INSTITUTE OF CURRENT WORLD AFFAIRS

JLS-25 In the Matter of Alberta Lessard -- IV

(the fourth part of an eight-part series)

29 West 17th Street
New York, New York 10011
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Mr. Richard H. Nolte
Institute of Current World Affairs
535 Fifth Avenue
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Dear Mr. Nolte:

In the year that Alberta Lessard was committed to North Division Mental Health Center, four hundred thousand other men and women were admitted to county and state mental hospitals across the United States, and about half of them were officially registered as involuntary patients. There is no way of knowing how many patients signed in voluntarily under the threat of commitment proceedings against them, but by most estimates the number is substantial. In any event, the number of mental patients held against their will in 1971 about equalled the total prison population of the United States. Men protested their confinement a bit more often than women; among non-white patients, involuntary admissions far exceeded voluntary ones.

Every state in the Union (and the District of Columbia) has a law authorizing the involuntary hospitalization of those judged to be mentally ill. The definitions of "mental illness" differ from state to state and are not helpful for understanding what the legislators had in mind because they are usually vague and circular: "any condition which substantially impairs an individual's mental health", "in such mental condition that he is in need of supervision, treatment, care

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or restraint", or "so afflicted by mental disease that he requires care and treatment for his own welfare or the welfare of the community." But the various definitions do not matter much, because every state commitment statute requires a finding of mental illness plus something else--some behavioral impact of the person's illness. Fifteen states commit those mentally ill who are dangerous to themselves or others or are unable to take care of their own physical needs (food, shelter, hygiene, and so forth) on the outside. This is the narrowest standard in that it limits forced hospitalization to the dangerous and the highly dependent--and it is the standard that Blondis and Dixon were to urge in federal court in the case of Lessard v. Schmidt. The thirty-five other states have looser criteria. Fourteen commit those who are dangerous or simply "in need of care and treatment." Fifteen others hospitalize individuals with a mental illness that renders them "in need of care and treatment or a fit subject for hospitalization"--the standard that bothered Blondis and Dixon in Wisconsin. And seven states authorize commitment when it is "necessary to protect the welfare of the individual or the welfare of others," which goes beyond the seriously ill and the dangerous, because it includes those who make nuisances of themselves.

In most states, then, two categories of the mentally ill are at risk of being forced into the hospital: those who are considered dangerous, and those who are thought to require care and treatment. While there are no reliable figures on how many patients were committed on each of these grounds, most guesses put the proportion of commitments for dangerousness at less than one-quarter of the total involuntary hospital population. How many of these were actually dangerous is another matter entirely. The American Psychiatric Association estimates that no more than ten percent of hospitalized mental patients are in fact dangerous; other experts feel that even ten percent is an exaggeration.

The incarceration of the violent--whether mentally ill or not--is accomplished under the "police power" of the state, the power to protect the general public from harm. The police power is a kind of societal self-defense, a doctrine of pure necessity, and it inheres in the very nature and purpose of the state. It has been used to keep the dangerously insane from harming others for as long as anyone can remember. In medieval England the "furiously madd" were commonly treated like criminals, heavily chained about the waist or ankles and consigned to dungeons. Sir William Blackstone, the great eighteenth century historian of the common law, informs us that

no legal proceedings or special authority from the crown was neededto confine the violent, and Sir Thomas More (canonized in 1935), writing in the sixteenth century, described how this was done: "I caused him to be taken by the constables and bound to a tree in the street before the whole town, and there striped him till he waxed weary. Verily, God be thanked, I hear no harm of him now." The earliest codification of this ancient practice was accomplished in the Parliamentary statute of 1713, which authorized whipping, imprisonment or exile; the law covered only vagrant lunatics and didn't extend to "persons who are of rank and condition in the world..." In 1744, Parliament added a legal safeguard: an order of two or more justices of the peace before these treatments could be administered.

With the settlement of the American colonies, the provincial legislatures followed the British practice of incarcerating only the violent among the mentally ill. A New York law passed in 1788 and copied from the Parliamentary statute of 1744 limited confinement to the "furiously mad, so far disordered in their sense that they may be dangerous to be permitted to go abroad." As in England, the harmless insane were entrusted to the care of friends or family.

The forced hospitalization of the vast majority of the mentally ill who like Alberta Lessard pose no danger to the community is carried out under the parens patriae power of the state, the power to protect those citizens who are incapable of protecting themselves. The Latin formula parens patriae literally means "father of the country," and it refers to the English king's authority to act as the common curator of the realm, the general guardian of all infants, idiots, and lunatics. While the use of the parens patriae power in civil commitment is little more than a century old, the power itself has a venerable pedigree. As with most developments of the early common law, it arose over the disposition of revenues among men of property and position.

In tenth century England the feudal lord was the guardian of idiots and natural fools among his immediate tenants. The lord would take charge of the idiot's lands and all the rents and profits, maintain the man and his household out of the revenues, keep the excess for himself, and when the idiot died, turn over the estate itself to the heirs. If the lord were honest, his prerogative was welcomed because the idiot could well squander the estate and leave nothing for the heirs. And the lord could justify his profits from the arrangement on the grounds that the mentally disabled tenant held his land either under knight's tenure (with the

obligation of military service) or socage tenure (with the obligation to help out on the farm), and his incapacity kept him from performing his end of the bargain.

But as one has come to expect from the English barons, they badly abused their prerogatives, laying waste to the idiots' estates and leaving their heirs penniless. There was a thriving market in medieval England in the more profitable forms of guardianship (those over idiots and over unmarried women and under-age heirs not entitled by law to manage their patrimony), and a feudal lord often sold his right to all future profits from his guardianship over an idiot to another man for a lump sum of liquid cash. The practice resembled the modern market in commodities futures because the buyer gambled that he would more than make back his investment before the idiot died, whereupon the estate would revert to the man's heirs. Sometimes a clever heir might himself purchase this feudal incident from the lord, getting the money to pay for it as soon as he had eased the idiot into the arms of death.

The English kings were naturally jealous of the immense profits the barons reaped from their guardianship over idiots, and as early as the days of Henry I (reigned 1100-35) or perhaps during the reign of Henry III (1207-72), Parliament transferred exclusive jurisdiction over the mentally disabled to the king himself. The king's agents might be constitutionally no more scrupulous than the wicked barons, no less eager to plunder the estates of their wards, but at least the king was nominally accountable to Parliament, whose members were all landowners and subject to the whims and depredations of their immediate temporal lord. (According to court gossip of the thirteenth century, the man responsible for the new legislation was Robert Walerand, a minister, justice, and favorite of Henry III. Walerand anticipated leaving an idiot as his own heir and preferred that his land should fall into the king's hands rather than those of his lord's.) In any event, the earliest written record of the king's new power is a statute from the reign of Edward II (1307-27) called De Praerogativa Regis--Of the Prerogatives of the King. It was basically a tax law designed to divvy up the various categories of feudal profit between the king and his barons.

An important distinction was made between idiots and lunatics. Idiots or "natural fools" were mentally defective from birth, but lunatics (or non compos mentis, which the great Lord Chancellor Sir Edward Coke tells us in 1603 "is the most legal name") were born with normal human faculties and some time later lost their senses. "A lunatic," as Sir William Blackstone

defines the word, "is indeed properly one that hath lucid intervals; sometimes enjoying his senses, and sometimes not, and that frequently depending upon the change of the moon." And the king's duties to these two categories of mentally disabled were quite distinct. His guardianship over idiots was just as lucrative as the barons' had been, because the statute empowered him to keep all the profits from the land until the idiot died, and his only responsibility was to see that the man and his household were given an allowance. The idiot's immediate heirs were usually entrusted with management of the estate as they had an interest in seeing it prosper and flourish for the day when they might inherit it, but since they had an equally profound interest in hastening that day, custody of the idiot himself was given to other relations or friends.

The king's guardianship over lunatics, however, was without profit. He was obliged to maintain the man and his household out of the rents and profits of the estate and, taking nothing for himself, conserve all the rest, both profit and capital, for the lunatic if he passed out of his madness or for his heirs if he died in lunacy. During lucid intervals the lunatic would resume charge of his lands, and he or his heirs could demand from the king a full accounting of the profits. Historians remark that never before had a king of England assumed an unprofitable guardianship. One imagines that Parliament compelled him to accept his profitless responsibility to lunatics in exchange for the more lucrative guardianship over idiots. In any event, when the question arose whether a man were a lunatic, an idiot, or neither, the king's chancellor issued a writ de idiota inquirendo, and a jury of twelve was assembled to decide. Blackstone reports that juries were fond of frustrating the king's financial interest in a verdict of idiocy, preferring by far to find their neighbor a lunatic.

And so the king became the guardian of the mentally disabled, and the parens patriae power was born. The new law, drafted to satisfy the sovereign's hunger for revenues and only incidentally to provide care and custody to his unfortunate subjects, was not inspired by a vision of the state's benevolence. It was not until five centuries later that the parens patriae power of the English king would be used to justify the incarceration of the harmless mentally ill for their own good.

For when the statute De Praerogativa Regis was enacted, there were only a handful of institutions to take custody of an idiot or lunatic--an occasional monastery and the single asylum in the realm, St. Mary of Bethlehem (later

shortened to Bethlem or Bedlam), which was founded in 1247 and housed no more than six lunatics until the end of the fourteenth century. By 1600, a number of private mad houses had sprung up; they were run for profit and gave asylum only to those whose families could afford the price of boarding them there. Unregulated by the government, the private mad houses came in time to serve all manner of evil designs, and rich husbands found them a convenient repository for their meddlesome wives. In 1687, Daniel Defoe complained of this

> vile Practice now so much in vogue among the better sort, as they are called, but the worst sort in fact, namely the sending their Wives to Mad-Houses at every Whim or Dislike, that they may be more secure and undisturb'd in their Debaucheries....if they are not mad when they go into these cursed Houses, they are soon made so by the barbarous Usage they here suffer... Is it not enough to make one mad to be suddenly slap'd up, stripp'd, and whipp'd, ill fed and worse us'd? To have no Reason assign'd for such Treatment, no crime alleged, or Accusers to confront?

Defoe was not alone in his indignation, and in 1754, Parliament asked the Royal College of Physicians to propose some corrective legislation. The Royal College refused the charge as being too difficult a matter, and in 1763 Parliament appointed a special committee which heard testimony from both doctors and former inmates about the common confinement of perfectly sane men and women. In 1774, in the reign of George III (who himself suffered five attacks of insanity, the first in 1765 when he was twenty-seven and the last of which he took to his grave), An Act for Regulating Madhouses was enacted, and it required that they be licensed by the Royal College, with a penalty of five hundred pounds for violators. A one hundred pound fine was the fate of the keeper of any licensed mad house who admitted someone without a certificate from a physician, surgeon, or apothecary. And there was a provision for yearly inspection. These minimal legal safeguards would not be surpassed in England or America for almost a century.

The Act for Regulating Madhouses specifically excluded insane paupers from its protective cloak, as by implication had the statute De Praerogativa Regis, which applied only to the heads of landed families. Before the seventeenth century, the indigent mentally ill without either ties to the land or friends or family to support them were generally allowed to wander about the countryside like the other poor, begging or living off the earth, subject to children and others who found sport in the baiting of fools. (Poor Tom o' Bedlam

describes such a lifestyle to King Lear and his companions: "Poor Tom, that eats the swimming frog...drinks the green mantle of the standing pool; who is whipped from tithing to tithing, and stock-punished and imprisoned..."). As England became urbanized, the poor and the insane and retarded among them drifted into the cities, and the laws treated them all without distinction: by authority of the Act of 1744, two or more justices could order them apprehended and kept "safely Locked up...until the next Quarter Sessions."

The treatment of the harmless mentally ill in the American colonies followed the English pattern closely. Long before there was legislation to protect their personal well-being, legal provision was made to protect their property, with guardianship entrusted to town selectmen, justices of the peace, or church wardens. The rich were cared for in their own homes, sometimes stored in attic rooms to hide the disgrace. And the needy insane were classed with other paupers--financial dependence was the disease from which they suffered. Until well into the nineteenth century, commitment laws were limited to the dangerous insane.

Colonial poor laws, patterned after the Elizabethan Poor Laws Act of 1601, obliged the towns and cities to care for their own poor. Strangers were carefully investigated, and if they lacked the requisite financial security, were summarily "warned out" of town. As in England the indigent insane who lacked family or roots in the community drifted aimlessly from place to place along with other paupers. Sometimes the town fathers would under cloak of night spirit away a mentally deficient fellow and deposit him in a neighboring town, where his incoherence might keep him from informing the local authorities how he had been brought there. This practice of "passing on" continued into the nineteenth century, and there were bitter lawsuits between rural villages over which one had legal responsibility. (The motive for these contests could not have been wholly financial, because the legal fees often exceeded the cost of care and maintenance for five or ten years.)

When towns did provide for their own, it was often with charity and compassion, and with little inclination to disrupt the lives of the poor. A needy family unable to contend with the derangement of one of its members would be helped out by neighbors, and the records of Upland, Pennsylvania, preserve the earliest instance of a public appropriation for this purpose: in 1676 the town voted to hire "three or four persons...to build a little block-house at Amesland for to put" the mad son of Jan Vorelissen, a boy named Erik.

In some rural areas, the ingenious "New England system" of local care prevailed. Once or twice a year a public auction would be held in the local tavern. The poor and the insane among them were placed in public view, the bidders would inspect their prospective charges to see how much work might be got out of them, the auction would start high and proceed downwards, and the town would entrust the custody of an individual, a family, or a bulk lot of the needy to the man who asked the smallest recompense for their care. The lowest bidder was given a free drink as a bonus for winning. And in every lot there could be found one or two paupers who were insane or feebleminded. The records of the Orphan's Court of St. Clair, Indiana, for March of 1808 preserve this example: "the insane boy Lemay was cried down to Francois Turcotte, for sixty-nine dollars for one year from that date." The practice of bidding off apparently persisted into the second quarter of this century in at least one southwestern state.

Institutional care for the insane in eighteenth-century America was a limited affair, a last resort after other methods had been exhausted. For the poor in urban areas there was the poorhouse, where the insane were set to work at knitting, sewing, and spinning flax and wool. For the rich there were a few small, privately incorporated mad houses in the Eastern seaboard states. In 1751 a group of Quaker reformers, among them Benjamin Franklin, founded the Pennsylvania Hospital, where the mentally ill were housed in the basement in accordance with a belief that had prevailed since the middle ages that they were insensitive to extremes of cold and weather. The good people of Philadelphia were quite taken by the novelty of an institution for the insane, and on weekends they would drive out the hospital to view the inmates and, not infrequently, bait them to fury. The crowds grew so large that a fee of four pence was instituted in 1767 to limit their size, and by 1822 the price of admission had been raised to twenty-five pence. (At Bedlam in England, a fee was used to bring extra income into the hospital coffers--as much as four hundred pounds a year until the practice was stopped in the late 1700's).

The first public hospital devoted wholly to the mentally ill in America was founded in Williamsburg, Virginia, in 1773, and it was to remain the only one of its kind until fifty years later when in 1824 the Eastern Lunatic Asylum was built in Lexington, Kentucky. Until the second decade of the nineteenth century, there were never more

than eight hundred institutionalized mental patients in America, most of them from wealthy families. Commitment procedures were simple and uncomplicated: a relative or friend (and on not a few occasions, an enemy) would apply to the institution's manager or one of its physicians for an order of admission, which was hastily written on whatever piece of paper came to hand. Only in Virginia, where the forerunner of the federal Bill of Rights was enacted in 1776, did forced hospitalization require the assent of three magistrates.

Then in the Jacksonian era, in the decade after 1820, America was swept by a movement for institutionalization--penitentiaries for the wicked, almoshouses for the needy, reformatories for young delinquents, and asylums for the insane. By the 1830's, public mental hospitals had been built in New York, Massachusetts, Vermont, Ohio, Tennesse, and Georgia, and by the 1860's, twenty-eight of the thirty-five states could boast a public asylum. Institutionalization had become a means of first resort.

Historian David J. Rothman has ably documented the rise of the asylum in ante-bellum America. The medical superintendents of the early institutions, in their annual reports and journal articles and later in the popular press, promoted the notion that America had among the highest instances of insanity anywhere in the world. They traced its causes to the social, economic, and political life of the new Republic. A fluid social order excited unreasonable ambitions in men and women who in an earlier era would have been content with the lot of their parents. The endless succession of elections for office at all levels of representative government and the competition for power they engendered; new religious doctrines and the people's disposition to inquire into matters formerly the province of the learned; the loss of authority in the family and the competitive life in the public schools; financial speculation, debt, and bankruptcy--all these were exciting causes of insanity. And the individual, beseiged by the chaos around him, was helpless to withstand the chaos within.

The solution proposed by the medical superintendents was not a counterrevolution in the patterns and government of American life, but the creation of asylums where the mind-weary could seek refuge from the frenzied American mainstream. If American society itself were the chief cause of the burgeoning epidemic of madness, then the institution would be modelled after a nostalgic image of the stable Colonial community--constructed in rural places with ample grounds and far bucolic views, governed with humane strictness and orderly routines. For the small number of paupers who were allowed into the new institutions, they were a welcome haven from the

perils of the poorhouse and the jail. And for the wealthy, the early asylums devoted perhaps the most humane and careful attention to the needs of mental patients that has been their lot either before or since.

Despite the dramatic increase in the numbers of patients, special commitment laws were rarely enacted. Of utmost importance to a prospective patient's welfare was his expeditious separation from the environment that caused and maintained the morbid excitement of his mind--his friends and family, his business, his fellow citizens. Relatives or friends would simply bring him directly to the asylum, and no judicial approval or trial by jury was required. Confinement was for cure, not for punishment, and it was surely better that the patient spend his time at the asylum than in the courtroom. Cumbersome legal niceties and the public display of a court proceeding would surely discourage most families from bringing their afflicted members to almost certain relief. One suspects that behind these sensible reasons for unchecked medical discretion there lurked the ancient resistance of the healing profession to interference by the law, for the medical superintendents opposed even the barest of legal regularity. The managers of New York's Utica Asylum bitterly fought a provision in the institution's legislative act of incorporation of 1836 that required two respectable physicians to sign a certificate of insanity under oath before a new patient could be admitted. And insanity itself was redefined, no longer limited to bizarre or violent behavior. "To lay down any particular definition of mania, founded on symptoms, and to consider every person mad who may happen to come into its range of application" was an unsound procedure, wrote the influential medical superintendent Dr. Issac Ray. Perhaps for the first time in history, laymen could no longer rely on their intuition to judge if someone were insane. The opinion of an expert witness became indispensible. Dr. Ray wrote the leading treatise on "The Medical Jurisprudence of Insanity" and frequently testified as an expert witness in criminal trials. His ideas greatly influenced the judges of this period, among them Chief Justice Lemuel Shaw of the Supreme Judicial Court of Massachusetts, who will enter our story presently.

A remarkable phenomenon of these years of asylum-building in pre-Civil War America was the universal belief that short term incarceration would relieve nearly every case of insanity. In 1827, a retired captain of the Royal Navy by the name of Basil Hall made a tour of North America, and when he returned home he wrote a book about his experiences.

His travels had taken him to many charitable and benevolent institutions in the United States, and he was particularly taken with the Hartford Retreat, a private asylum in Connecticut. A "noble establishment", he called it, "a model, I venture to say, from which any country might take instruction." What impressed Captain Hall most about the Hartford Retreat was its remarkable success in curing insanity, as documented in its annual report for 1827: "during the last year, there have been admitted twenty-three recent cases, of which twenty-one recovered, a number equivalent to 91 3/10 per cent." Since Captain Hall's general appraisal of the American scene was in other respects entirely contemptuous, his praise for the Hartford Retreat was widely reproduced in American newspapers and magazines.

Four years later these statistics found their way into a progress report that young Horace Mann submitted to the Massachusetts legislative committee overseeing the construction of a public asylum in Worcester. "It is now abundantly demonstrated," Mann wrote, "that with appropriate moral and medical treatment, insanity yields with more readiness than ordinary diseases," a finding that had been "established by a series of experiments, instituted from holier motives and crowned with happier results, than any ever recorded in the brilliant annals of science." One can sympathize with Dr. William Woodward, the first superintendent of the Massachusetts State Lunatic Hospital at Worcester, which opened for business in 1833, who could report no more than 50% cured in the first year of operation. Dr. Woodward was able to qualify his apologies with the excuse that half his patients had been transferred from jails and almshouses, a third had already been confined for over ten years, and 65% were furiously mad. The next year, by changing his methods of computation, Dr. Woodward was able to report that 82% of all <u>recent</u> cases of insanity had been completely relieved.

Other asylum superintendents furiously competed to produce the most dramatic statistics of cure, motivated no doubt by a humanitarian wish to foster the success of lay reformers and motivated too by the more personal desire to secure fatter legislative appropriations and their own reappointments. The figures soared. Dr. John Galt of the asylum at Williamsburg claimed a rate of 100% cured (excluding one patient who had died in therapy), and soon afterwards Dr. William Awl of the Ohio asylum stated the matter less equivocally--100% pure and simple.

In 1840, Dr. Luther V. Bell, the renowned head of the Mc Lean Asylum outside Boston wrote in the annual report

of his hospital, "The records of this Asylum justify the declaration that all cases, certainly recent--that is, whose origin does not, either directly or obscurely, run back more than a year--recover under a fair trial. This is the general law; the occasional instances to the contrary are the exception." And five years later, a recalcitrant patient of Dr. Bell's at the McLean Hospital was to become the first non-violent mental patient in the recorded history of American jurisprudence to be held in an asylum against his will.

Mr. Josiah Oakes was an essentially benign, sixty-seven year old business man living in East Cambridge, Masschusetts. A few days after the death of his wife in 1844, Mr. Oakes engaged to marry a young lady of questionable repute named Sarah Jane Neal. To prevent the union, Oakes' sons and daughters initiated prosecution for lewdness of conduct against Miss Neal in the local police court and brought their father to the McLean Hospital for the Insane.

Mr. Oakes found two Boston lawyers to apply to the Supreme Judicial Court of Massachusetts for a writ of habeas corpus to win his release, and a hearing was scheduled in the Matter of Josiah Oakes before Chief Justice Lemuel Shaw, one of the greatest common law judges ever to grace the American bench. The hearing lasted two days, with a host of witnesses for both sides and a written deposition from Dr. Luther Bell of the McLean Hospital. The evidence against Mr. Oakes was that beginning five years earlier, around 1839, his character had undergone a marked change: where once he had been prudent and industrious, now he grew moody and erratic and threatened to engage in a real estate speculation too grand for a man of his limited means and business sense. Formerly a domestic soul and devoted to his wife, now he treated her harshly and was often absent of an evening. One day as his wife lay dying, Oakes left their house to visit with Sarah Jane Neal, and on his return he inquired--in a manner that shocked his daughters--whether Mrs. Oakes had died yet. The testimony from the McLean asylum was unanimous. Both Dr. Fox and his chief steward agreed that Josiah Oakes was insane.

Oakes' lawyers introduced evidence of their client's undiminished sagacity in business and the testimony of an East Cambridge physician who, after examining Oakes for twenty minutes, had found no signs of insanity. His lawyers also suggested that Mr. Oakes' hostile behavior towards his family arose from his resentment at their having sent him to the McLean Asylum for ten days on one earlier occasion. Perhaps

the entire affair was a sinister design by his sons and daughters; perhaps they wanted their share of his estate before Miss Neal got hers.

Chief Justice Lemuel Shaw knocked down the defense arguments one by one. "Since the subject has been scientifically investigated," he wrote in his opinion, "we know that a person may show shrewdness and sagacity in his business, but still be decidedly insane on some one subject." As for the doctor from East Cambridge, his interview with Mr. Oakes had been brief, he had heard only Oakes' side of the story, and he was apparently unaware of Sara Jane Neal's unsavory character. Besides, Dr. Fox's opinion must be given great weight in light of his skill and experience in healing the insane. "If we cannot rely upon the opinion of those who have the charge of the institution...we must set all the insane at large who are confined in the McLean Asylum." Finally, Justice Shaw easily dispensed with the claim that Mr. Oakes' resentment might account for his hostility towards his family. "To a man acting under ordinary motives and feelings," he wrote, "such resentment, although it might be naturally felt for the time, could not be lasting." And there was in fact no evidence of an improper design on the part of his children, whose testimony appeared candid and unobjectionable.

Justice Shaw regarded the McLean Asylum as a "satisfactory and useful institution, a place of relief, protection and cure for a person whose mind is diseased" and he clearly felt that Josiah Oakes belonged there. But where would Shaw find the legal principle to support the incarceration of a harmless man?

Justice Shaw could safely rely on the police power of the state and on a wealth of authority, both ancient and modern, to justify the forced hospitalization of Josiah Oakes--but only if he were violent. Shaw tried his best to discover danger. He marshalled the daughters' testimony that if their father carried a weapon, they would fear for his life. Shaw also engaged in the practice of lay psychiatry: "...this species of insanity leads to ebullitions of passion, and in these ebullitions dangerous acts are likely to be committed." But in the end Justice Shaw was forced to concede that Dr. Fox, whose opinion he had accorded such great weight, "does not say positively that he considers [Oakes'] being at large as dangerous to others."

With no legal authority to rely on, Justice Shaw was still able to devise a higher law to justify the action he was

about to take:

> The right to restrain an insane person of his liberty is found in the great law of humanity, which makes it necessary to confine those whose going at large would be dangerous to themselves or others.... And the necessity which creates the law, creates the limitation of the law.... It is a principle of law that an insane person has no will of his own. In that case it becomes the duty of others to provide for his safety and their own. The question must then arise, in each particular case, whether a person's own safety or that of others requires that he should be restrained for a certain time, and whether the restraint is necessary for his restoration or will be conducive thereto.... At present we think that it would be dangerous for Mr. Oakes to be at large, and that the care which he would meet with at the hospital, would be more conducive to his cure than any other course of treatment.

One can hear in Justice Shaw's words a degree of ambivalence about the novel rationale he has discovered. He seems to vacillate among danger to others, danger to self, and the promise of cure. But at the very end, the new law of custody and treatment prevails. It is easy to imagine that when Justice Shaw enunciated the legal principle that the state may command a harmless citizen to exchange his liberty for the certainty of mental restoration, he was aware of Horace Mann's report to the legislature or Dr. William Woodward's widely publicized claims or those of McLean's own Dr. Luther V. Bell--all of them announced in the popular press of Boston.

Ever since the forced hospitalization of Josiah Oakes in 1845, the courts and legislatures of every state have assumed that the parens patriae doctrine authorized the involuntary confinement of the harmless mentally ill for care and treatment. The old laws and precedents that had restricted incarceration to the violent insane were soon replaced with new criteria: "in need of custody or treatment," "a proper subject for hospitalization." The laws inscribed in this time of optimism and hope and of the humane treatment of the mentally ill have survived to the present day.

It is a curious twist of history that Dr. Luther V. Bell of the McLean Asylum would be among the first to repudiate the widespread myth of curability. "I have come to the conclusion," he wrote in 1857, "that when a man once becomes insane, he is about used up for this world." But the extermination of the myth must be credited to Dr. Pliny Earle of the Northhampton

State Hospital, also in Massachusetts. Beginning in 1877, Dr. Earle analyzed the annual reports and discharge records of five leading asylums and published his findings ten years later in a volume entitled "The Curability of Insanity." Dr. Earle had discovered that the inflated claims of the superintendants had been neatly accomplished by taking the number of patients released as the measure of recovery. And if a patient were discharged and readmitted more than once in the same year, each discharge would be counted as a cure on the asylum books. One woman, Dr. Earle revealed, had been cured six times in the space of a year at New York's Bloomingdale Asylum, and in the five hospitals whose records he examined, forty individual patients had been discharged as cured a total of 484 times. Three women alone had contributed 102 recoveries to the proud statistics. Dr. Pliny Earle was unpopular with his colleagues in 1887.

By the time Dr. Earle's findings appeared, the Civil War had brought high rates of inflation, lowered legislative appropriations for the public asylums, dangerous overcrowding, filthy quarters, and the almost universal use of mechanical devices to immobilize the inmates. The growing stock of chronic and incurable patients discouraged families from admitting their recently afflicted relatives, and an influx of foreign-born patients discouraged native-born Americans, especially those of means, from using the asylum as anything but a last resort. As the asylums were deprived of their former reasons for existence, the medical superintendents were quick to discover new ones. Indigent patients, after all, were surely better off even in overcrowded and understaffed warehouses than in the almshouses and jails of an earlier time. But more important, the insane if left at large--even the harmless insane and the rich--posed a great danger to the public. As Dr. Issac Ray wrote in 1863, "Intimate associations with persons afflicted with nervous infirmities...should be avoided by all those who are endowed with a peculiarly susceptible nervous organization, whether strongly predisposed to nervous diseases, or vividly impressed by the sight of suffering and agitation." Even worse, the mentally ill might commit unexpected acts of violence at any time. Their confinement was indispensible, "not more for their own welfare than the safety of those immediately surrounding them. The dream of the humane bucolic asylum had all but vanished--yet the institutions themselves had become an abiding part of the American scene, as had the laws that made them possible.

Jeff Steingarten

Received in New York on May 4, 1976