Mental Commitment and the Principle of Equivalence

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MENTAL COMMITMENT AND THE PRINCIPLE OF EQUIVALENCE

The state's correctional process can impinge upon an individual's liberty in several ways. In Washington, for example, a person can be involuntarily deprived of his liberty after a finding of criminal culpability, delinquency or dependency, mental disorder, chronic alcoholism, sexual psychopathy, or after a determination of incompetence to stand trial or an acquittal on grounds of insanity. This comment focuses upon those procedures which can result in commitment to mental institutions. Because of the large number of persons deprived of their liberty through civil and criminal commitment to mental institutions, it is important to critically evaluate the substantive and procedural judicial safeguards provided to those committed individuals. These safeguards are necessary to insure that such individuals are not being deprived, without due process of law, of their constitutional right to freedom.

Although the United States Constitution requires that no person be deprived of liberty without due process of law, courts have often applied different standards of due process to analogous deprivation-of-liberty situations. But these situations, whether criminal trials, crim-

3. See id. ch. 71.05. For an extensive review of Washington's law of civil commitment see Comment, Progress in Involuntary Commitment, 49 WASH. L. REV. 617 (1974).
5. See WASH. REV. CODE ch. 71.06 (1974).
6. See id. ch. 10.77.
7. In 1972, 169,032 persons were involuntarily committed to state and county mental hospitals. Additionally, 9,261 persons were committed to mental institutions after being found incompetent to stand trial. Note, Developments in the Law—Civil Commitment of the Mentally Ill, 87 HARV. L. REV. 1190, 1193 n.3 (1974) [hereinafter cited as Developments]. This number almost equals the 197,838 persons incarcerated in state and federal prisons at the end of 1971. U.S. BUREAU OF THE CENSUS, U.S. DEP'T. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 164 (95th ed. 1974).

The traditional substantive due process bases for this large scale confinement of the mentally ill are the doctrines of parens patriae and the police power. It has been recently suggested that neither parens patriae nor the police power can properly be employed as a doctrinal basis for mental commitment. See Article, Substantive Constitutional Rights of the Mentally Ill, 7 U. CAL. DAVIS L. REV. 128 (1974).

8. U.S. CONST. amend. XIV.
inal commitment proceedings, or civil commitment proceedings, are more similar than they are different. They have the same goals of societal protection and individual rehabilitation and follow similar procedures, involving both an adjudicatory phase (trial or hearing) and a dispositive phase (sentencing or commitment). Furthermore, whether the procedure is labelled a trial or a commitment proceeding, the sanction—deprivation of liberty—is the same. This comment advances the argument—herein referred to as the principle of equivalence—that because these trial and commitment proceedings are analytically more similar than different, the same standards of due process should be applied to each.

I. DUE PROCESS IN CIVIL COMMITMENT PROCEEDINGS—THE SEARCH FOR FEDERAL CONSTITUTIONAL STANDARDS

Traditionally, states have taken a restrictive view of patients’ rights

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9. Courts have generally failed to recognize this principle and have therefore failed to apply the same standards of due process to all deprivations of liberty. Commentators have generally agreed with the reasoning of the majority of the courts. See, e.g., Leavy. The Mentally Ill Criminal Defendant, 9 CRIM. L. BULL. 197. 200 (1973).

Some courts, however, have begun impliedly to recognize a limited version of the principle of equivalence. In In re Gault, 387 U.S. 1 (1967), the United States Supreme Court noted that juvenile proceedings are essentially the same as adult criminal proceedings in terms of the basic nature of the proceedings and of the available sanctions. The Court held that the due process and equal protection clauses of the fourteenth amendment require that the protections afforded a defendant in a juvenile proceeding be substantially the same as those afforded in a criminal trial.

The principle of equivalence has not been applied as broadly in the area of mental commitment. But the Supreme Court has recognized that equal protection requires that one facing commitment to a mental institution through the criminal system be afforded the same rights as those provided to one facing civil commitment. See Baxstrom v. Herold, 383 U.S. 107 (1966). The Court, however, has not yet addressed the federal procedural due process question in civil commitment proceedings.

Nevertheless, the deprivation of liberty occasioned by mental commitment may be equal to if not greater than that suffered during prison incarceration:

By its very nature, confinement at an institution for the criminally insane is far more restrictive than at a prison. Nothing more dramatically illustrates this difference than the petty indignities to which inmates in the former are subjected.

Accordingly, we would delude ourselves if we believed that a prisoner’s transfer to a prison maintained for the criminally insane is a mere administrative matter. Prison and asylum are divided by far more than the few miles that separate Clinton and Dannemora.

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at involuntary commitment proceedings, for unless the legislature had provided otherwise, the requirements of procedural due process were deemed to have been met so long as notice and an opportunity to be heard were provided. This apparent lack of concern for individual rights generally has been based on the notion that the state, as parens patriae, is acting for the good of the potential patient.

The only case in which the United States Supreme Court has dealt directly with the procedural due process rights of those subject to civil commitment proceedings was the 1901 case of Simon v. Craft. In Simon, the Court held that the due process clause of the fourteenth amendment required that one subjected to an involuntary lunacy hearing be given notice of the proceedings and an opportunity to defend. More recently, the lower federal courts have frequently considered the due process rights of those subject to civil commitment. In 1968 the Court of Appeals for the Tenth Circuit held in Heryford v. Parker that due process rights applicable to involuntary civil com-
mitment included the right to counsel at commitment hearings. In *Dixon v. Attorney General*\(^4\) the Federal District Court for the Middle District of Pennsylvania, relying principally upon the United States Supreme Court cases of *Specht v. Patterson*\(^5\) and *In re Gault*,\(^6\) held that the Pennsylvania Mental Health Act was unconstitutional on its face. Having found the statute to be "almost completely devoid of the due process of law required by the Fourteenth Amendment," the court created a comprehensive set of principles to guide the state in future involuntary commitments.\(^7\) The principles set forth are in most respects the same as those procedural protections which govern criminal trials. Thus *Dixon* represents a systematic effort to deal with the problems of due process in commitment proceedings with a recognition that the situation is not unlike a criminal trial.

In *Lessard v. Schmidt*,\(^8\) a three-judge court sitting in the Eastern District of Wisconsin set forth a scheme of procedural standards to govern civil commitment even more comprehensive than those man-

counsel at his trial." *Id.* at 37. If being involuntarily placed in a mental institution constitutes an equal, if not greater, loss of liberty than does imprisonment, it would seem clear that the *Heryford* decision represents a correct interpretation of the fourteenth amendment.

15. 386 U.S. 605 (1967) (violation of due process not to afford separate hearing and right of confrontation when convicted sex offender is sentenced to indeterminate term under sex offender statute applicable if judge's opinion is that offender is dangerous to public or a habitual offender and mentally ill).
17. 325 F. Supp. at 973–75. Specifically, the state must provide: (1) counsel; (2) a psychiatrist when necessary to assist an indigent in preparing his defense; (3) that all communication between such a psychiatrist and the defendant be privileged; (4) a verbatim transcript and full record of the proceedings; (5) the right to state appellate review, including the provision of counsel and record and transcript without cost to the indigent.

The burden of proof and standard for commitment required in *Dixon* were stated succinctly:

"The fact finder must establish clearly, unequivocally and convincingly that the subject of the hearing requires commitment because of manifest indications that the subject poses a present threat of serious physical harm to other persons or to himself. No commitment shall authorize confinement at Fairview State Hospital absent a specific finding based on a preponderance of the evidence that placement at Fairview State Hospital is necessary. To support such a finding the Commonwealth shall have the burden of proving that there is no facility or part of a facility where the subject can be committed."

*Id.* at 974.

This far-reaching opinion seems to fall short of the ideal only in not providing for a jury trial and in not requiring proof beyond a reasonable doubt.

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dated by Dixon. In holding the Wisconsin civil commitment procedures violative of the due process clause of the fourteenth amendment, the court prescribed certain procedural requirements to be followed in a mental commitment proceeding. The procedural requirements mandated by Lessard include the following: right to notice which fully apprises the individual of the allegations in support of commitment, right to a hearing which affords a realistic opportunity to contest the commitment, right to counsel, right to a jury trial, right to demand that allegations be proved beyond a reasonable doubt, right to invoke the privilege against self-incrimination, and the right to exclude hearsay evidence from the hearing.

It is evident that the courts are beginning to recognize that in the sense of what the defendant or detainee stands to lose, the differences between criminal, juvenile, criminal commitment and civil commitment proceedings are inconsequential because in each case the right to remain at liberty is at stake. Courts are recognizing that procedural safeguards are constitutionally required not only for criminal defendants but for others faced with the possibility of forfeiting the same degree of liberty. Additionally, implicit in the holdings of Heryford, Lessard, and Dixon is the principle that procedural due process protections should be based on the probability that, under the procedure in question, the substantive law will be abused.

Consistent with the trend exemplified by Heryford, Dixon, and Lessard, the Washington legislature in 1973 overhauled the state's civil commitment statute and provided extensive procedural safeguards for persons drawn into the system. The statute accords the detained person the safeguards of notice and hearing. It also specifically pro-

19. It may be too soon to expect full acceptance of the principle of equivalence. Years may pass before the Supreme Court requires a comprehensive set of substantive and procedural constitutional safeguards, such as that set forth in Lessard, in civil commitments. Federal courts which have dealt with the issue of detention prior to an insanity hearing have generally ignored the principle of equivalence and have held that such detention is constitutionally valid if the incarcerated individual is given adequate notice of the availability of habeas corpus and if a due process hearing is held as promptly as is feasible. See In re Barnard, 455 F.2d 1370 (D.C. Cir. 1971) (initial hearing must be held within the first 48 hours of confinement); Anderson v. Solomon, 315 F. Supp. 1192 (D. Md. 1970); Fhagen v. Miller, 306 F. Supp. 634 (S.D.N.Y. 1969).


21. WASH. REV. CODE § 71.05.200 (1974). See also id. §§ 71.05.240, .310.
vides for the right to counsel and the right to a jury trial. Furthermore, the statute places the burden of proof upon the state to establish its allegations “by clear, cogent, and convincing evidence,” a standard of proof which the Washington Supreme Court has termed the civil equivalent of proof beyond a reasonable doubt. Finally, the statutory provisions protect the detained person’s privilege against self-incrimination and provide for periodic judicial review of each person’s commitment. No single order of commitment can exceed 180 days in length. In short, due process rights are well-protected under Washington’s civil commitment procedures.

The fact that Washington and other states have recently incorporated due process safeguards into their civil commitment statutes, however, does not alleviate the need for the promulgation of clear-cut constitutional standards by the United States Supreme Court. As long as the Court continues to avoid the issue of procedural due process in

22. Id. § 71.05.460. The right to counsel in civil commitment proceedings was also mandated by the Washington court in In re Quesnell, 83 Wn. 2d 224, 517 P.2d 568 (1973).
23. WASH. REV. CODE §§ 71.05.300-.310 (1974).
24. Id. § 71.05.310.
27. Id. § 71.05.320.

The policy declaration found in the North Carolina civil commitment act exemplifies the values embodied in these new enactments:

It is the policy of the State that no person shall be committed to a mental health facility unless he is mentally ill or an inebriate and imminently dangerous to himself or others; that a commitment will be accomplished under conditions that protect the dignity and constitutional rights of the person; and that committed persons will be discharged as soon as a less restrictive mode of treatment is appropriate.

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the area of mental commitment, the substantial risk of the use of unfair procedures continues to exist in those states lacking a statutory framework such as Washington's. This problem becomes acute when the principle of equivalence is invoked to bring the due process principles of civil commitment to bear upon the criminal commitment procedures discussed in Part II.

II. DUE PROCESS IN CRIMINAL COMMITMENT PROCEEDINGS

Despite current expansion of statutory due process safeguards in the field of civil commitment, expansion of procedural due process protections in criminal commitment proceedings continues to be slow. The disparity between procedures in civil and criminal commitments is inconsistent with the principle of equivalence advanced in this comment. Some of the barriers to equivalent treatment are beginning to fall, however.

A threshold barrier to the development of a comprehensive set of due process rights in the field of criminal commitment was eliminated in 1967 in *Specht v. Patterson* wherein the United States Supreme Court rejected the notion that the decision to commit a convicted individual to a mental institution as a sexual psychopath involves simply a sentencing decision wholly within the disposition phase of a proceeding. In *Specht*, the Court held that a person could not be ad-

30. See note 12 and accompanying text supra.
32. An examination of the law of due process in criminal commitment proceedings will demonstrate that courts generally are willing to require substantial equivalence between civil and criminal commitment procedures. But if a given state's civil commitment system lacks procedural safeguards, then the principle of equivalence cannot work to upgrade the procedural inadequacies frequently associated with criminal commitment.
33. This comment discusses three types of criminal commitment proceedings: (1) commitment of an accused prior to conviction on grounds of incompetence to stand trial; (2) commitment to a mental institution after acquittal on grounds of insanity; and (3) commitment after a finding of sexual psychopathy or psychopathic delinquency.
34. 386 U.S. 605 (1967).
35. It is clear that any criminal commitment proceeding involves an adjudicatory phase (determination of the existence of a mental condition in a criminal defendant
judged "an habitual offender" under Colorado's Sex Offenders Act absent adequate notice and opportunity to be heard, and by so doing foreclosed the argument that the decision to commit is simply a sentencing option.\textsuperscript{36}

The possibility of commitment can arise at a number of points in the criminal justice process from arrest to imprisonment.\textsuperscript{37} Varying substantive tests and procedural protections have been developed by the courts to be applied at each of these points. An analysis of each point will demonstrate, however, that despite the apparent complexity of existing case law in this field, there are no significant barriers to the recognition of the fundamental equivalence of the various proceedings and the application of consistent due process protections to each of them.

\textit{A. Incompetence to Stand Trial}

Since the mid-17th century the common law rule has been that one can not be required to plead to an indictment or stand trial when so disordered as to be incapable of putting forth a "rational" defense.\textsuperscript{38} In the federal courts, in order to be competent, the defendant must

which warrants his commitment rather than incarceration) and a disposition phase (specification of the nature and duration of the defendant-patient's confinement within the mental health system). On the other hand, a criminal defendant facing a post-conviction sentencing hearing has passed the adjudicatory phase as guilt has already been determined. The United States Supreme Court recognizes the fact that a convicted defendant facing sentencing can be afforded less in the way of due process than an unconvicted defendant. In Williams v. New York, 337 U.S. 241 (1949), the Court held that the sentencing decision was one to be left to the discretion of the trial judge and that the due process clause of the fourteenth amendment did not require the judge either to hold a hearing or to allow the defendant to make a statement before imposing sentence. \textit{See also} Hill v. U.S., 368 U.S. 424 (1962).

Whether the limited scope of due process granted one facing sentencing is constitutionally valid or desirable, or both, is not a question to be dealt with here. It need only be observed that sentencing is clearly distinguishable from criminal commitment in that the former is solely concerned with the disposition phase of the process of depriving one of liberty. Thus an expansion of the rights afforded one facing criminal commitment does not require, as a doctrinal question, a concomitant increase in due process for sentencing hearings. For a discussion of due process in the sentencing hearing see Pugh & Carver, \textit{Due Process and Sentencing: From Mapp to McGautha}, 49 \textit{TEXAS L. REV.} 25 (1970) and Cohen, \textit{Sentencing, Probation, and the Rehabilitative Ideal: The View from Mempa v. Rhay}, 47 \textit{TEXAS L. REV.} 1 (1968).

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possess sufficient present ability to consult with a lawyer with a rea-
sonable degree of rational understanding and must demonstrate a ra-
tional as well as a factual understanding of the proceedings against
him or her. This rule was announced in the case of *Dusky v. United
States*, 362 U.S. 402 (1960), involving the Supreme Court's interpre-
tation of the federal competency statute. Whether the aforementioned
test also represents a substantive constitutional test of competency is not clear. The *Dusky*
case has been cited with approval in other Supreme Court decisions
dealing with competency. Generally, state rules regarding compe-
tency are consistent with the *Dusky* test.

According to Washington statutory law, a person incompetent to
stand trial is one who "lacks the capacity to understand the nature of
the proceedings against him or to assist in his own defense as a result
of mental disease or defect." Consistent with the prevailing view, the
Washington Supreme Court has held that a person incompetent to
stand trial may not be prosecuted.

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40. 18 U.S.C. § 4244 (1970) provides in part:
Whenever after arrest and prior to the imposition of sentence or prior to the
expiration of any period of probation the United States Attorney has reasonable
cause to believe that a person charged with an offense against the United States
may be presently insane or otherwise so mentally incompetent as to be unable to
understand the proceedings against him or properly to assist in his own defense,
he shall file a motion for a judicial determination of such mental competency of
the accused . . .

41. For example, in *Pate v. Robinson*, 383 U.S. 375 (1966), a case dealing with
the right to a hearing on the question of competency in a state court, the *Dusky*
case is not cited with regard to the proper substantive test of competency but rather
for its discussion of the problems involved in a retrospective determination of com-
petency. *Id.* at 387. Justice Harlan, dissenting in *Pate*, states that "the test . . . is
reasonably well settled," citing *Dusky*. *Id.* at 388. In *Drope v. Missouri*, 420 U.S. 170
(1975), the Court made it clear that it is a violation of due process to require a per-
son to stand trial while incompetent, but again the Court declined to spell out the
exact meaning of "incompetent."

42. *See* Note, *supra* note 38, at 457. The test of competency to stand trial differs
from the standard for a plea of not guilty by reason of insanity. This distinction was
pointed out by the Pennsylvania court in *Commonwealth v. Harris*, 431 Pa. 114,
243 A.2d 408, 409 (1968), *quoting Commonwealth ex rel. Hilberry v. Maroney*,
"The test to be applied in determining the legal sufficiency of his mental capacity
to stand trial, or enter a plea at the time involved, is not the M'Naghten 'right
or wrong' test, but rather his ability to comprehend his position as one accused
of [crime] and to cooperate with his counsel in making a rational defense."
*See also* State v. *Page*, 104 R.I. 323, 244 A.2d 258, 265 (1968).

10.77 in 1974, the test of competency was whether a person possessed the capacity
to understand his peril and to rationally assist his counsel. *See, e.g.*, State v. *Ma-

44. *See, e.g.*, State v. *Tate*, 74 Wn. 2d 261, 444 P.2d 150 (1968); State *ex rel.
Mackintosh v. Superior Court*, 45 Wash. 248, 88 P. 207 (1907).
The competency rule developed out of the need to preserve the legitimacy and dignity of the criminal process and in order to facilitate the defendant's awareness of the basis for his punishment, but in operation this has facilitated the permanent incarceration of people accused of even the most petty offenses. The standards for invoking the competency rule and the nature and duration of the confinement that can be imposed on the basis of it, however, have undergone tremendous change in recent Supreme Court decisions.

1. Right to hearing

In *Pate v. Robinson* the Court held that a criminal defendant is entitled to a hearing on the issue of his competence to stand trial. The Court stated that a trial judge is required *sua sponte* to convene a hearing on the question of sanity at any time during proceedings when the evidence before the court raises a "bona fide doubt" as to the defendant's competence. Although *Pate* clearly established the right to a competency hearing and requires that the judge, under appropriate circumstances, raise the issue himself to avoid reversible error, the point at which the right to a hearing arises is not clear. The bona fide doubt test was drawn by the Court from the Illinois statute involved in the case. Whether the Court was merely citing the applicable state standard with approval or elevating it to a constitutional requirement is a question left unresolved by the Court's opinion. The federal courts, however, have employed the bona fide doubt test with

46. See, e.g., *Jackson v. Indiana*, 406 U.S. 715 (1972), where the accused, who was charged with theft of property valued at less than ten dollars, was originally committed, without trial, to what amounted to a life sentence because of the likelihood that he would never be competent to stand trial. The Supreme Court held that, in the absence of a prior hearing, such indeterminate commitments were unconstitutional. See notes 69–74 and accompanying text *infra*.
48. *Id.* at 385.
   (b) If during the trial the court has reason to believe that the defendant is incompetent the court shall suspend the proceedings and shall conduct a hearing to determine the defendant's competency and shall at the election of the defendant impanel a jury to determine that issue. See also *People v. Shrake*, 25 Ill.2d 141, 182 N.E.2d 754 (1962).
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considerable regularity since *Pate v. Robinson* was decided.\(^5\) Washington State has incorporated the bona fide doubt test in its statutory framework.\(^5\) Once the right to a hearing has been established the question arises as to the type of hearing required, *i.e.*, whether the accused is entitled to the benefits of counsel, jury trial, proof beyond a reasonable doubt, and the privilege against self-incrimination.

2. **Right to counsel**

The Federal Constitution requires that an attorney be provided in any proceeding "where counsel's absence might derogate from the accused's right to a fair trial."\(^5\) Washington law is consistent with this constitutional mandate, guaranteeing an accused person the right to counsel, appointed if necessary, at all stages of a competency proceeding.\(^5\) The Washington competency statute also provides defendants the right to have counsel present during any court-ordered psychiatric examinations.\(^5\) Federal court decisions have indicated that court-appointed experts are constitutionally mandated in situations where refusal to provide expert aid would deny the defendant adequate opportunity to make a defense.\(^5\) The Washington statute guarantees indigents the right to retain psychiatric experts to perform examinations and to testify in behalf of the accused.\(^5\)

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51. *E.g.*, Tyler v. Beto, 391 F.2d 993 (5th Cir. 1968); Wilson v. Bailey, 375 F.2d 663 (4th Cir. 1967); United States v. Davis, 365 F.2d 251 (6th Cir. 1966).

52. **WASH. REV. CODE** § 10.77.060 (1974) provides in part: Whenever a defendant has pleaded not guilty by reason of insanity, or there is reason to doubt his competency, the court on its own motion or on the motion of any party shall . . . appoint . . . at least two qualified experts . . . to examine and report upon the mental condition of the defendant.


55. **WASH. REV. CODE** § 10.77.020(4). Some courts have denied the existence of a right to have counsel present at such examinations, apparently upon the grounds that to do so would substantially disrupt the physician-patient relationship and effectively preclude any determination of competency. See, *e.g.*, United States v. Albright, 388 F.2d 719 (4th Cir. 1968); Tarantino v. Superior Court, 48 Cal. App. 3d 465, 122 Cal. Rptr. 61 (1975). See also Thornton v. Corcoran, 407 F.2d 695 (D.C. Cir. 1969) (Bazelon, C.J.).


3. **Burden of Proof**

The question of the burden of proof as to competency in mental commitment proceedings is significant. Because the Supreme Court has never dealt directly with the question of the burden of proof, no federal due process standard exists. State standards vary depending upon the jurisdiction. Tradition and reason, however, have resulted in a presumption of competence, which is analogous to the presumption of innocence. Thus the issue becomes one of the burden to be borne in establishing incompetence. A persuasive argument can be made for the application of the beyond a reasonable doubt standard in all areas of commitment. Under the Washington statute, incompetence must be established by a preponderance of the evidence.

4. **Right to Jury and Privilege Against Self-Incrimination**

It is unclear whether *Pate v. Robinson* requires a jury trial on the issue of competency to stand trial. At least one state court has concluded that it does not. Washington provides for a jury in competency hearings.

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59. This is particularly true when the state is the party asserting the defendant's incompetence. When a defendant is charged with a minor violation, he often is quite anxious to avoid a finding of incompetency because of the hardships that accompany such a finding, e.g., long periods of confinement in a mental institution even though the underlying offense carries only a small fine or jail sentence. See *Janis, Incompetency Commitment: The Need for Procedural Safeguards and a Proposed Statutory Scheme*, 23 Cath. U.L. Rev. 720 (1974). Consequently, by asserting and establishing a defendant's incompetence, the state is imposing a potentially greater burden than that imposed by a criminal conviction. Since the impositions upon the defendant are of an equal magnitude, the state should be required to meet the beyond a reasonable doubt standard in both situations.

60. Wash. Rev. Code § 10.77.090(2) (1974). See also *Young v. Smith*, 8 Wn. App. 276, 505 P.2d 824 (1973) (no requirement that the reasonable doubt test be applied to the determination of competency). Under Washington law, it is unclear what party has the burden of proving incompetence. Presumably the burden is upon the party asserting lack of competence. This is by no means a universal rule. Louisiana, for example, places the burden on the accused to show competence by a preponderance of the evidence. *State v. Flores*, 315 So. 2d 772 (La. 1975).


The case law is divided on the issue of whether one has the privilege against self-incrimination during hearings and psychiatric examinations concerning one's competency to stand trial.\(^6\) A Washington statute protects an accused's privilege against self-incrimination during competency proceedings.\(^6\) The statute also provides that a defendant need not answer questions during a psychiatric examination if he believes that doing so may tend to incriminate him.\(^6\)

5. Nature and duration of confinement

The nature and duration of commitment on the basis of incompetency to stand trial has been considered extensively by the courts. Until recently, prolonged commitments based upon incompetence to stand trial were common.\(^6\) Allegations that such confinement denied the defendant his constitutional right to a speedy trial have been consistently rejected.\(^6\) The interest of the state in the "safekeeping" of an incompetent defendant was deemed sufficient to justify prolonged incarceration.\(^6\)

by placing upon the court the decision whether the defendant is competent to participate in a trial.

63. This issue was clearly presented in McNeil v. Director, Patuxent Inst., 407 U.S. 245 (1972), where the petitioner, McNeil, had been confined in a mental institution for a period beyond his original penal sentence because of his refusal to answer questions put to him by the staff psychiatrists. Writing for the majority, Justice Marshall disposed of the case on general due process grounds without reaching the fifth amendment question. Justice Douglas, in a concurring opinion, concluded that McNeil's refusal to answer the psychiatrist's questions was protected by the self-incrimination clause of the fifth amendment. \^{Id.} at 257. The California Court of Appeals recently concluded that the privilege against self-incrimination is not violated by compelling a defendant to submit to examination by court-appointed psychiatrists. Tarantino v. Superior Court, 48 Cal. App. 3d 465, 122 Cal. Rptr. 61 (1975). Contra, Thornton v. Corcoran, 407 F.2d 695 (D.C. Cir. 1969). For a general discussion of this problem see Fielding, Compulsory Psychiatric Examination in Civil Commitment and the Privilege Against Self-Incrimination, 9 GONZAGA L. REV. 117, 138 (1973).

64. WASH. REV. CODE § 10.77.020(4) (1974).

65. \textit{Id.}

66. See generally Janis, supra note 59 at 722.


68. See, e.g., Daniels v. O'Connor, 243 So. 2d 144 (Fla. 1971). In Daniels, the state's interest in the safekeeping of the patient-plaintiff indicted for rape but found incompetent provided a valid basis for not releasing him when sanity and competency were regained even though he would have been entitled to release if he had been found not guilty by reason of insanity and later regained sanity.
This justification was eliminated by the Supreme Court's decision in *Jackson v. Indiana*. In that landmark decision, the Court held:

[A] person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future. If it is determined that this is not the case, then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant.

The decision was based on the proposition that to do otherwise violates both the equal protection and due process clauses. The Court recognized from the facts that Jackson could never regain his sanity and that, in effect, he had been given a life sentence in a manner totally devoid of the requisite due process. "At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." The Court pointed out that the basis for incompetency commitment is to allow the state to engage in efforts to make the defendant ready for trial. The Court indicated that confinement for this purpose must be temporary and implied that this requires that the defendant receive treatment: "[H]is continued commitment must be justified by progress toward that goal [attaining competency]." An adversary hearing to litigate the issues relevant to the type of commitment contemplated must be held.

The effect of *Jackson* is to limit the duration and nature of commitments based upon incompetency. Commitment on this ground can only be for the period of time necessary to establish whether the de-

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70. Id. at 738.
71. The basis for the equal protection argument was found in the Court's prior decision of *Baxstrom v. Herold*, 383 U.S. 107 (1966) (standards applied to the commitment of a person nearing the end of a penal sentence could not differ from those ordinarily utilized in civil commitment proceedings) and the denial of certiorari in *Schuster v. Herold*, 410 F.2d 1071 (2d Cir.), cert. denied, 396 U.S. 847 (1969).
72. 406 U.S. at 738.
73. Id.
74. Relevant issues might include: the petitioner's ability to function in society, the state's interest in his restraint and the state's ability to aid him through treatment.
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Defendant's incompetency is correctable. If it is not, the defendant must be released or committed via the civil system; if it is, further commitment may be justified, but only so long as treatment can be shown to be achieving demonstrable progress toward the goal of restoring competence. The case leaves open the question of how rapid the progress must be.\textsuperscript{75} What \textit{Jackson} requires in practice, however, simply may be mandatory periodic re-evaluation of the condition of inmates held on this basis to insure that continued confinement is justified by progress toward competence.\textsuperscript{76}

The competency proceedings set out in R.C.W. ch. 10.77 are consistent with the commands of \textit{Jackson}. The statute provides for periodic review of commitment orders and sets 12½ months as the maximum time that an incompetent person may be confined without invoking the civil commitment procedures of R.C.W. ch. 71.05.\textsuperscript{77} In no

\textsuperscript{75} Justice Blackmun observed: “In light of differing state facilities and procedures and a lack of evidence in this record, we do not think it appropriate for us to attempt to prescribe arbitrary time limits.” 406 U.S. at 738.

It seems reasonable to require that the defendant's competency be restored by the time he would have been eligible for parole if he had been convicted and sentenced for the original crime charged. Detention after that point should be based upon civil commitment proceedings. The use of the time of eligibility for parole rather than the time of maximum sentence as the cut-off date for this form of commitment is not without precedent. In United States ex rel. Schuster v. Herold, 410 F.2d 1071 (2d Cir. 1969), cert. denied 396 U.S. 847 (1969), the Court of Appeals for the Second Circuit looked to the length of time the petitioner had been confined beyond the point at which he would have been eligible for parole in measuring the hardship placed upon him by commitment.

\textsuperscript{76} In nearly every case criminal defendants are afforded the privilege of periodic review of their cases and their progress with a view to parole, work release, or other similar programs. See generally G. Giardini, \textit{The Parole Process} 12-16 (1959). See also 18 U.S.C. §§ 4201-03 (1970) (parole provisions). This is precisely the sort of procedure \textit{Jackson} suggests must be utilized in the competency area.

\textsuperscript{77} The procedure commences when it appears to the court that there is reason to doubt a defendant's competency. When such a doubt is present, the court commits the defendant to a hospital or other facility for the purpose of evaluating his mental condition. This initial commitment cannot exceed 15 days. \textit{Wash. Rev. Code} § 10.77.060(1) (1974). If the evaluation indicates that the defendant is incompetent, the court may commit the defendant for an additional 90 days. This commitment is reviewed at a hearing before the 90 days expire. \textit{Id.} § 10.77.090(1). If at this hearing the court finds the defendant incompetent, it may order a second 90-day commitment. This second commitment is reviewed at a hearing and either the judge or a jury makes a finding as to competence. \textit{Id.} § 10.77.090(2). If the defendant is still incompetent, civil commitment proceedings must be commenced to further detain the defendant unless the trier of fact determines that the defendant is dangerous and that there is a substantial possibility that the defendant will regain competency within a reasonable time. If these latter findings are made, the period of commitment may be extended for an additional six months. At the end of this six-month period (12½ months of total confinement), no further extensions are allowed without commencement of civil commitment proceedings. \textit{Id.} § 10.77.090(3).
event can the period of commitment exceed the maximum possible penal sentence for the offense charged.78 Thus Washington competency proceedings conform with the principle of equivalence.79

Because of the similarities between competency hearings and criminal trials the extension of those due process rights which are presently afforded criminal defendants to the accused in competency hearings is reasonable. There appears to be no practical or doctrinal barrier to conducting the competency hearing in the same manner as a criminal trial. Indeed, such a requirement would fill the large void in Supreme Court opinions as to the nature of this hearing. The Jackson Court recognized that competency hearings are at least of the same genus as civil commitment. It severely limited the right of the state to detain individuals for prolonged periods without utilizing the processes that would be used if the individual were involved in a civil commitment proceeding or an actual criminal trial. Confinement because of incompetence to stand trial is not a specialized form of confinement in which meager due process protections are acceptable, but rather it is a process designed to make the defendant competent to stand trial and to which the ordinary forms of due process apply.

B. Commitment Following a Verdict of Not Guilty by Reason of Insanity

1. Insanity determination

The initial verdict of not guilty by reason of insanity in a criminal trial raises few due process problems. A finding of insanity under any of the several American tests80 is sufficient to justify some added state

78. Id. § 10.77.020(3).
79. With respect to the rights to hearing, counsel, and jury trial, there is almost complete equivalence between the civil commitment procedures of Wash. Rev. Code ch. 71.05 (1974) and the competency procedures of id. ch. 10.77. The major distinction between the two procedures is with respect to the burden of proof required. Under id. ch. 71.05, the state can force commitment of an individual only by proving its allegations beyond a reasonable doubt. See notes 24–25 and accompanying text supra. On the other hand, under id. ch. 10.77, the state can force commitment if it establishes incompetence by a preponderance of the evidence. See note 60 and accompanying text supra.
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scrutiny of the person adjudged criminally insane. In the federal courts, the defendant is presumed sane until "some evidence" is introduced to the contrary, which necessitates a jury instruction on the issue of insanity. The burden is upon the government to establish, beyond a reasonable doubt, that the defendant was sane at the time the crime was committed. In Washington, the burden is upon the defendant to show insanity by a preponderance of the evidence.

2. Commitment procedures

When one has been found not guilty by reason of insanity, the difficult decision to commit or release the defendant must be made. Commitment at this stage is justified by one of the two traditional bases for deprivation of liberty, viz., protection of society or treatment of the patient. Some jurisdictions allow commitment only upon a showing of present dangerousness.

tests for establishing insanity: (1) the M'Naghten test; (2) the Durham rule; or (3) the Model Penal Code test.

Under the M'Naghten test, a defendant is not criminally responsible for his acts if, at the time of the act, he was laboring under such a defect of reason, created by a disease of the mind, that he did not know the nature and quality of his act, i.e., he did not know that his act was wrong. Under the Durham rule, developed by the Court of Appeals for the District of Columbia in Durham v. United States, a defendant is not criminally responsible for an act if that act was the "product" of a mental disease or defect. Under the Model Penal Code insanity test, a person is not responsible for criminal conduct if, as a result of mental disease or defect, he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.


81. See, e.g., United States v. Jacobs, 473 F.2d 461 (10th Cir.), cert. denied, 412 U.S. 920 (1973); United States v. Hedges, 458 F.2d 188 (10th Cir. 1972); Wilson v. United States, 288 F.2d 121 (D.C. Cir. 1960). See also Battie v. United States, 209 U.S. 36 (1908) (until evidence is produced by defendant, government's burden of proof satisfied by the presumption arising from the fact that most persons are sane).


83. WASH. REV. CODE § 10.77.030(2) (1974).

84. See note 7 supra.

85. See, e.g., State v. Johnson, 8 Ore. App. 263, 493 P.2d 1386 (1972) (defendant acquitted of crime by reason of insanity cannot be committed merely because her
The fundamental legal issue in this area is whether commitment to a mental institution may follow immediately upon an acquittal on grounds of insanity or whether the state must make some additional showing of the defendant's present dangerous condition beyond the defendant's conviction of a criminal act. Several state courts have held that mandatory commitment following acquittal on the grounds of insanity does not deny due process. The rationale for these cases is that the finding of insanity at the time of the crime creates a presumption of continuing insanity, obviating the need for a separate pre-commitment hearing on the issue of insanity. This presumption makes the commitment decision a dispositional one comparable to the sentencing of a convicted criminal defendant where a statute allows the court no discretion as to the sentence.

The United States Supreme Court apparently finds mandatory commitments to be constitutionally suspect, although it has never squarely faced the issue. In *Lynch v. Overholser*, the mandatory commitment provision of the District of Columbia Code was challenged as denying due process of law by failing to provide for an institutional condition was such that institutionalization was desirable). Likewise, Washington requires a showing of present dangerousness in this situation. See notes 95–96 and accompanying text infra. For a comprehensive review of the state statutes governing this topic see *American Bar Foundation*. supra note 10, at 404–05, 430–43. See also Note. *Commitment Following Acquittal by Reason of Insanity and the Equal Protection of the Laws*, 116 U. Pa. L. Rev. 924, 924–25 (1968).


87. See, e.g., *In re Franklin*, 7 Cal. 3d 126, 496 P.2d 465, 101 Cal. Rptr. 553 (1972). This presumption may well be unrealistic given the time factor between the commission of a crime and trial. See *American Bar Foundation*. supra note 10, at 404 n.290.


89. D.C. Code Ann. 24–301(d)(1) (1973) provides in part:

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...
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quiry into present sanity. The Court avoided that question by interpreting the statute as requiring mandatory commitment only where the defendant had affirmatively pleaded insanity and held that Lynch (who had not affirmatively pleaded the defense) could not be committed without being afforded the same procedural protections afforded those facing involuntary civil commitment.90

In the aftermath of Lynch, some courts have found mandatory commitment procedures unacceptable. In Bolton v. Harris,91 the Court of Appeals for the District of Columbia Circuit found the District of Columbia Code's mandatory commitment procedure to be "constitutionally suspect."92 Accordingly, the court mandated that a hearing establishing present insanity, i.e., at the date of the judgment of acquittal, must be held before the acquitted person can be committed.93 Recently the Wisconsin Supreme Court held that state's
mandatory commitment procedures to be violative of the equal protection clause of the fourteenth amendment.\textsuperscript{94}

Washington law does not allow mandatory commitment after acquittal on grounds of insanity. Instead, whenever the issue of insanity is taken to the jury, the court is required to instruct the jury to return a special verdict which includes a finding as to the defendant’s present dangerousness.\textsuperscript{95} If the defendant is not found to be presently dangerous, the court must discharge him from custody.\textsuperscript{96} Because an acquitted person can be committed only upon a jury determination of present dangerousness, there is substantial equivalence between civil and criminal commitment in this aspect of Washington law.\textsuperscript{97}

3. Nature and duration of the confinement

The Court in \textit{Jackson} implied that one committed as incompetent to stand trial must receive treatment aimed at making him competent, but the nature of confinement required under a not guilty by reason of insanity verdict is as yet undefined. The Court of Appeals for the District of Columbia Circuit in \textit{Ashe v. Robinson}\textsuperscript{98} held that treatment by means of the least restrictive alternative\textsuperscript{99} was required by the terms of

\textsuperscript{95} WASH. REV. CODE § 10.77.040 (1974).
\textsuperscript{96} Id. § 10.77.110 provides in part: If a defendant is acquitted by reason of insanity, and it is found that he is not a substantial danger to other persons, or does not present a substantial likelihood of committing felonious acts jeopardizing public safety or security, unless kept under further control by the court or other persons or institutions, the court shall direct his final discharge.
\textsuperscript{97} There may, however, be a disparity in burdens of proof. Whereas the state must prove dangerousness “by clear, cogent, and convincing evidence” in a civil commitment proceeding, WASH. REV. CODE § 71.05.310, it is unclear what burden of proof is required to establish the present dangerousness of one acquitted on grounds of insanity. Id. § 10.77.040 (providing for a special finding of dangerousness after an insanity acquittal) is silent on the burden issue. Justice Hamilton, in \textit{Alter v. Morris}, 85 Wn. 2d 414, 418, 536 P.2d 630, 632 (1975), recognized this ambiguity but did not resolve it: “The burden of proof on the issue of commitment at the time of acquittal is unclear from the statute.” If in practice the state need only establish present dangerousness by a preponderance of evidence, there is a significant disparity between civil and criminal commitment standards. A similar problem of nonequivalent standards exists with respect to release procedures. See notes 139–48 and accompanying text infra.
\textsuperscript{98} 450 F.2d 681 (D.C. Cir. 1971).
\textsuperscript{99} The District of Columbia Circuit had previously recognized the least restrictive alternative doctrine in \textit{Lake v. Cameron}, 364 F.2d 657 (D.C. Cir. 1966) and
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the statute\textsuperscript{100} applicable to not guilty by reason of insanity commitments in the District of Columbia. Washington's statutory framework is similar to that of the District of Columbia in mandating "adequate care and individualized treatment"\textsuperscript{101} and "appropriate alternative treatment less restrictive than detention in a state mental hospital."\textsuperscript{102} Consistent with the provisions of R.C.W. ch. 71.05 limiting the duration of civil commitment confinement,\textsuperscript{103} Section 10.77.020(3) provides that the period of criminal commitment cannot exceed the maximum possible penal sentence for the offense originally charged. Thus Washington procedures are again substantially consistent with the principle of equivalence.

\section*{C. Commitment of Convicted Criminal Defendants in Lieu of Sentencing to a Penal Institution}

The commitment of a convicted defendant in lieu of sentencing to a penal institution is governed by one of two types of statutes. Sexual psychopath acts, the first type of legislation, allow for the commitment of those found to be not insane but nonetheless dangerous to society because of an inability to control sexual impulses.\textsuperscript{104} Defective delinquency statutes, the second type of legislation, are in-

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\textsuperscript{100} D.C. Code Ann. 21-545(b) (1973) provides in part:

If the court or jury finds that the person is mentally ill and, because of that illness, is likely to injure himself or other persons if allowed to remain at liberty, the court may order his hospitalization for an indeterminate period, or order any other alternative course of treatment which the court believes will be in the best interests of the person or of the public.

\textsuperscript{101} WASH. REV. CODE § 10.77.110 (1974).

\textsuperscript{102} Id. § 10.77.110 (1974). See also id. § 10.77.040 which requires the jury to make a special finding whether the defendant should be placed in treatment that is less restrictive than detention in a mental hospital.

\textsuperscript{103} See notes 27-28 and accompanying text supra.

\textsuperscript{104} Twenty-eight states have enacted special legislation dealing with sexual psychopaths. AMERICAN BAR FOUNDATION, supra note 10, at 362-75. See also Millard v. Harris, 406 F.2d 964 (D.C. Cir. 1968); Petition of Peterson, 354 Mass. 116, 236 N.E.2d 82 (1968); People v. Bailey, 21 N.Y.2d 588, 237 N.E.2d 205, 289 N.Y.S.2d 943 (1968).
tended to provide for the commitment of persons who demonstrate a propensity toward criminal behavior coupled with an emotional imbalance or intellectual deficiency sufficient to render them dangerous to society.\textsuperscript{105} Washington's Sexual Psychopath and Psychopathic Delinquent Act is found at R.C.W. ch. 71.06.\textsuperscript{106}

Although it has been claimed that these sexual psychopath and defective delinquency statutes are civil in nature\textsuperscript{107} and thus beyond the reach of the procedural protections required by the Constitution in criminal cases, the Supreme Court has refused to accept such a view and has chosen to look to the substance rather than the form of such acts. In \textit{Specht v. Patterson}\textsuperscript{108} the provisions of Colorado's sexual psychopath statute were challenged. The state scheme provided that upon a finding that a defendant convicted under some other criminal statute was a sexual psychopath, such defendant could be sentenced, without notice or hearing, to indeterminate confinement in a mental institution. The state argued that this was a mere sentencing alternative within the discretion of the trial judge under \textit{Williams v. New York}.\textsuperscript{109} The Supreme Court rejected this contention, stating that "commitment proceedings whether denominated civil or criminal are subject both to the Equal Protection Clause of the Fourteenth Amendment... and to the Due Process Clause."\textsuperscript{110} The Court analogized the statute to the "distinct issue" involved in the determination that


Similar in rationale to the defective delinquency statutes are the so-called recidivist or habitual criminal statutes. Statutes of the latter type seem to assume implicitly that repeat offenders are in some way "abnormal." Despite this similarity, a full discussion of habitual offender legislation is beyond the scope of the present Comment. Washington's habitual criminal statute is \textit{Wash. Rev. Code \S 9.92.090 (1974).}

\textsuperscript{106} \textit{Wash. Rev. Code \S\S 71.06.010--260 (1974).}

\textsuperscript{107} \textit{See, e.g.}, \textit{People v. Oliver}, 32 Ill. App. 3d 772, 336 N.E.2d 586 (1975) (proceedings under Sexually Dangerous Persons Act are civil, not criminal); \textit{Chenault v. Director, Patuxent Inst.}, 28 Md. App. 357, 345 A.2d 440 (1975) (right to speedy trial does not apply to defective delinquency hearings which are not criminal in nature).

\textsuperscript{108} 386 U.S. 605 (1967).

\textsuperscript{109} 337 U.S. 241 (1949) (due process clause neither requires the judge to hold a hearing nor to give convicted person the opportunity to participate in such hearing prior to determination of sentence to be imposed).

\textsuperscript{110} 386 U.S. at 608.
one was a habitual criminal and expressed agreement with the decision of the Court of Appeals for the Third Circuit in United States ex rel. Gerchman v. Maroney, holding that in such a situation a defendant is entitled to “the full panoply of the relevant protections which due process guarantees in state criminal proceedings.”

The Court in Specht went on to enumerate the procedural safeguards required in a hearing to determine sexual psychopathy as a distinct issue: “Due process . . . requires that [the defendant] be present with counsel, have an opportunity to be heard, be confronted with the witnesses against him, have the right to cross-examine, and to offer evidence of his own.” This enumeration of rights did not include the right to a jury determination of the factual issues or the right to have the state meet a particular burden of proof. Some state courts have taken the view that only those rights specifically enumerated by the Court in Specht apply to sexual psychopath proceedings. This view was recently rejected by the Court of Appeals for the Seventh Circuit in United States ex rel. Stachulak v. Coughlin.

The Supreme Court further clarified the procedural rights of persons committed under sexual offender statutes in Humphrey v. Cady. In Humphrey the Court remanded for further consideration.

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111. Id. at 610. The Court cited Oyler v. Boles, 368 U.S. 448 (1962) for this proposition. Oyler established the principle that a defendant must receive reasonable notice and an opportunity to be heard when faced with an habitual criminal charge.

112. 355 F.2d 302 (3d Cir. 1966) (defendant is entitled to full judicial hearing before imposition of an increased sentence under Pennsylvania’s sex offender statute).

113. Id. at 312.

114. 386 U.S. at 610. See also Sarzen v. Gaughan, 489 F.2d 1076 (1st Cir. 1973).

115. It can be argued that a jury trial is required and that the proper burden is proof beyond a reasonable doubt based upon the Court’s quotation from and explicit agreement with the decision of the Court of Appeals for the Third Circuit in United States ex rel. Gerchman v. Maroney, 355 F.2d 302 (3d Cir. 1966). 386 U.S. at 609-10. See notes 112–13 and accompanying text supra. One commentator has taken this position. Note, Rights of the Person Acquitted by Reason of Insanity: Equal Protection and Due Process, 24 MAINE L. REV. 135, 146 (1967).


117. 520 F.2d 931 (7th Cir. 1975) (due process requires that the reasonable doubt standard be applied in proceedings under the Illinois Sexually Dangerous Persons Act). See also In re Andrews, 334 N.E.2d 15 (Mass. 1975) (sexual dangerousness must be proved beyond a reasonable doubt); People v. Jetter, 15 Cal. 3d 407, 540 P.2d 1217, 124 Cal. Rptr. 633 (1975) (same); Syvock v. State, 61 Wis. 2d 411, 213 N.W.2d 11 (1973) (burden on state to satisfy trier of fact to a reasonable certainty by the great weight of credible evidence).

118. 405 U.S. 504 (1972).
an appeal challenging various aspects of Wisconsin’s sexual deviant statute. The petitioner, Donald Humphrey, was convicted of contributing to the delinquency of a minor and sentenced to a one year jail term. On the basis of a finding that under the applicable Wisconsin statute, his act was “probably directly motivated by a desire for sexual excitement,” Humphrey was referred to the Department of Health and Social Services for examination. The Department recommended specialized treatment and, under the applicable statutory scheme, Humphrey was committed for treatment for the duration of his sentence. The statute also provided that upon a finding of dangerousness the defendant could be subject to renewal orders, each of five years duration. Thus confinement under the act could have been for an indefinite period without submission of the dangerousness issue to a jury even though Wisconsin provided a jury trial in civil commitment proceedings.

Humphrey brought a habeas corpus action contending that the renewal orders were essentially the same as civil commitment and that the equal protection clause required a jury determination of the relevant issues. The Court of Appeals for the Seventh Circuit refused to hear the petition. The Supreme Court disagreed, citing Specht and Baxstrom v. Herold as supporting the petitioner’s claim. The Court indicated that the petitioner’s right to a jury trial at the initial confinement hearing was not being considered, but only his right to a jury trial at the time of a renewal order.

119. Under Wis. Stat. Ann. § 975.02 (1975), after the defendant has been convicted of a crime, the court may then consider whether the crime was “probably directly motivated by a desire for sexual excitement.”

120. 383 U.S. 107 (1966) (violation of equal protection to continue the confinement of a convict in an institution for the criminally insane after the expiration of his sentence without a civil commitment proceeding).

121. 405 U.S. at 511 n.7. Humphrey is enlightening in that it seems to make clear the Court’s view of the application of Specht. The Specht decision appears to apply to the initial commitment proceedings where the determinative fact is whether the defendant was “probably motivated by a desire for sexual excitement.” In such a situation, the Court seems to indicate that only those procedural rights enumerated in Specht are required. But where the state’s right to commit is asserted on a basis which is essentially the same as that provided for in civil commitment, and the potential period of confinement is for a longer term than the sentence imposed, equal protection requires that the procedural safeguards utilized in both cases be the same.

The doctrinal logic of this differing treatment is at least questionable. The view implied by the Court in Humphrey seems to be that there is some possibility of a special characteristic of sexual deviance, as opposed to other forms of mental illness, which justifies the use of lesser procedures. Yet, it is clear that the equal protection clause would not allow different procedural protections for one committed as suffering from a manic-depressive psychosis than for one committed on the basis of simple
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In 1971 the Supreme Court granted certiorari in *Murel v. Baltimore City Criminal Court*, a case involving a comprehensive challenge to Maryland's defective delinquency laws. The statute had been upheld below on the grounds that the statute was civil in nature and that the procedural protections provided were therefore adequate to satisfy due process. The writ of certiorari was dismissed as improvidently granted as to all of the defendants but one because Maryland was engaged in a substantial revision of its commitment laws and even if the petitioners succeeded they would not (with a single exception) be released from custody.

In *McNeil v. Director, Patuxent Institution* the Court resolved the issues raised by the appeal of the lone remaining Maryland petitioner. McNeil had been convicted in 1966 and sentenced to five years imprisonment. The sentencing report, however, referred him to Patuxent Institution for a psychiatric examination to determine whether he should be sent to prison or indefinitely committed as a defective delinquent. McNeil refused to cooperate with the state's psychiatrists and asserted the fifth amendment privilege against self-incrimination whenever an attempt was made to examine him. Thus the sole basis for his six year confinement was an ex parte order. The Court, citing *Jackson v. Indiana*, held that it was a denial of due process to continue to hold the petitioner on the basis of an ex-
parte order committing him without the procedural safeguards re-
quired for long-term commitment and, observing that his confinement
had outlasted the duration of his potential criminal sentence, ordered
his release.\textsuperscript{128} Thus, in the area of sexual deviance and defective delin-
quency laws, the Supreme Court has come close to adopting the prin-
ciple of equivalence and has applied criminal due process rights to at
least a portion of the criminal commitment field.

Consistent with \textit{Specht}, \textit{Humphrey}, and \textit{McNeil}, the Washington
statutory scheme provides procedural safeguards for persons subject
to sexual psychopath and psychopathic delinquent proceedings. The
statute specifically provides for a hearing on the issue of psychopa-
thy\textsuperscript{129} and for the right to a jury trial.\textsuperscript{130} In addition, R.C.W. §
71.06.080 provides, \textit{inter alia}, that "[n]othing in this chapter [re-
lating to sexual psychopaths and psychopathic delinquents] shall be
construed as to affect the procedure for the ordinary conduct of crim-
inal trials as otherwise set up by law."\textsuperscript{131}

\textbf{D. Release Following Criminal Commitment—The Need for Equivalence}

The barriers to obtaining release after criminal commitment are
considerable. Often an individual's right to release depends upon
whether the inmate involved is no longer dangerous. Unlike the com-
mitment procedure where the burden is generally upon the state to

\textsuperscript{128} The majority opinion adds little to what had already been held in \textit{Jackson},
but simply applies that case to a new set of facts. \textit{McNeil} at least indicates that the
\textit{Jackson} decision will not be narrowly construed.

\textsuperscript{129} \textit{WASH. REV. CODE} § 71.06.040 (1974) (sexual psychopaths); \textit{id.} § 71.06.210
(psychopathic delinquents). \textit{See also} State \textit{ex rel.} Schillberg v. Morris. 85 Wn. 2d
382, 536 P.2d 1 (1975) (state must complete prosecution for underlying sex crime
before commencement of hearing on sexual psychopathy). \textit{But cf.} State \textit{v.} Osborn.
87 Wn. 2d 161, 550 P.2d 513 (1976) (sole discretion as to filing of petition for sexual
psychopathy proceeding vested in prosecuting attorney).

\textsuperscript{130} \textit{WASH. REV. CODE} § 71.06.070 (1974) (sexual psychopaths); \textit{id.} § 71.06.230
(psychopathic delinquents).

\textsuperscript{131} Arguably, this provision means that sexual psychopathy must be established
beyond a reasonable doubt. The Washington court, however, has not ruled on this
particular point. The statute also leaves unclear the maximum length of confinement
possible under a psychopathy commitment. \textit{Cf. WASH. REV. CODE} § 10.77.020 (3)
(1974) (limiting the period of confinement for the criminally insane to the maximum
possible penal sentence for the offense charged). \textit{But see} McCubbin \textit{v. Director,
Patuxent Inst.}, 17 Md. App. 351, 302 A.2d 712 (1973) (indeterminate sentences be-
yond term of originally imposable sentence for purposes of treatment under defective
delinquent act are proper).
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establish dangerousness, release procedures often demand that the defendant carry the burden of showing a lack of dangerousness. 132

1. Disparity in release standards

Court decisions in several states have held that procedural and substantive burdens placed upon one seeking release after a criminal commitment can be greater than those imposed upon patients seeking release after involuntary civil commitment. 133 It is argued that criminally committed persons fall into a special class because they have committed criminal offenses and in some jurisdictions, including Washington, have proven their own insanity by a preponderance of the evidence. In Chase v. Kearns, the Maine court expressed this notion in the following fashion: 134

The special interest which the public has acquired in the confinement and release of people in this exceptional class results from the fact that there has been a judicial determination that they have already endangered the public safety and their own as a result of their mental conditions as distinguished from people civilly committed because of only potential danger.

The position taken in Chase appears contrary to the view expressed by Chief Justice Warren in Baxstrom v. Herold: 135

Classification of mentally ill persons as either insane or dangerously insane of course may be a reasonable distinction for purposes of determining the type of custodial or medical care to be given, but it has no relevance whatever in the context of the opportunity to show whether a person is mentally ill at all. For purposes of granting judicial review


134. 278 A.2d 132, 138 (Me. 1971).

135. 383 U.S. 107, 111-12 (1966) (emphasis in original). In Baxstrom the Court was concerned with the power of the state to impose different standards on confinement solely because of prior criminal activity. The Court held that it could not do so.
before a jury of the question whether a person is mentally ill and in need of institutionalization, there is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments.

*State v. Clemons*\textsuperscript{136} is the leading case applying the *Baxstrom* rationale to disparities between release standards in civil and criminal commitment procedures. In *Clemons*, the Arizona court held unconstitutional a statutory provision placing the burden of showing lack of present dangerousness upon the criminally committed person petitioning for his release from a mental institution. The court found the provision contrary to the equal protection clause because persons committed through civil proceedings were not required to bear a similar burden when they sought release from confinement.\textsuperscript{137} A significant number of recent decisions have also struck down, on equal protection grounds, statutory schemes which emphasize the difference between civil and criminal commitment.\textsuperscript{138}

Washington does not recognize the principle of equivalence in this area of law. A brief comparison of R.C.W. ch. 71.05 with ch. 10.77 illustrates the typical disparity of release standards between civil and criminal commitment procedures in Washington. With respect to civilly committed persons, the statutes mandate periodic reevaluation and place the burden upon the state to establish at least each 180 days that the committed person is still dangerous.\textsuperscript{139} The *state* must estab-

\begin{itemize}
    \item \textsuperscript{136} 110 Ariz. 79, 515 P.2d 324 (1973), noted in 20 WAYNE L. REV. 1343 (1974).
    \item \textsuperscript{137} 515 P.2d at 329. The court concluded that the state could not rationally distinguish between the civilly and the criminally committed.
    \item *See also* Justice Rosellini's dissent in *Alter v. Morris*, 85 Wn. 2d 414, 536 P.2d 630 (1975) where he remarked:
    \begin{quote}
        I can perceive no significant difference between the criminally insane and the civilly insane which affords a justification for placing the burden of proving recovery on the patient in the one case and on the institution in the other.
    \end{quote}
    \begin{itemize}
        \item \textsuperscript{139} WASH. REV. CODE § 71.05.320 (1974).
    \end{itemize}
\end{itemize}
lish its position by "clear, cogent, and convincing evidence." Further-
more, the person in charge of an institution can, on his own initia-
tive, release a civilly committed patient before the expiration of the
commitment period when it appears that the patient "no longer pre-
sents a likelihood of serious harm to others." The burden
in the release proceeding is upon the petitioner, not the state. Addi-
tionally, the director of a mental institution cannot discharge a crimi-
nally insane person "save upon the order of a court of competent jur-
isdiction made after a hearing and judgment of discharge." This lack of equivalence between civil and criminal release stan-
dards was challenged in Alter v. Morris. The petitioners argued
that the difference in release procedures denied equal protection to
insanity-acquitted inmates because of the heavier procedural burden
imposed on them. The Washington court rejected this constitu-
tional attack by distinguishing the two groups (civilly and criminally

140. Id. § 71.05.310.
141. Id. § 71.05.330.
142. Id. § 10.77.200(2) (1974). Prior to the legislature's specification of the pre-
ponderance of evidence standard in 1974, Washington decisional law had required
the criminally insane person to show that it was "highly probable" that he was a safe
person in order to be released. See State v. Blubaugh, 80 Wn. 2d 28, 491 P.2d 646

Generally, other jurisdictions require the criminally committed person to carry the
burden by a preponderance of the evidence at his release hearing on the question of
dangerousness. See, e.g., United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972);
People v. Beksel, 10 Ill. App. 3d 406, 294 N.E.2d 111 (1973); State v. Montague,

144. Id. § 10.77.120. A similar provision in id. ch. 71.06 provides that the super-
visor of a correctional facility "shall never release the sexual psychopath from custody
without a court release . . . ." Id. § 71.06.091. The superintendent of an institution has more discretion with regard to the release of psychopathic delinquents. Id. §
71.06.240.
146. Each petitioner was incarcerated in a Washington state mental hospital. Each
had been acquitted of criminal charges on grounds of insanity. Id. at 415, 536 P.2d at
631.
147. Justice Hamilton summarized the petitioners' argument:
[Petitioners] contend that equal protection requires that the difference in treat-
ment be justified by its relation to a valid public purpose under a strict scrutiny
test. The State, they argue, must show that a compelling interest is satisfied by
subjecting the insanity acquitted to a more burdensome procedure than that con-
fronted by the civilly committed.

Id. at 419, 536 P.2d at 633.

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committed persons) and finding them thus legitimately subject to different procedural burdens.\textsuperscript{148}

2. \textit{Other procedural safeguards}

R.C.W. ch. 10.77 provides the criminally committed person a right to a hearing on the issue of release and also sanctions the use of habeas corpus for the purpose of challenging confinement.\textsuperscript{149} The statute also guarantees the right to a jury at the release hearing.\textsuperscript{150} The California Court of Appeals has specifically recognized the right to counsel at release proceedings.\textsuperscript{151} To be consistent with the principle of equivalence, such procedural rights as are granted those civilly committed upon release should likewise be available to those committed on the basis of an insanity acquittal.

The release procedures for sexual deviant or defective delinquent defendants are similar to those for persons found not guilty by reason of insanity. It has been held that while conviction of a crime might not justify substantially different procedures, a state legislature may require consideration of conviction in deciding whether to release a sex deviant.\textsuperscript{152} Federal constitutional rights have not been extensively elaborated in this area.\textsuperscript{153}

III. \textbf{CONCLUSION}

Most of the recent leading cases on commitment have embodied the premise that criminal commitment is of the same nature and for the same purpose as civil commitment and that the equal protection clause therefore precludes any substantial difference in the procedures utilized in the two situations.\textsuperscript{154} This approach, however, may have a

\textsuperscript{148} The court considered insanity-acquitted persons to be "an exceptional class of persons." \textit{Id.} at 421, 536 P.2d at 634.

\textsuperscript{149} \textsc{Wash. Rev. Code} \S 10.77.200 (1974).

\textsuperscript{150} \textit{Id.}

\textsuperscript{151} \textit{In re Jones}, 260 Cal. App. 2d 906, 68 Cal. Rptr. 32 (1968).

\textsuperscript{152} Hill v. Burke, 289 F. Supp. 921 (W.D. Wis. 1968).

\textsuperscript{153} Under Washington law, whether a sexual psychopath receives a release hearing appears to be left to the discretion of the committing court. \textsc{See Wash. Rev. Code} \S 71.06.091 (1974).

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negative impact in some states in which questionable civil standards provide poor guidelines for desirable criminal commitment standards.

The application of the principle of equivalence to insure procedural due process for all persons deprived of their liberty is frustrated by the lack of a definitive Supreme Court ruling on the rights which attach to the civil commitment process. At present, however, a logical extension of recent cases based upon the principle of equivalence would require that all persons faced with a potential deprivation of liberty be afforded substantially similar rights of procedural due process, without regard to the label attached to the proceedings involved. Hopefully, a comprehensive set of procedural standards applicable to all commitment proceedings can be developed.

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