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## TRANSFER OF PRISONERS TO MENTAL INSTITUTIONS

### INTRODUCTION

Ever since the development of the prison system in America in the early 19th century, prisons have been ruled with an iron hand by administrative officials.<sup>1</sup> Prison administrators have historically exercised what many legal scholars characterize as autocratic discretion.<sup>2</sup> The judiciary's traditional "hands-off" policy of deference to prison authorities' supposed expertise has significantly contributed to this development.<sup>3</sup>

The transfer of inmates within the penal system is no exception to this arbitrary discretion.<sup>4</sup> Specifically, the transfer of prisoners from the general prison population to mental hospitals for the criminally insane has been considered, until very recently, a purely administrative determination beyond judicial scrutiny.<sup>5</sup> Moreover, the autocratic power of prison administrators in the field of criminal commitment<sup>6</sup> is statutorily authorized in the vast majority of states. Despite recent advances in the legal rights of the mentally disturbed,<sup>7</sup> the statutory law of criminal commitment has gener-

ally lagged far behind.<sup>8</sup> Criminal commitment procedures in most states remain a matter of administrative discretion and convenience.<sup>9</sup>

In Arkansas, for example, when a prison staff physician (who need not even be trained in psychology or psychiatry) ascertains that a prisoner is mentally ill and certifies this finding to the warden of the prison, it becomes the warden's duty to

<sup>8</sup> United States ex rel. Schuster v. Herold, 410 F.2d 1071, 1083 (2d Cir.), cert. denied, 396 U.S. 847 (1969).

<sup>1</sup> D. RUDOVSKY, THE RIGHTS OF PRISONERS 11-12 (1973).

<sup>2</sup> See, e.g., Hirschkop, *The Rights of Prisoners*, in THE RIGHTS OF AMERICANS 451 (N. Dorsen ed. 1971); Note, *The Fourteenth Amendment and Prisoners: A New Look at Due Process for Prisoners*, 26 HASTINGS L. J. 1277 (1975).

<sup>3</sup> D. RUDOVSKY, *supra* note 1, at 12-16; Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L. J. 506 (1963).

<sup>4</sup> See *Meachum v. Fano*, 427 U.S. 215 (1976), and *Montayne v. Haymes*, 427 U.S. 236 (1976), discussed at length in note 25 *infra*.

<sup>5</sup> See notes 111-15 and accompanying text *infra*.

<sup>6</sup> The term 'criminal commitment' is herein used to describe the involuntary transfer of prison inmates to mental institutions, and is to be contrasted with the term 'civil commitment' which is herein used to describe the commitment of civilians to such institutions. While the commitment of those found incompetent to stand trial and those found innocent of criminal charges by reason of insanity are criminally related commitments, such commitments are not included within the term 'criminal commitment.'

<sup>7</sup> The mentally ill have recently been afforded a multitude of procedural protections in their initial commitment, periodic review of their need for further confinement, and more rigorous protection of their substantive rights during confinement. For detailed explication of this development see B. ENNIS, PRISONERS OF PSYCHIATRY (1972), and B. ENNIS & L. SIEGEL, THE RIGHTS OF MENTAL PATIENTS (1973).

<sup>9</sup> The criminal commitment procedures in thirty-three of the fifty-two jurisdictions surveyed (the fifty states plus the District of Columbia and the United States federal statute) are deplorably unprotective of the prisoners' interests. See, ALA. CODE tit. 22, §§ 52-70 to 72 (1975); ARK. STAT. ANN. § 59-415 (1971); CAL. PENAL CODE §§ 2684-2685 (Supp. 1978); COLO. REV. STAT. §§ 27-23-101 (Supp. 1976); DEL. CODE tit. 11 § 6525 (1974); FLA. STAT. § 945.12 (1971); GA. CODE § 77-310(d) (1973); HAW. REV. STAT. § 334-74 (1976); IDAHO CODE §§ 66-335, 66-1304(d) (1973), 66-1306; IOWA CODE § 247-16 (Supp. 1977-78); KAN. STAT. § 75-5209 (Supp. 1976); KY. REV. STAT. § 202A-190 (1977); MASS. ANN. LAWS ch. 123 § 18 (Michie Law. Co-op Supp. 1977); MINN. STAT. § 241.07 (1972); MISS. CODE ANN. § 47-5-120 (Supp. 1977); MO. REV. STAT. § 552.050 (Supp. 1977); NEB. REV. STAT. § 83-180 (1976); NEV. REV. STAT. § 433A.450 (1975); N.H. REV. STAT. § 607:4 (1955); OHIO REV. CODE ANN. § 5125.05 (Page 1974); OKLA. STAT. ANN. 43A § 61 (West 1954); R.I. GEN. LAWS § 26-4-6 (Supp. 1976); S.D. COMPILED LAWS ANN. § 24-2-24 (Supp. 1977); TEX. CRIM. PRO CODE tit. 46.01, § 2 (Vernon Supp. 1966-67); UTAH CODE ANN. § 77-63a-2 (Supp. 1977); VA. CODE § 192-177 (1977); WASH. REV. CODE § 72.68.031 (Supp. 1976); W. VA. CODE § 28-5-31 (1971); 18 U.S.C.A. § 4241 (West 1976).

By contrast, the procedures in sixteen of the remaining seventeen states are quite procedurally protective of the prisoners' interests, in many cases providing for civil commitment procedures. See, ARIZ. REV. STAT. § 31-224 (1977); CONN. GEN. STAT. ANN. § 17-194c *et seq.* (West Supp. 1977); ILL. REV. STAT. ch. 38 § 1003-8-5 (1975); LA. REV. STAT. ANN. § 28:59 (West 1975); ME. REV. STAT. tit. 34, § 136-A (1978); MICH. COMP. LAWS § 14-800 (1000) *et seq.* (1976); N.J. STAT. ANN. § 30:4-82 (West Supp. 1976); N.Y. CORREC. LAW § 40 (McKinney Supp. 1977); N.C. GEN. STAT. § 122-85 (1974); OR. REV. STAT. §§ 179, 473, 179.476(1) (1977); 50 PA. CONS. STAT. § 7401 (Purdon Supp. 1976); S.C. CODE § 44-23-210 (Supp. 1977); TENN. CODE ANN. § 33-705 (1977); VT. STAT. ANN. tit. 28, § 703 (1977); WIS. STAT. § 51.21(3) (West 1957); 24 D.C. CODE § 302 (1973). The Indiana procedures are also quite protective of the prisoners' interests. However, judicial hearing is not provided for only an administrative hearing before a hearing officer. See IND. CODE ANN. § 16-14-8-1 *et seq.* (Burns 1973).

transfer that prisoner to the state hospital until "reason be . . . restored."<sup>10</sup> The South Dakota criminal commitment statute presents another glaring example of the ease by which a prisoner can be summarily transferred from his prison cell to a state mental institution. That statute provides:

Whenever it shall appear to the satisfaction of the warden and the board of charities and corrections, that any person confined in the penitentiary . . . has become mentally ill . . . the board may order that such person be taken from the penitentiary and be confined and treated in one of the state hospitals for the mentally ill . . . and upon his recovery therefrom, if before the expiration of his sentence, that he be returned to the penitentiary.<sup>11</sup>

California has a similar criminal commitment statute. In that state, a prisoner may be committed if, in the opinion of the Director of Corrections, the prisoner is mentally ill and his "rehabilitation . . . may be expedited by treatment at any one of the state hospitals. . . ."<sup>12</sup> These three criminal commitment statutes are typical of those found in most states.

This broad administrative discretion has often produced catastrophic results. For example, in *Dennison v. State*,<sup>13</sup> the claimant, Dennison, was convicted in 1926 of stealing \$5 worth of candy from a roadside stand and was sentenced to ten years in prison. However, after serving slightly more than one year of that term, he was certified insane by a prison staff physician. Solely on the basis of that certification, and without any notice or hearing, prison officials transferred Dennison to Naponoch, a state mental asylum described as "a repository for unfortunates of varying degrees of imbecility, idiocy and moronity."<sup>14</sup>

As a result of his criminal commitment, Dennison's institutional confinement extended far beyond his original ten year prison sentence. In fact, he spent an additional 24 years in institutional custody merely on the basis of a prison staff physician's opinion that he was a "low grade moron."<sup>15</sup> The court however found this opinion to be a "tragic error"<sup>16</sup> and noted that Dennison had been sane at the time of his commitment.<sup>17</sup>

*Dennison* graphically illustrates the need for rigorous procedural safeguards governing the transfer of prison inmates to mental institutions. When commitment is a routine matter of administrative paper work and rubber stamps, the rights of individuals are severely jeopardized. Preservation of these rights, then, is more than a matter of human decency, it is a mandate of the Due Process and Equal Protection Clauses of the United States Constitution.

## CRIMINAL COMMITMENT AND THE DUE PROCESS CLAUSE

### *The Analytical Framework*

Modern procedural due process analysis is a bifurcated inquiry. First, the court must determine whether there has been a deprivation of sufficient magnitude to warrant application of the due process clause, that is, the court must question whether there has been such a "grievous loss" as to trigger due process.<sup>18</sup> Second, "[o]nce it is determined that due process applied, the question remains what process is due."<sup>19</sup> The answer to this question depends on the peculiar factual circumstances of the individual case and the requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property.<sup>20</sup>

### *Does Due Process Apply?*

Liberty, which is the particular fourteenth amendment interest most directly involved in criminal commitment proceedings, has been given an expansive interpretation by the Supreme Court:

While this Court has not attempted to define with exactness the liberty . . . guaranteed [by the due process clause], the term . . . [w]ithout doubt . . . denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God ac-

<sup>18</sup> Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972); Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

<sup>19</sup> Morrissey, 408 U.S. at 481.

<sup>20</sup> Board of Regents of State Colleges v. Roth, 408 U.S. at 569. Roth concerned a state university's decision not to rehire a non-tenured professor after his one year term of faculty appointment had expired. The Court noted that although the professor's interests in re-employment with the university may have been a major concern to him, that was not enough. <sup>25</sup>[T]o determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the nature of the interest at stake. . . . We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property." *Id.* at 570-71 (emphasis in original).

<sup>10</sup> ARK. STAT. ANN. § 59-415 (1971).

<sup>11</sup> S.D. COMPILED LAWS ANN. §24-2-24 (Supp. 1977).

<sup>12</sup> CAL. PENAL CODE § 2684 (West Supp. 1978).

<sup>13</sup> 49 Misc. 2d 533, 267 N.Y.S.2d 920 (Ct. Cl. 1966).

<sup>14</sup> *Id.* at 536, 267 N.Y.S.2d at 923.

<sup>15</sup> *Id.* at 535, 267 N.Y.S.2d at 922.

<sup>16</sup> *Id.* at 536, 267 N.Y.S.2d at 923.

<sup>17</sup> In fact, the court found that Dennison's confinement at Naponoch itself "caused" him to become insane. *Id.* at 537, 267 N.Y.S.2d at 924.

cording to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.<sup>21</sup>

As defined by the Court, the concept of liberty has been held to include instances wherein a "person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him. . . ." <sup>22</sup> In these situations the deprivation of liberty consists of damage to the individual's "standing and associations in his community."<sup>23</sup> Similarly, the state deprives an individual of his liberty by imposing upon him "a stigma or other disability that forecloses his freedom to take advantage of other employment opportunities."<sup>24</sup>

Unlike a transfer from one prison to another, which the Supreme Court has recently held to be an insufficient deprivation to trigger due process,<sup>25</sup> commitment of a prison inmate to a mental insti-

<sup>21</sup> *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

<sup>22</sup> *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971).

<sup>23</sup> *Board of Regents of State Colleges v. Roth*, 408 U.S. at 573.

<sup>24</sup> *Id.*

<sup>25</sup> In *Meachum v. Fano*, 427 U.S. 215 (1976), inmates who were transferred from minimum security prisons to other prisons "the conditions of which [were] substantially less favorable to the prisoner . . ." [*Id.* at 216], challenged their transfer on due process grounds. They alleged that the administrative hearings which they had been afforded were procedurally deficient because they had not been allowed the right to confront adverse witnesses. The Court, however, held that the interprison transfer did not constitute a deprivation of sufficient magnitude to implicate the due process clause, noting:

Similarly, we cannot agree that any change in the conditions of confinement having a substantial adverse impact on the prisoner involved is sufficient to invoke the protections of the Due Process Clause. The Due Process Clause by its own force forbids the State from convicting any person of crime and depriving him of his liberty without complying fully with the requirements of the Clause. But given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him and subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution. The Constitution does not . . . guarantee that the convicted prisoner will be placed in any particular prison . . . The conviction has sufficiently extinguished the defendant's liberty interest to empower the State to confine him in any of its prisons [emphasis in original].

*Id.* at 224.

See also, *Montayne v. Haymes*, 427 U.S. 236 (1976), decided the same day as *Meachum* and utilizing the same rationale, holding that a prisoner may legally be transferred from one prison to another without a hearing at all, even though the transfer resulted in significantly burdensome consequences for the prisoner.

tution is accompanied by a host of deleterious consequences of sufficient magnitude to implicate the due process clause of the fourteenth amendment.<sup>26</sup> Liberty in its fullest sense is at stake in criminal commitment proceedings. Through such proceedings, freedom from bodily constraints, from mental and emotional oppression, and from damage to reputational interests is put in jeopardy.

The first jeopardy to freedom is that criminal commitment results in the imposition of significantly more onerous physical restraints. The prisoner is invariably placed in a maximum security ward<sup>27</sup> where his freedom of movement within the institution is greatly diminished.<sup>28</sup> His actions are constantly monitored and controlled,<sup>29</sup> and he is subjected to "restrictions and routines . . . which differ significantly from those in a prison."<sup>30</sup> Rules and regulations are inherently vague and subject to *ad hoc*, discretionary interpretation, alteration, and creation by the hospital staff. Consequently, the individual is without adequate notice of the activities which lead to punitive measures.<sup>31</sup>

<sup>26</sup> Indeed, the court in *Sites v. McKenzie*, 423 F. Supp. 1190, (N.D., W. Va. 1976), held that before a prisoner may be transferred from prison to a state mental institution he must be afforded substantially all the procedural safeguards utilized in civil commitment proceedings. It distinguished *Meachum* and *Montayne* noting:

[A] transfer from a state prison to a state mental hospital is substantially different from a transfer from one state prison to another. The grievous loss to a prisoner involved in a transfer to the mental hospital is not merely "any grievous loss," as the *Meachum* Court described deprivations involved in intrastate prison transfers. . . . Rather, it is sufficiently onerous to require the imposition of procedural protections.

*Id.* at 1192-93.

<sup>27</sup> *Wexler and Scovilla, The Administration of Psychiatric Justice: Theory and Practice in Arizona*, 3 ARIZ. L. REV. 1, 187-88 (1971).

<sup>28</sup> *United States ex rel. Schuster v. Herold*, 410 F.2d 1071, 1078, 1090 (2d Cir.), cert. denied, 396 U.S. 847 (1969). In addition the court noted, in the appendix to its opinion, some thirty-five specific ways in which restrictions of the mental institution were significantly more onerous than the corresponding rules of the prison. These included such items as the scheduling and types of meals served, regularity of rules and procedures, types of "guarding" utilized, personal clothing and hygiene allowed, and mail privileges.

<sup>29</sup> See *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1194-96, 1358-65 (1974) ("[such] deprivations of liberty may be necessary to preserve order and to protect patients from self-inflicted injury.").

<sup>30</sup> *Matthews v. Hardy*, 420 F.2d 607, 611 (D.C. Cir. 1969), cert. denied, 397 U.S. 1010 (1970).

<sup>31</sup> *Id.* at 1359-60, *Ferleger, Loosing the Chains: In-Hospital Civil Liberties of Mental Patients*, 13 SANTA CLARA LAW. 447, 456 (1973).

Additionally, the imposition of institutional discipline for prohibited activities is much more severe in a mental hospital than in a prison. Mental patients may be subjected to beatings for no cause<sup>32</sup> and the use of seclusion, strip cells, and mechanical restraints (such as strapping the patient to his bed) are among the myriad of dehumanizing indignities often imposed for minor "offenses."<sup>33</sup> Moreover, much of the "treatment" in mental institutions constitutes serious invasion of bodily privacy. Forced injections of drugs, electro-shock treatments, and lobotomies severely debase personal autonomy and are still in widespread use.<sup>34</sup>

Commitment to a mental institution also curtails the prisoner's physical liberty because it may extend the length of his incarceration. In *Baxstrom v. Herold*,<sup>35</sup> the Supreme Court held that a transferred prisoner cannot be confined in a mental institution beyond the end of his prison sentence unless he is formally committed under a state civil commitment statute or similarly protective procedures. Despite *Baxstrom*, though, the prisoner may still lose the opportunity for early release through the parole and "good time" systems employed by the state prisons. In some states, parole is statutorily un-

available to prisoners who have been committed.<sup>36</sup> Even where parole is not statutorily precluded, parole boards are extremely reluctant to grant parole to committed prisoners and the practical result is the same as if there were a statutory preclusion.<sup>37</sup> This lost opportunity for parole may itself constitute a sufficient deprivation of liberty to implicate the due process clause. The Supreme Court has held that an individual must be afforded due process prior to the revocation of parole<sup>38</sup> or probation.<sup>39</sup> More specifically, other courts have held that the denial of parole is a sufficient deprivation of liberty to warrant observance of due process in parole determinations.<sup>40</sup> Thus, since committed prisoners lose the opportunity for early release through parole, criminal commitment should be considered so grievous of a loss as to warrant invocation of the due process clause.

Furthermore, the committed prisoner's period of incarceration may well be extended beyond the expiration of his prison sentence as a result of his transfer to a mental institution. Civil commitment of a prisoner who is already confined in a mental institution is little more than a rubber stamp proceeding, despite the application of rigorous procedural safeguards. The civil commitment determination, whether made by judge or jury, hinges almost exclusively on psychiatric expert testimony.<sup>41</sup> The psychiatrist's determination is likely to be a foregone conclusion based exclusively on his preconceived belief that a currently committed

<sup>32</sup> Rosenhan, *On Being Sane In Insane Places*, 13 SANTA CLARA LAW. 379 (1973). Professor Rosenhan conducted an experiment under which eight sane people were secretly admitted to mental institutions in order to test whether their sanity could be detected by the hospital staff and psychiatrists. In describing and interpreting the outcome of this experiment, Professor Rosenhan noted:

I have records of patients who were beaten by staff for the sin of having initiated verbal contact. During my own experience [Professor Rosenhan was one of those secretly admitted], for example, one patient was beaten in the presence of other patients for having approached an attendant and told him, "I like you." Occasionally punishment meted out seemed so excessive that it could not be justified by the most radical interpretations of psychiatric canon. Nevertheless, they appeared to go unquestioned.

*Id.* at 394. It should be noted that these hospitals were considered progressive. The conditions existing in maximum security wards must therefore be significantly worse.

<sup>33</sup> *Chesney v. Adams*, 377 F. Supp. 887, 889 (D. Conn. 1974), *aff'd*, 508 F.2d 836 (1975); *Ferleger*, *supra* note 31, at 447-49, 483-93.

<sup>34</sup> See Livermore, Malmquist, and Meehl, *On the Justifications for Civil Commitment*, 117 PA. L. REV. 75, 94-95 (1968); *Ferleger*, *supra* note 31, at 469-71, 473-77; *Developments in the Law*, *supra* note 30, at 1194-96; Note, *Due Process for All—Constitutional Standards for Involuntary Civil Commitment and Release*, 34 U. CHI. L. REV. 633, 645-46 (1967).

<sup>35</sup> 383 U.S. 107 (1966). See pp. 26-28 *infra*.

<sup>36</sup> See, e.g., MONT. REV. CODES ANN. § 38,501 and N.J. REV. STAT. § 30:4-107.

<sup>37</sup> *United States ex rel. Schuster v. Herold*, 410 F.2d at 1076; *Matthews v. Hardy*, 420 F.2d at 611; *Chesney v. Adams*, 377 F. Supp. at 893; *Wexler and Scoville*, *supra* note 27, at 184 (in Arizona the transferred prisoner loses certain "good time" benefits).

<sup>38</sup> *Morrissey v. Brewer*, 408 U.S. 471 (1972).

<sup>39</sup> *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

<sup>40</sup> *Bradford v. Weinstein*, 519 F.2d 728 (4th Cir. 1971), *vacated as moot*, 423 U.S. 147 (1975); *Franklin v. Shields*, 399 F. Supp. 309 (W.D. Va.), *cert. denied*, 423 U.S. 1037 (1975).

<sup>41</sup> The *Wexler and Scoville* study, *supra* note 27, at 60, demonstrates that the psychiatrist's "recommendation is probably the single most important factor in the commitment decision," noting that it was followed by either the judge or jury in 96.1% to 97.9% of the cases surveyed. "This extraordinary correlation, coupled with data gleaned from interviews with judges throughout the state [Arizona], can lead to only one conclusion—nearly total reliance is placed on the recommendations of the physician." *Id. Accord: B. ENNIS, PRISONERS OF PSYCHIATRY* (1972); L. LINN, A HANDBOOK OF HOSPITAL PSYCHIATRY: A PRACTICAL GUIDE TO THERAPY (1955).

prisoner must be mentally ill.<sup>42</sup> Therefore, the prison administrators' initial commitment decision, which ostensibly is to last no longer than the prisoner's sentence, is often dispositive of the prisoner's situation for a much longer period. In many

<sup>42</sup> T. SZASZ, LAW, LIBERTY, AND PSYCHIATRY 59 (1963); *Id.* at 171 (quoting *Overholser v. DeMarcos*, 149 F.2d 23, 24-25 (D.C. Cir.)), *cert. denied*, 325 U.S. 889 (1945):

[I]t is not the function of the Judge in habeas corpus proceedings to determine the mental condition of a person who has been committed for insanity. . . . [I]t should be remembered that persons committed . . . are presumed to be insane. . . . There is also a presumption that the hospital staff are competent . . . and that their opinion . . . is correct. Their determination that a petitioner should not be at large . . . must not be lightly disregarded. . . . The issue which must ultimately be decided is whether he has sufficiently recovered from a mental disease, so that he may be safely released. Lay judgment on such an issue is of little value. If, despite the judgment of the hospital staff that the petitioner has not recovered, there is a substantial doubt on the question, it becomes the duty of the court to see that a new judgment on the petitioner's sanity is made according to the procedure laid down in the District of Columbia code. This procedure requires an examination and report by the Commission on Mental Health [italics added].

Rosenhan, *supra* note 32, at 388 ("Given that the patient is in the hospital, he must be psychologically disturbed."); Wexler and Scoville, *supra* note 27, at 202 (Several psychology graduate students were secretly placed in a mental institution in order to observe the conditions existing in the institution first hand. One of them made the following observation regarding his inability to convince the hospital staff of his sanity and true identity:

It was about one o'clock in the morning before the technicians were finally able to sit down and talk with me. I began by telling them who I was and why I was there. Nothing had prepared me for their response: "Tell us more about your delusions!" In my initial shock, I became obviously and overtly confused, merely adding more to the "clinical picture" of their newest patient. I began to be filled, indeed swept, with all kinds of feelings. First was a paranoia about my own state. If the technicians really thought I was a patient, perhaps I would have difficulty getting out, a point about which Dr. Levy had been particularly reticent. But even more was an anger combined with a sense of disbelief and pity for those who really were there. I had done nothing throughout the day to allow the technicians to suspect even remotely that I had any psychological problems except present myself to the hospital. And it suddenly occurred to me that this was the ultimate criterion if you were here in a mental hospital there must be something wrong with you. But, not only was there not enough wrong with me to require hospitalization, there was equally little wrong with many of the patients that I saw on our ward.

*Id.* (emphasis added).

instances the prisoner remains committed for the rest of his life.<sup>43</sup> Consequently, the initial commitment of a prisoner must be considered more than a mere administrative transfer from one penal facility to another.

The second jeopardy to freedom is that criminal commitment endangers the individual's liberty, as that term is used in due process analysis, by subjecting the individual to severe mental and emotional stress and oppression. Mental patients are frequently drugged into docility<sup>44</sup>—a constant state of apathy nothing short of mental oppression.<sup>45</sup> The patient is thus deprived of the freedom of his own imagination and creative thought.<sup>46</sup>

The pacifistic effect of these tranquilizing drugs on the individual's will to resist<sup>47</sup> deprives the patient of the very essence of his humanity and his intellect.

Moreover, the very nature of institutional psychiatry, as practiced in the United States today,

<sup>43</sup> "There is repetitive evidence that once a patient has remained in a large mental hospital for two years or more, he is quite unlikely to leave except by death. He becomes one of the large mass of so-called 'chronic patients'." *United States ex rel. Schuster v. Herold*, 410 F.2d at 1079.

<sup>44</sup> See Shaffer, *Introduction, Symposium: Mental Illness, The Law and Civil Liberties*, 13 SANTA CLARA LAW. 369, 370 (1973):

Mental Hospitals are malign, global places. Mental patients are still beaten, shocked, drugged, or mutilated into submission. Even where these abuses are controlled, as they are probably controlled today in many places . . . the environment and the haze of drug-induced docility appear to create and confirm illness and deviance rather than 'cure' it.

<sup>45</sup> "Medication" (in most cases Thorazine, a highly potent tranquilizer) is uniformly administered without any determination of individual need. Wexler and Scoville, *supra* note 27, at 193. Moreover, if "medication" is refused by the patient, it is forcefully administered by means of intramuscular injection, and the patient is often punished with seclusion for his refusal. Ferleger, *supra* note 31, at 469-73.

<sup>46</sup> For example, consider the observations of a clinical psychology graduate student who, as part of a project examining mental health care institutes in the state of Arizona, was "planted" in an institution without revealing his true identity to the hospital staff or to the other patients:

I spent the morning . . . talking to other patients. One young woman interested me and I attempted to learn something about her. This soon became a very futile attempt, however, for I found that she was apparently so drugged that she found it difficult to carry as much as a single sentence in her thoughts before totally losing what I had said.

Wexler and Scoville, *supra* note 27, at 203.

<sup>47</sup> See Wexler and Scoville, *id.* at 66-69.

jeopardizes the individual's psychological autonomy. Involuntary institutional psychiatry has come under attack in the past fifteen years from critics both within the medical and the legal professions.<sup>48</sup> Doctor Thomas Szasz is the most caustic and prolific of these critics. The core of his criticism is the proposition that involuntary institutional psychiatry has enslaved the individuals it sought to aid,<sup>49</sup> resulting in "psychoauthoritarianism,"<sup>50</sup> "therapeutic tyranny,"<sup>51</sup> and "psychiatric slavery."<sup>52</sup> According to Szasz:

Most of the legal and social applications of psychiatry, undertaken in the name of psychiatric liberalism, are actually instances of despotism. To be sure, this type of despotism is based on health values, but it is despotism nonetheless. Why? Because the promoters of mental health do not eschew coercive methods but, on the contrary, eagerly embrace them. Just as in democracy, there lurks the danger of tyranny by the majority, so in mental-health legislation there lurks the danger of tyranny by therapy.

... [T]oday psychiatry in the United States is all too often used to subvert traditional political guarantees of individual liberty.<sup>53</sup>

... Scientific knowledge does not contain within itself directions for its "proper" humanitarian use.<sup>54</sup>

Szasz maintains that institutional psychiatry has become a form of social engineering synonymous with institutional brainwashing. The individual whose conduct is socially unacceptable is committed, his behavior is corrected ("treated"), and his mind is reshaped.<sup>55</sup> Mental health is equated with social and moral goodness, and mental illness with

social and moral turpitude.<sup>56</sup> Thus, those who behave "abnormally," that is in a socially unacceptable manner,<sup>57</sup> are considered mentally ill and in need of "therapy":

Institutional psychiatry is part of a broad, old, but ever new movement to solve problems by eliminating people who create or carry problems; the "mentally ill" like the aged ill, the retarded, and the unborn, are social nuisances—which tells you nothing about them, but everything about the rest of us.<sup>58</sup>

Psychiatrists conceal this inherent conflict of interest between themselves and their patients' liberty by "cloth[ing commitment] in a mantle of therapeutic paternalism."<sup>59</sup> They disguise it with a "facade of benevolence"<sup>60</sup> and an alleged interest in the patients' well-being:

[C]ommitment serves the institutional values of psychiatry as a system of social control. Yet, psychiatry is not explicitly defined as an agency of social control as, for example, is the police. Its controlling function is hidden under a facade of medical and psychiatric jargon, and is buttressed by a self-proclaimed desire to help or treat so-called mentally ill persons.<sup>61</sup>

As a consequence of these factors, the inmate transferred from a prison to a mental institution sacrifices psychic liberty for "psychiatric coercion"<sup>62</sup> in the guise of "treatment."<sup>63</sup> This is per-

<sup>56</sup> *Id.* at 3.

<sup>57</sup> *Id.* at 55.

<sup>58</sup> Shaffer, *supra* note 44, at 371-72. See also T. SZASZ, *supra* note 42, at 196-97 (the psychiatrist as the "social tranquilizer"); Gerbode, *supra* note 48, at 622.

This myth [that mental illness can be defined, diagnosed, and cured] provides a justification for what is a persistent tendency in societies toward persecuting the unpopular. The road to 1984 begins with persecution of a minority and ends with persecution of the majority. The concept of mental illness is inconsistent with a free society, where even the weird, unwanted, and troublesome must have the full protection of the laws. If a person commits crimes, he should be prosecuted with full legal safeguards, but if not, he should be free to pursue whatever existence he chooses. I advocate ... that we abolish the problem of mental illness by abolishing the concept of mental illness.

<sup>59</sup> T. SZASZ, *supra* note 42, at 43.

<sup>60</sup> *Id.* at 55.

<sup>61</sup> *Id.* at 39.

<sup>62</sup> *Id.* at 6.

<sup>63</sup> See Bazelon, *Forward, Symposium: Mental Illness, The Law and Civil Liberties*, 13 SANTA CLARA LAW. 367, 368 (1973): This cannot be "blamed on the psychiatric profes-

<sup>48</sup> See B. ENNIS, *PRISONERS OF PSYCHIATRY* (1972); R. LAING, *THE POLITICS OF EXPERIENCE* (1967), R. LAING & A. ESTERSON, *SANITY, MADNESS, AND THE FAMILY* (1964); T. SZASZ, *supra* note 42, *THE MYTH OF MENTAL ILLNESS* (1961), *THE MANUFACTURE OF MADNESS* (1970), and *PSYCHIATRIC SLAVERY* (1977); Gerbode, *Book Review*, 13 SANTA CLARA LAW. 161 (1973).

<sup>49</sup> The psychiatric abuses of power have become so grave, in Szasz's opinion, that "[l]iberty against psychiatry" is his suggestion for reform, namely the abolition of the psychiatric control over involuntary institutionalization. T. SZASZ, *supra* note 42, at 6. See also, Gerbode, *supra* note 48, at 622.

<sup>50</sup> T. SZASZ, *supra* note 42, at 101. (quoting Wertham, *Psychoauthoritarianism and the Law*, 22 U. CHI. L. REV. 336, 338 (1955)).

<sup>51</sup> *Id.* at 7.

<sup>52</sup> T. SZASZ, *PSYCHIATRIC SLAVERY* (1977). See also, B. ENNIS, *PRISONERS OF PSYCHIATRY* (1972).

<sup>53</sup> T. SZASZ, *supra* note 42, at vii-viii.

<sup>54</sup> *Id.* at 92.

<sup>55</sup> *Id.* at vii, 4, 39, 43.

haps the most severe deprivation involved in the commitment of prisoners to mental institutions.<sup>64</sup>

Criminal commitment jeopardizes the transferred prisoner's psychic liberty in still another manner. It may actually cause insanity or contribute to an already existing psychiatric disorder. As one court has stated:

[W]e are faced with the obvious but terrifying possibility that the transferred prisoner may not be mentally ill at all. Yet he will be confined with men who are not only mad, but dangerously so. . . . [H]e will be exposed to physical, emotional, and general mental agony. Confined with those who are insane, told repeatedly that he too is insane and indeed treated as insane, it does not take much for a man to question his own sanity and in the end to succumb to some mental aberration. . . .

[T]here is considerable evidence that a prolonged commitment in an institution providing only custodial confinement for the "mentally sick" and nothing more may itself cause serious psychological harm or exacerbate any pre-existing condition.<sup>65</sup>

Evidence indicates that the vast majority of mental institutions throughout the country, and virtually all maximum security wards in such institutions, provide nothing more than custodial

sion. Rather, it reflects society's reluctance to create adequate social or legal mechanisms to deal with the problems we dump into psychiatry's lap. We prefer to assume that by labelling the process "medical" and its results "treatment" we can convert coercion into benevolence and deprivation into help."

<sup>64</sup> Indeed, while some scholars have advocated that mental patients should be recognized as possessing a constitutional right to treatment, see note 68 *infra*, others have taken into consideration this grave psychological oppression disguised as treatment and have concluded that courts should instead recognize the patients' constitutional right to *refuse* treatment. See, e.g., T. SZASZ, at 214-15 (the right to treatment rubric is "both naive and dangerous," and has been readily accepted in legal and medical psychiatric circles because it "support[s] the myth that mental illness is a medical problem that can be solved by medical means."); Shaffer, *supra* note 44, at 371.

<sup>65</sup> *United States ex rel. Schuster v. Herold*, 410 F.2d at 1078-79. See also, *Matthews v. Hardy*, 420 F.2d at 611; *Chesney v. Adams*, 377 F. Supp. at 893; *Dennison v. State*, 49 Misc. 2d 933, 267 N.Y.S.2d 920, (1966), *rev'd on other grounds*, 28 App. Div. 2d 608, 280 N.Y.S.2d 31 (1967), *aff'd* 23 N.Y.2d 996, 298 N.Y.S.2d 1002 (1969), *cert. denied*, 397 U.S. 923 (1970):

The conclusion is inescapable that although the . . . [transferred prisoner] did become psychotic after several years at the . . . [state mental hospital], the psychosis . . . was caused by the nature of his confinement. In a sense, society labeled him as a sub-human, placed him in a cage with genuine sub-

confinement.<sup>66</sup> Patients are rarely visited by doctors, and when they are, "therapy" seldom lasts more than several minutes.<sup>67</sup> Moreover, psychiatric hospitals are so understaffed that it has become physically impossible to provide adequate treatment.<sup>68</sup>

[M]ost inmates [of mental institutions] receive little attention and much abuse, and . . . those who are given any ministrations at all are given whatever can be devised to keep them quiet. The honest rubric for this . . . is protection from the deviant, for society and for the family (but not from the family for the deviant). . . .

Habilitation (or rehabilitation) is at best a promise to condition the "patient" into conformity . . . and at worst a benign, hypocritical excuse for containment. . . .<sup>69</sup>

Clinical studies also support the proposition that commitment may itself cause or contribute to insanity. Professors Wexler and Scoville found that psychology graduate students posing as mental patients experienced psychological pressures in the institution which caused severe anxiety. If the students had not known that their stay was only

humans, drove him insane, and then used his insanity as an excuse for holding him indefinitely in an institution with few, if any, facilities for genuine treatment and rehabilitation of the mentally ill.

<sup>66</sup> *Morris, Criminality: and the Right to Treatment*, 36 U. CHI. L. REV. 784, 790 (1969); Wexler and Scoville, *supra* note 27, at 186-88, 200, 202-03, 205-06, 235-36; Comment, *Due Process for All—Constitutional Standards for Involuntary Civil Commitment and Release*, 34 U. CHI. L. REV. 633, 634 (1967).

<sup>67</sup> Wexler and Scoville, *supra* note 27, at 192-94. Rosenhan, *supra* note 32, at 391-93, 396-97: "Physicians, especially psychiatrists . . . were rarely seen on the wards. Quite commonly, they would only be seen when they arrived and departed, with the remaining time being spent in their offices. . . ." *Id.* at 392.

<sup>68</sup> *Dixon v. Attorney General of Commonwealth of Penn.*, 325 F. Supp. 966, 969 (M.D. Pa. 1971). Courts and legal scholars have recently noted this gross inadequacy of treatment and have concluded that mental patients are thereby being deprived of their constitutional right to treatment. The case law and scholarly material on the right to treatment has become voluminous. See, e.g., *Welsch v. Linkins*, 373 F. Supp. 487 (D. Minn. 1974); *Wyatt v. Stickney*, 344 F. Supp. 373, 387 (M.D. Ala. 1972); *Nason v. Superintendent of Bridgewater State Hospital*, 353 Mass. 604, 233 N.E.2d 908, (1968); *Birnbaum, The Right to Treatment*, 46 ABA J. 499 (1960); *Katz, The Right to Treatment—An Enchanting Legal Fiction*, 36 U. CHI. L. REV. 755 (1969); *Morris, supra* note 66; *Symposium: The Right to Treatment*, 57 GEORGETOWN L.J. 673 (1969). Note, *Civil Restraint, Mental Illness, and the Right to Treatment*, 77 YALE L.J. 87 (1967).

<sup>69</sup> Shaffer, *supra* note 44, at 371.



temporary, these pressures would have undoubtedly culminated in insanity.<sup>70</sup> Professor Rosenhan obtained similar results in a study wherein eight sane people were secretly admitted to twelve different mental hospitals to determine if the hospital psychiatrists and staff could detect their sanity. These individuals uniformly indicated that "[t]he psychological stresses associated with hospitalization were considerable, and all but one of the pseudopatients desired to be discharged almost immediately after being admitted."<sup>71</sup>

Aside from bodily constraints and emotional oppression, the final jeopardy to freedom caused by criminal commitment is the damage commitment does to the individual's reputation. The label "mentally ill," placed on the prisoner as a result of his transfer to a mental institution, stigmatizes him for the rest of his life. Upon release he is "socially ostracized and victimized by employment and educational discrimination."<sup>72</sup> In effect, the criminally committed are "'twice-cursed' as both mentally ill and criminal . . ."<sup>73</sup> The general public simply does not regard the mentally ill in the same light as they do the physically ill. Mental illness is

<sup>70</sup> Wexler and Scoville, *supra* note 27, at 189-206. One student had this to say about his experience:

My defense for the very real fears I was feeling was to become more or less catatonic. . . . [I] could not escape physically from my surroundings. So I escaped within myself. I probably would have degenerated to the state of many of the young patients I observed, had it not been for the saving knowledge that I was a short-term visitor and not a semi-permanent resident. As it was, I found myself trying to become more and more like the other patients, trying not to be different in any way. . . . [I] was modeling the patient.

*Id.* at 199.

<sup>71</sup> Rosenhan, *supra* note 32, at 384.

<sup>72</sup> *Developments in the Law*, *supra* note 29, at 1200. The stigmatic disapprobation that accompanies the label "mentally ill" has been extensively documented in psychiatric literature. See, e.g., H. FREEMAN, O. SIMMONS, *THE MENTAL PATIENT COMES HOME* (1963); J. NUNAN, *POPULAR CONCEPTIONS OF MENTAL HEALTH* (1961); Cummings & Cummings, *On the Stigma of Mental Illness*, 1 *COMM. MENT. HEALTH* J. 135 (1965); Farina & Ring, *The Influence of Perceived Mental Illness of Interpersonal Relations*, 70 *J. ABNORMAL PSYCH.* 47 (1965); Johansen, *Attitudes Toward Mental Patients: A Review of Empirical Research*, 53 *MENT. HYGIENE* 218 (1969); Sarbin, *On the Futility of the Proposition that Some People be Labeled "Mentally Ill"*, 31 *J. CONSULTING PSYCH.* 447 (1967); Sarbin & Mancuso, *Failure of a Moral Enterprise: Attitudes of the Public Toward Mental Illness*, 35 *J. CONSULT. & CLINICAL PSYCH.* 159 (1970); Steadman & Keveles, *The Community Adjustment and Criminal Activity of the Baxstrom Patients: 1966-1970*, 129 *AM. J. PSYCH.* 304 (1972).

<sup>73</sup> *United States ex rel. Schuster v. Herold*, 410 F.2d at 1073. Morris, *The Confusion of Confinement Syndrome: An*

never considered to be fully cured,<sup>74</sup> and as Rosenhan notes:

A broken leg is something one recovers from, but mental illness allegedly endures forever. A broken leg does not threaten the observer, but a crazy schizophrenic? There is by now a host of evidence that attitudes toward the mentally ill are characterized by fear, hostility, aloofness, suspicion, and dread. The mentally ill are society's lepers.

That such attitudes infect the general population is perhaps not surprising, only upsetting. But that they affect the professionals—attendants, nurses, physicians, psychologists [*sic*], and social workers—who treat and deal with the mentally ill is more disconcerting, both because such attitudes are self-evidently pernicious and because they are unwitting.<sup>75</sup>

In summary, the transfer of prisoners to mental institutions is much more than a mere administrative relocation within the penal system. The transfer actually results in a significant deprivation of physical, psychic and reputational interests. Since the due process clause is designed to protect against deprivations to liberty, the prisoner must be afforded procedural safeguards which comport with constitutional due process standards, before his transfer can be decreed legal.

### *What Process Is Due?*

Once the due process clause is triggered, the procedural safeguards required by the particular factual circumstances must be determined. "The interpretation and application of the Due Process clause are intensely practical matters and . . . '[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation'."<sup>76</sup> The Supreme Court has made it abundantly clear that the determination of what process is due turns on a balance-

*Analysis of the Confinement of Mentally Ill Criminals and Ex-Criminals by the Dept. of Correction of the State of New York*, 17 *BUFF. L. REV.* 651, 652 (1968).

<sup>74</sup> Rosenhan, *supra* note 32, at 389-90.

A psychiatric label has a life and an influence of its own. Once the impression has been formed that the patient is schizophrenic, the expectation is that he will continue to be schizophrenic. When a sufficient amount of time has passed, during which the patient has done nothing bizarre, he is considered to be in remission and available for discharge. But the label endures beyond discharge, with the unconfirmed expectation that he will behave as a schizophrenic again.

*Id.* at 389.

<sup>75</sup> *Id.* at 390-91 (footnotes omitted).

<sup>76</sup> *Goss v. Lopez*, 419 U.S. 565, 578 (1975).

ing of competing interests<sup>77</sup> and on an interpretation of the rudimentary concepts of fundamental fairness:

"Due Process" is an elusive concept. Its exact boundaries are undefinable, and its context varies according to specific factual contexts. . . . [A]s a generalization, it can be said that due process embodies the differing rules of *fair play*, which through the years have become associated with differing types of proceedings.<sup>78</sup>

Despite the amorphous character of due process, the Court has established certain "benchmarks"<sup>79</sup> deemed necessary to ensure fairness and "provide a meaningful hedge against erroneous action."<sup>80</sup> Among these benchmarks is the concept that due process requires for deprivation of life, liberty or property to be "preceded by notice and opportunity for hearing appropriate to the nature of the case."<sup>81</sup>

In addition to notice and the opportunity to be heard, there are other "quasi-fundamentals" which the Court has indicated will be required in nearly every instance:

In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. . . . [Moreover], "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."<sup>82</sup>

The balance of interests involved in a criminal commitment includes a number of factors which should cause the judicial scale to weigh heavily on

<sup>77</sup> *Id.* at 579.

<sup>78</sup> *Hannah v. Larche*, 363 U.S. 420, 442 (1960). "Due process is that which comports with the deepest notions of what is fair and right and just. The more fundamental the beliefs are the less likely they are to be explicitly stated," *Solesbee v. Balkcom*, 339 U.S. 9, 16 (1950) (Frankfurter, J., dissenting).

<sup>79</sup> *Goss v. Lopez*, 419 U.S. at 578.

<sup>80</sup> *Id.* at 583.

<sup>81</sup> *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950). As evidence that even these seemingly immutable requisites are not absolute, however, see *Ingram v. Wright*, 430 U.S. 651 (1977), where the Court for the first time found that a deprivation was involved (corporal punishment of students by teachers) of sufficient magnitude to trigger the due process clause, and yet held that due process was satisfied without any hearing on the propriety *vel non* of that deprivation (the student would receive only a *post*-deprivation opportunity to be heard on the limited issue of whether the punishment meted out was excessive; and even this would have to be initiated by the student by way of a subsequent remedial suit for damages).

<sup>82</sup> *Goldberg v. Kelly*, 397 U.S. 254, 269-70 (1970).

the side of strict procedural safeguards.<sup>83</sup> The states' interest in streamlined criminal commitment procedures which allow prison administrators vast discretion is minimal. The states' major concern is that the administrative cost of a full adversary hearing would be staggering in terms of both time and money.<sup>84</sup> However, this is insufficient justification, standing alone, for the denial of rigid procedural safeguards. In *Stanley v. Illinois*<sup>85</sup> the Court noted that:

[t]he establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy which may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.<sup>86</sup>

The fact that full adversary hearings are currently mandated in criminal commitment proceedings in a significant number of states, amply demonstrates that stringent procedural safeguards are administratively feasible and not prohibitively expensive.<sup>87</sup>

It has been argued that the state has another

<sup>83</sup> Indeed the severe mental oppression to which the individual is subjected as a result of commitment, both civil and criminal, has led one legal scholar to the conclusion that "the ultimate objective . . . [should be] to abolish institutional psychiatry . . . altogether. One either opens the doors of the institution or erects such imposing legal protections against involuntary commitment as to make it impossible to lock the doors." Shaffer, *supra* note 44, at 371.

<sup>84</sup> This floodgates argument was made in *United States ex rel. Schuster v. Herold*, 410 F.2d 1071 (2d Cir.), *cert. denied*, 396 U.S. 847 (1969). The court rejected the argument noting: "When measured against the possibility that persons committed . . . summarily . . . were wrongly subjected to the horrors of a prison for the insane, any inconvenience is . . . small by comparison. If we open any 'floodgate' today, which we doubt, it is only to provide a flood of long-overdue relief." *Id.* at 1087.

<sup>85</sup> 405 U.S. 645 (1972).

<sup>86</sup> *Id.* at 656. See also, *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) (legislative action undertaken "solely for the purpose of achieving administrative convenience, necessarily . . . involves the 'very kind of arbitrary legislative choice forbidden by the [Constitution]'.")

<sup>87</sup> See the criminal commitment statutes of the seventeen liberal states cited in note 9, *supra*, but especially ILL. REV. STAT. ch. 38 § 1003-8-5, MICH. COMP. LAWS § 14.800 (1000) *et seq.*, and N.C. GEN. STAT. § 122.85 and § 122.58.1 *et seq.*

interest in streamlined commitment procedures. Under its police power the state has an interest in protecting third parties from the alleged mentally ill individual, and under its *parens patriae* power an interest in protecting this individual from himself. Therefore, to the extent that rigorous procedures "may impair the state's ability to commit a person who falls within [state commitment] standards, the state has an interest in preventing its adoption."<sup>88</sup> However, this argument is fallacious in several respects. For one thing, the state's interest in protecting the community from the mentally ill individual may be "infringed by procedures which may increase the likelihood of error, such as the recognition of a right to remain silent, but not by those procedures designed only to increase the accuracy of the factfinding process, such as the provision of a hearing on the merits."<sup>89</sup> Moreover, prisons are by their very nature controlled environments. The possibility that a mentally disturbed prisoner may harm his fellow inmates is substantially minimized by prison security. If indeed the prisoner does pose a danger to fellow inmates, an emergency commitment procedure could be established whereby the full adversary hearing is postponed.<sup>90</sup> Finally, streamlined criminal commitment procedures, and indeed criminal commitment itself, cannot be justified by benevolent protestations that the commitment is for the prisoner's own well-being. Patients in mental institutions do not receive adequate treatment and their condition is more likely to be exacerbated than ameliorated by their commitment.<sup>91</sup> This is particularly true with respect to committed prisoners inevitably placed in maximum security wards where mere custodial confinement is the rule rather than the exception.<sup>92</sup>

In contrast to the nature of the state's interest, the prisoner's interests involved in criminal commitment proceedings are immense. As previously noted, his liberty is gravely jeopardized, and he stands to suffer significantly if committed.<sup>93</sup> More-

over, the weight of his interest in liberty is augmented by the significant possibility of erroneous commitment. This possibility arises from the inability of psychiatrists to define and diagnose mental illness accurately. Psychiatry is an inherently imprecise "science"<sup>94</sup> because mental health and mental illness are vague, almost meaningless term[s].<sup>95</sup>

One need only glance at the diagnostic manual of the American Psychiatric Association to learn what an elastic concept mental illness is. It ranges from massive functional inhibition characteristic of one form of catatonic schizophrenia to those seemingly slight aberrancies associated with an emotionally unstable personality, but which are so close to conduct in which we all engage as to define the entire continuum involved. Obviously the definition of mental illness is left largely to the user and is dependent upon the norms of adjustment that he employs. Usually the use of the phrase "mental illness" effectively masks the actual norms being applied. And, because of the unavoidably ambiguous generalities in which the American Psychiatric Association describes its diagnostic categories, *the diagnostician has the ability to shoehorn into the mentally diseased class almost any person he wishes, for whatever reason, to put there.*<sup>96</sup>

This assessment of the concept of mental illness comports with Dr. Thomas Szasz's belief that mental illness is a "myth,"<sup>97</sup> something which psychiatrists "manufacture"<sup>98</sup> on the basis of their own whimsical predilections of what is morally and socially acceptable conduct.<sup>99</sup> The inherent inability of psychiatry to distinguish sanity from insanity is graphically demonstrated by Professor Rosenhan's study.<sup>100</sup>

The imprecision of psychiatry as a "science" is amplified in the criminal commitment setting because prison staff physicians who conduct examinations of prisoners typically lack adequate psy-

<sup>94</sup> Psychiatry is perhaps more accurately described as a "non-science." Roth, Dayley, and Lerner, *Into the Abyss: Psychiatric Reliability and Emergency Commitment Statutes*, 13 SANTA CLARA LAW. 400, 402-11 (1973) (psychiatric prediction on mental illness is no more accurate than chance).

<sup>95</sup> T. SZASZ, *supra* note 42, at viii.

<sup>96</sup> Livermore, Malmquist, and Meehl, *supra* note 34, at 80 (emphasis added), (footnotes omitted); *Accord*: Roth, Dayley, and Lerner, *supra* note 94, at 411.

<sup>97</sup> T. SZASZ, *THE MYTH OF MENTAL ILLNESS* (1961).

<sup>98</sup> T. SZASZ, *THE MANUFACTURE OF MADNESS* (1970).

<sup>99</sup> T. SZASZ, *supra* note 42, at 13-16 (psychiatry is not a science, it is a value judgment based on the social and ethical orientations of psychiatrists in which mental illness is equated with deviance from established social norms).

<sup>100</sup> Rosenhan, *supra* note 32 and accompanying text.

<sup>88</sup> *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1272 (1974).

<sup>89</sup> *Id.*, (footnotes omitted), (emphasis added).

<sup>90</sup> Such emergency commitment procedures have long been utilized in civil commitment. *See, e.g.*, ILL. REV. STAT. ch. 91½, § 7-1 *et seq.*

<sup>91</sup> *See* notes 66-68, *supra*, and accompanying text; *O'Connor v. Donaldson*, 422 U.S. 563, 569-70 (1975).

<sup>92</sup> *United States ex rel. Schuster v. Herold*, 410 F.2d at 1076; *Dixon v. Att'y Gen. of Comm. of Penn.*, 325 F. Supp. at 969-70; *Morris, supra* note 66, at 790; *Morris, supra* note 73, at 658-59; T. SZASZ, *supra* note 42, at 83-84.

<sup>93</sup> *See* notes 25-75, *supra*, and accompanying text.

chiatric training.<sup>101</sup> Moreover, examinations conducted by prison staff physicians generally consist of a single ten to fifteen minute interview, which is hardly conducive to thorough medical diagnosis.<sup>102</sup>

Furthermore, psychiatry has developed an innate tendency toward overprediction. That is, psychiatrists

operate with a strong bias toward what statisticians call the type 2 error. This is to say that [they] are more inclined to call a healthy person sick (a false positive, type 2) than a sick person healthy (a false positive, type 1). The reasons for this are not hard to find: it is clearly more dangerous to misdiagnose illness than health. Better to err on the side of caution, to suspect illness even among the healthy.<sup>103</sup>

Overprediction is reinforced in the criminal commitment setting by a number of factors. First, many psychiatrists equate antisocial criminal behavior with psychiatric malady.<sup>104</sup> Consequently, they are likely to interpret the prisoner's present incarceration and past prison record as evidence of psychiatric disorder. Second, the examining psychiatrist may view his recommendation of commitment as being in the prisoner's best interests, since commitment will afford the prisoner an escape from the supposed horrors of prison confinement. Finally, the imprecision and bias toward overprediction inherent in the "science" of psychiatry is not limited to that profession, but instead is transmitted to the judicial process. It has a significant impact on the prisoner who is considered for commitment because judges and juries give unquestioning deference to the psychiatrists' recommendations and conclusions.<sup>105</sup>

The nature of psychiatry and its impact on the criminal commitment process requires observance of stringent procedural safeguards in the commitment determination. As noted in *United States ex rel. Stachulak v. Coughlin*,<sup>106</sup> "[i]f the disparate opinions of psychiatrists and the vagaries of proof and prediction suggest anything, it is the desirability of the utmost care in reaching the commitment decision."<sup>107</sup> Thus, it is imperative that a full adversary

hearing be afforded the prisoner prior to commitment. The prisoner should be granted the right to trial by jury, the right to be present and confront and cross-examine witnesses, and the right to be represented by counsel.

Some psychiatric scholars maintain that a full-blown hearing may have a traumatic effect on the "patient" and exacerbate his condition. From this they have argued that the commitment determination should be purely medical, excluding the judicial process altogether.<sup>108</sup> However, given the potential abuse of psychiatric power, this result must be avoided if individual autonomy and integrity is to be preserved. "Above all else, control of institutions, and of the processes for entering and leaving them, has to be taken away from the doctors."<sup>109</sup> The due process clause is designed to protect against this very type of arbitrary and discretionary action.

In addition to a full adversary hearing, certain other precautions are necessary. First, the prisoner should be entitled to independent psychiatric examination by a court-selected psychiatrist or a panel of psychiatrists. However, considering the imprecision which inheres in the "science" of psychiatry, psychiatric evidence must not be accorded conclusive weight. Rather, it "must be limited . . . to a necessary rather than a sufficient condition for commitment."<sup>110</sup> Second, if the hearing results in a commitment order, periodic review of that order should be required. This review must be more than a mere administrative glance at the individual's file and a short interview by the staff psychiatrist, and should consider whether continued hospitalization is needed.

Finally, the prisoner should not be committed unless it is unequivocally shown that he is in need of psychiatric treatment, that he will receive such treatment, and that failure to initiate treatment will pose a clear and present danger of physical harm to the prisoner or to others. No individual should be involuntarily committed merely because his behavior is annoying or incomprehensible to others. The belief that treatment will benefit the prisoner is insufficient justification for commitment. The age of state-enforced therapeutic paternalism should become history.

<sup>108</sup> E.g., H. DAVIDSON, *FORENSIC PSYCHIATRY* 281-82 (1965). See also, ILL. REV. STAT. ch. 91½ § 9-4; ME. REV. STAT. tit. 34 § 2334; S.C. CODE § 44-17-570; TENN. CODE ANN. § 33-707(d).

<sup>109</sup> Shaffer, *supra* note 44, at 371.

<sup>110</sup> Livermore, Malmquist, and Meehl, *supra* note 34, at 80.

<sup>101</sup> Wexler and Scoville, *supra* note 27, at 65.

<sup>102</sup> Project, *Civil Commitment of the Mentally Ill*, 14 U.C.L.A. L. REV. 822, 848 (1967).

<sup>103</sup> Rosenhan, *supra* note 32, at 385. Accord: Roth, Dayley, and Lerner, *supra* note 94, at 430 (psychiatrists "[play] it safe" by recommending continued commitment even "where the examination established nothing").

<sup>104</sup> T. SZASZ, *supra* note 42, at 92, 212-13.

<sup>105</sup> See note 26, *infra*, and accompanying text.

<sup>106</sup> 520 F.2d 931 (7th Cir. 1975), *cert. denied*, 424 U.S. 947 (1976).

<sup>107</sup> *Id.* at 936. See also, note 82 *supra*.

# CRIMINAL COMMITMENT AND THE EQUAL PROTECTION CLAUSE

In marked contrast to the procedurally deficient criminal commitment legislation found in most states,<sup>111</sup> lie the state civil commitment statutes. Unlike the criminal commitment statutes, civil involuntary commitment statutes strive to safeguard the potential patient's interests at each stage of the proceedings.<sup>112</sup> The Illinois statutory scheme is typical of those in general use throughout the nation.<sup>113</sup>

Civil commitment procedures in Illinois<sup>114</sup> can be initiated by any person eighteen years or older filing a petition with the court, asserting that an individual is in need of mental treatment. The court then appoints a physician to examine the individual, if such an examination has not already occurred within seventy-two hours of the filing of the petition. A copy of the petition and the court order of examination must be personally delivered to the individual, his attorney, and the individual's two nearest relatives at least thirty-six hours before the examination.

If the examining physician certifies to the court within seventy-two hours of the examination that the individual is in need of mental treatment and he sets forth the reasons supporting this conclusion, the court sets the matter for a hearing. This hearing must be held not more than five business days after the court's receipt of the petition and the certificate of the examining physician. Notice of the time and place of the hearing must be given to the individual and to such other persons as the court deems appropriate. Jury trial on the question of need for mental treatment can be demanded by the individual, his spouse, any relative or friend, or an attorney appearing for any of them. If no jury trial is demanded, the court hears the matter.

The court then appoints one or more examining physicians to conduct independent personal examinations and to file detailed reports regarding the individual's need for mental treatment. The patient is entitled to be present at the hearing unless the court finds that his presence would

constitute a serious danger to his physical or emotional well-being. He is to be represented by legal counsel, to have counsel appointed if he is indigent, to have the testimony of at least one of the examining physicians given at the hearing, and to have a record of the hearing kept. If the hearing results in a finding that the individual is in need of mental treatment or is mentally retarded, the court orders hospitalization, but only after a determination that no alternative form of care or treatment (such as care by relatives) is available.

Procedures for discharge are numerous. First, the court order of hospitalization is valid for only a one year period. Any hospitalization after this one year period requires a new court order after another hearing with all the procedural guaranties of the initial hearing. Second, the individual may at any time file a petition for discharge accompanied by his own physician's certificate that he is no longer in need of mental treatment. Third, the superintendent of the hospital is required to conduct an examination of the patient and review the need for continued hospitalization at least every six months. If he concludes that the individual does not need further mental treatment, the superintendent is required to grant him absolute discharge. Finally, at least once during the patient's first year of hospitalization and at least once in every two year period thereafter, the superintendent is required to file a written report with Department of Mental Health "setting forth the reasons supporting the need for further hospitalization."<sup>115</sup> He is also required to give notice of this report to the patient, his attorney, his nearest relative, and two other persons designated by the patient. In this notice, the superintendent must also set forth the right of the patient and of any person on the patient's behalf to request a hearing on the need for further hospitalization. At this hearing, which must be conducted within ten days of the request, the individual is entitled to all the procedural guaranties of the initial hearing.

The Illinois civil commitment procedures exemplify the elaborate framework for safeguards which has been imposed upon the state in the civil commitment process. Noting the existence of these elaborate civil statutes, a number of federal courts have recently considered whether the lax criminal commitment procedures violate the equal protection clause. Relying heavily on the Supreme Court's decision in *Baxstrom*,<sup>116</sup> these courts have

<sup>111</sup> See note 6-12 and accompanying text, *supra*.

<sup>112</sup> But as to whether even these seemingly laudable procedures are in fact sufficient in light of the dangers with which involuntary commitment is fraught, see pp. 5-22, *supra*.

<sup>113</sup> For a detailed review and analysis of civil commitment procedures throughout the nation see, *Developments in the Law*, *supra* note 29; Note, *Civil Commitment of the Mentally Ill: Lessard v. Schmidt*, 23 DE PAUL L. REV. 1276 (1974).

<sup>114</sup> ILL. REV. STAT. ch. 91½ §§ 8-1 to 10-8.

<sup>115</sup> *Id.*, § 10-2.

<sup>116</sup> 383 U.S. 107 (1966).

concluded that such criminal statutes cannot withstand such equal protection attack.

In *Baxstrom*, the petitioner had been convicted of second degree assault and sentenced to a maximum prison term of three years. While incarcerated, he was certified insane by a prison physician and transferred to Dannemora, the New York state mental institution for the criminally insane. Upon the expiration of his prison term, the petitioner was civilly committed under a special statutory procedure for commitment of prisoners, which did not allow *de novo* review by a jury on the question of sanity *vel non*, as was provided for by statute in the civil commitment of all other persons. The Court held that this procedure violated the equal protection clause of the fourteenth amendment because it believed that the disparate treatment of ex-prisoners was irrational. As the Court maintained:

Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made. . . . Classification of mentally ill persons as either insane or dangerously insane [i.e. criminally insane] of course may be a reasonable distinction for purposes of determining the type of custodial or medical care to be given, but it has no relevance whatever in the context of the opportunity to know whether a person is mentally ill at all. For purposes of granting judicial review before a jury of the question whether a person is mentally ill and in need of institutionalization, there is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments.<sup>117</sup>

The Court's holding in *Baxstrom* was limited to equal protection as it relates to the procedures for continued commitment of prisoners after their prison sentences have expired. Although the Court has declined to extend that holding, the underlying rationale of *Baxstrom* applies with equal strength to the commitment of prisoners during their prison sentence.<sup>118</sup> The fact that an individual has been convicted of a crime is a wholly irrelevant consideration in determining the commitment procedures

to be applied to that individual. As one lower federal court has explained *Baxstrom*:

The Supreme Court struck down the New York system not because *Baxstrom* was reaching the end of his sentence, but because it held dangerousness is not relevant to the procedures for determining whether "a person is mentally ill at all." . . . *Baxstrom* thus might be said to require the conclusion that, while prior criminal conduct is relevant to the determination whether a person is mentally ill and dangerous, it cannot justify denial of procedural safeguards for that determination.<sup>119</sup>

This reasoning has prompted several other federal courts to hold that procedures for committing prison inmates before the expiration of their sentences, which are inferior to generally applicable civil commitment procedures, violate equal protection.

The first such holding came in *United States ex rel. Schuster v. Herold*.<sup>120</sup> In that case the petitioner Schuster was convicted in 1931 of second degree murder and sentenced to a prison term of from twenty-five years to life. Ten years after his conviction, Schuster was transferred to Dannemora.<sup>121</sup> According to his petition for *habeas corpus*, Schuster believed that many of the prison officials were

<sup>119</sup> *Cameron v. Mullen*, 387 F.2d 193, 201 (D.C. Cir. 1967). See also, *United States ex rel. Schuster v. Herold*, 410 F.2d at 1081, discussed at length *infra*, where the Court concluded:

*Baxstrom* clearly instructs that the procedures to be followed in determining whether one is committable must be unaffected by the irrelevant circumstance that one is or has recently been under sentence pursuant to a criminal conviction, although the fact that one has committed a crime may be relevant to the substantive conclusion that he is mentally ill.

(emphasis in original); and Association of the Bar, City of New York, Special Committee on the Study of Commitment Procedures and Law Relating to Incompetents, Second Report, Due Process and the Criminal Defendant 1 (1968): "The basic and unifying thread which runs throughout our recommendations is a rejection of the notion that the mere fact of a criminal charge or conviction is a proper basis upon which to build other unnecessary, unprofitable, and essentially unfair distinctions among the mentally ill."

<sup>120</sup> 410 F.2d 1071 (2d Cir.), cert. denied, 396 U.S. 847 (1969).

<sup>121</sup> Schuster was committed under N.Y. Correc. Law § 383 (McKinney) which provided for automatic transfer upon certification of insanity by a single prison official. This statute was repealed in 1965 and replaced with § 408, which has since been revised in light of the court's holding in *Schuster*. The procedures for criminal commitment are now contained in § 402, and are substantially the same as those applied to civil commitment.

<sup>117</sup> *Id.* at 111-12 (emphasis in original).

<sup>118</sup> The Court has had ample opportunity to decide the issue but has thus far refrained from doing so. It denied certiorari in *United States ex rel. Schuster v. Herold*, 410 F.2d 1071 (2d Cir.), cert. denied, 396 U.S. 847 (1969), and in *Matthews v. Hardy*, 420 F.2d 607 (D.C. Cir. 1969), cert. denied, 397 U.S. 1010 (1970), which are discussed at length *infra*. Moreover, in *Humphrey v. Cady*, 405 U.S. 504 (1972), the Court took note of the holdings in *Schuster* and *Matthews*, but declined to decide the issue.

corrupt and that he was being transferred because he had voiced his objections to this corruption.<sup>122</sup> On this basis alone, the certifying physician concluded that Schuster was paranoid and mentally ill, and that he thus should be committed.<sup>123</sup>

Schuster languished in Dannemora from 1941 to 1975.<sup>124</sup> Although he would have been eligible for parole in 1948, this privilege was denied to him solely because of his commitment.<sup>125</sup> The court found that Schuster had received no treatment for his "condition" in all his years at Dannemora,<sup>126</sup> and that Schuster was not a dangerous individual in need of the custodial detention Dannemora offered. Thus, the court was; "forced to the unhappy conclusion that Schuster was simply a forgotten man in a mental institution which had nothing to offer him . . . and [was] able to keep his equilibrium only through his own efforts and his

hope that he [was] preparing himself<sup>127</sup> for the day when he would be released."<sup>128</sup>

Schuster challenged the legality of his commitment on equal protection grounds, contending that he was not afforded the same procedural rights allowed to civilians in contesting involuntary commitment. He prayed that he be returned to prison where he would be eligible for parole or "at least be removed from the grievously distressing atmosphere of an institution . . . which houses the insane."<sup>129</sup>

The court, in analyzing the legality of Schuster's commitment, first noted the deleterious efforts which had resulted from the transfer to Dannemora: the increased restraints upon his liberty, the increased indignities, and the "physical, emotional, and general mental agony"<sup>130</sup> to which he had

<sup>122</sup> This allegation appears, from the facts set forth by the court, to be quite believable. See notes 138 and 144 *infra*.

<sup>123</sup> Schuster testified at the hearing before the federal district judge on his petition for *habeas corpus* that the 1941 conversation with the staff physicians was brief in duration, that the "doctors devoted most of their 'diagnostic' efforts to persuading him to recant his charges," that he was not afforded an opportunity to cross-examine the doctors nor to rebut the "diagnosis" with evidence of his sanity, that neither of the doctors had any training in psychiatry, that he was forced to sign a transcript of the conversation without being allowed to read it, and that he was not permitted legal counsel although he had requested adjournment of the proceedings in order to secure representation. See 410 F.2d at 1075-76.

<sup>124</sup> Although the court held that Schuster's commitment was unconstitutional, it ordered only that Schuster be granted a hearing on the question of his sanity. The state, however, inexcusably delayed action on the order and the court was forced to hear the case again. This time the court held that in light of the state's flagrant violation of the spirit of its previous order and the prior unconstitutional acts of the state, Schuster was to be absolutely discharged. *United States ex. rel. Schuster v. Vincent*, 524 F.2d 153 (2d Cir. 1975).

<sup>125</sup> The court noted that "[w]hile, theoretically, the Parole Board has authority to parole Schuster directly from Dannemora . . . in practice the Board does not parole anyone who is incarcerated in a mental institution for the presumption is that he is mentally ill." 410 F.2d at 1076 n.3.

<sup>126</sup> "The reason for this apparent neglect according to . . . [the] assistant director of Dannemora, [was] that Schuster's paranoia [was] so 'deeply rooted' that it would not respond to therapy." 410 F.2d at 1076. The court indicated that had Schuster raised the question of his constitutional right to treatment in the state courts, it would have held that such a right does indeed exist and that Schuster had been deprived of it. See 410 F.2d at 1087-89, and the discussion of the right to treatment at notes 64 and 68, *supra*.

<sup>127</sup> Schuster was not assigned work at Dannemora. He testified that his spare time was spent studying so that he would be prepared "to step into an honorable job" upon his release. 410 F.2d at 1076.

<sup>128</sup> 410 F.2d at 1076. Indeed, it is very questionable whether Schuster was suffering any psychological disturbance at all. The court set forth at great length the findings of the state's psychiatrist in a prior state proceeding on one of Schuster's previous petitions for *habeas corpus*:

At the 1963 state hearing, only one psychiatrist, a Dr. Carson, testified. He admitted that Schuster was "an individual whose conduct in general is correct, who uses impeccable logic" and that "he shows no obvious signs of mental illness such as deterioration, untidiness, hallucinatory experiences, bizarre ideas or bizarre behavior." Nonetheless, Dr. Carson concluded that Schuster was mentally ill since he had a paranoid condition. "This is the type of illness," Carson explained, "in which an entire delusional but logical belief is based on a single false premise, and if one allows the truth of the false premises the patient's behavior no longer appears abnormal\*\*\*" Dr. Carson conceded that while he could believe cheating took place in the Regents' examinations in the prison, and that prison officials would be reluctant to have depositions submitted to that effect, he could not believe that anyone would commit a man to a hospital for the criminally insane because of it. *Accordingly, he concluded that Schuster must be insane.* He was unmoved by Schuster's claim, which the state did not deny, that the prison warden, chief clerk and controller had been dismissed shortly after Schuster made his charges of corruption. (emphasis added)

*Id.* at 1077. Indeed, the court questioned the validity of this psychiatrist's findings: "The insubstantiality of that doctor's testimony may be characterized as follows: Schuster believes in corruption. I don't believe such corruption exists, ergo Schuster is insane." 410 F.2d at 1085.

<sup>129</sup> *Id.* at 1077.

<sup>130</sup> *Id.* at 1078.

been exposed. The court then compared the procedures utilized in Schuster's commitment with those provided for civil involuntary commitment. While Schuster was committed solely on the basis of a single prison physician's certification of insanity without any kind of hearing or judicial review, the court noted that a civilian at that time could not be committed without examination by two qualified examiners, notice of the commitment proceedings, a judicial hearing on the question of sanity with the right to cross-examine witnesses, and a court order of commitment.<sup>131</sup> Consequently, the court, relying on *Baxstrom*, held that the substantial disparity between the civil procedures and those under which Schuster was committed, did indeed violate the principles of equal protection. As the court maintained:

*Baxstrom* clearly instructs that the procedures to be followed in determining whether one is committable must be unaffected by the irrelevant circumstance that one is or has recently been under sentence pursuant to a criminal conviction, although the fact that one has committed a crime may be relevant to the substantive conclusion that he is mentally ill.<sup>132</sup>

The court ordered that Schuster be given a hearing on the question of his sanity with substantially all the procedural safeguards then afforded to civilians in involuntary commitment proceedings. If that hearing resulted in a determination that Schuster was sane, he was to be returned to prison.<sup>133</sup>

After *Schuster*, the constitutionality of criminal commitment procedures was again at issue in *Matthews v. Hardy*.<sup>134</sup> In that case, the appellant Matthews was convicted of manslaughter in 1965 and sentenced to a prison term of from four to fourteen years. After serving a year and a half of this sentence, he was transferred to St. Elizabeth's Hospital pursuant to a District of Columbia statute which provided for commitment of a prisoner upon

the belief of the Director of the Department of Correction that the prisoner is mentally ill, followed by the concurrence of a psychiatrist.<sup>135</sup> Consequently, Matthews did not receive a hearing prior to his commitment. The psychiatrist's concurrence in the finding of mental illness was made on the basis of a mere ten-minute interview with Matthews. In contrast to this "streamlined procedure,"<sup>136</sup> the civil commitment procedures in the District of Columbia were much more demanding. The civilian facing civil commitment was entitled to judicial hearing, jury trial upon request, appointed counsel, periodic review of the commitment order, and independent psychiatric examination—without cost if he was indigent.<sup>137</sup>

In finding for Matthews on the equal protection question, the court was unpersuaded by the government's argument that Matthews' transfer was "an administrative matter . . . resting within the sound discretion of the prison authorities."<sup>138</sup> The Court stated that administrative discretion was not unlimited, but that it must give way to "paramount federal constitutional . . . rights,"<sup>139</sup> such as equal protection of the law. The stigma confronted by the mentally ill, the significantly increased restrictions upon the transferees' eligibility for parole, and the "severe emotional and psychic harm" that commitment could engender,<sup>140</sup> led the court to conclude that

incarceration in a mental institution is sufficiently different from incarceration in a prison [as] to require the same or similar safeguards [as allowed in civil commitment]. . . .

These factors make it understandable that many prisoners would fiercely resist being moved out of a prison into a mental hospital. We think the differences in the two types of incarceration are simply too great to treat transfer to a mental hospital as a routine administrative procedure.<sup>141</sup>

The court therefore followed the lead of the *Schuster* court and held that statutory provisions for criminal commitment procedures which are substantially inferior to procedures employed in civil involuntary commitment, violate equal protection.

<sup>135</sup> 24 D.C. CODE § 302.

<sup>136</sup> 420 F.2d at 609.

<sup>137</sup> 21 D.C. CODE § 501 *et seq.*

<sup>138</sup> 420 F.2d at 610.

<sup>139</sup> *Id.*, quoting *Johnson v. Avery*, 393 U.S. 483, 486 (1969).

<sup>140</sup> *Id.* at 611. See pp. 5-22, *supra*, dealing with the significant deprivation which criminal commitment entails.

<sup>141</sup> *Id.* at 610-11.

<sup>131</sup> The court noted that the procedures followed at the time of its opinion provided for essentially the same procedures as 1941 civil commitment did. However, civil commitment procedures in New York had since then improved substantially. *Id.* at 1083.

<sup>132</sup> *Id.* at 1081 (emphasis in original).

<sup>133</sup> Circuit Judge Moore, dissenting, would have deferred to the state determinations of Schuster's insanity and need for confinement in a mental institution. He criticized the majority for its judicial legislation and interference in New York's administration of its laws and prisons.

<sup>134</sup> 420 F.2d 607 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1010 (1970).



However, in contrast to the *Schuster* court, the *Matthews* court did not hold the challenged criminal commitment statute unconstitutional. Instead, the court read the civil commitment procedural safeguards into the criminal commitment statute to save that statute's constitutionality.

In addition to the criminal commitment procedures in New York and in the District of Columbia, the criminal commitment statutes in several other jurisdictions have been subjected to equal protection scrutiny and have failed that test. These jurisdictions include Connecticut,<sup>142</sup> Pennsylvania,<sup>143</sup> West Virginia,<sup>144</sup> and Massachusetts.<sup>145</sup> Thus, it can be forcefully argued that criminal commitment statutes which provide for transfer of prisoners to mental institutions under "streamlined

procedure[s],"<sup>146</sup> making the commitment determination largely a matter of administrative discretion, are unconstitutional on equal protection as well as on due process grounds.

### CONCLUSION

As the foregoing analysis demonstrates, the transfer of a prisoner to a mental institution constitutes much more than a mere administrative relocation of that prisoner within the penal system. Criminal commitment engenders severe deprivations of individual liberty. Freedom from bodily constraints, from mental and emotional oppression, and from damage to reputational interests is jeopardized. Thus, due process necessitates the observance of procedural safeguards in criminal commitment proceedings to ensure that the commitment determination is not arbitrarily and erroneously made. Furthermore, the equal protection clause demands that these procedural safeguards be at least as stringent in their protection of the rights of the individual as the procedures utilized in the civil commitment process.

Yet despite these clear constitutional mandates, criminal commitment in the vast majority of states is statutorily left to the absolute discretion of prison officials in conjunction with prison staff physicians. This fact alarmingly demonstrates the urgent need for reform. The states' interests in administrative convenience and efficiency are subordinate to the individual's interests in liberty. Thus, the criminal commitment decision must forever be removed from "the domain of the correctional officials. . . ."<sup>147</sup>

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victed of a crime. In order to avoid holding that section unconstitutional as violative of equal protection, the court read into it the more rigorous procedural safeguards provided for in civil commitment proceedings.

<sup>146</sup> *Matthews v. Hardy*, 420 F.2d 607, 609 (D.C. Cir. 1969), cert. denied, 397 U.S. 1010 (1970).

<sup>147</sup> Note, *The Fourteenth Amendment and Prisoners: A New Look at Due Process for Prisoners*, 26 HASTINGS L.J. 1277, 1297 (1975).

<sup>142</sup> In *Chesney v. Adams*, 377 F. Supp. 887 (D. Conn. 1974), *aff'd*, 508 F.2d 836 (1975), CONN. GEN. STAT. § 17-194a, which provided for transfer of a prisoner to a mental institution upon certification by a physician that the prisoner was mentally ill, was held unconstitutional. The court relied heavily upon *Baxstrom*, *Schuster*, and *Matthews* in holding that equal protection had been denied. CONN. GEN. STAT. § 17-194c now provides that civil commitment procedures will be followed in criminal commitment.

<sup>143</sup> In *United States ex rel. Souder v. Watson*, 413 F. Supp. 711 (M.D. Pa. 1976), the court held unconstitutional 50 PA. CONS. STAT. § 4411, which provided for judicial determination of commitment upon petition of the prison warden, but did not provide for personal notice, presence of the prisoner at the hearing, nor legal counsel, all of which were provided for in civil commitment proceedings. That statute was subsequently repealed and replaced with § 7401(a), which provides for the application of civil commitment procedures.

<sup>144</sup> In *Sites v. McKenzie*, 423 F. Supp. 1190 (N.D. W. Va. 1976), W. VA. CODE § 28-5-31, (not yet been repealed or revised) which provides for transfer to a mental hospital for 30 days observation when, in the warden's opinion a prisoner has become mentally ill, and for commitment if the hospital examining board finds him mentally ill, was held to contravene both the equal protection and due process clauses.

<sup>145</sup> See *Commonwealth v. Druken*, 356 Mass. 503, 254 N.E.2d 779 (1969) where the court ruled on the constitutionality of the commitment of a prisoner under MASS. GEN. LAWS ANN. ch. 123 § 105 (West), which provided for commitment of an individual charged with or con-