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NOTES

INVOLUNTARY COMMITMENT OF THE MENTALLY ILL: A PROPOSAL FOR CHANGE IN SOUTH CAROLINA

I. INTRODUCTION

The procedure for involuntary commitment, whether civil or criminal, creates possibilities of abuse for those confined to mental institutions. Manipulation of the civil commitment process by venal and unscrupulous relatives has been a serious matter since the mid-nineteenth century.¹ Similarly, law enforcement agents may commit individuals for reasons of security or suspicious conduct, without the procedural safeguards assured to those suspected of the commission of crime.² Once committed, an individual is often not afforded any effective means with which to challenge the continuation of his incarceration, thereby having his medical confinement become the equivalent of life imprisonment.³ To emphasize the scope of the problem, one need only consider the fact that annually over 350,000 persons are committed to mental institutions.⁴

1. See T. Szasz, *LAW, LIBERTY, AND PSYCHIATRY* 58 (1963). The famous case of Mrs. E.P. Packard, who allegedly was committed by her minister husband to "get rid of her," led to her personal crusade to reform the commitment laws in Illinois. At that time, husbands or guardians had the absolute power to commit married women and infants, and under this law Mrs. Packard languished in a mental hospital for three years before finally obtaining release.

2. Kiernan, *Detention Varies with Geography*, *The Washington Star-News*, Aug. 5, 1973, at B-1, col. 1. This article recounts the story of Mrs. Elsie Medynski, a Canadian citizen arrested and confined at St. Elizabeth's Hospital for seventy-two hours without a hearing. She was suspected of being mentally ill because she was picking up trash and emptying ashtrays in the lobby of Washington's National Airport while waiting for a connecting flight. Mrs. Medynski was but one of three persons to be detained at National Airport in an eight day period and involuntarily confined in a mental institution.

3. T. SZASZ, *supra* note 1, at 64-5. See also *Jackson v. Indiana*, 406 U.S. 715 (1972). In that case the Court found that criminal commitment of the petitioner for a minor theft meant in effect that there would be little probability for eventual release because of the capacities of Jackson, a severely retarded deaf mute. Examining psychiatrists had testified that the probability of a recovery sufficient to allow Jackson's release as "cured" under Indiana criminal commitment standards was very remote. See p. 775 & 793 *infra* for a discussion of this case.

4. N. KITTRIE, *THE RIGHT TO BE DIFFERENT* 6 (1971). The author states that 384,948

Aside from the possibility of abuses inherent in the procedure, commitment facilities are being subjected to closer scrutiny to remove the inhumane conditions characteristic in past decades.⁵ In particular, deficiencies have been found in South Carolina in the areas of funding, staff and patient environment.⁶

Recognizing this problem, the court and legislatures have increasingly attempted to correct abuses within the mental health field by restructuring the civil and criminal commitment process.⁷ In the courts, the remedial tool has been the fourteenth amendment, the courts finding that the statutory provisions governing involuntary commitment were violative of due process and equal protection.⁸

The provisions for involuntary commitment in South Carolina are currently being challenged in federal district court in *Alexander v. Hall*.⁹ This suit involves a class action instituted by five patients of the South Carolina State Hospital, two of whom were committed under the criminal commitment procedure. The complaint alleges that the present South Carolina involuntary commitment statutes are unconstitutional. In response to this pending litigation, a bill¹⁰ was introduced in the South Carolina Senate on June 19, 1973. If enacted, it would substantially change the current involuntary commitment procedures.

This article will explore and evaluate the proposed legisla-

persons were committed in 1966 to mental institutions of various types. This figure includes both voluntary and involuntary commitments, as well as those persons placed in institutions for the feeble-minded.

5. Stucker, *S.C. Hospitals Work on 'Major Deficiencies'*, The State (Columbia, S.C.), Oct. 25, 1973, at 10-C, col. 1.

6. *Id.* It should be pointed out that both the South Carolina State Hospital and Crafts-Farrow State Hospital have been given one year by the Joint Commission on Accreditation of Hospitals to correct "major deficiencies" in the areas of funding, staff and environment.

7. See *Jackson v. Indiana*, 406 U.S. 715 (1972) (criminal); *Heryford v. Parker*, 396 F.2d 393 (10th Cir. 1968) (civil). For a discussion of *Heryford* see p. 773 *infra*.

8. For a more exhaustive study of the constitutional challenges to the existing commitment procedures, the reader is referred to the following: Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill*, 44 TEX. L. REV. 424 (1966); Ennis, *Civil Liberties and Mental Illness*, 7 CRIM. L. BULL. 101 (1971); Kaplan, *Civil Commitment: "As You Like It,"* 49 B.U.L. REV. 14 (1969); Wormuth & Murkin, *The Doctrine of the Reasonable Alternative*, 9 UTAH L. REV. 254 (1964); Note, *Hospitalization of the Mentally Ill: Due Process and Equal Protection*, 35 BROOKLYN L. REV. 187 (1969).

9. Civil No. 72-209 (D.S.C., filed Feb. 11, 1972). See note 45 & text *infra*.

10. No. S.539, A Bill Relating to the Commitment, Admission and Discharge of Persons from Mental Institutions (1973). As the title indicates this bill is also concerned with other aspects of the mental health field; however, they are beyond the scope of this paper.

tion relating to involuntary commitment in light of the current provisions, recent court decisions and legislative and administrative responses to the problem in other jurisdictions. Particular attention will be given to some serious omissions in the proposed statutory revision and suggestions which might improve the current proposal.

The paper has been divided into two sections: (1) "civil" commitment, involuntary commitment of those not accused or convicted of a crime, and (2) "criminal" commitment, involuntary commitment of those accused or convicted of a crime. An appendix has been included to provide the reader with the exact wording of the sections of the proposed code mentioned in this paper.

II. COMMITMENT OF PERSONS NOT ACCUSED OR CONVICTED OF CRIMES

A. *Present Statutes*

South Carolina currently provides for three types of involuntary commitment of persons who are mentally ill but who are not accused or convicted of the commission of a crime. Two of these are non-emergency procedures which provide for the commitment of persons who are mentally ill and either need treatment or are dangerous. The first non-emergency procedure, generally referred to as admission by a two-physician certificate,¹¹ is effected without a hearing. The second is judicial admission,¹² by which a person is committed after a hearing before the probate court. Emergency commitment, the third involuntary procedure, concerns those who are mentally ill and dangerous either to themselves or others.¹³ This commitment is effected without either a hearing or authorization by the court, but the commitment must be endorsed by the probate judge subsequent to the patient's confinement.¹⁴

The two-physician certificate method, authorized in non-emergency situations, provides a summary procedure and alternate judicial procedure for unusual circumstances. The two-physician procedure permits the admission of a patient to the

11. S.C. CODE ANN. § 32-954 (1962).

12. *Id.* §§ 32-958 *et seq.*

13. *Id.* § 32-956.

14. *Id.* § 32-957.

state hospital on the written application of either a friend, relative, spouse, custodian or guardian, or if the individual is in a medical institution, the superintendent thereof.¹⁵ This application must be accompanied by a certificate of two designated examiners, defined by the code as physicians who are specially qualified in the diagnosis of mental or related illnesses or of mental deficiency.¹⁶ This certificate must attest that the two physicians have examined the individual and found either that he needs treatment for which his diminished capacity would prevent him from applying or that he is likely to injure himself or others.¹⁷ If this certificate indicates that the prospective patient is dangerous, it can be endorsed by a probate judge. The endorsement requires that a police officer take the individual into custody and transport him to the hospital.¹⁸ Therefore, under this procedure a person may be admitted as a mental patient solely on the strength of this application and certificate.

If the two-physician certificate procedure cannot be followed because of inability to locate the prospective patient or other unusual circumstances, the applicant must present an affidavit to the probate judge attesting to his belief in the mental illness of the prospective patient and the reasons why the two-physician procedure cannot be followed.¹⁹ Acting on this affidavit, the judge may order the individual taken into custody and examined within twenty-four hours by two court-designated examiners.²⁰ If this procedure is followed, the legislature has provided that the individual taken into custody has the right to be represented by counsel and the right to bail or an immediate examination by designated examiners; if these requirements are not complied with, the individual is entitled to release.²¹

Under the two-physician procedure, if the superintendent of the hospital deems it safe, a person admitted to a state hospital must be released upon his own written request or that of a spouse,

15. *Id.* § 32-954(1).

16. *Id.* § 32-911(6). For the purpose of carrying out this provision, the South Carolina Mental Health Commission has designated as examiners any physician licensed to practice medicine under the laws of South Carolina or any medical officer of the government of the United States who is in the state in performance of his official duties.

17. *Id.* § 32-954(2).

18. *Id.* § 32-955.

19. *Id.* § 32-956.

20. *Id.* § 32-955.1 (Cum. Supp. 1971).

21. *Id.* Despite the procedural safeguards, it is still unclear whether *Miranda*-type warnings are to be given prior to the commitment proceeding.

adult, relative, guardian, friend, or the applicant for his admission, if made thirty days or more after his admission.²² If this request for release is denied, the patient may be held for fifteen additional days while judicial admission procedures are begun.²³ As a result, the two-physician admission procedure allows a person to be held in a state hospital for a minimum of forty-five days without having an opportunity to be heard on the issue of his mental capacity or to be represented by counsel.²⁴

The second procedure for involuntary commitment in non-emergency situations, judicial admission, is invoked when a friend, relative, spouse, guardian, or the superintendent of an institution where the patient is confined files with the probate court an application similar to the one in the two-physician procedure.²⁵ This application, however, must be accompanied by a physician's statement that his examination of the individual determined that he is mentally ill and needs hospitalization, or that the prospective patient refused to submit to his examination.²⁶ Generally, notice of this application for judicial admission is given to the prospective patient, his spouse, parents, and nearest known other relative or friend. If the court believes that notice is likely to be injurious to the prospective patient, such notice may be withheld from him.²⁷

After filing of the application, the court must appoint two designated physicians to examine the prospective patient and report their findings. If the court denies notice of the judicial admission application and the patient refuses to be examined, notice must be given before he can be ordered to submit to the examination.²⁸

If both examiners believe the patient is mentally ill, the court

22. *Id.* § 32-972 (Cum. Supp. 1971).

23. *Id.*

24. In *Douglas v. Hall*, 229 S.C. 550, 93 S.E.2d 891 (1956), the court held that the writ of habeas corpus may not be used to challenge involuntary confinement in a mental institution because adequate procedures to challenge such commitments are provided by statute. The remedy should be deemed exclusive unless contrary legislative intent is clearly apparent.

25. S.C. CODE ANN. § 32-958 (1962).

26. *Id.*

27. *Id.* § 32.959. The term "injurious" is quite vague. Although it clearly encompasses situations in which the proposed patient might inflict bodily harm on himself, the term might also be extended to situations where the proposed patient may try to evade the authorities.

28. *Id.* § 32-960.

must schedule a hearing within fifteen days from receipt of the examiners' report and give notice of this hearing to the parties concerned.²⁹ If either examiner believes the patient is not mentally ill, the application for admission is denied.³⁰

At the probate court hearing, the prospective patient has the right to counsel³¹ and, if indigent, the right to court-appointed counsel,³² whether or not he is actually present at the hearing. The hearing is informal, and the court may accept all relevant and material evidence offered.³³ In making its final determination on commitment, the court has been provided with a standard to weigh the pertinent evidence. The court is charged with ordering commitment if the patient is found to be:

- (1) [I]n need of custody, care, or treatment in a hospital, and because of his condition lacks sufficient insight or capacity to make responsible decisions with respect to his admittance to a hospital; or
- (2) Because of his condition is likely to injure himself or others.³⁴

The order of the probate court may be appealed to the circuit court, and a trial *de novo* with jury will be granted.³⁵ In addition, after six months of confinement the patient, or another acting on his behalf, may petition the probate court for a reevaluation of the confinement order. The costs for this review must be borne by the patient.³⁶ Generally, such a post-confinement review is guided by the same procedural format as the original hearing.³⁷

29. *Id.* § 32-961.

30. *Id.*

31. *Id.* § 32-962.

32. *Id.*

33. *Id.* The informality of the hearing procedure and the inclusion of all "relevant and material" evidence implies that hearsay evidence would be admissible. See p. 779 & note 79 *infra*. A Wisconsin district court considered this issue in *Lessard v. Schmidt*, 349 F. Supp. 1078, 1103 (E.D. Wis. 1972):

To the extent that exceptions to the hearsay rule permit the admission of hearsay into evidence, the same evidence may be admitted in a civil commitment hearing. Where standard exclusionary rules forbid the admission of evidence, no sound policy reasons exist for admitting such evidence in an involuntary commitment hearing.

34. *Id.* § 32-936.

35. *Id.* § 32-937. Apparently, appeals may be taken to the court of common pleas in all cases and under the same conditions as in any other civil action. Appeal must be filed, however, within fifteen days after notice of the adverse decision.

36. *Id.* § 32-963. These costs are usually minimal and vary from county to county. They include minimal fees to the magistrate and such additional expenses as stenographic costs, witness fees, etc., which the patient may incur.

37. *Id.*

The third involuntary commitment procedure is specifically addressed to the admission of those requiring immediate restraint because they are likely to injure themselves or others.³⁸ This immediate restraint may be effectuated by anyone's written application coupled with a licensed physician's certification.³⁹ It should be noted that a physician's certificate alone authorizes police arrest and incarceration in a state hospital; however, a probate judge must endorse the certificate within forty-eight hours after custodial restraint.⁴⁰ It appears that this certification tends to act in these exigent circumstance cases as an arrest warrant might in regular criminal cases.

As indicated in the previous discussion of the two-physician commitment procedure, the patient, his family or a friend may request his release after thirty days or more.⁴¹ This same release request provision is also available to an individual committed under the emergency procedure.⁴² Likewise, the minimum period of involuntary confinement is forty-five days for one alleged to be mentally ill under this procedure but not so adjudicated.⁴³

One of the most obvious defects in the present involuntary commitment statutes is the lack of any standard for determining whether a non-emergency patient is to be committed by judicial admission or by the two-physician certification procedure. The mere existence of this summary certification commitment procedure has made a practical nullity of the judicial admission procedure, which affords the patient some procedural safeguards such as the right to counsel. Of the 3,723 admissions to the South Carolina State Hospital in fiscal 1971-72, only two were judicial commitments, while 1,505 were committed under a two-physician certificate.⁴⁴ Thus, it seems that in reality South Carolina only provides for two types of involuntary commitment procedures, emergency commitment and admission by a two-physician certificate. As pointed out earlier, neither of these affords the patient any right to a hearing or judicial determination that he is men-

38. *Id.* § 32-956(1).

39. *Id.* § 32-956.

40. *Id.* § 32-957.

41. See note 10 *supra*.

42. S.C. CODE ANN. § 32-972 (1962).

43. *Id.*

44. S.C. DEPARTMENT OF MENTAL HEALTH, ANNUAL REPORT, 1971-72, 86. According to the *Annual Report*, July 1, 1970-June 30, 1971, there were only two judicial admissions, as compared to 1,536 two-physician certificate admissions of the total 3,553 admissions to the South Carolina State Hospital for that fiscal year.

tally ill. Under both procedures a person may be held in a state mental hospital for forty-five days without a hearing, and the commitment may become indefinite if he or someone acting in his behalf does not submit a written request for his release.

B. Judicial Challenges

Both the physician-certificate commitment procedure and the emergency procedure are currently being challenged by a suit which poses questions that have been raised in many states. *Alexander v. Hall*⁴⁵ challenges both the commitment and continued confinement of plaintiffs committed by involuntary commitment procedures.⁴⁶

With respect to their commitment orders, the complaint seems grounded on the theory that persons involuntarily committed under present law have been deprived of their liberty without adequate notice of the proceedings against them, without counsel, without a judicial hearing, and without benefit of a recorded transcript for appeal. In effect, *Alexander* raises the question whether rights guaranteed by the Bill of Rights to persons accused of crimes should apply to prospective patients in involuntary commitment proceedings.

Courts are increasingly answering this question in the affirmative, thus expanding the rights afforded those confined to mental hospitals. Much has been accomplished by using *Specht v. Patterson*⁴⁷ and *In re Gault*,⁴⁸ cases involving situations analogous to the present one. Basically the petitioners in both cases were denied rights guaranteed by the Bill of Rights to the criminally accused, only because they were being dealt with in what was termed a "civil" proceeding which nevertheless resulted in involuntary confinement. In *Specht* the court held that the equal protection clause and the due process clause of the fourteenth amendment are applicable to commitment proceedings under the Colorado Sex Offenders Act⁴⁹ regardless of whether such proceedings are characterized as "civil" or "criminal" commitment. Under this statute the commitment procedure is triggered when

45. Civil No. 72-209 (D.S.C., filed Feb. 11, 1972). See note 9 & text *supra*.

46. After having been charged with a crime two of the plaintiffs were also confined in the State Hospital pursuant to § 32-969 of the South Carolina Code.

47. 386 U.S. 605 (1967).

48. 387 U.S. 1 (1967).

49. COLO. REV. STAT. ANN. §§ 39-19-1 to -10 (1963).

a person is found guilty of certain sex offenses. After conviction for indecent liberties but prior to sentencing, Specht was subjected to a psychiatric examination, of which a written report was given to the trial judge. Based on these findings and without notice and an opportunity to be heard, the trial judge committed him to an indeterminate term from one day to life as permitted under the Sex Offenders Act. On appeal the Supreme Court found that sentencing under the Sex Offenders Act was in fact punishment criminal in nature and that due process required the petitioner "[b]e present with counsel, 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."⁵⁰

Similarly *Gault* involved the validity of the distinction between "civil" and "criminal" proceedings. This case concerned juvenile commitment which the state deemed to be a civil proceeding, thereby alleviating any necessity to ensure that the individual receive his constitutionally guaranteed right to remain silent. The Supreme Court, however, rejected this argument and reasoned that, despite the label attached to a particular proceeding, one must look to the substantive effect of the proceeding. In effect, the right to remain silent should be secured to a juvenile in a proceeding which could lead to his indefinite incarceration.

The reasoning of the Court in *Specht* and *Gault* has recently been applied to the area of involuntary commitment of persons not accused or convicted of crimes because of the possibility that such a civil proceeding will result in substantial incarceration. In *Heryford v. Parker*,⁵¹ the court found that the petitioner's commitment to a state school for the feeble-minded and epileptic was constitutionally defective because he was deprived of his right to counsel at the commitment hearing. The court eschewed the civil-criminal distinction and determined that the likelihood of involuntary incarceration should command the observance of constitutional safeguards.⁵²

In striking down the Wisconsin emergency commitment statute⁵³ as unconstitutional, a federal district court in *Lessard v.*

50. 386 U.S. at 610.

51. 396 F.2d 393 (10th Cir. 1968).

52. *Id.* at 396.

53. WIS. STAT. ANN. §§ 51.02-.04 (1957). The Wisconsin involuntary commitment statute was enacted for the protection of persons and property, allowing temporary, involuntary detention for a possible 145 days upon an application executed by a licensed physician and two other persons. The application described the prospective patient's

*Schmidt*⁵⁴ indicated definite concern over the summary incarceration of individuals without any requirement for immediate arraignment and neutral determination of probable cause for detention. The court suggested that in formulating a new emergency commitment procedure, a forty-eight hour maximum be established within which the temporarily detained individual must be apprised of the situation and a magisterial determination of the necessity for continued incarceration must be rendered.⁵⁵ In addition, the court held that after a determination has been made to continue incarceration the individual should be afforded a speedy hearing to determine the issue of mental illness. Prior to the hearing, timely notice and a clear and particular statement of the basis for detention must be provided.⁵⁶ Furthermore, all psychiatric reports and other information which will be introduced at the hearing must be made available to the patient's counsel.⁵⁷ The constitutional guidelines set forth in the *Lessard* opinion seem to open the door to a greater expansion of the rights of those individuals subject to incarcerations from a "civil" involuntary commitment proceeding.

The foregoing has delineated the direction some courts have taken in considering the question of whether the procedural safeguards guaranteed by the Bill of Rights to persons accused of crimes should be extended to mental patients. In the pending *Alexander* case, the South Carolina federal district court could follow this lead and declare the two-physician certification commitment procedure unconstitutional on due process grounds;

illness and set forth reasons why the patient was to be considered irresponsible and dangerous. The statute permitted confinement without a hearing or without meaningful notice. It also allowed the court to dispense with notice altogether in cases where notice was deemed injurious or not advantageous to the person detained.

54. 349 F. Supp. 1078 (E.D. Wis. 1972). In *Lessard*, the plaintiff was picked up in front of her residence by two police officers and taken to a mental health center where she was committed for emergency mental observation. The policemen applied for an additional observation period of ten days in an ex parte hearing. Subsequently, a physician filed an application recommending permanent commitment because the plaintiff was suffering from schizophrenia. The court appointed two doctors as examiners. Eight days after her initial confinement, plaintiff was informed of the prior proceedings as well as the scheduled hearing. Twenty-four days later, plaintiff was found to be "mentally ill" by the court and ordered committed for thirty additional days. Each month for eleven months after the initial hearing, the thirty day commitment was perfunctorily extended for an additional month. The hospital authorities allowed the plaintiff to return to her home on an out-patient, "parole" basis three days after the hearing.

55. *Id.* at 1090.

56. *Id.* at 1092.

57. *Id.* at 1099.

however, it seems that another ground remains equally viable, that of equal protection.

In the recent decision of *Jackson v. Indiana*,⁵⁸ the Supreme Court concluded that the fact an individual undergoing a civil commitment proceeding is a prisoner does not provide a rational basis for denying him the same procedural safeguards afforded non-criminals in similar civil commitment hearings. As was pointed out previously, the current South Carolina non-emergency commitment statutes fail to establish any basis for determining whether the summary physician-certificate procedure or the judicial admission procedure is to be initiated.⁵⁹ In light of the principle in *Jackson v. Indiana*, allowing commitment based solely on the application of a friend and certificates of two physicians, while providing other individuals a judicial hearing prior to civil commitment, could be constitutionally defective on equal protection grounds. The pending *Alexander* case could adopt this position.

In light of these recent decisions, there seem to be serious constitutional problems with respect to the validity of the existing South Carolina procedures for commitment of mentally ill persons. If the federal district court in *Alexander* follows the lead of *Lessard* and *Heryford*, redrafting of the involuntary commitment procedures will be necessary to comply with the requirements of due process. Similarly the Supreme Court's mandate in *Jackson v. Indiana* seems to require a reevaluation of the two non-emergency commitment procedures.

C. Proposed Legislation

Although the South Carolina federal district court has not yet heard the *Alexander* case, the pending litigation seems to have provided some impetus for the South Carolina Legislature to draft a substantial revision of the involuntary commitment statutes.⁶⁰ The bill is expected to be reintroduced into the General Assembly for consideration at the beginning of the 1974 term. This legislative response to a class action challenging the present statutory procedures is not without recent precedent in the mental health field. In *Anderson v. Solomon*,⁶¹ the court, in refusing

58. 406 U.S. 715 (1972).

59. See p. 771 *supra*.

60. See *The State* (Columbia, S.C.), April 8, 1973, at B-1, col. 3.

61. 315 F. Supp. 1192 (W.D. Md. 1970). In *Anderson*, plaintiff brought a class action

to grant a motion to dismiss the complaint for failure to state a cause of action, recognized that substantial questions were raised as to the constitutionality of the Maryland commitment procedures. This prompted the state health authorities to take a hard look at the commitment procedures, resulting in a three-year study by a joint committee of health officials and Legal Aid Bureau lawyers and the drafting of a new set of regulations.⁶² The revision of the Maryland Mental Hygiene Regulations went into effect October 1, 1973.⁶³

The remainder of this portion of the paper will consider the proposed non-emergency and emergency commitment procedures in light of changes in similar procedures in other states. This comparison is offered with an eye to suggesting some additional innovations to the current draft of the proposed South Carolina statute.

The proposed South Carolina commitment procedures reflect substantive changes in three areas: (1) providing additional procedural safeguards prior to commitment; (2) imposing an affirmative duty on mental hospitals to inform patients of their right to request release; and (3) affording patients reasonable access to the exercise of their rights. Each of these innovations seems aimed at affording individuals adjudicated mentally ill the basic rights guaranteed by the fourteenth amendment.

1. Non-Emergency Commitment

By far one of the most sweeping changes in non-emergency admissions under the proposed statute seems to be the elimination of commitment by the two-physician certificate procedure.

for all persons who were or had recently been in state mental institutions. She alleged that the old Maryland involuntary commitment procedures were unconstitutional, that past records of confinement made future commitment more likely and that similar procedural infirmities were in the newer Maryland statute. The officials of the Department of Mental Health moved to dismiss the suit. The court, however, concluded that while state judicial or administrative interpretation could eliminate many of the constitutional issues, some might remain. The court directed plaintiff to file an amended complaint within fifteen days, alleging her complaints under the new statute. The court thereby reserved its right to decide constitutional issues pending consideration of the amended complaint and answer.

62. Knudson, *Patients Rights Law is Signed*, Baltimore Evening Sun, July 26, 1973, at D-8, col. 1.

63. MARYLAND STATE DEPARTMENT OF HEALTH AND MENTAL HYGIENE, § 10.04.03, REGULATIONS GOVERNING INVOLUNTARY ADMISSION TO MENTAL HEALTH FACILITIES UNDER THE JURISDICTION OF AND/OR LICENSED BY THE DEPARTMENT OF HEALTH AND MENTAL HYGIENE, amended June 12, 1973, effective October 1, 1973.

The current non-emergency procedures, which provide for both judicial admission with its procedural safeguards and the summary two-physician certificate procedure without any guidelines to determine when each method should be used, raise possible equal protection problems.⁶⁴ The proposed legislation, however, wisely eliminates this summary procedure; thus everyone committed under civil non-emergency procedures will receive a hearing by a probate judge *prior* to commitment.

In addition to eliminating the summary two-physician certificate procedure, the considerable revisions in the proposed legislation have definitely strengthened the judicial admission procedure. At the outset, the petition filed to initiate the proceeding must comply with the current requirement that it state the patient is mentally ill and should be hospitalized. Also, it must give the underlying facts upon which the designated examiner, or the petitioner if the individual has refused to submit to an examination, bases his conclusions.⁶⁵

Similarly the notice provision of the judicial admission procedure has been substantially changed.⁶⁶ Under the existing statute the court is allowed to withhold notice of the commitment proceeding from the prospective patient if the court has reason to believe that such notice would be likely to be injurious to him.⁶⁷ Under the proposed statute, however, no such withholding of notice from the prospective patient will be permitted.⁶⁸ It seems the drafters concluded that the value of the prospective patient's receiving notification of the hearing outweighed the interest of the court in determining whether notification might be injurious to the prospective patient.

As pointed out, under the current statute the court must order an examination of the prospective patient by two designated physicians.⁶⁹ The proposed legislation would require that an adequate record of the physicians' examination be supplied to the prospective patient's attorney to afford the patient meaning-

64. See *Jackson v. Indiana*, 406 U.S. 715 (1972).

65. No. S.539, A Bill Relating to the Commitment, Admission and Discharge of Persons From Mental Institutions, § 3 (1973). [Hereinafter S.539; also, all references to changes in Article 4 of Chapter 4 of Title 32 of the 1962 Code will use the section numbers as they appear in S.539.]

66. *Id.* § 32-960.

67. S.C. CODE ANN. § 32-959 (1962).

68. *Id.* § 32-960.

69. S.539, § 32-961.

ful representation.⁷⁰ Furthermore, the drafters of the proposed legislation have made provision for the prospective patient to be examined by a physician of his choice, rather than one appointed by the court.⁷¹ To prevent any due process or equal protection attacks, this opportunity is also afforded the indigent at the state's expense.⁷²

The court-ordered examination raises a serious problem with which both the present statute and the proposed draft failed to deal: whether evidence of criminal activity uncovered during a court-ordered psychiatric examination is privileged information under the fifth amendment. Several courts have considered this problem and have determined that such information should be privileged.⁷³ The comments to an earlier draft of the proposed statute, not introduced as part of the bill,⁷⁴ suggested that unless the individual gave a competent waiver, information of criminal activity that he might have revealed could not be used against him in a later trial. The considerable increase in the use of the judicial admission procedure as contemplated by the proposed legislation would seem to warrant the inclusion of such a provision in this draft to preclude any subsequent controversy over the disclosure of possibly privileged information.

70. *Id.* The statute is unclear as to who chooses this independent examiner: the patient, his attorney, a friend or relation.

71. *Id.*

72. Since no public interest in any particular patient's well-being exists comparable to society's interest in the courts and justice, no physician-patient privilege exists at common law in South Carolina. This would indicate that disclosure by a patient to a psychiatrist is not privileged under the rules of evidence.

73. *See United States v. Weiser*, 428 F.2d 932 (2d Cir. 1969). In *Weiser*, the defendant was convicted of bribing fellow Internal Revenue Service agents. At trial the defendant raised mental incapacity as a defense, and the court ordered that he be examined by the government's psychiatric expert who was later allowed to testify as to his professional opinion concerning the accused's mental capacity. When defense counsel revealed that mental incapacity would be raised as a defense, the court held on appeal that it was not a violation of the right against self-incrimination to permit a government psychiatrist, who did not testify to any statement of the defendant relating to guilt or innocence, to testify concerning the sanity of the defendant. *See also United States v. Albright*, 388 F.2d 719 (4th Cir. 1968). (The privilege against self-incrimination was held not to be violated by introducing into evidence statements made to a government psychiatrist which were not related to guilt.) *See also Parkin v. State*, 238 So. 2d 817 (Fla. 1970). (A person charged with murder served notice that she would rely on insanity as a defense. The court held that her right to freedom from self-incrimination was not invaded when she was ordered "to give testimonial response to a court-appointed psychiatrist under pain of forfeiting the testimony of her privately-engaged psychiatrist." *Id.* at 822. However, the psychiatrists were precluded from testifying directly as to facts surrounding the crime or as to admissions elicited during the course of the compulsory mental examination.)

74. S.539, Comments (tent. draft 1973).

The foregoing comparison of the present commitment statute with the proposed legislation has pointed out some pre-hearing procedural reformation. Similarly the proposed statute offers some needed changes in the procedure of the commitment hearing. As indicated in the earlier discussion of the current code, a judicial hearing is necessitated only upon two physicians' pronouncements that the patient is mentally ill.⁷⁵ Likewise, this same basis is used under the proposed code in determining if a judicial hearing is required.⁷⁶ Unlike the current code,⁷⁷ however, the proposed draft requires that the prospective patient attend the hearing unless the patient or his attorney waives the right to appear.⁷⁸ Furthermore, in the current code the court is permitted to receive all relevant and material evidence offered at the hearing,⁷⁹ seemingly allowing the possibility of introducing hearsay.⁸⁰ To prevent this use of hearsay, the proposed legislation specifically prescribes that the probate court's rules of evidence be applicable in these commitment proceedings.⁸¹ By including these proposed changes, the drafters seem to have recognized the very real injustices that might result from not having the prospective patient present at the time the question of his freedom is being determined, and by allowing evidence to be introduced at a commitment hearing that would not be properly submitted at a trial where an accused's freedom is similarly at stake.

Although the current statute allows appeal to the circuit court from the commitment order of the probate court,⁸² the appeal provision fails to take notice of the fact that unless a patient has ready access to a transcript of the proceeding the right to appeal is meaningless. In effect, if one cannot afford a transcript, then he would seemingly be denied his right of appeal. This problem has not been raised previously because the judicial admission

75. S.C. CODE ANN. § 32-961 (1962). See p. 769 *supra*.

76. S.539, § 32-955.

77. S.C. CODE ANN. § 32-962 (1962).

78. S.539, § 32-964.

79. S.C. CODE ANN. § 32-960 (1962). Section 10.04.03G of the Maryland Regulations provides a more informal admission of "[e]vidence which possesses probative value commonly accepted by reasonable and prudent men in the conduct of their affairs." The regulation allows the introduction as evidence of copies and excerpts of documents and specifically states that the formal rules of evidence of the Maryland courts will not be applied.

80. See note 33 *supra*.

81. S.539, § 32-964.

82. S.C. CODE ANN. § 32-967 (1962).

process was so seldom used.⁸³ However, in contemplation of the inevitable increase in the usage of the judicial admission procedure under the proposed code as a result of the elimination of the two-physician certification procedure, the drafters had to consider this problem.⁸⁴ The proposed statute provides the indigent patient the right to a free transcript.⁸⁵ This provision seems to preempt an equal protection problem which might arise from denying a patient an effective and meaningful right to appeal from the order of commitment.

To achieve a meaningful evaluation of the new procedure, one must turn from the examination of the innovative features of the proposed judicial admission procedure to some of the areas that the drafters have overlooked. Three areas deserve attention: (1) the quantum of proof for a determination of mental illness; (2) the length of the commitment period; and (3) consideration of less restrictive alternatives than confinement to a mental hospital.

Although the current statute fails to provide the court with any standard for the quantum of proof necessary for a determination of mental illness,⁸⁶ the drafters of the proposed judicial admission procedure advocate the adoption of the "clear and convincing" evidence standard.⁸⁷ Although some recent decisions concluded that the standard should be a preponderance of the evidence,⁸⁸ the courts in *Lessard v. Schmidt*⁸⁹ and *Denton v. Commonwealth*⁹⁰ concluded that the better standard for commitment should be "beyond a reasonable doubt." In reaching this determination, the court in *Lessard* reasoned that the same fundamental liberties are at stake in civil commitment as are involved in criminal incarceration.⁹¹ Although the provision for the "clear and convincing" standard in the proposed code indicates

83. See p. 771 *supra*.

84. In Maryland, a mechanical recording of the hearing is provided, with a transcript to be made if an appeal is taken. MD. REG. § 10.04.03G. This less expensive procedure could also be used in South Carolina without a change in the proposed statute and without infringing upon the right of appeal.

85. S.539, § 32-964.

86. See S.C. CODE ANN. § 32-963 (1962).

87. S.539, § 32-965.

88. See *Tippett v. Maryland*, 436 F.2d 1153 (4th Cir. 1971); *Sas v. Maryland*, 334 F.2d 506 (4th Cir. 1964); *Dixon v. Att'y. Gen.*, 325 F. Supp. 966 (M.D. Pa. 1971).

89. 349 F. Supp. 1078 (E.D. Wis. 1972).

90. 383 S.W.2d 681 (Ky. 1964).

91. *Lessard v. Schmidt*, 345 F. Supp. at 1084.

an awareness of the need for some standard, one cannot easily disregard the rationale on which the court in *Lessard* prescribed the "beyond a reasonable doubt" standard. Perhaps a reevaluation of the proposed standard would be desirable, as there seems to be a growing tendency by the courts to analogize the civil commitment procedure to that of criminal confinement.⁹²

Under both the current⁹³ and proposed statutes,⁹⁴ the duration of judicial commitment is indefinite. In *Dixon v. Attorney General*,⁹⁵ the court felt that if commitment is ordered the writ should specifically state the period of confinement, not to exceed six months. Although the commitment order under the proposed procedure does not specify a confinement period, the provision in the proposed code that requires the patient to receive written notification of his right to a rehearing at the end of each six-month period of confinement might mollify challenge to this deficiency.⁹⁶ This alternative, however, might not cure the indefiniteness if in practice the rehearing becomes a fiction and the six-month notification a mere procedural frill. Then it would seem that the Maryland solution as prescribed in *Dixon* would be the only realistic approach.

Finally, the judicial commitment statute, both under the present and proposed codes, failed to require the probate court to consider the possibility of less restrictive alternatives than confinement to a mental hospital. In both the *Lessard*⁹⁷ and *Dixon*⁹⁸ opinions, the courts seemed to imply that such consideration should be accorded the individual after he has been adjudicated mentally ill, but prior to any confinement, because involuntary

92. See p. 772 *supra*.

93. S.C. CODE ANN. § 32-963 (1962).

94. See S.539, § 32-965.

95. 325 F. Supp. 966, 974 (M.D. Pa. 1971). In *Dixon*, several patients brought a class action to have Pennsylvania's mental health law declared unconstitutional. After the original authority for their confinement for criminal convictions or charges had terminated, plaintiffs were recommitted for an indeterminable period without notice or procedural safeguards.

96. S.539, § 32-968.

97. The *Lessard* court opined that, even though the governmental purpose of confinement may be legitimate and substantial, that purpose cannot be pursued by means that stifle fundamental personal liberties when the same end can be more narrowly achieved.

98. The court in *Dixon* was prompted by its conclusion that medical and psychiatric treatment of inmates at the state hospital was grossly inadequate because insufficient funds had been made available for the hospital's maintenance and staffing. Evidence indicated that only three percent of the hospital's inhabitants had received any therapeutic treatment.

hospitalization should only be ordered as a last resort. This conclusion was premised on the idea that even though persons are adjudged mentally ill, but not alleged to have committed any crime, they should not be "[t]otally deprived of their liberty if there are less drastic means of achieving the same purpose."⁹⁹ Likewise, in *Covington v. Harris*,¹⁰⁰ the court determined that not only was consideration of an alternative to commitment desirable but that it was constitutionally required. Similarly the spirit of the California Code¹⁰¹ seems to adopt the idea that the mentally ill should receive the least restrictive method of treatment available. To that end, the statute requires the appointment of a conservator,¹⁰² who must choose the best treatment for a particular individual adjudged mentally ill. Also, California provides for an extensive system of outpatient facilities¹⁰³ which seem to be financially beyond the reach of the current South Carolina mental health program.¹⁰⁴ To encourage the development of such alternatives to confinement in mental hospitals in South Carolina, it is suggested that the proposed statute be amended to provide that

99. *Lessard v. Schmidt*, 349 F. Supp. at 1095.

100. 419 F.2d 617 (D.C. Cir. 1969). Soon after his release from prison, defendant was again charged with murder; however, he was found incompetent to stand trial because of a mental deficiency coupled with psychological problems. He was civilly committed to a maximum security hospital, and the pending murder charge was dismissed. When his request for transfer out of the maximum security division was denied, he sought relief with a habeas corpus petition. In remanding the case to cure deficiencies in the record, the court indicated that the very nature of civil commitment entails an extraordinary deprivation of liberty. Such a drastic curtailment of fundamental rights must be narrowly construed to avoid deprivations of liberty without due process of law.

101. CAL. WELF. & INSTS. CODE § 5200 *et seq.* (West 1973). The California Code provides for an evaluation consisting of multidisciplinary professional analysis of a prospective patient. Medical, psychological, social, financial and legal conditions are examined to determine the extent and ramifications of the individual's problems. In all cases of petitions for court-ordered evaluation, pre-petition screening is required and, if indicated, comprehensive evaluation, crisis intervention, referral, or other services may be recommended on a voluntary basis. See p. 785 *infra* for additional discussion.

102. CAL. WELF. & INSTS. CODE § 5206 (West 1973). The appointment of a conservator results from recommendations in the report of a conservatorship investigation. The investigations are conducted by an agency appointed by the court. If investigation results in a recommendation for conservatorship, a suitable person, state or local agency, or county officer or employee must be designated to act as conservator. No person or agency whose interests compromise the ability to represent and safeguard the interests of the conservatee may be designated as conservator.

103. See p. 786 *infra*.

104. Stucker, *S.C. Hospitals Work on 'Major Deficiencies,'* The State (Columbia, S.C.), October 25, 1973, at 10-C, col. 1. This article points out that the Mental Health Commission has requested a thirty-four percent increase in personnel for 1974-75 at an additional cost of 7.5 million.

after a person has been determined to be mentally ill and to need treatment, he be ordered confined to a state mental hospital or given treatment under some less restrictive program.

2. Emergency Commitment

Under both the proposed legislation and the current statute, emergency commitment can be initiated on the written application of anyone, accompanied by one physician's certification that the results of his examination revealed the individual to be both mentally ill and dangerous.¹⁰⁵ Also, if a person is believed to be mentally ill but cannot be examined by a physician prior to commitment because his whereabouts are unknown or for any other reason, the proposed emergency commitment statute provides for arrest and post-arrest examination.¹⁰⁶

By definition only those persons who are or are believed to be mentally ill and dangerous are subject to emergency commitment. As indicated in the proposed legislation, all others sought to be confined must be committed under the procedures established by judicial admission. This seems to present a problem for one group of persons, those who are gravely disabled as the result of a mental disorder and as such are really unable to provide for basic personal needs such as food, clothing and shelter. These individuals usually are in need of immediate commitment which cannot be obtained under the judicial admission process because of the substantial time lapse between commencement of the proceedings and actual admission of the patient to the hospital. California, for example, has realized the exigency of the circumstances in this type of case and accordingly has made provision for possible immediate commitment if the situation warrants.¹⁰⁷ Similarly it is suggested that the drafters of the proposed South Carolina legislation might consider the possibility of extending the coverage of emergency commitment to include this type of gravely disabled individual.

The drafters of the proposed emergency commitment statute have also added some innovations. After a person is taken into custody under the proposed emergency procedure, a preliminary

105. S.539, § 32-955.

106. *Id.* § 32-957. This provision incorporates the arrest and examination procedure of the two-physician admission procedure in § 32-955.1 of the South Carolina Code, which would be deleted under the proposed code.

107. CAL. WELF. & INSTS. CODE § 5202 (West 1973).

hearing at which the patient must be represented by counsel must be held within three to five calendar days.¹⁰⁸ Although it has been held that a longer period of time may elapse before a preliminary hearing after emergency commitment,¹⁰⁹ it is submitted that a forty-eight hour period would give sufficient time for the appointment and preliminary preparation of counsel and would assure that an individual would not be unjustly detained for a longer period than absolutely necessary.

If at the preliminary hearing the court determines there is probable cause to believe that the patient is mentally ill and dangerous, the patient will continue to be detained at the hospital.¹¹⁰ After this preliminary determination of mental illness, a hearing must be held pursuant to the judicial admission hearing procedure.¹¹¹ At this juncture in the proposed emergency provisions, the procedure and requirements of the judicial admission process are interposed,¹¹² thereby providing all prospective patients with the same procedural and substantive rights at the commitment hearing and on appeal as in judicial admission. In so doing, it appears the drafters failed to include portions of the judicial admission process preceding the provisions for the actual hearing. Initiation of emergency commitment only requires one physician to certify that an individual is mentally ill and dangerous. Unlike the judicial admission process which requires two designated physicians to examine the patient prior to the hearing, the proposed emergency procedure fails to require an examination by two court-appointed examiners prior to the commitment hearing. Furthermore, the drafters failed to provide for the right to request an examination by an independent examiner as is permitted under the judicial admission process.¹¹³ This omission means that the patient could be committed by the probate court

108. S.539, § 32-955(3).

109. *Logan v. Arafteh*, 346 F. Supp. 1265 (D. Conn. 1972), stated that under emergency admission procedures a fifteen day period was not an unreasonable time to hold a patient without a hearing. *But see In re Barnard*, 455 F.2d 1370 (D.C. Cir. 1970). The court upheld a statute allowing a seven-day detention period for emergency commitment but argued that an initial hearing should, whenever possible, be held within the first two days of such period.

110. S.539, § 32-955(3).

111. *Id.* § 32-956. At the preliminary hearing, the proposed patient must be present and represented by counsel, either retained or appointed by the court if he is indigent, and adequate notice requirements must also be met.

112. *See* S.539, § 32-955(3).

113. *Id.* § 32-961.

without ever having been examined by anyone except the one physician who signed the emergency commitment certificate before initial confinement.¹¹⁴

The foregoing has been an examination of the proposed emergency procedure to be followed when the patient has been examined prior to the initial confinement. The emergency procedure also encompasses the situation where the individual is only believed mentally ill and dangerous and is unavailable for examination because his whereabouts are unknown or for some other reason.¹¹⁵ To initiate emergency confinement in this instance, the petitioner seeking commitment of an individual must file an affidavit.¹¹⁶ On the basis of this affidavit, the probate judge may order that the individual be taken into custody for twenty-four hours during which the patient must be examined by one physician.¹¹⁷ The individual confined under this procedure does have the right to representation by counsel.¹¹⁸

In this phase of emergency commitment there seem to be some serious possibilities for abuse: a system that allows one individual's affidavit to serve as the sole basis for emergency incarceration of another seems ripe for frivolous and perhaps collusive manipulation. California has responded to this problem by providing for a "screening process" of emergency applications. Before any arrest and detention is authorized county officials determine whether there is probable cause to believe the allegations in the affidavit and, more importantly, whether the individual will agree to receive "crisis intervention services" or an examination in his home or an approved facility.¹¹⁹ This "pre-petition screening" consists of a professional review of all petitions, "[a]n interview with the petitioner and, whenever possible, the person alleged, as a result of mental disorder, to be a danger to others or to himself, or to be gravely disabled, to assess the problem and

114. It seems clear that the failure to provide for examination by designated examiners is an oversight. S.539, § 32-956, which deals with notice of a hearing for those detained under emergency commitment, states that the patient has the right to request the names of the designated examiners who may testify against him. This seems to assume that an examination by designated examiners has been provided; however, it seems it has not.

115. S.539, § 32-957.

116. *Id.* The affidavit must state why the person is believed to be mentally ill and dangerous and why the usual procedure cannot be followed.

117. *Id.* After examination and certification by one physician, the commitment continues under regular emergency commitment procedure. S.539, § 32-955(3).

118. *Id.*

119. CAL. WELF. & INSTS. CODE §§ 5000 *et seq.* (West 1972).

explain the petition"¹²⁰ As defined by the California code,

'crisis intervention' consists of an interview or series of interviews within a brief period of time, conducted by qualified professionals, and designed to alleviate personal or family situations which present a serious and imminent threat to the health or stability of the person or family, or on an inpatient or outpatient basis with such therapy, or other services, as may be appropriate. Crisis intervention may, as appropriate, include suicide prevention, psychiatric, welfare, psychological, legal, or other social services;¹²¹

The financial situation of the current mental health program in South Carolina would preclude such an extensive pre-commitment screening process.¹²² However, it is submitted that amending the proposed draft to require that the petitioner not only file a written application for another's emergency commitment without examination but also appear before the probate judge to justify such application would tend to discourage frivolous use of the procedure.

A final observation with respect to emergency commitment is that both the existing and proposed statutes fail to make any provision for the protection of privacy. This means that if a person committed under emergency procedures is found, either before or after the hearing, not mentally ill he nevertheless has a record of having been a mental patient. This record may injure him in the future far more than any deprivations of liberty which he experienced while temporarily confined. The Maryland involuntary admission regulations have dealt with this problem by designating an "observation period," the interval between initial confinement to a mental health facility and commitment after a hearing or discharge from the mental health facility.¹²³ For the duration of this period the patient's records are not integrated with or made part of the ordinary patient records of the facility. Only when the patient is admitted after a full hearing do they become a part of the official records. If he is not admitted, the "observation records" will not be disclosed to anyone without the permission of the patient, except upon summons or subpoena.¹²⁴

120. *Id.* § 5008(f).

121. *Id.* § 5008(e).

122. See note 36 *supra*.

123. MD. REG. § 10.04.03.02E.

124. *Id.*

It should be pointed out, however, that a provision such as this is far more adaptable to the Maryland experience than the South Carolina situation. In Maryland, the hearing before admission is an administrative function¹²⁵ allowing the patient's entire record to be maintained in the mental health department, whereas in South Carolina the hearing is a judicial function. Nevertheless, a similar result would ensue if a provision were added to the proposed code providing for maintenance of separate hospital records from the time of admission until the actual commitment hearing. Further, if the prospective patient were not found to be mentally ill the record of such hearing, together with all preliminary records, should be sealed or destroyed by order of the probate judge.

III. COMMITMENT OF PERSONS ACCUSED OR CONVICTED OF CRIME

A. Introduction

Traditionally in this country there has been an attempt to categorize commitments as either "civil" or "criminal." This article has dealt thus far with "civil" commitment procedures. It now turns to a discussion of the process used for the commitment to mental institutions of those persons charged with or convicted of crime. Denoting commitments as "criminal" or "civil" does not necessarily indicate the legal nature of the proceedings involved. Both types of commitment proceedings are essentially civil, but the distinction between the two lies in the circumstances surrounding the commitment. Criminal commitment applies to the commitment of persons charged with or convicted of crime while civil commitment pertains to the admission of all other persons to mental institutions. As will be discussed, separate commitment procedures do not seem to be constitutionally permissible. The general feeling that those who violate society's criminal laws are somehow different and require segregation from the community seems to carry over into the area of mental health, resulting in a separate procedure for criminal commitment. Perhaps notions that the commission of crime is itself a display of mental illness and that mentally diseased persons who are connected with criminal activity are more dangerous than their non-

125. The Maryland regulations apply to every patient whose involuntary admission is sought to be effected to any mental facility, licensed or subject to jurisdiction of the Department of Health and Mental Hygiene.

criminal peers are partly responsible for a history of separate commitment procedures.¹²⁶

Regardless of the underlying reasons for separate treatment, criminal commitment has been handled differently from its civil counterpart, and the present law regarding such commitment must be discussed with this in mind. One should also be aware that criminal commitments can be subdivided into three categories. The first is commitment for incompetency or unfitness to stand trial. "Competency to stand trial" refers to a person's fitness or mental condition at the time of the trial. A second type of commitment concerns instances in which the defense of insanity is used. The focus in this area is on criminal responsibility, the mental condition of the accused at the time the offense was committed. A third class of criminal commitment involves prisoners who have become mentally ill subsequent to their incarceration.

B. Present South Carolina Law

The traditional approach is followed in South Carolina in that the procedures in civil and criminal commitments are distinct.¹²⁷ A person charged with a crime can be admitted to a state hospital for thirty days by court order if he is adjudged mentally ill or if there is a question as to the relationship of mental illness to the alleged crime.¹²⁸ If found competent, the individual is released to stand trial; however, if found incompetent, the superintendent of the state hospital will certify his incompetency and retain the accused, subject to further orders of the court.¹²⁹ The present statute does not provide a hearing or other due process safeguards which would allow the person detained to effectively challenge a finding of incompetency. Unlike the provisions for review of the civil commitment decisions, criminal commitment proceedings do not provide for review of the determination of competency made by the hospital authorities, nor do they establish the right to a de novo jury trial on appeal.¹³⁰

Once an accused is found to be incompetent to stand trial,

126. For a general discussion of crime and its relationship to mental illness see T. SZASZ, *LAW, LIBERTY, AND PSYCHIATRY* (1963).

127. S.C. CODE ANN. §§ 32-969 to -970 (Cum. Supp. 1971).

128. S.C. CODE ANN. § 32-969 (Cum. Supp. 1971).

129. S.C. CODE ANN. § 32-970 (Cum. Supp. 1971).

130. S.C. CODE ANN. § 32-967 (1962).

the statute authorizing his retention by hospital authorities leaves the defendant's future open to question. Specifically, the present law provides for the holding of one found mentally incompetent "subject to the further orders of the court."¹³¹ No indication is given as to when, if ever, such an order is required to be issued, except if the person confined is at some future date deemed to have regained competency by hospital authorities, it shall be reported to the court. The court is then required to advise the hospital as to the further disposition of the patient. By omitting any requirement for further disposition (except when the defendant regains competency), the statute certainly implies that a person may be confined for life in a state hospital without ever having a hearing or formal judicial commitment.

The second type of criminal commitment has not played as significant a role in South Carolina as it has in other jurisdictions. In South Carolina there are no provisions for commitment of persons lacking criminal responsibility at the time the offense was committed. In fact, there is no verdict of "not guilty by reason of insanity" in South Carolina.¹³² Insanity¹³³ is a complete defense whereby a defendant who can prove that he was insane at the time of the offense is entitled to a verdict of acquittal. A finding of acquittal, however, does not completely release the defendant from possible commitment. Contrary to some jurisdictions, South Carolina has no provision for compulsory commitment of defendants who successfully rely on the insanity defense. The defendant may, nevertheless, be committed at the trial judge's discretion under the provisions applicable to persons found incompetent to stand trial.¹³⁴ The present code states that "any person" charged with the commission of a criminal offense who is adjudged to be mentally ill or "regarding whom there is a question as to the relation of mental illness to the alleged crime" may be committed to a state hospital by the court.¹³⁵ If found "mentally ill," an individual may be detained, "subject to the further orders

131. S.C. CODE ANN. § 32-970 (Cum. Supp. 1971).

132. W. LEDBETTER & W. MYERS, *CRIMINAL DEFENSE IN SOUTH CAROLINA* 139 (1970).

133. S.C. CODE ANN. § 32-969 (Cum. Supp. 1971). The only test for legal insanity in South Carolina is the M'Naughten Rule, frequently referred to as the "right-wrong test." *State v. Allen*, 231 S.C. 391, 98 S.E.2d 826 (1957); *State v. Byrd*, 229 S.C. 593, 93 S.E.2d 900 (1956); *State v. Fuller*, 229 S.C. 439, 93 S.E.2d 463 (1956). The "irresistible impulse test," used in many states in connection with M'Naughten, has been rejected in South Carolina. *State v. Allen*, 231 S.C. 391, 98 S.E.2d 826 (1957).

134. S.C. CODE ANN. § 32-969 (Cum. Supp. 1971).

135. *Id.*

of the court."¹³⁶ Apparently, under the pertinent sections a judge at his discretion may commit a person after acquittal since even one acquitted might come under the statute.

The remaining discussion of the present criminal commitment provisions involves the commitment of persons who are incarcerated in penal institutions and who, for whatever reasons, require confinement in a state hospital. The South Carolina Code does not deal separately with such commitments except in cases in which the length of commitment exceeds the prisoner's sentence.¹³⁷ If judicially committed, one confined to a facility operated by the Department of Mental Health, but located within the State Penitentiary,¹³⁸ may be required to remain there or in another mental health facility after the completion of his sentence.¹³⁹ The judicial commitment proceeding is initiated on completion of the sentence, and the person remains confined not to exceed a maximum of sixty days pending the court's determination.¹⁴⁰ If judicially committed as mentally ill and a potential danger to himself or others, one can be indefinitely continued in the Department of Mental Health's penitentiary facility if the

136. S.C. CODE ANN. § 32-970 (Cum. Supp. 1971); *see* 18 S.C.L. REV. 661, 666 (1966).

137. S.C. CODE ANN. § 32-970 (Cum. Supp. 1971). There is no mention in the S.C. Code of any statutory regulations concerning the transfer of an inmate from the general prison population to the state hospital. It is our understanding through informal inquiry that there is an agreement between the Department of Corrections and the Department of Mental Health whereby the Commissioner of Mental Health authorizes transfers of inmates on request of Department of Corrections officials. Such a transfer to a mental health facility either inside or outside the walls of the State Penitentiary is apparently made without any formal commitment proceeding or opportunity for the inmate to contest the transfer. Of course, the inmate must be judicially committed if his sentence expires. Until the inmate's sentence expires or until the authorities involved decide to transfer him back to the general prison population, he is simply considered to be serving his sentence on loan to the Department of Mental Health. It might also be mentioned that certain mentally deficient inmates are housed in a separate area designated Cell Block 2 (CB-2) at the State Penitentiary. This area is apparently not designated officially as a Department of Mental Health facility although certain mental health services are provided to those inmates. Once an inmate is transferred into the Department of Mental Health, the Commissioner is authorized to move him to various facilities within the system consistent with the medical needs of the patient. S.C. CODE ANN. § 32-995.13 (Cum. Supp. 1971).

138. S.C. CODE ANN. § 32-933 (Cum. Supp. 1971). This section provides for the designation of any building or portion of any building at the State Penitentiary as a facility of the Department of Mental Health. Such a facility is under the control of the Department of Mental Health for medical and psychiatric services, but responsibility for maintenance and security lies primarily with the Department of Corrections.

139. S.C. CODE ANN. § 32-970.1 (Cum. Supp. 1971).

140. Judicial commitment must be accomplished in accordance with the procedures provided by § 32-958 of the South Carolina Code.

Department so chooses.¹⁴¹ At first glance, it might seem that a person held in the penitentiary pending judicial commitment could be housed there only if the Department of Mental Health lacked adequate security facilities. However, a careful reading of the present statute reveals that a lack of adequate facilities must be shown only if a "person . . . charged with a crime" is being held at the penitentiary.¹⁴² There is no indication that such a showing must be made for persons continued at the penitentiary upon the termination of their sentence. After serving his sentence, the ex-offender would not fit this category, and it therefore appears that he could be forced to remain in the Mental Health unit at the prison without a showing that adequate security facilities were not available elsewhere.¹⁴³

C. *Judicial Reaction To Criminal Commitment*

The judicial reaction throughout the country to present criminal commitment law has shown clearly that major revisions are required before there will be statutory compliance with certain constitutional protections. As stated previously, the handling of civil and criminal commitment proceedings differently has in the past been acceptable.¹⁴⁴ Recent judicial pronouncements indicate, however, that procedural differences are to be avoided absent a showing of adequate justification.

*Baxstrom v. Herold*¹⁴⁵ is perhaps the leading case which expresses the requirement for procedural similarity. Baxstrom was a state prisoner in New York who was certified insane by a prison physician. At the expiration of Baxstrom's regular prison sentence, he was retained in the same facility on an indeterminate basis instead of being released. This retention was based solely on the doctor's certification as to his insanity.¹⁴⁶ The Supreme

141. S.C. CODE ANN. § 32-970.1 (Cum. Supp. 1971).

142. S.C. CODE ANN. § 32-970.2 (Cum. Supp. 1971).

143. The authors are not prepared to state that it is the Department of Mental Health's routine practice to keep persons at the penitentiary facility because they are ex-offenders. Our only contention is that §§ 32-970.1-.2 leave open the possibility of such a practice since the requirement for showing a lack of adequate security facilities is necessary only in regard to persons charged with crime. It seems the Department could house ex-inmates at the prison after termination of sentence without such a showing and be within their present statutory authority.

144. *Ragsdale v. Overholser*, 281 F.2d 943, 948 (D.C. Cir. 1960); *Overholser v. Leash*, 257 F.2d 667, 669 (D.C. Cir. 1958).

145. 383 U.S. 107 (1966).

146. A proceeding was held regarding Baxstrom's continued confinement, but Bax-

Court held that Baxstrom was denied equal protection of the law because the procedures normally used for civil commitment were denied him.¹⁴⁷ The Court stated "[t]hat the State, having made this substantial review proceeding generally available on this issue [of sanity], may not, consistent with the Equal Protection Clause of the Fourteenth Amendment, arbitrarily withhold it from some."¹⁴⁸ In the Court's view, even though a person found to be dangerous might custodially be handled differently once admitted to a mental institution, there is no legitimate basis for distinguishing between the procedural trappings provided a person committed at the termination of his prison sentence and a person civilly committed directly from the community.¹⁴⁹

The District of Columbia Court of Appeals relied heavily on the *Baxstrom* principle in *Bolton v. Harris*,¹⁵⁰ a decision involving the commitment of a defendant found "not guilty by reason of insanity."¹⁵¹ On rendering the verdict, the court ordered Bolton to mandatory commitment in a mental institution for an indeterminate period of time.¹⁵² The court held that in view of *Baxstrom*

strom, an indigent, was forced to appear without counsel. After the subsequent dismissal of several habeas corpus petitions in state court, Baxstrom was able to gain entrance into federal court by alleging constitutional violations.

147. In 1961 persons civilly committed under § 74 of the New York Mental Hygiene Law were entitled to a de novo review by jury trial regarding their sanity. Also, persons civilly committed from the community were afforded a judicial hearing to determine their dangerousness by § 85 of the New York Mental Hygiene Law, whereas persons awaiting expiration of sentence were not, as they were, determined to be dangerous by a nonreviewable decision of the Department of Mental Hygiene.

148. *Baxstrom v. Herold*, 383 U.S. at 111 (1966). The state contended in this case that it was reasonable to differentiate between the civilly insane and the criminally insane because of the dangerous or criminal propensities of the latter. The Court stated that even though "[e]qual protection does not require that all persons be dealt with identically, . . . it does require that a distinction made have some relevance to the purpose for which the classification is made." *Id.* at 111.

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

150. 395 F.2d 642 (D.C. Cir. 1968).

151. Gerald Bolton was charged with the unauthorized use of a motor vehicle and transportation of a stolen automobile.

152. D.C. CODE ANN. § 24-301(d) states in pertinent part:

If any person tried . . . for an offense . . . is acquitted solely on the ground that he was insane at the time of its commission, the court shall order such person to be confined in a hospital for the mentally ill.

The annotation to this section states that the purpose of the mandatory confinement required by § 24-301(d) was the "direct result of the change in the standard of criminal responsibility in the District of Columbia wrought by the *Durham* case." D.C. ENCY. ANN. § 24-301(d)(19). As a result of *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954), Congress changed commitment from a discretionary decision of the judge to a mandatory commitment whenever a person was found not guilty by reason of insanity. Though the

and the Hospitalization of the Mentally Ill Act,¹⁵³ "prior criminal conduct cannot be deemed a sufficient justification for substantial differences in the procedures and requirements for commitment" ¹⁵⁴ This holding meant that the same procedural safeguards provided for civil commitments were required for a commitment of Bolton after he was adjudicated "not guilty by reason of insanity."¹⁵⁵ The Court concluded that mandatory commitment differed from "civil" commitment in not requiring a hearing without which equal protection to those criminally committed would be denied. The court pointed out, however, that at least one important difference in the commitment process for persons found "not guilty by reason of insanity" could be allowed, that of a "temporary" commitment for examination. The fact that the jury had determined that a reasonable doubt did exist as to Bolton's sanity was considered a sufficient basis for confining the defendant "temporarily" for examination.¹⁵⁶ The length of time allowed for such an examination must, however, be reasonable.

The decision in *Bolton* concerned commitment after trial, without considering the problem of commitment before trial. In *Jackson v. Indiana*¹⁵⁷ the Supreme Court held that the *Baxstrom* standard applies to pre-trial commitment of incompetent criminal defendants. The petitioner, Theon Jackson, was a mentally defective deaf mute who could not read, write, or communicate except through some limited use of sign language. Charged with two robberies amounting to nine dollars, he faced confinement for

above annotation is careful to point out that commitment of a person after a verdict of not guilty by reason of insanity is not an adjudication of insanity or in competency, *Green v. United States*, 351 F.2d 198 (D.C. Cir. 1965), and that no penal or punitive intent is involved, *Ragsdale v. Overholser*, 281 F.2d 943 (D.C. Cir. 1960), it seems clear that *Bolton* recognized that nomenclature does not change the true substance and effect of such procedure. Apparently, the statute stands today only to authorize the mandatory commitment of a defendant for a temporary period of examination following his adjudication as not guilty by reason of insanity. After such examination, a commitment consistent with *Baxstrom* must be conducted in order to detain the defendant further.

153. D.C. CODE ANN. §§ 21-501 to -591 (1967).

154. *Bolton v. Harris*, 395 F.2d 642, 649 (D.C. Cir. 1968). The *Baxstrom* principle forbidding differences in commitment procedures finds support in other cases. *People v. Lally*, 19 N.Y.2d 27, 224 N.E.2d 87, 277 N.Y.S.2d 654 (1966); *Cameron v. Mullen*, 387 F.2d 193 (D.C. Cir. 1967); and *Carroll v. McNeill*, 294 F.2d 117 (2d Cir. 1961), *appeal dismissed as moot*, 369 U.S. 149 (1962).

155. *Bolton* was applied prospectively. For a more recent application see *Waite v. Jacobs*, 475 F.2d 392 (D.C. Cir. 1973).

156. *Bolton v. Harris*, 395 F.2d at 651.

157. 92 S. Ct. 1845 (1972).

life in a mental institution under the construction of Indiana's commitment procedures.¹⁵⁸ The trial testimony seemed to indicate little chance of Jackson's condition improving.¹⁵⁹ It seems very apparent that commitment until sane, pursuant to Indiana law, would very likely condemn Jackson to confinement for life in a mental hospital.

The Supreme Court found that the statute under which Jackson was committed was more lenient on admission and more severe on release than the comparable statute for involuntary commitment of feeble-minded persons¹⁶⁰ or for mentally ill persons.¹⁶¹ This disparity, said the Court, violated the equal protec-

158. Indiana did provide for a competency hearing under IND. CODE § 35-5-3-2 (1971). This section provides:

When at any time before the trial of any criminal cause or during the progress thereof and before the final submission of the cause to the court or jury trying the same, the court, either from his own knowledge or upon the suggestion of any person, has reasonable ground for believing the defendant to be insane, he shall immediately fix a time for a hearing to determine the question of the defendant's sanity and shall appoint two [2] competent disinterested physicians who shall examine the defendant upon the question of his sanity and testify concerning the same at the hearing. At the hearing, other evidence may be introduced to prove the defendant's sanity or insanity. If the court shall find that the defendant has comprehension sufficient to understand the nature of the criminal action against him and the proceedings thereon and to make his defense, the trial shall not be delayed or continued on the ground of the alleged insanity of the defendant. If the court shall find that the defendant has not comprehension sufficient to understand the proceedings and make his defense, the trial shall be delayed or continued on the ground of the alleged insanity of the defendant. If the court shall find that the defendant has not comprehension sufficient to understand the proceedings and make his defense, the court shall order the defendant committed to the department of mental health, to be confined by the department in an appropriate psychiatric institution. Whenever the defendant shall become sane the superintendent of the state psychiatric hospital shall certify the fact to the proper court, who shall enter an order on his record directing the sheriff to return the defendant, or the court may enter such order in the first instance whenever he shall be sufficiently advised of the defendant's restoration to sanity. Upon the return to court of any defendant so committed he or she shall then be placed upon trial for the criminal offense the same as if no delay or postponement had occurred by reason of defendant's insanity.

159. One physician testified at the competency hearing that "it was extremely unlikely that petitioner could ever learn to read or write and questioned whether petitioner even had the ability to develop any proficiency in sign language." He stated that petitioner's "prognosis appears rather dim." The other doctor who examined Jackson doubted that he would ever develop enough skills in communication to be considered competent. Additionally, there was testimony that because of the severity of Jackson's condition, the State of Indiana simply did not have the facilities to teach or train him. *Jackson v. Indiana*, 92 S. Ct. 1845, 1848 (1972).

160. IND. CODE § 16-15-1-3 (1971).

161. IND. CODE §§ 16-13-2-9 to -10, 16-14-9-1 to -19-1, 16-14-14-1 to -19, 16-14-15-1,

tion clause of the fourteenth amendment. According to the Court, if in *Baxstrom* criminal conviction was considered insufficient to justify fewer procedural safeguards than in civil commitment, then surely the fact that criminal charges had been filed would not warrant commitment procedures which differ from those used for persons not charged.¹⁶²

In *McNeil v. Director*,¹⁶³ the Supreme Court reaffirmed the view that one cannot be indefinitely confined by procedures substantially different from those used for civil commitment. McNeil was found guilty of two assaults and sentenced to five years imprisonment. Instead of going immediately to prison, however, McNeil was sent by the court to Patuxent Institution for an examination and possible commitment as a defective delinquent.¹⁶⁴ Six years later, McNeil was still "temporarily" confined for observation and examination because he refused to answer the questions posed by the examining officials. The officials claimed that without his cooperation no evaluation could be made and that as a result his commitment was temporary, not requiring normal commitment procedures. The Court stated, however, that procedures designed to authorize temporary observation cannot be used for confinement which is in fact indefinite. It therefore refused to allow confinement which was truly "permanent" to be called "temporary."¹⁶⁵ For observation periods that are actually temporary, reduced safeguards were considered permissible,¹⁶⁶ but the Court strongly emphasized that "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is commit-

16-14-15-5, 35-5-3-4 (1971).

162. *Jackson v. Indiana*, 92 S. Ct. 1845, 1851 (1972); accord, *Miller v. Blalock*, 411 F.2d 548 (4th Cir. 1969); *Commonwealth v. Druken*, 356 Mass. 503, 254 N.E.2d 779 (1969).

163. 407 U.S. 245 (1972). For an indepth analysis of this case by McNeil's attorney, E. Barrett Prettyman, Jr. of Washington, D.C., see 11 AM. CRIM. L. REV. 107 (1973).

164. MD. ANN. CODE art. 31B, § 6(b) (1971). A defective delinquent is defined as: an individual who, by the demonstration of persistent aggravated antisocial or criminal behavior, evidences a propensity toward criminal activity, and who is found to have either such intellectual deficiency or emotional unbalance, or both, as to clearly demonstrate an actual danger to society so as to require such confinement and treatment, when appropriate, as may make it reasonably safe for society to terminate the confinement and treatment.

MD. ANN. CODE art. 31B, § 5 (1971).

165. *McNeil v. Director*, 92 S. Ct. 2083, 2087 (1972).

166. This view is similar to that adopted by the D.C. Circuit in *Bolton*, regarding temporary mandatory commitment for examination of persons adjudged not guilty by reason of insanity.

ted."¹⁶⁷

All of the foregoing decisions revolved around the central theme that commitment procedures, absent adequate justification, must be substantially the same for all persons. Though the constitutionality of different commitment processes has never been decided by the Supreme Court of South Carolina, an attempt was made to raise the issue in *Schneider v. State*.¹⁶⁸ The petitioner challenged the provisions for commitment of persons charged with crimes¹⁶⁹ on the grounds that (1) no provision for review of the State Hospital's decision as to his sanity was allowed; and (2) unlike the provision for civil judicial admission,¹⁷⁰ no right to a jury trial de novo on appeal was provided. The court refused to address the constitutional issue, stating that the petitioner failed to allege or try to prove his sanity either at the time of his initial commitment or at his habeas corpus hearing.¹⁷¹ The court stated that because the petitioner had failed to allege competency he had not shown that the statute was being applied to his injury or disadvantage and was therefore in no position to challenge the constitutionality of the statute.¹⁷²

In *Humphrey v. Cady*¹⁷³ the Supreme Court expanded *Baxstrom* to apply to commitments rendered in lieu of sentencing. Under the Wisconsin Sex Crimes Act¹⁷⁴ Humphrey was com-

167. *McNeil v. Director*, 92 S. Ct. at 2087.

168. 255 S.C. 594, 180 S.E.2d 340 (1971). For background information see the earlier decision in *Schneider v. State*, 250 S.C. 298, 157 S.E.2d 593 (1967).

169. S.C. CODE ANN. §§ 32-969 to -970 (Cum. Supp. 1971).

170. Section 32-967 of the South Carolina Code states:

The petitioner or any interested person standing within the family relationship of the proposed patient may appeal from the order of the probate court to the court of common pleas of the county, and a trial shall be had de novo with a jury in the same manner as civil actions are tried.

171. The petitioner, Oscar E. Schneider, did not seek a trial on the criminal charges against him, nor did he allege his competency to stand trial or to assist in his own defense. The only relief requested was absolute release based on the unconstitutionality of § 32-970 of the South Carolina Code.

172. *Schneider v. State*, 255 S.C. at 596, 180 S.E.2d at 341. If the court had reached the constitutional issue, it appears that it would have had no choice but to find that § 32-970 violated the principles enunciated in *Baxstrom*. See p. 792 & note 148 *infra*.

173. 405 U.S. 504 (1972).

174. WIS. STAT. ANN. § 959.15 (1958), as amended WIS. STAT. ANN. § 975 (1971). This statute allows commitment for examination. If the defendant is found in need of special treatment, a hearing must be held to determine that need. If it can be established, the court must commit the defendant for a period equal to the maximum sentence authorized for the crime. At the end of the maximum sentence the Department of Health and Social Services may petition the court for renewal, a hearing must be conducted and the court must find the defendant "dangerous to the public."

mitted to a facility at the state prison for sex deviates, rather than receiving a sentence.¹⁷⁵ Since the commitment was in lieu of sentencing, the state argued that the same procedural safeguards used for civil commitment were not required. Because the provisions of the Sex Crimes Act limited the first period of confinement to a term equal to the maximum allowable for the offense for which the defendant was convicted, the Court seemed willing to accept the State's position. However, the Court indicated that in order for the confinement to be continued after service of the maximum time allowable for the offense, all safeguards provided for civil commitment should be enforced.¹⁷⁶

The *Baxstrom* decision clearly established that inmates whose sentences had ended could not be committed under procedures differing from those used to commit persons directly from the community. In *Schuster v. Herold*¹⁷⁷ the court determined that a New York prisoner could not be transferred to a facility for the criminally insane unless he was committed through "[s]ubstantially the same procedures including periodic review of the need for continued commitment in a mental institution and jury trial as are granted to civilians" involuntarily committed.¹⁷⁸ In effect, the transfer of an inmate serving a sentence from a prison to a facility for the mentally ill can only be completed after a commitment hearing is conducted. Informal transfer arrangements or transfers at the discretion of prison officials without a commitment proceeding appear to be impermissible under the *Schuster* decision. The court in *Schuster* found it significant that a transfer would effectively eliminate the possibility of Schuster's parole, increase the restraints on his activities, and cause him to suffer indignities, frustrations and dangers that he would not otherwise be required to endure in prison.¹⁷⁹ Though this decision is not from the United States Supreme Court, it does indicate the willingness of at least one circuit to extend the *Baxstrom* principle to transfers of inmates from prisons to mental health facilities.

175. The petitioner was convicted of contributing to the delinquency of a minor, a misdemeanor punishable by a maximum of one year's incarceration.

176. *Humphrey v. Cady*, 405 U.S. at 511.

177. 410 F.2d 1071 (2d Cir. 1969).

178. *Id.* at 1084.

179. *Id.* at 1078. It would seem apparent that an inmate's parole would be jeopardized by such a transfer, which might also significantly increase restrictions on the inmate's activities and freedom.

D. Proposed Legislation

With the present South Carolina law and various judicial pronouncements as a backdrop, it is possible to look at the changes which will be required to bring our statutes into harmony with the court decisions. As mentioned above, a bill¹⁸⁰ has been introduced in the South Carolina Senate which, if enacted, will make many needed improvements in our commitment statutes. In the discussion of the proposed statutes, an effort will be made to discuss the three types of criminal commitment, individually, in a manner similar to that used to discuss the present law on criminal commitment.

1. Competency to Stand Trial

The first type of criminal commitment is concerned with persons who, prior to trial, are held to be unfit or incompetent to stand trial. The proposed statutory changes for commitment of such persons would require a judge who believes a defendant appearing before him is mentally ill to order an examination by two designated examiners within fifteen days.¹⁸¹ The designated examiners must submit a written report reflecting their diagnosis of the person's mental condition and their findings on the issue of capacity to understand the proceedings against him and his ability to assist in his own defense.¹⁸² A finding of incompetency must be accompanied by an opinion from the examiners stating whether the defendant is likely to regain competency in the near future.¹⁸³ Following this report, a full hearing is conducted in which the defendant is provided with due process safeguards.¹⁸⁴ If the defendant is competent to stand trial, criminal proceedings will be resumed. However, if the examinee is found to be unfit¹⁸⁵

180. S.539, *supra* note 10.

181. S.539, § 32-970. This section also provides that an extension not to exceed fifteen days may be obtained, if requested by the hospital superintendent because of the inability of the hospital to complete the determination as to fitness within the first period.

182. S.539, § 32-971.

183. S.539, § 32-971(2).

184. S.539, § 32-972. The defendant and his counsel are entitled to notice of the hearing, and the defendant is entitled to be present at the hearing.

185. In unofficial comments to an early draft of S.539, the drafters indicated that they used the term "unfit" rather than "incompetent" to avoid confusion with the use of "incompetent" in S.539, § 17 at § 32-1021.1, which refers to the determination after commitment that a patient does not have the capacity to contract, sell or dispose of property and in other ways manage his affairs. However, this section is not within the scope of this paper. We have therefore taken the liberty of using "unfit" and "incompe-

to stand trial and the examiners are of the opinion that he will not regain competency in the foreseeable future,¹⁸⁶ the solicitor must initiate judicial commitment procedures like those required under the proposed involuntary civil commitment statutes.¹⁸⁷ By requiring the state to initiate judicial commitment proceedings, the proposed statutes bring South Carolina into compliance with the Supreme Court's decision in *Baxstrom v. Herold*.¹⁸⁸

The report of the designated examiners is very important because it carries tremendous weight in the court's competency determination. A significant safeguard which is absent from both the present and proposed South Carolina laws is worthy of note here. Under criminal law in the federal courts,

No statement made by the accused in the course of any examination into his sanity or mental competency . . . , whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding.¹⁸⁹

In essence, this safeguard means that the examiners are not allowed to question the examinee to make a determination of his competency to stand trial and then later reveal any information they may have derived from the examinee regarding his criminal responsibility for the offense with which he is charged. It seems appropriate, therefore, to suggest that the proposed South Carolina law include a specific requirement that different examiners be utilized for determinations of competency and the defendant's sanity at the time of the offense. Also, providing that information derived at a competency examination would not be used against the defendant should he plead insanity as a defense would insure that the defendant could be completely open and cooperative at the competency examination. Not only would this provision protect the defendant against self-incrimination, but it would also

tent" interchangeably in referring to the defendant's mental capacity to stand trial and aid in his defense.

186. No mention is made as to what is regarded as within "the foreseeable future." Clarification on this point would seem appropriate although there is some indicia of the time frame contemplated by the drafters in S.539, § 32-972(3). That section provides that a person found incompetent but likely to recover may be hospitalized for sixty additional days and then evaluated for competency. Apparently sixty days is a reasonable period of time and fits within the "foreseeable future" terminology.

187. See S.539, §§ 32-959 *et seq.*

188. 383 U.S. 107 (1966).

189. 18 U.S.C. § 4244 (1969).

insure that a more valid examination would result.¹⁹⁰ Although a proposal for separate examiners may not be practical at the present time because of the lack of qualified examiners, it seems a provision which states specifically that each examination must be limited solely to a determination of the condition for which the examination was ordered would be useful.¹⁹¹ Under the proposed judicial procedures available to those involuntarily committed, a person who is found to be incompetent to stand trial and thus is committed, may petition for a reexamination of his fitness.¹⁹³ This petition may be initiated not only by the person committed but also by his attorney, his legal guardian, the court, or the prosecuting attorney. Upon petition, an examination by two designated examiners shall be made and a report stating the underlying facts and the examiners' finding will be submitted to the court. At that time, the court will give ten days' notice for a hearing to be conducted with the same procedural safeguards as provided in the initial incompetency proceeding. A petition for reexamination shall be dismissed by the court without a hearing if filed within six months of a previous petition. It seems that the drafters should have left the dismissal of such petitions within the discretion of the court rather than providing for automatic dismissal. Although it is unlikely that a reexamination conducted six months later would be appropriate, the court is denied the flexi-

190. In an unpublished report a Justice Department Committee endorsed 18 U.S.C. § 4244 as it is presently written and stated in part:

When the same psychiatrist conducts an examination of the accused for both purposes, [incompetency to stand trial and criminal responsibility], the dangers of miscomprehension of the legal test for competency and possible conflicts in the duties of the psychiatrist are frequently unavoidable.

One Circuit Court of Appeals has held that an incompetency examination which is used for the purpose of obtaining evidence to rebut a defense of insanity violates notions of fundamental fairness when the accused is not informed of the purpose for the examination.

U.S. Dept. of Justice, Report of the Intra-Department Committee to Revise Chapter 313, Title 18, U.S. Code 6 (undated). [The court to which the committee report referred was the Second Circuit in its decision in *U.S. v. Driscoll*, 399 F.2d 135 (2d Cir. 1968).]

191. It should be noted that this concept is not new. This idea conveys the substance of certain sections of S.1, 93d Cong., 1st Sess. §§ 3-1103, -1105 (1973), a bill now before the United States Senate. Section 3-1103 requires that the scope of a competency hearing be limited to the defendant's competency to stand trial, while section 3-1105 strictly limits the scope of a determination of mental capacity to the defendant's mental condition at the time of the offense. Section 3-1105(c) states that the same psychiatrist cannot conduct both examinations.

192. S.539, § 32-959.

193. S.539, § 32-974.

bility to deal with such a situation should the need arise. It should be noted, however, that under no circumstances should the petition be denied if submitted six months or more after the previous request, thereby ensuring the availability of review at six month intervals.

Since a person found to be unfit to stand trial and unlikely to regain competency within a reasonable time must be judicially committed,¹⁹⁴ it seems plausible that the notice provision regarding the right to petition for a rehearing of the commitment order¹⁹⁵ would also apply to a petition for reexamination of competency. This premise would appear to conform to the spirit of *Baxstrom*. The proposed section on reexamination of competency¹⁹⁶ does not charge the hospital superintendent with an affirmative duty to notify the patient of his right to petition. Requiring such notification seems appropriate to avoid confusion and ensure that all patients receive equal procedural consideration.¹⁹⁷

Beyond this, the proposed statute would alter the present law regarding indefinite commitment after a finding of incompetency.¹⁹⁸ As stated earlier, the present law could easily subject a person unfit to stand trial to lifelong commitment since the patient could be confined until he is competent, pending the further orders of the court. The proposed statute provides that whenever the hospital superintendent believes the patient is no longer in need of hospitalization, he shall notify the court and a fitness hearing shall be held¹⁹⁹ at which the patient is entitled to have counsel present. If the patient is found to be fit, the court must decide whether to resume criminal proceedings. It may instead dismiss the charges if so much time has elapsed that a discretionary dismissal best serves the interests of justice.

Furthermore, if the person hospitalized has been confined for a period exceeding the maximum period of imprisonment for the

194. This must be done, of course, in accordance with S.539, §§ 32-959 to -969.

195. S.539, § 32-969.

196. S.539, § 32-974.

197. If the intent of the drafters was to make a distinction between petitions to re-examine commitment orders and petitions to re-examine competency to stand trial, a violation of at least the spirit of *Baxstrom* seems inevitable. There is no reason for treating petitioners in these two categories differently. It would be appropriate to add to S.539, § 32-974, a requirement that the hospital superintendent notify every patient and at least one other interested person of the patient's right to petition.

198. S.C. CODE ANN. § 32-970 (Cum. Supp. 1971). This section would be amended by S.539, § 32-975.

199. The fitness hearing is conducted in accordance with S.539, § 32-972.

offense charged, the court shall order the person released and the charges dismissed.²⁰⁰ This addition is of monumental importance to the person found fit because it provides him with credit for time served. On the other hand, it seems that perhaps a slight alteration would be even better. According to the proposed statute,²⁰¹ the dismissal of charges after a person has served the maximum period of incarceration is granted only if the person confined is found no longer in need of hospitalization. It would be preferable if all charges were automatically dropped when the maximum period of confinement is reached without having to wait for the competency petition, which might not issue from the superintendent.

A bill²⁰² presently pending in the United States Senate supports an automatic dismissal of charges under federal jurisdiction. The bill requires the court to dismiss the criminal charges against an incompetent defendant on the final day of a "period of time equal to the maximum term of imprisonment which he would have had to serve, if he had been convicted of the most serious offense with which he is charged."²⁰³ As in the South Carolina proposal, a finding that one is incompetent to stand trial and unlikely to gain competency within a reasonable time²⁰⁴ requires the initiation of civil commitment proceedings under the federal proposal. It appears, however, that a person charged with a crime, but found incompetent to stand trial and unlikely to regain competency within a reasonable time, would have a slight advantage under the federal proposal. If an incompetent defendant is committed under federal jurisdiction,²⁰⁵ the criminal charges against him will be automatically dropped when he has been confined for a period equal to the maximum time allowable for the crime charged. Even though he would physically remain confined because of civil commitment, he would automatically be relieved of the additional burden, however slight, of carrying a pending criminal charge. The federal and state proposals both provide the same protection in that a person receives credit for the time he was confined. In this sense, both proposals should be

200. S.539, § 32-975(2).

201. *Id.*

202. S.1, 93d Cong., 1st Sess. (1973).

203. *Id.* § 3-1004(a). Of course, in the interest of justice the court may dismiss the charges at an earlier time.

204. *Id.* § 3-1108(a)(1) (1973).

205. *Id.* §§ 3-1104, 3-1108 (1973).

noted as significant steps forward. The federal proposal is preferred, however, only because it would seem that any advantage, even if it only lessens the burden of a pending criminal charge, should be accorded to the person committed.

Even if the defendant is unfit to stand trial, the proposed statutes²⁰⁶ provide that he may put forth a defense that is "susceptible of fair determination prior to trial and without the personal participation of the defendant."²⁰⁷ This provision affords a defendant with an opportunity to eradicate charges lodged against him if his defense would entitle him to a directed verdict. He may enter a request to present his defense without the jury's presence, whereupon the charges against him will be dismissed if the judge rules in his favor. Addition of this provision enforces the idea of court action being with all due speed, thus remedying cases which might otherwise linger unnecessarily because of the defendant's incompetency. In accord with *Jackson v. Indiana*,²⁰⁸ the proposed statute adopts the rationale that where possible it is desirable to allow some judicial process despite the defendant's incompetency. At the same time, the defendant's right to understand the proceeding against him and to assist in his own defense must also be adequately protected.

2. Insanity as a Defense

With one exception, the second subdivision in the criminal area concerning commitment of persons who have used insanity as a successful defense is not included in the proposed statutes. Since insanity is a complete defense in South Carolina, a defendant found to have been insane at the time the offense was committed is considered not guilty. There is no mandatory commitment of such persons in this state, but commitment can be effected at the judge's discretion.²⁰⁹ Under the proposed statutes persons found not guilty would have to be committed by voluntary commitment or involuntary judicial commitment like other persons in the community. However, since the proposed statutes eliminate the possibility of indefinite commitment of such persons as allowed under the present law,²¹⁰ a new provision has been

206. S.539, § 32-973.

207. *Id.*

208. 406 U.S. 715 (1972).

209. S.C. CODE ANN. § 32-970 (Cum. Supp. 1971).

210. *Id.*

added which is directed specifically to the insanity defense.²¹¹ It provides for the examination of the defendant who pleads mental illness or deficiency as a defense. Should such illness or deficiency be found and hospitalization be required, judicial commitment procedures²¹² must be completed before the person may be detained further in a state hospital. A defendant who is found not to be responsible for his actions at the time of the offense is not necessarily incompetent or mentally ill at the time of trial and cannot be automatically committed on such a finding. *Bolton v. Harris*²¹³ supports the idea that a defendant should be held only for a brief period of examination; if he must be confined for a longer period, regular civil commitment must be instituted. The new statutory proposal²¹⁴ provides added protection for the defendant found not responsible for his actions at the time of the offense and ensures that commitment of such a person is based solely on his present mental condition.

3. Prior Conviction

The final type of commitment concerns persons already in prison serving sentences for criminal convictions. The proposed statute makes alterations in the procedures for continuing an inmate after completion of his sentence at the Department of Mental Health's prison facility and transfer of an inmate from the Department of Corrections to a state hospital.

Under the statutory proposals, an inmate cannot be held past the expiration of his sentence.²¹⁵ The judicial commitment process for a person whose sentence is ending must be initiated prior to the completion of the sentence²¹⁶ rather than at the termi-

211. S.539, § 32-983.

212. This procedure must be in accordance with S.539, § 32-959.

213. 395 F.2d 642 (D.C. Cir. 1968). See discussion of this case pp. 792-93 *supra*.

214. S.539, § 32-983.

215. S.539, § 32-976.

216. It is interesting to note that in both the present and proposed statutes a person judicially committed in accordance with this section can be committed only when found to be mentally ill and potentially dangerous to himself or others if returned to society. No mention is made of committing such persons on the ground that they need treatment and lack sufficient insight or capacity to decide responsibly concerning their admission to a hospital. [See § 32-963 of the current code and § 32-965 of S.539 in this regard.] Because of this omission it is assumed that only those found dangerous at the end of their sentence can be retained in Department of Mental Health facilities. The *parens patriae* provision of section 32-963(2) is not available here although it is available for persons

nation of the sentence. This change prevents the inmate from having to await the court's decision on commitment after his sentence has been completed. The proposal also forbids committing an ex-inmate to the mental health facility at the prison after his sentence has terminated.²¹⁷

Transfers from the Department of Corrections to the facility operated by the Department of Mental Health at the penitentiary may be effected only after judicial commitment.²¹⁸ Thus, the informal transfer procedures which are now in effect²¹⁹ can no longer be used. However, there does seem to be one problem in the proposed statute²²⁰ which should be corrected. As the statute is presently written, judicial commitment is required only if an inmate is moved from the general prison population into the Department of Mental Health's prison unit. Therefore, an inmate could technically be transferred to another mental health facility outside the prison without judicial commitment. It would be better to amend the wording so that an inmate moved to any Department of Mental Health facility, inside or outside of the penitentiary, is judicially committed prior to the transfer. The present system of transfer in South Carolina seems violative of the intent of the decision in *Schuster v. Herold*.²²¹ Although *Schuster* was decided in another circuit, the holding of the court certainly seems fair and reasonable, and one which should be followed if an inmate is to receive the same protections that persons in the community receive.²²²

committed from the community. Of course, once an inmate is released, he could qualify for the *parens patriae* provision of section 32-963(2) and could then be admitted to a mental health facility.

217. S.539, § 32-976. The place designated to house committed ex-offenders must be determined on the same basis as the place of confinement of other civilly committed persons.

218. S.539, § 32-977.

219. See p. 790 *supra*.

220. S.539, § 32-977.

221. 410 F.2d 1071 (2d Cir. 1969).

222. In regard to the mental health facility at the Central Correctional Institution in Columbia, S.C., it could be argued that an inmate is only being moved from one area of the prison to another. However, it seems clear that such a move carries more importance than that would imply. It could, in fact, greatly change the inmate's status and no doubt affect his parole. In short, the same constitutional problems would arise by such an intra-facility move as occurred in the transfer in *Schuster v. Herold*, 410 F.2d 1071 (2d Cir. 1969).

IV. CONCLUSION

Three different aspects of "civil" and "criminal" involuntary commitment have been explored in this article: (1) the current South Carolina procedures; (2) recent cases which tend to challenge the constitutionality of these procedures; and (3) the proposed South Carolina bill which would restructure the present commitment process. Although this proposal has far-reaching implications for the entire mental health field, this study has focused on but a few sections of the bill, those primarily dealing with due process considerations in the commitment procedure.

A discussion of the current commitment law, recent cases and proposed legislation leads to the conclusion that some change in this area is required. Of necessity, commitment of the mentally ill is a procedure that must be regulated. To fulfill this need the legislature has provided statutes which, unfortunately, are overly broad and therefore ineffective. Thus, the burden of ensuring due process safeguards to the committed has shifted from the legislature to the Department of Mental Health and to some extent the courts. This has produced varied interpretations and has left the process open to possible abuses. The proposed commitment procedure was drafted in response to this problem.

This proposal offers important changes and innovations in the area of civil and criminal commitment in South Carolina. The bill as presently written, however, has some problems in drafting that should be corrected. It is also suggested that some additional provisions be incorporated to maximize the impact of the legislation. The most progressive response to the problem of the mentally ill seems to be in the area of alternatives to confinement in a mental hospital, as suggested by the present California Code. This approach was ignored by the drafters in conceiving the current proposal, apparently a realization of the limited financial resources of the South Carolina Department of Mental Health. Despite the omissions of this proposal, it still affords the legislature the opportunity to ensure the constitutional rights of the mentally ill.

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APPENDIX

Selected Portions of S.539, a Bill Relating to the Commitment, Admission and Discharge of Persons from Mental Institutions § 3 (1973):

Section 32-955. Any individual may, subject to the availability of suitable accommodations, be admitted to a State hospital upon:

(1) Written application to the hospital by any person stating his belief that the individual is mentally ill and, because of his condition is likely to cause injury to himself or others if not immediately restrained and the grounds for this relief;

(2) A certification, in triplicate, by at least one licensed physician that he has examined the individual and is of the opinion that the individual is mentally ill and, because of his condition, is likely to injure himself or others if not immediately restrained. Such certification shall contain the grounds for such opinion.

An individual with respect to whom such a certificate has been issued may not be admitted on the basis thereof at any time after the expiration of three calendar days after the date of examination; and

(3) Within three to five calendar days of the individual's admission, a preliminary hearing shall be held before the probate court of the county in which the individual resides or was present, at which hearing the proposed patient shall be present and shall be represented by counsel either retained by himself or appointed by the court. If the court finds that probable cause exists that the individual is mentally ill and, because of his condition, is likely to injure himself or others if not restrained, it shall order that the individual be detained at a State hospital and shall fix a date for and give notice of a full hearing, pursuant to Section 32-956, to be held within fifteen days from the date of the preliminary hearing. The full hearing shall be held pursuant to Section 32-964.

Section 32-956. At least ten days prior to the full hearing scheduled by the court pursuant to Section 32-955 (3), written notice shall be given to the patient and to his counsel, the applicant, and other interested person [sic]. Notice shall include date, time, and place of the hearing, the basis for the patient's detention (conclusions and underlying facts) and the standard upon which he has been detained. The notice of hearing shall also include a statement advising the recipient that the proposed pa-

tient has the right to request the names of designated examiners and all other persons who may testify in favor of his continued detention, and the substance of their proposed testimony.

Section 32-957. If a person believed to be mentally ill and, because of his condition, likely to injure himself or others if not restrained cannot be examined by at least one licensed physician pursuant to Section 32-955 by reason of the fact that his whereabouts are unknown or for any other reason, the petitioner seeking commitment pursuant to Section 32-955 shall execute an affidavit stating that he believes the person to be mentally ill and, because of his condition, likely to injure himself or others if not restrained and the ground for such belief, and stating that the usual procedure for examination cannot be followed and the reason therefor. Upon presentation of such an affidavit, the judge of probate for the county in which the person is present may require any officer of the peace to take the person into custody for a period not exceeding twenty-four hours during which detention he shall be examined by at least one licensed physician as provided for in Section 32-955 (2); *provided*, that the person taken into custody shall have the right to representation by an attorney. If within the twenty-four hours the person in custody is not examined by a licensed physician or, if upon examination, the physician does not execute the certification provided for in Section 32-955 (2), the proceedings shall be terminated and the person in custody shall be immediately released. Otherwise proceedings shall be held pursuant to Section 32-955 (3).

Section 32-958. The certification required by Section 32-955 (2) shall authorize and require any officer of the peace, preferably in civilian clothes, to take the individual into custody and transport him to a State hospital.

Section 32-959. Proceedings for the involuntary hospitalization of an individual may be commenced by the filing of a written petition with the probate court of the county in which he is present by any interested person or the superintendent of any public or private mental institution in which the individual may be.

The petition shall be accompanied by a certificate of a designated examiner stating that he has examined the individual and is of the opinion that he is mentally ill and should be hospitalized or a written statement by the petitioner that the individual has refused to submit to an examination by a designated examiner. The certificate, or the written statement, shall state the underlying facts upon which the designated examiner or the petitioner,

if the individual has refused to submit to an examination, bases his conclusions [sic] and not merely the conclusions themselves.

Provided, that the individual shall have the right to demand removal of the proceedings to any other county of the State when the convenience of the witnesses and the ends of justice so require. When the place of the proceedings is changed all other proceedings shall be had in the county to which the place of hearing is changed, unless otherwise provided by the consent of the parties in writing, duly filed, or order of the court. And the papers shall be filed or transferred accordingly.

Section 32-960. Upon receipt of a petition the court shall give notice thereof to the proposed patient, to his legal guardian, if any, and to any other interested person. This notice shall also indicate the proposed patient's right to counsel.

Section 32-961. Within three days after notice of the commencement of the proceedings is given, the court shall appoint two designated examiners to examine the proposed patient and report to the court their findings as to his mental condition and his need for treatment in a hospital. The examination shall be had at a suitable place not likely to have a harmful effect upon the proposed patient's health. On the report of the designated examiners of refusal to submit to examination the court shall order him to submit to examination. An adequate record of the examination shall be made and offered to the proposed patient's counsel. If the conclusions of the examination are that the individual is mentally ill, the underlying facts shall be recorded as well as the conclusions. The proposed patient shall be given the opportunity to request an additional examination by an independent designated examiner. If the court determines that the proposed patient is indigent, such examination shall be conducted at public expense.

Section 32-962. If the report of the designated examiners is to the effect that they are of the opinion that the proposed patient is mentally ill, the court shall forthwith fix a date for and give notice of a hearing to be held not less than five nor more than twenty days from receipt of the report. If the report of the examiners is divided or is to the effect that they are of the opinion that the proposed patient is not mentally ill, the court shall terminate the proceedings and dismiss the petition.

If a full hearing is to be held, the court shall assure itself that the proposed patient has counsel; if he is unable to obtain counsel, the court shall appoint counsel for him.

Section 32-963. Notice of the hearing shall be given to the

proposed patient, to his counsel, and to any other interested person at least ten days prior to the hearing. Notice shall include the date, time, and place of the hearing, the underlying facts and the conclusions of the designated examiner's report, and the standard under which the proposed patient is sought to be committed. The notice of hearing shall also include a statement advising the recipient that the proposed patient has the right to request the names of the designated examiners and all other persons who may testify in favor of his commitment, and the substance of their proposed testimony.

Section 32-964. All persons to whom notice is required may appear at the hearing, testify and, within the discretion of the court, present and cross-examine witnesses, and the court may receive the testimony of any other person. The court may exclude all persons not necessary for the conduct of the proceedings. The proposed patient shall have the right to be present at the commitment hearing; such right shall be waivable only by the proposed patient or his attorney. The hearing shall be conducted in as informal a manner as may be consistent with orderly procedure and in a physical setting not likely to have a harmful effect on the mental health of the proposed patient. The court shall in receiving evidence follow the rules of evidence applicable to the probate courts of South Carolina. At the conclusion of the hearing, the proposed patient shall have the right to a free transcript of the record of the proceedings if he is indigent.

Section 32-965. If, upon completion of the hearing and consideration of the record, the court finds upon clear and convincing evidence that the proposed patient is mentally ill, and:

(1) Is in need of treatment in a hospital, and because of his condition lacks sufficient insight or capacity to make responsible decisions with respect to his admittance to a hospital; or

(2) Because of his condition is likely to injure himself or others.

Section 32-968. The petitioner or the proposed patient may appeal from any order of the probate court issued pursuant to Section 32-965 or Section 32-1021 to the court of common pleas of the county, and the matter shall be heard by any circuit judge having jurisdiction in the county upon the record of the probate court, with such additional evidence as such judge shall require, and such judge shall make a determination as to whether the order of the probate judge shall be affirmed or reversed. Such appeal shall not stay the order of the probate judge, but the

hearing herein provided shall be held within ten days after notice of appeal, failing which the order of the probate judge shall be vitiated.

Appeal by either party to the Supreme Court shall be from the order of the circuit judge as in other civil cases, except that an order of a circuit judge requiring release of the proposed patient shall be of force and effect unless and until it is reversed by the Supreme Court.

Section 32-969. Any patient confined pursuant to Sections 32-959 through 32-968 shall be entitled to a re-examination of the order for his confinement on his own petition, or that of any other interested person, to the probate court of the county from which he was admitted. The superintendent of the hospital shall inform every patient, and at least one other interested person, of his right to petition. Such notice shall be given in writing at the beginning of each six-month interval during the confinement of the patient. Upon receipt of the petition, the court shall conduct proceedings in accordance with Sections 32-959 through 32-968 except that the proceedings shall not be required to be conducted if the petition is filed sooner than six months after the issuance of the order of confinement or sooner than six months after the filing of a previous petition under this section. The costs shall be borne by the petitioner, unless the court determines that he cannot afford such costs.

Section 32-970. Whenever a judge of the circuit court, county court, or family court has reason to believe that a person on trial before him, charged with the commission of a criminal offense, is not fit to stand trial because such person lacks the capacity to understand the proceedings against him or to assist in his own defense as a result of mental illness or deficiency, the judge shall:

(1) Order examination of such person by two designated examiners (such examination shall be made within fifteen days after the court's order), or

(2) Order such person committed for examination and observation to a State hospital for a period not to exceed fifteen days. If at the end of fifteen days the State hospital has been unable to determine whether the person is fit to stand trial the superintendent of the hospital shall request in writing an additional period for observation not to exceed fifteen days.

If such person or his counsel so requests, the person may be examined additionally by a designated examiner of his choice. If the court determines that the person is indigent, the examination

by such additional examiner shall be at public expense. The report of such examination shall be admissible as evidence in subsequent hearings pursuant to Section 32-972. *Provided*, that the court may prescribe the time and conditions under which such independent examination is conducted.

Section 32-971. Within five days of examination under Section 32-970 (1) or at the conclusion of the observation period under Section 32-970 (2), the designated examiners shall make a written report to the court which shall include:

- (1) A diagnosis of the person's mental condition, and
- (2) Clinical findings bearing on the issues of whether or not the person is capable of understanding the proceedings against him and assisting in his own defense, and, if in the opinion of the designated examiners he does lack such capacity, whether or not he is likely to recover such capacity in the foreseeable future.

Section 32-972. Upon receiving the report of the designated examiners the court shall set a date for and notify the person and his counsel of a hearing on the issue of his fitness to stand trial. The person shall be entitled to be present at such hearing and to be represented by counsel. If upon completion of the hearing and consideration of the evidence the court finds that:

(1) The person is fit to stand trial, then it shall order criminal proceedings resumed; or

(2) The person is unfit to stand trial for the reasons set forth in Section 32-970 and is unlikely to become fit to stand trial in the foreseeable future, then the solicitor responsible for the criminal prosecution shall initiate judicial admission proceedings pursuant to Sections 32-959 through 32-969; or

(3) The person is unfit to stand trial but likely to become fit in the foreseeable future, then the court shall order him hospitalized for an additional sixty days. If the person is found to be unfit at the conclusion of this additional period, then the solicitor responsible for the criminal prosecution shall initiate judicial admission proceedings pursuant to Sections 32-959 through 32-969.

Subject to the provisions of Section 32-975, patients against whom criminal charges are pending shall have all the rights and privileges of other involuntarily hospitalized patients.

Persons against whom criminal charges are pending but who are not ordered hospitalized following judicial admission proceedings shall be released.

Section 32-973. A finding of unfitness to stand trial under

Section 32-972 does not preclude any legal objection to the prosecution of the individual which is susceptible of fair determination prior to trial and without the personal participation of the defendant.

If either the person found unfit to stand trial or his counsel believes he can establish a defense of not guilty to the charges other than the defense of insanity, he may request an opportunity to offer a defense on the merits to the court. The court may require affidavits and evidence in support of such request. If the court grants such request, the evidence of the state and the defendant shall be heard before the court sitting without a jury. If after hearing such petition the court finds the evidence is such as would entitle the defendant to a directed verdict of acquittal, it shall dismiss the indictment or other charges.

Section 32-974. A finding of unfitness to stand trial under Section 32-972 may be re-examined by the court upon its own motion, or that of the prosecuting attorney, the person found unfit to stand trial, his legal guardian, or his counsel. Upon receipt of the petition, the court shall order an examination by two designated examiners whose report shall be submitted to the court and shall include underlying facts and conclusions. The court shall notify the individual, his legal guardian, and his counsel of a hearing at least ten days prior to such hearing. The court shall conduct the proceedings in accordance with Section 32-972, except that any petition that is filed within six months after the initial finding of unfitness or within six months after the filing of a previous petition under this section shall be dismissed by the court without a hearing.

Section 32-975. When the superintendent of a State Hospital believes that a person against whom criminal charges are pending no longer requires hospitalization, the court shall be notified and shall set a date for and notify the person of a hearing on the issue of fitness pursuant to Section 32-972. At such time, the person shall be entitled to assistance of counsel.

(1) If upon the completion of the hearing, the court finds the person unfit to stand trial, it shall order his release.

(2) If such a person has been hospitalized for a period of time exceeding the maximum possible period of imprisonment to which the person could have been sentenced if convicted as charged, the court shall order the charges dismissed and the person released.

(3) The court may order that criminal proceedings against

a person who has been found fit to stand trial be resumed, or the court may dismiss criminal charges and order the person released if so much time has elapsed that prosecution would not be in the interest of justice.

Section 32-976. Prior to the expiration of a sentence of any person who is imprisoned in any portion of a state correctional institution designated as a facility of the South Carolina Department of Mental Health, if the superintendent of the correctional institution believes that such person is mentally ill and a potential danger to himself or others if returned to society, he shall commence proceedings in the probate court of the county where the person was last sentenced, pursuant to Section 32-959, and any other applicable provisions of law. If the court shall find such person mentally ill and potentially dangerous to himself or others if returned to society, it shall order his hospitalization in a non-penitentiary mental health facility.

Section 32-977. If any person is serving a sentence in a State correctional institution and the superintendent of such institution applies to have that person transferred to the portion of a State correctional institution designated as a facility of the Department of Mental Health, the superintendent shall file such application with the probate court of the county in which the correctional institution is located. Proceedings shall be commenced pursuant to Sections 32-959 through 32-696.

Section 32-983. In any criminal proceedings where mental illness or mental deficiency is raised as a defense:

(1) The court may order the examination of a defendant who has asserted the defense of mental illness or mental deficiency by a designated examiner, or may order such defendant hospitalized for examination and observation for a period not to exceed twenty days.

(2) A defendant who has asserted the defense of mental illness or mental deficiency and who is indigent shall be entitled to be examined by a designated examiner of his choice at public expense.

If the court believes that a person who has been adjudged not to be responsible for his criminal conduct because of mental illness or mental deficiency requires hospitalization, it shall order the initiation of judicial admission proceedings pursuant to Section 32-959 and may detain such person pending the outcome of such proceedings. If such person is found not to require hospitalization, the court shall order his release.

Section 32-1021.1. A separate finding pertaining to the competency or incompetency of the proposed patient shall be made after and only after the person has been committed, if commitment is the court's decision. Commitment shall not raise a presumption of incompetency.

No rights shall be denied an individual unless specifically ordered by the court.

The court is empowered to appoint a committee pursuant to Sections 32-1035 through 32-1041 for custody and control of the patient's estate and to make such further orders pertaining to the patient's legal status and property as may be necessary following a judgment of incompetency.

