

# NOTE

## NOT GUILTY, YET CONTINUOUSLY CONFINED: REFORMING THE INSANITY DEFENSE

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### I. INTRODUCTION

The insanity defense has been the subject of debate as much in academia as in popular culture. Recently, the defense captured public attention when James Holmes, the man found guilty of the Aurora theater shooting, asserted the defense at trial,<sup>1</sup> igniting popular debate about mental illness and criminal culpability.<sup>2</sup> The debate centers on how we should punish individuals who have committed a crime, yet may not be criminally responsible on account of a mental health condition.<sup>3</sup> Though very few individuals are found not guilty by reason of insanity (NGRI),<sup>4</sup> the insanity defense has long been caught in a contentious balancing act; one that involves balancing individual liberty, public safety, and our belief that individuals with mental health conditions deserve treatment.<sup>5</sup>

For some time, public safety has been the predominant justification for detaining individuals indeterminately until they recover.<sup>6</sup> However, the pendulum has swung so far in favor of protecting public safety that individual liberty and the right to access the least restrictive treatment have become secondary aims when

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1. See generally Ana Cabrera et al., *James Holmes Found Guilty of Murder in Colorado Theater Shooting*, CNN (Jul. 17, 2015), <https://www.cnn.com/2015/07/16/us/james-holmes-trial-colorado-movie-theater-shooting-verdict/index.html> (describing the trial of James Holmes, where Defendant was found guilty of killing twelve people, after opening fire in a crowded movie theater in Aurora, Colorado).

2. See generally Meghan Keneally, *Aurora Shooting Trial: James Holmes 'Not Faking' Insanity Plea, Defense Tells Jury*, ABC NEWS (Apr. 27, 2015), <https://abcnews.go.com/US/aurora-shooting-trial-james-holmes-faking-insanity-plea/story?id=30619051>.

3. See generally Ken Levy, *Dangerous Psychopaths: Criminally Responsible but Not Morally Responsible, Subject to Criminal Punishment and to Preventive Detention*, 48 SAN DIEGO L. REV. 1299 (2011).

4. ROBERT WEINSTOCK & JENNIFER PIEL, *DSM-5 AND NOT GUILTY BY REASON OF INSANITY AND DIMINISHED MENS REA DEFENSES*, IN *DSM-5 AND THE LAW: CHANGES AND CHALLENGES* 130 (Oxford Univ. Press, 2015).

5. See generally Colin Mickle, *Safety or Freedom: Permissiveness vs. Paternalism in Involuntary Commitment Law*, 36 LAW & PSYCHOL. REV. 297, 306 (2012).

6. *Id.* at 302–03.

considering release for NGRI individuals. A reformed system must reinstate a balance between the competing rights of individual liberty and public safety. To restore that balance, the courts and the mental health system must work in tandem with the goal of successfully integrating NGRI individuals back into our communities.

Reforming the insanity defense starts with challenging the notion that individuals found NGRI are inherently dangerous.<sup>7</sup> Certainly, public safety is a factor to be considered when deciding to release an individual found NGRI. However, many individuals found NGRI are confined for longer periods of time than those civilly committed to an inpatient psychiatric hospital, in part because of their presumed threat to public safety.<sup>8</sup> But when an individual reaches the maximum possible penal sentence they could have served if they had been convicted, the public safety justification weakens.<sup>9</sup> If the individual had been convicted in criminal court, they would have already served time and been released back into the community.

This Note argues that when an NGRI individual reaches the maximum penal sentence, the standards governing their release should be substantially similar to involuntary commitment laws for civil mental health commitments. A strong body of Supreme Court equal protection jurisprudence supports this notion.<sup>10</sup> Treating these two classes of individuals substantially the same would involve providing NGRI individuals procedural protections they are not presently afforded: frequent case review, the burden of proof borne by the government, and consideration of less restrictive means of treatment.<sup>11</sup>

Instead of confining NGRI individuals in inpatient settings long past their maximum penal sentence, NGRI release laws should be constructed with the goal of releasing individuals back into community settings earlier. Indeed, less restrictive community treatments promote individual autonomy, recovery, and often prove

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7. Indeed, many studies looking at criminal insanity recognize that predicting future dangerousness is often unreliable. See Adam Lamparello, *Using Cognitive Neuroscience to Predict Future Dangerousness*, 42 COLUM. HUM. RTS. L. REV. 481, 488–89 (2010). In addition, studies following NGRI individuals upon release show that the vast majority of these individuals successfully maintain their conditional release without further incident. These studies also advocate for moving insanity acquittees from the hospital environment to a supportive community environment. See, e.g., Michael A. Norko, et al., *Assessing Insanity Acquittee Recidivism in Connecticut*, 34 BEH. SCI. L. 423, 439 (2016); Michael J. Vitacco, et al., *Evaluating Conditional Release in Not Guilty by Reason of Insanity Acquitees: A Prospective Follow-Up Study in Virginia*, 38 LAW & HUMAN BEH. 346, 346 (2014). Despite this, current NGRI laws are predicated on the belief that NGRI individuals are dangerous. See *Jones v. United States*, 463 U.S. 354, 364 (1983) (stating that since acquittees have been found to be insane at the time they committed a criminal act, this “certainly indicates dangerousness”).

8. See Mac McClelland, *When ‘Not Guilty’ is Life Sentence*, N.Y. TIMES MAGAZINE (Sep. 27, 2017), <https://www.nytimes.com/2017/09/27/magazine/when-not-guilty-is-a-life-sentence.html> (describing states where NGRI individuals are confined for between five to thirty years).

9. See, e.g., *Baxstrom v. Herold*, 383 U.S. 107, 111–12 (1966). (“[T]here is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments.”)

10. See generally *Jackson v. Indiana*, 406 U.S. 715, 716 (1972); *Humphrey v. Cady*, 405 U.S. 504, 505 (1972); *Baxstrom*, 383 U.S. at 115 (1966). This topic will be taken up in detail in subsequent sections of this paper.

11. See discussion *infra* Part II.

more cost effective.<sup>12</sup> Therefore, reform around the insanity defense is needed to prioritize treatment in less restrictive settings and to increase options for conditional release. Achieving these reforms requires examining the policy rationale behind NGRI, as well as understanding the legal doctrine surrounding it and the gaps in legal precedent that can be used to push reform forward.

Part I provides background information addressing why reform is needed. Sections I.A and I.B cover background information on the insanity defense and modern legal definitions of insanity. Sections I.C and I.D explore relevant Supreme Court case law and detail how these laws have been constructed to allow for continuous confinement of NGRI individuals. Part II outlines suggestions for reforming the insanity defense. Sections II.A and II.B address suggested changes to the burden of proof and procedural protections for NGRI individuals. Section II.C focuses on challenging the policy rationale that NGRI individuals are dangerous. Section II.D argues against relying on long-term confinement in an inpatient setting and instead offers alternative, less restrictive treatment methods for NGRI individuals in community settings. Finally, Section II.E covers how strategic litigation can ensure legal justifications for confining NGRI individuals comport with modern understandings of treating mental health conditions.

#### A. Background on NGRI

NGRI is derived from British common law and is based on the belief that individuals should not be punished if they cannot comprehend their crimes.<sup>13</sup> Over time, NGRI has received a negative perception from the public, especially amongst those who believe that NGRI is a way for criminals to escape the justice system.<sup>14</sup> This history is important to understand because it has contributed to the emphasis courts place on protecting public safety, especially when considering whether NGRI individuals should be released.<sup>15</sup>

In the United States, outrage at the insanity defense reached an all-time high when John Hinckley Jr. tried to assassinate President Ronald Reagan in the hopes of winning the affections of Jodie Foster.<sup>16</sup> When Hinckley was found not guilty by reason of insanity, the country was outraged.<sup>17</sup> Politicians equated the defense

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12. See David De Matteo & Jennie Davis, *Mental Health Courts or Therapeutic Courts*, in THE ENCYCLOPEDIA OF CLINICAL PSYCHOLOGY 1792 (Robin L. Cautin & Scott O. Lilienfeld eds., 2015).

13. RISDON N. SLATE & W. WESLEY JOHNSON, *THE CRIMINALIZATION OF MENTAL ILLNESS* 326 (Carolina Acad. Press, 2008).

14. See, e.g., ANDREA L. ALDEN, *DISORDER IN THE COURT: MORALITY, MYTH, AND THE INSANITY DEFENSE* 93–94 (The Univ. of Alabama Press, 2018).

15. See generally Jeraldine Braff et al., *Detention Patterns of Successful and Unsuccessful Insanity Defendants*, 21 CRIMINOLOGY 439 (1983).

16. *Id.* at 78–80, 93.

17. *Id.* See also The Times Editorial Board, *Outrage Over Hinckley's Acquittal Changed American Law for the Worse*, L.A. TIMES (July 28, 2016), <https://www.latimes.com/opinion/editorials/la-ed-hinckley-insanity-20160727-snap-story.html>.

to a free ride that pampered criminals.<sup>18</sup> As a result, courts and legislators emphasized the government's ability to confine NGRI individuals indefinitely to ensure the public's protection.<sup>19</sup> These sentiments were meant to quell the country's outrage, but ultimately created a system that prioritized public safety above all else, and painted NGRI individuals as dangerous people in need of confinement in order to get well.<sup>20</sup> Since that time, it has been difficult both to successfully assert the insanity defense, and to be released from confinement once acquitted under NGRI statutes.<sup>21</sup>

Many states do not release data on the average length of time that NGRI individuals spend confined in a psychiatric hospital. However, experts estimate that "the national average confinement for NGRI individuals [is] around five to seven years."<sup>22</sup> From the states where data can be collected, nearly 1,000 NGRI individuals have been hospitalized for five to fifteen years, and more than 400 individuals have been hospitalized for more than fifteen years.<sup>23</sup> Of those 400, more than 100 individuals were hospitalized for longer than twenty five years and at least sixty individuals for longer than thirty years.<sup>24</sup> These statistics exclude thousands of NGRI individuals for whom data cannot be collected.<sup>25</sup> And this trend of lengthy institutionalization continues despite the fact that there is no widely accepted body of research that suggests it leads to better treatment outcomes.<sup>26</sup>

Despite the lack of scientific support, Supreme Court rulings have proclaimed that NGRI individuals can be confined in a psychiatric institution indefinitely.<sup>27</sup> In *Jones v. United States*, defendant Michael Jones was charged with larceny, a misdemeanor, for attempting to steal a jacket from a Washington, D.C. department store.<sup>28</sup> Jones pleaded NGRI.<sup>29</sup> By the time his case was heard in 1983, he had been confined by the state for eight years for an offense which carried a one-year maximum sentence.<sup>30</sup>

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18. *Id.* at 93–94.

19. *See Jones v. United States*, 463 U.S. 354, 368 (1983) (holding that NGRI individuals can be confined indefinitely until they are no longer a danger to themselves or others).

20. McClelland, *supra* note 8 (stating that "exaggerated concerns about public safety may be necessary to the survival of the insanity defense").

21. Natalie Jacewicz, *After Hinckley, States Tightened Use of the Insanity Plea*, N.P.R. (Jul. 28, 2016), <https://www.npr.org/sections/health-shots/2016/07/28/486607183/after-hinckley-states-tightened-use-of-the-insanity-plea>.

22. McClelland, *supra* note 8.

23. *Id.*

24. *Id.*

25. *Id.* ("The federal government doesn't collect data on forensic patients' lengths of stay, crimes or treatment. In some cases, neither do the state or local departments in charge of their custody. In 2015, [McClelland] began collecting, via request or the Freedom of Information Act, all individual length-of-stay data by legal status that existed in each state and Washington. Colorado, Wyoming, Arkansas, Missouri, California, Maine, New Hampshire, Kentucky, Wisconsin, Delaware, New Jersey, Ohio and South Carolina said they simply didn't have that information.")

26. *Id.*

27. David S. Wisz, *States' Right to Confine Not Guilty by Reason of Insanity Acquittees after Foucha v. Louisiana*, 82 Ky. L.J. 315 (1993).

28. *Jones v. United States*, 463 U.S. 354, 359 (1983).

29. *Id.* at 360.

30. *Id.*

Nonetheless, the Supreme Court held that he could still be confined in a psychiatric institution by the state, as his crime constituted an adequate basis for hospitalizing him.<sup>31</sup> Furthermore, the Court found that the commission of a criminal act justified treating Jones differently from those committed under civil commitment laws.<sup>32</sup> While this case has been roundly criticized for limiting the rights of NGRI individuals, it remains good law.<sup>33</sup> Given this background and understanding of how public sentiment contributed to tightened NGRI laws, it is important to elaborate on the legal doctrine surrounding NGRI.

### B. NGRI Doctrine

To be found NGRI, a defendant must have a mental health condition that so greatly impacts their ability to comprehend their actions that they cannot be held criminally responsible for them.<sup>34</sup> There is a common misconception that the insanity defense is often raised, often successful, and often leads to individuals getting off scot-free.<sup>35</sup> In reality, NGRI is raised in about one percent of felony cases and is only successful in fifteen to twenty-five percent of those cases.<sup>36</sup> Separately, an individual can be found incompetent to stand trial if they are not stable enough to participate in the proceedings.<sup>37</sup> Once the individual regains competency, they are considered rehabilitated and can be tried.<sup>38</sup> Alternately, a defendant might be mentally ill but found competent to stand trial to begin with. At either point, once the defendant is found competent, the district attorney can also offer an NGRI plea arrangement, which end up accounting for the vast majority of NGRI cases.<sup>39</sup> If no plea deal exists, however, a defendant's fate will be decided by a jury, who is far less likely to issue a verdict of insanity than judges.<sup>40</sup>

Most states use one of two tests for defining insanity: the M'Naghten standard<sup>41</sup> or the American Law Institute Model Penal Code (ALI) definition.<sup>42</sup> The

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31. *Wisz*, *supra* note 27, at 316–17 (1993); *see also Jones*, 463 U.S. at 370 (“We hold that when a criminal defendant establishes by a preponderance of the evidence that he is not guilty of a crime by reason of insanity, the Constitution permits the Government, on the basis of the insanity judgment, to confine him to a mental institution until such time as he has regained his sanity or is no longer a danger to himself or society.”).

32. *Wisz*, *supra* note 27, at 316–17.

33. *Id.* at 316.

34. Randy Borum & Solomon M. Fulero, *Empirical Research on the Insanity Defense and Attempted Reforms: Evidence Toward Informed Policy*, 23 *LAW & HUMAN BEHAV.* 375, 383 (1999).

35. WEINSTOCK & PIEL, *supra* note 4, at 130.

36. *Id.*

37. *See D.K.H., Competence to Plead Guilty and to Stand Trial: A New Standard When a Criminal Defendant Waives Counsel*, 68 *V.A. L. REV.* 1139, 1139–42 (1982).

38. *Id.*

39. WEINSTOCK & PIEL, *supra* note 4, at 130.

40. *Id.* Note that a finding of NGRI can be made at a bench trial, but in order for a bench trial to take place, the defense, prosecution, and judge must all agree to hold a bench trial. As judges more readily understand the significance of a NGRI finding, they are more likely than a jury to find an individual meets the NGRI standard.

41. WEINSTOCK & PIEL, *supra* note 4, at 132–33.

42. Borum & Fulero, *supra* note 34, at 377; *see also WEINSTOCK & PIEL*, *supra* note 4, at 132–33. Note that there is a third rule used only in New Hampshire called the Durham Rule. This rule is also sometimes referred to

M’Naghten test requires proof that the defendant was unable to know right from wrong or unable to appreciate the nature and quality of his actions.<sup>43</sup> By contrast, the ALI standard provides that “a person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law.”<sup>44</sup> The M’Naghten test is considered extremely narrow and has been roundly criticized for only focusing on the ability to know whether one’s actions are wrong, compared to the ALI standard which adds a volitional component.<sup>45</sup>

These standards are reflective of the premise that the law is not only concerned with individuals’ actions, but also with their state of mind.<sup>46</sup> People meeting this narrow defense are not criminally culpable in the eyes of the law.<sup>47</sup> While those found NGRI are not subject to criminal sanctions for their behavior, they are committed to a psychiatric hospital and can be continuously confined.<sup>48</sup>

### C. Baxstrom-Jackson *Equal Protection Doctrine*

NGRI doctrine is largely based in the Equal Protection doctrine. Two main cases govern NGRI release under equal protection: *Baxstrom v. Herold*<sup>49</sup> and *Jackson v. Indiana*.<sup>50</sup> In *Baxstrom v. Herold*, Baxstrom was sentenced to prison for assault and then, while serving his penal sentence, was transferred without a hearing to a psychiatric facility.<sup>51</sup> The state then sought to keep Baxstrom at that facility as a civil committee after his sentence was complete, following only a bench hearing.<sup>52</sup> A New York statute enabled this decision, stating that a prisoner could, at the end of his sentence, be civilly committed without the jury trial afforded to all other civil committees.<sup>53</sup> The Supreme Court held this to be an equal protection violation, and Baxstrom was entitled to have the procedural hearing generally available to civil committees at the time of commitment.<sup>54</sup>

Courts have extended the holding in *Baxstrom* further, stating “that equal protection requires the standards governing the release of criminal acquittees, who have

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as the “product test” and provides that the defendant is not criminally responsible if his unlawful act is the product of a mental disease or defect.

43. Borum & Fulero, *supra* note 34, at 377; *see, e.g.*, OHIO REV. CODE ANN. §§ 2901.01(A)(14), 2945.391 (West 2019).

44. Borum & Fulero, *supra* note 34, at 377 (internal quotation marks omitted).

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 377–78.

49. *Baxstrom v. Herold*, 383 U.S. 107 (1966).

50. *Jackson v. Indiana*, 406 U.S. 715, 729–31 (1972).

51. *Baxstrom*, 383 U.S. at 108.

52. *Id.*

53. *Id.* at 110–11.

54. *Id.* at 110.

been confined for a period equal to the maximum sentence authorized for their crimes, to be substantially the same as the standards applicable to civil commitments.”<sup>55</sup> Notably, the *Baxstrom* court stated that, for the purposes of determining whether an individual is mentally ill and presently dangerous, “there is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments.”<sup>56</sup>

In *Jackson v. Indiana*, another landmark NGRI equal protection case, the Court stated that indefinite commitment of a criminal defendant solely on account of his incompetency to stand trial violates the Due Process and Equal Protection Clauses.<sup>57</sup> Jackson, who was charged with two petty robberies, was found incompetent to stand trial and ordered to be committed until he gained competence.<sup>58</sup> Because it was unlikely that a court would ever find him competent, Jackson argued that he had been committed indefinitely without a conviction or even a trial.<sup>59</sup>

The *Jackson* Court held that the defendant could not “be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain [competency] in the foreseeable future.”<sup>60</sup> Moreover, the Court likened release standards for criminal defendants awaiting competency determinations to the release standards for civil commitments.<sup>61</sup> The Court explained that if a defendant is unlikely to regain competency in the foreseeable future, “the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant.”<sup>62</sup>

The *Jackson* Court expressly applied *Baxstrom*’s holding to release standards.<sup>63</sup> This interaction has been referred to as the “*Baxstrom-Jackson* equal protection doctrine.”<sup>64</sup> This doctrine asserts that release standards for criminal defendants should be substantially the same as the release standards applicable for civil commitments.<sup>65</sup> Moreover, this doctrine applies both to those who have served their entire penal sentence and those who are unlikely to gain competency in the foreseeable future.<sup>66</sup> The *Baxstrom-Jackson* equal protection doctrine was upheld in *Humphrey v. Cady*, which applied the doctrine to criminal defendants who are

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55. *United States v. Ecker*, 543 F.2d 178, 188 n.34, 197 (D.C. Cir. 1976) (“*Baxstrom* holds that even proven criminal conduct does not justify different standards and procedures at the commitment stage . . .”).

56. *Baxstrom*, 383 U.S. at 111–12.

57. *Jackson v. Indiana*, 406 U.S. 715, 729–31 (1972).

58. *Id.* at 717–19.

59. *Id.*

60. *Id.* at 738.

61. *Id.*

62. *Id.*

63. *Id.* at 729; see also *United States v. Ecker*, 543 F.2d 178, 197 (D.C. Cir. 1976) (“*Jackson* applies *Baxstrom*’s rationale to release standards as well as commitment standards . . .”).

64. *Ecker*, 543 F.2d at 198.

65. *Id.* at 188 n.34.

66. *Id.* at 198.

committed under NGRI laws for a period longer than the maximum sentence for their crimes.<sup>67</sup>

In addition, lower courts have used the *Baxstrom-Jackson* rationale to come to the conclusion that, upon being committed for a time equal to a maximum sentence, there is no valid reason for distinctions between release standards for committees and acquittees.<sup>68</sup> In *Ecker*, the D.C. Circuit held “that equal protection requires the standards governing the release of criminal acquittees, who have been confined for a period equal to the maximum sentence authorized for their crimes, to be substantially the same as the standards applicable to civil committees.”<sup>69</sup> The D.C. Circuit concluded that standards governing release for acquittees and committees should be “substantially the same” under equal protection doctrine, drawing from Supreme Court case law leading up to the *Ecker* decision in *Baxstrom, Jackson, and Humphrey*.<sup>70</sup> Thus, the *Baxstrom-Jackson* doctrine remains good law, and is an area in which the Supreme Court recognized that NGRI individuals and civilly committed individuals are entitled to similar protections.

Moreover, the Supreme Court held in *Jones* that when an NGRI individual has reached their maximum penal sentence they are not automatically entitled to release; the individual still must demonstrate that they are no longer a danger to themselves or others and are not likely to be dangerous in the reasonable future.<sup>71</sup> This high burden seems to conflict with the *Baxstrom-Jackson* equal protection doctrine, which stands for the proposition that NGRI individuals should be treated substantially the same as those subject to civil commitments for the purposes of release from confinement.<sup>72</sup>

### 1. *Jones v. United States* and the Effect on NGRI Release Standards

*Jones v. United States* curtailed the *Baxstrom-Jackson* equal protection doctrine. In *Jones*, the Supreme Court held that the Due Process Clause permitted the government to confine an NGRI individual to a psychiatric institution until such time

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67. *Ecker*, 543 F.2d at 198. Initially, *Humphrey* was read to stand for the broader premise that a criminal defendant cannot be committed for a period longer than the maximum penal sentence authorized for their crimes. This broad reading of the holding is explicitly overruled by *Jones v. United States*, 463 U.S. 354 (1983). However, *Humphrey v. Cady* is nonetheless a specific example of applying the *Baxstrom-Jackson* doctrine to individuals who have served their penal sentence. 405 U.S. 504 (1972).

68. *Ecker*, 543 F.2d at 199 (“Read together, then *Humphrey* and *Jackson* indicate that, once the maximum sentence period has expired, it is unconstitutional to discriminate against an acquittee, as compared with a committee, for purposes of release from indefinite commitment. From that moment on, acquittees and committees appear, in the Court’s contemplation, to be on the same footing.”).

69. *Id.* at 188 n.34.

70. *See id.* (citing *Jackson v. Indiana*, 406 U.S. 715 (1972); *Humphrey*, 405 U.S. at 504; *Baxstrom v. Herold*, 383 U.S. 107 (1966)).

71. *Jones v. United States*, 463 U.S. 354 (1983).

72. *United States v. Ecker*, 543 F.2d 178, 188 n.34 (D.C. Cir. 1976) (“[W]e recognize that equal protection requires the standards governing the release of criminal acquittees, who have been confined for a period equal to the maximum sentence authorized for their crimes, to be substantially the same as the standards applicable to civil committees.”) (citations omitted).



as he had regained his sanity or was no longer a danger to himself or society, even for a period longer than the maximum penal sentence.<sup>73</sup> Therefore, *Jones* precludes the argument that once an acquittee has served time beyond their maximum penal sentence, they are automatically entitled to release.<sup>74</sup> However, *Jones* does not disrupt the *Baxstrom-Jackson* equal protection doctrine.<sup>75</sup> Moreover, *Jones* can be distinguished as it focuses on the moment of initial confinement and does not explicitly address the constitutionality of procedures and standards for release from confinement for NGRI acquitees.

## 2. *Baxstrom-Jackson* Equal Protection Survives *Jones* and Applies to NGRI Individuals at the Time of Release

Despite the narrowing provided in *Jones*, the *Baxstrom-Jackson* equal protection argument still applies to NGRI release standards. While *Jones* stands for the proposition that it is not unconstitutional for an individual to be committed for an indefinite period of time, it does not explicitly address whether an NGRI individual should be entitled to the same standards and procedures as a civil committee once they have been confined for longer than their maximum penal sentence.<sup>76</sup> *Jones* focuses on the time of *initial* commitment for an NGRI acquittee.<sup>77</sup> Indeed, the *Jones* court explicitly states that NGRI individuals and those committed under civil mental health commitment laws can be treated “differently for purposes of initial commitment.”<sup>78</sup>

Thus, although *Jones* precludes an individual from seeking release from confinement merely because he has served time surpassing his maximum penal sentence, the general principle that standards governing NGRI and civil commitment releases should be substantially the same still remains. *Jones* neither overrules the *Baxstrom-Jackson* equal protection doctrine, nor does it specifically address the

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73. *Id.*

74. *Id.* at 368–69 (stating that NGRI acquitees are not automatically entitled to release merely because they have been hospitalized for a period longer than they would have been incarcerated for if convicted).

75. *See id.* at 380 (Brennan, J., dissenting) (“Today’s decision . . . does not, however, purport to overrule *Baxstrom* or any of the cases which have followed *Baxstrom*.”).

76. *See Baxstrom*, 383 U.S. at 111–12 (“[T]here is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments.”); *See also* *United States v. Ecker*, 543 F.2d 178, 199 (D.C. Cir. 1976) (“Read together, then *Humphrey* and *Jackson* indicate that, once the maximum sentence period has expired, it is unconstitutional to discriminate against an acquittee, as compared with a committee, for purposes of release from indefinite commitment. From that moment on, acquitees and committees appear, in the Court’s contemplation, to be on the same footing.”).

77. *See Jones*, 463 U.S. at 366 (“[A] finding of not guilty by reason of insanity is a sufficient foundation for [initial] commitment of an insanity acquittee for the purposes of treatment and the protection of society.”); *see also id.* at 387 (Stevens, J., dissenting) (stating that Justice Powell’s majority opinion in *Jones* supports the view that the “initial confinement of the acquittee is permissible . . .”).

78. *See* *Waite v. Jacobs*, 475 F.2d 392, 396 (D.C. Cir. 1973); *see also Jones*, 463 U.S. at 364 (stating that since acquitees have been found to be insane at the time they committed a criminal act, that this “certainly indicates dangerousness” and thus justifies treating them differently than civil committees at the time of commitment).

proper procedures and standards for acquittee release.<sup>79</sup>

When an individual has served their maximum penal sentence, the present state of equal protection doctrine especially demands that NGRI individuals be afforded the same protections provided in civil proceedings. Thus, this Note advocates for a conversion to civil commitment standards once an NGRI individual has served their penal sentence. At the time their maximum legal sentence expires, NGRI individuals pose no more danger to society than any other individual reaching the end of their sentence.<sup>80</sup> Having been designated NGRI, they will have served time even in the absence of guilt, and should be transferred back into the community on conditional release as early as possible, so they can receive adequate treatment in a supportive environment. As put by lower courts applying the equal protection doctrine to NGRI cases:

[I]t seems to us that, after the expiration of the period for which an acquittee might have been incarcerated had he been convicted, it may be irrational, within the meaning of equal protection doctrine, to distinguish between an acquittee and a committee. Acquittes who have been confined for that period, therefore, may be entitled to treatment no different from that afforded committees.<sup>81</sup>

#### D. *Individuals Found NGRI are Continuously Confined for Periods Longer than the Maximum Penal Sentence for their Crimes*

The *Baxstrom-Jackson* equal protection doctrine still applies to individuals who are committed pursuant to NGRI statutes. Yet, under the current structure of NGRI laws, it is increasingly difficult for individuals to be released from confinement. Indeed, individuals found NGRI often spend more time in confinement compared with other criminal defendants.<sup>82</sup> This is due in part to the fact that the standard governing release for NGRI individuals is based on whether the individual will be dangerous to themselves or others in the future.<sup>83</sup>

In addition, because of the holding in *Jones*, an NGRI individual must show they are no longer dangerous in order to gain release even if they have surpassed

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79. See *Jones*, 463 U.S. at 380–82.

80. See Lamparello, *supra* note 7, at 488–89.

81. *Waite*, 475 F.2d at 395. Note that the term “acquittee” refers to an individual found NGRI.

82. See Joseph H. Rodriguez et al., *The Insanity Defense Under Siege: Legislative Assaults and Legal Rejoinders*, 14 RUTGERS L.J. 397, 403–04 (1983) (stating that NGRI defendants spend twice as long in confinement as people convicted of similar charges); see also Steadman et al., *BEFORE AND AFTER HINCKLEY: EVALUATING INSANITY DEFENSE REFORM* 59, 94 (The Guilford Press, 1993) (finding in California, defendants found NGRI in cases of violent offense spend twice as long in confinement as those convicted).

83. See, e.g., D.C. Code 24-§ 501(e) (2008) (stating the court may grant an acquittee release if such person has recovered his sanity, that such person will not in the reasonable future be dangerous to himself or others, and in the opinion of the superintendent, the person is entitled to his unconditional release from the hospital).

the maximum penal sentence they would have served in prison.<sup>84</sup> Thus, although the *Baxstrom-Jackson* doctrine states civil and criminal mental health commitments should be substantially the same, the Court also held that to protect public safety, criminal defendants must disprove dangerousness to be granted relief.<sup>85</sup>

As a result of the tension between these holdings, current NGRI laws place the burden of proving eligibility for release on the defendant, and procedures for gaining release are far higher than they are for those individuals committed under civil mental health commitment statutes.<sup>86</sup> Courts justify this disparity by arguing that NGRI individuals are inherently more dangerous, and thus the potential threat to the public is higher.<sup>87</sup> As a result, NGRI individuals can be confined for a period longer than if they would have gone to jail without pleading NGRI.<sup>88</sup> This means that the insanity defense, a defense initially designed to recognize that people with mental health conditions who commit crimes are not criminally culpable, can confine people for periods longer than prisons. Despite the fact that they are legally not guilty, people with mental health conditions who have committed crimes are detained in mental health institutions continuously until they can prove that they are no longer a danger to society.

When individuals who are not guilty because of a mental health condition are confined for a longer time than individuals who are guilty, it is an indication that our NGRI laws are not functioning for the purpose they were originally designed. NGRI laws meant to protect a class of people who are not criminally responsible have instead become a mechanism that confines individuals indefinitely. As such, reforming the insanity defense is crucial to ensuring acquittees can receive treatment and be reintegrated into community mental health settings. Achieving such reform will necessitate altering standards for NGRI release in alignment with Supreme Court precedent and ensuring treatment for NGRI individuals comports with modern public health policy.

## II. REFORMING THE INSANITY DEFENSE

This discussion first explores possible reforms for the insanity defense including (a) assigning the burden of proof to the government and (b) ensuring that

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84. *Jones v. United States*, 463 U.S. 354 (1983).

85. *See Jones*, 463 U.S. at 370 (holding that an NGRI individual can be confined in a mental institution until they are able to demonstrate they are no longer a danger to society).

86. *Compare* D.C. Code § 24-501(e) (2008) (stating the court may grant an acquittee release if such person has recovered his sanity, that such person will not in the reasonable future be dangerous to himself or others, and in the opinion of the superintendent, the person is entitled to his unconditional release from the hospital), *with* D.C. Code § 21-545(b)(1) (stating that for civil committees if a person is not mentally ill *or* is not likely to injure himself or others as a result of mental illness, the court *shall* dismiss the petition and order the person's release).

87. *See Jones*, 463 U.S. at 364 (stating that since acquittees have been found to be insane at the time they committed a criminal act, that this "certainly indicates dangerousness" and thus justifies treating them differently than civil committees at the time of commitment).

88. James Ellis, *The Consequences of The Insanity Defense: Proposals to Reform Post-Acquittal Commitment Laws*, 35 CATHOLIC UNIV. L. REV. 961, 1019 (1986).

procedural protections afforded to NGRI individuals are substantially the same as those provided under civil mental health commitment laws. In addition, this section discusses how a concern with public safety has been prioritized when determining whether an NGRI individual should be released. This in turn contributes to an underutilization of models that have proven effective in supporting NGRI individuals in community settings like conditional release programs, supportive housing, and supervision by mental health courts. Finally, this section argues that, especially when NGRI confinement exceeds an individual's maximum penal sentence, the standards for release back into the community should be substantially the same as the standards for civil commitments. This argument is supported by a discussion of Supreme Court case law, and analysis of how this precedent might be used through strategic litigation to advance reform of the insanity defense.

#### A. *Continued Confinement Should be a Burden Borne by the Government*

The legal standards for release create an uphill battle for NGRI individuals arguing for conditional release. In determining release for those found NGRI, the individual found NGRI has the burden of proof.<sup>89</sup> If the court finds by a preponderance of the evidence that the individual is entitled to his release from custody, either conditional or unconditional, the court must order a change in the conditions of his release or other relief it deems appropriate.<sup>90</sup> By contrast, in civil proceedings, the government must demonstrate by clear and convincing evidence that an individual is mentally ill and dangerous in order to detain them.<sup>91</sup> Thus, not only is the standard of proof different (preponderance of the evidence versus clear and convincing evidence), but the burden is placed on the government in civil commitments and on the defendant in NGRI cases. Moreover, the NGRI statute gives courts more flexibility to deny release, whereas the commitment statute sets a higher threshold for detaining an individual.<sup>92</sup>

Not surprisingly, prosecutors and judges generally believe the burden of proof should be borne by the defense, while public defenders and private attorneys believe the government should bear the burden of proving cause for continued confinement.<sup>93</sup> Clinically, the research is mixed as to whether changing the burden of

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89. *See, e.g.*, 18 U.S.C. § 17(b). Under 18 U.S.C. § 17(b), the burden has been shifted to the defendant to prove the defense of insanity by clear and convincing evidence.

90. *See, e.g.*, D.C. Code § 24-501(d)(2)(B).

91. *See, e.g.*, D.C. Code § 21-545(b); *see also Jones*, 463 U.S. at 366–67.

92. *Compare* D.C. Code Ann. § 24-501(e) (West 2008) (stating the court may grant an acquittee release if such person has recovered his sanity, that such person will not in the reasonable future be dangerous to himself or others, and in the opinion of the superintendent, the person is entitled to his unconditional release from the hospital); *with* D.C. Code Ann. § 21-545(b)(1) (stating that for civil committees if a person is not mentally ill *or* is not likely to injure himself or others as a result of mental illness, the Court *shall* dismiss the petition and order the person's release).

93. Borum & Fulero, *supra* note 34, at 381.

proof reduces the number of individuals confined under NGRI laws.<sup>94</sup> Yet, as has been discussed, current equal protection doctrine dictates that NGRI individuals should be treated substantially the same as those committed under civil commitment procedures.<sup>95</sup> By this logic, the burden of proof for both civil committees and NGRI acquittees should be the same.<sup>96</sup>

Once an individual is being considered for release and they have reached their maximum penal sentence, equal protection demands NGRI individuals be treated the same as civil committees. This in turn means that the burden of proof should lie with the government, not the defendant, and the standard should be clear and convincing.

*B. NGRI Individuals Should Receive Substantially the Same Procedural Protections as Those Under Civil Mental Health Commitment*

Not only is the burden of proof more difficult for NGRI individuals compared with those confined under civil commitment laws, but there are generally fewer procedural protections in place under NGRI laws. Procedural protections are typically more explicit in civil commitment statutes.<sup>97</sup> For example, in civil cases:

The chief clinical officer . . . shall immediately release the person from the emergency detention in a hospital if, at any time during the detention, a psychiatrist or qualified psychologist at the hospital or the Department certifies that, based on an examination, it is his opinion that the person is no longer mentally ill to the extent that the person is likely to injure himself or others if not presently detained or that the person could be treated in a less restrictive setting.<sup>98</sup>

No such procedures are found in NGRI statutes. In fact, release for NGRI individuals is left to the discretion of judges who consider clinical psychiatric evaluations,

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94. See *id.* at 382 (“In a naturalistic study in Hawaii, Pasewark, Parnell, and Rock (1994) found that shifting the burden of persuasion from the prosecution to the defendant did not reduce the frequency or success rate of the insanity plea. However, [other researchers] conducted a similar study in Georgia and New York, which shifted the burden of persuasion to the defendant and the standard of proof to ‘preponderance of the evidence.’ Both states showed a significant decrease in the rate of insanity pleas.”).

95. See *Baxstrom v. Herold*, 383 U.S. 107, 111–12 (1966). Notably, the *Baxstrom* court stated for the purposes of determining whether an individual is mentally ill and presently dangerous, “there is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments.”

96. Notably, there are two different standards that are often discussed in the context of NGRI law. The first is the standard for finding an individual NGRI at the time of initial confinement. The second is the standard for determining when to release an individual NGRI back into the community. This section focuses on the latter standard. *Jones v. United States*, 463 U.S. 354, 355 (1983), addresses the time of initial confinement but does not explicitly address the constitutionality of procedural standards for release.

97. Compare D.C. Code Ann. §§ 21-545.01(g), 21-546 (stating explicit times at which an individual must be reevaluated for release); with D.C. Code Ann. § 24-501(e) (West 2008) (stating the court has the final determination regarding eligibility for release, and neither least restrictive means of treatment nor regular psychiatric reviews are explicitly considered in the statutory text).

98. D.C. Code Ann. § 21-527(b)(1).

but need not follow a psychiatrist recommendation.<sup>99</sup> Civil commitment cases are typically afforded far more procedural protections as the release date approaches compared with NGRI cases.<sup>100</sup> This disparity in procedural protections for NGRI individuals compared to civil commitments is less justifiable once an NGRI individual has served their penal sentence. Indeed, a 1992 Supreme Court case held that when the original basis for confinement no longer exists, due process entitles NGRI individuals to constitutionally adequate procedures.<sup>101</sup> The Court found that the required civil commitment proceedings when an individual can no longer be held as an insanity acquittee in a mental hospital are constitutionally adequate procedures.<sup>102</sup>

However, because of confusion in interpreting Supreme Court case law<sup>103</sup> and because of a continued emphasis on public safety,<sup>104</sup> most state laws have stayed the same and continue to provide broad discretion to judges to determine when an individual is no longer a danger and can be released.<sup>105</sup> More explicit protections in NGRI statutes are needed both to limit judicial discretion, and to comport with equal protection doctrine.

### *C. The Presumption that NGRI Individuals Threaten Public Safety Should be Reexamined*

One reason that NGRI individuals are confined for lengthy periods is the legitimate concern for recidivism and public safety, couched by the belief that individuals found NGRI are nonetheless still dangerous. Indeed, courts often justify differences in standards for civil mental health commitments and NGRI commitments because they “accord[] with the widely and reasonably held view that insanity acquittees constitute a special class that should be treated differently from other candidates for commitment.”<sup>106</sup> Because of this, individuals found NGRI are only

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99. See generally W. Neil Gowensmith et al., *Field Reliability Influences Field Validity: Risk Assessments of Individuals Found Not Guilty by Reason of Insanity*, 29 J. PSYCH. ASSES. 786, 786 (2017).

100. Compare 21 D.C. Code Ann. §§ 545.01(g), 546 (stating that civil committees are afforded a review of their case every 90 days as well as in the final 30 days of their commitment, during which a mental health professional assesses the committee’s eligibility for release, including whether the committee is being treated in the least restrictive way); with D.C. Code Ann. § 24-501(e) (West 2008) (stating the court has the final determination regarding eligibility for release, and neither least restrictive means of treatment nor regular psychiatric reviews are explicitly considered in the statutory text).

101. Wisz, *supra* note 27, at 317.

102. *Foucha v. Louisiana*, 504 U.S. 71, 79 (1992).

103. Wisz, *supra* note 27, at 332–33.

104. *Id.* at 333.

105. 105. See, e.g., CA. PENAL CODE § 1026 (“If the jury finds the defendant guilty, or if the defendant pleads only not guilty by reason of insanity, the question whether the defendant was sane or insane at the time the offense was committed shall be promptly tried, either before the same jury or before a new jury in the discretion of the court.”). Furthermore, depending on the sanity of the defendant, the court can impose a criminal sentence, direct that the defendant be committed to the State Department of State Hospitals or any other appropriate public or private treatment facility, or the court may order the defendant placed on outpatient status pursuant to Title 15.

106. See *Jones v. United States*, 463 U.S. 354, 370 (1983).

released when they are no longer considered a danger to themselves or others in the foreseeable future.<sup>107</sup>

Though the ‘dangerousness’ standard is the current law, judicial views surrounding the notion that NGRI individuals are inherently more dangerous than those committed under civil laws have evolved.<sup>108</sup> This is, in part, because the clinical research on the efficacy of risk assessment is mixed.<sup>109</sup> Indeed, recent studies have demonstrated that clinical risk assessment predictions of violent behavior have a limited ability to predict actual outcomes once an NGRI individual is conditionally released.<sup>110</sup> A recent study compared offenders with and without mental illness and found that general risk factors ultimately predicted recidivism rather than any particular risk factor associated with having a mental health condition.<sup>111</sup> In other words, even though NGRI individuals are continually confined based on the presumption that their continued mental illness presents a danger to the public, mental illness is not an adequate predictor for either violence or recidivism.<sup>112</sup>

In addition, courts have challenged the notion that commission of a crime is necessarily linked to future dangerousness.<sup>113</sup> For instance, many courts have held that when an NGRI statute requires an independent showing of dangerousness, committing the crime in question is not itself sufficient to establish the element of dangerousness.<sup>114</sup> Despite this, NGRI laws continue to use the dangerousness standard as a guide. Typically, individuals are not released unless their mental health condition is stable and they are unlikely to pose a danger to the community.

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107. See, e.g., D.C. Code Ann. § 24-501(e) (West 2008).

108. 108. In one of the first cases after *Foucha v. Louisiana*, 504 U.S. 71, 79 (1992) was decided, a Kansas Court of Appeals held that it was unconstitutional for a statute to provide for indefinite confinement based solely on a finding of dangerousness. See *In re Noel*, 838 P.2d 336 (Kan. Ct. App. 1992).

109. See Michael J. Vitacco et al., *Reconsidering Risk Assessment with Insanity Acquittes*, 42 LAW & HUM. BEHAV. 403, 404 (2018).

110. See *id.* at 409; see also Adam Lamparello, *Using Cognitive Neuroscience to Predict Future Dangerousness*, 42 COLUM. HUM. RTS. L. REV. 481, 488–91 (2010) (arguing that attempting to predict future dangerousness in NGRI acquittes is unreliable); Norko, et al., *supra* note 7, at 430–31; Michael J. Vitacco, et al., *supra* note 7, at 346 (finding that the vast majority of these individuals successfully maintain their conditional release without further incident and advocating for moving insanity acquittes from the hospital environment to a supportive community environment).

111. See Jennifer Skeem et al., *Offenders with Mental Illness Have Criminogenic Needs, Too: Toward Recidivism Reduction*, 38 LAW & HUM. BEHAV. 212, 221 (2014).

112. See *id.*; see also Lamparello *supra* note 7, at 488–91.

113. See *Jackson v. Indiana*, 406 U.S. 715, 728 (1972); see also *Baxstrom v. Herold*, 383 U.S. 107, 114 n.5 (1966) (classifying the oppositions attempts to establish *Baxstrom* as dangerous because of the criminal tendencies reflected in his criminal record as “arbitrary”); *Waite v. Jacobs*, 475 F.2d 392, 396 (D.C. Cir. 1973) (“After confinement for that term, and in most cases much earlier, even a person who was fully accountable for a crime is free to rejoin the community. It follows, therefore, that the acquittee’s substantially lesser [criminal] responsibility should have no bearing on his continued confinement after the maximum sentence period. That is not to say that the acquittee must be released even if he is mentally ill and dangerous, but rather that his continued confinement, and the procedures governing it, cannot be justified by reference to his partial responsibility for a prohibited act.”).

114. See *Jackson v. Indiana*, 406 U.S. 715, 728 (1972) (“The statute appears to require an independent showing of dangerousness . . . . Insofar as it may require such a showing, the pending criminal charges are insufficient to establish it . . . .”).

D. *NGRI Individuals are Successfully Treated in Less Restrictive Ways in Community Settings*

Instead of confining NGRI individuals in inpatient settings for long periods of time, such individuals should be treated in community settings earlier. This discussion explores how treatment in traditional community outpatient mental health settings promotes individual autonomy, is more cost-effective, and promotes recovery.<sup>115</sup> In addition, this discussion demonstrates how conditional release programs providing supervision of NGRI individuals have proven effective in many states,<sup>116</sup> especially when paired with a supportive housing environment.<sup>117</sup> Finally, this section examines how modern mental health courts can oversee treatment noncompliance, and are effective in helping individuals remain compliant with their conditional release protocol, avoiding recidivism.<sup>118</sup>

1. Conditional Release

Instead of confining individuals found NGRI in hospitals long past their maximum penal sentence, the system should assess an individual's recovery with the goal of placing them into empirically supported conditional release programs. When an individual is conditionally released, they can safely continue their treatment in the community under supervision.<sup>119</sup> They are required to follow mandated conditions such as residential programming, therapeutic and psychiatric services, supervision, and restrictions on association and movement.<sup>120</sup> For example, NGRI individuals on release are often forbidden from associating with known criminals, possessing weapons, or visiting businesses whose primary purpose is the sale of alcohol.<sup>121</sup> While on conditional release, all psychiatric care occurs on an outpatient basis.<sup>122</sup>

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115. See generally Ronald J. Smith, et al., *Forensic Continuum of Care with Assertive Community Treatment (ACT) for Persons Recovering From Co-Occurring Disabilities: Long-Term Outcomes*, 33 *PSYCHIATRIC REHABILITATION J.* 207, 207–17 (2010) (finding that treating NGRI individuals acquitted of violent crimes in assertive community treatment settings had strong results in preventing criminal recidivism in addition to achieving improved mental health and quality of life).

116. See, e.g., Norko, et al., *supra* note 7, at 423.

117. See generally Leila Salem et al., *Supportive Housing and Forensic Patient Outcomes*, 39 *LAW & HUM. BEH.* 311, 318 (2014).

118. See generally De Matteo & Davis, *supra* note 12, at 1791–92.

119. Norko, et al., *supra* note 7, at 425.

120. *Id.*

121. *Id.*

122. *Id.*



Conditional release has been a successful program in many states.<sup>123</sup> In a study done in Connecticut, for example, two-thirds of individuals on conditional release were able to successfully maintain their release status.<sup>124</sup> Revocation of conditional release was typically on account of clinical reasons, such as a need for periodic inpatient psychiatric treatment, rather than any criminal wrongdoing.<sup>125</sup> In addition, the vast majority of individuals on conditional release were also not rearrested in the community (83.7%), with 91% not rearrested for a felony charge.<sup>126</sup> This cuts against the presumption that those found NGRI are dangerous or likely to reoffend, and further illuminates why conditional release should be considered as an option for treatment far earlier than it currently is. Planning for an individual's release is crucial to the successful reentry of individuals with mental health conditions back into the community.<sup>127</sup> Unfortunately, most individuals are released without addressing their needs for treatment, supervision, and housing.<sup>128</sup>

## 2. Supportive Housing

Individuals with a mental health condition who are conditionally released may need to live in a supportive housing environment in order to transition back into the community and promote social integration.<sup>129</sup> Supportive housing is defined as housing with “on-site professional support intended to address daily living skills, implement better routines, increase awareness of mental illness, and promote vocational and educational engagement.”<sup>130</sup> A study in Canada showed that individuals placed in independent housing following a conditional discharge were two-and-a-half times more likely to commit a new offense, nearly three times more likely to commit an offense against a person, and almost one-and-a-half times more likely to be readmitted for psychiatric treatment compared with individuals residing in supportive housing.<sup>131</sup> Despite these outcomes, individuals face great barriers to accessing housing due to the stigma associated with the NGRI label.<sup>132</sup> More public education is needed to continue to encourage supportive housing for individuals conditionally released after being found NGRI, as a supportive housing

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123. See Vitacco, et al., *supra* note 109 (demonstrating significantly lower recidivism rates in states that provide conditional release programs for insanity acquittees in Oregon, Georgia, Virginia, Wisconsin and Maryland); see also Noriko, *supra* note 7, at 439 (showing two thirds of NGRI acquittees were able to successfully maintain their conditional release without further incident).

124. *Id.* at 439.

125. *Id.*

126. *Id.*; see also Vitacco, et al., *supra* note 7, at 349–54 (showing that the vast majority of NGRI individuals successfully maintain their conditional release without further incident and advocating for moving insanity acquittees from the hospital environment to a supportive community environment).

127. SLATE & JOHNSON, *supra* note 13, at 333.

128. *Id.*

129. Salem et al., *supra* note 117, at 318.

130. *Id.* at 312.

131. *Id.* at 311.

132. *Id.* at 311.

environment has the potential to reduce hospitalizations, increase housing stability, and reduce incarcerations of mentally ill individuals living in the community.<sup>133</sup>

Part of the success of supportive housing is due to the social integration and peer support gleaned in a supportive housing environment.<sup>134</sup> Many supportive housing environments offer peer specialists, individuals with mental illness who have been successful in their recovery.<sup>135</sup> Studies have found that supportive housing environments that include group peer-based activities in their housing program allow individuals with serious mental illness to develop better strategies for engaging in healthy lifestyle changes, and increase social connectedness.<sup>136</sup> Overall, supportive housing environments decrease psychological distress and contribute to better health outcomes.<sup>137</sup>

### 3. Addressing Treatment Noncompliance in Mental Health Courts

Beginning with just four mental health courts in 1997, the number of mental health courts in the United States has grown to over 300 as of this writing, with programs found in almost every state.<sup>138</sup> Mental health courts are treatment-oriented, problem-solving courts that divert mentally ill offenders from the criminal justice system into court-mandated, community-based treatment programs.<sup>139</sup> Mental health courts strive to protect society through the use of therapeutic jurisprudence and promote treatment with the overall goal of ending the revolving door of persons with mental illness through the criminal justice system.<sup>140</sup> They accomplish this by using problem solving techniques that de-emphasize punitive approaches and instead focus on treatment.<sup>141</sup>

Mental health courts, therefore, are well equipped to monitor treatment protocol and can assign parole officers and clinical supervisors alike to ensure a defendant is complying with the court's order. This makes mental health courts a better environment than criminal courts to supervise an NGRI individual should they have problems adhering to their treatment plan required by conditional release. Mental health courts are a more supportive environment that focus on providing the

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133. See *id.* at 312; see also David Novosad et al., *Statewide Survey of Living Arrangements for Conditionally Released Insanity Acquittes*, 32 BEHAV. SCI. LAW 659, 664 (2014).

134. See Kathleen O'Hara et al., *Developing a Peer-Based Healthy Lifestyle Program for People with Serious Mental Illness in Supportive Housing*, 7 TRANSLATIONAL BEHAVIORAL MEDICINE 793, 800–01 (2017).

135. *Id.*

136. *Id.*

137. Annette Crisanti et al., *A Longitudinal Analysis of Peer-Delivered Permanent Supportive Housing: Impact of Housing on Mental and Overall Health in an Ethnically Diverse Population*, 14 PSYCHOL. SERV. 141, 149–50 (2017).

138. Justice Center: The Council of State Governments, *Mental Health Courts*, <https://csgjusticecenter.org/mental-health-court-project/> (last visited Nov. 14, 2019).

139. National Institute of Justice, *Adult Mental Health Courts*, <https://www.crimesolutions.gov/PracticeDetails.aspx?ID=34> (last visited Nov. 14, 2019).

140. SLATE & JOHNSON, *supra* note 13, at 133.

141. *Id.*

individual with treatment plans. In addition, mental health courts have been found to reduce costs as well as rates of recidivism.<sup>142</sup> Thus, using mental health courts in conjunction with supportive release programs may be the best approach to keeping NGRI individuals compliant with their conditional release, saving the justice system money and reducing the chance of conditional release revocation.<sup>143</sup> Indeed, while more research is needed to understand the clinical efficacy of this emerging practice, studies have reported favorable recidivism outcomes for participants in mental health courts.<sup>144</sup>

### E. *Achieving Reform Through Strategic Litigation*

Litigation is an integral aspect of achieving NGRI reform. Future cases will need to clarify the present state of Supreme Court case law as applied to NGRI release standards and establish precedent for individuals who have served their maximum penal sentence. Supreme Court precedent currently provides that NGRI individuals are not automatically entitled to release once they have served their maximum penal sentence.<sup>145</sup> However, this precedent left intact a long-standing equal protection doctrine<sup>146</sup> which demands that NGRI individuals be afforded the same protections provided in civil proceedings.<sup>147</sup> This body of law explicitly requires that once an NGRI individual has served their maximum penal sentence, their release should be governed by substantially the same laws as those under civil commitment statutes.<sup>148</sup> Yet, since the Supreme Court has never directly answered this question, most states have continued on without any substantial reform to their NGRI laws. Indeed, most states do not even consider the maximum penal sentence

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142. De Matteo & Davis, *supra* note 12, at 1792.

143. See John Cummings, *The Cost of Crazy: How Therapeutic Jurisprudence and Mental Health Courts Lower Incarceration Costs, Reduce Recidivism, and Improve Public Safety*, 56 LOY. L. REV. 279, 299–300 (2010) (“Bonneville County [mental health court] in Idaho saw a 98% drop in the number of psychiatric hospitalizations and a 90% drop in incarcerations of program participants . . . an evaluation of 236 participants in the King County, Washington [mental health court] reported that in the year proceeding graduation from the program, participants are 75% less likely to reoffend”); see also Ilan Melnick, *Passageway: A Novel Approach to Conditional Release*, 34 BEHAV. SCI. & LIT. 396 (2016) (describing how a conditional release program served as a cost saving mechanism for the state of Florida).

144. Laura N. Honegger, *Does the Evidence Support the Case for Mental Health Courts?: A Review of the Literature*, 39 LAW & HUM. BEH. 478, 484–86 (2015).

145. *Jones v. United States*, 463 U.S. 354, 355 (1983) (“An insanity acquittee is not entitled to his release merely because he has been hospitalized for a period longer than he could have been incarcerated if convicted.”).

146. See *Jones*, 463 U.S. at 380 (Brennan, J., dissenting) (“Today’s decision . . . does not, however, purport to overrule *Baxstrom* or any of the cases which have followed *Baxstrom*.”).

147. See *Baxstrom v. Herold*, 383 U.S. 107 (1966) (“[T]here is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments.”).

148. 148. See *id.* at 111–12; see also *United States v. Ecker*, 543 F.2d 178, 199 (D.C. Cir. 1976) (“Read together, then *Humphrey* and [*Baxstrom v.*] *Jackson* indicate that, once the maximum sentence period has expired, it is unconstitutional to discriminate against an acquittee, as compared with a committee, for purposes of release from indefinite commitment. From that moment on, acquittees and committees appear, in the Court’s contemplation, to be on the same footing.”).

when determining whether to release an NGRI individual.<sup>149</sup> This seems to run directly afoul of guidance by the Supreme Court that commands jurisdictions to treat NGRI individuals substantially the same as civil mental health commitments once they reach their maximum penal sentence.<sup>150</sup> This chasm between Supreme Court guidance and state implementation of outdated NGRI release standards begs for strategic litigation.

Even if strategic litigation efforts successfully argue that NGRI individuals must be confined pursuant to civil commitment laws once their maximum penal sentence has elapsed, this would only go so far to reform the insanity defense. Most problematically, many individuals who plead NGRI face long maximum penal sentences for their crimes,<sup>151</sup> so this proposed reform would not completely prevent long detentions. However, the strategy of attacking an open question of law is one that can be used to advance social reform. Here, attacking the maximum penal sentence would use gaps in the current law as an opening to set new precedent to build from in future litigation.

If this issue were to reach the Supreme Court, it would be the first time since *Foucha* in 1992 that the Court has dealt with it. Scientific understanding of the effects of long-term commitment on the ability to treat mental health conditions has advanced greatly since that time<sup>152</sup> and would prompt involvement and advice from the scientific community. Furthermore, if we were able to add this new precedent to NGRI law, states would be forced to re-examine and change their local laws. Establishing this new precedent for NGRI release standards is an important start in addressing broader NGRI reform and can serve as a building block for future litigation.

## CONCLUSION

The ideas of insanity and dangerousness rely on outdated assumptions about individuals with mental health conditions—designations that fail to account for our scientific knowledge about mental health. The law has a long way to go in reforming treatment of NGRI individuals. Procedurally, NGRI individuals are

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149. See *Jones*, 463 U.S. at 370 n.20. *Jones* cites a 1980's survey of commitment statutes, and notes that only one state enacted into law the requirement that an insanity acquittee be released following expiration of his hypothetical maximum criminal sentence. This has certainly changed since the *Jones* court ruling, and presently, at least twelve states consider the maximum penal sentence when determining the length of commitment for an acquittee.

150. *United States v. Ecker*, 543 F.2d 178, 188 n.34, 197 (D.C. Cir. 1976) (“*Baxstrom* holds that even proven criminal conduct does not justify different standards and procedures at the commitment stage . . .”).

151. See, e.g., McClelland, *supra* note 8 (describing a case where the defendant was charged with first-degree murder, facing 25 years to life).

152. See, e.g., Mental Health America, *Position Statement 22: Involuntary Mental Health Treatment*, M.H.A. (March 7, 2015), [https://www.mhanational.org/issues/position-statement-22-involuntary-mental-health-treatment#\\_ednref1](https://www.mhanational.org/issues/position-statement-22-involuntary-mental-health-treatment#_ednref1) (“[I]nvoluntary treatment should only occur as a last resort and should be limited to instances where persons pose a serious risk of physical harm to themselves or others in the near future and to circumstances when no less restrictive alternative will respond adequately to the risk.”).

faced with an uphill battle to establish that they do indeed qualify for NGRI, and then again to prove that they are well enough to return to the community. This Note advocates for an overall change in the assignment of the burden of proof and argues that the government should bear the burden of proving that an individual should continue to be detained.

When an acquittee reaches the maximum penal sentence for a crime for which they have been criminally convicted, they should be afforded the same standards and protections afforded to those confined under civil commitment laws. This would ensure individuals have access to psychiatric evaluations more often and provide less judicial discretion and more onus on the government to demonstrate why an individual should be continually confined.

Equal protection indeed demands that once an NGRI individual reaches their maximum penal sentence, they should be treated substantially the same as they would under civil commitment laws. Studies show that once these individuals are released, they can be successfully reintegrated back into the community and afforded the supportive environment they need to get well through conditional release programs supervised by mental health courts instead of the criminal system. However, policy and legal reform are still required to support the notion that the answer for those found NGRI is in supportive reintegration rather than confinement to promote public protection.