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Standards of Mental Illness in the Insanity Defense and Police Power Commitments: A Proposal for A Uniform Standard

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Note: Standards of Mental Illness in the Insanity Defense and Police Power Commitments: A Proposal for a Uniform Standard

Civil proceedings to commit dangerous, mentally ill persons under the police power[1] and criminal prosecutions in which the insanity defense is raised both require courts to determine the existence and severity of mental illness in an individual whose past behavior suggests future danger to society.[2] Civil commit-

1. Police power commitments for mental illness and dangerousness must be distinguished from *parens patriae* commitments, in which state intervention is justified not by the protection of society but by the non-dangerous mentally ill individual's need for treatment.

In a recent case, O'Connor v. Donaldson, 422 U.S. 563 (1975), the Court held that the state must provide treatment for those individuals committed on the basis of their need for treatment, but did not reach the question whether this requirement extends to police power commitments. Thus, while treatment to improve the condition of the person committed is often advanced as a justification for police power commitments, in the absence of universally available and effective treatment, the dominant rationale for those commitments must be the safety of society. *See* Livermore, Malmquist & Meehl, *On the Justifications for Civil Commitment*, 117 U. PA. L. REV. 75 (1968) [hereinafter cited as *Justifications*]; Note, *Civil Commitment of the Mentally Ill: Theories and Procedures*, 79 HARV. L. REV. 1288 (1968) [hereinafter cited as *Theories*]; Note, *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190 (1974) [hereinafter cited as *Developments*].

Some state statutes treat commitments of those dangerous only to themselves as falling within the police power. *See Developments, supra* at 1123-24. This Note deals only with commitment of those dangerous to others.

Since this Note is not concerned with *parens patriae* commitments, the phrase civil commitment proceeding will hereinafter be employed to refer only to police power commitments.

2. At least in theory, the determination that an individual subjected to civil commitment proceedings is dangerous is separate from the determination of mental illness. This is so because our legal system has not approved incarceration, whether punitive or preventive, of persons who are known to be dangerous but are neither mentally ill nor guilty of criminal behavior.

In practice, however, the two determinations may not be distinct. The statutes generally fail to specify the evidentiary showings to be made in a commitment proceeding, *see* S. BRACKEL & R. ROCK, THE MENTALLY DISABLED AND THE LAW 66-72 (1971), and the typical proceeding is an all too brief affair in which the individual, without effective legal representation, will be committed or not according to the testimony of a psychiatrist. Whether or not the psychiatric testimony generally distinguishes between the issues of mental illness and dangerousness

ment of one who is dangerous and mentally ill imposes a deprivation of personal liberty, usually indefinite internment in a state mental hospital.[3] The insanity defense, on the other hand,

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would be a worthy topic for investigation but is beyond the scope of this Note.

The literature on police power commitments has concentrated on the problem of determining dangerousness, tending to ignore the problem of defining mental illness, which is the subject of this Note. *See generally* Bazelon, *Institutionalization, Deinstitutionalization and the Adversary Process*, 75 COLUM. L. REV. 897 (1975); Dershowitz, *The Origins of Preventive Confinement in the Anglo-American Law—Part I: The English Experience*, 43 U. CIN. L. REV. 1 (1974); Dershowitz, *The Origins of Preventive Confinement in the Anglo-American Law—Part II: The American Experience*, 43 U. CIN. L. REV. 781 (1974); Dershowitz, *Preventive Confinement: A Suggested Framework for Constitutional Analysis*, 51 TEX. L. REV. 1277 (1973); Frankel, *Preventive Restraints and Just Compensation: Toward a Sanction Law of the Future*, 78 YALE L.J. 229 (1968); Postel, *Civil Commitment: A Functional Analysis*, 39 BROOKLYN L. REV. 1 (1968).

A major target of criticism in these writings has been the sole use of psychiatric predictions as a basis for determining dangerousness. *See* Bazelon, *Institutionalization, Deinstitutionalization and the Adversary Process*, 75 COLUM. L. REV. 897 (1975); Diamond, *The Psychiatric Prediction of Dangerousness*, 123 U. PENN. L. REV. 439 (1975); Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 672 (1974); Goldstein & Katz, *Dangerousness and Mental Illness: Some Observations on the Decision to Release Persons Acquitted by Reason of Insanity*, 70 YALE L.J. 225 (1960). Recently a federal district court acknowledged this criticism by holding statutory definitions of dangerousness unconstitutionally vague, and narrowing them to require that a finding of dangerousness be premised on a proven past act inflicting or threatening substantial harm to another. Bell v. Wayne County Gen. Hosp., 384 F. Supp. 1085 (E.D. Mich. 1971). *See* Lynch v. Baxley, 386 F. Supp. 378 (M.D. Ala. 1974).

In discussing the determination of mental illness this Note will refer to the determination of dangerousness as though it is, as it ought to be, separate from and precedent to the determination of mental illness and based solely on past conduct.

3. See S. BRACKEL & R. ROCK, *supra* note 2, at 66-72, for a collection of applicable state statutes authorizing indefinite commitment to state mental hospitals.

Most individuals civilly committed are discharged within 90 days. However, this group includes the non-dangerous mentally ill; the average confinement of the mentally ill and dangerous may be substantially longer. *See Developments, supra* note 1. There are no separate figures for confinement of the latter group. The least restrictive alternative analysis applied in Lake v. Cameron, 364 F.2d 657 (D.C. Cir.) (*en banc*), *cert. denied*, 382 U.S. 863 (1966), *on remand* 267 F. Supp. 155 (D.D.C. 1967), suggests that the state's interest must be accomplished through an alternative procedure which least infringes on the liberty of the individual. Under this analysis some committed individuals may receive forms of treatment which do not require that they be confined in an institution. Although the frequency of these dispositions is uncertain, it may still be assumed that most patients are institutionalized.

Civil commitment for mental illness and dangerousness has generally

exonerates an individual from criminal liability after the state has proved beyond a reasonable doubt that he committed the act charged;[4] but such an acquittal often leads not to freedom, but to confinement in a state mental hospital.[5]

The consequences of either proceeding for the individual concerned are thus similar and perhaps equally grave. Yet despite the similarity in effect between police power commitment proceedings and the insanity defense, courts use very different definitions of "mental illness" in the two situations. Definitions of insanity are fairly strict and reasonably precise, but the statutory formulations of mental illness for civil commitment purposes are vague and susceptible to arbitrary application.[6] This Note will examine certain similarities between the insanity defense and police power commitment and suggest that the definitions employed to test the former should serve as the basis for narrowing the statutory definitions of mental illness as used in the latter proceedings to their appropriate scope.

I. CURRENT STANDARDS OF MENTAL ILLNESS IN THE INSANITY DEFENSE AND POLICE POWER COMMITMENTS

There are essentially two formulations of the insanity de-

been characterized as non-punitive preventive detention, since incarceration is ordered not to punish for past acts, but to prevent the commission of future acts. Nevertheless, there is a growing awareness that incarceration in a mental hospital is a severe curtailment of liberty. Humphrey v. Cady, 405 U.S. 504, 509 (1972); Cross v. Harris, 418 F.2d 1095, 1101-02 (D.C. Cir. 1969). Further, the distinction between treatment and punishment, especially when methods such as electroshock therapy and certain kinds of chemotherapy are used, is often a very fine one. *See* Knecht v. Gillman, 488 F.2d 1136 (8th Cir. 1973).

4. The insanity defense is normally not raised unless the defendant has little hope of being acquitted on other grounds. As a defense, the issue is usually not raised until after the prosecution has proved every element of the crime charged. A. GOLDSTEIN, THE INSANITY DEFENSE 110-11 (1967).

5. *Id.* at 24.

6. The current disparity between the strictness of the standards of mental illness in civil commitment and the insanity defense engenders seemingly inconsistent treatment of the same individual. For example, if an individual were committed for mental illness and dangerousness and during his confinement in a state institution committed a crime, he might fail to meet the strict standard for the insanity defense and therefore be sentenced to penal incarceration. Yet at the end of his prison term, he might remain mentally ill by civil commitment standards and thus be returned, without de novo commitment proceedings, to the state hospital for continued indefinite detention. *Cf.* Lausche v. Commissioner, 225 N.W.2d 366 (Minn. 1974).

fense currently in use. The M'Naghten Rule, formulated in 1843 and followed by a majority of the states, acquits the accused whose "disease of the mind" at the time of the act rendered him ignorant of "the nature and quality of the act" or of the fact that he was doing wrong.[7] The test promulgated in the American Law Institute's (ALI) Model Penal Code, which has been adopted by most other state courts and all of the federal circuit courts, retains language exculpating one whose disease prevents him from knowing the wrongfulness of his conduct, but also treats as a separate, sufficient ground for acquittal what is only an implicit element of the M'Naghten test—incapacity to "conform his conduct to the requirements of the law."[8] While commentators are not fully satisfied with the present formulations,[9] whatever shortcomings the tests suffer are not due to want of attention. Perhaps no topic has proved more alluring to courts and commentators than the insanity defense.[10] Indeed, in light

7. M'Naghten's Case, 4 St.Tr.N.S. 847, 8 Eng. Rep. 718 (1843).

8. MODEL PENAL CODE § 4.01(1) (1962):

> A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.

For a discussion of the ALI rule see GOLDSTEIN, *supra* note 4, at 86-96.

M'Naghten is used in two-thirds of the state jurisdictions. In about eighteen states an irresistable impulse test, emphasizing inability to exercise self-control, is used in addition to M'Naghten. GOLDSTEIN, *supra* note 4, at 9. In practice, the emphasis on inability to control behavior may be imported into M'Naghten without formally adopting the irresistible impulse test. *See, e.g.*, State v. Rawland, 294 Minn. 17, 199 N.W.2d 774 (1972). Most other state jurisdictions and all the federal circuits have adopted the ALI rule. *See* GOLDSTEIN, *supra* note 4, at 45 and United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972). Thus, a majority of the states provide for acquittal of the accused who was unable to control himself due to mental illness, either by adding an irresistable impulse provision to the M'Naghten test or by applying the ALI rule.

9. For example, there is support for the suggestion that the current formulations of the insanity defense be abandoned and that psychiatric testimony focus on whether the accused had the required mens rea, an essential element of the crime charged. Goldstein & Katz, *Abolish the Insanity Defense—Why Not?*, 72 YALE L.J. 853 (1963); Goldstein, *The Brawner Rule—Why?, or No More Nonsense or Non Sense in the Criminal Law, Please!*, 1973 WASH. U.L.Q. 126.

10. *See generally* R. ARENS, THE INSANITY DEFENSE (1974); A. MATTHEWS, MENTAL ILLNESS AND THE CRIMINAL LAW (1967); Livermore & Meehl, *The Virtues of M'Naghten*, 51 MINN. L. REV. 789 (1967); Morris, *Psychiatry and the Dangerous Criminal*, 41 S. CAL. L. REV. 514 (1968); and the cases cited and discussed in GOLDSTEIN, *supra* note 4, at 45-96.

of the relatively few cases in which the defense is raised,[11] the attention given it may be presumed to reflect the profound moral issues it presents within the highly visible criminal process, rather than its widespread social importance.[12]

In contrast, while every state jurisdiction has authorized police power commitments by statute, these statutory formulations of mental illness are multifarious. A precise characterization of the standards is hampered not only by their diversity but by the vagueness of the language used.[13] For example, Kentucky's statute, which is similar to a number of others, authorizes commitment of those suffering from "a psychiatric or other disease which substantially impairs . . . mental health"[14] without further defining any of the terms used.

Unfortunately, the vague language of these statutes has been little clarified by decisional law; the courts, to a large degree, have not undertaken their traditional role of providing a definitive version of an otherwise vague statute. Despite the fact that such statutory formulations result in the involuntary confinement of perhaps 50,000 persons per year,[15] there is no evidence of extensive efforts by legislators, courts or commentators to define or refine the police power standard, similar to the efforts lavished on the insanity defense.[16]

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11. *See* GOLDSTEIN, *supra* note 4, at 23-25. Although most of the commentators agree that the insanity defense is relatively rare, precise statistics are unavailable.

12. *Id.* at 3-4.

13. *See* statutes quoted in S. BRACKEL & R. ROCK, *supra* note 2, at 66-72.

14. KY. REV. STAT. § 202.010(1) (1970).

At least one court has held a state commitment statute unconstitutionally vague and overbroad. In Bell v. Wayne County Gen. Hosp., 384 F. Supp. 1085, 1095 (E.D. Mich. 1975), the court struck down a Michigan statute which defined mental illness to

> include every species of insanity and extend to every mentally deranged person, and to all of unsound mind, other than the mentally handicapped, epileptic, and persons who manifest the general deterioration of mental processes, including disorientation, confusion or impairment of memory, associated with senility, but without psychotic implications.

The court commented: "By the terms of that definition virtually any mental disorder would qualify, including many which, although unfortunate, could not be classified as other than harmless." *Id.*

15. Diamond, *supra* note 2, at 440.

16. "Little has been done, legislatively or judicially, in a comprehensive fashion to examine the parameters, inter-relationships and constitutional bases of the various laws dealing with mental illness."

The vagueness of police power commitment statutes allows inequitable and unpredictable results in commitment proceedings. In police power commitments, the state, acting under its plenary police power to provide for the safety, welfare, and health of its citizens, is an adversary of the individual.[17] The object of the state's solicitude is not primarily the proposed patient, but rather the safety of society, which the individual supposedly threatens.[18] When the standard the state must meet is vague and uncertain, the result of any of these proceedings is unpredictable, and the standard may in fact be determined by each court on the particular facts of each case.[19] Two forms of inconsistency might result: dissimilar standards used in different courts in the same jurisdiction,[20] and even different standards used by the same court in different cases. Thus, the consequence of liberty or confinement might depend on one's fortune or misfortune in appearing before a particular judge. Moreover, if the standard is uncertain, the trier of fact, either judge or jury, has the freedom to lower the standard and assure the state success if factors irrelevant to a determination of mental illness, such as a hostile demeanor or past criminal record, prompt the trier of fact to desire confinement for the proposed patient. Alternatively, the lack of a well-defined standard would allow the trier of fact who felt sympathetic to the proposed patient to raise the standard and ensure that the individual remained at liberty.

A related ramification of the vague standards used for

In re Ballay, 482 F.2d 648, 654 n.29 (D.C. Cir. 1973) (holding that the burden of proof at involuntary civil commitment proceedings must be proof beyond a reasonable doubt).

17. *See Justifications, supra* note 1; *Theories, supra* note 1.

18. *See* note 1 *supra.*

19. At least at the trial level where the judge issues no opinion in support of his decision, he may fashion the standard not only inconsistently but sub silentio. At least one author believes that police power commitments may be used to incarcerate in a mental hospital an individual whom the state suspects has committed a crime but against whom it cannot muster evidence sufficient for a criminal conviction. Dershowitz, *Preventive Confinement: A Suggested Framework for Constitutional Analysis*, 51 TEX. L. REV. 1277 (1973).

20. In part because few commitments are appealed, the appellate courts have failed to develop a uniform standard within a jurisdiction. Undoubtedly, this result is at least partially caused by inadequate legal representation for proposed patients. They usually receive either no legal representation, or the most cursory and ineffective legal counsel. *See* Chalmers & Davis, *Legal Representation in Civil Commitment*, 45 MISS. L.J. 43 (1974).

commitments for mental illness and dangerousness is the importance placed on psychiatric testimony. When legislators and courts fail to provide a well-defined, uniformly applicable legal standard, a psychiatric definition is substituted for the absent legal standard.[21] This medical assessment of mental illness focuses on diagnosis, recommended treatment, probable course of the illness, and expectations for recovery. The psychiatric concepts of mental illness comprehend a vast array of aberrations, from total dysfunction and divorce from reality to annoying or disturbing eccentricities.[22] A regard for individual liberty, basic to our legal system, would prevent acceptance of a system through which all persons with compulsive habits or grandiose self concepts would be deprived of their liberty.[23] Yet such persons may be mentally ill by medical standards.

On the other hand, a legal standard would more properly focus on balancing the state's interest in protecting its citizens against the interest of the proposed patient in maintaining his liberty. With a legal guideline, the court's inquiry would less likely be limited to such factors as medical diagnosis or the advisability of treatment, limitations which are inappropriate in a proceeding where the safety of society is the state's primary interest. A psychiatric diagnosis of "mental illness" should not be determinative in the court's balancing of interests.

Furthermore, when no legal standard is used to sift out irrelevant data and judge the import of a psychiatrist's testimony, this testimony may become conclusive, depriving the legally ordained decision-maker, the judge or jury, of the final decision on who shall go free and who shall be incarcerated.[24] In a re-

21. *Justifications, supra* note 1, at 86, 88-89.

22. See J. KATZ, J. GOLDSTEIN & A. DERSHOWITZ, PSYCHOANALYSIS, PSYCHIATRY AND THE LAW, 506-26 (1967); J. PAGE, PSYCHOPATHOLOGY, THE SCIENCE OF UNDERSTANDING DEVIANCE (2d ed. 1971), for a collection of representative categories of mental illness used by psychiatrists for diagnostic purposes.

23. *Cf.* Bell v. Wayne County Gen. Hosp., 384 F. Supp. 1085 (E.D. Mich. 1975) (quoted in note 14 *supra*).

24. *See* Bazelon, *supra* note 2, at 911. Strikingly similar problems with psychiatric testimony in the insanity defense were chronicled in the District of Columbia Circuit during the time the Durham Rule was employed. Durham called for a determination of whether the defendant's act was the "product" of mental disease. This formulation encouraged usurpation of jury function by psychiatrists so severely that the court finally abandoned the test in United States v. Brawner, 471 F.2d 969 (1972), and adopted the ALI rule. Prior to *Brawner* the court had unsuccessfully sought to limit the role of psychiatric testimony. United States v. Eichberg, 439 F.2d 620 (1971); Washington v. United

lated context, the Supreme Court has recognized that this final decision must reside in the judge or jury. In *Humphrey v. Cady*,[25] the Court said:

> Wisconsin conditions such confinement not solely on the medical judgment that the defendant is mentally ill and treatable, but also on the social and legal judgment that his potential for doing harm, to himself or others, is great enough to justify such a massive deprivation of liberty. In making this determination, the jury serves the critical function of introducing into the process a lay judgment reflecting values generally held in the community, concerning the kinds of potential harm that justify the State in confining a person for compulsory treatment.[26]

II. THE INSANITY DEFENSE AND POLICE POWER COMMITMENT COMPARED

A. Different Consequences for the Mentally Ill

When a jury decides to exonerate a defendant from criminal sanction because he did not know "the nature and quality of the act . . . [or that] he was doing what was wrong" or "that he lacks substantial capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law,"[27] it necessarily determines that the defendant lacked control over his behavior.[28] This incapacity to control behavior by reason of mental illness exonerates the defendant from moral blameworthiness and punishment.[29] Society distinguishes the mentally ill defendant from those held criminally responsible

States, 390 F.2d 444 (1967); McDonald v. United States, 312 F.2d 847 (1962); Carter v. United States, 252 F.2d 608 (1957). The fallibilities of psychiatric testimony included use of confusing and uninformative terminology and injection of personal bias into testimony. The same fallibilities apply in civil commitment proceedings. *See* Ennis & Litwack, *supra* note 2.

25. 405 U.S. 504 (1972).

26. *Id.* at 509. The statute in question authorized commitment of "sexual psychopaths." These statutes are fairly common in state jurisdictions. S. Brackel & R. Rock, *supra* note 2, at 341-75. Since the rationale for these commitments, protection of society and possible amelioration of the patient's condition, is the same as that for police power commitments in general, a special analysis of sexual psychopath commitments is unnecessary for present purposes.

27. *See* notes 7-8 *supra* and accompanying text.

28. For a more extensive discussion of the focus of the insanity defense standards on incapacity for control of behavior, see Goldstein, *supra* note 4, at 12-13.

29. *Id.* This exoneration is theoretically no different from the exoneration of an individual who lacked control over his behavior because of physical illness, as in the case of the automobile driver who has a heart attack at the wheel that causes his vehicle to collide with another car.

because mental illness has impaired the operation of that generally effective array of social, legal, and moral forces that impel most individuals to operate within the confines of the law.[30] One of the apparent functions of the criminal law is deterrence, though individuals seldom make a decision to forego commission of a crime solely because of the possibility of arrest, conviction, and punishment. Equally potent disincentives are a moral sense of right and wrong and the fear of social disapproval. Individuals with highly developed ethical sensibilities and regard for social proprieties are rarely faced with a decision to commit or abstain from crime. These ethical and social forces combine to remove a criminal act from the realm of alternative actions the decision-maker contemplates. While in any given criminal case, such forces will have failed to restrain the particular defendant, society holds responsible those not mentally ill[31] because, in theory at least, although such individuals chose to disregard society's restraints, they were not incapable of heeding them.[32] Their freely chosen criminal conduct makes them morally blameworthy and justifies imposition of criminal sanctions. The mentally ill defendant, however, had no comparable freedom to choose to obey the law and is therefore not blameworthy.

While society is willing to exonerate a defendant who cannot control his behavior to accord with the criminal law, it is equally willing to impose indefinite detention upon the mentally ill and dangerous through civil commitment. The legal disposition of these individuals is also different from that accorded to the non-mentally ill but dangerous. Social and environmental data afford a basis for predicting that certain groups within the population are fifty to eighty percent likely to commit a crime

30. *Id.*

31. It is difficult to describe individuals who are likely to commit crimes as mentally healthy, since the effect of this undesirable characteristic is to bring death, physical suffering, or pecuniary loss to the victim of the crime, as well as conviction and punishment to the criminal. The psychopath, a term describing an individual who cannot learn from experience, acts impulsively, and demands quick gratification for his desires, is described as mentally ill in some diagnostic systems. The Model Penal Code-American Law Institute test for the insanity defense includes the proviso: "The terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct." MODEL PENAL CODE § 4.01 (1962).

32. While it is often argued that a life spent in a vicious and amoral environment effectively decreases a person's freedom to choose to obey the law, our legal system has so far declined to exonerate these individuals. *See* Livermore & Meehl, *supra* note 10, at 846-49, 854-55.

within a relatively short time.[33] Yet, at present, before a crime is committed, the legal system refrains from incarcerating these groups on this basis alone. No such reticence is practiced in detaining the equally or less dangerous mentally ill.[34] The common perception is that the social, moral, and legal restraints which may be effective in deterring the non-mentally ill and dangerous will be ineffective in deterring the mentally ill.[35] Society views their mental illness as making them incapable of controlling their behavior and thus incapable of heeding these restraints.[36] Confronted with two individuals equally likely to commit an act harmful to others, one of whom is mentally ill and one of whom is not, we fear the mentally ill individual more and therefore feel justified in committing him for indefinite confinement in a mental hsopital. The equally dangerous non-mentally ill individual, however, will remain at liberty unless and until he commits a crime.

The justification, then, for involuntary commitment of mentally ill and dangerous persons must lie in the fact that they are relatively unable to control their behavior. In a police power commitment proceeding, the state's interest in preventing future harmful acts and improving the condition of the proposed patient is concededly compelling. But to achieve its goal and eschew unnecessary deprivations of liberty requires that the class of persons to be affected be precisely and narrowly defined.[37] The court in every police power commitment must therefore determine that the proposed patient lacks the capacity to obey the restraints that dangerous but sane individuals are at least capable of obeying. The present vague statutory definitions, however, do not require courts to make such a finding, and inquiry is not focused upon control or lack thereof. Perhaps this lack of inquiry into the effect of mental illness is due to a monolithic concept of mental disease, an ancient fear of all mentally ill people as totally deprived of control over their behavior. Yet the literature, both legal and medical, and our common, daily experience belies this assumption of lack of control.[38] There are many per-

33. *Justifications, supra* note 1, at 79. Significantly, the data on which these predictions are made have nothing to do with mental illness, but rather age, race, socio-economic status, and previous criminal records.

34. *See generally* Livermore & Meehl, *supra* note 10, at 818; *Justifications, supra* note 1, at 86.

35. GOLDSTEIN, *supra* note 4, at 12-13.

36. *See In re* Ballay, 482 F.2d 648, 660 (D.C. Cir. 1973).

37. *See* S. BRACKEL & R. ROCK, *supra* note 2, at 66-72.

38. *See generally Justifications, supra* note 1, at 88-91.

sons, impaired to some degree or in some manner by mental illness, who continue to think and act reasonably in other areas, and whose behavior is under their control. Livermore, Malmquist, and Meehl relate the story of a bus driver who inflicted his paranoid delusions on his passengers, but when admonished by his employer to desist or lose his job, did so and continued to be employed as a driver for many years.[39] Even inmates of mental hospitals quickly learn to curb the desire to air or act out their delusions.[40] Thus, the blanket assumption that mental illness is always accompanied by a substantial diminution of capacity to control conduct may often be incorrect. To the extent that present commitment standards depend upon that incapacity, they do not delineate with sufficient narrowness and precision the class of persons that may justifiably be reached by the state in commitment proceedings.

B. The Shared Characteristic of Insanity Defendants and the Mentally Ill and Dangerous

The relevant inquiry in police power commitments then, must be guided by a far narrower standard of mental illness than current medical or statutory standards. Assuming that an individual can be shown to be dangerous, he must be distinct from other dangerous persons who remain at liberty by virtue of his incapacity to control his behavior, just as the insane defendant must be distinct from those persons held responsible for their crimes because of this same incapacity to control behavior. Insanity-acquittal defendants and the proper subjects for police power commitments share this salient characteristic, an incapacity for control, or inability to choose to obey the law. They are, in fact, the same class of persons; the primary difference being that the insanity defendant's tendency to harm others has been proven by an attempt or the commission of a crime, while the mentally ill and dangerous person's harm is largely inchoate. If an insane defendant were intercepted before the crime was committed, given that the likelihood of the crime could be foreseen, he would be a proper subject for police power commitment. Similarly, if an individual committed for mental illness and dangerousness had not been intercepted and his dangerousness had matured into commission of a crime, he could appropriately raise the insanity defense, again because he lacked substan-

39. *Id.* at 90 n.42.
40. Goldstein, *supra* note 4, at 26-28.

tial capacity to control his behavior by reason of mental illness.[41]

While proposing a narrower focus for psychiatric testimony and a more stringent standard for commitment statutes, the above analysis would not impede the state's legitimate desire to remove from society those persons whose combined mental illness and dangerousness pose a substantial threat to others. The effect of the proposed standard in certain specific circumstances can be shown through a series of examples, drawn in part from the case law.

Individual A is a well-educated woman who is successful in her work but complains of severe anxiety and episodes of psychosis when she imagines that her fellow workers are attempting to "destroy" her by character assassination. Even if this were true, there would be no threat of serious bodily harm or death to A, but A's mental illness, paranoid schizophrenia, makes her equate character assassination with actual physical destruction and in turn justifies, in her mind, self-defense in the form of physical violence—even homicide. The likely target for self-defense is her superior at work, who has failed to put a stop to the malicious gossip A has imagined. This supervisor, therefore, is attempting to annihilate her. A has been overtly hostile to her superior and is likely to take some violent action soon. Assuming that this contemplated action is likely enough to justify a finding of dangerousness, A would be a proper subject of a police power commitment since her mental illness has substantially reduced her capacity to conform her conduct to the law.[42]

41. The insanity defense is usually raised only in trials for capital crimes, and the situation usually envisioned is a murder trial. GOLDSTEIN, *supra* note 4, at 24. The harm threatened by an individual committed under the police power need not be so egregious. Recent cases challenging state commitment statutes in federal court as unconstitutionally vague have narrowed the definition of dangerousness to require that a finding of dangerousness be premised on a proven past act inflicting or threatening substantial harm to another. Bell v. Wayne County Gen. Hosp., 384 F. Supp. 1085, 1095 (E.D. Mich. 1975); Lynch v. Baxley, 386 F. Supp. 378, 388 (M.D. Ala. 1974). This would seem to include at least all criminal activity. These cases do, however, limit the definition of dangerousness more narrowly than may be true in other state jurisdictions where no definitive interpretation of a vague statute has been rendered.

42. Example A was derived from Livermore & Meehl, *supra* note 10, at 836-38. Meehl is a psychologist and this example was used, rather than another invented, to ensure that the characteristics of mental illness imputed to the hypothetical individual would reflect actual cases

Individual B is a young man with a long history of mental illness, currently living at home with his parents. B believes that he will be elected president of the United States in the forthcoming elections but also believes that there is a vast conspiracy to assassinate him. He perceives his father to be the malevolent leader of this conspiracy. When his father deprives him of his shotgun, B is enraged since the gun represented his last hope for self-defense. Believing that his father is bringing to fruition the conspiracy to assassinate him, B makes a seemingly unprovoked attack on his father. He is unable to understand the wrongfulness of his action or refrain from further attacks. He would be a proper subject for a police power commitment, or, if he were prosecuted for the assault on his father, for acquittal on the ground of insanity.[43]

Individual C was found not guilty by reason of insanity for the crime of murder and committed to a state hospital. His condition seemed to improve and three years later he was transferred from the maximum security unit and given ground privileges. A short time later a hospital employee was found raped and murdered in an isolated section of the hospital grounds, and a few days later C confessed to the crime. His trial for this crime did not begin until about a year later; in the meantime C remained in the hospital. The director of the hospital in another proceeding initiated at the time of the trial unsuccessfully petitioned a court for C's unconditional release, certifying that he was neither mentally ill nor dangerous. At the criminal trial, members of the hospital staff testified that at the time of the crime C had been cured of any mental disease or defect. C's insanity defense failed and he was convicted of second degree murder, but he has remained under commitment at the hospital by order of the court. This result would not occur under the proposed standard for commitment. C would either be mentally ill, be acquitted under the insanity defense, and remain at the hospital, or would be found not mentally ill and guilty and would receive

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of mental illness. The same rationale promoted the choice of examples B, C and D. The kinds of harm the individuals in the examples threaten or have caused are more serious than would be necessary to make a finding of dangerousness in most instances. Furthermore, all these individuals suffer from what would be described as psychosis by medical definitions of mental illness, but the current statutory standards, and broader medical definitions, would include far less severe disorders, such as neurosis or personality disorder.

43. This example is derived from the facts of State v. Rawland, 294 Minn. 17, 199 N.W.2d 77 (1972), an insanity defense case.

the same penal incarceration and possible opportunity for release that other convicted defendants are accorded.[44]

Individual D has a lengthy history of convictions for assault, usually arising out of quarrels with drinking companions. So inveterate a fighter and brawler is D that local law enforcement authorities anticipate his frequent appearance before them. Several months have passed since his last release from jail and in that time he has become increasingly reclusive. At a commitment proceeding initiated by the county attorney's office, D's landlady testifies that D has refused to answer the door, replies to questions in grunts and monosyllables, rarely goes out, and has become so careless of hygiene and dress that passing him in the hall is decidedly unpleasant. A psychiatrist who has examined D testifies that he suffers from simple schizophrenia and suffers no delusions or hallucinations. Assuming that D's past criminal record provides a basis for a finding of dangerousness, D would nevertheless not be a subject for police power commitment. There is no evidence that D's schizophrenia impairs his ability to control his behavior.[45]

III. CONCLUSION

If the individuals under both the insanity defense and police power commitments belong to the same class of persons who lack substantial capacity to control their behavior, then the same test, employing a uniform standard to identify a common and uniform characteristic, should be used to ascertain which individuals fall within this class. The criminal law has slowly and laboriously developed a standard, the insanity defense, to identify these individuals. Civil commitment law under the police power lacks this carefully focused, well-defined, and uniformly administered standard. Incorporating the insanity defense standard of mental illness with its focus on capacity to control behavior would afford this area of the law predictability of result, fair and uniform administration, and a restraint on the unguided discretion of the ultimate decision-maker, either judge or jury, in imposing such a severe curtailment of liberty.

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44. Example C incorporates the facts of United States v. Robinson, 439 F.2d 553 (D.C. Cir. 1970).

45. This example is derived from the discussion in PAGE, *supra* note 22, at 188.