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Automatic and Indefinite Commitment of Insanity Acquittees: A Procedural Straitjacket

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I. INTRODUCTION

In 1843 the Queen's Bench formulated the modern basis of the insanity defense[1] and enshrined Daniel M'Naghten's name in legal history.[2] M'Naghten the insanity acquittee, however, did not fare

1. *See* W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 37, at 274-75 (1972); Morris, *Dealing Responsibly with the Criminally Irresponsible*, 1982 ARIZ. ST. L.J. 855, 855. The test that the justices enunciated for acquittal requires that "at the time of committing the act, the party accused [must labor] under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it that he did not know he was doing what was wrong." Daniel M'Naghten's Case, 8 Eng. Rep. 718, 720 (1843).

2. Daniel M'Naghten's Case, 8 Eng. Rep. 718 (1843). M'Naghten, under the delusion that Sir Robert Peel, the British Prime Minister, was the leader of a Tory conspiracy to kill M'Naghten, tried to shoot Peel, but shot his secretary instead. The jury verdict, acquittal by reason of insanity, was not popular. The House of Lords debated the issue and sought an advisory opinion from the Queen's Bench concerning the standards for acquittal. Commentators now treat the advisory opinion as part of the original case. *See* W. LAFAVE & A.

as well. The authorities sent M'Naghten to a mental hospital, where he remained until his death twenty-two years later. M'Naghten never received another hearing to determine whether he was still mentally ill and in need of confinement.[3]

The fundamental premise of the insanity defense is that the defendant was insane at the time of the alleged offense, and, therefore, was not morally or legally responsible for his act.[4] Historically, however, society has stigmatized insanity acquittees "as both criminal and mentally ill—twice-cursed as mad and bad."[5] Many jurisdictions, aware of the intense public fear of the criminally insane[6] and concerned that the insanity defense may provide a "revolving door" that allows defendants to avoid both conviction and commitment,[7] impose severe procedural requirements on acquittees who attempt to prove that they have recovered and no longer pose a danger to society.[8] Insanity acquittees are often "in a worse position than if they had been convicted, sentenced, and imprisoned."[9]

SCOTT, *supra* note 1, at 274; Morris, *supra* note 1, at 855.

3. Benham v. Edwards, 501 F. Supp. 1050, 1057 (N.D. Ga. 1980), *modified*, 678 F.2d 511 (5th Cir. 1982), *vacated sub nom.* Ledbetter v. Benham, 103 S. Ct. 3565 (1983) (*vacated* in light of Jones v. United States, 103 S. Ct. 3043 (1983)).

4. *See Benham*, 501 F. Supp. at 1065-66 and authorities cited therein.

5. Morris, *supra* note 1, at 856; *see* German & Singer, *Punishing the Not Guilty: Hospitalization of Persons Acquitted by Reason of Insanity*, 29 RUTGERS L. REV. 1011, 1011 (1976).

6. Steadman & Cocozza, *Selective Reporting and the Public's Misperceptions of the Criminally Insane*, 41 PUB. OP. Q. 523, 524 (1977-78).

7. *See* H.R. REP. No. 91-907, 91st Cong., 2d Sess. 74 (1970) [hereinafter cited as HOUSE REPORT]; *infra* note 76.

8. Many states, concerned about the alleged revolving door, have responded by automatically committing acquittees or by committing them under a lower standard of proof than the standard for civil committees. *See, e.g.*, D.C. CODE ANN. § 24-301(d)(1) (1981) (automatic commitment); HAWAII REV. STAT. § 704-411(4) (1976) (state need only prove fitness for commitment of acquittees hy a preponderance of the evidence); *see also* Note, *Commitment Following an Insanity Acquittal*, 94 HARV. L. REV. 605, 605-06 & nn.3-6 (1981). At least two states, Montana and Idaho, have eliminated the insanity defense altogether. *See* Morris, *supra* note 1, at 897; Note, *Rules for an Exceptional Class: The Commitment and Release of Persons Acquitted of Violent Offenses by Reason of Insanity*, 57 N.Y.U. L. REV. 281, 283 n.12 (1982) [hereinafter cited as Note, *Rules for an Exceptional Class*]. Several jurisdictions now have a verdict of guilty but mentally ill, which allows the court to impose a criminal sentence even though the defendant may have been insane at the time of the crime. *See* Morris, *supra* note 1, at 896-97; Note, *Rules for an Exceptional Class, supra*, at 283 n.12. For a recently published discussion of *Jones* and a complete analysis of the insanity defense, see Hermann & Sor, *Convicting or Confining? Alternative Directions in Insanity Law Reform: Guilty but Mentally Ill Versus New Rules for Release of Insanity Acquittees*, 1983 B.Y.U. L. REV. 499 (1983).

9. German & Singer, *supra* note 5, at 1011.

In *Jones v. United States*[10] the United States Supreme Court addressed for the first time[11] the issue of involuntary commitment of persons that a court finds not guilty by reason of insanity. In 1975 a trial court had committed Jones indefinitely to a mental hospital for attempting to steal a jacket.[12] When Jones sought review, the Supreme Court held that the United States Constitution permits the states to confine individuals indefinitely without ever having to prove continued mental illness and the need for continued confinement.[13]

This Recent Development suggests that the Court erroneously decided *Jones*. Part II examines the Supreme Court's constitutional analysis of commitment procedures and discusses postacquittal commitment in state and lower federal courts. Part III analyzes the *Jones* decision and the exception that it allows for the commitment of insanity acquittees. Part IV contends that prior to involuntary and indefinite commitment an insanity acquittee deserves the same standard of proof as a civil commitment candidate—proof of mental illness and dangerousness by clear and convincing evidence. Part IV also argues that absent proof by clear and convincing evidence of the acquittee's need for confinement, the insanity acquittee is entitled to release or recommitment through civil commitment procedures at the expiration of the underlying maximum sentence for the offense. In addition, part IV submits that *Jones* should not control in jurisdictions in which the criminal defendant need create only a reasonable doubt of his insanity at the time of the offense to obtain acquittal.

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10. 103 S. Ct. 3043 (1983).

11. *Id.* at 3053 (Brennan, J., dissenting). In Lynch v. Overholser, 369 U.S. 705 (1962), the Court considered the commitment of an insanity acquittee who had not raised the insanity defense himself. The Court held that automatic postacquittal commitment procedures are inappropriate when the Government, rather than the defendant, raises the issue of mental capability. In *Jones*, however, the Court addressed the propriety of postacquittal procedures for acquittees who have raised the insanity defense on their own initiative.

12. Reply Brief for Petitioner at 1, Jones v. United States, 103 S. Ct. 3043 (1983), *reprinted in* 14 Criminal Law Series (BNA's Law Reprints) No. 5, at 193 (1982-83). If the trial court had convicted Jones, he would have faced a maximum prison sentence of one year. *Jones*, 103 S. Ct. at 3047.

13. 103 S. Ct. at 3043.

II. LEGAL BACKGROUND

A. Supreme Court Constitutional Authority

Historically, most states automatically subjected insanity acquittees to involuntary and indefinite commitment.[14] In 1962, however, the Supreme Court in *Lynch v. Overholser*[15] limited the automatic commitment of acquittees. The *Lynch* Court, basing its decision on statutory construction rather than constitutional law,[16] held that mandatory commitment of an insanity acquittee is inappropriate when the prosecution rather than the acquittee puts the acquittee's sanity at issue.[17] The Court, nonetheless, indicated in dicta that automatic commitment is permissible when the acquittee himself raises the defense.[18]

Several Supreme Court decisions beginning in the late 1960s, without directly addressing the issue of postacquittal commitment, suggested that mandatory and indefinite postacquittal commitment schemes violate[19] the acquittee's due process or equal protection rights.[20] A discussion of the due process and equal protection principles that the Court has enunciated in the commitment area, therefore, is essential to an understanding of *Jones*.

1. Due Process

In *Specht v. Patterson*[21] the Supreme Court held that a state may not commit an individual for an indefinite term without first giving him a hearing on the issue of present mental health and

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14. *In re* Big Cy Kolocotronis, 99 Wash. 2d 147, ___, 660 P.2d 731, 735 (1983) (en banc) (citing former Washington Code provision). For a discussion of early postacquittal commitment procedures, see Note, *Commitment of Persons Acquitted by Reason of Insanity: The Example of the District of Columbia*, 74 COLUM. L. REV. 733, 735-36 (1974) ("Mandatory commitment was essentially the quid pro quo for being held blameless.").

15. 369 U.S. 705 (1962).

16. The Court noted, however, that its construction freed the statute "from not insubstantial constitutional doubts." *Id.* at 710-11.

17. *Id.* at 710, 719-20.

18. *Id.* at 715-17.

19. *Big Cy Kolocotronis*, 99 Wash. 2d at ___, 660 P.2d at 735; *see, e.g.*, Jackson v. Indiana, 406 U.S. 715 (1972) (procedures for indefinite commitment of individual incompetent to stand trial violated due process and equal protection clauses); Baxstrom v. Herold, 383 U.S. 107 (1966) (procedures for commitment of mentally ill prisoner violated equal protection clause).

20. For examples of acquittees asserting claims based on the Supreme Court's evolving due process and equal protection principles, see Warren v. Harvey, 632 F.2d 925 (2d Cir.) (due process), *cert. denied*, 449 U.S. 902 (1980); Bolton v. Harris, 395 F.2d 642 (D.C. Cir. 1968) (due process and equal protection).

21. 386 U.S. 605 (1967).

dangerousness. The trial court, without notice or a full hearing, committed Specht indefinitely under the Colorado Sex Offenders Act.[22] Noting that imposition of the indeterminate sentence under the Act required a finding that the individual is dangerous or a mentally ill habitual offender,[23] the Court held that due process[24] demands a hearing, the right to counsel, confrontation, cross-examination, presentation of evidence, and adequate findings of fact to allow for meaningful appeal.[25]

Following *Specht*, the Court in *Jackson v. Indiana*[26] expressed the general principle that due process requires that a reasonable relation exist between involuntary commitment and the purpose of the commitment. The State charged Jackson, an adult with the mental capacity of a preschool child, with stealing a purse and nine dollars.[27] The trial court determined that Jackson was incompetent to stand trial and committed him to an institution until the Department of Mental Health could certify to the court that he was sane.[28] Three and one-half years later, when the evidence established little hope that his condition would improve, Jackson argued that the trial court's commitment order amounted to a commitment for life.[29] The Supreme Court agreed with Jackson. Noting that the trial court did not consider any of the customary bases for invoking the power of indefinite commitment,[30] the Court stated that "[a]t the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."[31] Accordingly, the Court held that due process entitled Jackson to release or to civil commitment proceedings if the state could not determine within a reasonable period of time whether Jackson ever would be competent to stand trial.[32]

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22. *Id.* at 607. The Colorado Sex Offenders Act authorized indefinite commitment of an individual convicted of certain sex offenses if he represents a threat of harm to the public, or he is a habitual offender and is mentally ill. *Id.*

23. 386 U.S. at 608.

24. The due process clause provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

25. 386 U.S. at 610.

26. 406 U.S. 715 (1972).

27. *Id.* at 717.

28. *Id.* at 719-20.

29. *Id.* at 723, 738-39.

30. For example, the trial court did not assess Jackson's capacity to function in society, the need to confine Jackson, or the state's ability to treat him. *Id.* at 737-38.

31. *Id.* at 738.

32. *Id.* Less than a month after the decision in *Jackson* the Court addressed a similar

In *O'Connor v. Donaldson*[33] and *Addington v. Texas*[34] the Court addressed due process issues in the civil commitment context. A brief discussion of the constitutional doctrine that the Court enunciated in these cases is important for two reasons. First, the basic framework for constitutional analysis of due process issues in the civil commitment context applies to criminal commitment cases as well;[35] and second, the due process rights that the Constitution guarantees to potential civil committees set a standard for evaluating equal protection challenges to the lesser rights that state statutes frequently accord insanity acquittees.[36]

In *O'Connor v. Donaldson*[37] the Court articulated the substantive requirements for involuntarily committing an individual to a mental hospital. The state had confined Donaldson against his will for nearly fifteen years. Donaldson brought suit alleging that his continued confinement was an unconstitutional deprivation of liberty.[38] Although the jury did not determine whether Donaldson was still mentally ill, it did find that he was not dangerous to himself or others.[39] Noting that "[m]ere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty,"[40] the Court held that mental illness alone is not a sufficient basis for continued confinement. The constitutional right to freedom prohibits states from confining a mentally ill individual capable of living peacefully in society.[41] Even if the individual were both mentally ill and dangerous at the time of his initial commitment, his involuntary confinement could not continue constitution-

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issue in McNeil v. Director, Patuxent Inst., 407 U.S. 245 (1972). The trial court convicted McNeil of assault and sentenced him to a five year prison term. Instead of sending him to jail, however, the court—without an adversarial hearing—committed McNeil to a hospital to determine whether the state should institutionalize him for an indefinite period of time. *Id.* at 246. The five year prison sentence elapsed without any formal determination, and McNeil challenged his continued confinement. *Id.* Relying on *Jackson*, the Court held that although lesser procedural safeguards are permissible when the commitment is for a short period and with a limited purpose, due process requires that "indeterminate [confinement] cannot rest on procedures designed to authorize a brief period of observation." *Id.* at 249.

33. 422 U.S. 563 (1975).

34. 441 U.S. 418 (1979).

35. *See, e.g., infra* text accompanying notes 95-97 (discussion of the Court applying the *Addington* analysis in *Jones*).

36. Note, *Rules for an Exceptional Class, supra* note 8, at 290.

37. 422 U.S. 563 (1975).

38. *Id.* at 565.

39. *Id.* at 573.

40. *Id.* at 575.

41. *Id.* at 575-76.

ally after he ceased to be dangerous.[42] In *Addington v. Texas*[43] the Court addressed the standard of proof that the State must bear in an involuntary civil commitment proceeding. Addington had a history of threatening and assaulting people and of causing substantial property damage in mental institutions.[44] Following Addington's arrest on a charge of "assault by threat" against his mother, Addington's mother initiated proceedings for his indefinite commitment.[45] The jury found by "unequivocal and convincing evidence" that Addington was dangerous and mentally ill, and the judge committed him to a state hospital.[46] When Addington appealed the trial court decision, the Supreme Court rejected his claim that due process in civil commitment proceedings requires the criminal law standard of proof beyond a reasonable doubt.[47] The Court also concluded, however, that the preponderance of the evidence standard[48] that a trial court employs in civil cases[49] is insufficient to protect civil commitment candidates from erroneous

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42. *Id.* at 574-75 (citing *Jackson* and *McNeil*).

43. 441 U.S. 418 (1979).

44. *Id.* at 420-21.

45. *Id.* at 420.

46. *Id.* at 421.

47. The Court stated that "[i]n a criminal case . . . the interests of the defendant are of such magnitude that . . . our society imposes almost the entire risk of error upon itself. This is accomplished by requiring under the Due Process Clause that the state prove the guilt of an accused beyond a reasonable doubt." *Id.* at 423-24 (footnote omitted) (citing *In re* Winship, 397 U.S. 358 (1970)).

The Court explained that in commitment proceedings, unlike criminal prosecutions, "state power is not exercised in a punitive sense." *Addington*, 441 U.S. at 428. Courts historically have employed the beyond a reasonable doubt standard of proof only in criminal cases. *Id.* Although the Court noted that "an erroneous commitment is sometimes as undesirable as an erroneous conviction," the Court reasoned that "the layers of professional review and observation of the patient's condition, and the concern of family and friends generally will provide continuous opportunities for an erroneous commitment to be corrected." *Id.* at 428-29. In addition, the Court reasoned that erroneous release of a mentally ill individual could be worse for that individual than the erroneous release of a guilty defendant. *Id.* at 429. Finally, the Court explained that a state would have difficulty proving beyond a reasonable doubt that an individual is both mentally ill and dangerous. *Id.*

48. According to Professor McCormick, "[t]he most acceptable meaning to be given to the expression, proof by a preponderance, seems to be proof which leads the jury to find that the existence of the contested fact is more probable than its nonexistence." C. McCORMICK, McCORMICK ON EVIDENCE § 339, at 957 (3d ed. 1984).

49. The Court stated that "[s]ince society has a minimal concern with the outcome of . . . private suits [concerning monetary disputes], plaintiff's burden of proof [in civil cases] is a mere preponderance of the evidence." *Addington*, 441 U.S. at 423. Texas, however, had concluded that the preponderance standard satisfied the demands of due process in civil commitment proceedings, *id.* at 426, although the trial judge in *Addington* did not use that standard, *id.* at 421.

commitment.[50] After balancing the individual's interest in avoiding the stigma and significant deprivation of liberty that accompany indefinite commitment[51] against the state's interest in caring for and protecting its citizens,[52] the Court held that for involuntary indefinite commitment in civil proceedings due process requires, at a minimum, proof by clear and convincing evidence.[53]

2. Equal Protection

The Supreme Court decision of *Baxstrom v. Herold*[54] is the seminal equal protection case[55] addressing criminal commitment procedures. Midway through Baxstrom's sentence for committing second degree assault, a prison physician certified that he was insane, and the authorities transferred him to a state mental hospital. At the end of Baxstrom's penal sentence, state officials civilly committed him without a judicial determination that he was still insane and without jury review—rights the State affords all civil commitment candidates except those nearing the end of a prison

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50. The Court declared:

> The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state. We conclude that the individual's interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence.

Id. at 427.

51. *Id.* at 425-27.

52. *Id.* at 426. For the classic formulation of the procedural due process balancing test, see Mathews v. Eldridge, 424 U.S. 319 (1976).

53. *Addington*, 441 U.S. at 432-33. Due process does not require proof by unequivocal evidence. States, however, are free to impose that higher standard to protect against erroneous commitment. *Id.* at 432.

One year after *Addington*, the Court again considered criminal commitment procedures in Vitek v. Jones, 445 U.S. 480 (1980). Jones, a Nebraska state prisoner, alleged that his transfer to a mental hospital without receiving notice and an opportunity for a hearing violated his right to procedural due process. Despite Jones' status as an imprisoned felon, the Court held that the stigma and involuntary obligation to undergo treatment that institutionalization requires gives rise to a procedurally protected liberty interest. *Id.* at 491-94. Balancing this liberty interest against the state's interest in isolating mentally ill prisoners for treatment, the Court concluded that due process requires that the state provide sufficient procedural safeguards against the risk of error. *Id.* at 495. Before finding that the prisoner is mentally ill and eligible for transfer to a mental hospital, the state must, *inter alia*, provide written notice, a hearing with the opportunity to present evidence and cross-examine witnesses, and some form of independent assistance for indigent prisoners. *Id.*

54. 383 U.S. 107 (1966).

55. The equal protection clause provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

sentence.[56] The Supreme Court held that making a distinction between the commitment procedures for civil commitment candidates and mentally ill prisoners violated Baxstrom's equal protection rights.[57] The State argued that the classification was reasonable because mentally ill prisoners have demonstrated their need for confinement by having criminal records.[58] In rejecting this argument, the Court explained that past criminal conduct is not a valid reason to employ different procedures to determine whether an individual is mentally ill and in need of confinement.[59]

In *Humphrey v. Cady*[60] the Court denounced a similar classification scheme in a sexual deviance case. In lieu of sentencing Humphrey to the maximum prison term of one year for contributing to the delinquency of a minor, the trial court committed him indefinitely to the prison's sex deviate facility.[61] At the end of one year, the State renewed Humphrey's commitment without giving him the jury trial that is normally available to commitment candidates under Wisconsin law.[62] Relying on *Baxstrom,* the Court rejected the State's claim that criminal conviction justifies lesser procedural safeguards.[63] The Court held that the distinction between mentally ill convicted criminals and mentally ill law abiding citizens did not justify differences in commitment procedures beyond

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56. *Baxstrom,* 383 U.S. at 110.

57. *Id.*

58. *Id.* at 114.

59. The Court emphasized:

> Classification of mentally ill persons as either insane or dangerously insane of course may be a reasonable distinction for purposes of determining the type of custodial or medical care to be given, but it has no relevance whatever in the context of the opportunity to show whether a person is mentally ill *at all.* For purposes of [procedures for determining] whether a person is mentally ill and in need of institutionalization, there is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments.

Id. at 111-12 (emphasis in original). In addition, the Court added:

> A person with a past criminal record is presently entitled to a hearing on the question whether he is dangerously mentally ill so long as he is not in prison at the time civil commitment proceedings are instituted. Given this distinction, all semblance of rationality of the classification, purportedly based upon criminal propensities, disappears.

Id. at 115.

60. 405 U.S. 504 (1972).

61. *Id.* at 506. The Wisconsin Sex Crimes Act authorized commitment of an individual if his crime was "probably directly motivated by a desire for sexual excitement" and if the state established the need for treatment. *Id.* at 507 (quoting WIS. STAT. ANN. § 959.15(2) (West 1958)).

62. *Humphrey,* 405 U.S. at 508.

63. *Id.* at 508-11.

the duration of the maximum permissible sentence. The Court remanded the case for the evidentiary hearing that the district court had denied.[64]

In *Jackson v. Indiana*[65] the state court applied less stringent standards to commit Jackson and more stringent standards to release him than it applied to citizens that the state had not charged with criminal acts.[66] The Supreme Court relied on *Baxstrom* in holding that discrimination based on pending criminal charges denied Jackson equal protection under the law: "If criminal conviction and imposition of sentence are insufficient to justify less procedural and substantive protection against indefinite commitment than that generally available to all others, the mere filing of criminal charges surely cannot suffice."[67]

B. *Postacquittal Commitment in State and Lower Federal Courts*

Although the foregoing Supreme Court cases did not address commitment procedures in the context of postacquittal commitment, most states that have faced the issue have extended the Court's due process and equal protection analysis to insanity acquittees.[68] In the leading case of *Bolton v. Harris*,[69] the District of

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64. *Id.* at 510-11.

65. 406 U.S. 715 (1972).

66. *Id.* at 727-29. The Court also held that the state violated Jackson's right to due process. *See supra* text accompanying notes 26-32.

67. *Id.* at 724.

68. Allen v. Radack, 426 F. Supp. 1052, 1057 (D.S.D. 1977); *see, e.g.*, Locklear v. Hultine, 528 F. Supp. 982 (D. Kan. 1981) (state cannot require acquittee to prove fitness for release after automatic commitment; presumption of continuing insanity following acquittal is unconstitutional); *In re* Moye, 22 Cal. 3d 457, 584 P.2d 1097, 149 Cal. Rptr. 491 (1978) (en banc) (equal protection requires that burden of proof shift to the state once the underlying maximum term has expired); Wilson v. State, 259 Ind. 375, 287 N.E.2d 875 (1972) (equal protection requires that acquittees and civil commitment candidates receive the same attention for commitment and release); Williams v. Superintendent, 43 Md. App. 588, 406 A.2d 1302 (1979) (extending proof by clear and convincing evidence to insanity acquittees), *vacated sub nom. due to legislative enactment*, Coard v. State, 288 Md. 523, 419 A.2d 383 (1980); People v. McQuillan, 392 Mich. 511, 221 N.W.2d 569 (1974) (en banc) (automatic commitment of acquittees for an indefinite period is unconstitutional); State v. Fields, 77 N.J. 282, 390 A.2d 574 (1978) (procedures for release must be the same for acquittees and civil committees); State v. Krol, 68 N.J. 236, 344 A.2d 289 (1975) (state must prove that acquittee is mentally ill and dangerous following a temporary commitment for observation); *In re* Torsney, 47 N.Y.2d 667, 394 N.E.2d 262, 420 N.Y.S.2d 192 (1979) (after temporary automatic commitment for evaluation, due process and equal protection require that acquittees receive the same substantive and procedural rights as other commitment candidates); State v. Wilcox, 92 Wash. 2d 610, 600 P.2d 561 (1979) (en banc) (due process mandates that the state bear the burden of proof for commitment of acquittee); State *ex rel.* Kovach v.

Columbia charged Bolton with unauthorized use and transportation of a motor vehicle. Bolton successfully pleaded not guilty by reason of insanity. Although the District of Columbia Code provided civil commitment candidates a judicial hearing with the government bearing the burden of proving insanity,[70] the Code authorized the government to commit insanity acquittees like Bolton indefinitely without a hearing.[71] Relying on *Specht*[72] and *Baxstrom*,[73] the *Bolton* court held that all insanity acquittees, regardless of whether the defendant, the prosecutor, or the court raises the insanity plea,[74] "must be given a judicial hearing with procedures substantially similar to those in civil commitment proceedings."[75] The court explained that while an acquittal by reason of insanity is relevant evidence suggesting present mental illness and dangerousness, committing "criminal acts does not give rise to a presumption of dangerousness" sufficient to justify removing procedural safeguards when determining whether the acquittee is still mentally ill and in need of confinement.[76]

Schubert, 64 Wis. 2d 612, 219 N.W.2d 341 (1974), *cert. denied*, 419 U.S. 1130 (1975) (automatic commitment of acquittees violates equal protection and due process).

The Supreme Court in *Jackson* recognized that several stato courts have extended *Baxstrom* to cover the commitment of insanity acquittees. *Jackson*, 406 U.S. at 724. Whether the *Jackson* Court approved or merely did not disapprove of state courts relying on *Baxstrom* is unclear. *See, e.g., Allen*, 426 F. Supp. at 1057 (without disapproval); State *ex rel.* Kovach, 64 Wis. 2d at 618-19, 219 N.W.2d at 344-45 (approval).

69. 395 F.2d 642 (D.C. Cir. 1968).

70. *Bolton*, 395 F.2d at 648.

71. *Id.*

72. *Id.* at 650; *see supra* text accompanying notes 21-25.

73. *Bolton*, 395 F.2d at 649; *see supra* notes 54-59 and accompanying text.

74. *Bolton*, 395 F.2d at 649. *But see* Lynch v. Overholser, 369 U.S. 705 (1962); *supra* text accompanying note 18 (dicta indicating that automatic commitment may be appropriate when tbe defendant puts his sanity in question). The *Bolton* court noted that when the defendant raises the issue of his mental state he is not admitting present insanity—he merely is raising a reasonable doubt about past sanity. *Bolton*, 395 F.2d at 649.

75. *Bolton*, 395 F.2d at 651. The court acknowledged, however, that a reasonable application of the equal protection clause permits the government "to treat persons acquitted by reason of insanity differently from civilly committed persons to the extent that there are relevant differences between these two groups." *Id.* The court indicated that automatic commitment was permissible for a limited period in order to evaluate the acquittee's present mental condition. *Id.* At the conclusion of the examination period, however, the acquittee must receive the requisite hearing. *Id.*

76. *Id.* at 647, 651.

Congress responded to *Bolton* with dismay:

> This ruling permits dangerous criminals, particularly psychopaths, to win acquittals of serious criminal charges on grounds of insanity by raising a mere reasonable doubt as to their sanity and then to escape hospital commitment because the government is unable to prove their insanity following acquittal by a preponderance of the evidence. The result is a revolving door which, as now Chief Justice Burger explained

A number of states reject *Bolton* and refuse to extend to insanity acquittees the protection of the due process and equal protection principles that the Supreme Court has developed in other commitment contexts. In order to sanction lesser procedural safeguards for acquittees, courts in these states often rely on *Lynch*,[77] which allows automatic commitment of acquittees who raise the insanity plea themselves.[78] Courts have advanced additional reasons for rejecting *Bolton*: (1) acquittees constitute an exceptional class that already has demonstrated mental illness and dangerousness;[79] (2) a reasonable presumption exists that the acquittee will remain mentally ill and dangerous;[80] (3) courts desire to deter false insanity pleas;[81] and (4) courts hope to correct erroneous acquittals through the commitment process.[82]

C. Summary

In the last twenty years the Supreme Court has held, in varying contexts, that due process and equal protection principles pro-

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in rejecting such an outcome in *Overholser v. O'Beirne*, [302 F.2d 852, 861 (D.C. Cir. 1961)], allows defendants "to have it both ways"—to escape both conviction and commitment to a hospital.

> The Committee [of the District of Columbia] considers this result intolerable. It neither protects the public safety nor provides treatment for a defendant acquitted of a crime on grounds of insanity.

HOUSE REPORT, *supra* note 7, at 74. Congress took two steps to close the "revolving door." First, Congress amended the District of Columbia Code to make insanity an affirmative defense, with the burden of proof on the defendant to show by a preponderance of the evidence that he was insane at the time of the crime. *See* D.C. CODE ANN. § 24-301(j) (1981). Congress felt that the courts must stop acquitting defendants simply because they raise a reasonable doubt about their sanity. Second, Congress required that acquittees demonstrate fitness for release by a preponderance of the evidence. *See* Note, *supra* note 14, at 741-51 (arguing that the resulting procedure unconstitutionally re-establishes indefinite mandatory commitment).

77. *See supra* text accompanying notes 15-18.

78. *See, e.g., In re* Downing, 103 Idaho 689, 695, 652 P.2d 193, 199 (1982) (acquittee bears burden of establishing right to release following automatic commitment); *In re* Jones, 228 Kan. 90, 106-07, 612 P.2d 1211, 1225-26 (1980) (mandatory commitment).

79. *See, e.g.*, Chase v. Kearns, 278 A.2d 132, 138 (Me. 1971) (automatic commitment).

80. *See, e.g.*, People v. Chavez, ___ Colo. ___, ___, 629 P.2d 1040, 1047-48 (1981) (en banc) (burden of proof on acquittee at release hearing following automatic commitment); Clark v. State, 245 Ga. 629, 644, 266 S.E.2d 466, 476 (1980) (acquittee bears burden of establishing fitness for release following commitment for period of evaluation). The *Clark* court noted that the presumption against the defendant was valid because the defendant established his insanity by a preponderance of the evidence at his acquittal proceeding. *Id.* at 645, 266 S.E.2d at 477.

81. *See, e.g.*, Warren v. Harvey, 932 F.2d 925, 932 (2d Cir.) (commitment by preponderance of the evidence), *cert. denied*, 449 U.S. 902 (1980).

82. *See, e.g., Warren*, at 931; *see also infra* note 120 (discussion of the "cleanup doctrine").

vide individuals with certain minimum procedural and substantive safeguards prior to involuntary commitment to a mental institution. None of these cases, however, directly address the commitment of insanity acquittees, and state and lower federal courts have divided on whether to extend these safeguards to insanity acquittees. *Jones v. United States*[83] provided the Court with the opportunity to clarify the constitutional implications of automatically and indefinitely committing individuals found not guilty by reason of insanity.

III. Different Treatment for Insanity Acquittees is Permissible: *Jones v. United States*

In *Jones v. United States* defendant Jones successfully asserted the insanity defense to a charge of attempting to steal a coat from a department store, a misdemeanor carrying a one year maximum prison sentence.[84] The trial court automatically committed Jones to a mental institution, in accordance with the District of Columbia statutory scheme.[85] At subsequent release hearings,[86] Jones failed to carry the burden of showing that he was no longer mentally ill or dangerous. Still in a mental hospital at the expiration of the maximum prison term, Jones challenged his continued confinement. He contended that at the expiration of the term he was entitled to release or civil commitment proceedings, with the Government proving the need for continued confinement by clear and convincing evidence.[87]

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83. 103 S. Ct. 3043 (1983).

84. *Id.* at 3047.

85. *Id.* The District of Columbia Code provides that when a criminal defendant pleads not guilty by reason of insanity and establishes his insanity by a preponderance of the evidence, D. C. Code Ann. § 24-301(j) (1981), the court automatically must commit the acquittee to a mental hospital. *Id.* § 24-301(d)(1).

86. Within 50 days of a defendant's confinement he is entitled to a judicial release hearing. *Id.* § 24-301(d)(2)(A). To obtain a release, the defendant must prove by a preponderance of the evidence that he is no longer mentally ill or dangerous to himself or others. *Id.* § 24-301(d)(2)(B); *see* Jones v. United States, 432 A.2d 364, 372 n.16 (D.C. Cir. 1981) (en banc), *aff'd*, 103 S. Ct. 3043 (1983).

87. *Jones*, 103 S. Ct. at 3047; *see* D.C. Code Ann. § 21-545(b) (1981); *see also In re* Nelson, 408 A.2d 1233 (D.C. Cir. 1979).

The District of Columbia Superior Court rejected Jones' challenge, and he appealed to the District of Columbia Court of Appeals. *Jones*, 103 S. Ct. at 3047. The court of appeals initially denied relief. Jones v. United States, 396 A.2d 183 (1978). On rehearing, however, the court reversed and held that the "partially punitive rationale for the criminal commitment scheme" coupled with equal protection principles, entitled Jones to release or recommitment through civil proceedings when the maximum prison term expired. Jones v. United States, 411 A.2d 624, 630 (1980). Assembling en banc, the court heard the case a third time

The Court[88] initially addressed the question whether acquittal by reason of insanity justified automatically committing Jones. Answering the question in the affirmative, the Court noted that a successful plea of insanity establishes that the acquittee suffered from a past mental illness which caused him to behave criminally.[89] The Court indicated that Congress did not act unreasonably, and, therefore, acted constitutionally in determining that "insanity, once established, should be presumed to continue . . . ."[90] The Court also concluded that a criminal act sufficiently establishes the requisite dangerousness, even though the act may amount to no more than a nonviolent property crime.[91] The Court rejected Jones' argument that because the acquittal itself would have evidentiary value in a civil commitment proceeding, the Government has no legitimate reason for automatic commitment. A postacquit-

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and reversed again. Jones v. United States, 432 A.2d 364 (1981)(en banc). The court determined (1) that the length of the maximum prison sentence had no bearing on proper treatment for the acquittee or on protecting the public, *id.* at 369-70, (2) that commitment of acquittees is not punitive, *id.* at 369-71, and (3) that a presumption of continuing mental illness is reasonable, *id.* at 374. The court, therefore, held that the district court's commitment scheme did not violate the equal protection clause. *Id.* at 370-76.

In the Supreme Court, Jones framed his argument in terms of due process rather than equal protection, but the parties decided that either doctrine would lead to the same result. The Court agreed: "[I]f the Due Process Clause does not require that an insanity acquittee be given the particular procedural safeguards provided in a civil-commitment hearing . . ., then there necessarily is a rational basis for equal protection purposes for distinguishing between civil commitment and commitment of insanity acquittees." 103 S. Ct. at 3048 n.10. Jones relied on *Addington* in contending that under due process his criminal trial was insufficient to justify indefinite commitment and that the Government should bear the burden of proving the need for commitment by clear and convincing evidence. *Id.* at 3048; *see supra* notes 43-53 and accompanying text (discussion of *Addington*). Jones argued that his commitment also violated his right to due process because an acquittal by reason of insanity is a finding of past, not present mental illness, and because the finding of past mental illness requires proof by only a preponderance of the evidence. *Jones*, 103 S. Ct. at 3048. Finally, Jones contended that the underlying government interest in automatic commitment "is to ensure that insanity acquittees do not escape confinement entirely," a partially punitive interest that "can justify commitment at most for a period equal to the maximum prison sentence the acquittee could have received if convicted." *Id.* at 3048-49. For an account of the oral argument at the Supreme Court, see *U.S. Supreme Court Hears Insanity Acquittee's Release Argument*, 6 A.B.A. SEC MENTAL DISABILITY L. REP. 425 (Nov.-Dec. 1982).

88. Justice Powell authored the opinion of the Court, in which Chief Justice Burger and Justices O'Counor, Rehnquist, and White joined.

89. 103 S. Ct. at 3049. The Court distinguished Jackson v. Indiana, 406 U.S. 715 (1972), *see supra* text accompanying notes 26-32, in which the state had made no affirmative determination that Jackson had, in fact, committed a crime. *Jones*, 103 S. Ct. 3049 n.12.

90. 103 S. Ct. at 3049-50 (quoting S. REP. No. 1170, 84th Cong., 1st Sess. 13 (1955)).

91. 103 S. Ct. at 3049-50. The Court reasoned that crimes against property may lead to violence and danger "from the efforts of the criminal to escape or the victim to protect property or the police to apprehend the fleeing criminal." *Id.* at 3050 n.14.

tal hearing, the Court declared, would duplicate much of the criminal trial and would place a great burden on the Government.[92] Finally, the Court noted that the fifty day release hearing ensures prompt release if the acquittee has recovered.[93]

The Court next rejected Jones' contention that prior to indefinite commitment due process requires that acquittees receive the *Addington* clear and convincing evidence standard of proof for civil committees, rather than the preponderance standard that Congress established for acquittal by reason of insanity.[94] The Court determined that "important differences" exist between insanity acquittees and civil commitment candidates which diminish the concerns that the *Addington* standard of proof seeks to protect. An acquittee, the Court declared, faces less risk of an erroneous commitment than a civil committee because the acquittee himself asserted the insanity defense.[95] The Court reasoned further that the verdict of not guilty by reason of insanity stigmatizes the acquittee, and thus mitigates the potential harm of any additional stigma that might accompany commitment to a mental institution.[96] Proof that the acquittee committed a criminal act, explained the Court, precludes the possibility that the government confined the acquittee to a mental institution for nothing more than "idiosyncratic behavior," a possibility that concerned the *Addington* Court.[97]

Finally, the Court addressed the issue whether the length of the criminal sentence that the acquittee would have received provides a constitutional limit on the duration of his institutional commitment. Citing *Jackson*, the Court noted the due process requirement that the duration of commitment relate reasonably to the purpose of the commitment.[98] The Court explained that the purpose of postacquittal commitment, like the purpose of civil commitment, is to aid the individual and protect society, not to

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92. *Id.* at 3050.

93. *Id.*; *see* D.C. CODE ANN. § 24-301(d)(2) (1981); *supra* note 86.

94. *Jones*, 103 S. Ct. at 3051. *See generally supra* text accompanying notes 51-53 (*Addington* standard of proof); *supra* note 76 (congressional reaction to *Bolton*).

95. *Jones*, 103 S. Ct. at 3051.

96. *Id.* at 3051 n.16.

97. *Id.* at 3051 (quoting Addington v. Texas, 441 U.S. 418, 427 (1979)). The *Jones* Court acknowledged that if due process requires proof by clear and convincing evidence prior to commitment, Congress might respond by requiring that the defendant prove his insanity by a correspondingly high standard to gain acquittal. *Id.* at 3051 n.17. The Court indicated that this response would be constitutional. *Id.*

98. *Id.* at 3051.

punish the acquittee for his underlying offense.[99] Reasoning that the length of the criminal sentence which the acquittee would have received is unrelated to determining whether the acquittee is still in need of confinement, the Court concluded that the length of the criminal sentence is irrelevant to the duration of the acquittee's commitment. When a criminal defendant establishes his past insanity by a preponderance of the evidence and the trial court acquits him, the court may commit the defendant automatically and indefinitely on the basis of the acquittal alone.[100] The Constitution, held the Court, does not require release or recommitment through civil commitment procedures.[101]

Justice Breunan, in the lead dissent,[102] argued that neither Supreme Court precedent nor scientific research supports a presumption of present mental illness and dangerousness based on past mental illness and criminal activity. Justice Brennan contended that governmental and individual interests are substantially similar in both the civil and the criminal commitment context. The Constitution, according to Justice Brennan, thus prohibits indefinite commitment of insanity acquittees without proof by clear and convincing evidence.[103]

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99. *Id.* at 3051-52.

100. *Id.* at 3052.

101. The Court concluded:

> This holding accords with the widely and reasonably held view that insanity acquittees constitute a special class that should be treated differently from other candidates for commitment. We have observed before that "[w]hen Congress undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation . . . ."

Id. at 3052-53 (quoting Marshall v. United States, 414 U.S. 417, 427 (1974)) (footnote omitted).

102. Justices Marshall and Blackmun joined in Justice Brennan's dissent.

103. *Jones*, 103 S. Ct. at 3053-61 (Breunan, J., dissenting). Justice Breunan stated that "[a]n acquittal by reason of insanity of a single, nonviolent misdemeanor is not a constitutionally adequate substitute for the due process protections of *Addington* and *O'Connor, i.e.*, proof by clear and convincing evidence of present mental illness or dangerousness, with the Government bearing the burden of persuasion." *Id.* at 3056 (Brennan, J., dissenting). Justice Bremian further contended that the Court's "departures from *Addington* at most support deferring *Addington's* due process protections . . . for a limited period only, not indefinitely." *Id.* at 3061 (Brennan, J., dissenting). At the expiration of the one year maximum term for attempted shoplifting, the state should have committed Jones under the standards of *O'Connor* and *Addington*. *Id.* (Brennan, J., dissenting).

Justice Stevens also submitted a dissenting opinion. He concluded that although the Constitution permits automatic commitment of insanity acquittees, the Government should have to demonstrate the need for continued confinement by clear and convincing evidence at the expiration of the underlying prison term. *Id.* at 3061-62 (Stevens, J., dissenting).

IV. ANALYSIS

Several courts have followed *Jones* and denied insanity acquittees the procedural safeguards that courts afford civil commitment candidates.[104] The fundamental issue here is the standard of proof that the court should require in order to confine an acquittee: must the state demonstrate the acquittee's need for commitment by clear and convincing evidence, or may the state commit the acquittee based upon a mere preponderance of the evidence? The *Jones* Court sanctioned use of the preponderance of the evidence standard for the indefinite commitment of insanity acquittees. Due process and equal protection principles, however, mandate that the state should bear the burden of proof by clear and convincing evidence at some point prior to the indefinite commitment of the acquittee. The state's failure to carry this burden entitles the acquittee to release or civil recommitment at the expiration of the underlying prison term. This part of the Recent Development discusses the proper standard of proof that a court should require for commitment, the relevance of the maximum prison term, and the importance of the standard of proof for acquittal in criminal trials.

A. Determining the Proper Standard of Proof

The standard of proof signifies the relative importance of the determination at hand, indicates the degree of confidence that the factfinder should have in his conclusion, and allocates between the litigants the risk of an erroneous decision.[105] Regardless of the way a standard of proof actually affects decisionmaking, at a minimum,

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104. *See, e.g.*, Hickey v. Morris, 722 F.2d 543 (9th Cir. 1983) (constitutional to commit acquittee when state shows need hy a preponderance of the evidence); Lee v. Pavkovic, 119 Ill. App. 3d 439, ____, 456 N.E.2d 621, 627 (1983) (acquittee not entitled to rehearing upon expiration of initial commitment period); People v. Gamble, 117 Ill. App. 3d 543, ____, 453 N.E.2d 839, 841-42 (1983) (lesser safeguards justified because acquittees constitute a special class); *In re* A.L.U., 192 N.J. Super. 480, 485, 471 A.2d 63, 65 (1984) (preponderance of the evidence standard held constitutional in light of *Jones*); State v. Jacoh, 669 P.2d 865, 869 (Utah 1983) (*Addington, O'Connor,* and *Jackson* cast "doubt on the legality of different standards of commitment and release in connection with civil and criminal proceedings, but the *Jones* case explicitly approves some differences as to persons found not guilty by reason of insanity."). In addition, the Supreme Court, in light of *Jones*, vacated a major Fifth Circuit case which held that the Constitution requires clear and convincing proof prior to commitment of acquittees, and that the presumption of continued mental illness is unconstitutional. Ledhetter v. Edwards, 103 S. Ct. 3565 (1983), *vacating,* Benham v. Edwards, 678 F.2d 511 (5th Cir. 1982).

105. Addington v. Texas, 441 U.S. 418, 423 (1979) (citing *In re* Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)).

" 'the standard of proof reflects the value society places on individual liberty.' "[106] In the commitment context, the standard of proof is particularly important for its practical as well as its symbolic effect because "the allocation of the burden of proof can be outcome determinative" when the factfinder must rely on ambiguous psychiatric testimony.[107] This section analyzes the standard of proof in light of due process and equal protection principles.

1. Due Process

As the Court recognized in *Jones*, commitment of acquittees implicates a liberty interest that triggers due process concerns.[108] The *Jones* Court, using the *Addington* balancing test for civil committees,[109] properly addressed the due process question, but erred in its application. First, the relevant considerations in the civil commitment context are not, as the Court claimed, readily distinguishable from the interests in postacquittal commitment. Second, the Court's imposition of a greater risk of error on the acquittee through the preponderance standard is unjustified.

The insanity acquittee's interest in avoiding erroneous commitment should require proof by clear and convincing evidence that the acquittee is presently mentally ill and dangerous.[110] Despite the Court's assertion to the contrary, committing an insanity acquittee significantly stigmatizes him.[111] In addition, the acquittee and the civil commitment candidate have the same physical liberty interest—both face an egregious loss of liberty upon erroneous

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106. *Addington*, 441 U.S. at 424-25 (quoting Tippett v. Maryland, 436 F.2d 1153, 1166 (4th Cir. 1971)).

107. Waite v. Jacobs, 475 F.2d 392, 395 (D.C. Cir. 1973) (citing United States v. Leazer, 460 F.2d 864, 866 (D.C. Cir. 1972)) (Psychiatric testimony is "often unclear, sometimes woefully muddled.").

108. *Jones*, 103 S. Ct. at 3048.

109. *See supra* text accompanying notes 51-53.

110. As the Court noted in *Addington*, the mentally ill individual also has an interest in avoiding an erroneous decision not to commit him. 441 U.S. at 429. The Court determined, however, that the clear and convincing evidence standard adequately protects the "genuinely mentally ill person" from erroneous release. *Id.* at 429, 431-32.

111. *See supra* text accompanying note 96 (discussing Court's reasoning in *Jones*).

While the acquittee has suffered from mental illness, the acquittal only indicates past, not present, mental illness. A determination that the acquittee presently is mentally ill and dangerous, as opposed to a finding that he has recovered and is presently sane, obviously "can have a very significant impact on the individual." *Addington*, 441 U.S. at 426; *see* Note, *Commitment Following an Insanity Acquittal*, *supra* note 8, at 616-17 & n.54. *But see* Note, *Rules for an Exceptional Class*, *supra* note 8, at 305 (additioual stigma is minimal).

commitment to a mental institution.[112] The *Jones* Court concluded, however, that the acquittee had a lesser interest in the higher standard of proof than a civil commitment candidate because the defendant in *Jones* personally placed his sanity in issue and because proof of the criminal act reduces the risk of committing the acquittee for "idiosyncratic behavior."[113] This distinction is without merit. If, under the due process clause, courts must require proof by clear and convincing evidence to institutionalize civil commitment candidates who have engaged in prior criminal activity and already have demonstrated their insanity,[114] due process should provide insanity acquittees with the same protection. Prior mental illness and criminal behavior are strong evidence of the need for commitment, but they do not diminish the acquittee's interest in ensuring that the state does not commit him erroneously.[115]

As the *Jones* Court acknowledged, the government's interest in committing insanity acquittees and civil commitment candidates is identical—treating and caring for the individual and protecting society.[116] The *Addington* Court likewise recognized this interest as legitimate under the states' police and *parens patriae* powers.[117] Noting that a trial court typically reserves the preponderance standard for damages cases in which society only has minimal concern with the outcome,[118] the Court in *Addington* held that for civil commitment cases due process requires, at a minimum, proof by clear and convincing evidence.[119] The *Jones* Court, however, did not list any additional governmental interests that might

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112. *See* Note, *Commitment Following an Insanity Acquittal, supra* note 8, at 616-17 & n.54; Note, *Rules for an Exceptional Class, supra* note 8, at 305.

In addition, while a prisoner has a significant liberty interest in avoiding erroneous commitment to a mental hospital because of the stigma and the obligation to undergo involuntary psychiatric treatment, *see* Vitek v. Jones, 445 U.S. 480 (1980); *supra* note 53, that interest is even more vital when a court adjudges the individual not criminally responsible for his acts. *See* Note, *Rules for an Exceptional Class, supra* note 8, at 306.

113. *See supra* text accompanying notes 95-97.

114. *See* Addington v. Texas, 441 U.S. 418 (1979); *supra* text accompanying notes 43-53.

115. *See* Bolton v. Harris, 395 F.2d 642, 651 (D.C. Cir. 1968); Note, *Commitment Following an Insanity Acquittal, supra* note 8, at 615.

116. *See supra* text accompanying note 99.

117. *Addington*, 441 U.S. at 426.

118. *Id.* at 423.

119. In civil commitment cases courts use a clear and convincing evidence standard because the "interests at stake . . . are deemed to be more substantial than mere loss of money . . . ." *Id.* at 424.

justify a lower standard of proof for insanity acquittees.[120] At some point prior to indefinite commitment, therefore, due process should require that the government prove mental illness and dangerousness by clear and convincing evidence.[121]

The possibility exists that the preponderance standard actually may disserve the state interest in protecting society and treating the mentally ill because the lower standard may discourage legitimate insanity pleas.[122] In addition, as the *Addington* Court

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120. Conceivably the Government could have asserted that it had an interest in avoiding the burden of meeting the clear and convincing evidence standard. This argument carries little weight because of the magnitude of the acquittee's interest, and because the government must meet the burden in civil cases in which it does not have the benefit of evidence of past mental illness and a criminal act that flows from the acquittal.

Some courts have indicated that the state's interest in discouraging false pleas of insanity justifies the preponderance standard. *See, e.g.*, Warren v. Harvey, 632 F.2d 925, 932 (2d Cir.), *cert. denied*, 449 U.S. 902 (1980). Other courts and commentators criticize this approach. *See, e.g.*, Benham v. Edwards, 678 F.2d 511, 524-25 (5th Cir. 1982) (preponderance standard has punitive overtones), *vacated sub nom.* Ledbetter v. Benham, 103 S. Ct. 3565 (1983); Bolton v. Harris, 395 F.2d 642, 649 n.35 (D.C. Cir. 1968) (court shall not deny rights to all acquittees out of fear of abuse by a few); Note, *Commitment Following an Insanity Acquittal*, *supra* note 8, at 619 (not clear that lower standard of proof for commitment will deter false pleas); Note, *Rules for an Exceptional Class*, *supra* note 8, at 307-08 (preponderance standard may discourage valid pleas).

Another justification that courts have advanced for the preponderance standard is that it helps remedy mistakes in the criminal trial. *See* Warren v. Harvey, 632 F.2d at 931 ("While the acquittee . . . may be deprived erroneously . . . in the *commitment* process, the liberty he loses is likely to be liberty which society mistakenly had permitted him to retain in the *criminal* process." (emphasis in original)). One commentator terms this asserted state interest the "cleanup doctrine"—a mechanism for inappropriately ensuring that acquittees do not escape some form of punishment. Note, *Commitment Following an Insanity Acquittal*, *supra* note 8, at 617-25; *see also Benham*, 678 F.2d at 524 (preponderance standard represents "attempt to punish an 'erroneously' acquitted insanity acquittee"); Jackson v. Foti, 670 F.2d 516, 522 (5th Cir. 1982) ("Mental institutions exist for the benefit of those who can be helped by care and treatment or who require custodial attention. They are not substitutes for prisons.").

121. *See Benham*, 678 F.2d at 521-25; Deal v. State, ___ Ind. App. ___, ___, 446 N.E.2d 32, 34 (1983); Williams v. Superintendent, 43 Md. App. 588, 593-99, 406 A.2d 1302, 1306-08 (1979), *vacated sub nom. due to legislative enactment*, Coard v. State, 288 Md. 523, 419 A.2d 383 (1980); People v. Escobar, 90 A.D.2d 322, 329, 456 N.Y.S.2d 766, 770 (1982).

122. *See In re* Moye, 22 Cal. 3d 457, 468, 584 P.2d 1097, 1104, 149 Cal. Rptr. 491, 498 (1978) (en banc); Morris, *supra* note 1, at 859. In a jurisdiction that uses the preponderance standard to commit acquittees, the criminal defendant who was actually insane at the time of the crime faces a difficult tactical choice. If he pleads insanity and the court acquits him, he may suffer erroneous commitment for the rest of his life because he and society share equally the risk of error. If the acquittee does not plead insanity but the prosecution successfully raises the issue, he has a right to civil commitment procedures. *See* Lynch v. Overholser, 369 U.S. 705, 719-20 (1962). Finally, if no one advances the insanity defense, the acquittee faces the risk of a prison sentence. Defendants who are not criminally responsible for minor crimes because of insanity, therefore, have great incentive not to plead insanity. Courts should not reduce constitutional rights to a simple matter of trial tactics.

recognized, "the preponderance standard creates the risk of increasing the number of individuals erroneously committed [and makes it] unclear to what extent, if any, the state's interests are furthered" by erroneously committing sane individuals to mental hospitals.[123] The preponderance standard thus does not comport with the reasonable relation that due process requires between involuntary commitment and the government's purpose for that commitment.[124]

2. Equal Protection

The parties in *Jones* focused their attention on the due process clause, apparently concluding that equal protection analysis would yield the same result.[125] The Court, therefore, did not address the question of the appropriate level of scrutiny in an equal protection challenge to an unfair commitment procedure.[126] In

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123. *Addington*, 441 U.S. at 426.

124. *See* Jackson v. Indiana, 406 U.S. 715, 738 (1972); *supra* text accompanying notes 26-32.

Individuals adjudged not responsible for their acts should not be "taken from their families and deprived of their constitutionally protected liberty under the same standard of proof applicable to run-of-the-mill automobile negligence actions." Murel v. Baltimore City Criminal Court, 407 U.S. 355, 359 (1972) (Douglas, J., dissenting)(footnote omitted).

125. *See supra* note 87.

126. The threshold issue in equal protection cases is determining the appropriate level of judicial scrutiny. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973); Hickey v. Morris, 722 F.2d 543, 545 (9th Cir. 1983). The Supreme Court has articulated three different levels of review: strict scrutiny, the rational basis test, and intermediate review.

Courts apply strict scrutiny analysis when the unequal treatment concerns a suspect class or implicates a fundamental interest. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 524-25 (1978); Note, *Mental Illness: A Suspect Classification?*, 83 YALE L.J. 1237, 1239-40 (1974). To pass the strict scrutiny test, a state must demonstrate that its classification scheme serves a compelling state interest and that the unequal treatment furthers this interest through necessary and carefully defined means. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra*. Professor Gunther observes that strict scrutiny is " 'strict' in theory and fatal in fact." Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

Traditionally the Court employs the rational basis test when strict scrutiny is inappropriate. For the rational basis test, the classification need "bear [only] some rational relationship to legitimate state purposes." *Rodriguez*, 411 U.S. at 40; *see also* Williamson v. Lee Optical Co., 348 U.S. 483 (1955). Courts that use the rational basis test typically defer to the legislature and rubber-stamp the classification scheme—"minimal scrutiny in theory and virtually none in fact." Gunther, *supra*, at 8; *see* Note, *Rules for an Exceptional Class*, *supra* note 8, at 293.

Recent decisions suggest that the Court may apply the rational basis test with " 'a sharper focus' " to invalidate some classifications. *Hickey*, 722 F.2d at 546 (quoting Craig v. Boren, 429 U.S. 190, 210-11 n.* (1976) (Powell, J., concurring) (classification by gender for

dicta, however, the Court suggested that classifications which distinguish between the commitment procedures for civil committees and insanity acquittees need only receive minimal scrutiny—the rational basis test.[127] While the parties in *Jones* did not frame the issue in equal protection terms,[128] a thorough discussion of the insanity acquittee's rights in the commitment context requires a more detailed examination of the relevant equal protection principles.

Although courts usually employ the rational basis test for matters such as economic legislation rather than individual rights,[129] courts occasionally have applied the rational basis test in the commitment context.[130] Because of the liberty interest at stake in commitment cases, however, several courts and commentators have argued that strict review is appropriate.[131] In addition, the Supreme Court has cited *Baxstrom* to justify a strict level of review outside the commitment context.[132] The Court, however, never has used strict scrutiny in a commitment case,[133] and the Court is unlikely to do so given its present philosophy. Because of the importance of the individual's right to liberty and because the Court invalidated the classifications in *Baxstrom, Humphrey,* and *Jackson* using the normally deferential language of the rational basis test,[134] the

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sale of beer)). *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra*, at 109-12, 525-27 (Supp. 1982); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1082-92 (1978). Under this intermediate level of review, the "classification must be substantially related to the achievement of important governmental objectives." *Hickey*, 722 F.2d at 546 (citing *Craig*, 429 U.S. at 197).

127. Jones v. United States, 103 S. Ct. 3043, 3048 n.10 (1983); *see Hickey*, 722 F.2d at 546.

128. *See supra* note 87.

129. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 126, at 524; *see, e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483 (1955) (economic regulation of opticians); Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949) (regulation of advertisements on business vehicles).

130. *See, e.g.*, People v. Chavez, ___ Colo. ___, 629 P.2d 1040 (1981) (en banc).

131. *See, e.g., In re* Moye, 22 Cal. 3d 457, 465, 584 P.2d 1097, 1102-03, 149 Cal. Rptr. 491, 496-97 (1978) (en banc) (personal liberty at stake); People v. McQuillan, 392 Mich. 511, 533 n.4, 221 N.W.2d 569, 579 n.4 (1974) (en banc) (liberty); Comment, *Constitutional Standards for Release of the Civilly Committed and Not Guilty by Reason of Insanity: A Strict Scrutiny Analysis*, 20 ARIZ. L. REV. 233 (1978); Note, *supra* note 126. *But see* People v. Chavez, ___ Colo. at ___, 629 P.2d at 1051-52 (no suspect class; insanity acquittee has no fundamental right to liberty); Note, *Rules for an Exceptional Class, supra* note 8, at 291-92.

132. *See, e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966) (poll tax impinges on fundamental right); *supra* text accompanying notes 54-67 (discussing *Baxstrom* and equal protection concerns of committees).

133. *Hickey*, 722 F.2d at 545-46.

134. *See id.* at 546; *see, e.g.*, Baxstrom v. Herold, 383 U.S. 107, 111 (1966) (Equal protection requires "that a distinction made have some relevance to the purpose for which the classification is made.").

Court at a minimum should apply the intermediate level of scrutiny for equal protection challenges to classifications of commitment procedures.[135]

The governmental interest in the involuntary commitment of individuals—treating and caring for the mentally ill and protecting society—is unquestionably legitimate,[136] undoubtedly important,[137] and in all probability even compelling. The fundamental question is to what extent the means employed by the states—the lower standard of proof for commitment of insanity acquittees—advance the governmental goal. Courts frequently explain the rational[138] or substantial[139] relationship between lesser procedural safeguards for acquittees and the state's interest in caring for the individual and protecting society on the grounds that the insanity acquittee is a member of an exceptional class, and that the state already bas proved beyond a reasonable doubt that the acquittee has committed at least one dangerous act.[140] Only a tenuous relationship, however, exists between a lower standard of proof, and providing protection for society and treatment for the mentally ill. The preponderance standard actually may disserve the state's interest.[141] Additionally, studies indicate that insanity acquittees are not significantly more dangerous than their civil counterparts.[142] Although individuals acquitted of violent crimes because of insanity may have demonstrated a greater need for confinement, "[p]roportionately . . . such offenders are relatively rare . . . and the overall policy concerning the treatment of the criminally insane should not be based on the behavior of this small subgroup."[143]

Classifying acquittees as a group in greater need of confinement than civil committees presents problems with the classification scheme itself. The classification scheme is underinclusive be-

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135. *See, e.g., Hickey,* 722 F.2d at 546 (approving intermediate level of scrutiny); *see also* Note, *Rules for an Exceptional Class, supra* note 8, at 292-94.

136. *See Addington,* 441 U.S. at 426.

137. *See Hickey,* 722 F.2d at 547.

138. *See, e.g., Chavez,* ___ Colo. at ___, 629 P.2d at 1052-54.

139. *See, e.g., Hickey,* 722 F.2d at 547.

140. Harris v. Ballone, 681 F.2d 225, 228 (4th Cir. 1982); *see also* Chase v. Kearns, 278 A.2d 132, 138 (Me. 1971).

141. *See supra* notes 122-23 and accompanying text.

142. *See* Note, *Commitment and Release of Persons Found Not Guilty by Reason of Insanity: A Georgia Perspective,* 15 GA. L. REV. 1065, 1079 (1981).

143. T. THORNBERRY & J. JACOBY, THE CRIMINALLY INSANE 210 (1979). *But see* Note, *Rules for an Exceptional Class, supra* note 8, at 292 n.60, 295 n.73 (distinguishing procedural safeguards for violent and nonviolent acquittees).

cause civil commitment candidates, like the individual in *Addington*,[144] are more dangerous than many insanity acquittees. The classification scheme is overinclusive because insanity acquittees, like the defendant in *Jones*, are not as dangerous as many civil commitment candidates.[145] Admittedly, the acquittal by reason of insanity indicates that insanity acquittees, unlike most civil commitment candidates, acted criminally because of a past mental illness. The essential difference between the two groups, however, is that the state happened to intercept the civil commitment candidate before he committed a crime, or simply that the prosecutor elected to institute commitment proceedings rather than press criminal charges.[146]

Although some courts have determined that providing separate procedures for acquittees does not satisfy even the rational basis test,[147] the propriety of separate procedures turns on the level of scrutiny that the court applies. Under the rational basis test, the court usually will sustain the classification if it arguably bears a rational relationship to a governmental objective, even if the court disagrees with the legislature's belief that insanity acquittees constitute an exceptional class.[148] The classification should fail the intermediate level of review, however, because the acquittee is not a member of an exceptional class, because the preponderance standard may hinder the state's interest, and because the classification is not substantially related to a governmental interest.[149]

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144. *See supra* text accompanying notes 44-45.

145. *See Benham*, 678 F.2d at 526.

146. *See* Note, *Standards of Mental Illness in the Insanity Defense and Police Power Commitments: A Proposal for a Uniform Standard*, 60 MINN. L. REV. 1289, 1299-1301 (1976); Note, *The Validity of the Dangerousness Standard for Recommitment of Persons Found Not Guilty by Reason of Mental Disease or Defect*, 1980 WIS. L. REV. 391, 404 n.82 (1980). Additionally, the policeman is just as likely to take the mentally ill person to a mental hospital as to the police station. *See* A. GOLDSTEIN, THE INSANITY DEFENSE 172 (1967). The policeman's decision thus may have a direct impact upon whether the individual faces commitment as a civil commitment candidate or as an insanity acquittee.

147. *See, e.g.*, People v. McQuillan, 392 Mich. 511, 533 n.4, 221 N.W.2d 569, 579 n.4 (1974) (en banc); State v. Krol, 68 N.J. 236, 253-55, 344 A.2d 289, 298-99 (1975).

148. *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note at 126, at 524 (discussion of the rational basis test). The Court's assertion in *Jones* that the legislature need not rely on empirical studies to determine whether the acquittee actually is a member of an exceptional class, 103 S. Ct. at 3049-50 n.13, further demonstrates that the Court may believe that minimal scrutiny is appropriate in the commitment context.

149. *See generally* German & Singer, *supra* note 5, at 1012 n.4; *supra* note 126 (discussing the different levels of review in equal protection cases). *But see Hickey*, 722 F.2d at 547.

Finally, the lower standard of proof for insanity acquittees also fails to meet the equal protection standards of *Baxstrom* and *Jackson*. *Jackson* held that discrimination based on pending criminal charges violates the equal protection clause.[150] *Baxstrom* held that even an imprisoned felon has a right to civil commitment procedures.[151] The individual found not guilty of a criminal charge by reason of insanity is "conceptually between the petitioners in *Baxstrom* and *Jackson*,"[152] and, therefore, deserves the same procedural rights as a civil commitment candidate.[153] Although the *Jones* Court did not address the issue, equal protection clearly requires that insanity acquittees receive the same standard of proof as civil commitment candidates—proof by clear and convincing evidence—before the state indefinitely commits acquittees.[154]

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150. *See supra* text accompanying notes 65-67.

151. *See supra* notes 54-59 and accompanying text.

152. *In re* Torsney, 47 N.Y.2d 667, 676, 394 N.E.2d 262, 267, 420 N.Y.S.2d 192, 197 (1979).

153. *Id.* Arguably, *Baxstrom* and *Jackson* are distinguishable because they do not concern a judicial determination that the criminal conduct was due to mental illness; some commentators justify the preponderance standard on precisely this ground. *See* Note, *Stopping the Revolving Door: Adopting a Rational System for the Insanity Defense*, 8 HOFSTRA L. REV. 973, 1006-14 (1980). This argument should carry little weight, however, because the insanity acquittee has at least recovered to the point of being competent to stand trial; the civil commitment candidate is not necessarily that competent. *See* Comment, *supra* note 131, at 273. The irrational possibility thus exists that the state is less likely to commit a civil commitment candidate who would be incompetent to stand trial than an insanity acquittee who has at least recovered enough to regain his competency.

154. Assuming that due process and equal protection entitle the insanity acquittee to proof by clear and convincing evidence at some point prior to indefinite commitment, another question arises: How long may the state hold the acquittee on the basis of the acquittal before it must justify committing him by clear and convincing evidence? Automatically committing the acquittee for a limited evaluation period is justifiable. Commentators have criticized this approach, typically on the ground that the observation period for acquittees is excessive in comparison with the short period that the state holds civil commitment candidates for observation. *See, e.g.*, German & Singer, *supra* note 5, at 1027-31; Morris *supra* note 1, at 877-79. Many courts, however, have determined that while automatic indefinite commitment without a hearing is inappropriate, an observation period of limited duration to assess the acquittee's present mental condition complies with due process and equal protection. *See, e.g.*, Bolton v. Harris, 395 F.2d 642, 651 (D.C. Cir. 1968) (length of permissible examination period may vary with each case); Clark v. State, 245 Ga. 629, 641, 266 S.E.2d 466, 475 (1980) (thirty day evaluation period is constitutionally permissible); People v. McQuillan, 392 Mich. 511, 525-29, 221 N.W.2d 569, 575-77 (1974) (en banc) (sixty days is constitutional); State v. Krol, 68 N.J. 236, 256, 344 A.2d 289, 300 (1975) (sixty days is permissible for observation and examination); *In re* Torsney, 47 N.Y.2d 667, 672-75, 394 N.E.2d 262, 264-66, 420 N.Y.S.2d 192, 194-96 (1979) (Beyond automatic commitment "for a reasonable period to [evaluate the acquittee's] present sanity, justification for distinctions in treatment between [civil commitment candidates and insanity acquittees] draws impermissibly thin."); *cf.* McNeil v. Director, Patuxent Inst., 407 U.S. 245 (1972) (lesser procedural safeguards are permissible for a short-term commitment with a limited purpose).

B. Relevance of the Maximum Prison Term

The *Jones* Court stated correctly that the insanity acquittee's possible maximum prison sentence is irrelevant to the government's interest in caring for the mentally ill and protecting society.[155] Due process and equal protection analyses, however, indicate that the government's interest does not justify using a lower standard of proof for committing insanity acquittees than for committing civil commitment candidates. This inconsistency suggests that the legislature implicitly may have a punitive purpose for employing the preponderance standard,[156] despite the Court's assertion to the contrary.[157] Employing the lower standard of proof ensures that the insanity acquittee does not escape punishment for the offense, even if he has recovered since committing the act.

Although the possible maximum prison sentence is irrelevant if the state validly obtains the insanity acquittee's initial commitment by clear and convincing evidence, the underlying maximum prison sentence is relevant if the court employs the lower standard of proof and implicitly punishes an individual who theoretically is not responsible for his criminal act. As the *Jackson* Court stated, due process requires that the "duration of commitment bear some reasonable relation to the purpose for which the individual is committed."[158] At the expiration of the prison sentence, society's interest in punishing the acquittee also expires. The alleged "revolving door"[159] is no longer a threat, the interest in treating the individual and protecting society predominates, and the acquittee then should have the right to proof of mental illness and dangerousness

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Although the Court in *Jones* may have held correctly that automatic commitment is permissible, *see supra* text accompanying notes 88-93, the 50 day release hearing that the District provides, *see* D.C. CODE ANN. § 24-301(d)(2) (1981), sets a reasonable limitation on the time period that the state may hold the acquittee on the basis of the acquittal. At that point, the government should prove the need for continued confinement by clear and convincing evidence.

155. *See supra* text accompanying notes 99-100.

156. Note, *Commitment Following an Insanity Acquittal*, *supra* note 8, at 619-22; *see* Dixon v. Jacobs, 427 F.2d 589, 603-04 (D.C. Cir. 1970) (Leventhal, J., concurring) (insanity acquittee not entirely free of criminal responsibility); Jones v. United States, 411 A.2d 624, 628-30 (1980), *vacated*, 432 A.2d 364 (1981), *aff'd*, 103 S. Ct. 3043 (1983) (commitment of acquittees under the District of Columbia scheme is partially punitive); HOUSE REPORT, *supra* note 76 (maintaining that defendants should not escape both conviction and commitment); *supra* note 120 (discussion of state interest in punitive language); *see also* Morris, *supra* note 1, at 882-83 (finding the lower standard a punitive exercise of state power).

157. *See supra* text accompanying note 99.

158. Jackson v. Indiana, 406 U.S. 715, 738 (1972).

159. *See* HOUSE REPORT, *supra* note 76 (discussing the "revolving door").

by clear and convincing evidence.[160] The court only should allow continued commitment if it seeks to treat the acquittee and protect society.

Under the equal protection holding of *Humphrey,* criminal conduct does not justify procedural discrimination beyond the maximum permissible sentence.[161] Once the underlying sentence expires, the state's punitive interest disappears, and an insanity acquittee, like an individual that the court commits in lieu of sentence, stands on equal footing with civil commitment candidates and has a right to civil commitment procedures.[162]

C. *A Limitation on* Jones: *The Standard of Proof for Acquittal in Criminal Trials*

Assuming *arguendo* that the *Jones* Court concluded correctly that the insanity acquittal alone justifies indefinitely committing the acquittee, the quantum of proof that courts require for acquittal in a criminal trial is a crucial consideration. In about half the states insanity is a simple defense and the prosecution must prove beyond a reasonable doubt that the defendant was sane at the time of the alleged offense.[163] The defendant need create only a reasonable doubt of his sanity to gain acquittal.[164] The remaining jurisdictions treat insanity as an affirmative defense, requiring the defen-

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160. *See* United States v. Brown, 478 F.2d 606, 612 (D.C. Cir. 1973); Waite v. Jacobs, 475 F.2d 392, 396 (D.C. Cir. 1973); *In re* Moye, 22 Cal. 3d 457, 466-68, 584 P.2d 1097, 1103-04, 149 Cal. Rptr. 491, 497-98 (1978) (en banc); Morris, *supra* note 1, at 883-85.

161. *See supra* text accompanying notes 60-64 (discussing *Humphrey*).

162. *See* Comment, *supra* note 131, at 265-66.

The *Jones* Court, in rejecting the relevance of the maximum prison term, stated that "[t]he inherent fallacy of relying on a criminal sanction to determine the length of a therapeutic confinement is manifested by petitioner's failure to suggest any clear guidelines for deciding when a patient must be released." *Jones,* 103 S. Ct. at 3052 n.19. Several jurisdictions, however, have enacted legislation limiting separate procedures for acquittees to the duration of the underlying prison term. *See, e.g.,* ALASKA STAT. § 12.47.090(d) (1983); CONN. GEN. STAT. ANN. § 53a-47(b) (West 1984); WASH. REV. CODE ANN. § 10.77.020(3) (1980). The more explicit recognition of the punitive elements in postacquittal commitment procedures, however, creates the possible paradox that prior to commitment the state should prove beyond a reasonable doubt that the acquittee is presently mentally ill and dangerous. *See* Morris, *supra* note 1, at 882-83.

One commentater has argued that acquittees deserve civil commitment procedures at the expiration of the maximum term not because of the partially punitive character of the lower standard of proof, but because "[t]he significance of a violent act and an insanity acquittal lessens over time, while more recent diagnostic information about the acquittee's dangerousness due to mental illness increases in its importance." Note, *Rules for an Exceptional Class, supra* note 8, at 326-29.

163. *See* Note, *supra* note 153, at 987 & n.61.

164. *See* Morris, *supra* note 1, at 858.

dant to prove by a preponderance of the evidence that he was insane at the time of the crime.[165] An acquittal in an affirmative-defense jurisdiction, therefore, establishes that the acquittee committed the offense because he was mentally ill.[166] An acquittal in a simple-defense jurisdiction, however, is not an affirmative finding of past insanity. Accordingly, the Court in *Jones* appropriately framed its holding narrowly, stating that "when a criminal defendant establishes *by a preponderance of the evidence* that he is not guilty of a crime by reason of insanity, the Constitution permits" automatic and indefinite commitment on the basis of the acquittal alone.[167]

At least one jurisdiction, however, has sanctioned automatic and indefinite commitment on the basis of an acquittal that the defendant obtained by creating only a reasonable doubt about his sanity.[168] While a presumption of continued mental illness is highly questionable even in an affirmative-defense jurisdiction,[169] the presumption is entirely unjustified in a simple-defense jurisdiction, where the acquittal indicates only that the jury had a reasonable doubt about the defendant's sanity at the time of the offense.[170] A reasonable doubt about the acquittee's sanity at the time of the offense, however, bears only the "flimsiest relation" to the acquittee's present mental condition[171] and does not justify indefinitely institutionalizing him.[172]

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165. *See* Note, *supra* note 153, at 987-88 & n.62.

166. *See id.* at 1002 n.121.

167. *Jones*, 103 S.Ct. at 3052 (emphasis added).

168. People v. Chavez, ___ Colo. ___, ___, 629 P.2d 1040, 1047-54 (1981) (en banc).

169. *See* German & Singer, *supra* note 5, at 1018-20. The authors argue that at most the acquittal indicates mental illness at one point in the past. The acquittee, however, is now at least sane enough to stand trial. In addition, tests for acquittal and commitment differ, and the relation between past and present mental illness is too tenuous. *See also id.* at 1026-27 & n.68 (merely creating a reasonable doubt about defendant's sanity in a simple-defense jurisdiction is not the only basis for rejecting the presumption of continued mental illness); Morris, *supra* note 1, at 858 (presumption is illogical), 873-74 (presumption is not justified even when defendant proves past insanity by a preponderance of the evidence).

170. *See* Powell v. Florida, 579 F.2d 324, 330 (5th Cir. 1978) (reasonable doubt about acquittee's past insanity does not substitute for a hearing to determine the acquittee's present mental condition); Clark v. State, 245 Ga. 629, 645, 266 S.E.2d 466, 477 (1980) (courts rejecting presumption are simple-defense jurisdictions); Wilson v. State, 259 Ind. 375, 385, 287 N.E.2d 875, 881 (1972) (State's failure to prove sanity beyond a reasonable doubt "does not, in law, raise any presumption of insanity").

171. United States v. Brown, 478 F.2d 606, 613 (D.C. Cir. 1973) (Wright, J., dissenting).

172. A court's rejection of indefinite commitment procedures solely because of an acquittal that the defendant obtains when the prosecution fails to prove the defendant's past sanity beyond a reasonable doubt may encourage some simple-defense jurisdictions to make

V. CONCLUSION

The Supreme Court in *Jones* held that if a court determines that an individual is not criminally responsible for his conduct by reason of past mental illness, the state may confine him indefinitely upon a showing that the mental illness probably caused the past conduct, even if no evidence exists to demonstrate clearly that he is presently mentally ill. This Recent Development has argued that fundamental principles of due process and equal protection require that the state only institutionalize an insanity acquittee indefinitely if the state is appropriately satisfied that the acquittee is in need of permanent confinement. Neither society nor the individual benefits when a court erroneously commits a sane individual to a mental institution—a possibility that greatly increases by lowering the standard of proof for commitment.

A state's willinguess to risk the possibility of erroneous commitment indicates that the state is unwilling to accept that an individual may not be responsible for his criminal behavior. To retain the insanity defense, states must understand that they cannot surreptitiously punish the insanity acquittee by sending him to a mental hospital for an indefinite period when he is not mentally ill. If a court determines that an individual is accountable for his acts, it should send him to prison. If the court determines that he clearly is mentally ill, it should send him to a mental hospital. Mental hospitals "exist for the benefit of those who can be helped by care and treatment or who require custodial attention. They are not substitutes for prisons."[173]

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insanity an affirmative defense. The affirmative-defense approach, however, may be preferable to unjustified indefinito commitment based only on a reasonable doubt about the acquittee's past sanity. *See* Note, *supra* note 153, at 991 (Insanity as an affirmative defense "provides the cornerstone for a rational postacquittal system for handling the insanity acquittee.").

173. Jackson v. Foti, 670 F.2d 516, 522 (5th Cir. 1982).