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Worse than Punishment: How the Involuntary Commitment of Persons with Mental Illness Violates the United States Constitution

by SAMANTHA M. CASPAR* & ARTEM M. JOUKOV**

The most important deprivation of human and constitutional rights inflicted upon persons said to be mentally ill is involuntary mental hospitalization . . .

– Dr. Thomas Szasz

Individuals struggling with mental health ailments face many challenges, sometimes including the loss of liberty. While incarceration in jail or prison may follow criminal misconduct, this is not the most imposing threat to liberty faced by persons with mental illness. Instead, they must cope with the possibility of involuntary commitment to a treatment facility, a fate that may be worse than criminal incarceration. While it may be necessary to commit some persons with mental illness that pose a danger, the current process for determining the appropriateness of involuntary commitment leaves many unshielded from the unbounded discretion of judges and doctors. Because the terms of involuntary commitment are often unrestrained, the ability of those committed to obtain release or representation is minimal, and diagnosing mental health problems accurately

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proves difficult. This Article posits that both the United States Constitution and common sense should lead to far greater protections for persons with mental illness when these persons are faced with the danger of losing their liberty.

Introduction

Good intentions are often at the heart of laws that activists and politicians champion as protections for persons with mental illness. These laws may include the ability to claim insanity as a defense to criminal accusations,¹ the ability to have someone committed to an institution for their own protection,² and the ability to deprive someone of their liberty in order to prevent them from harming others.³ Undoubtedly, these are noble purposes: it is important to protect individuals with mental illness from themselves in certain circumstances,⁴ and it is equally important to permit them to plead insanity if they commit a crime due to an irresistible impulse or an inability to contemplate its moral implications.⁵ The problem is that, over the years, the use of mental health treatment facilities to limit the freedom of persons with mental illness has not always benefited such persons.⁶

Although many individuals in the United States suffer from mental illness, indefinite commitment to a mental health treatment facility might not be the best solution.⁷ In fact, misdiagnosis, the absence of adequate legal representation, and the lack of perceived credibility that often accompany confinement in a mental health treatment facility can result in the involuntary confinement of too many people for too long.⁸ Additionally, when compared to the fate suffered by individuals who commit the very crimes that confinement is supposed to prevent, people breaking the law often escape with far lighter sentences of incarceration than those locked in mental health institutions at the mercy of their doctors.⁹ When combined with the idea that a lower standard of proof is required for commitment than conviction,¹⁰ it is not difficult to see an impending catastrophe: confinement in a mental health

1. See, e.g., *Clark v. Arizona*, 548 U.S. 735 (2006).

2. *Addington v. Texas*, 441 U.S. 418 (1979).

3. *O'Connor v. Donaldson*, 422 U.S. 563 (1975).

4. *Id.*

5. See, e.g., *Clark*, 548 U.S. 735.

6. Megan Testa & Sara G. West, *Civil Commitment in the United States*, 7 *PSYCHIATRY (EDGMONT)* 30-40 (Oct. 2010), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3392176/>.

7. *Civil Commitment and the Mental Health Care Continuum: Historical Trends and Principles for Law and Practice*, SUBSTANCE ABUSE & MENTAL HEALTH SERVICES ADMIN., <https://www.samhsa.gov/sites/default/files/civil-commitment-continuum-of-care.pdf>.

8. *Id.*

9. See, e.g., Mac McClelland, *When 'Not Guilty' Is a Life Sentence*, *N.Y. TIMES MAGAZINE* (Sept. 27, 2017), <https://www.nytimes.com/2017/09/27/magazine/when-not-guilty-is-a-life-sentence.html>.

10. *Addington v. Texas*, 441 U.S. 418 (1979).

institution can be more likely and more severe than the punishment a convict would receive for similar misconduct.¹¹

Because individuals who are committed to mental health facilities against their will are often seized as a result of state laws (and often by state officials), the constitutional implications are grim. While the United States Supreme Court has approved the clear-and-convincing-evidence standard for determining whether an individual may be constitutionally confined, the passage of time and an updated understanding of psychology suggests that courts should revisit the rule.¹² This is especially true given the Supreme Court's concern regarding the commitment of individuals against their will absent proof of social harm.¹³

Because commitment may last far longer than incarceration, few controls on the discretion of doctors and judges exist (such as maximum sentence limitations), and psychologists have routinely misdiagnosed perfectly sane people with serious mental illnesses,¹⁴ the Supreme Court should consider reversing its precedent regarding the standard of proof that is required to involuntarily commit persons with mental illness. Additionally, and perhaps more importantly, states should reconsider their current due process provisions for individuals they seek to commit to ensure commitment is used as a last resort when judges and doctors are extremely confident that commitment is the only viable option to prevent disaster. Moreover, states should implement a constitutional limitation on the length of confinement prior to a rehearing.

In addition to elevating the standards of proof for commitment and increasing limitations on the length of commitments, courts and legislatures alike should consider extending the right to a jury trial to individuals whose commitment is in question. While jury trials require significant expense and effort, they should, theoretically, reduce the probability of a wrongful commitment.¹⁵ Furthermore, requiring the state to prove a case to an

11. Maria Cramer, *Worse Than Jail: Addicts Civilly Committed Say DOC Abused Them and Failed to Treat Them*, BOSTON GLOBE (July 13, 2017, 8:56 PM), <https://www.bostonglobe.com/metro/2017/07/13/worse-than-jail-addicts-civilly-committed-say-doc-abused-them-and-failed-treat-them/1kzQdRdO6F4QeQuYUiP54J/story.html>.

12. *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975) (While the Supreme Court upheld this standard, it also held in favor of the confined, finding that the State of Florida violated the individual's rights by confining him for 15 years. The basis for confinement was a suspicion of paranoid schizophrenia, despite the fact that the individual was harmless.); *see also* *Jones v. United States*, 463 U.S. 354 (1983); *Addington*, 441 U.S. at 418.

13. *Id.*; *see also* *Jackson v. Indiana*, 406 U.S. 715 (1972); *Foucha v. Louisiana*, 504 U.S. 71 (1992).

14. McClelland, *supra* note 9; David L. Rosenhan, *Being Sane in Insane Places*, 179 SCIENCE 250 (1973).

15. Vicki G. Kaufman, *The Confinement of Mabel Jones: Is There a Right to Jury Trial in Civil Commitment Proceedings?*, 6 FLA. ST. U. L. REV. 103, 122 (2014); *In re Jones*, 339 So. 2d 1117, 1119 (Fla. 1976) ("It is well recognized that unsupported allegations of insanity can have a

empaneled jury would increase public awareness of commitment hearings, the type of evidence these cases involve, and the questionable nature of some of this evidence.¹⁶ Such a requirement may also prompt greater effort on the part of counsel representing the government to prove his or her case, greater scrutiny by the experts involved, greater scrutiny of expert testimony, and perhaps even greater attentiveness from the judge and appellate courts.¹⁷ Then, individuals facing liberty and property deprivations due to mental illness will receive at least similar protections as those who face such deprivations due to intentional misconduct.¹⁸

Ultimately, this Article will explain that constitutionally mandated standards should be required to protect individuals who face losing their liberty due to the perceived threat of future harm. While preventing individuals from harming themselves or others is an honorable goal, the state should only be able to intervene when the threat is truly imminent. Psychologists, judges, and government agents are poor prophets: their ability to predict some future, undetermined harm is quite limited and can serve as only a feeble justification for commitment.¹⁹ Therefore, the ability to commit individuals with fewer protections than those offered under criminal law and use a lower burden of proof without a jury is a powerful weapon of oppression that no government should wield. Individuals who suffer from mental health problems can be particularly defenseless against an attack on

detrimental effect upon the personal lives and careers of people. It should not be left to the discretion of a single judge to make determinations of such allegations.”) (Boyd, J., dissenting); Peter J. Coughlan, *In Defense of Unanimous Jury Verdicts: Mistrials, Communication, and Strategic Voting*, 94 AMER. POL. SCI. REV. 375 (2000).

16. 145 A.L.R. 711 (1943); *Quesnell v. State*, 517 P.2d 568, 579 n.22 (Wash. 1974).

17. 145 A.L.R. 711; *Quesnell*, 517 P.2d at 579 n.22; Artem M. Joukov, *Who’s the Expert?* Frye and Daubert in *Alabama*, 47 CUMB. L. REV. 275 (2016) (demonstrating the scrutiny the rules of evidence require of experts both under federal and Alabama law).

18. Kaufman, *supra* note 15.

19. See, e.g., *Jones*, 339 So. at 1119 (“It is well recognized that unsupported allegations of insanity can have a detrimental effect upon the personal lives and careers of people. It should not be left to the discretion of a single judge to make determinations of such allegations.”) (Boyd, J., dissenting); Nathaniel Morris, *This Secret Experiment Tricked Psychiatrists into Diagnosing Sane People as Having Schizophrenia*, WASH. POST (Jan. 1, 2018, 7:46 AM), https://www.washingtonpost.com/national/health-science/an-experiment-fooled-psychiatrists-into-treating-sane-people-as-if-they-were-insane/2017/12/29/c6c9c3ea-d5f7-11e7-b62d-d9345ced896d_story.html; Rosenhan, *supra* note 14; Daniel Distant, *John Montin Lawsuit: Sane Man Trapped in Mental Hospital for 20 Years*, CHRISTIAN POST (July 15, 2014), <https://www.christianpost.com/trends/john-montin-lawsuit-sane-man-trapped-in-mental-hospital-for-20-years.html>; Ketema Ross, *I Spent Seven Years Locked in a Human Warehouse*, POLITICO (Apr. 16, 2015), https://www.politico.com/magazine/story/2015/04/mental-institution-mental-health-policy-117061_full.html; McClelland, *supra* note 9; Logan Albright, *Steven Soderbergh’s “Unsane” Exposes the Nightmare of Involuntary Commitment*, FEE (Mar. 26, 2018), <https://fee.org/articles/steven-soderberghs-unsane-exposes-the-nightmare-of-involuntary-commitment>.

their liberty through criminal²⁰ and civil law, and the current laws that permit potentially indefinite commitment of a person (who may not have even committed a single crime) reach too far. Leaving these decisions in the hands of largely unsupervised state agents, who rarely face appeal, is an injustice to the afflicted, and this essentially unrestrained power must change.

This Article will proceed in Part I by outlining the scope of the mental health problems across the United States to demonstrate the large number of people that these commitment procedures potentially impact. In Part II, this Article will demonstrate the risks and benefits of commitment and the increasing connection between law and psychology. Part III will outline the constitutional implications of using involuntary commitment, which sometimes proves to be a worse punishment than incarceration, to curtail the liberties of individuals under a lower standard of proof and with fewer safeguards and limitations on the length and intensity of treatment than those provided in the criminal justice system. This Article will conclude by positing that constitutionally mandated bright-line rules may be necessary to prevent individuals with mental illness from being involuntarily committed.

Part I: Mental Illness

According to the National Alliance on Mental Illness, approximately one in five United States adults experiences a mental illness in any given year.²¹ Additionally, one in five American youths ages 13-18 experiences a mental disorder at some point during their adolescence.²² Roughly 6.3% of the United States population suffers from a “severe mental illness,” defined as a long-standing mental illness, typically psychosis, which may cause prolonged moderate-to-severe disability.²³ To put these numbers in perspective, the number of American adults was approximately 253.2

20. See William N. Clark & Artem M. Joukov, *The Criminalization of America*, 76 ALA. LAW. 225 (July 2015) (cited and quoted in *Gamble v. United States*, 139 S. Ct. 1960, 2008, 2008 n.98 (2019) (Gorsuch, J., dissenting)). Republished by the Mises Institute (demonstrating how simple it is for some prosecutors to convict an individual *not* suffering from any mental illnesses); see also Artem M. Joukov & Samantha M. Caspar, *Wherefore is Fortunato? How the Corpus Delicti Rule Excludes Reliable Confessions, Helps the Guilty Avoid Responsibility, and Proves Inconsistent with Basic Evidence Principles*, 41 AM. J. TRIAL. ADV. 459, 481, 522 (2018) (noting the large number of state and federal statutes that may lead to prosecution and discussing the possibility that confessions to crime may be easier to secure from a mentally ill defendant even when that defendant did not commit the crime).

21. *Mental Health by the Numbers*, NAT'L ALLIANCE ON MENTAL ILLNESS (2019), <https://www.nami.org/learn-more/mental-health-by-the-numbers>.

22. *Id.*

23. Daniel Yohanna, *Deinstitutionalization of People with Mental Illness: Causes and Consequences*, AMA JOURNAL OF ETHICS (Oct. 15, 2013), <https://journalofethics.ama-assn.org/article/deinstitutionalization-people-mental-illness-causes-and-consequences/2013-10>.

million in 2018,²⁴ and nearly 15.9 million of these individuals endured a severe mental illness.²⁵ Perhaps more astonishing, 46% of Americans will meet the criteria for a diagnosable mental health condition at some point in their lives, and half of these individuals will develop a mental health condition by the age of 14.²⁶ Mental illnesses include anxiety disorders, trauma-and-stressor-related disorders, eating disorders, mood disorders, and schizophrenia, among others.²⁷ Many of these illnesses have the potential to result in criminal misconduct, and hence may increase government scrutiny of sufferers prior to and subsequently to criminal conduct.

Anxiety disorders include generalized anxiety disorder, panic attacks and panic disorder, and specific phobia disorders.²⁸ Psychologists define generalized anxiety disorder as a persistent state of increased anxiety and apprehension, characterized by heightened worrying, fear, and dread.²⁹ Generalized anxiety disorder affects approximately 3% of the U.S. population within a one-year period.³⁰ A panic attack is the sudden onset of a brief period of intense anxiety, fear, or discomfort, accompanied by physical or emotional symptoms.³¹ An individual suffering from a panic attack may have a fear of dying, a fear of going “crazy” or losing control, depersonalization symptoms, chest pain or discomfort, shortness of breath, and nausea.³² Panic attacks affect nearly 11% of the population in a single year and may cause panic disorder, which is the occurrence of repeated panic attacks, accompanied by fears about future attacks or changes in behavior to avoid certain situations that may predispose the individual to attacks.³³

24. *Quick Facts*, U.S. CENSUS BUREAU (2019), <https://www.census.gov/quickfacts/fact/table/US/PST045217>.

25. Yohanna, *supra* note 23.

26. *Quick Facts and Statistics About Mental Health*, MENTAL HEALTH AMERICA (2019), <https://staging.mhanational.org/mentalhealthfacts>.

27. Michael B. First, *Overview of Mental Illness*, MERCK MANUAL (2017), <https://www.merckmanuals.com/home/mental-health-disorders/overview-of-mental-health-care/overview-of-mental-illness>.

28. *Id.*

29. John W. Barnhill, *Generalized Anxiety Disorder (GAD)*, MERCK MANUAL (2018), <https://www.merckmanuals.com/professional/psychiatric-disorders/anxiety-and-stressor-related-disorders/generalized-anxiety-disorder-gad>; Michael B. First, *Specific Phobia Disorders*, MERCK MANUAL (2019), <https://www.merckmanuals.com/professional/psychiatric-disorders/anxiety-and-stressor-related-disorders/specific-phobic-disorders>.

30. *Id.*

31. John W. Barnhill, *Panic Attacks and Panic Disorder*, MERCK MANUAL (2018), <https://www.merckmanuals.com/professional/psychiatric-disorders/anxiety-and-stressor-related-disorders/panic-attacks-and-panic-disorder>.

32. *Understanding Panic Attack – Symptoms*, WEBMD, <https://www.webmd.com/anxiety-panic/understanding-panic-attack-symptoms> (last visited Mar. 23, 2020).

33. Barnhill, *Panic Attacks and Panic Disorder*, *supra* note 31.

Overall, anxiety disorders are more common than any other mental health disorder, affecting approximately 15% of U.S. adults.³⁴

Trauma-and-stressor-related disorders involve exposures to traumatic or stressful events.³⁵ Trauma-and-stressor-related disorders include acute stress disorder and post-traumatic stress disorder.³⁶ Acute stress disorder generally manifests after an individual experiences a traumatic event directly (such as a serious injury or death threat) or indirectly (such as witnessing events happening to others), and may cause depression, sleep disturbance, hypervigilance, or flashbacks.³⁷ Post-traumatic stress disorder is similar to acute stress disorder, except that acute stress disorder generally begins immediately after the trauma and lasts from three days to one month, whereas post-traumatic stress disorder can manifest up to six months after the trauma and last for longer than one month.³⁸

Mood disorders are emotional disturbances consisting of lengthened periods of excessive sadness, excessive joyfulness, or both, and are identified as depressive or bipolar.³⁹ A psychiatrist diagnoses a mood disorder when sadness or elation is overly intense and persistent, significantly impairs the individual's capacity to function, and is accompanied by various other symptoms.⁴⁰ In such scenarios, intense sadness is called depression, and intense elation is called mania.⁴¹ Depressive disorders are characterized by depression, whereas bipolar disorders are designated by varying combinations of depression and mania.⁴² Mood disorders are the third most common cause of hospitalizations for youth and adults ages 18-44 in the United States.⁴³ Sixteen million—or 6.9%—of adults in the United States had at least one major depressive episode in the past year.⁴⁴

Schizophrenia is a “chronic, severe, and debilitating brain disease that affects approximately one percent of the American population ages eighteen

34. First, *Overview of Mental Illness*, *supra* note 27.

35. John W. Barnhill, *Overview of Trauma and Stressor-Related Disorders*, MERCK MANUAL (2018), <https://www.merckmanuals.com/professional/psychiatric-disorders/anxiety-and-stressor-related-disorders/overview-of-trauma-and-stressor-related-disorders>.

36. *Id.*

37. John W. Barnhill, *Acute Stress Disorder (ASD)*, MERCK MANUAL (2018), <https://www.merckmanuals.com/professional/psychiatric-disorders/anxiety-and-stressor-related-disorders/acute-stress-disorder-asd>.

38. *Id.*

39. William Coryell, *Overview of Mood Disorders*, MERCK MANUAL (2018), <https://www.merckmanuals.com/professional/psychiatric-disorders/mood-disorders/overview-of-mood-disorders>.

40. *Id.*

41. *Bipolar Disorder (Manic Depressive Illness or Manic Depression)*, HARVARD MED. SCH. (Mar. 2019), https://www.health.harvard.edu/a_to_z/bipolar-disorder-manic-depressive-illness-or-manic-depression-a-to-z.

42. Coryell, *Overview of Mood Disorders*, *supra* note 39.

43. *Mental Health by the Numbers*, *supra* note 21.

44. *Id.*

and older in a given year.”⁴⁵ Schizophrenia may result in deterioration in thinking, impairments of social function, and disturbances in perception and may be accompanied by severe symptoms such as hallucinations, thought and movement disorders, delusions, social withdrawal, and a lack of motivation.⁴⁶ Schizophrenics attempt suicide more often than the general population, with nearly ten percent of schizophrenics dying by suicide.⁴⁷ Schizophrenia impacts 1.1% of U.S. adults, and bipolar disorder impacts 2.6% of U.S. adults.⁴⁸

More than half of those who experience a mental illness will exhibit moderate to severe symptoms.⁴⁹ Additionally, four of the ten leading causes of disability among persons ages five and older are mental health disorders.⁵⁰ Individuals living with serious mental illness face an increased risk of other chronic medical conditions, and adults in the United States enduring serious mental illness die nearly 25 years earlier than those without serious mental illnesses, largely due to treatable medical conditions.⁵¹

Part II: Involuntary Commitment

Involuntary commitment, though sometimes required for those who are particularly dangerous to themselves or others, is hardly the only treatment option for individuals who suffer from mental illness.⁵² In fact, evidence shows that facilities are largely lacking to house all (or even most) of the individuals enduring mental health problems.⁵³ Thus, important economic limitations exist to the government simply “locking up” every individual the government believes to be suffering from mental illness.⁵⁴ Regardless, a large number of individuals face the possibility of commitment, which may give the government a concerning power: to impose commitment on

45. Samantha M. Caspar & Artem M. Joukov, *The Implications of Marijuana Legalization on the Prevalence and Severity of Schizophrenia*, 28 HEALTH MATRIX 175, 179 (2018).

46. *Id.*

47. *Id.*

48. *Mental Health by the Numbers*, *supra* note 21.

49. First, *Overview of Mental Illness*, *supra* note 27.

50. *Id.*

51. *Mental Health by the Numbers*, *supra* note 21.

52. *Mental Health Treatment & Services*, NAT’L ALLIANCE ON MENTAL ILLNESS (2019), <https://www.nami.org/learn-more/treatment>.

53. Experts questioned by the Treatment Advocacy Center estimate that approximately 50 beds per 100,000 individuals would meet mental health needs for acute and long-term care. However, many individuals who need residential treatment cannot obtain it, because in some states, the number of available beds is as low as five beds per 100,000 people. Nationwide, approximately nine million adults with a mental health condition report having an unmet need. Yohanna, *supra* note 23; *The State of Mental Health in America*, MENTAL HEALTH AM. (2019), <http://www.mentalhealthamerica.net/issues/state-mental-health-america>.

54. *Id.*

individuals with mental illness, sometimes seemingly at random, despite the availability of other, less-imposing treatment options.⁵⁵

A. Mental Health Treatment Options

Individuals with mental illness have several treatment options available (including many options other than commitment to a psychiatric institution), such as antipsychotic, antidepressant, or antianxiety medication, rehabilitation, cognitive behavior therapy, and self-help groups.⁵⁶ Such treatment is provided in a variety of settings, and the environment and type of care depend on several factors, including the nature and severity of the person's mental illness, the person's physical health, and the type of treatment prescribed.⁵⁷ The primary settings for providing mental illness treatment include inpatient care and outpatient care.⁵⁸ Additionally, mental health care services are occasionally provided via online and telecommunications technologies.⁵⁹

Inpatient care is the most intensive level of treatment for individuals with mental illness, offering around-the-clock care.⁶⁰ Inpatient care is commonly tailored to patients suffering from severe mental illnesses, such as schizophrenia, bipolar disorder, or substance abuse issues, and who require near-constant monitoring.⁶¹ Inpatient care involves overnight or longer stays in a psychiatric hospital, a psychiatric unit of a general hospital, or a residential treatment facility.⁶² Psychiatric hospitals exclusively treat mental illnesses and may provide drug and alcohol detoxification and inpatient drug and alcohol rehabilitation services.⁶³ A psychiatric hospital may also have separate specialty units for eating disorder treatment and child and adolescent services.⁶⁴

Outpatient treatment involves providing services similar to inpatient care in a more flexible environment.⁶⁵ Outpatient care permits patients to attend treatments during the day and return home in the evenings, rather than

55. *Mental Health Treatment & Services*, *supra* note 52.

56. Caspar & Joukov, *supra* note 45, at 179.

57. *See, e.g., Types of Mental Health Treatment Settings and Levels of Care*, NORTH TEXAS HELP, <https://www.northtexashelp.com/mental-health-treatment-settings.html> (last visited Mar. 23, 2020).

58. *See, e.g., The Difference Between Inpatient vs. Outpatient Care*, ALVARADO PARKWAY INST. BEHAVIORAL HEALTH SYS. (Aug. 18, 2017), <https://www.apibhs.com/blog/2017/8/18/the-difference-between-inpatient-vs-outpatient-care>.

59. *See, e.g., Types of Mental Health Treatment Settings and Levels of Care*, *supra* note 57.

60. *See, e.g., The Difference Between Inpatient vs. Outpatient Care*, *supra* note 58.

61. *Id.*

62. *See, e.g., Types of Mental Health Treatment Settings and Levels of Care*, *supra* note 57.

63. *Id.*

64. *Id.*

65. *See, e.g., The Difference Between Inpatient vs. Outpatient Care*, *supra* note 58.

staying overnight in a treatment facility.⁶⁶ Outpatient services are typically geared toward individuals experiencing mild psychiatric symptoms or those transitioning from inpatient care.⁶⁷

i. Inpatient Commitment

Prior to the 1960s, involuntarily committing an individual to a psychiatric institution was relatively straightforward, with state laws turning on a fairly simple determination that the person required care, permitting confinement to be continued indefinitely without ongoing judicial oversight.⁶⁸ However, the deinstitutionalization movement of the 1960s brought a national trend to reform involuntary commitment laws, shifting the focus to the individual's "dangerousness to self or others" as the basis for civil commitment.⁶⁹ This trend gained momentum in reaction to a Supreme Court ruling in *O'Connor v. Donaldson*, which held that a state "cannot constitutionally confine . . . a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends."⁷⁰

Current involuntary commitment laws permit courts to order persons with mental illness held in a hospital over their objections for a period of care and treatment.⁷¹ At minimum, these laws are required to address the constitutional criteria for commitment and the process of commitment.⁷² Every U.S. state has established civil commitment laws and criteria that govern when court orders mandate mental health treatment for individuals suffering from psychiatric symptoms.⁷³ These civil commitment laws address: the length of a patient's stay, conditions to the patient's stay, whether the state may require a patient to adhere to court-ordered treatments, and when a patient may be involuntarily re-hospitalized.⁷⁴

Some states permit involuntary commitment when individuals are dangerous to themselves or others.⁷⁵ However, several states now have

66. *The Difference Between Inpatient vs. Outpatient Care*, *supra* note 58.

67. *Id.*

68. Brian Stettin et al., *Mental Health Commitment Laws: A Survey of the States*, TREATMENT ADVOCACY CTR. (2014), <https://www.treatmentadvocacycenter.org/mental-health-commitment-laws>.

69. *Id.*

70. 422 U.S. 563, 576 (1975).

71. John A. Menninger, *Involuntary Treatment: Hospitalization and Medications*, https://www.brown.edu/Courses/BI_278/Other/Clerkship/Didactics/Readings/INVOLUNTARY%20TREATMENT.pdf.

72. Stettin et al., *supra* note 68.

73. *Id.*

74. *Id.*

75. For example, Mississippi, North Carolina, and North Dakota have the dangerousness to self or others standard. MISS. CODE ANN. § 41-21-61(e); N.C. GEN. STAT. § 122C-3(11); N.D. CENT. CODE § 25-03.1-02(20).

broader commitment criteria, which permit the involuntary commitment of those who are not necessarily deemed “dangerous to themselves or others.”⁷⁶ Two of these broader commitment standards are the “grave disability” standard and the “need-for-treatment” standard.⁷⁷ The “grave disability” standard allows an individual who becomes unable to provide for the basic necessities of human survival to be involuntarily committed.⁷⁸ Alaska follows the “grave disability” standard, and its law defines “gravely disabled” as:

[A] condition in which a person as a result of mental illness . . . is in danger of physical harm arising from such complete neglect of basic needs for food, clothing, shelter, or personal safety as to render serious accident, illness, or death highly probable if care by another is not taken.⁷⁹

The “need-for-treatment” standard is even broader than the “gravely disabled” standard.⁸⁰ The justification for this standard is that deterioration of general health, psychiatric damage, and loss of the ability to function independently are all unacceptable harms that require involuntary commitment.⁸¹ A need-for-treatment standard generally requires a finding that an individual’s mental illness prevents him or her from seeking voluntary help, and if the individual is not treated, he or she will suffer.⁸² Need-for-treatment laws render involuntary commitment available to an individual who suffers from a mental illness, even if the individual manages to meet basic survival needs and exhibits no violent or suicidal tendencies.⁸³ Arizona adheres to the need-for-treatment standard, with involuntary commitment available if a person is “persistently and acutely disabled,” which is defined as follows:

‘Persistently or acutely disabled’ means a severe mental disorder that meets all the following criteria:

76. Stettin et al., *supra* note 68.

77. *Id.*

78. *Id.*

79. ALASKA STAT. § 47.30.915(9)(A) (2019). Utah also has a standard similar to the “grave disability” standard and provides that an individual may be involuntarily committed if he or she is in “substantial danger,” which is defined, in part, as the individual is at serious risk of “serious bodily injury because the individual is incapable of providing the basic necessities of life, including food, clothing, or shelter.” UTAH CODE ANN. § 62A-15-602(17).

80. Stettin et al., *supra* note 68.

81. *Id.*

82. *Id.*

83. *Id.*

- (a) If not treated has a substantial probability of causing the person to suffer or continue to suffer severe and abnormal mental, emotional or physical harm that significantly impairs judgment, reason, behavior or capacity to recognize reality.
- (b) Substantially impairs the person's capacity to make an informed decision regarding treatment and this impairment causes the person to be incapable of understanding and expressing an understanding of the advantages and disadvantages of accepting treatment and understanding and expressing an understanding of the alternatives to the particular treatment offered after the advantages, disadvantages and alternatives are explained to that person.
- (c) Has a reasonable prospect of being treatable.⁸⁴

Florida's involuntary commitment law is slightly different.⁸⁵ Termed "The Baker Act," Florida law permits judges, law enforcement officers, mental health professionals, or doctors to commit individuals suspected of having a mental illness for up to 72 hours in a mental health treatment facility if they meet certain criteria.⁸⁶ For an individual to be involuntarily held, there must be a reason to believe the person has a mental illness. Additionally, due to the mental illness, the person must have refused a voluntary examination or is unable to determine whether such an examination is necessary and without treatment, the person is likely to suffer from neglect or harm himself or herself or someone else in the near future.⁸⁷ An individual may be released or referred to outpatient treatment after 72 hours of involuntary commitment.⁸⁸ However, if the person is not discharged within 72 hours, the facility can obtain the individual's consent to continue his or her commitment voluntarily, or a facility administrator may file a petition through the circuit court for continued involuntary commitment.⁸⁹

84. A.R.S. § 36-501(32) (2019).

85. Dan Sullivan, *Five Things to Know About the Baker Act and Why It Didn't Prevent Car Attack on New Tampa Bike Family*, TAMPA BAY TIMES (June 26, 2018), https://www.tampabay.com/news/courts/Five-things-to-know-about-the-Baker-Act-and-why-it-didn-t-prevent-car-attack-on-New-Tampa-bike-family_169491866/.

86. Kate Santich, *Florida's Baker Act – A Revolving Door?*, ORLANDO SENTINEL (Aug. 25, 2017, 5:10 PM), <https://www.orlandosentinel.com/news/os-does-florida-baker-act-work-20170823-story.html>.

87. Sullivan, *supra* note 85; see also *What Happens When You Baker Act Someone?* FAMILY CTR. FOR RECOVERY (Sept. 27, 2017), <https://fcfrmd.com/happens-baker-act-someone/>.

88. Sullivan, *supra* note 85.

89. *Id.*

If the court finds that a person meets criteria for continued involuntary commitment, the person can be committed to a mental health facility for up to six months without an additional hearing or other court proceeding.⁹⁰

ii. Outpatient Commitment

Involuntary outpatient commitment, also known as assisted outpatient treatment, occurs when a court orders an individual meeting certain legal criteria to adhere to an outpatient treatment program as a condition of remaining in the community.⁹¹ Laws for involuntary outpatient commitment empower judges to order patients to comply with specifically prescribed treatment.⁹² All U.S. states but five authorize outpatient commitment: Connecticut, Maryland, Massachusetts, New Mexico, and Tennessee.⁹³ In a few states, such as Utah, an individual involuntarily committed to an outpatient program may be required to attend an inpatient program if the individual does not strictly follow the outpatient treatment regimen.⁹⁴ For example, Utah's involuntary outpatient commitment law provides as follows:⁹⁵

If at any time during the specified period it comes to the attention of the court, either that the patient is not complying with the order, or that the alternative treatment has not been adequate to meet the patient's treatment needs, the court may, after proper hearing:

(1) Consider other alternatives, modify its original order and direct the patient to undergo another program of alternative treatment for the remainder of the 90-day period; or

(2) Enter a new order directing that the patient be hospitalized for the remainder of the 90-day period.

As part of the treatment plan, a court may order involuntary outpatient commitment that may include participation in therapy, self-help groups, or

90. Sullivan, *supra* note 85.

91. *Outpatient Commitment*, HARVARD MED. SCH. (2006), https://www.health.harvard.edu/newsletter_article/Outpatient_commitment.

92. *Involuntary Outpatient Commitment*, HARVARD MED. SCH. (2008), https://www.health.harvard.edu/newsletter_article/Involuntary_outpatient_commitment.

93. Stettin et al., *supra* note 68.

94. *Id.*

95. 18 V.S.A. § 7618(b) (2019).

medication.⁹⁶ The outpatient treatment plan may also require supervised living and frequent drug testing.⁹⁷

B. Burden of Proof

There are generally three standards of proof that triers of fact apply to reach decisions in court proceedings. The highest standard of proof is “beyond a reasonable doubt.”⁹⁸ This standard requires that the judge or jury, as the trier of fact, be convinced of his or her decision without any reservations that would be expected of a reasonable person and is largely reserved for criminal cases.⁹⁹ The lowest standard of proof ordinarily applied in court is the “preponderance of the evidence” standard, requiring only that the trier of fact believe a particular outcome is more likely than another.¹⁰⁰ The “preponderance of the evidence” standard ordinarily applies in civil lawsuits and probable cause determinations in the criminal context.¹⁰¹ The third standard of proof allows decisions to be made based on “clear and convincing evidence,” which is a higher standard than preponderance of evidence but lower than beyond a reasonable doubt.¹⁰² The latter standard can be found both in criminal proceedings and civil proceedings in certain circumstances.

In 1978, the Supreme Court considered which standard of proof is required to involuntarily commit a psychiatric patient in *Addington v. Texas*.¹⁰³ Frank Addington had been hospitalized several times for his mental illness, and his mother requested his indefinite commitment due to a prior assault.¹⁰⁴ Her request was granted based on a standard of clear and convincing evidence.¹⁰⁵ Addington appealed the decision, arguing that the correct standard of proof should have been beyond a reasonable doubt.¹⁰⁶ However, the Supreme Court affirmed the ruling of the lower court, holding that because of the “uncertainties of psychiatric diagnosis” the standard of beyond a reasonable doubt was an “unreasonable barrier to needed medical treatment” for many patients who were in clear need of care.¹⁰⁷ An obvious

96. Jacob Kurlander, *Pro/Con: Outpatient Commitment for the Severely Mentally Ill*, AMA JOURNAL OF ETHICS (Oct. 2003), <https://journalofethics.ama-assn.org/article/procon-outpatient-commitment-severely-mentally-ill/2003-10>.

97. *Id.*

98. Testa & West, *supra* note 6.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. 441 U.S. 418 (1979).

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 442; Testa & West, *supra* note 6.

criticism of the decision is that if the need for care was indeed so “clear,” then why would the government fail to prove its case beyond a reasonable doubt?

C. Uncertainty in Confinement

The Precogs are never wrong. But, occasionally . . . they do disagree.

– Dr. Iris Hineman, *Minority Report*¹⁰⁸

In 1972, David Rosenhan, a psychologist at Stanford University, used ten psychologically normal individuals as confederates in a research study and sent them to twelve hospitals across the country.¹⁰⁹ These individuals gave the hospitals false names and occupations and claimed to hear voices.¹¹⁰ The individuals were truthful about all other details, and none of them had any significant history of mental illness.¹¹¹ All of the individuals were admitted to psychiatric units, at which point they stopped reporting psychiatric symptoms entirely, as instructed.¹¹² Regardless, nearly every person in the study was diagnosed with schizophrenia.¹¹³ Their involuntary hospitalizations ranged from seven to fifty-two days, with doctors prescribing them more than 2,000 pills combined, including antipsychotics and antidepressants.¹¹⁴ While institutionalized, staff commonly misinterpreted the patients’ behaviors to fit within the context of psychiatric disorders and behaviors.¹¹⁵ For instance, the patients often took notes while studying the psychiatric wards, and one nurse wrote in the chart, “[p]atient engages in writing behavior.”¹¹⁶ Rosenhan’s conclusions were striking: individuals faking mental illness all gained admission to psychiatric wards, and after they stopped faking symptoms, they remained institutionalized for prolonged periods.¹¹⁷ After the study’s completion, Rosenhan stated that it “is clear that we cannot distinguish the sane from the insane in psychiatric hospitals.”¹¹⁸

Such studies are difficult, if not dangerous, to repeat due to the unnecessary medications prescribed to the subjects and the uncertainty

108. MINORITY REPORT (20th Century Fox 2002).

109. Morris, *supra* note 19; Rosenhan, *supra* note 14.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. Morris, *supra* note 19; Rosenhaun, *supra* note 14.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

relating to the duration of confinement, but real-world examples sometimes help supplement the findings. More than twenty years after Rosenhan's experiment, John Montin walked up to a person's home and announced that it "belonged to his ancestors" and that he was "taking it back."¹¹⁹ Authorities charged Montin with False Imprisonment.¹²⁰ A jury found Montin not guilty because of temporary insanity, and the state transported him to Lincoln Regional Center, a mental health facility in Lincoln, Nebraska.¹²¹ Doctors at the Lincoln Regional Center never tested Montin themselves; instead they used police records to dismiss him as delusional rather than court reports showing otherwise.¹²² Twenty years after Montin was admitted to the mental health facility, a psychiatrist at the facility determined that Montin had been taking medication for back pain in 1993 that caused temporary psychosis.¹²³ The man stopped taking the medication prior to his not guilty verdict twenty years earlier, but he was only released in 2013, after spending two decades in the mental facility.¹²⁴ Montin filed a lawsuit against Lincoln Regional Center, stating that his confinement caused him to forego marrying, having a family, and attending his mother's funeral, not to mention many of the other benefits liberty provides.¹²⁵ Even a conviction for the crimes of which Nebraska accused Montin probably would not have carried such a harsh sentence, and accepting a plea offer may have further reduced the loss of liberty. But, perhaps given the uncertain nature of the commitment, Montin had reason to suspect he would be released soon given the *temporary* nature of his insanity.¹²⁶

More recently, in 2007, Ketema Ross kicked in his elderly neighbors' door, beat them with a broom handle, and immediately called police afterward to confess.¹²⁷ Police arrested Ross and charged him with first-degree burglary, second-degree assault, third-degree assault and third-degree unlawful imprisonment.¹²⁸ Based on a plea offer Ross received, he would have spent three years in prison.¹²⁹ However, Ross' crime manifested from a mental illness—he believed the attack was necessary at the order of the President and the Central Intelligence Agency to stop a terrorist attack. Evidence showed that Ross committed the attack despite the fact that he did

119. Distant, *supra* note 19.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. Distant, *supra* note 19.

125. *Id.*

126. *Id.*

127. Ross, *supra* note 19.

128. *Id.*

129. *Id.*

not want to harm his neighbors.¹³⁰ The jury found Ross not guilty of the charges by reason of insanity, and instead of locking him in prison for *three* years, the state locked in a mental institution for *seven* years.¹³¹ Once committed to a psychiatric hospital in Washington, Ross was diagnosed with chronic paranoid schizophrenia, and after taking the prescribed medicine to treat the symptoms of psychosis, Ross recovered sufficiently to satisfy the staff approximately 84 months after his confinement.¹³² This lengthy commitment was despite the fact that just two years into his confinement, Ross no longer experienced psychosis.¹³³ Despite his progress, hospital staff required him to remain in the hospital for an additional five years after his symptoms subsided.¹³⁴

Uncertain and prolonged commitment periods are troubling given the number of individuals currently facing the prospect of involuntary commitment due to mental health problems. According to a 2017 study conducted by the National Association of State Mental Health Program Directors, more than 10,000 Americans with mental illness who have not been convicted of a crime—individuals who have been found not guilty by reason of insanity or who have been arrested but deemed incompetent to stand trial—are involuntarily committed to psychiatric hospitals.¹³⁵ When a not-guilty-by-reason-of-insanity defense does succeed, it tends to resemble a conviction more than an acquittal—the acquitted individuals often endure longer periods of confinement, as they are pulled into a broken mental health system that can be more difficult to leave than prison.¹³⁶ In nearly all states, there is no limit on commitment duration.¹³⁷ In the states with limitations, such as California, the limitations are based on the maximum prison sentence for the offense, but California’s law permits repeated two-year extensions as

130. *Id.*

131. Ross, *supra* note 19.

132. *Id.*

133. *Id.*

134. *Id.*

135. McClelland, *supra* note 9.

136. *Id.*; Thea Amidov, *Mentally Ill and Locked Up: Prisons Versus Inpatient Wards for Psychiatric Patients*, PSCYH CENTRAL (Mar. 30, 2015), <https://pro.psychcentral.com/mentally-ill-and-locked-up-prisons-versus-inpatient-wards-for-psychiatric-patients/>. We should note that the not guilty by reason of insanity defense is not even available as separate from simply disputing the existence of *mens rea* in some jurisdictions, something the Supreme Court of the United States recently ruled conforms with the United States Constitution. Richard Wolf, *Supreme Court says states can limit the scope of insanity defense*, USA TODAY (Mar. 23, 2020), https://www.usatoday.com/story/news/politics/2020/03/23/insanity-defense-supreme-court-lets-states-make-harder-prov-e/2898915001/?fbclid=IwAR0CvCXHZQYbu5V08_-M3Q5Pv2J0ZsXYJLpswtS8Kb0ncS67o64YdXFk2xg (last visited Mar. 24, 2020). Kahler v. Kansas, No. 18-6135, slip op. (Mar. 23, 2020).

137. McClelland, *supra* note 9.

patients approach the limit set on their confinement, effectively permitting confinement to be extended indefinitely.¹³⁸

In 1983, a national study revealed that those pleading not guilty by reason of insanity were often confined for twice as long as those actually convicted of the same offense.¹³⁹ “Scant research, conducted decades ago, seems to constitute the most recent survey of the fate of the country’s [not-guilty-by-reason-of-insanity] commitments.”¹⁴⁰ Not much is known about the confinement of persons committed to psychiatric hospitals by the criminal justice system—no federal agency is charged with collecting data on not-guilty-by-reason-of-insanity patients’ lengths of commitment, crimes, or treatment, or otherwise monitoring these patients.¹⁴¹ There is no national registry or other watchdog organization that tracks how mentally infirm individuals have been involuntarily committed or why.¹⁴²

In 2015, Florida had 24 patients who were deemed not guilty by reason of insanity and were hospitalized for more than 15 years, and Texas had 27 such patients.¹⁴³ Connecticut had 40, Georgia had 43, and New York and Washington each had 60 not-guilty-by-reason-of-insanity patients committed for longer than 15 years.¹⁴⁴ In each of those states—which exclude thousands of patients that were deemed not guilty by reason of insanity—a “significant portion of [not-guilty-by-reason-of-insanity] patients had been hospitalized for more than two years. Nearly 1,000 patients had been hospitalized for five to 15 years.”¹⁴⁵ Even more alarming, “[m]ore than 400 [patients] had been in for longer than 15 [years]. Of these, more than 100 [patients] had been in longer than 25 years and at least 60 [patients] for more than 30 [years].”¹⁴⁶

When a hospital desires to release or transfer a patient that has pled not guilty by reason of insanity, the prosecutor’s office can demand a hearing.¹⁴⁷ In contesting transfer or release, the prosecutor’s office can compel the patient to be examined by a doctor the office selects.¹⁴⁸ Even if that doctor agrees that the patient should be released, the prosecutor can still contest the

138. *Id.*

139. Randy Borum & Solomon M. Fulero, *Empirical Research on the Insanity Defense and Attempted Reforms: Evidence Toward Informed Policy*, AM. PSYCHOLOGY ASS’N (1999), <https://link.springer.com/content/pdf/10.1023/A:1022364700424.pdf>.

140. McClelland, *supra* note 9.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. McClelland, *supra* note 9.

146. *Id.*

147. *Id.*; see also Jennifer E. Brockman and John R. Chamberlain, *Commitment Following a Finding of Not Guilty by Reason of Insanity*, JOURNAL OF AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW ONLINE (2007), 35(2) 268–69, <http://jaapl.org/content/35/2/268>.

148. McClelland, *supra* note 9.

release.¹⁴⁹ If a patient does win release or transfer, the prosecutor can appeal.¹⁵⁰ Additionally, in several states, such as New York, a patient that has pled not guilty by reason of insanity is almost always transferred to a civil, less secure facility for another undetermined amount of time before release.¹⁵¹ All of these steps create a difficult path to freedom for many patients.¹⁵² In the majority of states, the courts have final review over these releases and transfers, and judges commonly side with the prosecution regardless of what doctors advise.¹⁵³

For example, Cas Shearin, the Director of Investigations and Monitoring at Disability Rights North Carolina, recalled a 1988 case where, during an alcohol-related psychiatric meltdown, a man shot four strangers he thought were demons.¹⁵⁴ Year after year, the man's treating doctors told the judge that he was ready to be released.¹⁵⁵ The psychiatric hospital increased his leave privileges, and he was permitted to report to a full-time job and visit a girlfriend with whom he had children.¹⁵⁶ Finally, after 21 years of commitment and seven psychologists and psychiatrists testifying he no longer suffered from a mental illness, the hospital released him, and the judge ordered him to submit to random drug tests for one year.¹⁵⁷

According to the former New York State Office of Mental Health Forensic Director, Joel Dvoskin, politics can determine whether an individual will be confined for a significant amount of time, regardless of whether it is safe to release the person.¹⁵⁸ "Elected judges, fearing bad publicity, may be loath to release an offender into the community."¹⁵⁹ For example, a psychiatric hospital released John Hickley, Jr. 35 years after being found not guilty by reason of insanity: 20 years after Hickley's doctors declared his mental illness to be in full remission.¹⁶⁰ According to Dvoskin, the question "becomes one of risk tolerance. America has become—to an extreme level that's almost impossible to exaggerate—a risk-intolerant society."¹⁶¹ People fear mental illness, even though only approximately 3%–5% percent of violent crimes in the United States are attributed to serious

149. *Id.*

150. McClelland, *supra* note 9.

151. *Id.*

152. *Id.*; *What Happens to The Criminally Insane, After Court*, NATIONAL PUBLIC RADIO (2011), <https://www.npr.org/2011/11/28/142859813/what-happens-to-the-criminally-insane-after-court>.

153. McClelland, *supra* note 9.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. McClelland, *supra* note 9.

159. *Id.*

160. *Id.*

161. *Id.*

mental illness.¹⁶² Additionally, those with mental illness may actually be less likely to commit serious violent acts than the general population.¹⁶³ Some individuals pleading not guilty by reason of insanity have been acquitted of nonviolent crimes, such as traffic offenses and prostitution.¹⁶⁴

In addition, recidivism rates for individuals who are not guilty by reason of insanity are relatively low.¹⁶⁵ National recidivism rates for released prisoners are above 60 percent, but individuals “who are found [not guilty by reason of insanity] tend to go back out into the community, and they tend to do really, really well.”¹⁶⁶ The arrest rate for persons on conditional release, a mental-health parole from the hospital, is less than half of the arrest rate of the general population of Maryland.¹⁶⁷ Furthermore, a 2016 study of recidivism rates in Connecticut for those deemed not guilty by reason of insanity determined that the vast majority of individuals are never rearrested.¹⁶⁸

Psychiatric institutions are the preferred location for housing individuals who have been deemed “not guilty by reason of insanity,” and these individuals fill an increasing share of the remaining 42,000 state psychiatric hospital beds.¹⁶⁹ In Pennsylvania, the proportion of patients who were committed after being found not guilty by reason of insanity increased by 379% between 1988 and 2008.¹⁷⁰ In California, nearly 90% of its approximately 7,000 state hospital patients are those who were deemed not guilty by reason of insanity.¹⁷¹ Nationwide, approximately one-third of patients in state hospitals in 2007 were not guilty by reason of insanity patients, and that number is “rapidly expanding.”¹⁷² During the past ten years, these patients’ medical costs increased from \$2.5 billion to \$4.25 billion, and these individuals currently account for nearly 44% of total state psychiatric expenditures.¹⁷³ In Tennessee, there are not guilty by reason of insanity patients whom hospitals cannot discharge because they cannot find

162. *Mental Health Myths and Facts*, MENTALHEALTH.GOV (Aug. 29, 2017), <https://www.mentalhealth.gov/basics/mental-health-myths-facts>.

163. *Mental Illness and Violence*, HARVARD MED. SCH. (2011), https://www.health.harvard.edu/newsletter_article/mental-illness-and-violence.

164. Linda C. Fentiman, *Guilty But Mentally Ill: The Real Verdict is Guilty*, 26 B.C. L. REV. 601 (1985).

165. Lea Skene, *What Happens After Not Guilty by Reason of Insanity Plea? Story Behind an Accused Baton Rouge Cop Shooter*, ADVOCATE (Feb. 24, 2018, 1:35 PM), https://www.theadvocate.com/baton_rouge/news/crime_police/article_44b13aaa-1279-11e8-b0c0-07b4cb18013e.html.

166. McClelland, *supra* note 9.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. McClelland, *supra* note 9.

172. *Id.*

173. *Id.*

an outpatient provider for the individuals.¹⁷⁴ According to an employee of Tennessee's Mental Health Department, "once you get someone into [a psychiatric] hospital, it's hard to get the court to take them back out."¹⁷⁵

Given the uncertainty of confinement, it is entirely possible that in some cases, a defendant with mental illness may perceive it to be to his or her benefit to plead guilty (or accept a plea offer) rather than attempting to establish his or her own insanity.¹⁷⁶ This reasonable belief is because the individual may fear indefinite confinement to a mental health institution as opposed to a very definite (and sometimes curtailed) sentence he or she might receive for a crime. This fear and uncertainty might be well-founded, since in many confinements to mental health treatment facilities on the grounds of legal insanity, the standards for obtaining release, the representation of counsel, or both are very unclear.¹⁷⁷ Hence, the accused may elect the evil he or she knows (jail or prison) rather than the evil he or she does not know (commitment to a mental facility).¹⁷⁸

In author Joukov's practical experience, it was certainly easier for the government to keep someone involuntarily committed than to prove a criminal case beyond a reasonable doubt. In his role as a Florida Assistant State Attorney, Joukov handled several Baker Act hearings. The training of an attorney for one of these hearings consisted entirely of handing the attorney a single page of questions to read to a doctor the attorney had never met before (and never spoke to prior to the hearing) during the hearing. Joukov attended several hearings and read the questions precisely as they were written in the order they appeared before a judge, a psychologist, opposing counsel, and the client seeking to obtain release. Despite the fact that preparation for these hearings was minimal, and despite the fact that Joukov received no instructions for what he should do if the direct

174. McClelland, *supra* note 9.

175. *Id.*

176. For example, when James was 20 years old, he lured a woman into his house for a housekeeping interview and subsequently raped her. When charged, James pled "not guilty by reason of insanity." He was not sentenced to 20 years, 25 years, or any specific term of confinement. James was not sentenced at all. His plea did not prescribe or limit the duration of his stay. Rather, James is required to be hospitalized until he is deemed safe to release to society, no matter how long that takes. New York committed James to a state psychiatric facility, and psychologists diagnosed him with borderline-personality disorder. James' entire "medication" regimen consists of "fish oil twice a day, calcium, vitamin D and two Kool-Aids and prune juice and Metamucil." McClelland, *supra* note 9.

177. *Id.*; see also Artem M. Joukov, *Isn't That Hearsay Anyway? How the Federal Hearsay Rule Can Serve as a Map to the Confrontation Clause*, 63 WAYNE L. REV. 337, 380 (2018) (emphasizing the importance of legal clarity); see generally Artem M. Joukov & Samantha M. Caspar, *Comrades or Foes: Did the Russians Break the Law or New Ground for the First Amendment?*, 39 PACE L. REV. 43, 99 n.326 (2018) (emphasizing the same).

178. *Id.*; see also Samantha M. Caspar & Artem M. Joukov, *Mental Health and the Constitution: How Incarcerating the Mentally Ill Might Pave the Way to Treatment*, 20 NEV. L.J. 547, 569 (2020).

examination went off track, Joukov never lost a single hearing. He recalls that most hearings proceeded without any cross-examination, there were never any objections, and the hearings lasted no longer than fifteen minutes (including the time it took for the judge to issue a ruling). Joukov is unaware of a single appeal filed from one of these hearings, nor could there be an appeal in most instances since none of the issues would have been properly preserved without objection. These proceedings were very different from an adversarial jury trial, which is at least afforded to every Florida individual accused of a high crime or misdemeanor and which often incorporates objections, cross-examination, and even appeals. The Article leaves it to the readers to decide for themselves whether this Baker Act procedure and similar procedures in other states fully and properly protect the constitutional rights of the individual seeking release.¹⁷⁹

Part III: Constitutionality

In 1983, the Supreme Court ruled in *Jones v. United States* that it was not a due process violation to commit not guilty by reason of insanity defendants automatically and indefinitely to a mental hospital.¹⁸⁰ In *Jones*, Michael Jones, a paranoid schizophrenic, had been committed to a mental hospital since 1975 for eight years after pleading not guilty by reason of insanity to petty larceny for attempting to steal a jacket, a misdemeanor punishable by a maximum prison sentence of one year.¹⁸¹ The Superior Court of the District of Columbia found Jones not guilty by reason of insanity, committing him to a mental hospital.¹⁸² At Jones' subsequent 50-day hearing, the court found that he suffered from a mental illness and determined that he was considered a danger to himself or others.¹⁸³ The Court held a second release hearing after Jones had been hospitalized for more than one year—the maximum period he could have spent in prison had he been convicted.¹⁸⁴

Jones demanded that he be released, and the Superior Court denied his release, continuing his commitment, a ruling ultimately affirmed by the District of Columbia Court of Appeals and the United States Supreme Court.¹⁸⁵ According to the Supreme Court, when a criminal defendant establishes by a preponderance of the evidence that he is not guilty of a crime

179. See, e.g., *Mental Health Commitment Laws: A Survey of the States*, TREATMENT ADVOCACY CENTER (2014), <https://www.treatmentadvocacycenter.org/storage/documents/2014-state-survey-abridged.pdf> (last visited Mar. 24, 2020).

180. 463 U.S. 354 (1983).

181. *Id.* at 359.

182. *Id.*

183. *Id.* at 360.

184. *Id.*

185. *Id.* at 354, 370; *Jones v. United States*, 396 A.2d 183, 1978 D.C. App. LEXIS 585.

by reason of insanity, the United States Constitution permits the government, on the basis of the insanity judgment, to confine him to a mental hospital “until such time as he has regained his sanity or is no longer a danger to himself or society.”¹⁸⁶ Specifically, the Supreme Court stated that “[t]here simply is no necessary correlation between the length of the acquittee’s hypothetical criminal sentence and the length of time necessary for his recovery.”¹⁸⁷

This decision appeared to deviate from the Supreme Court’s jurisprudence.¹⁸⁸ For example, in *O’Connor v. Donaldson*, the Supreme Court held that non-dangerous individuals could not be confined against their will at all.¹⁸⁹ However, the *Jones* decision seemed to run contrary to *O’Connor*’s reasoning despite the fact that committing a crime is not an inherently dangerous act.¹⁹⁰ Examples of non-dangerous crimes include small-time theft, the recreational use of mild drugs (such as cannabis), and trespass that does not involve danger or threat of danger to the trespasser or others.¹⁹¹ These crimes, while constituting a nuisance, surely do not suggest a dangerous perpetrator in the vast majority of instances.¹⁹² According to *Jones*, however, if someone accused of trespass invokes the insanity defense,¹⁹³ the individual could be confined indefinitely until he or she overcomes his or her illness.¹⁹⁴

Although the Supreme Court later clarified *Jones* in *Foucha v. Louisiana*, the potential chilling effect on insanity defenses was not necessarily an abdicated possibility.¹⁹⁵ In *Foucha*, the Supreme Court held that potential future danger was insufficient cause, on its own, to keep a person committed after a not-guilty-by-reason-of-insanity verdict.¹⁹⁶ Theoretically, this would reduce the chance of a person remaining in commitment beyond the necessary time.¹⁹⁷ Practically, though, even Supreme Court rulings such as this one reach only as far as individuals are

186. *Jones*, 463 U.S. at 354.

187. *Id.* at 369.

188. *See, e.g., O’Connor v. Donaldson*, 422 U.S. 563 (1975).

189. *Id.*

190. *Jones*, 463 U.S. at 354.

191. Chris Christie, *Save Jail for the Dangerous*, BRENNAN CTR. FOR JUSTICE (Apr. 28, 2015), <https://www.brennancenter.org/our-work/analysis-opinion/save-jail-dangerous>.

192. *Id.*

193. The chances of such a defense being invoked on this charge are incredibly low, despite the fact that many individuals who commit petty crimes like trespass may be suffering from some type of mental illness. However, that may be because of the consequences *Jones* entails for individuals so accused: They may correctly infer that it is better to spend a day in jail and go free than to remain in a mental health institution indefinitely after a trial. *See Jones*, 463 U.S. at 354.

194. *Id.* at 369.

195. *Foucha v. Louisiana*, 504 U.S. 71 (1992).

196. *Id.*

197. *Id.*

willing to enforce them. Therefore, if the ultimate decision is left to the exclusive discretion of a doctor or a judge, society must rely solely on this individual to adequately protect the freedoms of persons with mental illness. As demonstrated earlier, this reliance can be somewhat misplaced.

However, *Foucha* did not prevent the Supreme Court from adding additional post-*Jones* hurdles to the commitment of individuals with mental illness.¹⁹⁸ Even when confronted with an individual previously convicted of sex offenses, the Supreme Court tread very lightly when discussing the possibility of civil commitment to prevent future harm.¹⁹⁹ Particularly, the Court held that even though the individual in question had more than one conviction for sexual crimes, the State of Kansas could not civilly commit him after he completed the punitive measures of the criminal charges without proof that the offender had “serious difficulty” in controlling his behavior.²⁰⁰ The Court clarified that this would require more than mere proof of potential for recidivism.²⁰¹ Rather, any state that sought such a commitment would have to prove that a psychological condition made the individual more dangerous than a “dangerous but typical recidivist convicted in an ordinary criminal case.”²⁰² This ruling put civil commitment in line with general concepts of criminal law: that individuals may not lose their liberty on the basis of crimes that they have yet to commit (regardless of the likelihood that the defendant would commit such crimes).

However, the Supreme Court has only been somewhat stringent with the potential use of civil commitment as an alternative to criminal punishment in instances where the government cannot prove sufficient criminal conduct to induce prolonged incarceration but hopes to confine an individual anyway.²⁰³ Particularly, the Supreme Court has drawn a distinction between civil commitment and criminal confinement that deprives individuals with mental illness of the protections available to criminals.²⁰⁴ For example, while Crane prevailed in *Kansas v. Crane*, *Seling v. Young* showed that bringing a challenge on similar constitutional grounds would not necessarily lead to the same result.²⁰⁵ Just like Crane, Young objected to his civil commitment after the conclusion of his punitive term for several sexual offenses (“six rapes over three decades”).²⁰⁶ However, his objections were not on due process grounds but rather based on the double

198. *Kansas v. Crane*, 534 U.S. 407 (2002).

199. *Id.*

200. *Id.* at 413.

201. *Id.* at 407–13.

202. *Id.* at 413.

203. *Crane*, 534 U.S. at 413.

204. *Seling v. Young*, 531 U.S. 250 (2001).

205. *Crane*, 534 U.S. at 413; *Seling*, 531 U.S. at 250.

206. *Seling*, 531 U.S. at 250.

jeopardy clause and the ex post facto law provision of the United States Constitution.²⁰⁷

The Supreme Court quickly dismissed these challenges.²⁰⁸ The Majority's analysis went no further than merely stressing that civil commitment and criminal punishment were fundamentally different, which prevented constitutional protections that the United States Constitution afforded to people accused or convicted of crimes from applying to individuals struggling with mental health problems.²⁰⁹ This distinction between criminal and civil commitment, however, might prove illusory in light of the actual challenges faced by those committed. Evidence shows that committing an individual to involuntary confinement is not significantly different from a term of imprisonment, except that confinement has far fewer limitations and can actually last longer, if not indefinitely.²¹⁰ Therefore, the distinction that the Supreme Court has continuously drawn should not be a sufficient justification for failing to reexamine involuntary commitment laws both in terms of their substance and their procedure.

The Supreme Court has certainly used the distinction between punishment and other government purposes to nullify arguments about constitutional rights violations.²¹¹ This distinction leads to a seemingly paradoxical outcome: once an individual is no longer in the realm of criminal law, his or her rights against detention tend to *decrease*. But this creates a significant and likely unintended discontinuity in the rights a person has in various instances. First, the Founding Fathers, who were trying to shape American government for centuries to come in a relatively short document, may not have foreseen the myriad of potential applications of the United States Constitution. It is entirely possible that they intended the Bill of Rights to protect people generally, not to address every conceivable instance of potential government overreach—an overreach that could be addressed by democratic process by the states. Second, by treating criminal confinement and civil confinement separately due to the original government purpose: prevention versus punishment,²¹² the Supreme Court allows reality to take a back seat.²¹³ To the citizen confined or incarcerated, the government purpose

207. *Seling*, 531 U.S. at 250; see also *Kansas v. Hendricks*, 521 U.S. 346 (1997).

208. *Seling*, 531 U.S. at 250.

209. *Id.*

210. Guy Hamilton-Smith, *The Endless Punishment of Civil Commitment*, THE APPEAL (Sept. 4, 2018), <https://theappeal.org/the-endless-punishment-of-civil-commitment/>; McClelland, *supra* note 9.

211. *Bell v. Wolfish*, 441 U.S. 520 (1979) (applying Eighth Amendment standards to jails, but holding that in the context of pre-trial detention, confinement to jail did not constitute punishment); *Seling*, 531 U.S. at 250.

212. Or the origin of the proceedings launched by the state as beginning in the realm of civil commitment as opposed to a criminal charge.

213. See, e.g., Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

for confinement is less relevant than the general loss of freedom altogether.²¹⁴ Hence, the concern with drawing a distinction between civil and criminal confinement ignores the interests of the person most impacted by the government action.

It is important to note that actual loss of freedom triggers additional protections in the criminal world.²¹⁵ The federal right of indigent defendants to be represented by court-appointed counsel applies only if the proceedings carry a possibility of incarceration.²¹⁶ The federal right to receive a jury trial only attaches when the possible length of incarceration exceeds six months.²¹⁷ Yet limiting all of these rights to criminally implicated individuals while refusing to extend them to individuals who may not have even committed a crime seems obviously unjust. The reason the United States Constitution draws such a distinction may be because the Founding Fathers may not have contemplated high rates of civil commitments on grounds of mental illness in a time when psychology and mental illness were not well-understood.²¹⁸ However, for such a distinction to continue into the twenty-first century would constitute a willful disregard for the problems individuals with mental illness face.²¹⁹

State and federal legislatures can certainly address this problem without court involvement by promulgating statutes that extend criminal rights to individuals with mental illness facing prolonged commitment. States may even go further, seeking to amend their respective constitutions to reflect these rights. In fact, the states or the federal legislature may even attempt to amend the United States Constitution, though such an amendment may prove particularly unlikely in such a divided time in our nation's history.²²⁰ However, it may be that a fair look at criminal rights and an extending interpretation of the Fourteenth Amendment would cure the problem within the courts, even if state and federal legislatures offer no solution.

The Supreme Court could view the current refusal to extend the rights enjoyed by criminal defendants to persons with mental illness as a violation

214. See, e.g., Holmes, *supra* note 213.

215. *Criminal Rights: Laws and Protections*, CRIMINAL JUSTICE DEGREE SCHOOLS, <https://www.criminaljusticedegreeschools.com/criminal-justice-resources/criminal-rights-laws-and-protections/> (last visited Feb. 14, 2020).

216. *The Right to a Public Defender*, JUSTIA, <https://www.justia.com/criminal/procedure/miranda-rights/right-to-public-defender/> (last visited Mar. 23, 2020).

217. *The Right to a Jury Trial*, FINDLAW, <https://criminal.findlaw.com/criminal-rights/the-right-to-a-jury-trial.html> (last visited Mar. 23, 2020).

218. See *History of Psychology (387 BC to Present)*, ALLPSYCH, <https://allpsych.com/timeline/>; see also *Timeline: The Development of Psychology*, GUARDIAN (Mar. 6, 2009, 7:01 PM), <https://www.theguardian.com/lifeandstyle/2009/mar/07/timeline-psychology-history>.

219. Kaufman, *supra* note 15.

220. *The Amendment Process*, HARRY S. TRUMAN LIBRARY AND MUSEUM, <https://www.trumanlibrary.gov/education/three-branches/amendment-process> (last visited Feb. 12, 2019).

of equal protection principles.²²¹ Surely, if a state extends certain rights to individuals that committed a crime, it must extend these rights to innocent or potentially innocent individuals facing a similar predicament.²²² While significant differences may exist between those accused of crimes and those facing civil commitment, these differences diminish when it comes to their shared interest in their liberty, the ability to receive due process in the determination of confinement, and many other traits that relate to the actual government proceedings that deprive individuals of liberty and property.

Admittedly, equal protection principles have “bite” only when similarly situated individuals receive differential treatment.²²³ However, even if some individuals with mental illness are too different from individuals accused of crimes for purposes of government detention, they are often *more sympathetic* from a legal perspective. This should ensure that they receive *greater* protections rather than *lesser* ones. Even if this entitlement to protection is insufficient to strike the differential treatment on its face, it is possible that as applied challenges in particular cases might be more successful. This likelihood should be particularly true when coupled with due process analysis, which the Supreme Court has previously used instead of equal protection and Eighth Amendment principles to protect the rights of persons with mental illness.²²⁴

Furthermore, this may be applicable well beyond state statutes and constitutional provisions because the Fourteenth Amendment, and its reverse incorporation into the Due Process Clause of the Fifth Amendment, fundamentally changed the applicability of constitutional protections in the Bill of Rights.²²⁵ For example, prior to the passage of the Due Process Clause that allowed the application of rights against the federal government against state government, criminal defendants would not have enjoyed the same rights that they enjoy today.²²⁶ Perhaps an argument can be made that

221. Equal protection provides: “nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV § 1.

222. Alan Meisel, *The Rights of the Mentally Ill Under State Constitutions*, 45 LAW AND CONTEMPORARY PROBLEMS 7–30 (1982).

223. *Women Prisoners v. District of Columbia*, 93 F.3d 910, 924 (D.C. Cir. 1996).

224. *Mental Health Rights*, MENTAL HEALTH AMERICA (2019), <https://www.mhanational.org/issues/mental-health-rights> (last visited Feb 12, 2019); *Seling v. Young*, 531 U.S. 250 (2001); *Kansas v. Crane*, 534 U.S. 407 (2002); *Kansas v. Hendricks*, 521 U.S. 346 (1997); *Foucha v. Louisiana*, 504 U.S. 71 (1992); *Jones v. United States*, 463 U.S. 354 (1983); *O’Connor v. Donaldson*, 422 U.S. 563 (1975); *Addington v. Texas*, 441 U.S. 418 (1979).

225. U.S. CONST. amend. XIV; U.S. CONST. amend. V; *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *United States v. Windsor*, 570 U.S. 744 (2013).

226. *Mapp v. Ohio*, 367 U.S. 643 (1961) (incorporating the right against unreasonable searches and seizures); *Wolf v. Colorado*, 338 U.S. 25 (1949) (mentioning in dicta that Fourth Amendment rights restrict state agents as well as federal ones); *Aguilar v. Texas*, 378 U.S. 108 (1964); *Ker v. California*, 374 U.S. 23 (1963); *Benton v. Maryland*, 395 U.S. 784 (1969)

excluding individuals with mental illness facing civil commitment from constitutional protections afforded to a criminal suspect violates equal protection principles.

For example, the Sixth Amendment's preservation of the right to an impartial jury trial "[i]n criminal prosecutions"²²⁷ could violate equal protection if it did not also apply to individuals facing civil commitment. After all, the Sixth Amendment treats individuals accused of crimes that face incarceration and individuals with mental illness facing commitment differently despite similar predicaments (and perhaps a common cause for the conduct leading up to the confinement).²²⁸ Since the Fourteenth Amendment was passed after the Sixth Amendment, it could technically overcome its limiting language regarding those who are entitled to a jury trial.²²⁹ The Fourteenth Amendment was passed in part to ensure that the freedoms available to all Americans would be available to recently-freed slaves.²³⁰ Since then, the Fourteenth Amendment has been extended many times by court rulings to protect classes outside of recently-freed slaves.²³¹ Perhaps its Equal Protection Clause could apply amendments previously unintended to protect persons with mental illness, to include individuals struggling with mental illness when they face loss of liberty. This scenario would not be the first time the Supreme Court extended criminal rights to individuals involved in quasi-criminal proceedings, even if those proceedings *did not* carry the possibility of incarceration.²³²

(incorporating the right against Double Jeopardy); *Griffin v. California*, 380 U.S. 609 (1965); *Malloy v. Hogan*, 378 U.S. 1 (1964); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (incorporating the right to a jury trial to apply to the states); *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (incorporating the right to a speedy trial); *In re Oliver*, 333 U.S. 257 (1948) (incorporating the right to a public trial); *Pointer v. Texas*, 380 U.S. 400 (1965) (incorporating the right to confront opposing witnesses); *Washington v. Texas*, 388 U.S. 14 (1967); *Powell v. Alabama*, 287 U.S. 45 (1932) (incorporating the right to assistance of counsel in capital cases); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Alabama v. Shelton*, 535 U.S. 654 (2002); *Robinson v. California*, 370 U.S. 660 (1962) (incorporating the right against cruel and unusual punishment); *Timbs v. Indiana*, 139 S.Ct. 682 (2019).

227. U.S. CONST. amend. VI.

228. See, e.g., *McClelland*, *supra* note 9.

229. U.S. CONST. amend. VI.

230. *14th Amendment*, HISTORY (2018), <https://www.history.com/topics/black-history/fourteenth-amendment>.

231. *Mapp*, 367 U.S. at 643; *Wolf*, 338 U.S. at 25; *Aguilar*, 378 U.S. at 108; *Ker*, 374 U.S. at 23; *Benton*, 395 U.S. at 784; *Griffin*, 380 U.S. at 609; *Malloy*, 378 U.S. at 1; *Miranda*, 384 U.S. at 436; *Duncan*, 391 U.S. at 145; *Klopfer*, 386 U.S. at 213; *In re Oliver*, 333 U.S. at 257; *Pointer*, 380 U.S. at 400; *Washington*, 388 U.S. at 14; *Powell*, 287 U.S. at 45; *Gideon*, 372 U.S. at 335; *Argersinger*, 407 U.S. at 25; *Shelton*, 535 U.S. at 654; *Robinson*, 370 U.S. at 660; *Timbs*, 586 U.S. at 682.

232. *Konigsberg v. State Bar of Cal.*, 353 U.S. 252 (1957) (acknowledging the quasi-criminal nature of a character and fitness inquiry regarding the character and fitness of a bar applicant and

Of course, such a ruling would turn quite a bit of jurisprudence on its head, which makes its occurrence unlikely. The Fourteenth Amendment requires balancing before invalidating prior laws or constitutional provisions.²³³ Generally, if the government can demonstrate a rational basis for its acts, then the discrimination is permissible.²³⁴ The rational basis standard is not a terribly high standard, even though the Majority in *United States v. Windsor* appeared to greatly increase the bite of rational basis review.²³⁵ However, the distinctions contained within the Bill of Rights, such as the right to a jury trial for individuals facing criminal prosecutions (but not civil commitment) likely pass this test with ease.²³⁶ In fact, if the mere argument that individuals accused of crimes receive a particular protection unavailable to the innocent was to be applied to the world of civil trials, a significant number of criminal protections would have to be immediately extended. These protections would include the right to confront the witnesses against the accused,²³⁷ the right against Double Jeopardy,²³⁸ the right against Cruel and Unusual Punishment (as well as excessive fines),²³⁹ and so on.

The answer to this potential problem is that there is a significant similarity between commitment due to mental illness and criminal confinement that is absent when it comes to comparing other civil proceedings to criminal ones.²⁴⁰ In the past, the existence of such similarities has been used to justify extending traditionally criminal protections to the civil world.²⁴¹ The right to legal representation at state cost was ordinarily reserved to criminal proceedings, but when the outcome involved truly high stakes, comparable to criminal sanctions, counsel could be provided.²⁴² One example is the requirement to provide counsel in civil proceedings that may

affording the bar applicant some of the rights afforded to individuals facing criminal accusations); see *Schwartz v. Bd. of Bar Examiners of the State of N.M.*, 252 U.S. 232 (1957).

233. *Nebbia v. New York*, 291 U.S. 502 (1934).

234. *Id.*

235. *United States v. Windsor*, 570 U.S. 744 (2013); Artem M. Joukov, *A Second Opinion: Can Windsor v. United States Survive President Trump's Supreme Court?*, 27 J.L. & POL'Y 327 (2019).

236. *Nebbia*, 291 U.S. at 502.

237. U.S. CONST. amend VI.

238. U.S. CONST. amend V.

239. U.S. CONST. amend VIII.

240. Ed Lyon, *Civil Commitment Used to Imprison Drug Users in Massachusetts*, PRISON LEGAL NEWS (July 2, 2018), <https://www.prisonlegalnews.org/news/2018/jul/2/civil-commitment-used-imprison-drug-users-massachusetts/>; Donald Stone, *There are Cracks in the Civil Commitment Process: A Practitioner's Recommendations to Patch the System*, 43 FORDHAM URB. L.J. 789 (2016).

241. See *Konigsberg v. State Bar of California*, 353 U.S. 252 (1957); see also *Schwartz v. Bd. of Bar Examiners of the State of N.M.*, 252 U.S. 232 (1957); *Lassiter v. Dept. of Soc. Services*, 542 U.S. 18 (1981).

242. *Lassiter*, 542 U.S. at 18; *Turner v. Rogers*, 564 U.S. 431 (2011).

lead to confinement due to a holding of civil contempt.²⁴³ This requirement constitutes important precedent, since civil contempt, much like commitment to a mental health treatment facility, could be indefinite.²⁴⁴ Another example is the required provision of counsel when sufficiently complex civil proceedings commence to fully terminate parental rights.²⁴⁵ Presumably, because the loss of parental rights is so significant that many would prefer a wide array of criminal sanctions to this outcome, the protections afforded to the criminally accused become extended to the defendant in this type of complex civil proceeding (albeit under due process principles rather than equal protection principles, though these are not altogether separable).²⁴⁶

These similarities should open the door to the argument that civil commitment for mental health reasons, due to its prolonged and indefinite nature, inherently includes greater loss of liberty and potential suffering than a definite criminal sentence.²⁴⁷ Hence, if individuals accused of crimes receive the protections of a jury trial and a heightened burden of proof,²⁴⁸ so should individuals whose only “crime” might be that they are sufficiently unfortunate to be stricken with mental illnesses. This would, of course, entail protections similar to representation by counsel, which many states already provide even without a Supreme Court ruling to that effect.²⁴⁹

It is true that the Supreme Court could also use the Due Process Clause to achieve this outcome.²⁵⁰ This process would certainly be consistent with its precedent that extends other rights to persons with mental illness and to individuals facing legal deprivations akin to criminal sanctions.²⁵¹ However, the analysis, ultimately, is a comparative one, which might make the Equal Protection Clause (and its implicit reverse-incorporation in the Due Process Clause of the Fifth Amendment) a potentially more appropriate instrument

243. *Turner*, 564 U.S. at 431.

244. In Alabama, for example, “[t]he sanction for civil contempt continues *indefinitely* until the contemnor performs as ordered. A critical distinction is that the sanction for criminal contempt is limited in Alabama district and circuit courts to a maximum fine of \$100 and imprisonment *not to exceed five days*.” *State v. Thomas*, 550 So. 2d 1067, 1072 (Ala. 1989) (emphasis added).

245. *Lassiter*, 542 U.S. at 18 (The court stated that *Lassiter* would *not* be entitled to appointed counsel in the proceeding at hand, but in situations where the case was particularly complex, the individual facing the termination of parental rights would be entitled to counsel.).

246. *Id.* The Due Process Clause has an equal protection component. *United States v. Windsor*, 570 U.S. 744 (2013).

247. *Addington v. Texas*, 441 U.S. 418 (1979); *see, e.g., McClelland, supra* note 9.

248. *Criminal Rights: Laws and Protections*, CRIMINAL JUSTICE DEGREE SCHOOLS, <https://www.criminaljusticedegreeschools.com/criminal-justice-resources/criminal-rights-laws-and-protections/> (last visited Feb. 14, 2020).

249. *Stone, supra* note 240.

250. U.S. CONST. amend XIV.

251. *Meisel, supra* note 222.

in the Supreme Court's toolbox.²⁵² What is most important, though, is that the Supreme Court set aside its distinction between individuals accused of criminal conduct and individuals facing almost identical predicaments in the civil context.²⁵³ These distinctions prevent the application of the Eighth Amendment, as well as other constitutional protections, to individuals that, from a practical perspective, should be entitled to them.²⁵⁴

If constitutional rights were designed to protect Americans from actual infringements by the government rather than theoretical ones, then distinctions like this do not help.²⁵⁵ The individual impacted by government action rarely cares about his or her theoretical predicament but concerns himself or herself with the practical one.²⁵⁶ Of course, an important textual argument is that the United States Constitution should be applied as written, not as society would want it to be written, to exclude government intrusions society dislikes.²⁵⁷ If the intrusion is so inconsistent with Americans' perception of their rights, then the option of amending the United States Constitution always exists, and the lack of such an amendment signifies a refusal to grant the courts authority to extend certain rights to certain individuals.²⁵⁸

These arguments may be consistent in many ways, but they should consider the Fourteenth Amendment, likely one of the most influential amendments in constitutional law.²⁵⁹ The text of the Fourteenth Amendment, and its passage after other amendments, should lead its interpretation to be that of modifying the language of prior amendments to potentially include within their protections those who were previously excluded.²⁶⁰ If that is the case, then the question of who those older amendments apply to under the Equal Protection Clause and Due Process Clause principles is non-trivial.²⁶¹ A case involving the adversity faced by individuals with mental health problems might give the Supreme Court an

252. U.S. CONST. amend. XIV; U.S. CONST. amend. V; *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *United States v. Windsor*, 570 U.S. 744 (2013).

253. Stone, *supra* note 240.

254. *Id.*; Holmes, *supra* note 213.

255. *Id.*

256. Holmes, *supra* note 213 (discussing an approach to the law from the perspective of the "bad man, who cares only for the material consequences that such knowledge enables him to predict, not as a good one, who finds his reason for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.").

257. *The Originalist Perspective*, HERITAGE, <https://www.heritage.org/constitution/#!/intro/essays/3/the-originalist-perspective> (last visited Feb. 14, 2020).

258. *Constitutional Amendment Process*, NAT'L ARCHIVES (2016), <https://www.archives.gov/federal-register/constitution>; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

259. U.S. CONST. amend XIV.

260. *Id.*

261. *Id.*

important opportunity to face this question once again. This Article advocates that the Supreme Court approach this question by raising the standard of proof required for involuntary civil commitment, requiring definite lengths of commitment to be determined, and imposing the requirement that a jury reach the commitment determination if the defendant invokes the right to a jury trial.

Finally, it is necessary to return at least once more to the Supreme Court's currently well-established distinction between detention and punishment.²⁶² This distinction, largely created to prevent Eighth Amendment challenges to pre-trial detention, is problematic in several ways. On the one hand, it is a crucial distinction, since equating pretrial detention to punishment would imply that an individual held in state custody prior to trial has already been punished despite the presumption of innocence and potential future acquittal.²⁶³ On the other hand, pretrial detention and post-conviction imprisonment are not very different. In some instances, the convicted individual would be merely sent back to the same jail to serve his or her sentence where he or she previously remained in anticipation of trial. Furthermore, time spent in jail prior to trial is often (if not always) credited as time served, reducing the sentence to be served post trial or plea by the amount of time spent in jail in anticipation of disposition.²⁶⁴ Hence, while the legal definitional distinction between pretrial and post-trial detention as punishment might be required to prevent the legal concept of pre-conviction punishment, the practical and legal application outside of this context proves dubious.²⁶⁵

At the intersection of mental health and the law, the Eighth Amendment can play two important roles. If applied to civil detentions due to their similarities to punishment (through equal protection principles or on its face), the Eighth Amendment can prevent indefinite or practically indefinite commitments of individuals who have not, through their criminal acts, justified such commitments. Furthermore, the Eighth Amendment could be used to eliminate the "prosecution" of individuals with mental illness. Just as the Supreme Court once held that it was cruel and unusual punishment to criminally punish drug addiction (an important type of mental illness),²⁶⁶ the Court can extend this holding to using a civil commitment process to essentially prosecute persons with mental illness, generally.

262. *Bell v. Wolfish*, 441 U.S. 520 (1979).

263. *See id.*; Stone, *supra* note 240; Richard M. Aborn & Ashley D. Cannon, *Prisons: In Jail, But Not Sentenced*, AMERICAS QUARTERLY (2013), <https://www.americasquarterly.org/aborn-prisons>.

264. Adam L. Banter, II, *Correction of Jail Credit After Sentencing*, VALRICO LAW GROUP (2017), <https://tampacrimeattorneys.com/correction-of-jail-credit-after-sentencing/>.

265. *See Bell*, 441 U.S. at 520; Holmes, *supra* note 213.

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

Conclusion

Overall, government leeway to commit individuals on suspicions of mental health problems should arouse suspicion and a significant amount of scrutiny. Psychologists are likely improving their ability to diagnose individuals with mental health problems, but the diagnoses are not nearly as clear-cut as a physician diagnosing a broken arm.²⁶⁷ Hence, while diagnoses made with a fair amount of confidence might be sufficient to limit certain rights and privileges, that should not apply to fundamental rights such as the right to liberty. Nevertheless, while the Supreme Court has been fairly clear that holding harmless individuals with mental illness against their will is impermissible,²⁶⁸ the reality is that this ruling has been all too difficult to enforce. Hence, this Article suggests that the Supreme Court expand its jurisprudence on the subject to further address the problems at hand.²⁶⁹

One suggestion involves raising the standard of proof and requiring jury determinations in favor of commitment before they occur. The heightened standard of proof would bring mental health commitment determination to the level of criminal trials, which is appropriate given similar, if not significantly greater, impositions upon individuals with mental illness in the event of an adverse ruling.²⁷⁰ The heightened standard may lead decision-makers to be more careful in applying the law to the facts and might ensure that, first and foremost, constitutional liberties are protected.

The additional jury requirement may also be helpful for several reasons. For one, it would raise the effort required by the state to achieve its goal of commitment. Jury trials are often far more formal than bench trials, ensuring adherence to the Rules of Evidence and other procedural standards that might otherwise be loosened in the presence of only a judge.²⁷¹ Furthermore, the expense of jury trials alone would ensure that state and federal authorities act to commit a person only when it is truly necessary.²⁷² Perhaps most importantly, though, a public jury trial would allow a significant amount of public scrutiny of the process. This scrutiny may permit individuals to escape unwanted commitment and prevent the nightmare scenario of a person being committed in a sham hearing by a judge and “expert” who have

267. Tanya J. Peterson, *Why Can Mental Illness Be So Hard to Diagnose?*, HEALTHY PLACE (Aug. 17, 2016), <https://www.healthypace.com/other-info/mental-health-newsletter/why-can-mental-illness-be-so-hard-to-diagnose>.

268. *O'Connor v. Donaldson*, 422 U.S. 563 (1975).

269. We also suggest that state supreme courts or legislatures voluntarily modify their standards to ensure the protections of individuals struggling with mental illness.

270. *See, e.g., McClelland, supra* note 9.

271. *See, e.g., Bench Trials vs. Jury Trials: The Advantages and Disadvantages of Both*, BRETT A. PODOLSKY (Aug. 23, 2017), <https://brettpodolsky.com/jury/jury-vs-bench-trials-the-advantages-and-disadvantages-of-both>.

272. *Id.*

made up their mind before the hearing begins. It is unlikely that jurors, mostly inexperienced with the system and perhaps sympathizing somewhat with the individual, would permit commitments on scant evidence of future danger.

Finally, we propose rules that limit the involuntary commitment of persons with mental illness to a definite timeframe. Courts, statutes, or both should require that commitments have a definite end date and perhaps that this end date should not extend beyond the time an individual might be incarcerated for similar conduct. Without this requirement, individuals found not guilty by reason of insanity would actually face greater sanctions than if they had pleaded guilty, which is a perverse outcome that should be discouraged. An individual should lose no more liberty due to a finding of mental instability than he or she might upon an outright conviction resulting from culpable criminal conduct.

Whether the procedural changes suggested in this Article come by way of constitutional mandate or by statute, they must come soon. The danger of depriving individuals needlessly through an essentially non-adversarial process away from the eyes of the public is high, particularly when individuals committed against their will might be perceived to lack credibility or the power to fight back. Because mental health commitments can result in the same or greater liberty and property deprivation than criminal incarceration, the constitutional and procedural scrutiny should be no less severe. Given psychologists' rate of error in diagnoses demonstrated by studies of the commitment of perfectly sane people, heightened standards should be expeditiously implemented. In a country seeking to be defined for its commitment to liberty, perhaps we should err on the side of liberty when in doubt. Extending this principle to persons with mental illness must result in reduction of potentially permanent civil commitments due to mere suspicion of future health and conduct problems.