INSTITUTE OF CURRENT WORLD AFFAIRS

JLS-27 In the Matter of Alberta Lessard -- VI

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
New York, New York 10017

Dear Mr. Nolte:

On October 18, 1972, almost a year after Alberta Lessard dropped from the window ledge on West Greenfield Street and was committed to North Division Mental Health Center, the federal district court reached a decision in the case of Lessard v. Schmidt. It was late in the afternoon when Bob Blondis and Tom Dixon heard the news, and they waited at the central office of Milwaukee Legal Services for a friend to bring an advance copy of the opinion. At six o'clock that evening, the courier arrived.

"I couldn't believe it," Blondis recalls. "Just going through it, it was hard to believe--we won on this, we won on that, we won on everything."

Dixon says, "We just couldn't believe it. We went through it, and we were just really ecstatic." The federal district court had granted Alberta and her lawyers practically everything they had asked for, and something more.

Jeffrey Steingarten was until recently an Institute Fellow interested in the relationship among psychoanalysis, psychiatry and law. These are his final newsletters.

Friends were telephoned and beer was purchased in fitting plenty and drunk well into the night. Alberta was alone that evening, at home by herself, like so many evenings in the past year. "After you're committed," she told me recently, "your friends just automatically drop out. I've always had a few that stuck by me. But two-thirds of the people were afraid to associate, either because of the stigma that's placed on someone who's mentally ill or else because it might affect their job or affect them socially. People just feel that way. But I've always been able to accept things very well. I would say that not once was I depressed. I can't say that I didn't cry, I can't say that. I can be hurt, but I wouldn't call it depression."

"It was a good party," Blondis recalls. "But Alberta isn't a late night person. So the day after the party we celebrated over coffee and donuts at Alberta's house." Of course, Alberta was happy with the outcome. The federal court order invalidated her commitment to North Division, which Judge Seraphim had renewed month after month since the previous November, even though Alberta had been allowed to return home on conditional leave within days of her hearing. Now she was free from the medication that made her feel drowsy and her mouth dry as cotton wool, free from the obligation to report to the Day Care Center at the mental hospital, whose staff could haul her back there any time she stepped out of line. Alberta was restored to full citizenship. For the first time in a year, she was empowered to make a contract or a will, she was privileged to sue and be sued, she could serve on a jury and she could marry. In just two weeks, on Election Day, Alberta could cast her vote against President Richard M. Nixon.

Now, free to vote again, Alberta hesitated. "I had the feeling," she would later tell me, "as if I was still going to get picked up somehow. The defendants were questioning the decision, saying they would appeal it. But I think I went to vote anyway, and nobody challenged my vote. I didn't

vote for Nixon, I'm sure of that. But do you know what? I think I didn't vote for either of them. Neither one deserved to be in there. The only ones who can get anything today are the wealthy and the socially prominent and the politically astute. They are the ones who have taken all my liberties away, not only them but the combination of all the unions. It's the unions that practically are taking over the government. And so I'm fighting it very strongly. You see, the Teachers' Association was the ones who got me dismissed."

As Alberta was soon to discover, the last entry in her hospital record was "Conditional Leave." The administrators at North Division refused her demand to change it to "Illegally and Unconstitutionally Committed," even though the federal court for the Eastern District of Wisconsin had voided her commitment. Alberta has spent much of the past five years trying to clear herself in the public's eyes, trying to prove her sanity. The federal court, in its landmark decision in the case of Lessard v. Schmidt, had, of course, no occasion to declare Alberta sane.

It was a unanimous decision, with Circuit Judge Sprecher writing a twenty-six page opinion for himself and District Judges Reynolds and Gordon. After describing the facts of Alberta's story and discussing the jurisdictional issues, Judge Sprecher signalled that he and his two colleagues were not inclined merely to tinker with Wisconsin's commitment procedures, but would undertake a fundamental review of the traditional way that persons accused of mental illness have been treated by the law for over a century. And on practically every point Dixon and Blondis had raised, the three federal judges held that even the benevolent purposes of forced hospitalization cannot excuse the disregard of Constitutional safeguards. Summing up, Judge Sprecher repeated

the familiar words of Mr. Justice Brandeis's dissent in the 1928 Olmstead case:

> Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent.... The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

The court found the Wisconsin commitment procedures constitutionally defective in many particulars: for failing to require effective and timely notice to the prospective patient of both the charges against him and his legal rights, and for permitting commitment at a hearing in which he is not represented by adversary counsel, in which hearsay evidence is introduced, in which psychiatric evidence is given without the prospective patient's having had the right to remain silent in the psychiatric interview, and in which proof beyond a reasonable doubt is not required. Rather than traumatizing the patient, Judge Sprecher wrote, the full panoply of procedural formalities and safeguards may even have a therapeutic effect. He referred to "medical evidence that indicates that patients respond more favorably to treatment when they feel they are being treated fairly and are treated as intelligent, aware, human beings." This declaration was primarily an article of faith on Judge Sprecher's part because most of the "medical evidence" he cited was hardly impartial: testimony at Senator Sam Ervin's 1970 hearings on the constitutional rights of the mentally ill by Dr. Thomas Szasz, famous for demanding the abolition of involuntary commitment on moral grounds, and of Bruce J. Ennis, an A.C.L.U. lawyer who favors abolition. But Judge Sprecher also quoted from Dr. Kevin Kennedy's own testimony at Alberta's commitment hearing in Judge Seraphim's chambers that Alberta's involvement with her lawyers was an "environmental influence" that accounted in part for her improved condition in the month she spent at North Division.

The federal judges also decided that a prospective patient must be given a probable cause hearing with his counsel present within forty-eight

hours of detention to make sure that some reasonable grounds exist for detaining him in the first place. Even a brief detention in a mental hospital, Judge Sprecher wrote, "may have long lasting effects on the individual's ability to function in the outside world due to the stigma attached to mental illness." A hearing on such short notice need not observe all the rules of evidence and the strict formality of a final commitment hearing, but it must afford the prospective patient the right to notice and counsel and the opportunity to be heard. And, he added, a detainee who appears at a hearing incapacitated by medication has not been accorded a meaningful right to be heard. Here Judge Sprecher cited testimony from the 1970 Senate hearings: "Often it is the drugs themselves which are responsible for 'crazy' behavior. Tranquillizers often give people a blank starey look and make them slow in responding to questions." Replying to the argument that a hearing so soon after detention may harm the mentally ill, the judge pointed out that until some kind of hearing is held, there is no reason in law to believe that the person is indeed mentally ill.

The federal judges also placed a strict outside limit on the amount of time that a person accused of mental illness may be held in the hospital before a full and final hearing on his commitability--no more than two weeks. Against the argument that more time may be needed to assemble the psychiatric evidence for a full hearing, Judge Sprecher reasoned that if "the facilities of the state hospitals do not permit full examination within this period because of inadequate personnel, it is difficult to see how continued detention can be said to be beneficial to the patient."

In their brief, Blondis and Dixon had attacked the commitment standard in Chapter 51--"mental illness" and "a proper subject for custody and treatment"--as too vague and overbroad to be constitutional, but they did not

suggest an alternative. Here, in what would become among the most controversial holdings in his opinion, Judge Sprecher laid down a strict and narrow criterion. Henceforth, commitment would be limited to mentally ill individuals who are judged to be imminently dangerous to themselves or others. And the immediacy of the danger must be proved, beyond a reasonable doubt, on evidence of a recent overt act, attempt, or threat of violence to themselves or to others. No longer could an individual be hospitalized against his will simply because others felt that he needed care and treatment in a hospital. The protection of life or limb--perhaps even the protection of property--was surely a compelling enough reason to justify the deprivation of liberty. But the parens patriae doctrine--the state's authority to act as guardian over children and the mentally ill--was no longer enough. For one thing, commitment based on "mental illness" or "need for treatment" seemed to Judge Sprecher far less objective than commitment based on dangerousness. Here the judge quoted from the law review article written by a lawyer, a psychiatrist, and a psychologist that pointed out the inherently arbitrary nature of the label "mentally ill":

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

For another thing, commitment to a mental hospital can be a perilous experience, Judge Sprecher wrote. He reviewed at some length the drawbacks of being committed in Wisconsin: the devastating loss of civil rights, more serious than that accompanying a criminal conviction; the social stigma following release and the attendant difficulty finding a job or buying a house; and the statistics showing that both in Wisconsin and

nationwide, the death rate among resident mental patients in 1966 was nine times the rate for the population at large, a difference explained not so much by the advanced age of the average patient but more by the chilling fact that the doctor-patient ratio in mental hospitals is far lower than the ratio on the outside. Under the circumstances, Judge Sprecher wrote, "it is not difficult to see that the rational choice in many instances would be to forgo treatment." The use of the parens patriae power to incarcerate the harmless mentally ill seemed to Judge Sprecher to accord them quite different treatment from the physically ill--a probable violation of the Equal Protection Clause of the Fourteenth Amendment. "Persons in need of hospitalization are allowed the choice of whether to undergo hospitalization and treatment or not," he reasoned. "The same should be true of persons in need of treatment for mental illness...."

But Judge Sprecher completed this last sentence in a way that oddly left open the door for a revival of the parens patriae power: "...unless the state can prove that the person is unable to make a decision about hospitalization because of the nature of his illness." Nowhere in his opinion did Judge Sprecher amplify on this qualification to the new dangerousness standard, not even in his closing summary. But these twenty-three words, almost casually inserted into his opinion, would for years to come permit judges throughout Wisconsin to violate, if they were so inclined, the new spirit of Lessard v. Schmidt.

As a final check on the state's power to deprive a harmless person of his liberty, Judge Sprecher held that "persons suffering from the condition of being mentally ill, but who are not alleged to have committed any crime, cannot be totally deprived of their liberty if there are less drastic means for achieving" the goal of treatment. He cited the 1960 Supreme Court case of Shelton v. Tucker for the "basic concept of American

justice" that "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same purpose." Accordingly, Judge Sprecher held that the state, the committing authority itself, has the burden of showing whether less restrictive modes of treatment are available--out-patient treatment, day treatment in the hospital, placement with a friend or relative--and why these won't do just as well as incarceration in a mental hospital.

At the end of his opinion, Judge Sprecher in effect invalidated the commitments of every patient eighteen years or older in Wisconsin mental hospitals. He gave the state Department of Mental Hygiene ninety days to review every one of these cases. Some, he wrote, might be persuaded to consent to voluntary status; others would have to be released if they posed no immediate danger to themselves or to others. For patients who still seemed dangerous, the state would have to arrange judicial hearings at which all the newly decreed procedural rights would be observed, as many as five hundred or a thousand hearings in the coming months. And for those patients who gained their release, Judge Sprecher ordered the state of Wisconsin to assist in their readjustment to life on the outside.

Throughout his opinion, Judge Sprecher indicated that he was not simply transferring in wholesale fashion the rights of criminals to individuals accused of mental illness. Instead he used a balancing test laid down by the Supreme Court for non-criminal cases. On one side of the balance are the benefits that a prospective patient may gain by exercising a given procedural right, and on the other side are the costs to the state of granting that right, particularly the danger that a given protection may frustrate the state's goal of helping the mentally afflicted. In their brief, Blondis and

Dixon had urged, for example, that the prospective patient must have his counsel present at the psychiatric interview. But by using this due process balancing test, the federal judges decided that whatever benefit may accrue to the patient from having his lawyer with him is surely outweighed by its potential to cripple the commitment process. While the patient's counsel should have access to all psychiatric reports, Judge Sprecher wrote, "we are unable at this point...to be so certain that assistance of counsel will prove materially beneficial at the psychiatric interview as to be able to determine that the right to effective aid of counsel outweighs the interests of the state in meaningful consultation." Besides, a transcript or tape recording of the psychiatric interview should give the patient's lawyer an adequate basis for challenging the examining psychiatrist's conclusions in court. This was the only claim on which the federal court found against Alberta and her lawyers. (The court also declined to take up their claim that a person accused of mental illness should be provided an independent psychiatric witness, just as he must be provided with counsel. The court felt that since Judge Seraphim had repeatedly offered to consider whatever independent medical testimony Alberta and her lawyers might produce, she consequently had no "standing" to raise the issue in this suit.)

Perhaps the most difficult question for the court to resolve with this due process balancing test was whether the patient should be granted the right to remain silent in the psychiatric interview. On the patient's side fall the dictates of principle; Judge Sprecher quoted from Mr. Justice Fortas, who in the Gault decision characterized the Fifth Amendment guarantee as "a command which this Court had broadly applied and generously implemented in accordance with the teaching of the history of the privilege and its great office in mankind's battle for freedom." On the state's side, however, is the practicality of allowing the patient to refuse to speak to his medical

examiners. "The prospect of a seriously ill individual being prevented from obtaining needed treatment appears ludicrous," Judge Sprecher acknowledged. But in the end, he resolved the balance in favor of the right to remain silent, and he made a bold supposition to back up his choice: "It may be expected that most patients, like Miss Lessard in the present case, will desire to talk to a person they believe they can trust."

Only years of experience would prove whether Judge Sprecher's guess were correct or not. It would take far less time than that for the psychiatric community to voice its outrage.

In 1973, the defendants appealed the Lessard decision, and again in 1974, and twice the Supreme Court of the United States remanded it on technical and jurisdictional grounds. The essential legal issues are still unresolved.

Meanwhile, the decision was paid only lip service in most Wisconsin courts. The local Milwaukee judges claimed that they were abiding by it, but for years commitment hearings continued to be perfunctory and formal, lasting only ten minutes each, with court-appointed counsel rarely cross-examining witnesses or introducing testimony of their own, and with judges still paying massive deference to the hasty opinions of psychiatrists. Blondis and Dixon contemplated a contempt action against the local judges, then gave up in frustration. Not until the summer of 1976 did the federal Constitution come to Milwaukee's mental hospitals. And in the rest of the state, most of the county judges claimed on one hand that Lessard did not apply to them and urged on the other hand that the state attorney general take the case twice to the Supreme Court.

Psychiatrists were alarmed by the Lessard decision and its progeny in other states--by the narrow dangerousness criterion for commitment and by the procedural safeguards designed to curtail the profession's traditional power to commit without judicial control. One psychiatrist sounded the call to battle: "It may be that the issue of the mentally ill is the place to stop the growing tyranny of law." Even Harvard's Dr. Alan Stone (who once criticized those of his colleagues who "committed people because it was the easiest thing to do") grew anxious: "Lessard...would if followed exactly, put a virtual end to involuntary commitment." There was psychiatric sabotage in Wisconsin and elsewhere, even when the profession had no need to protect its autonomy--even when judges were still not willing to act like judges and run their courtrooms by the rule of law. For as Blondis and Dixon had discovered, it is one thing to win a case, and another to enforce it.

But Lessard was extremely influential outside of Wisconsin. It became a rallying point for patients' advocates who won comparable cases in Kentucky, West Virginia, Alabama, Pennsylvania, and Michigan, and persuaded legislatures in six other states to write into law most of the rights that Lessard had decreed. Alberta's case had become a milestone in the history of the mentally ill. A Due Process revolution had begun, a revolution whose ambiguous consequences for the lives of patients and the practice of psychiatry are still unfolding.

Tom Dixon has the sense that Alberta was less elated by her historic victory in October, 1972, than he and Blondis were. "She began to feel more and more that while it was an extremely important decision, she hadn't gotten her due. She was the one who had been institutionalized, but

she never did get any money damages out of it. And some of the other cases where she felt she had been messed over still hadn't come to fruition. She probably felt that she had gotten less out of the whole thing than maybe we had."

Blondis and Dixon had promised Alberta that they would try to right the wrongs she claimed had been done to her in 1967 by the West Allis elementary school in firing her without a proper hearing and Marquette University in not letting her complete the doctoral degree in education and in dismissing her from the Reading Clinic. Between them, they interviewed Alberta for fifty hours and began collecting records from the two schools. They did almost strike a compromise with West Allis to put Alberta's name back on the roster of teachers for a possible job in the future. But Alberta balked at the last minute. As Dixon remembers it, "She didn't feel she could face a class of students again. Their parents might be telling them their teacher is wacko, or they might be coming to the school complaining that they didn't want their kids being taught by a crazy. Alberta couldn't face that."

For another thing, it was hard for Alberta to scale down her demands for full and public redress of all the wrongs against her. It may have been true that Alberta's lawyers in 1967--two well-known and esteemed attorneys--had not pushed hard enough to get her all the relief she had sought. But soon enough, her new lawyers found themselves in the same position.

"I can't remember the precise relief that Alberta wanted against Marquette," Dixon says, "but that was part of the problem all the time. It was very difficult for us to believe that we could get any kind of complete vindication. And a lot of times, that seemed all she wanted--complete vindication--which was not legally attainable, even if it had been the day after the events occurred. Initially she probably had some very strong cases against West Allis and Marquette. But as time passed and the potential for resolving

them legally became much less, she was caught out on a limb. It was no longer possible to win on each detail of her cases, and without being able to do that, she'd never be completely satisfied. Alberta has this intense sense of personal justice. She wanted her cases to be pursued so that she'd end up vindicating entirely the particular position she had taken. I suppose there ought to be a lot more of that. But unfortunately that's quite impossible to do legally. And it kept her from achieving her immediate goals of getting her job back and being readmitted to the Ph.D. program. Bob and I never did get all the facts straight. The details had become so muddled in the intervening years. But if I had to bet on somebody, I'd bet on Alberta."

On page forty-nine of the February, 1974, issue of the American Medical Association's Prism magazine is a photograph of a human skull. There are dark sockets where eyes once rolled, a triangular cavity between them for a nose, and between the teeth a parchment scroll with the words 'Bill of Rights' in antique lettering. The skull appears again on the following page, only now it is four times larger and takes up more of the page than the words it illuminates. The article, "Dying With Their Rights On," is an attack on the decision in Lessard v. Schmidt by Darold A. Treffert, M.D. At forty, Dr. Treffert is director of the Mental Health Institute in Winnebago, Wisconsin, also President of the Wisconsin Psychiatric Association, and Associate Clinical Professor of Psychiatry at the University of Wisconsin Medical School.

Dr. Treffert is an avid collector of cases from around the country in which mental patients died, in his phrase, "with their rights on." For instance: Rene, 26, and Angela, 20, stand for several hours on a busy streetcorner, silently gazing into each other's eyes. The police take them

down to the station house, where the women refuse to speak, gazing still. The police telephone the local prosecutor for advice on getting Rene and Angela put in the local hospital. Release them, says the prosecutor--only if they're dangerous to themselves or others can you hold them. Thirty hours later the police are summoned to an apartment where Rene and Angela have immolated themselves on a pyre of butcher paper. "Although more than 20 percent of her body was burned," writes Dr. Treffert, "including her chest, upper arms, and upper legs, Angela lived. Rene died. But she died with her rights on."

A woman, 49, is admitted to a general hospital because she won't eat--a condition psychiatrists sometimes call andrexia nervosa. She refuses psychiatric treatment. The local judge orders her released on the grounds that the woman is not psychotic and her condition is not immediately dangerous. Three weeks later she dies of starvation.

A coed, 19, attempts suicide by swallowing lots of pills, then signs out of a psychiatric hospital against medical advice and the wishes of her family, protesting that she'll never try it again. The family lawyer advises that under the Lessard case, commitment is impossible because there is no "extreme likelihood of immediate harm" to herself or others. Next day she hangs herself.

Two of these tales of horror are from Wisconsin in the aftermath of Lessard and one from Michigan where, by the time Dr. Treffert wrote "Dying With Their Rights On," the Bell case had instituted a similar dangerousness standard, relying on Lessard as precedent. By April, 1975, when Dr. Treffert's article was reissued in Psychiatric Annals under a quieter title and without the illustrative deathhead, the author's collection of stories had grown. A thirty-six year old California man, ordered released from the mental hospital by a court that found no "imminent danger," goes home and kills

his wife, three children, and himself. Michigan man, 32, shoots and kills self and two small sons after police refuse wife's pleas to have him locked up. Pregnant mother of nine children decapitates two of them in front yard after repeated attempts to commit her have failed.

Dr. Treffert's sources are varied: The Sacramento Bee, personal communications from the Detroit and Memphis Police Departments, testimony before a California Senate committee. There is no reason to doubt that these events happened more or less as Dr. Treffert's relates them. What they have to do with the Lessard case is another matter entirely.

Did the Lessard decision result in the release of large numbers of violent or hopelessly dependent mentally ill? Was Dr. Stone correct when he predicted that Alberta's case would put a virtual end to involuntary commitment? For four years after the federal court decision, only one probate judge in the entire state of Wisconsin seemed to take it seriously--Charles P. Jones of Dane County Court in Madison, the affluent and liberal university community. Judge Jones's courtroom is a kind of laboratory for looking at the consequences of the decision. And it provides a starting point for understanding the ethical issues raised by the forced hospitalization of the mentally ill.

Commitment hearings before Judge Jones, which last an average of two hours each, are more detailed and humane than any I had previously attended. Psychiatric testimony is far less perfunctory than in Milwaukee, where Lessard has been paid only lip service, and both the testifying psychiatrists and the county prosecutor appear to appreciate the reasons for running a commitment hearing by the same rules as other court business. The patient is always present and permitted to speak; his rights may be waived only with his competent consent. And while the 48-hour and two-week time limits have

caused some difficulty for Judge Jones and his clerk, Stu Schwartz, they are generally workable.

Of special concern to Dr. Stone and others is the patient's right to remain silent in the psychiatric interview. But according to Judge Jones, the Fifth Amendment guarantee has not crippled the commitment process. Jones estimates that no more than 10% of detainees refuse to speak to court-appointed psychiatrists even though they are warned of their right to do so and have met with a lawyer. Of this 10%, according to Judge Jones, half would have refused to speak even without having been granted the right to refuse, either because their condition made coherent speech impossible or because they were suspicious of the doctors. And of the estimated 5% who refuse to speak to the appointed psychiatrists because they now have the legal right to do so, half can be sufficiently evaluated on the basis of their behavior alone. This leaves about 3% of detainees who are released because Lessard granted them the right to remain silent--and some of these were probably not commitable in any case. As Circuit Judge Sprecher had uneasily predicted, the Fifth Amendment guarantee has lent a sense of dignity and fair play to commitment proceedings without causing many problems for the government. And besides: before Lessard, when a prospective patient refused to speak with his psychiatrists, the judge's only recourse was the issue a contempt citation, a meaningless gesture that was rarely used.

Nor have the stringent requirements of Lessard put a virtual end to involuntary commitment in Dane County. Here a comparison of the disposition data there and in Milwaukee is revealing, although still inconclusive. In the period from January to June, 1974, for example, 76% of the cases that went to trial in Milwaukee resulted in commitment, while only 36% of the Dane County cases did. This would seem to confirm the fears of psychiatrists like

Drs. Treffert and Stone and of others who predicted that Lessard would cause the wholesale release of the irresponsible and the violent. But a further look at the statistics shows that roughly the same percentage received psychiatric help in both places. The reason is that most of the detainees who avoided forced hospitalization in Dane County chose in the end to undergo some form of voluntary treatment, either in the hospital or on the outside; 21% agreed to enter the hospital voluntarily (compared with only 4% in Milwaukee) and 15% of the cases in Dane County were dismissed in exchange for a promise from the patient to accept a specified form of outpatient care. Thus, with all the safeguards of Lessard, only 8% more patients were released without care in Dane County than in Milwaukee, where business was conducted as usual.

These statistics raise more questions than they answer. If the threat of commitment did not loom over Judge Jones's courtroom, would so many of the detainees in Dane County have voluntarily offered to enter the hospital or out-patient treatment? (On the other hand, since the threat in Milwaukee was so much greater, why weren't there more voluntaries than in Dane County?) Can consent given in an institutional or court setting ever be considered voluntary? (One must keep in mind that in the Soviet Union, only 3% of the mental patient population are claimed to be involuntarily committed.) But several psychiatric writers have recently observed that with enough care and effort, it is rarely necessary to go to court to treat a patient, that if hospitalization does indeed offer the only hope, thepatient can usually be persuaded to sign in voluntarily.

In the end, it may well turn out that when men and women considered to be mentally ill are treated as autonomous, responsible individuals, many more of them than was once believed are capable of making decisions which the rest of us feel are in their own best interests. And the presumption of

responsibility may in itself have therapeutic value.

These conclusions, mild as they may seem, throw into question the entire practice of forced hospitalization. For they challenge the ethical premise underlying it: the notion that to be mentally ill is to lack the capacity for responsible choice, for self-determination, for autonomy. By American Psychiatric Association estimates, no more than 10% of the involuntary hospital population can be considered violent or dangerous; the vast majority are harmless and in the hospital for care and treatment. In other areas, Anglo-American law has generally abided by the familiar ethical precept set down by J.S. Mill in 1859: "The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not sufficient warrant." But with the mentally ill, our law has taken a different stance. "It is a principle of law that the insane have no will of their own," wrote Justice Lemuel Shaw in 1845, as he ordered Josiah Oakes held at the McLean Asylum--the first American to be forced into the hospital even though he posed no danger to the community.

For one hundred twenty-five years, the medical profession had been delegated the duty to supply this will. But to many doctors, "health" as a good in itself is more important than Mill's concern with individual responsibility. On this they have long been guided by the injunctions of the Hippocratic corpus, particularly that of Hypeos: "Lacking professional training, a patient is too ignorant to be able to comprehend what information he gets, and he is in any case too upset at being ill to be able to use the information he gets in a manner that is rational and responsible." Here, Hypeos speaks of the physically ill. Imagine how much less rationality and

and responsiblity he would accord to those considered mentally ill, how little freedom he would prescribe for them to decide their own fates.

And so the battles between law and psychiatry that Alberta's case provoked are not merely territorial struggles for professional dominance and control. They go to the heart of how madness will henceforth be morally and ethically understood.

Jeffrey Steingarten

Received in New York on June 2, 1977.