The Oregon Court of Appeals and the State Civil Commitment Statute

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In 1973 the Oregon Legislature passed a major revision of its civil commitment law adopting changes that mirrored those taking place across the United States. The new sections offered significant protections of the rights of individuals who are alleged to have mental illness, a limitation on the length of commitment, the adoption of both dangerousness and gravely disabled type commitment criteria and the adoption of "beyond a reasonable doubt" as the standard of proof for commitment hearings. From 1973 to the present time, the Oregon Court of Appeals adjudicated a large number of appeals emanating from civil commitment courts. This article is based on a review of 98 written Oregon Court of Appeals commitment decisions from the years 1998 through 2015 and is accompanied by a review of legislative intent in 1973. It appears that the court of appeals has significantly altered the 1973 legislative changes by moving the dangerousness criteria to imminence and the gravely disabled criteria to a focus on survival. Empirically, civil commitment has dramatically decreased in Oregon over a 40-year period and the case law, as developed by Oregon Court of Appeals, has had a significant contributing role in this reduction.

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The treatment of individuals with mental illness in state institutions became a major civil rights topic in the 1960s. This debate was soon followed by major court decisions leading to statutory changes and a significant shift in civil commitment law nationally.[1] As society trumpeted personal rights, courts began emphasizing individual liberty and reinforcing constitutional rights to due process and equal protection. In this context, states began turning from a commitment standard of need for treatment to the narrower dangerousness to self or others.[2] In 1964, Washington, DC was first to adopt a dangerousness standard. Five years later, California passed the Lanterman-Petris-Short Act,[3] which restricted commitment to those who were dangerous to themselves or others or so gravely disabled that they could not meet their needs for survival.

In the traditional *parens patriae* rationale for commitment, fewer due process protections were required because a major goal of the state was treatment. In the 1972 *Lessard v. Schmidt*[4] decision, a federal district court found Wisconsin's need-for-treatment commitment statute unconstitutional and narrowed the standard to "there is an extreme likelihood that if the person is not confined he will do immediate harm to himself or others." The three-judge panel made a striking departure, arguing that restrictions to liberty faced by a committed patient are worse than for a felon and thus "interests in avoiding civil commitment are at least as high as those of persons accused of criminal offenses," with the state having to prove mental illness and dangerousness beyond a reasonable doubt.

In 1975, the U.S. Supreme Court in *O'Connor v. Donaldson*[5] ruled that "a State cannot constitutionally confine without more, a nondangerous individual." Although the unanimous court specifically stated that "there is no reason now to decide whether the State may confine a nondangerous, mentally ill individual for the purpose of treatment," the ambiguous "without more" accelerated the national shift in these cases toward "dangerousness" rather than need for treatment as the guiding principle for commitment of nondangerous persons.[6]

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Civil Commitment in Oregon

The Oregon Legislature enacted its first civil commitment statute in 1862.[7] In 1973, in line with national trends, Oregon made significant changes in its commitment statute adopting many patient rights, including the adoption of "beyond a reasonable doubt" as the evidence standard for commitment hearings. In 1979, just after the Supreme Court decision in *Addington v. Texas*,[8] the Oregon Legislature changed the standard to "clear and convincing evidence."

The 1973 statutory provisions contained the following definition of "mental illness"[9]: "Person with mental illness means a person who because of a mental disorder is one or more of the following: (A) dangerous to self or others; (B) unable to provide for basic personal needs and is not receiving such care as is necessary for health or safety."

Since 1973, two additional commitment criteria were added to the Oregon statute, one focused on persons meeting a statutory definition of "chronic mental illness,"[10] whereas a new category of civil commitment legislated in 2013 is based on a definition of an "extremely dangerous person."[11] Commitments based on the chronic mental illness criteria will figure prominently in this review (see below), whereas to date, there are no appellate decisions regarding "extremely dangerous persons."

In testimony before the Oregon Legislature, two documents stand out as providing the then-prevailing view of the proposed statutory changes. Both documents were submitted in testimony to the Senate Committee on the Judiciary on April 4, 1973. The first document was a memo written by Dr. J. D. Bray,[12] administrator of the Mental Health Division, while the second was a report from Dr. D. K. Brooks,[13] Superintendent of the Oregon State Hospital and Chair of a multidisciplinary task force on Oregon commitment laws. These documents provide a contemporaneous view of the 1973 statutory changes.

Bray reviewed the proposed amendments and emphasized that a new community mental health initiative entitled "alternatives to state hospitalization" would decrease the number of individuals committed to state hospitals. He viewed the dangerousness criteria as in line with other new state statutes and commented on the basic-personal-needs criterion as follows: "Inclusion of the latter concept allows commitment of some persons, primarily the elderly and those associated with chronic psychosis, out of contact with reality, or unable to make decisions about their basic needs because of their mental condition."[12]

This comment was cited later by the court of appeals as evidence that the legislative intent of the basic-needs criteria was meant to be limited.

Brooks[13] offered the Senate Judiciary Committee more specific commentary about the two-fold legislative definition of "mental illness." He stated that nearly half of the states had adopted similar dangerousness criteria. He offered the following about the basic-needs criterion:

> (b) This alternative standard for commitment is basically taken from 1972 changes in the commitment laws in Pennsylvania. Situations covered under this definition are where a person may not be "dangerous" at all, but is in such a mental condition that he either cannot or will not provide for "basic personal needs" necessary for his own health and safety.
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> The requirement in (b) that the person not be receiving such care is to eliminate from the definition those persons who may be unable themselves to supply their basic needs, but who are in fact being properly cared for by others, whether relative, a nursing home, etc.

Both Bray and Brooks emphasized the importance of the patient rights sections of the proposed legislation and made it clear that the definition of "mental illness" for the purposes of civil commitment did not apply to individuals who were seeking voluntary hospital admission. Other members of the task force submitted testimony that supported the bill. The task force endorsed beyond a reasonable doubt as the legal standard for commitment hearings.

The Oregon Court of Appeals

The Oregon Court of Appeals was established in 1969 as Oregon's intermediate appellate court and has been described as one of the busiest appellate courts in the country. For example, from 2003 to 2008, an average of 3451 appeals per year were referred to the court of appeals of which 101 were appeals related to "mental commitments."[14,15]

The work of the court of appeals traditionally took place in three-judge panels. The 2009 Oregon Legislature allowed[16] the court to decide cases in two-judge panels, with the opinion of the third judge breaking ties. The bill also allowed the court discretion in deciding whether to review appeals *de novo* or to accept the trial courts record and base their decisions solely on matters of law. In 2010, the National

Center for State Courts conducted a caseload study[17] that demonstrated that the court needed additional staff and a minimum of three additional judges, just to keep their current workload flowing. The 2013 Legislature increased the number of judges on the court from 10 to 13.

With the exception of one case, *State v. O'Neill*,[18] in which the Oregon Supreme Court reviewed a 1974 court of appeals decision and upheld the constitutionality of the 1973 legislative changes, all commitment case law has come from the court of appeals. This article focuses on a review of this case law to the present time by examining themes that emerge from the review and by discussing how these themes may have influenced civil commitment in the state of Oregon.

Method

We identified and reviewed 98 civil commitment decisions reported on the Oregon Court of Appeals website from 1998 to 2015. For each case, we recorded the year of the decision, the case number, the county of origin of the case, the name of the trial court judge, the name of the individual who filed and argued the case for the appellant, the names of the court of appeals judges who participated in the review, the court of appeals decision, the main focus of the case and the reasoning for the decision. (The list of cases reviewed is available from the authors.)

Results

The 98 reported cases came from 17 Oregon counties. Many (37; 38%), come from Multnomah County, the site of Oregon's largest city, Portland. Other populous counties, Washington and Lane, each accounted for close to 10 percent of the sample. Umatilla County, the site of a former large state hospital also accounted for 10 percent of the sample. Some of Oregon's less populous counties such as Wasco, Douglas, and Coos were also the subject of court of appeals decisions.

The number of cases per year was fairly evenly divided, except for 12 decisions in 2002 and 15 in 2014. The 15 cases from 2014 included 11 in which the State of Oregon's Attorney General conceded to the essential correctness of the appellant's arguments in the appeal. The 11 cases in 2014 were by far the largest number of conceded cases in any year of the study.

The court of appeals reviewed 46 trial court judges, some multiple times. The largest number of reviews, 29, focused on two Multnomah County judges, of which 19 reviews resulted in reversals of their decisions.

Although each case lists the name of an individual who filed the brief for the appellant, the work setting of these individuals was not identified. However, in the past few years and in some appeals, the Multnomah Public Defender Agency was listed along with an individual. These are appeals that come from counties not under the jurisdiction of this particular defender agency.

During the study period, 27 different court of appeals' judges participated in the decisions. There were three court of appeals judges who participated in 26–33 panels, whereas another two participated in 15–16 panels. During the study period there were four decisions involving the entire court of appeals.[19–22] Including these four *en banc* rulings, the court of appeals reversed 74 (76%) of the trial court determinations, 24 in the cases in which the state conceded to the appellant, and 50 in other cases where the state defended the trial court decisions. The court of appeals affirmed 24 (24%) of the trial court decisions.

Aside from the 24 conceded cases, and before 2009, most appeals were reviewed *de novo*. Most of these reviews cited as precedent the 1976 case of *State v. O'Neill* (see above). After 2009, the number of *de novo* reviews decreased and the court of appeals made its determinations based on whether the trial judge adhered to the law, as determined by statute and prior court of appeals decisions.

The 98 civil commitment appeals broke down into two main areas of concern. Thirty-seven appeals focused on the question of appellant rights. Of these, 24 concerned a subsection of ORS 426.100(2)(a–e), entitled "Advice of Court," requiring that at the time of the commitment hearing the trial court: ". . . shall advise the person alleged to have a mental illness: the reason he or she is brought before the court; the nature and possible results of the proceedings; the right to subpoena witnesses and the right to be represented by counsel."[23]

The other significant area of court of appeals review focused on the decision that a trial court judge must make to civilly commit a person alleged to have

mental illness. Most of the appeals in this review stipulated to the fact that the appellant had a mental disorder. The question on appeal thus became whether the trial record demonstrated "clear and convincing evidence" (the evidence standard since 1979, see below), along with the particular concern of danger to others (13 appeals), danger to self (16 appeals), and the basic-needs criteria (29 appeals).

In these decisions the court of appeals often began the decision with a statement about the importance of the civil commitment decision for the person alleged to have mental illness. An example comes from one of the four *en banc* decisions:

> As we have observed, a civil commitment has serious consequences. See, e.g., State v. D.R., 244 P.3d 916, 920 (Or. Ct. App. 2010) "a serious deprivation of liberty and social stigma are attendant to a civil commitment" (State v. G.L., 243 P.3d 469, 475 (Or. Ct. 2010) (civil commitment "deprives a person of his or her constitutionally protected liberty interest, and carries deleterious collateral effects, including social stigma which affects the person's reputation and earning potential" (internal citations and quotation marks omitted)). The purpose of Or. Rev. Stat. § 426.100(1) is to ensure that, before an allegedly mentally ill person suffers those consequences, he or she receives "the benefit of a full and fair hearing". State v. *Allison*, 877 P.2d 660, 661 (Or. Ct. App. 1994).

This viewpoint forms the backdrop of the court of appeals approach to civil commitment.

Clear and Convincing Evidence

Many of the court's decisions were based on its definition of clear and convincing evidence. As previously mentioned, the 1973 Oregon statute adopted "beyond a reasonable doubt" as the required standard for commitment hearings. Experience with this standard of proof resulted in a great deal of controversy. In 1979, while the U.S. Supreme Court was considering *Addington v. Texas,*[8] the legislature considered lowering the burden to "clear and convincing" evidence. Testimony on HB2438, the proposed statutory change, was divided.[24] The Oregon Psychiatric Association, family members of patients, and several mental health agencies supported the bill. Defense attorneys and patient advocates argued that the bill "turned back the clock" to the time before the 1973 amendments expanded the rights of a person alleged to have mental illness.

The Department of Human Services Mental Health Division supported the proposed burden of proof change, citing two then-recent Oregon Court of Appeals cases. *In the Matter of Heinz*,[25] concurring Judge Tanzer concluded:

> The standard of proof beyond reasonable doubt, borrowed from criminal procedure, is inappropriate in a mental hearing where the issue is the degree of probability of future possibilities rather than the existence of a past fact. Yet the legislature has directed that we apply that standard and, however difficult it may be to apply, we are bound to and will find ways to make it workable.

Later in *In the Matter of Fry*,[26] concurring Judge Johnson quoted Judge Tanzer and further concluded:

> I concur with that statement except for the comment that we "will find ways to make it 'workable.'" In this case, we are confronted with persons who suffer from mental illness and in all probability are a danger to themselves or to others. If we applied a preponderance of the evidence test, I am certain that a majority of this court would agree with me that the trial court's order committing these individuals should be affirmed. We are compelled to reverse because the legislature in its wisdom requires that the state prove a probability as to the future beyond a reasonable doubt.

After the U.S. Supreme Court issued its opinion in *Addington*, the Legislature changed the standard to clear and convincing evidence. However, the Oregon Court of Appeals viewed clear and convincing evidence as presenting a high bar to commitment. For example, in a 2008 appeal,[27] citing *State v. Allen*[28] and *State v. Hambleton*,[29] the court shed light on its working definition of clear and convincing evidence as crucial to the fundamental goal of civil commitment. The court stated:

> We reiterate here, as we often do in civil commitment cases, that the clear and convincing evidence standard is a rigorous one, requiring evidence that is of "extraordinary persuasiveness" making the fact in issue "highly probable". *State v. Allen*, 149 P.3d 289, 292 (Or. Ct. App. 2006); *State v. Hambleton*, 123 P.3d 370, 374 (2005). That standard is not "merely abstract or precatory. Rather [it is] the product of a fundamental recognition of 'the priority of preserving personal liberties[.]'" *Hambleton*, 123 P.3d at 374 (quoting *State v. Lott*, 122 P.3d 97, 110 (Or. Ct. App. 2005), *rev. denied*, 132 P.3d 28 (Or. 2006) (Edmonds, P. J., dissenting)).

Danger to Others

Our sample contained 13 appeals focused on danger to others. In the 2008 case cited above,[27] the court of appeals stated:

> . . . a court assesses whether the evidence presented to it is sufficient to prove that "a person is a danger to others as a result of [her] 'condition at the time of the hearing as understood in the context of [her] history.'" *State v. Lawrence*, 144 P.3d 967, 969 (Or. Ct. App. 2006) (quoting *State v. King*, 34 P.3d 739, 741 (Or. Ct. App. 2001)). Specific acts of violence are not required to establish dangerousness. *Id.*; *see also State v. Bodell*, 853 P.2d 841, 842 (Or. Ct. App. 1993); *State v. Pieretti*, 823 P.2d 426, 428 (Or. Ct. App.1991), *rev. denied*, 833 P.2d 1283 (Or. 1992). Rather, past statements that threaten violence or harm can justify a

> finding that a person is dangerous to others so long as those statements, in context, clearly form the foundation for a prediction of future dangerousness. *Lawrence*, 144 P.3d at 969; *see also State v. D.R.K.*, 171 P.3d 998, 999 (Or. Ct. App. 2007). To form that foundation, we require that evidence of threats be accompanied by evidence of an overt act directed toward fulfilling the threats, or evidence that those threats are made under circumstances making future harmful acts highly likely. *D.R.K.*, 171 P.3d at 1000.

In a 2009 appeal[30] the Court added to the above formulation:

> ". . .conclusions based on conjecture as to whether appellant poses a danger to others are insufficient." Apprehensions and speculation alone are not enough to fulfill the requirements of the statute.[31]

Danger to Self

There were 16 decisions focused on danger to self. One from 2010[32] summarizes the court of appeals view in this area.

> To establish that a person is [d]angerous to self, the state must present evidence that the person's mental disorder would cause him or her to engage in behavior that is likely to result in physical harm to himself or herself in the near term. State v. Olsen, 145 P.3d 350, 352 (Or. Ct. App. 2006). That requires evidence that the person's mental disorder has resulted in harm or created situations likely to result in harm in the near future. Id. (internal quotation marks omitted). Additionally, our cases have established that the threatened harm must, at minimum, involve actual physical harm, id. at 353, and that the physical harm must be serious, State v. North, 189 Or.App. 76 P.3d 685, 689 (Or. Ct. App. 2003). See also Judd, 135 P.3d at 401 (discussing standard for harm). Indeed, a number of our cases have suggested that the potential harm must be life-threatening or involve some inherently dangerous activity. Judd, 135 P.3d at 400 (noting case law) (internal quotation marks omitted). In a related sense, we have explained that a person can be deemed dangerous to self if he or she has established a pattern in the past of taking certain actions that lead to self-destructive conduct, and then he or she begins to follow the pattern again. State v. Roberts, 52 P.3d 1123, 1125 (Or. Ct. App. 2002). Consistently with that understanding, although a person can be committed on the danger to self basis before he or she is on the brink of death, the prospect of serious physical harm must be more than merely speculative. Id. (internal quotation marks omitted). Indeed, we have repeatedly admonished that "apprehensions, speculations and conjecture are not sufficient to prove a need for mental commitment." Id. (quoting State v. Ayala, 991 P.2d 1100, 1103 (Or. Ct. App. 1999)) (brackets omitted). See also Olsen, 145 P.3d at 352 (quoting Roberts, Ayala, and similar language from State v. Stanley, 843 P.2d 1018, 1020 (Or. Ct. App. 1992)). Such restraint comports with the fundamental principle that the power to civilly commit a person must not be used as a "paternalistic vehicle" to "save people from themselves." Olsen, 145 P.3d at 353 (quoting State v. Powell, 35 P.3d 1084, 1087 (Or. Ct. App. 2001)).

Basic Personal Needs

This area drew the highest number of appellate decisions, 29 in our sample. The basic-needs criteria are complicated, because the trial court judge must make two distinct findings: first, that the person alleged to have mental illness is "unable to provide for basic personal needs," and second that the person "is not receiving such care as is necessary for health and safety."

In a 2011 decision[33] the court of appeals goes to great length to outline its interpretation of the meaning of the basic-needs criteria. The court began its analysis by first addressing defining basic personal needs:

> "Basic needs are the things necessary for survival." *State v. Shorett,* 95 P.3d 1146, 1151 (Or. Ct. App. 2004). They include the needs for water, food, and life-saving medical care. *State v. A.M.-M.,* 238 P.3d 407. 410 (Or. Ct. App. 2010). In order to commit a person on the ground that the person is unable to provide for his or her basic needs, the state must prove, by clear and convincing evidence, that, because of a mental disorder, the person is unable to secure basic self-care, and, as a result, the person "probably would not survive in the near future." *State v. Bunting,* 826 P.2d 1060, 1061 (Or. Ct. App. 1992).
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> A person's ability to provide for his or her basic needs is assessed at the time of the commitment hearing "in the light of existing, as opposed to future or potential, conditions." *State v. C.A.J.,* 230 213 P.3d 1279, 1284 n. 5 (Or. Ct. App. 2009) (quoting *State v. Headings,* 914 P.2d 1129, 1131 (Or. Ct. App. 1996)). A "basic needs" commitment must be based on "more than evidence of speculative threats to safe survival." *A.M.-M.,* 238 P.3d at 410 (internal quotation marks omitted).

The court then goes on to present factual situations from several of its earlier cases to illustrate their definition of needs:

> Because a basic needs commitment must be based on a current threat to a person's safe survival, we have held that evidence of homelessness is not, in and of itself, sufficient to support a basic needs commitment, nor is evidence that a person has schizophrenia and has suffered discomfort or minor injuries as a result of delusions. *State v. Baxter,* 906 P.2d 849 (Or. Ct. App. 1995), is illustrative.
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> In *Baxter,* the state presented evidence that the appellant, who had schizophrenia, had failed to take his prescribed psychiatric medications and, as a result, had difficulty sleeping, engaged in hostile behaviors, and abused drugs and alcohol. In addition to the state's evidence, the appellant himself reported that, while homeless, he had sought medical care for dehydration and a hernia. The trial court committed the appellant on the ground that he was unable to provide for his basic needs. On *de novo* review, we reversed. 906 P.2d at 850. We held that the appellant's failure to take his medications could not serve as a basis for his commitment because even assuming that his failure to take his medications resulted in the behaviors that preceded his

> commitment, including sleeplessness, hostility, and substance abuse the state had failed to prove that those behaviors were "so severe as to constitute a threat to his survival." *Id.* at 852. Similarly, we held that neither the appellant's homelessness, nor the physical ailments he had while homeless, could serve as a basis for his commitment, explaining that "we cannot say that homelessness by itself is sufficient grounds for commitment" and that the state had "failed to show that the ailments were so severe as to threaten appellant's survival." *Id.* at 852.
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> We recently followed *Baxter* in *A.M.-M.*, 238 P.3d 407, in which the appellant, who had schizophrenia, refused to take his prescribed psychiatric medications and, as a result, experienced delusions that caused him to wage "a religious battle" in his grandmother's house, where he lived. *Id.* at 409. The appellant *1090 caused substantial damage to his belongings and bedroom, and he sustained minor cuts to his hands when he tried to "push glass through a wall." Id. Because of the appellant's destructive behavior, his grandmother was not willing to allow him to continue to live at her house. The trial court committed the appellant on the ground that he was unable to provide for his basic needs. On *de novo* review, we reversed, concluding that the "[a]ppellant's failure to take his prescribed medication caused a change in his behavior, but that behavior was not so severe as to cause a threat to his survival," and specifically noting that "[t]he minor cuts that appellant inflicted on himself while pushing glass through walls were not life threatening." Id. at 411. In addition, we held that, "[although it seems plausible that appellant will not have housing services available on release, as we said in *Baxter,* homelessness is not adequate justification for involuntary commitment." Id.
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> As *Baxter* and *A. M.-M.* illustrate, the controlling legal principle is that, in order for a trial court to commit a person on the ground that the person is unable to provide for his or her basic needs, the state must present evidence that the person's mental disorder creates an imminent and serious threat to the person's health and safety. In other words, the state must establish the existence of a nonspeculative threat to the person's near-term survival. Evidence that the person suffers from a mental disorder that impairs his or her judgment and has caused discomfort or minor injury is legally insufficient to support a basic needs commitment. Again, as we held in *Bunting,* the state must present evidence that, as a result of a mental disorder, the person "probably would not survive in the near future. 826 P.2d at 1060.

The Evolution of the Court of Appeals Approach to Basic Personal Needs

The concept that the basic needs criteria apply only in situations where the person alleged to have mental illness "would not survive in the near future" dates in large measure to an interpretation made by the court of appeals in its 1990 decision, *State v. Brungard.*[34] This was one of the few decisions made by the court of appeals that applied to the little used separate set of civil commitment criteria,[35] which was enacted in 1987. It defines a person:

> With a chronic mental illness, as defined in Or. Rev. Stat. § 426.495.
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> Who, within the previous three years, has twice been placed in a hospital or approved inpatient facility.
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> Who is exhibiting symptoms or behavior substantially similar to those that preceded and led to one or more of the hospitalizations or inpatient placement.
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> Who, unless treated, will continue, to a reasonable medical probability, to deteriorate physically or mentally, so that the person will become a person (who is dangerous to self, others, or unable to take care of basic personal needs).

In the *Brungard* decision, the court of appeals stated that:

> It is consistent with both the words and the purpose of ORS 426.005(2)(c)(D) to construe it as implicitly requiring a finding that, unless treated, the person will continue, to a reasonable medical probability, to deteriorate in the near future to the point of being a danger or being unable to care for basic needs.

In 1992, in *State v. Bunting,*[36] the court of appeals applied the reasoning put forward in *Brungard* as applied to civil commitment based on the original 1973 basic rights criteria. The court stated:

> State v. Brungard, supra, 789 P.2d at 687, construed another commitment statute, Or. Rev. Stat. § 426.005 (2)(c),[1] to incorporate the phrase "in the near future" as the measure of the imminence of the statutory condition authorizing commitment. We construe Or. Rev. Stat. § 426.005(2)(b) to incorporate that standard, too. A person is subject to a "basic needs" commitment under Or. Rev. Stat. § 426.005(2)(b) if clear and convincing evidence demonstrates that, due to a mental disorder, there is a likelihood that the person probably would not survive in the near future because the person is unable to provide for basic personal needs and is not receiving care necessary for health or safety.

With these interpretations by the court of appeals, survival "in the near future" was introduced into the meaning of all three commitment criteria, danger to self and others, and basic personal needs. These words become most confusing in regard to danger to self and basic needs. The Appellate Division of the Attorney General's Office participates regularly in the training of trial court judges, attorneys, mental health investigators and examiners and others involved in the administration of the civil commitment statute. For these endeavors, the Appellate Division and the Oregon Health Authority pre-

Table 1 Civil Commitment Comparisons*

Year	Inv.†	Total CC	CC/100K
1972‡	–	1,168	53
1983	3996	1,165	45
1993	5864	959	31
2003	8315	785	22
2013	9852	585	15

*All data were obtained over the years from the Oregon Mental Health Division. Data published with the permission of the publisher, from *J Am Acad Psychiatry Law* 34: 534–7, 2006.
†Investigations done on individuals of emergency civil holds.
‡The only data available for 1972 are the total number of civil commitments.

pared training materials that review all of the relevant aspects of the commitment statute and recognize "a certain amount of overlap" between the basic needs and danger to self criteria.[37,38] This confusion was apparent enough for the court of appeals in 2013 to specifically address its view of the differences between the two criteria,[39] and for the 2015 Oregon Legislature to attempt to clarify the basic-needs criteria as follows: "unable to provide for basic personal needs *that are necessary to avoid serious physical harm in the near future*, and is not receiving such care as is necessary to *avoid such harm* (new language in italics)."[40]

Discussion

For the past 30 years, the number of individuals civilly committed in Oregon declined dramatically. Table 1 incorporates data from a 2006 article,[41] with data now available from 1972 to 2013 to provide a 41-year perspective on the Oregon commitment process. Table 1 demonstrates a steady increase in the total number of precommitment investigations,[42] with a steady decrease in the number of individuals actually civilly committed. These findings are dramatic. In a 2008 article, these changes in civil commitments have been viewed as related to factors such as the decrease in the number of psychiatric beds in the community and in the state hospitals, and to the use of the state hospital primarily for individuals referred from the criminal courts.[43] Although these factors remain important, we now attribute at least part of the drop in civil commitments to the influence of the court of appeals with the development of a long line of decisions that have narrowed the definitions of what it means to be a person with "mental illness" in Oregon. These are trends that were not anticipated by the 1973 Oregon Legislature.

The court itself appears to work in a relatively closed system. A small number of judges working in civil commitment appear to be responsible for many of the decisions over the years. Further, appeals were brought to the court by individuals whose work settings appear to be associated with the state's defender groups. These groups usually have advocated for limiting civil commitment. The Attorney General's Office of the State of Oregon is responsible for defending the decisions of the state's trial courts. We have no way of knowing how vigorous these defenses have been, and in recent years, the state has conceded many of the appeals without a defense. We do not know why these concessions have been made. We also have no information on whether the Attorney General consults with the Oregon Health Authority, the state's mental health agency, or with outside professionals to provide the court of appeals with expert views of appellant arguments. There is also no evidence in any of the reviewed appeals of *Amicus* briefs submitted in these appeals on either side of the arguments. These are all areas for future research that would shed further light on the situation described in this report.

The focus on patients' rights in these decisions is certainly understandable. Among other questions of patients' rights, the court of appeals was most insistent that the trial court judges specifically read the list of rights that persons alleged to have mental illness are required by statute to hear at the time of the commitment hearing. The worth of this recitation is questionable, however, if the person alleged to have mental illness is incompetent to understand these rights and to work with his attorney to act on them. In reviewing these decisions, it appears that many of the appellants would not be competent to understand these rights as read to them by the trial court judge. The reading of rights to possibly incompetent individuals is an important area for future legislative consideration.[44]

The Oregon Court of Appeals' focus on rights carries over to its view of the meaning of clear and convincing evidence and the three commitment criteria. Over the years the court has viewed civil commitment as primarily a "deprivation of liberty," with attendant "social stigma" which "affects the person's reputation and earning potential." Although the concerns are valid, the cases reviewed show little consideration for balancing them with the symptoms of mental illnesses, many of which, left untreated, can

lead to equal or more serious negative effects, and many of which are now treatable. Citing several psychiatric articles from the mid-1970s, a unanimous Supreme Court in *Addington v. Texas* stated: "One who is suffering from a debilitating mental illness and in need of treatment is neither wholly at liberty nor free of stigma."[8] In many ways, the Oregon Court of Appeals could be seen to be living in a "pre-Addington" world as the balance between rights and treatment does not appear forcefully in these decisions. In addition, this court of appeals does not seem to validate the fact that mental illnesses are in and of themselves serious diseases with potentially dire consequences beyond stigma, even to include premature death.[45]

This pre-Addington orientation carries over into the court of appeals view of the meaning of clear and convincing evidence. The view of this evidence standard as demonstrating "extraordinary persuasiveness" and "highly probable" as critical in attaining the goal of "preserving the personal liberties of those facing civil commitment" seems an extension of the original 1973 Oregon evidence standard of beyond a reasonable doubt.

As illustrated in the important court of appeals decisions in *Brungard*[34] and *Bunting*,[36] the dangerous-to-self-and-others criteria in Oregon have migrated in common usage to a focus on dangerousness in the near future without any statutory attempts to define these terms further in the statute in 1973 or later. This view derives from such court of appeals terms as "highly likely" or in the "near term."

Most of the commitment criteria decisions in this review were focused on the basic personal needs criteria, Oregon's version of *parens partriae* commitment based on grave disability, rather than dangerousness. It is in this area that the court of appeals has deviated most from what we were able to construct of the 1973 legislative intent. It appears that in *Brungard* the court of appeals developed its current understanding of the basic-needs criteria by adopting and changing the meaning of another very different set of commitment criteria meant for statutorily defined "chronically mentally ill individuals." The court changed "unless treated will continue, to a reasonable medical probability, to physically or mentally deteriorate" into "probably would not survive in the near future." "To a reasonable medical probability" is a legal standard that applies to medical testimony and is not much different from a "preponderance of the evidence" or a lesser standard such as "more likely than not." The chronically mentally ill statute calls for a statement by a physician about the course of a deteriorating medical condition based on previous episodes of the same disorder in the same patient. It is most certainly not based on a prediction of near-term survival. Medical prediction based on the understanding of a disease process is reasonably accurate in cancer and heart disease, as it is in the course of untreated schizophrenia or bipolar disorder.

The case presented[33] was but one of many that we could have chosen to illustrate about how far the court of appeals had come in explaining away many of the most serious complications of schizophrenia and bipolar disorder, leading in some situations to an acceptance of homelessness, serious psychiatric deterioration, and what might lie beyond for these individuals. It appears that by defining basic personal needs as those "things necessary for survival" and with the addition of "in the near future" the court of appeals has done a disservice to the population of severely ill individuals who are indeed gravely disabled and in need of care and treatment and who meet what appears to be the 1973 legislative intent as expressed in the testimony of both Drs. Bray[12] and Brooks.[13] Whether the 2015 legislative changes to the basic needs criteria will change the court of appeals views in this area remains to be seen.

It is also well known that one of the great consequences of narrow or ineffective civil commitment laws is a shift of persons with serious mental illness to criminal justice settings.[46] In a 2010 report the Treatment Advocacy Center[47] found that, in Oregon, persons with severe mental illness were three times as likely to be incarcerated persons (estimated 3,091) than those in a hospital (~1,026). Oftentimes, the loss of liberty experienced by mentally ill persons in such settings is dramatically greater than may have been experienced through involuntary civil commitment. Subjecting mentally ill defendants to arrest and possible conviction leads to further stigma and worsened quality of life. Unnecessary commitment should be strenuously avoided. The costs of these illnesses and the potential for treatment and making lives better should be viewed as at least equal to balancing these fears.

This study had limitations. First, it represents the actions of an appeals court in only one state, and

cannot be generalized to other states without further research. Second, from discussions with psychiatrists and trial court judges, the authors believe that the decisions of the court of appeals have influenced many Oregon judges and have played an important role in reducing the state's commitment rates. Discussions with some trial court judges have convinced us that being reversed by the court of appeals has negative ramifications for judges. However, we cannot support this conclusion with certainty on the basis of the data gathered for the article. Further support will have to wait for future reports. Third, this report does not take into account the roles of other actors in the civil commitment process including district attorneys and expert witnesses. Courts of appeals depend on the record given to them for review. There are reasons why records reviewed by the court of appeals may be viewed as deficient because of the way the commitment process is handled in this particular state. A 1979 article outlined some of these concerns.[48] A more comprehensive report should take these factors into account in judging the actions of this court.

Recommendations from this review include opening up the appellate process to more viewpoints and expert opinion on mental illness, its course, consequences, and treatment; encouraging the State Office of the Attorney General to consult on appeals with experts of its own choosing; and, most important, encouraging the Oregon Legislature to reformulate and update its civil commitment law so that the citizens of the state can have a workable law, and the court of appeals can have a fresh start. The 1983 American Psychiatric Association's model civil commitment statute[49] may be a good place for that fresh start for everyone in this state.

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