Civil Commitment and Commitment of Insanity Acquittees

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I. INTRODUCTION

In every state, a defendant’s acquittal by reason of insanity usually leads to confinement in a mental institution. But states have adopted a variety of procedures governing institutionalization of insanity acquittees,¹ many of which afford the acquittee less protection than that given candidates for commitment in civil proceedings. Several states allow automatic commitment of insanity acquittees pending a hearing on the acquittee’s mental state.² Others allow indefinite commitment subject to release upon a later showing that the acquittee’s freedom would pose no danger.³ Of those jurisdictions that require post-acquit-tal hearings, many allow commitment under a lesser standard of proof than that required to commit an individual in civil proceedings⁴ or shift the burden of proof of mental stability to the acquittee rather than requiring the state to prove the acquittee’s continued illness.⁵

Insanity acquittees who have attacked criminal commitment schemes’ attenuated protections have had little success. A few courts have, in the absence of statutory direction, required that insanity acquittees be afforded the due process protections of an evidentiary hearing with advice of counsel before indefinite commitment.⁶ But equal


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Protection attacks on the disparities between civil and criminal commitment schemes have generally produced only warnings that such differences must be based on distinctions between the two classes that are related to a legitimate state purpose in creating the separate classifications.\(^7\)

Courts, legislators and commentators have advanced several justifications for the lower standard of procedure and proof in commitment of insanity acquittees. The most common rationale is that the determination at trial of the defendant's insanity precludes the need for a rigorous post-acquittal inquiry.\(^8\) Another justification is that commitment, even if erroneous, does not further stigmatize a defendant who has already been adjudged insane to the same degree that erroneous civil commitment mars the reputation of the committee.\(^9\) One unspoken justification is that if the commitment of an acquittee is erroneous because the acquittee is in fact sane, that merely means that the insanity defense was inappropriate and that the penal confinement the acquittee escaped should be replaced with institutional confinement.\(^10\) The lower level of proof has also been viewed as a proper means of discouraging frivolous insanity pleas.\(^11\)

This article addresses the merits and defects of these justifications and analyzes the proper standard of judicial review of legislative classifications that ease the procedural requirements of criminal commitment hearings. It concludes that these common justifications for lower criminal commitment standards trace to the general societal fear of mental illness and mistrust of defendants who successfully invoke the insanity defense.

The author does not dispute the dangerousness of many insanity acquittees. But the essay asserts that the class of insanity acquittees includes persons who pose no peril to self or society. It also concludes that legislative classifications that fail to distinguish treatment of violent acquittees from that of nonviolent acquittees are not sufficiently precise to withstand even intermediate level constitutional review.

On the subject of the proper standard of review, the author finds

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that there are cogent arguments both for and against using a level of scrutiny higher than minimum rationality, but that the insanity acquittedee's status in society merits the same intermediate judicial protection that courts have extended to other "quasi-suspect" categories of disadvantaged persons.

II. JUSTIFICATIONS FOR A LOWER STANDARD OF PROOF

A. Insanity Acquittees Have Been Judicially Determined to be Suitable for Commitment

In the area of civil commitment, the Supreme Court has held that states may not involuntarily 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."\(^{12}\) Those who argue for a lesser standard of proof for commitment of insanity acquittedees urge that the insanity determination at trial is a valid judgment that the acquittedee is dangerous. One court recently said:

> The obvious difference between insanity acquittedees and other persons facing commitment is the fact that the former have been found beyond a reasonable doubt, to have committed a criminal act. Insanity acquittedees thus have "proved" themselves a danger to society at one time. Non-acquittees, in contrast, have not been found by any factfinder to have harmed society as a result of their mental illness. This difference, we believe, gives rise to considerations which justify a lesser standard of proof to commit insanity acquittedees than to commit other persons.\(^{13}\)

The Supreme Court recently came down on the side of proponents of a lower order of proof in *Jones v. United States*.\(^{14}\) In that case, the Court rejected an acquittedee's argument that indefinite commitment violated due process because the proof of his insanity was based only on a preponderance of the evidence instead of the usual requirement of clear and convincing evidence for civil commitment.\(^{15}\) The Court dismissed the petitioner's claim that earlier case law mandates the higher standard of proof to reduce the risk of erroneous confinement. In the Court's words, "the proof [at trial] that he committed a criminal act as a result of mental illness eliminates the risk that he is being committed for mere 'idiosyncratic behavior'. . . ."\(^{16}\)

The most potent attack on this justification is that commission of an

\(^{13}\) Warren v. Harvey, 632 F.2d at 931 (footnotes omitted).
\(^{15}\) See *infra* note 20 and accompanying text.
\(^{16}\) 463 U.S. at 367.
act proscribed by criminal statute does not necessarily show that the actor is dangerous to society. Some courts have found that the conduct of defendants acquitted by reason of insanity for such crimes as knowingly passing bad checks and attempting to steal a coat represents a sufficient menace to society to warrant either commitment or continued detention. While pilfering clothing and writing checks against insufficient funds are to be discouraged, it is arguable that the threat these acts pose to society is not so great as to warrant dilution of procedural protections in commitment proceedings.

Moreover, the justification that the reduced standard of proof is a legitimate exercise of the state's authority to protect the public from the dangerously ill falters when one considers the standards governing civil commitment. The state mandates greater procedural safeguards for civil commitment of persons who have demonstrated non-criminal belligerence towards family members or strangers but does not require the higher standard of proof for acquittees whose crime may have been nothing more than blaring music at an indecent hour or scribbling on a public monument. If the state were to consistently exercise its obligation to protect the public, it would also allow civil commitment of persons whose psychiatric evaluations indicate a violent propensity on something less than the "clear and convincing evidence" test mandated by Addington v. Texas or at least reserve the lower standard of proof for commitment of acquittees whose crimes were violent or otherwise menacing. Only a few states require more procedural protection for misdeameanants than for felons or for non-violent felons than for murderers and rapists.

19. It should not be surprising that such crimes are viewed by some courts as indicating dangerousness given the broad range of behavior that may support civil commitment in some jurisdictions. E.g., Mass. Ann. Laws c.123, § 1 (Michie/Law. Co-op 1969) (since amended) which read:

'Mentally ill' person, for the purpose of involuntary commitment to a mental hospital or school under the provisions of this chapter, shall mean a person subject to a disease, psychosis, psychoneurosis or character disorder which renders him so deficient in judgment or emotional control that he is in danger of causing physical harm to himself or to others, or the wanton destruction of valuable property, or is likely to conduct himself in a manner which clearly violates the established laws, or ordinances, conventions or morals of the community.

The oft-stated argument that the trial at which the defendant was acquitted by reason of insanity justifies the lower standard of proof of continuing illness was also voiced by the Supreme Court this past term in *Jones*. In that case, the Court said:

A verdict of not guilty by reason of insanity establishes two facts: (i) the defendant committed an act that constitutes a criminal offense, and (ii) he committed the act because of mental illness. Congress has determined that these findings constitute an adequate basis for hospitalizing the acquittee as a dangerous and mentally ill person... We cannot say that it was unreasonable and therefore unconstitutional for Congress to make this determination.\(^3\)

But the logic of prior opinions refutes this argument. The Supreme Court in *Addington* rejected the most lenient standard of proof—the preponderance of the evidence standard—in favor of a “clear and convincing evidence” rule for civil commitment partly because the Court recognized that psychiatry is an imprecise science. Therefore, even confident assertions of future dangerousness in psychiatric testimony must be supported by other evidence so that the totality of the proof satisfies a standard higher than that required in the ordinary civil suit where damages, and not confinement, is the remedy sought. The imprecision of the psychiatric evaluation and lay jurors’ necessary reliance on psychiatric evidence were also the Court’s reasons for rejecting the rigorous reasonable doubt standard for civil commitment:

The subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most situations... Psychiatric diagnosis... is to a large extent based on medical “impressions” drawn from subjective analysis and filtered through the experience of the diagnostician. This process often makes it very difficult for the expert physician to offer definite conclusions about any particular patient... If a trained psychiatrist has difficulty with the categorical “beyond a reasonable doubt” standard, the untrained lay juror—or indeed even a trained judge—who is required to rely upon expert opinion could be forced by the criminal law standard of proof to reject commitment for many patients desperately in need of institutionalized psychiatric care.\(^4\)

If it is true that a clear and convincing standard of proof is needed to protect civil committees from the imprecision of a psychiatric pro-
file, then one may wonder why the psychiatric evaluation of an insanity acquittee is deemed sufficiently more reliable to commit the acquittee on the lesser standard of proof.

The familiar argument that the certainty of the defendant's insanity is found by the jury's determination beyond a reasonable doubt that he was insane at the moment of the offense ignores the fact that many jurisdictions employ different standards of proof on the issues of guilt and mental health. In many jurisdictions, a defendant may be acquitted by reason of insanity if there is a mere reasonable doubt that he was sane at the time of the act for which he was indicted; this is very different from finding beyond a reasonable doubt that the defendant was insane at the time of the act.

It is also unrelated to any finding that the defendant is not sane at the time of the commitment hearing. Many sanity hearings do not occur until months or even years after the offense due to late apprehension, crowded court dockets and lengthy trials. It is far from fanciful to imagine that even a seriously disturbed felon, in the interim between his offense and the commitment hearing, might regain a measure of stability sufficient to avoid commitment in a civil proceeding.

Still another objection to the acceptance of a trial determination of insanity is that the judgment at trial was not a judgment on the whole of the defendant's mental state. All that a jury determines is that the acquittee was insane at the time of the act in question. But a civil commitment hearing must determine that the committee's overall behavior suggests that his future acts will pose a danger to society or to himself.

Even if insanity can be conclusively demonstrated at trial, it should be noted that there is considerable controversy over the proposition that even violent transgressors acquitted by reason of insanity are more predictably dangerous than civil committees. The Supreme Court in Jones seemed to accept this proposition as uncontroversial:

The fact that a person has been found, beyond a reasonable doubt, to have committed a criminal act certainly indicates dangerousness... Indeed, this concrete evidence generally may be at least as persuasive as any predictions about dangerousness that might be

25. Approximately half the states in 1971 placed the burden on the prosecution to show beyond a reasonable doubt that the defendant was sane at the time of the offense. S. Brahel & R. Rock, The Mentally Disabled and the Law 400 (1971); see Annot., 17 A.L.R. 3d 146, § 3(a) (1968).

made in a civil-commitment proceeding.  

But some studies of those judged to be criminally insane have concluded that they are not measurably more dangerous than others.  

Indeed, some commentators have concluded that none of the myriad studies asserting the dangerousness of the criminally insane are reliable.

Few courts could be willing to so sweepingly condemn all expert predictions of future violence. But, prior to Jones, some courts had begun to question the value of predictions of dangerousness. In Benham v. Edwards, a class of acquitees confined to mental hospitals sued to have Georgia's procedures for committing and releasing insanity acquitees declared unconstitutional. In considering the plaintiff's attack on a Georgia statute requiring, inter alia, court approval for the release of confinees, the court conceded that "[n]o psychiatrist can predict with certainty whether an individual will commit dangerous acts." It therefore upheld the requirement that a court validate the psychiatric


The [American Psychiatric Association] said it was 'quite skeptical' about procedures in many states requiring periodic psychiatric reassessments of whether a patient is still dangerous. Dr. Roth explained that psychiatrists 'have great difficulty in predicting dangerous behavior' and that the best indicator of future violence was a past record of violence, not a psychiatric diagnosis. The association said that future dangers posed by defendants who committed violent acts but were acquitted by reason of insanity could be 'assumed at least for a reasonable period of time.' (emphasis added).

29. N. Christie, Professor of Criminology at the University of Oslo, has said, "There seems to be no convincing study to show that we can predict really dangerous behavior with any amount of acceptability." See, DIAMOND, supra note 28, at 451 (citing Scott, Violence in Prisoners and Patients, in MEDICAL CARE OF PRISONERS AND DETAINNEES 143, 152 (CIBA Foundation Symposium 16 (1973)); see also Rappoport, Lassen and Hay, A Review of the Literature in the Dangerousness of the Mentally Ill in THE CLINICAL EVALUATION OF THE DANGEROUSNESS OF THE MENTALLY ILL 72, 79 (J. Rappoport ed. 1967) ("[T]here are no articles that would assist us to any great extent in determining who might be dangerous, particularly before he commits an offense."). cited in Diamond, supra note 28, at 451.


32. 501 F. Supp. at 1072.
finding of non-dangerousness in cases in which there is any question of continuing mental illness.

A more explicit refusal to rely on predictions of future dangerousness was voiced by the Supreme Court of California in People v. Murtishaw. This was a review of a murder conviction in which the trial court had admitted a psychopharmacologist’s testimony, as expert evidence of the likelihood of the defendant’s future violence if sent to prison, in its penalty hearing. The court said:

We believe that the trial court should not have permitted this testimony. We shall explain that (1) expert predictions that persons will commit future acts of violence are unreliable, and frequently erroneous. . . . The admission of this testimony, in our opinion, constitutes error requiring reversal of the verdict at the penalty trial. Numerous studies have demonstrated the inaccuracy of attempts to forecast future violent behavior.

Even before Jones, such express distrust of expert opinions of future dangerousness was rare, but Jones’ assertion that legislators may reasonably assume the continuing illness of acquittees — and therefore require them to bear the burden of proving recovery — will mute even that rare dissent.

It is only this observation of continuing illness that supports the statutory disadvantage to which many insanity acquittees are subject. If the observation of continuing illness is given less credence, the statutory differences in the treatment of civil commitment candidates and criminal acquittees are difficult to relate to a legitimate state purpose under even minimum constitutional review. (The issue of review of statutory commitment schemes is discussed further in the analysis of equal protection concerns, infra, Section IIIB.)

B. Erroneous Commitment is Less Damaging to Insanity Acquitrees Than to Civil Committees

In Addington v. Texas, the Supreme Court described the function of a standard of proof as “instruct[ing] the fact-finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.” In con-
sidering the standard of proof required in civil commitment cases, the Court stated that it would have to strike a balance between the individual's interest in remaining free and the state's interest in committing the mentally ill. The Court repeated its caveat that legal procedures should be designed to "minimize the risk of erroneous decisions." 36

But in Jones, the Court declared that Addington's concerns were inapposite to the circumstances of a post-acquittal commitment:

[Since automatic commitment under [District of Columbia law] follows only if the acquittee himself advances insanity as a defense and proves that his criminal act was a product of his mental illness, there is good reason for diminished concern as to the risk of error. More important, the proof that he committed a criminal act as a result of mental illness eliminates the risk that he is being committed for mere 'idiosyncratic behavior,' Addington, 441 U.S., at 427. A criminal act by definition is not 'within a range of conduct that is generally acceptable.' Id., at 426-427.

That petitioner raised the insanity defense also diminishes the significance of the deprivation. The Addington Court noted that the social stigma of civil commitment "can have a very significant impact on the individual." 441 U.S., at 426. A criminal defendant who successfully raises the insanity defense necessarily is stigmatized by the verdict itself, and thus the commitment causes little additional harm in this respect. 37

A number of courts before Jones reasoned that the insanity acquittee requires less protection from the harm that may flow from erroneous commitment than does the civil committee. In Warren v. Harvey, the second Circuit considered a challenge to a Connecticut statute that allowed the commitment of an insanity acquittee upon a showing by a preponderance of the evidence that the acquittee is mentally ill. The appellant-acquittee argued that there was no justification for allowing his commitment on a lesser standard of proof than Addington required for civil committees. But the court distinguished the plight of civil committees by analyzing the harm that the sane criminal committee would suffer due to erroneous commitment. The court conceded that, as much as the mere fact of wrongful confinement, the social stigmatization that the committee would suffer militates in favor of a higher burden of proof for the party moving to commit in a civil suit. But the court went on:

The same considerations do not come into play when the person

J., concurring)).


facing commitment is an insanity acquittee. He need not be overly protected against the possibility that the factfinder will commit him based on "a few isolated instances of unusual conduct." The insanity acquittee already has been found to have committed a criminal act. Furthermore, if an insanity acquittee is committed because of an erroneous determination that he is mentally ill, then the odds are high that he may have been found not guilty on insanity grounds because of a similar erroneous determination that he is not sane . . . . Next to the actual deprivation of liberty, the greatest harm to a person erroneously committed to a mental institution is the stigma attached to the commitment . . . . The harm that such stigma causes an individual provides another cogent reason for "weighting" the standard of proof scales in favor of the ordinary individual faced with civil commitment. It is hard to view the insanity acquittee with the same solicitude. He already has been found to have committed an unlawful act—with all the attendant stigmatization—and has escaped punishment solely because he convinced the factfinder in the criminal proceeding that there was merit to his claim of insanity. Any stigma resulting from the label "mentally ill and dangerous" certainly attached at the time the accused was found not guilty by reason of insanity. Additional stigma which might result from subsequent commitment to a mental hospital must be regarded as minimal, if any.\textsuperscript{38}

But this reasoning ignores the defects of a jury determination of insanity and misuses the principles underlying commitment of insanity acquittees. As noted above,\textsuperscript{39} the hearing to determine the sanity of an acquittee is an incomplete and inadequate consideration of the defendant's mental health. Moreover, the Warren court's analysis smacks of retribution. Although the court's words do not expressly advocate punishment, they suggest a suspiciousness of all insanity pleas and a desire to confine the acquittee even absent psychiatric justification. This contravenes the accepted view that a mentally ill person may not be institutionalized for other than rehabilitative and protective purposes.\textsuperscript{40}

\textsuperscript{38} 632 F.2d at 931-32. \textit{See also} United States v. Brown, 478 F.2d 606, 611 (D.C. Cir. 1973):

The difference between the classes for purposes of burden of proof, is in the extent of possibility and consequence of error. If there is 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.

\textsuperscript{39} \textit{See supra} text accompanying notes 24-29.

\textsuperscript{40} \textit{See}, e.g., Humphrey v. Cady, 405 U.S. 504, 510-511 (1972). The issue of the punitive underpinnings of many commitment statutes and decisions is discussed more fully in Section IIC, \textit{infra}.  


To the extent that the courts are concerned with erroneous acquittals, it may be argued that it is not the courts' place to correct such errors. Legislatures frequently specify different standards of proof on the issues of guilt and insanity of criminal defendants and rules of evidence that may ease the defendant's burden of showing insanity. In formulating these standards, the legislators have assumed a certain risk that a percentage of all insanity acquittees are in fact sane enough to be culpable. The lawmakers have determined that the truly insane defendant's interest in avoiding punishment is of sufficient weight to justify the risk of acquitting some disingenuous pleaders of insanity. If legislatures have not specified a lower standard of proof for criminal commitment than for civil commitment, it is difficult to understand the rationale for allowing courts to cure the risk of erroneous acquittal with a lower standard of proof at the commitment hearing.

Legislative freedom to specify lower standards of proof at the criminal commitment stage is also subject to the requirements of equal protection. The Supreme Court and Second Circuit are of the opinion that the state may successfully defend the application of a lower standard of proof of criminal insanity by, inter alia, noting the insanity acquittee's lower risk of stigmatization due to erroneous commitment. But if the state cannot articulate differences between the classes of civil committees and criminal acquittees that immunize acquittees from added stigma due to erroneous confinement, this justification may not support the discrepant standard of proof.

The justification is, in fact, difficult to sustain. One can easily imagine a prospective employer's skepticism over hiring an acquittee who was erroneously committed until accurate psychiatric review ultimately convinced the court that release was in order. An employer may be more open to persuasion in the case of an acquittee whose illness was deemed to have passed before the commitment hearing and so was not institutionalized. Social acquaintances are less likely to be familiar with or ask about insanity acquittals than about unexplained periods of confinement.

The acquittee's need for protection is arguably even greater than that of the civil committee. One court recently said:

Although an insanity acquittal officially absolves the defendant of all moral blame, in the eyes of many some element of responsibility

41. See supra note 25 and accompanying text.
42. See infra Section III.
43. See supra note 38 and accompanying text.
44. Job applications may be less likely to elicit information on insanity acquittals than on periods of institutionalization as well. See Comment, Commitment Following an Insanity Acquittal, 94 HARV. L. REV. 605, 616 n.54 (1981).
may remain. Thus, the insanity acquittee found to have committed
criminal acts and labeled insane may well see oneself [sic] ‘twice
cursed’. . . In addition, many persons do not understand mental
illness and some have an irrational fear of the mentally ill. Thus,
an individual once labeled insane may be socially ostracized and
victimized by employment or educational discrimination.\textsuperscript{46}

Since the trial process cannot accurately predict future dangerousness,
the risk of erroneous commitment requires that the standard of proof
at the commitment phase shield the acquittee no less than the civil
commitment candidate.

C. The Implicit Punitive Rationale for Criminal Commitment Under
a Lower Standard of Proof

The essence of the punitive rationale is that, whatever the legislature
may have deemed to be the appropriate treatment of mentally dis-
turbed offenders, the prospect of loosing an offender who has pled in-
sanity is unacceptable.\textsuperscript{46} This is part of a widely-held belief that indi-
viduals should be accountable for their acts because all acts entail
choice.\textsuperscript{47}

This rationale is rarely explicit. It is most often couched in language
that makes it appear as though the acquittee has voluntarily waived
his right to higher procedural protections. It is assumed that the defen-
dant, or at least counsel, comprehends the consequences of an insanity
defense.\textsuperscript{46} The emphasis on the voluntariness of the plea leads inevita-
ably to the argument that the defendant should not be heard to object
to the state’s use of the defendant’s own insanity plea as major evi-
dence against him at the commitment hearing.

The punitive rationale is more vividly reflected in statutes which set
the initial criminal commitment term at the maximum criminal sen-
tence the defendant could have drawn had the insanity defense failed

\textsuperscript{45} Frendak v. United States, 408 A.2d 364, 377 (D.C. 1979).
\textsuperscript{46} Commentators have described societal attitudes towards the mentally ill as a com-
bination of sympathy and repulsion that may lead courts to confine acquittees for rea-
sons other than the stated desire to aid their recovery and protect society. See Goldstein
and Katz, Abolish the Insanity Defense—Why Not?, 72 YALE L.J. 853, 870-71 (1963); A.
Deutsch, The Mentally Ill in America 449 (2nd ed. 1949).

\textsuperscript{47} H. Hart, Punishment and Responsibility 176 (1968) (“[I]n spite of psychological
doctrines to the contrary, [many believe] that if a man knows what he is doing, it must
be true that he has a capacity to adjust his behavior to the requirements of the law.”),
cited in Commitment Following an Insanity Acquittal, 94 HARV. L. REV. 605, 624 n.79

\textsuperscript{48} Hamann, The Confinement and Release of Persons Acquitted by Reason of In-
sanity, 4 HARV. J. ON LEGIS. 55, 63 (1966-67); see also Lynch v. Overholser, 369 U.S. 705,
715 (1962).
and the defendant been convicted. If, as courts state, protection of the public and of the acquittee were the true purposes of commitment, the initial period of confinement would be the minimum period during which, in the estimation of the legislature or psychiatric experts testifying to the court, the confinee could conceivably improve to the point that his release would pose no threat.

Courts have sometimes been embarrassed by the disparity between the standards of such commitment schemes and the theoretical purposes of commitment. In the lower court in the Jones case, the defendant urged that equal protection required that the government release him from confinement after the expiration of the maximum period of time for which he could have been incarcerated (one year) or satisfy the burden of proof needed to civilly commit him. The District of Columbia Court of Appeals, sitting en banc, ultimately determined that the acquittee was entitled to neither release nor a civil commitment hearing, a conclusion with which the Supreme Court agreed. But this was no easy decision for the District of Columbia court, which held several hearings on this matter, first denying, then granting, then vacating, and finally denying the relief requested. Part of the court's difficulty was in deciding whether the statute was punitive, as shown in its first en banc opinion. The court said:

If we conclude . . . that [the statute under which the appellant was committed] is wholly rehabilitative, then our first opinion and order will stand. If, however, we conclude that [the statute] in some respects is punitive, then appellant's argument may have merit . . . . [W]e reject the view that an acquittee's mental illness and dangerousness at the time of the offense are consistently such powerful evidence of illness and dangerousness later (i.e., at the time of the "release hearing") that they raise a presumption of continuing insanity in every case . . . . [W]e conclude that the difference between criminal and civil commitment procedures cannot be justified on purely evidentiary grounds. It follows, therefore, that if society legitimately can place a greater burden on the acquittee to avoid continued confinement than it places on a prospective civil committee, that burden must be justified by the public's interest in greater protection than it would be likely to receive by subjecting acquittees to the civil commitment process. Furthermore, because [the statute] is premised, in part, on an earlier criminal offense—a confinement which might not have occurred if the government had the burden of proof before a new jury—this release-hearing proce-

49. E.g., WASH. REV. CODE ANN. § 10-77.020(3) (1980).
50. To date, petitioner has been confined for at least eight years.
Punitive overtones are also found in comparing the treatment of convicted criminals who are to be committed with that of even those criminal acquittees who may, arguendo, be considered dangerous. As discussed earlier, one of the asserted justifications for the lower order of proof is that the acquittee has adequately demonstrated his dangerousness by his criminal act. But when the state seeks to commit convicted violent offenders—even those with multiple offense records—courts have declined to reduce the states' burden of proof of the candidate's fitness for commitment. One may well ask why legislatures have seen fit to reduce the standard of proof only for insanity acquittees; the dangerousness rationale would seem to apply at least equally to violent offenders who have been convicted of knowingly and deliberately committing violence.

One commentator points to two recent decisions of the Supreme Court of California as evidence of this disparate treatment. In People v. Burnick, the court held that the proper standard of proof in a hearing to determine the sanity of a convicted sex offender was proof beyond a reasonable doubt. The court was highly critical of psychiatric predictions of future dangerousness. In its view even a conviction of forcible rape, an offense more serious than that with which the defendant was charged, would not have been conclusive on the issue of the dangerousness that must be shown in a subsequent commitment hearing.

Yet the same court, when confronted with an insanity acquittee in In re Franklin, upheld a local statute allowing a ninety-day pre-hearing commitment period and imposing on the acquittee the burden of proving sanity at the commitment hearing. The court justified the reversal of the usual burden allocation by pointing to the trial finding that the defendant had, as a result of his mental state, endangered society. There was no discussion of the unreliability of psychiatric predictions
of future danger.

The obvious rationale underlying this discrepant treatment is mistrust of the insanity plea itself. The unwillingness to accord the acquittee the presumption of non-dangerousness in the absence of a contrary showing can only be explained as an unconscious—or concealed—means of penalizing the insanity defense.

The difficulty in impeaching the punitive motive is that it is easily concealed behind statements of the acceptable desire to rehabilitate the defendant or to protect society. Whether the acquittee is truly ill at the time of the commitment hearing or even at the moment of his offense, whether he is susceptible to rehabilitation in an institutional setting, or whether he is predictably dangerous are all questions that may be endlessly debated. As long as there is a possibility of treatable insanity or dangerousness, however, it is unlikely that there will be a public outcry against veiled punishment of insanity acquittees.

D. The Lower Order of Proof May Discourage Spurious Insanity Pleas

In *Lynch v. Overholser*, the Supreme Court speculated on the Congressional purpose in placing the burden of proof of showing recovery on the acquittee, rather than placing the burden of showing continued insanity on the state in District of Columbia criminal commitment statutes. The Court said, “Congress might have considered it appropriate to provide compulsory commitment for those who successfully invoke an insanity defense in order to discourage false pleas of insanity.”

Other courts have used this dictum as support for a lower standard of proof in all criminal commitment proceedings if not otherwise directed by statute.

The ready objection to the use of the lower standard to deter spurious pleas is that it also penalizes legitimate insanity pleas. The greater certainty of confinement due to the state's lower burden of proof would give pause to the defendant who feels that he was insane at the time of his crime, but that he has since improved to the point that the state would not be able to meet the same burden it would have to meet in a civil hearing. This sincere defendant may think twice before invoking the insanity defense, however unpleasant he finds the prospect of prison, for fear that the lower burden of proof will mean certain loss of

59. Id. at 715.
60. See, e.g., Warren v. Harvey, 632 F.2d at 932; United States v. Brown, 478 F.2d at 611.
liberty if his heartfelt insanity plea succeeds.

If the legitimate pleader's increased trepidation may be seen as a penalty, then the state has unconstitutionally burdened the exercise of a statutory privilege. Even if the insanity defense is merely a privilege discretionarily granted by the legislature, the state may not punish those who take advantage of the grant by satisfying prescribed standards of proof. Just as the state may not penalize or heavily burden the right to parole or probation, which are also discretionarily granted, the state may not punish the insanity plea once it has granted all defendants the right to so plead. Nor may the state deprive the defendants of traditional due process procedures as a condition of the use of the state-created insanity defense.

On another level, it is questionable that the lower standard of proof operates as a significant deterrent to disingenuous pleas. It seems unlikely that even a dishonest defendant willing to risk institutionalization as an alternative to imprisonment would be less likely to take the risk merely because the likelihood of institutionalization is increased under the state's lower order of proof. Presumably, the defendant's aversion to prison life, and not the likelihood of escaping confinement altogether, is what motivates the false insanity plea; few defendants could reasonably expect to be set scot-free, especially after committing a violent crime, even under a system which uses a rigorous standard of proof of insanity. This unprincipled defendant's distaste for prison is likely to prompt the same disingenuous plea even under eased standard of proof of insanity.

Even if the standard of proof can be demonstrated to deter false pleas, one may question whether the chilling effect on legitimate pleas is a price society wishes to exact for so limited a benefit. And if it does not, as the argument above suggests, the deterrent rationale becomes

61. The Supreme Court has not ruled on the issue of whether the insanity defense is a constitutionally required right.
64. See Sherbert v. Verner, 374 U.S. 398, 404-05 n.6 and accompanying text (1963) (state created benefits).
65. The court in Warren v. Harvey opined, "Even if it may be said that such deterrence is slight, we do not believe that the Constitution forecloses the states from making use of it." 632 F.2d at 932.
66. There may be greater support for the notion that the defendant would falsely plead insanity in hopes of drawing a shorter term of institutional confinement than he might have spent in prison. The author is not aware of any statistical studies which would show that periods of institutionalization are on average shorter than penal terms, however.
another veiled justification for penalizing the insanity defense.

III. THE LOWER STANDARD OF PROOF AND EQUAL PROTECTION

The doctrine of equal protection under the law has never required that government treat all persons—or even all insane persons—equally. It merely requires that differing treatment of different classes of people bear a reasonable relation to the legitimate government purpose for which the distinction was created, and that the differing treatment be not so discrepant as to be arbitrary.67

The Supreme Court's opinion in Jones v. United States,68 briefly disposed of the petitioner's argument that he was entitled to be judged by the same standard of proof as civil commitment candidates. But the Court did not frame its discussion in equal protection terms. A number of lower courts, however, have explicitly relied on equal protection analysis to dispose of acquittees' attacks on criminal commitment schemes. In Bolton v. Harris,69 the District of Columbia Circuit held that the difference between civil committees and criminal acquittees does not justify abandonment of the procedural safeguards provided in civil commitment hearings.70 But neither Bolton nor any other court has held that differences between the classes of insanity acquittees and prospective civil committees may not support different commitment procedures.

A. The Presumptions of Continuing Insanity and Dangerousness

What is noteworthy about cases that have examined differences between criminal and civil commitment procedures is that they rely heavily on the faulty assumptions discussed above to reconcile these differences with equal protection concerns. Until recently, the success of such reconciliation was virtually unquestioned in courts.

In United States v. Brown,71 for instance, the District of Columbia Circuit upheld a District code provision requiring the government to show by a preponderance of the evidence that the defendant is mentally ill, notwithstanding the court's concession that civil commitment might require a higher standard.72 The court reasoned that erroneous commitment harms the acquittee less than the civil committee and

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69. 395 F.2d 642 (D.C. Cir. 1968).
70. Id. at 651.
72. See supra note 55.
that this distinction validly grounds different commitment procedures. More recently, the Supreme Court of Kansas upheld the state legislature's provision of mandatory indefinite commitment of insanity acquittees, without a post-acquittal adversary hearing, on the ground that the acquittee's established dangerousness is one of several satisfactory bases for treating criminal acquittees differently.

One matter recently considered by the Supreme Court highlighted the insufficiency of these longstanding assumptions under equal protection analysis. In *Benham v. Edwards*, a class of plaintiffs attacked Georgia's statutory requirements for commitment and release of insanity acquittees as violative of due process and equal protection guarantees. Under the Georgia law, the commitment and release procedures for insanity acquittees, as interpreted by prior Georgia state court decisions, differed from those for civil committees in several ways. Among the differences: the state provided a commitment hearing for the acquittee only upon his timely application, whereas civil commitment required an adversary hearing in all cases; both at the initial commitment stage and at the release hearing, the acquittee was presumed to be insane whereas the civil committee was not presumed to be insane; insanity acquittees bore the burden of proving their fitness for release, whereas the state bore the burden of showing by clear and convincing evidence the need for the civil committee's continued confinement; the release of the insanity acquittee had to be ordered by the committing court, whereas the hospital was free to release the civil committee at any time without judicial approval.

The defendant state offered the trial court's findings of insanity as an adequate basis on which to distinguish the acquittee's position from that of the civil committee. But the court stated that reliance on this factor was inappropriate because it "ignored the irrelevance of the findings rendered by the criminal court to the determination which must be made by the committing court," and that "[t]he presumption . . . does not reflect a relevant difference between [civil] committees and insanity-acquittees, and does not justify the different allocation of the burden of proof." On the issue of burden of proof, the court refused to be bound by the "judicial myopia" of the Connecticut dis-

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73. 478 F.2d at 611.
75. See supra note 30.
77. 501 F. Supp. at 1063.
78. Id. at 1067.
district court in the lower *Warren v. Harvey* decision and dismissed the state's argument that the trial finding immunized the separate treatment from constitutional attack. It held that the clear and convincing evidence standard which *Addington* prescribed for civil commitment was also required for commitment and release of insanity acquittees. In addition, the court required the state to provide the same state-initiated initial commitment hearing to insanity acquittees that it provided to civil commitment candidates. It said, "On equal protection grounds . . . there is no rational explanation why insanity acquittees should not be guaranteed a state initiated hearing to determine their present mental state." The court did uphold the requirement that a court approve the release of insanity acquittees, but only with respect to those acquitted of violent crimes; other acquittees, the court held, must be released according to the same procedures that govern the release of civil committees.

On appeal, the Fifth Circuit agreed with the district court that the presumption of continuing dangerous insanity violated due process and equal protection principles, concluding that there was "no conceivable rational basis for applying the presumption against insanity acquittees and not against [civil] committees." The court also agreed that equal protection of the laws required the state to bear the burden of showing clear and convincing evidence of continued insanity both at a mandatory state-initiated commitment hearing and at release proceedings, asserting that "there is no rational basis to justify treating the two classes differently with respect to the burden of proof or with regard to the right to a state-initiated hearing."

The crux of the district court's objection to the presumption of continuing insanity was that it is "not based on valid scientific evidence." The Court of Appeals said, "Commentators have questioned the accuracy of the intuitive assumption that insanity acquittees are

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79. 472 F. Supp. 1061 (D. Conn. 1979) (relying on the dictum in *Lynch v. Overholser*, 369 U.S. 705 (1962) to the effect that an insanity acquittee may properly bear the burden of proving his sanity once he has raised the insanity defense). See supra text accompanying notes 58-59.
81. 678 F.2d at 519.
82. Id. at 525.
83. Id. at 521.
84. 501 F. Supp. at 1068. The district court partly based its analysis on the peculiar wording of Georgia statutes which ascribed dangerousness to civil committees and which therefore made more incongruous the requirement that the state satisfy a higher burden of proof to commit them than to commit insanity acquittees. See *id.* at 1069. But much more of the court's analysis focused on the questionability of the presumption of dangerousness per se.
more dangerous."

But these opinions could not survive Jones. Benham relied on an opinion by the Supreme Court in Baxstrom v. Herold for the proposition that equal protection will not suffer a presumption of continuing mental illness solely on the basis of acquittal by reason of insanity. In light of Jones, that was obviously further than Baxstrom intended to go. When the Benham case reached the Supreme Court, the Court vacated the decision and remanded to the Court of Appeals for further consideration consistent with Jones.

The two Benham opinions are no longer of precedential value. But this author believes that their reasoning is cogent and that they retain strength in questioning the intuitive belief that all insanity acquittees are dangerous or even insane at the time of the commitment proceeding. As these opinions demonstrate, this assumption is the underpinning of all statutory classifications that dilute the procedural protections afforded acquittees. If the assumption is shown to be invalid, the classifications cannot withstand equal protection analysis.

B. The Standard of Judicial Review of Divergent Commitment Schemes

It has been suggested that courts treat insanity acquittees as a suspect class for purposes of equal protection analysis. The gist of these arguments is that the mentally ill have long suffered discrimination at society's hands. Moreover, commentators argue, their mental state in-

85. 678 F.2d at 526-27. The appeals court also discussed the statutory ascription of dangerousness to civil committees. Id. at 527. See supra note 84.
87. In Baxstrom, the Court considered the dismissal of a habeas corpus petition by a convicted violent offender seeking release from a New York State mental facility used to house criminals psychiatrically determined to be insane while serving their sentences. One of the petitioner's claims was that equal protection forbade his confinement beyond the expiration of his penal sentence without the same type of judicial determination of insanity to which civil committees are entitled under New York law. The Court agreed with the petitioner that equal protection would not allow the state to deny established civil procedural protection to a class of civil commitment candidates solely because of the imminence of their release from penal detention. But the Court's basic objection to the New York procedure was that there was no judicial finding of insanity. It became clear in the Jones opinion that the Court would find no constitutional flaw in a presumption of continuing mental illness after a trial determination of insanity.
90. See Note, Mental Illness: A Suspect Classification?, 83 Yale L.J. 1237, 1258-59
herently disenfranchises them, limiting their ability to improve their fare. Even established procedures for self-help, such as many states’ provision for the committee to petition the court for release, are difficult for the mentally disabled because of the very nature of their disability.91

Courts have not been receptive to arguments that insanity acquittees constitute the type of “discrete and insular minority,”92 historically subject to discrimination, to which courts have extended special protection by designating them “suspect classes”93 for equal protection analysis. Nor has the right to avoid confinement been recognized as a “fundamental right,”94 a right so vital to liberty that the state may restrict it only by showing a compelling state interest.95

However, courts which have rejected strict scrutiny as an appropriate mode of analysis have assumed that the only alternative standard is the minimum rationality test.96 This deferential standard normally results in validation of the legislative classification97 since the state need only advance any legitimate governmental interest which may be

(1974).

91. For an example of a court’s view of the inherent disability of civil committees, see Fasulo v. Arafeh, 173 Conn. 473, 478, 378 A.2d 553, 555-56 (1977):

Any procedure to allow the release of involuntarily confined committed individuals must take account of the controlled and often isolated environment of the mental hospital from which the confined individuals will seek release. It must calculate the possible incompetence of those confined, their limited knowledge of release procedures, the cost of pursuing review and the amount of effort necessary to pursue review. Further, the procedure must be adapted to the possible effect of drugs or other treatment on the patient’s capacity and must be formulated with consideration of institutional pressures to rely on the medical judgments of the hospital staff rather than to pursue extraintitutional legal remedies.


93. This designation has been reserved for racial and ethnic groups, see, e.g., Korematsu v. United States, 323 U.S. 214, 216 (1944) and aliens, see Graham v. Richardson, 403 U.S. 365, 372 (1971).


95. It is not surprising that courts have rejected strict scrutiny as a test for postacquittal commitment schemes. Strict scrutiny is generally seen as a “death knell” for the subject of scrutiny. See, e.g., Gunther, The Supreme Court, 1971 Term-Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972). To accord commitment schemes strict scrutiny would conflict with the court’s general design to uphold statutes that confine individuals perceived as dangerous.


furthered by the classification.

The Supreme Court has, however, also used an intermediate standard of review that appears to have been ignored in litigation involving the mentally ill and the insane. The Court has used this standard to judge classifications affecting classes of people who share an immutable characteristic, like sex, that is determined by genetic heritage and "bears no relation to ability to perform or contribute to society." The Court has also used the standard to review state rules which implicate important, though not fundamental, rights.

The rationale of this middle scrutiny is essentially the same as that which supports strict review—i.e., that certain minorities have suffered such historical disadvantage and political powerlessness that the judiciary must stand between them and the state, or that certain vital rights deserve special protection. The only difference is in the degree of protection to which the Court believes the class or the right is entitled.

Classifications using "sensitive, although not necessarily suspect, criteria" which have come under intermediate review include gender-based classifications and classifications based on age and illegitimacy.

Classifications which touch important rights, in the Court's eye, include governmental interference with the retention of a driver's license and with the receipt of such subsistence benefits as food stamps.

Once it is determined that intermediate review applies, the state must articulate a reason to support its classification; the court will not supply an imagined purpose as it may do under minimum scrutiny. Furthermore, the classification may be neither significantly overinclusive nor underinclusive and must bear a substantial relation, not merely a plausible relation, to the state interest it serves. Finally, the state must advance an important interest, not merely a legitimate in-

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102. Id. § 16-31 at 1090.
There are two reasons that courts may not deem criminal commitment schemes worthy of intermediate review. First, it may be argued that the insanity acquittee's commitment under the lower standard of proof does not amount to unfair treatment at the hands of a legislative classification that "bears no relation to ability to perform or contribute to society." The classification that allows him to be more easily committed is purportedly based on the acquittee's record of dangerousness as determined at trial.

The counterargument is that, although different standards for civil and criminal commitment are ostensibly based on the acquittee's record of dangerousness, there is wide disagreement as to the dangerousness of acquittees as a class. That is not to say that refinement of the legislative classifications to allow, for instance, commitment of acquittees of longstanding violent repute would not cure this overinclusive-ness. But it may be argued that the lower standard for post-acquittal commitment of the criminally insane as a class ill serves the state's legitimate purpose of protecting society.

Even if we conclude that the state's purposes are closely served by this classification, it may be argued from another angle that divergent commitment procedures merit heightened review. Many decisions that have used intermediate review have stressed the disadvantages to which the plaintiffs have been traditionally subject. It may be urged that this factor should be controlling on whether to employ the evolving intermediate standard.

If this criterion is heavily weighed, mental illness may certainly be seen as a suspect classification. Candidates for criminal commitment, having escaped penal sanctions, are likely objects of retribution by juries, courts and even legislatures which prescribe lower procedural protections for acquittees than for civil committees. Even a disturbed individual who has never had any difficulty with the law or displayed any dangerous tendencies may, under some statutes, be deprived of the right to hold a trade license, to vote or to contract, although he

109. Id.
110. See supra text accompanying note 100. Frontiero v. Richardson, 411 U.S. at 686.
111. See supra text accompanying notes 28-29.
112. See supra text accompanying note 21.
114. Burt, Of Mad Dogs and Scientists: The Perils of the 'Criminal-Insane', 123 U.P.A.L. Rev. 258, 279-80 (1974); see supra text of Section IIC.
may perform these functions more competently than some who are deemed sane.\textsuperscript{118} This does not take into account the innumerable subtle ways that individuals, schools and businesses may discriminate against the mentally disturbed in social and commercial contexts.\textsuperscript{119}

Moreover, the obvious lack of representation of known mentally ill persons on legislatures and courts necessarily reduces the influence of the mentally ill on these major organs of reform. These bodies may or may not be sensitive to the needs of the mentally ill. But it is incontrovertible that the nature of the affliction impedes access to government that more stable individuals and their interest lobbies enjoy. It is precisely this combination of unequal access to the engines of change and historical discrimination\textsuperscript{120} that has created the need for higher levels of review.\textsuperscript{121}

The second justification for declining to use the intermediate standard is that the Supreme Court has yet to identify the need to avoid erroneous commitment as an important right under the second strand of equal protection analysis.

Those Supreme Court decisions which suggest that the Court highly values protection from erroneous commitment have dealt with commit-

\begin{itemize}
\item \textsuperscript{117} E.g., \textit{Cal. Civ. Code} § 40 (West 1985).
\item \textsuperscript{118} See generally \textit{Note, Mental Illness: A Suspect Classification?}, 83 \textit{Yale L.J.} 1237, 1267-68 (1974) (discussing the consequences of treating the mentally ill as a suspect class).
\item \textsuperscript{119} See \textit{Note, Developments in the Law—Civil Commitment of the Mentally Ill}, 87 \textit{Harv. L. Rev.} 1190, 1200 (1974). That courts may consider evidence of nonobvious societal discrimination in deciding the appropriate level of review is shown by Justice Brennan’s opinion in \textit{Frontiero v. Richardson}, 411 U.S. at 685-86.
\item \textsuperscript{120} See \textit{Brown v. Board of Education}, 347 U.S. 483, 489-90 (1954).
\item \textsuperscript{121} One may well ask why this severe disadvantage does not justify the highest level of scrutiny. The Supreme Court initially reserved this most rigorous review for classifications that bear on groups of people whose identifying characteristic is more obvious than that of the mentally diseased and who have traditionally suffered the highest levels of discrimination—i.e., those based on race and ethnic origin. \textit{See supra} note 93 and accompanying text. However, the extension of strict scrutiny to classifications based on alienage, \textit{Graham v. Richardson}, 403 U.S. at 372, undermines the argument that only those whose identifying characteristic is unconcealable are entitled to the highest order of judicial protection. Moreover, the Court has strictly scrutinized statutory classifications that affect fundamental rights. \textit{See supra} note 94 and accompanying text. There is an argument that the right to avoid erroneous institutionalization is of great weight, if not fundamental. \textit{See infra} text accompanying notes 122-23. The tenacious advocate, then, may argue that classifications affecting the mentally ill are entitled to strict scrutiny because the mentally disturbed have suffered severe discrimination. \textit{See supra} notes 114-19 and accompanying text. This combination, she may urge, militates in favor of the highest review even if neither standard for invoking strict scrutiny is precisely satisfied alone.
\end{itemize}
ment statutes whose hearing requirements were clearly infirm or which provided no hearing whatever on the elements of the offense charged. These cases may be distinguished from the situation of the insanity acquittee. The acquittee has, again, purportedly been determined to be dangerous in an adversary hearing that satisfies due process standards. This, it is said, greatly reduces the likelihood of erroneous commitment and obviates the need for searching review of the standards under which the acquittee is subsequently committed.

However, increasing judicial recognition of the unreliability of psychiatric evidence and of lay jury determinations of insanity may overcome the argument that the trial findings justify the presumption of continuing illness and dangerousness. If the Supreme Court can be convinced that trial findings of insanity do not bear on the issues at the commitment hearing, the possibility of erroneous commitment may move the Court to use the important right doctrine to protect the acquittee by intermediate review.

IV. Conclusion

The unspoken rationale for eased criminal commitment standards is that such treatment pacifies public resentment of the insanity defense. To say that insanity acquittees as a class are more dangerous than civil committees—when the psychiatric community has not yet resolved that even violent acquittees are more predictably dangerous than civil committees—is not convincing. The only reasoning that can be imputed to educated lawmakers and judges who openly rely on the dangerousness concept is that the public would not understand the release of persons who averred that they are not responsible for their actions. To say that the trial finding supports a lesser commitment hearing for acquittees—when the hearings are clearly different in scope

122. E.g., In re Gault, 387 U.S. 1 (1976) (Arizona procedure for committing juvenile delinquents to state industrial school which did not require notice of charges or hearing schedules, presence of complainant for purposes of cross-examination, presence of counsel, privilege against self-incrimination or compilation of record failed due process).
123. Specht v. Patterson, 386 U.S. 605 (1967) (Colorado sex offender statute allowing sentences of indeterminate length upon a finding that the defendant represents a public threat or is an habitual offender or is mentally ill could not be used to sentence defendant convicted under separate indecent liberties statute; defendant entitled to the full panoply of due process rights on the issues that comprise the offense before he may be sentenced for such offense).
124. See, e.g., Hamann, The Confinement and Release of Persons Acquitted by Reason of Insanity, 4 HARV. J. ON LEGIS. 55, 62 (1966-67); MODEL PENAL CODE, Tent. Draft No. 4, § 4.08, Comment(1955) (“The provision for automatic commitment . . . may also work to the advantage of the mentally diseased or defective defendants by making the defense of irresponsibility more acceptable to the public and to the jury”).
and purpose—is to conceal the intuition that it is simply unconscionable to free the malefactor.

The fashioning of laws that least offend the public is no shoddy objective. But one may conceive of laws regarding the disposition of acquittees that would more equitably serve the truly ill than do many current rules, and yet still comport with mores.

The above discussion suggests guidelines for reform. Some of the following guidelines are no more than goals to be attained, rather than specific statutory recommendations:

a) All states should afford insanity acquittees a hearing on the issue of insanity. This flows from the inherent differences in the nature of the trial finding of insanity and the commitment inquiry and from the possibility of the acquittee's mental improvement between the offense and the commitment hearing.

A brief period of detention for psychiatric observation prior to the commitment hearing should be required, but should be no longer than reasonably necessary to observe the patient.

b) If the local statute does not prescribe a standard of proof at the commitment hearing, trial courts should be statutorily directed to instruct the jury to consider the defendant's plea of insanity with regard to his mental state only at the moment of the alleged offense. This would produce a clearer trial record so that the court which conducts the commitment proceeding will not be tempted to use the trial findings as a basis for lowering the state's burden on the issue of the acquittee's overall sanity.

c) The legislature should be permitted to retain the presumption of continuing dangerousness only as to defendants acquitted of violent crimes. Although the psychiatric community has not resolved doubts as to the predictability of violence, it is not unreasonable for the courts to err, if at all, on the side of safety. This is especially so given the weight of authorities who do view past violence as a viable index of future behavior. The presumption of dangerousness, however, has no place in the case of nonviolent acquittees.

For purposes of fairness, and to satisfy equal protection requirements, the presumption of continuing dangerousness should also operate against civil committees whose history includes violent episodes, whether or not these have been the subject of criminal prosecution.

d) In the case of both violent acquittees and violent civil commitment candidates, the state should have to meet the same level of proof of insanity (a clear and convincing evidence test, under Addington). If

the burden is shifted to the acquittee in a criminal commitment hearing, the acquittee should be compensated by lowering the level of proof of sanity to a preponderance of the evidence.

e) The sole criterion for the term of commitment should be the mental state of the acquittee. The commitment period should bear no relation to the period of incarceration allowed by the penal statute covering the acquittee's offense. If the acquittee's mental health improves to the point that psychiatrists consider him no longer dangerous, he should be released, regardless of the brevity of his confinement relative to possible penal terms. Conversely, if the acquittee is deemed a danger to himself or to others beyond the period for which he could have been imprisoned had he been convicted, his release should not be authorized.

The possibility of longer institutional confinement than the criminal statute allows may chill the assertion of the legitimate insanity pleas. But this is an unavoidable result if the state is to maintain the distinction between the purposes of penal confinement and institutionalization. If the purpose of committing the acquittee is truly to protect society and aid his recovery, there can be no justification for release at any moment that would compromise these goals.

f) Procedural standards for release of acquittees should be equivalent to those for release of civil committees. Once the state has succeeded in committing the acquittee, it has no legitimate purpose in distinguishing release mechanisms. As stated above, the sole criterion for confining both the acquittee and the civil committee should be the confinee's mental state. Therefore, allowable frequency of application for release, requirements of court approval for release and burdens of proof at release hearings should be the same for both classes of confinee.

If the state determines to use more rigorous release procedures for persons acquitted of violent offenses, it should use these same procedures for civil committees whose histories indicate a tendency toward violence, in accordance with suggestion c, supra.

g) Courts hearing attacks on statutory commitment schemes should treat the insanity acquittee and all mentally ill persons as a quasi-suspect class for equal protection purposes.

Strict scrutiny has been rightly reserved for review of fundamental rights and for the benefit of racial and ethnic minorities and aliens, whose identifying characteristic is often undisguisable and who have been the subject of calculated institutional discrimination in the past.

There is some argument that the right to avoid erroneous commitment is a vital constitutional right, qualifying for even the strictest of scrutiny. Certainly there is an argument that it is at least as important
a right as those which have been the subject of intermediate review.

But the factor that places the mentally ill—and insanity acquittees in particular—in the company of other quasi-suspect classes is their long history as objects of discrimination and suspicion. Just as women have long been denied access to the higher level job market and, before that, to the ballot box, so the mentally ill have been shut off from opportunities in business and social life.

The argument that intermediate review should not be extended to classifications legitimately related to ability fails to consider the factors that isolate the mentally ill. The very nature of mental affliction removes the afflicted from positions of influence and undermines their access to even the most elemental source of leverage—the ballot box. Moreover, the mentally ill in confinement are, by the nature of their affliction and due to the effects of medication, often unable to effectively exercise even those protective rights the state does grant them.

This combination of the importance of the right to avoid unjust confinement and the peculiar helplessness of many disturbed people militates in favor of heightened judicial protection.