

## LAKE VIEW—A ROADMAP FOR ASSERTING THE RIGHTS OF THE JAILED MENTALLY ILL

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In 2000, the American Civil Liberties Union (ACLU) of Arkansas won a class action lawsuit, *Terry v. Hill*,<sup>1</sup> which was brought on behalf of all pre-trial detainees in Arkansas's jails who were either awaiting a forensic evaluation under a section 305 order of the Arkansas Code<sup>2</sup> or admission to Arkansas State Hospital for restoration to competency under a section 310 order of the Arkansas Code.<sup>3</sup> The lawsuit was initiated because the Division of Mental Health Services ("Division") was not performing evaluations in a timely manner, which resulted in too many mentally ill detainees languishing in jails for periods exceeding one year, often with no treatment.<sup>4</sup> The situation for these inmates and the jail staff was often intolerable, with the mentally ill suffering due to lack of treatment, and the jail staff lacking the resources and expertise to accommodate these individuals.<sup>5</sup> The defendant named in the lawsuit was Richard Hill, then Director of the Division of Mental Health Services, which is a division of the Arkansas Department of Human Services.<sup>6</sup> The lawsuit was brought in the Eastern District of Arkan-

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1. 232 F. Supp. 2d 934 (E.D. Ark. 2002). Pretrial detainees are inmates charged with an offense but not yet convicted of the offense.

2. ARK. CODE ANN. § 5-2-305 (West, Westlaw through 2012 Fiscal Sess.), *amended by* H.B. 1484, 89th Gen. Assemb., Gen. Sess. (Ark. 2013). This is the statute under which the court orders a defendant to undergo a mental evaluation to determine whether he or she is fit to proceed or competent to understand the criminal proceedings. The test to determine whether a defendant is fit is "sufficient present ability to consult with his [or her] lawyer with a reasonable degree of rational understanding, and . . . a rational as well as factual understanding of the proceedings." *Lawrence v. State*, 39 Ark. App. 39, 44, 839 S.W.2d 10, 13 (1992); *see also* ARK. CODE ANN. § 5-2-302 (West, Westlaw through 2012 Fiscal Sess.).

3. ARK. CODE ANN. § 5-2-310 (West, Westlaw through 2012 Fiscal Sess.). This is the statute under which the court will order a defendant to be restored to fitness (competency) once he or she has been found unfit pursuant to the 305 mental evaluation.

4. *Terry*, 232 F. Supp. 2d at 938–41.

5. *Id.*

6. The Division of Mental Health Services has been renamed. The new name is Division of Behavioral Health Services ("Division").

sas, before Judge Stephen Reasoner under 42 U.S.C. § 1983.<sup>7</sup> The complaint for injunctive relief alleged that the federal constitutional rights of the detainees, under the Fourteenth Amendment, were being violated because of the lack of treatment for their mental illnesses, which amounted to punishment, and that individuals who have not yet been convicted of a crime are not supposed to be punished.<sup>8</sup>

Judge Reasoner found that the Division had violated the constitutional rights of the class.<sup>9</sup> His opinion contained a summary of the lay and expert testimony admitted at trial and described the plight of the jailed mentally ill as a “cavalcade of human tragedy marched through the record at trial.”<sup>10</sup> Following Judge Reasoner’s opinion, the Division signed a settlement agreement with the ACLU, which provided that 305 evaluations would be done in a timely manner and that those detainees who were under a 310 order would receive treatment without delay.<sup>11</sup>

The settlement agreement in *Terry* naturally applied only to the plaintiff class—those under 305 or 310 orders.<sup>12</sup> However, there were persons incarcerated in the jails who, although mentally ill, were not part of the class; in other words, they were neither awaiting evaluation under 305 nor treatment under 310. Yet, they were in need of treatment. Another and different lawsuit would be required to assert the right to treatment of all mentally ill persons in Arkansas’s jails. The decision in *Lake View District No. 25 v. Huckabee*, provides the precedent needed for such a case under the Arkansas Constitution.<sup>13</sup>

This essay will first briefly discuss the situation that the mentally ill in Arkansas face while incarcerated. Next, this essay will examine the history of the Arkansas Constitution’s Insanity Article and other laws that impact the mentally ill in Arkansas. The essay will then discuss *Lake View* as precedent, followed by its application in a suit on behalf of the jailed mentally ill. Finally, the essay will conclude that a *Lake View*-type of action should

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7. *Terry*, 232 F. Supp. 2d at 934.

8. *Id.* at 935.

9. *Id.* at 945.

10. *Id.* at 941.

11. Order, *Terry v. Hill*, No. 4:01-cv-00458 (E.D. Ark. Jan. 14, 2003), ECF No. 60.

12. A defendant will only be ordered to undergo a 305 evaluation if the defendant, the prosecutor, or the judge raises a question as to the defendant’s fitness to proceed. According to the Division’s own statistics, approximately ninety-five percent of defendants who are evaluated are found fit to proceed and therefore will not be ordered to be restored to fitness under 310. ARK. DEP’T OF HUMAN SERVS. DIV. OF BEHAVIORAL HEALTH SERVS., FORENSIC SYSTEM UPDATE 3–9 (2012).

13. 351 Ark. 31, 91 S.W.3d 472 (2002), *mandate recalled by*, 355 Ark. 617, 142 S.W.3d 643 (2004), *supplemented by*, 358 Ark. 137, 189 S.W.3d 1 (2004), *mandate recalled by*, 362 Ark. 520, 210 S.W.3d 28 (2005).

have a good chance of success and could bring about a much-needed improvement in the plight of the incarcerated mentally ill in this state.

### I. THE SITUATION OF THE MENTALLY ILL IN ARKANSAS

Jails across the nation are full of the mentally ill. It is estimated that sixteen percent of those incarcerated in jails suffer from a serious mental illness.<sup>14</sup> There is no reason to believe that the situation in Arkansas is any different.<sup>15</sup> The treatment of the jailed mentally ill in Arkansas is the responsibility of the Division and the community mental health centers.<sup>16</sup> There are currently thirteen community mental health centers in the state, with each center serving a catchment area that covers at least one county and most often more.<sup>17</sup>

The centers all have contracts with the Division to provide services to the mentally ill in their respective catchment areas as a condition to receiving funds from the state.<sup>18</sup> The contract provides that the jail population is one of each center's priority populations.<sup>19</sup> However, in reality, treatment for inmates is either non-existent or inconsistent—depending on which center is providing the service.<sup>20</sup> There is a lack of enforcement by the state of the contract provisions, including a lack of oversight and enforcement of the requirement to treat the forensic mentally ill population.<sup>21</sup> The situation described by Judge Reasoner in his *Terry v. Hill* opinion is, unfortunately, once again the situation today.

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14. TREATMENT & ADVOCACY CTR. & NAT'L SHERIFF'S ASS'N, MORE MENTALLY ILL PERSONS ARE IN JAILS AND PRISONS THAN HOSPITALS: A SURVEY OF THE STATES 1 (2010).

15. *Id.* at 19.

16. *See, e.g.*, *Terry v. Hill*, 232 F. Supp. 2d 934, 935 (E.D. Ark. 2002); H.B. 2721, 86th Gen. Assemb., Reg. Sess. (Ark. 2007). Counties also have a duty under the Fourteenth and Eighth Amendments to the United States Constitution not to be deliberately indifferent to the mental health needs of jail inmates; however, their duty is not the subject of this essay.

17. *Community Mental Health Center (CMHC) Catchment Areas*, <http://humanservices.arkansas.gov/dbhs/Documents/CMHC%20Areas.pdf> (last visited Apr. 30, 2013).

18. *See* ARK. CODE ANN. §§ 20-47-201, 20-47-601 to -602 (West, Westlaw through 2012 Fiscal Sess.); *see generally* Contract between Community Mental Health Center and Arkansas Department of Human Services, at IV (Dec. 6, 2010) (on file with author) [hereinafter Contract].

19. Contract, *supra* note 18, at IV.B.7.a.iii.

20. *See, e.g.*, Answer to Petition for Writ of Habeas Corpus, No. CR 2009-1681 (Pulaski Cnty. 7th Cir. 2010); Motion to Release Defendant from Washington County Detention Center Pending Transfer to Arkansas State Hospital, No. CR2010-75-1 (Washington Cnty. Cir. Crim. Div. 2011); Petition for an Order to Appear and Show Cause, No. Ct-2007-2088 (Pulaski Cnty. 4th Cir. 2011).

21. *See, e.g.*, *Terry*, 232 F. Supp. 2d at 937-45.

## II. HISTORY OF THE INSANITY ARTICLE AND OTHER LAWS

Article 19, section 19 of the Arkansas Constitution (“Insanity Article”) states, “It shall be the duty of the General Assembly to provide by law for the support of institutions for the education of the deaf and dumb, and of the blind; and for the treatment of the insane.”<sup>22</sup> But, there are no cases interpreting or applying this provision.

The Insanity Article first appeared in the 1874 Constitution.<sup>23</sup> Prior to that time, the terms “idiots,” “lunatics,” and “insane persons” appeared in the *Laws of Arkansas Territory*,<sup>24</sup> as well as in subsequent acts of the General Assembly. A medical dictionary published by J.B. Lippincott & Co. in 1870 defined “insanity” as “[d]eranged intellect” and “madness or lunacy.”<sup>25</sup> “Lunacy” was defined as “[i]nsanity” but with “lucid intervals.”<sup>26</sup> “Madness” was defined by referring to the “insanity,” “lunacy,” and “mania” entries.<sup>27</sup> “Mania” was defined as “[d]elirium unaccompanied by fever; madness.”<sup>28</sup>

The first mention of the term “insane” in a state constitution appears in of the Arkansas Constitution of 1868; the insane and “idiots” were disqualified from voting.<sup>29</sup> In the context of the appointment of guardianships within the *Laws of the Arkansas Territory*, “lunatics” were described as “of unsound mind and incapable of prudently managing [their] affairs.”<sup>30</sup> Additionally, in the state’s statutes of 1837, there was a chapter entitled “Insane Persons,” who were spoken of as of being of “unsound mind.”<sup>31</sup> In 1883, the General Assembly passed laws precluding “[a] lunatic or insane person, without lucid intervals” of being found guilty of a crime or subject to criminal proceedings.<sup>32</sup> The same law stated, “A person shall be considered of sound mind who is neither an idiot or lunatic, or affected with insanity . . .”<sup>33</sup>

22. ARK. CONST. of 1874, art. 19, § 19.

23. In the Arkansas Constitution of 1870, “idiots” and the “insane” are only mentioned to prohibit them from voting. ARK. CONST. of 1870, art. 8, § 3. This is the first mention of these classes of individuals in an Arkansas constitution.

24. J. STEELE & J. M’CAMPBELL ESQ’S, *LAW OF ARKANSAS TERRITORY* 292 (1835).

25. JOSEPH THOMAS, *COMPREHENSIVE MEDICAL DICTIONARY: CONTAINING THE PRONUNCIATION, ETYMOLOGY, AND SIGNIFICATION OF THE TERMS MADE USE OF IN MEDICINE AND THE KINDRED SCIENCES* 275 (1870).

26. *Id.* at 309.

27. *Id.* at 312.

28. *Id.* at 316.

29. ARK. CONST. of 1870, art. 8, § 3.

30. STEELE & M’CAMPBELL, *supra* note 24, at 292.

31. REVISED STATUTES OF THE STATE OF ARKANSAS OF 1837, ch. 78, §§ 1–48 (Willam McK. Ball & Sam. C. Roane eds., 1838) [hereinafter REVISED STATUTES].

32. W.W. MANSFIELD, *A DIGEST OF THE STATUTES OF ARKANSAS* 424 (1884).

33. *Id.*

These early laws authorized the circuit courts to order guardianships of lunatics and insane persons for their “support, restraint and safe keeping.”<sup>34</sup> The Revised Statutes of the State of Arkansas, enacted in 1837, expanded on the duties of the courts with respect to the “care, custody and management of idiots, lunatics, habitual drunkards, and persons of unsound mind, who are incapable of conducting their own affairs[;]” instructed them “to provide for the safe keeping of such persons, the maintenance of themselves and their families, and the education of their children[;]”<sup>35</sup> and transferred jurisdiction over these individuals to the probate courts.

In 1873, \$50,000 was appropriated by the legislature for the purchase and construction of a lunatic asylum.<sup>36</sup> In 1881, the legislature levied a one-mill tax on all property in the state for two years and appropriated an additional \$150,000 for the construction, outfitting, and operation of the created asylum.<sup>37</sup> The asylum officially opened on March 1, 1883.<sup>38</sup> In 1897, the General Assembly passed a law that required the admission of any person found insane to the Arkansas State Insane Asylum in Little Rock as long as there was an unoccupied room.

More recent legislation has included the creation of the Division of Mental Health in 1971 and the authorization “to distribute the funds appropriated by the Legislature to community mental health clinics or centers within the State.”<sup>39</sup> Approval of a clinic or center was dependent on the adequacy of the mental health services provided.<sup>40</sup> In 1975, the legislature required the centers and clinics to meet minimum performance standards. This requirement was reaffirmed in Act 434 of 1977 and included in all subsequent appropriation bills.<sup>41</sup> In Act 944 of 1989, the legislature required mental health centers and clinics to establish “support programs for persons with long-term, severe mental illness.”<sup>42</sup> Finally, in 2007, the legislature passed Act 1012 of 2007, which required that law enforcement, county jails, and

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34. STEELE & M’CAMPBELL, *supra* note 24, at 292.

35. REVISED STATUTES, *supra* note 31, at ch. 78 § 1.

36. 1881 Ark. Acts, *reprinted in* ACTS AND RESOLUTIONS OF THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS, No. XLI, § 1, at 75–76 (1881).

37. *Id.*; see also April Goff, *Arkansas State Hospital*, ENCYCLOPEDIA OF ARK. HISTORY & CULTURE, <http://www.encyclopediainfarkansas.net/encyclopedia/entry-detail.aspx?search=1&entryID=2238> (last updated Mar. 14, 2012).

38. Goff, *supra* note 37.

39. ARK. CODE R. § 016.04.1-I (LexisNexis 2013). “A Community Mental Health Center is defined as an organization under a unified administration, either a local non-profit, corporate organization or by the State of Arkansas,” which must provide for specified patient services for the mentally ill within its catchment area. *Id.* There are 13 catchment areas within the state.

40. *Id.*

41. *Id.*

42. *Id.*

community mental health centers adopt protocols and standards for the assessment and treatment of mentally ill jail inmates.<sup>43</sup>

The continued expansion of these and other laws passed by the General Assembly reflect the state's recognition of its duty to the mentally ill under the Insanity Article.<sup>44</sup> These laws provide for a comprehensive system, with a panoply of services, to treat all mentally ill residents, including jail inmates.<sup>45</sup> However, more still needs to be done to fulfill this duty to the mentally ill in Arkansas.

### III. LAKE VIEW

In *Lake View District No. 25 v. Huckabee*,<sup>46</sup> the Arkansas Supreme Court upheld a decision of the Pulaski County Circuit Court, finding that the then current school-funding system in Arkansas was unconstitutional under Article 14 ("Education Article")<sup>47</sup> and Article 2, sections 2,<sup>48</sup> 3,<sup>49</sup> and 18<sup>50</sup> ("Equality Articles") of the Arkansas Constitution. The plaintiff<sup>51</sup> had sued for a declaration that the state's school-funding system was unconstitutional under the federal and state constitutions and for an injunction against implementing the unconstitutional system.<sup>52</sup> The supreme court's decision ended ten years of a tortuous and complicated path of litigation, as well as leg-

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43. ARK. CODE ANN. §§ 20-47-601 to -604 (West, Westlaw through 2012 Fiscal Sess.). Concurrently, the legislature made any new obligations imposed by the Act conditional on sufficient appropriations. *Id.*

44. *See* ARK. CODE ANN. §§ 20-45-101 to 20-47-603 (West, Westlaw through 2012 Fiscal Sess.).

45. *Id.*

46. 351 Ark. 31, 91 S.W.3d 472 (2002), *mandate recalled by*, 355 Ark. 617, 142 S.W.3d 643 (2004), *supplemented by*, 358 Ark. 137, 189 S.W.3d 1 (2004), *mandate recalled by*, 362 Ark. 520, 210 S.W.3d 28 (2005).

47. ARK. CONST. art. 14, § 1. "Intelligence and virtue being the safeguards of liberty and the bulwark of a free and good government, the State shall ever maintain a general, suitable and efficient system of free public schools and shall adopt all suitable means to secure to the people the advantages and opportunities of education." *Id.*

48. ARK. CONST. art. 2, § 2, "All men are created equally free and independent, and have certain inherent and inalienable rights; amongst which are those of enjoying and defending life and liberty; of acquiring, possessing and protecting property, and reputation; and of pursuing their own happiness. To secure these rights governments are instituted among men, deriving their just powers from the consent of the governed." *Id.*

49. *Id.* § 3. "The equality of all persons before the law is recognized, and shall ever remain inviolate; nor shall any citizen ever be deprived of any right, privilege or immunity; nor exempted from any burden or duty, on account of race, color or previous condition." *Id.*

50. *Id.* § 18. "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens." *Id.*

51. There was originally one plaintiff in the lawsuit. Intervenors were allowed to join, and a plaintiff class was certified. *Lake View*, 351 Ark. at 45-46, 91 S.W.3d at 478-79.

52. *Id.* at 42, 91 S.W.3d at 477.

isolation that is beyond the scope of this essay and need not be described here. For the purpose of the issue at hand, the significance of *Lake View* is that in its opinion, the supreme court provided a framework for a lawsuit to assert the rights of mentally ill jail inmates to effective treatment under the state's constitution.

As stated by the *Lake View* court, the issue before it was to “determine whether the trial court committed prejudicial legal error in determining whether the state school financing system at issue before it was violative of our state constitutional provisions guaranteeing equal protection of the laws insofar as it denies equal educational opportunity to the public school students of this state.”<sup>53</sup> In answering “no” to the above question, the court made five rulings that can be broken down into three main issues—justiciability, constitutional duty, and equality—and this should guide an approach to a suit under the Arkansas Constitution to obtain treatment for the mentally ill in jails.<sup>54</sup>

#### A. Justiciability

The first ruling in *Lake View* was that the case raised a justiciable issue.<sup>55</sup> The state had argued that the courts unduly interfered with and usurped the functions of the two other branches of government when the courts declared the school-funding system unconstitutional because it “equates to a mandate to the General Assembly to appropriate more funds for the public schools which violates the separation-of-powers clauses in the Arkansas Constitution.”<sup>56</sup> The court disagreed and quoted *Rose v. Council for Better Education, Inc.* to support its analysis:

The judiciary has the ultimate power, and the duty, to apply, interpret, define, and construe all words, phrases, sentences and sections of the Kentucky Constitution as necessitated by the controversies before it. It is *solely* the function of the judiciary to so do. This duty must be exercised even when such action [serves] as a check on the activities of another branch of government or when the court's view of the constitution is contrary to that of other branches, or even that of the public.<sup>57</sup>

The second ruling was a rejection of the state's argument that legislative acts are per se constitutional and, thus, the courts cannot examine

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53. *Id.* at 52, 91 S.W.3d at 483 (citing to its discussion of issues in *DuPree v. Alma Sch. Dist. No. 30*, 279 Ark. 340, 651 S.W.2d 90 (1983)).

54. *Id.* at 51–79, 91 S.W.3d at 482–500.

55. *Id.* at 51, 91 S.W.3d at 482.

56. *Id.*, 91 S.W.3d at 482–83.

57. *Lake View*, 351 Ark. at 55, 91 S.W.3d at 485 (quoting *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 208–10 (Ky. 1989)).

school funding, which is the subject of annual appropriations by the General Assembly.<sup>58</sup> The court held that a “refusal to review school funding under [the] state constitution would be a complete abrogation of our judicial responsibility and would work a severe disservice to the people of this state.”<sup>59</sup>

## B. The Constitutional Duty

The third ruling was that the state’s school-funding system violated article 14, section 1 of the Arkansas Constitution, which requires the state to maintain a general, suitable, and efficient system of free public schools.<sup>60</sup> In making this determination, the court discussed the state’s constitutional history, finding in this history that education has been of supreme importance to the people of this state since its inception.<sup>61</sup> It then cited the uncontested evidence of Arkansas’s educational deficiencies, of which Arkansas’s fiftieth place ranking in per capita state and local government expenditures for elementary and secondary education was number one.<sup>62</sup>

The court’s fourth ruling was to decide that the state’s constitutional requirement to provide a general, suitable, and efficient system of public education meant an absolute duty to provide school children with an adequate education.<sup>63</sup> The court grappled with the issue of whether the constitution’s language implied a fundamental right so as to trigger strict scrutiny of those legislative acts regarding the educational system.<sup>64</sup> It distinguished Article 2 of the Arkansas Constitution, “the Declaration of Rights,” which articulates the personal rights vested in the people of the state—such as equality, free speech, and press—from the right to a trial by jury and from Arkansas’s Education Article, which is separate and speaks in terms of a state’s duty and not a personal right of the people.<sup>65</sup>

It noted what courts in other states had decided but observed that many had gotten “lost in a morass of legal analysis when discussing the issue of fundamental right and the level of judicial scrutiny.”<sup>66</sup> Instead, the court sidestepped that morass by deciding that such a debate over education was unnecessary and reemphasized the point that the state had an absolute duty in which it had failed.<sup>67</sup>

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58. *Id.* at 53, 91 S.W.3d at 485.

59. *Id.* at 54, 91 S.W.3d at 484.

60. *Id.* at 66, 91 S.W.3d at 492.

61. *Id.*, 91 S.W.3d at 491.

62. *Id.* at 59–60, 91 S.W.3d at 488–89.

63. *Lake View*, 351 Ark. at 71, 91 S.W.3d at 495.

64. *Id.* at 66–72, 91 S.W.3d at 492–95.

65. *Id.* at 67, 91 S.W.3d at 492.

66. *Id.*, 91 S.W.3d at 492.

67. *Id.* at 66–72, 91 S.W.3d at 492–95.



### C. Equality

Finally, the fifth ruling of the court was that the school-funding system was inequitable under article 2, sections 2, 3, and 18 of the Arkansas Constitution.<sup>68</sup> First, the court decided, on the basis of the previous case of *DuPree v. Alma School Dist. No. 30*,<sup>69</sup> that expenditures spent on students rather than revenues paid to school districts was the relevant inquiry in analyzing whether there was equality in educational opportunities for students.<sup>70</sup> Revenues provided a minimum amount of funding for districts but did not make up for the disparity in expenditures between wealthy and poor school districts; the former could raise additional funds by passing millage increases in excess of the twenty-five mill uniform rate.<sup>71</sup> The evidence showed inequality between the curricula offered by wealthier school districts, such as Fort Smith, with those provided by poorer school districts, such as those in the Lake View School District.<sup>72</sup>

Second, the court held that the state had fostered funding discrimination against poorer districts.<sup>73</sup> It reviewed the school-funding system under the rational basis standard, finding that school districts are not a suspect class for purposes of equal protection, and thus not warranting strict scrutiny.<sup>74</sup> However, the court rejected the state's assertion that local control and other state programs were legitimate governmental purposes or rational bases for justifying the inequality, finding that "whether a school child has equal opportunities is largely an accident of residence."<sup>75</sup> A similar finding could be seen in the discrepancies in treatment that the mentally ill receive, depending on which center they are placed.

## IV. APPLICATION OF *LAKE VIEW* TO A LAWSUIT ON BEHALF OF THE JAILED MENTALLY ILL

A challenge to the constitutionality of the treatment of the mentally ill in Arkansas should apply the lessons of *Lake View District No. 25 v. Huckabee* to advance the arguments that there is inadequate treatment of the mentally ill in jails, which violates the Insanity Article, and disparities in their treatment, which violate article 2, sections 2, 3 and 18 of the Arkansas Con-

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68. *Id.* at 79, 91 S.W.3d at 500.

69. 279 Ark. 340, 651 S.W.2d 90 (1983).

70. *Lake View*, 351 Ark. at 73–75, 91 S.W.3d at 496–97.

71. *Id.* at 74, 91 S.W.3d at 497.

72. *Id.*, 91 S.W.3d at 497. Fort Smith School District offered advanced courses and specialty courses such as German, fashion merchandising, and marketing; Lake View offered only the most basic curriculum. *Id.*

73. *Id.* at 77, 91 S.W.3d at 499.

74. *Id.* at 78, 91 S.W.3d at 499.

75. *Id.* at 79, 91 S.W.3d at 500.

stitution. The three roadblocks to a challenge would include showing that the issue is justiciable, that there is a constitutional duty, and that equality demands a remedy. The *Lake View* reasoning and rulings demonstrate that the court could answer in the affirmative on each of these issues.

#### A. Justiciability

In contrast to the Education Article, which imposes the duty for the education of children on the state,<sup>76</sup> the Insanity Article places responsibility for the treatment of the mentally ill on the General Assembly.<sup>77</sup> However, this difference does not mean that a suit under the Insanity Article does not present a justiciable issue for the court. The distinction between duties imposed on the state versus the General Assembly was discussed in *Lake View*, but the court's ruling that the constitutionality of the education afforded in this state was properly a matter for its review did not hinge upon this distinction.<sup>78</sup> Even if the Education Article had pointed to the General Assembly rather than the state, the court's opinion shows that it still would have understood that it had jurisdiction to interpret this constitutional provision.<sup>79</sup> A constitutional challenge to the Insanity Article would likewise present a justiciable matter.

#### B. Constitutional Duty

The above-described constitutional and statutory history concerning the treatment of the mentally ill in Arkansas demonstrates that care for the mentally ill has been important to the people of Arkansas and that the legislature recognized its constitutional duty to care for the mentally ill. Though the Insanity Article uses the term "insane,"<sup>80</sup> this term was not defined. There has been considerable imprecision in the use of the word "insane," but two conclusions may be drawn from an analysis of the terms used to describe the mentally ill both before and contemporaneously with the 1874 constitution.<sup>81</sup>

First, "insane" includes a broader category of people than those who meet the narrow, legal definition applied in criminal proceedings.<sup>82</sup> Second, "insane" was understood to mean those of "unsound mind" and "incapable of managing their own affairs."<sup>83</sup> Therefore, a reasonable interpretation of

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76. ARK. CONST. art. 14, § 1.

77. *Id.* art. 19, § 19.

78. *Lake View*, 351 Ark. at 51–55, 91 S.W.3d at 483–85.

79. *Id.*, 91 S.W.3d at 483–85.

80. ARK. CONST. art. 19, § 19.

81. *See supra* Part II.

82. *See supra* Part II.

83. *See supra* Part II.

the constitutional duty owed by the General Assembly is that treatment is required for those suffering from a mental illness that makes them incapable of managing their own affairs. This would almost certainly include many if not most of the mentally ill in jails.<sup>84</sup>

In *Lake View*, the court determined that the language of the Education Article imposed an absolute constitutional duty on the state to provide an adequate education to its children, and in view of the utter inadequacy of the education they were receiving, it was unnecessary to decide whether a fundamental right was implicated that required a strict scrutiny test.<sup>85</sup> Similarly, the Insanity Article imposes an absolute constitutional duty on the state to provide for the treatment of the mentally ill.<sup>86</sup> However, the Education Article describes what type of education should be provided by the state: the state shall “maintain a general, suitable and efficient system of free public schools” and “shall adopt all suitable means to secure to the people the advantages and opportunities of education.”<sup>87</sup> The Insanity Article merely states that the General Assembly shall provide by law “for the treatment of the insane.”<sup>88</sup>

This raises the issue of what treatment is required. Obviously, some treatment is required. If there is no treatment, the constitutional duty is clearly violated. However, if there is some treatment, a court must determine whether this would satisfy the constitutional duty. The court would likely find “some treatment” does not. To have any meaning, treatment should serve some goals, and it is logical that these would be the same goals as for any illness—prevention, cure, management, and palliation.<sup>89</sup>

The laws passed by the General Assembly concerning treatment of the mentally ill are instructive in understanding what that body believes constitutes “treatment.” For instance, section 20-47-201 of the Arkansas Code enables the Division to assist in establishing “a comprehensive and effective system of services for persons with mental illness” who are “admitted to mental health facilities and programs within the state; reducing the occurrence, severity, and duration of mental disabilities; and preventing persons with mental illness from harming themselves or others.”<sup>90</sup> The law additionally provides that treatment should be “appropriate, adequate and humane,”

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84. Many of the mentally ill end up in jail because of an inability to manage their own affairs; thus, they meet the definition of mentally ill.

85. *Lake View*, 351 Ark. at 71, 91 S.W.3d at 495.

86. ARK. CONST. art. 19, § 19.

87. *Id.* art. 14, § 1.

88. *Id.* art. 19, § 19.

89. See Trisha Torrey, *The Four Goals of Medical Treatment: Managing Your Own Expectations*, ABOUT.COM, <http://patients.about.com/od/researchtreatmentoptions/ss/treatmentgoals.htm> (last updated July 18, 2012).

90. ARK. CODE ANN. § 20-47-201 (West, Westlaw through 2012 Fiscal Sess.).

“within each person’s own geographic area of residence”, and in the “least restrictive setting.”<sup>91</sup>

If there are mentally ill persons in jails who are receiving no treatment whatsoever, which occurs with distressing frequency, this should be sufficient to show that their constitutional rights are being violated. This is different from the situation presented in *Lake View*, because with regard to education, students were receiving an education, albeit inadequate. For other jail inmates who are receiving some treatment, it will be necessary to show that the treatment is deficient. Deficiency can be shown by the state’s failure to provide appropriate, adequate and humane treatment.

### C. Equality

*Lake View*’s finding that there were differences among the educational opportunities offered students depending on the school district, which violated the Equality Articles of the Arkansas constitution,<sup>92</sup> should be precedent for finding that disparities in the treatment of the mentally ill in jails also violate these sections. Manifestations of disparities could be that jail inmates receive less or less effective treatment than non-incarcerated individuals or that disparities in treatment options and services exist depending on where the mentally ill inmate was jailed.

In *Lake View* the court found that school districts were classified on the basis of wealth so that discrimination existed.<sup>93</sup> This approach could also be used to show inequality in the treatment of the jailed mentally ill. The Division and the community mental health centers are the vehicles in this state designated to provide treatment for the mentally ill, but the funding provided by the state to the centers is based on the total population of their respective catchment areas<sup>94</sup> and does not take into account differences in the number of mentally ill in the catchment area or the acuity of the illness in the population. What may be sufficient funding for one community mental healthcare center to provide services to the incarcerated may not be sufficient for another center. However, it is not apparent that funding disparity must be shown to find a violation of equal protection. It should be sufficient to show that treatment programs and services opportunities vary in order to prove a violation of the equal protection clause.

In *Lake View*, the court applied the rational-basis level of scrutiny to the claims involving inequality, having found that school districts are not a

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91. *Id.*

92. *Lake View*, 351 Ark. at 79, 91 S.W.3d at 500.

93. *Id.* at 77, 91 S.W.3d at 499.

94. *Division of Behavioral Health Adult Services, Funding Streams*, ARK. DEPARTMENT OF HUMAN SERVICES, <http://humanservices.arkansas.gov/dbhs/Pages/AdultServices.aspx> (last visited May 3, 2013).

suspect class justifying strict scrutiny.<sup>95</sup> Under this standard, the court found no legitimate governmental purpose for the disparity in funding among the school districts.<sup>96</sup> In a lawsuit involving the mentally ill, it is difficult to imagine that the state could advance a credible, legitimate reason for the lack of mental health treatment for people in jail or for disparities in the services available to them. Just as in *Lake View* when the court found that the school-funding system violated the equal protection provisions of the Arkansas Constitution, it should find that the current funding system for mental health services to inmates and the current disparities in services available to them also violate their right to equal protection.

#### V. CONCLUSION

The Arkansas Constitution requires the General Assembly to provide for the treatment of the insane. Pursuant to this provision, the General Assembly has enacted many laws that provide for services for the mentally ill and has created the Division and community mental health centers to deliver these services. However, funding is woefully inadequate, and services to inmates in Arkansas's jails are either nonexistent or inadequate.<sup>97</sup> Utilizing *Lake View* as precedent, one could argue that the state's failure to provide adequate treatment for the mentally ill in jails violates the state's absolute constitutional duties toward these individual under Insanity Article and Education Article. Based on the court's analysis, *Lake View* could be the very vehicle needed to remedy these violations and to assert the right to adequate and meaningful treatment for the mentally ill in Arkansas.

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95. *Lake View*, 351 Ark. at 78, 91 S.W.3d at 499.

96. *Id.* at 79, 91 S.W.3d at 500.

97. Nat'l Alliance on Mental Illness (NAMI), *The State of Public Mental Health Services Across the Nation*, NAMI.ORG (2009), available at <http://www.nami.org/gtsTemplate09.cfm?Section=Findings&Template=/ContentManagement/ContentDisplay.cfm&ContentID=75255>. Arkansas was one of four states given an F grade by NAMI. *Id.* at 25.