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THE VIRGINIA PROCEDURE FOR COMMITMENT AND
RELEASE OF PERSONS ACQUITTED BY REASON OF
INSANITY.

For centuries a state's power to protect society and the individual has been exercised to commit to mental institutions persons who because of mental illness are dangerous to themselves or to others.¹ Persons acquitted of a crime because of insanity are no exception to those who may be committed. At common law the court ordered confinement in jail for acquitted defendants who were considered dangerous because of insanity.² Automatic commitment to mental institutions became the law in felony cases for defendants acquitted on the ground of insanity.³ Today in most jurisdictions statutes prescribe the procedure by which persons acquitted by reason of insanity are committed to a mental institution.⁴ From this simple statement of similarity, only one generality can safely be propounded. Persons acquitted by reason of insanity are nearly always committed to a mental institution.⁵ Thereafter no generality is tenable. The post-trial commitment laws of the several states diverge sharply in a number of respects: the nature of the findings at the criminal trial, the standard for commitment, the post-trial procedure for determining present insanity, the standard for release, and the procedures for later release.⁶

Whatever the procedure or terminology utilized, every post-trial commitment procedure for individuals acquitted by reason of insanity re-

1. F. LINDMAN & D. MCINTYRE, JR., *THE MENTALLY DISABLED AND THE LAW* 15 (1961).

2. *United States v. Lawrence* 26 F. Cas. (No. 15577) (C.C.D.C. 1835). See also Note, *Compulsory Commitment Following a Successful Insanity Defense*, 56 NW. U.L. REV. 409, 414 n.23 (1961).

3. *Insane Offenders Act*, 39 & 40 Geo. 3, c. 94 (1800).

4. For a compilation of statutes, see *Lynch v. Overholser*, 369 U.S. 705, 725-28 (1962); Note, *Commitment Following Acquittal By Reason Of Insanity and The Equal Protection Of The Laws*, 116 U. PA. L. REV. 924 (1968).

5. Greenwald, *Disposition of the Insane Defendant After "Acquittal"—The Long Road From Commitment To Release*, 59 J. CRIM. L.C. & P.S. 583 (1968); Note, *Releasing Criminal Defendants Acquitted and Committed Because of Insanity: The Need for Balanced Administration*, 68 YALE L.J. 293 (1958).

6. See authorities cited *supra* note 4.

flects society's belief that the acquittal of those who have demonstrated their risk to society through acts otherwise criminal may necessitate the defendant's commitment to a mental institution.⁷ All too often this decision is made without any hearing on this need. Civil commitment proceedings are initiated in only a few states to commit persons acquitted by reason of insanity.⁸ Statutes in some states variously provide for mandatory or discretionary commitment if the trial judge, the trial jury, or a second jury finds that the defendant's insanity continues, or that his discharge would be dangerous.⁹ In the remaining states, statutes provide for discretionary commitment at the authorization of the trial judge or mandatory commitment without further hearing on present insanity of the acquitted defendant.¹⁰

Until 1966 a defendant acquitted by reason of insanity in Virginia, not unlike defendants in many states, faced mandatory commitment in a mental institution for an indefinite period without any hearing on present insanity.¹¹ The statute read:

When the defense is insanity or feeble-mindedness of the defendant at the time the offense was committed, the jury shall be instructed, if they acquit him on that ground, to state the fact with their verdict. If the jury so find the court shall thereupon if it deem his discharge dangerous to the public peace or safety, order him to be committed to one of the State hospitals for the insane and be confined there under special observation and custody until the superintendent of that hospital and the superintendent of any other State hospital or feeble-minded colony shall pronounce him sane and safe to be at large.

Release could be sought through habeas corpus proceedings initiated by the patient.

In 1966 the Virginia legislature revised the post-trial commitment and release procedure.¹² Subsequent amendments to this statute were made in 1968.¹³ While this revision substantially lessens the plight of those acquitted by reason of insanity, the imprecision of some of the terminology and indefiniteness in some of the procedures portend de-

7. Greenwald, *supra* note 5, at 583-84.

8. LA. REV. STAT. ANN. § 28:59 (1950); WYO. STAT. ANN. § 7-242(b) (1957).

9. See authorities cited *supra* note 4.

10. *Id.*

11. VA. CODE ANN. § 19.1-239 (Supp. 1964), *as amended*, (Cumulative Supp. 1968).

12. *Id.* (Supp. 1966).

13. *Id.* (Cumulative Supp. 1968).

bate over the judicial administration of this new statute. Examination of legislation and case law which preceded as well as that subsequent to the passage of this statute will hopefully make this debate more meaningful.

HISTORICAL PERSPECTIVE

The lack of adjudication of present insanity in post-trial mandatory and discretionary commitment of persons acquitted by reason of insanity has posed a difficult problem for the legal theorist. The most common rationale advanced for mandatory commitment without a hearing on present insanity and dangerousness is that insanity at the time of the crime, once proven, is presumed to continue up to the time the court commits the accused, and until the accused can prove the contrary.¹⁴ Perhaps the best virtue of the presumption theory "is the simplicity of its statement . . . [since] the presumption is *ab initio* suspect."¹⁵ In those jurisdictions where the defendant is acquitted if there is even a reasonable doubt about his sanity at the time of the offense, a presumption of continuing insanity can only be a reasonable doubt as to present insanity since there has been no affirmative finding of insanity at any time.¹⁶ Since "[m]ental disorder is not a homogeneous phenomenon . . . [and] the relevant factor is dangerousness of the individual to self or society . . . variation from case to case [could be] so large as to make a general presumption of little worth."¹⁷ Moreover, the length of time over which insanity is presumed to continue is only "a reasonable time."¹⁸ The likelihood that sanity has been regained is greatly increased when the period of years between commission of the offense and commitment resulting from the limited efficiency of our courts is involved.¹⁹ Furthermore, the presumption of continuing insanity is only *prima facie* evidence of this fact since continued dangerousness is by no means inevitable, and is rebuttable.²⁰

14. *E.g.*, *In re Rosenfield*, 157 F. Supp. 18, 19 (D.D.C. 1957); *Ex parte Clarke*, 86 Kan. 539, 546, 121 P. 492, 495 (1912); *In re Brown*, 39 Wash. 160, 162, 81 P. 552, 554 (1905).

15. Hamann, *The Confinement and Release of Persons Acquitted By Reason of Insanity*, 4 HARV. J. LEGIS. 55, 63 (1966).

16. *E.g.*, *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954); *See also* Krash, *The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia*, 70 YALE L.J. 905, 934 (1961).

17. Note, *supra* note 4, at 935.

18. *Hempton v. State*, 111 Wis. 127, 86 N.W. 596 (1901).

19. Note, *supra* note 4, at 936.

20. *Yankulov v. Bushong*, 80 Ohio App. 497, 502, 77 N.E.2d 88, 92 (1945).

An alternative rationale for mandatory commitment is that by pleading not guilty by reason of insanity, the defendant has voluntarily accepted the consequences of the plea, statutory consequences which include the waiver of a hearing prior to commitment.²¹ In other words, the defendant by pleading insanity "digs his own grave" since the plea takes on the characteristics of "confession and avoidance."²² The difficulty with this rationale is that the defendant did not plead present insanity; he averred that he was insane *only* at the time of the offense. Furthermore, this rationale proceeds on the theory that the insanity defense is a privilege whereas contemporary justice accords the insanity defense as a matter of right.²³ Diminished procedural safeguards as a price for the exercise of a privilege may arguably be justified, but the argument that unfavorable procedural consequences are voluntarily accepted in the exercise of a right is untenable.

Another justification for mandatory commitment without a hearing on present insanity is that such a policy discourages false pleas of insanity.²⁴ The necessity of such a deterrent is doubtful since in most cases it would be extremely difficult for an impostor to mislead a competent psychiatrist.²⁵ Secondly, the argument fails to mitigate the deterrent effect mandatory commitment may have on persons who meritoriously plead insanity but are presently sane, or the problem of committing those persons neither culpable for their past acts nor presently insane.²⁶ A similar deterrent effect may also discourage those who need hospitalization and treatment from pleading insanity.²⁷

A fourth argument for mandatory commitment without a hearing on present insanity is the need to observe a defendant's mental condition. Future habeas corpus proceedings provide adequate means for adjudicating the issue of need for continued confinement.²⁸ While ap-

21. E.g., *People ex rel. Peabody v. Chanler*, 133 App. Div. 159, 162, 117 N.Y.S. 322, 324 (1909); Goldstein & Katz, *Dangerousness and Mental Illness, Some Observations on the Decision to Release Persons Acquitted by Reason of Insanity*, 70 YALE L.J. 225, 230, 238 (1960).

22. Note, *supra* note 2, at 426.

23. Hamann, *supra* note 15, at 63; Note, *Bolton v. Harris: Equal Protection in Insanity Proceedings*, 56 GEO. L.J. 1191, 1199-1200 (1968); Note, *supra* note 2, at 427.

24. E.g., *Lynch v. Overholser*, 369 U.S. 705, 715 (1962); *In re Rosenfield*, 157 F. Supp. 18 (D.D.C. 1957).

25. See H. WEIHOFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* 45-46 (1954).

26. Note, *supra* note 4, at 937.

27. Hamann, *supra* note 15, at 64. See generally Note, *supra* note 23, at 1200; Note, *supra* note 2, at 428.

28. E.g., *Ragsdale v. Overholser*, 281 F.2d 943, 948 (D.C. Cir. 1960).

peeling on its face, this rationale has serious weaknesses. If mandatory commitment is justified by the need to observe, commitment would last only as long as observation was necessary.²⁹ This necessity for temporary or limited commitment however, has been used to support permanent or indefinite commitment, justified by the availability of habeas corpus.³⁰ Yet in habeas corpus proceedings the confined person must prove that he is not presently insane, a fact never before averred, only presumed.³¹ Deprivation of liberty under such a procedure is at the very least suspect.

Because a person acquitted by reason of insanity is sent into confinement pursuant to mandatory commitment statutes without any legal investigation into his mental condition at the time of the verdict, a time when he may be perfectly sane, deprivation of liberty without due process of law has often been argued in constitutional challenges to these procedures. *Underwood v. People* is perhaps the only case to find post-trial mandatory commitment without further hearing violative of due process;³² however, *People v. Dubina*, a later case from the same jurisdiction, distinguished *Underwood* on the ground of inadequate release procedures following mandatory commitment.³³ *In re Boyett* upset discretionary commitment, but the opinion suggests that the court may have been more concerned with inadequate release provisions than with commitment procedures.³⁴ Despite the argument that mandatory or discretionary post-trial commitment is a deprivation of liberty without due process of law in the absence of an adequate hearing on present insanity, *Boyett* stands virtually alone among cases in other jurisdictions which have rejected this claim.³⁵

The proliferation of civil commitment statutes containing liberal

29. See generally Note, *supra* note 2, at 443-44.

30. *Ragsdale v. Overholser*, 281 F.2d 943 (D.C. Cir. 1960).

31. *E.g.*, *Overholser v. Leach*, 257 F.2d 667 (D.C. Cir. 1958). See *Robinson v. Winstead*, 189 Va. 100, 52 S.E.2d 118 (1949) where the court held that one who is illegally restrained under an invalid commitment need not prove in a habeas corpus proceeding that he is sane in order to be discharged.

32. 32 Mich. 1, 20 Am. R. 633 (1875).

33. 304 Mich. 363, 8 N.W.2d 99, *cert. denied*, 319 U.S. 766 (1943).

34. 136 N.C. 415, 48 S.E. 789 (1904).

35. *E.g.*, *Ragsdale v. Overholser*, 281 F.2d 943 (D.C. Cir. 1960); *Ex parte Slayback*, 209 Cal. App. 480, 288 P. 769 (1930); *Ex parte Clark*, 86 Kan. 539, 121 P. 492 (1912); *People ex rel. Peabody v. Chanler*, 133 App. Div. 159, 117 N.Y.S. 322 (1909); *In re Brown*, 39 Wash. 160, 81 P. 552 (1905). For a compilation of cases, see *Lynch v. Overholser*, 369 U.S. 705, 728 (1962). For an analysis of the due process clause, see Note, *Compulsory Commitment Following a Successful Insanity Defense*, 56 Nw. U.L. Rev. 409 (1961).

procedures for safeguarding those persons suspected of mental incapacity against improvident confinement brought new thinking to bear on the problem of post-trial mandatory or discretionary commitment without a hearing on present insanity. The disparity between the civil commitment procedures and the mandatory commitment procedures applicable to persons acquitted by reason of insanity was patent.³⁶ A constitutional challenge to mandatory commitment procedures based upon the equal protection clause was inevitable.

Due process challenges to mandatory commitment procedures however, were not dead. In *Lynch v. Overholser* the Supreme Court evaded the constitutional issue of due process, holding that mandatory commitment pursuant to D.C. Code Ann. § 24-301(d) of a defendant acquitted after an *involuntary* plea of not guilty by reason of insanity was "out of harmony with the awareness that Congress has otherwise shown for safeguarding those suspected of mental incapacity against improvident confinement."³⁷ The defendant never suggested that he was mentally irresponsible. He was acquitted upon evidence that raised no more than a reasonable doubt as to his mental condition at the time of the offense.

36. The District of Columbia procedures provided a prime setting for such a challenge. With nothing more than a finding of reasonable doubt as to the defendant's sanity at the time of the offense, mandatory commitment without a hearing as to present insanity resulted upon acquittal. D.C. CODE ANN. § 24-301(d) (1961). Release was primarily dependent upon the superintendent's recommendation. *Id.* § 24-301(e). Habeas corpus proceedings could be initiated by the patient seeking release. *Id.* § 24-301(g). The patient had to prove that he was sane, would not be dangerous to himself or others in the foreseeable future, and that the superintendent acted arbitrarily and capriciously in refusing to recommend release. *Overholser v. Russell*, 283 F.2d 195 (D.C. Cir. 1960); *Overholser v. Leach*, 257 F.2d 667 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 1013 (1959). In civil commitment the Commission on Mental Health examined the allegedly mentally ill person and thereafter held a hearing. D.C. CODE ANN. § 21-542. If the decision of the Commission was adverse, the person sought to be committed had the right to demand a jury trial. *Id.* § 21-544. The burden of proof was on the person seeking commitment. *Lynch v. Overholser*, 369 U.S. 705, 711 (1962). Release was primarily dependent upon the superintendent's recommendation, but a patient was entitled to periodic examinations. Should one of the examining physicians believe that the patient was not mentally ill to the extent that he was likely to injure himself or others if not hospitalized, the patient was entitled to a court hearing. D.C. CODE ANN. §§ 21-546 to 548. Patients could also establish their eligibility for release by habeas corpus. *Id.* § 24-549.

37. 369 U.S. 705, 711 (1962). The Court's failure to reach the constitutional issue was characterized by Justice Clark, dissenting, as a "disingenuous evasion." *Id.* at 733. The District of Columbia statute read:

If any person tried upon an indictment or information for an offense, or tried in the juvenile court of the District of Columbia for an offense, is acquitted solely on the ground that he was insane at the time of its commis-

[Where] the accused has pleaded guilty—or . . . the Government has established that he committed a criminal act constitutes only strong evidence that his continued liberty could imperil “the preservation of the public peace.” [P]ost-trial commitment . . . presupposes a determination that the accused has committed the criminal act with which he is charged . . . [but this presupposition] no more rationally justifies his indeterminate commitment to a mental institution on a bare reasonable doubt as to past insanity than would any other cogent proof of possible jeopardy to the “rights of persons and of property” in any civil commitment. . . .

[The underlying congressional] intention . . . seems to have been . . . that only those who need treatment and who may be dangerous are confined; committing a criminal defendant who denies the existence of any mental abnormality merely on the basis of a reasonable doubt as to his condition at some earlier time is surely at odds with this policy.³⁸

The Court did not reach the question of the defendant who pleads not guilty by reason of insanity. Conjectured legislative considerations for passing section 24-301(d) were pertinent only to ascertain whether the defendant acquitted after an *involuntary* plea was intended to be covered by the same provision.³⁹

In *Baxstrom v. Herold*, the Supreme Court faced an equal protection challenge to New York procedure whereby a person nearing the expiration of his penal sentence could be civilly committed to a mental institution without the jury review available to all other persons civilly committed.⁴⁰ State justification for the procedural dis-

sion, the court shall order such person to be confined in a hospital for the mentally ill.

38. 369 U.S. at 714-15.

39. *Id.* at 715.

40. 383 U.S. 107 (1966). Speaking of the New York Correction Law § 384 as it appeared when applied to petitioner in 1961, the Court said that the statute

. . . prescribes the procedure for civil commitment upon the expiration of the prison term of a mentally ill person confined in Dannermora. Similar procedures are prescribed for civil commitment of all other allegedly mentally ill persons. N.Y. Mental Hygiene Law §§ 70, 72. All persons civilly committed, however, other than those committed at the expiration of a penal term, are expressly granted the right to *de novo* review by jury trial of the question of their sanity under § 74 of the Mental Hygiene Law. Under this procedure any person dissatisfied with an order certifying him as mentally ill may demand full review by a jury of the prior determination as to his competency. If the jury returns a verdict that the person is sane, he must be immediately discharged. It follows that the State, having made this sub-

parities was based upon mental classifications distinguishing between the civilly insane and the criminally insane—those with dangerous or criminal propensities. Into this latter group fell prisoners found to be insane while serving a criminal sentence.⁴¹ The Supreme Court, rejecting these classifications as a basis for procedural inequality, held that “[c]lassification of mentally ill persons as either insane or dangerously insane . . . may be a reasonable distinction for purposes of determining the type of custodial or medical care to be given, but it has no relevance whatever in the context of the opportunity to show whether a person is mentally ill *at all*.”⁴²

In light of *Baxstrom*, the New York Court of Appeals in *People v. Lally* judicially engrafted onto the procedures for mandatory commitment of persons acquitted by reason of insanity (procedures substantially similar to the District of Columbia mandatory commitment statute) all of the protections of the New York Mental Hygiene Law dealing with the civil commitment of persons allegedly mentally ill.⁴³

Sensing serious constitutional difficulties in the District of Columbia mandatory commitment statute as a result of the *Baxstrom* decision, the court of appeals in *Cameron v. Mullen* held that a defendant acquitted after an *involuntary* plea of not guilty by reason of insanity was entitled to the procedural benefits of the civil commitment statute.⁴⁴ In *Lynch*, the Supreme Court had suggested that commitment be accomplished either by resort to section 24-301(a) or the civil commitment provisions.⁴⁵ Rather than “amend” section 24-301(a) to com-

stantial review proceeding generally available on this issue, may not consistent with the Equal Protection Clause of the Fourteenth Amendment, arbitrarily withhold it from some.

Id. at 110-11.

41. *Id.* at 111.

42. *Id.*

43. 19 N.Y.2d 27, 224 N.E.2d 87, 277 N.Y.S.2d 654 (1966). Defendant argued that § 454 was unconstitutional because “it raised the presumption that a defendant who proves that he was insane at the time of an alleged crime is presumed to be insane at the time of trial if the trial results in acquittal, and he must thereafter prove his right to be at large.” *Id.* at 32, 224 N.E.2d at 90, 277 N.Y.S.2d at 658.

44. 387 F.2d 193 (1967).

45. 369 U.S. at 720. Section 24-301(a) read, in part, at the time of defendant’s commitment in 1961:

Whenever a person is arrested, indicted, charged by information . . . for or with an offense and, *prior to the imposition of sentence* . . . it shall appear to the court from the court’s own observations, or from *prima facie* evidence submitted to the court, that the accused is of unsound mind or is mentally incompetent so as to be unable to under-

port with civil commitment procedures, the Court held the section inapplicable.⁴⁶ Not only were the procedural differences between section 24-310(a) and civil commitment more pronounced than the differences struck down in *Baxstrom*, but the justification advanced for the procedural inequality—a presumption of greater danger to the public than those civilly committed because the accused has been found not guilty of a crime solely by reason of insanity—was virtually the same as that condemned in *Baxstrom*.⁴⁷ “*Baxstrom* thus might be said to require the conclusion that, while prior criminal conduct is relevant to the determination whether a person is mentally ill and dangerous, it cannot justify denial of procedural safeguards for that determination.”⁴⁸

Less than a month after the *Cameron* decision, in *Specht v. Patterson* a violation of due process was found in the application of Colorado's Sex Offenders Act to a person sentenced to prison for an indeterminate term without notice and full hearing following a conviction for indecent liberties under another Colorado statute which carried a maximum sentence of ten years.⁴⁹ The Supreme Court said:

The Sex Offenders Act does not make the commission of a specified crime the basis for sentencing. It makes one conviction the basis for commencing another proceeding under another Act to determine whether a person constitutes a threat of bodily harm to the public, or is an habitual offender and mentally ill. That is a new finding of fact . . . that was not an ingredient of the offense charged.⁵⁰

The court found that there was no hearing in the normal sense, no right of confrontation. Requirements of due process were not satisfied.⁵¹

stand the proceedings against him or properly to assist in his own defense, the court may order the accused committed . . . for such reasonable period as the court may determine for examination and observation and for care and treatment if such is necessary

(emphasis supplied).

46. 387 F.2d at 203.

47. *Id.* at 200-01; *Baxstrom v. Herold*, 383 U.S. at 111. See also Weihofen, *Institutional Treatment of Persons Acquitted by Reason of Insanity*, 38 TEXAS L. REV. 849, 855 (1960). *Contra*, *Overholser v. Leach*, 257 F.2d 667, 669 (D.C. Cir. 1958), *cert. denied sub nom.*, *Leach v. Overholser*, 359 U.S. 1013 (1959); *Hamann*, *supra* note 15, at 57.

48. 387 F.2d at 201.

49. 386 U.S. 605 (1967).

50. *Id.* at 608.

51. *Id.*

The analogy to defendants acquitted after a *voluntary* plea of not guilty by reason of insanity was irresistible. In *Bolton v. Harris*, the District of Columbia Court of Appeals faced the issue.⁵² The defendant, acquitted upon his own plea of insanity, challenged the constitutional validity of the District of Columbia post-trial mandatory commitment provisions contending that mandatory commitment without a hearing on present insanity did not give protection of the laws equal to those protecting the civilly committed in the District of Columbia.⁵³ The court reasoned that prior to *Baxstrom* and the 1964 Hospitalization of the Mentally Ill Act, persons found not guilty by reason of insanity, having demonstrated dangerousness to society through criminal acts, could reasonably have been treated differently from other mentally ill persons.⁵⁴ The effect of *Baxstrom* and the 1964 Act, however, rendered insufficient prior criminal conduct as justification for substantial differences in commitment procedures, and unreasonable the distinction between those who plead insanity and those who have the defense thrust upon them.⁵⁵ Moreover, *Specht* appeared to require that the finding of present insanity upon which commitment is predicated be made in a hearing since the trial determined that there was merely a reasonable doubt as to past insanity.⁵⁶ Instead of declaring the mandatory commitment procedure unconstitutional, the court chose a reasonable application of the equal protection doctrine which permitted different treatment of persons acquitted by reason of insanity from civilly committed persons "to the extent that there are relevant differences between the two groups."⁵⁷ Mandatory commitment for a period required to determine present mental condition was sufficiently justified by the jury's finding of a reasonable doubt as to the defendant's sanity at the time of the offense.⁵⁸ "Once the examination period is over . . . there is no rational basis for denying a hearing . . . with procedures substantially similar to those in civil commitment proceedings."⁵⁹ While upholding the release provisions of the mandatory commitment statute, the court construed the statute to in-

52. 395 F.2d 642 (D.C. Cir. 1968).

53. *Id.* at 645. -

54. *Id.* at 649. See *Ragsdale v. Overholser*, 281 F.2d 943 (D.C. Cir. 1960).

55. 395 F.2d at 649.

56. *Id.* at 651-53.

57. *Id.* at 651.

58. *Id.*

59. *Id.*

clude those procedural safeguards set forth in the civil commitment statute.⁶⁰

AN EXAMINATION OF THE VIRGINIA STATUTE

Against this variegated background of legislation and case law, let us now examine the recently enacted Virginia procedure for commitment and release of persons acquitted by reason of insanity. One rationale advanced for mandatory commitment without a hearing as to present insanity was the need to observe the defendant's mental condition.⁶¹ The *Bolton* court agreed when it held that commitment without a hearing is permissible for the period required to determine present mental condition.⁶² This observational period has been made statutorily unavoidable in Va. Code Ann. section 19.1-239(1) which provides that when the jury acquits a defendant whose defense is insanity or feeble-mindedness at the time the offense was committed,

the court shall place him in temporary custody of the Commissioner of Mental Hygiene and Hospitals . . . and appoint three physicians or two physicians and one clinical psychologist . . . to examine the defendant and make such investigation as they deem necessary in order to determine whether or not . . . he is insane or feeble-minded and to determine whether his discharge would be dangerous to the public peace and safety or to himself and to report their findings to the court.⁶³

This requirement of an automatic observation period reflects the approval of various legal writers. Lindman and McIntyre suggest that "[a]utomatic hospitalization for a determinate period would allow a thorough mental examination of the defendant to ascertain his present mental condition" and would add much to the reassurance of the acquitting jury "that an acquittal on grounds of insanity would not set loose a criminally dangerous person."⁶⁴ Additionally, several state stat-

60. *Id.* at 652.

61. See notes 29-32 *supra* and accompanying text.

62. 395 F.2d at 651. See also *Ragsdale v. Overholser*, 281 F.2d 943, 948 (D.C. Cir. 1960).

63. VA. CODE ANN. § 19.1-239(1) (Cumulative Supp. 1968).

64. F. LINDMAN & D. MCINTYRE, JR., *supra* note 1, at 367. See also Greenwald, *supra* note 5, at 592; Koller, *The Insanity Defense: The Need for Articulate Goals at the Acquittal, Commitment, and Release Stage*, 112 U. PA. L. REV. 733, 752 (1964); Note, *supra* note 23, at 1200; Note, *supra* note 2, at 459-60, 464; Note, *supra* note 4, at 938, 940.

utes provide for commitment for the purpose of observation in certain instances.⁶⁵ Related statutory antecedents to automatic observation periods can also be found in the civil commitment procedures of some states, including Virginia.⁶⁶ Section 19.1-239(1) speaks only in terms of temporary custody rather than a determinate period. In sharp contrast, the civil commitment statute requires that a person removed to a mental hospital upon certification by a justice be examined not later than twenty-four hours after arrival.⁶⁷ Should the superintendent decide that the patient be involuntarily confined after this examination, procedures for a hearing are immediately put into motion. Any suggestion that the temporary custody of section 19.1-239(1) would be limited to a twenty-four hour examination period is obviated by the provisions of the Model Penal Code, a source in part for the Virginia mandatory commitment provisions.⁶⁸ The *Bolton* court obviously felt that the civil commitment procedure of examination of the alleged mentally ill person by the Commission on Mental Health did not provide a reasonable opportunity to observe the subject. "Commitment . . . for the period required to determine present mental condition" was deemed a reasonable application of the equal protection doctrine, the length of time to be established by the court in each individual case.⁶⁹

A jury's finding of a reasonable doubt as to defendant's sanity at the time of the offense (or, as in Virginia, where the defendant has the burden of proving insanity to the satisfaction of the jury)⁷⁰ may provide sufficient warrant for commitment without a hearing to determine the present mental condition of the accused. It is questionable, however, in light of the *Baxstrom* language, whether equal protection challenges to the time disparities between civil and criminal commitment may be so easily answered by asserting that such jury findings provide sufficient warrant for treating differently persons acquitted by reason of insanity from persons civilly committed. "The equal protection

65. E.g., ARIZ. REV. STAT. ANN. § 36-515 (Supp. 1968).

66. E.g., MASS. GEN. LAWS ch. 123, § 78 (1969); MICH. COMP. LAWS § 14.811 (Supp. 1968); OHIO REV. CODE ANN. § 5122 (Supp. 1968).

67. VA. CODE ANN. § 37.1-79 (Cumulative Supp. 1968).

68. MODEL PENAL CODE § 4.08 (Proposed Official Draft 1962).

69. 395 F.2d at 651.

70. E.g., *Thompson v. Commonwealth*, 193 Va. 704, 70 S.E.2d 284 (1952). The burden of proof in Virginia arguably denies the defendant due process of law. Cf. *Johnson v. Bennett*, 89 S. Ct. 436 (1968); *People v. Pearson*, 19 Ill. 2d 609, 169 N.E.2d 252 (1960) wherein is discussed the denial of due process of law when the burden of proof is placed on the defendant to prove his alibi defense.

problem here is not merely whether or not there is inequality of treatment; the procedural discrimination is patent. What is involved is the doctrine of reasonable classification."⁷¹ Identical treatment of all persons is not required under equal protection, but equal protection does require that the absence of identical treatment have some relevance to the purpose for which the classification is made.⁷² The state's only purpose for observing those acquitted by reason of insanity is to determine present insanity and dangerousness, the same purpose embodied in civil commitment procedures.⁷³ These "civil commitment procedures, which presumably represent the legislature's judgment on how best to arrive at 'truth' with respect to the issues of sanity . . . and [dangerousness], constitute a readily available yardstick for comparison."⁷⁴

There remains the possibility, however, that this yardstick may be found inaccurate when societal and individual interests are weighed by the court in applying due process and equal protection doctrines. A survey was conducted on the question of whether an accurate diagnosis could be made without a period of observation and examination in an institution.⁷⁵ A majority of the heads of state and federal mental hospitals who responded felt that a period of observation and examination in an institution would be necessary for an accurate diagnosis in at least some cases, with a substantial minority of the opinion that such a period was required in all cases.⁷⁶ "[M]any psychiatrists feel that the possibility of feigning recovery makes . . . a brief post-trial exam of little or no validity, and believe that a period of hospitalization is essential to an accurate diagnosis in all cases."⁷⁷ It may well be that twenty-four hours are not "adequate" protection of the public. If observation is necessary to protect the public, there would seem to be little doubt in the state's use of its police power to retain not only those civilly committed, but also those acquitted by reason of insanity for a greater period than twenty-four hours to investigate present mental conditions. The solution is a tenuous one, but it offers a rational break with the civil commitment yardstick which plagued the *Bolton* court.

71. Note, *supra* note 4, at 929.

72. *Baxstrom v. Herold*, 383 U.S. at 111.

73. Note, *supra* note 4, at 939.

74. *Id.* at 934.

75. Note, *supra* note 2, at 443-44.

76. *Id.* at 444.

77. *Id.* at 445.

If the time disparities do survive equal protection challenges, or failing this, the court finds twenty-four hours an inadequate period of examination to protect the public, how much time should be allowed? The *Bolton* court suggested that the length of time be established by the court in each individual case based upon the same judgments made when the question of competency to stand trial is raised.⁷⁸ A maximum period seems desirable to prevent temporary periods of observation from becoming indefinite periods of confinement through official lethargy. To survive due process challenges, commitment for observation can last no longer than the period necessary to determine defendant's present mental condition. Ninety days was the average of outer limits suggested by heads of hospitals in the previously discussed survey.⁷⁹ This should serve as a maximum period in which the defendant may be held for observation and examination.

The Virginia mandatory commitment procedure also varies in minor details with the civil commitment provisions. Under civil certification the alleged mentally ill person is removed to the hospital or other facility designated by the Commissioner for receipt of persons alleged to be mentally ill.⁸⁰ Section 19.1-239(1) provides that the court shall place the defendant in the temporary custody of the Commissioner of Mental Hygiene and Hospitals. No mention is made of place of confinement during the observational period. Since the object to be attained in either provision is examination of the person to determine present mental condition, there appears no reason to doubt that commitment of the person acquitted by reason of insanity would be in a hospital or other facility designated by the Commissioner for receipt of persons alleged to be mentally ill.

Additionally, the person alleged to be mentally ill in civil commitment is examined by one or more of the physicians on the staff of the hospital to which he is certified for examination.⁸¹ Pursuant to section 19.1-239(1) the court in which the defendant was acquitted shall appoint three physicians or two physicians and one clinical psychologist, skilled in the diagnosis of insanity to examine the defendant and make necessary investigations. This provision obviously reflects the legislature's concern that the patient's interest should have some outside protection although there is no further provision to indicate that those

78. 395 F.2d at 651.

79. Note, *supra* note 2, at 466.

80. VA. CODE ANN. § 37.1-67 (Cumulative Supp. 1968).

81. *Id.* § 37.1-70.

physicians appointed to examine the defendant will be other than physicians of state mental institutions. These variations should, however, raise no constitutional objections.

The *Bolton* court held:

Once the examination period is over . . . there is no rational basis for denying a hearing. . . . [T]hat persons acquitted by reason of insanity have committed criminal acts . . . may tend to show [that] the requirements for commitment [have been met], namely, illness *and* dangerousness. But, it does not remove these requirements. Nor does it justify total abandonment of the procedures used in civil commitment proceedings to determine whether these same requirements have been satisfied. [Accordingly, the procedure at the hearing must, under the equal protection doctrine, be] substantially similar to those in civil commitment proceedings. . . . [S]ince *Baxstrom* and *Specht* require [a hearing], we deem it necessarily implicit in our statute.⁸²

That a hearing after the observation period is necessarily implicit in section 19.1-239(1) of the Virginia procedure is doubtful.

"If the court is satisfied by the report, or such testimony of the examining physicians or clinical psychologist as it deems necessary, that the defendant is insane or feeble-minded . . . the court shall order him to be committed. . . . Otherwise, the defendant forthwith shall be discharged and released."⁸³

Doubt resolves into certainty upon comparison of the applicable sections of a proposed replacement to the Model Penal Code, source, in part, for the Virginia statute, and section 19.1-239(1). Following an examination of the defendant's present mental condition, psychiatrists appointed by the court to examine the defendant report their findings. If the court is satisfied by the report filed, it shall order his discharge. If the court is not so satisfied and either the commissioner or the acquitted person or some person makes an application for a *hearing*, the court shall promptly order a *hearing*.⁸⁴

The most substantial reason for not requiring a hearing prior to commitment was the need for observation.⁸⁵ Once this need is satisfied, there remains no rational basis for denying a hearing.⁸⁶ Further-

82. 395 F.2d at 651-52.

83. VA. CODE ANN. § 19.1-239(1) (Cumulative Supp. 1968).

84. Hamann, *supra* note 15, at 97 (emphasis supplied).

85. Ragsdale v. Overholser, 281 F.2d 943. See also notes 29-32 *supra* and accompanying text.

86. Bolton v. Harris, 395 F.2d at 651.

more, acquittal by reason of insanity has no relevance whatever in the context of the opportunity to show whether a person is mentally ill *at all*.⁸⁷ Section 19.1-239(1) does not make the commission of a specified crime the basis for commitment. It makes acquittal the basis for commencing another proceeding to determine whether the defendant is presently insane or feeble-minded and that his discharge would be dangerous to public peace and safety or to himself. This is a new finding of fact (present insanity and dangerousness) that was not an ingredient of the offense of which the defendant was acquitted (insanity at the time of the offense).⁸⁸ Finally, lack of adjudication of present insanity for persons acquitted by reason of insanity is unquestionably "out of harmony with the awareness that [the Virginia legislature] has otherwise shown for safeguarding those suspected of mental incapacity against improvident confinement."⁸⁹

Whenever any patient civilly certified to a mental hospital for examination should be retained, in the superintendent's discretion, following examination, notice of such determination is served on the patient, and his legal counsel.⁹⁰ At or prior to the service of notice, the superintendent must inform the patient of his right to a hearing on the issue of his continued retention, his right to counsel, and his right to communicate with such attorney.⁹¹ A hearing shall be had if prior to the expiration of sixty days from the date of admission of the patient it is so requested by the patient, the attorney, any relative or a friend. At the hearing the court shall hear testimony and examine the person alleged to be mentally ill, and shall render a decision in writing as to the patient's mental condition and his need for continued hospitalization.⁹² Provisions are also made for appeal should the decision be adverse to the patient.⁹³

With the exception of the right to counsel,⁹⁴ section 19.1-239 provides none of the procedural safeguards in initial commitment that are afforded the civilly committed. Even this right in the commitment proceedings may be non-existent, since it is doubtful that the proceedings referred to in section 19.1-239.1 contemplate the decision-

87. Cf. *Baxstrom v. Herold*, 383 U.S. at 111.

88. Cf. *Specht v. Patterson* 386 U.S. at 608.

89. Cf. *Lynch v. Overholser*, 369 U.S. at 711.

90. VA. CODE ANN. § 37.1-79 (Cumulative Supp. 1968).

91. *Id.* § 37.1-80.

92. *Id.* § 37.1-81.

93. *Id.* § 37.1-84.

94. *Id.* § 19.1-239.1.

making process of section 19.1-239(1). If the right to counsel does exist, it may be severely limited, since the trial judge may forbid consultation if in his discretion such consultation would serve no useful purpose.⁹⁵ There is no right to appeal the decision of the court reached pursuant to section 19.1-239(1); appeal is limited to decisions of release.⁹⁶ If equal protection alone demands that commitment proceedings for persons acquitted by reason of insanity be "substantially similar" to civil commitment procedures, then section 19.1-239 must be construed to require the panoply of rights which the Virginia civil commitment statutes provide.

The Virginia criminal procedure has several minor differences with the civil commitment procedure. Under civil commitment, a court having jurisdiction of such cases in the county or city wherein the hospital is located shall hear the application for release.⁹⁷ Section 19.1-239(1) does not specifically state which court shall receive the report of the examining physicians, but the inference is that the court in which the defendant was acquitted shall also decide whether the defendant should be retained or released. Section 19.1-239(6), however, does specifically provide that no trial court other than the court which ordered the commitment of the person pursuant to paragraph (1) shall have jurisdiction to entertain any action seeking the release of persons committed pursuant to paragraph (1), whether the release is sought through application for a writ of habeas corpus or otherwise. Habeas corpus petitions by those civilly committed may be filed in the circuit court of the city in which the hospital is located, or in the circuit court in the city adjoining the county in which the institution is located.⁹⁸ These restrictions in the criminal procedure appear unobjectionable in that it "assures some degree of uniformity in the handling of each patient."⁹⁹

When a person's continued hospitalization is ordered after a hearing, the question of release procedures arises. In virtually all jurisdictions release is dependant upon the discretionary recommendation of the hospital superintendent or an administrative board with no requirement for periodic examinations of the person hospitalized, or the initia-

95. *Id.* § 19.1-239.1(b).

96. *Id.* § 19.1-239(6).

97. *Id.* § 37.1-81.

98. *Id.* § 37.1-104.

99. Hamann, *supra* note 15, at 73.

tion of habeas corpus proceedings by the patient.¹⁰⁰ *Bolton* deemed habeas corpus no longer adequate protection against unwarranted detention in view of *Baxstrom* and the 1964 Act.¹⁰¹ The court upheld the mandatory commitment statute release provisions which provide for release of the patient upon the hospital superintendent's discretionary decision; however, civil commitment procedural safeguards requiring periodic examination of the patient and a right to a court hearing if one of the examining physicians believes the patient should no longer be hospitalized were read into the statute under the equal protection doctrine.¹⁰²

Until 1966 in Virginia, a person committed to a mental institution following acquittal by reason of insanity was confined until the superintendent of that hospital and the superintendent of any other state hospital pronounced him sane and safe to be at large.¹⁰³ Release could be sought through initiation of habeas corpus proceedings by the patient.¹⁰⁴ The Virginia civil commitment discharge provision is devoid of those safeguards against unwarranted detention which are present in the District of Columbia civil commitment provisions. Section 37.1-98 provides that the superintendent may discharge any patient who, in his judgment, is recovered, is not mentally ill, is not recovered but whose discharge will not be detrimental to the public welfare or injurious to the patient.¹⁰⁵ Any person held in custody as mentally ill may by petition for a writ of habeas corpus have the question of the legality of his detention determined.¹⁰⁶

Obviously dissatisfied with the forced resort to habeas corpus for release as a supplement to discretionary institutional action, the Virginia legislature appropriately created a statutory procedure for release of persons committed after a successful insanity plea.

(2) If the superintendent of the State mental hospital in which a person is confined under paragraph (1) of this section is of the opinion that a person committed to his custody, pursuant to paragraph (1) of this section, is not insane or feeble-minded and may

100. For a compilation of statutes, see F. LINDMAN & D. MCINTYRE, JR., *supra* note 1, at 373-82; H. WEIHOFEN, *supra* note 25, at 376-89; see also Note, *supra* note 2, at 447-49.

101. 395 F.2d at 649.

102. *Id.* at 652.

103. VA. CODE ANN. § 19.1-239 (Supp. 1964).

104. *Id.* §§ 37-122, -123 (Replacement Volume 1960).

105. *Id.* § 37.1-98 (Cumulative Supp. 1968).

106. *Id.* § 37.1-103.

be discharged or released without danger to the public peace and safety or to himself, he shall make application for the discharge or release of such person in a report to the court by which such person was committed and shall transmit a copy of such application and report to the Commonwealth's attorney for the city or county from which the defendant was committed. Upon receipt of such application for discharge or release, the court forthwith shall appoint at least two qualified psychiatrists, one of whom shall be the superintendent of a State mental institution other than the one in which the person is confined, to examine such person and to report within sixty days their opinion as to his mental condition. To facilitate such examination and the proceedings thereon, the Commissioner shall transfer such person to the appropriate State mental institution located nearest the place where the court sits.

(3) If the court is satisfied by the application and report seeking the release or discharge of the committed person filed pursuant to paragraph (2) of this section and by the report or such testimony of the reporting psychiatrists, appointed pursuant to paragraph (2) of this section, as the court deems necessary, that the committed person is not insane or feeble-minded and that his discharge or release will not be dangerous to the public peace and safety or to himself, the court shall order his discharge or release. If the court is not so satisfied, it shall promptly order a hearing to determine whether the committed person is at that time insane or feeble-minded and to determine whether his discharge would be dangerous to the public peace and safety or to himself. Any such hearing shall be deemed a civil proceeding and the burden shall be on the committed person to prove that he is not insane or feeble-minded and that his discharge would not be dangerous to the public peace and safety or to himself. According to the determination of the court upon such hearing, the committed person shall thereupon be discharged or released or shall be recommitted to the custody of the Commissioner. It shall be the duty of the superintendent of the institution in which such person is confined, at yearly intervals commencing six months after the date of confinement, to make a report of such person's condition to the court from which he was committed.

....

(5) At yearly intervals commencing six months after the date of confinement, and not more frequently, a committed person may make application to the court by which he was committed

for his discharge or release and the procedure to be followed upon such application shall be the same as that prescribed above in the case of an application by the superintendent of the institution in which such person is confined.¹⁰⁷

The official comment to the Model Penal Code notes that applications by the patient are limited by what is thought to be the period necessary to observe him initially (six months) and by the interval probably necessary for a significant change in his condition to occur after any application has been denied (one year).¹⁰⁸ The one year ban also prevents nuisance requests for release. More importantly, an adverse decision on an application by the superintendent would not appear to affect the yearly filing right of the committed person.

A RECOMMENDATION

Paragraph (3) of the statute states that if the court is not satisfied with the application for release submitted by the hospital superintendent and the report of the examining psychiatrists appointed by the court, it shall order a hearing at which the burden shall be on the committed person to prove that he is not insane and that his discharge would not be dangerous to the public peace and safety or to himself. It would be more fitting to rewrite the release procedures by shifting the burden to the hospital authorities to prove the necessity for further hospitalization.¹⁰⁹ Paragraph (2) allows the superintendent to submit a report at any time; it is his duty to make yearly reports.¹¹⁰ A committed person may make application for release at yearly intervals, and not more frequently.¹¹¹ The yearly reporting requirement was obviously intended to force hospital superintendents to think not of confinement but of treatment and rehabilitation.¹¹² That bureaucratic actions tend to be slow, and danger exists that a person sane could be confined indeterminately were obviously factors the legislature considered in creating this statutory procedure for release.¹¹³ Of what greater benefit to the patient is this procedure than habeas corpus, if the patient has the burden of proving his eligibility for release? Where the superintendent

107. *Id.* § 19.1-239(2), (3), (5).

108. MODEL PENAL CODE § 4.08, comment (Tent. Draft No. 4, 1955).

109. *Cf. Lynch v. Overholser*, 369 U.S. at 734-35 (Clark, J., dissenting).

110. VA. CODE ANN. § 19.1-239(3) (Cumulative Supp. 1968).

111. *Id.* § 19.1-239(5).

112. *Cf. Hamann, supra* note 15, at 69.

113. *Id.* at 68.

and the examining psychiatrists recommend release but the court disagrees, the patient is placed on the horns of an even greater dilemma, for then the opinions of those who have had the greatest opportunity to examine and observe the patient become virtually worthless. "These doctrinal obstacles loom even larger in view of the difficulties which an indigent [patient] encounters in attempting to obtain expert psychiatric testimony. . . ." ¹¹⁴ Nor should a negative report by the superintendent and the reporting psychiatrists force the burden of proof upon the patient. Conservative opinions are fostered in hospital superintendents through fear of public criticism if premature release of the patient results in other criminal offenses. ¹¹⁵ Circumstances may divide the interest of the state psychiatrist and the patient. ¹¹⁶ Attempts by indigent patients to obtain expert testimony to rebut the opinion of the superintendent are often frustrating if not impossible. ¹¹⁷ The purpose of commitment is not punishment but protection and rehabilitation. ¹¹⁸ The issue at release is need for continued hospitalization. The state has greater resources and superior investigative facilities to prove this need than does the patient, usually indigent, to disprove it. Rules relating to burden of proof customarily take these factors into consideration. ¹¹⁹ Shifting the burden to the state to prove the necessity for further hospitalization would afford committed patients the full benefit of the statutory release procedure, and at the same time afford the public protection from improvident release of the dangerously mentally ill. ¹²⁰

The *Bolton* court upheld the release provision of the mandatory commitment statute even though they differed from the civil commitment procedures by authorizing court review of the hospital's decision to release a patient. "We do not think equal protection is offended by allowing the Government or the court the opportunity to insure that the standards for release of civilly committed patients are faithfully applied" in releasing persons committed who had been acquitted of crime by reason of insanity. ¹²¹ The same could be said of the Virginia civil and criminal differences.

114. Krash, *supra* note 16, at 946.

115. Note, *supra* note 2, at 449 n.134.

116. Cf. Hamann, *supra* note 15, at 76.

117. Note, *supra* note 2, at 449. See also Krash, *supra* note 16, at 946.

118. *Ragsdale v. Overholser*, 281 F.2d at 947. But see Szasz, *Psychiatry, Ethics, and the Criminal Law*, 58 COLUM. L. REV. 183, 196 (1958).

119. Krash, *supra* note 16, at 940.

120. Cf. *Lynch v. Overholser*, 369 U.S. at 734-35.

121. 395 F.2d at 652.

"A standard for [commitment and] release is central to a proper balancing of social and individual rights and interests." ¹²² *Bolton* held that commitment without a hearing was permissible to determine present mental condition. Thereafter, a hearing with procedures "substantially similar" to those in civil commitment was required to show that the "requirements for commitment, namely illness *and* dangerousness," had been met.¹²³ The standard for commitment expressed by *Bolton* was not substantially similar to the civil commitment standard. It was identical. "If the court or jury finds that the person is mentally ill and, because of that illness, is likely to injure himself or other persons if allowed to remain at liberty, the court may order his hospitalization." ¹²⁴ Modifying prior decisions, the court brought the standard for commitment as well as the standard for release in habeas corpus proceedings into conformity with the civil commitment standard.¹²⁵

That the standard for commitment in section 19.1-239(1) is even similar to the civil commitment criteria is doubtful. Following acquittal by reason of insanity and an examination period, the court shall order a person committed if satisfied that the defendant is insane or that his discharge would be dangerous to the public peace and safety or to himself.¹²⁶ In civil commitment, judicial certification to a hospital for examination results if the court finds sufficient cause to believe such person is or may be mentally ill.¹²⁷ Mentally ill "means any person afflicted with mental disease to such an extent that for his own welfare or the welfare of others, or of the community, he requires care and treatment." ¹²⁸ If a hearing is requested following the examination, the court shall render a decision in writing as to the patient's mental condition and his need for continued hospitalization.¹²⁹ Discharge results if the patient is recovered, is not mentally ill, or if not recovered but whose discharge will not be detrimental to the public welfare, or injurious to the patient.¹³⁰

Initial dissimilarities are recognizable and confusion engendered by the use of the terms insane and feeble-mindedness in section 19.1-239

122. Hamann, *supra* note 15, at 81.

123. 395 F.2d at 651.

124. D.C. CODE ANN. § 21-545(b) (1967).

125. 395 F.2d at 651, 653.

126. VA. CODE ANN. § 19.1-239(1) (Cumulative Supp. 1968).

127. *Id.* § 37.1-67.

128. *Id.* § 37.1-1.

129. *Id.* § 37.1-81.

130. *Id.* § 37.1-98.

and mental illness in the civil commitment provisions. Feeble-mindedness is defined in section 19.1-239(6) but there is no definition for the term insane. Editorial comments following the definitions in section 37-1 state that the revisors almost uniformly substituted the term mentally ill for the term insane in revising the Code. This would suggest that the use of insane in section 19.1-239(1) instead of mental illness was a revision oversight. The standards for commitment nevertheless remain substantially dissimilar under this interpretation. "The phrase welfare of others need not carry the same meaning as that attached to the term dangerous. It is conceivable that cases may arise in which the potential threat to the welfare of others dictates hospitalization even though the person involved is not judged to be dangerous."¹³¹ Moreover, civil commitment results only if the person is afflicted with a mental disease to such an extent that for his own welfare or the welfare of others he requires care and treatment.¹³² The terminology of section 19.1-239(1) invites an interpretation that the person will be committed if he is sane but dangerous or insane but not dangerous since the person will be committed if the court is satisfied that the defendant is insane or feeble-minded *or* that his discharge would be dangerous. Analysis of the release provisions invites a similar interpretation.¹³³

Although decided under former title 19, *Blalock v. Markley* lends support to this suggestion.¹³⁴ The court stated that the evidence showed that *Markley* was sane, but he had not been pronounced safe to be at large.¹³⁵

Despite the absence of explicit language in the District of Columbia Code section 24-301, the court of appeals has consistently required a determination of mental condition in deciding the question of dangerousness. In *Overholser v. Leach*, the court stated the standard as "freedom from such abnormal mental condition as would make the individual dangerous to himself. . . ." ¹³⁶ A proposed replacement to the Model Penal Code states that release or discharge without danger to the person or property of others shall require that a person released be unlikely as a result of his present mental condition to engage in offenses which would injure the person or property of others.¹³⁷ A similar construction of sec-

131. F. LINDMAN & D. MCINTYRE, JR., *supra* note 1, at 17.

132. VA. CODE ANN. § 37.1-1 (Cumulative Supp. 1968).

133. *Id.* § 19.1-239(3).

134. 207 Va. 1003, 154 S.E.2d 158 (1967).

135. *Id.* at 1006, 154 S.E.2d at 160.

136. *Overholser v. Leach*, 257 F.2d at 670.

137. Hamann, *supra* note 15, at 96.

tion 19.1-239 would bring the standard for mandatory commitment more in harmony with the civil commitment definition of mental illness.

If the "substantial similarity" test formulated in *Bolton* survives equal protection challenges, and the apparent dissimilarities in the Virginia procedures under the later interpretation escape question, there remains the task of articulating a more explicit definition of dangerousness, "the heart of the test for retention and release."¹³⁸ Such a task deserves recognition and acknowledgement of the competing and conflicting interests of the individual in liberty and society in protection. Proper assessment of the criteria for dangerousness demands that no penal or punitive considerations enter into the formulation. Protection of the public and rehabilitation of the person should guide the search for a formula which balances these competing interests.

Professors Goldstein and Katz would ask: "what kinds of behavior are sufficiently threatening to be called 'dangerous' . . . and with what degree of certainty must the prognosis establish the likelihood of the kind or kinds of behavior designated 'dangerous' occurring over what period of time?" Responses to the first question must be evaluated in relation to yet another question: "what behavior should be classified dangerous enough to authorize deprivation of liberty by continued detention in a mental institution . . .?"

Dangerous behavior might be construed to include: (1) only the crime for which the insanity defense was successfully raised; (2) all crimes; (3) only felonious crimes (as opposed to misdemeanors); (4) only crimes for which a given maximum sentence or more is authorized; (5) only crimes categorized as violent; (6) only crimes categorized as harmful, physical or psychological, reparable or irreparable, to the victim; (7) any conduct, even if not labelled criminal, categorized as violent, harmful, or threatening; (8) any conduct which may provoke violent retaliatory acts; (9) any physical violence towards oneself; (10) any combination of these.¹³⁹

The standard adopted in a proposed replacement draft to the Model Penal Code—release or discharge without danger to the person or property of others shall require that a person released or discharged be unlikely as a result of his present mental condition to engage in the reasonably foreseeable future in offenses which include physical vio-

138. *Ragsdale v. Overholser*, 281 F.2d at 949.

139. Goldstein & Katz, *supra* note 21, at 235.

lence which would injure the person or property of others—is deemed closest to the fifth factor mentioned above.¹⁴⁰

In *Ragsdale v. Overholser*, Judge Fahy, concurring, suggested danger comparable to the seriousness of the offense of which the committed person was acquitted, and if the offense is of a nonviolent character a more lenient approach to the question of danger is in order.¹⁴¹ But the court in *Overholser v. Russell* held that the danger to the public need not be possible physical violence or a crime of violence. It is enough if he commit any criminal act.¹⁴²

With regard to the second issue—with what degree of certainty must the prognosis establish the likelihood of the kinds of behavior designated dangerous occurring over what period of time — the District of Columbia Court of Appeals has held that the examining physician is not required to “give an absolute guarantee that the patient will never again be mentally ill or dangerous. Reasonable foreseeability . . . is the test.”¹⁴³ This test, however, confuses the issues of how certain the psychiatrist must be in a prognosis of future dangerousness occurring and within what period of future time should the prognosis be predicted. Another difficulty with the danger in the foreseeable future criterion is that psychiatrists are forced to make predictions which may be beyond their competence. Such predictions could result in the lifelong institutionalization of some individuals.¹⁴⁴

Bolton rejected a standard for commitment and release based upon dangerousness in the reasonably foreseeable future, substituting for it the civil commitment test of “likely to injure himself or others due to mental illness.”¹⁴⁵ The substantive law of civil commitment, however, provides little help in precise articulation of a definitive standard, for it is equally fraught with indefiniteness. Under the Virginia civil commitment standard, release would depend upon whether discharge would be detrimental to the public welfare, or injurious to the patient.¹⁴⁶ The shortcomings of this statutory criteria are no less so than those of dangerousness.¹⁴⁷

140. Hamann, *supra* note 15, at 84, 96.

141. 281 F.2d at 950.

142. 283 F.2d at 198.

143. *Rosenfield v. Overholser*, 262 F.2d 34, 35 n.1 (D.C. Cir. 1958).

144. Koller, *supra* note 66, at 750.

145. 395 F.2d at 651.

146. VA. CODE ANN. § 37.1-1 (Cumulative Supp. 1968).

147. See generally Greenwald, *supra* note 5, at 591.

As Professors Goldstein and Katz stated, "no criteria for 'dangerousness' have been precisely articulated."¹⁴⁸ To this Krash would add that "none of the solutions advanced is free from difficulty."¹⁴⁹ Recognition now of the existence of this problem in the Virginia commitment and release provisions will permit court and psychiatric experts to examine and to be aware of the values to be operative in future decisions balancing individual liberty and public safety.

CONCLUSION

As one legal writer said: "In applying civil standards to post-verdict commitment and release procedures, *Bolton* exhibited an admirable application of constitutional logic to correct an injustice based on unenlightened fears lightly concealed in legal semantics."¹⁵⁰ So could it be said of the Virginia legislature in enacting a more comprehensive commitment statute applicable to persons acquitted by reason of insanity. "Indeterminate detention not only threatens the liberty of the individual, but also the very existence of the defense of insanity."¹⁵¹ The possibility of a lengthy commitment probably caused many defendants to consider the alternative criminal conviction path.¹⁵² Today, however, the release policy for the insane may be favored over the parole policy for prisoners.¹⁵³ But the new commitment statute has not completely settled the matter of when and how persons acquitted by reason of insanity may be committed and eventually released. Their unfortunate plight may have been lessened, but the debate continues.

DONALD E. SCEARCE.

148. Goldstein & Katz, *supra* note 21, at 235.

149. Krash, *supra* note 15, at 946.

150. Note, *supra* note 23, at 1199.

151. Greenwald, *supra* note 5, at 591.

152. *Id.*

153. *Cf. Id.* at 592.