

regation in public facilities and how long it has taken for our constitutional practice to come close to living up to our constitutional ideals of racial equality. If the polity's constitutional practice does *not* meet the ideals set out in the constitutional document or enterprise, its failure to meet those standards is just as important to identify as the ideal itself. Therefore, my efforts to uncover the constitutional vision of full citizenship have two parts. First, I attempt to uncover the standard(s) against which the American polity actually measures the mentally ill when deciding whether to qualify their citizenship. Second, I assess that practice against the ideals bound up in the constitutional enterprise. For both tasks, I rely on my readings of the Constitution as both text and polity.

The Civil Commitment of Joyce Brown

ON OCTOBER 28, 1987, members of New York City's Homeless Emergency Liaison Project (Project HELP) approached a woman living on the sidewalk of Second Avenue. After the team did a quick examination of her mental status, the police helped them force her into a van and take her to the psychiatric emergency room at Bellevue Hospital. At the hospital, a psychiatrist examined her, diagnosed her as schizophrenic, injected her with an antipsychotic medication and a powerful tranquilizer, and committed her. "Ann Smith," who identified herself as "Billie Boggs," thus became the first homeless person committed under Mayor Koch's newest initiative to find and secure psychiatric care for the homeless mentally ill—whether they wanted treatment or not.

Workers from Project HELP had known Smith long before they picked her up on October 28. According to psychiatrist Lincoln Hess's application for her involuntary hospitalization, Project HELP began monitoring her behavior in December 1986 after private citizens and community representatives expressed concern about her mental health. Over the next several months, teams of mental health workers from Project HELP had observed her almost daily.¹ They watched her engage in "[b]izarre behavior (eating money, tearing [money] up and urinating on it, throwing it on the street.)" They noted that "she speaks to herself with abrupt changes of affect² as if in response to external stimuli that is not apparent, and gestures as if to a conversant who is not present... [She was also] seen chasing imaginary people." She often swore at Project HELP's workers, and even screamed at them to "'suck' her 'dick.'" Her clothes smelled of feces and appeared "disheveled, tattered, dirty," and inappropriate for in-

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clement weather. They often noted that she was "malodorous, smelling dirty, and of urine and feces."³

Between December 1986 and July 1987, Project HELP attempted on three occasions to commit Smith to Metropolitan Hospital. The New York City Police Department tried twice to do the same thing. Each time, psychiatrists at Metropolitan refused to commit her.⁴ In subsequent months, Project HELP workers believed, her behavior had become even "more bizarre" and her "self-care" had "deteriorated." In a memorandum on October 28 documenting Project HELP's "designation" of Smith, the organization's coordinator summarized the patient's condition during the summer and early fall:

She was physically threatening to passersby without any provocation. She had become increasingly hostile and aggressive to the Project H.E.L.P. staff. . . . [She] was observed urinating and defecating on herself; tearing up and urinating on U.S. paper currency; baring her buttocks, on the street, in order to make obscene statements and entering traffic on 2nd Ave without regard to her own safety. Paranoid delusions about black men trying to turn her into a prostitute were expressed. This was her reason for destroying money.⁵

When Hess and the other members of his Project HELP team came to evaluate her on the street on October 28, they found her lying on the pavement just fifteen feet away from torn pieces of currency stained with urine. They noted that she was underdressed for the weather. Her hair was matted and dirty. She was malodorous and very slender. Her affect was "angry, hostile, anxious, threatening . . . provocative, [and] condescending." She alternately muttered to herself and screamed obscenities at the Project HELP workers "in an intensely threatening tone. (E.g., Fuck Bellevue. Fuck the police)." Although she showed no signs of suicidal ideation,⁶ the team believed that she was a danger to herself.

This lady has a well-documented history of homelessness. . . . The exam today indicated continued psychosis. . . . [Diagnosis:] Chronic Schizophrenia, paranoid type. . . . This lady has a severe mental illness for which psychiatric hospitalization is appropriate. . . . In my opinion, she requires immediate transport

to Bellevue Hospital Center for emergency psychiatric and medical evaluation and treatment.⁷

Police helped the team transport Smith to Bellevue, where she identified herself as "Billie Boggs." Unlike the doctors at Metropolitan's emergency room, the doctor in Bellevue's emergency room admitted her. In less than twenty-four hours, a psychiatrist at Bellevue examined her and confirmed the need for emergency admission. Smith/Boggs was now committed to Bellevue, residing in 18 West—the hospital's new ward for the homeless mentally ill.

PROJECT HELP—I AND II

Why did the doctor at Bellevue admit Boggs when doctors had refused to admit her five times within the preceding seven months? The answer lies in the difference between Project HELP I and Project HELP II.

The Homeless Emergency Liaison Project, or Project HELP I, began as a pilot program in late 1982. Under the auspices of New York City Health and Hospital Corporation (HHC), teams of mental health workers combed Manhattan "trying to convince homeless people with a variety of mental disabilities to voluntarily accept the help they need."⁸ These services ranged from offers of food, coffee, and clothing to the provision of medical, mental health, and social services.⁹ According to HHC's Vice President for Mental Hygiene Services, Luis Marcos, Project HELP workers brought twelve to fifteen homeless people to the hospital each year in the project's first few years of operation. Compared with the ever-growing number of mentally ill homeless people, however, this small "success" rate seemed woefully inadequate.¹⁰

In order to secure care for more of the mentally ill homeless, Sara Kellerman, the Commissioner of Mental Health in New York City, agreed in 1985 to grant the psychiatrists on Project HELP teams the power to "designate" individuals as committable. This gave them the power to authorize the involuntary transportation of mentally ill homeless people to emergency rooms for evaluation and admission. This power to transport and recommend commitment effectively made Project HELP I into an "ER in the street."¹¹ The team's "success"

rate increased tenfold.¹² Nevertheless, the work of Project HELP I hardly made a dent in the number of mentally ill people living on the streets of Manhattan.

The biggest impediment to procuring treatment for the mentally ill homeless who refused assistance was a New York state law governing involuntary transportation to and commitment in a hospital. As city officials then interpreted it, the Mental Hygiene Law prohibited involuntary transportation to or commitment in a psychiatric hospital unless the individuals' mental illness constituted an imminent danger of harm to themselves or others. Thus, even though Project HELP was identifying more and more homeless people whose mental and physical health were deteriorating, the legal criteria for civil commitment only permitted the group to transport to the hospital that small fraction of their clients whose mental illness made them actively suicidal or homicidal. This left unserved all of the "harmless" homeless people whose mental illness was so severe that it prevented them from recognizing that they needed help. These people continued to deteriorate (mentally and physically) on the streets.

Mayor Koch became so frustrated with the city's seeming inability to help those he thought were obviously in need that he organized a task force to "suggest changes in current state law . . . [in order to] strike a better balance between the rights of the mentally disabled and their need for help."¹³ The problem, as he saw it, was that

This existing law with its limitations . . . sentences thousands of people to a slow, painful death on the streets of New York City. They are suffering and dying—not imminently—but week by week, month by month, year by year. As long as they choose to *refuse* help which is offered, they die slowly and quietly. And there's nothing anyone can do for them under the current law.¹⁴

The task force agreed and advocated changing the state law. Following their advice, Koch supported bills in the New York state legislature to expand the definition of "harm to self" to include self-neglect and/or grave disability. The bills did not pass.¹⁵

In May 1987, Koch redoubled his efforts to change the law after he took a tour of Manhattan with members of Project HELP. Among the many homeless mentally ill people he saw that day, one woman stood out to him. Project HELP knew her as "Ann Smith"—the woman

whom Metropolitan had refused to commit on five separate occasions. In speeches and broadcasting interviews over the next several months, Koch spoke of this woman again and again. At the annual meeting of the American Psychological Association, Koch cited the plight of this woman as grounds for changing the standards for civil commitment. According to coverage of the speech in the *New York Times*,

Mr. Koch recalled a visit to a woman [Ann Smith/Billie Boggs] . . . who had defecated in her clothes. He said in his speech that some experts accompanying him said that she did not qualify for an institution because she did not present an "imminent danger" to herself or others. Astonished by that conclusion, the Mayor said he thought privately: "You're loony yourself."¹⁶

If the standards did not permit the mayor to commit this woman, he reasoned, then he would have to change the standards.

On August 28, the mayor attacked the existing commitment criteria and announced an initiative that empowered the city to help the mentally ill homeless. "Under the law of this state," he argued,

People can be involuntarily admitted to a hospital if they suffer from mental illness, need immediate care, and are in danger of serious harm within the reasonably foreseeable future if care isn't received. The City's Mental Health Commissioner, [HHC] Corporation Counsel and I believe that the law hasn't been applied as broadly as it could be to help all who need help. As a result, far more seriously mentally ill people are on the streets than should be.¹⁷

He then promulgated a new interpretation of the old standards, extended the jurisdiction of Project HELP's power to designate, and created a special ward in Bellevue to care for those homeless mentally ill people who could finally be committed under his new version of the commitment law. He called this initiative "Project HELP." To distinguish his policy from the outreach teams of the same name, internal city documents refer to the package of programs (including the new standards for commitment) as "Project HELP II."

Koch began Project HELP II by asking HHC to instruct its doctors about the looser standards. In a memorandum dated September 9, HHC Vice Presidents John E. Linville and Marcos informed the city's directors of psychiatry that the mayor had "asked that we step up our efforts to ensure the availability of medical and psychiatric treatment to the mentally ill living on the street." In response to Koch's request, Linville and Marcos had reexamined the criteria used for involuntary transport, hospitalization, and treatment, and concluded that "some admitting psychiatrists may be applying an unduly narrow definition of what constitutes 'likelihood to result in serious harm to self.'" To correct this error, HHC planned to conduct workshops with the psychiatrists to "ensure full understanding [of] the broadest application of the law in this area." Although these officials maintained that the determination of "self-danger" is a "clinical judgment," HHC also urged the clinicians to remember that "*the law recognizes a concept of 'serious harm' that is significantly broader than actively suicidal conduct. Significant, passive self-neglect meets the 'serious harm' standard as well.*"¹⁸ In sum, they instructed the doctors to commit those patients they believe to be "in danger of serious harm within the foreseeable future" (i.e., not just those in imminent danger of harm).

Koch's announcement of Project HELP II touched off a war between the mayor and civil libertarians around the city (and the country). Norman Siegel, director of the New York Civil Liberties Union (NYCLU), was particularly vocal; he accused the mayor of posing broad threats to civil liberties.¹⁹ Koch replied that people who criticized his program were "crazies" for arguing that the city has "no right to intervene to help these people."²⁰ Indeed, in remarks to the National Press Club, the mayor justified Project HELP II as an effort to protect liberties and rights.

[Mental illness among the homeless] caus[es] tremendous suffering in cities across our country. What makes this situation unique, if not tragic, is that some individuals and groups—such as civil liberties organizations—say we must leave the victims alone. They say that not only must we let the suffering continue, we must do so in the name of civil liberties. In New York City we have decided that we are *not* going to let the suffering continue. . . . We are reaching out to those in need, and we are

doing so in the name of both human rights and human decency.²¹

Speaking for HHC, Marcos also defended the program as an effort to protect the rights of the mentally ill homeless. "For the first time there is a recognition of the patients' right to treatment, and their freedom from the prison of mental illness, rather than the freedom to die in the streets."²²

Right in the middle of this battle stood Ann Smith/Billie Boggs. Although Project HELP I and the police had been unsuccessful in their five attempts to commit her under the old standards, doctors following the guidelines promulgated under Project HELP II, with its broader definition of "harm to self," finally succeeded in committing her. In fact, she was the first person committed under the new standards of Project HELP II.

THE HEARING

Billie Boggs contested her commitment. She did not want the city's help. She did not want its pity. She did not want its psychiatric care. Boggs saw herself as a "professional" street person,²³ and she wanted to return to her "home" on Second Avenue. Speaking to a reporter by telephone from Bellevue, Boggs stated that "In this day and age, in the 80's in the United States of America, where everyone comes to be free, my rights are being violated."²⁴ Within twenty-four hours of her admission to 18 West, she petitioned for her release and telephoned the NYCLU, asking them to represent her.

Attorneys at the NYCLU had been expecting just such a call. As soon as the mayor had announced his initiative, Siegel and one of his staff attorneys, Robert Levy, had distributed hundreds of fliers to homeless people around the city, informing them of their rights and encouraging them to contact the NYCLU if they wished to contest an involuntary commitment.²⁵ When the call came from Boggs, Levy gladly accepted the case.

On November 2, attorneys and psychiatrists for HHC and the NYCLU brought the battle over Billie Boggs's rights into the courtroom. What emerged were two very different pictures of the peti-

tioner, her mental health, her personal qualities and capacities, and her lifestyle.

The city's argument, presented by HHC's Maureen McLeod, began by asserting that Billie Boggs suffered from a serious mental illness.²⁶ HHC's three psychiatrists and one psychiatric social worker all testified that she suffered from schizophrenia, paranoid type. To support their conclusion, the doctors explained that Boggs was delusional, suffered from different kinds of thought disorders, and had an inappropriate affect.

The psychiatric workers identified three kinds of delusions they elicited from Boggs. First, workers from Project HELP had testified that they had observed that Boggs had burned or ripped up paper money in a ritualized way, and that she appeared to have urinated on the torn currency.²⁷ When the admitting psychiatrist asked her why she did this, he testified that she told him that there were "people who were, in some way, trying to control her sexually through money." He believed that "the destruction of the money served to dispel that [for her]"—an explanation he thought delusional (Albert Sabatini, 184–85). Second, she used an alias. Once her picture was broadcast on television after the first day of the hearing, her family identified her not as Ann Smith or Billie Boggs, but as Joyce Brown. Although the respondent admitted that she was, in fact, Brown, the psychiatrists who had examined her earlier concluded that she was under the delusion that she was someone other than who she really was. Third, her treating psychiatrist believed that she suffered from the delusion that she was being incarcerated unfairly. Indeed, she refused to allow Brown access to the press because "[s]ubstantial press attention could exacerbate her delusional belief that she was being incarcerated unfairly. It is my clinical judgment that press interviews should be prohibited" (167–68*).²⁸

The NYCLU's three psychiatric witnesses denied that any of these actions or beliefs was delusional. First, Brown testified that she kept or destroyed money "depending on the manner in which it's given to me" (390). As she told her psychiatrist, policemen would occasionally throw money at her, shouting that it was money for a "who" (whore) (Robert Gould, 299). Her psychiatrist did not think it was delusional to reject money that was given as an insult. Similarly, she destroyed money from people who insisted on giving it to her, even after she told them she did not want it. As Brown testified, the donors would

say things like, "'Take it. It will make me feel good.' Or, 'I'm only trying to help you.' But I've already told you that I don't want it or I don't need it. And it's my job to make you feel good?" (373). She also rejected money when she already had enough for her daily budget,²⁹ or when it was close to nightfall (a time when street people are especially vulnerable to robberies). These explanations also struck her psychiatrists as well grounded in reality. Second, her psychiatrists denied that it was delusional for Brown to use an alias. As Brown explained, "I use other names . . . because I don't want my identity to be known. . . . I knew my sisters were looking for me, and they had hospitalized me once against my will. They tricked me, and it was under false pretenses, and I didn't want them to know where I was located" (357). Again, this explanation seemed rational. Finally, even her treating psychiatrist, Maeve Mahon, admitted that it might be reasonable for Brown to believe that she should not have been committed (169*)—not to mention that it might be rational for her attorneys and psychiatrists to share that belief.

City Attorney McLeod also attempted to demonstrate Brown's schizophrenia by presenting evidence that she suffered from a thought disorder. For example, she sometimes spoke using the sort of clang associations typically associated with schizophrenia. One psychiatrist, for example, argued that when he saw her on the street, she would sometimes create meaningless rhymes (i.e., clanging) that incorporated references to Brown's and his genitals (anonymous psychiatrist, 44–45*). Brown testified, however, that she did this on purpose to "ignore him" (376). McLeod also argued that Brown's affect was inappropriate, suggesting schizophrenia. One psychiatrist tried to substantiate this point by testifying that the petitioner often acted excessively (and inappropriately) angry whenever people from Project HELP approached her. But even this psychiatrist admitted under cross-examination that Project HELP's three previous attempts to hospitalize the patient—none of which was deemed necessary by the doctors in Metropolitan's emergency room—might indeed make her angry at workers from Project HELP. This reaction, he testified, was not necessarily inappropriate (anonymous psychiatrist, 70*).

Although they denied that she suffered from schizophrenia, Brown's psychiatrists did not conclude that she was free from mental illness. All three, in fact, diagnosed her as having a personality disorder. Although this disorder is not a psychosis, it is a form of mental ill-

ness. It therefore remained to be demonstrated whether her mental illness, whatever its precise nature, made her a danger to herself or others.

The city's attorneys argued that she was a danger to herself in three different ways. First, they alleged that she was actively suicidal. Members of Project HELP had tried to offer her a pair of slacks, but the petitioner refused them. She then decided to take the pants. Members of Project HELP testified that after she took the pants, she ran—without regard for the traffic—into the middle of Second Avenue, where she dropped and left the slacks. When Bellevue's admitting physician asked her why she had run into the middle of the street, he recorded her reply as, "I have a right to do it. It is my business; not your business" (134*, 146*). To all of HHC's psychiatrists, this action and explanation were patently suicidal. Brown's attorneys differed on two grounds. First, Brown denied that she ran into the middle of the street, insisting that she threw the pants into the street from a safe position (standing between two parked cars at the road's edge). "Never would I try to kill myself," she insisted. She simply did not want their clothes (Brown, 370). Second, Levy argued, even if she *had* run into the street, the incident occurred on one of the days Project HELP took her to Metropolitan. Had she been suicidal that day, the doctors there would have noticed it and admitted her (Levy, closing argument, 530).

The city also argued that Brown's inability to care for herself and/or her self-neglect made her a danger to herself. McLeod presented four arguments to support this conclusion. First, she presented evidence that the petitioner did not wear clothes that were appropriate. Workers from Project HELP noted again and again that her clothes were thin, dirty, tattered, and often inadequate for the weather (anonymous psychiatrist, 44*, 46*, 47*, 55*; anonymous psychiatric social worker, 100*, 110*; Mahon, 146–47*). Sometimes they saw her without shoes, which indicated to them that she was unable to keep herself warm in cold weather and caused them to worry that she might get frostbite.

Although Brown admitted that her clothes were thin, dirty, and tattered, she denied that they were inadequate to the weather. She lived against a hot air vent, she testified, that would have kept her *too* warm had she not covered it with a piece of cardboard (Brown, 357–58). Even with the cardboard, she explained, the air sometimes got to be so hot that she would take off part of her clothes (and shoes) to avoid

overheating. In short, she contended that she was always warm enough (379). Further, the only shoes she owned at one point fit her so poorly that she was afraid of tripping in them (393). Consequently, she only wore them when absolutely necessary. Finally, as to vulnerability to frostbite, she testified that only once did she ever come close to freezing. One night when the temperature dropped to 13–14 degrees, the police tried to commit her against her will. They woke her at 3 A.M., handcuffed her, and took her to Metropolitan. After finding that she did not qualify for involuntary hospitalization, the doctors released her at 6 A.M. Although the temperature had dropped to 10 degrees and she had no shoes with her, the doctors sent her home on foot, with only white hospital slippers on her feet. Not surprisingly, the thirty-block walk in clothes that were more appropriate for lying next to a heat vent left her very cold and almost frostbitten. She insisted, though, that she had not been until the police removed her from her heating vent (395–96).

Second, witnesses for the HHC and one neighbor testified that Brown defecated and urinated on the street, indicating that she was unable to care for herself (anonymous psychiatric social worker, 121*; anonymous psychiatrist, 47*, 67–68*). Mahon testified that when she asked Brown why she defecated on the street, the petitioner had replied, "Where else do you think I would defecate? Where do you think I would do it?" (Mahon, 171–72*). While Mahon found this answer indicative of pathology, Gould found the answer quite reasonable. As he argued,

The defecating on the street and the urinating had to do with the fact that she could not get access to facilities around her. She tried to go to a store, stores would not let her in. She tried to go to a restaurant, restaurant[s] would not let her in. She even was willing to pay money in order to buy food and be a patron to use the facilities, but she looked a little disheveled and not respectable, they did not allow her in. She didn't go into an alleyway . . . because there is a certain danger in being by yourself, so she did it in a way which was along the wall and it was all that she could do living the life that she lived, but she hurt nobody doing it and she didn't hurt herself and she knew why she was doing it. . . . It's not nice, but it's not delusional. (Robert Gould, 294)

The public toilet nearest to Brown was thirty to thirty-five blocks away (approximately one and a half miles). That she could not always "hold it," Levy argued, does not imply that she was unable to take care of herself. Rather, it reflects her homelessness (Levy, closing argument, 532).

Third, McLeod argued that Brown's repeated refusals to accept clothing, help, and/or food from Project HELP implied a pathological neglect of her basic needs (anonymous psychiatric social worker, 119-20*; Mahon, 143*). Mahon, for example, testified that the patient's unwillingness to accept Project HELP's or Bellevue's offers of food and social services constituted a failure to recognize her need for help. When Mahon asked Brown what she would do if she were discharged from the hospital, whether she would "see a psychiatrist" or "avail herself of any of the community services available for patients or people who are homeless," Brown told her, "no. There is nothing wrong with me, why should I accept anything? When I, if I want help, I know where to get it, and I will get it" (Mahon, 142-43*). Mahon testified that Brown's lack of insight into the pathology of her own lifestyle, and her refusal to find a healthier way to live, kept her living at an unacceptable level of self-neglect.

Brown and Levy disputed Mahon's interpretation. It wasn't that Brown was unwilling to accept help when she needed it, they argued. Many times she had accepted food and clothes from neighbors and passersby. Rather, Brown chose to avoid relying on others for help. She saw herself as a "professional" street person who could (and preferred to) provide her own food (Brown, 378, 368-69). Moreover, Levy argued,

We have seen from the evidence that Miss Boggs is willing to accept help from others. . . . She simply doesn't like the people from Project H[ELP]. . . . [S]he simply doesn't like people who impose their idea of help and of normalcy on her. . . . They locked her up in a hospital the first time she met them. She simply doesn't like them. (Levy, closing argument, 538-39)

Had there been evidence that Brown had been malnourished or had suffered from frostbite, perhaps Levy would have agreed that she had neglected herself. But she wasn't malnourished. She wasn't unhealthy. She had not neglected herself (Levy, 531).

Fourth, McLeod argued that the fact that Brown was very dirty and malodorous demonstrated that she had not taken adequate care of herself. One psychiatrist from Project HELP testified that every time he saw her on the street, she smelled of feces and urine, her skin was dirty, and her hair was matted. A social worker from Project HELP swore to the same thing (anonymous psychiatrist, 47*, 48*, 54; anonymous psychiatric social worker, 100*). As Mahon testified, Brown herself admitted that she had only bathed ten times in the preceding eleven months, that is, only when she had been brought to Metropolitan for a psychiatric evaluation (Mahon, 138*).³⁰ Brown denied, however, that her filthy condition was by choice. She merely lacked a place to bathe. Moreover, Gould argued, her smelly condition did not make her unhealthy. "She's not aesthetic and her hygiene is not good, but you don't get sick from that. She hasn't gotten sick from that. She just is not pleasant to be close to if she urinated and smells bad" (Gould, 317). As Levy concluded, there is no evidence that being malodorous causes harm to one's self or that it harmed Brown (Levy, closing argument, 533-34).

Finally, the city argued that Brown was a danger to herself because her behavior could easily provoke others to attack her. As workers for Project HELP testified, Brown often swore at them and was verbally aggressive whenever they approached (anonymous psychiatrist, 58*). Once, a worker from Project HELP watched her scream at some workmen across the street, using provocative language including "Niggers, fucking niggers, and suck my big black cock" (anonymous psychiatric social worker, 111-14*, 116-17*, 124-27*). As McLeod argued, these are "words in the City of New York that may bring about assault on oneself" (closing argument, 549-50). Mahon testified that Brown had continued her aggressive behavior in Bellevue, where she was insulting and provocative to hospital staff, made threatening gestures, was "extremely angry" and "attack[ed] people verbally" (Mahon, 147*).

When asked to explain her use of profanities, Brown testified that she would only use her "nice" language "when you are bothering me. . . . As long as you respect me, I'll respect you." Furthermore, she argued, she is careful not to swear at anyone who would attack her (Brown, 374). Gould supported Brown's contention that her swearing would not bring her harm. Rather, he argued, it "comes under the old cliché of sticks and stones may break my bones but names can never

hurt me. That's all she's ever done, being verbally abusive." Furthermore, he observed from his interviews that Brown's conflicts were mainly with "individuals who invaded her privacy, entruded [sic] on her turf and tried to force their good intentions, and I am not believing they were malevolent, but she did not want them, and when she did not want them, she cursed them out" (Gould, 298, 296). As Levy concluded, "She doesn't have a door; she lives on the street. She can't simply close the door the way the rest of us can, or hang up the telephone. The only thing she can do is use profanity and tell people to get away the best way she can." Despite this vulnerability, he argued that this swearing had not gotten her into trouble so far and that it would be unlikely to do so in the future (Levy, closing argument, 539).

McLeod also argued that Brown was a danger to others. Once when Project HELP offered her a box lunch, she took the lunch, threw it at the Project HELP workers, and chased them down the street. The psychiatrist she hit with the carton of milk characterized the incident as a dangerous assault. "[T]hat attack seemed to emerge," he argued, "in an unrestrained way out of a very intense, angry, threatening feeling" (anonymous psychiatrist, 56*, 72*, 76*). Levy made light of the contention that throwing a chicken sandwich constituted assault. Brown took the charge more seriously. Of course, she had thrown the lunch at Project HELP, she admitted. The workers had insisted on giving her the food despite her insistence that she had already eaten. She wanted to send them a message (Brown, 366-68). Gould found that explanation completely rational. As Brown explained on the stand, her meetings with Project HELP were "always very bad." The very first time she met them, they handcuffed her and took her to the hospital. "There has never been one time when they approached me where it was pleasant and it was not concerning hospitalization" (Gould, 296; Brown, 366-68). She felt that they put her on the defensive. She acted defensively.

Levy closed by restating his central theme: "What we have here is a person who lives differently from other people and has done so successfully." It was her homelessness that made her different, not any psychopathology. Furthermore, without evidence that she posed an imminent danger to herself or others—and not merely a possible danger at some undetermined time in the future—the fact that "she is able to survive in the community . . . entitle[s] her] to live in freedom."³¹ McLeod responded in her closing argument by summarizing

all of the evidence supporting her conclusion that Brown's illness placed her in danger of harm to herself and others—if not imminently, then within the foreseeable future. Arguing that the city had a duty to care for this woman until she was able to care for herself, McLeod concluded by "submit[ting]" that "the law and common sense do not require us to wait until something actually happens; that we can and should help her; that it is our duty to help her before it is too late" (McLeod, closing argument, 551).

On November 12, Justice Lippmann handed down his decision. The sole issue he addressed was whether Brown suffered from a "mental illness which is likely to result in serious harm to herself or others."³² He noted that "the psychiatric experts . . . are nearly diametrically opposed in their assessment of her mental condition and in their prediction as to whether she is likely to cause herself or others harm." The judge therefore derived "little psychiatric guidance from them," relying instead on his impressions of "the behavior and testimony of Joyce Brown herself" (1086). He found that she was "rational, logical and coherent" throughout her testimony, that "her use of English . . . bespeaks an educated, intelligent person," and that she had "displayed a sense of humor, pride, a fierce independence of spirit, [and] quick mental reflexes" (1087).

The city, he argued, had failed to meet its burden of proof that she was mentally ill. Even if she were, he found that she could not be committed because she was not a danger to others or herself. There had been no evidence of homicidal ideation or behavior. She was not suicidal. Finally, Justice Lippmann found no evidence to support the claim that she was incapable of meeting her essential needs. She was able to feed herself. She was healthy. She clothed herself and managed to keep warm. Although all parties agreed that her clothes were "pathetic," that was because she was poor, not because she lacked the mental capacity to clothe herself. Similarly, her inability to shelter herself, Lippmann contended, speaks not to her mental illness, but to her homelessness. "Housing in New York is an expensive commodity, so expensive that in this rich city many no longer can afford it and are driven to live on the street" (1089-90). That she refuses to go to a shelter, he asserted, "may reveal more about conditions in shelters than about her mental state. It might, in fact, prove that she's quite sane" (1091).

In conclusion, Lippmann held that although "her mode of existence does not conform to conventional standards" and is "an offense

to aesthetic senses," Joyce Brown is still entitled to her freedom. Citing *O'Connor v. Donaldson*, he argued that "[f]reedom, constitutionally guaranteed, is the right of all, no less those who are mentally ill."³³ Project HELP may well be a step in the right direction for the homeless mentally ill, he argued, but it was not right for Joyce Brown. For the Joyce Browns of society, "[t]here must be some civilized alternatives other than involuntary hospitalization or the street."

THE LEGAL AFTERMATH

The Health and Hospitals Corporation appealed the decision, and on December 18 of that same year, a five-judge panel in the Appellate Division reversed Justice Lippmann. They sought to strike a "better balance" between Joyce Brown's "freedom" and the "State's right to involuntarily confine" her.³⁴

Writing for the three-member majority, Justice David Ross ruled that Lippmann had been wrong to find the facts of the case without relying more heavily on the psychiatric experts. After providing a long summary of the psychiatrists' testimony, the court overruled Lippmann's findings of facts. That Brown had plausible explanations for her current behavior was not as relevant as the fact that her history revealed a marked disintegration. Looking to her life in New Jersey, they argued that Brown had been a "productive member of society" with a "continuous work record." She had "been employed in responsible positions" at Bell Laboratories and a Human Rights Commission in Elizabeth. At that time, she had also enjoyed a "home and a family." After suffering a "severe psychosis,"³⁵ however, she took to living in the streets, where she "has deteriorated."³⁶ The court then overruled Lippmann on the law for failing to recognize that this deterioration did indeed count as harm to self.

In a scathing dissent, Justice E. Leo Milonas reminded the majority that civil commitment is a "*massive curtailment of liberty*" and that it should not occur unless the patient's mental illness—unlike that of Joyce Brown—presents a danger that is "both *real* and *immediate*, not speculative and remote."³⁷ Although convinced that Brown was mentally ill, Milonas found no proof that she had ever "harmed herself or anyone else."³⁸ Moreover, "a claim that there is the possibility of future assault is too speculative and remote, and it is not sufficient

ground upon which to deprive someone of [her] liberty" (379). He attacked the majority for dismissing the petitioner's credibility, and railed against them further for giving no deference to the hearing court's assessment. "[I]f the court's judgment of her mental condition is to be completely ignored, then what was the purpose of the hearing in the first place?" Appealing to the underlying purpose of an independent judiciary, Milonas argued that due process *requires* a judge to compare his own evaluation of the mental health and dangerousness of the person involved with those offered by the experts. This independent assessment, he argues, provides the person with "fail-safe protection against improper confinement, whether the commitment is sought by a governmental authority or by relatives" (377). The homeless face many serious problems, he concluded, but "[c]ommitting Billie Boggs is not the answer" (380).

Joyce Brown and her attorneys appealed to New York State's highest court.

While the case was on appeal, HHC petitioned the Supreme Court for permission to medicate Brown against her will. Although psychiatrists generally agree that therapy for schizophrenics is ineffective unless accompanied by chemical treatment, the drugs available for the purpose are often associated with serious and permanent side effects.³⁹ On January 13, after two days of hearings over whether or not Brown should be forced to take antipsychotic medication, Justice Kirschenbaum appointed a psychiatrist, Francine Cournos, to conduct independent psychiatric tests to determine whether Bellevue should administer the drugs. In her report the following day, Cournos wrote that although "neuroleptics [antipsychotic medication] or possibly lithium have a good chance of improving [Brown's] hostility . . . and would significantly improve her chances of living more successfully in the community . . . she is not willing to take medication."⁴⁰ Cournos therefore advised the court to release Brown rather than forcibly medicate her. She provided two reasons. First, Brown "has partial capacity to make treatment decisions," and no harm has come (to her or anyone else) from allowing her to take the risks that arose from the decisions she made. Second, forcibly medicating her now would probably "backfire" in the long run. Because her condition was chronic, Cournos argued, she would be likely to need psychiatric help in the future. If the hospital forcibly medicated her now, she might well avoid seeking needed treatment at a later date.⁴¹

The next day, January 15, Justice Kirschenbaum ordered Brown's release. Bellevue complied four days later, as soon as they were assured that Brown had a room in a supervised Single Room Occupancy Hotel.

Within two weeks, New York's Court of Appeals refused to rule on the legality of Brown's civil commitment. After her release from Bellevue, New York's highest court considered the matter moot.

EPILOGUE

Upon her release, Brown went to work for the NYCLU as a temporary receptionist. She appeared on "Donahue," "60 Minutes," and "Channel 5 News." She spoke at New York University School of Law and Cardozo Law School. She even gave a speech at Harvard titled "Homelessness: A View from the Street."

On March 9, 1988, she admitted that she had been panhandling because she was out of cash. She only stopped begging after her sisters turned over the more than \$8,000 in social security checks they had been holding for her since 1985.

On September 7, 1988, she was arrested for illegal possession of heroin and released. On October 12, she pled guilty to disorderly conduct in a drug possession case and was conditionally discharged. Since that time, she has had one brief psychiatric commitment. Otherwise, with the help of those at her supervised residence for formerly homeless women, Brown has succeeded in returning to the private, anonymous life she had insisted all along that she preferred.

CHAPTER 2

The Theory behind Civil Commitment Rights and the Mentally Ill

AS IS TYPICAL AT CONTESTED commitment hearings,¹ attorneys on both sides of the litigation surrounding Joyce Brown's hospitalization relied on the logic and language of rights to frame and support their claims. The city argued that committing Brown would secure her right to treatment. Brown's attorney argued that it would violate her constitutional right to liberty. Brown herself had asserted her rights when she proclaimed that "In this day and age, in the 80's in the United States of America, where everyone comes to be free, my rights are being violated."² In other words, rights to special consideration for the mentally ill countered rights for "full" citizens. Less typical of commitment hearings, however, Brown's case reflected deep disagreement among lawyers and judges as to which standards courts should use when deciding whether to commit Brown and which menu of rights best suited her. At base, the case represented a fight over which qualities and abilities are essential to "full" citizenship and which qualities and inabilities render a citizen "different" enough to require an alternative menu of rights. Unfortunately, liberal jurisprudence offers little guidance for resolving this dilemma.

In this chapter I argue that while liberal political theory is replete with arguments about rights, it inadequately addresses the logically prior question of who qualifies as a regular rights-holder. Even liberalism's best theorists of rights—John Locke, John Stuart Mill, and Immanuel Kant—pay little attention to justifying their ascription of regular rights to some people but not to others. After exploring this weakness in liberal political theory, I examine some of its implica-