
INTRODUCTION

In the recent case of Jones v. United States, the United States Supreme Court held that when a criminal defendant is acquitted of a crime by reason of insanity established by a preponderance of the evidence, the Constitution permits the government, on the basis of the insanity judgment, to indefinitely commit him to a mental institution. This decision allows indefinite commitment of persons acquitted by reason of insanity (insanity acquittees) to mental institutions without “clear and convincing evidence” of mental illness and dangerousness, the standard established for civil commitments by the Supreme Court in Addington v. Texas.

Jones represents the first time the United States Supreme Court has considered the meaning of due process in the context of involuntary commitment of insanity acquittees. The outcome is not in keeping with the United States Supreme Court decisions that have increased protection for those facing commitment for mental illness. Furthermore, it is not in keeping with the trend of states to require that insanity acquittees be committed under the same standard as that used in civil commitments.

2. Id. at 3052. The writer has chosen to use the masculine pronoun merely for stylistic purposes. No inference should be drawn regarding the gender of a particular person.
3. 441 U.S. 418, 433 (1979). Addington concerned civil commitment, which refers to involuntary commitment of persons, other than insanity acquittees, to mental institutions. The “clear and convincing evidence” standard required by the Supreme Court is in between the “preponderance of the evidence” standard typically used in civil cases and the “beyond a reasonable doubt” standard typically used in criminal cases. That standard does more than no standard or the preponderance of the evidence standard to “impress the factfinder with the importance of the decision and thereby perhaps . . . reduce[s] the chances that inappropriate commitments will be ordered.” Id. at 427. See further discussion of Addington at notes 70-78 and accompanying text infra.
5. See notes 52-78 and accompanying text infra.
6. 23 states have provisions requiring that the standard used in civil commitments be used when committing insanity acquittees. This requirement is imposed in either an initial commitment proceeding or in a commitment proceeding following a limited period during which the insanity acquittee is confined for examination and observation. ARIZ. R. CRIM. P. 25; ILL. ANN. STAT. ch. 38, § 1005-2-4(a) (Smith-Hurd Supp. 1983-1984); IND. CODE ANN. § 35-36-2-4 (Burns Supp. 1983); KY. R. CRIM. P. 9.90(2); MD. HEALTH-GEN. CODE ANN. § 12-113 (1982); MASS. GEN. LAWS ANN. ch. 123, § 16 (West Supp. 1983-84); MICH. COMP. LAWS ANN. § 330.2050 (West 1980); MINN.
This note will address the issue raised by Jones of whether an


The number of states requiring clear and convincing evidence of mental illness and dangerousness to justify commitment is in sharp contrast to the situation not much more than a decade ago, when only three jurisdictions made commitment standards the same for insanity acquittee commitments and civil commitments. Note, Commitment Following an Insanity Acquittal, 94 HARV. L. REV. 605 n.3 (1981).

The Fifth Circuit Court of Appeals held that in Georgia, commitment of insanity acquittees following a 30 day period for examination and observation, must be under the same standard as that used in civil commitments. Benham v. Edwards, 678 F.2d 511, 542 (5th Cir. 1982).

In five states, either the courts or the legislatures have limited the time period the person committed under the lesser standard can be held, meaning that the person would eventually have to be committed under the same standard used in civil commitments: Stover v. Hamilton, 270 Ark. 310, —, 604 S.W.2d 934, 937 (1980) (one year), ALASKA STAT. § 12.47.090(d) (1980) (cannot be indefinite); N.J. STAT. ANN. § 2C:4-8b(3) (West 1982) (no longer than maximum sentence); OR. REV. STAT. § 161.328(3) (1981) (no longer than maximum sentence for nonfelonies); WIS. STAT. ANN. § 971.17(4) (West Supp. 1983-1984) (no longer than maximum sentence).

The problem with this approach is that while it shows concern for the insanity acquittee's rights, it reflects a punitive view which is contrary to the position that an insanity acquittee may not be punished. See notes 32 & 129 and accompanying text infra.

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The District of Columbia and 26 states have provisions allowing the insanity acquittee to be initially committed under a lesser standard than that required for civil commitments or that place the burden on the insanity acquittee to prove that he is not fit for commitment: ALA. CODE § 15-16-42 (1982); ALASKA STAT. § 12.47.090(c) (1980) (places the burden on the insanity acquittee to prove he is not fit for commitment); ARK. STAT. ANN. § 41-612(3) (1977); CAL. PENAL CODE § 1026(a) (West Supp. 1983); COL. REV. STAT. § 16-6-105(4) (1978); CONN. GEN. STAT. ANN. § 53a-47(a)(4) (1983-1984); DEL. CODE ANN. tit. 11 § 403(a) (1979); D.C. CODE ANN. § 24-301(d)(1) (1981); Fla. STAT. ANN. §§ 394.467(1)(a) 916.15(1) (West Supp. 1983); HAWAII REV. STAT. § 704-411(4) (1976); IOWA CODE ANN. § 813.2, Rule 21(8) (West 1979); KAN. STAT. ANN. § 22-3428(1) (1981); LA. CODE CRIM. PROC. ANN. art. 654 (West Supp. 1983); ME. REV. STAT. ANN. tit. 15, § 103 (1980); MISS. CODE ANN. § 99-13-7 (1973); MO. ANN. STAT. § 552.040(1) (Vernon Supp. 1983); MONT. CODE ANN. § 46-14-301(1) (1997); NEV. REV. STAT. § 178.425.1 (1973); N.H. REV. STAT. ANN. § 651:9-b (Supp. 1983); N.J. STAT. ANN. § 2C:4-8b(3) (West 1982); OKLA. STAT. ANN. tit. 22, § 1161 (West Supp. 1983-1984); OR. REV. STAT. §§ 161.327(1)-328(1) (1981); R.I. GEN. LAWS §§ 40.1-5.3-4(e) (Supp. 1983); VA. CODE § 19.2-181(1) (1983); WASH. REV. CODE ANN. § 10.77.110 (1980) (felonies); WIS. STAT. ANN. § 971.17 (West 1983); WYO. STAT. §§ 7-11-306(c), (d) (1982).

As discussed above, Alaska, Arkansas, New Jersey, Oregon, and Wisconsin do eventually require that an insanity acquittee be committed under the same standard as that used in civil commitments. Arkansas, Connecticut, Hawaii, New Jersey, Oregon, and Wyoming provide some protection for the insanity acquittee by requiring the preponderance of the evidence standard. However, the clear and convincing evidence standard should reduce the number of inappropriate commit-
acquittal of a criminal offense by reason of insanity established by a "preponderance of the evidence" provides a constitutionally adequate basis for indefinite, involuntary commitment of a person to a mental institution. It concludes that an insanity acquittal is not a constitutionally adequate basis for indefinite commitment and that insanity acquittees should be committed under the clear and convincing evidence of mental illness and dangerousness standard required for civil commitments.

An additional issue in Jones, is whether an insanity acquittee is entitled to release because he has been hospitalized for a longer period of time than he could have been incarcerated if convicted. This issue is important and must be answered. It is not, however, the primary issue in Jones and, accordingly, this note devotes less time addressing this issue.

FACTS AND HOLDING

On September 19, 1975, the petitioner Jones was arrested for attempting to steal a jacket from a department store. He was arraigned in the District of Columbia Superior Court on a charge of attempted petit larceny, a misdemeanor punishable by a maximum prison sentence of one year.

The court ruled that the petitioner was competent to stand trial. The petitioner pleaded not guilty by reason of insanity.

On March 12, 1976, the superior court found the petitioner not guilty by reason of insanity and committed him to St. Elizabeth's, a public hospital for the mentally ill, pursuant to section 24-
301(d)(1) of the District of Columbia Code. On May 25, 1976, the court held the fifty-day hearing required by section 24-301(d)(2)(A). On the basis of a psychologist’s testimony the court found that the defendant-patient was mentally ill and a danger to himself or others and returned the petitioner to St. Elizabeth’s.

A second release hearing was held on February 22, 1977, pursuant to section 24-301(k). Because at that time the petitioner was doing or not know right from wrong. This test would be more difficult to meet than one which followed the Model Penal Code.


If any person tried upon an indictment or information for an offense raises the defense of insanity and is acquitted solely on the ground that he was insane at the time of its commission, he shall be committed to a hospital for the mentally ill until such time as he is eligible for release pursuant to this subsection or subsection (e) of this section.


(A) A person confined pursuant to paragraph (1) of this subsection shall have a hearing, unless waived, within 50 days of his confinement to determine whether he is entitled to release from custody. . . .

(B) If the hearing is not waived, the court shall cause notice of the hearing to be served upon the person, his counsel, and the prosecuting attorney and hold the hearing. . . . The person confined shall have the burden of proof. If the court finds by a preponderance of the evidence that the person confined is entitled to his release from custody, either conditional or unconditional, the court shall enter such order as may appear appropriate.


15. Id.


(1) A person in custody or conditionally released from custody, pursuant to the provisions of this section, claiming the right to be released from custody, the right to any change in the conditions of his release, or other relief concerning his custody, may move the court having jurisdiction to order his release, to release him from custody, to change the conditions of his release, or to grant other relief.

(3) . . . On all issues raised by his motion, the person shall have the burden of proof. If the court finds by a preponderance of the evidence that the person is entitled to his release from custody, either conditional or unconditional, a change in the conditions of his release, or other relief, the court shall enter such order as may appear appropriate.

(5) A court shall not be required to entertain a 2nd or successive motion for relief under this section more often than once every 6 months. A court for good cause shown may in its discretion entertain such a motion more often than once every 6 months.

The other provision under which an insanity acquittee can be released is D.C. Code Ann. § 24-301(e) which provides in relevant part:

Where any person has been confined in a hospital for the mentally ill pursuant to subsection (d) of this section, and the superintendent of such
had been hospitalized for longer than the maximum term he could have spent in prison had he been convicted, he demanded that he be released unconditionally or committed pursuant to the civil commitment standards in section 21-545(b), which included a jury trial and proof by clear and convincing evidence of his mental illness and dangerousness.\textsuperscript{17} The superior court denied the petitioner's request for a civil commitment hearing and refused to release him from St. Elizabeth's.\textsuperscript{18}

The petitioner appealed to the District of Columbia Court of Appeals where a panel of the court initially affirmed the superior court,\textsuperscript{19} but later granted a rehearing and vacated the lower court's decision.\textsuperscript{20} Finally, the District of Columbia Court of Appeals heard the case en banc and affirmed the superior court.\textsuperscript{21}

The United States Supreme Court granted \textit{certiorari}\textsuperscript{22} and affirmed the en banc decision of the District of Columbia Court of Appeals.\textsuperscript{23} The Court held:

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 the Government, on the basis of the insanity judgment, to confine him to a mental institution until such time as he has regained his sanity or is no longer a danger to himself or society.\textsuperscript{24}

The Court's rationale was as follows: First, a finding of insanity at a criminal trial is sufficiently probative of mental illness
and dangerousness to justify commitment. The Court said "[t]he fact that a person has been found, beyond a reasonable doubt, to have committed a criminal act certainly indicates dangerousness." The Court also concluded that "[i]t comports with common sense to conclude that someone whose mental illness was sufficient to lead him to commit a criminal act is likely to remain ill and in need of treatment."

Second, there are differences between the class of insanity acquittees and the class of potential civil commitment candidates that justified differing standards of proof. The Court in Jones noted that "automatic commitment under [section] 24-301(d)(1) follows only if the acquittee himself advances insanity as a defense and proves that his criminal act was a product of his mental illness, [so] there is good reason for diminished concern as to the risk of error [of inappropriate commitments]." The Court said "[M]ore importantly, the proof that he committed a criminal act as a result of mental illness eliminates the risk that he is being committed for mere ‘idiosyncratic behavior,’"

Third, the purpose of commitment following an insanity acquittal is to treat the individual's mental illness and protect him and society from his potential dangerousness. His confinement depends on his continuing illness and dangerousness; it is not for punishment. The time necessary to recover may be shorter or longer than the hypothetical criminal sentence and therefore such sentence is irrelevant to the length of an insanity acquittee's commitment. Accordingly, an insanity acquittee is not entitled to release merely because he has been hospitalized for a longer period than he could have been incarcerated if convicted.

BACKGROUND

The United States Supreme Court has not previously considered the meaning of due process in the context of involuntary commitment of insanity acquittees. There are a number of Supreme

25. Id. at 3050.
26. Id. at 3049.
27. Id. at 3050.
28. Id. at 3051.
29. Id.
30. Id. (quoting Addington, 441 U.S. at 427). Idiosyncratic behavior refers to "a few isolated instances of unusual conduct." Addington, 441 U.S. at 427.
32. Id. at 3052.
33. See id.
34. Id. at 3051-52.
35. Id. at 3053 (Brennan, J., dissenting).
Court precedents involving mentally ill persons in other contexts in which the Court has considered what protection should be afforded the person being committed.\textsuperscript{36} What these decisions suggest about due process concerning involuntary commitment of insanity acquittees is considered below.

Some of the lower federal courts, the District of Columbia Court of Appeals, and some of the state courts have considered challenges to statutes allowing commitment under a lesser standard than clear and convincing evidence of mental illness and dangerousness.\textsuperscript{37} The challenges were based on denial of due process or equal protection under the fourteenth amendment to the United States Constitution.\textsuperscript{38} When a case involves a due process challenge...

\textsuperscript{36} See notes 52-78 and accompanying text infra.

\textsuperscript{37} See notes 81-126 and accompanying text infra.

\textsuperscript{38} The fourteenth amendment provides in relevant part: "nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

As to the challenges see generally Annot., 50 A.L.R.3d 144, 147-58 (1973 & Supp. 1983) (the annotation considers the various challenges and points out that due process challenges are the most frequent and have had some success).

The due process analysis is comprised of two parts. First, is whether an order of commitment deprives an insanity acquittee of "liberty," as that word is used in the fourteenth amendment to the Constitution. People v. Chavez, 629 P.2d 1040, 1045 (Colo. 1981). "It is clear that 'commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.'" Jones, 103 S. Ct. at 3048 (quoting Addington v. Texas, 441 U.S. 418, 425 (1979)).

As due process is required, the second inquiry is, "'what process is due?'" People, 629 P.2d at 1046 (quoting Morrissey v. Brewer, 408 U.S. 471, 483 (1972)). The answer to that question is supplied by balancing the three factors relied on by the United States Supreme Court in Mathews v. Eldridge:

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

424 U.S. 319, 335 (1976).

The equal protection analysis involves a determination of what level of judicial scrutiny to apply. Initially, there were two levels of scrutiny.

First, if the legislative judgment interferes with fundamental constitutional rights or involves a suspect classification "strict judicial scrutiny" is required. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 16 (1973). Under such scrutiny, the United States Supreme Court requires that the classification in question be necessary to achieve a compelling governmental interest, that the means chosen to achieve this interest be carefully tailored, and that no less drastic means be available. See id. at 16-17.

Second, where fundamental rights or suspect classes were not involved, and especially in cases concerning economic regulations, the United States Supreme Court has employed "rational basis scrutiny" and has upheld the classification if it was in any way rationally related to the purpose of the legislation. See Railway Express Agency, Inc. v. New York, 336 U.S. 106, 110 (1949).

Although never expressly recognized by the United States Supreme Court, a
lence, as in Jones, the United States Supreme Court case of Mathews v. Eldridge provides guidance for the court deciding the case. Mathews sets out the three factors that are to be balanced to determine what process is due:

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

What the decisions of the various lower courts that have considered due process or equal protection challenges suggest about due process concerning involuntary commitment of insanity acquittees is reviewed below.

In general, there were two primary reasons that some of these courts required that insanity acquittees be indefinitely committed only under the same standard as that used in civil commitments. First, these courts were usually in jurisdictions where insanity is established on the basis that the government failed to show beyond a reasonable doubt that the defendant was sane, which is weaker proof of insanity than where the defendant establishes his insanity by a preponderance of the evidence. However, in at least one jurisdiction which requires the defendant to establish his insanity by a preponderance of the evidence, it was held that insanity acquittees must be committed under the same standard as civil committees. Second, by reading the United States Supreme

middle or “heightened level of judicial scrutiny” has been used by the Court in cases concerning classifications based on gender and illegitimacy. J. Nowak, R. Rotunda, J. Young, Constitutional Law 525 (1978).

The United States Supreme Court has not yet expressly declared what level of scrutiny should be applied in the area of involuntary commitment of the mentally ill. Benham v. Edwards, 678 F.2d 511, 515-16 n.9 (5th Cir. 1982). It is likely that the Court would call for application of a heightened level of judicial scrutiny, as it appears that the Court has already used such scrutiny in the cases of Jackson v. Indiana, 406 U.S. 715 (1972) and Humphrey v. Cady, 405 U.S. 504 (1972), which involved involuntary commitment of the mentally ill. See Gunther, The Supreme Court, 1971 Term — Forward: In Search of Involving Doctrine on a Changing Court: A Model for Newer Equal Protection, 86 HARV. L. REV. 1, 31 (1972).

40. Id. at 334-35.
42. See Benham v. Edwards, 678 F.2d 511, 542 (5th Cir. 1982).
Court cases of Baxstrom v. Herold\(^43\) and Jackson v. Indiana\(^44\) to say that the fact that the person to be committed has previously engaged in criminal acts is not a constitutionally acceptable basis for imposing upon him a different standard or different procedures for involuntary commitment.\(^45\)

In general, the decisions of the courts allowing insanity acquitees to be committed under a lower standard were based on several different rationales. First, because the defendant had the burden of proving his insanity by a preponderance of the evidence it was reasonable to presume that his insanity continued to the date of commitment.\(^46\) Second, the fact that the defendant committed a criminal act indicated dangerousness.\(^47\) Third, there were procedures in place providing an opportunity for release within a reasonable time after commitment.\(^48\) Fourth, false insanity pleas would be discouraged.\(^49\) The fifth rationale, although rarely explicitly expressed, was to provide a method of obtaining incarceration for those who were wrongfully acquitted.\(^50\) All these positions have been criticized.\(^51\)

\(^{43}\) 383 U.S. 107 (1966) (see discussion of case at notes 52-56 and accompanying text infra).

\(^{44}\) 406 U.S. 715 (1972) (see discussion of case at notes 61-67 and accompanying text infra).


\(^{46}\) See, e.g., Jones, 103 S. Ct. at 3049; In re Franklin, 7 Cal. 3d 126, 141, 496 P.2d 465, 474, 101 Cal. Rptr. 533, 562 (1972); In re Lewis, 403 A.2d 1115, 1117 (Del. 1979); Jones v. United States, 432 A.2d 364, 374 (D.C. 1981) (en banc).


\(^{48}\) See, e.g., Jones, 103 S. Ct. at 3050; People v. Chavez, 629 F.2d 1040, 1050 (Colo. 1981) (en banc); State v. Allan, 166 N.W.2d 752, 760 (Iowa 1969).

\(^{49}\) The origin of this concept is attributable to dictum in Lynch v. Overholser, 369 U.S. 711, 715 (1962) (dictum). The Second Circuit Court of Appeals and the Alaska Supreme Court have used this rationale. See Warren, 632 F.2d at 932; State v. Alto, 589 P.2d 402, 407 (Alaska 1979).


\(^{51}\) Among the specific criticisms that have been directed at the first rationale the following: First, the mental health of the person committing the crime could have improved since the time of the crime. Benham, 678 F.2d at 518 n.14; Note, Commitment and Release of Persons Found not Guilty by Reason of Insanity: A Georgia Perspective, 15 Ga. L. Rev. 1055, 1074 (1981) [hereinafter cited as Note, A Georgia Perspective ]; Note, supra note 6, at 611. Indeed it must improve somewhat for the person to stand trial. See Benham, 678 F.2d at 518 n.14; Note, supra note 6, at 611. Second, the illness might be amenable to cure or control by drugs. See Note, Commitment of Persons Acquitted by Reason of Insanity: The Example of the District of Columbia, 74 Colum. L. Rev. 733, 748 (1974) [hereinafter cited as Note, The Example of the District of Columbia ]. Third, it is doubtful that an insanity finding is as reliable as the finding of mental illness at a civil commitment hearing because of the
United States Supreme Court Treatment of the Mentally Ill

Over the past two decades the United States Supreme Court has shown increased concern for those facing commitment for mental illness. In Baxstrom v. Herold\(^5\) the Supreme Court considered a challenge to a New York statutory procedure under which the petitioner, who was adjudged insane while serving a prison term for assault, was committed to a mental institution following the expiration of his criminal sentence.\(^5\) The Court held that the petitioner was denied equal protection when he was civilly committed at the end of his penal sentence without the jury review and judicial determination that he was dangerously mentally ill which were available to all other persons civilly committed.\(^5\) In arriving at its holding the Supreme Court said:

Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made. Classification of mentally ill persons as

different standards of proof. Benham, 678 F.2d at 517-518. Fourth, a jury only determines whether the defendant was mentally ill with respect to a particular act, not with respect to acts that he might commit in the future. See Note, supra note 6, at 611-12.


The following are criticisms of the second rationale: It is questionable whether dangerousness can be accurately predicted from a criminal act, particularly where the crime was not serious and/or the individual had not previously engaged in criminal behavior. See Jones, 103 S. Ct. at 3057-58 (Brennan, J., dissenting); Benham, 678 F.2d at 518-19; Note, A Georgia Perspective, supra, at 1078-79; Note, supra note 6, at 610. Also, there are studies showing that the criminally insane are not significantly more dangerous than others. See Benham, 678 F.2d at 526-27; State v. Krol, 68 N.J. 432, —, 344 A.2d 289, 295 n.2 (1975); Note, A Georgia Perspective, supra, at 1075; Note, supra note 6, at 610.

The third rationale has been criticized on the basis that an individual may not be able to utilize release procedures after extended institutionalization. See Jones, 103 S. Ct. at 3058 n.16 (Brennan, J., dissenting); Note, A Georgia Perspective, supra, at 1075-76.

The problem with the fourth rationale is that meritorious claims could also be discouraged. Note, A Georgia Perspective, supra, at 1075; Note, supra note 6, at 619.

The fifth rationale, which has been called the "cleanup doctrine" by the writer of the Note indicated below, rests on the idea that mistakes in commitment of insanity acquittees are justified by their effect of "cleaning up" the mistakes of criminal trials. Note, supra note 6, at 618 (this note contains an excellent discussion of the cleanup doctrine at 617-22). The problem with this approach can be summed up by the well known adage: "Two wrongs don't make a right." The Fifth Circuit Court of Appeals appears to take this approach. See Benham, 678 F.2d at 524. Also, if a person is not mentally ill, the state has no basis for committing him to a mental hospital. Benham, 678 F.2d at 524 n.24.

\(^{52}\) 383 U.S. 107 (1966).

\(^{53}\) Id. at 108-09.

\(^{54}\) Id. at 110.
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.\textsuperscript{55}

This statement from \textit{Baxstrom} has been perceived by many as support for the proposition that, as far as the standard and procedures used for commitment to mental institutions are concerned, there is no rational basis for distinguishing between insanity acquittees and civil committees.\textsuperscript{56}

\textit{Humphrey v. Cady}\textsuperscript{57} concerned a challenge to the Wisconsin Sex Crimes Act, which permitted commitment in lieu of sentencing following a conviction for sex offenses for a period equal to the maximum sentence authorized for the crime, followed by the possibility of renewed commitment for five years.\textsuperscript{58} The petitioner claimed that commitment, at least after the expiration of the initial commitment in lieu of sentence without a jury determination that he met the standards for civil commitment, deprived him of equal protection.\textsuperscript{59} The Supreme Court agreed and held that, in light of \textit{Baxstrom}, the petitioner's claims were substantial enough to warrant an evidentiary hearing as to the validity of the procedural disparities.\textsuperscript{60}

The case of \textit{Jackson v. Indiana}\textsuperscript{61} involved a petitioner who was found incompetent to stand trial for two alleged robberies and was committed to a mental institution under an Indiana statute which provided for such confinement pending the individual's return to competency.\textsuperscript{62} Evidence at trial indicated that it was unlikely that the petitioner would ever become fit to stand trial.\textsuperscript{63} Thus, lifelong commitment was highly probable. The Supreme Court said that before an incompetent defendant could be held indefinitely, the state must follow its civil commitment procedures.\textsuperscript{64} In its analy-

\textsuperscript{55} \textit{Id.} at 111 (citations omitted).
\textsuperscript{56} \textit{See} note 43 \textit{supra}.
\textsuperscript{57} 405 U.S. 504 (1972).
\textsuperscript{58} \textit{Id.} at 507.
\textsuperscript{59} \textit{Id.} at 508.
\textsuperscript{60} \textit{Id.} The Supreme Court also relied on \textit{Specht v. Patterson}, 386 U.S. 605 (1967) as support for its decision. In \textit{Specht}, the defendant had been convicted of "indecent liberties" under a Colorado law. \textit{Id.} at 607. Alternative sentencing of such offenders to an indefinite term in a state institution for the mentally ill was permitted by Colorado law. \textit{Id.} The failure of the Colorado law to provide full procedural safeguards for sentencing in this manner resulted in the Supreme Court finding a due process deficiency. \textit{Id.} at 610-11.
\textsuperscript{61} 406 U.S. 715 (1972).
\textsuperscript{62} \textit{Id.} at 719.
\textsuperscript{63} \textit{Id.} at 718-19.
\textsuperscript{64} \textit{Id.} at 738.
sis the Court noted in passing that the Baxstrom principle had been extended by some court to commitment following an insanity acquittal. Some courts, and at least one commentator, have said that this comment shows that the United States Supreme Court approved of extending the Baxstrom principle to treatment of insanity acquittees.

In another case, O'Connor v. Donaldson, the petitioner sought his release after being civilly committed for nearly fifteen years. The United States Supreme Court said that "there is . . . no constitutional basis for confining such persons [the mentally ill] involuntarily if they are dangerous to no one and can live safely in freedom." This language requires a finding that an individual is mentally ill and dangerous for any involuntary commitment to be justified.

Addington v. Texas involved the issue of "what standard of proof is required by the fourteenth amendment to the Constitution in a civil proceeding brought under state law to commit an individual involuntarily for an indefinite period to a state mental hospital." In that case, Addington had been previously committed to a mental institution several times. Following his arrest on a misdemeanor charge of "assault by threat" against his mother, she sought to have him indefinitely committed.

The Supreme Court applied a due process analysis to arrive at its conclusion that indefinite, involuntary civil commitment calls for the clear and convincing evidence standard of proof. The individual interest involved was retention of liberty. This interest was seen as outweighing the state's interests in providing care for those who are unable to do so themselves because of emotional disorders and protecting the community from the dangerous tendencies of some who are mentally ill. The Court noted that the preponderance of the evidence standard "creates the risk of in-

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65. See text at note 56 supra.
68. 422 U.S. 563 (1975).
69. Id. at 575.
70. 441 U.S. 418, 419-20 (1979).
71. Id. at 420.
72. Id.
73. Id. at 425-27. For what is involved in due process analysis see note 38 supra.
74. Id. at 433.
75. Id. at 425.
76. Id. at 425-27.
creasing the number of individuals erroneously committed"\textsuperscript{77} while the clear and convincing evidence standard "is one way to impress the factfinder with the importance of the decision and thereby perhaps . . . reduce the chances that inappropriate commitments will be ordered."\textsuperscript{78}

**LOWER FEDERAL COURT TREATMENT OF INSANITY ACQUITTEES**

Some lower federal courts have held that insanity acquittees must be afforded the greater protection of the civil commitment standard to be indefinitely committed.\textsuperscript{79} Conversely, there are lower federal courts that have upheld a lower standard for lengthy or indefinite commitment.\textsuperscript{80} The Federal Court of Appeals decisions provide helpful insight when considering what standard should be applied when an insanity acquittee is indefinitely, involuntarily committed.

One of the first cases to consider whether insanity acquittees should be indefinitely committed under the same standard as that used in civil commitments was in the District of Columbia Circuit Court case of *Bolton v. Harris*.\textsuperscript{81} In *Bolton*, the defendant was charged with the unauthorized use of a motor vehicle and transportation of a stolen motor vehicle.\textsuperscript{82} The defendant was found not guilty by reason of insanity and committed to a mental institution without a hearing.\textsuperscript{83}

The District of Columbia Circuit Court, relying on *Baxstrom v. Herold*,\textsuperscript{84} said that prior criminal conduct "may tend to show they [insanity acquittees] meet the requirements for commitment, namely, illness and dangerousness. But it does not remove these requirements."\textsuperscript{85} The court stated that prior criminal conduct could not justify "substantial differences in the procedures and re-

\textsuperscript{77} Id. at 426.
\textsuperscript{78} Id. at 427.
\textsuperscript{79} See Benham v. Edwards, 678 F.2d 511, 542 (1982) (the court applied Georgia law and imposed this requirement after 30 days commitment for examination and observation); Bolton v. Harris, 395 F.2d 642, 651 (D.C. Cir. 1968) (the court applied District of Columbia law which imposed this requirement after an examination period).
\textsuperscript{80} See Harris v. Ballone, 681 F.2d 225, 228 (4th Cir. 1982) (applying Virginia law); Warren v. Harvey, 632 F.2d 925, 936 (2d Cir.) (applying Connecticut law), cert. denied, 449 U.S. 902 (1980).
\textsuperscript{81} 395 F.2d 642 (D.C. Cir. 1968).
\textsuperscript{82} Id. at 645.
\textsuperscript{83} Id. at 646. Insanity was established on the basis that there was a reasonable doubt as to the defendant's sanity. Id. at 648.
\textsuperscript{84} 383 U.S. 107 (1966). This case is discussed at notes 52-56 and accompanying text supra.
\textsuperscript{85} *Bolton*, 395 F.2d at 651.
quirements for commitment, and habeas corpus may no longer be
demed to afford adequate protection against unwarranted
detention.\textsuperscript{86}

In \textit{Warren v. Harvey},\textsuperscript{87} the Second Circuit Court of Appeals
considered what standard should apply to commitment of an in-
sanity acquittee.\textsuperscript{88} In \textit{Warren}, the defendant was arrested for fa-
tally shooting his neighbor and was indicted for first degree
murder.\textsuperscript{89} He was acquitted by reason of insanity.\textsuperscript{90} Following
temporary confinement for examination to determine mental
condition, the degree of the defendant's mental illness was such that
his release would constitute a danger to himself or others.\textsuperscript{91}
Therefore, the court continued his commitment to a mental
institution.\textsuperscript{92}

The court considered whether the lower preponderance of the
evidence standard used with commitment of insanity acquittees
was justified.\textsuperscript{93} The court said the fact that an insanity acquittee
was found, beyond a reasonable doubt, to have committed a crim-
inal act, "proved" he was a danger to society at one time.\textsuperscript{94} In con-
trast, a person who has not been acquitted of a crime by reason of
insanity, has not been found to have harmed society as a result of
his mental illness.\textsuperscript{95} The court said that this difference "gives rise
to considerations which justify a lesser standard of proof to com-
mit insanity acquittees than to commit other persons."\textsuperscript{96}

The court offered additional justifications for a lower standard.
The first justification was stated as: "[W]hile the acquittee . . .
may be deprived erroneously of his liberty in the commitment pro-
cess, the liberty he loses is likely to be liberty which society mis-
takenly had permitted him to retain in the criminal process."\textsuperscript{97}
The second justification was the court's position that the stigma
associated with commitment to a mental institution affects an in-
sanity acquittee less than a civil committee.\textsuperscript{98} This position was

\begin{itemize}
\item \textsuperscript{86} \textit{Id.} at 649.
\item \textsuperscript{87} 632 F.2d 925 (2d Cir.), cert. denied, 449 U.S. 902 (1980).
\item \textsuperscript{88} \textit{See id.} at 930.
\item \textsuperscript{89} \textit{Id.} at 926.
\item \textsuperscript{90} \textit{Id.} at 927. Insanity was established on the basis that there was a reason-
able doubt as to the defendant's sanity. \textit{Id.} at n.1.
\item \textsuperscript{91} \textit{Id.} at 927.
\item \textsuperscript{92} \textit{Id.}
\item \textsuperscript{93} \textit{See id.} at 930.
\item \textsuperscript{94} \textit{Id.} at 931.
\item \textsuperscript{95} \textit{Id.}
\item \textsuperscript{96} \textit{Id.}
\item \textsuperscript{97} \textit{Id.} This is an expression of the "cleanup doctrine." See note 51 and accom-
panying text \textit{supra} for discussion of this doctrine.
\item \textsuperscript{98} \textit{See Warren}, 632 F.2d at 931-32.
\end{itemize}
based on the belief that most of the stigma from being labeled "mentally ill and dangerous" had already attached at the time when the accused was found not guilty by reason of insanity.\textsuperscript{99} The final justification offered by the court was that "the heightened risk to a sane defendant that he subsequently will be confined to a mental hospital may reduce his willingness to chance a disingenuous insanity defense."\textsuperscript{100}

When considering what the permissible standard for an indefinite, involuntary commitment of an insanity acquittee should be, the Second Circuit's decision in \textit{Warren} is less persuasive. This is because the state could not automatically commit the defendant, but had to show that he was mentally ill and dangerous by a preponderance of the evidence\textsuperscript{101} and the commitment could be for no longer than twenty-five years,\textsuperscript{102} rather than for an indefinite term.

In \textit{Harris v. Ballone}\textsuperscript{103} the Fourth Circuit considered the issue of the appropriate standard for indefinite commitment of an insanity acquittee.\textsuperscript{104} In \textit{Harris}, the defendant was found not guilty of murder and malicious wounding by reason of insanity.\textsuperscript{105} He was committed to a mental hospital without a hearing.\textsuperscript{106}

In addressing the challenge to the insanity acquittee commitment scheme, the court concluded that an insanity acquittee could be indefinitely committed under a lower standard than that used in civil commitments.\textsuperscript{107} The justification for the lower standard was that "an insanity acquittee has already been shown beyond a reasonable doubt to have committed at least one dangerous act. . . ."\textsuperscript{108}

\textit{Benham v. Edwards},\textsuperscript{109} involved the Fifth Circuit's consideration of what standard should be applied by Georgia to the indefinite commitment of an insanity acquittee.\textsuperscript{110} \textit{Benham} involved a classes action challenge to a Georgia statutory scheme governing

\begin{footnotes}

\footnotetext[99]{\textit{Id.}}

\footnotetext[100]{\textit{Id.} at 932.}

\footnotetext[101]{\textit{Id.} at 936.}

\footnotetext[102]{\textit{Id.} at 927 n.3.}

\footnotetext[103]{681 F.2d 225 (4th Cir. 1982).}

\footnotetext[104]{See \textit{id.} at 228.}

\footnotetext[105]{\textit{Id.} at 227. In Virginia, the defendant has the burden of establishing his insanity. \textit{Graham v. Gathright}, 345 F. Supp. 1148, 1150 (W.D. Va. 1972).}

\footnotetext[106]{\textit{Harris}, 681 F.2d at 227.}

\footnotetext[107]{See \textit{id.} at 228 (preponderance of the evidence).}

\footnotetext[108]{\textit{Id.}}

\footnotetext[109]{678 F.2d 511 (5th Cir. 1982).}


\end{footnotes}
commitment and release of insanity acquittees.111

The court held that after expiration of the thirty-day evaluation period there had to be a state initiated commitment hearing, with the state bearing the burden of proving by clear and convincing evidence that the insanity acquittee meets the civil commitment criteria.112 There were several bases for the court's holding. The first basis was that there were shortcomings to the presumption of continuing insanity and the dangerousness arguments. First, the court doubted that the insanity finding was as reliable as the finding of mental illness at a commitment hearing because of the different standards of proof.113 Second, the presumption of mental illness was weakened by the necessity of a person's mental competence improving sufficiently for him to stand trial.114 Third, the finding of dangerousness at a commitment hearing is more reliable than that at an insanity acquittal. This is because the commitment hearing is focused exclusively on only two issues, i.e., mental illness and dangerousness, whereas the criminal trial is focused on conviction and the issue of insanity. In a criminal trial, the issue of dangerousness is only incidentally involved, if at all.115 Further, applying the dangerousness criterion in a civil commitment hearing entails predicting future conduct which cannot be equated with a finding of a single past criminal act, even if that act constituted a substantial risk of imminent harm to the perpetrator or others.116 Finally, the court noted that "[a] finding that there is probable cause to believe a person is dangerous is considerably weaker than a finding, supported by clear and convincing evidence, that a person is dangerous."117

The court's second basis was that commission of a crime did not justify a lower standard because Addington v. Texas118 also involved criminal activity.119 The third basis was that the assumption that insanity acquittees are more dangerous than civil committees is inconsistent with Baxstrom v. Herold.120 The fourth basis was that even if an error was made in finding the defendant

111. Benham, 678 F.2d at 512.
112. Id. at 542.
113. Id. at 517.
114. Id. at 518 n.14.
115. Id. at 518.
116. Id.
117. Id.
118. 441 U.S. 418 (1979). Addington is discussed at notes 70-78 and accompanying text infra.
119. Benham, 678 F.2d at 523.
120. Id. at 523-27. Baxstrom, 383 U.S. 107 (1966), is discussed at notes 52-56 and accompanying text infra. In addition to citing Baxstrom, the court also cited United States ex rel. Schuster v. Herold, 410 F.2d 1071 (2d Cir. 1969) and Note, 4
not guilty by reason of insanity, this error could not be corrected by committing the defendant under the state’s mental health power. The fifth basis was that reliance on the idea of deterring false insanity pleas to justify a lower commitment standard contained overtones of punitive consequences lingering after an insanity acquittal. This was inconsistent with Georgia’s rejection of the notion that any punitive purpose remains after an insanity acquittal.

State Treatment of Insanity Acquittees

As noted, the trend of the states is to require that insanity acquittees be indefinitely committed under the same standard used in civil commitments. In most of the states it was the state legislature that brought about the change. In some states the state court brought about the change. In the District of Columbia and in some of the states where the law has not been changed, the courts have upheld a lower standard.

The respective positions of the majority and the dissent in Jones regarding treatment of an insanity acquittee are considered next, in light of the position of the courts and commentators stated above.

Georgia Perspective, supra note 51 as support for its conclusion. Benham, 678 F.2d at 527.

121. Benham, 678 F.2d at 524. Here the court rejected the “cleanup doctrine” discussed at note 51 supra.

122. Id. (citing Bailey v. State, 210 Ga. 52, —, 77 S.E.2d 511, 514 (1953)).

123. See note 6 and accompanying text supra.

124. This can be inferred by comparing the number of states in note 6 that have statutes requiring clear and convincing evidence for commitment with the number of state courts shown in note 125 infra.


Other state courts have held that commitment must be under the same standard as that used in civil commitments, but not until after a longer period. See State v. Alto, 589 P.2d 402, 408 (Alaska 1979) (no later than after maximum sentence); Stover v. Hamilton, 270 Ark. 310, —, 604 S.W.2d 934, 937 (1980) (after one year). While these holdings show concern for the insanity acquittee’s rights, they reflect a punitive view which is contrary to the position that an insanity acquittee may not be punished. See note 32 and accompanying text supra and note 129 and accompanying text infra.

ANALYSIS

The writer believes that the Brennan dissent in Jones correctly pointed out what should have been the focal point for the Court's decision. That is, does an acquittal of a criminal offense by reason of insanity established by a preponderance of the evidence, provide a constitutionally adequate basis for indefinite, involuntary commitment of a person to a mental institution? 127

It should have been the focal point because it is the primary question to be answered. Once one decides what is a constitutionally adequate basis for indefinite, involuntary commitment and the insanity acquittee has been committed in accordance with that decision, it logically follows that an insanity acquittee should not be released just because he has been hospitalized for a period longer than he might have served in prison had he been convicted.

This conclusion is in keeping with the idea stated by the majority128 and accepted by others,129 that the purpose of committing an insanity acquittee is not to punish him, but to treat the individual's mental illness and protect him and society from his potential dangerousness.130 Also, there should be little disagreement with the majority's conclusion that the time necessary to recover from mental illness may be shorter or longer than the hypothetical criminal sentence and therefore such sentence is irrelevant to the length of an insanity acquittee's commitment.131 The absurdity of accepting the argument that the criminal sentence is to determine when an insanity acquittee is to be released is illustrated by applying it when a crime calling for a lengthy sentence, such as life imprisonment, is involved.

Jones was decided using due process analysis because the petitioner's equal protection argument essentially duplicated his due process argument.132 The Brennan dissent points out that none of the United States Supreme Court precedents directly address the meaning of due process in the context of involuntary commitments

127. See Jones, 103 S. Ct. at 3053 (Brennan, J., dissenting). The majority does consider this issue but does not focus on it as the Brennan dissent does. Compare id. at 3049-50 with id. at 3053-61.
128. See Jones, 103 S. Ct. at 3051-52.
130. See notes 128-29 and accompanying text supra.
131. Jones, 103 S. Ct. at 3052.
132. Id. at 3048 n.10 and 3055 n.5.
of persons who have been acquitted by reason of insanity. As to what due process required, the majority and the Brennan dissent turned to the United States Supreme Court precedents dealing with due process in other commitment contexts and the due process approach called for by Mathews v. Eldridge, which is the foundation for determining what due process requires in any case.

The majority concluded that "a finding of not guilty by reason of insanity [established by a preponderance of the evidence] is a sufficient foundation for commitment of an insanity acquittee," as opposed to the clear and convincing evidence of mental illness and dangerousness required in civil commitments by Addington v. Texas.

In reaching its conclusion, the majority first stated that a finding of insanity at the criminal trial is sufficiently probative of mental illness and dangerousness to justify indefinite, involuntary commitment. As support for this position the majority stated that it was not "unreasonable for Congress to determine that the insanity acquittal supports an inference of continuing mental illness. It comports with common sense to conclude that someone whose mental illness was sufficient to lead him to commit a criminal act is likely to remain ill and in need of treatment."

It can be argued that this statement has more credibility where the defendant is required to establish his insanity by a preponderance of the evidence (as in Jones), than in a jurisdiction where insanity is established simply because the state fails to establish the defendant's sanity beyond a reasonable doubt. However, other courts and commentators have questioned whether mental illness can be presumed to continue because insanity was established by a preponderance of the evidence, as assumed by the majority.

Also supporting the majority's position was its statement that "[t]he fact that a person has been found, beyond a reasonable

133. Id. at 3053.
134. Most of these cases are considered at notes 52-78 and accompanying text supra.
135. 424 U.S. 319, 334-35 (1976) (see text at 40 supra).
136. Jones, 103 S. Ct. at 3050.
138. See Jones 103 S. Ct. at 3050.
139. Id.
141. See note 139 and accompanying text supra.
doubt, to have committed a criminal act certainly indicates dangerousness.'\textsuperscript{142} This position has its shortcomings. It disregards the fact that the petitioner committed the misdemeanor offense of shoplifting which did not involve either actual violence or any attempt to resist or evade arrest.\textsuperscript{143} It overlooks the fact pointed out by the Brennan dissent that "[r]esearch is practically nonexistent on the relationship of non-violent criminal behavior, such as petitioner's attempt to shoplift, to future dangerousness."\textsuperscript{144} Also, it is not in keeping with the concern expressed in the United States Supreme Court case of \textit{O'Connor v. Donaldson}\textsuperscript{145} that there be a showing of actual dangerousness to self or others to justify involuntary commitment.\textsuperscript{146} "A 'not guilty by reason of insanity' verdict is \textit{backward-looking}, focusing on one moment in the past."\textsuperscript{147} Thus, only predictions about present and future dangerousness, which is what commitment requires, can be made. The reliability of such predictions is questionable at best.\textsuperscript{148} In light of the uncertainty about the relationship between petitioner's crime and his present dangerousness, the Brennan dissent's position that the government should bear the burden of establishing mental illness and dangerousness by clear and convincing evidence is stronger.\textsuperscript{149}

The majority takes the position that past criminal behavior and mental illness justify indefinite, involuntary commitment without the benefits of the due process standards associated with civil commitment, most importantly, proof of present mental illness and dangerousness by clear and convincing evidence.\textsuperscript{150} However, its position is inconsistent with United States Supreme Court precedents in other commitment contexts.\textsuperscript{151} In \textit{Jackson v. Indiana}\textsuperscript{152} the petitioner had been charged with two robberies\textsuperscript{153} and in \textit{Addington v. Texas}\textsuperscript{154} the petitioner had engaged in assaultive conduct that could have been the basis for criminal

\begin{itemize}
  \item \textsuperscript{142} \textit{Jones}, 103 S. Ct. at 3049.
  \item \textsuperscript{143} \textit{Id.} at 3058 n.13.
  \item \textsuperscript{144} \textit{Id.} at 3057 (Brennan, J., dissenting).
  \item \textsuperscript{145} 422 U.S. 563 (1975).
  \item \textsuperscript{146} See note 69 and accompanying text \textit{supra}.
  \item \textsuperscript{147} \textit{Jones}, 103 S. Ct. at 3056.
  \item \textsuperscript{148} See \textit{id.} at 3057-58.
  \item \textsuperscript{149} See \textit{id.} at 3058. Additional support for this argument is the fact that the petitioner bore the burden of persuasion for release. \textit{Id.} at 3057 n.7.
  \item \textsuperscript{150} \textit{Id.} at 3051.
  \item \textsuperscript{151} \textit{Id.} at 3055.
  \item \textsuperscript{152} 406 U.S. 715 (1972).
  \item \textsuperscript{153} \textit{Id.} at 717. See notes 61-67 and accompanying text \textit{supra} for a discussion of this case.
  \item \textsuperscript{154} 441 U.S. 418 (1979).
\end{itemize}
charges had the state chosen to prosecute him. Yet in both cases the Supreme Court required that the civil commitment procedures be followed if the state sought indefinite, involuntary commitment. While these cases are perhaps distinguishable from Jones in that there was no proof that a crime had been committed, it has been pointed out that this cannot be said about Baxstrom v. Herold and Humphrey v. Cady. In Baxstrom, the Supreme Court required that civil commitment procedures be followed when indefinite, involuntary commitment after expiration of the criminal sentence was sought. In Humphrey, the petitioner challenged his renewed commitment. The Supreme Court held that the petitioner's constitutional challenge to his renewal order had substantial merit because he had not received the procedural protections given persons subject to civil commitment. The government's interests in committing the petitioner in Jones were the same as the interests involved in Baxstrom, Humphrey, Jackson, and Addington — isolation, protection, and treatment of a person who may, through no fault of his own, cause harm to others or to himself. The majority's position that the government's interests should prevail when committing an insanity acquittee because there is proof of past criminal behavior, is in contradiction to the decisions of the above cited United States Supreme Court cases.

In reaching its conclusion, the majority also stated: "But since automatic commitment under § 24-301(d)(1) follows only if the acquittee himself advances insanity as a defense and proves that his criminal act was a product of his mental illness, there is good reason for diminished concern as to the risk of error [of erroneous commitment]." This is the majority's stronger argument with respect to the second factor in Mathews v. Eldridge. How-

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155. Id. at 420. See notes 70-78 and accompanying text supra for a discussion of this case.
156. Jackson, 406 U.S. at 738; Addington, 441 U.S. at 433.
158. Id.
160. 405 U.S. 504 (1972). See notes 57-60 and accompanying text supra for a discussion of this case.
161. 383 U.S. at 110.
162. 405 U.S. at 506.
163. Id. at 508.
164. Jones, 103 S. Ct. at 3056.
165. See text at note 142 supra.
166. Jones, 103 S. Ct. at 3051.
ever, this position assumes that the mental illness continues, an assumption which is not necessarily true.168

The majority's other argument with respect to the second factor in Mathews was that "the proof that he [petitioner] committed a criminal act . . . eliminates the risk that he is being committed for mere 'idiosyncratic behavior.'"169 Thus, the concern of the court in Addington that a person might be committed for "a few isolated instances of unusual conduct" was diminished or absent and there was no need for proof of mental illness and dangerousness by clear and convincing evidence.170 The majority's position does not square with the fact that in Addington the petitioner was institutionalized several times before and would not be committed for mere "idiosyncratic behavior."171 Yet in that case the Supreme Court required clear and convincing evidence of mental illness and dangerousness.172

In its consideration of the second factor from Mathews, the majority does not thoroughly consider the probable value of additional or substitute procedural safeguards. Applying this factor to Jones should lead to the conclusion that there is substantial value in requiring the clear and convincing evidence standard. The value is in the diminished risk of erroneous commitment that should result from using this standard as opposed to using an insanity acquittal as the basis for commitment.173

The majority's argument, in support of its conclusion174 that the release hearing fifty days after commitment justifies a lower standard for commitment, is unacceptable. In the District of Columbia, the insanity acquittee has the burden of proof as to fitness for release,175 which he is less likely to be able to meet after extended institutionalization.176

168. See Benham, 678 F.2d at 518 n.14; Note, A Georgia Perspective, supra note 51, at 1074; Note, supra note 6, at 611.
170. See id.
171. Addington, 441 U.S. at 420.
172. Id. at 433. See notes 70-78 and accompanying text supra for a discussion of this case.
173. In Addington, the United States Supreme Court pointed out that using a lower standard than clear and convincing evidence "creates the risk of increasing the number of individuals erroneously committed." 441 U.S. at 426.
174. Jones, 103 S. Ct. at 3050. See text at note 136 supra.
176. See Jones, 103 S. Ct. at 3058-59 n.16, where the Brennan dissent stated that the reason for this is that institutionalization "deprives [an individual] of the economic wherewithal to obtain independent medical judgments and . . . the treatments he receives may make it difficult to demonstrate recovery." Id. (Brennan, J.,
In reaching its conclusion, the majority acknowledges the insanity acquittee's strong private interest in liberty by stating that "commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." However, little more is said by the majority to show concern for the petitioner. One explanation for this lack of concern is the majority's position that "[a] criminal defendant who successfully raises the insanity defense necessarily is stigmatized by the verdict itself, and thus the commitment causes little additional harm in this respect." The Brennan dissent points out that this is perhaps the majority's most cynical argument and it does not accord with the Supreme Court's position in Baxstrom v. Herold and O'Connor v. Donaldson, that even though an individual has already been stigmatized as mentally ill he still retains an interest in avoiding involuntary commitment. The majority should have shown greater concern for the petitioner in light of the Brennan dissent's observation that "[i]n many respects, confinement in a mental institution is even more intrusive than incarceration in a prison."

Under Mathews, one must balance the petitioner's strong personal interest of liberty and the risk of erroneous commitment against the government's interest of isolating and treating those who may be mentally ill and dangerous. When these three factors are balanced in Jones, it does not appear that a lesser stan-

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177. Id. at 3050. See text at note 136 supra.
178. Id. at 3046 (quoting from Addington, 441 U.S. at 425).
179. Id. at 3051 n.16.
180. Id. at 3060 (Brennan, J., dissenting).
183. Jones, 103 S. Ct. at 3060 (Brennan, J., dissenting).
184. Id. (Brennan, J., dissenting). The Brennan dissent went on to say:

Inmates of mental institutions, like prisoners, are deprived of unrestricted association with friends, family, and community; they must contend with locks, guards, and detailed regulation of their daily activities. In addition, a person who has been hospitalized involuntarily may to a significant extent lose the right enjoyed by others to withhold consent to medical treatment [citation omitted]. The treatments to which he may be subjected include physical restraints such as straightjacketing, as well as electroshock therapy, aversive conditioning, and even in some cases psychosurgery. Administration of psychotropic medication to control behavior is common [citation omitted]. . . . [I]t is possible that an inmate will be given medication for reasons that have more to do with the needs of the institution than with individualized therapy.

Id. at 3060-61 (Brennan, J., dissenting).
186. Id. at 344-45. See text at note 40 supra.
dard for commitment is justified. This conclusion should have been reached in *Jones* because it appears that the insanity acquittee's strong personal interest\(^{187}\) and the risk of erroneous commitment\(^{188}\) outweighed the government's interests in isolating and treating those who may be mentally ill and dangerous.\(^{189}\)

The majority in *Jones* notes and uses the concern that an individual might escape criminal responsibility by a successful insanity plea and also avoid necessary treatment for mental illness and dangerousness as support for its decision.\(^{190}\) The validity of this concern is questionable. This is because the use of the insanity defense is actually rare,\(^ {191}\) the District of Columbia changed to a tougher insanity test following the time such concern was expressed,\(^ {192}\) and the state should be able to meet the clear and convincing evidence commitment standard where the crime is of a more serious nature and the insanity acquittee more likely to be dangerous.\(^ {193}\)

Further, there are other ways to address the concern that an individual might escape criminal responsibility by a successful insanity plea and also avoid necessary treatment for mental illness and dangerousness, besides lowering the standard for commitment of an insanity acquittee. One would be to change the insanity standard from the modified version of Model Penal Code which the District of Columbia uses,\(^ {194}\) to the tougher M'Naghten standard.\(^ {195}\) Another would be to require that the defendant establish insanity by clear and convincing evidence.\(^ {196}\) While the necessity of making the change is questionable, changing to either one

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\(^{187}\) *See* discussion in text at notes 178-184 *supra*.

\(^{188}\) This is made possible by allowing commitment based only on an insanity acquittal as opposed to requiring clear and convincing evidence of mental illness and dangerousness for commitment. *See* discussion in text at notes 166-73 *supra*.

\(^{189}\) The government's interests, although legitimate, are no different than its interests in the civil commitment context. *See* note 164 and accompanying text *supra*.

\(^{190}\) *Jones*, 103 S. Ct. at 3049.


\(^{193}\) *See* Benham, 678 F.2d at 528.

\(^{194}\) *See* note 11 *supra*.

\(^{195}\) *Id*.

\(^{196}\) The majority points out this would be permissible. *Jones*, 103 S. Ct. at 3051 n.17 (citing Leland v. Oregon, 343 U.S. 790, 799 (1952)).
of these standards or combining the two, would be an acceptable means for further limiting the use of the insanity defense.

One acceptable way to assure that those in need of treatment will receive it is to automatically commit an insanity acquittee for a reasonably limited time period for examination and observation, after which the insanity acquittee would have to be committed under the clear and convincing evidence standard.\(^{197}\) Also, the insanity acquittal could be used in the commitment hearing.\(^{198}\)

**Conclusion**

The decision in *Jones* results in less protection for the insanity acquittee who is facing commitment. The outcome is not in keeping with United States Supreme Court precedents, the position of some of the lower federal courts, and the trend in the states. Analysis of the bases the majority used in arriving at its conclusion, that an insanity acquittal is a constitutionally adequate basis for indefinite, involuntary commitment, shows them to be inadequate and unacceptable to meet due process standards. Further, there are other ways to protect society without denying an individual the protection afforded by the clear and convincing evidence standard. For these reasons, it is suggested that in *Jones* and future cases the constitutionally adequate basis for indefinite, involuntary commitment of an insanity acquittee should have been and should be clear and convincing evidence of mental illness and dangerousness.

An insanity acquittee who has been committed under the clear and convincing evidence standard should not be released just because he has been hospitalized for a period longer than he might have served in prison had he been convicted. This conclusion is

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197. *See Jones*, 103 S. Ct. at 3059 (Brennan, J., dissenting). The writer disagrees with the tolerance of the Brennan dissent and the acceptance by the Stevens dissent, of the idea that the insanity acquittal provided a sufficient basis to confine the petitioner for the one year prison sentenced imposed in *Jones*. *Id.* at 3061 (Brennan, J., dissenting; Stevens, J., dissenting). This is not in keeping with the notion that an insanity acquittee may not be punished. *See* notes 32 & 129 and accompanying text supra. It is the writer's opinion that "a reasonably limited time period" should mean no longer than 90 days. The provisions for the states which follow this approach include: ILL. ANN. STAT. ch. 38, § 1005-2-4(a) (Smith-Hurd Supp. 1983-1984) (30 days); MASS. GEN. LAWS ANN. ch. 123, § 16(a) (West Supp. 1983-1984) (40 days); MICH. COMP. LAWS ANN. § 330.2050(1) (West 1980) (60 days); NEB. REV. STAT. § 29-2203 (Reissue 1979) (30 days); N.Y. CRIM. PROC. LAW § 330.20(4) (McKinney Supp. 1983-1984) (30 days plus a possible additional period of 30 days); TENN. CODE ANN. § 33-709(a) (Supp. 1983) (90 days); W. VA. CODE § 27-6a-3(a) (1980) (40 days).

198. *See Jones*, 103 S. Ct. at 3059. Where the crime is a felony the state will most likely be able to meet the clear and convincing evidence standard. *See Benham*, 678 F.2d at 528.
based on the fact that the time necessary to recover from mental illness may be shorter or longer than the hypothetical criminal sentence and therefore, such sentence is irrelevant to the length of an insanity acquittee's commitment.

Daniel H. Mundt, Jr.—'84