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## Constitutional Law - Equal Protection - Classification of the Criminally Insane for Purposes of Recovering Costs of Confinement - State v. Estate of Burnell, 439 P.2d 38 (Colo. 1968)

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establish proper limits for recovery within the Workmen's Compensation Act. Yet, it certainly was not intended that legitimate claims should fail merely on the ground that there were no eyewitnesses, or that those employees who did witness the accident refuse to testify for fear of losing their own jobs or pensions. It was not anticipated that the individual's right to compensation would depend upon an expensive and time consuming skirmish of lawyers and doctors. A rebuttable presumption in favor of the claimant would be more equitable to the employee. It would prevent the denial of valid claims on the basis of embattled principles of common law doctrine applied by the courts under the guise of legislative intent. At the same time, it would allow the employer to submit evidence which could justify a bar to the claimant's recovery. In the final analysis, the Colorado Supreme Court should not allow interpretation of the Workmen's Compensation Act to work a denial of legitimate claims by employees injured while performing their work-related duties, simply because the event which is the cause of the injury is unwitnessed.

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CONSTITUTIONAL LAW — EQUAL PROTECTION — CLASSIFICATION OF THE CRIMINALLY INSANE FOR PURPOSES OF RECOVERING COSTS OF CONFINEMENT. — *State v. Estate of Burnell*, 439 P.2d 38 (Colo. 1968).

Having been adjudicated not guilty by reason of insanity of the charge of murder, Arlester L. Burnell was committed to the Colorado State Hospital's ward for the criminally insane. In subsequent proceedings in the probate court, Burnell was civilly adjudicated a mental incompetent and an estate was opened. After a period of time in which funds had accumulated in Burnell's estate, the hospital filed a claim against the estate for costs of Burnell's care and maintenance, pursuant to a Colorado recovery statute.<sup>1</sup> The probate court

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<sup>1</sup> Ch. 224, § 1, [1951] Colo. Laws 557, as amended COLO. REV. STAT. ANN § 71-7-1(1) (Supp. 1965). The statute, before the 1964 amendment and relocation, provided:

*Estates liable.* — Whenever any person is admitted, committed or transferred to any public institution of this state, maintained for the care, support, maintenance, education and treatment of insane persons, mentally incompetent persons, criminally insane persons, feeble-minded or epileptic persons, and such person or persons have real or personal estate or both, the estate of such person or persons, irrespective of its source, composition or origin, shall be primarily liable for the payment of the claims of the said public institution for the care, support, maintenance, education and treatment of said person equal to the cost per capita per month of care and treatment of other patients in said institution.

denied the claim, holding that the statute allowing recovery of costs from criminally insane persons is unconstitutional as a denial of equal protection. The court's reasoning was that costs are not recovered from those who are convicted of crimes, and that there are insufficient distinctions between the criminally insane and the criminally convicted to justify unequal treatment under the law.<sup>2</sup> On review of the probate court's decision, *held*, reversed and remanded with instructions to allow the claim. The classification of criminally insane persons apart from criminally convicted persons for purposes of recovery by the state of costs of care and maintenance during commitment does not violate the equal protection clause of the fourteenth amendment to the United States Constitution, since there are real distinctions in fact between the two classes.<sup>3</sup>

The scope of this Comment will be limited to an in-depth analysis of the *Burnell* decision. Although courts have traditionally upheld the right of the state to recover from the estates of criminally insane persons the costs of commitment,<sup>4</sup> no case has been decided dealing directly and precisely with the constitutional proposition urged in this case, although several decisions have been handed down dealing with analogous situations which bear upon the issue raised in *Burnell*.<sup>5</sup> Thus, the Colorado Supreme Court was called

<sup>2</sup> *In re* Estate of Burnell, No. P-31270 (P. Ct. Denver, Dec. 22, 1966).

<sup>3</sup> *State v. Estate of Burnell*, 439 P.2d 38 (Colo.), *cert. denied*, 89 S.Ct. 46 (1968).

<sup>4</sup> *See, e.g.*, *Guardianship of Gestner's Estate*, 90 Cal. App. 2d 680, 204 P.2d 77 (1949); *Briskman v. Central State Hospital*, 264 S.W.2d 270 (Ky. 1954); *State v. Griffith*, 34 Ohio L. Abs. 95, 36 N.E.2d 489 (1941); *Commonwealth v. Evans*, 253 Pa. 524, 98 A. 722 (1916); *State v. Ikey's Estate*, 84 Vt. 368, 79 A. 850 (1911); *In re Radoll's Guardianship*, 222 Wis. 539, 269 N.W. 305 (1936).

<sup>5</sup> For instance, *Department of Mental Hygiene v. Hawley*, 59 Cal. 2d 247, 379 P.2d 22, 28 Cal. Rptr. 718 (1963) held that the *relatives* of an insane person could not be held liable for the costs of confinement of one who is found insane at the time of arraignment and unable to stand trial. The defendant's plea to the charge of murder in this case was not guilty by reason of insanity. One of the major grounds for this decision was:

The enactment and administration of laws providing for sequestration and treatment of persons in appropriate state institutions — subject of course, to the constitutional guaranties — who would endanger themselves or others if at large is a proper state function; being so, it follows that the expense of providing, operating and maintaining such institutions should (subject to reasonable exceptions against the inmate or his estate) be borne by the state.

*Id.* at 255-56, 379 P.2d at 27-28, 28 Cal. Rptr. at 273-74.

*See also* *People v. Brock*, 57 Cal. 2d 644, 649-50, 371 P.2d 296, 299, 21 Cal. Rptr. 560, 563 (1962) in which it was held that "commitment under such circumstances [arising from a charge of crime and for commission of an act which would be a crime except for the fact that the actor was laboring under M'Naughton test insanity] is placed on the same basis as the imprisonment of a defendant found guilty of crime, insofar as concerns responsibility of relatives for his support in the state institution in which he is thereafter confined." The *Brock* decision also held that, by legislative enactment, a person found not guilty by reason of insanity upon a trial of this issue was not liable to the state under the recovery statutes. *See* note 11 *infra*. *Napa State Hospital v. Yuba County*, 138 Cal. 378, 71 P. 450 (1903) and *In re Cathey*, 55 Cal.

upon to decide an issue of first impression, without having the benefit of persuasive authority from other jurisdictions. The resolution of the issue could therefore have significant repercussions in other jurisdictions.

However, analysis of the *Burnell* decision reveals that the holding of the court does *not* technically stand for the proposition that the separate classification of criminally insane persons from those criminally convicted is viable under an equal protection attack; moreover, the decision rests upon a questionable factual assumption and a misconstruction and misapplication of precedent. The decision is at best ambiguous and obfuscatory, and it leaves the resolution of important issues of public policy and constitutional interpretation resting on a legally and logically unsound basis.

### I. ISSUES OF PUBLIC POLICY

The development of the insanity defense referring to the accountability of a person for his criminal acts is indicative of a trend

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2d 679, 361 P.2d 426, 12 Cal. Rptr. 762 (1961) are also to the effect that those who are mentally ill and those who are charged with a crime, but unable to stand trial because of present insanity, form a separate and distinct class for purposes of recovering costs. *But see* *Wagner v. Mayor and City Council of Baltimore*, 134 Md. 305, 106 A. 753 (1919).

*Department of Mental Hygiene v. Kirchner*, 60 Cal. 2d 716, 388 P.2d 720, 36 Cal. Rptr. 488 (1964), *vacated and remanded*, 380 U.S. 194, *decision on remand*, 62 Cal. 2d 586, 400 P.2d 321, 43 Cal. Rptr. 329 (1965) appears to stand for the same proposition as the *Hawley* case, but extends the equal protection ground to the relatives of *civily* insane persons and has thereby become a significant case in this area. Most commentators have argued that, despite the language of the California Supreme Court to the contrary, the *Hawley* case was not clearly dispositive of the issue in *Kirchner*. *See* 49 CORNELL L.Q. 516 (1964); 12 U.C.L.A.L. REV. 606 (1965); TenBrock, *California's Dual System of Family Law: Its Origin, Development, and Present Status*, 17 STAN. L. REV. 614, 638-46 (1965); 16 HASTINGS L.J. 129 (1964); 38 SO. CAL. L. REV. 355 (1965). By the same reasoning, *Kirchner* cannot be said to bear directly upon the issue presented by the *Burnell* case.

*Kough v. Hoehler*, 413 Ill. 409, 109 N.E.2d 177 (1952) is also analogous to *Burnell*. *Kough* held that the legislature *may* classify criminal patients apart from noncriminal patients. It is therefore not direct authority for the proposition that the legislature may not constitutionally classify them together. However, one of the major grounds for the decision appears to be relevant to the issue in *Burnell*:

We cannot agree with plaintiff's reasoning that there is no valid basis for making a distinction between persons who are in the hospital merely for treatment and those who are imprisoned on account of some criminal charge or offense and who, if they were in physical and mental health, would be in the jails or penitentiaries. We think there is a clear basis for distinction. Inmates against whom there are no criminal charges, or who have been guilty of no criminal offenses, are in the hospital solely for treatment. Those who are charged with crime, or who have been convicted of a crime, would ordinarily be in the jail or penitentiary, but on account of the fact that there are no facilities there for treating them for their physical and mental ills they are transferred to the hospitals. Moreover, the public is vitally and directly interested in those who are in custody. They are in custody for the protection of the public, when convicted or accused of a crime.

*Id.* at 416, 109 N.E.2d at 181.

*See* 54 Ill. B.J. 876 (1966). For further discussion of the law in this area see note 4 *supra*, notes 11, 29 *infra*, and Annot., 20 A.L.R.3d 363 (1968).

in our society which proposes a gradual rejection of the concepts of pure punishment in favor of the allegedly more scientific and more humane concepts of rehabilitation.<sup>6</sup> One school of penology would argue that the insanity defense itself appears to be the product of an intellectually mature society which recognizes determinants of human behavior which are beyond the control of the individual and beyond the capacity of punishment to serve as a corrective device.<sup>7</sup>

However, the extent to which the insanity defense conforms to idealistic conceptions is limited by the actual punitive elements of the consequences of a plea of not guilty by reason of insanity. For instance, the Colorado statutes provide "[i]f the verdict is that the defendant was insane at the time the alleged offense was committed, the court shall forthwith commit him to the state hospital at Pueblo, or such other institution designated by law, there to be confined and treated until his discharge or conditional release as hereafter provided . . . ."<sup>8</sup> The termination of confinement involves a finding by the superintendent of the institution, the Colorado Psychopathic Hospital, and the committing court that the defendant is no longer insane.<sup>9</sup> Arguably, it is possible under these circumstances that the confinement of a defendant pursuant to a finding of insanity could exceed in duration his alternative incarceration in the penitentiary pursuant to a verdict of guilty.

In addition to the punitive aspect of indefinite confinement, the criminal defendant who is found not guilty by reason of insanity is also made liable through his estate for the costs of his care and maintenance.<sup>10</sup> In view of the rehabilitation ethic of our society and our emerging concepts of societal responsibility for environmentally determined defects in the behavior patterns of members of society, the utilization of recovery statutes such as Colorado's raises a significant issue of social policy. This issue can be phrased: Should a person be indefinitely confined in a mental institution

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<sup>6</sup> See generally H. BARNES, *THE STORY OF PUNISHMENT: A RECORD OF MAN'S INHUMANITY TO MAN* (1930); G. PLAYFAIR & O. SINGTON, *THE OFFENDERS: THE CASE AGAINST LEGAL VENGEANCE* (1957); G. ZILBOORG, *THE PSYCHOLOGY OF THE CRIMINAL ACT AND PUNISHMENT* (1959). *But cf.* Goldstein & Katz, *Abolish the Insanity Defense—Why Not?*, 72 *YALE L.J.* 853 (1963).

<sup>7</sup> For a discussion of the freedom-determinism issue and its relationship to criminal law and penology see S. GLUECK, *LAW AND PSYCHIATRY: COLD WAR OR ENTENTE CORDIALE?* 5-40 (1962).

<sup>8</sup> COLO. REV. STAT. ANN. § 39-8-4(2)(a) (Supp. 1965), *amending* COLO. REV. STAT. ANN. § 39-8-4(2) (1963).

<sup>9</sup> COLO. REV. STAT. ANN. §§ 39-8-4(3-7) (Supp. 1965), *amending* COLO. REV. STAT. ANN. §§ 39-8-4(3-5) (1963).

<sup>10</sup> COLO. REV. STAT. ANN. § 71-7-1(1) (Supp. 1965). See note 1 *supra*.

and forced to pay for his care and maintenance even though he was never formally convicted of a crime? Furthermore, the widespread existence of recovery statutes such as Colorado's<sup>11</sup> and their importance to state fiscal structures<sup>12</sup> frame the issue in an even broader context.

Thus, the constitutional issue before the Colorado Supreme Court in this case had important policy implications regarding the administration of state institutions, the administration of the criminal justice system, and the protection of individual rights. That these policy questions were not adequately considered by the court is evidenced by its treatment (or nontreatment) of the equal protection argument, which was the basis of the probate court's decision.

## II. THE CONSTITUTIONAL ISSUE

The basic constitutional question involved in *Burnell* was whether a person found not guilty of a specific crime by reason of insanity is reasonably classified apart from those who have been convicted of crimes for purposes of according the two groups un-

<sup>11</sup> See, e.g., ALA. CODE tit. 45, § 257 (1958); MD. ANN. CODE art. 59, § 5 (1957); N.C. GEN. STAT. § 143-121 (1963); R.I. GEN. LAWS ANN. § 26-3-17 (1956); TENN. CODE ANN. § 33-706 (1955); VA. CODE ANN. § 37.1-105 (1950). Some statutes provide for payment by the ward and his estate only. DEL. CODE ANN. tit. 16, § 5127(a) (1953) and § 5154 (Supp. 1966). Some statutes provide explicitly that the expenses of convicts and criminally insane shall be borne by the state. N.J. REV. STAT. § 30:4-78 (Supp. 1964). In some states a general liability provision of the statutes provides for recovery from mental patients in general, while a separate provision provides for payment by the state or county for those who are criminally committed. Compare N.Y. MENTAL HYGIENE LAW § 24(2) with § 79 (McKinney 1951). In California a conflict between statutory provisions (CAL. WELF. & INST'NS CODE § 6650 and § 6650.5 (West 1966)) was litigated and resolved in *People v. Brock*, *supra*. That case held that a person *adjudicated* not guilty by reason of insanity at the time of the commission of the offense falls within the applicability of § 6650.5 which relieves him, his estate, and his relatives from liability for his care and maintenance.

<sup>12</sup> The total amount collected from patients at the Colorado State Hospital during fiscal year 1966-67 was \$2,768,000. For fiscal year 1967-68, the total was \$2,600,000. The estimated revenue for fiscal year 1968-69 is \$2,846,700. There are presently fewer than 2,000 patients in the Colorado State Hospital, and the average monthly collection per patient is approximately \$130. Throughout the United States, state collections range from 8 to 12 percent of the total cost of care and maintenance. Interview with Matt McBride, Research Assistant, Colorado Dep't of Institutions, in Denver, Colorado, February 17, 1969. See generally STATE REIMBURSEMENT PROCEDURES FOR THE MENTALLY ILL AND THE MENTALLY RETARDED, KANSAS LEGISLATIVE COUNCIL PUB. NO. 261 (1967).

The maximum charge for patients in Colorado varies. As of July 1, 1966, Burnell's estate was being charged at the rate of \$390 per month. Brief in Support of Motion to Deny Claim of Colorado State Hospital, *In re* Estate of Burnell, No. P-31270 (P. Ct. Denver, Dec. 22, 1966), at 2. This rate of payment is slightly above the median of all states. National Ass'n of Mental Health Directors, State Reimbursement Procedures for the Mentally Ill, as of March, 1967, Study No. 90 (March 6, 1968).

equal treatment under the law — recovering the costs of care and maintenance from one group and not recovering from the other. The question might also be approached by asking whether or not the criminally insane are reasonably included in the same class as the civilly insane,<sup>13</sup> since it would appear that the latter group may be classified apart from the criminally convicted for purposes of charging them for their care and maintenance.

An applicable classification test was set forth in earlier Colorado Supreme Court decisions in which it was said: "Equal Protection in its guaranty of like treatment to all similarly situated permits classification which is reasonable and not arbitrary and which is based upon substantial differences having a reasonable relation to the objects or persons dealt with and to the public purpose sought to be achieved by the legislation involved."<sup>14</sup> To apply such a test to the present case, it must be determined whether the criminally insane are similarly situated with those who are convicted of crimes and whether their classification apart from the criminally convicted is based upon substantial differences which have a reasonable relation to the persons dealt with and the public purpose sought to be achieved by the legislation.

On the one hand, it can be argued that one who is adjudged criminally insane is not similarly situated with one who has been convicted of a crime. Arlester L. Burnell was never convicted of — nor even tried for — a crime. He was institutionalized for a different purpose than a convict would have been and, under the law,<sup>15</sup> would be released upon different conditions. He is receiving rehabilitation rather than punishment and ought, by this reasoning, to be held liable for the costs of the benefits conferred. These distinctions are rationally related to legitimate state purposes — for the criminal, to protect the community from and to punish the offender; for the criminally insane, to provide him with services by which he may regain his status as a productive member of society. Furthermore, it can be argued that the criminally insane actually

<sup>13</sup> The Colorado Supreme Court said, in dictum, that the classification of criminally insane persons with civilly insane persons was reasonable: "The legislative classification grouped the criminally insane with all other persons who are adjudicated mentally ill or mentally deficient. . . . We see nothing unreasonable or unequal in this classification." *State v. Estate of Burnell*, 439 P.2d 38, 40 (Colo. 1968).

<sup>14</sup> *Champlin Refining Co. v. Cruse*, 115 Colo. 329, 333, 173 P.2d 213, 215 (1946), quoting from 12 AM. JUR. *Constitutional Law* § 469, at 131 (1938). See also *McCarty v. Goldstein*, 151 Colo. 154, 158, 376 P.2d 691, 693 (1962), quoting from *Champlin Refining Co. v. Cruse*, *supra*.

<sup>15</sup> See notes 8, 9 *supra* and accompanying text.

belong to the same class as the civilly insane, the only real difference between the groups being in the *method* of commitment.<sup>16</sup>

On the other hand, it can be argued that there are substantial similarities between the criminally insane and the criminally convicted which overshadow the minor differences between the two groups. Both groups are confined for the protection of the populace against a possible repetition of an unfortunate prior act. The confinement of both groups have similar punitive aspects, and, under modern theories of penology, both groups receive some form of rehabilitation therapy. Thus the probate court was

unable to indulge in the niceties which would distinguish between persons sent to the penitentiary upon conviction of a crime and those charged with a crime, but whose trial thereon for the substantive offense is barred by the finding of insanity. One superficial distinction, that the criminally insane are not usually confined in the state penitentiary with ordinary prisoners, is due to a lack of proper facilities for treating their mental illnesses. The state does have the power, however, to imprison the criminally insane in the penitentiary if it chooses to do so.<sup>17</sup>

It is not the purpose of this Comment to resolve this classification issue. It is the purpose rather to frame the issue in its broad context and to suggest that the issue, so framed, was not adequately resolved by the Colorado Supreme Court.

### III. THE DECISION

The Colorado Supreme Court did not base its reversal upon a resolution of the equal protection question as originally framed in the probate court decision. Rather, it quoted the Colorado statute allowing the state to recover from convicts by deducting from their earnings<sup>18</sup> and adopted the reasoning of counsel for the appellant hospital that: "The real question before the Court is whether there are sufficient distinctions between recovery of the cost for the care and maintenance for each group in a different manner."<sup>19</sup> The

<sup>16</sup> In a civil commitment action, the process is initiated by a "reputable person" other than the alleged incompetent. COLO. REV. STAT. ANN. § 71-1-5(1) and § 71-1-6 (Supp. 1965). Upon a finding by a court-appointed medical commission that the respondent is mentally ill or mentally deficient, the court shall order his commitment. *Id.* § 71-1-11.

In a criminal proceeding the process is initiated by a plea of "not guilty by reason of insanity at the time of the alleged commission of the crime" by the accused himself. *Id.* § 39-8-1(1). Upon the making of such a plea, a jury is impaneled to decide the insanity issue. *Id.* § 39-8-1(3).

*But see* 12 U.C.L.A.L. REV. 605, 612 (1965) for a discussion of the "intrinsic differences that can exist between a civil and criminal commitment."

<sup>17</sup> *In re* Estate of Burnell, No. P-31270 (P. Ct. Denver, Dec. 22, 1966), at 3.

<sup>18</sup> COLO. REV. STAT. ANN. § 105-4-17 (1963).

<sup>19</sup> Brief of Plaintiffs in Error in Support of Application for Supersedeas at 7, State v. Estate of Burnell, 439 P.2d 38 (Colo. 1968).



court then quoted from a previous decision to the effect that: " 'Courts will not interfere with the legislative classification unless it appears that there is "no fair reason for the law [statute] that would not equally require its extension to the *accepted* class." \* \* ' "20 The court went on to hold that: "In making the distinction between the *method* of recovering the *costs* of confining and maintaining convicted criminals and of caring for and treating the criminally insane . . . such difference is not unreasonable."21

Although the reasoning of the court in the *Burnell* decision is vague and unnecessarily complex, the logic of the decision appears to have been as follows:

(1) The original question put to the court was, can the criminally insane be reasonably classified apart from the criminally convicted for purposes of according them unequal treatment under the law — unequal treatment being recovering costs from one group, while not recovering from the other?

(2) The court's answer was that the state *can* recover from the criminally convicted, only in a different manner. It assumes that the two groups are thus accorded substantially equal treatment under the law.

(3) Insofar as the manner of recovery differs, the distinctions between the groups (the type and amount of costs expended for them) justify the slightly different treatment under the law.

(4) Since the legal classification is thus reasonable, there is no fair reason to prevent application of the insane recovery law to the *accepted* — *i.e.*, criminally insane — class.

Thus it would appear that by modifying the issue and basing its decision upon the assumption that the criminally insane are accorded substantially equal treatment under the law, the court has left the original classification question presented by this case substantially unresolved.

#### IV. CRITIQUE OF THE DECISION

The decision which the court *did* make might be considered questionable on the following grounds:

(1) Counsel for the estate, in a petition for rehearing, alleged that no convict has in fact ever been billed for the cost of his maintenance at the penitentiary,<sup>22</sup> and that actual discrimination in the

<sup>20</sup> State v. Estate of Burnell, 439 P.2d 38, 39-40 (Colo. 1968), quoting from *Driverless Car Co. v. Armstrong*, 91 Colo. 334, 338, 14 P.2d 1098, 1100 (1932) (emphasis added). The significance of the word "accepted" is discussed at page 796 *infra*.

<sup>21</sup> State v. Estate of Burnell, 439 P.2d 38, 40 (Colo. 1968).

<sup>22</sup> Petition of Defendant in Error for Rehearing at 1, State v. Estate of Burnell, 439 P.2d 38 (Colo. 1968).

method of administering a law is as potent a denial of equal protection as discrimination in the statute itself.<sup>23</sup> This effectively challenges one of the key factual assumptions in the court's decision — that the state recovers from both groups.

(2) In quoting from *Driverless Car Co. v. Armstrong*,<sup>24</sup> the court misconstrued the term "excepted class" to mean "accepted class." That this metamorphosis was not a printer's error is evidenced by the fact that the word also appears as "accepted" in the typed copy of the court's opinion contained in the original record. It is further evidenced by the way the court appears to use the rule in its decision.<sup>25</sup>

(3) Even if the language had been correctly quoted, its applicability to the facts of the case is questionable. Tracing the quoted language back to *Watson v. Maryland*,<sup>26</sup> it can be seen that the original meaning of the language referred to statutes which contained questionable exceptions. The statute in question in *Watson* was to the effect that: "All persons, *except* physicians who were practicing medicine . . . shall make a written application for license to the president of either board of medical examiners . . ." <sup>27</sup> The headnote to this case phrased the holding as "nor will exceptions of specified classes render the law unconstitutional unless there is no fair reason for the law that would not equally require its extension to the excepted class."<sup>28</sup> It can be seen that the meaning of the rule when placed in its original context does not appear to bear a meaningful relationship to the way in which it has been subsequently used.

In view of the complicated ambiguity<sup>29</sup> and the evasion of

<sup>23</sup> *Griffin v. Illinois*, 351 U.S. 12 (1956); *Lane v. Wilson*, 307 U.S. 268 (1939). See 16 AM. JUR. 2d *Constitutional Law* § 540 (1968).

<sup>24</sup> 91 Colo. 334, 338, 14 P.2d 1098, 1100 (1932).

<sup>25</sup> See analysis of the decision at page 795 *supra*.

<sup>26</sup> 218 U.S. 173 (1910).

<sup>27</sup> *Id.* at 174 (emphasis added).

<sup>28</sup> *Id.* at 173.

<sup>29</sup> This ambiguity is comparable to but not excused by the vagueness and ambiguity which characterizes this area of the law in general. The following distinctions have been at one time or another recognized by the courts and/or legislatures: (1) Whether or not the insane person was civilly insane or criminally insane, *State v. Estate of Burnell*, 439 P.2d 38 (Colo.), *cert. denied*, 89 S.Ct. 46 (1968); (2) Whether or not, within the class of criminally insane, the person was found not guilty by reason of insanity or was unable to stand trial because of present insanity, *People v. Brock*, 57 Cal. 2d 644, 371 P.2d 296, 21 Cal. Rptr. 560 (1962); (3) Whether recovery was sought from the estate of the insane person or from his relatives, *Department of Mental Hygiene v. Kirchner*, 60 Cal. 2d 716, 388 P.2d 720, 36 Cal. Rptr. 488 (1964), *vacated and remanded*, 380 U.S. 194, *decision on remand*, 62 Cal. 2d 586, 400 P.2d 321, 43 Cal. Rptr. 329 (1965); (4) Whether the issue was the validity of legislative classification of criminally and civilly insane together or separately, or legislative classification of the criminally insane and criminally convicted together or separately, compare *State v. Estate of Burnell*, *supra*, with *Kough v. Hoehler*, 413 Ill. 409, 109 N.E.2d 177 (1952), and see note 5 *supra*; and (5) Whether or not the statute involved was challenged on the basis of an equal protection classification argument,

the original constitutional issue put to the court, it is difficult to make any definite statement about the practical effect of the *Burnell* decision on Colorado law or subsequent decisions in other jurisdictions. Perhaps a lower Colorado court or an appellate court in another jurisdiction could legitimately avoid the apparent holding of *Burnell* on the basis of reasoning such as that outlined above. Even the dictum which the court expressed rests upon a logically unsound basis: "Additionally, we believe the probate court erred in classifying the criminally insane with those found guilty of crimes and incarcerated in the state penitentiary. This classification cannot be found in any legislative enactment."<sup>30</sup> The court is interpreting the probate court's classification of criminally insane with criminally convicted as inconsistent with the legislative classification. However, the probate court made no such ruling, but, to the contrary, found that the legislative classification was invalid as violative of the equal protection clause.

The important issues inherent in the case being left thus unresolved by the *Burnell* decision, it is to be hoped that a subsequent consideration of these issues will provide the law in this area with a legally and logically sound precedent which recognizes the emerging issues of social policy concerning the penology of criminally insane persons.

Darryl Kaneko  
Karen Metzger

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WAR — TIME OF WAR — EFFECT OF THE GULF OF TONKIN RESOLUTION<sup>1</sup> ON THE DETERMINATION OF A TIME OF WAR IN MILITARY AND CIVILIAN COURTS. — *United States v. Anderson*, 17 U.S.C.M.A. 588, 38 C.M.R. 386 (1968); *Freed v. Baldi*, 443 P.2d 716 (Colo. 1968).

In *Anderson*, the accused absented himself without authority from his unit in Fort Polk, Louisiana, on November 3, 1964. On February 10, 1967, he surrendered to civilian authorities and was

*see note 4 supra* and accompanying text. However, it is apparent that no court dealing with one or more of these distinctions has recognized all of the distinctions, even when they may have been relevant. Thus, all of the cases above cited are distinguishable on their facts, and no principle or principles of law articulated by these courts adequately synthesize the varying fact situations into a logical structure.

<sup>30</sup> *State v. Estate of Burnell*, 439 P.2d 38, 40 (Colo. 1968).

<sup>1</sup> *Joint Resolution to Promote the Maintenance of International Peace and Security in Southeast Asia*, Pub. L. No. 88-408, 78 Stat. 384 (1964). The resolution was subsequently criticized by members of the Senate as not accurately reflecting the intent of the Congress. *Hearings on S.R. 151 Before the Senate Comm. on Foreign Relations on United States Commitments to Foreign Powers*, 90th Cong., 1st Sess. 118, 132 (1967).