NOTES

COMMITMENT—STANDARD FOR COMMITMENT FOLLOWING ACQUITTAL BY REASON OF INSANITY MADE UNIFORM WITH THAT FOR CIVIL COMMITMENT—*State v. Krol*, 68 N.J. 236, 344 A.2d 289 (1975).

On August 6, 1969, Stefan Krol fatally wounded his wife, Rosemary, during a heated argument in their home.[1] Krol admitted commission of the act upon arrest,[2] and was subsequently indicted for murder.[3] At the trial, psychiatrists testified that Krol was a schizophrenic,[4] acting under a delusion that his wife was plotting to kill

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[1] Brief and Appendix for Defendant-Appellant at 2–3, State v. Krol, 68 N.J. 236, 344 A.2d 289 (1975) [hereinafter cited as Brief for Appellant]. The autopsy revealed that Mrs. Krol was repeatedly stabbed in various parts of her body. *Id.* at 3.

[2] Brief for the State of New Jersey at 3, State v. Krol, 68 N.J. 236, 344 A.2d 289 (1975) [hereinafter cited as Brief for the State]. When the police officer arrived at the Krol home, the

> [d]efendant was jumping up and down, waving his arms over his head, and did not appear stable. He began yelling, "I killed her. I killed her." When [Officer] Arcari asked him, "Who?," defendant replied, "My wife."

Id. at 2–3. Subsequent testimony at the trial revealed that Krol had no recollection of quarrels with his wife or the actual stabbing. Brief for Appellant, *supra* note 1, at 8.

[3] Brief for the State, *supra* note 2, at 1. The indictment was returned by the Camden County Grand Jury on February 3, 1970. *Id.*

[4] Brief for Appellant, *supra* note 1, at 6–8. Two psychiatrists testified that Krol was "a schizophrenic, paranoid type." *Id.* at 7–8. This variation of schizophrenia

> is characterized primarily by the presence of persecutory or grandiose delusions, often associated with hallucinations. Excessive religiosity is sometimes seen. The patient's attitude is frequently hostile and aggressive, and his behavior tends to be consistent with his delusions. In general the disorder does not manifest the gross personality disorganization of the hebephrenic and catatonic types, perhaps because the patient uses the mechanism of projection, which ascribes to others characteristics he cannot accept in himself. Three subtypes of the disorder may sometimes be differentiated, depending on the predominant symptoms: hostile, grandiose, and hallucinatory.

COMMITTEE ON NOMENCLATURE AND STATISTICS OF THE AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS § 295.3, at 34 (2d ed. 1968) [hereinafter cited as DSM-II]. However, another psychiatrist classified Krol's condition as "schizophrenic reaction, chronic undifferentiated type," Brief for Appellant, *supra* at 6, which refers to "patients who show mixed schizophrenic symptoms and who present definite schizophrenic thought, affect and behavior not classifiable under the other types of schizophrenia," DSM-II, *supra* § 295.90, at 35. Schizophrenia, regardless of the type, is a severe mental disorer which has no known cure. ***Position Statement on Maik Decision of New Jersey Psychiatric Association***, 97 N.J.L.J. 327 (1974).

him.[5] The jury acquitted Krol by reason of insanity[6] and determined that his insanity continued.[7] Consequently, the trial judge ordered that Krol be confined in Trenton Psychiatric Hospital[8] until restored to reason.[9]

Following an affirmance of the commitment order by the appellate division,[10] the Supreme Court of New Jersey granted certification[11] to consider the constitutionality of the statutory standard for involuntary commitment of one acquitted by reason of insanity.[12] In *State v. Krol*,[13] the court held that due process and equal protection principles demand that the trier of fact examine the condition of the individual "in terms of continuing mental illness and dangerousness to self or others, not in terms of continuing insanity alone," to determine whether or not commitment is warranted.[14] The court set down

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[5] State v. Krol, 68 N.J. 236, 244, 344 A.2d 289, 294 (1975). At least one month prior to his wife's death, Krol had told a neighbor "that his wife was persecuting him," that she had put poison in his champagne, and that she was romantically involved with another. Brief for Appellant, *supra* note 1, at 4.

[6] The term "insanity" has varying definitions depending upon the purpose for which the determination is being made. "Insanity" is used in three contexts in this Note: for determining criminal responsibility, competency to stand trial, and commitment eligibility. "Insanity" in these three contexts has been defined as follows:

> 1. As a defense to crime, it must be proved that the accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act, or if he did know it, that he did not know what he was doing was wrong. . . .
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> 2. For the purpose of commitment to a mental institution, insanity usually comprehends any disease or disorder of the mind which renders its victim dangerous to himself or to others. . . .
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> 3. As a test of ability to stand trial on a criminal charge, insanity means a mental illness or condition which prevents the accused from comprehending his position and from consulting intelligently with counsel in the preparation of his defense.

Aponte v. State, 30 N.J. 441, 450, 153 A.2d 665, 669 (1959) (citations omitted).

[7] State v. Krol, 68 N.J. 236, 244, 344 A.2d 289, 294 (1975). The jury was instructed by the court that "insanity continues if the underlying disease which resulted in the psychotic episode still remains." Brief for Appellant, *supra* note 1, at 10.

[8] State v. Krol, 68 N.J. 236, 244, 344 A.2d 289, 294 (1975). The trial judge acted pursuant to N.J. STAT. ANN. § 2A:163–3 (1971) which requires automatic commitment upon a jury finding of continued insanity. For further discussion of the statutory procedure see note 27 *infra*.

[9] Brief for Appellant, *supra* note 1, at 1. For an explanation of this standard for release see notes 36–39 *infra* and accompanying text.

[10] *See* State v. Krol, 68 N.J. 236, 244, 344 A.2d 289, 294 (1975).

[11] State v. Krol, 65 N.J. 561, 325 A.2d 695 (1974).

[12] *See* State v. Krol, 68 N.J. 236, 244–45, 344 A.2d 289, 294 (1975).

[13] 68 N.J. 236, 344 A.2d 289 (1975).

[14] *Id.* at 249–50, 344 A.2d at 296–97. Although *Krol* specifically involved the commitment of one acquitted by reason of insanity under N.J. STAT. ANN. § 2A:163–3 (1971), the court stated that its holding also applied to persons committed following

an interim procedure to be applied retroactively until the legislature amends the invalidated statutory criteria for commitment so as to comply with the new standard.[15]

Historically, people acquitted of crimes by reason of insanity have been treated differently than other mentally ill persons for purposes of commitment.[16] At common law, only persons who were clearly deranged and violent could be sequestered from society, under the police power of the sovereign,[17] whereas those found to be insane at the time of the commission of a crime were usually imprisoned for life without inquiry into their dangerousness.[18] The advent of asylums provided an alternative to incarceration of the criminally insane,[19] but fear that this group would constitute a danger to other patients resulted in the establishment of special facilities for their restraint.[20] As the number of institutions grew and the available means of treatment improved, the test for involuntary commitment was expanded to permit confinement of those who needed restraint for their own protection.[21] Thus, in addition to relying upon their police powers to justify commitment, governments came to rely on their role as *parens patriae*, guardian of the disabled, in assuring the care and treatment of the mentally ill.[22] Largely as a consequence of

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dismissal of charges by reason of insanity under *id.* § 2A:163–2. 68 N.J. at 243–44 n.1, 255, 344 A.2d at 293, 299. For a discussion of the provisions of these two statutes see note 27 *infra*.

[15] 68 N.J. at 255–56, 267, 344 A.2d at 299–300, 306. For an outline and discussion of this new procedure see notes 111–33 *infra* and accompanying text.

[16] *See* K. JONES, LUNACY, LAW, AND CONSCIENCE 1744–1845, at 203 (1955) [hereinafter cited as JONES].

[17] A. DEUTSCH, THE MENTALLY ILL IN AMERICA 419–20 (1949). In fact,

> [a]nyone could arrest a "furiously insane" person, or one deemed "dangerous to be permitted to be at large," and confine him for the duration of his dangerous condition, provided that this were done in a humane manner. It was permitted to "confine, bind and beat" him if his condition rendered it "necessary."

Id. See also AMERICAN BAR FOUNDATION, THE MENTALLY DISABLED AND THE LAW 5 (2d ed. S. Brakel & R. Rock 1971) [hereinafter cited as Brakel & Rock].

[18] JONES, *supra* note 16, at 24–25. *See also* H. WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 372 (1954) [hereinafter cited as WEIHOFEN].

[19] *See* WEIHOFEN, *supra* note 18, at 372.

[20] JONES, *supra* note 16, at 220.

[21] *See* AMERICAN BAR FOUNDATION, THE MENTALLY DISABLED AND THE LAW 12 (1st ed. F. Lindman & D. McIntyre 1961).

[22] *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1207–45 (1974); Comment, *A Constitutional Right to Court Appointed Counsel for the Involuntarily Committed Mentally Ill: Beyond the Civil-Criminal Distinction*, 5 SETON HALL L. REV. 64, 67–75 (1973). *See also* Livermore, Malmquist & Meehl, *On the Justifications for Civil Commitment*, 117 U. PA. L. REV. 75, 80–96 (1968).

New Jersey courts appear to rely solely on the state's police power as the justifica-

these developments, states fashioned different civil and criminal commitment procedures along with various definitions of what constituted insanity sufficient to justify the loss of liberty involved.[23]

The state of New Jersey recognizes three categories of involuntary commitments:[24] civil commitment,[25] commitment upon a deter-

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tion for both criminal and civil commitments. *See, e.g.*, State v. Maik, 60 N.J. 203, 213, 287 A.2d 715, 720 (1972) (criminal); *In re* Perry, 137 N.J. Eq. 161, 162, 43 A.2d 885, 885–86 (Ch. 1945) (civil). *But see* State v. Caralluzzo, 49 N.J. 152, 157, 228 A.2d 693, 696 (1967). In *Caralluzzo*, protection and treatment of those dangerous to themselves or society was deemed to be an exercise of the *parens patriae* power. *Id.* For the argument that the *parens patriae* power should be used to permit commitment of mentally ill persons who may not be a threat to themselves or others see *In re* Heukelekian, 24 N.J. Super. 407, 411–12, 94 A.2d 501, 503–04 (App. Div. 1953) (Bigelow, J., dissenting).

[23] Lessard v. Schmidt, 349 F. Supp. 1078, 1086 (E.D. Wis. 1972), *vacated on other grounds and remanded*, 414 U.S. 473, *modified on other grounds and reinstated*, 379 F. Supp. 1376 (1974), *vacated on other grounds and remanded*, 421 U.S. 957 (1975). For a compilation of the varying commitment standards and procedures throughout the United States see Brakel & Rock, *supra* note 17, at 66–128.

[24] Commitments are termed "involuntary," not because the patient necessarily opposes confinement, but because once a decision to restrain has been made, the patient is legally bound to comply. *See* Matthews, *Observations on Police Policy and Procedures for Emergency Detention of the Mentally Ill*, 61 J. CRIM. L.C. & P.S. 283, 287–88 (1970).

New Jersey also has a voluntary commitment statute which provides that any New Jersey resident over eighteen years of age may be admitted without court determination if the admitting physician is satisfied that the patient requires hospitalization. *See* N.J. STAT. ANN. § 30:4–46 (Supp. 1975–76). Voluntary commitment of minors on the application of specified persons may be temporary only and requires a judicial determination of the desirability of commitment. *Compare id. with* N.J.R. 4:74–7(j).

[25] Involuntary civil commitment is divided into four general classes. *See* N.J. STAT. ANN. § 30:4–25 (Supp. 1975–76) (Classes A, B, C & E).

A Class A commitment occurs only after a county court hearing on the issue of mental illness and is pursued only when, in the opinion of the certifying physician, the patient's condition does not warrant hospitalization pending the judicial determination. *Id.* § 30:4–36 (1964).

Class B authorizes a court-ordered temporary confinement in an emergency situation. *Id.* § 30:4–25 (Supp. 1975–76). Such confinement requires certificates of two physicians, *id.* § 30:4–29, attesting that the person is in need of immediate restraint. *Id.* § 30:4–37 (1964). Although detention of the patient is limited to a 20-day period, *id.* § 30:4–37, the court rules permit a continuance "for a period of not more than 10 days," N.J.R. 4:74–7(c)(1).

Constables and police officers are also empowered to recommend commitment. They are permitted "to apprehend any person whose behavior suggests the existence of a mental illness, who shall on inspection be deemed to be dangerous to the public" and to take such a person to court immediately for an order of temporary commitment for a period of not more than 15 days. The order may issue without a physician's certificate if no physician is willing to examine the patient. N.J. STAT. ANN. § 30:4–26.3 (Supp. 1975–76).

Class C permits medically certified temporary commitment when it is impossible to obtain a Class B temporary commitment order and the patient's condition dictates immediate restraint. *Id.* § 30:4–25 (Supp. 1975–76); *id.* § 30:4–38 (1964). The original justification and warrant for this action is a complaint accompanied by two physicians'

mination of incompetency to stand trial,[26] and commitment following a dismissal of charges or an acquittal by reason of insanity.[27] The stan-

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certificates detailing the patient's condition. Upon presentation of these documents to the chief executive officer of a mental institution, they are certified and forwarded to the county adjuster, who presents them to the county court for a temporary commitment order. Such an order authorizes detention of the individual for 20 days from the date of admission. *Id.* § 30:4–38 (1964).

Furthermore, under another provision, a single physician may certify that a person is unable, due to mental illness or psychosis caused by drugs or alcohol, to make voluntary application for admission. Such a person may, in the discretion of the chief executive officer of a mental institution, be admitted for observation for no longer than seven days unless under authority of subsequent formal commitment procedures. *Id.* § 30:4–46.1. This type of admission, due to the absence of a judicial hearing or any consent on the part of the individual or his relatives, is strictly limited to those who are incapable of volitional acts as a result of specified pathological problems. *In re* J. W., 44 N.J. Super. 216, 226, 130 A.2d 64, 69 (App. Div.), *cert. denied*, 24 N.J. 465, 132 A.2d 558 (1957).

Class E commitments encompass transfers of previously confined persons to mental institutions. N.J. STAT. ANN. § 30:4–25 (Supp. 1975–76). This commitment procedure is used with those who have been previously committed, indicted, sentenced to imprisonment, or are under process. Upon the court's determination that such a person is mentally ill or mentally retarded, he may be ordered transferred to an appropriate mental institution until the chief executive officer certifies that the patient is "in a state of remission and free of symptoms of the mental disease which required his original transfer." *Id.* § 30:4–82. *Compare id. with* notes 37–38 *infra* and accompanying text (*Maik* release standard). This section also authorizes a temporary confinement prior to the required judicial determination of whether the patient is a hazard to himself or others or whether he cannot fend for himself. State v. Caralluzzo, 49 N.J. 152, 156, 157, 228 A.2d 693, 695, 696 (1967).

Under N.J. STAT. ANN. § 30:4–7 (1964), the Commissioner of Institutions and Agencies is empowered to transfer inmates from the state prison to a mental hospital without a court hearing, only where the prisoner is mentally ill and threatens the safety of himself or others, and only for a 30-day period, as provided by *id.* § 30:4–84 (Supp. 1975–76). McCorkle v. Smith, 100 N.J. Super. 595, 599, 600, 242 A.2d 861, 863, 864 (App. Div. 1968).

[26] N.J. STAT. ANN. § 2A:163–2 (1971). This statute authorizes a judicial determination of the mental competency of a defendant, that is, ascertainment of whether the individual is suffering from mental illness or retardation which would impair his ability to comprehend his position and to consult intelligently with his defense counsel. State v. Lucas, 30 N.J. 37, 72, 152 A.2d 50, 69 (1959). If found incompetent to stand trial, a defendant may be involuntarily committed pursuant to N.J. STAT. ANN. § 30:4–82 (Supp. 1975–76). For a discussion of this statute see note 25 *supra*.

[27] N.J. STAT. ANN. §§ 2A:163–2, –3 (1971). Section 2A:163–3 provides:

> If, upon the trial of any indictment, the defense of insanity is pleaded and it shall be given in evidence that the person charged therein was insane at the time of the commission of the offense charged in such indictment and such person shall be acquitted, the jury shall be required to find specially by their verdict whether or not such person was insane at the time of the commission of such offense and to declare whether or not such person was acquitted by them by reason of the insanity of such person at the time of the commission of such offense, and to find specially by their verdict also whether or not such insanity continues, and if the jury shall find by their verdict that such insanity does continue, the court shall order such person into safe custody and commit him to the New Jersey state hospital at Trenton until such time as he may be restored

dard for commitment has not been uniform among these classes. The

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to reason.

Section 2A:163–2 provides in pertinent part:

> If any person in confinement under commitment, indictment or under any process, shall appear to be insane, the assignment judge, or judge of the county court of the county in which such person is confined, may, upon presentation to him of the application and certificates as provided in Title 30, chapter 4 of the Revised Statutes, institute an inquiry and take proofs as to the mental condition of such person. The proofs herein referred to may include testimony of qualified psychiatrists to be taken in open court by the judge, either in the presence of a jury specially impanelled to try the issue of insanity alone, or without a jury, as the judge in his discretion may determine. It shall be competent for the judge if sitting without a jury, or the jury, if one is impanelled, to determine not only the sanity of the accused at the time of the hearing, but as well the sanity of the accused at the time the offense charged against him is alleged to have been committed.
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> If it shall be determined after hearing as aforesaid, that the accused was insane at the time the offense charged against him is alleged to have been committed, the charge against him shall be dismissed on this ground and the records of the proceedings so noted. In this event, the judge or jury, as the case may be, shall also find separately whether his insanity in any degree continues, and, if it does, shall order him into safe custody and direct him to be sent to the New Jersey state hospital at Trenton, to be confined as otherwise provided by law, and maintained as to expense as is otherwise provided for the maintenance of the criminal insane, until such time as he may be restored to reason, and no person so confined shall be released from such confinement except upon the order of the court by which he was committed. This section shall not be construed to prevent the use of the writ of habeas corpus.

Both sections mandate immediate commitment following determination that the defendant's insanity continued. Under section 2A:163–2, in addition to ascertaining the competency of an accused to stand trial, the judge may, with or without a jury, determine whether the accused was insane at the time of the crime and, if so, whether his insanity continues. If the defendant is competent to stand trial and the insanity defense is pleaded, section 2A:163–3 requires that a jury determine the issues of past and present insanity.

Although the statute does not define the term, "insanity" as a defense to a criminal charge requires

> that the accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act, or if he did know it, that he did not know what he was doing was wrong.

Aponte v. State, 30 N.J. 441, 450, 153 A.2d 665, 669 (1959). This standard for determining criminal responsibility is referred to as the *M'Naghten* rule, so named for *M'Naghten's Case*, 10 Clark & F. 200, 8 Eng. Rep. 718 (1843), in which the principle was first enunciated. The standard was adopted early in New Jersey. *See* State v. Spencer, 21 N.J.L. 196, 212 (O. & T. 1846). It has been consistently reaffirmed since. *See, e.g.*, State v. Maik, 60 N.J. 203, 212, 287 A.2d 715, 720 (1972); State v. Sikora, 44 N.J. 453, 470, 210 A.2d 193, 202 (1965); State v. Lucas, 30 N.J. 37, 68, 72, 152 A.2d 50, 66, 68 (1959). Such "insanity" must be demonstrated by a preponderance of the evidence. State v. DiPaglia, 64 N.J. 288, 293, 315 A.2d 385, 388 (1974).

For a comparison of the *M'Naghten* standard with the commitment standard which evolved from State v. Maik, *supra*, see Comment, *Release from Confinement of Persons Acquitted by Reason of Insanity in New Jersey*, 27 RUTGERS L. REV. 160, 169–73 (1973).

civil commitment procedure[28] has continually limited the definition of insane persons to those mentally ill individuals who are dangerous to themselves or others.[29] The burden of proving this condition is upon the person who alleges the insanity;[30] any reasonable doubt as to the individual's mental condition is to be resolved in favor of the patient.[31] Similarly, if the individual is found incompetent to stand trial,[32] his involuntary commitment remains conditioned upon a judicial determination of dangerousness to self or others.[33]

In the cases prior to *Krol* in which commitment resulted from a dismissal of charges or an acquittal by reason of insanity, a different standard and procedure had been employed. The judge or jury first determined by a preponderance of the evidence whether the insanity of the accused continued.[34] Upon a finding of continuing insanity, the judge would order the defendant committed until "restored to reason."[35] In order to determine the continuing insanity of an indi-

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[28] For a listing of those commitments which are classified as civil see note 25 *supra*.

[29] *See, e.g., In re* Heukelekian, 24 N.J. Super. 407, 409, 94 A.2d 501, 502 (App. Div. 1953) (if "liberated she will probably imperil her own safety or the safety or property of others"); *In re* R. R., 140 N.J. Eq. 371, 373, 54 A.2d 814, 816 (Ch. 1947) ("if liberated, the inmate in the light of the evidence is reasonably likely to menace the safety of himself or that of the person or property of others"); *In re* Perry, 137 N.J. Eq. 161, 163, 164, 43 A.2d 885, 886 (Ch. 1945) (mere eccentricities do not establish insanity; the person must "appreciably menace the safety of himself or that of the person or property of others"). *Cf.* Boesch v. Kick, 97 N.J.L. 92, 96–97, 116 A. 796, 797–98 (Sup. Ct.), *aff'd on other grounds*, 98 N.J.L. 183, 119 A. 1 (Ct. Err. & App. 1922) (commitment of person without proof that he would endanger himself or the public held to be false imprisonment).

The amended rule governing civil commitment, promulgated prior to the *Krol* decision and effective as of September 8, 1975, requires the certifying physician to determine "that the patient if not committed would be a probable danger to himself or the community" and to state the factual basis for his conclusion. N.J.R. 4:74–7(b).

[30] Boesch v. Kick, 97 N.J.L. 92, 96–97, 116 A. 796, 797 (Sup. Ct.), *aff'd on other grounds*, 98 N.J.L. 183, 119 A. 1 (Ct. Err. & App. 1922).

[31] *In re* J. W., 44 N.J. Super. 216, 226, 130 A.2d 64, 69 (App. Div.), *cert. denied*, 24 N.J. 465, 132 A.2d 558 (1957); *In re* Heukelekian, 24 N.J. Super. 407, 409, 94 A.2d 501, 503 (App. Div. 1953); *In re* Perry, 137 N.J. Eq. 161, 164, 43 A.2d 885, 887 (Ch. 1945).

It should be noted that the revised N.J.R. 4:74–7 is silent on the burden of proof issue, contrary to the recommendation of the Supreme Court Committee on Civil Practice which proposed a reasonable-doubt standard. *See* 98 N.J.L.J. 377 (1975).

[32] For the standard of insanity used to determine incompetency to stand trial see note 26 *supra*.

[33] State v. Caralluzzo, 49 N.J. 152, 158, 228 A.2d 693, 696 (1967).

[34] In cases where the judge initially found the accused incompetent to stand trial, the judge had the option of determining, alone or with a jury, whether the accused was insane at the time of the crime. N.J. STAT. ANN. § 2A:163–2 (1971). This option continues to be available. However, if the defendant were found mentally competent to stand trial, the issues of past and present insanity were formerly placed in the hands of the jury. *Id.* § 2A:163–3. This procedure has been altered by the decision in *Krol*. *See* notes 111–26 *infra* and accompanying text.

[35] N.J. STAT. ANN. §§ 2A:163–2, –3 (1971).

vidual, the judge or jury was required to decide whether the underlying illness persisted.[36] This criterion for commitment evolved from the release standard set forth in *State v. Maik*.[37] In that case, the New Jersey supreme court held that a defendant should not be considered " 'restored to reason,' " and consequently released, unless the underlying condition or defect had been "removed or effectively neutralized," as determined by the court.[38] Under this standard, then, it was possible for a person with an incurable mental disorder to be committed and confined indefinitely, even though he posed no danger to himself or society.[39]

Subsequently, the supreme court in *State v. Carter*[40] took cog-

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[36] SUPREME COURT OF NEW JERSEY, COMMITTEE ON MODEL JURY CHARGES § 3.180, at 9 (1973). The charge given to the jury at Krol's trial, illustrative of the factors under consideration in this type of jury charge, read as follows:

> "But, when considering the question of whether insanity continues or whether [the defendant] has presently been restored to reason, the standard is different. Your determination is whether the defendant still suffers from the underlying condition which manifested itself at the time of the alleged crime. It is the underlying or latent mental disease and not merely a psychotic episode which emerged from it or manifested itself which is relevant to this inquiry. An offender is not restored to reason unless he is so freed of the underlying illness that his reason can be expected to prevail. A temporary abatement is not sufficient. A legal requirement for restoration to reason is not met so long as the underlying illness continues. Therefore, if you find that after the commission of the offense the defendant's condition lessens in severity or is free of symptoms of a mental disease but the underlying latent disease remains, then the defendant is not restored to reason within the meaning of the law and you must find that his insanity continues. If, on the other hand, you are satisfied that the defendant no longer suffers from the underlying disease, you are to find specially that the insanity no longer continues, thus indicating that the defendant has been restored to reason and is to be freed."

Defendant's Petition for Certification at 6–7, State v. Krol, 68 N.J. 236, 344 A.2d 289 (1975) (quoting from the trial transcript).

The standard set out in the above jury charge has apparently been used to determine continuing insanity despite the fact that the supreme court suggested in State v. Carter, 64 N.J. 382, 388, 316 A.2d 449, 453 (1974), that the *M'Naghten* test of insanity was the standard governing the initial commitment. For discussion of the *M'Naghten* test see note 27 *supra*.

[37] 60 N.J. 203, 287 A.2d 715 (1972). *See* Note, *Conditional Release From Mental Institutions Made Available to Persons Confined Under Criminal Statutes*, 6 SETON HALL L. REV. 128, 129 n.5 (1974).

[38] 60 N.J. at 218–19, 287 A.2d at 723. For a discussion of this standard for release see Comment, *supra* note 27, at 160–61, 169–73; Note, *supra* note 37, at 135–36; Note, M'Naghten *and Public Security—Post-Acquittal Release Potential Reduced Under Temporary Insanity Defense*, 4 SETON HALL L. REV. 295, 304–10 (1972).

[39] This is especially true for sufferers of schizophrenia, a disease with no known cure. *See Position Statement on Maik Decision of New Jersey Psychiatric Association*, 97 N.J.L.J. 327 (1974); Note, *supra* note 37, at 136.

[40] 64 N.J. 382, 316 A.2d 449 (1974). For a discussion of *Carter* see Note, *supra* note 37.

nizance of this predicament[41] when it considered whether a conditional release would be available to one committed following dismissal of criminal charges on the ground of insanity.[42] Carter, a mentally retarded schizophrenic,[43] was adjudged incompetent to stand trial; the charges against him were dismissed following a finding that he was insane at the time of the offenses.[44] The judge further determined that Carter's insanity continued, and accordingly ordered him committed.[45] When hospital officials released Carter into the custody of his parents without a court order, the state protested, and, following a hearing at which it was determined that Carter's underlying condition had not abated as required by *Maik*, he was ordered recommitted.[46] This judgment was affirmed by the appellate division.[47]

On appeal, the supreme court acknowledged the *Maik* standard for final release[48] but recognized the harshness of this standard and permitted a conditional release to one whose mental illness was in "remission."[49] This type of release depended upon showing "clearly and convincingly"[50] the individual's fitness for release,[51] his inability to benefit from continued confinement, and the availability of

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[41] 64 N.J. at 389, 394, 316 A.2d at 453, 456.

[42] *Id.* at 386, 316 A.2d at 451. The commitment and dismissal of charges occurred pursuant to the provisions of N.J. STAT. ANN. § 2A:163–2 (1971). 64 N.J. at 386, 316 A.2d at 451. The statute is set out in note 27 *supra*.

For civilly committed patients, conditional release had previously been provided for by the statute. N.J. STAT. ANN. § 30:4–107 (Supp. 1975–76).

[43] For a discussion of schizophrenia see note 4 *supra*.

[44] 64 N.J. at 386–87, 316 A.2d at 451–52.

[45] *See id.* at 386, 316 A.2d at 451.

[46] *Id.* at 386–87, 316 A.2d at 451–52.

[47] *See id.* at 387, 316 A.2d at 452.

[48] *Id.* at 398–400, 316 A.2d at 458–59.

[49] *Id.* at 389, 400, 401, 316 A.2d at 453, 459, 460. The court distinguished "remission" from "neutralization," the *Maik* requirement for release, stating that the latter was a state in which a person could function without supervision, whereas the former merely required total or partial abatement of the symptoms of the disease. *Id.* at 399–400, 316 A.2d at 458–59.

[50] *Id.* at 408, 316 A.2d at 463. In the court's view, a conditional release demanded a higher burden of proof than a mere preponderance, since the patient had previously been declared insane and had shown that he presented a threat to society. However, a reasonable-doubt standard was found to be an unfair burden on the patient. *Id.*

For a discussion of the burden-of-proof issue in *Carter* see *id.* at 423–27, 316 A.2d at 471–73 (Clifford, J., concurring in part and dissenting in part). *See also* Note, *supra* note 37, at 139–40 & n.78.

[51] It was indicated that a court deciding whether to grant conditional release should consider the patient's ability to cooperate in outpatient treatment without compulsion, to live safely among society, and to benefit from the release. *See* 64 N.J. at 403–04, 316 A.2d at 461.

resources to aid him in his readjustment to society.[52] A conditional release was made available not only to those committed after dismissal of charges on grounds of insanity but also to those confined following acquittal by reason of insanity.[53] Although the *Carter* court was presented with the issue of the constitutionality of New Jersey's standard for commitment of those acquitted by reason of insanity, it declined to reach the question, opting instead to follow the prior *Maik* reasoning.[54]

The United States Supreme Court, when considering other states' commitment procedures, provided some constitutional guidelines relevant to the issue in *Krol*. In the leading case of *Baxstrom v. Herold*,[55] a prisoner who had been serving a sentence for second-degree assault was transferred to a mental institution administered by the department of corrections.[56] When the expiration of his penal term drew near, hospital authorities requested Baxstrom's civil commitment.[57] In a proceeding in which Baxstrom was not represented by counsel,[58] the judge found that Baxstrom remained mentally ill and in need of treatment[59] and left the question of his transfer to a civil hospital to the discretion of the mental health authorities.[60] Hospital officials decided that Baxstrom was not suited for treatment in a civil institution and kept him confined in the department of corrections' hospital, even past the termination of his sentence.[61] Baxstrom's repeated requests for release or transfer from the corrections institution were thereafter denied.[62]

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[52] *Id.* at 403–04, 316 A.2d at 461.

[53] *Id.* at 401, 316 A.2d at 460.

[54] *See id.* at 410, 316 A.2d at 464.

[55] 383 U.S. 107 (1966).

[56] *Id.* at 108.

[57] *Id.* The request was made by way of a petition filed in the surrogate's court of the appropriate county. *Id.*

[58] *Id.* Apparently Baxstrom could have had legal counsel had he been able to afford it. *Id.* at 109 n.1. He was, however, granted a brief question period during the proceeding held in the judge's chambers. *Id.* at 108–09.

[59] *See id.* at 109. The decision was based in part upon the certificates of two examining physicians, which documents were presented by the state. *Id.* at 108.

[60] *Id.* at 109.

[61] *Id.* The decision as to where to confine Baxstrom was made ex parte, apparently even before the commitment order had been entered. *Id.*

[62] *Id.* at 109–10. Baxstrom twice petitioned for writs of habeas corpus in the state courts, but on both occasions the writs were ultimately dismissed. *Id.* Dismissal of the second writ was affirmed on appeal, People *ex rel.* Baxstrom v. Herold, 21 App. Div. 2d 754, 251 N.Y.S. 2d 938 (1964), and leave to appeal further was denied by the New York court of appeals. People *ex rel.* Baxstrom v. Herold, 14 N.Y.2d 490, 202 N.E.2d 159, 253 N.Y.S.2d 1028 (1964).

On certiorari, the Supreme Court first noted that under the applicable New York law, all who were civilly committed, unless committed at the conclusion of a prison term, had a right to jury review of the insanity issue[63] and had to be found "dangerous to the safety of other[s]" in order to be confined to the department of corrections' hospital.[64] The only requirement for the commitment of one nearing the completion of his prison term was the judge's finding that the individual required institutionalization for treatment, in which case hospital administrators were to decide where to confine the individual.[65]

The hospital director contended that this difference in procedure was justified because people such as Baxstrom had demonstrated their dangerous propensities by their prior criminal acts and, therefore, that the state's classification was reasonable.[66] In dealing with this argument, the Court acknowledged that while equal protection of the laws does not demand identical treatment of all individuals, any distinction made has to be related to the purpose behind such classification.[67] The Court found that there was "no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments," when the state decides whether to grant a jury review of the issue of mental illness.[68] Nor could the state deny a hearing on the issue of the patient's dangerousness on the sole basis that he was soon to finish a term of imprisonment.[69] The Court therefore held that under the equal protection clause Baxstrom was entitled to a judicial review of the finding of his insanity and to a proceeding in which his potential danger to others would be determined.[70]

One year later, the Supreme Court applied principles of due process to the commitment area in *Specht v. Patterson*.[71] In that case, the petitioner, Specht, was convicted of taking indecent sexual

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[63] 383 U.S. at 111.

[64] *Id.* at 112–13.

[65] *Id.* at 112.

[66] *Id.* at 111, 114.

[67] *Id.* at 111 (citing Walters v. St. Louis, 347 U.S. 231, 237 (1954)).

[68] 383 U.S. at 111–12. The Court also pointed out that the classifications of "insane" and "dangerously insane" are never relevant to "the opportunity to show whether a person is mentally ill *at all*," although such classifications might be "reasonable" for purposes of selecting the kind of medical treatment and confinement required. *Id.* at 111 (emphasis in original).

[69] *Id.* at 114. The Court rejected the argument that persons convicted of crimes had already demonstrated their dangerousness to a sufficient extent. *See id.*

[70] *Id.* at 110, 114–15.

[71] 386 U.S. 605 (1967).

liberties—a crime which carried a statutory maximum sentence of ten years.[72] Ultimately, however, Specht was sentenced to commitment under a different statute, which permitted confinement of a sex offender for an indeterminate period if the trial court found him to present a physical threat to the public or to be a continual offender who was mentally disturbed.[73] The trial court made its judgment based on the results of a psychiatric examination; neither a hearing nor the right to confront adverse witnesses was provided to Specht.[74]

Under these circumstances, the Court held the scheme under which Specht was sentenced to be violative of due process.[75] It was acknowledged that hearings were not constitutionally required prior to an ordinary determination of the sentence to be imposed upon a defendant, since in that case the sentence is based upon a previously ascertained fact, that is, guilt of a particular crime.[76] However, the Court noted that, in the situation before it, the indeterminate sentence was not based on Specht's conviction but was instead predicated upon a finding that he was either dangerous or a habitual lawbreaker who was mentally ill.[77] Since such a determination involved a new finding of fact,[78] it was held that the determination could not be made without according Specht the due process rights available to him in the normal criminal proceeding.[79]

More recently, the Supreme Court found a pretrial commitment procedure to be violative of both equal protection and due process in *Jackson v. Indiana*.[80] Jackson, a mentally retarded deaf-mute,[81] was charged with committing two robberies.[82] A competency hearing fol-

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[72] *Id.* at 607.

[73] *Id.*

[74] *Id.* at 608.

[75] *Id.* Although the *Specht* decision turned on the due process issue alone, *see id.* at 608–11, the Court, citing *Baxstrom*, observed that both civil and criminal commitment procedures were subject to the constraints of the equal protection clause as well. *Id.* at 608.

[76] *Id.* at 606, 608. This was the holding of Williams v. New York, 337 U.S. 241, 244–45, 252 (1949).

[77] 386 U.S. at 608.

[78] *Id.*

[79] *Id.* at 610–11. The Court stated that under the requirements of due process a defendant must

> have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own. And there must be findings adequate to make meaningful any appeal that is allowed.

Id. at 610.

[80] 406 U.S. 715 (1972).

[81] *Id.* at 717. Jackson's communicative abilities were found to be "almost nonexistent." *Id.* at 718.

[82] *Id.* at 717. The total amount involved in the alleged thefts was nine dollars. *Id.*

lowed at which two psychiatrists who had examined Jackson were called upon to testify.[83] Relying upon the psychiatric evaluations and other expert evidence, the trial judge found Jackson incompetent to stand trial and ordered him committed until he was certified "sane" by the state mental health department.[84]

Jackson argued that since the statute under which he was committed permitted release only when complete sanity was attained, his commitment was tantamount to a life sentence inasmuch as he was unlikely ever to gain sufficient competency to be tried.[85] It was urged that the state should have utilized the standards applicable in other classes of involuntary commitment.[86] Statutes regulating those classes required for commitment either a determination of inability to care for oneself[87] or findings of mental illness and a threat of danger to self or society;[88] release was permitted whenever, in the discretion of the hospital superintendent, the patient's condition warranted it.[89]

The Supreme Court agreed with Jackson's position and held that the difference between Indiana's commitment procedures constituted a denial of equal protection in that a person like Jackson was subjected "to a more lenient commitment standard and to a more stringent standard of release" than those applied to persons not accused of crimes.[90] The Court also held that the pretrial procedure under which Jackson was committed violated the due process clause.[91] It was observed that the purpose behind the procedure was purportedly to help mentally deficient persons gain competency by means of confinement and treatment.[92] Stating that "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed," the Court found the commitment procedure in issue to be deficient in that no opportunity was provided to inquire into whether a person sought to be

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[83] *Id.* at 717–19.

[84] *Id.* at 718–19. Trial testimony revealed the improbability of Jackson's recovering sufficiently to present his defense. *Id.*

[85] *Id.* at 719. The Court found the record to support this contention. *Id.* at 727.

[86] *Id.* at 721, 723.

[87] This was the standard governing institutionalization of the mentally deficient. *Id.* at 721–22.

[88] This was the standard governing involuntary civil commitments in general. *Id.* at 722–23.

[89] *Id.* at 721, 723, 728–29. The Court found the evidence of Jackson's background "strongly suggest[ed]" that under this standard he might have been released at any time, even absent improvement in his condition. *Id.* at 729.

[90] *Id.* at 730.

[91] *Id.* at 731.

[92] *Id.* at 738.

confined would, in fact, be aided in attaining competency.[93] For this reason the Indiana statute in issue was found unconstitutional, the Court holding that one committed as incompetent to stand trial could not be detained longer "than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain [competency] in the foreseeable future."[94]

The principles of due process and equal protection established by the Supreme Court in *Jackson*, *Baxstrom*, and *Specht* were utilized by the *Krol* court in resolving the constitutional challenge to New Jersey's statutory procedure for the commitment of those acquitted by reason of insanity.[95] The court began its discussion of the due process issue by noting that this type of commitment was designed to be protective rather than punitive—that is, to safeguard society from the threat posed by dangerous, mentally ill people.[96] It was pointed out that, in light of this purpose, the procedure presented an anomaly in that an inquiry into the individual's dangerousness was not provided; the only requirement for commitment was that the defendant's insanity continue.[97] Thus, the commitment standard did not reasonably

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[93] *Id.* The Court had earlier noted that Indiana had not made, nor would the record support, "any contention that the commitment could contribute to Jackson's improvement." *Id.* at 727.

[94] *Id.* at 738. If there were no probability of recovery, the Court averred, the state would have to either institute ordinary civil commitment proceedings against the defendant or else release him. *Id.*

[95] 68 N.J. at 248–51, 344 A.2d at 296–97. Prior to addressing the substantive issues of the case, the court disposed of the procedural issue of whether this appeal had been rendered moot by the conditional release of Krol from Trenton Psychiatric Hospital. *Id.* at 245, 344 A.2d at 294. Review of commitment orders is not permitted where the person is no longer deprived of his liberty or property. Stizza v. Essex County Juv. & Dom. Rel. Ct., 132 N.J.L. 406, 407–08, 40 A.2d 567, 569 (Ct. Err. & App. 1945). The court found that the conditions placed upon Krol's release substantially impaired his liberty. 68 N.J. at 245, 344 A.2d at 294. Thus, Krol had "a real and substantial interest in the validity of the original commitment order" and the substantive issues had not been rendered moot. *Id. Cf.* Sibran v. New York, 392 U.S. 40, 50–59 (1968); State v. Parmigiani, 65 N.J. 154, 155, 320 A.2d 161, 161 (1974).

[96] 68 N.J. at 246, 344 A.2d at 295. It is firmly established in New Jersey that insane individuals are not held culpable for their criminal actions since they lack the requisite mens rea, or guilty mind. *See, e.g.*, State v. Carter, 64 N.J. 382, 401, 316 A.2d 449, 459 (1974); State v. Maik, 60 N.J. 203, 212, 287 A.2d 715, 720 (1972); State v. Stern, 40 N.J. Super. 291, 296, 123 A.2d 43, 45 (App. Div. 1956). However, as pointed out by Chief Justice Weintraub in *Maik*, "the aim of the law is to protect the innocent from injury by the sick as well as the bad," and N.J. STAT. ANN. § 2A:163–3 (1971) provides this protection. 60 N.J. at 213, 287 A.2d at 720.

[97] 68 N.J. at 246–47, 344 A.2d at 295. The court drew a distinction between past and present dangerousness, stating that

> [t]he fact that [a] defendant is presently suffering from some degree of mental illness and that at some point in the past mental illness caused him to commit a criminal act, while certainly sufficient to give probable cause to inquire into

relate to the protective purpose behind the statute[98] as the principles of *Jackson* required.[99] The court therefore held that the standard could not be cast solely in terms of continuing mental illness; due process required that the standard also include "dangerousness to self or others."[100]

Furthermore, a defendant's dangerousness could not be statutorily presumed from his previous criminal act since, in the court's view, statutory presumptions of adjudicatory facts are impermissible.[101] Thus, in order to satisfy the due process requirements of *Specht* and

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whether he is dangerous, does not, in and of itself, warrant the inference that he presently poses a significant threat of harm, either to himself or to others.

Id. at 247, 344 A.2d at 295 (footnote omitted). Attention was called to psychological and sociological studies which suggested that the mentally ill are only slightly more likely than the general public to commit harmful acts, and which further suggested that the mentally ill criminal is not substantially more dangerous than other mentally ill persons. *See id.* at 247 n.2, 344 A.2d at 295, and sources cited therein.

[98] Since the construction of the purpose behind N.J. STAT. ANN. § 2A:163–3 (1971) had not been questioned in the case, the *Krol* court postponed any decision on whether due process would permit commitment for a less compelling reason than the protection of the public from dangerous mentally ill individuals. *See* 68 N.J. at 249 n.3, 344 A.2d at 296.

[99] 68 N.J. at 248–49, 344 A.2d at 296. For a discussion of the holding in *Jackson* see notes 80–94 *supra* and accompanying text.

[100] 68 N.J. at 249, 344 A.2d at 296. The *Krol* court also looked to decisions in several other courts which had applied the principles enunciated in *Baxstrom*, *Jackson*, and *Specht*. 68 N.J. at 251, 344 A.2d at 297.

The District of Columbia Circuit has upheld the constitutionality of a statute which provided for different treatment of the civilly and criminally committed, but it held that such different treatment was permissible only "to the extent that there are relevant differences between the two groups." Bolton v. Harris, 395 F.2d 642, 651 (D.C. Cir. 1968). Although not specified in the statute, the court construed the provision in question to require a judicial hearing prior to commitment similar to that provided for the civilly committed. *Id.* at 651–52. *See also* People v. McQuillan, 392 Mich. 511, 535–36, 221 N.W.2d 569, 580 (1974) (after temporary observation period, defendant found not guilty by reason of insanity must have the benefit of commitment and release provisions equal to those available for the civilly committed); State *ex rel.* Kovach v. Schubert, 64 Wis. 2d 612, 623, 219 N.W.2d 341, 347 (1974), *appeal dismissed*, 419 U.S. 1117, *cert. denied*, 419 U.S. 1130 (1975) (due process requires hearing on question of present sanity for criminally committed).

[101] 68 N.J. at 248–49, 344 A.2d at 296. *See also* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 634, 643–48 (1974) (conclusive presumption that pregnant school teacher unable to teach from five months before expected birth violative of due process); Vlandis v. Kline, 412 U.S. 441, 442–43, 453 (1973) (due process violated by irrebuttable presumption that student who applied to university from address outside state is still nonresident); Stanley v. Illinois, 405 U.S. 645, 647, 649 (1972) (presumption that unwed fathers were unfit parents inconsistent with due process and equal protection clauses).

For more detailed consideration of irrebuttable presumptions see Bezanson, *Some Thoughts on the Emerging Irrebuttable Presumption Doctrine*, 7 IND. L. REV. 644 (1974); Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534 (1974); Note, *Conclusive Presumption Doctrine: Equal Process or Due Protection?*, 72 MICH. L. REV. 800 (1974).

Jackson, the court held that there must be a factual determination as to whether the individual himself is presently dangerous.[102]

The court also found the same result to be mandated by principles of equal protection.[103] The *Krol* court read *Baxstrom* and *Jackson* to stand for the proposition that a prior criminal action on the part of one to be committed "is not a constitutionally acceptable basis for imposing upon him a substantially different standard or procedure for involuntary commitment."[104] This principle was found to be broadly applicable to the entire field of involuntary commitment, and the New Jersey standards for civil commitment and commitment following acquittal by reason of insanity were compared in this light.[105] Although the statute setting forth the standard governing civil commitments had not been construed since its amendment in 1965, the court was able to find that the civil commitment statute incorporated the " 'dangerous to self or to society' " standard as a prerequisite to commitment.[106] The court noted that if equal protection does not demand identical treatment of all individuals under all circumstances, it at least requires that differences in treatment serve some state interest.[107] In the instant case, not "even a rational basis" was found

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[102] 68 N.J. at 248–49, 344 A.2d at 296.

[103] *Id.* at 250, 344 A.2d at 297.

[104] *Id.* at 250–51, 344 A.2d at 297.

[105] *Id.* at 251–55, 344 A.2d at 297–99.

[106] *Id.* at 252, 344 A.2d at 298. The earlier civil commitment statute set out the standard only in an indirect fashion, stating that "[i]f the patient shall be found to be sane, the court shall direct his discharge forthwith." N.J. STAT. ANN. § 30:4–44 (1964). This statute had been held to permit confinement only when the party sought to be committed was dangerous to himself or others. *See* cases cited note 29 *supra*. The amended statute directs discharge when "the patient shall be found not suffering from a mental illness," N.J. STAT. ANN. § 30:4–44 (Supp. 1975–76), but the court found this language to be consistent with the "dangerous to self or others" construction given the prior statute. *See* 68 N.J. at 252–53, 344 A.2d at 298.

The court's interpretation of the civil commitment standard appears to be in accord with the intent of the legislature, which defines "mental illness" as

> mental disease to such an extent that a person so afflicted requires care and treatment for his own welfare, or the welfare of others, or of the community.

N.J. STAT. ANN. § 30:4–23 (Supp. 1975–76). This definition applies to all statutorily authorized civil commitment procedures, *see id.*, and in connection with the institutionalization of previously confined persons authorized by *id.* § 30:4–82 it has been stated that the intent to limit commitment to "persons dangerous to themselves or society" is apparent. *See* State v. Caralluzzo, 49 N.J. 152, 156 n.1, 228 A.2d 693, 695 (1967).

[107] 68 N.J. at 253, 344 A.2d at 298. United States Supreme Court cases dealing with the equal protection clause suggest that the weight of the state interest required to justify any disparity in treatment varies with the nature of the classification utilized or the status of the right infringed. Thus, where "fundamental rights" are at issue or a constitutionally "suspect classification" is employed the state must demonstrate a "compelling interest" to support its procedure. *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 371–72, 375 (1971) (distinctions based upon alienage, nationality or race must

which would support the state's utilization of dissimilar standards for those civilly committed and for those committed following acquittal by reason of insanity.[108] Therefore, the court held that Krol could only be confined to a mental institution upon a finding that he was both mentally ill and dangerous to himself or others, the same finding required before civil commitment could take place.[109]

The *Krol* court went beyond a mere declaration that the statutory post-acquittal commitment procedure was unconstitutional in authorizing confinement "without proof of dangerousness."[110] Although it was recognized that the legislature had the ultimate duty to amend the statute, the court decided that the continuing operation of "the machinery of justice" necessitated the creation of a system to continue in effect until the legislature acts.[111] The procedure set out by the court was not claimed to be either the only acceptable one or the best one, but the court found it to be "constitutional and workable."[112] In brief, the provisions enumerated are as follows: (1) At trial, the jury will decide whether the defendant was insane at the time he committed the offense;[113] (2) the jury will "no longer be in-

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be justified by compelling state interest); Shapiro v. Thompson, 394 U.S. 618, 634, 638 (1969) (state must counterbalance abridgment of right to travel with compelling interest). In other cases, the state need only demonstrate that its scheme rationally serves a legitimate purpose. *See, e.g.*, San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 55 (1973) (school financing plan relying on local property taxes not impermissibly discriminatory as to children of poorer areas).

For a review of the so-called two-tiered analysis of equal protection detailed above see *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1076–1132 (1969). For discussion suggesting that equal protection analysis may be assuming new and different contours see Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissible Classifications*, 62 GEO. L.J. 1071 (1974).

[108] 68 N.J. at 253, 344 A.2d at 298–99.

[109] *See id.* at 252–55, 344 A.2d at 298–99. The court reiterated its prior holding that a specific determination of an individual defendant's dangerousness must be made, rejecting the state's argument that those who have demonstrated by a preponderance of the evidence that their criminal act was a result of mental illness are an exceptional class, "more likely to be dangerous than other persons." *Id.* at 253–54, 344 A.2d at 299. The court noted cases which found those acquitted by reason of insanity to be an exceptional class, but it pointed out that such findings were made not in response to the issue of the defendants' dangerousness, but rather in response to the issue of mental illness, which was the sole criterion for involuntary commitment in those cases. *Id.* at 254–55, 344 A.2d at 299 (citing Mills v. State, 256 A.2d 752 (Del. 1969); Chase v. Kearns, 278 A.2d 132 (Me. 1971); State v. Kee, 510 S.W.2d 477 (Mo. 1974)).

[110] 68 N.J. at 255, 344 A.2d at 299 (footnote omitted).

[111] *Id.* at 255–56, 344 A.2d at 299–300.

[112] *Id.* at 255–56, 265, 344 A.2d at 300, 304.

[113] *See id.* at 264–65, 344 A.2d at 304. This aspect of the new procedure is consistent

structed to render a special verdict" regarding the defendant's continuing insanity, but must be instructed as to the consequences of an acquittal "by reason of insanity";[114] (3) if the defendant is acquitted by reason of insanity, the state may at that time request a 60-day observational confinement of the defendant in a mental hospital;[115] (4)

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with the prior practice as set out in N.J. STAT. ANN. § 2A:163–3 (1971). For the full text of the statute see note 27 *supra*.

[114] 68 N.J. at 265, 344 A.2d at 304–05. The court gave two reasons for withdrawing the decision from the jury:

> First, proofs pertinent to the likelihood of harmful conduct by defendant in the future are altogether different in substance and character from those pertinent to guilt or innocence or to defendant's insanity plea. Introduction of such proofs at trial creates a significant risk that the jury may be confused or may be distracted from proper consideration of guilt or innocence, the principal question before it. Second, requiring defendant to simultaneously argue to the jury both that he was insane at the time of the crime and that he is no longer mentally ill or dangerous places him in a difficult and unfair tactical position. He may reasonably fear that the jury will be very loath to reach a verdict of not guilty by reason of insanity if he successfully demonstrates that he is no longer dangerous and must be released upon such a verdict. This fear may well deter him from vigorously arguing present sanity and lack of dangerousness under such circumstances. . . . Separating the issues frees defendant from this potential unfairness.

Id. at 264–65, 344 A.2d at 304 (citations omitted). *Cf.* Weihofen, *Institutional Treatment of Persons Acquitted by Reason of Insanity*, 38 TEXAS L. REV. 849, 850 (1960) (jury incapable of making determination of present insanity on basis of evidence produced at criminal trial).

The instruction to the jury regarding the consequences of their verdict was deemed necessary to insure "that the jury does not act under the mistaken impression that the defendant will necessarily be freed or be indefinitely committed to a mental institution." 68 N.J. at 265, 344 A.2d at 304–05. For a jury charge illustrative of these principles see Bolton v. Harris, 395 F.2d 642, 651 n.50 (D.C. Cir. 1968).

[115] 68 N.J. at 256, 344 A.2d at 300. The court justified this temporary detention by the fact that the defendant's criminal conduct had already been shown to result from mental illness. *Id.* The period for observational confinement authorized by *Krol* differs from the periods permitted in civil commitment cases. *Compare id.* (60 days following acquittal by reason of insanity) *with* N.J. STAT. ANN. § 30:4–26.3 (Supp. 1975–76) (15 days following commitment on application of police) *and id.* § 30:4–37 (1964) (20 days following temporary commitment on court order) *and id.* § 30:4–38 (20 days following temporary commitment on physicians' certifications) *and id.* § 30:4–46.1 (7 days following commitment on certification of single physician). The court, however, pointed to cases from other jurisdictions which had upheld similar temporary commitment proceedings, despite their failure to conform to those followed in civil commitments. 68 N.J. at 256, 344 A.2d at 300. *See* Bolton v. Harris, 395 F.2d 642, 651 (D.C. Cir. 1968); State v. Clemons, 110 Ariz. 79, 84, 515 P.2d 324, 328 (1973); *In re* Franklin, 7 Cal. 3d 126, 141–44, 496 P.2d 465, 474–76, 101 Cal. Rptr. 553, 562–64 (1972); People v. McQuillan, 392 Mich. 511, 524–30, 221 N.W.2d 569, 575–77 (1974).

Logically, however, there seems to be no reason for any particular group of individuals to require more prolonged observation than any other, and at least one commentator has called for "equating mental patients acquitted of crime by reason of insanity with other civil mental patients in *all* respects—including treatment, release, and discharge." Morris, *Mental Illness and Criminal Commitment in Michigan*, 5 MICH. J.L.

within the 60-day period, the state may move for an indefinite confinement on the basis that the defendant is mentally ill and is likely to endanger himself or society;[116] (5) the judge will then hold a hearing without a jury on the issue of indefinite commitment;[117] (6) the state will have the burden of demonstrating the defendant's mental illness and dangerousness by a preponderance of the evidence;[118] (7) if the state meets its burden of proof, the court should order appropriate restraints;[119] (8) the commitment order may be modified when the defendant's dangerousness had diminished or increased;[120] (9) the party requesting the modification order will have the burden of proving the need for a change of the order by a preponderance of the evidence;[121] (10) pending proceedings on the modification, a nonin-

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REF. 2, 38, 39 (1971) (emphasis in original). Inequality of treatment aside, it appears open to at least some dispute whether 60 days is a sufficient time in which an opinion as to future dangerousness may be reached, even by a qualified expert. *See* Comment, *Compulsory Commitment Following a Successful Insanity Defense*, 56 NW. U. L. REV. 409, 466 (1961). The problem may be further aggravated by the vagueness inherent in the "dangerousness" standard itself. *See* notes 154–56 *infra* and accompanying text.

[116] 68 N.J. at 257, 344 A.2d at 300. "Mental illness" is used here by the court as the expression is defined in N.J. STAT. ANN. § 30:4–23 (Supp. 1975–76). 68 N.J. at 257 n.8, 344 A.2d at 300.

[117] 68 N.J. at 264, 344 A.2d at 304.

[118] *Id.* at 257, 344 A.2d at 300. For a discussion of the standard of proof see notes 140–41 *infra* and accompanying text.

[119] 68 N.J. 257–58, 344 A.2d at 300–01. The court made it clear that restraint *must* be accompanied by suitable treatment, which may be administered in a mental institution, in a halfway house, or by means of out-patient care. *Id.* at 257–58, 262, 344 A.2d at 300–01, 303. For a current analysis of the constitutional right to treatment see Perlin, *The Right to Voluntary, Compensated, Therapeutic Work as Part of the Right to Treatment: A New Theory in the Aftermath of* Souder, 7 SETON HALL L. REV. 298 (1976).

The *Krol* court also emphasized that a commitment order should be devised so as to interfere with the patient's liberty only to the extent necessary to insure public protection. 68 N.J. at 257–58, 344 A.2d at 300–01. This directive is consistent with the "least restrictive alternative" doctrine, which essentially mandates

> that, under state constitutions and the Constitution of the United States, committing courts and agencies must refrain from ordering hospitalization whenever a less restrictive alternative will serve as well or better the state's purposes.

Chambers, *Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives*, 70 MICH. L. REV. 1107, 1145 (1972). Although the *Krol* court noted the existence and development of the doctrine, it declined to consider the question within the context of the case before it. 68 N.J. at 258 n.10, 344 A.2d at 301.

For an analysis of the possible constitutional bases for the doctrine see Note, *The Less Restrictive Alternative in Constitutional Adjudication: An Analysis, a Justification, and Some Criteria*, 27 VAND. L. REV. 971 (1974). For discussions of the ramifications of the least restrictive alternative principle in the mental health field see Chambers, *supra*; Chambers, *Right to the Least Restrictive Alternative Setting for Treatment*, in 2 MENTAL HEALTH LAW PROJECT, PRACTICING LAW INSTITUTE, LEGAL RIGHTS OF THE MENTALLY HANDICAPPED 991 (B. Ennis & P. Friedman eds. 1973).

[120] 68 N.J. at 263, 344 A.2d at 303.

[121] *Id.* at 263 n.13, 344 A.2d at 303.

stitutionalized patient may be ordered temporarily confined to a mental hospital for observation and evaluation where there is probable cause to believe that he "poses an imminent danger to himself or others";[122] (11) a temporarily institutionalized patient must have a hearing on the modification "as promptly as is practical";[123] (12) the commitment order may be terminated when the defendant ceases to be mentally ill and dangerous;[124] (13) the party seeking the termination order will have the burden of proof by a preponderance of the evidence;[125] and (14) following the "unconditiona[l]" termination of the commitment order, the individual may only be recommitted pursuant to the involuntary civil commitment statutes.[126]

The issue of a defendant's dangerousness obviously permeates the entire new procedure.[127] The court recognized the difficulty in correctly predicting an individual's behavior, but it did provide some guidelines to aid the trial judge in reaching the final decision.[128] Dangerousness is not, the court stated, synonymous with criminal behavior, nor is it to be equated with a "mer[e] violation of social norms."[129] In order to make a finding of dangerousness, the court asserted, there must be a substantial and reasonably foreseeable risk of "significant physical or psychological injury to persons or substantial destruction of property."[130] The factors which a judge must consider are: (1) the probability of the dangerous behavior; (2) the gravity of the possible harm; (3) the prospects of confronting a similar situa-

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[122] *Id.* at 263, 344 A.2d at 303-04. Suggested situations which would mandate temporary confinement prior to a modification proceeding are inadequate restraints, noncompliance with the original order, or a change in the patient's condition. *Id.* at 263, 344 A.2d at 304.

[123] *Id.* at 263, 344 A.2d at 304.

[124] *Id.* at 263, 344 A.2d at 303.

[125] *Id.* at 263 n.13, 344 A.2d at 303.

[126] *Id.* at 263–64, 344 A.2d at 304. Subsequent civil commitment proceedings can be instituted only as provided in N.J. STAT. ANN. § 30:4–23 *et seq.* (Supp. 1975–76). 68 N.J. at 264, 344 A.2d at 304.

[127] Although the court's discussion of dangerousness stressed the threat posed to society, the court did acknowledge that the "dangerousness to self" standard presented many problems. 68 N.J. at 259 n.11, 344 A.2d at 301. Judge Stanton of the Morris County Court has pointed out the difficulties in determining an individual's dangerousness to himself in the civil commitment field. Stanton, *Involuntary Civil Commitment Proceedings: A Trial Judge's View*, 98 N.J.L.J. 425, 440 (1975).

For further consideration of the ambiguity inherent in the "dangerous to self or society" standard see notes 154–56 *infra* and accompanying text.

[128] 68 N.J. at 258–61, 344 A.2d at 301–02.

[129] *Id.* at 259, 344 A.2d at 301.

[130] *Id.* at 259, 260, 344 A.2d at 301, 302. A possible example of pyschological injury to people is presented by the case of the "flasher," who may not cause physical harm to others, but who may nevertheless adversely affect their sensibilities. *Cf.* Livermore, Malmquist & Meehl, *supra* note 22, at 82.

tion if the individual is dangerous only in certain circumstances; and (4) the nature and seriousness of prior criminal conduct related to his present mental condition.[131] The court noted that, in reaching a determination of dangerousness, the balance to be struck is between the public's need to be safeguarded from injurious acts and the individual's interest in personal freedom.[132] While judges may use any psychiatric resources available, expert opinions will not be conclusive since, in the court's view, the final determination of dangerousness is a legal rather than a medical decision.[133]

Having thus outlined the new commitment procedure, the court endeavored to clarify the relationship between the holding in *Krol* and the earlier decisions of *Maik* and *Carter*.[134] The construction given to the statutory standard for criminal commitment in *Maik* was explicitly overruled as unconstitutional.[135] Thus, under *Krol*, it is not a sufficient ground for commitment that the defendant is suffering from an underlying mental illness; confinement is justified only where the defendant is *both* mentally ill *and* a danger to himself or others.[136]

With respect to the *Carter* case, the *Krol* court stated without elaboration that *Carter* was "superseded" to the extent that it was not consonant with *Krol*.[137] The most obvious distinction between the

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[131] 68 N.J. at 260–61, 344 A.2d at 302.

[132] *Id.* at 261, 344 A.2d at 302.

[133] *Id.* The interplay between the questions of fact and law involved in any determination of dangerousness was similarly discussed in Dixon v. Jacobs, 427 F.2d 589 (D.C. Cir. 1970). It was therein stated that "[t]he likelihood of future misconduct, the type of misconduct to be expected, and its probable frequency, are questions of fact." *Id.* at 595 n.17. By contrast, the issue "whether the expected harm, *and* its apparent likelihood, are sufficiently great to warrant coercive intervention under [relevant] statutes" was seen as purely a legal question. *Id.* (emphasis in original). *But cf.* Humphrey v. Cady, 405 U.S. 504, 509 (1972) (jury deciding whether to confine for compulsory psychiatric treatment serves function of introducing into the process a lay judgment reflecting community values on kinds of harm and risk necessary to justify commitment).

[134] 68 N.J. at 265–66, 344 A.2d at 305.

[135] *Id.* at 265, 344 A.2d at 305. *Maik* had held that for purposes of release, the phrase "restored to reason," as used in N.J. STAT. ANN. § 2A:163–3 (1971), required that the patient's underlying illness, not merely his psychotic episode, be "removed or effectively neutralized." 60 N.J. at 218–19, 287 A.2d at 723.

The *Krol* court pointed out that the constitutionality of the commitment procedures for those acquitted by reason of insanity had not been questioned in *Maik*. 68 N.J. at 265, 344 A.2d at 305.

[136] *Compare* 68 N.J. at 249, 344 A.2d at 296 *with* 60 N.J. at 218–19, 287 A.2d at 723. The distinction will mean the difference between indefinite confinement and release in certain situations. For example, if it can be established that Krol is no longer a danger to himself or others, he will be released even though he still suffers from schizophrenia. This result would not have been possible under the *Maik* standard for release.

[137] 68 N.J. at 266, 344 A.2d at 305.

cases has to do with the standards for release from confinement. In *Carter*, it was assumed that final release would not be available to one whose underlying mental illness continued; but the court permitted conditional release when certain requirements were met, including, but not limited to, the patient's lack of dangerousness to himself or society.[138] Under *Krol*, the absence of dangerousness is *in itself* a sufficient ground for final release, even if an underlying mental illness continues.[139]

A second difference between *Carter* and *Krol* exists with reference to the quantum of proof with which a patient must demonstrate facts in order to obtain a modification of the terms of his commitment. In *Carter*, it was held that a confined party must show such facts "clearly and convincingly" in order to obtain a conditional release.[140] Under the holding of *Krol*, the party seeking modification or termination of a commitment order need only prove relevant facts by a "preponderance of the evidence."[141]

A final distinction between *Carter* and *Krol* centers upon the respective courts' perceptions of the purposes to be served by initial commitment and prolonged restraint. There is language in the *Carter* case which, although acknowledging the public-safety intent behind confinement, apparently indicates a concurrent state interest in care and treatment of a patient for *his own benefit*.[142] Such intimations are notably absent from *Krol*, wherein the court asserted that involuntary commitment as presently authorized "is designed to protect the public,"[143] implying that if this purpose were not served, restraint would be unjustified even if it would somehow aid the individual concerned.[144]

Overall, the court's decision in *Krol* appears to be a sound and straightforward application of due process and equal protection principles established by the United States Supreme Court. Still, some

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[138] 64 N.J. at 389, 403–04, 316 A.2d at 453, 461. For a listing of other factors to be considered in the decision whether to grant a conditional release see notes 51–52 *supra* and accompanying text.

[139] *See* 68 N.J. at 263 n.13, 344 A.2d at 303–04.

[140] *See* text accompanying notes 50–52 *supra*.

[141] 68 N.J. at 263 n.13, 344 A.2d at 303–04.

[142] *See* 64 N.J. at 388, 316 A.2d at 452, where the court stated that in addition to protecting society, "[a]nother object of confining the insane is treatment and rehabilitation." *See also id.* at 401, 316 A.2d at 459 ("The basis for [an insane offender's] confinement is rehabilitation and treatment"); *id.* at 404, 316 A.2d at 461 ("Public protection may demand prolonged confinement in hopes of eventual recovery and release").

[143] 68 N.J. at 249, 344 A.2d at 296.

[144] This would, of course, not be the case where the committing state relied upon its role as *parens patriae*. *See* note 22 *supra* and accompanying text.

aspects of the procedure set down in the case merit particular attention, one such aspect being the burden of proof necessary to commit or to release an individual. The majority of the court found that the party who seeks the commitment or the release of one acquitted by reason of insanity must prove the propriety of such action by a preponderance of the evidence.[145] In his dissent, Justice Clifford took issue with this standard of proof, noting that this quantum of proof was at variance with that required in prior cases for civil commitments: proof beyond a reasonable doubt.[146] Justice Clifford's primary concern was that, in mandating equal treatment between the types of commitments, the majority may have sub silentio overruled prior law and altered the burden of proof required in all other involuntary commitments.[147] Justice Clifford looked to the constitutional principle which demands the reasonable doubt burden of proof in situations where "personal liberty may be lost and the defendant faces the possible stigma of a criminal conviction."[148] He found this principle equally applicable to the commitment situation whether it is labeled "civil" or "criminal"[149] since due process is not to be measured "by the label under which the proceeding parades."[150] Furthermore, according to Justice Clifford, the extent of possible error in psychiatric predictions mandates the higher burden of proof.[151] Whatever the

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[145] 68 N.J. at 257, 263 n.13, 344 A.2d at 300, 303.

[146] *Id.* at 268, 275–76, 344 A.2d at 306, 310–11. For cases holding that civil commitment of an individual requires proof of his insanity beyond a reasonable doubt see *In re* J. W., 44 N.J. Super. 216, 226, 130 A.2d 64, 69 (App. Div.), *cert. denied*, 24 N.J. 465, 132 A.2d 558 (1957); *In re* Heukelekian, 24 N.J. Super. 407, 409, 94 A.2d 501, 503 (App. Div. 1953); *In re* Perry, 137 N.J. Eq. 161, 164, 43 A.2d 885, 887 (Ch. 1945).

[147] 68 N.J. at 268–69, 344 A.2d at 306–07.

[148] *Id.* at 271, 344 A.2d at 308 (footnote omitted) (citing *In re* Winship, 397 U.S. 358, 363–64 (1970)). *See In re* Ballay, 482 F.2d 648 (D.C. Cir. 1973), wherein it was suggested that a considerable stigma continues to be associated with mental illness. *Id.* at 668. Not only may such stigma result in "social ostracism" and loss of livelihood but it may also operate internally upon the patient, causing a diminution of his self-esteem. *Id.* at 668–69.

[149] 68 N.J. at 273, 344 A.2d at 309. *See In re* Winship, 397 U.S. 358 (1970); *In re* Gault, 387 U.S. 1 (1967). Both *Winship* and *Gault* mandate due process protections for juvenile proceedings which are civil in nature.

[150] 68 N.J. at 273, 344 A.2d at 309. *See* Murel v. Baltimore City Crim. Ct., 407 U.S. 355, 364 (1972) (Douglas, J., dissenting) (to deprive an individual of liberty for a lengthy or indefinite period, a state must prove its case beyond a reasonable doubt).

[151] 68 N.J. at 275, 344 A.2d at 310. Justice Clifford foresaw not only the problem of disagreement between psychiatrists but also a marked predisposition on their part "to err on the side of finding 'dangerousness.' " *Id.* at 274, 344 A.2d at 310. *See also* State v. Carter, 64 N.J. 382, 426–27 n.7, 316 A.2d 449, 473 (1974) (Clifford, J., concurring in part and dissenting in part); Diamond, *The Psychiatric Prediction of Dangerousness*, 123 U. PA. L. REV. 439, 444–45 (1974); Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693, 711–16 (1974);

merits of the "preponderance" standard adopted by the majority in *Krol*, Justice Clifford's point—that more careful weighing of policy considerations should have occurred before any burden of proof was established for commitment cases[152]—appears well taken.[153]

The burden-of-proof issue aside, the commitment standard mandated by the court for use in insanity-acquittal cases—"dangerous to self or society"—appears to be susceptible to varying interpretations.[154] Behavior "dangerous to society" could easily be construed to include many reasonably possible concepts: only the criminal act in which the insanity defense was interposed or all criminal acts; only felonies or all acts involving force even though noncriminal; only violent crimes or all conduct which might provoke retaliation by others; or any combination of these "dangers" or a host of others.[155] The "dangerous to self" test is similarly vague and could conceivably be construed at some future time to describe not only persons who are suicidal but also those who might squander "assets from foolish expenditures, or even [lose] social standing or reputation from behaving peculiarly in the presence of others."[156] It is, of course, doubtful that a committing court would go so far. Nevertheless, unless and until a body of case law on "dangerous" conduct develops, the courts involved will be left to what are essentially case-by-case determinations.

A problem related to the question of vagueness in the standards to be applied is the difficulty in predicting dangerousness with a high degree of certainty. Many commentators have observed that high-

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Rosenhan, *On Being Sane in Insane Places*, 13 SANTA CLARA LAW. 379, 385 (1973).

It was apparently the Justice's view that persons might be committed under the "preponderance" standard who would not be confined if the "reasonable doubt" standard were employed. *See* 68 N.J. at 276–77, 344 A.2d at 311. *See also In re* Ballay, 482 F.2d 648, 662–67 (D.C. Cir. 1973). Assuming this to be a bad result, however, there is a saving grace in that equal burdens for commitment and release mean that the easier it is for the state to confine an individual, the easier it will be for that individual to obtain his final release.

[152] *See* 68 N.J. at 276, 344 A.2d at 311 (Clifford, J., dissenting in part).

[153] This "preponderance" standard was announced without discussion in the majority's opinion but was supported with case law from other jurisdictions. *See id.* at 257 & n.9, 344 A.2d at 300.

[154] The *Krol* court attempted to provide some guidance on the point, but its comments were necessarily general. *See* notes 129–31 *supra* and accompanying text.

[155] The examples included are suggested in Goldstein & Katz, *Dangerousness and Mental Illness, Some Observations on the Decision to Release Persons Acquitted By Reason of Insanity*, 70 YALE L.J. 225, 235–36 (1960). *See also* Rubin, *Prediction of Dangerousness in Mentally Ill Criminals*, 27 ARCH. GEN. PSYCHIATRY 397, 398–99 (1972), wherein the author discusses other constructions of "dangerousness" but proposes that the concept be restricted to four crimes: homicide, forcible rape, robbery, and aggravated assault.

[156] Livermore, Malmquist & Meehl, *supra* note 22, at 83 (footnote omitted).

accuracy forecasting in the mental-illness context is not possible given the present state of learning.[157] While psychiatrists may, therefore, tend to overpredict future dangerousness in the interest of public safety,[158] it is also possible that doctors, aware of the limits of their own knowledge, may hesitate to predict dangerousness, knowing that such a prediction would substantially influence a court in its decision to commit a person or retain him in confinement.[159] If either situation develops to an appreciable degree, judgments on commitment or release are likely to become even more difficult for courts in the future.

Krol purported to set out a scheme for commitment following acquittal by reason of insanity which was both constitutional and workable. The procedure is constitutional because the court has declared it to be so, but whether it will ultimately prove workable is less certain. However, the legislature will now have the opportunity to observe the workings of the procedure over a period of time, should it choose to do so, and to correct or supplement any deficiencies which might appear in the future.

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[157] *See, e.g.*, Kozol, Boucher & Garofalo, *The Diagnosis and Treatment of Dangerousness*, 18 CRIME & DELIN. 371, 383–84 (1972); Morris, *Psychiatry and the Dangerous Criminal*, 41 S. CAL. L. REV. 514, 529–36 (1968); Rubin, *supra* note 155, at 405.

[158] *See* note 151 *supra*.

[159] *Cf.* Morris, *supra* note 157, at 532.