IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

No. 77-5992

FRANK O'NEAL ADDINGTON,
Appellant,
v.

THE STATE OF TEXAS,
Appellee.

On Appeal from the Supreme Court of Texas

BRIEF FOR THE AMERICAN PSYCHIATRIC ASSOCIATION AS *AMICUS CURIAE*

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BRIEF FOR THE AMERICAN PSYCHIATRIC ASSOCIATION AS *AMICUS CURIAE*

INTEREST OF *AMICUS CURIAE*

The American Psychiatric Association, founded in 1844, is the nation's largest organization of qualified doctors of medicine specializing in psychiatry. Almost 24,000 of the nation's approximately 30,000 psychiatrists are members. Psychiatrists have the principal responsibility for providing expert testimony in civil commitment proceedings and for offering treatment to those who suffer from mental illness. The Association has par-

ticipated as *amicus curiae* in numerous cases involving mental health issues, including *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975), and *Parham* v. *J.L.*, No. 75-1690, prob. juris. noted May 31, 1977, argued December 6, 1977, set for reargument January 16, 1978. The instant case, in which the Court must decide whether the criminal standard of proof beyond a reasonable doubt is required in proceedings involving civil commitment of the mentally ill, will have important implications for the treatment of serious mental illness and, consequently, may greatly affect the concerns and the work of the Association and its members.

The parties have consented to the filing of this brief. Copies of their consenting letters have been filed with the Clerk.

QUESTION PRESENTED

Whether the due process clause requires that the "reasonable doubt" standard applicable in criminal cases be applied to state proceedings for civil commitment of the mentally ill.

STATEMENT OF THE CASE

The State of Texas provides by statute for the temporary and indefinite commitment of the mentally ill. All applications for temporary commitment must be supported by statements of two physicians that the subject is mentally ill and needs observation or treatment in a mental hospital. Tex. Mental Health Code, Art. 5547-32. (Hereinafter cited only by article number.) The person to be committed is then notified of the application, Art. 5547-33, and a hearing is held at which he may request consideration of his case by a jury. Art. 5547-36. Commitment may not be authorized unless it is determined both that the person is mentally ill and that he requires observation or treatment for his own welfare and protection or for the protection of other persons. Art. 5547-38. Even if such determinations are made, the court may decline to order commitment where satisfactory treatment can be provided outside a mental hospital. *Ibid.*

Indefinite commitment is permitted only if temporary hospitalization has proved insufficient. A petition for indefinite commitment must state upon information and belief that the proposed patient has been hospitalized for at least sixty days for treatment or observation, is mentally ill, and needs hospitalization for his own welfare and protection or for the protection of others. Art. 5547-41. The person must have been examined by two physicians within 15 days prior to the filing of the petition, and the physicians must certify that he is mentally ill and requires hospitalization. Art. 5547-42. The person to be committed is notified of a hearing on the petition, Art. 5547-44, is entitled to representation by counsel (including appointed counsel), *ibid.*, and receives a jury trial unless he waives it in writing. Art. 5547-45. Before a person can be committed indefinitely, the jury must decide on the basis of competent medical testimony, Art. 5547-50, that he is mentally ill and needs hospitalization for his own welfare and protection or for the protection of others. Art. 5547-51; Art. 5547-52.

Appellant was first hospitalized for temporary treatment after a family altercation. Supp. Tr. 12, 13. Thereafter, he was interviewed by psychiatrists, including the county psychiatric examiner, who recommended that he be committed for a longer period. See, *e.g.*, Supp. Tr. 17-18, 19-20, 21-24. The State then filed a petition for his indefinite commitment. Tr. 1-2.

The hearing on the State's petition lasted five days. The State presented numerous witnesses including two psychiatrists who stated their opinion that appellant was mentally ill and required hospitalization. See, *e.g.*, State-

ment of Facts 384-385, 503; see generally *id.*, 352-591. Witnesses for appellant, including a psychologist, testified that he could not be reliably classified as dangerous and that hospitalization was not required.

At the conclusion of the evidence, the trial judge instructed the jury that the State had to prove by "clear, unequivocal and convincing evidence" that appellant was "mentally ill" and that he "require[d] hospitalization in a mental hospital for his own welfare and protection or the protection of others." J.S. App. D-5; see Art 5547-51; Art 5547-52. Appellant objected to the charge, contending that the State had to prove the statutory criteria beyond a reasonable doubt. J.S. App. D-8. The judge also explained to the jury that the term "mentally ill" means "a mental condition which is such as to substantially impair the person's mental health." J.S. App. D-5. The jury then determined that appellant should be committed. It did not indicate whether its determination was based on a finding that he required hospitalization for "his own welfare and protecton," or for "the protection of others," or both.

Appellant appealed the commitment order to the Texas Court of Civil Appeals. See Art 5547-57. He contended, *inter alia*, that due process required the State to establish the criteria for commitment by proof beyond a reasonable doubt. The Court of Civil Appeals agreed, and remanded the case to the trial court for reconsideration according to the stricter standard. *Addington* v. *State*, 546 S.W.2d 105 (1976).

The Texas Supreme Court reversed, relying on its then-recent decision in *State* v. *Turner*, 556 S.W.2d 563 (1977), *cert. denied*, No. 77-6082, March 20, 1978. In *Turner* the court had declined to adopt a standard of "clear and convincing evidence" for civil commitment proceedings, stating that in its jurisdiction only the standards of preponderance of the evidence and proof beyond a reasonable doubt were recognized. The court then concluded that the preponderance of the evidence standard was most appropriate for civil commitment proceedings, noting that it perceived "several distinctions between civil commitment proceedings and criminal proceedings which justify the lesser standard [in civil commitment proceedings]." 556 S.W.2d at 566.

The court pointed out that a patient's loss of liberty resulting from hospitalization was less severe than the loss caused by imprisonment because the patient, unlike the convicted criminal, is "entitled to treatment, to periodic and recurrent review of his mental condition, and to release at such time as he no longer presents a danger to himself or others." *Ibid.* In addition, the court found that the lesser standard was justified by the "significant difference between the retrospective assessment of conduct made by a jury in a criminal case, and the determination of *future* conduct and *future* need made by a jury in a civil commitment." *Ibid.* (emphasis in original). If the more severe reasonable doubt standard were to be adopted, the court said, "the State's ability to act as *parens patriae* for the mentally ill would be impaired." As a result "a person in need of care [could] be deprived of aid because he is mentally incapable of knowing his needs and the medical profession cannot meet a too strict burden." *Ibid.*

The Texas Supreme Court thus affirmed the order of commitment in this case, ruling that "[s]ince the jury found [appellant] to be mentally ill under a stricter standard than is required, the instruction given does not constitute harmful error." J.S. App. A-2. Appellant, in his appeal here, contends that due process prohibits his commitment upon any standard less than reasonable doubt. J.S. 3. This Court noted probable jurisdiction on April 17, 1978.

SUMMARY OF ARGUMENT

It is the position of the American Psychiatric Association that neither the Constitution nor enlightened policy requires the reasonable doubt standard applicable in criminal cases to be applied to civil proceedings for commitment of the mentally ill.

a. The interests at stake in civil commitment proceedings are significantly different from the interests involved in criminal or juvenile proceedings (pp. 9-12 *infra*). The primary state concern in civil commitment proceedings is to provide assistance to seriously ill persons, a remote concern at best in criminal cases. Hospitalization of the mentally ill is sought not as an end in itself, but only as a necessary consequence of giving medical treatment. As a result, the commitment process cannot be viewed as a strictly adversarial one: in most cases, the ultimate interests of the State and the individual in his care and treatment should be largely the same.

Application of the analysis followed in *In re Winship*, 397 U.S. 358 (1970), to require use of the reasonable doubt standard in juvenile proceedings leads to a different result here. Although there are superficial similarities between the loss of liberty and social stigma associated with criminal convictions and that resulting from civil commitment, at bottom the differences, both qualitative and quantitative, are more compelling (pp. 12-14 *infra*). Similarly, community respect for the law and individual security will more likely be advanced by permitting responsive procedures in civil commitment proceedings than by forcing adherence to the standards accepted in the criminal law (pp. 14-15 *infra*). A balancing of the comparative social and individual risks, the approach favored

by Mr. Justice Harlan in *Winship, supra*, cuts the same way (pp. 15-16 *infra*).

b. Nor would imposition of a constitutional reasonable doubt standard be sound policy. The proper procedures for commitment cannot reasonably be viewed apart from the substantive criteria for commitment, which vary from state to state. A loose substantive standard for commitment may in fact justify a stricter standard of proof, but the Texas statutes at issue here have never been authoritatively construed by the state courts (pp. 17-18 *infra*). Moreover, different criteria serve different purposes. To apply a reasonable doubt standard in all commitment cases will further criminalize the commitment process and inhibit essential state efforts to care for the mentally ill.

ARGUMENT

The question in this case is whether due process requires the adoption of a nationwide standard of proof beyond a reasonable doubt in civil commitment. Although this issue is cast in limited procedural terms, *amicus*, the American Psychiatric Association, believes that the decision of this Court will affect far more than the question of procedure immediately involved.[1]

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[1] We note at the outset that, in contrast to the position taken by *amici curiae*, National Association of Mental Health, *et al.*, Br. at 5-6, appellant raises no issue regarding the constitutional necessity for an intermediate standard of proof, such as clear and convincing evidence. The jury in this case, instructed according to the clear and convincing evidence standard, found that appellant was subject to commitment; the Texas Supreme Court, applying a preponderance of the evidence standard, upheld the order of commitment. Appellant can prevail, therefore, only if this Court directs that the statutory prerequisites for civil commitment must be proved beyond a reasonable doubt (or, at least, by more than clear and convincing evidence). If it does not, there is no occasion for this Court to fashion a constitutional rule of procedure binding on the states that will provide no benefit to appellant.

Any complete analysis of procedural safeguards must necessarily involve an examination of substantive standards for civil commitment, and of the role of government in the treatment of the mentally ill. During the past decade, lower federal courts have been inundated with litigation challenging both the substantive standards and the procedural safeguards for civil commitment.[2] Although various constitutional questions have been raised, most of the challenges essentially demand that the legal approach to the confinement of the mentally ill be made to conform to that of the criminal law.[3] The effect of this litigation has largely been to eviscerate the states' *parens patriae* function in civil commitment, while at the same time circumscribing their police powers by establishing increasingly narrower and more specific requirements for proving dangerousness.[4] Not surprisingly, one dramatic result of these changes has been that many seriously mentally ill people have "escaped" civil commitment only to find themselves abandoned by society.[5]

[2] *E.g.*, *Lessard* v. *Schmidt*, 349 F.Supp. 1078 (E.D. Wisc. 1972), *vacated on other grounds*, 414 U.S. 473 (1974), *on remand*, 379 F. Supp. 1376 (1974), *vacated*, 421 U.S. 957 (1975), *prior judgment reinstated*, 413 F. Supp. 1318 (1976); *Suzuki* v. *Alba*, 438 F.Supp. 1106 (D. Hawaii 1977); *French* v. *Blackburn*, 428 F.Supp. 1351 (M.D. N.C. 1977); *Goldy* v. *Beal*, 429 F.Supp. 640 (M.D. Pa. 1976); *Stamus* v. *Leonhardt*, 414 F.Supp. 439 (S.D. Iowa 1976); *Suzuki* v. *Quisenberry*, 411 F.Supp. 1113 (D. Hawaii 1976); *Coll* v. *Hyland*, 411 F.Supp. 905 (D. N.J. 1976); *Lynch* v. *Baxley*, 386 F.Supp. 378 (M.D. Ala. 1974); *Bell* v. *Wayne County General Hospital at Eloise*, 384 F.Supp. 1085 (E.D. Mich. 1974).

[3] See Stone, *Recent Mental Health Litigation: A Critical Perspective*, 134 Am. J. Psychiatry 273 (1977).

[4] See, *e.g.*, *Lessard* v. *Schmidt*, *supra*, 349 F.Supp. at 1093, which held, *inter alia*, that the Constitution requires the State to prove an overt act, attempt or threat as a precondition to civil commitment.

[5] This trend has been most obvious in highly populated states, where mental patients have increasingly been caught up in low-level criminal behavior as they are consigned to the blight of urban ghettos. See Bachrach, *Deinstitutionalization: An Analytical Review and Sociological Perspective* (NIMH, 1976); Robitscher, "Moving Patients Out of Hospitals—In Whose Interest?" *in* P. Ahmed & S. Plog, eds., State Hospitals: What Happens When They Close 141 (1976); Schwed, *Protecting the Rights of the Mentally Ill*, 64 A.B.A.J. 564 (1978).

This Court, as it recognized in *Jackson* v. *Indiana*, 406 U.S. 715, 728 (1972), has had very little to say about these important judicial developments. See *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975). Thus the instant case will have substantial symbolic as well as practical significance. *Amicus* believes that adoption of the reasonable doubt standard would do much to assure the unfortunate rigidification and criminalization of the civil commitment process at a time when the legal, social and medical aspects of that process are in a state of dynamic growth and change. In particular, *amicus* is concerned that constitutional imposition of such a standard would effectively shut the door on the sensible application of *parens patriae* civil commitment.

I. Due Process Does Not Require That The Criteria For Civil Commitment Be Proved Beyond A Reasonable Doubt.

Any constitutional determination of "what process is due" in a particular situation involves a careful assessment of the likely impact of a specific procedure on the competing interests to be affected thereby. See, *e.g.*, *Matthews* v. *Eldridge*, 424 U.S. 319 (1976).[6] In criminal cases, this Court has concluded that the interests of the

[6] Although appellant claims that "the State's alleged interests in a lower evidentiary standard are simply irrelevant under the *Winship* test," Br. at 29, *Winship*, itself, refutes this contention. There the Court fully considered the State's interests but found them insufficient to overcome the need for a standard of proof beyond a reasonable doubt. 397 U.S. at 366-367. Due process always involves a comparative balance. See *Patterson* v. *New York*, 432 U.S. 197 (1977); *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975).

individual so outweigh the State's interests that the "Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship, supra*, 397 U.S. at 364. The Court further has ruled that the same rigorous standard applies when juveniles "are charged with violations of a criminal law," since "[t]he same considerations that demand extreme caution in factfinding to protect the innocent adult apply as well to the innocent child." *Id.* at 365.

"The requirement of proof beyond a reasonable doubt in a criminal case is 'bottomed on the fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.'" *Patterson* v. *New York*, 432 U.S. 197, 208 (1977) (citation omitted). The calculus in civil commitment proceedings, however, may be radically different. In a criminal case, society alone bears the risk of a mistaken release: the freed criminal receives an obvious benefit. In civil commitment proceedings, the proposed patient bears the risk of mistaken release himself. The legal system does no favor for a person needing medical care when it denies treatment to him. If he later harms others, society may share, but still only share, the consequences of having imposed unduly restrictive procedural barriers to commitment.

The differences in relative risks stem from the differences in the systems themselves. In criminal matters the State and the individual are purely adversaries. The State's purpose is essentially to punish the guilty, for reasons of individual deterrence and retribution, and to make an example of the offender so that others will be deterred as well. See, *e.g.*, *Gregg* v. *Georgia*, 428 U.S. 153, 183 (1976) (plurality opinion). The individual's interest is solely to avoid conviction and its attendant consequences.

The same is true, though perhaps to a lesser extent, in juvenile proceedings. A delinquency determination "is by definition bottomed on a finding that the accused *committed a crime.*" *In re Winship, supra*, 397 U.S. at 374 (Harlan, J., concurring) (footnote omitted) (emphasis added). In both juvenile and adult trials, the issue thus is whether the defendant committed a particular harmful act with the requisite intent. Not surprisingly in these circumstances, the juvenile, seeking to avoid conviction, views his interest as diametrically opposed to that of the State.

Civil commitment, by contrast, implicates far different interests. The paramount societal interest, one that is at best of peripheral concern in the criminal law, is to provide assistance to those who are seriously mentally ill. As the Illinois Supreme Court recently stated:

> "Our free society's interest in prospectively protecting itself from dangerous or harmful conduct, standing alone, suffices to justify only minimal infringements upon an individual's person [*sic*] liberty. A high value has also been placed, however, on our society's obligation to protect and care for those of its members unable to protect or care for themselves. It is important to a concerned and humane society that the margin of error be held to a minimum in denying such protection and care." *In re Stephenson*, 367 N.E.2d 1273, 1276-77 (1977).

The individual's interests in a civil commitment proceeding also are different from those at stake in a criminal case. While in both instances the individual may have a significant interest in protecting his liberty, in a criminal case this is his only concern. Rarely, if ever, will a convicted criminal agree that incarceration was actually in his best interest. In civil commitment, however, it may indeed be in the best interest of the individual to secure treatment designed "to restore him to a useful life and

place in society." Art 5547-2. See Gove & Fain, *A Comparison of Voluntary and Committed Psychiatric Patients*, 34 Arch. Gen. Psychiatry 669, 675 (1977) (75.3% of committed patients studied subsequently reported that hospitalization helped; 5.5% of such patients reported hospitalization was harmful). Moreover, if the allegations of the commitment petition are true—that is, if the individual should properly be committed—he will not typically be in a position to assess his own interests rationally and may indeed have failed to seek voluntary treatment for precisely this reason. See Spensley, *et al.*, *Involuntary Hospitalization: What For and How Long?*, 131 Am. J. Psychiatry 219 (1974) (68% of committed patients subsequently accepted recommendation for voluntary treatment).

The significance of these distinctions is clear when viewed against the specific considerations found crucial in *Winship*. There, the Court identified four factors justifying the reasonable doubt standard in criminal cases: (1) the accused's interest in liberty; (2) the accused's interest in avoiding stigmatization; (3) the community's respect for the moral force of the criminal law; and (4) the individual's need for the security of knowing that he cannot be convicted of a crime without the government proving his guilt with the utmost certainty. 397 U.S. at 363-64. Consideration of these factors in the context of civil commitment leads to a different result.

The strongest point of similarity between the criminal law and civil commitment obviously lies in the first factor, the potential loss of liberty. But even this factor is substantially different in the two systems. In the criminal law, the loss of liberty typically is, in and of itself, a desired societal goal, for purposes of deterrence and retribution. In civil commitment, by contrast, deprivation of liberty is not an end in itself; it is, rather, a derivative consequence of the need for intensive care and treatment. Indeed, in contrast to the criminal justice system, the

State has every interest in minimizing the committed person's loss of liberty.

Moreover, in a psychiatric hospital truly designed for effective treatment, the qualitative intrusion on the individual's liberty is different from that resulting from imprisonment. See generally J. Maxmen, G. Tucker & M. LeBow, Rational Hospital Psychiatry: The Reactive Environment (1974). When the inappropriate punitive aspects of hospitalization are removed, the individual is often provided significant freedom of movement. The "open" ward of today's psychiatric facilities is making an anachronism of the "locked door" of the past. Similarly, the acknowledged therapeutic effect of increased respect for the patients' privacy has led to less monitoring and intrusion. This increased concern for patient liberty has no counterpart in the criminal law, where protection and security are still the dominant considerations.

Finally, it is important to note the grave intrusion on liberty that is inflicted by a severe mental illness. The aphorism that "stone walls do not a prison make" is a particularly apt reminder of the confining nature of a debilitating mental illness. In a real sense, many severely mentally ill persons may have little recognizable "liberty" to give up in exchange for hospital treatment. See Chodoff, *The Case for Involuntary Hospitalization of the Mentally Ill*, 133 Am. J. Psychiatry 496 (1976). A meaningful assessment of liberty must involve analysis of such qualitative as well as quantitative considerations.

Appellant also overstates the stigma resulting from civil commitment. What is truly, if unfortunately, stigmatizing is severe mental illness and its resulting symptomatology. See Schwartz, *et al.*, *Psychiatric Labeling and the Rehabilitation of the Mental Patient*, 31 Arch. Gen. Psychiatry 329 (1974) ("psychiatric treatment per se is less important in determining rejection of the men-

tally ill than is the ex-patient's level of impairment"). As the sources cited by appellant plainly demonstrate, Br. at 21-23, society has an irrational fear of the aberrant, albeit non-dangerous, behavior that results from mental illness. Long before civil commitment existed such stigma existed. There is no basis for suggesting that the voluntary mental patient is less stigmatized than the involuntary patient. Indeed, in the long-run the patient who is cured or whose symptoms are ameliorated is less likely to suffer from adverse social responses than the untreated patient whose bizarre behavior can be readily witnessed by all who come in contact with him. The patient who is abandoned faces the prospect of greater stigmatization, resulting from the aggravated symptoms of an untreated disease, and from the possibility of getting enmeshed in the criminal justice system.

Nor will community respect for the law be enhanced by imposing the reasonable doubt standard in civil commitment cases. To the contrary, the community may well become increasingly disenchanted if members who engage in irrational and destructive behavior are denied medical assistance because of needless procedural barriers. Respect for the law is more likely to be advanced by a reasonable accommodation with medical capabilities than by increased conflict between legal and medical theory at the patient's possible expense. At the very least, the law should permit a flexible response to changes in medical knowledge rather than convert a particular procedure into a constitutional requirement.

The individual's concern for security in everyday life also justifies a less rigorous burden of proof in civil commitment. To be genuinely secure, an individual must know not just that he will be protected from unwarranted hospitalization, but that he can receive help if he becomes a victim of a serious mental illness, even if he is unable to perceive the need for such assistance. There

can be little comfort in knowing that legal procedures—rather than medical knowledge—will be the key factor in determining whether proper treatment will be provided.

The distinctions between criminal law and civil commitment are also compelling when viewed according to the analysis advanced by Mr. Justice Harlan in his concurrence in *Winship*. There, Justice Harlan succinctly noted that "the choice of the standard for a particular variety of adjudication . . . reflect[s] a very fundamental assessment of the comparative social costs of erroneous factual determinations." 397 U.S. at 370 (footnote omitted). In criminal and juvenile cases, he concluded, proof beyond a reasonable doubt is required because "it is far worse to convict an innocent man than to let a guilty man go free." *Id.* at 372.

The "social costs" of erroneous decisionmaking in civil commitment cases differ substantially from those in criminal cases. As indicated above, in contrast to what occurs in the criminal law, failure to commit a person who properly should be committed may prevent him from "getting needed care or treatment which will enable him to function normally . . ." *In re Stephenson, supra*, 367 N.E.2d at 1277.

On the other hand, the consequences of an erroneous decision to commit are not likely to be so grave as those attending an erroneous criminal conviction. First, the criminal process is based on the implicit philosophical assumption that "[t]he line between guilt and innocence is, in an abstract sense, clear, *i.e.*, either defendant did or did not commit the offense . . ." *In re Stephenson, supra*, 367 N.E.2d at 1277. In short, a definite boundary line separates the guilty from the innocent, and to convict any of those on the "innocent" side of the line is a complete injustice. No such bright line can be drawn in civil commitment cases, where the criteria necessarily lead to questions of degree. Thus, although any "erroneous" com-

mitment is unfortunate, it is nevertheless true that if a lower burden of proof were to result in such commitments, it would affect those who partially satisfy the criteria, rather than those who are wholly free of such characteristics.

More significantly, the results of erroneously committing persons who partly satisfy the substantive standards are different from those of incarcerating innocent people. Under Texas law, for example,

> "[t]he involuntary mental patient is entitled to treatment, to periodic and recurrent review of his mental condition, and to release at such time as he no longer presents a danger to himself or others." *State* v. *Turner*, *supra*, 556 S.W.2d at 566 (citations omitted).

Thus, if erroneously committed, a person at least has the chance to receive potentially helpful treatment. Moreover, as a result of the "recurrent review" of the patient's status under Texas law, opportunity exists for early detection and release of an erroneously committed patient. No such opportunity exists for the erroneously convicted criminal; parole, of course, does not normally depend upon subsequent discovery that the defendant did not commit the crime.[7]

[7] These kinds of distinctions regarding the consequences of an erroneous factual finding did not go unnoticed by Justice Harlan in *Winship*, who compared delinquency determinations with "persons in need of supervision [PINS]" adjudications in New York. 397 U.S. at 374 n.6. He stated that a PINS adjudication was not bottomed on a violation of the criminal law, but rather applied to a child "who is an habitual truant or who is incorrigible, ungovernable or habitually disobedient and beyond the lawful control of parent or other lawful authority." *Ibid.* In view of this distinction, Justice Harlan made clear that "in a PINS type case, the consequences of an erroneous factual determination are by no means identical to those involved [in a delinquency case]," *ibid.*, even though a PINS determination can result in a deprivation of a child's liberty. In terms of the "consequences of an erroneous factual determination," civil commitment proceedings are more akin to a PINS determination than a criminal trial.

II. Adoption Of A Constitutional Standard Of Proof Beyond A Reasonable Doubt In Civil Commitment Cases Would Cause A Serious Erosion Of The State's Role As *Parens Patriae.*

Appellant and *amici curiae*, National Association for Mental Health, *et al.*, strongly suggest that the importation of criminal standards of proof into civil commitment proceedings is good policy as well as good law. That suggestion merits closer examination.

Perhaps the most remarkable feature of this case is that appellant is asking the Court to adopt a nationwide standard of the highest degree of proof before it has specifically addressed the constitutional limitations on the substantive criteria that can justify commitment.[8] But surely it makes little sense to consider procedural standards of proof without regard to the substantive criteria to be proved. The Texas statute, for example, states that, before a person can be committed, it must be shown that he "requires hospitalization in a mental hospital for his own welfare and protection or for the protection of other persons," Art. 5547-52; neither the statutes nor the case law, however, define the scope of individual welfare and protection. It could in fact be easier to prove a broad interpretation of these criteria beyond a reasonable doubt than to prove a narrow interpretation by a preponderance of evidence. In the absence of more precise substantive standards, therefore, the value of an inflexible procedural rule seems limited.

Moreover, different substantive standards serve very different purposes. In *O'Connor* v. *Donaldson*, *supra*, 422 U.S. at 573-74, the Court noted that the "contemporary"

[8] See Share, *The Standard of Proof in Involuntary Civil Commitment Proceedings*, 1977 Det. Coll. L. Rev. 209, 210 (1977) ("[i]t is important to keep in mind that in any consideration of the law relating to civil commitment the starting point must be what it is that must be proved, not how much must it be proved by.").

justifications for civil commitment generally require a showing that a person is "mentally ill" and that his hospitalization is likely "to prevent injury to the public, or to ensure his own survival or safety or to alleviate or cure his illness." Thus, the Court recognized that the legal phrase "civil commitment" embodies various substantive criteria, serving different societal ends. On the one hand, civil commitment reflects the pure *parens patriae* concern to help the seriously disturbed citizen who can be treated effectively; on the other hand, it reflects exercise of society's police power to protect itself against what it perceives to be the dangerous mentally ill, with perhaps the ancillary concern of providing treatment to such people.

These concerns are distinct—indeed, almost polar opposites. Moreover, it is obvious that the proof relating to each is markedly different. Nevertheless, appellant makes a broadside argument that all civil commitments—irrespective of the purpose or the nature of proof—must be established by proof beyond a reasonable doubt.[9] Acceptance of this uniform standard will have the derivative, if unintended, effect of forcing the states to develop the kinds of substantive criteria that can be proved beyond a reasonable doubt. This, in turn, is likely to erode, if not destroy, the *parens patriae* aspects of civil commitment.

[9] *Amici curiae,* National Association of Mental Health, *et al.,* apparently attempts to rescue appellant's broadside by arguing that proof beyond a reasonable doubt is required when "an individual is sought to be confined on grounds that he or she *constitutes a danger to others* . . ." Br. at 11 (emphasis supplied). But this case involves *only* a facial challenge to the Texas commitment statute which provides for commitment on two distinct grounds—*i.e.,* individual "welfare and protection" or "protection of others." Art. 5547-52. Indeed, this Courts' appellate jurisdiction is invoked specifically on the basis of appellant's facial challenge. See 28 U.S.C. § 1257(2). Hence, this case is not limited to the underlying dangerousness predicate of *amici*'s brief.

The *parens patriae* aspects of commitment focus on the individual's mental condition and the likely consequences of that condition for him, as well as the prospect that his condition can be cured or alleviated through intervention. Such factors inescapably involve consideration of medical concepts such as diagnosis and prognosis, concepts that have provoked considerable judicial and social controversy. See, *e.g., Greenwood* v. *United States,* 350 U.S. 366, 375 (1956).[10] However that controversy ultimately may be resolved, nothing will be gained in the interim by making hospitalization for the mentally ill contingent on meeting a legal standard of proof that ignores existing (though limited) medical knowledge.[11] For, while *amicus* is not prepared to say that these medical matters can never be established with the kind of certainty required by the reasonable doubt standard,[12] the pragmatic realities of the adversary process make it apparent that a competent attorney almost invariably will be able to raise a reasonable doubt with respect to these medical criteria.[13] As Judge Sobeloff has acknowledged:

> "After all, the ultimate issue is not as in a criminal case whether an alleged act was committed or event

[10] In this respect, it should be noted that these kinds of subjective criteria are distinctly different from "intent" as that concept is applied in the criminal law. "Intent," as the Court made clear in *Mullaney* v. *Wilbur, supra,* 421 U.S. at 702, is an "objective behavioral criterion" traditionally "established by adducing evidence of the factual circumstances surrounding the commission of the [criminal act]."

[11] See note 15 *infra.*

[12] It should be noted that in recent years confidence in the reliability of psychiatric diagnoses of serious mental illness has increased. See A. Stone, Mental Health and Law: A System In Transition 65-66 (NIMH, 1975); Helzer, *et al., Reliability of Psychiatric Diagnosis,* 34 Arch. Gen. Psychiatry 136 (1977).

[13] This is particularly true because, despite considerable recent judicial concern regarding the quality of counsel representing the individual in commitment cases, see, *e.g., Memmel* v. *Mundy,* 249 N.W.2d 573 (Wisc. 1977), there is no comparable concern regarding the quality of counsel who present the case for commitment.

occurred, but the much more subjective issue of the individual's mental and emotional character. Such a subjective judgment cannot ordinarily attain the same 'state of certitude' demanded in criminal cases." *Tippet* v. *Maryland*, 436 F.2d 1153, 1165 (4th Cir. 1971) (opinion concurring and dissenting). See also *Lynch* v. *Baxley*, 386 F.Supp. 378 (M.D. Ala. 1974) (3 judge court).[14]

Dissatisfaction with the uncertainty inherent in the medical aspects of civil commitment has already led to a shift in focus from mental illness itself to the behavioral effects of that illness; in the traditional legal formula of "mental illness plus something else," the emphasis has been placed on the "something else" (usually dangerousness).[15] In turn, since there is no established basis for making even remotely accurate predictions about future harmful behavior,[16] the focus on dangerousness has shifted the inquiry to *past* antisocial or harmful behavior. See, *e.g.*, *Lessard* v. *Schmidt*, *supra*; *Lynch* v. *Baxley*, *supra*. This process of "criminalization" almost inexorably demands the adoption of the reasonable doubt standard. For once the dominant focus of civil commitment becomes past antisocial behavior, the purpose of civil commitment begins to closely mirror that

[14] An article in the Harvard Law Review, even as it urges a standard of proof beyond a reasonable doubt in civil commitment, candidly acknowledges that "[g]iven the relatively undeveloped state of psychiatry as a predictive science, potential detainees probably should quite often be able to raise at least a reasonable doubt that they fall within the standards." Developments in the Law—Civil Commitment, 87 Harv. L. Rev. 1190, 1302 (1974).

[15] This dissatisfaction has also led to the futile search for a "legal," as distinguished from a medical, definition of mental illness. Cf. *Commonwealth ex rel. Finken* v. *Roop*, 339 A.2d 764 (Pa. Super. 1975); *In re Beverly*, 342 So.2d 481 (Fla. 1977).

[16] See, e.g., A. Stone, Mental Health and Law: A System In Transition, *supra* note 12, at ch.2; Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 Calif. L. Rev. 693 (1974).

of the criminal law (positioning society *against* the individual),[17] and the issues in dispute (*i.e.*, the occurrence of past acts) are traditionally subject to proof beyond a reasonable doubt.[18]

But this argument proves too much. Absolute adherence to the reasonable doubt standard will increasingly turn civil commitment into a function of the police power where the State will seek to prove prior harmful acts by the traditional criminal standard of proof. What it will not do is alleviate the severe and debilitating mental illness that plagues many in our society. The vast majority of people suffering from serious mental illness have not committed harmful acts and are not dangerous to other people;[19] they *can*, however, have their conditions cured or effectively controlled with proper psychiatric treatment.[20] Yet it is these people who, if appellant's argument prevails, will be deprived of the benefits of civil commitment.

[17] It should also be noted that psychiatry's ability to treat many of those who are actually violent is limited. See Stone, Comment, 132 Am. J. Psychiatry 829 (1975). Hence these commitments often cannot be justified on the ground that the State is capable of providing assistance to the patient.

[18] This is essentially the argument advanced both by appellant and *amici curiae*, National Association of Mental Health, *et al.* Each suggests, *e.g.*, Appellant's Br. at 32; Amici's Br. at 19-20, that adoption of the reasonable doubt standard would present no practical problems of proof precisely because civil commitment *should* be linked to proof of prior harmful acts. Indeed, *amici curiae* candidly acknowledged this position by stating that "[c]ertainly it should not be 'impossible' for the state to meet *some* substantive standard 'beyond a reasonable doubt.'" Br. at 22 (emphasis in original).

[19] See, *e.g.*, Gulevich & Bourne, "Mental Illness and Violence," *in* D. Daniels, *et al.*, eds., Violence and the Struggle for Existence 309 (1970). See also sources cited at n.16 *supra*.

[20] See, *e.g.*, Gove & Fain, *A Comparison of Voluntary and Committed Psychiatric Patients*, 34 Arch. Gen. Psychiatry 669, 675 (1977).

It is not an adequate response to suggest that such people can seek voluntary treatment. While the American Psychiaric Association strongly endorses voluntary treatment, the incontrovertible fact remains that there will always be a small but significant number of people who, *because* they suffer from mental illness, will not or cannot seek treatment. These include, for example, people who, while not objecting to treatment, simply fail to seek it, as well as severely depressed persons who believe that they are "unworthy of treatment," or paranoid schizophrenic persons who claim that "the doctors are undercover agents who are part of the conspiracy against them." For such people, the choice is between "involuntary" commitment or abandonment. And, as the court said in *Coll* v. *Hyland, supra,* 411 F.Supp. at 910, "[w]hen the choice is between a loss of life or health and a loss of liberty for a brief period of time, the preferable alternative is apparent." The fact that psychiatry has not reached the level of certainty required by the reasonable doubt standard should not mean that this "preferable alternative" will no longer be available. See *Greenwood* v. *United States, supra,* 350 U.S. at 376.

To be sure, the strength of this position depends not merely on the availability of curative treatment but, more significantly, on its actual provision to the committed patient. There can be no doubt, as appellant has argued, Br. at 16-18, that many who have been committed in the past have had to spend time in grim and destructive institutions that are sometimes less conducive to their well-being than prisons. This tragic reality has strongly kindled the argument for "criminalization" of civil commitment: if hospitals are like prisons, the criteria for becoming a patient should be similar to those for becoming a convict. But this remedy does not meet the problem. If a court provides the most rigorous safeguards and standards of proof, but then confines a patient

in a hospital where little or no care and treatment are provided, it is difficult to understand how an acceptable result, either morally or constitutionally, has been achieved.

The proper remedy to the problem of prison-like hospital conditions is to correct the conditions, not to strengthen the procedural antecedents to hospitalization. See, *e.g.*, *Wyatt* v. *Aderholt*, 503 F.2d 1305 (5th Cir. 1974). The contemporary psychiatric hospital is capable of providing effective treatment in a relatively short time, and in an environment that provides patients with maximum liberty compatible with their conditions.[21] Security measures can be minimized; locked doors and physical restraints need be used only in extreme situations.

These improvements have begun to be realized. Increasingly, state legislatures have allocated more funds for hospitalized psychiatric patients. And, despite the claim by proponents of "criminalization" that there is marked pressure by psychiatrists to confine people needlessly, the evidence is to the contrary: the census of state and county hospitals has declined dramatically in the past decade.[22] Likewise, the length of stay for hospitalized psychiatric patients has so decreased that at least 75% are discharged within 3 months, and 87% within 6 months.[23] Continuation of this progress, and the achieve-

[21] For this reason, *amicus* has proposed as an official policy statement that patients only be involuntarily hospitalized in facilities accredited by the Joint Commission on the Accreditation of Hospitals. Such accreditation assures that at least the capacity and environment for effective treatment are available.

[22] Between 1965 and 1974 the number of resident patients in state and county mental hospitals decreased from 475,202 to 215,573. See Ozarin, Redick & Taube, *A Quarter Century of Psychiatric Care, 1950-1974: A Statistical Review,* 27 Hosp. & Comm. Psychiatry 515, 516 (1976).

[23] See Ozarin, Redick & Taube, *supra* note 22, at 516. Those data are based on a 1971 survey. While apparently no comparable later data exist, *amicus* is confident that the length of hospitalization for psychiatric patients has decreased further in subsequent years.

ment of other much needed improvements, will not be promoted by adoption of the criminal standard of proof beyond a reasonable doubt in civil commitment cases.[24]

In any event, in view of the importance of the issue, if this Court is to eradicate or severely limit the *parens patriae* component of civil commitment, it should do so when the issue is directly presented, not as an incidental consequence of resolving a narrow procedural issue. To do otherwise is surely to allow the tail to wag the dog.

III. Proper Concern For Flexibility In The Effective Administration Of The Varying State Commitment Laws Requires That The Individual States Determine The Burden Of Proof In Civil Commitment Cases.

This Court, noting in an analogous case its concern for flexibility and experimentation in state laws, recently made clear that Due Process

> "has required that only the most basic procedural safeguards be observed; more subtle balancing . . . [has] been left to the legislative branch." *Patterson* v. *New York*, *supra*, 432 U.S. at 210.

See also *Specht* v. *Patterson*, 386 U.S. 605 (1967), where the Court required certain procedural safeguards prior to imposition of post-conviction commitment under a sex offender statute, but did not include proof beyond a reasonable doubt among these.

[24] On the contrary, criminalization of civil commitment will insure a hospital population that more closely resembles a prison population. See, Zitrin, Hardesty & Burdock, *Crime and Violence Among Mental Patients*, 133 Am. J. Psychiatry 142 (1976); Sosowsky, *Crime and Violence Among Mental Patients Reconsidered in View of the New Legal Relationship Between the State and the Mentally Ill*, 135 Am. J. Psychiatry 33 (1978). Such patients will require the hospital to adopt the kinds of anti-therapeutic security measures used in prisons.

The Brief for *amici curiae*, the National Association for Mental Health, *et al.*, contains a detailed appendix reflecting that civil commitment laws have undergone dramatic changes in recent years. The survey indicates that the substantive criteria for commitment as well as the procedural safeguards attendant thereto vary greatly among the fifty states.[25] See also, Share, *The Standard of Proof In Involuntary Commitment Proceedings*, *supra* note 8, at 209. Some states, such as Wisconsin, essentially have adopted the criminal model of commitment, requiring substantive criteria that focus on prior acts, and procedural safeguards that include proof beyond a reason-

[25] This factor alone indicates that there is not the kind of unanimity that would augur for a constitutional rule. See *Leland* v. *Oregon*, 343 U.S. 790, 798 (1952); *McKeiver* v. *Pennsylvania*, 403 U.S. 528, 548 (1971). Amici's survey indicates that only seven states have adopted the reasonable doubt standard by statute. And while some courts have upheld the standard, the decided majority have ruled against it. Our research indicates that the following 14 courts have rejected the reasonable doubt standard in civil commitment cases. *French* v. *Blackburn*, 428 F.Supp. 1351, 1360 (M.D. N.C. 1977); *Stamus* v. *Leonhardt*, 414 F.Supp. 439, 449 (S.D. Iowa 1976); *Doremus* v. *Farrell*, 407 F.Supp. 509, 517 (D. Neb. 1975); *Bartley* v. *Kremens*, 402 F.Supp. 1039, 1052 (E.D. Pa. 1975), *vacated on other grounds*, 431 U.S. 119 (1977); *Lynch* v. *Baxley*, 386 F.Supp. 378, 393 (M.D. Ala. 1974); *State* v. *Turner*, 556 S.W.2d 563 (Tex. 1977); *In re Stephenson*, 367 N.E.2d 1273 (Ill. 1977); *In re Beverly*, 342 So.2d 481 (Fla. 1977); *State* v. *Kroll*, 344 A.2d 289 (N.J. 1975); *In the Matter of Valdez*, 540 P.2d 818 (N.M. 1975); *In the Matter of Ward M.*, 533 P.2d 896 (Utah 1975); *State ex rel. Hawks* v. *Lazaro*, 202 S.E.2d 109, 126-27 (W.Va. 1974); *In re Levias*, 517 P.2d 588 (Wash. 1973); *Fhagen* v. *Miller*, 317 N.Y.S.2d 128, 138 (Sup. Ct. N.Y. Co. 1970), *modified*, 321 N.Y.S. 2d 61 (App. Div. 1971), *modified*, 328 N.Y.S.2d 393 (Ct. App. 1972). The following 6 courts have upheld the reasonable doubt standard in commitment cases: *In re Ballay*, 482 F.2d 648 (D.C. Cir. 1973); *Suzuki* v. *Quisenberry*, 411 F.Supp. 1113, 1132 (D. Hawaii 1976); *Lessard* v. *Schmidt*, 349 F.Supp. 1078, 1095 (E.D. Wisc. 1972), *vacated on other grounds*, 414 U.S. 473 (1974), *on remand*, 379 F.Supp. 1376 (1974), *vacated*, 421 U.S. 957 (1975), *prior judgment reinstated*, 413 F.Supp. 1318 (1976); *Superintendant of Worster State Hospital* v. *Hagbert*, 372 N.E.2d 242 (Mass. 1978); *Proctor* v. *Butler*, 380 A.2d 673 (N.H. 1977); *In re Hodges*, 325 A.2d 605 (D.C. 1974).

able doubt. Other states, such as Missouri, still opt for a considerable degree of *parens patriae* authority in this area.

Amicus views this diversity as constructive. For even though we strongly favor *parens patriae* commitment power, we recognize that there are serious divisions in our society about this issue. By allowing the political process to grapple with these competing claims, society will best be able to benefit from the knowledge to be gained from experimentation and diversity.[26] Uniform imposition of the reasonable doubt standard will stymie this dynamic process.[27]

The Task Panel on Legal and Ethical Issues in its report to the President's Commission on Mental Health has recently stated: "[L]egal closure on the question of commitment criteria would now be premature and unwise." Task Panel Reports Submitted to the President's Commission on Mental Health 1359, 1445 (Vol. IV, 1978). At a time when long-denied rights are beginning to be recognized and when courts and legislatures are addressing the difficult and sensitive choices between legal rights and social results, this Court should be especially "reluctant to disallow the states to experiment further and to seek in new and different ways the elusive answers

[26] See *Greenwood* v. *United States, supra,* 350 U.S. at 376 ("Certainly denial of constitutional power of commitment . . . ought not to rest on dogmatic adherence to one view or another on controversial psychiatric issues.").

[27] In this regard it is well to recall Justice Harlan's admonition in *In re Gault,* 387 U.S. 1, 77-78 (1967) (citation omitted):

> "I very much fear that this Court by imposing these rigid procedural requirements may inadvertently have served to discourage these efforts to find more satisfactory solutions for the problems of juvenile crime, and may thus now hamper enlightened development of the system of juvenile courts. It is appropriate to recall that the Fourteenth Amendment does not compel the law to remain passive in the midst of change; to demand otherwise denies 'every quality of the law but its age.' "

to the problems of the [mentally ill] . . ." *McKeiver* v. *Pennsylvania, supra,* 403 U.S. at 547. In our view, the Constitution does not mandate a contrary result.

CONCLUSION

For the foregoing reasons, *amicus curiae*, the American Psychiatric Association, urges this Court to affirm the judgment below.

Respectfully submitted,

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