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Cramer v.Tyars: An Anomaly in California Civil Commitment Case Law

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CRAMER V. TYARS: AN ANOMALY IN CALIFORNIA CIVIL COMMITMENT CASE LAW

In *Cramer v. Tyars*,[1] the California Supreme Court held that a defendant in an involuntary civil commitment proceeding may be compelled to serve as a witness at his own commitment hearing.[2] Although the court held that the defendant should have been allowed to invoke the privilege against self-incrimination with respect to those disclosures that could have exposed him to criminal prosecution, he could not refuse to give testimony relevant to determining his dangerousness or his mental condition.[3] The court reasoned that the entire range of procedural safeguards available to criminal defendants were not necessary because of the civil nature of the proceeding.[4]

A finding of mental retardation and dangerousness, however, results in incarceration (albeit hospitalization) in the same manner that a guilty verdict does in a criminal proceeding. In both proceedings, the critical effect is loss of liberty. Therefore, by holding that a person subject to an involuntary commitment proceeding has only qualified fifth amendment rights rather than the absolute rights afforded to defendants in criminal trials, the California Supreme Court effectively required that Tyars incriminate himself. Regardless of the content, the testimony elicited can establish an element required by the state's commitment statute in a manner analogous to proof of the requisite elements of a criminal act leading to confinement.

As this note demonstrates, the rationale of the California Supreme Court represents a break from federal and state case law, both of which have gradually expanded the scope of constitutional privileges afforded to persons who are subjects of involuntary commitment hearings.[5] Although the majority in *Tyars* found that the trial court erred in denying the privilege against self-incrimination,[6] they concluded that the trial court's error was harmless beyond all reasonable doubt due to the overwhelming evidence of the subject's mental retardation. This note discusses why the trial court's error should not have been deemed harmless in *Tyars* and demonstrates that the overwhelming evidence

1. 23 Cal. 3d 131, 588 P.2d 793, 151 Cal. Rptr. 653 (1979).
2. The masculine gender includes the feminine gender throughout this article.
3. 23 Cal. 3d at 138, 588 P.2d at 797, 151 Cal. Rptr. at 657.
4. *Id.* at 137, 588 P.2d at 797, 151 Cal. Rptr. at 657.
5. *See* notes 21-44 *infra* and accompanying text.
6. 23 Cal. 3d at 138, 588 P.2d at 797, 151 Cal. Rptr. at 657.

standard was inappropriately applied. This note also presents alternative modes of analysis which the *Tyars* court could have used more successfully in dealing with each issue in *Tyars*. Finally, the detrimental effects of the majority opinion are reviewed against the background of subsequent decisions, which suggest that *Tyars* should be considered an anomaly in California civil commitment case law.

I. FACTS

In 1976, the district attorney of San Bernardino County filed a petition for the commitment of Luther Tyars pursuant to sections 6500 and 6502 of the California Welfare and Institutions Code.[7] The petition alleged that Tyars was mentally retarded and a danger to himself and others.[8] At the hearing, evidence presented by the prosecution established that Tyars was unable to attend to his basic hygiene, that he suffered from assaultive seizures, and that since 1971 he had resided at Patton State Hospital because he had repeatedly attacked his family when at home. Tyars' testimony, taken over the objection of his counsel, was included in the evidence presented by the prosecution. Because of his speech impediment, a hospital attendant was allowed to "interpret" Tyars' testimony.[9] When the judge asked Tyars whether he had been involved in any fights, Tyars testified to several assaultive acts, including "breaking someone's head wide open" and to hitting a hospital technician,[10] which he illustrated by "swinging his fists like a fighter" and uttering child-like "pows."[11] Upon the jury's finding that he was mentally retarded and dangerous, Tyars was "committed to the Department of Health for placement in a state hospital."[12]

On appeal, Tyars contended that the trial court committed a reversible error in denying his right to the privilege against self-incrimi-

7. CAL. WELF. & INST. CODE § 6500 (West Supp. 1979) provides in pertinent part: no mentally retarded person may be committed to the State Department of Development Services . . . unless he is a danger to himself or others . . . . At any judicial proceeding under the provisions of this article, allegations that a person is mentally retarded and a danger to himself or to others shall be presented by the district attorney . . . .

8. 23 Cal. 3d at 135, 588 P.2d at 795, 151 Cal. Rptr. at 655.

9. The "interpreter," a technician from Patton State Hospital where Tyars had lived since 1971, was also the prosecutor's main witness against Tyars on the issue of his dangerousness. Frequently, the questions posed were not restated to Tyars, and the "interpreter" answered those questions himself. When Tyars was allowed to respond, the "interpreter" changed many of Tyars' understandable words in restating the answer. *Id.* at 143, 588 P.2d at 800, 151 Cal. Rptr. at 660.

10. *Id.* at 136, 588 P.2d at 796, 151 Cal. Rptr. at 656.

11. *Id.* at 143, 588 P.2d at 800, 151 Cal. Rptr. at 660 (Bird, C.J., dissenting).

12. *Id.* at 137, 588 P.2d at 796, 151 Cal. Rptr. at 656.

nation, a violation of due process under the United States and California Constitutions.[13] The court of appeal agreed and held that, when loss of liberty will result, mentally retarded persons may assert their right to silence.

In affirming the trial court and vacating the appellate court decision, the California Supreme Court concluded that an involuntary commitment hearing is essentially civil rather than criminal in nature,[14] thereby precluding application of the right not to be called as a witness.[15] The court held that Tyars had the absolute right to refuse to offer testimony about criminal conduct, but he could not refuse either to serve as a witness or to testify about his relevant mental condition.[16] Thus, the court ruled that the trial court had erred in denying Tyars the right to silence in matters that might be criminally incriminating.[17] Nevertheless, due to the overwhelming evidence of mental retardation and dangerousness from other sources, the error was considered harmless beyond a reasonable doubt, and the California Supreme Court upheld the trial court's commitment.[18] Two justices dissented.[19]

II. ANALYSIS

A. The Civil-Criminal Distinction: Form Over Substance

Although unwarranted prejudices against mentally retarded persons are deeply instilled in American society,[20] the trend in federal and

13. U.S. CONST. amend. V states in part: "No person . . . shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty or property, without due process of law . . . ." CAL. CONST. art. 1, § 15 uses virtually the same language.

14. 23 Cal. 3d at 137, 588 P.2d at 796, 151 Cal. Rptr. at 656. The court reasoned that because the commitment was limited to one year and because the petitioner could have been someone other than a public prosecutor, Tyars' trial should be classified as a civil proceeding.

15. The absolute right to refuse to take the witness stand applies only to criminal defendants. *See* note 13 *supra*. *See also* CAL. EVID. CODE § 930 (West 1966) ("To the extent that such privilege exists under the Constitution of the United States or the State of California, a defendant in a criminal case has a privilege not to be called as a witness and not to testify.").

16. 23 Cal. 3d at 137, 588 P.2d at 796, 151 Cal. Rptr. at 656.

17. *Id.* at 138-39, 588 P.2d at 797-98, 151 Cal. Rptr. at 657-58.

18. *Id.*

19. The two dissenting justices were Chief Justice Bird, *id.* at 142, 588 P.2d at 800, 151 Cal. Rptr. at 660, and Justice Newman, *id.* at 150, 588 P.2d at 805, 151 Cal. Rptr. at 665.

20. Wolfensberger, *The Origin and Nature of Our Institutional Models*, CHANGING PATTERNS IN RESIDENTIAL SERVICES FOR THE MENTALLY RETARDED (President's Committee on Mental Retardation) (rev. ed. 1976) mentions seven different perceptions of the mentally retarded person. The retarded person may be perceived as (1) sick, (2) a subhuman organism who should be "broken or tamed like horses or wild beasts," (3) an object of pity, (4) a

state civil commitment case law has been to increase the procedural safeguards afforded to subjects of these proceedings. In *In re Gault*,[21] the United States Supreme Court held that the adjudication of a juvenile offender "must measure up to the essentials of due process" required by the fourteenth amendment.[22] *Gault* involved the commitment of a youth as a juvenile delinquent because he allegedly made lewd telephone calls. The Supreme Court held that the availability of the privilege against self-incrimination, usually limited to criminal defendants, must be afforded to juveniles in a commitment proceeding,[23] even though a juvenile commitment is technically civil. The Court stated that "the availability of the privilege [against self-incrimination] does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement of admission and the exposure which it invites."[24] According to the *Gault* Court, labels defining the civil-criminal distinction are largely superficial and based on convenience.[25]

Virtually all types of commitment proceedings, from juvenile delinquency and conservatorship hearings to those involving narcotic addicts and mentally disordered sex offenders, are labeled "civil," yet their common result is the deprivation of liberty for rehabilitative purposes,[26] thereby warranting due process scrutiny. Thus, in a line of cases based on the *Gault* analysis, defendants of these civil proceedings have been afforded many constitutional protections traditionally reserved solely for criminal defendants. These include right to counsel, right to jury trial and unanimous verdict, right to notice, and right to be heard.[27]

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special person of God, (5) a burden of charity, (6) a menace, and (7) a developing individual. *Id.* at 36-45.

21. 387 U.S. 1 (1967).

22. *Id.* at 30-31.

23. *Id.* at 49.

24. *Id.* The Court further stated that "[i]t would indeed be surprising if the privilege against self-incrimination were available to hardened criminals but not to children." *Id.* at 47.

25. *Id.* at 49-50. *See generally* Comment, *Arkansas Civil Involuntary Commitment: In the Rear Guard of the Due Process Revolution*, 32 ARK. L. REV. 294 (1978) [hereinafter cited as ACIC].

26. *See* Note, *A New Emancipation: Toward an End to Involuntary Commitments*, 48 NOTRE DAME LAW. 1334, 1343 (1973).

27. *See In re* Winship, 397 U.S. 358 (1970) (in a juvenile justice case, proof beyond a reasonable doubt specifically included among *Gault*'s "essentials of due process"); Specht v. Patterson, 386 U.S. 605 (1967) (due process required procedural safeguards for a mentally disordered sex offender); *In re* Ballay, 482 F.2d 648 (D.C. Cir. 1973) (proof beyond a reasonable doubt of mental illness and dangerousness required in an involuntary civil commitment proceeding); Heryford v. Parker, 396 F.2d 393 (10th Cir. 1968) (right to counsel extends to

Traditionally, an evaluation of the extent of the protections afforded by the due process clause involves a balancing of the individual's interest in liberty against the state's interest in commitment.[28] The primary question is whether the ultimate interest of the individual falls within the due process clause.[29] This, in turn, involves a two-part analysis. First, if the final decision will result in a deprivation of the individual's liberty,[30] such as incarceration,[31] the proceeding is considered to be criminal in nature. This allows for the exercise of constitutional rights normally available only to criminal defendants. Second, a determination is made whether the individual being committed for treatment will be looked upon with societal opprobrium[32] equal to that resulting from a criminal conviction. Thus, the interest of the individ-

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all significant stages of commitment process); Lynch v. Baxley, 386 F. Supp. 378 (M.D. Ala. 1974) (right to a judicial hearing and to be committed only upon "clear, unequivocal, and convincing proof").

28. Lynch v. Baxley, 386 F. Supp. at 390. *See generally* Heryford v. Parker, 396 F.2d at 396.

29. *In re* Gault, 387 U.S. at 30-31. *See* ACIC, *supra* note 25, at 307. *See generally* Note, *Developments in The Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1271 (1974) [hereinafter cited as *Developments*]. In exploring the scope of the fourteenth amendment, the United States Supreme Court in Malloy v. Hogan, 378 U.S. 1, 8 (1963), concluded that the same standards must exist vis-à-vis the application of the fifth amendment in both state and federal courts.

30. In discussing deprivation of liberty, Justice Fortas in *Gault* wrote that commitment "is incarceration against one's will, whether it is called 'criminal' or 'civil'." 387 U.S. at 50. *Accord, In re* Winship, 397 U.S. at 365-66. *See Developments, supra* note 29, at 1194-96. *See generally* Note, *Mental Health and Human Rights: Report of the Task Panel on Legal and Ethical Issues*, 20 ARIZ. L. REV. 49, 117 (1978).

31. One author, referring to civil commitment, simply stated that "confinement in an institution for total care is a massive restriction on one's ability to wander the streets and do what one will." Strauss, *Due Process in Civil Commitment and Elsewhere*, THE MENTALLY RETARDED CITIZEN AND THE LAW 442, 448 (M. Kindred ed. 1978). *See* Humphrey v. Cady, 405 U.S. 504, 509 (1972).

32. *Developments, supra* note 29, at 1200.

> [A] former mental patient may suffer from the social opprobrium which attaches to treatment for mental illness and which may have more severe consequences than do formally imposed disabilities. Many people have an "irrational fear of the mentally ill." The former mental patient is likely to be treated with disgust and even loathing; he may be socially ostracized and victimized by employment and educational discrimination.

Id. As suggested by another commentator, "Medical illnesses, while unfortunate, are not commonly perjorative. Psychiatric diagnoses, on the contrary, carry with them personal, legal and social stigmas." Rosenhan, *On Being Sane in Insane Places*, 13 SANTA CLARA LAW. 379, 385 (1973). This article monitored the commitment of eight volunteers as "patients" including three psychologists, a pediatrician, a psychiatrist, and a housewife. When admitted, these actors displayed symptoms of paranoid schizophrenia, although they returned to normal behavior once inside the institution. Upon their release (hospitalization ranged from 7-52 days), each was diagnosed as "schizophrenia in remission" rather than "normal or cured."

ual is examined in detail by comparing, for example, the effect of a delinquency hearing on a delinquent with that of a criminal trial on a criminal.[33]

The individual's interest in liberty must then be balanced with the state's interest in confinement.[34] Even though a state may have a legitimate reason for confining an individual, the denial of an individual's liberty must be justified by a compelling state interest.[35] Historically, the state's interest is two-fold. Under the parens patriae theory, the state has the responsibility of taking care of those unable to care for themselves.[36] Under its police power, the state has a duty to protect society from dangerous people.[37] The state has the choice of emphasizing either or both of these theories. More often than not, the state's chosen objective is best revealed in its commitment statute.[38] Thus, a

33. *In re* Gault, 387 U.S. at 49-50.

34. "If the deprivation is found to be of such constitutional stature, courts must proceed to the second step of the due process analysis, balancing, with respect to each procedural protection, the magnitude of the individual interests and the importance of the procedure in protecting them, against the countervailing state objectives." *Developments, supra* note 29, at 1271. *See generally Legal Issues in State Mental Care: Proposals for Change—Civil Commitment*, 2 MENTAL DISABILITY L. REP. 75, 102 (1977). The *Gault* Court examined the state's interest in commitment in the context of its parens patriae power, *i.e.*, in its duty to protect "the property interests and the person of the child." 387 U.S. at 16.

35. Due process of law is a limitation on "the powers which the state may exercise," *In re* Gault, 387 U.S. at 20, and as such has been applied to civil commitments. *See In re* Ballay, 482 F.2d 648, 655-62, 667-69 (D.C. Cir. 1973); Lessard v. Schmidt, 349 F. Supp. 1078, 1084 (E.D. Wis. 1972), *vacated and remanded on procedural grounds*, 414 U.S. 473 (1974), *on remand*, 413 F. Supp. 1318 (E.D. Wis. 1976). More specifically, "[t]he strict scrutiny test requires that state intrusions into protected liberty be justified by some compelling interest." Kirschner, *Constitutional Standards for Release of the Civilly Committed and Not Guilty by Reason of Insanity: A Strict Scrutiny Analysis*, 20 ARIZ. L. REV. 233, 243 (1978) [hereinafter cited as *Constitutional Standards*].

36. The *Gault* Court suggested that the state acts as a surrogate parent to the juvenile in its parens patriae power. 387 U.S. at 16-17. The notion of parens patriae originally developed under English law where the sovereign was seen as the "father of the country," whose duty it was "to promote the interests and welfare of his wards," the people. In America, this power transferred to the state legislature, which has the duty of protecting the well-being of its citizens. *Developments, supra* note 29, at 1207-08.

37. "Although dangerousness to self and dangerousness to others are frequently considered together, it is clear that they actually represent quite different state interests. Commitment on account of dangerousness to others serves the police power, while commitment for dangerousness to self partakes of the *parens patriae* notion . . . ." Lynch v. Baxley, 386 F. Supp. at 390. *See also* Note, *Procedural Safeguards for Periodic Review: A New Commitment to Mental Patient's Rights*, 88 YALE L.J. 850, 862 (1979) [hereinafter cited as *Procedural Safeguards*].

38. As suggested in *Developments, supra* note 29, at 1300, "Three factors determine an individual's dangerousness: (1) the likelihood that he will commit a harmful act; (2) the magnitude of the harms likely to result from such an act; and (3) the time period within which the act is likely to occur." Thus, the California statute reflects the state's duties flow-

substantive analysis under the due process clause considers the potential detriment to the individual and the importance of the state interest in requiring that deprivation.[39] Justification for seeking to deprive a person of his liberty is the burden of the state.[40]

In *Tyars*, the California Supreme Court did not review the record in accordance with the above criteria, which the court had previously applied, without hesitation, in other situations involving civil commitment and incarceration.[41] The civil-criminal distinction used instead

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ing from its police power and parens patriae in that it provides for commitment upon the finding that the mentally retarded person is a danger to himself or others. CAL. WELF. & INST. CODE § 6500 (West Supp. 1979), see note 7 *supra*.

39. *In re* Ballay, 482 F.2d 648, 655-62 (D.C. Cir. 1973). *See Developments, supra* note 29, at 1272-73; *Constitutional Standards, supra* note 35, at 243-47.

40. [T]he state . . . shall have the burden of demonstrating that the proposed commitment is . . . consistent with the needs of the person to be committed . . . . This duty of investigation and burden of persuasion derive from the general and well-recognized principle that ". . . even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."

Lynch v. Baxley, 386 F. Supp. at 392 (quoting Shelton v. Tucker, 364 U.S. 479 (1960)). *See* Elrod v. Burns, 427 U.S. 347, 362 (1976); Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1963).

41. In People v. Burnick, 14 Cal. 3d 306, 310, 535 P.2d 352, 354, 121 Cal. Rptr. 488, 490 (1975), the California Supreme Court held that proof beyond a reasonable doubt is the proper standard for the commitment hearing of a mentally disordered sex offender. After rejecting the civil-criminal distinction, the *Burnick* court asserted that the curtailment of a sex offender's liberty and the resulting social stigma are no less than those which result from an adjudication in a juvenile delinquency hearing. *Id.* at 323, 535 P.2d at 363, 121 Cal. Rptr. at 499.

After reviewing the individual interest at stake, the court then examined the state interest involved. The state argued that proof by a preponderance of the evidence is an appropriate burden considering the predictive nature of the proceeding. *Id.* at 325-28, 535 P.2d at 366-67, 121 Cal. Rptr. at 500-03. The court was not persuaded by this argument and concluded that the state's interest was not sufficiently compelling to justify Burnick's commitment by any lesser standard than beyond a reasonable doubt. *Id.* at 328, 534 P.2d at 367, 121 Cal. Rptr. at 502-03.

In People v. Feagley, 14 Cal. 3d 338, 352, 535 P.2d 373, 381, 121 Cal. Rptr. 509, 517 (1975), the California Supreme Court held that mentally disordered sex offenders should be guaranteed the right to a unanimous jury verdict, which is not required by the California Constitution for "civil" defendants. Because proceedings of mentally disordered sex offenders are technically "civil," the trial court had denied the defendant in *Feagley* a unanimous verdict. The California Supreme Court rejected the superficial civil-criminal distinction and stated that a mentally disordered sex offender's hearing has all the trappings of a criminal prosecution, "together with [its] worst consequences." *Id.* at 350, 535 P.2d at 380, 121 Cal. Rptr. at 516. In discussing the state's interest, the court noted that "closer scrutiny is afforded a statute which affects fundamental interests . . . . In such cases the state bears the burden of establishing . . . that the state has a compelling interest which justifies the law." *Id.* at 355, 535 P.2d at 384, 121 Cal. Rptr. at 520 (quoting *In re* Gary W., 5 Cal. 3d 296, 306, 486 P.2d 1201, 1209, 96 Cal. Rptr. 1, 9 (1971)).

Based on essentially the same reasoning, the court in People v. Thomas, 19 Cal. 3d 630,

by the *Tyars* majority clouded the central issue—deprivation of liberty and the social stigma associated therewith. Additionally, the court did not look at the state's interest and balance that against Tyars' individual interest. Indeed, the court could have reasonably concluded that Tyars' need for treatment was so great that the state was required as parens patriae to give Tyars the care he clearly needed.

Instead, as Chief Justice Bird's dissent pointed out, cases distinguishable in fact and result were relied upon, revealing one of the major weaknesses of the *Tyars* opinion.[42] The majority's reliance on *Black v. State Bar*,[43] for example, was misplaced. That case involved a disciplinary proceeding against an attorney that could not have resulted in incarceration. Furthermore, the attorney waived his privilege against self-incrimination by testifying fully without objection. Tyars, on the other hand, was faced with the threat of confinement and objected to taking the stand. The *Black* court specifically noted that a disbarment proceeding was distinguishable from a juvenile justice proceeding precisely on the incarceration issue.[44] Finally, in denying Tyars due process protections, the court disregarded the substance of the commitment proceeding because it was labelled "civil."

B. The Right Not To Be Called to the Witness Stand

Both the United States and California Constitutions provide that no person shall be compelled to be a witness against himself in a criminal case.[45] This right against self-incrimination has been construed as having two distinct elements: first, the privilege not to be called to the witness stand and, second, the privilege not to incriminate oneself.[46]

566 P.2d 228, 139 Cal. Rptr. 594 (1977), held that narcotics addiction commitment proceedings were governed by the same procedural safeguards as those applied in *Burnick* and *Feagley*. The *Thomas* court articulated the public's image of a heroin addict as "a self-indulgent social parasite who caters to his uncontrolled craving for the drug at the expense of his family and community obligations." *Id.* at 640, 566 P.2d at 234, 139 Cal. Rptr. at 600. This stigma, combined with loss of liberty resulting from commitment, convinced the court that the highest standard of proof, proof beyond a reasonable doubt, must be the state's burden in narcotic addiction proceedings. *Id.* at 633, 566 P.2d at 229, 139 Cal. Rptr. at 595.

42. 23 Cal. 3d at 148, 588 P.2d at 803, 151 Cal. Rptr. at 663 (Bird, C.J., dissenting).

43. 7 Cal. 3d 676, 499 P.2d 968, 103 Cal. Rptr. 288 (1972).

44. *Id.* at 688, 499 P.2d at 974, 103 Cal. Rptr. at 294.

45. U.S. CONST. amend. V; CAL. CONST. art. 1, § 15. *See also* Malloy v. Hogan, 378 U.S. 1, 11 (1964) (fifth amendment privilege against self-incrimination held applicable to the states within the fourteenth amendment's due process clause).

46. *E.g.*, United States v. Gay, 567 F.2d 916, 918 (9th Cir.), *cert. denied*, 435 U.S. 999 (1978) (privileges not to take the witness stand and not to incriminate oneself are distinct); United States v. Echeles, 352 F.2d 892, 897 (7th Cir. 1965) ("a defendant on trial cannot be required to take the stand to answer even the most innocuous nonincriminating inquiries").

The first aspect of this fifth amendment right is not explicitly stated in either the California or United States Constitutions.[47] Nor has the United States Supreme Court directly acknowledged the fifth amendment's dual existence.[48] Nevertheless, the privilege not to be called to the witness stand has been recognized by several federal courts[49] as well as the California Supreme Court[50] and California Legislature.[51]

In *Griffin v. California*,[52] the United States Supreme Court held that the fifth amendment prohibits comment by prosecutors on the defendant's failure to testify, stating that such comments were "a remnant of the 'inquisitorial system of criminal justice.' "[53] Indeed, fifth amendment rights were created to prevent a recurrence of the horrors of the Star Chamber, where a suspect, under the threat of incarceration, banishment, or mutilation, was coerced into responding.[54] The *Griffin* Court, aware of the pressures that result from taking the witness stand, suggested that nervousness and fear in a defendant can operate to increase, rather than decrease, prejudices against him.[55] Thus, the underlying rationale of both aspects of the privilege is to protect the accused from giving evidence against himself.[56] The defendant has the choice of either refusing to take the witness stand or of taking the stand and then refusing to testify.

In *Tyars*, the California Supreme Court failed to recognize Tyars' right to each protection of the fifth amendment and held that Tyars was required to be a witness. The reasons for fifth amendment protection of criminal defendants are equally as compelling in the civil commitment context. The nature of the proceeding, with its consequent loss of

47. Both constitutions instead prohibit a defendant from being compelled to be a witness against himself in a criminal case. *See* U.S. CONST. amend. V; CAL. CONST. art. 1, § 15.

48. The United States Supreme Court indirectly recognized the existence of the right not to take the witness stand in its decision in Griffin v. California, 380 U.S. 609 (1965). The Court held that the prosecutor's comments to the jury about the defendant's refusal to take the witness stand increased the possibility of prejudice against the criminal defendant, thus violating his fifth amendment rights. *Id.* at 613-15.

49. *See* cases cited note 46 *supra*.

50. *E.g.*, Black v. State Bar of California, 7 Cal. 3d 676, 685, 499 P.2d 968, 972-73, 103 Cal. Rptr. 288, 292-93 (1972); People v. Robinson, 61 Cal. 2d 373, 393, 392 P.2d 970, 982, 38 Cal. Rptr. 890, 902 (1964).

51. *See* CAL. EVID. CODE § 930 (West 1966), which provides: "To the extent that such privilege exists under the Constitution of the United States or the State of California, a defendant in a criminal case has a privilege not to be called as a witness and not to testify."

52. 380 U.S. 609 (1965).

53. *Id.* at 614-15.

54. *Id.* at 620 (Stewart, J., dissenting).

55. *Id.* at 613 (citing Wilson v. United States, 149 U.S. 60, 66 (1893)).

56. *See* L. LEVY, THE ORIGINS OF THE FIFTH AMENDMENT 425-27 (1968).

liberty and social stigma, mandates that the court reject the "civil" label and focus on the substance of the process.

Tyars was required to give testimony relevant to a determination of his mental retardation and dangerousness, the requisite statutory elements for commitment.[57] The court equated Tyars' testimony with certain other physical evidence, such as voice or handwriting identification, which is admissible at a criminal trial.[58] The majority's reference to the admissibility of physical evidence is misplaced, for it focuses on a point in the hearing *after* which Tyars had already taken the witness stand. The central issue, whether he should have been called as a witness *in the first place*, was not analyzed. Not only did the majority superficially review the civil-criminal distinction, but they also failed to address whether Tyars had the absolute right of a criminal defendant to refuse to take the witness stand. If, as the majority asserted, the purpose of the privilege is "to assure that the *criminal* justice system remains accusatorial, not inquisitorial,"[59] then Tyars should have had the right to refuse to take the witness stand.

C. The Right to Refuse to Testify

Any person, witness or defendant, has the right in any proceeding, civil or criminal, to decline to answer questions that may tend to incriminate him.[60] The right extends to any situation in which a person "has reasonable cause to apprehend danger from a direct answer."[61] This federal standard reflects three basic rationales: "(1) the necessity to maintain a responsible accusatorial system; (2) the desire to prevent cruel and inhumane treatment of individuals by forcing them into a 'trilemma of self-accusation, perjury or contempt'; and (3) the belief that compelled confessions are serious invasions of personal privacy."[62] The *Tyars* court held that Tyars could refuse to answer questions relevant to establishing his mental retardation or dangerousness only if these questions specifically required answers concerning criminal conduct.[63] Therefore, because Tyars could have incriminated himself, the

57. 23 Cal. 3d at 137, 588 P.2d at 796, 151 Cal. Rptr. at 656.

58. *Id.* at 139, 588 P.2d at 798, 151 Cal. Rptr. at 658.

59. *Id.* at 137-38, 588 P.2d at 797, 151 Cal. Rptr. at 657.

60. Malloy v. Hogan, 378 U.S. 1, 11 (1964).

61. Hoffman v. United States, 341 U.S. 479, 486 (1951).

62. O'Brien, *The Fifth Amendment: Fox Hunters, Old Women, Hermits, and the Burger Court*, 54 NOTRE DAME LAW. 26, 35 (1978).

63. The court stated: "To the extent that the *necessary elements* of mental retardation and *dangerousness* may be established by evidence of criminal conduct, such evidence *must, in its entirety be elicited from sources other than the individual who is the subject of the commit-*

trial court had erred in denying his right to silence. Nonetheless, the California Supreme Court upheld Tyars' commitment because of the overwhelming evidence of Tyars' retardation, finding the error harmless beyond a reasonable doubt.[64]

The majority in *Tyars* did not confront the main issue: the incriminating effect of Tyars' testimony. The threat of incrimination to a criminal defendant is subsequent prosecution, which can result in confinement. The threat to Tyars, or any subject of involuntary commitment proceedings, is also confinement in an institution. Allowing Tyars to give testimony ultimately determinative of his mental condition is analogous to allowing a criminal defendant to give testimony of his subjective intent in committing a crime. In either proceeding, the testimony given establishes the necessary element of the state's burden leading to incarceration or commitment. Therefore, to term Tyars' testimony as harmless, regardless of the quantity or quality of evidence against him, was simplistic.

1. The harmless error rule

The *Tyars* court used an outdated standard to determine whether the trial court's error was harmless. The harmless error rule forbids "reversal unless 'the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.' "[65] The federal standard for determining whether an error is harmless is derived from *Chapman v. California*,[66] in which the prosecutor commented extensively on the defendants' failure to testify at their own trial, hoping to imply that their silence was evidence of their guilt.[67] In disapproving the harmless error rule used by the California courts, the *Chapman* Court found that, if a reasonable possibility exists that evidence complained of might have contributed to a conviction,[68] the error cannot be considered harmless.[69]

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ment proceeding." 23 Cal. 3d at 138, 588 P.2d at 797, 151 Cal. Rptr. at 657 (emphasis added).

64. *Id.* at 139, 588 P.2d at 797, 151 Cal. Rptr. at 657-58.

65. Chapman v. California, 386 U.S. 18, 20 (1967) (quoting CAL. CONST. art. 6, § 13).

66. 386 U.S. 18 (1967).

67. *Id.* at 19.

68. *Id.* at 23. The Court stated:

> The California constitutional rule emphasizes a "miscarriage of justice," but the California courts have neutralized this to some extent by emphasis, and perhaps overemphasis, upon the courts' view of "overwhelming evidence." We prefer the approach of this court in deciding what was harmless error in our recent case of *Fahy v. Connecticut* . . . .

69. "An error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot . . . be conceived of as harmless." *Id.* at 23-24.

Although the "reasonable possibility" standard may be somewhat ambiguous,[70] it cannot be definitively said that Tyars' testimony did not in any way adversely influence the jury. Indeed, Justice Newman's dissent termed the improper questioning of Tyars as "cruel and degrading" treatment.[71] The court held, however, that "[g]iven the weight and nature of the uncontradicted evidence . . . it is clear that any erroneous questioning of the appellant was harmless beyond all reasonable doubt."[72]

Moreover, the *Tyars* majority declined to utilize the method set forth by the *Chapman* Court in examining the effect of erroneously admitted evidence. In a recent article that reviewed the need for a clear harmless error standard, one commentator formulated two different approaches for assessing harmlessness. The first approach focuses upon the erroneously admitted evidence (or other constitutional error) and asks whether it could have contributed to a guilty verdict. The second approach asks whether, once erroneously admitted evidence is excluded, overwhelming evidence in support of the jury's verdict remains.[73]

The majority in *Tyars* followed the second approach, looking at the properly admitted evidence, such as psychiatric testimony, and concluded that it overwhelmingly supported Tyars' commitment.[74] The dissent in *Tyars*, however, utilized the approach of the *Chapman* Court and examined whether the improperly admitted evidence had contributed to Tyars' commitment.[75] The dissent stated that Tyars' testimony of assaults that established his dangerousness and his "child like dramatizations,"[76] which established his mental retardation, could not have been more harmful.

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70. *See* Field, *Assessing the Harmlessness of Federal Constitutional Error—A Process in Need of a Rationale*, 125 UNIV. PENN. L. REV. 15, 32 (1976) [hereinafter cited as Field] ("[t]he case law on the content of the harmless error standard is less than lucid"); Note, *Harmless Constitutional Error: A Reappraisal*, 83 HARV. L. REV. 814, 815 (1970) [hereinafter cited as *A Reappraisal*].

71. Citing article five of the Universal Declaration of Human Rights, Justice Newman stated that "courts should countenance neither witting nor unwitting attempts by prosecutors to exploit possible 'freak show' prejudices." 23 Cal. 3d at 151, 588 P.2d at 805, 151 Cal. Rptr. at 665 (Newman, J., dissenting).

72. *Id.* at 139, 588 P.2d at 797, 151 Cal. Rptr. at 657.

73. Field, *supra* note 70, at 16. It should be noted that a third approach was suggested by Field, but since it is not represented in the present case, it will not be reviewed.

74. 23 Cal. 3d at 139, 588 P.2d at 797-98, 151 Cal. Rptr. at 657.

75. *Id.* at 150, 588 P.2d at 805, 151 Cal. Rptr. at 665 (Bird, C.J., dissenting).

76. *Id.*

2. Disapproval of the overwhelming evidence standard

In *Chapman*, the United States Supreme Court held that California's harmless error rule violated the fifth and fourteenth amendments of the United States Constitution.[77] Although the California courts have since attempted to neutralize this harsh rule by adopting a standard of "overwhelming evidence,"[78] they have been strongly criticized.[79] First, it has been suggested that the courts use the standard in order to avoid their primary function and the more difficult determination of whether a constitutional error has been committed.[80] Second, a court using this standard usurps the jury's function by denying the jury the opportunity to decide upon what body of evidence it will convict the defendant,[81] thereby increasing the scope of the appellate court's inquiry. Application of this standard acknowledges that evidence was admitted incorrectly and that it affected the verdict. But, the duty of a reviewing court is to "examine whether the trial was an essentially fair one, in which the conviction was not based upon any constitutional error."[82]

Thus, in adopting this standard, the *Tyars* majority evaded its duty as a reviewing court; it did not examine whether or not the commitment hearing was fair. The acceptance of erroneously admitted testimony ostensibly justified by "other overwhelming evidence" is tantamount to saying that it is permissible to imprison a criminal defendant, even though procedural rules were violated, because he was clearly guilty.

The overwhelming evidence on which the majority based its conclusion consisted of testimony from two medical examiners who diagnosed Tyars' condition as mental retardation encephalopathy caused

77. 386 U.S. at 21.

78. People v. Teale, 63 Cal. 2d 178, 197, 404 P.2d 209, 220, 45 Cal. Rptr. 729, 740 (1965) (prosecution for murder, robbery and kidnapping); People v. Gant, 252 Cal. App. 2d 101, 118, 60 Cal. Rptr. 154, 165 (1967) (prosecution for conspiracy to commit burglary); People v. Elliott, 241 Cal. App. 2d 659, 668, 50 Cal. Rptr. 757, 762 (1966) (prosecution for pimping and pandering); People v. Potter, 240 Cal. App. 2d 621, 631, 49 Cal. Rptr. 892, 899 (1966) (prosecution for conspiracy and wiretapping); People v. Boyden, 237 Cal. App. 2d 695, 699-700, 47 Cal. Rptr. 136, 139 (1965) (prosecution for armed robbery); People v. De Leon, 236 Cal. App. 2d 530, 539, 46 Cal. Rptr. 241, 247 (1965) (prosecution for burglary and several felonious acts).

79. The *Chapman* Court specifically disapproved the use of this standard. 386 U.S. at 23. *See A Reappraisal, supra* note 70, at 816; Note, *Applications of the Harmless Error Doctrine to Violations of* Miranda: *The California Experience*, 69 MICH. L. REV. 941, 950-54 (1971) [hereinafter cited as *California Experience*].

80. Field, *supra* note 70, at 36. *See also California Experience, supra* note 79.

81. *See A Reappraisal, supra* note 70, at 819; Field, *supra* note 70, at 33-34.

82. Field, *supra* note 70, at 35.

by post natal injury.[83] Additionally, a psychiatric technician testified as to Tyars' assaultive behavior at Patton State Hospital.[84] Yet, as mentioned in Chief Justice Bird's dissent, one of the physicians had interviewed Tyars for only thirty minutes while the other had only administered intelligence quotient tests.[85]

Furthermore, severe problems exist with psychiatric predictions of dangerousness.[86] It has been suggested that psychiatric determinations of dangerousness are unreliable because of their inability to correctly predict future actions and, therefore, should be excluded from the courtroom.[87] Commentators suggest that the technical difficulties encountered when discussing dangerousness seriously undermine the accuracy of this type of testimony.[88] The psychiatrist's personal interests

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83. 23 Cal. 3d at 139, 588 P.2d at 795-96, 151 Cal. Rptr. at 657.

84. *Id.* The reader should recall that the psychiatric technician was the interpreter assigned to Tyars during his testimony. *See* note 9 *supra*.

85. *Id.* at 143, 588 P.2d at 800, 151 Cal. Rptr. at 660.

86. This has been recognized by the United States Supreme Court. O'Connor v. Donaldson, 422 U.S. 563, 579 (1975) (Burger, C.J., concurring).

87. Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693, 694-96 (1974). The authors stated:

> Although the specific reasons why psychiatric judgments and predictions are unreliable and invalid are varied, many of them can be grouped under six broad and occasionally overlapping headings: 1) orientation and training [psychiatrists are trained in medical school, as are all doctors, to suspect illness], 2) context [diagnosis is influenced by the setting in which the subject is observed], 3) time [patient inconsistencies from day to day], 4) class and culture [influence of the socio-economic background of the physician], 5) personal bias [the clinician's own biases, values, etc.], and 6) inadequacies of the diagnostic system and ambiguity of psychiatric data [inconsistency of clinicians' perceptions].

Id. at 720.

88. These difficulties in discussing dangerousness begin with the vagueness of the concept. "[E]very prediction of dangerousness involves not only the question of the magnitude of the harm, but also questions of the likelihood, imminence and frequency of the predicted behavior." Cocozza & Steadman, *The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence*, 29 RUTGERS L. REV. 1084, 1087 (1976) [hereinafter cited as Cocozza & Steadman]. The concept of dangerousness is usually expressed through the state statutory scheme. If the intent of the statute is preventive detention, then a simple prediction of dangerousness will suffice. If the goal is treatment, however, usually the statute requires a recent overt act to predict future dangerousness. *Procedural Safeguards, supra* note 37, at 856-57.

Furthermore, the actual occurrence of dangerous behavior among mental patients is low, making it more difficult to accurately predict its occurrence in the future. Hartman & Allison, *Predicting Dangerousness*, 1979 MED. TRIAL TECH. Q. 131, 133 [hereinafter cited as Hartman & Allison]. In addition, psychiatrists tend to favor treatment, practicing preventive medicine if any question of potential danger remains. *Procedural Safeguards, supra* note 37, at 854. This may be because the socio-political consequences resulting from erroneous overprediction are relatively few as compared to those resulting from a mistaken underprediction. Hartman & Allison, supra, at 133-34.

may influence the testimony.[89] It follows, then, that the extent to which psychiatric testimony can be the sole measure of overwhelming evidence should be seriously questioned. Most importantly, psychiatrists, like other physicians, are trained to diagnose rather than to predict.[90] The legal system has placed an unfair burden on the psychiatric profession by unrealistically expecting absolute accuracy,[91] when the same degree of accuracy is demanded from no other medical specialty.[92]

Even if the overwhelming evidence standard prevails, the California Supreme Court has adopted error as the unqualified standard for California commitments. Not only does the degree of retardation need to be established in the courtroom to justify commitment, but also the type of commitment needs to be explored. Tyars' right to a fair trial was unquestionably abused in the San Bernardino courtroom. When Tyars was called as a witness, his attorney objected. If Tyars had been a criminal defendant, this objection would have been sustained.[93] Tyars was then asked by the judge whether he had been involved in any fights. Almost any answer Tyars could have given would have been indicative of dangerousness or his mental condition, thus proving one element required by the state statute.[94] The court should have held that Tyars' refusal to answer was protected by the right against self-incrimination because the answer may have provided evidence to support his commitment.

Because of Tyars' speech impediment, the trial court appointed an interpreter for him. Yet, the majority failed to point out that the interpreter was also the key witness for the prosecution against Tyars.[95] The interpreter answered many questions himself without even repeating them to Tyars. In addition, the interpreter's translations at times were completely different from Tyars' partially understandable responses.

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89. Pertinent to the situation in *Tyars*, in which psychiatric testimony was the sole source of the overwhelming evidence, it has been suggested that a private physician may want to cover up past mistakes, a hospital psychiatrist may be influenced by feared repercussions from his superiors, and consultant may not want to interfere because of professional courtesy or apathy. *Procedural Safeguards, supra* note 37, at 854.

90. *See* Cocozza & Steadman, *supra* note 88, at 1091.

91. *Id.*

92. *See* Slovenko, *Reflections of the Criticisms of Psychiatric Expert Testimony*, 25 WAYNE L. REV. 37, 52 (1978). Indeed, when a University of California staff psychiatrist successfully predicted potential death as a future act by a particular patient, authorities paid little heed, and the woman was killed. The psychiatrist was accused of failure to exercise reasonable care because he did not inform the woman or her parents of the potential harm. Tarasoff v. Regents of Univ. of Calif., 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

93. *See* notes 45-46 *supra* and accompanying text.

94. CAL. WELF. & INST. CODE § 6500 (West Supp. 1979), see note 7 *supra*.

95. 23 Cal. 3d at 143, 588 P.2d at 800, 151 Cal. Rptr. at 660 (Bird, C.J., dissenting).

Finally, Tyars' attorney never challenged his competency as a witness. A defendant's physical presence is not enough to enable him to participate effectively in his own defense; legal presence, in terms of comprehension of the proceedings, is also required.[96] This may be attributed to inadequate attorney representation which often occurs in civil commitment hearings and which has been commented upon extensively.[97] It is clear that successful litigation of a commitment proceeding turns upon the effective fulfillment of the attorney's adversarial role.[98] The California court had a duty to be aware of these potential

96. In Dusky v. United States, 362 U.S. 402, 402 (1960) (per curiam), the Court suggested that not only must the defendant be oriented to time and place and have some memory of events, "but that the 'test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him'." *See also* Chang & Araujo, *Interpreters for the Defense: Due Process for the Non-English Speaking Defendant*, 63 CALIF. L. REV. 801, 815-16 (1975).

97. The problems contributing to inadequate representation are many, but all are exacerbated by the nature of the proceeding. As often happens, the attorney has no opponent which immediately removes him from an adversarial arena. As can be expected, this is frustrating for one who is trained to fight. Since counsel does not play the "typical advocate," proceedings take on a perfunctory character due to nonexistent pressure because "nothing" is at stake. Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill*, 44 TEX. L. REV. 424, 448-57 (1966) [hereinafter cited as Cohen]. *See* Note, *The Right to Counsel in Ohio Involuntary Civil Commitment*, 36 OHIO ST. L.J. 436, 446 (1975). Uncertain about the client's desires because no pre-hearing conference has been held or because the patient is unable to communicate due to medication or fright, counsel often sees his role as merely guarding the person's procedural rights, only opposing commitment when he has subjectively determined that his client does not need treatment. Litwack, *The Role of Counsel in Civil Commitment Proceedings: Emerging Problems*, 62 CALIF. L. REV. 816, 829-31 (1974). The attorney has no standard of success against which to measure his performance, other than his clients' "best interest." Cohen, *supra*, at 447. Clearly, the potential for error in this type of situation is high. At the same time, the state has not satisfied its duty in providing counsel. In fact, Tyars' attorney did not object to his competency as a witness, and, therefore, the severity of error cannot be underestimated. Certainly, the "overwhelmingness" of evidence and its concomitant harmlessness diminish.

98. Professor Brunetti has summarized what the role of counsel should be:

> (1) [E]xplain the nature of the proceedings to the client and interview him to ascertain what action he wishes to take; (2) undertake a factual investigation of the client's background and the circumstances of the case, including interviews with the person seeking the client's commitment, the examining physician(s) and family members, and the examination of hospital records; (3) demand a jury trial, if available, after consultation with the client; (4) speak on behalf of the client who may be illiterate, inarticulate, or timid; (5) employ ordinary advocacy skills such as producing evidence, cross-examining witnesses, and guarding procedural rights; (6) investigate alternatives to commitment; (7) prepare the client for commitment if no other disposition can be agreed upon.

Brunetti, *The Right to Counsel, Waiver Thereof, and Effective Assistance of Counsel in Civil Commitment Proceedings*, 29 SW. L.J. 684, 707-08 (1975). For a comprehensive review of what techniques counsel should use, see Cohen, *supra* note 97, at 450-57. Commentators suggest two main roles commonly adopted by attorneys: that of the guardian ad litem and

deficiencies if, in fact, they existed.

3. The physical-testimonial evidentiary distinction

Even if the court was justified in determining that Tyars' testimony was harmless beyond all reasonable doubt, it should not have equated Tyars' testimony to physical evidence. It is generally accepted that the right against self-incrimination protects against the compulsion of producing evidence that is of a testimonial nature.[99] Statements that communicate a defendant's thoughts are included within the scope of the fifth amendment. Real or physical evidence is not protected by this aspect of the privilege against self-incrimination. In this context, compulsory blood tests have been held to be proper,[100] as have handwriting exemplars.[101] Participating in a lineup and being compelled to speak the words of a robber have also been held not to violate the privilege.[102] In other words, making the accused a source of real or physical evidence does not violate the fifth amendment.

At least one court, however, has disagreed with equating testimonial evidence to physical evidence. In *Thornton v. Corcoran*,[103] the District of Columbia Court of Appeals reviewed whether petitioner had a sixth amendment right to counsel during his pre-indictment mental examination. The court held that psychiatric testimony of the accused's mental state could hardly be considered physical evidence since his words were of critical importance in determining his mental condition.[104] Similarly, the testimony of Tyars was much more than "physical" evidence. Not only did Tyars testify about specific criminal conduct, but his actions in court, responses to questions, and his own description of what he liked to do were all indicative of his mental retardation. The California Supreme Court equated all of this "testimony" to physical evidence and considered it admissible. Yet, the privilege against self-incrimination should have prevented its forced disclosure.

Alternatively, the California Supreme Court could have upheld Tyars' commitment without equating mental testimony to physical evi-

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that of the adversary. Although each has its shortcomings, the adversary is most often chosen. ACIC, *supra* note 25, at 322.

99. *See* G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE (1978).

100. Schmerber v. California, 384 U.S. 757, 761 (1966).

101. Gilbert v. California, 388 U.S. 263, 266 (1967).

102. United States v. Wade, 388 U.S. 218, 221 (1967).

103. 407 F.2d 695 (D.C. Cir. 1969).

104. *Id.* at 699. *See* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 134 (2d ed. 1972).

dence. In exploring the purpose of calling Tyars to the witness stand and requiring him to testify, the majority could have concluded that the questions posed were of such a nature as to require substantively incriminating answers that would result in a jury finding of mental retardation and dangerousness.[105] In addition, the court could have inquired into the trial court judge's motivation in questioning Tyars about his involvement in fights and concluded that the judge was investigating Tyars' mental understanding of the trial since evidence of violence had been admitted.[106] In both of these situations, the goal parallels that of a psychiatric interview in that the judge was trying to explore defendant's mind.

In *French v. Blackburn*,[107] petitioner, who was civilly committed and then released under the North Carolina statutory scheme, contended that no statements made to a psychiatrist could be used against him.[108] Using a balancing test, the district court stated: "We are of the opinion that to apply the privilege . . . would be to destroy the valid purposes which [the interviews] serve . . . ."[109] Similarly, *Tippett v. Maryland*,[110] a Fourth Circuit case, involved a petitioner who, according to the Maryland Defective Delinquents Act, was required to submit

105. In an article suggesting a constitutional framework within which issues involving preventive confinement based on predictions of future dangerousness may be reviewed, Dershowitz specifically discussed this issue. He stated:

> The privilege [against self-incrimination] ought . . . to apply at least to answers whose substantive content may lead the psychiatrist to recommend confinement. The analogy to demeanor evidence leads directly to the second question of whether the subject of a predictive proceeding may refuse to testify at his trial (as may the defendant in a criminal prosecution), or must take the stand and invoke the privilege only in response to particular questions that expose him to the risk of confinement (as must a participant in a noncriminal proceeding). This question becomes particularly important in civil commitment cases when the government calls the "patient" to the witness stand in order to demonstrate that he is "crazy." In effect, the patient serves as an exhibit rather than a witness, and the prosecution often asks questions designed to provoke outbursts or expose a delusional system, rather than to induce substantively incriminating answers.

Dershowitz, *Preventive Confinement: A Suggested Framework for Constitutional Analysis*, 51 TEX. L. REV. 1277, 1316 (1973).

106. One commentator, in discussing the admissibility of evidence elicited during a psychiatric examination suggested: "The more logical approach [is] that such evidence is 'testimonial' in nature, since the mental examination attempts to discover the thought processes of the subject, and his often previously unexpressed feelings, through the elicitation of verbal and physical responses." Note, *Application of the Fifth Amendment Privilege Against Self-Incrimination to the Civil Commitment Proceeding*, 1973 DUKE L.J. 729, 741.

107. 428 F. Supp. 1351 (M.D.N.C.), *aff'd*, 443 U.S. 901 (1979).

108. *Id.* at 1358.

109. *Id.* at 1359.

110. 436 F.2d 1153 (4th Cir. 1971), *cert. dismissed*, 407 U.S. 355 (1972). *Tippett* was more recently approved in Dower v. Boslow, 539 F.2d 969 (4th Cir. 1976).

to a psychiatric interview. Judge Sobeloff's opinion, which concurred in part and dissented in part with the majority, stated that "the legitimate objectives of the legislation would be frustrated if inmates were permitted to refuse cooperation. Granting the inmate the right to silence would in many instances thwart the personal examinations and interviews considered indispensable.[111]

Although these cases do not constitute mandatory authority in California, the *Tyars* majority could have patterned its reasoning on any of these legal theories without equating testimonial evidence to physical evidence. The court could have looked to other jurisdictions, which have refused application of the privilege against self-incrimination in civil commitments because of the consequential invalidation of the diagnostic process.

III. POTENTIAL EFFECT OF *CRAMER V. TYARS* IN CALIFORNIA

Three weeks after the *Tyars* decision, the California Supreme Court decided a similar case, *Conservatorship of Roulet*,[112] and utilized reasoning inconsistent with *Tyars*. In *Roulet*, the Public Guardian of Santa Barbara County, as conservator of the person and estate of Roulet, sought reappointment in order to commit Roulet involuntarily to a state mental institution.[113] At trial, it was shown by medical testimony that Roulet, age 59, was unable to care for her basic needs. Using a preponderance of the evidence standard, with nine out of twelve jurors deciding, the jury found Roulet gravely disabled and reestablished the conservatorship.[114] The California Supreme Court reversed, holding that proof beyond a reasonable doubt and a unanimous jury verdict were necessary to establish grave disability and the appointment of a conservator.[115] The majority opinion, authored by Chief Justice Bird, who had dissented in *Tyars*,[116] relied on *People v. Burnick*,[117] *People v. Feagley*,[118] and *People v. Thomas*[119] and followed the balancing test set forth in *Gault*.[120] *Tyars*, which preceded *Roulet*, was neither

111. 436 F.2d at 1162. *Accord*, Kiritsis v. Marion Probate Court, 381 N.E.2d 1245, 1248 (Ind. 1978); *Ex rel.* Ellenwood, 567 S.W.2d 251, 253 (Tex. Civ. Ct. App. 1978).

112. 23 Cal. 3d 219, 590 P.2d 1, 152 Cal. Rptr. 425 (1979).

113. *Id.* at 222, 590 P.2d at 2, 152 Cal. Rptr. at 426.

114. *Id.*

115. *Id.* at 235, 590 P.2d at 11, 152 Cal. Rptr. at 435.

116. *Tyars* was a 5-2 decision. *Roulet* was a 4-3 decision with Justices Tobriner and Mosk taking inconsistent positions.

117. 14 Cal. 3d 306, 535 P.2d 352, 121 Cal. Rptr. 488 (1975).

118. 14 Cal. 3d 338, 535 P.2d 373, 121 Cal. Rptr. 509 (1975).

119. 19 Cal. 3d 630, 566 P.2d 228, 139 Cal. Rptr. 594 (1977).

120. 23 Cal. 3d at 223-33, 590 P.2d at 3-9, 152 Cal. Rptr. at 427-33.

distinguished nor discussed. Rather, the court reestablished pre-*Tyars* precedent by extending due process safeguards, such as the requisite standard of proof[121] and unanimous jury verdict, to the area of conservatorship commitments. In its concluding paragraph, the *Roulet* court stated that "[t]here is no logical reason to diverge from . . . [the path of *Burnick*, *Feagley* and *Thomas*] in this case. . . . Logic and law, as well as regard for the value of liberty, compel this court to follow those decisions today."[122] Chief Justice Bird may have been referring to *Tyars* when she stated that "[t]o turn back to the repudiated criterion of the civil-criminal label serves only to exalt form over substance."[123]

121. Until the recent decision of Addington v. Texas, 441 U.S. 418 (1979), many jurisdictions agreed that the benefiting party must prove that the respondent is mentally ill, but most disagreed as to the necessary standard of proof.

The landmark case in this area was *In re* Winship, 397 U.S. 358 (1970), which held that proof beyond a reasonable doubt, required by due process in criminal trials, is equally applicable to commitment hearings (in this case juvenile) in which the same fundamental rights are threatened. This holding has been followed in many of the United States appellate and district courts. *See In re* Ballay, 482 F.2d 648 (D.C. Cir. 1973); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded on procedural grounds*, 414 U.S. 473 (1974), *on remand*, 413 F. Supp. 1318 (E.D. Wis. 1976).

In contrast, the *Addington* Court ruled that, in a petition for civil commitment, due process "only requires proof *more substantial than a mere preponderance of evidence*." (emphasis added). The United States Supreme Court explicitly distinguished *Winship* by stating that it was a delinquency hearing, inquiring whether an individual in fact committed a criminal act. Since that is the same inquiry which occurs in a criminal hearing, the same standard of proof can be used.

A civil commitment hearing, however, cannot be equated to a criminal proceeding largely because a civil commitment revolves around the meaning of a set of facts—the psychiatric interpretation of existing mental characteristics—whereas the central issue in a criminal proceeding is whether the accused committed the acts. 441 U.S. at 428-30. Finally, the Court held it impractical and unfair to require the state to carry such an onerous standard as "beyond a reasonable doubt" stating that "there is a serious question as to whether a state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous." *Id.* at 429.

The California Supreme Court could have used similar reasoning in distinguishing *Tyars* from a criminal hearing. In *Addington*, civil commitment proceedings were distinguished from criminal proceedings, not by a label, but by the nature of the factfinders' inquiry. The inquiry was directed to the subject's state of mind and not to the factual investigation of the accused's acts, as in the criminal counterpart. The full panoply of rights granted by the *Gault-Winship* rule and its progeny now have an exception. Thus, the standard of proof used in *Roulet* was rejected by the United States Supreme Court.

122. 23 Cal. 3d at 235, 590 P.2d at 11, 152 Cal. Rptr. at 435. Is this the foreshadowing of the emergence of two separate standards in two distinct proceedings? A proceeding to determine whether a person is gravely disabled (thus in need of a conservator) may be inherently more "criminal" than a proceeding to determine whether a person is mentally retarded. In the former, liberty is in the hands of another, the conservator. In the latter, liberty is in the hands of the state. Future decisions will tell whether one is more of a deprivation than the other.

123. *Id.*

Nevertheless, *Tyars* was completely ignored in *Roulet*. It may be that the California Supreme Court views *Cramer v. Tyars* as an anomaly in California case law.

This trend of expanding due process protections to subjects of civil commitments continued in the decision of *In re Watson*.[124] The California Court of Appeal held that Watson's fundamental constitutional rights were violated when she was denied an opportunity to be present at her own civil commitment hearing. No evidence was presented to show that she was physically unable to attend or that she had waived her personal presence. In fact, the record showed that she was standing outside the courtroom.[125] After initially concluding that Watson's absence resulted in a "substantial loss of liberty,"[126] the court analogized the hearing to a criminal trial and asserted that "a defendant's personal presence at trial is a condition of due process . . . [which] would be thwarted by the absence of the accused. . . . The right to a fair hearing is an essential of due process whether life, liberty or property is being taken by criminal or civil process."[127]

IV. CONCLUSION

Tyars' testimony was of questionable value to the trial court. If overwhelming evidence in fact existed that indicated mental retardation, there was no compelling reason to violate Tyars' due process rights by denying him both protections afforded by the fifth amendment: the absolute right to refuse to take the witness stand and the right to refuse to testify.

The initial determination that subjects of civil commitment proceedings should not be afforded criminal due process protections reflects a reliance on labels rather than the true nature of involuntary commitment. An analysis of the individual's interest involved, balanced against the state's interest in commitment, would have been appropriate. Not only should Tyars have had the absolute right not to

124. 91 Cal. App. 3d 455, 154 Cal. Rptr. 151 (1979).

125. *Id.* at 458, 154 Cal. Rptr. at 154.

126. *Id.* at 459, 154 Cal. Rptr. at 154.

127. *Id.* at 460-61, 154 Cal. Rptr. at 155-56. One subsequent California appellate case has relied on the *Tyars* holding. In Cramer v. Shay, 94 Cal. App. 3d 242, 156 Cal. Rptr. 303 (1979), a man who was the subject of a civil commitment was released by the court after telling the police, four psychiatrists, his grandmother, and his cousin that he had burned two houses and one car because he was angry. The *Shay* court held that, mandated by the *Tyars* court, evidence of mental retardation and dangerousness established by criminal conduct must be elicited entirely "from sources other than the individual who is the subject of the commitment proceeding." *Id.* at 246, 156 Cal. Rptr. at 306 (citing Cramer v. Tyars, 23 Cal. 3d at 138, 588 P.2d at 797, 151 Cal. Rptr. at 657).

take the witness stand, but he also should not have been required to testify at all, because any testimony would have contributed to the state's case for commitment. Additionally, the court's method of assessing the harmlessness of error and employing the overwhelming evidence standard seems to indicate a denial of the judiciary's responsibility of ensuring a fair trial. Finally, the confusion created by the court is exacerbated when seen against the background of subsequent decisions such as *Watson* or *Roulet*, in which the California Supreme Court ignored *Tyars*.

Dina Tecimer