NOTES

COMMITMENT—CONDITIONAL RELEASE FROM MENTAL INSTITUTIONS MADE AVAILABLE TO PERSONS CONFINED UNDER CRIMINAL STATUTES—*State v. Carter*, 64 N.J. 382, 316 A.2d 449 (1974).

In January of 1969, Milton Carter entered police headquarters in Plainfield, New Jersey and proceeded to shoot and wound a policeman.[1] He was subsequently "indicted for assault with intent to kill and for other related offenses."[2] A year later, Carter was given a sanity hearing[3] at which the Union County Court found him both incapable of standing trial and legally insane at the time of the offense, resulting in a dismissal of the indictment.[4] Follow-

[1] State v. Carter, 64 N.J. 382, 386, 316 A.2d 449, 451 (1974). Carter entered police headquarters armed with a .38 calibre revolver, went to the second floor, held a police sergeant captive, and shot him twice in the chest. Brief for Plaintiff-Respondent at 1, State v. Carter, No. A-3005-71 (N.J. Super. Ct., App. Div., Mar. 2, 1973). There was no apparent reason for Carter's action. Brief for State of New Jersey as Amicus Curiae at 1, State v. Carter, 64 N.J. 382, 316 A.2d 449 (1974) [hereinafter cited as Brief for Amicus Curiae]. References made about Carter throughout the opinion reveal he had an I.Q. of 67 and was about 23 years old at the time of the offense. State v. Carter, 64 N.J. 382, 412 n.1n, 316 A.2d 449, 466 (Clifford, J., concurring in part & dissenting in part). His condition had been alternately diagnosed as "one of mental deficiency rather than mental illness," as "mental defective with incipient schizophrenia," and as "a catatonic type of schizophrenia." *Id.* at 386-87, 316 A.2d at 451-52. Prior to the shooting, Carter was withdrawn and had a record of psychiatric treatment. *Id.* at 386, 316 A.2d at 451.

[2] Brief for Amicus Curiae, *supra* note 1, at 1.

[3] Brief for Defendant-Appellant at 1, State v. Carter, 64 N.J. 382, 316 A.2d 449 (1974) [hereinafter cited as Brief for Defendant-Appellant]. Carter spent time both at Trenton Psychiatric Hospital and Union County Jail prior to the hearing which was held in May, 1970. *Id.*

[4] State v. Carter, 64 N.J. 382, 386, 316 A.2d 449, 451 (1974). Procedure regarding a finding of incapacity to stand trial and insanity warranting pre-trial dismissal is governed by N.J. STAT. ANN. § 2A:163-2 (1971), which provides in pertinent part:

> 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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> . . . .
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> If it shall be determined . . . 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.

This statute does not define insanity nor does it indicate that the test used to determine insanity at the time of the hearing is necessarily different from the test used to determine insanity at the time of the offense. However, the court in Aponte v. State, 30 N.J. 441, 153 A.2d 665 (1959), stated that the absence of distinct tests did not mean the legislature intended to establish a single concept of insanity, and that the following definitions are controlling in their respective situations: (1) As a test of competency to stand trial, the test is whether the person can comprehend his situation and consult intelligently with counsel;

ing a finding that his insanity continued, Carter was committed to the New Jersey State Hospital in Trenton " 'until such time as he may be restored to reason.' "[5]

After being shunted between various institutions for a period of two years, Carter was released, without court approval, to his parents' custody by order of the Trenton State Hospital's medical director.[6] Subsequently, the State moved for a hearing on the issue

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(2) as a defense to criminal prosecution, the defendant must have been 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.

Id. at 450-51, 153 A.2d at 669-70. The latter is the *M'Naghten* rule, stemming from Daniel M'Naghten's Case, 8 Eng. Rep. 718 (H.L. 1843), which is well established in New Jersey, and has been forcefully reiterated and defended in State v. Lucas, 30 N.J. 37, 68-72, 152 A.2d 50, 66-69 (1959). More recently, the doctrine was reaffirmed in State v. Maik, 60 N.J. 203, 212-13, 287 A.2d 715, 720 (1972).

[5] State v. Carter, 64 N.J. 382, 386, 316 A.2d 449, 451 (1974) (quoting from N.J. STAT. ANN. § 2A:163-2 (1971)). N.J. STAT. ANN. § 2A:163-2 (1971) provides that when charges are dismissed on grounds of insanity,

> the judge or jury . . . 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 . . . until such time as he may be restored to reason . . . .

There has been conflicting opinion regarding the basis on which the judge or jury should find the defendant's insanity continues and order commitment. Three views have been propounded. The most current one recommends a charge that the jury find continuing insanity if the underlying illness is found to continue. SUPREME COURT OF NEW JERSEY, COMMITTEE ON MODEL JURY CHARGES § 3.180, at 9 (1973). This is the release standard promulgated in State v. Maik, 60 N.J. 203, 218-19, 287 A.2d 715, 723 (1972), which defined "restored to reason" as cure or effective neutralization of the underlying mental illness. *See* Note, *Release from Confinement of Persons Acquitted by Reason of Insanity in New Jersey,* 27 RUTGERS L. REV. 160, 170 (1973) (*Maik* standard harmonized with the *M'Naghten* test); Note, *M'Naghten and Public Security—Post-Acquittal Release Potential Reduced Under Temporary Insanity Defense,* 4 SETON HALL L. REV. 295, 307-08 (1972) (post-acquittal commitment as affected by *Maik* release standard).

The *Maik* standard is currently under attack in State v. Krol, No. A-707-72 (N.J. Super. Ct., App. Div., April 9, 1974), *cert. granted,* No. 10,532 (N.J. June 19, 1974). Defendant-Appellant Krol argues that the *Maik* standard violates the equal protection and due process clauses of the fourteenth amendment because different standards of release than those applied in civil commitments may result in lifetime confinement for one committed under criminal statutes. Petition for Certification at 5, State v. Krol, No. 10,532 (N.J. June 19, 1974).

The other two views regarding the basis for commitment appear in *Carter.* The majority implies that the test is whether *M'Naghten* insanity continues. 64 N.J. at 388, 316 A.2d at 453. The separate opinion by Justice Clifford specified the standard warranting commitment to be danger to self and others. 64 N.J. at 421, 316 A.2d at 470 (citing Aponte v. State, 30 N.J. 441, 455, 153 A.2d 665, 672 (1959)). *See* note 4 *supra.*

[6] State v. Carter, 64 N.J. 382, 386, 316 A.2d 449, 451-52 (1974). Although N.J. STAT. ANN. § 2A:163-2 (1971) directs that a person can be released only by order of the committing court, the hospital, evidently considering Carter a civil commitment, granted a civil discharge. *See* Letter from Martin H. Weinberg, M.D., then Medical Director of Trenton Psychiatric Hospital to Judge Barger, superior court judge in Union County, June 29, 1972,

of whether Carter was in fact eligible for release under the "restored to reason" test, which requires freedom from underlying mental illness.[7] At this hearing the court found Carter continued to suffer from schizophrenia[8] and mental retardation[9] and determined there was no form of release available which would adequately protect the public. The court consequently ruled Carter was not "restored to reason" and ordered him to return to the state hospital.[10]

On appeal, the court rejected Carter's contentions that the finding of the court below was against the weight of the evidence and that current New Jersey law authorized a conditional release.[11] In a per curiam decision, the appellate division held the lower court's finding to be supported by the evidence, and conditional release, even if available, to be unjustified in Carter's case.[12] The court further stated that authorization for conditional release could only come from the legislature or the supreme court.[13]

Carter brought his appeal to the supreme court, challenging the release standard utilized by the lower courts as medically

and Answering Letter from Judge Barger to Dr. Weinberg, July 7, 1972, on file at *Seton Hall Law Review*.

[7] State v. Maik, 60 N.J. 203, 218-19, 287 A.2d 715, 723 (1972).

[8] 64 N.J. at 387, 316 A.2d at 452. A diagnosis of schizophrenia is based initially on the presence of the fundamental symptoms. Although "schizophrenia does not necessarily imply progressive deterioration," the disease is considered virtually incurable. *See* L. HINSIE & R. CAMPBELL, PSYCHIATRIC DICTIONARY 679-80 (4th ed. 1970) [hereinafter cited as HINSIE & CAMPBELL]. This creates the potential problem that under the standard established by *Maik* a person diagnosed schizophrenic may not be released even though the symptoms on which the diagnosis was based have disappeared.

[9] State v. Carter, 64 N.J. 382, 387, 316 A.2d 449, 452 (1974). New Jersey statutes define "mental retardation" as

> a state of significant subnormal intellectual development with reduction of social competence in a minor or adult person [which] existed prior to adolescence and is expected to be of life duration.

N.J. STAT. ANN. § 30:4-23 (Supp. 1974-75). Carter's I.Q. was designated at 67. *See* note 1 *supra*. Thus, the 1968 revision of psychiatric nomenclature would classify Carter as mildly mentally retarded. HINSIE & CAMPBELL, *supra* note 8, at 665 (citing AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (2d ed. 1968)).

[10] State v. Carter, 64 N.J. 382, 387, 316 A.2d 449, 452 (1974).

[11] State v. Carter, No. A-3005-71, at 3 (N.J. Super. Ct., App. Div., March 2, 1973).

[12] *Id.*

[13] *Id.* The appellate division rejected the argument that *Maik* authorized a conditional release and apparently found no support for granting such a release in either section 2A:163-2 or section 2A:163-3 which provide for release only when an individual is "restored to reason." *Id. See* N.J. STAT. ANN. §§ 2A:163-2, -3 (1971). Judge Halpern, dissenting, stated *Maik* placed a responsibility upon the courts to "make considered judgments and take calculated risks in releasing defendants." He would grant release when the defendant's illness is neutralized and when his level of reason indicates that he will not be a threat to himself or society. State v. Carter, No. A-3005-71, at 2 (N.J. Super. Ct., App. Div., March 2, 1973) (Halpern, J., dissenting).

unjustified and constitutionally unreasonable.[14] Carter argued that the standards governing release of individuals whose criminal charges had been dismissed should be the same as the standards governing release of those confined under civil commitment statutes.[15] Conditional release, he contended, was not only constitutionally mandated but also the humane course of action.[16]

Confronted with these issues, the Supreme Court of New Jersey in *State v. Carter*[17] held that while release requires either cure or effective neutralization of the underlying mental illness,[18] conditional release may be granted to one in remission.[19] Conditional release hinges upon a clear and convincing demonstration[20] that the patient is a fit subject for such release,[21] that he is unable to benefit by further confinement,[22] and that available supervisory and out-patient facilities are adequate to assure his safe return to society.[23] The court's decision makes conditional release available to those confined following acquittal on grounds of insanity as well as to those confined pursuant to a pre-trial dismissal of charges on grounds of insanity.[24]

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[14] Brief for Defendant-Appellant, *supra* note 3, at 4-5, 8.

[15] *Id.* at 7-8.

[16] *Id.* at 9-10.

[17] 64 N.J. 382, 316 A.2d 449 (1974).

[18] *Id.* at 399-400, 316 A.2d at 459. The court in State v. Maik, 60 N.J. 203, 287 A.2d 715 (1972), enunciated the standard which required the underlying illness to be "removed" or "effectively neutralized." *Id.* at 218-19, 287 A.2d 723. While adhering to this standard and determining that neutralization meant something less than a complete cure, the court in *Carter* asserted that the effect of the neutralization must be to free the individual from his underlying condition. 64 N.J. at 399-400, 316 A.2d at 459.

[19] 64 N.J. at 389, 316 A.2d at 453. "Remission" is defined as partial or complete "[a]batement of the symptoms and signs of a disorder or disease." HINSIE & CAMPBELL, *supra* note 8, at 659.

In *Carter,* the court differentiates neutralization and remission, regarding the latter as a "mere abatement of symptoms" carrying with it no guarantee that reason will prevail. 64 N.J. at 399, 316 A.2d at 458. The court views neutralization as a state in which the individual can cope with the world without supervision. *Id.* at 400, 316 A.2d at 459. It explains that

> while neutralization is not an outright cure of the illness, it is a state which the patient has achieved where there is no danger to those around him of injury from a psychotic episode arising from the illness.

Id.

[20] For a discussion of this standard see notes 126-27 *infra* and accompanying text.

[21] 64 N.J. at 404, 316 A.2d at 461. By "fit subject" the court appears to mean a patient who would not endanger himself or others, who would function and benefit from release, and who would willingly and cooperatively participate in an out-patient program. *Id.* at 403-04, 316 A.2d at 461.

[22] *Id.* at 404, 316 A.2d at 461. For a discussion of the criteria warranting continued confinement see notes 85-88 *infra* and accompanying text.

[23] 64 N.J. at 403, 405, 316 A.2d at 461-62.

[24] *Id.* at 399 n.7, 316 A.2d at 458. The court states that "[t]he standards for release under this section [N.J. STAT. ANN. § 2A:163-3] and N.J.S.A. 2A:163-2 are identical." *Id.*

The state's power to confine individuals relieved of criminal accountability on grounds of insanity is traditionally based upon its "police power" interest in protecting its citizens from persons deemed dangerous and its parens patriae interest in rehabilitating and caring for the mentally ill.[25] Confinement is therefore justified by the individual's threat to society and/or his need for treatment.

The question of release becomes a dilemma when a person may still present some threat to society but is at a stage where further confinement is anti-therapeutic. On one hand, there is a risk inherent in releasing such an individual. On the other, by denying release, the state may be condemning him to further deterioration and almost certain lifetime confinement.[26] This results in the situation whereby one deemed "innocent" of criminal liability is confined indefinitely, while one deemed "guilty" of the same offense can be released after a comparatively short prison term.[27]

[25] *See, e.g., In re* Ballay, 482 F.2d 648, 650 (D.C. Cir. 1973) (the state's interest in involuntary confinement reflects "dual motives," one being "society's concern with antisocial conduct" and the second "involving its role as parens patriae"). *See also* Jackson v. Indiana, 406 U.S. 715, 736-37 (1972) (traditional state interests justifying the state's power to commit persons to mental institutions include concern for public safety and treatment of the individual).

For a discussion of the state's power to commit see Livermore, Malmquist & Meehl, *On the Justifications for Civil Commitment,* 117 U. PA. L. REV. 75 (1968) (discussion and critique of the impact of traditional state interests on actual confinement standards); *Developments in the Law—Civil Commitment of the Mentally Ill,* 87 HARV. L. REV. 1190, 1207-11, 1222-35 (1974) (a thorough discussion of the various bases of state's power: parens patriae and police power).

[26] *See generally* Kimmel, *Patterns Of Psychiatric Treatment,* 21 BROOKLYN BARRISTER 186, 190 (1970). In a study of 7,000 mental cases in the 1950's, half of the subjects were institutionalized and treated, and half received no treatment at all. This study revealed that a greater number of the untreated group recovered sooner, apparently spontaneously. *Id.* It was the contention of a state psychiatrist in a recent conditional release hearing that

> the petitioner's condition may deteriorate if he were not granted some form of release. The deterioration, which they have witnessed in other long-term patients, leads to a dependency on institutional care and ultimately an inability to function outside institutionalization.

Letter from Bal K. Kaushal, M.D., Ancora Psychiatric Hospital, to author, August 21, 1974, on file at *Seton Hall Law Review.*

[27] State v. Maik, 60 N.J. 203, 213, 287 A.2d 715, 720 (1972). In New Jersey, offenders may be granted probation, in which case they serve no sentence at all and are placed instead under the supervision of a probation officer for a period of one to five years. N.J. STAT. ANN. § 2A:168-1 (1971). Convicted offenders are eligible for parole after serving a specific fraction of their sentence. *See id.* § 30:4-123.10; *id.* § 30:4-123.12 (Supp. 1973-74).

The plight of those who are deemed mentally ill and subjected to indefinite commitment is made more acute by the overprediction of dangerousness and subsequent confinement of many who actually present no threat to society. *See* Dershowitz, *The Psychiatrist's Power in Civil Commitment: A Knife that Cuts Both Ways,* PSYCHOLOGY TODAY, February, 1969, at 47; Livermore, Malmquist & Meehl, *supra* note 25, at 85; Schreiber, *Indeterminate Therapeutic Incarceration of Dangerous Criminals: Perspectives and Problems,* 56 VA. L. REV. 602, 619 (1970). The situation is further exacerbated by the present state of mental

When deciding the issue of whether to release such an individual, states are confronted with two criteria: public safety and welfare of the individual. In some instances, the duty to protect the public has been deemed overriding.[28] In other cases, this duty has been balanced against the patient's constitutional rights under the fourteenth amendment.[29]

The New Jersey courts, left to wrestle with the problem in a vacuum created by the lack of legislative standards and remedies,[30]

hospitals which have become repositories for individuals who are unwanted or undesirable. *See* Comment, *Civil Commitment of the Mentally Ill in California: 1969 Style,* 10 SANTA CLARA LAW. 74, 75 (1970).

[28] The New Jersey supreme court, for example, has placed considerable emphasis upon its police power duty to protect the public. *See, e.g.,* State v. Maik, 60 N.J. 203, 213, 287 A.2d 715, 720 (1972), in which the court observed:

> The point to be stressed is that in drawing a line between the sick and the bad, there is no purpose to subject others to harm at the hands of the mentally ill. On the contrary, the aim of the law is to protect the innocent from injury by the sick as well as the bad.

See also State v. Taylor, 158 Mont. 323, 331-32, 491 P.2d 877, 881 (1971), *cert. denied,* 406 U.S. 978 (1972); State v. Lucas, 30 N.J. 37, 83, 88, 152 A.2d 50, 75, 77 (1959) (Weintraub, C.J., concurring).

[29] Cases involving the rights of those confined to mental institutions pursuant to criminal indictments have involved both equal protection and due process arguments. In the area of equal protection, some courts have held that those criminally committed must be accorded the same procedural safeguards as those civilly committed. *See, e.g.,* Jackson v. Indiana, 406 U.S. 715, 730 (1972); Baxstrom v. Herold, 383 U.S. 107, 111 (1966). *See also* Bolton v. Harris, 395 F.2d 642, 651 (D.C. Cir. 1968); Gomez v. Miller, 341 F. Supp. 323, 329-30 (S.D.N.Y. 1972), *aff'd mem.,* 412 U.S. 914 (1973); People v. McCabe, 74 Misc. 2d 1060, 347 N.Y.S.2d 259, 261 (Nassau County Ct. 1973); State *ex rel.* Walker v. Jenkins, 203 S.E.2d 353, 357-58 (W. Va. 1974).

Some courts have interpreted *Jackson* and *Baxstrom* to mandate essentially equal standards pertaining to the commitment and release of the civilly and criminally mentally ill. *See* State v. Clemons, 110 Ariz. 79, —, 515 P.2d 324, 329 (1973) (*Baxstrom* and *Jackson* indicate that where there is a significant difference between the standards applied to the criminally committed and the civilly committed, the equal protection clause is violated). *But see* State *ex rel.* Farrell v. Stovall, 59 Wis. 2d 148, 173, 207 N.W.2d 809, 821 (1973) (*Jackson*'s mandate construed to apply only to proceedings which ignore the bases for exercising the state's power of indefinite commitment).

Cases have also held that due process requirements apply to the confinement of the mentally ill. *See, e.g.,* Jackson v. Indiana, 406 U.S. 715, 731 (1972); Davy v. Sullivan, 354 F. Supp. 1320, 1329 (M.D. Ala. 1973).

[30] Governing statutes do not provide administrative procedure or standards to oversee release. *See* N.J. STAT. ANN. §§ 2A:163-2, -3 (1971). The court has therefore approached the question of release guardedly. In State v. Lucas, 30 N.J. 37, 86, 152 A.2d 50, 76-77 (1959), Chief Justice Weintraub took the position that any deviation from current judicial standards which would result in the release of those relieved of criminal accountability on grounds of insanity would depend on legislative and administrative action. However, in State v. Maik, 60 N.J. 203, 220-21, 287 A.2d 715, 724 (1972), he appeared to be moving toward considering a judicially fashioned release predicated on certain conditions being met.

Pending legislation, though not solving the problems beleaguering conditional release, does offer additional guidance in the procedure to be followed. *See* N.J. Senate Bill No. 1115, §§ 5a-f (introduced on April 22, 1974) [hereinafter cited as S. 1115]. This legislation

have generally favored public safety, preferring to leave aside constitutional considerations.[31] In doing so they have been guided by three statutes[32] which, prior to 1972, had the cumulative effects of authorizing confinement for those found incompetent to stand trial until they achieved competency[33] and of requiring in-

would adopt the *Model Penal Code* definition of criminal responsibility, replacing the *M'Naghten* rule with one dependent upon whether

> as a result of mental disease or defect he lacks substantial and adequate capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.

S. 1115, § 1a. *Compare id. with* MODEL PENAL CODE § 4.01(1) (Proposed Official Draft 1962).

The bill provides for defendants to be committed to the custody of the Commissioner of Institutions and Agencies for "custody, cure and treatment." S. 1115, § 5a. The Commissioner or his designee becomes the authorized moving party regarding the release of those in his custody. *Id.* § 5b. Following a report from two court-appointed psychiatrists, the court, if satisfied "that the committed person may be discharged, released on condition without danger to himself or others, or treated as in civil commitment," may order his discharge, his conditional release, or his transfer. *Id.* § 5c. If the court is not satisfied, it orders a hearing at which the person seeking release bears the burden of proving he may "safely be discharged or released." *Id.* The bill provides for the court to retain jurisdiction for a period of five years. *Id.* § 5d. The bill further provides that those not discharged within ten years after initial commitment either be discharged or confined subject to the law governing civil commitments. *Id.* § 5f.

Pending legislation, concerning those incompetent to stand trial, provides procedures similar to those found in S. 1115, in the event that the court finds a conditional release to be appropriate. *See* N.J. Senate Bill No. 1116, §§ 4a-d (introduced on April 22, 1974).

The rights of indigents confined to New Jersey mental institutions will be affected by pending action contemplated by the Division of Mental Health Advocacy within the Department of the Public Advocate. The Division will have field offices in Newark and Trenton to handle commitment and habeas corpus hearings from Mercer and Essex counties, and a class action office in Trenton to handle those matters in which a large class is affected. The Division's primary purpose is representation of clients from which should flow a body of case law and a greater awareness of problems inherent in the mental health field. The ultimate goal is to insure that the mentally ill are able to exercise their constitutional rights. Interview with Michael L. Perlin, Director, Division of Mental Health, Department of the Public Advocate, in Trenton, New Jersey, July 1, 1974 [hereinafter cited as Perlin Interview].

[31] *See* note 28 *supra*.

[32] *See* N.J. STAT. ANN. §§ 2A:163-2, -3 (1971); *id.* § 30:4-82 (Supp. 1973-74).

[33] *Id.* § 2A:163-2 (1971) provides that one found incompetent to stand trial

> be confined in an institution as provided by section 30:4-82 of the Revised Statutes, and his custody and release from such institution shall be governed by the provisions of said section.

Id. § 30:4-82 (Supp. 1973-74) provides:

> When . . . such person is in a condition to be discharged . . . as being in a state of remission and free of symptoms of the mental disease which required his original transfer . . . such person shall be remanded by order of the court to the place in which he was confined under commitment, indictment or sentence . . . there to be dealt with according to law . . . .

Since section 30:4-82 makes the remission of the symptoms which required the original transfer a condition precedent for release, it has the effect, when combined with section 2A:163-2, of requiring competency to stand trial as a prerequisite for release from the mental institution. Theoretically, for one suffering from mental retardation, confinement could be for life. *But see* note 65 *infra*.

stitutionalization for those dismissed or acquitted of charges on grounds of insanity until they were "restored to reason."[34]

Although the court did not define "restored to reason" until *State v. Maik*[35] in 1972, problems inherent in releasing those deemed criminally insane had been discussed years earlier by Chief Justice Weintraub in his concurring opinion in *State v. Lucas.*[36] Agreeing with the majority that the *Durham* test of legal insanity should be rejected,[37] the former Chief Justice set forth the reasoning which laid the groundwork for subsequent decisions regarding commitment and release of those acquitted on grounds of insanity. Emphasizing that psychiatric opinion was too vague and uncertain to play a determinative role when the release of someone acquitted on grounds of insanity was at stake, he concluded public safety could not "depend upon a science which can produce such conflicting estimates of probable human behavior."[38] Chief Justice Weintraub then put forth the conditions under which the court might grant such a release, including more definite medical testimony, parole supervision, provision for summary recall upon signs of recurrence, and the ability of medical directors to handle increased responsibility.[39] Without such assurances, which he stated could be provided only by the legislative and executive branches, the judiciary could not venture from its then current view of criminal responsibility.[40]

The rationale expressed by Chief Justice Weintraub in *Lucas* was reiterated in *Maik* when the court first addressed itself to what the "restored to reason" standard required.[41] In *Maik,* the court was dealing with a defendant who had experimented with hallucinogenic drugs and had subsequently experienced a psychotic episode during which he stabbed a friend to death.[42] Although the defendant was in remission when the case was argued,[43] the court

[34] N.J. STAT. ANN. § 2A:163-2 (1971) (commitment following dismissal of charges); *id.* § 2A:163-3 (1971) (commitment following acquittal at trial).

[35] 60 N.J. 203, 287 A.2d 715 (1972).

[36] 30 N.J. 37, 82, 152 A.2d 50, 74 (1959).

[37] *Id.* at 83, 152 A.2d at 75. The *Durham* test establishes that "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." Durham v. United States, 214 F.2d 862, 874-75 (D.C. Cir. 1954). The test was rejected by the District of Columbia court of appeals in United States v. Brawner, 471 F.2d 969, 971 (D.C. Cir. 1972).

[38] 30 N.J. at 86, 152 A.2d at 76.

[39] *Id.*

[40] *Id.* at 86, 152 A.2d at 76-77.

[41] 60 N.J. at 217, 287 A.2d at 722.

[42] *Id.* at 207, 210-12, 287 A.2d at 717, 718-20.

[43] *See* note 19 *supra.*

held the safety of society would be insured only if the patient's underlying condition was cured or effectively neutralized.[44] The *Maik* court also ruled it was the duty of the committing court to decide the ultimate question of whether release should be granted.[45]

In weighing the needs of public safety against the uncertainties of releasing an individual in remission, the *Maik* court opted for public safety.[46] Under the rationale of *Maik,* for example, a person afflicted with schizophrenia[47] and mental retardation[48] would be confined for life, despite the fact he might otherwise function at home without harm to himself or others.[49]

Although the fact situation did not present the issue of whether a conditional type of release might permit a less stringent standard to be applied, language in *Maik* seemed to invite a later judicial fashioning of such a remedy:

> [W]e do not deal with the question whether the court may order a release conditioned upon a defendant's return to custody if signs of an oncoming acute illness should appear. . . . If adequate medical assurance could be given that supervision is reasonably feasible, that course would be humane.[50]

Shortly after *Maik* was decided, the United States Supreme Court in *Jackson v. Indiana*[51] declared that a state could not constitutionally commit an alleged offender for an indefinite period

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[44] 60 N.J. at 218-19, 287 A.2d at 723. The meaning of "neutralization" as a requisite for release is the subject of disagreement in the *Carter* opinion. The majority describes neutralization as being

> something less than a complete "cure," allowing for the limited possibility of relapses. The individual whose condition is "neutralized" can cope with the world as it is, without supervision and guidance. . . . [I]t is a state which the patient has achieved where there is no danger to those around him of injury from a psychotic episode arising from the illness.

64 N.J. at 399-400, 316 A.2d at 459. Justice Clifford, disagreeing with the majority, finds absolutely no warrant for the majority opinion's statement that the Maik Court "indicated that something less than a 'cure' is acceptable for compliance with the 'restored to reason' standard of conditional release . . . ."

Id. at 420, 316 A.2d at 470.

[45] 60 N.J. at 219-20, 287 A.2d at 723-24.

[46] *Id.* at 217-19, 287 A.2d at 722-23.

[47] For a discussion of schizophrenia see note 8 *supra.*

[48] For a discussion of mental retardation see note 9 *supra.*

[49] It should be noted that Milton Carter had been living at home with his family and working steadily for a year without incident. 64 N.J. at 412 n.ln, 316 A.2d at 465-66. Both the trial and appellate courts ordered him recommitted on the basis that his underlying condition—mental retardation and schizophrenia—continued. *See* notes 8-12 *supra* and accompanying text.

[50] 60 N.J. at 220-21, 287 A.2d at 724.

[51] 406 U.S. 715 (1972).

simply because of his incompetency to stand trial.[52] The petitioner in *Jackson* was a mentally retarded deaf-mute who could communicate only in limited sign language.[53] He had been charged with robbery and, following a plea of not guilty, was given a competency hearing pursuant to the Indiana Criminal Code and subsequently committed to the Indiana Department of Mental Health until certified sane.[54]

The Court found Jackson's commitment violated his right to equal protection because the criminal standard for commitment, incompetency to stand trial, was less demanding than civil commitment standards, inability to care for self or dangerousness to one's own and others' welfare. Furthermore, the criminal release standard was more stringent than the civil release standard.[55] The Court intimated that Jackson would probably never have been committed under the civil standard, but that if he had, he would probably have been eligible for release.[56] The net effect of the criminal commitment upon Jackson was to confine him for life.[57]

In reaching its decision, the *Jackson* Court relied upon its earlier decision in *Baxstrom v. Herold.*[58] In that case, the Court held that a state convict who was civilly committed upon termination of his prison sentence on the finding of a surrogate was denied equal protection in that he was deprived of a jury trial that the state made available to other patients.[59] The Court reasoned that prior criminal conviction and sentencing did not justify the difference in procedure; hence, Baxstrom was denied equal protection when he was committed to an institution for "dangerously mentally ill" persons without a judicial determination that he was dangerous—a procedure guaranteed to others.[60] The *Jackson* Court, incorporating *Baxstrom,* held that if criminal conviction and imposition of sentence were insufficient to justify less procedural and substantive protection against indefinite commitment, then the "mere filing of criminal charges" in Jackson's case could not suffice.[61]

The Court also held Jackson's commitment violated the due process clause of the fourteenth amendment on the rationale that

[52] *Id.* at 720.
[53] *Id.* at 717.
[54] *Id.* at 717-19.
[55] *Id.* at 727-30.
[56] *Id.* at 727-29.
[57] *Id.* at 725-26, 729-30.
[58] 383 U.S. 107 (1966).
[59] *Id.* at 114-15.
[60] *Id.*
[61] 406 U.S. at 724.

"due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."[62] It therefore concluded that a person deemed incompetent to stand trial could not be held indefinitely.[63] Such a person must be civilly committed or released when there is no substantial probability that he will attain this capacity in the foreseeable future or when confinement is not aiding his progress toward that goal.[64]

The *Jackson* decision has had great impact on New Jersey procedure regarding commitment of those deemed incompetent to stand trial.[65] At the same time, the decision has provided judicial authority for an attack on state power to confine the mentally ill when unaccompanied by a showing of a valid state interest.[66]

Although some of the constitutional issues presented in *Jackson* were argued before the *Carter* court,[67] the majority eschewed constitutional questions,[68] preferring to base its decision to grant con-

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[62] *Id.* at 738.

[63] *Id.*

[64] *Id.*

[65] The *Jackson* decision was implemented in New Jersey in Dixon v. Cahill, No. L-30977-71 (N.J. Super. Ct., L. Div., Jan. 4, 1973). According to the director of Mental Health Advocacy, *Jackson* and *Dixon* had the effect of removing many patients from Vroom Building, the maximum security Forensic Division of Trenton Psychiatric Hospital, to civil hospitals. Prior to these decisions, those found incompetent to stand trial, those whose charges had been dismissed, and those who had been acquitted on grounds of insanity were confined in Vroom Building. Following *Jackson* and *Dixon,* those adjudicated incompetent to stand trial were transferred to civil confinement unless it was found they would achieve competency in the foreseeable future or they needed maximum security confinement. *See* Singer v. State, 63 N.J. 319, 307 A.2d 94, *cert. granted,* 63 N.J. 504, 308 A.2d 669 (1973). Those confined following dismissal or acquittal were also transferred to civil confinement absent a need for maximum security or treatment available only at Vroom Building. Of approximately 160 patients on whose behalf petitions were filed following *Dixon,* relief was obtained for about 120. Perlin Interview, *supra* note 30.

[66] In *Jackson,* Justice Blackmun notes that traditional bases for committing the mentally ill have included "dangerousness to self, dangerousness to others, and the need for care or treatment or training." 406 U.S. at 737 (footnote omitted). He adds, however, that the Court did not even have to address itself to the validity of these bases because Indiana did not purport to rely upon any of these with regard to Jackson's commitment. *Id.* The Court determined that his commitment was irrelevant to his capacity to function outside confinement, or to society's concern in restraining him, or to the State's capability to help him. Consequently, it was a violation of due process. *Id.* at 737-38.

[67] *See* notes 14-16 *supra* and accompanying text.

[68] 64 N.J. at 410, 316 A.2d at 464. The *Carter* majority evidently felt that by providing a form of conditional release, it had obviated the need to consider the question of equal protection:

> Our judgment on the question of conditional release renders it unnecessary at this time to reach a claim of unconstitutionality under the equal protection clause.

Id. Although counsel confined itself to an equal protection argument, Justice Clifford, in his dissent, noted that due process requirements render *Maik* suspect. *See id.* at 420, 316 A.2d at 470.

ditional release on legislative intent,[69] the right to treatment,[70] and the court's traditional power to fashion remedies.[71] Rather than follow the line of reasoning presented in *Jackson,* the court followed that propounded in *Maik,* apparently endeavoring to hold closely to the type of release it interpreted *Maik* as authorizing.[72] In seeking to soften the harsh effect of *Maik* yet also to honor that court's concern with public safety,[73] the court fashioned a conditional release based upon a balance between protection of the public and the therapeutic need for release.[74]

At a "*Carter*" conditional release hearing, the judge must conduct as broad an inquiry as possible, covering the patient's background, initial offense, available out-patient care, family life and potential job situation.[75] He must hear and resolve conflicts in testimony from psychiatrists and, if not satisfied, call additional experts.[76] Ultimately, he must make findings of fact as to the applicant's state of mental health and the conditions necessary to adequately assure his safe return to society.[77] If the evidence clearly and convincingly demonstrates the propriety of release,[78]

[69] *Id.* at 390-91, 316 A.2d at 454. The court also found a legislative intent to provide humane treatment for the mentally ill, of which conditional release is a part to the extent it is therapeutically indicated. *Id.* at 393, 316 A.2d at 455.

[70] *Id.* at 393-94, 316 A.2d at 455-56. For a discussion of right to treatment see note 100 *infra.*

[71] 64 N.J. at 392-93, 316 A.2d at 455. The court noted specifically its power to provide probation in the criminal context and concluded there is no logical distinction between its authority in that context and its authority to fashion an analogous release system for those adjudicated insane. *Id.* at 393, 316 A.2d at 455.

[72] *Id.* at 400, 316 A.2d at 459. The court interpreted *Maik* as authorizing conditional release as "a third alternative for release if one has not been fully 'restored to reason' or one's condition 'neutralized.' " *Id.* (footnote omitted).

[73] *Id.* at 388-89, 316 A.2d at 453.

[74] *Id.* at 409-10, 316 A.2d at 464. The court also expressed this balance as follows:

> The basis for his confinement is rehabilitation and treatment. Any standards for release must be based on this nature of commitment, given the overriding concern for the public safety.

Id. at 401, 316 A.2d at 459. This language reflects a continuing viewpoint that the state's role as public protector should be weighed against its role as parens patriae rather than against the individual's constitutional rights. *See* notes 28-29 *supra.*

[75] 64 N.J. at 403, 316 A.2d at 461.

[76] *Id.* at 406, 316 A.2d at 462.

[77] *Id.* For a more complete description of the function of the trial judge presiding at a conditional release hearing see United States v. McNeil, 434 F.2d 502, 513-15 (D.C. Cir. 1970). For a discussion of some of the problems inherent in granting conditional release to one acquitted on grounds of insanity see United States v. Ecker, 479 F.2d 1206, 1209 n.9 (D.C. Cir. 1973). The *Ecker* court affirmed a denial of conditional release on grounds that expert testimony was based on insufficient evidence. *Id.* at 1208.

[78] 64 N.J. at 408, 316 A.2d at 463. The court's requirement of a clear and convincing standard is apparently based on the patient's declared insanity and "the State's concern with public safety." *Id.* For a discussion of Justice Clifford's dissent on this issue see notes 121-24 *infra* and accompanying text.

he will authorize it, retaining jurisdiction to insure the court's power to recall the patient summarily if a "problem has arisen which jeopardizes the safety and well being of the patient or those around him."[79] The trial court must continue to monitor the patient by reports from the patient and supervising psychiatrists, which reports are channelled through a court-appointed probation officer.[80]

Requirements for release under *Carter* are predicated both on the existence of adequate environmental and supervisory controls and on the mental state of the patient.[81] Perhaps the most important requirement is the availability of long-term psychiatric outpatient care.[82] Understandably, the patient must be a willing and cooperative participant in such care, the main purpose of which is to enable the psychiatrist to monitor, anticipate, and thus prevent psychotic episodes.[83] The patient's potential home and work environment, if not therapeutic, must at least "not aggravate his condition."[84]

Concerning the patient's mental state, dangerousness—which is the basis for involuntary civil confinement—is to be considered, but it is not "the sole criterion for release."[85] The court states that

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Some courts have sought to resolve the burden of proof issue through an equal protection rationale. *See* Bolton v. Harris, 395 F.2d 642, 653 (D.C. Cir. 1968) (equal protection requires that the burden of proof for those committed under criminal statutes be the same as that for civilly committed patients). One court, holding that equal protection mandated similar burdens of proof, has, in effect, placed the burden on the state to prove the patient is still insane. State v. Clemons, 110 Ariz. 79, —, —, 515 P.2d 324, 327, 329 (1973).

[79] 64 N.J. at 408, 316 A.2d at 463. This "implies some territorial restrictions on the patient's right to travel." *Id.* at 409, 316 A.2d at 463. Conditional release for civilly committed patients also provides for summary recall. *See* N.J. STAT. ANN. § 30:4-107 (Supp. 1974-75).

[80] 64 N.J. at 408, 316 A.2d at 463.

[81] *Id.* at 403-07, 316 A.2d at 461-63. There is a scarcity of case law regarding standards to be set concerning conditional release for such individuals. *See* United States v. Ecker, 479 F.2d 1206, 1209 n.9 (D.C. Cir. 1973). Judge Bazelon, writing for a unanimous court, attributed this "to the rapidity with which patients' circumstances can be, and are changed, and the consequent frustration of adequate judicial review." *Id.*

Some authorities attribute the lack of information, needed as a foundation for determining release standards, to the overprediction of dangerousness resulting in the confinement of most patients and an inadequate statistical base. *See* Dershowitz, *supra* note 27, at 47; Livermore, Malmquist & Meehl, *supra* note 25, at 85; Schreiber, *supra* note 27, at 619. For a general discussion of the problems inherent in release and some suggested solutions see Weihofen, *Institutional Treatment of Persons Acquitted by Reason of Insanity*, 38 TEXAS L. REV. 849, 867-68 (1960).

[82] 64 N.J. at 403, 316 A.2d at 461.

[83] *Id.* at 404, 316 A.2d at 461.

[84] *Id.* at 403, 316 A.2d at 461.

[85] *Id.* at 404, 316 A.2d at 461.

even if the patient poses "no threat to society," confinement may continue "if further progress can be made in 'curing' his underlying condition."[86] The court suggests that mere "hopes of eventual recovery" may mandate prolonged confinement in the interests of public protection.[87] To the extent that hopes of cure or of eventual recovery result in confinement of those who are no longer dangerous to themselves or to others, *Carter* may deny conditional release to one who would otherwise be eligible for unconditional release if he had been confined under civil statutes.[88]

In discussing how the trial court should approach its consideration of "dangerousness," the court offers many possible definitions, ranging from commission of any unlawful act to acts which threaten violence.[89] Other than suggesting that public policy may be different in cases where the potential threat to society involves physical violence,[90] the court offers no guidance as to which definition should predominate.[91] Nevertheless, the court appears to require a finding regarding the patient's potential threat to society:

> Release is to occur only 'if a combination of conditions may be found that would reduce the likelihood of dangerous behavior below the standard required for commitment . . . .'[92]

[86] *Id.* The implications raised by this statement are attacked as "big brotherism" by Justice Clifford, who urges adoption of a standard based on dangerousness to self or others so long as terms of conditional release are complied with. *Id.* at 423-24, 316 A.2d at 471-72. "[D]anger to himself or others" is the standard adopted in the proposed revision to New Jersey's penal code, utilizing the same standard proposed in section 4.08(3) of the *Model Penal Code. Compare* S. 1115, *supra* note 30, §§ 5b-c *with* MODEL PENAL CODE § 4.08(3) (Proposed Official Draft 1962).

[87] 64 N.J. at 404, 316 A.2d at 461.

[88] Dangerousness to self and others is the standard for unconditional release of those committed under civil statutes in New Jersey. *See, e.g.,* State v. Caralluzzo, 49 N.J. 152, 156, 228 A.2d 693, 695 (1967); DiGiovanni v. Pessel, 104 N.J. Super. 550, 572, 250 A.2d 756, 768 (App. Div. 1969), *modified on other grounds,* 55 N.J. 188, 260 A.2d 510 (1970); *In re* J.W., 44 N.J. Super. 216, 221-22, 130 A.2d 64, 66-67 (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, 502 (App. Div. 1953). For a discussion of the equal protection problems posed by the differences in the release standards see notes 107-13 *infra* and accompanying text.

[89] 64 N.J. at 404-05, 316 A.2d at 461-62.

[90] *Id.* at 405, 316 A.2d at 462. The court, however, also cites to Overholser v. O'Beirne, 302 F.2d 852, 861 (D.C. Cir. 1961), which cautions that non-violent criminal acts may nonetheless be dangerous both to society and the perpetrator. 64 N.J. at 405, 316 A.2d at 462.

[91] 64 N.J. at 404-05, 316 A.2d at 461-62.

[92] *Id.* at 406, 316 A.2d at 462 (quoting from United States v. McNeil, 434 F.2d 502, 513 (D.C. Cir. 1970) (Bazelon, C.J., concurring)). It is unclear whether the court intends this formula to be dispositive or merely to be a suggested approach. Justice Clifford found this statement irreconcilable with the court's earlier statement that " '[d]angerousness is not . . . the sole criterion for release,' " and " 'dangerousness by itself is not a sufficiently specific

This admonition by the court presents several practical problems. The first is the absence of even a general definition of what constitutes dangerous behavior. A second is that the "dangerous behavior . . . required for commitment" becomes a meaningless standard when this "behavior" is merely a continuation of the underlying illness.[93] While the breadth and vagueness of the court's "dangerousness" standard permits the trial judge wide latitude and flexibility in fashioning a conditional release, it also invites a wide variation in interpretation and application, potentially resulting in vastly different standards being applied throughout the state.[94]

A final problem inherent in the court's directive is the "combination of conditions" required to "reduce the likelihood of dangerous behavior."[95] It is apparent from this statement, when read with the court's specific requirements of supervisory and out-patient facilities,[96] that release may depend as much on the availability of adequate living and out-patient facilities as it does on the patient's ability to function outside confinement. The inference is that where these facilities are available, release may be granted; where they are not, release will be denied.[97] That a person may be denied liberty or may be confined indefinitely on this basis raises the question of whether a patient's rights to equal protection, due process and treatment are being violated.[98]

Carter recognized a patient's right to treatment as evidenced by

guide to the formulation of conditional release standards.' " 64 N.J. at 423-24, 316 A.2d at 471-72 (quoting from *id.* at 404-05, 316 A.2d at 461).

[93] The current basis for commitment for a person acquitted or dismissed of charges on grounds of insanity is whether the underlying illness continues. *See* note 5 *supra.*

[94] By putting forth a wide range of possible considerations drawn from case law in other jurisdictions, the court, in effect, has provided the trial judge with authority for any decision he might make. For example, one judge might deny release to one showing potential for committing any unlawful act, while another judge might deny release only when there is a threat of serious bodily harm to another. Both could find ample justification for their respective decisions in *Carter. See* 64 N.J. at 404-05, 409, 316 A.2d at 461-62, 464.

[95] 64 N.J. at 406, 316 A.2d at 462 (quoting from United States v. McNeil, 434 F.2d 502, 513 (D.C. Cir. 1970) (Bazelon, C.J., concurring)).

[96] 64 N.J. at 403-04, 316 A.2d at 461.

[97] The court emphasizes that "[p]erhaps most important is the establishment of psychiatric out-patient care," and that "[t]he success of conditional release depends, to a large extent, upon the adequacy of the supervisory controls imposed by the courts." *Id.* at 403, 316 A.2d at 461.

[98] *See* note 29 *supra.* It is possible that lack of facilities could cause similar deprivations for those committed under civil statutes. However, under the civil statutes, the hospital administrator is under an affirmative duty to provide suitable arrangements should conditional release be deemed therapeutic. N.J. STAT. ANN. § 30:4-107 (Supp. 1974-75). In addition, a civil patient must be released if he is no longer dangerous to himself or to others. *See* note 86 *supra.*

legislative intent[99] and case law,[100] but concluded that the problem of delineating its scope was not before the court.[101] By holding that Carter could be eligible for a conditional release, the court has increased the possibilities for therapeutic solutions and it would appear, has effectively added substance to his right to treatment. Despite this fact, a patient's right to treatment and the state's obligation to provide it remain problems where confinement may be anti-therapeutic but the patient remains ineligible for release. For instance, where denial of release rests solely on the lack of out-patient facilities, it may be asked whether the right to treatment extends to the right to state-provided out-patient living and treatment centers. Where one is to be confined for his own good in hope of a cure, it may be asked whether the state should carry an affirmative burden not only to provide treatment but to demonstrate that confinement is, in fact, beneficial to the patient. Without such a showing, confinement may be a denial of due process as mandated by *Jackson*.[102] Where confinement is due to danger posed to others, the absence of treatment may raise the issue of preventive detention or cruel and unusual punishment.[103]

Another approach to release bearing on the right to treatment

[99] For a discussion of the court's view of legislative intent see note 69 *supra*.

[100] 64 N.J. at 393-94, 316 A.2d at 455-56. The court states that "[t]he right to treatment is an affirmative obligation on behalf of the State." *Id.* at 393, 316 A.2d at 455 (citing *In re* D.D., 118 N.J. Super. 1, 6, 285 A.2d 283, 286 (App. Div. 1971). Exactly how far the right to treatment extends remains undefined. In Singer v. State, 63 N.J. 319, 307 A.2d 94, *cert. granted*, 63 N.J. 504, 308 A.2d 669 (1973), the supreme court reversed an appellate decision based on *In re D.D.* which had held that a civilly committed mental patient could not be confined in the Forensic Division (Vroom Building) with the "criminally insane." 63 N.J. at 322-23, 307 A.2d at 96. The supreme court stated that "[a]bsent evidence that the housing together of both categories of patients injures the non-convict patient in some way," the appellate judgment must be reversed. *Id.* at 323, 307 A.2d at 96.

[101] 64 N.J. at 393, 316 A.2d at 455. However, the *Carter* court seems to acknowledge that the right to treatment exists and that a petition for conditional release may be brought on this basis:

> While the Court is not now directly faced with delineating the scope of the right to treatment in New Jersey, the existence of such a right bears on the availability of conditional release, at least to the extent that such release is a therapeutic measure.

Id.

[102] 406 U.S. at 738. *See* text accompanying notes 62-64 *supra*.

[103] In United States v. Pardue, 354 F. Supp. 1377 (D. Conn. 1973), for example, the court was faced with an individual declared incompetent to stand trial who had been given comprehensive sanity hearings over a three-year period and had been confined in seven different institutions. *Id.* at 1381. Since it was not foreseeable that he would become competent to stand trial and since there was no existing federal facility in which he could receive effective care, the judge required that the accused be released from federal custody and confinement on the basis that continued detention without adequate treatment had "reached constitutional dimensions" involving the right to a speedy trial, due process, and cruel and unusual punishment. *Id.* at 1381-82.

is that of "the least restrictive alternative," suggested by Justice Clifford in his separate opinion.[104] According to this view, the patient would have the right to treatment in the "least restrictive" setting possible. Although this again would depend in part on available facilities, a mandate that the trial court channel its efforts in this direction may expand the possibilities for therapeutic treatment[105] and would appear consistent with legislative intent.[106]

The majority in *Carter* declined to deal with the question of whether those committed pursuant to criminal statutes merit equal treatment with those committed under civil statutes.[107] Justice Clifford, however, attacked this omission on the grounds that equal protection requires that the mentally ill be treated alike in essential matters and that since conditional release is available to those civilly committed, it must be made available to those "criminally" committed.[108] Taking this point even further, he contended that those whose charges have been dismissed or who have been acquitted are in fact civil committees and must therefore be treated equally with other civil committees.[109]

What Justice Clifford did not discuss, however, is whether there may be any rational basis for distinguishing those mentally ill who have committed offenses as a result of their illness from those who have not. Rather, he chose to read *Jackson* and *Baxstrom* as mandating similar treatment for one like Carter,[110] despite the differences among the respective defendants' situations. For instance, unlike the defendants in *Jackson* and *Baxstrom,* Carter's

[104] 64 N.J. at 421-23, 316 A.2d at 470-71. For a discussion of the origin of the least restrictive alternative doctrine and its impact on commitment standards see *Developments in the Law, supra* note 25, at 1245-53.

[105] For various examples of how this doctrine may be applied to mentally ill patients and result in non-institutional solutions see Livermore, Malmquist & Meehl, *supra* note 25, at 91-92.

[106] N.J. STAT. ANN. § 30:4-24.1 (Supp. 1974-75) provides that the mentally ill be accorded treatment "in accordance with the highest accepted standards," which easily would seem to incorporate the least restrictive alternative doctrine in light of data indicating extended confinement is generally anti-therapeutic. *See* note 26 *supra.* Pending legislation actually states a patient has a right "[t]o the least restrictive conditions necessary to achieve the purposes of treatment." N.J. Senate Bill No. 1117, § 10e(2) (approved by Senate on June 13, 1974).

[107] 64 N.J. at 410, 316 A.2d at 464. *See* notes 14-16 *supra* and accompanying text.

[108] 64 N.J. at 413-17, 316 A.2d at 466-68.

[109] *Id.* at 418, 316 A.2d at 469. Justice Clifford accepted the court's jurisdiction over the release of those confined under criminal statutes, even though he retained "reservations about the constitutionality of this differential in treatment." *Id.* at 419, 316 A.2d at 469.

[110] *Id.* at 415-17, 316 A.2d at 467-68. Justice Clifford argued that "[t]he Jackson and Carter cases are essentially the same" and that, "if anything, Carter presents even a stronger equal protection argument since the charges against him had been dropped." *Id.* at 415, 316 A.2d at 467.

insanity erupted into physical violence against another person.[111] In contrast with Jackson and Baxstrom, Carter was adjudged incompetent to stand trial and insane at the time the offense was committed, and was then given a separate pre-commitment hearing at which his insanity was found to continue.[112] Arguably, establishing that Carter was capable of violence flowing from insanity and finding that his insanity continued would satisfy *Jackson* and *Baxstrom* and would justify the state's imposition of a stricter release standard.[113]

While Justice Clifford's opinion that all mentally ill patients should be treated alike, regardless of offenses they may have committed, may be questionable,[114] his position that different stan-

[111] Carter had, in fact, shot a policeman. *Id.* at 386, 316 A.2d at 451. Jackson had only been accused of purse-snatching. 406 U.S. at 717. Baxstrom's insanity appeared after he was imprisoned and was not a consideration in his original confinement. 383 U.S. at 108.

[112] 64 N.J. at 386, 316 A.2d at 451.

[113] Even cases on which Justice Clifford relied appear to acknowledge the justification for some differential treatment. In *Baxstrom,* the Court stated:

> Classification of mentally ill persons as either insane or dangerously insane of course may be a reasonable distinction for purposes of determining the type of custodial or medical care to be given.

383 U.S. at 111. The court in Bolton v. Harris, 395 F.2d 642, 649 (5th Cir. 1968), read *Baxstrom* to mean that while prior criminal behavior cannot be considered a sufficient basis for substantial differences in commitment procedures and requirements, a reasonable application of the equal protection doctrine permits persons acquitted by reason of insanity to be treated differently from civilly committed persons "to the extent that there are relevant differences between these two groups." *Id.* at 649-51. The court even accepted "that commitment without a hearing is permissible for the period required to determine present mental condition," even though this represented a different procedure from that followed in regard to civilly committed patients. *Id. Bolton* indicated that while requirements for ultimate confinement and burden of proof must be the same, the fact that one has been acquitted by reason of insanity may help to show the requirements for commitment have been met. *Id.* The *Bolton* court also continued to uphold release provisions, even though they differed from civil commitment procedures, by providing court review of the hospital's decision to release a patient. *Id.* at 652.

The court in United States v. Ecker, 479 F.2d 1206, 1209-10 (D.C. Cir. 1973), resisted any argument that any differential treatment of the release of the two groups violates equal protection. This court acknowledged, however,

> [t]hat the issue of what standard of review should be applied to release decisions is a question of constitutional dimensions . . . . [involving] the validity of the substantive and procedural terms of commitment against the requirements of the Constitution.

Id. at 1210 (footnote omitted).

Some authorities feel different procedures are justified for those mentally ill who have committed offenses against the state and those who have not. *See* Hamann, *The Confinement and Release of Persons Acquitted by Reason of Insanity,* 4 HARV. J. LEGIS. 55, 57 (1966) (proven dangerousness is adequate basis for treating individuals acquitted on grounds of insanity as a special class).

[114] *See* notes 110-13 *supra* and accompanying text. However, an equal protection argument could be made upon an empirical basis. *See* Weihofen, *supra* note 81, at 855, in which the assumption that the "criminally insane" are more dangerous than other mental hospital inmates is asserted to be false. Contending that mentally ill patients who have committed

dards are unconstitutional when they are irrelevant to dangerousness or to need for treatment is well taken. A standard which results in indefinite confinement of one who is neither dangerous to himself or others nor who would benefit from confinement violates the due process clause of the fourteenth amendment because confinement does not then bear a " 'reasonable relation to the purpose for which the individual is committed' " as required by *Jackson.*[115] Standards irrelevant to dangerousness would also seem to violate the equal protection clause by removing the very basis —protection of the public—upon which the state draws its authority to impose a more stringent release standard.

In addition to leaving unresolved the question of how the constitutional rights of equal protection and due process and the right to treatment might affect a "criminally" committed mental patient's quest for release, the *Carter* decision also leaves practical questions unanswered. The first and most crucial involves the absence of any designated person or agency to handle the conditional release. Problems relating to initiating the action for a release hearing, setting up an acceptable home environment outside institutionalization, and arranging for out-patient care and reports to the proper authorities are left unanswered. The *Carter* court requires only that reports should be sent by the patient and the treating psychiatrist to a probation officer who in turn shall report to the releasing court.[116] Although it would appear that the administrators of the state hospital in which the person is confined might be best equipped to handle such procedure—particularly since they are authorized to handle conditional releases for civilly committed patients—[117] they have taken the position that they want no part of the administration of conditional releases for criminally committed patients.[118] Similarly, another seemingly ap-

violent acts are essentially no different than those who have not, Weihofen states that

> [t]hey run the same gamut of psychiatric disorders as psychiatric patients in general. Moreover, psychotic murderers respond to the same methods of care and treatment as do other mental hospital patients.

Id. See Letter from Martin H. Weinberg, M.D., Department of Institutions and Agencies of N.J., to author, October 8, 1974, on file at *Seton Hall Law Review* [hereinafter cited as Letter from Weinberg].

[115] 64 N.J. at 420, 316 A.2d at 470 (quoting from Jackson v. Indiana, 406 U.S. 715, 738 (1972)).

[116] *Id.* at 408, 316 A.2d at 463.

[117] N.J. STAT. ANN. § 30:4-107 (Supp. 1974-75) authorizes the hospital administrator to make necessary arrangements when care outside confinement is deemed beneficial to the patient. Justice Clifford questions the extent to which the conditional release provision is exercised. 64 N.J. at 416 n.2, 316 A.2d at 467-68.

[118] According to the Director of the Division of Mental Health and Hospitals, Department of Institutions and Agencies:

propriate agency, the fledgling Mental Health Division of the Department of the Public Advocate,[119] has indicated it will not handle conditional release hearings.[120] The result is a void to be filled at the discretion of involved judges, prosecutors and attorneys.[121] Concomitantly, a petitioner's case for release becomes even more difficult to establish because it appears virtually impossible to demonstrate "clearly and convincingly" that "adequate supervisory controls" exist when there is no supervising authority to initiate them. If conditional release is to become a reality, responsibilities will have to be allocated to appropriate authorities.

A second problem concerns the duration of the court's jurisdiction over a conditionally released mental patient. One solution would be to retain jurisdiction until the patient demonstrates to the trial court that he is no longer in need of such supervisory controls. A prima facie demonstration might proffer a period of time during which there has been no evidence of relapse or serious incident. Eventually, it would seem feasible to establish a certain period after which jurisdiction would cease automatically, absent a showing by the state of a need for continuing supervision.[122]

A third problem arising from *Carter* involves the court's ability to recall summarily a patient "upon being notified that some problem has arisen which jeopardizes the safety and well being of the patient or those around him."[123] Which acts, signs, or manifesta-

> Hospital administrators do not want any part in post-release supervision on grounds that the goals of the hospital are therapeutic and these would be adversely affected by the probation type of supervision Carter demands. In fact, the administrators question the value of the Carter-type release since it differentiates among the patients in a manner in which the hospitals themselves do not by placing certain patients under a different release standard.

Letter from Weinberg, *supra* note 114.

[119] N.J. Assembly Bill No. 1409, art. III (approved by Assembly on May 13, 1974) establishes a Division of Mental Health Advocacy within the Department of the Public Advocate. For a brief discussion of this Division see note 30 *supra*.

[120] Since the Division on Mental Health will have offices in only two counties and *Carter*-type release hearings will be held in counties throughout the state, the Division, which is not currently staffed to serve every county, will not handle conditional releases. Perlin Interview, *supra* note 30.

[121] For instance, at a recent conditional release hearing, release was dependent upon the patient's acceptance into a halfway house program. Krol v. State, No. 534-69, at 2-3 (N.J., Camden County Ct., Aug. 2, 1974) (consent order). The application to this program was suggested and arranged by the Assistant Prosecutor, who represented the county at the hearing. Letter from John McFeely, Assistant Prosecutor, Camden County, to author, Sept. 18, 1974, on file at *Seton Hall Law Review*.

[122] Senate Bill No. 1115 calls for a five year period. S. 1115, *supra* note 30, § 5d. If the probation department is to act as the supervisory agency, the question arises as to whether the patient will come under the purview of probation statutes. If so, jurisdiction must terminate after five years. *See* N.J. STAT. ANN. § 2A:168-1 (1971).

[123] 64 N.J. at 408, 316 A.2d at 463.

tions will trigger a summary recall?[124] Without some sort of procedural safeguard, it is conceivable a person could be recommitted unjustifiably. The Supreme Court has held that liberty, even in conjunction with parole and probation, cannot be taken away without due process.[125] Conditional release from a mental institution would appear equally deserving of fourteenth amendment protections.

Although the total effect of these unresolved issues may be to retard the implementation of conditional release, some of these problems may be judicially resolvable. For instance, adoption of a release standard based on dangerousness would appear to satisfy equal protection and due process requirements, while still providing the flexibility and control necessary to ensure society's safety. A court's assessment of a patient's present or potential dangerousness, for example, could be reflected in the type of conditions imposed upon his release. Regardless, the mentally ill should be treated and classified according to their status as dangerous or non-dangerous rather than their status as criminal or civil committees. It would also seem advisable for the court to arrive at a general understanding of the dangerousness which would preclude release. Considering the drastic deprivation of liberty involved, the preferable definition would stress the likelihood of serious bodily or psychic injury to self and others.

Requiring a petitioner to establish his eligibility for release by a preponderance of the evidence seems more appropriate under the circumstances than the clear and convincing demonstration currently required. As noted by the *Carter* majority, the field of predicting human behavior is by its nature uncertain.[126] When combined with the difficulty of assessing psychiatric testimony and the usual conflicts of opinion among psychiatrists themselves,[127] it ap-

[124] The probation officers who will ultimately be charged with the duty of supervising conditionally released patients are concerned with the scope of their authority regarding summary recall. They are particularly troubled by the lack of guidelines delineating the conduct which will justify action by the probationary officer. Letter from John Janowski, Bergen County Probation Department, to author, August 21, 1974, on file at *Seton Hall Law Review*.

[125] *See, e.g.*, Gagnon v. Scarpelli, 411 U.S. 778, 781-82 (1973) (revocation of probation, like parole, involves loss of liberty and accordingly entitles a probationer to due process protections); Morrissey v. Brewer, 408 U.S. 471, 482 (1972) (loss of liberty threatened by revocation of parole is "within the protection of the Fourteenth Amendment").

[126] 64 N.J. at 396, 409, 316 A.2d at 457, 464.

[127] The psychiatric testimony in Carter's case exemplifies the problem. One psychiatrist, testifying for the state, called Carter a catatonic schizophrenic who was " 'potentially dangerous to others.' " *Id.* at 396, 316 A.2d at 457. A second psychiatrist determined that any manifestation of schizophrenia was residual and concluded that Carter would not experience

pears almost impossible to meet the clear and convincing standard.

Despite the problems left in the wake of *Carter,* the decision has laid groundwork which will inevitably involve the courts, hospital administrators and other agencies in further developing therapeutic alternatives to lifetime confinement. *Carter* also has the effect of negating the harsh effect of *Maik* by providing a release mechanism for those whose condition will never be "cured" or "effectively neutralized." Although it remains to be seen whether *Carter* standards will be considered in post-acquittal deliberations, it would seem a logical step to introduce its provisions when the determination as to the patient's continuing insanity is made. If the patient, following either acquittal or dismissal of charges on grounds of insanity, is found to be in remission and the other requirements of *Carter* are met, there seems no reason why conditional release should not be granted.

Joan Foster

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another serious episode if properly supervised. *Id.* A third psychiatrist testified Carter "was no longer dangerous and that he could safely be reintegrated into society." *Id.* (footnote omitted).