CHAPTER 3

Notes on Defining the "Dangerousness" of the Mentally Ill

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Introduction

The legal determination that a mentally ill person is "dangerous" can have drastic consequences. A finding of dangerousness can result in an indeterminate and lengthy involuntary confinement in a civil mental hospital.[1] If the civilly committed, mentally ill person is found to be too dangerous for safe confinement in the civil hospital to which he has been committed, he may be transferred to a correctional hospital for the so-called "criminally insane," even though he has committed no crime.[2] In some States, a "dangerous" civil patient, though guilty of no offense, can be transferred to, and placed in, a prison.[3]

For the mentally ill offender, the consequences of a finding of dangerousness are likely to be even harsher.[4] A finding of dangerousness applied to a defendant accused of crime, but ruled incompetent to stand trial, may result in confinement in a correctional or maximum security hospital, rather than in a civil hospital, regardless of the seriousness of the original charge.[5] If the mentally ill offender has been tried but acquitted because of insanity, he can, in a number of States, be further confined only if he is found to be "dangerous," the mode of his confinement being affected by that finding.[6] Release will depend on a determination that the dangerousness is no longer present, a difficult proposition for the patient to establish.[7]

A mentally disturbed prisoner, who is otherwise able to withhold his consent to being drugged, may be subjected to drugs against his will if a consulting psychiatrist finds him to be dangerous.[8] A prisoner who becomes mentally ill can be transferred to, and retained in, a correctional mental hospital if he is found to be dangerous.[9] Even juvenile offenders, in many ways members of a protected group, may, if confined, be subjected to invidious transfers if found to be mentally ill and dangerous.[10] In California, the confinement of a juvenile, who would otherwise be subject to

release, may be extended for 2 year periods, which are indefinitely extendable to what has been characterized as a life term if the juvenile is found to be "... physically dangerous to the public because of his mental ... deficiency, disorder or abnormality."[11]

Many States provide long-term indeterminate confinement in special treatment programs for particular types of "dangerous" offenders, such as dangerous sex offenders, whose confinement is sometimes provided in lieu of, but often in addition to, regular prison terms.[12] Maryland requires an indeterminate confinement for so-called "defective delinquents," defined as "intellectually deficient, or emotionally unbalanced persons, who, because of their persistent antisocial or criminal behavior, demonstrate that they are an 'actual danger' to society."[13]

The A.L.I. Model Penal Code proposes lengthier imprisonment for "mentally abnormal persons" who are found to be dangerous.[14] The Model Sentencing Act provides for longer terms for convicted criminals suffering from severe personality disorder who are found to be "dangerous."[15] A Federal statute provides for additional sentences for "dangerous special offenders."[16] Finally, a recent California Supreme Court decision has made a determination as to "dangerousness" critical by imposing a duty upon psychotherapists, to warn a prospective victim of any potentially dangerous act threatened by a person in treatment for emotional and mental problems.[17] If a patient is considered dangerous, the usual confidentiality of the doctor-patient relationship is breached.

This brief, and by no means complete, list of special and invariably onerous dispositions resulting from a finding of dangerousness suggests the importance of the concept of dangerousness in the evolving body of mental health law. In recent years, the concept of dangerousness has emerged as a major factor in determining the disposition of mentally disabled persons. Indeed, the dangerousness concept is widely regarded as embodying an even more restrictive approach, with respect to the civil commitment of mentally ill persons, than has previously been the case, in view of the fact that earlier commitment standards have been significantly looser and more permissive. The dangerousness requirement has been perceived by many as substantially more protective of the civil liberties and rights of the mentally ill. Whether it is, in fact, more libertarian depends on how it is actually applied. What is quite remarkable is that, despite the importance of a finding of dangerousness, and the extraordinary effect the implementation of that standard has had on the lives of thousands of persons,[18] there has, until recently, been little rigorous examination of what is meant by "dangerousness"; whether dangerousness can be adequately predicted; how much so-called dangerousness our society should tolerate; and what

procedures should be used to determine dangerousness. In some quarters, the dangerousness approach has been presented as a liberalizing force in law, representing a rejection of the position that mentally ill persons should be confined for less. Others contend that the dangerousness standard, by reason of its vagueness, is both under- and over-inclusive, in that an over rigorous application of it, particularly as an exclusive criterion, prevents the hospitalization of many who desperately need confinement; whereas a loose application of it does not discourage inappropriate confinement. It is argued, moreover, that the dangerousness standard can unnecessarily stigmatize persons as "dangerous," who are merely disabled, or who are in need of treatment.

Elsewhere in this monograph, there are discussions of other facets of the dangerousness issue. This discussion is confined to but one dimension of the dangerousness question: the problem of defining what we mean, particularly in the context of civil commitment, when we refer to a mentally ill person as dangerous.

How Is Dangerousness Defined?

One would ordinarily expect that, if significant individual deprevations flow from a finding of dangerousness, the term would be carefully and precisely defined so that it could be applied in an appropriate manner and with reasonable uniformity. It is the tradition of another branch of law, the criminal law, that, where the deprivation of an individual's liberty is at risk because of an application of the State's police power, rigorous specificity in defining offenses is demanded. However, that has not been our history in dealing with the mentally ill, even though a substantial proportion of involuntary hospitalizations are implementations of the State's police power and are just as surely implementations of the State's social control function as are confinements under the criminal law. This is not to say that involuntary civil hospitalizations are "punishment." Nevertheless, to the extent that mentally ill persons are confined against their will because of their dangerousness to others, it is clear that the deprivation of their liberty is primarily for the benefit of the State and not themselves.

That part of the law which deals with the involuntary civil commitment of the mentally ill is one area in which findings of dangerousness now play a particularly substantial role. Yet, in earlier civil commitment statutes, legislatures have neglected to define the term, beyond providing that a mentally ill person may be involuntarily confined if he is "dangerous," or is likely to "injure" or

"harm" others, or himself. Indeed, some legislatures merge the concept of mental illness and dangerousness by defining mental illness as a condition that makes one dangerous.[19] Other statutes are circular. For example, New York's 1971 Criminal Procedure Law (now repealed) once defined a "dangerously incapacitated person" as ". . . an incapacitated person who is so mentally ill, or mentally defective, that his presence in an institution operated by the Department of Mental Hygiene, is dangerous to the Safety of other patients therein, the staff of the institution, or the community."[20]

It is not at all obvious why there has been such a lack of precision in definition. Some legislatures, in adopting earlier statutes, may not have been clear in their own minds when they adopted the term. A review of legislative history reveals that the word "dangerousness" and its counterparts are often not defined adequately, at the inception of the legislative process. Other legislatures may have thought, when adopting their statutes, that words such as "danger," "harm," "injury," and the like were sufficiently clear and needed no further refinement. Indeed, one court, in rejecting a contention that the term "injury" was unconstitutionally vague, argued that, "Webster has no difficulty giving a definition of these words which are in ordinary and common usage," and reasoned that, while the word "injury" was "not an absolute model of clarity," those charged with administering the law, would have no difficulty in defining and applying it.[21] Still other legislatures may have hoped that further clarification would emanate from the courts. Some legislators may have intended that the term be defined in an ad hoc manner by mental health professionals, judges, and juries. This last approach seems to have been the case in California, where the term "dangerousness," as used in the Lanterman-Petris-Short Act, was deliberately left undefined in the statute, "in order to allow some flexibility in the commitment standards."[22] In any event, legislators in earlier days either failed to recognize the complexity of the concept, or, having recognized it, were unwilling to wrestle with difficult problems of definition.

The courts did not fill this definitional gap, either in their rulemaking or adjudicative capacities. Trial judges, charged with adjudicating cases, and confronted by day-to-day decisional demands, relied heavily on the conclusory testimony of psychiatrists, unhampered by rules of law. In the exercise of broad discretion, they uniformly rubberstamped psychiatric evaluations. The appelate courts, which did not have the rulemaking responsibility for defining that which would be applied below, provided little guidance. In part, this may have been because reviewing courts were not asked for such definitions. Lawyers, whose function it is to test questionable legal practices, did not present questions for appelate

review, and did not challenge the questionable applications of the term by trial judges.[23] Their performances were perfunctory. Until recently, there were few lawyers attentive to most civil commitment cases, with little goad to the courts as a consequence.

To the extent that appelate courts were called upon, occasionally, to consider what the word "dangerousness" meant, they originally defined the term with such sweeping broadness that it was stripped of any significant meaning. To illustrate: In 1960, a three-judge panel of the District of Columbia Circuit Court, in dealing with the release from hospital of an offender acquitted by reason of insanity, defined the term "dangerousness," as used in the District of Columbia involuntary civil commitment statute, as including any criminal act, whatsoever, such as passing a bad check.[24]

It had been argued before the court, that the term "dangerousness" should be limited to describing a likelihood that the patient would commit "an act of violence." However, the Court rejected this argument, saying, "We think the danger to the public need not be possible physical violence, or a crime of violence. It is enough if there is competent evidence that he may commit any criminal act, for any such act will injure others and will expose the person to arrest, trial and conviction. There is always the additional possible danger—not to be discounted even if remote—that a nonviolent criminal act may expose the perpetrator to violent retaliatory acts by the victim of the crime.[25]

A year later, the court, *en banc*, reiterated its position, but in the face of a three-judge dissent which pointed out that the term "dangerousness" had not been intended by Congress to apply to "any kind of unlawful conduct, however minor," but had been intended to apply only to "persons who have engaged in unlawful conduct of a dangerous character." "The language used," said the dissenters, "convey the idea of physical danger to persons, and, perhaps, to property."[26] In 1962, the same court ruled that the term "dangerousness" also encompassed emotional injury.[27]

Because the legislatures and courts did not provide adequate and specific definitions, the burden devolved upon psychiatrists, general practitioners, physicians, and other mental health professionals, to give meaning to terms such as "dangerousness," "harm," and "injury." Since, in psychiatry and other mental health circles, there is no generally accepted legal, psychiatric, or medical meaning of the term, and, inasmuch as it is not a part of psychiatric training to evaluate dangerousness,[28] each expert provided his own personal and subjective definition. These definitions tended to implement the expert's idiosyncratic legal views, his personal set of values about the protection of persons and society, and his hidden agenda about appropriate dispositions for the mentally ill.

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For many psychiatrists, "dangerousness" is an elastic concept that includes within its ambit any harm to others or to self that is psychiatrically cognizable, and for which hospitalization and treatment seem appropriate. Indeed, dangerousness is equated by many psychiatrists with "need for treatment," a concept which the term dangerousness was originally intended to displace. It is understandable why this should be so. The physician is trained in a tradition in which he responds with treatment and applications of the medical model to the most minor problems perceived as medical. The doctor's perception of deprivation to his patient is minimal. Even onerous treatments are subsumed within his perception of appropriateness. Finally, the average physician and mental health professional, working within the medical sphere, has little awareness that he is performing a social control function, often masked as an individual treatment function, in which he is the agent of others, and is not, necessarily, acting on behalf of the person who is euphemistically referred to as his "patient."

For the average psychiatrist, the notion of "dangerousness to others" is regarded as including even remote supposititious harms, however trivial, and whether physical or emotional. The mere outside possibility of the occurrence of some minor harm can elicit a psychiatric, or medical prognosis that the person is dangerous to others or to himself. For example, a leading psychiatrist has acknowledged that, "When practicing psychiatrists are faced with a potentially dangerous patient, we may evaluate him, using vague and subjective criteria which do not distinguish among menace, nuisance, assaultiveness, and violence."[29] Such an approach would include within the concept of dangerousness not only all criminal activity but also risks that: A manic person might deplete his family's financial resources and expose them to economic hardship; a paranoid schizophrenic might frighten another with bizarre behavior; an hysterical person might regularly call people on the phone in the middle of the night; and a sex deviant might expose himself to others, or be a "peeping Tom."

"Dangerousness to self" is a particularly elastic concept for the psychiatrist. Judicial reports, transcripts, and empirical studies are filled with instances in which psychiatrists have characterized as "dangerous" persons who have engaged in the following: wandering; being a vagabond; "eating out of maybe the trash cans, or something like that"; failing to take medicine; or wearing inadequate clothing. Left by the courts to their own devices, psychiatrists are prepared to characterize virtually all deviant behaviors of mentally ill persons as dangerous. Since very few mentally ill persons are presented for commitment unless their behavior is perceived as somewhat deviant, the extent to which deviance is equated

with dangerousness tends to render the dangerousness standard meaningless. The term affords guidance neither to the psychiatrist who testifies, nor to the judge and jury who must evaluate the testimony. This development has troubled psychiatrists as well as lawyers. A director of a court clinic has remarked, "Too often, in my experience, judges and attorneys have failed to challenge psychiatric testimony which is either incompetent, or clearly erroneous. . . . The absence of any clear written criteria for such evaluations have (sic) two consequences. It leaves the examining physician with only the broadest concept of what is expected of him. It leaves the courts and the attorneys without the means of adequately measuring the quality of his evaluation."[30]

Some psychiatrists routinely equate dangerousness with certain mental disorders. For example, they may see all paranoid schizophrenics as dangerous. In one well-known case, a celebrated psychiatrist, when asked whether "an aggressive paranoid" would be "potentially dangerous," answered: "It is conceded universally an aggressive paranoid is dangerous. I would even say that, universally, we think that any paranoid schizophrenic is potentially dangerous, because one can never tell when the meekness and submissiveness may turn around and become aggressive. . . . Ask me whether a paranoid schizophrenic is potentially dangerous, and I would say, 'yes,' "[31] Other psychiatrists are careful to point out that not all persons diagnosed as paranoid schizophrenic are dangerous; only those with certain types of delusions. In one case, a doctor stated that he had known delusional patients who were not dangerous to others, but "not with this kind of delusional material," i.e., delusions regarding law enforcement and law officers.[32]

Experienced observers have expressed the view that many psychiatrists are well aware that legal definitions of dangerousness are intended to be more restrictive, but that they ignore this and manipulate the dangerousness concept in order to accomplish their treatment objectives. In a typical commitment case, the psychiatrist, when asked why he had certified the respondent as a "menace" to himself and others, testified that the respondent "had certain paranoid delusions; feelings of persecution to the extent that he felt his life had been jeopardized on numerous occasions . . . I felt there was a reasonable possibility that he would seek redress for his persecution and . . . I had no assurance that such redress would be of an orderly or lawful type. Therefore, I felt that he might seek redress of a violent nature." However, later the psychiatrist said, "Actually, he need not have been much of a menace to himself and society. That is the current phrase used by anybody we feel needs hospital care, whether he wants it or not."[33]

In a careful study of Arizona commitment practices, Wexler has pointed out, "The literal meaning of dangerousness is admittedly ignored in favor of the best interest of the patient, i.e., whether he will benefit from treatment. Although it is recognized that such a determination is probably illegal, the psychiatrists feel it is more humanitarian to require treatment than to be thwarted statutorily in their attempt to prescribe it."[34] Judge David Bazelon has pointed out, "I have even been told that psychiatrists believe they are justified in fudging their testimony on 'dangerousness,' if they are convinced that an individual is too sick to know that he needs help."[35]

Psychiatric testimony, to the extent that it overextends the reasonable boundaries of dangerousness, reflects an amalgam of ignorance, zeal, and self-protectiveness. The ignorance represents an unawareness that the concept of dangerousness either is, or should be, carefully conceptualized. Indeed, to the extent that psychiatric and legal views run parallel, there are no constraints for the psychiatrist to be aware of. The zeal reflects the willingness of the psychiatrist to offer the appropriate legal talismanic language which will accomplish his psychiatric objective, whether or not the words are strictly applicable. In this enterprise, the psychiatrist finds that many judges are eager to defer to them. Self-protectiveness reflects the understandable desire of the psychiatrist not to run unnecessary risks by testifying to the nondangerousness of a mentally ill person who may later comit suicide, assault others, or engage in other undesirable acts.

In a perceptive analysis of the role of the psychiatrist in establishing the dangerousness of the mentally ill persons, Shah has pointed out that, "Psychiatrists may find themselves placed in a social role in which society expects them to assist in the labeling and social control of persons who are perceived by the community as disturbing, discomforting, and threatening. . . . The 'experts' might be responding to what they *perceive* is socially expected of them rather than in response to the specific legal questions and processes designed to attain the desired societal objectives." Shah points out further that, while many psychiatrists who are asked to apply the dangerousness label "might not actually be very knowledgeable in the sense of having demonstrable and reliable knowledge" about dangerousness, nevertheless, such psychiatrists often find themselves "in a social role (viz., of knowledgeable and skilled 'experts') which *requires* that they not jeopardize this ascribed expertise—and, thus, the associated status, prestige, and power. . . . It is not surprising that psychiatrists and other experts turn to medical decision rules which state: 'When in doubt, suspect illness'; 'When in doubt, suspect dangerousness. . . .' " (Italics in original.)[36]

If judges actually wished a more careful explicitation of the al-

leged dangerousness of the mentally ill person, they could insist on it. However, trial judges have routinely accepted the conclusory opinions of psychiatrists in hearings that are strikingly superficial and brief. A 1966 study of civil commitment hearings in Texas reported that patients were committed at a rate of 40 within 75 minutes, or at a rate of less than 2 minutes per commitment hearing.[37] Contemporary studies indicate that the situation in many States remains substantially unchanged. Wexler has reported that in 1971 the average duration of a commitment hearing in one Arizona county was 4.7 minutes.[38] Zander has reported that in 1974 the average duration of commitment proceedings in Milwaukee, Wisconsin, under the Lessard decision, was 13 minutes.[39] In such a short period of time, there is frequently little opportunity for an adequate inquiry into dangerousness. Testimony tends to be conclusory. A typical psychiatric statement is, "The patient suffers from a major psychiatric illness and would be dangerous to others."[40] The psychiatrists are ordinarily not asked for an explanation of any of the factors that go into the formulation of their opinions, or what they mean when they say a patient is dangerous.

A typical hearing on the need for confinement because of mental illness and dangerousness following an insanity acquittal in the District of Columbia is cut and dried. The following is an example:

Examiner:	Do you find that the defendant is still suffering from paranoid schizophrenia?
Psychiatrist:	Yes.
Examiner:	Is he likely to be dangerous to himself or others in the foreseeable future, because of his illness?
Psychiatrist:	Yes.
Judge:	I hereby commit the defendant to Saint Elizabeths Hospital, until such time as this court is satisfied that he is no longer likely to be a danger to himself or others, in the foreseeable future, by reason of mental illness. Adjourned."[41]

There is a twofold reason for such abbreviated hearings. First, the term "dangerousness" has been stretched to such an extent that is has become practically meaningless. Second, judges have typically abdicated their decisional role to the psychiatrist in their deference to psychiatric judgment. Indeed, many judges are unwilling to reject a psychiatric opinion, especially one from an "official" source, such as a court-appointed psychiatrist, or a psychiatrist from an "official" hospital, such as Saint Elizabeths, in Washington, D.C. Such unquestioning deference brings the court into an uneasy connivance with the psychiatrist in bending the law. Wexler has

reported the following characteristic judicial reaction: "In one county . . . the veteran judge freely expressed his own lack of knowledge . . . to the end that he has exclusively followed the doctors' recommendations for the past 20 years. In another county, little concern was expressed about the statutory commitment standards, for the attitude prevailed that the State hospital was capable of correcting errors which might be made by the commiting court.[42] Zander has reported a Milwaukee judge saying to the patient's attorney, after the attorney had said he didn't understand why full-time inpatient hospitalization was necessary, "My feelings are the same as yours, but I can't disregard the expert testimony."[43]

New Approaches

Judicial

A major focus in the new awareness of rights for mental patients is concern about the vagueness of standards. Many older statutes provided, typically, that mentally ill persons could be involuntarily hospitalized if they were found to be "in need of treatment." Lawyers entering the mental health field found such criteria to be intolerably vague, in that they give practically no guidance, whatsoever, to judges, for the purpose of discriminating among the mentally ill to determine which persons are appropriately committable, and which not.[44] Indeed, it is arguable that if all mentally ill persons are in need of treatment (a position maintained by a large proportion of psychiatrists), then all, not merely some, mentally ill persons are subject to involuntary hospitalization, a position recently repudiated by the U.S. Supreme Court in *O'Connor* v. *Donaldson*,[45] discussed elsewhere in this article.

In the early 1970s, mental health lawyers, new to the field and dissatisfied with such loose standards, attempted to persuade the courts that no mentally ill person could constitutionally be involuntarily confined, even for a brief period of time, unless found by a court to be "dangerous." A case arguing this view, *Fhagen* v. *Miller*, was presented to the New York Court of Appeals in 1971. In January, 1972, the New York Court ruled, not unlike the D.C. Court of Appeals a decade earlier, that, "One 'afflicted with mental disease,' as defined in our statute. . . need not be violent, or dangerous, to justify a short confinement prior to notice, and an opportunity to be heard. The public is entitled to prompt protection against the acts of such a person which, *though not dangerous*, might—if committed by a sane person—constitute a punishable

offense, or which, by reason of his urgent need for immediate care and treatment, might harm others, albeit in a nonviolent manner" [italics added]. The Court of Appeals quoted, with approval, the opinion of the court below which had held that "if the allegedly mentally ill person is engaging in conduct which, if committed by a sane person, would constitute disorderly conduct, criminal nuisance, public lewdness, or sexual abuse of a minor, the State's legitimate interest in protecting society would warrant that person's temporary confinement, as surely as if the individual was engaging in conduct amounting to felonious assault or homicide."[47] The N.Y. Court of Appeals not only rejected dangerousness as a constitutionally required standard, but also seemed to characterize public lewdness and sexual abuse of a minor as "nondangerous," confining the term "dangerous" to more violent acts, such as felonious assault and homicide. This traditional, and limited, view of dangerousness stands in marked contrast to later definitions.

A short time later, in 1972, the U.S. Supreme Court decided *Humphrey* v. *Cady*,[48] which dealt with Wisconsin's sex offender program. In its opinion, the court issued dictum concerning Wisconsin's involuntary civil commitment provision, which, at the time, provided for commitment if the mentally ill person was diseased "to such extent that a person so afflicted requires care and treatment for his own welfare, or the welfare of others, or of the community."[49] The Supreme Court, in commenting on this definition, noted that the language denoted a "social and legal judgment that (the person's) potential for doing harm to himself, or to others, is great enough to justify such a massive curtailment of liberty" as is involved in involuntary civil commitment.[50]

Shortly thereafter, the case of Alberta Lessard, a Wisconsin school teacher, was brought before a three-judge court in Wisconsin, and the Wisconsin statute was attacked as unconstitutional. *Lessard* v. *Schmidt*,[51] decided in October, 1972, became the first landmark case dealing with the concept of dangerousness. In *Lessard*, the Federal district court relied on the Supreme Court's dictum in *Humphrey*, and took a quantum leap from it. The *Lessard* court noted that earlier courts had not "felt much concern for either a definition of 'dangerousness,' or the effects of deprivations of liberty upon those committed."[52]

In commenting on the Supreme Court's dictum in Humphrey, the *Lessard* court said, "In other words, the (Wisconsin) statute, itself, requires a finding of 'dangerousness' to self or others in order to deprive an individual of his, or her, freedom."[53] The *Lessard* court then went on to acknowledge that the Supreme Court "did not directly address itself to the degree of dangerousness that is constitutionally required before a person may be involuntarily

deprived of liberty."[54] The three-judge court undertook to provide such a definition. In upholding the Wisconsin statute by interpreting it so that it conformed with what the three-judge court interpreted as the Supreme Court's standard, the *Lessard* court defined "dangerousness," as a condition where "there is an extreme likelihood that if the person is not confined, he will do immediate harm to himself or others.[55] Elsewhere in the opinion, the court also used the language "imminent danger."[56] Although the *Lessard* court did not further define the words "extreme likelihood," "immediate harm," or "imminent harm," it seemed clear, from the context, that these terms ruled out long-term "self-harm," the type of self-harm which results from neglect of self, the condition which by 1972 had, for several years, been characterized as "gravely disabled" in California's Lanterman–Petris-Short Act.[57] In a later order, presented after a remand from the U.S. Supreme Court, which called for greater precision, the *Lessard* court modified its standard by removing the terms "extreme" and "immediate," substituting the language "imminent dangerousness to self or others . . . based, at minimum, upon a recent act, attempt, or threat to do substantial harm."[58]

It is worth noting that the *Lessard* requirement that commitment supported by a finding of dangerousness be based on a minimal showing of a "recent act," a "recent attempt," or a "recent threat," is not a further definition of "dangerousness," but, rather, an evidential requirement. In view of the questionable accuracy of psychiatric predictions concerning future behavior, the *Lessard* court decided that one or more of these relatively objective facts would have to be in evidence to support a psychiatric opinion concerning dangerousness. A psychiatric opinion, however persuasive, could not prevail, absent such a showing. A number of other courts and legislatures have since adopted this, or a similar, formulation; but the formulation itself raises further definitional questions: What act suffices? What is recent? What is an attempt? What is a threat? The Arizona statute uses a 12-month period rather than the vaguer concept of recency. Other statutes include different time spans.

How did the Wisconsin judges apply the *Lessard* ruling? One influential Wisconsin judge interpreted the *Lessard* language as permitting the commitment only of mentally ill persons who had engaged in, who had seriously threatened, homicidal or other violent behavior, suicidal behavior, or neglect of self which presented imminent danger to health or life. Under his view, if a mentally ill person threatened to starve himself to death, he would not qualify as "dangerous" until his condition had reached a point where further fasting would be imminently threating either to his health

or his life. Other Wisconsin judges either ignored the *Lessard* dangerousness standard entirely or applied the standard loosely. Over 56 percent of Wisconsin judges, when questioned about their interpretation of the Lessard language, responded that the words "substantial harm" could be interpreted as including not only property damage, but also severe psychological and financial hardship to the mentally ill person's immediate family. The judges characterized as "dangerous" such behavior as "wandering" and "acting out" in an abnormal way."[59]

The *Lessard* case became a high-water mark in "dangerousness" law. Many civil libertarian mental health lawyers hoped that other courts would follow Lessard's lead in providing highly restrictive standards concerning commitments focusing on dangerousness, defined narrowly to encompass only physical violence to self or others. However, while other courts followed *Lessard* in providing for extensive procedural due process of law and other protections for the mentally ill and while they struck down extremely vague standards, they were more cautious in defining dangerousness. Two significant cases followed Lessard: *State ex rel. Hawks* v. *Lazaro*[60] and *Lynch* v. *Baxley*.[61] *Lazaro* defined "dangerousness" in terms of "violence" and "physical injury" to self or other, but modified the *Lessard* approach by providing that the physical injury to the person need not be through overt acts, but could take place by means of the slow deterioration that leads to death through starvation or bodily neglect. *Lynch* v. *Baxley* took the same approach, stating that a showing of "actual violence" is not necessary to establish dangerousness to self. Said the *Lynch* court, "There is sufficient dangerousness if a mentally ill person's neglect or refusal to care for himself poses a real and present threat of substantial harm to his well-being.[62] In other words, a person who in California's terms was "gravely disabled" was dangerous, within the interpretation of these newer cases.

The trend toward the inclusion of disablement within the concept of dangerousness, was capped by the U.S. Supreme Court in *O'Connor* v. *Donaldson*,[63] where the U.S. Supreme Court did not hold that a finding of dangerousness is a required constitutional standard,[64] but did rule that a mentally ill person may not be involuntarily committed if he is "dangerous to no one and can live safely in freedom."[64] The Court's precise holding was that ". . . a State cannot constitutionally confine a non-dangerous individual who is capable of surviving safely in freedom by himself, or with the help of willing and responsible family members or friends."[65] In a footnote, the Court added a significant gloss to the "dangerousness" definition: "Of course, even if there is no forseeable risk of self-injury or suicide, a person is literally 'dangerous to himself'

for physical or other reasons, he is helpless to avoid the hazards of freedom, either through his own efforts, or with the aid of willing family members or friends."[66] The Court provided no further explication of what was meant by the "hazards of freedom." It does seem, however, that the Court's tentative definition of "dangerousness" includes what in some jurisdictions, e.g., California and Washington, has been separately defined as being "gravely disabled." The Supreme Court, having originally used "dangerousness" language in *Humphrey* v. *Cady*, may now feel compelled to define dangerousness in such a broad and permissive manner as to encompass conditions which only a few years ago were not generally regarded as dangerous. This is an unfortunate development, since the stronger term "dangerousness" does tend to stigmatize. It is inappropraite to refer to a gravely disabled person as a "dangerous" person, with the potential for misunderstanding that may be involved. Yet, by suggesting dangerousness as a constitutional requirement for involuntary civil commitment, the Supreme Court may have boxed itself into an unrealistic label.

Legislative

On the legislative front, there has been a flood of new State legislation in the field of civil commitment. Most of the new statutes conform to a common pattern. Typically, new legislation provides two categories of dangerousness: to others and to self. Dangerousness to others is commonly defined in terms of acts, threats, or inducing fear of "violence" or "physical harm" to a person. Ordinarily, harm to property is not included, although it is understood that certain acts against property, such as arson, are also acts against persons.

The Massachusetts statute, adopted in 1970, is a progenitor of many of the more contemporary statutes. It provides for commitment, where there is "likelihood of serious harm," which is defined as including "a substantial risk of physical harm to other persons as manifested by evidence of homicidal, or other violent behavior, or evidence that others are placed in reasonable fear of violent and serious physical harm to them . . ."[67] It is clear that only physical harm is included in the Massachusetts statute. So much is definite; but, what is a "substantial" risk of harm? One Massachusetts analyst has commented that, "to one judge, a 20 percent change of harm may be 'substantial,' whereas, another judge may require the harm to be more likely than not. Moreover, how soon must the anticipated harm occur? There may be a relatively low risk of harm within six months, but a high risk of its occurring within several

years' time. Such complexities predominate in every civil commitment hearing . . ."[68]

A few statutes go beyond physical harm to include emotional harm within the concept of dangerousness. A recent Iowa statute permits commitment where a person "is likely to inflict emotional injury on members of his, or her, family, or others who lack reasonable opportunity to avoid contact with the afflicted person . . ."[69] "Serious emotional injury" is further defined as "an injury which does not necessarily exhibit any physical characteristics, but which can be recognized and diagnosed by a licensed physician or other qualified mental health professional, and which can be causually connected with the act or omission of a person who is, or is alleged to be, mentally ill."[70] Such emotional harm can go beyond the type of harm which results from being put in fear of threatening behavior. It could include the consequences of bizarre behavior. In the view of one authoritative commentator, under the Iowa statute, "The injury need not be physically overt, but it must be medically overt, and susceptible of medical diagnosis . . ."[70]

Emotional injury is not precisely delineated, but it would include, for example, serious disruption of family relations leading to depression or nervous breakdown of family members, physical violence on the part of others, or other medically diagnosable complications . . ."[71] Many of the newer statutes seem reasonably restrictive, especially in light of evidentiary requirements.

The category of "dangerousness to self" is more broadly defined. "Dangerousness to self," in many contemporary statutes, breaks down into three basic categories of behavior: (1) suicidal; (2) self-maiming; and (3) disabled behavior. The Massachusetts statute is again typical. That enactment provides that the "likelihood of serious harm" to self includes "a substantial risk of physical harm to the person, himself, as manifested by evidence of, or attempts at, suicide or serious bodily harm," or "a very substantial risk of physical impairment or injury to the person, himself, as manifested by evidence that such person's judgment is so affected that he is unable to protect himself in the community, and that reasonable provision for his protection is not available in the community."[72] A recent Pennsylvanis statute is even more explicit in requiring a finding that "the person has severely multilated himself, or attempted to multilate himself severely, and that there is the reasonable probability of mutilation, unless adequate treatment is afforded . . ."[73]

It is noteworthy that, in defining dangerousness to self, the statutes tend to go beyond immediate physical harm to subsequent physical impairment or injury, by now including within that definition the condition previously defined as "gravely disabled." The

Massachusetts statute speaks of potential "physical impairment or injury" and an inability to protect oneself. Here, too, the Pennsylvania formulation is particularly explicit, requiring a finding that "the person has acted in such manner as to evidence that he would be unable, without care, supervision, and the continued assistance of others, to satisfy his need for nourishment, personal or medical care, shelter, or self-protection and safety; and there is a reasonable probability that death, serious bodily injury, or serious physical debilitation would ensue within 30 days, unless adequate treatment were afforded under this act."[74]

This broadening of the definition of "dangerousness" to include the concept of "grave disablement" represents a significant departure from the criteria originally enunciated in the *Lessard* case, which civil libertarian lawyers hoped would be adopted as a universal one. Although such provisos are far more restrictive than the "in-need-of-treatment" criterion, they, nevertheless, provide a broad and highly inclusive standard, subject to significant manipulative potential and, thus, a far cry from the original restrictiveness associated with dangerousness. The fact is that most, if not all, of the literature dealing with prediction of dangerousness does not apply to this loose definition. It is only recently that legislatures (and courts) have expanded the term "dangerousness" to include "being disabled." Thus, a standard originally associated exclusively with the police power has also become a parens patriae standard.

Defining "Dangerousness to Others"

While the newer judicial definitions discussed here represent a marked improvement over a previous situation in which dangerousness to others was totally undefined, nevertheless, they still represent a relatively modest attempt at dangerousness definition. Although the *Lessard* court referred to the need for a "balancing test," in which the mentally ill person's "potential for doing harm" should be weighed against the "massive curtailment of liberty," no further clues were offered as to the components that should go into such a balance. The beginnings of such an analysis of dangerousness have been provided by Chief Judge Bazelon, speaking for the District of Columbia Circuit Court, in the context of decisions dealing with the release of a committed sex offender. The D.C. sex offender statute defines dangerousness as a condition where one is "likely to attack or otherwise inflict injury, loss, pain, or other evil on the objects of his desire."[75] In two leading cases, *Millard* v. *Harris*[76] and *Cross* v. *Harris*,[77] Judge Bazelon ruled that a finding of dangerousness under the statute requires the factual determination of

three questions: "(1) the likelihood of recurrence of sexual misconduct; (2) the likely frequency of any such behavior; and (3) the magnitude of harm to other persons that is likely to result."

As to magnitude, the court ruled that the legislature did not intend the words "injury," "loss," "pain," or "evil" to apply merely to offensive or obnoxious behavior, but, rather to "extremely aggravated situations," where persons are a "dangerous menace" to society. In effect, the court used the "substantial injury" notion. With respect to the "likelihood" of the harm, the court acknowledged that a precise definition of "likely" may well be impossible. The court indicated that factors determining likelihood should include seriousness, availability of inpatient and outpatient treatment, and the expected length of confinement required. It is difficult to see how seriousness bears on probability, when it is more relevant to magnitude. Moreover, the expected length of confinement does not appear to be relevant; yet, the availability and likely efficacy of treatment would seem to be highly probative.

Where release is conditional, the conditions of release may bear substantially on the probability issue. If the undesirable conduct is provoked by drinking, or by some other condition susceptible to control, probationary conditions imposed by the court can tend to insure a low probability of recurrence. The third factual finding relates to the frequency of occurrence of the relevant behavior. The court stated that the behavior would be considered less dangerous as the likely extent of frequency diminished. The court did not consider the question of imminence.

In the *Millard* case, which dealt with an exhibitionist, the court concluded that, although the offender might in fact exhibit himself, he was not "dangerous" because he would probably exhibit himself infrequently, if at all, and the impact of his exhibitionism would not be serious. The magnitude of the harm was small. The careful analysis of the D.C. Circuit Court in the *Millard* and *Cross* cases represents a high-water mark in sophistication in defining dangerousness. Few other courts in the country have approached the complexity of its analysis in this area.

Conclusion

What will be the effect of the newer definitional thrusts? Reform on the appellate court or legislative level does not guarantee that practices in the lower courts will immediately follow suit. Trial judges have been known to ignore and subvert, on a day-to-day basis, the unpopular mandates of reviewing courts or legislatures

which they regard as unrealistic. If trial court judges view a more restrictive interpretation of dangerousness unsympathetically, and apply it accordingly, a long tug-of-war is likely to ensue. Psychiatrists, too, are likely to be unsympathetic to a more limited definition of dangerousness; but the weight of the American Psychiatric Association has been brought to bear in attempting to encourage a more sophisticated view of dangerousness on the part of psychiatrists who participate in legal decisionmaking. In its thoughtful "Task Force Report 8,—Clinical Aspects of the Violent Individual," The A.P.A. has presented a careful analysis of dangerousness which should, in time, influence forensic psychiatrists.

Some of the newer legislation has apparently had some significant effect on psychiatric practices in defining dangerousness. A California psychiatrist has reported that, following the adoption of the Lanterman-Petris-Short Act, mental health professionals in California began to "use a rather narrow definition of the criteria" dangerous to self or others.[78] Many mental health professionals regarded the California standards, when adopted, as a rebuke to their previous exercise of discretion under looser criteria. The psychiatrist points out that, "At times, there seems to be an almost passive-aggressive strictness to the way they have interpreted these new criteria . . . ." He goes on to say that "even institutional psychiatrists, who are long used to treating the involuntary patient, apply the LPS criteria strictly."[79]

Until more precise formulations of the dangerousness concept can be worked out, we should at least press for an awareness among lawyers, psychiatrists, and judges of the various component elements that go into the making of the dangerousness label. The magnitude of harm dimension, whether to person or to property, whether to physical being or to the psyche, should be more carefully elaborated and examined. The degree of probability of the harm should be carefully appraised. The frequency with which the harm is likely to occur is critical; and, finally, the courts should more closely examine the imminence question. Such an examination is likely to lead to more objective and more reliable findings. It is also important to require that the judge make findings of fact to support his ruling that the respondent is dangerous. In at least one interesting case, an appelate court reversed and remanded a commitment order because of a confused finding on the dangerousness issue.[80]

The U.S. Supreme Court has not helped much in the process of defining dangerousness. Apart from its broad inclusions, referred to earlier, the Supreme Court, in *Donaldson*, did rule that dangerousness does not include the "nuisance" cases. Said the Court, "May the State fence in the harmless mentally ill to save its citizens

from exposure to those whose ways are different? One might as well ask if the State, to avoid public unease, could incarcerate all who are physically unattractive or socially eccentric. Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty."[81] The court's rhetoric is interesting, but the illustrations are not particularly helpful. Mentally ill persons are ordinarily not presented for commitment because they are physically unattractive, or if their eccentricities do not bother anyone. It is when the eccentricities adversely affect others that commitments are requested. In *Donaldson* the Court presented no guidelines to distinguish between so-called "nuisance" behavior and behavior that could be characterized as "dangerous." In addition to which, it should be noted, that the Supreme Court has not closed the constitutional door to confinement of the mentally ill for purposes of treatment.

If the courts are to avoid constitutional attacks on the looseness of the dangerousness standard based on the void-for-vagueness doctrine, they must take steps to provide, in the concept, a greater degree of objective definition and less room for unbridled discretion which has been the order of the day until recently. It is hoped that the courts and legislatures will respond with more carefully articulated definitions in order to further limit the subjectivity and judicial discretion that has characterized this area of the law until recently.

Footnotes

The evaluation of the various definitions of the term "dangerousness" set forth here is not intended as a final analysis, but is a small portion of a substantially larger work in progress in which I intend an all embracing discussion of the use of the "dangerousness" concept in the way the law deals with the mentally ill. There are, therefore, many dimensions of the dangerousness issue, even those of definition, not treated here, or dealt with only in passing.

1. See generally A. Brooks, Law, Psychiatry and the Mental Health System 677-717 (1974). Many jurisdictions provide for the involuntary civil commitment of mentally ill persons who are dangerous to themselves or others or who are unable to care for their physical needs. The most recent compilation is to be found in Developments in the Law: Civil Commitment of the Mentally Ill, 87 *Harv. L. Rev.* 1190 (1974).
2. See, e.g., Ohio Rev. Code Ann. § 5125.03 (Baldwin 1971) which "permits an administrative transfer of any patient in a State [civil] hospital "who exhibits dangerous or homicidal tendencies, rendering his presence a source of danger to others in Lima State Hospital for the criminally insane." Such transfers have been ruled unconstitutional in New York in an important case, *Kesselbrenner* v. *Anonymous*, 33 N.Y. 2d 161, 305 N.E. 3d, 350 N.Y.S. 2d 889 (1973), but the constitutionality of a similar provision has been upheld in New Jersey in *Singer* v. *State*, 63 N.J. 319, 307 A.2d

94 (1973), where the Court said, "Surely a hospital does not become a jail merely because convicts are admitted when they are ill." 307 A.2d at 96. The difference between the New York and New Jersey cases seems to be that the New York institution was, at the time, within the corrections system and the New Jersey institution nominally in the mental health system. Although both institutions served virtually identical functions.

3. A Colorado statute permits the transfer of civil mental patients to the State penitentiary "for safekeeping" if they "cannot be safely confined in any institution for the care and treatment of the mentally ill or retarded." This statute has been declared unconstitutional, but only because psychiatric treatment in the prison was considered substantially inferior to that provided in the civil mental hospital; otherwise the statute would be constitutional. See *Romero* v. *Schauer*, 386 F. Supp. 851 (D. Colo. 1974). See also *Craig* v. *Hocker*, 405 F. Supp. 656 (D.C.D. Nev. 1975), holding unconstitutional Nev. Rev. Stat. § 433.315, which permitted confinement of the "dangerous" civilly committed mentally ill in the death row cell block of Nevada State Prison.
4. For a valuable general description see D. Wexler, *Criminal Commitments and Dangerous Mental Patients: Legal Issues of Confinement, Treatment, and Release* (1976). Also see an excellent new study, German and Singer, *Punishing the Not Guilty: Hospitalization of Persons Acquitted by Reason of Insanity*, 29 *Rutgers L. Rev.* 1101 (1976).
5. A number of States require a finding of dangerousness to support a commitment of an accused found incompetent to stand trial. See, e.g., Iowa Code § 783.3 (Supp. 1972); Okla. Stat. Tit. 22, § 1167 (1958); S.D. Compiled Laws § 23-38-6 (1967).
6. A number of statutes provide for the commitment of the N.G.R.I. (not guilty by reason of insanity) if he is found to be not only still mentally ill, but also "dangerous." Other statutes provide only for the commitment of a person upon his acquittal. See, e.g., D.C. Code § 24-301 (1967) which provides, "If any person tried upon an indictment or information for an offense, or tried in the juvenile court of the District of Columbia for an offense, is acquitted solely on the ground that he was insane at the time of its commission, the court shall order such person to be confined in a hospital for the mentally ill." But a number of new cases have written in a finding of dangerousness as a requirement for commitment. See e.g., *State* v. *Krol*, 68 N.J. 236,344 A.2d 289 (1975) and other cases analyzed in German and Singer, op. cit., n.4.
7. For an illustration of how difficult it is for even a "model patient" to shed the label of "dangerousness" after 10 years of trouble-free confinement see *Covington* v. *Harris*, 419 F.2d 617 (D.C. Cir. 1969).
8. See Sitnick, *Major Tranquilizers in Prison: Drug Therapy and the Unconsenting Inmate*, 11 Willamette L.J. 378 (1975).
9. See, e.g., *United States ex rel. Schuster* v. *Herold*, 410 F.2d 1071 (2s Cir. 1969).
10. *Morales* v. *Turman*, 364 F. Supp. 166 (E.D. Tex. 1973), reversed, 535 F. Supp. 864 (5th Cir. 1976).
11. Cal. Welf. and Inst. Code § 1800 et seq. (West 1972), discussed in Note, A Dangerous Commitment, 2 Pepperdine L. Rev. 117 (1974). See In Re Gary W., 5 Cal. 3d 296, 486 P.2d 1201, 96 Cal. Rptr. 1 (1971).
12. A typical sex offender statute is New Hampshire's, which defines a "sexual psychopath" as "any person suffering from such conditions of emotional instability or impulsiveness of behavior, or lack of customary standards of good judgment, or failure to appreciate the consequences of

his act, or a combination of any and such conditions, as to render such person irresponsible with respect to sexual matters and thereby dangerous to himself or to other persons."

13. Md. Ann. Code art. 31B, § 5 (Supp. 1965) provides the indeterminate confinement of a "defective delinquent," defined as "an individual who, by the demonstration of persistent aggravated anti-social or criminal behavior, evidences a propensity toward criminal activity, and who is found to have either such intellectual deficiency or emotional unbalance, or both, as to clearly demonstrate an actual danger to society so as to require such confinement treatment, when appropriate, as may make it reasonably safe for society to terminate the confinement and treatment."
14. Model Penal Code § 7.03(3) (Proposed Official Draft, 1962).
15. National Council on Crime and Delinquency, Advisory Council of Judges, Model Sentencing Act § 5 (with commentary 1963).
16. See 18 U.S.C.A. § 3575 (Supp. 1971) as discussed in *United States* v. *Duardi*, 384 F. Supp. 861 (W.D. Mo. 1973); *United States* v. *Duardi*, 384 F. Supp. 871 (W.D. Mo. 1974); and *United States* v. *Duardi*, 383 F. Supp. 874 (W.D. Mo. 1974).
17. *Tarasoff* v. *Regents of Univ. of California*, 551 P.2d 334,131 Cal. Rptr. 14 (1976), discussed in Brooks, Mental Health Law, 4 Admin. in Mental Health 94 (Fall, 1976). See also Stone, The Tarasoff Decisions: Suing Psychotherapists to Safeguard Society, 90 Harv. L. Rev. 358 (1976).
18. Rubin has estimated that approximately 50,000 persons a year are involuntarily committed on the basis that they are dangerous. Rubin, Predictions of Dangerousness in Mentally Ill Criminals, 27 Arch. of Gen. Psychiat. 397 (1972).
19. A now superseded Washington statute had defined a "mentally ill person" as one "found to be suffering from psychosis or other disease impairing his mental health, and the symptoms of such disease are of a suicidal, homicidal, or incendiary nature, or of such nature which would render such person dangerous to his own life or the lives or property of others." Wash. Rev. Code 71.02.010. A typical formulation is that of Montana, which defines a commitable mentally ill person as one who is "so far disordered in his mind as to endanger health, person, or property." Mont. Rev. Codes Ann. § 38-208 (Interim Supp. 1974).
20. See, e.g., Steadman, Some Evidence on the Inadequacy of the Concept and Determination of Dangerousness in Law and Psychiatry, 1 J. Psychiat. & L. 409, 413 (1973).
21. In Re Alexander, 336 F. Supp. 1305, 1307 (D.D.C. 1972). The court cited Webster's Unabridged New International Dictionary (1955) as defining "injure" a person to mean: "to do harm to"; to hurt; damage; impare; to hurt or wound."
22. See Note, Civil Commitment of the Mentally Ill in California: The Lanterman-Petris-Short Act, 7 Loyola of L.A. L. Rev. 93, 113 (1974). But see § 5300, providing that a patient may be detained for a 90-day period if he has recently either threatened, attempted, or successfully inflicted physical harm upon another individual.
23. The Supreme Court, in *Jackson* v. *Indiana*, 406 U.S. 715 (1972) commented on this, saying, "The basis [for the power exercised in involuntary civil commitments] that have been articulated include dangerousness to self, dangerousness to others, and the need for care or treatment or training. Considering the number of persons affected, it is perhaps remarkable that the substantive constitutional limitations on this power have not been more frequently litigated." 406 U.S. 715, 738 (1972).

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But the Supreme Court has since refused to decide several significant mental health law cases.

For example, the Supreme Court vacated *Lessard* v. *Schmidt*, a landmark case, twice. *Lessard* v. *Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972), vacated on other grounds and remanded 414 U.S. 473 (1974), judgment modified on other grounds and reinstated, 379 F. Supp. 1376 (1974), vacated on other grounds and remanded, 421 U.S. 957, 43 U.S.L.W. 3600 (May 12, 1975). The Court refused to deal with the right to treatment issue in *O'connor* v. *Donaldson*, 422 U.S. 563, 95 S. Ct. 2486 (1975) which it vacated and remanded. It also vacated and remanded *Reynolds* v. *Neil*, 381 F. Supp. 1374 (N.D. Texas 1974), vacated and remanded *sub nom. Sheldon* v. *Reynolds*, 95 Sct. 2671 (1975), a decision dealing with procedures and standards relating to the confinement and treatment of insanity acquittees. It is perhaps not surprising that Dr. Alan Stone has referred to the Court's comment in Jackson as "disingenuous." A. Stone, *Mental Health and Law: A System in Transition* 50 (1975).

24. *Overholser* v. *Russell*, 283 F.2d 195 (D.C. Cir. 1960). The language of the statute required a finding that the "person will not in the reasonable future be dangerous to himself or others." D.C. Code § 24-301(3) (Supp. VII, 1959).
25. Id.
26. *Overholser* v. *O'Beirne*, 302 F.2d 852 (D.C. Cir. 1961).
27. *Overholser* v. *Lynch*, 288 F.2d 388 (D.C. Cir. 1961).
28. Kozol and his colleagues point out that, "the terms used in standard psychiatric diagnosis are almost totally irrelevant to the determination of dangerousness." Kozol, Boucher, and Garafalo, The Diagnosis and Treatment of Dangerousness, 18 Crime & Delinquency 371, 383 (1972).
29. Panel Report: When Is Dangerous, Dangerous?, 1 J. Psychiat. & L. 427, 431 (1973).
30. Jacobs, Psychiatric Examinations in the Determination of Sexual Dangerousness in Massachusetts, 10 N.E. L. Rev. 85 (1974).
31. *Hough* v. *United States*, 371 F.2d 458, 468-469 (D.C. Cir. 1959).
32. *People* v. *Sansone*, 18 Ill. App. 3d 315, 309 N.E. 2d 733, 736 (1st Dist. 1974), leave to appeal denied, 56 Ill. 2d 584 (1974).
33. *Brock* v. *Southern Pacific Co.*, 86 Cal. App. 2d 182, 198, 200, 195 P.2d 66, 76-77 (1948).
34. Wexler and Scoville, The Administration of Psychiatric Justice: Theory and Practice in Arizona, 13 Ariz. L. Rev. 1, 100-101 (1971).
35. Bazelon, The Adversary Process in Psychiatry, Address, Southern California Psychiatric Society, April 21, 1973, as quoted in Shestack, Psychiatry and the Dilemmas of Dual Loyalties, in F. Ayd, Jr., Medical, Moral and Legal Issues in Mental Health Care 11, n.3 (1974).
36. Shah, Some Interactions of Law and Mental Health in the Handling of Social Deviance, 23 Cath. U. L. Rev. 674, 710 (1974). See also Shah, Dangerousness and Civil Commitment of the Mentally Ill: Some Public Policy Considerations, 132 Am. J. Psychiat. 501 (1975). An official publication of the American Psychiatric Association has acknowledged at least a portion of this problem. See, e.g., American Psychiatric Association Task Force Report 8, Clinical Aspects of the Violent Individual (1974) which points out that, "Psychiatrists, in order to be safe, too often predict dangerousness, especially in the case of the mentally ill offenders." At 25.
37. Cohen, The Function of the Attorney and the Commitment of the Mentally Ill, 44 Tex. L. Rev. 424 (1966).

38. Wexler and Scoville, The Administration of Psychiatric Justice: Theory and Practice in Arizona, 13 Ariz. L. Rev. 1 (1971).
39. Zander, Civil Commitment in Wisconsin: The Impact of *Lessard* v. *Schmidt*, 1976 Wis. L. Rev. 503, 526.
40. Id.
41. Pugh, The Insanity Defense in Operation: A Practicing Psychiatrist Views Durham and Brawner, 1973 Wash. U.L.Q. 87, 91.
42. Wexler and Scoville op. cit., n.38, at 100.
43. Zander, op. cit., n.39, at 503.
44. See, e.g., Developments in the Law, Civil Commitment of the Mentally Ill, 87 Harv. L. Rev. 1190, 1253-1258 (1974).
45. 422 U.S. 563 (1975).
46. *Fhagen* v. *Miller*, 29 N.Y. 2d 348, 278 N.E. 2d 615, 617 (1972).
47. Id. at 618.
48. 405 U.S. 504 (1972).
49. Id. at 509, n. 4.
50. Id. at 509.
51. 349 F. Supp. 1078 (E. D. Wis. 1972).
52. Id. at 1086.
53. Id. at 1093.
54. Id. at 1093.
55. Id. at 1093.
56. Id. at 1094.
57. Cal. Welf. & Inst'ns Code § 5250 (1972).
58. 379 F. Supp. 1376, 1379 (E. D. Wis., 1974).
59. Zander, op. cit. at 539.
60. 202 S.E. 2d 109 (W. Va. 1974).
61. 386 F. Supp. 378 (M.D. Ala. 1974).
62. Id. at 391.
63. 422 U.S. 563 (1975).
64. Id. at 575.
65. Id. at 576.
66. Id. at 574, n. 10.
67. Mass. Gen. Laws Ann. Ch. 123 § 7 (1972).
68. Walker, Mental Health Law Reform In Massachusetts, 53 B. U. L. Rev. 986, 994 (1973).
69. Ch. 229 [1975] Laws of the 66th G.A. of Iowa, Ist. Sess. § § 1-82 (1975), as cited in Bezanson, Involuntary Treatment of the Mentally Ill in Iowa: The 1975 Legislation, 61 Iowa L. Rev. 261, 289 (1975).
70. Id.
71. This and other aspects of the "emotional injury standard" are discussed in Bezanson, Involuntary Treatment of the Mentally Ill in Iowa: The 1974 Legislation, 61 Iowa L. Rev. 261, 300-307 (1975).
72. Mass. Gen. Laws Ann. Ch. 123 § 7 (1972).
73. Senate Bill No. 1025, Printer's No. 2097, Section 301 (b)(2)(iii).
74. Id., Section 301 (b)(2)(i).
75. 22 D.C. Code §§ 3501 (I) (1967).
76. 406 F. 2d 964 (D.C. Cir. 1968).
77. 418 F. 2d 109 (D.C. Cir. 1969).
78. Abramson, The Criminalization of Mentally Disordered Behavior: Possible Side Effect of a New Mental Health Law, 23 Hosp. & Commun. Psychiat. 101 (1972).
79. Id.
80. *State* v. *Johnson*, 493 P.2d 1386 (Or. 1972).

81. 422 U.S. 563, 575 (1975). For an illustration of a typical "nuisance" case see transcript of testimony in the case of Alice Kahn in A. Brooks, Law, Psychiatry and the Mental Health System 719-725 (1974). Ms. Kahn called her ex-husband and grown daughter on the phone in the middle of the night. She was committed.