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Case Comment

Jones v. United States: A Sociological Vindication

I. INTRODUCTION: *Jones v. United States*

Michael Jones was arrested on September 19, 1975, while attempting to steal a jacket from a District of Columbia store.[1] He was arraigned in the District of Columbia Superior Court and charged with petit larceny, a misdemeanor with a maximum one-year prison sentence.[2] Because there was some doubt as to his mental capacity to stand trial, the superior court ordered a determination of his mental competency, a procedure allowed by statute, to be conducted at St. Elizabeth's Hospital in the District of Columbia.[3] Jones was found competent by a hospital psychiatrist[4] and subsequently stood trial.[5] He pled not guilty by reason of insanity to the petit larceny charge,[6] and on March 12, 1976, the superior court found Jones not guilty by reason of insanity[7] and committed him to St. Elizabeth's in accordance with the pertinent

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1. Jones v. United States, 103 S. Ct. 3043 (1983).

2. 103 S. Ct. at 3047. The applicable statute provided "[w]hoever shall attempt to commit any crime, which attempt is not otherwise made punishable by this title, shall be punished by a fine not exceeding $1000 or by imprisonment for not more than 1 year, or both." D.C. CODE ANN. § 22-103 (1981).

3. 103 S. Ct. at 3047. The District of Columbia Code authorized the court to "order the accused committed to the District of Columbia General Hospital or other mental hospital designated by the court, for such reasonable period as the court may determine for examination and observation and for care and treatment if such is necessary by the psychiatric staff of said hospital." D.C. CODE ANN. § 24-301(a) (1981).

4. 103 S. Ct. at 3047.

5. *Id.*

6. *Id.* The government did not contest the plea, entering into a stipulation of fact with Jones. Jones had the burden of proving his insanity, pursuant to the District of Columbia Code, which provided "[n]o person accused of an offense shall be acquitted on the ground that he was insane at the time of its commission unless his insanity, regardless of who raises the issue, is affirmatively established by a preponderance of the evidence." D.C. CODE ANN. § 24-301(j) (1981).

7. 103 S. Ct. at 3047.

statute.[8] The District of Columbia Code also provided that the committed party could become eligible for release if, within fifty days of commitment, it was proven by a preponderance of the evidence that no mental illness or dangerousness persisted.[9] At Jones' fifty-day hearing, after testimony from a hospital psychiatrist concerning his dangerousness and cross-examination by Jones' counsel, the superior court still considered him to be a danger to himself or to others and returned him to St. Elizabeth's.[10]

Following this return, a second release hearing was held on February 26, 1977.[11] Jones had by this time been hospitalized longer than one year, the maximum length of prison time he would have faced had he been found guilty.[12] In light of the maximum sentence time, Jones petitioned the court to be released unconditionally or to be recommitted pursuant to the civil commitment standards, which required a jury trial and proof by clear and convincing evidence of his mental illness and dangerousness.[13] His

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8. *Id.* The District of Columbia Code provided:

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

D.C. CODE ANN § 24-301(d)(1) (1981).

Subsection (e) provided:

> Where any person has been confined in a hospital for the mentally ill pursuant to subsection (d) of this section, and the superintendent of such hospital certifies (1) that such person has recovered his sanity, (2) that, in the opinion of the superintendent, such person will not in the reasonable future be dangerous to himself or others, and (3) in the opinion of the superintendent, the person is entitled to unconditional release from the hospital . . . such certificate shall be sufficient to authorize the court to order the unconditional release of the person so confined from further hospitalization . . . .

D.C. CODE ANN. § 24-301(e) (1981).

9. 103 S. Ct. at 3045-46. The District of Columbia Code provided:

> (A) A person confined pursuant to paragraph (1) of this subsection shall have a hearing, unless waived, within 50 days of his confinement to determine whether he is entitled to release from custody . . . . (B) If the hearing is not waived . . . [t]he person confined shall have the burden of proof. If the court finds by a preponderance of the evidence that the person confined is entitled to his release from custody, either conditional or unconditional, the court shall enter such order as may appear appropriate.

D.C.CODE ANN. § 24-301(d)(2) (1981).

10. 103 S. Ct. at 3047. In the psychologist's opinion, Jones still suffered from paranoid schizophrenia, and, because his illness was still quite active, he was still a danger to himself and to others. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* The District of Columbia Code § 21-545(b) provided that if the person is found

request for a civil commitment hearing was denied, and he was returned to St. Elizabeth's for an indeterminate period.[14] Jones appealed to the District of Columbia Court of Appeals, which affirmed the findings of the superior court.[15] The appeals court granted a rehearing, however, and reversed, ruling that Jones was entitled to civil commitment procedures.[16] In a third proceeding, the court heard Jones' case en banc and affirmed his commitment,[17] holding that the commitment procedures did not violate the equal protection clause of the United States constitution.[18] The United States Supreme Court granted certiorari[19] and affirmed the en banc hearing of the appeals court, holding that when a criminal defendant establishes by a preponderance of the evidence that he is not guilty by reason of insanity, it is not unconstitutional for his commitment to last until he is able to show by a preponderance of the evidence that he is sane or no longer dangerous, regardless of

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to be mentally ill and, because of that illness, likely to harm himself or others, the court may order hospitalization for an indeterminate period, or it may order any other treatment that it feels is in the best interest of that individual or of the public. 103 S. Ct. at 3046 n.6. *See* In re Nelson, 408 A.2d. 1233 (D.C. App. 1979) (reading into the statute the due process requirement of clear and convincing proof).

14. 103 S. Ct. at 3047. In March of 1977, a subsequent motion for release under the Code was denied by the District of Columbia Superior Court. The pertinent Code section provided:

> (1) A person in custody or conditionally released from custody, pursuant to the provisions of this section, claiming the right to be released from custody, the right to any change in the conditions of his release, or other relief concerning his custody, may move the court having jurisdiction to order his release, to release him from custody, to change the conditions of his release, or to grant other relief . . . . (3) On all issues raised by this motion, the person shall have the burden of proof. If the court finds by a preponderance of the evidence that the person is entitled to his release from custody, either conditional or unconditional, a change in the conditions of his release, or other relief, the court shall enter such order as may appear appropriate.

D.C. CODE ANN. § 24-301(k) (1981).

Three months later, Jones was released on terms recommended by St. Elizabeth's, which permitted daytime and overnight visits in the community. Jones v. United States, 432 A.2d. 364, 368 n.6 (D.C. App. 1981).

15. Jones v. United States, 396 A.2d 183 (D.C. App. 1978).

16. Jones v. United States, 411 A.2d 624 (D.C. App. 1980).

17. Jones v. United States, 432 A.2d 364 (D.C. App. 1981).

18. 103 S. Ct. at 3048. The court disagreed with Jones' contention that the confinement in the mental hospital should be no more than the prison sentence would be, without civil commitment procedure. The court maintained that the length of the prison sentence which may have been received does not determine the release date from commitment. 432 A.2d at 368. The court went on to claim that the statutory distinctions between civil commitment and insanity acquittals were justified under the equal protection clause of the fifth amendment. 432 A.2d at 371-76.

19. Jones v. United States, 454 U.S. 1141 (1982).

how long this may take.[20]

Jones relied before the Supreme Court on its 1979 decision in *Addington v. Texas*,[21] which held that insanity commitment requires full due process protection.[22] In *Addington*, the Court stated that a civil commitment proceeding requires the government to demonstrate by clear and convincing evidence that the individual is mentally ill and dangerous, if he is to be hospitalized indefinitely.[23] Jones contended that due process standards were not met in his situation, since he did not receive the procedural safeguards to which he had a right.[24] This was due, he claimed, to the fact that the not guilty by reason of insanity judgment by the superior court did not constitute proof of a present state of mental illness or dangerousness and because the verdict was established by only a preponderance of the evidence.[25] The government, Jones concluded, did not have a purpose for the confinement that would pass constitutional muster.[26]

The *Jones* Court, in an opinion by Justice Powell,[27] first turned to the question of whether the insanity finding was sufficiently indicative of mental illness and dangerousness to justify commitment.[28] Congress had, according to Justice Powell, determined that the not guilty by reason of insanity finding, which establishes that

20. 103 S. Ct. at 3052.

21. 441 U.S. 418 (1979).

22. 103 S. Ct. at 3048. The Court in *Addington* stated that any type of commitment was a serious deprivation of liberty and required due process protection. 441 U.S. at 425. *See also* O'Connor v. Donaldson, 422 U.S. 563 (1975), where it was held that a state must have "a constitutionally adequate purpose for the confinement." 422 U.S. at 574.

23. 103 S. Ct. at 3048. The reason for the standard of proof, according to the *Addington* court, is that the present state of knowledge of mental illness is not complete, and science in this area (both in diagnosis and therapy) had not yet reached any final, certain conclusion. 441 U.S. at 426-27, 429-30.

24. 103 S. Ct. at 3048. In the court of appeals, 432 A.2d at 371, these arguments were based on equal protection rather than due process, but both sides agreed that the two arguments were essentially duplicated. Petitioner's Brief at 22-23, Jones v. United States, 432 A.2d 364 (1981); Brief for Respondent at 55, Jones v. United States, 432 A.2d 364 (1981).

25. 103 S. Ct. at 3048-49. According to the majority in *O'Connor*, the state must have "a constitutionally adequate purpose for the confinement." 422 U.S. at 574. It is interesting to note that Jones had not sought appellate review of the District of Columbia Superior Court's finding in 1976-1977 that he remained mentally ill and dangerous. Since 1977, he had not sought a release hearing, to which he was entitled every six months. 103 S. Ct. at 3049 n.11.

26. 103 S. Ct. at 3049.

27. Chief Justice Burger and Justices White, Rehnquist, and O'Conner joined in the majority opinion. Justice Brennan, with whom Justices Marshall and Blackmun joined, dissented. Justice Stevens filed a separate dissent. 103 S. Ct. at 3043.

28. *Id.* at 3049.

the defendant committed an act that constitutes a criminal offense, and that he committed such act because of mental illness, was a sufficient basis for concluding that the defendant was mentally ill and dangerous.[29] Further, according to Justice Powell, just as it was not unreasonable or unconstitutional for Congress to make this previous determination, neither was it unreasonable to infer continuing mental illness from the insanity acquittal.[30] Common sense, the Court maintained, suggested that someone whose mental illness had led to a crime was likely to remain ill and in need of psychiatric care.[31]

Jones had also argued that automatic commitment was not necessary, since the insanity acquittal could be used as evidence in a civil proceeding.[32] The Court, however, considered the interest of avoiding relitigation essential, necessitating the automatic commitment.[33] The Court concluded, therefore, that the insanity acquittal was sufficient foundation for commitment of an individual for treatment and for the protection of society.[34]

The Court then discussed the differing standards of proof in the civil and insanity acquittal procedures.[35] Justice Powell noted that *Addington* required proof, by clear and convincing evidence, in a civil commitment hearing, that an individual was insane.[36] This,

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29. *Id.* The U.S. Senate Committee on Internal Affairs had made the following determination:

> When the accused has pleaded insanity as a defense to a crime, and the jury has found that the defendant was, in fact, insane at the time the crime was committed, it is just and reasonable in the Committee's opinion that the insanity, once established, should be presumed to continue and that the accused should be automatically confined for treatment until it can be shown that he has recovered.

S. Rep. No. 1170, 84th Cong., 1st Sess. 13 (1955). *See* Lynch v. Overholser, 369 U.S. 705, 714 (1962), which supported this determination.

The proof of the criminal act, Justice Powell maintained, distinguished *Jones* from Jackson v. Indiana, 406 U.S. 715 (1972), where it was held that a person found incompetent to stand trial could not be indefinitely committed solely because of the incompetency, it never having been established that the accused had committed any criminal act or was in any way dangerous. 103 S. Ct. at 3049 n.12. The proof of the criminal act, as in Jones' situation, the Court claimed, certainly indicated dangerousness. 103 S. Ct. at 3049.

30. 103 S. Ct. at 3050.

31. *Id.*

32. *Id.*

33. *Id.* Justice Powell, in Mathews v. Eldridge, 424 U.S. 319 (1976), stated that the resolution of the constitutionality of administrative procedures requires analysis of both the private and governmental interests effected. Included in the governmental interests were the administrative burdens of additional or substitute procedural requirements. 424 U.S. at 334-35.

34. 103 S. Ct. at 3050.

35. *Id.* at 3051.

36. *Id.*

Justice Powell said, was to protect an individual from commitment for some idiosyncratic behavior.[37] The risk of error in automatic commitment following an insanity acquittal, however, wrote Justice Powell, was greatly diminished, since by statute the acquittee himself was required to advance insanity as a defense, and the proof of a criminal act lessened the danger of commitment for mere idiosyncratic behavior.[38]

The final question that the Court considered was whether commitment should be confined to the maximum prison sentence that could have been charged for the crime involved.[39] The Court relied on the different considerations involved in committing the insanity acquittee as opposed to imprisoning the criminal.[40] The Court pointed out that in *Jackson v. Indiana*,[41] it had been noted that there was necessarily a close relationship between the confinement and its nature on the one hand and the purpose for the confinement on the other.[42] The purpose of commitment after an insanity acquittal, noted Justice Powell, as in a civil commitment hearing, is to treat the individual and protect society, and the impossibility of prediction of recovery thus necessitated the indefinite period.[43] A particular sentence of incarceration for a crime, the Court maintained, indicated society's view of the way to deal with the offense, based on such considerations as retribution, deterrence, and rehabilitation.[44] The state, Justice Powell continued, may punish the criminal even if he was very unlikely to commit another crime.[45] In light of these considerations, the Court rejected Jones' argument that the period of confinement of the acquittee was limited to the possible period of criminal incarceration.[46] Jones was to be con-

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37. *Id.* The Court in *Addington* deemed it inappropriate to ask the individual to share with society the risk of error. 441 U.S. at 427.

38. 103 S. Ct. at 3051.

39. *Id.*

40. *Id.*

41. 406 U.S. 715 (1972).

42. 103 S. Ct. at 3051. The Court in *Jackson* stated that the nature and length of commitment must be reasonably related to the purpose of the commitment. 406 U.S. at 738.

43. 103 S. Ct. at 3051-52.

44. *Id.* at 3052. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 183-86 (1976) (opinions of Justices Stewart, Powell and Stevens); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963); Williams v. New York, 337 U.S. 241, 248-49 (1949).

45. 103 S. Ct. at 3052.

46. *Id.* Justice Powell concluded with the following language:

> We hold that when a criminal defendant establishes by a preponderance of the evidence that he is not guilty of a crime by reason of insanity, the Constitution permits the Government, on the basis of the insanity judgment, to confine him to a mental institution until such time as he has regained his sanity, or is no longer a danger to

fined at St. Elizabeth's until such time as he could meet his burden of proof in a release hearing.[47]

Justice Brennan, dissenting, saw the question before the Court not as a matter concerning Jones' release, but whether the fact that an individual had been found not guilty by reason of insanity by itself was a constitutionally justifiable basis for involuntary and indefinite lasting psychiatric commitment.[48] Justice Brennan claimed that the Court had held earlier that the government may not confine the insanity acquittee for a period longer than the maximum penal incarceration period for the crime.[49] Justice Brennan also noted that once Congress had established a certain punishment for a particular crime, the proof of additional facts beyond a reasonable doubt was essential for additional punishment to be dealt.[50] Indefinite commitment thus did not appear to be justified, according to Justice Brennan, unless supplemental facts supporting the commitment beyond the incarceration period were proven.[51]

Justice Brennan then attacked the majority's conclusion that mental illness and dangerousness could be found solely from the insanity acquittal,[52] pointing to *Baxstrom v. Herold*,[53] where the Court had held that once sentence time is served, the acquittee must be treated like other civil commitment patients.[54] The only

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himself or society.

Id.

47. *Id.* at 3053.

48. *Id.* (Brennan, J., dissenting).

49. *Id.* at 3054-55. (Brennan, J., dissenting). *See* Humphrey v. Cady, 405 U.S. 504 (1972). In *Humphrey*, Justice Marshall had noted that initial psychiatric commitment under the Sex Crimes Act, imposed in lieu of sentence, was to be limited in duration to the maximum permissible sentence. 404 U.S. at 510-11.

50. 103 S. Ct. at 3055. (Brennan, J., dissenting). *See* In re Winship, 397 U.S. 358, 361-64 (1970), and Specht v. Patterson, 386 U.S. 605, 610 (1967). Both Courts required an additional hearing with proof of meaningful supplemental facts before commitment longer than the maximum incarceration period was allowed. 103 S. Ct. at 3055 (Brennan, J., dissenting).

51. 103 S. Ct. at 3055. (Brennan, J., dissenting).

52. *Id.* Justice Brennan further noted that:

Our precedents in other commitment contexts are inconsistent with the argument that the mere fact of past criminal behavior and mental illness justify indefinite commitment without the benefit of the minimum due process standards associated with civil commitment, most importantly proof of present mental illness and dangerousness by clear and convincing evidence.

Id. (Brennan, J., dissenting).

53. 383 U.S. 107 (1966).

54. 103 S. Ct. at 3055-56. (Brennan, J., dissenting). The *Baxstrom* Court had held as follows:

Where the State has provided for a judicial proceeding to determine the dangerous

key difference between *Baxstrom* and *Jones*, according to Justice Brennan, was that Jones, pursuant to statute, admitted that his act was the product of mental illness, and Baxstrom never had.[55] The importance of that distinction, however, according to Justice Brennan, had been diminished[56] in *Humphrey v. Cady*.[57] While the connection between petitioner's act and his mental illness was never made at all in *Baxstrom*,[58] such a connection had been made in *Humphrey*, and the defendant therein was still found to be entitled to civil commitment procedural protections.[59] Justice Brennan then pointed out that after Jones' February, 1977, hearing, the factual situations of *Humphrey* and *Jones* were nearly identical.[60] Therefore, Justice Brennan concluded, that *Baxstrom* and *Jones* were not so distinguishable as to warrant the refusal of Jones' procedural safeguards in keeping him beyond the one-year incarceration period.[61]

Justice Brennan had other objections to the finding of continued mental illness and dangerousness solely on the basis of the insanity acquittal.[62] A not guilty by reason of insanity verdict, Justice Brennan noted, looks backward in time, focusing on the individual's condition at a moment in the past.[63] The impossibility of prediction of dangerous behavior from an isolated act, Justice Brennan maintained, weakened the claim of continued mental illness and

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> propensities of all others civilly committed to an institution of the Department of Correction, it may not deny this right to a person in Baxstrom's position solely on the ground that he was nearing the expiration of a prison term. It may or may not be that Baxstrom is presently mentally ill and such a danger to others that the strict security of a Department of Correction hospital is warranted. All others receive a judicial hearing on this issue. Equal protection demands that Baxstrom receive the same.

383 U.S. at 114-15.

55. 103 S. Ct. at 3056. (Brennan, J., dissenting).

56. *Id.*

57. 405 U.S. at 506-07. *See supra* note 49 and accompanying text.

58. 103 S. Ct. at 3056. (Brennan, J., dissenting).

59. *Id.* (Brennan, J., dissenting). The *Humphrey* Court noted that the argument set forth by the government, that this psychiatric confinement should not require civil procedural safeguards since it is in effect merely a substitute for criminal incarceration, had some merit with regard to the initial confinement, which is imposed in lieu of sentence and limited in duration to the maximum permissible sentence. The government's argument carried little weight, however, concluded the Court, with regard to subsequent renewal proceedings, which result in five-year commitment orders based on new factual findings and are in no way limited by the nature of or sentence authorized for defendant's crime. 405 U.S. at 511.

60. 103 S. Ct. at 3056. (Brennan, J., dissenting).

61. *Id.*

62. *Id.*

63. *Id.*

dangerousness.[64] A close look at the majority's opinion, the dissent continued, showed that the holding may have overruled *Humphrey* by implication, the same facts and the same above-mentioned connection between act and mental illness producing different results in the two cases, but it did not overrule *Baxstrom*, where the connection between act and mental illness was never made.[65] It was clear to Justice Brennan, then, that the separate facts of criminality and mental illness alone cannot support indefinite psychiatric commitment, since both were present in *Baxstrom*.[66] Further, Justice Brennan continued, the connection between these elements, relied on by the majority, constituted "more a social judgment than a sound basis for determining dangerousness."[67] Justice Brennan, therefore, advocated upholding the due process protections of *Addington* for insanity acquittees confined in mental hospitals for longer than the incarceration period of the underlying crime.[68]

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64. *Id.* at 3057. (Brennan, J., dissenting). Justice Brennan noted that research was practically non-existent with respect to the showing of a relation between a criminal's nonviolent behavior and any future dangerousness. Also, Justice Brennan asserted, the frequency of prior violent behavior was an important, though unreliable, predictive element, and Jones had committed one isolated, nonviolent, criminal act. *Id.* at 3057-58. (Brennan, J., dissenting).

65. *Id.* at 3058. (Brennan, J., dissenting).

66. *Id.*

67. *Id.*

68. *Id.* Justice Brennan also rejected the risk of error reasoning of the majority, stressing the liberty interests of the individual subject to commitment. The risk of error, Justice Brennan noted, was seen by the majority as subsuming two separate risks. First, Justice Brennan claimed, the majority noted the *Addington* fear of commitment for idiosyncratic behavior, *see supra* notes 36-38 and accompanying text, but it also stressed that criminal acts were clearly outside the range of acceptable conduct. 103 S. Ct. at 3060. (Brennan, J., dissenting). Justice Brennan pointed out, however, that *O'Conner* required actual dangerousness of the individual to be proven, not simply unacceptability of his behavior. 103 S. Ct. at 3060. (Brennan, J., dissenting). The *O'Conner* Court set forth its rationale as follows:

> 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 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 . . . . [In short], a State cannot constitutionally confine . . . a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends. Since the jury found, upon ample evidence, that O'Conner, as an agent of the State, knowingly did so confine Donaldson, it properly concluded that O'Conner violated Donaldson's constitutional right to freedom.

422 U.S. at 575-76. *See supra* notes 22 and 25 and accompanying text.

Also, Justice Brennan maintained, the majority preferred not to use the civil commitment procedure because of the stigma it would attach to the individual. 103 S. Ct. at 3060. (Brennan, J., dissenting). Justice Brennan stated, however, that the effects of involuntary commitment other than stigma were far more immediate: restricted personal associations, in-

Justice Stevens, in a separate dissent, stated that the insanity plea, like a guilty plea, might provide a sufficient basis for confinement for the fixed legislative period, as long as there was ample opportunity to prove a defendant's recovery.[69] To confine the individual for longer, Justice Stevens maintained, required clear and convincing evidence that the confinee was still mentally ill or dangerous,[70] agreeing with Justice Brennan that prior cases dictated this requirement.[71] Justice Stevens also maintained that Justice Powell's opinion supported the idea that the initial confinement was allowed, but did not support the notion that the individual had the burden of proving his own entitlement to freedom after the maximum legal sentence period had been served.[72] Justice Stevens concluded that after one year of confinement, Jones was presumptively entitled to his freedom.[73]

II. Background

The *Jones* Court held that the defendant, an insanity acquittee, should be treated differently from civil committees in that at the end of the incarceration period the defendant must prove his sanity by a preponderance of the evidence in order to gain release, rather than the state having to prove his insanity by clear and convincing evidence in order to keep him confined.[74] This holding was generated, as apparent from Justice Powell's opinion, in acknowledgement of the fact that Jones had himself proven his insanity by a preponderance of the evidence in order to take advantage of the

ability to withhold consent to medical treatment, straightjacketing, and the like could be even more obtrusive than incarceration in prison. 103 S. Ct. at 3060. (Brennan, J., dissenting). For this reason, Justice Brennan stressed, a person labeled as mentally ill would still want to avoid involuntary commitment. Justice Brennan could not agree with the majority that Jones had any less interest in procedural protections than did the petitioners in *Addington, O'Conner,* and *Baxstrom.* 103 S. Ct. at 3060-61. (Brennan, J., dissenting). The risk of error here, the dissent further maintained, was not so diminished as to relieve the government of its *Addington* responsibilities. 103 S. Ct. at 3061. (Brennan, J., dissenting). Thus, Justice Brennan concluded, Jones' confinement, insofar as it extended past the one-year incarceration period, was unconstitutional. The dissenting Justice did note, however, that under the majority's rationale for § 24-301's departure from *Addington,* commitment for only a reasonably limited period upon insanity acquittal could be justified. 103 S. Ct. at 3061. (Brennan, J., dissenting).

69. 103 S. Ct. at 3061. (Stevens, J., dissenting).

70. *Id.*

71. *Id. See supra* note 49 and accompanying text.

72. 103 S. Ct. at 3061-62. (Stevens, J., dissenting).

73. *Id.* at 3062 (Stevens, J., dissenting).

74. *Id.* at 3052-53.

insanity defense.[75] There had long been disagreement among state and federal courts with respect to where this burden of proving insanity should lie and to what degree of certainty,[76] and so logically there was confusion as to who should have the burden of proving entitlement to release from psychiatric confinement or necessity for continued confinement.[77]

A. *Burden of Proof and the Insanity Defense*

The decision which first established insanity as a valid defense in criminal law was *Daniel M'Naughten's Case,*[78] the holding of which represents the general approach to the insanity defense as espoused by the English courts during the first part of the twentieth century.[79] In *M'Naughten's Case,* the court stated that the burden is upon the defendant who wished to use the insanity defense to clearly demonstrate his insanity, since all defendants are presumed to be sane.[80]

The earliest American decision of note with respect to burden and degree of proof was *Davis v. United States,* fully outlining the then current status of the law in the area.[81] The *Davis* Court made strong suggestions that the burden of proof beyond a reasonable doubt of insanity should lie with the defendant,[82] but it concluded that the burden of proving sanity beyond a reasonable doubt is with the prosecution, as are the other elements of any crime.[83]

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75. *Id.* at 3051. *See supra* note 6 and accompanying text.

76. *See infra* notes 81-92 and accompanying text.

77. *See infra* notes 96-129 and accompanying text.

78. 8 Eng. Rep. 718 (1843).

79. *See* Davis v. United States, 160 U.S. 469 at 479 (1895).

80. 8 Eng. Rep. at 722. The court's holding was phrased as follows:

> [I]t must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong.

Id.

81. 160 U.S. 469 (1895). *See infra* notes 82-92 and accompanying text.

82. *Id.* at 472, 472-73. The Court used a statistical approach, comparing the approaches of different jurisdictions. *Id.* at 472. The more popular view, noted the Court, was that the burden to prove insanity was on the defendant. The Court stated: "Thus it appears that the preponderance of authority is against the contention that it is only necessary to raise a reasonable doubt." *Id.* at 472. The Court also stated:

> The reasoning upon which the . . . conclusion is based is that sanity is the normal condition, and that there is a presumption that every person is sane, and this presumption stands until it is overthrown, and that evidence which merely raises a reasonable doubt of sanity does not overthrow this presumption.

Id. at 473.

83. *Id.* at 493. The Court asserted that no man should be deprived of his liberty under

At the time of the *Davis* decision, there were two lines of authority among the states with respect to which party had the burden of proof in insanity cases, one line holding that the burden of proof of insanity rests with the defendant, who was required to establish his infirmity to the reasonable satisfaction of the jury, and one holding that if the evidence raised a reasonable doubt of sanity, the jury had to acquit if the government could not meet its burden of proving sanity.[84] In recognition of the theory that insanity is a true affirmative defense, Professor Wharton, in his treatise on criminal evidence,[85] states that the defendant has the burden of proving by a preponderance of the evidence or to the satisfaction of the jury his sanity.[86] This line of thinking is reflected in numerous court decisions during the general period in which *Davis* was decided.[87] The second, slightly less popular view of the burden in

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the law unless the evidence presented to the jury, by whomsoever it is presented, is sufficient to prove beyond a reasonable doubt the existence of every element necessary to constitute the crime charged. *Id.*

84. *Id.* at 471-74.

85. 1 C.E. Torcia, Wharton's Criminal Evidence § 30 (1972).

86. *Id.*

87. An examination of the early cases which followed the more popular defendant's burden view—cases which apparently refuted *Davis*—demonstrates the atmosphere within which the courts operated at the time. In Commonwealth v. Rogers, 48 Mass. 500 (7 Met.) 41 Am. Dec. 458 (1844), for example, the Massachusetts Supreme Court held that the burden of proof of insanity by a preponderance of the evidence was upon the defendant in order to gain acquittal. In the court's words, the standard was "if the preponderance of the evidence was in favor of the insanity of the prisoner, the jury would be authorized to find him insane." *Id.* at 504. Another Massachusetts case, Commonwealth v. Eddy, 73 Mass. 583 (7 Gray) (1856), upheld the standard applied in *Rogers*. The *Eddy* court maintained that while the state, to effect a conviction, normally had the burden of proving all the elements of a crime including, of course, sanity, in order to overcome the legal presumption of sanity, the defendant had to demonstrate his insanity by a preponderance of the evidence. As the *Eddy* court explained:

> The burden is on the Commonwealth to prove all that is necessary to constitute the crime of murder. And as that crime can be committed only by a reasonable being—a person of sane mind—the burden is on the Commonwealth to prove that the defendant was of sane mind when he committed the act of killing. But it is a presumption of law that all men are of sane mind; and that presumption sustains the burden of proof, unless it is rebutted and overcome by satisfactory evidence to the contrary. In order to overcome this presumption of law, and shield the defendant from legal responsibility, the burden is on him to prove, to the satisfaction of the jury, by a preponderance of the whole evidence in the case, that, at the time of committing the homicide, he was not of sane mind.

73 Mass. at 584. *See also* Boswell v. State, 63 Ala. 307, 35 Am. R. 20 (1879); Ortwein v. Commonwealth, 76 Pa. 414, 18 Am. R. 420 (1874); Bond v. State, 23 Ohio 349 (1872); and Loeffner v. State, 10 Ohio 598 (1857). All of these early decisions demonstrated the more popular approach to the insanity defense at the time.

insanity cases also had its share of support.[88] Again, the majority of the courts at this early time followed the former approach.[89] As the nineteenth century came to a close, however, the view that the defendant carried the burden of proving insanity, though still the majority view, began to lose its stronghold in American courts, as more cases holding that the state had the burden of proving sanity arose.[90] Toward the end of the nineteenth century, American courts were thus beginning to decide where the burden of proof in insanity cases should fall in two completely divergent ways.[91] The disagreement and confusion as to where the burden should fall and to what degree of certainty the proof must reach continued throughout most of the twentieth century as well.[92]

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88. *See, e.g.*, United States v. Faulkner, 35 F. 730 (1888); United States v. Guiteau, 10 F. 161 (1882); and United States v. Lancaster, 7 Bissel 440 (1881). *See also* BISHOP'S CRIMINAL PROCEDURE §§ 398-99 (1882).

89. *See supra* notes 85-87 and accompanying text.

90. In People v. Garbutt, 17 Mich. 9 (1868), a Michigan case, where the defendant committed murder while, he claimed, under the influence of intoxicating drinks and hereditary tendencies of violence, the court held that the state had to prove defendant's sanity to the reasonable satisfaction of the jury. *Id.* at 21-22. In the court's words:

> But to give it full effect, the jury must be left to weigh the evidence, and to examine the alleged motives by their own tests. They can not [sic] properly be furnished for this purpose with balances which leave them no discretion, but which, under certain circumstances, will compel them to find a malicious intent when they can not [sic] conscientiously say they believe such an intent to exist.

Id. at 27-28.

In a Mississippi case, Cunningham v. State, 56 Miss. 269 (1879), where the defendant claimed that she had killed her husband in self defense but in fact had murdered him with an axe as he slept, the court stated that if a reasonable doubt of defendant's sanity is raised, then the burden shifts and the state then has the onus to prove sanity. 56 Miss. at 276. As the court explained, whenever some doubt as to sanity is raised by facts proven by either side, it becomes the state's burden to remove the doubt and "to establish the sanity of the prisoner to the satisfaction of the jury, beyond all reasonable doubt arising out of all the evidence in the case." 56 Miss. at 276.

91. *See supra* notes 81-89 and accompanying text. It is interesting to note that this divergence in the courts continued through most of the twentieth century as well. *See infra* note 92. In Leland v. Oregon, 343 U.S. 790 (1933), however, where the defendant pled insanity as his defense to a charge of first degree murder, the United States Supreme Court required the defendant to prove his insanity beyond a reasonable doubt. 343 U.S. at 798. Justice Clark noted that "[t]oday, Oregon is the only state that requires the accused, on a plea of insanity, to establish that defense beyond a reasonable doubt." Some twenty states, however, place the burden on the accused to establish his insanity by a preponderance of the evidence or some similar measure of persuasion." 343 U.S. at 798.

92. *See* R. WEIHOFEN, INSANITY AS A DEFENSE IN CRIMINAL LAW (1933). Weihofen presents a state by state survey of the degree of proof required of the *defendant* to show his insanity, *id.* at 148-51, 172-200, which clearly demonstrated the uncertainty in the law in this area. The survey included twelve states requiring "a preponderance," four mandating "to the satisfaction of the jury," two combining the first two standards, one requiring insanity "clearly proved to the reasonable satisfaction of the jury," one that the jury "believe"

B. *Burden of Proof For Release After Asserting the Insanity Defense*

The courts during the twentieth century were similarly struggling with the burden and degree of proof requirements for an insanity acquittee to effect his release from psychiatric hospitalization or for the state to establish the need for his recommittal.[93] The decisions handed down as the result of this struggle, particularly those in the courts of the District of Columbia in the years approaching the original superior court decision in *Jones*, as will be examined herein, paved the way for the Supreme Court's rationale in its determination of the case:[94] the courts were beginning to acknowledge the defendant's burden of proving his own entitlement to release from psychiatric confinement, a key element of Justice Powell's opinion in *Jones*.[95]

Perhaps at the very base of the burden of proof for release problem was the decision in *Ragsdale v. Overholser*,[96] where the District of Columbia circuit court held that § 24-301 of the District of Columbia Code,[97] which provided for the automatic psychiatric confinement of insanity acquittees, was constitutional.[98] Without the legitimization of this automatic confinement, psychiatric hospitalization would be effected pursuant to civil standards and the problem of release at the heart of *Jones* would not arise.[99]

In *Robertson v. Cameron*,[100] decided by the District of Columbia district court in 1963, the petitioner Robertson was seeking his release from a mental hospital after being acquitted of housebreaking and larceny charges on the basis of insanity.[101] The court placed on Robertson the burden of proving his own sanity by a preponderance of the evidence as a prerequisite for release from

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the defendant insane, and one apparently (though not stated) the preponderance rule. *Id.* at 148-51, 172-200.

93. *See infra* notes 96-129 and accompanying text.

94. *See infra* note 96-115 and accompanying text.

95. *See supra* notes 39-47 and accompanying text.

96. 281 F.2d 943 (D.C. Cir. 1960).

97. *See supra* note 8.

98. 281 F.2d at 949. The *Ragsdale* court asserted that no constitutional violation was worked by the statute since there was no relation to the presumption of innocence; guilt or innocence are not involved when one's sanity is being determined, and objectives are protection and rehabilitation rather than punishment. The *Ragsdale* court noted that courts in most other jurisdictions, when deciding the constitutionality of statutes similar to § 24-301, find no due process violations. 281 F.2d at 949.

99. *See supra* notes 29-47 and accompanying text.

100. 224 F. Supp. 60 (D.D.C. 1963).

101. *Id.* at 62.

confinement in a mental institution.[102] Four years later, the District of Columbia Circuit Court in *Collins v. Cameron*[103] upheld the standard followed in *Robertson,*[104] where petitioner Collins had been acquitted of second degree murder by reason of insanity.[105] *Bolton v. Harris,*[106] decided by the same court one year after *Collins*, was a clear predecessor of *Jones* in terms of the *Jones* rationale for release.[107] Bolton was acquitted of multiple charges of auto theft by reason of insanity, the latter verdict predictable since the accused was already a patient at St. Elizabeth's Hospital at the time of his infractions.[108] After his return to St. Elizabeth's, he brought a habeus corpus action for his release, claiming that after his insanity acquittal he had been cured of the mental defects which led to his actions.[109] The court allowed the standards for release from civil commitment and the standards for release from insanity acquittal confinement to differ, upholding the difference against an equal protection challenge.[110] The distinction between the two standards was that while the petitioner still had the burden of proving his own sanity, the court could review hospital decisions concerning acquittees, but *not* the decisions concerning civilly-committed patients.[111] In *Harris v. United States,*[112] af-

102. *Id.* As the court explained, the petitioner has the burden of proving, by a preponderance of the evidence, that he has recovered his sanity, that he will not in the foreseeable future be dangerous to himself or others because of mental illness, and that the hospital supervisor's refusal to certify him for release is arbitrary or capricious. *Id.*

103. 377 F.2d 945 (D.C. Cir. 1967).

104. *Id.* at 948. Justice Burger, speaking of seeking release from hospitalization for mental illness after an insanity acquittal, noted that "in that posture it is the *petitioner*, not the government, who bears the burden of showing his eligibility for relief." *Id.* (emphasis in original).

105. *Id.* at 946.

106. 395 F.2d 642 (D.C. Cir. 1968).

107. *Id.* at 652.

108. *Id.* at 645.

109. *Id.* at 645-46.

110. *Id.* at 652.

111. *Id.* Judge Bazelon noted the court was authorizing itself to review the hospital's decisions concerning release of insanity acquittees, unlike the decisions concerning civil committees. He did not feel that this violated equal protection, though, and thus upheld § 24-301(e)'s allowance of court review. *Id.*

Two years earlier, the Supreme Court in Baxstrom v. Herold, while keeping the burden of proof of sanity on the acquittee for purposes of release, asserted that for equal protection to be served, civil procedural protections must be maintained over the length of sentence in a mental hospital. 383 U.S. at 112-13. This decision, noted the Court in *Jones*, seemed to indicate that the length of the underlying criminal sentence was irrelevant as far as the release date from psychiatric confinement was concerned. Further, Justice Powell noted, the factual situation in *Baxstrom* is distinguishable from that in *Jones* in that Jones admitted that his crime was a product of his mental illness, and Baxstom never did make such an

firmed by the District of Columbia Court of Appeals in 1976,[113] the defendant was found not guilty by reason of insanity to the charge of taking indecent liberties with a minor and was transferred to a mental hospital for treatment.[114] The court applied the rationale eventually used by Justice Powell in *Jones*, and in effect refused to release the acquittee unless he proved his sanity and entitlement to release by a preponderance of the evidence, regardless of when, in relation to the expiration of the underlying criminal sentence, this proof came.[115] It becomes evident upon examination of these cases in the District of Columbia that the court of appeal's determination on rehearing[116]—that Jones was entitled to civil procedural protections—was in large part *against* the trend that had begun to take form in the District.[117]

An examination of the background of the law in this area would be incomplete without an examination of the Supreme Court decisions which predated, but approached, *Jones*.[118] In *Humphrey v. Cady*,[119] where the petitioner had violated the Wisconsin Sex Crimes Act and was acquitted by reason of insanity, the Court applied a rationale very similar to that in *Harris* and held that the

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admission. 103 S. Ct. at 3047. *See supra* discussion by Justice Brennan, dissenting, at notes 52-60 and accompanying text.

112. 356 A.2d 630 (D.C. App. 1976).

113. The District of Columbia Code was amended in 1970, making insanity an affirmative defense. District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, § 207, 84 Stat. 473, 602. *See supra* note 6. The defendant in that jurisdiction now clearly having the burden of proving his own insanity to take advantage of the defense, the District of Columbia court had a firm ground upon which to base its assertion in *Harris* that the defendant must not prove his own entitlement to release. *See infra* notes 114-15 and accompanying text. *But see* United States v. Brown, 478 F.2d 606 (D.C. Cir. 1973), where the court clearly held that the defendant's confinement in a mental hospital, after acquittal by reason of insanity of the charges of robbery, assault with a deadly weapon, rape, and carrying a pistol without a license, was limited in duration to the length of the incarceration period for the underlying crimes. 478 F.2d at 612. As the court explained:

> The extent of that period calls for sound discretion, would take into account, *e.g.*, the nature of the crime (violent or not), nature of treatment given and response of the person, would generally not exceed five years, and should, of course, never exceed the maximum sentence for the offense, less mandatory release time.

478 F.2d at 612.

114. 356 A.2d at 630-31.

115. *Id.* The court explained that in these cases the defendant must carry the burden of proof, holding that the patient "must establish by a firm preponderance of the evidence that he is no longer mentally ill and that he no longer represents a danger to himself or others in the community." *Id.*

116. *See supra* note 16 and accompanying text.

117. *See supra* notes 96-115 and accompanying text.

118. *See infra* notes 119-29 and accompanying text.

119. 405 U.S. 504 (1972). *See supra* note 49 and accompanying text.

petitioner had to prove by a preponderance of the evidence his own entitlement to release.[120] The acquittee in this case was required to serve the rest of his renewed five-year psychiatric confinement term, which would take him well beyond the one-year maximum incarceration period for the crime.[121] Additional facts had been proven to initiate this renewed confinement, however,[122] unlike in *Jones*, where petitioner was simply unable to prove his sanity and corresponding entitlement to release.[123] In *Jackson v. Indiana*,[124] decided the same year as *Humphrey*, the Court adopted an approach differing from but compatible with that later adopted in *Jones*, holding that an individual found mentally incompetent to stand trial could not be confined indefinitely in a mental institution without further civil commitment proceedings.[125] The *Jackson* case is distinguishable from *Jones* in that the defendant in *Jackson* was never proven to have committed any crime, while such proof was set forth in *Jones*.[126] Finally, in *Addington v. Texas*,[127] relied upon so heavily by Jones, the Court held that for indefinite civil commitment to be effected, the government must prove by clear and convincing evidence that the individual is mentally ill and dangerous.[128] Addington, unlike Jones, had been civilly committed from the start of the proceedings against him,

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120. 405 U.S. 510.

121. *Id.* at 510-11.

122. *Id.* at 511.

123. 103 S. Ct. at 3052.

124. 406 U.S. 715 (1972). *See supra* note 29 and accompanying text.

125. *Id.* at 738. Justice Blackmun explained that when a person who is declared mentally incompetent to stand trial is committed, he can only be held for a reasonable period of time necessary to determine if there is a substantial likelihood that he will attain that capacity in the foreseeable future. If this is not likely to occur, the Court continued, the state must either commit him indefinitely under the customary civil commitment proceeding used for any other mentally ill citizen or release the patient. If he is likely to soon be able to stand trial, progress toward that goal is necessary to justify continued commitment. *Id.*

126. *See supra* note 29 and accompanying text. Justice Blackmun noted in *Jackson*:

> It is clear that Jackson's commitment rests on proceedings that did not purport to bring into play, indeed did not even consider relevant, *any* of the articulated bases for exercise of Indiana's power of indefinite commitment . . . . Jackson did not present the Sixth-Fourteenth Amendment issue to the state court. Nor did the highest state court rule on the due process issue . . . . We think . . . that the Indiana courts should have the first opportunity to determine these issues.

406 U.S. at 737-40 (emphasis in original).

127. 441 U.S. 418 (1979).

128. *Id.* at 433. Jones had used *Addington* to support his claim for civil commitment standards, asserting that once his sentence time was served, the state had to show by clear and convincing evidence, not just by a preponderance, that he was still insane, as had to be done for all civil commitment patients. 103 S. Ct. at 3048. *See supra* notes 21-26 and accompanying text.

having never been charged with any criminal conduct.[129] Thus, although the Supreme Court had addressed factual situations very similar to that in *Jones*, it had never before entertained the specific issues of release presented by that case.

III. *Jones* Within the Framework of Modern Sociological Thought

A. *Introduction*

When analyzing the role of *Jones* in our law and its practical impact on society, the "moving forces" behind the justices, in terms of their deciding the way they did, become paramount in importance if any reasonable attempt at predicting the future course of the law in this area is to be made. The Court, of course, gives a judicial rationale for the decision, based upon such notions as stare decisis and traditional methods of statutory interpretation, but an even more basic movant is present: the force of social pressure. This is not peer pressure, in its customary sense, but rather fundamental underlying societal forces which to a great extent control individual behavior. The deciding Justices are individuals in a society who are influenced by the multitudinous facets of our culture and interaction with others,[130] and the opinion thus cannot be considered in a vacuum. In other words, the Court may hand down a decision based upon a judicial justification, but because the Justices are influenced by these social pressures, their decision will necessarily reflect the social attitudes and currents of our culture. If the *Jones* decision does not seem to lend itself readily to the prominent social theories of the twentieth century, assuming that these theories are not completely valueless, then it must be a "wrong" decision in terms of social desires and expectations; if this is the case, then there must be some alternative to *Jones* in the future. However, in a careful reading of the prominent social theo-

129. 441 U.S. at 420-21. *See supra* note 23 and accompanying text.

130. *See* E.B. TYLOR, PRIMITIVE CULTURE (1891). Tylor defines *culture* as "that complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society." *Id.* at 1. Max Weber defines *social interaction* as "behavior of a plurality of actors in so far as, in its meaningful content, the action of each takes account of that of the others and is oriented in these terms." M. WEBER, MAX WEBER: THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 118 (1947). He goes on further, saying, "Concretely it is social, for instance, if in relation to the actor's own consumption the future wants of others are taken into account and this becomes one consideration affecting the actor's own saving." *Id.* at 111.

rists of this century, one can see that the ideas and structures expressed and detailed by them do seem to answer the question "Why *Jones*?"

Jones must thus be viewed as the true apex of the law in this area, the point toward which the law had necessarily been heading and the end beyond which it will not move. Apart from a few inconsistencies and contradictions among the theories themselves (which will be touched upon), the *Jones* decision and the great social theories of this century that are applicable to Jones' and the justices' situations seem to be quite closely coordinated. It is highly unlikely, therefore, that the Court—or more correctly the Justices therein—will depart from the result and desired effects of *Jones*, for to do so would be to go against the social forces which are constantly influencing their actions and their thinking.[131]

B. *Reciprocity Theory: C. Levi-Strauss*

The desired effects of Justice Powell's decision, or at least the apparent desired effects, appear to be precisely what the reciprocity theory of social action, developed by C. Levi-Strauss, would have it achieve.[132] In order to appreciate what is meant by this statement, one must understand, at least on a superficial level, what "social exchange" entails. All society is built upon interaction between individuals against a particular cultural background: a person gives something to another, be it a tangible object, an emotional uplifting, or any entity of value to that other, and he expects something in return. If he gets the expected return, he may give more in order to receive even greater return. The same process is occurring with the individual who made the initial return as well. Court decisions go through the same process, too, only on a societal level: no matter what the substantive content of the opinion, the court, or more fundamentally and more accurately, society, is giving to *someone* something of value, and, as such, society expects something in return. *Jones* can be analyzed in this light.

According to C. Levi-Strauss, social exchange is in reality an exchange for "gifts." These gifts are either exchanged immediately

131. It must be assumed that for the purposes of the analysis herein presented that Jones and any other insanity acquittees are not too far out of touch with reality, that is, not too disturbed to be touched by social influences. Only the rare case, a defendant who is clinically schizophrenic, will not be suitably covered by this examination; even here, though, such an individual's influences on others and on society itself are all part of the general interaction schema. *See* WEBER, *supra* note 130.

132. C. LEVI-STRAUSS, THE PRINCIPLE OF RECIPROCITY (1949).

for gifts of equal value, or they are given with the expectation that the gesture will be returned with even greater rewards, with the further expectation of more rewards by the original receiver.[133] Society's gift to Jones, through the penal system, is psychiatric treatment *until he is better* and a functioning member of society. This could never be effected if Jones were to be released before he had recovered mentally, and thus to guarantee release at the end of a maximum criminal incarceration period would be senseless. The return that is expected is that Jones will be able to contribute to society and social interaction in a positive way by obtaining work, helping the economy with a steady cash flow, participating in civic functions, and the like. If Jones excels in his "remuneration" to society by becoming, for example, a prominent civic leader, then society has received really more than it had originally contributed, in a sense, and will be willing to give even greater benefits to Jones, such as riches and fame. Both sides will bestow greater gifts to the other in expectation of even greater return, but this process can only work effectively if Jones is of sound mental capacity.

There are, however, problems of which both sides of a social exchange scenario must be aware and for which each must assume the risk. The party that begins the cycle (the penal system), even though already at an advantage because of the greater social ease attained when society *freely gives* to its members, takes the risk that the recipient will return a much less generous gift or no gift at all.[134] In Jones' case, the penal system and society seem to be taking the risk that even if they do confine him until he is cured, he may not recontribute any of his gain to the social system. Or, if he does return something, it will be of insignificant value in comparison with the great expense of time and money that has been contributed to the confinee. Even considering the risks, however, if the theory of reciprocity works as Levi-Strauss has so defined, the effect of *Jones*, in holding that the defendant be kept confined until

133. *Id.* at 1.

134. *Id.* In the words of Levi-Strauss:

> The person who begins the cycle has taken the initiative, and the greater social ease which he has proved becomes an advantage for him. However, the opening always carries with it a risk, namely that the partner will answer the offered libation with a less generous drink, or, on the contrary, that he will prove to be a higher bidder thus forcing the person who offered the wine first to sacrifice a second bottle for the sake of his prestige. We are, therefore, on a microscopic scale, it is true, in the presence of a "total social fact" whose implications are at the same time social, psychological and economic.

Id. at 6.

he can prove his sanity by a preponderance of the evidence and not simply until his sentence for the crime would have run, would seem to be very consistent with desired societal goals.

C. *Social Control and Jones*

In addition to the cost-benefit rationale of the forces behind *Jones*, there is another, somewhat less "optimistic" view involving a much more general force called "social control." Social control, in its simplest sense, is the means by which the controlling elements of society (*e.g.*, politicians, police, justices, educators) keep the individual members of society from negatively influencing social benefits and advantages such as societal cohesion, order, and even survival. A careful examination of the more prominent and accepted theories concerning this social phenomenon will do much to explain the *Jones* result. By keeping Jones confined until he can prove he is sane and not a danger to society, no matter how long this might take, the Justices, as controlling elements of society, are either controlling this individual from the outside or forcing him to place controls on himself. This is done to achieve desired social benefits and advantages.

1. *External Social Control: E.A. Ross*

E.A. Ross gives a much cited analysis of the nature and workings of this social phenomenon in his work *Social Control.*[135] In his popular example, the mining camp, he sees not all issues as being between individual men. In keeping arms or whiskey out of the hands of the Indians, or in controlling gambling, there is a *group* interest which only collective group action can protect. The offenses Ross speaks of exasperate the group as a whole as well as the individual; we have social control of the person because of this common wrath and common vengeance.[136] According to Ross, in any highly organized society, in order for there to be any social benefit or advantage on the whole, there must be constraint over individuals to some degree; if there were not, the goals of the group as a whole, as well as the organization and functioning of society, would collapse.[137]

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135. E.A. Ross, Social Control (1901).

136. *Id.* at 49.

137. *Id.* at 59. As Ross explains:

It is, in fact, impossible to reap the advantages of high organization of any kind—military, political, industrial, commercial, education—save by the restraints of

With respect to *Jones*, one can easily see that a person like the petitioner-confinee, who by his mental incapacity threatens the social order, must be constrained, kept out of society until he no longer poses such a threat; otherwise, any group goals or advantage to society as a whole (such as peace and quiet, individual freedom from fear, a more mentally stable populous) would be seriously hampered. Thus, rather than releasing the defendant at the time his crime's sentence would expire, the Court orders him confined until he can prove that he is no longer mentally ill or dangerous, that he is no longer a threat to the overall desires and workings of society as a whole. With respect to the common interest, then, Ross would see *Jones* as a very effective decision.

Ross also reasons that it is the "political controls," the policy tools of the controlling elements, along with the "ethical control" that society attempts to place on the individual, which realize the social order.[138] The Court has placed Jones in a mental institution until he is sane, and the hope is that, regardless of the effect of the political controls, he will be able to realize a "moral" order through such devices as public opinion, suggestion, and social valuation. *Jones* seems to be the natural result if indeed the Justices are acting under the influence of the desire for social control, as Ross would suppose, and it is highly unlikely that the Courts will risk jeopardizing this order and control by significantly altering *Jones*

> one kind or another. If the units of society are not reliable, the waste and leakage on the one hand, or the friction due to the checks and safeguards required to prevent such loss on the other hand, prove so burdensome as to nullify the advantages of high organization and make complicated social machinery of any kind unprofitable . . . . If in their collective capacity men did not find a means of guiding the will or conscience of the individual member of society, they would here betray a lack of enterprise they show nowhere else. The elementary personal struggle threatens the general prosperity just as the swollen river or the wildfire. And if men raise levees and firebrakes against the natural forces, why not against the human passion?

Id. at 59-60.

138. *Id.* at 411. Ross explains further:

> Such instruments of control as public opinion, suggestion, personal ideal, social religion, art, and social valuation draw much of their strength from the primal moral feelings. They take their shape from sentiment rather than utility. They control men in many things which have little to do with the welfare of society regarded as a corporation. They are aimed to realize not merely a social order but what one might term a *moral* order. These we may call *ethical*. On the other hand, law, belief, ceremony, education, and illusion need not spring from ethical feelings at all. They are frequently the means deliberately chosen in order to reach certain ends. They are likely to come under the control of the organized few, and be used, whether for the corporate benefit or for class benefit, as the tools of policy. They may be termed *political*, using the word "political" in its original sense of "pertaining-to-policy."

Id. at 411-12 (emphasis in original).

in the future.

2. *Internalized Social Control: E. Durkheim, G.H. Mead, and J. Piaget*

It is also very useful—in terms of analyzing the place that *Jones* will have in the future—to look at the decision and determine how it comports with the theories of internalization of social control espoused by E. Durkheim,[139] G.H. Mead,[140] and J. Piaget.[141] Ross looked at how control is placed upon an individual by society from the outside, (external social control), whereas these sociologists produce theories with respect to how society makes this control come from within the individual, that is, internalization of social control. A close look at these theories will reveal that they are closely, though not necessarily congruently, related to the practical results of *Jones*.

It is essential, in order for one to understand *Jones* properly in the framework of internalization of social control, to look at the role that *sanctions* will play in Jones' situation. Durkheim speaks of two types of sanctions, mechanical and synthetic.[142] Mechanical sanctions, according to Durkheim, flow directly from the breaking of a rule: for example, if one does not bathe, he will become diseased. Synthetic sanctions, on the other hand, do not result from the content of the wrongful act itself but flow from the outside, because the act violates an already established rule.[143] One can see how these synthetic sanctions, in particular, will operate on Jones: by imposing the sanction of confinement upon Jones, the Court

139. E. Durkheim, Sociology and Philosophy (1953).

140. G.H. Mead, Mind, Self, and Society (1934).

141. J. Piaget, The Moral Judgment of the Child (1951).

142. Durkheim, *supra* note 139 at 40-46.

143. *Id.* Durkheim explains:

> The violation of a rule generally brings unpleasant consequences to the agent. But we may distinguish two different types of consequences: (i) The first results mechanically from the act of violation. If I violate a rule of hygiene that orders me to stay away from infection, the result of this act will automatically be disease. The act, once it has been performed, sets in motion the consequences, and by analysis of the act we can know in advance what the result will be. (ii) When, however, I violate the rule that forbids me to kill, an analysis of my act will tell me nothing. I shall not find inherent in it the subsequent blame or punishment. There is complete heterogeneity between the act and its consequence. It is impossible to discover *analytically* in the act of murder the slightest notion of blame. The link between act and consequence is here a *synthetic* one . . . . Such consequences attached to acts by synthetic links I shall call *sanctions* . . . . It is not the intrinsic nature of my action that produces the sanction which follows, but the fact that the act violates the rule that forbids it.

Id. at 42-43 (emphasis in original).

will ideally be able to make him internalize what society wants from him and conform his actions accordingly. That is why he is kept confined until he regains sanity. If he were released at the end of the statutory incarceration period for the underlying crime, having not regained his sanity, then the sanction of confinement and any future sanctions that society might impose upon him might very well be useless in terms of getting him to conform his behavior to the normal societal standard: he simply would not be able to understand properly that behavior that society deems wrongful, if engaged in, will result in sanctions—some type of punishment. Without this basic understanding, an insane person released at the end of his criminal incarceration period will be unaffected by social rules. Thus society needs to ensure that the confinee is sane before he is released from mental detention, so that he will be able to understand and hopefully participate in the interplay between sanction and social control. Once mentally stable, he will be able to use any societal sanctions, both mechanical and synthetic, for the purpose of restructuring his actions to conform to societal requirements and desires. The *Jones* Court, in keeping Jones confined until he regains his sanity, is in effect enabling the confinee to effectively internalize social control. To allow Jones to go free before he can establish his sanity would be to likely forego all the benefits that internalized social control, as Durkheim sees it, offers; society—or more particularly these Justices—have no *social* reason to let this occur, and thus its occurrence in the future is highly unlikely.

The Mead theory of the "I" and the "me"[144] is more difficult to align with *Jones*, but a careful examination will reveal that *Jones* does indeed lend itself to a Mead explanation. For Mead, there are two "persons" in the individual. There is the "I," the personal, non-social self, the self that is aware of the other person—the social "me," or the acting self. When someone thinks of what he is going to do, it is the "I" working, and when the thought becomes social action it is the "me" at work, the "me" being the self that is amongst other "me's" of other people. Thus, a person's "me" was his "I" of a moment ago.[145]

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144. G.H. MEAD, MIND, SELF, AND SOCIETY (1934).

145. *Id.* at 173-78. As Mead much more clearly puts it:

The "I" is the response of the organism to the attitude of others; the "me" is the organized set of attitudes of others which one himself assumes. The attitudes of the others constitute the organized "me," and then one reacts toward that as an "I" . . . . If you ask, then, where directly in your own experience the "I" comes in, the

When Jones is placed into a mental hospital, his "me" becomes one that is looked down upon by others in normal society. When he is confined for even longer than he would be were he found guilty of the crime, this "me" necessarily becomes a source of great discomfort and dissatisfaction for his "I." Now, how will the "I" react? Hopefully, under a Mead analysis, if Jones is kept confined until he is sane, his "I" will react in the way that will make his "me" more favorable in the eyes of society.[146] This process constitutes internalization of social control; without this, external social control would be considerably less effective.[147] By placing Jones in a socially disreputable place and keeping him there until he is proven sane, the *Jones* Court was effecting Jones' internalization of social control, which will hopefully cause him to conform and structure his actions to create a more acceptable "me" for society. Unless the function of the penal system is solely to punish or incapacitate the defendant, the benefits that can be realized from the internalization of social control by Jones would make alteration of the *Jones* decision by the Court a key sociological error.

A third view of the internalization of social control comes from Jean-Paul Piaget, who sees autonomous rationality as society's goal for the individual.[148] Piaget sees society as the sum of all social relations, the two extreme types of relations being relations of constraint and relations of cooperation.[149] Relations of cooperation create an equilibrial limit of a person's actions, helping to effect autonomy of the mind, and these are generally preferred by society over relations of constraint, which create a static system and are

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> answer is that it comes in as a historical figure. It is what you were a second ago that is the "I" of the "me". . . . I want to call attention particularly to the fact that this response of the "I" is something that is more or less uncertain. The attitudes of others which one assumes as affecting his own conduct constitute the "me," and that is there, but the response to it is as yet not given . . . . The "I" as a response to this situation, in contrast to the "me" which is involved in the attitudes which he takes, is uncertain. And when the response takes place, then it appears in the field of experience largely as a memory image.

Id.

146. *Id.* at 178. According to Mead:

> The "I" both calls out the "me" and responds to it. Taken together they constitute a personality as it appears in social experience. The self is essentially a social process going on with these two distinguishable phases. If it did not have these two phases there could not be conscious responsibility, and there would be nothing novel in experience.

Id.

147. *See supra* note 152 and accompanying text.

148. J. PIAGET, THE MORAL JUDGMENT OF THE CHILD (1951).

149. *Id.* at 401.

contrary to the principles of reciprocity that Levi-Strauss dictates.[150] Logic, for Piaget, is the morality of thought just as morality is the logic of action; therefore, cooperation, which leads to freedom of thought, is the key to one's gaining autonomous rationality.[151] Cooperation, social life, is necessary if the individual is to become conscious of his own mind and thus "transform into norms . . . the simple functional equilibria immanent in all mental and even all vital activity."[152] Thus, by bringing the individual into cooperative situations with others, bringing him into social contact and interaction, society can cause the individual to realize the norms of the group, because the individual's mind is gaining an autonomy that relations of constraint do not allow.[153]

Now, in applying this view to *Jones*, one can argue that the decision either fits within the theory or completely contradicts it. Those who would argue that the *Jones* result contradicts Piaget's theory of the internalization of social control would say that by keeping Jones in an institution for an overly extensive period of time because of his mental illness, in effect constraining his actions and relations, society is cutting him off from social interaction, thus preventing him from being exposed to the judgments and evaluations from others which are so vital to his forming an idea of what society feels is right, good, or moral. The argument that *Jones* supports Piaget's view appears to be more persuasive, however. First, the judgments and evaluations made by hospital staff members, which represent what can be called, to use Piaget's terminology, the "morality" of society since these individuals are, for Jones, the controlling elements of society, can be used by Jones to form his own idea of societal desires. Second, by keeping Jones

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150. *Id.* Piaget describes the two relations:

> Society is the sum of social relations, and among these relations we can distinguish two extreme types: relations of constraint, whose characteristic is to impose upon the individual from outside a system of rules with obligatory content, and relations of cooperation whose characteristic is to create within people's minds the consciousness of ideal norms at the back of all rules . . . Constraint, the source of duty and heteronomy, cannot, therefore, be reduced to the good and to autonomous rationality, which are the fruits of reciprocity, although the actual evolution of the relations of constraint tends to bring these nearer to cooperation.

Id. See supra notes 136-37 and accompanying text for Levi-Strauss' discussion of the principle of reciprocity.

151. *Id.* at 405.

152. *Id.* at 407.

153. *Id.* Piaget explains: For the individual, left to himself, remains egocentric . . . . It is only through contact with the judgments and evaluations of others that this intellectual and affective anomie will gradually yield to the pressure of collective logical and moral laws. *Id.*

confined until his mental incapacity is removed, the Court is allowing a totally functioning individual back into society, a man who can more effectively form an internalization of societal values through cooperative interaction with others. This social phenomenon, if described accurately by Piaget, would seem to call out for the *Jones* rationale; *Jones'* place in this area of law cannot be significantly altered without a complete contradiction of desired societal ends.

IV. Conclusion

In analyzing the relation of these sociological theories to Justice Powell's decision in *Jones*, one can clearly ascertain a pattern of close coordination. As one of the controlling elements in society, the Court seems to be effecting exactly what the theorists call for the powers in society to effect. *Jones* can be seen as a functioning cog in the social mechanisms of reciprocity, sanction, and internalized and external social control.[154]

One may thus conclude that *Jones* is a "right" decision in terms of societal desires; as such, the Court will almost certainly keep *Jones* as much a part of the judicial law as it is a part of social "law." This is not so much because the rule of stare decisis requires it, but because the social forces discussed herein are pervasive and necessitate it. Stare decisis is not an absolute; if a court feels that changes in a line of cases is required by change in circumstances or a new enlightened approach to an issue, it will forego stare decisis. Thus, when societal forces require that judges make a decision that will effect socially valued ends, stare decisis will not be respected even if prior case law is contradictory to the needed decision: the Court will find a judicial reason to forego stare decisis, just as was done in *Jones*. Also, the fact that due process is declared satisfied by *Jones* is only a surface manifestation of a socially-influenced decision. Judges decide what due process requires in any situation, that determination constituting their interpretation of the ultimate constitutional requirement; when social forces require a decision such as *Jones*, the judges make the decision and declare that due process is satisfied, supporting their

154. Other fields of sociological analysis, treating the subjects of power and authority and anomie are also applicable to *Jones*, though not particularly relevant to the preceding discussion. *See, e.g.*, G. Simmel, The Sociology of Georg Simmel (1950); M. Weber, Essays in Sociology (1946); and Bierstedt, *An Analysis of Social Power*, 15 Am. Soc. Rev. 730-38 (1950). *See also* E. Durkheim, Suicide: A Study In Sociology (1951), and R.K. Merton, Social Theory And Social Structure (1949).

opinion with a judicial rationale.

A change in the particular Justices in the Supreme Court should make no difference in the decisions made: whoever sits on the bench is equally influenced by the social pressures and forces discussed above. For *Jones* to be significantly changed, the Court would have to counter not only all of the social influences working upon them, but also all of the desired effects, in terms of social order and functioning, that can be achieved. *Jones,* as representative of the idea espoused by the theorists discussed herein, must be the end point in this area of law—the insanity acquittee must be kept confined until it is proven that he is no longer insane or dangerous. This decision necessarily is the final step in the sociological march toward the culturally desired.

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