Senate Bill 43: A Refinement of North Carolina's Involuntary Civil Commitment Procedures

Bruce Vrana
COMMENT

SENATE BILL 43: A REFINEMENT OF NORTH CAROLINA’S INVOLUNTARY CIVIL COMMITMENT PROCEDURES

INTRODUCTION

At Dorothea Dix, a North Carolina state mental health facility, there are two classes of patients. The distinction between these classes is not made according to the patient’s illnesses nor according to the level of supervision each needs. Recently enacted Senate Bill 43 makes the distinction a legal one that is determined by the circumstances of the patient’s original commitment. Those acquitted of a crime by reason of insanity constitute one class, and those committed into the facility by a third party (usually a family member) constitute the other. While our legal system affirms that insanity acquittees are not responsible for their crimes, our civil system holds them to stricter standards for both commitment and release.

In Part I, this Comment will examine the historical context of Senate Bill 43. Part II will review the evolution of due process rights of mentally ill people who undergo involuntary civil commitment proceedings. Part III will demonstrate that the new requirements of Senate Bill 43 for automatic commitment and burden of proof do not violate insanity acquittees’ due process rights. Part IV will show that the new “dangerousness test” of Senate Bill 43 en-

1. Defendants acquitted by reason of insanity will be referred to in this Comment as “insanity acquittees.”
2. Individuals committed to a mental hospital by a third party will be referred to in this Comment as “civil committees.”

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dangers due process rights of insanity acquittees. Part V will discuss the constitutionality of retrospective application of these different procedures to patients whose commitments predate the defining legislation.

I. HISTORICAL CONTEXT OF SENATE BILL 43

Senate Bill 43, passed by the North Carolina General Assembly in 1991, is the defining legislation that draws the distinction between insanity acquittees and civil committees. Prior to this Bill, North Carolina law did not draw this distinction, and insanity acquittees enjoyed the same due process protections as civil committees. However, due to several recent cases, lawmakers began to question the wisdom of treating both types of patients the same.

John Hinckley's attempted assassination of President Reagan and his successful insanity defense in a district with a broad standard for insanity created a national clamor for more rigorous insanity standards. As a result, Congress passed insanity legislation


7. Telephone interview with Senator Alexander P. Sands III, Dem., 24th Dist. (July 15, 1991). The General Assembly did not change the standard for legal insanity (M'Naghten Rule) because it was considered to be the toughest standard available. A guilty but mentally ill verdict was contemplated. This alternative verdict was rejected when it was learned that states who had adopted this verdict witnessed no significant decrease in the number of acquittals based on insanity verdicts. However, the General Assembly found that involuntary commitment procedures for insanity acquittees could be made more stringent.

8. At the time of John Hinckley's trial, the insanity defense in the District of Columbia was based on language suggested in the Model Penal Code: “A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.” Modern Penal Code § 4.01(1) (1962). In addition, the jury had to acquit Hinckley by reason of insanity unless the government proved his sanity beyond a reasonable doubt. United States v. Hinckley, 672 F.2d 114 (D.C. Cir. 1982).

9. The Hinckley trial precipitated legislative reform throughout the country. Three years after the Hinckley verdict nine states had narrowed the insanity standard, seven states shifted the burden of proving insanity to the defendant, eight states substituted the not guilty by reason of insanity verdict with the guilty but mentally ill verdict, and one state abolished the insanity defense altogether.
which incorporates the M'Naghten standard.\textsuperscript{10} The M'Naghten standard defines insanity as the inability of the defendant to appreciate the difference between right and wrong.\textsuperscript{11} The M'Naghten standard makes it difficult for a defendant to win an insanity defense in federal court.\textsuperscript{12}

Another case that influenced public opinion was the Michael Hayes case.\textsuperscript{13} On July 14, 1989, Michael Hayes, charged with killing five people outside his moped repair shop in Winston Salem, North Carolina,\textsuperscript{14} was acquitted by reason of insanity.\textsuperscript{15} "Hayes found insane, not guilty in slayings" was the headline the next day in The Raleigh News And Observer.\textsuperscript{16} The acquittal reinforced the public's fear that criminal defendants use the insanity plea to circumvent lengthy prison sentences.\textsuperscript{17} Strong public pressure provided the impetus for the North Carolina General Assembly to pass Senate Bill 43.\textsuperscript{18}


10. At the national level, John Hinckley's successful insanity defense resulted in Congress adopting this standard:

\textit{Affirmative defense. -It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.}


11. \textit{Id.}

12. The insanity test followed by the District of Columbia at the time John Hinckley was tried incorporated, inter alia, the "irresistible impulse test." TRIAL OF JOHN W. HINCKLEY, supra note 9, at 14-21. This test adds flexibility to the defense because a defendant may know the difference between right and wrong yet still be unable to control his conduct. \textit{Id.}


16. \textit{Id.}


18. Telephone interview with Senator Alexander P. Sands III, Dem., 24th Dist. (July 15, 1991). Since John Hinckley's successful insanity defense the legislature had been thinking of making changes to relevant North Carolina insanity statutes. However, Hayes' acquittal and public reaction provided the impetus for immediate reform.
Unlike the legislation that incorporated the M'Naghten standard, Senate Bill 43 does not change the legal definition of insanity. Instead, Senate Bill 43 amends involuntary civil commitment and release procedures for defendants found not guilty by reason of insanity. The Bill makes three important changes in these procedures: (1) a defendant found not guilty by reason of insanity is automatically committed to a 24-hour mental hospital, thus eliminating the insanity acquittee's previous statutory right to a pre-commitment hearing; (2) the burden of proof is shifted from the state to the insanity acquittee at all subsequent hearings for release; and (3) continued involuntary commitment can be

19. North Carolina goes by the M'Naghten test: Insanity as a defense to a criminal charge is whether the defendant was laboring under such a defect of reason from disease or deficiency of mind at the time of the alleged act as to be (1) incapable of knowing the nature and quality of his act, or (2) incapable of distinguishing between right and wrong with respect to such act.


20. See supra note 5.

Automatic civil commitment of defendants found not guilty by reason of insanity.
When a defendant charged with a crime is found not guilty by reason of insanity by verdict or upon motion pursuant to G.S. 15A-959(c) [pretrial determination of insanity], the presiding judge shall enter an order finding that the defendant has been found not guilty by reason of insanity of a crime and committing the defendant to a State 24-hour facility designated pursuant to G.S. 122C-252 [twenty-four hour facilities for custody and treatment of involuntary clients]. The court order shall also grant custody of the defendant to a law enforcement officer who shall take the defendant directly to that facility.


23. N.C. GEN. STAT. § 122C-268.1 (Supp. 1991) reads in part:
Inpatient commitment: hearing following automatic commitment.
(a) A respondent who is committed pursuant to G.S. 15A-1321 [automatic civil commitment] shall be provided a hearing unless waived, before the expiration of 50 days from the date of his commitment.

(h) The respondent shall bear the burden to prove by a preponderance of the evidence that he is no longer dangerous to others. If the court is so satisfied, then the respondent shall bear the burden to prove by a preponderance of the evidence (i) that he does not have a mental illness, or (ii) that confinement is not necessary to ensure his own survival or safety and that confinement is not necessary to alleviate or cure his illness. If the court is so satisfied, then the court shall order the respondent discharged and released. If the court finds that the respondent has not met
based solely on a finding of dangerousness, thus eliminating mental illness as a required condition for continued confinement.

The new procedures could result in commitment of some insanity acquittees who might have been released under prior civil commitment statutes. The new procedures are therefore adverse to insanity acquittees' liberty interests. The question this Comment asks is whether these procedures violate due process rights. Before examining this issue, a historical overview of due process will help put this question into context.

II. EVOLUTION OF DUE PROCESS RIGHTS

A. The Addition of Due Process Protections for Mentally Ill People

As late as 1960, involuntary confinement in a hospital was not considered, "such [a] loss of liberty . . . as is within the meaning of the constitutional provision that 'no person shall be deprived of

his burdens of proof, then the court shall order that inpatient commitment continue at a 24-hour facility . . . for a period not to exceed 90 days.

24. Id.

25. The first procedural change, automatic commitment, precludes immediate release of a defendant found not guilty by reason of insanity. Immediate release of a defendant found not guilty by reason of insanity was possible under prior law. See N.C. GEN. STAT. § 15A-1321 (Supp. 1991).

A shift of burden of proof to the insanity acquittee will make it difficult for some insanity acquittees to win release. "A standard of proof represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." In re Winship, 397 U.S. 358, 370 (1970). The higher the degree of confidence required, the higher the proof required, and the higher society's disapproval of a wrong result. Id. at 370, 372. See also Lego v. Twomey, 404 U.S. 477, 493-94 (1972), and Speiser v. Randall, 357 U.S. 513, 525-26 (1958). It follows that a higher standard of proof allows fewer wrong results than a lower standard. The burden of proof has been referred to as the "risk of nonpersuasion." 9 Wigmore, EVIDENCE § 2485 (Chadbourn ed. 1981). What this means is that in cases where the matter is very close, the person who has to bear the burden of proof will lose. TRIAL OF JOHN W. HINCKLEY, supra note 9, at 3.

There are no studies which demonstrate the effect of the "dangerousness test" (recommitment based on dangerousness alone) on the liberty interest of insanity acquittees. However, it is logical to assume that the intent of this statutory test is to force a dangerous insanity acquittee to remain committed even if there are no signs of mental illness. These patients would have been released under previous law. See infra notes 47-63 and accompanying text.
life, liberty or property without due process of law.'”

Criteria for commitment was expressed in vague and overly broad language. For example, in 1967, 24 states provided for involuntary commitment if a citizen was “in need of treatment.” North Carolina statutes prior to 1973, provided that “commitment could be initiated by certification of two physicians . . . [N]o counsel was provided and no court hearing or review was mandated.”

The drive to protect individual rights in the 1960’s inspired the legal community to take an interest in the rights of the mentally ill. The legal community weighed the potential benefits to society of involuntary commitment against the mentally ill person’s interest in retaining his personal liberty, and concluded that a mentally ill person has a need for due process protection.

In 1972, the United States Supreme Court responded and held that involuntary civil commitment involves liberty interest that re-

26. Prochaska v. Brinegar, 251 Iowa 834, 838, 102 N.W.2d 870, 872 (1960) (citations omitted). Although the Iowa Supreme Court did not recognize involuntary commitment as a fourteenth amendment due process violation, it was long established that individuals subjected to the possibility of involuntary commitment do have due process rights. In 1901, the United States Supreme Court ruled that commitment must be proceeded by notice and an opportunity to contest. Simon v. Craft, 182 U.S. 427 (1901).

27. See N.C. GEN. STAT. § 122-58 (repealed after 1971) (vague standards of commitment based on mental illness, mental retardation, or inebriety, plus grave disability or need for treatment) The United States Supreme Court in O’Connor v. Donaldson, 422 U.S. 563 (1975), ruled that vague commitment standards based solely on the need for treatment were unconstitutional. See infra, notes 36-41 and accompanying text.


29. Miller & Fiddleman, Involuntary Civil Commitment in North Carolina: The Result of the 1979 Statutory Changes, 60 N.C.L. Rev. 985, 993 (1982) (examines the role of psychiatrists and attorneys in the commitment process and concludes that the 1979 statutory changes, designed to increase due process protections, are not in the best interests of candidates for commitments and civil committees).


31. Ross, Commitment of the Mentally Ill: Problems of Law and Policy, 57 Mich. L. Rev. 945 (1959). Studied the effect that hospitalization had on the legal capacity of a patient in a mental health facility. From state to state, due process procedures were loosely worded. There was little agreement as to what civil rights the mental patients retained.
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quires the presence of due process procedures. The Court in other cases developed specific procedural safeguards related to involuntary civil commitment. These safeguards include reasonable notice, a judicial hearing, and access to an advocate counsel.

In 1975, the United States Supreme Court set even higher standards for the states. In *O'Connor v. Donaldson*, the Court ruled that involuntary civil commitment based solely on mental illness is unconstitutional. "The mere presence of mental illness does not disqualify a person from preferring his home to the comforts of an institution." Public intolerance and unease is not a compelling justification for involuntary confinement. However, the state is constitutionally justified in commitment of a mentally ill person who presents a danger to the public or himself. Mental illness and dangerousness are the criteria that must be established for commitment.

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34. Vitek v. Jones, 445 U.S. 480 (1980) (a prisoner could not be transferred to a mental health facility without a hearing and court appointed counsel); Jackson v. Indiana, 406 U.S. 715 (1972) (a defendant unlikely ever to be declared competent to stand trial must be provided a full hearing within a "reasonable time"); Humphrey v. Cady, 405 U.S. 504 (1972) (an individual convicted under Wisconsin's Sex Crime Act could not be confined beyond the period of the original sentence without a new hearing).


37. Id. at 576.

38. Id. at 575.

39. Id. at 576.

40. Id. at 575.

41. State v. Fields, 324 N.C. 204, 376 S.E.2d 740 (1989) (a person found not
The United States Supreme Court in *Addington v. Texas* further addressed due process by examining the burden of proof used in civil commitment hearings. The Court ruled the preponderance of the evidence standard too low because it ran the "risk of increasing the number of individuals erroneously committed." The Court set as a minimum standard for the state the burden of clear and convincing evidence because it impresses upon the factfinders the high value that society "places on individual liberty." To complete its determination the Court also analyzed the criminal burden of beyond a reasonable doubt. The Court concluded that this burden was too strict because "the uncertainties of psychiatric diagnosis . . . may impose a burden the state cannot meet and thereby erect an unreasonable barrier to needed medical treatment."

**B. Due Process Protections Included in North Carolina's Involuntary Civil Commitment Procedures**

Initiation of involuntary civil commitment begins with any third party who has knowledge of an individual's mental illness and dangerousness, who executes an affidavit to a clerk or magistrate. If the clerk or magistrate finds reasonable grounds to be-guilty by reason of unconsciousness cannot be committed to a mental hospital unless it is established that the individual is mentally ill and dangerous to himself; In re Monroe, 49 N.C. App. 23, 270 S.E.2d 537 (1980) (an individual who would fast and then eat whole loaves of bread, whole chickens, and five pounds of sugar every two days did not satisfy the dangerousness criteria necessary for involuntary commitment); In re Collins, 49 N.C. App. 243, 271 S.E.2d 72 (1980) (court must consider whether there was any competent evidence to support a finding of dangerousness and mental illness).  

42. 441 U.S. 418 (1979).  
43. *Id.* at 418-19.  
44. *Id.* at 426-27.  
45. *Id.* at 425 (quoting Tippett v. Maryland, 436 F.2d 1153, 1166 (4th Cir. 1971) (Sobeloff, J., concurring in part and dissenting in part)).  
46. *Id.* at 432. *See also* French v: Blackburn, 428 F. Supp. 1351 (M.D.N.C. 1977), aff'd, 443 U.S. 901 (1979) (a standard of proof of beyond a reasonable doubt is not required by due process clause and North Carolina's clear, cogent, and convincing standard is constitutional).  
49. N.C. GEN. STAT. § 122C-261(a) (Supp. 1991). The different circumstances surrounding initial involuntary commitment between insanity acquittees and civil
lieve that the individual in question is both mentally ill and danger-
ous then a custody order is executed and the individual is
picked up by law enforcement officers and brought to a 24-hour
mental health facility. During the first day of custody the indi-
vidual must be examined by a physician. If the physician finds
that the individual is mentally ill and either dangerous to himself
or to others, the individual is held at the facility until the
hearing.

The hearing must be held in district court within 10 days. The
court must find by clear, cogent, and convincing evidence that
the individual is both mentally ill and dangerous to himself or to
others. If the court finds that the burden of proof is not satisfied,
the individual must be released. If the court finds that the bur-
den of proof is satisfied, then the court orders inpatient commit-
ment at a 24 hour facility for up to 90 days, at which time the
civil committee has the right to a rehearing.

At the rehearing the state must again prove by clear, cogent,
and convincing evidence that the civil committee remains mentally
ill and either dangerous to others or himself. If the burden is met,
the next mandatory rehearing is set for 180 days after the first re-
hearing. If the burden is not met at this rehearing, the individual
must be released.

Due to the Hayes case both the General Assembly and the
public were uneasy with these legal procedures because they did
not seem to provide adequate protection from defendants who had
been found beyond a reasonable doubt to have committed a dan-
gerous act. However, there was no data to support this percep-
tion. Data was not available to indicate that civil commitment pro-

committees begin here. The civil committee does not initiate commitment pro-
ceedings against him or herself, but the criminal defendant must raise insanity as
an affirmative defense pursuant to N.C. GEN. STAT. § 15A-959(c) (1988).

50. N.C. GEN. STAT. § 122C-261(b) (Supp. 1991).
52. N.C. GEN. STAT. § 122C-266(a) (Supp. 1991).
61. See supra note 17.
cedures were being used by criminal defendants as a way to circumvent criminal punishment. Nor had studies been done to determine whether insanity acquittees once released from the hospital were more dangerous than any other mental patients. This lack of data is especially important in the context of due process analysis, because reductions in due process protections must meet the constitutional standard of compelling state interest.

C. Due Process is Flexible

Senate Bill 43 has already been challenged in court on constitutional grounds. In *In re Coley,* the plaintiff contends that Senate Bill 43 violates the due process clause because it treats insanity acquittees as a separate class of mental patient without a valid public policy justification.

Due process formulation is a subjective process because “due process is flexible and calls for such procedural protections as the particular situation demands.” The United States Supreme Court in *Mathews v. Eldridge* elucidated the factors to balance when considering a due process question:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the

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62. In 1989, there was a total of 7 persons found “not guilty by reason of insanity” (NGRI) admitted to state mental health facilities. The percentage of current statewide hospital population found NGRI is .26%, (unpublished data compiled by the North Carolina Attorney General's Office).

63. A 1989 study, H. McGinley, P. Pasewark, *National Survey of the Frequency and Success of the Insanity Plea and Alternative Pleas,* 17 J. PSYCHIATRY L. 205, 214-215 (1989), found that only 5 jurisdictions (North Carolina not being one of them) were able to provide data on the frequency and success of the insanity plea. The study showed that in the 5 jurisdictions which provided the data the insanity plea is rarely used and rarely successful. Examples are Wyoming, with one insanity plea out of 204 arrests with a 2% success rate, and Colorado with one plea out of 4,968 arrests at a 44% success rate.

64. In re Coley, No. 91 SPC 639, (motion denied, N.C. Sup. Ct. Aug. 2, 1991) (the petitioner challenged the constitutionality of Senate Bill 43, but no brief was filed by petitioner, the case is still pending in Superior Court).

65. *Id.*


fiscal and administrative burdens that the additional or substitute procedural requirement would entail.68

Whether the new procedures of Senate Bill 43 are constitutional requires an analysis of the private and governmental interests involved.69 Each procedural change—automatic commitment, burden of proof, and continuing commitment based on dangerousness alone ("dangerousness test"), manifests a different mix of private and governmental interests and will be analyzed separately in Part III, sections A (automatic commitment), B (burden of proof), and Part IV ("dangerousness test").

III. Senate Bill 43's Threat to Due Process Rights by Providing for Initial Commitment and Burden of Proof Requirements Different from Civil Committees

A. Jones v. United States: Is Automatic Commitment a Privation of Due Process?

1. State's Interest

Automatic commitment serves state interests in three important ways. First, the state has a compelling interest in protecting the public from an individual who has already been proven beyond a reasonable doubt to have committed a crime.70 In Jones v. United States, the Supreme Court considered criminal acts to be dangerous acts; "[t]he fact that a person has been found . . . to have committed a criminal act certainly indicates dangerousness."

68. Id. at 335.

69. Arnett v. Kennedy, 416 U.S. 134, 167-68 (1974) (in analysis of interests, the term "just cause [for dismissal] as will promote the efficiency of the service" as a standard of job security is intended to authorize dismissal for speech as well as other conduct); Goldberg v. Kelly, 397 U.S. 254, 263 (1970) (due process requirements are influenced by the grievous loss caused to a welfare recipient by termination of aid, and outweighs governmental interest in summary adjudication); Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961) (held that commander of military installation denying access, without formal hearing, of civil employee to site of her employment for security reasons was unconstitutional). Important military interest of authority outweighs an individual interest in a formal hearing; Board of Regents v. Roth, 408 U.S. 564 (1972) (where State refusing to rehire assistant professor at state university, did not make any charge against him that might seriously damage reputation, honor or integrity, did not deprive him of a liberty interest protected by the fourteenth amendment).

ness.”  

In a prior case the Court stated that the defendant's criminal act is “strong evidence that his continued liberty could imperil the preservation of public peace.”

Second, there is also a strong governmental “interest in avoiding the need to conduct a de novo commitment hearing following every insanity acquittal.” The jury's determination of insanity at trial makes it unnecessary to hold a subsequent pre-commitment hearing on the same matter. The state values judicial efficiency and this efficiency interest is given strong weight in Jones.

Third, the state has an interest in preventing abuse of the insanity plea. The legislature may “have considered it appropriate to provide compulsory commitment for those who successfully invoke an insanity defense in order to discourage false pleas of insanity.”

2. Private Interests

Mathews requires that the state's interests be balanced against the individual's interests. The individual has an interest in being free from erroneous commitment. In Jones, the Court ruled that findings of fact at trial (concerning the state's obligation to prove beyond a reasonable doubt that the defendant committed the criminal act, and the defendant's obligation to prove by a preponderance of the evidence that he was insane), establish the defendant's insanity as reliably as findings at a civil commitment hearing. The Court added that “[I]t is just and reasonable . . . that the insanity, once established, should be presumed to continue and that the accused should automatically be confined for treatment.”

The original trial provides the defendant with adequate due process protection and its conclusion supports subse-

71. Id.
73. Jones, 463 U.S. at 366.
74. Id.
78. Jones, 463 U.S. at 364.
B. Does the New Burden of Proof Meet Due Process Requirements?

The United States Supreme Court has not ruled on the constitutionality of shifting the burden of proof to the insanity acquittee in release proceedings. However, the Court's reasoning in *Jones* implies support for this shift by emphasizing the defendant's initiative in establishing his own insanity. A logical extension of this emphasis is to continue to keep the initiative with the insanity acquittee in future release hearings.

In addition, protection against erroneous commitment is written into the provisions of Senate Bill 43. A hearing is required fifty days after initial commitment. The insanity acquittee is represented by counsel if he desires, and is provided with the advantages of an adversarial proceeding. At this hearing he can rebut the presumption of insanity. If he does, he must be released. If recommitted the patient is provided periodic hearings where he can establish his sanity. Thus, the insanity acquittee is given sub-

80. Id. at 366.
81. "Petitioner has challenged neither the adequacy of the release standards generally nor the disparity in treatment of insanity acquittees and other committed persons." Id. at 363 n.11.
82. See supra notes 72-74. The need to avoid a de novo review is no longer consequential because the insanity acquittee is guaranteed periodic hearings by N.C. GEN. STAT. § 122C-276 (c),(d) (Supp. 1991). See also Benham v. Ledbetter, 785 F.2d 1480, 1490-91 (11th Cir. 1986).
83. Lower courts have cited *Jones* to validate statutes that create a procedure for release for insanity acquittees different from procedures applicable to civil committees. State v. Foucha, 563 So. 2d 1138, 1142 (La. 1990) (the "dangerousness test" for continuing commitment of the insanity acquittee does not violate equal protection), cert. granted, 111 S.Ct. 1412 (1991); State v. Mahone, 127 Wis. 2d 364, 379 N.W.2d 878, 881 (Wis. Ct. App. 1985) (recommitment of insanity acquittee because conditions necessary for release had not been fulfilled, and the safety of such person or safety of others as a criteria for release is not cruel and unusual punishment).
89. Id.
stansial opportunity to gain his release.91

IV. THE "DANGEROUSNESS TEST" OF SENATE BILL 43 AND DUE PROCESS RIGHTS

At release hearings, insanity acquittees must first prove they are no longer dangerous.92 If they succeed, they must then prove they are not insane.93 This sequential, two-step process is different from the conditions present at the patient's original trial.94 At that time, the court regards dangerousness and insanity as inseparably linked.95 To then consider at re-commitment hearings the two conditions as unrelated could allow unfair conclusions. For example, it is possible for a patient to be recommitted for dangerousness without any investigation of his sanity or insanity. Using the logic demonstrated in Jones,96 dangerousness and insanity should be considered in the same way at release hearings as they were in the original trial: as related aspects of the same mental condition.97 Preserving the original criteria throughout protects the patient by establishing legitimate reasons for continued treatment and protects the public by providing a more thorough assessment of the patient's progress.

V. RETROSPECTIVE APPLICATION OF SENATE BILL 43

A. Ex Post Facto Law: Brief History

The prohibition against enactment of ex post facto laws98 "is

91. In fact, the insanity acquittee can be released unconditionally after only 50 days of commitment to a mental hospital, regardless of the severity of the crime he committed. Jones v. United States, 463 U.S. 354, 368 (1983).


93. Id.

94. See supra notes 47-60 and accompanying text.

95. "A verdict of not guilty by reason of insanity establishes two facts: i) the defendant committed an act that constitutes a criminal offense, and ii) he committed the act because of mental illness." Jones, 463 U.S. at 363.

96. The Jones ruling was based on consistency; i.e., as the defendant insisted upon raising the insanity defense and proving his insanity by a preponderance of the evidence, it is logical to require him to prove his sanity at the release hearing by a preponderance of the evidence. See supra notes 82-91 and accompanying text. The "dangerousness test" lacks such a consistent structure. A consistent structure would necessitate that criteria for confinement remain unchanged throughout.


98. U.S. CONST. art. 1, § 10.
designed to give individuals warning of new legislative acts and the assurance that they can rely on them until explicitly changed.\footnote{99} To fall within the scope of the ex post facto prohibition, three primary factors must be established: (1) the law “must be retrospective, that is, it must apply to events occurring before its enactment, (2) . . . it must disadvantage the offender affected by it,”\footnote{100} and 3) it must apply to criminal matters.\footnote{101}

Insanity acquittees who raised the insanity defense before enactment of Senate Bill 43 expected their release to be governed by procedures in place at the time of their trial. Retrospective application of the stricter procedures of Senate Bill 43 frustrates these expectations and is adverse to the acquittee’s interests.\footnote{102} Therefore, the ex post facto status of Senate Bill 43 turns on whether it is a civil statute, enacted for the protection of society (in which case the ex post facto clause does not apply), or whether it is a criminal statute designed to punish past conduct (in which case the ex post facto clause does apply).

\subsection*{B. Involuntary Civil Commitment Processes Under the Auspices of Civil Law}

The first level of inquiry is to establish whether the North Carolina General Assembly intends Senate Bill 43 to be civil law rather than penal law.\footnote{103} Apparently it does. N.C. GEN. STAT. § 15A-959 (1988) provides that “[i]f the court determines that the defendant has a valid defense of insanity with regard to any criminal charge, it may dismiss that charge . . . .”\footnote{104} The insanity acquittee is thereafter subject to the rules and procedures of civil law as enacted by the North Carolina General Assembly.\footnote{105}

\begin{footnotesize}
\footnote{99. Weaver v. Graham, 450 U.S. 24, 28-29 (1981).}
\footnote{100. Weaver, 450 U.S. at 29. See also Miller v. Florida, 482 U.S. 423, 430 (1987).}
\footnote{101. Beazell v. Ohio, 269 U.S. 167 (1925), characterized the nature of an ex post facto law as any criminal statute: [W]hich punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime any defense available according to law at the time when the act was committed, is prohibited as 'ex post facto.' \textit{Id.} at 169-70. See also Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798).}
\footnote{102. See supra note 25.}
\footnote{103. United States v. Ward, 448 U.S. 242, 249 (1980).}
\footnote{104. N.C. GEN. STAT. § 15A-959 (1988).}
\end{footnotesize}
The accumulation of case law firmly supports the belief that the insanity acquittee is not responsible for his behavior and is not an appropriate target for punishment; i.e., the insanity acquittee is not under the jurisdiction of the criminal system.\textsuperscript{106} In \textit{In re Rogers},\textsuperscript{107} the respondent, an insanity acquittee, challenged the constitutionality of a statute requiring a hearing before release, while those civilly committed are permitted to be released at the discretion of the director of the 24 hour facility.\textsuperscript{108} The respondent argued that the statute results in an increase in his punishment, thus violating the ex post facto clause.\textsuperscript{109} On the basis of the patient's proven violent behavior the court ruled that the new procedure does not constitute punishment for a crime but is relevant to the wise discharge of insanity acquittees.\textsuperscript{110}

\textbf{C. Civil Statutes Which Have the Effect of Punishing Past Conduct and Violations of the Ex Post Facto Clause}

After establishing the civil intent of Senate Bill 43, it is necessary to proceed to a second level of inquiry:\textsuperscript{111} whether or not Senate Bill 43 is punitive "in purpose or effect as to negate that [civil] intention."\textsuperscript{112} "The ex post facto effect of a law cannot be evaded by giving civil form to that which was essentially criminal."\textsuperscript{113} The Court in \textit{Ex parte Garland},\textsuperscript{114} found an ex post facto violation in a constitutional provision that barred all persons from practicing law who would not take an oath of past loyalty to the United States Government.\textsuperscript{115} The provision, which was a result of passions stemming from the Civil War, was punitive in nature and therefore violated the constitutional prohibition against ex post facto laws.\textsuperscript{116}

To find that Senate Bill 43 is an ex post facto violation it must

\textsuperscript{108} \textit{Id.} at 706, 306 S.E.2d at 512.
\textsuperscript{109} \textit{Id.} at 708, 306 S.E.2d at 512-13.
\textsuperscript{110} \textit{Id.}
\textsuperscript{111} United States v. Ward, 448 U.S. 242, 249 (1980).
\textsuperscript{112} \textit{Id.}
\textsuperscript{114} 71 U.S. (4 Wall.) 333, 337 (1866).
\textsuperscript{115} \textit{Id.}
\textsuperscript{116} \textit{Id.}
be established that one of its provisions is punitive in nature.\textsuperscript{117} The automatic commitment\textsuperscript{118} and the shifted burden of proof\textsuperscript{119} provisions have a rational basis in legitimate state regulation. However, the “dangerousness test” disregards the connection between insanity and dangerousness that has traditionally been the basis of involuntary civil commitment proceedings.\textsuperscript{120} This deviation from involuntary civil commitment criteria, criteria which guided the Court in Jones,\textsuperscript{121} strongly suggests that the “the dangerousness test” is no longer civil in nature. This conclusion is supported by the connection between the uproar over the Hayes verdict and immediate passage of Senate Bill 43.\textsuperscript{122} Senate Bill 43 has made it possible to institutionalize non-mentally ill people, and has thus deviated too far from the fundamental precepts of involuntary civil commitment.\textsuperscript{123} The “dangerousness test” should be considered punitive and therefore a violation of the constitutional prohibition against ex post facto laws when applied retroactively.

**CONCLUSION**

The history of involuntary commitment traces the increasing recognition of the importance of due process protections for the mentally ill. Senate Bill 43 represents the latest step in this process. However, it is different from previously enacted laws because it places less burden on the state, rather than more. Justification lies in the real danger that the criminally insane present to society.

Automatic commitment and a shift in the burden of proof to the insanity acquittee are reasonable efforts by the North Carolina General Assembly to protect the public from danger and to protect the insanity defense from abuse. However, the “dangerousness test” distorts the basic purpose (medical treatment of mental illness) of involuntary civil commitment.

\begin{itemize}
  \item \textsuperscript{117} See supra notes 106-107 and accompanying text.
  \item \textsuperscript{118} See supra notes 70-80 and accompanying text.
  \item \textsuperscript{119} See supra notes 81-91 and accompanying text.
  \item \textsuperscript{120} See supra notes 92-97 and accompanying text.
  \item \textsuperscript{121} See supra note 96 and accompanying text.
  \item \textsuperscript{122} See supra notes 13-18 and accompanying text.
  \item \textsuperscript{123} In re Doty, 38 N.C. App. 233, 236, 247 S.E.2d 628, 630 (1978) “There are two humanitarian purposes for involuntary commitment: [T]emporary withdrawal from society of those who may be dangerous, and treatment.” Id. “[T]he very purpose of that deprivation is not solely to protect society but also has as a purpose the protection, treatment, and aid of an individual who cannot or will not protect himself.” French v. Blackburn, 428 F. Supp. 1351, 1354 (M.D.N.C. 1977).
\end{itemize}
This Comment contends that the "dangerousness test" is therefore unconstitutional and that re-commitment to a mental hospital should be based on the traditional criteria of both mental illness and dangerousness. If this is done Senate Bill 43 will represent a positive step in our treatment of insanity acquittees. The traditional criteria reinforce the logical connection between the terms and conditions set forth in the original trial and the subsequent rights and responsibilities of the insanity acquittedee.

Bruce Vrana