal Requirements for the Commitment of the Insane, 63 Albany L. J. 441 (1901); Szasz, Hospital Refusal to Release Mental Patient, 9 Clev.-Mar. L. Rev. 220 (1960); Tuma, Civil Rights of the Mentally Ill in Ohio, 11 Clev.-Mar. L. Rev. 306 (1962).

33 Schmideberg, The Promise of Psychiatry: Hopes and Disillusionment, 57 Nw. L. Rev. 20, 22 (1962), states: “According to a recent survey, eighty per cent of mental institutions are purely custodial, providing no treatment of any significance even to their law-abiding patients. A good portion of the remaining twenty per cent provide adequate treatment only for well-paying private patients.”
eral thousand psychologists, and many social workers and other physical therapists, the facilities for treating non-patients is nearly nil, and treatment is the rare exception. The plight of the mental patient was eloquently stated by Albert Deutsch in the following manner:

Let thousands of mental patients in the public hospitals of a State exist under terrible conditions of overcrowding; let them be fed with bad food; let them be placed under all sorts of unreasonable restrictions; let them lack adequate medical care due to poor therapeutic equipment or [because of] an under-staffed personnel; let them be housed in dangerous firetraps; let them suffer a thousand and one unnecessary indignities and humiliations and [left in this plight they] will attract little attention. The newspapers will maintain a respectful silence; the public will remain ignorant and indifferent. But once let a rumor spread about a man or woman illegally committed to a mental hospital and newspaper headlines will scream; the public will seethe with indignation; investigations and punitive expenditures will be demanded.

RATIONALE OF COMMITMENT AND THE STATE'S DUTY TO THE COMMITTED

The reasons for involuntary commitment are varied and various. The State, in the name of society and for the preservation of social structures, as well as for the benefit of the persons hospitalized, acts by virtue of its police powers and as parens patriae. As such, the State has to protect the individual from harming himself, and protect so-

34 Schmideberg, supra note 33. See also, Solomon, The American Psychiatric Association in Relation to American Psychiatry, 115 Am. J. Psy. 1, 7 (1958), wherein it is stated: “after 114 years of effort, . . . rarely has a state hospital an adequate staff as measured against the minimum standards set by our Association, and these standards represent a compromise between what was thought had some possibility of being realized. . . . In many of our hospitals, about the best that can be done is to give a physical examination making a mental note on each patient once a year, and often there is not enough staff to do this much.” A typical example would be Illinois Elgin State Hospital, with an average 5500 patients, admitting approximately 500 patients each month, and discharging a like number in this period. Built over 80 years ago with a capacity of approximately 2,500 at that time, the maximum number which should be institutionalized there today is 1,500. The staff is generally composed of some forty doctors (M.D.'s) and ten to twelve psychiatrists. See Illinois Department of Mental Health, Statistics (1964).

35 Deutsch, The Mentally Ill in America 418 (1937).

36 Christiansen v. Weston, 36 Ariz. 200, 284 Pac. 149 (1930).

37 See material infra.

38 Letter to Mr. M. Cherif Bassiouni from the Menninger Foundation, Dr. Joseph Satton, M.D., Director, Division of Law and Psychiatry, May 27, 1965, wherein Dr. Satton stated that the Foundation was able to induce the Kansas Legislature to include the following among those deemed to be a mentally ill person: anyone "who is or probably will become dangerous to himself . . . if not given 'care or treatment' . . . (Hospitalization Bill, Kan. Gen. Stat. Ann. 59-2002). Another way of stating this premise
ciety from persons who could endanger the life and property of others.

As to the latter rationale, the state assumes a duty to commit such a person, and the commitment is to care, treat and restore him to a useful role in society. The justification for involuntary commitment should remain within the confines of these social reasons and necessities. Hospitalization requirements should strike a sensible balance between the rights of the individual and the needs of the community. 39

The stigma of "insanity" and the accumulation of misunderstandings and traditional prejudices will not only be heavy to bear for the patient, but will render cure and treatment of these danger-symptoms more difficult. Apprehensions of roving maniacs and definitions of insanity such as Lord Hale's are still present in most people's minds. One of the legal consequences of such social behavior is incompetency, a legal disqualification which will prevent the person from exercising many rights, social and legal functions. 40 Often when commitment need only be temporary, it is avoided for fear of the consequences of the incompetency label which would be attached to the patient.

The State has the duty to assure those committed that they will be given procedural safeguards, and that they will be given care or treatment. As to the procedural safeguards against undue commitments,

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was given by Mrs. Margaret Seeger in a letter to the American Bar Foundation, February 12, 1957: "The citizen's right to his personal behavior and beliefs cannot be infringed upon when his behavior harms neither himself nor others. Social non-conformance is often called mental illness."

39 Flaschner, Analysis of Legal and Medical Considerations in Commitment of the Mentally Ill, 56 Yale L.J. 1178 (1947).

40 See Ray, Confinement of the Mentally Ill, 3 Am. L. Rev. 193 (1869), wherein those legal rights denied were listed as (1) inability to hold public or civil office, (2) contractual incapacity, (3) testamentary incapacity and (4) the inability to hold property. See also, Goldman v. Goldman, 169 Cal. App. 2d 103, 336 P.2d 952 (1959); Curran, Tort Liability of the Mentally Ill and Mentally Deficient, 21 Ohio St. L.J. 52 (1960); Ewin, Contractual Incapacity of the Insane in Louisiana, 22 Tul. L. Rev. 598 (1948); Gordon, Insanity and Divorce, 5 J. Am. Inst. Of Crim. Law and Criminology 544 (1914); Green, Fraud, Undue Influence and Mental Incompetency, 43 Colum. L. Rev. 176 (1943); Green, Proof of Mental Incompetency and the Unexpressed Major Premise, 53 Yale L.J. 271 (1931); Green, The Operative Affect of Mental Incompetency on Agreements and Wills, 21 Texas L. Rev. 554 (1943); Guttmacher and Weihofen, Mental Incompetency, 36 Minn. L. Rev. 179 (1952); Halpern, Civil Insanity: The New York Treatment of the Issue of Mental Incapacity—Non-Criminal Cases, 44 Cornell L. Q. 76 (1958); Note, 34 Ind. L.J. 492 (1959); Note, 57 Mich. L. Rev. 1021 (1959); Prosser, Torts 791 (2d ed. 1955); Rowley, The Competency of Witnesses, 24 Iowa L. Rev. 482 (1939); 5 Wigmore, Evidence § 1671 (2d ed. 1940); Wilkinson, Mental Incompetency as a Defense to Tort Liability, 17 Rocky Mt. L. Rev. 38 (1945).
most legal authorities and many eminent psychiatrists have been in disagreement as to whether committed persons should be given such adequate procedural protection in the context of medical considerations, and while under medical or psychiatric treatment.

Lawyers are inclined to emphasize the need to protect persons from being "railroaded" into institutions. Such protection, they argue, is assured by a fair trial, with adequate notice and a chance to be heard. Clearly, these are fundamental principles of justice which cannot be ignored. Without them, no citizen would be safe from the machinations of secret tribunals, and the most sane member of the community might be adjudged insane and landed in a madhouse. It will not do to say that it is useless to serve notice upon an insane person... His sanity is the very thing to be tried.

The psychiatrists, on the other hand, claim that "railroading" does not occur. Dr. Francis Braceland, M.D., testifying before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee in 1961, stated that he had not seen a single instance of railroading in his 30-year connection with psychiatry. In addition, Dr. Braceland seemed to infer that the laws and procedures expounded by the legal profession are partially responsible for the problems discussed by the subcommittee:

The laws and procedures which govern the admissions, treatment and discharge of patients from mental hospitals [from a medical point of view] impede and delay treatment, and since they often involve procedures similar in nature to criminal law proceedings, they perpetuate the stigma attached to the mentally ill.

This position, however, was not predominant in the hearings, and the purpose of the hearings was to protect the constitutional rights of the mentally ill which were, and still are in some instances, seriously abused, as a result of which Congress enacted remedial legislation.

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43 See Bowman, *Presidential Address*, 103 Am. J. Psy. 11 (1946): "I have been in psychiatry for over 30 years. In all this time, I have only seen two attempts of railroading and neither of them were successful."

44 Statement by Dr. Braceland, *Hearings*, supra note 6 at 65. 45 Id. at 64.

The almost exclusive reliance upon the psychiatrist arises in part from the assumption that the diagnostic aspect of psychiatry is a branch of medicine. However, at this point, psychiatry is primarily an art rather than a science. When an individual is unable to adjust to society, the psychiatrist formulates a theory of causation which, because of his experience and training, is more sophisticated than that of a layman. The point is that mental illness is not a fact in the same sense as that of a broken leg. It is a theory used to explain deviant behavior.\footnote{Supra note 31.}

The state's actions, based on its police power and its sovereign rights as \textit{parens patriae}, are the primary source for the law of "guardianship," which in turn is the basis for the state's duty to give care and treatment.\footnote{See supra note 40.} The original jurisdiction at common law was vested in the Court of Exchequer and the Chancellor, who represented the King.\footnote{Holdsworth, \textit{History of English Law} 473 (1924).}

Historically,

\begin{quote}
[I]aw has given the custody of him and all that he has to the King, who is bound by his laws to defend his subjects and their goods and chattels, lands and tenements; and because every subject is in the King's protection, an idiot who cannot defend or govern himself nor order his lands, tenements, goods and chattels, the King of right, ought to have him in his custody, and to protect him and his lands, goods and chattels.\footnote{Beverly's Case, 4 Co. Rep. 123 B, 126 A (1603). See also, Thompson’s Case, 8 Co. Rep. 170 A (1611).}
\end{quote}

By the beginning of the 14th Century in England, guardianship included mentally ill persons, persons mentally deficient, or persons unable to protect their property or personal interests.\footnote{II Shelford, \textit{A Practical Treatise on the Law of Confining Lunatics, Idiots and Persons of Unsound Mind} (1883).} The duty of
guardianship was formally recognized as the duty of the crown, and was *praerogativa regis.*

In the United States, the responsibility for incompetency is vested in the people by common law inheritance, by constitution and by statute. Although incompetency is different, and is not to be confused with hospitalization for mental illness, statutes often refer to "non compos mentis", thereby confusing mental illness (held insane) and incompetence (also held insane).

This historical background illustrates the State's duty to care for the mentally ill. The same power formally exercised by the King, through his Lord Chancellor, is exercised by the State as *parens patriae.* The State's duty to the mentally ill was succinctly stated by one commentator as follows:

The argument is that mentally ill persons are considered wards of the State. The State as parens patriae must provide necessary care and treatment. The care and treatment of mental patients is a governmental function, and the basic consideration in the exercise of this function is the patient's welfare.

**MANDATORY CRIMINAL COMMITMENT**

Many jurisdictions provide that an acquittal of a crime by reason of insanity shall be followed by confinement for an undetermined period of time in a state institution. The acquitted defendant is placed in the charge of the Director of Public Safety, or Public Health as the case may be, and in the custody of the superintendent of the state institution in which he will be confined. The patient's release is based solely upon satisfactory recovery. In these cases, there is no question of "procedural safeguards", since the individual will be confined ipso facto by virtue of the consequence of his plea and acquittal. There is no determination in most instances of the question of "present sanity" or ability to function in society without danger to "himself or

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53 *Praerogative Regis, 17 Edw. 2, Chap. 9 (1324).*

54 See supra note 11. See also Guttmacher and Weihofen, supra note 40.

55 *People v. Janssen, 263 Ill. App. 101 (1931).* See *Warner Bros. Pictures, Inc. v. Brodel, 31 Cal. 2d 766, 179 P. 2d 57, 70 (1947), wherein the court stated: "[t]he state has a sovereign privilege of guardianship over persons under disability, such as minors and incompetent persons." See also, Guttmacher and Weihofen, *supra* note 40.

56 *Ross, Hospitalization of the Mentally Ill—Emergency and Temporary Commitments, Current Trends in State Legislation 534 (1955–56).*
there is no question, then, that a person in such an instance suffers deprivation of liberty.\textsuperscript{57}

The determination of the individual's release rests in the hands of institutional psychiatrists, and in the care and treatment leading to the patient's rehabilitation.\textsuperscript{68}

The institutional psychiatrist has a dual role. On the one hand, he is the therapist of the patient, and on the other, he represents the state, society and its interest in protecting itself against mentally disabled. The dedication of many psychiatrists in this situation results in compromises, based largely on their own moral or professional determinations. However, the mere existence of such a conflict, arising out of this simultaneous representation of possible opposing interests breeds injustice and potential denial of due process. As stated by one authority,

The mere fact that a patient seeking release from a hospital is denied his request should, I submit, be considered prima facie evidence of a conflict of interests between himself and the hospital authorities. . . . For what is involved here is the adjudication of the legitimacy of interests [or desires, wishes, etc.], rather than their acknowledgment or description.\textsuperscript{59}

In many instances, the individual judgment can also be capricious or arbitrary.\textsuperscript{60} Thus, whenever individuals are deprived of liberty or subjected to arbitrary decisions affecting their liberty, the essence of such actions is punitive in character. This reality is not altered by the fact that the motives of the administrative powers are more or less laudable or disinterested.\textsuperscript{61}

The problems facing the institutional psychiatrist are overshadowed by the problem of automatically confining\textsuperscript{62} the accused after an

\textsuperscript{57} In re Bryant, 14 D.C. 489 (1885), wherein the court indicated that confinement in a mental hospital is as full and effective a deprivation of personal liberty as is confinement in jail. The court said that due process of law requires an opportunity for a hearing and a defense. See also, Barry v. Hall, 98 F.2d 222 (D.C. Cir. 1938).

\textsuperscript{68} All patients receiving care, cure and treatment do not recover, but all patients have the right to receive such.

\textsuperscript{59} Szasz, Hospital Refusal to Release Mental Patient, 9 CLEV.-MAR. L. REV. 220, 221 (1960). See also, Szasz, Civil Liberties and the Mentally Ill, supra at 399.


\textsuperscript{61} Hawkins, Punishment and Moral Responsibility, 7 MODERN L. REV. 205 (1944).

\textsuperscript{62} Prior to the passage of the Criminal Lunatics Act, 39 & 40 Geo. III ch. 94, 1 (1800), English law allowed a person acquitted of a crime because of insanity to go free without confinement.
acquittal of a crime by reason of insanity, even though he may not be dangerous to himself or society, and the release of such a person depending upon his ability to prove that he has been cured. Some jurisdictions hold that if the jury finds the defendant insane at the time of the crime, there is no alternative to confinement.

The degree of certainty with which the defendant will be able to prove his recovery will depend upon his means of securing such evidence, and his recovery will depend on the cure and treatment which he will receive. The facts remain, however, that unless it is available, it cannot even be remedial. It has been pointed out that cure and treatment is not always available. The Joint Commission on Mental Illness and Health has reported that "[m]ore than half of the patients in most state hospitals receive no active treatment of any kind designed to improve their mental conditions." The indigent patient who has no means of securing independent psychiatric help, or of securing the expertise to assist in asserting his sanity or administering treatment, will have to rely entirely upon the discretion of the hospital administration, and will not be able to regain his freedom if there is the slightest objection to his release by the hospital administration. The difficulties faced by the patient were pointed out by Lawrence Speiser before the Senate Subcommittee on Constitutional Rights:

[The patient] is for all practical purposes under established case law dependent on the almost unlimited discretion of the hospital administration. His release can be blocked by nothing more than his failure to carry the burden of showing that the hospital authorities have acted arbitrarily or capriciously in refusing to certify him as "recovered" and to predict that he will not in the reasonable future be dangerous to himself and others.

64 See Note, 15 Rutgers L. Rev. 624 (1961).
65 Id at 626. See also, Note, 68 Yale L.J. 293 (1958). For cases holding that mandatory commitment statutes do not violate due process see Annot., 143 A.L.R. 892 (1943).
67 In Obeirne v. Overholser, supra, the court pointed out that cure is not always attained, since hospitalization is remedial and its limits are to be determined by the conditions treated.
69 Supra note 6 at 5. See also, Overholser v. Leech, 257 F.2d 667 (D.C. Cir. 1958).
Few men, even outside the walls of mental hospitals, could receive release from an institution in this fashion against the opposition of a single skeptical psychiatrist, because the term "dangerous" is not confined to danger of committing violent crimes, but also includes the danger of committing any criminal act, violent or non-violent.

It is clear that such confinement often results in the total deprivation of a patient's right to liberty. One observer has put it in the following manner:

If not contributive to mental deterioration, confinement within the average public mental hospital under court order rarely realizes the recuperative potential of the patient involved. Overcrowding, understaffing, mediocrity in therapeutic skill and occasional brutality in custodial treatment continue to characterize numerous, if not most, public mental hospitals throughout the country. Moreover, it has been noted that the whole system [of public mental hospitals] has been hamstrung for decades by physical and scientific isolation from the mainstems of modern medicine.

A look at the procedural steps for a mandatory criminal commitment point out another problem regarding the right to cure and treatment. Generally, a plea of not guilty by reason of insanity is entered by the defendant on his own motion. The defendant will sustain the burden of proof in accordance with the concept of the defense of insanity in the particular jurisdiction. Several states have adopted the "some evidence" rule in raising the issue of insanity. However, the "some evidence" rule allows the raising of the issue by the prosecution as well as the defense, which represents some problems when it would be an inappropriate defense.

Some 21 jurisdictions place the burden of proving insanity squarely on the defense by a preponderance of evidence. In these jurisdictions, the contention is that the failure of defense to prove insanity cannot constitute a presumption of sanity. The same holds true in the cases where the prosecution has to prove sanity beyond a reasonable doubt. The failure of the prosecution to prove sanity beyond a reasonable doubt is not a determination of his real sanity and need

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71 Supra note 6 at 7. For cases holding commitments to mental hospitals unconstitutional, see Barry v. Hall, 98 F.2d 222 (D.C. Cir. 1938); Overholser v. Treibly, 147 F.2d 705 (D.C. Cir. 1945); Dooling v. Overholser, 243 F.2d 827 (D.C. Cir. 1957).
74 Supra note 6 at 555–580.
for commitment. There is a tendency to interpret the standards and tests of sanity (in the broad sense) according to the legal purpose and context in which it is used. Competency and insanity, as a plea of "not guilty", are two separate grounds for commitment, each following different standards and tests in determining the same issue. A defendant who pleads insanity as a defense and stands trial is deemed competent, yet, notwithstanding such presumption of competency, he is automatically committed by reason of insanity.

The trial which determines the insanity of the defendant at the time of the crime also considers the defendant's competency to understand the nature and purposes of the proceedings against him, as well as whether he is capable of assisting counsel in his own defense. This can result in a presumption of present insanity, while still being competent to stand trial. Although no determination is made as to the present mental condition of the defendant, his dangerousness to himself or others, and his need for cure and treatment, all of which will have to be disproved to secure his release from the mandatory commitment.

Such defendants who are confined under mandatory commitment statutes will have to secure their release through the superintendent of the institution, who will demonstrate that the patient has recovered, and that he is not presently, or in the reasonable future, dangerous to himself or others. If the hospital superintendent refuses to release the patient, he could, by habeas corpus, request his release by showing that the superintendent was arbitrary in refusing his release, in that he has recovered and is not dangerous to himself or others. Under these circumstances, it is not surprising that a defendant, often uneducated, indigent and committed to a mental institution, cannot demonstrate and prove these requisites for release when, in the first place, there

75 ILL. REV. STAT. ch. 38, art. 104 (1965). However, the duality of standards in civil and criminal commitment can result in a denial of equal protection. The Supreme Court, in Baxstrom v. Herold, supra note 46, held that if a person is in need of cure and treatment, the decision to hospitalize him if it exceeds his prison term, should be in accordance with civil commitment procedures, including all procedural safeguards, and that institutionalizing a person without such procedures and standards is a denial of equal protection. Illinois deems that although civil in nature, a defendant must be accorded the essential protection in a criminal trial. See People v. Olmstead, 32 Ill. 2d 306, 205 N.E.2d 625 (1965); People v. Breese, 213 N.E.2d 500 (Ill. 1966). On the right of counsel in commitment proceedings, see 3 Defender's Newsletter (March, 1966).

was never a determination of his condition at the time of his mandatory commitment.\textsuperscript{77}

However, this study deals with the right to cure and treatment, and we are concerned about the standard of recovery, since without recovery, there can be no release, and failure to provide cure and treatment will prevent release completely. As stated by one observer, if the hospital to which the prisoner is sent is insufficiently staffed or has inadequately trained personnel to deal with the problem, here the automatic commitment may be even more severe than a jail sentence where the prisoner may have a better chance of receiving adequate therapy. . . . \textsuperscript{78}

**CURE AND TREATMENT AS A CONSTITUTIONAL RIGHT**

Due process is not a shorthand statement of any specific rights, but a "notion of fair play and substantial justice,"\textsuperscript{79} in the sense most obvious to the common understanding at the time of the adoption of the Constitution. It is applied in a functional context to safeguard "immutable principles of justice."\textsuperscript{80} As conceived by a civilized society. Due process does not only set out minimum standards which are "of the very essence of a scheme of ordered liberty,"\textsuperscript{81} but also embodies canons of decency emanating from natural law\textsuperscript{82} and fundamental principles of liberty and justice which are the essential means for the pursuit of happiness in a civilized society.\textsuperscript{83}

We must be deeply mindful of the responsibilities of the states in the exercise of their sovereignty within standards which are "implicit in the concept of ordered liberty."\textsuperscript{84} They are precisely the standards.

\textsuperscript{77} See statement by Mr. Krash, supra note 6 at 609, wherein he states that in the District of Columbia, 90\% of the accused criminals committed are indigents.

\textsuperscript{78} Statement by Dr. Salzman, supra note 6 at 626.

\textsuperscript{79} International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

\textsuperscript{80} Twining v. New Jersey, 211 U.S. 78, 102 (1908).


\textsuperscript{82} Snyder v. Mass., 291 U.S. 97 (1934).

\textsuperscript{83} Supra note 80. See also, Brock, The Anti-Slavery Origins of the Fourteenth Amendment (1951); Farand, The Framing of the Constitution of the United States (1962); Flack, The Adoption of the Fourteenth Amendment (1908); Faitman, Does the 14th Amendment Incorporate the Bill of Rights? The Original Understanding, 2 Stan. L. Rev. 5 (1954); Guthrie, The Fourteenth Article of the Constitution of the United States (1898); Pound, An Introduction of the Philosophy of Law (1934); Rostow, The Sovereign Prerogative: The Supreme Court and the Quest for Law (1962).

\textsuperscript{84} Supra note 81 at 325.
which society has a right to expect from those entrusted with sovereign prerogative. Justice Mathews, speaking for the Court in *Hurtado v. California*, declared that

arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the governments, both state and national, are essential to the preservation of public and private rights notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self-governing communities to protect the right of individuals and minorities, as well against the power of members, as against the violence of public agents transcending the limits of *lawful authority*, even when acting in the name of wielding force of the government.

Thus, the states are on notice that every action taken as a sovereign power will be scrutinized by the court when a question of *essential justice* is raised.

However, these limitations are not the sole impact of the concept of due process, since that concept applies to the state’s failure to act, as well as to their positive actions. Indeed, it is a part of due process to impose upon states the need to exercise its duties, failure of which causes the denial of life, liberty and the pursuit of happiness. The object of government is to protect that which is an essential part of every man’s rights. If it were possible to define when a state is violating the due process clause, in terms which would cover every exercise of power forbidden to the state, while excluding those which are not, the fundamental principles of justice which are to the essence of due process could not be implemented, and no more useful construction could be furnished. But apart from the risk of a failure to give any adequate definition which would be at once perspicuous, comprehensive and judicious, there is wisdom in ascertaining the concept, intent and application of such an important provision so that the gradual process of judicial inclusion and exclusion may evolve with

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85 110 U.S. 516 (1884).

86 Id at 536 (emphasis added).

87 In Budd v. New York, 143 U.S. 517 (1892), Justice Breever, in his dissent, stated that “[T]he Paternal theory of government . . . is odious. The utmost possible liberty to the individual and the fullest possible protection to him and his property is both the limitation and duty of the government.” (Id at 551.)

88 These rights are equivalent to the rights of “life, liberty, or property” guaranteed by the Fourteenth Amendment. U.S. Const. amend. XIV, 1. See *Slaughter House* cases, 16 Wall. 36 (1873) (J. Bradley, dissenting).
the new needs of the changing times.\textsuperscript{89} No greater justification can be found for the functional interpretation and application of a "concept" inherent to a free society in which the freedom emanates from justice and equality.\textsuperscript{90}

The concept of due process is an immutable principle of justice, and it lies at the base of all our civil and political institutions. The public safety is, of course, a proper concern for states, and their rights to commit persons who are dangerous to themselves or others is undeniably a duty, as well as a privilege, which a state, by virtue of its police powers, may exercise.\textsuperscript{91} The mentally ill who are committed civilly or criminally are held and detained by the exercise of said sovereign powers. The privilege of the state is generally based on the person's need for cure, care or treatment, but the right to cure or treatment is not specifically set out in the Constitution or statutes.\textsuperscript{92} Denial of liberty and property without adequate treatment to restore these rights to individuals is shocking to a sense of justice and fair play, and persistent denial is violative of due process, because "[c]onfinement in a mental hospital is as full and effective a deprivation of personal liberty as is confinement in jail."\textsuperscript{93} Society has been woefully deficient in providing for treatment in the past.\textsuperscript{94} There are still in-

\textsuperscript{89} In Rochin v. California, 342 U.S. 165 (1952), Justice Frankfurter stated that the absence of formal exactitude and want of fixity of meaning of the due process clause was not regrettable. "Words being symbols do not speak without a gloss. [T]he gloss of some of the verbal symbols of the Constitution does not give them a fixed technical content, it exacts a continuing process of application." (Id. at 169-70.) See also, Twining v. New Jersey, \textit{supra} note 80, Roberts, \textit{The Court and the Constitution} (1957); Madison, \textit{The Federalists} 236 (Cooke ed. 1961).

\textsuperscript{90} Cardozo, \textit{The Nature of Judicial Process} (1921).

\textsuperscript{91} \textit{In re} Williams, 157 F. Supp. 871, 876 (D.D.C. 1958): "This Court is conscious . . . of the need for protection not only of the community but also of individuals in need of psychiatric care and treatment. But these laudable purposes, under our form of government, must be accomplished by procedures which are legal and not at the cost of disregarding constitutional safeguards by deprivation of liberty without due process of law."

\textsuperscript{92} An interesting situation came to light recently in Washington, D.C. A Mr. Jones was admitted to St. Elizabeth's after he was acquitted of a crime by reason of insanity. Jones requested and pleaded with the hospital authorities for treatment, but he did not receive any. This is an ugly example of what happens all too often. A defendant is incarcerated in a mental institution, perhaps for life, without adequate treatment, rather than being sent to prison or being placed on probation with the understanding he will secure non-institutional psychiatric services. The conclusion is inescapable that the defendant committed under such circumstances is being denied due process of law. See also, Ragsdale v. Overholser, 281 F.2d 943 (D.C. Cir. 1960).

\textsuperscript{93} Barry v. Hall, \textit{supra} note 71 at 225.

\textsuperscript{94} See \textit{supra} note 33.
adequate facilities for providing treatment. The relation of treatment to due process was eloquently stated by Mr. Justice Frankfurter as follows:

"[T]he due process clause embodies a system of right based on moral principles so deeply embedded in the traditions and values of our people as to be deemed fundamental to a civilized society as conceived by our whole history. Due process is that which comports with the notions of what is fair and right and just. The more fundamental the beliefs are, the less likely they are to be explicitly stated. But respect for them is of the very essence of the due process clause. . . ."

In applying due process to the country's institutions, the Court enforces those permanent and persuasive feelings of our society which have been compellingly manifested. As significant as are the losses of freedom of movement and association with family and friends, the mentally ill, as a result of his confinement and incompetency, is denied many fundamental rights. He is, however, without statutory or judicial recourse to exact the adequate and humane treatment which would restore him to these rights and privileges. It seems unbelievable that no remedy for inadequate, improper or non-existent treatment has emerged clearly from any judicial proceedings thus far.

CONCLUSION

The efforts of jurists have resulted in procedural safeguards for the admission of the mentally ill in institutions. However, once the procedural safeguards have been satisfied, it is necessary to guarantee care, and cure and treatment, or at least inquire as to the facilities available in the public mental hospitals for the care and treatment of the mentally ill.

That the patient should receive good medical treatment is apparent from the fact that commitment generally rests upon the supposition that treatment of the mental condition is necessary, "[a]nd this necessity for treatment presupposes in turn that treatment will be accorded." As shown above, however, such treatment has not been forthcoming.

95 See supra note 34.
97 Kittrie, supra note 32. See also, Kadish, A Case Study in the Signification of Procedural Due Process, 2 W. Polit. Qur. 93 (1956).
99 See supra notes 33 and 34. See also, GLUECK, LAW AND PSYCHIATRY 159-60 (1962): "[h]ospitalization of a mentally ill person is remedial and its limitations are determined
Mental illness is not an end in itself, but a determination to establish a person’s need for hospital care and treatment. This is demonstrated by statutes which require the finding of a need for cure and treatment as a basis for hospitalization, and sanity is defined as a "mental disease or mental defect." Society has an interest in seeing to it that a defendant or patient who needs hospital treatment is not sent to prison but is institutionalized so that he may be restored to usefulness to society and to his inherent privileges.

The clamor for cure and treatment is becoming louder, and the problem of proper cure and treatment is being given greater thought and consideration. Hopefully, the day soon will come when we will no longer have mental wards housing approximately 1,000 mental patients with only two psychiatrists to give each of them an estimated 15 minutes per month of care and treatment.

The need for humane, healing, handling and care for the mentally ill takes greater significance with the rising number of people in need of care and treatment. Where society for years has been so woefully deficient in granting democratic, humanitarian, scientific and therapeutic rights to the mentally ill, we turn to "due process" to render the plight less unbearable.

by the conditions to be treated but a survey disclosed widespread abuses including the fact that the great majority of state mental hospitals are little more than convenient closets for the storage of the mentally ill and that more than half of the patients in mental hospitals receive no active treatment of any kind designed to improve their mental condition." (Emphasis added.)


101 See statement by Senator Sam I. Erwin, Jr., February 20, 1965: "... it seems clear that to deprive a person of liberty on the ground that he is in need of treatment, and then to deny him that treatment is tantamount to denial of due process. ..." Senator Erwin, Chairman of the Senate Judiciary's Subcommittee on Constitutional Rights, has long been an advocate of the constitutional right to cure and treatment, and the federal legislation in this regard, supra note 31, is largely due to his efforts.

102 See supra note 6. See also statement by Senator Erwin, supra.

103 See Overholser v. Lynch, 288 F.2d 388 (D.C. Cir. 1961), wherein Mr. Lynch, upon being adjudged insane, was placed in such a ward in St. Elizabeth's Hospital. Prior to committal, Mr. Lynch was under the care of a private physician. In a habeas corpus brief, Mr. Lynch contended he was being denied medical due process, in that "his restoration to sanity was dependent primarily upon the almost unlimited discretion of an overburdened hospital staff devoid of adequate therapeutic resources." Arens, Due Process and the Rights of the Mentally Ill: The Strange Case of Frederick Lynch, 13 Catholic U.L. Rev. 1, 13 (1964).