St. John's Law Review

Volume 54
Number 3 *Volume 54, Spring 1980, Number 3*

Article 8

July 2012

# CPL § 330.20: Persons Involuntarily Committed Pursuant to CPL Entitled to Procedural and Substantive Safeguards Guaranteed Involuntary Civil Detainees

Carole F. Barrett

the statute.[59] It is submitted that in the absence of court-ordered relief or of sufficient verification guidelines,[60] the use of CPLR 308(4) under *Feinstein* is perilous at best.

*Bruce Pearl*

### *CPL § 330.20: Persons involuntarily committed pursuant to CPL entitled to procedural and substantive safeguards guaranteed involuntary civil detainees*

CPL § 330.20 requires that a person acquitted of criminal charges by reason of mental disease or defect be committed to a mental institution.[61] A person committed pursuant to this section

---

[59] *See* note 24 *supra*. Moreover, the ease with which the plaintiff's verification attempts could be proved should militate against fraudulent proof of such efforts.

[60] The necessity for verification criteria may be more imperative in non-automobile injury cases where the possibility of checking with either the Motor Vehicle Bureau or the liability insurer is removed.

[61] CPL § 330.20(1) (1971) provides in pertinent part:

> Upon rendition of a verdict of acquittal by reason of mental disease or defect, the court must order the defendant to be committed to the custody of the commissioner of mental hygiene to be placed in an appropriate institution in the state department of mental hygiene. . . . Such defendant is entitled to the assistance of the mental health information service.

Acquittal by reason of mental disease or defect is governed by N.Y. PENAL LAW § 30.05 (McKinney 1975) [hereinafter cited as PENAL LAW § 30.05], providing in pertinent part:

> 1. A person is not criminally responsible for conduct if at the time of such conduct, as a result of mental disease or defect, he lacks substantial capacity to know or appreciate either:
>
> (a) The nature and consequence of such conduct; or
>
> (b) That such conduct was wrong.
>
> 2. In any such prosecution for an offense, lack of criminal responsibility by reason of mental disease . . . is a defense.

Prior to 1960, under the Code of Criminal Procedure § 354, commitment was within the discretion of the trial judge. One court, however, while finding the discretionary commitment statute constitutional, held that it could be invoked only if an acquitee was found so insane at the time of acquittal as to be a menace to the public. People *ex rel.* Peabody v. Chanler, 133 App. Div. 159, 117 N.Y.S. 322 (2d Dep't), *aff'd mem.*, 196 N.Y. 525, 89 N.E. 1109 (1909); *see* Morris, *The Confusion of Confinement Syndrome Extended: The Treatment of Mentally Ill "Non-Criminal Criminals" in New York*, 18 BUFFALO L. REV. 393 (1969). More recently, the Court of Appeals held that mandatory commitment for testing does not offend constitutional guarantees. People v. Lally, 19 N.Y.2d 27, 23, 224 N.E.2d 87, 91, 277 N.Y.S.2d 654, 659 (1966). Notwithstanding the finding of validity, CPL § 330.20 has undergone frequent "judicial amendment," *see* note 92 *infra*, leaving judges free to interpret the statute in any way that conforms to the constitution and resulting in a lack of uniformity of construction. *See* People v. McNelly, 83 Misc. 2d 262, 371 N.Y.S.2d 538 (Sup. Ct. N.Y. County 1975); R. PITLER, NEW YORK CRIMINAL PROCEDURE LAW § 12.66 (1972 & Supp. 1979); Pasewark, Pantle & Steadman, *The Insanity Plea in New York State, 1965-1976*, 51 N.Y.S.

must be released if the court that committed him determines that he may be "released . . . without danger to himself or others."[62] Where an involuntary civil detainee seeks discharge, in contrast, the Mental Hygiene Law (MHL) requires that he be released unless it is determined that he suffers from "a mental illness for which immediate inpatient care . . . is appropriate and which is likely to result in serious harm to himself or others . . . ."[63] Notwithstanding Supreme Court decisions mandating that criminal and civil detainees be treated equally under the law,[64] courts consistently have applied the rigid release provisions of CPL § 330.20 to those acquitted based on the insanity defense[65] and have placed the burden of proving eligibility for release on the acquitees themselves.[66] Recently, however, in *Torsney v. Gold*,[67] the Court of Ap-

---

BAR J. 186 (1979).

[62] CPL § 330.20(2), (3) (1971 & Supp. 1979-1980). The Criminal Procedure Law provides:

> 2. If the commissioner of mental hygiene is of the opinion that a person committed to his custody . . . may be discharged or released on condition without danger to himself or to others, he must make application for the discharge or release of such person . . . to the court by which such person was committed . . . .
>
> 3. If the court is satisfied that the committed person may be discharged or released on condition without danger to himself or others, the court must order his discharge, or his release on such conditions as the court determines to be necessary. If the court is not so satisfied, it must promptly order a hearing to determine whether such person may safely be discharged or released. Any such hearing shall be deemed a civil proceeding. . . . After such a hearing, the committed person must be discharged, released on such conditions as the court determines to be necessary, or recommitted to the commissioner of mental hygiene.

*Id.*

[63] N.Y. MENTAL HYG. LAW § 9.37(a) (McKinney 1978). The Mental Hygiene Law provides for commitment of

> any person who . . . has a mental illness for which immediate inpatient care and treatment in a hospital is appropriate and which is likely to result in serious harm to himself or others; "likelihood of serious harm" shall mean:
>
> 1. substantial risk of physical harm to himself as manifested by threats of or attempts at suicide or serious bodily harm or other conduct demonstrating that he is dangerous to himself, or
>
> 2. a substantial risk of physical harm to other persons as manifested by homicidal or other violent behavior by which others are placed in reasonable fear or serious physical harm.

*Id.* (a)(1)(2).

[64] *See* notes 81 & 82 *infra*.

[65] *See* Lublin v. Central Islip Psychiatric Center, 43 N.Y.2d 341, 372 N.E.2d 307, 401 N.Y.S.2d 466 (1977); People *ex rel.* Henig v. Commissioner of Mental Hygiene, 43 N.Y.2d 334, 372 N.E.2d 304, 401 N.Y.S.2d 462 (1977); People v. Lally, 19 N.Y.2d 27, 224 N.E.2d 87, 277 N.Y.S.2d 654 (1966).

[66] *See* Lublin v. Central Islip Psychiatric Center, 43 N.Y.2d 341, 372 N.E.2d 307, 401 N.Y.S.2d 466 (1977). In *Lublin*, the Court of Appeals held that an acquitee's constitutional

peals held that equal protection requires courts to apply the more relaxed standards of the MHL to petitions for release brought by those detained pursuant to CPL § 330.20.[68]

In 1976, Robert Torsney, a police officer, was charged with second degree murder for allegedly having killed a 15-year-old youth.[69] At his trial in November 1977, Torsney admitted that he killed the youth, but claimed that his actions stemmed from a mental disease or defect.[70] The jury found him not guilty on this basis, and he was institutionalized for mandatory observation and testing pursuant to CPL § 330.20.[71] Shortly thereafter, in July 1978, the Commissioner of the Department of Mental Hygiene (Commissioner) determined that Torsney was neither dangerous nor mentally ill and petitioned the court that had ordered him committed for his release.[72] Following a full evidentiary hearing,[73]

---

rights are not infringed by requiring him to prove by a fair preponderance of evidence that he safely can be released from custody. *Id.* at 343, 372 N.E.2d at 309, 401 N.Y.S.2d at 468. In so ruling, however, the Court asserted that, since a hearing under CPL § 330.20 is civil in nature, due process and equal protection would be offended if the acquitee were required to prove his lack of dangerousness beyond a reasonable doubt. *Id. See generally* RICHARDSON, EVIDENCE § 100 (10th ed. 1973); *see also In re* Richard E. R., 52 App. Div. 2d 927, 383 N.Y.S.2d 406 (2d Dep't 1976) (mem.). Apparently, the constitutionality of the statute as currently applied rests on a presumption that the insanity suffered by an acquitee at the time he performed the criminal act continues up to the date of acquittal. People *ex rel.* Henig v. Commissioner of Mental Hygiene, 43 N.Y.2d 334, 372 N.E.2d 304, 401 N.Y.S.2d 462 (1977). Whenever anyone automatically is committed, therefore, a prompt hearing should be held to determine if the presumption has "ripen[ed] into a conclusion of dangerousness." *Id.* at 340, 372 N.E.2d at 308, 401 N.Y.S.2d at 466.

[67] 47 N.Y.2d 667, 394 N.E.2d 262, 420 N.Y.S.2d 192 (1979).

[68] *Id.* at 676, 394 N.E.2d at 267, 420 N.Y.S.2d at 197.

[69] *Id.* at 670, 394 N.E.2d at 263, 420 N.Y.S.2d at 193.

[70] *Id.* Torsney was charged with second degree murder and interposed a defense of lack of criminal culpability due to mental illness at the time of the crime. *Id.* Medical witnesses for the defense testified at the criminal trial that during the shooting Torsney had exhibited a psychosis that is generally associated with epilepsy and maintained, therefore, that Torsney was unable to understand or appreciate the wrongfulness of his conduct. *Id.* at 677, 394 N.E.2d at 268, 420 N.Y.S.2d at 198; *see* PENAL LAW § 30.05, *supra* note 61. Once raised as an issue in the criminal proceeding, Torsney's sanity at the time of the shooting had to be proven by the prosecution beyond a reasonable doubt. PENAL LAW § 30.05, *supra* note 61; N.Y. PENAL LAW § 25.00 (McKinney 1975); *see* RICHARDSON, *supra* note 66, § 102. Although the prosecution's medical witnesses testified that Torsney was subject to "hysterical dissociation under stress," they asserted that Torsney was criminally responsible at the time of the shooting. 47 N.Y.2d at 677, 394 N.E.2d at 268, 420 N.Y.S.2d at 198.

[71] *Id.* at 670, 394 N.E.2d at 263, 420 N.Y.S.2d at 193.

[72] *Id.* at 678, 394 N.E.2d at 268, 420 N.Y.S.2d at 198. *See* CPL § 330.20, *quoted in* notes 61 & 62 *supra*. After examination in two psychiatric centers failed to reveal the presence of mental disease, *id.* at 678-79, 394 N.E.2d at 268, 420 N.Y.S.2d at 198-99, an independent review committee was convened and found that Torsney should be released since he was neither dangerous nor suicidal, *id.* at 679, 394 N.E.2d at 269, 420 N.Y.S.2d at 199.

the court sustained the petition and ordered that Torsney be conditionally released.[74] The Appellate Division, Second Department, reversed, however, finding that Torsney had failed to establish by a preponderance of credible evidence that he could be released without the likelihood of " 'serious physical harm to himself or others.' "[75]

On appeal, a divided Court of Appeals reinstated the order of the committing court, holding that release petitions brought pursuant to CPL § 330.20 must be judged according to the same standards as those governing the release of involuntary civil detainees.[76] In an opinion written by Judge Jasen,[77] the plurality acknowledged that the "unique status" of persons successfully raising an insanity defense justifies according them somewhat different

---

[73] *Id.* at 680, 394 N.E.2d at 269, 420 N.Y.S.2d at 199-200; *see* CPL § 330.20(2), (3) *quoted in* note 62 *supra*. The right to an evidentiary determination on the issue of sanity has constitutional underpinnings. *See* Humphrey v. Cady, 405 U.S. 504 (1972); Baxstrom v. Herold, 383 U.S. 107 (1966); *accord,* People v. Lally, 19 N.Y.2d 27, 224 N.E.2d 87, 277 N.Y.S.2d 654 (1966).

[74] 47 N.Y.2d at 670-71, 394 N.E.2d at 263-64, 420 N.Y.S.2d at 193-94. The Supreme Court, Kings County, released Torsney on condition that he maintain outpatient status at Creedmoor Psychiatric Center, not carry or own a gun, and not return to the police force. *Id.*

[75] 66 App. Div. 2d 281, 285, 412 N.Y.S.2d 914, 918 (2d Dep't 1979). The appellate division adopted the definitional standard of dangerousness provided by the Mental Hygiene Law, *see* note 63 *supra,* but found that since the detainee in question was a person found not guilty by reason of mental illness, it was unnecessary to prove the condition precedent of mental illness prescribed by the Mental Hygiene Law to effectuate commitment. 66 App. Div. 2d at 288 n.6, 412 N.Y.S.2d at 918 n.6. The appellate division maintained that under CPL § 330.20 the State could confine a dangerous detainee even if he were not mentally ill nor in need of immediate treatment. *Id.* Furthermore, the court noted that since dangerousness was the sole criteria for commitment under CPL § 330.20, an acquitee who was mentally ill would qualify for release as long as he could demonstrate his lack of dangerousness. *Id.* For other attempts to construe dangerousness, see Cross v. Harris, 418 F.2d 1095, 1099-100 (D.C. Cir. 1969) (high probability of substantial injury); Rosenfield v. Overholser, 262 F.2d 34 (D.C. Cir. 1958) (reasonable foreseeability of danger); People v. McNelly, 83 Misc. 2d 262, 371 N.Y.S.2d 538 (Sup. Ct. N.Y. County 1975) (likelihood of serious harm).

In reaching its conclusion that the insanity of the acquitee was presumed to continue until the contrary was proved, the appellate division relied on the Court of Appeals finding in Lublin v. Central Islip Pyschiatric Center, 43 N.Y.2d at 344, 372 N.E.2d at 305, 401 N.Y.S.2d at 468. The *Lublin* Court determined that a presumption of continued insanity was appropriate where release from criminal liability resulted from the admission of a violent act coupled with a successful assertion of the insanity defense. *Id.* at 344, 372 N.E.2d at 309, 401 N.Y.S.2d at 468.

[76] 47 N.Y.2d at 676, 394 N.E.2d at 267, 420 N.Y.S.2d at 197.

[77] Judge Jasen authored the plurality opinion in which Judge Jones joined. Judge Meyer concurred in the result, but authored a separate opinion. Judge Fuchsberg joined in both the plurality opinion and the concurrence. Judge Wachtler dissented in a separate opinion in which Chief Judge Cooke and Judge Gabrielli joined.

treatment from that accorded others believed to be insane.[78] Thus, the State constitutionally may require commitment of such acquitees for a time sufficient to permit evaluation of their sanity.[79] The Court declared, however, that justification for any other distinctions in treatment "draws impermissibly thin."[80] Finding that due process and equal protection of the laws prohibit a disparity in release standards,[81] Judge Jasen concluded that "CPL 330.20 . . .

---

[78] 47 N.Y.2d at 673, 394 N.E.2d at 265, 420 N.Y.S.2d at 195.

[79] *Id.* at 673-74, 394 N.E.2d at 265-66, 420 N.Y.S.2d at 195-96. While finding that the "presumption that the causative mental illness" continued until the time of acquittal justified permitting the State to designate the acquitee as a member of an exceptional class for the purposes of mandatory testing, Judge Jasen found that this presumption was "flawed" by the possibility that a large amount of time might elapse between commission of the act on which criminal charges were based and acquittal. *Id.* at 674, 394 N.E.2d at 265, 420 N.Y.S.2d at 195. Judge Jasen concluded that, since the successful assertion of the insanity defense does not in the first instance prove insanity at the time of the alleged commission of the crime, but rather only reflected the inability of the People to prove the sanity of the acquitee beyond a reasonable doubt, automatic commitment could be permissible for only a "reasonable" time. *Id.* at 674, 394 N.E.2d at 265, 420 N.Y.S.2d at 195-96. Therefore, although the presumption of insanity that attaches upon the successful assertion of the insanity defense is valid, it is only sufficiently broad to cover that period of time necessary to complete "a prompt examination and report as to sanity" and to determine an acquitee's need for "present treatment and confinement." *Id.* at 674, 394 N.E.2d at 266, 420 N.Y.S.2d at 196.

[80] *Id.* at 674-75, 394 N.E.2d at 266, 420 N.Y.S.2d at 196.

[81] *Id.* at 675, 394 N.E.2d at 266, 420 N.Y.S.2d at 196. Judge Jasen based his equal protection and due process arguments on the Supreme Court's rulings in Jackson v. Indiana, 406 U.S. 715 (1972) and Baxstrom v. Herold, 383 U.S. 107 (1966). The *Jackson* Court struck down an Indiana statute that mandated pretrial commitment until the defendant became sane. 406 U.S. at 729. The Court held that application of lenient commitment standards when coupled with stringent release procedures deprived the defendant of due process and equal protection. *Id.* The *Jackson* Court restricted mandatory commitment to that time reasonably necessary to determine whether the defendant would regain sanity. *Id. See also* McNeil v. Director, Patuxent Institution, 407 U.S. 245 (1972). Earlier, the *Baxstrom* Court had set aside the commitment of a prisioner to a mental institution at the end of his prison sentence. 383 U.S. at 110. In finding such commitment unconstitutional, the *Baxstrom* Court held that equal protection mandated that a prisoner at the end of his term be accorded some procedural protections extended by the State to all other civil detainees. *Id.* at 111. Moreover, while observing that past criminal history might be a factor weighing on the type of treatment ultimately administered, the *Baxstrom* Court ruled that it cannot be used in the first instance to deprive a detainee of a jury determination on present insanity and concomitant need for treatment. *Id. See also* Humphrey v. Cady, 405 U.S. 504 (1972); Note, *The Rights of the Person Acquitted by Reason of Insanity: Equal Protection and Due Process*, 24 ME. L. REV. 135 (1972).

In a decision rendered subsequent to *Torsney*, the Supreme Court reiterated and extended its position that a prisoner may not be transferred to a mental institution without "appropriate procedural protections." Vitek v. Jones, 100 S.Ct. 1254, 1257 (1980). Concerned with protecting the "liberty interests" required by due process and preventing "stigmatizing" consequences, the *Vitek* Court found that involuntary transfer to a mental institution is not within the range of conditions of confinement to which a prison term subjects

requir[es] a detainee's release unless it is found that he is presently dangerous to himself or others by reason of a mental disease or defect."[82]

Judge Meyer filed a concurring opinion. Although agreeing with the plurality that "dangerousness alone is an insufficient basis for involuntary commitment,"[83] Judge Meyer would not have incorporated the release standards of the MHL into CPL § 330.20. Instead, Judge Meyer interpreted CPL § 330.20 as requiring a detainee to demonstrate a lack of dangerousness to gain release.[84] Where the State seeks to extend a detainee's commitment beyond the time necessary for evaluation of his sanity, however, Judge Meyer would require the State to "begin a Mental Hygiene Law

---

an individual. *Id.* at 1261.

[82] 47 N.Y.2d at 676, 394 N.E.2d at 267, 420 N.Y.S.2d at 197. Judge Jasen asserted that the person acquitted by reason of mental illness is conceptually between the prisoner transferred at the end of his term in *Baxstrom* and the defendant yet to stand trial in *Jackson*. *Id.; see* note 81 *supra*. Judge Jasen determined that the procedural and substantive safeguards extended to the petitioners in *Jackson* and in *Baxstrom* must be offered to one found to be without criminal liability. *Id.* Although the Supreme Court had determined that equal protection principles will permit classification of detainees for different treatment if a rational relationship can be shown to exist between the composition of the class and the purpose for its creation, Eisenstadt v. Baird, 405 U.S. 438, 445-46 (1972); Reed v. Reed, 404 U.S. 71, 75-76 (1971); Baxstrom v. Herold, 383 U.S. 107 (1966), Judge Jasen maintained that since acquittal results in a defendant's release from criminal culpability, 47 N.Y.2d at 674, 394 N.E.2d at 267, 420 N.Y.S.2d at 196, distinctions between acquitees and other civil involuntary detainees cannot be founded on prior criminal acts of the acquitees. *Id.* at 676, 394 N.E.2d at 267, 420 N.Y.S.2d at 197. Moreover, Judge Jasen asserted that based on Supreme Court precedent, *see* note 81 *supra*, disparate treatment cannot be based "solely" on past criminal conviction. 47 N.Y.2d at 676, 394 N.E.2d at 267, 420 N.Y.S.2d at 197; *see* Association of the Bar of the City of New York, Special Committee to Study Commitment Procedures, *Mental Illness, Due Process and the Acquitted Defendant* 8 (1979) [hereinafter cited as *Mental Illness, Due Process*].

After determining that the constitution mandates interpretation of CPL § 330.20 to include the procedural and substantive standards of the Mental Hygiene Law, Judge Jasen turned to a discussion of the medical evidence presented by Torsney in seeking release. 47 N.Y.2d at 677, 394 N.E.2d at 267, 420 N.Y.S.2d at 198. Reviewing only medical evidence that was amassed after the acquittal, *id.*, Judge Jasen observed that diagnostic testing had revealed Torsney to be free from feelings of hostility towards others and "psychosis, psychopathic disorder or organic damage." *Id.* at 679, 394 N.E.2d at 269, 420 N.Y.S.2d at 199. Although one physician indicated upon close questioning that Torsney was " 'somewhat explosive' " and had the type of personality that erupted instantaneously and impulsively, *id.* at 682, 394 N.E.2d at 270, 420 N.Y.S.2d at 200-01, the Court noted that dangerous propensity cannot be the sole predicate for "warehousing" an acquitee and depriving him of his liberty. *Id.* at 682-83, 394 N.E.2d at 271, 420 N.Y.S.2d at 201. The Court concluded that the weight of credible evidence demonstrated that Torsney was neither mentally ill nor dangerous. *Id.*

[83] *Id.* at 685, 394 N.E.2d at 273, 420 N.Y.S.2d at 203 (Meyer, J., concurring).

[84] *Id.* at 686, 394 N.E.2d at 273, 420 N.Y.S.2d at 203 (Meyer, J., concurring).

proceeding and make the showing required for any other civil commitment under that law."[85]

In a dissenting opinion, Judge Wachtler criticized the plurality for requiring equal treatment of persons sought to be civilly committed and persons acquitted of criminal charges by reason of mental disease or defect. Relying on the wording of cases construing CPL § 330.20, Judge Wachtler asserted that detention of a person committed pursuant to this section "should continue unless he proves that he no longer suffers from the symptomatology which made him dangerous."[86] Absent such a showing, Judge Wachtler contended, the State has the dual responsibilities of protecting society from the acquitee and attempting to rehabilitate the acquitee.[87] Turning to a discussion of the plurality's equal protection

---

[85] *Id.*

[86] *Id* at 688, 394 N.E.2d at 274, 420 N.Y.S.2d at 204 (Wachtler, J., dissenting). Relying on Lublin v. Central Islip Psychiatric Center, 43 N.Y.2d 341, 372 N.E.2d 307, 401 N.Y.S.2d 477 (1977), Judge Wachtler found that the presumption of insanity continues " 'until the contrary is proven.' " 47 N.Y.2d at 688, 394 N.E.2d at 274, 420 N.Y.S.2d at 205 (quoting Lublin v. Central Islip Psychiatric Center, 43 N.Y.2d at 344, 372 N.E.2d at 310, 401 N.Y.S.2d at 468). Although Judge Jasen interpreted prior cases as limiting the presumption of insanity to the period of time running from the commission of the act upon which criminal charges are based until " 'the date of acquittal,' " *id.* at 674, 394 N.E.2d at 265, 420 N.Y.S.2d at 195 (quoting People *ex rel.* Henig v. Commissioner of Mental Hygiene, 43 N.Y.2d at 340, 372 N.E.2d at 301, 401 N.Y.S.2d at 466), the *Lublin* Court specifically held that "it is appropriate" to presume insanity continues until the contrary is proven by the detainee. 43 N.Y.2d at 344, 372 N.E.2d at 309, 401 N.Y.S.2d at 468.

[87] 47 N.Y.2d at 689, 394 N.E.2d at 275, 420 N.Y.S.2d at 205. Relying on the State's *parens patriae* interest, Judge Wachtler would permit confinement for purposes of rehabilitating the detainee and protecting society, but would find detention beyond that point impermissibly punitive in light of the detainee's lack of criminal culpability. *Id.* at 688-89, 394 N.E.2d at 274-75, 420 N.Y.S.2d at 205. Judge Wachtler concluded that a detainee seeking to establish fitness for release should be required to demonstrate that he is no longer suffering from the "symptomatology associated with the wrongful act." *Id.* at 689, 394 N.E.2d at 275, 420 N.Y.S.2d at 205. Interestingly, Judge Wachtler expressed his belief that the plurality opinion requires the State to demonstrate that the detainee's malady is of a specific and recognized mental illness before he can be committed. *Id.* at 689, 394 N.E.2d at 275, 420 N.Y.S.2d at 206. Dismissing such an interpretation of the holding, however, Judge Jasen indicated that under different facts a " 'personality disorder' which resulted in a finding of dangerousness and which required treatment" might be sufficient to preclude release. *Id.* at 684, 394 N.E.2d at 272, 420 N.Y.S.2d at 202. Judge Wachtler, nevertheless, asserted that it would be paradoxical for a person acquitted based on the broad interpretation given to mental defect under Penal Law § 30.05, *see* note 61 *supra*, to gain release under the Court's interpretation of CPL § 330.20 even though he still exhibited the very same defect upon which the jury had predicated lack of criminal culpability. *Id.* at 690, 394 N.E.2d at 275, 420 N.Y.S.2d at 206. Observing that the medical definition of mental illness has undergone continuous change, Judge Wachtler maintained that the determination of fitness for release should not be based on a psychiatric model, but rather should be the product of "reasoned judgment based on careful scrutiny of the record." *Id.* at 689-90, 394 N.E.2d at 275, 420

analysis, Judge Wachtler asserted that there is a "critical distinction" between those committed pursuant to the CPL and those committed pursuant to the MHL: "the person acquitted of a violent crime by reason of mental defect has necessarily demonstrated by his own hand that he is a menace to society, whereas the person sought to be civilly committed has not."[88]

In holding that a detainee seeking release pursuant to CPL § 330.20 must be discharged unless determined to be "dangerous to himself or others by reason of a mental disease or defect," the *Torsney* Court effectively has amended a section that heretofore predicated release solely upon "dangerousness."[89] Notwithstanding the Court's departure from the language of the section, however, the change appears necessary in order to align New York's commitment and release procedures with constitutional principles of equal protection and due process.[90] The Court's conclusion that equal

---

N.Y.S.2d at 206.

[88] *Id.* at 690, 394 N.E.2d at 276, 420 N.Y.S.2d at 206. Noting that the Court itself had determined that acquitees could be considered as a unique class for testing purposes, *see* note 79 *supra*, Judge Wachtler asserted that an overriding State interest would justify the continuation of different treatment. *Id.* Turning to an evaluation of Torsney's eligibility for release under this standard, Judge Wachtler reviewed the medical testimony taken at the murder trial and noted that the psychiatrists and psychologists had described Torsney as volatile, impulsive, and prone to erupt in aggressive behavior when threatened or attacked. *Id.* at 691, 394 N.E.2d at 276, 420 N.Y.S.2d at 207. Judge Wachtler next examined the release hearing record and determined that, while recommending conditional release, the discharge reports advised that Torsney was impulsive, had an explosive personality, and was susceptible to hysterical dissociation under stress. *Id.* at 691-92, 394 N.E.2d at 276-77, 420 N.Y.S.2d at 207. Comparing the medical testimony amassed during the release procedure with that given at the murder trial, Judge Wachtler concluded that "Torsney's condition . . . never changed substantially and . . . he remains as dangerous" as on the day of the shooting. *Id.* at 691, 394 N.E.2d at 276, 420 N.Y.S.2d at 207. Judge Wachtler agreed with the plurality that a mental institution should not be used to deprive an acquitee of his "liberty unfairly," but maintained that the continuation of an "explosive personality disorder" coupled with a past "act of senseless violence" is sufficient to trigger the State's overriding interest in protecting the public from future acts of violence. *Id.* at 693, 394 N.E.2d at 277-78, 420 N.Y.S.2d at 208.

[89] CPL § 330.20(2), (3), (1971 & Supp. 1979-1980), *quoted in* note 62 *supra*.

[90] The *Torsney* decision is not the first in which CPL § 330.20 has been "judicially amended" to conform to constitutional requirements. This "judicial legislation" has been precipitated by the legislature's failure to amend the section to reflect due process and equal protection mandates and has resulted in selective application of the Mental Hygiene Law to acquitees. In an early decision construing the section, for example, the Court of Appeals recognized that depriving an acquitee of a jury finding on the issue of insanity would violate due process. *See* People v. Lally, 19 N.Y.2d 27, 224 N.E.2d 87, 277 N.Y.S.2d 654 (1966). More recently, the Court determined that constitutional standards would not be offended by requiring an acquitee seeking release to overcome the presumption of continued insanity and convince the jury of his freedom from dangerousness. *See* Lublin v. Central Islip Psy-

protection requires the State to afford acquitees the procedural and substantive rights extended to other involuntary detainees appears to be well-founded in Supreme Court precedent.[91] Moreover, since the decision mandates that those acquitted of criminal charges by reason of mental disease or defect be placed on an equal footing with involuntary civil detainees, it comports with the understanding that one who successfully asserts an insanity defense in New York necessarily lacks criminal culpability.[92]

Notwithstanding the *Torsney* Court's adherence to the dic-

---

chiatric Center, 43 N.Y.2d 341, 372 N.E.2d 307, 401 N.Y.S.2d 466 (1977). Moreover, on the same day that the Court issued its *Lublin* decision, it held that successful assertion of the insanity defense was to be viewed not only as proof of dangerousness and of performance of the criminal act charged, but also as sufficient to predicate exceptional class standing and disparate treatment reasonably related to distinguishing characteristics of the acquitee. *See* People *ex rel.* Henig v. Commissioner of Mental Hygiene, 43 N.Y.2d 334, 372 N.E.2d 304, 401 N.Y.S.2d 462 (1977). Similarly, prior to *Torsney,* inconsistencies in the application of CPL § 330.20 had become apparent in the trial courts, which, on a finding of mere potential dangerousness, alternately released an acquitee, *see* People v. Del Guidice, 74 Misc. 2d 293, 345 N.Y.S.2d 341 (Dutchess County Ct. 1973), or retained him, *see* People v. Corrente, 63 Misc. 2d 214, 311 N.Y.S.2d 711 (Sup. Ct. Onondaga County 1970).

[91] *See* notes 81 & 82 *supra.*

[92] One issue not explicitly addressed by the *Torsney* Court is upon whom the burden of proof is to fall in determining an acquitee's eligibility for release. Although prior decisions placed this burden upon the acquitee, *see* notes 66 & 90 *supra,* it is submitted that the *Torsney* ruling must place it upon the People. As the Court noted, acquittal by reason of mental disease or defect "indicates only that the People failed to prove beyond a reasonble doubt that the defendant was criminally responsible for his act." 47 N.Y.2d at 674, 394 N.E.2d at 265, 420 N.Y.S.2d at 195-96. Automatic commitment pursuant to CPL § 330.20 takes place, therefore, without any affirmative showing that mental illness exists. In an involuntary civil commitment proceeding, by contrast, the burden of proving insanity and the necessity for retention is placed upon the party seeking to commit the detainee against his will. N.Y. MENTAL HYG. LAW § 9.37 (McKinney 1978); *see* People v. Fuller, 24 N.Y.2d 292, 248 N.E.2d 17, 300 N.Y.S.2d 102 (1969); *In re* Coates, 9 N.Y.2d 242, 173 N.E.2d 797, 213 N.Y.S.2d 74, *appeal dismissed,* 368 U.S. 34 (1961); Fhagen v. Miller, 65 Misc. 2d 163, 317 N.Y.S.2d 128 (Sup. Ct. N.Y. County 1970), *modified on other grounds,* 36 App. Div. 2d 926, 321 N.Y.S.2d 61 (1st Dep't 1971), *aff'd,* 29 N.Y.2d 348, 278 N.E.2d 615, 328 N.Y.S.2d 393, *cert. denied,* 409 U.S. 845 (1972). While the facts of *Torsney* made it unnecessary so to stipulate, the Court's reasoning also suggests that the People will have the burden of demonstrating compliance with notice, hearing, and review procedures as well as treatment requisites of the Mental Hygiene Law. *See* N.Y. MENTAL HYG. LAW §§ 9.27-.37 (McKinney 1978 & Supp. 1979-1980). The Mental Hygiene Law specifically provides for an integrated, rehabilitative treatment program, *id.* § 29.13, and, additionally, allows the release of detainees to relatives "willing and able" to care for them, *id.* § 9.31(c). It is submitted that if *Torsney* and its Supreme Court lineage, *see* notes 81 & 82 *supra,* dictate that all persons committed involuntarily receive equal treatment, CPL § 330.20 may not be construed as requiring an acquitee seeking release to prove that he is no longer dangerous. Similarly, following *Torsney,* compliance with all of the procedural and substantive requirements of commitment, treatment, and release under the Mental Hygiene Law may have to precede detention or commitment of an acquitee.

tates of due process and equal protection, it is submitted that the decision highlights the need to amend CPL § 330.20 in order that it comport with the judicial interpretation it has received. Although the section has never been declared unconstitutional, courts faced with constitutional challenges to it have upheld the statute based solely on its application to restricted and specific factual situations.[93] Indeed, the constitutional limitations on the use of the section are so substantial that prior to *Torsney* one federal court in dicta called upon the legislature to amend the statute to reflect its true meaning.[94] Since *Torsney* has engrafted yet another limitation onto the section, the call for legislative action seems especially compelling. The Association of the Bar of the City of New York has drafted a new version of CPL § 330.20 designed to harmonize New York's criminal commitment procedure with constitutional precedent.[95] It is suggested that the legislature consider this proposal and take appropriate measures to obviate the need for "judicial legislation" such as that engaged in by the *Torsney*

---

[93] *See, e.g.*, People *ex rel.* Henig v. Commissioner of Mental Hygiene, 43 N.Y.2d 334, 372 N.E.2d 304, 401 N.Y.S.2d 462 (1977) (automatic commitment for a time sufficient to determine dangerousness); Lublin v. Central Islip Psychiatric Center, 43 N.Y.2d 341, 372 N.E.2d 307, 401 N.Y.S.2d 466 (1977) (burden of proving freedom from dangerousness not violative of equal protection); People v. McNelly, 83 Misc. 2d 262, 371 N.Y.S.2d 538 (Sup. Ct. N.Y. County 1975) (mandatory commitment not violative of equal protection since Mental Hygiene Law contains numerous comparable provisions).

[94] Lee v. Kolb, 449 F. Supp. 1368, 1380 (W.D.N.Y.), *vacated mem.*, 591 F.2d 1330 (2d Cir. 1978). The *Kolb* court was asked to rule the deprivation of treatment unconstitutional. While avoiding that issue, the court "respectfully suggest[ed] . . . to the New York legislature that it would be appropriate to amend the statute to reflect the constitutionally mandated interpretations rendered by the New York courts." *Id.* at 1380. Prior to the *Torsney* decision, the Association of the Bar of the City of New York similarly recommended that the legislature avoid the "declaration of unconstitutionality" of CPL § 330.20 and the damage suits and chaos that would accompany such a ruling by amending the section to provide for commitment of acquitees pursuant to N.Y. MENTAL HYG. LAW §§ 9.01-.37, 15.27-.35. *Mental Illness, Due Process, supra* note 82, at 12-13.

[95] *Mental Illness, Due Process, supra* note 82, at 42-47. The Special Committee of the Bar of the City of New York has proposed a comprehensive revision of CPL § 330.20. The Committee recommends a mandatory initial 30-day examination period following acquittal by reason of mental disease or defect, prompt report to the court, and subsequent, independent, discretionary reevaluation by the court. *Id.* at 42. The statute would align itself with Mental Hygiene Law § 29.15 by providing for release of a person acquitted of a nonviolent crime without judicial approval. *Id.* at 44. Additionally, the proposed statute would require "treatment that will afford . . . [the acquitee] a realistic opportunity to be cured or to improve his mental condition." *Id.* at 45. Any uncertainty concerning burden of proof, *see* note 92 *supra*, would be eliminated by the proposed revision, since it specifically places the burden on the person seeking to show the need for involuntary treatment, care or retention. *Id.*

Court.[96]

*Carole F. Barrett*

*Recent developments in the expanding right to counsel*

During the past several years, the Bar has witnessed significant activity by the Court of Appeals in its continuing effort to evolve an acceptable right to counsel standard. The Court's often expressed belief that the criminal defendant is at a great disadvantage when confronted with the "coercive police power of the state"[97] has served as the primary impetus for the Court to afford considerable protection to a defendant in custody. In order to strike a balance between the competing interests of effective law enforcement on the one hand and preserving the rights of the criminally accused on the other, one solution offered by the Court

---

[96] Although the *Torsney* Court's equal protection analysis appears sound, its liberal construction of CPL § 330.20 raises questions as to the protection afforded society by the resultant "judicial amendment." Indeed, the Court itself acknowledged the dichotomy that may now exist between the subjective, nonuniform concept of mental illness that justifies acquittal and the objective criteria mandated by due process to justify continued confinement. 47 N.Y.2d at 683, 394 N.E.2d at 271, 420 N.Y.S.2d at 202. Judge Jasen suggested that the solution to this "friction" might lie with legislative reevaluation of the insanity defense itself. *Id.* The Department of Mental Hygiene has recommended that the insanity defense be abolished and replaced by a plea of "diminished capacity under which evidence of abnormal mental condition would be admissible to affect the degree of crime for which the accused could be convicted." New York State Department of Mental Hygiene, *A Report to Governor Hugh L. Carey on the Insanity Defense in New York* 9 (1978). *See also* Steadman, *Insanity Acquittals in New York State, 1965-1978*, 137 AM. J. PSYCH. 321 (1980). It also has been suggested that the insanity defense be modified to "guilty, but insane," to allow for retention and treatment within the criminal justice system itself. *See* R. PERKINS, CRIMINAL LAW 883 (2d ed. 1969); Note, *Insanity—Guilty But Mentally Ill—Diminished Capacity: An Aggregate Approach to Madness*, 12 J. MAR. J. PRAC. & PROC. 351 (1979). Alternatively, it is suggested that a statute requiring testimony on present sanity and specific jury determination on that issue should be adopted. Upon a finding of acquittal with continued insanity, the defendant would then be automatically committed for treatment. *See* Note, *Commitment—Standard for Commitment Following Acquittal by Reason of Insanity made Uniform with that for Civil Commitment—State v. Krol*, 7 SETON HALL L. REV. 412 (1976). While discussion of the possible statutory amendment of Penal Law § 30.05, *see* note 61 *supra*, is beyond the scope of this article, it is submitted that legislative review of CPL § 330.20 should include review of Penal Law § 30.05, in order to ensure that any proposed statutory scheme protects both the constitutional requisites of due process, equal protection, and the general societal interests of the State.

[97] People v. Hobson, 39 N.Y.2d 479, 485, 348 N.E.2d 894, 898, 384 N.Y.S.2d 419, 423 (1976); *see* People v. Settles, 46 N.Y.2d 154, 160, 385 N.E.2d 612, 614, 412 N.Y.S.2d 874, 877 (1978).