

A Constitutional Analysis of the Pathways Project

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Pathways Project

- Commitment Statute (based on dangerousness to self or others, inability to care for self, likelihood of deterioration)
- Emergency Treatment Guidelines
- Medication Over Objection Guidelines
- Criminal System Involvement

Pendulum Swings

- New York statute (1788): detention only to those who are “so far disordered in their senses that they may be dangerous to be permitted to go abroad”
- New York statute (1842): detention required of all “lunatics” for a minimum of six months,
- Illinois statute (1860s): detention permitted of “married women who in the judgment of the medical superintendent are evidently insane or distracted.”
- By the 1970s: Most states permitted commitment based on a “need for treatment”; informal procedure
- Lessard v. Schmidt (Wisconsin Fed. Dist. Ct., 1973): commitment only if proof of imminent dangerousness as manifested by a recent overt act at a judicial hearing, with the rights to counsel, remain silent, an independent evaluation, and rules of evidence.
- W. Va. Supreme Court (1974): “the ancient doctrine of parens patriae is in full retreat on all fronts except in those very narrow areas where the state can demonstrate, as a matter of fact, that its care and custody is superior to any available alternative.”
- U.S. Sup. Ct, O’Connor v. Donaldson (1975): “a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends.”
- U.S. Sup. Ct., Addington v. Texas & Parham v. J.R. (1979): adopting the medical model of commitment

Today's laws

- **Dangerousness:** The most restrictive statutes require clear and convincing proof that the person poses a substantial imminent risk of serious bodily harm to self or others, as evidenced by a recent overt act, and that there are no less restrictive alternatives that can effectively alleviate the risk.
- **Inability to care:** Most states also permit commitment if a person is unable to provide for basic needs.
- **Predicted deterioration:** A third also permit commitment if a person is likely to deteriorate to the point where they become dangerous to self or others unless they are treated. This latter so-called “predicted deterioration” test is often limited to outpatient commitment.
- **Need for treatment?** Alone, an insufficient basis for commitment. However, some states do permit involuntary treatment in a closely related situation: if, as a result of mental illness, the person is incompetent to make treatment decisions.
- **Legal procedures?** Procedurally, most states provide counsel and require a judicial determination of committability, but usually only in non-emergency circumstances.

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The Pathways Commitment Statute

“Person requiring court ordered treatment” means an individual who, as a result of mental illness and based on his or her recent actions, omissions, or behaviors:

- (a) presents a substantial risk of harm to the individual or others, which includes:
 - (i) suicidal behavior or inflicting significant self-injury; or
 - (ii) attempting, causing, or threatening to cause serious injury to others; or
- (b) has demonstrated an inability to:
 - (i) attend to basic physical needs such as medical care, food, clothing, or shelter; or
 - (ii) protect him/herself from harm or victimization by others; or
 - (iii) exercise sufficient behavioral control to avoid serious criminal justice involvement; or

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- (c) lacks the capacity to recognize that they are experiencing symptoms of a serious mental illness and therefore are unable to:
 - (i) make a decision regarding treatment; or
 - (ii) understand or retain information relevant to the treatment decision; use, weigh or appreciate that information as part of the process of making the treatment decision; or
 - (iii) communicate the decision; or
 - (iv) to appreciate the risks or benefits of treatment; and
 - (iv) in the absence of treatment is likely to experience a relapse or deterioration of his or her condition that would meet the criteria in (a) or (b).

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- (c) lacks the capacity to recognize that they are experiencing symptoms of a serious mental illness and therefore are unable to:
 - (i) make a decision regarding treatment or communicate that decision; or
 - (ii) understand or retain information relevant to the treatment decision, including its risk and benefits; or
 - (iii) provide a rational [non-delusional] explanation for refusing treatment;
 - ~~(iv) use, weigh or appreciate that information as part of the process of making the treatment decision; or~~
 - ~~(v) communicate the decision; or~~
 - ~~(vi) to appreciate the risks or benefits of treatment; and~~
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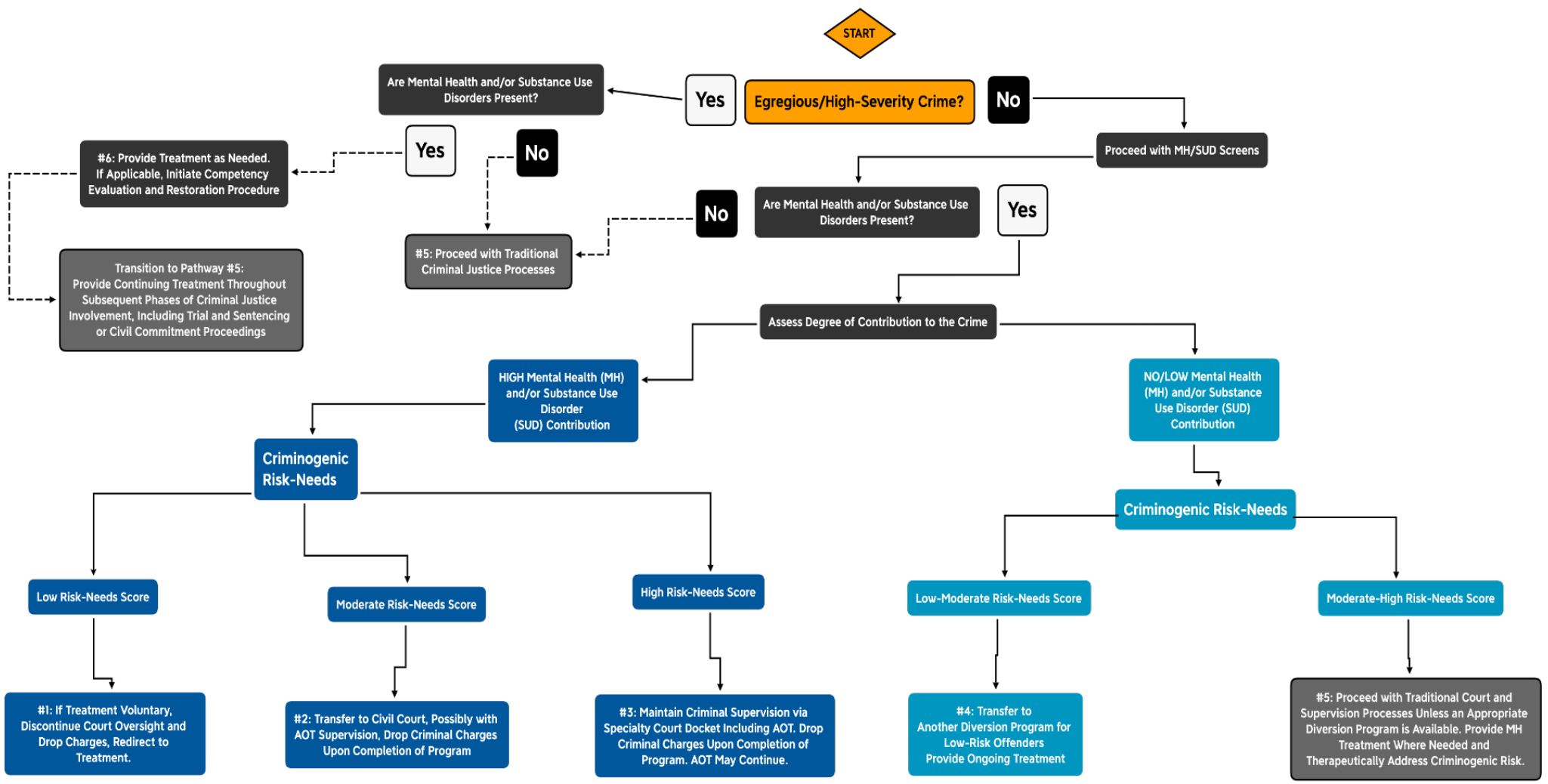
Pathways Emergency Commitment Guidance

- A legally empowered person may initiate an emergency assessment of an individual if there is good cause to believe that, as a result of mental illness and based on his or her recent actions, omission, or behaviors, an individual [meets the commitment criteria].
- The period of [emergency] involuntary mental health evaluation and intervention may continue up to, but no longer than 5 calendar days from the beginning of the assessment.
- If a civil commitment petition for involuntary inpatient or outpatient mental health treatment for an individual is filed, the individual is entitled to a hearing as soon as practicable, but in no circumstance longer than 7 days [after the 5-day emergency treatment period].
- If emergency involuntary psychiatric medications are necessary, they are administered consistent with relevant rules and regulations governing such administration.

Pathways Rules on Medication over Objection

- *Washington v. Harper* (1990): Permitted medication of prisoners who are neither imminently dangerous or incompetent.
- *Riggins v. Nevada* (1992); *Sell v. United States* (2003): appear to require a showing of (1) either serious dangerousness **or** (2) incapacity to make treatment decisions, and further showings that (3) the treatment is the least restrictive (4) medically appropriate way of (5) effectively achieving the state's preventive or treatment aims.
- Pathways Guidance:
 - Administration of non-emergency involuntary psychiatric medication should only occur a judge or administrative panel [ideally at the time of commitment] finds clear and convincing evidence, in most instances based on the individual's history of prior treatment experiences and both successful and unsuccessful treatment responses, that [**all** of the last four *Riggins* criteria above are met, including incapacity to make a treatment decision] and
 - Efforts to engage the person voluntarily in treatment have already been tried but have not succeeded;
 - "Involuntary treatment orders should be as specific as possible and should contain information including the medication(s) to be prescribed, how adherence to the medication(s) will be monitored, and the degree to which modifications to the medications can be made without returning to court."
 - People committed on an outpatient basis who fail to appear for Rx may be transported for a hearing.
- Should incapacity be required for people who are dangerous to others?

Criminal Justice Redirection Framework Decision Tree



Competence Restoration

MI/ SUD Contribution	Criminogenic Risk	Needs	Severity	Participation
MI/SUD Present	High	Any	High & Sig. State Interest	N/A

Confinement for competence restoration should be limited to this situation for three reasons:

1. *Jackson v. Indiana* (1972): the state may confine an individual on incompetent to stand trial grounds only for a reasonable period of time necessary to restore them to competence or to determine that they are not restorable. States often violate this (cf. Florida)
2. Over-targeted treatment (focused on competence restoration alone)
3. Revolving door problem (decompensation in the community)

