Y4.J89/2:C86/12/pt.8

REFORM OF THE FEDERAL CRIMINAL LAWS

HEARINGS

BEFORE THE

SUBCOMMITTEE ON CRIMINAL LAWS AND PROCEDURES

OF THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

NINETY-THIRD CONGRESS

FIRST SESSION

ON

S. 1 and S. 1400

[TAX LAW, INSANITY DEFENSE, FIREARMS, OBSCENITY]

JULY 18, 19, 1973

Part VIII

Printed for the use of the Committee on the Judiciary

DOCS

Search Library

FRANKLIN PIERCE LAW CENTER
Concord, New Hampshire 03301

MAR 21 1974

Boston Public Library
Boston, MA 02116

REFORM OF THE FEDERAL CRIMINAL LAWS

HEARINGS

BEFORE THE

SUBCOMMITTEE ON CRIMINAL LAWS AND PROCEDURES

OF THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

NINETY-THIRD CONGRESS

FIRST SESSION

ON

S. 1 and S. 1400

[TAX LAW, INSANITY DEFENSE, FIREARMS, OBSCENITY]

JULY 18, 19, 1973

Part VIII

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
25-404 WASHINGTON : 1973

COMMITTEE ON THE JUDICIARY

JAMES O. EASTLAND, Mississippi, *Chairman*

JOHN L. McCLELLAN, Arkansas
SAM J. ERVIN, JR., North Carolina
PHILIP A. HART, Michigan
EDWARD M. KENNEDY, Massachusetts
BIRCH BAYH, Indiana
QUENTIN N. BURDICK, North Dakota
ROBERT C. BYRD, West Virginia
JOHN V. TUNNEY, California

ROMAN L. HRUSKA, Nebraska
HIRAM L. FONG, Hawaii
HUGH SCOTT, Pennsylvania
STROM THURMOND, South Carolina
MARLOW W. COOK, Kentucky
CHARLES McC. MATHIAS, JR., Maryland
EDWARD J. GURNEY, Florida

SUBCOMMITTEE ON CRIMINAL LAWS AND PROCEDURES

JOHN L. McCLELLAN, Arkansas, *Chairman*

SAM J. ERVIN, JR., North Carolina
PHILIP A. HART, Michigan
JAMES O. EASTLAND, Mississippi
EDWARD M. KENNEDY, Massachusetts
ROBERT C. BYRD, West Virginia

ROMAN L. HRUSKA, Nebraska
HUGH SCOTT, Pennsylvania
STROM THURMOND, South Carolina
MARLOW W. COOK, Kentucky

G. ROBERT BLAKEY, *Chief Counsel*
KENNETH A. LAZARUS, *Minority Counsel*

CONTENTS

Hearings held on—

PART VI

S. 1, S. 716 AND S. 1400

(National Security, Rules of Criminal Procedure, Antitrust, Abortion and Appellate Review of Sentencing)

PART VII

S. 1 AND S. 1400

(Codification, Indian law, national security, capital punishment, obscenity and Federal-State jurisdiction)

PART VIII

S. 1 AND S. 1400

(Codification and provisions relating to firearms, insanity defense, obscenity, and tax laws)

PART VIII

REFORM OF FEDERAL CRIMINAL LAWS

WEDNESDAY, JULY 18, 1973

U.S. SENATE,
SUBCOMMITTEE ON CRIMINAL LAWS AND PROCEDURES
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:05 a.m., in room 2228 Dirksen Senate Office Building, Senator Roman Hruska presiding.

Present: Senator Hruska (presiding).

Also present: G. Robert Blakey, chief counsel; Paul C. Summitt, deputy chief counsel; Kenneth A. Lazarus, minority counsel; Dennis C. Thelen, assistant counsel; and Mabel A. Downey, clerk.

Senator HRUSKA. The committee will come to order. We will resume our hearings on S. 1 and S. 1400, which are proposed revisions of the Federal Criminal Code.

Our witness this morning is Mr. Scott Crampton, assistant attorney general in charge of the Tax Division. He will identify, for the record, please, his associates and companions of the morning.

STATEMENT OF THE HONORABLE SCOTT P. CRAMPTON, ASSISTANT ATTORNEY GENERAL, TAX DIVISION, DEPARTMENT OF JUSTICE; ACCOMPANIED BY FREDERICK B. UGAST, DEPUTY ASSISTANT ATTORNEY GENERAL OF THE TAX DIVISION; FRED G. FOLSOM, SPECIAL ASSISTANT TO THE ASSISTANT ATTORNEY GENERAL; AND NORMAN SEPENUK, SPECIAL ASSISTANT TO THE ATTORNEY GENERAL

Mr. CRAMPTON. I am very glad to do that, Mr. Chairman.

On my right is Mr. Frederick B. Ugast, deputy assistant attorney general of the Tax Division. On my immediate left is Mr. Fred G. Folsom, former head of the Criminal Section of the Tax Division and now a special assistant to me in connection with our criminal activities in the Tax Division. On my far left is Mr. Norman Sepenuk, a special assistant to the attorney general and a part-time consultant to the Department of Justice in connection with his work on S. 1400. Mr. Sepenuk was formerly a member of the Justice Department's Criminal Code Revision Unit, and is presently in private practice in Oregon.

Senator HRUSKA. Well, fine. You have filed a statement with the committee. It will be put in the record in its full text, and you may proceed in your own fashion.

Mr. CRAMPTON. Thank you.

Mr. Chairman and members of the subcommittee: The Department of Justice appreciates the privilege of appearing today to comment on the proposals relating to internal revenue offenses as set forth in proposed chapter 14 in S. 1400, the Criminal Code Reform Act prepared in the Department of Justice and introduced by Senator Hruska and Senator McClellan.

Since the subcommittee is well aware of the history of this legislation and of its origin, there is no need to review S. 1400 or the previously published study draft prepared by the National Commission for the Reform of Federal Criminal Laws which was submitted to the President in January of 1971. The subcommittee is also undoubtedly quite familiar with S. 1, introduced by Senators McClellan, Hruska, and Ervin, which has the same objectives as the National Commission's draft. It seems apparent from these three bills that there is a consensus as to the need for an updating of the criminal laws of the United States. The treatment of revenue offenses in all three bills similarly reflects a considerable area of agreement.

Generally speaking, the National Commission's formulation, S. 1, and S. 1400 divide offenses against the revenue into two categories—"tax evasion" and "disregard of tax obligations." Under the heading of tax evasion all three bills attempt the device of defining the offenses as action taken with the intent to evade and then list the six most usual evasion activities. Briefly, these are filing a false return, concealing an asset, failing to account for withheld taxes, removing property from Federal custody, failing to file, and the all-embracing catch-all, in any manner acting to evade taxes or the payment thereof.

The disregard of tax obligations provisions of each reform proposal makes the offender guilty if he knowingly fails to file, or carries on Stamp Act activity without the stamp, or fails to collect withholding taxes, or fails to comply with the trust fund provisions of section 7512 of the Revenue Code, or he fails to provide employees with correct W–2 forms.

To comply with the consensus objective of achieving a degree of uniformity in sentencing and a systematic sentencing scheme, all three bills grade tax evasions as felonies and, in effect, all three bills make disregard of tax obligations punishable as misdemeanors with the same 1-year maximum penalty. The differences in the grading of evasion offenses between the three legislative proposals come about by reason of the attempt of the National Commission and S. 1 to grade on the basis of the amount of tax evaded. The Department of Justice's bill does not have this grading differential. It is our belief that we can be most helpful to this subcommittee by taking up the problem areas in the three bills.

As is more fully set forth in the Department's background statement filed with the subcommittee on proposed chapter 14 of title 18 in S. 1400, we think the effort to grade tax evasion as a severe felony or a lesser felony depending on the amount of "tax due" or "evasion-related tax" would unduly complicate criminal trials and would put on petit jurors the insuperable burden of attempting to arrive at a tax figure, a task which specialists find difficult at best. We submit that it would be the almost necessary response of prosecutors to include in tax evasion indictments the largest possible figure that might conceivably be

established. If minimum monetary targets had to be achieved, the tendency would be to add on highly technical issues which are, under present practice, ordinarily eliminated as unnecessary and confusing.

Mr. BLAKEY. Mr. Crampton, could I ask a question at this point?

Mr. CRAMPTON. Yes.

Mr. BLAKEY. The three drafts before this subcommittee really have three basic alternatives. The Commission document would grade both up and down. It would grade both from a more severe felony and a relatively less severe misdemeanor, depending on the amount of evasion-related income involved. S. 1 would only grade up. It would not grade down. The basic felony level would be a D level, as in S. 1400. Now, S. 1400 would not grade at all.

Would the difficulty that you are describing be fully present in S. 1? I am thinking of this factual situation: if a simple, specific item case involved a relatively large amount of money, say, $100,000, that kind of case would not present the sort of evidentiary difficulties that you describe.

Mr. CRAMPTON. If you limit it to that, I would agree.

Mr. BLAKEY. As long as you do not grade it down, any substantial evasion would be graded as a felony. Wouldn't simple prosecutorial discretion handle most of your problem? I am thinking of those situations in which there is a difficult evidentiary question to establish higher amounts. The prosecutor would simply present to the grand jury the basic class D felony. Thus, the day-to-day operation of S. 1 and S. 1400 would be indistinguishable. Where, however, they have a relatively simple case that would not present the basic evidentiary problems, they could indict at the higher level. If that analysis is correct, I wonder if your objection is universal to the feature of grading up as is presented in your oral testimony?

Mr. CRAMPTON. I would not say that the objection was universal, but I would say that there may be many instances where the defendant is in organized crime or in narcotics, and you do want to have as high a charge as you can. If you happen to be bringing your case on a net worth basis, and you may have 10 items, you would want to charge, I think, the largest degree that you could. You have the problem if, perhaps, the jury agrees with items 2, 4, 6, and 8, disagrees on 1, 3, 5, and 7. Then you have the problem of whether you are over or under the $25,000 figure. I think that that is our primary concern.

Mr. BLAKEY. If the evidence was relatively clear, the jury would not have that problem, and the prosecutor would always have the option before indictment of assessing the character of his evidence. If he had a clear case, he could present it to the grand jury. If he had a relatively difficult case, he could proceed with a class D felony charge. Wouldn't that meet most of your objection? I wonder if your colleagues might want to comment on that?

Mr. CRAMPTON. Yes; I was just going to ask them.

Mr. BLAKEY. I can visualize cases where the upper level grading would not only have utility in the organized crime type cases, but would also be more just. One person who evades a substantial amount of tax, and another person who evades a substantial amount of tax are not necessarily in the same category. If, in fact, one evasion is $100,000, where another is $500,000 or $600,000, and if the problem of the difficulty of proof of establishing the two did not exist—I could

see that problems might exist in a large number of sophisticated tax prosecutions; but, it would not be in all tax prosecutions—and if we do not have the option of grading up, we would be precluded from using that additional authority. I wonder if anybody else would like to comment?

Mr. CRAMPTON. Let me ask Mr. Folsom to give you his views, because he is the one who has worked with this on a day-to-day basis for many years.

Mr. FOLSOM. Well, let me start out by saying that, first of all, we have not had a severe problem in this area, and there has not been any tremendous urge on anybody's part, the prosecutor or the bar, for grading on the basis of the amount involved.

Secondly, the amount involved is not necessarily the measure of the heinousness of the offense, and I am put in mind of the millionaire who has a very large income, most of which is reported, who saves a nest egg of $20,000 to support a mistress and does not report that. This is not hypothetical, this has happened. We think that would be a more heinous evasion attempt than as though it were $100,000.

The prosecutor does have a choice, to be sure, but his choice, according to Department policy, is always to attempt to make the crime the most impressive dollarwise, to make the most out of his case that he can make out of it. Hence, he would be tempted to use all of the evidence, whether it involved technical issues or not, in an effort to get it on the highest possible level. We do not think that this necessarily is a matter of fairness either.

I do not know whether I have answered you.

Mr. BLAKEY. I can see that you are suggesting there may be more factors than the financial—money involved—in assessing the seriousness, and I suppose the judge would have to assess that at the time of the presentence report. But, certainly the amount of money is one factor.

Mr. FOLSOM. It is one factor, and it is a factor which, if injected into the jury room, makes it a very difficult problem for the jury to determine.

Mr. BLAKEY. That would depend entirely on the evidence.

Mr. FOLSOM. Yes, it would.

Mr. BLAKEY. And in a simple case, it would not be a difficult factor.

Mr. FOLSOM. Well, it is an oversimplification to talk about a simple tax case. I assure you if they are contested they are very hard fought by the best counsel that money can buy, because they are cases involving money.

Mr. BLAKEY. Of course, we have the element of money in other Federal criminal cases, for example, interstate transportation of stolen property in excess of $5,000.

Mr. FOLSOM. With a very simple valuation problem to present to a jury.

Mr. BLAKEY. Or relatively simple. But, there could be a very difficult case of a stolen art object requiring an inquiry into the value of the art object. But, if you had a specific item case where a person did not include a $10,000 check, it would be a very simple $10,000. So, what I am raising with you, if I understand the Department's policy, it is an attempt to maximize the case involved, but surely this is also limited by the availability of the evidence. You do not overtry a case if your evidence is not there.

Mr. FOLSOM. That is true, but the temptation to overtry it would be greater if you had to meet a minimum level of deficiency in order to achieve the highest grade of offense.

Mr. BLAKEY. Mr. Sepenuk, do you have any comment?

Mr. SEPENUK. No. I have nothing to add to what Mr. Folsom has said, and what has been submitted in our prepared statement.

Mr. CRAMPTON. I might supplement the response by going to this other point that we had.

The vast majority of criminal tax cases are disposed of on the basis of pleas of guilty or nolo contendere entered by the defendants. If the felony of tax evasion were graded on the basis of the amount of money found to be due in the criminal proceeding, every case would have to go to trial or the prosecutor in plea bargaining would have to compromise the figures in his indictment. The result would be a tendency to reach for the lowest felony figure in cases that would not go to trial. No such necessity for compromising and watering down the deterrent effect after prosecutions exists under the proven capabilities of the present criminal tax statutes.

Mr. BLAKEY. I wonder if you would not actually be better off under the higher level. Suppose you indicted under the class D felony. Would not the defense counsel and prosecutor, and this may be objectionable, but I am just wondering if what you indicate would be the practice if you indicted under the class D felony, you would have something to bargain with as a prosecutor to get a guilty plea to the class B, whereas if you can only indict under the class D felony, no matter what the evasion-related deficiency is, you can only get a guilty plea to the class D felony. It seems to me—putting aside for the moment the legitimacy of overcharging in order to coerce guilty pleas at a lesser level. Assuming that would never happen, it seems to me that you could charge at a higher level, and then compromise at a lower level, which would have the reverse effect than the one you are describing?

Mr. FOLSOM. May I respond to that?

Mr. CRAMPTON. Please do.

Mr. FOLSOM. We spent 30 years attempting to keep prosecutors and judges and defense counsel from watering down our tax cases. We are trying to get the highest impact for a deterrent effect generally. We do not want the prosecutor to have wide bargaining authority in the field.

Mr. BLAKEY. But as long as he could not bargain down, then he can only bargain up, and that maximizes your impact.

Mr. FOLSOM. He could bargain down if you had disputed issues.

Mr. BLAKEY. He cannot bargain down below a class D under S. 1 or your statute. Both carry a floor at the class D felony level. S. 1, however, goes up to class B felony. It is not possible to bargain under the S. 1400 level. It is possible to bargain over the S. 1400 level. How could S. 1 result in the watering down of the tax impact? If anything, it would potentially increase it.

Mr. FOLSOM. To charge a $200,000 tax deficiency, and to leave it with the prosecutor to negotiate with defense counsel for a plea, he would agree to anything less than the $200,000 level.

Mr. BLAKEY. And he would end up at a D level. And under your statute he would start out a D level. The lowest level of S. 1 is roughly the equivalent of D level of S. 1400.

Mr. FOLSOM. So there would be no flexibility in our statute and more flexibility in S. 1?

Mr. BLAKEY. Yes, but the flexibility in S. 1 could never result in the watering down below the level of S. 1400. So, how would it lessen the deterrent impact? If anything, in those areas where the defendant got a higher sentence, it would increase the deterrent impact. It certainly would never decrease the impact in tax evasion cases.

Mr. CRAMPTON. Do you have anything on that, Mr. Sepenuk?

Mr. SEPENUK. No, I do not. I think that a lot of what Mr. Blakey says is very well taken, and I think that there probably are ways to overcome the problems of proof that we have outlined in our memo. Now, particularly where the prosecutor has the option of charging the lowest felony figures, as you have suggested, that still leaves what you might refer to as a philosophical objection to grading tax evasion in terms of amount. And I believe that the comments in the National Commission's working papers state very clearly the competing considerations involved. I think it is essentially a policy decision that this committee will have to make.

Mr. UGAST. I would just add that I think there is also a practical matter, Mr. Blakey, when you evaluate your case and determine what you are going to present to the grand jury for indictment, and you make the best evaluation of your evidence in choosing what figure you are using. But, if by some chance, as may well happen, the negotiations toward a plea break down, then you have some real practical problems of whether you have evaluated your proof correctly, and whether you are going to end up with a variance that might be so substantial that it would cause you trouble at the time of trial.

Mr. BLAKEY. Well, any variance would always necessarily be a lesser included offense. In other words, if, when you went to the jury, you decided that you had not made your class B felony, the court would simply instruct on the only verdict the jury could return, which would be a lesser included offense level.

Mr. UGAST. I think that that is another factor that would enter into this type of grading of the lesser included offense. We have avoided up to now any instructions dealing with the lesser included offense, dealing with the felony, but we would have to face it if we got into the grading situation.

Mr. CRAMPTON. We have been talking most of the time as though we were considering just 1 year. I believe as a practical matter in most of these cases we have counts for 2, 3, maybe 4 years. I would say that this opportunity to grade down or grade up is of less significance when you realize that the man is faced with charges for 3 or 4 years. Usually what they do in their negotiations is to plead to one of the years as a practical matter.

Mr. BLAKEY. That would be considered less, as under S. 1400, and there is a sharp restriction on consecutive sentences. If under the new code you are dealing with multiple counts, as if they were really only one, your ability to secure a higher sentence in aggregating cases by making multiple charges, based on a series of years, would be severely cut down. This is not true under S. 1, but certainly would be true under S. 1400.

Mr. CRAMPTON. But, as a practical matter, when you do have three or four counts, you usually wash them out with a plea to one of

them. There again, there is an opportunity for plea bargaining between defense counsel and the prosecutor. I do not believe the picture should be looked at just as though we had only the 1 year. As a practical matter, I do not believe that we usually do.

We have already touched on the fact that the tax dollars are not always a valid measure of the degree of culpability. One additional glaring example is the tax refund mill where a tax return preparer fraudulently understates small amounts of tax on many separate returns in order to maintain his customers, attract new ones, and enrich himself.

Manifestly such a parasite on the tax structure is at least as culpable as a taxpayer who understates a large amount of tax on a single return. In fact, the tax refund mill may corrupt many taxpayers and pose a greater threat to the self-assessment tax system.

Mr. BLAKEY. Do you have any suggestion how that kind of pattern of activity for evasion could be built into a grading structure? I take it that your single grading structure would not represent that form of aggravation either?

Mr. CRAMPTON. Well, I believe that our particular grading structure is sufficiently severe that it would be quite a deterrent to the person in the neighborhood if somebody else had been convicted of the same type of a crime.

Fred, do you have any comment on that?

Mr. SEPENUK. Well, those cases inevitably call for multiple count indictments, and I would think that the deterrent impact of a class D felony would certainly be sufficient.

Mr. BLAKEY. No, the question again and I do not want to sound like I have only one question to ask but we lump all tax evasion cases under S. 1400, with a maximum penalty for the aggregate at essentially the D category. What you have pointed out is that you can think of exceptionally aggravated cases, even where larger sums of money are not individually involved, I think the point you make is extremely valid, that money is not the only criteria, that there may be other forms of aggravation. But, I wonder if S. 1400, considers those forms of aggravation in a sophisticated grading scheme? In other words, by noting that there is something severe about a pattern of evasion-related conduct, even where a larger sum is not involved, noting that, and noting that correctly, the problem is not met in the statute that simply grades in one category. In other words, that is a good criticism of both S. 1 and S. 1400. It is not a good criticism of S. 1 provisions attempting a more sophisticated grading scheme where money is involved, since both S. 1 and S. 1400 start with the basic category of class D.

Mr. CRAMPTON. I believe the answer is a matter of judgment for the committee, whether the advantages of having your grading system is outweighed by the problems that you may have at the actual trial of the cases and in the negotiating of pleas. All we can do here, is to express our view, and the committee will have to decide which one to accept.

Continuing my thought on this, another factor is that the tax refund mill, which we are seeing more of from time to time, may corrupt many taxpayers and pose a greater threat to the self-assessment tax system.

Similarly, the removal or destruction of property in the hands of the Internal Revenue Service should be subject to substantial punishment even though relatively small tax liabilities are involved. Accordingly, we argue strongly, as you have already noticed, that the Department's nongrading proposal is essential to continued maximum effectiveness in this area.

A comment is in order on the severity of the sentences for tax evasion which are proposed in S. 1400. By grading a violation of the evasion statute as a class D felony with a maximum of 7 years' imprisonment and a maximum fine of $50,000, the penalty would be increased from that in the present statute. We do not think that there are valid objections to the increase in penalty. In fiscal offenses, courts are seldom inclined to give the maximum penalty in any event, but, when the situation deserves the maximum, consecutive sentencing under existing law frequently results in prison terms exceeding the 7-year maximum penalty. In addition, if any of the three bills is to achieve the objective of systematizing sentences, then the urge to decimate the scheme with exceptions must be resisted. It seems appropriate that white collar crimes such as tax evasion involving the type of citizens who should know better should carry a relatively severe sentence.

Objections have been raised to the taking of the Revenue Code provisions out of title 26 and placing them, as all three bills do, in a combined Federal criminal code. This is probably the objection of the practitioner who is used to finding the laws involving the area of his specialty in the set of books which encompasses the entire specialty. We think that objective does not alone outweigh the need for putting the criminal laws where the public at large will best know where to find them.

Coming now to other problems posed in S. 1400, the subcommittee will note that the word "willfulness" has been eliminated from the evasion statute and the disregard of tax obligations offenses. We think it is a simple answer in support of elimination of the word "willfulness" that it has to be defined in every context in which it is used. In the context of these two proposed tax sanctions, willfulness would, in fact, mean action taken with intent to evade or an action knowingly committed. The drive for precision and simplicity which characterizes the Natonal Commission's draft and S. 1 and S. 1400 would seem to argue that the specific intent provisions in all three bills are an improvement over the vagaries of willfulness. That "willfulness" has been a troublesome word in our tax statutes is underlined in the decision just handed down by the Supreme Court in *United States* v. *Bishop*, 36 L. Ed. 2d 941—1973.

A difference of approach exists between S. 1 on the one hand and the submission of the National Commission and S. 1400 on the other in the area of the definition of evasion. S. 1 would add to the elements of the offense the necessity that there be "a substantial tax due." We submit that this unnecessarily complicates the definition of the crime of evasion and is a departure from the objective of employing simple precise language. A substantial tax due is frequently referred to in the case law under the present evasion statute in the Internal Revenue Code. This is by way of an explanation to a jury that they must find a definite and concrete amount of tax actually evaded in

order to be certain that something more is involved than a mistake or an insignificant oversight. In short, "substantial" is now a qualitative guide for juries in the instructions given by the courts. If a requirement of a "substantial tax due" is written into the statute, we believe the requirement would then become an element of the offense in the quantitative sense and would serve to confuse the issue of intent. Such action would undermine the present concept that the amount due is not the deciding factor; there must be only a clear amount evaded. The jury is not expected to compute the amount but only to be convinced of it beyond a reasonable doubt.

The position taken by the National Commission and the Department of Justice eliminates the question necessitated by S. 1 of whether a man can be innocent if he intended to evade only an "insubstantial" amount. As an aside, and relevant both to the question of "substantiality" and the grading of offenses by the amount of tax evaded, it might be noted that tax crimes are considered more heinous, regardless of the amount, if they are committed in the area of public corruption or involve the concealment of ill-gotten gains. Similarly, a taxpayer in a high tax bracket may be found more reprehensible for setting aside, through evasion devices, a small percentage of his total income to constitute a tax-free nest egg. This is the point Mr. Folsom was making just a few moments ago.

An issue has been raised concerning the justification for making failure to file a felony when it is accompanied by the intent to evade. The Department's position is that this is, in effect, merely a restatement of present law as illustrated by the landmark *Spies*[1] case. We think that the fears that the prosecutor will have an unfair choice of charges and that he might make every failure to file the basis of a felony indictment are mistaken. In order to prove the evasion intent, we submit proof of affirmative activities will be necessary to demonstrate that state of mind. This is the burden of present case law. The Department's bill makes no changes in this regard and present case law should continue to govern.

There are other areas of concern relating to complicity of offenders and to defenses which are not specifically referred to in chapter 14. The other provisions, however, apply to chapter 14 in general as they apply to all other areas of crimes.

Consideration has been given to objections raised to the inclusion of the proposed misdemeanor sanction for falsely claiming exemptions on withholding statements. This, however, continues present law as contained in section 7205 of the Internal Revenue Code. The statute has been useful against the small wage earner who has been cheating on his taxes. It has also been a real deterrent in preventing the snowballing of tax protest movements resulting from claimed false exemptions. The misdemeanor penalty is properly scaled to fit the nature of the offense. It is a misplaced fear that the version appearing as section 1402(a)(6) in the Criminal Code Reform bill would work any change in the law with respect to false withholding certificates. With respect to false personal exemptions knowingly claimed in final returns, section 1402(a)(6) would supply a narrowly drawn misdemeanor sanction to reach this specific abuse, which seldom warrants felony prosecution.

[1] *Spies* v. *United States*, 317 U.S. 492.

We note that fears have been expressed that other sections of the reformed code outside the tax chapters might be invoked by the prosecutor. This, of course, is true and we conceive that it was so intended. But this breadth of available offenses exists today and is of material assistance to the Department in its law enforcement activities. We do not think it is a bad state of affairs to have a variety of sanctions appropriate to the multitude of ways that malefactors may devise to offend the revenue.

One such wrongdoing is the supplying of misinformation on tax returns and revenue forms or in testimony under oath. Some false statements are patently material; some are arguably so from the Revenue Service point of view, but the argument may not appeal to lay ears. Accordingly, we think it makes good sense to include in the criminal code measures to cover both the demonstrable material falsities under oath or affirmation and those that are merely demonstrably false. This comports with the concept that everyone should turn square corners in dealing with the Government. We deem both sanctions to be necessary protections for the audit and investigative functions of the Internal Revenue Service.

Further consideration of these and other matters raised by the tax bar can perhaps be better handled if the committee has specific questions. In conclusion, we note that the tax offense provisions, S. 1400, were worked out in conjunction with the Tax Division and the Office of the Chief Counsel of the Internal Revenue Service. We urge the adoption of the provisions of S. 1400 as the most effective way to continue the highly efficient criminal enforcement program of the Tax Division and the Internal Revenue Service.

Senator HRUSKA. Mr. Crampton, both S. 1 and S. 1400 substitute the phrase "with intent to evade" for the present law's "willfully" as a standard of culpability for the felony of tax evasion. Now, similarly, both bills substitute "knowingly" for the present term "willfully" in the misdemeanor offenses designated as a disregard of a tax obligation. Is it correct to say that these substitutions are intended to clarify present law as developed in the courts in regard to tax offenses?

Mr. CRAMPTON. Well, I do not know that it is so much a question of clarifying. We think it is relatively clear, and we think we are just codifying it.

Senator HRUSKA. Just restating it.

Mr. CRAMPTON. Yes.

Senator HRUSKA. And there are no changes in culpability standards for tax evasion as set forth in the *Spies* case, for example?

Mr. CRAMPTON. That is our understanding.

Senator HRUSKA. Now, specifically, some people have expressed concern that the change in language——

Mr. SEPENUK. Excuse me, Senator. May I just add one comment here?

To the extent that the concept of willfulness under current law has included the idea of an evil motive or bad purpose, as that phrase is used in numerous cases, to that extent I believe that S. 1400 does constitute a modification. Evil motive and bad purpose have been confused for many years in the courts. Very few people know what it means, and ordinarily motivation is held irrelevant in determining guilt or innocence under a tax evasion statute. For example, the fact

that a taxpayer was cheating on his taxes in order to raise money to feed the poor is not considered a legitimate defense to a charge of tax evasion.

I believe it is the view of the Department that the only evil motive or bad purpose necessary in the evasion offense is the deliberate filing of a false return with intent to understate the tax. Similarly, in the misdemeanor offense, the only evil motive or bad purpose embraced within the term knowingly is the taxpayer's knowledge of the obligation to file, together with the deliberate failure to do so. So, I think to the extent that we do away with the idea of bad purpose and evil motive, that our proposed bill does constitute a departure from current law.

Mr. BLAKEY. But in the recent Supreme Court decision in *Bishop*, if I read it correctly, it equated the notion of willfulness both in the felony and misdemeanor as simply the intentional avoidance of a known tax obligation. In other words, the evil motive is defined as what you specify in the particular substantive provision. If that is the correct understanding of the present law as explicated by the Supreme Court in *Bishop*, and a correct understanding in both bills, the only thing that is changed between either S. 1 or S. 1400 and present law is the elimination of the confusion that evil motive might embrace something besides a tax evasion-related motive, is that correct?

Mr. SEPENUK. I think that is true. Perhaps Mr. Folsom might want to comment on that.

Mr. FOLSOM. I think that is exactly right, and I could not have said it better. I agree with you.

Mr. BLAKEY. Thank you.

Senator HRUSKA. Now, specifically, some people have expressed concern that the change in language would impose tax evasion, felony penalties on mere omissions, for example, or the simple failure to file a tax return. And as I understood your position, the intent of the evasion language clearly requires, in addition, affirmative acts evidencing the purpose to evade taxes, is that correct?

Mr. CRAMPTON. Yes, sir; the simple failure to file without anything more, we do not think would necessarily meet that intent. He has got to do something to evidence this intent beyond the fact that the document just was not received.

Senator HRUSKA. Now, in regard to the subject of mistake of law defense on the advice of counsel, last May we had testimony here from Mr. McDonald, chairman of the section of taxation of the American Bar Association. In his testimony he noted that both S. 1 and S. 1400 do not provide a specific defense to tax offenses when the taxpayer relies upon advice of counsel. He urged that such a defense be created, and as I understand it, both S. 1 and S. 1400, preserve present law in this area. That is, both bills provide a defense for a mistake of law or fact which negates the culpable mental state required for the commission of the offense; namely, the intent to evade.

Advice of counsel would be a factor to a jury in considering whether to decide that a case is proved beyond a reasonable doubt, whether the defendant had the required mental state. But, neither bill would provide an absolute defense, because a lawyer told him it was all right. Is that not the present law?

Mr. CRAMPTON. I believe it is. I might add and tell the subcommittee that a number of us in the Tax Division of the Department of Justice have met with representatives of the Section of Taxation to discuss this very problem. It is our view that if a person in good faith acts on advice of counsel, he is protected under present law, and would be protected under either one of these bills. We have not been able to see the concern of the Section of Taxation on this point. We suggested to them, if they thought that something further was needed, that they try to draft some language, and then we would meet with them again. There has not been time for us to get together again on it, but I might say we have thoroughly explored this with them.

Senator HRUSKA. But you consider, do you, that both S. 1 and S. 1400 are simple restatements of what the law is now?

Mr. CRAMPTON. We definitely do.

Senator HRUSKA. On the substantiality test, S. 1 has an explicit requirement in its tax evasion provision that the tax liability due must be substantial. I think we have covered this a bit already in the colloquy that has occurred. Now, the present statute is not explicit in this regard, and such a requirement has been construed into it by judicial decision. In S. 1400 it was elected not to include substantiality in express language. As I understood your statement, however, there is no intent to alter present judicial decisions in this regard. Is that right?

Mr. CRAMPTON. That is right.

Senator HRUSKA. Would you care to elaborate on the reason you feel that it is undesirable to make the requirement of substantiality express beyond what you have already said?

Mr. CRAMPTON. Well, I believe what we brought out in earlier testimony is really the heart of this situation. We think that if there was something written into the statute, that you had to find a substantial amount involved, then you, in effect, are increasing the burden on the jury, and you will have appeals on whether this is or is not substantial. We believe it is much better for the jury simply to be convinced in determining the man's guilt that the amount was not unsubstantial. We think existing law is quite adequate on this point.

Mr. BLAKEY. If the jury has to be convinced that it was substantial, is not substantiality then already an element of the crime? Would it not result in a hidden element of the offense if substantiality is required in jury instructions, but is not there on the face of the statute? Wouldn't it be fairer to tell the taxpayer that we do not prosecute unsubstantial deficiencies and we do prosecute substantial deficiencies—just as a matter of fair notice? Shouldn't we put it on the face of the statute?

Mr. CRAMPTON. May I let Mr. Sepenuk answer?

Mr. SEPENUK. No, I think it would be a great mistake to put it on the face of the statute, and I think, as a matter of fairness to the taxpayers, it would be a great mistake to put it on the face of the statute. Let us assume that an ordinary taxpayer picks up section 1401, the tax evasion section, and notes that it says that if you file a tax return which substantially understates the tax due, that is a felony. I think that to ordinary taxpayers, the implication is, well, heck, I can cheat a little bit. As long as I do not cheat in substantial amounts I am OK. Well, the fact is that he cannot cheat a little bit,

because the way substantiality has been interpreted by the courts for many years, and it is a very flexible concept, and as we pointed out in our prepared memorandum on page 15, the manner in which the courts have interpreted the substantial deficiency requirement allows great flexibility in prosecution and has resulted in convictions where the deficiency amounts seem minor when considered in vacuo, but substantial when considered as a percentage of the tax reported on the returns. There have been a number of cases on this point. We have cited the *Janko*[1] case where the tax evaded was $134 in 1954, $264 in each of the following 2 years. We also cited the *Marks*[2] case in the District of Oregon where the tax evaded was $375.49 in 1961. Now, these in absolute terms are rather small amounts, but in those cases, when you considered those amounts as a percentage of the tax due, the ultimate tax due, they were very substantial indeed.

So, considering the way in which the courts have interpreted substantiality and further considering it is the position of the Department that substantiality will remain part of the Government's proof in tax evasion cases, and the concept will be defined as it has previously been defined in case law, it would be very misleading to the average taxpayer to put substantial on the face of the statute, and thereby create the erroneous impression that, yes, he could cheat a little bit as long as he did not cheat in large amounts.

Senator HRUSKA. The Chair neglected to order that there be inserted after your prepared statement, Mr. Crampton, the memorandum to which reference has just been made. I think it will be useful in connection with understanding the testimony which was received.

[The memorandum above referred to follows:]

DEPARTMENT OF JUSTICE MEMORANDUM ON SECTIONS 1401–1403 OF THE CRIMINAL CODE REFORM ACT (TAX OFFENSES)

I. INTRODUCTION

The first two sections of Chapter 14 of S. 1400 defining offenses involving internal revenue and customs are concerned with tax evasion and disregard of tax obligations.

II. TAX EVASION—FILING A FRAUDULENT RETURN

A. *Current Law.*

The overwhelming majority of current criminal tax evasion prosecutions involve the filing of fraudulent income tax returns. These cases are prosecuted under Section 7201 of the Internal Revenue Code of 1954 (26 U.S.C. 7201), which imposes a 5-year penalty on anyone who "willfully attempts in any manner to evade or defeat any tax." The elements of the crime are: (1) proof of a tax deficiency, (2) willfulness, and (3) an attempt to evade or defeat the tax. The latter two elements are usually defined as a "specific intent to evade and defeat the tax and some act done in furtherance of such intent." Proof of intent may be shown, *inter alia*, by such tax evasion motivated conduct as:

> * * * keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal. If the tax-evasion motive plays any part in such conduct the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime. (*Spies* v. *United States*, 317 U.S. 492, 499.)

[1] *Janko* v. *United States*, 281 F. 2d 156 (8 cir.)
[2] *United States* v. *Marks*, 282 F. Supp. 546 (Ore.)

There are certain cases where it is evident that the taxpayer has filed a false return, but the Government may be unable to prove any ultimate tax deficiency—let alone one substantial enough to meet the standard of beyond a reasonable doubt, as, e.g., where the defendant understates his gross income but later shows that he has a "loss carryover" from prior years or other legitimate deductions not claimed by him on the return which offset unreported income. In these situations, the Government ordinarily brings a case under Title 26, Section 7206(1), a 3-year felony prohibiting the filing of a return which the taxpayer "does not believe to be true and correct as to every material matter." In enacting this provision in 1942, Congress was retaining the effect of the perjury statute which became inapplicable to tax returns by reason of the elimination of the requirement that such returns be made and signed under oath. *Cohen* v. *United States*, 201 F. 2d 386, 393 (C.A. 9). The statute does not specifically require an intent to evade tax, and no such intent need be shown. See, e.g., *Schepps* v. *United States*, 395 F. 2d 749 (C.A. 5), cert. denied, 393 U.S. 925; *United States* v. *Jernigan*, 411 F. 2d 471, 473 (C.A. 5); *Gaunt* v. *United States*, 184 F. 2d 284, 288 (C.A. 1), cert. denied, 340 U.S. 917; *Siravo* v. *United States*, 377 F. 2d 469, 472, fn. 4 (C.A. 1); *Silverstein* v. *United States*, 377 F. 2d 269 (C.A. 1); *Sherwin* v. *United States*, 320 F. 2d 137, 156, fn. 33 (C.A 9), cert denied, 375 U.S. 964. The Government need only prove a knowing false statement as to a material matter:

> "The test of materiality is whether the statement *was material to the* contents of the return. Obviously it is material because it is required to be made in order that the taxpayer estimate and compute his tax correctly * * *." * * * "* * * [also] the Internal Revenue Service, if it is to audit properly the return * * * must have complete and truthful disclosure * * *." (*United States* v. *Baker*, 262 F. Supp. 657, 682 (D.C. D.C.), affirmed, 430 F. 2d 499 (C.A. D.C.), cert. denied, 400 U.S. 965).

In sum, current law makes felonious the willful filing of a fraudulent return which results in a clearly demonstrated, i.e., substantial, tax deficiency (5-year felony) or which is false as to a material matter whether or not an intent to evade exists or a deficiency results (3-year felony).

B. Proposal of the National Commission on Reform of the Federal Criminal Law. Final Report Section 1401(1)(a).

In an effort to combine the two felonies previously mentioned, the Commission formulation provides that a person is guilty of tax evasion if "with intent to evade any tax, he files or causes the filing of a tax return or information return which is false as to a material matter" (§ 1401(1)(a)). The Commission formulation grades tax evasion as a Class B (15-year) felony if the amount of the tax deficiency exceeds $25,000 and a Class C (7-year) felony if the deficiency exceeds $500. Where there is no deficiency or one less than $500, the offense is graded as a Class A (1-year) misdemeanor.

The Commission thus makes the following changes in current law:

(1) An "intent to evade tax" is required in all cases of filing false returns. A material false statement, without an intent to evade, is treated under the general false statement statue (§ 1352) as a one year misdemeanor.

(2) The general requirement of a "substantial" tax deficiency is replaced by a grading system, similar to that employed in the Commission's theft provision (§ 1735), which makes the seriousness of the offense depend on the amount evaded.

C. Proposed Tax Evasion Provisions of S. 1. Section 2–6G1.

Section 2–6G1 provides that a person if guilty of tax evasion if, with intent to evade any tax or its payment, he files or causes to be filed a tax return or information return which is false as to a, in fact, material matter and there is due and owing a substantial tax liability. The offense carries a 20-year penalty if the amount of the "evasion related tax liability" is $100,000 or more, ten years if it is $10,000 or more, and six years if it is less than $10,000.

D. Department of Justice Proposal. Section 1401(a)(1).

The formulations proposed by the Commission and in S. 1 are followed, insofar as they require an "intent to evade tax" in all felony cases. Even under present Section 7206(1), the false statement provision, it is a rare case where the Government cannot prove an intent to evade where there is a knowing material false statement. Where proof of such intent is lacking, the prosecution can well be left to the proposed general false statement provision (§1343).[1]

---

[1] The Department of Justice proposes to upgrade the false statement penalty (a Class A misdemeanor under the Commission formulation) to a Class E (3-year) felony.

With respect to the nature of the tax return, both the Commission and S. 1 require that it be false as to a material matter. The Justice Department's proposed Section 1401(a)(1) defines this aspect of the offense more narrowly, requiring the filing of a tax return which "understates the tax." If the return is fraudulent in some other respect, the taxpayer can be prosecuted under the proposed false statement provisions (§ 1343) which, like present 26 U.S.C. 7206(1), carries a maximum 3-year penalty.

Under the formulations proposed by the National Commission and in S. 1, the size of the tax deficiency determines the penalty. Whether it is sound policy to grade tax evasion by the size of the deficiency,[2] there are serious—if not insuperable—problems of proof in establishing the precise amount of the deficiency. At the trial, the Government ordinarily proves the tax deficiency through an Internal Revenue Service expert witness who bases his conclusion on the testimonial and documentary evidence in the case. If the defendant wishes to contest the size of the deficiency, he usually does so through cross-examination of the Government's expert or use of his own expert evaluation of the evidence introduced by both sides. There is no problem where the jury simply accepts or rejects *in toto* the Government's proof on the deficiency. However, there are many cases where the jury will accept the Government's evidence as to certain specific items of income or illegal deductions (or certain parts of a net worth statement) and reject the remainder. When this occurs, there is no practical way for the jury to figure precisely the resultant tax deficiency. This is so since the tax rate tables are usually not submitted to the jury and, even if they were, it would be unrealistic to expect the jury to perform the mathematical calculations involved. In a case where the Government claimed the tax deficiency to be in excess of $25,000, while the defendant claimed it to be zero or *de minimis*, it would presumably be necessary for the respective expert witnesses to calculate the tax deficiency with respect to several differing amounts of unreported income between zero and $25,000. Moreover, even if the sheer arithmetic problem could be surmounted, a special verdict on the amount of the deficiency would presumably be required if the proposed grading scheme were accepted. No such problem is presented under current law where the jury must simply find that a sufficiently "substantial" tax deficiency exists. The meaning of the term "substantial" is usually defined by the courts as follows:

> The word "substantial," as applicable here, is necessarily a relative term and not susceptible of an exact meaning. This concept is implicit in *United States* v. *Nunan* [56-2 USTC ¶9876], 236 F. 2d 576 (2 Cir. 1956), cert. denied, 353 U.S. 912, where the court, in pertinent part, stated, at p. 585:
>
> > "* * * The showing by the government must warrant a finding that the amount of the tax evaded is substantial. (Citing cases). But this is not measured in terms of gross or net income nor by any particular percentage of the tax shown to be due and payable. All the attendant circumstances must be taken into consideration. * * * But a few thousand dollars of omissions of taxable income may in a given case warrant criminal prosecution, depending on the circumstances of the particular case. Otherwise the rich and powerful could evade the income tax with impunity."

(*Canaday* v. *United States*, 354 F. 2d 849, 851-852 (C.A. 8, 1966.))

Under current law, juries are traditionally instructed that it is not necessary to determine the exact amount of the defendant's income for the year in question. All that the Government need show is that a substantial amount was omitted from reported income. See, e.g., *Fischer* v. *United States*, 212 F. 2d 441, 443 (C.A. 10); *Smith* v. *United States*, 236 F. 2d 260, 264 (C.A. 8).

The flexibility of the "substantial" deficiency requirement is illustrated by *Watts* v. *United States*, 212 F. 2d 275 (C.A. 10), vacated on other grounds, 348 U.S. 905, where the Government introduced evidence at trial establishing substantial unreported income but did not introduce any evidence, expert or otherwise, to show the additional tax due and owing based on the unreported income. On appeal, the defendant contended that this failure to inform the jury of the additional tax due was error. The Court of Appeals rejected this argument as follows:

---

[2] Competing arguments are set forth in the Working Papers of the National Commission on Reform of the Federal Criminal Laws at pp. 774, 752-53.

> It was not necessary that the Government introduce evidence as to the exact amount of the additional tax due. To make a case for the jury, it was sufficient that the Government present substantial evidence from which the jury could find that a substantial amount of net income was not reported and that the failure to so respect it was willful and intentional. *When once that was established, the amount of the additional income tax remained unimportant because it would follow as a matter of course that a substantial amount of additional tax remained due and unpaid.* The exact amount of such tax was not an essential element of the offense with which appellant was charged. (212 F. 2d at p. 277.) (Emphasis supplied).

The same point is made by the case of *United States* v. *Nunan*, 236 F. 2d 576 (C.A. 2), where appellant contended on appeal that the Government's evidence failed to support a finding that numerous cash bank deposits and disbursements made by him during the prosecution years constituted taxable income. The Court of Appeals rejected this argument as follows:

> Here, even if the jury had been unable to agree with the contentions of the government to the effect that the cash deposits and disbursements constituted, to the extent alleged, taxable income, still a verdict of guilty would have been warranted by the proof of specific unreported items, viewed in the light of the evidence taken as a whole.
>
> * * * * * * *
>
> * * * each tax evasion case must rest on its own bottom. This is not a net worth case. All the law requires is that there be proof sufficient to establish that there has been a receipt of taxable income by the accused and a wilful evasion of the tax thereon. *It is not necessary to prove that there was a particular amount of tax evaded nor need the computations be exact in an accounting sense.* (236 F. 2d at pp. 585–586). (Emphasis supplied).

In short, the courts have had no difficulty in trusting the jury to determine an ultimate substantial tax deficiency—even if the jury, in its deliberations, may have arrived at a lesser unreported income figure than that claimed by the Government. This is only to recognize that a tax evasion prosecution is not a proceeding to determine or collect the amount of tax alleged to be due (cf., *Leeby* v. *United States*, 192 F. 2d 331, 334 (C.A. 8)), but rather a proceeding to determine the defendant's fraudulent intent, proof of which is shown, *inter alia*, by the existence of a clearly demonstrable tax deficiency.

All this is apart from the question of whether the Government should be required to prove any deficiency at all in a tax evasion prosecution. Current law proscribes the wilful "attempt" to evade. If one attempts to evade tax by filing a return he believes to be false, it is arguable that the existence of a tax deficiency should be relevant only in determining the defendant's intent to evade, and not be required as a separate element of the offense. Common-law concepts of attempt, where factual impossibility is not a defense, would focus on the actor's *mens rea*, and would impose criminal liability on the unsuccessful tax cheat. Indeed, a leading Supreme Court case supports an argument that proof of a tax deficiency is not necessary where the crime is phrased in terms of an "attempt" to evade. In *Spies* v. *United States*, 317 U.S. 492, the Government argued that the wilful failure to file a return, together with a wilful failure to pay the tax (both misdemeanors), could, without more, constitute the felony of wilfully attempting to evade the tax. The Supreme Court rejected this contention, holding that Congress, in enacting the felony provision, contemplated that the taxpayer must commit some affirmative acts (as opposed to acts of omission) of tax evasion (such as keeping a double set of books, concealment of assets, etc.). In explaining the concept of "attempt", the Supreme Court noted:

> The difference between the two offenses [the misdemeanors and the felony], it seems to us, is found in the affirmative action implied from the term "attempt", as used in the felony subsection. It is not necessary to involve this subject with the complexities of the common-law "attempt." The attempt made criminal by this statute does not consist of conduct that would culminate in a more serious crime but for some impossibility of completion or interruption or frustration. This is an independent crime, complete in its most serious form when the attempt is complete, and nothing is added to its criminality by success or consummation, as would be the case, say, of attempted murder. Although the attempt succeed in evading tax, there is no criminal offense of that kind, and the prosecution can be only for the attempt. (317 U.S. at pp. 498–499).

Thus, while purporting to rid the area of common-law notions of attempt, the Supreme Court seemed to preclude specifically a requirement that "the attempt succeed in evading tax." However, despite the supportive language in the *Spies* decision, the Government has never seriously advanced an argument that proof of a tax deficiency is not required in an evasion case.[3] While such an argument could be supported, it is felt that the reasons for maintaining the requirement of proving a tax deficiency are more persuasive. First, the tax evasion provision is the capstone of a system of sanctions designed to protect the revenue. The deficiency requirement serves as a means of identifying the "*corpus delicti*" of the crime and focuses attention on what should be, after all, the fundamental point, the loss of revenue to the Government. Second, in the relatively few flagrant cases where the intent to evade is clear, but proof of a deficiency is lacking, the Government can still proceed under the proposed general attempt statute (§1001) if the requisite conduct toward commission of the offense could be demonstrated. Under proposed Section 1001, attempt is graded the same as the completed offense. Third, tax returns are also included under the proposed false statement statute (§ 1343), which makes it a 3-year felony knowingly or recklessly to make a false statement of a material matter. Since conviction under this section requires proof of neither a deficiency nor an intent to evade tax, it is believed that the major tax evasion provision should contain one or both of such requirements in order to justify the more serious (7-year) penalty.

In addition to concluding that the evasion statute contains a deficiency requirment, the Department of Justice believes that the deficiency should be "substantial" in the qualitative sense, as that concept has developed in the case law relating to instructions to juries. As previously stated, the manner in which the courts have interpreted the "substantial" deficiency requirement allows appropriate flexibility in prosecution, and has resulted in convictions where the deficiency amounts seem minor when considered *in vacuo*, but "substantial" when considered as a percentage of the tax reported on the returns. See, e.g., *Janko* v. *United States*, 281 F. 2d 156, 163 (C.A. 8), reversed on other grounds, 366 U.S. 716 (tax evaded was $134 in 1954 and $264 in each of the following two years); *United States* v. *Marks*, 282 F. Supp. 546 (Ore.), affirmed, 391 F. 2d 210 (C.A. 9) (tax evaded was $375.49 in 1961). See also *United States* v. *Cindrich*, 140 F. Supp. 356 (W.D. Pa.), affirmed, 241 F. 2d 54, 57 (C.A. 3), where the court concluded that the deficiency was substantial when the defendant reported gross receipts of $133,111.77 but did not include ten checks totalling $4,680.60; and *United States* v. *Nunan*, 236 F. 2d 576, 585 (C.A. 2), where the court noted that "All the attendant circumstances must be taken into consideration" in determining whether the deficiency was substantial, and that

> a few thousand dollars of omissions of taxable income may in a given case warrant criminal prosecution, depending on the circumstances of the particular case. Otherwise the rich and powerful could evade the income tax law with impunity.

The possibility was considered of putting the word "substantially" into the evasion statute as an element of subsection (a)(1) of Section 1400 as it is in S. 1. (See Section 2-6G1(a)(2)). This was rejected on grounds the Department believes are compelling. The word "substantial" is not in the present law (26 U.S.C. § 7201), but has been invoked by trial judges as a means of explaining to a jury that they should look for a definite and certain understatement of tax. The sense of "substantially" is qualitative; that is, it tells jurors to avoid the uncertain and to consider, in relation to the element of intent, whether the tax due is sufficient to persuade them that the purpose to cheat was present. If the word "substantially" were written into the statute, it would cease to be admonitory; it would become an element of the offense. Almost certainly the tendency would be to give it a purely quantitative meaning. Judges and juries would seek to determine if there were enough dollars to satisfy this independent element without regard to whether the amount nonetheless showed the defendant's purpose to cheat and was a concrete sum.

---

[3] Such an argument, in addition to involving the previously discussed common-law notions of attempt and the *Spies* rationale, could run along the following lines: The requirement of a tax deficiency (if valid at all) may be pertinent only in the net worth type of case where the Government seeks to prove the tax deficiency by a circumstantial, indirect method of proof. When the Government rests its case solely on the approximations and circumstantial inferences of a net worth computation, there is a serious danger that errors could arise (such as in the area of depreciation, opening net worth, cash on hand, etc.) which would make the net worth increases more apparent than real. But no such dangers are present in the ordinary "specific item" type of case where the Government simply seeks to show an omission from income of definite items in certain amounts from ascertainable sources.

The Department concluded that "substantially" is an uncertain measure and its use would conflict with the purpose of the drafters of all three codes to use precise language. The term invites further interpretation and hence confusion. It is deemed more reasonable to leave the matter as it presently stands under the current statute.

One further point to be noted in connection with Section 1401(a)(1) is that it does not apply to the filing of fraudulent information returns, since information returns are expressly excluded from the definition of "tax return" in Section 1403. In this respect, Section 1407(a)(1) differs from the similar provisions proposed by the Commission and in S. 1. The omission of information returns is based on the theory that false information returns do not *per se* usually cause or result in a tax deficiency. Accordingly, it is felt that the filing of such returns can be handled by prosecution under the Justice Department's false statement provision (§ 1343).

III. TAX EVASION—OTHER EVASIVE CONDUCT

A. Department of Justice Proposed Section 1401(a)(2)

This section makes it an offense to remove or conceal assets with intent to evade payment of any tax which is or may become due. This covers the situation, among others, where the taxpayer files a return (false or otherwise) and then hides his assets (through transfers to dummy corporations foreign bank accounts, etc.) in an effort to thwart collection of the tax due. Such conduct can be reached under present law (26 U.S.C. § 7201),[4] and is included in the tax evasion offense proposed by the National Commission (§ 1401(1)(b)) and in S. 1 (§ 2-6G1(a)(ii)). The formulation proposed here differs from the Commission and S. 1 version only in the addition of the phrase "or may become due" to cover concealment of assets in contemplation of a tax liability which has not yet been incurred.

B. Department of Justice Proposed Section 1401(a)(3)

Under this section, a person is guilty of an offense if, with intent to evade payment of any tax, he fails to account for, or pay over when due, taxes previously collected or withheld, or taxes received from another person with the understanding that they will be paid over to the United States. Virtually identical provisions appear in the Final Report of the National Commission (§ 1401(1)(c)) and in S. 1 (§ 2-6G1(a)(iii)). The Commission's Working Papers summarize the rationale of this section as follows (pp. 750-751):

> *Failure to Pay Over.*—Present law defines as a felony the willful failure of one who is required to collect, account for or pay over Title 26 taxes, to collect, account for, or pay over same. 26 U.S.C. § 7202. Draft section 1401(c) preserves felony status for one who collects but, with intent to evade payment, fails to account for and pay over such taxes. Knowing failures to collect are relegated to misdemeanor status under draft section 1402.
>
> Willful failures to collect or withhold taxes do not seem to be appropriate conduct for felony treatment. Civil penalties are adequate in most cases. Where they are not, misdemeanor treatment is surely enough. The failure to collect a tax lacks the strong elements of acquisitive or fraudulent intent which accompanies tax evasion and justifies felony treatment, and there have been virtually no prosecutions of employers for failure to collect excise taxes under present law.
>
> One who collects but keeps taxes is in a different category. His conduct resembles embezzlement and threatens the integrity of the system. If his failure to pay over is intentional and acquisitive rather than accidental, due to negligence, or the result of financial disaster, then, of course, he would be guilty under this section.
>
> The draft would also clarify present law in making a felon of anyone who receives money from another with the understanding that it will be paid over to the Treasury and then permanently pockets it. Prosecutions of tax consultants who accepted money from clients with the representation that it would be paid over and then kept the money have been unsuccessful in the Seventh and Ninth Circuits, where it has been held that such conduct is not an attempt to evade taxes under Section 7201 because there was no affirmative act of deception directed at the government and the wrongdoer was neither evading his taxes nor assisting his client's evasion.

---

[4] See Working Papers, at p. 749.

Plainly, such conduct is more than a simple embezzlement and is a threat to the Federal taxing system. No reason, apart from statutory language, appears why it should not be regarded as a Federal felony.

C. Department of Justice Proposed Section 1401(a)(4)

This provision penalizes persons who, with intent to evade any tax or the payment of any tax, alter, destroy, mutilate, remove, or tamper with any property in the care, custody or control of the United States. Similar provisions are incorporated in the tax evasion statutes of the National Commission (§ 1401(1)(d)) and of S. 1 (§ 2–6G1(a)(iv)), although the Commission version does not reach conduct motivated by intent to evade payment of a tax.

The section can be applied to the not uncommon case where a taxpayer retakes property which has been seized or levied upon for delinquent taxes. This type of conduct is currently covered by Section 7212(b) of the Internal Revenue Code, which makes it a 2-year felony forcibly to rescue or cause "to be rescued any property after it shall have been seized under this title." The proposed section will change existing law by eliminating the requirement of a forcible rescue, but will add the element of an intent to evade the tax, thereby upgrading the offense to a Class D (7-year) felony.

Since the prohibited conduct usually arises after the tax has been assessed and is due and owing, the section has been drafted to make it apply where the intent is "to evade any tax or the payment thereof."

D. Department of Justice Proposed Section 1401(a)(5)

This section provides felony treatment for failure to file a tax return when due with intent to evade any tax then due. The comparable provisions of the Final Report (§ 1401(1)(e)) and of S. 1 (§ 2–6G1(a)(v)) are distinguishable from the proposed section in that they enumerate the types of tax returns in question ("income, excise, estate or gift tax returns"). The Justice Department proposes to deal with the question by defining the term "tax return" in a separate definitional section (§ 1403).

Under present law 26 (U.S.C. § 7203), the "wilful" failure to file a tax return is a misdemeanor. The instant proposal would make the offense a felony if the failure to file is accompanied by an intent to evade taxes due. In justification of such a proposal, the Working Papers of the National Commission noted (at p. 751): "numerous observers regard as anomalous and indefensible the fact that filing a false return is a felony but filing no return at all is a lesser offense, even if the purpose of not filing is permanently to evade all taxes."

There is considerable merit in making failure to file a felony when the requisite intent to evade taxes is shown. As previously discussed, the Supreme Court, in *Spies* v. *United States*, *supra*, held that 26 U.S.C. § 7201 (the major existing felony provision) defined a crime which is distinct from the crimes of omission (wilful failure to file or to pay) defined in 26 U.S.C. § 7203. The Supreme Court specifically noted, however, that failure to file a return (or pay a tax) may serve as a means of committing the felony where there is proof of affirmative tax-evasion-motivated conduct such as keeping a double set of books, etc. Although permitted under the *Spies* decision to prosecute a failure to file as a felony in an appropriate case, the Government has prosecuted very few such cases as felonies over the years. Nonetheless, inclusion of the proposed section, even if it is rarely used, will provide additional prosecutorial flexibility in failure to file cases.

E. Department of Justice Proposed Section 1401(a)(6)

This section substantially reenacts the "catch-all" aspects of current law (26 U.S.C. § 7201) by penalizing a person who, with intent to evade any tax or the payment of any tax, otherwise acts in any manner to evade such tax or payment. The comparable provisions of the Commission Report (§ 1401(1)(f)) and of S. 1 (§ 2–6G1(a)(vi)) are cast in terms of "attempting" or "seeking" to evade specified kinds of taxes. Attempt language has not been included in the Justice Department formulation in the expectation that the proposed general attempt statute (§ 1001) can be used to reach attempted evasion in appropriate cases. In addition, to make this provision a true "catch-all," it has been drafted to cover evasion of payment as well as evasion of the tax. In this respect, the proposal carries forward the broad coverage of 26 U.S.C. § 7201, which includes the phrase "or the payment thereof," and maintains the principle of existing law that an attempt to evade payment of a tax is a separate offense from that of attempting to evade the tax. *United States* v. *Mollet*, 290 F. 2d 273 (C.A. 2);

Cohen v. *United States*, 297 F. 2d 760, 769–771 (C.A. 9); *United States* v. *Jannuzzio*, 184 F. Supp. 460, 465 (Del.). In other words, one may properly report one's tax liability, but then commit an offense by evading "the payment thereof."

IV. Tax Evasion—Grading

As noted above, tax evasion is currently punishable by imprisonment for up to five years. The National Commission proposed to substitute for this penalty a grading scheme pursuant to which the penalty would range from one year to fifteen years, depending upon the amount of the tax deficiency. S. 1 employs a similarly graduated grading system, with penalties ranging from six years to twenty years. For the reasons discussed above, the Justice Department believes that this type of grading scheme will cause unnecessary practical difficulties. Accordingly, the proposed statute follows the approach of current law in providing a single maximum penalty, while at the same time increasing the maximum from five years to seven years.

V. DISREGARDING TAX OBLIGATIONS—FAILURE TO FILE RETURNS

A. Present Law

26 U.S.C. § 7203 provides a 1-year misdemeanor penalty for wilful failure to file a tax return. The elements of this offense are: (1) that the defendant was a person required by law to file a return; (2) that he failed to file the return at the time required by law; and (3) that the failure to file was wilful. In this context, "wilful" means nothing more than the "deliberate intention on the part of the Defendant not to file returns, which the Defendant knew he was required to file at the time he was required by law to file them." See e.g., *United States* v. *MacCorkle*, 69–1 U.S.T.C., par. 9364, p. 84,503 (S.D. W. Va., July 31, 1968), affirmed *per curiam*, 407 F. 2d 497 (C.A. 4), cert. denied, 395 U.S. 906. And cf. *United States* v. *Bishop*, 36 L. 2d. 941 (Sup. Ct., May 29, 1973).

B. National Commission and S. 1 Approaches

Both the National Commission (§ 1402(a)) and S. 1 (§ 2–6G2(a)(1)) propose an offense of knowing failure to file a tax return when due. The maximum prison term provided by both proposals in one year, as under current law, although S. 1 characterizes the offense as a "felony."

C. Department of Justice Proposed Section 1402(a)

This section carries forward the 1-year misdemeanor of failing to file a tax return when due. As is true of the formulations proposed by the National Commission and in S. 1, the culpability standard is "knowingly." Unlike the Commission and S. 1 versions, however, the Justice Department proposal would include failures to file information returns when due. While such derelictions are seldom prosecuted, no reason appears why they should be exempt from prosecution.

VI. DISREGARDING TAX OBLIGATIONS—OTHER OFFENSES

Subsections 1402(a)(2)–(6) set forth five additional misdemeanor offenses in the area of disregarding tax obligations. Section 1402 of the National Commission's Final Report and Section 2–6G2 of S. 1 include each of these offenses except the offense defined in proposed subsection 1402(a)(6) (false exemption claims). These offenses, each punishable by a 1-year prison term, are as follows:

A. § 1402(a)(2)

This provision penalizes a person who knowingly engages in an occupation or enterprise without having registered or purchased a stamp required of persons engaged in such an occupation or enterprise under the Internal Revenue Code of 1954. Such conduct is presently subject to prosecution under 26 U.S.C. §§ 7271 and 7272.

B. § 1402(a)(3)

Knowing failure to withhold or collect taxes required to be withheld or collected under the Internal Revenue Code of 1954 is subject to prosecution under this subsection. Under present law such conduct, if engaged in "wilfully," is a felony punishable by imprisonment for five years (26 U.S.C. § 7202); otherwise it is a misdemeanor (26 U.S.C. § 7215). Under the Justice Department's proposed statute, felony treatment would be available if the failure to withhold or collect taxes were accompanied by an intent to evade (§ 1401(a)(6)). Where no such

intent is present, felony treatment seems manifestly inappropriate. Accordingly, a mere knowing failure to collect or withhold taxes is continued as a misdemeanor.

C. § 1402(a)(4)

This subsection provides misdemeanor treatment for a person who knowingly fails to safeguard collected taxes (by depositing them in a special bank account) or knowingly pays them over to anyone other than the United States. The subsection carries forward the provisions of 26 U.S.C. §§ 7215 and 7512.

D. § 1402(a)(5)

26 U.S.C. § 7204 makes it a misdemeanor for an employer wilfully to fail to furnish an employee with a statement of tax withheld or to furnish him with a false withholding statement. Section 1402(a)(5) is intended to preserve this offense as a misdemeanor, changing only the culpability requirement from "wilfully" to "knowingly."

E. § 1402(a)(6)

This subsection, which has no counterpart in existing law, in the Final Report of the National Commission, or in S. 1, makes it a misdemeanor knowingly to make a false claim for a personal exemption in an income tax return or a withholding exemption certificate. Enactment of such a provision, which has been urged repeatedly by the Internal Revenue Service,[5] can be expected to provide needed prosecutorial flexibility in this area.

VII. ACCOMPLICE LIABILITY

Under 26 U.S.C. § 7206(2), it is a 3-year felony to aid or assist in the preparation or presentation of a return which is false as to any material matter, "whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return." This section covers, *inter alia*, the tax return refund mill operator, who specializes in illegal deductions. As one court has noted, the purpose of this section "was very plainly to reach the advisers of taxpayers who got up their returns, and who might wish to keep down the taxes because of the credit they would get with their principals, who might be altogether innocent." *United States* v. *Kelley*, 105 F. 2d 912, 917 (C.A. 2).

Under the Justice Department's proposed Code, the return preparer's fraud is covered both under Section 1401(a)(1) (in that he "causes the filing" of the return) and under Section 401, concerning accomplice liability.

Section 401 provides:

A person is guilty of an offense based upon the conduct of another and may be charged and punished as a principal if:

* * * * * * *

(2) acting with the kind of culpability required for the offense charged, he causes an innocent, irresponsible, or incompetent person to engage in conduct which if performed by the defendant or another would be an offense.

Accordingly, it is not necessary to reenact the accomplice provision of current law.

Senator HRUSKA. It is noted that the present tax evasion law contains a special attempt concept different from the common law criminal attempt and this concept played a very prominant role in the decision in the *Spies* case. Since the tax evasion language of both S. 1 and S. 1400 uses "intent to evade," to codify prior law in its total scope, would there be any objection to inserting in the tax evasion statute an express exemption from the general attempt provision of the bills?

Mr. CRAMPTON. May I ask Mr. Sepenuk to answer that.

Mr. SEPENUK. I think it would be a mistake to eliminate the general attempt statute as it applies to tax crimes. Now, the committee knows that in 1401(a)(6) there is a so-called catchall provision; 1401(a)(6) reads, "A person is guilty of an offense if with intent to evade any tax

[5] See National Commission, Working Papers, at p. 766.

or the payment of any tax he otherwise acts in any manner to evade such tax or payment." Now, the "otherwise" means other than the acts of evasion enumerated in the previous five items. One of the acts of evasion enumerated is the most important one, at least in my view, the filing of a tax return which understates the tax, and I can conceive of a situation where a taxpayer files a return which ostensibly understates the tax. Assume that there is very clear proof that there has been an attempt to evade. Let us say there is proof that he made certain statements to neighbors or friends that he intended to cheat the Governmen or to beat the Government out of taxes rightfully due. Let us further assume that at the trial, through some technicality, for example, a loss "carry forward" or a mistake by the taxpayer on depreciation items, or perhaps an underestimation by him of his travel and entertainment expenses, that the Government's case is de minimis on the issue of the deficiency. Now, in that situation, the Government would, of course, have the option to prosecute under the false statement provision, section 1343, because the taxpayer would have filed a return which is false as to a material matter, the material matter being, of course, the amount of his gross income.

But, I think that the Government should probably also have the flexibility to treat an aggravated, flagrant case like this as an attempted evasion even though there was no deficiency, let alone a substantial one. Or let us say a de minimis deficiency. I think the Government should have the option there under the general attempt statute to charge that a taxpayer has attempted tax evasion.

Mr. Blakey. Let me ask you this, under present law, if the Government fails to show a deficiency, not because the defendant excluded a specific item, but rather because he forgot that he could exclude something else, are you able to obtain convictions now? In other words, if you can offset the evasion-related funds with other honest mistakes in the Government's favor, can't you get a conviction now?

Mr. Folsom. The courts have consistently denied us that, although it is a logical result of our present statute, that we should be able to get a conviction.

Mr. Blakey. I take it under present law there is a requirement, at least judicially, that there be a deficiency?

Mr. Folsom. That is correct.

Mr. Blakey. So what you are ultimately asking for is making the attempt section applicable to your section that does not have a deficiency requirement, in that you have something less than an attempt that does not even amount to a deficiency. Is that not terribly inchoate? In other words, in S. 1 you must have a deficiency, and consequently, when you did not have a deficiency, you could fall back on the general attempt statute and catchall of those cases where there is no deficiency. But, under S. 1400 there is no requirement of deficiency. So, you are really talking about a person who attempts to do such things as fail to file a tax return with an evasion-related deficiency.

Mr. Folsom. I think there is a requirement for a deficiency under S. 1400, because, for example, in section 1401(a)(1), the return has to understate the tax. That is the ultimate fact that has to be demonstrated to the jury. Under subsection (a)(2), payment of tax with the intent to evade or conceal assets, there has to be a tax due in order for there to be an attempt to evade the payment of that tax by removal of assets.

Mr. BLAKEY. I am getting to the notion of present law, although there is a tax due, that they are able to offset it with this other requirement, which was contrary to the illustration that Mr. Sepenuk raised.

Mr. FOLSOM. Under present law we have to establish a tax deficiency at the close of the Government's case——

Mr. BLAKEY. Even though that person——

Mr. FOLSOM. In order to achieve the establishment of the crime of attempt to evade tax. And this is not common law attempt. It is embraced in both S. 1 and S. 1400.

Mr. BLAKEY. Well, do I understand your testimony to be that you want to broaden the present law to go beyond what you could show under present law and include, in addition, common law attempts?

Mr. FOLSOM. Well, we see no objection to that. It would give the Government another weapon in its arsenal to protect the revenue.

Mr. BLAKEY. Even though the present law is defined in terms of attempts with the special laws of *Spies*, you would like, in addition, to attempt an attempt, a second attempt to being understood in the *Spies* concept?

Mr. SEPENUK. Well, except that *Spies* purported to do away with common law notions of attempt, and the Court specifically stated in its opinion that the common law notions of attempt do not apply in a tax evasion case, that attempt as used under the current law simply means affirmative acts of misconduct, acts of concealment and whatnot. But, under S. 1400, we have a general attempt statute which really is an attempt statute based on common law principles, and I do not see any particular reason to make a special exception in tax cases, although I concede the truth of the statement you made before about the inchoate nature of the offense. But, if it is inchoate throughout the Criminal Code, I see no reason to single out the tax evasion offenses for special treatment. Indeed, they are among the most important provisions in the code.

Mr. BLAKEY. Well, I wonder though, as we have in certain provisions of the code recognized that some of the offenses are defined in rather a choate fashion, for example, the conspiracy or the scheme to defraud was recognized as a very choate version of an action to defraud, and there has been an attempt in certain provisions to include the application of one, conspiracy or attempt to this, so you would not end up with an attempt to attempt. And I wonder if we are undefining a crime as otherwise acts in any manner to evade such payments if you have the general attempt statute applicable to it, if you would really be saying he otherwise acts or attempts to act in any manner to evade such payments, and that attempts to act seems to me the most minimal sort of conduct from which you could then, with some showing of evasion-related attempt, secure a conviction.

Mr. SEPENUK. Well, I think that the point you are making has a good deal of substance to it. The difficulty is that the "otherwise acts" really has yet to be defined. The catchall provision was meant to apply to the rather ingenious schemes to defraud the revenue that we just have not been able to envision and think about, and it could very well be if you have an ingenious scheme of that nature, it would be valid to prosecute even if the standard is simply an attempt to act. Granted it is very inchoate. I do not think its theory is as inchoate as the mail fraud example you gave about devising a scheme, although perhaps

it comes close to that. I think it is a very difficult issue, but I believe that it certainly should not be resolved by wholesale elimination of attempt concepts from the entire 1401 or 1402.

Senator HRUSKA. Now, on the subject of alternative fines, I refer you to S. 1, at section 14(c)(1) and in S. 1400, it is section 2201(c). Each of these provisions would permit a sentencing court to impose a fine up to twice the amount of the gain or the loss caused by the commission of the offense. Keeping in mind the substantial civil penalties applicable to tax matters, at this juncture would you care to comment on the usefulness of this alternative as applied to tax cases?

Mr. CRAMPTON. This alternative is not nearly as important in tax cases, because of the civil penalty of 50 percent that usually follows, plus the time that has elapsed whereby you have a very substantial amount of interest added on to the tax. When a person is found to have been guilty of defrauding Uncle Sam, the fine is not nearly as important as is the civil penalty that follows. And they do follow, just like night follows day. I was telling the men in the office recently about a case we had some years ago when I was in private practice where we found that for every dollar of income we could save the man, we were actually saving him $2.10 in cash, because he was in a high tax bracket to which you added the 50 percent penalty and the interest. It was a tremendous compilation.

Senator HRUSKA. It could be assumed, could it not, that sentencing judges would take into consideration a civil fine in determining whether or not to apply the alternative?

Mr. FOLSOM. They frequently do.

Mr. CRAMPTON. I am sure they all know that. It is well established.

Senator HRUSKA. Most of them were practicing lawyers before they became judges, and they would understand that.

Mr. CRAMPTON. Yes.

Senator HRUSKA. Mr. Blakey, have you any further questions?

Mr. BLAKEY. No, sir.

Senator HRUSKA. Well, this will conclude the hearing for the morning. We thank all four of you for being here, and the record is the richer for your presence.

Mr. CRAMPTON. Thank you, Senator.

Senator HRUSKA. We will stand in adjournment until 10 o'clock in the morning in the same room.

[Whereupon, at 11:05 a.m., the hearing was recessed, to reconvene on Thursday, July 19, 1973, at 10 a.m.]

REFORM OF FEDERAL CRIMINAL LAWS

THURSDAY, JULY 19, 1973

U.S. SENATE,
SUBCOMMITTEE ON CRIMINAL LAWS AND PROCEDURES,
Washington, D.C.

The subcommittee met, pursuant to recess, at 11:15 a.m., in room 2228 Dirksen Senate Office Building, Senator Roman Hruska presiding.

Present: Senator Hruska [presiding].

Also present: G. Robert Blakey, chief counsel; Paul C. Summitt, deputy chief counsel; Kenneth A. Lazarus, minority counsel.

Senator HRUSKA. The subcommittee will come to order. We will resume hearings on the Criminal Code revision bills, S. 1 and S. 1400.

Our first witness this morning is Prof. Paul Rothstein, on the subject of general codification. He is from the School of Law, Georgetown University.

We welcome you, Professor. You may proceed with your testimony.

STATEMENT OF PROF. PAUL F. ROTHSTEIN, SCHOOL OF LAW, GEORGETOWN UNIVERSITY

Mr. ROTHSTEIN. Thank you, Senator Hruska, gentlemen, ladies, I am here today to talk about S. 1, and more particularly to talk about the draftsmanship of S. 1.

And preliminarily, I would like to say that I find in my view much more that is good about this bill, S. 1, than is bad. But in order of presentation, I would like to point out just a few of the things that I feel could be improved, and I am going to be illustrative only. I'm only going to give a few for instances, because many of those comments will go beyond the scope of what I view as the subject of my testimony, which is draftsmanship.

I am here not only as a professor of law but presumably because I served as reporter to a Texas committee that was concerned with the revision of the Texas Penal Code, and because I have been reporter to the National Conference of Commissioners on Uniform State Law. And in my work in those two capacities, I have been concerned with the problems of draftsmanship. That is the main subject of my address at this time.

But as I say, before I get to the subject of draftsmanship and the many things that are good about the draftsmanship in S. 1, I do have a few illustrative comments about things that I think could be improved. And these comments go not only to draftsmanship, but to matters of substance as well. And once again, they are only illustrative, a few for instances.

First of all, section 1–2A1 of S. 1 is a central section in my view. It is the culpability section. It defines the kinds of culpability, the kind of state of mind or the kinds of states of mind that are required for there to be criminality. And it seems to me in my view that this section is unclear. It is difficult to parse. It is difficult to figure out what it says.

I know what it says, but I have been studying it and I am familiar with its forbearers in the Model Penal Code, the Brown Commission draft. But for the average person who would be concerned with it, the lawyers, the judges, people of that sort, let alone lay persons, it is very difficult to parse.

I prefer the formulation of essentially the same material that appears in the Model Penal Code, section 2.02.

Addressing myself also to the same section, the culpability section, 1–2A1, I find in here that a number of the subsections are included kind of as a safeguard in case the drafters have overlooked something later on in the code and in revising other statutes.

And it is my feeling that this kind of provision should not be found in the code, that the drafters should, as they really have done in very large measure and have done very well, they should go through all the other provisions in the code and all the other criminal statutes, and make sure that the necessary adjustments are made, so that they don't need a general provision that says, well, in case we've overlooked something, such-and-such is the case.

Well, what am I talking about specifically? Well, subsection (b) says that if there is no cupability requirement, in other words, if there is no culpability requirement in a particular section defining a particular crime like murder or assault or obstruction of justice, if there's no particular requirement that a particular state of mind is required, like intent or knowledge or criminal negligence, that nevertheless even though this specific section does not so provide, nevertheless it is to be understood that there is a requirement of some kind of cupability, either intent, criminal negligence, knowledge, that kind of thing.

In other words, it is a general provision that tells us what is to be the case in case the drafters have forgotten in some other section to specify the kind culpability, the kind of mental state that is required.

And it seems to me there is no place for this kind of provision in a well-drafted code. All the other sections should specify what kind of culpability is required, and there should be no need for a general provision that says, well, in case we have forgotten to, this is the kind of culpability that we need.

And by and large I might say that the drafters really have, by and large, specified in other sections what kind of culpability is required, and they can have self-confidence in their drafting, and they don't need this kind of general provision.

Another general provision of this kind contained in section 1–2A1, one that is kind of a safeguard against omission in later provisions is subsection (d) of 1–2A1, and this says that if, for example, intent or knowledge or criminal negligence is specified in the definition of the crime in later sections, if it is specified with respect to one element of a particular crime, then it therefore also applies to all the other elements of the particular crime. And it seems to me that a well drafted code ought to have a specification in each section that defines that par-

ticular crime. It ought to specify for each element of that crime the kind of culpability that is required; intent, criminal negligence, knowledge ought to be specified for each particular element.

Next, I would like to address myself to a number of provisions that were handed to the drafters by the Omnibus Crime Control and Safe Streets Act of 1968, and about which the drafters of S. 1 really could do nothing because presumably they had the objective of incorporating the Omnibus Crime Control and Safe Streets Act into S. 1.

But nevertheless, there are some things that I find personally objectionable in that incorporation, and I find them objectionable whether they appear in the 1968 act or in S. 1. And I will just mention them. They relate to eavesdropping by witnesses and confessions.

With respect to eavesdropping, which is section 2–7G1 of S. 1, and the sections following that section, it seemed to me that it has always been a bad rule that eavesdropping is okay if one of the parties to the conversation consents to the eavesdropping, and the other party who doesn't know anything about it, nevertheless, he has nothing to say. There has been no crime. There has been no offense, and the evidence contained thereby is admissible in court. And it has always seemed to me that this is a bad rule.

And I might mention that the State of Maryland has always found this a bad rule, too, although an attempt was made to change it recently. But in the State of Maryland just because one party to the conversation is consenting, that doesn't make the eavesdropping all right. It seems to me that that ought to be the Federal rule as well. It is not presently the rule and it is not the rule in S. 1.

In other words, I feel it is a bad thing to say that eavesdropping is all right if one of the parties knows about it, one of the parties to the conversation knows about it or consents to it, that that makes eavesdropping all right even though the other party doesn't really know anything about it. I think that is a bad rule.

The other thing I would like to say about the eavesdropping as it appears in S. 1, is that it seems that the provisions relating to eavesdropping are divided up into two places in the code, and it makes it confusing. The general prohibition of eavesdropping appears in part 2, but the administrative or procedural provisions concerning eavesdropping appear in part 3.

In other words part 3 contains the warrant provisions, that eavesdropping is all right if you have a warrant. And part 3 also contains the evidentiary proscription that improperly eavesdropped material may not be introduced into evidence. And it seems to me that all of these provisions, the proscription, the prohibition, the warrant provisions and the evidentiary results of eavesdropping, ought all to be under one rule; because otherwise, the way it is now in S. 1, when you read part 2 of S. 1, you look up eavesdropping, it looks like eavesdropping is prohibited. But then when you read—if you ever do read—part 3, you find out it's not really prohibited if there is a warrant, and you find out that the prohibition is not only a criminal prohibition but it also relates to admission of the eavesdropped material into evidence.

Further related to eavesdropping, it has always seemed to me that the idea of giving the police emergency powers to tap, to eavesdrop without a warrant in certain emergency situations, is a bad idea. The

warrant scheme set up with the eavesdropping provision is a good one, and there ought not to be exceptions to it.

Finally, with respect to eavesdropping, I have a question. S. 1 leaves me in doubt, as does, to some extent, the Omnibus Crime Control and Safe Street Act—leaves me in doubt as to tape recording a conversation held between two people not on a telephone, not on any means of electronic communication, just two people talking in a room. And let's say, it is tape recorded secretly. I have doubt as to whether that is included in the word eavesdropping, whether that is prohibited, whether that is a crime. It is not clear from the language of S. 1, it seems to me.

Moving on to my criticisms of the eyewitness provisons of both the 1968 act and S. 1, I'm talking here about section 3–11A5, this says very simply that nothing shall prohibit an eyewitness to a crime from testifying in court. And I submit that this is contrary to certain Supreme Court rulings, which I find to be good rulings.

It attempts to override the *Wade-Gilbert-Stovall* rule of the Supreme Court, which says that if the eyewitness appeared at an identification lineup, and there was some defect in the way that lineup was conducted—say it was conducted without counsel or under suggestive circumstances—that then that eyewitness, that identification lineup is improper. And also the eyewitness may not testify in court.

Section 3–11A5 attempts to overrule that (and I wonder whether it can overrule constitutional doctrine), and I wonder whether it is wise to so do it.

Secondly, with respect to the eyewitness provision, 3–11A5, this also seems to say that the eyewitness can testify in court even if the eyewitness' identity and presence was only discovered because the police got an illegal, involuntary confession or some illegal search and seizure led to the eyewitness.

The Supreme Court has been clear that if the eyewitness is discovered only because of some illegality, like an illegal search, an illegal confession, and that's the only way the police learn that there was an eyewitness; and therefore, the police's obtaining of this eyewitness was a result of some illegalities, the Supreme Court has clearly said that the eyewitness may not testify in court; because it is tainted evidence.

Section 3–11A5 attempts to overrule this. I wonder if it can. I wonder if it is wise to.

Moving on to the confession provisions of S. 1, which again are incorporated from the 1968 Omnibus Crime Control Act, the confession provisions attempt to overrule the *Miranda* case, which says that a confession obtained without proper advisement, without counsel, in violation of the right to counsel, that such a confession cannot come in. Well, S. 1 and the 1968 act says yes, it can come in. The confession can come in. The only thing you can consider about a confession is whether it is voluntary or not.

Senator HRUSKA. Professor, would you indicate the section?

Mr. ROTHSTEIN. It is 3–11A4, I believe.

Am I correct? Is that correct?

Senator HRUSKA. That's right.

Mr. ROTHSTEIN. Again, I question whether this case can be overruled in this fashion; and secondly, I question whether it is really wise to do so even if it could be overruled constitutionally.

Now, this confession section in S. 1 says something else, and so did the 1968 act. It says that violation of *Miranda*, for example, a failure to give the *Miranda* warnings to the accused in the police station, failure to respect his right to counsel, these things may be considered not in themselves as invalidating the confession, but they may be considered in calculating and deciding whether the confession was voluntary.

And I question whether that makes sense. It seems to me that those are factors that really don't have much to do with voluntariness or may not have much to do with voluntariness. They're a separate kind of factor, and trying to relate them to voluntariness seems to me—I hardly understand what they are saying. This section says that you may, in determining voluntariness of the confession, the judge may consider whether the guy was given his warnings that he has a right to counsel and that he may keep quiet. I wonder what that means: that doesn't really seem to have much to do with voluntariness. It is a separate kind of factor I don't understand it in other words.

Still concentrating on ways in which I think S. 1 could be improved—and by the way, I want to footnote once again here that I think S. 1 is a fine effort, and that there is more good in S. 1 than bad. But I am concentrating preliminarily on the things that I find to be bad.

In the statutory rape section 2–7E2, it seems to me that there is no specification of the kind of culpability that is required, the kind of state of mind that is required as to any of the elements of statutory rape. You will notice in 2–7E2 there are several elements of statutory rape; the victim has to be of a certain age, there has to be intercourse, there may have to be the introduction of intoxicating drugs. All of these elements are listed, and it doesn't say whether the accused has to have knowledge of each of these elements, has to intend each of these elements, and whether criminal negligence with respect to each of these elements is enough. It just doesn't say.

And in view of the fact that there has been a big dispute in the law about this—for example, about whether the accused must know the girl is under 16, California decisions call this into question. Since there has been dispute about this, it would seem to me that specificity on this would be a good idea.

Now, it is true that by reading the statutory rape section with the general sections in part 1, you can kind of figure out the answer. But it takes kind of a legal scholar to figure out the answer, and I don't think that is a good idea.

The general purpose provisions in the general part of S. 1, setting out what the general purposes of this new code are, I don't think it really adds anything. I don't think it is helpful. The general purposes are so general that everyone would agree with them. They're kind of understood and they're not detailed enough to really add anything at all.

Section 1–2A4 dealing with attempts, I find the language there unclear where it says you have an attempt if a person (1) attempts a crime and (2) he has the kind of culpability, the kind of state of mind, that would be required for the crime itself; then, he is guilty of an attempt.

Well, I don't understand that language, "kind of culpability." It is unclear, it seems to me.

Secondly with respect to attempts, it says that there cannot be an attempt unless the attemptor has taken a substantial step toward committing the crime. And it seems to me that substantial step is defined in such a way that there is a real danger that very slight steps might be regarded as substantial steps, and that a person might be convicted of attempt even though he hasn't really done very much; essentially, convicted for his intent. I think that is a bad thing.

In the insanity section, 1–3C2, I find this formulation really inferior to the Model Penal Code's formulation. For example, the formulation of the insanity defense says that the fellow has a defense if he is so insane or so mentally diseased that he doesn't know "the character of his conduct." I don't know what that means.

I prefer the language in the Model Penal Code, which says he couldn't appreciate the criminality, the criminal nature of his conduct. I find that better. A person may understand some aspects of the character or nature of his conduct and not others. This tells us which aspects are important.

Secondly, section 1–3C2 says he gets off if he didn't have the capacity to control his conduct. Well, again, I don't know what that means. There are degrees of control. You can control your conduct to some degree, but maybe not all the way.

I found the formulation in the Model Penal Code to be better. It says he gets off if he lacks capacity to conform his conduct to law. It seems to me that tells you very specifically in what respect he has to lack capacity to control his conduct.

Moving on to the self-defense, defense of others, defense of property, prevention of crime provision, which is 1–3C4, here I think there is a grave omission. This section completely omits the common law notion, the notion we find in the law throughout this country: that deadly force, no matter how necessary to stop an offensive or to ward off an attack or to prevent a crime—no matter how necessary it might seem that deadly force would be required in one of these situations—no matter how reasonable or how proportionate the use of deadly force would appear for purposes of warding off an attack or stopping a crime or preventing something happening to another person—the common law says that no matter how reasonable it might appear, deadly force is not justified to stop anything other than an attack or crime which itself involves deadly force.

In other words, it may not be used to prevent property offenses and lesser offenses, and offenses involving violence less than deadly force type violence. And it seems to me that is a good rule: Do we want to permit people to inflict death, great bodily harm, when all that is threatened is a property crime?

I am talking now, in other words, about the privilege of self-defense, and the privilege to defend others from attack, and the privilege to defend property, and the privilege to prevent a crime. It seems to me the privileged person, the preventer or self-defender, ought not to be able to use deadly force when all he is protecting against is a crime of some lesser amount of violence or a crime to property.

And the common law agrees with me in pretty near every jurisdiction, agrees with me.

Okay. As I said, these are examples only of some of the things I find bad about S. 1. They transcend the scope of my assignment here today, which really was to talk just about draftsmanship. You notice some of the things I said had to do with draftsmanship, but many others had nothing to do with draftsmanship, but really talked more about the substance of the code.

Now, I would like to get into draftsmanship proper, and say mostly good things about the draftmanship, because I think that the drafters of S. 1 have done a magnificent job, made some innovations in the area of draftsmanship that ought to be noted and ought to be passed on; particularly, in view of the fact that States are going to use this record that we are making here today, and are going to use S. 1 as a model, for drafting their own penal codes.

And it seems to me that there is a danger that in the debate, in the controversy over the substantive provisions of S. 1, the substantive provisions being the more interesting and the more important, it seems to me that in the debate over the substantive provisions of S. 1 a lot of the drafting innovations, a lot of the good drafting principles that are embodied in S. 1 will go unnoticed, because draftsmanship and drafting is essentially a dryer subject, and not likely to command much attention.

So with that, with those comments in mind, I will proceed to mention what I feel is good about the draftsmanship of S. 1, and I think it is very good in large measure. As a preface to this draftsmanship discussion, I would like to state my views shared by most others, that I am aware of, that the Federal penal law as it now stands is really little more than a patchwork of individual acts, which are often inconsistent with each other or unclear.

And many penal law principles appear only in case decisions and this often results in confusion and frequently injustice. Revision and reform into a modern, comprehensive, systematic code like S. 1 will be a great step forward toward a legal system that will be both intelligible and equitable.

Turning now to draftsmanship features of S. 1, the first principal subject that I would like to talk about is to whom the code is addressed. In considering the question of statutory language, indeed, whenever any legal instrument is drafted, the draftsmen should always be conscious of the people for whom he is writing.

In the case of the proposed criminal code, those individuals for the most part can be divided into four classes; prosecuting and defense attorneys is one class. The next class is law enforcement agents. The next class is jurors, and the next class is judges.

Now, someone will probably stand up and say, wait a minute. You omitted the average citizen to whom the code is really addressed. Well, I recognize that usually people do say that a code is to speak to the general citizen, telling him what is criminal and what is not. But I think we are asked to believe too much when we are asked to believe that very many people examine the text of the criminal law before they engage in particular acts. More often than not, a citizen reads the criminal law only after he has done something, and he gets into trouble.

What I am suggesting, therefore, is that at least from the point of view of the draftsman, we ought to assume that the primary con-

sumers of our product are those who are engaged in the every day administration of the law, not those who are engaged in its violation.

All right. Turning to my first group of people, then, to whom the code is addressed, these are lawyers, and firstly, prosecutors. The lawyers who administer the criminal justice system day-to-day are frequently what one might call short-term people; indeed, the average prosecutor acts in his capacity as prosecutor for approximately only 4 to 5 years. He generally comes to his job straight from law school, young and inexperienced, and spends the major part of those 4 or 5 years learning the law. Soon after he acquires the necessary expertise, he leaves to go on to something else; usually, civil practice.

A more intelligible code will be able to be absorbed more quickly and thereby increase the effectiveness of these short-term persons.

Senator HRUSKA. Professor, our hearings have one thing in common with professional football, we give a 5 minute warning of the conclusion of the time that is alloted. That 5 minute warning is now given.

Mr. ROTHSTEIN. Thank you, Senator. Secondly defense counsel—and it seems to me that defense counsel are frequently young men as are the prosecutors, and often times they are people who come from other areas of the law and do not have a lot of experience in their criminal law.

Jurors similarly do not have a lot of experience. They are once in a lifetime people. They get a criminal case once in a lifetime. It seems to me that they need intelligible instructions and of course instructions are based upon the code.

The law enforcers are probably the best trained in their particular task, but it would facilitate their training, and facilitate programs trying to acquaint them with the law if we had a simple, intelligible code.

Therefore, this brings me to my second main principal of draftsmanship, the use of the common sense words. And one of the most striking characteristics of S. 1, which you see as soon as you look at it, is that it uses current, everyday language, and it doesn't make difficult, hard distinctions in most cases.

It uses such words, instead of robbery in the first degree, robbery in the second degree, which don't convey anything, it uses such terms as armed robbery and robbery, which tells you immediately what it means. It uses commonsense words, like it calls the crime of loan sharking, it calls it just that, loan sharking. It doesn't use the phrase, extortionate credit transactions, in naming a crime. It calls it just that, loan sharking.

Other examples are bail jumping, retaliation, aiding suicide, skyjacking, and joy riding. These are the names of crimes in this bill, and it is clear immediately what they refer to. It avoids the archaic difficult language of the law to the extent possible. Of course, you can't always do that.

All right. The third main point about draftsmanship is the organization of the code; the arrangement of the ideas, the arrangement of things within the code. The code is broken down into three parts; part 1, part 2 and part 3; part 1, the general part, part 2, the special part, and part 3, administration.

The general part contains things of applicability throughout the code, and it enables the special part, part 2, to be much shorter. Part 2 contains the specific crimes.

There are some particular features in the general part that I ought to mention, and maybe the best way, in view of the fact that I've only five more minutes—and I have about 25 more pages; pages that I think are important to put into the record, because as I say State legal drafters are going to be using S. 1 as a model. And these many, many good draftsmanship points contained in S. 1 ought to be communicated to them. Maybe the best way to do this would be for me to submit in writing, for the record, the remainder of what I have.

And just say at the present time, since my time has run out, that there are many, many very good features of draftsmanship that must be communicated to others who are going to use S. 1 as a model; and I will volunteer, if it is permissible, Senator, to put these into writing, and submit them for the record.

Senator HRUSKA. Very well. They will be very gratefully accepted.

Senator HRUSKA. Professor, let me call your attention to the system of numbering in S. 1. Would you comment on that?

Mr. ROTHSTEIN. Yes. I think it is a very good system, superior to others that I have seen, such as in the Model Code and in the Brown Commission and S. 1400. It is superior in two respects, it seems to me. First of all, it tells you precisely where in the code a particular section is found. The first number refers to the part, part 1, part 2, or part 3; the second number refers to the chapter. And third digit, which is a letter, refers to the subchapter. And then the fourth number refers to the particular section in the subchapter. So it tells you immediately where something is in the code.

And secondly, it leaves room for continuous, almost infinite, expansion of the code, as is going to happen in the future, new provisions are going to be inserted and they should come at a certain point in the code. And this new, flexible numbering system allows that almost to an infinite extent.

I notice, for example, in the Brown Commission draft, that they are running out of numbers. In many places, they are able to leave only two or three numbers blank where there might be as many as 15 or 20 new provisions and new numbers needed in the future. And they are unable—well, they can't correct this, because if they did leave more numbers blank, they would run into the next number series, which they have utilized for another subject matter.

So I think it is a very good numbering system, and it looks——

Senator HRUSKA. Is this a novel feature, or has it been used in other statutory codes?

Mr. ROTHSTEIN. I would judge it as fairly novel, although some of the newer State codes have adopted it, have used it, but it is fairly novel. It does look a bit strange, and a bit confusing, at first.

Senator HRUSKA. And how has it been received in the States that have had it for some time?

Mr. ROTHSTEIN. Those lawyers that I know who have had experience with it find it easier to work with than the more traditional numbering system.

Senator HRUSKA. Well, thank you very much. This is going to be quite helpful. Furnish that additional material if you will please.

Mr. ROTHSTEIN. Yes, sir.

Thank you, Senator. My only regret is that all I got to talk about today was deficiencies in S. 1, and I believe that the good things about

S. 1 are much more numerous than the deficiencies. And that will emerge from my written comments.

Thank you.

[The prepared statement follows:]

STATEMENT OF PAUL F. ROTHSTEIN, PROFESSOR OF LAW, GEORGETOWN UNIVERSITY LAW CENTER

Mr. Chairman, Members of the Subcommittee, my name is Paul F. Rothstein. I am professor of Law at Georgetown University Law Center. I have taught in the areas of civil and criminal litigation. I have served as Reporter to the Texas State Bar Committee for the revision of the Texas Penal Code; and am presently Reporter to the National Conference of Commissioners on Uniform State Laws. My work in these capacities has been legislative drafting, and I had to meet many of the problems now facing the drafters of a new Federal Code. I appear here this morning, to discuss the *technical draftsmanship* only, of S. 1, the "Criminal Justice Codification, Revision and Reform Act of 1973".

I feel this subject deserves some comment in this record, not only for purposes of processing the present legislation, but because state governments will refer to the work of this Subcommittee and to this record, in codifying, reforming, and revising state penal codes. I further feel that S. 1 has made some salutary drafting innovations that might be overlooked in the debate over the larger, more glamorous or important substantive issues—issues which will be extensively explored because of their essentially more interest-commanding nature.

Inattention to draftsmanship aspects of a code can only result in future misunderstandings and misinterpretations of the intent of Congress and, conquently, misapplication of the law. This is especially true here, where fundamental modifications are being made to a pre-existing structure.

Preliminarily, I would like to state my view, shared by most lawyers and scholars, that the Federal penal law, as it now stands, is really little more than a patch-work of individual acts which are often inconsistent or unclear. Many penal law principles appear only in case decisions. This often results in confusion and, frequently, injustice. Revision and reform into a modern, comprehensive, systematic code will be a great step forward toward a legal system that will be both intelligible and equitable.

Now I would like to turn to a few of the principal draftsmanship features of S 1.

I.—TO WHOM THE CODE IS ADDRESSED

In considering the question of statutory language—indeed whenever any legal instrument is drafted—the draftsman should always be conscious of the people for whom he is writing. In the case of the proposed Federal Criminal Code, those individuals, for the most part, can be divided into four classes; prosecuting and defense attorneys; law enforcement agents; jurors; and judges.

I recognize, of course, that it is usually said that a code is supposed to speak to the general citizen, telling him what is criminal and what is not. But I think we are asked to believe too much when we are asked to believe that very many people examine the text of the criminal law before they engage in particular acts. More often than not, a citizen reads the criminal law only after he has done something and he gets into trouble. What I am suggesting, therefore, is that, at least from the point of view of the draftsman, we ought to assume that the primary consumers of our product are those who are engaged in the everyday administration of law, not in its violation.

Lawyers: (a) prosecutors

The lawyers who administer the criminal justice system on the government side day to day are frequently what one might call short-term people. Indeed, the average prosecutor acts in that capacity for approximately only four to five years. He generally comes to his job straight from law school, young and inexperienced, and spends the major part of those four or five years learning the law. Soon after he acquires the necessary expertise, he leaves to go on to something else, usually civil practice. A more intelligible code will be able to be absorbed more quickly and thereby will increase the effectiveness of these men.

Lawyers: (b) defense counsel

Defense counsel are often young associates from major firms, bright, but almost wholly without experience. It is an understatement to say that they need a penal law that can be readily mastered. Like the prosecutors, these young men and women will benefit from a new and modern criminal code.

Jurors

With respect to jurors the problem is greater. Jury duty is frequently a once-in-a-lifetime occurrence for someone with no experience in the idiom of the legal world. These people are then subjected to instructions which are often long, tedious, and largely incomprehensible. They can hardly be expected to catch up in one afternoon with what the other participants in the criminal justice system have spent years trying to learn. An intelligible code, in short, should enable courts to give intelligible instructions, and intelligible instructions should enable our jurors to give better service.

Law Enforcers: police

Let us also consider the law enforcement agent. He, too, will benefit from a simplified legal system. Cases will be easier to investigate. The training of his junior associates will be facilitated. The sources he must consult will be more limited. His training should be able to reach higher levels more quickly at less expense.

Thus we are brought to our next major point: the desirability of common sense words.

II—USE OF COMMON SENSE WORDS

One of the most immediately striking characteristics of S. 1, which becomes apparent at first glance, is its use of current, everyday language. A common and justifiable criticism of many statutes today is that they are almost unintelligible, even to experts, let alone laymen. Admittedly, in certain cases, a statute is unavoidably difficult to understand because of the complexity of the subject matter with which it deals. But frequently the problem of unintelligibility can be remedied easily by simplifying the words, that is, by substituting the short word for the long word. S. 1 is to be applauded in its efforts to achieve this objective. Simplification of language should aid each of the participants in the criminal justice process in doing his or her job better.

The language used throughout the proposed code is essentially common sense language which should be understandable even to the average layman. Subtle distinctions with little function have been avoided to a considerable extent. The Model Penal Code and the code proposed in the Final Report of the National Commission on Reform of Federal Criminal Laws cannot claim the same degree of intelligibility. S. 1 does not seem to sacrifice much of substance in achieving this simplification.

Rather than using names such as robbery in the first degree and robbery in the second degree, which names give no indication of the difference between them, S. 1 provides for armed robbery (sec. 2–8D1) and robbery (sec. 2–8D2). The distinguished feature is obvious. Compare § 1721 of the National Commission proposal. Again, instead of dealing with "extortionate credit transaction" (18 U.S.C. sec. 891ff), S. 1 includes the crime of "loansharking" (sec. 2–9C2), a term familiar to most people. (Additional examples are: "Bail Jumping" (sec. 2–6B4), "Retaliation" (sec. 2–6E4), "Aiding Suicide" (sec. 2–7B5), Skyjacking" (sec. 2–7D4), and "Joy riding" (sec. 2–8D8).)

Where difficult distinctions were unavoidable, S. 1 frequently does a better job than previous attempts, to make them clear.

III—ORGANIZATION OF THE CODE

Related to this idea of intelligibility, is the structure or organization of the code: that is, the arrangement of the ideas, sections and subjects. I see its organization as one of the strong points of S. 1.

The proposed code is broken down into three parts: Part I, the General Part; Part II, the Special Part; and Part III, Administration.

The General Part contains general principles, definitions, jurisdictional matters, defenses, and sentencing provisions having general applicability throughout the Code. It enables the Special Part, containing specific crimes, to contain relatively brief sections for each crime. I also personally prefer the sentencing provisions

to be up front in Part I, as S. 1 provides, rather than in Part III, as the Brown Commission would have it, although this is not a matter of great consequence. I prefer them "up front" because I think they are often one of the first or more central concerns to lawyers and others in the process, and they condition the import of other provisions in the Code.

Organization: the General Part: Definitions

There are some particular features of the General Part that are deserving of special note. The first of these is the section devoted to General Definitions. This is a rather extensive section containing definitions of those terms that will be seen to appear throughout the code. These are the intellectual building blocks that are later used to write the whole Code. One great advantage of this type of drafting tool, of course, is that it hopefully removes ambiquity as to the meaning of the many terms defined, and does it without repetition. Rigorous definition lessens uncertainties in the judicial interpretive process.

Although this particular section is lengthy, I do not think it is unduly so. The terms that are defined are those that might otherwise give rise to litigation. This should be a main criterion for determining which terms are to be included in a definition section. I also note with approval the use in S. 1 of two distinct styles of definitions. So-called "true" definitions define by inclusion and exclusion. The Code contains a number of these (see, e.g., Sec. 1–1A4, Subsec. (17)—"crime"). Another useful kind of definition also found in S 1, sets forth examples of included items, but not exhaustively. That is, it defines part of a class by example but leaves open the rest for development in the light of policy. See, e.g., Sec. 1–1A4 (51)—"organization". Section 1–1A4 Subsection (39) contemplates that a number of definitions are of this type, when it sets out the rule that "includes" should be read as if the phrase "but is not limited to" were also set forth. A so-called "true" definition is denoted by the use of the word "means" rather than the word "includes". "Includes" connotes the second kind of definition I have mentioned.

In addition to general definitions contained in Part I of S. 1, there are also definitions that apply only to specific sections. These definitions appear in the sections to which they apply. What if a definition pertains to several sections throughout the code, but not to enough sections to be regarded as having general applicability? Should the definition appear in each section in which they are applicable, or should any definition which would have to appear more than once be placed in the General Definitions section with an indication of what later sections it pertains to? S. 1 opts to repeat the definition for each section, rather than place it in the general definitions. I concur. Repeating these definitions does not appear to unduly lengthen the code, and it eliminates the necessity of constant referral to the General Definitions. It also tends to greater clarity and ease in reading. (Some examples of this technique are: "Eavesdropping device" (Secs. 2–7G1 and 2–7G2), "Receives" (Secs. 2–8D4 and 2–8E4), "Sports contest" (Secs. 2–8F2 and 2–8F4), and "Participates" (Secs. 2–9F1 and 2–9F3)).

Organization: Jurisdiction

In a fashion somewhat similar to its treatment of definitions, S. 1 has simplified the treatment of federal bases for jurisdiction—i.e., the jurisdictional elements of crimes. Under the present system jurisdictional elements are made a part of the definition of the crime to which they apply. This approach has resulted in a totally unnecessary proliferation of offenses. An examination of current federal law quickly results in a list of many separate crimes that amount to essentially one crime, and which differ from one another solely by reason of their jurisdictional bases. (See, for example, the many types of robbery: "Affecting commerce"—18 U.S.C., Sec. 1951; "Robbery of banks"—18 U.S.C., Sec. 2113; "Robbery of the mails and other Federal property"—18 U.S.C., Sec. 2114; "Robbery in Federal enclaves"—18 U.S.C., Sec. 2111.) S.1 eliminates the need for this type of proliferation by the simple expedient of listing the bases for federal jurisdiction over a particular crime in a separate subsection following the definition of the crime. This approach permits the consolidation of what were previously many offenses into a single definition of the general crime.

Although the jurisdictional bases appear immediately following each definition, they are not themselves there defined or spelled out in detail. The bases are merely *listed*, with a reference to the General Definitions section, wherein each is fully explained.

S. 1's treatment of jurisdictional elements has the effect of communicating a more realistic view of federal offenses. Under the present system, the impression

is frequently created that the essence of a particular crime is the jurisdictional part of it. For example, the impression is given that the essence of the wrong is its effect on interstate commerce or its occurrence on federal property, or its effect on the mails. I.e., it is not a federal offense to rob—only to rob the mails, or on federal property. These elements should be merely accidental circumstances which justify federal action against wrongful conduct, whether that conduct be robbery, murder, rape, or otherwise.

Organization: Lesser Included Offenses, Attempt, and Conspiracy

As a matter of good draftsmanship, wherever possible problems of interpretation should, of course, be anticipated and avoided. Admittedly it is quite impossible to foresee all that will arise. Examination of past history, however, will frequently provide some indication. In two particular instances, S. 1 succeeds admirably in eliminating possible controversy. First, wherever possible the code specifically designates lesser included offenses. (See, for example: Sec. 2–7B1 (Murder), Sec. 2–7C1 (Maiming), Sec. 2–7D1 (Aggravated Kidnapping), Sec. 2–7E1 (Rape)). Any offenses not so designated will not be regarded as such. A frequent issue at trial has thus been removed. Related to this is the code's treatment of the inchoate offenses: attempt and conspiracy. Again, where appropriate, specific provision is made that the sections dealing with these offenses shall not be applied. An example of this is found in Sec. 2–8D5, Scheme to Defraud, where it is explicitly stated that there can be no attempt or conspiracy to scheme to defraud. Again the result is one less question to be litigated. (See also Sec. 1–2A5 (Criminal Conspiracy)).

Organization: the Numbering System

The numbering system used throughout the Code is new to federal law. This very characteristic has created opposition to it on the part of some. In determining its merits, however, consideration should be given to the purpose of the system. In any such system two things are desirable: it should be so structured as to allow for the addition of new provisions, and each number should on its face indicate to the researcher considerable information as to precisely where a particular section is located. Most statutes comply with one or the other of these purposes, but it is unusual to find a statute that fulfills both. The code proposed by the National Commission on Reform of Federal Criminal Laws, for instance, attempts to achieve the first objective by simply skipping several numbers between chapters and subchapters, thereby allowing these numbers to be utilized when new sections are added. The objective is jeopardized when one examines the sections and finds in many sections the number of numbers skipped is a mere guess and is likely to be inadequate. The deficiency cannot be made up by skipping more numbers, because there are not enough numbers within a particular series allotted to a subject, to skip more without going into the next series allotted for the next subject.

On the second goal (that number should convey considerable information about location within the code), it is obvious from comparison of the table of contents of S. 1 and the National Commission draft, that S. 1 is superior in this respect. The numbering system of S. 1 fulfills both goals in the following fashion. The section will have a number like "1–3B2". The first number ("1") tells us it appears in Part I, the General Part. The second number (the number following the dash) is a "3". It tells us the section is in Chapter 3, "Defense and Bars." The "B" following that tells us the section is in subchapter B of Chapter 3, subchapter B being labelled "Bars". The final number ("2") tells us the section is the second section in that subchapter. An examination of the table of contents reveals that, under this numbering system, in no instance does a number run above 13 or a letter go farther in the alphabet than F, with the result that there are many numbers and letters left for new sections. Nor can a high number of new sections run into the series allotted for the next subject, because the prefix number or letter would be wrong.

Organization: Order Of Listing Offenses

Of less importance than the foregoing but nonetheless an example of improved draftsmenship, is the order in which offenses are treated in the Code. Present Title 18 lists its criminal offenses in alphabetical order, totally disregarding their relationship to one another. S. 1, on the other hand, groups offenses according to class, treating similar offenses in the same subchapter. This is a more sensible approach in that it facilitates comparison and distinction and thereby provides for easier research.

Organization: Parallelism and Cross Referencing

According to the principle of parallelism, the parts of an instrument dealing with the same or similar subject matter should be drafted in the same style. The most obvious expressions of this quality in S. 1 can be found in the definitions of crimes in the Special Part. As even a quick examination will reveal, all the crimes in this part are described in exactly the same format. Each begins: "A person is guilty . . . if . . ." and is followed by the elements of the offense. The use of such a drafting technique wherever possible will necessarily lessen, if not eliminate, interpretive problems unintended by the drafters that are engendered by inconsistent phraseology. I would like to submit for the record here (see Appendix to this statement) an outline of the model apparently used in drafting S. 1. Its use in the future should facilitate amendments to the Code.

As a small matter of drafting style, cross-referencing should be kept to a minimum. Wherever a cross-reference *is* made, the section referred to should be referred to by letter or number *and* description. Cross-reference by letter or number alone can cause confusion, particularly in the event of typographical errors. S. 1 is commendable in this respect.

IV—CONFORMING OTHER LAWS

Approximately one-half of S. 1 consists of conforming amendments designed to bring the other titles of the United States Code in line with the new Title 18 codified by S. 1. Although these amendments result in a lengthy bill, I find their inclusion much preferable to one alternative, a simple general provision to the effect that, where Title 18 is found inconsistent with any other title, Title 18 will prevail. Such a general provision would require a person trying to ascertain what the law is, to make constant reference from the other titles to Title 18, and to make nice judgments as to what is or is not directly or impliedly "overruled" by Title 18. The approach taken in S. 1 eliminates this particular problem. As a matter of drafting style, it should also be noted that the styles used in the conforming amendments are the styles of the titles they are designed to amend. This is much more appropriate than imposing upon all other titles the style of S. 1 (Title 18).

I also applaud the Subcommittee for undertaking the difficult task of processing the conforming amendments. It would be much easier to leave to others the "dirty work" of draftsmanship or not to do it at all.

V—BUILDING IN A SELF-CORRECTION MECHANISM

The wisest drafters are those who perceive their own fallibility and temporal nature, and build in an effective amendment process. S. 1 wisely provides for the establishment of the Criminal Law Reform Commission, one of the duties of which is "to conduct a continuing and comprehensive legal and factual study of the Federal Criminal Code and to formulate and propose to the President and to the Congress at the start of each session of Congress such changes in the Code and other provisions as the Commission may deem appropriate, including the preparation of appropriate conforming and other technical amendments needed to maintain consistency between the Federal Criminal Code and the other titles of the United States Code." By carrying out this task the Commission will be able to avoid the result we see too frequently today—anachronistic criminal statutes, made such because their drafters failed to provide a system for meeting society's changing needs. Among other things, the Commission is also charged with the duty to recommend appropriate changes to existing rules of practice and procedure and to prepare pattern jury instructions applicable to the code.

VI—CONCLUSION

In conclusion, on the subject of draftsmanship, it is my view that on the whole S. 1 does an excellent job of clearly communicating a complex body of federal law, and displays some drafting techniques which are worthy of emulation.

MODEL STATUTE FORM

STATUTE

(1) *Definition*

(a) *Offense.*—A person is guilty of perjury, a Class C felony, if, etc.

Variation of Statement of Definition

(a) *Offense.*—A person is guilty of an offense, if, etc. (no short name possible and multiple grading factors).

(2) *Defense*

(b) *Defense.*—It is a defense that a defendant

(b) *Defense Precluded.*—It is not a defense that a defendant, etc.

(b) *Affirmative Defense.*—It is an affirmative defense that, etc.

(3) *Special Issue*

(c) *Special Provision.*—

Attempt Precluded.
Conspiracy Precluded.
Evidence.
Procedure.
Presumption.

Say: "Proof that a defendant . . . give rise to a presumption that the defendant . . ."

Say: "—or—are inapplicable under this section."

(4) *Included Offenses*

(d) *Included Offenses.*—Manslaughter, assisting suicide and criminally negligent homicide are [or may be] offenses included in reckless homicide.

(5) *Grading*

(e) *Grading.*—The Offense is a Class A felony, unless, etc. Otherwise it is a, etc.

Variation of Statement of Grading

(e) The offense defined in:

(1) subsection (a) (1) is a Class B felony;
(2) subsection (a) (2) is a Class C felony; and
(3) subsection (a) (3) is a Class D felony.

Do not say paragraph (a) (2)

(6) *Compound Grading*

(f) The offense is:

(1) a Class A felony if any of the following additional offenses is committed: murder or aggravated kidnapping; or

(2) a Class B felony if any of the following additional offenses is committed: maiming, aggravated arson or aggravated malicious mischief.

(7) *Definitions*

(g) *Definitions.*—As used in this section—

(1) 'catastrophe' means, etc. (if limiting)
(2) 'harm' includes, etc. (if illustrating) and
(3) 'benefit' means, etc.

(g) *Paragraph Definition.*—

Say: "for the purposes of this [section or paragraph] 'term' means [or includes]"

(8) *Jurisdiction*

(h) *Jurisdiction.*—Federal jurisdiction exists when the offense is committed within the jurisdiction defined in section.—(short description)

Senator HRUSKA. Our next witnesses are Mr. Anthony P. Marshall, who is chairman, and Mr. Mark Benenson, who is a member of the Committee on Federal Legislation of the New York State Bar Association.

Will they come forward please?

Mr. BENENSON. If the Senator will excuse me. I will let Mr. Marshall begin the testimony, and when he is finished with your permission I will come up.

Senator HRUSKA. Very well.

STATEMENT OF ANTHONY P. MARSHALL; KIRLIN, CAMPBELL & KEATING AND THE COMMITTEE ON FEDERAL LEGISLATION, NEW YORK STATE BAR ASSOCIATION

Mr. MARSHALL. First of all, Senator, on behalf of the New York State Bar Association, and in particular on behalf of its committee on Federal legislation, I would like to thank you for offering us this time

to testify before you on the two matters on which we will testify this morning.

Personally, I am a practicing lawyer in New York City, a member of the firm of Kirlin, Campbell & Keating; by specialty, a trusts and estates lawyer. You might say that my professional hobby, at least over the past 3 years, has been being chairman of the Federal legislation committee; before that for a couple of years, I was its secretary.

In 1969, when we issued our report entitled "The Dilemma of Mental Issues in Criminal Trials," I was secretary of the committee and we had 18 other members. It might help you to know a little bit about the composition of the committee.

Being a State bar committee, our representation is statewide, although most of the members are from the Greater New York City metropolitan area. We had on our committee at that time four assistant U.S. attorneys, one of whom was Chief of the Criminal Division of the U.S. Attorney's Office for the Southern District of New York, and who later became the executive director of the civilian review board in New York City, which was established by Mayor Lindsay to hear complaints of citizens against police brutality and police corruption.

We had as a member of our committee the previous police commissioner of the city of New York, Vincent Broderick. We had as a member of the committee several corporation lawyers, a labor lawyer, an attorney for the NAACP legal defense and educational fund, and also the president of the Legal Aid Society. So I think you can see that we had a pretty broad representation, not only geographically, but by speciality.

I would like to depart from my prepared statement to just emphasize three basic factors in the insanity provisions of the bills that you are considering. The first, insanity as a separate defense; second, the sentencing and probation provisions; and third, the question of a defendant's competency to stand trial.

We feel especially privileged to be able to testify to you today, because you are faced with one real choice in these provisions between the two bills; and that is with regard to insanity as a separate defense, because S. 1 and S. 1400 treat that differently. Although the other provisions are drafted differently, I think, basically, the differences are of form rather than of substance. But, the committee and the Congress is faced with a real choice as to whether insanity should be an actual defense per se.

Our report in 1969 suggested that it should not, that the insanity defense should be abolished, and questions of mental competency should only be considered in regard to whether the defendant had the requisite criminal intent to commit the offense with which he was charged.

S. 1400 essentially adopts that view. S. 1 adopts pretty much the very complicated—and well, you could say complicated if you want to be derogatory, or say the advanced, more learned psychiatric conception of insanity as a defense if you are in favor of it—posture of the present law enunciated in the *Freeman* case, and supported by the American Law Institute.

To understand our position, why we favor the treatment in S. 1400, that is the definition under section 502, why we favor that; I think you have to take an historical look at the development of insanity as a defense, and at what the criminal statutes are intending to do.

Basically, I think it is fair to start with the premise that since criminal sanctions were originally considered a form of vengeance, a person who committed a criminal act because he was insane or had a mental disease was thought to be excused from punishment, because it would be unfair to punish him for the sake of venegeance if he did what he did without knowing that it was wrong, and without knowing that he shouldn't have done it.

Our first departure was from the famous *McNaughton* rule, the question of whether or not the man knew right from wrong. As our concepts of psychiatry advanced, medical knowledge advanced, we found that a person really might not be in control of his faculties even though he knew right from wrong, and that the insanity defense simply based on knowing right from wrong was too limited. Therefore, it was expanded to include irresistible impulse.

As our knowledge developed more toward its present state and we gained a greater understanding of why people do things, the defense, based on simply right and wrong plus irresistible impulse, was again found to be deficient. It was expanded in the *Durham* case so that if the conduct was a product of a mental disease or a defect, then the conduct, and the defendant, would be excused. That would be a defense.

Even that was then found wanting in the *Freeman* case because we were told by psychiatrists that you always couldn't completely connect the particular act under a product of mental disease or defect theory with the mental disease. And it was considered unfair if a man obviously was suffering from a mental disease to say that because you couldn't in the normal way of tracing casuality, connect the particular deed definitely to the disease, he should be declared competent, and therefore guilty.

So the standard was broadened further. The disease, the defect, would just have to render him incapable of understanding the normal modes of conduct in general, at least in the legal sense of wrongfulness.

This may confuse you a little. It confuses me a little, and I think this is really one of the reasons why we support the provision in S. 1400. Probably the most famous, you might say deserved result of this kind of reasoning is the *Sheller* case. I'm not trying at this point to make any comment on whether or not *Sheller* should have been found guilty.

But let me just describe the case for a minute. This is the man who was a practicing attorney, who from all outward circumstances seemed to be leading a normal life, and in fact had a successful law practice. His only trouble was that in 1959 he only reported $9,000 of his $43,000 earnings on his income tax return.

And he was defended on the ground that he was insane in the sense that he had a mental disease or a defect which rendered him incapable of properly preparing his income tax returns.

Now, the lower court found him guilty. They rejected this defense,

but this was before the expansion, last expansion, of the insanity defense under *Freeman*. His conviction was then appealed, and the appellate court reversed his conviction and remitted his case for a new trial, several years after his original trial. And he was subsequently acquitted.

Now, I don't know whether he was guilty, or he wasn't guilty, but obviously the jury had great difficulty understanding—in both trials, I think—how a man can be sane enough to file a return, but not sane enough to get the figures right, and yet capable of practicing his law practice, being successful and leading an otherwise normal life.

We contend that the basic advantage of S. 1400, in its provision 502, is that jurors would be much more able to understand a defense based on insanity if the mental disease, or the mental defect is not a separate defense by itself, but if they are just told that they have to find out whether or not the man knew what he was doing, whether he intended to do the act that he wanted to do, whether he had the required criminal intent.

In other words, if it is an indictment for selling narcotics, did he actually intend to sell the narcotics? Did he know they were narcotics, and did he intend to sell them?

Now, this doesn't deprive the defendant of his defense of mental illness or defect, because evidence as to that can be introduced by psychiatrists who will say that this man couldn't have known what he was doing because he was insane, he had a mental disease, he didn't understand.

But the question is and the crucial factor is, I think it is much easier for the jury to make a determination as to whether or not he actually had the criminal intent to do a particular act than to have to sit back and listen to competing psychiatric testimony as to whether or not he had a mental disease or a defect, to try to understand what a mental disease or a defect is in the first instance; then to try to make a decision as to whether he had one, and then to make the further determination of whether or not this influenced his conduct so that he was unable to conform his conduct to the rightness of the law or the particular act that he was charged with committing.

I think that is a much harder and sometimes almost a metaphysical problem. It involves several negatives. I mean was a man able to know, or was he rendered unable to not know, that his act was wrong, and that he shouldn't have done it.

I think that is one of the basic advantages of the S. 1400 provision; it makes the defense much simpler. I think it would make it simpler for jurors to understand the testimony before them and perhaps more able to properly adjudicate the matter before them.

I think it would also cut down, from the practical standpoint, the number of appeals and the number of reversals, because the Federal courts will no longer be grappling with the technical language of charges to a jury because the charges under S. 1400, I think, will be rendered much more simple. And today you have a lot of reversals, not on the ground of whether the evidence indicated that the man was really guilty or not guilty, but that the charge to the jury was deficient because it didn't contain all these very confusing elements of our present law, which as developed to this time is spelled out in S. 1.

However, I don't think you are really going to have a greater conviction rate. It is conceivable that people like Sheller would be convicted; but here again, it would depend on whether the jury thought he really knew what he was doing when he filed fraudulent income tax return. That is really for the jury to say. Certainly with most crimes, especially crimes of violence, the question of insanity and mental deficiency will be introduced to prove that the defendant lacked the requisite criminal intent. Therefore, he will be protected in that regard.

So on balance, I think there will not be a great deal more convictions than there are under the present scheme. And I think there is a safeguard against even a few additional convictions: that is in the expanded and made more elaborate sentencing and acquittal provisions under both proposed bills, which leads me into my second point.

We think that, in substance, both S. 1400 and S. 1—S. 1 in its sentencing and probation provisions under 1–4D1, and S. 1400 under 2003, its sentencing provisions, S. 1 also on its sentencing provisions under 3–11C1 and subsequent sections dealing with psychiatric examinations after convictions, give us a safety valve. If because of the more simpler definition or use of insanity, the elimination of it as a defense in and of itself, and only the introduction of it as evidence to the basic matter of criminal intent, if that does lead to a conviction and a man might really be insane, the codes, both provisions, now provide for the Federal Government, for the Federal authorities to raise the question of insanity before sentencing, and give the Federal courts the option to remit the defendant, not to prison, but to psychiatric help.

Presently in some cases, the Federal courts have to rely on State authorities for doing that, especially after acquittal. But both these bills provide that even in the case of acquittal on the basis of insanity, the court on its own motion, or the prosecution, can recommend that the defendant needs psychiatric help and should not simply be released to go out into the street.

And I think these provisions are good, because they give the judicial process much more flexibility. And I think this is consonant with our developed, modern concepts of criminal justice—that criminal justice is not designed for vengenance sake, but is designed rather to prevent antisocial conduct: and that antisocial conduct can be prevented in three basic ways through first, rehabilitation; second, deterring others; and if necessary, removal of the offender from society.

The last point I want to address myself to is the defendant's competency to stand trial. S. 1 introduces procedures to determine competency to stand trial. It creates a panel of psychiatrists that are used for that purpose, and for other purposes, and sets up procedures for incarceration, or at least for limited detention, of a person who is found incompetent to stand trial.

S. 1400 does not specifically create new provisions for that purpose, but relies on present law. I think it's in section 4244 of title 18, which deals with competency to stand trial. So again, both bills are essentially the same in substance although different in form.

We approve of both bills in this regard, but we don't think they go quite far enough, because our report in 1969 suggested something

new, and that is psychiatrists have been telling us, law enforcement officers have been telling us, that—or at least we may be getting to the stage whereby—hospitals are becoming more like prisons, rather than prisons becoming more like hospitals. And if one gets himself in or finds himself committed to a mental institution because he is incompetent to stand trial, he may find it very difficult to get out, and it may be worse than being actually sent to prison on the offense for which he is charged; especially, if that offense would not be one to which he would be subjected to a lengthy incarceration if convicted.

Now, what we propose, which is different, for your consideration than simply a continuation of the present law or a recodification of it, is that if a defendant wants a trial, he should be given trial. Even if the court on its own or in response to a motion by the prosecution, decides that he is not competent to stand trial, we feel that he should be given the opportunity to stand trial. What is he losing? If he is incompetent to stand trial, he will be committed. In effect, he is captive. He's incarcerated.

If he stands trial, he might win. He might be exonerated. If he loses, he goes to prison, or under the more liberal and more expanded sentencing and probation procedures, he may simply be committed.

So he doesn't really end up any worse off, in the sense that he will either be restrained in a prison or restrained in a mental institution, which would essentially be the same place he would be if he were being held pending regaining his competency in order to stand trial.

And in addition, there is a safeguard that we propose: and that is that if he were convicted and subsequently claimed that he had regained his competency, but was incompetent at the time of his trial and, as a result of that incompetency, was unable to come forth with certain evidence that would have been material in his defense, the court would be allowed to consider that evidence, hold a hearing regarding it, to determine whether it would have been material and was unavailable because of his mental condition. If the court should determine that the evidence would have been material and was unavailable, it would grant him a new trial. I think that is a sufficient safeguard to a man being unnecessarily convicted, because he wasn't competent enough to assist his counsel adequately.

And guaranteeing a trial is in a sense even an additional safeguard for the defendant, because it enables him to possibly avoid incarceration anywhere if he is found to be not guilty. Experience has taught us that many people are incarcerated for incompetency to stand trial and may be locked up for quite a long time.

Now, S. 1 is probably more dangerous in that sense than S. 1400, because I believe the present statutes have been rather severely restricted regarding incarceration for incompetency to stand trial under case law. S. 1 puts limits on the length of the duration, but the outer limit is the length of the sentence of the crime for which the man would have been charged.

So I think under S. 1, there's a possibility that incarceration for incompetency to stand trial could be more severe than under present law. And for that reason we feel that serious consideration should be given to giving the defendant an absolute right to demand trial.

Thank you very much for letting me take this opportunity to address you on these points. And if you don't have any questions, I would

like to turn over this mike to Mr. Benenson, my colleague on the committee.

Senator HRUSKA. Mr. Summitt may have some questions.

Mr. SUMMITT. I would just like to ask you, Mr. Marshall, how many States are there that have followed the approach that S. 1400 takes, that is, by abolishing the insanity defense as such?

Mr. MARSHALL. I don't know the answer to that. I could research it for you.

Mr. SUMMITT. Would you say there are any?

Mr. MARSHALL. I frankly don't know.

Mr. SUMMITT. What about foreign countries? Are there any foreign countries that treat insanity in this same way?

Mr. MARSHALL. I have no idea.

Mr. SUMMITT. And then one last question; we have in our traditional concept of criminal law the idea that a person should be blameworthy or really an evil person if they're going to be held criminally liable. This is one of our attitudes toward the criminal law. Apparent abrogation of this idea has been the basis for some criticism of the S. 1400 approach.

Would you comment on that?

Mr. MARSHALL. Yes. I don't think that's a justifiable criticism, because I don't think the S. 1400 treatment deprives the defendant of any defenses he really has now. It just shifts the sort of semantic emphasis of how they're introduced and used, because if he isn't blameworthy because of mental disease or mental defect, this would be all introduced in psychiatric testimony at trial under S. 1400 on the question of whether he had the requisite criminal intent to commit the act.

Mr. SUMMITT. Well, theoretically, he could be very sick in the sense that he couldn't control his behavior, but he would still know what he was doing. For instance, if knowledge was the culpable mental state——

Mr. MARSHALL. Well, but then I think there is a safeguard in the sentencing and probation procedures which would come into play, because if he was that sick, he probably needs psychiatric help, compulsory psychiatric help. And if he is convicted, and it is determined that he knew, in a legal sense and the criminal intent sense, what he was doing, but he is so sick that he really couldn't help himself—again, I'm not really ready to concede that that would be the result under criminal intent—but if he had the intent, then it is possible for the judge, under the procedures actually set into the statutes, both of them, to waive imprisonment, and to have him committed for psychiatric help, as a rehabilitation factor, which I think conforms to our modern concepts of criminal law to help people.

Mr. SUMMITT. Then your observation would be that this is really a sentencing problem, as opposed to a criminal conviction problem.

Mr. MARSHALL. Yes, and I think that S. 1400 will make it much easier for juries to understand the meaningfulness of the psychiatric testimony in arriving at a conclusion as to culpability, and will eliminate a great deal of judicial time in appeals spent on the technical nature of charges to the jury. Today you can hardly blame a jury for having difficulty understanding what the charges are supposed to mean, because they have become so complicated.

But I think the defendant is protected because he still has the opportunity to introduce all of the evidence on his ability to know what he was doing, on the aspect of criminal intent. And even if he is convicted if he is really sick, he will not be sent to prison. He could very well be sent to an institution, a mental institution.

Senator HRUSKA. Have you any questions, Mr. Lazarus?

Mr. LAZARUS. No, sir.

Senator HRUSKA. No further questions on that?

Mr. MARSHALL. Thank you very much, Senator.

Senator HRUSKA. There will be inserted in the record at this point your prepared statement, the report of the Committee on Federal Legislation of the New York State Bar Association, a statement by Dean Abraham Goldstein of the Yale Law School on the insanity defense, and a staff survey of the State mental health departments on the insanity issue.

[The material referred to follows:]

STATEMENT OF ANTHONY P. MARSHALL

My name is Anthony P. Marshall. I am appearing today as Chairman of the Committee on Federal Legislation of the New York State Bar Association in relation to the Committee's report "The Dilemma of Mental Issues in Criminal Trials," 41 New York State Bar Journal 394 (Aug. 1969).

At the time this report was published, the versions of the proposed new Federal Criminal Code now pending before this Committee, had, of course, not yet been prepared (S. 1 and S. 1400, 93d Cong., 1st Sess. (1973)). However, the concepts suggested in the report may have some bearing on two aspects of the proposed Code:

(1) The treatment of a claim of insanity at the time of an alleged offense, and

(2) The treatment of alleged mental incapacity of a defendant to stand trial.

I am attaching a copy of the report to this statement and respectfully request that it may be made a copy of the record of this hearing. Without purporting to give answers to these questions the report raises considerations which may be relevant to your Committee's consideration of these problems. The report was unanimous in all respects except for the abstention of one member.

INSANITY AT THE TIME OF AN ALLEGED CRIME

The report suggests that careful consideration be given to the possibility of recognizing evidence concerning the mental condition of a defendant as relevant to his capacity to form the intent required to commit a particular offense, and as a factor in connection with sentencing. If this were done, the report suggests that insanity as such might no longer be treated as a separate defense.

The reasons that led the Committee on Federal Legislation to believe that this path should be explored included the following:

(a) Many authorities in psychiatry as well as law increasingly appear to believe that it is not realistic to attempt to draw a sharp distinction between those labeled "sane" and "insane." See Menninger, The Crime of Punishment 117–18 1968); Douglas, "Should There Be An Insanity Defense;" Corrective Psych. & J. Soc. Therapy, Fall 1968, p. 129; Goldstein & Katz, "Abolish The Insanity Defense—Why Not?" 72 Yale L. J. 853 (1963). In this connection the difficulties in categorizing persons involved in recent hijacking and other cases may be instructive. See e.g. Lindsey, "Sane Or Insane? A Case Study of the T.W.A. Hijacker," N.Y. Times, Jan. 21, 1973, § 4 p. 7. Recently, eight persons claimed insanity in order to be admitted to mental hospitals and later had difficulty convincing the authorities that they were in fact sane in order to be released. Blakeslee. "S Feign Insanity In Test And Are Termed Insane," N.Y. Times, Jan. 21, 1973, p. 26.

(b) Juries, although able to deal with questions of intent and the like, which are within their experience, lack the ability to thread their way among the conflicting assertions of experts as to whether a person suffered from a "mental disease or defect," the definitions of which experts even frequently disagree about. Similarly, juries have difficulty in determining the extent to which a mental disease or defect, if found, causes particular behavior under Durham v. United

States, 214 F.2d 862, (D.C.Cir. 1954), or whether the prosecution has proved beyond a reasonable doubt that the defendant is not by reason of such defect substantially unable to conform his conduct to the requirements of the law he is accused of violating under United States v. Freeman, 357 F.2d 606 (2d Cir. 1966). The latter may raise a philosophical or even a theological question of free will and determinism rather than an ordinary fact question realistically capable of resolution by jury.

(c) Defendants may be acquitted by reason of insanity, but escape any compulsory sanction or treatment for their conduct because it is alleged that they are no longer suffering from the mental condition at the time of the trial. See discussion in United States v. Freeman, 357 F.2d 606 (2d Cir. 1966). Commitment after a verdict must depend on the mental condition of the defendant at the time of trial, not at the time of the act, according to Bolton v. Harris 395 F. 2d 642 (D.C. Cir. 1968).

(d) The insanity defense has been applied to instances where the defendant is obviously functioning in society and has not had to be commited to a mental hospital, thus possibly perverting the original purpose of the defense. See United States v. Sheller, 369 F. 2d 293 (2 Cir. 1966); Time, Jan. 6, 1967, p. 80.

(e) Many believe that if the insanity defense continues to be expanded there is "more likelihood that hospitals will become prisons than that prisons will become hospitals." Birnbaum, "Medicine and The Law," 261 New England J. of Medicine, 1220, 1223, (1959). In this connection, the so-called "therapeutic" imprisonment of Soviet dissenters may be a warning. See Trotter, "Psychiatry As A Tool of the State," Science News, 2/17/73 p. 107; "Soviet Are Reported To Order Rights Leader To Hospital," N.Y. Times, April 9, 1973, p. 14. See also Petri and Smith, "The Rights Of The Mentally Ill," Ripon Forum, Feb. 1967; Willis; "Prisoners of Psychiatry," N.Y. Times Book Review, March 4, 1973, p. 6, reviewing Ennis, Mental Patients, Psychiatrists and The Law (1973); Szaz Law, Liberty & Psychiatry (1963); Kutner, "The Illusion of Due Process in Commitment Proceedings," 57 N.W.U.L. Rev. 383 (1962).

The views of the New York State Bar Committee have subsequently been echoed by other Bar groups. See Special Committee on the proposed new Federal Criminal Code, The Association of the Bar of the City of New York in "The New Criminal Code Proposed By The National Commission On Reform Of Federal Criminal Laws," May 20, 1972, p. 14–15; Report of the Committee on Federal Legislation, New York County Lawyers Association in "Reform of the Federal Criminal Laws." Hearings before the Sub-committee on Criminal Laws and Procedures of the Committee on the Judiciary, United States Senate, 92d Cong., 2d Sess. (1972), Part III, Subpart B, p. 1401–1402. See also report of consultant to the National Commission on Reform of Federal Criminal Laws, 1 Working Papers of the National Commission on Reform of Federal Criminal Laws 229–260 (July 1970).

Psychiatric or other evidence relevant to the defendant's mental condition would, of course, continue to be admissible on the issue of intent and the defendant's ability to form the required intent. See Goldstein & Katz, "Abolish The Insanity Defense—Why Not?," 72 Yale L.J. 853 (1963); Brief for the United States, United States v. Sheller, 369 f.2d 293 (2d Cir. 1966).

The chief thrust for development of the insanity defense originally came in cases where the death penalty or other extremely serious sentences could be imposed. In these cases, there is always a stringent requirement of criminal intent, and the issue of intent gives at least as much, if not more scope to the jury to acquit if they feel conviction would be unjust. This is so because no esoteric concepts such as "mental disease or defect" are involved.

Consideration of psychiatric information in sentencing would be consistent with the criteria set forth in S. 1 and in section 2003(b) on p. 145 of S. 1400. See also Committee on Criminal Law, Federal Bar Association of New York, New Jersey and Connecticut, "The Need For New Approaches To Sentencing," 3 Criminal Law Bull. 682 (Dec. 1967).

The report of the Committee on Federal Legislation indicates that there would appear to be no constitutional obstacle to eliminating the insanity defense; this view was based on the reasoning of Powell v. Texas, 392 U.S. 514, 529, 536 (1968) where the prevailing opinion by Mr. Justice Marshall stated:

"Nothing could be less fruitful than for this Court to be impelled into defining some sort of insanity test in constitutional terms."

Section 502 of S. 1400 dealing with insanity as a defense is consistent with the suggestions made by the report. Section 1-3C2 of S. 1, on the other hand, would give statutory status to the insanity defense for the first time where previously it was a matter of case law.

Both S. 1 (Section 3–11C1—Sec. 3–11C8) and S. 1400 (by leaving the existing 18 U.S.C. § 4221 et seq. basically unaltered, see S. 1400, p. 283) continue essentially the present approach under which the court makes an independent determination as to whether the defendant has the mental ability to stand the charges and assist in his defense. This independent determination is made when the issue is raised by either party or by facts coming to the attention of the court, regardless of the desires of the defendant.

The report of the Committee on Federal Legislation suggests that consideration be given to a different approach under which a defendant would have the right to insist on a trial, regardless of whether the court or other third parties considered him to be competent. If the defendant insisted on a trial and was convicted, a new trial would only be ordered in the event that an improvement in the defendant's mental condition led to grounds to believe that a different result might follow upon a second trial.

The basis for the report's suggestion is lack of confidence in our ability to determine for another person whether it is really best for him to face incarceration without trial instead of going to trial with allegedly reduced competency. The suggestion would not change present law in cases where the defendant or his counsel affirmatively assert incompetency.

The report quotes Powell v. Texas, 392 U.S. 514, 529 (1968) as follows:

"One virtue of the criminal process is, at least, that the duration of penal incarceration typically has some outside statutory limit . . . 'Therapeutic civil commitment' lacks this feature; one is typically committed until one is "cured."

According to the report, we often say something like this to persons accused of crime:

"You claim to be innocent and ask for a trial. We in our superior wisdom don't think that you are able to do the best possible job in protecting yourself. Therefore, in order to see to it that the trial you ultimately get is perfect we are going to give you no trial at all until we decide you are better. Please don't object when you are put in an institution without your consent, without trial or proof that you are guilty. This is for your own good. Remember when you are locked up that this is a hospital and not a jail. If we decide that you are able to do a better job in proving your innocence we may give you a chance to try. In the meantime, best of luck." 41 N.Y. State Bar J. at 396, 397.

The dangers of this type of thinking are made graphic by recent indications that psychiatric judgments are both uncertain and subject to abuse. See Blakeslee, "8 Feign Insanity In Test And Are Termed Insane," N.Y. Times, Jan. 21, 1973, section 1, p. 26; "Soviet Are Reported To Order Rights Leader To Hospital," N.Y. Times, April 9, 1973, p. 14; Willis, "Prisoners of Psychiatry," N.Y. Times Book Review, 3/4/73 p. 6; Trotter, "Psychiatry As A Tool Of The State," Science News, 2/17/73, p. 107; Rensberger, "Which Psychiatrist Can A Jury Believe," N.Y. Times, 1/21/73, § 4, p. 7; Petri & Smith, "The Rights Of The Mentally Ill," Ripon Forum, Feb. 1967; see also Rhodes & Jauchius, The Trial of Mary Todd Lincoln (1959); Szaz, Law, Liberty and Psychiatry (1963); Kutner, "The Illusion of Due Process in Commitment Proceedings," 57 N.W.U.L. Rev. 383 (1962).

Under present concepts, the prosecution is forced to raise the question of competency to stand trial whenever there is any information suggesting possible incompetency; otherwise, a new trial might be sought by the defendant later, and the burden would be on the prosecutor to show that the defendant was competent at the time of the trial. See Pate v. Robinson, 383 U.S. 375 (1966); Dusky v. United States, 362 U.S. 402 (1960). In some cases the government might be able to develop evidence of the defendant's activities inconsistent with a later claim of incompetency. See Zovluck v. United States, 448 F. 2d 339 (2d Cir. 1971). But, it is rarely foreseeable that this would be possible.

One result of forcing the raising of the question may be that a defendant found incompetent before trial will be subject to lengthy incarceration without trial. See Greenwood v. United States, 350 U.S. 366 (1955); cf. Weither v. Settle, 193 F. Supp. 318 (W.D. Mo. 1961); Royal v. Settle, 192 F. Supp. 176 (W.D. Mo. 1959).

Obviously, if we assume that a defendant is in fact incompetent, it follows that a trial with this defect present is insufficient and a new trial should be ordered. On the other hand, recognition of our inability to say to what extent another person is competent—especially if the person disagrees with our judgment—might lead to a different approach. The notion that we should be able to

categorize situations with confidence as being either within or without a particular category is a vulnerable one, called the "pigs is pigs" fallacy in H.R. Johnson & Co. v. S.E.C., 198 F. 2d 690, 696 (2d Cir.), cert denied, 344 U.S. 855 (1952).

Furthermore, recognition of the fallibility of fact-finding processes in certain types of cases is hardly new. See England v. Louisiana State Bd. of Medical Ex'rs, 375 U.S. 411, 417 (1964); Speiser v. Randall, 355 U.S. 513, 525 (1958); Frank. Courts on Trial (1949); Cahn, "Fact-Skepticism: An Unexpected Chapter," 38 N.Y.U.L. Rev. 1025 (1963).

We realize that it may be impossible for your Committee to devise a new approach to the question of competency to stand trial within the time remaining for work on the proposed new Federal Criminal Code. Assuming that the existing approach is carried forward, as S. 1 and S. 1400 would in general do, perhaps a specific study of this question, addressing itself to the issues raised in the New York State Bar Committee report, might be undertaken by your Committee or by a study group authorized by the statute enacting the Code (perhaps the Commission contemplated by Section 3–13C1 of S. 1 if created). Compare Burt & Morris, "A Proposal for the Abolition of the Incompetency Plea," 40 U. Chi. L. Rev. 66 (1972).

CONCLUSION

I hope that these comments will be helpful to your Committee in the tremendous and vital job of redesigning the federal crime laws.

Respectfully submitted.

ANTHONY P. MARSHALL, *Chairman.*

[From the New York State Bar Journal, vol. 41 No. 5, p. 394, August 1969]

THE DILEMMA OF MENTAL ISSUES IN CRIMINAL TRIALS—REPORT OF THE COMMITTEE ON FEDERAL LEGISLATION

Changes in outlook concerning the purposes of criminal justice, changes in scientific evaluations of human personality, and difficulties encountered regarding mental issues in criminal trials impel us to raise the questions outlined in this report. This Committee intends to study the matter further before recommending legislation in this area. Nevertheless, we believe that the publication of this report outlining some of the areas of our concern will be helpful in stimulating discussion out of which new alternatives may emerge.

A basic reason that "insanity" has been a defense to a criminal charge [1] is that since criminal sanctions have been considered a form of vengeance it has been deemed unfair to punish one who, because of his mental condition, could not comply with the law.

The modern concept of criminal justice is that its purpose is to prevent antisocial conduct rather than to "get even" with the offender. Antisocial conduct can be prevented by rehabilitating the offender, by deterring others from committing antisocial acts, and by removing the means of committing further acts injurious to society.[2] Once it is found that a person has engaged in antisocial conduct, wise choice requires the weighing of many alternatives and cannot be simply achieved.

The insanity defense presupposes the assumption that there are certain people who can be marked off in a clearly defined category labelled "insane" and who should be treated differently. This notion, like the concept of retribution, is being increasingly called into question. Some modern psychologists believe that extreme behavior flows from basic sources which are present in all of us. According to them, there are no sharp dividing lines. Instead, they believe there is a broad spectrum of sources of conduct determined by the past environment of an individual, his basic impulses and changes in the environment.[3]

---

[1] See discussion of differing tests in e.g., United States v. Freeman, 357 F.2d 606 2d Cir. 1966).

[2] On the purposes of criminal justice, see Michael & Wechsler, "A Rationale of the Law of Homicide," 37 Colum. L. Rev. 1262, 1325 (1937); on deterrence generally, see Schelling, Strategies of Conflict (1963); on approaches to rehabilitation, compare Glasser, Reality Therapy (1967).

[3] See Meninger, The Crime of Punishment 117–118 (1968); Axline, Dibs: In Search of Self (1964); Fried, "Moral Causation," 77 Harv L. Rev. 1258 (1964); Glasser, Reality Therapy (1967) Douglas, "Should There Be an Insanity Defense," Corrective Psych. & J. Soc. Therapy 129 (Fall, 1968.)

Nevertheless, we have seen a broadening of the insanity defense in criminal cases.[4]

Among the results of this expansion are:

(a) Some defendants who are acquitted by reason of insanity may receive no mandatory treatment for antisocial conduct, where they are not an obvious physical danger to the community,[5] there is no special verdict as to the basis of an acquittal,[6] or "temporary" past insanity is claimed. The Court of Appeals for the District of Columbia has also held that commitment to a mental hospital cannot automatically follow from an acquittal by reason of insanity, but must depend on a separate hearing concerning the *present* mental condition of the defendant.[7]

(b) Others may be committed to hospital as insane and have far more difficulty being released than would a person imprisoned under a sentence for the offense involved.

For these reasons, as the insanity defense has expanded, questions have begun to be raised whether such a defense is the best way of approaching decisions as to how offenders should be treated.[8]

It has been suggested that:

"Label judicial process as one will, no resort to subtlety can refute the fact that the power to imprison is a criminal sanction. To view otherwise is self delusion." [9]

It has also been suggested that as the insanity defense is expanded there is "more likelihood that hospitals will become prisons than that prisions will become hospitals." [10]

As an alternative a decision could first be made by the ordinary legal processes whether a person was guilty of a prohibited antisocial act under a criminal statute. If so he could then be subjected to measures for the prevention of such conduct appropriate to the particular case. At this point, all of the resources of psychology and psychiatry, and every other discipline relevant to the case, could be brought to bear. A wide variety of choices might be open. Of course this entails time and effort, but so does the trial of each insanity defense raised. The decision among alternative should be made by the sentencing judge or other institutions or both. The alternatives available might be widened to include in appropriate cases not merely imprisonment, fine or probation, but also voluntary commitment to special types of institutions of various kinds—medical and other—with the consent of the defendant in lieu of the conventional sanctions.[11]

The possibility of the abolition of the insanity defense is partly dependent upon the movement to abolish the death penalty.[12] The insanity defense or some other escape valve would continue to be needed in cases where a death penalty is authorized; flexible sentencing is a necessary part of any substitute for the insanity defense.

A rationale which would support such a substitute for the insanity defense is implicit in the prevailing opinion in *Powell* v. *Texas*,[13] in which the Supreme

---

[4] E.g., Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954); United States v. Freeman, 357 F.2d 606 (2d Cir. 1966); United States v. Currens, 290 F.2d 751 (3d Cir. 1961).

[5] See United States v. Sheller, 369 F.2d 293 (2d Cir. 1966); Time, January 6, 1967, p. 80.

[6] Concerning federal practice see Pope v. United States, 372 F.2d 710, 731–32 (8th Cir. 1967), vacated on other grounds, 392 U.S. 651 (1968); Sauer v. United States, 241 F.2d 640, 650–52 (9th Cir. 1957) cert. denied, 354 U.S. 940 (1957); United States v. Currens, 290 F.2d 751, 775–76 (3d Cir. 1961); Pope v. United States, 298 F.2d 507, 509–10 (5th Cir. 1962); Powers v. United States, 305 F.2d 157, 158 (10th Cir. 1962); cf. Greenwood v. United States, 350 U.S. 366 (1956); but cf. Pollard v. United States, 285 F.2d 81, 83 (6th Cir. 1960).

[7] Bolton v. Harris, 395 F.2d 642 (D.C. Cir. 1968). Compare generally Lynch v. Overholser, 369 U.S. 705 (1962).

[8] See Douglas, "Should There Be an Insanity Defense?", Corrective Psych. & J. Soc. Therapy 129 (Fall 1968); Goldstein & Katz, "Abolish the Insanity Defense—Why Not?," 72 Yale L.J. 853 (1963); Meninger, the Crime of Punishment (1968); See also Bennett & Matthews, "Mental Disability and the Law," 54 A.B.A.J. 467 (1968); Schwartz, "Psychiatry and Criminal Law," N.Y.L.J. July 30, 1968, at p. 4, Cols. 7–8; Brief for the United States, United States v. Freeman, 357 F.2d 606 (2d Cir. 1966), pp. 15–20. Compare also Aubert, The Hidden Society 31 (1965) (". . . any situation in which an individual stands to gain from withdrawal is such as to render suspect his claim of illness.")

[9] Cannon City v. Meri, 137 Colo. 169, 174, 323 P.2d 614, 617 (1958) quoted in Goldstein & Katz, "Abolish the Insanity Defense—Why Not?," Yale L.J. 853, 869 n.48 (1963).

[10] Birnbaum, "Medicine and the Law," 261 New England J. of Medicine 1220, 1223 (1959).

[11] Committee on Criminal Law, Federal Bar Association of New York, New Jersey and Connecticut, "New Approaches to Sentencing," 3 Criminal L. Bull. 682 (Dec. 1967).

[12] For a suggestion that the death penalty may ultimately be held cruel and unusual punishment, see Bickel, The Least Dangerous Branch (1962).

[13] 392 U.S. 514 (1968).

Court refused to hold unconstitutional a conviction for public drunkenness where the state court had found that the defendant acted under compulsion of a disease of alcoholism. The prevailing opinion by four Justices distinguished a prior case holding invalid a statute which punished a defendant for the status of being an addict rather than for any specific act.[14] At one point the opinion stated:

"One virtue of the criminal process is, at least, that the duration of penal incarceration typically has some outside statutory limit . . . 'Therapeutic civil commitment' lacks this feature; one is typically committed until one is 'cured'." [15]

The opinion concluded that criminal sanctions could serve a valid social purpose of deterrence, and added:

"Nothing could be less fruitful than for this Court to be impelled into defining some sort of insanity test in constitutional terms." [16]

Since the insanity defense has been a purely judicial concept with a few exceptions [17] it would seem that the courts could modify it.[18] Change could also come through legislation. Since crimes are defined by legislation, defenses can likewise be defined by statute absent a constitutional barrier.

Even were the courts to rule that the insanity defense involved a constitutional dimension, the judiciary should be given an opportunity to pass upon different ways of dealing with the problem.[19]

Abolition of "insanity" as a separate defense would not remove criminal intent as an element of any offense. Any evidence tending to show that a defendant was incapable of forming the intent required to commit a particular offense would still be admissible on that issue.

A basic re-evaluation of the relation of psychiatric concepts to the criminal law might also extend to the problem of a defendant's competency to stand trial.

Today we often say something like this to persons accused of crime:

"You claim to be innocent and ask for a trial. We in our superior wisdom don't think that you are able to do the best possible job in protecting yourself. Therefore, in order to see to it that the trial you ultimately get is perfect, we are going to give you no trial at all until we decide you are better. Please don't object when you are put in an institution without your consent, without trial or proof that you are guilty. This is for your own good. Remember when you are locked up that this is a hospital and not a jail. If we decide that you are able to do a better job in proving your innocence we may give you a chance to try. In the meantime, best of luck."

At present we not only sanction this type of procedure but sometimes encourage and even require it. Where there is serious question about the matter, unless the prosecutor insists on a hearing as to whether a defendant who wants a trial is able to help his lawyer effectively, the defendant may claim later that he was incompetent at the time of trial. Some have had their convictions set aside by this means where the Government could not prove retroactively that the defendant was able to assist his counsel at the time of trial.[20]

This ruling, unlike those dealing with the insanity at the time of the crime, has been said to be one of constitutional dimension. But this should not deter us from seeking to change the procedure if a better alternative providing adequate protection can be found.

Some psychiatrists have disclaimed the notion that psychiatric judgments are adequate in this area.[21] Defense counsel may have competence here and indeed the defendant himself may have a basis for saying whether he feels he can defend himself.

One possibility for dealing with this problem would be as follows: If a defendant or his lawyer thought the defendant needed psychiatric treatment before he could defend himself effectively he could be given a chance to prove it. If he claimed that he had uncovered evidence as a result of an improvement in his

[14] Robinson v. California, 370 U.S. 660 (1962).
[15] 392 U.S. at 529.
[16] Id at 536.
[17] E.g. N.Y. Penal Law Section 1120.
[18] Compare Brown v. Board of Education, 347 U.S. 483 (1954); Baker v. Carr, 369 U.S. 186 (1962); Gideon v. Wainwright, 372 U.S. 335 (1963).
[19] See Bickel, The Least Dangerous Branch (1962).
[20] Pate v. Robinson, 383 U.S. 375 (1966); Dusky v. United States, 362 U.S. 402 (1960). The consequence of being held incompetent before trial may be lengthy incarceration without trial. See Greenwood v. United States, 350 U.S. 366 (1955); cf. Weiter v. Settle, 193 F. Supp. 318 (W.D. Mo. 1961); Royal v. Settle, 192 F. Supp. 176 (W.D. Mo. 159).
[21] Schwart, "Psychiatry and Criminal Law," N.Y.L.J. July 30, 1968, p. 4, Col. 7–8.

wanted a trial and his lawyer said that he and the defendant could defend the case adequately they could be allowed to do so. If the defendant subsequently

mental condition which would tend to establish his innocence, he could be given a hearing as to whether the new evidence was in fact indicative of innocence and was previously unavailable because of his mental condition. If so, the defendant could be given a new trial. Otherwise he would not.

The present notion is that a person who "cannot effectively assist his counsel" is not "competent" and therefore cannot waive the "right" to a trial at which he will be "competent." This tends to ignore the human element in all such judgments;[22] the term "person who is incompetent" does not necessarily describe a clearly defined category. We may be "doing little more than using labels to describe a result rather than any trustworthy formula by which it is reached."[23]

When presented with a new alternative and a new rationale the courts would be dealing with a new situation.

The present approach to ability to stand trial, which permits a person to be deprived of his right to any trial, is subject to abuse and can be used to deprive citizens of their liberty for improper reasons.[24] Reform in the area of commitment for inability to stand trial might be only one aspect of an effort to protect against abuses in the field of compulsory commitment generally.

A re-evaluation of the role of psychiatric concepts in criminal justice can benefit both the effectiveness of law enforcement and the respect for individual rights.

Psychiatric and psychological manpower now devoted to testifying about issues which are not really medical issues can be liberated for helping patients. Both law and psychiatry—and both the fairness and effectiveness of criminal justice—can gain. Respectfully submitted.

The Insanity Defense Under the Proposed Federal Criminal Code

(By Abraham S. Goldstein*)

I am grateful for the opportunity to appear before you to discuss the insanity defense under the proposed federal criminal code. I should like to address my remarks to three areas: (1) S. 1's provision for a defense because of mental illness or defect; (2) the suggestion that the defense be abolished; and (3) the mechanism provided by S. 1 for determining whether a person who established the defense should be committed and for how long. In my testimony, I shall draw heavily upon my book on *The Insanity Defense* (Yale, 1967), and on my experience as a teacher of criminal law, as a member of the Connecticut Commission to Revise the Criminal Statutes and, for some years, as a member of the Connecticut Board of Parole.

I. The defense of "mental illness or defect."

S. 1 proposes a rule substantially like that of the American Law Institutes Model Penal Code. This test is a modernized and much improved rendition of *M'Naghten* and the "control" tests. It substitutes "appreciate" for "know," thereby indicating a preference for the view that a sane offender must be emotionally as well as intellectually aware of the significance of his conduct.

It avoids any reference to the misleading words "irresistible impulse," which had introduced confusion into a body of law built on loss of control. And it requires only "substantial" incapacity, thereby eliminating the occasional references in the older cases to "complete" or "total" destruction of the normal capacity of the defendant.

It has been suggested, of course, that the words "substantial" and "appreciate" are vague, that the test assumes a compartmentalized mind, that mental disease (and S. 1's substitute "mental illness") is largely undefined. But the *Durham* experience has taken much of the bite from such criticisms. It is now apparent that a precise definition of insanity is impossible, that the effort to eliminate functional definitions deprives the jury of an essential concreteness of statement and that it is entirely sensible to leave "mental illness" undefined, at least so long as it is modified by a statement of minimal conditions for being held to account under a system of criminal law.

---

[22] See Frank, Courts on Trial (1949); Cahn, "Fact Skepticism: An Unexpected Chapter," 38 N.Y.U.L. Rev. 1025 (1963).

[23] DiSanto v. Pennsylvania, 273 U.S. 34, 44 (1927) (Stone, J. Dissenting).

[24] See Petri & Smith, "The Rights of the Mentally Ill," Ripon Forum Report No. P67–1 (Feb. 1967). See also Szaz, Law, Liberty and Psychiatry (1963); Kutner, "The Illusion of Due Process in Commitment Proceedings," 57 N.W. U.L. Rev. 383 (1962).

*Dean and Cromwell Professor of Law, Yale Law School. Statement submitted on July 19, 1973 to Subcommittee on Criminal Law and Procedure of U.S. Senate Committee on the Judiciary, considering S. 1 (93 Cong. 1st sess.).

The ALI test has already been adopted in all but one of the federal circuit courts of appeals. See the comprehensive opinion of Judge Leventhal in *United States v. Brawner*, F. 2d (D.C. Cir., June 23, 1972). And an increasing number of state courts have adopted it entirely, or in modified forms similar to that proposed in S. 1. Unquestionably, the ALI rule solves most of the problems generally associated with the older rules while at the same time representing the same line of historical development. As a result, it is likely to become the formula for the immediate future in the United States.

As a new rule is being considered, it is important to bear in mind the role of the insanity defense in criminal law and the remarkable degree to which that role has been misunderstood, both by lawyers and psychiatrists. It has been widely, and incorrectly, assumed that the defense called for specific psychological facts. The critics of existing rules, believing that the wrong facts were being sought, devoted their energies to finding the "correct" questions, questions which would enable the psychiatric witness to testify fully and meaningfully. Hence, the revival in the twenties of the "control" tests and the support in more recent times for the *Durham* rule. But every new rule has brought disappointment with it. Even under *Durham*, the phrase "mental disease" has begun to look less and less medical, more and more normative, as close attention has been directed to it.

The key to the insanity defense is probably to be found in the extent to which it must serve as a bridge, for a lay jury, between medical science and the complex social objectives of channeling retributive impulses and satisfying the need for special and general deterrence. This has meant that the exemption from criminal responsibility could not be stated in medical terms alone. It must instead reflect the idea of "blame" because that concept is the appropriate societal reaction to those who choose to do wrong; only those whose illness makes them incapable of responding to the warning signals sent out by the criminal code are regarded by most of us as deserving compassion rather than condemnation, "treatment" rather than "correction."

So long as we do not know what really "causes" crime, the insanity defense will have to be framed in a way which permits juries to express the feelings of the community on the subject of responsibility. Perhaps when there are experts who do know, the matter can be given over entirely to them, or the question can be framed for the jury in precise terms. But in the long meanwhile, we shall have to be content with a concept of insanity very much like the one we now have. That concept treats insanity as a legal standard, a loosely framed guide for a process in which particular cases are reconciled with the hard-to-state purposes of the substantive law. Those purposes are, in turn, fixed by bodies which are authorized, through a political process, to speak for the society—legislatures in some instances, courts in others, and juries ultimately. Stated another way, legislatures and courts have fixed the insanity standard in ways which enable jurors to make moral judgments about blame, but informed as much as possible by relevant facts and medical opinion. Thus viewed, the insanity test is merely the organizing principle of a process of decision which uses a "political" solution to advance subtle social objectives. It is a normative standard applied to conflicting clusters of fact and opinion by a jury, and institution which is the traditional embodiment of community morality and, therefore, well suited to determining whether a particular defendant, and his act, warrant condemnation rather than compassion.

II. The proposal to abolish the defense

It has been suggested by a committee consultant that mental defenses or defect should be a defense only if "it negatives an element of the offense." Presumably, under such a standard, juries would be asked if the defendant's mental illness was such as to negative the intent, or knowledge, or recklessness, or negligence required for criminal liability. Since much of the existing body of criminal law is built on an objective theory of criminal liability, mental illness would not "negative" an element of the offense if the jury faithfully applied the objective standard. If, for example, a jury were told—as it generally is except where specific intent is required—that defendants are to be held to intend the natural and probable consequence of their acts, the fact of mental illness would be theoretically irrelevant. The same would be true in circumstances of provocation and similar situations, when a "reasonable man" standard is applied. "Mental illness or defect" would become relevant only if the jury were also told that objective standards are inapplicable.

The apparent purpose of "Alternative Formulation 1" is to restrict the insanity defense only to those situations where, under current law, mental illness can already be used to negative an element of the offense—as in reducing the grade of murder from first to second degree, or perhaps adopting the *Wells-Gorshen* line of cases in California.[1] It would, therefore, abolish the insanity defense and make criminality a matter of strict liability, turning on objective conduct alone and leaving the real mental state of the accused out of account except at the sentencing stage. Proponents of this view argue that there is little purpose in trying to assess "blame" because the factors which move a man to crime are too various and too unfathomable.

There are serious, and decisive, objections to the proposal to abolish the insanity defense. First, the effort to separate the offending act from the mental state of the offender has been singularly unsuccessful in the only jurisdictions which have tried it. Louisell and Hazard have recounted in detail the manner in which California's two-step trial, separating the issue of "guilt" from that of insanity, has foundered on the view that *mens rea* may not be read out of the guilt-finding part of the criminal trial.[2] A more sustained effort might, of course, be made to eliminate all questions of mental condition from the first stage. But the California courts have intimated it would be unconstitutional to do so. And they have case law on their side. The only two attempts in our history to eliminate both the *mens rea* requirement and the insanity defense have been unsuccessful. The statutes were held by the courts of Washington and Mississippi to deny due process of law, depriving defendants of a jury trial on defenses which had "always" been passed on by the jury. "This right of trial," said the Washington court, "must mean something more than the preservation of the mere form of trial by jury, else the Legislature could by the process of . . . defining crime or criminal procedure entirely destroy the substance of the right by limiting the questions to be submitted to the jury." The issue of insanity, the court continued, was too intrinsic to the concept of crime to permit its removal by legislation. It "is patent to all men that the status and condition in the eyes of the world, and under the law, of one convicted of crime is vastly different from one simply judged insane."[3] To convict an insane man, said the Mississippi court in tones remarkably like those of *Robinson v. California*, would be a "cruel and unusual punishment."[4]

Second, the proposal tends to sweep past the jury and toward the sentencing stage large numbers of "offenders" who would now go free, because they lacked *mens rea*, on the assumption that they would be weeded out by the sentencing or corrections authority. Experience suggests, however, that prematurely labeling a person an "offender" is more likely than any other single factor to confirm him in a criminal career; and that the "helping" professions tend to think they can help even when they cannot, with all that implies for keeping more people in custody or control than in the past.

Third, and most fundamentally, eliminating the insanity defense would remove from the criminal law and the public conscience the vitally important distinction between illness and evil, or would tuck it away in an administrative process. The man who wished to contest his responsibility before the public and his peers would no longer be able to do so. Instead, he would be approached entirely in social engineering terms: How has the human mechanism gone awry? What stresses does it place upon the society? How can the stresses be minimized and the mechanism put right?

This approach overlooks entirely the place of the concept of responsibility itself in keeping the mechanism in proper running order. That concept is more seriously threatened today than ever before. This is a time of anomie—of men separated from their faiths, their tribes, and their villages—and trying to achieve in a single generation what could not previously be achieved in several. Many achieve all they expect, but huge numbers do not; these vent their frustration in anger, in violence, and in theft.

In such a time, the insanity defense can play a part in reinforcing the sense of obligation or responsibility. Its emphasis on whether an offender is sick or bad helps to keep alive the almost forgotten drama of individual responsibility. Its

---

[1] See A. Goldstein, The Insanity Defense, ch. 12 (1967).

[2] Louisell and Hazard, "Insanity as a Defense: The Bifurcated Trial," 49 Calif. L. Rev. 805 (1961).

[3] *Sinclair* v. *State*, 132 So. 581, et seq. (Miss. 1931); *State* v. *Strasburg*, 110 Pac. 1020 (Wash. 1910).

[4] *Robinson* v. *California*, 370 U.S. 660 (1962).

weight is felt through the tremendous appeal it holds for the popular imagination, as that imagination is gripped by a dramatic trial and as the public at large identifies with the man in the dock. In this way, it becomes part of a complex of cultural forces that keep alive the moral lessons, and the myths, which are essential to the continued order of society. In short, even if we have misgivings about blaming a particular individual, because he has been shaped long ago by forces he may no longer be able to resist, the concept of "blame" may be necessary.

However much we may concentrate our attention on the individual, we rely implicitly upon the existence of a culture, and a value system, which will enable us to move the individual toward conformity or to a reasonable nonconformity. That value system, if it is to become fixed early enough, must be absorbed from parents. And it, in turn, is a reflection of the larger culture, absorbed slowly and subtly over generations, transmitted by parent to child through the child-rearing devices extant in a given society. The concept of "blame," and insanity which is its other side, is one of the ways in which the culture marks out the extremes beyond which nonconformity may not go. It is one of the complex of elements which train people so that it becomes almost intuitive not to steal or rape or kill. A society which did not set such limits would probably, in time, become a less-law-abiding society. This is not to say that there is not a good deal of room for humanizing the criminal law, or the insanity defense, but only that it is essential that "blame" be retained as a spur to individual responsibility.

Finally, the heart of the distinction between conviction and acquittal by reason of insanity lies in the fact that the former represents official condemnation. Yet the acquittal is itself a sanction, bringing with it comparable stigma and the prospect of indeterminate detention. If the choice between the two sanctions is to be made in a way that will not only be acceptable to the larger community but will also serve the symbolic function we have noted, it is important that the decision be made by a democratically selected jury rather than by experts—because the public can identify with the former but not with the latter.

III The problem of indeterminate detention

One of the critical problems in administering the insanity defense is that it is raised so rarely as to make questionable assigning it an important role in the criminal law. That problem will continue as long as the defense brings with it the specter of indeterminate detention. Defense counsel would be derelict in his duty if he failed to ask how the consequences of criminality compare with those of insanity. Since he will find that as much stigma is suffered from one as from the other, that employers are equally likely to hesitate about hiring persons in either category, he will quickly turn to the question of length of incarceration. The defendant who does not assert the insanity defense will probably be convicted and sentenced to a term of years fixed by the legislature, or to a range with minimum and maximum limits. These may be suspended by the court, or he may be released on probation. Even if he is sent to prison, his sentence may be reduced by allowance of time off for good behavior or by release on parole. However, if he should successfully assert the insanity defense, he would probably be committed for a wholly indefinite period. This may prove to be longer, or shorter, than the period he would have served if he had been convicted.

The insanity route is likely to be chosen only where conviction would bring with it a sufficiently long sentence to override the anxiety and fear excited by a wholly indefinite term. But as the probable sentence decreases, the risks inhering in an indefinite term will seem more forbidding and the insanity defense will be correspondingly inhibited. At present, the lawyer's inclination in the bulk of criminal cases is, unquestionably, to keep his client within the conventional criminal process—because he is more familiar with it, because he can make educated guesses about what will happen to his client at various stages, and because the fixed maximum sentence allays the haunting fear of a detention which may never end.

It may well be that this attitude will change as lawyers become more proficient in handling criminal cases. In time, they may be able to predict with reasonable accuracy—through their own experience or through the publication of statistics on release—just what the prospects of release may be after a successful insanity defense and to compare them with the probable periods of detention after conviction. Matters may develop so far that account will be taken of the therapeutic aspects of the problem: Will the offender be helped more by the mental hospital or by the prison? Is he suffering from a mental illness which can

be treated? How long will the treatment take? Do the state's institutions for the criminally insane have the personnel and the facilities to provide the treatment indicated? Are such facilities equally likely to be available in the prisons or somewhere else within the Department of Corrections? Is it possible for someone within the prison system to be treated within the mental hospital system and yet not have to be committed for an indefinite term? What is release policy for the insane? And how does it compare with parole policy for prisoners?

Until we arrive at a day when questions of this sort can be answered with relative precision, and the ability to treat successfully makes the answers comport with a decent concern for individual liberty, it is essential that something be done about the problem of completely indeterminate detention. One approach would be to have the acquittal by reason of insanity result at most, in a commitment for a period fixed at the outset, the outer limit of which would be the sentence that might have been imposed. That period represents the "political" judgment as to how much detention is needed to serve legitimate deterrent or retributive functions. For the bulk of mentally ill offenders, the period fixed for their criminal sentence is long enough to try to make them better. If that should fail, then they should be released—because the prediction that they will err again is likely to be inaccurate and because the crimes threatened are not likely to be either so imminent or so serious as to compensate for the probably inaccurate prediction. For a relatively few offenders, a detention procedure should be devised for defined and limited periods, but only after a showing that such persons are imminently and seriously dangerous to life—making appropriate discounts for the unreliability of such predictions. The procedure for such extensions of term should be one in which the burden of proof is upon the state and the offender is given every opportunity, and aid, in rebutting the charge against him.

S. 1 makes important advances in dealing with this problem. It does not provide for automatic commitment of the person acquitted because of mental illness at the time of the crime. Instead, it authorizes an inquiry, after acquittal, into his current mental condition and provides for commitment only if he would "create a likelihood of serious harm by reason of mental illness or defect unless hospitalized. . ." (§3–11 C8(a)(3)).

And "serious harm" is defined to include only "substantial risk of bodily injury" to self or others (§ 3–11 C1(4)). In addition to this relatively narrow basis for commitment after acquittal, S. 1 provides for an annual report to the court "setting forth the reasons why failure to continue to hospitalize the person would create a likelihood of serious harm by reason of mental illness or defect." (§ 3–11 C 8(g)).

In short, S. 1 deals satisfactorily with the problem of indeterminate detention, except that it sets no upper limit. Yet without such an upper limit, a defendant is artificially inhibited from making a genuinely free choice, within the criminal process, as to whether he wishes to plead guilty or seek acquittal on grounds of mental illness or defect. I think this Committee would add to its already significant improvements in this area if it were to require the trial judge, at the time of commitment under § 3–11 C8, to fix a maximum period of detention no greater than the sentence he would have imposed if the defendant had been convicted. At the close of that period, there should be a right to release unless the state can then establish by a heavy burden of proof (such as "clear and convincing evidence") the requisite "likelihood of serious harm."

Supplement to Statement on Insanity Defense Submitted on July 19, 1973

(By Abraham S. Goldstein*)

I should like to add to my earlier comments on S. 1's insanity provisions some observations on the Administration bill, S. 1400, which was introduced in late March. This latest proposal is not only confusing; it represents a dramatic departure from existing law and will set the courts on years of conflicting interpretations—all in a direction different from the mainstream of development in other jurisdictions.

The Administration bill, S. 1400, adds yet another formulation of the insanity defense to those already before the Congress. Under its § 502,

*Dean and Cromwell Professor of Law, Yale Law School. Statement to be presented on May 16, 1973 to Subcommittee on Criminal Law and Procedure of U.S. Senate Committee on the Judiciary, considering S. 1 (93 Cong. 2nd sess.).

"It is a defense . . . that the defendant, as a result of mental disease or defect, lacked the state of mind required as an element of the offense charged. Mental disease or defect does not otherwise constitute a defense."

On its face, this provision makes the defense turn on the definition of each offense. To prevail, a defendant must have had a mental disease with characteristics which persuade a jury that he lacked, for example, (a) the intention to kill or (b) the recklessness required for manslaughter, or (c) the negligence required for lesser crimes. As in all other insanity tests, therefore, "mental disease" is used as a limiting device, to assure that it is of the sort which would make it inappropriate to condemn the defendant as a criminal. Most tests, however, introduce functional criteria for determining whether the defendant could have been deterred by the warnings of the criminal code. They ask questions about his capacity to know that his conduct was wrong, or to control his conduct. And the answers to those questions tell us whether the criminal law should be used against him, or whether he should be left to other remedial processes.

The Administration proposal retains the idea that there must be a "mental disease or defect" but then it bypasses the effort to get the jury to relate that condition to the objectives of the criminal law. Instead, it moves the inquiry to the relationship between "mental disease" and intention or recklessness or negligence. The resulting approach is strikingly reminiscent of the *Durham* rule. Where *Durham* asked whether the crime charged was "the product of mental disease or defect", § 502 would ask whether the crime charged was "intended" [or was the result of reckless or negligent conduct] by a person with a given "mental disease or defect".

It seems plain, from the comments which have been made by the President and by Mr. Peterson of the Criminal Division, that the Administration's purpose is not to present a *broader* defense than the one proposed by the Brown Commission or by S. 1. Indeed, they have spoken as if they were proposing either a narrow version of *McNaghten* or a total abolition of the insanity defense, making criminal liability turn on conduct alone and leaving the mental element entirely to the sentencing stage. In my statement of March 8, I set forth some of the constitutional and policy objections to so drastic an approach. In any event, the only way to accomplish these stated objectives would be through a different measure than the one proposed. Plainly, the language of § 502 accomplishes none of these objectives. Their current proposal cannot be construed consistently with such objectives unless it is distorted well beyond its plain meaning—for example, by reading it as limiting the insanity defense only to crimes requiring a specific intent and eliminating it for all the rest of the crimes requiring a lesser mental element. The courts would have to strain far beyond their proper role to accomplish such objectives under the language now used.

If, therefore, § 502 means to restore a *Durham*-like standard, it comes too late. Even the *Durham* court has moved on to a rule approximating S. 1, in plain recognition of the need for functional and normative guides for judge and jury as to the nature of the mental disease or defect which can qualify for an insanity defense. If, despite the language used in their bill, the Administration spokesman should prevail, they will set in motion years of litigation and conflict in an area where consensus is rapidly emerging around rules like those in S. 1. In my earlier statement, I have set forth in detail why I think such rules represent the proper approach to the insanity defense.

STAFF SURVEY, COMMITTEE ON THE JUDICIARY, SUBCOMMITTEE ON CRIMINAL LAWS AND PROCEDURES, U.S. SENATE

RECOMMENDATION OF STATE MENTAL HEALTH DEPARTMENTS ON DEFENSE OF INSANITY TO CRIMINAL LIABILITY

On March 24, 1972, the staff of the Subcommittee on Criminal Laws and Procedures initiated a survey of the departments of mental health of each of the 50 states and the District of Columbia and a number of individual psychiatrists. The survey stated the position taken by the National Commission on Reform of Federal Criminal Laws with respect to the so-called insanity defense and then summarized five possible alternative legal positions which have been mentioned or recommended in the literature or in communications to the Subcommittee.

The Chairman of the Subcommittee asked the several commissioners and directors "which of the six choices, or variations thereof, should this Subcommittee recommend to the full Committee and Senate?"

The body of the letter is as follows:

"The Subcommittee on Criminal Laws and Procedures of the Committee on the Judiciary of the United States Senate is considering a revision of the Federal criminal code.

"Our 'work basis' is a proposed new Federal Criminal Code prepared by the National Commission on Reform of Federal Criminal Laws.

"The Commission recommended, among many other things, that the 'insanity' defense to criminal responsibility be codified because 'present federal law as to the defense of insanity is not uniform.' They accepted and proposed as Section 503 of the new Code a somewhat modified version of the so-called A.L.I. formulation: '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 to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. 'Mental disease or defect' does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct. Lack of criminal responsibility under this section is a defense.'

"The Subcommittee has heard a great many alternative suggestions including the following:

"(1) Retain the present law under which each Circuit Court of Appeals by case law sets the defense for the Federal courts in that circuit;

"(2) Enact a defense, but ask the question directly and make it a ground for acquittal if the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law 'is so substantially impaired that he cannot justly be held responsible';

"(3) Enact a defense, but limit the defense to the mental or culpability element of the crime, to wit:

" 'Mental disease or mental defect is a defense to a criminal charge only if it negates the culpability required as an element of the offense charged. In any prosecution for an offense, evidence of mental disease or mental defect of the defendant may be admitted whenever it is relevant to negate the culpability required as an element of the offense;'

"(4) Abolish the insanity defense, but make it mandatory in case of conviction that the defendant be treated or hospitalized and not sent to prison, to wit:

" 'For a crime which someone has committed under the influence of insanity, feeble-mindedness or other abnormality of such profound nature that it must be considered equivalent to insanity, no other sanction may be applied than surrender for special care or, in cases specified in the second paragraph, fine or probation;' cf. Swedish Penal Code, Chapter 33, § 2;

"(5) Enact the so-called M'Naghten and irresistible impulse tests.

"We would like to have the benefit of your expertise on this important question of penal policy. Which of the six choices, or variations thereof, should this Subcommittee recommend to the full Committee and Senate? Please indicate whether you have testified in court in a criminal case as an expert witness and under which test(s), and if so, please evaluate that experience. If you do not wish to express a preference, please forward this to a fellow colleague who may wish to do so."

Approximately 55 letters were sent out by the Subcommittee. The recipients in Colorado, Mississippi, Maryland, and Wyoming took advantage of the suggestion to "forward this to a fellow colleague who may wish to [express a preference]." The Subcommittee received a total of 38 responses, of which 6 merely enclosed substantive responses or indicated interest in the project and requested copies of the complete code proposed by the National Commission. The 32 substantive responses (in absolute numbers and as a percentage of the total substantive reply) are as follows:

A.L.I.—Commission formulation ["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 to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. 'Mental disease or defect' does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct."] *8 (25.0%)*

Alternative (1) [Present Federal law] *1 (3.1%)*

Alternative (2) [Defense if the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law "is so substantially impaired that he cannot justly be held responsible."] *2* (*6.3%*)

Alternative (*3*) ["Mental disease or mental defect is a defense to a criminal charge only if it negates the culpability required as an element of the offense charged. In any prosecution for an offense, evidence of mental disease or mental defect of the defendant may be admitted whenever it is relevant to negate the culpability required as an element of the offense."] *3* (*9.4%*)

Alternative (*4*) [Abolish the insanity defense, but make it mandatory in case of conviction that the defendant be treated or hospitalized and not sent to prison if he is suffering from mental disease or defect] *15* (*46.9%*)

Alternative (*5*) [The M'Naghten and irresistible impulse tests] *1* (*3.1%*)

Other: 2 (*6.3%*)

Both of the "other" responses mentioned Alternative No. 4 (one recommended either No. 3 or No. 4, and the other recommended a combination of either No. 4 and No. 2 or No. 4 and No. 3). If they were included in the tabulation for the fourth alternative—abolish the insanity defense entirely—then 53.1% of the psychiatrist-respondents favor abandonment of this age-old defense to criminal prosecution.

The percentage of the psychiatrists who responded who recommended that there be no insanity defense but that a convicted defendant who is mentally ill be treated or hospitalized rather than sent to prison upon sentencing was unexpectedly high. As Dr. John Ayerigg of the Division of Mental Health of Colorado put it in 2 memoranda forwarded to the Subcommittee:

"A person is, in fact, guilty or not guilty, regardless of whether he is 'insane' or not. One of the most significant moves in psychiatry over the last ten or so years . . . is the belief that people are responsible for their behavior and that simply having a psychiatric disorder does not absolve them of responsibility." He, along with many other respondents, declared that the "adversary court setting" is a bad place for psychiatric examination, testimony and disagreement to be introduced. "The determination of . . . responsibility should be the first issue. Then how society can best manage the predicament it is in surrounding this particular individual, if [he is] in fact guilty, is the second issue." On this second issue, the expert knowledge and opinion of the psychiatrist can be helpful and useful both to the defendant and to the government. "When we consider the range of criminal behavior, the range of degrees within any category of criminal behavior, the knowledge of family dynamics and the role they play in individual behavior, the influence of group dynamics, etc., the insanity plea seems anachronistic. If we then couple this with the much needed reforms in our national penal system, reducing the emphasis on punishment and increasing the emphasis on rehabilitation, then the insanity plea seems even more anachronistic."

Another Colorado psychiatrist, Dr. Ethel Bonn, declared that she is "definitely opposed to the 'battle of the experts' which now prevails in many courtrooms as one of the means to persuade the judge and jury about culpability and about what should be done with the mentally ill offender." She recommends: "(1) determining in the courtroom whether or not the accused did indeed commit the crime and if so, (2) later determining, perhaps in the judge's chambers, with the benefit of psychiatric and other expert consultation, what course of action (treatment, rehabilitation, confinement, etc.) might be taken in the best interests of the accused, the community, and society as a whole."

A Mississippi psychiatrist, the director of a state hospital, was blunt: "First and foremost, my admittedly limited experience has convinced me that the insanity defense is too often used as just another legalistic ploy, either to attempt to avoid or evade responsibility, or, at the very least to delay the case while awaiting psychiatric examination . . . I have seen the very bewildering (to the jury) and frustrating (to the professionals) situation of having two approximately equally competent psychiatrists get up and present diametrically opposite conclusions, based on essentially the same information. I can only strongly infer that this does nothing to promote justice, and it certainly plays havoc with respect for the psychiatric specialty of medicine. My very strong recommendations to the Subcommittee would be to abolish totally the use of an insanity defense, but to make available in every penal system the services of psychiatric and clinical psychological consultation, so that individuals convicted of any criminal act could be screened for *treatable* mental disorders. . . . [W]e are

finding . . . that the commitment of persons who have committed criminal acts, but who are also mentally ill, to mental hospitals has been, in many ways, a more cruel punishment, since so many of our mental hospitals operated by State and Federal systems are actually penitentiaries in everything but name, and in addition, the 'sentences' are indefinite and sometimes lifelong."

The Commissioner of Mental Health of the State of Alabama, Dr. Stonewall B. Stickney, was equally emphatic on the basis of his experience for many years as a consultant to the United States Attorney in Pittsburgh. "It was my strong impression over a period of five years that any lawyer could find just as many psychiatrists to say yes or to say no to the questions." On the basis of his experience with the Alabama department he commented that the insanity defense "causes a heavy burden on the state mental institutions, where many such cases are sent for very flimsy reasons, e.g., to allow the case to cool off." He does not believe that the insanity defense "will be useful very much longer" but that the best place for a psychiatric opinion in a criminal case is "in the pre-trial consultation with the court, and the post-trial deliberations on treatment. The issues of culpability and of appropriate treatment appear to me best answered when kept separate."

Another psychiatrist, Dr. Zigmond M. Lebensohn of the District of Columbia wrote: "I have felt for a long time that psychiatry does not really belong in the adversary proceeding. There is nothing in the training of a psychiatrist which prepares him for this type of business. . . . I would strongly advocate any system which would use the psychiatrist in the way for which he is best equipped, namely, to advise the court as to the best treatment suitable to a given case since the psychiatrist is thoroughly aware of both the possibilities and the limitations of mental hospital care."

Another District psychiatrist, Dr. David A. Lanham, recommended the A.L.I.-Commission formulation *but without* using psychiatrists as expert witnesses until after the defendant has been found guilty. The psychiatrist could assist in determining whether the defendant is competent to stand trial and in advising the court as to sentence, but he would not participate in the trial itself. "I believe this remedy would serve a variety of functions. It would take away the 'Roman Circus' atmosphere of psychiatrists testifying as expert witnesses on opposite sides in an adversary proceeding. It would also get away from the notion that mentally ill people either have no responsibility at all for what they do, or total responsibility. There are many shades of gray in between, and everyone is responsible for his actions insofar as he has actually done something. Actually, I believe this total exoneration from responsibility often works to the detriment of the mentally ill person."

The Director of the Bureau of Mental Health of the State of Maine expressed somewhat similar views, at least in part. Dr. William Schumacher declared: "I believe that the idea of considering an individual 'not guilty' for a criminal offense because he is mentally ill is an outdated concept." His proposed solution is to authorize the factfinder to return a verdict of "guilty—but ill" or to devote the first part of a 2-part trial to the determination of "whether the individual charged with the act had indeed committed it."

The Superintendent of the Wyoming State Hospital, Dr. William N. Karn, after commenting that he has "always found it a very unrewarding experience" to testify in criminal cases in that state, urged total abolition of the defense. "I believe that a trial should be held to determine first of all whether or not the defendant committed the crime in question and if found 'guilty' of the crime, then the determination of degree of responsibility could be made. . . . Such dispositions, of course, could then include involuntary psychiatric hospitalization, penal incarceration, probation under supervision, outpatient counseling, or the like. To me, this would seem to be a more reasonable approach than the archaic systems now employed over the country; I doubt that trial lawyers will agree."

One additional argument in favor of abolition of the insanity defense is that it can turn out to be not a "defense" but a worse punishment. This is adverted to in a 1972 Report by the Georgetown University School of Medicine [E. Grazia, *Report on Pre-Trial Diversion of Accused Offenders to Community Mental Health Treatment Programs* (1972)]. The defendant who is found not guilty by reason of insanity and then committed to a mental hospital may be worse off than the defendant who is convicted and sentenced to imprisonment. "Although there are correctional counterparts to both those attributes of the psychiatric 'correction' of offenders [undergo unfamiliar and frightening modes of custody, care, and treatment and acquire a record of being insane or incompetent], it seems unlikely that they—the prospects of a criminal record and of jail-house life—are quite as

discouraging to most offenders, coming as they do from economic and cultural social groupings among whom criminality is reputed to be a badge of honor, but insanity a disgrace. As one recent study put it: 'The public prefers not to have close social relations with ex-mental hospital patients.'" [Report, p. 4]*

The second most frequently recommended formulation is the modified American Law Institute standard proposed by the National Commission. The Commissioner of Mental Health of the Commonwealth of Massachusetts, Dr. Milton Greenblatt, declared "that the A.L.I. formulation is probably as sensible and useful, from the standard point of view of psychiatry, that can be arrived at, given our present knowledge." The Commissioner for the Commonwealth of Virginia, Dr. William S. Allerton, agreed for somewhat different reasons: "My own experience and that of members of my department who have testified as expert witnesses in the Courts of Virginia when the plea of insanity was raised are that there has been no real difficulty under the M'Naghten and Irresistible Impulse Test which both prevail in Virginia. However, there is such a stigma attached to the M'Naghten rule because it exculpates only those who develop a thinking impairment as a result of mental illness that it is time to adopt a new formulation without discarding the positive features of the old. For one reason or another, the alternatives to the A.L.I. formulation are less desirable."

The complete text of the 31 substantive responses follows since many of the thoughts, concerns and insights expressed do not lend themselves to summarization and selective quotation.

One thought which appears to run through most of the letters is that the law should not expect of psychiatry that which it cannot perform. According to a majority of the doctors it is a misuse of psychiatric resources and capabilities to continue the present practice of warring experts, retained by the government and the defendant respectively, disputing the defendant's condition before a jury or judge. Dr. Karl Menninger has described such jury trials in the following words: "To the scientist, the whole thing is monstrous strange, and more than a little absurd. The noisy public exposure of the details of certain disapproved behavior, for example, is in startling contrast with the quiet, private, sensitive but searching examination made of an individual who is a patient rather than a criminal." [K. Menninger *The Crime of Punishment* 54 (1969)] Dr. Philip Q. Roche has observed: "In the courtroom, psychiatry appears in two forms, one that is in agreement with the prosecution, the other that is in agreement with the defense. On reflection, it may be that in court neither form is psychiatry but mere advocacy." [P. Roche, *The Criminal Mind: A Study of Communication Between Criminal Law and Psychiatry* 149 (1958)]. According to another authority: "The psychiatrist is asked about the legal insanity and responsibility of a given person. These are not psychiatric questions. These become particularly dangerous questions when the psychiatrist is expected to accept the legal definition of insanity because it is legal and then use his scientific knowledge which more often than not is fully opposed to the legal definition." [G. Zilboorg, *The Psychology of the Criminal Act and Punishment* 112 (1954)].

The Director of the West Virginia Department of Mental Health, Dr. M. Mitchell-Bateman recommended the third alternative (defense only as to lack of mental element necessary for the offense—i.e. unable to act intentionally because of illness) because it offers "the most flexibility." He concluded: "In summary, I should like to express my hope that whatever legislation is adopted in this regard will allow for a consideration of psychiatric factors in crime beyond the simple question of whether the accused was so incapacitated by mental illness as to be unable to recognize the consequences of his actions. At the same time, it should be recognized that many individuals who become involved in crime because of mental illness do require treatment of a kind which can be offered more effectively in facilities other than hospitals. In the latter regard, it is essential that facilities and programs be provided within the correctional system to deal with the psychiatric problems of the criminal offender. I am not sure that these two aspects of the problem can be dealt with effectively in isolation from each other."

---

*For a recent discussion of practical, medical and constitutional issues in Alternative No. 4 see Shwedel and Roether, "The Disposition Hearing: An Alternative to the Insanity Defense," 49 *Journal of Urban Law* 711 (1972). The authors are both prosecuting attorneys. See also Goldstein & Katz, "Abolish the Insanity Defense—Why Not? 72 *YALE L. J.* 853 (1963).

RESPONSES

Alabama	Maryland	Texas
Arizona	Massachusetts	Utah
Colorado	Michigan	Virginia
District of Columbia	Mississippi	West Virginia
Hawaii	North Carolina	Wisconsin
Illinois	Oklahoma	Wyoming
Indiana	Oregon	
Maine	Tennessee	

STATE OF ALABAMA,
DEPARTMENT OF MENTAL HEALTH,
Montgomery, Ala., April 7, 1972.

Hon. JOHN L. MCCLELLAN,
Chairman, Committee on the Judiciary Subcommittee on Criminal Laws and Procedures, U.S. Senate, Washington, D.C.

DEAR SENATOR MCCLELLAN: I have reviewed the material you sent to me on March 24 about the insanity defense.

For several years I served in Pittsburgh, Pennsylvania, as consultant to the U.S. Attorney's Office. During that time I also served occasionally as an expert witness in non-criminal cases. It was my strong impression over a period of five years that any lawyer could find just as many psychiatrists to say yes or to say no to the question. I do not believe the sanity defense will be useful very much longer. In addition, it causes a heavy burden on the state mental institutions, where many of such cases are sent for very flimsy reasons, e.g., to allow the case to cool off. It seems to me that the best place for a psychiatric opinion is not in the course of the trial at all, but in the pre-trial consultation with the court, and the post-trial deliberations on treatment. The issues of culpability and of appropriate treatment appear to me best answered when kept separate.

Therefore, I would choose alternative (4), "Abolish the insanity defense, but make it mandatory in case of conviction that the defendant be treated or hospitalized and not sent to prison."

I would very much like a copy of the entire proposed Criminal Code.

Sincerely,

STONEWALL B. STICKNEY, M.D.,
Commissioner.

ARIZONA STATE HOSPITAL,
Phoenix, Ariz., May 19, 1972.

Hon. JOHN L. MCCLELLAN,
Chairman, Subcommittee on Criminal Laws and Procedures,
Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR SENATOR MCCLELLAN: This is in reply to your letter of March 24, 1972, asking for our preferences with respect to the problem of criminal responsibility and the insanity defense, matters now before the Subcommittee on Criminal Laws and Procedures of the Committee on the Judiciary of the United States Senate.

I hope that my delay does not make my reply unusable to you. I thought it best to consult with two of my staff members, whom I consider experts, and to incorporate their responses.

Response of Dr. Michael Cleary: Dr. Cleary prefers Number 4; that is, abolish the insanity defense, but make it mandatory in case of conviction that the defendant be treated or hospitalized and not sent to prison.

Explanation: The advantage is that the choice between prison and a mental hospital of a potentially mentally ill person is abolished, and the convicted offender in such a case would routinely have psychiatric treatment rather than have this depend upon the determination of the court, jury, or defense attorney.

Qualifications of Dr. Cleary: Dr. Cleary has testified in court in at least 100 criminal cases as an expert witness and has examined and reported upon many more criminal cases at the Arizona State Hospital. The test used in Arizona is essentially the M'Naghten Rule.

Response of Dr. Harrison Baker: Dr. Baker prefers the A.L.I. formulation as set forth in the third paragraph of your letter, but wishes to express as an alternative his recognition of Dr. Cleary's statement above.

Explanation: Dr. Baker believes that this alternative has much merit even though it entails a considerable amount of work and new legislation by abolishing the issue of insanity, taking the entire matter out of the court system and presenting it as a medical or psychiatric problem.

Qualifications of Dr. Baker: Dr. Baker has testified in court in about 1000 cases as an expert witness. Some of these were in the state of New Hampshire under a modified formulation similar to the A.L.I. formulation, and the others were in Arizona under the M'Naghten Rule as used in this State.

Response of Dr. Willis H. Bower: Prefers No. 4; that is, abolish the insanity defense, but make it mandatory in case of conviction that the defendant be treated or hospitalized and not sent to prison.

Explanation: Many or perhaps most cases in which a contest between attorneys develops to show that the defendant is insane or not insane are from a medical viewpoint not really one way or the other but a mixture, that is, psychiatric problems are usually somewhere in the picture. The outcome of the proceedings in court makes the matter go completely one way or the other which artificially cuts out the one aspect or the other insofar as treatment goes after conviction (or after a finding of not guilty by reason of insanity). The course which should be followed in further work with the defendant (if he actually committed the offense) should not be determined in this way but should be determined by his needs and by whatever method offers the prospect for the best outcome. It appears that this could be much more easily done by abolishing the insanity defense.

Qualifications of Dr. Bower: No testimony in criminal cases as an expert witness, but he has presided over criminally insane divisions of state hospitals in the state of Colorado and in the state of Arizona.

Sincerely yours,

WILLIS H. BOWER, M.D.,
Director.

DEPARTMENT OF INSTITUTIONS,
DIVISION OF MENTAL HEALTH,
Denver, Colo., April 7, 1972.

Hon. JOHN L. MCCLELLAN,
U.S. Senator,
Washington, D.C.

DEAR SENATOR MCCLELLAN: I am in receipt of your letter of March 24 requesting suggestions regarding the insanity defense under federal law.

My personal preference is for item four. However, since I have had only a small amount of experience as an expert witness in such cases, I am sending copies of your letter to Dr. Ethel Bonn, Director of the Fort Logan Mental Health Center in Denver and Dr. Charles Meredith, Superintendent of Colorado State Hospital in Pueblo with suggestions that they respond directly to you.

Sincerely yours,

HARL H. YOUNG, Ph. D.,
Acting Chief.

COLORADO STATE HOSPITAL,
Pueblo, Colo., May 2, 1972.

Hon. JOHN L. MCCLELLAN,
U.S. Senator,
Washington, D.C.

DEAR SENATOR MCCLELLAN: This is in further reply to your March 24, 1972, request to Dr. Harl H. Young, Division of Mental Health, Department of Institutions, Denver, concerning the revision of the Federal Criminal Code.

A considerable proportion of the work load at this hospital is concerned with the treatment and rehabilitation of the social offender, or those individuals who have been committed to this institution by a district court by virtue of being found innocent of a crime for reasons of insanity. Efforts are currently underway within the state of Colorado to rectify some of the inequities of the state law, and I am delighted that your committee is actively considering an update of the federal laws in this regard.

My preference of alternatives you have listed would be a combination of number 4 with number 2 or number 4 with number 3. We have found that it is imperative that an individual must not be committed to inpatient hospitalization for the remainder of his life if once found insane. Such a stand is anti-therapeutic and offers little incentive for the patient to engage in a meaningful treatment program. Here in Colorado, a district court criminally committed patient is returned to society as quickly as possible once it has been determined that he is no longer insane and is no longer considered to be dangerous to self or others. Such a recommendation is finalized by action of the court that originally committed the individual to the Colorado State Hospital.

I hope this information will be of assistance and should you require any further details, please let me know.

Sincerely,

CHARLES E. MEREDITH, M.D.,
Superintendent.

FORT LOGAN MENTAL HEALTH CENTER,
Denver, Colo., June 1, 1972.

Senator JOHN L. MCCLELLAN,
Chairman, Senate Subcommittee on Criminal Laws and Procedures,
U.S. Senate, Washington, D.C.

DEAR SENATOR MCCLELLAN: As suggested by Dr. Harl Young, Acting Chief of the Division of Mental Health, in his letter of April 7, 1972, I am sending you the attached material from the psychiatrist on our Fort Logan Mental Center staff who has had the most experience as an expert witness in cases involving the insanity defense. Dr. Ayerigg's comments are based on experience in Colorado courts over the past seven years.

I concur with Dr. Ayerigg and Dr. Young in their support of Alternative Number Four in the list you provided in your letter of March 24.

I have held views congruent with this alternative for quite some time. I have had very little direct experience as an expert witness in the court room, but as an administrative psychiatrist, I have learned much that would support Alternative Number 4.

I am definitely opposed to the "battle of the experts" which now prevails in many courtrooms as one of the means to persuade the judge and jury about culpability and about what should be done with the mentally ill offender. I strongly favor (1) determining in the courtroom whether or not the accused did indeed commit the crime and if so, (2) later determining, perhaps in the judge's chambers, with the benefit of psychiatric and other expert consultation, what course of action (treatment, rehabilitation, confinement, etc.) might be taken in the best interests of the accused, the community, and society as a whole.

I hope you will find the attached memoranda and the above comments helpful to you and your Committee.

Most sincerely yours,

ETHEL M. BONN, M.D.
Director.

MEMORANDUM FORT LOGAN MENTAL HEALTH CENTER,
Denver, Colo., May 25, 1972.

To: Dr. Bonn.
From: Dr. Ayerigg.
Subject: Insanity Defense Under Federal Law.

I have testified only under the Colorado law, which was at the time a curious combination of McNaughton, irresistible impulse, and moralistic judgments. In my experience only the McNaughton portion was emphasized, though Dr. John Macdonald of Colorado Psychiatric Hospital has encountered the irresistible impulse and the moralistic aspects in his very extensive experience. See the attached copy of my memo to Dr. Mitra and Al Fontana for further comment.

Certainly the right or wrong distinction is a very difficult one. The difficulties are reflected in the many instances of psychiatrists for the prosecution and the defense having diametrically opposite opinions. And often, if there are more than two psychiatrists, you don't get simply two poles, but one for each psychiatrist. While some mentally ill offenders convey (1) knowledge of the law, (2) knowledge of right and wrong, and (3) wanting simply not to follow the law,

these instances are not common. And, I think, in every instance, the personal values of the psychiatrist do significantly impinge upon testimony. For example, for some psychiatrists, drinking is voluntarily controllable and one is "accountable" for the state of drunkenness; for others it is not voluntary and one is not accountable.

A further facet of McNaughton and of most other tests is the assumption that blame must be assessed against one individual. Family dynamics, even social dynamics to the extent we know them, make it clear that this view is not in accord with the facts. (The case of the rapist we treated here is a good example.)

All these considerations lead me to think the McNaughton test, while perhaps helpful from a legal point of view, is not really applicable to the realities of human behavior and the requirements of trial court procedures.

Now, taking specifically the alternatives in Senator McClellan's letter:

Alternative 1.—I can only comment on this from a layman's view, but I would think consistent rules would make better sense than having local option for each Circuit Court of Appeals.

Alternative 2.—This has the problems of vagueness and indefiniteness involved in "capacity to appreciate the criminality of his conduct." Perhaps there is no good solution, but again personal and professional values will be very influential here. It also states, "he cannot justly be held responsible." For psychiatric illness I don't think this makes sense. I have seen too many psychotics who later held themselves responsible for acts during their psychosis.

Alternative 3.—If I understand this correctly, it is similar to "2" in that it attempts to absolve someone if he is mentally ill, and would be subject to similar objections.

Alternative 4.—This says the insanity defense would be abolished, but still calls for a determination of whether or not a person is under the influence of insanity, etc.

Alternative 5.—I have already commented upon this.

When we consider the range of criminal behavior, the range of degrees within any category of criminal behavior, the knowledge of family dynamics and the role they play in individual behavior, the influence of group dynamics, etc., the insanity plea seems anachronistic. If we then couple this with the much needed reforms in our national penal system, reducing the emphasis on punishment and increasing the emphasis on rehabilitation, then the insanity plea seems even more anachronistic.

Society does face a predicament with various kinds of criminal behavior as to what can best be done for the person, his immediate social group, and society as a whole. It appears that the best means for society to use to determine whether or not such a predicament exists is a judicial determination of whether or not the person committed the acts as alleged. If not, then there is no predicament.

We know there is little basis in fact for concern about whether there are extenuating factors to consider in many instances. However, the matter is complex enough for those found guilty so as to argue against including some or all who are found innocent. If there is basis for concern about mitigating factors, then all of society's resources, including psychiatric resources, should be aimed at the best possible treatment-rehabilitation. A great variety of options would need to be available, of course, to provide properly for each individual case.

I always find it difficult to express myself lucidly on this matter, but I hope this and the copy of my other memo help.

Tests of Insanity

Pranab, my thoughts are:

1. The current Colorado test has several facets: the right or wrong, the irresistible impulse, and the moral obliquity, etc., part. These only confuse the issues.

(*a*) The right or wrong test assumes that right and wrong are very clear, mutually exclusive concepts under all conditions. In actual use it usually comes down to: does the person know it is wrong according to the law? This test also includes the nebulous concept of willpower. The concepts of right or wrong, as used here and interpreted by the examining psychiatrist, must often reflect judgment based on the personal values of the psychiatrist. The concept of willpower is not one which is common in psychiatric thinking.

(*b*) Irresistible impulse is also not a psychiatric term, it is not defined in the statute, and so is essentially unusable. In any case, it would reflect the personal more than professional judgment of the psychiatrist.

(*c*) The moral obliquity, etc., sentence then seems to negate all the preceding parts of the test because nothing seems excludable from "anger, revenge, hatred, or other motives, and kindred evil conditions." "Evil conditions" has a moral judgment flavor which doesn't seem applicable to an insanity hearing.

(*d*) In actual application the test, I believe, much more often than those who wrote the statute probably intended, reflects the personal values of the psychiatrist, and in borderline situations these values will be particularly important. The role of values is enhanced by the lack of definition of terms on the test and the lack of basis for understanding some of the terms in the psychiatric background of the psychiatrist.

2. The Durham Test: I have had no experience testifying under this test, so it is hard to see the predicaments in which one would be. It does focus strictly on whether the person is able to understand that which he is about to do is a crime This again is wide open to interpretation. It assumes a very specific correspondence between various psychological states and being able to "appreciate" or "conform," and there is no such exact correspondence. In such a case the psychiatrist would be in effect advising the court in the context of an adversary proceeding, which is a paradox, to say the least..

3. Suggested Colorado Test: This test comes closer to a correspondence with psychological states which is consistent with the knowledge of psychiatry. But it still leaves open much personal values influence.

The exclusion of alcoholism, drug addiction, drug dependence, drug reaction seems very moralistic, as if the use of drugs, alcohol, etc., are entirely under voluntary control and so should be excluded.

4. General Comments:

(*a*) I feel "not guilty by reason of" is a very poor phrase. A person is, in fact, guilty or not guilty, regardless of whether he is "insane" or not. One of the most significant moves in psychiatry over the last ten or so years, connected with the development of community psychiatry beliefs and principles, is the belief that people are responsible for their behavior and that simply having a psychiatric disorder does not absolve them of responsibility.

(*b*) I belong to the group that sees the adversary court setting as a bad place for psychiatric consultation to be introduced. The determination of fact or not fact, of responsibility, should be the first issue. Then how society can best manage the predicament it is in surrounding this particular individual, if in fact guilty, is the second issue and where a variety of expert knowledge and opinion can be useful, depending on the circumstances. Here is where the psychiatrist should enter the picture.

(*c*) Dropping the insanity plea as anarchronistic in light of present-day knowledge of the individual, family, and societal roots of mental disorder makes most sense to me. The insanity plea says that solely, and the individual contributes to the predicaments he gets into. This is simply not true.

Thanks.

GOVERNMENT OF THE DISTRICT OF COLUMBIA,
DEPARTMENT OF HUMAN RESOURCES,
MENTAL HEALTH ADMINISTRATION,
Washington, D.C., April 12, 1972.

Hon. JOHN L. MCCLELLAN,
U.S. Senate, Chairman, Committee on the Judiciary, Subcommittee on Criminal Laws and Procedures, Washington, D.C.

MY DEAR SENATOR MCCLELLAN: I have been asked to reply to your recent letter of inquiry concerning a uniform insanity defense as part of a new Federal Criminal Code. My opinions are based on some seventeen years of experience in forensic psychiatry in the District of Columbia.

I believe the A.L.I. formulation is as good a test as any in existence to date. My actual preference about the use of psychiatrists in the courtroom, is that they enter the picture at the post-trial, pre-sentencing phase, if the defendant has already been found mentally competent to stand trial. Thus, every individual would have to take a certain amount of responsibility for his behavior, if it is determined that he committed the acts in question. Psychiatrists would participate to determine competency and to assist in proper sentencing of the accused. i.e., hospitalization, probation with psychiatric treatment, incarceration or other rehabilitative measures.

I believe this remedy would serve a variety of functions. It would take away the "Roman Circus" atmosphere of psychiatrists testifying as expert witnesses on opposite sides in an adversary proceeding. It would also get away from the notion that mentally ill people either have no responsibility at all for what they do, or total responsibility. There are many shades of gray in between, and everyone is responsible for his actions insofar as he has actually done something. Actually, I believe this total exoneration from responsibility often works to the detriment of the mentally ill person.

I realize that these suggestions may be unrealistic in that they swim against the mainstream of common law and tradition. Their enactment would require bold, far-reaching change. In lieu of this, if psychiatrists must continue to appear in adversary proceedings I believe that the Durham (or A.L.I.) rule as modified by McDonald and other decisions in the District of Columbia is the best in the country. That is, the psychiatric expert witness does not give a simple yes or no answer to a rule or question, but testifies extensively about the accused person's symptoms, psychodynamics, and personality make-up. Then the decision as to whether the individual fits the requirements for acquittal on a legal insanity basis is truly in the hands of the jury.

I appreciate the opportunity to make input into this matter which is of vital importance to the citizens of this country and to those of us who work in the area of forensic psychiatry.

Respectfully yours,

DAVID A. LANHAM, M.D.,
Chief, Forensic Psychiatry Office.

WASHINGTON, D.C., *March 17, 1972.*

Re proposed statute, section 503.
Hon. JOHN L. MCCLELLAN,
Chairman, Subcommittee on Criminal Laws and Procedures, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR SENATOR MCCLELLAN: I have read with considerable interest the Hearings Record on the proposed statutory defense of "Mental Disease or Defect" for the new Federal Criminal Code and as a practicing psychiatrist who has been interested in these matters for many years, I thought you might be interested in my comments.

I have felt for a long time that psychiatry does not really belong in the adversary proceeding. There is nothing in the training of a psychiatrist which prepares him for this type of business. I think his primary training has to do with the diagnosis and treatment of mentally and emotionally sick people. Therefore, I have been an ardent advocate of the "bifurcated" trial as has been tried in the State of California. I talked about this, at a symposium held on the subject of criminal responsibility at the Medical Society in 1959, at the time the Davis bill was pending. I understand, however, that there are some very serious constitutional objections to the use of the bifurcated trial. Even so, I would strongly advocate any system which would use the psychiatrist in the way for which he is best equipped, namely, to advise the court as to the best treatment suitable to a given case since the psychiatrist is thoroughly aware of both the possibilities and the limitations of mental hospital care. Furthermore, I think he does have a somewhat better understanding of the patient's potential for doing harm to himself or others because of the psychiatric disorder from which he is suffering.

Sincerely yours,

ZIGMOND M. LEBENSOHN, M.D.

STATE OF HAWAII,
DEPARTMENT OF HEALTH,
Honolulu, Hawaii, April 6, 1972.

Hon. JOHN L. MCCLELLAN,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR SENATOR MCCLELLAN: This is in reply to your letter of March 24th, 1972, which was addressed to J. Kendall Wallis, M.D. Dr. Wallis left the Mental Health Division on September 15th, 1971 and I have replaced him as Chief of this Division.

With regard to the alternative suggestion which you listed, I would recommend suggestion (2). I must say, however, that my experience in testifying in criminal cases is very limited.

Sincerely yours,

ALDON N. ROAT, M.D.,
Chief, Mental Health Division.

STATE OF ILLINOIS,
DEPARTMENT OF MENTAL HEALTH,
Chicago, Ill., June 19, 1972.

Hon. JOHN L. MCCLELLAN,
Chairman, Subcommittee on Criminal Laws and Procedures, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR SENATOR MCCLELLAN: In response to your letter of March 24, 1972 requesting my view as Director of the Illinois Department of Mental Health as to what revisions in the substantive insanity law would be appropriate in my opinion, my strong preference is for alternative (3) which in effect would abolish the present insanity defense as we traditionally know it.

I have had the benefit of consultation with our legal counsel, Jerome F. Goldberg, and Professor Norval Morris of the University of Chicago, Center for Studies in Criminal Justice, The Law School, who share my view.

Please be assured of my continued cooperation and willingness to assist you.

Sincerely,

ALBERT J. GLASS, M.D.

STATE OF INDIANA,
DEPARTMENT OF MENTAL HEALTH,
Indianapolis, Ind., July 11, 1972.

Hon. JOHN L. MCCLELLAN,
Chairman, Subcommittee on Criminal Laws and Procedures, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR SENATOR MCCLELLAN: My delay in replying to your letter of 24 March 1972 regarding the proposed new Federal Criminal Code, particularly in regards to the tests for "insanity," is more from frustration than lack of interest.

I have had some experience in court, using the M'Naghten and irresistible impulse tests, although I do not consider myself an expert. It was also my duty to testify for the court in the Lee Willie Hill case, a copy of which is attached. In short, Mr. Hill pleaded insanity, was charged with first degree murder and was convicted of murder in the second degree, and appealed to the Indiana Supreme Court, which upheld the conviction. The appellant urged consideration of the Durham rule. The Court rejected this ". . . in favor of one that recognizes both cognition and volition as elements of such responsibility. . . . Appellant's argument, in our view, is better adapted to the American Law Institute definition of insanity. . . ."

The few cases I have testified on subsequently had used all three tests for responsibility. My own personal feeling is that I would like the insanity defense abolished altogether. Perhaps it is too simplistic to have a trial to determine whether the alleged act was committed, or not, and then make disposition secondarily.

The test of ability to stand trial is another problem. You are, no doubt, acquainted with the U.S. Supreme Court decision on Theon Jackson. It would appear that his difficulty is in communication because he is "deaf and dumb." He was felt to be mentally retarded. Yet, as his communications skills increase, so does his apparent level of mental functioning. Yet he was legally "insane." We have, as yet, not received any instructions on this case. Parenthetically, what would be best for him as a human being would be to sign himself back into the same hospital on a voluntary basis and continue his rehabilitation program.

The matter of the "right to treatment" and the individual's rights have taken up a good deal of my time and energy in the hopes of getting our legislature to do something actively rather than by case law.

In summary, I would, personally, as an individual, prefer abolition of the insanity defense. Lacking this, my preference is toward the wisdom of the A.L.I.

If there is any way that I may be of service, please do not hesitate to call upon me. Meanwhile, I should appreciate it if you would be kind enough to send me a copy of the proposed criminal code.

Sincerely,

WILLIAM ELLSWORTH MURRAY, M.D.,
Mental Health Commissioner.

STATE OF MAINE,
DEPARTMENT OF MENTAL HEALTH AND CORRECTIONS,
Augusta, Maine, April 11, 1972.

Hon. JOHN L. MCCLELLAN,
U.S. Congress, Washington, D.C.

DEAR SENATOR MCCLELLAN: I received your letter of March 24th, inquiring about some alternatives to the present handling of mentally ill criminals. There were five alternatives listed in your letter and a request that I respond to one of these alternatives. I think a more appropriate alternative was not suggested in the list.

I believe that the idea of considering an individual "not guilty" for a criminal offense because he is mentally ill is an outdated concept. The law, as such, formalizes certain rules for social and individual conduct and provides sanctions for those who do not conform to the needs of society as determined by that society. Taking this concept as an appropriate one for the protection of our society, its members and their property, the matter of the basis of the antisocial conduct becomes relatively unimportant. Consequently, the mental state of the individual committing the act against society or the property of those of society is inconsequential. The law is designed to prevent the repetition of those acts which are considered harmful to the extent that there must be rules accompanied by sanctions against such conduct.

However, everyone realizes that certain individuals behave in particularly harmful ways, not as the result of criminal intent, but because of disordered thinking or disordered behavior which stems from a mental illness. As such, they are guilty—but ill.

From my own personal experience, having worked under the universal code of military justice and its precursor, and also having a great deal to do with the administration of mental health programs involving the care and handling of mentally ill offenders, I feel that a great many problems would be solved if there were a two-part trial, the first of which would determine whether the individual charged with the act had indeed committed it. Rather than a finding of guilty, the finding could be different and could be worded in some way such as "allegation confirmed". This finding would be made by a jury unless the respondent chose to waive a trial by jury and the finding would be based on the preponderance of evidence.

The only real barrier to this type of initial finding of whether or not the accused committed the alleged offense would be the matter of the competency of the accused. The court, if the matter of competency to stand trial was questioned, could have a guardian ad litem appointed for him who would evaluate the situation to determine when a level of competency or the facts he could learn from the accused confirmed that he was ready to stand trial. The attorney could do this in cooperation with the clinical persons attempting to restore the individual to a state of readiness for trial. The court, of course, would have to require periodic reports on anyone declared incompetent and should have the authority to drop the charges and terminate the proceedings against the accused after a reasonable period of time if treatment had failed to restore an individual to a level at which he could be fairly tried.

Following the court's finding that the allegation was confirmed, the jury would be dismissed and the individual defendant would then be evaluated as to his mental state. The court would then have at its discretion a variety of alternatives including a treatment program if psychiatric illness existed, a behavior modification program for those individuals who display consistent and repeated antisocial behavior, an educational-vocational program for those individuals lacking the skills necessary to assume a meaningful role in society, immediate parole, etc. In other words, the judge would have at his discretion a variety of alternatives appropriate to the individual defendant. These alternatives could be utilized in lieu of a correctional sentence, although it would be quite appropriate for a sentence to a correctional facility to be one of the alternatives. At the completion of a rehabilitation, educational or treatment program, the judge

then could impose additional constraints upon the individual commensurate with the nature of the offense or offenses which he had been found to have committed.

As you can see, this implies a two-part trial, the first to determine the facts about the alleged offense and to determine if the individual committed that offense as judged by his peers. The second hearing would not involve exclusively lay opinion but would involve the opinion of individuals from the behavorial sciences, law enforcement, and community representatives to plan for the offender rather than the offense. Throughout these proceedings the court would maintain its primary jurisdiction and ultimate discretion in relation to the accused individual.

In reviewing your letter, number 4 seems closest to the suggestions made above, but it still preserves the single sanction of care which to me seems inappropriate. Certainly, some types of treatment can never be confirmed as successful until a phased reentry into society has been completed successfully.

I recognize that with the multiplicity of criminal jurisdictions in the United States, the development of any type of uniform system is virtually impossible but I do think that a trial should be made of some system of this type. California's system is not unlike this but the old principle of mens rea seems very inappropriate when the matter of the criminal law as a means of protecting society against the behavior of some of its own members is so important.

Thank you for the opportunity of responding to your letter.

Sincerely yours,

WILLIAM E. SCHUMACHER, M.D.,

DEPARTMENT OF MENTAL HYGIENE, MEDICAL SERVICE,
OF THE SUPREME BENCH OF BALTIMORE,
Baltimore, Md., July 24, 1972.

DR. IRENE HITCHMAN,
Department of Mental Hygiene,
Baltimore, Md.

DEAR DR. HITCHMAN: Please excuse me for the delay in answering Senator McClellan's letter, however, vacation and other demands made it impossible for me to get to this before. I shall attempt to answer the questions as listed by the sub-committee. I am acquainted with the A.L.I. formulation since that is the law in Maryland. I have generally found it satisfactory although there is a need to have some specific definitions for many of the words in the test.

1. This in the end may continue to be the best procedure although it is recognized that it poses some difficulty for general federal court administration. however. it does reflect what the Court of Appeals of each state feel should be the law in that jurisdiction. There appears to be a strong tendency for jurisdictions to accept the A.L.I. formulation so that in the end uniformity may be established.

2. I don't think that this adds anything. It just rephrases things in a direct manner. (Unless the word substantial and impaired are quite clearly defined, I can see where we can be led into a battle of sematics particularly about diagnosis and diagnostic terms similar to what the Durham court has had to struggle with and had attempted to overcome in its Washington instructions.)

3. I am not sure that there is sufficient capacity of the psychiatric community to assist the court in judging an element of culpability anymore than there has been success in assisting with "product" as used in Durham.

4. I don't like this at all. I don't think psychiatry or judge can consistently establish a level of "insanity" to fit this test, with any degree of fairness. However, I would like to understand more about the use of this in Sweden as it has promise.

5. The M'Naghten and irresistible impulse test, I think are better handled by A.L.I. which most of us consider to be a broadened M'Naghten test with some of the features of irresistible impulse.

Therefore, what I seem to be saying is that I prefer the A.L.I. formulation over others. However, what I really would prefer is no formulation. By this I mean taking the insanity issue out of guilt procedure and somehow, perhaps similar to Sweden, allow it to be dealt with by the judge with reference to disposition. An additional suggestion might well be for more study.

Sincerely yours,

JONAS RAPPEPORT, M.D.,
Chief Medical Officer.

MAY 17, 1972.

In reference to Senator McClellan's letter dated March 24, 1972. On the basis of my experience and in discussion with other colleagues in the field, it would be my suggestion to retain the present law as spelled out under paragraph (1).

DR. W. R. FREINEK.

Dr. I. HITCHMAN:

THE COMMONWEALTH OF MASSACHUSETTS,
DEPARTMENT OF MENTAL HEALTH,
Boston, Mass., April 28, 1972.

HON. JOHN L. MCCLELLAN,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR SENATOR MCCLELLAN: This is an answer to your request for recommendations regarding the best formulations for assessing criminal responsibility in the mentally ill.

I have consulted with Dr. A. Louis McGarry in my department who has wide experience in this area and we both agree that the A.L.I. formulation is probably as sensible and useful, from the standard point of view of psychiatry that can be arrived at, given our present knowledge.

Sincerely yours,

MILTON GREENBLATT, M.D.,
Commissioner.

STATE OF MICHIGAN,
DEPARTMENT OF MENTAL HEALTH,
Lansing, Mich., May 9, 1972.

HON. JOHN L. MCCLELLAN,
Chairman, Subcommittee on Criminal Laws and Procedures, Senate Committee on the Judiciary, Senate Office Building, Washington, D.C.

DEAR SENATOR MCCLELLAN: This is in response to your letter of March 24 setting forth the alternative suggestions which have been presented to your Subcommittee concerning the "insanity" defense.

My recommendations to the Subcommittee is that suggestion No. 4 be adopted, abolishing the insanity defense.

Sincerely,

E. G. YUDASHKIN, M.D.,
Director.

STATE BOARD OF HEALTH,
Jackson, Miss., May 23, 1972.

HON. JOHN L. MCCLELLAN,
U.S. Senate, Washington, D.C.

DEAR SIR: Please refer to your correspondence of March 24, 1972 in reference to the revision under consideration of the Federal Criminal Code regarding the insanity plea. Also please refer to my response of April 6, 1972.

I have now heard from most of the psychiatrists in Mississippi whom I wrote for their opinion. Several have had little experience in testifying in criminal court and had no strong opinions in the matter. The faculty of the Psychiatric Department at the University of Mississippi Medical Center endorse the American Law Institute formulation. However, the physician with the greatest experience in this matter in Mississippi is Dr. Glen Anderson, Mississippi State hospital. I enclose a copy of his letter. Dr. Reginald P. White, Director of East Mississippi State Hospital, generally agrees with Dr. Anderson and I will also enclose a copy of his letter.

Personally, I have testified only once in court on a criminal matter, though I have been involved with evaluation and treatment of criminal cases in the past.

I personally ideally agree with Dr. Anderson and Dr. White, but in the interest of practicality, knowing the problem some states might have in providing such psychiatric evaluations at the prisons, I would approve the American Law Institute formulation at this time.

Thank you for giving the psychiatrists of Mississippi the opportunity to share our opinions with your committee.

Sincerely yours,

NINA B. GOSS-MOFFIT, M.D.,
Acting Director, Mental Health Services.

Enclosures 2.

EAST MISSISSIPPI STATE HOSPITAL,
Meridian, Miss., April 4, 1972.

DR. NINA MOFFITT,
Mental Health Services, State Board of Health,
Jackson, Miss.

DEAR DR. MOFFITT: I am in receipt of your memorandum dated March 31, 1972, with the attachment of a letter relative to proposed changes in the Federal Criminal Code for the mentally ill and mentally retarded.

Although my experience has been perhaps more limited than some of the other persons to whom you sent the memorandum, especially Dr. Jaquith and Dr. Anderson, I do, indeed, have some fairly strong feelings about the entire situation, which I will express to you for your use in transmitting a response back to the Senate Committee on Judiciary, Subcommittee on Criminal Laws and Procedures.

First and foremost, my admittedly limited experience has convinced me that the insanity defense is too often used as just another legalistic ploy, either to attempt to avoid or evade responsibility, or, at the very least to delay the case while awaiting psychiatric examination. I have testified in both State and Federal jurisdictions in criminal cases as an expert psychiatric witness, and I know that we were operating under the M'Naghten Rule in the State court, and I believe also in our particular Federal jurisdiction. I really do not know what formulation we were subject to, Federally, however.

In both instances, I have seen the very bewildering (to the jury) and frustrating (to the professionals) situation of having two approximately equally competent psychiatrists get up and present diametrically opposite conclusions, based on essentially the same information. I can only strongly infer that this does nothing to promote justice, and it certainly plays havoc with respect for the psychiatric specialty of medicine.

My very strong recommendation to the Subcommittee would be to *abolish totally the use of an insanity defense*, but to make available in every penal system the services of psychiatric and clinical psychological consultation, so that individuals convicted of any criminal act could be screened for treatable mental disorders.

The major criticism expressed about sending "mentally ill persons" to prison has been, to a great extent, due to the deplorable conditions in the prisons themselves. Now, perhaps belatedly, we are finding what many of us knew all along, that the commitment of persons who have committed criminal acts, but who are also mentally ill, to mental hospitals has been, in many ways, a more cruel punishment, since so many of our mental hospitals operated by State and Federal systems are actually penitentiaries in everything but name, and in addition, the "sentences" are indefinite and sometimes lifelong. The landmark case in the U.S. District Court in Alabama, by Judge Frank M. Johnson, Jr., will go a long way toward correcting the faults of the mental institutions. I would strongly recommend a similar approach be utilized to make the penal institutions true institutions for reform and rehabilitation, and when that occurs, there will not be the aversion of sending persons who happen to be mentally ill into such facilities.

If my recommendation is considered by some to be too simplistic, I would respond that, in my opinion, any of the other approaches listed in the letter, with possible exception of No. 4, are simply avoidant of total responsibility.

Sincerely,

REGINALD P. WHITE, M.D.,
Director.

MISSISSIPPI STATE HOSPITAL,
Whitfield, Miss., April 3, 1972.

DR. NINA B. GOSS-MOFFITT,
Mental Health Services, State Board of Health, Jackson, Miss.

DEAR NINA: Thank you for your letter of March 31, 1972 as regards your correspondence with Senator McClellan.

Generally speaking, my first impression is that all courts of law should try the individual accused of a crime and either make an acquittal or a conviction as to his guilt. Then of course if due to some mental disease or mental defect that they feel that the individual does not have mens rea then they could either refer him to the appropriate mental health facility or let him return to his

family. This of course would depend for the most part on psychiatric testimony which would lead to the main point of the letter from Senator McClellan.

Of the six choices that the senator refers to, I would be more inclined to go with numbers *three or four* as referred to in his letter. As you are well aware, the circuit courts of this state hold strictly to M'Naghten's Rule and there are very few who actually feel that this is a good rule of law to follow as regards insanity pleas. My third choice of course will be the American Law Institute's Code or the modification of same as is enclosed in Senator McClellan's letter. I feel that the American Law Institute's Code gives more opportunity for the psychiatrist to explain but not necessarily excuse the man's behavior.

To be perfectly frank, this is the first opportunity that I have had to see the Swedish Penal Code and the only real objection that I have to that is the use of the words "insanity, feeble-mindedness or other abnormality of such profound nature" which may be misconstrued by some to mean certain things that they should not necessarily refer to.

It has been my opinion for some time and I am happy to see that this is shared by some others in the forensic psychiatry field that the individual should be tried on the basis of whether he is guilty of the crime and then the legal responsibility settled so that if any psychiatric help is needed then we may attempt to rehabilitate the individual rather than having to rely on whether any legal disposition will be made in the future or not.

I hope that this information will be helpful. I am happy to have the opportunity to express my opinion about this.

Sincerely,

A. G. Anderson, M.D.,
Staff Psychiatrist.

State of North Carolina,
Department of Mental Health,
Raleigh, N.C., July 17, 1972.

Hon. John L. McClellan,
Chairman, Subcommittee on Criminal Laws and Procedures, Committee on the Judiciary of the U.S. Senate, Washington, D.C.

Dear Senator McClellan: Your letter regarding the deliberations of the Judiciary Committee on the "insanity" defense has been read with great interest. Other members of the department who are experienced in forensic psychiatry have read and commented, and this letter summarizes our reactions.

In general, we believe that consistency in the federal law in this regard is indeed desirable. We further believe the proposed Section 503, based on the A.L.I. proposal, would be a fairly adequate solution, and preferable to the alternatives listed. (It must be said, however, that the "M'Naghten Rule," for all its theoretical shortcomings, seems to work fairly well in practice).

The greatest concern we have over such cases in North Carolina is with the disposition following determination of responsibility. Most often, the finding of non-responsibility results in a virtual life sentence in the forensic unit of a mental hospital—a sorry existence with little hope of improvement. At the least, some safeguards relative to observation and treatment are indicated for those found not responsible as a result of mental disease or defect.

We find the relatively new concept of limited responsibility to be a most interesting suggestion. Perhaps the Judiciary Committee will consider this solution also.

I very much appreciate the opportunity to comment on these matters, and shall be pleased to render any possible assistance in the future.

Sincerely,

Eugene A. Hargrove, M.D.,
Commissioner.

State of Oklahoma,
Department of Mental Health,
Central State Griffin Memorial Hospital,
Norman, Okla., September 7, 1972.

Hon. John L. McClellan,
Chairman, Subcommittee on Criminal Laws and Procedures, Committee on the Judiciary, U.S. Senate, Washington, D.C.

Dear Senator McClellan: This is in response to your letter to Dr. Hayden Donahue, Director of the Department of Mental Health, State of Oklahoma, re-

garding the proposed revision of the Federal Criminal Code involving insanity as a defense to criminal responsibility. Dr. Donahue gave me a copy of this letter sometime ago and I have had it on my mind for some months.

First, let me say that I am now, and have been for some years, involved in the forensic process in the State of Oklahoma in various capacities, including evaluating cases referred by the State for the determination of competency to stand trial and also in the capacity of expert witness. Also, while in the military service as a psychiatrist during the years 1966 and 1967, including one year in Viet Nam, I had frequent occasion to testify as an expert witness in criminal trials.

In my current position as Clinical Director of Central State Hospital, I am involved to some degree in the forensic process, both directly and indirectly.

It is not necessary to point out or to elaborate on the dissatisfactions which are almost universal to the present system, or the lack of agreement among various authorities on a suitable alternative.

My own opinion, however, and that of a growing number of colleagues is that it would be best to abolish the insanity defense and not to involve a psychiatrist in the legal process except perhaps as part of a pre-sentencing evaluation for individuals found guilty.

This would eliminate a number of problems, not the least of which is the problem of an individual potentially being committed to a mental institution under the current system without ever having been found guilty, since his evaluation of competency may occur before innocence or guilt is established. And an individual may therefore be incarcerated for a considerable period of time, perhaps even indefinitely, and never actually face trial and have his innocence or guilt determined.

I am aware of the constitutional objection that some individuals make to this proposal; namely, that an individual may not have a fair trial if he is not capable of aiding and assisting in his own defense. But it seems to me that the prosecution either does or does not have enough evidence to prove the individual is in fact the person who committed the crime, regardless of whether or not the individual participates in his defense. If responsibility for a crime can be fixed on an individual, then he should be found guilty, whether or not he is capable of aggressively and effectively defending himself in court. However, at the point in time at which he is found guilty, then there should be some determination as to what is the appropriate thing to do with him; and it is conceivable then at this point that a psychiatric evaluation needs to be considered to see what is the feasibility of actual rehabilitation by treatment.

The other objection to this proposal, which is essentially your Proposal Number Four, would be that this could result in many people being admitted to hospitals who are now going to jail and who are essentially not treatable, and who would be either released without any significant change occurring in them or else would be retained indefinitely since no essential change would be forthcoming; both of which alternatives would be undesirable. I think if this sort or law is adopted it should be made quite clear that the individual is to be sent to a treatment facility, as opposed to a penal institution, only when there appears to be definite indication that treatment will be effective in modifying future behavior. There should be some very definite time limit, such as one year for instance, and such that if an individual after a period of treatment does not appear to be making the sort of progress which would indicate a change in his future behavior, then he should be either discharged from the hospital and freed or sent to a penal institution, depending on the individual case.

The real problem with this, or with any other rule, is the application of the rule rather than the philosophy behind the rule, as in the case of the Durham Decision which, as you know, is unsatisfactory in application although quite humane in its intent. But the fact remains that the present system is not working well and is simply not a productive use of professional time; and it appears to me that the time of judges and attorneys is also unnecessarily absorbed in the process of establishing competency to stand trial rather than getting on with the business of establishing whether or not an individual is the individual who committed the crime in question.

Sincerely yours,

W. L. Baker, M.D.
Clinical Director.

MENTAL HEALTH DIVISION,
DEPARTMENT OF HUMAN RESOURCES,
Salem, Oreg., June 27, 1972.

Hon. JOHN L. MCCLELLAN,
Chairman, Subcommittee on Criminal Laws and Procedures, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR SENATOR MCCLELLAN: Thank you for giving us an opportunity to study and react to your proposed revisions of the Federal Criminal Code.

Oregon's new Criminal Code, representing the first major overhaul of the state's 107-year-old criminal laws, became law on January 1, 1972. The code is the product of three years of work by the Oregon Criminal Law Revision Commission. It was introduced to, and adopted by, the Oregon Legislative Assembly during its 1971 regular session.

The Oregon Criminal Code is identical to that proposed by the National Commission on Reform of Federal Criminal Laws. Under Article 5 of the new code, "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 of his conduct or to conform his conduct to the requirements of the law. As used in this Act, the terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct."

Enclosed is a copy of pages 34–37 from the Final Draft and Report of the Criminal Law Revision Commission prepared in July 1970. Copies of the report, as well as the new Oregon Criminal Code, are available from the Commission, 311 State Capitol in Salem.

Since the Code has been in effect only since January 1, we have had little experience with it. I have not personally testified under this Code, but have sought reactions from various staff members within the Mental Health Division.

I am supportive of Oregon's new Criminal Code, as well as the proposal of the National Commission. The code provides reasonable safeguards for the mentally ill offender and offers more flexibility in presenting testimony than the old M'Naghten Rule, while safeguarding the public. I think there is considerable benefit to be derived from having the federal courts and state courts working under the same code.

The relationship between psychiatry and mental health on the one hand and the law enforcement and criminal justice system on the other is taking on increasing importance. I believe that mental health has a role in (1) determining the ability of an individual to stand trial, (2) recommending a rehabilitation program once guilt has been established, and (3) providing alternative rehabilitation programs to those provided by the corrections system. I do not believe that psychiatry should become involved in the determination of guilt or innocence related to a specific act.

Therefore, I recommend a three-step process when a defendant enters a plea of not guilty by reason of insanity:

1. A prehearing investigation to determine whether the individual understands the nature of the charges and can participate in his own defense. If not, he should be referred directly for treatment without first being subjected to the court process, which, in itself, can be deleterious to his health. The same due process should be provided that would be available for any mental patient facing possible commitment, however.

2. The determination by the judge or jury whether the defendant did in fact commit the act in question, based on evidence presented (without regard for mental state at the time of the act).

3. A presentencing evaluation to assess the strengths and weaknesses of the individual and to recommend a rehabilitation plan.

Disposition would be based primarily upon the mental-social condition of the defendant and his needs, rather than be dependent upon the nature of the crime committed.

I am convinced that neither incarceration nor hospitalization is in the best long-run interest of either the individual or society in many cases, although I would oppose any dogmatic approach. As many options as possible should be made available to the judge, consistent with public safety and the needs of the individual and his family. This is not to deny that some individuals (a relative few) will need to remain in a secure facility for an extended period of time.

In our experience, carefully supervised outpatient treatment as a condition of parole results in a minimal disruption of family and employment ties, is economical, and (with careful selection of participants) is safe. The proper balance between threat and support, between logical consequences and a real opportunity for change, can be very beneficial. Either, alone, may be ineffectual or unworkable.

I would suggest that this concept be considered, not only for the mentally ill offender, but also for a variety of other offenders. For example, we have had excellent results in two pilot programs involving drunken drivers and chronic alcoholics, requiring mandatory group therapy and/or antabuse as a condition of parole or commitment. The relevance of this approach to other types of offenders, such as misdemeanants and juvenile offenders, should also be explored at some point, although this is outside the sphere of your immediate concern.

I would very much appreciate receiving a copy of the entire proposed Federal criminal code. If I can be of further assistance to you and your subcommittee, I hope you will let me know.

Sincerely yours,

J. D. BRAY, M.D.
Administrator.

Enclosure.

ARTICLE 5. RESPONSIBILITY

SECTION 36. MENTAL DISEASE OR DEFECT EXCLUDING RESPONSIBILITY

(1) 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 of his conduct or to conform his conduct to the requirements of law.

(2) As used in this Act, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

COMMENTARY

A. Summary

Subsection (1) of this section, based on § 4.01 (1) of the Model Penal Code, is a modernized rendition of the *M'Naghten* and the "control" (irresistible impulse) tests. The *M'Naghten* rule in its classical form reads as follows:

"In all cases of this kind the jurors ought to be told that a man is presumed sane . . . until the contrary be proved to their satisfaction. It must be clearly proved that at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or as not to know that what he was doing was wrong." 8 Eng Rep 718 (1843).

M'Naghten is in effect in all but a half dozen or so of the states.

The "irresistible impulse," or control, test addendum to the *M'Naghten* rule, which is operative in about a third of the states, adds the following consideration to the rule:

"If he did have such knowledge, he may nevertheless not be responsible if by reason of the duress of such mental disease, he had so far lost the power to choose between right and wrong, and to avoid doing the act in question, as that his free agency was at the time destroyed."

The draft section substitutes "appreciate" for *M'Naghten's* "know," thereby indicating a preference for the view that an offender must be emotionally as well as intellectually aware of the significance of his conduct. The section uses the word "conform" instead of the phrase "loss of power to choose between right and wrong" while studiously avoiding any reference to the misleading words "irresistible impulse."

In addition the section requires only "substantial" incapacity, thereby eliminating the occasional references in some of the older cases to "complete" or "total" destruction of the normal cognitive capacity of the defendant.

Subsection (2) of this section, based on § 4.01 (2) of the Model Penal Code, is the object of a divergence of opinion as to its efficacy and desirability.

The main purpose of the provision is to bar psychopaths (more modernly called sociopaths) from the insanity defense. The comment on this portion in the Model Penal Code reads as follows:

"Paragraph (2) of section 4.01 is designed to exclude from the concept of 'mental disease or defect' the case of so-called 'psychopathic personality.' The reason for the exclusion is that, as the Royal Commission put it, psychopathy 'is a statistical abnormality; that is to say, the psychopath differs from a normal person only quantitatively or in degree, not qualitatively; and the diagnosis of psychopathic personality does not carry with it any explanation of the causes of the abnormality.' While it may not be feasible to formulate a definition of 'disease', there is much to be said for excluding a condition that is manifested only by the behavior phenomena that must, by hypothesis, be the result of disease for irresponsibility to be established. Although British psychiatrists have agreed, on the whole, that psychopathy should not be called 'disease', there is considerable difference of opinion on the point in the United States. Yet it does not seem useful to contemplate the litigation of what is essentially a matter of terminology; nor is it right to have the legal result rest upon the resolution of a dispute of this kind." (Tent. Draft No. 4, at 160 (1955)).

The principal criticism of the Model Penal Code formulation, apart from those who oppose the addition of the "control" test, centers on subsection (2) of the section. The critics of this portion suggest that it represents an inadvisable effort to bar psychopaths from the insanity test. (A psychopath is commonly regarded as having either antisocial character or no character at all. Though his cognitive faculties are likely to be intact, he is unable to defer his gratifications. What he does seems unmotivated by conventional standards, and he feels neither anxiety nor guilt if he hurts others in the process. Because he will seem very much like the "normal" man in most respects, he will be less able to persuade a jury that he should be acquitted.)

Others in support of the provision in subsection (2) feel that the effort to bar psychopaths from the insanity defense is advisable because it is essential to keep the defense from swallowing up the whole of criminal liability, as it might if all recidivists could qualify for the defense merely by being labeled psychopaths. The Commission adopts this view.

Before passing from the discussion of this section, a brief review of the *M'Naghten* rule and some of the more modern deviations from it seems appropriate.

The *M'Naghten* rule was not strictly a product of common law case-by-case analysis although there had been cases prior to *M'Naghten* announcing a similar rule. Rather it was the response of fifteen common law judges to five hypothetical questions put to them by the House of Lords. The now famous rule was espoused in 1843 by Chief Justice Tindal in response to these questions.

Although the *M'Naghten* rule has remained in force in Oregon, other jurisdictions have attempted to find new tests both through the judicial and legislative processes. The following is a discussion of these alternatives.

The United States Supreme Court has left the states free to experiment and to adopt their own test for legal insanity.

"At this stage of scientific knowledge it would be indefensible to impose upon the States through the due process of law . . . one test rather than another for determining criminal culpability, and thereby displace a State's own choice of such a test, no matter how backward it may be in light of the best scientific canons." *Leland* v. *Oregon*, 343 US 790 (1952); cf., *United States* v. *Freeman*, 357 F2d 607 (2d Cir 1966).

M'Naghten is by no means a perfect test for criminal insanity. Weighty arguments have been advanced in opposition to the rule. As early as 1930 Mr. Justice Cardozo said to the New York Academy of Medicine that "the present legal definition of insanity has little relation to the truths of mental life." B. Cardozo, *Law and Literature and Other Essays and Addresses, 106* (Harcourt, Brace 1931). The Royal Commission on Capital Punishment concluded that the "right-wrong test was based on an entirely obsolete and misleading conception of the nature of insanity." *Royal Commission Report* 73–129 (1949). The major difficulty found with the *M'Naghten* test was that it concentrated solely on one aspect of mental make-up, viz., the cognitive, to the exclusion of all other phases of mental life.

The most radical shift away from *M'Naghten* occurred in 1954 with the decision of the United States Court of Appeals for the District of Columbia in *Durham v. United States*, 214 F2d 862, in which Judge Bazelon rejected the *M'Naghten* rule as well as the supplemental control test. The rule finally adopted in *Durham* was similar to the rule in use in New Hampshire since 1870. "An accused is not criminally responsible if his unlawful act was the product of mental disease or

defect." The *Durham* rule supposedly would give much more freedom to the expert witness to explain fully the mental condition of the defendant. However, a major difficulty with *Durham* was that it tended to confuse medical "concepts" of mental illness with legal insanity. Critics of the rule point out that this tends to outstrip community attitudes toward insanity and that expert testimony may usurp the function of the jury. The rule came further into disrepute when psychiatrists of St. Elizabeth's Hospital in Washington, D.C., decided at a weekend conference to change "sociopathy" (the new term for psychopathic personality) from a nondisease to a disease category which had the immediate effect of freeing the defendant when the change was incorporated into the *Durham* rule in *Blocker* v. *United States*, 288 F2d 853 (DC Cir 1961). These weekend changes in medical nomenclature affecting the *Durham* rule have been strongly criticized as demonstrating that the *Durham* rule really is not a useful legal standard.

Because of these and other difficulties with the *Durham* test, Maine and the Virgin Islands have been the only jurisdictions to date to adopt the *Durham* rule. Me Rev Stat Ann, c 15, § 102 (1963) ; V I Code Ann, Title 14, § 14.

In 1953 the American Law Institute began its exhaustive study of criminal conduct. Nine years of research and debate culminated in § 4.01, formally adopted by the Institute in 1962. The section is a well considered compromise between *M'Naghten* and *Durham*. It was first followed in part in *United States v. Currens*, 290 F2d 751 (3rd Cir 1961). The *Currens* case provides:

"The jury must be satisfied that at the time of committing the prohibited act, the defendant, as a result of mental disease or defect, lacked substantial capacity to conform his conduct to the requirements of the law . . . ."

Unlike the *M'Naghten* rule which was concerned with absolutes (right or wrong), the *Currens* rule only requires "substantial" impairment of one's capacity to control his conduct. Like the Model Penal Code § 4.01, the *Currens* test recognizes variations in degree and allows wide scope for expert testimony without the troublesome casual questions raised by *Durham*. *Currens* has been criticized, however, as being too narrow in that it relies on the control test to the exclusion of the right-wrong cognitive test. The Model Penal Code incorporates both.

Five years after *Currens* the United States Court of Appeals for the Second Circuit adopted a fullblown version of § 4.01 of the Model Penal Code. *United States v. Freeman*, 357 F2d 606 (1966). The trend in the federal courts is decidedly toward the Model Penal Code. At least five states have also adopted the Model Penal Code version in complete or substantially complete form including Illinois, Vermont, Massachusetts, Maryland and Wisconsin. Of the Model Penal Code insanity test one authority has said recently:

"Its proposal solves most of the problems generally associated with the older rules while at the same time representing the same line of historical development. As a result, it is likely to become the formula for the immediate future in the United States." Goldstein, *The Insanity Defense* 95 (1967).

B. Derivation

The insanity test proposed in the draft is that of the Model Penal Code § 4.01. Illinois has adopted § 4.01 of the Model Penal Code in its entirely. Michigan in its proposed draft chooses the *Currens* formulation. New York has chosen to follow the more liberal language of the right-wrong portion of the Model Penal Code but has refused to incorporate the control test portion and subsection (2). The comments of the New York Commission on the New York version were that the prosecutors throughout the state felt the control test was too liberal and for this reason it was deleted. Thus the New York version falls somewhere between *M'Naghten* and the Model Penal Code version.

C. Relationship to Existing Law

This section will effect a substantial change in Oregon's present insanity test. Oregon's test came into being largely as the result of decisional law. The most recent formulation of the Oregon rule appears in the following jury instruction approved in *State v. Gilmore*, 242 Or 463 (1966) :

"Insanity, to excuse a crime, must be such a disease of the mind as dethrones reason and renders the person incapable of understanding the nature and quality and consequences of his act or of distinguishing between right and wrong in relation to such act." At 568.

It should be noted that this formulation is somewhat more liberal than the original *M'Naghten* rule. The Oregon test speaks of lack of capacity for "understanding" the nature of the act. This would seem to allow a full examination of the mental condition of a defendant on not only the intellectual awareness of

his acts but also the emotional awareness. The word "know" in the psychiatric sense is understood to be not limited to intellectual awareness. Psychiatrists uniformly insist that it is possible for a person to "know" intellectually what he is doing but not to "know" it emotionally, and, if either of the two levels of "knowledge" is missing, a person qualifies as insane under the test. By using the word "understanding" in the Oregon formulation this subtle, yet highly significant distinction of levels of knowledge seems to be incorporated. This is in accord with the meaning generally given the "knowledge" test in most jurisdictions which have directly faced the issue and in a great number of jurisdictions which have not. In these latter jurisdictions the word "know" is given no narrow definition in the jury instruction—it is simply presented to the jury which is then permitted to make its own "common sense" determination of the word's meaning. Psychiatrists testifying at the trial in these jurisdictions (and Oregon) are, as a practical matter, able to testify as to both the intellectual and emotional awareness of the defendant. And the juries, in actual practice, then consider all such testimony.

STATE OF TENNESSEE,
DEPARTMENT OF MENTAL HEALTH,
Nashville, Tenn., May 16, 1972.

Hon. JOHN L. MCCLELLAN,
Chairman, Subcommittee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR SENATOR MCCLELLAN: In response to your letter of March 24, 1972 regarding the issue of criminal insanity, we believe it is not a simple problem and that it does not lend itself to simple solutions. We have thought long and hard before composing an answer to your questions.

We will begin by making a statement as to our position on the question of codifying the definition of insanity as a defense against criminal accusation; it simply cannot be done. This comes as near to an impossibility as we can conceive.

There are three elements which are recognizable in the commission of a crime. The first is a cognitive element which involves "knowledge" or "knowing" . . . right from wrong, legal from illegal, and specific knowledge. The second is the volitional element, which implies choice. In legal terms this means intent or "mens rea." Thirdly, there is a behavioral component which puts the first two into action.

As we understand the Law, there is a presumption that all men are sane until proven otherwise. Along with this is the legal presumption that every man has a freedom of choice—if he is sane. It is also presumed that one who commits a crime has the knowledge that he has done wrong and is aware of the possible consequences of his actions.

The aforegoing can easily be understood by judges, lawyers, and possibly laymen. However, there are other factors which determine the reasons for criminal activity which are not easily understood and not really accounted for in any legal definition. These are the affective and emotional factors.

Since nothing in the Law relates to these factors in such a way as would explain their involvement in behavior, the assessment of them should be left to those trained in the behavioral sciences. Few behavioral scientists have adequate technical knowledge of the Law and its implications. Very few jurists, attorneys, or laymen have more than a superficial or popularized knowledge of psychiatry and allied fields. It has long been a bone of contention between legal and behavioral people as to who will make and interpret the rules by which sanity or insanity is judged. Each is determined that the other not be trusted with the final answers.

We believe this question was best understood by the fifteen Chief Justices of England, whose answers to specific questions led to the formulation of the McNaughten rule or rules in 1843. These "Law Lords" recognized, we believe, the true limitations of their formulae and really intended these rules to be uesd as guidelines, not definitive determinants.

McNaughten began to be challenged shortly after the rule was proposed. In this country it began in 1870 in New Hampshire, where the first of the "product" rules was forwarded. Since that time uncounted other determinations were made by judges all over the nation in their efforts to find a more nearly perfect rule governing the finding of insanity. In our opinion these were all unsuccessful. Some stressed the ability to "appreciate" or "know" the criminality of the act or acts (ALI). Others ignored criminal knowledge and stressed mental disease

and "produce" of such disease (N.H., Durham). Still others would rely on "irresistible impulse" and some would blame criminal activity on the "unconscious," whatever that might be. Some of these, if followed to their logical conclusions, would result in a rule of "universal irresponsibility," to quote Henry Davidson. All the proposed formulae have been and are either modifications or direct concepts which can be found in McNaughten. It has been suggested by recent decisions that nobody be entrusted with the determination of criminal insanity, but that it remain a matter of fact to be determined by a jury. The proposal has been repeatedly made that the defense of insanity be abolished.

The section proposed further modifies the Oregon rule by requiring that the defendant's capacity for understanding need only be "substantially" impaired. This again liberalizes the kind of expert evidence which is necessary for the jury to have a more complete understanding of the defendant's mental life before it makes its decision.

The section in its second major aspect would permit a defendant raising the defense to show that even if he had substantial capacity to appreciate the wrongfulness of his act, he may still bring himself under the defense if he can show he lacked substantial capacity to "conform his conduct to the requirements of law." This, of course, is the control test formulation. Presently Oregon by statute prohibits a defendant from raising the control test. ORS 136.410 provides: "A morbid propensity to commit a prohibited act, existing in the mind of a person who is not shown to have been capable of knowing the wrongfulness of the act, forms no defense to a prosecution for committing the act." This section would be repealed if the proposed section on the insanity test is adopted.

Lest the impression be given that the new section is too radical a departure from existing Oregon law to command acceptance by the Oregon Legislature, it is important to note that the entire language of § 4.01 of the Model Penal Code was actually enacted by the 1961 session of the Oregon Legislative Assembly in Senate Bill No. 96. Only a veto by Governor Hatfield prevented Oregon from having as law the section in the form now presented. In his veto message, the Governor said:

"Senate Bill No. 96 while a laudable and humanitarian approach to the problem of mental illness or defect in a criminal case, is in my judgment, premature. The bill lacks adequate safeguards and there are not sufficient institutional facilities and trained personnel to implement . . . wide sweeping changes in our concept of criminality." *Senate and House Journal*, 1963 at 32.

An examination of the literature in the field indicates that what Governor Hatfield feared might happen if the Model Penal Code version were adopted—a flood of successful insanity pleas—has in fact not occurred in the jurisdictions which have adopted the rule.

Concerning the various proposals heard by the subcommittee, we make the following comments:

(1) If this be adopted, the committee has no problems in writing a uniform law. On the other hand, the present state of confusion would remain.

(2) This, in part is ALI; but who is to determine what "sustantial impairment" is? The lawyers? The judge? The jury? The psychiatrist? This, in our opinion is too narrow.

(3) This is no rule at all! This should properly be included in the determination of mitigation circumstances before *sentencing*-after a finding of guilty.

(4) We believe this could open a Pandora's Box of litigation if adopted in the United States. Every case of criminal prosecution could be defended on the basis of insanity and appealed in case of a finding of guilty, especially by those who believe that every criminal must be insane. Almost every criminal code in the country would have to be rewritten to adopt to this concept. If adopted, this would leave us exactly where we are now. *Who* makes the determination of need for treatment?

(5) We favor this minus the "irresistible impulse" test. Again, we question if anybody has the wisdom to distinguish between an irresistible impulse and one which is not resisted.

We propose that McNaughten be retained. It should be re-defined, if possible, by means of clarifying rules for both the legal and psychiatric professions. How is this to be accomplished? We offer our suggestions for guidelines for all those who might be concerned in the determination of criminal insanity.

Criteria for the psychiatrist:

(1) Is the accused mentally ill? If he is, what is his illness and what is its severity?

(2) Has this mental illness affected his ability to know, morally and legally, the difference between right and wrong?

(3) Is he able to translate this knowledge to the specific act of which he is accused? Does he know the act he is accused of doing is legally and morally right or wrong?

(4) Is he able to appreciate the true nature of his act? Does he understand the possible consequences of such an act to himself and others?

(5) Can he maintain a sufficiently undistorted relationship with his defense counsel and assist counsel in his defense?

(6) What is the likelihood of his decompensating under stress of awaiting trial or during trial?

(7) What is the best estimate you can make of his present mental condition? What is your best estimate of his condition at the time of commission of the crime?

(8) What is your opinion of the possibility that he can refrain from repeating his imputed act or acts if found not guilty? Can he live in communal relationship with others without disruption to himself or those about him?

Criteria for the lawyer:

(1) Do you really and honestly believe your client is or was mentally ill?

(2) Do you believe him to be, or was he mentally incompetent? Should you have competent psychiatric consultation if you do so believe?

(3) After psychiatric consultation, what, in your best judgment, would be the proper defense? Insanity at the time of commission of the crime or present insanity?

(4) Have you evaluated your client with respect to the following:

(*a*) Can he communicate and collaborate with you in his defense?

(*b*) Does he understand the charges against him and can he appreciate his current legal situation? Does he understand the facts in his case?

(*c*) Have you found him able to comprehend instructions and to follow advice?

(*d*) Is he able to make reasonably responsible decisions based upon your advice?

(*e*) Do you believe he can testify, if this be necessary? Can he be cross-examined?

(*f*) Is he able, in your best judgment, to follow testimony and confer with you on this testimony?

We do not propose the retention of the McNaughten rule as a rigid test. We do recommend that this be retained as the best guide for the determination of criminal insanity as a defense against criminal accusation. We have advocated the use of McNaughten as the best basis, in our opinion, of determining if and when the defense of insanity should be used. It has, in the past, been used too often and too capriciously—to the detriment of both the law and psychiatry. We also would add that we feel the final arbiter of criminal insanity should be the judge or jury, after presentation of the findings and evidence.

We hope this lengthy dissertation is of some help to you in solving a very knotty problem.

Sincerely,

C. RICHARD TREADWAY, M.D.,
Commissioner.

TEXAS DEPARTMENT OF MENTAL HEALTH
AND MENTAL RETARDATION,
Austin, Tex., April 4, 1972.

Hon. JOHN L. MCCLELLAN,
U.S. Senate,
Washington, D.C.

DEAR SENATOR MCCLELLAN: This is in response to your letter of March 24, 1972 regarding your subcommittee's work on a proposed new Federal Criminal Code.

The M'Naghten test is followed in this State with respect to the question of insanity as a defense in a criminal case. As a psychiatrist I have testified as an expert witness in cases involving the application of this test.

I know of no miscarriage of justice in this State in its application of the M'Naghten test; however, I believe that the 2d alternative suggested in your letter of March 24th provides a less dogmatic and more complex test for insanity as a defense in criminal matters and would respectfully suggest that alternative.

Very truly yours,

DAVID WADE, M.D.,
Commissioner.

DEPARTMENT OF SOCIAL SERVICES,
DIVISION OF MENTAL HEALTH,
Salt Lake City, Utah, May 2, 1972.

Hon. JOHN L. MCCLELLAN,
Chairman, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR SENATOR MCCLELLAN: This is in answer to your letter of March 24, 1972, requesting an opinion about the suggestions for change in the Federal Criminal Code.

Alternative No. 4, "Abolish the insanity defense, but make it mandatory in case of conviction that the defendant be treated or hospitalized and not sent to prison," seems to be the most reasonable. We believe that any individual who needs mental health treatment has a right to receive that treatment.

I have not had the opportunity to testify in a court in a criminal case as an expert witness.

We would very much appreciate a copy of the entire proposed Criminal Code and hope this reply will be helpful.

Sincerely yours,

WILFRED H. HIGASHI, Ph.D.,
Director.

COMMONWEALTH OF VIRGINIA,
MENTAL HYGIENE AND HOSPITALS,
Richmond, Va., April 3, 1972.

Hon. JOHN L. MCCLELLAN,
Chairman, Subcommittee on Criminal Laws and Procedures, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR SENATOR MCCLELLAN: Of all the alternatives suggested for the proposed new Federal criminal Code as it relates to the "insanity" defense to criminal responsibility my own preference is for that which the commission recommended: the somewhat modified version of the A.L.I. formulation.

My own experience and that of members of my department who have testified as expert witnesses in the Courts of Virginia when the plea of insanity was raised are that there has been no real difficulty under the M'Naghten and Irresistible Impulse Test which both prevail in Virginia. However, there is such a stigma attached to the M'Naghten rule because it exculpates only those who develop a thinking impairment as a result of mental illness that it is time to adopt a new formulation without discarding the positive features of the old. For one reason or another, the alternatives to the A.L.I. formulation are less desirable.

I wish to thank you for the opportunity to offer your subcommittee my thoughts on this matter.

Sincerely yours,

WILLIAM S. ALLERTON,
Commissioner.

P.S. A copy of the entire proposed criminal Code would be appreciated.

STATE OF WEST VIRGINIA,
DEPARTMENT OF MENTAL HEALTH,
Charleston, W. Va., May 26, 1972.

Hon. JOHN L. MCCLELLAN,
Chairman, Subcommittee on Criminal Laws and Procedures, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR SENATOR MCCLELLAN: In response to your letter of March 24, 1972, I am pleased to learn that consideration is being given for federal legislation to clarify the confused state of the legal situation in this regard. As you are well aware, the tests of insanity vary greatly from one jurisdiction to another, and what may be considered a valid defense for "not guilty by reason of insanity" in one jurisdiction may be completely inadmissible in another. So far as I know, there has been no really good procedure devised which meets the legal requirements, and still provides the flexibility which could satisfy psychiatrists, who often feel that an individual's behavior is determined by psychological abnormalities, yet which do not necessarily reflect an actual loss of ability to recognize the consequences of his acts.

At the present time, we in West Virginia are attempting, through a committee composed of five of our circuit judges and five prosecuting attorneys, along with members of my staff, to study the statutes in regard to the "criminally mentally ill" in an effort to recommend legislation to correct some of the glaring deficiencies in these statutes. This committee probably will not address itself directly to a consideration of the question of mental illness as a defense in criminal proceedings.

So far as I am aware, some of the best legal discussions of insanity as a defense have been written by Judge Bazelon of the Fourth United States Circuit Court of Appeals. Decisions from that court have, as you know, expanded the concept of psychiatric testimony and the kinds of psychiatric difficulties which may be considered as a defense. It is my understanding, however, that these landmark decisions have not necessarily been adopted throughout the federal jurisdiction.

Among the alternatives which your subcommittee has considered, I would feel that the third alternative seems to offer the most flexibility. That alternative, as you recall, is to enact a defense, but limit the defense to the mental or culpability element of the crime. The other alternatives would seem to be much too inflexible.

I should also like to point out that some provision must be made which will allow hospitals to which individuals are admitted following trial for crime the necessary flexibility in treatment, including the right to grant passes and leaves from the hospital. Without such flexibility, the hospitals become mere custodial institutions, in which treatment resources are too rigidly curtailed.

Several members of my staff have had the experience of testifying as expert witnesses in criminal cases. The tests applied have included the Durham and the M'Naughten rules. The Durham rule, of course, is a broader interpretation of the concept of insanity, and does allow for a greater consideration of psychiatric factors than does M'Naughten. It has generally been the experience of our staff members that the courts are concerned and recognize that mental illness does not necessarily fit any rigid definitions. In most instances, therefore, the courts grant wide latitude in the testimony which they consider admissible.

In summary, I should like to express my hope that whatever legislation is adopted in this regard will allow for a consideration of psychiatric factors in crime beyond the simple question of whether the accused was so incapacitated by mental illness as to be unable to recognize the consequences of his actions. At the same time, it should be recognized that many individuals who become involved in crime because of mental illness do require treatment of a kind which can be offered more effectively in facilities other than hospitals. In the latter regard, it is essential that facilities and programs be provided within the correctional system to deal with the psychiatric problems of the criminal offender. I am not sure that these two aspects of the problem can be dealt with effectively in isolation from each other.

I hope the above will be of some use to your committee. If I can be of any further assistance, please feel free to call upon me.

Sincerely,

M. MITCHELL-BATEMAN, M.D.,
Director.

STATE OF WISCONSIN,
DEPARTMENT OF HEALTH AND SOCIAL SERVICES,
DIVISION OF MENTAL HYGIENE,
Madison, Wis., April 12, 1972.

Hon. JOHN L. MCCLELLAN,
Chairman, Subcommittee on Criminal Laws and Procedures, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR SENATOR MCCLELLAN: I am in receipt of your letter of March 24, 1972, regarding the Subcommittee on Criminal Laws and Procedures of the Committee on the Judiciary of the United States Senate, and its consideration of the new Federal Criminal Code prepared by the National Commission on Reform of Federal Criminal Laws.

From my experience, it appears that the so-called American Law Institute Rule has developed strong popularity in some states. Such is the case in Wisconsin where a version of the American Law Institute Rule is the stipulated test

for determining mental responsibility of the defendant—Section 971.15(1) of the Wisconsin Statutes. Prior to July of 1970, case law in Wisconsin indicated the preference for the so-called M'Naghten Rule.

My experience in testifying with use of the M'Naghten Rule is identical to my experience using the American Law Institute Rule. Neither of these tests really falls entirely within the province of psychiatry and properly should be used by the court or the jury in reaching the ultimate decision. The American Law Institute Rule, as well as the McNaghten Rule, are tests of cognition and determinance of moral considerations which are not properly psychiatric considerations.

After some years of experience in functioning as a resource to the courts in making the responsibility determination, I believe at this time that enumerated section (3) of your letter is the most practical solution to a very difficult problem. The ultimate decision must still be made by the court or the jury, but the psychiatrist in particular can offer a great help in indicating the presence or absence of mental disease or mental defect.

I would like to take advantage of your kind offer and request a copy of the entire proposed criminal code.

Sincerely,

L. J. GANSER, M.D.,
Administrator.

STATE OF WYOMING,
WYOMING STATE HOSPITAL,
Evanston, Wyo., April 27, 1972.

Hon. JOHN L. MCCLELLAN,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR SENATOR: Thank you for contacting me regarding the proposed changes in the Federal Criminal Laws.

Of the five alternatives listed I prefer number four with provisions that if necessary a psychiatric examination be made to determine competency to stand trial and that in all cases following conviction all individuals be examined to determine need for possible treatment or hospitalization.

I have testified in criminal cases as an expert witness in a fairly large number of cases. In most of these cases the M'Naghten and irresistible impulse tests were used. I have also testified in a small number of cases in which military rules applied.

I would appreciate receiving a copy of the entire proposed Criminal Code.

Sincerely,

WILLIAM D. PACE, M.D.,
Associate Superintendent.

STATE OF WYOMING,
WYOMING STATE HOSPITAL,
Evanston, Wyo., May 16, 1972.

Hon. JOHN L. MCCLELLAN,
Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR MR. MCCLELLAN: Thank you for your recent letter concerning the new federal criminal code act. I have been obliged for the past twelve years to testify as an expert witness here in Wyoming under the M'Naghten rule and have always found it a very unrewarding experience.

If it were at all possible I would like to see the insanity defense abolished entirely, which essentially would be comparable with your alternative No. 4. I believe that a trial should be held to determine first of all whether or not the defendant committed the crime in question and if found "guilty" of the crime, then the determination of degree of responsibility could be made. In this fashion some sort of adult authority could then make a rational disposition of the individual pursuant to an adequate pre-sentence evaluation consisting of psychiatric and psychological examinations, and such other requirements as an adult authority might find necessry in arriving at a suitable disposition for the convicted person. Such dispositions, of course, could then include involuntary psychiatric hospitalization, penal incarceration, probation under supervision, outpatient counseling, or the like.

To me, this would seem to be a more reasonable approach than the archaic systems now employed over the country; I doubt that trial lawyers will agree.

Thank you for asking my opinion.

Sincerely yours,

WILLIAM N. KARN, JR., M.D.,
Superintendent and Medical Director.

Appendix

[Working Papers of the National Commission on Reform of the Federal Criminal Laws, vol. 1, pp. 229–259]

CONSULTANT'S REPORT ON CRIMINAL RESPONSIBILITY—MENTAL ILLNESS: SECTION 503 (ROBINSON; FEBRUARY 19, 1969)

I. PRESENT FEDERAL LAW

A. Supreme Court

In 1897 the United States Supreme Court in *Davis* v. *United States*,[1] approved an insanity charge to a jury which was as follows:

"The term 'insanity,' as used in this defense, means a perverted and deranged condition of the mental and moral faculties as to render a person incapable of distinguishing between right and wrong, or unconscious at the time of the nature of the act he is committing, or where, though conscious of it and able to distinguish between right and wrong, and know that the act is wrong, yet his will—by which I mean the governing power of his mind—has been otherwise than voluntarily so completely destroyed that his actions are not subject to it, but are beyond his control."

The Court affirmed the conviction stating that the instruction "under the circumstances of this case, was in no degree prejudicial to the rights of the defendant."[2]

Davis is thus a combination of the rules announced in *M'Naghten's Case*,[3] and a volition test. In *M'Naghten* it was stated:[4]

"[T]o establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong."

The second element in the *Davis* charge relates to the capacity of the defendant to comply with the requirements of law. While this is sometimes called the "irresistible impulse" doctrine, its formulation in *Davis* makes no requirement that the abnormality be characterized by sudden impulse as opposed to brooding and reflection. We shall call it a control or volitional test.

The Supreme Court has declined many opportunities to speak authoritatively on the subject in recent decades. Congress, too, has remained silent. Substantial development has occurred in the courts of appeal, however.

B. Court of Appeals for the District of Columbia Circuit

In 1954 the Court of Appeals for the District of Columbia Circuit departed from an insanity rule similar to that of *Davis*. It stated in *Durham* v. *United States*,[5] :"[A]n accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." The court did not define the terms of the *Durham* rule in that decision. In *Carter* v. *United States*,[6] "product" was said to be established if the criminal act would not have occurred but for the mental disease or defect. The *Carter* opinion indicated that whether or not the accused suffered from a mental disease was a medical question. In *Blocker* v. *United States*,[7] the defendant had been classified by expert medical witnesses as a "sociopath," but they indicated that this was not considered to be a mental disease or defect. Shortly after Blocker's conviction however, the medical staff at St. Elizabeths Hospital, the Federal mental hospital for the District of Columbia, decided to classify sociopathy as a mental disease. The court of appeals

---

[1] 165 U.S. 373, 378 (1897).
[2] *Id.*
[3] 10 Cl. & F. 200, 8 Eng. Rep. 718 (H.L. 1843).
[4] 10 Cl. & F. 200, 210, 8 Eng. Rep. 718, 722.
[5] 214 F. 2d 862, 874 (D.C. Cir. 1954).
[6] 252 F. 2d 608 (D.C. Cir. 1957).
[7] 274 F. 2d 572 (D.C. Cir. 1959).

ordered reversal of the conviction "on the basis of this new medical evidence." The effect was a judicial acceptance of the hospital staff's assumption of legislative power over the scope of criminal liability of mentally abnormal persons.

However, in *McDonald* v. *United States*,[8] the same court later stated:[9]

"Our purpose now is to make it very clear that neither the court nor the jury is bound by *ad hoc* definitions or conclusions as to what experts state is a disease or defect. What psychiatrists may consider a "mental disease or defect" for clinical purposes where their concern is treatment, may or may not be the same as mental disease or defect for the jury's purpose in determining criminal responsibility."

The court then offered the following definition:

"[T]he jury should be told that a mental disease or defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls."

C. Court of Appeals for the First Circuit

There appear to be no recent decisions of the First Circuit authoritatively announcing an insanity rule. In *Beltran* v. *United States*,[10] the trial court had rejected an insanity defense, indicating that the rule applied was *M'Naghten*. The court of appeals reversed the conviction on the basis of the insufficiency of the evidence supporting the findings and remanded the case, suggesting that findings be made in the light of "such cases as Currens" [11] as well as the standard applied on the first trial, leaving open the question of whether the court would consider adopting a broader rule. Apparently the case was not again heard by the court of appeals.

D. Court of Appeals for the Second Circuit

The Second Circuit has recently departed from an insanity test similar to *Davis*. In *United States* v. *Freeman*,[12] the court rejected older criteria as being "not in harmony with modern medical science" and adopted essentially the test prepared for the American Law Institute's Model Penal Code:[13]

"(1) 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 law.

"(2) . . . [T]he terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct."

The only modification of the draft of the Model Penal Code made by the *Freeman* court was to substitute the suggested alternative "wrongfulness" (which we have underlined) for the draft term "criminality." This was done to include cases where the perpetrator appreciates that his conduct is criminal, but because of delusion believes it to be morally justified.[14]

E. Court of Appeals for the Third Circuit

In *United States* v. *Currens*,[15] the court adopted a modified form of the American Law Institute test. It stated:[16]

"The jury must be satisfied that at the time of committing the prohibited act the defendant, as a result of mental disease or defect, lacked substantial capacity to conform his conduct to the requirements of the law which he is alleged to have violated."

The alterations were made to avoid what was deemed to be a residual undue emphasis of cognition and to avoid taking what the court believed to be an unjustified attempt to exclude psychopaths from possible exculpation under the insanity defense. The court indicated that "psychopath" used narrowly refers to people who are disordered not only in terms of behavioral conformity but also in terms of affect, foresight, and general organization of behavior. Furthermore, the court felt the second paragraph of A.L.I. invited essentially terminological dispute.

---

[8] 312 F. 2d 847, 851 (D.C. Cir. 1962).
[9] *Id.*
[10] 302 F. 2d 48 (1st Cir. 1962).
[11] 290 F. 2d 751 (3d Cir. 1961).
[12] 357 F. 2d 606 (2d Cir. 1966).
[13] Model Penal Code § 4.01 (P.O.D. 1962)
[14] 357 F. 2d at 606n, 52.
[15] 290 F. 2d 751 (3d. Cir. 1961).
[16] 290 F. 2d at 774.

F. Court of Appeals for the Fourth Circuit

The Fourth Circuit recently indicated that the entire American Law Institute proposal as presented would be "preferred" although the court declined to require a standard form of instruction. *United States* v. *Chandler*, 393 F.2d 920 (4th Cir. 1968) (*en banc*). The court however added: [17]

"That other changes will come with the future is readily apparent in the imperfection of our present resolution. Endorsement of the American Law Institute formula solves some problems. It is an advance toward the avoidance of retributive incarceration of those not morally responsible for their conduct and toward assuring for them institutional care with psychiatric and related services. It is far from complete assurance that those in federal custody in need of treatment will receive it. Many defendants who are criminally responsible need psychiatric care and guidance, and many of those may be far better prospects for substantial improvement and complete rehabilitation than most of those found to be criminally irresponsible. Some of the criminally irresponsible will be beyond the capacity for help by medical and related sciences in their present state of development, but if public hospitals are required to accept those for whom they can offer only custodial services, prisoners needing hospitalization may be denied it. Resolution of the question of criminal responsibility, therefore, by whatever standard, is far from a perfect means of assuring the kind of institutional care each defendant should receive.

"The ideal solution, perhaps, would be to exclude the question of criminal responsibility from the trial, leaving to penologists the answers to the question of criminal responsibility, with leave to record the court's commitment as criminal or civil depending upon the answer to that question, and to the questions of the kind and duration of the custodial care and treatment he receives. Such an arrangement would afford an opportunity for the answers to come after the development of a much fuller, more reliable record upon more thorough psychiatric and psychological testing. Unfortunately, penology, psychiatry and psychology have not advanced to the point that penologist would welcome such responsibilities or that Congress and judges would willingly entrust them to them. Meanwhile, it may be recognized that a jury is not the most appropriate instrument for the resolution of these problems. As representatives of society, jurors, under the court's instructions, may appropriately exercise a judgment as to a defendant's moral accountability, but they have no demonstrated capacity for answering diagnostic questions or those involved in prescribing the kind of institutional care a defendant should receive. Moreover, the latter question seems inappropriate for an answer on a record made in a trial on criminal charges when the defendant need not testify and may exclude much evidence relevant to the question. The judge, on the other hand, is experienced in making considered recommendations as to the nature and duration of institutional care, and he may avail himself of the decided advantages of pre-sentence reports by probation officers and thorough clinical studies under such provisions as 18 U.S.C.A. § 4208(b).

"There would seem to be, therefore, a wide range for consideration of revisions in our procedures and possible recasting of the questions in order to serve better the ultimate humanitarian purposes of society. For the present, however, we move within the existing framework of the law with awareness that no judicial response to the problem today is perfect and need not endure beyond the availability of more acceptable solutions."

G. Court of Appeals for the Fifth Circuit

The last rulings of this circuit appear to sustain *Davis*-type instructions. *Howard* v. *United States*, 232 F. 2d 274 (5th Cir. 1956); *Carter* v. *United States*, 325 F. 2d 697 (5th Cir. 1963). In the last case cited a conviction was affirmed *per curiam* by an equally divided court. Nevertheless the possibility of using *Davis* was further sustained by a dissenting opinion's statement that either a *Davis* instruction, an irresistible impulse instruction, or an American Law Institute instruction would be appropriate if adjusted to the facts of the particular case.*

H. Court of Appeals for the Sixth Circuit

This circuit has just held that a *Davis*-type charge may no longer be given. In its place the court chose a modification of the American Law Institute test,

---

[17] 393 F. 2d at 928.

*The Fifth Circuit adopted the *Freeman* modification of the A.L.I. text in *Blake* v. *United States*, 407 F. 2d 908 (5th Cir. 1969).

omitting the second paragraph caveat, stating that there is "great dispute over [its] psychiatric soundness." *United States* v. *Smith*, 404 F. 2d 720, 727 n. 8 (6th Cir. 1968).

I. Court of Appeals for the Seventh Circuit

The American Law Institute formula with the first paragraph containing the "wrongfulness" modification made by *Freeman* has been adopted by the Seventh Circuit. *United States* v. *Shapiro*, 383 F. 2d 680 (7th Cir. 1967) (*en banc*). The opinion does not make it clear whether the second paragraph of A.L.I. is to be part of an instruction in that circuit.

J. Court of Appeals for the Eighth Circuit

This circuit has stated that any of the tests which include cognition, volition and capacity to control behavior are acceptable to it. *Pope* v. *United States*, 372 F. 2d 710 (8th Cir. 1967); *Beardslee* v. *United States*, 387 F.2d 280 (8th Cir. 1967). The court has not made clear the distinction intended between volition and capacity to control but apparently *Davis*, A.L.I. (including its variations in other circuits) or *Durham-McDonald* would suffice.

K. Court of Appeals for the Ninth Circuit

Sauer v. *United States*, 241 F. 2d 640 (9th Cir. 1957), affirming a conviction in which a *Davis* instruction had been given by the trial court, still appears to be the leading case. *See Ramer* v. *United States*, 390 F. 2d 564 (9th Cir. 1968).*

L. Court of Appeals for the Tenth Circuit

The court has approved the American Law Institute test (with some ambiguity as to whether the second paragraph caveat is to be included). *Wion* v. *United States*, 325 F. 2d 420 (10th Cir. 1963) (*en banc*). The court added:[18]

"This leads us to suggest that the emphasis on psychiatry at the point of criminal responsibility is misplaced. In most cases where irresponsibility is in issue, the commission of the prohibited act is not disputed, and the question whether the accused is to be excused as mentally irresponsible, or is to be held accountable, does not solve the problem. In either case, the law must in some way protect the community by rehabilitation or isolation. This involves the sentencing function, which is the ultimate responsibility of the Court, as an instrument of the social order. It is at this point that the behavioral sciences can be of most help to the Court, and to the offender as well."

II. A FEDERAL STATUTE DEFINING THE INSANITY DEFENSE

The formulation preferred by the writer (Alternative Formulation I)** can be most conveniently discussed after consideration of Alternative Formulations II (*M'Naghten*) and III (Study Draft section 503).

A. M'Naghten

Alternative Formulation II is *M'Naghten* as broadened by the language used by the American Law Institute in the first part of its test.[19] It is also similar to the 1967 New York Revised Penal Law (§ 30.05), which follows:

"1. A person is not criminally responsible for conduct if at the time of such conduct, as a result of mental disease or defect, he lacks substantial capacity to know or appreciate either:

---

*The Ninth Circuit has recently joined the Second, Fifth and Seventh Circuits in adopting a modified version of the A.L.I. test. *Wade* v. *United States*, —— F. 2d —, 7. Cir. L. 2104 (9th Cir. 1970).

[18] 325 F. 2d at 428.

**The tentative draft offered three statutory alternatives on the defense of mental illness. Alternative Formulation III, is proposed as Study Draft section 503. The other alternatives offered in the Tentative Draft are as follows:

ALTERNATIVE FORMULATION I

Mental disease or defect provides no defense unless it negatives an element of the offense.

* * * * * * *

ALTERNATIVE FORMULATION II

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 to appreciate the criminality of his conduct.

[19] Model Penal Code § 4.01 (P.O.D. 1962)

"(a) The nature and consequence of such conduct; or
"(b) That such conduct was wrong."

The comments to section 4.01 of the Model Penal Code define the problem and defend the *M'Naghten* aspect of the proposed test as follows: [20]

"1. No problem in the drafting of a penal code presents larger intrinsic difficulty than that of determining when individuals whose conduct would otherwise be criminal ought to be exculpated on the ground that they were suffering from mental disease or defect when they acted as they did. What is involved specifically is the drawing of a line between the use of public agencies and public force to condemn the offender by conviction, with resultant sanctions in which there is inescapably a punitive ingredient (however constructive we may attempt to make the process of correction) and modes of disposition in which the ingredient is absent, even though restraint may be involved. To put the matter differently, the problem is to discriminate between the cases where a punitive-correctional disposition is appropriate and those in which a medical-custodial disposition is the only kind that the law should allow.

"2. The traditional *M'Naghten* rule resolves the problem solely in regard to the capacity of the individual to know what he was doing and to know that it was wrong. Absent these minimal elements of rationality, condemnation and punishment are obviously both unjust and futile. They are unjust because the individual could not, by hypothesis, have employed reason to restrain the act; he did not and could not know the facts essential to bring reason in to play. On the same ground, they are futile. A madman who believes that he is squeezing lemons when he chokes his wife or thinks that homicide is the command of God is plainly beyond reach of the restraining influence of law; he needs restraint but condemnation is entirely meaningless and ineffective. Thus the attacks on the *M'Naghten* rule as an inept definition of insanity or as an arbitrary definition in terms of special symptoms are entirely misconceived. The *rationale* of the position is that these are cases in which reason can not operate and in which it is totally impossible for individuals to be deterred. Moreover, the category defined by the rule is so extreme that to the ordinary man the exculpation of the persons it encompasses bespeaks no weakness in the law. He does not identify by such persons and himself; they are a world apart."

The American Law Institute reformulation of *M'Naghten* substitutes the word "appreciate" for "know" in order to suggest that an affective sort of knowledge, rather than an abstract cognition, is required for responsibility. Furthermore, rather than requiring total incapacity of cognition to exculpate, lack of "substantial" capacity is made to suffice. The defense is thus broadened to a somewhat indeterminate degree. Nonetheless, most of the criticism which is made with respect to *M'Naghten* could be expected to be applicable to the reformulation made by the first part of the American Law Institute draft. Review and evaluation of such objections follow:

(1) *M'Naghten* is considered obsolete. Enormous expansion has occurred in psychological knowledge since the mid-19th century and indeed *M'Naghten* did not consider the most advanced information obtainable at its own time, most notably in the writing of Dr. Isaac Ray, who concluded that exculpation should follow if a crime was the product of a mental disease.[21]

Criticism of *M'Naghten* in terms of obsolescence is not in itself an argument for its repudiation, of course. Furthermore, it tends to ignore the distinction between a medical concept of mental illness or defect and a normative legal standard for exculpation of a person charged with crime. The legal definition must aim at legal purposes rather than the identification of medical or psychological entities. Ray himself, while a versatile thinker, was a phrenologist and a believer in organic bases for all mental illness; he was by no means a modern psychologist.

(2) *M'Naghten* is said to disregard the realities of mental impairment. *Durham* v. *United States*,[22] for example states:

"The science of psychiatry now recognizes that a man is an integrated personality and that reason, which is only one element in that personality, is not the sole determinant of his conduct. The right-wrong test, which considers knowledge or reason alone, is therefore, an inadequate guide to mental responsibility for criminal behavior."

---

[20] Model Penal Code § 4.01. Comment at 156–157 (Tent. Draft No. 4, 1955).
[21] Ray, Medical Jurisprudence of Insanity 32, 34 *et seq.*, 47 (1st ed. 1838).
[22] 214 F. 2d 862, 871–872 (D.C. Cir. 1954).

* * * * * * *

"By its misleading emphasis on the cognitive, the right-wrong test requires court and jury to rely upon what is, scientifically speaking, inadequate, and most often, invalid and irrelevant testimony in determining criminal responsibility."

In *United States* v. *Currens*,[23] Chief Judge Biggs expressed the point:

"The vast absurdity of the application of the M'Naghten Rules in order to determine the sanity or insanity, the mental health or lack of it, of the defendant by securing the answer to a single question: Did the defendant know the difference between right and wrong, appears clearly when one surveys the array of symptomatology which the skilled psychiatrist employs in determining the mental condition of an individual . . . How, conceivably, can the criminal responsibility of a mentally ill defendant be determined by the answer to a single question placed on a moral basis? To state the question seems to us to answer it."

Again the criticism seems misplaced. If *M'Naughten* were designed to identify a medical category of mentally ill, such objections would appear apposite. As a rule defining criminal responsibility of mentally ill persons, the critiques are misdirected.

(3) Related to the foregoing is the criticism that *M'Naughten* does not acquit a sufficient number of mentally ill persons. When strictly applied it probably exempts from criminal responsibility only persons who are grossly mentally deficient and psychotics with blurred perception and consciousness together with some paranoid schizophrenics.[24] This is the most common and the most realistic objection to *M'Naughten*. Frequently it has led to interpretation of key terms of the rule in such a manner as to encompass volitional impairment. "Know" is expanded to include a substantial emotional component together with the possibility of acting upon knowledge. "Wrong" may be expanded to include moral wrong as well as violation of criminal law. More commonly today the approach may be to add a control test to the knowledge test of *M'Naughten* and to exculpate those who are said to be volitionally impaired.

Sometimes the analysis is functional. For example, the comments to the American Law Institute proposal state:[25]

"Jurisdictions in which the M'Naughten test has been expanded to include the case where mental disease produces an 'irresistible impulse' proceed on the same *rationale*. They recognize, however, that cognitive factors are not the only ones that preclude inhibition; that even though cognition still obtains, mental disorder may produce a total incapacity for self-control."

Evaluation of this argument will be deferred until control tests are considered.[26]

Sometimes it is asserted that the narrowness of *M'Naughten* results in release of dangerous persons rather than alleviation of the risk by appropriate treatment or even by a sufficient period of isolation, as would occur upon indefinite commitment to a mental institution.[27] This argument assumes, of course, that appropriate institutions and techniques for successful treatment are or shortly can be available and that in any event prediction of future "dangerousness" can be made with sufficient precision to allow open-ended discretion with respect to release.

(4) It is sometimes stated that the rule asks questions which a psychiatrist cannot answer since they are said to be directed to moralistic rather than scientific concerns.[28] While it must be conceded that there is ample ambiguity in the language of *M'Naughten*, one may suspect that much of the criticism which is made in terms of vagueness, and perhaps of language regarded as prescientific, is actually directed more intensely at the narrow scope of the rule than at its vagueness. For example Dr. Gregory Zilboorg stated in an address:[29]

"To force a psychiatrist to talk in terms of the ability to distinguish between right and wrong and of legal responsibility is—let us admit it openly and frankly—to force him to violate Hippocratic Oath, even to violate the oath he

---

[23] 290 F. 2d 751, 766–767 (D.C. Cir. 1961).

[24] *See* Waelder, *Psychiatry and the Problem of Criminal Responsibility*, 101 U. Pa. L. Rev. 378, 379–380 (1952).

[25] Model Penal Code § 4.01, Comment at 157 (Tent. Draft No. 4, 1955).

[26] *See* p. 239 *et seq.*, *infra*.

[27] *See, e.g.*, *United States* v. *Freeman*, 357 F. 2d 606, 618 (2d Cir. 1966).

[28] *See* Guttmacher, *The Psychiatrist as a Witness*, 22 U. Chi. L. Rev. 325, 326 (1955); Freedman, Guttmacher & Overholser, *Mental Disease or Defect Excluding Responsibility*, 1961 Wash. U.L.Q. 250, 251 (1961).

[29] *Quoted in* Guttmacher & Weihofen, Psychiatry and the Law 406–407 (1952) (emphasis added).

takes as a witness to tell the truth and nothing but the truth, to force him to perjure himself *for the sake of justice*. For what else is it if not perjury, if a clinician speaks of right and wrong, and criminal responsibility, and the understanding of the nature and quality of the criminal act committed, when he, the psychiatrist, really knows absolutely nothing about such things."

The dispute must be seen as disagreement by psychiatrists with a legal, not medical, standard. The quoted passage illustrates a failure to grasp the distinction.

(5) It is also frequently contended that *M'Naghten* unjustifiably restricts expert testimony, serving to exclude relevant information. This criticism was made of both *M'Naghten* and the Model Penal Code by the psychiatric consultants to the American Law Institute.[30] The argument was explicitly accepted in *United States* v. *Freeman:*[31]

"The true vice of *M'Naghten* is not, therefore, that psychiatrists will feel constricted in artifically structuring their testimony but rather that the ultimate deciders—the judge or the jury—will be deprived of information vital to their final judgment."

However, as Professor Abraham Goldstein has recently pointed out, there is little evidence to suggest that the *M'Naghten* jurisdiction courts have limited detailed description of the psychological condition of defendants when counsel have attempted to elicit it.[32] The key terms in *M'Naghten* are capable of flexibility. Moreover, if counsel avoid restricting their questions to attempted solicitations of opinions on the ultimate issues posed by the rules, experience suggests that the evidence is admitted. In the appendix to the comment to section 4.01 of the American Law Institute, Model Penal Code it is reported:[33]

"No American case has been found where a trial court excluded evidence or refused to charge on the defense of insanity merely because the evidence in support of the defense related to neurosis or psychopathic personality or other mental disturbance rather than a psychosis."

Again, it is submitted that the major thrust of this objection is that too few persons are declared irresponsible under *M'Naghten* rather than that the expert is muzzled.

(6) It has also been urged that in the final analysis a *M'Naghten* type of defense results in nullification through the testimony of hostile expert witnesses. Undoubtedly this is sometimes done by psychiatrists who feel that commitment to a mental hospital is preferable to criminal conviction and punishment in all cases. In addition there are others who rebel when the class of irresponsibles is defined in as extreme terms as does *M'Naghten*. The result may be conjectural psychiatric judgments which nullify *M'Naghten* in practice.[34] This represents an ethical contribution of some psychiatrists (Professor Wechsler has referred to it as a sort of "psychiatric crypto-ethics") in a field where the normative decisions are ostensibly to be made by the law and not by the witnesses. However such nullification becomes a practical problem to which a draft dealing with criminal responsibility must give consideration.

B. The control tests

As we have mentioned,[35] in 1897, the Supreme Court approved an instruction which added a defense predicated on lack of power to avoid criminal conduct to the *M'Naghten* test.[36] Functionally, there is much appeal in such a criterion. If one conceives the major purpose of the insanity defense to be the exclusion of the nondeterrables from criminal responsibility, a control test seems designed to meet that objective. Furthermore, notions of retributive punishment seem particularly inappropriate with respect to one powerless to do otherwise than he did. And, treatment and incapacitation can be accomplished in a mental hospital, as well as in a prison. Accordingly, it is perhaps not astonishing that control tests are utilized in the Federal courts today either alone, as in *United States* v. *Currens*,[37] or combined with a cognition test, as was done in *Davis* and

[30] Freedman, Guttmacher & Overholser, *Mental Disease or Defect Excluding Responsibility*, 1961 Wash. U.L.Q. 250, 251 (1961).
[31] 357 F. 2d 606, 620 (2d Cir. 1966).
[32] *See* Goldstein, The Insanity Defense c. 4 (1967).
[33] Model Penal Code § 4— Comment at 162 (Tent. Draft No. 4, 1955).
[34] *See* Wechsler, *The Criteria of Criminal Responsibility*, 22 U. Chi. L. Rev. 367, 374–375 (1955); Diamond, *Criminal Responsibility of the Mentally Ill*, 14 Stan. L. Rev. 59–60 (1961).
[35] *See* note 1, *supra*, and accompanying text.
[36] *Davis* v. *United States*, 165 U.S. 373, 378 (1897).
[37] 290 F. 2d 751 (3d Cir. 1961).

the proposal of the American Law Institute. In the District of Columbia, *Durham* was not itself expressed in terms of control. However, the definition of "mental disease or defect" in *McDonald* v. *United States*,[38] required a determination of substantially impaired behavior controls as a basis of nonresponsibility.

A consideration of major criticisms of control tests follows:

(1) It has been common to refer to control tests as the "irresistible impulse" modification of *M'Naghten* and then to criticize the results as too narrow, as implying that only impulsive loss of control will suffice. Such was the objection to existing District of Columbia law expressed in *Durham*, and the *Durham* argument was adopted in the commentary to section 4.01 of the Model Penal Code of the American Law Institute. As we have mentioned, however, *Davis* as well as many other cases in which *M'Naghten* was expressly modified to add a control test as a third rule, makes no requirement that the volitional impairment be impulsive. Indeed, even the phrase "irresistible impulse" may be interpreted consistently with a period of reflection prior to the criminal act. In any event, there seems little basis to restrict a control test to situations of impulsive behavior, and an evaluation ought to confront a proposal which would exculpate the accused if as a result of mental disease or defect he was incapable of preventing himself from committing the criminal act.

(2) Another criticism of control tests is that they tend to exculpate too many persons.[39] A concommitant result in jurisdictions where acquittal on the basis of insanity is likely to result in indefinite commitment to a mental hospital is that confinement for any period subject to the discretion of an administrative board may replace the safeguards of the criminal process, particularly a fixed maximum term and proportionality between the maximum period of incarceration and the seriousness of the criminal conduct.

A related difficulty with a control test is associated with a determinism which seems dominant in the thinking of many expert witnesses. Modern psychiatry has tended to view man as controlled by antecedent hereditary and environmental factors. Freud, for example, wrote:[40]

"I have already taken the liberty of pointing out to you that there is within you a deeply rooted belief in psychic freedom and choice, that this belief is quite unscientific, and that it must give ground before the claims of a determinism which governs even mental life."

In their widely recognized recent text, *The Theory and Practice of Psychiatry* (1966), Doctors Frederick C. Redlich and Daniel X. Freedman, the Dean of the Yale Medical School and the Chairman of the Psychiatry Department, University of Chicago, state:[41]

"As a technology based on the behavioral and biological sciences, psychiatry takes a deterministic point of view. This does not mean that all phenomena in our field can be explained, or that there is no uncertainty. It merely commits us to a scientific search for reliable and significant relationships. We assume causation—by which we mean that a *range* of similar antecedents in *both* the organism and environment produces a similar *set* of consequences. (Emphasis original.)"

Such a view is consistent with the notion that all criminal conduct is evidence of lack of power to conform behavior to the requirements of law.

One approach to this problem is to conclude that psychiatry and the criminal law operate on sets of separate and inconsistent assumptions. This appears to be the view of Chief Justice Weintraub of the New Jersey Supreme Court.[42] Such a solution is obviously not entirely satisfactory in an endeavor which is as needful of cooperation between law and psychiatry as is the administration of an insanity defense.

Difficult as is a confrontation with a deterministic discipline in the context in which insanity is claimed as a defense, it is considerably more unmanageable when "voluntary conduct" is written into the criminal act requirement, as has been suggested in the draft of section 301 of the proposed Code. If a "voluntary act" (or omission) means something like the volitional standard utilized in a control insanity defense, the result is not mere duplicity. It creates the possi-

---

[38] 312 F. 2d 847, 851 (D.C. Cir. 1962).

[39] *See, e.g.*, N.Y. Rev. Pen. Law § 30.05, Comment at 257–258 (McKinney 1967).

[40] Freud, A General Introduction to Psychoanalysis 95 (1935).

[41] Redlich & Freedman, The Theory and Practice of Psychiatry 79 (1966) [hereinafter cited as Redlich & Freedman].

[42] *See State* v. *Lucas*, 30 N.J. 37, 152 A.2d 50 (1959); Weintraub (Panel), *Insanity as a Defense*, 37 F.R.D. 365, 369–375 (1964).

bility of acquittal of persons who have engaged in criminal conduct without facilitating their appraisal for possible commitment to a civil institution. A determination that the accused acted "involuntarily," even though there was consciousness and choice-in-fact, would lead to his unconditional discharge. Accordingly, if volitional incapacity is to be exculpatory, there is much to be said for channeling it into an insanity defense and providing concommitant procedures for a confinement of dangerous persons acquitted by reason of insanity in noncriminal institutions.

In England, these considerations have led to the result that evidence of "automatism" (lack of any awareness of conduct) must be raised with the insanity defense, and "diminished responsibility" (mental disease or defect used as evidence of mens rea only of an offense lesser than that charged) allows the prosecution to ask the jury to consider the claim in connection with an insanity defense.[43] The draft of section 301 presents broader dangers in this regard than does the American Law Institute's equivalent section,[44] which includes an implicit limitation of the voluntary act requirement in its statement that "a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual," and unconscious or reflexive conduct are not voluntary acts within the meaning of that section. No such limitations are contained in our own draft.

The control tests and volitional standards acutely raise the problem of what is meant by lack of power to avoid conduct or to conform to the requirements of law. This may be conveniently confronted in the context of a more basic objection to control tests. To this we shall now turn.

(3) Perhaps the most fundamental objection to the control tests is their lack of determinate meaning. The Royal Commission on Capital Punishment 1949–1953 reported:[45]

"Most lawyers have consistently maintained that the concept of an 'irresistible' or 'uncontrollable' impulse is a dangerous one, since it is impracticable to distinguish between those impulses which are the product of mental disease and those which are the product of ordinary passion, or, where mental disease exists, between impulses that may be genuinely irresistible and those which are merely not resisted."

The same objection was noted in the comments to the Model Penal Code insanity defense:[46]

"The draft accepts the view that any effort to exclude the nondeterrables from strictly penal sanctions must take account of the impairment of volitional capacity no less than of impairment of cognition; and this result should be achieved directly in the formulation of the test, rather than left to mitigation in the application of *M'Naghten*."

* * * * * * *

"Both the main formulation recommended and alternative (a) deem the proper question on this branch of the inquiry to be whether the defendant was without capacity to conform his conduct to the requirements of law. . . . The application of the principle will call, of course, for a distinction between incapacity, upon the one hand, and mere indisposition on the other. Such a distinction is inevitable in the application of a standard addressed to impairment of volition. We believe that the distinction can be made."

"The American Law Institute's commentary fails to elaborate upon its last assertion. *How* can the distinction be made?

Durham suggested that the notion involved in a determination of responsibility was freedom of will. But it is in significant part the difficulty of ascribing operational meaning to concepts of volitional freedom which make it a nebulous, if not impossible, criterion to litigate. To be sure, there are situations in which there would be substantial agreement that freedom of choice was absent, for example, actions during unconsciousness such as occurs in some epileptic seizures and sleepwalking. These are cases in which lack of mens rea and probably actus reus would exculpate, as would a cognitive insanity test. They pose no challenge for a volitional insanity defense. Beyond this core type of situation one can expect little agreement as to the meaning of a volitional standard. There is no

---

[43] *See* A. Goldstein, The Insanity Defense 207 (1967).
[44] Model Penal Code § 2.01 (P.O.D. 1962).
[45] Royal Commission on Capital Punishment Report 1949–1953, para. 228, at 80 (1953).
[46] Model Penal Code § 4.01, Comment at 157 (Tent. Draft No. 4, 1955).

consensus with respect even to criteria for decision in the real problem areas, where some yield to desires to engage in proscribed conduct and others do not.[47]

In testimony before the Royal Commission on Capital Punishment, the Director of Public Prosecutions reportedly stated that a volitional standard which extended beyond cases such as automatic epilepsy presented a question which "ceased to be one to which objective tests could readily be applied and became a matter of metaphysical speculation which presented an impossible problem to the Judge and jury." [48] Asked the Lord Chief Justice, "Who is to judge whether the impulse is irresistible or not?" [49]

An extraordinarily perceptive discussion of the problem is contained in the concurring opinion of Mr. Justice Black, joined by Mr. Justice Harlan, in *Powell* v. *Texas*,[50] upholding the constitutionality of criminal penalties applied to alcoholics whose public drunkenness is alleged to be beyond volitional control:

"When we say that appellant's appearance in public is caused not by 'his own' volition but rather by some other force, we are clearly thinking of a force which is nevertheless 'his' except in some special sense. The accused undoubtedly commits the proscribed act and the only question is whether the act can be attributed to a part of 'his' personality that should not be regarded as criminally responsible."

* * * * * * *

"[T]he question whether an act is 'involuntary' is, as I have already indicated, an inherently elusive question, and one which the State may, for good reasons, wish to regard as irrelevant."

(4) The indeterminacy of control tests is not sufficiently mitigated by the requirement of mental disease or defect.

The disease or defect requirement is present in all of the statements of insanity defenses; it is almost never defined, however. In *M'Naghten* its meaning is rarely critical; perhaps most frequently it is used to exclude intoxication. In the original formulation of *Durham* and in the control tests, definition becomes important as a limitation of their otherwise sweeping or indeterminate reach. Still, there has been little effort at judicial definition. Primary reliance is conventionally placed on the expert testimony, apparently because it is widely assumed (1) that there is a medical consensus on the meaning of these terms, and (2) that this meaning is relevant to the legal purposes at hand. Neither assumption is accurate.

Dorland's *Illustrated Medical Dictionary* (24th ed. 1965) defines "disease" as "a definite morbid process." The *Diagnostic and Statistical Manual of Mental Disorders* of the American Psychiatric Association stopped attempting to define "mental disease" in its 1952 edition and continued this omission in its 1968 edition. The medical profession has little need of attempting to define "disease." Treatment may proceed irrespective of such effort. Psychiatric authorities are occasionally called upon to use the term in a legal context, but here the response is again quite varied. Sometimes there is denial of the existence or usefulness of such an entity.[51] At other times "psychosis" is called mental disease, though "neurosis" is not. (There is little agreement as to the definition of these terms, either.) [52] Sometimes mental disease is used to refer to anything treated by a physician treating mental conditions; sometimes it refers to social malfunctioning as defined by moral or legal criteria; occasionally it refers to failure to realize one's capacities.[53]

Doctors Redlich and Freedman point out: [54]

"In older texts and in current lay parlance, psychiatry is often defined as the science dealing with mental diseases and illness of the mind or psyche. Since these are terms reminiscent of the metaphysical concepts of soul and spirit, we prefer to speak of behavior disorder. . . . *Medically* recognizable diseases of the brain cannot, for the most part, be demonstrated in behavior disorders.

"What, then, are these difficulties psychiatrists are supposed to treat, the so-called behavior disorders? Defying easy definition, the term refers to the presence of certain behavior patterns—variously described as abnormal, subnormal,

---

[47] *See Waelder, Psychiatry and the Problem of Criminal Responsibility,* 101 U.Pa. L. Rev. 378, 383 (1952).
[48] Royal Commission on Capital Punishment, Report 1949–1953, para. 268, at 95 (1953).
[49] *Id.*
[50] 392 U.S. 514, 540, 544 (1968).
[51] *E.g.,* Szasz, The Myth of Mental Illness 43, 214 (1961).
[52] *See* Menninger, The Crime of Punishment 130, 134 (1968).
[53] *See* Fingarette, *The Concept of Mental Disease in Criminal Law Insanity Tests,* 33 U.Chi. L. Rev. 229 (1966).
[54] Redlich & Freedman, *supra* note 41, at 1–2.

undesirable, inadequate, inappropriate, maladaptive or maladjusted—that are *not compatible with the norms and expectations of the patient's social and cultural system.* (Emphasis added.)"

The difference between using "mental disease" and "behavior disorder" is nonetheless important. One would not have expected an important test to state: "One is not criminally responsive if his criminal act is the product of a behavior disorder."[55] The absence of analogy to physical illness, the circularity, the confusion of an abstraction from conduct with its cause, the danger of metaphysical assumptions of the *existence* of illness categories, and the failure to provide a standard capable of operational use to distinguish between criminal and noncriminal proscribed behavior would all become more apparent. The problem has perhaps been most realistically recognized in a recent District of Columbia case:[56]

"In Durham v. United States, we announced a new test for insanity: 'An accused is not criminally responsible if his unlawful act was the product of a mental disease or defect.' We intended to widen the range of expert testimony in order to enable the jury 'to consider all the information advanced by relevant scientific disciplines.'

"This purpose was not fully achieved, largely because many people thought *Durham* was only an attempt to identify a clearly defined category of persons—those classified as mentally ill by the medical profession—and excuse them from criminal responsibility. In fact the medical profession has no such clearly defined category, and the classifications it has developed for purposes of treatment, commitment, etc., may be inappropriate for assessing responsibility in criminal cases. Since these classifications were familiar, however, many psychiatrists understandably used them in court despite their unsuitability. And some psychiatrists, perhaps unwittingly, permitted their own notions about blame to determine whether the term mental illness should be limited to psychoses, should include serious behavior disorders, or should include virtually all mental abnormalities."

* * * * * * *

"[T]estimony in terms of 'mental disease or defect' seems to leave the psychiatrist too free to testify according to his judgment about the defendant's criminal responsibility."

* * * * * * *

"An alternative to *Durham-McDonald* would be to make the ultimate test whether or not it is just to blame the defendant for his act. If the question were simply whether it is 'just' to 'blame' the defendant, then mental illness, productivity, ability to control oneself, etc., might be factors which the jury could consider in reaching its conclusion on the justness of punishment. Since the words 'just' and 'blame' do not lend themselves to refined definition, the charge to the jury under this test probably would not be detailed. But the words that have been used in other charges, such as 'defect of reason,' 'disease of the mind,' 'nature and quality of the act, 'behavior controls,' 'mental disease or defect,' 'capacity . . . to appreciate the criminality of his conduct,' and 'capacity to conform his conduct to the requirements of law,' are also vague—the chief difference being that these words give a false impression of scientific exactness, an impression which may lead the jury to ignore its own moral judgment and defer to the moral judgment of scientific 'experts.' However, we are unaware of any test for criminal responsibility which does not focus on the term 'mental illness,' or some closely similar term. This focus may be unfortunate, but we are not deciding that question now, and are not proposing to abandon the term. Contrast Dershowitz, [Address by Prof. Alan M. Dershowitz, *Psychiatry in the Legal Process: A Knife That Cuts Both Ways*, 51 JUDICATURE 370 (1968)], recommending that 'no legal rule should ever be phrased in medical terms . . .'"

The American Law Institute Proposal. (Alternative Formulation III (Study Draft Section 503)).—This test must be considered by any group drafting a Federal statute dealing with the insanity defense. Essentially it is a more careful statement of the *Davis* standards, providing exculpation upon lack of cognitive or volitional ability due to mental disease or defect. It is probably the most ably drawn of such tests. It provides that "substantial incapacity" will suffice, rather than requiring that it be total. It uses the more affective term "appreciate" for

---

[55] *Cf. State* v. *Pike*, 49 N.H. 399 (1869); *Durham* v. *United States*, 214 F. 2d 862 (D.C. Cir. 1954).

[56] *Washington* v. *United States*, 390 F. 2d 444, 446, 453, 452n. 23 (D.C. Cir. 1967). (per Bazelon, C. J.).

the more coldly cognitive "know" of *M'Naghten*. It attempts to avoid the circularity of defining repeated criminal conduct as a disease and concluding from the definition that ground for exculpation has thereby presented itself.* In explaining this second paragraph, the comments to the Model Penal Code state: [57]

"While it may not be feasible to formulate a definition of 'disease,' there is much to be said for excluding a condition that is manifested only by the behavior phenomena that must, by hypothesis, be the result of disease for irresponsibility to be established . . . . It does not seem useful to contemplate the litigation of what is essentially a matter of terminology; nor is it right to have the legal result rest upon the resolution of a dispute of this kind."

Our evaluation of the American Law Institute proposal has been suggested by the previous discussion. To summarize:

(1) The key terms are without meaning or extremely vague. A.L.I. is largely a control test, and subject to the metaphysical quandaries associated with assigning operational meaning. To a determinist, the abolition of criminal liability appears to be authorized by it; to a nondeterminist it remains indeterminate in scope. "Mental disease or defect" and "substantial capacity to conform" cannot be resolved except by utilizing the moral preferences of expert witnesses and triers of fact.

(2) The effort to exclude the so-called sociopath from exculpation is likely to be ineffective, since this diffuse, amorphous classification of behavioral deviants can be said to be characterized by more than repeated criminality and otherwise antisocial conduct. As a result, large numbers of defendants presently regarded as "bad," rather than "sick," would be exculpated on careful psychiatric examination and testimony.[58] According to the latest American Psychiatric Association Manual, these persons (renamed "antisocial personalities") are impulsive, unable to feel guilt, have low tolerance to frustration, and otherwise in addition to engaging in repeated legal or social offenses differ from the normal.[59] Doctor Bernard Diamond has predicted that the second paragraph exclusion of A.L.I. will in fact tend to reduce the number of sociopaths exculpated, but only those who had routine examination would be benefited; the affluent and the fortunate would be able to avoid the restriction.[60]

The effort by the American Law Institute to exclude sociopaths from relief in spite of the fact that they are paradigms of those said to be without capacity to conform to the requirements of law suggests an inconsistency with respect to trust of a volitional standard as an appropriate basis for determining legal responsibility.

Despite the seemingly insuperable indeterminacy and the possibly sweeping scope of volitional tests, statistics in the District of Columbia indicate that the percentage of defendants acquitted by reason of insanity in cases terminated since the *Durham* rule was expressly converted into a control test by *McDonald* in late 1962 averaged between 2 and 3 percent. Defendants found not guilty by reason of insanity during the same period were from about 6 to 9 percent of defendants in all cases tried.[61] The semantic and metaphysical problems to which we have alluded seem to have usually been less than overwhelming to the judges and juries which decided the cases. The expert witnesses have accepted the delegation of authority of the mental disease requirement. Volitional impairment problems have apparently been resolved by intuition. The approach of an opinion of the English Court of Criminal Appeal (considering an issue of diminished responsibility under the Homicide Act of 1957) may provide assistance in understanding the sort of reasoning which may not uncommonly be involved: [62]

"In a case where the abnormality of mind is one which affects the accused's self-control the step between "he did not resist his impulse" [sic] and "he could not resist his impulse" is, as the evidence in this case shows, one which is incap-

---

*The second paragraph of the A.L.I. test, providing that: "The terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct" is, in accordance with recent opinion, excluded from the Study Draft. See pp. 245–247, *infra*, and *Wade* v. *United States*, — F. 2d —, 7 Cr. L. 2104 (9th Cir. 1970).

[57] Model Penal Code § 4.01, Comment at 160 (Tent. Draft No. 4, 1955).

[58] *See Diamond, From M'Naghten to Currens, and Beyond*, 50 Cal. L. Rev. 189 (1962) [hereinafter cited as Diamond].

[59] *Diagnostic and Statistical Manual of Mental Disorders*, 43 (1968). *See United States* v. *Currens*, 290 F. 2d 751, 762 (3d Cir. 1961).

[60] Diamond, *supra* note 58, at 194.

[61] Report of the President's Commission on Crime in the District of Columbia 535 (1966).

[62] *Regina* v. *Byrne*, 44 Cr. App. R. 246, 2 Q.B.D. 396, 404 (1960).

able of scientific proof. A fortiori there is no scientific measurement of the degree of difficulty which an abnormal person finds in controlling his impulses.

"These problems which in the present state of scientific knowledge are scientifically insoluble, the jury can only approach in a broad, common-sense way . . . ."

Such a commonsense approach would presumably consider such factors as the rationality of the conduct of the actor, judged from the perspective of the trier of fact, whether it is associated with a medically-labeled syndrome, whether it represents a repetitive behavior pattern in the actor and in others similarly situated, and the subjective reports of the actor as to his thought processes particularly with respect to his control of his behavior. The conclusions of expert witnesses on the ultimate issues, since they are likely to be based on moral and metaphysical assumptions of the person giving testimony, might also weigh heavily, unless they are excluded.[63] Such an approach perhaps avoids intellectual rigor and may be unsatisfying to the contemplative, but it might be a practical solution to a problem which seems to call for at least a verbally less open-ended inquiry than would be presented if the jury were asked if they believed the defendant ought in justice to be exculpated.[64]

III. ABOLITION OF A SEPARATE INSANITY DEFENSE

"JUDGE: Well, what about the question of whether or not this man is responsible under the law? He committed a crime; that we know. But there is still the question of his intentions and his capacity from knowing right from wrong, his capacity to refrain from the wrong if he knows what wrong is. If he is not responsible, then technically he is not guilty.

ANSWER: [Dr. Karl Menninger] Your Honor, *responsible* is another one of these functionally undefined words.

"JUDGE: But your colleagues have often testified in this court that in their opinion a certain prisoner *was* or was *not* responsible.

ANSWER: Yes, your Honor, because the word *responsible* is in everyday use. But this use is different from the legal use, as you well know, and that fact is not always clear to your witnesses.

* * * * * * *

"What you want to know, I suppose, is whether this man is capable of living with the rest of us and refraining from his propensity to injure us. You want to know whether he is dangerous, whether he can be deterred, whether he can be treated and cured—whether we must arrange to detain him in protective custody indefinitely.

"JUDGE: Exactly. This is indeed what the court would like to know. But it seems we do not know how to communicate with one another, and our laws do not permit us to ask you. How, I beg of you, may I obtain direct, nonevasive answers to precisely these questions?

ANSWER: Your Honor, by asking for them. As you say yourself, you are not permitted by precedent and custom to do so." [65]

The formulation preferred by the writer* eliminates insanity as a separate defense, according it only evidentiary significance. If evidence of mental disease or defect negatives an element of the offense, it is exculpatory, but not otherwise. Most commonly negatived would be a mental element. The Model Penal Code commentary illustrates the proper subject of an insanity defense by the example of a madman who believes that he is squeezing lemons when he chokes his wife. Under Alternative Formation I he would be not guilty of homicide (unless gross negligence suffices for manslaughter), not because he would fall within a special defense but because he would lack the criminal intent required by the homicide offenses. Occasionally, evidence of mental abnormality might negative a required criminal act, as by tending to prove incapacity.

Mentally abnormal offenders suitable for treatment in a mental hospital would be removable from the criminal justice process by: (1) being found incompetent to stand trial, (2) being found not guilty because without criminal intent, (3) being referred to a mental hospital after a finding of guilt and suspension of the imposition of sentence, and/or (4) being transferred from a correctional institu-

---

[63] *Cf. Washington* v. *United States*, 390 F. 2d 444 (D.C. Cir. 1967).

[64] *Compare, e.g.*, Royal Commission on Capital Punishment Report 1949–1953 paras. 331, 332 (1953).

[65] Menninger, The Crime of Punishment 136–137 (1968).

*Alternative Formulation I in the tentative draft. *See* note**, p. 234, *supra*.

tion to a mental hospital after sentence. The fundamental policy is to replace the search for an elusive concept of responsibility at the time of the commission of an offense with treatment criteria applied to the defendant at the time of the decision as to his most appropriate disposition.

It may be observed that all three of the formulations ought to be accompanied by provision for notice of intent to rely upon evidence of mental disease or defect and verdict of not guilty by reason of mental disease or defect when that is the basis of a not guilty determination. There is much to be said for facilitating an inquiry as to the desirability of civil commitment of such persons and for providing for Federal commitment if they are found to be presently dangerously abnormal.

Much of the thinking which has led to the conclusion of the desirability of abolition of a separate insanity defense has been indicated in previous discussion in this commentary. An effort will be made to summarize considerations favoring and/or opposing this proposal. The former will be considered first:

(1) Trained mental health personnel, particularly psychiatrists and psychologists, are in critically short supply in the United States. The bulk of these resources are allocated outside the population of persons enmeshed in the criminal process. Pitifully small numbers are engaged in treatment in public mental hospitals and even smaller allocations of psychiatric and psychological personnel have been available to prison and jail populations. Attempting to devote these services to assistance in disposition and treatment of persons who have engaged in criminal conduct seems far more sensible than encouraging their presence in courthouses so that they will be available to engage in retrospective reconstructions of criminal responsibility. (A fairly extreme example is *Wright* v. *United States*,[66] in which eleven psychiatrists examined the defendant and testified before the jury.)

In the District of Columbia a committee of the Judicial Conference reported that the number of psychiatrists attending hospital staff conferences to evaluate persons facing criminal charges was deliberately reduced by the hospital administrators in an effort to lower the number of subpoenas handed out to its staff.[67] Insanity is frequently properly called a "rich man's defense," for the wealthy can sift the pool of potential expert witnesses for those who will produce favorable testimony in a convincing manner. Indeed, poor men have been strongly disadvantaged in litigating insanity questions. They have typically had to rely on public mental hospital experts or those selected by the court. Commonly, reports and witnesses have been made available to the prosecution as well as the defense. Signs of change are detectable, but they do not appear to be likely to result in a fair litigation of insanity issues. Statutory authority was recently granted for payment of expert witnesses selected privately by the defense.[68] Increased sensitivity to constitutional protections for the accused may make adversary trial of the mental state of the defendant at the time of the crime difficult in the future, as privilege against selfincrimination, right to counsel at examinations and evaluations, and equal protection claims are pressed.[69]

(2) Key terms in the conventionally utilized insanity tests (particularly when one goes beyond *M'Naghten*) such as "mental disease," "capacity to conform," are vague at best and perhaps meaningless. The insanity defenses invite semantic jousting, metaphysical speculation, intuitive moral judgments in the guise of factual determinations.

In *Washington* v. *United States*,[70] Chief Judge Bazelon ordered that expert witnesses in trials involving insanity defenses be instructed to refrain from expressing an opinion as to whether the criminal act charged was the "product" of a mental disease or defect:[71]

"The writer of this opinion would make the following observations for himself. It may be that this instruction will not significantly improve the adjudication of criminal responsibility. Then we may be forced to consider an absolute prohibition on the use of conclusory legal labels. Or it may be that psychiatry and the other social and behavioral sciences cannot provide sufficient data relevant to a

---

[66] 250 F. 2d 4 (D.C. Cir. 1957).

[67] Judicial Conference of the District of Columbia Circuit, Report of the Committee on Problems Connected with Mental Examination of the Accused in Criminal Cases, Before Trial 32–33 (1965).

[68] 18 U.S.C. § 3006A(e).

[69] *See Thornton* v. *Corcoran*, 407 F. 2d 695 (D.C. Cir. 1969); *Shepard* v. *Bowe*, 442 P. 2d 238 (Ore. 1968), and the authorities which it collects.

[70] 390 F. 2d 444 (D.C. Cir. 1967).

[71] 390 F. 2d at 457n. 33.

determination of criminal responsibility no matter what our rules of evidence are. If so, we may be forced to eliminate the insanity defense altogether, or refashion it in a way which is not tied so tightly to the medical model. . . ."

(3) The literature reveals great uncertainty as to the function of insanity defenses. Currently, it perhaps is most commonly stated as designed to remove from the criminal process those who are deemed to be not blameworthy.[72] Left unclear is the establishment of criteria for determining blameworthiness and the identification of persons meeting such criteria.

(4) The crucial decisions with respect to persons, including mentally abnormal persons, who commit criminal acts involve disposition. An insanity defense is a poor device for determination of whether persons ought to be institutionalized and if so, to what facility they are to be directed. It is far more rational to face this question frankly and directly.[73] Large numbers of defendants who could present effective insanity defenses under present standards do not do so either because the possibility is not recognized or because it is avoided, commonly out of fear of more lengthy detention and/or more painful stigmatization.

No matter what insanity defense approach is taken, it is likely that large numbers of abnormal persons will continue to be placed in correctional institutions. In view of our poor abilities to reform behavioral deviants, irrespective of the sort of institution to which they are directed, this is obviously not a tragedy from the standpoint of the prevention of recidivism. Successful treatment, once a central article of liberal faith, is more commonly today seen by professionals as an illusory goal of our poor skills and meager resources.[74] In view of the large numbers of persons of all personality types who will continue to be found in correctional institutions, rehabilitative efforts must be directed to mentally abnormal offenders who are placed in them. Dr. Bernard Diamond has written that the psychiatric care at Vacaville, a part of the California correctional system, may be categorically said to be better than that available at Atascadero, the hospital for the criminally insane.[75] Dr. Jonas Robitscher adds:[76]

"If the death penalty is abolished, if prison sentences are shortened to be consistent with deterrence and rehabilitation rather than revenge, and if psychiatric and other rehabilitation services are provided, it will not make any real difference if a disturbed person who has admittedly done an illegal act is treated in prison or in a mental hospital; in either case he will have problems of guilt, in either case he will feel he deserves punishment; in either case he will respond—if he responds at all—only to thoroughgoing and sincere efforts to help him whether the setting is called prison or hospital. (What we call our institutions is less important than what we do in them. It is time we recognized the inhumanity of indeterminate sentences, which represent a peculiar 20th century cruelty imposed on the pretext that we are therapists and not jailers, even when the prisoner-patient is not amenable to treatment.)"

(5) The criminal process has the advantages of determinate maximum periods of detention, proportionality between the seriousness of the offense and the penalty. Persons channelled out of the criminal system by the insanity defense are subject to incarceration, possibly for life. The criteria for release such as "recovered sanity," no longer "dangerous" are subject to such wide variations of meaning as to afford little protection to the "patient." Prediction of future criminal behavior, its frequency, its nature and severity, the length of confinement needed to reduce the risk, is a primitive science in and about which few empirical studies have been conducted.[77] The safe thing for a hospital administrator to do may be to err on the side of caution and continue hospitalization for an extended period of time. The criminal justice system diffuses responsibility among legislature, police, prosecutors, judges and parole boards and may consequently be in a better position to opt for release.

(6) A number of informed observers believe that it is therapeutically desirable to treat behavioral deviants as responsible for their conduct rather than as involuntary victims playing a sick role.

---

[72] *See e.g.*, Model Penal Code § 4.01, Comment at 156 (Tent. Draft No. 4, 1955).

[73] *Cf. Bolton* v. *Harris*, 395 F. 2d 642 (D.C. Cir. 1968), holding that a finding of not guilty by reason of insanity does not provide a constitutionally rational basis for indefinite commitment to a mental hospital. But *see Lynch* v. *Overholser*, 369 U.S. 705 (1962), assuming the contrary if the defense is raised at the instance of the defendant.

[74] *See* A. Goldstein, The Insanity Defense 21 (1967).

[75] Diamond, *Criminal Responsibility of the Mentally Ill*, 14 Stan. L. Rev. 59, 85 (1961).

[76] Robitscher, *Tests of Criminal Responsibility; New Rules and Old Problems*, 3, Land and Water. L. Rev. 153, 172 (1968).

[77] *See* Dershowitz, *Psychiatry in the Legal Process: "A Knife That Cuts Both Ways,"* 51 Judicature 370 (1968).

(7) The insanity defense developed in England at a time in which all felonies were punishable by death. In the United States in 1967 a death penalty was administered to one person and in 1968 to none. The appropriateness of capital punishment in the Federal system ought to be directly faced rather than ameliorated by retention of an insanity defense.

(8) The insanity defense discriminates against persons who commit crimes because of influences on their personalities other than mental disease or defect. Professor Norval Morris writes: [78]

"It too often is overlooked that one group's exculpation from criminal responsibility confirms the inculpation of other groups. Why not permit the defense of dwelling in a Negro ghetto? Such a defense would not be morally indefensible. Adverse social and subcultural background is statistically more criminogenic than is psychosis; like insanity, it also severely circumscribes the freedom of choice which a nondeterministic criminal law (all present criminal law systems) attributes to accused persons. True, a defense of social adversity would politically be intolerable; but that does not vitiate the analogy for my purposes. You argue that insanity destroys, undermines, diminishes man's capacity to reject what is wrong and to adhere to what is right. So does the ghetto—more so. But surely, you reply, I would not have us punish the sick. Indeed I would, if you insist on punishing the grossly deprived. To the extent that criminal sanctions serve punitive purposes, I fail to see the difference between these two defenses. To the extent that they serve rehabilitative, treatment, and curative purposes I fail to see the need for the difference."

(9) There is undoubtedly some overlap between the insanity defense and the mens rea requirement. The overlap is most substantial in *M'Naghten*. For persons within this group the insanity defense may become a means of facilitating detention of those who are not guilty of crime and whose present dangerousness has not been estimated.[79]

Arguments favoring retention of a separate insanity defense follow:

(1) There is a powerful root feeling in our culture than an "insane" person is not appropriately subject to the condemnation implicit in criminal conviction and sentencing. We sense a lack of culpability. In spite of the vagueness of these feelings and of the terms we use to express them the moral sentiments are strong and pervasive. In part they may be attributable to notions of retribution associated with criminal sanctions, however great our effort to avoid such a rationale. In part these feelings may be attributable to a subjective sense of freedom to avoid criminal conduct ourselves and our lack of identification with grossly abnormal offenders, whom we feel to be different from ourselves in the sense of being less free.

To abolish the insanity defense would be to seem to recognize that criminal sanctions may be imposed irrespective of whether the defendant freely chose his course of conduct, thus weakening what is at least a useful myth.

(2) Criminal convictions carry added sanctions of loss of reputation, self-deprecation, and (frequently) civil legal liabilities. The difficulties experienced by ex-convicts in obtaining employment alone justify avoidance of criminal stigmatization where reasonably feasible.

This argument is considerably weakened by the stigma associated with being judged insane.

(3) Elimination of the insanity defense may be unconstitutional. It has been attempted in two States. In *State* v. *Strasburg*,[80] a statute so providing was declared unconstitutional by the Washington Supreme Court as violating due process of law and the right to a trial by jury. The legislation in that case was held to abolish the use of evidence of insanity in connection with disproving mens rea, thus differing from the abolition suggested by Alternative Formulation I. The second case is *Sinclair* v. *State*,[81] in which a statute similar to the Washington provision was held violative of the due process provision of the Mississippi Constitution.

Powell v. *Texas* [82] may be read to require exculpation of a defendant whose criminal act was beyond his power of avoidance. The four Justices urging reversal of Powell's conviction were joined in such a view by Mr. Justice White,

---

[78] Morris, *Psychiatry and the Dangerous Criminal*, 41 S. Cal. L. Rev. 514, 520 (1968).
[79] *See* J. Goldstein & Katz, *Abolish the Insanity Defense—Why Not?*, 72 Yale L. J. 865 (1963).
[80] 60 Wash. 106, 110 Pac. 1020 (1910).
[81] 161 Miss. 142, 132 So. 581 (1931).
[82] 392 U.S. 514 (1968).

who concurred in affirmance on the basis of the facts of the particular case. On the other hand, even the dissenting Justices disclaimed the accusation that they were creating a constitutional insanity standard of general applicability.[83] In any event, the area of litigation, the mere public drunken appearance of chronic alcoholics, did not present the Court with the question of the elimination of a separate insanity defense in a carefully considered Criminal Code. *Leland* v. *Oregon*[84] sustained a cognition test in the face of a contention that irresistible impulse exculpation was required by the fourteenth amendment.

Another possibility which might be considered would be the vacation of a conviction upon a decision to place one who has been found guilty of an offense in a mental institution for treatment. "Suitability for treatment" presents many questions as to the nature and meaning of the criteria employed, the extent to which decisions are influenced by the facilities available in correctional and mental health institutions, and would present great challenges to attempts at evenhanded administration. Although believing it seems worth considering, the writer prefers giving an option for postconviction commitment to a mental hospital. Such a proposal will be considered in connection with procedural suggestions.

(4) The abolition of the insanity defense may be, in fact, impossible. In California, where split trials were established to separate the adjudication of insanity from the trial of guilt of the elements of the offense, evidence of mental abnormality has been commonly introduced in both trials. In homicide cases it is typically presented in the first trial to rebut premeditation, deliberation, or malice and reduce a charge of first degree murder to murder in the second degree or manslaughter.[85] However California has also approved the use of such evidence to establish lack of criminal intent required for any homicide crime.[86]

On the other hand, many jurisdictions have declined to allow evidence of mental abnormality short of insanity to be used to rebut mental elements of an offense. In *Fisher* v. *United States*,[87] a murder case, psychiatric evidence of mental abnormality was received and instructions on insanity, malice, premeditation, and deliberation were given. However, a requested instruction that the jury might weigh the evidence of defendant's mental deficiencies in determining whether there was premeditation and deliberation was refused. The Supreme Court affirmed the conviction, stating that rejection of such a doctrine of "partial responsibility" was in conformity with the common law, and if it were to be changed either Congress or the courts of the District of Columbia, where the case arose, should change it.

Affirmative Formulation I takes the view that evidence of mental abnormality should be accorded its full evidentiary significance. The Model Penal Code took the same position.[88] The effect of this doctrine is to exculpate or mitigate in situations where defendants may be more dangerous as well as thought less culpable by reason of mental abnormalities. It is consequently suggested that concomitant procedures ought to be adopted to determine whether such persons ought to be civilly committed to mental institutions in the event of their exculpation. The California Joint Legislative Committee for Revision of the Penal Code has proposed a similar response be authorized in the event of a successful *Wells-Gorshen* defense.[89]

If the special insanity defense is eliminated, there will be greater need to provide means for channeling mentally abnormal persons away from correctional institutions and into mental hospitals. Under 18 U.S.C. § 4241, a prisoner in a Federal correctional institution may be transferred to a mental hospital by the Attorney General upon recommendation of a medical panel. If the court had power to take a similar measure, it might not believe it necessary to impose sentence in many cases, and the decision of the appropriate sentence to impose, if any, could frequently be more wisely made after release from the hospital. Such authority would be a more realistic replacement of one function of the special insanity defense (in jurisdictions where commitment may follow acquittal) : the assigning of people to facilities most suited to their needs.

---

[83] *See* dissenting opinion of Fortas, J., 392 U.S. 514, 559n. 2.
[84] 343 U.S. 790 (1952).
[85] *See, e.g., People* v. *Wells*, 33 Cal. 2d 330, 202 P. 2d 53, *cert. denied*, 338 U.S. 836 (1949).
[86] *People* v. *Gorshen*, 51 Cal. 2d 716, 336 P. 2d 492 (1959).
[87] 328 U.S. 463 (1946).
[88] Model Penal Code § 4.02 (P.O.D. 1962), and Model Penal Code § 4.02, Comment at 193 (Tent. Draft No. 4, 1955).
[89] Cal. Penal Code Revision Project § 534, Comment at 84 (Tent. Draft No. 2, 1968).

Procedural Proposals Relating to Acquittal Because of Mental Disease or Defect Negativing an Element of an Offense [Insanity]; Commitment

I. PRESENT FEDERAL LAW

Federal law contains no present provision for notice or verdict (or finding) of not guilty by reason of insanity. Furthermore, there is no procedure for commitment to mental institutions of persons who obtain acquittals on the basis of insanity defenses. Federal officials must attempt civil commitment by urging local authorities to institute such proceedings. Frequently such efforts are unsuccessful; not uncommonly this is due to lack of sufficient contacts between the acquitted defendant and a particular state for the latter to be willing to undertake care and treatment responsibility for him.[90] The absence of post-acquittal arrangements for commitment is in marked contrast with procedures presently provided by chapter 313 of Title 18, United States Code for Federal commitment of persons found incompetent to stand trial and convicted prisoners who subsequently become mentally ill.[91] Senators Robert Kennedy, Joseph Tydings, and Wayne Morse introduced bills to provide for commitment of dangerously mentally ill persons acquitted by reason of instanity, but no hearings appear to have been held on them.[92]

II. PROPOSALS*

It is recommended that procedural reform provide for advance notice that evidence of mental disease or defect will be relied upon in defense in a provision similar to section 4.03(2) of the Model Penal Code. Section 4.03(1) of the Model Penal Code provides that mental disease or defect excluding responsibility is an affirmative defense. While there is much to be said for such a view with respect to a separate defense of insanity, particularly in view of greater accessibility to the defense of evidence of the accused's mental state, the proposal for abolition of such a defense (Alternative Formulation I) could not consistently require the prosecution to prove mental elements of offenses and at the same time have the burden on defendants to disprove them.

Upon notice that defendant will introduce evidence of mental disease or defect, it is suggested that such a procedural provision permit the court to order psychiatric examinations and reports, the latter to be in other than conclusory terms. These proposals and many of those which follow are modeled closely upon Senate Bill 1007, introduced in the Senate by Senator Tydings for himself and Senator Morse.[93] A finding of mental disease or defect inconsistent with guilt should trigger consideration of possible commitment to a mental hospital. The criteria for ordering commitment would be present mental illness or defect plus dangerousness at the time of the post-acquittal hearing. To at least slightly alleviate the ambiguity of the word "dangerous," it is recommended that the provision require that the danger be found to be substantial. In the event of commitment, regular reports from the hospital to the court should be required and habeas corpus jurisdiction retained. Authorization for utilization of non-federal institutions should be provided for, to permit maintenance of the patient in the area of family and friends. When dangerousness has receded to the point that compulsory hospitalization need not be required, the court should terminate the commitment.

A Proposal To Authorize Civil Commitment of Persons Convicted of Federal Offenses

I. PRESENT FEDERAL LAW

18 U.S.C. § 4241 provides for transfer of mentally ill Federal prisoners to a mental hospital. No similar power is granted sentencing courts.

---

[90] *See* Tydings, *A Federal Verdict of Not Guilty by Reason of Insanity and a Subsequent Commitment Procedure*, 27 Md. L. Rev. 131, 133 (1968).

[91] *See* 18 U.S.C. §§ 4241–4248.

[92] S. 3689, S. 3753, 89th Cong., 2d sess. (1966); S. 1007, S. 2740, 90th Cong., 1st sess. (1967); S. 979, 91st Cong., 1st sess. (1969).

*The Commission did not undertake any detailed consideration of procedural reforms in this or any other area. Current proposals covering procedural reforms in the matter of mental disability and the Federal criminal law include H.R. 15046, 91st Cong., 1st sess. (1969).

[93] S. 1007, 90th Cong., 1st sess. (1967).

II. A PROPOSAL

It is suggested that Federal courts be given authority to suspend the imposition of sentence on persons found to be mentally ill at the time of conviction and commit them to a hospital for treatment, rather than either imprison or release them. The criteria should be: mental illness or defect and need for custody, care or treatment in a hospital. This provision could be adopted from the *Draft Act Governing Hospitalization of the Mentally Ill* prepared by the National Institute of Mental Health.[94] Similar provisions may be found in many State involuntary commitment statutes. The criteria here would be primarily directed to the most suitable place of treatment and custody, as we are considering persons who have been convicted of a crime and might otherwise be imprisoned. It is thought that Federal courts would welcome the hospitalization option. People would be diverted from treatment in penal institutions on the basis of present suitability for treatment, rather than on retrospective reconstructions of mental status relating to responsibility criteria as of the time of the offense. Similar authority was granted to English courts by the Mental Health Act of 1959, 7 & 8 Eliz. 2, c. 72, § 60. It is said to be commonly used.[95]

Consideration was given to the possibility of vacating the convictions of such persons, but on balance, it is thought undesirable to give authority to in effect pardon persons convicted of offenses against the United States on the basis of mental health and suitability for hospital treatment criteria. They are too vague to permit evenhanded administration of such a power. Furthermore, it is thought likely that many persons initially referred to a hospital subsequent to conviction will be returned to the court for subsequent possible penal institutionalization. In the event this is done, credit would be given for time served. At any event, hospitalization for a period longer than the term for which imprisonment could be ordered should not be allowed without a determination of dangerousness of the offender. A maximum time limit on hospitalization for treatment should be established. Any revision of chapter 313 of Title 18[96] should continue to permit hearing to determine dangerousness and subsequent indefinite retention of such persons in a Federal hospital.

COMPETENCY TO BE TRIED, CONVICTED, OR SENTENCED

I. PRESENT LAW

The function of the incompetency standards seems to be twofold: First, it appears fundamentally unfair to convict an accused *in absentia*, so to speak. Such was the decision in *Pate* v. *Robinson*,[97] in terms of the due process clause of the fourteenth amendment. In addition, the accuracy of the factual determination of guilt is suspect when an accused lacks opportunity to challenge it at a trial.

Competency to stand trial in Federal courts is governed by chapter 313 of Title 18,[98] which constitutes part of comprehensive legislation enacted in 1949[99]: "To provide for the care and custody of insane persons charged with or convicted of offenses against the United States, and for other purposes." This chapter was proposed by the Judicial Conference of the United States "after long study by a conspicuously able committee, followed by consultation with Federal district and circuit judges."[100]

18 U.S.C. § 4244 provides that whenever the United States Attorney has reasonable cause to believe that a person charged with a Federal offense may be presently "insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense" he shall file a motion to determine competency. Upon such a motion, or a similar one filed by the accused, or on its own motion, the court shall have the accused examined. If the report of the psychiatrist conducting the examination indicates "present insanity or such incompetency" the court is to conduct a hearing and make a finding with respect to the "mental condition of the accused." If the court finds the accused "mentally incompetent," it may commit him to the cus-

[94] Public Health Service Publication No. 51, 1952.
[95] *See* H. L. A. Hart, Punishment and Responsibility 194, 198 (1968).
[96] 18 U.S.C. §§ 4241–4248.
[97] 383 U.S. 375 (1966).
[98] 18 U.S.C. §§ 4241–4248.
[99] 18 U.S.C. §§ 4244–4248, added by Act of Sept. 7, 1949, c. 535 § 1, 63 Stat. 686.
[100] *Greenwood* v. *United States*, 350 U.S. 366, 373 (1956), per Frankfurter, J.

tody of the Attorney General "until the accused shall be mentally competent to stand trial or until the pending charges against him are disposed of according to law." 18 U.S.C. § 4246. Other sections of chapter 313 deal with incompetency at trial disclosed after trial, and transfer of persons "insane, or of unsound mind, or otherwise defective" from Federal prisons to mental hospitals, even after expiration of sentence.

The statutes do not explicitly state the test of competency to stand trial, although the strong implication is that the question is whether the accused is "presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense." The leading decision appears to be *Dusky* v. *United States*.[101] There the Court reversed a conviction after the government confessed that the trial court had erred in finding competency on the basis of the record before it. In a very brief, *per curiam* opinion, the Supreme Court stated: [102]

"We also agree with the suggestion of the Solicitor General that it is not enough for the district judge to find that 'the defendant [is] oriented to time and place and [has] some recollection of events,' but that the 'test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as a factual understanding of the proceedings against him.'"

There is no express limitation of time beyond which a Federal patient may not be held upon determination of incompetency to stand trial. However, an alternative procedure is provided for the committing court to hold a hearing to determine if the accused is dangerous to Federal "officers, property, or other interests." If the court so finds 18 U.S.C. § 4248 provides that the commitment shall continue until competency is restored or the danger has passed.

II. EXPLANATION OF A PROPOSAL

Any revision of present laws should closely follow the Model Penal Code, which reads: [103]

"No person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted or sentenced for the commission of an offense so long as such incapacity endures."

The use of rather more extended language could recognize the problem of the existence of a range of capacities among defendants and require "substantial capacity," analogously to the language in the A.L.I. insanity defense proposal, by adding requirements of ability to understand the nature of the charge and to cooperate with defense counsel, not because these things are not fairly implied by shorter formulas, but rather because it is thought that it adds emphasis to the functional position of competency standards. The major problem in the application of the competency to stand trial test has been one of confusion of purposes. Sometimes it is thought to be aimed at withdrawal of psychotics from the criminal process. The Royal Commission on Capital Punishment found both in England and in the United States a widespread view among prison medical officials that incompetency to stand trial means "insanity in the ordinary medical sense." [104] This position is not supported by existing law. An accused may be deemed psychotic yet able to function with substantial self protective capacity in a criminal prosecution. At the same time, a substantial overlap between psychosis and incapacity to defend oneself must be acknowledged.

A closely related common misconception is that the competency to stand trial standard is designed to select out the civilly commitable for hospitalization. Again, the overlap of the categories must be noted, without conceding that all persons subject to involuntary hospitalization are incapable of standing trial.

An incompetency proceeding is sometimes also used to satisfy the moral preferences of some psychiatrists and courts to substitute medical custody for possible criminal incarceration. A study in the District of Columbia indicated that after the insanity defense was broadened by *Durham*, both the percentage and number of persons found incompetent to stand trial declined.[105] Some observers

[101] 362 U.S. 402 (1960).
[102] *Id.* at 403.
[103] Model Penal Code, § 4.04 (P.O.D. 1962).
[104] Royal Commission on Capital Punishment, Report 1949–53, para. 220, at 77 (1953).
[105] Judicial Conference of the District of Columbia Circuit, Report of the Committee on Problems Connected With Mental Examination of the Accused in Criminal Cases, Before Trial 44–45 (1965).

interviewed by the D. C. Committee attributed this to a belief by psychiatrists that it was unnecessary to declare as many persons incompetent to stand trial after the broadening of the insanity defense, as acquittals and subsequent commitments to a mental hospital could be more readily anticipated.

Competency criteria should not be designed to identify these other classes of persons, and it does not seem right to confine persons accused of crime in mental hospitals for ends other than that envisaged in the competency tests upon determination only of incapacity to stand trial.

III. EXPLANATION OF PROPOSED CHANGES IN THE PROCEDURAL PROVISIONS RELATING TO COMPETENCY TO PROCEED

Chapter 313 of Title 18[106] would be left largely unchanged by the proposals contemplated, with the following major exceptions:

(1) The length of time during which an accused could be held on a finding merely that he is incompetent to stand trial should no longer be unlimited. It should be provided that it could not exceed the period for which he could be sentenced upon conviction of the offense charged, and in no event could exceed three years. A longer period of hospitalization should require a finding of substantial dangerousness and thus be equivalent to a most limited type of civil commitment procedure.[107] Assistance of counsel should be expressly provided in the event indefinite commitment is sought, in contrast to the present statute (18 U.S.C. § 4247), which seems to assume that the court is to act to protect the accused. Similar explicit guarantees would seem unnecessary with respect to the hearing on competency to proceed, since this is clearly a critical phase of the criminal case.[108]

(2) The standard to determine competency to stand trial should be incorporated in the procedural provisions, rather than being only implied.

(3) A minimum of two psychiatrists (if any) should be appointed by a court, rather than one. At best competency standards are rather ambiguous and subject to significant variations of expert judgment. In view of the importance of the issue and the desirability of reducing the likelihood of idiosyncratic evaluation, more than one appraisal is thought desirable.

(4) A determination of incompetency to proceed ought not to prevent determination of pretrial legal issues not requiring the personal participation of the defendant. The recommendation of the American Law Institute proposal is to so provide.[109]

Senator HRUSKA. Very well.

You may proceed with your portion of the testimony.

STATEMENT OF MARK K. BENENSON, ON BEHALF OF THE COMMITTEE ON FEDERAL LEGISLATION, NEW YORK STATE BAR ASSOCIATION

Mr. BENENSON. Senator, Gentlemen, my name is Mark Benenson. I am a member of Mr. Marshall's Committee on Federal Legislation of the New York State Bar Association, and I am down here today not so much to talk about S. 1 and S. 1400, but to talk to you about a proposal that the New York State Bar Association made on Federal gun controls 2 years ago.

I am particularly glad that Senator Hruska is here because it is my impression that he knows as much about this subject as anyone in Congress.

Now, the New York State Bar Association's Committee on Federal Legislation 2 years ago was not a metropolitan committee of New York

---

[106] 18 U.S.C. §§ 4241–4248.

[107] *Compare* the Ervin Act, Pub. L. No. 78 Stat. 944 (1964); D.C. Code Ann. § 21–501 *et seq.* (1967).

[108] *See* 18 U.S.C. § 3006A.

[109] Model Penal Code § 4.06(3) (P.O.D. 1962).

City lawyers who automatically came down with a pronouncement in favor of strict gun controls. We had people from upstate, we had people from the city, we had people who knew about guns and liked guns and people who did not know about them and did not want to know about them.

I myself am a life member of the National Rifle Association. I am a gun collector, target shooter. I go hunting. I have licenses from several jurisdictions. They are necessary in that part of the country where I live. And our then committee chairman, Dick Givens came to me and said, Benenson, you have been opposing gun controls both in litigation and legislation for some time. We have another member of our committee, Vincent Broderick, who used to be police commissioner in New York City, and who has been for gun controls for a long time. I would like the two of you to consider yourself locked into a closed committee room, and would you please emerge with some kind of proposal that you both think that you can live with.

Well, we did, we struggled a bit. There were some arguments in the committee. It took a year or so and finally we did come up with a report which is before you, and I would like to outline it.

Now, we accepted several premises. First of all, we decided not to try to figure out whether gun controls would work or would not work. I am personally convinced that it is pretty much an exercise in legislative futility. You spend a great deal of money. To me it is one of the least efficient methods of controlling crime imaginable. On the other hand, Vincent Broderick thought if you did not have gun controls, you were letting the potential for murder roam unchecked throughout the Nation.

Now, the committee split on that. We were all able to find statistics to support our side of the argument, so we decided to be pragmatic about it and we looked at the historical situation in the United States, where what had been a rural country was turning into a metropolitan one where a lesser and lesser proportion of the populace was familiar with firearms as time went on, when a one man one vote rule had lowered the power of rural legislators, and we concluded that with the unremitting efforts of the media, which are essentially metropolitan, eventually all the big industrial States and all the big cities woud have some kinds of firearms control laws, even if a State, Senator, like yours, holds out until the end, and if the present pattern is any guide to the future, those laws will be inconsistent; every State and city will write its own law. They will make no provisions in those laws for people from other jurisdictions, who have licenses from other jurisdictions.

I have a New York City rifle and shotgun license. I have a Federal gun collectors license. If I want to go to the Baltimore gun collectors meeting, which takes place twice a year, and I have got my rifles in my car, I am subject to arrest as I drive through New Jersey because of New Jersey's firearms control law, although it does make provision for somebody who comes to hunt in New Jersey from out of State, it clears him, it doesn't have an exemption for some fellow who is going through the State to a gun collector's meeting. This is pretty typical.

In the New York City rifle and shotgun law, for instance, the criteria for the issuance of the license were taken straight, almost verbatim from the New Jersey identification card law. They were copied by the

city councilmen who drafted the law, but the New York City law gives no comity to someone with a New Jersey license. The New Jersey license does not recognize the New York City license. And we considered that this kind of situation would get worse and worse.

Today if you were, let's say, you are from Virginia and you want to go deer hunting in Maine, and you and your friends decide to drive to Maine, you have the potential for getting into trouble in Washington, D.C., in Baltimore, in New Jersey, in New York City, and in Massachusetts as you pass through all of these locations on your way.

So what we did was to frame a proposal which really, I suppose, offers something to stimulate discussion more than anything else because we did not really draft it. We suggested on the one hand a voluntary arrangement under which a gun owner could apply for a Federal identification card and if he had the Federal identification card, he would then be immune——

Senator HRUSKA. Will you excuse me? There is a vote in progress. I will get back as soon as I can.

(A brief recess was taken.)

Senator HRUSKA. Very well. We will resume the testimony.

Mr. BENENSON. Gentlemen, I will resume.

So essentially our committee decided that the present pattern, that the way the pattern of gun controls in the United States was shaping for the future, if the present trend continues, was one that was going to create a real entanglement for sportsmen who are mobile. Hunters do not just hunt in their own State. Gun collectors travel. Target shooters travel, and we sort of put our heads together and we came up with a proposal which works like this, Senator.

First of all, you can go in voluntarily to the Federal Government and get a Federal firearms identity card. Now, we do discuss the criteria for its issuance in our report. Those criteria would be stricter if the identity card was to cover handguns as well as long arms. The criteria would also have to be specific and intelligible, none of this kind of thing that you have in the New York City license, for instance, where the commissioner can deny your license, if for any other reason the health and safety and welfare of the populace is threatened. There would have to be specific criteria. If you did not fit those negative criteria you had to get your license. There would be no discretion on the part of the issuing authority to refuse you your license for any but the specific reasons given.

Now, once you had your Federal license, you would be immunized against prosecution for violation of State firearms license laws or local firearms license laws when you were passing through that locality for a legitimate purpose like hunting, target shooting, or just perhaps traveling with a rifle in your camper, with the expectation that you might do a little shooting wherever you were going.

Now, that license would not immunize you against a violation of your own State's laws, but it would immunize you against prosecution for violating any others.

In addition, once you had the Federal license, we suggested that the prohibitions against interstate purchase of firearms ought to be removed, no more mail order prohibition, for instance, because if you have a Federal license, we do not really care whether you get your gun in your State of residence or anyplace else. It does not make any difference.

The purpose of the Gun Control Act of 1968, when it restricted interstate purchase of firearms, was to prevent people from evading the gun license laws of their own States. Once you have the Federal license, once you are screened, that becomes irrelevant, while at the same time in our suggestion we turned around and we said to the individual States, this is our proposal. Look, if you want to require some sort of gun licensing, do not set up your own system of administration. Do not pass your own laws. Simply pass a one sentence statute that says any resident of this State who wants to own a firearm has to get a Federal license.

Now, in that way I would think that we would practically assure that no State would busy itself writing its own gun law. They would not have to sustain any direct cost in gun control. The indirect costs, the cost of license issuance, of investigation and so on would still be there, borne by the Federal Government, but the State would not have to draft its own law, would not have to pass its own law, would not have to administer its own law.

So, by doing this we think we do two things. First of all, we relieve the legitimate sportsman of a lot of the irritations that the present system of patchwork gun control is imposing on him. Now, I know that out west, for instance, and in the south some of these problems that I have talked about are still problems of the future, but in the northeast, for the people who use firearms as a hobby, they are very present and real problems, and they are problems which are going to get worse as time goes on.

And then we turn around and say to the other side of the argument. Here is your chance that you have been talking about all these years, in the New York Times and the Washington Post, to start a uniform national system of screening firearms and others. Now, we quite emphatically, in our report, we are not for registration. We are just talking about licensing. We did not get a consensus in support of registration for two reasons.

First of all, the difficulties created by the case of Haynes against the United States in 1968, I think it was, which I am sure the Senator is familiar with, and second, the fact that gun owners who do not really object to the idea of a license will really begin to get their short hairs up at the idea of registering, and frankly I feel that way myself. If some governmental authority wants me to show him that I do not have a criminal record, that I have not been in the booby hatch, and that I am a responsible citizen, I do not object to it too much if that is a precondition to my owning firearms. I certainly do not want lists of my guns on file in the local police precinct. And a great many gun owners feel the same way. They will accept the licensing law. It does not mean they like it. They accept it, where they violently oppose registration.

And in any case, there is not as much utility in knowing how many guns people have. I think if you are safe to own one you should be safe to own 50. The real efficacy of firearms control, if there is any, comes from licensing and not from registration.

We also said in our report that we disagreed with the National Commission Report that says that the private ownership of handguns ought to be prohibited. We did not agree with that at all. We thought that hunting and target shooting with pistols were perfectly legitimate avocations, and that they ought not to be prohibited.

Now, I think that is the outline of our proposal, essentially a voluntary system under which anybody can come to the Federal Government and get a license which would relieve him of the restrictions that are being imposed by State and local laws, and an option to States to adopt the Federal System. I think that should be enough, gentlemen, to give the skeleton of the proposal.

I will end now unless there are questions.

Senator HRUSKA. I have here, Mr. Witness, a copy of the New York State Bar Association report, March 1971.

Is that the report to which you refer?

Mr. BENENSON. It is, Senator.

Senator HRUSKA. It will be printed in the record at the conclusion of your testimony, and I have noticed that you have pretty well followed some of the principal points in it. This will furnish a good reference and footnotes which you of course have omitted.

Mr. BENENSON. Thank you, sir.

Senator HRUSKA. Very well, and thanks for coming.

[The prepared statement of Mr. Benenson and the report referred to follow:]

NEW YORK STATE BAR ASSOCIATION COMMITTEE RECOMMENDS NEW GUN CONTROL SYSTEM

In testimony today before the Senate Subcommittee on Criminal Laws and Procedure, Judiciary Committee, the Committee on Federal Legislation of the New York State Bar Association proposed a compromise federal firearms license act and called for "moderation" and a "balance point" in the gun control controversy. Anthony Marshall, a New York City attorney who is the committee chairman, stated:

"The Committee is composed of members from New York City and upstate, some of whom are pro-gun control, some anti-gun control. Only one member dissented from the report which was drafted by Mark K. Benenson, who has worked for elements of the gun industry against controls, and Vincent L. Broderick, a former New York City police commissioner who has worked for controls. We hope that the proposed licensing law may provide a framework for legislation by Congress that can be supported by those on both sides of the controversy."

The proposal was described by Mark K. Benenson. Noting that the hard core of opposition to gun control comes from hunters, target shooters, and gun collectors whose activities are restricted by many local and state laws which do not recognize gun licenses from other localities, Benenson urged that a federal gun license be issued upon request to persons meeting "specific intelligible criteria". Once possessing a license, a person could not be prosecuted for gun law violations by any state or local municipality through whose territory he was passing for lawful purposes, and he could buy guns in any state or by mail order.

The proposal envisions that a state could adopt the federal law by simply requiring its own residents to obtain the federal license to own a gun within the state. States would not have to set up their own gun licensing systems, encouraging adoption and uniformity.

The Committee did not recommend registration of firearms and, while urging stiffer criteria for issuance of a federal license which would permit the interstate carriage of pistols as well as longarms, it disagreed with proposals that the private ownership of pistols be forbidden. In the view of the Bar Association Committee, hunting and target shooting with pistols are legitimate avocations which should not be generally proscribed.

This statement is submitted on behalf of the Committee on Federal Legislation of the New York State Bar Association. In March, 1971, the Committee issued a report on Federal Firearms Controls, which had been prepared by its Subcommittee on Firearms, consisting of Mark K. Benenson and Vincent L. Broderick. Mr. Benenson is counsel to the New York Sporting Arms Association, Inc. and Mr. Broderick, who is Chairman of the New York Citizens Committee on Gun Control Laws, was Police Commissioner of New York City in 1965–66. Mr. Benen-

son's present address is 401 Broadway, New York, New York 10013, telephone (212) 966-1800, and Mr. Broderick's present address is 51 West 51st Street, New York, New York 10019, telephone (212) 581-7575.

This statement is presented by Mark K. Benenson.

STATEMENT OF MARK K. BENENSON

Mr. Chairman and Senators, the Committee on Federal Legislation of the New York State Bar Association very much appreciates this opportunity to make a statement before you on the gun control provisions of S. 1 and S. 1400. In our view, the proposals represent standardized, although carefully drafted, approaches to this problem, and are primarily codifications of present law.

We do not think that this is enough. With many other groups, this committee does not believe that existing federal gun control laws are adequate; at the same time, it considers that many existing state and municipal laws are overly severe, contradictory, and not well-designed to simultaneously recognize the rights of the very large number of Americans who have a legitimate purpose in owning and using firearms, and the requirements for effective law enforcement.

We submit that the New York State Committee on Federal Legislation, in its March, 1971 report on this subject,[1] made suggestions which are worthy of your consideration. The Washington Post, in an editorial of May 7, 1971,[2] while considering our proposal "inadequate", called it a "constructive, reasoned effort to find a practical solution for a pressing public problem."

We wish to emphasize, before getting to the meat of our statement, that our committee is not the usual metropolitan group of lawyers who come out with the knee-jerk automatic statement in favor of strict gun control. Our committee is statewide. There are members on it who do not own a firearm and would not have one in the house, but there are others to whom guns have been familiar household implements since childhood, and to whom they are perfectly ordinary tools like any others. The drafters of the report were on opposite sides of the gun control argument. I myself am a life member of the National Rifle Association, I am counsel to the New York City firearms dealers association, and I have done a good deal of legislative work and litigation in opposing gun controls. My co-drafter, Vincent Broderick, was one of New York's most distinguished Commissioners of Police and like every police commissioner of New York City since time immemorial, he is a strong supporter of strict registration and licensing for all kinds of firearms. Our committee chairman in 1970, Richard P. Givens, finding that he had two persons with such diametrically opposed views as members of the Committee, told us that we should consider ourselves locked into the committee room until we could emerge with a proposal for federal gun controls that made sense to both of us. We did so, in the result, the committee, with one exception, voted to approve our report, and as I have already indicated to you, it has received some notes of outside approval.

We did not, in the Committee, try very hard to decide whether gun controls would work or would not work. For my part, I doubt very much that they will, but Vincent Broderick thought it very likely that they would. The Committee divided along similar lines. Both sides were armed with plenty of statistics to show that their view ought to prevail. But we concluded, after much discussion, some of which, as you can imagine, was raucous, that no purpose was served by repeating the familiar arguments on both sides advanced in the media and in Congress on this subject. We concluded that we simply did not know whether gun controls would work or whether they would not work and that there was no point in arguing about it.

We decided instead to be pragmatists. Many Americans want gun controls and think they are important. But fifty million Americans, we estimate, own guns and use them for legitimate purposes. The situation is one that in the best American political tradition, requires a compromise solution. We considered, looking at the course of American history and its continuing evolution from a rural to an urban and suburban society, that it was inevitable that as the years and decades passed by and we moved into the twenty-first century, more and more gun control laws would be passed. If the present situation is any guide, those laws will be passed by states and municipalities without any reference to each other. It is rather rare for a legislature, when passing a gun control law,

[1] Appendix A.
[2] Appendix B.

to make any provision in it for licenses or permits issued in another jurisdiction. The requirements for these licenses differ from state to state and municipality to municipality. Some of them make provision for transit through the state or city by non-residents, but most do not. Perhaps the leading example of the silliness of the situation is that when New York City passed its own rifle and shotgun law, the requirements for issuance were taken from the New Jersey Identification Card Law, but a New Jersey Identification Card carries no weight in New York City.

We felt that as more and more of these disparate laws were passed, it would become very difficult for legitimate owners of firearms, such as hunters, gun collectors, and target shooters, who have good cause to travel with firearms, to do so. As noted in our report, a party of hunters from Virginia who drive to Maine after deer, can in varying circumstances, be subject to arrest in Washington, D.C., Philadelphia, New Jersey, New York City, and Massachusetts, all places that they may pass through along the way. We felt that something should be done to straighten out this kind of situation. What evolved from our discussion was a different proposal for federal legislation, which, so far as we know, has not been suggested elsewhere. We proposed a law which would be voluntary on the federal level, but compulsory if adopted by states.

In outline, any person could apply for and receive, if he met the criteria, a Federal Firearms Identification Card. The requirements for the card are not part of the essence of our proposal, although we do discuss them. The applicant would have to satisfy the issuing authority that he had no recent criminal record, that he was stable mentally, and that he was above a certain age. We discussed these requirements, and some others which we did not wish to impose, in an appendix to our report. The criteria would be stiffer if the Federal Identification Card was also intended to cover handguns. The regular card would cover only rifles and shotguns.

Once a person had such a federal firearms identification card, he would be protected against arrest for violation of inconsistent state laws while travelling, anywheres but in his state of residence, with a firearm for a lawful purpose. Our putative Virginia hunters could accordingly make their trips to Maine, if they had the federal cards, without fear of trouble along the way from law enforcement authorities. The law would not, however, operate so as to permit a person with a federal card to defy the law of his own state of residence, if that state had other and different requirements for firearms' ownership.

However, the other side of our proposal might make that problem academic, for we recommend that any state be specifically granted the power, by the federal law, to require its own residents, as a condition of gun ownership within the state, to obtain the federal identification card. At one stroke, as we envision it, this arrangement immediately makes unlikely the passage of state legislation with differing requirements. It is hard to conceive of any state writing its own gun law, and setting up its own administrative apparatus, at its own expense, when it can so easily opt into the federal system. At the same time, we would expect that many states which have avoided the issue might now take this simple way to impose a licensing requirement. Even if some of the western and southern states never come into the federal system, we think that our proposal at least offers a resonable start towards a uniform and rational system of national gun control.

We do not propose that the individual guns be registered. We find this proposal arouses much more antipathy and nervousness on the part of gun owners than a simple licensing system like the one proposed. If there is a list of guns, it is said, it becomes easy for the wrong people to obtain that list and for the gunowners to be the object of criminal acts, such as theft. Should there be some kind of civil disturbance, the gun owner fears that his firearms, which he wants to protect himself with in such emergencies, might be taken away by law enforcement personnel. We don't consider whether these fears are real or imaginary—that was another thing that provoked a strong debate in our committee. But these apprehensions exist, and they must be considered.

In any case, what we are really trying to do, in gun control, we take it, is not to find out whether an individual owns one gun or a dozen, but to try to assure that his character is such that he will not use them improperly. That is the purpose of licensing, and that is the purpose of our proposal.

[From the Washington Post, May 7, 1971]

A Safety Catch for Firearms

Progress often comes in short steps rather than in giant strides. The reason, of course, is that it is commonly achieved through compromises between conflicting claimants—between the irresistible forces of reform and the immovable opposition of the status quo. Into the long-embittered and deadlocked controversy over gun control, a committee of the New York State Bar Association has at last injected a moderating proposal which deserves consideration on its merits rather than in terms of overheated emotion. In our judgment, it is an inadequate proposal; we applaud it, nevertheless, as a constructive, reasoned effort to find a practical solution for a pressing public problem.

The New York proposal was approved by a committee made up of members from New York City and from upstate—people of diverse views—and was prepared by two members who have taken opposing positions on the gun control issue: Vincent L. Broderick, Jr., a former New York City police commissioner who has championed strict regulation of firearms, and Mark K. Benenson, a gun collector, target shooter and lawyer who has served as counsel to elements of the gun industry opposed to controls. The ground on which they found agreement is a system of voluntary federal licensing of gun owners.

The committee gave approval to the licensing of gun owners rather than the registration of all firearms in part at least because registration raises sportsmen's hackles far more than licensing; it is, in our view, an irrationality but nevertheless a fact that many sportsmen have been deluded by the National Rifle Association into believing that registration of guns is a prelude to confiscation. Apparently, however, they do not object so strongly to a licensing system which would require them merely to show that they are not criminals or mental defectives—a system under which, once licensed, they could buy all the guns they pleased, wherever they pleased, and with freedom to transport the guns for legitimate uses from state to state without falling afoul of local gun laws.

Licensing seems to us preferable to registration, if it is necessary to choose between the two, because registration merely lists those who possess guns, while licensing affords a means of determining who should and who should not posses them. But licensing, to be genuinely effective, must be on a mandatory rather than a voluntary basis, in our judgment. We can see nothing more inimical to freedom—and to legitimate sportsmanship—in requiring a license to possess a firearm than in requiring a license to hunt or fish in a particular area, or than in requiring a license to own and operate an automobile as a means of getting to that area.

"In 1969," the committee report notes, "51 percent of murders in the United States were committed with handguns, and 14 per cent with long guns. The pattern is repeated more strongly in armed robberies; 95 per cent of gun-armed robbers use a handgun (but only 39 per cent of robbers use any kind of gun)." These are facts of life—and of death. They seem to us to make gun control imperative—reasonable control that will restrict gun ownership to responsible persons for legitimate purposes. The New York State Bar Association committee deserves warm commendation for a real effort to move in the direction of this goal.

New York State Bar Association Report of the Committee on Federal Legislation on Federal Firearms Controls*

THE GUN CONTROL CONTROVERSY

Since the assassination of President John F. Kennedy in November 1963, the issue of gun control on all legislative levels has engaged the interest of the nation. Local gun laws affecting the ownership of rifles and shotguns have been passed in Philadelphia in 1965,[1] New Jersey in 1966,[2] Illinois[3] and New York

*This report was adopted at the Annual Meeting of the Committee on Federal Legislation held on January 29, 1971. It is based on the work of the Subcommittee on Firearms Controls, consisting of Mark K. Benenson and Vincent L. Broderick. Neither the Executive Committee nor the New York State Bar Association as a whole has taken any position on these recommendations.

[1] Philadelphia, Pa., Ordinance 560, April 15, 1965.

[2] N.J. Stat. Ann. Sec. 2A :151 et seq. (1953).

[3] Ill. Rev. Stat. ch. 38, Sec. 24–1 et seq., Sec. 83–1 et seq. (Cum. Supp. 1969).

City[4] in 1967, and Chicago,[5] Washington, D.C.,[6] Miami,[7] San Francisco,[8] and Massachusetts[9] in 1968. In October 1968 new federal legislation, the first in decades, was enacted to limit the interstate sale of firearms and ammunition.[10] Before this burst of legislative activity, not one state or city required a permit to buy a rifle or shotgun and even as late as 1966 only seven required one for purchasing a concealable firearm.[11] Even as of this writing, registration of rifles and shotguns is required only in New York City and Chicago.

Predictably, the controversy over whether such controls are desirable or necessary has become heated and positions have become polarized. Forceful advocates on both sides, from the editors of the Christian Science Monitor who would not even let hunters own firearms,[12] to some members of the National Rifle Association who regard even the most reasonable controls as a violation of hallowed constitutional rights and civil privileges, have come to dominate the argument. In the uproar, no meaningful dialogue has been possible and those statutes that have been passed too frequently exhibit the unfortunate result of push-and-pull politics.

Some effort should be made, and be made now, to find a balance point. To some extent, this Committee, in microcosm, reflects the national spectrum of opinion on gun controls. Among its members are lawyers from upstate New York, where the traditions of firearms ownership are strong. Others are from New York City, where guns are, at least among the law-abiding, exotic objects. Some members are familiar with the recreational use of firearms, others are not. One member has strongly opposed firearms controls in a professional capacity,[13] another has as strongly supported them.[14] If this Committee can find common ground in this report, it may be of some value.

First, the Committee eschews any pronouncement that gun laws are or are not effective. Those members of the Committee who hold disparate views on the subject have supported them sturdily in our discussions. The flow of reports and statistical data published by both sides in the national argument has been considerable.[15] Both sides are convinced they have proven their cases. There is a large body of national opinion that supports gun controls; there is a large group that opposes them. This is a situation where in the best American political tradition, some rational compromise between strongly antipathetic views seems advisable.

It is believed that from 40,000,000 to 50,000,000 Americans own from 90,000,000 to 200,000,000 firearms, and as many as 25,000,000 of us may go hunting every year.[16] The statistics are staggering; they illustrate, simultaneously, the dimensions of the gun control problem and the extent of the legitimate gun-owning interests that are involved. Of all these firearms, about a quarter are handguns,[17] and the rest are "long guns", or rifles and shotguns. In 1969, 51% of murders in the United States were committed with handguns, and 14% with long guns.[18] The pattern is repeated more strongly in armed robberies; 95% of gun-armed robbers use a handgun[19] (but only 39% of robbers use any kind of gun).[20] If we

---

[4] New York City, N.Y., Administrative Code Sec. 436–6.0 through 6.16 (Cum. Supp. 1968).

[5] Chicago, Ill., Municipal Code chs. 11.1 et seq. (1968).

[6] District of Columbia, Police Regulations, arts. 50–55 (1968).

[7] Miami, Fla., Code Sec. 24.104–25.119, ch. 61 (1968).

[8] San Francisco, Cal., Municipal Code ch. VII, pt. II, Sec. 1(610)–(610.8) (1968).

[9] Mass. Gen. Laws Ann. ch. 140 (Cum. Summary 1968).

[10] Gun Control Act of 1968, Public Law 90–618, 90th Congress, H.R. 17735, Oct. 22, 1968, 18 U.S.C. Sec. 921 et seq.

[11] C. Bakal, *The Right to Bear Arms*, 346–51 (Appendix) (1966).

[12] Editorial, *The Christian Science Monitor*, April 15, 1968 (Weekend Issue).

[13] Mark K. Benenson, counsel to New York Sporting Arms Association, Inc.

[14] Vincent L. Broderick, Police Commissioner, New York City, 1965–1966, now Chairman, New York Citizens Committee on Gun Control Laws.

[15] For a useful summary of the opposing arguments, see Mosk, "Gun Control, Valid and Necessary," XIV, 4 *New York Law Forum* 694, and Benenson, "A Controlled Look at Gun Controls," *ibid*, 718.

[16] Bakal, op. cit. note 11 at pp. 68–70; Newton annd Zimring, *Firearms and Violence in American Life, a Staff Report to the National Commission on the Causes and Prevention of Violence*, 3–12.

[17] *1969 Report, National Commission on the Causes and Prevention of Violence*, 184.

[18] *1969 Uniform Crime Reports*, 7.

[19] Hearings on S.1 before the Subcommittee to Investigate Juvenile Delinquency of the Subcommittee on the Judiciary, 90th Cong., 1st sess. 379 (1967) (Statement of William Cahalen, Prosecuting Attorney, Wayne County, Mich.).

[20] *Supra* note 18, at 16. Armed robbery is 61.5% of all robbery; 63% of armed robbery is with a gun. Ergo, 39% of robbers use a gun and, factoring in Cahalen's 95% handgun figure, only 1.95% of armed robberies are committed with rifles or shotguns.

accept the figure that one in four firearms is a pistol, any pistol is about 11 times as likely as any rifle or shotgun to be used in a homicide, and is no less than 56 times as likely to be used in a robbery. Accordingly, handguns require special attention.[21]

It is well established that reasonable controls on who can buy and own a firearm are constitutional.[22] The Committee also believes that the national debate on the subject has fairly well settled that we will have some kind of gun controls throughout most of the country sooner or later. This is the time to make an effort to have these controls uniform, instead of at wild variance. Most members of this Committee would prefer federal regulation with umbrella application, but because of the composition of the Congress, with representatives from the Western and Southern states where gun ownership is especially popular, compulsory federal licensing and registration laws seem still far from realization.

The Committee suggests, however, that it might be possible to frame federal legislation which by offering advantages to firearms owners, might persuade them to lessen their opposition. The hard core of antipathy to gun controls comes from the so-called recreational gun owners; the hunters, plinkers, target shooters, and gun collectors, many of whom belong to national and local organizations and clubs. These people have been strongly affected by the recent legislation. The Federal Gun Control Act of 1968[23] has stopped most interstate gun and ammunition transactions, including mail order sales and "swapping". The local laws that have been passed are inconsistent, and most of them are without comity provisions for licensees from other localities. It may be assumed, with the increasing urbanization of the national population and the concomitant lesser familiarity of that population with firearms, that more firearms legislation will be passed on the local level. If past recent experience is any guide, the new laws will be no more consistent than the old. Even today, a party of gun owners from Virginia, who travel by car to hunt deer in Maine, may be subject to arrest, in Washington, D.C., Philadelphia,[24] New York City, New Jersey, and Massachusetts, all places that they may pass through en route. Efficiency in enforcement is hampered by this lack of uniformity and any benefits that may be obtained by regulating firearms ownership are attenuated.[25]

Nearly all the state and local laws require an FBI fingerprint check of applicants. The FBI, however, is not required to process non-federal fingerprint check requests and Director Hoover, on April 27, 1970, notified local law enforcement agencies that "the Identification Division will no longer accept for processing the fingerprints of applicants taken in connection with local licensing or employment."[26] Mr. Hoover made it plain that budgetary considerations, caused by the immense increase in fingerprint submissions, had dictated his action.[27] As a result, gun license applications from all over the country have been tied up. In New York State, for example, the State Attorney General on July 30, 1970, took

---

[21] The National Commission on Reform of Federal Criminal Laws, in its January 7, 1971 report to the Congress at 246, suggested that only police and military personnel should be permitted to possess handguns. Although many members of this Committee would as individuals support stronger controls on handguns, such as registration, than are suggested in this report, our consensus does not agree with the National Commission's proposal. We consider that hunting and target shooting with handguns are legitimate avocations and that they should not be generally proscribed by any system of handgun control. The Committee has no opinion on whether the ownership of handguns for personal protection in the home should be prohibited.

[22] *United States* v. *Miller*, 307 U.S. 174 (1939); *Burton* v. *Sills*, 99 N.J. Super. 459, 240 A.2d 432, aff'd, 99 N.J. Super. 516, 240 A.2d 462 (Super. Ct. 1968); *People* v. *Warden of City Prison*, 154 App. Div. 413, 139 N.Y.S. 277 (1st Dep't. 1913); *Grimm* v. *City of New York*, 56 Misc. 2d 525, 289 N.Y.S. 2d 358 (Sup. Ct., Queens Co. 1968); *New York Sporting Arms Ass'n.* v. *City of New York*, N.Y.L.J. Apr. 10, 1968, at 2, col. 1 (Sup. Ct., N.Y. Co.), aff'd, 31 A.D.2d 793, 297 N.Y.S. 2d 287 (1968); *Galvan* v. *Superior Ct.*, 76 Cal.Rptr. 642, 452 P.2d 930 (1969).

[23] *Op. cit.* note 10.

[24] In *Commonwealth* v. *Ray*, —— Pa. Super. Ct. —— (Superior Ct., Dist. Phila., December 10, 1970), the Philadelphia gun law, *op. cit.* note 1, was held an invalid exercise of local legislative powers.

[25] Some of the state and local laws are being attacked. In 1969 the Illinois legislature repealed the identification card law, *op. cit.* note 3, but the repealer was vetoed. The San Francisco gun law, *op. cit.* note 8, first stricken by the intermediate appellate court in *Galvan* v. *Superior Ct.*, 266 A.C.A. 717 (1968), then sustained when the city appealed, 76 Cal. Rptr. 642, 452 P.2d 930 (1969), has now been set aside by a state preemption law, Government Code § 9619, passed in 1969. The Philadelphia law has been declared void, *op. cit.* note 24, and the New York City cases, *op. cit.* note 22, are being appealed to the Court of Appeals.

[26] April 27, 1970 letter from J. Edgar Hoover, Director, FBI to All Fingerprint Contributors, Re: FBI Identification Services.

[27] June 16, 1970 letter from J. Edgar Hoover to Congressman John D. Dingell.

the extraordinary step of advising the Superintendent of State Police that he could issue pistol licenses "without making a request to the FBI to check an applicant's fingerprints",[28] despite the contrary requirement in Section 400.00(4) of the Penal Law. No doubt the Attorney General was correct in his view that the "law does not generally require the performance of a useless or futile act", i.e., the submission of a request to an agency that would not honor it. Also, he was undoubtedly aware that applications were pending from persons who under the law were entitled to pistol licenses, and who could not indefinitely be barred from them because of the FBI's money problems. Nevertheless, the idea of issuing licenses, under a law which says that persons with criminal records ought not to receive them, without first checking the basic repository for that kind of information, is ludicrous. The obvious solution, it seems to this Committee, is to make the gun controls federal, so that the fingerprint check is required by federal law.

But in framing such federal regulation this Committee earnestly suggests moderation. We pass over for the nonce the concept of registration of individual firearms and emphasize instead the licensing of gun owners. Many members of the Committee still support registration as an ultimate goal; others oppose it, but we are agreed to put it aside for now.[29] There are several reasons for this. First, the political reason; registration raises sportsmens' hackles far more than licensing; hunters who will only grumble at the idea of getting a license on a showing that they are neither mental defectives nor criminally inclined will balk at the idea of registering all their guns. Rightly or wrongly, many consider registering a prelude to confiscation. We do not consider this belief well-founded; but it exists, and it is very strong. Others do not want lists of their valuable guns on file in public offices where they can be read by anyone.

Further, since the decision in *Haynes* v. *United States*, 390 U.S. 85, (1968) which held that a person who had illegally obtained a prohibited weapon could not be prosecuted for its possession, or for failing to register it, the utility of registration has been thrown into question. The Chicago registration law, passed a few days after *Haynes*, specifically exempted (as a direct and admitted[30] result of *Haynes*), any person who had obtained or owned his rifle or shotgun in violation of any state or federal law. The ironical result is that those persons who should be barred from gun ownership need not register in Chicago and only the legitimate gun owner, about whose ownership of a firearms one is not especially worried, must do so. Some members of the Committee argue that Chicago was unduly disturbed by *Haynes* and that a valid registration law could be written around the decision, and that violators, if not prosecutable for failure to register, could be prosecuted for not having a license, if such a parallel requirement existed. This may be so, but the majority of the Committee, on balance, believes that time should be allowed for the effects of *Haynes* to be worked out by the courts.

In any case, registration seems a less direct approach to firearms control than licensing. Registration merely lists who has the guns; licensing at least seeks to determine who should and should not have them. Many sportsmen will accept, even if they will not embrace, licensing laws which are limited to specific intelligible criteria and which do not permit police or other licensing authorities to determine on their own discretion and without legislative guidelines, who may and who may not own a gun. In addition, the licensing authority should be required to render its decision within a delimited time and there should be an administrative appeal to a body composed in part of sportsmen representatives. Illinois[31] and Massachusetts[32] list specific reasons for the denial of a license and there is no discretionary element. Connecticut[33] (for pistol licenses) and New York City[34] (for rifles and shotguns) have an appeals board with sportsmen representatives. When these features are combined, many sportsmen will accept a licensing law, whatever their dislike of registration.

---

[28] July 30, 1970 letter from Louis J. Lefkowitz to William E. Kirwan.

[29] Since 1938, first under the Federal Firearms Act U.S.C. Title 15, §§ 901–909, repealed by Act June 14, 1968, P.L. 90–351, Title IV, § 906, 82 Stat. 234, and now under the Gun Control Act of 1968, *op. cit.* note 10, all dealers have been required to record the identity of gun purchasers in their books.

[30] July 31, 1968, letter from Marvin E. Aspen, Head of Appeal and Review Division, Department of Law, City of Chicago, to Charles H. Greenberg, Esq.

[31] *Op. cit.* note 3.

[32] *Op. cit.* note 9.

[33] Sec. 29–32a, General Statutes of the State of Connecticut.

[34] *Op. cit.* note 4.

PROPOSAL FOR A FEDERAL LICENSING LAW

We conclude that a logical approach for a federal licensing law at the present time would be as set out in the attached outline. Licensing would not be imposed upon every gun owner in the country. Instead, federal licensing would be made voluntary, with features attractive to hunters, target shooters, gun collectors and hobbyists, who have been most severely restricted by the new gun laws and who are also the most active opponents of further legislation. Anyone with the proposed federal license would not be subject to local law in a state or city through whose territory he is passing. For instance, it has always been a source of annoyance and irritation to New Jersey pistol target shooters that even if they have New Jersey concealed weapons licenses they cannot compete in a perfectly lawful target competition in New York without danger of arrest. There are are no comity provisions in the New Jersey and New York City rifle and shotgun laws even though the criteria for the New York City rifle and shotgun permit were based upon the provisions in the New Jersey "identification card" law.[35] Sportsmen would also be relieved of the current restrictions against interstate sale of firearms. The rationale is that if a person can qualify for a federal license, we do not really care how he buys his gun—in his own state, in another state where he is visiting, or by mail order.

Uniformity and state adoption of licensing laws would be encouraged by federal assumption of the burden of administration and issuance of licenses. Any state would be permitted to require that its own residents obtain a federal license in order to own a gun within the state. Since licensing of firearms owners is an immensely expensive process, estimated to run in New York City (for administrative expense to the city alone, excluding loss of time for the firearms owner) to $25 per rifle and shotgun owner,[36] and $72 for a pistol owner,[37] states are frequently reluctant to pass such laws because of the expense. A federal system would encourage states to pass laws by relieving them of the direct costs and at the same time would insure that such controls as were adopted were uniform.

States which already have inconsistent laws in effect might repeal them and adopt the federal system. Alternatively, the federal law might well provide that anyone who had been issued a gun license by any state or municipality, the licensing standards of which were at least the equivalent of the federal standards, would be issued a federal identity card forthwith. The federal administrator would be empowered to decide the issue of equivalency.

Some members of the Committee would go further and make the federal identity card a flat requirement for interstate travel with a firearm. The majority of the Committee does not object to this in principle. However, such a requirement would considerably increase resistance to the bill in the Congress, in the Committee's judgment. On the other hand, once the bill was passed, it would speed state adoption of the federal licensing system. A compromise might be to exempt contiguous states, but require the identity card for other interstate travel. The Committee takes no position on these points.

Obviously, many details remain to be worked out. Among these are penalties, the term of the license, the criteria for license issuance, some of which are discussed in the attached outline, but which the committee emphasizes should be made distinctly stricter for handguns; the way in which firearms, and handguns especially, would have to be transported (i.e., unloaded, a locked case, etc.); the specific purposes for which interstate travel with a handgun, especially, ought to be protected and the proof the traveler ought fairly to be required to offer of such a purpose; the appellate structure when a license is refused; and, of course, the basic administrative pattern and the sort of license fees, if any, that ought to be charged—in the Committee's view, the lower the better. The Committee leaves these details to Congress.

CONCLUSION

The Committee's basic purpose in this report is to suggest a frame for legislation which would recognize the objections of the legitimate gun owning public to many aspects of gun control and which would offer, to the millions of such

---

[35] Compare N.J. Stat. Ann. § 2A :151–33 and N.Y.C. Admin. Code § 4360–6.6(a).

[36] Lindsay Signs Gun License Law Despite Last-Minute Opposition, The *New York Times*, Nov. 15, 1967, at 35, col. 5.

[37] "A Preliminary Cost Analysis of Firearms Controls Programs," prepared for the National Commission on the Causes and Prevention of Violence, at 26 (Dec. 20, 1968).

Americans, upon obtaining a federal license, relief from many present state and local restrictions. At the same time, and particularly as more and more states opt into the system and require federal identity cards for their own citizens, our proposal, we believe, gives to the gun-control side of the dialogue a good start towards a uniform national system of screening firearms owners.

Respectfully submitted,

ANTHONY P. MARSHALL, *Chairman*,
(and 20 others).

I dissent from the report. While I agree, to a certain extent, with a basic premise of the report—i.e., that it is better to adopt proposals susceptible of passage by Congress than those which have no chance whatsoever—such proposals must also be an advance towards the hoped-for goals. In my view, the proper goals for federal firearms controls are to reduce the number of firearms in the hands of the public and to restrict the persons to whom such firearms are available. The Committee's proposal makes no appreciable advance towards either goal while it would permit some persons to travel with firearms under circumstances in which they would presently be barred.

MICHAEL A. BAMBERGER.

OUTLINE

FEDERAL FIREARMS LICENSE TRANSIT AND TRANSPORT LAW

I. Prohibitions

It would be a violation, *unless* the individual concerned held a "Federal Firearms Identity Card" to

A. Receive a firearm from outside one's own state's borders,* whether by mail, express or otherwise—licensed dealers, etc., would be exempted.

B. Buy a firearm in another state.*

C. Cross a state line with a firearm. (option, see pg. 7, line 28 of report.)

II. Protections

A. person holding such a federal license would be exempted from the above-listed prohibitions, and

B. Could with a gun freely pass through any state or enter and return from any state for the purpose of ordinary travel, hunting, going to or from a gunsmith for repairs or a dealer for sale, target shooting, going to gun collectors meetings, etc.,** without danger of prosecution under that state's gun laws.

C. No limit on number of firearms owned or transported.

III. Adoption by States

A. States would specifically be granted the power to require their own residents to obtain *federal* licenses as a *state* requirement for firearms ownership. This would promote uniformity, and by putting the burden of administration on the U.S., encourage such state action.

B. Any state could still enforce stricter—or easier—laws for its *own* residents, but could not affect outsiders bearing a federal license.

C. States such as Utah, which have a 14-year minimum age for gun ownership, could exempt persons between 14 and 16 but require that the license be obtained at 16, or the federal law could provide for issuance of the license at an earlier age for intrastate purposes only.

IV. Possible license requirements, surveyed by committee

A. Recommended by Committee:

1. Bar anyone convicted of a crime of violence or a crime involving a threat of violence, unless the conviction was prior to, say, ten years before the application and the applicant can persuade the Appeals Board (discussed later) he is not a risk.

2. Bar narcotics addicts, chronic hallucinatory drug users, and chronic alcoholics.

3. Bar persons who have ever been confined to a mental health institution, unless cleared as recovered by a physician.

4. Bar persons under the age of 18, unless they have parental permission, when the age could be 16.

5. Bar adjudged incompetents.

---

*Presently prohibited by Gun Control Act of 1968.

**Should be more restrictive for handguns. We do not think, for instance, that the federal license should permit the interstate carriage of handguns concealed on the person for self-protection.

6. Require safe physical condition to handle a gun—exclude the blind and near blind and perhaps persons with certain diseases, such as epilepsy (Requires careful drafting, as many physical defectives, using guns altered for them, or optical sights, can and do engage in hunting or target shooting, and some diseases, including epilepsy, may be manageable).

7. Exclude any person who has unlawfully or negligently used a firearm. Basically a safety requirement, not in any gun licensing legislation but can be basis for revoking a hunting license under New York State Conservation Law, Sec. 217(2)(a). But Appeals Board must be allowed to waive for good cause—including the passage of time.

8. Require licensees to take a safety test soon after obtaining the license. Logical but in view of possibly 50,000,000 gun owners, many whom may want these licenses to hunt in other states, the prospective administrative burden is daunting. It might possible be considered for the handgun license, and the Committee recommends it for long gun applicants under the age of 18.

For a pistol license, there should be additional and stricter requirements. We suggest at least:

9. An age floor of 21.

10. A wider class of disqualifying crimes.

11. Barring any one who has been a narcotics addict or a user of hallucinatory drugs in the last five years.

B. Disapproved by Committee:

1. Requiring "good moral character," or barring "mental defectives." Full of pitfalls in definition.

2. Barring any person who has made a threat of unlawful use of a firearm. May run afoul of First Amendment.

C. Committee takes no position:

1. Deny license if issuance inconsistent with public safety. In New York City and New Jersey licensing laws, but violently antipathetic to sportsmen, who fear abuse of administrative discretion. Committee members supporting this requirement agree that the danger must be clear and unambiguous, and that any denial for public safety reasons be limited to the duration of the emergency.

V. License issuance

A. A license would have to be issued or denied in writing within a set period, say 40 days for the first year of the law, 20 afterwards when administrative procedures had smoothed out. More time would be allowed for a pistol license.

B. Denials or revocations would have to specify the reason, which could be only one of those specified in the statute.

C. There would be an administrative appellate procedure, with a three-member Appeals Board in, say, each state. One member would be appointed from a state law-enforcement agency, one from a sportsmen's organization, and the third might be an attorney with no special preconceived views on gun controls, all possibly to be named by the state governor or the chief judge of the state's highest court.

D. Appeal by an applicant from a decision of the Appeals Board would be, for the sake of uniformity, first to the central administrator in Washington, and from him to the Court of Appeals for the District of Columbia. The burden on the federal court system could be reduced by permitting a direct appeal from the local board through the state's court system, but this increases the likelihood of disparate treatment of applicants in different states.

Senator HRUSKA. We have Mr. Friedkin here on behalf of the Directors Guild of America.

Are you accompanied by Tony Fantozzi?

Mr. FRIEDKIN. Yes, sir.

Senator HRUSKA. Come up to the table if you wish, and Ernest D. Ricca—do I pronounce that right?

Mr. RICCA. Yes.

STATEMENT OF WILLIAM FRIEDKIN ON BEHALF OF THE DIRECTORS GUILD OF AMERICA, ACCOMPANIED BY ERNEST D. RICCA AND TONY FANTOZZI

Mr. FRIEDKIN. Senator, my name is William Friedkin. I have directed six motion pictures, including "the Boys in the Band," "the Night They Raided Minsky's," "the French Connection," and now "the Exorcist." In addition I have directed over 1,000 television programs.

I have been asked by the Directors Guild of America through its national board, to read a very brief statement into the record pertaining to section 1851 of the proposed Criminal Code Reform Act, S. 1400.

The statement very briefly, if I may, is:

> The National Board of the Directors Guild of America, meeting on June 9, 1973, voted unanimously to oppose with all strength the proposed Criminal Code Reform Act of 1973 as it affects film-making and other arts. We consider that those sections of the act purporting to expand legal obscenity definitions are an oppressive and unconstitutional threat to fundamental American freedoms and would be destructive to traditional creative writings of film directors, writers, actors, composers and other artists.
>
> We urgently request that during the consideration of the Act, your Committee hear expert testimony from leading filmmakers who will represent our national membership of 3900 speaking against this dangerous legislation.

This is signed by Robert Wise, the president of the Directors Guild of America.

In addition to that, Senator, I would like to make a personal statement. As a film director with a commitment to produce and direct six motion pictures over the next 8 years, I find myself totally inhibited by the Supreme Court ruling of June 21, and by the obscenity provision of this proposed new criminal code. I am uncertain as to whether a sequence or indeed an entire film will be acceptable in one part of the country and unacceptable in another.

Who is to say whether the sequence constitutes a minor part of the whole or fulfills an artistic purpose when opinions differ in every city, State and county in the Nation. I do not want to make the claim that the price for freedom of expression is pornography, that if you want "Carnal Knowledge" you have to accept "Deep Throat." It is my personal belief, Senator, that pornography is harmless, but I leave its defense to others.

What concerns me about this proposed legislation is the confusion that it fosters between exploitation and legitimate expression.

As I plead with you to consider the wisdom and the implication of still more obscenity laws, repression of ideas is a fact today in America, not a possibility of an inevitability, but a fact. The motion picture, "Carnal Knowledge," was banned in Georgia, which leads us to wonder how long before knowledge itself is going to go on trial in this country.

Today the words "massage parlor" stand for house of prostitution, and yet massage is not evil nor is it illegal, but a man or woman engaged in this profession is tarred with the same brush as those who have abused and exploited their profession.

We feel that the time is approaching when the words "motion picture" will have the same connotation, when serious film makers will either be condemned as pornographers or survive as eunuchs. No art, no industry can survive so frontal an assault.

If we are hit with another brace of obscenity laws, laws that do not tend to distinguish between ideas and exploitation, then the film industry as we know it cannot survive. Film makers who care about what they put on the screen, who believe that the proper study of mankind is man, will be unable to function in a system that says that the proper diet for the American audience is bland.

In conclusion, Senator, I urge you—I urge this Subcommittee not to confuse pornography with the work of serious film makers to the extent that films like "Carnal Knowledge" are banned in Georgia and the "Last Picture Show" is called a dirty movie. The feeling among supporters of these new laws is that freedom of expression has probably gone too far, that we ought to be a little bit free with our ideas but not very. With freedom, of course, we risk abuse.

But I suggest that the risk is preferable to the alternatives.

Senator HRUSKA. Mr. Fantozzi and Mr. Ricca, have you any supplemental remarks?

Mr. FANTOZZI. No, I do not, Senator. Thank you.

Senator HRUSKA. If you should want to submit a statement for the record, you are welcome to do so.

Mr. Counsel, have you some questions?

Mr. SUMMITT. I would like to ask one question, Senator.

Mr. HRUSKA. Very well.

Mr. SUMMITT. I would like to just ask one question in relation to your remarks about freedom of expression in the context in which the film industry can realistically work. That language is taken from a recent Supreme Court decision, *Miller* v. *California*.

Is it possible—do you think it would be possible for the film industry to work within the standard enunciated in that case, to wit, whether the work taken as a whole lacked serious artistic, literary, political or scientific value?

Does that set down criteria that the film industry can work within?

Mr. FRIEDKIN. What has happened is that the criteria, in practice seem to encourage every State, local and county official, to act as censors. It is a return to local boards instead of national standards. In other words, it eliminates the social values test, and the prurient interest test, and, practically, Mr. Summitt, the fact is that film makers today are faced with the possibility of altered versions for 25 different States.

In other words, a film can go into one State or one city and be held obscene, even though it has not been rated obscene by the Motion Picture Association of America.

We feel that the laws that existed before *Miller* v. *California*, were adequate to deal with obscenity, which we know is not protected under the first amendment.

Mr. SUMMITT. I take it your real objection then is not to that particular standard, that is, a work should, as a whole, have some artistic, literary, or political value but to the diversity that results from applying the local community standard.

Is that the real objection you are making?

Mr. FRIEDKIN. Yes. The real objection is it is now fragmented to the point where a studio with a commitment of millions of dollars in the production of a motion picture is now uncertain and unable to determine whether that picture will meet community standards that differ from one part of the United States to another. This has not happened heretofore, and I think all the recent rulings have tended to make serious film makers pay for the work of the pornographers.

Mr. SUMMITT. I would just point out that it would appear in *Miller* v. *California*, that this particular criteria may not have a "local standard" application.

Mr. FRIEDKIN. But what has happened since *Miller* v. *California* is that the Georgia Supreme Court barred the motion picture "Carnal Knowledge," which was an "R" rated movie, which had played three or four times around the State already. The Georgia State court acted immediately after the June 21 Supreme Court ruling to bar any further showings, which is the acknowledged work of a major American film maker, Mike Nichols.

Also, a film called the "Last Picture Show" was said to have obscene language in its fifth or sixth run in Dallas, Tex., and faces a court ruling.

Mr. SUMMITT. Thank you.

Senator HRUSKA. Some people contend it is impossible to determine a national standard without just leaving the bill wide open for anything and everything.

Do you agree with that?

Mr. FRIEDKIN. It is very difficult, but I do think that it is possible. I think that industry control—I am talking about the Motion Picture Association of America and its member companies and the various guilds that affiliate with those companies. Senator, I am not talking about someone who comes along and spends $20,000 to make an obscene movie and gets it released somewhere. The member companies of the Motion Picture Association of America have standards within the organization itself, and as you know, a ratings committee which passes on the suitability of motion pictures and offers a warning to parents about what material is contained in a given motion picture.

Senator HRUSKA. What would you say as to the practicability of having the States legislate and preempt the county, city, village, summer resorts and the like?

Mr. FRIEDKIN. I think it would be safer than what has been opened now by the recent rulings. I think it would be far more acceptable than making every local county official a film censor because the baby tends to get thrown out with the bath water. The standards now are too inconsistent, and tend unfortunately to affect films whose seriousness of purpose has been demonstrated, demonstrated by industry standards, critical standards, and public acceptance.

Motion pictures like "Carnal Knowledge," which were held to be obscene since the June 21 ruling, were not originally so held. "Carnal Knowledge" had a wide distribution in the United States and abroad, and after the June 21 ruling by the Supreme Court, was banned by the Georgia State Court and is challenged in other States as the result of local community rulings.

Mr. SUMMITT. But *Miller* itself applied a statewide standard.

Mr. FRIEDKIN. What has happened is that *Miller* has caused State legislatures to give wider vent to the local communities. And the standards of the local communities may differ from State to State and I really feel that it is harmful to the motion picture industry because in fragmenting the law, to such a degree, it makes it impossible for any film maker today in terms of the product that is in the planning stages. With regard to my own work, I do not know whether this particular motion picture would be vulnerable not only to prosecution but to being banned in a given State, and perhaps it could be challenged, perhaps we would win a court challenge 2 or 3 years down the line after the life of that motion picture is over.

Senator HRUSKA. Well, when it is said that it will be difficult to fashion or determine a national standard, I think it would require a good deal of sophistry to try to say it could be done at all. Wahoo, Nebr., and Yuma, Ariz., are different from Greenwich Village. They just are.

Now, I do not know how you are going to strike an average. How do you strike an average in a nation of 210 million people?

Mr. FRIEDKIN. I think you do it this way. The first amendment of the Constitution does not protect obscenity, and the member companies of the Motion Picture Association, the members of the Directors Guild of America, are not engaged in making obscene films. I think you would have a very difficult time if you attempted to prove that "Carnal Knowledge" was obscene and did not fall under the protection of the first amendment. I think if it is found that a film appeals to prurient interests, that it is totally without qualities that stand up to the social values test, then it is an obscene picture and it is not protected and should be prosecuted.

Senator HRUSKA. Very well.

Any further questions?

Mr. SUMMITT. No, sir.

Senator HRUSKA. Thank you very much for coming.

Mr. FRIEDKIN. Thank you, sir.

Senator HRUSKA. We will adjourn subject to the call of the Chair.

[Whereupon, at 1 o'clock p.m., the subcommittee was adjourned subject to the call of the Chair.]

APPENDIX

AUGUSTUS F. KINZEL, M.D.
New York, N.Y., November 26, 1973.

HON. ROMAN L. HRUSKA,
U.S. Senate,
Washington, D.C.

DEAR SENATOR HRUSKA: I am writing regarding that part of the proposed revision of the Criminal Code, now before Congress, which would alter the federal insanity statutes. Two weeks ago I sent you a copy of a position statement on this matter by the Executive Committee of the American Academy of Psychiatry and the Law which, as a concerned member, I sponsored. I am also, as Instructor in the Department of Psychiatry, responsible for the teaching of Psychiatry and the Law at Columbia University. I am writing now, however, as a concerned physician in private practice with seven years experience as an expert witness in federal courts in over one third of the United States.

In the last year or so there has been a notable trend toward excessive prosecution of the mentally ill in federal courts. Some U.S. Attorneys have chosen to overlook the law which clearly states that when there is evidence of mental illness at the time of an offense, that it be assumed that the defendant was insane at the time of the offense, unless there is substantial evidence otherwise. Instead, they have assumed that the defendants who raise the insanity defense are feigning illness, malingering, or manipulating the law. A myth apparently grew in the Justice Department that there was a great deal of such abuse by defendants. Although those responsible in the Justice Department could not cite cases where such abuse occurred, they were still convinced that such abuse was rampant. They also had the temerity to suggest that they had to take the law into their own hands or else defendants acquitted on the grounds of insanity would be able to "walk right out the door". They were unaware of how many defendants actually have pleaded insanity, let alone how many have been left unrestrained following acquittal. My repeated requests to Mr. Henry Petersen and others that they investigate this possible error in their perception met with total inaction.

Apparently this myth formed the basis for their current proposal to revise the insanity statutes which, as I understand it, would change the insanity rule to, "Did he know he was pulling the trigger?" That is, it would shift the proof to "intent", rather than "capacity". Should such a revision be passed, it would set us back at least two centuries. Almost all those who are acutely mentally ill at the time of an offense are able to form a superficial or momentary illegal intent (as are most healthy citizens in their dreams), but most are incapable of judging its seriousness, and are incapable of restraining themselves from doing it. If the proposed rule is adopted, only those exceedingly rare individuals who are so confused that they are running amok or "know no more than a wild beast" (the eighteenth century common law rule) will be exculpated. From my own experience, and from discussion with colleagues who work in this area, my impression is that the current American Law Institute rule—". . . substantial capacity to adhere to the right."—is accurate, applicable, and needs no revision. We are not impressed that there is wide scale abuse of the insanity statutes.

I hope that you, and those members of Congress considering these proposed revisions will help see to it that the rights of the mentally ill are maintained in this country, will vote against the proposed revision, and will insure that the progress made in this area by many from both professions over the last two centuries will not be erased by an uninformed government.

Thank you for your consideration. I will be happy to discuss any of these matters further if you wish.

Sincerely,

AUGUSTUS F. KINZEL, M.D.

Copy to: Dr. Seymour Pollack, President, American Academy of Psychiatry and the Law, 511 Bellagio Terrace, Los Angeles, California.

25-404—74——9

AMERICAN ACADEMY OF PSYCHIATRY & THE LAW,
EXECUTIVE COMMITTEE,
Los Angeles, Calif., October 20, 1973.

To whom it may concern:

We are very concerned about what may represent a serious error in the evaluation of criminal responsibility as promulgated by the proposed federal test of insanity currently before Congress. We request further evaluation before any legislative action is taken.

SEYMOUR L. POLLACK, M.D., *President.*

[From, Rutgers Law Review, Summer 1973]

ABOLISH THE INSANITY DEFENSE?—NOT YET*

(By John Monahan**)

The debate over the insanity defense has become increasingly heated in recent years, until at present "there is no more hotly controverted issue in the criminal law."[1] The ranks of those advocating the abolition of the insanity defense are swelling;[2] others rally to its support.[3]

Though the author's sympathies lie with the abolitionists, this paper will not consider directly the reasons why the criminal law would benefit from the absence of the insanity defense. These reasons are readily available elsewhere.[4] Rather, the paper is concerned with a critical analysis of the justifications for the existence of the insanity defense. All too often in the past, the participants in the debate on the insanity defense have failed to confront their opponents' arguments and have countered instead with their own. This paper meets the defenders of the insanity defense on their own terms and responds coherently, without characterization of the case that they present. While some of their arguments are specious, others are sufficiently compelling to make abolitionists pause.

Most writings on the insanity defense give only cursory treatment to the *raison d'être* of their subject matter befose immersing themselves in the mechanics of the defense and the relative merits of the various rules of its operation.[5] From a careful examination of the most lucid writings in support of the insanity defense, however, it is possible to abstract two generic justifications for its existence.

---

*This article is an addition to the debate begun by Goldstein & Katz, *Abolish the Insanity Defense—Why Not?*, 72 YALE L.J. 853 (1963). *See also* Brady, *Abolish the Insanity Defense—No!*, 8 HOUSTON L. REV. 629 (1971). The author is grateful to Thomas Schornhurst, Richard Price, Marc Abramson, and Theodore Sabot for their comments on a previous draft of this paper.

**Assistant Professor in Social Ecology, University of Ecology, University of California, Irvine; B.A. 1966, State University of New York at Stony Brook; Ph.D. 1972, Indiana University.

[1] PACKER, THE LIMITS OF THE CRIMINAL SANCTION 131 (1968) [hereinafter cited as PACKER].

[2] *See* HALLECK, PSYCHIATRY AND THE DILEMMAS OF CRIME 341–42 [hereinafter cited as HALLECK]; HART, THE MORALITY OF THE CRIMINAL LAW (1964) [hereinafter cited as HART]; SZASZ, LAW, LIBERTY, AND PSYCHIATRY 138–46 (1963) [hereinafter cited as SZASZ] WOOTTON, CRIME AND THE CRIMINAL LAW (1963) [hereinafter cited as WOOTTON]; Goldstein & Katz, *Abolish the Insanity Defense—Why Not?*, 72 YALE L.J. 853 (1963) [hereinafter cited as Goldstein & Katz]; Morris, *Psychiatry and the Dangerous Criminal*, 41 S. CAL. L. REV. 514 (1968) [hereinafter cited as Morris]. Most recently, the National District Attorneys Association and the American Psychiatric Association have advocated the abolition of the insanity defense in *amicus curiae* briefs in United States v. Brawner, No. 22,714 (D.C. Cir. June 23, 1972), at 28. The court declined this suggestion and instead adopted the American Law Institute's test of insanity, MODEL PENAL CODE § 4.01 (Proposed Off. Draft 1962), in place of its own "Durham rule," Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).

[3] *See* FINGARETTE, THE MEANING OF CRIMINAL INSANITY 1–15 (1972) [hereinafter cited as FINGARETTE]; GOLDSTEIN, THE INSANITY DEFENSE 222–26 (1967) [hereinafter cited as GOLDSTEIN]; PACKER, *supra* note 1, at 131; Kadish, *The Decline of Innocence*, 26 CAMB. L.J. 273 (1968) [hereinafter cited as Kadish].

[4] *See* Morris, supra note 2, at 544 (app.), where the arguments for abolition are detailed. Kadish summarizes what he sees as the major arguments against the insanity defense:

> The first is that the administration of the tests of insanity—all tests—have been a total failure. . . .
>
> Secondly, it is argued that the defense of legal insanity is of little practical importance. . . .
>
> Finally, and of central importance, it is believed that the retention of the distinction between those to be punished and those only to be treated as unfortunate and invidious because in point of fact it is in all cases, not only in some, that persons who do harm should be treated and held in the interest of the public protection.

Kadish, *supra* note 3, at 277–78.

[5] *See, e.g.*, Goldstein & Katz, *supra* note 2, at 859: "[T]he purpose of the insanity defense either has been assumed to be so obvious as not to require articulation or has been expressed in such vague generalizations as to afford no basis for evaluating the multitude of formulae." *See also* Fingarette, *supra* note 3, at 123.

The first centers on the notion that the citizen needs the insanity defense. The argument is that the insanity defense is necessary to symbolize and reinforce the average citizen's belief in personal responsibility, and that this belief is an important determinant of his law-abiding behavior. This person-oriented justification contrasts with the second, more programmatic justification that the law needs the insanity defense. The core of this justification is that the insanity defense plays a crucial role in our present system of criminal justice and cannot be abolished without adversely affecting the basic assumptions upon which the entire criminal law is built.

I. THE CITIZEN NEEDS THE INSANITY DEFENSE

The argument that the citizen needs the insanity defense is stated most cogently by Goldstein:

> [Eliminating the insanity defense] overlooks entirely the place of the concept of responsibility itself in keeping the [human] mechanism in proper running order. That concept is more seriously threatened today than ever before. . . . [T]he insanity defense can play a part in reinforcing the sense of obligation or responsibility. . . . In this way, it becomes part of a complex of cultural forces that keep alive the moral lessons, and the myths, which are essential to the continued order of society.[6]

The argument that the insanity defense is a crucial prop in a "public morality play"[7] is fundamentally of the "exception proves the rule" variety: if we can identify a group of individuals (the "insane") who are not responsible for their actions, we shall induce in the remainder of the population the belief that they are responsible. One group's exculpation from criminal responsibility shall inculcate moral responsibility in the rest of us.[8]

This justification for the existence of the insanity defense logically can be broken down into two separate issues. First, does a belief in personal responsibility have a significant effect upon an individual's behavior; and second, if so, does the insanity defense contribute to an individual's belief in personal responsibility?

A. *Human Behavior and the Perception of Personal Responsibility*

There exists a substantial body of empirical research relevant to the proposition that an individual's perception of personal responsibility or free will affects his behavior in important ways.[9] While a full description of this literature would be voluminous, the convergence of conclusions drawn from research on theories

---

[6] Goldstein, *supra* note 3, at 233. *See also* Hall, *Responsibility and Law: In Defense of the M'Naghten Rules*, 42 A.B.A.J. 917 (1956); Kadish, *supra* note 3, at 287. Kittrie, The Right to be Different—Deviance and Enforced Therapy 46 (1971) [hereinafter cited as Kittrie]: "Granting that mental patients, juveniles, addicts, and psychopaths (as well as the rest of the populace) may in fact never exercise total free will in their social conduct, cannot society's endorsement of the free will concept still work towards the enhancement of whatever self-restraint the diverse members of these groups might be able to generate?"

[7] Morris summarizes this argument as follows: "In short, the criminal justice system is a name-calling, stigmatizing, community super-ego reinforcing system—a system that should not be used against the mentally ill. They are mad not bad, sick not wicked; it is important that we should not misclassify them." Morris, *supra* note 2, at 524. On the social function of the law as part of the "symbolism of mortality," see also Platt, The Child Savers 310–20 (1966).

[8] *See* Morris, *supra* note 2, at 520.

[9] It should be clear at the outset that we are here dealing with free will or responsibility as a *psychological* perception (belief, disposition) and not with the *philosophical* issue of whether man "actually" has free will. The former is within the domain of empirical research, whereas the latter is of necessity speculative. Even the current free will system of law does not take a philosophical stand on the existence of free will, but merely "assumes the freedom of the will as a working hypothesis in the solution of its problems." Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937). *See also* Marshall, Intention in Law and Society 19–25 (1968); Packer, *supra* note 1, at 74. For a discussion of the various meanings of the term "responsibility," see Fingarette, *supra* note 3, at 132; Hart, *supra* note 2, at 212; Szasz, *supra* note 2, at 124. See Andenaes, *The Moral or Educative Influence of Criminal Law*, 27 J. Social Issues, Apr., 1971, at 17 (1971) for an excellent discussion of the relevance of psychological research to legal issues, and the limitations of such research.

of locus of control,[10] cognizance dissonance,[11] attribution,[12] achievement motivation,[13] personal causation,[14] reactance,[15] and perceived control[16] among others, strongly suggests that the individual who perceives himself as free and responsible behaves very dieffrently than the individual who believes that he lacks choice

[10] Rotter distinguishes between external control, in which a person does not believe the reinforcements he gets in life are dependent upon his own behavior, but rather are the results of luck, chance, or fate, and internal control, in which a person believes that his behavior determines the reinforcements he receives. He summarizes the results of scores of studies within this locus of control paradigm by stating that, compared with an "externalizer," an "internalizer" is likely to "(a) be more alert to those aspects of the environment which provide useful information for his future behavior; (b) takes steps to improve his environmental condition; (c) place greater value on skill or achievement reinforcements and be generally more concerned with his ability, particularly his failures; and (d) be resistive to subtle attempts to influence him." Rotter, *Generalized Experiences for Internal Versus External Control of Reinforcement*, 80 Psych. Monographs 1 (1966). *See also* Rotter, Chance & Phares, Applications of a Social Learning Theory of Personality (1972).

[11] Dissonance theory holds that a negative drive state is aroused whenever an individual simultaneously holds two cognitions (ideas, opinions, beliefs) which are psychologically inconsistent. Since dissonance is presumed to be unpleasant, individuals strive to reduce it by changing one or both cognitions to make them "fit better" or by adding new cognitions. *See* Festinger, A Theory of Cognitive Dissonance 36–40 (1957). Literally thousands of studies have been conducted within the framework of dissonance theory, and a central finding to emerge from this research has been the importance of the perception of "freedom of choice" in the arousal of dissonance. *See* Brehm & Cohen, Explorations in Cognitive Dissonance (1962); Gerald, *Basic Features of Commitment*, in Theories of Cognitive Consistency 456 (Abelson, ed. 1968). For example, a person can be induced to change his attitudes in a direction predicted by dissonance theory only when he perceives himself as free and uncoerced. *See* Sherman, *Effects of Choice and Incentive on Attitude Change in a Discrepant Behavior Situation*, 15 J. Personality & Social Psychology 245 (1970).

[12] Attribution theory holds that the way in which a person perceives the cause of an event determines, in part, his reaction to that event. *See generally* Heider, The Psychology of Interpersonal Relations 164–73 1958; Kelley, *Attribution Theory in Social Psychology*, 15 Neb. Symposium on Motivation 192 (1967). There is ample evidence to suggest that whether one perceives another as behaving freely or under coercion is an important determinant of the traits that one will attribute to him, and hence of how one will behave towards him. *See* Jones & Davis, *From Acts to Dispositions: The Attribution Process in Person Perception* in 2 Advances in Experimental Social Psychology 219 (1965). Whether one attributes responsibility for behavioral change to himself or to an external force may significantly affect how long the individual will maintain the change in behavior, the change persisting longer if attributed to himself. *See* Valins & Nisbett, Attribution Processes in the Development and Treatment of Emotional Disorders (1972); Davison & Valins, *Maintenance of Self-Attributed and Drug-Attributed Behavior Change*, 11 J. Personality & Social Psychology 25 (1969).

[13] The perception of personal responsibility for the outcome of one's behavior may be a critical determinant of the amount of satisfaction one takes in his achievements. Without the belief that one is personally responsible for his successes, those successes may lose their incentive value. *See generally* Heckhausen, *Achievement Motive Research: Current Problems and Some Contributions Toward a General Theory of Motivation*, 17 Neb. Symposium on Motivation 101, 126–29 (1968); Weiner, Heckhausen, Meyer & Cook, *Casual Ascriptions and Achievement Behavior: A Conceptual Analysis of Effort and Reanalysis of Locus of Control*, 21 J. Personality & Social Psychology 239 (1972).

[14] De Charms distinguishes between people who perceive themselves as Origins and people who perceive themselves as Pawns: "An Origin has a strong feeling of personal causation, a feeling that the locus for causation of effects in his environment lies within himself. The feedback that reinforces this feeling comes from changes in his environment that are attributed to personal behavior. . . . A Pawn has a feeling that causal forces beyond his control, or personal forces residing in others, or in the physical environment, determine his behavior. This constitutes a strong feeling of powerlessness or ineffectiveness." De Charms, Personal Causation 274 (1968).

[15] Psychological reactance is a motivational state that impels an individual to re-establish his freedom when it is threatened. There is much evidence to suggest that a threatened or eliminated alternative becomes more desirable. Where, for example, a person can select either alternative A or alternative B and his freedom to take A is threatened, reactance will be aroused in him and he will consequently feel an increase in desire to have A. *See generally* Brehm, A Theory of Psychological Reactance (1966).

[16] The perception of having effective control over the occurrence of an aversive event, even if the perception is not veridical, can have an effect upon automatic nervous system responses. In one study, subjects who believed (incorrectly) that they had the power to shorten the duration of electric shocks administered to them manifested less reactivity to the shock than subjects who believed (correctly) that they could not affect the shock's duration. Geer, Davison & Gatchel, *Reduction of Stress in Humans Through Non-Veridical Perceived Control of Aversive Stimulation*, 16 J. Personality & Social Psychology 731 (1970). The authors conclude: "Man creates his own gods to fill in gaps in his knowledge about a sometimes terrifying environment, creating at least an illusion of control which is presumably comforting. Perhaps the next best thing to being master of one's fate is being deluded into thinking he is." *Id.* at 737–38. *See also* Staub, Tursky & Schwartz, *Self-control and Predictability: Their Effects on Reactions to Aversive Stimulation*, 18 J. Personality and Social Psychology 157 (1971), where the authors state: "The ability to predict and control events in the environment is important for the comfort and safety of organisms. Consequently, control and predictability may come to be valued for their own sake, while lack of control, uncertainly, and unpredictability may become intrinsically aversive."

and responsibility.[17] In general, the direction of this difference is toward a higher level of awareness, initiative, achievement, independence and complexity for those who perceive themselves as freely choosing to behave in certain ways and as responsible for their behavior. The quality of life associated with these attributes is not lightly tampered with or casually disparaged. The first half of the argument that the citizen needs the insanity defense, therefore has substantial validity.

B. *The Insanity Defense and the Perception of Personal Responsibility*

The second half of the argument that the citizen needs the insanity defense asserts that the defense reinforces the average citizen's belief in his own personal responsibility[18] by "[i]ts emphasis on whether an offender is sick or bad,"[19] that is, on whether an offender is legally responsible for his acts. It is presumed that citizens will become more responsible by constantly emphasizing responsibility in the law.

While there is no empirical evidence to support this presumption, neither is there any to refute it.[20] Evaluation of this half of the argument is, therefore, speculative. However, it is reasonable to make an initial distinction between responsibility as a psychological self-perception and responsibility as a technical construct in the legal process. Proponents of this argument have concluded that the former should be promoted, but it remains unclear whether the use of responsibility in the latter sense will reinforce the average citizen's belief in his own personal responsibility.

The defenders of the insanity defense assume that its invocation affects the attitudes of the populace through the psychological process of contrast.[21] Citizens are exposed to the bizarre behavior of those labeled irresponsible through the ascription of insanity, and contrast their own "normal" behavior with that of the defendant. They reason: "He is irresponsible. I am not like him. Therefore, I must be responsible."

It can also be argued, however, that the psychological process evoked by the insanity defense is more likely to be assimilation.[22] If individuals frequently hear that some people are not being held responsible for their behavior, they may begin to wonder, "Maybe sometimes I, too, am not responsible for my behavior." While an individual would otherwise take his responsibility for granted, the invocation of the insanity defense may engender doubts that he is laboring under psychological forces too deep and murky to fathom, much less control.[23] If this is the case, the existence of the insanity defense is marginally reducing the citizen's belief in his own responsibility. This argument gains credence as the insanity defense is watered down to become "diminished responsibility,"[24] and as high esti-

---

[17] For a perspective on the over-all social utility of the free will or responsibility concepts see Skinner, Beyond Freedom and Dignity (1971).

[18] *See* notes 6–7 *supra* and accompanying text.

[19] Goldstein, *supra* note 3, at 224.

[20] For a discussion of an analogous lack of research on an even more basic assumption of the criminal justice system see Chappell, Geis & Hardt, *Explorations in Deterrence and Criminal Justice*, 8 Crim. L. Bull. 514 (1972).

[21] *See* Sherif & Holland, Social Judgment 46–47 (1961).

[22] *Id.*

[23] Theoretically, of course, the insanity defense is designed to avoid sowing the seeds of diffidence. Wechsler states that "[t]he problem is to differentiate between the wholly nondeterrable and persons who are more or less susceptible to influence by law. The category must be so extreme that to the ordinary man burdened by passion and beset by large temptations, the exculpation of the irresponsibles bespeaks no weakness in the law. He does not identify himself and them; they are a world apart." Wechsler, *The Criteria of Criminal Responsibility*, 22 U. Chi. L. Rev. 367, 374 (1955). It is precisely this "bespeaking of weakness," however, which is at issue.

[24] On the trend to dilute the insanity defense *see* Dix, *Psychological Abnormality as a Factor in Grading Criminal Liability: Diminished Capacity, Diminished Responsibility, and the Like*, 62 J. Crim. L.C. & P.S. 313, 332 (1971) [hereinafter cited as Dix]: "[F]ormally recognizing the relevance of psychological abnormality [short of insanity] would amount to a realistic accommodation with the inevitable. Triers of fact will continue to be confronted with the formal all-or-nothing choice of the insanity defense in cases where any reasonable man would seek a compromise." The United States Court of Appeals for the District of Columbia recently adopted a rule already advocated in several states. In United States v. Brawner, No. 22,714 (D.C. Cir. June 23, 1972) the court concluded that expert testimony as to abnormal mental condition will be admitted to negative or establish the existence of a particular specific intent which is an element of the crime, as premeditation in first degree murder, though the condition will not exonerate the defendant from all criminal responsibility. *See id.* at 55–63.

mates are given of the proportion of the population which is mentally ill [25] and presumably more likely to identify with the defendant in an insanity trial. Goldstein's worry that the concept of responsibility is more seriously threatened today than ever before [26] may be justified, but the insanity defense may be contributing more to the removal of responsibility than to its restoration.

It may be that "[i]f the law is to promote responsibility, it must impose responsibility." [27] This argument is as plausible as asserting that the existence of a mechanism whereby certain people may evade legal responsibility results in increased psychological responsibility for the remainder of the populace.

The perception of personal responsibility does appear to have powerful and positive effects upon human behavior. The insanity defense, however, affects the citizen's perception of responsibility in an unknown direction, if it affects that perception at all. The argument that the citizen needs the insanity defense is, threfore, weak.

II. THE LAW NEEDS THE INSANITY DEFENSE

There are two versions of the argument that the law needs the insanity defense. The first asserts that our present system of legal principles requires an insanity defense to function properly. The second emphasizes the insanity defense as necessary to prevent a change from present assumptions to a new and allegedly undesirable system of legal assumptions.

A. *The Insanity Defense and a Legal System Based on Responsibility*

The existing Anglo-American system of criminal justice is based on a model of man as a responsible agent with a free will.[28] The insanity defense is closely tied to this model. Oversimplifying somewhat, "[t]he defense of insanity rests upon the assumption that insanity negates free will, and the law does not punish people who lack the capacity for free choice." [29]

Assuming a desire to retain a system of criminal law based on a free will model of man, it is argued that the insanity defense is essential.[30] Kadish argues that the insanity defense is necessary to keep a mentally abnormal offender from having a complete defense to his crime, and hence going free; and that it is necessary to prevent the condemnation of those to whom we cannot attribute blame.[31] Release would have socially dangerous consequences [32] while condemnation would be inconsistent with a free model of the law.

---

[25] There are between forty and fifty epidemiological surveys of the prevalence of mental illness in the population. The findings are widely divergent—reporting a prevalence rate of between 1 and 64 per cent—depending largely on the definition of "mental illness" employed. "The two best current studies of this field appear to indicate that psychiatric symptoms severe enough to require treatment may be present in as much as 30 per cent of the population." Lemkau, *Prevention of Psychiatric Illness*, in Perspectives in Community Mental Health 223, 225 (Bindman & Spiegel ed. 1969), *referring to* Leighton, *The Distribution of Psychiatric Symptoms in a Small Town*, 112 Am. J. Psychiatry 716 (1956) and Rennie, *Urban Life and Mental Health*, 133 Am. J. Psychiatry 831 (1951).

[26] See text accompanying note 6 *supra*.

[27] Livermore & Meehl, *The Virtues of M'Naghten*, 51 Minn. L. Rev. 789, 849 (1967). *See also* Halleck, *supra* note 2, at 341, where the author states that abolishing the insanity defense "would foster a greater sense of responsibility throughout our society. . . ."

[28] Pound, *Introduction* to Sayer, Cases on Criminal Law xxxvi-xxxvii (1927): "Historically, our substantive criminal law is based on a theory of punishing the vicious will. It postulates a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong." Likewise, Judge Bazelon has held that "[t]he legal and moral traditions of the western world require that those who, of their own free will and with evil intent (sometimes called *mens rea*) commit acts which violate the law, shall be criminally responsible for those acts." *Durham* v. *United States*, 214 F. 2d 862, 876 (D.C. Cir. 1954). In short, "An unwarrantable act without a vicious will is no crime at all." Kadish, *supra* note 3, at 274 (Blackstone's translation of "Actus non facit reum, nisi mens sit rea"). Most recently, *United States* v. *Brawner*, No. 22,714 (D.C. Cir. June 23, 1972) reaffirmed this proposition: "Our jurisprudence . . . while not oblivious to deterministic components, ultimately rests on a premise of freedom of will." *Id.* at 49.

[29] *Preface* to Jeffery, Criminal Responsibility and Mental Disease at xi (1967). *See also* Goldstein & Katz, *supra* note 2, at 864.

[30] See Goldstein, *supra* note 3, at 222; Packer, *supra* note 1, at 132; Kadish, *supra* note 3, at 280.

[31] See Kadish, *supra* note 3, at 280.

[32] See Dix, *supra* note 24, at 322: "While an offender who is psychologically abnormal may well be less blameworthy, he may also be more dangerous than one without his impairments." Goldstein holds that the complete acquittal of mentally abnormal offenders would release from state control "the very persons society should probably fear most—because their endowments are fewer, because they are more suggestible, more manipulable, more fearful." Goldstein, *supra* note 3, at 202.

1. Preventing a Complete Defense. If an individual has a complete inability to know the nature and quality of the act he has committed, that is, if he is insane by *M'Naghten* standards,[33] then, it is argued, he is incapable of forming the cognitive or mental component (intent, recklessness, etc.) which is part of the definition of much serious crime.[34] Since the insane person is held to be incapable of forming normal cognitions, and since cognitive ability is part of the definition of crime,[35] he has a complete defense to much criminal prosecution.

To prevent the state from being powerless in the face of crime committed by the insane, the insanity defense is invoked to deprive the defendant of his normal mens rea defense. This defense, the state's inability to prove that intent existed, would lead to discharge. The insanity defense, however, requires acquittal on the special grounds of insanity, with the probable consequence that the defendant is channeled into the mental health system of social control.[36]

One solution to the problem of completely acquitting those judged insane, to preclude all evidence on the absence of mens rea which is related to the accused's mental abnormality, was attempted in Washington. This first abolitionist statute, however, was declared violative of the state constitution in *State v. Strasburg*.[37] That case held that insanity was a substantive question of fact which the defendant was entitled to have submitted to the jury. Any inhibition of that right was a denial of the right to trial by jury, incorporated into the state constitution at the time of its adoption, and was a deprivation of due process.[38]

Additionally, this solution is unworkable because the defendant's mental condition may be directly relevant to the crucial issue of whether he possessed the required mens rea. The relevance of mental abnormality to the issue of mens rea, established in *People v. Wells*[39] and reformulated in *People v. Gorshen*,[40] has been widely accepted.[41]

Even if the *Wells-Gorshen* prohibition against the exclusion of evidence relevant to mental abnormality could be overcome, there still would be additional problems in trying to exclude any mens rea evidence involving mental illness from the trial proceedings. If some mens rea evidence is to be excluded, the judge must have a criterion to distinguish the admissible from the inadmissible evidence. The criterion, presumably, would be whether the evidence goes to establish the defendant's mental illness. If it does, then the evidence would be excluded. The resulting situation, however, would be the functional equivalent of retaining the insanity defense. The test of legal insanity would not be excluded, but merely re-labeled as a rule of evidence rather than a substantive defense. As Kadish observed, "You can change the name of the game, but you cannot avoid playing it so long as *mens rea* is required." [42]

---

[33] *See* M'Naghten's Case, 8 Eng. Rep. 718 (1843).

[34] *See* Model Penal Code § 2.02 (Proposed Off. Draft 1962): ". . . [A] person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently . . . with respect to each material element of the offense." This *mens rea* formulation proposed by the Model Penal Code has been substantially adopted in the 1967 N.Y. Penal Law § 15.05 (McKinney 1967).

[35] See Kadish, *supra* note 3, at 280: "A total inability to know the nature and quality of the act quite plainly precludes convincing a defendant of any crime whose definition requires that he have that knowledge. And any crime which requires intent, or knowledge or recklessness surely posits that knowing. If it were not for the special, pre-emptive defence of legal insansity, therefore, the defendant would have a complete defence on the merits to any such crime—namely, the lack of mens rea."

[36] See note 60 *infra*. See also *Baxtrom* v. *Herold*, 383 U.S. 107 (1966) and *Bolton* v. *Harris*, 395 F. 2d 642 (D.C. Cir. 1968) on the requirement for a separate hearing to determine current dangerousness.

[37] *State* v. *Strasburg*, 60 Wash. 106, 110 P. 1020 (1910). For what appear to be the only other attempts at abolition, see *State* v. *Lange*, 168 La. 959, 123 So. 639 (1929); *Sinclair* v. *State*, 161 Miss. 142, 132 So. 581 (1931).

[38] 60 Wash. at 119–20, 110 P. at 1024.

[39] *People* v. *Wells*, 33 Cal. 2d 333, 345, 202 P. 2d 53, 62–63, *cert. denied*, 338 U.S. 919 (1949).

[40] *People* v. *Gorshen*, 51 Cal. 2d 716, 733, 336 P. 2d 492, 502–03 (1959).

[41] *See, e.g., Rhodes* v. *United States*, 282 F. 2d 59, 60–61 (4th Cir. 1960); *United States* v. *Higgins*, 15 C.M.R. 143, 148 (1954); *Beeksted* v. *People*, 133 Colo. 72, 292 P. 2d 189 (1965); *Battalion* v. *People*, 118 Colo. 587, 199 P. 2d 897 (1948); *State* v. *Clokey*, 83 Idaho 322, 364 P. 2d 159 (1961); *State* v. *Grumeny*, 256 Iowa 134, 126 N.W. 2d 285 (1964); *Washington* v. *State*, 165 Neb. 275, 85 N.W. 2d 509 (1957); *Fox* v. *State*, 73 Nev. 241, 316 P. 2d 924 (1957); *State* v. *Di Paolo*, 34 N.J. 279, 168 A.2d 401 (1961); *State* v. *Padilla*, 66 N.M. 289, 347 P. 2d 312 (1959). For cases to the contrary, see Dix, *supra* note 24, at 318 n.33. The Model Penal Code, § 4.02 (Proposed Off. Draft 1962) provides: "Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind which is an element of the offense." For a discussion of the Model Penal Code rule *see* Dix, *supra* note 24, at 318 n.32. See also note 24, *supra*.

[42] Kadish, *supra* note 3, at 282.

Morris advocates another approach to the admission of mental illness evidence,[43] it should be admitted as to the presence or absence of mens rea.[44] He dismisses the problem of completely acquitting and setting free disordered offenders by stating that cases involving the effect of mental abnormality on mens rea would be rare.[45]

There is, however, every reason to believe that cases raising the mens rea issue would be the rule rather than the exception under Morris' formulation. Given the recent extraordinary expansion of the concept of illness, especially of mental illness,[46] it is difficult to imagine otherwise. Menninger has stated that "the time will come when stealing or murder will be thought of as a symptom, indicating the presence of a disease."[47] To the extent that this occurs, Morris' rule would result in the elimination of all criminal sanctioning. Morris speaks of "insane *mens rea*."[48] The connotations of this hybrid term, however, are internally contradictory: mens rea is part of a nomological net including the concepts "free will," "choice," and "responsibility," while "insanity" connotes "lack of free will," "inability to choose," and "irresponsibility." The term "insane *mens rea*" is born of a paridigm clash; it simply cannot withstand judicial scrutiny.

2. Condemning the Blameless. The most frequently uttered justification for maintaining the insanity defense is that without it the law would be forced to officially condemn persons not psychologically considered blameworthy, a morally intolerable situation. "Our collective conscience does not allow punishment where it cannot impose blame."[49]

It is evident that this argument is the obverse of the previous one. The previous argument held that without the insanity defense the law would not be able to sanction those considered insane; they would have a complete defense to crime. This argument asserts that without the insanity defense, the law would be forced to criminally sanction the insane. If the previous argument is valid, this one is inapplicable: if without the insanity defense the law is powerless to sanction the insane, it need not worry about the ramifications of criminally sanctioning them. Perhaps it is fair to say that the arguments are in two different forms. Viewed in this context, the insanity defense is necessary since without it, the law would be forced either to fully acquit the insane or to unjustly condemn them.

It would appear that the terms "blame" or "condemnation" can be viewed from either of two perspectives: that of the offender who is the recipient of the blame and condemnation, or that of society (personified in the court), which bestows the blame and condemnation.[50]

---

[43] Morris, *supra* note 2, at 518–19.

[44] "The accused's mental condition should be relevant to the question of whether he did or did not, at the time of the act, have the prohibited *mens rea* of the crime of which he is charged. There should be no special rules like M'Naughten or Durham; the defense of insanity would be eliminated. Evidence of mental illness would be admissible as to the *mens rea* issue to the same limited extent that deafness, blindness, a heart condition, stomach cramps, illiteracy, stupidity, lack of education, 'foreignness', drunkeness, and drug addiction are admissible. In practice, cases raising these issues are rare, and they would remain rare if mental illness were added to the list." *Id.*

[45] *Id.* For a discussion of Morris' position see Dix, *supra* note 24, at 331–32 n. 102.

[46] *See* Packer, *supra* note 1, at 79; Price, Abnormal Behavior—Perspectives in Conflict 62 (1972).

[47] Menninger, *Medicolegal Proposals of the American Psychiatric Association*, 19 J. Crim. L.C. & P.S. 367, 373 (1928). The years appear to have tempered Menninger. In Menninger, The Crime of Punishment 254 (1969), he states "I would say that according to the prevalent understanding of the words, crime is *not* a disease. Neither is it an illness, although I think it *should be!*" See Packer's comments on Menninger's "Humpty-Dumptyish" use of words, in Packer, *Enemies of Progress*, N.Y. Rev. of Books, Oct. 23, 1969, at 17.

[48] Morris, *supra* note 2, at 521.

[49] *Durham* v. *United States*, 214 F. 2d. 862, 876 (D.C. Cir. 1954). See analogous sentiments expressed in *Budd* v. *California*, 385 U.S. 909, 912–13 (1966) (Fortas, J., dissenting from denial of cert.); *Robinson* v. *California*, 370 U.S. 660, 666 (1962); *Lambert* v. *California*, 355 U.S. 225, 229 (1957); *Overholser* v. *Lynch*, 288 F. 2d 388, 393 (D.C. Cir. 1961); *Williams* v. *United States*, 250 F. 2d 19, 26 (D.C. Cir. 1957). Kittrie summarizes the point well: "If man has an unfettered free will to elect between several possible courses of action, the fact that one chooses a prohibited action then becomes sufficient justification to punish him. Without this free will, however, punishment would be unfair and ineffective. This reasoning was especially evident in the classicists' vigorous efforts to abolish the punishment of insane persons under the criminal law." Kittrie, *supra* note 6, at 23.

[50] *See generally*, Scott, *The Construction of Conceptions of Stigma by Professional Experts*, in Deviance and Respectability 255 (Douglas ed. 1970).

The defenders of the insanity defense, when asserting the "condemnation of the blameless" argument, acknowledge that labeling a defendant "not guilty by reason of insanity" constitutes condemnation from the offender's perspective.[51] Indeed, a growing body of psychological research indicates that the stigma attached to the ascription of mental illness is at least as severe as that which is attached to a criminal record. This holds true at the levels of self-perception[52] and interpersonal relations,[53] as well as the more formal societal level.[54] Morris' comments on the fact of "double stigmatization" are not without merit:

> Prison authorities regard their inmates in the facilities for the psychologically disturbed as both criminal and insane, bad and mad; mental hospital authorities regard their inmates who have been convicted—or only arrested and charged with crime—as both insane and criminal, mad and bad. . . .
>
> Thus the defense of insanity is neither essential to the morality of punishment nor effective at present to reduce social stigma.[55]

From the court's perspective, however, it makes a great deal of difference whether one is ascribing criminality or mental illness. In the current free will model of criminal justice, since criminals freely choose to do evil, it is morally permissible to condemn them. Indeed, this should be done, since fear of condemnation is said to deter them and others from future crime.[56]

The case is otherwise, however, with those judged insane. Since the insane are held to have impaired volitional capacity,[57] they cannot choose to commit a crime. It is morally impermissible to condemn or otherwise punish them.[58] However, to insure community safety, some form of control must be applied to those who commit dangerous acts, regardless of their mental state.[59] Hence, the insanity defense: it allows for social control, as a convenient by-product of "treatment" in a secure institution, while obviating the moral implications of imposing that control.[60]

For the law to need the insanity defense in order to function under its present assumptions, therefore, means that condemnation must be viewed from its moral, court-centered perspective rather than from its actual, defendant-centered one. Kadish does this when he acknowledges the similarity from the defendant's perspective between condemnation as a criminal and as a mental defective, but stresses the "paradigmatic affront" to courts' moral sense of justice which would accompany the criminal conviction of the insane.[61]

---

[51] Thus Goldstein acknowledges that "being regarded as mentally ill may bring him [the defendant] as much stigma, economic deprivation, family dislocation, and often as little treatment or physical comfort as being a criminal." Goldstein, *supra* note 3, at 20.

[52] *See, e.g.*, Farina, Gliha, Boudreau, Allen & Sherman, *Mental Illness and the Impact of Believing Others Know About It*, 77 J. Abnormal Psychology 1, 4 (1971) stating that believing others to be aware of their status caused patients to feel less appreciated, to find a task more difficult, to perform more poorly, and they were perceived as more tense, anxious, and poorly adjusted by an observer. *See generally*, Goffman, Stigma (1963).

[53] *See*, e.g., Farina, Gliha, Boudreau, Allen & Sherman, *supra* note 52, at 1: "Insane people are less acceptable as friends and neighbors than dope addicts or ex-convicts and are described as more worthless than those who are blind or have leprosy." See also Farina, Holland & Ring, *Role of Stigma and Set In Interpersonal Interaction*, 71 J. Abnormal Psychology 421 (1966); Lamy, *Social Consequences of Mental Illness*, 30 J. Consulting Psychology 450 (1966).

[54] *See, e.g.*, Ennis, *Civil Liberties and Mental Illness*, 7 Crim. L. Bull. 101, 123 (1971): "Former mental patients do not get jobs. In the job market, it is better to be an ex-felon than an ex-patient."

[55] Morris, *supra* note 2, at 525.

[56] See note 90 *infra* and accompanying text.

[57] See note 35 *supra* and accompanying text.

[58] *See* note 49 *supra*.

[59] *See* Wootton, *supra* note 2, at 52: "[A]n action does not become innocuous merely because whoever performed it meant no harm."

[60] See Goldstein & Katz, *supra* note 2, at 865: "[T]he insanity defense is not designed, as is the defense of self-defense, to define an exception to criminal liability, but rather to define for sanction an exception from among those who would be free of liability." *See also* Fingarette, *supra* note 3.

[61] Kadish, *supra* note 3, at 283: "It is true . . . that a person adjudicated not guilty but insane suffers a substantial social stigma. It is also true that this is hurtful and unfortunate, and indeed, unjust. But it results from the misinterpretation placed upon the person's conduct by people in the community. It is not, like the conviction of the irresponsible, the paradigmatic affront to the sense of justice in the law which consists in the deliberative act of convicting a morally innocent person of a crime, of imposing blame when there is no occasion for it."

The free will assumptions underlying the present criminal justice system thus necessitate a studied ignorance of some of the law's actual effects upon mentally abnormal offenders. This has been taken as one additional piece of evidence [62] indicating that an alternate set of operating assumptions might prove more fruitful. Discussion has centered on the behavioral position as the chief contender for an alternative set of assumptions to guide the administration of criminal justice. The second form of the argument that the law needs the insanity defense is a reaction to those who have proffered this position.

3. The Insanity Defense and the Behavioral Position. The argument that the law needs the insanity defense to avoid shifting to a new and allegedly undesirable set of principles treats the insanity defense more as symbol than as a substantive issue. The assertion that the insanity defense is the "chief paradigm of free will" [63] in a legal system based on a free will model of man is the first line of defense against those who would inject deterministic assumptions into the criminal law and substitute social dangerousness for moral guilt as the basis for state sanctioning. Abolition of the insanity defense would "cut loose the criminal law from its moorings of condemnation for moral failure. Once one has started down this road there is no defensible stopping point short of strict liability with the question of culpability being raised at the stage of disposition." [64]

Indeed, many do advocate the abolition of the insanity defense "as one part of a larger radical transformation of the law which would tear up, root and branch, all manifestations of *mens rea* towards the end of extirpating blame and punishment from the criminal law." [65] Those who advocate this radical transformation are adherents of what Packer has dubbed the "behavioral position," [66] and what Kittrie calls the "Therapeutic State." [67]

There are two parts to the claim that the insanity defense must be maintained. First, abolishing the insanity defense will move the law toward the behavioral position. Second, the behavioral position forms an undesirable basis upon which to form a system of criminal law.

The first point must be conceded. As discussed above, if the law is forced by the removal of the insanity defense to release large numbers of abnormal offenders, or if jurists are forced into the morally intolerable and inconsistent position of having to condemn those to whom they could not attribute the blame, the free will model of man cannot be maintained as the basic concept of the criminal justice system. The notion of moral culpability or responsibility in the law is already being strained by the presence of strict liability "social welfare" statutes, which do not require moral guilt for the imposition of punishment.[68] The free will model has been steadily losing ground to the Therapeutic State in recent years,[69] and the loss of the insanity defense would be the *coup de grâce*. The behavioral position would be adopted by default; it is the only set of assumptions seriously being offered as a substitute for the free will model.[70]

---

[62] For a complete discussion of the sources of dissatisfaction with the free will position, see Kittrie, *supra* note 6, at 24.

[63] Packer, *supra* note 1, at 132.

[64] Livermore & Meehl, *supra* note 27, at 797.

[65] Kadish, *supra* note 3, at 285.

[66] *See* Packer, *supra* note 1, at 11.

[67] *See* Kittrie, *supra* note 6, at 24. The behavioral position is not to be confused with "behaviorism" or "behavior modification" in psychology. Indeed, some of the most influential legal behaviorists (*e.g.*, Karl Menninger) are psychoanalysts. A conceptual distinction must also be made between the behavioral position and a "medical model" of abnormal behavior. While one may (and many do) simultaneously adhere to the deterministic behavioral position and to the view that abnormal behavior is best conceptualized as "sickness," there is no logical necessity for so doing and probably much to recommend against it. On the "medical model," see Price, *supra* note 46, at 62; Szasz, The Myth of Mental Illness (1961).

[68] *See generally Morissette* v. *United States*, 342 U.S. 246 (1952); *Speidel* v. *State*, 460 P. 2d 77 (Alas. 1969). Wootton, *supra* note 2, at 48: "Nothing has dealt so devastating a blow at the punitive conception of the criminal process as the proliferation of offenses of strict liability."

[69] See Kittrie, *supra* note 6, at 32–39 for an excellent discussion of "the divestment of the criminal law."

[70] *See* American Friends Service Comm., Struggle for Justice 47 (1971); Kittrie, *supra* note 6, at 372–74; Packer, *supra* note 1, at 9. Fear that abolishing the insanity defense would usher in a deterministic behavioral position is explicit in *United States* v. *Brawner*, No. 22,714 (D.C. Cir. June 23, 1972). The majority felt that the judicial system could not function if it was decided that "mental disorder is only a relative concept and that the behavior of every individual is dictated by forces—ultimately, his genes and lifelong environment—that are unconscious and beyond his control." *Id.* at 63. *See also* Simon, *Brawner Decision: Beyond Science and Determinism*, 3 Am. Psychological Ass'n Monitor 4 (1972).

The remaining question becomes: why not immigrate to the Therapeutic State and adopt the behavioral position on criminal justice?

B. *The Behavioral Position*

The behavioral position on criminal justice has been argued most eloquently by Lady Barbara Wootton[71] and most vocally by Karl Menninger.[72] The position is best understood in terms of its six assumptions, as they are presented by Packer:

> First, free will is an illusion, because human conduct is determined by forces that lie beyond the power of the individual to modify.
>
> Second, moral responsibility, accordingly, is an illusion because blame cannot be ascribed for behavior that is ineluctably conditioned.
>
> Third, human conduct, being causally determined, can and should be scientifically studied and controlled.
>
> Fourth, the function of the criminal law should be purely and simply to bring into play processes for modifying the personality, and hence the behavior, or people who commit antisocial acts, so that they will not commit them in the future; or, if all else fails, to restrain them from committing offenses by the use of external compulsion (*e.g.*, confinement).[73]
>
> [Fifth,] we have . . . real knowledge about how to rehabilitate people.
>
> [Sixth,] we know how to predict those who exhibit traits that are dangerous.[74]

Under the behavioral position, the trial court would consider solely whether the defendant committed the physical act with which he was charged. After conviction, mens rea and any other information available regarding the defendant would be considered by a panel of experts in deciding disposition.[75] The advocates of this position see it as more scientific, rational, humane, and forward-looking than the punishment-oriented free will system.[76]

Five major objections have been raised against the behavioral position as an alternative to the insanity defense. The position is best evaluated by briefly considering these objections.

1. Treatment and Prediction. The fifth and sixth assumptions[77] of the behavioral position have been seriously scrutinized in the last few years. While Wootten has stated that "clear evidence that reformative measures do in fact reform would be very welcome,"[78] the empirical response to her invitation has

---

[71] *See* Wootton, *supra* note 2.

[72] *See* Menninger, *supra* note 47.

[73] Packer, *supra* note 1, at 12.

[74] Packer, *Enemies of Progress*, N.Y. Rev. of Books, Oct. 23, 1969 at 17.

[75] *See* Glueck, Law and Psychiatry: Cold War or Entente Cordiale? 152 (1962): "[I]t would seem desirable that the work of the criminal court should cease with the finding of guilt or innocence. The procedure thereafter should be guided by a professional treatment tribunal to be composed, say, of a psychiatrist, a psychologist, a sociologist or cultural anthropologist, an educator, and a judge with long experience in criminal trials and with special interest in the protection of the legal rights of those charged with crime. Such a tribunal would begin to function, beyond the point to which the substantive and procedural criminal law has carried the case, to determine the sentence and to plan and supervise its implementation." *See also* Marshall, Intention in Law and Society 187–88 (1968).

[76] *See* Kittrie, *supra* note 6, at 39; Packer, *supra* note 1, at 66–67.

[77] Note that the fifth and sixth assumptions are of a different character than the first four. The latter may be termed "philosophical" or "theoretical" assumptions. They are incapable of empirical demonstration. No amount of data on human predictability could logically demonstrate to the skeptic that human behavior is causally affected by antecedent conditions, and the lack of such data need not make a determinist revert to free will. The first four assumptions are, if you will, value preferences or statements of faith.

The final two assumptions, on the other hand, are of a different sort. They are factual or empirical assumptions. As such, they *are* capable of support or refute by research data.

It is possible to develop a "neo-behavioral" position. This position would accept the four theoretical assumptions of the behavioral view but would share the skepticism of Packer and others concerning the empirical assumptions. Such a position would be internally consistent: the theoretical belief that behavior is the product of antecedent conditions in no way implies the factual statement that we now know what those antecedent conditions are; likewise, admitting that we are presently ignorant of the determinants of behavior does not invalidate the belief that such determinants exist.

This position is termed "neo-behavioral" since it is separable from the behavioral position only by disagreement concerning the current status of treatment and prediction. As treatment becomes more effective and prediction more accurate, the neo-behavioral position would merge with the behavioral. While such a position has not yet been argued in the literature, it may have some heuristic value in generating alternatives to the free will and behavioral models. See the "Conclusions" of this article *infra*.

[78] Wootton, Social Science and Social Pathology 335 (1959).

been less than heartening. Despite frequent dataless assertions to the contrary,[79] the effective treatment of antisocial behavior is nonexistent. The most recent and exhaustive review of correctional treatment found two hundred and thirty-one studies in the literature which met minimal standards of scientific methodology. The reviewer concluded: "On the whole, the evidence from the survey indicated that the present array of correctional treatments has no appreciable effect—positive or negative—on the rates of recidivism of convicted offenders." [80]

The prediction of dangerousness has been subject to less empirical evaluation than the treatment of antisocial behavior, but the literature that exists gives no cause for optimism. Dershowitz surveyed the literature on follow-up studies of psychiatric predictions of dangerousness and found fewer than twelve studies. He found psychiatrists to be highly inaccurate predictors of dangerousness, and even more significant for legal purposes, to be particularly prone to overprediction, to such an extent that "for every correct psychiatric prediction of violence, there are numerous erroneous predictions." [81]

In sum, the currently available data suggest that "our criteria for predicting who will commit a dangerous act are totally inadequate, and our efforts at treatment are pitiful." [82]

2. Definition of Crime. If a behavioral position is adopted, it will be impossible to retain present criminal statutes with only the mens rea component removed since it is crucial to the description of the behavior we wish to prohibit. Kadish notes that under the behavioral position the criminal law would have to be rewritten to consist entirely of the specification of harms.[83]

It is, indeed, difficult to see how a non-cognitive Wootten code could reach many situations currently considered to be within the criminal law. Perjury without knowing one is lying is simply making an incorrect statement under oath. An unlawful assembly without the intent to perform an unlawful act is joining a group of people in a public place. How could attempt to commit murder be defined without recourse to the mentalistic concept of intent? [84]

3. The Citizen's Perception of Responsibility. This objection to the behavioral position is an extension of "the citizen needs the insanity defense" argument [85]

---

[79] *See, e.g.*, Clark, Crime in America 215 (1970): "We know . . . , indeed we have demonstrated, that recidivism —the repetition of crime by individuals—can be cut in half. It can be cut far more than that." Martinson thinks otherwise: "He [Clark] has demonstrated only a cavalier attitude toward scientific research." Martinson, *Can Corrections Correct?* The New Republic, Apr. 8, 1972, at 13, 14. *See also* Menninger, *supra* note 47, at 261; Douglas, *Forward* to Marshall, *supra* note 75, at xiv.

[80] Martinson, *supra* note 79, at 14–15. *See also* Kassebaum, Ward & Wilner, Prison Treatment and Parole Survival 306 (1971); Bailey, *Correctional Outcome: An Evaluation of One Hundred Correctional Outcome Reports*, 57 J. Crim. L.C. & P.S. 153 (1966); Monahan, *The Psychiatrization of Criminal Behavior* in Hospital and Community Psychiatry (1973).

[81] Dershowitz, *Psychiatrists' Power in Civil Commitment*, 2 Psychology Today, Feb. 1969, at 43, 47. *See also* Usdin, *Broader Aspects of Dangerousness*, in the Clinical Evaluation of the Dangerousness of the Mentally Ill 47 (Rappeport ed. 1967): "We cannot predict even with reasonable certainty that an individual will be dangerous to himself or to others. . . . We can make an educated guess, but what right does society have to act upon a guess?" Clinical prediction, of course, is not the only method of predicting dangerousness. Wootton states that "the suggestion that sentencing is becoming an increasingly expert business for which its practitioners should be suitably trained does not mean that it should be handed over to psychiatrists. Fundamentally, the job is statistical not psychiatric." Wootton, *supra* note 2, at 115. *See generally* Meehl, Clinical Versus Statistical Prediction (1954); Mischel, Personality and Assessment (1968). While the potential of prediction tables for forecasting criminal behavior has been recognized for some time, see Glueck & Glueck, Predicting Delinquency and Crime 1–17 (1959); Glueck & Glueck, Unraveling Juvenile Delinquency (1950), that potential is as yet unrealized. *See* Kahn, *The Case of the Premature Claims*, 11 Crime and Delinquency 217 (1965). Morris observes: "Psychiatrists must do the hard statistical work; they cannot continue to rely on superficial assumptions as to the sufficiency of clinical insights. . . . Until this hard work has been done I would most strenuously oppose any sentencing or paroling process structured around psychiatric predictions of dangerousness." Morris, *supra* note 2, at 536. Packer is more blunt: "If Dr. Menninger thinks that he or any other psychiatrist can make the kind of prediction of dangerousness upon which the concept of preventive detention rests, he has managed successfully to conceal the evidence." Packer, Book Review, N.Y. Rev. of Books, Oct. 23, 1969 at 17, 18. *See also* Goldstein, *The Mentally Disordered Offender and the Criminal Law*, in De Reuck & Porter, The Mentally Abnormal Offender 195 (1968).

[82] Halleck, *supra* note 2, at 34.

[83] Kadish, *supra* note 3, at 286. He gives a hypothetical "Wootton code" dealing with crimes against the person: "'A person commits a crime' (or perhaps 'subjects himself to the compulsory regime of social prevention and personal betterment') 'who engages in conduct (in the sense only of bodily movements) as a factual consequence of which: (1) another person's life is lost, (2) another person is physically injured; or, (3) another person's life or physical well-being is imperilled.'" *Id.*

[84] *Id.*

[85] *See* text accompanying notes 6–27 *supra*.

to "the citizen needs a criminal justice system based on free will." Hart observes[86] that people do not view themselves as objects of circumstances, but rather as responsible authors of their own conduct. The psychological research noted previously[87] supports the contention that beliefs about personal responsibility have an important behavioral impact. The issue here, as before, is whether the use of responsibility as a conduct in the legal process affects the citizen's psychological perception of his own responsibility. Kadish asserts that it would be damaging for the law to run counter to the pervasive free will orientation of morality and social life in general.[88] In the absence of data on the law's socializing ability to induce this psychological perception of responsibility, I maintain that the issue is still an open one.[89]

4. Loss of Deterrence. This objection is that in a behavioral system of law, since blame and responsibility are not relevant, criminal conviction will not be viewed as societal condemnation. Conviction, therefore, will not be as aversive as at present and the law will lose some of its ability to deter potential lawbreakers.[90]

One may reply to this objection in a manner similar to "condemning the blameless" above.[91] Society will still condemn and stigmatize those who break its norms, regardless of how the law chooses to label the norm-breaker. This informal condemnation, when added to the aversive nature of the "treatment" for an offense, will suffice to deter others, to the extent that others are deterrable.[92] The prospect of treatment "is unpalatable enough and sufficiently threatening in its uncertainty to provide at least as effective a deterrent to potential offenders as that of the traditional eye-for-an-eye model.[93] Would a potential car thief be deterred any less by hearing that his car-stealing friend was "diagnosed" by the behaviorists' "board of experts" as having to be "treated" indefinitely at a "state re-education center" than he would be by hearing that his friend was "convicted" by a "jury" and had to spend several years in "prison"?

5. State Intervention. The final objection to moving toward a behaviorial view of the criminal law is also the major one. The "Wootton fallacy" is asserted to be that she sees only the negative side of the criminal law, the punishment ("treatment") of persons found guilty. She ignores the positive side, the protection which the rest of us receive from official interference in our lives, largely through the concepts of responsibility, culpability, and mens rea.[94] In Kadish's terms, the decline of guilt necessarily carries with it the decline of innocence.[95]

The proponents of the behavioral position intend that individuals who commit proscribed behavior but who are not dangerous (for example, those involved in a freak accident) would be promptly released by the police and not prosecuted. The discretion to release, however, and the decision not to prosecute

---

[86] Hart, Punishment and Responsibility 182 (1968).

[87] See notes 10–16 *supra* and accompanying text.

[88] See Kadish, *supra* note 3, at 287.

[89] Note that the behaviorists do not suggest that the state rent billboards to inform the populace "From this day forth, you are no longer responsible for your actions." Rather, Wootton suggests that the concept of responsibility be allowed to "wither away." "[A]ll that is necessary is that we should refrain from raising the issue of responsibility at all." Wootton, *Diminished Responsibility: A Layman's View*, 76 L.Q. Rev. 224, 239 (1960). Assuming that this change would have any psychological effect upon people, it is uncertain whether they would infer that now no one was responsible, or that now everyone was responsible. *See* text accompanying notes 22–29 *supra*.

[90] *See* Dix, *supra* note 24, at 333; Livermore & Meehl, *supra* note 27, at 849.

[91] *See* text accompanying notes 50–61 *supra*.

[92] On the unknown extent to which the criminal law sanctions can serve a deterrent function, see Chappel, Geis & Hardt, *Explorations in Deterrence and Criminal Justice*, 8 Crim. L. Bull. 514 (1972); Tapp, *Socialization, the Law, and Society*, 27 J. Social Issues No. 2 *passim* (1971).

[93] American Friends Service Comm., *supra* note 70, at 39.

[94] Packer expands this point:

> People ought in general to be able to plan their conduct with some assurance that they can avoid entanglement with the criminal law; by the same token the enforcers and appliers of the law should not waste their time lurking in the bushes ready to trap the offender who is unaware that he is offending. It is precisely the fact that in its normal and characteristic operation the criminal law provides this opportunity and this protection to people in their everyday lives that makes it a tolerable institution in a free society. Take this away, and the criminal law ceases to be a guide to the well-intentioned and a restriction on the restraining power of the state. Take it away is precisely what you do, however, when you abandon culpability as the basis for imposing punishment.

Packers, *supra* note 1, at 68.

[95] Kadish, *supra* note 3, at 285.

would lie solely with the authorities.[96] In the behavioral system, the citizen would have no guarantee that he would be released. Decisions involving a man's life would not be argued in open court, they would be issued *ex cathedra* from the consultation room by state-chosen experts. The opportunity for abuse—ranging from treatment decisions based on unfounded theoretical inferences[97] to outright prejudice—would be rife.

What would the behaviorists' treatment board do with a "schizophrenic" who accidentally injured someone—the accident being unrelated to his mental state? As a participant in an accident, the board may think he does not require treatment, but what about as a schizophrenic?

The behavioral position, in sum, is not a viable substitute for the free will assumptions currently guiding the administration of criminal justice. If the abolition of the insanity defense would hasten the arrival of the Therapeutic State—and I have argued that it would—then abolition had best be approached with extreme trepidation.

III. CONCLUSION

In this evaluation of the justifications for the existence of the insanity defense, I have questioned the notion that the citizen needs the insanity defense, and several components of the argument that the law needs the insanity defense.

I have been unable, however, to answer the claims that the elimination of the insanity defense would lead to the complete acquittal of the abnormal offender, and would eventually usher in a legal system based upon non-existent treatment procedures and unfounded faith in our ability to predict dangerousness, a system in which it would be impossible to define the very phenomena we wish to prohibit, and which would leave the citizen at the mercy of politically chosen "experts."

Applying a lesser-of-two-evils rule dictates that the insanity defense should not be abolished, at least not yet. The consequences are too uncertain and too potentially disastrous to recommend abolition.

It is obvious to the point of boredom that the insanity defense should be reformed. Chief among the reforms should be restoring presently denied rights to the abnormal offender,[98] including the right to decline "treatment"[99] and substituting for indeterminate commitment, commitment for no longer than the corresponding prison sentence would have been.[100] As regards the recommendation that we humanize rather than eradicate the insanity defense, I am mindful of Lord Morley's comment that small reforms are the enemies of large ones. I am convinced, however, that large reforms in the criminal law, including the abolition of the insanity defense, are contingent upon the occurrence of two events.

The first is the development of a new set of operating assumptions for the criminal justice system, a model of man more sophisticated and viable than either the free will or behavioral positions. Kittrie thinks that one day the free will and behavioral positions will merge into a unified system of social sanctions.[101] That day may be an ominous one for human liberty, unless provision has

---

[96] See American Friends Service Comm., *supra* note 70, at 40: "At every level—from prosecutor to parole-board member—the concept of individualization has been used to justify secret procedures, unreviewable decision making, and an unwillingness to formulate anything other than the most general rules or policy. Whatever else may be credited to a century of individualized-treatment reform effort, there has been a steady expansion of the scope of the criminal justice system and a consolidation of the state's absolute power over the lives of those caught in the net."

[97] *See* Lewis, *The Humanitarian Theory of Punishment*, 6 Res Judicatae 224, 227 (1953): "To be taken without consent from my home and friends; to lose my liberty; to undergo all these assaults on my personality which modern psychotherapy knows how to deliver; to be re-made after some pattern of 'normality' hatched in a Viennese laboratory to which I never professed allegiance; to know that this process will never end until either my captors have succeeded or I have grown wise enough to cheat them with apparent success—who cares whether this is called Punishment or not?"

[98] *See* Szasz, *supra* note 2, at 182; Ennis, *supra* note 54, at 123-24.

[99] *See* Note, *Conditioning and Other Technologies Used to "Treat?" "Rehabilitate?" "Demolish?" Prisoners and Mental Patients*, 45 So. Cal. L. Rev. 616, 658 (1972).

[100] *See* Morris, *Impediments to Penal Reform*, 33 U. Chi. L. Rev. 627, 638 (1966): "Power over a criminal's life should not be taken in excess of that which would be taken were his reform not considered as one of our purposes." *See also* Morris & Howard, Studies in Criminal Law 147-87 (1964). For criticism of this proposal, see Kadish, Book Review, 78 Harv. L. Rev. 908 (1965); Sparks, *Custodial Training Sentences*, 1966 Crim. L. Rev. (Eng.) 96 n. 44.

[101] *See* Kittrie, *supra* note 6, at 407.

been made for fundamental procedural safeguards to protect the citizen against the parens patriae power of the ever-benevolent State.[102] Much creative legal work must be done to develop principles accepting the rehabilitative ideal as a guide to the administration of criminal justice and at the same time mitigating its inherent threat to human autonomy, its "1984-ish potentialities."[103]

In flirting with the abolition of the insanity defense, Goldstein and Katz state[104] that abolition would force us to completely reconsider the criminal and civil law as it presently relates to the mentally abnormal individual. Ultimately, they think, abolishing the insanity defense requires coming to terms with such "emotionally-freighted"[105] concepts as free will and determinism. I completely agree that these are the issues to which the law should be addressing itself. Since these issues relate to the very essence of democracy and human liberty, however, it seems that rather than immediately abolishing the insanity defense, a more judicious course would be to come to terms with these concepts first. "Emotionally-freighted concepts" are not easily dealt with on the run.

The second event which must occur before major reform of the substantive criminal law can materialize is the establishment of a solid body of empirical evidence to guide the development of that reform. Core hypotheses of the criminal justice system can no longer be merely assumed; they must be tested. Empirical investigation of some of the assumptions of the Therapeutic State—the treatment of antisocial behavior and the prediction of dangerousness[106]—is beginning to provide data which should be fed back to the model and serve a corrective function.[107] Many other potentially researchable areas, however, remain almost untouched.[108] The creative contribution of social scientists in providing an empirical assessment of the alternative hypotheses available for use in the development of a criminal justice system is potentially great.[109] As in other fields,[110] generalized questions such as "Does punishment deter?" and "Does treatment work?" are unanswerable and counterproductive. The meaningful questions for social scientists are "*What* punishment, for what offense, committed by *whom*, serves to deter *what* type of person, from *what* type of acts, and *how much*?" "*Which* treatment, administered by *whom*, has *what* specific effects on *which* type of offender, under *what* circumstances?"

While waiting and working for a structure of procedural safeguards to be built on a foundation of empirical fact, caution would be appropriate for those who are troubled by what they see as injustice and farce in the administration of the insantity defense, as Szasz and others[111] have so poignantly depicted. We will have to learn to live with a reformed insanity defense, at least for awhile, lest in our efforts to secure equal and just treatment for those thought mentally abnormal, we succeed only in lowering all citizens to the present legal status of mental patients.

The Honest Politician's Guide To Crime Control

(By Norval Morris and Gordon Hawkins)

CRIME AND THE PSYCHIATRIST

The accused is, we are informed, "psychotic," and should therefore not be convicted of a crime. Further, though "acquitted" because of his mental illness, he is "dangerous" and should therefore be detained until he is both "cured"

---

[102] See *id.* at 400, for a discussion of a Therapeutic Bill of Rights.
[103] *Cf.* Morris, *supra* note 100, at 627.
[104] Goldstein & Katz, *supra* note 2, at 872.
[105] *Id.*
[106] See text accompanying notes 77-82 *supra*.
[107] On the ability of the treatment model to remain impervious to disconfirming evidence, see Kassebaum, Ward & Wilner, *supra* note 80, at 323–24: "Precisely because the concept and connotations of psychological treatment provide a suitable imagery with which to depict imprisonment, it is unlikely that studies which fail to confirm such treatment's effects will lead to the abandonment of the treatment ideology . . . . It seems likely that both the flexibility and the benign visage of treatment will continue to be of value to social control agencies."
[108] *See* Andenaes, *supra* note 9; Chappell, Geis & Hardt, *supra* note 92, at 514.
[109] *Cf.* Moynihan, Maximum Feasible Misunderstanding 193–94 (1969).
[110] In the field of psychotherapy, for example, *see* Paul, *Outcome of Systematic Desensitization*, in Behavior Therapy: Appraisal and Status 63, 70 (Franks ed. 1969).
[111] *See* note 3 *supra*.

of this malady and no longer "dangerous." Lewis Carroll, in *Through the Looking-Glass,* offered a fine commentary on the superficialities involved in such a traditional response to the psychologically disturbed offender:

> "What sort of insects do you rejoice in, where *you* come from" the Gnat inquired.
>
> "I don't *rejoice* in insects at all," Alice explained, "because I'm rather afraid of them—at least the large kinds. But I can tell you the names of them."
>
> "Of course they answer to their names?" the Gnat remarked carelessly.
>
> "I never knew them to do it."
>
> "What's the use of their having names," the Gnat said, "if they won't answer to them?"
>
> "No use to *them,*" said Alice; "but it's useful to the people that name them, I suppose. If not, why do things have names at all?"

Our program on crime and the psychiatrist is designed both to eliminate our present futile name-calling from the criminal justice system and to engage the psychiatrist in the treatment of certain dangerous criminals, a task he now eschews. We achieve these results by three ukases:

1. The defense of insanity shall be abolished. The accused's mental condition will be relevant to the question of whether he did or did not, at the time of the crime, have the *mens rea* of the crime of which he is charged. His mental condition will, of course, also be highly relevant to his sentence and his correctional treatment if he is convicted.
2. High priority shall be accorded to research aimed at the definition of social dangerousness and the development of prediction tables designed to deal with the "dangerous" psychologically disturbed offender.
3. Special institutions for the treatment of "dangerous" psychologically disturbed offenders, on the lines set out in this chapter, shall be established in all states.

The vast literature dealing with psychiatric or psychoanalytic criminology ranges from detailed studies of particular cases to attempts to explain all criminal behavior in terms of psychopathy. Yet apart from providing a profusion of new labels the practical contribution that psychiatry has made to the problems of defining and treating the offender is very limited. This is in part, but by no means entirely, the fault of psychiatrists themselves. There is no doubt, however, that the leaders in corrections and in criminal law policy accord the psychiatrist a slim role indeed in treating the behavior disorders that come to the courts, the prisons, and other correctional agencies. The slight attention given to the role of the psychiatrist in the report of the President's Commission, *The Challenge of Crime in a Free Society,* and in the same commission's task force report on corrections, is recent testament to this neglect. Let us be clear about this. We are not suggesting that the judges, academic and practicing lawyers, correctional administrators, and criminologists prominent in the criminal justice system are reactionary, or that they fail to keep up with the literature in the social sciences; their attitude to psychiatry is not usually one of ignorance, it is rather a thoughtful rejection. They see psychiatrists, as too frequently psychiatrists see themselves, merely as diagnosticians, classifiers, separating out from the bulk of criminal offenders those whose psychological disturbance is at the level of psychosis. Where, it is asked, are psychiatrists successfully treating criminal offenders? The psychiatrist is useful, it is agreed, in classification and in staff training, but he is not seen as a serious ally in the correctional process.

We do not share this view. We believe there has been gross failure both by leading forsenic psychiatrists and by those responsible for the criminal justice system sufficiently to mobolize psychiatric resources for the prevention and treatment of crime. We believe part of the fault lies in our national monomania, our *folie à collcetive,* concerning criminal responsibility and the defense of insanity. This has distracted us from many important tasks, two of which we shall deal with in this chapter—first, the task of defining the dangerous offender for sentencing and treatment purposes, and second, the task of better mobilizing psychiatric and other clinical resources for the treatment of such criminals. We believe these three themes—the defense of insanity, the definition of dangerousness, and the mobilization of clinical resources for the treatment of crim-

inals who are dangerous and psychologically disturbed—are closely interconnected. The importance of all three issues must be recognized if the psychiatrist is to assist appreciably in efforts to protect the community and to treat the criminal.

ABOLITION OF THE DEFENSE OF INSANITY

Rivers of ink, mountains of printer's lead, and forests of paper have been expended on an issue that is surely marginal to the chaotic problems of the effective, rational, and humane prevention and treatment of crime. We determinedly insulate ourselves from the realities we are facing—the role of psychological disturbances in criminality and the measures we might effectively and fairly use to deal with psychologically disturbed and dangerous criminals. We do not propose here to contribute to the wastage or to pursue the traditional minutiae. Our view is that the defense of insanity itself is moribund and should be interred. We are not suggesting amendments to the rules concerning fitness to plead; that issue is relevant to our present topic, but it is not one we now wish to consider.

The suggestion that the defense of insanity should be abolished is not original. Many authorities including Lady Barbara Wootten, Professor H. L. A. Hart, and Chief Justice Joseph Weintraub of New Jersey among others have advocated its abolition, though for diverse reasons and with diverse substitutes for it. We do not propose to marshal and analyze their reasons and their suggestions. We have put forward a ukase on this topic and we shall here advance some of the reasons underlying it, a few of which are not to be found in the writings of the authorities on this subject.

Why Should There Be A Defense of Insanity?

The question strikes deep into the social function of the criminal law. Over the years, we have found the traditional answers less and less convincing—such as the uncritical acceptance of what is by the Royal Commission on Capital Punishment:

> It has for centuries been recognized that, if a person was, at the time of his unlawful act, mentally so disordered that it would be unreasonable to impute guilt to him, he ought not to be held liable to conviction and punishment under the criminal law. Views have changed and opinions have differed, as they differ now, about the standards to be applied in deciding whether an individual should be exempted from criminal responsibility for this reason; but the principle has been accepted without question.

Or the answer in the American Law Institute's Model Penal Code:

> What is involved specifically is the drawing of a line between the use of public agencies and public force to condemn the offender by conviction, with resultant sanctions in which there is inescapably a punitive ingredient (however constructive we may attempt to make the process of correction) and modes of disposition in which that ingredient is absent, even though restraint may be involved. To put the matter differently, the problem is to discriminate between the cases where a punitive-correctional disposition is appropriate and those in which a medical-custodial disposition is the only kind that the law should allow.

Or that offered by Sir Owen Dixon:

> Now it is perfectly useless for the law to attempt, by threatening punishment, to deter people from committing crimes if their mental condition is such that they cannot be in the least influenced by the possibility or probability of subsequent punishment; if they cannot understand what they are doing or cannot understand the ground upon which the law proceeds.

Or that in the Durham case:

> Our collective conscience does not allow punishment when it cannot impose blame.

Our position, putting aside the difficult and important issue of fitness to plead—competency to be tried—is very simple. The accused's mental condition should be relevant to the question of whether he did or did not, at the time of the crime, have the *mens rea* of the crime of which he is charged. There should be no special rules of the M'Naughten or Durham types. The defense of insanity being abrogated, evidence of mental illness would be admissible on the *mens rea* issue to the same limited extent that deafness, blindness, a heart condition, stomach

cramps, illiteracy, stupidity, lack of education, "foreignness," drunkenness, and drug addiction are admissible. In practice, such cases are rare, and they would remain rare were mental illness added to the list. There would not merely be a shifting of psychiatric testimony to the *mens rea* issue with the same problems as beset the courts which hear it in the defense of insanity. A quite different issue would be raised, and one traditionally within the competence of the finder of fact. The convicted person's mental condition would, of course, be highly relevant to his sentence and to his correctional treatment if he were convicted.

Historically the defense of insanity made good sense. The executioner infused it with meaning. And in a larger sense, all criminal sanctions did so too, since they made no pretense of being rehabilitative. In the present context of the expressed purposes and developing realities of both the criminal justice system and the mental health system this defense is an anachronism. In the future, this defense would be not only anachronistic, it would be manifestly inefficient as well.

Let us offer a small statistical point before turning to the moral issue. In this country the defense of insanity is pleaded in about 2 percent of the criminal cases which come to jury trial. Overwhelmingly, of course, criminal matters are disposed of by pleas of guilty and trials by a judge sitting without a jury. Only the exceptional case goes to trial by jury. And of these exceptional cases, in only two of every hundred is this defense raised. In the United Kingdom, for the period on which the Royal Commission on Capital Punishment reported, the situation was very similar. The verdict of "guilty but insane" was returned, over a five-year period, in 19.8 percent of murder trials, whereas over the same period it was returned in only 0.1 percent of trials for other offenses. Does anyone believe that this measures the significance of gross psychopathology to crime? Let him visit the nearest criminal court or penitentiary if he does. Is not this defense clearly a sop to our conscience, a comfort for our failure to address the difficult arena of psychopathology and crime?

The practical difference between traditional tests of insanity and modern revisions was recently empirically tested. Various juries were given instructions based on the M'Naughten rules, the Durham test, and the following simple and uncluttered formula: "If you believe the defendant was insane at the time he committed the act of which he is accused, then you must find the defendant not guilty by reason of insanity." The juries failed to see any operative differences in the three instructions. Do we need to labor another century and a half to produce a mouse of such inconsequence ?

Yet the moral issue remains central. Should we exculpate from criminal responsibility, or from "accountability" to use the preferable European concept, those whose freedom to choose between criminal and lawful behavior has been curtailed by mental illness? It is too often overlooked that the exculpation of one group of "criminal actors" confirms the inculpation of others. Why not a defense of "dwelling in a Negro ghetto"? This defense would not be morally indefensible. Such an adverse social and subcultural background is statistically *more* criminogenic than is psychosis, and it also severely circumscribes the freedom of choice which a nondeterministic criminal law (and that describes all present criminal law systems) attributes to accused persons.

True, a defense of social adversity would be politically intolerable; but that does not vitiate the analogy for our purposes. Insanity, it is said, destroys, undermines, or diminishes man's capacity to reject the wrong and adhere to the right. So does the ghetto—more so. But surely, you might ask, you would not have us punish the sick? Indeed we would, if you insist on punishing the grossly deprived. To the extent that criminal sanctions serve punitive purposes we fail to see the difference between these two defenses; to the extent that they serve rehabilitative, treatment, and curative purposes, we fail to see the need for the difference. Some reply: it is not a question of freedom or morality, it is a question of stigmatization, and to this we shall return; but let us not brush aside the moral issue so lightly.

In Shavian terms: Vengence is mine, saith the Lord—which means that it is not the Lord Chief Justice's! It seems to us clear that there *are* different degrees of moral turpitude in criminal conduct and that the mental health or illness of an actor is relevant to an assessment of that degree—as are many other factors in the social setting and historical antecedents of a crime. This does not mean,

however, that society is obliged to measure any or all of these pressures for purposes of a moral assessment which will lead to conclusions concerning criminal responsibility.

In a few cases the question of moral irresponsibility is so clear that there is no purpose in invoking the criminal process. The example of accident, in its purest and least subconcious accident-prone form, is a situation where there is little utility in invoking the criminal process. The same is true of a person who did not know what he was doing at the time of the alleged crime. But to exculpate him there is no need for M'Naughten or Durham rules for he falls clearly within general criminal law exculpatory rules. He simply lacks the *mens rea* of the crime. Thus, it seems to us that all we need to achieve within the area of criminal responsibility and psychological disturbance is already achieved by existing and long-established rules of mental intent and crime, and we would allow a sane or insane *mens rea* to suffice for guilt.

Perhaps an example of this principle may help. The *Hadfield* case will serve our purpose admirably. Hadfield had been severely wounded in the head in the Napoleanic wars and subsequently decided that it was necessary for the salvation of the world that he kill George III. He equipped himself with a blunderbuss and secreted himself in the Drury Lane Theatre in a position from which he hoped to shoot George III as he waddled into the royal box. Hadfield saw the flabby creature in the royal box and discharged his blunderbuss in the direction of the king, unfortunately missing him.

There was no doubt of Hadfield's brain damage or of his psychosis, his gross psychological disturbance. He did, however, clearly intend to kill the king. He had the insane *mens rea* of murder, and indeed of treason. We do not regard "insane *mens rea*" as a contradiction in terms. Had his psychological disturbance led him to think that he was discharging the blunderbuss to start the performance on the stage, or to burst a balloon, he would have lacked the *mens rea* of murder and of treason. But he saw himself as sacrificing himself for the good of the world and he may not have been far wrong. We do not deplore the fact that Hadfield was held to be not guilty on the grounds of insanity. We do, however, maintain that there would be no greater injustice involved in convicting in such a case and applying the psychological diagnosis to the decision how to treat the offender than in convicting in any of the other thousands of cases that daily flow through our criminal courts.

Clearly the crucial question in this context is: what are the consequences of the defense of insanity? Is there an operative difference between peno-correctional and psychiatric-custodial processes which renders benefit to the accused who is found not guilty on the grounds of insanity? To this important inquiry we offer two replies. First, the differences if they exist are marginal; and second, the defense of insanity is an extraordinarily inefficient mechanism of deciding on the allocation of psychiatric treatment resources.

The American Law Institute's recommended modification of the M'Naughten rules in its Model Penal Code was accompanied by a recommendation requiring the indeterminate commitment of those found not guilty by reason of insanity. Likewise, within a month of the adoption of the Durham rules in the District of Columbia, Congress provided that being found not guilty on the grounds of insanity should be followed, mandatorily, not in the discretion of the court, by indeterminate commitment to Saint Elizabeth's Hospital until such time as the person so committed could meet the requirements that he prove, beyond reasonable doubt, his freedom from "any abnormal condition" and that he is not likely to repeat the act which resulted in his insanity acquittal. Dr. Winfred Overholser, the late superintendent of the mental hospital to which the recipients of this benevolence in the District of Columbia are sent, put the matter precisely: "The notion that a verdict of not guilty by reason of insanity means an easy way out is far from the truth. Indeed the odds favor such a person spending a longer period of confinement in the hospital than if the sentence was being served in jail."

Facilities and practice differ from country to country, and in this country from state to state. The point we wish to stress is that it is error to *assume* benevolence and to assume that there are more psychiatric treatment resources, better physical conditions, and earlier release practices pursuant to a finding of not guilty on the grounds of insanity than pursuant to a conviction. It all depends.

We know of systems where there are more facilities per patient for psychiatric treatment in the penitentiary holding psychologically disturbed prisoners than in the nearby state mental hospitals. Frequently the converse is true.

Let us offer a final point on the sometimes assumed benevolence of the defense of insanity. It is more than a straw in the wind, more than a suggestion that this is not a liberal, benevolent, humanely exculpating defense, when one finds the prosecution alleging at trial the insanity of the accused at the time of the crime while the defense urges his sanity; but this has occurred in both the United Kingdom and this country. Lady Barbara Wooton has discussed at least six cases in which "the witness called by the Crown to rebut evidence of diminished responsibility sought to establish that the accused was in fact insane." And in a judgment in the House of Lords, Lord Denning said: "The old notion that only the defense can raise a defense of insanity is now gone. The prosecution are entitled to raise it and it is their duty to do so rather than allow a dangerous person to be at large."

It might be suggested that our attack on the defense of insanity misconceives the problem. The task of the law, it might be suggested, is mainly to protect the community, and the defense of insanity will indeed permit better psychiatric treatment and, if necessary, longer custodial supervision of the disturbed and dangerous criminal. Later in this chapter we shall deal with the definition and prediction of social dangerousness; in the meantime, it suffices to note that the defense of insanity started on moral premises different from this, and that the defense is both unnecessary and inefficient to achieve this protective purpose.

A more sophisticated critic might suggest that we are missing the point in a different way. Criminal processes are, he might say, public morality plays. They have diferrent purposes, perhaps, but they certainly aim dramatically to affirm the minimum standards of conduct society will tolerate. By public ceremonial and defined liturgy, criminal trials stigmatize those who fail to conform to society's standards. In short, the criminal justice system is a name-calling, stigmatizing community superego reinforcing system. And, it could be urged, we should not stigmatize the mentally ill. They are mad not bad, sick not wicked; it is important that we not misclassify them. Is there a rebuttal to this defense of the defense of insanity? We believe there is—the fact of "double stigmatization."

Consider the question, Are psychologically disturbed criminals seen by prison authorities only as "criminal," and are the mentally ill who have committed or have been charged with crime seen only as "mentally ill" by the hospital authorities? Or are the former seen as "mentally ill criminals" and the latter as "criminal and mentally ill"? Are the systems separate or confused in the minds of the staff and of the "patients"? It is clear that some belief in the separateness and purity of the two systems infects the position of those who advocate retention of the defense of insanity. Yet the fact is that the prison authorities regard their inmates in the facilities for the psychologically disturbed as both criminal and insane, bad and mad; and the mental hospital authorities regard their inmates who have been convicted of crime or even arrested and charged with crime as both insane and criminal, mad and bad.

In mental hospitals the fact that an inmate was arrested for a crime seriously influences the date of his likely discharge. Note, it is an arrest without a conviction that has this effect. Likewise the conditions of incarceration in the psychiatric divisions of correctional systems are frequently less desirable than elsewhere in the system and the chances of obtaining parole are substantially lower. The truth is that our present intellectually loose approach to this problem inflicts gratuitous extra suffering both on those who are categorized as criminal and mentally disturbed and those who are categorized as mentally disturbed and criminal. The police power of the state and the mental health power of the state are surely sufficient unto themselves, separately, to control questions of dangerousness and the upper limits of power over individual citizens. It is mutually corruptive and a potent source of injustice loosely and thoughtlessly to blend these two powers, and thus to gloss over in each the proper balance between state power and the freedom of the individual.

There is one concept common to both, the concept of social dangerousness. The problem for both the prison authorities and the mental health authorities is reasonably and effectively to make assessments of social dangerousness and to

design a process by which that assessment can be fed into the releasing procedure. We do not facilitate this difficult task by making a porridge, a farrago, out of the two powers—the mental health power and the police power—and using this mess to avoid facing and trying to dispose of a genuinely difficult problem.

Thus, in terms neither of the morality of punishment nor of stigmatization is the defense of insanity now essential or operative. Similarly, it is neither a necessary nor effective principle around which to mobilize clinical resources for the rational treatment of the psychologically disturbed criminal actor. It is, however, in our view, a political issue of some difficulty and the politics are concerned with the stigmatizing role of the criminal law.

While the hangman, or in this country the fryman, and the capital punishment controversy lurk in the background, the issue of criminal irresponsibility in relation to homicide is intractable. Yet, in the five years 1964, 1965, 1966, 1967, and 1968, the number of executions in this country was, respectively, 15, 7, 1, 2, and 0. Our ukase on this matter does no more than hasten the inevitable. Moreover, when one looks at the pattern of capital punishment for murder in the world, it becomes clear that this is a rapidly declining sanction. We can reasonably exclude it from our consideration of the future. What remains then is the question of stigmatization of conduct as either wicked or the product of sickness, as either bad or mad. This difference in stigmatization may result in different treatments but the differences are neither essential to our system or criminal justice nor necessarily involved in either our correctional or mental health systems. The essential difference is the difference of nomenclature, of overt public stigmatization.

For our part, we look toward a future in which moral outrage and name-calling will not so significantly influence our reaction to the behavior of others. This is a generation that despoils our natural resources and prepares to terminate human life on this planet; but if the ruination of our environment and the eleminating of our species are avoided, if aggressions are controlled in favor of decency and creativity, we do not believe that systems of justice in which name-calling and vengeance figure so prominently can long survive. If this be so, then the issue becomes one of how we can, as rapidly as the traffic will allow, destigmatize our criminal law processes.

There is a choice. We could follow the pattern of a gradual extension of the exculpatory and allegedly destigmatizing process of the defense of insanity, opening it more and more widely to cover larger and larger slices of criminal conduct until most criminal behavior is encompassed. Many of those working in this field, men whom we respect, favor that engulfing process. We do not oppose their purpose; but we think their political judgment wrong. It seems to us that we should not make an artificial and morally unjustifiable exception to a false general rule and allow the exception to swallow the rule. It seems to us better to support the advance that is now taking place, certainly in theory and rhetoric, in the treatment of all criminal conduct, and to a degree in correctional practice. In other words, to put it aggressively, we think society will move faster toward a rational system of criminal justice through honesty than by self-deception; and we think it dishonest to create an artificial, morally unjustifiable, practically ineffective exception to the general rules of criminal responsibility. We think the English judges went wrong in the nineteenth century and that it is time we got back to earlier and truer principles.

We find it impossible morally to distinguish the insane from others who may be convicted though suffering deficiencies of intelligence, adversities of social circumstances, indeed all the ills to which the flesh and life of man is prey. It seems to us that our approach better accords with the total role of the criminal law in society than does a system which makes a special exculpatory case out of one rare and unusual criminogenic process, while it determinedly denies exculpatory effects to other, more potent processes. In the long run we will better handle these problems, as well as the whole and more complex problem of criminality in the community, if we will recognize that within crime itself there lies the greatest disparity of human wickedness and the greatest range of human capacities for self-control.

Our perennial perseverations about the defense of insanity impede recognition of this adversity, since they push us to a false dichotomy between the responsible and the irresponsible. They should be abandoned. One occupation for the energies

thus released might be suggested, a task in which the psychiatrist has an important role ot play: the defining of those categories of psychologically disturbed criminals who are serious threats to the comunity and to whom special treatment measures therefore be applied.

[From the Drake (University) Law Review, June 1973]

The Insanity Defense and the Juror

(By Ibtihaj Arafat† and Kathleen McCahery††)

One of the most disputed issues in legal history is the insanity defense. Basically such a defense is not a question of guilt per se but rather a question of legal responsibility for a crime. During an insanity trial, there is rarely any doubt that the defendant committed the crime for which he stands accused: *i.e.*, sufficient evidence is usually present to show a direct causal relationship between the defendant's conduct and the resultant harm that was inflicted. However, the issue to be resolved is whether or not mens rea was present; *i.e.*, whether the defendant willfully intended to commit the crime. It is mens rea which is challenged by the insanity defense. "The decision as to the defendant's responsibility or lack of it rests with a jury. If the jury believes the defendant was responsible for his behavior at the time he committed the acts, it will find him guilty. If it believes he was not, it will acquit him on the grounds of insanity."[1]

Little is given in the way of guidance to help the jury decide the insanity issue. Instructions to the jury often refer to the presumption of insanity. "Jurors are told it is a matter of common sense to assume men are sane unless evidence is introduced to provide they are not. . . . The underying assumption is that if errors are to be made about who is sane and who is not, they should be made in favor of sanity and that by doing so the principles of deterrence and retribution are reinforced as often as reasonably possible."[2] Psychiatrists, acting as expert witnesses, are retained by both the defense and prosecution to testify upon the mental condition of the defendant. Frequently, however, such testimony does not help the jury since the psychiatrists cannot assume the burden of deciding directly whether or not the defendant was insane at the time of the crime—insanity being a legal concept with no direct medical equivalency. The typical procedure in trials involving such testimony is for the judge to instruct the jurors that they are not bound to accept the testimony of expert witnesses.[3] Hence the jury is left to its own devices to decide the ultimate issue of insanity. Considering the ambiguity of the law, the complex and technical nature of the expert testimony, and the instruction to presume sanity, the only "clear" and seemingly "simple" aspect that the jurors have in common while deciding the issue of insanity is their individual attitude developed from popular culture toward crime and insanity. This study will show the relationship between the juror's orientation toward the concept of insanity and its effect on his decision during an insanity trial.

The data used in this study was collected by self-administered questionnaires. Five hundred respondents were chosen at random from the greater New York area having been summoned to be registered as prospective jurors in the criminal courts of the City of New York—namely, Queens, Brooklyn, and Manhattan. Of the 500 questionnaires, 450 were usable.

The data was analyzed systematically. The Chic-square test was used in the analysis to determine whether the different relationships between the variables were significant or not.

I. Review of Literature

For over one hundred years, the insanity defense has been one of the most controversial issues in criminal law. The battle has been represented by two

---

† Assistant Professor in Sociology, City College of The City University of New York. B.S. 1967, M.S. 1968, Ph.D. 1970, Oklahoma State University.

†† Lecturer in Sociology, City College of The City University of New York. B.A. 1964, Immaculate College; M.A. 1966, Ph.D. candidate at New York University.

[1] R. Simon & W. Shackelford, Defense of Insanity: Survey of Legal and Psychiatric Opinion 463–64 (1968).

[2] A. Goldstein, The Insanity Defense 115 (1967).

[3] R. Simon & W. Shackelford, Defense of Insanity: Survey of Legal and Psychiatric Opinion (1968).

opposing forces; criminal law versus psychiatry. The basic conflict has centered around whether or not the defendant is permitted to disclaim legal responsibility for his alleged crime. This conflict is further enhanced by negative attitudes as well as distortions and stereotypes perpetuated by such agents as mass media.

In the United States, the M'Naghten, Irresistible Impulse, Durham and various amended versions of the Model Penal Code are the milieu by which insanity is determined and measured. The problems inherent in applying the M'Naghten rules in court are essentially the same problems that will arise when applying the Irresistible Impulse, Durham, or Model Penal Code although there are slight differences in their content.

From the very beginning, the M'Naghten rules, and subsequently any other laws dealing with the insanity defense, have come under constant and bitter attack because many believe that the verdict of not guilty by reason of insanity is simply a way of escaping one's just punishment. The M'Naghten rules demand that one be acutely aware of the fact that "the legal and the medical ideas of insanity are essentially different and a person is not excused from criminal responsibility and liability on grounds of insanity except upon proof that at the time of committing the alleged criminal act, he was laboring under such a defect of reason as to: a) not know the nature and quality of his act, b) not know that his act was wrong." [4]

Many authorities agree that the laws pertaining to the use of the insanity defense require the court and jury to rely upon what is, scientifically speaking, inadequate and often invalid and irrelevant testimony in determining criminal responsibility.[5] The insanity defense is a question of legal responsibility for a given crime. The theory being questioned is the presence of men rea—the intent to commit the crime.

The jurors are faced with the task of deciding a man's fate based on whether or not he is insane. Jurors are given relatively little instruction other than to assume that the defendant is sane unless proven otherwise. "In a criminal trial, it is insanity which must be proved, not sanity. It is a fundamental assumption in law that every dam is deemed sane until his insanity has been established." [6] Psychiatrists, who have been retained as expert witnesses, have been known to give conflicting testimony thus completely confusing the jurors who are laymen. Such testimony does not help to clarify the task for the juror who must ultimately decide upon the mental condition of the defendant at the time of the crime.

However, many researchers have studied the problem of the insanity defense (Glueck, 1962; Guttmacher, 1959; Macdonald, 1969; Overholser, 1953; Rocho, 1958; Rubin, 1965; Szasz, 1965; Weihofen, 1957) but none of them have covered the particular aspect of the problem incorporated in this study.

II. METHODS AND PROCEDURES

Due to the ambiguity of the law, there is a lack of agreement on a concrete definition that could be applied in virtually all cases when insanity pleas are the issue. This research studies those cultural biases that influence the attitudes of jurors toward making a decision when an insanity plea has been entered.

The purpose of this study is to measure the relationship between culturally biased jurors and their attitudes toward insanity as a defense. The juror's attitudinal bias includes their attitude toward the use of psychiatry, the relationship between criminal activity and responsibility for the action, decision as to the severity of two possible dispositions—psychiatic hospital or penitentiary—the relationship between insanity and expected behavior, use of insanity as a defense, who should assume the responsibility for making a final verdict in a plea of insanity—jury of laymen or a panel of specialists—and the relationship between certain background variables such as educational level, occupational category, and prior experience as a juror and their attitude toward psychiatry. It is the objective of the researchers to find those factors that would influence the juror's attitude toward insanity and its effect on his decision in an insanity case at trial.

---

[4] J. Biggs, The Guilty Mind 116 (1955).
[5] A. Goldstein, The Insanity Defense (1967).
[6] J. Goodman, Insanity and the Criminal 252 (1923).

The sample was chosen at random from a population of jurors from the Queens, Brooklyn, and Manhattan Criminal Courts. Being prospective jurors, the sample had to meet the requirements set by the criminal courts. Of this sample, 61 percent were males and 39 percent were females. As for the age, 54.4 percent were in the age group 20–39, 37.1 percent in the age group 40–59, 4.9 percent in the age group 60–65, and 3.6 percent were over 65 years of age. The educational pattern shows that 8.7 percent had a grade school education, 44.2 percent had a high school education, 31.5 percent a college education, and 15.6 percent had reached the graduate school level. The income distribution shows that 63.8 percent earned less than $10,000 annually, 32.4 percent earned between $10,000 and $20,000 annually, and 3.8 percent earned over $20,000 annually. The occupational categories show that 24.7 percent were professionals, 24.4 percent were white collar workers, 17.1 percent were blue collar workers, 16.9 percent were unskilled, and 16.9 percent had no occupation. Of this sample, 20 percent had prior experience as a juror while 80 percent had never served on a jury before.

The questionnaire was divided into four parts. Part I consisted of six questions which covered age, income, sex, education, occupation, and prior experience as a juror. Part II consisted of questions relating to one's attitude toward psychiatry. Part III pertained to attitude toward criminal behavior, severity of penalties, and rehabilitation through psychiatry. Part IV pertained to the description of the nature of insanity as perceived by the juror and who should be responsible for the decision of insanity.

The Chi-square test was used for the analysis since the data is a frequency count placing it on the nominal scale. To facilitate comparisons, percentages were used for descriptive purposes. The results were intepreted in the light of the existing problems in applying the present laws in rendering a decision of insanity.

III. STATISTICAL ANALYSIS

The sample of 450 respondents was asked, on Part II of the questionnaire, to respond to certain questions regarding the field of psychiatry in general and the use of psychiatry as a method of treatment. This resulted in dividing the sample into two groups: a) those with favorable attitudes toward psychiatry (N=300), and b) those with unfavorable attitudes toward psychiatry (N=150). A number of relationships were then investigated using the respondents' attitudes toward psychiatry as the main focal point for comparison.

TABLE I—PERCENT OF JURORS' ATTITUDES TOWARD PSYCHIATRY BY EDUCATION LEVEL

Educational Level	Favorable	Unfavorable	Total
Grade school	4.67	17.33	N=40
High school	41.00	52.67	N=202
College	37.00	22.67	N=145
Graduate school	17.33	7.33	N=63
Total	100.00 (1)	100.00 (2)	N=450

[1] (N=300) $X^2=34.79$.
[2] (N=150) $p<.001$.

Table I shows the difference between the educational levels and the attitudes toward psychiatry. Of the 300 respondents who were favorable toward psychiatry, 4.67 percent were of the grade school level, 41 percent of high school level, 37 percent college level, and 17.33 percent were of graduate school level. In comparison to the 150 respondents who were unfavorable toward psychiatry, 17.33 percent were of the grade school level, 52.67 percent of high school level, 22.67 percent college level, and 7.33 percent were of graduate school level. It could be concluded that there is a highly significant relationship ($p<.001$) between the presence of a favorable or unfavorable attitude toward psychiatry and the level of education. This table shows that 54.33 percent of those favorable toward psychiatry have at least a college level of education while only 30 percent of those unfavorable to psychiatry have a college level of education.

TABLE II—PERCENT OF JURORS' ATTITUDES TOWARD PSYCHIATRY BY OCCUPATIONAL CATEGORY

Occupational category	Favorable	Unfavorable	Total
Professional	30.67	12.66	N=111
White collar	27.00	19.33	N=110
Blue collar	13.33	24.67	N=77
Unskilled	15.00	20.67	N=76
No occupation	14.00	22.67	N=76
Total	100.00 (1)	100.00 (2)	N=450

[1] (N=300) $X^2=31.40$.
[2] (N=150) $p<.001$.

Table II shows the relationship between the occupational categories of the respondents and their attitudes toward psychiatry. Of the 300 respondents favorable toward psychiatry, 30.67 percent were professionals, 27 percent white collar workers, 13.33 percent blue collar workers, 15 percent unskilled workers and 14 percent had no occupation. Of the 150 respondents unfavorable toward psychiatry, 12.66 percent were professionals, 19.33 percent white collar workers, 24.67 percent blue collar workers, 20.67 percent unskilled workers, and 22.67 percent had no occupation. The relationship between the occupational categories and the presence of favorable attitudes toward psychiatry shows a highly significant relationship ($p < .001$). This table shows that 57.7 percent of those with favorable attitudes toward psychiatry have higher status occupations, being professional or white collar workers, whereas only 32 percent of those unfavorable toward psychiatry can be found in the same occupational levels. From these two tables, it can be seen that those respondents with a higher level of education and a higher status occupation tend to be more positive toward psychiatry than those respondents with a lower level of education and in a lower status occupation.

TABLE III—PERCENT OF JURORS' ATTITUDES TOWARD PSYCHIATRY BY PRIOR JURY EXPERIENCE

Attitude toward psychiatry	With experience	Without experience	Total
Favorable	83.33	62.50	N=300
Unfavorable	16.67	37.50	N=150
Total	[1] 100.00	[2] 100.00	N=450

[1] (N=90) $X^2=11.80$.
[2] (N=360) $p<.001$.

The respondents were asked whether or not they had any prior experience serving as a juror in criminal court. Of the 450 respondents, 90 had prior experience as a juror while 360 did not. Of the jurors with experience, 83.33 percent had a favorable attitude toward psychiatry while only 16.67 percent had an unfavorable attitude. Of the jurors without experience, 62.5 percent were favorable toward psychiatry while 37.5 percent were unfavorable. The results of this table show that there is a highly significant relationship ($p < .001$) between one's prior experience as a juror and the presence of a favorable or unfavorable attitude toward psychiatry.

TABLE IV—PERCENT OF JURORS' ATTITUDES TOWARD PSYCHIATRY BY ATTITUDE TOWARD CRIMINAL RESPONSIBILITY

Criminal responsibility	Favorable	Unfavorable	Total
Responsible	50.00	61.33	N=242
Not responsible	50.00	38.67	N=208
Total	[1] 100.00	[2] 100.00	N=450

[1] (N=300) $X^2=4.72$.
[2] (N=150) $p<.05$.

Table IV shows the relationship between the respondents' attitudes towards psychiatry and their attitudes regarding criminal responsibility. The main focus, at this point, is whether the respondents view crime as a function of free will or whether they view crime as one possible result of many interacting factors. The results of this table show that there is a slightly significant relationship ($p < .05$) between one's attitude toward psychiatry and criminal responsibility. It can be seen that of the 300 respondents favorable toward psychiatry, 50 percent view crimes as a function of free will while 50 percent are showing an awareness of possible mitigating factors that can be present in any criminal act. In comparison to the 150 respondents unfavorable toward psychiatry, 61.33 percent view crime as a function of free will while only 38.67 percent favor the broader definition of the problem. This difference between the two groups, even though slight, shows that a bigger percentage of those unfavorable toward psychiatry feel that the defendant, as an individual, should be held fully responsible for his crime.

TABLE V.—PERCENT OF JURORS' ATTITUDES TOWARD PSYCHIATRY BY THE EVALUATION OF THE SEVERITY BETWEEN PENITENTIARY AND PSYCHIATRIC HOSPITAL AS PENAL DISPOSITIONS

Penal disposition	Favorable	Unfavorable	Total
Penitentiary	81.33	95.33	N=387
Psychiatric hospital	18.67	4.67	N= 63
Total	[1] 100.00	[2] 100.00	N=450

[1] (N=300) $X^2=14.64$.
[2] (N=150) $p<.001$.

As a follow-up to the relationship expressed in Table IV, the respondents were asked to judge which of the following alternatives would be a more severe disposition for the defendant: a) penitentiary or b) psychiatric hospital. Of the 300 respondents favorable toward psychiatry, 81.33 percent felt that a penitentiary sentence would be a more severe disposition while 18.67 percent felt that a sentence to a psychiatric hospital would be more severe. Of the 150 respondents unfavorable toward psychiatry, 95.34 percent felt that a penitentiary sentence would be more severe while only 4.66 percent felt that a psychiatric hospital would be more severe. As can be seen from Table V, there is a highly significant relationship ($p < .001$) between one's attitude toward psychiatry and the evaluation of the severity of penal dispositions. In comparing the two groups, it can be seen that a little more than 1/6th of the 300 respondents favorable toward psychiatry as compared to less than 1 out of 21 of the 150 respondents unfavorable toward psychiatry found that the psychiatric hospital was a more severe penalty. The results of this table agree with the results of Table IV in that those respondents with a favorable attitude toward psychiatry are aware that, for those criminals who cannot be held fully responsible for their crime, the psychiatric hospital would be a better disposition. For this group, the psychiatric hospital is not associated with the familiar expression that it is an "easy out" for criminals. Those respondents with unfavorable attitudes toward psychiatry felt more often that the criminal, as an individual, should be held completely responsible for his crime, and hence the better disposition would be a sentence to a penitentiary. For this group, the punishment must fit the crime with the penitentiary being the only proper punishment.

TABLE VI—PERCENT OF JURORS' DECISION REGARDING THE SUITABILITY OF THE BOSTON STRANGLER AND RICHARD SPECK CASES AS EXAMPLES FOR THE VERDICT "NOT GUILTY BY REASON OF INSANITY" AND THE PRESENCE OF A STEREOTYPED IMAGE OF THE "INSANE" OFFENDER

Not guilty by reason of insanity	Stereotyped	Not stereotyped	Total
Agree	35.65	63.81	N=190
Disagree	64.35	36.19	N=260
Total	[1] 100.00	[2] 100.00	N=450

[1] (N=345) $X^2=25.02$.
[2] (N=105) $p<.001$.

The respondents were presented with a dichotomous list of opposing characteristics which are often used by mass media to describe the "insane" offender. The respondents were then asked to check-off those traits that agree with their image of how an "insane" offender should look or act when in court. According to the responses given, the sample was divided into two categories: a) those who had a stereotyped image of the "insane" offender, and b) those who did not have a stereotyped image. These two groups were then asked to respond to two very popular criminal cases, popular to the extent that a great deal of mass media coverage was given to both cases—namely, the case of the Boston Strangler and the case of Richard Speck who was accused of killing eight nurses in Chicago. In both instances, the respondents were asked whether or not they would have found these two criminal cases as suitable examples for the verdict "not guilty by reason of insanity." The results of Table VI show that there is a highly significant relationship ($p. < .001$) between the presence or lack of a stereotyped image and the decision rendered regarding the use of the insanity defense for both the Boston Strangler and Richard Speck cases.

TABLE VII—PERCENT OF JURORS' DECISION REGARDING THE SUITABILITY OF THE INSANITY DEFENSE FOR THE BOSTON STRANGLER AND RICHARD SPECK CASES AND THE PRESENCE OF A STEREOTYPED IMAGE OF THE "INSANE" OFFENDER FOR THOSE FAVORABLE TOWARD PSYCHIATRY"

Not guilty by reason of insanity	Stereotyped	Not stereotyped	Total
Agree	48.65	60.26	N=155
Disagree	51.35	39.74	N=145
Total	[1] 100.00	[2] 100.00	N=300

[1] (N=222) $X^2=2.81$.
[2] (N=78) Not significant.

While the relationship between the presence or lack of a stereotyped image and one's attitude toward psychiatry did not prove to be a significant one, breaking down the results of Table VI according to one's attitude toward psychiatry did yield some interesting findings. Table VII shows that of the 300 respondents who were favorable toward psychiatry, 74 percent had a stereotyped image of the "insane" offender while 26 percent did not have such an image. Of the 74 percent with a stereotyped image, 48.65 percent agreed that the Boston Strangler and Richard Speck cases were suitable examples for the verdict "not guilty by reason of insanity" while 51.35 percent disagreed with the suitability of the insanity defense. Of the 26 percent who did not have a stereotyped image, 60.26 percent agreed with the insanity defense for the Boston Strangler and Speck cases while 39.74 percent did not agree. While the relationship between the presence of a stereotyped image and the decision regarding the insanity defense for both criminal cases was highly significant, this same relationship, when considered in the light of only those respondents who were favorable toward psychiatry, does not prove to be significant for this group. However, the relationship between the presence of a stereotyped image and the decision regarding the insanity defense for the Boston Strangler and the Speck cases does prove to be highly significant ($p < .001$) for those respondents with an unfavorable attitude toward psychiatry.

Table VIII shows that of the 150 respondents who were unfavorable toward psychiatry, 82 percent had a stereotyped image of the "insane" offender while 18 percent did not. Of the 82 percent with a stereotyped image, 12.2 percent agreed with the suitability of the insanity defense while 87.8 percent disagreed. Of the 18 percent who did not have a stereotyped image, 74 percent agreed that the Boston Strangler and Speck cases were suitable examples for the insanity defense while 25.3 percent did not agree. As Tables VI, VII, and VIII indicate, one's stereotyped image of how an insane person should look and act in court is an influential factor in making a decision as to what type of offender is suitable for an insanity defense. However, one's attitude toward psychiatry, primarily negative attitude, is perhaps, a more influential factor as Table VIII would indicate. In selecting a jury for a criminal case, the lawyers for both the defense and the prosecution are interested in obtaining a jury that would be

fair or impartial. Given the situation where an insanity plea is to be entered, choosing a jury becomes a doubly difficult task. It would not be practical to ask prospective jurors to outline for the court their image of how an "insane" offender should act. However, it would not be unduly difficult to ascertain a juror's attitude toward psychiatry. Of the 450 respondents chosen because they were prospective jurors, 51.6 percent of those favorable to psychiatry as compared to only 23.3 percent of those unfavorable toward psychiatry were more positively disposed toward the use of an insanity plea.

TABLE VIII.—PERCENT OF JURORS' DECISION REGARDING THE SUITABILITY OF THE INSANITY DEFENSE FOR THE BOSTON STRANGLER AND RICHARD SPECK CASES AND THE PRESENCE OF A STEREOTYPED IMAGE OF THE "INSANE" OFFENDER FOR THOSE UNFAVORABLE TOWARD PSYCHIATRY

Not guilty by reason of insanity	Stereotyped	Not stereotyped	Total
Agree	12.20	74.07	N=35
Disagree	87.80	25.93	N=115
Total	[1] 100.00	[2] 100.00	N=150

[1] (N=123) X^2=43.99.
[2] (N=27) p <.001.

Table IX shows the relationship between one's attitude toward psychiatry and the role that a jury should play in a criminal case where an insanity defense has been entered. The respondents were asked to decide whether a jury of laymen or a panel of specialists should be responsible for the final verdict when a plea of insanity is present. Of the 300 respondents favorable toward psychiatry, 36.67 percent chose a jury of laymen while 63.33 percent chose a panel of specialists. Of those respondents who were unfavorable toward psychiatry, 60 percent chose a jury of laymen while only 40 percent chose a panel of specialists. As can be seen from Table IX, there is a highly significant relationship ($p < .001$) between one's attitude toward psychiatry and one's choice between a jury of laymen or a panel of specialists. It can be seen that those respondents with favorable attitudes toward psychiatry tend to be more positively disposed to the role that psychiatry might play in a court trial.

TABLE IX.—PERCENT OF JURORS' ATTITUDES TOWARD PSYCHIATRY BY EVALUATION OF WHO SHOULD BE RESPONSIBLE FOR THE FINAL VERDICT IN A PLEA OF INSANITY

Who should be responsible	Favorable	Unfavorable	Total
Jury of laymen	36.67	60.00	N=200
Panel of specialists	63.33	40.00	N=250
Total	[1] 100.00	[2] 100.00	N=450

[1] (N=300) X^2=21.11.
[2] (N=150) p <.001.

IV. CONCLUSION

The purpose of this study was to ascertain those factors that would influence the juror's decisions when dealing with a plea of insanity during a criminal trial. The legal situation is such that there are no clear guidelines that jurors can use to define what insanity is. In order to help the juror decide whether or not the defendant should be held responsible for his crime, psychiatric testimony is introduced to give a picture of the mental condition of the defendant. Such testimony, however, cannot definitely state whether or not the defendant was "insane" at the time of the criminal act since there is no medical equivalency to the legal concept of insanity. This situation of legal ambiguity forces the jury to devise its own resources whereby the question of insanity can be measured and decided.

This research has shown that there are certain factors which appear to be directly associated with the decisions made by the jurors regarding the insanity defense. In making a decision as to whether or not a plea of insanity would be

appropriate for such criminal cases as the Boston Strangler and Richard Speck cases, two factors appear to be operating—namely, the presence of a stereotyped image of the offender as well as the juror's attitude toward psychiatry. In this situation, it was shown that the presence of an unfavorable attitude toward psychiatry was strongly associated with the decision against the use of the insanity plea while the presence of a favorable attitude toward psychiatry did not have any association with the decision.

If a jury is to be selected that would be impartial toward the defendant, then it is necessary that the jury should also be impartial to the type of plea that is entered in behalf of the accused. As the data of this research indicates, those jurors who have favorable attitudes toward psychiatry would have a greater tendency to act in an impartial manner when considering an insanity plea. Such jurors tend to consider the aspect of mitigating circumstances in judging the question of criminal responsibility. Those favorable toward psychiatry also tend to show a greater receptivity toward the use of specialists, such as psychiatrists, during the criminal trial as well as a tendency to be more open-minded regarding the possible use of a psychiatric hospital as a form of penal disposition.

Conversely, those jurors who have unfavorable attitudes toward psychiatry appear to have a more basic approach to the relationship between crime and punishment. A greater percentage of these jurors have less than a college education and are found to be primarily blue collar workers and unskilled laborers. Such jurors tend to define the criminal act in terms of free will; and hence, such factors as one's mental condition at the time of the criminal act would not necessarily be conceived of as a mitigating circumstance. Those unfavorable toward psychiatry tend to be cautious when considering the use of psychiatry in general. Such jurors do not tend to be receptive to the use of specialists such as psychiatrists during a criminal trial nor are they prone to consider the psychiatric hospital as a viable form of penal disposition. For these jurors, the penitentiary is the only proper form of penal sanction that can be expected to discourage further criminal acts.

In a situation where an insanity plea has been entered, it can be concluded that one's orientation to the field of psychiatry in general is a strong influencing factor not only in relation to how receptive a juror may be toward psychiatric testimony but also in relation to the type of verdict such as a juror may render.

[From the Washington (St. Louis, Mo.) University Law Quarterly, Winter, 1973]

The Brawner Rule—Why? or No More Nonsense on Non Sense in the Criminal Law, Please!

Joseph Goldstein *

I. INTRODUCTION

It ought not to be a matter of great scholarly interest to learn that yet another court has adopted as its formulation for the insanity defense the oft-embraced, oft-analyzed and oft-criticized text of the ALI Model Penal Code. It is not. It ought not to be a matter of more than momentary interest that in so doing that court "abandoned" its very own eighteen-year-old, oft-rejected, oft-analyzed and oft-criticized rule of *Durham v. United States*.[1] It is not. It ought not to be worthy of more than slight interest that by retaining the definition of mental disease and defect which it adopted more than a decade ago in its reconstruction of *Durham* in *McDonald v. United States*,[2] and by retaining the position it took later in *Washington* v. *United States*[3] concerning the respective roles of the medical expert and the jury in determining criminal responsibility under *Durham*, the court in *United States v. Brawner*[4] does no more than change the label and the apparent vintage year of its old and presumably discredited rule. It is not.

---

*Walton Hale Hamilton Professor of Law, Science and Social Policy, Yale University. A.B., 1943 Dartmouth College; Ph.D., 1950, London School of Economics; LL.B., 1952, Yale University.

[1] 214 F.2d 862 (D.C. Cir. 1954).
[2] 312 F.2d 847 (D.C. Cir. 1962).
[3] 390 F.2d 444 (D.C. Cir. 1967).
[4] 471 F.2d 969 (D.C. Cir. 1972).

Note: I wish to acknowledge the valuable comments I received from Steven Goldberg, Louise Hall, Robert Reich, David Roe and Marshall Wolff, members of my seminar, *Fictions in Criminal Law*, to whom an earlier version of this paper was presented. I am greatly indebted to Daniel J. Freed, Sonja Goldstein, William D. Iverson and Barbara Underwood for their critical substantive and editorial advice.

All copyrights have been retained by the author.

The question becomes, why devote any time to the study of a decision in which a court, not unlike the Esso tiger announcing its change of name with the assurance of no change in stripes, announces, albeit with far more words, a change in name only for its insanity defense formulation.[5] The answer is to be found in another question which is worth asking and worth trying to answer: "Why does the court, except for Chief Judge Bazelon, who writes a separate but concurring 'dissent'[6] fail to recognize how great is its contribution to the confusion and misunderstanding which hallmark the debate about the insanity defense?" The answer is that the court neither asks nor answers: "Why an insanity defense? What are its purposes?"

The significance of asking "why" an insanity defense before finally trying to determine what "the ultimate standard"[7] for such a defense should be seems too obvious to say. But *Brawner* demonstrates that it is not—in an eighty page marathon slip opinion replete with Introduction, Table of Contents, Main Text, Clarifying Supplement, and Appendices. It seems worth repeating observations made more than a decade ago about the insanity defense:

> . . . No device has troubled the administration of criminal law and obscured the goals involved more than "insanity" as a basis for relieving persons of criminal responsibility.
>
> . . . To evaluate such a defense, it is necessary to identify the need for an exception to criminal liability. Unless a conflict can be discovered between some basic objective of the criminal law and its application to an "insane" person, there can be no purpose for "insanity" as a defense. Until a purpose is uncovered, debates about the appropriateness of any insanity-defense formula as well as efforts to evaluate various formulae with respect to the present state of psychiatric knowledge are destined to continue to be frustrating and fruitless. . . .
>
> . . . Neither legislative report nor judicial opinion nor scholarly comment criticizing or proposing formulations of the insanity defense has faced the crucial questions: "What is the purpose of the defense in the criminal process?" or "What need for an exception to criminal liability is being met and what objectives of the criminal law are being reinforced by the defense?"[8]

At the time plans for this symposium were made, the expectations were high that the court would face just such questions. The court, in sua sponte ordering a rehearing en banc, appointed amicus "without instructions as to result or theory, 'to research the authorities on the issue of criminal responsibility'"[9] and to submit, with other interested organizations, briefs which would address such far reaching questions as:

> 6. If a defendant's behavior controls are impaired, should a test of criminal responsibility distinguish between physiological, emotional, social, and cultural sources of the impairment? . . . Is it appropriate to tie a test of criminal responsibility to the medical model of mental illness? . . .
>
> 9. Would it be sound as a matter of policy to abolish the insanity defense? Possible as a matter of law? If so, what are the possible alternatives? Should the issues presently under that heading be subsumed under the inquiry into mens rea? Should we reconsider the posibility of "diminished" or "partial" responsibility?[10]

In the preface to the opinion the court announces that "the interest of justice that has called us to this labor bids us set forth comments in which we review the matters we concluded were of *primary consequence*. . . ." and to comment on features of the rule designed "to improve its capacity to further its *underlying objectives*."[11] But the court never reveals what it or the legislature understands

---

[5] *See id.* at 990:
In the last analysis, however, if there is a case where there would be a difference in result [between the ALI rule and *Durham-McDonald* rule] and it would seem rare . . . .

[6] Judge Bazelon does not label his opinion. He opens it by making unanimous the court's adoption of the ALI rule. A substantial part of the remainder has the tone and substance of a dissent. *Id.* at 1010: "[O]n the whole I fear that the change made by the Court today is primarily one of form rather than of substance."

[7] *Id.* at 1006.

[8] Goldstein & Katz, *Why an "Insanity Defense"?*, 92 Daedelus 549, 550, 552–53 (1963); Goldstein & Katz, *Abolish the Insanity Defense—Why Not?*, 72 Yale L.J. 853 (1963).

[9] 471 F.2d at 973.

[10] *Id.* at 1007 (Appendix A).

[11] *Id.* at 973 (emphasis added).

are the "underlying objectives" of an insanity defense in the administration of criminal justice. The court assumes the need for such a defense without giving definition to that need. At most it assumes that the defense is related to a determination of "blameworthiness" in assessing criminal liability. But the court never examines, except in rhetorical terms, *why* we wish to make a "blameworthiness" determination or *what* the implications of the need to make a "such a determination should be for the administration of the defense or for this disposition of the accused.

The court limits its consideration to second-order and relatively insignificant objectives. It never confronts the hard issues it raises. Nor does it evaluate the substantive merits of any of the tests it considers.[12] To illustrate how such an approach leads to confusion on both a practical and analytical level, this essay will focus primarily on two matters in the court's opinion:

1) its decision not to abolish the insanity defense; and

2) its decision to permit the introduction of evidence concerning a defendant's abnormal mental condition if relevant to establishing or negating the specific intent element of certain crimes.

Before turning directly to these determinations, it may be helpful to first clarify, to the extent possible, the court's perception of the point in time in a jury's deliberations when the insanity defense may become operative, and secondly, to explain the special meaning which the court gives to "exculpation," "exoneration," "complete exoneration," and "exculpatory mental illness"—terms used interchangeably by the court to describe the function of the insanity defense as a device for "negativing criminal responsibility."[13]

A. WHEN DOES THE INSANITY DEFENSE BECOME OPERATIVE?

The court's jury instruction on insanity provides:

> You are *not* to consider this defense unless you have first found that the government has proved beyond a reasonable doubt *each essential element of the offense.*[14]

The court must mean that the insanity defense does not become ripe for consideration until a finding has been made by the jury, or by a judge without a jury, that the prosecution has established beyond reasonable doubt that the accused *voluntarily* ACTED with *purpose* or *knowledge* (mens rea) to *purposely* or *knowingly* (mens rea) CAUSE the prohibited RESULT which he *intended* or *knew* (mens rea) *would occur.*[15] It is, thus, not enough for the jury to find beyond a reasonable doubt that the defendant *acted* so as to *cause* the offending *result.* The insanity defense does not become operative if the jury remains in doubt, for example, about either the actor's volition or his mens rea. It must find him not guilty because not all of the requisite elements of the offensive were established. The defendant must be acquitted.

Thus, the court appears to recognize that in defining an offense the legislature, in making certain elements requisites for liability, excludes thereby from liability all those who did not act, as well as all those *actors* who beyond doubt

---

[12] What the court does consider are the relatively minor matters which it calls "the inter-related goals of the insanity defense":
(a) a broad input of pertinent facts and opinions
(b) enhancing the information and judgment
(c) of a jury necessarily given latitude in light of its functioning as the representative of the entire community.
Id. at 985.
The court's reasons for adopting the ALI rule are equally unrelated to "underlying objectives." It justifies its choice in terms of serving the "Interest of uniformity of judicial approach and vocabulary" (*id.* at 984), and meeting the need to prevent "undue dominance by experts." *See id.* at 981-83; and Judge Bazelon's concurrence, *id.* at 1021-22.

[13] *Id.* at 995.

[14] *Id.* at 1008. (Appendix B: Suggestion for Instruction on Insanity) (emphasis added).

[15] This structural definition of an offense rests on articles 1 & 2 of the ALI Model Penal Code (Tent. Draft 1954). Those provisions are concerned with the general principles of criminal liability. For purposes of this discussion, the lesser degrees of culpability, recklessness and negligence have generally been left out. As *Morrissette* v. *United States*, 342 U.S. 246 (1952), demonstrates, the words of mens rea—intent, wilfulness, knowledge, premeditation, purpose, etc.—are countless but are all designed, as is the volitional element associated with the act, to assure that criminal liability is imposed on the "blameworthy." *Cf.* D.C. CODE ANN. § 22-2401 (1967) (murder in the first degree); D.C. CODE ANN. § 22-2403 (1967) (murder in in the second degree).

caused offending *results*, but about whose volition, or mens rea, there is reasonable doubt. Such actors are not deemed "blameworthy" apparently because reasonable doubt exists about the voluntariness of their actions or the purpose or knowledge with which they *caused* the prohibited *results*.[16] The insanity defense applies then, only to persons covered, not excluded, by the definition of the offense charged. The defense may become operative only in relation to those who have already been found beyond doubt to have voluntarily acted with purpose or knowledge to cause the offending result.

The insanity defense, as the *Brawner* court apparently wishes it to be employed by the jury, is a defense in pure form. It is not an evidentiary standard for casting doubt on volition, purpose, knowledge or any other requisite of liability.[17] It is a defense that comes alive only when those requisites are established beyond doubt and fail in their application to exclude from responsibility someone whom the court or legislature or jury believes justice would require finding not criminally liable. Thus, the insanity defense may be seen as a safety valve, not unlike the pardon, for words that "go too far," for crimes whose requisites of liability are not precisely enough worded to prevent convictions which would subvert the goals of the criminal law.[18]

The literature of the law needs, but does not have, a word to describe the status of the accused at that moment in the criminal process when the insanity defense can become operative—that moment when the accused is no longer presumed innocent. This status begins when the jury has determined that the defendant has committed the crime and continues until it determines whether his insanity defense precludes his being found criminally responsible. The nature of this status of "suspended guilt" may be more easily perceived in jurisdictions which, unlike the District of Columbia, require a bifurcated trial.[19] It was more clearly revealed in the former British verdict of "*guilty* but insane" than it is in our and the current English verdict of "*acquittal* by reason of insanity." [20] For our purposes, the phrase "suspended guilt" will be employed to describe the status of an accused from that moment when the trier of fact may take into account the insanity defense until a determination is made of either acquittal by reason of insanity or guilt as charged. If the defense fails, the accused is found guilty; whatever sanctions are authorized for the offense may then be imposed. If the defense prevails, the accused is acquitted by reason of insanity and, according to the Brawner court, will then be "completely exonerated." [21]

B. *On the Meaning of Exoneration Following Acquittal by Reason of Insanity*

What do "complete exoneration," "exculpation" and "exculpatory mental illness"—words and phrases of high frequency in the majority opinion as well as the concurring "dissent"—mean to the *Brawner* court? The syllabus by the court, in which the principal features of its decision are announced, notes in considering another "defense" that it "is not, like insanity, a complete exoneration." But "complete exoneration" as a result of a finding of not guilty by reason of insanity does not mean for the court what it would mean to the average citizen, nor what it would mean to the average law-trained person, nor what it would mean to the court were it talking about the outright acquittal which follows a successful plea of self-defense.

---

[16] *See, e.g., Morrissette* v. *United States*, 342 U.S. (1952).

[17] On retrial following the introduction of the *Durham* rule, the trial judge committed error when he instructed the jury as follows:

> If you find the defendant not guilty by reason of insanity, you will render a verdict of not guilty by reason of insanity.
>
> *If you do not so find, then you will proceed to determine whether he is guilty or innocent* of one or both of the offenses charged on the basis of the same act.

Durham v. *United States*, Record on Retrial, *reprinted in* R. Donnelly, J. Goldstein & R. Schwart, Criminal Law 776 (1962) (emphasis added).

[18] Conceptually, at least, the insanity defense could be invoked for crimes of strict liability, malum prohibitum offenses. Once liability is established beyond reasonable doubt the defense would come alive, if the accused chose to raise it.

[19] "The D.C. Court has indicated approval of bifurcated trials where the insanity defense is to be raised." *United States* v. *Brown*, 428 F.2d 1100, 1103 n.2 (D.C. Cir. 1970). And *see, e.g., United States* v. *Alexander & Murdock*, 471 F.2d 923 (D.C. Cir. 1972).

[20] *See Austin* v. *United States*, 382 F.2d 129, 138 n.21 (D.C. Cir. 1967) (Leventhal, C.J.). The Criminal Procedure (Insanity) Act 1964 c. 84, § 1:

> 1. *Acquittal on grounds of insanity.*—The special verdict required by section 2 of the Trial of Lunatics Act 1883 . . . shall be that the accused is not guilty by reason of insanity. . . .

[21] 471 F.2d at 972 (Syllabus by the court).

To all, including the court, "complete exoneration" would usually mean a finding of no liability, of no responsibility, of no guilt, of no authorization for the state to impose any sanction or to deprive the "exonerated" of any of his freedoms. But to the *Brawner* court, "complete exoneration" means automatic incarceration in a mental institution for an initial period of fifty days, during which time one acquitted by reason of insanity must assume the burden of establishing by a preponderance of evidence that he is entitled to release from incarceration; that is, "that he is not likely to injure himself or others due to mental illness." [22] The entire court often employs "complete exoneration," "exculpation" and "negativing criminal responsibility" as if those words continued to carry the meaning generally borne by them. It is as if the court had forgotten what special meaning it had assigned to them.

In order to comprehend the confusion in the court's reasoning, this unusual meaning of "exoneration" must be kept in mind when analyzing the *Brawner* opinions. Following an acquittal by reason of insanity, exoneration is not liberty for the defendant, but restraint coupled with a presumption of his dangerousness to self and others. For the state, such an acquittal is authority to incarcerate coupled with a presumption of power to hold the acquitted indefinitely. It is as if the word "benign" were substituted whenever ordinary usage called for "malignant." "The first task of free men," the court fails to keep in mind, "is to call things by their right name." [23] For purposes of this essay, it is important not just to reveal that the court has destroyed the meaning of some ordinary words upon which ordinary citizens should be able to base their understanding of the law; it is also important to remain more alert than the court apparently wishes its readers to be to the confusion which permeates its jurisprudence as a result of its pious references to such critical words as "exoneration" and "exculpation." [24]

In summary, the insanity defense, according to *Brawner*, becomes ripe for consideration only if, and only after, it is determined that the accused is beyond reasonable doubt guilty of each requisite element of the crime charged, *i.e.* in a state of suspended guilt; and the words "complete exoneration," "exculpation" and "negativing criminal responsibility"—often used interchangeably in association with a finding of "not guilty by reason of insanity"—mean automatic incarceration as criminally insane, with the burden on the person so acquitted to establish his right to release. It is with this understanding of the court's perception of the place of the insanity defense and its consequences—an understanding which the court clearly wishes to convey to the jury, but which the court either forgets or wishes to obscure in the body of its opinion—that we turn to its decisions to: (1) reject the proposal to abolish the insanity defense and (2) accept the proposal to admit evidence of an accused's abnormal mental condition, which "though insufficient to exonerate, may be relevant . . . to show . . . that the defendant did not have the specific mental state required for a particular crime or degree of crime." [25]

II. CONSIDERATION AND REJECTION OF THE PROPOSAL TO ABOLISH THE INSANITY DEFENSE

The court introduces the proposal by noting, without discussion, that numerous journals and responsible judges, including Chief Justice Burger, have recommended abolition of the insanity defense. It avoids an examination of the reasons for and against abolition that amicus were invited to address, and summarily

---

[22] *Id.* at 1009–10 (Appendix B: Suggestion for Instruction on Insanity): *Effect of verdict of not guilty by reason of insanity*—If the defendant is found not guilty by reason of insanity, it becomes the duty of the court to commit him to St. Elizabeths Hospital. There will be a hearing within 50 days to determine whether defendant is entitled to release. In that hearing the defendant has the burden of proof. The defendant will remain in custody, and will be entitled to release from custody only if the court finds by a preponderance of the evidence that he is not likely to injure himself or other persons due to mental illness.

Note: If the defendant so requests, this instruction need not be given.

[23] *People* v. *McMurty*, 64 Misc. 2d 63, 66, 314 N.Y.S.2d 194, 197 (N.Y. Crim. Ct 1970).

[24] Judge Leventhal, who writes for the court in *Brawner*, demonstrates in both pre- and post-*Brawner* decisions that he does not wish exoneration or exculpation to be the consequence of an "insanity acquittal." For significant passages from *Dixon* v. *Jacobs*, 427 F.2d 589 (D.C. Cir. 1970), and *United States* v. *Brown*, No. 24,646 (D.C. Cir. Jan. 8, 1973), *see* Appendix *infra*.

Note further the introduction of the euphemistic and misleading label *"legal* exculpation" which the court in *Brown* attaches to the consequences of an insanity acquittal.

[25] 471 F.2d at 998.

concludes "that the proposal cannot properly be imposed by judicial fiat." [26] The court apparently means more than the truism that it would be wrong for a court, without explanation, arbitrarily to issue an edict of abolition. The court must have meant that even if it were to conclude after reasoned discourse that such a proposal be adopted, it could not adopt it because legislative action, if not constitutional amendment, might be required to abandon the court-created, though statutorily recognized, defense.[27]

In two short paragraphs of explanation and reinforcement which follow its declaration of incapacity, the court reveals either its confusion about the place and the consequences of the insanity defense or its unwillingness to clarify its position. It fails to face openly the general issue of why there should be a blameworthiness determination, how it should be made, and what its consequences ought to be:

> The courts have emphasized over the centuries that "free will" is the postulate of responsibility under our jurisprudence. 4 Blackstone's Commentaries 27. The concept of "belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil" is a core concept that is "universal and persistent in mature systems of law." *Morrissette* v. *United States*, 342 U.S. 246, 250 (1952). Criminal responsibility is assessed when through "free will" a man elects to do evil. And while, as noted in *Morrissette*, the legislature has dispensed with mental element in some statutory offenses, in furtherance of a paramount need of the community, these instances mark the exception and not the rule, and only in the most limited instances has the mental element been omitted by the legislature as a requisite for an offense that was a crime at common law.
>
> The concept of lack of "free will" is both the root of origin of the insanity defense and the line of its growth. [Davis v. United States, 160 U.S. 469, 484–85 (1895).] This cherished principle is not undercut by difficulties, or differences of view, as to how best to express the free will concept in the light of the expansion of medical knowledge. We do not concur in the view of the National District Attorneys Association that the insanity defense should be abandoned judicially, either because it is at too great a variance with popular conceptions of guilt or fails "to show proper respect for the personality of the criminal [who] is liable to resent pathology more than punishment." [28]

The court mistakenly equates the proposal to abolish the insanity defense with a proposal to eliminate "free will," "mens rea," "intent" and possibly even "voluntariness" as essential elements of criminal liability for *mala in se* offenses. It mistakes the proposal to be a proposal that murder, as well as all other now-codified infamous common law offenses, become strict liability offenses: that is, that they be placed in the same category as traffic violations and other so-called "statutory" (*malum prohibitum*) offenses.[29]

Proposals to abolish the insanity defense are just that and not more. They are not proposals to eliminate mens rea or volition or any other requisite element of criminal liability. Nor are they intended to "sweep out of all federal crimes . . . the ancient requirement of a culpable state of mind." [30] That was the issue in *Morrissette v. United States*.[31] Congress had failed explicitly to preserve the mens rea requisite in its codification of some common law offenses. There is no such issue in *Brawner*. There is no proposal to automatically exclude evidence of a defendant's mental health if it be relevant to any of the requisites of liability—including, of course, intent and volition. It is as if the court suffered a lapse of memory concerning its jury instruction that the insanity defense becomes a matter of concern only after the jury has found beyond a reasonable doubt that each requisite element of the offense charged has been established, *i.e.* the defendant is found to have the status of *suspended guilt*.[32]

---

[26] *Id.* at 985.

[27] *See* D.C. Code Ann. § 24–301 (1967).

[28] 471 F. 2d at 985–86.

[29] The court cites with approval, but without quotations (471 F. 2d at 985 n. 18), a research memorandum from the University of Virginia Law School Research group. That memo contains the following statement, which reflects the court's misreading of proposals to abolish the insanity defense: "Complete abolition of the insanity defense, with an emphasis solely on whether the act charged was committed, is legally an unrealistic solution."

[30] *Morrissette* v. *United States*, 342 U.S. 246, 250 (1952).

[31] 342 U.S. 246 (1952).

[32] *See* note 24 *supra*, and Appendix *infra*.

If anything, the proposal to abolish the insanity defense would enhance the vitality of the "free will," "mens rea," and "volition" postulates of responsibility which the court seems so anxious to safeguard. It would restore to evidence of mental abnormality the same status of admissibility which any other potentially relevant evidence has for casting doubt on or establishing culpable states of mind.[33] With the abolition of the insanity defense there would no longer be any basis for the judge-made rule to exclude evidence of mental state from the main focus of the trial until a finding of "suspended guilt." The real consequence of abolishing the insanity defense would be to provide "real exculpation," in the *Morrissette* outright-acquittal sense, not the *Brawner* incarcerative-acquittal sense, to all those accused for whom the jury has doubt about their "free will." [34]

Beyond the court's misapplication, if not misreading, of *Morrissette* is its misuse of *Davis v. United States*,[35] the other Supreme Court opinion on which it relies. The only question decided in *Davis* was that the burden of proof, once the defense of insanity is in issue, is on the government to establish beyond doubt the defendant's sanity.[36] Interestingly enough, the insanity defense in Davis' trial, in accord with the then current practice, became an issue for jury determination once the *act*—not the crime including all the requisite elements—had been established beyond doubt. The Court in *Davis* did not question that part of the judge's instruction which advised the jury that if it found the defendant criminally responsible "for the act of killing" [37] it was to take the next step "and see whether these attributes of the crime of murder existed as I have defined them to you: that is, that the killing was done willfully and with malice aforethought." [38] The insanity defense at that time became an issue for decision before—not after, as *Brawner* requires—"each essential element of the offense" has been proven by the government beyond doubt. There was no stage of suspended guilt. The insanity defense was *not* a defense to a crime established, but solely an evidentiary provision which went to the capacity to be criminally responsible once the physical *act* and apparent *result* (here a killing) were established. Even if capacity to be responsible were established by the government's establishing *sanity* beyond doubt, the question of the accused's criminal liability for the offense charged remained an issue. The prosecutor in *Davis* was still required to establish the defendant's willfullness and malice before he could be held criminally liable.[39] The *Brawner* construction of the insanity defense as a "defense" rather than a rule of evidence makes clear, it would seem to all but the *Brawner* court, that the proposal to abolish the insanity defense is not a proposal to eliminate the concept of "free will," "mens rea" or "volition." The court, were it not so confusing and confused about its task, might have better understood the limited implications of the proposal had it consulted its own Suggestion for Instruction on Insanity. The jury is to be instructed that one of the essential elements of an offense which must be established beyond doubt before the insanity defense is to be considered is the requirement of premeditation or deliberation for the first degree murder or of specific intent for unspecified offenses.[40]

---

[33] *See, e.g.*, Goldstein & Katz, *Abolish The Insanity Defense—Why Not?*, 72 Yale L.J. 853 (1963).

[34] *See Dixon* v. *Jacobs*, 427 F. 2d 589 (D.C. Cir. 1970); note 24 *supra*.

[35] 160 U.S. 469 (1895).

[36] The question in *Davis* arose because the evidence on the issue of insanity was in equipoise. It is interesting to note that Congress in 1970 in effect reversed *Davis* by enacting D.C. Code Ann. § 24–301(j) (Supp. IV, 1971), which provides:

> No person accused of an offense shall be acquitted on the ground that he was insane at the time of its commission unless his insanity, regardless of who raises the issue, is affirmatively established by a preponderance of the evidence.

The court decided to avoid determining the validity of the D.C. statute—one of the few issues genuinely before it and the only issue to which *Davis* might be relevant. The court's suggested instruction provides both wording which conforms to *Davis* and alternate wording which conforms to the new statute. I gather that the trial judge is free to choose.

[37] 160 U.S. at 478.

[38] *Id.*

[39] For a detailed development of this point, *see* Goldstein & Katz, *Abolish The Insanity Defense—Why Not?*, 72 Yale L.J. 853 (1963).

[40] 471 F. 2d at 1008 (Appendix B: Suggestion for Instruction on Insanity): "One of these [essential] elements is the requirement (of premeditation or deliberation for first degree murder) (or of specific intent for ——). . . ."

Since the court goes to such lengths to segregate the insanity defense from the mens rea, it should be obvious that a proposal to abolish one is not a proposal to abolish the other. Yet the court rests its decision on the absurd—once directly stated—position that to abolish the insanity defense which can only arise after, not before, mens rea, volition or any other free will requisite has been established is to abolish mens rea, volition or any other free will requirement of criminal liability. Finally, it should be noted that the court does not develop a relationship between an undefined "free will" and an undefined "mental abnormality" for insanity defense purposes. Probably more important is that the court, despite its abiding concern for protecting the concepts of "free will" and "blameworthiness," never raises them above the level of rhetoric. They are not employed in the court's Suggestion for Instruction on Insanity. Who more than the jury should be told what the purposes of an insanity defense are?

This illustration of the court's general confusion about the proposal to abolish the insanity defense and about the meaning and place of that defense should not be read to be more than that. This analysis does not lead to a conclusion that the insanity defense should be either abolished or retained. It may be that even if we can find no greater reason for retention of an insanity defense than that it has somehow and in some form persisted in our criminal law through the ages, that is reason enough. But the issue here has not been the relative merits of abolishing the insanity defense, rather it has been the *Brawner* court's serious confusion, if not duplicity, in thinking about the insanity defense at all.

III. ON THE ADMISSIBILITY OF EVIDENCE OF MENTAL CONDITION, INSUFFICIENT TO EXONERATE, IF RELEVANT TO SPECIFIC MENTAL ELEMENT OF CERTAIN CRIMES OR DEGREES OF CRIME

Before *Brawner*, testimony on a defendant's mental health was inadmissible except to the extent it was relevant to the defense of insanity. It could not be introduced, even if relevant, to negate or to establish the mens rea or the voluntariness requisites essential for conviction of the crime charged.[41] *Brawner*, in slightly modifying this exclusionary rule, provides further evidence of the court's confusion about the insanity defense. The court holds that expert testimony as to a defendant's abnormal mental condition may be received and considered, as tending to show, in a responsible way, that defendant did not have the specific mental state required for a particular crime or degree of crime—even though he was aware that his act was wrongful and was able to control it, and hence was not entitled to *complete exoneration*.[42]

This holding has at least two plausible and conflicting readings. The first and less likely reading is that the jury may now consider evidence of mental abnormality so far as it relates to specific intent in its initial determination of guilt or suspended guilt without a prior finding that such evidence is insufficient to sustain the insanity defense. An accused would be found not guilty if such evidence cast doubt on the requisite element of specific intent. Under this reading, the *Brawner* court would abolish the insanity defense for all crimes requiring specific intent.[43] When there is no lesser included "general intent" offense, this would mean outright acquittal[44] and reliance on the civil commitment process to incarcerate "dangerous" actors.[45] When the accused may be found guilty of a lesser included offense, such as second degree murder, the insanity defense may still apply. In other words, a defendant may be released as not guilty of the usually more severe specific intent offense while he may not, on the basis of the same evidence (about mental abnormality), be released as not guilty of the less severe general intent volitional offenses. It would seem more difficult for the court to justify this result than to abolish

[41] See *Fisher* v. *United States*, 149 F. 2d 28 (D.C. Cir. 1946).

[42] 471 F. 2d at 998 (emphasis added).

[43] Of course, such evidence of mental abnormality might not cast doubt on specific intent. The insanity defense would then be available following a finding of suspended guilt for that offense. *See* note 77 *infra* and accompanying text.

[44] *See* D.C. Code Ann. §§ 22–401 to 404 (1967). Arson and its associated offenses seem to be such specific intent offenses which do not have lesser included general intent offenses.

[45] 471 F.2d at 1001-02: In 1964 . . .Congress enacted the Hospitalization of the Mentally Ill Act, which provides civil commitment for the "mentally ill" who are dangerous to themselves or others. . . . Those statutory provisions provide a shield against danger from persons with abnormal mental condition—a danger which in all likelihood bolstered, or even impelled the draconic *Fisher* doctrine.

the insanity defense for just the lesser included offenses. This first reading leads the court, one would guess unwittingly, to an outcome which would require at least a reasoned explanation for not abolishing the insanity defense altogether. Furthermore, if civil commitment is an adequate instrument for safeguarding societal interests from persons acquitted outright because they lacked "specific intent," then surely it is adequate protection from persons who also lack general intent and volition as a result of mental abnormality. At the very least, this first reading would require that the consequences of acquittal by reason of insanity be the same as those of outright acquittal, a position unequivocally rejected by the court in its special definition of exculpation and exoneration.[46]

That the court contemplated that its opinion might be so misread and that another reading is preferred is strongly suggested by the footnote with which the court closes its discussion of "mental conditions [which], though insufficient to exonerate, may be relevant to specific mental element of certain crimes or degrees of crimes." [47] The court in footnote 75 observes:

> At the risk of repetition, but out of abundance of caution, and in order to obviate needless misunderstanding, we reiterate that this opinion retains the "abnormal mental condition" concept that marks the threshold of *McDonald*. Assuming the introduction of evidence showing "abnormal mental condition," the judge will consider an appropriate instruction making it clear to the jury that even though defendant did not have an abnormal mental condition that absolves him of criminal responsibility, *e.g.*, if he had substantial capacity to appreciate the wrongfulness of his act, he may have a condition that negatives the specific mental state required for a higher degree of crime, *e.g.*, if the abnormal mental condition existing at the time of the homicide deprived him of the capacity for the premeditation required for first degree murder.[48]

The court's holding under the second and more likely reading means: (1) if evidence of mental abnormality is sufficient to sustain the defense of insanity, the exclusionary rule remains in full force; (2) if such evidence is insufficient, it may be introduced, but only "if it is relevant to negative, or establish, the specific mental condition [specific intent] that is an element of the crime." [49]

In its Suggestion for Instruction on Insanity the court provides: "You are not to consider this [insanity] defense unless you have first found that the Government has proved beyond a reasonable doubt each essential *element* of the offense." [50] Under the old, as well as the new, exclusionary rule, this continues to mean that the crucial elements of voluntariness and mens rea *may* be established *beyond* doubt even if (possibly only if) relevant evidence concerning the defendant's mental state is withheld from the factfinder.

With the court's modification of the exclusionary rule the jury may apparently reopen its finding of suspended guilt if the testimony on abnormal mental condition is not sufficient to sustain the insanity defense. For example, had the jury in *Brawner* made a suspended guilt finding of murder in the first degree and then, in considering evidence of mental abnormality, found it insufficient to sustain the insanity defense, it need not then automatically render a verdict of guilty. It may find that doubt is now cast on the *specific intent requirement*, and thus must modify its initial finding "that the Government has proved beyond a reasonable doubt each essential element" of murder in the first degree. It must, apparently, then declare Brawner guilty of the lesser included non-specific intent offense of murder in the second degree. Of course, it must find that each essential element of murder in the second degree has been established without considering the still partially excluded testimony on mental abnormality, even if it be relevant to the defendant's volition or malice. Even if such evidence became fully admissible, it would, of course, according to the second and preferred reading

---

[46] See *United States* v. *Brown*, No. 24,646 (D.C. Cir. Jan. 8, 1973), which seems to reaffirm the court's general view about the need for less stringent civil commitment standards for those acquired by reason of insanity than for others. *See* note 24 *supra*, and Appendix *infra*.

[47] 471 F.2d at 998.

[48] *Id.* at 1002 n.75.

[49] *Id.* at 1002.

[50] *Id.* at 1008 (emphasis added).

of the court's holding, be considered only if it were insufficient to sustain the defense of insanity.[51]

A finding by jury or judge of "not guilty by reason of insanity" thus may mean that the defendant will be "completely exonerated" for an offense greater than that for which he might otherwise have been convicted. He could be acquitted by reason of insanity of first degree murder rather than of second degree murder, manslaughter, or possibly of carrying a dangerous weapon, when in fact a lesser included offense might have been the only offense or offenses that could be established beyond doubt if all relevant evidence were admissible before a finding of suspended guilt. In an area so heavily freighted with the symbols of justice, it seems, at a minimum, to be unfair that an "acquittal" by reason of insanity for all the offenses charged be deemed equivalent to an out right acquittal for first and second degree murder coupled with an acquittal by reason of insanity for only the remaining offenses charged, here manslaughter and carrying a dangerous weapon.[52] In application the new doctrine is absurd.

The court, in adopting its new evidentiary rule, seems to have forgotten, or is willing to ignore, that its meaning of "complete exoneration" is complete incarceration. The insanity defense, whatever formula the court selects when joined with the old or new exclusionary rule, serves to undercut the very concept of blameworthiness that the definition of an offense is designed to reinforce. The court thereby supports in fact the concept of strict criminal liability while endorsing only in assertion the Supreme Court's powerful argument in *Morrissette* against such liability for major crimes.[53] The court in *Brawner* correctly observes:

> Neither logic nor justice can tolerate a jurisprudence that defines the elements of an offense as requiring a mental state such that one defendant can properly argue that his voluntary drunkenness removed his capacity to

---

[51] D.C. Code Ann. § 22-2403 (1967) provides: Whoever with malice aforethought . . . kills another is guilty of murder in the second degree.

The court apparently does not foreclose the possibility of introducing evidence of mental abnormality to cast doubt on malice aforethought. 471 F.2d at 1002 n.75:

> . . . Whether it may be applicable in a case where malice is established on a subjective standard, so as to reduce the offense to manslaughter, is a matter that requires further analysis and reflection. The cases are in conflict, *see* Annot., 22 ALR 3d 1228 (1968). Generally, at least, a defendant with substantial capacity to appreciate the wrongfulness of his crime would appear to have the capacity requisite for malice. Without further study, however, we hesitate to rule as a matter of law concerning the possibility that there may be abnormal mental conditions falling short of legal insanity that would leave the defendant with capacity to appreciate the wrongfulness of his acts, but without awareness of the danger of serious harm. The problem is remitted to future consideration, which we think will be aided by the availability of a specific factual context.

The *Brawner* case in fact provides just such a "specific factual context." *See* text accompanying notes 64–66 *infra*.

[52] D.C. Code Ann. § 22-3214 (1967) (Possession of Certain Dangerous Weapons Prohibited) is no crime of strict liability. Not only is volition a requisite of the act of possession, intent is a requisite of at least one of its provisions. Section 22-3214 (b) provides:

> No person shall within the District of Columbia possess with intent to use unlawfully against another, an imitation pistol, or a dagger . . . or other dangerous weapon.

Of course, defense counsel, knowing the meaning of "complete exoneration," may decide not to invoke a defense of insanity to a charge of carrying a dangerous weapon.

With the court's decision in *Brown*, it becomes of even greater significance to determine which specific crime the accused is acquitted of by reason of by reason of insanity. The court observed with regard to the period of civil detention of the "insanity acquittal": "The extent of that period calls for sound discretion, would take into account *e.g.*, the nature of the crime (violent or not) . . . would generally *not exceed five years, and should, of course, never exceed the maximum sentence for the offense*. . . ." *United States* v. *Brown*, No. 24,646 (D.C. Cir. Jan. 8, 1973), slip opinion at 11 (emphasis added).

[53] A. Goldstein, The Insanity Defense 206–07 (1967):

> If the pressures toward a subjective theory continue to build, it may become necessary to refashion the traditional devices in order to solve the new problems. This has, of course, already begun with the insanity defense as it comes to encompass the broader conception of mental disease. But so long as the insanity defense remains an *alternative* to these other defenses which the defendant may assert or not, as he wishes, it is unreasonable to expect that very many defendants will use it. It may become necessary, therefore, to develop doctrines that will once again make the insanity defense the exclusive avenue for bringing subjective evidence into the trial. . . . Moreover, we may see a legislative effort to avoid the problem entirely by expanding the number of crimes which abandon *mens rea* and which impose strict liability on the offender.

Implicit in this observation is a recognition that the insanity defense is a device for achieving, without disclosure, strict liability while appearing to reinforce the doctrine of blameworthiness.

> form the specific intent but another defendant is inhibited from a submission of his contention that an abnormal mental condition, for which he was in no way responsible, negated his capacity to form a particular specific intent, even though the condition did not exonerate him from all criminal responsibility.[54]

That view should be rephrased to read:

> Neither logic nor justice can tolerate a jurisprudence that defines the elements of an offense as requiring a mental state of volition such that one defendant can properly argue that some evidence about him or the surrounding circumstances removed his capacity to act voluntarily or with intent or knowledge or malice (etc.) to cause the offending result but another defendant is inhibited from a submission of his contention that an abnormal mental condition, for which he was in no way responsible, negated his capacity to act voluntarily or with intent or knowledge or malice (etc.) to cause an offending result.

The court in its resolution of the evidentiary issue provides a perception of the insanity defense which is in direct conflict with the description it gives to the jury of the place of the insanity defense in the fact-finding process. Rather than reflect the court's alleged uneasiness that, without an insanity defense, some persons might unfairly be held criminally responsible because the definition of an offense with all its requisite elements might still be inadequate to the task of excluding from liability all those persons it wishes to exclude from the sanctioning authority, it reflects the opposite. The court seems to fear that too many people might be excluded from liability if the requisite elements were really applied.[55] By coupling the evidentiary rule with the insanity defense, the court can, while declaring the opposite, remove from circulation those it could not hold criminally responsible. That may be a desirable goal and may even be constitutional, but it is not the issue here.

This analysis of two plausible readings of the court's ruling on the process for admitting evidence of an accused's mental abnormality is used only to illustrate again the magnitude of the court's confusion or its disingenuousness. However characterized, the court's reasoning can only plague rather than facilitate its declared intention to improve communication between the federal courts on the subject of the insanity defense.[56] The opinion can only worsen communication and understanding about that defense between judge and jury, between court and counsel, between counsel and client, and between court and mental health administrators. Possibly of greater significance, the court's garbled communication leaves the average person without a basis for understanding the concept of blameworthiness which has been declared fundamental to the just administration of a law of crimes.

IV. ON THE MEANING OF JUDICIAL RESTRAINT

There remains a matter of significance which this analysis has ignored up until now; namely, the court's concept of judicial restraint. In an admirable pledge of allegiance to that doctrine, the court rejects the proposal to abolish the insanity defense as improper to impose without "a legislative re-examination of settled doctrines of criminal responsibility, root, stock and branch."[57] "The judicial role," the court declares in recalling Mr. Justice Holmes, "is limited to action that is molecular, with the restraint inherent in taking relatively small steps . . ."[58]

Judicial restraint to the court means that, even following a careful examination of the court's experience with its own judge-made rule, it cannot abandon the rule, though it may, as it does, "enact" a new rule which has been drafted primarily for legislative consideration by the American Law Institute. It means that though a proposal to abolish the insanity defense requiring a reassessment "that seeks to probe and appraise society's processes and values" is a task better left to the legislative branch,[59] the court is willing to review and dispose of a series of issues, raised not by the appellant but by the court sua sponte, which

---

[54] 471 F. 2d at 999.
[55] See *United States* v. *Brown*, No. 24,646 (D.C. Cir. Jan. 8, 1973).
[56] 471 F. 2d at 984–85.
[57] *Id.* at 986.
[58] *Id.*
[59] *Id.*

require just such an appraisal of "society's processes and values." Its eighty page opinion is cluttered with *obiter dicta*. One example out of many is the court's discussion of Judge Bazelon's proposed formulation of the insanity defense: "If mental disease impairs capacity to such an extent that the defendant cannot 'justly be held responsible.'" [60] In rejecting the proposal, the court engages in the kind of analysis it warns against:

> The thrust of a rule that in essence invites the jury to ponder the evidence on impairment of defendant's capacity and appreciation, and then do what to them seems just, is to focus on what seems "just" as to the particular individual. Under the centuries-long pull of the Judeo-Christian ethic, this is likely to suggest a call for understanding and forgiveness of those who have committed crimes against society, but plead the influence of passionate and perhaps justified grievances against that society, perhaps grievances not wholly lacking in merit. In the domain of morality and religion, the gears may be governed by the particular instance of the individual seeking salvation. The judgment of a court of law must further justice to the community, and safeguard it against undercutting and evasion from overconcern for the individual. What this reflects is not the rigidity of retributive justice—an eye for an eye—but awareness how justice in the broad may be undermined by an excess of compassion as well as passion. Justice to the community includes penalties needed to cope with disobedience by those capable of control, undergirding a social environment that broadly inhibits behavior destructive of the common good. An open society requires mutual respect and regard, and mutually reenforcing relationships among its citizens, and its ideals of justice must safeguard the vast majority who responsibly shoulder the burdens implicit in its ordered liberty. . . .
>
> It is the sense of justice propounded by *those charged with making and declaring the law—the legislatures and courts*—that lays down the rule that persons without substantial capacity to know or control the act shall be excused.[61]

Thus, without succumbing to the temptation of assuming what it calls the legislature's function of "prob[ing] and apprais[ing] society's processes and values," the court does just that and more. It rightly recognizes what it was quick to deny earlier in its opinion, that courts as well as legislatures may and do make and declare law. The point is more than that the court mistates the doctrine of judicial restraint. The point, even accepting the court's notion of the doctrine, is more than that it avoids examining the global issues posed by one proposal and takes them on in another by arbitrarily applying its doctrine. The main point, as the material which follows demonstrates, is that in the name of judicial restraint the court decides issues not raised by the case before it.[62]

What judicial restraint means to the court in practice is that after adopting a new standard for the insanity defense, it finds no reversible error in the conviction of Brawner. Less restrained courts might have suggested that if there is no error below there is no occasion for announcing a new standard. The court remands the case to the trial judge not for a new trial under the new rule, but for a determination of whether the new rule would or could affect Brawner's jury conviction and "whether a new trial is appropriate in the interest of justice." [63]

The clearest illustration of "judicial restraint," according to the court's way, is found in its decision to modify its exclusionary rule. In holding that an accused's abnormal mental condition is admissible when relevant to the specific intent requisite of a crime charged, the court decides an issue that it must know is not before it. At the same time, it leaves unresolved an issue clearly raised by the case on the appeal involving the exclusionary rule. But that matter, it says, requires further "analysis and reflection." So far as the court's decision relates to specific intent, it might have been apposite had the trial judge not granted

---

[60] *Id.*

[61] *Id.* at 988 (emphasis added).

[62] For a vigorous statement urging the court not to speak out on matters not before it, see the concurring opinion of Leventhal, J., in *Scott* v. *United States*, 419 F. 2d 264, 281 *et seq.* (D.C. Cir. 1969).

[63] *Id.* at 1005. Even the *Durham* rule was announced only after the court concluded there was reversible error. On remand a new trial was ordered.

Brawner's motion for a judgment of acquittal on the charge of first degree murder. The trial judge held that the evidence—despite the exclusion of evidence of mental abnormality—was insufficient to permit the jury to conclude beyond a reasonable doubt that the defendant had acted with the *deliberation* essential to that specific intent offense. Rather, Brawner was convicted of the general intent offense of murder in the second degree. "[T]he Court thus resolves," as Judge Bazelon in his separate opinion observes, "the question of diminished responsibility up to the point where it becomes relevant to this case, and it remits to future consideration the only aspect of the issue which could have any bearing on the outcome of the case before us." [64] In remanding the case to the trial judge, the court instructs the trial judge to *consider* the appropriateness of a new trial only in relation to the new insanity defense rule because "the benefit of the rule cannot wholly be withheld from the defendant in whose case it is to be established." [65] The court thus denies Brawner, the appellant, the benefit of what might generously be perceived as the ambiguity of its position with regard to the admissibility of evidence on mental abnormality. "Out of an abundance of caution, and in order to avoid needless misunderstanding" the court announces its uncertainty about the application of its new evidentiary rule to general intent offenses: "we hesitate to rule as a matter of law concerning the possibility that there may be abnormal mental conditions falling short of legal insanity that would leave the defendant with capacity to appreciate the wrongfulness of his acts, but without awareness of the danger of serious harm. The problem is remitted to future consideration, which we think will be aided by the availability of a specific factual context." [66] Brawner, the defendant, is thereby denied the opportunity to benefit from the new rule by establishing, even via a new trial, the specific factual context which the court has in fact before it and chooses to ignore. This may be because amici briefs did not address the question. But the court had the authority to ask for supplemental briefs to address the question, as well as the discretion, if not the obligation, to focus on the actual issues before it.[67]

Apparently anticipating the new meaning it had in mind for "judicial restrain*t*," the court's opinion opens with "we have stretched our canvas wide . . . ." "We have in doing so," it might have added, "lost Archie W. Brawner somewhere in the landscape before us." Without obtaining the informed consent of the appellant to its experiment, the court deprives its human subject of the review his right of appeal was designed to provide. More significantly, the court, in a manner not unlike its treatment of "complete exoneration," drains of real meaning another important concept in the overall administration of the criminal process. The antithesis of judicial restraint thus becomes "judicial restraint"—a most dangerous legal fiction.

V. CONCLUSION

Chief Judge Bazelon is almost right when he closes the preface to his separate opinion with the rhetorical statement: "If the court's decision today rests on the belief that nothing is wrong which cannot be cured by fixing a new label to our text, then eighteen years' experience has surely been wasted." [68] He would have been more accurate had he said that the court's decision rested on just such a belief and that those years had been wasted. Wasted, not because the court has not been able to formulate the right or a better test for the insanity defense, nor because it rejects the Bazelon preference for a jury instruction which would provide: . . . a defendant is not responsible if at the time of his unlawful conduct his mental or emotional processes or behavior controls were impaired to such an extent that he cannot justly be held responsible for his act.[69]

---

[64] 471 F. 2d at 1039.

[65] *Id.* at 1005.

[66] *Id.* at 1002 n. 75. Similarly it avoids the issue before it of the reversal of *Davis* by Congress when evidence of insanity is in equipoise. *See* note 51 *supra* for the relevant text of the opinion's footnote 75.

[67] It might be argued—though it seems to have gone unnoticed by the court as well as Chief Judge Babzelon—that the modified exclusionary rule may apply to Brawner himself. Brawner was convicted of carrying a dangerous weapon. Though it is not clear of which section of the code provision he was found guilty, at least one section seems to require for conviction the establishing beyond reasonable doubt of a specific intent to do harm with the dangerous weapon being carried. D.C. Code Ann. § 22–3214 (1967). Thus, the court may have unwittingly decided an issue before it on appeal.

[68] 471 F. 2d at 1013.

[69] *Id.* at 1032.

But wasted because the court, including Judge Bazelon, has failed to ask "why" and "what" the insanity defense is designed to accomplish. The court, eighteen years after *Durham*, does not know today any better than it did when it formulated that test what it is doing and why it is doing it. The court would not recognize the "right" test if it happened upon it.[70] The court may even have passed it by with "the wild beast test," "the *M'Naghten* test," "the irrestible impulse test," "the *Durham-McDonald-Washington* test," or "the justly responsible test." It may even have embraced it in *Brawner* with the "*ALI-McDonald-Washington* test." It may be that all tests are equally "satisfactory"—equally "appropriate" tests—and that none of the labels makes any real difference.[71] It may be that some still unidentified function or purpose of an insanity defense is being served, whatever test may be selected. It may be that some societal need is being satisfied that we cannot understand or do not wish to acknowledge.[72] This may account for the tenacity with which tests of insanity emerge in the administration of the criminal process.

That the court in *Brawner* could respond to its massive experience of eighteen years with *Durham* without learning from it is what is most noteworthy about the case. It makes *United States v. Brawner* a leading non-landmark decision.

How the court could proceed, as it did, without first asking and answering for itself, at least, "What fundamental purposes do we mean to further in the administration of criminal justice with a *Durham* or an ALI Rule, or more broadly, with any insanity defense?" remains incomprehensible—though, I guess in retrospect, predictable. The court has again left itself and the rest of us without any basis for evaluating its decision to abandon the *Durham* rule or its decision to adopt the ALI rule—unless it is acknowledging, even if it is not saying so, that the court does not know what the insanity defense is supposed to do, but that it does know that for whatever it is designed, it is not designed to accomplish what it is currently accomplishing in the way that it is doing it.

Yet, without an explicit answer, even if only a tentative one, to the question of "why" before "how," or at least an acknowledgement that it has no answer to "why," the court has been compelled to repeat its past failures. It only adds another name to the body count of undistinguished and often undistingnishable decisions that have unjustifiably consumed the energies and talents of many of our most talented judges and lawyers. Chief Judge Bazelon in another massive opinion concerning the insanity defense, issued only two months before *Brawner*, wrote: "While brevity may *normally* be the touchstone of good writing style as well as sound judicial practice, it is *occasionally* essential to write at length on issues of far reaching importance." [73] When the insanity defense is in issue,

---

[70] *Id.* at 989 (emphasis added):

> [S]ince *Durham* was modified by *McDonald*, insanity acquittals have run at about 2 percent of all cases terminated. In the seven years subsequent to *McDonald* jury verdicts of not guilty by reason of insanity averaged only 3 per annum. In trials by the court, there has been an annual average of about 38 verdicts of not guilty by reason of insanity; these typically are cases where the Government psychiatrists agreed that the crime was the product of mental illness. *We perceive no basis in these data for any conclusion that the number or percentage of insanity acquittals has been either excessive or inadequate.*

The criteria which the court has for determining if "the number or percentage of insanity acquittals [is] either excessive or inadequate" are never revealed in this or any other of the court's opinions. The court would have to determine what characteristics of an event as well as of the accused would "appropriately" place him in the acquittal category—a task the court clearly does not wish to confront by determining what the legislature wishes to accomplish with the defense.

[71] That is the way the court could and probably should have read Dean Abraham S. Goldstein's magnificent *tour de force*, in his chapter entitled *M'Naghten: The Stereotype Challenged*. There he demonstrates that whatever the *Durham* test can do, *M'Naghten* can do better or at least as well. *See A. Goldstein, The Insanity Defense* 45–66 (1967).

[72] For one speculation, *see* Goldstein & Katz, *Why An "Insanity Defense,"* 92 Daedalus, 549, 557 (1963):

> [T]he insanity defense is not designed, as is self-defense, to define an exception to criminal liability, but rather to select for restraint a group of persons from among those who would be free of liability. It is as if the insanity defense were prompted by an affirmative answer to the silently posed question: Does *mens rea* or any essential element of an offense exclude from liability anyone whom the community wishes to restrain? Thus, if the suggested relationship between *mens rea* and "insanity" means that "insanity" precludes proof beyond doubt of *mens rea*, then the "defense" is designed to authorize the holding of persons who have committed no crime. So conceived, the problem really facing the criminal process has been how to obtain authority to sanction the "insane" who would be excluded from liability by an over-all application of the general principles of the criminal law.

[73] *United States* v. *Alexander & Murdock*, 471 F. 2d 923, 926 (D.C. Cir. 1972) (emphasis added).

the term "occasionally" has, like "complete exoneration," "judicial restraint," and "strict liability," come to mean for the court its opposite—"normally."

It is hoped that *Brawner*, despite all its pages and tables of contents, or because of them, wil remain another profoundly insignificant case.

VI. EPILOGUE

United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972)

Tenthjudge, J., dissenting: While I have an emotional and intellectual sympathy with much of what is said in my brother Bazelon's engaging and forth right concurrence, I should not wish to be understood as expressing judicial agreement with his conclusion to join the majority in what he calls their "scholarly opinion."[74] I share his conclusion on the narrow issue. The only real issue before us concerns the rule which prevents the jury from considering evidence of mental abnormality as it may relate to any of the requisite elements of murder in the second degree, and of all lesser included offenses, as well as of the crime of carrying a dangerous weapon. In the words of my most distinguished namesake, Mr. Justice Tenthjudge, dissenting in *Morrissette*:[75]

> We ought to refrain from writing discursive essays, on the law, if only to spare law students the burden of reading them and law professors the pain of deciding whether to reproduce them in their case books. But there is a still more compelling reason for restraint. We cannot possibly apply our minds to all the considerations which are relevant to all the propositions which the Court's opinion advances. We cannot possibly be sure, therefore, that each proposition will stand up when it is tested in the crucible of a litigation squarely involving it. Thus, to the pecadillo of announcing too much law in this case, we add the cardinal sin of announcing law of dubious reliability.

If our eighteen years of experience with a less discursive but equally unjudicious determination in *Durham* should have taught us anything, it should have been that.

We have to deal here with an appeal from a jury verdict finding the appellant guilty of second degree murder and of carrying a dangerous weapon. He was sentenced to a term of imprisonment of not less than five nor more than twenty years. He argues that evidence concerning his mental condition, specifically an epileptic personality disorder, should not automatically have been excluded from jury consideration in determining whether the prosecution had established beyond doubt the voluntariness and mens rea requisities essential to both his conviction for murder in the second degree and his conviction for carrying a dangerous weapon. The principal question to be determined is whether the trial court erred in automatically limiting the use of such testimony to jury deliberations concerning the insanity defense. I would find plain error in that rule. Such testimony, if relevant, must be considered by the jury in deciding whether, for example, the appellant's act of killing was *voluntary* and whether it was done with *malice aforethought*. To make such evidence inadmissible without first allowing the trial court to determine relevance, and to exclude such evidence from the jury if relevant, would be to deny appellant his right not to be punished for a crime unless each of the requisite elements of the offenses charged is established beyond doubt. I join my brethren, therefore, in overruling our decision in *Stewart v. United States*, 245 F.2d 617 (1960), *rev'd on other grounds*, 360 U.S. 1 (1961). But I would, as they do not, extend that ruling to apply to the appellant.

We all accept the view that the function of the definition of each specific offense is to exclude from criminal liability all those whom the legislature has determined ought not to be held criminally liable, *i.e.* blameworthy. That function is buttressed by the presumption of innocence, which in turn is reinforced by placing upon the prosecution the burden of proof beyond a reasonable doubt of each basic element of the crime's definition. To assure that the legislative intent

---

[74] Bazelon's opinion opens: "We are unanimous in our decision today to abandon the formulation of criminal responsibility adopted eighteen years ago in *Durham* v. *United States*, 94 U.S. App. D.C. 228, 214 F.2d 862 (1954)." Despite this beginning, the unlabeled opinion might better have been introduced with "dissent on the whole concurrence in small part." 471 F.2d at 1010.

[75] Hart, *The Aims of the Criminal Law*, 23 Law & Contemp. Prob. 401, 431 n.70 (1958).

is not thwarted, I would hold that all admissible evidence relevant to any requisite element of liability of the offense charged, in this case murder in the second degree and possession of a dangerous weapon, must be taken into account in determining guilt. Thus, evidence of the accused's mental health may no longer be excluded if it is deemed relevant to voluntariness, intent, purpose, knowledge, willfullness, or any other requisite reflecting the legislature's obligation to relieve those who do not have the capacity to exercise free will from criminal liability.

To hold otherwise would be to undermine the Supreme Court decision in *Morrissette* v. *United States*, 342 U.S. 246 (1952), which sought to protect those who were not blameworthy in mind from conviction of infamous common law crimes. The Court held that the "mere omission [by statute] of any mention of intent will not be construed as eliminating that element from the crimes denounced." [76] To retain the language of intent in second degree murder, as well as in the crime of carrying a dangerous weapon, as Congress does, only to eliminate it by an evidentiary rule such as that in issue here would maintain as a fiction our commitment to convict only those who are blameworthy. In those cases—and this may be one—the crimes of second degree murder and carrying a dangerous weapon would become strict liability offenses.

I would reverse and remand for a new trial.[77]

Appendix

Before *Brawner*, Judge Leventhal wrote in Dixon v Jacobs, 427 F.2d 589, 601, 604 (D.C. Cir. 1970) (emphasis in original):

> What I find doubtful is the view of the majority opinion that because Congress has provided that a civilly committed person cannot be kept in confinement if he is not "*likely* to injure himself or other persons," the same standard governs a man who has killed another, and is relieved of a conviction for that homicide only because of a doubt that this may have been the product of a mental disease.
>
> Plainly the acquittal by reason of insanity reflects a jury determination, beyond a reasonable doubt, that except for the defense of insanity, defendant did do the act, e.g. kill the deceased, and have the intent, that constitutes the substantive crime without any exculpation or mitigation in noninsanity defenses (e.g. self-defense). . . . If a jury is not ready to make that determination it must acquit completely, without going on to consider the insanity defense.
>
> . . . I think there may be room for a difference in the standard that governs the issue of detention or release for the person who has already unhappily manifested the reality of anti-social conduct, perhaps even shifting to him the burden of proof that decides the doubtful case where we cannot have confidence in our predictions. . . .

Following *Brawner*, Judge Leventhal wrote in United States v. Brown, No. 24,646 (D.C. Cir. Jan. 8, 1973), slip opinion at 9-10 (emphasis added):

> There is justification for the preponderance of proof standard for confinement of the insanity-acquitted even assuming a higher standard is required prior to civil commitment for propensity. . . .
>
> The difference between the classes for purposes of burden of proof, is in the extent of possibility and consequence of error. If there is error in a determination of mental illness that results in a civil commitment, a person may be deprived of liberty although he never posed any harm to society. If there is a similar error in confinement of an insanity-acquitted individual, there is not only the fact of harm already done, but the substantial prospect that the same error, ascribing the quality of mental disease to a less extreme deviance, resulted in a *legal exculpation* where there should have been legal responsibility for the antisocial action.

Judge J. Skelly Wright dissenting, wrote in *Brown*, slip opinion at 13–14, 16–18:

> . . . *I believe the disparity in treatment sanctioned by the majority is logically untenable*, rests on unsupportable policy grounds, and is in con-

[76] *Morrissette* v. *United States*, 342 U.S. 246, 263 (1952).

[77] Of course, evidence of mental health which now becomes admissible with this holding continues to be admissible if relevant to the insanity defense, which defense would become operative only upon a finding of suspended guilt for one of the crimes or lesser included offenses charged.

flict with prior decisions of this court and the Supreme Court. . . . [Emphasis added.]

In *Bolton v. Harris*, 130 U.S. App. D.C. 1, 10, 395 F.2d 642, 561 (1968), this court held that persons acquitted of criminal charges by reason of insanity could not be civilly committed under 24 D.C. Code § 301(d) (1967) without being provided a judicial hearing with procedures "substantially similar" to those in ordinary civil commitment proceedings. These safeguards included a right to a judicial hearing on the issue of whether the defendant was presently dangerous as a result of mental illness, imposition of the burden of proof on the Government, trial by jury, and a right to counsel. . . .

[*Bolton* was] based on a *Baxstrom v. Herold*, 383 U.S. 107 (1966), where the Supreme Court held that New York's statutory procedure permitting civil commitment of persons at the end of jail sentences without the jury trial safeguards afforded persons subject to ordinary civil commitment violated equal protection. The Court held that the fact of past criminal conduct lacked a sufficient connection with current mental illness to justify lesser procedural safeguards. . . .

The majority's central proposition is that Brown should be treated differently because he has already been found to have committed a series of indisputably dangerous felonies. These acts are said to dictate lesser solicitude for his rights—as expressed through a burden of proof—than if he were sought to be committed before he was found to have committed such acts. But it should be obvious that these acts, standing alone, go only to the civil commitment standard of dangerousness, which Brown's counsel has stipulated is not at issue, and not to the additional, central, question of mental illness. Yet the majority opinion is willing to accept the *non sequitur* that the admitted fact of dangerousness in the past must have a necessary bearing on the court's finding on the question of illness in the present.

The underlying justification for the majority's acceptance of this illogic seems to be its fear that strengthening the burden of proof in Section 301(d) proceedings will cause wholesale release of persons acquitted of crimes by reason of insanity. . . .

Finally, in my view it is untenable to argue, as does the majority, that this disparity in burdens of proof is justifiable as a means of deterring frivolous insanity defenses . . . [I]t seems anomalous, to say the least, that this court, which has given such consistent recognition to the need for a carefully administered insanity defense . . . should suddenly embrace such a rough-hewn and very possibly useless means of restraining its use.

It is doubtless true, as the majority suggests, that the insanity defense as it has been administered in this case, when coupled with the *Bolton* decision, might in theory give rise to a "revolving door" phenomenon whereby persons who have committed dangerous acts may be first acquitted by reason of insanity and next totally freed because of the Government's inability to meet the standards of proof for civil commitment. . . . *Bolton* sought to place those acquitted by reason of insanity on the same footing as those haled before the court in ordinary civil commitment proceedings. I would continue to follow its teaching. Indeed, given *Baxstrom*, in my judgment we have no choice.

[From The American Criminal Law Review, Spring 1972]

The Insanity Defense: Historical Development and Contemporary Relevance

(BY SHEILA HAFTER GRAY*)

INTRODUCTION

The United States Court of Appeals for the District of Columbia has recently focused its attention on the present status of the insanity defense in its considera-

*M.D. Harvard 1958. Member, American Psychoanalytic Association, Clinical Assistant Professor of Psychiatry, University of Maryland School of Medicine, Faculty, Washington Psychoanalytic Institute.

The author is indebted to Robert A. Boutillier, Lee Peeler and Joseph Perpich, M.D., for their assistance in the preparation and writing of this article, particularly for the legal research reflected in the footnotes.

tion of *Brawner* v. *United States*.[1] In so doing, the court has raised numerous questions concerning the current insanity tests' suitability for the future determination of criminal responsibility. In order to clarify the issues involved in this reevaluation, it is necessary to review the historical development of the insanity defense with particular reference to the role of psychiatric expert opinion in formulating standards for its application. The following review will attempt to demonstrate that the old, broad insanity tests retain their relevance and, in fact, are superior to the recent "technical" tests which depend on current scientific theory rather than long-range legal precedents for their effectiveness. As Justice Doe of New Hampshire pointedly asserted over a century ago, "the law does not change with every advance of science; nor does it maintain a fantastic consistency by adhering to medical mistakes which science has corrected."[2]

M'NAGHTEN AND ITS COMMON LAW ANTECEDENTS

Since the 12th century, the common law has recognized mental incapacity as a defense to criminal conduct.[3] The modern tests for insanity, however, developed slowly and coevally with other defenses of incapacity[4] as the law, both civil and criminal, moved from a concept of strict liability to one based on fault.[5]

In the criminal law this movement away from absolute liability led gradually to the development of the concept of intent as a prerequisite to responsibility. The movement was nurtured by two sources: the rising interest in the newly-discovered Roman law, and the increasingly significant influence of the clergy upon government policy.[6] Both these sources emphasized guilt of the mind, a moral guilt, rather than guilt based on action alone.[7]

---

[a] M.D. Harvard 1958. Member, American Psychoanalytic Association. Clinical Assistant Professor of Psychiatry, University of Maryland School of Medicine. Faculty, Washington Psychoanalytic Institute.

The author is indebted to Robert A. Boutillier, Lee Peeler and Joseph Perpich, M.D., for their assistance in the preparation and writing of this article, particularly for the legal research reflected in the footnotes.

[1] Crim. No. 22,414 (D.C. Cir., filed Feb. 6, 1969). Following the appeal, the court ordered the American Civil Liberties Union, Public Defender Service, American Psychiatric Association and the Georgetown Legal Intern Project, among others, to submit briefs as amici curiae on such issues as the adoption of the ALI test for criminal responsibility and the possibility of the complete abolition of the current insanity defense - *State* v. *Pike* 49 N.H. 399, 438 (1869) (Doe, J. concurring).

[3] *See* Sayre, *Mens Rea*, 45 Harv. L. Rev. 974, 1004–07 (1932) [hereinafter cited as Sayre]. For comprehensive histories of the origins of the insanity defense see S. Glueck, Mental Disorder and the Criminal Law 123–60 (1925); 1 F. Wharton & M. Stille, Medical Jurisprudence 504 *et seq.* (5th ed. 1905); Crotty, *The History of Insanity As a Defense to Crime in English Criminal Law*, 12 Calif. L. Rev. 105 (1924); *Platt & Diamond, The Origins of the "Right and Wrong" Test of Criminal Responsibility and Its Subsequent Development in the United States*, 54 Calif. L. Rev. 1227 (1966). *See generally* E. Coke, The Third Part of the Institutes of the Law of England 4–6, 54 (1817); 2 W. Holdsworth, A History of English Law 50–54 (5th ed. 1942); 3 W. Holdsworth, A History of English Law 371–75 (5th ed. 1942); 2 F. Pollock and F. Maitland, History of English Law 476–84 (2d ed. 1952); H. Weihofen, Mental Disorder as a Criminal Defense 52–64 (1954).

[4] Sayre at 1004–16 (tracing the development and recognition of the defenses of insanity, infancy, compulsion, coercion, intoxication, and mistake of fact).

[5] 3 W. Holdsworth, *supra* note 3, at 372:

> We have seen too that necessary self-defence, misadventure, or lunacy were admitted to be good grounds for mitigation of punishment. These department from the older principles continued all through the period . . . and their growing precision doubtless helped to develop the view that the proof of some of these facts should negative guilt.

Accord, Sayre at 1004. *Compare* Wigmore, *Responsibility for Tortious Acts*, 7 Harv. L. Rev. 315, 317 (1894) *with* T. Plucknett, A Concise History of the Common Law 435–37 (4th ed. 1948) for differing views of the early common law concept of strict liability. *But see Sayre* at 981.

[6] Sayre at 982–83. *See* 1 F. Wharton & M. Stille, *supra* note 3, at 471–73, 506; Platt & Diamond, *The Origins and Development of the "Wild Beast" Concept of Mental Illness and its Relation to Theories of Criminal Responsibility*, 1 J. of Hist. of Behavioral Sciences 355–66 (1965).

During the 12th century the judges in the royal courts were primarily clergy. 2 W. Holdsworth, *supra* note 3, at 177, 282–90, and were responsible for the administration of the laws. The most notable instance of ecclesiastical influence was Bracton, whose *De Legibus et Consuetudinibus Angliae* (1300) borrowed heavily from Roman law and strongly influenced the development of English law. *Id.* at 282, 289. Bracton urged:

> [W]e must consider with what mind (*animo*) and with what intent (*voluntate*) a thing is done, in fact or in judgment, in order that it may be determined accordingly what action should follow and what punishment. For take away the will and every act will be indifferent, because your state of mind gives meaning to your act, and a crime is not committed unless the intent to injure (*nocendi voluntas*) intervene, nor is a theft committed except with the intent to steal.

Id. at 101, *quoted in* Sayre at 985. Bracton became Archdeacon of Barnstaple in 1264 and Chancellor of Exeter Cathedral and in 1265 was Chief Judge of England's highest court, the *Iulia Regis*. *See* Platt & Diamond, *supra*.

[7] Sayre at 988–89. *See* 3 W. Holdsworth, *supra* note 3, at 373; 2 F. Pollock & F. Maitland, *supra* note 3 at 476; Platt & Diamond *supra* note 3; *Cf.* Hales v. Petit, 75 Eng. Rep. 387, 399 (K.B. 1562) ("[m]urder is the killing of a man with malice prepense.").

In order to constitute a crime it gradually became necessary for an act to have been performed with a criminal intent, that is, with mens rea, by someone who could control his behavior.[8] This new concept of criminal responsibility led not only to a growing search for mens rea as an element of a crime,[9] but also to the beginnings of a body of defenses based precisely upon the absence of this intent.[10] One of the general categories of defenses, lack of mental capacity, embraced the insanity defense.[11]

The use of insanity to excuse criminal conduct seems to have first appeared at the end of the reign of Henry III in the form of king's pardons granted to those he judged insane.[12] These pardons became so frequent that they were ultimately granted as a matter of course if the situation so dictated.[13] The courts later adopted insanity as a valid defense, by the 16th century it was well-established in the criminal law.[14]

---

[8] *See, e.g.*, Williamson v. Norris, [1899] 1 Q.B. 7, 14 (Russell, C.J.) ("[t]he generals rule of English Law is that no crime can be committed unless there is mens rea."); Carter v. United States, 252 F.2d 608, 616 (D.C. Cir. 1957) ("[i]f a man . . . is not a free agent, or not making a choice, or unknowing of the difference between right and wrong, or not choosing freely, or not acting freely, he is outside the postulate of the law of punishment."); Boardman v. Woodman, 47 N.H. 120, 147 (1866) (Doe, J., dissenting) ("[t]he general theory of the common law is that the free operation of a sound mind is the essence of contract and crime, that contracts and crimes do not consist of mere acts or words, and cannot be produced by mental disease.").

[9] Sayre at 994–1004.

[10] *Id.* at 1004–16. Sayre cites the following as early examples of defenses based on the lack of criminal intent: Selden Society, Eyre of Kent, 6 & 7 Edw. II, 109 (1313–14) ("[a]n infant under the age of seven years, though he be convicted of felony, shall go free of judgment because he knoweth no good and evil"); 27 Lib. Ass. f. 137, pl. 400 (1353); (a wife acting under coercion if her husband is not criminally responsible). 1 M. Hale, Pleas of the Crown 49 (1st Am. ed. 1847) (criminal acts done under fear of death by rebels who induced the fear can excuse one raising fear as a defense to a treason charge). *See generally* 1 M. Hale, *supra* at 13–57 (discussing the defenses of infancy, idiocy, madness, lunacy, casualty, misfortune, ignorance, coercion and civil subjection, compulsion, fear and necessity); 3 W. Holdsworth, *supra* note 3, at 372–88.

For a summary of more recent development in the common law defense of incapacity see Brief for ACLU as Amicus Curiae at 4, 5, Brawner v. United States, Crim. No. 22,714 (D.C. Cir., filed Feb. 6, 1969):

> "Duress has long been held to excuse criminal action. (Martin v. State, 31 Ala. App. 334, 17 So. 2d 427, (1944)). A sleepwalker has been held not to be criminally responsible for his action (Fain v. Commonwealth, 78 Ky. 183, 39 Am. Rep. 213 (1879)). An epileptic seizure unquestionably excuses conduct that would otherwise be deemed unlawful (People v. Freeman, 16 Cal. App. 2d 110, 142 P.2d 435, (1943)). The influence of medication has been recognized as a defense (Pribble v. People, 49 Colo. 210, 112 P. 220, (1910)), as has kleptomania (State v. McCullough, 114 Iowa 532, 87 N.W. 503, (1901)). Infants are not criminally responsible for their conduct (Allen v. United States, 150 U.S. 551 (1893)). Delerium tremens has long been recognized as an exculpatory defense. (United States v. McGlue, 26 Fed. Cas. 1093 (No. 15,679) (C.C.D. Mass. 1851) (Curtis, J.); United States v. Drew, 25 Fed. Cas. 913 (No. 14,993) (C.C.D. Mass. 1828) (Story, J.)). More recently, alcoholism (State v. Fearon, 283 Minn. 90, 166 N.W.2d 720 (1969); Easter v. District of Columbia, 124 U.S. App. D.C. 33, 361 F.2d 50 (1966)) and drug dependence (United States v. Ashton, 317 F. Supp. 860 (D.D.C. 1970); United States v. Allen, D.C. Super. Ct. Nos. 4133–70 & 21031–70 (February 10, 1971); United States v. Bowser, D.C. Super. Ct. No. 45504–70 (February 24, 1971)), have been recognized as disabilities that may excuse a defendant from criminal responsibility for his actions. All of these situations invoke the fundamental common law principle that substantial impairment of behavior controls, resulting in action that is not voluntary, is sufficient to excuse a defendant from criminal responsibility for his conduct."

Id. at 5.

[11] Sayre at 1004–07; *see* 1 M. Hale, *supra* note 10, at 14. Hale divided the defense of mental incapacity into three realistic categories for the purpose of discussion of the scope of this single defense in the later part of the 17th century. S. Glueck, *supra* note 3, at 136–37. *See also* notes 17 & 28 *infra*.

[12] For example, a pardon was granted to a woman by Henry III on the ground that the inquest showed she had killed her two sons in a fit of madness rather than with criminal intent. 2F. Pollack & F. Maitland, *supra* note 3 at 480 (listing other examples of Royal Pardons).

[13] The practice of granting pardons liberally was certainly a major step away from the early concept of strict liability. *See* Wigmore, *supra* note 5. But even so the law still dictated that a jury "must convict a man who slays in self defense or misadventure and that person must appeal to the King's mercy." 2 F. Pollock & F. Maitland, *supra* note 3, at 479. Such pardons came to be granted liberally, *id.* at 480–81, and a statute was passed restricting the King's use of pardons to cases in which it historically had been granted. 1 Rot. Par. 443b, 3 Edw. II (1310) *quoted in* Sayre at 1005 n.125.

[14] *Hales* v. *Petit*, 75 Eng. Rep. 387 (K.B. 1562):

> A lunatic wounded himself mortally with a knife and afterwards he became of sound mind and had the rights of Holy Church and after died of the same wound, and his chattels were not forfeited . . . when he gave himself the wound he was out of his senses, in which case the killing of another should not be adjudged felony in him and for the same reason he shall not be a felon for killing himself. . . .

Id. at 397–98. *See* Beverly's Case, 76 Eng. Rep. 1118, 1121 (K.B. 1603) ("[n]o felony or murder can be committed without a felonious intent and purpose."); A. Fitzherbert, *Natura Brevium* 202 (1534) ("[h]e who is of unsound memory hath not any matter of discretion; for if he kills a man it shall not be felony, nor murder, nor he shall not forfeit his land or goods for the same . . .").

Although it was held, even as late as 1724, that an accused must be totally deprived of reason for the insanity defense to apply,[15] there were efforts to introduce partial insanity as a defense. At the end of the 17th century, Sir Mathew Hale, in his attempt to categorize the recognized defenses to criminal charges,[16] developed in some detail the concept that partial insanity was sufficient to prove the absence of criminal intent.[17] He proposed a rule whereby a person would not be held responsible if, at the time of the offense, his mental capacity was less than that of a child of 14 years.[18] His test did not gain wide use, however, possibly because an understanding of the relationship between mental age and mental capacity had not yet developed in scientific circles.[19] Furthermore, society at that time was not willing to accept the possibility of large scale exoneration of criminals on the ground of insanity, possibly because no alternative to imprisonment could be envisioned. The requirement of total insanity embodied in the traditional "wilde beeste" test therefore continued to prevail.[20]

In 1800, *Hadfield's Case* added insane delusions to the "wilde beeste" test as a basis for a finding of insanity.[21] Hadfield, a soldier who had suffered severe head injuries in battle, attempted to assassinate the king in order to attain the martyr's death he believed to be his destiny. His delusion was held to be sufficient ground for acquittal. This defense, although not widely successful, led to acquittal in some cases. In 1840, for example, Edward Oxford, acting under a similar delusion, attempted to assassinate Queen Victoria and Prince Albert.[22] He too was acquitted on the ground of insanity.

---

[15] *Rex* v. *Arnold*, 16 How. St. Tr. 695 (C.P. 1724). Arnold was convicted for having shot and wounded Lord Onslow while laboring under an insane delusion that Onslow was the source of all his problems and that Onslow had bewitched him and was using imps to torture him. This case is usually referred to as the codification of the "wilde beeste" test of insanity in English common law. Yet the actual instruction to the jury does not fully bear this out. *Id.* at 763–64; *see* Platt & Diamond, *supra* note 6.

The instruction to the jury recognized the possibility of one exception to the strict rule requiring total insanity, that of recurring insanity. To be a defense, however, the insanity must have been operative at the time of the crime and complete or perfect. *Rex* v. *Arnold*, 16 How. St. Tr. 695, 764 (C.P. 1724); *cf.* 1 M. Hale, *supra* note 10, at 30.

[16] M. Hale, *supra* note 10, at 29–36. Hale divided mental incapacity into three groups: *idiocy*, which included natural defects such as mental retardation, *dementia accidentalis vel adventitia*, which was insanity stemming from injury to the brain from concussion or disease, and *dementia affectata*, or drunkenness. *Id.* at 29–31.

[17] *Id.* at 30. The second class of disorders, *dementia accidentalis vel adventitia*, was further divided into two classes—partial insanity and total insanity. Partial insanity was distinguished from total insanity in that it was of a lesser degree or it was limited to "particular discourses, subjects, or applications." Hale believed that many suffering from partial insanity are not "wholly destitute of reason" and so are accountable for their capital crimes. They are to be distinguished, however, from those persons suffering from "perfect" insanity who have lucid intervals (*i.e.* lunatics). These persons are not criminally liable for acts done during periods of insanity. *Id.* at 30.

[18] Hale set out his test as follows:

> The best measure that I can think of is this: such a person as labouring under melancholy distempers [for example] hath yet ordinarily as great understanding as ordinarily a child of fourteen years hath, is such a person as may be guilty of treason or felony.

Id. at 30.

[19] S. Glueck, *supra* note 3, at 137. *See* Platt & Diamond, *supra* note 6, at 364, 366. Without specifically referring to Hale, the authors point to the emergence of the "infancy concept" of mental illness, which supplanted the "wilde beeste" concept, and to the less humanitarian approaches to mental illness that the latter concept fostered and reflected. *But see* 1 F. Wharton & M. Stille, *supra* note 3, at 519–20; Sayre at 1006.

[20] *See* Platt & Diamond, *supra* note 6, at 356–66. The "wilde beeste" test is usually attributed to the 13th century writing of Bracton, but in fact the test is a corruption of Bracton's more sensitive theories. *Id.* at 358. *See* note 6 *supra*. The "wilde beeste" concept appears to have developed from the medieval supersition of demonic possession, the accepted church psychology which distinguished man from beast on the basis of reason and a mistranslation of the word *Brutus*. Platt & Diamond, *supra* at 364. The "wilde beeste" test was also extremely simple and readily lent itself to extractions from more elaborate treatment of insanity. *See* S. Glueck, *supra* note 3, at 139. *See also* *Arnold's Case*, 16 How. St. Tr. 695, 763–64 (C.P. 1724); *Beverly's Case*, 76 Eng. Rep. 1118 (K.B. 1603); 1 F. Wharton & M. Stille, *supra* note 3, at 524; Sayre at 1005.

[21] *Hadfield's Case*, 27 How. Tr. St. 1281 (K.B. 1800). Hadfield was acquitted due to the ability and foresight of his advocate, Erskine, whose arguments were so forceful that the judge, in fact, directed that Hadfield be acquitted with the understanding that he would be committed. *Id.* at 1354–55. It is not surprising to find that Erskine based his case of Hale's definitions of insanity. *Id.* at 1310–11. *See also* 1 F. Wharton & M. Stille, *supra* note 3, at 527–30; Crotty, *supra* note 3, at 116–17.

[22] *Regina* v. *Oxford*, 173 Eng. Rep. 941 (C.P. 1840). Oxford was a victim of hereditary insanity, both his father and his grandfather having been insane. The jury was instructed that Oxford's guilt was a question of "whether he was under the influence of a diseased mind, and was really unconscious at the time . . . that it was a crime." *Id.* at 950. *See* 1 F. Wharton & M. Stille, *supra* note 3, at 536 n.82, indicating the authors' belief that neither Hadfield nor Oxford would have been acquitted if the sovereign had been killed or wounded. *Cf.* *Rex* v. *Offord*, 172 Eng. Rep. 924 (C.P. 1831). Offord, acting under an insane delusion that a group of 50 people in his village were conspiring to kill him, killed one of the supposed conspirators. The question presented to the jury was, "Did he know that he was committing an offense against the laws of God and nature." *Id.* at 925. Offord was found not guilty. *But see* 1 F. Wharton & M. Stille, *supra* note 3, at 531–36.

Three years later, the case of Daniel M'Naghten [23] led to a substantial change in the legal rule used to determine insanity. M'Naghten had been found not guilty by reason of insanity of the murder of Sir Robert Peel's secretary, Edward Drummond. Lord Chief Justice Tindal had instructed the jury to decide whether at the time of the crime, the defendant "had or had not the use of his understanding, so as to know that he was doing a wrong or wicked act." [24] If he did not know that he was violating the law, he was to be acquitted; but if he was "in a sound state of mind," he was to be found guilty.[25] When the verdict was rendered, however, the public and the Queen were so disturbed over the obvious ambiguities of the charge that the House of Lords was asked to define what constituted a sound mind and under what circumstances the insanity defense would apply in the future. Lord Tindal set out a double test, requiring that the defendant either not know what he was doing (total insanity) or not know that it was wrong.[26]

DEVELOPMENT AND MODIFICATION OF M'NAGHTEN

We cannot understand the subsequent development of the insanity defense, however, without taking into account the position of psychiatry, both as a body of knowledge and as a group of practitioners, in relation to the courts. The first systematic application of medical science to jurisprudence was proposed by Hale,[27] as part of his aforementioned categorization of criminal defenses. Although he defined his terms according to contemporary medical understanding of the conditions he described,[28] these definitions were not legal rules but rather examples to help judges instruct juries who tried the cases in which the insanity defense was raised. Hale made it clear that mental incapacity was to be a question of fact to be determined by the jury.[29] The evidence presented by medical experts was, however, given no greater weight than that of lay witnesses.

---

[23] *M'Naghten's Case,* 8 Eng. Rep. 718 (H.L. 1843).

[24] *Id.* at 719–20.

[25] *Id.* The full instruction reads:

> The question to be determined is, whether, at the time the act in question was committed, the prisoner had or had not the use of his understanding, so as to know that he was doing a wrong or wicked act. If the jurors should be of the opinion that the prisoner was not sensible, at the time he committed it, that he was violating the laws of both God and man then he would be entitled to a verdict in his favor. . . .

[26] The test as stated by Lord Tindal was the following:

> [T]o establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.

Id. at 722.

[27] 1 M. Hale, *supra* note 10.

[28] While Hale's three categorizations were based on 17th century medical jurisprudence, they remain sufficiently accurate to be readily translatable into modern terminology. Note, for example, Hale's definition of lunacy:

> Again this accidental *dementia* whether total or partial, is distinguished into that which is permanent or fixed, and that which is interpolated and by certain periods and vicissitudes: the former is *phrensis* or madness; the latter is that which is usually called lunacy.

1 M. Hale, *supra* note 10, at 30. Compare it with the following modern description of mania-depressive psychosis:

> Oscillations of mood from time to time are normal happenings. . . . The mania despressive psychoses are exaggerations of such oscillations sometimes brought about by adequate cause in surroundings though in degree and sometimes apparently arising without discoverable external cause.

H. Singer & W. Krohn, Insanity and the Law 44 (1924).

Hale's treatment of his third classification of *dementia*, drunkenness, is also precocious. While he states the general rule that intoxication is not a defense to crime, he allows two exceptions. The first is a person who by "unskillfulness of his physician, or by the contrivance of his enemies" became intoxicated while the second is:

> That although *simplex* phrenzy occasioned *immediately* by drunkenness excuse not in criminals, yet if by one or more such practices, an *habitual* or fixed phrenzy be caused, though this madness was contracted by the vice and will of the party, yet this habitual and fixed phrenzy thereby caused puts the man into the same condition in relation to crimes, as if the same were contracted involuntarily at first.

1 M. Hale, *supra* at 32. For an example of the possible application of Hale's description to a modern case see *Brawner* v. *United States,* Crim. No. 22,714 (D.C. Cir., filed Feb. 6, 1969).

[29] 1 M. Hale, *supra* note 10, at 29, 30, 32. Hale, for example, in closing his description of the symptoms of idiocy writes: "These, though they may be evidences, yet they are too narrow, and conclude not always, for *idiocy or not* is a question of fact triable by a jury, and sometimes by inspection." *Id.* at 29. However he does not leave the jury without restraint in determining the "indivisible line" which separates "partial" from "perfect" insanity:

> [I]t must rest upon circumstances duly to be weighed and considered both by the judge and jury, lest on the one side there be a kind of inhumanity towards the defects of human nature, or on the other side too great an indulgence given to great crimes. . . .

Id. at 30.

It was not until M'Naghten's Case[30] that the testimony of psychiatrists, as experts in the field of mental disease and deficiency, was accorded special status. For the first time they could offer an opinion concerning an event which they had not actually witnessed, but about which they might reconstruct information using their newly developed techniques.[31] While physicians still could not determine the fact of insanity, they were permitted to testify whether the accused had been suffering from a disabling disease at the time of the alleged offense and to state whether the criminal act was a product of that disease.[32] Pandora's Box was opened just enough for the courts to view its contents; but it took 85 years for another court to muster the courage to lift the lid once again.

The *M'Naghten* rule, later modified beyond recognition by experts and jurists alike, became the basic rule in the English and American courts for almost 100 years.[33] The promulgation of the rule, heavily influenced by the American psychiatrist, Isaac Ray,[34] marked the first instance in which the courts responded to the budding science of psychiatry.[35] Its carefully drafted language[36] made psychiatric testimony useful because it permitted the expert to formulate the relationship between criminal intent and mental state in a particular case. Furthermore, the rule allowed wide leeway in the definition of "disease of the mind" and yet prevented acquittals based solely on the presence of mental illness at the time of the crime.[37] But *M'Naghten* soon became a rigid codification of

---

[30] 8 Eng. Rep. 718 (H.L. 1843).

[31] Lord Tindal confronted the issue as follows:

> Can a medical man conversant with the disease of insanity, who never saw the prisoner previous to the trial, but who was present during the whole trial and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the the prisoner was conscious at the time of doing the act that he was acting contrary to law, or whether he was laboring under any and what delusion at the time? In answer thereto, we state to your Lordships, that we think the medical man, under the circumstances supposed, cannot in strictness be asked his opinion in the terms above stated, because each of those questions involves *the determination of the truth of the facts deposed to, which it is for the jury to decide, and the questions are not mere questions are not mere questions upon a matter of science, in which case such evidence is admissible.* But where the facts are admitted or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right.

Id. at 723 (emphasis added).

[32] *Id. But cf.* Hadfield's Case, 27 How. St. Tr. 1282, 1334 (K.B. 1800), Erskine succeeded in introducing into evidence the testimony of Dr. Crieghton that based on a single pretrial examination of the defendant the doctor had "not the smallest doubt that he was insane." Erskine also used testimony of the surgeon who treated Hadfield's initial head injury that the defendant was insane at the time of his discharge from the army and in all probability, remained so. *Id* at 1335–36. For an early example of miscarried expert testimony, see Earl Ferrer's Trial, 19 How. St. Tr. 886, 942–44 (H.L. 1760), *cited in* S. Glueck, *supra* note 3, at 143 & n.1.

[33] "[T]he rules of M'Naghten's Case were widely adopted and are now the sole test of criminal insanity in most common law jurisdictions, although in several states they have been modified by, and are applied in conjunction with, the 'irresistible impulse' test. . . ." Annot., 45 A.L.R.2d 1447, 1452 (1956) (footnotes omitted) (containing a list of representative cases applying the rules.).

[34] *See* I. Ray, Medical Jurisprudence of Insanity (4th ed. 1860).

[35] For a description of the *M'Naughten* courts' response to the introduction of contemporary psychiatric knowledge, *see* J. Biggs, The Guilty Mind: Psychiatry and the Law of Homicide 100 *passim* (1955); Diamond, *Isaac Ray and the Trial of Daniel M'Naghten*, 112 Am. J. of Psychiatry 651 (1956). *See also* Platt & Diamond, *supra* note 3, at 1247; Slovenko, *A History of Criminal Procedures as Related to Mental Disorders*, 71 W.Va. L. Rev., 135, 138–39 (1969).

[36] *See* note 26 *supra*.

[37] *See* Mueller, M'Naghten *Remains Irreplaceable: Recent Events in the Law of Incapacity*, 50 Geo. L.J. 105 (1961).

[38] For examples of early cases rigidly applying the *M'Naghten* "right-wrong" test, *see People* v. *Coffman*, 24 Cal. 230, 235 (1864); *Spencer* v. *State*, 69 Md. 28, 37–41, 13 A. 809, 812–15 (1888); *Flanagan* v. *People*, 52 N.Y. 467, 469, 11 Am. Rep. 731–32 (1873). *See generally* G. Williams, Criminal Law 477, 482, 491, 492–93 (2d ed. 1961).

For an example of an early case supplementing *M'Naghten* with an irresistible impulse test, see *Commonwealth* v. *Rogers*, 48 Mass. 500, 501–03, 41 Am. Dec. 458, 461 (1844) (Shaw, C. J.), *discussed in Spencer* v. *State*, 69 Md. at 38, 13 A. at 813.

A contemporary illustration of rigid, misguided interpretation of *M'Naghten* appears in *United States* v. *Currens*, 290 F. 2d 751, 763–64 (3d Cir. 1961) wherein Chief Judge Biggs described the *M'Naghten* test as a mere extension of the more ancient "good-evil" test for criminal responsibility. Biggs' interpretation is criticized in Mueller, *supra* note 37. For actual examples of rigid application, *see, e.g., Bryant* v. *State*, 207 Md. 565, 558–94, 115 A. 2d 502, 512–15 (1955) (refusing to alter "right and wrong" test adopted in 1888); *State* v. *White*, 60 Wash. 2d 551, 585–93, 374 P. 2d 942, 959–67 (1962) (en banc) (refusing to allow any insanity defense beyond *M'Naghten's* minimum standards); Bazelon *The Concept of Responsibility*, 53 Geo. L.J. 5, 12–14 (1964) (criticizing *State* v. *White, supra*). *See generally* Annot. A.L.R., *supra* note 33, at 1450–59 (Supp. 1971).

(Footnote reference on following page.)

early examples of its application,[38] as the New Hampshire supreme Court had envisioned when it rejected the test in 1869.[39]

The narrow interpretation of *M'Naghten* led to two major erroneous consequences. First, the words of the test came to be interpreted as requiring a cognitive understanding of the difference between right and wrong.[40] Secondly, the concept of "disease of the mind" came to be held by some psychiatrists to encompass only psychosis itself.[41] The latter is illustrated by Frederic Wertham in a case involving a pedophiliac [42] whom he believed should be held responsible under *M'Naghten* because "the law of legal insanity is not intended to exculpate such a person who does not suffer from a psychosis, *i.e.*, a major disease, and who is not committable." [43] Psychiatric experts seemed to forget that the *M'Naghten* rule refers to the "true capacity of the individual." [44] Instead, these experts sought to modify the law by attempting to codify each new psychiatric theory and to substitute their findings for those of the jury as they became more confident of their ability to postdict human behavior.[45]

The recent experience in the District of Columbia illustrates the futility of the constant recodifications of medical theories.[46] *M'Naghten*, adopted as the rule in the District of Columbia in 1882,[47] was broadened to include the "irresistible impulse" test in 1929 [48] in response to the requests of a number of psychiatrists who argued that unlawful acts often arise from an impulse, a force from within, that could become strong enough to overcome the defendant's cognitive knowledge of

---

[39] Justice Doe pointed to the errors of both the medical and legal professions:

> Defective medical theories have usurped the position of common-law principles.
>
> The usurpation, when detected, should cease. The manifest imposture of an extinct medical theory pretending to be legal authority, cannot appeal for support to our reason or even to our sympathy. The proverbial reverence for precedent, does not readily yield; but when it comes to be understood that a precedent in medicine and not law, the reverence in which it is held, will, in the course of time subside.
>
> The legal profession, in profound ignorance of mental disease, have assailed the superintendents of asylums who knew all that was known on the subject, and to whom the world owes an incalculable debt, as visionary theorists and sentimental philosophers attempting to overturn settled principles of law; whereas, in fact, the legal profession were invading the province of medicine, and attempting to install old exploded medical theories in the place of facts established in the progress of scientific knowledge. The invading party will escape from a false position when it withdraws into its own territory; and the administration of justice will avoid discredit when the controversy is thus brought to an end. Whether the old or the new medical theories are correct, is a question of fact for the jury; it is not the business of the court to know whether any of them are correct. *The law does not change with every advance of science; nor does it maintain a fantastic consistency by adhering to medical mistakes which science has corrected.*

State v. *Pike*, 49 N.H. 399, 438 (1869) (Doe, J., concurring) (emphasis added).

[40] Bernard Diamond's recent criticism of the *M'Naghten* rule serves to illustrate the misplaced emphasis on cognition. He states:

> I shall start with the assumption (which many readers will question) that M'Naghten is dead—that the "knowledge of right and wrong" test of criminal responsibility remains only to be buried, and that the real issue is how long must the funeral services go on and how many decades must pass before the law ceases to mourn at its grave. For me the truth is that the principle behind M'Naghten, namely, *that defect of cognition as a consequence of mental disease is the primary exculpating factor in the determination of legal insanity, has probably never been other than a legal fiction.*

Diamond, *From* M'Naghten *to* Currens, *and Beyond*, 50 Calif. L. Rev. 189 (1962).

[41] American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (2d ed. 1968) offers the following description of psychosis:

> Patients are described as psychotics when mental functioning is sufficiently impaired to interfere grossly with their capacity to meet their ordinary demands of life. The impairment may result from a serious distortion in their capacity to recognize reality. Hallucinations and delusions for example, may distort their perceptions. Alterations of mood may be so profound that the patient's capactiy to respond appropriately is grossly impaired. Deficits in perception, language and memory may be so severe that the patient's capacity for mental grasp of his situation is effectively lost.

Id. at 23.

[42] Pedophilia is a sexual deviation in which the desired love object for the adult is a child.

[43] Wertham, *Psychoauthoritarianism and the Law*, 22 U. Chi. L. Rev. 336, 337 (1955).

[44] *Id.*, *quoting* Judge Cardozo, *The Psychiatry of Criminal Guilt* in Cahn, Social Meaning of Legal Concepts (1950).

[45] Postdiction is the explanation of past behavior on the basis of an evaluation of present behavior. For a detailed discussion of postdiction in psychiatry and psychoanalysis, see Rapaport, *The Structure of Psychoanalytic Theory*, 2 Psychological Issues 15 (1960).

[46] For purposes of this article, the emphasis will be placed upon the law of the District of Columbia and the Third Circuit, in part because the author has gained her experience in this region and in part because the case law in these jurisdictions provides all excellent focus for the ferment which has developed in the effort to fashion new standards for criminal responsibility.

[47] *United States* v. *Guiteau*, 12 D.C. (1 Mackey) 498 (1882).

[48] *Smith* v. *United States*, 36 F. 2d 548 (D.C. Cir. 1929).

the legal or moral wrongfulness of an act.[49] Even this rule was not satisfactory, however,[50] and in 1954 the *M'Naghten* rule was broadened almost to the point of nonexistence when the United States Court of Appeals for the District of Columbia Circuit held in *Durham* v. *United States*[51] that "an accused is not criminally responsible if his unlawful act was the product of a mental disease or defect."[52]

The *Durham* rule was a reformulation of the New Hampshire test announced in *State v. Pike*,[53] with one major and critical difference: the New Hampshire rule was an evidentiary one while *Durham* was a substantive rule of law.[54] This was a victory for the postdicters; but it was a pyhrric victory for they found they could not postdict with the degree of certainty required in criminal cases. But within a few years, the *Durham* rule itself rigidified. Meeting the test became a game of semantics, requiring definition and redefinition of "product" and "mental disease or defect."[55] Perforce, the rule left little room for the introduction of yet newer medical discoveries.[56]

---

[49] *See S. Glueck, Crime and Correction* 153 (1952); H. Weihofen, Mental Disorder as a Criminal Defense 82–85 (1954); L. Winslow, The Plea of Insanity in Criminal Cases 74 (1843); Glueck, *Psychiatry and the Criminal Law*, 14 Va. L. Rev. 155, 166–67 (1928). Recognition of "irresistible impulse" was also included in the recommendation of the British Medical Association to the Committee on Insanity and Crime appointed by the Lord High Chancellor in 1923. Report of the Committee on Insanity and Crime 4, 8 (1923), *cited in* Keedy, *Irresistible Impulse as a Defense in the Criminal Law*, 100 U. Pa. L. Rev. 956, 963 (1952). The same recommendation was later made to the British Royal Commission on Capital Punishment. Royal Commission on Capital Punishment Report 1949–53 275–76 (1953). For an extensive collection of medical references, see Keedy, *supra* at 989 n.201.

In fact, the New Hampshire Supreme Court saw the need for recognition of the "irresistible impulse" as early as 1869 when it stated that:

> When disease is the propelling, uncontrollable power, the man is as innocent as the weapon. . . . If a man knowing the difference between right and wrong, but deprived . . . of the power to choose between them, is punished, he is punished for his inability to make the choice—he is punished for incapacity; and that is the very thing for which the law says he shall not be punished.

State v. *Pike*, 49 N.H. 399, 441–42 (1869).

[50] In *Durham* v. *United States*, 214 F. 2d 862, 874 (D.C. Cir. 1954), the United States Court of Appeals for the District of Columbia Circuit said: "We find that the irresistible impulse test is also inadequate in that it gives no recognition to mental illness characterized by brooding and reflection and so relegates acts caused by such illness to the application of the inadequate right-wrong test."

[51] 214 F. 2d 862 (D.C. Cir. 1954).

[52] *Id.* at 874–75.

[53] 49 N.H. 399 (1869). Judge Doe, in his concurring opinion, stated the rule as follows:

> The whole difficulty is, that courts have undertaken to declare that to be law which is a matter of fact. The principles of the law were maintained at the trial of the present case, when, experts having testified as usual that neither knowledge nor delusion is the test, the court instructed the jury that all tests of mental disease are purely matters of fact, and that if the homicide was the offspring or product of mental disease in the defendant, he was not guilty by reason of insanity.

Id. at 442.

[54] The change from an evidentiary to a substantive rule made all the difference in the long run, for making legal standards of medical theories which by their very nature must grow and change is the danger about which the court in *Pike* warned. More recently, Dr. Thomas Szasz has pointed out the folly of *Durham:*

> To believe that one's own theories are facts is considered by many contemporary psychiatrists as a "symptom" of schizophrenia. Yet this is what the language of the *Durham* decision does. It specifies some of the shakiest and most controversial aspects of contemporary psychiatry (i.e., those pertaining to what is "mental disease" and the classification of such alleged diseases) and by legal fiat seeks to transform inadequate theory into "judicial fact."

Szasz, *Psychiatry, Ethics, and the Criminal Law*, 58 Colum. L. Rev. 183, 190 (1958), *quoted in* Reid, *Understanding the New Hampshire Doctrine of Criminal Insanity*, 69 Yale L.J. 367, 389–91 (1960). For a detailed comparison of the *Durham* and New Hampshire rules, see Reid, *supra*, at 389–98.

[55] In *Carter* v. *United States*, 252 F. 2d 608, 617 (D.C. Cir. 1957) "product" was defined to mean that, but for the mental disease, the accused would not have committed the act. In *McDonald* v. *United States*, 312 F. 2d 847 (D.C. Cir. 1962), "mental disease or defect" was defined as "any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls." Chief Judge Bazelon described the nature of the semantic game in *Washington* v. *United States*, 390 F. 2d 444 (1967):

> [T]he jury was often subjected to a confusing mass of abstract philosophical discussion and fruitless disputation between lawyer and witness about legal and psychiatric labels and jargon. Dr. Hamman's entire testimony on direct examination was that Washington did not have a "passive-aggressive personality," . . . did not have "an irresistible impulse," was "not mentally ill," and was not "abnormal from the standpoint of psychiatric illness".

Id. at 447–48.

Since the *M'Naghten* decision, medical terms have frequently been heard in court. The following are but a few: "defect of reason," "disease of the mind," "nature and quality of

(Continued)

Recognizing the inadequacies of *Durham*, the United States Court of Appeals for the Third Circuit in *United States* v. *Currens*[57] adopted a test to determine criminal responsibility based on the American Law Institute's Model Penal Code formulations for the insanity defense.[58] The Third Circuit rejected *Durham* for its failure to provide the jury with a standard to relate a defendant's mental disease to mens rea requirements.[59] Focusing on the guilty mind of the accused,[60] it adopted the following formulation:

> The jury must be satisfied that at the time of the committing of the prohibited act the defendant, as a result of mental disease or defect, lacked substantial capacity to conform his conduct to the requirements of the law which he is alleged to have violated.[61]

Although the District of Columbia Circuit has not as yet adopted the *Currens* formulation, there are at least indications that it is currently being considered to replace the *Durham* rule.[62] Thus, the game of redefinition of terms of limit application of the test may begin anew.

MODERN PSYCHOLOGICAL THEORY AND ITS APPLICATION TO CRIMINAL RESPONSIBILITY

As we have pointed out, many psychiatrists shared with the legal profession profound misconceptions about the significance of the *M'Naghten rule*.[63] While the psychiatrists and legal scholars attempted to alter the rules, there developed,

---

(Continued)

the act," "behavior controls," "mental disease or defect," "capacity . . . to appreciate the criminality of his conduct," and "capacity to conform his conduct to the requirements of law." See *Washington* v. *United States*, *supra* at 452 n. 23. Chief Judge Bazelon concluded after considering the history of the use of medical terminology in the courts that such terminology is vague and gives a false impression of scientific exactness. Professor Alan M. Dershowitz is quoted in the Bazelon opinion as going so far as to recommend that no legal rule should ever be phrased in medical terms. The trend appears to be away from the *Durham-Carter-McDonald* line of cases, which were attempts at defining and refining the meaning of medical terms, and into an area which leaves much to the common sense judgment of the jury.

[56] *Durham* has been accepted in only two other jurisdictions, Maine and the Virgin Islands. A. Goldstein, *The Insanity Defense* 83 (1967). However, the impact of *Durham* has been enormous, forcing a complete reevaluation of the tests for criminal responsibility. *See* Goldstein & Katz, *Abolish the "Insanity Defense"—Why Not?*, 72 Yale L.J. 853, 855 n. 5 (1963) (*Durham* cited in 140 cases between 1957 and 1963).

[57] 290 F.2d 751 (3d Cir. 1961).

[58] The court referred to the ALI Model Penal Code § 4.01(1) (Tent. Draft No. 4, 1955) which provides that:

> (1) 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 of his conduct or to conform his conduct to the requirements of the law.
>
> (2) The terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

290 F. 2d at 774.

[59] The court concluded:

> [*Durham*] omits the most important step in deciding the issue of criminal responsibility, namely that of determining the total mental condition of the defendant at the time he committed the act, and providing the jury with a standard by means of which an ultimate social and moral judgment can be rendered.

Id.

[60] The court stated:

> Our . . . objective is, therefore, to verbalize the relationship between mental disease and the concept of "guilty mind" in a way that will be both meaningful to a jury charged with the duty of determining the issue of criminal responsibility and consistent with the basic aims, purposes and assumptions of the criminal law.

Id. at 773.

[61] *Id.* at 774.

[62] The court in *Brawner* v. *United States* specifically requested that the amici curiae discuss the feasibility of replacing *Durham* with the A.L.I. test from which the *Currens* test was adopted. Brief for William Dempsey as Amicus Curiae at Appendix A, *Brawner* v. *United States*, Crim. No. 22,744 (D.C. Cir., filed Feb. 6, 1969).

[63] *See* A. Goldstein, The Insanity Defense 59–66 (1967), where it is argued:

> The critics of M'Naghten may be correct in their allegation that many defendants who are seriously ill are arbitrarily excluded from the insanity defense. But the fault lies less with the formulation of the defense than with its presentation. The responsible parties are counsel and psychiatrists who have contributed to a failure of the adversary process, allowing an unwarranted assumption of what the rule "must" mean to govern their conception of the defense.

Id. at 64.

ironically, a substantial body of psychological, and particularly psychoanalytic, knowledge which suggested that most, if not all defendants who now qualify under *Currens* could have qualified under *M'Naghten* or even the ancient formula of Sir Mathew Hale.

An examination of the meaning of the right-wrong test will serve to illustrate the interchangeability of the various formulations. Narrow interpretations of the *M'Naghten* rule suggested that verbalization of a moral principle implied understanding. But Jean Piaget's studies have shown that while a young child has some vague notion about the "rules of the game" of justice and morality, these mental faculties do not develop into their fully mature forms until the age of 15 years.[64] Interestingly enough, however, the younger child may be able to verbalize these rules which he cannot follow, thereby giving an interviewer the impression that he actually "knows" right from wrong. But his behavior indicates he can neither comprehend nor comform his conduct to the rules he has previously articulated.[65] Thus, in normal children, there seems to be an intrinsic connection between morality and the ability to think logically which is not established until early adolescence. Crosscultural studies indicate that these basic mental faculties develop similarly in all cultures provided there is sufficient development of civilization.[66] However, in social groups, where there is a deficiency in educational opportunity or other stimulating social interaction, children who show normal intelligence on *performance tests* tend to be severely retarded in tests of *intellectual function*.[67] They do not achieve the level of abstract thinking which normally develops between the ages of 12 and 15 years.[68] Based on Piaget's studies, one could argue that they never develop the functions necessary for a valid moral sense as defined by law.[69]

The implications of these recent psychological studies assume further importance in the light of the growing and increasingly disturbing body of knowledge which points to the conclusion that children in the ghettos of America often do not achieve an adult level of abstract thinking. Roger Hurley has assembled a massive amount of data which clearly supports the idea that "proverty in America is one of the most significant causes of mental retardation—far beyond the more publicized damage believed to be done by heredity or uncontrollable accidents suffered by prominent, prosperous families." [70] He further shows how the difficult social and family situation of the poor makes it impossible for the child to develop his innate psychological capabilities, explaining:

> A very intimate relationship exists between the stultification of the child's intellectual development and his psychological maturation and well-being [i.e., development of his character]. Because the impoverished child does not prosper and does not develop the intellectual equipment needed to function effectively in our society, because he remains embedded in a whole subculture of misfortune, his psychological orientation becomes gnarled and unhealthy.[71]

Gustav Bychowski has also documented the stultifying effect of the impoverised envidonment on the psychological development of the child, emphasizing the deleterious effect upon his psychic drives and paying special attention to the fate of inborn aggression.[72] While these internal forces are normally neutralized and diverted to socially productive goals, the threatening environment of the impoverished child intensifies them. This not only leads to a heightened capacity

---

[64] *See generally* Flavel, The Developmental Psychology of Jean Piaget (1963).

[65] "It is clear that the mechanism which Piaget holds responsible for the development of a rational morality is exactly the same as that which he thinks engenders rationality in general. . . . [L]ogic is the morality of thought just as morality is the logic of action." *Id.* at 206.

[66] J. Piaget, Psychology and Epistomology 50 (1971).

[67] *Id.* at 49.

[68] *Id.* at 62.

[69] These important studies on the development of intellectual function are strikingly similar to the formulations of Sir Mathew Hale for the age of 14 as the cut-off point in evaluating partial insanity. *See* note 17 *supra*. Hale's standards for the insanity test are as valid and applicable today, based on Piaget's studies, as they were in the 17th century. Indeed, our juvenile court system is a reflection of the premise that before a certain age a youth will not be held responsible as would an adult for comparable conduct. *See* Louisell & Diamond, *Law and Psychiatry: Détente, Entente, or Concomitance*, 50 Cornell L.Q. 217, 232 n. 72 (1965).

[70] R. Hurley, Poverty and Mental Retardation: A Causal Relationship 45 (1969).

[71] *Id.* at 86.

[72] Bychowski, *Psychoanalystic Reflections on the Psychiatry of the Poor*, 51 Int. J. Psychoanalysis 503 (1970).

for violent behavior in the adult, but it also deprives the ego of a major source of energy for the task of intellectual and moral development.[73] It should also be noted that it is the general instability of deprived families rather than the absence of money that does the damage.[74]

Taken together, the results of this psychological research reveal that to grasp effectively, rather than merely to verbalize, the difference between right and wrong described in the *M'Naghten* test, an individual must have reached a specified level of psychological development. This finding becomes of the utmost importance when we realize that substantial proportion of the criminally accused have never reached this stage of mental development. Thus, under the allegedly conservative *M'Naghten* rule, a large number of those criminally accused could plead not guilty by reason of insanity if knowledge of right and wrong were defined in light of recent psychological discoveries.

This is not to suggest that a new rule should supplant *Currens*, but rather to show that any broad rule can be used if it is reinterpreted in each case in light of its facts and contemporary scientific understanding. The combination of increased knowledge and open-minded interpretation could have made *M'Naghten* an effective insanity test and could now do the same for *Currens*. We need no new rules, but rather careful application of those we have.

THE INSANITY DEFENSE: THEORY VERSUS APPLICATION—A POLICY DECISION

Courts have become reluctant to redefine the insanity test in light of each new scientific finding at least in part because they have feared that the acceptance of a broader rule would lead to the disintegration of the present legal system and the social order it preserves.[75] In fact, this fear of societal breakdown, often combined with a lack of understanding of the nature and treatment of mental illness, frequently becomes the primary concern, overshadowing the key issue of criminal

---

[73] *Id.* at 509; *see* Hartmann, *Notes on the Theory of Sublimation*, 10 Psychoanalytic Study of the Child 9–29 (1955), for a comprehensive review of the theory of socialization of psychic drives.

[74] Pavenstedt notes that many well organized families living at or below welfare standards manage to raise their children to be reasonable, socially productive, law-abiding citizens. The Drifters: Children of Lower Class Families *passim* (E. Pavenstedt ed. 1967). *See generally* Hurley, *supra* note 70; Bychowski, *supra* note 72. Recent social trends which lead to the breakdown of family structure are more causative than impecuniousness. The social welfare system in this country has been a prime culprit in this regard. *Cf.* Hurley, *supra* at 165.

We see similar psychological deviation in children of affluent parents whose gratifying permissive attitudes have inhibited the child from developing moral standards. The author has on several occasions examined and/or treated affluent defendants. One young lady had been engaging in petty thievery at least since she had entered grade school. Whenever she was caught, the father compensated the victim handsomely with cash far in excess of the value of the articles stolen; and she was always permitted to keep the pilfered goods. At the age of 19 she was finally apprehended by the police, but the father's political influence enabled her to be transferred immediately to an expensive private mental hospital. On examination she proved indeed to be suffering from latent schizophrenia (which soon became acute) as are many of our poor offenders.

Other studies further cement the relationship between family disorganization and improper psychological development. Charles A. Malone and his research team found persons in the Boston slum who are so disorganized that they cannot even belong to a poverty culture. *See* The Drifters, *supra, passim*. In a population that contains many white people as well as Blacks it was found that

> [t]he primary social-psychological characteristic that appeared during the course of our study is the enormous confusion in each family about the differences between adults and children. . . . All our adults showed persisting failure to exercise self-restraint or self-discipline at crucial points when their own anxieties are aroused. . . . My first impression . . . was that we were watching "families of children" in action. You could hardly distinguish the adults from the children except for the fact that the former were larger.

Id. at 312–13.

It is no surprise that these people have a high degree of delinquency. *See* Bychowski *supra* note 72 (wherein he makes a convincing argument for viewing "hippies" and lower class social misfits as environmentally-produced schizophrenics; a view which conforms with the author's experience).

[75] See, e.g., *United States* v. *Chandler*, 393 F. 2d 920, 929 (4th Cir. 1968) (*en banc*) (the court, per Judge Haynsworth, refused to adopt an insanity rule allowing "mental abnormality" to be a defense to criminal responsibility, but instead adopted the A.L.I. test. The court commented: "The law may not serve its purpose, however, should it embrace the doctrine of determinism. . . . [T]he processes of the law would break down and society would be forced to find other substitutes for its protection."); *State* v. *Sikora*, 44 N.J. 453, 210 A. 2d 193 (1965) (a test including genetic and environmental influences was rejected since the court felt that any recognition of unconscious influences would destroy criminal responsibility as we now know it).

responsibility. As a result, the courts and their officers, motivated by justifiable fear and advised on occasion by partisan psychiatrists, have arbitrarily drawn lines which, not surprisingly, are often unreasoned, unrecognized and unarticulated.[76]

Prejudice in the Courts—Juries and Prosecutors. Prosecutors often distort the real issues involved in the determination of criminal responsibility. In each case in which the author has testified, for example, she has been asked on cross-examination by the prosecution (or directly by the court) some question about "treatability," that is, what disposition could be made of the allegedly insane defendant. It is not difficult to conclude that beneath the quest for truth which motivates these participants in an adversary proceeding, there lurks a dispropotionate concern for security and order. The state's attorney, if not the judge and jury, seems to have lost confidence in the ability of the public mental hospitals to keep the offender under civil commitment until he is cured of his disease.[77]

There is, in addition, evidence to suggest that the fear of the consequences of an insanity verdict voiced by prosecutors is shared by jurors.[78] In *State* v. *White*,[79] for instance, interviews with seven of the jurors revealed that the primary reason for the imposition of the death penalty in that case was doubt that the authorities would keep the accused institutionalized until he was no longer a danger to society.[80] The focus of the jury's concern is also illustrated by frequent inquiries to the court as to whether the defendant will be confined or automatically released should they find him not guilty by reason of insanity.[81] And although some appellate courts have fashioned standards for jury instructions to explain the consequences of insanity verdicts,[82] and others have reversed guilty verdicts on the ground that jury instructions[83] or prosecution state-

---

[76] An outstanding example is the ALI test, *supra* note 58, which eliminates repetitive criminal and anti-social behavior from consideration. The author agrees with Diamond, *supra* note 40, at 198, that this exclusion is arbitrary and capricious and legislates as a matter of law what is and is not a psychiatric condition. In the author's experience this creates a special problem in schizophrenia where the individual on examination shows an underlying schizophrenic process and whose criminal activity serves as an escape valve to avoid total breakdown.

[77] In *United States* v. *McGirr*, Crim. No. 1620–68 (D.D.C. May 7, 1970) and *United States* v. *McGirr*, Crim. No. 27–932 (D. Md. Feb. 5, 1971), *aff'd* (4th Cir. Dec. 23, 1971), the author, among others including the then chief psychiatrist of the George Washington University Hospital, testified that the defendant had suffered from latent schizophrenia all his life. It was possible to demonstrate, by postdiction, that this defect had substantially impaired his capacity to conform his conduct to the requirements of the law. A jury found him not guilty by reason of insanity in the first trial and he was committed to Saint Elizabeths' Hospital in the District of Columbia, from which he was speedily discharged as not suffering from any mental illness. He was then found guilty at the next trial at which precisely the same evidence was admitted to support the plea of not guilty by reason of insanity.

[78] Studies indicate the consequence of an insanity acquittal is one of the most important factors in the jury deliberation. Jurors disposed toward a verdict of insanity are often brought over to a guilty verdict by the argument that if declared insane the defendant would go "scot free." Weihofen, *Procedure for Determining Defendant's Mental Condition Under the American Law Institute's Model Penal Code*, 29 Temp. L.Q. 235, 247 (1956).

[79] 60 Wash. 2d 551, 374 P.2d 942 (1962).

[80] *Id.* at 573–74, 374 P.2d at 956.

[81] In *Brown* v. *State*, 8 Md. App. 462, 260 A.2d 665 (1970), the jury inquired, "If Mr. Brown, the defendant, is found insane by the jury, will he be allowed to go free or will he be put in a mental institution?" *Id.* at 465, 260 A. 2d at 668. For examples of similar jury questions, *see Register* v. *State*, 121 Fla. 9, 163 So. 219 (1935); *Campbell* v. *State*, 111 Ga. App. 219, 141 S.E.2d 186 (1965).

[82] In *Lyles* v. *United States*, 254 F.2d 725 (D.C. Cir. 1957), the court held that where the insanity defense is raised, the judge shall instruct the jury as to the consequences of a verdict of not guilty by reason of insanity, unless the defendant affirmatively requests instruction not be given, because, unlike either the verdict of guilty or not guilty, the verdict of not guilty by reason of insanity has no commonly understood meaning. *See Kuk* v. *State*, 80 Nev. 291, 392 P.2d 630 (1964), where the court held that the propriety of giving the instruction does not depend upon whether the defendant wants it. But *see Bean* v. *State*, 81 Nev. 25, 398 P.2d (1965), where the failure to instruct the jury on insanity was not prejudicial per se, since a similar explanation was given in defense counsel's summation.

[83] In *Durham* v. *United States*, 237 F. 2d 760, 761–62 (D.C. Cir. 1956) (Bazelon, J.), the court reversed the defendant's housebreaking conviction designating as "plain error" the trial judge's statement that he would send the defendant to the District of Columbia's mental facility, Saint Elizabeths Hospital, if he were found not guilty by reason of insanity, but that "if the authorities adhere to their last opinion on this point [defendant's sanity], he will be released very shortly."

In *Gambrell* v. *State*, 238 Miss. 892, 901–02, 120 So. 2d 758, 762 (1960), the following jury instruction was disapproved: "[if you] should find the defendant not guilty by reason of insanity and certify that he is dangerous to the community, then it would be the duty

(Continued)

ments [84] were prejudicial to a defendant's insanity plea, the District of Columbia courts have not taken sufficient steps to remedy the situation.

This concern with the "abuse" of the "liberal" insanity defense has, furthermore, turned the adversary system into a battle of and against the experts. To counteract the supposed abuse of the insanity defense, prosecutors often attempt to prove the defendant's sanity by any method, including unwarranted attacks on expert witnesses' testimony and qualifications.[85]

Thus, the entire judicial determination of criminal responsibility is often enshrouded by a pervasive fear of the wholesale diversion of dangerous criminals from the jails to the streets, after an all-too-short stay at a mental hospital. The resulting prejudice has caused uneven and arbitrary applications of the insanity defense which have arguably denied many defendants the right to a fair trial.[86]

(Continued)

of the court to commit him to the asylum until such time as he regained his sanity." In reversing the conviction, the Mississippi Supreme Court found this instruction to be the equivalent of saying "in effect that a verdict of not guilty on the grounds of insanity would result in freeing the accused."

In *Register* v. *State*, 121 Fla. 9, 163 So. 219 (1935), the Florida Supreme Court reversed the defendant's conviction due to the trial court's response to the jury's question about what would happen to the defendant if he were found not guilty by reason of insanity. The trial court had said that "any adjudication of insanity that will confine the Defendant in the State Insane Asylum will have to come out of the county Judge's Court based on lunacy proceedings." *Id.* at 11, 163 So. at 220. The Florida Supreme Court found that the instruction erroneously led the jury to the belief that a verdict of not guilty by reason of insanity would cause the defendant "to be released by the court upon society as a criminally inclined insane person" and therefore seriously prejudiced the accused's right to a fair trial.

For an elaboration of the problem of instructing a jury in criminal insanity cases, see *State* v. *Smith*, 220 So. 2d 313, 316 (Miss. 1969). Jury instructions incorporating references to hospital confinement in the event of acquittal are discussed more extensively in Annot., 11 A.L.R. 3d 737 (1967).

[84] *Smith* v. *State*, 220 So. 2d 313 (Miss. 1969) (held that the district attorney's arguments to the jury that a murder defendant would be committed to a state mental hospital and then almost immediately released, constituted reversible error); *State* v. *Nickens*, 403 S.W. 2d 582, 588 (Mo. 1966) (en banc) (held that the State's closing argument constituted reversible error since its effect was to "incite the jury in making their choice between conviction and acquittal on the grounds of insanity to ignore defendant's legal defense of insanity and the evidence in support or refutation thereof and to convict"); cf. *Lime* v. *State*, 479 P. 2d 608 (Okla. Crim. App. 1971) (reversible error found in the prosecution's closing argument that if the jury failed to convict on the basis of the evidence presented, they would be responsible for the defendant's future killings).

For a more detailed discussion of the prejudicial effect of statements suggesting that an accused, if found not guilty by reason of insanity, would soon be released from the institution to which he was committed, *see* Annot., 44 A.L.R. 2d 978 (1955).

[85] In *Brawner* v. *United States*, Crim. No. 22,714 (D.C. Cir., filed Feb. 6, 1969) the prosecutor summarized his case as follows:

> Ladies and gentlemen, then we came to that ink blot and the doctor said well, the usual thing about that was those anatomical things, and how many of them were there. Well, let's see, and he counts and there are four. . . . [F]ourteen responses and four of them turn out to be anatomical—hearts or whatever it happened to be.
>
> Is there something unusual about that? Is a man crazy when he sees a heart or something else four times. . . . in those little drawings, those little ink blots. After all, they are just blots of ink. Is a man crazy when he sees them?
>
> But I can say one thing: that it is a jury decision. It is your province. It is your function to take that evidence and weigh that evidence and decide whether what that doctor said, as far as you are concerned, made any sense at all.

Record at 33–38.

William Dempsey, in his brief as amicus curiae, expresses concern that this "common sense" attack is not the proper intellectual response to evaluate an ink blot test and should not be permitted. He further argues that the government should not be allowed to discredit the very types of test which it will often use to its own advantage. At present it is considered permissible and ethical. Brief for William Dempsey as Amicus Curiae at 93, *Brawner* v. *United States*, Crim. No. 22,714 (D.C. Cir., filed Feb. 6, 1969).

See King v. *United States*, 372 F.2d 383, 397 (1967) (where the prosecutor emphasized that neither of the testifying psychiatrists was a diplomate of the American Board of Neurology and Psychiatry, court held that the statement carried implication "that a more experienced expert might or would have reached a different conclusion," and that the government had the burden of proof to support such an implication).

[86] *See Lyles* v. *United States*, 254 F.2d 725, 734 (D.C. Cir. 1957) (Bazelon, J., dissenting) (concluding that the false assumption that "acquittal by reason of insanity, like outright acquittal, frees the accused to walk out on the streets may lead juries to convict, despite strong evidence of insanity at the time of the crime").

This pervasive fear appears to lead to trials based on facts and assumptions that are not material to the merits of the case and to convictions for crimes the defendant *might* commit. For examples of convictions reversed because of statements to the jury inciting fear of a defendant's premature release, *see Hale* v. *United States*, 25 F. 2d 430, 440 (8th Cir. 1928); *State* v. *Nickens*, 403 S.W.2d 582, 588 (Mo. 1966) (en banc); *Lime* v. *State*, 479 P.2d 608, 609 (Okla. Crim. App. 1971).

The Effect of Psychiatric Attitudes and Testimony. Another obstacle to the fair implementation of any insanity defense in the District of Columbia is the distorted position held by government psychiatrists who testify regularly in insanity cases.[87] Psychiatrists from the District of Columbia's mental facility, Saint Elizabeths Hospital, examine before trial virtually all defendants who plead insanity in the courts of the District[88] and later receive for treatment all those found not guilty by reason of insanity. Although they are only participants in the adversary process, these psychiatrists, because of the lack of opposing experts, have often taken the position of advisor to the court and therefore have been able to make the decisive determination in the vast majority of insanity defense cases.[89] One need only note the frequency with which trial judges depend solely upon the government psychiatrist to determine whether an indigent's mental condition warrants the appointment of a defense psychiatrist to recognize the imbalance of opposing forces.

The degree of reliance placed on the opinions of the psychiatrists from Saint Elizabeths Hospital reflects a widely espoused opinion that these experts are more reliable than independent experts because they constantly observe the criminally insane, and more impartial, because they are public servants. The prevalence of these opinions suggests that the diagnostic procedures upon which the government psychiatrists' decisions are based reflect a higher degree of accuracy and impartiality than those of their nongovernmental counterparts. But this is patently not the case. David Chambers, in a review of the pretrial practices at the hospital, points out the disparity between the theory accepted by the courts and the harsh reality.[90] His study documents a serious impairment of thorough, impartial psychiatric evaluation resulting from a lack of staff and an abundance of defendants.[91] Even the United States Court of Appeals for the District of Columbia Circuit recognizes that a defendant committed to the hospital for 60 days or more ordinarily spends no more time being examined than a defendant who is simply interviewed at the cell block.[92]

As long as manpower and treatment facilities remain inadequate, both objectivity and technical accuracy will suffer. Saint Elizabeths Hospital psychiatrists

---

[87] The testimony of the government psychiatrist (usually a staff member of the institution to which the accused will be committed if found insane) is given, by far, the greater weight at trial. See *United States* v. *Schappel*, 445 F. 2d 716, 720–22 (D.C. Cir. 1971).

[88] In *United States* v. *Schappel*, 445 F. 2d 716 (D.C. Cir. 1971) the court admitted that: "[i]t is standard practice in this jurisdiction for the court to commit criminal defendants to Saint Elizabeths Hospital for 60 days or more, for the purpose of a pretrial mental examination." *Id.* at 721.

[89] Hospital statistics included in the Report of the President's Commission on Crime in the District of Columbia (1966), although not precisely on point, bear out this conclusion. In a breakdown of psychiatric diagnoses of the 591 persons admitted to St. Elizabeths Hospital from the United States District Court for the District of Columbia and the District of Columbia Court of General Sessions after verdicts of not guilty by reason of insanity during the years 1954 through 1965, 39 persons (6.6 percent) were diagnosed on admission as "without mental disorder." Included in this latter group were those defendants who successfully used private psychiatrists or minority hospital reports contesting the St. Elizabeths Hospital finding of no illness to convince the jury of the merit of their defense. *Id.* at 537–38, table 4. The strong inference to be drawn from this statistic is that during the reported period less than seven percent of the defendants were acquitted by reason of insanity over the opposing opinion of state-appointed psychiatrists.

The effect of the hospital's pretrial determination as to presence or lack of legally recognizable mental illness was more dramatically illustrated by a change in the hospital's psychiatric classifications in 1957, to include "sociopathic personality" among the mental diseases. The consequence was a ten-fold increase in insanity acquittals. Diamond, *supra* note 40, at 192. See *Blocker* v. *United States*, 288 F. 2d 853 (D.C. Cir. 1961). Also consider the view of the government psychiatrist who stated therein, "I think these people are able to control their acts if they make the necessary effort." *Id.* at 861 n. 12 quoting *Ragsdale* v. *Overholser*, 281 F. 2d 943, n. 5 (D.C. Cir. 1960).

[90] D. Chambers, A Report on John Howard Pavilion at Saint Elizabeths Hospital, submitted to Saint Elizabeths Hospital and the National Institute of Mental Health, June 4, 1969.

[91] In *United States* v. *Schappel*, 445 F. 2d 716 (D.C. Cir. 1971) the United States Court of Appeals for the District of Columbia Circuit recognized the fallacy inherent in giving great weight to government psychiatrists' testimony. The trial judge had resolved the conflict between testimony offered by St. Elizabeths' psychiatrists and a contrary opinion by an independent psychiatrist in favor of the hospital psychiatrists, citing the greater opportunity of hospital observation and evaluation over an extended period of time. While affirming on grounds narrowed to the particular facts of the case, the Court of Appeals said that a flat rule resolving conflicting testimony in favor of St. Elizabeths psychiatrists, because of their apparent greater access to patients, lacked factual basis. *Id.* at 720–22.

[92] *Id.* at 722 n. 15; *see* Judicial Conference of the District of Columbia, Report of the Committee on Problems Connected With Mental Examination of the Accused in Criminal Cases Before Trial, 33–34 (1966).

responsible for both pretrial examinations and post-trial treatment under the present system, can only feel exhausted at the prospect of admitting additional offenders to their overcrowded facilities. This unfortunate state of affairs is bound to cloud the judgment of the examiners, even if they make a good faith effort to be impartial.[93]

Although obtaining governmental appropriations properly to staff and equip institutions like Saint Elizabeths Hospital is, at best, a difficult task, there is at least one viable alternative—greater use of independent experts. Employment of nongovernment psychiatrists to render pretrial examinations for both the prosecution and the defense would not only reduce the clinical demands on hospital staffs, but also eliminate the apparent conflicting interests currently existing between adequate treatment and objective examination.[94] If independent experts are not exclusively used for pretrial examinations, we must at least forbid examining physicians from being members of the institutions to which the patient would be committed. Such a separation of the examination and treatment functions has long been accepted in the area of civil commitment.[95]

Thus, current pretrial examination practices in the District of Columbia, as well as the prejudice in the court system itself, are powerful deterrents to a fair utilization of the insanity defense. Without the adoption of the aforementioned reforms or acceptable alternatives to them,[96] the right to a fair hearing for all those criminally accused will continue to be impaired.[97]

THE FUTURE OF THE INSANITY DEFENSE

Difficulties such as those previously described have led many experts to recommend the abolition of the insanity defense because they consider it archaic and irrelevant to the current status of society or medicine or both. Bernard Diamond, for example, argues engagingly that treating the mentally ill offenders as if he were in fact more responsible for his acts than he actually is may be therapeutic for him.[98] Thomas Szasz carries this notion to its logical conclusion by recommending the complete abolition of the insanity defense for the offender's own good.[99] Joseph Goldstein and Jay Katz note the tendency to replace the terms "responsible" and "irresponsible" with the terms "punatively correctional" and "incorrigible, requiring medical custodial care," [100] and, like Szasz, they suggest that the plea of not guilty by reason of insanity has been used to secure an indeterminate sentence for the difficult offender in violation of his civil liberties.[101]

---

[93] *See also* in this Symposium, Lefelt, *Pretrial Mental Examinations: Compelled Cooperation and the Fifth Amendment*.

[94] Experts are available at government expense for the indigent defendant. 18 U.S.C. § 3006A(e) (1970). *See, e.g., United States* v. *Taylor*, 437 F.2d 371 (4th Cir. 1971); *United States* v. *Tate*, 419 F.2d 131 (6th Cir. 1969). The author has done frequent examinations for the defense but has yet to be asked to lend her expertise to the government. In fact, advances in diagnostic and community psychiatry have made evaluation outside a mental hospital feasible, obviating the need to use St. Elizabeths Hospital for this purpose. The Sixth Circuit Court for Montgomery County, Maryland, for example, has recently sent offenders to the Day Treatment Center of the Potomac Foundation for Mental Health for observation. In one such case, a woman charged with murder was later found not guilty by reason of insanity. *State* v. *Wilgus*, Crim. No. 11061 (Md. 6th Cir., Apr. 28, 1971).

[95] *See* D.C. Code Ann. § 21–582 (1967) which provides:

> No petition, application, or certificate for commitment authorized under Sections 6(a) and 7(a) of this Act may be considered if made by a physician who . . . is financially interested in the hospital in which the alleged mentally ill person is to be detained or . . . who [is] professionally or officially connected with such hospital.

Cf. Md. Code Ann. art. 59 § 33 (1957); Mass. Ann. Laws ch. 123, § 53 (1965).

[96] Bernard Diamond asserts that mental hospitals are becoming less and less suitable to accommodate and treat mentally ill offenders since the maximum security needs for the class of patients directly contravenes present-day psychiatric treatment which emphasizes community programs and open facilities. Diamond, *supra* note 40, at 199.

[97] *See* note 86 *supra*.

[98] Diamond, *supra* note 40, at 204.

[99] *See* Szasz, Law, Liberty and Psychiatry 136–37 (1963); Szasz, *The Insanity Plea and The Insanity Verdict*, 40 Temp. L.Q. 271, 280 (1967).

[100] Goldstein & Katz, *supra*, note 56, at 861, *quoting* ALI Model Penal Code § 4.01 Comment (Tent. Draft No. 4, 1956).

[101] In *Psychiatric Justice*, Dr. Thomas Szasz illustrates this abuse of the insanity defense by reference to the case of Mr. Frederick Lynch. Lynch allegedly violated the D.C. "Bad Check" Law by overdrawing his checking account by $100 and failing to repay the amount within five days. He was arrested and pleaded not guilty. He was thereafter examined at Saint Elizabeths Hospital and found incompetent to stand trial. After he was deemed to have sufficiently recovered to be brought to trial, Lynch sought to change his earlier plea

(Continued)

Attempts have in fact been made to abolish the insanity defense by statute, but the courts have overturned them on the basis of the due process requirements of state constitutions.[102] The results of these decisions point to the realization that the abolition of the insanity defense would not only substitute an accused's constitutionally guaranteed right to a trial by a jury of his peers for a trial by a panel of expert,[103] but would also deny him the opportunity to raise the traditional plea of incapacity.[104]

---

to guilty but was refused because the Saint Elizabeths Hospital psychiatrist had determined that his criminal act was a product of a mental disease or defect. As a result, he was committed to Saint Elizabeths for treatment for an indeterminate period of time. Despite the fact that the Supreme Court reversed the not guilty by reason of insanity verdict, *Lynch* v. *Overholser*, 369 U.S. 705 (1962), Lynch remained incarcerated under the District's civil commitment statute until his death by suicide. Szasz comments:

> This travesty, not only on justice but on everyday common sense, logic, and psychiatry, has been made possible by the *Durham* decision and by the subsequent work of its defenders. The coerced plea of "not guilty by reason of insanity," thus stands as probably the single most terrible manifestation of evangelistic psychiatry riding roughshod over civil liberties and human dignity.

T. Szasz, Psychiatric Justice 226–27 (1965). *See* Goldstein & Katz, *supra* note 56, claiming that "[t]he insanity defense is not a defense, it is a device for triggering indeterminate restraint." *Id.* at 868.

[102] In *Sinclair* v. *State*, 161 Miss. 142, 132 So. 581 (1931), a state law which provided that insanity at the time of the act was no defense to a murder charge was held to violate the due process requirement of § 14 of the Mississippi constitution. Similarly in *State* v. *Strasburg*, 60 Wash. 106, 110 P. 102 (1920), the Washington Supreme Court held that the legislature cannot, without violating art. 3 § 1 of the State constitution, render an insane person amenable to criminal prosecution so long as the criminal law contemplates punishment.

[103] The Constitution provides that "[t]he trial of all Crimes, except in Case of Impeachment, shall be by Jury. . . ." U.S. Const. art III, § 2 More specifically, the sixth amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, *by an impartial jury of the State and district wherein the crime shall have been committed.*" U.S. Const. amend. VI (emphasis added). Furthermore, recent Supreme Court decisions make it clear that "[t]he fourteenth amendment imposes upon the States the requirement of Article III and the Sixth Amendment that jury trials be available to all criminal defendants." *Duke* v. *Taylor Implement Mfg. Co.*, 391 U.S. 216, 219 (1968); *Duncan* v. *Louisiana*, 391 U.S. 145 (1968).

In United States *ex rel. Toth* v. *Quarles*, 350 U.S. 11 (1955), the late Justice Black, writing for the Court, discussed the suitability of trial by experts in light of the sixth amendment guarantee:

> But whether right or wrong, the premise underlying the constitutional method for determining guilt or innocence in federal courts is that laymen are better than specialists to perform this task. This idea is inherent in the institution of trial by jury.
>
> Juries fairly chosen from different walks of life bring into the jury box a variety of different experiences, feelings, intuitions and habits. Such juries may reach completely different conclusions than would be reached by specialists in any single field . . .

Id. at 18 (dictum) (footnotes omitted).

In *Fay* v. *New York*, 332 U.S. 261 (1946), although the Court upheld the use of jury panels selected on the basis of intelligence, it reflected upon the limitations of such selections as follows: "Trial must be held before a tribunal not biased by interest in the event, *Tumey* v. *Ohio*, 273 U.S. 510 (1927). . . . Society also has a right to a fair trial. The defendant's right is a neutral jury. He has no constitutional right to friends on the jury." *Id.* at 288–89. In *Moore* v. *New York*, 333 U.S. 565 (1947), Mr. Justice Murphy warned in his dissenting opinion that:

> Jury panels are supposed to be representative of all qualified classes. Within those classes, of course, are persons with varying degrees of intelligence, wealth, education, ability and experience. . . . Any method that permits only the "best" of these to be selected opens the way to grave abuses. The jury is then in danger of losing its democratic flavor and becoming the instrument of the select few.

Id. at 570. These warnings were heeded by Congress in 28 U.S.C. § 1861 (1970), which states: "It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes."

However, the use of experts to determine criminal responsibility has been suggested by the courts. In *United States* v. *Chandler*, 393 F. 2d 920 (4th Cir. 1968), Chief Judge Haynsworth proposed:

> The ideal solution, perhaps, would be to exclude the question of criminal responsibility from the trial, leaving to penologists the answers to the question of criminal responsibility, with leave to record the court's commitment as criminal or civil depending upon the answer to that question, and to the questions of the kind and duration of the custodial care and treatment he receives. Such an arrangement would afford an opportunity for the answers to come after the development of a much fuller, more reliable record upon more thorough psychiatric and psychological testing. Unfortunately, penology, psychiatry and psychology have not advanced to the point that penologists would welcome such responsibilities or that Congress and judges would willingly entrust them to them.

Id. at 928. For a more detailed discussion of this and similar proposals see Brief for William Dempsey as Amicus Curiae at 41–45, *Brawner* v. *United States*, Crim. No. 22,714 (D.C. Cir., filed Feb. 6, 1969).

[104] Thus, it has been argued during the United States Court of Appeals for the District of Columbia Circuit's reexamination of the insanity defense that absent many legislative charges, elimination of the insanity plea would raise *mens rea* problems:

(Continued)

Despite the problems previously discussed in ensuring its fair application, the right to raise the defense of insanity, an integral part of the common law's protection of those whose wrongful acts lack criminal intent, need not be abrogated. Whatever broad legal rule is applied, the jury itself will arrive at a fair, practical definition of insanity [105] if it, rather than the experts, determines whether the defendant suffered from a disease or defect which substantially contributed to his criminal behavior. Practical considerations, such as the need for security from those who are a danger to themselves or others and the fear of overcrowded psychiatric institutions, must not only be recognized,[106] but properly circumscribed and delimited if the jury is to function properly. And if, perchance, this method of determining criminal responsibility should result in a larger number of offenders requiring treatment, the expense of providing more hospitals for them may be substantially counterbalanced by a decrease in the size and number of new penal institutions required.

The common law has, over the past several centuries, consistently protected the mentally disabled from suffering inappropriate punishment for their acts. The insanity defense, along with other defenses of incapacity in the criminal law, is far from obsolete. It provides an important safeguard for the rights of the weaker members of our society, and should continue to do so.

(Continued)

> [T]he abolition of the defense would mean either the indiscriminate incarceration of mentally ill defendants, if insanity evidence were *not* considered relevant to the *mens rea* elements of the crime, or indiscriminate acquittal without established commitment procedures, if insanity evidence *were* considered relevant to the *mens rea* elements—or more likely, both, if some types of evidence of insanity were considered relevant to the *mens rea* elements and some types not.
>
> Moreover, surely the abolition of the insanity defense would raise grave constitutional problems. However free legislatures may be to change the procedures that govern the assertion of the defense, I know of no authority to support the complete abolition of this ancient plea. . . .

Brief for William Dempsey as Amicus Curiae at 44, *Brawner* v. *United States,* Crim. No. 22,714 (D.C. Cir., filed Feb. 6, 1969).

[105] In *Adams* v. *United States,* 413 F. 2d 411, 416 (D.C. Cir. 1969), Chief Judge Bazelon stated:

> We have emphasized time and again that "in view of the complicated nature of the decision to be made—intertwining moral, legal and medical judgments—the insanity defense is peculiarly apt for resolution by the jury. As part of its task, the jury is free to believe any reasonable estimate even though different or contrary views may be reasonable." [footnotes omitted].

Cf. 1 M. Hale, *supra* note 10, at 31.

[106] The United States Supreme Court indicated the importance of such policy factors in its refusal to reject Oregon's insanity test on constitutional grounds, stating: "Moreover, choice of a test of legal insanity involves not only scientific knowledge but questions of basic policy as to the extent to which that knowledge should determine criminal responsibility." *Leland* v. *Oregon,* 343 U.S. 790, 801 (1951).

○

BOSTON PUBLIC LIBRARY
3 9999 05995 127 5