Oregon's Civil Commitment Statute: Stone's "Thank-You Theory" — A Judicial Survey

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The object of this paper is to examine judicial attitudes toward the Oregon civil commitment law as measured by a questionnaire recently circulated to all Oregon Circuit Court judges having jurisdiction for civil commitment of individuals under Oregon law. The questionnaire had two main purposes. The first was to look at certain aspects of the current statute and get the judges' perspectives on its strengths and weaknesses. The second purpose was to get the judges' opinions on a theory formulated by Alan Stone which he calls the "thank you theory" of civil commitment.[1] To accomplish this second goal each judge was asked to review Stone's theory in detail and then to give his views on strengths and weaknesses embodied in this potential approach to civil commitment. Finally, each was asked to state whether he would support a new statute based on this approach. This paper will of necessity focus on certain areas of civil commitment which are unique to the Oregon area, as certain of the procedures adopted here do not exist, to our knowledge, in other states. The particular problems in Oregon highlight often-repeated themes which exist with most of the newer civil commitment statutes around the country.

The Oregon civil commitment statute was modified in the 1973-74 legislature. Shore[2,3] summarized the history of this change, along with some of the consequences of the change in statutes. In addition he compared the commitment process in various western states. Using Treffert's criteria[4] of a model commitment statute, Oregon achieved a rating of 15 points which was in the middle of the state-by-state rating.

Briefly, the Oregon statute allows for five day emergency hospitalization and treatment under either a police or a physician "hold." During this emergency hospitalization the local county mental health office conducts a pre-commitment investigation by interviewing the allegedly mentally ill person, the petitioner, and others on the ward where the person is

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hospitalized. The investigator makes a recommendation to the circuit court judge regarding probable cause that the person is first mentally ill, and if so, is dangerous either to self or to others, or unable to provide for his basic personal needs. Once probable cause is determined, the mentally ill person is guaranteed the basic rights of any person on trial. Psychiatrists participate as court examiners, and, curiously enough, the role of the court examiner has evolved into an in-court "psychiatric interview" during the actual commitment hearing. The last legislature also made it possible for the judge to request the presence of a district attorney at the hearing. The roles of both the psychiatrist in the courtroom and the district attorney will be discussed when we look at the results of the questionnaire. The judge makes a decision by applying a burden of proof "beyond a reasonable doubt" to the following standard.

A "mentally ill person" means a person who because of a mental disorder is either:
a. dangerous to himself or others; or
b. unable to provide for his basic personal needs and is not receiving such care as is necessary for his health or safety."[5]

A person, if civilly committed, is committed for up to 180 days either to in-patient or out-patient facilities. Most care, however, is delivered on an in-patient basis in one of the state's three state hospitals.

Results of the Questionnaire

There are 76 circuit court judges in Oregon who potentially handle civil commitment hearings. Each judge was sent a questionnaire. We received 65 responses. Of the 65 responses, 23 of the judges said that they didn't feel qualified to render an opinion on the subject. In the most populous counties, specific judges handle all commitment hearings. Forty-five of the judges did fill out the questionnaire.

In regard to the strengths of the current statute, 29 responses were made by the 45 judges. Of the 29 responses 86 per cent were focused on due process safeguards for the allegedly mentally ill person. Seven per cent of the responses focused on the issues of time and money, with the judges feeling that the hearings were expeditious and minimized state costs.

Table I lists the weaknesses of the current Oregon statute as identified by the judges. In this area 66 responses were made by the 45 judges.

TABLE I
WEAKNESSES OF CURRENT OREGON STATUTE
N=66

	Number	Percentage
Procedural issues	19	29
Treatment issues	16	24
Nature of the test and the burden of proof	12	18
Unavailability of past records	9	14
Mistake of converting medical into legal decisions	6	9
Lack of expertise — attorneys, judges, and court room examiner	4	6

Three of the four top categories focus on the procedures, the nature of the test, burden of proof, and the unavailability of past records. The majority of judges' criticisms of the current statute fell into these areas. They felt that there was a general lack of clarity on the nature of the hearing itself: was it a civil or a criminal hearing. Beyond this the judges felt that the burden of proof was too demanding, given the data on which they had to make their findings.

Because of interpretation of doctor-patient privilege, all past medical records, including those of the emergency hospitalization just prior to the commitment hearing, are excluded from examination in court. Because of this the psychiatrist who serves as court examiner must examine the patient in court during the commitment hearing itself. In this way the examiner can at least be party to whatever information is developed in the court hearing on the past history of the patient. This evolution of the role of psychiatrist as in-court examiner is unusual to say the least, and also substantially reduces the costs and logistics involved in setting up a commitment hearing. In our survey we found that in some county courts, more particularly the rural and less formal courts, the examiner generally has some records available and can interview the patient in surroundings other than in court. However, 88 per cent of the judges surveyed, covering the majority of Oregon counties, stated that the examination was carried out in court during the hearing.

Prior to the last Oregon legislative session, the civil commitment hearing was carried out without the presence of an attorney to represent the state. The last legislature amended the original bill passed in the 1973-74 session to include a district attorney at the request of the judge. Our survey found that 36 per cent of the judges had a district attorney present in all cases, while 35 per cent said that they were making plans for including a district attorney. However, 29 per cent were not making any plans to have a district attorney present. Several of those planning to have a district attorney planned to use this state's attorney only for difficult or contested cases where judgment differed between pre-investigators and the physicians who had signed the emergency hold. Two main obstacles seem to exist for the universal inclusion of district attorneys in the hearing: the added cost factor, and the fear of some judges that the hearing would get too "legalistic."

Treatment issues were the second leading criticism of the statute. In this area the judges recognized certain issues related to the fact that the procedures often sacrificed early treatment of the allegedly mentally ill patient. In addition to concern about the lack of treatment for people in the civil commitment system there also was a thread of concern about lack of control of what happens to a person passing through the court. It was clear that at least a few judges would have wanted greater control over the mental health treatment systems.

The other two areas in Table I represent small numbers of responses, and focus on whether it is wise for the courts to be involved at all in what a

few judges saw as a medical problem, and on the question of expertise and training for these individuals suddenly thrust into the arena of evaluating and predicting the behaviors of the mentally ill.

A fair summary of the criticisms of the statute developed by the judges highlighted legal issues involved in the nature of the hearing itself, a call for a clearer test, a lessening of the burden of proof, and a call for the loosening of the restraints on the court to discover information about the allegedly mentally ill person. It would seem that a call to roll back the clocks to the pre-due process days would be supported by only a few judges.

Stone's "Thank You Theory"

Each judge was presented with a detailed review of Stone's approach to civil commitment and asked to comment on the apparent strengths and weaknesses of the work. Further, each was asked about whether he would support new legislation based on Stone and if not, why not. Briefly, Stone's approach avoids the issues involved in the prediction of dangerousness and makes the cornerstone of civil commitment the diagnosis of severe mental illness: a prognosis involving substantial suffering to the individual and the availability of treatment, plus an inability on the part of the mentally ill person to accept voluntary treatment because of the illness. The legal test would place the burden of proof beyond the professional diagnosis on the mentally ill person, the standard being what a reasonable man might do under similar circumstances.[6]

The strengths of Stone's work listed by the judges are summarized in Table II.

TABLE II
STRENGTHS OF STONE'S THEORY
N=20

	Number	Percentage
Improvement in diagnosis and treatment facilities	8	40
Provides clear guidelines for civil commitment	6	30
Eliminates problem of predicting dangerousness	3	15
"Doctors would like it" more in line with their profession	3	15

As listed above, the main strengths as perceived by the Oregon judges are in the areas of improvement in the diagnosis in the court setting and an improvement in hospitals which would have to comply with the adequate treatment criteria. They felt that Stone would provide clearer guidelines for the commitment court that would result in more people getting help. It is interesting to note that eliminating the prediction of dangerousness is not a high priority for the judges. This is confirmed when we look at the list of weaknesses developed by the judges.

Table III summarizes the weaknesses in Stone's approach as perceived by the judges:

TABLE III
WEAKNESSES OF STONE'S THEORY
N=33

	Number	Percentage
Does not provide for the care of the dangerous person with poor expectation of treatment	7	21
Conflicts with person's civil liberties and is of questionable constitutionality	7	21
Poor definition within the law of the "reasonable man" test	4	12
Presumes higher functioning than mental health system can deliver	4	12
Confuses law and medicine even further, "too legalistic"	4	12
Only committing those who refuse treatment, would result in too many hearings as people change their minds	4	12
Would take too much time and be too expensive	3	10

As noted in the previous section, the issue of dangerousness and responsibility for those so-labeled is important to the judges. Included within that first category is the perception that, if dangerousness dropped out of the civil commitment arena, an added intolerable burden would fall upon the criminal court and the jails. The civil libertarian viewpoint also comes through strongly with some judges as a drawback to Stone's proposals. Other responses questioned the appropriateness of the reasonable man test, and there was also a general feeling expressed that Stone's model would take too much time and be even more "legalistic" than current practices.

Thirty-seven of the original 45 judges who completed the survey responded to the question of whether they would support legislation based on Stone's work. Eleven (30%) said they would definitely support such legislation while twenty-one (56%) said they would not, and five (13%) said that they couldn't comment until they reviewed the actual legislation. The reasons given by the twenty-one who opposed the development of such legislation were similar to the ideas expressed above in Table III. Most commonly listed reasons for not supporting such legislation were satisfaction with the current law, questionable constitutionality in regard to civil liberties, the need to deal with dangerous people, and the burdens that such a law would pose to criminal courts. It should be said that the eleven judges who would support a change in civil commitment statutes along the lines proposed by Stone were consistent in their total responses in being very dissatisfied with the current statute in Oregon.

Discussion

Several issues emerge in reviewing the current Oregon civil commitment statute. First, and perhaps foremost, it is a relatively new law, and one which is in a state of flux. Its basic structure was drawn in 1973-74. It was amended in 1975-76 to include the provision for a state's attorney in the hearings at the request of the judge conducting the hearing. There are several conflicts existing in the current law as it is practiced which would support the hypothesis that the law will continue to evolve, and in fact could go rapidly in one of several directions. There is the possibility that

the Oregon statute could move quickly to what recently transpired in the Hawaii statutes.[7] This would mean the further application of criminal law safeguards to emergency hospitalization and treatment in a direction which would severely hamper the ability of psychiatry to treat in the emergency situation. There is also clearly a potential for a very real challenge to the whole area of the prediction of dangerousness which, in light of current evidence, is fraught with great difficulties except in the small minority of situations where clear dangerousness is present.[8]

Assuming that radical change does not occur in the areas mentioned above, the current Oregon statute presents some severe handicaps which must be dealt with in an evolutionary manner in order to have a more workable law. In our survey, these problems, discussed from the judges' viewpoint, mainly involved procedural problems which would clarify the nature of the proceedings and provide more information to the judicial decision maker. For the psychiatrist, however, the current role of court room examiner is an ambiguous one. As it is practiced in Oregon courts, the psychiatric role is antithetical to proper psychiatric functioning. The examination is conducted in the courtroom setting, a setting which severely handicaps the collection of psychiatric data essential to accurate diagnosis and prognosis. Further, the examiner is handicapped since he lacks knowledge of the patient's past medical history, including the immediate period prior to the proceedings of emergency hospitalization.

As we have reviewed the opinions of the Oregon judges expressed in our survey, it has become clear that the civil commitment hearing is a forensic hearing serving needs which transcend medical-psychiatric treatment modes. The hearing goes to the fundamental relationships between individuals and society as mediated by the judicial systems of the country. Viewed as a forensic hearing, civil commitment should resemble the role of psychiatry within the court system in general. For example, within the criminal law, the role of the psychiatrist within the framework of the insanity defense is controversial, yet structured and a part of the working law. It is our hypothesis that the same opportunities do not exist for the psychiatric expert witness in the civil commitment hearing in Oregon. We believe that psychiatrists should question their role in another system, even one dealing with the allegedly mentally ill, if their ability to properly carry out psychiatric evaluation is compromised.

The ability to carry out one's functions as a psychiatrist is hampered severely enough in the present court room examiner role to force the issue toward a confrontation which might result in psychiatrists' abandoning their roles in the civil commitment hearing. This could be prevented by changes which would allow psychiatrists to function in civil commitment court in a manner similar to the expert witness role in criminal court: conducting proper interviews with relevant medical records in order to make a proper diagnosis.

Therefore, changes encompassing judicial and psychiatric needs are necessary in Oregon at this time if this law is to continue to evolve in a

manner satisfactory to all participants. This discussion could also be broadened to include the needs of patients and their families in relation to civil commitment. We are witnessing in Oregon a growing constituency of families of "schizophrenic" people who view the present civil commitment laws as injurious to patients and families alike, and who are likely to influence legislative decision-making as their case becomes stronger and more politically organized. Their case will be bolstered by the growing body of literature which defines the hardships endured by the psychiatric deinstitutionalized patient.[9,10,11]

From this research several thoughts emerge about Alan Stone's "thank you theory." Most judges view the prediction of dangerousness from an entirely different viewpoint than scientific evidence seems to allow. The existence of a preventive detention hearing within the framework of civil commitment is important to judicial thinking, because of concerns about the overcrowded criminal courts and concerns about crime prevention. Civil commitment is virtually the only place within the court system where a "dangerous" person can be briefly institutionalized and "treated." The recent literature on the relationship between criminal activity and mentally ill persons bears out the concerns in this area.[12,13,14,15]

Although the survey documents much agreement with Stone's ideas, at this time an overall impression was that they simply are too dramatically different to be accepted easily at first reading. Stone's work is based on a limited, scientifically accurate psychiatry which cuts loose, at least from the involuntary commitment system, a whole host of individuals whose diagnosis won't allow them entry into the system.

With the evolution of the civil commitment hearing process, events are likely to move rapidly in two areas: the pre-commitment detention phase and the nature of the civil commitment test based on dangerousness. If these rapid changes do occur, Stone's proposal may provide the basis for a studied replacement. Regardless of the weaknesses apparent in the theory, it does carry wide appeal and is consistent with current directions in psychiatry. It does represent a view of mental illness and psychiatry which the judicial branch will need to understand and incorporate into modified civil commitment laws.

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Dear Dr. Bloom:

Thank you very much for sharing your study of my thank-you theory. The study points up a number of interesting issues for me.

The judges who find weaknesses in my theory emphasize that it would add an "intolerable burden upon the criminal courts and the jails" by omitting dangerousness. My basic perspective, of course, does insist that the burden of dealing with dangerous persons be handed over to the criminal justice system. The reasons for this are very basic, namely that the justification for confinement of such people is the police power of the state, and I have taken the position that the police power belongs to the criminal justice system and should not become a rationale for involuntary psychiatric treatment. I continue to hold to the belief that the only possible justification for involuntary psychiatric treatment is the traditional *parens patriae* justification in law, which is the only justification that makes sense medically.

I can understand the immediate reaction of judges who are aware of the current difficulties of the criminal courts and jails. However, if the current approach to civil commitment continues in the form advocated by the civil libertarians, the criminal courts and the jails will not be spared, since, as many empirical studies going back decades show, where civil commitment goes down, the population of jails and prisons goes up.

I do not understand the problem of constitutionality seen by the judges who disfavored my theory. Certainly, they can have no due process objection unless they have already taken the position that the police power justification is the only justification for depriving persons of liberty.

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I am at a loss to deal with the judicial opinion which holds that "Stone's model would take too much time and be even more legalistic than current practices." Either we have a formal legal system for civil commitment or we have judges using their own discretion in snap judgments.

Finally, I fully appreciate the questions raised about the appropriateness of the reasonable man test, although only four judges raised that issue. In California, where they are working on a civil commitment code, they have altered my model slightly and posed the question "Would that person, if not mentally ill, accept the treatment," substituting what is thought to be a more subjective, personalized judgment for the more objective reasonable man test.

At any rate, I found the study quite fascinating, and congratulate you for your work. I would like to take this opportunity to express my appreciation for your interest in my ideas.

Sincerely yours,

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