UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 63 | Number 1 Article 13

11-1-1984

Involuntary Civil Commitment: The Dangerousness Standard and Its Problems

David T. Simpson Jr.

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On October 16, 1981, James became confused and angry while driving his automobile. Hearing voices that told him to kill himself, he suddenly accelerated his vehicle and crashed into a car in front of him, causing the other driver's death. After the incident, James remained violent and confused. He subsequently was committed to a state mental health facility, where he had been a patient on previous occasions. Within three weeks, James was termed "not dangerous" and released. He was tried for manslaughter but was found not guilty by reason of insanity on July 15, 1982.[1] As a result of that verdict he again was committed involuntarily only to be released on October 14, 1982, after a district court decided that he no longer was a threat to himself or others.[2]

On Christmas Eve 1980 Danny discovered that he was the subject of involuntary civil commitment proceedings, even though he had not exhibited any overt dangerous behavior. Danny spent Christmas Day incarcerated. During the following three years he was served with twelve commitment petitions that either were dismissed or resulted in short commitments. Released from his latest incarceration on October 7, 1983, Danny's freedom remains subject to the whim of the members of his family.[3]

James and Danny both are victims of the North Carolina involuntary civil commitment system. This system is premised on the notion that the state has the power to place the mentally ill in mental hospitals for the benefit of themselves and society. In recent years courts have held that substantive due process requires that before one may be committed involuntarily, the state's interests in protecting both society and the mentally ill individual must be shown to outweigh the individual's interest in personal liberty.[4] From this balancing has evolved the "dangerousness standard," which limits the application of involuntary civil commitment proceedings to those individuals who are mentally ill and dangerous to themselves or others. In North Carolina, this dangerousness is required to be shown by clear, cogent, and convincing evi-

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1. *In re* Autry, No. 81SP 243 (N.C. Union County Dist. Ct. Oct. 16, 1981).

2. *In re* Autry, No. 82SP 153 (N.C. Union County Dist. Ct. July 15, 1982).

3. *See In re* Huntley, No. 80SP 244 (N.C. Union County Dist. Ct. Dec. 23, 1980). *See also In re* Huntley, No. 83SP 181 (N.C. Union County Dist. Ct. Sept. 22, 1983); *In re* Huntley, No. 82SP 173 (N.C. Union County Dist. Ct. Aug. 18, 1982); *In re* Huntley, No. 82SP 040 (N.C. Union County Dist. Ct. Mar. 11, 1982); *In re* Huntley, No. 81SP 249 (N.C. Union County Dist. Ct. Oct. 22, 1981); *In re* Huntley, No. 81SP 147 (N.C. Union County Dist. Ct. June 18, 1981); *In re* Huntley, No. 81SP 004 (N.C. Union County Dist. Ct. Jan. 6, 1981); *In re* Huntley, No. 80SP 177 (N.C. Union County Dist. Ct. Sept. 20, 1980); *In re* Huntley, No. 80SP 157 (N.C. Union County Dist. Ct. Aug. 27, 1980); *In re* Huntley, No. 79SP 177 (N.C. Union County Dist. Ct. Aug. 16, 1979); *In re* Huntley, No. 79SP 033 (N.C. Union County Dist. Ct. Feb. 28, 1979).

4. *See* Youngberg v. Romeo, 457 U.S. 307 (1982); Jackson v. Indiana, 406 U.S. 715 (1972); Humphrey v. Cady, 405 U.S. 504 (1972). For a general discussion of substantive due process and its effects on fundamental rights, see J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 425-60 (1983).

dence of recent dangerous behavior.[5] This requirement is disturbing because it exacerbates the two most serious flaws of the dangerousness standard: underinclusiveness and overinclusiveness. Underinclusiveness, such as in the case of James, occurs when the system fails to detect and commit those individuals who are dangerous to themselves or others. Overinclusiveness is the commitment of an individual such as Danny to a mental health facility when the individual poses no serious danger to anyone. Unfortunately, there often is no clear standard to determine which individuals should be committed. Some have even said that the present decision-making process resembles flipping a coin.[6]

In response to these weaknesses, some commentators have espoused discarding the entire commitment system,[7] while others have suggested a model based more on capacity for treatment.[8] Such drastic changes, however, should not be adopted hastily by the judiciary. Instead, legislation should be enacted which requires that dangerousness be proven beyond a reasonable doubt by evidence that is probative of a substantial risk of harm. This legislation would diminish the existing overinclusiveness and underinclusiveness problems.

The involuntary civil commitment system used in North Carolina and throughout the United States is founded on the states' powers to curtail the liberty of those individuals the states deem dangerous to themselves or others.[9]

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5. To support an inpatient commitment order, the court is required to find, by clear, cogent and convincing evidence, that the respondent is mentally ill or inebriate, and dangerous to himself or others, or is mentally retarded, and because of an accompanying behavior disorder, is dangerous to others. The court shall record the facts which support its findings.

N.C. GEN. STAT. § 122-58.7(i) (Cum. Supp. 1983). *See also In re* Jackson, 60 N.C. App. 581, 583-84, 299 S.E.2d 677, 679 (1983) (specific application of the standard).

6. Ennis & Litwack, *Psychiatry and the Prediction of Dangerousness: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693 (1974).

7. *See, e.g.*, Morse, *A Preference for Liberty: The Case Against Involuntary Commitment of the Mentally Disordered*, 70 CALIF. L. REV. 54 (1982). Morse makes four arguments against involuntary commitment:

> First, it is difficult or impossible to support, with theory or data, the differential treatment of mentally disordered persons that allows them, but not normal persons to be committed. Second, the [present] system is unlikely to identify accurately those persons who should arguably be committed; consequently, large numbers of persons who are not properly committable will be unjustly and needlessly deprived of their liberty. Third, it is unlikely that the states will be able to provide the quality of care and treatment for those committed that is absolutely necessary to justify the enormous deprivation of liberty caused by commitment. Finally, most, and probably all, of the alleged benefits of involuntary hospitalization can be provided by less intrusive alternatives that are equally efficacious but cause much less deprivation of liberty.

Id. at 58-59.

8. A. STONE, MENTAL HEALTH AND LAW: A SYSTEM IN TRANSITION (1975); Roth, *A Commitment Law for Patients, Doctors, and Lawyers*, 136 AM. J. PSYCHIATRY 1121 (1979). The Stone-Roth type proposal recommends commitment only when (1) there has been a convincing diagnosis of serious illness; (2) the patient presently is suffering from lack of treatment; (3) treatment is available; and (4) the patient's objections to treatment are irrational and based on his illness. A. STONE, *supra*, at 69.

9. Humphrey v. Cady, 405 U.S. 504, 509 (1972) (Involuntary confinement in most states is not based solely on medical judgments that the defendant is mentally ill and treatable, but also on the social and legal judgment that his potential for doing harm to himself or to others is sufficient to justify such a massive curtailment of liberty.). *In re* Hatley, 291 N.C. 693, 231 S.E.2d 633 (1977)

This power to restrict liberty rests on two theories: *parens patriae* and the police power. *Parens patriae*[10] is the sovereign power of guardianship over persons who are unable to care for themselves.[11] The police power is the inherent power of the state as sovereign to promote the health, safety, and general welfare of the public.[12] Courts, in response to due process concerns, have limited this power to situations in which its application is " 'reasonably necessary' " and " 'not unduly oppressive.' "[13] Thus, the application of the police power has come to depend on balancing the interests of society and the affected individual.[14]

Involuntary civil commitment is controlled by statute, and North Carolina's statute[15] is typical of those nationwide. In North Carolina, a person may be committed to an inpatient mental health facility only if that person is shown to be mentally ill or inebriate and dangerous to himself or others, or if the person is mentally retarded and has a behavior disorder that causes him to be dangerous to others.[16] Critical to the application of such a statute is how criteria like mental illness and dangerousness are defined.[17]

Under North Carolina's statute anyone who knows of a person satisfying the statutory criteria may make a sworn statement to that effect to a designated judicial official.[18] This statement, or petition, must set forth the facts upon which the petitioner bases his belief and must be filed in the county where the subject individual (respondent) resides or is found.[19] If the judicial official finds reasonable grounds to believe the alleged facts, he issues an order directing law enforcement officers to take the respondent into custody for examination.[20] After being taken into custody the respondent must be brought

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(There is no constitutional justification for confinement of mentally ill individuals who are not dangerous and can live safely in freedom.).

10. For an extensive discussion of the development of *parens patriae*, see *In re* Gault, 387 U.S. 1 (1967).

11. State *ex rel.* Hawks v. Lazaro, 157 W. Va. 417, 425-26, 202 S.E.2d 109, 117 (1974).

12. Note, *Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1222 (1974). *See also* Jacobson v. Massachusetts, 197 U.S. 11 (1905) (explaining the police power).

13. Goldblatt v. Town of Hempstead, 369 U.S. 590, 594-95 (1962) (quoting Lawton v. Steele, 152 U.S. 133, 137 (1894)) (police power applied in the form of zoning held constitutional).

14. Note, *supra* note 12, at 1223. Today, most commitments are based on the police power. Due process concerns have limited the exercise of *parens patriae* to those situations in which a person poses a danger to his own safety. See Weissbourd, *Involuntary Commitment: The Move Toward Dangerousness*, 15 J. MAR. L. REV. 83, 85-86 (1982) for a discussion of how the police power now overlaps *parens patriae* as the basis for involuntary civil commitment.

15. N.C. GEN. STAT. § 122-58.1 to .27 (1981 & Cum. Supp. 1983). *See* H. TURNBULL, THE LAW AND THE MENTALLY HANDICAPPED IN NORTH CAROLINA § 5 (2d ed. 1979) (textual treatment of the North Carolina commitment statutes). For a more detailed description and analysis of the 1979 amendments, see Miller & Fiddleman, *Involuntary Civil Commitment in North Carolina: The Result of the 1979 Statutory Changes*, 60 N.C.L. REV. 985 (1982). *See also* Note, *Involuntary Outpatient Civil Commitment Expanded: The 1983 Changes in the North Carolina Law*, 62 N.C.L. REV. 1158 (1984).

16. N.C. GEN. STAT. § 122-58.1 (Cum. Supp. 1983).

17. *See infra* notes 34-44.

18. N.C. GEN. STAT. § 122-58.3(a) (1981).

19. *Id.*

20. *Id.* § 122-58.3(b) (Cum. Supp. 1983).

before a local mental health official or physician without unnecessary delay.[21] If the doctor determines that the respondent is not a proper subject for commitment, he is released.[22] If the doctor determines that the respondent is mentally ill and dangerous, the respondent then is transferred to a regional mental health facility.[23]

At the mental health facility the respondent is examined by another physician to verify the findings of the local doctor.[24] This physician determines whether to release respondent immediately or set a district court hearing for formal commitment.[25] The respondent is entitled to be represented by an attorney at the hearing,[26] and various evidence is presented ranging from eyewitness accounts of respondent's actions to technical psychiatric testimony.[27] If the judge decides that the respondent should be committed, he makes specific findings of fact and enters an order committing the respondent for inpatient[28] or outpatient[29] treatment at a public[30] or private[31] mental health

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21. *Id.* § 122-58.4(a).

> If a physician is not immediately available, the respondent may be temporarily detained in a community mental health facility, if one is available; if such facility is not available, he may be detained, under appropriate supervision, in his home, in a private hospital or clinic, in a general hospital, or in a regional mental health facility, but not in a jail or other penal facility.

Id.

22. *Id.* § 122-58.4(c)(3).

23. *Id.* § 122-58.4(c)(1).

24. *Id.* § 122-58.6(a), (a1).

25. *Id.* § 122-58.6(a).

26. *Id.* § 122-58.7(b) (1981). *See generally* Note, *A Trial Manual for Civil Commitment: Chapter Excerpt on the Commitment Hearing*, 1 MENTAL DISABILITY L. REP. 380 (1977) (discussion of civil commitment hearing process from the attorney's perspective). For some observations on the role of an attorney under the North Carolina statutes, see Hiday, *The Attorney's Role in Involuntary Civil Commitment*, 60 N.C.L. REV. 1027 (1982).

27. Hiday, *supra* note 26, at 1036-44. During 1979, Hiday and her researchers observed 479 initial commitment hearings in North Carolina and concluded that attorneys for the respondents were poorly prepared, were inactive at the hearing, and generally deferred to the psychiatrist's ideas for resolution of the case. *Id.*

28. "To support an inpatient commitment order, the court is required to find, by clear, cogent, and convincing evidence, that the respondent is mentally ill or inebriate, and dangerous to himself or others, or is mentally retarded, and because of an accompanying behavior disorder, is dangerous to others." N.C. GEN. STAT. § 122-58.7(i) (Cum. Supp. 1983).

29. To support outpatient commitment, the court is required to find by clear, cogent, and convincing evidence that:

> a. The respondent is mentally ill, and
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> b. The respondent is capable of surviving safely in the community with available supervision from family, friends or others, and
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> c. Based on the respondent's treatment history, the respondent is in need of treatment in order to prevent further disability or deterioration which would predictably result in dangerousness as defined by G.S. 122-58.2(1), and
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> d. His current mental status or the nature of his illness limits or negates his ability to make an informed decision to voluntarily seek or comply with recommended treatment, the physician shall so indicate on the physician's examination report and shall recommend outpatient commitment. In addition, the examining physician shall indicate the name, address, and telephone number of the proposed outpatient treatment physician or center. The person designated in the order to provide transportation shall return the respondent to his regular residence or to the home of a consenting person, and he shall be released from custody.

N.C. GEN. STAT. 122-58.4(c)(2) (Cum. Supp. 1983). *See* Note, *supra* note 15, at 1158.

facility.[32] At this point, the respondent is officially, involuntarily, civilly committed.[33]

The substantive dangerousness criterion required for involuntary civil commitment arises within this procedural framework. The dangerousness standard for involuntary commitment has developed nationally over the last 200 years. A 1788 New York statute provided that those persons who were "furiously madd" and could not be taken under the care and protection of friends and relatives could be confined if they were "so far disordered in their senses that they may be dangerous to be permitted to go abroad."[34] In 1845 the Massachusetts Supreme Court stated: "[T]he right to restrain an insane person of his liberty is found in that great law of humanity, which makes it necessary to confine those whose going at large would be dangerous to themselves or others."[35]

This "great law of humanity" was entrenched firmly in our jurisprudence when the United States Supreme Court ruled that dangerousness was a constitutionally sufficient standard for commitment. In *O'Connor v. Donaldson*[36] the Court expressly declined to decide whether that standard was constitution-

30. Public mental health facilities are defined to include community and area mental health facilities, N.C. GEN. STAT. §§ 122-35.24 to -35.57 (1981 & Cum. Supp. 1983), as well as the four regional mental health facilities in North Carolina. *Id.* § 122-7 (1981).

31. Commitment to a private mental health facility is allowed at the expense of the respondent if the private facility is licensed by the Department of Human Resources. *Id.* § 122-58.8(c) (Cum. Supp. 1983).

32. *Id.* § 122-58.8(a)(1).

33. Although the system is efficient, there seems to be a great deal of discretion placed on each functionary in the process. The petitioner, the judicial officer, the local physician, and the mental health facility physician all make decisions on short notice and scanty evidence. Two particularly troublesome features of the process must be noted, although in-depth considerations of these procedural problems are not within the scope of this discussion.

First, the system provides only for a check on overinclusiveness (by various levels of review), without taking steps to guard against releasing a very dangerous mentally disturbed individual. Obviously, not all dangerous mentally ill individuals can be detected through simple examination; once an overworked emergency room doctor releases a respondent without proper examination, however, there is a great likelihood that if the individual was actually mentally ill and dangerous, he is now mentally ill, dangerous, and furious with those relatives or friends who tried to "put him away."

Second, the initial custodial confinement should be cause for concern. The first hours of custody are the most traumatic. Custody of the respondent is taken in the same manner as arrest warrants are executed. Often respondent is handcuffed, and, if he gives any indication of violence, he may be placed in leg irons. Unfortunately, the experience is made worse by the fact that unlike arrest warrants, which make clear what the respondent is charged with doing, commitment petitions do not provide law enforcement officers or the respondent with any answer to respondent's repeated question: "Why?" The individual is ripped from his environment and thrown into a world of patrol cars, hospitals, and strangers. Even if the respondent is soon released, he still may have been affected seriously by this short period of deprivation.

34. N.Y. Laws of 1788, ch. 31, *cited in* Lessard v. Schmidt, 349 F. Supp. 1078, 1085 (E.D. Wis. 1972), *vacated and remanded for a more specific order*, 414 U.S. 473 (1974) (per curiam).

35. *In re* Josiah Oakes, 8 Law Rep. 123 (Mass. 1845).

36. 422 U.S. 563 (1975). Kenneth Donaldson was involuntarily confined in a mental institution for 15 years despite the fact that he posed no danger to others and was not believed likely to harm himself. Donaldson brought suit seeking release and the district court granted relief, finding that his constitutional right to liberty had been violated. The United States Court of Appeals for the Fifth Circuit affirmed, Donaldson v. O'Connor, 493 F.2d 507 (5th Cir. 1974), *vacated and remanded on other grounds*, 422 U.S. 563 (1975). The Supreme Court agreed that Donaldson's confinement was unconstitutional, but attempted to limit its holding to the facts of the case.

ally required,[37] but it implicitly recommended such a standard. The Court noted that a state "cannot constitutionally confine without more a nondangerous individual."[38] This statement implies that the state can justify the commitment of an individual on a showing of dangerousness, but that anything less might pose a constitutional problem. The lower courts have interpreted the language to mean that an involuntary commitment is justified only when an individual is dangerous.[39] To avoid having their state procedure declared unconstitutional, most state legislatures established dangerousness as the criterion for commitment of the mentally ill.[40] Thus, in North Carolina, as well as in the vast majority of states, dangerousness is the linchpin of the involuntary commitment statute.[41]

"Dangerousness" is an amorphous concept and its application as a standard for commitment is dependent upon statutory interpretation. The definitions in the North Carolina statutes are typical of those in many jurisdictions.[42] "Dangerous to himself" means "that within the recent past:"

1. The person has acted in such manner as to evidence:
   I. That he would be unable without care, supervision, and the continued assistance of others not otherwise available, to exercise self-control, judgment, and discretion in the conduct of his daily responsibilities and social relations, or to satisfy his need for nourishment, personal or medical care, shelter, or self-protection and safety; and
   II. That there is a reasonable probability of serious physical debilitation to him within the near future unless adequate treatment is afforded pursuant to this Article. A showing of behavior that is grossly irrational or of actions which the person is unable to control or of behavior that is grossly in-

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Under a due process balancing approach, the Court held that none of the State's interests justified Donaldson's continued confinement. *O'Connor*, 422 U.S. at 574.

37. *O'Connor*, 422 U.S. at 573.

38. *Id.* at 576. The Court expressly did not decide:

> whether, when, or by what procedures, a mentally ill person may be confined by the State on any of the grounds which, under contemporary statutes, are generally advanced to justify involuntary confinement of such a person—to prevent injury to the public, to ensure his own survival or safety, or to alleviate or cure his illness.

Id. at 573.

39. *See, e.g.*, Doremus v. Farrell, 407 F. Supp. 509 (D. Neb. 1975) (finding Nebraska civil commitment statutes unconstitutional for failure to require that the mentally ill person be dangerous to himself or other people); Commonwealth *ex rel.* Finken v. Roop, 234 Pa. Super. 155, 339 A.2d 764 (1975) (state's requirement that respondent be "in need of care" is impermissibly vague and suggests a dangerousness standard), *appeal dismissed*, 424 U.S. 960 (1976).

40. *See* Note, *Overt Dangerous Behavior as a Constitutional Requirement for Involuntary Civil Commitment of the Mentally Ill*, 44 U. CHI. L. REV. 562, 562 (1977) (Eight states—Alabama, California, Hawaii, Massachusetts, Nebraska, North Carolina, Washington, and Wisconsin—reformed their statutes within approximately one year of the *O'Connor* decision.). *See also* Beis, *State Involuntary Commitment Statutes*, 7 MENTAL DISABILITY L. REV. 358 (1983) (All states except New Jersey statutorily required dangerousness for involuntary commitment as of 1983.).

41. N.C. GEN. STAT. § 122-58.1 (Cum. Supp. 1983); *In re* Collins, 49 N.C. App. 243, 250, 271 S.E.2d 72, 76 (1980) (In commitment proceeding, district court must find that the subject of the proceeding is dangerous to himself or others.).

42. For a comparison of statutory requirements of all fifty states, see Beis, *supra* note 40.

> appropriate to the situation or other evidence of severely impaired insight and judgment shall create a prima facie inference that the person is unable to care for himself; or
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> 2. The person has attempted suicide or threatened suicide and that there is a reasonable probability of suicide unless adequate treatment is afforded under this Article; or
> 3. The person has mutilated himself or attempted to mutilate himself and that there is a reasonable probability of serious self-mutilation unless adequate treatment is afforded under this Article.[43]

A person is "dangerous to others" if,

> within the recent past, the person has inflicted or attempted to inflict or threatened to inflict serious bodily harm on another or has acted in such a manner as to create a substantial risk of serious bodily harm to another and . . . there is a reasonable probability that such conduct will be repeated.[44]

Commitment under these definitions involves two questions: (1) What is sufficient evidence of dangerousness? and (2) What standard of proof of dangerousness should be required? It is in the resolution of these two issues that reformation of the current standards is needed.

A commitment proceeding is dismissed if there is insufficient evidence from which a reasonable person could find dangerousness.[45] The problems of overinclusiveness and underinclusiveness in the commitment process can be minimized by selecting the proper standard for sufficiency. Essentially, the standard reflects a policy decision of who should be confined—those who commit overt dangerous acts, or those who psychiatrists believe pose a substantial risk of harm to themselves or others. Three alternative sufficiency standards have emerged without any one gaining particular favor. Some states require evidence that the mentally ill individual has committed a recent overt act that posed a risk of substantial harm to himself or others.[46] Other states have refined that alternative also to require evidence that there is an imminent danger that such harmful conduct will be repeated.[47] The majority of states, however, have a more relaxed standard which merely requires evidence that the individual poses a substantial risk of harm to himself or others.[48]

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43. N.C. GEN. STAT. § 122-58.2(1)(a) (1981).

44. *Id.* § 122-58.2(1)(b).

45. C. MCCORMICK, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 338, at 789-90 (E. Cleary 2d ed. 1972). *See* F. JAMES & G. HAZARD, CIVIL PROCEDURE § 7.11, at 268-79 (2d ed. 1977).

46. *See* ALA. CODE § 22-52-10(c) (Cum. Supp. 1983); CAL. WELF. & INST. CODE § 5300(c) (West Supp. 1983-84) (within seven days of being taken into custody); GA. CODE ANN. § 37-3-1(12) (1982); ME. REV. STAT. ANN. tit. 34B, § 3864(6)(A) (Supp. 1983-84); MINN. STAT. ANN. § 253B.02 (West Supp. 1984); NEB. REV. STAT. § 83-1009 (1981); PA. STAT. ANN. tit. 50, § 7301 (Purdon Supp. 1983-84); VT. STAT. ANN. tit. 18, § 7101(17) (Supp. 1983); WASH. REV. CODE ANN. §§ 71.05.020(1)-(3), 71.05.150(4) (Supp. 1984-85).

47. ARK. STAT. ANN. §§ 59-1401(a)-(c), -1404 to -1410 (Cum. Supp. 1981); HAWAII REV. STAT. §§ 334-1, -60(b)(1) (Supp. 1982); MONT. CODE ANN. §§ 53-21-102(14), -129 (1983).

48. ALASKA STAT. § 47.30.070(i) (1979); ARIZ. REV. STAT. ANN. § 36-540 (Supp. 1983); COLO. REV. STAT. § 27-10-111 (1982); CONN. GEN. STAT. ANN. § 17-178(c) (West Supp. 1984);

Until quite recently, the national trend had been toward the recent-overt-act standard.[49] In *Lessard v. Schmidt*[50] a federal district court determined that the Wisconsin commitment statute was not vague or overbroad by inferring a requirement that "dangerousness" be evinced by a "recent overt act, attempt or threat to do substantial harm to oneself or another."[51] The court based its interpretation of "dangerousness" on the need to be cautious before depriving anyone of liberty and upon an express suspicion of the reliablity of psychiatric prediction.[52] *Lessard* and similar cases frequently have been cited to support states' decisions to adopt the recent-overt-act standard.[53]

FLA. STAT. ANN. § 394-467 (West 1983); IDAHO CODE § 66-329(k) (Supp. 1981); ILL. ANN. STAT. ch. 91½, § 1-119 (Smith-Hurd Supp. 1983-84); IND. CODE ANN. § 16-14-9.1-10(d) (Burns Supp. 1983); IOWA CODE ANN. § 229.11 (West Supp. 1983-84); KAN. STAT. ANN. § 59-2902(a) (1983); KY. REV. STAT. ANN. § 202A.026 (Bobbs-Merrill 1982); LA. REV. STAT. ANN. § 28:55(E) (West Supp. 1984); MD. HEALTH-GENERAL CODE ANN. § 10-617 (Cum. Supp. 1983); MASS. ANN. LAWS ch. 123, § 1 (Michie/Law. Co-op. 1981); MICH. STAT. ANN. § 14.800(401) (Callaghan 1980); MISS. CODE ANN. § 41-21-61 (1981); MO. ANN. STAT. § 632.300 (Vernon 1984); NEV. REV. STAT. § 433A.310(1) (1983); N.H. REV. STAT. ANN. § 135-B:38 (1977); N.M. STAT. ANN. § 43-1-3(L) (1979); N.Y. MENTAL HYG. LAW § 9.37(a) (McKinney 1978); N.C. GEN. STAT. § 122-58.1 (Cum. Supp. 1983); N.D. CENT. CODE § 25-03.1-02(11) (Supp. 1983); OHIO REV. CODE ANN. § 5122.01(B) (Page 1981); OKLA. STAT. ANN. tit. 43A, § 52.1(I)(2) (West Supp. 1983-84); OR. REV. STAT. § 426.005 (1983); S.C. CODE ANN. § 44-17-580 (Law. Co-op. Cum. Supp. 1983); S.D. CODIFIED LAWS ANN. § 27A-1-1 (1976); TENN. CODE ANN. § 33-604 (Supp. 1983); TEX. REV. CIV. STAT. ANN. art. 5547-33(a) (Vernon Supp. 1984); UTAH CODE ANN. § 64-7-36(b)(10) (Supp. 1983); VA. CODE § 37-1-67.3 (Cum. Supp. 1983); W. VA. CODE § 27-1-12 (Cum. Supp. 1983); WIS. STAT. ANN. § 51.20(1) (West Supp. 1983-84); WYO. STAT. § 25-10-101 (1982).

49. *See* Note, *supra* note 40, at 562.

50. 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded for a more specific order*, 414 U.S. 473 (1974) (per curiam).

Alberta Lessard was taken into custody by two police officers in front of her home and taken to a mental health center. The police officers filled out an "Emergency Detention for Mental Observation" form at the center and Lessard was detained there on an emergency basis. The same officers restated the allegations of mental illness contained in the emergency petition before a county court judge three days later and the judge issued an order "permitting Miss Lessard's detention for an additional ten days." *Id.* at 1081. Lessard was represented at a commitment hearing held 26 days after her initial confinement by an attorney she obtained. At the hearing the county court judge ordered Lessard to be committed for 30 additional days. The judge provided "no reasons for his order except to state that he found Miss Lessard to be 'mentally ill.'" Although the hospital authorities "permitted Miss Lessard to go home on an out-patient 'parole' basis," the thirty-day commitment order had been extended for one month for each month until the review by the federal district court. *Id.* at 1082.

In the federal suit, brought as a class action on behalf of Lessard and those similarly situated in the state of Wisconsin, Lessard alleged that the Wisconsin procedure for involuntary civil commitment denied her due process of law on several grounds. One of her primary allegations was that commitment of a person violates due process when it is made without a determination that the person is in need of commitment beyond a reasonable doubt. *Id.*

51. *Id.* at 1093.

52. *Id.* at 1093-96.

53. *See, e.g.*, Stamus v. Leonhardt, 414 F. Supp. 439, 449-51 (S.D. Iowa 1976) (lack of overt act requirement was a factor in the court holding that the statute violated due process); Doremus v. Farrell, 407 F. Supp. 509, 513-14 (D. Neb. 1975) (compelling interest standard in justifying confinement requires a dangerousness standard based on overt dangerous behavior); Commonwealth *ex rel.* Finken v. Roop, 234 Pa. Super. 155, 181-84, 339 A.2d 764, 778-79 (1975) (commitment linked to problems of prediction—one cannot be committed without some overt act and a conclusion that the probability of such acts recurring is substantial), *appeal dismissed*, 424 U.S. 960 (1976).

Other cases have developed the theory behind the *Lessard* standard more fully. As one court noted:

A mere expectancy that danger-productive behavior might be engaged in does not rise to

It often is difficult to decide whether certain actions constitute overtly dangerous behavior. No case ever has determined that a particular act is per se overtly dangerous,[54] and statutes and commentators offer, at best, general definitions subject to conflicting interpretations.[55] Dangerousness is a function of the particular characteristics of an individual in a unique situation. In a practical sense, we are left with a subjective "I know it when I see it" standard.[56]

There is some sentiment that the *Lessard* court did not go far enough towards requiring a substantial showing of dangerousness. For example, in *Suzuki v. Yuen*[57] the United States Court of Appeals for the Ninth Circuit held that danger to oneself or others not only must be proven by overt acts but also must be imminent before involuntary commitment is constitutionally acceptable.[58]

The *Suzuki* holding is by no means overinclusive. It, however, effectively renders a state "powerless" to protect its citizens from an individual who possesses serious destructive potential, but has not manifested this potential in a recent overt act or in a manner to suggest imminent violence.[59] In addition, the imminence requirement stands as a blatant rejection of the predictions of dangerousness by mental health professionals. Although there is some reason

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the level of legal significance when the consequence of such an evaluation is involuntary confinement. To confine a citizen against his will because he is likely to be dangerous in the future, it must be shown that he has actually been dangerous in the recent past and that such danger was manifested by an overt act, attempt or threat to do substantial harm to himself or to another.

Lynch v. Baxley, 386 F. Supp. 378, 391 (M.D. Ala. 1974).

54. *See* Note, *supra* note 40, at 576.

55. *See id.* at 577. One commentator has defined overt dangerous behavior as "behavior that could reasonably be regarded as presenting a risk of substantial physical harm to others or to the actor, or as demonstrating an inability to survive in freedom." *Id.* at 579. This definition adds little to the ability of mental health officials and judges to make well-reasoned decisions.

56. *Cf.* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I know it when I see it" definition of pornography).

57. 617 F.2d 173 (9th Cir. 1980).

"Plaintiff Suzuki sought a writ of habeas corpus and release from her involuntary commitment to" a Hawaii psychiatric facility in 1973. "She also sought a declaratory judgment that portions of Hawaii's mental health laws [were] unconstitutional, and an injunction against the involuntary commitment of persons under those statutes." Pursuant to that action, "the district judge declared Hawaii's procedures for involuntary civil commitment unconstitutional." *Id.* at 175 (citing Suzuki v. Quisenberry, 411 F. Supp. 1113 (D. Hawaii 1976)). The district court "retained jurisdiction to rule on the constitutionality of any curative legislation." *Id.* at 173.

After Hawaii's passage of new commitment statutes in 1976, plaintiff brought a second suit seeking a declaration that portions of the new law were unconstitutional. The district court granted plaintiff's motion for summary judgment. Suzuki v. Alba, 438 F. Supp. 1106 (D. Hawaii 1977), *aff'd in part and rev'd in part sub nom.* Suzuki v. Yuen, 617 F.2d 173 (9th Cir. 1980). The State appealed the court's decision and sought review of several points. Foremost of these contentions was the district court's holding that the statute unconstitutionally failed to specify that only "imminently dangerous" persons may be committed. *Id.* at 1110.

58. *Suzuki*, 617 F.2d at 178. The court's decision was influenced by dicta from *Lessard.*

> [That] the potential for doing harm be *great enough* to justify such a *massive curtailment* of liberty implies a balancing test in which the state must bear the burden of proving that there is an extreme likelihood that if the person is not confined he will do *immediate* harm to himself or others.

Lessard, 349 F. Supp. at 1093 (emphasis added), *cited in Suzuki*, 617 F.2d at 178.

59. United States *ex rel.* Mathew v. Nelson, 461 F. Supp. 707, 711 (N.D. Ill. 1978).

for the court's distrust,[60] the suspicion of psychiatric prediction should be dealt with in a more constructive manner.

Recently, courts have halted the trend toward favoring the individual in the substantive due process balancing of interests. Two key decisions have upheld the constitutionality of commitment statutes that require neither recent overt acts nor imminent danger, but merely a finding of a substantial risk of harm to others or oneself. The first of these cases was *Hatcher v. Wachtel*[61] in which the court reasoned that dangerousness was linked inextricably with an individual's situation. Therefore, a court "must take into account the likelihood that defendant will be exposed to such situations or come into contact with such individuals" that would bring about such a dangerous situation.[62] Since neither the imminent danger nor overt act test considers such possibilities, the court was satisfied that the "substantial risk of harm" approach was superior.[63] The second major case reversing the trend was *Project Release v. Prevost*,[64] in which the United States District Court for the Eastern District of New York upheld New York's use of the substantial-risk-of-harm standard. Rejecting an argument for a recent-overt-act-and-imminent-danger standard,[65] the court concluded that a factfinder should not have to wait until an individual's conduct has made serious harm inevitable before acting to prevent it.[66] The court made it clear that involuntary commitments are based on a prediction/prevention model and not an act/punishment model; thus, no particular act necessarily should be required before preventive steps are taken.[67]

There are several other reasons why the substantial-risk-of-harm standard has been embraced by the courts. There has been no showing that the recent commission of an overt act makes such a future act more likely.[68] In fact, frequently a psychiatrist can determine that a subject is reasonably expected to

60. *See generally* Ennis & Litwack, *supra* note 6, at 697-734. The authors note that at least 60 to 70% of the people whom psychiatrists judge to be dangerous may be harmless. *Id.* Also, the authors argue that psychiatrists should not be permitted to testify as experts in civil commitment proceedings because psychiatric judgments are not sufficiently reliable or valid to justify their admissibility under traditional rules of evidence. *Id.* at 734-43.

61. 269 S.E.2d 849 (W. Va. 1980).

62. *Id.* at 852.

63. *Id. See also* Commonwealth v. Nassar, 406 N.E.2d 1286 (Mass. 1980), in which the court noted that its higher standard of proof obviated the need to require specific acts or imminent danger to avoid overinclusive commitments. *Id.* at 1291. The court reasoned that the more serious the anticipated harm, the less important the requirement of imminence. *Id.*

64. 551 F. Supp. 1298 (E.D.N.Y. 1982). Project Release, a nonprofit organization, brought action challenging the constitutionality of New York commitment procedures. *Id.* at 1299. Among other claims for relief, Project Release sought to have the court hold that proof of imminent danger, demonstrated by a recent overt act, is required for any civil commitment. *Id.* at 1303-04.

65. *Id.* at 1304.

66. *Id.* at 1305.

67. *Id.* The court stated: "Regardless, an impartial factfinder, guided by medical documentation, should be permitted to determine that mental illness is present and danger likely without waiting for an individual's conduct to make serious physical harm all but inevitable." *Id.*

68. United States *ex rel.* Mathew v. Nelson, 461 F. Supp. 707, 710 (N.D. Ill. 1978); Note, *supra* note 40, at 584.

injure himself or another even though there is no history of an overt act.[69] Moreover, it is in the best interests of the individual and society that a state be able to prevent a mentally ill person from committing a dangerous act.

Nevertheless, it must be recognized that the recent-overt-act requirement has some merit. That standard provides the judge with a concrete threshold upon which to decide a motion to dismiss. He can base his decision on the presence or absence of a particular element, not on his interpretations of ambiguous medical diagnoses and predictions.[70] Any constitutional problem of vagueness also is overcome by such a standard.[71] The facts leading to a decision can be described with specificity. The standard also avoids punishment for status; the requirement of some act or attempt lessens the likelihood that someone will be taken into custody merely because he is mentally ill.[72] Although there would continue to be confinement for achieving the status of mentally ill *and* dangerous, this punishment would have a more articulable basis.[73]

For many of these reasons, a requirement of either recent dangerous behavior or imminent danger would prove to be a satisfactory standard of evidentiary sufficiency. The question, however, is which standard is *most* satisfactory. North Carolina formerly required harm to be imminent before allowing commitment, but this requirement was deleted in 1979.[74] Today, North Carolina is considered to be a "substantial risk of harm" state.[75] The statute, however, appears to require some recent dangerous action as a prerequisite to certain involuntary commitments.[76] By deleting the requirement of "imminent" harm, North Carolina has taken a positive step, but a further step can be taken by the unambiguous adoption of the substantial-risk-of-harm standard. Under this broader standard, a recent, overt, dangerous act still would be given great weight by a factfinder. The medical community, however, could continue its input by improving its predictive capabilities.[77] Fur-

69. United States *ex rel.* Mathew v. Nelson, 461 F. Supp. 707, 711 (N.D. Ill. 1978).

70. Note, *supra* note 40, at 586-87.

71. *Id.* at 587-89. For cases holding the vagueness doctrine applicable to civil commitment, see United States *ex rel.* Mathew v. Nelson, 461 F. Supp. 707 (N.D. Ill. 1978) (expectation of harm statute not vague); *In re* Salem, 31 N.C. App. 57, 228 S.E.2d 649 (1976).

72. Note, *supra* note 40, at 589-91. *But see* People v. Sansone, 18 Ill. App. 3d 315, 324, 309 N.E.2d 733, 739 (1974) (punishment for status argument summarily rejected).

73. Often the recent-overt-act requirement and imminent danger alternatives are offered to overcome the perceived unreliability of psychiatric prediction. With evidence of an overt act or imminent danger a factfinder feels more comfortable in reaching the decision that the probability of future dangerousness is high enough to justify incarceration.

74. *In re* Collins, 49 N.C. App. 243, 250, 271 S.E.2d 72, 76 (1980). *See* Miller & Fiddleman *supra* note 15, at 993.

75. *In re* Monroe, 49 N.C. App. 23, 31, 270 S.E.2d 537, 541 (1980) ("This court has not required 'overt acts' under the former standard of 'imminent' danger and the present statutory definition of 'dangerous to others' does not require a finding of 'overt acts.' ").

76. *See* N.C. GEN STAT. § 122-58.2 (1981). In defining "dangerous to himself" this statute uses the language "within the recent past . . . the person has acted in such a manner as to evidence" his danger to himself. The definition of "dangerous to others" in the statute explicitly requires acts that create a substantial risk of harm. *Id.*

77. Predictive capabilities in the area of mental health are improving. Recent studies appear to demonstrate that the reliability and validity of mental disorder diagnoses have increased over

thermore, the standard would enable the State to prevent potential harmful acts. Most importantly, the suggested standard would protect against the underinclusiveness of a required-prior-act standard.

It is clear that this broader evidentiary standard, while alleviating possible underinclusiveness, has the potential for creating an equally harmful result—overinclusiveness. It must be recognized, however, that the evidentiary standard is only one factor in the commitment system. To understand fully how the substantial-risk-of-harm standard better suits the present needs of the system, one must consider the other major factor: the standard of proof. The threshold standard of proof required in a judicial process "serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision."[78] It "reflects the value society places on individual liberty."[79] There are three general standards of proof: proof by a preponderance of the evidence, proof that is clear and convincing, and proof beyond a reasonable doubt.[80]

The Supreme Court already has narrowed the choice. In *Addington v. Texas*[81] plaintiff argued that proof beyond a reasonable doubt was constitutionally required for an involuntary commitment. The Texas Supreme Court held that a mere preponderance standard satisfied due process.[82] The Supreme Court reversed, concluding that "the individual's interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence."[83]

Unfortunately, the Court did not stop there. It intimated that the reasonable doubt standard had great weaknesses when applied to civil commitment.[84] Chief Justice Burger, writing for the Court, provided four reasons for not adopting the reasonable doubt standard. First, the reasonable doubt standard should be reserved to cases where "state power is . . . exercised in a punitive sense."[85] Second, the sense of importance given the reasonable doubt standard would be diluted if used outside the criminal justice system.[86] Third, the danger of an erroneous commitment is less undesirable than the risk of an erroneous criminal conviction because "the layers of professional review and observation of the patient's condition, and the concern of family and friends generally will provide continuous opportunities for an erroneous commitment to be corrected."[87] Finally, the Chief Justice argued that problems of diagno-

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the last five years. DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 5 (3d ed. 1980).

78. Addington v. Texas, 441 U.S. 418, 423 (1979).
79. *Id.* at 425 (quoting Tippett v. Maryland, 436 F.2d 1153, 1166 (4th Cir. 1971)).
80. F. JAMES & G. HAZARD, *supra* note 45, at 243-45.
81. 441 U.S. 418 (1979).
82. State v. Addington, 557 S.W.2d 511 (Tex. 1977), *vacated*, 441 U.S. 418 (1979).
83. *Addington*, 441 U.S. at 427.
84. *Id.* at 428-29.
85. *Id.* at 428.
86. *Id.*
87. *Id.* at 428-29.

sis and prediction raise serious questions whether dangerousness ever could be proven beyond a reasonable doubt.[88] Thus, almost by a process of elimination, the Court recommended a clear and convincing evidence standard of proof.[89]

Addington served as the impetus for major changes in the quantum of proof required by most jurisdictions for a civil commitment. Today, nearly all states, including North Carolina,[90] have employed some form of the clear and convincing evidence standard.[91] This trend has been more reactionary than rational. *Addington* clearly held a mere preponderance standard constitutionally unacceptable.[92] *Addington*, however, neither held that a clear and convincing evidence standard must be used nor forbade the use of a reasonable doubt standard.[93] The Court specifically stated that although a clear and convincing evidence standard was sufficient, states are free to require a more stringent standard of proof.[94] The issue, then, is whether and why a state would want a standard of proof higher than clear and convincing evidence.

Some of the problems of an overinclusive system probably could be remedied through a more thorough examination of the evidence offered to prove the need for commitment. The reasonable doubt standard of proof would encourage this greater scrutiny by impressing upon the factfinder the significance of his decision. The use of this standard in civil commitment proceedings hardly would detract from the seriousness with which criminal trials and punishment are taken; few lay jurors will be aware of which standards are used in which arenas. Moreover, today's emphasis on preventive detention through civil commitment makes the differentiation between criminal cases and civil commitment somewhat unwarranted; detention entails the deprivation of the same rights in either context.

The Chief Justice argues that a higher standard of proof is not required by assuming that an erroneous commitment is more easily corrected than an erroneous conviction.[95] His argument is not necessarily true. There are more avenues for relief available to the convicted criminal than to the committed individual.[96] The family and friends of the individual also may prove to be

88. *Id.* at 429.

89. *Id.* at 432-33.

90. N.C. GEN. STAT. § 122-58.7(i) (1981 & Cum. Supp. 1983).

91. All states except Massachusetts, which demands proof beyond a reasonable doubt, presently apply some form of a clear and convincing evidence standard of proof to the issues of mental illness and dangerousness. *See* Worcester State Hosp. v. Hagberg, 374 Mass. 271, 275-77, 372 N.E.2d 242, 245-46 (1978) (court construed MASS. ANN. LAWS ch. 123, §§ 7-8 (Michie/Law. Co-op. 1981) to require proof beyond a reasonable doubt); *infra* note 99. *See also supra* notes 46-48 (other states' statutes digested).

92. *Addington*, 441 U.S. at 427.

93. *Id.* at 433 ("[D]etermination of the precise burden equal to or greater than the 'clear and convincing' standard which we hold is required to meet due process guarantees is a matter of state law.").

94. *Id.*

95. *Id.* at 428-29.

96. Although it may be true that there is more periodic review in the involuntary commitment system than the criminal system, the involuntarily committed individual is not benefitted by programs such as prisoners' rights projects and parole hearings, or by imaginative appeals and

more of a hindrance than an aid in correcting a wrongful commitment.[97]

Finally, contrary to the Chief Justice's opinion, commitments are not impossible under a reasonable doubt standard. Scores of individuals have been committed under this standard prior to and since *Addington*.[98] Nonetheless, a reasonable doubt standard for involuntary civil commitment rarely is considered by state legislators, who perhaps are concerned only with providing minimal protection to the mentally ill. The State could ensure that the mentally ill are given more than just minimal protection while still providing an effective procedural mechanism for the protection of society from dangerous individuals, however, by adopting a reasonable doubt standard of dangerousness.

The present system of involuntary civil commitment can be improved greatly by adopting two interdependent proposals. The present system's underinclusiveness could be relieved partially by enacting a broad evidentiary sufficiency standard requiring only evidence that a mentally ill individual poses a substantial risk of harm to himself or others. At the same time, the adoption of a reasonable doubt standard of proof would impress upon the trier of fact the seriousness of the proceedings and reduce overinclusiveness by encouraging more meticulous scrutiny of the evidence.

Although these proposals are facially paradoxical—loosening standards at one point and tightening them at another—the result should be an improvement in the system. The adoption of both proposals would make a positive substantive statement. There are people who are so dangerous to themselves or others, that the interests of society in safety outweighs the individuals' interest in personal freedom. Therefore, a decision-maker should consider any evidence which is predictive of whether or not there is a substantial risk of harm to the mentally ill person or others; but because as a society we are serious about protecting the interests of the individual and the state, the decision-maker should also diligently and meticulously apply a very high standard of proof in determining whether involuntary commitment would appropriately balance those interests.

Hatcher v. Wachtel[99] and *Project Release v. Prevost*[100] indicate that the courts generally are accepting the broader sufficiency standard. The reasonable doubt standard of proof, however, is the stumbling block of the proposal. In a criminal case, "beyond a reasonable doubt" connotes near certainty.[101]

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jail-house lawyers. Often, once the individual is committed, whether by error or not, he is forgotten by society and, unlike the criminally convicted, the mentally ill person rarely has the ability to call attention to himself.

97. *See, e.g., supra* note 3 and accompanying text.

98. The reasonable doubt standard of proof currently is employed in Massachusetts and was used in Rhode Island until 1982. The involuntary commitment has not vanished in either of these states. *See generally* D. LELOS, P. LIPSITT, A. MCGARRY & R. SCHWITZGEBEL, CIVIL COMMITMENT AND SOCIAL POLICY: AN EVALUATION OF THE MASSACHUSETTS MENTAL HEALTH REFORM ACT OF 1970. (U.S. Dep't of Health & Human Services Monograph Series on Crime and Delinquency, 1981).

99. 269 S.E.2d 849 (W. Va. 1980).

100. 551 F. Supp. 1298 (E.D.N.Y. 1982).

101. *See* State v. Harris, 233 N.C. 697, 703, 28 S.E.2d 232, 237 (1943) and cases cited therein.

Outside the criminal context, however, beyond a reasonable doubt may be seen as something slightly less than near certainty. Evidence in commitment proceedings is much more amorphous and subject to varying interpretations than in the criminal context. Because the purpose of commitment proceedings is to foresee and prevent dangerous behavior, rather than to decide whether a specific crime has been commited, the trier of fact expects a greater amount of uncertainty in the evidence. In the criminal context, the trier of fact hears evidence of what did happen, while in the commitment process, the trier hears evidence of what might happen. The trier expects greater uncertainty in the proof of future events than of past.[102] Thus, the threshold of beyond a reasonable doubt will be satisfied more easily in civil commitment because the factfinder has a lower expectation of certainty.

The substantive effects of a reasonable doubt standard of proof must be given more analysis than whether the standard seems appropriate based on its use in criminal cases. Civil commitments have occurred under the reasonable doubt standard in two states,[103] in settings in which the level of certainty apparently was lower than it would have been in a criminal case. The difference between the proof required by this lessened reasonable doubt standard, and that required by the clear and convincing evidence standard, is the amount of proof that is necessary to tighten the system and reduce overinclusiveness.

Even though the reasonable doubt standard is not applied as stringently in a civil commitment case as it would be in a criminal case, the standard raises the level of seriousness with which a trier of fact approaches the problem. Judge Haynsworth has written: "[H]owever meaningful the distinction may be to us as judges, . . . it is greatly to be doubted that a jury's verdict would ever be influenced by the choice of one standard or the other."[104] This Note demonstrates that how the standard of proof is described is not as important as how the description affects the fact finder. Therefore, using "unequivocal" and "beyond a reasonable doubt" will increase the scrutiny to be applied to the evidence, but neither is intended to be, nor should it be, taken literally. Considering the flaws of the present system, the use of a reasonable doubt standard simply raises the threshold of proof to a more appropriate level.

Ideally, only those individuals who are mentally ill and who pose a serious risk of harm to themselves or others would be incarcerated through the involuntary civil commitment process. To say that the present system even approaches that goal is unrealistic. The combination of a lack of detailed psychiatric and medical evaluation and a concern for substantive due process rights have convoluted our goals. Individuals who should be committed often

102. The trier of fact will expect greater uncertainty in a civil commitment case than in a criminal case. Thus, a greater measure of doubt than in a criminal case will be able to exist before it rises to a "reasonable doubt," thereby preventing commitment. A "reasonable doubt" will exist when the amount of doubt exceeds that amount which the trier of fact already expects to exist in the finding.

103. *See supra* note 98.

104. Tippet v. Maryland, 436 F.2d 1153, 1158-59 (4th Cir. 1971), *cert. dismissed sub nom.* Murel v. Baltimore City Criminal Court, 407 U.S. 355 (1972).

are not, while others who may not be dangerous often are taken from their environment and secluded from society. The solution to this problem rests with our legislatures. No one can blame the judiciary for being concerned with due process; that is its duty in our society. Nor can one fault the medical community for its desire to provide treatment to all who might need it. The legislature has the power to reform the system and it must do so. Merely by requiring evidence of substantial risk of harm as the sufficiency standard, the legislature would free judges to study each case in its own perspective, uncolored by some talismanic requirement like overt acts. This broad evidentiary standard can be counterbalanced by a beyond a reasonable doubt standard of proof that impresses upon the factfinder the seriousness of the decison he must make. If these two proposals are adopted in tandem we can begin to cope with the problems of both overinclusiveness and underinclusiveness that presently haunt our involuntary civil commitment system.

DAVID T. SIMPSON, JR.