Catholic University Law Review

Volume 13 | Issue 1 Article 2

1964

Due Process and the Rights of the Mentally Ill: The Strange Case of Frederick Lynch

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In my studies of the care and treatment of the mentally sick . . . I had developed a respect for the power to distinguish between the word and the deed. I learned that many neologisms . . . were to old actualities what perfume was to the unbathed bodies of the Elizabethan court. No magical change came about in the treatment of mental patients when 'mental hospital' was substituted for 'insane asylum'. No stigma was . . . erased . . . when 'lunatics' and 'madmen' became classified as 'psychotics'. The old strait jacket held the same terrible power of confinement when it became known as the 'camisole'. . . . [C]ruel and unusual punishments were often inflicted on patients under such fancy names as 'hydrotherapy' and 'chemical restraint'.

DEUTSCH, OUR REJECTED CHILDREN, 12 (1950).

The history of liberty has largely been the history of observance of procedural safeguards.

JUSTICE FRANKFURTER for the Supreme Court, *McNabb* v. *United States*, 318 U.S. 332, 347 (1943).**

I

PRIOR TO HIS FIRST and only encounter with criminal justice in the District of Columbia or anywhere else, Frederick Lynch, a respectable realtor and one-time lieutenant colonel who had served with distinction in the Air Force, lived in one of Washington's more exclusive and fashionable neighborhoods.

On November 6, 1959, Frederick Lynch was arrested and charged in the then Municipal Court for the District of Columbia with a violation of the

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He gratefully acknowledges the research assistance of Messrs. Ronald Lenkin and Gordon Quist, now members of the District of Columbia bar and of Mr. Thomas Willging, a second year student at Catholic University Law School.

"Bad Check" Law of the District of Columbia.[1] Specifically, Frederick Lynch was charged with overdrawing his checking account by $100 with an intent to defraud, that intent being deemed inferrable by local law from his failure to make restitution within a period of five days after notice thereof.[2]

On November 29, 1959, Frederick Lynch, who, after a mental examination upon court order pursuant to D.C. CODE ANN. §24-30 (*a*),[3] had been pronounced mentally ill as of the time of the alleged offense but nonetheless competent to participate in the proceedings against him, sought to enter a guilty plea to the information against him. The presiding judge refused to accept the guilty plea and, acting over the objection of Frederick Lynch, duly represented by counsel, heard evidence upon the charges.[4]

In a trial in which the conventional positions of the participants were reversed, the defense sought to secure the "conviction" of Frederick Lynch, while the prosecution sought to secure his "acquittal"—significantly, by reason of insanity. Over the objection of Frederick Lynch, a government psychia-

[1] The Bad Check Law, D.C. Code Ann. §22-1410 (1961) reads as follows:

"Any person within the District of Columbia who, with intent to defraud, shall make... any check, draft, or order for the payment of money upon any bank or other depository, knowing at the time of such making... that the maker or drawer has not sufficient funds in or credit with such bank... shall be guilty of a misdemeanor and punishable by imprisonment for not more than one year, or be fined not more than $1,000, or both.... [The] making ... by such maker or drawer of a check, draft, or order, payment of which is refused by the drawee because of insufficient funds of the maker or drawer in its possession or control, shall be prima facie evidence of the intent to defraud and of knowledge of insufficient funds in or credit with such bank or other depository, provided such maker or drawer shall not have paid the holder thereof the amount due thereon, together with the amount of protest fees, if any, within five days after receiving notice in person, or writing, that such draft or order has not been paid." D.C. CODE ANN. §22-1410 (1961).

[2] Transcript of Record in the Supreme Court of the United States, pp. 25-26, Lynch v. Overholser, 369 U.S. 705 (1962).

[3] D.C. CODE ANN., §24-301 (a) (1961), which was in effect at the time of Frederick Lynch's trial, reads as follows:

"(a) Whenever a person is arrested, indicted, charged by information, or is charged in the juvenile court of the District of Columbia, for or with an offense and, prior to the imposition of sentence or prior to the expiration of any period of probation, 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 understand the proceedings against him or properly to assist in his own defense, the court may order the accused committed to the District of Columbia General Hospital or other mental hospital designated by the court, for such reasonable period as the court may determine for examination and observation and for care and treatment if such is necessary by the psychiatric staff of said hospital. If, after such examination and observation, the superintendent of the hospital, in the case of a mental hospital, or the chief psychiatrist of the District of Columbia General Hospital, in the case of District of Columbia General Hospital, shall report that in his opinion the accused is of unsound mind or mentally incompetent, such report shall be sufficient to authorize the court to commit by order the accused to a hospital for the mentally ill unless the accused or the Government objects, in which event, the court, after hearing without a jury, shall make a judicial determination of the competency of the accused to stand trial. If the court shall find the accused to be then of unsound mind or mentally incompetent to stand trial, the court shall order the accused confined to a hospital for the mentally ill." D.C. CODE ANN. §24-301 (*a*) (1961).

[4] Transcript of Record, *supra*, note 2, at pp. 2, 6, 7-11, 13-20.

trist, called at the behest of either the court or prosecution,[5] testified that Frederick Lynch had been a victim of mental illness as of the time of the overdrawn checking account and that his crime, if any, was the product of his illness.[6]

As a result of recent reverses, Frederick Lynch lacked the resources to secure independent psychiatric assessment of the claims concerning his mental health, propounded by the one psychiatrist who had thus testified against him. Accordingly, the judicial inquiry into Frederick Lynch's state of mind remained completely one-sided.

Frederick Lynch was thereupon—still over his objection—acquitted by reason of insanity.[7] Then and there, the court, without holding any hearing or making any determination as to Frederick Lynch's then existing state of mind or need for hospitalization, ordered his commitment to a mental institution pursuant to D.C. CODE ANN. §24-301 (*d*)[8] until such time as Frederick Lynch, pursuant to D.C. CODE ANN. §24-301 (*e*),[9] as interpreted by the Court

[5] The lack of a transcript in the Municipal Court proceedings precludes determination as to whether it was the court or the prosecution which called the psychiatrist in the case.

[6] Since no transcript of the proceedings in Municipal Court was available, it is fair to assume that the testimony of the government psychiatrist was substantially the equivalent of the letter which he furnished to the Court.

That letter read as follows:

"Dear Sir:

This patient was admitted to the District of Columbia General Hospital on November 6, 1959. On December 4, 1959 he was reported to the Court as being of unsound mind, and unable to understand the charges against him.

Since the time of our report, Mr. Lynch has shown some improvement and at this time appears able to understand the charges against him, and to assist counsel in his own defense. In my opinion he was suffering from a mental disease, i.e., a manic depressive psychosis, at the time of the crime charged. Such an illness would particularly affect his judgment in regard to financial matters, so that the crime charged would be a product of this mental disease.

At the present time Mr. Lynch appears to be in an early stage of recovery from manic depressive psychosis. It is thus possible that he may have further lapses of judgment in the near future. It would be advisable for him to have a period of further treatment in a psychiatric hospital.

Sincerely yours,

James A. Ryan, M.D.
Assistant Chief Psychiatrist."

Transcript of Record, *supra*, note 2, at p. 24.

[7] Transcript of Record, *supra*, 21, 25.

[8] D.C. CODE ANN. §24-301 (*d*) (1961) reads as follows:

"(d) 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 commission, the court shall order such person to be confined in a hospital for the mentally ill."

[9] D.C. CODE ANN. §24-301 (*e*) (1961) reads as follows:

"(e) Where any person has been confined in a hospital for the mentally ill pursuant to subsection (d) of this section, and the superintendent of such hospital certifies (1) that such person has recovered his sanity, (2) that, in the opinion of the superintendent, such person will not in the reasonable future be dangerous to himself or others, and (3) in the opinion of the superintendent, the person is entitled to his unconditional release from the hospital, and such certificate is filed with the clerk of the court in which the person was tried, and a

of Appeals, was judicially and psychiatrically deemed recovered from his illness and no longer prone to overdraw his checking account in the reasonably foreseeable future.[10] In so doing, the Municipal Court bypassed the procedural safeguards available to the citizen whose commitment is sought under the Civil Commitment Law.[11]

One is bound to observe at this point that there is no reason to believe that in overdrawing his checking account, Frederick Lynch had any intent what-

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copy thereof served on the United States Attorney or the Corporation Counsel of the District of Columbia, whichever office prosecuted the accused, such certificate shall be sufficient to authorize the court to order the unconditional release of the person so confined from further hospitalization at the expiration of fifteen days from the time said certificate was filed and served as above; but the court in its discretion may, or upon objection of the United States or the District of Columbia shall, after due notice, hold a hearing at which evidence as to the mental condition of the person so confined may be submitted, including the testimony of one or more psychiatrists from said hospital. The court shall weigh the evidence and, if the court finds that such person has recovered his sanity and will not in the reasonable future be dangerous to himself or others, the court shall order such person unconditionally released from further confinement in said hospital. If the court does not so find, the court shall order such person returned to said hospital. Where, in the judgment of the superintendent of such hospital, a person confined under subsection (d) above is not in such condition as to warrant his unconditional release, but is in a condition to be conditionally released under supervision, and such certificate is filed and served as above provided, such certificate shall be sufficient to authorize the court to order the release of such person under such conditions as the court shall see fit at the expiration of fifteen days from the time such certificate is filed and served pursuant to this section: *Provided*, That the provisions as to hearing prior to unconditional release shall also apply to conditional releases, and, if, after a hearing and weighing the evidence, the court shall find that the condition of such person warrants his conditional release, the court shall order his release under such conditions as the court shall see fit, or, if the court does not so find, the court shall order such person returned to such hospital."

[10] See Overholser v. Russell, 283 F. 2d 195 (D.C. Cir. 1960) for the Court of Appeals interpretation of §24-301 (*e*). For the action of the Municipal Court in this context see Transcript of Record, *supra*, note 2, at pp. 21, 25.

[11] The procedure for civil commitment in the District of Columbia is an exacting one. It is set forth in D.C. CODE ANN. §21-306-14 (1961).

The forcible hospitalization of a mental patient is initiated by a verified petition alleging insanity filed by "[a]ny person with whom ... [the] alleged insane person may reside, or at whose house he may be, or [by] the father or mother, husband or wife, brother or sister, or the child of lawful age of any such person, or the nearest relative or friend available, or the committee of such person, or [by] an officer of any charitable institution, home, or hospital in which such person may be, or any duly accredited officer or agent of the Board of Public Welfare, or any officer authorized to make arrests in the District of Columbia who has arrested any alleged insane person [found in any public place.]" D.C. CODE ANN. §21-310 (1961).

The verified petition must be "accompanied by the affidavits of two or more responsible residents [who have known the person whose commitment is sought], setting forth that they believe ... [such] person ... to be insane or of an unsound mind, ... that they believe such person to be incapable of managing his own affairs, and that such person is not fit to be at large or go unrestrained, and that if such person be permitted to remain at liberty, the rights of persons and property will be jeopardized or the preservation of public peace imperiled or the commission of crime rendered probable, and that such person is a fit subject for treatment by reason of his ... mental condition ..." D.C. Code Ann. §21-311 (1961).

The allegedly insane person is then entitled to an examination and hearing of his case by the Mental Health Commission. *Ibid.*

A report by the Mental Health Commission holding the patient to be insane calls for a District Court hearing on the matter with a jury trial—if demanded by the patient D.C. CODE ANN. §21-311, 312, 313, 314 (1961).

ever to defraud anyone. How explain then his consistent and persistent attempt to enter a guilty plea to the charge of passing the bad checks?

The short answer is probably that his counsel, apprehensive of the weight of the statutory presumption of intent to defraud in any trial which might be held and hopeful of a suspended sentence on a minor first "offense", advised his client to elect a guilty plea to avoid the danger of a sentence on a finding of guilty or commitment on an acquittal by reason of insanity after the assertion of the insanity defense by the court or prosecution.[12] The soundness of this view was in fact demonstrated by the very trial of Frederick Lynch.

Under established District of Columbia law, an acquittal by reason of insanity is conditioned upon the initial establishment of the substantive crime charged.[13] Frederick Lynch's "acquittal", therefore was based initially upon the finding that he had indeed been guilty of passing bad checks with intent to defraud. The intent to defraud under the circumstances seems to have been

[12] The atmosphere of a congested court of inferior jurisdiction is best perceived by a perusal of this table:

STATISTICAL SUMMARY OF THE BUSINESS OF THE MUNICIPAL COURT FOR THE DISTRICT OF COLUMBIA
COVERING THE FISCAL YEAR JULY 1, 1961 THROUGH JUNE 30, 1962
AND A COMPARISON WITH THE FISCAL YEAR JULY 1, 1960 THROUGH JUNE 30, 1961
Provided by the Chief Judge of the Municipal Court

Table 1
NUMBER OF NEW CASES FILED
During Fiscal Year July 1 1961 through June 30, 1962
as Compared with Fiscal Year July 1 1960 through June 30, 1961

	July 1, 1960 to June 30, 1961	*July 1, 1961 to June 30, 1962*	*Percentage of Increase or Decrease*
Criminal Division			
District of Columbia	31,720	36,059	+ 13.68
United States	8,694	8,501	— 2.22
Traffic	23,009	26,058	+ 13.25
Totals	63,423	70,618	+ 11.34
Civil Division			
Class M	37,044	21,998	— 40.62
Class C (Small Claims)	13,664	25,078	+ 83.53
Landlord and Tenant	87,854	92,103	+ 4.84
Domestic Relations	4,413	4,718	+ 6.91
Totals	142,975	143,897	+ .64
TOTAL CASES (Criminal and Civil)	206,398	214,515	+ 3.93
Monthly average of new cases	17,200	17,876	+ 3.93

The significance of these data becomes apparent from the fact that as of the time of the release of this table there were only 16 judges who sat on the Municipal Court of the District of Columbia.

[13] "Inherent in a verdict of not guilty by reason of insanity are two important elements, (a) that the defendant did in fact commit the act charged, (b) that there exists some rational basis for belief that the defendant suffered from a mental disease or defect of which the criminal act is a product." Ragsdale v. Overholser, 281 F. 2d 943, 949 (D.C. Cir. 1960).

"The general verdict of not guilty by reason of insanity... [carries] with it a finding, except for the question as to his sanity [that] defendant was guilty as charged." Rucker v. United States, 280 F. 2d 623, 625 (D.C. Cir. 1960).

inferred from the failure of Frederick Lynch to make restitution within a period of five days after notice that the checks had been dishonored.[14]

In a word, Frederick Lynch's proffer of a guilty plea may be reasonably interpreted as the product of a careful estimate of the existing situation under the inevitably swift procedures which have characterized so many of our congested and understaffed courts of inferior jurisdiction.[15] Certainly, the rational as well as humane resolution of the dilemma posed by Frederick Lynch would have been the dismissal of the charges coupled with arrangements for appropriate medical care which might or might not, in the light of available family resources, have included the initiation of civil commitment proceedings.[16] This, however, was not to be. Frederick Lynch was proceeded against as an accused criminal and subjected to the summary commitment process of the criminal court.

On his arrival at St. Elizabeths Hospital, home to the beneficiary of the successful insanity defense in the District of Columbia, Frederick Lynch who had been taken from the care of a private physician by the long arm of fate, was housed with 1,000 other mental patients in a ward which provided precisely two psychiatrists for their "care and treatment."[17]

His counsel, who sought to interview him at St. Elizabeths Hospital, pre-

[14] See *prima facie* evidence provision, contained in Bad Check Law as reproduced in note 1.

[15] The impression thus gleaned is confirmed by the results of recent research.

"In the densely populated case-load of the metropolitan court, there is a special danger that some of the cases will be completed too fast, so that perfunctory, routine disposition will be made of some problems that should receive more prolonged or more specialized attention in order to achieve a just disposition." Virtue, *The Two Faces of Janus: Delay in Metropolitan Trial Courts*, 328 Annals 126 (1960).

"The most direct reflection of the demographic phenomena referred to as 'metropolitanization' as translated into court conditions is the sheer overwhelming size of the caseloads in metropolitan courts." VIRTUE, SURVEY OF METROPOLITAN COURTS FINAL REPORT, 48 (1962).

[16] It is interesting to note that the concern of the prosecution for the maintenance of the unblemished civic record of the defendant did not become manifest at the commencement of the proceedings when the entry of a plea of *nolle prosequi* by the prosecution could have accomplished precisely that result.

Authoritative expression of the power of the prosecution to *nolle* a case has been furnished in these words:

"The prosecuting attorney at common law clearly has the power to enter a *nolle prosequi* from the return of the indictment, up to the beginning of the trial.

"[The] Federal Rules of Criminal Procedure did not take away the powers of the prosecuting attorney but required him to furnish a statement of reasons. Rule 50 provide[s]: "The Attorney General or the United States Attorney may file a dismissal of the indictment or information with a statement of the reasons therefor and the prosecution shall thereupon terminate..." ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL, 338-343 (1947).

See also Warner & Cabor, *Prosecution's Heavy Workload*, 50 HARV. L. REV. 583, 597 (1950) to the effect that "the prosecutor must determine not only whether there is sufficient evidence to justify a trial, but whether as a matter of policy he will *nolle prosequi* particular cases or classes of cases."

Civil Commitment proceedings would of course have been available to the prosecution after entering a plea of *nolle prosequi*. See, e.g., the language of the Court of Appeals on this score in Williams v. United States, 250 F. 2d 19, 26 (D.C. Cir. 1957).

[17] Lynch v. Overholser, Habeas Corpus 171-60 (D.D.C. 1960).

liminary to the filing of a habeas corpus petition in his behalf in the District Court, was informed that the "patient" was working on a vegetable patch in an outlying area of the hospital grounds and that he would be unavailable for several hours, irrespective of his legal needs.[18]

A habeas corpus petition attacking his commitment, was filed on June 13, 1960. It asserted that commitment of Frederick Lynch, pursuant to an involuntary insanity defense, as outlined above, violated due process of law. It further asserted that the commitment of Frederick Lynch circumvented the safeguards of the Civil Commitment Law.[19] In the words of the habeas corpus petition:

> [I]f this commitment be permitted to stand, the mere establishment of a reasonable doubt of mental health could result in the instant confinement in a mental hospital, without benefit of jury, Mental Health Commission or District Court proceeding, including jury trial, of any citizen facing the Municipal Court upon the basis of a parking ticket. The Court of Appeals has expressed itself in unambiguous terms upon this issue in *Williams v. Overholser,* 259 F. 2d 175 (D.C. Cir. 1958).

After a hearing upon the writ, held on June 16, 1960, the District Court held that an improper circumvention of the Civil Commitment Law had taken place in the Municipal Court. In the words of the District Court Judge:

> I don't believe that the Municipal Court had a right to convert . . . [t]he proceeding into a civil commitment proceeding, which is what it did. Therefore, I don't think the Municipal Court had jurisdiction to commit . . . [Frederick Lynch] to St. Elizabeths.[20]

In an order signed on June 27, 1960, the District Court sustained the writ and declared that "the Municipal Court lacked jurisdiction to effect such a commitment and thereby permit the government to obtain commitment of the petitioner as of unsound mind by use of a criminal proceeding in substitution for civil commitment procedures established by law . . . [and] . . . that petitioner, therefore, . . . [was] illegally detained at St. Elizabeths Hospital."[21]

[18] The above assertion is made by this writer on the strength of his experience of this episode as Frederick Lynch's counsel. The episode appears characteristic of the hospital milieu, described in a comparable context, in these words:

"In the mental hospital, the setting and the house rules press home to the patient that he is, after all, a mental case who has suffered some kind of social collapse on the outside, having failed in some over-all way, and that here he is of little social weight, being hardly capable of acting like a full-fledged person at all. These humiliations are likely to be most keenly felt by middle-class patients, since their previous condition of life little immunizes them against such affronts, but all patients feel some downgrading." GOFFMAN, ASYLUMS 151-2 (1961).

[19] Transcript of Record, *supra,* note 2, at pp. 3-5.

[20] *Id.,* p. 18.

[21] *Id.,* p. 20.

The District Court order, directing the release of Frederick Lynch, however, was stayed pending an appeal therefrom by the prosecution.[22]

The office of the public prosecution, as appellant, filed a brief attacking the District Court's order directing the release of Colonel Lynch as erroneous. In so doing it claimed that the Municipal Court exercised an unquestionable discretion in rejecting a guilty plea and went on to assert that a duty was in fact incumbent on the Municipal Court to reject the guilty plea in the light of such information of mental disorder as was made available to it. It declared that the fact that Frederick Lynch might be kept confined within St. Elizabeths Hospital for a period longer "than the maximum imprisonment possible under the offenses to which he desired to plead guilty," was not relevant to a determination of the legality of his detention. It then went on to assert that the purpose of hospitalization was both to provide Lynch with facilities for treatment and rehabilitation as well as to protect him and the public and went on to argue:

> Neither the ends of justice demanded by society nor appellee's rights as an individual citizen would have been properly served had he been tried on the charges and no effort made to disclose his mental condition when the acts were committed. This is not to say there is such a duty upon the courts of the Government in every criminal case, but certainly it arises in those situations falling within the doctrine of the *Winn, Blunt* and *Williams* cases.[23]

Addressing itself to Frederick Lynch, it concluded as follows:

> Therefore, accepting for the sake of argument the appellee's allegation of 'a stigma of insanity,' acceptance of his guilty pleas would have created a double stigma—conviction of crime and insanity.
>
> In sum, the way of justice is clear. There can be no moral justification for a judge of any court permitting an accused to plead guilty to a crime when the judge had excellent reasons to believe the accused did not have the mental capacity to commit the offense. To hold otherwise would be to violate one of the basic tenets of criminal law, and would have the courts and the Government standing idly by while a man went to prison who was mentally ill when he committed the acts charged and who was in need of hospitalization. True, he was competent to be tried. But he was still suffering from mental illness despite his competency to stand trial. This Court has unequivocally held that 'The standard of measurement of competency to stand trial is different from the standard of measurement for responsibility for a criminal act.' . . . Therefore, it appears that if the Municipal Court was wrong in the instant case, it would not matter what criteria or tests were used to measure criminal responsibility when the accused is competent to stand trial and wants to plead guilty. It could be the Durham

[22] *Ibid.*

[23] Overholser v. Lynch, No. 15859, U.S. Court of Appeals for the District of Columbia Circuit, Brief for Appellant, p. 20.

> rule, the 'right and wrong' standard, and indeed, even the 'wild beast test'; so long as the accused standing before the court was mentally competent to be tried, he could plead guilty and go to prison. This result does not square with the public policy of treating such persons as appellee, who are seriously disturbed mentally and are in present need of treatment for their own good as for the good of society.
>
> It necessarily follows that the Municipal Court was correct in refusing appellee's pleas of guilty and in hearing the testimony—including that of the psychiatrist. The Court did not lose its jurisdiction nor abuse its discretion at any time in the proceedings. In finding appellee not guilty by reason of insanity, the Court followed existing law; and in ordering appellee committed to St. Elizabeths Hospital, the Court obeyed the mandate of § 301(d).[24]

The government's mechanistic interpretation suggested the possibility of the transformation of a prison into a hospital by the painting of the legend "hospital" upon the guarded portals of the prison building.

Inevitably it called for the rejoinder in appellee's brief that a loss of liberty was a loss of liberty whatever the auspices under which it was inflicted. It also led appellee to inquire in his brief as to whether the facilities at St. Elizabeths Hospital were indeed "therapeutic" in view of the fact that St. Elizabeths Hospital had never met the standards of the American Psychiatric Association and to raise the question as to whether St. Elizabeths Hospital was in fact "a fit place for human habitation."

A flurry of publicity following the filing of the brief resulted in a newspaper investigation of conditions at St. Elizabeths Hospital. The investigation provided a picture typical of the public mental hospital systems[25] with which responsible investigators have long been acquainted.[26]

On January 26, 1961, the United States Court of Appeals reversed the District Court order and sustained the commitment of Frederick Lynch by the Municipal Court as a proper exercise of judicial discretion.

In an action without precedent in the nation, the United States Court of Appeals for the District of Columbia Circuit held:

[24] *Id.*, pp. 25-26.

[25] "An inscribed stone is imbedded in the threshold of a building at St. Elizabeths Hospital —home to some 7000 of the mentally sick.

"It reads: Built, 1853-54; repaired, 1872.

"One of the building's crowded men's wards is a kind of all-purpose room used for sleeping, eating and watching TV. Some of the patients pace it among a profusion of tables, beds, and benches. Others are frozen into a tableau; their eyes closed in almost endless sleep or focused on the 17-inch screen.

"The only bath is a shower with leaky joints bound by rags which fail to keep the water from squirting into the center of the room where it forms a puddle.

"The walls are heavy with layers of paint, which peel and buckle like paper. The human odors have so permeated the century-old woodwork that they defy the strongest of modern detergents." Washington Post, November 27, 1960, p. A-1.

[26] See, e.g., DEUTSCH, THE SHAME OF THE STATES (1948).

1. That a defendant could be validly denied the right of entering a guilty plea to a misdemeanor even though it was conceded that he was mentally competent to participate in the proceeding against him and there was no question of coercion or undue influence, and even though defendant was effectively assisted by counsel who advised the entry of a guilty plea;

2. that an insanity defense could be thrust upon the defendant by either court or prosecution upon the basis of a history of some mental illness; and

3. that upon acquittal by reason of insanity upon the basis of a reasonable doubt as to defendant's mental health as of the time of the misdemeanor in question, the defendant was properly subject to indefinite confinement in a lunatic asylum without any hearing as to his then existing mental state.

It declared that the case law of the District of Columbia established "almost a positive duty on the part of . . . [a] trial judge not to impose a criminal sentence on a mentally ill person."[27] It went on to explain that hospitalization of such a mentally ill person pursuant to District of Columbia law was "remedial and that its limitations . . . were determined by the condition to be treated."[28]

Three dissenters—viz., Judges Fahy, Edgerton and Bazelon, declared that Frederick Lynch and his counsel "were . . . confronted with a serious situation [affecting Frederick Lynch] in the Municipal Court, and the record does not show that they were given reasonable opportunity to cope with it by showing . . . [Frederick Lynch] was not of unsound mind when the checks were cashed." They went on to declare that "[i]n the absence of that opportunity there could be no valid finding that he was not guilty by reason of insanity."[29]

They based their dissent, however, in large part on the assumption that the dangerousness capable of barring the release of Frederick Lynch under §301 (*e*) was not the dangerousness of any unlawful conduct, however minor, but a dangerousness conveying "the idea of physical danger to persons and, perhaps, to property."[29a]

Shortly before this decision of the Court of Appeals was handed down, Frederick Lynch had been given a "conditional release" from St. Elizabeths Hospital. He appeared, at that time, shunned by many of his erstwhile friends or acquaintances. He was also unable to secure employment commensurate with his ability and experience. Once every three weeks he was required to report to a medical officer at St. Elizabeths Hospital.

Further personal difficulties coincided with an apparent deterioration in his health.

The sanguine prediction made by the majority of the Court of Appeals that "[n]ow . . . [that Frederick Lynch] has received treatment he is well on the way

[27] Overholser v. Lynch, 288 F. 2d 388, 393 (D.C. Cir. 1961).
[28] *Id.*, at p. 394.
[29] *Id.*, at p. 395.
[29a] Overholser v. Lynch, *supra*, note 27 at 397.

to unconditional release without the probability of repeat offenses" was not borne out by subsequent events. Several relatively minor worthless checks, drawn upon his own account, appear to have been made out by Frederick Lynch as his condition deteriorated. Accordingly, the conditional release was revoked on April 7, 1961, on the strength of the original Municipal Court order which had been upheld by the Court of Appeals.[30]

A petition for certiorari was filed with the Supreme Court at about that time. Certiorari was granted by the Supreme Court on June 19, 1961.

Both a violation of due process of law and the circumvention of the civil commitment law were charged by the petitioner in his brief.

As explained by Justice Harlan, "[i]n essence the [constitutional] claim ... [was] that §24-301(*d*)compels the indeterminate commitment of ... a person [acquitted by reason of insanity] without any inquiry as to his present sanity, and solely on evidence sufficient to warrant a reasonable doubt as to his mental responsibility as of the time he committed the offense charged. The claim ... [was] said to be buttressed when §24-301(*d*) is taken in conjunction with the rigorous release-from-confinement provisions of §24-301(*e*) as construed by the Court of Appeals. ..."[31]

Significantly, the due process implications of denial of the right to enter a guilty plea and the subjection of an individual defendant to an involuntary defense were also raised as was the question of the right of effective assistance of counsel.

The petitioner also complained of the denial of "medical due process" as a result of the prevailing conditions at St. Elizabeths Hospital. In brief, the petitioner asserted that the deprivation inflicted upon him was compounded by the fact that his restoration to society was dependent primarily upon the almost unlimited discretion of an overburdened hospital staff devoid of adequate therapeutic resources. He asserted as well that no commitment to a mental institution could be deemed constitutionally justifiable save upon the assumption that the person so committed would receive adequate psychiatric treatment and rehabilitation and that since such treatment and rehabilitation were not being afforded to petitioner, this assumption was untenable in his case.

The evasion of the civil commitment safeguards was raised in a manner substantially identical with that observed in the District Court.

The American Civil Liberties Union filed an independent *amicus* brief, urging the reversal of the judgment of the Court of Appeals. It relied in part on the due process clause but strongly suggested the avoidance by the Supreme Court of the constitutional issues by reliance upon statutory interpretation.

[30] See United States v. Lynch, U.S. 7736-59 and U.S. 7737-59 in the Municipal Court for the District of Columbia.

[31] Lynch v. Overholser, 369 U.S. 705, at 710, n. 5 (1962).

On May 21, 1962, the Supreme Court held Frederick Lynch's commitment by the Municipal Court to be null and void. It reversed the judgment of the Court of Appeals and remanded the case to the District Court. Speaking for the Supreme Court, Justice Harlan declared that it was unnecessary to consider the "constitutional claims" raised by the petitioner and proceeded to announce that the Supreme Court "read §24-301(*d*) as applicable only to a defendant acquitted on the ground of insanity, who affirmatively relied upon a defense of insanity and not to one, like the petitioner who has maintained that he was mentally responsible when the alleged offense was committed."[32]

He further explained that §24-301(*d*) could not be construed as "requiring a court, without further proceedings, automatically to commit a defendant, who, as in the present case, has competently and advisedly not tendered a defense of insanity to the crime charged and has not been found incompetent at the time of commitment. . . ."[33]

He concluded that "it was not Congress' purpose to make a commitment compulsory, when, as here, an accused disclaims reliance on a defense of mental irresponsibility."[34] In a word, Frederick Lynch was held entitled to his freedom on the basis of the record before the Supreme Court.

Whether as part of the holding, or as an explanation thereof, Justice Harlan went on to declare:

> This does not mean, of course, that a criminal defendant has an absolute right to have his guilty plea accepted by the Court. As provided in Rule 11, Fed. Rules Crim. Proc. and Rule 9, D. C. Munic. Ct. Crim. Rules, the trial judge may refuse to accept such a plea and enter a plea of not guilty on behalf of the accused. We decide in this case only that, if this is done, and the defendant, despite his own assertion of sanity, is found not guilty by reason of insanity, §24-301 (d) does not apply. If commitment is then considered warranted, it must be accomplished by resorting to §24-301 (a) or by recourse to the civil commitment provisions in Title 21 of the D.C. Code.[35]

Justice Harlan, however, did not stop at this, but suggested the possible use of D.C. CODE ANN. §24-301 (*a*) as a basis for commitment of an individual, acquitted by reason of insanity over his protest.

Section 24-301 (*a*) was interpreted by Justice Harlan, in this context, as providing:

> a procedure for confining an accused who, though found competent to stand trial, is nonetheless committable as a person of unsound mind. That section permits the trial judge to act 'prior to the imposition of sentence or prior to the ex-

[32] *Id.*, at p. 710.
[33] *Id.*, at p. 711.
[34] *Id.*, at p. 719.
[35] *Id.*, 719-21.

> piration of any period of probation,' if he has reason to believe that the accused 'is of unsound mind *or* is mentally incompetent so as to be unable to understand the proceedings against him.' . . . The statute provides for a preliminary examination by a hospital staff, and then 'if the court shall find the accused to be then of unsound mind or mentally incompetent to stand trial, the court shall order the accused confined to a hospital for the mentally ill.' . . . This inquiry, therefore, is not limited to the accused's competence to stand trial; the judge may consider as well, whether the accused is presently committable as a person of unsound mind. Since this inquiry may be undertaken at any time 'prior to the imposition of sentence,' it appears to be as available after the jury returns a verdict of not guilty by reason of insanity as before trial.[36]

Justice Clark dissented.[37]

II

The proceedings against Frederick Lynch raise fundamental questions for the administration of justice in a free society.

What, since *Lynch,* is the status of the right to waive personal defenses, or enter a guilty plea? What, if any, "sea-change" has the concept of competency undergone as a consequence of *Lynch*? And what, if any, are the repercussions of *Lynch* on fairness in commitment proceedings in general?

An extraordinary change in ancient procedure is implicit in denial of the right of waiver of personal defenses, exemplified by the Municipal Court action and approved by the Court of Appeals.

Constitutional safeguards have consistently been held subject to waiver by the courts.[38]

In enunciating a proposition, never seriously disputed until *Lynch,* the United States Court of Appeals for the Fifth Circuit declared:

> It seems thoroughly established that an intelligent accused may waive any constitutional right that is in the nature of a privilege to him, or that is for his personal protection or benefit.[39]

Courts which had occasion to consider the issue had held emphatically that the insanity defense could solely be asserted by the defendant.

A unanimous Supreme Court of the State of Colorado declared:

> Under no circumstances can the Court, on its own motion, enter the plea of not

[36] *Id.,* 718-19.

[37] Justice Clark dissented, asserting that the decision in *Lynch* undermined Congress' "humanitarian purpose of affording hospitalization for those in need of treatment." Lynch v. Overholser, *supra,* note 27, at 721 (1962).

[38] See, *e.g.,* Patton v. United States, 281 U.S. 276 (1930); Raffel v. United States, 271 U.S. 494 (1926); Edwards v. United States, 256 F. 2d 707 (D.C. Cir. 1958); United States v. Sturm, 180 F. 2d 413 (7th Cir. 1950).

[39] Barkman v. Sanford, 162 F. 2d 592, 594 (5th Cir. 1947).

> guilty by reason of insanity. Such a plea is in the nature of confession and avoidance ... [T]he defense can only be raised by special plea.[40]

The law of England is "that the issue of insanity at the time of the offence may not be raised either by the Judge or by the prosecution, but only by the defence."[41]

As expressed by the Lord Chief Justice of England, for the Court of Criminal Appeals, in *Rex. v. Oliver*:

> The question came up seven or eight years ago, when a practice arose of the Crown calling the prison doctor to prove insanity. All the Judges met and resolved that it was not proper for the Crown to call evidence of insanity, but that any evidence in the possession of the Crown should be placed at the disposal of the prisoner's counsel to be used by him as he thought fit.[42]

Underlying the traditional practice as thus set forth is the fear of the oppressive results of a successful insanity defense through interference with the trial strategy of the defendant.

The Royal Commission in its Report on Capital Punishment noted, in commenting upon existing English practice, the oppressive results of any invocation of the insanity defense by anyone other than the defendant. It noted that a defendant who was attempting to set up a defense such as provocation would be seriously and unfairly prejudiced if the prosecution were to be allowed to present evidence as to the defendant's insanity.[43] The obvious reason is that an insanity defense could be used by the prosecution, not so much to secure the acquittal of the defendant as to nullify such a defense as that he, as a reasonable man, had grounds to take certain defensive action or that he was reasonably provoked.

In considering possible objections to the practice exemplified by *Rex v. Oliver*,[44] the Royal Commission concluded:

> ... [T]here are not sufficient grounds to justify us in recommending such a fundamental change in English judicial procedure. Cases in which an insane prisoner declined to plead insanity, and those in which the defence may be embarrassed by pleading simultaneously both insanity and another defence, are not likely together to amount to more than one or two a year. It is a fundamental principle of criminal jurisprudence that a long established procedure should not be altered unless there are very strong reasons for doing so, and in this matter the proposed

[40] Boyd v. People, 108 Col. 289, 116 P. 2d 193, 195 (1941). In that case, the Court reversed an order committing an accused to a mental hospital. The specific basis for reversal was the holding that the accused had been improperly acquitted by reason of insanity because the trial court had, *sua sponte*, entered a plea of not guilty by reason of insanity.

[41] See ROYAL COMMISSION ON CAPITAL PUNISHMENT, REPORT, §443 (1953).

[42] Rex v. Oliver, 6 Crim. App. R. 19, 20 (1910).

[43] See *supra*, note 41 at §§448, 454.

[44] 6 Crim. App. R. 19 (1910).

> remedy would be altogether disproportionate to the mischief it is designed to cure.... [It] would [therefore] not be desirable to give the prosecution power to raise the issue of insanity against the wishes of the defence.[45]

One is bound to add that the insanity defense is by no means the only defense which could be used by the prosecution to defeat the interests of the defendant. The prosecution, for example, could assert with equal ease the defense of alibi. Thus, a guilty plea to a traffic violation might be barred upon the representation by the prosecution that the defense of alibi should be submitted to the Court. Following the procedure, condoned by the Court of Appeals in *Lynch,* the prosecution might then attempt to show that the defendant could not have been guilty of the violation in question because precisely at the time of the alleged violation he was engaged in sabotaging military installations, attending a meeting called by a Communist-infiltrated group, or keeping an illicit tryst with a neighbor's wife.

While, of course, no conviction could be obtained under such circumstances, the deprivation inflicted upon the defendant by this "defense" would constitute punishment infinitely more severe than any that could be inflicted after conviction upon the charge in question. This is transformation of the accusatorial into the inquisitorial system of justice without even the safeguards of the latter.[46]

The *Lynch* opinion of the Court of Appeals signified the repudiation of the right of waiver of personal defenses at least insofar as the insanity defense was involved.

[45] *Op cit., supra,* note 43, §§453-454.

Addressing itself entirely to the subject of capital crime, the Royal Commission did recommend granting the power of invoking the insanity defense to the judge, as distinct from the prosecution. ROYAL COMMISSION ON CAPITAL PUNISHMENT, REPORT §454.

[46] See generally ESMEIN, A HISTORY OF CONTINENTAL CRIMINAL PROCEDURE (1913).

The loss of role of counsel, as traditionally understood under Anglo-American law, is not an inconsequential by-product of this "sea-change" in ancient procedures.

It would seem that if "the guiding hand of counsel" is not to be denied, counsel should provide an informed estimate of a client's chances of acquittal and the likelihood of leniency in sentencing upon a guilty plea and advise his client accordingly. See, *e.g.,* Comment, *The Influence of the Defendant's Plea on Judicial Determination of Sentence,* 66 YALE L. J. 204 (1956). Clients have traditionally depended on such advice. To deprive an accused of the right to follow the advice of counsel in these matters is to deprive him of a substantial personal benefit, traditionally linked to Sixth Amendment rights and never heretofore challenged in the courts.

Perhaps the most celebrated case highlighting the nature of such a benefit to a client is the Loeb-Leopold case of 1924. As a matter of calculated strategy Clarence Darrow advised his clients to enter guilty pleas to charges of murder in the first degree. It seems plain that to have rejected the guilty pleas in that case would have deprived defendants of the benefit of the best legal judgment of the time, and, in all likelihood, of their lives as well. See WEINBERG, ATTORNEY FOR THE DAMNED, 23-24 (1957).

It is ominous that the restriction of counsel's role in this context should have been justified by the prosecution by reference to a purported supervening public interest.

Cf. Ex parte Hodges, 166 Crim. App. 433, 314 S.W. 2d 581 (Tex. 1958) as exemplifying a more traditional judicial view concerning loss of counsel as a consequence of an individual submission of defendant to an inquiry into his mental health in a criminal court case.

Whether by dictum or by holding, the Supreme Court appears to have put its *imprimatur* upon this phase of District of Columbia jurisprudence.

An equally extraordinary change in ancient procedure is implicit in the denial of the right of a defendant to enter a guilty plea in a pending criminal proceeding.

Specifically, common law practice has secured to the defendant the right to enter a guilty plea, once it is clear that he is mentally competent to do so and that his acton is voluntary.

To be sure, Archbold declared it to be sound judicial practice to warn the defendants before the bar of justice as to the consequences of a guilty plea. Immediately, however, he went on to declare:

> If... they still persist in their plea of guilty, it is then recorded... and in the record, when made up, the judgment... follows the plea.[47]

The common law rule has been decisively enunciated as follows:[48]

> Undoubtedly a prisoner of competent understanding, duly enlightened, has the *right* to plead guilty instead of denying the charge. (Emphasis supplied.)[49]

The right to enter a guilty plea has been repeatedly recognized by state courts. Thus, in substantially identical language state courts have held time and again that "[i]n a criminal prosecution a defendant has a right to plead guilty...."[50] The matter has been stated incisively by the Supreme Court of the State of Iowa in these terms:

> It matters not whether the defendant is in fact guilty, the plea of guilty is just as effectual as if such was the case. Reasons other than the fact that he is guilty may induce a defendant to so plead, and thereby the state may be deprived of the services of the citizen, and yet the state never actively interferes in such a case, and the right of the defendant to so plead has never been doubted. He must be permitted to judge for himself in this respect.[51]

Speaking for the United States Supreme Court, Justice Butler declared:

> A plea of guilty differs in purpose and effect from a mere admission or an extra-judicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sen-

[47] I ARCHBOLD, A COMPLETE PRACTICAL TREATISE ON CRIMINAL PROCEDURE, 355-356 (Waterman ed. 1860).

[48] II BISHOP, NEW CRIMINAL PROCEDURE, §795 (1913).

[49] Blackstone can be quoted in support of the common law rule as enunciated above: "Upon a simple and plain confession, the court hath nothing to do but to award judgment; but it is usually very backward in receiving and recording such confession, out of tenderness to the life of the subject; and will generally advise the prisoner to retract it, and plead to the indictment." 4 BLACKSTONE, COMMENTARIES 329 (Cooley ed. 1899).

[50] Williams v. State, 89 Okla. Crim. 95, 205 P. 2d 524, 542 (1949); Canada v. State, 144 Fla. 633, 198 So. 220, 223 (1940); Pope v. State, 56 Fla. 81, 47 So. 487, 488 (1908).

[51] State v. Kaufman, 51 Iowa 578, 2 N.W. 275, 276 (1879).

> tence. Out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences.[52]

Yet another succinct and authoritative summary is provided by the Court of Appeals for the Sixth Circuit in these terms:

> But while the right of everyone to have his cause tried, or to be tried himself if accused of crime, by a jury, is guaranteed and established beyond the power of the legislature to abridge it, the Constitution does not compel anyone to exercise the right thus secured; and there is no reason whatever to suppose that its makers designed to repeal or alter the moss-grown rule of the common law, 'by which a party indicted for an offense, however grave in its nature, may enter a plea of guilty thereto, if he sees fit so to do. . . .'[53]

The only valid exception to this "moss-grown rule of the common law" is found in various statutory enactments, barring the acceptance of the guilty plea to capital crimes.[54]

The invocation of the alleged powers conferred upon the trial judge by the terms of Rule 9 of the Municipal Court in the District of Columbia, an exact replica of Rule 11, FED. R. CRIM. P., in no way changes this result. The language of the Rule is self-explanatory. "A defendant *may* plead . . . guilty." (Emphasis supplied.) Only for the plea of *nolo contendere* does he require "the consent of the court." Significantly, the Rule then goes on, "[t]he court may refuse to accept a plea of guilty"—but the scope of this power is directly delimited by linking it in immediate sequence to a clause that it "shall not accept the [guilty] plea without first determining that the plea is made voluntarily with understanding of the nature of the charge." The intent that emerges is clearly one of affording the power of the court the necessary latitude in cases of reasonable doubt that the plea is made voluntarily with understanding of the nature of the charge and not in any case.

The Notes of the Advisory Committee on the Federal Rules of Criminal

[52] Kercheval v. United States, 274 U.S. 220, 223 (1927).

[53] West v. Gammon *et al.*, 98 F. 426, 428 (6th Cir. 1899). See also Opinion of Justices, 9 Allen (Mass.) 585 (1866).

[54] See, *e.g.*, N.Y. CODE CRIM. P. §332 (1889).

No valid analogy is possible between the *Lynch* rule and the statutory bar against a guilty plea in capital prosecutions. The death penalty case is a warranted exception. In that exceptional situation, denial to defendant of the waiver of his rights cannot conceivably operate to the defendant's prejudice. Moreover, there is a world of difference between a statutory enactment, uniformly rejecting a guilty plea and providing for a trial in all cases of capital crimes, and a judge-made law, allowing for judicial discretion in the imposition of an insanity defense on a competent and recalcitrant defendant upon some evidence of insanity and then permitting incarceration of that defendant in a lunatic asylum on the basis of a doubt as to his mental health. The former exemplifies a government of laws, zealous in the protection of individual rights; the latter, a government of men permitting the transformation of the shield of the insanity defense into the sword of the prosecution in effecting the indefinite confinement of the accused without significant safeguards.

Procedure make it plain that the rulemakers sought merely the reenactment of previously established common law practice and sought to safeguard the defendant against the effects of duress and lack of understanding.[55]

It would seem plain that the Court's discretional power to reject the guilty plea had heretofore been always limited to action designed to secure the protection of the accused; no authority has heretofore been granted to a court to reject the guilty plea with a view to prejudicing the accused and helping the prosecution.

By declaring, whether by holding or dictum, that reversal of the *Lynch* commitment did "not mean, of course, that a criminal defendant has an absolute right to have a guilty plea accepted by the court", without outlining in any manner the specific circumstances under which a guilty plea might validly be rejected, as in cases of incompetency or duress, Justice Harlan left in doubt the previously unquestioned common law interpretation of Rule 11 of the Federal Rules of Criminal Procedure—a matter which, it is hoped, will be clarified by the new draftsmen of the Federal Rules.[56]

A change as extraordinary as either of the two foregoing is the apparent transformation of the concept of competency—a concept connoting freedom of choice within broad rather than narrow limits.

Such a concept would seem incompatible with a practice permitting denial of the right of waiver of defenses or of the entry of a guilty plea encountered in the case of Frederick Lynch. If competency is to remain meaningful, the defendant cannot be denied the right of choice as was done in *Lynch*.[57]

This concept of competency appears fundamental to a democratic jurisprudence which by definition affords wide latitude to individual volition. The rejection of this concept of competency has been heretofore encountered solely in the framework of totalitarian jurisprudence. An enforced "therapeutic" program has indeed—as pointed out by Dr. Thomas Szasz—been furnished for the Soviet citizen under Soviet law. Imposition of an involuntary insanity defense is thus consistent with both the letter and spirit of Soviet law.[58] Fun-

[55] See 18 U.S.C.A. FED. R. CRIM. P., Rule 11, Notes of Advisory Committee on Rules. See also Fogus v. United States, 34 F. 2d 97 (4th Cir. 1929), specifically cited by the Advisory Committee as illustrative of its intent and involving solely the question of whether a guilty plea has been freely and voluntarily entered "by a person of competent intelligence . . . and with a full understanding of its nature and effect, and of the facts on which it is founded." *Id.*, 98.

[56] The work of a new advisory committee on the Criminal Rules has thus far failed to deal with the implication of the *Lynch* case for Rule 11, FED. R. CRIM. P. See, COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE (December, 1962). See also 31 F.R.D. 669 (1962).

[57] State v. Kaufman, 51 Iowa 578, 2 N.W. 275, 276 (1879).

[58] See, *e.g.*, CRIM. CODE OF THE R.S.F.S.R., Article 11 (1961) and CODE OF CRIM. PROC. OF THE R.S.F.S.R., Sec. 8, ch. 33, Article 44 (1961) as reproduced by the United States Joint Publication Research Service.

damental to such an approach is a mood of paternalism which does not augur well for the preservation of individual rights. For in brief:

> The Soviet litigant or accused is treated less as an independent possessor of rights and duties who knows what he wants and must stand or fall on his own claim or defense than as a dependent member of the collective group, a youth whom the law must not only protect against the consequences of his own ignorance but must also guide and train. The Soviet judge may upbraid or counsel those who come before him, explaining to them what is right and what is wrong. The atmosphere of the trial may approximate that of our juvenile or domestic relations courts.[59]

What has been said about the repudiation of time-honored principles with regard to waiver must now be repeated in the discussion of the limitation of the freedom of the defendant in the criminal trial. Again, whether by holding or by dictum the Supreme Court appears to have supported the Court of Appeals.

The commitment procedures to which Frederick Lynch was subjected under District of Columbia law were extraordinary too in the sense that they denied the person threatened with the loss of liberty the rudimentary rights deemed essential in any hearing aimed at the control of the activities of a citizen under official auspices in our society.

It is impossible to see how, under a law which "hears before it condemns," commitment to a mental hospital can be allowed to be effected by proof which is less than clear, convincing and satisfactory, without transgressing the constitutional command of due process.[60]

The standard of proof applicable to a hearing in court in the District of Columbia, however, when what appears to be a criminal prosecution is transformed into an inquisition into the defendant's sanity, is solely that of reasonable doubt concerning the defendant's sanity as of the time of the crimes charged in the information. In this context, since the prosecution needs evidence only sufficient to raise a reasonable doubt concerning the defendant's sanity, the defendant is in practical effect under the burden of disproving his "insanity" beyond all reasonable doubt—if he is to prevail against the prosecution in this matter.[61] Clearly, this is a most unequal contest in which the defendant cannot be deemed to be afforded due process of law.

[59] Berman, III, *The Challenge of Soviet Law*, 62 HARV. L. REV. 449, 457 (1949). My attention to the above quoted passage was invited by a reading of SZASZ, LAW, LIBERTY AND PSYCHIATRY, 219 (1963).

[60] See Ex parte Romero, 51 N.M. 201, 181 P. 2d 811 (1947); In re Olson's Guardianship, 236 Wis. 301, 295 N.W. 24 (1940).

[61] For a lucid discussion of the inequality of the contest thus forced upon petitioner, see Krash, *The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia*, 70 YALE L. J. 905, 938-940 (1961). See Davis v. United States, 160 U.S. 469 (1895); Tatum v. United States, 190 F. 2d 612 (D.C. Cir. 1951).

Aside from the obvious unfairness to which it subjects the defendant, the procedure employed under these circumstances seems to lack essential rationality.

The observation is relevant in this context that "the rule of substantial evidence is one of fundamental importance and is the dividing line between law and arbitrary power."[62] As expressed by the Supreme Court on another occasion, the greatest flexibility in administrative procedure cannot be deemed to authorize orders "without a basis in evidence having rational probative force."[63] Condonation of such extraordinary proceedings constitutes in effect authorization for the issuance of orders affecting human liberty upon a doubt, however reasonable, i.e., "without a basis in evidence having rational probative force," as those terms have been traditionally understood and applied in this country. Thus authority is provided to any trial court to pass "the dividing line between law and arbitrary power."[64]

The due process problems of the case are further highlighted by the fact that while a summary commitment can be accomplished with ease by the prosecution, the quest for release from the mental hospital by the "acquitted" party reminds one of the labors of a Sisyphus.

Central to the consideration of the status of the beneficiary of the insanity defense is the fact that under District law, a person acquitted by reason of insanity, *must* be committed to St. Elizabeths Hospital,[65] and that his release is conditioned upon the rigorous release requirements of §24-301(e) of the D.C. Code.

Significantly, such an acquittal is in no wise founded upon a positive finding that the person whose commitment is effected is presently mentally ill—since the verdict of acquittal can be based solely upon a reasonable doubt concerning the defendant's mental health as of some past date.[66]

As stipulated by the Congress under §24-301(e), an inmate committed pursuant to an insanity acquittal may be released unconditionally from St. Elizabeths Hospital when "the superintendent of the hospital certifies (1) that such person has recovered his sanity, (2) that, in the opinion of the superintendent, such person will not in the reasonable future be dangerous to himself or others, and (3) in the opinion of the superintendent, the person is entitled to his unconditional release from the hospital. . . ."[67] Specifically, this certifi-

[62] National Labor Relations Board v. Thompson Products, 97 F. 2d 13, 15 (6th Cir. 1938).

[63] Consolidated Edison Co. v. National Labor Relations Board, 305 U.S. 197, 230 (1938).

[64] If this were permitted to come to pass, loss of liberty would be conditioned upon what in effect amounts to suspicion alone. It cannot be claimed that this method is consistent with ordered liberty. See, *e.g.*, People v. Pieri, 269 N.Y. 315, 199 N.E. 495 (1936); Albertson v. Schmidt, 128 Cal. App. 344, 17 P. 2d 158, 159 (1932).

[65] D.C. CODE ANN. §24-301 (*d*) (1961).

[66] Davis v. United States, 160 U.S. 469 (1895); Tatum v. United States, 190 F. 2d 612 (D.C. Cir. 1951).

[67] D.C. CODE ANN. §24-301 (*e*) (1961).

cation and the subsequent release of the inmate[68] are subject to the approval of the Court. The District Court in its discretion may hold a hearing, or on a motion by the United States Attorney or Corporation Counsel of the District of Columbia must hold a hearing to test the conclusions of the superintendent of the hospital.[69] If the District Court, after weighing the evidence, is not satisfied with the conclusions of the superintendent of the hospital, it can refuse to grant the unconditional release and order the person returned to the hospital.[70] If the District Court finds that the confined person has recovered his "sanity" and will not in the reasonable future be dangerous to himself and others, the Court must release such person unconditionally.[71]

Implicit within §24-301(e) is the assumption that the Superintendent of the Hospital will initiate the release of the patient by filing an appropriate certificate, recommending release with the clerk of court in which the patient was tried. Often, however, the patient is left to his own meagre resources. In the absence of an emancipatory initiative by the Superintendent, a patient confined under §24-301(d) can attempt to establish his eligibility for release by a writ of *habeas corpus.*[72] If the issue of whether the petitioner is of sound mind and not dangerous to the community is raised for the first time, the District Court is now required to hold a hearing when the inmate petitions for relief by *habeas corpus.*[73]

Release procedures provided by statute declare *inter alia*:

> The court shall *weigh* the evidence and, if the *court* finds that such person has recovered his sanity and will not in the reasonable future be dangerous to himself or others, the *court* shall order such person unconditionally released from further confinement in said hospital. (Emphasis supplied.)[74]

Nothing the Court of Appeals has written, however, encourages the District Court to "weigh" the evidence—either upon hearings on certifications for release or upon hearings on *habeas corpus* petitions.

The resultant situation does not appear conducive to the careful preservation of individual rights.[75]

The statute requires that before one confined under §24-301(d) can be released, it must be established that he is "sane."[76]

[68] *Ibid.*
[69] *Ibid.*
[70] *Ibid.*
[71] *Ibid.*
[72] D.C. CODE ANN. §24-301 (*g*) (1961).
[73] Lewis v. Overholser, 274 F. 2d 592 (D.C. Cir. 1960).
[74] D.C. CODE ANN. §24-301 (*e*) (1961).
These procedures were designed to guide hearings *dehors habeas corpus* situations but must be presumed applicable to the latter as well in reason and fairness.
[75] For a graphic portrayal of the plight of St. Elizabeths patients in this context, see *The Insanity Defense in the Distrcit of Columbia—A Legal Lorelei,* 49 GEO. L. J. 294 (1960).
[76] *Supra,* note 67.

The Court of Appeals has required more. It has said that there "must be freedom from such abnormal mental condition as would make the individual dangerous to himself or the community in the reasonably foreseeable future."[77]

It has held that such a patient must show (1) that he has recovered to the point of total freedom from "any abnormal mental condition,"[78] (2) that he is not likely to repeat the criminal act, which had resulted in his insanity acquittal, however minor and non-violent it may be, and (3) "that the superintendent acted arbitrarily and capriciously in refusing to certify him and to recommend his unconditional release."[79] In this context, evidence of a "check writing proclivity," stemming from a psychoneurotic condition, is enough to bar release.[80]

Moreover, "[i]n a 'close' case, even where the preponderance of the evidence favors the petitioner, the doubt, if reasonable doubt exists about danger to the public or the patient, cannot be resolved so as to risk [such] danger.... A patient may have improved materially and appear to be a good prospect for restoration as a useful member of society, but if an 'abnormal mental condition' renders him potentially dangerous, reasonable medical doubts or reasonable judicial doubts are to be resolved in favor of the public and in favor of the subject's safety."[81]

It may be observed that what is called for from the hospital staff as a condition for release is a prophecy as to the future good conduct of the inmate and what is called for from the inmate challenging the refusal of the St. Elizabeths' staff to make such a prophecy is proof that failure to so prophesy constitutes an abuse of discretion.

The situation is complicated by the fact that the indigent petitioner is afforded psychiatric witnesses, outside the institutional hierarchy whose judgment he challenges, only under highly restricted conditions and at rare intervals.[82]

The quandary of the patient seeking his release—aside from what appears at first glance as a rationally insurmountable standard of proof—has been aptly put in these words by Dr. Szasz:

> How can a lay person effectively rebut the testimony of 'prosecuting' psychiatrists? To accomplish this, he would need psychiatrists on his side, at least as prominent and impressive to the court or jury as those who are trying to incrimi-

[77] Overholser v. Leach, 257 F. 2d 667, 670 (D.C. Cir. 1958).
[78] *Ibid.*
[79] Overholser v. Russell, 283 F. 2d 195, 197 (D.C. Cir. 1960).
[80] *Id.*, 198.
[81] Ragsdale v. Overholser, 281 F. 2d 943, 947 (D.C. Cir. 1960).
[82] Watson v. Cameron, 312 F. 2d 878 (D.C. Cir. 1962).

nate him as mentally ill or dangerous. Obviously, this may be extremely difficult —or even impossible—for a patient to secure.[83]

Where the Court of Appeals opinion appeared to endorse the action against Frederick Lynch under the hearing procedures authorized by District law as not inconsistent with the due process clause, the Supreme Court was silent, clearly preferring to bypass this issue in favor of a purely statutory approach.

One can say in sum that the *Lynch* doctrine of the Court of Appeals can be seen, upon analysis, as disregarding fundamental procedural principles which "protect the citizen in his private right and guard him against the arbitrary action of government."[84] The Supreme Court opinion in turn can be seen as failing to restore such principles to a place of safety.

III

Since the loss of procedural safeguards described above, was defended in the name of "care and treatment," it is necessary to inquire as to the facilities available in our overburdened public mental hospitals for the "care and treatment of the mentally ill."

For assuming the propriety of the procedural short-cuts, the right to treatment would appear the rational *conditio sine qua non* of enforced hospitalization.

A critical element in the plight of Frederick Lynch, however, was that, having been subjected to the brand of criminal lunacy in the public eye, he did not receive the type of psychiatric treatment which would have passed muster as adequate when judged even by the limited standards established by the American Psychiatric Association for public mental hospitals in terms of doctor-patient ratio. The defect in treatment facilities was compounded by an atmosphere of hopelessness for his freedom generated in part by the release procedures, which have been described above.[85]

[83] SZASZ, LAW, LIBERTY AND PSYCHIATRY 69 (1963).

[84] See language of Justice Moody in Twining v. New Jersey, 211 U.S. 78, 101 (1908).

[85] One is bound to point out in this context that the very enactment providing for the mandatory commitment of a person acquitted by reason of insanity and its judicial administration tend in many instances to be anti-therapeutic in results.

Extramural treatment, recognized as the treatment of choice for various conditions, is prevented.

In the light of the mandatory commitment law and its administration, moreover, intramural treatment cannot be marked by "continuing solicitude" for the freedom of the patient.

The "treatment" itself, as will be set forth *infra*, appears grossly inadequate.

It has been aptly observed in this connection:

"It is ironic that the Congressional committee responsible for the adoption of the mandatory commitment statute had included in its report a statement which recognized that the hospital facilities used to treat persons in need of psychiatric examination or treatment under the criminal procedures are inadequate." Comment, *Criminal Law—Defense of Insanity—Mandatory Commitment Statute Under the Durham Rule*, 15 RUTGERS L. REV. 624, at 631 (1961).

In this process, the hospitalization of Frederick Lynch involved a denial of the proposition enunciated as essential to due process by the Association of the Bar of the City of New York, to-wit "that the patient will receive good medical treatment, [and that this] will be followed up with continuing solicitude for his freedom, and [that he] will be released as soon as his welfare and that of the community allow."[86]

Conditions prevailing in our public mental hospitals do not permit of self-congratulation on the part of a lethargic public. Overcrowding, understaffing and the consequent lack of meaningful psychotherapy and often unsanitary conditions appear widespread.

As of 1958, the situation in our public mental hospitals has been described by the President of the American Psychiatric Association in these terms in the *American Journal of Psychiatry*:

> After 114 years of effort, in this year 1958, rarely has a state hospital an adequate staff as measured against the minimum standards set by our Association, and these standards represented a compromise between what was thought to be adequate and what it was thought had some possibility of being realized. Only 15 states have more than 50 percent of the total number of physicians needed to staff the public mental hospitals according to these standards. On the national average registered nurses are calculated to be only 19.4 percent adequate, social workers 36.4 percent, and psychologists 65 percent. Even the least highly trained, the attendants, are only 80 percent adequate.
>
> . . . In many of our hospitals about the best that can be done is to give a physical examination and make a mental note on each patient once a year, and often there is not even enough staff to do this much.[87]

A pioneer in the investigation of the public mental hospital,[88] reported to a Senate Committee in 1961 on the subject of existing conditions in the public mental hospital, as follows:

> The chronically acute shortage of physicians in most wards makes the term 'psychotherapy' a hideous mockery for most patients. In most public mental hospitals,

[86] ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, MENTAL ILLNESS AND DUE PROCESS, 243 (1962).

[87] Solomon, *The American Psychiatric Association in Relation to American Psychiatry*, 115 AM. J. PSYCHIATRY, 1, 7 (1958).

[88] DEUTSCH, THE SHAME OF THE STATES (1948).

Another expression of opinion as to the state of public mental hospitals is this:

"As to the state of public mental hospitals, many such institutions fall short of even a modest standard; indeed, some can be more accurately described as huge modern survivors of eighteenth-century English 'gaols' or 'bedlams.' Last year the results of a wide-ranging five-year investigation of American mental hospitals was made public by the Joint Commission on Mental Illness and Health. . . . The survey disclosed widespread abuses, including the fact that the great majority of state mental hospitals are little more than 'convenient closets' for the storage of the mentally ill and that 'more than half the patients in mental hospitals receive no active treatment of any kind designed to improve their mental condition'." GLUECK, LAW, AND PSYCHIATRY 159-60 (1962).

the average ward patient comes into person to person contact with a physician about 15 minutes every month.[89]

In all this, St. Elizabeths Hospital does not present a markedly different picture from that obtained by these authoritative observers of the national hospital scene.[90] Frederick Lynch, it will be recalled, was upon commitment to St. Elizabeths Hospital, placed in a ward providing two psychiatrists for the treatment of one thousand patients.

In the light of existing resources and the rigorous release procedures enforced by the District of Columbia courts, the plight of many a patient, acquitted by reason of insanity, and confined to St. Elizabeths Hospital, is all too frequently the plight of a prisoner without hope of release.

One such prisoner, who sought his release upon habeas corpus after acquittal by reason of insanity, provided the following uncontradicted testimony as to lack of treatment at St. Elizabeths Hospital in his habeas corpus hearing:

Q. Mr. Pettit, where do you reside?

A. Right now at St. Elizabeths Hospital, John Howard Pavilion.

Q. How long have you been in St. Elizabeths Hospital at John Howard Pavilion?

A. I have been back there six months and four days.

Q. Mr. Pettit, would you tell the Court what your average day at the John Howard Pavilion is? . . .

THE WITNESS: In the mornings, after the breakfast meal, average day is about —helping clean up the ward, and I am chairman of the ward committee there and I check around and make sure everyone is helping to clean up, and I take care of my personal needs, maybe write a letter or something like that. Other times I practice a little bit on a musical instrument I play.

In the afternoons, I usually go to the John Howard Journal, where I work as a clerk. It's, you know, voluntary services, and I go up and type to help, you know, make the paper, to put the John Howard paper out.

Q. What do you do after that?

A. Well, in the evening there is nothing more to do except watch television or write letters, read a book, and that's all there is.

* * * * *

Q. And is this how you spend your days?

[89] *I Hearings Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate,* 87th Congress, 1st. Sess., March 28, 1961, 43-44 (1961).

The status of the mental patient in the United States was authoritatively depicted by the Joint Commission on Mental Illness and Health in these terms:

"Humane, healing care for the mentally ill, historically well tested, and further clarified in the last decade, remains the great unfinished business of the mental health movement. . . . A large proportion of mental patients at present, as in the past, are not treated in accordance with democratic, humanitarian, scientific and therapeutic principles. We have substantially failed the majority of them on all counts." JOINT COMMISSION ON MENTAL ILLNESS AND HEALTH, ACTION FOR MENTAL HEALTH 56 (1961).

[90] Tremblay v. Overholser, 199 F. Supp. 569 (D.D.C. 1961).

A. Yes, sir.

Q. Are you receiving any medication, Mr. Pettit?

A. No, sir.

Q. Mr. Pettit, are you receiving any individual or group psychotherapy?

A. No, sir.

Q. Are you receiving any vocational training, guidance, or counseling designed to fit you for a lawful life in free society?

A. No, sir. The only thing that is happening to me there that I can see is I am being held a prisoner there.[91]

After the discharge of his writ and during the pendency of his appeal, Pettit escaped from St. Elizabeths Hospital. He has not been heard from since.

Dr. Thomas Szasz, in commenting upon a comparable situation, observed:

> Mental hospitalization of this kind reminds one of the tales of the Count of Monte Cristo; that is, of indefinite detention in jails without possibilities of legal reprieve, intelligently conceived and skillfully executed escape being the only means for gaining one's freedom.[92]

Other cases involving inmates of St. Elizabeths Hospital, challenging their confinement by habeas corpus, have highlighted both lack of treatment as well as unsanitary conditions.[93]

The data furnished by the Department of Health, Education and Welfare as well as by the Superintendent of St. Elizabeths Hospital, respectively, as to the available resources at St. Elizabeths Hospital do not suggest that the case of Frederick Lynch was necessarily exceptional.

Number of patients housed during period 1958 through 1963[94]

Fiscal Year	*Average "in-hospital" patient load*
1958	6,965
1959	6,900
1960	6,983
1961	6,976
1962	6,838
1963	6,668

[91] Pettit v. Overholser, U.S.C.A., No. 16,792, J.A., pp. 11-12 (D.C. Cir. 1961).

[92] Szasz, *Hospital Refusal to Release Mental Patient*, 9 CLEVELAND-MARSHALL L. REV. 220, 223-24 (1960).

[93] Tremblay v. Overholser, *supra*, note 90.

[94] Letter from the Department of Health, Education, and Welfare to Mr. Thomas Willging, dated September 12, 1963.

Number of physicians, psychiatrists, psychologists and social workers employed during period 1958 through 1963

Category	*1958*	*1959*	*1960*	*1961*	*1962*	*1963*
Psychiatrists	27	30	27	25	31	54
Other physicians	18	23	27	42	46	40
Psychologists	6	6	7	8	16	22
Social workers	14	14	17	24	34	33

1. Total cost per patient day[95]		*2. Food cost per patient day*	
Fiscal Year 1962	$ 8.88	Fiscal Year 1962	84 cents
Fiscal Year 1963	10.30	Fiscal Year 1963	93 cents
Fiscal Year 1964	11.22	Fiscal Year 1964	93 cents

It does not seem surprising to discover an occasional patient-inmate familiar with the resources of both St. Elizabeths Hospital and that of the federal prison system, voicing an open preference for the latter as better geared to meet his therapeutic needs.[96]

Presumably, a court concerned with continuing the detention of the citizen acquitted by reason of insanity until the making of an overwhelming demonstration of his recovery and prognosis of lack of dangerousness, would seem equally concerned with assuring the necessary facilities for making such recovery possible within the hospital setting made mandatory by statute.

Without the benefit of a liberalized insanity defense, the Massachusetts Court has referred to a right to treatment for the hospitalized mental patient, and suggested that denial of such treatment might give rise to a right to release.[97]

As expressed by Judge Fahy, the "mandatory commitment provision [of the District of Columbia] rests upon a supposition, namely, the necessity for treatment of the mental condition which led to the acquittal by reason of insanity. And this necessity for treatment presupposes in turn that treatment will be accorded."[98] In expressing this view, however, Judge Fahy did not appear to have the support of the Court.

Despite obvious good will, the personal concern for the right to treatment doubtlessly felt by the Court of Appeals has not as yet been translated into official action. For the present in fact the Court of Appeals is on record as explicitly disclaiming official concern for existing conditions in the mental hospital to which defendants are committed after acquittal by reason of insanity. As expressed by the Court, the adequacy or inadequacy of treatment at St. Elizabeths Hospital does not bear upon a patient's right to release and such considerations as that the therapeutic facilities at St. Elizabeths Hospital

[95] Letter from Dr. Dale C. Cameron to Mr. Thomas Willging, dated August 19, 1963.
[96] Sutherland v. United States, U.S.C.A., No. 16,160 (D.C. Cir. 1961).
[97] Commonwealth v. Page, 339 Mass. 313, 159 N.E. 2d 82 (1959).
[98] Ragsdale v. Overholser, *supra*, note 81 at 950.

might be worse than those of a federal prison are "the business of the legislative, not the judicial branch of government. . . ."[99]

Notwithstanding present reverses, it does not seem unduly optimistic to suggest that the "right to treatment"—as indeed any right essential to the humane administration of justice—will in time be successfully claimed as inherent in an expanding concept of due process of law in the Twentieth Century.

It seems plausible that such a right would be susceptible of adequate enforcement primarily through the sanction of assuring the release of the patient to whom adequate medical treatment is denied.

As expressed by a leader in the struggle for the rights of the mentally ill:

> If the right to treatment were to be recognized, our substantive constitutional law would then include the concepts that if a person is involuntarily institutionalized in a mental institution because he is sufficiently mentally ill to require institutionalization for care and treatment, he needs, and is entitled to, adequate medical treatment; that being mentally ill is not a crime; that an institution that involuntarily institutionalizes the mentally ill without giving them adequate medical treatment for their mental illness is a mental prison and not a mental hospital; and, that substantive due process of law does not allow a mentally ill person who has committed no crime to be deprived of his liberty by indefinitely institutionalizing him in a mental prison.
>
> If this proposed development is to be achieved, rather than only discussed, the courts must be prepared to hold that if an inmate is being kept in a mental institution against his will, he must be given proper medical treatment or else the inmate can obtain his release at will in spite of the existence or severity of his mental illness.[100]

It seems plausible, too, to assume under present conditions that until such time as the Supreme Court sees fit to enunciate such a right to treatment as part of a more comprehensive right to "medical due process," the rights of the mentally ill will remain at the mercy of the overburdened public hospital administration.[101]

[99] Overholser v. O'Beirne, 302 F. 2d 852, 854 (D.C. Cir. 1962).

[100] Birnbaum, *The Right to Treatment*, 46 A.B.A.J. 499, 503 (1960).

[101] S. 935, "A bill to protect the constitutional rights of certain individuals who are mentally ill, to provide for their care, treatment, and hospitalization, and for other purposes.", represents a gratifying first step in asserting the right to treatment.

Significantly, however, it is devoid of any enforcement machinery.

It provides:

"Each patient hospitalized in any public hospital for a mental illness, shall during his hospitalization, be entitled to medical and psychiatric care and treatment. Within five days after the end of each calendar month the administrator of each public hospital shall submit to the Commissioners of the District of Columbia a report giving a detailed account of the type of medical and psychiatric care and treatment which, during such months, has been provided by such hospital to each patient hospitalized therein for a mental illness." *Hearings Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate*, 88th Cong., 1st. Sess. on S.935, May 2, 3, and 8, 1963, 1, 5 (1963).

That this right has thus far not been adequately secured is apparent from the case of Frederick Lynch.

IV

The question arises as to what the impact of the Supreme Court opinion has been upon commitment practices in the District of Columbia.

A short answer is that it has been productive of confusion and has proven an incentive to further experimentation with statutory commitment provisions as a substitute for more conventional forms of dragnet law.

The holding, if holding it was, that an individual forcibly acquitted by reason of insanity, over his protest, could be subjected to confinement after a §301(a) hearing may have put the clock back in the District of Columbia to the days preceding *Williams v. Overholser,*[102] and what is more it may have done so without any awareness by the Supreme Court as to this effect.

The history of the *Williams* case deserves to be set forth in some detail.

When, on February 3, 1958, Dallas Williams, the "Bad Man of Swampoodle", was charged in the Municipal Court of the District of Columbia with public drunkenness, the prosecution quickly decided to by-pass an attempt at securing a criminal conviction, capable of resulting in a maximum sentence of 90 days in prison, in favor of securing the commitment of the "bad man" to a lunatic asylum—preferably for life. Significantly, this attempted commitment was not based upon the Civil Commitment Law,[103] but the near summary commitment power of the criminal court in the District of Columbia.[104]

His was, in the words of a prosecutor in the District Court, "the worst criminal record for violence [he had] ever seen."[105] In the words of a District Court Judge, it was "an almost incredible record since 1933 of criminal charges and convictions, including manslaughter, assault and battery, assault with intent to kill, shooting with intent to kill, assault with a pistol, and other crimes of violence.... There ... [was] no doubt that he [had] been a turbulent, dangerous character...."[106] The Court of Appeals noted that it had been "informed by the Government that he was convicted of attempted robbery in 1933; twice of assault and battery in 1934; of manslaughter in 1936; of assault and battery with intent to kill in 1942; of assault with a pistol in 1944; of assault in 1945; of assault with intent to kill, assault with a dangerous weapon and carrying a dangerous weapon in 1949. In 1952, twelve days after he was released on bail to await his second trial for the present offense, he threatened someone with a pistol and was convicted of that offense. While on bail before his fifth trial in

[102] 259 F. 2d 175, 177 (D.C. Cir. 1958).
[103] D.C. CODE ANN. §21-306, *et seq.* (1961).
[104] D.C. CODE ANN. §24-301 (a) (1961).
[105] Williams v. United States, 250 F. 2d 19, 21 n. 3 (1957).
[106] Williams v. Overholser, 162 F. Supp. 514, 515 (1958).

1956, he committed another crime involving a pistol and was convicted of that crime after the present conviction. Williams told one of the court-appointed psychiatrists who examined him in 1953 that he had spent about 20 of his 39 years in jail.[107]

Thus, when the "bad man" pleaded guilty to a charge of public drunkenness, the Municipal Court, after a lapse of a few days, set aside the plea and committed the defendant to a public hospital for mental examination and observation to determine whether "the accused . . . [was] of unsound mind or . . . mentally incompetent . . . to understand the proceedings against him or properly to assist in his own defense. . . ."[108]

Thereafter, the chief psychiatrist of a government hospital reported to the court "that . . . [the accused] was psychotic and dangerous to himself and others. The report said nothing about competency to stand trial."[109]

In the hearing that followed, government psychiatrists testified essentially along the lines of the report furnished by the chief psychiatrist. None, however, questioned his intellectual capacity to participate rationally in his own defense.

On this evidence, the Municipal Court found the accused "of unsound mind" and committed him to St. Elizabeths Hospital. It made no findings as to his mental competency to stand trial.

Habeas corpus action challenging this commitment, as founded upon no ascertainable standard and further as improperly evading the District of Columbia Civil Commitment Law, was ultimately reviewed by the U. S. Court of Appeals for the District of Columbia Circuit.

That Court held that the criminal commitment power of the trial court was strictly limited to cases involving lack of competency to stand trial and added that "the Municipal Court and the District Court seem to have thought that when the person suspected of insanity is also accused of crime, Congress intends to bypass all those provisions and safeguards [of the civil commitment law] and to permit any trial court, including the Municipal Court, to commit the person to a mental hospital without benefit of a jury or of the Mental Health Commission, although he may be perfectly competent to stand trial."[110]

The Court then added:

> We think Congress had no such intention. Such an intention, if it were plainly

[107] Williams v. United States, *supra*, note 105.

[108] D.C. CODE ANN. §24-301 (a) (1961).

[109] Williams v. Overholser, *supra*, note 102 at 176.

[110] *Id.* at 176-7.

expressed, would raise serious questions of due process of law and equal protection of the laws.[111]

The action of the Court of Appeals required the release of Dallas Williams from St. Elizabeths Hospital unless "within ten days either

(1) The Municipal Court determines that he is mentally incompetent to stand trial and orders him confined on that ground or
(2) 'proper lunacy proceedings are instituted.'[112]

"Proper lunacy proceedings," under the civil commitment law of the District of Columbia, included "a report and recommendation by the Commission on Mental Health, a jury's verdict if demanded, and an order of the District Court."[113]

The purpose of §301(a) was as seen by the Court of Appeals, simply "to prescribe the procedures for determining whether an accused person can understand the proceedings against him and properly assist in his defense and to provide for his confinement in a hospital instead of a jail until he can."[114]

In sum, the Court of Appeals held that a summary commitment of a person charged with crime was possible only in a case of lack of competency to stand trial.

It is clear today that the language of Justice Harlan, if interpreted as repudiating the *Williams* decision, would invite the utilization of summary insanity proceedings which the *Williams* case was clearly meant to curb. Should this be the case, a citizen could be haled into the lowest trial court upon a minor traffic charge, acquitted by reason of insanity over his protest and then committed to St. Elizabeths Hospital pursuant to a finding under a §301(a) hearing that he was of "unsound mind."[115] It must be conceded, of course, that the burden of establishing unsoundness of mind would rest upon the prosecution under the circumstances. This, however, would in no way be significantly curative. The proceeding would still be marked by a lack of ascer-

[111] *Id.* at 177.

The specific interpretation of §24-301 (a) made by the Court of Appeals for the District of Columbia Circuit—significant in the light of the statutory interpretation subsequently undertaken by *Lynch v. Overholser*, 369 U.S. 705 (1962), was that the "purpose" of §24-301 (a) was "simply to prescribe the procedure for determining whether an accused person can understand the proceedings against him and properly assist in his defense, and to provide for his confinement in a hospital instead of a jail until he can." Williams v. Overholser, *supra*, note 102 at 177.

[112] *Ibid.*

[113] *Id.* at 176; see also D.C. CODE ANN. §21-306, *et seq.* (1961).

[114] *Id.* at 177.

[115] Traffic charges have in fact been used as the basis of summary mental commitment in the District of Columbia pursuant to §301 (*a*). See Watwood v. McIndoo, Habeas Corpus No. 243-60 (D.D.C. 1960).

tainable standards.[116] An irrational disparity in the treatment of the citizen would be exemplified by this contrast: A citizen suspected of mental illness without more would be accorded the elaborate procedural safeguards of the civil commitment law; a citizen suspected of mental illness *plus* a parking violation would be proceeded against summarily under §301(a).

What would seem even more oppressive under the statutory interpretation of §301(a) furnished by Justice Harlan for the Supreme Court, that is if it be accepted as holding rather than dictum, is that all those acquitted, as distinct from those convicted by a criminal court would appear to be subject to a possible loss of liberty under the summary commitment procedures of this statutory enactment at any time in their lives. Since, as seen by Justice Harlan, this section "is not limited to the accused's competence to stand trial" and "appears to be as available after the jury returns a verdict of not guilty by reason of insanity as before trial,"[117] it would seem that a new class of citizens would appear to have been created, a class subject to summary commitment procedures by reason of an insanity acquittal and indeed by reason of outright acquittal itself within the District of Columbia. For, in the case of all those acquitted of crime, §301(a) proceedings, no matter when brought, would invariably appear to be "prior to the imposition of sentence" as that section appears to be interpreted by Justice Harlan. The resultant commitment power, available to the prosecution, would be unparalleled within the English speaking world.[118]

It is difficult to believe that the Supreme Court either considered or condoned such consequences. The possibility of such consequences, however, emerges inexorably from the language of Justice Harlan's opinion referring

[116] The words "unsound mind" have no settled legal meaning. Should they constitute the future standard pursuant to §301 (a) they would, to use the language of the Supreme Court in another case, leave "open . . . the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against." United States v. L. Cohen Grocery Co., 255 U.S. 81, 89 (1921).

[117] Lynch v. Overholser, *supra*, note 36.

[118] Considering a commitment problem arising from an invocation of §301 (a) *after* the *Lynch* decision of the Supreme Court, the Court of Appeals interpreted *Lynch* as not including "a holding that Section 301 (a) was available after the criminal charge which brought the person into court had been *entirely* disposed of." (Emphasis supplied)

Focusing upon the Supreme Court language concerning Section 301 (a) the Court of Appeals said:

> "The court referred to Section 301 (a) in connection with the 'pre-trial commitment' of an accused antedating the finding of guilt. It is in this light that we read the Court's further statement that since the inquiry under Section 301 (a) 'may be undertaken at any time' prior to imposition of sentence 'it appears to be as available after the jury returns a verdict of not guilty by reason of insanity as before trial.' . . . But surely the time available after verdict of not guilty by reason of insanity, within which it was thus thought a commitment under Section 301 (a) for unsoundness of mind might be made, was not intended by the Court to be extended beyond the time the criminal charge is decided and the question of custody incident to the disposition of the charge is determined."

Cameron v. Fisher—F. 2d—(D.C. Cir. 1963).

to §301(a). Whether such a possibility is to be translated into operational realities remains to be seen.

At the least, however, the status of the individual who is either acquitted without more, or else acquitted by reason of insanity, appears to have been obscured by the Supreme Court opinion in the *Lynch* case.[119]

The tortured statutory interpretation of the Supreme Court suggests the obvious.

Acting desperately to avoid an adjudication of constitutional claims, the Supreme Court proceeded to squeeze the complex and voluminous issues of the case into a statutory framework which can only be regarded as a product of judicial sleight-of-hand.

Neither a policy of deference to local judicial interpretation[120] nor one of "judicial self-restraint"[121] on the part of the Supreme Court in passing upon a local practice can furnish adequate justification of case law so drastically at variance from the intent of Congress as is *Lynch*.

Patently the Supreme Court appeared better equipped to resolve the issues specifically presented to it by the parties in litigation than to unravel the tangled skein of local practice and procedure—both in haste and in apparent ignorance of the *Williams* decision of the Court of Appeals.

Senator Ervin, Chairman of the Senate Subcommittee on Constitutional Rights, commenting upon the oversight of the *Williams* case by the Supreme Court in its interpretation of D. C. Commitment Law in the *Lynch* case, declared:

> There is some consolation to some of us that even Justices of the Supreme Court . . . in writing an opinion can overlook a point, . . . Although . . . [it] causes a slight amount of consternation about what they will do in the future, [due to this oversight].[122]

Perhaps it is best to conclude that since the Supreme Court failed to indicate any awareness of the *Williams* interpretation, which thus remained formally unrepudiated, and since the issue before the Supreme Court was solely that of due process and the circumvention of the civil commitment law, the language of the Supreme Court relative to §301(a) could and should be viewed as mere dictum.

Significantly, however, neither the District of Columbia Court of Appeals,

[119] See, *e.g.*, the interpretation of the Supreme Court opinion in United States v. Limber, —Atl. 2d—(D.C. Ct. App. 1963).

[120] See, *e.g.*, Hysler v. Florida, 315 U.S. 411 (1942).

[121] See dissenting opinion of Mr. Justice Frankfurter in West Virginia State Board of Education v. Barnette, 319 U.S. 624, 646 (1943).

[122] *Hearings on S. 935 Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 88th Cong., 1st. Sess., p. 52 (1963).
1st. Sess., p. 52 (1963).

formerly the Municipal Court of Appeals, nor the office of the public prose cutor has viewed it in this light.

Shortly after the *Lynch* decision, the prosecution initiated attempts at the utilization of §301(a) for the commitment of individuals who had been subjected to the involuntary assertion of the "insanity defense" and who appeared clearly not committable under the Civil Commitment Law.[123] As of the time of this writing, the issue concerning the utilization of the statutory interpreta-

[123] The following facts emerged from the case of United States v. Limber,—Atl. 2d—(D.C. Ct. of App. 1963).

Limber was charged with petit larceny and hospitalized as incompetent to stand trial. At a later time, the public hospital certified that he had recovered his competency to stand trial but that he was a victim of a mental illness "and that the alleged offense was a product of his illness."

Upon trial of the case, the defense advised the court "that the defense of insanity would not be raised. . . ." The prosecution, however, insisted upon the presentation of psychiatric testimony over the defendant's objection which was overruled.

At the conclusion of the evidence "[t]he trial court found that (1) Limber was competent to stand trial, (2) that he committed the act of petit larceny and (3) that the court had a reasonable doubt concerning Limber's ability to form the required criminal intent at the time he committed the act; and then ordered judgment of not guilty on the ground that defendant 'was insane at the time of the commission of the offense.' "

Proceeding within what it claimed to be the letter of the *Lynch* case, the prosecution moved to secure the commitment of the "acquitted" defendant pursuant to §24-301 (a). When the trial court refused to hold such a hearing, saying that it lacked jurisdiction and that the Supreme Court's reference to Section 301 (a) in this situation was dictum, the prosecution appealed and secured a reversal and remand of the case.

As expressed by Chief Judge Hood for a unanimous panel of the District of Columbia Court of Appeals:

"We cannot agree that the Supreme Court's references to §24-301 (a) constitute dicta. The court, in holding that §24-301 (d) was not applicable, of necessity considered all sections of the statute, and in holding that *Lynch* could not be committed under the mandatory provision of §24-301 (d), was faced with the problem of what proceedings could be had against him for commitment. Obviously civil proceedings for commitment could be had under §21-310, and if that were the only available proceeding it appears to us the Supreme Court would have so stated. But the Court did not so state. Instead it discussed at some length the procedure under §24-301 (a) and concluded that the procedure under that section was available after a verdict of not guilty by reason of insanity. It then said that in a Lynch-type situation when §24-301 (d) is not applicable, if commitment is considered warranted it 'must be accomplished either by resorting to §24-301 (a) or by recourse to the civil commitment provisions. . . .'

"We cannot ignore this plain language and must hold that the Supreme Court has decided that in the situation here presented the trial court has authority to conduct a hearing under §24-301 (a)."

It is not insignificant that the District of Columbia Court of Appeals proceeded in this vein with knowledge of the United States Court of Appeals opinion in *Cameron v. Fisher*—F. 2d—(D.C. Cir. 1963). The latter declared that:

". . . *Lynch,* was not a holding that Section 301 (a) was available after the criminal charge which brought the person into court had been entirely disposed of. The Court referred to Section 301 (a) in connection with the 'pretrial commitment' of an accused antedating a finding of guilt. It is in this light that we read the Court's further statement that since the inquiry under Section 301 (a) 'may be undertaken at any time 'prior to imposition of sentence,' it appears to be as available after the jury returns a verdict of not guilty by reason of insanity as before trial.' 369 U.S. at 719. But surely the time available after verdict of not guilty by reason of insanity, within which it was thus thought a commitment under Section 301 (a) for unsoundness of mind might be made, was not intended by the Court to be extended beyond the time the criminal charge is decided and the question of custody incident to the disposition of the charge is determined."

tion which the Court of Appeals has declared likely to raise serious questions of due process and equal protection has not been fully resolved. Section 301, thus, continues to invite the attention of the prosecution.[124]

V

Finally, what about Frederick Lynch in the wake of the Supreme Court decision?

Far from assuring Frederick Lynch's release, the Supreme Court's decision

[124] See the *Limber* case, *supra,* note 19.

The interest of the prosecution in summary insanity proceedings appears to be cut of the same cloth as the interest of the prosecution in the use of the more conventional dragnet statutes. These have been capable of lending the color of law to arrests on suspicion or other forms of official harassment of unpopular, or otherwise troublesome characters, and have been favorites of the prosecution. Vagrancy laws, disorderly conduct acts, and generally loosely drawn legislation, designed to afford the maximum in discretional latitude to police and prosecution provide classic illustration of law traditionally favored by the prosecution. See, e.g., N.Y. PEN. LAW §43, 722. See also generally Note, 59 YALE L.J. 1351 (1950).

It may be suggested at this stage that loosely drawn statutes for the commitment of the citizen to a mental hospital have, of late, provided much of the attraction of the earlier dragnet laws to police and prosecution.

The ease with which coercive psychiatric hospitalization can be utilized in aid of repressive measures against non-conformists under such statutes—in a manner reminiscent of the totalitarian doctrine of analogy—is highlighted by recent developments.

Major General Walker, charged with complicity in the obstruction of a federal court order directing the admission of a Negro student to the University of Mississippi, was prevented from obtaining his release under bond and was lodged in the psychiatric ward of a federal prison institution for an examination intended to cover a period of 60 to 90 days. See Washington Post, Oct. 3, 1962, p. A-5; Oct. 4, 1962, p. A-9.

Ironically two pickets, protesting racial segregation in Maryland were sent to Spring Grove State Hospital for what was deemed appropriate mental examination by a magistrate. See, *e.g.,* Washington Post, Nov. 7, 1963, p. D-26.

In each case loosely drawn statutes indistinguishable from those encountered in the District of Columbia were available to justify an incursion upon political and civil rights. In each case, the medical label of contemporary psychiatry was permitted to obscure, however temporarily, the reality not only of a loss of liberty but of the wilful infliction of a destructive and humiliating deprivation on a sanction target.

Such statutes have thus served not only the obvious purpose of providing for the possibility of the summary detention of the individual deemed troublesome by the authorities, but the further purpose of the incapacitation and confinement of that individual for extensive periods of time. The conventional dragnet law thus pales into insignificance in the presence of such loosely drawn legislation, seemingly designed for therapeutic and rehabilitative ends.

The District of Columbia law for the commitment of the citizen under criminal albeit not civil auspices, provides a dramatic case in point. §301 (a) in particular is readily drawn upon for oppressive use.

A recent illustration of the scope of this power was furnished when "[m]ental tests were ordered by Judge Edward A. Beard . . . for a 43 year-old critic of the manner in which the jurist conducts his Court of General Sessions business." The Washington Post, April 20, 1963, p. 1.

The account furnished by The Washington Post in this news story included the following data:

"Beard said it all began when the man approached several prospective women jurors outside his courtroom and tried to engage one of them in conversation.

"Although the man's approach was innocuous enough, his piercing eyes and positive manner of speaking shook up the juror to such an extent that she was unable to concentrate on the opening testimony in a civil suit and her agitation was noticed by one of the trial attor-

of his case precipitated active consideration by the office of the public prosecutor of further commitment proceedings against him.[125]

Still upon the premises of St. Elizabeths Hospital, still without treatment meeting the standards of the American Psychiatric Association, still without hope of early release, and still the target of legal proceedings, Frederick Lynch committed suicide.[126]

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neys.... Judge Beard said the man insisted during their interview that Beard was seating his jurors incorrectly and otherwise running a lamentably loose operation.

"The judge said he had no recourse but to hold the visitor in contempt and refer him to D. C. General Hospital for observation."

Added to the already vast reservoir of summary commitment powers, the involuntary insanity defense, linked to §301 (a) furnishes the District of Columbia with the dragnet law par excellence.

The short-cut available by this form of summary commitment stands as a constant inducement to the prosecution to by-pass the more onerous requirements of the Civil Commitment Law.

[125] Disposed initially to proceed under §24-301 (a), the prosecutor's office subsequently indicated that it was preparing to proceed under the Civil Commitment Law.

[126] In a letter dated January 22, 1962, Frederick Lynch wrote:

"Frankly, the conditions here are almost more than anyone can bear... the monotony—78 cents per day per patient food budget, no laundry, and above all no treatment. This hospital... is a human warehouse.

* * * *

"Even if the Court does rule in my favor, it is kind of a case where the operation was a success but the patient died."

A news item, dated August 24, 1962, in the local press reported the denouement in the strange case of Frederick Lynch:

"Frederick C. Lynch, who charged an insanity defense was forced upon him in a Municipal Court trial, yesterday threw himself under the wheels of a slow-moving truck on the grounds of St. Elizabeths Hospital, police said.

"The apparent suicide of the 45-year-old Air Force Lieutenant Colonel came on the eve of a new court hearing today in which the Government, which lost the case before the Supreme Court, sought a civil hospital commitment.

"The Government had its fingers crossed in the Lynch case, because for a while it appeared that he might not be sick enough to qualify for a civil commitment." Evening Star, Aug. 24. 1962, p. B-2.

The Catholic University
of America

Law Review

VOLUME XIII • FEBRUARY, 1964 • NUMBER 1