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## ARTICLE

# THE CONSEQUENCES OF THE INSANITY DEFENSE: PROPOSALS TO REFORM POST-ACQUITTAL COMMITMENT LAWS\*

James W. Ellis\*\*

Legislatures currently face a spate of proposals concerning the civil commitment of criminal defendants who have been acquitted by reason of insanity.<sup>1</sup> This outpouring of suggested reforms has been occasioned by the political reaction to the controversial acquittal in the *Hinckley* trial and emboldened by a United States Supreme Court decision that grants considerable latitude to legislators on this topic.<sup>2</sup> Legislators will find some common themes in these competing recommendations, but also some important differences. This Article analyzes the most prominent proposals.

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\* © James W. Ellis, 1986. This Article is an expanded version of a paper delivered at a conference on mental health law sponsored by the University of Miami School of Law. Portions of it will appear in somewhat different form in a collection of papers from that conference.

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1. The defense has long carried the label of "insanity." This terminology has increasingly created confusion as the word has taken on different meanings and connotations. One difficulty is that it appears to address only mentally ill defendants, while in fact, the defense encompasses mentally retarded individuals as well. *See, e.g., In re Ramon M.*, 22 Cal. 3d 419, 584 P.2d 524, 149 Cal. Rptr. 387 (1978); Ellis & Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 432-41 (1985). The American Bar Association's new *Criminal Justice Mental Health Standards* call for abandonment of the term "insanity" and its replacement with "mental nonresponsibility," because "[t]erms like 'insanity' and 'the criminally insane' conjure up visions of beastlike derangement" and are thus "offensive and stigmatizing." ABA STANDARDS FOR CRIMINAL JUSTICE ch. 7 & Introduction to Part VI (2d ed. 1980) [hereinafter cited as ABA Standards]. *See George, The American Bar Association's Mental Health Standards: An Overview*, 53 GEO. WASH. L. REV. 338, 362 n.176 (1985). While in full agreement with the motivation for the Standards' change in terminology, this Article will continue to use the archaic, but more familiar, label of "insanity."

2. *Jones v. United States*, 463 U.S. 354 (1983).

Although the criminal defense of insanity has long engendered substantial controversy, the focus has been directed more frequently at the defense itself rather than the consequences of its successful assertion. In academic circles, the dispute has most frequently and prominently centered around almost metaphysical debates about the concept of blameworthiness and the propriety of labelling acts as "criminal" when the moral responsibility of the actor was in doubt because of his mental condition.<sup>3</sup> "Rivers of ink, mountains of printer's lead, forests of paper have been expended"<sup>4</sup> debating "the volition prong" and "the cognitive prong" of the defense of insanity, and the relative merits of insanity as an affirmative defense, as contrasted to exclusive reliance on the requirement of *mens rea*.

These debates are useful in a number of ways,<sup>5</sup> but they do not address directly the crucial political issue of whether a person acquitted because of his mental state is "getting away with" criminal acts and thus escaping punishment.<sup>6</sup> The public's concern is less with ascertaining whether blame properly can be assigned to a particular defendant than with determining when he will get out. And the delusions of law professors and mental disability professionals to the contrary notwithstanding, it is the public's concern that drives the debate on possible changes in the insanity defense.

While legislators routinely invite the views of psychiatric experts and legal scholars at hearings on proposals to change the legal rules,<sup>7</sup> it cannot be doubted that even if these experts were to speak with a single voice endorsing the legal status quo, their polite reception would be followed by the enactment of changes demanded by a public dissatisfied with the perceived

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3. The literature on this issue is voluminous. Among recent contributions, see, e.g., H. FINGARETTE & A. HASSE, *MENTAL DISABILITIES AND CRIMINAL RESPONSIBILITY* (1979); N. MORRIS, *MADNESS AND THE CRIMINAL LAW* (1982); A. STONE, *LAW, PSYCHIATRY & MORALITY* (1984); W. WINSLADE & J. ROSS, *THE INSANITY PLEA* (1983).

4. Morris, *Psychiatry and the Dangerous Criminal*, 41 S. CAL. L. REV. 514, 516 (1968).

5. Their principal importance, of course, is in directing our attention to the question of the appropriate use of the criminal sanction in cases involving mental disability. They also serve to illuminate moral questions as they relate to public policy, to instruct first year law students in the methodology of legal reasoning, and to provide the opportunity for the occasional turn of a felicitous phrase, as in the American Psychiatric Association's observation that "[t]he line between an irresistible impulse and an impulse not resisted is probably no sharper than that between twilight and dusk." American Psychiatric Association, *Statement on the Insanity Defense* (Dec. 1982), in *ISSUES IN FORENSIC PSYCHIATRY* 7, 16 (1984) [hereinafter cited as APA Statement].

6. Cf. H. STEADMAN, *BEATING A RAP?: DEFENDANTS FOUND INCOMPETENT TO STAND TRIAL* (1979).

7. See, e.g., *Limiting the Insanity Defense: Hearings on S. 818 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. (1982); *The Insanity Defense: Hearings on S. 818 Before the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. (1982); *Insanity Defense in Federal Courts: Hearings on H.R. 6783 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. (1982).

workings of the insanity defense.<sup>8</sup> There is reason to believe that the public's perception of the consequences of an acquittal by reason of insanity is inaccurate,<sup>9</sup> but it cannot be doubted that the public's principal concern is the likelihood that an acquitted defendant will be released from custody more quickly than the public deems desirable.<sup>10</sup> Indeed, the popular dissatisfaction with other issues, such as allocation of the burden of proof on the insanity issue and the insanity standard, is fueled ultimately by concern over the possibility that too many defendants are "getting off," which to many in the general public means "going free."<sup>11</sup>

Therefore, it was not surprising that when an outcry followed the acquittal of John W. Hinckley, Jr., for the attempted assassination of the President,<sup>12</sup> legislative attention should turn to the issue of disposition of insanity acquittees. Following the *Hinckley* verdict, the American Psychiatric Association and the American Bar Association formulated positions on the dis-

8. An example demonstrating the predominance of the political impulses in this area is the enactment of "Guilty But Mentally Ill" statutes in a number of states. Disapproval by the American Bar Association, the American Psychiatric Association, and most commentators who addressed the topic did not stay the hands of legislators bent on their enactment. See generally ABA Standards, *supra* note 1, at 7-6.10(b) and accompanying commentary; APA Statement, *supra* note 5, at 14 ("[T]he American Psychiatric Association is extremely skeptical of this approach."); Hermann & Sor, *Convicting or Confining? Alternative Directions in Insanity Law Reform: Guilty But Mentally Ill Versus New Rules for Release of Insanity Acquittes*, 1983 B.Y.U. L. REV. 499; Slobogin, *The Guilty But Mentally Ill Verdict: An Idea Whose Time Should Not Have Come*, 53 GEO. WASH. L. REV. 494 (1985).

9. For a review of the relevant literature, see Steadman & Braff, *Defendants Not Guilty by Reason of Insanity*, in *MENTALLY DISORDERED OFFENDERS: PERSPECTIVES FROM LAW AND SOCIAL SCIENCE* 109 (J. Monahan & H. Steadman eds. 1983).

10. See, e.g., Senator Orrin Hatch's list of reasons why he believes the insanity defense to be "obsolete:"

First, no longer may acquittees be placed indefinitely in a facility for the criminally insane. They must be treated comparably to a civilly committed patient. Secondly, our psychiatric hospitals are no longer warehouses for prolonged storage of socially unacceptable deviants. Thirdly, a loosening of the insanity defense and tightening of civil commitment standards have resulted in the placement within our psychiatric hospitals of some individuals acquitted of bizarre sociopathic activities who cannot be "treated"; and yet must and should be confined for the protection of society. Finally, standards for release of acquittees require a psychiatric prediction of continuing dangerousness, a feat that is, at best, chimerical.

*Limiting the Insanity Defense: Hearings on S. 818 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 34 (1982).

11. A national public opinion poll taken at the outset of the *Hinckley* trial revealed that 87% of the sample "believed that too many murderers were using insanity pleas to avoid jail." L. CAPLAN, *THE INSANITY DEFENSE AND THE TRIAL OF JOHN W. HINCKLEY, JR.* 103 (1984) (citing an Associated Press/NBC News poll). See also Margulies, *The "Pandemonium Between the Mad and the Bad:" Procedures for the Commitment and Release of Insanity Acquittes after Jones v. United States*, 36 RUTGERS L. REV. 793, 794 n.3 (1984) (citing New York Times poll in which 75% of the respondents opposed the insanity defense).

12. See L. CAPLAN, *supra* note 11, at 101-27.

position of such defendants,<sup>13</sup> as did the National Conference of Commissioners on Uniform State Laws and a commission convened by the National Mental Health Association. Also during this period, the United States Supreme Court issued a ruling on some of the constitutional issues involved in commitment of insanity acquittees,<sup>14</sup> and Congress passed the Insanity Defense Reform Act of 1984.<sup>15</sup>

Each of these proposals may be considered as possible models by state legislators interested in reforming commitment laws for insanity acquittees. Two earlier models, the American Law Institute's Model Penal Code and Oregon's Psychiatric Security Review Board, may also attract legislative attention. After a brief review of the historical background of the issue, this Article will analyze the Supreme Court's decision, the proposal from the APA, the new federal statute, the ABA Criminal Justice Mental Health Standards and the Model Statute proposed by the Commissioners on Uniform State Laws. This Article will also discuss the provisions of the Model Penal Code, Oregon's system, and the recommendations of the National Commission on the Insanity Defense.<sup>16</sup>

## I. HISTORICAL TREATMENT OF ACQUITTEES

Since the inception of the insanity defense, it has always been assumed

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13. Both the ABA and APA acknowledged that their new positions were occasioned, in part, by reaction to the *Hinckley* case. The Supreme Court, in *Jones*, did not. 463 U.S. 354 (1983).

14. *Jones v. United States*, 463 U.S. 354 (1983).

15. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, 2057-68.

16. There is a voluminous literature that preceded these recent events on the subject of the commitment of insanity acquittees. See, e.g., Morris, *Acquittal by Reason of Insanity: Developments in the Law*, in *MENTALLY DISORDERED OFFENDERS: PERSPECTIVES FROM LAW AND SOCIAL SCIENCE* 65-108 (J. Monahan & H. Steadman eds. 1983); D. WEXLER, *CRIMINAL COMMITMENTS AND DANGEROUS MENTAL PATIENTS: LEGAL ISSUES OF CONFINEMENT, TREATMENT, AND RELEASE* (Nat'l Inst. of Mental Health 1976); German & Singer, *Punishing the Not Guilty: Hospitalization of Persons Acquitted by Reason of Insanity*, 29 RUTGERS L. REV. 1011 (1976); Hamann, *The Confinement and Release of Persons Acquitted by Reason of Insanity*, 4 HARV. J. ON LEGIS. 55 (1966); Weihofen, *Institutional Treatment of Persons Acquitted by Reason of Insanity*, 38 TEX. L. REV. 849 (1960); Weiner, *Not Guilty by Reason of Insanity: A Sane Approach*, 56 CHI.-[KENT] L. REV. 1057 (1980); Note, *Commitment Following an Insanity Acquittal*, 94 HARV. L. REV. 605 (1981); 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 (1982); Comment, *Compulsory Commitment Following a Successful Insanity Defense*, 56 NW. U.L. REV. 409 (1961). For more recent analysis, see Hermann, *Automatic Commitment and Release of Insanity Acquittes: Constitutional Dimensions*, 14 RUTGERS L.J. 667 (1983); Singer, *The Aftermath of an Insanity Acquittal: The Supreme Court's Recent Decision in Jones v. United States*, 477 ANNALS 114 (1985); Wexler, *Redefining the Insanity Problem*, 53 GEO. WASH. L. REV. 528 (1985).

that acquittal by reason of mental disability would not entitle the defendant to automatic (or even eventual) freedom. Blackstone, after describing the circumstances under which an insane person was exculpated, declared that "as they are not answerable for their actions, they should not be permitted the liberty of acting unless under proper control; and in particular they ought not to be suffered to go loose, to the terror of the king's subjects."<sup>17</sup> The harshness of Norman and medieval punishments was mitigated for insane defendants in the form of "consultation" with the King, who had the power to waive the penalty in the interests of justice and also to determine the insane offender's disposition. Indeed the fiction that setting the length and location of post-acquittal confinement was a royal prerogative was not abandoned in England until 1964.<sup>18</sup>

But whether the actual decision about disposition was made by the sovereign or by the courts, it is clear that "treatment" as we know it was not the purpose of the confinement. As Blackstone observed, "It was the doctrine of our ancient law that persons deprived of their reason might be confined till they recovered their senses, without waiting for the forms of a commission or other special authority from the crown: and now, by the vagrant acts, a method is chalked out for imprisoning, chaining and sending them to their proper homes."<sup>19</sup> The possibility of committing insanity acquittees to mental institutions rather than prisons was codified in the wake of *Hadfield's Case* in 1800.<sup>20</sup> But even then, the principal focus remained on confinement.<sup>21</sup>

In this country, there was a similar assumption that acquittal upon grounds of insanity at the time of the offense would lead to confinement for the protection of society. Perhaps the most prominent case in the early decades of the new republic was that of Richard Lawrence, who attempted to assassinate President Andrew Jackson in 1835.<sup>22</sup> Lawrence's obvious mental illness led the jury, after five minutes of deliberation, to acquit him by reason of insanity, following which he spent the remaining quarter century

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17. 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*25.

18. 1 N. WALKER, CRIME AND INSANITY IN ENGLAND: THE HISTORICAL PERSPECTIVE 194 (1968).

19. W. BLACKSTONE, *supra* note 17.

20. Criminal Lunatics Act, 1800, 39 & 40 Geo. 3, ch. 94, 5 Stat. 393; Moran, *The Origin of Insanity as a Special Verdict: The Trial for Treason of James Hadfield (1800)*, 19 LAW & SOC'Y REV. 487 (1985); N. WALKER, *supra* note 18, at 78-81. See also S. GLEUCK, MENTAL DISORDER AND THE CRIMINAL LAW 393 (1925); R. SMITH, TRIAL BY MEDICINE: INSANITY AND RESPONSIBILITY IN VICTORIAN TRIALS 20 (1981).

21. The statute announced its purpose as "the safe custody of persons charged with offenses." N. WALKER, *supra* note 18, at 78. For a fuller discussion of the statute and its historical context, see Moran, *supra* note 20.

22. See *United States v. Lawrence*, 26 F. Cas. 887 (C.C.D.C. 1835) (No. 15,577).

of his life at what is now St. Elizabeths Hospital.<sup>23</sup> Eventually, most states codified rules providing for automatic confinement with extremely burdensome standards and procedures for obtaining release from confinement.<sup>24</sup> With few exceptions, nineteenth and early twentieth century American courts upheld statutes which provided for the automatic and indeterminate confinement of defendants who were successful in pleading insanity.<sup>25</sup>

Challenges to the assumptions underlying automatic commitment accompanied the more general recognition of the civil rights of mentally disabled people in the 1960's and 1970's.<sup>26</sup> Particularly influential in crystallizing dissatisfaction with the automatic commitment system were reports by the Association of the Bar of the City of New York,<sup>27</sup> and the opinion by the United States Court of Appeals for the District of Columbia in *Bolton v. Harris*,<sup>28</sup> holding that equal protection required that insanity acquittees receive procedural protections roughly equivalent to those afforded general civil commitment patients.<sup>29</sup>

The movement toward equivalence of treatment required a substantial de-

23. *Id.*; J. CLARKE, AMERICAN ASSASSINS: THE DARKER SIDE OF POLITICS 195-98 (1982); Zonana, *The First Presidential Assassination Attempt*, 12 BULL. AM. ACAD. PSYCHIATRY & L. 309 (1984).

24. For a survey of state laws in the 1920s, see S. GLUECK, *supra* note 20, at 391-412 (1925). By 1954, the majority of states required no additional procedure beyond the insanity acquittal to warrant commitment. H. WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 365-75 (1954). Most states provided that mental facilities lacked the ability to release acquittees without approval of a court, commission, or the governor. *Id.* at 376-84. (A provision requiring approval by the legislature before an acquittee could be released was declared unconstitutional because it denied the right of habeas corpus. *In re Boyett*, 136 N.C. 415, 48 S.E. 789 (1904).) Almost all of the statutes placed the burden of persuasion on the acquittee to demonstrate that he was no longer insane and, in some states, that he was not dangerous. H. WEIHOFEN, *supra* at 376-84.

25. See, e.g., *Ex parte Slayback*, 209 Cal. 480, 288 P. 769 (1930); *People v. Dubina*, 304 Mich. 363, 8 N.W.2d 99 (1943). See generally H. WEIHOFEN, *supra* note 24, at 365-84, and cases cited therein. *But see* *Underwood v. People*, 32 Mich. 1 (1875) (statute unconstitutional because it provides no inquiry into current mental condition); *In re Boyett*, 136 N.C. 415, 48 S.E. 789 (1904) (statute denied due process where it lacked notice, adjudication by a court, or any form of review).

26. See THE MENTALLY DISABLED AND THE LAW 404-05 (S. Brakel & R. Rock rev. ed. 1971). See generally Wald & Friedman, *The Politics of Mental Health Advocacy in the United States*, 1 INT'L J.L. & PSYCHIATRY 137 (1978).

27. ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, MENTAL ILLNESS AND DUE PROCESS (1962); ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, MENTAL ILLNESS, DUE PROCESS AND ACQUITTED DEFENDANTS (1979); ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, MENTAL ILLNESS, DUE PROCESS AND THE CRIMINAL DEFENDANT (1968).

28. 395 F.2d 642 (D.C. Cir. 1968).

29. *Id.* at 651. The view that insanity acquittees were entitled to procedural protections equivalent to those received by general civil commitment patients appeared to be supported by language in *Jackson v. Indiana*, 406 U.S. 715 (1972), which required equivalence between gen-

parture from past procedures for acquittees since civil mental patients were entitled to greater protections than they had received in past decades.<sup>30</sup> In particular, courts and legislatures<sup>31</sup> recognized rights to a commitment hearing which included representation by counsel in all cases (and assistance by a mental disability professional expert in many), with the burden of persuasion on the state to prove the individual's dangerousness to himself or to others, to individualized treatment or habilitation in the least restrictive alternative, and to periodic review of his continuing need for commitment.<sup>32</sup> These new laws meant that initiation of civil commitment proceedings did not automatically result in confinement in a mental hospital and, that even if committed, the confinement of most patients would not be permanent or of very long duration.<sup>33</sup> The new legal structure for general civil patients was inconsistent with the previous expectation that insanity acquittees would be confined automatically and permanently, and this was of particular concern in those states which used general civil commitment procedures for the confinement of acquittees.<sup>34</sup>

Nevertheless, this tension between new legal procedures and enduring public expectations about the confinement of acquittees did not produce any widespread changes in commitment procedures prior to the *Hinckley* case. In a few states, legislators responded to local insanity defense cases which achieved public notoriety with a somewhat oblique change in dispositional alternatives, the "Guilty But Mentally Ill" verdict. But this was only an attempt to reduce the number of acquittees rather than to assure the secure

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eral commitment patients and those criminal defendants found permanently incompetent to stand trial.

30. The case for equivalence between acquittees and general civil patients is argued forcefully by Professor Grant Morris. See Morris, *supra* note 16.

31. For a discussion of the political process in enacting one such statute, see E. BARDACH, *THE SKILL FACTOR IN POLITICS: REPEALING THE MENTAL COMMITMENT LAWS IN CALIFORNIA* (1972).

32. See, e.g., *Addington v. Texas*, 441 U.S. 418 (1979); *Lynch v. Baxley*, 386 F. Supp. 378 (M.D. Ala. 1974); *Fasulo v. Arafah*, 173 Conn. 473, 378 A.2d 553 (1977); N.M. STAT. ANN. §§ 43-1-2 to 43-1-25 (Repl. 1984). For model statutes embodying many of these provisions, see *Legal Issues in State Mental Health Care: Proposals for Change, Civil Commitment*, 2 MENTAL DISABILITY L. REP. 73 (1977); *Model Right to Developmental Disabilities Services Act*, in *DISABLED PERSONS AND THE LAW: STATE LEGISLATIVE ISSUES* 409, 425 (B. Sales, D. Powell & R. Van Duizend eds. 1982); Stromberg & Stone, *A Model State Law on Civil Commitment of the Mentally Ill*, 20 HARV. J. ON LEGIS. 275 (1983), reprinted in *ISSUES IN FORENSIC PSYCHIATRY* 57 (American Psychiatric Ass'n 1984).

33. For a study of the practical effect of these new laws, see C. WARREN, *THE COURT OF LAST RESORT: MENTAL ILLNESS AND THE LAW* (1982).

34. In 1981, 19 states used general commitment procedures for acquittees. Note, *Commitment Following an Insanity Acquittal*, 94 HARV. L. REV. 605 n.3 (1981).



confinement of those who were acquitted.<sup>35</sup> The *Hinckley* acquittal changed the situation radically, and the first vehicle for change was the otherwise obscure appeal of Michael Jones in the District of Columbia.

## II. THE SUPREME COURT DECISION IN THE *JONES* CASE

It is certainly ironic that *Jones v. United States*<sup>36</sup> became the focus for this politically charged issue, since it did not involve a notorious criminal or a crime which outraged the community. Michael Jones was arrested in a department store in 1975 and charged with attempting to steal a jacket. It is difficult to imagine many criminal acts more obscure or less threatening to the public's sense of security. The fact that thrust Michael Jones into the legal spotlight, and thus pushed him into the path of the Supreme Court's onrushing reaction against the rights of mental patients who might be thought dangerous, was his acquittal by reason of insanity. The intervening event that placed in controversy his uncontested<sup>37</sup> entitlement to a verdict of acquittal was John Hinckley, Jr.'s acquittal on charges of attempting to assassinate President Reagan. Jones and Hinckley had two things in common: mental illness and the fact that they were both acquitted and confined under the same District of Columbia statute.

Jones had been confined at St. Elizabeths Hospital for eight years before his case became a legal cause celebre. In the litigation that eventually reached the Supreme Court, his lawyers claimed that he was entitled to a commitment hearing at which the government had the burden of persuasion, because he would have been released years earlier had he been convicted rather than acquitted. Thus, the claim was that the government's right to deny him a hearing that all other patients are entitled to ended at the expiration of the sentence he could have received following a conviction. Inherent in this contention is the basic proposition that the prosecution constitutionally could not gain greater authority over a defendant through an acquittal than it would have received from a conviction. This was a simple proposition, supported by the preponderance of scholarly commentary on the subject<sup>38</sup> as well as a substantial body of case law.<sup>39</sup> The District of Columbia's

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35. These expectations have not been borne out in practice. See *Evaluating Michigan's Guilty But Mentally Ill Verdict: An Empirical Study*, 16 U. MICH. J.L. REF. 77 (1982).

36. 463 U.S. 354 (1983).

37. The prosecution did not contest Jones' plea of insanity and stipulated to the relevant facts in the trial court. 463 U.S. at 360.

38. See, e.g., Morris, *supra* note 16; Note, *Commitment Following an Insanity Acquittal*, 94 HARV. L. REV. 605 (1981); 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 (1982).

39. See, e.g., *Benham v. Edwards*, 768 F.2d 511 (5th Cir. 1982), *vacated sub nom. Ledbet-*

Court of Appeals rejected Jones' appeal,<sup>40</sup> and the United States Supreme Court agreed by a vote of five to four.<sup>41</sup> Analysis of the Court's opinion requires an inquiry into the justification for treating acquittees differently from other individuals whose civil commitment is sought by the government.

#### A. Automatic Commitment

The initial issue in the disposition of insanity acquittees is whether automatic commitment should follow the criminal court's verdict. Automatic commitment is politically attractive, since it assures the public that a defendant who is successful in pleading insanity for a criminal act he committed will not, at least for some time, be returned to society and thus pose a danger to public safety. Acquittal, however, renders punishment constitutionally unacceptable, requiring some other justification for the defendant's continued confinement.<sup>42</sup> The only available rationale is that acquittees remain dangerous due to a mental disability and therefore can be automatically committed for treatment of that disability, or simply to incapacitate them—as the Court in *Jones* put it, to “protect him and society from his potential dangerousness.”<sup>43</sup> But as a logical (and thus constitutional) matter, this requires a conclusion that all acquittees are prospectively dangerous. The constitutional principle of equal protection<sup>44</sup> requires that different treatment of persons committed after acquittal and other committed persons be based on some difference between the two groups.<sup>45</sup> The conclusion that the govern-

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ter v. Benham, 103 S. Ct. 3565 (1983); *People v. McQuillan*, 392 Mich. 511, 221 N.W.2d 569 (1974). *But see* *Warren v. Harvey*, 632 F.2d 925 (2d Cir. 1980).

40. A panel of that court had originally rejected Jones' appeal, and then reversed itself after a rehearing. 396 A.2d 183 (1978), *rev'd on rehearing*, 411 A.2d 624 (1980). Finally the entire court heard the appeal and rejected it. 432 A.2d 364 (1981).

41. 463 U.S. 354 (1983).

42. The Supreme Court has held that “due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.” *Jackson v. Indiana*, 406 U.S. 715, 738 (1972).

43. 463 U.S. at 368.

44. The principle embodied in the fourteenth amendment's equal protection clause is applicable to the federal government (and thus the District of Columbia) through the fifth amendment's due process clause. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

45. The weight of the government's burden in establishing the difference between the groups varies with the nature of the case. Cases involving “fundamental rights” require that the government demonstrate a “compelling interest” in treating groups of people differently. *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 528-37 (3d ed. 1986). The majority in *Jones* employed the more deferential standard for measuring the government's interest and thereby implicitly suggested that freedom from confinement in a mental hospital does not constitute a “fundamental right.” 463 U.S. at 362 n.10. This conclusion is questionable and may produce a variety of undesirable results in cases that do not involve insanity acquittees, but discussion of these issues is beyond the scope of this Article. *See Margulies, supra* note 11, at 814-18. It is sufficient for these purposes to demonstrate that there are

ment need not prove the prospective dangerousness of insanity acquittees in a separate proceeding (commitment hearing) requires the assumption that all such acquittees have been demonstrated to be dangerous in the course of their criminal trials. However, the determination in the criminal case that the defendant is not guilty by reason of insanity does not support this conclusion.<sup>46</sup>

Insanity acquittees are found not guilty at their criminal trials because of the effect of their mental disability as it existed and manifested itself at the time of the offense. However, a substantial period of time will have elapsed between the crime and the trial, and that period will be even longer when, as is frequently the case, the defendant's competence to stand trial has also been called into question. By the time the criminal court issues its verdict,<sup>47</sup> the defendant may no longer be mentally ill,<sup>48</sup> or if he is still mentally disabled, he may no longer be dangerous. These changes may occur naturally or as a result of treatment or habilitation. In either event, a factual finding about a defendant's mental state at the time of the crime may be inadequate as a description of his mental state at the time of the criminal court's verdict.<sup>49</sup>

It is now commonly accepted that psychiatrists and other mental disability professionals lack the ability to predict future dangerousness with a high degree of accuracy.<sup>50</sup> Yet whatever difficulties these professionals confront,

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not sufficient differences between insanity acquittees and other patients to constitute a "rational basis" for distinction, and that procedural due process is denied when acquittees do not receive a full hearing on their present mental condition and prospective dangerousness.

46. The equal protection argument is parallel to analysis under the due process clause requiring the same result. Since commitment involves a deprivation of liberty, it must be supported by adequate justification and accomplished with appropriate procedural protections. The justification for an acquittee's confinement must be sufficiently related to its "nature and duration." See *supra* note 42. Commitment premised on prospective dangerousness must be supported, therefore, by a finding that such dangerous conduct is likely from a particular acquittee. And the procedural component of due process requires that such a finding must be based on an individual determination. See *Specht v. Patterson*, 386 U.S. 605 (1967); *Baxstrom v. Herold*, 383 U.S. 107 (1966); *Addington v. Texas*, 441 U.S. 418 (1979).

47. Some insanity acquittals result from plea bargaining rather than verdicts following trials. See, e.g., *infra* note 91. Even in these cases, the mental condition of the defendant may have changed since the occurrence of the criminal act.

48. It is less likely that the passage of time or provision of habilitation will render a previously mentally retarded defendant nonretarded. But as with mentally ill defendants, those who are mentally retarded may no longer be dangerous at the time of conclusion of the trial. See generally *Ellis & Luckasson*, *supra* note 1.

49. This is not a novel observation. See *Underwood v. People*, 32 Mich. 1 (1875).

50. For insightful analysis of the research findings, see Monahan, *The Predictions of Violent Behavior: Toward a Second Generation of Theory and Policy*, 141 AM. J. PSYCHIATRY 10 (1984). See also Slobogin, *Dangerousness and Expertise*, 133 U. PA. L. REV. 97 (1984). Cf. *Diamond*, *The Psychiatric Prediction of Dangerousness*, 123 U. PA. L. REV. 439 (1974); *Ennis*

they are surely in a much better position to achieve accuracy than are criminal trial courts, whose focus is limited to a single past incident and the mental state that accompanied and produced it. It is thus difficult to conclude that that verdict can itself serve as an accurate prediction of future dangerousness. Without such a prediction, a commitment hearing to determine whether the basis for commitment exists would seem constitutionally required.

Another flaw in the assumptions underlying automatic commitment is that some acquittees may not have been dangerous even at the time of the criminal offense. The type of danger presented would have to be sufficiently serious to outweigh the individual's liberty interests in order to justify commitment. Some criminal offenses involve no danger or threat to the safety of others. Attempting to steal a jacket is an example of such an offense, as are embezzlement, fraud, and perjury. The law provides for the punishment of these offenses, but the likelihood that an individual will commit them in the future is not a sufficient basis for civil commitment, which typically requires demonstration of imminent likelihood of serious harm to self or others.<sup>51</sup> Therefore, whatever the strength of the government's claim that an insanity acquittal for a crime of violence or potential violence demonstrates prospective dangerousness, it does not extend to acquittees whose offense gives no indication of even past violent propensities.

Finally, the criminal court's verdict may be an inadequate predictor of future conduct because jurisdictions differ in their requirements of proof to support a verdict of insanity. Some jurisdictions place the burden of persuasion regarding the defendant's mental state at the time of the offense on the defendant, requiring him to demonstrate (at varying levels of certainty) that he lacked the requisite understanding of his actions or ability to control them. Other jurisdictions require for conviction that the state have proven, often beyond a reasonable doubt, that the defendant was not insane at the time of the offense. In these latter jurisdictions, a verdict of acquittal by reason of insanity may merely indicate that the finder of fact entertained a

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& Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693 (1974).

The United States Supreme Court, confronted with these research findings, declined to rule that psychiatric predictions of dangerousness were so unreliable that they could not be used in support of claims of aggravation in death penalty cases. *Barefoot v. Estelle*, 463 U.S. 880, 896-903 (1983). The majority in *Barefoot* held that the fact that a majority of psychiatrists believed such predictions to be unreliable should not preclude trial courts from hearing testimony from those mental health professionals who believed that they could predict accurately future violent behavior.

51. See *supra* note 32.

reasonable doubt about the defendant's mental condition.<sup>52</sup> In such cases, there has not even been an affirmative finding that the defendant was mentally ill or mentally retarded at the time of the offense. A judge's or juror's doubt about the certainty with which the state has proven its case regarding the defendant's insanity does not constitute a finding that he was in fact mentally ill or mentally retarded. It cannot, therefore, be taken as a substitute for such a finding in a civil commitment hearing.

The *Jones* majority dismissed two of these factors and limited its holding in a way that avoided the third.<sup>53</sup> The Court held that the District of Columbia's statute, which provided acquittees with the opportunity for a release hearing after fifty days of post-acquittal confinement<sup>54</sup> (and periodically thereafter) did not violate the Constitution. The fact that the District allowed release hearings distinguishes the case from statutes providing for completely unreviewed automatic commitment. But since the District of Columbia acquittee bears the burden of establishing his nondangerousness (or recovery from his mental disability) at those hearings, the Court's ruling upholds the constitutionality of denying acquittees the procedural protections afforded civil patients.<sup>55</sup> The majority accomplished this by determining that the finding of acquittal by reason of insanity provides enough information about the acquittee to justify treating him differently from civil commitment patients.<sup>56</sup>

The Court found little difficulty in approving the implicit prediction of dangerousness drawn from the criminal verdict under the District of Columbia system. Justice Powell, writing for the majority, observed that under the

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52. See *Morris*, *supra* note 16, at 68.

53. The Court's holding only extends to commitment systems in which the defendant bore the burden of persuasion at the previous criminal trial, and thus proved by at least a preponderance of the evidence that he had been mentally disabled at the time of the offense. Therefore, the decision does not speak to the constitutionality of automatic commitment following a trial at which an insanity verdict could be reached if the judge or jury merely entertained a reasonable doubt as to sanity, i.e., a system in which the prosecution had the burden of proof on the issue of insanity. 463 U.S. at 363-66. See Wexler, *Redefining the Insanity Problem*, 53 GEO. WASH. L. REV. 528, 534-35 n.37 (1985); ABA Standards, *supra* note 1, at Intro. to Part VII.

54. D.C. CODE ANN. § 24-301(d)(2) (1981). Acquittees can also obtain their release at similar hearings, which they can request at six-month intervals, at which they also bear the burden of persuasion. An acquittee can also be released if the hospital superintendent certifies that the acquittee is no longer mentally disabled or dangerous and if the court agrees with this conclusion. *Id.* § 24-301(e).

55. Typical modern civil commitment statutes for general mental health patients require the state to bear the burden of persuasion on periodic review of the patients' need for continued commitment. Van Duizend, McGraw & Keilitz, *An Overview of State Involuntary Commitment Statutes*, 8 MENTAL & PHYSICAL DISABILITY L. REP. 328, 335 (1984).

56. *But see* German & Singer, *supra* note 16, at 118.

District's statute an insanity acquittal establishes that the defendant committed the act for which he was prosecuted and that he did so as a result of mental illness. "Congress has determined that these findings constitute an adequate basis for hospitalizing the acquittee as a dangerous and mentally ill person. . . . We cannot say that it was unreasonable . . . for Congress to make this determination."<sup>57</sup> Thus the Court's opinion does not even address the fact that the trial court's determinations regarding mental illness and the resulting criminal act refer to a point in time substantially removed from the situation at the time of the acquittal (and even further removed from the time of subsequent hearings on periodic review). The fact that the predictive power of past events and conditions dims with the passage of intervening years is not acknowledged or even addressed by the Court's opinion.

The effect of the passage of time upon the accuracy of predictions of future dangerousness is a subject that the available empirical literature addresses in some detail.<sup>58</sup> But the Court's majority was disdainful of invitations to consult the state of current scientific knowledge on predictions of dangerousness.<sup>59</sup> Counsel for Jones had argued that the statute had no support in the empirical literature, but the majority dismissed this argument in a footnote: "We do not agree with the suggestion that Congress' power to legislate in this area depends on the research conducted by the psychiatric community." After quoting from previous opinions about the uncertainty of psychiatric diagnoses, the footnote concludes: "The lesson we have drawn is not that government may not act in the face of this uncertainty, but rather that courts should pay particular deference to reasonable legislative judgments."<sup>60</sup>

This is a startling lesson to draw. The fact that unchallenged empirical research has shown the fallibility of psychiatric diagnoses and predictions of

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57. 463 U.S. at 364.

58. See J. MONAHAN, *THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR* (National Inst. of Mental Health 1981).

59. The *Jones* Court's endorsement of unsupported presumptions and disregard for scientific knowledge on predictability of dangerousness have been widely criticized. See, e.g., Hermann, *supra* note 16, at 667; Margulies, *supra* note 11; Monahan, *supra* note 50; Schmidt, *Supreme Court Decision Making on Insanity Acquittees Does Not Depend on Research Conducted by the Behavioral Science Community: Jones v. United States*, 12 J.L. & PSYCHIATRY 507 (1984); Singer, *supra* note 16; Slobogin, *The Guilty But Mentally Ill Verdict: An Idea Whose Time Should Not Have Come*, 53 GEO. WASH. L. REV. 494, 524 (1985); *The Supreme Court, 1982 Term*, 97 HARV. L. REV. 70, 94 (1983); Note, *Indefinite Commitment of Insanity Acquittees and Due Process Considerations: Jones v. United States*, 74 J. CRIM. L. & CRIMINOLOGY 1334 (1983); Comment, *Jones v. United States: Automatic Commitment of Individuals Found Not Guilty by Reason of Insanity*, 68 MINN. L. REV. 822 (1984).

60. 463 U.S. at 365 n.13. This shifts the debate to the reasonableness of the legislative judgment at issue. But the Court in *Jones* accepted as "reasonable" a seriously flawed congressional enactment.

future behavior leads the Court to conclude that it is acceptable to base predictions of great consequence on presumptions that are even less reliable. Since the judgments of mental disability professionals form an imperfect foundation for such predictions,<sup>61</sup> it is acceptable, in the Court's view, for legislatures to make categorical predictions based on marginally relevant facts determined by trial courts that were litigating a different issue. In mandating deference to legislative judgments in this area, the Court does require that these be "reasonable," but in giving its approval to a legislative scheme that is unsupported by the existing knowledge about predictions of future violent conduct, the majority makes it hard to imagine what an "unreasonable" legislative approach would look like.

This would be troubling enough if the Court had limited the allowable inference of future dangerousness to cases in which the defendant had been found to have committed an act that involved some form of violent conduct. But Mr. Jones had only been charged with attempted petit larceny. Whatever the predictive power regarding future dangerous behavior of a violent felony, such as Hinckley's, the reliability of predictions based on acts which were themselves nonviolent property offenses must be substantially lower. The Court's attempt to justify predictions based on these lesser offenses is not persuasive. The majority first observed that its previous decisions had never held "that 'violence,' however that term might be defined, is a prerequisite for a constitutional commitment."<sup>62</sup> But this observation mischaracterizes the issue. The contention is not that an act of violence, which would presumably not include attempted shoplifting under any definition, must be a prerequisite to commitment, but rather that an act which was totally unrelated to personal violence cannot support a prediction of future violent behavior.

Since the finding by the trial court that a defendant engaged in nonviolent conduct tells us nothing reliable about future violent conduct of the acquittee, it cannot support a presumption sufficient to deny him a commitment hearing at which the government is required to prove that he is subject to lawful commitment. Systems of automatic commitment like the District of Columbia's are a short-circuit of the constitutional requirement that individuals can be deprived of their liberty only after a hearing. This is justifiable

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61. This is not to say that mental disability professionals lack any ability to predict dangerousness. Under some limited circumstances, such professionals can make some useful predictions about some kinds of behavior. *See, e.g.,* Monahan, *supra* note 50. But there is a consensus among researchers that such predictions will be accurate far less frequently than the general public (and perhaps the judiciary) believes.

62. 463 U.S. at 365.

only if we have learned something about the individual at the criminal trial that gives us a comparable assurance about his future conduct.

The *Jones* majority feebly attempts to persuade us that we have learned enough about Mr. Jones to make a reliable prediction about his propensity for future violent conduct because “crimes of theft frequently may result in violence from the efforts of the criminal to escape or the victim to protect property or the police to apprehend the fleeing criminal.”<sup>63</sup> Professor John Monahan has correctly observed that this argument proves too much:

Should such a Pickwickian definition be extended from insanity cases to general civil commitment, we may witness a reversal of the national trend toward increased specificity in the dangerousness criterion of commitment laws. The prediction of such “dangerous” acts as writing checks on insufficient funds, long thought to be a parody of statutory interpretation, may once again suffice to justify involuntary hospitalization.<sup>64</sup>

If this level of likelihood of future violent behavior is an acceptable basis for commitment without a hearing, the liberty of groups other than those acquitted by reason of insanity is also threatened.

The Court has rejected what we have learned scientifically about predictions of future dangerous conduct in favor of folk wisdom: “The fact that a person has been found, beyond a reasonable doubt, to have committed a criminal act certainly indicates dangerousness.”<sup>65</sup> This nihilism is all the more disturbing because the Court is willing to jeopardize an individual’s liberty, and even life itself,<sup>66</sup> on the basis of predictions that are demonstrably unreliable.

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63. *Id.* at 365 n.14.

64. Monahan, *supra* note 50, at 13.

65. 463 U.S. at 364. Similarly, the majority invokes “common sense” in determining the likelihood that the acquittee’s mental disability has not abated or responded to treatment: “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.” 463 U.S. at 366. It is true that the past existence of mental illness makes its current existence more likely than if the individual had never been mentally ill. But common sense does not dictate that this increased likelihood (as contrasted to the general population) warrants a “conclusion,” particularly when the acquittee may have received treatment that ameliorated his condition during the intervening months or years. Indeed, a defendant who was suffering from a severe mental illness at the time of the offense is particularly likely to have been committed before trial to evaluate (and possibly effect) competence. The possibility that this intervening commitment was accompanied by effective treatment increases the likelihood that his or her mental condition has improved by the time of the trial. See *supra* text accompanying notes 47-49.

66. A few days after the *Jones* decision, the Court approved the use of unsupported psychiatric predictions of dangerousness based on hypothetical questions in the penalty phase of capital punishment cases. *Barefoot v. Estelle*, 463 U.S. 880 (1983).



### B. Burden of Persuasion

Perhaps the most controversial issue in the area of the commitment of insanity acquittees is the allocation and magnitude of the burden of proof on the issue of committability. For mental patients who are not in the criminal justice system, the United States Supreme Court has held that the Constitution requires the government to bear the burden of persuasion by clear and convincing evidence. In *Addington v. Texas*,<sup>67</sup> the Court mandated this intermediate level of proof to reflect "the value society places on individual liberty,"<sup>68</sup> and thus to require a substantial degree of certainty that the proposed patient met the statutory requirements for commitment.<sup>69</sup> In a number of cases, insanity acquittees had claimed that the *Addington* standard should be applied to their commitment hearings following acquittal. Appellate courts divided on the question.<sup>70</sup> The Supreme Court decided in *Jones* that insanity acquittees were not entitled to the protections afforded by *Addington*.

In *Addington*, the Court used the procedural due process balancing test that it had announced in the context of disputes over Social Security disability payments.<sup>71</sup> Under this test, courts are to decide what procedural protections are constitutionally required by considering the nature of the individual interest involved, the risk of erroneous deprivation of that interest if the requested procedures are denied, the likelihood that those procedures will reduce the risk of error, and the government's interest in avoiding the requested procedures.<sup>72</sup> The *Jones* majority concluded that several of these factors were sufficiently different in cases involving insanity acquittees to warrant a radically different result than that reached in ordinary civil commitment cases.

According to the *Jones* majority, the individual interest in avoiding commitment was smaller for acquittees than for other civil patients. Acquittees, unlike other civil patients, would suffer little incremental stigmatization

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67. 441 U.S. 418 (1979).

68. *Id.* at 425.

69. On the problems inherent in quantifying burdens of persuasion, see Monahan & Wexler, *A Definite Maybe: Proof and Probability in Civil Commitment*, 2 LAW & HUMAN BEHAVIOR 37 (1978).

70. Compare *Benham v. Edwards*, 678 F.2d 511, 525 (5th Cir. 1982), *vacated sub nom. Ledbetter v. Benham*, 103 S. Ct. 3565 (1983) (*Addington* is applicable), with *Warren v. Harvey*, 632 F.2d 925, 931-32 (2d Cir. 1980), *cert. denied*, 449 U.S. 902 (1980) (*Addington* is distinguishable).

71. See *Mathews v. Eldridge*, 424 U.S. 319 (1976).

72. 424 U.S. at 335. For a discussion of the implementation of the *Mathews v. Eldridge* test in the context of mental disability cases, see Teitelbaum & Ellis, *The Liberty Interest of Children: Due Process Rights and Their Application*, 12 FAM. L.Q. 153, 174-202 (1978).

from their commitment, the Court concluded, since they were already stigmatized by the insanity verdict itself.<sup>73</sup> This is certainly true, but its significance is less clear. The greatest deprivation suffered by anyone who is civilly committed is the loss of physical freedom,<sup>74</sup> and this applies equally to insanity acquittees and to other patients. The stigmatization suffered by general civil commitment patients is doubtless real, but is surely the smaller part of the liberty interest that they lose through commitment.<sup>75</sup> Thus, for purposes of the procedural due process calculus the individual interest of acquittees in commitment cases is somewhat less than that of civil patients at stake in *Addington*, although the difference is slight.

The Court also concluded that the risk of erroneous commitment is lower for acquittees than for other patients. Any analysis of this element of the due process test requires identification of what is meant by "error" in this particular context. The majority opinion implies a definition by identifying its concern as the possible commitment of someone whose actions are "in fact within a range of conduct that is generally acceptable" and who is being confined for mere "idiosyncratic behavior."<sup>76</sup> It then concluded that this is a smaller risk for acquittees than for other potential patients because under the District of Columbia statute the defendant himself proved that he had committed a criminal act as a result of mental disability.<sup>77</sup>

As was true of the Court's analysis of the individual interest, this observation is accurate as far as it goes, but does not address the issue fully. The hypothetical case in which an eccentric crank is wrongfully committed is not the only type of error possible in a civil commitment system. It is also an

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73. 463 U.S. at 367 n.16.

74. The Court has variously referred to this deprivation as a "massive curtailment of liberty," *Humphrey v. Cady*, 405 U.S. 504, 509 (1972), and a "significant deprivation of liberty," *Addington v. Texas*, 441 U.S. at 425.

75. The Court has already recognized this fact in the general commitment case of *Parham v. J.R.*, 442 U.S. 584, 601 (1979), where it observed that formal commitment is only a part of "the public reaction to the mentally ill, for what is truly 'stigmatizing' is the symptomatology of a mental or emotional illness."

76. 463 U.S. at 367 (quoting *Addington*, 441 U.S. at 426-27). The Court earlier had focused its attention on the specter of states confining harmless individuals because of mere eccentricity.

May the State fence in the harmless mentally ill solely to save its citizens from exposure to those whose ways are different? One might as well ask if the State, to avoid public unease, could incarcerate all who are physically unattractive or socially eccentric. Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty.

*O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975).

77. 463 U.S. at 367. It is noteworthy that this feature of the majority opinion may mean that *Jones* is inapplicable in jurisdictions where the burden of persuasion at the criminal trial is differently allocated. See *supra* note 53.

error to commit a person who had been mentally disabled and, as a result, committed a criminal act sometime in the past, but who is currently free from mental disability or who will not constitute a danger to others if allowed to remain at liberty. By failing to focus on the costs of this kind of erroneous commitment, the Court's analysis ignores the risk that in a substantial number of cases insanity acquittees are committed based merely on a finding that they were mentally disabled at the time of the (often much earlier) criminal act. By failing to acknowledge the broader spectrum of possible errors, the Court underestimates the likelihood of erroneous decisions in a system in which the government is not required to establish the acquittee's current committability.

The Court does not directly address the next element of the due process test, the likelihood that the requested procedures will reduce errors.<sup>78</sup> The difference between a system in which the government bears the burden of persuasion by clear and convincing evidence that the individual currently meets commitment criteria (general commitment) and one in which the patient must prove that he has "recovered" or is no longer dangerous (the District of Columbia system for insanity acquittees) is substantial. This difference will surely be reflected in the results of hearings under the two systems. Indeed, in cases involving insanity acquittees the allocation of the burden may well be dispositive. Requiring the acquittee to establish that he does not meet the criteria for commitment may prove to be an impossible burden before trial courts which, because of understandable political pressures, are not predisposed to order his release from confinement.

The final element of the procedural due process test is an evaluation of the government's interest in avoiding the additional procedure. Usually this factor addresses the costs of the requested procedure, such as the financial cost of providing appointed counsel to indigents. In *Jones*, the majority focused on "the Government's strong interest in avoiding the need to conduct a *de novo* commitment hearing following every insanity acquittal—a hearing at which a jury trial may be demanded . . . and at which the Government bears the burden of proof by clear and convincing evidence."<sup>79</sup> This characterization of the governmental interest suggests that such hearings will be numerous and thus burdensome. Yet we know that few defendants are acquitted

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78. It could be argued that the Court alluded to the issue of error reduction implicitly by mentioning the District of Columbia's procedures for post-commitment review. 463 U.S. at 363 n.11. The Court did not rule on the constitutionality of these provisions. *Id.* But this passing reference provides no analysis of whether these procedures leave a substantial risk of error that other procedures requested by Jones could have reduced.

79. *Id.* at 366.

by reason of insanity.<sup>80</sup> The Court counts as a major cost the provision of jury trials, although the availability of juries in civil commitment cases is generally held to be within the discretion of the states.<sup>81</sup> Therefore, a state that found this a burdensome requirement could constitutionally provide for commitment proceedings to be heard by judges.<sup>82</sup> Even more puzzling is the Court's insistence on counting, as a reason for avoiding the requested allocation of the burden of proof to the government, the fact that the burden would then be on the government. It is certainly circular to suggest that a persuasive reason for avoiding a requested procedure is the fact that it will otherwise have to be provided.

The Court also observes that the hearing would be burdensome because "[i]nstead of focusing on the critical question whether the acquittee has recovered, the new proceeding likely would have to relitigate much of the criminal trial."<sup>83</sup> The Court's meaning is unclear. First, the "critical question" is not whether the acquittee has "recovered," but rather whether the government can lawfully confine him following his acquittal. Some defendants will not have "recovered" from all indicia of mental disability, but will no longer be (or never were) dangerous to others. This is particularly true for mentally retarded defendants.<sup>84</sup> Also, it is not clear why the Court believes that "much of the criminal trial" would have to be relitigated. The criminal offense for which the defendant was acquitted may, or may not, be necessary as evidence of the acquittee's dangerousness, but demonstrating it anew will not be more burdensome than adducing evidence to demonstrate dangerousness in any other civil commitment proceeding.

Whatever the public policy merits of placing the burden of persuasion on the government in the commitment of insanity acquittees, it is clear that the Supreme Court's use of the due process balancing test in *Jones* was far from even-handed. The awkwardness and seeming illogic of the majority opinion stem from the fact that the balancing test asks questions that are incongruent with the policies underlying automatic commitment. The main reason for avoiding a requirement that the state bear the burden at a commitment hear-

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80. See Steadman & Braff, *Defendants Not Guilty by Reason of Insanity*, in *MENTALLY DISORDERED OFFENDERS: PERSPECTIVES FROM LAW AND SOCIAL SCIENCE* 109, 110 (J. Monahan & H. Steadman eds. 1983); Steadman, Monahan, Harstone, Davis & Robbins, *Mentally Disordered Offenders: A National Survey of Patients and Facilities*, 6 *LAW & HUMAN BEHAVIOR* 31, 36 (1982).

81. See *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 *HARV. L. REV.* 1190, 1291-95 (1974).

82. This problem is even less troublesome than it may appear, since even where juries are permitted in civil commitment cases under state law, they are seldom requested.

83. 463 U.S. at 366.

84. See Ellis & Luckasson, *supra* note 1, at 468.

ing is not that such a hearing would add little of value to the rights of acquittees. Rather, the incentive for avoiding *Addington* hearings is that they might produce “undesirable” results in some cases—cases in which the government could not demonstrate that the acquittee is subject to lawful confinement. The concern about this prospect is not that those judgments would be factually incorrect, but rather that they would be politically unacceptable.<sup>85</sup> Presumably, the public demand is that acquittees not be allowed to “get off,” and a system of automatic commitment under which the individual never receives an *Addington* hearing is more likely to satisfy that desire than a system in which the acquittee’s current mental condition and prospective dangerousness are fairly litigated. This result can be accomplished within the Court’s previously announced test for procedural due process cases only by doctrinal brute force.

### C. Duration of Special Commitment

The simplest and most emotionally appealing argument advanced by the defendant in *Jones* was that he had been held in involuntary confinement as an acquittee for many years longer than he possibly could have been incarcerated as a convict. Counsel for Jones argued that equal protection and due process were denied when he was not treated as an ordinary mental patient when the government’s right to hold him would have expired had he been convicted. Whatever the merits of treating insanity acquittees differently for initial commitment and retention decisions, it was argued, they should be treated the same as civil patients at the expiration of the maximum authorized sentence for the offense with which they were charged. Thus the Court was asked to hold that the government’s ability to confine an acquittee under special commitment procedures should expire at the end of the maximum sentence he could have received had he been found guilty.

The Supreme Court rejected this argument. The majority concluded that the hypothetical maximum sentence for which an acquittee was tried was unrelated to the amount of time needed to treat him for his mental disability.<sup>86</sup> It further suggested that because the sentence was selected by the leg-

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85. Another wrinkle in the political aspects of this dispute is the possibility that one of the reasons courts may go through doctrinal contortions in supporting automatic commitment and avoiding equation with the *Addington* rights of other civil commitment patients is that they believe this to be necessary in order to “save” the insanity defense itself. The *Jones* majority opinion hints at this motivation in suggesting that placing the commitment burden on the state as in *Addington* might lead the legislature to make the insanity defense itself more difficult. 463 U.S. at 368 n.17. It is not clear whether the Court’s speculations about legislative politics are correct, but they are arguably *ultra vires* and surely inappropriate in an analysis of the requirements of the due process clause.

86. “There simply is no necessary correlation between severity of the offense and length of

islature for punitive purposes, use of that time period as a limitation on commitment would constitute impermissible punishment of a person who had not been convicted and therefore could not be punished.<sup>87</sup>

The majority's analysis attempts to answer the wrong question.<sup>88</sup> The issue is not how long Jones could be lawfully committed, but rather how long he could be confined under procedures different from those employed for general commitment patients. The Court is correct in stating that treatment needs should be a determining factor in ascertaining the appropriate length of commitment.<sup>89</sup> But the duration of the applicability of special commitment procedures should be set independently by principles of fairness and equality. Those principles require that special commitment be limited to the period of time during which the individual could have been confined had he been convicted.<sup>90</sup>

The statutory scheme approved in *Jones* puts a prosecutor whose primary motivation is maximizing the length of confinement and incapacitation of a defendant in a better position with an acquittal than he or she could achieve with a conviction, at least in cases in which the possible sentence for the criminal charge is relatively short.<sup>91</sup> The legislative determination of an appropriate sentence sets the length of time that the state believes is just for purposes of removing a convict from society, and thus constitutes a rough measure of proportionality between the offense and the appropriate maximum length of confinement.<sup>92</sup> It also reflects the legislature's judgment that no additional period of confinement is necessary to protect the public from the defendant's dangerousness unless he also meets the criteria for civil com-

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time necessary for recovery. The length of the acquittee's hypothetical criminal sentence therefore is irrelevant to the purposes of his commitment." 463 U.S. at 369.

87. *Id.* at 368-69.

88. See Justice Brennan's dissenting opinion, which comes much closer to getting the question right. *Id.* at 371. See also the dissenting opinion by Justice Stevens. *Id.* at 387.

89. An individual's need for treatment or habilitation is not the sole criterion for commitment; prospective dangerousness must also be demonstrated. "His confinement rests on his continuing illness and dangerousness." *Id.* at 369.

90. Cf. Margulies, *supra* note 11, at 825-27 (suggesting that another means of reducing the harshness of indefinite commitment would be to end all special commitments at an arbitrary time limit, such as five years).

91. It may be noteworthy on this point that the prosecution did not contest Mr. Jones' plea of not guilty by reason of insanity. See *supra* note 37. See generally Rogers, Bloom & Manson, *Insanity Defenses: Contested or Conceded*, 141 AM. J. PSYCHIATRY 885 (1984). The possibility of prolonged confinement in excess of the maximum sentence obviously will reduce the desirability of plea bargaining for defendants in insanity defense cases.

92. Individualization in the sentencing process allows the judge to decide that a particular convicted defendant should be confined for a shorter period of time (or not at all, as in sentence of probation), but does not permit an individual sentence longer than the maximum provided by the legislature.

mitment. The expiration of that maximum period is the end of the state's declared interest in incapacitation and confinement of people who have committed that particular offense.

Special commitment systems for insanity acquittees are a recognition that the state has an interest in the confinement of acquittees that is different from its interest in the confinement of other mental patients, and that special interest must be related to the offense committed by the individual acquittee. The state interest occasioned by attempted petit larceny is finite and measured by the maximum sentence;<sup>93</sup> it does not increase when the offender proves to be mentally disabled. Any greater interest in confining the disabled offender must arise from his disability rather than his offense. Confining an acquittee for a longer period than the maximum sentence for his crime can only be justified by his continuing treatment or habilitation needs, and at that point, the fact of his offense becomes irrelevant.<sup>94</sup> Therefore, there is no justification for treating him differently than general commitment patients who have a continuing treatment or habilitation need. Thus general commitment procedures should be the only means of extending such a commitment.

The *Jones* majority responds that using the sentence as a measure of the permissible length of commitment would constitute punishment of those who may not be punished.<sup>95</sup> But the petitioner's suggested use of the hypothetical maximum sentence does not involve an attempt to allow states to punish acquittees, but rather an attempt to circumscribe the otherwise limitless power of the government to treat acquittees differently from other committed patients. Giving Mr. Jones an *Addington* hearing at the end of one year of commitment surely cannot be seen as more punitive than denying him such a hearing forever.

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93. The *Jones* majority acknowledges this fact. "A particular sentence of incarceration is chosen to reflect society's view of the proper response to commission of a particular criminal offense, based on a variety of considerations such as retribution, deterrence, and rehabilitation." 463 U.S. at 368-69.

94. Similarly, in *Baxstrom v. Herold*, 383 U.S. 107 (1966), a unanimous Court declared that the Constitution requires that mentally ill prisoners be committed by general commitment procedures if their continued confinement is sought at the expiration of their sentence. The *Jones* majority does not address the rationale behind *Baxstrom*, but merely observes that it did not involve an insanity acquittee. 463 U.S. at 369 n.19; *cf. id.* at 375-76 (Brennan, J., dissenting). Surely a fuller explanation of why the majority did not deem *Baxstrom* controlling on this point would have been appropriate.

95. 463 U.S. at 369.

#### D. Conclusion

The *Jones* decision establishes a federal<sup>96</sup> constitutional floor for procedures for the civil commitment of acquittees in jurisdictions where the defendant bears the burden of persuasion on the issue of insanity at criminal trials. It does not address the constitutionality of similar procedures where the state bears the burden of proving sanity, and it does not preclude any jurisdiction from voluntarily adopting more substantial procedural protections. Although the Court upheld the constitutionality of the policy judgments made by Congress in the District of Columbia statute, its decision does not endorse the wisdom of those judgments. State legislatures, given the political pressures raised by the insanity defense, may be tempted to adopt similar provisions, but they need not do so and, indeed, there are substantial reasons to take a different approach. The *Jones* decision grants a substantial latitude to the states in setting commitment procedures, but each state must address the public policy issues surrounding the appropriateness of treating acquittees differently from other patients. Reviewing the various available models for systems of special commitment of acquittees may provide some guidance to states considering how to respond to the dilemmas presented by the insanity defense.

### III. THE AMERICAN PSYCHIATRIC ASSOCIATION'S POSITION

In the wake of the public reaction to the *Hinckley* verdict, the American Psychiatric Association (APA) issued an official position statement on the insanity defense.<sup>97</sup> The statement traced the history of the defense, discussed the reaction to the *Hinckley* verdict, and took positions opposing the abolition of the insanity defense,<sup>98</sup> expressing "extreme" skepticism about the advisability of enacting "guilty but mentally ill" statutes,<sup>99</sup> supporting abandonment of the volitional prong of the insanity defense,<sup>100</sup> expressing agnosticism about the allocation of the burden of persuasion on the issue of insanity at criminal trials,<sup>101</sup> and declining to oppose limitations on psychiatric testimony on the "ultimate issue" of insanity.<sup>102</sup> In addition, it pro-

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96. State constitutions may be interpreted to offer greater procedural protections than those the Supreme Court has recognized in *Jones*. See generally Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Meisel, *The Rights of the Mentally Ill Under State Constitutions*, 43 LAW. & CONTEMP. PROBS. (3) 7 (1982).

97. APA Statement, *supra* note 5, at 1.

98. *Id.* at 13.

99. *Id.* at 14.

100. *Id.* at 15-16.

101. *Id.* at 17-18.

102. *Id.* at 18-20.



posed changes in the laws governing disposition of individuals acquitted by reason of insanity.<sup>103</sup>

By way of preface, the APA report stated that "over the last decade, as a consequence of some civil libertarian-type court rulings that insanity acquittees may not be subjected to procedures for confinement that are more restrictive than those used for civil patients who have not committed criminal acts, the insanity defense became a more attractive alternative for defendants to plead."<sup>104</sup> A result, the statement concluded, "has been the rapid release from hospitals for a segment of insanity acquittees in some states," which, in turn, "has alarmed both the public and the psychiatric profession."<sup>105</sup> The APA then expressed concern that this reaction may imperil the continued availability of the insanity defense: "The public's perception that a successful plea of insanity is a good way to 'beat a rap' contributes to a belief that the criminal insanity defense is not only fundamentally unfair ('for after all, he did do it') but also that insanity is a dangerous doctrine."<sup>106</sup>

The APA then proposed a system of special commitment for acquittees. This system would be more modest in scope than that subsequently upheld by the Supreme Court in *Jones*, because it would apply only to defendants "charged with violent crime."<sup>107</sup> It is inappropriate to equate these defendants with ordinary civil commitment patients, according to the APA, because the latter are seldom actually violent, while the acquittees have already committed acts of violence. This leads to the conclusion that for these acquittees,

[t]heir future dangerousness need not be inferred; it may be assumed, at least for a reasonable period of time. The American Psychiatric Association is therefore quite skeptical about procedures now implemented in many states requiring periodic decisionmaking by mental health professionals (or by others) concerning a re-

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103. It should be noted that the APA's position is a brief description of its view of proposed statutory approaches; unlike the American Bar Association's Criminal Justice Mental Health Standards, discussed *infra* notes 172-208 and accompanying text, it does not purport to be detailed analysis for acquittees that might lead legislators to tighten up each of the policy issues involved in enacting such statutes. The issuance of the APA Statement followed the *Hinckley* acquittal but preceded the Supreme Court's decision in *Jones*. While the APA did not have the benefit of the Court's holdings on the constitutional issues involved in the commitment of acquittees, none of the Statement's proposals are in direct conflict with the holding in *Jones*.

104. APA Statement, *supra* note 5, at 11.

105. *Id.*

106. *Id.* at 12. This resembles the *Jones* majority's expressed concern that requiring an *Addington* hearing for acquittees might lead legislators to tighten up the availability of the defense itself. See *supra* note 85.

107. APA Statement, *supra* note 5, at 20. Cf. *supra* text accompanying note 62.

quirement that insanity acquittees who have committed previous violent offenses be repetitively adjudicated as "dangerous," thereupon provoking their release once future dangerousness cannot be clearly demonstrated in accord with the standard of proof required.<sup>108</sup>

The APA also proposed that there be a "presumption" that final discharge of acquittees be preceded by a long period of conditional release under clinical supervision, and that adequate resources be provided for this purpose.<sup>109</sup>

The statement opposed the continued confinement in mental health facilities of acquittees who are no longer amenable to treatment:

When there exists no realistic therapeutic justification for confinement, the psychiatric facility becomes a prison. The American Psychiatric Association believes this hypocrisy must be confronted and remedied. One appropriate alternative is to transfer the locus of responsibility and confinement for such acquittees to a nontreatment facility that can provide the necessary security.<sup>110</sup>

Finally, the APA stated that decisions to release acquittees from confinement "should not be made *solely* by psychiatrists or *solely* on the basis of psychiatric testimony about the patient's mental condition or predictions of future dangerousness."<sup>111</sup> The statement commended the Oregon model of a multidisciplinary board for making both commitment and release decisions for violent acquittees,<sup>112</sup> and stated that such a board should have the authority to order an acquittee's recommitment.<sup>113</sup>

#### A. Assumption of Future Dangerousness

The APA proposal sensibly suggested that special commitment procedures are warranted for violent acquittees because of the dissimilarity between the problems they pose and those presented by ordinary civil mental patients.<sup>114</sup> Less sensible, however, is the APA's suggestion, without citation to empirical research, that the acquittees' "future dangerousness need not be inferred; it may be assumed, at least for a reasonable period of

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108. APA Statement, *supra* note 5, at 21.

109. *Id.*

110. *Id.* at 22.

111. *Id.*

112. See OR. REV. STAT. §§ 161.327-161.336 (Repl. 1985). For a discussion of the Oregon system, see *infra* text accompanying notes 282-94.

113. APA Statement, *supra* note 5, at 23.

114. Of course, there are some civil patients who are demonstrably dangerous to others, but they are the minority among civil commitment patients.

time."<sup>115</sup> To the extent that this sentence purports to describe the factual dangerousness of insanity acquittees, the scientific literature does not support it. While existing data on recidivism (including both rehospitalization and subsequent criminal behavior) are imperfect, the studies that have been published in the professional literature offer no support for the conclusion that an accurate prediction of subsequent violence can be made from the mere fact of an acquittal.<sup>116</sup>

As an empirical assertion, the APA's statement that future dangerousness can be "assumed" is thus unsupported, and indeed is contradicted by the existing studies. It simply is not true that all (or even most) acquittees will engage in dangerous conduct in the future. The statement must therefore be read as a political judgment that the (much lower) likelihood of future violence is sufficient, as a matter of policy, to warrant their confinement without inquiry into their individual propensities. Such a policy judgment, while surely permissible (and indeed consistent with that of the Congress in the District of Columbia statute upheld by the Supreme Court in *Jones*), is not a scientific conclusion and rests on no special expertise possessed by the psychiatric profession. This judgment about the desirability of automatic commitment of acquittees who were charged with violent crimes masks certain implicit assumptions about the relative risks and costs of erroneous commitment of this class of patients. It is thus subject to the same criticism as the Supreme Court's opinion in *Jones*. Both fail to articulate clearly their underlying assumptions, and upon examination these assumptions seem inappropriate. If, in fact, acquittal by reason of insanity is not an accurate predictor of future dangerousness, this proposal displays a willingness to tolerate a high rate of erroneous commitments with the result of substantial individual and social costs. Although the prevention of dangerous acts is a compelling

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115. The APA does not further explain what it considers "a reasonable period of time." In approving the model of Oregon's Psychiatric Security Review Board, it notes that the authority of that board is limited to the duration of the sentence an acquittee could have received if convicted. The APA Statement does not appear to disapprove of this limitation, but it is not clear whether it believes that future dangerousness can be "assumed" for such a long period, given the fact that sentences for crimes of violence tend to be long. It should be noted that while the APA asserts that future dangerousness can be "assumed," the Oregon statute requires that the state demonstrate, by a preponderance of the evidence, the acquittee's current mental disability and prospective dangerousness to others. OR. REV. STAT. § 262.328 (Repl. 1985).

116. See Steadman & Braff, *Defendants Not Guilty By Reason of Insanity*, in *MENTALLY DISORDERED OFFENDERS: PERSPECTIVES FROM LAW AND SOCIAL SCIENCE* 109, 118-19 (1983), and studies cited therein. (Using different definitions—including misdemeanors and property crimes in some instances—and different populations from a variety of jurisdictions, the recidivism and rehospitalization rates ranged from 20% to 37%. Steadman and Braff suggest that this is probably higher than for general commitment mental patients but lower than the rate for ex-convicts.)

social need, absent empirical support for the assumption of future dangerousness from the fact of acquittal, a civil commitment finding regarding future dangerousness by clear and convincing evidence would meet this need consistent with our constitutional commitment to individual liberty.<sup>117</sup>

The APA's approval of automatic commitment for insanity acquittees is even more distressing in view of its resistance to providing periodic review for specially committed acquittees. For civil patients generally, the APA has endorsed the process of periodic review, with the state bearing the burden of persuasion by clear and convincing evidence at each interval.<sup>118</sup> Its opposition to the same protection against continued erroneous confinement for acquittees presumably results from a greater concern about the prospect of "premature" release of acquittees whose dangerousness can no longer be demonstrated but is nonetheless real. This concern is, of course, legitimate, but the APA's proposal sweeps too broadly in denying acquittees access to periodic review. It could easily result in life "sentences" for some acquittees whose potential for dangerous conduct waned long ago.<sup>119</sup> There exist less draconian measures to minimize the likelihood of releasing acquittees who

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117. Somewhat surprisingly, the APA proposal does not address the issue of whether continuing mental disability can be "assumed" from the verdict of acquittal, or whether it needs to be litigated in a commitment hearing (and subsequently on periodic review), and who should bear the burden of persuasion on this issue. By its silence, the APA avoids endorsing the old legal fiction that a mental state is invariably presumed to continue indefinitely, a presumption that is difficult to square with a modern clinical understanding of mental disability. It would not be inconsistent with the APA position (although arguably awkward in implementation) to require the state to demonstrate a current condition of mental illness or mental retardation but not continuing dangerousness. However, there is also a suggestion in the Statement that acquittees can be continued in confinement even when they no longer require treatment, and this may indicate a view that subsequent commitment need not be supported by demonstration of current mental disability at all. If this is the proper interpretation of the APA's position, it raises serious constitutional issues. See *infra* notes 201-04.

118. American Psychiatric Association, *Guidelines for Legislation on the Psychiatric Hospitalization of Adults*, in *ISSUES IN FORENSIC PSYCHIATRY* 27, 47 (1984).

119. The public's greatest concern, understandably, is with defendants acquitted of homicide. But since homicide is most frequently a crime committed against family members or close acquaintances, its recidivism rate is quite low. See E. SUTHERLAND & D. CRESSEY, *CRIMINOLOGY* 513, 650 (10th ed. 1978); N. MORRIS & G. HAWKINS, *THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL* 56-57 (1970). Thus prospective dangerousness may not be completely congruent with the nature of the individual's offense.

Consider, for example, the hypothetical case of an infanticidal mother who kills her baby as a result of temporary postpartum psychosis, and who is acquitted by reason of insanity. In the absence of other pathology, her prospective dangerousness must surely be minimal. Yet the APA proposal would "assume" that dangerousness, commit her automatically, and deny her periodic review at which the state would be required to demonstrate the likelihood of future violent conduct. Admittedly, she would be a logical candidate for conditional release under the APA scheme, and she might be able to bear the burden of persuasion regarding nondangerousness in proceedings that might be available (although the APA does not discuss

remain dangerous.<sup>120</sup>

### B. Release Procedures

Even more problematic are some of the APA's proposals regarding release procedures themselves. The statement declares that the decision to release an acquittee from confinement should not be a purely clinical judgment left to the sole discretion of mental health professionals.<sup>121</sup> This is a reasonable position, and it acknowledges that the decision to release an acquittee has components beyond the merely clinical. It also provides a check against individual clinical misjudgment and thus errs, if at all, on the side of caution in individual cases. It appropriately reflects public concern over the ill-advised release of violent acquittees.

But the statement also opposed the use of mental health facilities to confine acquittees who are not treatable. This, too, reflects a reasonable clinical and public policy concern that treatment facilities should not be transformed into prisons or warehouses by the requirement that they confine individuals whom they cannot treat.<sup>122</sup> However, the APA went further and suggested that acquittees who are not amenable to treatment can be transferred "to a nontreatment facility that can provide the necessary security."<sup>123</sup> The only existing facilities that match this description are jails and prisons, and it is difficult to imagine the invention of new facilities to meet this purpose that would be substantially different from jails or prisons, however they might be labeled.

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them). But it remains troubling that this proposal would automatically "assume" her present and continuing mental illness and dangerousness in the face of its clinical implausibility.

A different—and provocative—approach to public concern about the insanity defense is taken by Professor David Wexler, who argues that the defense should be unavailable to defendants who commit serious crimes against victims to whom they are not related. Wexler, *An Offense-Victim Approach to Insanity Defense Reform*, 26 ARIZ. L. REV. 17 (1984). See also Hall, *The Insanity Defense: Thumbs Down to Wexler's "Offense-Victim" Limitation*, 27 ARIZ. L. REV. 329 (1985); Wexler, *The "Offense-Victim" Insanity Limitation: A Rejoinder*, 27 ARIZ. L. REV. 335 (1985).

120. See *infra* text accompanying notes 172-208.

121. The APA expresses admiration for Oregon's decision to create a Psychiatric Security Review Board for these purposes. See *supra* note 112. The same goals can be accomplished through a system which requires judicial approval of release decisions. See *infra* notes 205-07.

122. Some general commitment statutes take the same position. See, e.g., N.M. STAT. ANN. § 43-1-12(G) (Repl. 1984) ("No mental health treatment facility is required to detain, treat or provide services to a client when the client does not require such detention, treatment or services.").

123. Indeed, the APA appears to go even further by suggesting that this class would also include those who cannot be treated because of "the lack of resources." APA Statement, *supra* note 5, at 22. It is inconceivable that the state should be allowed to incarcerate acquitted persons in nontreatment facilities because it declines to fund their treatment.

This is a most disturbing suggestion because it envisions the continuing confinement of an acquittee who is no longer mentally ill or whose mental illness will not be receiving treatment. Such confinement bears no resemblance to lawful commitment of any kind and is either post-acquittal preventive detention or punishment under another label.<sup>124</sup> In its decision in *Jones*, which was subsequent to the issuance of the APA statement, the Supreme Court made clear that it was impermissible to punish acquittees. The APA statement, which expresses extreme skepticism about the proposed "guilty but mentally ill" (GBMI) verdict,<sup>125</sup> has reinvented the GBMI dispositional system and imposed it upon nondisabled or untreatable acquittees.<sup>126</sup> If the state can confine acquittees without providing them with treatment, it is unclear how an acquittal differs from a conviction. Even within the context of the latitude allowed to states by the *Jones* decision, this proposal raises serious constitutional concerns.<sup>127</sup>

There are other ways to address the "hypocrisy" of the hospitalization of the nontreatable acquittee without running afoul of the principle that punishment is impermissible for those who have been acquitted. They involve releasing those acquittees who do not meet commitment criteria. This raises the specter of releasing a small number of individuals who may continue to be dangerous. Such a prospect is desired by no one, but the criminal justice system releases many other dangerous individuals because the Constitution and sound public policy require rules that prevent their conviction and incarceration. Paying that price is no more comfortable, but no less necessary, where the individual was acquitted by reason of insanity. Our concern with preventing unnecessary deprivation of liberty mandates that we assume these risks.

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124. The fact that a nontreatable acquittee may still be believed to be dangerous is not sufficient to warrant his continued confinement in a prison-like setting. Individuals acquitted for reasons other than insanity, such as the expiration of the statute of limitations or the inability of a jury to conclude that they were guilty "beyond a reasonable doubt," may also be thought to be dangerous, but they cannot be confined on that ground alone. The only thing that distinguishes insanity acquittees from other acquittees sufficiently to allow subsequent confinement is the presence of a treatable mental disorder.

125. See *supra* note 8.

126. Typical GBMI statutes provide that defendants convicted under this verdict may receive treatment at the discretion of the Department of Corrections, but have no statutory right to such treatment. See Stelzner & Piatt, *The Guilty But Mentally Ill Verdict and Plea in New Mexico*, 13 N.M.L. REV. 99, 115 (1983). A study of the GBMI statute that has been in effect the longest indicated that GBMI convicts were no more likely to receive treatment than other prisoners. Project, *Evaluating Michigan's Guilty But Mentally Ill Verdict: An Empirical Study*, 16 U. MICH. J.L. REF. 77, 104-05 (1982). For a discussion of the habilitation of mentally retarded prisoners under GBMI statutes, see Ellis & Luckasson, *supra* note 1, at 442-44.

127. See Solvenko, *Disposition of the Insanity Acquittee*, 11 J. PSYCHIATRY & L. 97, 107-08 (1983).

### C. Conclusion

The APA statement represents a timely call for special commitment procedures for insanity acquittees, but exceeds the bounds of prudent public policy in its call for automatic commitment without individual determinations of committability or periodic review and infringes upon constitutional liberties in its proposal for incarceration of those acquittees who cannot be treated.

## IV. THE INSANITY DEFENSE REFORM ACT OF 1984

Congress recently responded to public concern about the insanity defense by enacting the Insanity Defense Reform Act of 1984 as a part of the Comprehensive Crime Control Act of 1984.<sup>128</sup> The bills that formed the ultimate legislation were introduced in the wake of the *Hinckley* acquittal,<sup>129</sup> and focused on criminal trials in which the defense of insanity would be raised and on the disposition of the individuals acquitted, as well as other issues involving criminal defendants and prisoners who are mentally disabled.

A principal feature of the Act is to change the formulation of the insanity defense from the American Law Institute's Model Penal Code test<sup>130</sup> to a slight modification of the *Mc'Naghten* test (thus abandoning the volitional prong of the defense),<sup>131</sup> and to reverse the burden of proof by requiring the defendant who asserts the defense to prove his insanity by clear and convinc-

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128. Pub. L. No. 98-473, 98 Stat. 1976 (1984). The statute passed the Senate on February 2, 1984, but was not reported to the House Floor by the Judiciary Committee. In the closing days of the 98th Congress, the Senate bill was attached to the Continuing Appropriations Act on the House floor and passed.

129. See L. CAPLAN, *supra* note 11.

130. MODEL PENAL CODE § 4.01 (1985). There was no previous federal statute on the form of the insanity defense, but the courts of appeals had each individually adopted the ALI test. See, e.g., *United States v. Brawner*, 471 F.2d 969-73 (D.C. Cir. 1972). *But see* *United States v. Lyons*, 731 F.2d 243, 248 (5th Cir. 1984) (abandoning the ALI test for a formulation similar to that adopted by Congress later that year). These court decisions are, of course, superseded by the new statute.

131. The new formulation is similar to that recommended by the American Bar Association and the American Psychiatric Association. *Cf.* APA Statement, *supra* note 5, at 17; ABA Standards, *supra* note 1, at 7-6.1. The principal difference is that Congress, in adopting an amendment in the Judiciary Committee by Senator Specter, added the modifier "severe" to the term "mental disease or defect." S. REP. NO. 225, 98th Cong., 2d Sess. 422, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 3182, 3559 [hereinafter cited as S. REP. NO. 225]. The impact of this amendment, particularly for defendants who are mentally retarded, is not clear. See generally *Ellis & Luckasson*, *supra* note 1, at 437 n.123. The new statute's criteria for special commitment of acquittees require merely that the acquittee be dangerous "due to a present mental disease or defect," which raises the possibility of committing an individual whose current disability has improved to the point that it is not "severe" enough to meet the test for insanity but is nevertheless sufficient to justify commitment.

ing evidence.<sup>132</sup> In addition, the statute revises procedures for defendants believed to be incompetent to stand trial,<sup>133</sup> establishes procedures for evaluation of defendants who assert the insanity defense,<sup>134</sup> provides for a special verdict form when the defendant is acquitted "only by reason of insanity,"<sup>135</sup> and establishes procedures for committing convicts at sentencing<sup>136</sup> and as transfers from prison.<sup>137</sup> It provides for commitment of permanently incompetent defendants and for prisoners who remain mentally ill at the end of their sentences.<sup>138</sup> It also amends the Federal Rules of Evidence to preclude expert testimony on the ultimate issue of responsibility in insanity defense trials.<sup>139</sup>

In the course of these various changes in federal law regarding mentally disabled criminal defendants, Congress enacted a system of special commitment for federal defendants found not guilty "only by reason of insanity." Previously, federal courts had no dispositional powers regarding insanity acquittees and relied on persuading state officials to seek civil commitment under state law of these individuals following acquittal.<sup>140</sup> According to the Senate Report accompanying the bill, "[f]requently such efforts are unsuccessful; not uncommonly this is due to lack of sufficient contacts between the acquitted defendant and a particular State for the latter to be willing to undertake care and treatment responsibility for him."<sup>141</sup> In addition, very few federal crimes involve violence, and very few federal defendants successfully assert the insanity defense. Therefore, it had been suggested that Congress simply permit federal judges to hold acquittees for a period long enough to accomplish an evaluation of their current mental condition and to invoke state commitment procedures, rather than create an elaborate set of commit-

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132. Pub. L. No. 98-473, § 402, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 1837 (to be codified at 18 U.S.C. § 20) [hereinafter citations will refer to the codification citation only].

133. 18 U.S.C. § 4241 (Supp. 1984).

134. *Id.* § 4242.

135. *Id.* Previously, "guilty" and "not guilty" were the only verdicts available under the federal system, with insanity acquittees subsumed within the latter group without official designation by the trier of fact of the reason for acquittal. *See infra* note 140.

136. 18 U.S.C. § 4244.

137. *Id.* § 4245.

138. *Id.* § 4246.

139. *Id.* § 406 (amending rule 704).

140. *See* United States v. Gay, 522 F.2d 429 (6th Cir. 1975); United States v. Alvarez, 519 F.2d 1036 (3d Cir. 1975). This omission had been the subject of sporadic criticism. *See, e.g.,* United States v. McCracken, 488 F.2d 406, 415-18 (5th Cir. 1974); Dession, *The Mentally Ill Offender in Federal Criminal Law and Administration*, 53 YALE L.J. 684, 696 (1944); Tydings, *A Federal Verdict of Not Guilty by Reason of Insanity and a Subsequent Commitment Procedure*, 27 MD. L. REV. 131, 133 (1967).

141. S. REP. NO. 225, *supra* note 131, at 239. *See* Tydings, *supra* note 140, at 133.



ment and release procedures for a handful of federal acquittees.<sup>142</sup> Nevertheless, the symbolic and political importance of the disposition of acquittees was sufficient to persuade Congress to enact federal procedures for commitment.

Since the insanity defense is rarely employed in federal cases, these procedures have little practical importance in federal law. The procedures may, however, be considered by states as a model for designing a special commitment system. A brief analysis of the statute, including a comparison to other available models, is therefore appropriate.

The statute provides for automatic commitment of all insanity acquittees.<sup>143</sup> Each acquittee is to be examined, and a report prepared on his current mental condition.<sup>144</sup> A commitment hearing is to be held within forty days of the verdict of acquittal.<sup>145</sup> At the hearing, all acquittees must bear the burden of persuading the court that their "release would not create a substantial risk of bodily injury to another person or serious damage of property of another due to a present mental disease or defect," with acquittees in one category of crimes bearing the burden of proof by clear and convincing evidence, and all other acquittees by a preponderance of the evidence.<sup>146</sup> If an acquittee fails to carry his burden, he is to be committed to the custody of the Attorney General, who is then charged with the responsibility for trying to persuade the state to confine and treat the acquittee.<sup>147</sup> If the state refuses

142. Commentary to ABA Standards, *supra* note 1, at 7-7.3; *Limiting the Insanity Defense: Hearings on S. 818 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 387 (1982) (supplement to testimony of Prof. James W. Ellis).

143. "If a person is found not guilty only by reason of insanity at the time of the offense charged, he shall be committed to a suitable facility until such time as he is eligible for release . . ." 18 U.S.C. § 4243(a) (Supp. II 1984). There is some confusion about whether every acquittee must be confined; the Senate report states that "[o]f course, if the court believes that the examination can be conducted on an outpatient basis, it need not order commitment for the examination." S. REP. NO. 225, *supra* note 131, at 242.

144. 18 U.S.C. § 4243(b) (Supp. II 1984).

145. *Id.* § 4243(c). This time period can apparently be extended for an additional 30 days upon application by the director of the evaluating facility if more time is needed to accomplish the evaluation. *Id.* § 4247(b).

146. *Id.* § 4243(d). This section provides for a heavier burden of persuasion for individuals acquitted of offenses "involving bodily injury to, or serious damage to the property of, another person, or involving a substantial risk of such injury or damage." The Senate Report explains that "[t]he Committee intends that crimes such as burglary or unarmed robbery with their likelihood to provoke violence and bodily injury be included in the 'substantial risk' category." S. REP. NO. 225, *supra* note 131, at 242 n.78.

147. 18 U.S.C. § 4243(e) (Supp. II 1984). There is no explicit provision for the federal government to pay for state-provided treatment. That such reimbursement was not anticipated is supported by the opinion of the Congressional Budget Office that the statute on the insanity defense is not expected to have "any significant budgetary effect." S. REP. NO. 225, *supra* note 131, at 419.

to accept this responsibility, the Attorney General is directed to confine the acquittee in a "suitable facility."

The acquittee may be released upon his own petition<sup>148</sup> or petition by the director of the facility.<sup>149</sup> In either case, the acquittee will be released only if the court is persuaded that he no longer meets the commitment criteria. The acquittee (or the director) bears the same burden of persuasion on the release issue as in the original hearing.<sup>150</sup> Conditional release is permitted, but must be ordered by the court under the same criteria and burdens as discharge, and any modifications of the "regimen of medical, psychiatric, or psychological care or treatment" must be approved in the same fashion.<sup>151</sup> There is no provision for expiration of the special commitment procedures at the termination of the maximum sentence an acquittee could have received if convicted, or at any other time.<sup>152</sup>

The basic structure of the federal scheme is not novel; it incorporates automatic commitment for all acquittees, places the burden of persuasion on them in seeking their release, and denies them an *Addington* hearing<sup>153</sup> at any time throughout the duration of the sentence they could have received if convicted, or at any time thereafter. The Senate committee report offers no justification for any of these provisions, but instead merely cites the *Jones* opinion for the proposition that they are constitutional.<sup>154</sup> Proposed legislation which was introduced before the *Jones* decision, the predecessor to the bill Congress ultimately enacted, provided that the government would have the burden of persuasion by clear and convincing evidence in post-acquittal commitment hearings.<sup>155</sup> Thus, these provisions of the new federal statute

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148. 18 U.S.C. § 4247(h) (Supp. II 1984). Such a petition is not permitted for 180 days following any order that the acquittee should be committed or continued in commitment. *Id.* However, access to writs of habeas corpus, which may be used to challenge continued unnecessary commitment, is not impaired. *Id.* § 4247(g).

149. *Id.* § 4243(f). The director is also required to submit to the court annual reports on each acquittee's current mental condition. *Id.* § 4247(e).

150. *Id.* § 4243(f).

151. *Id.*

152. *See supra* text accompanying notes 86-95.

153. *See supra* text accompanying notes 67-85.

154. S. REP. NO. 225, *supra* note 131, at 425.

155. S. 2572, 97th Cong., 2d Sess., § 701, 128 CONG. REC. 6197, 6220 (1982). The bill was introduced by Senator Strom Thurmond as the "Violent Crime and Drug Enforcement Improvements Act of 1982." Most of its provisions regarding mentally disabled criminal defendants are identical to those ultimately passed by the Congress. Its less restrictive provisions for commitment of acquittees were described as "noncontroversial modernized procedural provisions" by the sponsors. 128 CONG. REC. at 6226. The bill also provided that the burden of persuasion on the issue of release at periodic review was on the proponent of release (e.g., the director of the facility) by a preponderance of the evidence.

are merely a political reaction to the *Hinckley* verdict and Congress made commitment as restrictive as the *Jones* decision appeared to allow.

A. *Criteria for Commitment: Danger to Property*

There are several features of the Act, however, that go beyond the system approved in *Jones* that are particularly troubling.<sup>156</sup> One is the inclusion of the risk of "serious" damage to property in the criteria for commitment. Damage to property has been held to be an insufficient justification for general civil commitment because the individual's interest in liberty outweighs the importance of the damage he might do to property.<sup>157</sup> The Senate Report attempted to justify the inclusion of danger to property among the criteria for special commitment of acquittees by stating that "danger to the public from a person who is insane need not be limited to the risk of physical injury to another person."<sup>158</sup> The issue, of course, is not whether there is a danger, but whether the danger is of sufficient magnitude and likelihood to justify a deprivation of liberty.<sup>159</sup> The scope of the limitation that property damage be "serious" is not clear,<sup>160</sup> but a predicted propensity to commit

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156. An aspect of the legislation that is constitutionally permissible under *Jones*, but which raises serious policy concerns, is the use of special commitment for acquittees whose offenses did not involve actual or threatened violence. See *supra* text accompanying notes 62-66. Although this is constitutional, both the American Psychiatric Association and the American Bar Association favor limiting special commitment to those who pose an extraordinary danger to the public as evidenced by the nature of their offense. APA Statement, *supra* note 5, at 23; ABA Standards, *supra* note 1, at 7-7.3. The fact that most federal crimes do not remotely involve violence makes the extension of special commitment particularly questionable.

157. For a case involving general commitment patients, see *Suzuki v. Yuen*, 617 F.2d 173 (9th Cir. 1980) (which held that Hawaii's commitment statute was unconstitutional based on its provision for commitment because of dangerousness to property); see also Diamond, *The Psychiatric Prediction of Dangerousness*, 123 U. PA. L. REV. 439, 449-50 (1974); ABA Mental Commission on the Mentally Disabled, *Legal Issues in State Mental Health Care: Proposals for Change, Civil Commitment*, 2 MENTAL DISABILITY L. REP. 73, 86 (1977). Most modern civil commitment statutes limit the criteria for commitment to dangerousness to self or others. Van Duizend, McGraw & Keilitz, *An Overview of State Involuntary Civil Commitment Statutes*, 8 MENTAL & PHYSICAL DISABILITY L. REP. 328, 334 (1984). See also American Psychiatric Association, *Guidelines for Legislation on the Psychiatric Hospitalization of Adults* (1982), in ISSUES IN FORENSIC PSYCHIATRY 27, 40 (1984).

158. S. REP. NO. 225, *supra* note 131, at 424 n.77. The Report cites as authority the *Jones* case, presumably referring to the passage stating that "[t]his Court never has held that 'violence,' however that term might be defined, is a prerequisite for constitutional commitment," and observing that violence may result from the attempt of a thief to escape capture. 463 U.S. at 365 n.14. See *supra* text accompanying notes 63-64. This provision was included in the bill that preceded the Court's opinion in *Jones*. See *supra* note 155.

159. The sufficiency of the state's justification is both an issue of public policy and a constitutional requirement under the substantive component of the due process clause.

160. The Ninth Circuit's opinion in *Suzuki* did not need to reach the issue of whether some forms of damage to property might be of sufficient magnitude to warrant commitment, since the statute in question made any damage to property a ground for commitment. 617 F.2d at

property offenses that do not involve danger to others<sup>161</sup> constitutes an unacceptably weak justification for depriving an acquitted individual of liberty.<sup>162</sup>

### B. Burden of Persuasion

Similarly problematic is the Act's standard of proof on the issue of release from confinement. The statute requires "ordinary" acquittees to prove their nondangerousness by a preponderance of the evidence, but requires those acquitted of "violent" crimes to demonstrate their noncommittability by clear and convincing evidence.<sup>163</sup> The Senate Report argued that this provision is permissible<sup>164</sup> by noting that the Constitution permits allocating the burden of persuasion on the issue of criminal insanity to the defendant at a level higher than preponderance of the evidence.<sup>165</sup> The report concluded that setting a higher standard for proving insanity at trial "in turn would justify requiring [the acquittee] at the commitment hearing to prove his present sanity or lack of dangerousness by such a higher standard."<sup>166</sup>

This conclusion is questionable both as a matter of logic and of constitutional doctrine. The fact that a jurisdiction may require that an affirmative defense to a criminal charge be proven by a standard higher than preponderance of the evidence is irrelevant to the issue of the appropriate standard of proof for release from commitment. The former question involves an asser-

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176. See also *In re Herman*, 30 Wash. App. 321, 634 P.2d 310 (1981) (involving the likelihood that an acquittee would damage a particular statue in a cemetery).

161. E.g., arson, which clearly could fall within the definition of dangerousness to others.

162. A commendable feature of the Act is the omission of dangerousness to self as a criterion for special commitment of acquittees. While this is a standard component of general commitment statutes, see *supra* note 32, there is nothing inherent in an acquittal by reason of insanity that warrants the use of special commitment procedures in such cases. Acquittees who constitute a danger to themselves are more appropriately confined under general commitment procedures. See ABA Standards, *supra* note 1, at Commentary to Standard 7-7.4.

163. See *supra* note 146. Section 4247(g) provides that nothing in § 4243 "precludes a person . . . from establishing by writ of habeas corpus the illegality of his detention." Traditionally the burden of persuasion in habeas corpus cases is on the petitioner by a preponderance of the evidence. *Walker v. Johnson*, 312 U.S. 275, 286 (1941). It is not clear whether acquittees in the so-called "violent" crime category will be required to meet a higher standard of proof in habeas corpus proceedings.

164. The Report makes no argument for the desirability of this provision, but rather merely contends that it is not unconstitutional. There is no assertion that the government needs more liberal rules for keeping this category of acquittees in confinement after they can demonstrate, by a preponderance of the evidence, that they no longer meet the commitment criteria. S. REP. NO. 225, *supra* note 131.

165. See *Leland v. Oregon*, 343 U.S. 790 (1952).

166. S. REP. NO. 225, *supra* note 131, at 243. The Report concluded that "[s]ince this bill requires the defendant to prove his insanity as a defense to the criminal charge by clear and convincing evidence, it is clearly constitutional to require those defendants acquitted of violent crimes to prove that they are no longer dangerous or insane by a similar standard." *Id.*

tion of a form of excuse for criminal misconduct while the latter is an inquiry about whether an acquitted person may be deprived of liberty. The fact that a jurisdiction imposes a burden heavier than preponderance on the issue of criminal insanity merely means that in some cases<sup>167</sup> the fact finder is required to reach a higher level of certainty about the defendant's mental condition at the time of the offense and its relevance to the offense committed. This somewhat heightened degree of assurance about earlier events does not affect the issue of whether the acquittee is mentally disabled at the time of acquittal or, in periodic review, years later,<sup>168</sup> nor does it add to our knowledge about his prospective dangerousness.<sup>169</sup>

An increased certitude—beyond a preponderance of the evidence—that the defendant was insane at the time of the offense does not justify the imposition of more substantial barriers to post-acquittal release. Moreover, such increased barriers are constitutionally dubious.<sup>170</sup> Erection of those barriers demonstrates congressional intent to assure that even those acquittees who can show by a preponderance that they are no longer dangerous or mentally disabled should not be released. The purpose of continuing to confine acquittees who can somehow demonstrate that their release would not imperil the public can only be punitive, and as the Court declared in *Jones*, acquittees cannot be punished.<sup>171</sup>

### C. Conclusion

Thus the federal statute offers an inadequate model for states considering the adoption of special commitment procedures for insanity acquittees. It unquestioningly adopts every form of restriction made available by the

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167. The heightened burden of proof affects only cases at the margin. For example, in a "preponderance of the evidence" jurisdiction, juries will be persuaded in some cases to a degree of certainty equivalent to "clear and convincing evidence" and, in a smaller number, "beyond a reasonable doubt." In the latter groups of cases, the fact that the jurisdiction has adopted a lower standard is irrelevant to the outcome. Therefore, in both "preponderance" and "clear and convincing" jurisdictions, there will be cases in which the fact finder is more certain than is necessary under the relevant standard.

168. It should be recalled that the Act does not place a limitation on use of the special commitment procedures at the expiration of the sentence an acquittee could have received if convicted—the burden falls to the acquittee, unless released by the court, for the remainder of his life.

169. See text accompanying notes 42-66.

170. Nothing in the *Jones* decision supports the contention that a standard higher than "preponderance" is constitutionally acceptable on the issue of commitment and periodic review following acquittal. The Court merely speculates that placing the burden on the government at commitment might lead legislators to narrow the scope of the insanity defense by increasing the burden of persuasion on the defendant at the criminal trial. 463 U.S. at 368 n.17. See *supra* note 85.

171. 463 U.S. at 369.

flawed opinion in *Jones* and enacts even more drastic limitations than approved by *Jones* on the rights of acquittees to a fair hearing on their need for commitment. While the Act is understandable as a political reaction to public outcries at a particularly unpopular verdict, it strikes the wrong balance in weighing the public's need for protection against legitimate liberty interests and thus should not be followed by state legislatures seeking reform in this area.

#### V. THE AMERICAN BAR ASSOCIATION STANDARDS

The American Bar Association recently concluded a three-year project to devise standards for mental disability cases in the criminal justice system with the adoption of ninety-six standards in August 1984.<sup>172</sup> The project involved participation by six interdisciplinary task forces whose membership included lawyers, judges, and mental health and mental retardation professionals.<sup>173</sup> The resulting standards are incorporated into the more comprehensive body of Association Standards for Criminal Justice,<sup>174</sup> which address a wide variety of criminal law and criminal procedure issues. In addition to the commitment of acquittees, the new mental health standards address the roles of mental disability professionals and lawyers in the criminal justice system, the role of the police in dealing with mentally disabled people, pretrial evaluations and expert testimony, competence to stand trial and competence for other situations, the insanity defense (designated "non-responsibility for crime"<sup>175</sup>), special dispositional statutes, sentencing, and mentally disabled prisoners.

The ABA standards provide that each state should adopt procedures for evaluating the current mental condition of all defendants acquitted by reason

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172. See George, *The American Bar Association's Mental Health Standards: An Overview*, 53 GEO. WASH. L. REV. 338 (1985). Each standard is accompanied by explanatory commentary, but only the standards themselves have been adopted as the official position of the ABA.

The Criminal Justice Mental Health Project was begun well before the *Hinckley* verdict. Following the acquittal, the project reevaluated its tentative positions on the form of the insanity defense and changed its recommendation from the ALI test to a modified version of *M'Naghten* that lacks the volitional prong of the ALI formulation. Following the *Jones* decision, the task force on commitment of acquittees convened to reconsider its tentative view that the state should bear the burden of persuasion and that special commitment should expire with the maximum possible sentence. The task force reiterated its previous view that these positions were necessitated by principles of fundamental fairness even if they were not mandated by the Constitution, and the ABA house of Delegates concurred in that judgment. *Id.*

173. A law professor served as "Law Reporter" for each task force. The author was Law Reporter for the task force on Commitment of Nonresponsibility Acquittees.

174. ABA Standards, *supra* note 1. See Hodson, *The American Bar Association Standards for Criminal Justice: Their Development, Evolution and Future*, 59 DEN. L.J. 3 (1981).

175. See *supra* note 1.

of insanity, to be completed within thirty days of the verdict of acquittal.<sup>176</sup> If the prosecution decides to seek commitment, the acquittee is entitled to a judicial hearing on whether he is currently committable. Acquittees who were charged with crimes that did not involve violence<sup>177</sup> can be committed only under the general commitment laws applicable to proposed patients outside the criminal justice system.<sup>178</sup> Acquittees who were charged with violent crimes can be confined and treated under a system of special commitment, which the ABA recommends that every state adopt.<sup>179</sup>

At the initial special commitment hearing following the evaluation, the acquittee can be committed if the court finds, by clear and convincing evidence, that he is "currently mentally ill or mentally retarded" and "as a result, poses a substantial risk of serious bodily harm to others."<sup>180</sup> The use of special commitment criteria and procedures cannot extend beyond the period of the maximum sentence an acquittee could have received if convicted; thereafter, the acquittee can continue to be confined only pursuant to

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176. ABA Standards, *supra* note 1, at 7-7.1, 7-7.2.

177. ABA Standards, *supra* note 1, at 7-7.3(a) describes this category as "felonies which did not involve acts causing, threatening, or creating a substantial risk of death or serious bodily harm." The Commentary notes that the ABA declines to specify which crimes fall within this category, leaving this task to the individual states. It is clear that the category is narrower than that drawn by Congress in the Insanity Defense Reform Act of 1984. *See supra* note 146.

178. ABA Standards, *supra* note 1, at 7-7.3(b). It should be noted that the standard only approves the use of general commitment procedures which "satisfy the requirements of due process of law." The Commentary notes that while commitment procedures for mentally ill persons have generally conformed to modern due process case law, the same is not uniformly true of statutes for the confinement of mentally retarded people. *See Ellis & Luckasson, supra* note 1, at 468-69; *DISABLED PERSONS AND THE LAW: STATE LEGISLATIVE ISSUES 416-21* (B. Sales, D. Powell, R. Van Duizend eds. 1982). *See generally Dybwad & Herr, Unnecessary Coercion: An End to Involuntary Civil Commitment of Retarded Persons*, 31 *STAN. L. REV.* 753 (1979). Although they were designed for acquittees charged with violent felonies, Standards 7-7.4 (on commitment criteria and burden of persuasion) and 7-7.5 (on procedures to be followed at the commitment hearing) may serve as an approximation of constitutional minima necessary in gauging the requirements of due process in general commitment procedures as well.

179. ABA Standards, *supra* note 1, at 7-7.3(a). The ABA also proposes that this system of special commitment is appropriate for dangerous individuals found permanently incompetent to stand trial who have been shown at a hearing to have committed the offense for which they cannot be "tried." *See id.* at 7-4.13(b) and accompanying commentary. Discussion of this proposal is beyond the scope of the present Article.

180. ABA Standards, *supra* note 1, at 7-7.4(b). The court must also find, beyond a reasonable doubt, that the acquittee committed the criminal act for which he was charged. *Id.* at 7-7.4(c). In some jurisdictions this will have been an essential element of the trial court's verdict of acquittal by reason of insanity, but in others, it may have to be independently demonstrated. Without a finding that the acquittee actually did the act for which he was charged, there is not a sufficient basis for employing special (and more restrictive) commitment procedures.

general commitment procedures.<sup>181</sup> The specially committed acquittee can request a hearing on his continuing need for confinement one year after his initial commitment and at two-year intervals thereafter.<sup>182</sup> At these acquittee-initiated periodic review hearings, the state must bear the burden of persuasion by clear and convincing evidence that the acquittee meets the commitment criteria.<sup>183</sup> The standards also provide for release upon the petition of the superintendent of the facility<sup>184</sup> and for a system of court-approved authorized leave.<sup>185</sup>

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181. Standard 7-7.7 provides that the committing judge should establish a maximum duration for special commitment which cannot exceed the length of the sentence, but which may be shorter. In setting this limit, the court may consider a variety of factors, but "retribution or punitive factors" cannot be considered. ABA Standards, *supra* note 1, at 7-7.7.

182. The court has authority under Standard 7-7.8(a) to set a shorter interval between petitions by the acquittee as his mental condition "and other relevant factors" may warrant. *Id.* at 7-7.8(a).

183. *Id.* at 7-7.8(b). Like the federal statute, the ABA provides that the acquittee retains the right to petition for habeas corpus at any time. *Id.* at 7-7.8(d). However, the difference between the burden of persuasion in the two systems gives the writ of habeas corpus different roles. A defendant committed under the ABA's standards will find the writ less attractive because, unlike periodic review, the habeas corpus petition must persuade the court of his or her entitlement to release by a preponderance of the evidence. Under the federal statute, an acquittee who was charged with a "nondangerous" crime will find habeas corpus identical to his situation under periodic review, while the acquittee charged with a "violent" offense will find the burden lower than that which he faces under the statute. *See supra* note 146.

184. Under ABA Standard 7-7.9, the acquittee is to be released if the superintendent proves, by a preponderance of the evidence, that he no longer meets the commitment criteria. ABA Standards, *supra* note 1, at 7-7.9.

185. The "authorized leave" provisions of Standard 7-7.11 roughly parallel the provisions for "conditional release" under the federal statute, the Model Penal Code, the Uniform Law Commissioners' Model Act, and the APA Statement. *See* 18 U.S.C. § 4243(g) (Supp. II 1984); MODEL PENAL CODE § 4.08(4) (1985); UNIFORM LAW COMMISSIONERS' MODEL INSANITY DEFENSE AND POST-TRIAL DISPOSITION ACT § 906, 11 U.L.A. 167 (Supp. 1986) [hereinafter cited as MODEL ACT]; APA Statement, *supra* note 5, at 21. All the models agree that outright release should not be the only option for returning an acquittee to the community. If this were the only option, decisionmakers (whether judges, administrative boards, or mental disability professionals) would be extremely reluctant to release an acquittee from commitment because an error leading to a premature release could imperil the public safety and thus engender public criticism. The alternative of authorized leave or conditional release permits a more tentative testing of the acquittee's readiness to return in safety to the community. The ABA's approach is slightly more restrictive than the federal statute. Under Standard 7-7.11(c), authorized leave may be revoked for any violation of a condition imposed by the court. ABA Standards, *supra* note 1, at 7-7.11(c). Section 4243(g) of the federal statute requires that the court determine that noncompliance with "the regimen" indicates prospective dangerousness. 18 U.S.C. § 4243(g) (Supp. II 1984). The Commissioners' Model Act focuses on the prospective dangerousness of the acquittee on conditional release rather than his compliance with the conditions established by the court. MODEL ACT § 906(d), (e).



### A. Comparison to General Commitment

Several features of the ABA model merit discussion. One is the governing principle basic to its design. In setting the categories of offenses triggering special commitment, the criteria for commitment, the burden of persuasion, and procedures for release, the standards begin from the premise that acquittees should be treated differently from ordinary mental patients only where there is a factual basis for a distinction. Although the *Jones* opinion grants extraordinary constitutional latitude in implementing this principle,<sup>186</sup> the ABA standards reflect the view that sound public policy requires a persuasive showing to warrant differential treatment. The threat posed to the public by persons acquitted of violent crimes warrants more rigorous and deliberate procedures preceding their release and greater care in supervising their activities in the community. It does not, however, justify less rigorous procedural protections in determining whether they should be committed or continue to be confined. The options made permissible by *Jones* have been rejected by the ABA as unwise.<sup>187</sup>

Yet the ABA has also rejected treating violent acquittees the same as ordinary mental patients. Although offering the states an option of either special commitment or general<sup>188</sup> commitment for all acquittees was considered,<sup>189</sup> the final approved standards recommended that all states adopt special commitment procedures.<sup>190</sup> Despite the existence of a substantial theoretical argument for equivalent treatment,<sup>191</sup> practical considerations outweigh the value of treating all committed patients identically. Some general commitment patients will be manifestly dangerous to others, but the number is relatively small and the civil commitment system is designed for a patient population whose overall level of dangerousness to others is relatively small

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186. The majority appears to acknowledge that departures from ordinary procedures must be supported by a demonstration of empirical differences: “[C]oncerns critical to our decision in *Addington* are diminished or absent in the case of insanity acquittees.” 463 U.S. at 367.

187. As will be true for many states, the *Jones* holding does not directly apply to the standards, since they recommend, under the ABA’s favored test for nonresponsibility, that the burden of persuasion at the criminal trial be placed on the prosecution. See ABA Standards, *supra* note 1, at Intro. to Part VII & Standard 7-6.9. But even for those jurisdictions that require a defendant to demonstrate his insanity at trial, the ABA rejects, as fundamentally unfair and empirically unwarranted, the shifting of the burden at subsequent special commitment hearings. See ABA Standards, *supra* note 1, at 7-7.4 and accompanying Commentary.

188. The term “general” commitment is used here, as in the ABA Standards, to describe civil commitment procedures employed by a jurisdiction to commit ordinary civil commitment patients outside the criminal justice system.

189. See ABA Standards, *supra* note 1, at Commentary to Standard 7-7.3.

190. ABA Standards, *supra* note 1, at 7-7.3(a).

191. These arguments contend that nothing relevant is learned from the criminal verdict that is sufficient to distinguish acquittees from general commitment patients regarding commitment procedures. See, e.g., Morris, *supra* note 16.

or who only pose a danger to themselves. The typical general commitment patient more closely resembles a *parens patriae* patient like Mrs. Lake<sup>192</sup> than John W. Hinckley, Jr.

Modern mental health statutes governing general civil commitment are designed to provide needed institutional treatment, but also to facilitate and encourage the earliest possible release of the patient to the community. This reflects a judgment that long-term institutionalization should be avoided because it is a "massive curtailment of liberty,"<sup>193</sup> and because it is generally believed to be both ineffective and counter-therapeutic for most patients.<sup>194</sup> This goal is accomplished by shortening the duration of commitment orders,<sup>195</sup> requiring exhaustion of less restrictive alternatives before institutionalization can be mandated,<sup>196</sup> and giving clinical personnel the authority to devise and implement transitional programs such as conditional release and to release patients outright when, in their professional judgment, confinement and mandatory treatment are no longer warranted.<sup>197</sup> These procedures have combined with the ubiquitous prescription of psychotropic medications and the development of successful community treatment<sup>198</sup> and

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192. See *Lake v. Cameron*, 364 F.2d 657 (D.C. Cir. 1966) (describing a confused 60-year-old taken into custody by a police officer who found her wandering aimlessly).

193. *Humphrey v. Cady*, 405 U.S. 504, 509 (1972).

194. The causes of the demise of the previous consensus that institutionalization was the treatment of choice for all mental patients has been described by historian David Rothman. D. ROTHMAN, *CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA* 324-75 (1980). The preferability of community care for many mentally disabled people was argued by several prestigious commissions in the 1950's, 1960's, and 1970's. See J. ROBITSCHER, *THE POWERS OF PSYCHIATRY* 122-27 (1980); 1 PRESIDENT'S COMMISSION ON MENTAL HEALTH, *REPORT AND RECOMMENDATIONS TO THE PRESIDENT* 16 (1978). The new consensus supporting community care developed a symbiotic relationship with the legal doctrine that treatment should be provided in the least restrictive alternative. See *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975) ("A finding of 'mental illness' alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement."); Chambers, *Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives*, 70 MICH. L. REV. 1107 (1972). See generally P. LERMAN, *DEINSTITUTIONALIZATION AND THE WELFARE STATE* (1982).

195. Even the American Psychiatric Association has recommended an initial commitment of no longer than 30 days, and the longest recommended period before the expiration of subsequent commitment orders is 180 days. American Psychiatric Association, *Guidelines For Legislation on the Psychiatric Hospitalization of Adults*, in *ISSUES IN FORENSIC PSYCHIATRY* 39, 48 (1984).

196. See, e.g., N.M. STAT. ANN. § 43-1-3(D) (Repl. 1984) (defining "least drastic means principle"). See generally AMERICAN ASSOCIATION ON MENTAL DEFICIENCY, *THE LEAST RESTRICTIVE ALTERNATIVE: PRINCIPLES AND PRACTICES* (H.R. Turnbull ed. 1981).

197. See, e.g., N.M. STAT. ANN. § 43-1-12(G) (Repl. 1984): "No mental health treatment facility is required to detain, treat or provide services to a client when the client does not require such detention, treatment or services."

198. See Chambers, *supra* note 194.

habilitation<sup>199</sup> programs to shorten the average stay in mental hospitals to a fraction of the typical duration two or three decades ago.<sup>200</sup>

Only some of these developments have relevance for the appropriate treatment of acquittees. Overall they presuppose that the dangerousness of mental patients is minimal and can be readily reduced by treatment and habilitation in settings that lack substantial restrictions on physical liberty. These assumptions are less likely to be true for a patient who has been found beyond a reasonable doubt to have committed a violent criminal offense. The public's perception of the peril posed by insanity acquittees is surely exaggerated, but it is by no means groundless. A commitment system that minimizes restrictions and relentlessly promotes early release is ill-designed for a class of patients who have so clearly demonstrated their dangerousness to others. As a result, a departure from general commitment procedures is warranted where they would otherwise fail to assure that release into the community is the result of careful evaluation of the acquittee's current mental condition and potential for violent conduct. Thus, the ABA has required all decisions about release and authorized leave of violent acquittees to be made by a court. It has also recommended commitment periods somewhat longer than are common under general civil commitment statutes.

There is another persuasive reason for rejecting identical treatment of violent acquittees and general commitment patients. As noted above, the typical general commitment patient is a disabled individual who poses little or no threat to society and whose involuntary confinement and restriction of

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199. Community-based programs for mentally retarded people have been particularly successful. See B. BAKER, G. SELTZER & M. SELTZER, *AS CLOSE AS POSSIBLE: COMMUNITY RESIDENCES FOR RETARDED ADULTS* (1977); D. BRADDOCK, *OPENING CLOSED DOORS: THE DEINSTITUTIONALIZATION OF DISABLED INDIVIDUALS* (1977); K. CASEY, J. MCGEE, J. STARK & F. MENOLASCINO, *A COMMUNITY-BASED SYSTEM FOR THE MENTALLY RETARDED: THE ENCOR EXPERIENCE* (1985) (describing one major metropolitan area that serves virtually all its mentally retarded citizens—regardless of level of mental retardation—in the community); J. CONROY & V. BRADLEY, *PENNHURST LONGITUDINAL STUDY: A REPORT OF FIVE YEARS OF RESEARCH AND ANALYSIS* (Temple University & Human Services Research Institute 1985) (finding that all Pennhurst residents—regardless of level of mental disability—could be served successfully in the community); *DEINSTITUTIONALIZATION AND COMMUNITY ADJUSTMENT OF MENTALLY RETARDED PEOPLE* (R. Bruininks, C. Meyers, B. Sigford & K. Lakin eds. 1981); *PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, CHANGING PATTERNS IN RESIDENTIAL SERVICES FOR THE MENTALLY RETARDED* (R. Kugel & A. Shearer rev. ed. 1976).

200. As early as 1971, the average stay in a state hospital had been reduced to 41 days, and 86.9% of all patients were released within six months of admission. A. STONE, *MENTAL HEALTH AND LAW: A SYSTEM IN TRANSITION* 41 (1976). One study suggests that even after the trend toward shortened commitments was well underway, the enactment of a more restrictive civil commitment statute reduced the number of long-term commitments by half. E. BARDACH, *THE IMPLEMENTATION GAME: WHAT HAPPENS AFTER A BILL BECOMES A LAW* 286 (1977).

liberty should be held to the minimum time period necessary. If a state chooses to use the same commitment criteria for both this benign group and violent acquittees, the political concern aroused by fear of the latter will demand commitment and release procedures that are much more restrictive than they would choose for general patients alone. Selecting a unitary system of commitment would thus provide less restrictive treatment for a very small group at the expense of unnecessary deprivations of liberty for a substantially larger group. This would be especially hard to justify since the smaller group (i.e. violent acquittees) has a much weaker claim to our sympathy and tolerance. Therefore, the adoption of a separate system of special commitment for violent acquittees protects both the public and the rights of general civil commitment patients.

### *B. Criteria for Commitment: Treatability*

Another noteworthy feature of the ABA standards is the omission from the criteria for special commitment of a requirement that the acquittee be shown to be amenable to treatment or habilitation. As discussed above, the American Psychiatric Association described as "hypocrisy" the practice of requiring treatment facilities to confine individuals when "there exists no realistic therapeutic justification for confinement."<sup>201</sup> The APA proposed remedying this "hypocrisy" with the dubious proposal to confine such acquittees in "nontreatment" facilities.<sup>202</sup> The Bar Association's standards do not explicitly address this problem, but by omitting treatability from the criteria for commitment, they implicitly allow the continued confinement of an acquittee who remains mentally disabled and dangerous but who cannot be treated effectively.<sup>203</sup> This presents a most difficult dilemma. Making treatability a condition of special commitment could result in the release of individuals acknowledged to be both mentally disabled and dangerous. Omitting it requires confinement in some cases where there is no rationale to distinguish confinement of these individuals from dangerous acquittees who are not mentally disabled, and thus transforms special commitment into unadorned preventive detention.<sup>204</sup> There is room for disagreement about

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201. See *supra* text accompanying notes 110, 122-27.

202. See *supra* text accompanying notes 122-27.

203. See ABA Standards, *supra* note 1, at Commentary to Standard 7-7.4.

204. Such individuals present an equal protection problem because they are confined when equally dangerous individuals who are not mentally disabled are not (including acquittees who have recovered from their disability). Typically, the rationale offered for commitment of the dangerous who are mentally ill, as contrasted to dangerous individuals who are not mentally ill, is that the former can be treated. That rationale is unavailable when untreatable acquittees are confined.

Another rationale has occasionally been offered to justify confining dangerous individuals

whether the approach chosen by the ABA is the best of an unattractive set of alternatives.

### C. Release Procedures and Access to Counsel

Finally, it is noteworthy that the standards require the individual acquittee to request a hearing on periodic review.<sup>205</sup> An earlier draft had proposed two alternative systems for consideration by the states, one that placed the burden of initiation on the state, and the other on the acquittee. The final standards include only the acquittee-initiated review mechanism, because of concern that a system that required the state to initiate the process theoretically risked the release of an acquittee only because the official responsible for filing the petition for recommitment neglected to perform his or her duty.<sup>206</sup>

As the Commentary acknowledges, this is a difficult issue since the acquittee may lack the knowledge, understanding, initiative, or means to file the necessary petition to begin the periodic review process. In an attempt to mitigate this problem, the standards insist that all acquittees have access to regularly available legal assistance.<sup>207</sup> The possibility exists that an acquittee who has long since been rendered nondangerous will remain sufficiently disabled (or become sufficiently institutionalized) that he will not be able to seek periodic review and will, as a result, get lost in the special commitment system until the expiration of his hypothetical sentence. This prospect was

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who are mentally disabled while not confining equally dangerous persons who aren't disabled. This argument suggests that the point of distinction between these two groups is that the nondisabled are *really* less dangerous because they can be deterred from committing violent acts by fear of the punishment they may face under the criminal law. This theoretical distinction is a favorite ploy of law professors, but ultimately it is unsatisfactory in its attempt to rationalize confinement of mentally disabled persons without treatment or habilitation, particularly in the context of insanity acquittees. It fails because it denies the premise of the argument: that there are some nondisabled individuals who can be predicted, with some accuracy, to constitute a danger to society. The equal protection analysis hinges not on whether the nondisabled are somehow *less* dangerous than the disabled, but rather whether they are dangerous *enough* to constitute a threat to the public if left at liberty. The rationale about deterrence is even less persuasive when applied to a comparison between insanity acquittees and other defendants who were acquitted for other reasons (such as the exclusion of illegally seized evidence). If acquittees in each group committed the act constituting the violent offense, each has demonstrated equally that it is at least sometimes immune to being deterred by the prospect of punishment. This ploy will not suffice to justify confining the mentally disabled while leaving similarly dangerous persons at liberty.

205. See ABA Standards, *supra* note 1, at 7-7.8(a). Once the acquittee has petitioned for the hearing, the burden of persuasion is on the state. *Id.* at 7-7.8(b). See *supra* note 183.

206. See ABA Standards, *supra* note 1, at Commentary to Standard 7-7.8.

207. Another mitigating feature is the opportunity afforded by the ABA Standards for the Superintendent to petition for the release of an acquittee whom he or she believes not to be presently committable. See ABA Standards, *supra* note 1, at 7-7.9.

deemed insufficient to outweigh the risks of a state-initiated system of periodic review, but it is a real enough possibility to require that a state adopting special commitment make diligent efforts to provide appropriate legal assistance to acquittees.

#### D. Conclusion

The ABA standards represent an attempt to protect the public from violent acquittees without denying them fair treatment or resorting to disguised (and impermissible) punishment of individuals who have been acquitted.<sup>208</sup>

### VI. THE UNIFORM LAW COMMISSIONERS' MODEL ACT

Following the *Hinckley* verdict, the National Conference of Commissioners on Uniform State Laws<sup>209</sup> took under consideration the issues of the insanity defense and subsequent commitment. While acknowledging that this was "not a subject on which uniformity among states is a principal objective,"<sup>210</sup> the Conference thought it important to "call attention to the issues" and "provide a means of dealing with those questions."<sup>211</sup> Its deliberations were attended by representatives of the American Psychiatric Association, the American Psychological Association, the National Commission on the Insanity Defense<sup>212</sup> and the American Bar Association's Standing Committee on Criminal Justice Standards.<sup>213</sup> The Model Act was adopted by the Conference in August of 1984.<sup>214</sup>

The Model Act adopts a test for criminal responsibility<sup>215</sup> that is identical to that adopted in the ABA standards.<sup>216</sup> It places the burden of disproving

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208. The degree of success of this attempt is, of course, for others to judge.

209. The National Conference consists of Commissioners from each state, the District of Columbia, and Puerto Rico. Each Commissioner is appointed by the jurisdiction's chief executive for a term of three years. The Commission promulgates model statutes as proposals to the states, with the principal purpose of "promot[ing] uniformity in state laws on all subjects where uniformity is deemed desirable and practicable." Explanation, National Conference of Commissioners on Uniform Laws, 14 U.L.A. iv (1980).

210. MODEL ACT, *supra* note 185, at Prefatory Note.

211. *Id.*

212. *See infra* notes 295-302.

213. MODEL ACT Prefatory Note.

214. *Id.* Thus, the Commissioners had access to all the other models discussed in this Article.

215. The Model Act does not use the term "insanity" in its provisions because the Commissioners believed it to be "a word without adequate definition." MODEL ACT § 101 comment. *Cf.* ABA Standards, *supra* note 1.

216. "An individual is not criminally responsible if at the time of the alleged offense, as a result of mental disease or defect the individual was substantially unable to appreciate the wrongfulness of the alleged conduct." MODEL ACT § 201 (1986). *Cf.* ABA Standards, *supra* note 1, at 7-6.1(a).

the claimed mental condition on the prosecution, and the standard of proof is beyond a reasonable doubt.<sup>217</sup> It explicitly provides that neither intoxication, the effect of drugs, nor psychopathy will constitute a basis for the defense.<sup>218</sup> The Act provides procedures for examination of a defendant's mental condition that parallel the ABA standards.<sup>219</sup> The primary departure from the approach adopted by the ABA is in the Model Act's provisions for the disposition of defendants acquitted by reason of mental illness or defect.<sup>220</sup>

### A. Overview of Commitment System

The Model Act requires the court, after a criminal verdict, to order the individual committed for evaluation. Within ninety days of this order, the court must conduct a dispositional hearing.<sup>221</sup> At this hearing, the rules of civil procedure and evidence are to be applied<sup>222</sup> and the acquittee is to be represented by counsel, including appointed counsel if the acquittee is indigent.<sup>223</sup> The acquittee also has the right to the assistance of a mental health professional.<sup>224</sup> On these issues, the general outline of the Act parallels the provisions of the ABA standards.<sup>225</sup>

The Model Act places the burden on the acquittee to demonstrate, by a preponderance of the evidence, that he does not meet the criteria for com-

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217. MODEL ACT § 702. This allocation of burdens is identical to the ABA's for those jurisdictions that adopt the ABA Standards' preferred formulation of the nonresponsibility defense. *Cf.* ABA Standards, *supra* note 1, at 7-6.9(b)(i).

218. MODEL ACT § 202.

219. *See* MODEL ACT arts. IV, V, VI. *Cf.* ABA Standards, *supra* note 1, at 7-3.1 to 7-3.13. The principal difference regarding these procedures is that the ABA Standards address the issues in much greater detail.

220. *See* MODEL ACT art. IX. Another difference between the two proposals is that the ABA recommended abolishing the system of bifurcated criminal trials used by some states, while the Model Act would permit either bifurcated or unitary trials. *Compare* ABA Standard 7-6.7 with MODEL ACT § 701.

221. MODEL ACT § 903(a). In contrast, the ABA recommends that the prehearing evaluation be concluded within 30 days, with the hearing to be held within the next 15 days. ABA Standards, *supra* note 1, at 7-7.2(d). It should be noted that all time limits within both the ABA Standards and the Model Act are bracketed, suggesting that the recommendation regarding time limits is less insistent than those regarding other procedural and substantive issues.

222. MODEL ACT § 907(a), (c).

223. *Id.* § 907(b). The attorney who represented the defendant in the criminal trial is required, unless excused by order of the court, to represent the acquittee in the initial hearing. *Id.* § 903(b).

224. *Id.* § 903(c). *Accord* ABA Standards, *supra* note 1, at 7-7.5.

225. Although there are no significant disagreements between the Model Act and the ABA Standards regarding the procedures for conducting the commitment hearings, the ABA Standards address these issues in greater detail.

mitment.<sup>226</sup> In contrast, the ABA standards place the burden of demonstrating committability on the state by clear and convincing evidence<sup>227</sup> and the new federal statute places the burden on the acquittee by a standard that varies with the nature of the acquittee's offense.<sup>228</sup> The Commissioners attempt to justify placing the burden on the acquittee by quoting the American Psychiatric Association's (APA) statement that "[t]heir future dangerousness need not be inferred; it may be assumed, at least for a reasonable period of time."<sup>229</sup> The Commentary to the Act also argues that even when the acquittee's mental illness appears to be in remission, "the apparent success of . . . treatment is not inconsistent with a conclusion that time may be needed to evaluate the longer term results of such a program."<sup>230</sup>

### B. Commitment Criteria

The criteria for commitment under the Act are tied to the perceived dangerousness of the individual acquittee. While other proposals contain variations based on the nature of the offense for which the individual was acquitted,<sup>231</sup> the Model Act relies on the nature of the criminal act that an acquittee is predicted to be likely to commit in the future. Thus, the trial judge at the dispositional hearing must predict whether the acquittee will, as a result of mental illness or defect, "commit a criminal act of violence threatening another person with bodily injury or property damage," or commit some other criminal act.<sup>232</sup> If the acquittee is predicted likely to commit a violent criminal offense, the court is to order him committed to "a mental hospital or other suitable facility or into a program of conditional release."<sup>233</sup> If the court predicts that the acquittee is likely to commit a criminal offense that is not within the "violent" category, it may order the acquittee to report to a mental health facility "for noncustodial evaluation and treatment and to accept nonexperimental, generally accepted medical, psychiatric, or psychological treatment recommended by the facility."<sup>234</sup> An acquittee who is not predicted likely to commit a criminal offense is not committable under these special commitment procedures and may be com-

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226. MODEL ACT § 903(d).

227. ABA Standards, *supra* note 1, at 7-7.4. See also *supra* notes 67-85 and accompanying text.

228. See *supra* note 146.

229. MODEL ACT § 903 comment. See *supra* notes 115-17 and accompanying text.

230. MODEL ACT § 903 comment.

231. See *supra* notes 146, 177.

232. MODEL ACT § 903(d).

233. *Id.* § 903(d)(2).

234. *Id.* § 903(d)(3).



mitted only under general commitment statutes.<sup>235</sup>

There are several troubling questions raised by these provisions. The first is that commitment under the special procedures is extended even to acquittees whose offense did not involve an act or risk of violence. Although this has been held to be constitutional in *Jones* (at least in jurisdictions where the burden on the issue of insanity was on the defendant at the criminal trial), it raises public policy concerns about fairness.<sup>236</sup> Under the Act, the judge may predict a future violent criminal act, and thus trigger special commitment procedures, without reference to any previous criminal behavior by the acquittee that involved or threatened violence.<sup>237</sup> Thus a shoplifter like Mr. Jones could be committed under the Act if the judge predicted, on whatever basis, that he would commit a violent criminal act at some time in the future.<sup>238</sup>

This illustrates a central problem with the Model Act's commitment criteria: the remoteness of the prediction from any empirical basis in the acquittee's past conduct. Neither the text of the Act nor its commentary offers any guidance about how a judge is to predict whether the acquittee will commit a future criminal act or to determine which criminal offense he is likely to commit. It may be inferred that the court would turn to mental disability professionals for guidance in making these predictions, but the limited ability of such professionals to predict future *unspecified* violent conduct must surely be even weaker when the prediction must identify the specific future crime.

Another difficulty is the Act's assignment of criminal offenses to the "violent" and "nonviolent" categories. The former group includes criminal acts "of violence threatening another person with bodily injury or property damage."<sup>239</sup> As discussed earlier, there are both constitutional and policy concerns with commitment systems whose criteria include predictions of mere

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235. *Id.* § 903(d)(1). One commendable provision of the Act is that it does not extend to predicted dangerousness to self. *See id.* § 903 comment; *see also* Commentary to ABA Standards, *supra* note 1, at 7-7.4.

236. *See* authorities cited *supra* note 50.

237. "This Act contemplates that an individual remains subject to the jurisdiction of the criminal court if the individual was found to have committed any offense, whether the offense was a felony or a misdemeanor." MODEL ACT § 903 comment.

238. Another problem with the Act is that it specifies no time limit for the future conduct: there is no provision that requires that the anticipated criminal offense must be predicted to occur in the reasonably near future.

239. *Id.* § 903(d)(2). Property damage is undefined in the Act or the commentary, and it is unclear whether a prediction of any future property crime, e.g., shoplifting, would be sufficient to warrant special commitment. If so, the category of nonviolent offenses under the Act will be limited, in large part, to so-called victimless crimes.

dangerousness to property.<sup>240</sup>

### C. Duration of Commitment and Periodic Review

The Model Act limits the use of special commitment to the duration of the sentence an acquittee could have received if convicted.<sup>241</sup> This time limit is established in individual cases by requiring the criminal trial court to make a finding about the maximum sentence at the time the verdict of acquittal is entered.<sup>242</sup> At the expiration of the maximum sentence, the acquittee can be committed only through use of the jurisdiction's general commitment procedures.<sup>243</sup>

Acquittees are entitled to periodic review once a year of their continuing need for special commitment.<sup>244</sup> As the date for periodic review approaches, the superintendent is directed to determine whether the acquittee is currently represented by counsel; otherwise, the court will appoint counsel.<sup>245</sup> The attorney is to consult with the acquittee and "to apply to the court for appointment of counsel to represent the individual in a proceeding for conditional release or discharge."<sup>246</sup> As noted earlier,<sup>247</sup> designing a mechanism to trigger periodic review for acquittees is a difficult matter. Nevertheless, the Model Act's provisions appear unnecessarily murky.

The Commissioners have commendably provided an opportunity for every acquittee to consult with counsel on a periodic basis, but they have left unclear the relationship between the "consulting" attorney and the lawyer who may represent the acquittee in a resulting hearing (e.g., can they be the same lawyer?). It is also uncertain who is to make the decision whether to seek conditional release or discharge<sup>248</sup>—the acquittee or one of the lawyers—or

240. See *supra* notes 157-62 and accompanying text. It appears that, in at least one respect, the Model Act's criteria are even broader than those of the new federal statute, which refers to *serious* damage to property. See *supra* note 146.

241. "[An acquittee] is subject to the jurisdiction of the court for a period equal to the maximum term of imprisonment that could have been imposed for the most serious crime of which the individual was charged but found not criminally responsible." MODEL ACT § 901(a) (Supp. 1986). See *supra* notes 86-95 and accompanying text.

242. MODEL ACT § 902(1).

243. *Id.* § 901(b). The parallel provision in the ABA Standards is similar, but allows the judge to set a duration for special commitment shorter than that maximum sentence. See ABA Standards, *supra* note 1, at 7-7.7.

244. MODEL ACT § 904(b). This annual schedule is apparently an assurance that the intervals between review are not excessive, because "relief under the Act is available to committed individuals at all times." *Id.* § 905 comment, at 163. Petitions for habeas corpus are to be considered as applications for relief under the Act. *Id.*

245. *Id.* § 904(c).

246. *Id.*

247. See *supra* text accompanying notes 205-07.

248. There is also a provision allowing "another person acting on the individual's behalf"

indeed whether the periodic review procedures are waivable at all.<sup>249</sup> If a lawyer is to make this determination, he or she is given no guidance on the standard to use in making the decision.

At the periodic review hearings, the burden of persuasion rests with the "applicant," who may be either the acquittee or someone acting on his behalf or the superintendent.<sup>250</sup> The standard for review, and the alternatives available to the court, are the same as those of the initial post-acquittal commitment hearing,<sup>251</sup> except that, on periodic review, the petitioner may also request modification of the terms of the commitment order.<sup>252</sup>

#### D. Treatment Issues

There are difficulties accompanying the Act's judicial prediction of whether the supposed future criminality of an individual acquittee is likely to be within the category of "violent" crimes. Those acquittees determined likely to commit violent criminal offenses can be committed to a facility for in-patient care or for conditional release, while those predicted likely to commit nonviolent crimes may only be committed for "noncustodial" treatment involving "nonexperimental, generally accepted medical, psychiatric, or psychological" methods. This limitation on special commitment<sup>253</sup> to prevent future nonviolent crimes is rationalized in the commentary as required because, in such cases, "the most appropriate response may be to cause the individual to undergo appropriate therapy on an outpatient basis. Such an individual is not sufficiently dangerous to justify institutionalization."<sup>254</sup> As a therapeutic matter, the match between judicial prediction of supposed future crimes by an acquittee and the appropriate method of treatment may not be perfect in every instance. A more appropriate rationale for this limitation would be legal rather than medical: a prediction of nonviolent conduct may be an insufficient justification for the "massive curtailment of liberty"<sup>255</sup> that custodial commitment represents.

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to apply for conditional release, modification of commitment, or discharge of the acquittee. Neither the text nor the commentary indicates any limitation on the persons who can exercise this right. MODEL ACT § 905(b).

249. See generally Wexler, *The Waivability of Recommitment Hearings*, 20 ARIZ. L. REV. 175 (1978).

250. MODEL ACT § 905(c).

251. See *supra* notes 226, 231-35.

252. MODEL ACT § 905(b).

253. Acquittees who are predicted likely to commit nonviolent criminal offenses might be committable to custodial treatment under the general commitment laws of the jurisdiction, as are acquittees predicted to be dangerous to themselves. See *supra* note 235.

254. MODEL ACT § 903 comment.

255. *Humphrey v. Cady*, 405 U.S. 504, 509 (1972).

Aside from this limitation on the location of the commitment of "nonviolent predictees," the Model Act leaves the principal decisions regarding treatment during special commitment to the superintendent of the facility, but requires the court's permission for those activities that might involve issues of public safety. For example, it provides that in the absence of a judicial order for greater restrictions, the superintendent "may determine from time to time the nature of the constraints necessary within the [hospital or facility] to carry out the court's order."<sup>256</sup> However, the Act provides that the superintendent can authorize limited leaves from the grounds of the facility only within the scope of the court's delegated authority.<sup>257</sup>

The Model Act appears to restrict severely the acquittee's right to refuse treatment. Both for the original noncustodial commitment of "nonviolent predictees" and for the commitment to noncustodial commitment on periodic review,<sup>258</sup> the statute permits the court to order the acquittee to accept any "nonexperimental, generally accepted medical, psychiatric, or psychological treatment recommended by the facility."<sup>259</sup> The commentary notes that "[f]ailure or refusal of the individual to comply with the order could be an act of contempt of court."<sup>260</sup> This mandatory treatment stands in sharp contrast to the right to refuse treatment that patients may possess under civil commitment laws.<sup>261</sup> It should also be noted that the Model Act's provision for treatment without the patient's consent is not limited to those therapies that are not hazardous. Thus, for example, if a particular psychotropic medication were "generally accepted" and not experimental, but entailed a substantial risk to the patient,<sup>262</sup> it could be mandated under this section for acquittees predicted likely to commit acts that endangered neither persons nor property.<sup>263</sup>

A final issue involving treatment is the total lack of appropriate provisions concerning acquittees who are mentally retarded. Although the Model Act

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256. MODEL ACT § 904(a).

257. *Id.* Cf. ABA Standards, *supra* note 1, at 7-7.11 (requiring court order for authorized leaves for special commitment acquittees).

258. MODEL ACT §§ 903(d)(3), 905(c)(2).

259. *Id.* § 905(c)(2).

260. *Id.* § 903 comment.

261. Cf. ABA Standards, *supra* note 1, at 7-7.6 (specially committed acquittees have a right to treatment and a right to refuse treatment comparable to general commitment patients). The Model Act has no comparable provisions indicating whether acquittees have a right to treatment.

262. See generally Plotkin, *Limiting the Therapeutic Orgy: Mental Patients' Right to Refuse Treatment*, 72 NW. U.L. REV. 461, 474-79 (1977).

263. Curiously, the Model Act does not indicate whether acquittees who have been predicted as likely to commit violent crimes may also be required to accept such treatment.

clearly covers both "mental illness" and "defect,"<sup>264</sup> the Act's terminology appears to anticipate only acquittees whose mental disability arises from mental illness. For example, there are provisions regarding "medical, psychiatric, or psychological treatment,"<sup>265</sup> but no mention of habilitation for mentally retarded acquittees.<sup>266</sup> Similarly, while there are references to mental health professionals, there are no parallel discussions of mental retardation professionals.<sup>267</sup> Indeed, people with mental retardation are described by the archaic and stigmatizing label "mentally defective."<sup>268</sup> Such difficulties may arise from the fact that, unlike the ABA Mental Health Standards Project,<sup>269</sup> the Commissioners do not appear to have involved mental retardation professionals in the development of their model statute.

### E. Conclusion

The Model Act has a number of commendable features in its approach to the commitment of insanity acquittees. The Commissioners refrained from exercising every restrictive option left open by the *Jones* decision, but recommended some provisions more restrictive than those in the ABA standards. The rationalizations for some of the departures from the ABA model are not fully persuasive, and the failure of the Model Act to address the issues of mentally retarded defendants constitutes a serious drawback.

## VII. OTHER REFORM PROPOSALS

In addition to the proposals already discussed, three other suggestions for reform merit some discussion: the Model Penal Code, the recommendations of the National Commission on the Insanity Defense, and Oregon's Psychiatric Security Review Board.

### A. The Model Penal Code

The American Law Institute's Model Penal Code has proven an influential guide to legislatures and courts for nearly a quarter of a century. The

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264. MODEL ACT § 201.

265. See, e.g., *id.* § 903(d)(3).

266. See Ellis & Luckasson, *supra* note 1, at 424 n.57.

267. E.g., MODEL ACT § 501. Cf. ABA Standards, *supra* note 1, at 7-3.12 commentary. "In situations in which the defendant is mentally retarded, or potentially mentally retarded, the services of a special education teacher, speech and language pathologist, or an audiologist may be desirable to fully evaluate defendant's ability to communicate, to understand, and to learn. [This standard] . . . permits these professionals to testify as expert witnesses in appropriate cases." See also Ellis & Luckasson, *supra* note 1, at 484-91.

268. E.g., MODEL ACT § 903(d)(3). See generally J. DUDLEY, *LIVING WITH STIGMA: THE PLIGHT OF THE PEOPLE WHO WE LABEL MENTALLY RETARDED* (1983).

269. See Ellis & Luckasson, *supra* note 1, at 415.

Code's formulation of the insanity defense gained acceptance in all of the federal circuits and numerous states before the Hinckley controversy, and remains the law in many states.<sup>270</sup> Its proposals for commitment of insanity acquittees will be reviewed only briefly in this section, since they antedate major constitutional developments in the field of mental disability law.<sup>271</sup>

The Code requires that all insanity acquittees be committed to the custody of the jurisdiction's Commissioner of Mental Hygiene "to be placed in an appropriate institution for custody, care and treatment."<sup>272</sup> Acquittees can only obtain their release by order of the court, and release can be sought by either the Commissioner<sup>273</sup> or the acquittee.<sup>274</sup> Upon receiving an application, the court is to appoint at least two psychiatrists to examine the acquittee and report to the court within sixty days. Upon receipt of their report, the court may release the acquittee summarily or order a hearing on his continued need for confinement.<sup>275</sup> The burden of persuasion is on the party seeking the acquittee's release,<sup>276</sup> and the standard is whether the acquittee "may be discharged or released on condition without danger to himself or to others."<sup>277</sup>

The court need not consider an application from the acquittee until he has been confined for at least six months, and an acquittee is not permitted to file an application for one year after an unsuccessful petition.<sup>278</sup> The Code provides conditional release as one of the options available to the court when it receives an application<sup>279</sup> and allows the court to revoke a conditional release if, within five years of the granting of the release, the acquittee has not fulfilled the conditions of the release and revocation is necessary for the safety of the acquittee or others.<sup>280</sup>

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270. See *supra* note 130.

271. The Model Penal Code was adopted in 1962 and has not been revised since. An Explanatory Note in the 1985 edition acknowledges that there may be constitutional problems with some of the Code's provisions regarding the commitment of acquittees.

A more recent model statute, which nevertheless predated the *Hinckley* controversy by several years, was a proposal by the Mental Health Law Project. *Legal Issues in State Mental Health Care: Proposals for Change, Suggested Statute on the Insanity Defense*, 2 MENTAL DISABILITY L. REP. 651, 657-663 (1978). The provisions of the suggested statute are substantially similar to those of the ABA Standards.

272. MODEL PENAL CODE § 4.08(1) (1985).

273. *Id.* § 4.08(2).

274. *Id.* § 4.08(5).

275. *Id.* § 4.08(2).

276. *Id.* § 4.08(3). The commentary makes clear that the standard of proof is preponderance of the evidence. *Id.* comment, at 264.

277. *Id.* §§ 4.08(2), 4.08(5).

278. *Id.* § 4.08(5).

279. *Id.* § 4.08(3).

280. *Id.* § 4.08(4).

The Model Penal Code represented a significant advance over previous statutes at the time it was proposed, particularly in making the release criteria turn on the question of dangerousness rather than the acquittee's "restoration" to sanity,<sup>281</sup> and in providing conditional release as an alternative to outright release or continued institutionalization. However, because of changes in mental disability law and improvements in our understanding of predictions of dangerousness, mental illness, and mental retardation, it offers little useful guidance to modern legislators on the issue of the commitment of acquittees.

The Code requires automatic commitment of all acquittees, whether their offense involved violence or not. It appears to require confinement in an institution for all acquittees, and thus it is ill-suited to an era in which community mental health and mental retardation services have proven to be effective. The Code requires confinement for at least six months, even if all parties agree that the acquittee is not currently mentally disabled or dangerous. It places the burden of persuasion on the acquittee and fails to recognize the role of mental health and mental retardation professionals other than psychiatrists.

The standard for commitment is also problematic. It incorporates dangerousness to self despite the fact that acquittal has indicated nothing to distinguish acquittees from ordinary civil mental patients. More significantly, it allows continued confinement upon a mere prediction of future dangerousness, without a requirement that the acquittee be currently mentally ill or mentally retarded or that the dangerousness be caused by mental disability.

Although the Code remains more reasonable on some points than a few of the modern reform proposals, today's legislators will find more useful guidance in other suggestions for change.

### B. Oregon's Psychiatric Security Review Board

In 1977, the Oregon legislature enacted a new system for the commitment and release of insanity acquittees. Its principal feature was transferring authority for commitment and release decisions from the courts to a new administrative body, the Psychiatric Security Review Board (PSRB).<sup>282</sup>

The PSRB consists of five members appointed by the governor to terms of

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281. See *id.* comment, at 259.

282. See OR. REV. STAT. §§ 161.327 to 161.336 (Repl. 1985); Bloom, Rogers & Manson, *After Oregon's Insanity Defense: A Comparison of Conditional Release and Hospitalization*, 5 INT'L J.L. & PSYCHIATRY 391 (1983); Rogers, *1981 Oregon Legislation Relating to the Insanity Defense and the Psychiatric Security Review Board*, 18 WILLAMETTE L.J. 23 (1982); Rogers & Bloom, *Characteristics of Persons Committed to Oregon's Psychiatric Security Review Board*, 10 BULL. AM. ACAD. PSYCHIATRY & L. 155 (1982).

four years and subject to confirmation by the state senate.<sup>283</sup> The membership includes a psychiatrist, a psychologist, an individual with experience in the area of parole and probation, a criminal trial lawyer, and a member of the general public. The Board may include no employee of either a district attorney, a public defender, the Mental Health Division, or a community mental health program.<sup>284</sup>

When a criminal defendant is acquitted by reason of insanity,<sup>285</sup> the trial court determines "the offense of which the person otherwise would have been convicted,"<sup>286</sup> and then either orders the defendant conditionally released or transfers jurisdiction to the PSRB.<sup>287</sup> The Board has jurisdiction over special commitment of insanity acquittees who were acquitted of an offense that was a felony or a misdemeanor causing "physical injury or risk of physical injury to another," and who are currently "affected by mental disease or defect" and who present a substantial danger to others.<sup>288</sup> The Board's jurisdiction expires at the end of the maximum sentence the acquittee could have received.<sup>289</sup>

The Board has responsibility for the periodic review of all committed acquittees and for petitions for discharge, conditional release, and modifications of commitment orders. At all such hearings, the applicant carries the burden of persuasion by a preponderance of the evidence.<sup>290</sup> The standard of review is whether the acquittee is currently "affected by mental disease or defect," and "presents a substantial danger to others which requires regular medical care, medication, supervision or treatment."<sup>291</sup> There are elaborate procedures and standards for conditional release, and an acquittee who has

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283. OR. REV. STAT. § 161.385(1), (3) (Repl. 1985).

284. *Id.* § 161.385(2).

285. The Oregon verdict form is "guilty except for insanity" and is defined by the Model Penal Code test. *Id.* § 161.295. Insanity constitutes an affirmative defense, on which the defendant bears the burden of persuasion by a preponderance of the evidence. *Id.* §§ 161.305, 161.055.

286. *Id.* § 161.325(2)(a). The offense must be determined in order to calculate the maximum sentence that is the measure of the duration of the Board's jurisdiction. It is also necessary to determine whether a misdemeanor was one which caused or risked physical injury to another person. *See infra* note 288. For those defendants acquitted of "nonviolent" misdemeanors, the state bears the burden on the issue of special civil commitment by a preponderance of the evidence (a heavier burden for the state than *Addington* allows for ordinary civil patients, but more generous to acquittees than the burden for felonies and violent misdemeanors). OR. REV. STAT. § 161.328 (Repl. 1985). The duration of this form of special commitment also expires at the end of the maximum sentence for the acquittee's offense. *Id.*

287. *Id.* § 161.327.

288. *Id.* § 161.327(1).

289. *Id.*

290. *Id.* § 161.346.

291. *Id.* § 161.351(1).



been on release for five years will be reviewed to determine whether he should be discharged from the Board's jurisdiction.<sup>292</sup> Acquittes who are dissatisfied with the Board's disposition of their case have a right to appeal to the courts.<sup>293</sup>

The PSRB system has attracted considerable national attention.<sup>294</sup> It is particularly attractive for those states that have a substantial number of insanity acquittes and prefer to have commitment and release decisions made by an interdisciplinary body rather than judges. It should be noted that the PSRB structure does not require that other states adopt all aspects of Oregon's system, such as the allocation of burdens. Legislatures that find the PSRB approach desirable can easily adapt both substantive and procedural provisions from other models, such as the ABA Standards or the Uniform Commissioners' Model Act, to be implemented by an administrative decisionmaking body.

### C. *The National Commission on the Insanity Defense*

Following the *Hinckley* verdict, the National Mental Health Association organized and convened a National Commission on the Insanity Defense. Under the chairmanship of former Senator Birch Bayh, the Commission held public hearings in October 1982<sup>295</sup> and issued a Report that included recommendations concerning proposals to modify the insanity defense.<sup>296</sup> The Report concluded that all jurisdictions should retain the insanity defense, including both cognitive and volitional prongs, and place the burden of persuasion by a preponderance of the evidence on the issue of insanity on the defendant. States were also urged to reject proposals for a "guilty but mentally ill" verdict.<sup>297</sup>

The Commission also recommended that all jurisdictions enact a system of special commitment for defendants acquitted by reason of insanity of a

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292. *Id.* § 161.351(3).

293. *Id.* § 161.385(8). *See* *State v. Cooper*, 37 Or. App. 443, 587 P.2d 1051 (1978) (defining an appealable PSRB order).

294. The APA has endorsed the Oregon approach. *See supra* note 112. The commentary to the ABA Standards describe the PSRB as "interesting and important." ABA Standards, *supra* note 1, at 7-7.8 commentary. The Uniform Law Commissioners recognized advantages in a PSRB system, but concluded that it was "not sufficiently suited to all states to justify including it as the standard in a model act." MODEL ACT, *supra* note 185, § 905 comment.

295. NATIONAL MENTAL HEALTH ASSOCIATION, MYTHS AND REALITIES: HEARING TRANSCRIPT OF THE NATIONAL COMMISSION ON THE INSANITY DEFENSE (1983).

296. NATIONAL MENTAL HEALTH ASSOCIATION, MYTHS AND REALITIES: A REPORT OF THE NATIONAL COMMISSION ON THE INSANITY DEFENSE (1983) [hereinafter cited as REPORT].

297. *Id.* at 3.

violent crime.<sup>298</sup> The Report emphasized that “[t]he mere fact of acquittal by reason of insanity should not, in itself, satisfy the statutory requirements of a finding of ‘dangerousness.’”<sup>299</sup> The Commissioners concluded that the decision about “confinement, release and approval of an appropriate treatment plan” should be made by either a court or a PSRB type of quasi-judicial administrative body, rather than the treatment facility itself.<sup>300</sup> The Report endorsed the adoption of provisions for conditional release of committed acquittees, and strongly opposed the APA’s suggestion that acquittees who were not receiving treatment could be confined in nontreatment facilities.<sup>301</sup> “The Commission strongly objects to the referral of anyone not convicted of a crime to a prison or other correctional environment.”<sup>302</sup>

Although the National Commission’s Report does not take the form of legislative language, and does not contain the procedural details found in some of the other models, its recommendations concerning the commitment of insanity acquittees are generally sensible and supportive of reasonable reforms.

#### VIII. THE INSANITY DEFENSE AND SPECIAL COMMITMENT: THE POLITICAL AND LEGAL DILEMMAS

The sporadic public controversies that arise concerning the insanity defense invariably lead to calls for changes in the legal rules surrounding both its availability and its consequences. The recent uproar about the *Hinckley* verdict was unusually productive in this regard. It inspired the ABA, the APA, the National Conference of Commissioners on Uniform State Laws, and Congress to abandon the volitional prong of the insanity defense. It gave impetus to the movement to adopt “guilty but mentally ill” statutes in a number of states. And it engendered a flurry of competing proposals to reform commitment procedures for acquittees.<sup>303</sup>

The commitment proposals merit cautious evaluation before they are adopted. One reason for care is the need to protect the public from the potential violent acts of acquittees, but this concern will already be accommodated by the political impulses that occasion consideration of the topic.

A concern that is unlikely to have its own political constituency is the need for the fair treatment of acquittees. On the whole, this is a relatively

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298. *Id.* at 37.

299. *Id.* at 38.

300. *Id.*

301. See *supra* notes 122-27.

302. REPORT, *supra* note 296, at 39.

303. See also Wexler, *Redefining the Insanity Problem*, 53 GEO. WASH. L. REV. 528 (1985).

unattractive group. However, individual instances of injustice, such as that visited upon Michael Jones by the laws of the District of Columbia and the United States Supreme Court, should always be a source of concern. Thus, proposed systems of special commitment should be inspected closely to evaluate their provisions for identifying and correcting instances of unjustified deprivation of liberty. In their haste to assure the public that no violent individual will ever be released, some current proposals fail to allow a fair determination of committability for those acquittees who, realistically viewed, pose no substantial danger to anyone.

A somewhat less obvious concern, also lacking a ready-made political constituency, is the impact of proposed changes on the structure of mental health law in general. A version of this concern has already surfaced: the argument that special commitment of acquittees must be made more restrictive because it is the only source of reassurance sufficient to "save" the insanity defense from abolition.<sup>304</sup> This view is commendable in its attempt to accommodate two different legal structures in a politically palatable way. Nevertheless, it is worth considering whether this perspective has ordered its political and legal priorities correctly.

Upholding systems of automatic commitment that require acquitted persons to prove that their confinement is unlawful must, of necessity, offend accepted principles of equal protection and procedural due process. What we know about acquittees, even those acquitted of violent offenses, will not support the conclusion that it is unnecessary to inquire into their current mental condition or prospective dangerousness. The likelihood that they are committable at the time of acquittal or at any subsequent periodic review is not so certain that we can dispense with hearings at which the state must prove its case in order to deprive them of liberty. The state can offer no persuasive justification for continuing them in special confinement when their sentence would have elapsed, because at that point they are indistinguishable from ordinary civil patients or mentally disabled convicts who have completed their sentence. The Supreme Court in *Jones* twisted previously clear doctrines of equal protection and due process to reach the conclusion that the Constitution provides few obstacles to the confinement of insanity acquittees.

This pliant view of the Constitution's requirements may well eventually affect the rights of mentally disabled people who have never been accused of crimes. Attempts during the last decade and a half to construct a general

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304. See *supra* note 85. A similar view that harshness in the design of post-acquittal commitment will enhance the palatability of the defense to both jurors and the general public is offered by the commentary to the MODEL PENAL CODE § 4.08 comment (1985).

civil commitment system that protects the rights of individuals are threatened by the possible extensions of the *Jones* holding and its dicta. Indeed, by relying on such an insubstantial empirical foundation in its attempt to differentiate acquittees from other patients, the Court may have begun an erosion of the equal protection and due process principles it purported to distinguish in *Jones*.

The Court's treatment of the disposition issues raises anew the issue of the wisdom of retaining the insanity defense itself. If the price for keeping the defense is a system of special commitment that excludes procedural protections in order to insure invariable long-term or permanent confinement, it is not clear whether this is preferable to a system that convicts some individuals who are currently eligible for the defense. It may be claimed that justice is served because these individuals are not being punished. But the insistence upon, or acquiescence in, procedures which assure that acquittees will not reenter our communities regardless of their current mental condition suggests that the distinction between automatic special commitment and punishment by incarceration<sup>305</sup> is almost purely metaphysical. Ultimately, such semantic camouflage may be the price we will have to pay to protect harmless general mental patients from the unnecessary confinement that society inevitably will demand if we attempt to equate the treatment of these two groups of patients.

If these pessimistic speculations are correct, we may have to reconsider the draconian "special commitment" proposed as a barricade against the assault on the insanity defense. It is not clear whether some residuum of the defense is constitutionally required.<sup>306</sup> If legislatures are free to abolish or greatly restrict the insanity defense, we may be confronted with the necessity of political triage. It is not unquestionably obvious that the retention of the defense in its current form is worth the price if that price involves the erosion of the rights of general commitment patients.

Dr. Alan Stone has suggested that these recent developments have arisen because "[p]erhaps for the first time in its history the insanity defense has

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305. This argument loses force, of course, when the alternative to acquittal by reason of insanity is the death penalty. Severe mental disability, however, may be a mitigating factor in determining whether the death penalty is to be applied. See ABA Standard, *supra* note 1, at 7-9.3; Ellis & Luckasson, *supra* note 1, at 471-73.

306. See *State v. Korell*, 690 P.2d 992 (Mont. 1984) (holding that it is not); *Sinclair v. State*, 161 Miss. 142, 132 So. 581 (1931) (holding that it is). For a sampling of the policy debate on the proposed abolition of the defense, see Commentary to ABA Standards, *supra* note 1, at 7-6.1; Bonnie, *The Moral Basis of the Insanity Defense*, 69 A.B.A. J. 194 (1983); Goldstein & Katz, *Abolish the "Insanity Defense"—Why Not?*, 72 YALE L.J. 853 (1963); Monahan, *Abolish the Insanity Defense?—Not Yet*, 26 RUTGERS L. REV. 719 (1973).

bite.”<sup>307</sup> The essence of the defense is the declaration that an individual found to meet the test is *acquitted*. The debate over automatic special commitment suggests that we don't really mean it, at least for some acquittees. If we don't really mean it, perhaps we should say so.

Fear of the future acts of acquittees and our impulses for retribution for acts that harmed society come into conflict with our moral predisposition that people should not be punished for acts that were not their “fault.” But there is more than one way to address our societal ambivalence about whether insanity acquittees should be punished. Distorting the constitutional principles and public policy considerations that place boundaries on the state's civil commitment power is an unacceptable means of sweeping the insanity defense debate under the rug.

### IX. CONCLUSION

There are sound public policy reasons for considering a reform of state laws concerning commitment of insanity acquittees. A balanced system of special commitment can protect the public safety and, at the same time, give acquittees a fair hearing on their current mental condition and continuing need for confinement. Special commitment can also insulate general commitment laws from political pressures that can arise from the prospect of the possible release of notorious insanity acquittees.

Some of the recent proposals for reform contain features that are ill-considered. Commitment systems that rely on presumptions of dangerousness that are not empirically justifiable should not be enacted. Similarly, commitment on the basis of fear of future property offenses that do not endanger the safety of others is unacceptable. Some of the proposals fail to address adequately the problems presented by mentally retarded defendants who are acquitted by reason of mental nonresponsibility. The suggestion that acquittees can be confined in prisons or prison-like settings if treatment is not being provided is inconsistent with any reasonable, nonpunitive conception of the insanity defense.

Several of the recently proposed model reforms, however, have features that commend them to the attention of state legislators. The Oregon model of using a Psychiatric Security Review Board instead of courts in making commitment and release decisions will be attractive to legislators in some states. Whether a state chooses to use judges or an administrative body to make these decisions, it may find that the ABA Criminal Justice Mental Health Standards represent a balanced approach to the problem of committing insanity acquittees.

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307. A. STONE, LAW, PSYCHIATRY, AND MORALITY: ESSAYS AND ANALYSIS 141 (1984).