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WHY OHIO SHOULD RECOGNIZE THE RIGHT TO A JURY TRIAL IN INVOLUNTARY COMMITMENT PROCEEDINGS

*Katherine McDonald**

“Experience should teach us to be most on our guard to protect liberty when the government’s purposes are beneficent.”¹

I. INTRODUCTION

Each year in the U.S., “well over one million persons are civilly committed to hospitals for psychiatric treatment,” and a third are involuntary commitments.² Involuntary commitment involves the detention and, generally, the treatment of individuals with a mental illness.³ This commitment is a deprivation of an individual’s liberty, and it can extend for an indefinite period of time.⁴ In addition, an individual adjudicated mentally ill will experience serious collateral consequences that may include stigma and forced treatment.⁵ Although mental illness does not differentiate in regards to economic status, race, or level of education, involuntarily commitment tends to focus on individuals who were considered “social outcast[s] even prior to their hospitalization” and thirty-seven percent of commitments are for nonwhites.⁶ Further, “[t]he vast majority of involuntary committees are hospitalized because of annoying or bizarre behavior rather than for threatening or violent acts.”⁷

Currently, civil commitment is a legal process.⁸ This article argues that since it is a legal process with serious repercussions, reflective legal protections must be afforded to individuals involved in the proceedings.

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1. *Lessard v. Schmidt*, 349 F. Supp. 1078, 1103 (ED Wis. 1972) (quoting *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting)).

2. Mary L. Durham, *Civil Commitment of the Mentally Ill: Research, Policy and Practice*, in *MENTAL HEALTH AND LAW: RESEARCH, POLICY AND SERVICES* 17, 17 (Bruce D. Sales & Saleem A. Shah eds., 1996). Additionally, the author writes that an issue exists about whether the two-thirds of voluntary commitments are really voluntary or if some of them are the product of being given the choice of either voluntarily committing or being committed against their will. *Id.* at n.1.

3. *O’Connor v. Donaldson*, 422 U.S. 563 (1997). *But see* *Kansas v. Hendricks*, 521 U.S. 346 (1997); *Kansas v. Crane*, 534 U.S. 407 (2002).

4. *Developments in the Law, Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1193-94 (1974) [hereinafter *Civil Commitment of the Mentally Ill*].

5. *Id.* at 1200-1201; *Addington v. Texas*, 441 U.S. 418, 426 (1979); *Sell v. U.S.*, 539 U.S. 166 (2003).

6. Durham, *supra* note 2, at 18-19. Further the article notes that “[n]inety percent or more of state mental hospital patients are unemployed when committed. Most do not have a high school education and lack skills or experience for well-paying jobs.”

7. *Id.* at 19.

8. *Id.* at 21; SAMUEL JAN BRACKEL ET AL., *THE MENTALLY DISABLED AND THE LAW*, 21 (1985).

Particularly, it argues that Ohio should statutorily adopt the right to a jury trial for involuntary commitment proceedings.⁹

Part II of this article provides background information on juries and involuntary commitment. First, it describes why jury trials are important. Second, it provides a brief history on the treatment of individuals with a mental illness. Part III focuses on Supreme Court decisions reforming substantive and procedural protections for civil commitment. In addition, it will describe involuntary commitment in Ohio. Part IV analyzes the repercussions of involuntary commitment. Finally, Part V argues that because of the important role the jury serves and the serious nature of involuntary civil commitment, individuals should have a jury trial option.

II. WHY HAVE A JURY: HISTORICAL TREATMENT OF INDIVIDUALS WITH A MENTAL DISORDER

A. *Why Juries Are Important*

The Constitution and its protections are “an important bulwark against tyranny and corruption.”¹⁰ Understanding the importance of jury trials, the founders codified the right in both the Sixth and Seventh Amendments.¹¹ Further, jury trials in civil proceedings are an imperative protection, and the Supreme Court has stated:

[w]ith, perhaps, some exceptions, trial by jury has always been, and still is, generally regarded as the normal and preferable mode of disposing of issues of fact in civil cases at law as well as in criminal cases. Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial

9. This article focuses on involuntary commitment proceedings that are neither the result of an insanity defense nor sexual predator statutes. Both the insanity and sexual predator commitment are pertinent at to some issues, but they include other issues that distinguish them from other involuntary commitment proceedings. For example, the insanity defense is an affirmative defense chosen by a defendant and asserted at trial. If the individual is found not guilty by reason of insanity, then individual States determine the proceedings for commencing civil commitment. *See Jones v. U.S.*, 463 U.S. 354 (1983) for a discussion on the differences. Likewise, sexual predator statutes may be the result of a trial (or criminal proceeding) that then leads to civil commitment; *see Hendricks*, 521 U.S. 346 for further discussion.

10. *See e.g. Parklane Hosiery Co. Inc. v Shore*, 439 U.S. 322, 343 (1979) (Rehnquist, J., dissenting) (The full quote is as follows “[t]he founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary.”); *TXO Prod. Corp. v. All. Res. Corp.*, 509 U.S. 443, 473 (1993) (O’Connor, J., concurring in part and dissenting in part); *Butler v. Jordan*, 750 N.E.2d 554, 570 (Ohio 2001); *Gladon v. Greater Cleveland Regional Transit Auth.*, 662 N.E.2d 287, 302 (Ohio 1996).

11. U.S. Const. amend. VI & VII.

should be scrutinized with the utmost care.¹²

Below are a few of the reasons why juries are important. This article recognizes that a jury trial also raises practical concerns, such as the cost and delay associated with juries.¹³ Additionally, some scholars argue that juries are unfair and inefficient because they are untrained and unskilled (in law) citizens working through complex issues.¹⁴ Nevertheless, as this article illustrates, a balancing of those reasons against the individual and public interest supports affording the right of jury trials.

1. A Safeguard for American Ideals & a Reflection of the Community

A jury trial embodies democratic ideals, encourages the participation of society, and introduces community values into the decision-making process.¹⁵ The jury serves and preserves the “fundamental American perceptions about the nature of justice and its interaction with various social processes.”¹⁶ In addition, the jury is a better reflection of the community.¹⁷ Although juries have prejudices and biases, voir dire provides an opportunity to discover these prejudices, whereas such an opportunity is not possible to determine judicial prejudices.¹⁸

2. A Group Setting to Weigh the Evidence and Facts Appropriately

Another important aspect of a jury is its makeup. First, the group setting may influence the jury to deliberate longer than a judge; thus, the discussion “may raise issues not otherwise considered by judicial fact finders.”¹⁹ Second, jurors may weigh the standard more heavily in a case than a judge would.²⁰ Finally, jurors, as a decision-making body, have an

12. *Dimick v. Schiedt*, 293 U.S. 474, 485–86 (1935).

13. 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2301 (3d ed.).

14. *Id.*

15. *Id.*; *Civil Commitment of the Mentally Ill*, *supra* note 4, at 1292-94; John Kip Cornwell, *Confining Mentally Disordered “Super Criminals”*: *A Realignment of Rights in the Nineties*, 33 HOUS. L. REV. 651, 703 (1996); Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1123 (1991); Lisa Kavanaugh, *Massachusetts’s Sexually Dangerous Persons Legislation: Can Juries Make A Bad Law Better*, 35 HARV. C.R.-C.L. L. REV. 509, 545 (2000).

16. WRIGHT, *supra* note 13, at § 2301.

17. Ainsworth, *supra* note 15, at 1125.

18. Kavanaugh, *supra* note 15, at 552–53. For more information on what voir dire is and its purposes see 2 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 380 (4th ed.); 9B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2482 (3d ed.).

19. Kavanaugh, *supra* note 15, at 552; Ainsworth, *supra* note 15, at 1124-25.

20. Kavanaugh, *supra* note 15, at 550; Ainsworth, *supra* note 15, at 1124.

amount of anonymity that judges do not have.²¹ Therefore, jurors can make uncomfortable or tough choices without the external pressures that judges have.²²

3. Justice in Juries

For several reasons, juries may ensure that an individual has a fair and just proceeding. First, juries may ensure a more formalized process.²³ Second, since a jury normally hears one case, the members are less likely to become jaded and make standardized or preconceived judgments of individuals based on past experience with other patients.²⁴ In other words, based on a judge's experience, she may use abstract categorization of individuals to make decisions rather than an individualized decision.²⁵ In contrast, the jury would not have the same experience to base their decisions.²⁶ Also, the judge may have knowledge of the individual from prior interactions within the court system or the issue at hand,²⁷ whereas, juries generally are not privy to any background knowledge on the individual that cause prejudgments.²⁸ Third, jurors represent an independent decision-making body with an amount of discretion.²⁹ Therefore, juries are not constrained to unfairness in a law and can precipitate "social judgments to what is fair and equitable."³⁰ Fourth, jury trials prevent oppressive or arbitrary decisions imposed on individuals.³¹ Finally, a jury may provide protections against serious threats against civil liberties of "unpopular and vulnerable population."³²

B. Historic Handling of Individuals with a Mental Illness

The history of commitment of individuals is important for several reasons.³³ First, although this article does not explore what is the

21. Kavanaugh, *supra* note 15, at 552.

22. *Id.*

23. *Civil Commitment of the Mentally Ill*, *supra* note 4, at 1293.

24. Ainsworth, *supra* note 15, at 1124-25.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. WRIGHT, *supra* note 13 § 2301.

30. *Id.*

31. *Civil Commitment of the Mentally Ill*, *supra* note 4, at 1292-93.

32. Kavanaugh, *supra* note 15, at 567 (This article focusses on juries for sexually dangerous persons under a Massachusetts statute. Further, it notes that whether juries are protecting the civil liberties of individuals is unclear, but the data appears to illustrate that they are.)

33. Since the Seventh Amendment relies on historical understanding and common law, this history focuses on treatment of the mentally ill in Western Countries.

necessary for treatment of individuals with a mental illness, it is important to illustrate the consequences of commitment. This is important to fully appreciate the gravity of commitment to enable a better decision about what type of substantive and procedural protections should be in place. Second, as a society, handling of individuals with a mental illness reflects a perceived understanding of the illness and then applies the *necessary* corresponding medicinal, physical, situational (where/if they are housed and the conditions), and legal treatment.³⁴ However, our understanding of mental illness and reflective treatment is not always as sound as the current the society believes; therefore, the following section challenges the automatic conclusion that commitment is what is best for individuals and the overreliance on or deference to experts in the decision-making of commitment.

1. Ancient Times to the Medieval Ages: “before medicine, there was magic”³⁵

As the following explains, during ancient times and the medieval period, a mental illness was the result of a demonic possession.³⁶ In the ancient period, evil spirits or deities punished the individual through disease.³⁷ Thus, the treatment involved magic and exorcisms.³⁸ At times treatment involved inhumane and bizarre methods such as physical torture.³⁹ Specialized individuals—wizards, sorcerers, priests, medicine men and the like—were the forerunners of the modern doctor, and used magic to heal.⁴⁰

Other highly developed ancient societies like Egypt and Greece also connected mental illness with the supernatural and incorporated in their treatment healing shrines and ceremonies.⁴¹ Both societies showed advancement in treatment beyond the mystical.⁴² For example, in Greece

34. Bruce G. Link et al., *Public Conceptions of Mental Illness: Labels, Causes, Dangerousness, and Social Distance*, 89 AM. J. PUB. HEALTH 1328; BRACKEL, *supra* note 8, at 34.

35. ALBERT DEUTSCH, *THE MENTALLY ILL IN AMERICA: A HISTORY OF THEIR CARE AND TREATMENT FROM COLONIAL TIMES*, 1 (2007).

36. BRACKEL, *supra* note 8, at 9.

37. *Id.*

38. *Id.*

39. *Id.* (For example, one treatment removed parts of the individual’s skull; the reasoning was to let out or drive out the evil spirit.)

40. DEUTSCH, *supra* note 35, at 2.

41. *Id.* at 4-8 (For example, in Greece individuals with a mentally illness were taken to a shrine for treatment, and then to the temple for “temple sleep.” During temple sleep—the attendant of the temple dressed as a god—appeared and determined where the illness that plagued the individuals was located. Those who were not cured by the process were cast out of the temple as unworthy of cure. This gave the priest-physician an out when the curative ritual and incantation did not work on everyone.)

42. *Id.* Nevertheless, early Greece also equated mental disorders with demonic or divine visions.

in the fourth century B.C., Hippocrates and his followers made strides to dispel the supernatural as the cause of mental disorders and instead as the result of natural phenomena.⁴³ Nevertheless, Hippocrates explained mental illness through his four humors, and used blood-letting and purging as treatments.⁴⁴ Furthermore, when humane and advanced treatments were available, often only a small, affluent audience received them.⁴⁵ The more common treatments included those by Celsus, who “advocated chains, flogging, semi-starvation diet and the application of terror and torture as excellent therapeutic agents.”⁴⁶ Further, individuals with a mental disorder belonging to poorer classes of Rome and Greece “were frequently put to death as undesirable or intolerable burdens.”⁴⁷

The Roman era demonstrated a gradual shift for mental illnesses from a religious cause to a medical problem.⁴⁸ Nevertheless, the medieval period brought a return of the belief that possessions caused mental illness, and in general treatments were more torturous and elaborate than in the ancient civilization.⁴⁹

2. Eighteenth & Nineteenth Century U.S.: “Terror acts powerfully upon the body, through the medium of the mind, and should be employed in the cure of madness.”⁵⁰

In the Eighteenth-century, society created hospitals for the treatment of mentally ill individuals.⁵¹ For example, Benjamin Franklin, among others, petitioned Pennsylvania for a hospital for the “mad” to restore their sanity and to protect society.⁵² However, the conditions of the hospital included keeping the

The mental illness may represent the will of god by angry or displeased Gods, for example, in the myth of Hercules being seized by Lyssa by the goddess Hera. *Id.* at 5-6.

43. *Id.*; BRACKEL, *supra* note 8, at 9.

44. DEUTSCH, *supra* note 35, at 9-11 (Other treatments included helebore, massages, baths, diets, and exercise.).

45. *Id.*

46. *Id.* at 11.

47. *Id.*

48. *Id.* at 7-12.

49. BRACKEL, *supra* note 8, at 10; DEUTSCH, *supra* note 35, at 12-23. For example, a tenth century treatment for insanity was to “take a skin of mere-swine (sea-pig) or porpoise, work it into a whip, swinge the man therewith, soon he will be well.” DEUTSCH, *supra* note 35 at 12-13. Although this period also saw the rise of asylums, sympathy towards the mentally ill, and individuals who spoke out against the perceived superstitious connection, the supernatural dominated with beliefs in demonic possessions and witches. DEUTSCH, *supra* note 35 at 12-23.

50. ROBERT WHITAKER, MAD IN AMERICA: BAD SCIENCE, BAD MEDICINE, AND THE ENDURING MISTREATMENT OF THE MENTALLY ILL, 3 (2002) (quoting Benjamin Rush).

51. BRACKEL, *supra* note 8, at 13.

52. WHITAKER, *supra* note 50, at 3-4.

lunatics . . . in gloomy, foul-smelling cells and were ruled over by ‘keepers’ who used their whips freely. Unruly patients, when not being beaten, were regularly ‘chained to rings of iron, let into the floor or wall of the cell . . . restrained in hand-cuffs or ankle-irons,’ and bundled into Madd-shirts that ‘left the patient an impotent bundle of wrath.’⁵³

Benjamin Rush reformed the Pennsylvania hospital; he advocated that the insane “needed to be treated with kindness and respect.”⁵⁴ Nevertheless, Rush was a man of science influenced by English treatments such as extreme bloodletting and his rhetoric for the mentally ill included calling them “the mad bull and the enraged dog.”⁵⁵ Commitment during this time, including to the Pennsylvania hospital, generally required only the certification of one physician.⁵⁶

3. The Twentieth Century: “Why do we preserve these useless and harmful beings?”⁵⁷

During the first half of the twentieth century, eugenics and compulsory sterilization influenced treatment of individuals with a mental illness.⁵⁸ Eugenics sought to divide the human race into two categories: suitable individuals and the mentally ill who were not.⁵⁹ It was this eugenicist mentality that “encouraged Nazi Germany in its massive sterilization of the mentally ill, a program that led directly to the crematoriums of the Holocaust.”⁶⁰ Some States prevented mentally ill individuals from marrying, and even imposed sanctions—prison time or a fine—on those who did marry.⁶¹ However, those laws—in the mind of eugenicists—were not effective enough at keeping mentally ill individuals from procreating,

53. *Id.* at 4.

54. *Id.* at 5.

55. *Id.* at 5, 14-16 (For example, he blood let his patients, and in one patient he removed nearly “four-fifths of the blood” in the individual’s body. Other treatments he employed included blisters on the ankles, caustics on the back of the neck to allow for “permanent discharge” providing relief to the overheated brain, purges, spinning therapy (strapping an individual to a board and spinning them at great speeds), etc.).

56. BRACKEL, *supra* note 8, at 14.

57. WHITAKER, *supra* note 50, at 41 (quoting Nobel Prize Winner Dr. Alexis Carrel).

58. *Id.* at 42-62.

59. *Id.* at 44.

60. *Id.* at 42. (Advocates for eugenics included Ivy league educated individuals and academics of top schools, “titans of America” such as Rockefeller, feminists, PH.D holders, doctors, psychiatrists, biologists, zoologists, geneticists, psychologists, etc. In other words, a wide range of individuals supported this *scientific* justification. In 1921, the “American Museum of Natural History hosted the Second International Congress on Eugenics.” Even priests and reverends believed in eugenics. It should be noted that acceptance was not across the board. *Id.* at 45-56.

61. *Id.* at 56.

so the mentally ill were segregated into asylums and sterilization.⁶² Furthermore,

There was no talk, among the eugenicists, of sending the mentally ill to hospitals for therapeutic purposes. Instead, they envisioned sending the mentally ‘unfit,’ in essence, to detention camps, run on barebones budgets, with the ‘patients’ kept there until they had passed reproductive age or had been sterilized.⁶³

In addition, although psychiatrists may not have driven the eugenics agenda, some embraced sterilization.⁶⁴ Further, during this time, psychiatry performed prefrontal lobotomies and experimented with a variety of physical remedies such as removing teeth of the mentally ill.⁶⁵ Moreover, doctors touted a procedures success, safety, and necessity; some did so even if they had a true understanding of its severe negative side-effects.⁶⁶

The next half of the twentieth century brought about a “Modern-Day Alchemy.”⁶⁷ Drugs became the way to treat the mentally ill.⁶⁸ This period saw a cycle of miracle drugs followed by discovery of the disastrous side-effects.⁶⁹ The medical model approach influenced commitment, and States’ laws allowed for easy commitment.⁷⁰ For example, in 1970, 31 states still allowed for certification by one or more physicians to allow for commitment.⁷¹

62. *Id.* at 57.

63. *Id.*

64. WHITAKER, *supra* note 50, at 73.

65. *Id.* at 73-106 (Other treatments included keeping patients asleep for weeks, fever therapy (inducing fevers through infecting patients with tuberculosis and other illnesses), hibernation (severely reducing temperature of patients, for example in Ohio, by putting mentally ill patients in closets packing body with ice and keeping that way for a day or two and then repeating), insulin-coma therapy, etc. These therapies were not just back alley and secretive. Findings were presented at conferences, newspapers and magazines celebrated successes, etc.).

66. *Id.* at 102-03, 121-127.

67. *Id.* at 141.

68. *Id.*

69. *Id.* at 141-144 (For example, in 1954 chlorpromazine as Thorazine was introduced for the treatment of schizophrenia. Chlorpromazine was a phenothiazine derivative—used to kill swine parasites and as insecticide—and early on the side effects, such as parkinson’s disease symptoms was known.).

70. BRACKEL, *supra* note 8, at 22.

71. MELTON ET AL., *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS* 300 (2ND ED., GUILFORD PRESS).

III. SUPREME COURT REFORMS AND OHIO LAW

A. Supreme Court Reform

In 1971, Justice Blackmun—in regard to civilly committed individuals—wrote, “[c]onsidering the number of persons affected, it is perhaps remarkable that the substantive constitutional limitations on this power have not been more frequently litigated.”⁷² Early attacks assaulted the medical model’s influence on laws, but it was in the 1970s that counter trends of the medical model reached their peak, and challenged the judicial proceedings deference to medical opinions.⁷³ Although most of the procedures and substantive rights that governed involuntary commitment were (and are today) statutory, the Supreme Court’s decisions began to reform the procedural and substantive rights afforded to mentally ill individuals.⁷⁴

1. Length of Detention

For example in *Jackson v. Indiana*, the Supreme Court placed limits on the length of time a State could civilly detain an individual.⁷⁵ The Court found that the defendant, Jackson, had been deprived of his due process and equal protection rights under the Fourteenth Amendment when the state of Indiana involuntarily committed him on a finding that he was incompetent to stand trial that was achieved through a lenient standard with the possibility of being an indefinite confinement.⁷⁶ The Court wrote that “[a]t the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.”⁷⁷ Individual states determine whether the nature and duration of a commitment bears a reasonable relation to the purpose.⁷⁸

2. Standard of Proof

In addition, the Supreme Court held that civil commitment requires the clear and convincing standard of proof.⁷⁹ In *Addington v. Texas*, the individual argued that his substantive and procedural due process rights

72. *Jackson v. Indiana*, 406 U.S. 715, 737 (1972) (internal citations omitted).

73. MELTON, *supra* note 71, at 300-317; BRACKEL, *supra* note 8, at 21- 22.

74. *Id.*

75. *Jackson*, 406 U.S. 715.

76. *Id.*

77. *Id.* at 738.

78. *See e.g.* Ohio Rev. Code Ann. § 2945.38 (West 2017); Ky. Rev. Stat. Ann. § 504.110 (West 2017).

79. *Addington*, 441 U.S. at 433.

were violated when he was civilly committed by a standard less than beyond a reasonable doubt.⁸⁰ In determining what standard of proof was appropriate the Court balanced the state interest or the societal value on the “correctness of factual conclusions for a particular type of adjudication” and the individual interest or the “value society places on individual liberty.”⁸¹ The appropriate “standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.”⁸² The Court determined that preponderance was too low because the individual and society should not share the same risk of error when the individual’s possible harm was significantly greater than the possible harm to the state.⁸³ Additionally, the Court determined that beyond a reasonable doubt was too high, because a false positive—to find a person committable when ultimately unnecessary—in the civil setting was not as detrimental as it is in the criminal setting.⁸⁴ Moreover, it determined that the false negative—to find a person not committable but really is—was worse in the civil commitment setting than in the criminal setting.⁸⁵ Further, the Court noted that in the civil setting it was easier to correct a wrongly committed individual because of continued doctor evaluations.⁸⁶ For example, the Court noted that family and friends serve as a protection against falsely committing an individual.⁸⁷ Lastly, the Court reasoned that since psychiatric evidence is not an exact science—and necessary in the civil commitment setting—so a higher burden of proof would make it almost impossible to prove an individual needed to be committed.⁸⁸ States must adhere to the clear and convincing standard of proof, but can decide who determines whether the burden has been met.⁸⁹ In other words, state legislatures and courts determine whether a judge, jury, or another decides if the evidence supports commitment by clear and convincing evidence.⁹⁰

80. *Id.* at 421-22.

81. *Id.* at 423-425.

82. *Id.* at 423.

83. *Id.* at 425-427.

84. *Addington*, 441 U.S. at 428-29.

85. *Id.* It is based on the presumption that with a false negative in the criminal context individuals still have their autonomy, but in civil commitment they do not. If a person lacks autonomy and needs commitment, then commitment is beneficial and preferred even on the chance that it is erroneous. In other words, to treat someone restores her autonomy and self-determination. *See id.*

86. *Id.*

87. *Id.*

88. *Id.* at 429-30.

89. *Id.* *See e.g.* Ohio Rev. Code § 5122.15 (West 2017); Mich. Comp. Laws Ann. § 330.1458 (West 2017); Ala. Code § 22-52-9 (West 2017).

90. *Addington*, 441 U.S. at 429-430; Ohio Rev. Code Ann. § 5122.15 (The statute requires that if the judge or probate court designates a referee, then it must be a lawyer.).

3. Substantive Criteria & State Powers

In *O'Connor v. Donaldson*, the Supreme Court held that civil commitment could not be based on mental illness “without more.”⁹¹ In *O'Connor*, Donaldson was involuntarily committed because he was suffering from delusions, and he was detained for fifteen years.⁹² Throughout his confinement he did not receive treatment for his illness, and repeatedly demanded his release.⁹³ Additionally, Donaldson had family and community groups who were willing to provide care for him and requested his release.⁹⁴ Moreover, Donaldson requested privileges for the grounds, occupational training, and the chance to discuss his case, but all requests were denied.⁹⁵ Further, while confined Donaldson was kept in large rooms for substantial periods of time with 60 patients, many of whom had been criminally committed.⁹⁶ Donaldson did not pose a danger to himself or others during his commitment.⁹⁷

Ultimately, the Court held that a non-dangerous individual was neither committable solely for being mentally ill, nor if his life could be improved by commitment.⁹⁸ Nonetheless, the Court recognized the legitimacy of commitment of individuals through a State’s police power or its *parens patriae* power.⁹⁹ Under the *parens patriae* power, the State may commit an individual based on the individual’s inability to care for herself.¹⁰⁰ Under the police power, the State can commit mentally ill individuals based on their predicted dangerousness to society or self.¹⁰¹ States through legislation define the substantive criteria such as what a mental illness is and what the appropriate criteria for commitment are.¹⁰²

4. The Seventh Amendment, Due Process, & Equal Protection

Despite reform, the Supreme Court has yet to determine whether

91. *O'Connor*, 422 U.S. 563, 576.

92. *Id.* at 566-67.

93. *Id.* at 568-59, 571.

94. *Id.* at 568-69 (for example, “[i]n 1963, for example, a representative of Helping Hands, Inc., a halfway house for mental patients, wrote O'Connor asking him to release Donaldson to its care . . . In addition, on four separate occasions between 1964 and 1968, John Lembcke, a college classmate of Donaldson's and a longtime family friend, asked O'Connor to release Donaldson to his care.”).

95. *Id.* at 569.

96. *Id.*

97. *O'Connor*, 422 U.S. at 568.

98. *Id.* at 575-76.

99. *Id.* at 573-574.

100. BRACKEL, *supra* note 8, at 24.

101. *Id.* at 24-25.

102. *See e.g.* Ohio Rev. Code Ann. § 5122.01 (West 2017); Ky. Rev. Stat. Ann. § 202A.026 (West 2017); Ala. Code § 22-52-10.4 (West 2017).

involuntary commitment proceedings require a jury right.¹⁰³ Since involuntary commitment is designated a civil proceeding, the right to jury trial in the Constitution is under the Seventh Amendment which states “[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be *preserved*, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, *than according to the rules of the common law.*”¹⁰⁴ Generally, to determine if the right was preserved at common law, courts must decide if the individual making a similar claim in 1791 had the right to a jury.¹⁰⁵ This analysis also takes into account the importance of jury trials.¹⁰⁶ A historical analysis of whether the right existed—depending on interpretation—may go either way.¹⁰⁷ Although it has not directly addressed a jury trial in involuntary commitment, the Supreme Court has addressed the right in juvenile adjudication; ultimately deciding the right to jury neither existed in neither juvenile adjudication nor involuntary commitment of juveniles.¹⁰⁸ This is pertinent because juvenile adjudication and civil commitment are at times analogized because of similarities.¹⁰⁹ Nevertheless, inherent differences exist in juvenile adjudications and the civil commitment of adults.¹¹⁰

As far as due process rights, the Court is less likely to affirm the right to a jury trial.¹¹¹ Nevertheless, the Court has held that States violate Equal

103. See *Poole v. Goodno*, 335 F.3d 705, 711 (8th Cir.2003); C. Peter Erlinder, *Essay: Of Rights Lost and Rights Found: The Coming Restoration of the Right to A Jury Trial in Minnesota Civil Commitment Proceedings*, 29 WM. MITCHELL L. REV. 1269 (2003).

104. Const. Amend. VII (emphasis added).

105. *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558 (U.S. 1990).

106. See *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959).

107. Alan M. Dershowitz, *Preventive Confinement: A Suggested Framework for Constitutional Analysis*, 51 TEX. L. REV. 1277, 1316 (1973) (indicating at the time of the adoption of the Constitution that the right to a jury for determination of involuntary confinement existed in some colonies.).

108. *Parham v. J. R.*, 442 U.S. 584 (1979); *McKeiver v. Pennsylvania*, 403 U.S. 528 (1970) (plurality). In *Parham*, the Court held that Due Process did not require a jury trial for a juvenile to be committed. The Court recognized a child’s liberty interest and potential negative consequences of erroneously being labeled as mentally ill, but also wrote that consequences exist for an individual needing and not receiving treatment. The Court recognized the parent’s interest in child’s health and welfare. Further, it recognized the State interest in commitment and treatment of children and not erecting obstacles to prevent individuals who need treatment from receiving such treatment. Ultimately, the Court determined that some process by a neutral fact finder was required. However, it noted that the neutral fact finder did not have to be a jury or judge and it can be someone such as a social worker. Further, commitment must continually be reviewed. *Parham*, 442 U.S. 584. In *McKeiver*, the Court undertook a balancing approach of the right to have a jury trial in juvenile proceedings against the effect of the right on state interests and juvenile commitment proceedings in general. The Court in a plurality decision found that a jury trial would not provide for more accurate fact-finding. Additionally, the procedural protection would cost the state and may create the juvenile process as adversarial, delays, and not allow changes/improvements in the systems to achieve goals of rehabilitation. *McKeiver*, 403 U.S. 528.

109. See *Civil Commitment of the Mentally Ill*, *supra* note 4, at 1284-1285.

110. See *id.*; *Addington*, 441 U.S. 418.

111. *Civil Commitment of the Mentally Ill*, *supra* note 4, at 1295; Dershowitz, *supra* note at 107, at

Protection if they offer a jury trial for civil commitment in one scenario but not for others similarly situated.¹¹² In addition, an interesting question arises—outside of the scope of this paper—about whether individuals with mental illness should be a suspect classification.¹¹³

Although the Supreme Court made reforms, in 1979 civil commitments demonstrated an ease to accomplish involuntary commitments with a returned deference to medical decisions.¹¹⁴

B. Ohio Law

Currently, the Seventh Amendment is not incorporated to the States.¹¹⁵ Nonetheless, the Ohio Constitution protects the right to jury trial in civil proceedings.¹¹⁶ Further, Ohio applies the federal analysis that the right must be preserved at the time Ohio adopted the right to a jury trial in its Constitution.¹¹⁷ In 1851, Ohio adopted “[t]he right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury.”¹¹⁸ Whether a right existed in Ohio at the time of the adoption of

1316-17 (noting that McKeiver “suggests that the Court will not require a jury trial in other predictive proceedings leading to confinement.”).

112. *Baxstrom v. Herold*, 383 U.S. 107 (1966); *Humphrey v. Cady*, 405 U.S. 504, (1972). *But see* Dershowitz, *supra* note 107, at 1318-19 (noting that although challenges under equal protection clause perhaps provide a successful avenue, the work around would be to not offer a jury trial to either category of individuals.).

113. For further reading on this topic and arguments that mentally ill individuals should constitute a suspect classification and be afforded judicial heightened scrutiny *see Mental Illness: A Suspect Classification?*, 83 *YALE L. J.* 1237 (1974); Steven K. Hoge, *Cleburne and the Pursuit of Equal Protection for Individuals With Mental Disorders*, 43 *J. A. Academy of Psychiatry L. Online* 416-422 (2015) available at <http://jaapl.org/content/43/4/416>. Currently, the Supreme Court has held that individuals with a mental illness do not constitute heightened scrutiny, but not with unanimity. *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, (2001); *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 442, (1985) (concluding “for several reasons that the Court of Appeals erred in holding mental retardation a quasi-suspect classification calling for a more exacting standard of judicial review than is normally accorded economic and social legislation.”); *Heller v. Doe by Doe*, 509 U.S. 312 (1993) (applying rational basis for a distinction of mental illness and mental retardation in law). *Cf.* *Cleburne*, 473 U.S. at 445-78 (J. Marshall concurring in part and dissenting in part noting that it appears the majority did apply a distinct standard); *Heller*, 509 U.S. at 334-35 (J. Blackmun dissenting writing “separately only to note [his] continuing adherence to the view that laws that discriminate against individuals with mental retardation, or infringe upon fundamental rights, are subject to heightened review.”).

114. *Durham*, *supra* note 2, at 26-28. Additionally, state legislatures changed commitment standards from a focus on dangerousness to encompass, for example some states, “need for treatment” or “grave disability.” *Id.* at 27.

115. *WRIGHT*, *supra* note 13, at § 2301.

116. OH. CONST. Art. I, § 5.

117. *Belding v. State*, 169 N.E. 301, 302 (Ohio 1929); *Hoops v. United Tel. Co. of Ohio*, 553 N.E.2d 252, 255 (Ohio 1990) (stating “[t]he Ohio Constitution preserves the right to a jury trial only in those civil actions where the right existed prior to the adoption” of the section codifying the right.”).

118. OH. CONST. Art. I, § 5.

the Constitution is an interesting question, but an argument can be made that it was a common law right.¹¹⁹ Nevertheless, States may also provide for the right to a jury trial through statutes.¹²⁰

Some States explicitly deny the right to jury trial in involuntary commitment proceedings.¹²¹ Other States have recognized the right to a jury trial in involuntary commitment procedures.¹²² Neither Ohio's Constitution nor its statutes explicitly provide or deny the right to a jury trial in involuntary commitment proceedings.¹²³

1. Substantive Criteria for Involuntary Commitment

The Ohio Revised Code ("O.R.C.") sections 5122.01 through 5122.15 provide the substantive and procedural criteria for involuntarily committing an individual with a mental illness.¹²⁴ Ohio defines mental illness as "a substantial disorder of thought, mood, perception, orientation, or memory that grossly impairs judgment, behavior, capacity to recognize reality, or ability to meet the ordinary demands of life."¹²⁵ As noted, commitment requires an individual to have a mental illness plus something else. The "something else" is based on the States' police power or *parens patriae* power described above. The former involves the individual's threat of harm to himself or to society.¹²⁶ The latter involves the treatment of the individual because he lacks the capacity to make decisions regarding her basic physical needs and the incapacity "[r]epresents a substantial and immediate risk of serious physical

119. BRACKEL, *supra* note 8, at 11-12; Dershowitz, *supra* note 107, at 1316 (This argument is ultimately for the federal right of Seventh Amendment and the right being rooted in common law at the time of the federal constitution); Erlinder, *supra* note 103, at 1271-1274 (tracing the historical roots of the right to a jury in proceedings involving a determination of mental state of the individual); *Id.* at nt. 3 (Stating that whether the right is appropriate under the Seventh Amendment is outside the scope of the paper, but "the Seventh Amendment "historical test," which looks to the common law to determine the right to a jury, leads to the conclusion that civil commitments required a jury at common law, and would therefore, be required under the Seventh Amendment.") (internal citation omitted); MELTON, *supra* note 71, at 299.

120. *Raine v. Curry*, 341 N.E.2d 606, 611 (Ohio Ct. App. 1975) (noting that "[w]here a statute setting forth a new civil right is adopted, the General Assembly may grant a right to jury trial, but need not do so.").

121. *See e.g.* Ala. Code § 22-52-9; Del. Code Ann. tit. 16, § 5007 (West 2017).

122. *See e.g.* Alaska Stat. Ann. § 47.30.735 (West 2017); Colo. Rev. Stat. Ann. § 27-65-107 (West 2017) and § 27-65-109; Colo. Rev. Stat. Ann. § 27-65-109 (West 2017); Mich. Comp. Laws Ann. § 330.1458 (West 2017); Tenn. Code Ann. § 33-3-609; Ky. Rev. Stat. Ann. § 202A.076 (West 2017).

123. Ohio Rev. Code Ann. § 5122.15(C) (The statutes states, "[i]f, upon completion of the hearing, the court finds by clear and convincing evidence that the respondent is a mentally ill person subject to court order, the court shall order the respondent for a period not to exceed ninety days to any of the following.").

124. Ohio Rev. Code. Ann §§ 5122.01-15 (West 2017).

125. Ohio Rev. Code Ann. § 5122.01(A) & (B).

126. *Id.*

impairment or injury.”¹²⁷ Additionally, a person is committable if treatment is necessary to prevent “grave and imminent risk to substantial rights of others or the person.”¹²⁸

2. Procedures for Commitment: The Ohio Revised Code and *In re Mental Illness of Thomas*

Involuntary commitment procedures commenced through O.R.C. 5122.11 require a filing of an affidavit “by any person or persons with the probate court, either on reliable information or actual knowledge, whichever is determined to be proper by the court.”¹²⁹ The affidavit must sufficiently allege facts to indicate probable cause and allege reasons for commitment according to O.R.C. 5122.01(B).¹³⁰ Under 5122.10, emergency commitment may be initiated by psychiatrist, licensed psychologists, licensed physician, health officer, parole officer, police officer or sheriff.¹³¹

An Ohio Court of Appeals of the Ninth District decision is illustrative of the process and results of involuntary commitment procedures in Ohio.¹³² *In re Mental Illness of Thomas* involved the commitment of Linda Thomas to the care of the Alcohol, Drug Addiction and Mental Health Services Board of Summit County.¹³³ The process was initiated by Thomas’s son, who went to the probate court and filed an affidavit stating his mother, “[r]epresents a substantial risk of physical harm to others as manifested by evidence of recent homicidal or other violent behavior or evidence of recent threats that place another in reasonable fear of violent behavior and serious physical harm.”¹³⁴ His mother, Thomas, was detained and admitted to a General Hospital in accordance with O.R.C. 5122.11.¹³⁵ She had a hearing in which referee was the trier of fact and found by clear and convincing evidence that “Thomas was a mentally ill person subject to hospitalization by court order pursuant to R.C. 5122.15.”¹³⁶

127. *Id.*

128. *Id.*

129. Oh. Rev. Code Ann. § 5122.11 (West 2017).

130. *Id.*

131. Ohio Rev. Code Ann. § 5122.10 (West 2017). Under O.R.C. 5122.01 a health official “means any public health physician; public health nurse; or other person authorized or designated by a city or general health district or a board of alcohol, drug addiction, and mental health services to perform the duties of a health officer under this chapter.” (emphasis added). *Id.*

132. Ohio Rev. Code Ann. § 5122.15.

133. *In re Mental Illness of Thomas*, 671 N.E.2d 616, 617 (Ohio Ct. App. 1996).

134. *Id.*

135. *Id.*

136. *Id.*

At Thomas's hearing two experts testified. The first expert, Dr. Parkeeree, had treated Thomas for anxiety about her divorce a year and half prior to the hearing, and treated her again upon admission to the hospital.¹³⁷ He diagnosed her with circumscribed, paranoid delusional disorder.¹³⁸ He admitted that Thomas did not suffer from "a substantial disorder of memory, mood, orientation or perception," that Thomas was able to care for herself and meet the demands of her life, and that he did not notice behavior that illustrated danger to self or others.¹³⁹ Most of his testimony was based on facts provided to him by Thomas's son and husband including the only evidence of violent behavior which was an incident six to nine months prior.¹⁴⁰ Dr. Pakeeree recommended that Thomas be kept in the hospital against her will.¹⁴¹

The other expert, Dr. Karpawich, first met Thomas in October 1994 through domestic relations court; he was appointed to evaluate her.¹⁴² He had three interactions with her throughout that time, and then another interaction to evaluate her before the hearing.¹⁴³ He testified that Thomas suffered from "very circumscribed, delusional disorder."¹⁴⁴ Further, that her paranoia was limited to her husband; she believed he was following her because of the divorce proceedings.¹⁴⁵ Dr. Karpawich testified that Linda was not afraid of people in general; her paranoia did not extend to the doctor or the hospital, but she did have concerns with the other expert who had a long relationship with her husband.¹⁴⁶ He noted that such a concern was legitimate, and not delusional.¹⁴⁷ He testified she did not have a substantial mood, memory, or orientation disorder; her thought disorder was not substantial; and she could meet the ordinary demands of life.¹⁴⁸ He also testified that he had not witnessed or heard from family that she was violent or had any homicidal behavior.¹⁴⁹ He did not recommend Thomas be involuntarily hospitalized.¹⁵⁰

Linda's son Andrew also testified, and he admitted that she never threatened him or his family, and only knew of threats because his father

137. In re Mental Illness of Thomas, 671 N.E.2d at 618.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. In re Mental Illness of Thomas, 671 N.E.2d at 619.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. In re Mental Illness of Thomas, 671 N.E.2d at 619.

150. *Id.* at 620.

told him.¹⁵¹ He admitted that although his mom was a recovering alcoholic, she had been handling sobriety well.¹⁵² Linda's estranged husband Gale also testified. He testified to one incident in their 37-year marriage that Thomas threatened him and that the threat had happened six months before.¹⁵³ Gale testified that Thomas called him to tell him to stop following her.¹⁵⁴

Finally, Thomas testified. She "stated that her husband had been spontaneously stopping by her home two to three times a day, telling her she needed to get help because she was sick."¹⁵⁵ These visits agitated her to the point that she drove to her husband's house to tell him to leave her alone.¹⁵⁶ During the confrontation with her husband, he kept remarking that she would not get upset if she got help.¹⁵⁷ She then said, "I could kill you. I could really kill you."¹⁵⁸ She testified she did not mean her threat and that her husband had also threatened her.¹⁵⁹ She stated this was the only time she had threatened him and after the incident the two went on vacation to Las Vegas.¹⁶⁰ The trip was a reconciliation attempt.¹⁶¹ In the end, she said she would be willing to go to outpatient counseling.¹⁶²

At the end of the hearing, the referee determined by clear and convincing evidence that Linda was mentally ill and subject to hospitalization.¹⁶³ As the trier of fact, the referee concluded that the evidence satisfied the above substantive criteria; Thomas objected to the

151. *Id.*

152. *Id.* When questioned about his motives for commitment he admitted the following message he left: "Yeah, I'm calling for Linda the Lunatic. You there, mom? You know, I'm just wondering what it's like to be you. Why do you have to hang around somebody like Steve and Linda King? You used to have friends like Susie Leigh. So why are you going from Susie Leigh to Linda King?" "I'd hate to be you, having to look at yourself in the mirror and see what you've done to your retarded daughter and your family, your grown children, and your neighbors. How anyone can stand to even look at you or be around you is amazing, because you really turned out to be a nothing. "I'm so grateful that Grandma Holton passed away where she wouldn't have to see what her daughter has become. It would have broke Grandma's heart." *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *In re Mental Illness of Thomas*, 671 N.E.2d at 621.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* at 617. The Ohio Supreme Court defined clear and convincing evidence as "[t]hat measure or degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will provide in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cincinnati Bar Assn. v. Massengale*, 568 N.E.2d 1222, 1223 (Ohio 1991).

finding, but the probate court adopted the referee's report.¹⁶⁴ On appeal, the Court ultimately determined that Linda Thomas was not an individual subject to court-ordered hospitalization according to O.R.C. 5122.01(B).¹⁶⁵ Thomas was committed on March 3, 1995; the institution moved to terminate commitment on May 1, 1995; and it was not granted until May 16, 1995.¹⁶⁶ She had been wrongfully and involuntarily committed for 73 days.¹⁶⁷

3. Case Law

The Ohio Supreme Court has not determined whether an individual has a right to a jury trial in involuntary commitment proceedings. A case from the Ohio Court of Appeals for the Fourth District addressed this question.¹⁶⁸ The defendant in *In re Kister* appealed pro se and asserted the trial court erred in denying him a right to a jury trial.¹⁶⁹ The Court of Appeals' entire analysis on this issue is as follows:

In his 8th assignment of error, appellant asserts that the trial court erred by denying his request for a jury trial. We disagree.

An individual does not possess a constitutional or statutory right to a jury trial during a probate court proceeding involving an involuntary commitment. Cf. *State ex rel. Kear v. Court of Common Pleas of Lucas Cty., Probate Div.* (1981), 67 Ohio St.2d 189, 191–192, 21 O.O.3d 118, 423 N.E.2d 427 (stating that there is no constitutional or statutory right to a jury trial in a will contest proceeding). Indeed, R.C. 2101.31 specifically states:

All questions of fact shall be determined by the probate judge, unless the judge orders those questions of fact to be tried before a jury or refers those questions of fact to a special master commissioner as provided in sections 2101.06 and 2101.07 of the Revised Code.

Moreover, appellant has not pointed to any provision contained in the involuntary-commitment statutes that would entitle him to a jury trial.

164. *In re Mental Illness of Thomas*, 671 N.E.2d at 617.

165. *Id.* at 621-22.

166. *Id.* at 617.

167. *Id.*

168. *In re Kister*, 955 N.E.2d 1029 (Ohio Ct. App. 2014).

169. *Id.*

Accordingly, based upon the foregoing reasons, we hereby overrule appellant's 8th assignment of error.¹⁷⁰

The opinion has two flaws. First, it analogizes the rights afforded in will contestation proceedings to those afforded in involuntary commitment proceedings because they both occur in probate court. The court reasoned that since will contestation does not require a jury trial, involuntary commitment proceedings do not either. The opinion cited the Ohio Supreme Court decision in *State ex rel. Kear v. Court of Common Pleas of Lucas Cty.* for this proposition. However, the *Kister* Court mischaracterizes the *Kear* case. In *Kear*, the Court explicitly held that “[a] party to a will contest action does not have the right to a jury trial; instead, a probate court has discretion to determine whether to sit as the trier of fact in a will contest action or to impanel a jury. (R.C. 2107.71 through 2107.76 and R.C. 2101.31 construed and applied.)”¹⁷¹ The Ohio Supreme Court’s sole issue was to determine if a party contesting a will has the right to a jury trial—as opposed to probate courts in general.¹⁷² The Ohio Supreme Court determined this question by doing a historical analysis; whether the right to will contestation was a right prior to adoption of Section 5 of the Ohio Constitution or not.¹⁷³ Although in *Kear* the Court noted that probate courts are decedents of ecclesial courts which did not offer the right to a jury trial, the Ohio Supreme Court based its decision on the historical analysis.¹⁷⁴

Second, unlike the *Kear* decision, the *Kister* Court did not engage in any type of historical analysis of whether an individual has a right to a jury trial in involuntary commitment proceedings.¹⁷⁵ Nor does the opinion for the issue address any type of equal protection or due process rights.¹⁷⁶ In fact the opinion denies the right to a jury trial constitutionally without even citing the Ohio Constitution.¹⁷⁷

IV. CONSEQUENCES OF INVOLUNTARY COMMITMENT

Involuntary commitment involves a multitude of negative consequences for individuals. This section illustrates why the *Kear*

170. *Id.* at 1050-51.

171. *State ex rel. Kear v. Ct. Com. Pl. of Lucas Cty., Prob. Div.*, 423 N.E.2d 427, 427–28 (Ohio 1981) (syllabus).

172. *Id.* at 428.

173. *Id.* at 429.

174. *Id.*

175. *In re Kister*, 955 N.E.2d at 1029.

176. *Id.*

177. *Id.*

court's analogy of wills and civil commitment is illogical, supports the gravity of what commitment entails, and demonstrates the need for extra protections for involuntary commitment proceedings, such as a jury option.

A. Deprivation of Liberty

Both the United States Supreme Court and the Ohio Supreme Court have recognized that involuntary commitment is a significant deprivation of liberty.¹⁷⁸ This deprivation extends beyond continual detainment, for example, safety concerns and disciplinary reasoning restrict a committee's movements within an institution.¹⁷⁹

In addition, commitment is likely to be based on predictive basis using psychiatric diagnosis to predict the individual's future harmful conduct.¹⁸⁰ Dueling psychiatrists illustrate one problem with predictive confinement, in other words, it is not an exact science and avails itself to differing opinions.¹⁸¹ In addition, the unreliability of professionals to predict future violent acts, and further "to overpredict violence, and indeed are more often wrong than right" is a problem.¹⁸² Further, since confinement may result without the individual committing an offense or committing a minor offense, the standard of proof—clear and convincing evidence—is lower than for a criminal trial, but may result in longer confinement.¹⁸³ Moreover, since the proceeding is characterized as civil and not criminal, the individual is offered less procedural safeguards.¹⁸⁴

B. Serious Collateral Consequences & Forcible Medication

Negative societal stereotypes of individuals with mental illness have

178. Addington, 441 U.S. 418; State v. Williams, 930 N.E.2d 770, 781 (Ohio 2010).

179. *Civil Commitment of the Mentally Ill*, *supra* note 4, at 1193–94.

180. Dershowitz, *supra* note 107, at 1286–87. The article further notes that "a large number of mentally ill persons currently confined in mental hospitals on purely preventive grounds." *Id.* at 187–88.

181. *Id.* at 1290. Dueling psychiatrists refers to cases such as *In re Thomas* described above.

182. Tarasoff v. Regents of Univ. of California, 17 Cal. 3d 425, 437–38, (California 1976) (citing the American Psychiatric Association amicus brief as well as other articles); American Psychiatric Association, *Amicus Briefs: Barefoot v. Estelle*, 3–4 (1982), available at <https://www.psychiatry.org/psychiatrists/search-directories-databases/library-and-archive/amicus-briefs> (arguing "[t]he Use of Psychiatric Testimony in a Capital Case on the Issue of a Defendant's Long-Term Future Dangerousness is Constitutionally Invalid Because it Undermines the Reliability of the Factfinding Process" and stating that "[t]he large body of research in this area indicates that, even under the best of conditions, psychiatric predictions of long-term future dangerousness are wrong in at least two out of every three cases."); see also Addington, 441 U.S. at 418 (noting that "[t]he reasonable-doubt standard is inappropriate in civil commitment proceedings because, given the uncertainties of psychiatric diagnosis.).

183. Dershowitz, *supra* note 107, at 1291–94.

184. *Id.* at 1296–1307.

increased since the 1950s.¹⁸⁵ Stereotypes include the fear that such individuals are violent and should be excluded from society.¹⁸⁶ Additionally, stereotypes engender authoritarianism attitudes, such as the notion that severe mental illness makes people irresponsible, and therefore their decisions should be made by others. Alternatively, stereotypes promote a type of benevolent attitude that individuals with a mental illness are like children and need to be provided care.¹⁸⁷

1. Stigma, Adverse Social Consequences, & Discrimination

Stereotypes can create prejudices, stigmas, and other adverse social consequences for individuals with mental illness such as discrimination.¹⁸⁸ An individual may suffer from both societally and individually created stigmas; both are significant and harmful.¹⁸⁹ For example, the “fear-based exclusion” and a fear of individuals with a mental illness (and fear of viewing the undesirable symptoms of mental illness) induces in people a “strong desire for social distance,” and can influence an individual’s decision not to seek help.¹⁹⁰ In addition, having a mental illness can cause other adverse social consequences and discrimination.¹⁹¹ Discriminatory behavior towards mentally ill individuals includes “withholding help, avoidance, coercive treatment, and segregated institutions.”¹⁹² Further, it influences mentally ill individuals’ ability to lease safe housing or obtain a good job.¹⁹³

2. Forcible Medication

It is well settled that forcible medication significantly infringes on an individual’s liberty interest in bodily integrity, autonomy, and personal security.¹⁹⁴ Further, individuals have a constitutional right to refuse medicine based on individual autonomy.¹⁹⁵ Nevertheless, the Supreme Court has upheld the right to forcibly medicate individuals, with

185. Link, *supra* note 34, at 1328.

186. *Id.* at 1332-33; Patrick W. Corrigan & Amy Watson, *Understanding the impact of stigma on people with mental illness*, 1 WORLD PSYCHIATRY 16, 17 (2002).

187. *Id.*

188. Corrigan, *supra* note 186, at 16; Addington, 441 U.S. at 425-426.

189. *Id.*

190. Link, *supra* note 34, at 1332-3.

191. Corrigan, *supra* note 186; *Civil Commitment of the Mentally Ill*, *supra* note 4, at 1200-01.

192. *Id.*

193. *Id.*

194. Harper, 494 U.S. 210, 221-22 (1990); *Steele v. Hamilton Cty. Community Mental Health Bd.*, 736 N.E.2d 10, 16 (Ohio 2007).

195. *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990).

qualifications, who are committed.¹⁹⁶ For example, an individual who is found dangerous to self or others may be forcibly medicated.¹⁹⁷ Further, a compelling governmental interest may overcome the mentally ill individual's refusal of medication.¹⁹⁸ Moreover, the police power as well as *parens patriae* justifications can overcome the refusal of treatment and allow for forcible medication.¹⁹⁹

The fact that antipsychotic drugs have serious side effects amplifies the liberty interest against forcible medication.²⁰⁰ The Ohio Supreme Court recognized the negative side effects of antipsychotic drugs including Parkinsonian syndrome, akathisia, dystonia, and dyskinesia.²⁰¹ Some side effects are reversible by stopping the use of the drugs, but other side effects, such as tardive dyskinesia, have no known treatment to manage symptoms.²⁰² Finally, a side effect called neuroleptic malignant syndrome can cause death.²⁰³

V. OHIO SHOULD RECOGNIZE THE RIGHT TO A JURY TRIAL IN INVOLUNTARY COMMITMENT PROCEEDINGS

It is unlikely that the Supreme Court will secure the right to a jury trial under the equal protection or the due process. Further, the unanswered question under the Seventh Amendment would not extend to the states automatically. Therefore, Ohio should follow other states and statutorily recognize the right to a jury trial in involuntary commitment proceedings. This recognition would provide protection for the individual, and a better societal understanding of individuals with a mental illness.

196. Harper, 494 U.S. 210; Debra A. Breneman, *Forcible Antipsychotic Medication and the Unfortunate Side Effects of Sell v. United States*, 539 U.S. 166, 123 S.Ct. 2174 (2003), 27 HARV. J.L. & PUB. POL'Y 965, 966 (2004).

197. *Id.*

198. *Id.*

199. Steele, 736 N.E.2d 10, 18-20.

200. *Id.* at 16; Harper, 494 U.S. at 210.

201. Steele, 736 N.E.2d at 17. The diseases side effects include, "Parkinsonian syndrome consists of muscular rigidity, fine resting tremors, a masklike face, salivation, motor retardation, a shuffling gait, and pill-rolling hand movements. Akathisia is a feeling of motor restlessness or of a compelling need to be in constant motion. Dystonia involves bizarre muscular spasm, primarily of the muscles of the head and neck, often accompanied by facial grimacing, involuntary spasm of the tongue and mouth interfering with speech and swallowing, oculogyric crisis marked by eyes flipping to the top of the head in a painful upward gaze persisting for minutes or hours, convulsive movements of the arms and head, bizarre gaits, and difficulty walking. The dyskinesia present a broad range of bizarre tongue, face, and neck movements." *Id.*

202. *Id.*

203. *Id.*

A. *Individual's Interest*

As the previous sections illustrate, commitment of mentally ill individuals is not always conducive to the rhetoric that assures it is what is best for them. Additionally, as the history illustrates experts are not always the best indicators of commitment. Also, the unreliability of predictive judgments exacerbates the situation. Moreover, as Section IV indicates involuntary commitment involves a whole host of negative consequences. Likewise, as noted above, stereotypes and discrimination towards individuals with a mental illness illicit several reactions: fear and exclusion, authoritarianism, or benevolence.

A jury trial may rectify these issues for the following reasons. It may cause the civil commitment proceedings to take a more serious form and ensure that an individual is given a fair proceeding and proper consideration.²⁰⁴ The jury may influence the proceedings to be more formalized and enforce procedural safeguards.²⁰⁵ Second, as noted above, a jury will safeguard the civil liberties of individuals, evaluate evidence, apply standards, and overall give the case the fact-based treatment it deserves.²⁰⁶ Further, it will consider the case without relying on stereotypical ideological beliefs that individual need someone to care for them or be excluded from society.²⁰⁷ Thus, people like Linda Thomas—when the evidence did not support a clear and convincing standard—may not be automatically committed. Fourth, if a jury trial exists individuals may receive an individualized decision.²⁰⁸ For example, commitment will be based on the proceedings and evidence presented at the proceeding, and not any interactions prior to the proceeding.²⁰⁹ Finally, a jury trial will present another opportunity for appeal of commitment statutes.²¹⁰

Additionally, the nature of civil commitment based on predictive

204. Section II, A.

205. *Id.*

206. *Id.*

207. *Id.* Of course, the counterargument then goes how does a jury ensure that the individuals on the jury will not do the same. *But see* Kavanaugh, *supra* note, 15 (The article illustrates that the jury for sexually dangerous commitments in Massachusetts were providing fair and just decisions, evaluating the evidence, enforcing the standards of commitment, and overall doing exactly the opposite of what the legislatures thought they would do. In other words, the juries were letting individuals go at a higher rate than judges, but the legislators thought they would commit more individuals.).

208. *See* Section II, A. Additionally a trial jury “imposes a barrier to “judicial whispering,” a phenomenon that plagues predictive proceedings. Prosecutors often manage to convey to the judge—informally and off the record—the “real” basis for the confinement, which may often differ from the formal one. But no one can whisper to the jury. The jury must be openly and formally charged and may hear only evidence that is a matter of record.” Dershowitz, *supra* note 107, at 1318.

209. *Id.*

210. Dershowitz, *supra* note 107, at 1318 (For example, the judge must give the instruction to the jury on the meaning of the statute’s criteria and such instructions can be appealed. However, with no jury the judge does not have to openly remark on specifics.).

judgments and not factual disputes about what happened—in contrast to some rhetoric—indicate a greater need for protections.²¹¹ In other words, when an individual is facing commitment based on what she might do, “why should this critical fact not be established in the same manner as other critical facts, and why should the law deputize the psychiatrist, rather than the jury, to perform this fact-finding function?”²¹² Thus, involuntary commitment should be afforded at least similar protections as criminal proceedings, such as the right to jury.²¹³

B. Societal Interest

As noted above, another reason for a jury trial is that it embodies democratic ideals, it encourages the participation of society, and it introduces community values into the decision-making process. Currently, “the public is largely unaware of civil commitment policies and practice—its extent, function and current context.”²¹⁴ Since possible solutions to correcting the stigmas and discrimination include education, participation in the commitment proceedings may alleviate some of the myths surrounding individuals with mental illness.²¹⁵ Overall, the exposure to individuals with mental illness through jury participation can increase a better understanding of what it means to have a mental illness.²¹⁶ Moreover, a better understanding would influence better and reflective treatments of individuals with a mental illness.²¹⁷

In addition, since predictive confinement is a social policy judgment, a jury made up of the community is arguable the best to make such a decision and not an expert.²¹⁸ Moreover, a jury would increase perceived legitimacy of the proceedings.²¹⁹

211. *Id.* at 1306.

212. *Id.* at 1311.

213. *Id.* at 1318.

214. Durham, *supra* note 2, at 18.

215. Corrigan, *supra* note 186 (The article notes that “[s]everal studies have shown that participation in education programs on mental illness led to improved attitudes about persons with these problems. Education programs are effective for a wide variety of participants, including college undergraduates, graduate students, adolescents, community residents, and persons with mental illness.”) (internal citations omitted); David L. Penn & Shannon M. Couture, *Strategies for reducing stigma toward Persons with Mental Illness*, 1 *WORLD PSYCHIATRY* 20, (2002).

216. *Id.*

217. BRACKEL, *supra* note 8, at 16. Additionally, “the history of social psychiatry teaches us that cultural conceptions of mental illness have dramatic consequences for

218. Dershowitz, *supra* note 107, at 1317 (Noting that “[i]f these decisions about risks and freedom are to be abdicated, in a democratic society it is better that it be abdicated to a jury than to a psychiatrist or a judge.”).

219. Ainsworth, *supra* note 15, at 1126.

VI. CONCLUSION

Involuntary commitment needs to move away from a “for their best interest” mentality or fear of the undesirables. As the history illustrates, the presumption of involuntary commitment as what is best for the individual does not always conform and should be eliminated, and individuals should be afforded protections that represent the gravity of his or her commitment. Although it may be true that an individual with a serious problem needs help, involuntary commitment should not just seek to isolate individuals, deemed undesirable, from society.²²⁰ As noted above, these individuals are facing serious consequences, and it is imperative that such consequences reflect the appropriate protections. As long as involuntary commitment remains a legal question, the protections should be legal in nature. To be clear, this article is not advocating that people who need treatment should not receive such treatment. But by making a fairer proceeding for commitment, as a society, we can concentrate on the individual patients’ needs and formulate treatment accordingly. Further, it may help alleviate and remove stigma, stereotypes, and discrimination surrounding mental illness. Therefore, individuals may seek out treatment voluntarily for themselves and others.

220. Durham, *supra* note 2, at 19 (The articles states two things pertinent here, the first a question: “If seriously mentally ill people come from all segments of society, why are only poor and disadvantaged people committed to state mental hospitals?” The other is a statement that “[t]he vast majority of involuntary committees are hospitalized because of annoying or bizarre behavior rather than for threatening or violent acts.”).