

CONSTITUTIONAL STANDARDS FOR RELEASE OF THE CIVILLY COMMITTED AND NOT GUILTY BY REASON OF INSANITY: A STRICT SCRUTINY ANALYSIS

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The nature of the individual interest intruded upon by involuntary commitment—liberty—is basic to our constitutional scheme. Due process of law permits denial of the natural legal status of freedom only when significant state interests are advanced as justification. Similarly, procedures must be afforded to enable an individual legitimately deprived of his liberty because of dangerousness to prove he is no longer dangerous or mentally ill. Complicating this matter is the legal status of the individual found not guilty by reason of insanity [NGI]. It seems that despite his acquittal, an NGI patient may be confined for purposes related to criminal rather than civil law. These difficult matters of law lay beneath the surface of *United States v. Ecker*.¹

On May 22, 1967, Lewis Ecker brutally raped and killed an employee of the United States Senate.² Shortly thereafter his competency to stand trial was evaluated;³ a Saint Elizabeth's Hospital⁴ staff conference concluded that Ecker was competent to stand trial,⁵ although he was considered "one of the sickest people we've ever had in this hospital."⁶ The District of Columbia tried Ecker for murder and rape,⁷ and he was found not guilty by reason of insanity on both counts.⁸ Immediately after acquittal Judge John Smith of the United States District Court for the District of Columbia ordered Ecker committed to Saint

1. 543 F.2d 178 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1063 (1977). *Accord*, Powell v. Florida, 579 F.2d 324 (5th Cir. 1978).

2. *Id.* at 181.

3. *Id.*

4. Saint Elizabeth's Hospital is a large government hospital in the District of Columbia. *See* 24 U.S.C. §§ 161-221 (1966 & Supp. IV 1977); D.C. Code §§ 24-401 to -416 (1973 & Supp. IV 1977) (providing legislative authorization).

5. 543 F.2d at 181.

6. *Id.*

7. *Id.*

8. *Id.*

Elizabeth's Hospital because he was suffering from mental illness and if released would likely be a danger to himself or others.⁹

The Saint Elizabeth's Hospital staff on two occasions recommended conditional release programs for Ecker which were denied by the district court.¹⁰ In January of 1973, a conditional release plan was approved by Saint Elizabeth's which would have enabled Ecker to take advantage of vocational training facilities outside of the hospital grounds, and to visit his parent's home without hospital supervision.¹¹ Judge Smith rejected the plan,¹² and the rejection was affirmed in *United States v. Ecker [Ecker I]*.¹³ The court was careful to note, however, that future approval of a comparable plan might be appropriate.¹⁴ Chief Judge Bazelon, writing for the United States Court of Appeals for the District of Columbia, expressed the view that the mere passage of time could settle many of the questions which led to the disapproval of the plan on that occasion.¹⁵

Over three years elapsed between Judge Smith's rejection of the conditional release plans involved in *Ecker I* and the 1976 court of appeals' decision in *Ecker II*.¹⁶ The appellate court in *Ecker II* was confronted with the district court's rejection of a hospital proposal for Ecker's staged reentry into the community.¹⁷ Throughout each stage Ecker would live and receive therapy at the hospital. The district court rejected the release plan¹⁸ even though Ecker had met the conditions which *Ecker I* suggested were prerequisites to release,¹⁹ and the Government's psychologist agreed with the staff of Saint Elizabeth's Hospi-

9. See *id.* Judge Smith issued the order after conducting a hearing to determine Ecker's present mental state. *Id.* See text & notes 53-56 *infra*.

10. See 543 F.2d at 181-82.

11. *United States v. Ecker*, 479 F.2d 1206, 1208 (D.C. Cir. 1973).

12. See *id.*

13. *Id.* at 1207.

14. *Id.* at 1207, 1211.

15. *Id.* at 1211. Among the signs of improvement to be examined before granting release in the future were: whether the patient had been off medication for a significant period of time, *id.* at 1208; whether an elopement incident, recent at the time of the recommendation for conditional release, no longer typified how the patient might handle responsibility, *id.* at 1207, 1211; and whether or not the hospital proposal was based upon hasty psychological testimony, *id.* at 1211.

16. Compare *United States v. Ecker*, 479 F.2d 1206, 1208 (D.C. Cir. 1973) with *United States v. Ecker*, 543 F.2d 178 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1063 (1977). The rejection at issue in *Ecker II* occurred on December 27, 1974. *Id.* at 180. The rejection in *Ecker I* occurred on January 30, 1973. 479 F.2d at 1208.

17. Under the plan considered in *Ecker II*, Ecker would have been required to report to Saint Elizabeth's Hospital and stay there each night. 543 F.2d at 183. Judge Smith had minimized the importance of differences between this and the previous proposal. See *id.* at 189 (quoting *United States v. Ecker*, Criminal Case No. 1481-67, app. at 2 (D.D.C. 1974) ("both submissions propose that Mr. Ecker be released to attend school and to spend time at his parents' home. The release plan currently before the Court . . . still does not provide adequate controls over Mr. Ecker during the periods he would be away from the hospital.")).

18. See 543 F.2d at 189-91.

19. *Id.* at 205 n.12 (Wright, J., dissenting). But see *id.* at 190.

tal that the plan should be granted.²⁰

Judge Smith relied on evidence tending to demonstrate Ecker remained chronically mentally ill, experiencing elaborate fantasies and exhibiting an uncertain ability to cope with them.²¹ The district court also found that in March of 1974, Ecker was "seeking out our female patients in the deaf program at the movies and through a window on the ward."²² It was noted that in April 1974, Ecker was reprimanded for "improperly touching a female patient on the buttocks."²³

Judge Wilkey, writing for the divided court in *Ecker II*, indicated that Judge Smith could have reasonably concluded that Ecker and the hospital had not proven by a preponderance of the evidence that the patient would not be a "substantial problem of danger in the reasonable future" if the release were granted.²⁴ The court of appeals majority rejected Ecker's argument that the district court had erred in placing the burden of proof on the patient in the conditional release proceeding.²⁵

Ecker II followed distinctions made in the District of Columbia Code between the NGI and the civil committee for purposes of conditional release. Those civilly committed are entitled to release following a favorable administrative determination by Saint Elizabeth's Hospital.²⁶ The NGI are entitled to release upon favorable administrative determination only if the court or United States Attorney pose no objection to the release program, or if the trial court finds that an NGI "will not endanger himself or others in the reasonably foreseeable

20. The Government objected to Ecker's release. As Judge Wright pointed out in his dissenting opinion, *id.* at 203, this put the United States Attorney's office in the position of representing both sides in the controversy, since the office represents Saint Elizabeth's Hospital which proposed the plan in question. In spite of the Government's opposition to the proposed conditional release, the expert witness it presented agreed that the proposal should be granted. *Id.* at 182, 206.

21. See *id.* at 188-89. Included in Judge Smith's findings of fact were:

4. At the present time, Mr. Ecker is still suffering from a chronic mental illness, namely, antisocial personality disorder (with organic features), severe and sexual deviation (sadism).

5. Mr. Ecker's fantasy life, observed upon his initial commitment at the hospital has continued in virtually the same quality and intensity up to the present time; this is evidenced by psychological tests conducted on him in 1971, 1972 and 1974.

Id. at 189, (quoting *United States v. Ecker*, Criminal Case No. 1481-67, app., at 2 (D.D.C. 1974)).

22. *Id.*

23. *Id.* Judge Wright in his dissenting opinion stated that Ecker's chronic mental illness was not contested, but that the issue before the court was whether "the individual has recovered sufficiently so that under the proposed conditions—or under conditions which the statute empowers the court to impose "as (it) shall see fit"—such person will not in the reasonable future be dangerous to himself or others." *Id.* at 204 (quoting *Hough v. United States*, 271 F.2d 458, 461 (D.C. Cir. 1959)).

24. See 543 F.2d at 188.

25. See *id.* at 191-94; *id.* at 202-03 (Wright, J., dissenting). For a discussion of the lack of clarity in the court of appeal's placement of the burden of proof, see text & notes 325-27 *infra*.

26. D.C. Code §§ 21-541 to -545 (1973); see 543 F.2d at 194.

future" under terms of the release.²⁷ *Ecker II* held that an NGI patient would be entitled to the same release standard as civilly committed patients only after he had been confined for the number of years equal to the hypothetical maximum sentence which could have been imposed following conviction for the offense charged.²⁸ The majority opinion also allowed the postponement of the patient's right to treatment where therapy would mandate unsupervised access to the community and the conditionally released patient would be dangerous to the community.²⁹

Ecker II raises significant questions concerning constitutional requirements for release or conditional release of those not guilty by reason of insanity. The court tacitly places the NGI on a spectrum of culpability and dangerousness between the criminal convict and the civil committee. Consequently, it is permissible for the District of Columbia to erect obstacles to the release of an NGI which are not faced by civil committees. But the assumption that the NGI are on a different place on a spectrum of culpability and dangerousness than are the civilly committed seems inconsistent with the meaning of an NGI acquittal. As important advancements have been made in the rights of the civilly committed, and the potentially civilly committed, distinctions in treatment between the NGI and the committee gain added significance.

This Comment will suggest that the right to remain free from confinement is deserving of strict judicial scrutiny for purposes of constitutional due process and equal protection analysis. The liberty interest at a stage of continued confinement will be found as worthy of constitutional protection as the liberty of individuals who have not yet been confined. Consequently, continuation of a long term detention must be justified by a compelling state interest. State action infringing upon this liberty must be the least restrictive alternative necessary to protect the compelling interest. Similarly, it will be argued that different release procedures for committees and the NGI must be justified by a compelling interest. Those interests which have been suggested as justification for an NGI committee distinction will be evaluated and found less than compelling.

27. D.C. Code § 24-301(e) (1973); see 543 F.2d at 195; *Hough v. United States*, 271 F.2d 458, 461 (D.C. Cir. 1959).

28. 543 F.2d 198-99. Patients who were acquitted of crimes with penalties including life imprisonment would never be eligible for the committee's release standards.

29. *Id.* at 199-200 ("there is no right to treatment at the community's peril").

JUSTIFICATIONS FOR INVOLUNTARY CONFINEMENT

Criminal Conviction

Confinement has long been recognized as a proper punishment for one who has been convicted of criminal offenses.³⁰ The widely accepted purposes of incarceration include retribution, deterrence, isolation and rehabilitation.³¹ An expression of the retributory purpose is found in Justice Powell's dissenting opinion in *Furman v. Georgia*.³² "[S]ome crimes are so outrageous that society insists on adequate punishment, because the wrong-doer deserves it, irrespective of whether it is a deterrent or not."³³ Deterrence is based on the utilitarian principle that if a potential criminal calculates the magnitude of pain in punishment as greater than the value of his potential criminal act, he will be prevented from doing it.³⁴ Confinement theoretically enhances the safety of society by isolating criminals from their potential victims.³⁵ Rehabilitation is a purpose of punishment which hopes to improve convicts' attitudes and abilities so that a successful return to the community can be accomplished.³⁶

Several constitutionally-based procedural safeguards protect an individual before he may be convicted and sentenced to involuntary confinement.³⁷ The presumption of the defendant's innocence can only be overcome by evidence which establishes guilt beyond a reasonable doubt.³⁸ An accused has a right to counsel in a criminal proceeding where any post conviction confinement may occur.³⁹ A defendant

30. See, e.g., *Hobbs v. State*, 133 Ind. 404, 32 N.E. 1019 (1893); *People v. Morris*, 80 Mich. 634, 45 N.W. 591 (1890); *State v. Dietz*, 264 Minn. 551, 119 N.W.2d 833 (1963); A. DE TOCQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE 53-79 (1833); Carlson, *Corrections in the United States Today: A Balance Has Been Struck*, 13 AM. CRIM. L. REV. 615, 617-21 (1974).

31. See, e.g., *United States v. Brown*, 381 U.S. 437, 458 (1965); *United States v. Schipani*, 315 F. Supp. 253, 255-56 (E.D.N.Y.), *aff'd*, 435 F.2d 26 (2d Cir. 1970), *cert. denied*, 401 U.S. 983 (1971); *Commonwealth v. Ritter*, 13 Pa. D. & C. 285, 289-90 (1930).

32. 408 U.S. 238 (1972).

33. *Id.* at 453 (quoting Royal Commission on Capital Punishment, Minutes of Evidence 207 (1949-53) (statement of Lord Denning)).

34. J. BENTHAM, *Principles of Penal Law*, Pt. II, in 1 BENTHAM'S WORKS 396, 402 (Bowring ed. 1843).

35. See *United States v. Chandler*, 393 F.2d 920, 929 (4th Cir. 1968).

36. *Williams v. New York*, 337 U.S. 241, 249 (1949); *United States v. McCoy*, 429 F.2d 739, 743-44 (D.C. Cir. 1970); *Briscoe v. United States*, 391 F.2d 984, 988 (D.C. Cir. 1968), *appeal after remand*, 432 F.2d 1351 (D.C. Cir. 1973); see Allen, *Criminal Justice, Legal Values and the Rehabilitative Ideal*, 50 J. CRIM. L.C. & P.S. 226 (1959).

37. See, e.g., *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972); *In Re Winship*, 397 U.S. 358, 368 (1970); *Dusky v. United States*, 362 U.S. 402 (1960).

38. See *In Re Winship*, 397 U.S. 358, 368 (1970); *United States v. Davis*, 160 U.S. 469, 493 (1895). But perhaps those affirmatively asserting an NGI defense may be required to prove their lack of mental culpability by a preponderance of the evidence. *Buzynski v. Oliver*, 538 F.2d 6, 10 (1st Cir.), *cert. denied*, 429 U.S. 984 (1976); *Bethea v. United States*, 365 A.2d 64, 93-94 (D.D.C. 1976), *cert. denied*, 433 U.S. 911 (1977).

39. *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972); *Gideon v. Wainwright*, 372 U.S. 335, 340-41 (1963).

should not be tried if he is incompetent to understand the nature of the criminal proceedings brought against him.⁴⁰ If a potential sentence exceeds six months, he is guaranteed the right to a trial by jury.⁴¹ Defendants are entitled to information within the prosecution's possession if properly requested and materially favorable to the defense.⁴² A panoply of other federal constitutional guarantees also protect defendants in criminal trials.⁴³

Maximum allowable punishment for conviction of crime is generally predetermined by statute.⁴⁴ Within statutory limits, the sentencing judge decrees a maximum confinement of the individual for the specific crime charged.⁴⁵ Since it is possible for prisoners to shorten their maximum sentences by taking advantage of certain statutory entitlement programs, a prisoner may be entitled to release before completion of the apparent maximum number of years for which he is sentenced.⁴⁶ Similarly, the granting of parole to a given prisoner is nearly entirely within the discretion of administrative agencies,⁴⁷ but once parole has been granted, substantial due process rights prevent arbitrary revocation of the parolee status.⁴⁸

40. *Dusky v. United States*, 362 U.S. 402 (1960); *McKinney v. United States*, 487 F.2d 948, 949 (9th Cir. 1973); *People v. Lang*, 26 Ill. App. 3d 648, 654-55, 325 N.E.2d 305, 309 (1975).

41. *Baldwin v. New York*, 399 U.S. 66, 69 (1970); see *Duncan v. Louisiana*, 391 U.S. 145 (1968).

42. *United States v. Agurs*, 427 U.S. 97, 110-11 (1976); *Moore v. Illinois*, 408 U.S. 786, 794-95 (1972); *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

43. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 166-70 (1972), and *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971), require criminal laws, at least as far as they affect the exercise of first amendment rights, to be sufficiently specific to give the criminal defendant reasonable notice of the conduct proscribed. The fourth amendment generally protects defendants from having evidence gained through an illegal search or seizure presented by the prosecution at trial. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). The fifth amendment prohibits use by the prosecution of evidence obtained by confession while a suspect is in custodial interrogation and not advised of his right to remain silent. *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966). *Miranda* was modified in *Harris v. New York*, 401 U.S. 222, 225-26 (1966) (allowing use of statements obtained in violation of *Miranda* to rebut testimony of the defendant.) The eighth amendment prohibits the punishment of an individual for his status rather than for commission of a criminal act. *Robinson v. California*, 370 U.S. 660, 667 (1962). See generally Y. KAMISAR, W. LAFAYE & J. ISRAEL, *BASIC CRIMINAL PROCEDURE* 19-27 (4th ed. 1974).

44. See, e.g., *Specht v. Patterson*, 386 U.S. 605, 607 (1967); *In re Lynch*, 8 Cal. 3d 410, 415, 503 P.2d 921, 923, 105 Cal. Rptr. 217, 219 (1972). The "life" sentence is the obvious exception to the maximum sentence of predetermined length.

45. See *McNeil v. Director, Patuxent Inst.*, 407 U.S. 245, 252 (1972); *Baxstrom v. Herold*, 383 U.S. 107, 118 (1966).

46. See, e.g., *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974); *Weber v. Willingham*, 356 F.2d 933, 934 (10th Cir.), cert. denied, 384 U.S. 991 (1966); *Blackwell v. Edwards*, 303 F.2d 103, 108-09 (9th Cir. 1962).

47. See, e.g., *Brown v. Lundgren*, 538 F.2d 1050, 1055 (5th Cir. 1976); *Sweeton v. Sneddon*, 463 F.2d 713, 715 (10th Cir. 1972); *United States v. Isaacs*, 392 F. Supp. 597, 600 (N.D. Ill. 1975). See Note, *Procedural Due Process in Parole Release Decisions*, 18 ARIZ. L. REV. 1023, 1025-32 (1976).

48. See *Morissey v. Brewer*, 408 U.S. 471, 489 (1972) (minimum due process requirements for parole revocation hearings include: written notice of charges against a parolee and evidence in support of those charges; an opportunity to present evidence and cross-examine adverse witnesses; and a written statement of evidence relied on by a neutral and detached factfinder).

Not Guilty by Reason of Insanity

The purpose of the criminal law is to punish the "bad" and not the "mad."⁴⁹ Therefore, where an individual, because of mental illness, substantially lacks the capacity for understanding the wrongful nature of an act, his mental incapacity is generally recognized as a defense to a criminal charge.⁵⁰ Persons who are found beyond a reasonable doubt to have committed an act generally punishable by law, but who are found not to be mentally responsible for their action,⁵¹ are judged NGI.

Until the time of an NGI acquittal, procedures afforded to the NGI are identical to those afforded criminal defendants.⁵² Following an NGI verdict, procedures which can result in involuntary confinement vary greatly among jurisdictions.⁵³ Some state courts interpret the United States Constitution to require that postacquittal confinement may be accomplished only through the normal procedures for civil commitment.⁵⁴ These states allow release of the NGI where the states cannot prove *present* insanity and dangerousness.⁵⁵ Other jurisdictions have procedures which differ substantially from those given committees.⁵⁶

Where the NGI are involuntarily confined, it is justified not as a punishment for the offensive act, but to protect society from the harm

49. *United States v. McGraw*, 515 F.2d 758, 759 (9th Cir. 1975); *United States v. Brawner*, 471 F.2d 969, 988 (D.C. Cir. 1972); *United States v. Chandler*, 393 F.2d 920, 929 (4th Cir. 1968); *M'Naughten's Case*, 8 Eng. Rep. 718 (1843).

50. *People v. Schmidt*, 216 N.Y. 324, 329-39, 110 N.E. 945, 946-49 (1915); *M'Naughten's Case*, 8 Eng. Rep. 718, 721-22 (1843).

51. *Lynch v. Overholser*, 369 U.S. 705, 714 (1962); *In re Franklin*, 7 Cal. 3d 126, 138, 496 P.2d 465, 471, 101 Cal. Rptr. 553, 559 (1972); *State v. Krol*, 68 N.J. 236, 246, 344 A.2d 289, 295 (1975). The word "action" is not meant to exclude omissions which are ordinarily criminal.

52. Until the verdict of NGI acquittal such individuals are criminal defendants. Generally, they have raised insanity as an affirmative defense. See D.C. Code § 24-301(d). *But see Lynch v. Overholser*, 369 U.S. 705, 710 (1962) (NGI verdict resulted in spite of defendant not raising it on his own behalf).

53. See German & Singer, *Punishing the Not Guilty: Hospitalization of Persons Acquitted by Reason of Insanity*, 29 RUTGERS L. REV. 1011, 1075-79 app. (1976). See discussion note 55 *infra*.

54. See, e.g., *State v. Clemons*, 110 Ariz. 79, 83, 515 P.2d 324, 328 (1973); *Wilson v. State*, 259 Ind. 375, 386, 287 N.E.2d 875, 881 (1972); *People v. McQuillen*, 392 Mich. 511, 536, 221 N.W.2d 569, 580 (1974); *People v. Lally*, 19 N.Y.2d 27, 35, 224 N.E.2d 87, 92, 277 N.Y.S.2d 654, 661 (1966). Distinctions in temporary commitment designed to allow time for the diagnosis of the NGI were acceptable in *State v. Clemons*, 110 Ariz. 79, 83, 515 P.2d 324, 328 (1973), and *People v. McQuillen*, 392 Mich. 511, 527, 221 N.W.2d 569, 576 (1974).

55. Present insanity is a necessary determination in order to insure that those who have successfully raised questions regarding their *past* mental responsibility are protected by requirements of current commitment. See *Bolton v. Harris*, 395 F.2d 642, 651 (D.C. Cir. 1968); *Allen v. Radack*, 426 F. Supp. 1052, 1056-58 (D.S.D.1977).

56. See *United States v. Brown*, 478 F.2d 606, 610-11 (D.C. Cir. 1973); *In re Franklin*, 7 Cal. 3d 126, 137-38, 496 P.2d 465, 471, 101 Cal. Rptr. 553, 559 (1972); *Chase v. Kearns*, 278 A.2d 132, 134-38 (Me. 1971). "Committee" is used to designate an individual who is involuntarily civilly committed and is to be distinguished from one committed as a result of an NGI verdict. See text & notes 149-51 *infra*.

of potential future acts.⁵⁷ The continuation of society's need for protection, however, is a constitutional limitation on the states' ability to justify continued confinement, since due process permits states to confine an individual only if the "nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."⁵⁸ Therefore, since the NGI are confined because of their danger to the community, when their freedom no longer threatens the community they should be released.⁵⁹ This Comment deals primarily with the procedures required by the Constitution to support the state's determination to continue an individual's confinement.⁶⁰ The influential United States Court of Appeals, District of Columbia Circuit, has held that the government need not prove, even by a preponderance of the evidence, that a confined NGI remains dangerous in order to continue his involuntary detention; and this is so, although the confining hospital has approved a release plan, if the office which prosecuted the case resulting in acquittal, or the trial court, objects to an administrative determination that the patient should be either conditionally or unconditionally released.⁶¹ Other jurisdictions have shown signs of favoring a less stringent burden for the NGI seeking release.⁶²

Civil Commitment

Involuntary civil commitment has traditionally been justified where a committee is dangerous either to himself or to others, or in need of treatment.⁶³ Confinement of those dangerous to others represents an exercise of the state's police power.⁶⁴ Commitment of those in need of treatment is classically an exercise of the state's *parens patriae* power.⁶⁵ Those who are dangerous to themselves may be confined under a broad interpretation of either *parens patriae* or police power.⁶⁶

57. *United States v. Ecker*, 479 F.2d 1206, 1211 (D.C. Cir. 1973); *Dixon v. Jacobs*, 427 F.2d 589, 594 (D.C. Cir. 1970); *cf. United States v. Powell*, 503 F.2d 195, 196 (D.C. Cir. 1974) (NGI escape from hospital held not to violate the Federal Escape Act, 18 U.S.C. § 751(a) (1976)). *But cf. Rouse v. Cameron*, 373 F.2d 451, 452-53 (D.C. Cir. 1966) (emphasizing the treatment aspect of post-acquittal confinement).

58. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972).

59. *United States v. Ecker*, 479 F.2d 1206, 1211 (D.C. Cir. 1973); *see Dixon v. Jacobs*, 427 F.2d 589, 594 (D.C. Cir. 1970); *cf. O'Connor v. Donaldson*, 422 U.S. 563, 575-76 (1975) (a non-dangerous individual cannot be confined because of his need for treatment where he has received no treatment and is capable of surviving safely in freedom with the aid of willing friends or family members). *See text & notes 172-77 infra.*

60. *See text & notes 161-390 infra.*

61. *United States v. Ecker*, 543 F.2d 178, 194 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1063 (1977). *See text & notes 325-27 infra.*

62. *See text & note 54 supra.*

63. *O'Connor v. Donaldson*, 422 U.S. 563, 573-74 (1975); *see Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1201-40 (1974) [hereinafter cited as *Developments in the Law*].

64. *See Developments in the Law, supra* note 63, at 1222-45.

65. *See id.* at 1207-22.

66. Cases concluding that commitments for dangerousness to self are within the police power

Civil commitment may be either temporary or long term.⁶⁷ The temporary commitment allows for emergency confinements to prevent suspected imminent danger.⁶⁸ Non-emergency temporary commitment provides opportunities for protection, observation, and diagnosis of an individual,⁶⁹ thus permitting the state to evaluate a patient to ascertain mental illness and dangerousness. One federal court has held that temporary commitment should not exceed thirty days.⁷⁰ The state's interest in long term commitment is to prevent patients from inflicting harm on themselves or others,⁷¹ and to treat patients for their mental illness.⁷² Emerging constitutional standards indicate that potential patients have a due process right to adequate precommitment noticed hearings,⁷³ as well as rights to be represented by counsel, and to attend and present evidence at the hearing.⁷⁴ In order to civilly commit, jurisdictions must prove by at least clear and convincing evidence that an individual is both dangerous and mentally ill.⁷⁵ Dangerousness must be proven through evidence of recent overt acts.⁷⁶ The continuing validity of a commitment is contingent on the continuation of

include *Kendall v. True*, 391 F. Supp. 413, 417 (W.D. Ky. 1975), and *Maycock v. Martin*, 157 Conn. 56, 64, 245 A.2d 574, 578 (1968). Cases claiming these commitments are based on the *parens patriae* power include *In re Ballay*, 482 F.2d 648, 658 (D.C. Cir. 1973) (dictum), and *Lynch v. Baxley*, 386 F. Supp. 387, 390-91 (M.D. Ala. 1974). In *O'Connor v. Donaldson*, 422 U.S. 563 (1975), the Court addressed the meaning of "dangerous to himself":

The judge's instructions used the phrase 'dangerous to himself.' Of course, even if there is no foreseeable risk of self-injury or suicide, a person is literally 'dangerous to himself' if for physical or other reasons he is helpless to avoid the hazards of freedom either through his own efforts or with the aid of willing family members or friends

Id. at 574 n.9; see Note, *Protection Following Commitment: Enforcing the Rights of Persons Confined in Arizona Mental Health Facilities*, 17 ARIZ. L. REV. 1090, 1095-1100 (1975).

67. See, e.g., *Suzuki v. Quisenberry*, 411 F. Supp. 1113, 1125-27 (D. Hawaii 1976); *Lynch v. Baxley*, 386 F. Supp. 378, 387-88 (M.D. Ala. 1974); *Lessard v. Schmidt*, 349 F. Supp. 1078, 1091-93 (E.D. Wis. 1972), *vacated on procedural grounds*, 414 U.S. 473 (1974).

68. *Developments in the Law*, *supra* note 63, at 1265-71.

69. E.g., *Suzuki v. Quisenberry*, 411 F. Supp. 1113, 1125 (D. Hawaii 1976); *Lynch v. Baxley*, 386 F. Supp. 378, 387 (M.D. Ala. 1974); *Lessard v. Schmidt*, 349 F. Supp. 1078, 1091 (E.D. Wis. 1972), *vacated on procedural grounds*, 414 U.S. 473 (1974); *In re Franklin*, 7 Cal. 3d 126, 132, 496 P.2d 465, 467, 101 Cal. Rptr. 553, 555 (1972).

70. *Lynch v. Baxley*, 386 F. Supp. 378, 388 (M.D. Ala. 1974).

71. *O'Connor v. Donaldson*, 422 U.S. 563, 573-74 (1975); *Humphrey v. Cady*, 405 U.S. 504, 509 (1972); *Suzuki v. Quisenberry*, 411 F. Supp. 1113, 1124-25 (D. Hawaii 1976); *Lynch v. Baxley*, 386 F. Supp. 378, 390 (M.D. Ala. 1974).

72. *O'Connor v. Donaldson*, 422 U.S. 563, 575-76 (1975); *In re Ballay*, 482 F.2d 648, 658-59 (D.C. Cir. 1973).

73. *Suzuki v. Quisenberry*, 411 F. Supp. 1113, 1127 (D. Hawaii 1976); *Lynch v. Baxley*, 386 F. Supp. 378, 388 (M.D. Ala. 1974); *Lessard v. Schmidt*, 349 F. Supp. 1078, 1092 (E.D. Wis. 1972), *vacated on procedural grounds*, 414 U.S. 473 (1974).

74. *Heryford v. Parker*, 396 F.2d 393, 396 (10th Cir. 1968); *Suzuki v. Quisenberry*, 411 F. Supp. 1113, 1129 (D. Hawaii 1976); *Lynch v. Baxley*, 386 F. Supp. 378, 389 (M.D. Ala. 1974); *Lessard v. Schmidt*, 349 F. Supp. 1078, 1092 (E.D. Wis. 1972) *vacated on procedural grounds*, 414 U.S. 473 (1974).

75. *In re Ballay*, 482 F.2d 648, 669 (D.C. Cir. 1973); *Suzuki v. Quisenberry*, 411 F. Supp. 1113, 1132 (D. Hawaii 1976); *Lynch v. Baxley*, 386 F. Supp. 378, 393 (M.D. Ala. 1974).

76. See, e.g., *Cross v. Harris*, 418 F.2d 1095, 1102 (D.C. Cir. 1969); *Millard v. Harris*, 406 F.2d 964, 973 (D.C. Cir. 1966); *Stamus v. Leonhardt*, 414 F. Supp. 439, 450 (S.D. Iowa 1976); *Doremus v. Farrell*, 407 F. Supp. 509, 515 (D. Neb. 1975); *Lynch v. Baxley*, 386 F. Supp. 378, 391 (M.D. Ala. 1974); *Lessard v. Schmidt*, 349 F. Supp. 1078, 1084 (E.D. Wis. 1972), *vacated on proce-*

the state's need to confine an individual.⁷⁷

Commitment in Order to Stand Trial

It is generally required that defendants in criminal cases be "competent" to stand trial before they are convicted of an offense.⁷⁸ Competence includes such factors as the defendant's ability to understand the nature and purpose of the proceedings against him, to comprehend his own status regarding his trial, and to cooperate in the preparation of his own defense.⁷⁹ When prospective defendants do not meet these standards, they are generally committed for treatment to restore them to a condition which will permit them to stand trial.⁸⁰ This, however, is not an ordinary civil commitment.⁸¹ Whereas civil commitment is designed to protect the public or the committee from the risk of harm posed by the committee's mental condition, the purpose of the state in involuntarily confining an individual incompetent to stand trial is to make him competent to stand trial.⁸² It is primarily an exercise of the state's police power to try criminal defendants.⁸³

If the defendant is found incompetent to stand trial, he may be ordered confined.⁸⁴ The status of the defendant should be periodically evaluated to see whether he has been sufficiently restored to reason to enable him to stand trial.⁸⁵ If there is no reasonable probability of restoring a defendant's competence, he must be either released, or civilly committed via procedures normally in effect where no criminal charge complicates the matter.⁸⁶ This was the holding of *Jackson v. Indiana*⁸⁷ where a mentally defective deaf mute, who was confined for three and one half years in the virtually non-existent hope that he would become competent, was found to be wrongfully held. The implications of *Jackson* are not yet fully appreciated, but it is clear that states cannot use the competency confinement to detain an individual

dural grounds, 414 U.S. 473 (1974). *But see In re Chambers*, 71 Cal. App. 3d 277, 285, 139 Cal. Rptr. 357, 362 (1977).

77. *O'Connor v. Donaldson*, 422 U.S. 563, 574-75 (1975); *Jackson v. Indiana*, 406 U.S. 715, 738 (1972); *Suzuki v. Quisenberry*, 411 F. Supp. 1113, 1134 (D. Hawaii 1976).

78. *See Dusky v. United States*, 362 U.S. 402 (1960).

79. *Id.*; *People v. Campbell*, 63 Cal. App. 3d 599, 609, 133 Cal. Rptr. 815, 819-20 (1976).

80. *See, e.g.*, D.C. Code § 24-301(a), (b) (1973); IND. CODE § 35-5-3-2 (1971); ARIZ. R. CRIM. P. 11.5(b).

81. *Compare* D.C. Code §§ 24-301 to -303 with D.C. Code §§ 24-541 to -545 (1973).

82. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972); *Commonwealth v. McQuaid*, 464 Pa. 499, 509, 347 A.2d 465, 470 (1975); *State ex rel. Walker v. Jenkins*, — W. Va. —, —, 203 S.E.2d 353, 357 (1974).

83. *Commonwealth v. McQuaid*, 464 Pa. 499, 508-14, 347 A.2d 465, 470-72 (1975).

84. D.C. Code § 24-301(A) (1973); MODEL PENAL CODE § 4.06.

85. *See, e.g.*, *Jackson v. Indiana*, 406 U.S. 715, 738 (1972); *Commonwealth v. McQuaid*, 464 Pa. 499, 517, 347 A.2d 465, 475 (1975); *State ex rel. Walker v. Jenkins*, — W. Va. —, —, 203 S.E.2d 353, 357-58 (1974).

86. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972).

87. 406 U.S. 715 (1972).

limitlessly without trial; "[a]t 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."⁸⁸

CONSTITUTIONAL PROBLEMS OF CURRENT STANDARDS FOR CONFINEMENT

Due Process

Every justification for involuntary confinement has due process implications.⁸⁹ Since freedom from confinement is the natural legal status of individuals in the United States,⁹⁰ even though a state may have a legitimate motive for confining an individual, that motive will not necessarily justify the state's restriction of the individual's liberty. For instance, a person may be a member of an unusually dangerous class of people, but this by itself cannot justify confining the individual involuntarily.⁹¹ Likewise, the state may not involuntarily confine an individual in order to improve his living standard, or prevent its citizens from exposure to people with harmless but peculiar habits.⁹² The protection afforded to individuals by this *substantive* aspect of the due process clauses of the fifth and fourteenth amendments to the United States Constitution has varied considerably as attitudes of the judiciary have changed.⁹³

Often crucial in due process adjudication is whether a particular right which might be infringed by a state is deserving of strict judicial scrutiny protection, or the less rigorous "rational basis" scrutiny.⁹⁴ The strict scrutiny test requires that state intrusions into the protected liberty be justified by some "compelling" interest, and that the scope of the intrusion be the least restrictive alternative possible to accomplish

88. *Id.* at 738. There is a serious problem in enforcing the substantive mandate of *Jackson*. Those who are incompetent to stand trial are likely not in an optimal position to enforce the rights they have. For example, in *Commonwealth v. McQuaid*, 464 Pa. 499, 347 A.2d 465 (1975), an individual was confined for 15 years in order to gain competency. Assuming his inability to understand the nature of criminal charges against him, it seems impossible to expect such an individual to be sophisticated about, or even aware of, legal procedures which may enforce a substantive right of release.

89. See *Fasulo v. Arafah*, 173 Conn. 473, 481, 378 A.2d 553, 557 (1977).

90. *Id.*

91. *State v. Krol*, 68 N.J. 236, 255, 344 A.2d 289, 299 (1975); see Livermore, Malmquist & Meehl, *On the Justification for Civil Commitment*, 117 U. PA. L. REV. 75, 84 (1968) [hereinafter cited as Livermore]; Morris, *The Future of Imprisonment: Toward a Punitive Philosophy*, 72 MICH. L. REV. 1161, 1167-73 (1974).

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

93. Compare *Lochner v. New York*, 198 U.S. 45 (1905) with *Nebbia v. New York*, 291 U.S. 502 (1934).

94. See, e.g., *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 98 (1973) (Marshall, J., dissenting); *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); *Bullock v. Carter*, 405 U.S. 134, 143-50 (1972); Goodpastor, *The Constitution and Fundamental Rights*, 15 ARIZ. L. REV. 479, 484-88 (1973).

the compelling interest.⁹⁵ The rational basis test will merely determine whether it is rational to believe that the government policy involved promotes a legitimate government purpose.⁹⁶

This section will describe currently recognized substantive due process standards relating to each of the four justifications for confinement. It will show that courts generally ignore the strict scrutiny test when length of criminal sentence is at issue.⁹⁷ On the other hand, strict scrutiny analysis of several aspects of the law of civil commitment has resulted in great advances in the right of individuals to remain free from confinement.⁹⁸ These due process advances in the area of civil commitment raise equal protection questions with respect to other categories of confined individuals, and these questions will be discussed in a later section.⁹⁹

Criminal Law. The criminal law is an expression of the state's police power and is designed to protect the community¹⁰⁰ which has an interest in punishing, deterring, isolating, and treating those adjudicated guilty of criminal behavior.¹⁰¹ Although this protective purpose is sufficient to overcome the substantive due process right of natural liberty enjoyed by those who are found beyond a reasonable doubt to have violated the criminal law,¹⁰² there are limits to the length and conditions of criminally based confinement.¹⁰³ For example, states may be prevented from placing convicts in prisons which are grossly overcrowded or unsafe.¹⁰⁴ Similarly, courts occasionally review the length or conditions of a sentence to see whether it is cruel or unusual as applied to a particular convict.¹⁰⁵ However, it is unusual for courts

95. *Elrod v. Burns*, 427 U.S. 347, 362-63 (1976); *Roe v. Wade*, 410 U.S. 113, 156 (1973); *Shelton v. Tucker*, 364 U.S. 479, 488-90 (1960).

96. *North Dakota State Bd. of Pharmacy v. Snyder's Drug Store*, 414 U.S. 156, 164-67 (1973); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 392 (1937); *Nebbia v. New York*, 291 U.S. 502, 537 (1934).

97. See text & notes 101-14 *infra*.

98. See text & notes 115-43 *infra*.

99. See text & notes 300-90 *infra*.

100. *Skinner v. Oklahoma*, 316 U.S. 535, 540 (1942).

101. *United States v. Brown*, 381 U.S. 437, 458 (1965); *United States v. Chandler*, 393 F.2d 920, 929 (4th Cir. 1968); *Commonwealth v. Ritter*, 12 Pa. D. & C. 285, 289-90 (1930).

102. *Skinner v. Oklahoma*, 316 U.S. 535, 540 (1942); see *Hobbs v. State*, 133 Ind. 404, 32 N.E. 1019 (1893); *People v. Morris*, 80 Mich. 634, 45 N.W. 591 (1890); *State v. Dietz*, 264 Minn. 551, 119 N.W. 2d 833 (1963).

103. For example, the eighth amendment to the U.S. Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

104. See, e.g., *Finney v. Arkansas Bd. of Corrections*, 505 F.2d 194, 201 (8th Cir. 1974); *Gates v. Collier*, 501 F.2d 1291, 1300-01 (5th Cir. 1974); *McCray v. Sullivan*, 399 F. Supp. 271, 275 (S.D. Ala.), *cert. denied*, 423 U.S. 859 (1975). For the application of this principle to pretrial detainees, see *Rehm v. Malcolm*, 507 F.2d 333, 340 (2d Cir. 1974); *Ambrose v. Malcolm*, 414 F. Supp. 485, 493-95 (S.D.N.Y. 1976).

105. See *Weems v. United States*, 217 U.S. 349, 381 (1910); *In re Lynch*, 8 Cal. 3d 410, 426, 503 P.2d 921, 930-31, 105 Cal. Rptr. 217, 226-27 (1972); *State v. Ward*, 57 N.J. 75, 81-82, 270 A.2d 1, 4-5 (1970); cases cited in *In re Lynch*, 8 Cal. 3d at 420-25, 503 P.2d at 927-30, 105 Cal. Rptr. at 223-26.

to place substantive restrictions on the actions of sentencing courts.¹⁰⁶

Courts which scrutinize the length of a particular prisoner's sentence usually use the eighth amendment of the United States Constitution, or its state counterparts, and not substantive due process analysis.¹⁰⁷ One of the few direct references to substantive due process in sentencing came in Justice Marshall's concurring opinion in *Furman v. Georgia*.¹⁰⁸ Justice Marshall suggested that the concepts of cruel and unusual punishment and substantive due process merge to provide identical protection to prisoners who bear heavy burdens of demonstrating their punishment is excessive.¹⁰⁹

There are three possible explanations for the failure of courts to discuss substantive due process considerations when the length of a criminal sentence is at issue. First, the eighth amendment is a more specific constitutional provision limiting the severity of sentences, and punishments under substantive criminal law have been viewed in the light of this amendment for so long with no due process analysis that they may be immune to it.¹¹⁰ Second, perhaps courts believe there is

106. *Gregg v. Georgia*, 428 U.S. 153, 175 (1976); *State v. Espinosa*, 101 Ariz. 474, 476, 421 P.2d 322, 325 (1966).

107. See *State v. Espinosa*, 101 Ariz. 474, 476, 421 P.2d 322, 325 (1966) (appellant challenged his sentence as violation of both the eighth amendment to the United States Constitution and art. 2, § 15 of the Arizona Constitution); *In re Lynch*, 8 Cal. 3d 410, 440, 503 P.2d 921, 940, 105 Cal. Rptr. 217, 236 (1972) (successful challenge based on art. I, § 6, of the California Constitution); *People v. Lorentzen*, 387 Mich. 167, 181, 194 N.W. 2d 827, 834 (1972) (invalidating a state statute as violative of both the eighth amendment to the United States Constitution and art. I, § 16 of the Michigan Constitution of 1963). See *Commonwealth v. Jackson*, 369 Mass. —, —, 344 N.E.2d 166, 175 (1976) which rejected this "novel" due process argument.

108. 408 U.S. 238, 359 n.141 (1972).

109.

The concepts of cruel and unusual punishment and substantive due process become so close as to merge when the substantive due process argument is stated in the following manner: because capital punishment deprives an individual of a fundamental right (*i.e.*, the right to life), *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938), the State needs a compelling interest to justify it. See Note, *The Death Penalty Cases*, 56 U. Calif. L. Rev. 1268, 1324-1354 (1968). Thus stated the substantive due process argument reiterates what is essentially the primary purpose of the Cruel and Unusual Punishments Clause of the Eighth Amendment—*i.e.*, punishment may not be more severe than is necessary to serve the legitimate interests of the State.

THE CHIEF JUSTICE asserts that if we hold that capital punishment is unconstitutional because it is excessive, we will next have to determine whether a 10-year prison sentence rather than a five-year sentence is also excessive, or whether a \$5 fine would not do equally well as a \$10 fine. He may be correct that such determinations will have to be made, but, as in these cases, those persons challenging the penalty will bear a heavy burden of demonstrating that it is excessive. These cases arise after 200 years of inquiry, 200 years of public debate and 200 years of marshaling evidence. The burden placed on those challenging capital punishment could not have been greater. I am convinced that they have met their burden. Whether a similar burden will prove too great in future cases is a question that we can resolve in time.

Id. Justice Marshall acknowledged that a fundamental rights analysis is proper. Although he mentioned the compelling state interest requirement, he assumed that petitioners must carry the burden of proving that the least restrictive alternative prong of the fundamental rights test was not satisfied. *Id.* at 360. But where fundamental rights are involved it seems that the states and not the individuals carry the burden of proof. *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972); see text accompanying notes 190-222 *infra*.

110. *Gregg v. Georgia*, 428 U.S. 153, 175 (1976) states: "We may not require the legislature to

no fundamental right to be free from confinement; therefore, the non-intrusive rational basis test is appropriate.¹¹¹ Since the rational basis test for purposes of sentencing is very similar to the cruel and unusual punishment test,¹¹² courts might feel it need not be discussed.¹¹³ Third, even assuming that a person's right to be free from confinement is fundamental, courts may see a compelling interest in the criminal law's goal of protecting the remainder of society from the criminal.¹¹⁴

Civil Commitment. While substantive due process theories have provided little relief where a criminal sentence has been imposed, recent law of the civilly committed has been quite different.¹¹⁵ The state cannot commit certain people involuntarily regardless of the procedures that are given the prospective committee.¹¹⁶ This should be obvious where the potential committee is not mentally ill, not disabled, and not dangerous, since the state has no interest sufficiently strong to outweigh this individual's right to freedom.¹¹⁷

On the other hand, where a mentally ill¹¹⁸ individual has recently committed an overt, dangerous act, he implicates a strong community interest in restricting his liberty: protection of itself and its members from an apparently dangerous person.¹¹⁹ This interest allows the confinement of the dangerous mentally ill.¹²⁰ The community also has an interest in curing those whose mental illness interferes with the ability to deal effectively with society.¹²¹ Whether the state may involuntarily

select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved." Of course long-standing application of the eighth amendment is not a reason why the due process analysis should not be discussed. The Supreme Court rejected a lengthy tradition in *Elrod v. Burns*, 427 U.S. 347, 354 (1976). Compare *Brown v. Board of Education*, 347 U.S. 483 (1954), with *Plessy v. Ferguson*, 163 U.S. 537 (1896).

111. See text accompanying notes 161-220 *infra*.

112. See note 109 *supra*.

113. See text accompanying note 109 *supra*.

114. Indeed there are times when the state interest in punishment and deterrence is so great that it can justify capital punishment. See *Gregg v. Georgia*, 428 U.S. 153, 186 (1976).

115. See *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Jackson v. Indiana*, 406 U.S. 715 (1972).

116. See text & notes 189-94 *infra*.

117. *O'Connor v. Donaldson*, 422 U.S. 563, 575-76 (1975).

118. The term "mentally ill" is very ambiguous. See *Livermore*, *supra* note 91, at 80. Arizona has attempted to avoid problems of vagueness in its commitment statute. For example, "mental disorder" is defined to exclude those suffering solely from alcoholism, drug abuse, mental retardation, illness accompanying impending death, and certain personality disorders. ARIZ. REV. STAT. ANN. § 36-501 (18) (1974). For an analysis of the effect of several of Arizona's fairly specific definitions, see Shuman, Hegland & Wexler, *Arizona's Mental Health Services Act: An Overview and an Analysis of Proposed Amendments*, 19 ARIZ. L. REV. 313, 329-43 (1977).

119. *Cross v. Harris*, 413 F.2d 1095, 1102 (D.C. Cir. 1969); *Lynch v. Baxley*, 386 F. Supp. 378, 391 (M.D. Ala. 1974); *Bell v. Wayne County Gen. Hosp.*, 384 F. Supp. 1085, 1092 (W.D. Mich. 1974); *Lessard v. Schmidt*, 349 F. Supp. 1078, 1093 (E.D. Wis. 1972), *vacated on procedural grounds*, 414 U.S. 473 (1974); *State v. James*, 534 S.W.2d 41, 44 (Mo. 1976).

120. *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975); *In re Ballay*, 482 F.2d 648, 658-59 (D.C. Cir. 1973); *Nason v. Superintendent, Bridgewater Hosp.*, 353 Mass. 604, 612, 233 N.E.2d 908, 913 (1968).

121. See text & notes 63-77 *supra*.

commit such a nondangerous mentally ill individual is now in question.¹²²

A significant number of jurisdictions have long required that those subject to initial commitment be dangerous to themselves or others.¹²³ *Lessard v. Schmidt*¹²⁴ and *Lynch v. Baxley*,¹²⁵ United States district court cases decided before *O'Connor v. Donaldson*,¹²⁶ held that dangerousness is a constitutional prerequisite to civil commitment.¹²⁷ Since *Donaldson*, the constitutional requirement of dangerousness prior to civil commitment has emerged more fully.¹²⁸ Not only does the recently developed standard require that a committee be dangerous, but the state must prove his dangerousness by introducing evidence of recent overt acts.¹²⁹ A recent overt act is a judicially-made¹³⁰ requirement designed to insure that the best predictive devices be utilized before an individual is preventively detained because of his status as mentally ill.¹³¹

Substantive due process analysis considers both the potential deprivation to the individual and the importance of the state interest in requiring that deprivation.¹³² Society's interest in confining the dangerous non-criminal is not identical to its interest in imprisoning dan-

122. See text & notes 189-206 *infra*.

123. See *Developments in the Law*, *supra* note 63, at 1203.

124. 349 F. Supp. 1078 (E.D. Wis. 1972).

125. 386 F. Supp. 378 (M.D. Ala. 1974).

126. 422 U.S. 563 (1975).

127. See *State ex rel. Hawks v. Lazaro*, — W. Va. —, —, 202 S.E.2d 109, 123-24 (1974). *Contra*, *Fhagen v. Miller*, 29 N.Y.2d 348, 354, 278 N.E.2d 615, 617-18, 328 N.Y.S.2d 393, 396-97 (1972), *cert. denied*, 409 U.S. 845 (1972).

128. See, e.g., *Stamus v. Leonhardt*, 414 F. Supp. 439, 450-51 (S.D. Iowa 1976); *Suzuki v. Quisenberry*, 411 F. Supp. 1113, 1124-25 (D. Hawaii 1976); *Doremus v. Farrell*, 407 F. Supp. 509, 514 (D. Neb. 1975); *Kendall v. True*, 391 F. Supp. 413, 418 (W.D. Ky. 1975); *In re Beverly*, 342 So. 2d 481, 487 (Fla. 1977).

129. *Cross v. Harris*, 418 F.2d 1095, 1102 (D.C. Cir. 1969); *Millard v. Harris*, 406 F.2d 964, 973 (D.C. Cir. 1968); *Stamus v. Leonhardt*, 414 F. Supp. 439, 450-51 (S.D. Iowa 1976); *Doremus v. Farrell*, 407 F. Supp. 509, 515 (D. Neb. 1975); *Lynch v. Baxley*, 386 F. Supp. 378, 391 (M.D. Ala. 1974); *Lessard v. Schmidt*, 349 F. Supp. 1078, 1093 (E.D. Wis. 1972), *vacated on procedural grounds*, 414 U.S. 473 (1974). *But see In re Chambers*, 71 Cal. App. 3d 277, 285, 139 Cal. Rptr. 357, 362 (1977).

130. *Cross v. Harris*, 418 F.2d 1095, 1102 (D.C. Cir. 1969); *Doremus v. Farrell*, 407 F. Supp. 509, 515 (D. Neb. 1975); *Lynch v. Baxley*, 386 F. Supp. 378, 391 (M.D. Ala. 1974). *But see ARIZ. REV. STAT. ANN. § 36-501.3*; Note, *Donaldson, Dangerousness and the Right to Treatment*, 3 HASTINGS CONST. L.Q. 599, 619-26 (1976). See text & notes 230-31 *infra*.

131. *Cross v. Harris*, 418 F.2d 1095, 1101-02 (D.C. Cir. 1969); *Millard v. Harris*, 406 F.2d 964, 972-73 (D.C. Cir. 1968); *Lynch v. Baxley*, 386 F. Supp. 378, 391 (M.D. Ala. 1974). Verbal threats can be acts used to prove dangerousness. *Id.*; *In re Graham*, 40 Ill. App. 3d 452, 454, 352 N.E.2d 387, 388-89 (1976). One federal court has recently held that a person's overt acts which exhibit only dangerousness to property are not a constitutionally adequate basis on which to commit an individual. *Suzuki v. Alba*, 438 F. Supp. 1106, 1109 (D. Hawaii 1977). The overt acts requirement does not preclude civil commitment of those unable to care for themselves where no willing family members or friends can assist the individual in surviving safely in freedom. *In re Beverly*, 342 So. 2d 481, 485-86 (Fla. 1977).

132. See *Elrod v. Burns*, 427 U.S. 347, 362-63 (1976); *Buckley v. Valeo*, 424 U.S. 1, 25-26 (1976).

gerous convicts.¹³³ The latter are proper candidates for punishment and are assumed to be members of a class of rational individuals who are capable of being deterred;¹³⁴ the former should not be punished for their illness¹³⁵ and are generally considered not affected by the principles of deterrence.¹³⁶ There are, of course, similarities in society's interests in isolating and treating the dangerous culpable and non-culpable individuals.¹³⁷

The basic freedom lost by all of the involuntarily confined is identical. But courts seem to be considerably more protective of the substantive due process rights of committed persons than they are of convicted persons.¹³⁸ The difference is most easily explained by the differing state interests involved. Punishment and deterrence are state interests against the culpable convict but not against the non-culpable patient.¹³⁹ If a "state interest spectrum" is assumed to exist,¹⁴⁰ the weight of the interest in confining convicts is at the most weighty end; while confinement of committees is at the end which least justifies confinement at all. Thus, society's apparent willingness to warehouse

133. *Dixon v. Jacobs*, 427 F.2d 589, 595 (D.C. Cir. 1970); *State v. Krol*, 68 N.J. 236, 246, 344 A.2d 289, 295 (1975).

134. See *Gregg v. Georgia*, 428 U.S. 153, 186 (1976); Antunes & Hunt, *The Deterrent Impact of Criminal Sanctions: Some Implications for Criminal Justice Policy*, 51 J. URB. L. 145 (1973); text accompanying notes 101-14 *supra*, 136 *infra*.

135. See *Dixon v. Jacobs*, 427 F.2d 589, 595 (D.C. Cir. 1970); *State v. Krol*, 68 N.J. 236, 246, 344 A.2d, 289, 295 (1975).

136. Both the M'Naughten and Model Penal Code tests for insanity require a state of mind which is substantially nondeterrable. See *Developments in the Law*, *supra* note 63, at 1232-35.

137. "Dangerousness to others" commitments and the criminal law both rest on the police power of the state. *Id.* at 1222-45. The police power embraces an almost infinite variety of subjects designed to promote or protect the general welfare, including criminal law. See *Skinner v. Oklahoma*, 316 U.S. 535, 540 (1942).

138. Spece, *The Least Restrictive Alternative Right to Treatment Theory: A Case Study in Justifying and Applying Constitutional Standards of Judicial Review*, 20 ARIZ. L. REV. 1 (1979). There is a trend towards less availability for post-conviction habeas corpus relief. Compare *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Stone v. Powell*, 428 U.S. 465 (1976); and *Davis v. United States*, 417 U.S. 333 (1974), with *Sanders v. United States*, 373 U.S. 1 (1963). On the other hand, *Jackson v. Indiana*, 406 U.S. 715 (1972); *O'Connor v. Donaldson*, 422 U.S. 563 (1975), and lower court cases like *Suzuki v. Quisenberry*, 411 F. Supp. 1113 (D. Hawaii 1976); *Fasulo v. Arafeh*, 173 Conn. 473, 378 A.2d 553 (1977), have made release from civil commitment less difficult.

139. Compare text & notes 100-01 *supra*, with text & notes 133-36 *supra*.

140. Spectrum of state interest in confining classes of individuals:

Convicts	NGI	Committee	Non-Dangerous Mentally Ill
Greatest state interest in confinement		Least state interest justifying confinement	No sufficiently strong state interest in confinement

The spectrum's extreme left represents the state and the strength of its police power interests in punishing crime. At the right end of the continuum are people who have committed no crime and are capable of surviving safely in freedom. The committee may be confined if mentally ill and a danger to self or others. See text & notes 115-31 *supra*. The gap between the committee and the convict on the spectrum is caused by the state's interest in enforcing its criminal law. It is often assumed that state interests in confining the NGI exceed its interests in restricting the liberty of committees, but are less than its interests in imprisoning convicts. See text & note 144 *infra*.

prisoners does not seem to completely carry over to the mentally ill.¹⁴¹ Outrageous instances of the misuse of involuntary commitment¹⁴² have apparently sensitized judges to potential abuses being suffered by innocent patients.¹⁴³

Not Guilty by Reason of Insanity. Assuming again that classes of individuals occupy spots on a spectrum of state interests in confinement, the law has long proceeded as though the NGI rest between the convicted and the mentally competent civilly committed.¹⁴⁴ Although this assumption has been the subject of serious attack,¹⁴⁵ it nevertheless remains true that courts often impose more restrictive criteria upon the NGI than the civilly committed before release or conditional release will be granted.¹⁴⁶ In *Ecker II*, for example, the court upheld the District of Columbia practice of requiring the NGI to successfully complete procedures not required of civil committees.¹⁴⁷ The court allowed this distinction to continue as long as the hypothetical maximum sentence for the charge which resulted in the NGI verdict had not

141. In *McNeil v. Director, Patuxent Inst.*, 407 U.S. 245 (1972), the Court was quite willing to release the petitioner who was kept in custody beyond the date of expiration of his sentence, even though he would not cooperate with authorities who wanted to diagnose his mental condition. *Id.* at 252. The ability of the state to hold the uncooperative inmate before his sentence had elapsed was unquestioned.

142. See *O'Connor v. Donaldson*, 422 U.S. 563 (1975), discussed in note 53 *supra*; *United States ex rel. Schuster v. Vincent*, 524 F.2d 153 (2d Cir. 1975). Kenneth Donaldson was confined for over fourteen years based on his need for treatment which he never received. 422 U.S. at 568-69. Donaldson has now written a book detailing his experience. See K. DONALDSON, *INSANITY INSIDE OUT* (1976).

Roy Schuster had suffered several major disappointments which took him from a life of success to a point of threatening suicide, and eventually to the murder of his wife for which he was sentenced to 25 years to life in a New York state prison. 524 F.2d at 155. In 1941, seven years before his parole eligibility date, Schuster complained of prison corruption. He was subsequently committed to an institution for the criminally insane where he remained for 31 years, and from which he lost his opportunity for parole. *Id.* Schuster had been a model prisoner, the kind parole boards allow to serve a shortened sentence. He never faced a parole board until 1972, 24 years beyond his normal eligibility time. Even this belated appearance came about only because of a favorable decision in *United States ex rel. Schuster v. Herold*, 410 F.2d 1071 (2d Cir. 1965). *Id.* at 155-56. Ironically, the medical reason for his commitment was paranoia because he felt the prison personnel were against him. 410 F.2d at 1073. Judge Kaufman of the Second Circuit agreed with Schuster and expressed his outrage over the state's conduct by making an analogy to Alexander Solzhenitsyn's *Gulag Archipelago*. 524 F.2d at 154.

143. See *O'Connor v. Donaldson*, 422 U.S. 563, 568-69 (1975); *United States ex rel. Schuster v. Vincent*, 524 F.2d 153, 155 (2d Cir. 1975); *In re Sealy*, 218 So. 2d 765, 768-69 (Fla. Dist. Ct. App. 1969).

144. See, e.g., *Lynch v. Overholser*, 369 U.S. 705, 715 (1962); *United States v. Ecker*, 543 F.2d 178, 199 (D.C. Cir. 1976); *In Re Franklin*, 7 Cal. 3d 126, 147-48, 496 P.2d 465, 478-79, 101 Cal. Rptr. 553, 566-67 (1972); *Chase v. Kearns*, 278 A.2d 132, 138 (Me. 1971); *Alter v. Morris*, 85 Wash. 2d 414, 420, 536 P.2d 630, 633 (1975); Note, *Commitment of Persons Acquitted By Reason of Insanity: The Example of the District of Columbia*, 74 COLUM. L. REV. 732, 735-36 (1974); 24 ME. L. REV. 135, 140 (1972). See discussion note 140 *supra*; text accompanying notes 270-390 *infra*.

145. *United States v. Ecker*, 479 F.2d 1206, 1211 (D.C. Cir. 1973); *State v. Krol*, 68 N.J. 236, 254-55, 344 A.2d 289, 299 (1975); see *German & Singer, supra* note 53, at 1019-24; Note, *supra* note 144, at 748-49.

146. *United States v. Ecker*, 543 F.2d 178, 194-99 (D.C. Cir. 1976); *Alter v. Morris*, 85 Wash. 2d 414, 424, 536 P.2d 630, 635 (1975); see *German & Singer, supra* note 53, at 1054-55.

147. 543 F.2d at 194-99; see text accompanying notes 310-14 *infra*.

been reached.¹⁴⁸

Ecker II exemplifies acceptance of the "middle of the continuum" assumption for rights of the NGI. Deterrence and the hypothetical maximum sentence for the anti-social act are relevant in establishing procedures for NGI release; a criminal law interest apparently remains even after a verdict of acquittal is rendered.¹⁴⁹ While the District of Columbia must prove mental illness and dangerousness of committees beyond a reasonable doubt,¹⁵⁰ it is permissible to confine the NGI upon a demonstration by a preponderance of the evidence that the individual is mentally ill and because of that illness is likely to injure himself or others.¹⁵¹ Other jurisdictions are re-thinking the continuum theory accepted by *Ecker II*, apparently on the assumption that the criminal law should have no influence on release decisions involving defendants who have been found not guilty.¹⁵² An examination of the validity of the underlying rationale for the continuum theory is necessary to understand whether the NGI are entitled to the same procedural rights as civil committees.¹⁵³

Commitment in Order to Stand Trial. Like the NGI, those who are confined for the purpose of gaining competence to stand trial are often placed between the convict and the civil committee on the spectrum of rights retained.¹⁵⁴ Unlike the NGI, they have not been adjudicated "not guilty" and remain subject to future trial and conviction for a past event.¹⁵⁵ The purposes behind the detention of those waiting to gain competence to stand trial should determine the substantive stand-

148. 543 F.2d at 199 ("Ecker had been institutionalized for over seven years, but absent his acquittal by reason of insanity he could have been incarcerated for life.")

149. *Id.* at 196-99. In *Lynch v. Overholser*, 369 U.S. 705, 714-15 (1962), the Supreme Court interpreted the applicable statute to have intended a deterrent purpose.

150. See *In re Ballay*, 482 F.2d 648, 669 (D.C. Cir. 1973).

151. *United States v. Brown*, 478 F.2d 606, 608, 610 (D.C. Cir. 1973).

152. See *State v. Clemons*, 110 Ariz. 79, 83, 515 P.2d 324, 328, (1973); *Wilson v. State*, 259 Ind. 375, 386, 287 N.E.2d 875, 881 (1972); *People v. McQuillen*, 392 Mich. 511, 533-35, 221 N.W.2d 569, 579-80 (1974); *People v. Lally*, 19 N.Y.2d 27, 35, 224 N.E.2d 87, 92, 277 N.Y.S.2d 654, 660 (1966); *State ex rel. Kovach v. Schubert*, 64 Wis. 2d 612, 622, 219 N.W.2d 341, 346-47 (1974). *Contra*, *Alter v. Morris*, 85 Wash. 2d 414, 420, 536 P.2d 630, 633 (1975).

153. See text & notes 270-390 *infra*.

154. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972), allows confinement where progress towards regaining competency is being made without institution of customary civil commitment procedures. *Commonwealth v. McQuaid*, 464 Pa. 499, 347 A.2d 465 (1975), states:

Dangerousness may well be required for civil commitment; however, it need not and should not be applied to section 408. A defendant's incompetency may be curable but not dangerous. The interests of both the Commonwealth and the defendant would best be served by having the defendant committed and treated in hope that he will become competent and the trial might then proceed. Requiring a finding of dangerousness would cause the trial to be stayed indefinitely because a nondangerous but incompetent defendant could not be committed and therefore would not receive potentially beneficial treatment.

Id. at 512-13, 347 A.2d at 472.

155. See text & notes 78-88 *supra*.

ards under which confinement or release should be granted.¹⁵⁶ Where an incompetent accused is not dangerous to himself or others, and does not require in-patient treatment to improve his mental condition, he may be released and treated without being confined.¹⁵⁷ Where in-patient treatment is required to restore competence and the individual is not dangerous, the state maintains a greater interest in confining the incompetent defendant than in confining a civil committee who is in need of treatment.¹⁵⁸ This is so because the state has an interest in the orderly disposition of a pending criminal trial of an incompetent which it does not possess with respect to civil committees.¹⁵⁹ Thus the police power interest in bringing criminal defendants to trial may supplement the state's interest in treating the individual to bring the sum of the state interests to a level sufficiently compelling to overcome even a fundamental right.¹⁶⁰

Fundamental Rights & Strict Scrutiny: The Basic Right to be Free From Confinement.

To arrive at the proper due process standard for release from confinement, the threshold determination is whether the right to be free from confinement is deserving of strict judicial scrutiny. If basic freedom is protected by the strict scrutiny standard, deprivations of this freedom can be justified only where a state's interest in confinement is compelling, and where confinement is the least restrictive means of promoting that compelling interest; otherwise, the less demanding rational basis test will justify involuntary confinement to promote a legitimate interest of the state.¹⁶¹ What creates a right which triggers strict scrutiny review is subject to debate. In *Dandridge v. Williams*¹⁶² the Supreme Court rejected an equal protection challenge to a Maryland law which limited aid to families with dependent children in a manner which disadvantaged large families.¹⁶³ The Court considered whether the deprivation of the public welfare right at issue required strict scru-

156. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972); *Commonwealth v. McQuaid*, 464 Pa. 499, 508-13, 347 A.2d 465, 470-72 (1975).

157. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972); *Gibbs v. State*, 235 Ga. 480, 484, 220 S.E.2d 254, 257 (1975); *Commonwealth v. McQuaid*, 464 Pa. 499, 512, 347 A.2d 465, 472 (1975). *But see* Foote, *A Comment on Pre-Trial Commitment of Criminal Defendants*, 108 U. PA. L. REV. 832, 843 (1960) ("There is little reason to question that a criminal pretrial commitment will usually result in the poorest and most restrictive form of hospitalization."). Also, nothing in the text is meant to suggest that the incompetent have rights to release or bail over and above that of competent pre-trial detainees.

158. *See* *Commonwealth v. McQuaid*, 464 Pa. 499, 508-13, 347 A.2d 465, 470-72 (1975).

159. *Id.*; *see* discussion note 154, *supra*.

160. 464 Pa. 499, 508-14, 347 A.2d 465, 470-72 (1975).

161. *See* text & notes 94-96 *supra*.

162. 397 U.S. 471 (1970).

163. *Id.* at 475.

tiny.¹⁶⁴ A majority of the Court conceded that the administration of public welfare assistance "involves the most basic economic needs of impoverished human beings," but nevertheless held the right in issue was not fundamental.¹⁶⁵ *San Antonio Independent School District v. Rodriguez*¹⁶⁶ confirmed that the importance of the right at stake does not, by itself, require strict scrutiny in the constitutional scheme;¹⁶⁷ rather, a right is fundamental if it receives explicit or implicit recognition in the text of the Constitution.¹⁶⁸

The right to be free from confinement is at the core of "liberty" explicitly mentioned in the due process clauses of the fifth and fourteenth amendments.¹⁶⁹ Liberty is a basic right, second only to life itself.¹⁷⁰ It has also been suggested that civil commitment deprives individuals of their fundamental rights of privacy, travel, and association.¹⁷¹ This Commentary will summarize judicial precedents which either apply or decline to apply invigorated due process protection where confinement is in question.

The United States Supreme Court has not explicitly stated what level of judicial protection is commanded by the "massive deprivation of liberty" civil commitment entails.¹⁷² Three decisions in the mental health area, *Baxstrom v. Herold*,¹⁷³ *Jackson v. Indiana*,¹⁷⁴ and *O'Connor v. Donaldson*,¹⁷⁵ relate most closely to the issue. *Baxstrom* involved an equal protection challenge of a prisoner who was summarily civilly committed at the expiration of his criminal sentence.¹⁷⁶ Although he was transferred from the custody of the Department of Corrections to the Department of Mental Hygiene, he remained in Dannemora State Hospital, a facility for the criminally insane.¹⁷⁷ The Court agreed with the equal protection challenge but suggested that a rational basis, that is, "some relevance to the purpose for which the classification is made," might suffice to justify the state procedures.¹⁷⁸

164. *Id.* at 485-86.

165. *Id.* at 486-87.

166. 411 U.S. 1 (1973).

167. *Id.* at 33.

168. *Id.*

169. *See, e.g.,* *Arnett v. Kennedy*, 416 U.S. 134, 157 (1974); *Roth v. Board of Regents*, 408 U.S. 564, 572 (1971); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

170. *United States v. York*, 281 F. Supp. 8, 16 (D. Conn. 1968); *People v. Olivas*, 17 Cal. 3d 236, 252, 551 P.2d 375, 384, 131 Cal. Rptr. 55, 64 (1976).

171. Chambers, *Alternatives to Civil Commitment of the Mentally ill: Practical Guides and Constitutional Imperatives*, 70 MICH. L. REV. 1108, 1158-59 (1972).

172. *See Humphrey v. Cady*, 405 U.S. 504, 506 (1972).

173. 383 U.S. 107 (1966).

174. 406 U.S. 715 (1972).

175. 422 U.S. 563 (1975).

176. 383 U.S. at 108.

177. *Id.*

178. *See id.* at 111.

Similarly, in *Jackson v. Indiana*, there is language which suggests that the statutory scheme which allowed the lengthy confinement without a hearing, of an individual who was incompetent to stand trial, was lacking a "reasonable justification."¹⁷⁹ More recently, *Donaldson* held that a non-dangerous committee who was capable of surviving safely in freedom could not be kept in simple custodial confinement.¹⁸⁰ Analysis of these three cases does not resolve the ambiguity surrounding the level of scrutiny to be applied, but *Donaldson* implicitly used a test which approximates the strict scrutiny and not the rational basis test.¹⁸¹

In *United States v. Jackson*,¹⁸² the District of Columbia Circuit Court of Appeals relied on language in *Baxstrom* and *Jackson v. Indiana* to apply the rational basis test to an equal protection challenge which was premised on the "fundamental" right to liberty.¹⁸³ But the Supreme Court in *Baxstrom* and *Jackson* did not analyze the factors which led to this apparent use of the rational basis test. In both cases, the Court found that no reasonable grounds existed for the distinctions at issue.¹⁸⁴ Therefore, there were no reasons for the Court to concern itself with whether the strict scrutiny standard applied. Indeed, *Baxstrom* at one point states: "This statutory classification cannot be justified by the contention that Dannemora is substantially similar to other mental hospitals in the State and that commitment to one hospital or another is simply an administrative matter affecting no *fundamental rights*."¹⁸⁵ "Fundamental rights" is one term used to indicate the need for a strict scrutiny standard.¹⁸⁶ The equal protection rational basis test at the time of *Baxstrom* had been stated as follows: "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."¹⁸⁷ Considering this together with the use of the words "fundamental rights" and the rejection of the state procedure as violative of equal protection, it may be argued that *Baxstrom* did in fact apply strict scrutiny review. Since *Jackson v. Indiana*'s use of rational basis language followed *Baxstrom* as authority,¹⁸⁸ these two Supreme Court cases are clearly ambiguous as final

179. 406 U.S. at 729.

180. 422 U.S. at 575-76.

181. See text & notes 189-95 *infra*.

182. 553 F.2d 109 (D.C. Cir. 1976).

183. *Id.* at 119-20. *Accord*, *Dorsey v. Solomon*, 435 F. Supp. 725, 732 (D. Md. 1977), which specifically held that indeterminate confinement for treatment did not infringe upon any fundamental right. *Dorsey* relied on *Dower v. Boslow*, 539 F.2d 969 (4th Cir. 1976), in which the court did not specify which test was being applied but apparently adopted the rational basis test.

184. *Baxstrom v. Herold*, 383 U.S. 107, 111, 114 (1966); *Jackson v. Indiana*, 406 U.S. 715, 738 (1972).

185. 383 U.S. at 113 (emphasis added).

186. See *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 33 (1973); *Danbridge v. Williams*, 397 U.S. 471, 475-76 (1970).

187. *McGowan v. Maryland*, 366 U.S. 420, 426 (1961). See discussion note 276 *infra*.

188. 406 U.S. at 729.

authority for which test is proper for those involuntarily confined.

The more recent Supreme Court decision gives indirect support for the advocates of strict scrutiny. Although *Donaldson* specifically disclaimed decision on the issue,¹⁸⁹ it has been widely interpreted as prohibiting the civil commitment of those who are not dangerous to self or others.¹⁹⁰ It has long been acknowledged that states have a legitimate interest in treating those who are mentally ill.¹⁹¹ If the state is prohibited from involuntarily committing people to promote its accepted legitimate interest in providing treatment, it becomes obvious that a more stringent test than "rational basis" is being required of states. *Donaldson* also stated:

May the State confine the mentally ill merely to ensure them a living standard superior to that they enjoy in the private community? That the State has a proper interest in providing care and assistance to the unfortunate goes without saying. But the mere presence of mental illness does not disqualify a person from preferring his home to the comforts of an institution. Moreover, while the State may arguably confine a person to save him from harm, incarceration is rarely if ever a necessary condition for raising the living standards of those capable of surviving safely in freedom, on their own or with the help of family or friends.¹⁹²

Thus, improving a person's living standard is a legitimate interest for the state, but nevertheless, it is not sufficient to overcome the individual's right to choose where to live.¹⁹³ *Donaldson* also held that states must consider less restrictive means before confining the non-dangerous.¹⁹⁴ The least restrictive means analysis is commonly used in cases where states must justify their actions by not merely a rational, but a compelling interest.¹⁹⁵

The deference given to the right to be free from confinement in non-mental health cases may also support the argument for strict scrutiny in civil commitment cases. For instance, the liberty interest is suf-

189. 422 U.S. at 573.

190. See, e.g., *Stamus v. Leonhardt*, 414 F. Supp. 439, 450-51 (S.D. Iowa 1976); *Suzuki v. Quisenberry*, 411 F. Supp. 1113, 1124-25 (D. Hawaii 1976); *Doremus v. Farrell*, 407 F. Supp. 509, 514 (D. Neb. 1975); *Kendall v. True*, 391 F. Supp. 413, 418 (W.D. Ky. 1975); *State v. Krol*, 64 N.J. 236, 260, 344 A.2d 289, 302 (1975).

In *Donaldson*, Chief Justice Burger joined the Court in its unanimous opinion, 422 U.S. at 578, and also stated in a concurring opinion: "Nor can I accept the theory that a state may lawfully confine an individual thought to need treatment and justify that deprivation of liberty solely by providing some treatment. Our concept of due process would not tolerate such a 'tradeoff.'" *Id.* at 589.

191. 422 U.S. at 575.

192. *Id.*

193. *Id.*

194. *Id.* The Court cites as authority *Shelton v. Tucker*, 364 U.S. 479, 488-90 (1960), which contains an often used description of the least restrictive means principle. See text & notes 224-25 *infra*.

195. See text & notes 93-94 *supra*.

ficient to justify a criminal defendant's right to counsel in all cases where his freedom may be removed for even one day.¹⁹⁶ Likewise, the state's "concededly valid" interest in enforcing payment of fines is not sufficient justification to keep in jail someone who has served his maximum sentence;¹⁹⁷ or someone unable to pay those fines, at least where the state has not exhausted less restrictive means.¹⁹⁸

Explicit recognition of a right to be free from confinement, the infringement of which is subject to strict constitutional scrutiny, has come from two United States District Court decisions.¹⁹⁹ The court in *Lessard v. Schmidt*²⁰⁰ stated:

The power of the state to deprive a person of the fundamental liberty to go unimpeded about his or her affairs must rest on a consideration that society has a compelling interest in such deprivation. In criminal cases this authority is derived from the police power, granted because of the necessity of protecting society from anti-social actions. . . . In civil commitment proceedings the same fundamental liberties are at stake.²⁰¹

The Validity of Continuing Confinement. Assuming that the right to be free from confinement is fundamental, yet overridden by a showing of dangerousness at the time of an initial commitment, does it have continuing constitutional protection when courts review the validity of a continuing confinement? *Donaldson* seems to have answered this question in the affirmative. In *Donaldson*, the patient sued hospital personnel for wrongfully preventing his release from a Florida mental institution.²⁰² Donaldson was told at the time of his commitment that he would need a few weeks treatment for his mental condition.²⁰³ He remained committed, without treatment, for over fourteen years in spite of his own diligent efforts, and those of his friends, to secure his release.²⁰⁴ The Court in *Donaldson* in part ruled:

The fact that state law may have authorized confinement of the harmless mentally ill does not itself establish a constitutionally adequate purpose for the confinement. . . . Nor is it enough that Donaldson's original confinement was founded upon a constitutionally

196. See *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972).

197. See *Williams v. Illinois*, 399 U.S. 235, 244-45 (1970).

198. See *Tate v. Short*, 401 U.S. 395, 399-401 (1971).

199. See *Bell v. Wayne County Gen. Hosp.*, 384 F. Supp. 1085, 1092 (W.D. Mich. 1974); *Lessard v. Schmidt*, 349 F. Supp. 1078, 1084 (E.D. Wis. 1972), *vacated on procedural grounds*, 414 U.S. 473 (1974). See also *People v. Olivias*, 17 Cal. 3d 236, 247-52, 551 P.2d 375, 381-84, 131 Cal. Rptr. 55, 61-64 (1976) which concluded liberty is a fundamental right for equal protection purposes where a juvenile misdemeanor challenges his potential confinement for a period in excess of the maximum sentence an adult could have received for the same behavior.

200. 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated on procedural grounds*, 414 U.S. 473 (1974).

201. *Id.* at 1084.

202. 422 U.S. at 565.

203. *Id.* at 576.

204. See *id.* at 567-69.

adequate basis, if in fact it was, because even if his involuntary confinement was initially permissible, it could not constitutionally continue after that basis no longer existed.²⁰⁵

Donaldson strongly implied that, if the importance of the state's purpose diminished after initial commitment to the point where it was no longer compelling, it would no longer be adequate to justify confinement.²⁰⁶ For example, assume patient *X* was initially committed because he was in need of treatment and a danger to the community. Also assume that the state has a compelling interest in preventing *X* from endangering the community, but a less than compelling interest in providing *X* with treatment. If after confinement begins, *X*'s condition improves so he is no longer a danger to the community, the state should not be able to confine *X* even though he is still in need of treatment.

Several cases where states sought to hold prisoners beyond the time of their maximum sentence also illustrate this point.²⁰⁷ In *Williams v. Illinois*²⁰⁸ an indigent individual had been convicted of theft and sentenced to one year in prison plus a \$500 fine.²⁰⁹ If the prisoner was unable to pay the fine after he otherwise would be eligible for release, the Illinois statute provided for extended incarceration.²¹⁰ The Supreme Court, comparing *Williams*' situation to that of an indigent unable to pay a judgment where no imprisonment is included,²¹¹ struck down this state legislation which wrongfully withheld the freedom of an already confined individual.²¹² The fact that *Williams* involved an individual already confined did not prevent Justice Harlan from stating in his concurring opinion that the Court will "squint hard at any legislation that deprives an individual of his liberty—his right to remain free."²¹³

In summary, courts have held that, as a matter of substantive due process, states could not confine individuals in furtherance of interests that are concededly rational but nothing more.²¹⁴ The least restrictive means principle has been applied to minimize the possibility of com-

205. *Id.* at 574-75 (citations omitted).

206. *See id.*; *see Fasulo v. Arafah*, 173 Conn. 473, 476-79, 378 A.2d 553, 555-56 (1977).

207. *See, e.g., McNeil v. Director, Patuxent Inst.*, 407 U.S. 245 (1972); *Specht v. Patterson*, 386 U.S. 605 (1967); *Baxtrom v. Herold*, 383 U.S. 107 (1966).

208. 399 U.S. 235 (1970).

209. *Id.* at 236.

210. *Id.* at 236-37.

211. *Id.* at 238.

212. *Id.* at 240-41; *see Tate v. Short*, 401 U.S. 395, 399-401 (1971).

213. 399 U.S. at 263; *see Special Project: The Administration of Psychiatric Justice: Theory and Practice in Arizona*, 13 ARIZ. L. REV. 1, 142-43 (1971).

Williams is used to illustrate judicial scrutiny more intense than the traditional rational basis test for substantive due process. *Williams* was decided on equal protection grounds, but because of the similarity in tests for due process and equal protection violations, it is pertinent to this discussion. *See text & notes 272-76 infra.*

214. *See text & notes 189-95 supra.*

mitment.²¹⁵ These holdings have protected the liberty interests of those already confined as well as those who may be confined in the future.²¹⁶ The continuing liberty interest of individuals properly civilly committed has been found entitled to a strict scrutiny protection.²¹⁷ Criminals detained longer than their maximum sentence likewise have received significant judicial protection.²¹⁸ In civil commitment, a standard of dangerousness to self or others is now recognized as a constitutional pre-requisite for involuntary confinement.²¹⁹ More precisely, if dangerousness to self or others is necessary to justify initial commitment, and if the nature and duration of confinement must bear reasonable relation to these justifications, then the continuing validity of confinement must be judged on the existence *vel non* of the original justifications for commitment.²²⁰

Strict Scrutiny Standard of Release from Confinement: Compelling Interests and Least Restrictive Means. The state must have a compelling interest to satisfy substantive due process requirements before denying an individual his right of liberty. Procedural protections must be as strong as necessary to preserve the substantive right in issue.²²¹ The Connecticut Supreme Court has applied this flexible due process doctrine to its civil committees:

Any procedure to allow the release of involuntarily confined civilly 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 extrainstitutional *legal* remedies.²²²

The second prong of the fundamental rights test requires that necessary infringements take place only in the least restrictive way possible consistent with the state's compelling interest.²²³ The least restrictive

215. See text & note 194 *supra*.

216. See text accompanying notes 202-15 *supra*.

217. *Id.*

218. See *McNeil v. Director, Patuxent Inst.*, 407 U.S. 245 (1972); *Williams v. Illinois*, 399 U.S. 235 (1970); *Baxstrom v. Herold*, 383 U.S. 107 (1966).

219. See text & notes 123-31, 189-201 *supra*.

220. See text & notes 202-19 *supra*.

221. See *Goldberg v. Kelly*, 397 U.S. 254, 268-69 (1970); *Speiser v. Randall*, 357 U.S. 513, 525 (1958); *In re Ballay*, 482 F.2d 648, 668 (D.C. Cir. 1973).

222. *Fasulo v. Arafteh*, 173 Conn. 473, 478, 378 A.2d 553, 555-56 (1977) (emphasis in original).

223. *Roe v. Wade*, 410 U.S. 113, 155 (1973); *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972); *Shelton v. Tucker*, 364 U.S. 479, 488-90 (1960); see *Bastress, The Less Restrictive Alternative in*

alternative principle is often described in language from *Shelton v. Tucker*.²²⁴

In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.²²⁵

This principle is relevant to the length of time a single commitment authorizes custody,²²⁶ and the place and conditions for confinement.²²⁷

The least restrictive alternative principle and the holdings of *Jackson v. Indiana* and *Donaldson* may not be adequately enforced if the possibility for an indeterminate commitment exists.²²⁸ It is clear that when the state's compelling interest in confining individuals no longer exists, those persons should be released. In order to have a compelling interest, the state must prove that an individual is mentally ill and is dangerous to himself or others.²²⁹ In order to prove the individual dangerous, the Constitution seems to require that evidence of recent overt acts exhibiting dangerousness be introduced.²³⁰ If it is necessary to justify confinement with evidence of recent overt acts, it would seem necessary to conclude that when those acts are no longer recent, the confinement is no longer justified.²³¹ Moreover, where the procedures

Constitutional Adjudication: An Analysis, A Justification, and Some Criteria, 27 VAND. L. REV. 971, 980-85 (1974).

224. 364 U.S. 479 (1960).

225. *Id.* at 488.

226. A ten year confinement is more restrictive than a five year confinement, all other things being equal.

227. *Dixon v. Weinberger*, 405 F. Supp. 974, 978 (D.D.C. 1975), used statutory authority to implement this least restrictive alternative principle. It should be equally applicable to constitutional issues. See *Eubanks v. Clark*, 434 F. Supp. 1022, 1027-28 (E.D. Pa. 1977); *Chambers*, *supra* note 171, at 1145-68.

228. *Contra* *State v. McCarter*, 17 Wash. App. 319, 325, 562 P.2d 995, 999-1000 (1977), where a majority opinion upheld Washington's sexual psychopath statutes, RCW 71.06.010-140, which allow for indefinite commitment of certain individuals. The majority opinion made no mention of *Jackson v. Indiana*, 406 U.S. 715 (1972), or *O'Connor v. Donaldson*, 422 U.S. 563 (1975).

229. See text accompanying notes 189-206 *supra*.

230. See cases cited note 129 *supra*. Professor David Wexler has pointed out some of the benefits and detriments to the requirement that an overt act be "recent." Wexler, *Comments and Questions About Mental Health Laws in Hawaii*, 13 HAWAII B.J. 3, 5-6 (Winter 1978). He notes that defining "recent" too rigidly, for example within the past 30 days, might avoid the misuse of stale acts at commitments at the expense of excluding evidence of acts which have not lost their predictive significance, and he suggests that recent may mean a matter of weeks for the suicidal patient because of the short duration of the predictive value of a suicide attempt. Interview with David B. Wexler, Professor of Law at the University of Arizona, College of Law, in Tucson, Arizona (Mar. 30, 1978); see Greenberg, *Involuntary Psychiatric Commitments to Prevent Suicide*, 49 N.Y.U.L. REV. 227, 238-39 (1974). On the other hand, recent may mean considerably more time if the overt act was horrendous and diagnosis of the patient reliably indicated that he could be expected to remain dangerous and mentally ill for a substantial length of time. Interview with David B. Wexler, *supra*.

231. Durational limits on confinement provide problems similar to those concerning definitions of "recent." See discussion note 230 *supra*. For a description of how Arizona has "fudged"

authorizing commitment do not provide for periodic reevaluation of the justification for commitment, confinement under such procedures would seem to be the antithesis of a "least restrictive alternative."

Strict Scrutiny Standard of Release from Confinement: Burden of Proof. Where commitment is of an undetermined length with no specified maximum period, petitions for writs of habeas corpus have often been the vehicle for release used by individuals wrongfully confined.²³² But this method as it presently exists is inadequate to enforce *Donaldson*.²³³ In petitions for writs of habeas corpus the affirmative burden of proving need for relief is, for two reasons, on the confined individual. First, habeas corpus proceedings traditionally require the challenging party to overcome prior determinations which are presumptively valid.²³⁴ In addition, there are judicial and state interests in avoiding needless review which would be hampered by forcing the state to carry the burden of proof.²³⁵ The challenging party generally must prove by a preponderance of the evidence that he is wrongfully confined.²³⁶ As to the presumed correctness of the initial commitment, if recent overt acts are necessary to justify continuation of a civil commitment, there would seem to be no logical or permissible way to presume the continuing validity of the commitment once the acts justifying initial commitment are no longer recent.²³⁷ The second factor given as justifying the habeas corpus burden is the need to protect courts and states from frivolous litigation. This rationale assumes that the proverbial "floodgates of litigation" would be opened if patients and their attorneys knew the government would have to carry an affirmative burden of proof in hearings involving release from confinement.²³⁸ But *Donaldson* and the strict scrutiny test require that the government interest be no less compelling at release hearings than it is at initial commitments.²³⁹ If the liberty at issue in release hearings is the same as in initial commitment, the state's burden in overcoming that liberty interest should also be the same as in initial commitment. The burden

on its durational limits for confinement, see Wexler, *Current Currents in Institutionalization*, 14 SAN DIEGO L. REV. 979, 999-1000 (1977).

232. See Preiser v. Rodriguez, 411 U.S. 475 (1973); *Humphrey v. Cady*, 405 U.S. 504 (1972).

233. *Fasulo v. Arafah*, 173 Conn. 473, 478-79, 378 A.2d 553, 555-56 (1977); cf. *Bolton v. Harris*, 395 F.2d 642, 649 (D.C. Cir. 1968) (habeas corpus petitions are not adequate to protect the NGI from detention if commitment could occur without a hearing regarding the *present* sanity of the NGI).

234. *Johnson v. Zerbst*, 304 U.S. 458, 468-69 (1938); *Bolton v. Harris*, 395 F.2d 642, 653 (D.C. Cir. 1968).

235. See *Dixon v. Jacobs*, 427 F.2d 589, 596-97 (D.C. Cir. 1966).

236. *Bolton v. Harris*, 395 F.2d 642, 653 (D.C. Cir. 1968); *Suzuki v. Quisenberry*, 411 F. Supp. 1113, 1134 (D. Hawaii 1976).

237. *Dixon v. Jacobs*, 427 F.2d 589, 596-97 (D.C. Cir. 1966); see text & notes 201-13 *supra*.

238. *Id.*

239. *Fasulo v. Arafah*, 173 Conn. 473, 478-79, 378 A.2d 553, 556 (1977). See text & notes 172-89 *supra*.

of proof in cases of release from civil commitment is often outcome determinative.²⁴⁰ There is a substantial difference between the constitutionally-imposed state burden of proving by clear and convincing evidence that a patient is mentally ill and dangerous, and the current habeas corpus burden on the patient of proving by a preponderance of the evidence that he is no longer dangerous or mentally ill.²⁴¹ *Donaldson* simply requires more protection for the confined patient than the habeas corpus remedy now gives.

In *Fasulo v. Arafeh*,²⁴² the Connecticut Supreme Court held that civilly committed patients were denied due process "by the state's failure to provide them with periodic judicial review of their commitments in the form of state initiated recommitment hearings replete with the safeguards of the initial commitment hearings at which the state bears the burden of proving the necessity for their continued confinement."²⁴³ In *Suzuki v. Quisenberry*²⁴⁴ the federal district court went nearly as far as *Fasulo* by requiring Hawaii to reprove its need to commit a patient using procedures identical to those used at initial commitment, if the patient took the first step of initiating the procedure. *Suzuki* allowed patients an automatic right to request judicial redetermination of the need for confinement as often as every six months.²⁴⁵ The patient, or someone on his behalf, is required to make a request for the hearing at which all burdens of proof are on the state.²⁴⁶ The statutory procedures are without cost to the patient, and capable of being put in motion by any responsible person.²⁴⁷ Habeas corpus writs are available to supplement Hawaii statutory procedures for release, but these writs are available only if the patient can meet the traditional habeas corpus burden.²⁴⁸

The plans of Connecticut and Hawaii provide for administrative procedures which can enforce the substantive rule of law pronounced in *Donaldson*.²⁴⁹ They are not the only possible plans, but some plan

240. *Waite v. Jacobs*, 475 F.2d 392, 395 (D.C. Cir. 1973).

241. *Fasulo v. Arafeh*, 173 Conn. 473, 480-83, 378 A.2d 553, 557-58 (1977). This is particularly so when "dangerousness" is at issue. See *Covington v. Harris*, 419 F.2d 617, 627-28 (D.C. Cir. 1969); *Morris, The Future of Imprisonment: Toward a Punitive Philosophy*, 72 MICH. L. REV. 1161, 1164-73 (1974); *Developments in the Law*, *supra* note 63 at 1240-44. But see *Lublin v. Central Islip Psychiatric Center*, 56 App. Div. 2d 1, 26-27, 391 N.Y.S.2d 603, 619 (1977) (Titone, J., concurring in part and dissenting in part).

242. 173 Conn. 473, 378 A.2d 553 (1977).

243. *Id.* at 483, 378 A.2d at 558.

244. 411 F. Supp. 1113 (D. Hawaii 1976).

245. *Id.* at 1134.

246. *Id.*

247. *Id.*

248. *Id.*

249. See text & notes 189-206 *supra*.

is necessary to meet post-*Donaldson* requirements.²⁵⁰ *Fasulo* and *Suzuki* indicate that provisions placing the burden of proving the continuing need for commitment on the state are mandated by *Donaldson*.²⁵¹ While six months is a permissible period of time to honor the authority of a prior commitment, *Suzuki* implied that open-ended commitment would violate the holding of *Donaldson*.²⁵² The court in *Fasulo* explicitly stated:

[T]he original involuntary commitment proceeding can only establish that the state may confine the individual at the time of the hearing and for the foreseeable period during which that status is unlikely to change. Upon the expiration of that period, the state's power to deprive the patient of his liberty lapses and any further commitment must be justified anew. The state, therefore, must bear the burden of initiating recommitment proceedings.²⁵³

Whether *Donaldson* safeguards will be extended beyond the civil committee to the NGI depends on whether insanity acquittees possess a legal status more similar to committees or to convicts.²⁵⁴

NGI and the Strict Scrutiny Standard of Review. The NGI have characteristics common to both the convict and the committee. Like the convict, they were charged with a criminal offense and afforded the procedural protections of the criminal process.²⁵⁵ Like the committee, the NGI have not been convicted of wrongdoing, and are confined for the safety of themselves or the community.²⁵⁶ Generally, the NGI have been afforded greater procedural protections than their civil counterparts regarding whether they committed a particular act,²⁵⁷ although they might either have received less procedural protections than civil committees on the issues of present dangerousness and present mental illness²⁵⁸ or been subject to an open-ended confinement.²⁵⁹ Since the

250. See Wexler, *supra* note 231, suggesting that different lengths of commitment may be justified for police power patients than for parens patriae patients.

251. See *Suzuki v. Quisenberry*, 411 F. Supp. 1113, 1134 (D. Hawaii 1976); *Fasulo v. Arafah*, 173 Conn. 473, 480-81, 378 A.2d 553, 556-57 (1977).

252. 411 F. Supp. at 1134.

253. 173 Conn. 473, 480, 378 A.2d at 556-57 (footnote omitted).

254. Connecticut's recommitment scheme was enjoyed by the NGI before it was enjoyed by the committees. *Id.* at 482, 378 A.2d at 557. See text & notes 265-390 *infra*.

255. See text & notes 52-56 *supra*.

256. See text & notes 57-59 *supra*. But see Morrow & Peterson, *Follow-up of Discharged Psychiatric Offenders—"Not Guilty By Reason of Insanity" and "Criminal Sexual Psychopaths,"* 57 J. CRIM. L.C. & P.S. 31 (1966), in which the authors suggest the NGI may have psychological characteristics more common to the criminal than the civil committee.

257. Some courts have held that fifth amendment protections against self-incrimination do not apply to civil commitment proceedings. See *Dower v. Director, Patuxent Inst.*, 396 F. Supp. 1070, 1077, (D. Md. 1975); *In re Beverly*, 342 So. 2d 481, 488-89 (Fla. 1977). Similarly, jury trials may not be constitutionally mandated in civil cases where confinement might exceed six months. Compare *Doremus v. Farrell*, 407 F. Supp. 509, 516 (D. Neb. 1975) and *Dorsey v. Solomon*, 435 F. Supp. 725, 733 (D. Md. 1977), with *Duncan v. Louisiana*, 391 U.S. 145, 149-50 (1968).

258. It is possible in many jurisdictions for the NGI to be committed upon a showing of dangerousness and mental illness by a preponderance of the evidence while committees are protected

liberty right of the confined NGI is identical to that of the imprisoned and committed,²⁶⁰ it follows that distinctions in treatment of or procedural rights afforded to these three categories must be justified by reference to the differing state interests in confinement.²⁶¹

In *Ecker II* the District of Columbia Circuit impliedly accepted the premise that confinement of the NGI, the convict, and the civil committee occupied different places on the continuum of state interests,²⁶² which would justify different treatment of civil committees and NGI. This is consistent with the view earlier expressed in *United States v. Brown*,²⁶³ where the same court allowed the "preponderance of the evidence" standard to apply to NGI commitments although it might be a lower standard than constitutionally required for initial civil commitment.²⁶⁴ *Brown* was decided before the Supreme Court's *Donaldson* opinion. *Ecker II* made no mention of the Supreme Court's *Donaldson* holding, nor did it engage in any discussion of strict scrutiny.²⁶⁵ It did discuss questions of equal protection raised by differing release procedures and standards for committees and the NGI.²⁶⁶

An analysis of NGI release standards comparable to that already made in this Comment for civilly committed patients would raise questions concerning whether the proper due process standard was used in *Ecker II*.²⁶⁷ But if committees are given the procedures for release which this Comment suggests are constitutionally mandated, denial of these procedures to the NGI creates serious equal protection questions. If no legitimate and compelling state interest exists to distinguish the treatment of committee release from NGI release, it is necessary to conclude that the constitution requires identical procedures be applied to

by a "beyond a reasonable doubt" standard. Compare *United States v. Brown*, 478 F.2d 606, (D.C. Cir. 1973), with *In re Ballay*, 482 F.2d 648 (D.C. Cir. 1973).

259. The first right to treatment holding was based on a *quid pro quo* theory which sought to justify the substantive right of treatment by the difference in procedural safeguards between prisoners and patients. *Rouse v. Cameron*, 373 F.2d 451, 453 (D.C. Cir. 1966). One of the distinctions relied on was the "open ended" commitment which is unlike the determinate maximum sentence. *Id.* The *quid pro quo* theory came under sharp attack in Chief Justice Burger's concurring opinion in *O'Connor v. Donaldson*, 422 U.S. 563, 585-87 (1975).

260. *United States v. Brown*, 381 U.S. 437, 458 (1965).

261. *Powell v. Texas*, 392 U.S. 514, 529 (1968) (dictum); *Ragsdale v. Overholser*, 281 F.2d 943, 950 (D.C. Cir. 1960) (Fahy, J., concurring); *Fasulo v. Arafeh*, 173 Conn. 473, 484-86, 378 A.2d 553, 558-59 (1977) (Bogdanski, J., concurring).

262. 543 F.2d at 194-99.

263. 478 F.2d 606, 611 (D.C. Cir. 1973).

264. *Id.* at 610. The D.C. Circuit Court of Appeals requires proof beyond a reasonable doubt in ordinary civil commitment proceedings. *In re Ballay*, 482 F.2d 648, 669 (D.C. Cir. 1973); see text & notes 63-77 *supra*.

265. See text & notes 161-220 *supra*. But see *United States v. Jackson*, 553 F.2d 109, 119-20 (D.C. Cir. 1976) (rejecting use of the strict scrutiny equal protection test where the liberty of a mentally retarded NGI was at issue).

266. 543 F.2d at 194-99.

267. See text & notes 221-53 *supra*.

the release of these two categories of patient.²⁶⁸ In that instance the standards already discussed for the civil committee should likewise be used for the NGI.²⁶⁹

Equal Protection for the NGI. The fourteenth amendment's equal protection clause reads: "No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the law."²⁷⁰ The fifth amendment has been read to offer virtually identical protection within federal jurisdictions.²⁷¹ Like substantive due process, equal protection cases are divided into two levels of judicial scrutiny.²⁷² As recently reaffirmed in *Maher v. Roe*:²⁷³

"We must decide, first whether state legislation operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny. . . . If not, the legislative scheme must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination"²⁷⁴

The strict scrutiny equal protection test requires the state to establish a compelling interest in its distinction between classes similarly situated, and further requires that the state prove those distinctions are the least restrictive alternative necessary to fulfilling its purpose.²⁷⁵ The rational basis test requires only that a rational basis exist for the differential treatment and that the purpose of the differing treatment be legitimate and articulated.²⁷⁶

268. *Bolton v. Harris*, 395 F.2d 642, 651-52 (D.C. Cir. 1968), held that equal protection required "substantially similar" and not identical procedures for NGI and committee. Although *Baxstrom v. Herold*, 383 U.S. 107 (1966), does say "substantially similar" at one point, *id.* at 113, *Baxstrom's* holding and spirit seem to require identical procedures. For example:

It follows that the State, having made this substantial review proceeding generally available on this issue, may not, consistent with the Equal Protection Clause of the Fourteenth Amendment arbitrarily withhold for some. . . . Classification of mentally ill persons as either insane or dangerously insane. . . has no relevance whatever in the context of the opportunity to show whether a person is mentally ill *at all*.

Id. at 111 (emphasis in original). Further, at the release stage both the NGI and committee are patients in mental hospitals not convicted of wrongdoing. They are likely housed in similar surroundings and non-identical, substantially similar procedures could create administrative confusion and legal uncertainty.

269. See text & notes 221-53 *supra*.

270. U.S. CONST. amend. XIV.

271. See, e.g., *Weinberger v. Weisenfeld*, 420 U.S. 636, 638 n.2 (1975); *Shapiro v. Thompson*, 394 U.S. 618, 642 (1969); *Schneider v. Rusk*, 377 U.S. 163, 168 (1964). *Contra*, *Truax v. Corrigan*, 257 U.S. 312, 331-32 (1921).

272. See *Maher v. Roe*, 432 U.S. 464, 470 (1977); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

273. 432 U.S. 464 (1977).

274. *Id.* at 470 (quoting *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973)).

275. *Dunn v. Blumstein*, 405 U.S. 330, 353 (1973); *Boddie v. Connecticut*, 401 U.S. 371, 383 (1971); see text & notes 223-31 *supra*.

276. *Maher v. Roe*, 432 U.S. 464, 470 (1977); *Schlesinger v. Ballard*, 419 U.S. 498, 520 (1975) (Brennan, J., dissenting); *McGinnis v. Royster*, 410 U.S. 263, 270 (1973); see Gunther, *Newer Equal Protection*, 86 HARV. L. REV. 1 (1972). The requirement that the state must have articu-

Certain classifications of individuals have been designated by the Supreme Court as "suspect categories."²⁷⁷ Unfavorable government action against these categories is subjected to strict judicial scrutiny because of the historical disadvantages suffered by their members.²⁷⁸ Suspect classes do include race,²⁷⁹ may include sex,²⁸⁰ but do not include the indigent.²⁸¹ Those who are civilly committed or confined as a result of an NGI verdict may argue that mental illness creates a suspect classification.²⁸² This claim may be enhanced by the state's monopoly on the power to involuntarily confine.²⁸³ But the Court has indicated an unwillingness to extend protections of the suspect classifications principle beyond those categories already designated as such,²⁸⁴ and it has never explicitly accepted the mentally ill as a suspect category. Since the fundamental right to be free from confinement is the issue involved in examination of release procedures provided the NGI, it is unnecessary to rely on the suspect category to trigger strict scrutiny review of differing standards and procedures applied to release of civilly committed patients and the NGI.²⁸⁵

The Supreme Court has confronted equal protection problems of individuals who claimed they were similarly situated to civil commitments.²⁸⁶ In *Baxstrom v. Herold*,²⁸⁷ the petitioner challenged a New York *ex parte* procedure which transferred him from the custody of the Department of Corrections to the Department of Mental Hygiene upon expiration of his penal sentence.²⁸⁸ The Court held that the New York procedure violated the equal protection clause because it failed to give

lated its rational basis for action seems to have evolved from the extremely broad standard of *McGowan v. Maryland*, 366 U.S. 420 (1961): "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *Id.* at 426.

277. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 658 (1969) (Harlan, J., dissenting); *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

278. *Maher v. Roe*, 432 U.S. 464, 470 (1977); *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973); *Graham v. Richardson*, 403 U.S. 365, 372 (1971); see Note, *Mental Illness: A Suspect Classification*, 83 *YALE L.J.* 1237 (1974).

279. *Graham v. Richardson*, 403 U.S. 365, 372 (1971); *Shapiro v. Thompson*, 384 U.S. 618, 659 (1969) (Harlan, J., dissenting).

280. *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) declared sex to be a suspect category, but that determination was agreed on by only a plurality of justices. But see *General Elec. Co. v. Gilbert*, 429 U.S. 125, 133-35, (1976); *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974) (holding that pregnant women are not a class entitled to the strict scrutiny equal protection standard).

281. *Maher v. Roe*, 432 U.S. 464, 471 (1977); *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 29 (1973).

282. Note, *supra* note 278.

283. See *Maher v. Roe*, 432 U.S. 464, 469 n.5, 471 n.6 (1977), distinguishing the right of an indigent woman to have an abortion paid for by the state from divorce and from rights which accrue to those wishing to appeal criminal convictions.

284. *Maher v. Roe*, 432 U.S. 464, 470-71 (1977).

285. *Id.* at 470; *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973).

286. *McNeil v. Director, Patuxent Inst.*, 407 U.S. 245 (1972); *Jackson v. Indiana*, 406 U.S. 715 (1972); *Humphrey v. Cady*, 405 U.S. 504 (1972); *Baxstrom v. Herold*, 383 U.S. 107 (1966).

287. 383 U.S. 107 (1966).

288. *Id.* at 109.

the same procedural protections to convicts ending their sentence that it gave to other categories of potential civil committees.²⁸⁹ In *Humphrey v. Cady*²⁹⁰ an individual was committed under Wisconsin's Sex Crimes Act to a "sex deviate facility" in lieu of criminal punishment.²⁹¹ The statute allowed recommitment for an indefinite number of five-year confinements without a jury trial to which other civil committees were entitled.²⁹² Following *Baxstrom*, the Court held that Humphrey had been denied equal protection because of the dissimilar jury procedures, at least where recommitment authorized confinement in excess of the maximum sentence authorized for the crime which triggered Wisconsin's Sex Crimes Act procedures.²⁹³ *Jackson v. Indiana*²⁹⁴ extended the principle of *Baxstrom* to include those confined because of incompetence to stand trial. Jackson was a deaf mute with a mental level of a preschool child.²⁹⁵ He was charged with robbery and held for nearly four years before the Supreme Court ruled in his case.²⁹⁶ Jackson contended that he was very unlikely ever to become competent to stand trial, and therefore his confinement for being incompetent to stand trial amounted to a commitment for life.²⁹⁷ He also argued that he would have been entitled to significantly greater procedural safeguards had the state committed him under its general civil commitment powers.²⁹⁸ Justice Blackmun writing for a unanimous Court held that the pendency of criminal charges could not justify long term commitment procedures for Jackson which were different from those generally applicable to others not charged with an offense.²⁹⁹

The *Baxstrom-Humphrey-Jackson* trilogy is applicable to release of the NGI acquittee, at least where the acquittee has been confined for a period in excess of the maximum sentence for which he could have been convicted had his sanity not been at issue in his criminal trial.³⁰⁰ Whether the NGI acquittee is entitled to the identical release procedure his civil committee counterpart receives before the conclusion of his hypothetical maximum sentence seems to rely on three determinations. First, are NGI acquittees and civil committees similarly situated for purposes of release? Second, what level of judicial protection is de-

289. *Id.* at 110, 114.

290. 405 U.S. 504 (1972).

291. *Id.* at 507.

292. *Id.*

293. *Id.* at 511-12.

294. 406 U.S. 715 (1972).

295. *Id.* at 718.

296. *Id.*

297. *Id.* at 724.

298. *Id.*

299. *Id.* at 730-31.

300. See, e.g., *Humphrey v. Cady*, 405 U.S. 504, 511 (1972); *United States v. Ecker*, 543 F.2d 178, 199 (D.C. Cir. 1976); *Waite v. Jacobs*, 475 F.2d 392, 399 (D.C. Cir. 1973).

manded by the liberty interest involved in release from confinement? Third, is the state interest in distinguishing between NGI acquittees and civil committees for purposes of release sufficiently strong to justify the proposed distinctions in procedure?

A successful equal protection challenge is an implicit acceptance of the fact that the victimized classification is similarly situated to a larger class in which there are other non-victimized classifications.³⁰¹ The basic purpose of asking whether two classes are similarly situated is to avoid comparisons of apples with oranges.³⁰² *Baxstrom* and *Humphrey* establish that convicts who remain confined beyond the length of their penal sentence are sufficiently similarly situated with civil committees to sustain equal protection challenges to significantly different state release procedures.³⁰³ *Jackson* held that those confined for a long period of time because of incompetence to stand trial were likewise similarly situated to civil committees.³⁰⁴ Like the petitioners in *Baxstrom*, *Humphrey*, and *Jackson*, NGI acquittees suffer loss of liberty justified by the state's police power. Perhaps jurisdictions have a stronger interest in continuing to confine NGI acquittees than civil committees.³⁰⁵ However, differing interests in dealing with NGI and civil committees are more appropriately considered in judging whether particular distinctions can be justified; they should not be utilized to provide blanket approval of all differences between treatment of members of each class.³⁰⁶

Since NGI acquittees and civil committees are similarly situated and deprived of the fundamental right to remain free from confinement,³⁰⁷ distinctions in treatment between these two categories must be based on a "compelling" state interest.³⁰⁸

The equal protection problems raised by distinctions between the NGI and civil committees seem more serious at the release stage than

301. See Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 343-53 (1949); cf. *Tigner v. Texas*, 310 U.S. 141, 147 (1940) (if classes were not similarly situated there would be no yardstick for measurement of an equal protection challenge).

302. For example, "[t]he standards and purposes of the proceedings to commit someone who is mentally ill or an inebriate and imminently dangerous to himself or others are entirely different from the standards and purposes of the appointment of a guardian to one who is found incapable of handling his own affairs." *French v. Blackburn*, 428 F. Supp. 1351, 1361 (D.N.C. 1977). See *Dorsey v. Solomon*, 435 F. Supp. 725, 734-35 (D. Md. 1977).

303. *Humphrey v. Cady*, 405 U.S. 504, 510-11 (1972); *Baxstrom v. Herold*, 383 U.S. 107, 110 (1966).

304. 406 U.S. at 738.

305. For a discussion of these differing interests, see text & notes 329-90 *infra*.

306. Not all civil committees are confined based on the police power interest of protection of the community. See text & notes 329-79 *infra*.

307. The answer to the second stage of the equal protection analysis is assumed. Based on the discussions at text & notes 161-220 *supra*, the right to be free from confinement is considered to be deserving of the strict judicial protection generally afforded to "fundamental" rights.

308. See text & note 274 *supra*.

at the initial confinement.³⁰⁹ Nevertheless, significant distinctions continue to be made. For instance, the District of Columbia allows committees to be released upon an administrative determination by the hospital that a patient is "no longer likely to injure himself or other persons because of mental illness."³¹⁰ If favorable to the patient, no judicial review of this determination is authorized.³¹¹ If unfavorable to the patient, the administrative decision may be reviewed for its "reasonableness."³¹² An NGI whose release is challenged by the prosecution or court must overcome two hurdles. First, he must achieve certification from the hospital superintendent that he has recovered his sanity, and that "in the opinion of the superintendent, such person will not in the reasonable future be dangerous to himself or others."³¹³ Second, if either the court or the prosecutor object to his release, the NGI must prove the same thing to a trial judge who does not simply review the administrative decision for reasonableness, but weighs all the evidence anew.³¹⁴

309. See text & notes 341-45 *infra*. Some distinctions between the NGI and committees have been upheld, largely because of procedural advantages offered to the NGI at his criminal trial which were not afforded to the committee at his hearing. For example, *In re Franklin*, 7 Cal. 3d 126, 142-43, 496 P.2d 465, 468, 101 Cal. Rptr. 553, 556 (1972), noted that temporary detention of the NGI may properly last up to 90 days, even though temporary commitment may have a constitutional limitation of 30 days. See *Lynch v. Baxley*, 386 F. Supp. 378, 388 (M.D. Ala. 1974). This difference may logically be justified because the NGI have been found beyond a reasonable doubt to have committed an act which ordinarily is criminal while temporary committees may be detained based upon a finding of danger which may be less accurate than the NGI acquittal. See text & notes 352-53 *infra*. In *Dorsey v. Solomon*, 435 F. Supp. 725, 734-37 (D. Md. 1977), it was held that no jury trial is necessary for the NGI at initial commitment hearings partly because the NGI have already faced a jury regarding their illness.

310. *United States v. Ecker*, 543 F.2d 178, 194 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1063 (1977).

311. *Id.*

312. *Id.* at 182.

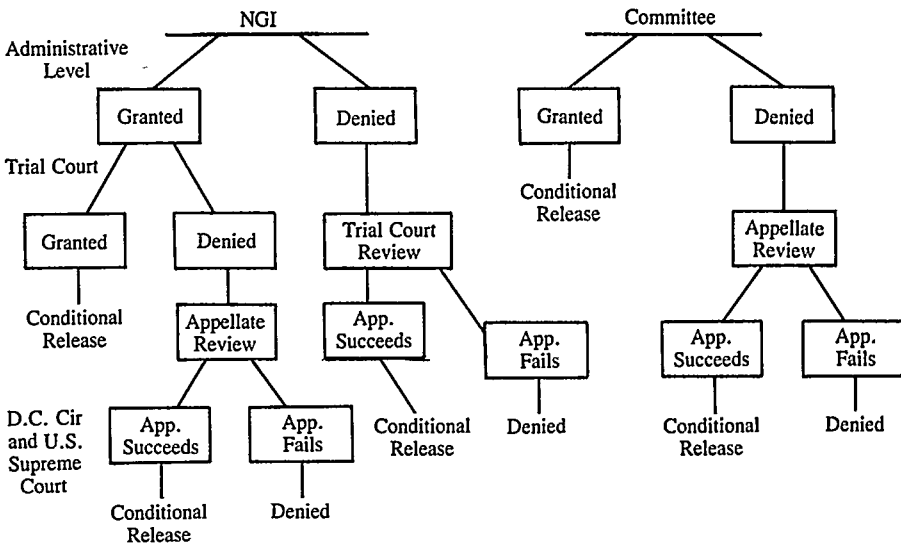
313. D.C. Code § 24-301(a) (1973); see *United States v. Ecker*, 543 F.2d 178, 194-95 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1063 (1977).

314. D.C. Code § 24-301(a) (1973); see *United States v. Ecker*, 543 F.2d 178, 187 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1063 (1977). See *Bolton v. Harris*, 395 F.2d 642, 652 (D.C. Cir. 1968).

The chart below represents the possible alternative dispositions where conditional release is requested in the District of Columbia. If conditional release is denied by the hospital superintendent, the NGI and civil committee have similar appellate review, except that the state has the burden of proof when seeking to commit the non-acquitted patient. D.C. Code § 21-547 (1973). In case the hospital refuses to approve release, NGI patients have no procedure to obtain their freedom which does not require them to carry the burden of proving their eligibility for release by a preponderance of the evidence. D.C. Code § 24-301(k)(3)(9); see *United States v. Ecker*, 543 F.2d 178, 192 n.52 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1063 (1977). Compare *Lynch v. Overholser*, 369 U.S. 705, 711 (1962), with *United States v. Ecker*, 543 F.2d 178, 192-93 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1063 (1977). If the committee's request is granted at the administrative level, the conditional release is granted. But if the NGI's request is granted at the administrative level, and the prosecution or court objects to the hospital decision, he will not gain conditional release unless the trial court also rules in his favor after a *de novo* review of the evidence. *Id.* at 187. See also *Bolton v. Harris*, 395 F.2d 642, 652 (D.C. Cir. 1968).

*Bolton v. Harris*³¹⁵ held that equal protection guarantees were not violated by the requirement that NGI acquittees undergo a judicial proceeding which was not required of civil committees.³¹⁶ The judicial proceeding required when release is sought by an NGI acquittee is, in theory, guided by the same substantive standard as the hospital chief's release approval; hence, the required judicial hearing imposes no extra evidentiary burden on the patient.³¹⁷ The second review would simply be insurance that the statutory standard was being applied, and would protect the public by not allowing ultimate determinations to be made by a hospital staff with "subjective standards."³¹⁸

The *Bolton* court's reasoning on this point deserves criticism. While *Baxstrom* indicates that distinctions between classes of mentally ill may be permissible for purposes of custody and treatment, "it has no relevance whatever in the context of the opportunity to show whether a person is mentally ill *at all*."³¹⁹ It is possible to interpret *Baxstrom* for the proposition that dangerousness of a class is not relevant to the procedures for determining whether an individual is dangerous and men-



315. 395 F.2d 642 (D.C. Cir. 1968).

316. *Id.* at 652.

317. Wexler, *Criminal Commitments and Dangerous Mental Patients: Legal Issues of Confinement, Treatment, and Release*, National Institute of Mental Health, DHEW Publication No. 76-331 (ADM) (1976) 53-54 suggests that the extra proceedings may add to the probability of the patient's release because of the diffusion of possible negative responsibility.

318. *United States v. Ecker*, 543 F.2d 178, 197-98 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1063 (1977); *United States v. McNeil*, 434 F.2d 502, 515 (D.C. Cir. 1970) (Bazelon, C.J., concurring). In *United States v. Ecker*, 479 F.2d 1206 (D.C. Cir. 1976), Judge Bazelon indicated that recent developments in mental health law raised questions about *Bolton's* continuing validity. *Id.*; see *Waite v. Jacobs*, 475 F.2d 392, 398-99 (D.C. Cir. 1973).

319. 383 U.S. at 111-12 (emphasis in original).

tally ill.³²⁰ Since the determinations necessary for release of the NGI and the committee both relate to dangerousness and mental illness, and the same liberty interests are at stake for both classes of patients, it would seem equal procedures should be used to make those determinations. The effects of these differing procedures may, of course, be substantial.³²¹

Assuming that there is an equal probability of petitions being granted and denied at the administrative level of the District of Columbia's procedure,³²² the committee would have a fifty percent probability of being granted relief by the hospital. This relief would automatically entitle him to conditional release. The NGI would also have a fifty percent probability of gaining hospital approval, but if there is a fifty percent probability of being denied conditional release by a trial court, the probability of receiving the requested relief for the NGI is twenty-five percent—one-half of that for the committee. This numerical illustration is artificial, but it is no more so than assumptions accepted by the District of Columbia Circuit when it allowed this procedural discrepancy to continue without careful analysis of either its stated justification or its substantive effect. The court assumed that an NGI patient who can prove to the superintendent that he should be released can reprove the same matter to a trial court, and therefore is not disadvantaged by the second procedure.³²³ But a second hearing before the trial judge serves no purpose other than to protect the public from those whom the hospital is ready to release. If trial courts always agreed with the superintendent, there would be no need for the trial court function. Should the trial court disagree with the superintendent's decision approving an NGI's conditional release program, as in *Ecker I* and *Ecker II*, the extra procedure causes the patient to lose his conditional liberty.³²⁴

320. See *Waite v. Jacobs*, 475 F.2d 392, 397 (D.C. Cir. 1973); *United States ex rel. Schuster v. Herold*, 410 F.2d 1071, 1081-82 (2d Cir. 1969); *Cameron v. Mullen*, 387 F.2d 193, 201 (D.C. Cir. 1967). It is not necessary to subscribe to this interpretation of *Baxstrom* to conclude that the differing procedures for the civil committee and the NGI discussed in *Ecker II* are not supported by a compelling state interest.

321. See *Waite v. Jacobs*, 475 F.2d 392, 398-99 (D.C. Cir. 1973). In both *Ecker I* and *Ecker II* the differing procedures caused the NGI patient to be denied conditional release (assuming that the administrative determination would be the same regardless of the existence or non-existence of the second procedure for the NGI). See discussion note 317 *supra*.

322. The "administrative level" in this instance is the determination of the hospital superintendent.

323. *United States v. Ecker*, 543 F.2d 178, 187-88, 197-98 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1063 (1977); *United States v. McNeil*, 434 F.2d 502, 515 (D.C. Cir. 1970) (Bazelon, C.J., concurring); *Bolton v. Harris*, 395 F.2d 642, 652 (D.C. Cir. 1968).

Placed in another context of the legal profession, would a plaintiff's attorney be disadvantaged by scrutiny of his victories by a preponderance of the evidence standard determined de novo by an appellate court?

324. Cf. *Waite v. Jacobs*, 475 F.2d 392, 398 (D.C. Cir. 1973) ("Renewal proceedings with inadequate safeguards are surely better than no proceedings at all; since the Court found constitu-

There is also a distinction made by *Ecker II* between the substantive burdens of proof for release which must be met by the NGI and the committee.³²⁵ The basis of the distinction, however, was hopelessly confused. Each of the three judges on the panel wrote a separate opinion on this issue.³²⁶ The opinion of Judge Wilkey dealt with the burden of proof issue at length, but left several possible interpretations of what that burden is.³²⁷ Whatever the substantive distinction in release standards is, in combination with the procedural distinctions already discussed, it is clear that there is significance in the totality of the difference in treatment accorded the NGI requesting release *vis a vis* the committee seeking release.³²⁸ If the standards recommended in this Comment were adopted for the civilly committed of the District of Columbia, the current release standard for the NGI would need to be justified by a compelling state interest in confining the NGI which does not apply to confining committees.

If release standards for the NGI are to be more stringent than for civil committees, the state should be required to justify this distinction with a compelling interest.³²⁹ Three rationales have been offered in support of governmental distinctions between committees and NGI. These are: First, the state has an interest in deterring false insanity

tional fault in the former, a similar holding as to the latter may be implicit."). If a system which provides for unequal procedures can be held violative of equal protection principles, *see* *Humphrey v. Cady*, 405 U.S. 504, 507-08 (1972), it seems a fortiori that a system which provides review procedures in one case and not in another would also be constitutionally impermissible.

An analogy can be drawn with *Griffin v. Illinois*, 351 U.S. 12 (1956). In *Griffin* the Supreme Court struck down a procedure which allowed unequal access to transcripts used for criminal appeals. Those who could not afford transcripts were not denied their right to appeal; they were denied the right to "as adequate appellate review as defendants who have money enough to buy transcripts." *Id.* at 18-19. Thus, equal protection was violated because one class of convicts—those who could afford to buy transcripts—had an unfair advantage in appellate review over a second class of similarly situated convicts—the indigent. The District of Columbia procedure at issue in *Bolton* goes one step beyond what violated equal protection in *Griffin*. One class of patients—committees—has a certainty of achieving release after success at the administrative level, while another class of similarly situated patients—NGI's—has less than a certainty. The committee is given the right not to lose at trial court; the very fact of the second procedure for the NGI means the NGI must present evidence a second time with no assurance of a successful outcome.

325. Judge Lumbard wrote a brief concurring opinion in which he substantially agreed with Judge Wilkey's opinion, except on the issue of burden of proof. 543 F.2d at 200. *See id.* at 180 note**. Judge Wright wrote a dissenting opinion largely based on what he considered inadequate findings of the district court. *See id.* at 202.

326. As Judge Wright points out in his dissenting opinion, *id.*, Judge Wilkey's opinion is not clear on the burden of proof issue. At one point Judge Wilkey's opinion declares: "We hold that in a hospital initiated, conditional release proceeding there is no assignable burden of proof as we would know it in a criminal or civil case." *Id.* at 193. At several points the opinion indicates the patient can gain release by proving a 50% plus probability of not being likely to injure himself or others. *Id.* at 188, 193 n.57, 198 n.80. Judge Wilkey also suggested, but did not discuss, a distinction between "endanger" and "likely to injure" in the release burden of proof of the NGI and committee. *Id.* at 195.

327. *See* discussion note 326 *supra*.

328. *See* text & notes 221-76 *supra*.

329. *See* text & notes 270-300 *supra*.

pleas by future criminal defendants;³³⁰ second, those acquitted may have a degree of culpability for an offensive act which civil committees do not have;³³¹ and third, the acquitted patient may be more likely to injure others, since his conduct has already manifested itself in an anti-social manner.³³²

The goal of deterring false NGI pleas is a legitimate state interest.³³³ But whether it should justify confinement of those already adjudicated as NGI is a different issue.³³⁴ The NGI verdict exonerates the defendant from guilt while declaring that it was in fact he who committed the offensive act.³³⁵ Confinement of an NGI is predicated on the dangerousness of the defendant who has raised doubts about his past sanity.³³⁶ Even the harshest standard for release of the NGI does not suggest that a person who proves he is no longer dangerous or mentally ill may be denied release because it would encourage others to commit crime and escape punishment through insanity defenses.³³⁷ The purpose of the NGI verdict is to excuse those not culpable for their actions from criminal punishment.³³⁸ Allowing non-criminal confinement of the NGI for the purpose of deterring future insanity pleas does not avoid the problem of punishing the not guilty; in effect, it simply hangs "a new sign—reading 'hospital'—over one wing of the jail house."³³⁹ Such a policy might run afoul of the eighth amendment prohibitions against punishing an individual for his status and not for an offense.³⁴⁰

330. *Lynch v. Overholser*, 396 U.S. 705, 715 (1962); *United States v. Brown*, 478 F.2d 606, 610-12 (D.C. Cir. 1973); see *United States v. Carter*, 415 F. Supp. 15 (D.D.C. 1975). See text & notes 33-45 *infra*.

331. *United States v. Ecker*, 543 F.2d 178, 196-97 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1063 (1977). See text & notes 346-60 *infra*.

332. *United States v. Ecker*, 543 F.2d 178, 197 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1063 (1977); *Dixon v. Jacobs*, 427 F.2d 589, 604 (D.C. Cir. 1970) (Levanthal, J., concurring); *Alter v. Morris*, 85 Wash. 2d 414, 420, 536 P.2d 630, 633 (1975); see text and notes 361-71 *infra*.

333. *Lynch v. Overholser*, 396 U.S. 705, 715 (1962); *United States v. Brown*, 478 F.2d 606, 610-12 (D.C. Cir. 1973); see *United States v. Carter*, 415 F. Supp. 15 (D.D.C. 1975).

334. See *State v. Krol*, 68 N.J. 236, 246-47, 344 A.2d 289, 295 (1975). In *Bolton v. Harris*, 395 F.2d 642, 649 n.35 (D.C. Cir. 1968), the court of appeals stated: "It has been suggested that Congress might have established the presumption of continuing insanity for those who successfully pleaded insanity in order to guard against false pleas. But rights are not ordinarily denied to all because of the fear that a few might abuse them." See *German & Singer*, *supra* note 53, at 1018-21.

335. See text & notes 144-53 *supra*.

336. See text & notes 49-62 *supra*.

337. *Lynch v. Overholser*, 396 U.S. 705, 715 (1962). The Court in *Lynch* acknowledged the legitimacy of using the NGI as examples to deter those who would misuse the insanity plea, but recognized that merely possessing NGI status would not allow confinement without additional findings regarding present mental condition. *Id.* at 718-19. See *United States v. Brown*, 478 F.2d 606, 610 (D.C. Cir. 1973).

338. See text & notes 49-71 *supra*.

339. *Powell v. Texas*, 392 U.S. 514, 529 (1968). The *Powell* Court belittled the distinction between civil and criminal confinement of an alcoholic, suggesting that an alcoholic might be better off as a convict than as a committee. *Id.* at 529. There is no reason why this logic would not apply to the NGI as well as the committee; thus, punishing the NGI might deter true NGI's from pursuing a legitimate defense.

340. *Robinson v. California*, 370 U.S. 660, 666-67 (1962); *People v. Feagley*, 14 Cal. 3d 338,

*United States v. Brown*³⁴¹ held that for purposes of initial commitment, the deterrence of false guilty pleas is a legitimate interest which can be protected by allowing the NGI to be confined upon a less demanding burden than the state must establish in other civil commitments.³⁴² At least three jurisdictions disagree with the *Brown* holding.³⁴³ These states require initial commitment to follow identical burdens of proof for NGI and civil committees.³⁴⁴ *Brown* itself seems to preclude application of the deterrence rationale to a case like *Ecker II*, since the *Brown* court conceded that any deterrence value wanes after a lengthy confinement.³⁴⁵

The second reason proposed for allowing a more difficult release standard for the NGI is that some NGI may possess a meaningful degree of culpability for acts which would have been criminal if committed by a legally responsible individual. This argument is misguided for two reasons. First, it overlooks the purpose of the NGI verdict, which is to excuse from guilt—and therefore punishment—those who have been found not to have the requisite mental capacity to be held criminally liable.³⁴⁶ Moreover, those who may have no culpability cannot be distinguished from those who do.³⁴⁷ Thus, NGI's who do not have significant degrees of responsibility for their acts are disadvantaged by differing procedures solely because there may be some NGI's who are, in some sense, culpable. It seems impermissible to continue detaining an unidentifiable number of patients who have no culpability simply because others might.³⁴⁸ Second, the culpability rationale fails in its implicit assumption that civilly committed patients do not possess any guilt on the spectrum of culpability. The only consistent distinction in findings of fact between the NGI and the civilly committed is that the NGI have been found beyond a reasonable doubt to have committed

377, 535 P.2d 373, 398, 121 Cal. Rptr. 509, 534 (1975). It should be remembered that while *Ecker* performed a violent anti-social act, he was found not guilty of that act. His confinement was based on his present mental condition. For the view that the eighth amendment does not apply to non-convicted patients, see *Johnson v. Glick*, 481 F.2d 1028, 1032 (2d Cir. 1973).

341. 478 F.2d 606 (D.C. Cir. 1973).

342. *Id.* at 610-12.

343. See *Allen v. Radack*, 426 F. Supp. 1052, 1057-58 (D.S.D. 1977); *State v. Clemons*, 110 Ariz. 79, 83, 515 P.2d 324, 328 (1973); *Wilson v. State*, 259 Ind. 375, 386, 287 N.W.2d 875, 881 (1972); *People v. McQuillen*, 392 Mich. 511, 536, 221 N.W.2d 569, 580 (1974).

344. *State v. Clemons*, 110 Ariz. 79, 83, 515 P.2d 324, 328 (1973), and *People v. McQuillen*, 392 Mich. 511, 527, 221 N.W.2d 569, 576 (1974), did allow distinctions to be made for purposes of temporary commitment to allow time for diagnosis of the NGI.

345. 478 F.2d at 612. *Ecker* had been confined over seven years at the time the denial of his release was affirmed in *Ecker II*.

346. See *Dixon v. Jacobs*, 427 F.2d 589, 595 (D.C. Cir. 1970); *State v. Krol*, 68 N.J. 236, 246, 344 A.2d 289, 295 (1975).

347. Detention based on culpability for a past act can be accomplished only after proof beyond a reasonable doubt.

348. See *State v. Krol*, 68 N.J. 236, 254-55, 344 A.2d 289, 299 (1975). Confinement based on dangerousness without culpability has unsettling implications. See *Williamson v. United States*, 184 F.2d 280, 282-83 (1950).

an act which would have been criminal if committed by a mentally responsible individual.³⁴⁹ On the other hand, a committee may have been confined based only on clear and convincing evidence. Despite the differing burdens of proof, there are committees who performed acts which would have been felonies if done by responsible individuals.³⁵⁰ Since recent overt acts evidencing dangerousness now seem constitutionally required before civil commitment can take place,³⁵¹ an individual may be a committee instead of an NGI simply because one prosecutor used discretion to avoid a costly criminal trial which would result in an NGI verdict, while another did not.³⁵² Indeed, acceptance of the culpability rationale might encourage prosecutors to bring criminal charges for the purpose of gaining an NGI acquittal.³⁵³

The only viable difference between a committee and an NGI may be that the NGI was competent to stand trial and the committee was not.³⁵⁴ Following *Jackson*, individuals who are incompetent to face a criminal trial can be confined pending restoration of their competence only so long as there is a reasonable probability of their one day becoming competent.³⁵⁵ On the other hand, if such individuals remain dangerous and mentally ill at the time the impossibility of their restoration to competency is recognized, the state may civilly commit them under initial commitment procedures.³⁵⁶ This means that if Ecker had been so mentally ill as to be incompetent to stand trial, he might be entitled to meeting the lower release burden of the committee.³⁵⁷ He

349. The NGI status could result from a negotiated plea as well as from a determination by the trier of fact.

350. *Alter v. Morris*, 85 Wash. 2d 414, 420, 536 P.2d 630, 633 (1975) (Rosellini, J., dissenting).

351. See text & notes 129-31, 230-31 *supra*.

352. *Alter v. Morris*, 85 Wash. 2d 414, 431-32, 536 P.2d 630, 639 (1975) (Rosellini, J., dissenting).

353. Prosecutors who wish to evade certain responsibilities imposed on the state when release from civil commitment is at issue could bring charges against the most obviously insane of patients, if judicially authorized distinctions in procedures for the NGI and committee would result in lengthier confinement of the NGI. It seems possible that almost anyone who can be proven dangerous with evidence of a recent overt act can be charged with some violation of criminal law.

354. Those who are incompetent to stand trial and without reasonable hope of becoming competent may become ordinary committees if they meet the commitment standard for non-criminally accused individuals. See text & notes 78-88 *supra*.

355. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972); *Commonwealth v. McQuaid*, 464 Pa. 499, 517, 347 A.2d 465, 475 (1975).

356. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972); *Commonwealth v. McQuaid*, 464 Pa. 499, 517, 347 A.2d 465, 475 (1975).

357. Section 24-301(a) and (b) of the District of Columbia Code, which deals with those incompetent to stand trial, is in need of revision in light of *Jackson*. The statute allows for the indeterminate holding of such individuals without undergoing the normal civil commitment procedures of committees. The only apparent methods of terminating this type of commitment are the successful return to competency to stand trial, and writs of habeas corpus. Following *Jackson's* precedent, *Commonwealth v. McQuaid*, 464 Pa. 499, 347 A.2d 465 (1975), ordered that an individual committed for a long period of time under a comparable Pennsylvania statute be either tried for his crime, committed via standards customarily used for non-accused persons who undergo initial commitment proceedings, or be released. *Id.* at 517, 347 A.2d at 475. This means that the individual who remains incompetent to stand trial beyond the allowable period of time a state

might have been as dangerous and culpable as he was at the time of *Ecker II*, but his release would more likely have been granted.³⁵⁸ The apparent anomaly of granting lesser procedural protection to those incompetent to stand trial than for the NGI may superficially be justified because the state may still be allowed to safeguard the community from the former by prosecuting their criminal trials. But release from confinement of those initially held because they were incompetent to stand trial is not determinative of potential for criminal prosecution since an individual may be eligible for release and still be incompetent to stand trial.³⁵⁹ Similarly, an individual may be competent to stand trial and yet remain sufficiently mentally ill and dangerous to justify his confinement.³⁶⁰

The third proposed rationale for putting an added burden on the NGI assumes that patients who have been acquitted are more likely to perform anti-social acts than are their civil committee counterparts. Indeed, one commentator recently wrote: "The view that criminal inmates are in fact more dangerous than civil inmates is uncontroverted by common knowledge or scientific proof."³⁶¹ There is reason to believe that the best evidence of a person's prospective dangerousness is his past dangerousness.³⁶² But the recently recognized standard for initial commitment requires that states carry a burden of clear and convincing proof of dangerousness,³⁶³ and that the burden be met by evidence of recent overt acts.³⁶⁴ The fact of an NGI's past dangerousness is no more compelling evidence of future dangerousness than is the fact of a committee's past dangerousness. Again, it must be remembered that prosecution and acquittal is not a foolproof test of dangerousness. For example, a person who severs his limbs³⁶⁵ may reasonably be considered more dangerous than a person who writes bad checks.³⁶⁶ But since prosecution for self-inflicted injury is generally considered futile,³⁶⁷ the fraudulent check casher may have a lesser like-

may hold him in the hopes of his return to competency, will eventually be released or become an ordinary committee. See *People ex rel. Martin v. Strayhorn*, 62 Ill. 2d 296, 302, 342 N.E.2d 5, 9 (1976).

358. See, e.g., *People v. Lang*, 26 Ill. App. 3d 648, 650-51, 325 N.E.2d 305, 306 (1975); see Note, *supra* note 144, at 749. For an example of this principle, see *Ariz. Daily Star*, Sept. 24, 1977, § B at 6, col. 1.

359. *Gibbs v. State*, 235 Ga. 480, 484, 220 S.E.2d 254, 257 (1975).

360. Presumably this is the case with Ecker and all other NGI who cannot secure their release.

361. 20 WAYNE L. REV. 1343, 1350 (1974).

362. See *Millard v. Harris*, 406 F.2d 964, 973 (D.C. Cir. 1968); *Lynch v. Baxley*, 386 F. Supp. 378, 391 (M.D. Ala. 1974); Kozol, Boucher, & Garofalo, *The Diagnosis and Treatment of Dangerousness*, 18 CRIME & DELINQUENCY 371, 384 (1972).

363. See text & notes 123-28 *supra*.

364. See text & notes 129-31 *supra*.

365. See *Maycock v. Martin*, 157 Conn. 56, 63-64, 245 A.2d 574, 578 (1968).

366. See *United States v. Charnizon*, 232 A.2d 586, 588-89 (D.C. 1967).

367. *John F. Kennedy Memorial Hosp. v. Heston*, 58 N.J. 576, 580, 279 A.2d 670, 672 (1971).

likelihood of obtaining release than a self-maimer.

In addition to these considerations, it must be realized that when dealing with probable dangerousness, even the most sophisticated methods of prediction have very high rates of error.³⁶⁸ Requirements such as right to counsel and proof beyond a reasonable doubt reflect a desire to minimize the possibility that people will unnecessarily lose their liberty.³⁶⁹ If it is true that NGI's are more likely to be dangerous than other patients, this could be reflected on a case-by-case basis where all share identical burdens of proof. Just as the prosecution's burden of proving criminality is equal whether the defendant is ninety-nine percent likely to be guilty or fifty percent likely to be guilty, the level of proof required for allowing release should not be based on the probability of dangerousness of the class of which the NGI is a member.³⁷⁰ As indicated recently by the New Jersey Supreme Court in *State v. Krol*,³⁷¹ the propriety of confining an individual based on dangerousness should be determined by analysis of the circumstances of that individual's case, and not on the basis of NGI or committee status.³⁷² The difficulty with differential treatment of NGI's and other confined persons based solely on their status as such is singularly manifest when the issue is not merely one of present dangerousness, but rather involves the propriety of differing procedures for making that determination.

*Dorsey v. Solomon*³⁷³ is an example of how easily the NGI/committee distinction can be misapplied. In *Dorsey*, a class of NGI plaintiffs challenged involuntary commitment procedures on due process and equal protection grounds.³⁷⁴ The court held that since the NGI and committee suffer the same deprivation of liberty and have the same need for counsel to protect their interests, the NGI and the committee are both entitled to appointed counsel.³⁷⁵ Several other equal protection challenges were denied, however, including the right to trial by jury at initial commitment.³⁷⁶ But unlike its analysis of the relatively equal need of the two classes for appointed counsel the court did not analyze the *purpose* of different procedures which it held permissible. For instance, nowhere did *Dorsey* explain if or why a jury is bet-

368. See *Developments in the Law, supra* note 63, at 1240-44.

369. *In re Ballay*, 482 F.2d 648, 653-69 (D.C. Cir. 1973); *Suzuki v. Quinsenberry*, 411 F. Supp. 1113, 1132 (D. Hawaii 1976).

370. If a certain jurisdiction had a 99% conviction rate for murder cases, and a 50% rate for burglaries, the state could not rest with a less stringent burden of proof in future murder trials. See *In re Winship*, 397 U.S. 358 (1970).

371. 68 N.J. 236, 344 A.2d 289 (1975).

372. *Id.* at 254-55, 344 A.2d at 299.

373. 435 F. Supp. 725 (D. Md. 1977).

374. *Id.* at 728.

375. *Id.* at 733.

376. See *id.* at 734-40.

ter equipped than a judge to decide the issue of present mental health.³⁷⁷ It deferred on this issue to the legislature's rational basis.³⁷⁸ The fundamental defect of *Dorsey* and *Ecker II*, in relying on a class distinction to justify differing methods of dealing with NGI's and committees, is that the fact that an NGI may have been recently found beyond a reasonable doubt to have committed an offensive act is in no way pertinent in deciding what *procedures* he should be afforded at a hearing on the validity of his initial or continued confinement;³⁷⁹ the only relevance of the acquittal is that it may shed some light on the substantive determination of dangerousness and perhaps mental illness.

There may be a fourth, unexpressed reason motivating legislatures and courts to make distinctions in release procedures for the NGI and the committee: these officials may simply fear the response of the public to the spectre of seeing an infamous insanity acquittee released.³⁸⁰ An aroused public may want to do more than deter false insanity pleas, it might feel that retribution and isolation are so important that a person should be punished regardless of mental responsibility.³⁸¹ Legislators and judges "notice" that people will be very upset if they perceive even an insane killer is to avoid punishment.³⁸² Chief Judge Bazelon, writing for the District of Columbia Circuit in *Ecker I*, clearly disapproved of this type of political consideration entering into the release determination.³⁸³

There can be little doubt that judges, as well as legislators, are cognizant of political reality.³⁸⁴ While this awareness might explain certain actions, it may not properly justify these actions. Even the rational basis test requires that differences in treatment further some legitimate and articulated state purpose.³⁸⁵ Legislatures apparently have the opportunity to eliminate the NGI verdict.³⁸⁶ Many legal commentators have advocated this position.³⁸⁷ Legislatures could, for example, adopt commitment laws which make substantive distinctions based on

377. *See id.* at 733-34.

378. *See id.*

379. *See text & notes 319-21 supra.*

380. *Cf. State v. Wright*, 87 Wash. 2d 783, 793-94, 557 P.2d 1, 8 (1976) (Wright, J., concurring) (acknowledging the public clamor against reversing convictions based on "technicalities").

381. Pure deterrence theory has often been criticized because it could be used to justify punishment of the innocent. J. Rawls, *A THEORY OF JUSTICE* 26 (1971).

382. *See note 384 infra.*

383. 479 F.2d at 1211.

384. *See Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *State v. Wright*, 87 Wash. 2d 783, 793-94, 557 P.2d 1, 8 (1976) (Wright, J., concurring); *See Miller & Howell, The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661, 671-83 (1960).

385. *Maher v. Roe*, 432 U.S. 464, 470, (1977); *McGinnis v. Royster*, 410 U.S. 263, 270 (1973). *See text & note 276 supra.*

386. *See Leland v. Oregon*, 343 U.S. 790, 797 (1952).

387. *See G. MORRIS, THE INSANITY DEFENSE: A BLUEPRINT FOR LEGISLATIVE REFORM* 2-6 (1975); N. MORRIS, *The Criminal Justice System and Psychiatry Past, Present, and Future*, in *LAW*

the possibility of dangerousness to others instead of on whether an NGI verdict preceded commitment.³⁸⁸ The purpose of this distinction may be sufficiently compelling to authorize different standards and procedures for those who are dangerous to themselves as opposed to the NGI and committees who are dangerous to others.³⁸⁹ Nevertheless, NGI verdicts remain authorized in every jurisdiction.³⁹⁰ To the extent that political considerations require distinctions in treatment between committees and the NGI, it would seem that it is a function of the legislature to articulate the state's purpose, and that the purpose be a legitimate one.

CONCLUSION

Involuntary confinement intrudes upon an individual's natural legal status of freedom. Infringements of this right to liberty can be justified only if the committing jurisdiction satisfies the strict scrutiny due process test. Limitations on the state's ability to continue involuntary confinement of a patient are mandated by *Jackson v. Indiana* and *O'Conner v. Donaldson*. Procedural guidelines for implementing the substantive right to release holdings of *Jackson* and *Donaldson* are developing, but are still inadequate. There is now a constitutional requirement of a finding of dangerousness to self or others before one can justifiably be civilly committed. This dangerousness must be proven by evidence of recent overt acts, and a confinement based on such evidence must be implemented in the least restrictive alternative means possible. The least restrictive means test of confinement would permit a commitment to remain valid only as long as the underlying overt acts of dangerousness remain recent. To implement this requirement states should either eliminate the open-ended commitment, or allow patients committed indefinitely or for long periods of time to require the state to rejustify their confinement. In either case, the same procedures as are required in initial commitment should attach where recommitment or rejustification of commitment is in issue.

Distinctions in release procedures between the NGI and committees raise questions of equal protection violations. Since the right to be free from confinement requires strict judicial scrutiny, these distinc-

PSYCHIATRY, AND THE MENTALLY DISORDERED OFFENDER 3, 7 (L. Irvine & T. Brelje, eds. 1972); Goldstein & Katz, *Abolish the "Insanity Defense"—Why Not?*, 72 YALE L.J. 853, 872 (1963).

388. See discussion note 250 *supra*.

389. This assumes that the predictive significance of acts which are dangerous to others tends to last longer than acts evidencing danger to self. See discussion notes 230-31 *supra*. Even *Fasulo v. Arafah*, 173 Conn. 473, 480, 378 A.2d 553, 556 (1977), acknowledges that "the state may confine the individual . . . for the foreseeable period during which [his] status is unlikely to change."

390. German & Singer, *supra* note 53, at 1076-79.

tions should be tested under the compelling interest standard. Under this standard it is impossible to justify continuation of the assumption that the NGI lie between committees and convicts on a spectrum of culpability, dangerousness, and state interest in confinement. Continued acceptance of a practice which makes it more difficult for NGI to obtain release than committees tends to punish the not guilty, encourages prosecutorial misuse of the criminal system against the insane, and conflicts with the purposes of the NGI verdict.