Innocents Imprisoned: The Deficiencies of the New Jersey Standard Governing the Involuntary Commitment of Children†

> This time I read the title of the painting: *Girl Interrupted at Her Music.*
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> Interrupted at her music: as my life had been, interrupted in the music of being seventeen, as her life had been, snatched and fixed on canvas: one moment made to stand still and to stand for all the other moments, whatever they would be or might have been. What life can recover from that?[1]

INTRODUCTION

In 1986, two New Jersey youths, sent by their parents to a Minnesota hospital for psychiatric treatment, entered a twilight zone from which they could not escape.[2] While this scenario differs

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† Editor's Note: As this piece was being prepared for publication, the New Jersey Supreme Court Committee on Civil Practice recommended that N.J. Ct. R. 4:74-7(f) be amended. This development is briefly addressed by the author.

1 SUSANNA KAYSEN, GIRL, INTERRUPTED 167 (1993). This book is a poignant memoir of a young woman's travails in the mental health system. *See generally id.*

2 Marilyn Jackson-Beeck et al., *Trends and Issues in Juvenile Confinement for Psychiatric and Chemical Dependency Treatment*, 10 INT'L J.L. & PSYCHIATRY 153, 164 (1987). After learning of their rights, the two minors requested to be released. *Id.* The hospital felt, however, that continued treatment would best serve the youths. *Id.* Furthermore, the parents refused to have the children returned home, and welfare departments in both states declined to intervene. *Id.*

The epidemic of out-of-state placement of alleged mentally ill minors has reached a dangerous apex, giving rise to a groundswell of opposition. *See* NATIONAL MENTAL HEALTH ASSOCIATION, INVISIBLE CHILDREN PROJECT, FINAL REPORT AND RECOMMENDATIONS OF THE INVISIBLE CHILDREN PROJECT 3, 7, 8, 19 app. A, 22 app. D (1989) [hereinafter INVISIBLE CHILDREN PROJECT] (maintaining that "[s]tates placed at least four thousand children [during 1986-87] in out-of-state residential treatment and psychiatric facilities at an estimated cost of $215 million"). New Jersey ranked as the sixth highest state in placing minors in out-of-state facilities. *Id.* at 2. Additionally, New Jersey was one of 21 states with a greater-than-average rate per 100,000 children in out-of-state placements. *Id.* at 4. One truly alarming finding stated:

> State agencies often do not know the exact number of children they place in out-of-state and in-state psychiatric facilities, the amount of money being spent on their treatment, their diagnosis or even their whereabouts. One state for example, could estimate the number of children sent out of state only by examining the claim requests for payment submitted by out-of-state facilities. An official in another state commented that he could not remember the last time they counted the number of children placed out of state. No federal agency gathers such data either.

Id. at 8.

slightly from a state-imposed involuntary civil commitment,[3] the outcome is identical and reveals the problems inherent in the commitment of children to psychiatric institutions.[4] Providing mental health care for children is a daunting task, one that is made even more daunting when such factors as a weak family structure, insufficient funding, and a low socioeconomic status exist.[5]

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[3] "Involuntary civil commitment" will be used in this Comment to describe any compulsory hospitalization or other restriction on personal liberty imposed by a state because of an individual's mental illness. "Involuntary civil commitment" is a term of art that denotes hospitalization in a mental institution for noncriminal behavior. BLACK'S LAW DICTIONARY 245, 273 (6th ed. 1990) (citations omitted). The usual involuntary commitment criterion is that the person have a mental illness or condition which, as a result, causes the person to be dangerous to herself or others. *See, e.g.*, ARK. CODE ANN. § 20-47-207 (Michie 1991) (stating that a person who is mentally ill and "poses a clear and present danger to himself or others" shall be eligible for involuntary admission). Involuntary commitment is sometimes referred to as an emergency measure. *See, e.g.*, COLO. REV. STAT. ANN. § 27-10-105 (West 1990) (defining involuntary commitment as an "emergency procedure").

The usual procedural methods for involuntary commitment of both minors and adults vary only slightly from state to state. EDWARD B. BEIS, MENTAL HEALTH AND THE LAW 119-26 (1984). In New Jersey, to initiate involuntary commitment proceedings, two physicians must certify why the minor is in need of psychiatric treatment. CECILIA ZALKIND, YOU HAVE THE RIGHT! YOUR RIGHTS AS A YOUNG PERSON IN NEW JERSEY 104-05 (1990). A judge may then issue a temporary order committing the minor to a psychiatric facility. *Id.* at 105. Within 20 days, a hearing must be held on the minor's commitment, and the minor must be provided counsel, usually by the Office of the Public Advocate. *Id.* If the judge finds by clear and convincing evidence that the minor is "in need of intensive psychiatric therapy," the minor will be committed for an initial period of three months. N.J. CT. R. 4:74-7(f); ZALKIND, *supra*, at 105.

[4] LOUISE ARMSTRONG, AND THEY CALL IT HELP: THE PSYCHIATRIC POLICING OF AMERICA'S CHILDREN 8-9 (1993); James W. Ellis, *Volunteering Children: Parental Commitment of Minors to Mental Institutions*, 62 CAL. L. REV. 840, 851-52 (1974). The media is constantly presenting horror stories of children who are merely "acting up" and then being committed to mental institutions against their will by their parents. *See, e.g.*, Katherine Barrett & Richard Greene, *"Mom, Please Get Me Out!"*, LADIES' HOME JOURNAL, May 1990, at 98, 103 (enunciating that as many as two-thirds of institutionalized children were needlessly committed); Nora Leven, *Invisible Children*, MINNEAPOLIS ST. PAUL, July 1988, at 52, 55 (stating that it is common for parents to commit their children to a psychiatric hospital for such minor transgressions as skipping school and being argumentative); Anastasia Toufexis, *Struggling for Sanity*, TIME, Oct. 8, 1990, at 47, 47 (maintaining that as many as 7.5 million children suffer from some kind of mental illness and that hospitalizations jumped nearly 40 percent between 1980 and 1986); *cf.* John Hamm, *Intensive Day Treatment Provides an Alternative to Residential Care*, CHILDREN TODAY, Sept.-Oct. 1989, at 11, 15 (showing that outpatient, or "day" treatment, is more effective than long-term residential care).

[5] *See* K. Edward Greene, *Mental Health Care for Children: Before and During State Custody*, 13 CAMPBELL L. REV. 1, 2-3 (1990) (maintaining that as of January 12, 1990, approximately 500,000 children were residing in "out-of-home" placement facilities). Greene further explained that children have historically been taken into state custody for one of two reasons: "[T]o protect the child from her parents and to protect others from the child's activities." *Id.* at 5. Approximately 340,000 children were in foster care in 1988, and in 1987, 54,716 minors were in residential facilities for the treat-

Admittedly, a parent's right to commit her child to a psychiatric hospital is bound up in the inherent right of the parent to raise her child.[6] The United States Supreme Court, however, narrowed this right slightly in *Parham v. J.R.*,[7] holding that the commitment of a child to a mental institution implicated the child's due process rights.[8] As a result, the Court maintained that a mental health professional should review a parent's decision to commit her child and trump such a decision when warranted.[9]

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ment of mental problems. *Id.* at 3. According to the *Invisible Children Project*, 22,472 children were committed to state hospitals in 1986; the average was 449 children per state. INVISIBLE CHILDREN PROJECT, *supra* note 2, at 4. More importantly, the mental health services provided are woefully inadequate. SELECT COMMITTEE ON CHILDREN, YOUTH & FAMILIES, NO PLACE TO CALL HOME: DISCARDED CHILDREN IN AMERICA, H.R. REP. NOS. 101-395, 101st Cong., 2d Sess. 5, 45 (1990) [hereinafter HOUSE REPORT]. Specifically, "[t]he range of services is frequently unavailable, there is very little coordination among the systems that are mandated to serve our children and there is usually no plan to determine which agencies should be responsible for serving a particular child. Consequently, our children are unserved, underserved or served inappropriately." *Id.* (quotation omitted). The INVISIBLE CHILDREN PROJECT's committee alleged that almost 80 percent of mentally disturbed children received inappropriate mental health services. *Id.* at 48-49. Additionally, the committee noted that the supply of mental health services for children was inadequate. *Id.* One criticism was that states lack clear policies regarding which children should be admitted to state hospitals, the length of their stay, and the appropriate admission criteria. *Id.*

6 *See, e.g.*, Ginsberg v. New York, 390 U.S. 629, 639 (1968) (stating that "the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society"); Pierce v. Society of Sisters, 268 U.S. 510, 533-35 (1925) (concluding that the Due Process Clause protects the right of parents to direct a child's upbringing).

7 442 U.S. 584 (1979). In *Parham*, the Court examined a Georgia statute which provided that upon the request of a parent or guardian, the state mental institution could temporarily admit the child for observation and diagnosis. *Id.* at 588, 590-91 (citing GA. CODE ANN. § 88-503.1 (Michie 1975)). Thereafter, the hospital could detain the minor if it found that there was "evidence of mental illness" and that the minor was suitable for treatment. *Id.* at 591 (citing GA. CODE ANN. § 88-503.1 (Michie 1975)).

8 *Id.* at 600. The Court maintained that a child, similar to an adult, "has a substantial liberty interest in not being confined unnecessarily for medical treatment and that the state's involvement in the commitment decision constitutes state action under the Fourteenth Amendment." *Id.* (citations omitted); *see also In re* Roger S., 569 P.2d 1286, 1289 (Cal. 1977) (emphasizing that a minor has the right "to procedural due process in determining whether the minor is mentally ill or disordered, and whether, if the minor is not gravely disabled or dangerous to himself or others . . . the admission sought is likely to benefit him") (footnote omitted). The *Parham* Court also acknowledged the stigma under which a child might later live as a result of mental hospitalization. *Parham*, 422 U.S. at 600 (citation omitted).

9 *Parham*, 442 U.S. at 606-07. The Court noted that the inherent risk of error in a parental decision was great, thus warranting an independent evaluation by a neutral factfinder to ensure that the standards for admission were met. *Id.* at 606. Justice Burger noted, however, that "[m]ost children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments." *Id.* at 603.

The extent to which admission to a private psychiatric institution is governed by statute varies from jurisdiction to jurisdiction.[10] Generally, however, a minor is "sentenced" to a state psychiatric hospital because the family cannot afford a private institution or because the child is a ward of the state.[11] On the other hand, parents who have adequate financial resources usually admit their children to private hospitals.[12]

In recent years, legislatures have taken affirmative steps to protect a minor's due process rights in civil commitment proceedings,

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The court in *In re Roger S.* similarly concluded that the right to procedural due process included a precommitment hearing before a neutral fact finder. *In re* Roger S., 569 P.2d at 1296 (citations omitted). *But cf.* Ellis, *supra* note 4, at 886-90, 904-06 (maintaining that a minor's commitment should be accompanied by the assistance of counsel and the opportunity for a full blown judicial hearing). Ellis criticized the fact that, often, the only requirement for a parent's "voluntary" commitment of her child is a concurrence by the admitting authority—normally the hospital administrator or the admitting physician. *Id.* at 850. These officials often defer to the parent's wishes and fail to exercise their own independent judgment. *Id.* One psychiatrist proclaimed: "'[The family request cases are] pretty automatic. If the patient's own family wants to get rid of him you know there is something wrong.'" *Id.* at 868 (quotation omitted). Furthermore, some institutions limit their investigation to whatever information is supplied by the patient's family. *Id.* at 850. The *Parham* Court, however, looked with disfavor upon an adversarial proceeding in the context of a voluntary commitment of a minor by her parent. *Parham*, 442 U.S. at 610.

10 BEIS, *supra* note 3, at 119-26; *compare* N.C. GEN. STAT. § 122C-3(14)c (1989) (defining "facility" to include private facilities) *and* S.D. CODIFIED LAWS ANN. § 27A-1-1(9) (1992) (defining "inpatient psychiatric facility" as "a public or private facility") *with* N.J. STAT. ANN. § 30:4-27.2 (West Supp. 1993) (defining a "psychiatric facility" under New Jersey's involuntary civil commitment statute as "a State psychiatric hospital . . ., a county psychiatric hospital, or a psychiatric unit of a county hospital"). Most states, however, include private facilities within their statutory realm. *See, e.g.*, COLO. REV. STAT. ANN. § 27-10-102(4.5) (West 1990) (defining "facility" as a public or licensed private hospital); FLA. STAT. ANN. § 394.455(1) (West 1986) (defining "hospital" as "a public or private hospital"); MO. ANN. STAT. § 632.005(11) (Vernon 1988) (stating that a "mental health facility" is any residential facility, either public or private).

11 ARMSTRONG, *supra* note 4, at 7-8. In 1986, 22,472 children were committed to state psychiatric hospitals at a cost of approximately $300 per day, compared with a weekly cost of $8,000 in a private, for-profit psychiatric hospital. *Id.* at 8 (citing INVISIBLE CHILDREN PROJECT, *supra* note 2, at 4). Armstrong cautioned, however, that only 16 states responded to the survey. *Id.* A family's socioeconomic status largely determines the availability of hospitalization alternatives. *Ellis, supra* note 4, at 851-52. Simply stated, the poor cannot afford private psychiatric care. *Id.* at 852.

12 ARMSTRONG, *supra* note 4, at 7. This practice, however, is rife with abuses. *Id.* at 4-6. In the past, national hospital chains such as Community Psychiatric Centers, Psychiatric Institutes of America, and National Medical Enterprises have used alarmist and coercive advertising techniques to promote their services. *Id.* at 5-6; *see also The Profits of Misery: How Inpatient Psychiatric Treatment Bilks The System And Betrays Our Trust: Hearing Before the Select Committee on Children, Youth, and Families*, 102d Cong., 2d Sess. 457-58 (1992) [hereinafter *Profits of Misery*] (educing from testimony and documentation that some private psychiatric institutions awarded bonus points towards cruises and other gifts to employees who successfully "recruited" patients).

going so far as to categorize a parent's attempt to commit her child as an involuntary admission.[13] Other states label the commitment voluntary, but still mandate an independent evaluation before a minor can be confined to a mental institution.[14]

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[13] *See, e.g.*, ALA. CODE § 12-15-90 (1986) (stating that a parent or legal guardian may petition to have her child involuntarily committed "to the custody of the state department of mental health" if the child is mentally ill and poses a threat of substantial harm to herself or others). In many states, a minor's involuntary commitment can be initiated by any person, which presumably includes parents. *See, e.g.*, ARK. CODE ANN. § 20-47-207 (Michie 1991) (maintaining that a petition for involuntary commitment can be executed by "any person"). While New Jersey's legislation no longer applies to children, the applicable court rule mandates that the involuntary commitment process be followed if a parent or legal guardian originally petitioned for a child's voluntary commitment and the confinement has lasted for more than seven days. N.J. STAT. ANN. § 30:4-27.2s (West Supp. 1993); N.J. CT. R. 4:74-7(k); *see also In re* J.C.G., 144 N.J. Super. 579, 585, 366 A.2d 733, 736-37 (Law Div. 1976) (verifying that this procedural safeguard is mandated to "prevent a so-called voluntary commitment of a minor by his parent or other person in loco parentis") (quotation omitted). At that point, the child is appointed a guardian *ad litem* to represent her interests. N.J. CT. R. 4:74-7(c)3.

In *J.C.G.*, a mother obtained a temporary involuntary commitment of her daughter to the Trenton Psychiatric Hospital. *In re* J.C.G., 144 N.J. Super. at 581-82, 366 A.2d at 734. At the final commitment hearing, the mother expressed the desire that her daughter stay at the hospital. *Id.* at 582, 366 A.2d at 735. The mother also sought to obtain access to her daughter's court records and financial reports. *Id.* at 581, 366 A.2d at 735.

The *J.C.G.* court denied the mother's request, asserting that such records were confidential. *Id.* at 584, 366 A.2d at 736. The court maintained that when a child is involuntarily committed, the appointed guardian *ad litem* assumes many responsibilities, which include protecting the minor's due process rights and ensuring that commitment is not prematurely terminated. *Id.* at 586, 366 A.2d at 737. More importantly, the court asserted, the guardian *ad litem* is better suited to represent the child due to the potential conflicts between the parent and child. *Id.* at 585, 366 A.2d at 737. The *J.C.G.* court emphasized that parents often seek mental hospitalization for their children not because of the child's mental state, but because of family difficulties. *Id.* at 585-86, 366 A.2d at 737 (quoting Ellis, *supra* note 4, at 859). In this case, the court noted that the pattern of placements by J.C.G.'s mother seemed to serve primarily "the mother's interest and convenience." *Id.* at 586, 366 A.2d at 737. Accordingly, the court concluded that when a child is finally committed, her care and treatment become the responsibility of the state and, more specifically, the guardian. *Id.* at 587, 366 A.2d at 738.

[14] *See* COLO. REV. STAT. ANN. § 27-10-103(3.1) (West 1990) (stating that an independent "professional person" must examine the minor and find that the child is mentally ill and needs hospitalization, and that hospitalization will be beneficial); D.C. CODE ANN. § 21-542(a) (1989) (mandating that an independent medical evaluation must be conducted following the petition by any individual to have another committed); GA. CODE ANN. § 37-3-81(a)(4) (Michie 1982 & Supp. 1993) (allowing a patient to be examined by a psychiatrist of her own choosing); *see also* P.F. v. Walsh, 648 P.2d 1067, 1069-70, 1071-72 (Colo. 1982) (holding that the Colorado statute governing voluntary admission of a minor by her parents to a psychiatric hospital was unconstitutional because it gave the hospital unbridled discretion in admitting the child) (citation omitted). The *P.F.* court maintained that the legislature had not provided any standards or limits within the law "to guard against arbitrary and inconsis-

While an entire article could focus on the parent-child commitment proceedings,[15] this Comment examines the constitutionality of New Jersey Court Rule 4:74-7(f), which governs the involuntary commitment of children.[16] Part I of this Comment

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tent application." *Id.* at 1071-72. Additionally, the court emphasized that "[g]iven the substantial liberty interest at stake and the risk of an erroneous admission decision," the hospital could not be the arbiter of defining the admission standard; that duty belonged to the legislature. *Id.* at 1072.

Criticism has been leveled at the "involuntary" and "voluntary" labels. *See* Elyce H. Zenoff & Alan B. Zients, *If Civil Commitment is the Answer for Children, What are the Questions?*, 51 GEO. WASH. L. REV. 171, 204 (1983) (asserting that "[b]ecause minors lack the maturity and experience to make decisions about hospitalization, they should not be divided into voluntary and involuntary patients"). The commentators further explained that because children lack capacity in other legal genres, such as entering into a contract, they also lack the capacity to make an informed choice about confinement. *Id.* at 204-05.

[15] For excellent discussions on parent-child commitments, see Ellis, *supra* note 4, at 850 (providing a discussion of the burgeoning effort to afford minors substantial rights in commitment proceedings initiated by their parents); Note, *The Mental Hospitalization of Children and the Limits of Parental Authority*, 88 YALE L.J. 186, 186-87 (1978) (challenging statutes that authorize a parent to admit her child to a mental hospital while depriving the child of her due process rights); Comment, *"Voluntary" Admission of Children to Mental Hospitals: A Conflict of Interest Between Parent and Child*, 36 MD. L. REV. 153, 181 (1976) (declaring that a parent should not be able to waive the constitutional rights of her child in a voluntary commitment proceeding). The scope of this Comment, for purposes of length and clarity, will be confined to a discussion of involuntary commitment to mental institutions or psychiatric hospitals where the child is committed without her consent or that of her parents or guardians.

[16] N.J. CT. R. 4:74-7(f). Rule 4:74-7(f) provides:

> Final Order of Commitment, Review. The court shall enter an order authorizing the involuntary commitment of an adult patient if it finds, by clear and convincing evidence presented at the hearing that the patient is in need of continued involuntary commitment by reason of the fact that he is (1) mentally ill, (2) mental illness causes him to be dangerous to self or dangerous to others or property as defined in N.J.S.A. [§] 30:4-27.2h and -.2i, (3) he is unwilling to be admitted to a facility for voluntary care, and (4) he needs care at a short-term care, psychiatric facility or special psychiatric facility because other services are not appropriate or available to meet his mental health care needs. *Alternatively, if the patient is a minor, the order may be entered if the court finds that he is in need of intensive psychiatric therapy which cannot practically or feasibly be rendered in the home or in the community or on any outpatient basis.*

Id. (emphasis added). Because the legislation governing civil commitment was amended in 1988 to exclude all reference to minors, this rule remains the only standard by which a New Jersey court can examine the commitment of a minor. N.J. STAT. ANN. § 30:4-27.2s (West Supp. 1993) (defining "patient" as "a person over the age of 18"). Additionally, the term "in need of involuntary commitment" governs only mentally ill adults. N.J. STAT. ANN. § 30:4-27.2m (West Supp. 1993). The previous statutory definition of "patient" included "any person or persons alleged to be mentally ill." N.J. STAT. ANN. § 30:4-23 (West 1981). In the past, the courts applied the statute to both adults and minors. *See, e.g., In re* D.D., 118 N.J Super. 1, 3, 4-5, 285 A.2d 283, 284, 285 (App. Div. 1971) (utilizing the adult dangerousness standard in the involuntary commitment proceedings of a minor).

provides a history of the judicial recognition of an individual's due process rights in commitment proceedings and follows with an overview of involuntary commitment standards throughout the country. Part II explains the past and current New Jersey standard governing the involuntary commitment of minors. Part III addresses the vagueness of New Jersey's standard and discusses the lack of substantive due process safeguards in Rule 4:74-7(f). Part IV argues that because Rule 4:74-7(f) is substantive, it violates the New Jersey constitutional requirement that court rules can only be procedural. This Comment advocates that absent underlying legislation, the standard under Rule 4:74-7(f) is unconstitutional and therefore void. In conclusion, this Comment proffers a recommendation and urges the Legislature to adopt safeguards to ensure that the rights of children in New Jersey are adequately protected.

I. TWO DECADES OF INVOLUNTARY COMMITMENT REFORM IN THE UNITED STATES

A. *Court Recognition of Due Process Rights in Civil Commitment*

Historically, a state committed an individual to a mental insti-

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As this Comment was being readied for publication, the New Jersey Supreme Court Civil Practice Committee proposed an amendment to N.J. CT. R. 4:74-7(f) to include the necessity of finding a mental illness and an alternative finding of dangerousness to the already enunciated standard of "in need of intensive psychiatric therapy." *Report of the Supreme Court Committee on Civil Practice*, 136 N.J. L.J. 581, 591 (Feb. 14, 1994). The proposal adds a threshold of 14 years old to utilize the dangerousness standard, but fails to provide any reasoning for this arbitrary "bright line." *Id.* The proposal for section (f) reads:

> *Final Order of Commitment, Review.* The court shall enter an order authorizing the involuntary commitment of an adult patient if it finds, by clear and convincing evidence presented at the hearing that the patient is in need of continued involuntary commitment by reason of the fact that (1) *the patient is* mentally ill, (2) mental illness causes *the patient* to be dangerous to self or dangerous to others or property as defined in N.J.S.A. [§] 30:4-27.2h and -.2i, (3) *the patient* is unwilling to be admitted to a facility for voluntary care, and (4) *the patient* needs care at a short-term care or psychiatric facility or special psychiatric *hospital* because other services are not appropriate or available to meet *the patient's* mental health care needs. *If, however,* the patient is a minor *under the age of 14,* the order may *also* be entered if the court finds that *the patient is mentally ill and either that the mental illness causes the patient to be dangerous to self or others or property, or that the patient* is in need of intensive psychiatric therapy *that can be provided at a psychiatric hospital and that* cannot practically or feasibly be rendered in the home or in the community or on *an* outpatient basis.

Id. As will be discussed *infra*, the author of this Comment recommends that the New Jersey Supreme Court not adopt this rule without underlying legislation in place.

tution by invoking its police power[17] and utilizing the *parens patriae* doctrine.[18] Civil commitment has long been justified because it prevents the mentally ill from harming others or themselves.[19] Whether a state is constitutionally barred from involuntarily committing a mentally ill individual who is not dangerous, however, remains an unanswered question.[20]

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17 A state's police power is defined as the power of the state to prevent harm to others. Note, *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 Harv. L. Rev. 1190, 1222 (1974) [hereinafter Note, *Developments*]; *see also* Rogers v. Okin, 634 F.2d 650, 654 (1st Cir. 1980) (pronouncing that "the state has a legitimate interest in protecting persons from physical harm at the hands of the mentally ill"), *vacated and remanded sub nom* Mills v. Rogers, 457 U.S. 291 (1982); Donahue v. Rhode Island Dep't of Mental Health, Retardation and Hospitals, 632 F. Supp. 1456, 1462 (D.R.I. 1986) (enunciating that the state has an interest in preventing an individual from harming others) (citations omitted).

18 RALPH REISNER & CHRISTOPHER SLOBOGIN, LAW AND THE MENTAL HEALTH SYSTEM 319-20 (1985). A state's exercise of its *parens patriae* power is justified when the patient is a danger to herself. *See, e.g., Donahue*, 632 F. Supp. at 1462 (remarking that "[t]he state's ability to commit its citizens . . . is bottomed upon . . . the sovereign's parens patriae interest 'in providing care to its citizens who are unable to care for themselves'") (quoting Addington v. Texas, 441 U.S. 418, 426 (1979)); Johnson v. Solomon, 484 F. Supp. 278, 286 (D. Md. 1979) (concluding that "dangerousness to oneself provides the rationale for commitment by the State's *parens patriae* powers"); State v. Taylor, 618 P.2d 1127, 1133 (Colo. 1980) (admitting that a state can act as *parens patriae* "where an individual is unable to take care of himself and his safety is at stake").

The courts in England first developed the doctrine of *parens patriae*. Greene, *supra* note 5, at 5. Initially, the English Chancery courts utilized the *parens patriae* doctrine to protect lunatics, and later applied the doctrine to children. Daniel B. Griffith, *The Best Interests Standard: A Comparison of the State's Parens Patriae Authority and Judicial Oversight in Best Interests Determinations for Children and Incompetent Patients*, 7 ISSUES L. & MED. 283, 287 (1991). Griffith explained further that in America, the *parens patriae* power "emanates from the state's traditional role as sovereign and guardian of persons under legal disability." *Id.* at 288. For an excellent examination of the history of the state's police and *parens patriae* powers, and an exhaustive discussion of the state of involuntary civil commitment in the 1970s, see generally Note, *Developments*, *supra* note 17.

19 Jones v. United States, 463 U.S. 354, 368 (1983) ("The purpose . . . of civil commitment, is to treat the individual's mental illness and protect him and society from his potential dangerousness.").

20 *See* O'Connor v. Donaldson, 422 U.S. 563, 573 (1975). In *O'Connor*, the respondent brought an action for damages against a Florida state hospital where he had been involuntarily committed. *Id.* at 564, 565. The action alleged that the hospital and its supervisor had deprived the respondent of his constitutional right to liberty. *Id.* at 565. More specifically, respondent maintained that he was neither dangerous nor mentally ill, and was therefore improperly committed. *Id.* The *O'Connor* Court suggested that the only grounds upon which a state could involuntarily commit an individual were to cure mental illness, protect the individual from herself, and protect others. *Id.* at 575-76; *see also* Donald Hermann, *Barriers to Providing Effective Treatment: A Critique of Revisions in Procedural, Substantive, and Dispositional Criteria in Involuntary Civil Commitment*, 39 VAND. L. REV. 83, 87 (1986) (discussing the *O'Connor* Court's reasoning).

Surprisingly, prior to 1972, courts did not consider involuntary commitment to result in a substantial enough loss of liberty to invoke the Fourteenth Amendment.[21] In *Lessard v. Schmidt*,[22] however, the United States District Court for the Eastern District of Wisconsin recognized that due process requirements must be met in cases of involuntary commitment.[23] The *Lessard* court maintained that a mentally ill person could not be committed unless

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The Court stated that "there [was] no reason now to decide whether . . . the State may compulsorily confine a nondangerous, mentally ill individual for the purpose of treatment." *O'Connor*, 422 U.S. at 573. The Court enunciated, however, that a "State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom . . . ." *Id.* at 576. For a more detailed discussion of *O'Connor*, see *infra* notes 27-31 and accompanying text.

The Supreme Court has never revisited this issue, but most state legislatures have mandated dangerousness as a prerequisite to involuntary commitment. *See infra* notes 62-77 and accompanying text (discussing the dangerousness requirement in involuntary civil commitment proceedings). Additionally, commentators have consistently maintained that the *O'Connor* decision requires a finding of both mental illness and dangerousness. *See, e.g.*, Reed Groethe, Comment, *Overt Dangerous Behavior as a Constitutional Requirement for Involuntary Civil Commitment of the Mentally Ill*, 44 U. CHI. L. REV. 562, 562 n.1 (1977) (explaining that Alabama, California, Hawaii, Massachusetts, Nebraska, North Carolina, Washington, and Wisconsin reformed their statutes within one year of the *O'Connor* decision to include a finding of dangerousness); Bruce Vrana, Comment, *Senate Bill 43: A Refinement of North Carolina's Involuntary Civil Commitment Procedures*, 14 CAMPBELL L. REV. 105, 111 & n.41 (1991) (suggesting that the criteria set forth by the *O'Connor* Court and other courts is dangerousness and mental illness).

21 *See, e.g.*, Prochaska v. Brinegar, 102 N.W.2d 870, 872 (Iowa 1960) (stating that "[s]uch [a] loss of liberty [in an involuntary commitment] is not such liberty as is within the meaning of the constitutional provision that 'no person shall be deprived of life, liberty or property without due process of law'") (quotation omitted). In *Prochaska*, the appellant brought a *habeas corpus* action to gain release from a mental hospital, alleging various procedural deficiencies in his commitment hearing. *Id.* at 870. The court maintained that because appellant was not being "punished" in a criminal sense, but rather was committed for his own protection, he was not entitled to full due process protection. *Id.* at 872.

22 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded for more specific order*, 414 U.S. 473 (1974), *order on remand*, 379 F. Supp. 1376 (E.D. Wis. 1974), *vacated and remanded on other grounds*, 421 U.S. 957 (1975), *order reinstated on remand*, 413 F. Supp. 1318 (E.D. Wis. 1976).

23 *Lessard*, 349 F. Supp. at 1087. *Lessard* was a class action contesting the validity of Wisconsin's procedures for involuntary civil commitment. *Id.* at 1082. The action was initiated when Alberta Lessard was involuntarily taken into custody and placed in a mental hospital. *Id.* at 1081. The court ruled that "unless constitutionally prescribed due process requirements for involuntary commitment are met, no person should be subject to 'treatment' against his will." *Id.* at 1087. Additionally, the court emphasized that even where there is substantial evidence of mental illness and dangerousness to oneself or others, hospitalization should only be ordered as a last resort. *Id.* at 1095. The court opined that although "'the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.'" *Id.* (quotation omitted).

there was a prior hearing, absent an emergency, and commitment was found to be the least restrictive alternative.[24] More importantly, the court held that an individual must be dangerous to herself or others to justify commitment.[25]

The *Lessard* court's reasoning has been followed by many courts.[26] Most importantly, the Supreme Court utilized a similar

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[24] *Id.* at 1091-93, 1095 (citations omitted). The court concluded:

> [T]he Wisconsin civil commitment procedure is constitutionally defective insofar as it fails to require effective and timely notice of the "charges" under which a person is sought to be detained; fails to require adequate notice of all rights, including the right to jury trial; permits detention longer than 48 hours without a hearing on probable cause; permits detention longer than two weeks without a full hearing on the necessity for commitment; permits commitment based upon a hearing in which the person charged with mental illness is not represented by adversary counsel, at which hearsay evidence is admitted, and in which psychiatric evidence is presented without the patient having been given the benefit of the privilege against self-incrimination; permits commitment without proof beyond a reasonable doubt that the patient is both "mentally ill" and dangerous; and fails to require those seeking commitment to consider less restrictive alternatives to commitment.

Id. at 1103.

[25] *Id.* at 1093. The court required an extreme likelihood that the individual will do immediate harm to herself or another if she is not confined. *Id.* Recognizing that predictions of dangerousness are not foolproof, the court postulated that "a finding of a recent overt act, attempt or threat to do substantial harm to oneself or another" would be enough to justify involuntary commitment. *Id.* (citation omitted). The dangerousness standard, the court noted, had existed in various jurisdictions for over 200 years, as evidenced by a 1788 New York statute that provided for the confinement of "furiously madd" persons who were "'so far disordered in their senses that they may be dangerous to be permitted to go abroad.'" *Id.* at 1085 (quotation omitted). Additionally, the court pointed to an 1845 Massachusetts Supreme Court decision stating that "'the 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.'" *Id.* (quotation omitted).

[26] *See, e.g.*, Bartley v. Kremens, 402 F. Supp. 1039, 1045 (E.D. Pa. 1975) (declaring that substantial procedures must be utilized by the state to avoid violating the due process rights of a person who has been committed) (citations omitted); Bell v. Wayne County Gen. Hosp., 384 F. Supp. 1085, 1092 (E.D. Mich. 1974) (maintaining that due process requires adequate notice and other procedural safeguards, such as the right to counsel). The *Bell* case involved a consolidated action alleging that the Michigan standards and procedures for involuntary commitment were unconstitutional. *Id.* at 1090. Throughout its opinion, the *Bell* court frequently cited to *Lessard* because of the similarities between the two cases. *Id.* at 1092 & n.4, 1093, 1094, 1096, 1097-98 (citation omitted).

The court in *State ex rel. Hawks v. Lazaro* modified the *Lessard* approach to dangerousness by providing that overt acts of violence did not have to be shown in instances where the physical injury was by means of slow deterioration of the body due to starvation or bodily neglect. State *ex rel.* Hawks v. Lazaro, 202 S.E.2d 109, 123 (W. Va. 1974) (citation omitted). Another court took the same approach as *Hawks*, stating that there was sufficient dangerousness if a mentally ill person's "neglect or refusal to care for himself poses a real and present threat of substantial harm to his well-being."

rationale in *O'Connor v. Donaldson*[27] to hold that involuntary commitment of a mentally ill person was subject to due process.[28] Although the Court did not expressly mandate a requirement of dangerousness, it suggested that the protection of the public from the individual and the individual from herself were the only constitutionally recognized grounds for involuntary commitment.[29] Indeed, Justice Stewart explicitly stated that mental illness alone was not enough to justify involuntary commitment.[30] The Court de-

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Lynch v. Baxley, 386 F. Supp. 378, 391 (M.D. Ala. 1974). For an exposition of the *Lessard* decision and its applicability to the state of Washington's commitment procedures, see Betty L. Drumheller, Recent Developments, 59 WASH. L. REV. 375, 379 (1984) ("Most courts have followed the *Lessard* court's example in holding that strict standards and thorough procedures are necessary to ensure protection of the mentally ill individual's rights."). Several United States Supreme Court decisions subsequent to *Lessard* enhanced the procedural requirements that a state must meet in involuntary commitment proceedings. *See, e.g.*, Vitek v. Jones, 445 U.S. 480, 483, 496-97 (1980) (pronouncing that under the Nebraska statute for transferring mentally ill prisoners to mental hospitals, due process requires notice, an adversarial hearing, and legal counsel); Jackson v. Indiana, 406 U.S. 715, 738 (1972) (enunciating that a full hearing must be provided within a reasonable time to commit an alleged criminal, who is incompetent, to an institution before trial).

27 422 U.S. 563 (1975).

28 *Id.* at 576. The respondent, a person who had been committed and who was denied release after 15 years of confinement even though he could demonstrate that he was not dangerous, claimed his institutionalization violated his right to liberty. *Id.* at 564, 568. For a more detailed discussion of the facts in *O'Connor*, see *supra* note 20.

29 *O'Connor*, 422 U.S. at 575. Specifically, Justice Stewart forcefully stated for the majority:

> May the State fence in the harmless mentally ill solely to save its citizens from exposure to those whose ways are different? One might as well ask if the State, to avoid public unease, could incarcerate all who are physically unattractive or socially eccentric. Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty.

Id. (citations omitted).

30 *Id.* Specifically, the *O'Connor* Court posited that "[a] finding of 'mental illness' alone cannot justify a State's locking a person up against his will . . . . [T]here is still no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom." *Id.* The Supreme Court echoed this language in *Zinermon v. Burch.* Zinermon v. Burch, 494 U.S. 113, 133-34 (1990) (citing *O'Connor*, 422 U.S. at 575). In *Zinermon*, the respondent brought an action against the Florida mental hospital to which he had been committed, alleging that he was deprived of the procedural safeguards required by the Constitution. *Id.* at 114-15. Specifically, the respondent claimed that his admission, as a voluntary patient incapable of giving informed consent to the admission, violated his right to due process. *Id.* at 115. The Court maintained that the confinement of a mentally ill but nondangerous person was not only contrary to Florida law but also unconstitutional under the Federal Constitution. *Id.* at 133-34 (citing *O'Connor*, 422 U.S. at 575). Also, according to one commentator, the *O'Connor* Court also implied that absent a reexamination of the standards for involuntary commitment, states risked having the courts declare their involuntary commitment statutes void for vagueness. Grant H. Morris, *The*

clined, however, to determine whether a nondangerous person could be involuntarily committed.[31]

Recognizing the significant intrusions on the rights of a person who was involuntarily committed, the Court, in *Addington v. Texas*,[32] established the minimum standard of proof required in a commitment proceeding.[33] The Court determined that the "beyond a reasonable doubt" standard would be too onerous a burden on the state because that standard has historically been reserved for criminal cases.[34] Therefore, the Court posited that the constitutional standard to be utilized was "clear and convincing evidence."[35]

Supreme Court Examines Civil Commitment Issues: A Retrospective and Prospective Assessment, 60 TUL. L. REV. 927, 936 (1986).

31 *Id.* at 573; *see also supra* note 20 and accompanying text (discussing the Court's refusal to determine whether a nondangerous person could be committed).

32 441 U.S. 418 (1979). In *Addington*, the appellant's mother filed a petition for his indefinite involuntary commitment to a state mental hospital. *Id.* at 420. The mother sought this recourse after appellant was arrested for assaulting her by threat. *Id.* The evidence showed that the appellant "suffered from serious delusions," had threatened to injure his parents and others, had been involved in numerous assaultive episodes during his hospitalization, and had caused significant property damage to his own apartment and his parents' home. *Id.* at 420-21. The appellant argued that his commitment should have been based on evidence that was "beyond a reasonable doubt," and that the state trial court erred when it instructed the jury that the standard of proof was "clear, unequivocal and convincing evidence." *Id.* at 421.

33 *Id.* at 432-33. In determining the standard, the Court weighed "both the extent of the individual's interest in not being involuntarily confined indefinitely and the state's interest in committing the emotionally disturbed." *Id.* at 425. The Court emphasized that such balancing was required to minimize the specter of erroneous decisions. *Id.*

34 *Id.* at 428. The Court reasoned that a defendant's interest in a criminal case is so high and of such magnitude that it has consistently been protected by the standard of "beyond a reasonable doubt" to prevent an incorrect judgment. *Id.* at 423. The Court also asserted that use of the beyond a reasonable doubt standard would impose an impossible burden on the state, given the uncertainties in diagnosing psychiatric disorders. *Id.* at 432. Such a burden, the Court reasoned, might therefore "erect an unreasonable barrier to needed medical treatment." *Id.* For a more detailed explanation of the reasoning behind the beyond a reasonable doubt standard, see Patterson v. New York, 432 U.S. 197, 208 (1977) and *In re* Winship, 397 U.S. 358, 364 (1970).

35 *Addington*, 441 U.S. at 433. The Court reasoned that the "clear and convincing" standard was "'no stranger to the civil law.'" *Id.* at 424 (quotation omitted). "Clear and convincing" is arguably a tenuous standard, but it has been defined as the "proof which results in reasonable certainty of the truth of the ultimate fact in controversy." BLACK'S LAW DICTIONARY 251 (6th ed. 1990). Most states use either the "clear and convincing evidence" or "substantial evidence" standard in civil commitment proceedings. *See, e.g.*, ALA. CODE § 12-15-90(i) (1986) (stating that there must be substantial evidence that the minor is mentally ill and is dangerous); ALASKA STAT. § 47.30.770(b) (1990) (maintaining that the standard for civil commitment is clear and convincing evidence); ARIZ. REV. STAT. ANN. § 36-540A (1986 & Supp. 1992) (stating that clear and convincing evidence is the standard to be utilized in involuntary commitment); ARK. CODE ANN. § 20-47-214(b)(1)(A) (Michie 1991) (mandating that clear and con-

In the first United States Supreme Court case addressing the commitment of children, *Parham v. J.R.*,[36] the Court held that an inquiry by a neutral factfinder was required before a child could be committed.[37] The Court reasoned that because the questions involved in commitment proceedings were essentially medical in nature, psychiatrists should be given deference in deciding whether the child should be committed.[38] The inquiry by the neutral factfinder, the Court maintained, had to take several factors into account.[39] Specifically, the Court determined that an inquiry must consider the child's background and health, as well as the results of a personal interview with the child.[40] Periodic review of the continuance of commitment, the Court proffered, was also required in a

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vincing evidence must be presented); CONN. GEN. STAT. ANN. § 17a-77(e) (West 1992) (articulating that clear and convincing evidence of mental illness and need for hospitalization must be present before commitment can be initiated); DEL. CODE ANN. tit. 16, § 5010(2) (1983 & Supp. 1992) (asserting that mental illness must be proven by clear and convincing evidence); FLA. STAT. ANN. § 394.467(1) (West 1986) (mandating that the standard for involuntary treatment is clear and convincing evidence); HAW. REV. STAT. § 334-60.2-60.5(i) (1985) (providing that evidence of mental illness must be clear and convincing); IDAHO CODE § 66-329(k) (1989) (stressing that mental illness must be proven by clear and convincing evidence). For a complete compilation of the applicable standard in each state and the burden of proof required in involuntary civil commitment proceedings, see Debra T. Landis, Annotation, *Modern Status of Rules as to Standard of Proof Required in Civil Commitment Proceedings*, 97 A.L.R.3D 780 (1980). New Jersey's standard of proof reflects the Supreme Court's holding in *Addington*. *See* N.J. CT. R. 4:74-7(f) (stating that the standard for commitment must be shown to have been met by clear and convincing evidence).

[36] 442 U.S. 584 (1979). The *Parham* case concerned the due process rights of children who were voluntarily committed to a mental hospital by their parents or guardians. *Id.* at 587. Commentators have been critical of the *Parham* Court's use of the term "voluntary" when describing a parent's commitment of her child. *See, e.g.*, Morris, *supra* note 30, at 946-47 ("The *Parham* decision is reprehensible. It is pure doublethink to construe the involuntary civil commitment of a child as a 'voluntary' admission. . . . If the child does not freely choose to enter the institution, his or her admission, when achieved by the substitute decisionmaking of the parent and physician, should not be construed as voluntary.").

[37] *Parham*, 442 U.S. at 606 (citations omitted). The Court concluded that "the risk of error inherent in the parental decision to have a child institutionalized for mental health care is sufficiently great that some kind of inquiry should be made by a 'neutral factfinder' to determine whether the statutory requirements for admission are satisfied." *Id.*

[38] *Id.* at 609, 613. The Court proclaimed that psychiatrists were more qualified than judges or hearing officers to make determinations of psychiatric health. *Id.* at 607 (quoting *In re* Roger S., 569 P.2d 1286, 1299 (Cal. 1977) (Clark, J., dissenting)).

[39] *Id.* at 606-07.

[40] *Id.* The inquiry, Justice Burger explained,

> must carefully probe the child's background using all available sources, including, but not limited to, parents, schools, and other social agencies. Of course, the review must also include an interview with the child. It is necessary that the decisionmaker have the authority to refuse to admit any child who does not satisfy the medical standards for admis-

similar independent procedure.[41]

Justice Brennan, concurring in part and dissenting in part, emphasized that children were entitled to the same due process rights afforded to adults.[42] Justice Brennan asserted that an individual's constitutional rights did not "magically" appear upon reaching an age of majority.[43] In fact, argued Justice Brennan, children might be entitled to even more protection than adults.[44] Justice Brennan's sentiments were echoed in *Johnson v. Solomon*,[45] where the United States District Court for the District of Maryland held that Maryland's statutory standard for minors, which differed from the adult standard, was unconstitutionally vague.[46]

These decisions evidence the fact that courts, whether dealing with adults or minors, now recognize the substantial deprivation of liberty inherent in an involuntary commitment.[47] Indeed, horror

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sion. Finally, it is necessary that the child's continuing need for commitment be reviewed periodically by a similarly independent procedure.

Id. (footnote omitted).

41 *Id.* (footnote omitted).

42 *Id.* at 627 (Brennan, J., concurring in part and dissenting in part).

43 *Id.*

44 *Id.* Justice Brennan reasoned that children were often confined for longer periods of time than adults. *Id.* at 628 (Brennan, J., concurring in part and dissenting in part). Moreover, noted the Justice, as childhood is a vulnerable period during an individual's life, a groundless institutionalization during such years could leave permanent psychological scars. *Id.* The Justice also observed that the finances needed to provide adequate mental care for institutionalized individuals were not available. *Id.* Finally, the Justice concluded, the possibility of an altogether erroneous commitment would be particularly great, especially when psychiatric interviews, on which many courts relied to commit a child, were performed when the child was under abnormal stress and the doctor was unfamiliar with his patient. *Id.* at 628-29 (Brennan, J., concurring in part and dissenting in part).

45 484 F. Supp. 278 (D. Md. 1979). This case involved a class action by 76 children confined to mental hospitals. *Id.* at 281. Their suit alleged that the procedures and standards utilized in the commitment of children were deficient, and that the use of a different standard for adults and children was unconstitutional. *Id.* at 281, 282.

46 *Id.* at 282-88. The Maryland statute governing the involuntary commitment of adults stated that an adult must, before commitment, have a mental disorder, require commitment for the protection of others or herself, need inpatient medical treatment or care, and be unwilling or unable to voluntarily commit herself. *Id.* at 283 (citation omitted). Conversely, the statute governing the commitment of minors allowed minors to be committed when the "program of treatment, training, and rehabilitation best suited . . . the physical, mental, and moral welfare of the child consistent with the public interest." *Id.* (citation omitted). In holding that the standard applicable to minors was unconstitutionally vague, the *Johnson* court emphasized that "[u]nless the state commitment standards embody an approach more specific than the 'best interests of the child,' there is no guarantee that involuntary commitment will bear any rational relationship to the underlying *parens patriae* principle justifying the juvenile's loss of liberty." *Id.* at 286, 288.

47 *See, e.g.*, Stephen J. Morse, *A Preference for Liberty: The Case Against Involuntary Commitment of the Mentally Disordered*, 70 CAL. L. REV. 54, 55 (1982) (arguing that the

stories of brutal treatment in mental hospitals buttress that recognition.[48]

B. *Legislative Interpretation of Due Process Rights in Civil Commitment*

In all states, legislative standards have been enacted to ensure that due process is adequately afforded to those subject to involun-

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"balance between individual liberty and autonomy on the one hand, and the state's paternalistic right to confine and treat persons involuntarily on the other, has clearly shifted to a preference for liberty"). For examples of courts that have recognized this substantial deprivation of liberty, see Lessard v. Schmidt, 349 F. Supp. 1078, 1089 (E.D. Wis. 1972) (suggesting that the deprivation of liberty in a civil commitment is more serious than that which follows a criminal conviction), *vacated and remanded for more specific order*, 414 U.S. 473 (1974), *order on remand*, 379 F. Supp. 1376 (E.D. Wis. 1974), *vacated and remanded on other grounds*, 421 U.S. 957 (1975), *order reinstated on remand*, 413 F. Supp. 1318 (E.D. Wis. 1976); State v. Taylor, 618 P.2d 1127, 1138 (Colo. 1980) (stating that the deprivation of liberty in mental health commitment proceedings is similar to that in criminal proceedings, necessitating the "imposition of similar procedural safeguards") (citations omitted). One group of commentators simply stated: "[C]onfinement is confinement regardless of the name under which it parades." Joseph M. Livermore et al., *On the Justifications for Civil Commitment*, 117 U. PA. L. REV. 75, 75 n.1 (1968) (citation omitted). *But see* Coll v. Hyland, 411 F. Supp. 905, 912 (D.N.J. 1976) (questioning whether the loss of liberty in a civil commitment is equivalent to that for a criminal offense).

[48] *See, e.g.*, *Profits of Misery*, *supra* note 12, at 110 (relating the statement of Dr. Duard Bok, a psychiatrist and former employee of a psychiatric hospital, which described the abusive, unethical, and dangerous practices occurring at private psychiatric institutions in North Texas). Testifying before the House Committee on Children, Youth and Family Services, Dr. Bok explained some of the problems he had witnessed due to "rage reduction therapy":

> Not only is there no professionally recognized validation of "rage reduction therapy," but it involves holding the young person down by one or more audits [sic] while another person usually verbally taunts them and beats him/her in the rib and chest areas often causing severe pain and bruising.
>
> In some of the female preadolescent and adolescent patients there was tissue injury in the form of severe bruising incurred in the nipple and breast areas. The nursing staff were concerned about fractured ribs as a result of this procedure.
>
> Many of these children were probably the victims and survivors of physical, sexual and psychological abuse by their various major caregivers.
>
> In these youths the verbal taunting and the beating while being forcibly held down would often have been reminiscent of the type of terrifying abuse many of them had experienced before admission. . . . .
>
> It is high level abuse in the name of therapy.

Id. at 110-11. Additionally, Dr. Bok had heard of children who were confined in four-point restraints for weeks at a time, kept in seclusion for nearly two weeks, placed in "body bags" (with one young adult dying therein), and kept awake for nights at a time in order to "break them down." *Id.* at 115.

tary commitment.[49] In some states, minors are included in those statutes governing adults.[50] Other states have adopted separate sections governing the involuntary commitment of minors.[51] New Jersey, however, in enacting a comprehensive statute governing involuntary commitment, excluded minors from its purview.[52] Thus,

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49 BEIS, *supra* note 3, at 297 app. A (listing each state and its involuntary commitment criteria as of 1984).

50 *See, e.g.*, DEL. CODE ANN. tit. 16, § 5001(4) (1983) (stating that an involuntary patient is "a *person* admitted involuntarily to the custody of the hospital") (emphasis added); FLA. STAT. ANN. § 394.455 (West 1986) (indicating that a patient is "any mentally ill *person*" for whom treatment is sought) (emphasis added); OR. REV. STAT. § 426.005(2) (1991) (defining "mentally ill person" as *a person* who meets the applicable criteria) (emphasis added); TEX. HEALTH AND SAFETY CODE ANN. § 571.003(16) (West 1992) (defining "patient" as "an *individual* who is receiving voluntary or involuntary mental health services under this subtitle") (emphasis added).

51 *See* ARIZ. REV. STAT. ANN. § 8-242.01 (1992) (governing the evaluation, treatment, and placement of a minor who is mentally ill); *see also* CONN. GEN. STAT. ANN. § 17a-75 (West 1992) (encompassing the commitment of mentally ill children); N.M. STAT. ANN. § 43-1-16.1 (Michie Supp. 1989) (governing the involuntary residential commitment of minors); UTAH CODE ANN. § 62A-12-280 (Supp. 1993) (authority regarding the commitment of persons under the age of 18 given to the division of mental health). Section 8-242.01 of the Arizona Revised Statutes, however, applies the adult standard, i.e., that the minor must be mentally ill, dangerous, and in need of treatment. ARIZ. REV. STAT. ANN. § 36-540 (1986); *In re* Coconino County Juvenile Action No. J-10359, 754 P.2d 1356, 1361 (Ariz. Ct. App. 1987). Moreover, Utah appears to have the most comprehensive legislation governing the involuntary commitment of minors. *See* UTAH CODE ANN. § 62A-12-282 (1993). Section 62A-12-282 states:

> (2) The juvenile court shall order commitment to the division if, upon completion of the hearing and consideration of the record, it finds by clear and convincing evidence that:
>
> (a) the individual has a mental illness, as defined in Section 62A-12-202;
>
> (b) the individual demonstrates a risk of harm to himself or others;
>
> (c) the individual is experiencing significant impairment in his ability to perform socially;
>
> (d) the individual will benefit from care and treatment by the division; and
>
> (e) there is no appropriate less-restrictive alternative.

Id.

52 *See generally* N.J. STAT. ANN. § 30:4-27.1 to -27.23 (West Supp. 1993). The original statute defined "patient" as "*any person or persons* alleged to be mentally ill . . . ." N.J. STAT. ANN. 30:4-23 (West 1981) (amended 1988) (emphasis added). The courts in New Jersey had long interpreted this legislation to include minors as well as adults. *See generally In re* D.D., 118 N.J. Super. 1, 4-5, 285 A.2d 283, 285 (App. Div. 1971) (explaining that D.D., a minor, was committed because she would be dangerous to herself or others if released); *In re* Williams, 140 N.J. Super. 495, 497, 356 A.2d 468, 470 (Essex County Ct. 1976) (holding that where a minor is subject to involuntary commitment, the court must find from the evidence that hospitalization is required because the proposed patient would be a danger to herself or the community if not so confined) (citation omitted). In 1988, the Legislature enacted legislation, effective in 1989, which now governs only persons "over the age of 18 who [have] been admitted to, but not discharged from a short-term care or psychiatric facility." N.J. STAT. ANN. § 30:4-27.2s (West Supp. 1993). Additionally, "[i]n need of involuntary commitment"

the only standard in New Jersey governing the involuntary commitment of minors is Rule 4:74-7(f).[53]

Most states require an initial finding that an individual is suffering from a mental illness or a mental disorder before she can be involuntarily committed.[54] While the New Jersey statute governing the involuntary commitment of adults contains a similar prerequisite,[55] Rule 4:74-7(f) does not require the same finding for mi-

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is defined to mean "an *adult* who is mentally ill, whose mental illness causes the person to be dangerous to self or dangerous to others or property . . . ." N.J. STAT. ANN. § 30:4-27.2m (West Supp. 1993) (emphasis added). The statute is silent regarding individuals under the age of 18. *See* N.J. STAT. ANN. § 30:4-27.2s (West Supp. 1993).

[53] N.J. CT. R. 4:74-7(f). Rule 4:74-7(f) provides that a minor can be committed involuntarily if the minor is "in need of intensive psychiatric therapy which cannot practically or feasibly be rendered in the home or in the community or on any outpatient basis." *Id.*

[54] *See* Randall P. Bezanson, *Involuntary Treatment of the Mentally Ill in Iowa: The 1975 Legislation*, 61 IOWA L. REV. 261, 271 (1975) ("A finding of mental illness is universally required in all state statutes relating to civil commitment.") (footnote omitted); *see, e.g.*, ARIZ. REV. STAT. ANN. § 36-540 (1986) (requiring that an initial finding of mental disorder must be made in the commitment proceedings of any individual); CAL. WELF. & INST. CODE § 5213(a) (West Supp. 1993) (positing that there must be an initial finding of a mental disorder); COLO. REV. STAT. ANN. § 27-10-109(4) (West 1990) (stating that a determination must first be made that the individual is mentally ill); FLA. STAT. ANN. § 394.467(1)(a) (West 1986) (mandating that a person must initially be found mentally ill in a commitment proceeding); IDAHO CODE § 66-329(k)(1) (1989) (proclaiming that an individual must be found mentally ill); N.H. REV. STAT. ANN. § 135-C:27 (1990) (pronouncing that a person shall be eligible for involuntary commitment if she is first found to be suffering from a mental illness).

Various jurisdictions include within the applicable statutory section a definition of "mental illness" or "mental disorder." *See, e.g.*, COLO. REV. STAT. ANN. § 27-10-102(7) (West 1990) (defining "mentally ill person" as "a person with a substantial disorder of the cognitive, volitional, or emotional processes that grossly impairs judgment or capacity to recognize reality or to control behavior"); GA. CODE ANN. § 37-3-1(11) (Michie 1982 & Supp. 1993) (defining "mentally ill" as "having a disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life"); MD. HEALTH-GEN. CODE ANN. § 10-620(e)(ii) (1990) (declaring that "mental disorder means the behavioral or other symptoms that indicate . . . [t]o a physician or psychologist doing an examination, at least one mental disorder that is described in the version of the American Psychiatric Association's 'Diagnostic and Statistical Manual—Mental Disorders' that is current at the time of the examination"); N.J. STAT. ANN. § 30:4-27.2r (West Supp. 1993) (defining "mental illness" as "a current, substantial disturbance of thought, mood, perception or orientation which significantly impairs judgment, behavior or capacity to recognize reality, but does not include simple alcohol intoxication, transitory reaction to drug ingestion, organic brain syndrome or developmental disability unless it results in the severity of impairment described herein"); VT. STAT. ANN. tit. 18, § 7101(14) (1987) (maintaining that "[m]ental illness means a substantial disorder of thought, mood, perception, orientation, or memory, any of which grossly impairs judgment, behavior, capacity to recognize reality, or ability to meet the ordinary demands of life, but shall not include mental retardation").

[55] N.J. STAT. ANN. § 30:4-27.2m (West Supp. 1993) (defining "in need of involuntary commitment" to mean "an adult who is mentally ill" and dangerous).

nors.[56] Instead, Rule 4:74-7(f) only mandates a finding that the child needs intensive psychiatric therapy.[57]

Mental illness alone, however, can never be a justification for involuntary confinement.[58] Moreover, the term "mental disorder" has been construed more narrowly than the term "mental illness,"[59] and both judges and commentators have criticized the use of such terms in statutory definitions.[60] Unfortunately, the defini-

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56 N.J. CT. R. 4:74-7(f).

57 *Id.*

58 *See, e.g.*, O'Connor v. Donaldson, 422 U.S. 563, 575 (1975) (stating that mental illness alone is not enough to justify locking up a person against her will); *see also* State v. Taylor, 618 P.2d 1127, 1133 (Colo. 1980) (maintaining that mental illness alone can never justify the involuntary commitment of an individual). However, courts have held that the term "mentally ill" is not vague, and therefore does not violate a person's due process rights. State v. Lang, 498 N.E.2d 1105, 1127 (Ill. 1986) ("A person of common intelligence would comprehend the statute as including only those mentally ill who pose a danger to [the] public or themselves, and as excluding those mentally ill who do not.").

59 *In re* Janovitz, 403 N.E.2d 583, 586 (Ill. App. Ct. 1980). The respondent in *Janovitz* had threatened to kill his roommate and was involuntarily committed. *Id.* at 584. The court pointed out that the newly-enacted statute substituted the term "mental illness" for the former term, "mental disorder." *Id.* at 586. The court asserted that the term "mental illness expands the scope of the provision that defines which individuals qualify as persons subject to involuntary admission." *Id.* (citation omitted).

60 Lessard v. Schmidt, 349 F. Supp. 1078, 1094 (E.D. Wis. 1972), *vacated and remanded for more specific order*, 414 U.S. 473 (1974), *order on remand*, 379 F. Supp. 1376 (E.D. Wis. 1974), *vacated and remanded on other grounds*, 421 U.S. 957 (1975), *order reinstated on remand*, 413 F. Supp. 1318 (E.D. Wis. 1976). Specifically, the *Lessard* court stated:

> 'Obviously, the definition of mental illness is left largely to the user and is dependent upon the norms of adjustment that he employs. Usually the use of the phrase "mental illness" effectively masks the actual norms being applied. And, because of the unavoidably ambiguous generalities in which the American Psychiatric Association describes its diagnostic categories, the diagnostician has the ability to shoehorn into the mentally diseased class almost any person he wishes, for whatever reason, to put there.'

Id. (quoting Livermore, *supra* note 47, at 80).

The number of recognized mental diseases has greatly expanded in recent years according to the *Diagnostic and Statistical Manual*, which was first published in 1952 and contained 60 types of mental illness. ARMSTRONG, *supra* note 4, at 132. Now, in its third revised edition (DSM-III-R), the manual includes over 200 mental diseases or illnesses. *Id.* Use of the DSM-III-R as a diagnostic tool in the commitment of children has been criticized, especially because psychiatry is considered a "soft science." Holly Metz, *Branding Juveniles Against Their Will*, STUDENT LAW., Feb. 1992, at 21, 26. The DSM-III-R contains descriptions of various disorders, the criteria for diagnosing them, and guidelines for determining their severity. *Id.* Metz maintained that because these criteria are so overbroad, most people would find themselves pigeonholed into one or more disorders. *Id.* For instance, the criteria for "oppositional defiant disorder"one used to commit many minorsare " 'a pattern of negativistic, hostile, and defiant behavior. . . . Children with this disorder are argumentative with adults, frequently lose

tion of mental illness is often applied more broadly to minors than adults.[61]

In addition to a finding of mental illness, many state legislative provisions also require that the individual be dangerous to warrant involuntary commission.[62] Various federal courts have echoed this requirement.[63] New Jersey courts have also held that a finding of

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their temper, swear, are often angry. . . . They frequently actively defy adult requests or rules.'" *Id.* (quotation omitted). Such behavior, Metz asserted, sounds like "routine family conflict." *Id.*

As evidenced by a recent Institute of Medicine publication, defining "mental illness" or "mental disorder" has never been easy because

> [n]o term is wholly adequate to convey the range of psychopathology. The term "disorders" has achieved acceptance, as a broad rubric without theoretical implications about etiology. The term "illness" may convey an implication that the troubles being discussed are like medical diseases or have a clearly established biological basis.[ ] "Disease" conveys a specificity and pathological implication which is inappropriate for most childhood mental disorders. . . .
>
> The term "mental" is not quite right, either, since it seems to split the child into "mind" and "body." In some circles "mental" is derogatory, and there are advocacy groups, such as the parents of autistic children or those with Tourette's disorder, who feel that having these disorders classified as "mental disorders" has an etiological implication which slights their biological foundations.

INSTITUTE OF MEDICINE, DIV. OF MENTAL HEALTH AND BEHAVIORAL MEDICINE, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, RESEARCH ON CHILDREN AND ADOLESCENTS WITH MENTAL, BEHAVIORAL AND DEVELOPMENTAL DISORDERS 19 (1990).

[61] Jackson-Beeck, *supra* note 2, at 156. Almost half of all minors' admissions to mental hospitals in 1980 were for diagnoses of "preadult" and other nonpsychotic disorders. *Id.* ("These categories include adjustment reactions, emotional disturbance of childhood and adolescence, neuroses, conduct disorders, hyperactivity, sexual deviation . . . developmental delays . . . and . . . stammering, stuttering, tics, eating disorders, sleep disorders, and bedwetting."). Another problem noticed in commitment proceedings is overdiagnosis, which can be terribly detrimental to minors. Ellis, *supra* note 4, at 865. Overdiagnosis is "a pattern which reflects a value judgment within the medical profession that it is better to err on the side of caution, assuming disease rather than health." *Id.* Moreover, doctors have a tendency to overdiagnose "when the patient is a child." *Id.*

[62] *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-540.A (1986) (mandating that the individual be found "a danger to himself, a danger to others or gravely disabled" before being involuntarily committed); DEL. CODE ANN. tit. 16, § 5001(1) (1983) (stating that a person considered to be mentally ill and therefore subject to involuntary commitment must pose "a real and present threat, based upon manifest indications, that such person is likely to commit or suffer serious harm to himself or others or to property").

[63] *See, e.g.*, Plain v. Flicker, 645 F. Supp. 898, 906 (D.N.J. 1986) (recognizing a nondangerous individual's right to be free from confinement); Donahue v. Rhode Island Dep't of Mental Health, Retardation and Hospitals, 632 F. Supp. 1456, 1462 (D.R.I. 1986) (mandating that dangerousness is a necessary component in an involuntary commitment); Stamus v. Leonhardt, 414 F. Supp. 439, 450-51 (S.D. Iowa 1976) (holding that committing an individual solely by reason of a mental illness would be too low a standard); Bell v. Wayne County Gen. Hosp., 384 F. Supp. 1085, 1096 (E.D. Mich. 1974) (enunciating that "the basis for confinement must lie in threatened or

dangerousness is required for the commitment of adults, emphasizing the importance of meeting such a standard.[64] The dangerousness, as required by many states, must be imminent and substantial.[65] However, criticisms of the mental health commu-

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actual behavior stemming from the mental disorder, and of a nature which the state may legitimately control, viz., that causing harm to self or others") (citations omitted). The United States District Court for the District of Hawaii explained the requirements of a dangerousness finding:

> A finding of dangerousness indicates the likelihood that the person to be committed will inflict serious harm on himself or on others. In the case of dangerousness to others, this threat of harm comprehends the positive infliction of injury-ordinary physical injury, but possibly emotional injury as well. In the case of dangerousness to self, both the threat of physical injury and discernible physical neglect may warrant a finding of dangerousness. Although he does not threaten actual violence to himself, a person may be properly committable under the dangerousness standard if it can be shown that he is mentally ill, that his mental illness manifests itself in neglect or refusal to care for himself, that such neglect or refusal poses a real and present threat of substantial harm to his well-being, and that he is incompetent to determine for himself whether treatment for his mental illness would be desirable.

Suzuki v. Quisenberry, 411 F. Supp. 1113, 1124 (D. Haw. 1976) (quoting Lynch v. Baxley, 386 F. Supp. 378, 391 (M.D. Ala. 1974)).

64 *See, e.g., In re* S.L., 94 N.J. 128, 138, 462 A.2d 1252, 1257 (1983) (voicing that in order to justify commitment, "the State must show that an individual is likely to pose a danger to self or others or property by reason of mental illness") (citations omitted); *In re* A.A., 252 N.J. Super. 170, 178, 599 A.2d 573, 577 (App. Div. 1991) (remarking that one of the statutory prerequisites was a finding of dangerousness to oneself or others) (citations and footnote omitted); *In re* Z.O., 197 N.J. Super. 330, 333, 484 A.2d 1287, 1289 (App. Div. 1984) (holding that the patient must be "likely to pose a danger to self or others or property" and that this action will occur in the immediate future) (citation omitted). The court in *State v. Krol* went to great lengths to emphasize the importance of a dangerousness requirement. State v. Krol, 68 N.J. 236, 259-61, 344 A.2d 289, 301-02 (1975). Specifically, the court cautioned that individuals could not be confined simply because there was a risk that they might conduct themselves in a socially undesirable manner. *Id.* at 259, 344 A.2d at 301. Justice Pashman, writing for the majority, emphasized that "[p]ersonal liberty and autonomy are of too great value to be sacrificed to protect society against the possibility of future behavior which some may find odd, disagreeable, or offensive . . . ." *Id.*, 344 A.2d at 301-02. The court warned against treating individuals as inanimate objects simply because they might be public nuisances. *Id.*, 344 A.2d at 302 (citations omitted).

65 *See* ARK. CODE ANN. § 20-47-207(c) (Michie 1991) (postulating that the individual must pose a "clear and present danger to himself or others"); DEL. CODE ANN. tit. 16, § 5001(1) (1983) (articulating that a person considered to be mentally ill and therefore subject to involuntary commitment must pose "a real and present threat, based upon manifest indications, that such person is likely to commit or suffer serious harm to himself or others or to property"); GA. CODE ANN. § 37-3-1(9.1) (Michie Supp. 1993) (mandating that the individual present "a substantial risk of imminent harm to that person or others"). *Compare In re* Y.P., 603 So. 2d 1050, 1051, 1052 (Ala. Civ. App. 1992) (submitting that recent overt acts by the minor, including threatening his aunt and her child, assaulting a schoolmate with a metal chair, and aiming a gun towards a girl, were enough to justify commitment) *with In re* Monroe, 270 S.E.2d 537, 538 (N.C. Ct. App. 1980) (asserting that an individual who would fast and then

nity's ability to predict future dangerousness are abundant,[66] and some psychiatrists apparently manipulate the definition of dangerousness.[67] Because of this uncertainty, several courts have maintained that an overt act or threat by an individual evidence her dangerous propensities.[68] Such evidence provides the factfinder

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eat loaves of bread, whole chickens, and five pounds of sugar every two days failed to satisfy dangerousness criteria). It has also been held that a person found guilty of a criminal act has the requisite dangerousness. Jones v. United States, 463 U.S. 354, 364 (1983) (footnote and citations omitted).

66 *See generally* Dale A. Albers et al., *Involuntary Hospitalization and Psychiatric Testimony: The Fallibility of the Doctrine of Immaculate Perception*, 6 CAP. U. L. REV. 11, 28 (1976) (elaborating that dangerousness is difficult to determine because "the concepts and definitions employed in psychiatry are vague, ill-defined, and circular in nature"); Joseph J. Cocozza & Henry J. Steadman, *The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence*, 29 RUTGERS L. REV. 1084, 1085 (1976) (stressing that the difficulty in predicting dangerousness is "the vagueness of the concept itself" and "that it is unrealistic to expect psychiatrists to be able to predict dangerousness accurately"); Michael A. Peszke, *Is Dangerousness an Issue for Physicians in Emergency Commitment?*, 132 AM. J. PSYCHIATRY 825, 826 (1975) (voicing that while many states require a finding of dangerousness, the difficulty in predicting dangerous behavior has led some to question the definition of danger); Note, *Developments*, *supra* note 17, at 1240-45 (discussing the inability of psychiatrists to measure adequately future dangerousness).

67 Alexander D. Brooks, *Notes on Defining the "Dangerousness" of the Mentally Ill*, *in* DANGEROUS BEHAVIOR: A PROBLEM IN LAW AND MENTAL HEALTH 37, 42, 43 (Calvin J. Frederick ed., 1978). Brooks noted that:

> For many psychiatrists, "dangerousness" is an elastic concept that includes within its ambit any harm to others or to self that is psychiatrically cognizable, and for which hospitalization and treatment seem appropriate. Indeed, dangerousness is equated by many psychiatrists with "need for treatment," a concept which the term dangerousness was originally intended to displace.

Id. at 42. The author further intimated that psychiatrists "manipulate the dangerousness concept in order to accomplish their treatment objectives." *Id.* at 43. For example, in *Brock v. Southern Pacific Railroad Co.*, a psychiatrist, in explaining how he had categorized the respondent as "a menace," stated:

> [Respondent] had certain paranoid delusions; feelings of persecution to the extent that he felt his life was, had been jeopardized on numerous occasions[.] . . . I felt there was a reasonable possibility that he would seek redress for his persecution[.] . . . I had no assurance that such redress would be of an orderly or lawful type and therefore I felt that he might seek redress of a violent nature . . . .

Brock v. Southern Pacific R.R., 195 P.2d 66, 76-77 (Cal. Dist. Ct. App. 1948). The psychiatrist later maintained: "Actually, he need not have been much of a menace to himself and society. That is the current phrase used by anybody we feel needs hospital care, whether he wants it or not." *Id.* at 77.

68 Lessard v. Schmidt, 349 F. Supp. 1078, 1093 (E.D. Wis. 1972) (citation omitted), *vacated and remanded for more specific order*, 414 U.S. 473 (1974), *order on remand*, 379 F. Supp. 1376 (E.D. Wis. 1974), *vacated and remanded on other grounds*, 421 U.S. 957 (1975), *order reinstated on remand*, 413 F. Supp. 1318 (E.D. Wis. 1976). The *Lessard* court recognized the difficulty in speculating about future dangerousness, and therefore held that the dangerousness necessary to involuntarily commit an individual should be based on "a recent overt act, attempt or threat to do substantial harm to

with a concrete factual threshold by which to measure dangerousness.[69] The applicability of the dangerousness requirement to minors is quite strong and is often contained within the applicable statutory guidelines.[70] Furthermore, several state courts have discussed the dangerousness requirement in the context of the commitment of minors.[71] For example, in *In re S.C.*,[72] a Pennsylvania court found that the standard for involuntary commitment on the basis of a clear and present danger was applicable to minors.[73] The

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oneself or another." *Id.* (citation omitted). *Lessard* has become "a high-water mark in 'dangerousness law.'" Brooks, *supra* note 67, at 49. Several state legislatures have also mandated that dangerousness be evidenced by an overt act. *See, e.g.*, ARK. CODE ANN. § 20-47-207(c)(2) (Michie 1991) (maintaining that the state must demonstrate that the individual "has inflicted, attempted to inflict, or threatened to inflict serious bodily harm on another, and there is a reasonable probability that such conduct will occur if admission is not ordered."). Of course, the overt act requirement has been criticized:

> We agree that the "science" of predicting future dangerous behavior is inexact, and certainly is not infallible. . . . However, we are of the opinion that a decision to commit based upon a medical opinion which clearly states that a person is reasonably expected to engage in dangerous conduct, and which is based upon the experience and studies of qualified psychiatrists, is a determination which properly can be made by the State.

State v. Sansone, 309 N.E.2d 733, 739 (Ill. App. Ct. 1974). Additionally, one court held that "[a]lthough commitment may not be justified on the basis of threats alone, the trial court is not required to wait until someone is actually injured or until respondent injures himself prior to ordering commitment." *In re* Janovitz, 403 N.E.2d 583, 587 (Ill. App. Ct. 1980) (citation omitted).

69 *See* David T. Simpson, Jr., Comment, *Involuntary Civil Commitment: The Dangerousness Standard and its Problems*, 63 N.C. LAW REV. 241, 251 (1984) (maintaining that the overt act standard provides the judge with the ability to base her decision on physical acts rather than ambiguous psychological predictions, thereby overcoming the void for vagueness doctrine).

70 *See, e.g.*, ALA. CODE § 12-15-90(i)(2) (1986) (mandating that a minor must be found to pose "a real and present threat of substantial harm to himself or to others"); ARIZ. REV. STAT. ANN. § 36-540.A (1986 & Supp. 1992) (stating that the minor must be found to be a danger to either herself or others).

71 *See In re* S.C., 421 A.2d 853, 857-58 (Pa. Super. Ct. 1980); *In re* L.L., 114 Cal. Rptr. 11, 14 (Cal. Ct. App. 1974) (citation omitted); *see also* Johnson v. Solomon, 484 F. Supp. 278, 286-87 (D. Md. 1979) ("Unless the state commitment standards embody an approach more specific than the 'best interest of the child,' [i.e., include a specific finding of dangerousness] there is no guarantee that involuntary commitment will bear any rational relationship to the underlying *parens patriae* principle justifying the juvenile's loss of liberty.").

72 421 A.2d 853 (Pa. Super. Ct. 1980). In this case, a minor challenged his commitment, alleging that the basis for the ruling committing him was erroneous. *Id.* at 854. More specifically, the minor challenged the lower court's use of a less stringent standard than the one utilized for adults, which mandated findings of mental illness and dangerousness. *Id.* at 858. The lower court maintained that the standard to be used in commitment proceedings regarding minors was whether the minor could function in society without supervision. *Id.*

73 *Id.* at 856-57. The lower court was admonished for impermissibly applying lower

decision in *In re L.L.*[74] reflected a similar stance by a California state court, which required a dangerousness or "gravely disabled" finding for the involuntary commitment of a minor.[75] At common law, New Jersey courts applied the same dangerousness standard to both minors and adults.[76] A dangerousness component, however, is missing from the current New Jersey standard governing the involuntary commitment of minors; this is a deficiency that must be addressed.[77]

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standards and not following the clear and present danger requirement found in the Mental Health Procedures Act, thereby violating the minor's due process rights. *Id.* at 856-57, 858. In reversing the lower court's use of the lesser standard, the court emphasized that "we cannot support the practice of mental commitments of problem children under standards which are insufficient under both well established case law and the clear provisions of the Mental Health Procedures Act." *Id.* at 858.

74 114 Cal. Rptr. 11 (Cal. Ct. App. 1974). In *In re L.L.*, the lower court ordered the commitment of a minor without the requisite finding of dangerousness mandated by the applicable statute. *Id.* at 14. The question was whether a diagnosis of chronic depressive reaction was enough to commit the minor. *Id.* at 13, 14. The appellate court stated emphatically that a child could only be committed upon a finding of dangerousness to herself or others. *Id.* at 14 (citation omitted).

75 *Id.* The term "gravely disabled" is sometimes used in place of the dangerousness requirement, and generally contemplates the individual who is "unable, without supervision and the assistance of others, to satisfy his need for nourishment, personal or medical care, shelter, or self-protection and safety, so that it is probable that death, substantial physical bodily injury, serious mental deterioration or serious physical debilitation or disease" will occur unless adequate treatment is provided. *See id.*; VT. STAT. ANN. tit. 18, § 7101(17)(B)(ii) (1987); *see also* ILL. ANN. STAT. ch. 5, para. 1-119(2) (Smith-Hurd 1993) (providing that "[a] person who is mentally ill and who because of his illness is unable to provide for his basic physical needs so as to guard himself from serious harm" is subject to involuntary commitment).

76 *See In re* D.D., 118 N.J. Super. 1, 4-5, 285 A.2d 283, 285 (App. Div. 1971). The *In re D.D.* court affirmed the finding of the lower court that D.D., the minor who had been committed, was dangerous and was therefore properly committed. *Id.* The court found that D.D. was schizophrenic, suffered from hallucinations, and was occasionally "assaultive." *Id.* at 5, 285 A.2d at 285. Additionally, prior to her last admission, D.D. had struck a woman, resulting in the victim's partial disability and hospitalization. *Id.*

77 *See* N.J. CT. R. 4:74-7(f). Dangerousness is required for adults, while minors need only be "in need of intensive psychiatric therapy" that cannot be rendered on an outpatient basis. *Id.* It is interesting to note that one author erroneously stated that the substantive criteria used in New Jersey are that the minor must be mentally ill and dangerous to herself or others before she can be involuntarily committed. ZALKIND, *supra* note 3, at 105.

As noted *supra* at note 16, the New Jersey Supreme Court Committee on Civil Practice, after a report by the Mental Commitments Subcommittee, recently proposed an amendment to the court rule to require a finding of mental illness and dangerousness before the involuntary commitment of a minor could be exacted. *Report of the Supreme Court Committee on Civil Practice*, 136 N.J. L.J. 581, 591 (Feb. 14, 1994). The author of this Comment, while applauding the Committee's initiative, would recommend that the proposal be adopted by the New Jersey Supreme Court only in conjunction with an amendment to the legislation governing involuntary commitment. This amendment should include children within its purview. Otherwise,

II. History of the New Jersey Standard for the Involuntary Commitment of Children

Although New Jersey common law maintained that any person could be detained and involuntarily committed to a mental hospital upon a suitable judicial determination, the state has in fact had statutes governing the commitment of persons to mental hospitals since its early history.[78] While these statutes have been periodically revised, the courts have invariably held that an individual could be committed only upon a judicial determination of mental illness that would render the individual dangerous to herself or others.[79] The New Jersey courts have traditionally applied this standard to minors as well as adults.[80]

In 1974, the New Jersey Supreme Court, responding out of its own concern about the lack of safeguards in the commitment process and to the issues raised by pending litigation, requested that the Committee on Civil Practice draft a new court rule governing

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the court would be overstepping its constitutionally granted powers of rulemaking. *See infra* notes 130-41 and accompanying text for a discussion of the court's rulemaking powers.

78 *See, e.g.*, Stizza v. Essex County Juvenile and Domestic Relations Court, 132 N.J.L. 406, 408, 40 A.2d 567, 569 (N.J. 1945) (explaining that various statutes were enacted early in the state's history to govern the confinement of insane persons).

79 *See, e.g.*, State v. Caralluzzo, 49 N.J. 152, 156, 228 A.2d 693, 695 (1967) (stressing that the commitment statute only authorized the commitment of an individual who was a hazard to herself or others) (citation omitted); *In re* Raymond S., 263 N.J. Super. 428, 431, 623 A.2d 249, 251 (App. Div. 1993) (proclaiming that the Legislature and the court have required a finding of both mental illness and dangerousness); *In re* Robert S., 263 N.J. Super. 307, 312, 622 A.2d 1311, 1314 (App. Div. 1992) (requiring that dangerousness be proved by clear and convincing evidence); *In re* J.L.J., 210 N.J. Super. 1, 5-6, 509 A.2d 184, 186 (App. Div. 1985) (stating that the determination of dangerousness is a judicial decision) (quotation omitted); *In re* Heukelekian, 24 N.J. Super. 407, 409, 94 A.2d 501, 502 (App. Div. 1953) (reiterating that to commit an individual under the applicable statute, there had to be a showing that the person would "probably imperil her own safety or the safety or property of others" if liberated) (citations omitted).

80 *See, e.g.*, *In re* Williams, 140 N.J. Super. 495, 497, 356 A.2d 468, 470 (Essex County Ct. 1976) (stating that where a minor is subject to involuntary commitment, the court must find from the evidence that hospitalization is required because the proposed patient would be a danger to herself or the community if not so confined) (citing N.J. Ct. R. 4:74-7(f)); *In re* D.D., 118 N.J. Super. 1, 4-5, 285 A.2d 283, 285 (App. Div. 1971) (holding that evidence of assaults by minor girl was enough to meet the adult dangerousness requirement); *In re* R.R., 140 N.J. Eq. 371, 376-77, 378, 54 A.2d 814, 817, 818 (Ch. 1947) (claiming that 41-year-old man's belief that Christ was a woman was not enough to infer that he would be violent upon release from hospital); *In re* Perry, 137 N.J. Eq. 161, 163-64, 43 A.2d 885, 886-87 (Ch. 1945) (maintaining that adult male's peculiarities and eccentricities were not enough to evidence dangerousness); Boesch v. Kick, 97 N.J.L. 92, 97, 116 A. 796, 798 (Sup. Ct. 1922) (finding that dangerousness must be probable not merely possible before commitment is ordered).

civil commitment.[81] The court promulgated the new rule, Rule 4:74-7, in 1975.[82] In light of perceived difficulties in applying Rule 4:74-7, however, the committee reviewed the rule in 1976.[83] A then-recent federal court decision, *Coll v. Hyland*,[84] which highlighted certain potential vagaries with Rule 4:74-7, also prompted the committee to review the rule.[85] On the committee's recom-

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81 *Report Of The Supreme Court's Committee On Civil Practice*, 99 N.J. L.J. 393, 403 (1976) [hereinafter *Civil Practice Committee Report*]; *see also In re* Geraghty, 68 N.J. 209, 211, 212, 213, 343 A.2d 737, 738, 739 (1975) (describing how the new court rule, promulgated during the pendency of the case at bar, eliminated many of the plaintiff's complaints regarding the standard for involuntary civil commitment). In *Geraghty*, the Somerset County adjuster held a commitment hearing without notifying the person who was to be committed and, as was the adjuster's practice, ordered the commitment due to the defendant's failure to contest. *Id.* at 211, 343 A.2d at 738. The New Jersey Supreme Court agreed to hear the matter, only to dismiss it because the new court rule was promulgated during the matter's pendency. *Id.* at 212, 213, 343 A.2d at 739 (citation omitted). The court maintained: "We are satisfied that R. 4:74-7, as newly revised, adequately deals with the [procedural] issues" in involuntary commitment hearings. *Id.* at 213, 343 A.2d at 739.

82 *See* N.J. CT. R. 4:74-7 cmt.; *Civil Practice Committee Report*, *supra* note 81, at 403. Paragraph (f) codified the common law standard that a person could not be involuntarily committed to a mental hospital unless the court determined her to be both mentally ill and dangerous to herself or others. N.J. CT. R. 4:74-7(b), (f) & cmts. Under the old rule, the same standard governed the involuntary commitment of both adults and minors. N.J. CT. R. 4:74-7(b) cmt.

83 *See, e.g.*, *Civil Practice Committee Report*, *supra* note 81, at 403-04. The Committee on Civil Practice maintained that various substantive and procedural inadequacies in the rule had become apparent. *Id.* Particularly, "[t]he Committee considered intensively the adequacy of our present standard for the commitment of minors. This reevaluation . . . resulted from the recurring difficulties experienced by judges and psychiatrists in attempting to apply the adult standard for commitment to juveniles . . . ." *Id.* at 403. The Public Advocate's Office vehemently opposed the proposed change to the "in need of intensive psychiatric therapy" standard. *Id.* at 404. The Public Advocate maintained that there had been "no documentation of any experience throughout the state as to the commitment of children under the present 'dangerousness' standard." *Id.* The Public Advocate argued that the different treatment of children suggested "that a minor's interest in incarceration is somehow less worthy of protection than an adult's interest." *Id.* (citations omitted).

84 411 F. Supp. 905 (D.N.J. 1976).

85 *Civil Practice Committee Report*, *supra* note 81, at 403. In *Coll*, the plaintiff represented a class action alleging a deprivation of rights based on his involuntary commitment to a psychiatric hospital. *Coll*, 411 F. Supp. at 907. Specifically, the plaintiff alleged various constitutional deficiencies with the recently enacted New Jersey Court Rule 4:74-7 and the statutes governing involuntary commitment. *Id.* While noting certain small problems with Rule 4:74-7, the court held that constitutional standards had been met. *Id.* at 913.

First, the *Coll* court concluded that the failure to have a preliminary hearing before commitment was not constitutionally deficient. *Id.* at 909, 911. The court reasoned that in light of Supreme Court precedent, the rule's requirement that a final hearing occur within 20 days of admission was not unreasonable. *Id.* at 911. Allowing such a time span, the court noted, would provide both the hospital and counsel adequate time to prepare for such a hearing. *Id.*

mendation, the New Jersey Supreme Court amended Rule 4:74-7 to provide a standard for involuntary commitment of minors different from that of adults.[86] More specifically, the court added Rule 4:74-7(f), which provided that a minor could be involuntarily committed if she was in need of "intensive psychiatric therapy."[87] This alternative standard for minors was provided because of the committee's perception that the dangerousness standard was not applicable to children.[88]

In 1988, the New Jersey Legislature enacted a comprehensive statute establishing a uniform standard for a person's involuntary commitment to a mental hospital.[89] In promulgating this standard, the Legislature emphasized the deprivation of liberty inherent in an involuntary commitment.[90] Under the 1988 act, an individual could be committed to a psychiatric hospital based on clear and convincing evidence that she was dangerous to herself, others or property.[91] The statute, however, is currently limited to

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Second, the court in *Coll* rejected the plaintiff's contention that the notice of commitment had to contain a factual basis for the requested commitment. *Id.* The court pointed to New Jersey's absolute requirement that counsel be assigned at the time of a commitment order. *Id.* Moreover, under Rule 4:74-7(d), the court noted, the lawyer could inspect all commitment applications and physician's certificates prior to the hearing. *Id.*

Finally, the court concluded that Rule 4:74-7(e)'s requirement that the patient be present at all stages of the hearing, except where good cause showed otherwise, removed any constitutional inadequacies. *Id.* at 912. The court rejected the plaintiff's contention that civil commitment was no less serious than criminal incarceration, and that the plaintiff, therefore, was entitled to similar procedural safeguards. *Id.* The court reasoned that unlike a criminal, a person who is civilly committed often poses a danger to himself. *Id.* As a result, the court maintained that the State had a moral duty to protect the mentally ill under the *parens patriae* doctrine. *Id.* Such an obligation, the court claimed, distinguished criminal proceedings from civil commitment. *Id.* Thus, concluded the court, the provisions of Rule 4:74-7(e), which permitted testimony without the presence of the patient, was permissible. *Id.* at 913.

86 N.J. CT. R. 4:74-7(f) cmt.; *Civil Practice Committee Report, supra* note 81, at 403.

87 N.J. CT. R. 4:74-7(f). *See supra* note 16 for text of Rule 4:74-7.

88 N.J. CT. R. 4:74-7(b) cmt. Judge Pressler proffered that the reason for the new standard for children was that "children who are so seriously ill as to require institutionalization should not be denied treatment even if they are not probable dangers to themselves or others." *Id.*

89 N.J. STAT. ANN. § 30:4-27.1 to -27.23 (West Supp. 1993).

90 *See* N.J. STAT. ANN. § 30:4-27.1b (West Supp. 1993) (noting that "because involuntary commitment entails certain deprivations of liberty, it is necessary that State law balance the basic value of liberty with the need for safety and treatment"). The Legislature emphasized that state law must necessarily provide procedural safeguards and clear standards to assure that "only those persons who are dangerous to themselves, to others or to property, are involuntarily committed." *Id.*

91 SENATE REVENUE, FINANCE AND APPROPRIATIONS COMMITTEE STATEMENT, ASSEMBLY NO. 1813—L.1987, c.116, *reprinted in* N.J. STAT. ANN. § 30:4-27.1 (West Supp. 1993). The legislative preface to the act stated that the purpose of the act was to:

the commitment of adults, as a patient is defined as any person over the age of eighteen.[92] Thus, Rule 4:74-7(f) is the sole authority governing the commitment of minors.[93] It is ironic, however, that in light of the Legislature's concern with the deprivation of one's liberty, an inherent problem with involuntary commitment whether the individual is a minor or an adult, the Legislature has removed children from within the protection of the statute.[94]

> [revise] the statutes concerning involuntary civil commitment to reflect clinical and programmatic advances and to incorporate language based on recent court decisions and rules. The bill provides that a person shall be involuntarily committed to a short-term care or psychiatric facility or a special psychiatric hospital only if mentally ill and dangerous to himself, others or to property, and be retained based upon clear and convincing evidence only.

Id.

92 N.J. STAT. ANN. § 30:4-27.2s (West Supp. 1993). Section 30:4-27.2s provides: "'Patient' means a person over the age of 18 who has been admitted to, but not discharged from a short-term care or psychiatric facility." *Id.* Section 30:4-27.2m defines a person in need of involuntary commitment as "an *adult* who is mentally ill, whose mental illness causes the person to be dangerous to self or dangerous to others or property and who is unwilling to be admitted to a facility voluntarily for care . . . ." N.J. STAT. ANN. § 30:4-27m (West Supp. 1993) (emphasis added).

93 *See* N.J. CT. R. 4:74-7(f).

94 *See* N.J. STAT. ANN. 30:4-27.1b (West Supp. 1993); N.J. CT. R. 4:74-7(f). This deficiency was likely the impetus behind the recent New Jersey Supreme Court Committee on Civil Practice's proposal to amend Rule 4:74-7(f). *See Report of the Supreme Court Committee on Civil Practice*, 136 N.J. L.J. 581, 591 (Feb. 14, 1994). The committee, however, seemed divided on exactly what should be done with the rule, as evidenced by the following narrative:

> The Committee proposes numerous changes to *R.* 4:74-7, in response to the recommendations of the Mental Commitments Subcommittee. That subcommittee, chaired by Deborah T. Poritz, Esq., directed much of its effort in the past term to the issue of the commitment of minors. This is an area not covered by statute, since *N.J.S.A.* 30:4-27.1 *et seq.*, enacted in 1988, repealed but did not replace previous legislation dealing with juvenile commitments.
>
> A majority of the subcommittee proposed a standard for the commitment of minors that would call for a finding that the patient suffers from mental illness *and either* that the mental illness causes the patient to be dangerous to self, others or property *or* that the patient is in need of intensive psychiatric therapy that can only be provided at a psychiatric facility. . . .
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> A minority of the subcommittee, however, echoed the Public Advocate's concern that children who are mentally ill but in no way dangerous could be institutionalized because their families cannot handle them, when other, less restrictive treatment alternatives are available. The minority proposed a differentiated standard for the commitment of minors—for those 14 and over, a finding of mental illness and dangerousness is necessary; for those under 14, mental illness and either dangerousness or, in the alternative, a need for intensive psychiatric therapy must be found. . . .
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> . . . .

III. NEW JERSEY COURT RULE 4:74-7(F) IS IMPERMISSIBLY VAGUE AND FAILS TO PROTECT A MINOR'S SUBSTANTIVE DUE PROCESS RIGHTS

A. *Absence of a Dangerousness Requirement Renders Rule 4:74-7(f) Void for Vagueness*

When a standard lacks adequate specificity as mandated by considerations of due process, it is impermissibly vague.[95] In *Goldy v. Beal*,[96] for example, a Pennsylvania statute permitted the involuntary commitment of persons whose mental illness lessened their ability to the extent that care was necessary or advisable.[97] Invalidating the statute, the court reasoned that the "in need of care" standard was susceptible to more than one interpretation and, as a result, was unconstitutionally vague.[98]

> The Committee discussed the subcommittee's report at length, and was sharply divided in its views. The Committee as a whole feels strongly, however, that R. 4:74-7 must be amended in this rules cycle to make provision for the commitment of minors, especially as no legislative standard is anticipated to be forthcoming in the near future.

Id. The author of this Comment notes that in the proposed rule, there are provisions for an adult patient and for those patients under the age of 14; there is no provision for minors between the age of 14 and 18. *See supra* note 16 for full text of the proposed rule.

95 Johnson v. Solomon, 484 F. Supp. 278, 283-84 (D. Md. 1979) (citation omitted). The North Carolina Supreme Court has held that "[a] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *In re* Burrus, 169 S.E.2d 879, 888 (N.C. 1969) (quotation and citations omitted). Additionally, the North Carolina Court of Appeals has noted that "a statute should prescribe boundaries sufficiently distinct for judges to interpret and administer it uniformly." *In re* Lynette H., 368 S.E.2d 452, 454 (N.C. Ct. App. 1988) (citation omitted).

96 429 F. Supp. 640 (M.D. Pa. 1976). In *Goldy*, the plaintiffs were committees in a Pennsylvania mental hospital. *Id.* at 641. They alleged that commitment based upon the standard of "in need of care and treatment" because of a mental disability was unconstitutionally vague. *Id.*

97 *Id.* at 646-47.

98 *Goldy*, 429 F. Supp. at 648. The court maintained that:

> The void for vagueness doctrine requires statutes to be drawn with sufficient definiteness and specificity to provide fair warning of the conduct proscribed by the law and to restrict the discretion of governmental authorities or courts in enforcing the law. . . . Although it has generally been applied to criminal statutes, . . . the doctrine has also been used to strike down civil sanctions authorized by overly vague statutes. . . . It always operates when a statute's vagueness creates the possibility that it can be applied in an arbitrary manner that infringes on . . . the right of physical liberty.

Id. at 647-48 (citations omitted). Accordingly, the court rejected the notion that "in need of care" was a valid standard, stating:

> How incapacitated must a person be before he needs care within the

In *Johnson v. Solomon*, the Maryland standard governing the commitment of minors was similarly struck down as void for vagueness.[99] Likewise, the court in *Stamus v. Leonhardt*[100] held unconstitutional Iowa's involuntary commitment standard, requiring that the individual be mentally ill and hospitalization be in her best interests, because it was vague and subject to arbitrary application.[101]

> meaning of the statute? Must he be completely incapable of conducting his own affairs, or may he be committed if he simply cannot conduct his affairs as well as most other people? And what is meant by "care"? Does it mean active medical treatment under the supervision of doctors and other medical personnel, or does it simply mean providing for the committed person's basic needs? Such lack of specificity in a statute that authorizes an interference with the constitutionally protected right of physical liberty places insufficient limits on the discretion of officials who are responsible for its implementation, with the result that there is nothing in the statute to prevent it from being enforced arbitrarily. Such a result amounts to vagueness that violates due process.

Id. The court further noted that "[t]he key term in the statute is the 'mental disability' on account of which a person in need of care may be committed." *Id.* at 648. Judge Nealon emphasized:

> "Mental disability" in turn is defined in Section 102 as "any mental illness, mental impairment, mental retardation, or mental deficiency which *so lessens the capacity of a person to use his customary self-control, judgment and discretion in the conduct of his affairs and social relations as to make it necessary or advisable for him to be under care as provided in this act.*" (emphasis supplied). The operative words are italicized. The most apparent aspect of the Pennsylvania civil commitment standard as embodied in sections 406 and 102 is that it is circular—a person may be committed if he is *in need of care* because of a mental disability which so lessens his capacity "as to make it *necessary or advisable for him to be under care* . . . ."

Id.; *see also* Commonwealth *ex rel.* Finken v. Roop, 339 A.2d 764, 778 (1975) (holding that the "in need of care" standard was impermissibly vague), *appeal dismissed*, 424 U.S. 960 (1976).

99 Johnson v. Solomon, 484 F. Supp. 278, 282-88 (D. Md. 1979). In *Johnson*, the court held as unconstitutionally vague the standard that the child must be "delinquent, in need of supervision, or in need of assistance" before being committed. *Id.* at 283 (citation omitted). The plaintiffs in *Johnson*, 76 children confined to mental institutions in the state of Maryland, argued that because the *parens patriae* doctrine required dangerousness, an initial determination on that ground had to be made. *Id.* at 281, 286. The *Johnson* court agreed, maintaining that the lack of a dangerousness finding was fatal to the Maryland standard. *Id.* at 286, 288. The court emphasized that "[w]ithout articulation and application of appropriate standards, subsequent commitments under the *parens patriae* doctrine lack the necessary 'reasonable relation' between commitment and purpose." *Id.* (quotation omitted).

100 414 F. Supp. 439 (S.D. Iowa 1976). The two plaintiffs in *Stamus* were taken into custody and detained at a psychiatric facility because of their alleged mental illness. *Id.* at 441. After their release, the plaintiffs filed an action attacking the constitutionality of the Iowa statute governing the involuntary commitment of individuals. *Id.*

101 *Id.* at 452. The court noted that the code section was vulnerable to attack "because it allows the county commissions of hospitalization too much discretion in determining what constitutes mental illness and what is in the subject's 'best interest.'"

Utilizing similar reasoning, the United States District Court for the District of Nebraska in *Doremus v. Farrell*[102] also struck down the standard used in that state.[103]

Because New Jersey Court Rule 4:74-7(f) fails to require a finding of mental illness and, more importantly, dangerousness before involuntary commitment of a minor is ordered, the rule does not provide proper guidance and thus suffers from the same deficiency decried by courts across the country.[104] The combination of a dangerousness requirement and a finding of mental illness for the commitment of minors is mandated in nearly every jurisdiction but New Jersey,[105] and a New Jersey court would be hard-pressed to read those standards into the present rule.[106] Moreover, because

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Id. The court emphasized that arbitrary application of the standard was inevitable due to the subjectivity of psychiatric diagnoses. *Id.*; *see also* Bezanson, *supra* note 54, at 281 (declaring that because the elements of dangerousness and "judgmental incapacity" were contained in the Iowa statute, "the critical elements of both the police power and *parens patriae* theories are merged"); Livermore, *supra* note 47, at 80 (maintaining that "the diagnostician has the ability to shoehorn into the mentally diseased class almost any person he wishes"). Consequently, Livermore and Bezanson argued that mental illness as a condition to civil commitment must be necessary rather than sufficient. Bezanson, *supra* note 54, at 281; Livermore, *supra* note 47, at 80.

102 407 F. Supp. 509 (D. Neb. 1975).

103 *Id.* at 513-15. Therein, the plaintiffs argued that the Nebraska involuntary commitment statute was vague and overbroad. *Id.* at 513. A three-judge panel agreed, holding that:

> To permit involuntary commitment upon a finding of "mental illness" and the need for treatment alone would be tantamount to condoning the State's commitment of persons deemed socially undesirable for the purpose of indoctrination or conforming the individual's beliefs to the beliefs of the State. Due process and equal protection require that the standards for commitment must be (a) that the person is mentally ill and poses a serious threat of substantial harm to himself or to others; and (b) that this threat of harm has been evidenced by a recent overt act or threat. The threat of harm to oneself may be through neglect or inability to care for oneself. We are unable to imply these standards in the Nebraska statutes . . . .

Id. at 514-15.

104 N.J. Cr. R. 4:74-7(f); *Doremus*, 407 F. Supp. at 514; Lynch v. Baxley, 386 F. Supp. 378, 390 (M.D. Ala. 1974) (maintaining that the state may legitimately control mentally ill persons who are dangerous); Bell v. Wayne County Gen. Hosp., 384 F. Supp. 1085, 1096 (E.D. Mich. 1974) (holding that dangerousness is a necessary element in commitment proceedings) (citations omitted).

105 *See supra* notes 54, 62-63 and accompanying text (listing statutes and state decisions which require a finding of mental illness and/or dangerousness prior to commitment).

106 *See Bell*, 384 F. Supp. at 1095. The defendants in *Bell* maintained that the court should adopt an inherent concept of dangerousness into the current standard, which read:

> "[M]entally ill" or "mentally ill person" as used in this act, include every species of insanity and extend to every mentally deranged person, and

the study of mental health is an inaccurate science, more stringent safeguards must necessarily be provided to those minors who are funneled into a state's mental health system.[107] A minor who is

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> to all of unsound mind, other than mentally handicapped, epileptics, and persons who manifest the general deterioration of mental processes, including disorientation, confusion or impairment of memory, associated with senility, but without psychotic implications.

Id. (quotation omitted). Criticizing the defendants' position, the court pointed out that almost any mental disorder would qualify under this concept and that the defendants had failed to trace this concept to the given definition of mental illness including those that were harmless. *Id.* The court therefore held that:

> [T]he Michigan act sets forth a process under which a person whose affliction, in the view of a given court, falls anywhere within a vast, uncontoured description of mental ills, is subject to both temporary and indefinite commitment, whether his particular ill presents a realistic threat of harm to himself or to others. In our opinion, the standard of commitment for mental illness is fatally vague and overbroad.

Id. at 1096. Notably, Rule 4:74-7(f) fails to even mandate a finding of mental illness before a child can be involuntarily committed. *See* N.J. CT. R. 4:74-7(f).

Moreover, a mental illness standard without a requisite finding of dangerousness has been held deficient. *In re* Lynette H., 368 S.E.2d 452, 455 (N.C. Ct. App. 1988). In *Lynette*, the North Carolina standard for involuntary commitment of minors was struck down as void for vagueness. *Id.* at 455. The standard, according to the court, could be interpreted "so that any minor who fails to exercise 'age appropriate initiative' in his 'activities and social relationships' so as to make it 'advisable' for him to receive 'guidance' is by definition mentally ill." *Id.* The court maintained that under that standard, few adolescents could escape being found mentally ill during their teenage years. *Id.*

107 Carol K. Dillon et al., Comment, *In re* Roger S.: *The Impact of a Child's Due Process Victory on the California Mental Health System*, 70 CAL. L. REV. 373, 386-87 (1982). The authors noted that "[r]eliability is the extent to which two or more psychiatrists agree on a psychiatric conclusion given a single set of facts; validity is the extent to which psychiatric conclusions accurately reflect reality." *Id.* at 386. Unfortunately, the reliability and validity of a psychiatrist's judgment is often very poor. *Id.* at 386-87.

Criticism has also been leveled at the lack of criteria "commonly accepted or applied within the fields of child and adolescent psychiatry and psychology, to guide decisions about juvenile mental hospital admissions." Lois A. Weithorn, Note, *Mental Hospitalization of Troublesome Youth: An Analysis of Skyrocketing Admission Rates*, 40 STAN. L. REV. 773, 785 (1988). Indeed, Weithorn noted:

> Fewer than one-third of those juveniles admitted for inpatient mental health treatment in recent years were diagnosed as having severe or acute mental disorders of the type typically associated with such admissions (such as psychotic, serious depressive, or organic disorder). By contrast, about one-half to two-thirds of adults admitted for inpatient mental health treatment were diagnosed as having such serious disorders.

Id. at 788 (footnotes omitted).

The New Jersey Supreme Court has also recognized the fallibility of psychiatric testimony. State v. Krol, 68 N.J. 236, 261, 344 A.2d 289, 302 (1975). Specifically, the *Krol* court stated:

> It should be emphasized that while courts in determining dangerousness should take full advantage of expert testimony presented by the State and by defendant, the decision is not one that can be left wholly to

threatened with involuntary commitment should be afforded the same protection as an adult.[108] Because both New Jersey's statute and court rule governing involuntary civil commitment mandate a finding of mental illness and dangerousness for an adult who has been committed,[109] that same standard should apply to minors.[110] Requiring a dangerousness finding is especially necessary in light of the New Jersey Supreme Court's opinion in *In re S.L.*,[111] and the

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> the technical expertise of the psychiatrists and psychologists. The determination of dangerousness involves a delicate balancing of society's interest in protection from harmful conduct against the individual's interest in personal liberty and autonomy. This decision, while requiring the court to make use of the assistance which medical testimony may provide, is ultimately a legal one, not a medical one.

Id. (citations omitted).

108 *Cf.* Reed v. Reed, 404 U.S. 71, 75-76 (1971) (citations omitted). In *Reed*, the United States Supreme Court struck down a provision in the Idaho probate code which preferred men over women when members of the opposite sex applied to be the administrator of a decedent's estate. *Id.* at 72-73 (citations omitted). The Court maintained that "[a] classification 'must be reasonable, not arbitrary,'" and have a fair and substantial relationship to the legislative purpose to ensure that all similarly situated persons are treated alike. *Id.* at 76 (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)). One court has even held that the Equal Protection Clause is applicable to involuntary civil commitment proceedings. Johnson v. Solomon, 484 F. Supp. 278, 285, 286, 288 (D. Md. 1979) (citation omitted).

109 N.J. STAT. ANN. § 30:4-27.2m (West Supp. 1993) (defining "in need of voluntary commitment" to mean an adult who is mentally ill and dangerous to herself or others); N.J. CT. R. 4:74-7(f) (stating that an adult can be involuntarily committed only where she is mentally ill and is dangerous to herself or others). Although dangerousness is sometimes difficult to predict, it is more accepted as a reliable indicator of commitability. *See, e.g.*, Jonna Smit, *Question or Quarrel: An Analysis of the Dialogue Between Judge and Patient in the Involuntary Commitment Procedure*, 10 INT'L J.L. & PSYCHIATRY 251, 251, 252 (1987) (stating that The Netherlands recently recognized the deficiency in its involuntary commitment standard and now mandates a finding of dangerousness). Smit also pointed out that the "benefit to the patient [standard was] no longer an adequate legal justification for involuntary commitment." *Id.* at 252.

110 *See* State v. Krol, 68 N.J. 236, 249 n.3, 344 A.2d 289, 296 n.3 (1975). The *Krol* court asserted that it was inappropriate to impose upon an individual such a "massive, indefinite curtailment of personal liberty involved in involuntary commitment for [a] reason less compelling than protection of society against a substantial threat of conduct by the defendant dangerous to himself or others." *Id.* (citations omitted).

In 1992, the "in need of intensive psychiatric therapy" standard resulted in approximately 3,000 children being committed in cases in which the Public Advocate represented the minor. Telephone Interview with Patrick Reilly, Deputy Director of the Division of Mental Health Advocacy, Department of the Public Advocate, State of New Jersey (June 15, 1993). Such commitments were likely caused by the obligation felt by the courts to order commitment due to the vagueness of the court rule. *Id.*

111 94 N.J. 128, 462 A.2d 1252 (1983). In this case, nine individuals who had been held in mental institutions for most of their lives challenged their continued commitment on grounds that they were not dangerous. *Id.* at 130 & n.1, 131, 462 A.2d at 1253 & n.1. The court held that although the individuals were no longer dangerous, their inability to care for themselves in the outside community permitted the State to continue confinement until alternative arrangements were possible. *Id.* at 139-40, 462

Legislature's enunciation of the importance of protecting the rights of individuals subject to involuntary commitment.[112]

B. *Rule 4:74-7(f) Violates Substantive Due Process*

Most importantly, while Rule 4:74-7(f) recognizes a minor's procedural due process rights, it lacks a requirement of dangerousness, thereby failing to recognize a minor's substantive due process rights.[113] Under the constitutional mandate of due process, a sys-

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A.2d at 1258. Justice Handler maintained that "[t]he civil commitment process must be narrowly circumscribed because of the extraordinary degree of state control it exerts over a citizen's autonomy." *Id.* at 139, 462 A.2d at 1257. Additionally, the court posited that where commitment is warranted, the order for commitment "should be molded so as to protect society's very strong interest in public safety but to do so in a fashion that reasonably minimizes infringements upon [the individual's] liberty and autonomy and gives him the best opportunity to receive appropriate care and treatment." *Id.* at 138, 462 A.2d at 1257 (quoting *Krol*, 68 N.J. at 257-58, 344 A.2d at 300-01) (footnote omitted). The court also rejected the possibility of expanding the standards of commitment to cover one who, because of a mental illness, is unable to care for herself without some form of aid or supervision. *Id.* at 139, 344 A.2d at 1257. The court reasoned that:

> [t]o widen the net cast by the civil commitment process . . . is inconsistent with the central purposes of the commitment process. It would permit the State to commit individuals to mental institutions solely to provide custodial care. This authority cannot be justified as a measure to safeguard the citizenry under the police power. Nor is it a proper exercise of the State's *parens patriae* power because confinement in a mental hospital is not necessary to provide the care needed by individuals who are simply incapable of living independently.

Id. (footnote omitted); *see also* Coll v. Hyland, 411 F. Supp. 905, 912 (D.N.J. 1976) (maintaining that the state cannot force a nondangerous mentally ill individual to enter a mental hospital).

112 N.J. STAT. ANN. § 30:4-27.1 (West Supp. 1993). Section 30:4-27.1b currently states:

> Because involuntary commitment entails certain deprivations of liberty, it is necessary that State law balance the basic value of liberty with the need for safety and treatment, a balance that is difficult to effect because of the limited ability to predict behavior; and, therefore, it is necessary that State law provide clear standards and procedural safeguards that ensure that only those persons who are dangerous to themselves, to others or to property, are involuntarily committed.

N.J. STAT. ANN. § 30:4:271b (West Supp. 1993). The New Jersey Supreme Court also cited the importance of treating involuntary committees fairly. *In re* Edward S., 118 N.J. 118, 124-25, 570 A.2d 917, 920 (1990). The court maintained that "[a]s doubts concerning the fairness of society's treatment of the mentally ill grew, legislative provisions affording greater protection were adopted, reflected in, and to some extent triggered by judicial decisions on the subject." *Id.*

113 *See* N.J. CT. R. 4:74-7(f). The current court rule provides the requisite procedural necessities, such as notice, representation, and the standard of proof to be utilized in commitment proceedings. *See* N.J. CT. R. 4:74(c), (f). For example, a *guardian ad litem* is provided to a minor to represent her in any commitment proceedings. N.J. CT. R. 4:74-7(c)3. Notice shall be given to the minor no less than 10 days

tem has developed in which a person who might be subject to a loss of liberty is entitled to adequate procedural safeguards.[114] Guaranteeing such protections is especially important in cases where an individual is involuntarily committed.[115] A commitment not only causes a child to lose her freedom, but also may result in a lifelong stigma that attaches to an institutionalized person.[116] Additionally,

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before the hearing date, and shall be given to the patient's nearest relatives, the county adjuster, and any individual with custody. N.J. CT. R. 4:74-7(c)4. The standard utilized in commitment proceedings is that of clear and convincing evidence. N.J. CT. R. 4:74-7(f). A finding of dangerousness, however, is only required for adults. *Id.* Minors, as previously noted, can be committed if found to be merely "in need of intensive psychiatric therapy." *Id.*

114 Parham v. J.R., 442 U.S. 584, 599-600 (1979). In setting forth the test for examining a due process claim, the United States Supreme Court, required a number of factors to be considered, including:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail."

Id. (quotation omitted).

115 Holm v. State, 404 P.2d 740, 742 (Wyo. 1965) ("No matter how commendable the motives back of legislation for the mentally ill may be, it still remains the fundamental law of the land that a person is not to be deprived of his liberty—whether by involuntary hospitalization or some other kind of incarceration—without due process of law."). Additionally, it has been held that even if the institutionalization of children is for rehabilitation, due process must still be observed. Heryford v. Parker, 396 F.2d 393, 396 (10th Cir. 1968).

116 Bartley v. Kremens, 402 F. Supp. 1039, 1046-47 (E.D. Pa. 1975) (footnote omitted). The *Bartley* court noted that the Due Process Clause also "affords protection 'where a person's good name, reputation, honor, or integrity is at stake' because of the government's actions towards him.'" *Id.* at 1046 n.8 (quotations omitted). Commitment for a mental illness can subject a person to many types of discrimination throughout her lifetime and has even been compared to racial discrimination. TOM CAMPBELL & CHRIS HEGINBOTHAM, MENTAL ILLNESS: PREJUDICE, DISCRIMINATION, AND THE LAW 19 (1991). Campbell and Heginbotham explained:

> To have a mental illness can be an extremely distressing experience with considerable disabling consequences. To this suffering and disadvantage are added unnecessary and unjustified deprivations which stem from society's failures of understanding and responsiveness. These failures [are] not simply the fruits of the meanness and indifference of the healthy majority. They have as much to do with general ignorance about mental illnesses and well established hostility to their victims. . . .
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> . . ."The mentally ill" are assumed to be "different", a class apart.

Id. at 3. One commentator suggested that children may be affected more strongly than adults because

> [i]nvoluntarily committed patients are deprived of friends, family, and community. They live in unnatural surroundings and their activities are continuously controlled by strangers. They are subjected to intrusive treatments. These consequences are even more severe for children than for adults. Children tend to be confined for longer periods than

the institutionalization and treatment of the minor may even have a deleterious effect on her mental health.[117]

The United States Supreme Court resolved any lingering doubt as to whether a child subject to commitment was entitled to due process in *Parham v. J.R.*[118] In *Parham*, the Court held that minors are entitled to due process, and that a neutral factfinder must conduct an inquiry to determine the appropriateness of hospitalization.[119] The United Nations General Assembly further enunciated this right to due process when it adopted the *Convention on the Rights of the Child.*[120]

Admittedly, due process in the context of civil commitment is difficult to apply.[121] Rule 4:74-7(f) adequately affords minors due

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are adults. Because of their immaturity, children are more sensitive and vulnerable than are adults, and institutionalization may affect them adversely for the rest of their lives.

Morris, *supra* note 30, at 947-48 (footnotes omitted).

117 *See, e.g.*, Armstrong, *supra* note 4, at 220-21 (relating a case history of a young boy whose condition significantly worsened after being placed on the drug Ritalin, one used a great deal in psychiatric institutions). While the child was merely "acting up" before being placed on the drug, his behavior while taking the medication escalated. *Id.* at 221. He was defiant, lied a great deal, and was becoming a "wild child." *Id.* Despite the contraindication for its use, Ritalin is routinely administered to children who are labeled hyperactive. *Id.* at 199. The fact sheet for Ritalin states that the drug may cause marked "anxiety, tension and agitation" and that the safety and effectiveness of long-term use for children are unknown. *Id.* at 198. Use of the drug can actually be accompanied by side effects of hyperactivity, irritability, and memory problems—the exact symptoms the drug is meant to address. *Id.* at 198-99.

118 442 U.S. 584, 606-09 (1979). For an in-depth discussion of *Parham*, see *supra* notes 7-9 and 36-44 and accompanying text.

119 *Id.* at 606. In so holding, the Court stated that "a child, in common with adults, has a substantial liberty interest in not being confined unnecessarily for medical treatment." *Id.* at 600.

120 Howard A. Davidson, *The Child's Right to be Heard and Represented in Judicial Proceedings*, 18 PEPP. L. REV. 255, 255 (1991) (explaining that the United Nation's Convention for the Rights of the Child is "a comprehensive compilation of rights—civil-political, economic-social-cultural, and humanitarian—that all nations of the world could agree were the minimum rights governments should guarantee to children") (footnote omitted). Article 12 of the United Nation's Convention for the Rights of the Child (Convention), for instance, mandates that a child be present at all judicial proceedings to which she is a party and be provided with counsel. U.N. CONVENTION ON THE RIGHTS OF THE CHILD, art. 12, para. 2, *reprinted in* CHILDREN'S RIGHTS IN AMERICA at xvi (Cynthia P. Cohen & Howard A. Davidson eds., 1990). Articles 24 and 25 mandate that a child is entitled to the highest standard of health care and treatment, and that any child placed in a psychiatric institution for treatment because of a mental health problem shall be periodically reviewed. *Id.* arts. 24-25, at xxi-xxii.

121 *See, e.g.*, Henry J. Friendly, *"Some Kind of Hearing,"* 123 U. PA. L. REV. 1267, 1267-79 (1975) (providing a general overview and historical analysis of hearings and the requirement of due process). Friendly suggests that "[t]he required degree of procedural safeguards varies directly with the importance of the private interest affected and the need for and usefulness of the particular safeguard in the given circum-

process in all procedural matters; the missing substantive components, however, are the mental illness and dangerousness requirements.[122] This inadequacy is impermissible in light of the substantial length to which many courts have gone to ensure that due process rights are not violated in civil commitment proceedings.[123] Despite the absence of a dangerousness requirement, many New Jersey courts have emphasized this requirement in dealing with both adults and minors.[124]

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stances and inversely with the burden and any other adverse consequences of affording it." *Id.* at 1278 (footnote omitted).

122 See N.J. Ct. R. 4:74-7(c), (e)-(f); Note, *Developments*, supra note 17, at 1236. Imposing a dangerousness requirement, one author maintained, depended on "whether the magnitude of the threat he poses to society exceeds the deprivations imposed by involuntary commitment." Note, *Developments*, *supra* note 17, at 1236. It is true that a standard of dangerousness may be imprecise, mandating a question of degree and balancing. Lessard v. Schmidt, 349 F. Supp. 1078, 1093 (E.D. Wis. 1972), *vacated and remanded for more specific order*, 414 U.S. 473 (1974), *order on remand*, 379 F. Supp. 1376 (E.D. Wis. 1974), *vacated and remanded on other grounds*, 421 U.S. 957 (1975), *order reinstated on remand*, 413 F. Supp. 1318 (E.D. Wis. 1976). A formulation, however, that "somehow imports a need for treatment to stem a realistic threat of harm, at least focuses deliberation along proper lines." Bell v. Wayne County Gen. Hosp., 384 F. Supp. 1085, 1096 n.15 (E.D. Mich. 1974). The only reason as to why the dangerousness requirement was struck down in the court rule, as noted earlier, is set forth in Judge Pressler's comments to the New Jersey court rules, which read:

> The evident motivation for this change was the recognition that the "probable-danger" standard is not applicable to children, at least not in the same way that it is in the case of adults and from the further recognition that while adults who are competent but in need of mental treatment may well have the right to decline such treatment, children who are so seriously ill as to require institutionalization should not be denied treatment even if they are not probable dangers to themselves or to others.

N.J. Ct. R. 4:74-7(b) cmt. One commentator has argued, however, that the dangerousness requirement should be reserved for adult committees under the philosophy that a child who is mentally ill can be better cured during her "formative years." Ellis, *supra* note 4, at 908. This Comment argues, however, that without more scientific support, such a philosophy suggests that the massive curtailment of liberty in a commitment is deemed less important when dealing with children and further opens the door to commitments of children who may simply be "aggravating" to their parents.

123 Hermann, *supra* note 20, at 85-86.

124 *See, e.g.*, *In re* A.A., 252 N.J. Super. 170, 178, 599 A.2d 573, 577 (App. Div. 1991) (maintaining that commitment must be based on a finding that the person was dangerous to herself, others, or property) (citations omitted); *In re* B.S., 213 N.J. Super. 243, 248, 517 A.2d 146, 148 (App. Div. 1986) (stating that the court must be satisfied "that the person is dangerous to self or others or society if not confined and treated") (citations omitted); *In re* S.D., 212 N.J. Super. 211, 214, 514 A.2d 844, 846 (App. Div. 1986) (commenting that there must be "a substantial risk of dangerousness") (citation omitted); *In re* R.B., 158 N.J. Super. 542, 546-47, 386 A.2d 893, 895 (App. Div. 1978) (holding that there must be a substantial risk of harm before commitment can be ordered) (quoting State v. Krol, 63 N.J. 236, 260, 344 A.2d 289, 302 (1975)); *In re* Heukelekian, 24 N.J. Super. 407, 409, 94 A.2d 501, 502 (App. Div. 1953) (elucidating

This deficiency is also intensified by the fact that absent an adequate legal standard, some public agencies may disregard the opinions of doctors when institutionalizing children.[125] Criticisms of agencies and allegations of "child dumping" are many, and New Jersey's standard may only exacerbate the problem.[126] While the dangerousness standard may have its flaws,[127] the need for treatment because of imminent harm to the child or others will be ap-

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that a person who is dangerous to self, others, or property is properly committable) (citations omitted).

125 Susan P. Leviton & Nancy B. Shuger, *Maryland's Exchangeable Children: A Critique of Maryland's System of Providing Services to Mentally Handicapped Children*, 42 MD. L. REV. 823, 834 (1983). The authors illustrated this point by emphasizing that the Maryland agencies in the case of "Lisa" only "considered their own budgetary needs, not the best interests of the child." *Id.* "Lisa" was an emotionally disturbed child who spent nine years of her early childhood in various state institutions. *Id.* at 823-27. After a staff psychologist concluded that Lisa would fare best in a foster home, she was instead moved to another institution by Maryland's child services agency. *Id.* at 834.

126 *See, e.g.*, ARMSTRONG, *supra* note 4, at 8-9. Armstrong maintained that too often, children are institutionalized because of expediency rather than need. *Id.* at 7-8. Additionally, testimony before the House Committee on Children, Youth and Families evidenced collusion between social service workers and mental institutions. *Profits of Misery*, *supra* note 12, at 115. For example, Dr. Duard Bok testified that "[t]here have been rumors and suggestions . . . that, in some locations, the official agencies charged with the responsibility of investigating and remedying reports of child abuse have been operating in collusion" with the hospitals. *Id.* The United States Supreme Court evidenced these fears when it noted that a witness testified to the fact that "juvenile court judges and child welfare agencies misused [the system]." Parham v. J.R., 442 U.S. 584, 597 n.8 (1979) (citation omitted). Perhaps more importantly, the entire welfare system has been vulnerable to attack, as one commentator noted:

> Unfortunately, the state often does as bad a job and sometimes a worse job than the child's own parents. The children who have contact with child welfare systems are the most vulnerable in this country; almost all are poor and members of minority groups are disproportionately overrepresented. Child welfare systems take these children of the poor and, in many instances, complete what poverty and discrimination have begun, destroying salvageable human beings and producing yet another generation of the economically dependent and socially and psychologically unfit. Grown up, these former foster children fill our mental hospitals, our jails and our welfare rolls.

Marcia Lowry, *Derring-Do in the 1980s: Child Welfare Impact Litigation After the Warren Years*, 20 FAM. L.Q. 255, 257 (1986).

127 *See* Albers, *supra* note 66, at 22. Professor Albers and his colleagues maintained:

> The fact that at least forty-four states include the criterion of danger as a major determinant for involuntary hospitalization suggests two assumptions. First, those persons labeled "mentally ill" are, as a class, dangerous. Second, danger can be predicted by psychiatrists and other mental health professionals. Both assumptions merit further examination.

Id. (footnote omitted). The commentators contended that the mentally ill may not be as dangerous as society believes. *Id.*

Courts have long been troubled by reliance on expert psychiatric testimony, emphasizing that such testimony should not be construed as being conclusory. Washington v. United States, 390 F.2d 444, 451 (D.C. Cir. 1967). The *Washington* court was

parent in most instances.[128] New Jersey's current standard for minors—"in need of intensive psychiatric therapy"—is so vague and lacking in due process safeguards that children who merely need more nurturing and attention may find themselves locked in a ward with very little chance of getting the attention they need.[129]

IV. THE NEW JERSEY SUPREME COURT TRANSGRESSED ITS RULE-MAKING POWER WHEN IT ENACTED NEW JERSEY COURT RULE 4:74-7(F)

The New Jersey Supreme Court is authorized to promulgate rules pursuant to the New Jersey Constitution.[130] Although the mandate, which authorizes the court to create rules governing "practice and procedure," appears to be straightforward, rules often contain both substantive and procedural elements.[131] Adhering to the separation of powers doctrine in *State v. Leonardis*,[132] the court recognized that the Legislature is the sole branch of the New Jersey government authorized to make substantive rules.[133] Case

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"deeply troubled by the persistent use of labels and by the paucity of meaningful information presented" to the finder of fact by psychiatric testimony. *Id.* at 447.

128 *See, e.g.*, D.L. v. Commissioner of Social Serv's, 591 N.E.2d 173, 175 n.6 (Mass. 1992) (stating that dangerousness was shown by a 13-year-old boy banging himself against walls, biting himself, and hitting, kicking, or biting others). The plaintiffs in *D.L.* challenged the authority of the Department of Social Services (DSS) to consent to the admission of children in its custody to a psychiatric hospital. *Id.* at 174. The court rejected that challenge. *Id.* The court concluded that although the DSS was not a child's guardian or parent, it had the power to make regulations and fashion procedures that would permit the agency to exercise similar authority of a parent or guardian. *Id.* at 177 (citations omitted). The court noted that the purpose of granting the DSS such power was to insure children of "good substitute parental care" in the absence, unfitness or inability of parents to provide such care. *Id.*

129 *See* N.J. CT. R. 4:74-7(f).

130 N.J. CONST. art. VI, § 2, para. 3. Article VI provides in pertinent part that "[t]he Supreme Court shall make rules governing the administration of all courts in the State and, subject to the law, the practice and procedure in all such courts." *Id.*

131 Busik v. Levine, 63 N.J. 351, 364, 307 A.2d 571, 578 (1973). The *Busik* court maintained that "it is simplistic to assume that all law is divided neatly between 'substance' and 'procedure.' A rule of procedure may have an impact upon the substantive result and be no less a rule of procedure on that account." *Id.*

132 73 N.J. 360, 375 A.2d 607 (1977).

133 *Id.* at 374, 375 A.2d at 614 (citations omitted). The court emphasized, however, that "an absolute prohibition against rules which merely affect substantive rights or liabilities, however slight such effect may be, would seriously cripple the authority and concomitant responsibility which have been given to the Court by the Constitution." *Id.* (citation omitted). The *Leonardis* court held that it had not impermissibly encroached upon the Legislature's power by creating a rule to order pretrial intervention in certain circumstances. *Id.* at 365, 367, 374-75, 375 A.2d at 610-11, 614. The court cautioned, however, that its holding "should not be taken as a departure from the longstanding rule that the Court is not to invade the Legislature's domain by

law indicates, however, that the New Jersey Supreme Court has broadly construed its rule-making power despite its long-time recognition of the separation of powers doctrine.[134]

In so doing, problems arise where the court rule weighs more heavily in substance than procedure.[135] Specifically, when examining Rule 4:74-7(f), the substantive aspects of the standard are difficult to deny.[136] The substantive nature of the standard becomes even more lucid when applying the test enunciated in *Suchit v. Baxt*.[137] In *Suchit*, the court declared that a rule is generally substantive if it determines the outcome of a proceeding.[138] This is

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'mak[ing] substantive law wholesale through the exercise of the rule-making power.'" *Id.* at 374, 375 A.2d at 614 (quotation omitted).

134 *See* Winberry v. Salisbury, 5 N.J. 240, 251-52, 74 A.2d 406, 411-12 (recognizing that the separation of powers doctrine did not prevent the court from exercising the full sweep of its rule-making powers), *cert. denied*, 340 U.S. 877 (1950). Chief Justice Vanderbilt maintained that some overlapping of functions was necessary for the government to operate effectively. *Id.* The *Leonardis* court agreed with that sentiment when it stated that "the separation of powers doctrine should not be construed to prevent the Court from adopting rules which have some effect on matters which involve executive and legislative functions." *Leonardis*, 73 N.J. at 372, 375 A.2d at 613.

135 *See Leonardis*, 73 N.J. at 372-73, 375 A.2d at 613-14. Justice Pashman explained that the state constitutional provision, like the federal statute authorizing federal rule-making power, conferred the court with the power to "promulgate rules governing practice and procedure" as long as no substantive right was abridged, enlarged, or modified. *Id.* at 373, 375 A.2d at 614 (citation omitted). The line dividing substance and procedure, the court noted, "shifts as the legal context changes. 'Each implies different variables depending upon the particular problem for which it is used.'" *Id.* (quotation and citations omitted).

136 *See* N.J. Ct. R. 4:74-7(f). Because Rule 4:74-7(f) is the only guideline governing the commitment of minors, it should be construed as a substantive standard. *See supra* notes 89-94 and accompanying text (discussing the absence of a statutory standard for minors).

137 176 N.J. Super. 407, 423 A.2d 670 (Law Div. 1980). In *Suchit*, the court rule in question controlled the process by which a judgment in medical malpractice was obtained. *Id.* at 412-13, 426, 423 A.2d at 672-73, 680. The *Suchit* court maintained that substantive law clearly fell within the Legislature's domain, and the supreme court was not entitled to usurp the power of the Legislature when fashioning court rules. *Id.* at 424, 423 A.2d at 679. Although there were some substantive aspects to the rule, such as admissibility of evidence, the court applied the test in *Busic* and decided that the rule only served to expedite the exposition of a case, thereby not infringing upon the Legislature's power to make substantive law. *Id.* at 426-27, 423 A.2d at 680. Accordingly, the court held the rule was clearly procedural. *Id.* at 427, 423 A.2d at 680.

138 *Id.* The court proffered, however, that if the rule "is but one step in the ladder to final determination and can effectively aid a court function, it is procedural in nature and within the Supreme Court's power of rule promulgation." *Id.* By way of analogy, Rule 4:74-7 contains all of the procedural requirements necessary to commit a minor and could therefore be considered the "ladder" itself. *See, e.g.*, N.J. Ct. R. 4:74-7(c)3 (providing a *guardian ad litem* to represent a minor who is subject to involuntary commitment); N.J. Ct. R. 4:74-7(c)4 (mandating notice of hearing and to whom it should be sent); N.J. Ct. R. 4:74-7(e) (stating that a hearing must be conducted to determine whether the minor is subject to commitment); N.J. Ct. R. 4:74-

clearly the case with Rule 4:74-7(f), as it provides the only standard to be applied when determining whether a minor is subject to involuntary commitment.[139] Moreover, because of the lack of a statutory underpinning present in a minor's commitment, the standard contained in Rule 4:74-7(f) is clearly substantive.[140] Accordingly, in enacting Rule 4:74-7(f), the New Jersey Supreme Court acted inconsistently with the separation of powers doctrine and, thus, violated the New Jersey Constitution.[141]

V. CONCLUSION

It is difficult to enunciate a panacean solution to what amounts to a horrible disservice to those children in New Jersey who are saddled with emotional or mental disorders. As evidenced by the inability of the supreme court to create and establish substantive standards,[142] an amendment to the court rule in this situation must be accompanied by underlying legislation. Because the standard "in need of intensive psychiatric therapy" closely resembles the "in need of treatment" standard struck down by several courts due to vagueness,[143] the New Jersey standard would also likely fail judicial scrutiny along these lines. Additionally, children should be afforded the same due process rights as adults in commitment proceedings, and the standard for minors should, indeed must, mirror that utilized for adults. This assertion is reflected in common law and statutory authority across the country.[144]

7(f) (providing for a review hearing every three months during which the minor is committed).

139 *See* N.J. CT. R. 4:74-7(f). For an outlay of Rule 4:74-7(f), see *supra* note 16. Moreover, the new court rule proposed by the Supreme Court Civil Practice Committee is even more comprehensive and, consequently (if possible), more substantive. See *supra* note 16 for the text of the proposed rule. Again, the author of this Comment emphasizes that the Legislature must first act before a change in the court rule is made.

140 *Cf.* State v. Goodman, 92 N.J. 43, 49, 455 A.2d 475, 478 (1983) (concluding that substance in the context of criminal law "'is mostly concerned with what act and mental state, together with what attendant circumstances or consequences, are necessary ingredients of the various crimes'") (quotation and citations omitted).

141 N.J. CONST. art. VI, § 2, para. 3. The Legislature emphatically recognized that the time has come to set out clear and precise standards by statute, which clearly militates against the court's fashioning of such a substantive court rule. *See* N.J. STAT. ANN. § 30:4-27.1b (West Supp. 1993).

142 *See* N.J. CONST. art. VI, § 2, para. 3.

143 Johnson v. Solomon, 484 F. Supp. 278, 283 (D. Md. 1979) (citation omitted); Goldy v. Beal, 429 F. Supp. 640, 648 (M.D. Pa. 1976); Commonwealth *ex rel.* Finken v. Roop, 339 A.2d 764, 778 (1975), *appeal dismissed*, 424 U.S. 960 (1976).

144 *See supra* note 62 (listing states which require a finding of dangerousness to be involuntarily committed); *supra* note 62, 124 and accompanying text (discussing vari-

The responsibility for providing a standard for the commitment of minors is squarely within the Legislature's arena. While the Legislature has provided adequate safeguards for adults,[145] it has abdicated its responsibility to the children of New Jersey by removing them from the legislative umbrella. The Legislature has the power to ameliorate this situation, and this power it must wield. Admittedly, the Legislature is caught between the Scylla of a fiscal burden inherent in a recodification of the statute and the Charybdis of failing to adequately protect the most important asset of New Jersey. The potential harm, however, is much greater a cost than the financial outlay.

Certainly, the standard for minors should include an initial finding of mental illness; New Jersey remains the only state lacking this prong for the commitment of children. A finding of dangerousness reflects the underlying doctrine of *parens patriae* and police power upon which the theory of civil commitment has evolved.[146] Such a finding should therefore be mandated in involuntary commitment proceedings regarding minors, as it is for adults. If the minor can function in society, albeit at a "lower" level, without being dangerous, the doctrines forming the substrata of involuntary commitment cannot be invoked. Children should not be "dumped" in a mental institution for convenience's sake. This conclusion is in line with the standards enunciated by many states with regard to the involuntary civil commitment of minors.[147] Although the Supreme Court Civil Practice Committee has attempted to make amends for the Legislature, the time and effort put into its recent proposal was, unfortunately, a boondoggle.

The onus in this situation is on the Legislature. Without a statutory basis, the court rule provides the only substantive standard for the involuntary commitment of a minor. The New Jersey Supreme Court lacks the authority to create substantive standards; that responsibility is clearly within the Legislature's purview. While a first impression might lead one to assert that an amendment to the court rule is better than the present standard, correcting a wrong with an "unlawful" solution is not the answer.

The New Jersey Supreme Court has in place admirable proce-

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ous federal and New Jersey courts that have emphasized the dangerousness requirement).

145 N.J. STAT. ANN. § 30:4-27m (West Supp. 1993).

146 For a discussion of the *parens patriae* power and the state's police power, see *supra* notes 17-19 and accompanying text.

147 *See supra* notes 54, 62 and accompanying text (listing statutes which require a finding of mental illness before commitment).

dural protections for minors who are thrust into the courts as a result of an application for civil commitment filed by a third person. The fact remains, however, that the standard for commitment, the substantive aspect, is lacking in view of the substantial movement to protect minors who might be subject to an extraordinary stifling of their personal liberty. The Legislature must take the torch and light the path. The price tag attached to the solution may be a bitter pill to swallow, but thoughts should remain focused on the 10-year-old who is stripped from her family and placed in what amounts to a prison, locked away from everything to which she has become attached. What life can recover from that?

Louis A. Chiafullo