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Fifth Amendment--Indefinite Commitment of Insanity Acquittees and Due Process Considerations

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FIFTH AMENDMENT—INDEFINITE COMMITMENT OF INSANITY ACQUITTEES AND DUE PROCESS CONSIDERATIONS

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

I. INTRODUCTION

The Constitution guarantees due process protections to mentally ill persons whom the State wishes to involuntarily commit to mental institutions.[1] In *Jones v. United States*,[2] the Supreme Court held that the government may confine to a mental institution for an indeterminate length of time defendants who establish by a preponderance of the evidence that they are not guilty of a crime by reason of insanity without violating the Due Process Clause. The Government may commit acquittees until they can prove by a preponderance of the evidence that they are no longer mentally ill or dangerous to themselves or society.[3] The period for which acquittees may be hospitalized bears no relation to the length of time they could have been incarcerated had they been convicted.[4] In arriving at this conclusion, the Court rejected the argument that insanity acquittees should be afforded the same procedural safeguards as persons who are committed to mental institutions via civil commitment proceedings.[5]

This Note argues that the Court's decision is an externalization of a growing fear among the general public that too many "guilty" people escape confinement by use of the insanity plea.[6] The majority does not follow explicitly the usual due process analysis of balancing competing governmental interests with the interests of the individual. As a result, persons who have been acquitted by reason of insanity are indefinitely

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[1] *See, e.g.*, Addington v. Texas, 441 U.S. 418 (1979); O'Connor v. Donaldson, 422 U.S. 563 (1975); Jackson v. Indiana, 406 U.S. 715 (1972); Baxstrom v. Herold, 383 U.S. 107 (1966).

[2] 103 S. Ct. 3043 (1983).

[3] *Id.* at 3052.

[4] *Id.*

[5] *Id.* at 3051. Criminal commitment occurs only after the defendant has successfully raised insanity as a defense to a crime. In civil commitment, persons who are not on trial for commission of a crime are involuntarily hospitalized. Note, *Commitment Following an Insanity Acquittal*, 94 HARV. L. REV. 605, 605 n.2 (1981).

[6] *See* W. WINSLADE & J. ROSS, THE INSANITY PLEA (1983).

committed to mental institutions without a correct weighing of their interests in escaping involuntary hospitalization.

II. FACTS AND BACKGROUND

Police arrested petitioner Michael Jones on September 19, 1975, for attempting to steal a jacket from a department store in Washington, D.C.[7] He was arraigned the following day in the Superior Court of the District of Columbia on a charge of petit larceny, a misdemeanor carrying a maximum jail sentence of one year.[8] Two days later, the court ordered Jones committed to St. Elizabeths, a public mental hospital, for a determination of his competency to stand trial.[9] Approximately six months later, the District of Columbia Superior Court ruled, on the basis of testimony of a hospital psychologist, that the petitioner was competent to stand trial.[10] When Jones pleaded not guilty by reason of insanity, the Government did not contest the plea. The Superior Court found Jones not guilty by reason of insanity and, pursuant to Section 24-301(d)(1) of the District of Columbia Code,[11] committed the petitioner to St. Elizabeths.[12]

On May 25, 1976, at the fifty-day hearing required by statute,[13] the court found that Jones was still mentally ill and, as a result, constituted

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[7] Jones v. United States, 103 S. Ct. 3043, 3047 (1983).

[8] *See* D.C. CODE ANN. § 22-103, 22-2202 (1981).

[9] *Jones*, 103 S.Ct. at 3047; *see* D.C. CODE ANN. § 24-301(a) (1981). Under the statute, persons are of unsound mind or mentally incompetent if they are unable to understand the proceedings against them or to assist in their own defense. D.C. CODE ANN. § 24-301(a).

[10] Brief for Petitioner at 7, Jones v. United States, 103 S. Ct. 3043 (1983). On March 2, 1976, a hospital psychologist reported that Jones was competent to stand trial but had suffered from "[s]chizophrenia, paranoid type" on the date of the offense, and that the offense was a product of this mental disease. *Jones*, 103 S. Ct. at 3047.

[11] D.C. CODE ANN. § 24-301(d)(1) provides:

> 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.

[12] *Jones*, 103 S.Ct. at 3047.

[13] D.C. CODE ANN. § 24-301(d)(2) provides:

> (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. At the conclusion of the criminal action referred to in paragraph (1) of this subsection, the court shall provide such person with representation by counsel. . . .
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> (B) If the hearing is not waived, the court shall cause notice of the hearing to be served upon the person, his counsel, and the prosecuting attorney and hold the hearing. Within 10 days from the date the hearing was begun, the court shall determine the issues and make findings of fact and conclusions of law with respect thereto. The person confined shall have the burden of proof. If the court finds by a preponderance of the evidence that the person confined is entitled to his release from custody, either conditional or unconditional, the court shall enter such order as may appear appropriate.

a danger to himself and others.[14] The court did not conduct another release hearing until February 22, 1977,[15] by which time Jones had been hospitalized for more than the maximum period of one year that he could have spent in prison had he been convicted of the original misdemeanor charge.[16] On this basis, Jones argued that the Due Process Clause of the fifth amendment and its inherent principle of equal protection required his release or a new commitment hearing pursuant to civil commitment standards.[17] The Superior Court rejected this argument and denied his request for a civil commitment hearing. Petitioner's involuntary commitment to St. Elizabeths continued.[18]

III. THE SUPREME COURT'S DECISION

The Supreme Court, Justice Powell writing for the majority, affirmed the decision of the District of Columbia Court of Appeals.[19] The Court held that the District of Columbia statutory scheme that permits indefinite hospitalization of insanity acquittees is not offensive to the Constitution, even though the Government need never carry the burden of proof as to the mental illness or dangerousness of the acquittee.[20] Furthermore, the period of hospitalization need bear no relation to the hypothetical prison term that the acquittee would have served upon conviction of a crime.[21]

The Court first recognized that any commitment requires due process protections because it involves a deprivation of liberty.[22] The State, therefore, must have "a constitutionally adequate purpose for the con-

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[14] *Jones*, 103 S.Ct. at 3047.

[15] This hearing was held pursuant to D.C. CODE ANN. § 24-301(k)(5), which provides for release hearings at least once every six months.

[16] *Jones*, 103 S.Ct. at 3047.

[17] *Id.* D.C. CODE ANN. § 21-545(b) governs civil commitment hearings. Congress enacted separate statutes with procedural differences for involuntary civil commitments and those following an insanity acquittal. *See infra* note 71 and accompanying text.

[18] *Jones*, 103 S.Ct. at 3047.

[19] 103 S. Ct. 3043 (1983). The District of Columbia Court of Appeals reversed the Superior Court, ordering that Jones be set free or committed under civil commitment procedures. Jones v. United States, 411 A.2d 624 (1980). The Government then successfully petitioned for rehearing *en banc*. After several hearings, the Court of Appeals, sitting *en banc*, reversed itself and affirmed the judgment of the Superior Court in Jones v. United States, 432 A.2d 364 (1981). The Court of Appeals held that petitioner's commitment should have no relation to the prison sentence he would have served had he been convicted. *Id.* at 368. It also held that the use of different procedures for civil and criminal commitment was justified and did not violate the equal protection component of the fifth amendment. *Id.* at 371-76. The Supreme Court granted certiorari. Jones v. United States, 454 U.S. 1141 (1982).

[20] *Id.* at 3052.

[21] *Id.*

[22] *Id.* at 3048 (citing Addington v. Texas, 441 U.S. 418, 425 (1979)); *see also* Specht v. Patterson, 386 U.S. 605, 608 (1967).

finement."[23] In *Jones*, the Court determined that the congressional purposes of treating the individual and protecting society[24] that underlie the District of Columbia statutes adequately support indefinite commitment of insanity acquittees based solely on the insanity acquittal. The Court held that an insanity acquittal adequately proves mental illness and dangerousness[25] because a verdict of not guilty by reason of insanity establishes beyond a reasonable doubt that the defendant committed a criminal offense and that the defendant committed the act because of mental illness.[26]

The Court found that because the defendant committed a crime he is likely to be dangerous presently.[27] The evidence of the crime, it said, "may be at least as persuasive as any predictions about dangerousness that might be made in a civil-commitment proceeding."[28] In light of "uncertainty of diagnosis in this field [psychiatry] and the tentativeness of professional judgment,"[29] the courts should defer to reasonable judgments by the legislature in finding the commission of a prior crime adequate prediction of future dangerousness.[30]

The Court also held that Congress reasonably could determine that the insanity acquittal supports an inference of continuing mental illness.[31] It noted that a person who commits a criminal act because of a mental illness usually does not recover without treatment. If some acquittees are no longer mentally ill by the time they are committed, however, "the Due Process Clause does not require Congress to make

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23 O'Connor v. Donaldson, 422 U.S. 563, 574 (1975), *quoted in Jones*, 103 S. Ct. at 3048.

24 *See* H.R. REP. NO. 91-907, 9lst Cong., 2d Sess. 73-74 (1970).

25 The Court has held that the State may not commit persons against their will for an indefinite period solely because of mental illness; if they are dangerous to no one and can live safely in freedom, the State may not incarcerate them. *O'Connor*, 422 U.S. at 575.

26 *Jones*, 103 S. Ct. at 3049.

27 *Id.* The Court distinguished *Jones* from Jackson v. Indiana, 406 U.S. 715 (1972), in which it held that the State cannot constitutionally commit persons for an indefinite period simply because they are incompetent to stand trial. In *Jackson*, "there never was any affirmative proof that the accused had committed criminal acts or otherwise was dangerous," *Jones*, 103 S. Ct. at 3049 n.12, whereas an insanity acquittal implies proof beyond a reasonable doubt that the acquittee committed a crime.

28 *Jones*, 103 S. Ct. at 3049.

29 *Id.* at 3050 n.13 (quoting Greenwood v. United States, 350 U.S. 366, 375 (1956)). The Court accepted the proposition asserted by the Government that "[t]his affirmative finding of the past commission of a dangerous act anchors the commitment decision in a way that has no counterpart in ordinary civil commitment proceedings, which often rest entirely upon unavoidable speculative professional assessments of future dangerousness." Brief for the United States at 36, Jones v. United States, 103 S. Ct. 3043 (1983).

30 *Jones*, 103 S. Ct. at 3050 n.13. For a general discussion of the predictive value of past criminal conduct upon future dangerous acts, see *Jones*, 103 S. Ct. at 3057 (Brennan, J., dissenting), and sources cited therein. The Court noted that "violence" is not a prerequisite for constitutional confinement. *Id.* at 3050 & n.14.

31 *Id.* at 3050.

classifications that fit every individual with the same degree of relevance."[32] An acquittee who has recovered is assured a prompt chance for release at the hearing required within fifty days of commitment.[33]

Jones contended that he was entitled to a separate commitment proceeding in which the Government could use the insanity acquittal as evidence in its effort to prove his mental illness and dangerousness by the civil commitment standard of clear and convincing evidence.[34] The Court rejected this argument, noting the Government's strong interest in avoiding *de novo* commitment hearings which merely would relitigate the criminal trial.[35]

The Court also rejected petitioner's argument that the clear and convincing proof standard for civil commitment,[36] required by the Court in *Addington v. Texas*,[37] should apply to insanity acquittees.[38] The Court did not find the same concerns present in the insanity acquittal situation that prompted it to require clear and convincing proof for civil commitment. Because Section 24-301(d)(1)(j) of the District of Columbia Code requires automatic commitment only if the acquittee raises the insanity defense and proves insanity by a preponderance of the evidence, there is less possibility that courts will commit individuals erroneously in acquittal than in civil commitment proceedings.[39] Since the concerns in *Addington* are diminished or not present in cases involving

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[32] *Id.* (citing Marshall v. United States, 414 U.S. 417, 428 (1974)).

[33] *Id.*; *see also* D.C. CODE ANN. § 24-301(d)(2) (1981).

[34] *Jones*, 103 S. Ct. at 3050.

[35] *Id.*

[36] *Id.* at 3051.

[37] 441 U.S. 418 (1979). In *Addington*, the appellant's mother sought to have him civilly committed to a state mental institution. The appellant contended that, to adequately assure him of due process protections, the Court should have required the State to prove that he was mentally ill and dangerous "beyond a reasonable doubt." *Id.* at 427. The Court held that states may choose to use any standard of proof in civil indefinite commitment proceedings, provided that they require at least a preponderance of the evidence. *Id.* at 432-33. It found that to require the Government to prove beyond a reasonable doubt that persons are fit for civil commitment is too difficult and unnecessarily interferes with the Government's legitimate purposes. The Court specifically approved a "clear and convincing evidence" standard. *Id.* at 433. The District of Columbia presently requires this standard for civil commitments. *See In re* Nelson, 408 A.2d 1233 (D.C. 1979).

[38] D.C. CODE ANN. § 24-301(j) requires defendants to affirmatively establish their insanity by a preponderance of the evidence. The constitutionality of this provision has been upheld twice by the District of Columbia Court of Appeals. *See* Betea v. United States, 365 A.2d 64 (D.C. Cir. 1976), *cert. denied*, 433 U.S. 911 (1977); United States v. Greene, 489 F.2d 1145 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 977 (1974).

[39] *Jones*, 103 S. Ct. at 3051. The Court noted the concern in *Addington* that members of the public could be committed due to idiosyncratic behavior that might appear to be mental illness but is generally acceptable behavior. *Id.* Since the risk of erroneous commitment is severe, the *Addington* Court placed the burden of proof on the Government in civil commitment cases, forcing it to bear the risk of possible error. 441 U.S. at 427. The *Jones* Court found this risk diminished in cases of insanity acquittals because the defendant raises and

insanity acquittees, the Court reasoned that identical procedural protections are not required for civil and criminal commitment procedures. The Court concluded that "[t]he preponderance of the evidence standard comports with due process for commitment of insanity acquittees."[40]

Finally, the Court held that petitioner was not entitled to release even though he had been hospitalized for longer than he could have been incarcerated had he been convicted. The Due Process Clause "requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."[41] Courts commit insanity acquittees to treat their mental illness and protect them and society from their potential dangerousness. Because no one can predict the length of time needed for recovery, "Congress has chosen, as it has with respect to civil commitment, to leave the length of commitment indeterminate, subject to periodic review of the patient's suitability for release."[42] The Court reasoned that the length of the potential criminal sentence is of no relevance to the length or purpose of commitment: "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."[43] An insanity acquittee is committed to encourage recovery from continuing mental illness and dangerousness rather than to punish the individual. Therefore, a criminal sentence should not limit the length of time an acquittee may be required to spend in an institution.[44]

IV. THE DISSENTING OPINIONS

The dissent, written by Justice Brennan, with whom Marshall and Blackmun joined, began by restating the question presented. The dissent argued that the issue was not whether the petitioner must be released because he had been hospitalized for longer than the length of the prison sentence he might have served had he been convicted; rather,

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proves his insanity and a crime is not " 'within a range of conduct that is generally acceptable.' " 103 S. Ct. at 3051 (quoting *Addington*, 441 U.S. at 426-27).

The *Addington* Court was also concerned with the stigma to the individual caused by civil commitment. 441 U.S. at 426. In cases involving insanity acquittals, the acquittee is already stigmatized by the verdict of "not guilty by reason of insanity." The small increment the commitment may add to the stigma "causes little additional harm in this respect." *Jones*, 103 S. Ct. at 3051 n.16.

[40] *Jones*, 103 S. Ct. at 3051.

[41] *Id.* (citing Jackson v. Indiana, 406 U.S. 715, 738 (1972)).

[42] *Id.* at 3052.

[43] *Id.*

[44] *Id.*

"[t]he question before us is whether the fact that an individual has been found 'not guilty by reason of insanity,' by itself, provides a constitutionally adequate basis for involuntary, indefinite commitment to psychiatric hospitalization."[45] These three Justices concluded that it does not.[46]

The dissent recognized that the Supreme Court has employed a balancing test to decide cases involving due process requirements for the indefinite commitment of mentally ill persons.[47] Three factors are at the core of these cases: "[T]he governmental interest in isolating and treating those who may be mentally ill and dangerous; the difficulty of proving or disproving mental illness and dangerousness in court; and the massive intrusion on individual liberty that involuntary psychiatric hospitalization entails."[48]

The petitioner contended that the balance to be struck in the case of an insanity acquittee is the same as that for a person who is civilly committed. Because the Government has no greater interest in indefinitely committing insanity acquittees than it does with civilly committed persons, the same due process standards should apply to the commitment procedures of both categories of individuals.[49] The dissenting Justices ultimately agreed with this argument, contending that, beyond the period of the maximum sentence for a crime, insanity acquittees must either be released or recommitted under the standards of *Addington* and *O'Connor*.[50]

The dissent began its analysis by noting that insanity acquittees are different from other candidates for commitment because the verdict of not guilty by reason of insanity implies beyond a reasonable doubt that the acquittees in fact committed the criminal acts with which they were charged.[51] The dissent said that this finding might justify punishment of the acquittee, but noted that the Government disclaims any interest in punishment. Despite the implicit proof of the commission of a criminal act, the Government must still meet its separate burden of proof of establishing by clear and convincing evidence mental illness and dangerousness in order to indefinitely commit an insanity acquittee.[52]

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[45] *Id.* at 3053 (Brennan, J., dissenting).

[46] Justice Stevens, dissenting separately, suggested that there should be a presumption that acquittees are entitled to freedom after they have been confined for the period fixed by the legislature. Insanity acquittees may be held longer only if the State can prove by clear and convincing evidence that additional confinement is appropriate. 103 S. Ct. at 3061 (Stevens, J., dissenting).

[47] *See, e.g.*, Addington v. Texas, 441 U.S. 418 (1979); O'Connor v. Donaldson, 422 U.S. 563 (1975).

[48] *Jones*, 103 S. Ct. at 3054 (Brennan, J., dissenting).

[49] *Id.*

[50] *Id.* at 3061.

[51] *Id.* at 3054.

[52] *Id.* at 3055.

First, it is inconsistent with precedents of the Court in other commitment contexts to find that the combination of past criminal behavior and mental illness justifies indefinite commitment without the benefits of the civil commitment due process standards.[53] In past cases in which the Court had some evidence that the defendant had committed a crime, it nevertheless required that the defendant be committed pursuant to civil commitment standards that afforded due process protections.[54]

Second, the dissent noted that in the Court's past decisions, it has weighed the Government's interest in accurate, efficient commitments and the individual's interest in liberty and autonomy, deciding that the Government may not indefinitely commit a person unless it proves by clear and convincing evidence that the defendant is mentally ill and dangerous.[55] An insanity acquittal of a "single, nonviolent misdemeanor" does not provide an adequate substitute to such constitutional protections.[56]

While the verdict is "backward looking" in that it is a report on the state of affairs at the time of the crime, a commitment decision should be a judgment concerning the present and future.[57] The dissent, however, found the occurrence of prior non-violent misdemeanors to have no predictive value as to future commission of crimes:[58] "It is completely unlikely that persons acquitted by reason of insanity display a rate of future 'dangerous' activity higher than civil committees with similar arrest records, or than persons convicted of crimes who are later found to be mentally ill."[59] Therefore, an acquittal by reason of insanity does not provide a "sound basis for determining dangerousness."[60]

Third, the dissent offered less restrictive alternatives by which the Government could satisfy its interests while maintaining due process protections for insanity acquittees.[61] The dissent suggested that the Government may be able to commit a person solely on the basis of an insanity acquittal for a limited period of time equal to the amount of time the acquittee could have served in prison for the crime committed.

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53 *Id.*; *see also* Addington v. Texas, 441 U.S. 418 (1979); Jackson v. Indiana, 406 U.S. 715 (1972); Humphrey v. Cady, 405 U.S. 504 (1972); Baxstrom v. Herold, 383 U.S. 107 (1966).

54 *Jones*, 103 S. Ct. at 3055 (Brennan, J., dissenting); *see, e.g.*, Humphrey v. Cady, 405 U.S. 504 (1972).

55 *Jones*, 103 S. Ct. at 3056 (Brennan, J., dissenting). *See generally* Addington v. Texas, 441 U.S. 418 (1979); O'Connor v. Donaldson, 422 U.S. 563 (1975).

56 *Jones*, 103 S. Ct. at 3056 (Brennan, J., dissenting).

57 *Id.*

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

59 *Id.*

60 *Id.*

61 *Id.* at 3059 (Brennan, J., dissenting).

At some point, however, the Government must satisfy the civil commitment requirements by proving the defendant mentally ill and dangerous by clear and convincing evidence.[62] Because Jones could have been sentenced for a maximum period of one year had he been convicted, the dissent argued that he should have received due process protections identical to those provided for civilly committed persons after that time had passed.[63]

Fourth, the dissent recognized that the risk of falsely committing an insanity acquittee is no less than the risk incurred by a civilly committed person.[64] While the majority reasoned that there is a reduced risk of error because the Government has shown that the defendant committed an act "unacceptable" to society in violating the criminal law, the dissent emphasized that unacceptability alone will not justify commitment; the defendant must be dangerous as well.[65] Moreover, although the risk of stigmatization may be reduced for insanity acquittees, this reduced risk does not lessen the severe intrusion on the acquittee's interest in avoiding involuntary commitment. For example, "confinement in a mental institution is even more intrusive than incarceration in a prison,"[66] because in addition to the deprivations of liberty that occur in a prison, a person committed to a mental institution may not even be free to reject medical treatment.[67]

V. ANALYSIS

Since 1970, a defendant in the District of Columbia who raises the insanity defense has had the burden of establishing insanity by a preponderance of the evidence.[68] Previously, in an adjudication in which the sanity of the defendant was in question in the District of Columbia, the burden of proof always had rested upon the prosecution to prove the defendant's sanity beyond a reasonable doubt.[69] Congress shifted the

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62 *Id.*

63 *Id.*

64 *Id.* at 3060 (Brennan, J., dissenting). In assessing the individual's interests in liberty, the Court considered only those interests it concluded were considered in *Addington*: first, that a person may be committed wrongly due to mere idiosyncratic behavior, and second, that a person may become stigmatized by being committed to a mental institution. *Id.* The dissent argued that there are additional interests involved. *Id.*

65 *Id.*; *see O'Connor*, 422 U.S. at 575.

66 *Jones*, 103 S. Ct. at 3060 (Brennan, J., dissenting).

67 *Id.* (citing Youngberg v. Romeo, 457 U.S. 307, 314 (1982)).

68 D.C. CODE ANN. § 24-301(j) (1981); *see also infra* text accompanying notes 72-76.

69 Today the Government still must bear the burden of proving the defendant's sanity beyond a reasonable doubt in federal prosecutions. In Davis v. United States, 160 U.S. 469, 484 (1895), the Court held that an accused is "entitled to an acquittal of the specific crime charged if upon all the evidence there is reasonable doubt whether he was capable in law of committing crime." *Davis*, however, established no constitutional doctrine but merely set the

burden of proof to the defendant because in *Bolton v. Harris*[70] the District of Columbia Circuit Court ruled that insanity acquittees could not be automatically committed for an indefinite period of time.[71] After a reasonable time following the criminal trial, however, insanity acquittees should be provided with a separate commitment hearing with procedures substantially similar to those in civil commitment proceedings. The Government should prove the defendant's insanity by clear and convincing evidence to warrant indefinite commitment.[72] Congress, however, feared that allowing separate trials to adjudicate the criminal issues and commitment would allow dangerous criminals to "have it both ways."[73] Acquittees could escape imprisonment if they could establish insanity by a preponderance of the evidence and might also escape hospital confinement if the Government could not prove their insanity by clear and convincing evidence. Congress feared that these procedures would create a "revolving door"[74] through which persons who commit crimes continually would circle in a series of arrests and acquittals, resulting ultimately in freedom for dangerous individuals.[75] Congress noted that the court's interpretation of the statute as written "neither protects the public safety nor provides treatment for a defendant acquitted of a crime on grounds of insanity."[76] Thus, Congress re-

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rule to be followed in federal courts. *But see* Leland v. Oregon, 343 U.S. 790 (1952)(upholding an Oregon statute that required defendants to prove their insanity beyond a reasonable doubt). For a discussion of the evolution of insanity as an affirmative defense, see Note, *Stopping the Revolving Door: Adopting a Rational System for the Insanity Defense*, 8 HOFSTRA L. REV. 973, 984-86 (1980).

70 395 F.2d 642 (D.C. Cir. 1968).

71 *See* D.C. CODE ANN. § 24-301(d), enacted in 1955, which provided for mandatory commitment when the court found a defendant not guilty by reason of insanity. Congress enacted this statute in reaction to Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954), in which the court announced a new, more relaxed formulation for the insanity defense: "[A]n accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." *Id.* at 874-75. Prior to *Durham*, the District of Columbia courts employed the right-wrong test for criminal responsibility under which a defendant is insane if, at the time of the criminal act, he or she did not 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." M'Naghten's Case, 8 Eng. Rep. 718, 722 (1843), *quoted in Durham*, 214 F.2d at 870; *see also infra* note 121. Congress later amended the statute to provide for mandatory commitment rather than discretionary commitment when a defendant successfully pleads the insanity defense because it was afraid that under a more relaxed standard there would be a "flood" of acquittals by reason of insanity. *Cf.* Lynch v. Overholser, 369 U.S. 705 (1962)(mandatory commitment permissible only when defendant affirmatively pleads insanity).

72 The civil commitment proceedings for the District of Columbia are found in D.C. CODE ANN. § 22-545 (1981). The statute requires notice, the right to trial by jury, and places the burden of proof on the Government. *Id.*

73 H.R. REP. NO. 91-907, 91st Cong., 2d Sess. 74 (1970).

74 For a complete discussion of the "revolving door" problem, see Note, *supra* note 68, at 975-77.

75 H.R. REP. NO. 91-907, at 74.

76 *Id.*

quired the defendant to carry the burden of proof of insanity.[77]

Although insanity acquittees must be committed automatically,[78] Congress provided for a hearing within fifty days of the initial commitment at which acquittees, represented by counsel, may establish eligibility for release by proving that they are no longer mentally ill and dangerous.[79] Whereas the focus in the original criminal trial is on the defendant's condition at the time of the crime, the emphasis in this hearing is on present mental condition. Thus, under the District of Columbia statutory scheme an insanity acquittee may be indefinitely committed without the Government bearing the burden of proof as it must in civil commitment proceedings.

The fifth amendment to the United States Constitution provides: "No person shall . . . be deprived of life, liberty or property without due process of law. . . ."[80] The fifth amendment protects individuals from

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[77] A standard of proof reflects society's decision about the degree of certainty factfinders should have in the correctness of the conclusions they draw as to the facts in any particular case. Addington v. Texas, 441 U.S. 418, 423 (1979); *In re* Winship, 397 U.S. 358, 370 (1970). The standard of proof "serves to allocate the risk of error between litigants and to indicate the relative importance attached to the ultimate decision." *Addington*, 441 U.S. at 423. Where the defendant risks only monetary loss, the plaintiff must prove his case by a mere preponderance of the evidence. Where the defendant's individual liberty is at stake, as in criminal cases, however, courts require the Government to convince the factfinder of the defendant's guilt beyond a reasonable doubt. Between these two extremes exists an intermediate standard of "clear," "cogent," "unequivocal" or "convincing" evidence. The Court stated in *Addington*:

> One typical use of the standard is in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant. The interests at stake in those cases are deemed more substantial than mere loss of money and some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof. Similarly, this Court has used the "clear, unequivocal and convincing" standard of proof to protect particularly important individual interests in various civil cases.

Id. at 424 (citations omitted); *see* C. MCCORMICK, EVIDENCE §§ 339-340 (1972); 9 J. WIGMORE, EVIDENCE § 2498 (Chadbourne rev. ed. 1972). In *Jones*, the petitioner argued that the Government should bear the burden of proof and meet this intermediate standard. *See also infra* text accompanying notes 90-115.

Although it is unclear how juries apply these three burdens of proof, *see Addington*, 441 U.S. at 424 n.3, "standards of proof are important for their symbolic meaning as well as for their practical effect." *Id.* at 426. "In cases involving individual rights, whether criminal or civil, '[t]he standard of proof [at a minimum] reflects the value society places on individual liberty.'" *Id.* at 425 (quoting Tippet v. Maryland, 436 F.2d 1153, 1166 (4th Cir. 1971)(Sobeloff, J., concurring in part, dissenting in part)).

[78] D.C. CODE ANN. § 24-301(d)(1).

[79] *Id.* at § 24-301(d)(2).

[80] U.S. CONST. amend. V. The Due Process Clause embodies the concept of equal protection. *See* Bolling v. Sharpe, 347 U.S. 497 (1954). The Court in *Jones*, however, explicitly stated that it was addressing petitioner's arguments in terms of the Due Process Clause because the petitioner's equal protection arguments essentially duplicated his due process arguments. 103 S. Ct. at 3048 n.10. The Supreme Court recognizes a difference in analysis:

> As we recognized in Ross v. Moffitt, 417 U.S. at 608-609 . . . , we generally analyze the fairness of relations between the criminal defendant and the State under the Due Process Clause, while we approach the question whether the State has invidiously denied one

oppressive governmental intrusions by providing flexible due process protections responsive to individual situations.[81] The Supreme Court set out its due process test in *Mathews v. Eldridge*.[82] The Court weighed the individual's interest in remaining free against the Government's interest in isolating the individual. The Court also accounted for the risk that the procedures used will erroneously deprive an individual of constitutionally protected rights.[83]

Under a due process analysis, the individual interest involved is the fundamental right to personal liberty.[84] As the dissent in *Jones* noted, persons committed to mental institutions suffer even more than those committed to prisons because, in addition to having restrictions upon their associations and activities, mental patients may be unable to withhold consent for medical treatment.[85]

The Government's interests in the commitment of insanity acquittees are clear. The Government seeks to provide care to those citizens who are unable to care for themselves.[86] More importantly, the State has an interest in protecting the public from dangerous individuals, including those who are mentally ill.[87]

In *Jones*, Justice Powell accepted the governmental purposes of protecting society and treating the individual as legitimate bases for indefinitely committing a person who is mentally ill and dangerous without mentioning the individual interest in liberty that is infringed by the confinement.[88] The Court equated the verdict of not guilty by reason of insanity with a finding of mental illness and dangerousness, and therefore concluded that the verdict itself sufficiently justified indefinite commitment. The Government need never prove that an insanity acquittee is presently mentally ill and dangerous.[89]

The Court should have employed a separate due process analysis to the case at hand because the deprivation of liberty is so severe. Instead, the Court relied on a congressional decision that insanity acquittees are

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class of defendants a substantial benefit available to another class of defendants under the Equal Protection Clause.

Bearden v. Georgia, 103 S. Ct. 2064, 2069 (1983).

81 Morrissey v. Brewer, 408 U.S. 471 (1972).

82 424 U.S. 319, 334 (1976). Although *Mathews* involved a property interest, the distribution of social security benefits, rather than a personal interest such as liberty, the Court should employ the same analysis. *See Jones*, 103 S. Ct. at 3053-54 (Brennan, J., dissenting).

83 *Mathews*, 424 U.S. at 335, 341.

84 O'Connor v. Donaldson, 422 U.S. 563, 580 (1975) (citing Specht v. Patterson, 386 U.S. 605, 608 (1967)).

85 *Jones*, 103 S. Ct. at 3060 (Brennan, J., dissenting).

86 *See* Addington v. Texas, 441 U.S. 418, 426 (1979).

87 *Id.*

88 103 S. Ct. 3043, 3048 (1983).

89 *Id.* at 3049.

automatically subject to indefinite commitment to a mental institution. It disregarded any psychological data pertaining to the predictive value of a crime committed by an individual who was mentally ill. In addition, the Court neglected to note fully the individual's interest in avoiding indefinite commitment to a mental institution.

Therefore, the *Jones* Court overstated the Government's interest and underestimated the individual's interest in liberty.[90] The Court reached this erroneous result because it relied on two false assumptions: (1) the insanity acquittal sufficiently proves mental illness and dangerousness so as to justify commitment; and (2) the risk of erroneous commitment is less in confinements resulting from insanity acquittals than in those resulting from civil commitment proceedings.[91]

The Court reasoned that because the prosecution has shown beyond a reasonable doubt that insanity acquittees committed a crime, they are proven dangerous. The Court also reasoned that a showing of past insanity suggested that acquittees continue to be insane.[92] In support of its argument, the majority cited *Lynch v. Overholser*[93] as stating that "[t]he fact that the accused was found to have committed a criminal act is 'strong evidence that his continued liberty could imperil "the preservation of the peace." ' "[94] The *Lynch* Court went on to state, however, that "[i]t no more rationally justifies his indeterminate commitment to a mental institution on a bare reasonable doubt as to past insanity than would any other cogent proof of possible jeopardy to 'the rights of persons and of property' in any civil commitment."[95] In *Lynch*, the Court asserted that past criminal conduct serves only as evidence of present dangerousness, whereas in *Jones* the Court construed the crime as conclusive proof of present dangerousness.

The District of Columbia Circuit Court had decided previously that proof of a crime does not automatically prove dangerousness. In *Baxstrom v. Herold*,[96] the Supreme Court held, on an equal protection basis, that persons may not be committed at the expiration of a prison sentence unless they are afforded civil commitment procedural protec-

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90 The individual's interests are not offended by an automatic initial commitment without a hearing "for the period required to determine present mental condition." Bolton v. Harris, 395 F.2d 642, 651 (D.C. Cir. 1968). The acquittal by reason of insanity raises a question as to present mental condition and warrants further examination. The legislature provided a fifty-day period presumably for diagnosis of the acquittee's present mental condition. *See* D.C. CODE ANN. § 24-301(d)(2)(A); *see also supra* note 13.

91 103 S. Ct. at 3048-52.

92 *Id.* at 3050.

93 369 U.S. 705 (1962)(automatic commitment reserved only for defendants who raise insanity as a defense).

94 *Jones*, 103 S. Ct. at 3049 (quoting *Lynch*, 369 U.S. at 714).

95 *Lynch*, 369 U.S. at 714.

96 383 U.S. 107 (1966).

tions. In *Bolton v. Harris*,[97] the court interpreted the Supreme Court's decision in *Baxstrom* to mean that "the commission of criminal acts does not give rise to a presumption of dangerousness which, standing alone, justifies substantial difference in commitment procedures and confinement conditions for the mentally ill."[98] Additionally, the dissent in *Jones* noted that "[n]one of the available evidence that criminal behavior by the mentally ill is likely to repeat itself distinguishes between behaviors that were 'the product' of mental illness and those that were not."[99]

The majority cited no empirical evidence for its assumption that the commission of a crime indicates present dangerousness and mental illness.[100] While the dissent argued that "mere statistical validity is far from perfect for purposes of predicting which individuals will be dangerous,"[101] the majority chose to accept the legislative determination that a previous crime indicates future dangerousness. The Court instinctively reacted that if persons have committed crimes in the past, they are likely to do so again in the future. The majority's suggestion that concrete evidence of the crime "may be at least as persuasive as any predictions about dangerousness that might be made in a civil-commitment proceeding"[102] begs the question. As one commentator suggested, because a lower standard of proof for the commitment of insanity acquittees cannot be explained by the normal concern for protecting the community, the lower standard implicitly contains elements of punishment.[103]

The Court or Congress should define the term "dangerous" more precisely; without such a definition, it is impossible to determine whether persons truly should be committed indefinitely for the protection of themselves and society. The Court insisted that *dangerous* does not mean *violent*, but it failed to define "dangerous." Few persons would equate an attempt to steal a coat with "dangerousness" as that word is used in everyday language.[104]

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97 395 F.2d 642 (D.C. Cir. 1968).

98 *Id.* at 647; *see also* Cameron v. Fisher, 387 F.2d 193 (D.C. Cir. 1967).

99 103 S. Ct. at 3058 (Brennan, J., dissenting).

100 *See id.* at 3049-50 n.13.

101 *Id.* at 3057 (Brennan, J., dissenting).

102 *Id.* at 3049.

103 Note, *supra* note 5, at 607.

104 *Cf.* CONN. GEN. STAT. § 53a-47(b) (Supp. 1981), which requires that, to warrant commitment to a mental hospital following an insanity acquittal, the Government in a separate commitment hearing prove by a preponderance of the evidence that persons are "mentally ill to the extent that [their] release would constitute a danger to [themselves] or others." The Commission comment following the 1971 version of the statute, which is identical to the current version, does not confine "danger to himself or others" to physical danger, but includes those who are a danger to the property of others in some cases. CONN. GEN. STAT. § 53a-47(b) Comment (1971).

The Court did not find it unreasonable for Congress to determine that the insanity acquittal supports an inference of continuing mental illness.[105] The time span between the commission of the crime and the commitment hearing,[106] however, may present adequate time for recovery. The Court recognized that, at the required fifty-day hearing, acquittees are given a "prompt opportunity to obtain release."[107] Individuals, however, cannot easily prove they are no longer mentally ill after they have been so labeled: "It is extremely difficult to overcome a label of mental illness since mental health professionals' perceptions of the individual's behavior are colored by the diagnosis of mental illness."[108]

The Court, therefore, incorrectly equated the verdict of not guilty by reason of insanity with a finding of present mental illness and dangerousness. Using the verdict only as evidence of present mental illness and dangerousness would serve the congressional aim of confining those who present harm to society. The verdict should not excuse the Government from bearing the burden of proof in a separate commitment hearing.[109]

The majority concluded that insanity acquittees need not be afforded the same due process protections as persons who are to be civilly committed because insanity acquittees incur a smaller risk of erroneous

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[105] *Jones*, 103 S. Ct. at 3050.

[106] In United States v. Brown, 478 F.2d 606 (D.C. Cir. 1973), Judge Skelly Wright, dissenting, stated:

> At most, an insanity acquittal means that at the time the charged crime was committed, which ordinarily would be months or sometimes years before the Section 301(d) hearing, there was a reasonable doubt that the defendant was free of such an illness. Since a reasonable doubt as to sanity is hardly tantamount to a conclusion of mental illness, there may well be only the flimsiest relation between the Government's failure to prove past capacity and current incapacity. Thus, it can hardly be argued that the prior acquittal, standing alone, has any necessary bearing as a factual matter on the mental illness finding to be made in the Section 301(d) hearing.

Id. at 613-14 (footnote omitted).

[107] *Jones*, 103 S. Ct. at 3050.

[108] Note, *The Standard of Proof Necessary in Involuntary Civil Commitment of the Mentally Ill*—Addington v. Texas, 8 S.D.L. REV. 379, 387 (1980); *see also* Rosenhan, *On Being Sane in Insane Places*, 179 SCIENCE 250 (Jan. 1973), *reprinted in* 13 SANTA CLARA L. REV. 379, 381-87 (1973) *cited in* Note, *supra*, at 387 n.63.

Even if acquittees can prove that they are no longer mentally ill and dangerous, their release still may be difficult to obtain. In Utah v. Jacobs, No. 18173, slip. op. (Utah Aug. 26, 1983), the court refused to release an insanity acquittee—even though he could function adequately and without danger in the community if his medication was carefully supervised—because there existed no means of supervision.

[109] *See* German & Singer, *Punishing the Not Guilty: Hospitalization of Persons Acquitted by Reason of Insanity*, 29 RUTGERS L. REV. 1011 (1976) (the commitment, treatment, and methods of release of persons found not guilty by reason of insanity are unconstitutional as violative of equal protection and due process).

commitment.[110] In *Addington v. Texas*, the Court was concerned that the State would confine persons who were not really dangerous, but who exhibited "idiosyncratic" behavior.[111] The Court in *Jones* asserted that the risk of erroneous commitment is lower for insanity acquittees because there is proof beyond a reasonable doubt that the defendant committed a crime.[112] The Government, however, may commit to a mental institution only defendants who are presently both mentally ill and dangerous. The Court's suggestion that the proof of a crime warrants commitment must be based on the Court's assumption that evidence of past criminal behavior constitutes proof of present dangerousness. If this assumption is erroneous, as this Note argues, then the risk of erroneous commitment of the insanity acquittee remains significant. The Court could only justify confinement based upon proof of the crime as punishment of the perpetrator. Punishment, however, is contrary to the rationale of the insanity plea.[113]

Although the Court spoke of the risk incurred by the *acquittee*, perhaps it implicitly employed the analysis used in *United States v. Brown*.[114] In that case, the Court of Appeals for the District of Columbia determined that the risk of error incurred by *society* in civilly committing a person is less than that in committing an insanity acquittee:

> If there is an error in a determination of mental illness that results in a civil commitment, a person may be deprived of liberty although he never posed any harm to society. If there is a similar error in confinement of an insanity-acquitted individual, there is not only the fact of harm already done, but the substantial prospect that the same error, ascribing the quality of mental disease to a less extreme deviance, resulted in a legal exculpation where there should have been legal responsibility for the antisocial action.[115]

The court in *Brown* concluded that, because of the risk that persons will be acquitted when they are not really mentally ill, insanity acquittees should be confined for a defined period; thereafter, continued detention "should be governed by the same standard of proof as applies to civil commitments."[116]

The majority in *Jones* accepted the premise of *Brown* without reaching its result.[117] If the Court was concerned about wrongful acquittals rather than wrongful commitments, it should have addressed that issue

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[110] *Jones*, 103 S. Ct. at 3051.

[111] 441 U.S. 418, 427 (1979).

[112] 103 S. Ct. at 3049.

[113] *See infra* notes 119-22 and accompanying text.

[114] 478 F.2d 606 (D.C. Cir. 1973).

[115] *Id.* at 611.

[116] *Id.* at 612.

[117] *See supra* text accompanying notes 31-35.

separately. The questions of who bears the burden of proof and of the appropriate standard in the criminal trial are not the issues in *Jones*. An involuntary commitment of an insanity acquittee should be based upon the need for treatment of the acquittee and for protection of the public. A commitment following an insanity acquittal is not designed to compensate for the possibility of an erroneous acquittal of one who is not mentally ill.[118] The *Brown* analysis seems to inject a punitive aspect into the commitment of an insanity acquittee. The Government, however, disclaims any punitive motive as inconsistent with the insanity plea.[119]

The purpose of the insanity plea is not to allow people who commit criminal acts to avoid incarceration; rather, the insanity plea recognizes that people should be punished only if they are blameworthy or suitable subjects of deterrence.[120] For example, society has chosen to release children from the full burden of adult responsibility because they lack mature judgment.[121] Society also excuses those who have less than full moral culpability for their actions because of mental illness:[122]

> The legal and moral traditions of the western world require that those who, of their own free will and with evil intent (sometimes called *mens rea*), commit acts which violate the law, shall be criminally responsible for those acts. Our traditions also require that where such acts stem from and are the product of a mental disease or defect . . . moral blame shall not attach, and hence there will not be criminal responsibility.[123]

Any theory that justifies commitment as a form of punishment is not in accord with the purpose of the insanity plea. The goals of punishment include retribution, deterrence, and rehabilitation.[124] These goals, however, can be achieved only when punishment is imposed upon those

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[118] *See* Note, *supra* note 5, at 618. That Note asserts that courts employ a "cleanup doctrine" by assigning different commitment procedures for insanity acquittees: "[M]istakes in criminal commitment hearings are justified by their effect of 'cleaning up' the mistakes of criminal trials." *Id.*

[119] *See Jones*, 103 S. Ct. at 3054.

[120] *Id.* at 3054 n.4.

[121] *See* Bellotti v. Baird, 443 U.S. 622 (1979).

[122] Since the *M'Naghten Case*, 8 Eng. Rep. 718, 722 (1843), defendants are not held responsible for their acts if it can be proved that they suffered from a mental disease so as not to know what they were doing at the time they committed the crime, or, if they did know it, that they could not tell that their act was wrong. In 1954, a more flexible standard for the insanity defense was set forth in Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954). The Court summarized the foundations underlying the insanity defense and held that a defendant could not be held guilty if his or her criminal conduct was the result of a mental defect or disease. Therefore, an acquittal by reason of insanity relieves the defendant of any moral or personal responsibility. The *Durham* product test was eventually rejected by the Court of Appeals for the District of Columbia in United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972).

[123] *Durham*, 214 F.2d at 876.

[124] *Jones*, 103 S. Ct. at 3052 (citing Gregg v. Georgia, 428 U.S. 153, 183-86 (1976) (opinion of Stewart, Powell and Stevens, JJ.)).

who are responsible for their crimes and have control of their actions.[125] An insanity acquittee has been found by the Court to lack that requisite control and, therefore, should not be subject to punitive measures. It is upon this theory that the majority refuses to recognize a relation between the maximum possible criminal sentence and the amount of time the acquittee must be committed for psychiatric treatment.[126] The Court was correct in recognizing the absence of punitive aims behind commitment following an insanity acquittal. It should have extended this reasoning and afforded insanity acquittees the procedural protections afforded in civil commitment proceedings.

The Court's decision that the Government need never prove the acquittee's continuing mental illness and dangerousness, as is required in civil commitment proceedings, suggests that it believes that insanity acquittees should not be released from moral and legal culpability for their actions. The dissent noted that it is not criminal activity that distinguishes *Jones* from previous cases.[127] The true distinguishing factor is simply that Jones asserted his own insanity defense. Apparently, the Court finds the insanity defense suspect and open to abuse; thus, the Court has merely ratified Congress' intent to stop the "revolving door."[128]

VI. CONCLUSION

The Court in *Jones* determined that insanity acquittees may be indefinitely committed on the basis of the verdict of not guilty by reason of insanity at their criminal trials. They need never be afforded the due process protections required for a civil commitment. This holding is erroneous because it is founded upon the false assumptions that an insanity acquittal is equivalent to a finding of *present* mental illness and dangerousness and that the risk of erroneous commitment is less for an insanity acquittee than for a civilly committed person.

The decision in *Jones* reflects a conservatism on the part of the Court and a withdrawal from its previous view of the role psychology and psychiatry can play in the law. At the time of *Durham v. United States*,[129] courts seemed to have had faith that advances in the field of psychiatry would allow courts to distinguish between those who should be held criminally responsible for their behavior and those who should be treated rather than punished. In *Jones*, the Court rejected the valid-

125 *See* A. GOLDSTEIN, THE INSANITY DEFENSE 15 (1967).
126 *Jones*, 103 S. Ct. at 3052.
127 *Id.* at 3058 (Brennan, J., dissenting).
128 *See supra* text accompanying note 73.
129 214 F.2d 862 (D.C. Cir. 1954).

ity of psychiatric opinion and testing, prefering to rely on the judgment of the legislature.

Public opinion polls suggest that many people believe that the insanity defense has been open to abuse, allowing persons who are truly dangerous back out on the streets.[130] Society abhors this result; large numbers of people believe that those who have committed crimes should be held responsible regardless of their mental state at the time of the crime and that the insanity plea should be eliminated totally.[131] The Court in *Jones* reflects this attitude in its decision to require that the one who commits a crime, and is thereafter acquitted, prove the lack of present insanity and dangerousness rather than requring the Government to prove continuing mental illness and dangerousness. Such a holding, however, is completely contradictory to the fundamental basis of American criminal law. The Court should have held that the acquittal released the acquittee of responsibility for the crime; the acquittee, therefore, has the same status as a person whom the Government wishes to civilly commit. Therefore, confinement after the initial fifty-day commitment should require a separate commitment hearing at which the crime and the insanity acquittal may be used as significant evidence of the requisite mental illness and dangerousness warranting confinement.

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130 W. WINSLADE & J. ROSS, *supra* note 6, at 199 (citing a 1981 Associated Press-NBC News poll showing that 87% of the public thought many murderers were not sent to jail because of insanity pleas).

131 *Id.* The poll showed that 70% of the public favored total elimination of the insanity defense. *Id.*