punishing the mentally ill

a critical analysis of law and psychiatry

BRUCE A. ARRIGO
Foreword by George B. Palermo
Preface by Michael L. Perlin

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PUNISHING THE MENTALLY ILL

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Punishing the Mentally Ill

A Critical Analysis of Law and Psychiatry

Bruce A. Arrigo

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For Chris:

Whether as student, teacher, friend, or mentor,
thank you for reminding me
that we are all philosophers.

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Contents

Foreword

Mental illness has been present since the beginnings of humankind, and throughout the centuries the mentally ill—"the different"—have been dealt with in various ways. They have been seen as repulsive and frightening, and they have been ostracized, rejected, and abandoned, or confined to the back rooms of family homes, rudimentary prisons, "insane" asylums, and hospices. At one time, they were even collectively gathered on the so-called Ship of Fools, a boat that went up and down the Rhine, obviously excluding them from contact with the mainland and its inhabitants. Throughout history their victimization appears to have been a cyclical Vichian presence.

The mentally ill may face people with the most devastating infirmity, the "loss" of one's mind, the most cherished part of one's self. This is a frightening realization, a traumatic event the thought of which cannot be sustained by the so-called sane majority, and it may contribute to a strong reaction formation leading to the exclusion of the mentally ill from mainstream society and at times even to their annihilation. Indeed, from the time of ancient Sparta to the middle of the twentieth century they have been eliminated, at times with drastic measures, because they were thought not only to be different but to be a burden, even being seen as evil.

The old psychiatric hospitals, often more "snake pits" than hospitals, saw the mentally ill languish to the point of inanition. Great scholars and benefactors such as Vincenzo Chiarugi, Philippe Pinel, and Dorothea Dix attempted to rescue the mentally ill from their humiliating conditions and partially succeeded in returning them to a humane state, even though they were still confined and later subjected to moral therapy. The third psychiatric revolution, subsequent to the development of psychotropic medications, that of the sixties, brought about mass deinstitutionalization of the mentally ill. The subsequent confusion created the emargination of many of these people and the unconscionable criminalization of a great number of them.

Bruce Arrigo presents a critique of the present-day psychiatric and legal approaches to the mentally ill in court proceedings, whether for civil or criminal

commitment. He believes that this way of dealing with the mentally ill is an injustice. He is of the opinion that at the basis of the policing of the mentally ill is, in fact, their being seen as "different" from others. His disquisition is not only theoretical and philosophical, but practical, aimed at demonstrating the unfairness of the civil and criminal laws regarding the mentally ill enacted by the justice system. His basic tenet is that "being different" is a category in itself and it is assessed by symbolic language that sustains and legitimizes inequalities before the law. In his criticism of the psychiatric-legal manner of dealing with the mentally ill he uses Lacanian psychoanalytic theories. He moves through Lacanian semiotics, through the Three Orders of the psychic configuration of the unconscious: the symbolic, the imaginary, and the real with the easiness of the expert he has proved himself to be. He explains the frequent presence of metaphors and metonymical expressions in the conventional thought of psychiatric-legal debates concerning the mentally ill relative to the discourse of Foucault's involuntary confinement. Psychiatric-legal justice, he says, and the enactors of clinical-legal discourse (the players in a court of law) attempt to affirm values consistent with logic that upholds unity, homogeneity, stability, and order. This is in essence the symbolic language of Lacan, a spoken language that cleanses, sanitizes, and corrects difference. In so doing, the real self of the mentally ill is not taken into consideration, its uniqueness is not given proper appreciation. This reminds me that our expertise in courtrooms is too often only a behavioral assessment and not a thorough inquiry into the deeper conflicts and motivations for the behavior of the mentally ill, and, obviously, does not elicit and put forward the still untouched-by-illness positive self of these individuals. Courts limit themselves to facts, and the clinical psychiatric-legal language, the symbolic communication of the players, follows suit.

This book says much more than the above in its well-written, well-thought out pages. Significantly, in Arrigo's concluding thoughts he introduces three perspectives on how the mentally ill are assessed, or should be assessed, in the courts: The Medical Model Perspective upholds the use of present-day clinical legal language, the symbolic language; the Mainstream Legal Perspective, which, even though subscribing to the same approach, admits that at times this approach may erode the rights of mentally ill citizens and should be amended if harmful to these persons; and the Critical Perspective, which, instead, proposes that violence is done to the mentally ill through the various symbolic activities and qualifying statements, such as "disease, sick, incompetent or diminished," at times used by court players, unconsciously and without recognizing the consequences of such labeling. This book is, indeed, a critical analysis of the present-day labeling of mental illness, its logic sponsored by mental health and legal professionals, and accepted by the justice system at large. Arrigo, who favors the last view—the Critical Perspective—believes that the process of justice for the mentally ill is irreparably flawed and suggests the elimination of civil and crim-

inal confinement for this category of people, or, at least, a reassessment of the "theoretical premises and epistemological assumptions underscoring all legal and psychiatric decision making." He demonstrates not only a great deal of empathy for what has become the legal plight of the mentally ill, but a deep sense of humane concern. He feels at one with the "different" and he firmly believes, in his objective rigorous analysis, that they are being wrongly punished by the system. I agree with his view, and I also believe that, while obviously needing understanding and treatment, even when they perpetrate violent crimes, the mentally ill in general do not belong in the justice arena.

However, if they do not belong to the justice arena, where do they belong? Even though this book does not answer the question, it certainly gives strong indications for reflection. Arrigo has lifted the lid of a Pandora's box. His voice should be listened to, and his concerns properly assessed. This book presents an intellectual challenge to the reader, and, at the same time, it sends an important message to policy makers. Society can only benefit from a critical analysis of its shortcomings, especially when they involve some of its weakest members: To be different is not a crime.

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Preface

One of the few memories from my introductory philosophy course in college—over 35 years ago—is the parable of the blind men and the elephant.

> Four blind men come across an elephant. They decide to feel the elephant to determine what sort of creature it is. One blind man feels the back leg of the elephant. He says, "An elephant is like a tree." The second blind man feels the trunk. He says, "An elephant is like a snake." The third blind man feels the tail. He says, "An elephant is like a rope." The fourth blind man is afraid. He doesn't feel the elephant at all.
>
> The three blind men argue a long time about what an elephant is and based on their own personal experience each is right.[1]

This affected me greatly, when I first heard it at age 18, and it has stayed with me to this day. It seems to explain so much of our social, intrapsychic, political, and cultural behavior, especially the "disconnects" we all frequently experience in everyday work and professional life. When I started writing about the meretricious allure of "ordinary common sense" in legal theory,[2] I realized that that parable helped explain our distorted thinking processes that have led to such incoherence in, for example, our insanity defense policies.[3]

When I read the manuscript of Bruce Arrigo's brilliant new book, *Punishing the Mentally Ill: A Critical Analysis of Law and Psychiatry*, the parable came back to me in a very different way. For what Professor Arrigo has done is to expose the failures and shortcomings of those methodologies that insist on looking at the "mental health system" through one perspective only—be that the clinical, the legal, the behavioral, the empirical, the political, or the theoretical. Professor Arrigo—who demonstrates in this book a prodigious knowledge of *all* of these approaches—aims to do more, and he sets out that aim clearly.

In the first pages of his Introduction he says this:

> I am interested in exploring the depths of punishment enacted first unconsciously in symbolic form and subsequently legitimized, knowingly or not, in social effect. In other words, this project seeks to link clinicolgeal practices (e.g., predicting dangerousness, executing the mentally ill) with unspoken desires (e.g., the metaphysics of presence, the social control thesis), revealing how ideology and circumscribed knowledge inform the behavior of law and psychiatry.[4]

His thesis is that we cannot possibly understand the mental health system without confronting ideology, desires, and unconscious imagery. He also argues that this perception controls whether we are looking at civil or criminal mental disability law, at institutional or community mental disability law policy, or questions of mental health advocacy. And I agree. By framing his arguments as he does, he recognizes that what is really going on in mental disability policy decision-making is complex, and is informed by a discourse that is highly dependent on our understanding of the depths of our punitive urges, and the roots of our need to control those perceived to be deviant.[5]

Professor Arrigo shows how these attitudes inform our clinical policies and out legal policies, whether we are looking at involuntary civil commitment, the provision of community treatment, the right to refuse treatment, an insanity defense trial, or the decision making involved in determining whether a person with mental disability can be executed. By doing this, he forces us to leave the comfortably narrow cocoons of our own substantive specialties (and professional calling), and makes us understand how a set of unconsciously integrated attitudes explains why we do what we do—especially in the name of the state—in the way we deal with persons with mental disability.

I am interested in all of the topics that Professor Arrigo has brought to the scholarly table, and have written about many of them.[6] I was most interested, however, in his chapter on "the ethics of advocacy for the mentally ill." This is a topic that has been severely underconsidered over the years,[7] and about which there has truly been little that is original or controversial. Professor Arrigo's thesis here is clear: "Each time the mentally ill (or their representatives) engage the law, they strengthen and bolster their dependence on it, and, further, *become somewhat disempowered because of it*."[8] This, he concludes, establishes the "profound paradox" faced by persons with mental disability: "to endure without rights (as the law has taken them away), or seek rights from the law, which, in turn, fortifies the power of the law."[9] And this leads him to his ultimate question on this topic:

> If advocacy in mental health law is anchored by clinicolegal interpretations of rights, illness, competency, and the like, and if

> confinement decisions hinge, fundamentally, on an appeal to established structures of civil and criminal institutional authority, what room, if any, is legitimately left for the disparate voices of the psychiatrically disordered? Indeed, given these constructed realities, on whose behalf is the advocacy truly initiated?[10]

This is, of course, very unsettling, perhaps more so to someone like me who spent 11 years representing persons with mental disabilities (3 as a Public Defender, specializing in cases involving incompetency status determinations and insanity trials, and 8 as director of the NJ Division of Mental Health Advocacy, a state-funded, subcabinet office vested with the power to provide legal representation in both individual and class action matters for persons with mental disability), who, for the past 17 years, has taught students, in both classroom and clinical settings, to do the same,[11] and who employs different modes of legal analysis as a means of expanding the rights of persons with mental disabilities through mental health advocacy.[12] Professor Arrigo's arguments here "push the envelope" in directions new to interdisciplinary scholarship, and will, I hope, inaugurate a new and important dialogue in the mental health "rights community."

For the past decade or so, I have focused my own writing on what I term *sanism* as well as what I term *pretextuality*. Simply put, sanism is an irrational prejudice of the same quality and character of other irrational prejudices that cause (and are reflected in) prevailing social attitudes of racism, sexism, homophobia, and ethnic bigotry. It infects both our jurisprudence and our lawyering practices. Sanism is largely invisible and largely socially acceptable. It is based predominantly on stereotype, myth, superstition, and deindividualization, and is sustained and perpetuated by our use of alleged "ordinary common sense" (OCS) and heuristic reasoning in an unconscious response to events both in everyday life and in the legal process.

And, "pretextuality" means that courts accept (either implicitly or explicitly) testimonial dishonesty and engage similarly in dishonest (frequently meretricious) decision-making, specifically where witnesses, especially *expert* witnesses, show a "high propensity to purposely distort their testimony in order to achieve desired ends." This pretextuality is poisonous; it infects all participants in the judicial system, breeds cynicism and disrespect for the law, demeans participants, and reinforces shoddy lawyering, blasé judging, and, at times, perjurious and/or corrupt testifying.[13]

I turned to these concepts as a way of explaining why and how mental disability law has developed as it has. And I believe that the perniciousness and malignance of these concepts *do* so explain that law, whether we are looking at assisted outpatient commitment law, sexually violent predator laws, assessing defendants' competence to plead guilty, the right of institutionalized patients to

sexual interaction, or any of the other "standard" topics of mental disability law about which courts decide cases and scholars write articles.

I have sought—especially in my earlier writings of the topic—to explain the historical, religious, and political sources of sanism, and how, to a great extent, these sources still animate current attitudes and behaviors.[14] But, having said that, I always have wondered if there were still "something else" to be added to help solve this most difficult of social policy puzzles. Professor Arrigo provides that "something else" in this book, and he does so clearly, provocatively, and persuasively. It is one that we will be thinking about for a long, long time.

Michael L. Perlin
Professor, New York Law School

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Introduction

Historically, society's response to mental illness has been marked by grand reformist efforts producing disappointing, if not disastrous, results (Grob, 1994). Typically, these results have led to civil incarceration, criminal confinement or other forms of liberty deprivation (Perlin, 1999). Along the way, both law and psychiatry have exercised considerable decision making and discretionary authority. According to some observers, their ongoing involvement has fostered a system of care that has led to the abandonment of the mentally disordered (Isaac & Armat, 1990; Torrey, 1997). In the extreme, I have questioned this abandonment suggesting, instead, that psychiatric citizens are punished for being different (Arrigo, 1996b). This book specifically considers why efforts at reform, particularly during the past 25 years, have failed, mindful of how punishment underscores decisions made at the crossroads of law and psychiatry.

Other investigators have examined the disciplining of mental illness in varying degrees. Indeed, philosophical (Foucault, 1965, 1977), historical (Scull, 1989; Rothman, 1971, 1980), psychiatric (Szasz, 1963, 1987), legal (Perlin, 1999, 2000), and sociological (Warren, 1982; Holstein, 1993; Scheff, 2000) explanations abound. However, unlike these works, I am interested in exploring the depth of punishment enacted first unconsciously in symbolic form and subsequently legitimized, knowingly or not, in social effect. In other words, this project seeks to link clinicolegal practices (e.g., predicting dangerousness, executing the mentally ill) with unspoken desires (e.g., the metaphysics of presence, the social control thesis), revealing how ideology and circumscribed knowledge inform the behavior of law and psychiatry (Arrigo, 1996a).

The significance of this research should not be underestimated. Indeed, if symbolic violence, activated deep within the inner network of psycholegal thought, shapes mental health law and policy decisions, then the legitimacy of any forensic trial, administrative hearing, medical intervention, or liberty protection can be seriously questioned, dramatically reconfigured, or thoroughly abrogated. This position is as disturbing as it is vexing. The perspective is particularly thorny

when considering the freedom-limiting practices of civil commitment, criminal confinement, or both. After all, if sustained institutional care is part of the problem, what are its alternatives?

Punishing the Mentally Ill does not offer a detailed response to the dilemma it systematically identifies. While this is a worthwhile (policy-based) project in its own right, it is decidedly beyond the scope of the present endeavor. Instead, the focus of this book is on critique. Accordingly, I draw from a wide range of literatures and consolidate them so as to make, hopefully, a compelling and cogent argument about law, psychiatry, and punishment.

In order to accomplish my objective, the book is divided into two main sections: civil confinement and criminal confinement. Each section contains several chapters. The chapters address important and provocative controversies that have received considerable research attention, especially during the past twenty-five years. The presentation of this material is not exhaustive. Rather, each chapter discusses a notable psycholegal topic in order to illustrate a particular point about the penalty for mental illness.

In chapter 1, I address the issue of civil commitment. In particular, I trace the recent history of this practice, pointing out how related matters such as interpreting mental illness, defining and predicting dangerousness, and establishing a right to refuse treatment all have been plagued by "illness politics." This notion refers to the law's preference for liberty and psychiatry's penchant for treatment producing client/patient abandonment. I demonstrate how illness politics is linked to paternalism, and explore its three most prevalent forms: social control; custody; and treatment. I conclude the chapter by suggesting how law and psychiatry can help fashion a more humane civil commitment policy, and recommend that it be based on understanding and valuing the identity of the mental health consumer.

In chapter 2, I explore the ethics of advocacy for the mentally ill. Specifically, I question whether it is possible for the medicolegal community to know, define, and promote fully the interests of psychiatric citizens. To answer this query, I review the manner in which rights are routinely given to and taken from mental health consumers through the law. In this context, I assess the ethics of involuntary confinement and the ethics of advocating for the rights of the mentally disordered. I argue that psychological egoism or measured altruism underscore decisions made at the crossroads of law and psychiatry. In other words, I demonstrate how advocates incompletely (and selfishly) represent the consumer's interests, which is not the same as genuine client/patient advocacy. Given this distinction, I conclude by speculating on who the "real" benefactor is in the forensic decision-making process.

In chapter 3, I investigate the dilemma of community-based treatment for the mentally ill. I consider whether, and to what extent, the psychiatric citizen possesses a federal constitutional right to such treatment. To access this matter,

I canvass the precedent-setting case law on the issue and the political philosophy related to it. This investigation reveals how certain values (e.g., identity politics or the reduction of difference to sameness) govern forensic courtroom decision making. These values give rise to the mostly absent right to community-based treatment for psychiatric citizens. In response to these values and their marginalizing logic, I offer three counter arguments: a sociological analysis on the success of neighborhood-situated care; a legal analysis on the federal constitutional source of such a right; and a philosophical analysis on the limits of identity politics.

In chapter 4, I describe the social control thesis. This notion builds on Michel Foucault's work regarding disciplinary institutions. Given the analysis in the first three chapters, I argue that mental illness is "policed" and that this policing fills a social function; namely, the surveillance and control of difference. I explore how such monitoring is linked to specific disciplinary regimes (i.e., the psychiatric hospital, the correctional facility), and speculate on whether alternative conceptual approaches to disciplining difference exist that more completely advance our understanding of mental illness, dangerousness, and confinement. I conclude the chapter by asserting that the penalty for mental illness operating within and throughout psycholegal decision making is the policing of difference. I contend that this practice, although mostly unconscious, adversely harms or negatively impacts the identity of psychiatric citizens.

In chapter 5, I examine the phenomenon of transcarceration. This is a process whereby psychiatric citizens are alternately and repeatedly routed to and from the mental health and criminal justice systems. I argue that this is the effect of the social control thesis. I explore trancarceration both conceptually and ethnographically. Relying on constitutive thought, I demonstrate how users of mental health services both shape and are shaped by the discourse and logic of custody, control, and treatment. I speculate on how transcarceration therefore renders such citizens ideological "prisoners" of confinement.

In chapter 6, I investigate the psychiatric courtroom; specifically, the not-guilty-by-reason-of-insanity (NGRI) and the guilty-but-mentally-ill (GBMI) verdicts. I demonstrate how decision making in the forensic courtroom is the state-sanctioned vehicle by which the social control thesis is legitimized. I consider several unconscious, but deeply felt, forces that inform and circumscribe legal and psychiatric decision-making. Specifically, I argue that subjectivity and language are integral to the clinicolegal sense-making process. This phenomenon is defined as desire-in-discourse. I demonstrate how desire-in-discourse, particularly within law and psychiatry, creates and sustains symbolic violence that, knowingly or not, discursively punishes the mentally ill in social effect. I demonstrate how this occurs through NGRI and GBMI practices.

In chapter 7, I explore the correctional law and policy on executing the mentally ill. To ground the analysis, I rely on the interpretive tools of legal

semiotics and deconstruction. I demonstrate how clinicolegal notions such as competency, treatment, or both embody hidden messages and concealed assumptions about the mentally disordered, confinement, and capital punishment. These messages and assumptions are latent, though semiotically and deconstructively discernible, and fail to find their way into the otherwise narratively coherent and socially constructed text on executing the psychiatrically disordered. I argue that revealing this unspoken text allows us to interpret what values are privileged and what values are excluded within forensic decision-making practices. I conclude by maintaining that the social control thesis and the penalty for mental illness entail the articulation of values that deny and repudiate difference. This is how desire-in-discourse functions at the conscious level.

In chapter 8, I present a provisional, though critically informed, theory of punishment situated at the crossroads of law and psychiatry. I explore additional features of desire-in-discourse by relying on several of Jacques Lacan's psychoanalytic formulations. I show how the unconscious mind of law and psychiatry operates, reproducing and sustaining language and thought that marginalizes and invalidates the mentally ill for their articulated and lived difference. This is how desire-in-discourse functions at the prethematic level. Following this analysis and based on the accumulated insights of each chapter, I describe, in postulate form, a theory of punishment. I conclude by tentatively discussing the justice policy implications of the theory in relation to the future of civil and criminal mental health confinement law.

Punishing the Mentally Ill provides a critical review of how law and psychiatry interactively function, impacting the every day lives and ongoing experiences of mental health consumers. Ultimately, this book wrestles with notions of citizen justice and social well-being, and the extent to which existing psycholegal practices sufficiently advance these important objectives. *Punishing the Mentally Ill* considerably challenges the wisdom of law and psychiatry, raising many troubling philosophical, societal, and policy questions as a consequence. While this is certainly not the final word on the topic, readers will have to decide whether this book provides a compelling critique, documenting where and how punishment is enacted at the crossroads of law psychiatry. Indeed, in the final analysis, readers will have to determine for whom justice is served as our system of mental health law responds to psychiatric disorder and renders judgments about civil and criminal confinement.

PART ONE

Civil Confinement

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ONE

Civil Commitment and Paternalism

Legal and Psychiatric Dynamics

OVERVIEW. *The legal and psychiatric communities are largely responsible for fashioning social (and public) policy in relation to the mentally ill. The question, of course, is to what extent do these systems work in concert to affect meaningful outcomes that include the sensibilities of persons with diagnosed psychiatric disabilities. This chapter examines a full range of forensic issues that impact civil commitment determinations. How are involuntary hospitalization decisions made? In what way are treatment needs balanced against liberty rights? What are the aims of civil confinement? To what extent is justice for the mentally ill assured through institutionalization? What role, if any, does paternalism, punishment, or both play in the decision-making process? These and other similar questions are explored in the pages that follow.*

INTRODUCTION

The history of civil commitment and confinement law in general reflect long-standing attitudinal divisions among the psychiatric and legal communities, patients' rights advocates, governmental agencies, legislative bodies, and other invested constituencies (Deutsch, 1949; Grob, 1973, pp. 4–12; Scull, 1989, pp. 4, 10). At the center of this controversy are two well-established and, at times, competing social values that attempt to fashion appropriate mental health policy. On the one hand, involuntary hospitalization for mentally ill persons diagnosed as dangerous or otherwise disabled is encouraged. On the other hand, the slightest abridgment of personal autonomy and individual liberty for these citizens is discouraged. While the medical profession asserts its responsibility to treat dangerous (Chodoff, 1976, p. 496) and obviously ill persons (Treffert, 1985, p. 259) so that they are effectively controlled (Zusman, 1982, pp. 110–113), civil libertarians seek to challenge psychiatric judgments altogether. These advocates maintain that

mental illness is manufactured (Szasz, 1970, pp. 1–15), that civilly confined persons are in fact prisoners (Ennis, 1972, p. 2) and that the "preciousness of liberty" doctrine demands that the practice of involuntary hospitalization be abolished (Morse, 1982a, pp. 54, 106).

The results of this and prior debates have produced large-scale reforms with disappointing consumer-oriented outcomes. From the introduction of the asylum and public intervention in the form of moral treatment (Morrissey & Goldman, 1984, p. 786); to the emergence of the psychopathic hospital and the mental hygiene movement (Grob, 1983, p. 144), to the more recent spawning of community mental health and its emphasis on deinstitutionalization (Bachrach, 1978, pp. 573, 574; Musto, 1975, p. 53; Talbott, 1979, pp. 621, 622), one reality has endured: "While cyclical patterns of institutional reform" have been the hallmark of America's response to the mentally ill (Morrissey & Goldman, 1984, p. 790; Morrissey & Goldman, 1986, pp. 12, 13), the politics of abandonment has been and continues to be its legacy (Rhoden, 1982, p. 375; Isaac & Armat, 1990, p. 250).

This statement is not so much an indictment of those forces that largely shape civil commitment laws or develop intervention strategies for effective treatment. It is, however, a recognition that although we have journeyed beyond the institutional "snakepits" of the past (Deutsch, 1948, pp. 3–21), the "right to rot" is not an acceptable path (Appelbaum & Gutheil, 1980, pp. 720–723). Our contemporary social landscape, especially over the last 25 years, poignantly reflects this theme of abandonment. Psychiatric facilities, viewed in the past as nightmarish warehouses servicing chronically mentally ill persons have been replaced by ill-conceived and poorly managed new "asylums" in the community (Goldman & Morrissey, 1985, p. 722; Lamb, 1979, p. 129). And while treatment regimens for persons committed against their will continue to evolve through psychopharmacological and other therapy-based discoveries, the best available evidence shows that these interventions are only minimally better than doing nothing at all (Brooks, 1987, pp. 339, 341; Durham & LaFond, 1988, p. 305).

Coupled with these disturbing realities are the commitment laws themselves (Perlin, 2000). No where else are the entrenched tensions that beset the psychiatric and legal communities more evident. Challenges to the scientific meaning of mental illness (Morse, 1978, pp. 527, 528; Scheff, 1984, pp. 1–3; Laing, 1969, pp. 7–10), pitfalls in predicting dangerousness (Morse, 1982b, p. 95; Shah, 1977, pp. 91, 98), debate over the promise and peril of involuntary outpatient commitment (Mulvey, Geller, & Roth, 1987, p. 571; Miller, 1985, pp. 265, 267; Hinds, 1990, pp. 346, 349), division over the patient's right to refuse treatment (Roth, 1986, p. 139, 142; Brooks, 1987, p. 339), disagreement about the efficacy of the least restrictive alternative doctrine (Arrigo, 1992b, pp. 1–31; Schmidt, 1985, p. 13; Hiday & Goodman,

1982, pp. 81–83), and other such matters demonstrate a woeful lack of consensus on how best to deliver much needed services to psychiatrically disordered citizens, while respecting the intrinsic dignity and right to self-determination these consumers possess. It is not surprising that in the wake of such acrimony over appropriate mental health policy, deinstitutionalization remains a dream deferred for the chronically disordered (Dorwart, 1988, pp. 287, 290), involuntary treatment for the homeless mentally ill continues to escalate (Belcher, 1988, p. 1203; Lamb, 1984, pp. 899–903), and an alarming number of mental health systems users find themselves displaced throughout the criminal justice system (Brakel, et al., 1985, pp. 1–15; Lamb, 1982, p. 17; Slovenko, 1977, pp. 817–818).

The purpose of this chapter is to examine critically the role that both law and psychiatry have played in casting mentally ill persons as deviants; citizen/outsiders caught in a crossfire of illness politics (Szasz, 1987; Grob, 1994). This examination will focus on those values protected and privileged by the medical and legal professions as reflected in confinement law and policy primarily during the last quarter of the twentieth century. The social, economic and political power these disciplines exercise in the lives of psychiatric citizens raises significant questions concerning the future of involuntary civil commitment both from a clinical and justice policy perspective. As such, these matters will be addressed as well. No attempt will be made here to detail the historical dimensions of abandonment in the care and treatment of the mentally ill. Similarly, assessing other environmental influences contributing to this phenomenon (e.g., urbanization, immigration, industrialization, transinstitutionalization) is beyond the scope of this chapter. While these factors are significant components in the development of civil commitment laws, they are decidedly more global in nature.

My aim is to provide a current account of how law and psychiatry, despite their respective calls to safeguard individual rights and to treat the sick, have fashioned an ineffective system of care. I begin with a brief history emphasizing the social, scientific, and legal developments that set the stage for present-day civil commitment policy. I then outline in what context law and psychiatry speak for the mentally ill, evaluate some controversial and significant areas where treatment, liberty, or both are sacrificed, and describe the inherent social values law and psychiatry promote through confinement practices. By carefully considering the manner in which involuntarily committed persons are simultaneously subjected to and repeatedly forced to choose among principles of freedom in the abstract and clinical interventions in the extreme, my intent is to identify the parameters of a debate that embody the ongoing climate of uncertainty in civil commitment matters. Along these lines, I conclude this chapter with several tentative recommendations for ameliorating the crisis in civil confinement practice and policy.