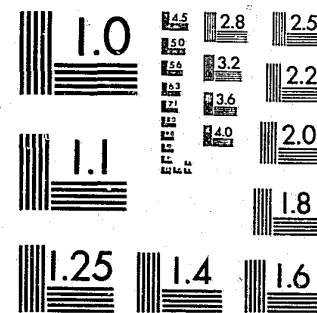


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2/8/84

THE INSANITY DEFENSE

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

SECOND SESSION

ON

**S. 818, S. 1106, S. 1558, S. 2669,
S. 2672, S. 2678, S. 2745, and S. 2780**

BILLS TO AMEND TITLE 18 TO LIMIT THE INSANITY DEFENSE

JULY 19 AND 28; AUGUST 2 AND 4, 1982

Serial No. J-97-126

Printed for the use of the Committee on the Judiciary



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THE INSANITY DEFENSE

MONDAY, JULY 19, 1982

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 10 a.m., in room 2228, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Present: Senators Hatch and Heflin.

Staff present: Vinton DeVane Lide, chief counsel; Laurie McBride, counsel; Paul Summitt, special counsel; Arthur Briskman, counsel to Senator Heflin; and Paula Argento, counsel.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. The committee will come to order.

Today we are starting hearings by the full Committee on the Judiciary on the insanity defense and how to deal with the mentally ill defendant charged with a Federal crime.

I appreciate the groundwork laid by the Subcommittee on Criminal Law in 3 days of hearings over the past few weeks, chaired by Senator Specter. I anticipate that these hearings will continue to build on the foundation of the subcommittee work and, hopefully, provide us with the information necessary to weigh the various pending legislative proposals.

I am entering these hearings with an open mind on the subject. I have not reached a firm conclusion one way or the other on the various approaches to be considered. I am firm, however, in the belief that the safety of society is of paramount consideration. Violence and brutality must not be tolerated. The Government is responsible for finding a solution to deal effectively with the mentally ill individual who engages in criminal conduct.

The modern insanity defense derives from the rules established in England in the *Daniel M'Naghten* case in 1843. That rule provided:

Every man is presumed to be sane. To establish a defense on the grounds of insanity, it must be clearly proved that at the time of the committing of 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. If he did know it, that he did not know that he was doing what was wrong.

This rule became the dominant test in the United States. While a number of States expanded the *M'Naghten* test to include a second criteria, sometimes called a control of irresistible impulse test, at the time the American Law Institute was working on the

model penal code, in the mid-1950's, the *M'Naghten* test was the insanity defense in about two-thirds of the States.

The model penal code formulation of the insanity defense which includes both cognitive and controlled criteria provides:

A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacked substantial capacity either to appreciate the criminality—wrongfulness—of his conduct or to conform his conduct to the requirements of law.

The drafters of this provision, therefore, expanded their defense to cover not only the inability of a person to distinguish right from wrong, but to record independent significance on the inability to control the behavior. In addition, to provide a substantial capacity formulation, the American Law Institute recommended explicit recognition of a vague and blurred line between the sane and the insane.

A survey in 1981 indicated that the model penal code test has been adopted in more than half of the States. It is also the basic test in the Federal courts. Some version of the *M'Naghten* defense is a test in about one-third of the States, with most of the remaining few States using some variation on the cognitive and controlled concepts. At least two States, Montana and Idaho, have abolished the defense. Also, a number of States have created an alternative verdict of "guilty but mentally ill."

It should also be noted that in the Federal courts in about half of the States, the prosecution bears the burden of disproving the elements of a defense, that is, proving insanity beyond a reasonable doubt. In the other States, the defendant is presumed to be sane and has the burden of proving their defense, usually by a preponderance of the evidence. That happens to be the case in my State of South Carolina.

I have outlined this brief history of the modern insanity defenses to provide a context and launching point for the discussion today. At least seven bills have been introduced by my colleagues on this important subject. They propose a number of different approaches which should be carefully but expeditiously considered. I am looking forward to hearing from the Attorney General of the United States and other distinguished witnesses today. We need the wisdom and experience of these dedicated and concerned persons to assist us in considering this important subject.

Now, we have a number of witnesses here today. We will take the Members of the Senate first and then the Members of the House, if there are any here, and then Mr. Attorney General, if you don't mind, we will take you next.

The first witness we have today, I believe, is Senator Orrin Hatch.

Senator Hatch, we will be glad to hear from you.

Senator HATCH. Thank you, Mr. Chairman.

Mr. Chairman, the insanity defense is always—

The CHAIRMAN. Excuse me just a minute. I didn't see Senator Heflin come in.

Senator Heflin, do you have an opening statement that you would like to give?

Senator HEFLIN. I'm glad to realize that I'm getting small in someones eyes—

Senator HATCH. That realization is a hope for one, Senator. It is not a reality.

STATEMENT OF SENATOR HOWELL HEFLIN

Senator HEFLIN. Well, I'm only going to make a very brief statement.

We all know that the *Hinckley* verdict has caused a tremendous amount of discussion of the issue of insanity and its relationship to the criminal justice system. And I think it is incumbent upon Congress to reexamine all elements of the issue of insanity in the criminal justice system, which includes the burden of proof, the issue of the standard by which the jury is instructed as to whether or not a person is not responsible for his criminal acts in the event that he suffers from a mental disease or mental defect which in the relationship of cause and effect was the—was the controlling factor or the sole factor that brought about the act. Then there is the issue involved of what happens after a person is declared not guilty by reason of insanity. What types of societal protection are then available. Will the person commit similar acts. What type of treatment should occur.

We had testimony in the subcommittee that if the *Hinckley* case had been tried, we will say in the State of Florida or the State of Pennsylvania or the State of Alabama, under the procedure there would have been no legal right to have detained him. He could have walked out completely.

All of these are issues and I think it calls for a very thorough, reasoned, and studied approach to the issue of insanity in the relationship to the criminal justice system and the many elements that are involved therein. Congress has really played very little part in the development of the issue of insanity in the criminal justice system in the past. This development has largely occurred from the field of jurisprudence courts and their decisions. And I think it's incumbent that we take a studied approach, not rush into this matter. I think that you can make mistakes by rushing into it. And I hope that careful consideration will be given to all of the problems confronting this issue.

The CHAIRMAN. Is that all, Senator?

Senator Hatch, we will be glad to hear from you.

STATEMENT OF SENATOR ORRIN G. HATCH

Senator HATCH. Thank you, Mr. Chairman.

I am delighted to be with you today and especially discussing this very important issue that all of us on the Judiciary Committee feel so strongly about. The *Hinckley* case only highlights some of the outrageous things that do occur as a result of the present status of the insanity defense. And I might mention that I find some of those problems to arise because the Congress has failed to act in this area and I'm hopeful that we can come up with some approaches that will help to resolve this very important issue.

I have long been concerned about the need for amendment of the insanity defense under title 18 of the Criminal Code. Accordingly, I have previously introduced legislation, S. 818, S. 1558, and now in S. 2572, to return sanity to the insanity defense.

Trials in which the insanity defense has been raised have often degenerated into swearing contests between opposing teams of expert witnesses, all of whom are forced to translate the language

of the psychiatric profession into the quite alien language of the legal profession. It has been a very difficult thing.

Mr. Chairman, I ask unanimous consent, or ask that my complete remarks be placed in the record, and I will try and summarize for the committee.

The CHAIRMAN. Without objection, so ordered.

Senator HATCH. With widely divergent psychological theories on the origin of behavior, it is no wonder that standards like the ALI test, which basically stated that when 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 to the requirements of the law.

And No. 2, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

I would say even in the absence of the adversarial context of the courtroom, psychiatrists wage academic wars over questions like, what conduct is the result of mental disease or how individuals learn to appreciate the criminality of their conduct. Adding the courtroom atmosphere to the internecine conflicts of the field of psychology and psychiatry only complicates the jury's task of making the fine legal distinctions. The unfortunate result of this confusion is that some individuals are able to avoid responsibility for committing heinous crimes by exploiting disagreements in the field of psychiatry and psychology. Perhaps this explains to some degree the reason that acquittals on the grounds of insanity have risen to more than 50 per year in New York State, 7 times the number in the late sixties.

The current insanity defense has also become a "rich man's defense." Only the wealthy are able to pay for a battery of expensive psychiatric witnesses from the best universities around the country to provide testimony which is likely to exculpate the defendant. The hundreds of thousands of dollars spent on Hinckley's defense is an excellent case in point. Less well-to-do defendants, on the other hand, often lack the resources to hire experts to provide favorable testimony and must instead rely upon court-appointed experts whose reports are available to both sides in the litigation. This disparity of judicial treatment and result also argues strongly for a change in the defense.

At this point I would like to turn to our task, that is finding a legislative solution to these unjust results. S. 1558, my bill, which has been incorporated into—which was incorporated into title VII of S. 2572, would add a new section to title 18 of the United States Code that would read as follows:

It shall be a defense to a prosecution under any federal statute, 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.

Perhaps I can restate the concept behind this language to make it more clear. There is no such thing as a crime per se. An act is not in and of itself criminal. For instance, any killing is not murder. A killing only becomes murder when each element of the carefully defined criminal offense is established in a court of law. These elements of a crime have developed over centuries of Anglo-American common law to define which individual acts endanger

the safety and survival of the community and require society's intervention to protect itself. One of these elements is, in nearly every instance, the mens rea, or state-of-mind requirement. The current Federal Code states that "murder is the unlawful killing of a human being." The mens rea in this crime requires the prosecution to show that the defendant planned the killing in advance of executing it and did so with a wrongful motivation. Until a killer is found by a court to have demonstrated this mens rea, he is not a murderer subject to punishment for first-degree murder.

S. 2572 allows the introduction of evidence by a defendant to show that he did not possess the proper mens rea because of a mental disease or defect. In other words, a claim of insanity is only valid in a criminal proceeding to the degree that a defendant can show that his mental condition at the time of the purported crime negated the requisite state-of-mind requirement. In the case of first-degree murder, the defendant might defeat the prosecution's case by showing that he did not possess adequate mental control or capacity to maliciously plan to kill. The jury's deliberations would be limited to the same deliberations undertaken in any criminal trial: Did the prosecution prove each element of the offense beyond a reasonable doubt?

The court would not become involved in a juridical circus with "experts" trying to convince the jury that the defendant could appreciate right and wrong, the famous *M'Naghten* rule, or that the defendant was subject to an "irresistible impulse," or that the defendant's act was the product of mental disease and that the defendant was unable to conform his actions to the requirements of the law, in other words the ALI test. Instead, the jury would make the same strictly legal judgment that juries have been making for centuries: Did the prosecution prove each element of the offense beyond a reasonable doubt?

Under S. 2572, the "insanity defense," and I put that in quotes, because strictly speaking there would be no "insanity defense," but only an argument by the defendant that the crime was not committed because one of its elements, namely mens rea, was absent, would be confined to legal issues. The complexity of modern psychological theory, with its unknowns, would be irrelevant, except to the degree that these theories might shed some light on whether the defendant demonstrated a mens rea. In the words of Chief Justice Burger, who commented while still a circuit judge:

No rule of law can possibly be sound or workable which is dependent on the terms of another discipline whose members are in profound disagreement about what those terms mean.

This bill makes contentions about the mental state of the defendant, a question to be addressed within the legal terms of the state-of-mind requirements of any criminal offense.

Perhaps I should specifically address what this means about burdens of proof. Centuries of criminal procedure would continue to dictate this course, as well. The prosecution, of course, has the initial burden to demonstrate that each legal element is present in the act that is purported to be a crime. If the prosecution fails to show that each element is present, the defense could move for a directed verdict before it even presents its arguments and the court

would be compelled by law to dismiss the case. Once the prosecution has established that the elements are present, the defense makes its argument that one or more of the elements is not present, based on the facts of the case. Each side gets one more chance to rehabilitate its contentions and undermine the other's arguments before the jury takes over. The jury must decide if the prosecution has established each element of the offense beyond any reasonable doubt.

Let us take the *Hinckley* case, for example. The prosecution presented evidence that Hinckley intended to kill the President, what he referred to as an "historic act" in one letter, and that he planned the killing in advance. Unless the defense could have shown that his mental condition made it impossible for him to plan or to form an intent, Hinckley would have been found guilty—the likely outcome under the facts of that case. Hinckley admitted intent and planning, but contended under the ALI test that he "lacked substantial capacity to appreciate the criminality of his conduct or to conform to the requirements of the law."

Current criminal procedures handle perfectly well the question of burdens of proof in criminal adjudications. We have no need to alter centuries of precedents on that subject. We need only confine the scope of the insanity defense to the mens rea requirements of any criminal offense. As I mentioned earlier, this means, in effect, that there will be no affirmative insanity defense. Instead, the defendant will be able to argue that the crime was not committed because its state-of-mind element was not proven beyond a reasonable doubt. Since S. 2572, in effect, abolishes the insanity defense, neither the defendant nor the prosecution has the burden of proof on it.

Upon proof beyond a reasonable doubt that an individual committed the prohibited conduct with the required state of mind, the individual would be found guilty of the offense. At the time of sentencing, however, the court would hear whatever further psychiatric testimony was available to assist it in determining the conditions under which the defendant would be committed to a prison, mental hospital, or some other facility.

Next, Mr. Chairman, I'd like to briefly comment on the distinction between the various legislative approaches pending before the committee.

S. 1106 adopts essentially the same approach outlined in my bills, S. 818, S. 1558, and title VII of S. 2572. It uses the same approach of restricting the scope of the insanity defense to the established legal criteria of the mens rea element of the crime. In one fundamental respect, however, it differs. The plea which the defendant would enter to invoke the defense in S. 1106 would be "guilty but insane," instead of "not guilty only by reason of insanity," which I prefer. This misconstrues the nature of the mens rea defense. A crime is only a crime if all elements of its definition are present. If the defendant can show that he did not have the proper state of mind he did not commit that crime. It, therefore, makes no sense to call him guilty of a crime he did not, by its own terms, commit. A more correct legal characterization of his plea is that he is not guilty, but that not guilty plea is only possible because he lacks the mens rea by reason of insanity.

Once the defendant has shown the lack of mens rea, both S. 1106 and my bills adopt the same approach of authorizing the court to supervise the individual's custody. Instead of the current system which allows a panel of psychiatrists to determine that an individual should be released as early as 50 days after he has been committed to a mental institution, the court would be empowered to insure that no dangerous individuals would be prematurely transferred away from a secure treatment facility.

Another bill before this committee, S. 2658, changes the burden of proof to the defendant to prove, under the existing American Law Institute or *M'Naghten* tests, that he did not know the nature and quality of his actions or did not know the wrongfulness of his actions. While shifting the burden to the defendant diminishes the chances that responsible individuals might escape responsibility for their criminal behavior, this approach perpetuates the basic problems of the current law.

In the first place, the terms of psychology will continue to muddle legal decisions. Courts and juries will struggle to make decisions with profound legal consequences based on the vague standards of the ALI and *M'Naghten* tests.

Second, a point related to the first, I might add, the guilt or innocence of particular defendants may still depend upon the credibility of a battery of "expert witnesses," and I would put that in quotes, instead of on the legal question of whether the defendant committed the crime as defined in law. This perpetuates all the problems of the "rich man's defense" with countless resources of psychiatrists and courts poured into a juridical circus of psychological testimony extraneous to issues of mens re and the elements of the crime.

Third, this approach uses current law to handle a defendant who successfully convinces a court that he is insane. The defendant is surrendered to the jurisdiction of the civil authorities who place him in a mental institution until a panel of doctors, for reasons perhaps completely unrelated to legal obligations, such as overcrowding in the asylum, decide he should be released. As the media has learned in the *Hinckley* case, this could occur within 50 days under such a system.

Finally, this burden shift still would exculpate any defendant who can stretch the elastic ALI, American Law Institute, and *M'Naghten* language to show by a mere preponderance of the evidence that he was insane; 51 factors out of 100 on the side of insanity exculpate an individual who otherwise has committed every element of a criminal offense. This would have the damaging result of undermining the public's respect for our legal institutions. In the long run, this may be the worst consequence of failing to depart from our current misguided course.

Finally, Mr. Chairman, let me just go to the last few thoughts I have. I would like to emphasize once more the proposed reform of the insanity defense would promote better than any present insanity defense two objectives that are critical to a sound system of criminal justice: First, it would promote the integrity of the system, and promote protection of the community, by insuring that individuals who are found guilty of an offense with the requisite mens rea are treated as blameworthy criminals.

Second, it would focus genuine promise of rehabilitation by allowing the court to focus upon their medical condition separately from a determination of their legal guilt. Nebulous and extraneous issues would be removed from the consideration of each of these questions. For these very important reasons, I would strongly recommend that my colleagues support this crucial amendment.

The CHAIRMAN. Thank you, Senator.
 Senator HATCH. Thank you, Mr. Chairman.
 [Prepared statement follows:]

STATEMENT OF SENATOR ORRIN G. HATCH

JUDICIARY COMMITTEE HEARING

THE INSANITY DEFENSE

Mr. Chairman, I am delighted to appear before you to discuss this most crucial and relevant issue. I have long been concerned about the need for amendment of the insanity defense under title 18 of the Criminal Code. Accordingly, I have previously introduced legislation, S. 818, S. 1558, and now in S. 2572, to return sanity to the insanity defense.

In the wake of extensive media coverage of the Hinckley assassination attempt and trial, the public outcry for changes in the insanity defense has been clear and sustained. Few aspects of criminal law, in recent memory, have provoked as much criticism of our courts and judicial system as has the use of the insanity defense.

Generations of Federal judges have struggled to define the circumstances under which mentally abnormal offenders should be held responsible for their conduct, without notable success. As Dr. Abraham Halpern, the distinguished psychiatrist, has noted, "insanity has come to mean anything anybody wants it to mean."

The traditional insanity defense is both a legal anachronism and a concept ill-suited to modern psychological theory. It presents issues -- important issues -- that are not susceptible of intelligent resolution in the courtroom environment. Trials in which the insanity defense has been raised have often degenerated into swearing contests between opposing teams of expert witnesses, all of whom are forced to translate the language of the psychiatric profession into the quite alien language of the legal profession. It is this attempt to marry these two incompatible disciplines that has created the current confusion.

The insanity defense evolved principally as a means by which English jurists could avoid--in a legally rational manner--the discomfiture of condemning to death a felon who was so mentally deranged that his execution would affront ordinary moral sensibilities. As Lord Erskine stated in the earliest years of the 19th century, "Delusion...is the true character of insanity." Individuals suffering in this manner could not truly be considered "responsible" in the legal sense.

Although the criminal law over the years substituted imprisonment and lesser penalties for capital punishment and substituted judicial discretion for mandatory penalties, the insanity defense, as an exception to the ordinary consequences of criminal conduct, survived the former strict legal requirements which it had been designed to avoid.

Even within the psychological community, the insane asylum, which once served as a warehouse for the criminally insane, has become just a brief stepping stone back to the street.

In the United States, the Congress has never enacted legislation on the insanity defense. Its development has largely been left to the courts, particularly the courts of appeals. The foundation of the present defense was laid down in M'Naghten's case (8 Eng. Rep. 718 House of Lords, 1843) in which it was stated--

To 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 laboring under such 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, he did not know he was doing what was wrong.

The so-called "right-wrong" test of insanity posited in M'Naghten has gradually, but steadily, been broadened over the years.

Most importantly, the M'Naghten Test, a purely cognitive test was supplemented by a volitional test stating that an individual who could discern right from wrong, yet who, for reasons of mental disease, could not control his actions, could avail himself of the insanity defense. As it came to be known, the "irresistible impulse" rider to M'Naghten, inquired into whether an offender was able to restrain his actions once having been shown to appreciate the wrongness of such actions, see Davis v. United States, 165 U.S. 373 (1897). In that case the court held --

An accused is not criminally responsible if his unlawful act was the product of mental disease or defect.

After nearly two decades of interpreting the provisions of this rule, provisions whose meanings were by no means widely agreed upon, the District of Columbia court in 1972 adopted a formulation that had previously been adopted by other circuits.

The American Law Institute's model penal code (section 4.01 proposed official draft 1962) stated 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 to appreciate the criminality of his conduct or to conform 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 anti-social conduct.

It is this language that serves today as direction for the insanity defense in the Federal courts.

With widely divergent psychological theories on the origin of behavior, it is no wonder that standards like the ALI test become completely unmanageable when interpreted by different psychiatric experts representing opposing sides of a legal dispute. Even in the absence of the adversarial context of the courtroom, psychiatrists wage academic wars over questions like what conduct is the result of mental disease or how individuals learn to appreciate the criminality of their conduct. Adding the courtroom atmosphere to the internecine conflicts of the field of psychology only complicates the jury's task of making fine legal distinctions. The unfortunate result of this confusion is that some individuals are able to avoid responsibility for committing heinous crimes by exploiting disagreements in the field of psychology. Perhaps this explains to some degree the reason that acquittals on the grounds of insanity have risen to more than 50 per year in New York State -- seven times the number in the late '60s.

The current insanity defense has also become a "rich man's defense." Only the wealthy are able to pay a battery of expensive expert psychiatric witnesses from the best universities around the country to provide testimony likely to help exculpate the defendant. The hundreds of thousands of dollars spent on Hinckley's defense is an excellent case in point. Less well-to-do defendants, on the other hand, often lack the resources to hire experts to provide favorable testimony and must instead rely on court-appointed experts whose reports are available to both sides in litigation. This disparity of judicial treatment and result also argues strongly for change in the defense.

At this point I would like to turn to our task -- finding a legislative solution to these unjust results. S. 1558, my bill which has been incorporated into Title VII of S. 2572, would add a new section to title 18 of the United States Code that would read as follows:

It shall be a defense to a prosecution under any Federal statute, 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.

Perhaps I can restate the concept behind this language to make it more clear: There is no such thing as a crime per se. An act is not in and of itself criminal. For instance, any killing is not murder. A killing only becomes murder when each element of the carefully defined criminal offense is established in a court of law. These elements of a crime have developed over centuries of Anglo-American common law to define which individual acts endanger the safety and survival of the community and require society's intervention to protect itself. One of these elements is, in nearly every instance, the mens rea, or state of mind requirement. The current federal code states that "Murder is the unlawful killing of a human being with malice aforethought, 18 U.S.C. 1111. The mens rea in this crime requires the prosecution to show that the defendant planned the killing in advance of executing it and did so with a wrongful motivation. Until a killer is found by a court to have demonstrated this mens rea, he is not a murderer subject to punishment for first degree murder.

S. 2572 allows the introduction of evidence by a defendant to show that he did not possess the proper mens rea because of a mental disease or defect. In other words, a claim of insanity is only valid in a criminal proceeding to the degree that the defendant can show that his mental condition at the time of the purported crime negated the requisite state of mind requirement. In the case of first degree murder, the defendant might defeat the prosecution's case by showing that he did not possess adequate mental control or capacity to maliciously plan to kill. The jury's deliberations would be limited to the same deliberations undertaken in any criminal trial: Did the prosecution prove each element of the offense beyond a reasonable doubt?

The court would not become involved in a juridical circus with "experts" trying to convince the jury that the defendant could appreciate right and wrong (the M'Naghten Rule) or that the defendant was subject to an "irresistible impulse" (Davis case addition to M'Naghten) or that the defendant's act was the product of mental disease and that the defendant was unable to conform his actions to the requirements of the law (ALI test). Instead the jury would make the same strictly legal judgment that juries have been making for centuries: Did the prosecution prove each element of the offense beyond a reasonable doubt?

Under S. 2572, the "insanity defense" (and I put that in quotes because strictly speaking there would be no "insanity defense" but only an argument by the defendant that the crime was not committed because one of its elements, namely mens rea, was absent) would be confined to legal issues. The complexity of modern psychological theory with its unknowns would be irrelevant, except to the degree that these theories might shed some light on whether the defendant demonstrated a mens rea. In the words of Chief Justice Burger, who commented while still a circuit judge: "No rule of law can possibly be sound or workable which is dependent on the terms of another discipline whose members are in profound disagreement about what those terms mean." Campbell v. U.S. 307 F. 2d 597, 612 (1962). This bill makes contentions about the mental state of the defendant a question to be addressed within the legal terms of the state of mind requirements of any criminal offense.

Perhaps I should specifically address what this means about burdens. Centuries of criminal procedure would continue to dictate this course as well. The prosecution, of course, has the initial burden to demonstrate that each legal element is present in the act that is purported to be a crime. If it fails to show that each element

is present, the defense could move for a directed verdict before it even presents its arguments and the court would be compelled by the law to dismiss the case. Once the prosecution has established that the elements are present, the defense makes its argument that one or more of the elements are not present based on the facts of the case. Each side gets one more chance to rehabilitate its contentions and undermine the other's arguments before the jury takes over. The jury must decide if the prosecution has established each element of the offense beyond any reasonable doubt.

Let us take the Hinckley case for example. The prosecution presented evidence that Hinckley intended to kill the President (what he referred to as an "historic act" in one letter) and that he planned the killing in advance. Unless the defense could have shown that his mental condition made it impossible for him to plan or to form an intent, Hinckley would have been found guilty -- the likely outcome under the facts of that case. Hinckley admitted intent and planning but contended under the ALI test that he "lacked substantial capacity to appreciate the criminality of his conduct or to conform to the requirements of the law."

Current criminal procedure handles perfectly well the question of burdens of proof in criminal adjudications. We have no need to alter centuries of precedents on that subject. We need only confine the scope of the insanity defense to the mens rea requirements of any criminal offense. As I mentioned earlier, this means, in effect, that there will be no affirmative insanity defense. Instead the defendant will be able to argue that the crime was not committed because its state of mind element was not proven beyond a reasonable doubt. Since S. 2572, in effect, abolishes the insanity defense, neither the defendant nor the prosecution has the burden of proof on it.

Upon proof beyond a reasonable doubt that an individual committed the prohibited conduct with the required state of mind, the individual would be found guilty of the offense. At the time of sentencing, however, the court would hear whatever further psychiatric testimony was available to assist it in determining the conditions under which the defendant would be committed to a prison, mental hospital, or some other facility.

These points in favor of Title VII of S. 2572 are covered very concisely by a letter from the Attorney General endorsing this title of the Crime Control Act:

This proposed reform of the present insanity defense would strictly limit sanity issues which may be raised at trial to those bearing upon the one truly relevant mental element involved in every criminal prosecution: whether the defendant had the mens rea or legal state of mind necessary for the offense. . . Under the mens rea approach, psychiatric testimony to the effect that the defendant did not know right from wrong or was acting in response to an irresistible impulse would be irrelevant and inadmissible during the guilt determination phase of a criminal trial. Of course such evidence could be admitted during the sentencing stage if the defendant is found guilty.

By limiting the insanity defense to the one truly legal issue, we would avoid the miscarriages of justice and the gross deviations from basic rules of semantics which occur when a defendant is found "not guilty by reason of insanity" even where it is clear that he committed the offense and had the requisite legal state of mind. This, we believe, is the cause of the recent public outrage over the verdict in the Hinckley case.

Adoption of the mens rea approach would also avoid the unseemly "battle of psychiatric experts," the waste of judicial, prosecutorial, and medical resources and the unfairness arising from the present insanity procedure. On this last point, present law favors well-to-do over economically disadvantaged defendants. Furthermore, limitation of the insanity defense to the one legal issue -- mens rea -- avoids the necessity of further complicating the law by shifting burden of proof or by reducing the standard of proof; in fact, the government must always, under our constitution, bear the burden of proof beyond a reasonable doubt as to the state of mind element of every criminal offense. Letter of Attorney General William F. Smith, July 1, 1982, 128 Cong. Rec. S. 7869.

This insightful letter from our Attorney General restates with precision the reasons that the approach of Title VII of S. 2572 is the most reasonable way to solve the dilemmas created by the current insanity defense procedure.

Next, Mr. Chairman, I would like to briefly comment on the distinctions between the various legislative approaches pending before the Committee.

S. 1106 adopts essentially the same approach outlined in my bills, S. 813, S. 1558, and Title VII of S. 2572. It uses the same approach of restricting the scope of the insanity defense to the established legal criteria of the mens rea element of the crime. In one fundamental respect, however, it differs. The plea which the defendant would enter to invoke the defense in S. 1106 would be "guilty but insane," instead of "not guilty only by reason of insanity." This misconstrues the nature of the mens rea defense. A crime is only a crime if all elements of its definition are present. If the defendant can show that he did not have the proper state of mind, he did not commit that crime. It, therefore, makes no sense to call him "guilty" of a crime he did not, by its own terms, commit. A more correct legal characterization of his plea is that he is "not guilty," but that "not guilty" plea is only possible because he lacks the mens rea "by reason of insanity."

Once the defendant has shown a lack of the mens rea, both S. 1106 and my bills adopt the same approach of authorizing the court to supervise the individual's custody. Instead of the current system, which allows a panel of psychiatrists to determine that an individual should be released as early as 50 days after he has been committed to a mental institution, the court would be empowered to ensure that no dangerous individuals would be prematurely transferred away from a secure treatment facility.

Another bill before the Committee, S. 2658, changes the burden of proof to the defendant to prove, under the existing ALI or M'Naughten tests, that he did not know the nature and quality of his actions or did not know the wrongfulness of his actions. While shifting the burden to the defendant diminishes the chances that responsible individuals might escape responsibility for their criminal behavior, this approach perpetuates the basic problems of current law.

In the first place, the terms of psychology will continue to muddle legal decisions. Courts and juries will struggle to make decisions with profound legal consequences based on the vague standards of the ALI and M'Naughten tests.

Second, a point related to the first, the guilt or innocence of particular defendants may still depend on the credibility of a battery of "expert witnesses," instead of on the legal question of whether the defendant committed the crime as defined in law. This perpetuates all the problems of the "rich man's defense" with countless resources of psychiatrists and courts poured into a juridical circus of psychological testimony extraneous to issues of mens rea and the elements of the crime.

Third, this approach uses current law to handle a defendant who successfully convinces a court that he is insane. The defendant is surrendered to the jurisdiction of the civil authorities who place him in a mental institution until a panel of doctors, for reasons perhaps completely unrelated to legal obligations (such as overcrowding in the asylum), decide he may be released. As the media has learned in the Hinckley case, this could occur within 50 days under such a system.

Finally, this burden shift still would exculpate any defendant who can stretch the elastic ALI and M'Naughten language to show by a mere preponderance of the evidence that he was insane. 51 factors out of a hundred on the side of insanity exculpate an individual who otherwise has committed every element of a criminal offense. This would have the damaging result of undermining the public's respect for our legal institutions. In the long run, this may be the worst consequence of failing to depart from our current misguided course.

Finally, permit me to recount a number of arguments that weigh in favor of the changes in S. 2572 or S. 1558:

First, those individuals suffering the most serious forms of mental disabilities are unlikely to be criminally convicted under any circumstance. Such individuals will either be found incompetent to stand trial in the first place or continue to be acquitted under the proposed amendment's *mens rea* test. It is in the case of borderline sociopaths or anti-social personalities that this test differs from the American Law Institute and other tests.

Second, it has become very difficult to separate mental illness from environmental and economic conditioning, due to the determinist ideology of the 20th century. The objective of S. 1558 is to keep the insanity defense an exception not a rule.

Third, the present insanity defense is an imprecise way for determining whether individuals ought to be institutionalized and, if so, to what type of institution. My proposed change would allow this question to be faced directly and explicitly by the court. Rather than focusing only upon some elusive and fluctuating concept of responsibility at the time of the offense, the focus would be upon insuring proper means of treatment of the underlying mental problem. Under the amendment, it is likely that the number of truly abnormal individuals assigned to traditional prisons would be reduced since the sentencing options of the sentencing judge would be increased. This would keep the jurisdiction of the case in the hands of the criminal court and not pass it on to the second hand knowledge of civil authorities.

Fourth, the amendment would encourage more effective use of professional psychiatric resources, as well as legal resources. Highly trained psychiatrist and psychologists could devote more of their time as clinicians and advisors, not tying up their valuable talents in courtroom battles.

Fifth, the present insanity defense, it has been suggested, encourages juries to overlook the fundamental question of whether or not defendants may simply not be guilty by virtue of lacking in *mens rea*.

Finally, and in some respects the most important, the insanity tests, as they have become increasingly broad in application, have undermined significantly public respect for and confidence in the criminal justice system as they have resulted in the release of individuals clearly dangerous to society.

I will not cite specific horror stories, but suffice it to say they are not difficult to identify. I am confident that each of us here is familiar with instances in which the present insanity defense has been abused, and, quite probably, in which acquitted individuals have wreaked further violence upon society. In the past several months alone, we have witnessed invocation of the defense

in several highly celebrated trials, including those of former San Francisco city supervisor Dan White and John Wayne Gacy in Chicago and most recently John W. Hinckley, Jr.

I feel that there is a need for reform, and the time is now. John Hinckley, Jr. was not the first attempted presidential assassin to be acquitted on the insanity defense. Richard Lawrence's pistol misfired when aimed at Andrew Jackson in 1835 and John Schrank wounded Theodore Roosevelt in 1912.

Mr. Chairman there is an obvious difference between these cases and the Hinckley case. Both of these earlier assassins had definite psychotic illusions. Andrew Jackson's assailant believed he was King Richard III, and the man who wounded Theodore Roosevelt claimed the shooting was ordered by President McKinley's ghost. There is another notable difference. Richard Lawrence went to an asylum for life, and Schrank went to a mental ward for 31 years where he died.

Contrast these severe symptoms of psychosis and the hospitalization that was diagnosed in treatment, with the mild behavior which Hinckley exhibited and the length of hospitalization which will most probably be quite short.

As is evidenced by these contrasting cases, there has been a marked change in the meaning and the action of the insanity defense in the past century.

Proponents of the insanity defense argue that there is no need to change the existing insanity defense laws, because criminal defendants plead insanity in only a small fraction of the cases around the country, but the number of such cases has been growing rapidly. In addition, the insanity defense, once invoked, almost exclusively in cases where the defendant was charged with murder, is now being used in trials for "less serious" offenses with increasing frequency. The most tragic example of this extension is surely the use of the insanity defense in cases of rape and child abuse, where repeated acquittal may be gained on grounds of insanity, for offenses which are generally held as crimes having high rates of recidivism and low rates of success in the ability to "treat" and "cure" those known to have a tendency to commit these offenses.

Mr. Chairman there are, in my opinion, few legislative acts in the area of criminal justice that this body can take that will do more to restore public confidence in our system than by reforming the present antiquated insanity defense.

The proposed amendment would concentrate trial exploration of the defendant's mental state in the sole area in which it is legally meaningful--the evaluation of the necessary *mens rea*--while enabling the post-trial process to concentrate upon the question of disposition of the defendant, free from the artificial fetters of evidentiary rules.

This amendment would end the insanity charade that has demeaned the Federal courts for too long. It would establish an effective means by which offenders could appropriately be channeled into either the punitive-correctional system or the medical-legal system. Most importantly, it would insure that this determination took place in an environment that is suited for making it, rather than, as is presently the case, in an environment in which legal and psychiatric questions are confusingly and inappropriately intertwined.

There is among psychiatrists simply nothing that even remotely approaches a consensus on what constitutes insanity or on how such a condition is to be medically determined, much less legally determined.

The proposed reform of the insanity defense is supported by a large number of responsible observers, including doctors Seymour Halleck and Karl Menninger, law professors Norval Morris, Fr. James B. McGoldrick, and Joseph Golstein, the Justice Department under Edward Levy, 62 percent of the respondents of a survey conducted among

the departments of mental health in the States by the Senate Judiciary Committee, a number of local and State bar associations, and a committee of the American Bar Association. In addition, a number of States and foreign countries have adopted formulations similar to the proposed language.

To emphasize once more, the proposed reform of the insanity defense would promote better than any present insanity defense two objectives that are critical to a sound system of criminal justice: First, it would promote the integrity of the system, and promote protection of the community, by insuring that individuals who are found guilty of an offense with the requisite *mens rea* are treated as blameworthy criminals. Second, it would promote genuine promise of rehabilitation by allowing the court to focus upon their legal guilt. Nebulous and extraneous issues would be removed from the consideration of each of these questions. For these very important reasons, I strongly recommend that my colleagues will support this most crucial amendment.

The CHAIRMAN. Senator Quayle?

Our second witness today is Senator Quayle who is the sponsor of an amendment dealing with the form of insanity defense and establishing a verdict of guilty for the mentally ill.

Senator Quayle?

Senator QUAYLE. Thank you, Mr. Chairman.

The CHAIRMAN. Now, I want to announce that we don't put a full statement in the record and then turn around and read the statement.

Now, do you want to put your whole statement in the record and highlight it, or do you want to read the whole statement?

Senator QUAYLE. No, sir, I do not want to read the whole statement.

The CHAIRMAN. Well, that is duplication and we just had that occur just a moment ago. And I've got to straighten that record out now as not to duplicate it. There is no use to make the Government pay a lot of printing costs for nothing, as you understand.

Senator QUAYLE. I certainly understand.

The CHAIRMAN. So, you take your choice now. You can highlight your statement or you can read your whole statement.

Senator QUAYLE. I would prefer to highlight my statement here.

The CHAIRMAN. Without objection, your entire statement will go in the record and then you can highlight it in a few words.

STATEMENT OF HON. DAN QUAYLE, A U.S. SENATOR FROM THE STATE OF INDIANA

Senator QUAYLE. Thank you. Thank you very much, Mr. Chairman, I will try to speak in a few words and take less than 5 minutes.

First of all, thank you very much for holding these hearings in such an expeditious fashion.

Now, I'm not alone in expressing the outrage and discomfort that we had with the verdict of the *Hinckley* case. We're not disconcerted about the jury, the judge, or the trial itself, but we are disconcerted about the verdict. And that is why I'm here today. I believe that I could probably summarize the feeling of my constituents by reading a very short sentence from a constituent in the State of Indiana. He says:

By all means, let us help people who are truly insane. But let us not give a license to troubled, frustrated people to kill innocent people with impunity.

Mr. Chairman, there are a number of victims throughout this whole affair, as a matter of fact, there are many victims of the whole insanity issue. We can just focus in on the *Hinckley* case, and talk about President Reagan, talk about Jim Brady, Jodie Foster, the Secret Service agent and policeman that were hurt, but I believe we ought to look at the victim possibly being Congress, if we fail to act on this matter. You might ask the question, why am I interested in this particular issue?

Well, I come from the State of Indiana, as all of you know, and in 1977 we had a situation similar to the *Hinckley* case. It was dealing with a man by the name of Tony Kiritsis. This man wired a shotgun to the head of a bank executive, and held him hostage for 24 hours. Kiritsis went to trial very quickly thereafter, where he was found insane, and, therefore, not guilty.

Now, Mr. Chairman, the General Assembly of Indiana acted. In 1978 passed a law that I want to recommend to you today. My legislation is copied after that Indiana law and it basically adds a new element to the insanity issue. This law says that you may raise the defense of insanity but there also can be a verdict of guilty. In other words, a verdict of insane but guilty as well.

My legislation, Mr. Chairman, does essentially three things:

First of all, it does keep the plea of insane and not guilty as a defense. The jury can, in fact, still find that verdict.

Second, we change the burden of proof. From now on the prosecution, if the issue of insanity is raised, has to prove by a preponderance of the evidence that the defendant was sane. We are saying that if the defendant raises that issue of insanity, that not by "reasonable doubt," but by a "preponderance of the evidence," I believe as your home State, Mr. Chairman, South Carolina uses, that by a "preponderance of the evidence" the defendant must show that he was insane.

And finally, Mr. Chairman, we establish a verdict of guilty and mentally ill. And I might, just for clarification, call this a middle ground because the jury could still find insane and not guilty, but they can also find insane and guilty. I suppose most of the cases that would come down in this area would be where there is really conflicting psychiatric testimony on the insanity issue.

In other words, if in fact the jury can't find beyond a reasonable doubt that the accused was sane, but yet there is no doubt that the accused committed the act, the jury could, as sort of a safe middle position, find the accused insane, but "guilty" instead of "not guilty."

So, these are the three changes, Mr. Chairman, that my bill effects. It preserves the verdict of "insane and not guilty," it places the burden of proof on the defendant to show insanity, and it establishes a new verdict of "guilty and mentally ill."

The CHAIRMAN. Thank you very much, Senator. We are glad to have you with us. We appreciate your presence here and the statement you have made.

Senator QUAYLE. Thank you.

[The prepared statement of Senator Quayle follows:]

PREPARED STATEMENT OF SENATOR DAN QUAYLE

Mr. Chairman, I applaud your moving quickly to hold these hearings concerning the criminal defense of insanity while the issue is burning in the minds of most Americans. You have moved to "strike while the iron is hot," and I believe the Congress will achieve much needed reform in the Federal criminal laws because of your agility and skill as Chairman of this Committee. I thank you for the opportunity to testify this morning.

Mr. Chairman, like many of my colleagues, I was surprised at and disappointed in the verdict in the case of Mr. John W. Hinckley, Jr., "the man who tried to assassinate President Reagan." But I was not disappointed in the judge, who merely followed the law, or the jury, who I believe followed the instructions of the court. The judge, the jury, and the entire court did their duty as set forth by the law, in finding Mr. Hinckley innocent by reason of insanity.

I am not alone in my concern for this particular case. In addition to many of my Colleagues, including the Senator from Utah, Mr. Hatch, and the Senator from Pennsylvania, Mr. Specter, who have spoken out on this issue, many across the Nation have expressed their disbelief and disappointment in our Federal laws and even our judicial system itself. Criticism of the Hinckley case has been heard from every corner of our country. The plain question put to me by my constituents is "what happened?"

How can the man known to have shot the President and wounded three others in a violent attack, an act seen by millions, be eligible for possible release into society only 50 days after the close of his trial?

I would like to share with the Committee for the public record a sample of those comments from my constituents:

This case vividly illustrates the urgent need to drastically reform the legal system which has for too long pampered criminals while the so-called 'rights' of the innocent law-abiding victims are ignored.

Another writes:

How can people be stimulated to be constructive with decadent demoralizing court decisions such as this?

And finally:

By all means, let us help people who are truly insane. But let us not give a license to troubled, frustrated people to kill innocent people with impunity.

The questions and concerns of all of us were put most succinctly in a recent Washington Post editorial by Mr. James Grady, a local author. As Mr. Grady said, there are victims scattered throughout John Hinckley's path, including Jodie Foster, Ronald Reagan, James Brady, Thomas Delahanty, and Timothy McCarthy. But one more victim, the U. S. Congress, can be avoided if we have the sense to act here.

Mr. Chairman, I have introduced legislation, S. 2672, designed to reform the criminal defense of insanity. Most importantly, this legislation differs from previously offered bills in that it would establish a verdict of "guilty but mentally ill."

My bill reforms the insanity defense by providing a straightforward and commonsense approach to the issue of insanity as a defense to criminal guilt. Essentially, the bill does three things: First, preserve the defense of insanity for those clear cases of mental illness; Second, place the burden of proof upon the defendant to establish the defense of insanity by a preponderance of the evidence; And, third, establish the verdict of "guilty but mentally ill" in the Federal law, a verdict now available in my own State of Indiana.

I am not here to belabor the case of John W. Hinckley, Jr. However, Mr. Chairman, if John Hinckley had been tried in Indiana, it is unlikely that his insanity defense would have been successful. He would have been found guilty but mentally ill under a new criminal statute.

That statute grew out of another infamous criminal case, that of the 1977 Tony Kiritsis kidnapping and attempted murder, in which Kiritsis like Hinckley was found not guilty by reason of insanity. Like Hinckley, Tony Kiritsis was seen on national television, reaching for and grabbing instant fame with his horrifying act. The nation watched in suspense as Tony Kiritsis paraded in front of the news cameras with a

sawed-off shotgun wired to the neck of his hapless victim, a local bank officer. The result of that case led to the change in Indiana law adding the special verdict of "guilty but mentally ill." I would like to address the three elements of my bill which take as their precedent this Indiana State legislation.

Mr. Chairman, the Indiana State Legislature has seen fit to retain the verdict of "not guilty by reason of insanity" within the Indiana Code, even as it shifted the burden of proof for this verdict and added the new verdict of "guilty but mentally ill." I would support this course of legislation and recommend it to the Committee. There are several reasons, both jurisprudential and pragmatic, for retaining the verdict of not guilty by reason of insanity.

The test of Constitutionality can be better met, I believe, by retaining the option for the trier of fact to find the defendant not guilty by reason of insanity. Constitutional concerns for due process can more clearly be satisfied if a range of verdicts is available to match the variety of criminal defendants which society will encounter. Likewise, any objection of cruel and unusual punishment meted out for the crime alleged can be better overcome with this flexibility provided the courts.

Further, persons do exist in our society who, by every scientific and commonsensical standard, do not know the nature of their acts, and who cannot know the meaning of right from wrong within the context of the law. I believe that, for these individuals, the law must retain the defense of not guilty by reason of insanity. As the Director of the American Psychiatric Association has said, insanity is a legal, not medical, term. "Jurors, not psychiatrists, must decide if a particular form of mental illness constitutes insanity on the given day that a crime is committed." (American Medical News, July 9, 1982, at 16.) I can only agree with this statement, and recommend to the Committee that the defense of insanity be retained for proper determination by the trier of fact.

The most important issue addressed by my bill is the burden of proof for a showing of mental illness. Like everyone

in this room, I support without question our requirement of proof beyond a reasonable doubt in showing the elements of a crime. The use of this high standard is "bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." Winship, 397 U.S. at 372 (Harlan, J. concurring).

However, the social cost of placing the burden upon the prosecution to prove criminal guilt beyond a reasonable doubt is an increased risk that the guilty will go free. It is equally clear, as Mr. Justice White has stated, that the risk society bears is not without limits; Mr. Justice Harlan's aphorism provides little guidance for determining what those limits are. Patterson v. New York, 432 U.S. 197 at 208 (1976). That guidance is the duty of this Congress, and that is what we are gathered here to provide.

Under the Federal rule today, once evidence of insanity is introduced, the burden of proof is upon the prosecution to prove beyond a reasonable doubt that the defendant was legally sane at the time of the offense. The theory offered by some commentators is that there can be no criminal intent without sanity; thus a reasonable doubt as to sanity is necessarily a reasonable doubt as to guilt. Therefore, an acquittal is required if there is any doubt put forward that is not clearly rebutted as to the accused's sanity. See 17 A.L.R. 3d 146. I reject this theory as fundamentally flawed: it would require that an essential element of every crime include sanity.

The United States Supreme Court, in its most recent decision on this issue, has been quite plain in its declination to adopt a Constitutional imperative, operative countrywide, that a prosecutor must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused. Patterson, 432 U.S. at 210. Constitutional due process requires only that the most basic procedural safeguards be observed; the Court has left to this branch of government a more subtle balancing of society's interests against those of the accused.

The trend over the years seems to have been to require the prosecution to disprove affirmative defenses beyond a reasonable doubt. By recommending the lower standard of proof of a preponderance of the evidence, my bill balances the protection for the defendants as well as the state. The split among the various jurisdictions varies for any given defense. Thus, 22 jurisdictions place the burden of proving the affirmative defense of insanity upon the defendant, while 28 jurisdictions place the burden of disproving insanity on the prosecution. Constitutional Limitations on Allocating the Burden of Proof of Insanity to the Defendant in Murder Cases, 56 B.U.L.Rev. 499 (1976).

There is a complex issue here before the Committee, involving the elements of a crime as balanced against the requirements of an affirmative defense. Some would argue that the elements of a crime may not be negated by an affirmative defense if that would leave the defense to prove, by any standard, those elements. If the elements of a crime relate only in degrees to the severity of the punishment, then the Court would appear to have held that no due process violation will occur in making the defendant go forward with a proof of certain of those elements, and thus to a showing of lesser culpability. As the Court said in Patterson, "If the State... chooses to recognize a factor that mitigates the degree of criminality or punishment, we think the State may assure itself that the fact has been established with reasonable certainty." 432 U.S. at 209. Thus the State may in fact permit the blameworthiness of an act or the severity of punishment authorized for its commission to depend on the presence or absence of an identified fact without assuming the burden of proving the presence of that fact, as the case may be, beyond a reasonable doubt or by a preponderance of the evidence.

I would submit to the Committee that there is a more fundamental point to be made about the elements of a crime and whether the defendant may be required to prove by a preponderance of the evidence the existence or absence of a related element found within the affirmative defense. That point is that the element of the crime related to the affirmative defense is not so inextricably tied to the affirmative defense that to place the

burden upon the defendant to prove the defense will require him to prove the absence of the crime. The existence or nonexistence of legal insanity bears no necessary relationship to the existence or nonexistence of the required mental elements of a crime.

Finally, the legislation which I have introduced adopts the approach of the Indiana legislature in adding the special verdict of "guilty but mentally ill" to the criminal code. I most strongly recommend to the Committee that this approach be adopted for the Federal law.

By adding this special verdict to the available verdicts of guilty, not guilty, and not guilty by reason of insanity, I believe the Committee can be assured of a Constitutional solution to the problem of improper application of the insanity defense. Under my bill, an accused could be found to be guilty but mentally ill if he were found to have committed all the requisite elements of the offense charged other than the requisite state of mind, and if the accused lacked the requisite state of mind as a result of mental disease or defect.

In light of the Hinckley case, the Kiritsis case, and others, I believe this to be an eminently practical and humane approach to the mentally ill accused of committing a crime.

While the new verdict of guilty but mentally ill has not yet been tested in the Indiana courts, I would like to report to the Committee on its apparent effect there. As a practical matter, juries have now been given an option which is a more "middle of the road," balanced approach to the difficult choice of incarcerating an individual in need of medical attention or releasing a confused and possibly dangerous individual into society. Some have attacked this verdict because it provides the jury this middle ground, but I applaud the concept for this very reason. A jury, or judge, when confronted with a clear case of guilty action and a difficult question of sanity, can protect society even at the same time providing medical treatment for the mentally ill.

Another result already observed in Indiana is a reduction in the practical number of entered pleas claiming "not guilty by reason of insanity." In obvious cases, defendants and their counsel continue to choose the plea of not guilty by reason of

insanity. In the not so obvious cases, the close cases, counsel may be more reluctant to choose insanity as a defense, and will thus make a more determined effort to show clear lack of the requisite state of mind.

If the accused is found guilty but mentally ill under my proposed legislation the court will sentence in the same manner as if the accused were found guilty. The defendant can then be treated for mental illness by the appropriate official of the State in which the person is domiciled. Presumably, the State's department of public mental health and department of corrections will be involved.

Lastly, I would note for the Committee that Section 4 of my bill, in providing for the discharge of the convicted individual from a mental hospital, applies to the accused found guilty but mentally ill who is in need of treatment. The individual may be treated and, upon recovery, be released from the hospital to be available for the balance, if any, of the regular sentence.

The CHAIRMAN. Our next witness is Senator Symms of Idaho, who recently introduced a bill regarding the insanity defense, which is modeled on the Idaho statute that just came into effect.

Senator Symms, do you want your entire statement put in and highlight it, or do you want to present—

Senator SYMMS. Mr. Chairman, I can deliver my entire statement in less than 5 minutes.

The CHAIRMAN. All right.

Senator SYMMS. It would be best if I just presented my statement in its entirety.

The CHAIRMAN. All right. You may proceed.

STATEMENT OF HON. STEVEN D. SYMMS, A U.S. SENATOR FROM THE STATE OF IDAHO

Senator SYMMS. Mr. Chairman, I want to thank you and Senator Heflin and others on the committee who have shown an interest in this subject. Speaking as a layman in law, I think I do speak as to the outrage that American citizens felt in the recent verdict in the Presidential assassination attempt in the trial of John W. Hinckley. It has caused a great expression of outrage and dismay. I think that for that reason we are thankful that you are working on this and I hope that something can be done in the very near future to make some corrections in our laws because I do believe the American people are registering their feelings of shock and disbelief concerning the decision of the jury in this case.

Now, because of the national prominence and the result of the trial, such a violation of justice and commonsense, it has served as a focal point for an expression of national dissatisfaction. Yet, the

result of the *Hinckley* trial is not the root cause of the dissatisfaction. The *Hinckley* verdict only served to coalesce a basic national feeling that something is dreadfully wrong in our Nation's criminal justice system, of which the insanity defense is but one small part. Americans view the result in this case as typical and representative of a system gone awry and no longer representative of the interest of a civilized society.

My constituents in Idaho express their concern over not only the need for reform in the insanity defense, but also the need for a reform in the apprehension, arrest, bail, sentencing, and parole of violent criminals.

Mr. Chairman, I'm hopeful that the *Hinckley* trial will serve to provide the momentum necessary to reach such a needed and beneficial change in our criminal justice system, and I know this has been a wish of our distinguished chairman for many years, having watched him operate in the Senate. And I have been following the Senate's consideration of the insanity defense reform with a great interest. There is a fundamental deficiency in the modern insanity plea and the men and women of the *Hinckley* jury are not to be condemned for their decision in that case. They were bound by the law and instructions given them by the trial judge. It is the system which must be changed, and that change must be more than cosmetic in nature. The change must be fundamental and substantive and I note that many of my colleagues have submitted numerous and varying proposals in this regard. Each one is positive and moves in the right direction, but I have yet to see which accomplishes all we might hope for in insanity plea reform.

There are three basic approaches which are being used to correct the deficiencies of the insanity defense. The first approach is toward allowing for a new jury finding of "guilty but insane or mentally ill." The second approach is to change the time or manner of consideration of the issue of insanity and the third deals with shifting the burden of proving the issue of insanity.

All of the above, and there are several variations while improvements over our present system, do not address the basic problem of the insanity plea reform. The basic problem of insanity defense is that there is not, nor can be, a knowable, workable definition of "insanity." Even technical experts whose lives are devoted to the study of the mind, admit that insanity is an elusive, imprecise concept. Because of this we must adopt a system which, while providing for consideration of the issue of insanity at a limited and specific time, does away with the insanity plea.

The legislation which I introduced Friday avoids the need to consider the entangling, imponderable concept of insanity by a group of people ill equipped for such consideration. It avoids definitions and the shifting of burdens of proof which, in any event, are less than fully productive. If the person charged with a criminal act is so mentally unstable as to be unable to stand trial, he or she will be ruled incompetent and handled in a manner similar to what the law presently provides. If the person is able to stand trial, insanity will not be a defense to a criminal charge. This allows the jury in a criminal trial to consider the issue of the commission of the crime and the intent of the defendant in committing the act.

If a person is found not to have been capable of performing the required intent, he will be found not guilty. At this point if the prosecution feels that the person was unable to form intent because of a dangerous mental condition, my bill would allow for a civil commitment of the individual until he is no longer a danger to himself or the community. If the individual is found guilty of the charge of criminal acts, he will be appropriately sentenced.

If the sentencing judge determines that there is a mental condition which needs evaluation or treatment, such can be part of the sentence. Once the treatment for the condition is completed, the defendant will serve the remainder of his or her sentence in a standard correction facility subject to parole and normal rules of commutation.

Under my bill the defendant still maintains all constitutional rights presently accorded him and burdens of proof remain with the prosecution. However, the criminal trial system plugging plea of not guilty by reason of insanity will no longer exist. People even with mental problems, Mr. Chairman, will be responsible for what they intentionally do. The burdensome battle of the experts is done away with. The lay jury will only have to consider those issues which they are best equipped to handle.

And I might say, Mr. Chairman, I'm very proud to represent a State which some time ago recognized the need to reform the insanity defense and move to bring a positive change about. The Idaho model is considered by many experts to be superior to all others. Idaho has set an example and I hope that Congress will follow Idaho's lead by quickly adopting a similar insanity plea reform.

Mr. Chairman, last week Attorney General David Leroy from my State testified before the subcommittee chaired by Senator Specter and in which Senator Heflin was present and I would encourage the chairman to have his personal staff brief him on that hearing in which our attorney general laid out how the Idaho law was formulated successfully into law. And I thank you and the committee very much for your indulgence.

The CHAIRMAN. Senator, thank you very much. We appreciate your presence here and the excellent testimony you have given.

Senator SYMMS. Thank you.

The CHAIRMAN. Our next witness is Mr. William French Smith, Attorney General of the United States.

**STATEMENT OF HON. WILLIAM FRENCH SMITH, ATTORNEY
GENERAL OF THE UNITED STATES**

Attorney General SMITH. Good morning, Mr. Chairman. I am very pleased to be here to present to you the views of the administration with respect to the insanity defense.

The CHAIRMAN. Your statement does not appear to be very long. It might be well if you would present it in full.

Attorney General SMITH. It is fairly short by our usual standards, Mr. Chairman.

The administration's proposal to reform the insanity defense is one part of a larger program of legislation that would restore the balance between the forces of law and the forces of lawlessness. In

recent years, through actions by the courts and inaction by the Congress, an imbalance has arisen in the scales of justice. The criminal justice system has tilted too decidedly in favor of the rights of criminals and against the rights of society.

After many years of debate—and growing public outrage—a substantial and bipartisan consensus has formed behind a carefully crafted set of basic reforms. Those proposed reforms would, among other things:

Reform our bail system to prevent the most dangerous offenders from returning to the streets once they have been caught;

Make jail sentences more certain and abolish the frequently abused process of parole;

Provide stronger criminal forfeiture laws that will take the profit out of crime, especially organized crime and drug trafficking;

Increase the other Federal penalties for drug trafficking;

Recognize the rights of the victim more fully and require judges to weigh in sentencing the criminal's impact upon the innocent;

Make it a Federal crime to kill, kidnap, or assault senior Federal officials, including Justices of the Supreme Court; and

Permit the Federal Government to transfer surplus property to the States, free of charge, when the property is needed by the States for prisons.

The importance of these reforms to our system of justice and to the safety of the public cannot be overstated. It is now time for the full Senate to act. Perhaps, then, the House will follow suit.

As you know, the administration has supported other legislative reforms that would also help to restore the balance between the forces of law and the lawless. Those important reforms include modification of the exclusionary rule, limiting Federal habeas corpus—and, the subject of my testimony today, changing the insanity defense.

Modification of the insanity defense is a major element of the program needed to restore the effectiveness of Federal law enforcement. Combined with the other reforms I have outlined, reform of the insanity defense would improve our system of justice and heighten public confidence in the effectiveness and fairness of that system. Like those other reforms taken individually, modification of the insanity defense will lead to different judicial results in only a small percentage of all Federal criminal cases. Taken together, however, the procedural reforms will affect nearly all Federal criminal prosecutions, either in terms of results or in terms of real-locating resources presently misspent in dealing with outmoded procedures.

The insanity defense is of great concern even though the number of occasions in which the defense is successfully employed is not large. The manner in which the defense is defined involves policy decisions about the nature of criminal responsibility that are of basic importance to the criminal justice system. In addition, the defense tends to be raised in cases of considerable notoriety, which serves to influence, far beyond the numbers, the public's perception of the fairness and efficiency of the entire criminal justice process.

Although the insanity defense is of fundamental significance to the Federal justice system, it is ironic that neither the Congress nor the Supreme Court has yet played a major role in its develop-

ment. Its evolution in England and in this country over several centuries has been haphazard and confusing. As the committee knows from its work over the past decade or more on the Criminal Code revision bills, Congress has never enacted legislation defining the insanity defense. Similarly, the Supreme Court has generally left development of the defense to the various courts of appeals. As a result, the Federal circuits do not even today apply a wholly uniform standard. In recent years, however, all of the Federal circuits have adopted, with some variations, the formulation proposed by the American Law Institute's model penal code. According to that model, 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 wrongfulness of his conduct or to conform to the requirements of the law."

In our view, this model statement of the insanity defense contains two critical flaws. First, it undermines the basic concept of criminal responsibility by introducing motivation into the determination of guilt or innocence. Second, it invites the presentation of massive amounts of conflicting and irrelevant evidence by psychiatric experts.

Many have long questioned whether mental disease or defect should excuse a defendant from criminal responsibility. Congress has, by statute, defined the elements of all Federal offenses, including required mental elements or states of mind. Using murder as an example, Congress has said, in essence, that it is a crime intentionally to take the life of another human being. Ordinarily, under our law, the reason or motivation for such an act is irrelevant to guilt. For instance, the fact that a killing is politically motivated—that the defendant genuinely believed that his act was morally justified because the victim was a bad man whose death would end injustice, be just recompense for past wrongs, or lead to a better social order—is clearly, and properly, viewed as irrelevant to his guilt or innocence. One would expect such an assassin to be found guilty. Motivation, if deemed to involve mitigating circumstances, would be taken into account only by the judge in sentencing.

Under the prevailing insanity test, however, an analogous situation can lead today to the opposite result: Acquittal. A defendant who intentionally killed another person could now be found not guilty by reason of insanity, for example, if some mental defect caused him to believe that God had ordered the murder because the victim was an agent of the devil, interfering with God's work.

Not only is this difference in outcome difficult to explain, indeed, in our judgment it is indefensible. A person who has intentionally killed another human being, or committed some other crime, should be held responsible for the act. Any mental disease or defect, like any other motivation, should be taken into account only at the time of sentencing.

The present insanity defense also frequently leads to a gross distortion of the trial process. Commonly, in a trial involving an insanity defense, the defendant's commission of the acts in question is conceded. The trial focuses on the issue of insanity. Both sides present an array of expert psychiatric witnesses who offer conflicting opinions on the defendant's sanity. Unfortunately for the jury—and society—the terms used in any statement of the scope of

the defense—for example, the phrase "disease or defect"—are usually not defined and the experts themselves do not agree on their meaning. Moreover, the experts often do not agree even on the extent to which certain behavior patterns or mental disorders that have been labeled "inadequate personality," "abnormal personality," and "schizophrenia" actually impel a person to act in a certain way. In short, medical disagreement is implicit in the issue of whether a person could conform to the requirements of the law.

Since the experts disagree about both the meaning of the terms used to discuss the defendant's mental state and the effect of particular mental states on actions, it is small wonder that trials involving an insanity plea are arduous, expensive and worst of all, thoroughly confusing to the jury. Indeed, the disagreement of the supposed experts is perhaps so basic that it makes the jury's decision rationally impossible. Thus, a rational jury's decision can be in a sense ordained by the procedural question of burden of proof.

The Department of Justice has sought legislative change in the insanity defense for more than a decade. As a result of the intense debate and discussion following the recent verdict in the *Hinckley* case, the administration again considered the proper scope of the insanity defense. We have concluded that the general approach adopted in title VII of S. 2572 would best protect the public and promote efficiency. That approach has undergone years of thoughtful consideration both in the Department and in hearings before the Congress on criminal code reform measures. Nothing in recent events detracts from the soundness and superiority of that approach. It would best meet the three goals of reform—protecting the public, insuring that the guilty do not escape punishment, and avoiding an illogical choice between competing psychiatric opinions.

The bill provides for civilly committing defendants who are dangerously disturbed and who, for one reason or another, are not convicted. At present, other than in the District of Columbia, there is no Federal statute authorizing or compelling the commitment of an acquitted but presently dangerous and insane individual. Today, when faced with such a situation, Federal prosecutors can do no more than call the matter to the attention of State or local authorities and urge them to institute appropriate commitment proceedings. The absence of such a requirement or Federal procedure creates the very real potential that the public will not be adequately protected from a dangerously insane defendant who is acquitted at trial. The Task Force on Violent Crime, which I appointed last year, strongly recommended that legislation be enacted "to establish a Federal commitment procedure for persons found incompetent to stand trial or not guilty by reason of insanity in Federal court." Such provisions were developed in connection with S. 1630, the Criminal Code revision bill, and are also embodied in title VII of S. 2572. I strongly support the recommendations of the Task Force on Violent Crime that these commitment procedures, about which there appears to be little doubt or controversy, be promptly enacted into law.

In addition, S. 2572 would effectively eliminate the insanity defense except in those rare cases in which the defendant lacked the state of mind required as an element of the offense.

The CHAIRMAN. Mr. Attorney General, just a moment.

I've got to leave and go and open the Senate. The distinguished Senator from Alabama will preside over the hearing.

Senator HEFLIN. You may proceed.

Attorney General SMITH. Under this formulation, the mental disease or defect would be no defense if the defendant knew he was shooting at a human being to kill him—even if the defendant acted out of an irrational or insane belief. Mental disease or defect would constitute a defense only if the defendant did not even know he had a gun in his hand or thought, for example, that he was shooting at a tree.

This would abolish the insanity defense to the maximum extent permitted under the Constitution and would make mental illness a factor to be considered at the time of sentencing, just like any other mitigating factor. It would eliminate entirely as a test whether a defendant knew his actions were morally wrong and whether he could control his behavior. It would also, of course, eliminate entirely the presentation at trial of confusing psychiatric testimony on this issue.

S. 2572 incorporates the one approach that would assure both that defendants do not inappropriately escape justice and that the criminal trial is not diverted into a time-consuming, confusing swearing contest between opposing psychiatrists. As the committee's report on the Criminal Code revision legislation has documented, this approach has been endorsed in the past by numerous legal scholars, bar associations, and psychiatrists. We share their view that it is the best way to revise the law from the perspective both of insuring the public safety and of improving the efficiency of criminal trials.

One point should be emphasized in view of some recent debate. Under any approach, the Government will always be required to prove every element of the statutory offense that is charged. This includes any specific intent or knowledge required by the statute. In the rare case, therefore, in which a defendant is so deranged that, for example, he did not know that he was shooting a human being, one of the elements of the offense could not be proved—the mental element or mens rea—and he could not be convicted under current law or under any constitutionally supportable change in the law. Under S. 2572 this is the only situation in which a defendant committing a criminal act could not be found guilty. In that case, however, the defendant would no longer be set free—as he would be under current Federal law outside the District of Columbia—but would be subject instead to civil commitment.

The need to change the law of insanity is urgent and clear. I am hopeful that Congress will act to effect the reform contained in title VII of S. 2572 during this session—as well as the many other criminal justice reforms that the administration has proposed and the public needs.

Thank you very much.

Senator HEFLIN. Thank you, Mr. Attorney General. I understand that the Associate Attorney General, Mr. Giuliani, is here and will testify in some details on the matter.

Let me ask you only one or two questions. No. 1, the task force appointed by the Attorney General which made a study and report-

ed on the entire issue of crime, was done before the *Hinckley* verdict occurred, I believe; isn't that correct?

Attorney General SMITH. Yes, it was.

Senator HEFLIN. Well, do you think there are some different changes that should be considered differently from what that Attorney General's task force considered?

Attorney General SMITH. With respect to the insanity plea?

Senator HEFLIN. Yes.

Attorney General SMITH. The task force made a recommendation of an additional plea of guilty but mentally ill. That certainly is one of the alternatives that is being considered. We actually, in reviewing the matter ourselves, prefer the approach that is used in 2572. We do so because we think that it comes closest, as I've indicated in my statement, to providing the most efficient, fair and effective procedure for dealing with this particular subject matter.

But that approach, as I've indicated in my statement, does eliminate the insanity defense except in those very rare cases where the elements of the crime themselves have not been proved, for example, where the necessary criminal intent or mens rea has not been established.

Senator HEFLIN. The fact that the Attorney General's task force studied this issue and came up with substantial changes from existing provisions would indicate that the issue of insanity in relationship to the criminal justice system needs to be reexamined and—

Attorney General SMITH. Indeed so.

Senator HEFLIN [continuing]. And even before the *Hinckley* matter was decided.

Let me ask you this, do you feel that there would have been as much of an outpouring of public outrage if *Hinckley* had only shot at a mere Senator?

Attorney General SMITH. I'm sure, Senator Heflin, there would have been.

Senator HEFLIN. I doubt it.

Thank you very much. We appreciate your testimony.

Mr. Giuliani, we're delighted to have you, and if you will go ahead, your entire statement will be entered in the record and you may read or you may summarize, as you choose.

STATEMENT OF HON. RUDOLPH W. GIULIANI, ASSOCIATE
ATTORNEY GENERAL

Mr. GIULIANI. Mr. Chairman and Senator Heflin: It is a privilege for me to be testifying here today before two Senators who have, for a long time now, been seeking reform of the insanity defense, and also before two Senators who have had such distinguished prior careers as members of the judiciary.

There are four possible ways in which to modify the insanity defense. The first such approach would shift to the defendant the burden of proving that he was insane. Of course, under present law, the government bears the burden of proving beyond a reasonable doubt that the defendant was not insane at the time of the crime charged. The Federal courts first placed this burden on the prosecution in 1895 in the case of *Davis v. United States*. The *Davis* rule departs from the common law, under which the burden of

proving all affirmative defenses, including insanity, rested with the defendant.

Placing the burden of proof on the defendant might alter the result in some cases. This course of action would be constitutionally permissible, so long as it was not applied to relieve the government of the burden of proving every essential element of the crime charged, including the required state of mind.

Nevertheless, this approach fails to narrow the scope of the defense. It would still permit the introduction of confusing psychiatric testimony on the defendant's moral capacity or ability to conform his conduct to the law. The insanity defense would still exist, and as such, would continue to permit or require the acquittal of persons who committed all the elements of the crime with which they were charged. Instructions on shifting burdens of proof would make the judge's charge to the jury even more confusing than it is today. In short, this change would make, in our view, very little practical difference, would tend to confuse and fails to resolve the basic problem of assuring justice and efficiency in the trial process.

A second approach is to permit the jury to return a verdict of "guilty but insane." Such a verdict could be rendered where the defendant's actions constitute all necessary elements of the offense charged other than the requisite state of mind, and the defendant lacked the requisite state of mind as a result of mental disease or defect.

In our view, this approach raises serious constitutional concerns. The due process clause requires that the government prove every element of the offense, including the requisite mental state, beyond a reasonable doubt. This approach, however, could permit a jury to convict a defendant even though he lacks the statutorily required state of mind.

For example, murder requires proof that the defendant has acted "knowingly" or "willfully," concepts embraced within the language of title 18, United States Code, section 1111, which defines murder as "the unlawful killing of a human being with malice aforethought." Under this approach, a jury could find a defendant "guilty but insane" even if the defendant thought that the gun in his hand was actually a fishing pole. An identical result could occur even if the defendant, because of mental disease or defect, shot a person believing he was shooting at a tree.

In short, a verdict of "guilty but insane" would be permissible even in cases in which proof of knowledge or willfulness were lacking. Under these circumstances, we believe that this approach may well violate the due process clauses of the 5th and 14th amendments of the Constitution.

The third approach to modifying the defense is to provide for a special verdict of "guilty but mentally ill." The Attorney General's Task Force on Violent Crime recommended this approach in its final report last year. A few States have recently enacted legislation to this effect. This approach does not alter the requirement that the Government prove every essential element of the offense, including the required state of mind. Under the task force approach, a verdict of "guilty but mentally ill" could be returned only if the mental illness does not negate the defendant's ability to understand the unlawful nature of his conduct and does not negate

his ability to conform his actions to the requirements of the law. Although easily confused, "guilty but insane" and "guilty but mentally ill" are substantially different concepts.

This approach avoids constitutional problems and offers a jury an alternative to the stark choice between conviction and acquittal. The task force approach allows the jury to recognize that a defendant may be mentally ill even if his illness is not directly related to the mental element that must be shown for conviction of the crime. It does not, however, eliminate confusing psychiatric testimony concerning a wide range of issues not directly related to the mental element, such as delusions of a divine calling. This may serve to confuse the jury. Therefore, this approach would still lead to a battle of expert witnesses on issues as wide and possibly even more varied than under present procedures.

The final approach, and the one incorporated in S. 2572, permits a jury to return a verdict of guilty, not guilty, or not guilty only by reason of insanity. This last verdict may be returned only if the defendant, as a result of mental disease or defect, lacked the state of mind required as an element of the offense. Mental disease or defect would not otherwise constitute a defense.

As the Attorney General noted, this would effectively eliminate the insanity defense except in those very rare cases in which the defendant lacked the state of mind required as an element of the offense. Under this formulation, a mental disease or defect would be no defense if a defendant knew he was shooting at a human being to kill him, even if the defendant acted out of an irrational or insane belief. Mental disease or defect would constitute a defense only if the defendant did not even know he had a gun in his hand or thought, for example, that he was shooting at a tree.

This would abolish the insanity defense to the maximum extent permitted under the Constitution and would make mental illness a factor to be considered at the time of sentencing, just like any other mitigating factor. It would appropriately narrow the test of insanity, as well as the presentation at trial of confusing psychiatric testimony on the issue.

Of course, as the Attorney General noted, the insanity defense can never be completely eliminated. Under any approach, the Government will always be required to prove every element of the statutory offense charged, including intent or knowledge. Thus, in the rare case in which a defendant is so deranged that he could not form the statutorily required mental state, the government would fail to prove a required element and a conviction cannot constitutionally be obtained. He could not be convicted of the charged offense under current law or under any constitutionally supportable variation of the above approaches. However, under the approach embodied in S. 2572, this rare case is the only one in which a defendant committing a criminal act could not be found guilty. Thus, S. 2572 eliminates the defense as far as constitutionally permissible.

Mr. Chairman, that summarizes and analyzes the various possible approaches to an amendment of the insanity defense. I am ready to answer any questions that the committee may have.

Senator HEFLIN. You have outlined four approaches toward this issue. The first is an issue of shifting to the defendant the burden

of proof that he was insane. Then you raise some constitutional issues pertaining to that.

It is my understanding that a number of States have, in effect, created a presumption in the criminal law field which would be, in effect, that everyone over the age of 14 years charged with a crime is presumed to be responsible for his acts. And that the burden of proving that he is irresponsible—that he is not responsible because of insanity, is cast upon the accused. The degree of proof that is required by varying jurisdictions, different States, may vary. Some go to the extent of saying that proof beyond a reasonable doubt; others, clear and convincing evidence; the third being the preponderance of the evidence, and the fourth being to the reasonable satisfaction of the jury.

It's my understanding that there is a U.S. Supreme Court case dealing with an Oregon statute which, in effect, shifted the burden of proof to the defendant beyond a reasonable doubt, and the Court held this was constitutional.

Would you give us your thoughts pertaining to the shifting of the burden of proof to the defendant under varying and different requirements; that is in effect, on requiring the defendant to prove that he is insane and, therefore, not criminally responsible for his acts.

Mr. GIULIANI. Senator Heflin, the shifting of the burden of proof may or may not raise a constitutional problem, depending on how it's done. If, in fact, the burden of proving willfulness and intent remains with the Government or with the State, then there would be no real constitutional problem. The case which you make reference to, *Leland v. Oregon* and the case of *Patterson v. New York*, establish that. However, if, in fact, in giving that instruction the judge were not careful and if the jury could come to the conclusion that the burden of proving the mental state required to commit the crime, namely willfulness and intent, had shifted to the defendant, then, of course, that verdict would be constitutionally impermissible. So, you're dealing in a very dangerous area and it gets very close to the line of shifting the burden of proof on one of the required elements. But if it's done carefully enough, it can be done without creating a constitutional issue.

The real problem that we see with that approach is that it really doesn't narrow the insanity defense. No doubt it would result in fewer acquittals by reason of insanity, just by virtue of the burden shifting. A defendant would have to prove that he was insane. But the full scope of the insanity defense remains pretty much intact under that approach, psychiatrists would testify, as they do today, on issues such as irresistible impulse or claims that the person knew what they were doing and intended to do what they did, but they were controlled by an outside force, the devil had taken control of them, or someone else had taken control of them and forced them to do what they had done. All of that panoply would still be played out in front of a jury and trials on the insanity issue would be as protracted as they are now and would involve the same kinds of disagreements among experts, which are so confusing to juries.

So, we don't think that that really—that approach really helps very much to get to the core of the problem and also in the long run, when you start instructing juries on shifting burdens, it just

adds to confusion in the whole process. And if there is a way—if there is a way to achieve the same result, namely, narrow the insanity defense without having to do that, we would prefer it and we think that the approach in S. 2572 accomplishes that result, narrowing it to the constitutional minimum without getting into the inherent confusion in telling a jury the burden of proof and willfulness is on the Government, however, the burden of proof shifts to the defendant on the question of could he conform his conduct to the dictates of the law and the defendant has to prove that by some standard. We think that's an inherently confusing process and if it can be avoided, we think it makes sense from the point of view of both judicial economy and fairness.

Senator HEFLIN. In your argument against the shifting of the burden of proof, you refer to confusion, wide openness, and the broad aspects that it would involve, and I suppose that what you are referring to by narrowing the issue is the mens rea concept. I want to address that a little bit later, but go over first some of the approaches that you have used in your testimony which you brought out.

Your second one is the alternative of permitting the jury to return a verdict of "guilty but insane." And I see that you have questions about that approach.

Are those words contradictory, "guilty but insane"?

Mr. GIULIANI. They can be. It depends on how broad the definition of "insanity" is that you use in conjunction with the "guilty but insane" verdict.

If we use the present definition of "insanity" and a jury came back with the verdict of "guilty but insane," there would be no way of knowing whether that verdict found the person guilty, even though the person may have demonstrated, or the government had failed to demonstrate that the person knew what they were doing and intended to do what they did. And it would become a verdict that would create very serious constitutional questions.

For example, if a person successfully was able to demonstrate that he absolutely did not know what he was doing at the time that he committed the crime, he had the mental age of a 2-year-old, or he—he thought he was shooting at an apple, when, in fact, he was shooting at a human being, and that were proved beyond any doubt, whoever had the burden of proof, under a "guilty but insane" verdict, that person would be found guilty even though insane and both semantically and substantively we think those two concepts contradict each other under that fact circumstances.

Senator HEFLIN. It seems to be the argument put forth by some of the proponents of this that it serves society better, to have an accused found guilty but insane.

Is there any societal advantage or answer to the societal request for more responsibility or more law and order to have a verdict of guilty but insane.

Mr. GIULIANI. I think the frustration is with the lack of control over a person who is—let's say a person who is truly insane by any test. A person who has the mental age of a 2-year-old or the person who thinks he is shooting at an apple, when, in fact, he is shooting at a human being. The societal frustration is losing control over that person. If that person is found not guilty by reason of insanity,

then society—society's safety rests in the hands of psychiatrists deciding sometime later that the person is now cured and can be released.

We think the best approach, both from society's point of view and in the development of a sensible and fair body of law, is to narrow the defense to the strictest limits that the Constitution requires and then to deal with those few situations where a person would be insane under the circumstances I've described by giving control to the court as to how long that person should remain confined and under what circumstances that person should be released.

Senator HEFLIN. The third approach that you have brought forth is a special verdict of "guilty but mentally ill."

Could this be, in effect—is this a finding that the man is guilty, the indictment—the allegations in the indictment proven, but he is mentally ill at the time of trial? Is that contradictory of the finding, preliminarily, before going to trial that he is mentally able to stand trial?

Mr. GIULIANI. My understanding of the "guilty but mentally ill" verdict, as it is used in some States and as it's recommended here, is that it would focus on the time the crime was committed, and it would be a finding that the person was guilty, but mentally ill and there are different definitions of what is meant by mentally ill at the time that the crime was committed.

Our reservations about that are not constitutional, we think that that lawfully could be done, but more tactical from the point of view of the prosecution. It leaves an attractive alternative for a jury to find a person "guilty but mentally ill," probably even in a wider range of cases where that finding is made now. And it also doesn't do anything about the very difficult problem that courts face in having to have psychiatric testimony on a very, very wide ranging issues that don't focus very clearly on a legal definition and, in fact, at least I believe that that approach might very well increase the scope of that kind of testimony because you would now be dealing with a more general concept of mental illness rather than legal insanity.

Senator HEFLIN. Your fourth point is a verdict of "not guilty only by reason of insanity," which you—and then to go into the mens rea, as the standard.

You add to the verdict the word "only." Why do you add to the verdict the word "only" to the verdict of "not guilty by reason of insanity"? In order—isn't it "not guilty by reason of insanity," doesn't it contain within its language the word "only"? Why the word "only"?

Mr. GIULIANI. To focus attention on the fact that all the other elements of the crime were established and this is the sole reason why the person was found not guilty.

What that approach would do, is narrow—and this is of course, the approach under S. 2572—it would narrow substantially the legal definition of insanity, reduce it to what we believe to be the constitutional barebones, the minimum, and make trials where insanity defenses are raised not very different than but in fact, substantially similar to other trials. The Government would have to prove that the person knew what he was doing and intended to do

what he did, namely, knew that he was committing the crime of murder and intended to commit the crime of murder, even if that person later contended that someone else forced him to do it or he was operating under an irresistible impulse, so long as he knew what he was doing and he intended to kill, he intended to discharge the weapon into a human being. That person would not have the defense of insanity available. It would eliminate the insanity defense in a vast majority of cases in which it is now used. It would preserve it in those few cases where we believe these would be substantial constitutional problems, if you attempted to eliminate it, and it would also greatly reduce the range in which psychiatric testimony could take place. Psychiatric testimony would focus on those few cases where a defendant could raise an issue as to whether he knew what he was doing or intended to do what he was doing.

Senator HEFLIN. Well, let me ask you about the mens rea, the state of mind that you are advocating. You defined it as being the required state of mind for the elements of the offense charged. And the word "elements of the offense charged" causes me a lot of concern. We will take several different crimes. The distinction between murder and manslaughter is malice. The distinction between first degree murder and second degree murder is premeditation. Those are states of mind. There are a quite large number of offenses, many different states of mind, and many different elements.

In, for example, of receiving and concealing stolen goods, there is the element, depending on the statute, whether the person had knowledge that the article was stolen. Or in another instance in some statutes, whether or not the accused had reason to believe that the article was stolen. All of those being states of mind.

We have recently adopted here in Congress a statute pertaining to CIA agents, the agent identity bill. This has, as I view it, at least four individual states of mind involved, one being proof that there be a course of a pattern of activities, and the second state of mind intended to identify and expose covert agents. A third state of mind is the requirement of the proof that there be reason to believe that such activities could impair or impede the foreign intelligence activities of the United States. Then it requires, of course, disclosure the identity; and then it has another state of mind: knowing that the information disclosed so identifies such individual and that the United States is taking affirmative measures to conceal such individuals classified intelligence.

Now, I am worried that the mens rea in the state of mind, where the burden of proof does not shift, will create a quagmire and will really give lawyers a field day in defending these cases. If you have to place the burden of proof on the Government to prove that there was premeditation, if there is an insanity issue that arises, this causes not a narrowing, but it seems to me to be causing a broadening of these—of the elements of insanity in its relationship to the specific crime that the accused may be charged.

Would you care to comment on this?

The CHAIRMAN. Mr. Giuliani, just a minute. I've got to leave in 10 minutes, at 11:30, to go to the White House. I've been called down there. I wonder if the distinguished Senator from Alabama would carry on the session after I leave—

So, I want you to give that a lot of thought and I would like for you to get back in touch with me on that point. Because we just must protect the public from these people who go out and commit crimes and claim insanity. They bring in these high-powered psychiatrists, as in the *Hinckley* case, they did on both sides, and they get the jury confused and then when the judge charges that you have got to prove it beyond a reasonable doubt, and you have got to prove the defendant did not have an irresistible impulse to commit the crime, and that is a very heavy burden on the Government to prove, isn't it.

Mr. GIULIANI. It is a very heavy burden, Mr. Chairman.

The CHAIRMAN. It's a very heavy burden and we've got to lessen that burden some way. Now, I realize we've got to stay within the bounds of the Constitution, but at the time it seems to me we've got to put the public first and the interest of the public first, and follow a course that will really mete our justice and not allow guilty people to go free.

And so if you will give that a lot of thought and get back in touch with us, we would appreciate it.

Mr. GIULIANI. We certainly will, Mr. Chairman. We agree in concept with everything you said and this is a very complicated issue and I think it's useful that you have had more time and will have more time to consider various approaches, because there is no one right answer.

The CHAIRMAN. We want to move fast, but we're not going to move so fast that we are not going to consider every facet of this matter. Because once we come out with a bill, we want it to be a bill that will really protect the public and at the same time promote justice.

I want to thank the able Senator from Alabama for carrying on this hearing now, and he has been the chief justice of the Supreme Court of Alabama, and he's a very fine lawyer and I thank you for taking over now, Senator.

Senator HEFLIN. I was asking you about this mens rea. Now, I think we have to bear in mind, and I think that decisions that have been made that advocate mens rea, that you can't change the burden of proof and have a mens rea. Constitutionally, there are too many problems. You've got a conflict when you define mens rea as to the elements.

You talked a while ago about the changing of the burden of proof and how fine tuned it had to be. So, really I think that we ought to start with an understanding that—and I think this is inherent in it, that you can't shift the burden of proof and have a mens rea standard, I think.

Do you agree with that?

Mr. GIULIANI. Yes; I do.

Senator HEFLIN. OK.

With that, then, this word that's in the mens rea standard that has been proposed for a number of years, you have this question and this language about the element of the offense charged. And we know that there are many elements in crimes, there were elements that developed over common law, just like in burglary, breaking. You had to prove first a separate breaking, and then you had to prove an entering. Now, some jurisdictions have changed

that. But those elements have caused, in my judgment, some concern, and I outlined a while ago the various elements that are in numerous defenses, and the state of mind that can be directed toward the separate elements. I'm concerned that instead of narrowing, we are opening up the issue of insanity to be pinpointed to one element and if that element is lacking in its proof beyond a reasonable doubt, it calls for the acquittal.

If you will comment on this?

Mr. GIULIANI. The approach that we see in 2572, that we think makes sense, is rather than trying to change the burden, the best way to assure that the insanity defense can't be expanded is to adjust the definition. And that is what we think 2572 does. We think it narrows the definition of insanity substantially from the present—from the present definition that now exists.

If I were a defense lawyer and I had someone come to me and the person said, "I was unable to form the intent to know what I was doing, to appreciate what I was doing because I've been treated by a psychiatrist for 5 years and I suffer from delusions and I hear voices talking to me and those voices tell me to do things." Under present law, under any of the statutes that you've outlined, I'd have a reasonable chance at presenting an insanity defense, since I could have psychiatrists testify that the person, although he knew what he was doing and although he might very well have intended to do what he did, he was operating from a situation where he couldn't control his behavior. He was being told by other people—these voices that existed within his head—what to do, or he was operating under delusions. Even though he knew he was robbing a bank and intended to rob a bank, this inner voice was telling him to do it and not he himself, and, therefore, he fits under the definition "unable to conform his conduct to the dictates of the law." Or, maybe even appreciate the wrongfulness of what he is doing. He knows it's wrong but he doesn't appreciate it. That's the way in which most psychiatric testimony has taken place in courts and we think that it is probably one of the reasons why the public and the observers of all of this are so scandalized by the scope of the insanity defense, that it reaches situations that really were never intended as the insanity defense originally developed.

The definition that would exist under 2572 would permit the insanity defense and testimony would only be relevant if you could show that the person did not know what he was doing and was unable to form any intent at all. And it would have to be a situation where a psychiatrist would be willing to testify that when the person walked into the bank he wasn't operating from voices that told him to do it, he wasn't operating from an impulse, but he thought he was in Egypt and not in the bank. Or, a situation where a person is so mentally defective that he has, let's say, the equivalent mental age of a 2- or 3-year-old, although he might be an adult. It would narrow it to very, very limited situations, both legally and, I believe, psychologically. It would also be fairly objective to the extent that any of this testimony is objective, it would be fairly objective testimony. Psychiatrists don't, as often, disagree over someone having a mental age of 2 or 3, as they are prone to be able to disagree over people operating from irresistible impulses or some of these vaguer concepts.

So, for all those reasons, considering the fact that the definition would be so drastically narrowed and not involve conforming your conduct, or appreciating wrongfulness, none of those concepts would be involved. We think that would narrow it and it doesn't put much more of a burden, if any additional burden, on the government than the government already has. Under any of these statutes, the government still has to prove that a person knew what he was doing, intended to do what he was doing, or to the extent that his specific intent—it also has to prove specific intent. So, it wouldn't alter greatly what happens at a trial right now and the burden the government already has to meet.

Senator HEFLIN. Well, I gather that is the way you would feel that it would be interpreted. But it goes to judges and they read the language, and they are faced with the burden of proof. What is to keep them from saying, "all right, here in the identity bill, you, as the jury, have to formulate separately in your mind and come up with a finding that he had the mental capacity, the required state of mind to form each of the, we will say at least four state of mind elements that are involved in that offense." What is to keep them from ruling that way?

Mr. GIULIANI. You can have a lot more control over that than I can by the legislative history of this language and explaining exactly what it is that the Congress intends. And if that is inadequate, then additional language could be placed in 2572 to make it clear that what is meant by "knowledge" and "intent" is only the knowledge and intent required by the statute and the testimony cannot range into areas of conforming your conduct to the dictates of the law, irresistible impulse and so forth. If that is the concern, that could be handled by making the legislative intent very, very clear. I think it already is if you look at the history of the Criminal Code and the way this all developed, but if that weren't clear enough, then that could be inserted right in the language—right in the language of the statute.

Senator HEFLIN. Well, judicial review of legislative intent is flexible and is the most elastic of any type review which they might do, and judges tend to really follow their interpretation of the specific words of a statute more than they do of a—more than they do in regards to a review of the debates. And the debates may well develop in this instance, with differences as to what the legislative intent would be. There are those who may take this language and say that it broadens the scope of inquiry of a jury or a court, pertaining to insanity.

I think if you are going to depend on legislative history, it is wishful thinking from your viewpoint.

Mr. GIULIANI. Senator, may I just say that it would be hard to say that it broadens the scope of the inquiry, because under present law, even an insanity case, in any case, the government has to prove knowledge and intent and whatever specific intent is included in the statute. That is presently the obligation of the government. Plus, under present law, the government has to disprove the insanity defense.

The change in the law would leave that first burden still on the government. It wouldn't expand it in any way, it would just leave it exactly as it is and it would contract substantially the second,

which is disproving insanity. So, there couldn't be any possible way in which logically this change in the law would expand areas in which the insanity defense could be used. All this law does is reiterate the government's burden of proving the specific elements of the crime, under Federal law, at least.

So, it couldn't possibly expand the insanity inquiry. It could only serve to contract it. Now, a legitimate question could be, Is it clear enough just how far the burden is being contracted, or the standard is being contracted. And if that's the case, then I think it would be advisable to insert language right in the statute that makes clear precisely how narrow the inquiry should be.

Senator HEFLIN. Well, the Supreme Court of California, which has been the one that has gone into effect, applying it to elements of a defense, such as in murder prosecutions, the question of premeditation and the question of malice, I think that court and maybe one or two that have gone along with it, have expanded the insanity defense rather than narrowing it. I mean, that's the danger of the mens rea as it is presently composed and written.

Now, I want to ask you this. Is there a danger that in the mens rea, if you get into the elements, that this opens Pandora's box of plea bargaining?

Mr. GIULIANI. In the Federal system?

Senator HEFLIN. In the Federal system. You, in other words, first come in and you are charged with an offense and there are lesser included offenses within it. If there is a question of the ability of the State to—I mean the ability of the prosecution, the Federal Government, to prove beyond a reasonable doubt a certain element of the crime because of the issue of insanity, does it not then open the area of plea bargaining? We will say in a murder prosecution, all right we have got real questions whether we could prove premeditation because of his insanity; we've got questions whether or not we could prove malice because of his mental illness, therefore, we are willing to accept a plea for manslaughter. What is your response to this?

Mr. GIULIANI. First of all, it narrows rather than expands the opportunity of—

Senator HEFLIN. That's a debatable question. That is your position that it narrows. I'm not sure that it does, but go ahead on your assumption that it narrows.

Mr. GIULIANI. It narrows it—it narrows it, Senator, because you have to look at what is available now and compare it to what would be available if 2572 became law. Everything that is available under 2572 is available now, plus the expanded definition of the insanity defense. By that I mean, if a person wants to contend now that he could not form the intent required by the statute, that argument is available to him under present law. The government presently has the burden that 2572 would keep on the government, that is, to prove intent and willfulness. So, that the situation is the same now as it would be after 2572 becomes law.

However, S. 2572 makes a narrowing change. It changes substantially the definition of insanity. And in situations where the insanity defense was available before, namely irresistible impulse, conforming your conduct to the dictates of the law, or appreciating the wrongfulness of your conduct, the insanity defense would not be

available for those defenses any longer. So, in terms of plea bargaining or trial, there are fewer situations in which the insanity defense could be used if 2572 were law than is presently the case. Now, whether they are few enough is a different question. But the change is one of fewer situations in which it could be used rather than more.

Second, under the Federal system there really aren't a great many statutes in title 18 that have lesser included offenses and the kind of plea bargaining, to the extent that you could call it that takes place in the Federal system is very different than the kind of plea bargaining by tradition that takes place under State systems where there are a large number of lesser included offenses. There are few situations in which the U.S. attorney or department attorney would accept a plea to a lesser included offense. The usual form of plea bargaining, if it can be called that, is to take a plea to one or two felony charges in satisfaction of an indictment that might contain five or six, or eight or nine felony charges where the situation would likely be one where concurrent rather than consecutive sentences would be given. And it is rare, although this is not strict policy, it is rare for a U.S. attorney to enter into a situation where the Government agrees to any strict number of years. That is almost always left to the judge. So, there aren't the same—under the Federal system, there really aren't the kinds of plea bargaining situations that take place in State systems. So, I don't see that really as much of a danger.

Senator HEFLIN. Of course you've got another sort of plea bargain that could develop, and that is the question of sentence reduction. In effect, while you have elements of a defense which justify a prosecutor in saying—reduce the matter from a felony to a misdemeanor, you have also the element of punishment involved. Many defendants desire to get probation and they, in effect, enter a plea of guilty or enter a plea of nolo contendere under plea bargaining with the idea that they would go to some mental institution and take treatment. It may well be that the type of insanity is a threat not only from a white-collar crime, but could be a type of insanity that affect violent crimes.

So, there are problems—what I would suggest we look into, is some sort of prohibition under any type of approach that is used which would prevent or at least make it extremely difficult to get into plea bargaining.

Mr. GIULIANI. We would have no trouble with that.

Senator HEFLIN. Could the end result of a verdict like "guilty but mentally ill" be better obtained through some type of interrogatories that might be propounded to a jury if they were needed?

Mr. GIULIANI. Special verdict?

Senator HEFLIN. Well, special—not necessarily special verdict, but some type of interrogatories that might be propounded to bring forth what the jury felt about it and the type of it.

Mr. GIULIANI. If that were the approach that were taken, it would seem to me you almost need to do that in order to make sure that the jury's verdict was a focal point. So many concepts are being introduced to them, there were so many alternatives that it probably would make sense from the judge's point of view and, therefore, probably even in the legislation, to require forms of spe-

cial verdict. That is why we have real reservations about the "guilty but mentally ill" approach. It's just inherently confusing and unless you define "mentally ill" narrowly it's going to actually, in our view, expand the number of situations in which you could assert insanity and the number of situations in which you could call psychiatrists to testify before the jury as to mental state. And the end result is going to be a more confusing system than the one we presently have.

Senator HEFLIN. There is an issue on whether or not our laws are adequate for a detention of a person found not guilty by reason of insanity.

Is there any problem that you see, constitutionally, with the fact that a jury or a judge, in effect, makes some statutory finding, which would be sufficient to meet constitutional muster, to detain the accused after his acquittal in effect for treatment. There, of course, as we know in the appeal of civil commitments there is such constitutional requirement that has to be met. We had the attorney general of Idaho here, and under their statute, if the man is found not guilty by reason of insanity, he is free to walk out; but he also stated that in 10 minutes they could start the procedures by typing a petition for civil commitment. Well, I am not sure that Idaho typists are that fast, but it seems to me that we ought to be sure to place language into the finding of a jury or statutorily require an immediate finding by the trial judge that can meet constitutional muster for a detention until other proceedings can be held.

Now, you have seen the problems with this. What sort of language ought to be drafted to insure that there is a constitutional muster met in regard to detention?

Mr. GIULIANI. This is a very serious gap that exists between Federal procedure and State procedure. It has existed for some time and there have been numerous recommendations and calls for reforming it and changing it, and I hope—probably on an emergency basis this is the most important thing that could be done, changing the insanity defense long term, I think it would have great effect, but immediately this is the most serious problem that Federal prosecutors face in every State other than in the District of Columbia. If a person is found not guilty by reason of insanity under present law under any of these approaches, that person would then be free to leave the courtroom. The U.S. judge does not have the power to hold the person.

The approach taken in 2572 is a reasonable one and one that we support. There are other ways to do it, but the verdict alone of not guilty only by reason of insanity should at least for a period of time before there can be a hearing be a sufficient ground in order to protect the public for holding the person for a hearing. Now, that hearing could take place before a State judge, if there were a State procedure available, but in those situations where a State procedure would not be available, under 2572 or any other approach that you would work out, the Federal judge should be given the statutory power to conduct the commitment procedure under the same standards that have been approved by the Supreme Court for States. It really—it is a power that has not been given to a Federal judge and the approach really should be to give the Federal judge essentially the same kind of power that a State judge has

and make determinations for civil commitment in the public interest.

Senator HEFLIN. Well, under existing Federal law, as I understand it now, if a person is found not guilty by reason of insanity, he is referred to the State mental institution and this transfers the treatment from the Federal Government to the State government.

What is your thinking on this? Does this need to be changed? Of course, under existing law in the District of Columbia there is St. Elizabeths, a Federal hospital, but otherwise in any Federal-State relation, you've got a situation where many of the State mental institutions are under Federal order as being constitutionally infirm. And yet a person that is going to be treated, under existing law, goes to one of those constitutionally infirm institutions for his treatment.

Now, what is the remedy for this and how can we do this?

Mr. GIULIANI. The—actually under present Federal law, there really is no such verdict as not guilty by reason of insanity. It's called that, but as a legal matter, when a person is found not guilty at the conclusion of a Federal trial, he is not guilty.

Senator HEFLIN. Well, I believe that—understood that there was such a verdict.

Mr. GIULIANI. Well, it's called that but it has no legal effect. A jury comes back with a verdict of not guilty or if they say the words "not guilty by reason of insanity," the same legal effect takes place. The person is innocent and can walk out of that courtroom, and it is only by arrangement, informal arrangement, that the Federal Government works out with a State, taking that person into custody and then beginning under whatever State procedure exists, and they are very different in different States, the civil commitment procedure. So, that the gap is a very real one. If, in fact, that isn't worked out or the civil commitment procedures of a State take longer to start, that person was found not guilty by reason of insanity, who possibly has just committed a bank robbery and shot someone or killed someone, is free, just like any other person found not guilty.

The major changes that have to be made are, first of all, to have a statutory "not guilty only by reason of insanity," so it has legal effect and give the Federal judge the power to hold that person pending either a State hearing or being turned over to State custody, rather than just walking out of the courtroom and being picked up if it works out, or where that fails to permit the Federal judge to conduct a Federal hearing and the person would then be civilly committed under Federal law as an alternative. But that gap has to be closed, otherwise we face—each time a person raises the defense of insanity in the Federal court—we face a very dangerous situation of losing control over a person who may very well be a very dangerous person.

Senator HEFLIN. Well, thank you, Mr. Giuliani. We appreciate your testimony.

I asked you about this statute where you put a presumption of the—the person is presumed to be sane and responsible for his acts?

Mr. GIULIANI. Yes, you did, sir.

Senator HEFLIN. You have various presumptions or inferences that exist in criminal law, for example, that malice is supplied by the use of a weapon in a murder case.

Are there any other problems that you foresee with such a statutory presumption declared in the Federal law? That is, if we decide to change the burden of proof?

Mr. GIULIANI. So long as you make a record for the factual basis for the presumption and it's a reasonable one, it would pass Supreme Court muster, that basically this test. So long as the presumption is factually based and rational, a rational presumption, it can be used in court. And many States have different presumptions in this whole area of insanity. Again, we favor the 2572 approach, which we think is the cleanest, but we would have to look at it to the extent that we could give opinions on, we would really have to look at the particular presumption. Depending on the factual basis for it, it would or would not be valid.

[The following correspondence was subsequently supplied for the record:]



U.S. Department of Justice

Office of the Associate Attorney General

Washington, D.C. 20530

September 3, 1982

Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
209 Russell Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

At your recent hearings concerning amendments to the insanity defense, you posed several questions which I would like to answer. First, at the hearings and in subsequent correspondence, you asked for any available statistics regarding the insanity defense and defendants who are found not guilty by reason of insanity. Those statistics are being compiled and will shortly be forwarded to you.

You also asked whether individuals who are found not guilty by reason of insanity can "serve in a mental institution such time as they would have served if they had been found guilty" Transcript of Hearing at p. 63. Our evaluation of the relevant legal issues convinces us that the Constitution would not permit the automatic commitment of such an individual for a determinate period of time. Even though such a person may have committed all the acts sufficient to constitute a crime, he has been found "not guilty." Therefore, society cannot treat him as if he had been convicted. Applicable court decisions require a hearing, in addition to the criminal trial, in order to commit an individual for treatment and to continue that treatment for such period of time as may be necessary. See, e.g., *Paxstrom v. Herold*, 383 U.S. 107 (1966); *Bolton v. Harris*, 395 F.2d 642, 649 (D.C. Cir. 1968). See also *Addington v. Texas*, 441 U.S. 418, 425 (1979). Congress recognized this principle in 1970 when it enacted the commitment procedures currently in effect in the District of Columbia -- 24 D.C. Code § 301, which provides for a commitment hearing and periodic subsequent hearings on the issue of insanity. Therefore, in our view, serious constitutional issues would be raised by legislation providing for a predetermined period of hospitalization for someone found not guilty by reason of insanity.

Finally, you asked us to re-evaluate our position on the so-called mens rea approach to amendment of the insanity defense. Of course, we share your concern that legislation in this area provide true protection for the public within the bounds of the Constitution. Transcript of Hearing at p. 65. We have supported the mens rea approach because we believe it will achieve precisely that. The Department of Justice position on this issue has been formulated over the course of nearly a decade of study.

The mens rea approach corrects the two critical flaws in current law. It removes the defendant's motivation from the determination of guilt and it curtails the far-reaching psychiatric testimony which today is admissible at trial. Other approaches are not as comprehensive in addressing the problems in current law. Because the mens rea approach will bring about the broadest and most effective reforms, we continue to support it.

Of course, this is not to say that other approaches to amendment are without merit. Lawyers, judges and scholars have disagreed for many years on this issue. Therefore, we believe it is critical that our discussions continue. We look forward to meeting with you and your colleagues in the very near future.

Very truly yours,

Rudolph W. Giuliani
Associate Attorney General

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United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, D.C. 20510

August 16, 1982

Honorable William French Smith
Attorney General of the United States
Department of Justice
Washington, D.C. 20530

Dear Mr. Attorney General:

Enclosed please find a list of questions that Senator Specter requested I submit to you for your response thereon.

So that your answers may be included in the hearing record, I would appreciate your prompt consideration of these questions.

With kindest regards and best wishes,

Sincerely,

Strom Thurmond

Strom Thurmond
Chairman

ST:jqqp

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U. S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

NOV 04 1982

Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

This is in response to your letter of August 16, 1982 enclosing questions from Senator Specter concerning matters raised at the hearing on the insanity defense on July 19, 1982. Senator Specter poses questions in six major categories.

Empirical Data

It is extremely difficult to develop reliable statistics on insanity acquittals in the federal court system. The 94 United States Attorneys' offices submit information, the accuracy of which depends on both the timeliness and thoroughness of the submissions. For example, we have previously informally advised Committee staff members that in Fiscal Year 1981, 14 defendants were acquitted pursuant to an insanity defense. Follow-up inquiries to the offices involved have now indicated that while these 14 were reported in Fiscal Year 1981, many of them were actually closed before October 1, 1980. Accordingly, the measurement by Fiscal Year of cases lost is not accurate, and a count of cases closed by calendar year was attempted starting with the last complete year, 1981. Contact with the United States Attorneys' offices then revealed that many cases reported as insanity verdicts actually did not involve an insanity defense. Our information now indicates that in calendar year 1981 only four federal defendants were acquitted of charges on the basis of a successful insanity defense. The additional information on each of the four defendants as requested by Senator Specter is as follows.

One of the defendants was charged with mailing a threatening communication in violation of 18 U.S.C. 876. The defendant was in a mental institution (based on a prior State commitment) at the time she mailed the threatening letters and remained committed after the acquittal. We are not aware of any State charges against the defendant resulting from the events underlying the federal charges.

The second case involved a violation of 18 U.S.C. 2113, bank robbery. The defendant was tried in the United States District Court for the District of Columbia and was adjudged not guilty by reason of insanity. Upon his acquittal he was committed to Saint Elizabeth's Hospital, from which he was conditionally released approximately four months after his commitment. (The conditions for his release included attending counseling sessions as an outpatient and taking prescribed medication.) We have no information as to whether the defendant has been arrested since his release.

The third defendant also was charged with a bank robbery in the District of Columbia. Upon his acquittal he was committed to Saint Elizabeth's Hospital and, we understand, is still committed there approximately 14 months later. He left Saint Elizabeth's without authorization on two occasions and subsequently returned to the hospital. He is suspected of having committed an additional bank robbery during one of his unauthorized absences, and may be charged by local officials for that crime.

The last defendant was charged under 18 U.S.C. 1153 for having committed a murder on an Indian reservation. Upon his acquittal he was neither committed to a mental institution nor tried by any non-federal authority for any offense arising out of the incident. We have no information that the defendant has been arrested for any subsequent offense.

If the Committee deems it necessary, we can attempt to obtain similar information for previous years but its accuracy depends on direct contact with the Assistant United States Attorneys who handled the cases and their ability to recollect the case and its aftermath. In view of personnel turnover, it is doubtful that complete information can be obtained for years prior to 1981.

Coordination with the States

As you know, federal law embodies no provision for hospitalizing a person acquitted after raising an insanity defense. Only state courts can order such a civil commitment. Such arrangements are made on a case-by-case basis by individual federal prosecutors in contact with State prosecutors. The Law Enforcement Coordinating Committees have not devoted a great amount of time to this subject which, as indicated, is usually handled on an ad hoc basis. Department policy is to encourage commitments on such a basis.

Frequently, when it appears that insanity may be raised as a defense, a federal prosecutor will defer to state prosecuting authorities precisely because State authorities can institute civil commitment proceedings immediately following any acquittal. The Department encourages cross-designation of State and federal prosecutors to accomplish this purpose, among others.

Litigation Strategy

It would be improper to discuss in detail our litigation strategy in the Hinckley case. Suffice it to say that only in the federal district court could all crimes be charged including a violation of 18 U.S.C. 1751, the Presidential Assassination Statute. In Superior Court the prosecution would have been under a statute of local applicability proscribing assault with intent to kill. As you will recall, the Congress enacted 18 U.S.C. 1751 in response to a recommendation of the Warren Commission after the assassination of President Kennedy and in so doing expressed a clear preference for federal investigation and prosecution of a crime which is unparalleled in national impact.

As for the California case of People v. Valdez, reported in the National Law Journal of January 11, 1982, there has been an ongoing relationship between the United States Attorney's Office in San Diego and the District Attorney's office providing for cross-designation of prosecutors. Pursuant to a request made by the United States Attorney, an Assistant United States Attorney was appointed an Assistant District Attorney for this case. The case was originally brought in federal court because of a policy in the Southern District of California that all bank robberies be prosecuted in federal court.

Commitment and Release

Temporary commitment for evaluation following an insanity acquittal has been almost uniformly upheld, even in those cases where the acquittal rests on only a reasonable doubt as to the sanity of the acquittee. See Bolton v. Harris, 395 F.2d 642, 651 (D.C.Cir. 1968) where the court noted that the jury's finding of such doubt as to sanity provides a sufficient ground for further examination of the defendant. See also In Re Franklin, 7 Cal. 3rd 126 (1972); People v. Chavez, 629 P. 2d 1040, 1046-1050 (Colo., 1981); People v. McQuillan, 392 Mich. 511, 525-529 (1974). As for the permissible length of the temporary commitment before the defendant must be afforded a hearing, the Franklin and Chavez cases involved statutes calling for a commitment of 90 and 180 days respectively, while the Supreme Court of Michigan adopted a 60-day period in McQuillan. The District of Columbia Code mandates a 50-day waiting period. 24 D.C. Code 301(d).

The question of which party should have the burden of proof in the commitment proceeding of an insanity acquittee is related, in our view, to the type of insanity defense contemplated. Under the mens rea approach which the Department favors, we have suggested that the burden be on the government since the insanity defense itself would be so narrow that there would be few, if any, cases in which the government would lose the criminal case and yet could not meet this burden in the commitment proceeding. Moreover, placing the burden on the government and requiring it to prove the

existence of a mental disease or defect and dangerousness -- a presumption of which could be statutorily created for an offense involving bodily injury or property damage -- by clear and convincing evidence would justify keeping the insanity acquittee confined in a hospital for a period of time longer than he would have been incarcerated in prison if he had been found guilty, thus maximizing public protection. The "clear and convincing" standard was, of course, adopted by the Supreme Court in *Addington v. Texas*, 441 U.S. 418 (1979) for a civil commitment. On the other hand, if the defendant bears the burden of proof on insanity at the trial and successfully carries that burden, it is not illogical to require him to show that he is not presently insane and dangerous, the system that is in effect in the District of Columbia.

The Department has endorsed provisions that would allow the director of the facility in which the insanity acquittee is confined to recommend his release if this would not, in the director's opinion, create a substantial risk of bodily injury or property damage. However, the government is entitled to a hearing on these issues and at the hearing the defendant must show by a preponderance of the evidence that his release would not create a substantial risk of bodily injury or property damage. The preponderance of the evidence standard is derived from the District of Columbia Code and has been found workable for several years.

Mens Rea Approach

Under the mens rea approach, or any other limitation of the insanity defense, it would continue to be the prosecution's burden to prove that the defendant acted with the mental element set out in the statute. In this regard it should be emphasized that the mens rea approach places no new burden on the government as to any element of the offense. Under the mens rea approach, mental disease or defect, "diminished capacity," or any other impairment would only constitute a defense if it negated the mental element of the offense. For example, a defendant with the mental age of a two-year-old child could not be convicted of murder since he could not be shown to have acted with malice aforethought, or have intended to kill. On the other hand, a defendant who killed out of an irrational desire to impress a stranger, or who acted in the genuine belief that the defendant was an evil person and deserved to die, or who merely had medically recognized problems in adjusting to life, could be convicted of murder if the government proved that he knew he intended to kill a human being. The reasons for his offense would be a matter to consider at sentencing, not a matter to be the subject of confusing psychiatric testimony during the determination of guilt or innocence.

It might be added that while the government bears the burden or proof on each element of the crime, the defendant's knowledge or intent is irrelevant to many elements. For example, in the offense of receiving stolen property it must be shown that the

defendant knew that the property was stolen, but it does not have to be shown that the defendant knew the property was moving in interstate commerce.

To be sure, psychiatric testimony would be admissible under the mens rea approach but it would be less prevalent than under any alternative insanity defense system. We would expect that over a relatively short period of time, psychiatric testimony would be sharply limited on the grounds of relevance as courts and defense counsel come to recognize that mental disease or defect is only a defense when it is of such a nature as to negate the government's proof of the mental element of the offense. Psychiatric testimony not relevant to this element would be excluded.

Guilty but Mentally Ill

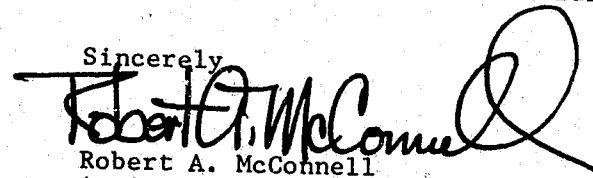
The Department has favored the mens rea approach over the verdict of "guilty but mentally ill" for the numerous reasons previously discussed and those in our testimony on the subject. While some States have adopted such a verdict, and although many legislative proposals for such a verdict contemplate the hospitalization for treatment rather than imprisonment of a person so found, the verdict can present constitutional problems. Initially it would arguably violate Due Process to label as "guilty" (but mentally ill) a defendant who the government by definition was unable to prove had committed every element of the crime charged, including the requisite state of mind.

For example, such a verdict could apparently be rendered even if the defendant choked another person to death but was so deranged that he thought he was squeezing a grapefruit. Moreover, the fact that the verdict of guilty but mentally ill would likely have certain collateral consequences, such as the loss of the right to vote or hold certain offices, that are the same as those triggered by a simple finding of guilty, would also raise serious Due Process questions.

Finally, we believe that the guilty but mentally ill approach may actually broaden the range of psychiatric testimony which would be admissible at trial. Moreover, our mens rea approach would, like the guilty but mentally ill formulation, permit a guilty person to be hospitalized in appropriate circumstances.

Of course, I hope that the above answers are responsive to your inquiry and that you will let me know if we can be of further assistance in any way.

Sincerely,


Robert A. McCannell
Assistant Attorney General

Senator HEFLIN. Thank you. We appreciate your testimony and are sorry that we are just now getting to the very distinguished analysts—

Mr. GIULIANI. Thank you, Senator.

Senator HEFLIN [continuing]. At such a late time, Prof. David Robinson, Prof. Richard Bonnie, and Prof. Randolph Read, Dr. Read.

We have a problem because I am going to have to leave here in 10 minutes. It may well be that we may have to call additional hearings for you to be heard at a later time. Some of you are close by, but Dr. Read, I see, is from San Diego. My problem is that I have to meet the President this afternoon, so I've got to leave here at that time. So you can have your choice as far as coming back or—

Dr. READ. As far as I'm concerned, Senator, I am available at the pleasure of the committee. I don't—I can't speak for my colleagues.

Senator HEFLIN. Which is Dr. Read?

Dr. READ. Excuse me?

Senator HEFLIN. Are you Dr. Read?

Dr. READ. Yes.

Senator HEFLIN. You've got the problem of travel, I suppose.

Dr. READ. Yes.

Senator HEFLIN. Well, why don't we go ahead and hear from Dr. Read, if we could and how about Professor Bonnie, are you available?

Mr. BONNIE. Depending on the date, when we are summoned.

Senator HEFLIN. But you're not too far away?

Mr. BONNIE. No. And it's a pretty ride, too.

Senator HEFLIN. All right. Well maybe we will go ahead with Dr. Read, if you would, and hear from you and perhaps maybe Professor Robinson and Professor Bonnie can come back at a later time. We will work that out.

So go ahead, Dr. Read.

**STATEMENT OF RANDOLPH A. READ, M.D., FORENSIC
PSYCHIATRIST, SAN DIEGO, CALIF.**

Dr. READ. OK. I will try to be brief and to the point. My written statement, I think, covers most of the issues that I think relevant.

Perhaps I should just say, by way of background, that I'm a board certified psychiatrist. I have been licensed in California since 1972. I have examined approximately 1,000 individuals on forensic cases for the State and for the ninth circuit, as well as the multi-courts martial in that area.

I think clearly we need to have a system that will identify and treat mentally ill offenders. There is just no question about that, and I think everybody is in basic agreement that we need some kind of system. I think for me, as a clinician, probably the most important issue is just simply the utilitarian one, that there are people who are treatable, that if we don't treat them, then we are going to pay in some fashion when they get out. I have seen too many cases of individuals who have either been in State hospitals or have been in prisons—by the way, quite a bit more of them have been in prisons than have been in hospitals, that then reoffend and

hurt somebody very badly. And in each one of those cases it was because of inadequate followup. It was easy in retrospect to see where the ball had been dropped. So, I think that is really where the major change needs to occur.

The average criminal population individual is not treatable by current psychiatric methods. If we could cure the people in prisons, we would love to, psychiatrists. But we are just not able to. On the other hand, the people with the chronic psychotic disorders, there is a lot we can do to reduce their dangerousness to the community.

There are also a variety of different humanitarian and legalistic issues involved in this. I think they have been brought up quite a few times.

Let me talk about some of the specific proposals. I think the problem with all of the mens rea approaches—in some of the bills they are offered as insanity defenses, but they are really, once again, mens rea defense—is that it encourages the trier of fact to bend the law. I have seen a variety of times that this has happened in cases where things have not been spelled out very well for the jury and the jury has to ad lib. But let me just give two hypothetical examples that are actually based on real cases.

Individual "A" I will call Freddie, a cocaine dealer. He buys and sells large quantities of cocaine and he knows that there are Federal laws against doing so. In fact, the Federal laws help his profit picture by making the black market. He doesn't like all the Government agents, however, and he feels that they are following him. There is some truth in that. And he is very suspicious of an individual who he believes is an informer. So, he lures that individual out to a rural area and using a handgun executes him in an execution-style killing, by having the man kneel down and shoot him in the head. I think that just about anybody would agree that that is a very bad person, doing a very bad thing.

Compare that, though, to a housewife, I'm going to call her Betty, who is the mother of an 8-year-old and an 11-year-old boy. She is divorced and still enjoys a cordial relationship with her ex-husband. She begins to believe that Israeli secret agents are trying to kill her and have been following her around. She is sure of this fact because she smells the odor of poisonous gas that is being piped into her house. She later concludes that the Mexican Mafia is also helping these Israeli agents after she heard an ad on the radio for real estate that remarks in the ad, you could have a new home, and she interprets that to be a message that if she doesn't move out of her house they are going to come and kill her.

She calls up her ex-husband and asks him to come over and watch the house and guard her for the night and goes out and buys a shotgun. And that evening—she had been thinking about it during the day, and decided that evening to kill both boys and herself. She decided not to kill her ex-husband though, because he was an unpleasant fellow and deserved to live, and suffer at the hands of the secret agents. She shoots one of the boys, blowing his head off completely, wakes up the other child in the process, who wrestles the gun from her.

Now, the trouble with mens rea is that it says that both of these individuals should be treated the same. Juries are not going to do that. I think it is nonsense to believe that they will. And the argu-

ment that a judge can sentence these people differently is a very naive argument. I teach at the California Judicial College, and the increasing fear among judges is the pressure of the media and the pressure from political action committees. There is tremendous pressure put on judges regarding sentencing, and to ask judges to make up for errors that occur at the time of the trial is just naive.

Furthermore, I just do not believe that juries are going to do that. They will somehow reduce the charges on the housewife even though she clearly planned ahead of time and intended to kill that child, it is just not in their minds, I think, based on many jurors that I have talked to, the same kind of situation as the other fellow. There needs to be a way of distinguishing these very ill people.

I think there is objection in the "guilty but mentally ill" approach in that although it could be applied to this housewife, what I'm afraid is going to be happening and it seems to be happening in most of the jurisdictions, is that these individuals are sent to the prison systems and given minimal, if any, treatment, very, very superficial care. It's hardly surprising, since the prisons are so overcrowded that if they can't afford to adequately house the inmates, they certainly are not going to be able to afford to adequately treat them.

The one thing that "guilty but mentally ill" does is it takes care of the social labeling purpose. The thing I have heard almost universally following the *Hinckley* verdict—in fact, my father called me up to ask me about it, he said the man was obviously ill, but he did it, didn't he. And the question is, he did do it, didn't he, I think is where most people have a problem with the guilty—not guilty aspect—not guilty by reason of insanity.

Perhaps the real solution to this is to adopt the American Bar Association's Criminal Justice Standard Committee's recommendation, of using nonresponsibility by reason of mental illness. The nonresponsibility, I think, is a much better term for the public than not guilty.

Senator HEFLIN. What about something like "indictment proven, but not criminally responsible"?

Dr. READ. That would—

Senator HEFLIN. Some type of language of that sort?

Dr. READ. That would be fine. I guess from my perspective, as a psychiatrist, I'm most interested in what happens to the people afterward. I think much of the current furor, is a furor about the label, the label that seems to say to a lot of people—

Senator HEFLIN. The words "not guilty" is what the label that society gets shocked about.

Dr. READ. Exactly.

Senator HEFLIN. I think—I asked the Attorney General if it had been a mere Senator, I don't think you would have had the public outrage. I think it's the fact that you have the President who was shot and the word "not guilty" that really causes the outrage that the public has demonstrated.

Dr. READ. Yes; I think that is quite true, Senator.

I think there is another issue, too, that there is a general public belief that individuals who are found not guilty by reason of insanity walk out the doors a week later. That is so far from the truth.

The little bit of systematic data that has been collected suggests that people stay longer when they have been found legally insane. There have been a variety of different studies done about the public perceptions of this and it's interesting to note that one study of legislators found that the legislators overestimated the number of insanity defenses by a factor of 200 to 1,000. In other words, they thought that the insanity defense was successful 200 to 1,000 times more often than it is. I suppose it's reassuring that they were State legislatures rather than congressional.

At any rate, I think that the problem that psychiatrist always disagree is largely the result of the legal system itself. I have yet to see a civil personal injury suit in which orthopedic surgeons were testifying where the surgeons called by the opposite sides didn't agree, that typically one will say there is complete disability, the other will say that there is no disability at all. Ballistic experts, pathologists routinely disagree on very technical areas and juries are able to sort that out. I think it's really the adversary process itself that does that.

I think the mens rea, despite the fact that prosecutors seem to believe that it will keep out psychiatric testimony. I expect that it will let in a flood of psychiatric testimony because there will no longer be an insanity defense available and attorneys will try to see what they can do with it. It certainly did expand in California through diminished capacity, because the courts there decided to do it. I wouldn't be surprised if that happens elsewhere.

What I would suggest, specifically, is to change the burden. I think it definitely should be on the defendant. I don't think it has been resulting in acquittals. I haven't seen that in California in the ninth district, but what I have seen is hung juries as a result. It's easy to pick a juror who doesn't like the government and will be willing to hang it up because the burden is on the government. I think the burden should be on the defendant.

I like the ALI test, I think it's a good test. I think also that we're advised that the *M'Naghten* test, which has been used in some areas, it says that the person who lacks substantial capacity can know and understand the nature and quality of their acts. I think that the very narrowly defined tests are naive, once again, because juries go by what they think is fair.

I mention as an aside, California changed from *M'Naghten* from ALI and there is not any significant change in the acquittal rates for insanity. It really doesn't seem to make a lot of difference with tests that are used. I think there should be a Federal commitment standard for people who have been found NGI. I think it's very important. I think one thing that should be part of this is that when these people are hospitalized, wherever they are put, they should have the same standards of care as civilly committed individuals. If a guilty but mentally ill is used, I think it is vital, just absolutely vital, for those people to have the same standard of care. Typically, they get minimal custodial care, they are transferred to hospitals to be doped up on medication, but as far as any meaningful therapy, they don't get it. If we're going to execute these people it would matter, but eventually we let them go again. I think there ought to be periodic evaluations. Initially, they can be maybe every 6 months, but I think biannual after that. And then I think the

people should be followed up for 5 to 10 years on hospital parole after they are released to insure their cooperation with outpatient treatment. That is the most important step of the outpatient therapy and without that, in a way, it doesn't matter what happened in prison or in the hospitals, the individuals that I have seen reoffend have typically dropped out of treatment for 3 or 4 months and even though the clinics know it and the mental health center knows it, nobody does anything about it. We need hospital parole agents to do something about it as soon as the person fails to follow it through.

I think that briefly summarizes my remarks.

Senator HEFLIN. Thank you.

The other witnesses, if you would—your statements will be entered into the record, and we will be back in touch with you because we want to hear from you. Both have been in this field and they have written about it, and we are interested in your opinions.

Without objection, your material will be inserted into the record.
[The prepared statements of Mr. Read and Mr. Robinson follow:]

PREPARED STATEMENT OF RANDOLPH A. READ

"A gentleman in the prime of life, of a most amiable character, incapable of giving offence or of injuring any individual, was murdered in the streets of this metropolis in open day. The assassin was secure; he was committed for trial; that trial has taken place and he has escaped with impunity. Your Lordships will not be surprised that these circumstances have created a deep feeling in the public mind and that many persons should, upon first impression, be disposed to think that there is some great defect in the laws of the country with reference to this subject which calls for a revision of those laws in order that a repetition of such outrage may be prevented."

"HINCKLEY BEATS RAP"

The second quotation is obviously of modern origin, a sample of the ill-informed rantings of a New York tabloid. The first quotation came from remarks by the lord chancellor of the British House of Lords in 1843. Daniel McNaughtan¹, another would-be assassin of a political figure, killed an individual other than his would-be victim. He was acquitted by reason of insanity and the public uproar was intense.

Mr. McNaughtan apparently believed that the tory government had singled him out for abuse. As he put it, "They follow and persecute me wherever I go . . . they do everything in their power to harass and persecute me; in fact they wish to murder me."² As he considered his major persecutor to be the prime minister, he planned to shoot that governmental chief but instead killed his secretary. Queen Victoria, having weathered three attempts on her own life, was not happy with this result, and special hearings were held to determine the appropriateness of the notion of legal insanity.

In the United States in 1835, Richard Lawrence, an unemployed house painter, attempted to murder President Andrew Jackson. Mr. Lawrence believed himself to be the owner of large sums of money and blamed Jackson for withholding them from him. Later Lawrence believed himself to be the rightful King of England. After he was found legally insane, Mr. Lawrence spent the remainder of his life in a mental institution.

The insanity verdict in that case was unpopular also. Supporters of President Jackson felt that the attempted assassination may have been part of a larger political plot. Yet remarkably little outcry occurred in 1882 when Charles Guiteau was executed after assassinating President James Garfield. Guiteau had concocted the belief that the death of the President was the only way to save the Republican Party, and believed his mission to be mandated by the Deity.

And in recent times the lack of public outcry over the conviction of defendants who may be mentally ill has been striking. Little if any protest occurred when Patty Hearst was not found to be legally insane. Hardly any mention was made of the fact that the "Son of Sam" killer, David Berkowitz, or John Lennon's assassin, Mark Chapman, went through the criminal justice system without the insanity issue even being raised. More peculiar yet is the widespread misperception that all of these defendants were found legally insane or somehow had a reduction in penalty by means of a psychiatric defense.

During times of relative economic hardship, the general public seems to have an increasing resentment towards individuals who seem to be "getting away with" something. The tendency for many people to assume that any judge or legislator accused of wrongdoing is probably guilty is a good example. Criminal defendants who plead insanity are another handy target, especially since most people poorly understand the issues involved.

The ignorance regarding the insanity defense seems to have congealed into several pernicious myths. Lately these myths have resulted in pressure for legislative changes, particularly when reasonable-sounding if simple-minded panaceas are offered. Unfortunately, a "simple fix" can't work.

Common Myths Regarding the Insanity Defense

1. It's easy to be found legally insane.

This could not be further from the truth. Judges and juries are extremely skeptical of the insanity defense. It's hardly surprising that juries should have such skepticism, for they share the attitudes of the general public. And yet paradoxically, many people believe that merely by entering an insanity defense a defendant stands a good chance of gaining an acquittal.

One would hope that lawmakers would be well-informed about issues relevant to the insanity defense, especially if they contemplate modifying it. A study by Pasewark and Pantle³ in 1979 did little to dispel the fear that legislators might not be ideally informed. A large number of research studies have shown that the rate of "Not Guilty by Reason of Insanity" verdicts is about 0.1 to 0.6 percent of all adult felony cases. Legislators studied by Pasewark and Pantle grossly overestimated the NGRI acquittal rate, guessing that close to one in ten felony indictments yielded an insanity verdict.

2. Individuals found NGRI go to a hospital for a few weeks and "get off" completely.

This is a very distorted half-truth. The true part is that after eventual release from the hospital outpatient follow-up care is usually dismal. This must be changed. The distorted part is that although the statistical data is poor in this area, it does seem to be true that the average NGRI acquittee spends a lengthier hospital commitment than his counterpart in the prison system. This is especially so when the standard prison reductions of sentence for good behavior ("good time") are taken into account.

3. Psychiatry is a "pseudoscience" and has no business being used in a court of law.

This myth has become more popular of late, especially since a few psychiatrists nationwide have found it to be a profitable business. Psychiatrists offering themselves to testify as witnesses against psychiatry find steady employment. And the general public,

uncomfortable with mental health subjects, can find it easy to reject psychiatry as a legitimate branch of the medical sciences.

The most frequent complaint is that in an insanity trial, psychiatrists can offer diametrically opposed conclusions. Yet these disagreements are not the fault of psychiatry. Rather they are a reflection of the adversary system that seeks to maximize differences rather than look for points of agreement. Psychiatrists will be called by whichever side perceives their opinion to be helpful.

Similar "wars of the experts" occur in almost any area the law touches. Accountants, physicists, microbiologists, specialists of almost any discipline have been called at one time or another and displayed their disagreements in court. Orthopedic surgeons regularly testify in civil cases--one offering an opinion that a disability is nonexistent, the other offering the opinion that the disability is one hundred percent. All disciplines have disagreements, and the adversary process magnifies the controversies in an attempt to resolve them.

Public Policy Goals for the Disposition
of Mentally Ill Offenders

Despite the widespread disagreements about the insanity defense, there may be an underlying consensus on the goals for this part of the criminal justice system. Although a variety of subsidiary purposes can be listed, the major goals seem to fall into three categories:

1. Utilitarian

"Stop him from hurting himself or anybody else." This seems to be a widespread attitude regarding the management of mentally ill offenders. While some diehard retributivists might wish to inflict suffering upon the mentally ill offender, most people simply want him "off the streets" or otherwise rendered harmless.

The most effective measure, that employed by ancient Rome and other societies, was execution. But it does seem to be widely felt that the wholesale slaughter of mentally ill offenders would not be beneficial for society. Present behavioral control technology is essentially limited to external restraints (incarceration) and internal restraints (tranquilizing drugs). Even though these methods

are less than completely effective, few seem to acknowledge that some recidivism in any offenders, mentally ill or not, will be unavoidable.

2. Humanitarian

Perhaps as a result of more difficult economic times, this goal has fallen into lesser prominence. Although it has been especially dear to legal scholars and civil libertarians, it may be that humanitarian goals also serve society as a whole. While some offenders are to be punished for their misdeeds, there does seem to be a general perception that the truly mentally ill should not be held completely responsible for their actions.

3. Sectarian

Although one of the least obvious, this may be one of the most important goals. The sectarianism here is the general perception by most people that they are somehow "good" and "normal." The law serves sectarian purposes by isolating certain individuals and labeling them as blameworthy or mentally ill.

In this sense, a criminal trial is a modern morality play. Ideas of good and evil are defined, and notions of degrees of "badness" are spelled out for the entire community.^{e.g.} The conviction of an individual of second degree murder communicates back to the society its current beliefs about right and wrong.

The widespread public outcry over the insanity defense may be due in large part to the phrase not guilty by reason of insanity. It is the "not guilty" that so many people find offensive, for the usual response is something like, "Well, he did it, didn't he?"
^{Legal} scholars have attempted to make the law consistent, rational and fair. Unless we move to a system of strict liability (an unlikely prospect), criminal responsibility will continue to require not only the act (actus reus) but also the criminal thought (mens rea). The average person probably does not agree with this dichotomy. To the man in the street there is guilty, not guilty, and a moderately blameworthy residual third category of "insane."

Some Recommendations

1. Retain a scheme whereby mentally ill offenders can be clearly identified, given specific treatment while isolated from society, and closely followed upon their eventual return.

These are utilitarian goals. They are necessary not because mentally ill offenders have the highest recidivism rate. Indeed, somewhere between 40 and 75 percent of the general felony population reoffend. Persons found NGRI reoffend somewhere between 5 and 10 percent of the time. Rather, such measures are needed because the mentally ill offenders are actually more treatable.

Many of the chronic criminals have severe personality disorders such as antisocial personality. They respond poorly, if at all, to any of the available psychiatric treatments. Many of the mentally ill offenders, on the other hand, suffer from a form of schizophrenia or manic depressive illness. Many of these disorders are highly treatable.

Under the current systems in most jurisdictions, many mentally ill offenders receive less than ideal psychiatric care. When they are in prison settings they generally receive marginal care. Typically a disturbed inmate may see a psychiatrist once every few months for a half hour. In the state hospital setting the level of care, although limited, is typically much better.

After eventual release--as there is a limit to how many offenders can be ever incarcerated--mentally ill offenders should receive careful outpatient follow-up. At this time, few ever do. Responsibility for outpatient care is typically divided between several agencies, and the offenders often vanish in the confusion. Although the statistics in this area are limited, it does seem that most reoffending by mentally ill offenders occurs after a lapse in treatment of several months.

2. Create a label that clearly states the social goals.

It may be that the verdict "not guilty by reason of insanity" has reached the end of its useful life. The general public seems to wish for some acknowledgment of at least a minimal degree of responsibility for the offense--if nothing else, to serve the sectarian purpose of emphasizing that mentally ill offenders are

not a privileged class. Before the advent of tranquilizing drugs, most NGRI acquittees spent the rest of their lives in hospitals. Now that remission and hospital release is a real possibility for most mentally ill offenders, the sense that they are "getting away with something" bothers many people.

It may also be that with the broader tolerance of behavioral eccentricity these days, insanity is no longer the term of approbrium it once was. A verdict of not guilty by reason of insanity branded the person as a hopelessly ill social "untouchable." While lunacy is hardly fashionable, eccentric behavior that yields financial rewards and prestige has been often demonstrated by members of the entertainment industries. "Legally insane" now may seem to denote membership in a privileged social class that has carte blanche to break any law.

Some of the paradoxical terms that have been used have been "guilty but insane" and "guilty but not criminally responsible."

Probably the best phrase yet offered has been used in the provisional standards of the American Bar Association Criminal Justice Standards Committee. Their approach of redefining legal insanity as "nonresponsibility as a result of mental disability," while less than elegant, may be able to avoid stirring the passions that "not guilty by reason of insanity" usually does.

3. Avoid "quick fix" solutions such as "guilty but mentally ill."

The alternative verdict of "guilty but mentally ill" has been, without a doubt, the most brilliant stroke yet by those who oppose the insanity defense. Even if a jury is given the option of finding a defendant NGRI, it is hard to believe that they will pick that verdict over "guilty but mentally ill" (GBMI). Juries notoriously will "split the difference" and ^{try to} avoid extreme verdicts for those in the middle ranges. GBMI could easily be a compromise when jurors are struggling with the difficult question of an NGRI acquittal versus conviction.

The deceit in GBMI legislation has been the consistent use of commitment to the Department of Corrections rather than a mental health facility. It must be by now widespread knowledge that correc-

tions departments in almost every state are woefully underfunded and overpopulated. If a prison doesn't have enough money to provide adequate housing for its inmates, how likely is it that mentally ill offenders will be given adequate psychiatric care?

One would expect that the usual pattern will be "revolving door" overflows to state hospitals. The mentally ill offenders in corrections facilities will periodically decompensate and be transferred to hospitals for medication. After they begin to stabilize, they will return to the prison and gradually decompensate again. If GBMI laws mandated commitment to mental health facilities, with treatment at a standard equal to that provided to civilly committed patients, it would be a useful approach. But GBMI avoids such a tack possibly because simple incarceration is cheaper.

But the decreased expense is only a short-term benefit. Even aside from the humanitarian issues that housing mentally ill offenders in prisons is often cruel and abusive, there are the utilitarian consequences of inadequate treatment. Examples abound of mentally ill offenders who have been placed in prisons with minimal treatment, then reoffend shortly after their release. In order to adequately protect society, mentally ill offenders must receive treatment.

Other cosmetic changes such as a return to the McNaughtan test of insanity offer little real benefits. Changes in legal tests had little effect on acquittal rates, but the more recent tests make it far easier for juries to understand the relevant issues. The American Law Institute test is the best yet devised and should be kept.

4. Use "hospital parole" as a mechanism to insure after-care.

The worst way to release a mentally ill offender from a hospital or prison is with inadequate follow-up psychiatric care. The average prison inmate finds it difficult enough to readjust to life on the outside. Mentally ill offenders, hampered by their psychiatric disabilities, find it even more difficult. Expecting the defendant himself to follow through with outpatient care is naive, and yet this is often the approach used.

Rather than releasing a defendant once he is found to be sane, a better scheme might be periodic releases on hospital passes of gradually increasing duration. Day hospital care, family therapy, and outpatient individual therapy can help the individual gradually return to society. Long-term follow-up of five to ten years should be used in all cases of violent offenses.

A workable scheme might run as follows: a person found NGRI could have a mandatory hospital stay for evaluation, followed by a hearing to determine the need for continued hospital care. Upon the decision of the court--usually at the recommendation of the hospital--the defendant could be released to "hospital parole"; when ready.

On hospital parole, the defendant would be required to participate in day treatment or other forms of outpatient therapy to aid community reentry. If the defendant fails in any way to adequately cooperate with therapy, prompt rehospitalization could occur. A "hospital parole agent" could be appointed, with duties similar to that of a conservator of the person. Recidivism could probably be dramatically reduced by prompt response to the defendant's deterioration. With steady improvement, the controls on the defendant could gradually be reduced.

One simple way of affixing the length for hospital parole could be the total time that the defendant could have served in a prison if found guilty. Another scheme might be to require five or ten years for all serious felonies. Ultimately any approach is arbitrary, and simply represents a hedge against errors in diagnostic assessment. Even a prematurely released defendant may have little chance to do serious harm if closely observed after returning to society.

Summary

As this statement was prepared on very short notice, it only briefly deals with the relevant issues in this area. The furor over the insanity defense is not new, but unfortunately the problems presented by the mentally ill offender cannot be solved by a quick solution. As a society we are in an awkward phase where we are able to identify, after disputation, those who we perceive as mentally ill,

but not yet able to completely "cure" them. Still, it would be naive to say that things are not improving.

Despite the claims of the rabid antipsychiatry factionalists, psychiatry is becoming an increasingly refined field. The old saw that diagnostic reliability is no better than 50 percent (hence the phrase "flipping coins in the courtroom") is being pushed aside by studies that show high diagnostic reliability. Indeed, the severe mental illnesses such as schizophrenia now enjoy an interrater reliability of 80 to 95 percent thanks to the new diagnostic and statistical manual (DSM-III). A good review of reliability studies of psychiatric diagnoses was published by Grove and his colleagues⁴ in 1981. Furthermore, while the prediction of dangerousness continues to be a controversial area, several researchers, notably Monahan⁵, have developed promising approaches.

The gradually developing technology for thought control offered by psychobiology will profoundly change our civilization. Up until now the tranquilizing drugs available have been essentially "chemical straitjackets." Eventually psychiatry will have developed drugs that can control one's entire mental life. How these drugs will be used is still an unanswered and frightening question. There seems little doubt, however, that the first people to receive mind controlling drugs will be that class of undesirables who has no political action committee--the mentally ill offenders.

At this point, hormone suppressing drugs are being investigated in the treatment of sex offenders and aggressive mentally ill offenders. Drugs such as cyprotenone acetate and medroxyprogesterone are used to reduce the blood levels and effectiveness of male hormones in these individuals. This form of "partial chemical castration" was first utilized in Germany, and the preliminary studies in the United States have been quite promising.^{6,7} Whether we will use these new chemical tools well remains to be seen.

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PREPARED STATEMENT OF DAVID ROBINSON, JR.

My name is David Robinson, Jr. I am a professor of law at George Washington University, Washington, D.C. I have been both a state and a federal prosecuting attorney and a litigator of the insanity defense and related questions before courts ranging from the trial level to the United States Supreme Court. I have served as a consultant on the insanity defense to the National Commission on Reform of Federal Criminal Laws and to the Department of Justice. For the last 18 years I have taught Criminal Law and Procedure and Evidence.

To reconsider the insanity defense is to enter a process which has been going on for some time. With your indulgence, I would like to outline its recent course in federal criminal law, a process which is continuing today and one with which I am personally familiar. As many of you know, in March 1966, President Johnson sent Congress a message entitled, "A National Strategy Against Crime," proposing, among other things, a commission to comprehensively review the federal criminal laws and recommend revision of them by 1968. An administration bill was introduced a few days later, and with congressional revisions, the National Commission on Federal Criminal Laws was established. This Commission was headed by the former Governor Pat Brown of California, that is Brown One. It included a number of distinguished

people such as Senators McClellan, Hruska, and Ervin, Representative Kastenmeier, Judge George Edwards, Judge Leon Higginbotham and many others. An advisory committee was set up headed by former Justice Tom Clark and included persons of varying backgrounds, such as Patricia Harris, Elliot Richardson, James Vorenberg, presently Dean of Harvard Law School, and others. The permanent staff was headed by Professor Louis B. Schwartz of the University of Pennsylvania Law School, who asked that I serve as a consultant on the insanity defense.

A model insanity defense statute had already been drafted by the American Law Institute in its Model Penal Code. It was a modernized version of the old M'Naghten right-wrong test added to the irresistible impulse test. This proposal was a central edifice in the Model Penal Code effort and had already been adopted by most of the United States Courts of Appeals, albeit commonly without careful thought. At the same time it was apparent that much of the enormous judicial and professional literature was misconceived. Persistently, for example, there was and is a confusion of a legal standard of criminal responsibility and a medical terminology adopted for different purposes. Nevertheless, it was obvious that the tide was running strongly against the older rule and that any effort to reembrace it would be likely regarded as quixotic, pre-scientific, and unacceptable. The American Law Institute standard, while framed in non-Victorian language, centered on the accused's capacity to conform to the legal proscription, which also presented difficulties. Most fundamentally, the critical language of the American Law Institute's proposal is undefined and without operational meaning. There is no definition of what is meant by "mental disease" or "mental defect" or "capacity to conform to the requirements of law". No test is available to distinguish between those who cannot and those who will not conform to legal requirements. The result is an invitation to semantic jousting, metaphysical speculation and intuitive moral judgments masked as factual determinations.

It is clear that the control tests, such as the American Law Institute one, have potential for expansion so sweeping as to vitiate the rule of law. As Dr. Daniel Robinson at Georgetown University has said, "Quite simply, where there is no settled body

of knowledge, no accepted methods of investigation, no accepted validity and reliability of relevant measures, no predictive efficiency, no widely adopted and testable theoretical foundation, there can be no expertise. And when there is no expertise, there are no experts, and therefore, no expert testimony."

To say that there is no expert testimony, of course, is not to deny that highly trained and thoughtful expert witnesses do testify. In the case of John Hinkley, for example, one defense psychiatrist, a Dr. David Bear, was quoted as testifying, "Do I conclude this act was rational and planned?... My God, my sense of justice says absolutely not."* On the other hand, prosecution psychiatric testimony described the defendant as a selfish, manipulative parasite with an exaggerated sense of self-importance.

Such evaluations vividly illustrate an additional persistent problem with a conventional insanity defense. Its murky parameters invite expert witnesses to substitute their own moral preferences for those of the law and the jury.

Another difficulty with control tests is associated with the 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: "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 determinism which govern even mental life." Doctors Redlich and Freedman, two distinguished psychiatrists, have written: "As a technology based upon 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." Such a view is consistent with a conclusion that all criminal conduct is evidence of lack of power to conform behavior to the requirements of law.

Other problems present themselves as well. The insanity defense

*New York Times, June 22, 1982, p. D27, col. 3.

has resulted in the misuse of resources. Psychiatrists and psychologists, in critically short supply as far as the criminal justice system is concerned, are being called upon to devote their time to the battle of experts in courts, rather than to use their skills in more productive fashion. In such a contest, wealthy defendants have a distinct advantage. Furthermore, a fair litigation of the insanity defense requires evaluation by experts who might be asked to testify on behalf of the prosecution as well as experts employed for the defense. This presents potentially severe problems in terms of the privilege against self-incrimination and the constitutional right to counsel as well, the character of which are just beginning to be explored by the United States Supreme Court. See Estelle v. Smith, 451 U.S. 454 (1981).

Another difficulty with a conventional, separate insanity defense is the danger to the public which may be presented following an insanity acquittal. Following the 1954 decision in Durham v. United States, 214 F.2d 862, which expanded the defense in the District of Columbia, the Congress provided for automatic hospital commitment of indeterminate length of persons acquitted by reason of insanity, in order to reassure the public and provide for its safety. This legislation was subsequently struck down by the United States Court of Appeals on constitutional grounds. Bolton v. Harris, 395 F.2d 642 (1968). The result is that there can be automatic commitment only for a brief period, now set by statute at 50 days, to allow examination under standards similar to those required for civil commitment of the mentally ill. The danger to the public is apparent. In the Hinkley case, for example, government witnesses testified that the defendant was not mentally ill. In addition, there are the legendary further difficulties in litigating the issue of "dangerousness." There is also a serious constitutional question whether dangerousness without mental illness, even if established or conceded, is sufficient to permit detention. As a result, we are faced with the possibility that Mr. Hinkley may soon be released notwithstanding his conceded and nearly successful attempt to kill the President of the United States and three other people.

Other difficulties with the separate insanity defense are presented as well. There is no ethically supportable basis for

distinguishing the mentally ill from other behavioral deviants, such as the stupid, the intoxicated, the environmentally deprived or the sociopath, none of whom are given special dispensation. Furthermore, neither the American Law Institute standard nor any other existing test is aimed at the important functional issues of what should be done with mentally abnormal behavioral deviants; whether they should be confined, and if so, to what type of facility, under what conditions, and with what sort of temporal limits.

I and others have thought that these and other related considerations should be faced directly. First, guilt should be considered under conventional mens rea criteria. The trier of fact would be asked if the accused committed the charged crime, including the proscribed act with the required intent. For example, in the case of Mr. Hinckley, did he intend to kill the President of the United States and did he act to do so? Evidence of mental abnormality would be admissible to help resolve these issues, but crucially, the jury would be asked such questions as whether the defendant intended to kill rather than whether he had the capacity to conform. I do not mean to suggest that concepts such as intent are themselves clear, only that they are far more clear than the concepts central to the conventional insanity tests. If convicted, the question of disposition would be directly faced. The court would be given authority under appropriate findings to order a defendant committed to a mental health facility, rather than to a prison.

While the proposal to abolish the separate insanity defense received support from some members of the Brown Commission, it seemed radical, controversial, and possibly even immoral to others. A decision was made to recommend the American Law Institute standards, referring to the mens rea proposal only in the printed commentary. After the Brown Commission reported to the President and Congress in early 1971, the Department of Justice asked if I would assist them in evaluating the Brown Commission proposal. I repeated my previous recommendation for the elimination of the separate insanity defense, and after some hesitation, it was approved by the Justice Department. President Nixon, delivering a public address on the introduction of the Justice Department bill, said he regarded the

insanity provision as essential to the elimination of what he regarded as an unconscionable abuse of the defense.

While his words may have been prophetic, as it turned out, that endorsement did not help. Actually, the proposal was arguably rather libertarian. Under traditional standards, relatively few defendants were being found not guilty by reason of insanity. The federal criminal insanity defense cases outside the District of Columbia averaged about 50 per year. If judges, rather than juries, made the decision to channel people to hospitals rather than prisons, it seemed likely that more would be diverted out of the criminal process. On the other hand, they could be returned to prison following a period of hospital evaluation or treatment, if this was judged appropriate, subject to statutory limitations.

The mens rea approach to the issue of insanity has attained support from a wide spectrum of psychiatrists, legal scholars, and professional groups. It has also had impressive bipartisan support in the Congress, by members representing a broad range of political and social views. Initially the mens rea formulation was incorporated in the major Senate comprehensive criminal code reform bills. Yet the subsequent history of federal criminal code revision is a familiar one. Bill has followed bill. In 1975 a decision was made to remove all defenses from the proposed new criminal code. Some were regarded as too controversial--the abolition of the separate insanity defense being among them. While the mens rea proposal has again been suggested in subsequent bills, no action has been taken.

The case of John Hinkley provides a unique opportunity to reexamine the wisdom of present federal insanity law. Hinkley was tried under a variation of the American Law Institute's Model Penal Code test. Predictably, psychiatrists testified on both sides of the questions of mental illness, causation, capacity to appreciate wrongfulness, and capacity to conform behavior. The attorneys argued their respective cases. Judge Parker instructed the jury. None, however, not the psychiatrists, not the attorneys, not the judge, not the jury understood what they were saying or doing, for what they were doing defies comprehension. The notion that we are governed by law and not by individual decisions of men and women necessarily suffered. The public sense of injustice is surely great. This ought to concern us all.

Senator HEFLIN. The record will stay open until the close of the day. Any Senators who want to can submit questions in writing that would be sent to the witnesses and they can respond in writing.

Thank you. I apologize that we are running late. Maybe I asked too many questions and maybe too many Senators testified in the beginning. Whatever it was, we do have a time problem, and we appreciate your consideration. We want you to come back, and we will arrange for it.

Mr. ROBINSON. Thank you very much.

Mr. BONNIE. Thank you, sir.

[Whereupon, at 12:12 p.m., the hearing was concluded.]

THE INSANITY DEFENSE

WEDNESDAY, JULY 28, 1982

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to call, at 10:01 a.m. in room 2228 of the Dirksen Senate Office Building, Hon. Arlen Specter (acting chairman) presiding.

Present: Senator Heflin.

OPENING STATEMENT OF SENATOR SPECTER

Senator SPECTER. Good morning, ladies and gentlemen. The hour of 10 o'clock having arrived, we shall proceed with this hearing of the full Judiciary Committee on the subject of possible legislation on the defense of insanity.

This is the fifth in a series of hearings, the second by the full Judiciary Committee, and three hearings having been held by the Criminal Law Subcommittee, on the subject of possible changes in legislation resulting from the verdict of not guilty of John Hinckley.

We are examining a variety of issues, whether the definition of insanity should be modified as it has evolved from the *M'Naghten* rule to the ALI rule; whether the burden of proof ought to be changed as it now exists in the federal system with the prosecution having the burden of proving beyond a reasonable doubt that the defendant is sane; whether there ought to be the standard which is used in many if not most of the state jurisdictions of the affirmative burden on the defendant to establish his insanity by a preponderance of the evidence; and an additional question is the scope of psychiatric testimony, how far should it be extended.

At this point I would like to put in the record a statement by the chairman of the Judiciary Committee, Senator Thurmond.

[Material submitted for the record follows:]

PREPARED STATEMENT OF CHAIRMAN STROM THURMOND

Today the Committee on the Judiciary is continuing hearings on the insanity defense and the treatment of mentally ill offenders charged with violations of Federal law. Senator Specter has graciously agreed to chair the hearing today and I thank him for taking the time from his busy schedule to once again explore this most important issue.

There are currently nine bills pending before the Committee relative to the insanity defense. As I stated at the outset, I have an open mind on the subject. All of the pending legislative proposals have merit and each should be given careful consideration by the Committee.

I am looking forward to hearing the testimony from our many distinguished witnesses. The Committee is fortunate to have both State prosecutors and criminal de-

fense lawyers appearing today. I sincerely appreciate the enormous effort our witnesses have made in preparing their testimony and in traveling to Washington to share their knowledge and expertise with the Committee. We need the practical insights and experience of these concerned individuals to assist us in considering this vital subject.

Senator SPECTER. We have a distinguished array of witnesses today, prosecuting attorneys, defense attorneys, and our lead witnesses will be two U.S. Senators, Hon. Thad Cochran, Senator from the State of Mississippi, and Hon. Larry Pressler, Senator from the State of South Dakota.

Is there any election among the Senators as to who shall precede? Alphabetically, Senator Cochran has the floor.

STATEMENT OF HON. THAD COCHRAN, A U.S. SENATOR FROM
THE STATE OF MISSISSIPPI

Senator SPECTER. Welcome, Senator Cochran, to this committee. You have served with distinction on the Committee of the Judiciary and it is with regret, I know, that the committee witnessed your departure to warmer climes, but we welcome you here today and look forward to your testimony on this very important subject.

Senator COCHRAN. Thank you very much, Mr. Chairman, it's a pleasure to be back to the Judiciary Committee hearing room, and a pleasure to appear before you.

I have prepared a statement which I have furnished to the committee, and would hope that it could be made a part of the record in its entirety, and I will attempt to condense that statement and make some brief remarks.

Senator SPECTER. We will make it a part of the record, Senator Cochran.

Senator COCHRAN. Mr. Chairman, as you are certainly fully aware, the citizens of the country were deeply disturbed by the verdict in the recent trial of would-be Presidential assassin John Hinckley. That verdict appeared to be the last straw for many who are concerned that the criminal justice system in our country is out of control. To many the verdict was an outrage. Now, where should the blame be placed for such an apparent travesty of justice? We can't blame the judge who presided over the trial nor the jurors who found him not guilty by reason of insanity.

I think we need to place the blame on the provision of the law defining the Federal criminal insanity defense. The verdict was simply a reflection of the law.

Yesterday I introduced a bill, which is S. 2780, to restore confidence that I think needs to be restored in our Federal criminal justice system. The bill does essentially four things. First it establishes the familiar common law *M'Naghten* rule as the standard for all future Federal criminal prosecutions. Second, it shifts the burden of persuasion to the defendant to prove his insanity by the greater weight of the evidence. Third, it prohibits expert psychiatric testimony on the ultimate issue to be decided by the triers of fact. And, fourth, it creates a special verdict of guilty but mentally ill.

As you know, the modern insanity defense stems from the English rule of law in *M'Naghten's* case. Under that rule, which is currently in use in 20 States, a person is held responsible for his ac-

tions unless a mental disease or defect that was present when the crime was committed prevented that person from knowing the nature and quality of his acts or that those acts were wrong.

There have been developments in the law—the *Durham* rule has been developed, the American Law Institute has developed a rule. But it is my judgment that this *M'Naghten* test is the best for application in our Federal system. For instance, in the *Hinckley* trial the jury would have only had to answer one simple commonsense question: Did John Hinckley understand right from wrong when he attempted to assassinate the President? If the answer had been "yes," then he could have been held legally responsible for the results of his intentional criminal actions. And he would not have been absolved from guilt just because he had a mental problem.

The second major provision of the bill shifts the burden of proof. Again, the *Hinckley* trial offers a good example of how our insanity defense should be changed, and why it should be changed. The prosecution was required to prove beyond a reasonable doubt that Hinckley was sane, and, of course, that is a very difficult task. I believe it should have been the other way around. If a criminal wants to use the defense of insanity, he should have the burden of proving insanity, and, if he fails, the jury must find him sane and responsible for his intentional criminal conduct.

The third major component of the bill would limit the use of expert medical testimony. It is a rule of evidence applicable in courts that witnesses are not normally given the right to make a decision on an ultimate issue. For instance, in a negligence case, an expert witness is not permitted to testify whether or not a party to the litigation was in fact negligent. He can testify instead about the facts, what he saw, what he saw the party do. This, in my judgment, should be a limitation placed on the use of expert psychiatric witnesses in cases where the insanity defense is raised.

The ultimate issue of insanity is one that should necessarily be left to the jury to decide. Testimony from numerous conflicting witnesses in the *Hinckley* case, as another example, tended to confuse the jurors.

Finally, in a case in which the insanity defense has been invoked, my bill offers the jury the option of finding a defendant guilty but mentally ill, or not guilty by reason of insanity.

For example, in the hearings that you had here following the *Hinckley* case, the five jurors who testified indicated that they all thought that Hinckley had a mental problem, but that they were bound by the law to find him legally insane—there was no option. One juror testified, and others agreed with her, that if it had been possible to have found Hinckley guilty but mentally ill, that she would have done so. She also testified that if such a verdict had been available, then the result of the trial would have been complete opposite from what it was.

This new verdict provides a much-needed middle ground for future juries, to give them an option, something between turning an offender loose because he has a mental problem and sending that same offender to prison with absolutely no psychiatric help for his mental problem.

In effect, this new verdict will be different from current law. A person found to be guilty but mentally ill will not be released when

he is later determined to be sane, if he is rehabilitated—he will not be released and run the risk of posing a danger to society. Instead, he must return to prison and finish any sentence that might have been awarded. The public is thereby protected, Mr. Chairman, from a potentially dangerous criminal's future crimes while he receives medical help that he might need.

On the other hand, there probably are persons who are legally insane and should not be held legally responsible for their actions. And this bill makes a provision for retaining, then, the not guilty by reason of insanity verdict. In the overwhelming majority of Federal jurisdictions, once the defendant is found not guilty by reason of insanity, he is free to go, just as any other defendant who is found not guilty. The only way to prevent this effect is through an agreement between the U.S. attorney involved and the appropriate State authorities to initiate civil commitment proceedings immediately after the trial. If the State refuses to do so, then the defendant found insane and not guilty is free. There is no provision in the current Federal law allowing U.S. attorneys to initiate commitment proceedings. The bill that I have introduced will also close this loophole.

Thank you very much, Mr. Chairman.

Senator SPECTER. Thank you very much, Senator Cochran. Would you be willing to answer a few questions?

Senator COCHRAN. Of course, if they are not too hard. [Laughter.]

Senator SPECTER. I would be delighted to make them too hard, but I don't think it possible either from the questioner or from the answerer.

Senator, on the first subject, the question of going back to the *M'Naghten* rule, I think there is substantial merit in the suggestion which you have made. I have some questions how much influence the standard has with a jury and their ability to define and apply the standard, but I think we should make some effort on that problem.

My own sense is that we are going to have a difficult time getting a consensus in the Congress on a change back to *M'Naghten* from the ALI standard. And one interesting suggestion was made in a prior hearing by Dr. Stone, psychiatrist from Harvard, who, in response to a question about what changes could be made to tighten up the standard, started with the ALI standard and made two changes in the ALI standard which I would like your consideration of.

The ALI standard provides that it shall be an affirmative defense to a prosecution for a Federal offense that the defendant should not be held responsible because at the time of the conduct alleged, as a result of mental disease or defect, he lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.

Dr. Stone suggested two changes. Instead of having the language "as a result of mental disease," to tighten it up by inserting the word "severe," so that it would be "as a result of severe mental disease," and instead of the language of "lacked substantial capacity," change that to "lacked entirely the capacity."

What would your thought be, Senator Cochran, about that kind of a modification?

Senator COCHRAN. I think those are good suggestions, Mr. Chairman. I think it would impress upon the jury that just because a person had a mental problem, even though it might be slight, and at the time had difficulty determining the difference between right and wrong, that he could come within the standard and be found not guilty by reason of insanity. I think that would be a very good change.

Also, I think the change relating to the second element of the defense is appropriate.

Senator SPECTER. Do you share my sense that we may have a hard time getting the Congress to go backward as far as 1843 with *M'Naghten*?

Senator COCHRAN. Well, there are 20 States who like the rule and who still have the rule, but I agree: It will be difficult to develop a consensus for a change in the standard, there is no doubt of that. I share your concern about it.

I simply prefer this as a change in the standard because so many of those who are going to be presiding over the trials are eminently familiar with the *M'Naghten* rule; it may have been in effect in States where they practiced law, and it is not something that has to be learned and tested anew with many appeals and court of appeals decisions trying to clearly apply the new law to the facts. The *M'Naghten* rule has been applied in many, many cases.

So I think it would be easier to use an existing standard for that reason, because of the problem of certainty, than it would to go to a new standard.

Senator SPECTER. The difficulty that I see is if you talk about going to *M'Naghten*, it's going back to *M'Naghten*, and going back to an 1843 standard, whereas the so-called advances which have come with the *Durham* rule, and then the refinement of *Durham* to ALI, which also has been tested—we now have that which is well accepted—and it would not be a step back, as some would view it, but a step sideways to tighten it in those two respects.

Senator COCHRAN. It could very well be, I think, Mr. Chairman, that taking Dr. Stone's suggestion and then coupling that with other changes, such as the shifting of the burden of proof and the provision for a verdict of guilty but mentally ill could very well, I think, tighten up the law and overcome some of the problems which have been illustrated by the result in the *Hinckley* case.

Senator SPECTER. Oh, on the shift of the burden of proof, Does your bill provide for the burden being on the defendant to show by a preponderance of the evidence?

Senator COCHRAN. That's correct, it is a preponderance-of-the-evidence requirement, and not-a-beyond-a-reasonable-doubt requirement.

Senator SPECTER. What would you think of a standard of clear and convincing evidence?

Senator COCHRAN. Well, I think it gets confusing when you try to depart from the two traditional standards. Obviously, a jury has to be convinced that the evidence is sufficient to sustain the burden, and necessarily it becomes convincing if they think the greater weight of the evidence has been put on by the party burdened with the requirement.

I think that the clear-and-convincing standard tends to be more confusing. I know that it has crept into the rules of evidence somehow or other, but I think it was probably a mistake to ever get away from just the preponderance rule and the beyond-a-reasonable-doubt rule.

Senator SPECTER. Senator Cochran, when you advocate limiting the psychiatric evidence—and you have had a lot of experience as a trial lawyer, I know—what would you do with the question as to whether the psychiatrist could testify that a defendant suffers from schizophrenia or some other kind of mental disease or defect which tends to be conclusary?

Would you permit that?

Senator COCHRAN. Oh, yes, I think so. I think the witness ought to be free to testify as to his findings and as to his opinion about the nature of the disease, if any, that the defendant suffers from. But to have him basically testifying that the accused is insane is, in my judgment, inappropriate. This is something that the jury has the responsibility for doing.

Senator SPECTER. On your standard of guilty but mentally ill, as you define "mentally ill" in your bill, that would not be a sufficient illness to constitute insanity, as I take it.

Senator COCHRAN. It would be up to the jury to decide, frankly; they would have the option, knowing the consequences to the defendant, that he could be incarcerated in a prison but at the same time provided rehabilitation for his disease. They might decide that is the more appropriate decision to make rather than simply permitting him to go free if he does become sane at a later date.

Senator SPECTER. Well, the nature of my question goes to whether this category of guilty but mentally ill is the same as some have proposed on guilty but insane, and I am wondering if in saying guilty but mentally ill you are establishing a standard of less mental illness than occurs when somebody is outright insane?

Senator COCHRAN. Yes, that is my intent. I think there are gradations of mental incapacity, someone might be mentally disturbed—or, in the words of the jurors, have a mental problem, and probably needed psychiatric help, but might, at the same time have the capacity at the time he committed this act to discern right from wrong, and intentionally commit a criminal act. If that is true, then I think a provision for a middle ground, a compromise verdict, in effect, would be appropriate. A finding of guilty but mentally ill would assure the defendant his being given the opportunity to be rehabilitated and to be cured, if he can be, of his mental illness, but at the same time still be held responsible to society, and society's interest protected from someone who might tend toward violence, if he is turned loose on the streets.

Senator SPECTER. So the three categories would be just straight guilty, guilty but mentally ill, and not guilty by reason of insanity.

Senator COCHRAN. That's right—or not guilty.

Senator SPECTER. Not guilty at all with the insanity not being the issue—it just didn't do it.

Senator COCHRAN. Right.

Senator SPECTER. One final question, Senator Cochran. There has been a legislative proposal to totally eliminate the defense of insan-

ity and instead to permit evidence of insanity or related subjects to come into the issue on mens rea.

Do you have a judgment on that suggestion?

Senator COCHRAN. Well, we looked at that. I am sure that those who are proposing that have thought it out very carefully, and it is something that I guess we should consider very carefully, but I frankly think that would be inappropriate. I think we do need to recognize in our society that someone who is clearly insane and cannot tell the difference between right and wrong or does not have the capacity to adhere to the right at the time of the criminal act, should not be held responsible for his conduct. To do away with that finding, I think, would fly in the face of constitutional rights and our sense of justice.

Senator SPECTER. Well, on behalf of the committee, Senator Cochran, I want to thank you very much for your prepared statement, for coming today, and for your leadership in this very important subject.

Senator COCHRAN. Thank you, Mr. Chairman.

[The prepared statement of Senator Cochran follows:]

PREPARED STATEMENT OF SENATOR THAD COCHRAN

Mr. Chairman, the citizens of this country are deeply disturbed by the verdict in the recent trial of would-be Presidential assassin, John W. Hinckley, Jr. That verdict is the "last straw" for many Americans who are concerned that the criminal justice system in this country is out of control. Hinckley severely wounded the President, a secret service agent, a policeman, and James Brady on national t.v., in full view of millions of Americans. The video tape of that horrible scene has been replayed over and over, leaving no doubt as to what Hinckley did, and yet, a jury found that he was "not guilty" of the crime because he was "insane". To many this verdict was an outrage. Where should the blame be placed for such an apparent travesty of justice?

We cannot blame the judge who presided over Hinckley's trial, nor can we blame the jurors that found him "not guilty by reason of insanity". We must instead place the blame on the provision of the law defining the federal criminal insanity defense. The Hinckley verdict was simply a reflection of that law-- a law that must be changed. The confidence of the American public in our federal criminal justice system must be restored.

Yesterday I introduced a bill to restore that confidence. The bill does essentially four things to reform the insanity defense: First, it establishes the familiar common law M'Naghten rule as the standard for all future federal criminal prosecutions; second, it shifts the burden of persuasion to the defendant to prove his insanity by a preponderance of the evidence; third, it prohibits expert psychiatric testimony on the ultimate issues to be decided by the trier of fact; and fourth, it creates a special verdict of "guilty but mentally ill".

The modern insanity defense stems from the English rule of law in M'Naghten's case. Under that rule, currently in use in twenty states, a person is held responsible for his actions unless a mental disease or defect that was present when the crime was committed prevented that person from knowing the nature and quality of his acts or that those acts were wrong.

Over the last thirty years this test has been criticized by many legal and medical scholars as too narrow, thus the trend has been in recent years to broaden the use of the insanity defense. The culmination of the move to broaden the defense came in 1954 when the United States Court of Appeals for the District of Columbia decided Durham v. United States. In Durham the court decided that a person should not be held responsible for any unlawful act that was the product of a mental disease or defect. This broad test, accepted only by the D.C. circuit and two states, created a flurry of criticism and has been substantially abandoned.

In the early 1960's the American Law Institute offered an insanity test as a replacement for both the M'Naghten test, which was seen as too narrow, and the Durham test, which was seen as too broad. Under the ALI test a person is not held responsible for criminal conduct if at the time the crime was committed, as a result of a mental disease or defect he lacked the substantial capacity to appreciate the criminality of the conduct or conform his conduct to the requirements of the law. In 1972, the D.C. Court of Appeals abandoned the Durham rule and adopted the ALI test.

In fact, the ALI test is in current use in the majority of our federal district courts and was the basis of the jury's decision in the Hinckley trial. Some of the members of that jury have recently testified before this committee that they felt "straight-jacketed" by that law and the parade of expert medical witnesses to find Hinckley had some "mental problem" that prevented him from conforming his conduct to the law. Thus, the ALI test for insanity was met and the jury reached the only verdict that they could have reached under the circumstances--that John Hinckley was legally insane.

Mr. Chairman, it is time for a change. The bill that I have introduced substitutes the much narrower M'Naghten test for the ALI test currently used in the federal courts. Under the M'Naghten test, for example, the Hinckley jury would have only had to answer one simple, common sense question: Did John Hinckley understand right from wrong when he attempted to assassinate the

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President? If the answer had been yes, then Hinckley would have been held legally responsible for the results of his intentional criminal actions. He would not have been absolved of the responsibility simply because he had a "mental problem" that prevented him from obeying the law.

I would also like to note for the record that the M'Naghten test has been the common law test in many states, including the state of Mississippi, for over 100 years. Thus, it is eminently familiar to the federal judges that will be required to implement and interpret it if it should become law. There will be then, unlike the new mens rea test offered by other bills, no period of judicial interpretation required. The law can be immediately and successfully applied by the federal judges.

The second major provision of the bill shifts the burden of persuasion to the defendant to prove his insanity by a preponderance of the evidence. Again, the Hinckley trial offers an excellent example of just how our insanity defense system should be changed. The prosecution in that case was required by current law to prove beyond a reasonable doubt that Hinckley was sane. It would be a difficult task indeed to prove anyone sane beyond a reasonable doubt, yet this is what the prosecution was required to do in order to hold Hinckley accountable.

Understandably, the prosecution failed. As a result, the jury was compelled by the law to find Hinckley insane. I believe that it should be the other way around--if a criminal wants to use the defense of insanity he should have the burden of proving insanity-- and if he fails, the jury must find him sane and responsible for his intentional criminal acts.

Mr. Chairman, the United States Supreme Court has held that it is constitutional for the states to shift this burden to the defendant and the Congress should join those states, like Mississippi, that have done so.

The third major component of the bill would limit the use of expert medical testimony. Under the general rules of evidence and under common law, an expert witness cannot testify on an ultimate issue to be submitted to the trier of fact. For

example, an expert in automobile accidents cannot testify in a negligence suit that the defendant was in fact negligent. That's the question that the jury must decide -- the ultimate issue is whether the defendant was negligent.

Likewise, in a criminal trial involving the question of insanity and the insanity defense, an expert witness should not be permitted to testify that the defendant was or is insane. That is the ultimate issue, the question that the jury is asked to decide. Therefore, expert medical testimony should be limited to the findings of the doctors as to the defendant's general mental condition. The jury may then, after hearing the judge's instructions on the law, draw their own conclusions as to whether the defendant was or is legally insane. Testimony from numerous conflicting expert witnesses as to whether the defendant is sane or insane serves only to confuse the issue and the jury and should be eliminated. My bill would do so.

Finally, in a case in which the insanity defense has been invoked, my bill offers the jury the option of finding a defendant "guilty but mentally ill" or "not guilty by reason of insanity."

For example, the jury may find from the evidence that the defendant is guilty of the offense charged and is not legally insane, but he instead has some "mental problem." In that situation, by applying the new "guilty but mentally ill" verdict, the jury can find that defendant guilty of the crime and at the same time provide the defendant with proper medical treatment for a mental problem.

Again, the Hinckley case is illustrative. The five jurors from that case that testified before this committee, as a group, acknowledged that Hinckley had a "mental problem." All stressed that they were bound by the law to find Hinckley legally insane. One juror testified, and others agreed with her, that if it had been possible to have found Hinckley "guilty but mentally ill", then she would have done so. She also testified that if such a verdict had been available then the result of the trial would have been completely opposite.

This new verdict, offered in my bill, provides a much needed

"middle ground" for future "Hinckley" juries -- to give them an option -- something between turning an offender loose because he has a "mental problem" and sending that same offender to prison with absolutely no psychiatric help for his problem.

In effect, the new "guilty but mentally ill" verdict will be different from current law. A person found by the jury to be "guilty but mentally ill" will not be released when he is later determined to be sane and not dangerous to society. Instead, that person must return to prison to finish any remaining sentence. The public is thereby protected from a potentially dangerous criminal's future crimes while the criminal receives the medical help that he needs.

On the other hand, Mr. Chairman, there are those persons that are truly legally insane and should not be held legally responsible for their actions. It is for these people that we retain the verdict of "not guilty by reason of insanity". The law and society has always recognized that those individuals that did not know that what they were doing was wrong should be held blameless. Further, a person who is so disturbed mentally that he or she cannot form the intent element of the crime cannot be constitutionally held responsible. I believe that none of us would want to send a person to prison who thought, for example, that they had chopped down a tree when in fact they had killed someone with the axe. That individual should not be held criminally responsible for his or her actions.

At the same time, however, the law should prevent that axe wielder from being loosed upon society if he is still insane. Unfortunately, current federal law does not do so. In the overwhelming majority of federal jurisdictions, once a defendant is found "not guilty by reason of insanity" he is free to go -- just as any other defendant found not guilty. The only way to prevent this effect is through an agreement between the U.S. attorney involved and the appropriate state authorities to initiate civil commitment proceedings immediately after the trial. If the state refuses to do so then the defendant found insane and not guilty is free to go. There is no provision in the current federal law allowing the U.S. attorney to initiate commitment proceedings. The bill that I have introduced will close this loophole.

Senator SPECTER. Senator Pressler? The committee welcomes the distinguished senior Senator from South Dakota, the Honorable Larry Pressler who was present to share his thoughts with us on the opening hearing, and we welcome you back today, Senator.

STATEMENT OF HON. LARRY PRESSLER, A U.S. SENATOR FROM THE STATE OF SOUTH DAKOTA

Senator PRESSLER. Thank you very much, Mr. Chairman. I want to commend you and the committee for the progress you are making in this important area. Indeed, let me also commend my colleague, Senator Cochran for his fine testimony. I join in his remarks and shall be very brief since I have appeared here before.

Let me say, I think the dialog between the two former trial lawyers that we have just heard from is very useful. I would agree that the clear-and-convincing-evidence standard is one that is very confusing to a jury. But, in any event, let me say that I am well aware of Senator Specter's bill and Senator Cochran's effort, which include making the insanity defense an affirmative defense so that the defendant would have the burden of the proof. I am also aware of Senator Hatch's bill and other bills. And I am sure that you, as chairman of this committee, will be blending together these various ideas.

I support the efforts which are being made by so many of my distinguished colleagues who serve on the Judiciary Committee and commend them for taking immediate action on this important issue.

As has been mentioned, there is a great deal of discussion about this issue in view of the *Hinckley* case. While I do not think we should act in the heat of passion with regard to this issue, I believe that the *Hinckley* case illustrates much of what is wrong with our criminal justice system. There is a growing wave of protest with regard to the insanity defense.

Last fall, an Associated Press-NBC news poll showed that 87 percent of the public believed that too many murderers were using insanity pleas to avoid jail.

Let me also say that the insanity defense is a millionaire's defense, or a rich man's defense. Unless one is a cause celebre, there is almost no hope of a middle-income person or a poor person marshalling the type of psychiatric testimony that would be necessary to sustain such an action.

It is time for Congress to take action to limit this defense. I have therefore joined as a cosponsor of the measures sponsored by Senator Hatch which provide for amending title 18 of the United States Code to limit the insanity defense to those who lack the requisite intent to know what they are doing at the time they committed the offense. I have also joined Senator Thurmond and 58 other Members of the Senate in support of S. 2572, the Violent Crime and Drug Enforcement Act of 1982.

As you are aware, Mr. Chairman, I have also introduced legislation to amend title 18 of the United States Code to limit the Federal insanity defense. This bill, S. 2669, is similar to Senator Hatch's bill, which has been incorporated into S. 2572. It is similar in the fact that it provides that the insanity defense be available only to a

defendant who lacked the requisite state of mind to know what he or she was doing at the time the offense was committed.

My bill differs from the other proposals before this committee in that it provides for the mandatory confinement of those who are acquitted by reason of insanity for the offenses of murder and attempted murder.

This legislation would provide that one who opted to use the insanity defense with regard to the offenses of murder and attempted murder and was acquitted only by reason of insanity serve a provisional sentence. Under this provisional sentencing a defendant would be confined to a mental institution until such time as the sentencing court is notified by the director of the facility that the defendant is no longer in need of custody for care or treatment in such a facility. At that time, the court could order the defendant to serve the remainder of the provisional sentence in a prison or other suitable correctional facility.

It should be noted that two measures have been introduced in the House of Representatives which call for similar provisional sentencing for those acquitted only by reason of insanity.

Mr. Chairman, I believe that the public is calling out for this type of reform. We must not let the Federal insanity defense be distorted to such a degree that it benefits and protects those accused of criminal conduct at the expense of the law-abiding public.

Mr. Chairman, I thank you for this opportunity to testify and commend you for holding these important hearings.

Senator SPECTER. Thank you very much, Senator Pressler. Would you be willing to submit to questioning?

Senator PRESSLER. Yes indeed.

Senator SPECTER. We will defer to Senator Heflin at the outset of this questioning.

Senator HEFLIN. Well, I don't want to ask a great deal of questions.

Do you, in your "state-of-mind" standard of insanity, as being a defense—do you agree with testimony that we have had from other people that you cannot change the burden of proof and have the state of mind, or mens rea, approach?

Senator PRESSLER. Well, we could possibly, as I believe in Senator Specter's bill, make the insanity defense an affirmative defense in which the defendant would have the burden of proof. I think that might be a healthy change. Right now all the burden seems to be on the prosecution to prove that someone is sane. I believe that Hinckley was tried under the ALI rule of the District of Columbia, which put all the burden on the prosecutors to prove that he was sane, and it just seems to me that that doesn't make sense.

Senator HEFLIN. Well, under the mens rea, and the state of mind, the way the bills have been drafted, they say that you in effect are required to prove—the Government is required to prove the elements of the offense charged. And we have had testimony including from the Department of Justice that you cannot, if you adopt a state-of-mind or mens rea test, change the burden of proof, but that the burden would maintain on the Government to prove beyond a reasonable doubt all of the elements of the offense, including the state-of-mind elements in an offense.

Now, this is a problem as to whether or not to go forward with the mens rea or to change the burden of proof and possibly have a different standard. You have done some work relative to this matter—as I understand it, written maybe a Law Review article on insanity—I was just interested in your opinion on whether or not you can or cannot change the burden of proof in a state-of-mind or mens rea standard pertaining to the insanity defense.

Senator PRESSLER. I think the Congress could. I do think that the clear and convincing evidence thing is too vague. I would agree with the comments of Senator Cochran in this area. But, as I understand Senator Specter's bill, it would do precisely that.

Senator HEFLIN. Senator Specter's bill does not have the mens rea. You said you are a cosponsor of Senator Hatch's bill, and his bill has the mens rea.

Senator PRESSLER. Yes; I feel that Congress could make that change.

Senator SPECTER. Senator Pressler, I have a question relating to the commitment which your statute moves toward, where there is an acquittal—and I quite agree with you that there is a gap at the present time in the Federal courts, if there is acquittal by reason of insanity. If the *Hinckley* case had been tried in any Federal court other than the District of Columbia—say, it had been tried in Sioux Falls, S.D., or Pittsburgh, Pa.—and there had been an acquittal, the defendant could have walked right out of court, because the only commitment procedures are present under State law.

And you have sought to correct that gap in your statute. You say here that when somebody is acquitted that they can in lieu of being sentenced to probation or imprisonment, be committed to a suitable facility for care and treatment, and in the custody of the attorney general, and the maximum term of such commitment shall approximately equal the maximum term of imprisonment authorized by law for the offense.

I have some difficulty in how that can be done constitutionally. Isn't it necessarily true that the commitment for someone who is insane or mentally ill has to turn on a recovery from that situation, by whatever standard you may impose, as opposed to saying that if they are acquitted you can keep them for a term approximately as long as the sentence would be if convicted?

Senator PRESSLER. What this is trying to get at is a case where John Hinckley could be released from St. Elizabeths 30 days after the trial. This probably won't happen, that would be an extreme case—but I think that we need to protect ourselves against that kind of situation. He could be as I understand it under the law. The judge could make a decision to put him back on the street. We have had "60 Minutes" and newspapers doing articles on similar cases where someone has been out on the street 60 days later.

I think a judge should have a guideline at least. There has to be a period of confinement that might be in a mental institution, or, if the person is declared sane, the judge could then make an option as to whether a further period of confinement would be appropriate. Maybe there would be some constitutional questions, but I think we could get around that by giving the judge a standard or a guideline.

Senator SPECTER. Are you suggesting, though, that if a person is found to be insane that he can be detained for a period longer than the standard definition of insanity, that is, a danger to himself or others?

Senator PRESSLER. Yes, I am suggesting that. I know that there will probably be constitutional arguments but I think it would be sustained.

Senator SPECTER. Well, how could he be, if he is acquitted of the crime? Once there is an acquittal by reason of insanity, then you can detain as long as he continues to be insane. But if there is an acquittal, doesn't the law lose its authority to impose a sanction that arises by virtue of a conviction?

Senator PRESSLER. I think a provision that provided for a verdict of guilty but mentally ill, for example, could meet the standard.

Senator SPECTER. Well, it may be so if you structure it in terms of a conviction for the underlying offense, and perhaps compartmentalize the remedy.

Senator PRESSLER. I concede it is a constitutional problem, but I think if we structured the verdict as to the options that the jury had we would get out from under that constitutional problem.

Senator SPECTER. One final question, Senator Pressler. If the Congress should be heading in the direction of revising the standard on insanity—not going to the mens rea test, which you have urged, along with Senator Hatch and others—what would your opinion be of the modification of the ALI standard by tightening it up in the two respects that I asked Senator Cochran about, to insert the word "severe" in front of "mental disease," and to require "lacked entirely capacity," as opposed to merely the "substantial capacity"?

Senator PRESSLER. I think that would be very constructive. As I understand it, the ALI standard succeeded the *Durham* standard, and we will probably have to build on that, which I presume you are.

Senator SPECTER. Yes.

Senator PRESSLER. I would agree with those changes.

Senator SPECTER. This is an effort—as I say, Dr. Stone made the suggestion which takes *M'Naghten* and then *Durham* builds on *M'Naghten*, then ALI currently builds on where *Durham* had left off; and this would be with the avant garde with the two tightening provisions.

Any further questions, Senator Heflin?

Senator HEFLIN. No, Mr. Chairman.

Senator SPECTER. Thank you very much, Senator Pressler, we very much appreciate your leadership in this very important subject.

Senator PRESSLER. Thank you.

We have a statement submitted by Senator Nunn, who could not be with us today, and I would ask that it be inserted in the record immediately following the testimony of Senator Pressler.

[The prepared statement of Senator Nunn follows:]

STATEMENT OF SENATOR SAM NUNN

ON THE INSANITY DEFENSE

Mr. Chairman, I appreciate the invitation to participate in these hearings and to offer my thoughts on the insanity defense as it exists today in criminal law. This Committee is to be commended for its efforts to promptly and responsibly examine an issue which has generated so much concern in recent months.

The acquittal of John Hinckley on insanity grounds served as a catalyst in rapidly focusing public attention on the glaring deficiencies in the American legal system's treatment of the insanity defense. In the Hinckley case, we quickly sympathized with the frustrations of a lay jury that is required to decipher a long parade of complex and confusing psychiatric testimony. We were even more alarmed to hear psychiatrists themselves openly disagree in the media as to whether such testimony can ever be conclusive or even helpful to a finding of criminal intent. In the days immediately following the trial, the jurors themselves publicly questioned the failure of our system to adequately formulate the issue of insanity versus criminal responsibility. Finally, the public has been astonished to realize that our federal system does not generally provide for the automatic institutional commitment of individuals like John Hinckley who are acquitted of violent crimes by reason of insanity.

In the wake of the Hinckley case and the concerns which it has generated, numerous suggestions have been made as to statutory reform of the insanity defense. On the state level, my own state of Georgia has just last month enacted legislation providing for a criminal verdict of guilty but insane coupled with special commitment procedures in insanity defense cases. I believe that this approach should be reviewed carefully at the Federal level. Aside from proposals in the states, this very Committee has before it some eight separate Senate bills to reform the federal insanity defense.

I introduced one of those bills, S. 2678, as a straightforward and common-sense response to the problems which became so evident during the course of the Hinckley trial. Entitled the "Insanity Defense Act of 1982", the bill does three things: (1) establishes uniformity in the insanity defense for all Federal criminal prosecutions; (2) places the burden of proving such a defense on the defendant; and (3) provides for the institutional commitment of individuals acquitted by reason of insanity. The evidence amply demonstrates that each of those revisions is long overdue in our criminal justice system.

Although insanity as a negation of criminal intent has always been recognized as a defense to criminal charges, there is no statutory federal law currently governing the insanity defense. Federal law in title 18 specifically covers insanity at the time of trial and procedures to be followed in such cases; this, however, deals only with the question of competency to stand trial. The law on insanity at the time of the offense has evolved by way of case law, not statute. As a result, there exists a broad spectrum of federal insanity defenses with definitions varying from jurisdiction to jurisdiction. Such disparity in the definition of criminal conduct is confusing and unfair to both the public and criminal defendants alike.

Probably the oldest and most widely used definition of insanity stems from the old English rule in M'Naghten's case. It determines insanity by asking whether the accused was laboring under such a defect of reason or disease of the mind so 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 what he was doing was wrong. Some jurisdictions have altered M'Naghten by adding the alternative test of whether the defendant was acting under an "irresistible impulse". Others have further broadened the rule, finding no criminal responsibility where the defendant acted as a result of mental disease or defect, regardless of his knowledge of right or wrong.

S. 2678 would end the current disparity in the meaning of "insanity" on the federal level by a return to the M'Naghten Rule as the standard definition. A defendant would not be criminally responsible for his acts if (1) as a result of mental disease or defect, he lacked the ability to understand the nature and quality of his act; or (2) as a result of mental disease or defect, he lacked the ability to distinguish right and wrong in respect to the act.

Aside from the need for a uniform definition of insanity, S. 2678 deals with other questions raised by the Hinckley case. Having viewed the seemingly endless litany of psychiatric testimony and evidence produced in that case, one must certainly appreciate the incredibly confusing nature of much of that testimony to the jury. One juror has since openly discussed the fact that while the government could not prove Hinckley sane, neither could the defense prove Hinckley insane. Yet, under current law, the jury was required to acquit. S. 2678 specifically provides that the burden shall be on the defendant to prove insanity as a defense to federal criminal charges. By altering the burden of proof, we can effectively prevent attempts to use the insanity defense as a confusing smokescreen by which to frustrate the criminal justice system.

Currently, the prosecution in federal criminal cases must bear the oftentimes impossible burden of proving a defendant sane where insanity has been raised as a defense. That rule is, however, a policy one based on the Supreme Court's 1895 decision in Davis v. United States, 160 U.S. 469. It is not, by the Supreme Court's own admission, required by the Constitution. The Court has in fact held constitutional state laws placing the burden of proving insanity on the defendant, as in Patterson v. New York, 432 U.S. 215 (1977). At the time of the Patterson decision, some twenty-two state jurisdictions had already placed the burden of proving insanity on the defendant. Moreover, at

common law, the burden of proving all affirmative defenses, including insanity, rested on the defendant. I suggest that a return to that rule is now long overdue in the federal system.

Finally, S. 2678 addresses what is certainly the most glaring inequity in our current treatment of the insanity defense: the absence of any federal requirement that a defendant acquitted as insane be institutionally committed. Title 18 provides only for institutional commitment pending trial of individuals found incompetent at the time of trial or of federal prisoners found incompetent after sentence. Fortunately, due to the particular system in place within the District of Columbia, John Hinckley was not set free immediately upon his acquittal. In the federal system on the whole, however, such procedures are not the rule. Amazingly, federal law does not require what one would consider the very minimum required to insure the public's safety.

To correct this problem, my bill establishes a special verdict of "not guilty by reason of insanity" and accompanying commitment procedures in cases where that verdict is returned. By doing so, the bill insures that a defendant, acquitted by reason of insanity, would be committed to an appropriate institution until such time as he is no longer a danger to the community. Certainly this is the least that we, as a responsible Congress, can do to guarantee the public safety.

In sum, insanity, since the days of early common law, has been a proper defense to criminal charges. The legislative proposals which I offer today do not dispute or change that tradition. Rather, they serve only to place the insanity defense in its proper perspective, with due regard given to both the integrity and credibility of our judicial system and the safety and security of the public.

Senator SPECTER. I would like now to call the distinguished prosecuting attorney from Wayne County, covering Detroit, Mich., the honorable William L. Cahalan.

Welcome, Mr. Cahalan, to the Committee on the Judiciary. We are very appreciative of your willingness to share with us the extensive experience which you have gained as the prosecuting attorney of that tough city, Detroit. I know personally, from having served with you on the national district attorneys scene when I was DA of Philadelphia and you were DA of Detroit, of your leadership and your excellence in this area.

And it is a pleasure to welcome you here and to hear your testimony and to know your thoughts on this important subject of the defense of insanity.

STATEMENT OF WILLIAM L. CAHALAN, PROSECUTING ATTORNEY, WAYNE COUNTY, MICH.

Mr. CAHALAN. Thank you very much. It's good to be here to help fashion some of this legislation, because, of course, it's very, very important legislation.

You have a copy of my statement. I would just like to make a few comments in addition thereto, or to clarify them.

Within the last several years, we have been gradually, so to speak, opening the doors of the prisons and opening the doors of the mental hospitals when it comes to the insanity defense. On the one hand, we have made it easier to plead the insanity defense and to prove it, so to speak, and we have made it much more difficult for the State to keep someone in prison once he is found not guilty by reason of insanity.

And having gradually opened these doors, then a *Hinckley* verdict comes along and we are surprised, and we said: "What happened?" It brings us up short.

And there is a great demand for change, but, of course, "We must be cautious in that change. And there should be change. But I don't agree with several of the changes suggested in the Senate bills that I was furnished. Don't abolish the insanity—defense. A man is responsible for his acts and is held responsible for his acts in a criminal court because he has volition and cognition. If he does not have those, then he is not responsible. You can't have it both ways.

I think we can all agree that most of us are responsible for our acts at all times. I think we can agree that some of us, who are mentally ill, are still responsible for our acts. But, on the other hand, there are some of us who are so mentally ill that we are not responsible for their acts.

And that pretty much is my testimony, in a nutshell.

There is a suggestion in some of the bills about the diminished capacity. I don't think that would be a good idea. I think you are just opening the door more. There may be some constitutional question there, too. If the defendant doesn't meet the test of not guilty by reason of insanity and he doesn't want to risk commitment, then he could say "diminished capacity." I think this would invite more defendants to add that defense in their defense of the crime charged.

Seldom is a person who is charged with a serious crime, and he does plead not guilty by reason of insanity—he is seldom found not guilty; he is either found guilty or, in Michigan, guilty but mentally ill, or not guilty by reason of insanity.

I would suggest that the diminished capacity just sort of clouds the issue. I don't know if I quite understand it. I was discussing this with someone who is somewhat of an expert in this field, and I said I really don't understand diminished capacity, and he said, don't worry, it's irrational, irrational, therefore you can't understand it. And that made me feel better.

Senator SPECTER. You say your capacity is not sufficiently diminished to understand it? [Laughter.]

Mr. CAHALAN. That's right, you've got it now. Then there is the question—some of the bills suggest that we limit the testimony of experts. I don't think we can do that; I don't even know if we can do that constitutionally, because actually we always have the mens rea in a case, and whatever testimony goes to that is relevant, and I don't think that we can keep that out. And there has been some suggestions, by the two witnesses that testified, that they could be witnesses but maybe not be able to give a conclusion.

I think that we need that testimony, we need that testimony when we have not guilty by reason of insanity, or the insanity defense pled, to assist the jurors. And I think that we have got to have faith in the jurors, that they can discern and give weight to the psychiatric testimony, that they won't give any more weight than it should have. I think we have to reestablish our faith in the jury system, which I know we all have in this room.

I do think, however, that perhaps one of the things that could be done is to the burden in the insanity defense, perhaps if we could place the burden on the defendant and not make it on the prosecution to prove beyond all reasonable doubt the sanity of the defendant. When there is a doubt there, I think we have to decide who shall benefit from that doubt. Shall the society benefit from that doubt, or should the accused benefit from the doubt? And I think that perhaps except in capital cases, where there would be an execution, I think that it would be fair and equitable and reasonable to have society be the beneficiary of that doubt instead of letting the accused, who would be found not guilty by reason of insanity.

I wonder sometimes if—

Senator SPECTER. You say you would make that distinction in capital cases, Mr. Cahalan?

Mr. CAHALAN. Well, it gives me great difficulty, because I can say to you that if there is doubt about the person's sanity, if we have not been able—if the people have not been able to prove his sanity beyond all reasonable doubt, I can see that person being committed to a mental hospital, but I can't see that person being executed. We can shoot mad dogs, but we can't hang mad men. Perhaps when *M'Naghten* came along, if they didn't have capital punishment in England, we wouldn't be here today, perhaps this would not have developed. I think perhaps the reason it developed, from what I have read and understand—the reason it has developed, they didn't want to hang a mad man, and I think that we should not hang mad men. You have got to recognize that there are some people who are insane, and we shouldn't do that.

Senator SPECTER. Is the difficulty that you have under the *Hinckley* standard, if the prosecution must prove insanity beyond a reasonable doubt—beyond a reasonable doubt is higher than a 51-percent standard at least, you can't fix a mathematical percentage to it. On the other hand, if the defendant has to prove that he is insane by a preponderance of the evidence, more probably than not, say, 51 percent would tilt the scales on a preponderance-of-the-evidence standard. If a person falls, say, just for purposes of illustration, somewhere in the 60-percent range or 55-percent range, he would not be sufficiently insane or provably so, beyond a reasonable doubt, so as to be convicted of the crime, not sane beyond a reasonable doubt, but he would be, more probably than not, insane—and you have that gap which plays in conceptually, which is a great problem that I have with *Hinckley*. *Hinckley* is not saying beyond a reasonable doubt, but he may be insane more probably than not.

Mr. CAHALAN. And that leads us right into guilty but mentally ill; that is where that falls. And we in Michigan adopted the guilty-but-mentally-ill verdict—and I understand we were the first State to do it.

Senator SPECTER. How long have you had it, Mr. Cahalan?

Mr. CAHALAN. 1965. It came about—it might be of interest to you how we came about having that—prior to 1966, if you were found not guilty by reason of insanity, the trial judge appointed a sanity commission which was of two psychiatrists, and they would report that the person is insane and the trial judge would then commit him to Ionia Hospital for the Criminally Insane where they would stay, usually longer than they would have stayed if they had been convicted on the major offense. And we had problems with that. In 1974 our supreme court said that that is unconstitutional, that is not due process.

So we had to give them all hearings, all those people that were in the center, the Forensic Center, where we send them, or in whose custody they are—we had about 300 people there who were there because they were found not guilty by reason of insanity, they hadn't had a sanity hearing in the probate court; they were there because the trial judge had appointed two psychiatrists, and the trial judge says that you will stay there. And there was no procedure for hearings, automatic hearings. There was habeus corpus always available.

So here in 1974 we had about 300 people not guilty by reason of insanity in the hospital.

So we conducted hearings on those, and about 60 percent of them were released, which might say something about the fact that maybe they weren't insane. After they were released, there was 1 person who went home and killed his wife, and there were about 10 or 12 others who went out and committed serious crimes, and there was a great hue and cry to do something. And, fortunately, I think we did the right thing: We came up with the guilty but mentally ill.

Senator SPECTER. How long have you had it, since 1975?

Mr. CAHALAN. Since 1975, and since that time, since 1975, you might be interested to—and guilty but mentally ill, you are ac-

quainted with that term, I'm sure. I might give you the definition of it before I go on to other things.

Senator HEFLIN. In your Michigan cases, does it allow for confinement, mental treatment then serving of the maximum or some period of time?

Mr. CAHALAN. You are committed to the Department of Corrections; if you are guilty but mentally ill, you are convicted, you are committed to the Department of Corrections. Under the law the Department of Corrections must see to it that you get treatment for your mental illness. If they do not have the facilities for that, then they refer the defendant, the convicted defendant, to the Department of Mental Health, and when the Department of Mental Health feels they have done all that they can for that person, then they go back to the Department of Corrections under their custody, but they serve the sentence just as if they were found guilty.

Senator HEFLIN. They are sentenced to a specific—

Mr. CAHALAN. They are sentenced.

Senator SPECTER. And there still is an insanity defense? I mean, you could be acquitted, found not guilty by reason of insanity.

Mr. CAHALAN. That's true. When the defense is pled, when the insanity defense is raised, then the jury could find him not guilty by reason of insanity or guilty but mentally ill, or just guilty, or just not guilty.

Senator SPECTER. Is the burden of proof on the defendant, on the insanity defense, under Michigan law?

Mr. CAHALAN. The burden of proof on the sanity?

Senator SPECTER. When the defendant raises the defense of insanity, does he have the burden of proving that he is insane?

Mr. CAHALAN. No; the people have to prove beyond all reasonable doubt that he is sane, as it is here. I might read, if you would like, the law as it applies specifically to this guilty but mentally ill, which I understand is what you are interested in. Our insanity definitions are pretty much the ALI definitions.

If the defendant asserts * * *—

I'm reading from the statute—

If the defendant asserts a defense of insanity, he may be found guilty but mentally ill, if, after trial, the trier of facts finds all of the following beyond a reasonable doubt: that the defendant is guilty of the offense, that the defendant was mentally ill at the time of the offense, that the defendant was not legally insane at the time of the commission of that offense.

We have had it for the last 5 years, so I've got statistics for the first 5 years that it was in effect, the guilty but mentally ill. And the juries are making the distinctions, because in that time in Michigan 262 defendants were found not guilty by reason of insanity, and 137 were found guilty but mentally ill. So the jurors are making distinctions, which reaffirms our faith in the system.

Senator SPECTER. What is the charge, in a general way, Mr. Cahalan, as the judge distinguishes between—well, the insanity, he gives the ALI charge—what does he tell them about the standard for being mentally ill?

Mr. CAHALAN. Mental illness is a substantial disorder of thought or mood which significantly impairs judgment, behavior, capacity

to recognize reality, or ability to cope with the ordinary demands of life—that's mentally ill.

Senator HEFLIN. What is your standard for not guilty by reason of insanity? Do you have the *M'Naghten* or the *Durham*?

Mr. CAHALAN. Pretty much the ALI. A person is legally insane if, as a result of mental illness, that person lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.

This works. We have a rather dramatic example of how well this works in Michigan that I would like to share with you. Incidentally, before I get to the example, the Forensic Center, the center for forensic psychiatry, which is the center established in Michigan by law to handle all of the matters of mental illness as it applies to the criminal court, they have concluded that 50 percent of those people who are found guilty but mentally ill are not mentally ill; they usually go there and they are examined and they just go right back into the prison system because, in their opinion, they are not mentally ill.

In 1973 a man in Michigan raped and killed an 80-year-old woman, 1973.

Senator SPECTER. Mr. Cahalan, before you go on, so that the jury's conclusion of mental illness doesn't really have any effect.

Mr. CAHALAN. Well, at least the psychiatrists at our Forensic Center didn't agree that he was mentally ill.

Senator SPECTER. Well, that could be justified on the theory that the status of mental illness changes from the time the jury imposes a verdict until the time of the later examination, which is certainly possible. However, if it is very close in time, the same day, the day after, a week later, which is what you are suggesting, then the jury's verdict is really not given any weight at all.

Mr. CAHALAN. Well, it is given weight in the fact that they have to examine him, but they would examine him anyway. When a person goes to prison, he goes through the—

Senator SPECTER. I am not suggesting the jury's verdict should have any more weight, but it is an interesting twist that on immediate examination, with a contrary conclusion, somebody found guilty but mentally ill, it would follow that they would be in a mental institution as opposed to a prison, but that doesn't necessarily follow.

Mr. CAHALAN. No; they are examined when they are received by the department of corrections. I guess that proves that psychiatry is not an exact science, among other things.

Senator SPECTER. Unlike the law. [Laughter.]

Mr. CAHALAN. If it proves anything.

Senator HEFLIN. It may prove that it turns out as a sort of a compromise verdict.

Mr. CAHALAN. You could say that, yes. But I think that they are facing reality. And the reality of life is that there are some people who are mentally ill yet who are responsible for their acts, and that is all they are saying.

It takes the mental illness thing, and says, OK, the prosecution says I agree he's mentally ill—in the *Hinckley* case, the prosecutor said, "yes, he's mentally ill, but he is responsible for his acts. I agree with you."

Senator HEFLIN. Well, is that in the criminal justice system of adjudications, does it have a proper place as to adjudications?

Mr. CAHALAN. I think so, because this area is so confusing to everybody, and certainly to the jurors, that when you have got the insanity defense in issue, and all the psychiatrists have testified, and the charge was made by the court to the jury, it's confusing. The juries are going to say, well, there is something wrong with him, but he is still responsible for his acts, and we are just allowing them to say that in their verdicts, that is all we are doing.

Senator SPECTER. Mr. Cahalan, has there been any situation where after a finding of guilty but mentally ill the defendant is then examined by the psychiatrist who finds him to be insane?

Mr. CAHALAN. Yes—well, mentally ill, at least. He wouldn't reach that conclusion, he has no reason to reach that conclusion.

Senator SPECTER. Why not?

Mr. CAHALAN. Well, because he is not going to testify in court that he is insane; I mean, the only thing he is looking for is should this person get treatment or not, so his standard is not there, the standard of insanity is not there.

Senator HEFLIN. Well, he uses psychiatric standards, would he not? Would he use the word "psychotic"?

Mr. CAHALAN. Well, certainly he would use all those psychiatric terms.

Senator HEFLIN. Well, of course, "psychotic" is pretty well construed to be close to insanity.

Senator SPECTER. What you are saying is a legal consequence—whatever finding he made would not disturb the verdict of the jury that the defendant was guilty, because he was not found to be insane.

Mr. CAHALAN. True. At the time of the sentence, of course, the judge can take into consideration that this person was found guilty but mentally ill, unless there is a mandatory sentence. He can take that into consideration and say I am not going to send him to prison at all.

Senator SPECTER. We heard testimony from Dr. Reed, who criticized the guilty-but-mentally-ill verdict as, as he put it, a "quick fix," and that it was no solution at all because juries would notoriously split the difference if given that middle course, and that is in effect a copout. You don't share that evaluation.

Mr. CAHALAN. No; I think our statistics show that, that the jurors in Michigan in the last 5 years found 262 people not guilty by reason of insanity and 137 guilty but mentally ill; and the others they found guilty.

Senator SPECTER. How many did they find guilty? What were those statistics in terms of the convictions guilty generally and not guilty, if you know?

Mr. CAHALAN. I'm going to get that. We process about between 300 and 400 murder warrants a year in Detroit, and that is about 70 percent of the Michigan total, so that would be about 2,000 cases, murder cases, in Michigan.

Senator SPECTER. When you say 300 to 400 murder cases, you are including manslaughter cases in that statistic?

Mr. CAHALAN. Right, manslaughter, second-degree, and first-degree homicide cases, but not involuntary, not traffic cases.

So out of 2,000—that is an educated guess—there were 262 not guilty by reason of insanity and 137 guilty but mentally ill.

Senator SPECTER. Any just plain not guilty in Michigan?

Mr. CAHALAN. A few.

Senator SPECTER. That would be outside of Wayne County?

Mr. CAHALAN. Right, outside of Wayne County. [Laughter.]

But anyway, the example I was giving, we had a man who raped and killed this woman; he was found not guilty by reason of insanity, and he was in the mental hospital for less than a year, he came out, and we enacted our law—after he got out, we enacted our law, he had nothing to do with it, in 1975, and then in 1980 he went out and raped and killed another woman, and this time the same facts, practically the same testimony, he was found guilty but mentally ill of first-degree murder, now he will get life imprisonment, mandatory life imprisonment. At least some 80-year-old woman out in Wayne County is glad we got this, the next one who would have been raped.

Senator SPECTER. Mr. Cahalan, in testimony earlier given before the committee, we examined the question about how long people remained in confinement after a finding of not guilty by reason of insanity, and the testimony of Professor Stone was that it was typically not more than 3 months.

Do you have any sense as to how long people are confined in Michigan when found not guilty by reason of insanity?

Mr. CAHALAN. No; I don't. I tried to find that out before I came here, and I left before the answer came back from the Forensic Center. But I will get that to you.

Senator SPECTER. We would appreciate that.

Senator HEFLIN. I'm interested, first, your statistics you had, do you have any figures on the relationship of those figures to the number of times that the insanity defense was raised? I mean, are your figures overall as to the criminal justice system, or do you have it as to when it is raised?

Mr. CAHALAN. No; I don't have those figures. I tried to get them before I came, but I couldn't get those either.

Senator HEFLIN. This guilty but mentally ill verdict, has there been any rise in plea bargaining with that?

Mr. CAHALAN. No.

Senator HEFLIN. Isn't it more conducive to plea bargaining? Just take a number of different examples. A man is charged with first-degree murder; he has some mental problem, let's say not sufficient enough for a prosecution to believe that a jury would find him not guilty by reason of insanity. And overall it is my observation there have been very few, generally, verdicts returned of not guilty by reason of insanity in the overall criminal justice field, but here a person charged with first-degree murder, that he might reduce it down to second-degree murder, or else the punishment might be lighter under the concept that the man does have some mental illness, but not sufficient to be a defense.

Would this make it more conducive, of a more conducive nature for a prosecutor to recommend to a judge and for a judge to accept a lesser included offense or a lesser punishment than would normally be given, if the man pled guilty but mentally ill?

Mr. CAHALAN. Well, there is really not much reason to plead guilty but mentally ill. We had some woman who killed her children just recently who did that, but if you are going to plead guilty there is really not much advantage to pleading guilty but mentally ill, because before the judge sentenced you he would get a psychiatric report from the probation department.

Senator HEFLIN. Well, it would seem to me that a prosecutor could possibly bargain better with that as a tool. I mean, I am asking, because you have had the experience with it, but you don't think—from a prosecutorial viewpoint, it's not a bargaining tool to get pleas of guilty?

Mr. CAHALAN. No; not at all.

Senator HEFLIN. As to the question of—after a return of a verdict of guilty but insane, would that influence judges as to the length of the sentence that they would impose, where the judge imposes the sentence?

Mr. CAHALAN. I would just be guessing; I would say that some judges, yes.

Senator SPECTER. You mean on guilty but mentally ill.

Senator HEFLIN. Yes, I am speaking of this verdict of guilty but mentally ill; the judge may have a feeling, well, he's observed the man during the trial, and there is a question about that, maybe I ought not to give him 5 years, maybe I ought to just give him 3 years, and he will be recovered about that, I don't want to inflict punishment upon a wounded dog, you know—that sort of concept. Has any of that cropped out in these cases?

Mr. CAHALAN. Well, of course, when the judge is sentencing him, he has the testimony in his mind at the time that he sentences him; I am sure that is has some influence.

Senator HEFLIN. But you haven't noticed any disparity coming about as a result of that?

Mr. CAHALAN. No.

Senator HEFLIN. All right, now, some States have statutory presumptions in criminal cases, such as every person over the age of 14 years charged with a crime is presumed to be responsible for his acts, and the burden of proving that he is irresponsible is cast upon the accused, which is in effect—those type of statutory presumptions have caused the defense of insanity to be to shift the burden of proof, to shift, to various standards, either clear and convincing evidence, preponderance, or to the reasonable satisfaction of the jury.

Do you see any problems with adopting such a standard which would mean that you would be changing the burden of proof, and what are the problems you see with it?

Mr. CAHALAN. No; I think you can change the burden of proof, and I think you can do it—I think it might be a good idea, except, as I say, in capital cases—I have trouble with that from my own personal moral standpoint. But I think it would be constitutional. There are some cases on it—*Leland v. Oregon* and *Rivera v. Delaware* my research discloses.

Senator SPECTER. Mr. Cahalan, just one final question. If we should choose to modify the standard of insanity, what would your thought be about taking the ALI, albeit slightly different from the Michigan standard, and tightening it a little bit by inserting the

language of "severe" in front of "mental disease," and in front of "capacity" instead of "lacks substantial," "lacks entirely the capacity, et cetera"?

Mr. CAHALAN. I have no problem with that.

Senator SPECTER. Mr. Cahalan, we are very grateful to you for coming.

Senator HEFLIN. Let me ask you on that matter of lacking entirely the capacity—in the other part of the ALI, you have got two alternatives, that he lacks entirely the capacity to appreciate the criminality or the wrongfulness of his conduct—that's one; or his conduct—or to conform his conduct to the requirements of the law. He has got to have a 100-percent disabling capacity to appreciate the criminality of his wrong. If you were to put "entirely" in it, would it eliminate the "irresistible impulse"? We had the *M'Naghten* rule and then you came along with the irresistible influence, and the ALI—I'm just exploring this, talking out loud—the American Law Institute has said a "substantial capacity," and that, of course, has given me some concern. But if he lacked entirely the capacity to appreciate the criminality of his conduct, does that in any way eliminate—would that eliminate the "irresistible impulse" defense? In other words, you lack the ability to know right from wrong—that's in the old *M'Naghten*; and you have here a situation where you say you lack entirely the capacity to appreciate the wrongfulness of your conduct, but there have been, of course—the other qualification of the *M'Naghten* rule, as it developed, was even if you knew right from wrong, if you could not resist doing so.

Now, how would the ALI test, as changed by the language of Senator Spector, affect the "irresistible impulse," in your opinion?

Mr. CAHALAN. Well, the ALI, as it is now, has the irresistible impulse, or to conform his conduct to the requirements of law. What were you going to put in there?

Senator SPECTER. It would be changed, instead of saying "lacks substantial capacity," "lacks entirely the capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law."

Mr. CAHALAN. I think it's just saying the same thing. I think in all these definitions, except maybe when you get to diminished capacity, is that we are always talking about the same thing—it's cognition and volition, which makes us human beings. And I think we all understand that, and I think sometimes we get caught up in the language. And I don't think it would change. The jury would understand that he couldn't help himself, he had to do what he did, he could not resist it. Although there are a lot of things I don't think I can resist, I think on reflection I probably could have resisted them.

Senator HEFLIN. Well, maybe the word tied to appreciate is what raises questions. You get to conform—maybe to conform his conduct, a substantial capacity—but that's "or," it's not "and."

Well, anyway, we appreciate your thoughts on it.

Senator SPECTER. Again, Mr. Cahalan, we are very indebted to you for coming. As usual, your testimony is very, very helpful, based on the very substantial experience you have had.

Mr. CAHALAN. It's always a pleasure to have the opportunity to come here at the end of July. [Laughter.]

Senator HEFLIN. I see you do have a diminished capacity. [Laughter.]

Mr. CAHALAN. That's insane. [Laughter.]
[The prepared statement of Mr. Cahalan follows:]

PREPARED STATEMENT OF WILLIAM L. CAHALAN

IT IS SAFE TO SAY THAT THE MAJORITY OF THE PEOPLE IN THIS NATION WERE DISMAYED BY THE RESULTS OF THE JOHN HINCKLEY CASE. THE SYSTEM OF THE CRIMINAL JUSTICE SYSTEM IN THE UNITED STATES HAS BEEN UNDER CRITICAL EXAMINATION BY THE CITIZENS FOR SOME TIME. IT DOES NOT APPEAR TO ACCOMPLISH THE PURPOSE FOR WHICH IT WAS ESTABLISHED. THE HINCKLEY VERDICT WAS ONE MORE STRAW. THE DEMAND FOR CHANGE BECOMES GREATER AND GREATER.

WHENEVER THERE IS A SERIOUS DEMAND FOR CHANGE AND REFORM, IT IS INCUMBENT ON US, WHO ARE ACTIVELY ENGAGED IN THE SYSTEM, DAY IN AND DAY OUT, TO ADVISE CAUTION. WHENEVER THERE IS SUCH A MOOD FOR CHANGE, THERE IS A DANGER THAT THE MORAL AND POLITICAL FORCE TOWARDS REFORM MAY OVERREACH ITS MARK AND CAUSE, RATHER THAN PREVENT, HARM. THE DISTRUST FELT BY THE PUBLIC OVER THE RESULT OF THIS AND OTHER CASES INVOLVING THE INSANITY DEFENSE IS LEGITIMATE. THE TASK IS TO RESPOND TO THAT DISTRUST BY USING OUR ENERGY TOWARDS CONSTRUCTIVE REFORM WHICH REQUIRES A SOUND ANALYSIS OF THE ISSUES AND PROBLEMS AND ALL PROPOSED REMEDIES.

THERE ARE SOME WHO ARE DEMANDING THE ABOLITION OF THE INSANITY DEFENSE. I AM NOT ONE OF THEM. THAT DEFENSE SHOULD BE RETAINED.

TO UNDERSTAND THE LEGITIMACY OF THE INSANITY DEFENSE WE MUST UNDERSTAND SOME FUNDAMENTAL, PHILOSOPHICAL CONCEPTS. OUR SOCIETY BELIEVES THAT MAN IS RESPONSIBLE FOR HIS ACTS BECAUSE HUMANS HAVE COGNITIVE AND VOLITIONAL CAPACITY. THE INSANITY DEFENSE HAS BEEN FASHIONED TO RECOGNIZE BOTH: 1) COGNITIVE — NOT KNOWING THE NATURE OF THE ACT OR NOT KNOWING THE ACT IS WRONG; AND 2) VOLITIONAL — IRRESISTIBLE IMPULSE.

THE LAW, TO THE EXTENT THAT IT CONFORMS TO THE NATURE OF MAN, REQUIRES INDIVIDUAL ACCOUNTABILITY AND RESPONSIBILITY. HOWEVER, SUCH CRIMINAL RESPONSIBILITY FLOWS DIRECTLY FROM THE NOTIONS OF FREE WILL AND INTELLECT. THE CHOICE TO DO WRONG IS THE BASIS FOR LIABILITY. THUS, MENS REA IS A REQUIREMENT FOR ALMOST ALL CRIMINAL RESPONSIBILITY.

NOT ONLY WOULD THE ABOLITION OF THE INSANITY DEFENSE RUN CONTRARY TO OUR PHILOSOPHICAL CONCEPTS, BUT IT WOULD REQUIRE A CONSTITUTIONAL AMENDMENT AND SUBSTANTIAL CHANGES IN THE CRIMINAL LAW IN ALL OF OUR FIFTY STATES.

LET ME GIVE AN EXAMPLE. A DEFENDANT IS CHARGED WITH FIRST DEGREE MURDER WHICH REQUIRES PROOF OF PREMEDITATION AND MALICE. EVEN IF THE INSANITY DEFENSE WERE ABOLISHED, THE DEFENDANT COULD NOT BE PREVENTED FROM OFFERING EXPERT TESTIMONY ON HIS INABILITY OR INCAPACITY TO PREMEDITATE. YOU SIMPLY CANNOT DEFINE AS AN ELEMENT A MENTAL STATE WHICH THE GOVERNMENT IS OBLIGATED TO PROVE BEYOND A REASONABLE DOUBT AND SIMULTANEOUSLY PREVENT THE DEFENDANT FROM OFFERING RELEVANT EVIDENCE ON THE ISSUE.

TOTAL ABOLITION IS UNCONSTITUTIONAL, UNWORKABLE, AND UNWISE.

ANOTHER CHANGE SUGGESTED IS TO LIMIT THE INSANITY DEFENSE TO WHAT IS COMMONLY CALLED, "DIMINISHED CAPACITY." UNDER THIS PROPOSAL, THE DEFENSE WOULD BE LIMITED TO A SHOWING THAT THE DEFENDANT LACKED THE MENTAL CAPACITY TO FORM THE SPECIFIC INTENT.

ITS ADOPTION WOULD BE A MISTAKE. PRESENTLY, THE INSANITY DEFENSE IS ONLY RAISED IN ABOUT TWO OR THREE PER CENT OF ALL CRIMINAL CASES. HOWEVER, ALMOST ALL CRIMINAL CASES WHERE THE INSANITY DEFENSE MIGHT BE RAISED INVOLVE A SPECIFIC INTENT. THEREFORE, THE DEFENSE OF "DIMINISHED CAPACITY" WOULD INVITE THAT DEFENSE IN ALL SPECIFIC INTENT CASES. IN ANY EVENT, IT WOULD STILL BE INCUMBENT UPON THE PROSECUTION TO PROVE BEYOND ALL REASONABLE DOUBT THE NECESSARY SPECIFIC INTENT.

YET ANOTHER PROPOSAL IS TO LIMIT THE TESTIMONY OF EXPERTS. I DO NOT AGREE. IF THE INSANITY DEFENSE IS RETAINED, THEN EXPERTS MUST BE ALLOWED TO TESTIFY BECAUSE THEIR TESTIMONY IS RELEVANT. IT IS PART AND PARCEL OF THE ADVERSARY SYSTEM INHERENT IN OUR CRIMINAL JUSTICE SYSTEM. I BELIEVE IN THAT SYSTEM. TRUTH MORE OFTEN THAN NOT IS REVEALED IN THE CLASH OF OPPOSING SIDES.

ALTHOUGH I DO NOT AGREE WITH THESE CHANGES, I DO AGREE THAT CHANGE THERE MUST BE. I RECOMMEND THE FOLLOWING FOR YOUR SERIOUS CONSIDERATION:

FIRST, INSANITY SHOULD BE TREATED AS AN AFFIRMATIVE DEFENSE AND THE BURDEN OF PROOF PLACED UPON THE DEFENDANT TO PROVE IT. THIS WOULD HAVE SIGNIFICANT IMPACT. WHEN EXPERTS DISAGREE AS TO THE SANITY OF THE DEFENDANT, IT CONFUSES THE JURORS. BECAUSE OF THE BURDEN OF PROOF, THAT CONFUSION NOW RESULTS IN "NOT GUILTY BY REASON OF INSANITY." SHIFT THAT BURDEN TO THE DEFENDANT AND THAT CONFUSION WILL NOT STAND IN THE WAY OF THE PROPER VERDICT OF GUILTY WHICH HAS BEEN PROVEN IN ALL ITS ELEMENTS BEYOND A REASONABLE DOUBT TO A MORAL CERTAINTY.

THE SECOND AND MORE IMPORTANT REFORM INVOLVES THE CREATION OF AN ALTERNATIVE VERDICT, "GUILTY BUT MENTALLY ILL".

MICHIGAN BECAME THE FIRST STATE IN THE NATION TO ADOPT THE VERDICT, "GUILTY BUT MENTALLY ILL." IT DID SO BECAUSE IT BECAME STRIKINGLY CLEAR THAT THE STANDARDS UNDER WHICH THE DEFENSE OF INSANITY COULD BE RAISED WERE BEING EXPANDED WHILE SIMULTANEOUSLY THE STANDARDS FOR CIVIL COMMITMENT OF THE CRIMINALLY INSANE WERE BEING NARROWED. AS A RESULT, PERSONS FOUND "NOT GUILTY BY REASON OF INSANITY" IN VERY SERIOUS CASES WERE NOT COMMITTABLE UNDER CIVIL STANDARDS.

TO UNDERSTAND THE NATURE AND SCOPE OF THE CHANGE IN MICHIGAN, CERTAIN DEFINITIONS ARE HELPFUL.

INSANITY IS DEFINED AS FOLLOWS:

". . . A PERSON IS LEGALLY INSANE IF, AS A RESULT OF MENTAL ILLNESS. . . THAT PERSON LACKS SUBSTANTIAL CAPACITY EITHER TO APPRECIATE THE WRONGFULNESS OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF THE LAW." (MCL 768.21a)

GUILTY BUT MENTALLY ILL IS DEFINED AS FOLLOWS:

". . . IF THE DEFENDANT ASSERTS A DEFENSE OF INSANITY. . . (HE) MAY BE FOUND "GUILTY BUT MENTALLY ILL;" IF, AFTER

TRIAL, THE TRIER OF THE FACT FINDS ALL OF THE FOLLOWING BEYOND A REASONABLE DOUBT:

- a) THAT THE DEFENDANT IS GUILTY OF AN OFFENSE
- b) THAT THE DEFENDANT WAS MENTALLY ILL AT THE TIME OF THE OFFENSE
- c) THAT THE DEFENDANT WAS NOT LEGALLY INSANE AT THE TIME OF THE COMMISSION OF THAT OFFENSE." (MCL 768.36(1))

IF THE DEFENDANT IS FOUND NOT GUILTY BY REASON OF INSANITY, HE MAY BE CIVILLY COMMITTABLE. TO BE COMMITTABLE, HE MUST BE FOUND IN PROBATE COURT TO BE A "PERSON REQUIRING TREATMENT" WHICH IS DEFINED AS FOLLOWS:

"a) A PERSON WHO IS MENTALLY ILL, AND WHO AS A RESULT OF THAT MENTAL ILLNESS CAN REASONABLY BE EXPECTED WITHIN THE NEAR FUTURE TO INTENTIONALLY OR UNINTENTIONALLY SERIOUSLY PHYSICALLY INJURE HIMSELF OR ANOTHER PERSON, AND WHO HAS ENGAGED IN AN ACT OR ACTS OR MADE SIGNIFICANT THREATS THAT ARE SUBSTANTIALLY SUPPORTIVE OF THE EXPECTATION." (MCL 330.1401(a))

THE TERM MENTAL ILLNESS WHICH IS COMMON TO "NOT GUILTY BY REASON OF INSANITY" AND "GUILTY BUT MENTALLY ILL" VERDICTS AS WELL AS TO DISPOSITION OF THE PERSON FOUND NOT GUILTY BY REASON OF INSANITY, MEANS:

"... A SUBSTANTIAL DISORDER OF THOUGHT OR MOOD WHICH SIGNIFICANTLY IMPAIRS JUDGMENT, BEHAVIOR, CAPACITY TO RECOGNIZE REALITY, OR ABILITY TO COPE WITH THE ORDINARY DEMANDS OF LIFE." (MCL 330.1440a)

WHAT DOES THE "GUILTY BUT MENTALLY ILL" VERDICT DO? FUNCTIONALLY, IT ALLOWS THE FACT FINDER TO AGREE THAT THE DEFENDANT IS MENTALLY ILL, BUT NEVERTHELESS TO HOLD HIM CRIMINALLY RESPONSIBLE FOR HIS CONDUCT. THE LEGAL THEORY IS THAT THE MENTAL ILLNESS WAS NOT THE PROXIMATE CAUSE OF HIS CRIME. THE DEFENDANT FOUND "GUILTY BUT MENTALLY ILL" IS COMMITTED TO THE DEPARTMENT OF CORRECTIONS. HE IS CLASSIFIED IDENTICALLY AS ANY OTHER DEFENDANT EXCEPT THAT HE IS ENTITLED TO RECEIVE TREATMENT FOR HIS ILLNESS WHILE IN PRISON. IF THE PRISON FACILITIES OR RESOURCES ARE INADEQUATE, THE LAW

PROVIDES FOR A TRANSFER OF THE PRISONER TO A SECURE FACILITY OF THE DEPARTMENT OF MENTAL HEALTH.

ONE MORE ASPECT OF MICHIGAN LAW SHOULD BE NOTED. IN 1965, THE CENTER FOR FORENSIC PSYCHIATRY WAS CREATED AS AN AGENCY OF STATE GOVERNMENT. OPERATING UNDER OUR STATE DEPARTMENT OF MENTAL HEALTH, THE CENTER EVALUATES, AND REPORTS ON, COMPETENCY TO STAND TRIAL. IT EVALUATES, AND REPORTS ON, CRIMINAL RESPONSIBILITY. IT EVALUATES AND FILES THE NECESSARY MEDICAL REPORTS ON PERSONS FOUND NOT GUILTY BY REASON OF INSANITY WHERE CIVIL COMMITMENT IS SOUGHT.

THUS, ALL THREE WAYS IN WHICH THE ISSUE OF MENTAL ILLNESS IMPACTS UPON THE CRIMINAL JUSTICE SYSTEM ARE HANDLED BY THE CENTER.

WITH ALL THESE LEGAL AND INSTITUTIONAL CHANGES THE MICHIGAN SYSTEM FUNCTIONS VERY WELL. FOR THE FIVE-YEAR PERIOD, 1976-1980, THERE WERE 3,755 EVALUATIONS OF PERSONS FOR CRIMINAL RESPONSIBILITY, CONDUCTED BY THIS CENTER. OF THAT NUMBER, THE CENTER RECOMMENDED THAT 10% BE FOUND NOT CRIMINALLY RESPONSIBLE. FOR THE SAME PERIOD IN THE MICHIGAN CRIMINAL COURTS, 262 DEFENDANTS WERE FOUND "NOT GUILTY BY REASON OF INSANITY," AND 137 DEFENDANTS WERE FOUND "GUILTY BUT MENTALLY ILL".

THE MICHIGAN SYSTEM HANDLES THE ISSUE OF MENTAL ILLNESS AS IT IMPACTS ON THE CRIMINAL JUSTICE SYSTEM AS IT SHOULD BE. THE "GUILTY BUT MENTALLY ILL" VERDICT GIVES THE FACT FINDER THE OPPORTUNITY OF AGREEING THAT THE DEFENDANT IS MENTALLY ILL, YET HOLDING HIM CRIMINALLY RESPONSIBLE.

I AM CONVINCED THAT IF THE VERDICT HAD BEEN AVAILABLE TO THE JURORS IN THE HINCKLEY CASE, THEY WOULD HAVE FOUND HIM "GUILTY BUT MENTALLY ILL". SUCH A CONCLUSION IS OBVIOUS AFTER READING THE JURORS' REMARKS.

HOWEVER, BECAUSE IT WAS NOT AVAILABLE, AND BECAUSE OF THE BURDEN OF PROOF, ONCE THEY FOUND A DOUBT AS TO HIS MENTAL STATE, THEY FELT OBLIGATED TO FIND HIM "NOT GUILTY BY REASON OF INSANITY."

REFORM OF THE SYSTEM WILL BEST BE ACCOMPLISHED BY PROVIDING THE ALTERNATIVE VERDICT, "GUILTY BUT MENTALLY ILL," AND BY SHIFTING THE BURDEN OF PROOF FOR INSANITY TO THE DEFENSE.

THIS WILL NOT SOLVE ALL THE PROBLEMS. IN MICHIGAN, PROFESSIONALS WITHIN CORRECTIONS HAVE COMPLAINED THAT AS MANY AS HALF OF THE PERSONS FOUND "GUILTY BUT MENTALLY ILL" UPON DIAGNOSIS AFTER COMMITMENT, ARE FOUND NOT TO BE MENTALLY ILL. THESE ARE THE VERY PERSONS WHO ARE ALSO NOT CIVILLY COMMITTABLE AND, BUT FOR THE "GUILTY BUT MENTALLY ILL VERDICT", WOULD HAVE BEEN RELEASED WITHOUT PENALTY. BECAUSE OF THE VERDICT, THEY ARE WHERE THEY OUGHT TO BE, THAT IS, IN PRISON.

PRIOR TO THE CHANGE IN THE MICHIGAN LAW, THERE WERE APPROXIMATELY 300 PERSONS FOUND "NOT GUILTY BY REASON OF INSANITY" AND COMMITTED TO THE CENTER FOR FORENSIC PSYCHIATRY. 80% OF THEM WERE SUBSEQUENTLY RELEASED BECAUSE IT WAS DETERMINED THAT, IN FACT, THEY WERE NOT MENTALLY ILL. HAD THE "GUILTY BUT MENTALLY ILL" VERDICT BEEN AVAILABLE, MANY OF THEM MIGHT STILL BE IN JAIL TODAY.

THE TRUTH OF THAT STATEMENT IS GRAPHICALLY ILLUSTRATED IN A MOST RECENT CASE IN DETROIT, MICHIGAN. ON MAY 13, 1973, LARRY DARDEN RAPED AND KILLED MADGE HAMBLEY, AN 80-YEAR OLD WOMAN. AT HIS TRIAL THERE WAS CONFLICTING PSYCHIATRIC TESTIMONY. ON APRIL 23, 1974, DARDEN WAS FOUND "NOT GUILTY BY REASON OF INSANITY". HE WAS RELEASED FROM THE MENTAL HOSPITAL IN LESS THAN A YEAR.

ON DECEMBER 1, 1980, LARRY DARDEN RAPED AND KILLED AN 85-YEAR OLD FEMALE, MARVEL KENITZ. AT HIS TRIAL THERE WAS CONFLICTING PSYCHIATRIC TESTIMONY. ON JULY 23, 1982, HE WAS FOUND "GUILTY BUT MENTALLY ILL" OF FIRST DEGREE MURDER. HE WILL NOW BE SENTENCED TO MANDATORY LIFE IMPRISONMENT.

HAD MICHIGAN NOT ADOPTED THE "GUILTY BUT MENTALLY ILL" VERDICT, IT IS REASONABLE TO CONCLUDE THAT MR. DARDEN WOULD HAVE BEEN FOUND "NOT GUILTY BY REASON OF INSANITY" AND, IN A SHORT TIME BE RELEASED FROM THE MENTAL INSTITUTION AND PERHAPS RAPE AND KILL ANOTHER 80 YEAR OLD WOMAN.

THESE STATISTICS AND THE DARDEN CASE DO NOT SUGGEST THAT THE INSANITY DEFENSE BE ABOLISHED, BUT THEY DO SUGGEST THAT THE BURDEN OF PROOF IS THE VILLAIN OF THE PIECE. THESE STATISTICS ALSO UNDERLINE THE DIFFICULTY OF THE PROBLEM AND THE REAL POSSIBILITY OF ERROR UPON THE PART OF THE FACT FINDERS. I CAN THINK OF NO MORE DIFFICULT TASK THAN TO REACH A JUDGMENT ON WHETHER A PARTICULAR ACT WAS THE PRODUCT OF A MENTAL ILLNESS OR A SIMPLE CHOICE TO DO EVIL. THIS DIFFICULTY DOES NOT REQUIRE US TO REMOVE THE POWER OF THAT JUDGMENT. THE REMEDY IS TO INCREASE THE ALTERNATIVES BY GIVING TO THE JURY THE RIGHT TO FIND THE PERSON "GUILTY BUT MENTALLY ILL." THIS CLEARS THE ISSUE OF MENTAL ILLNESS. IF THE DEFENDANT IS NOT MENTALLY ILL, THERE IS NO DEFENSE AND HE SHOULD BE FOUND GUILTY. IF HE IS MENTALLY ILL, THE ISSUE PROCEEDS TO WHETHER HE SHOULD BE FOUND CRIMINALLY RESPONSIBLE.

Senator SPECTER. We next welcome attorney Frank Maloney who is representing the National Association of Criminal Defense Attorneys

Mr. Maloney, we appreciate your being with us here today, we thank you for coming. We would appreciate it if, at the outset of your testimony, if you would give us just a little biographical sketch of your own background, please.

Senator HEFLIN. Well, let's ask him not to read this testimony; it's pretty lengthy.

Summarize it, please.

Senator SPECTER. Senator Heflin reminds us of the practice to call for summarizations, hopefully within a 5-minute span, leaving the maximum amount of time for questions and answers, and, as you can see, at least by my colleague, they are extensive and provocative and penetrating.

Senator HEFLIN. I think "extensive" is the only proper description.

STATEMENT BY FRANK MALONEY, ATTORNEY, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE ATTORNEYS

Mr. MALONEY. Mr. Chairman, this is a rather long document. Most of it pertains to exhibits, though, that are attached to it, and there are exhibits there that I think you need to be acquainted with, perhaps you already are.

My name is Frank Maloney, I am an attorney, I practice in Austin; I am an adjunct professor of law at the University of Texas. My background consists of 5 years in the prosecutorial effort as an assistant district attorney in Travis County in Austin. I was also chief of the attorney general's office in the State of Texas law enforcement division. I have practiced both in Federal and State courts all over the country.

One of the documents that is attached to this magnum opus that you have before you is a lecture that I have given to the American

Trial Lawyers Association seminars in Boston, San Francisco, New Orleans, Las Vegas, and other places. It deals with the law as it applies in Federal courts. Now, it is an abridged version, because I've cut out all of the State material. But it deals with the law as applied in Federal courts in all 12 of the circuits as well as a summary of the medical terminology and kind of a how-to-do-it situation in the insanity defense in Federal court.

I probably have defended maybe 30 insanity defense cases in State and Federal court, probably prosecuted close to 100. I guess that is enough about my background. You have a copy of that.

I represent the National Association of Criminal Defense Lawyers. Now, that is a group of about 2,000 lawyers around the country who practice primarily defense law as well as in the public defender capacity and also as private practitioners. And pursuant to your invitation of that association to appear, I was designated to come up and talk to you about our views, or the views of the association, or at least the view of the criminal bar, as I see it. Now, I don't purport to represent every criminal defense lawyer in the country. Probably some of us would disagree greatly with what I have to say, but we did think you needed to have some view of this.

What I have done basically is traced the history of the insanity law primarily to give you an idea, as early as the 17th century, what the tests were that were submitted, beginning with the "wild beast" test down through the so-called products test, which is the *Durham* rule, incidentally, the *M'Naghten*, and then the ALI MPC test, how it has been applied, and so forth.

Then I have gone into the various bills that are before you—I was not aware of Senator Cochran's latest bill, but it seems to me to offer very little difference from what you have in front of you, in reference to the other nine bills. I have tried to analyze them and also determine where I think you have constitutional problems both from the standpoint of destroying the mens rea concept by adopting the diminished capacity test, in view of *Mullaney v. Wilbur* and *In Re Winship*. And, more important, a case that was just handed down last term called *Enmund v. Florida*, a case that you ought to be cognizant of, because it makes intent now a matter of constitutional law, applicable to the States by way of the 14th amendment.

Senator SPECTER. Prior to that decision, there had not been, as you understand the law, a constitutional requirement that intent be established?

Mr. MALONEY. Yes, sir, *Robinson v California*. But *Enmund* now states that the definitional and substantive aspects of what intent means has now opened up a bag of worms. You see Justice O'Connor joined by Justices Rehnquist and Berger just going in effect—criticizing that decision tremendously, because intent now—not only the concept of intent, but what it means, is going to be looked at by the Supreme Court, at least in accordance with the five Justices who—

Senator SPECTER. Five-to-four decision.

Mr. MALONEY. Five-to-four decision, right. I quoted Justice O'Connor in my paper; she has quite a lot to say about it, none of it complimentary, all of it derogatory. And that case in itself is going to present a problem for this committee, a big one. You just cannot

use the diminished capacity test as that test is in most of these bills at this time and place the burden on the defendant to prove by any burden that he did not have the mens rea, because he had a mental disease which affected that mens rea concept.

Senator SPECTER. Is there any problem that you see constitutionally of shifting the burden of proof to the defendant to prove insanity?

Mr. MALONEY. I do. I think when you start—I quoted Justice Frankfurter, he makes a lot of sense in what he says concerning insanity, and also Judge Bazelon, in my paper—and I will get to that in a moment, if I could abate that for just a second. The point that I want to make at this juncture is that with *Enmund* the diminished capacity test, with the burden on the defendant to establish that as an insanity defense, I think is unconstitutional. I think the Senate, if it passes a bill like that, is creating problems and a problem that will ultimately result in that bill being held unconstitutional. And I will demonstrate that in a moment.

In tracing these tests, I wanted to call to your attention that since 1892—and I know you know this—since *Davis v. United States*, the burden has been in Federal practice, regardless of the test, to place the burden on the Government to prove sanity beyond a reasonable doubt—since 1892. And that has been consistent, whether the federals are using *M'Naghten*, simply the right-wrong test, whether they were using *Durham*, the products test, or whether they were using the irresistible impulse test or the ALI MPC test—that has been the law since 1892 in Federal practice.

And what many of these bills are asking now is that you change that burden, that you take somewhere close to 100 years of trial and error and change it.

Now, another exhibit that I have put in this paper is the recent proposal of the American Bar Association, and that is exhibit B. I have attached to this a letter from Miss Applegate, the staff assistant of the American Bar Association, dated July 21, 1982, to me, and enclosed the ABA provisional criminal justice mental health standards that have just been promulgated, last April. These standards deal with the entire concept of mental illness and criminal law, from the competency issue through the insanity issue through postacquittal confinement, and so forth. These tests were promulgated—rather, provisions—were promulgated by a committee that was comprised of Judge Erickson, Federal court in Denver, B. J. George, professor of law, New York University, Terence MacCarthy, who is chief of the public defenders, Federal, in Chicago, and others, a great many people who know what they are talking about. They received close to \$1 million to make this study and they are still continuing with it. That ABA study will be presented to the general committee in August of this year in San Francisco, and then will be ultimately presented, after the complete study, to the board of delegates, chamber of delegates, of the American Bar Association.

My point is that they have done a great deal of work in this, gentlemen, and it would be a shame to just ignore some of the suggestions. They deal in many respects with the questions you are asking here about what do you do with a person who has been acquitted by reason of insanity.

In that regard let me say that I, for one, believe he ought to be committed, if, after hearing, it can be demonstrated that he has a mental illness, and, second, that he is dangerous to himself or others or is apt to commit some danger to society.

One of the reasons juries turn down an insanity test, even where the defendant meets the "wild beast" test, where he is a total raving maniac, is they are afraid he is going to get out and kill again.

Now, I noticed in the charge and instructions of Judge Parker, since the *Hinckley* case has been mentioned here, that Judge Parker told the jury that if you find this defendant not guilty by reason of insanity, I intend to commit him after hearing to St. Elizabeth's for psychiatric evaluation. That should be told to a jury, a jury is entitled to know that the man isn't going to walk out of the court room.

Senator SPECTER. Mr. Maloney, when you recommend that Congress not act until the ABA makes up its mind, how long do you think it will take?

Mr. MALONEY. Well, I think that the provisional standards are probably going to be adopted by the full committee of the ABA standards committee probably in Chicago; there will be some debate, and then—

Senator SPECTER. And when will that meeting be held? Mid-winter?

Mr. MALONEY. No, that's going to be held in August, this next month.

Senator SPECTER. In Chicago in August, not San Francisco?

Mr. MALONEY. Excuse me, I mean San Francisco.

Senator SPECTER. So it will be this next month.

Mr. MALONEY. And then it will be submitted probably at the midwinter meeting in Chicago to the house of delegates for enactment.

Senator SPECTER. It's highly doubtful that the Congress will act before mid-August on most anything.

Mr. MALONEY. You have an excellent staff, and—

Senator SPECTER. They are somewhat inhibited, however.

Mr. MALONEY. I don't think that McBride woman is inhibited; she is fantastic.

At any rate, she and I have discussed this—and I submitted these because I felt you needed to have them, I didn't know whether you knew about them.

One thing I have added to this, and that is this. I have heard and read that the jury in the *Hinckley* case has been criticized tremendously, and, you know, I really don't know if anybody knows what happened in the *Hinckley* case, unless, one, they were a participant in it, as a trial judge or a prosecutor or a defense lawyer. I do know that there is a way of determining whether or not the jury acted in accordance with law, and that is simply by looking at the instructions given by Judge Parker to the jury, to determine whether his instructions were valid, whether they were in accordance with *United States v. Brawner*, which is what they were based on, and whether in effect the jury acted within the parameters of that charge. Now, for that reason I have enclosed a certified copy in my paper of the jury instructions in *Hinckley* submitted to me by the

court reporter—they are certified. I have not submitted the entire charge because it's too lengthy, but I have submitted the entire charge as it applies to insanity, and as it was given to the jury.

I have also submitted and attached to my paper a portion of that charge that deals with the presumptions, the inferences, that Judge Parker gave. And I can tell you this, if the defense lawyers perfected their objections—and that is not in this record, because they perfected objections in chambers, and I did not ask for that record—if they did, the *Hinckley* case, had it resulted in a conviction, probably would have been reversed, because Judge Parker charged on an inference, on presumption, that was held to be reversible error in *Sandstrom v. Montana*. And you have an attorney general here from Montana; perhaps he can talk to you about *Sandstrom*. It holds that it is a violation of constitutional law to state that the law presumes intent from the ordinary acts of an individual. I have cited that in my paper.

Now, he charged it in terms of inferences, and he qualified it. He might have gotten out of it. But you had a multiple-count indictment in that case—13 counts; the first 3 counts dealt with assault with intent to murder, or attempted murder, on the individuals under federal law; the other 10 counts dealt with assault with a deadly weapon dealing with D.C. law.

So this was a multifarious-count indictment, and the court was required to charge and also define intent. You can't talk about presumption of intent by the use of a weapon in a criminal charge because you are in effect transferring the burden of proof, and intent is an issue that must be proven by the government beyond a reasonable doubt. When you try to do that for 13 charges under 2 different systems of law, you have problems. It's not Judge Parker's fault. The indictment contained too many counts, should not have been drafted that way; that is a problem that Federal prosecutors face every day—they always try to overload the an indictment, because that indictment goes into the jury room and it acts like a jury argument.

At any rate, that's my view. I am not saying the case would have been reversed, I am saying that the inference was charged in the charge, a copy of it is in front of you, you can read it. It begins, I believe, on page 8700.

You may infer that a person ordinarily intends the natural and probable consequences of his acts knowingly done or knowingly committed.

If a person uses upon another an instrument or weapon of such nature and in such a way and under such circumstances that such use would naturally and probably result in the death of the other, you may infer that he did so with the specific intent to kill.

That inference has been held unconstitutional in *Sandstrom v. Montana* by the Supreme Court.

Senator SPECTER. Mr. Maloney, what authority do you have for questioning the constitutionality of shifting the burden of proof from the prosecution to the defendant?

Mr. MALONEY. *Sandstrom v. Montana*, Senator, 442 U.S. 510, 99 Supreme Court, 1979 is the date. A charge to the jury that a person intends the ordinary consequences of his voluntary acts violates due process under the 14th amendment.

Now, let's assume, for the sake of argument, that the court has submitted the diminished capacity test. You are charged, ladies and gentlemen of the jury, that if you find or have a reasonable doubt that the defendant at the time he committed the conduct, if he did, because of mental disease or disorder could not formulate the necessary intent to cause the death of the individual, President Reagan, you shall acquit. In this regard, the Government has the burden of proving beyond a reasonable doubt that the defendant, one, either did not have a mental disease or defect, or, two, if he did, could formulate the necessary intent to cause the death of Reagan. You are further instructed that a person intends the ordinary and voluntary—excuse me, that a person intends the consequences of his voluntary acts.

And then you go into this part, dealing with the deadly weapon, that I have just read.

Senator SPECTER. Mr. Maloney, that's fine; if that is the authority you have, we can review that.

On the subject of modifying the definition of insanity, what is your reaction to the proposal which we have talked about here this morning about adding the word "severe" and changing "lacks substantial capacity" to "lacks entirely the capacity," under the ALI standard?

Mr. MALONEY. There is a big difference. I wish I could tell you there wasn't.

I notice the Attorney General mentioned that psychiatrists do not agree with terminologies. I am sure this Committee is aware that since 1927 the American Psychiatric Association has published both DSM-I and then in 1962 DSM-2, and finally, in 1980, DSM-3. That is this book here.

Senator SPECTER. Yes, we are familiar with those.

Mr. MALONEY. All right. Now, that book attempts to define mental disorders. What we are talking about here is mental disease and mental defects. Every one of them are defined in this book, beginning with the principal psychoses, whether it be organic or psychogenic, right down through the adjustment reaction.

Senator SPECTER. Mr. Maloney, are you opposed to these changes?

Mr. MALONEY. Yes, of course, I am. I would like to state my reason, Senator.

Senator SPECTER. All right.

Mr. MALONEY. My reason is you are going to knock out about half of the mental diseases—

Senator SPECTER. We are starting to run into some scheduling problems; we have three more witnesses—that's why I am trying to draw you down to the core of your consideration. But we are very much interested in your reasons for opposing this.

Mr. MALONEY. If you adopt that case, and if it is strictly construed, you will knock out about 50 percent of the mental diseases or disorders that are listed in the Diagnostic Manual.

Senator SPECTER. So you think it really does make a difference, whether the charge is *M'Naghten* or ALI or the revised ALI?

Mr. MALONEY. Well, the revised ALI, including the word "entirely," would make this difference on the—

Senator SPECTER. You think some 50 percent of the defenses would be eliminated?

Mr. MALONEY. I think so. You would knock out the situation where a person suffers a posttraumatic adjustment reaction, where he, because of some past illness, something triggered that adjustment reaction where at that time he could do nothing but exercise the psychiatric defense of denial. Take a man in a perjury situation. I defended a district attorney who was brought up in front of a grand jury and committed perjury because he couldn't bring himself to admit that the conduct they were accusing him of was in fact illegal.

Senator SPECTER. What was he charged with?

Mr. MALONEY. He was charged initially with conspiracy with intent to kidnap with intent to commit murder, and then 14 counts of perjury. The fifth circuit knocked out the conspiracy count on interlocutory appeal and then he was tried on the perjury counts.

Senator SPECTER. What is your view of the suggestions to limit the psychiatric testimony?

Mr. MALONEY. I don't think you can. You can amend rule 701 under the Federal Rules of Evidence, I would suppose—it's not a constitutional mandate—but—the courts have that ability now under rule 401: If it's something cumulative; if it's—even though it might be relevant and probative, if it's highly prejudicial, they can knock it out.

Senator SPECTER. Are you satisfied with the law of insanity the way it stands at the present time?

Mr. MALONEY. Yes, I am, Senator. I think it should remain the way it is; you have under 12.2(b) the authority to submit diminished capacity as it stands—that is a notice requirement. In the case I was just mentioning, the court submitted both the insanity under ALI MPC and the diminished capacity.

Senator SPECTER. Senator Heflin?

Senator HEFLIN. Suppose Congress were to adopt for the Federal courts the *M'Naghten* rule.

Mr. MALONEY. The straight *M'Naghten* rule.

Senator HEFLIN. A lot of States still have it. What would be your arguments against or for that?

Mr. MALONEY. Purely a cognition test that says that a little man up there in the head of an individual tells you what's right and what's wrong.

Senator SPECTER. May I interrupt just a moment? A vote has just started. Suppose I start now, Senator Heflin, and go and return, and then you can go and return, if that is acceptable.

Senator HEFLIN. I might not return, but I will be glad to—

Senator SPECTER. Well, I shall return, and the rest is up to you. [Senator Heflin assumes the chair.]

Senator HEFLIN. All right, sir, go ahead on what you were stating.

Mr. MALONEY. I think the cognition test, that's *M'Naghten*, the ability to determine the rightness and wrongness of one's conduct, inability caused by mental disease. That is strictly a cognition test, and that was the rule up until about 1950, when the ALI adopted—

Senator HEFLIN. With "irresistible impulse" added to it, you include that within it?

Mr. MALONEY. I take issue, Senator Heflin, with whether or not the second prong of the MPC is in fact an irresistible impulse test. That smacks of something that is immediate. The test itself says that because of mental disease or disorder one is unable to conform his conduct to the right. That could speak to something that is chronic. When you talk about irresistible, you have the connotation of something that occurs immediately, you just can't—

Senator HEFLIN. Well, what I am talking about is *M'Naghten* as it was changed just about before the turn of the century by adding the "irresistible impulse." If Congress were to adopt that, or the Federal courts, what arguments do you have against that?

Mr. MALONEY. None. I would think that the MPC ALI test should be retained; all 12 circuits use it today, every one of them, since as late as 1961. You have had 20 years of experience with that test. Why change it? The jury in *Hinckley* ought to be congratulated for following the law, rather than criticized because they did something that was unpopular politically. The ALI MPC test is a good test; it works; it worked even though the burden is on the Government. There aren't very many people, Senator, as you pointed out about 20 minutes ago, that are found not guilty in Federal court by reason of insanity—very few; as a matter of fact, there aren't many insanity defenses that are raised in Federal court nationally. Most of the insanity defenses today are in State courts.

Senator HEFLIN. Well, I think there is a real likelihood, if you adopt this mens rea state of mind, that it will be in many, many Federal cases, which is a problem—at least I am worried about it, the concept of the mens rea is that the Government has to prove a state of mind of the elements of the offense charged, and the burden would have to be on the prosecution in that. We just passed an agents' identity law that has at least four state-of-mind elements involved in it.

Mr. MALONEY. That's better than 72, though. You know, you have, if you adopt, under the proposed code—what is it, 2572, or whatever the proposed new code was—you had four elements: intent, knowledge, recklessness, and negligence. And if you look at the definitions of those elements, you are talking about a conscious desire to cause the result, an intent; an awareness that the facts exist or the result is apt to occur, knowledge; you were aware but disregarded, reckless; and then should have been aware, and negligent.

Now, you change the test—let's assume you change the test on insanity for the diminished capacity; you are talking about the Government having to prove that conscious desire or that conscious awareness—you are putting a tremendous burden on them. I wasn't going to tell you this, but I would much rather have, as a defense lawyer, the diminished capacity test than the right-wrong as a defense. I could win a case under that test, if a man had a bad toenail that affected his emotional involvement; and if you want to give it to me, I would love to have it. And that definition of disease is in DSM-3.

So what I would rather see the Congress do, retain the law as it stands—it worked for 20 years. *Hinckley* has caused an uproar. The same thing happened in Leland, Oreg., there was an uproar. Justice Frankfurter had something to say about that. The same thing happened in *M'Naghten*. *M'Naghten* was found not guilty by reason of insanity in 1843, and the public went into an uproar and the House of Lords then had to debate the test. That is exactly what is occurring today because of *Hinckley*. And the jury in *Hinckley* followed the law.

Senator HEFLIN. How about giving us your thoughts on this additional proposed verdict of guilty but mentally ill.

Mr. MALONEY. It's a split fix. I agree with what—

Senator HEFLIN. Did you call it a "split fix"?

Mr. MALONEY. That's what I thought one of the psychiatrists said, according to Senator Specter. It's going to create a problem; the jury is going to be totally confused. The studies under the ABA, considered this, considered that as a possible test. There were six committees and they met over the past year. And this business of guilty but mentally ill was presented to them, and they had witnesses from all over the country come in there and testify on that. And they concluded it was a bunch of malarkey.

What was happening in the situation was that juries were coping out, they were finding the defendant guilty but mentally ill in situations where the evidence was overwhelming that the defendant met the test of MPC ALI. And then what happens to him? He goes to the penitentiary, he is examined, and I think, as you pointed out, the stressors are no longer there on his schizophrenic mind, he looks normal, he spends 10 minutes with a psychiatrist, he doesn't steal anything while he is there, so they put him in the penitentiary rather than give him treatment.

The real area that should be looked at is the ability of the hospitals in this country to treat the insane.

An ancillary part to that should be much like some of these bills suggest, and that is a hearing after an acquittee is found not guilty by reason of insanity to determine whether or not he is mentally ill, whether or not he is a danger, a commitment procedure, and then conditional supervision after he is released thereafter by the courts. That would work, and I think that is what ought to be done.

Senator HEFLIN. Well, I am going to have to go vote now. So we will stand in recess until Senator Specter returns.

Mr. MALONEY. Am I excused, Senator?

Senator HEFLIN. Yes, sir, unless you want to bend Senator Specter's ear when he gets back.

[The prepared statement of Mr. Maloney follows:]

PREPARED STATEMENT OF FRANK MALONEY

Mr. Chairman, members of the United States Senate
Judiciary Committee:

My name is Frank Maloney, I am an attorney practicing law in Austin, Texas. I appear before you on behalf of the National Association of Criminal Defense Lawyers, an organization consisting of some 2,000 lawyers who practice criminal law as public defenders or in private practice throughout the 50 states both in various state courts and the federal courts. The National Association of Criminal Defense Lawyers is an organization formed exclusively for charitable scientific and educational purposes. One of its functions of course is to promote the proper administration of criminal justice.

The Association has requested that I as a member of its Board of Directors appear in answer to your invitation to testify on the various Senate Bills that have been presented to the Senate on the issue of insanity as a defense.

I have prepared a paper for you consisting of a listing and definition of the various insanity defenses, an analysis of the various Senate Bills on the issue presently before you, and my interpretation of these Bills and my critique of them.

The paper makes some reference to the Hinckley trial, utilizing the Court's instructions to the jury as an example only.

Attached to the paper are three exhibits. Exhibit A consists of a paper in abridged form that I have delivered on the Insanity Defense to the various circuit seminars of the American Trial Lawyers Association, in Boston, Atlanta, New Orleans and elsewhere. Exhibit B is the recent American Bar Association publication of the ABA Provisional General Justice Mental Health Standards (April 1982) and Exhibit C is a certified copy of portions of the jury instructions in U.S. v. Hinckley. A certified copy of the complete charge will be presented to you for your record during my testimony.

I do not intend to read to you the entire paper; however, I shall cover as much of the subject matter of the paper during my testimony as time allows.

I. THE INSANITY TESTS

The English test in the early 1700s was in 1 Hale P.C. 30 as follows:

A person laboring under a mental defect or disease shall be held responsible for his acts if he has as great an understanding as a child of 14 years.

A later test attributed to Bracton appearing in Arnold's case 16 HOW ST. Tr. 764, known as the "wild beast" test, was utilized throughout the 18th century:

A man, to be exempt from responsibility, must be totally deprived of his reason and memory, and must not know what he is doing, no more than an infant, or a wild beast.

McNaghten's Case, 10 Clark and Finelly 200, 1 C. and K 30. Defendant McNaghten had been indicted for the murder of Edward Drummond, the private secretary to Sir Robert Peel, then Prime Minister of England. After a plea of not guilty, and evidence having been offered of the shooting of Mr. Drummond and of his death and consequences thereof, Drummond then called witnesses to prove that he was not, at the time of the committing of the act, of a sound state of mind.

Chief Justice Tindal charged the jury as follows:

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 both of God and man, then he would be entitled to a verdict in his favor; but if, on the contrary, they were of the opinion that when he committed the act he was of a sound state of mind, the verdict must be against him.

McNaghten was found not guilty by reason of insanity.

Like the public excitement generated by the Hinckley case, the public excitement in England after the verdict caused the question of insanity as a defense to be debated by the House of Lords. The Lords submitted to the Law Lords of the House of Lords certain questions concerning the

defense and particularly what type of definition should be accorded to it. In answer to some six questions the Law Lords defined the type of insanity as follows:

To establish a defense on the ground of insanity, 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 or quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong.

For a complete listing of the questions and answers submitting see Criminal Law and Its Enforcement, Lowell and Gleuck, West Publishing Company 1958 page 287.

In State v. Jones, 50 N.H. 369, 9 Am. Rep. 242 (1891), some forty years after McNaghten, the New Hampshire Supreme Court adopted the following test:

At the trial where insanity is set up, two questions are to be presented:

1. Has the prisoner a mental disease?
2. If he had, was the disease of such a character, or was it so far developed, or had it so far subjugated the powers of the mind, as to take away the capacity to form or entertain a criminal intent?

The "irresistible impulse" test adopted in some jurisdictions in the early 1890s and has been severely criticized. See: State v. Harrison, 76 W.Va. 729, 15 S.E. 982 (1892):

A person who engaged in conduct because he was irresistibly compelled to do so because of some form of mental disease or disorder; that is he had an uncontrollable impulse to the point that his faculties and powers were possessed and he was compelled to do what he knew to be wrong and a crime, he therefore should not be held criminally responsible.

In 1954, the United States Court of Appeals for the District of Columbia, in the case of Durham v. United States, 214 F.2d 862, 45 A.L.R. 2d 1430 (1954) recognizing that the right and wrong test was approved in the D.C. jurisdiction in 1882 and extended in 1929 when the court approved the irresistible impulse test as a supplementary test, citing dissertation by the American Psychiatric Association, a report of the Royal Commission on Capital Punishment, 1949,

1953 and a preliminary report by the Committee on Forensic Psychiatry for the advancement of psychiatry concluded that the right and wrong test was based on an entirely obsolete and misleading conception of the nature of insanity.

'The science of psychiatry now recognizes that a man is an integrated personality and that reason, as only one element of 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.

The modern science of psychology does not concede that there is a separate little man at the top of one's head called Reason whose function it is to guide another unruly little man called Instinct, Emotion or Impulse in the way he should go.

The Court also felt that the term "irresistible impulse" carries the misleading implication that diseased mental conditions produced only sudden, momentary or spontaneous inclinations to commit unlawful acts.

Citing State v. Pike, 49 N.H. 399 (1870) and adopting the rule of Pike, the Durham court concluded that the test for insanity should now be as follows:

An accused is not criminally responsible if his unlawful act is the product of a mental disease or mental defect.

The Durham test came under more severe criticism than the irresistible impulse test. Under that test, once the defendant raised the issue of causal connection between mental disease and the crime, the government was required to prove beyond a reasonable doubt either (1) that the defendant was free of mental disease or (2) that no relationship existed between the disease and the alleged criminal act which would justify a conclusion that but for the disease the act would not have been committed.

In 1961, the Third Circuit in Currens v. United States, 290 F.2d 751 and in 1962 the First Circuit in Beltram v. United States, 302 F.2d 48 established a volitional test in their respective circuits:

A person is not responsible for his criminal conduct,

if as a result of mental disease or defect, he lacks the substantial capacity to conform his conduct to the requirements of the law which he allegedly violated.

In 1955 the American Law Institute proposed Section 4.01, 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) The term "mental disease or defect" do not include abnormality manifested only by repeated criminal or otherwise antisocial conduct.

The American Law Institute proposed that only paragraph (1) be adopted as an alternative.

The reporters of the Institute reported in commentary that the Committee was concerned that there be not only a cognitive test but also a volitional test.

All of the eleven circuits and the District of Columbia circuit have now adopted the ALI MPC test in some form or another.

II. THE BURDEN OF PROOF

All of the twelve Circuits now provide that once the defendant has met his burden of production that is, he has established with some evidence that he was suffering from a mental disease or defect and that either he did not know that his conduct was wrong or he could not conform his conduct to the right, then the government has the burden of proving beyond a reasonable doubt that he did not have a mental disease or defect or if he did, he knew that his criminal conduct was wrong and he could conform his conduct to the right. The Circuits have uniformly followed the ruling imposed by U.S. v. Davis, 160 U.S. 500 (1895) wherein Mr. Justice Harlan, delivering the opinion of the court stated:

We are unable to assent to the doctrine that in the prosecution for murder, the defense being insanity, and the fact of the killing, with the deadly weapon is clearly established, it is the duty of the jury to convict wherein the evidence is equally balanced on the issue as to the sanity of the accused at the time of the killing. On the contrary, he is entitled to an

acquittal of the specific crime charged if upon all the evidence there is reasonable doubt whether he was capable in law of committing crimes.

No one, we assume, would wish either the courts or juries when trying a case of murder to disregard that to make a complete crime cognizable by human laws, there must be both a will and an act; and... in order to constitute a crime, a person must have intelligence and capacity enough to have a criminal intent and purpose. If his reason and mental powers are either so deficient that he has no will, no conscience or controlling mental power, or if, through the overwhelming violence of mental disease his intellectual power is for the time obliterated, he is not a responsible moral agent and is not punishable for criminal acts.

Strictly speaking, the burden of proof as those words are understood in criminal law, is never upon the accused to establish his innocence or to disprove the facts necessary to establish the crime for which he is indicted. It is on the prosecution from the beginning to the end of the trial and applies to every element necessary to constitute the crime. Giving to the prosecution, where the defense is insanity, the benefit in the way of proof of the presumption in favor of sanity, the vital question from the time the plea of not guilty is entered until the return of the verdict is whether upon all the evidence, by whatever side adduced, guilt is established beyond reasonable doubt... his guilt cannot be said to have been proved beyond a reasonable doubt - his will and his acts cannot be held to have joined in perpetrating the murder charged, if the jury, upon all the evidence, have a reasonable doubt whether he was legally capable of committing crime, or whether he wilfully, unlawfully, deliberately and of malice aforethought took the life of the deceased.

Despite the fact that Davis was not predicated upon Constitutional but rather supervisory mandate, that mandate concerning federal prosecutions as far back as 1892 as promulgated by Davis has required the prosecution in all federal criminal cases to prove beyond a reasonable doubt the sanity of the defendant.

In 1952 in the case of Leland v. Oregon, 342 U.S. 790, 72 S.Ct. 1002 (1952) the Supreme Court of the United States, speaking through Justice Clark, for seven members of the court, distinguishing Davis as being based on supervisory powers, stated that due process was not violated either by the State's casting upon the defendant the burden of proving insanity beyond a reasonable doubt, and thus there was no Fourteenth Amendment violation.

Following the decision of Leland v. Oregon, however, the

Supreme Court decided In the Matter of Samuel Winship, 397 U.S. 358, 90 S.Ct. 1068 (1970), and Mullaney v. Wilbur 421 U.S. 684, 95 S.Ct. 1881 (1975).

Judge Bazelon, Chief Judge of the United States Court of Appeals for the District of Columbia in U.S. v. Caldwell, 543 F.2d. 1333 (1976) speaking for the entire court en banc states that Leland v. Oregon was severely undermined by the later opinions of Mullaney v. Wilbur and In Re Winship, in that Mullaney specifically reaffirmed the Supreme Court's conclusion stated in Davis v. United States, infra, that sanity is a fact essential to constitute the crime, even though the burden of going forward with evidence on insanity is placed on the defense.

If due process required proof beyond a reasonable doubt of elements relating to the degree of culpability, a fortiori, due process must require proof beyond a reasonable doubt of sanity which determines culpability vel non.

However, several months later in 1977 the Supreme Court of the United States decided Patterson v. New York, 432 U.S. 197, 97 S.Ct. 2319 (1977) holding that a New York statute did not violate the due process clause of the Fourteenth Amendment requiring the defendant to prove by preponderance of the evidence the affirmative defense of supreme emotional disturbance in order to reduce the charge from murder to manslaughter. The Supreme Court rationalized that the affirmative defense question constituted a separate issue and that that issue was not involved as far as any fact of the crime which the state had the burden of proving beyond a reasonable doubt in order to convict. In Patterson the court pointed out that in Leland v. Oregon the Supreme Court distinguished Davis v. United States, which required the government in federal prosecutions to shoulder the burden of proof of insanity, stating that Davis was primarily based upon a supervisory rule of process as opposed to a constitutional underpinning.

The Patterson Court agreed that the due process clause protects the accused against convictions except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. In Re Winship, infra, and that as per Mullaney v. Wilbur, infra, under the Maine law of homicide the burden could not constitutionally be placed on the defendant of proving by a preponderance of the evidence that the killing had occurred in heat of passion or on sudden provocation. In a weak moment of rationalization, the Court in Patterson further stated:

We are unwilling to reconsider Leland... but even if we were to hold that the Constitution requires a state must prove insanity to convict, once that fact is put at issue, it would not necessarily follow that the state must prove beyond a reasonable doubt every fact, the existence or nonexistence of which it is willing to recognize as an exculpatory or mitigating circumstance affecting the degree of culpability or the severity of the punishment.

Justice Powell joined by Justices Brennan and Marshall dissented, pointing out that the Court had adopted a formalistic approach as opposed to a substantive approach in its decision and that the Court's decision was contrary to Mullaney because Mullaney held invalid Maine's requirement that the defendant prove heat of passion, and without disavowing the unanimous holding of Mullaney, approved the New York requirement that the defendant prove extreme emotional disturbance.

Justice Powell further stated:

The test the court today establishes allows the legislature to shift, virtually at will, the burden of persuasion with respect to any factor in a criminal case, so long as it is careful not to mention the non-existence of that factor in the statutory language that defines the crime.

Obviously, intent or state of mind in any case is a matter that should be proven beyond a reasonable doubt by the government. See In Re Winship, infra.

Enmund v. Florida, decided July 2, 1982, appearing at 50 L.W. 5087, the Supreme Court of the United States held that death was not a valid penalty under the Eighth and

Fourteenth Amendments for one who neither took life, attempted to take life, or intended to take life (as an accomplice to murder committed during a robbery). Justices Burger, Powell, Rehnquist and O'Connor dissented. The primary concern of the dissent was that the Court's holding cast intent as a matter of federal constitutional law. Justice O'Connor stated as follows:

The Court's holding today is essentially disturbing because it makes intent a matter of federal constitutional law, requiring this Court both to review highly subjective definitional problems customarily left to state criminal law, and to develop an Eighth Amendment meaning of intent.

Because intent is of paramount importance in the definition of an offense, any legislation which would relieve the government of proving the necessary mens rea or intent, should be questioned. See Morissette v. United States, 342 U.S. 246, 72 S.Ct. 40 (1952), holding that intent, an essential prerequisite of criminal responsibility, cannot be presumed in an embezzlement case; Robertson v. California, 370 U.S. 660 82, S.Ct. 1417 (1962) holding that punishment of conduct without a necessary mens rea is a violation of the Eighth and Fourteenth Amendments (addiction); and Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 4450 (1979) holding that charging a jury that the law presumes a person intends the ordinary consequences of his voluntary acts, would have the effect of shifting the burden of proof on the issue of purpose or knowledge to the defense, and therefore is in violation of the Fourteenth Amendment due process clause, requiring that the state prove every element of a criminal offense beyond a reasonable doubt.

III. LISTING & ANALYSIS OF SENATE BILLS
BEFORE THE SENATE JUDICIARY COMMITTEE

1. Senate Bill 818, by Senator Hatch, March 26, 1981, Title 18, Sec. 16 "Insanity Defense"

"(a) It shall be a defense to prosecution under any Federal statute, 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."

2. Senate Bill 1106, by Senators Zorinsky and Thurmond, April 27, 1981.

Amends Rule 12, Federal Rules of Criminal Procedure by adding subsection (i), the plea of guilty but insane shall be pursuant to Rule 12.2, further amending Rule 12.2 of Federal Rules of Criminal Procedure concerning notice of the plea of guilty but insane; further amends Chapter 313 Title 18, Sections 4241 et seq.

Section 4242 is entitled, "Determination of Existence of Insanity at the Time of the Offense" and sets up procedures for motions for pretrial psychiatric examination.

Section 4243 establishes procedures for the Court to follow in the event of a finding of guilty but insane, creating a hearing procedure as well as a dispositional procedure, a treatment procedure in the state of the individual domicile. If the individual recovers his sanity, and after the hearing the court may order the defendant be released, and placed on probation or be imprisoned, the remainder of the sentence or any lesser term.

3. Senate Bill 1558, by Senator Hatch, July 31, 1981, Title 18, Section 16, "Insanity Defense"

"(a) State of Mind - It shall be a defense to a prosecution under any federal statute 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."

Section 17 establishes procedures for the determination of the existence of insanity at the time of the offense. It

establishes procedure for hospitalization of a person acquitted by reason of insanity.

4. Senate Bill 2572, by Senator Thurmond and 40 Other Senators, "Violent Crime and Drug Enforcement Act of 1982" pertaining to offenders with mental disease or defect. Section 4241 concerns the determination of mental competency to stand trial. Section 4242 concerns determination of the existence of insanity at the time of the offense.

Section 4242 "(a) Insanity Defense - It is a defense to prosecution under any federal statute that the defendant as a result of mental disease or defect lacked the state of mind required as a element of the offense charged. Mental disease or defect does not otherwise constitute a defense."

Section 4243 deals with hospitalization of a person acquitted by reason of insanity and requires that if an individual is found not guilty by reason of insanity at the time of the offense charged, he shall be committed to a facility until such time as he is eligible for release pursuant to subsection (d). Subsections (c) and (d) require a hearing, and further require that it be found by the court by clear and convincing evidence that the acquitted person is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk involving injury to another person or serious damage to property of another, authorizes a commitment to the Attorney General for further commitment to a state institution in the state where the defendant was domiciled.

(e) sets up procedures for discharge, certified to the court for hearing, conditional discharge, subject to further orders of the court concerning treatment. The act also provides for hospitalization of a convicted person suffering from mental disease or defect.

5. Senate Bill 2658, by Senators Specter and Rudman, June 22, 1982, Section 16, "Insanity Defense"

"(a) It shall be an affirmative defense to a prosecution under any Federal Statute that the defendant, as a result of mental disease did not know the nature and quality of his actions or did not know the wrongfulness of his actions at the time he committed the act otherwise constituting the offense.

(b) The defendant has the burden of proving by clear and convincing evidence the defense of insanity.

(c) Expert witnesses shall not be permitted to offer opinions on the ultimate legal issues presented to the trier of fact."

6. Senate Bill 2669, Senator Pressler, June 23, 1982 Title 18, Section 16, "Insanity Defense"

"(a) State of Mind - It shall be a defense to prosecution under any federal statute that the defendant, as a result of mental disease or defect, lacked the state of mind required as an a element of the offense charged. Mental disease or defect does not otherwise constitute a defense."

Section 17 establishes the determination of the existence of insanity at the time of the offense, authorizing a motion for pretrial psychiatric examination by the government, establishing a special verdict, not guilty only by reason of insanity.

Section 18 establishes mandatory confinement. For a person acquitted by reason of insanity from the crime of murder and attempted murder. If the Court, after hearing finds by a preponderance of the evidence that the defendant acquitted only by reason of insanity is presently suffering from a mental disease, or defect, he should in lieu of being sentenced to probation or imprisonment be committed to a suitable facility for care and treatment. The Court shall

commit the defendant to the custody of the Attorney General.

"The maximum term of such confinement shall approximately equal the maximum term of imprisonment authorized by law for the offense."

Section e, provides that if the person becomes sane and is certified back to the court and the provisional sentence has not expired, the court shall proceed finally to sentencing and may modify the provisional sentence.

7. Senate Bill 2672, Senator Quail, June 23, 1982, Title 18, Section 16, "Insanity Defense"

"(a) State of Mind - It shall be a defense to prosecution under any federal statute 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.

"(b) Burden of Proof - the burden of proof is on the defendant to establish the defense of insanity by a preponderance of the evidence."

U.S. Code 801 is amended by adding the phrase "guilty but mentally ill." Rule 12.2 is also amended concerning notice of the plea of guilty for the mentally ill.

Section 4250 is amended providing for hospitalization of the person found guilty but mentally ill, requires sentence of the defendant in the same manner as a defendant found guilty of the offense; if however he does have a mental disease or defect which creates a substantial danger, he is committed to the custody of the Attorney General and placed in a hospital in the state where he is domiciled. If he is discharged, he is certified back to the court for additional hearing. If the Court finds by a preponderance of the evidence that he has recovered, the Court shall order his immediate discharge from the hospital; presumably to go to a penitentiary, to serve out his sentence.

8. Senate Bill 2678, by Senators Nunn, Chiles, and Randolph, June 24, 1982, amends Title 18, 313 by adding Section 4249, "Insanity at the Time of the Offense"

"(a) Insanity Defense - It is a defense to criminal prosecution under any federal statute that a defendant as a result of mental disease or defect lacked (1) the ability to understand the nature and quality of the act, or (2), the ability to distinguish right and wrong with respect to the act.

(b) In any criminal prosecution the burden of proving insanity shall rest with the defendant."

Section 4251 authorizes a hearing after a person is found not guilty only by reason of insanity. Additional psychiatric examination and commitment to a mental hospital for custody, care or treatment, after hearing, discharge from such facility.

In determining whether or not the above bills meet the constitutional muster, of the Eighth, Fifth and Fourteenth Amendment requirements, the following issues are pertinent:

Does the test in any way shift the burden of proof from the government on the culpable state of mind issue, thus creating a problem under Mullaney and In Re Winship?

Can the Congress enact legislation that would in effect create punishment for a person who did not possess the necessary mens rea in violation of the Eighth and Fourteenth Amendments of the Constitution?

From a practical standpoint, does the Congress intend to broaden or limit the insanity defense beyond what it is presently in federal practice?

As to the above listed Senate Bills where the insanity defense has been keyed to a mens rea, i.e. Senate Bills 818, 1558, 2572, 2669, and 2672, it is apparent that they violate Mullaney and In Re Winship's proscription against placing the burden on the defendant to show lack of a culpable

state of mind, not to mention the possibility of negating the requirement of a mens rea, thus violating Eighth Amendment proscriptions.

Senate Bills 2658 and 2678, where the right and wrong test and/or the inability to conform one's conduct to the right test are utilized, are also in question. See Enmund infra.

IV. MENS REA

The non-physical element which combines with the act of the accused makes up the crime charged. Most frequently it is the criminal intent or the guilty mind; quite often it is defined in terms of knowledge, recklessness and negligence.

Chapter Three of the proposed codification of Title 18 defines state of mind applicable to an offense in terms of intent, knowledge, recklessness or negligence. Senate Bill 1722 and 1723 purporting to be the recommended code, or perhaps its precursor, have definitions that should be considered before one attempts to change the definition of insanity. See definitions of belief, knowledge, recklessness or negligence as well as conduct and offense. The doctrine of *actus non facit reum, nisi mens sit rea* (wrongful act and a wrongful intent must occur before one may be guilty of a crime) constitutionally precludes, in view of the Eighth and Fourteenth Amendment proscriptions, the placing on the defendant of any burden of proof that would require him to establish the negation of a mens rea and relieve the government from establishing the mens rea beyond a reasonable doubt.

V. CONCLUSION

Justice Frankfurter and Black, dissenting in Leland v. Oregon, stated:

However much conditions may have improved... no informed person can be other than unhappy about the serious defects of present-day American criminal justice. It is not unthinkable that failure to bring the guilty to book for a heinous crime which deeply stirs popular sentiment may

lead the legislature of a state, in one of those emotional storms, which on occasion sweep over our people, to enact that thereafter an indictment for murder following attempted rape, should be presumptive proof of guilt and cast upon the defendant the burden of proving beyond a reasonable doubt that he did not do the killing.

Can there be any doubt that such a statute would go beyond the freedom of the states, under the due process clause of the Fourteenth Amendment... Why is that so? Because from the time that the law which we have inherited has emerged from dark and barbaric times, the conception of justice which has dominated our criminal law has refused to put an accused at the hazard of punishment if he fails to remove every reasonable doubt of his innocence in the eyes of a jury. It is the duty of the government to establish his guilt beyond a reasonable doubt. This notion, basic in our law and rightly one of the boasts of a free society is a requirement and a safeguard of due process of law in the historic procedural content of "due process"... But a muscular contraction resulting in a homicide does not constitute murder. Even though a person be the immediate occasion of another's death, he is not a deodand to be forfeited like a thing in the medieval law. Behind a muscular contraction resulting in another's death there must be culpability to turn homicide into murder.

The duty of the state (government) of establishing every fact of the equation which adds up to a crime, and of establishing it to the satisfaction of a jury beyond a reasonable doubt, is the decisive difference between criminal culpability and civil liability. To suggest that the legal oddity by which Oregon imposes upon the accused the burden of proving beyond a reasonable doubt that he had not the mind capable of committing murder is a mere difference in the measure of proof, is to obliterate the distinction between civil and criminal law.

To suggest.. that this requirement (burden on defendant to prove insanity) does not offend the due process clause because the trial judge also indulged in a farrago of generalities to the jury about premeditation and deliberation, malice and intent, is to exact gifts of subtlety that not even judges let alone juries possess.

(The Oregon statute utilized the right and wrong test as opposed to the state of mind test in some of the Senate Bills proposed here.)

In view of the present state of the law, the American Bar Association's promulgation of its provisional criminal justice - mental health standards and the continued work that is being done along those lines (see Exhibit B), it is the request of the National Association of Criminal Defense Lawyers that the present test and burden be retained in the federal system, at

least until the American Bar Association concludes its studies. In addition, the ALI-MPC test is in fact the product of decisional law - law that has evolved over a period of two hundred years of trial and error - it shouldn't be tossed aside because of "one of those emotional storms," to quote Justice Frankfurter.

VI. EPILOGUE - THE HINCKLEY TRIAL

Attached to this paper as Exhibit C is the court's charge concerning presumptions and the insanity defense in the Hinckley case. I have not included the entire charge but only that part of the charge which deals with those two issues. However, a copy of the entire charge is now submitted to you for the purpose of the record of this hearing. The trial judge charged the jury on the issue of insanity as it is defined in the model penal code of the American Law Institute and as that charge had been approved in the case of United States v. Brawner, 471 F.2d 969 (D.C. 1972). Beginning on page 8700 of the charge, the court attempted to tell the jury the difference between general intent and specific intent; however at the bottom of the page the court states:

You may infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly committed.

On page 8701 the court continued:

When a person uses upon another an instrument or weapon of such a nature and in such a way and under such circumstances that such use would naturally and probably result in the death of the other, you may infer that he did so with the specific intent to kill. However, you are not required to do so, and you should consider all the circumstances and evidence you deem relevant in determining whether the government has proved beyond a reasonable doubt that the defendant acted with the required intent to kill.

In Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450 (1979) the Supreme Court reversed a Montana conviction for murder where the defendant had admitted killing the victim but argued that he did not do so purposely or knowingly and

therefore was not guilty of deliberate homicide but of a lesser crime. There was psychiatric evidence to the effect that the defendant had a personality disorder aggravated by alcohol at the time of the killing. The Court charged to the jury that the law presumes that a person intends the ordinary consequences of his voluntary acts.

The Supreme Court of the United States reversed. The Supreme Court stated that a reasonable jury may well have interpreted the presumption as conclusive, that is not technically as a presumption at all but rather as an irrebuttable direction by the court to find intent once convinced that the facts triggered the presumption. Alternatively, the jury may have interpreted the instruction as a direction to find intent upon proving the defendant's voluntary action and and their ordinary consequences, thus effectively shifting the burden of persuasion on the element of intent.

Lest there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the due process clause protects the accused against conviction except on proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. Patterson v. New York, 432 U.S. 210 97 S.Ct. 2319

Ex. C, 1 Devitt and Blackmar, Federal Jury Practice and Instructions 405 (3rd Ed. 1977), describing the instruction as clearly erroneous and constituting reversible error at page 448 citing the U.S. Court of Appeals for the D.C. Circuit.

Although the presumption was qualified by the trial judge in Hinckley, the instruction remains questionable, particularly in view of the necessity of charging the jury on the multiple counts in the indictment. The problem would have been compounded had the test for insanity been as recommended in the several Bills before this committee.

ENCLOSURES.

EXHIBIT A

INCOMPETENCY AND INSANITY

(FEDERAL)

Frank Maloney

I. SCOPE OF PAPER.

The purpose of this paper is to present an overview of the law of incompetency and insanity, federal, with some discussion of psychiatry and its use and application from a practical approach. With some trepidation, I have attempted to succinctly discuss the Diagnostic and Statistical Manual (DSM III), the various psychological testing devices; the psychologist's technique, presentation of the evidence and other factors in the incompetency, insanity and ancillary areas. Although the paper is far from a complete discourse, it might act as a beginning for those of you who are faced with delving into the depths of this technical area.

II. INCOMPETENCY.A. THE LEGAL STANDARD OF INCOMPETENCY.

The Federal Test: The test of legal competence to stand trial is whether the accused has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and has a rational as well as factual understanding of the proceedings against him. See Dusky v. United States, 362 U.S. 402 (1960).

B. ADJUDICATING DEFENDANT'S COMPETENCY. Competency procedure is governed by 18 U.S.C.A., Secs. 4241-48.

1. Raising the Issue. Section 4244 provides that after arrest and prior to the imposition of sentence the United States Attorney, if he has reasonable cause to believe that a person charged with an offense against the United States may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense, shall file a motion for a judicial determination of such mental competency of the accused. The defendant may file such a motion.

2. Examination by a Psychiatrist. Upon such a motion or upon its own motion the court shall cause the accused, whether or not previously admitted to bail, to be examined as to his mental condition by at least one qualified psychiatrist who shall report to the court. For purposes of the examination the court may order the accused committed for such reasonable period as the court may determine to a suitable hospital or other facility to be designated by the court.

3. Hearing. If the report of the psychiatrist indicates that the defendant is presently incompetent the court shall hold a hearing upon due notice at which evidence as to mental condition of the accused may be submitted, including that of the reporting psychiatrist, and the court shall then make a finding in respect thereto.

C. COLLATERAL EFFECTS OF ADJUDICATION.

1. Self-incrimination. Section 4244 states: "No statement made by the accused in the course of any examination into his sanity or mental competency provided for by this section, whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding."

2. Effect on Insanity Defense. "A finding by the judge that the accused is mentally competent to stand trial shall in no way prejudice the accused in a plea of insanity as a defense to the crime charged; such finding shall not be introduced in evidence on that issue nor otherwise be brought to the notice of the jury." Sec. 4244.

D. COMMITMENT.

Section 4246 provides that where there is a finding by the court of mental incompetency the court may commit the accused to the custody 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.

III. INSANITY.

A. THE LEGAL STANDARD. Blake v. United States, 407 F.2d 908, 916 (5th Cir. 1969) adopted the ALI standard for use in defining insanity in the 5th Circuit.

"(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 wrongfulness of his conduct or to conform his conduct to the requirements of law.

"(2) As used in this Article, the terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct."

The above test is basically the American Law Institute Model Penal Code test. A survey of all the circuits in the federal system indicates that the Blake test has been adopted by all of the circuits.

B. PROCEDURE FOR ADJUDICATION OF INSANITY.

1. Raising the Insanity Defense. Rule 12.2, F.R.Crim.P., requires that if a defendant intends to rely upon the defense of insanity at the time of the alleged crime he shall, within the time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. If there is a failure to comply with this provision then the insanity defense may not be raised; however, the court may for cause shown allow a late filing of the notice or grant additional time for the parties to prepare for trial or make such order as may be appropriate.

2. Burden of Proof. The burden of proof never shifts to the defendant, and the prosecution must disprove insanity once the issue is raised and must do so beyond a reasonable doubt. See United States v. Parr, 516 F.2d 458 (5th Cir. 1975). The presumption of sanity vanishes once slight evidence of a criminal defendant's lack of mental capacity is introduced and the government must then prove the defendant's sanity beyond a reasonable doubt. United States v. Iberson, 588 F.2d 194 (5th Cir. 1979).

3. Diminished Capacity. In addition to the above, Rule 12.2 provides as follows:

"(b) Mental Disease or Defect Inconsistent with the Mental Element Required for the Offense Charged. If a defendant intends to introduce expert testimony relating to a mental disease, defect, or other condition bearing upon the issue of whether he had the mental state required for the offense charged, he shall, within the time provided for the filing of pre-trial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. The court may

for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate."

Although the jury may find that the defendant was legally sane, if they find he was suffering from a mental disease or defect that caused him not to have the requisite mens rea they may still acquit.

4. Self-incrimination. Rule 12.2(c) provides that the Court may, upon motion of the attorney for the government, order the defendant to submit to a psychiatric examination by a psychiatrist designated by the court, and "(n)o statement made by the accused in the course of any examination provided for by this rule, whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding." (emphasis added). Thus, under federal law, the accused is protected against the use of such statements both when the psychiatrists are examining for competency and when the psychiatrists are examining for either insanity or diminished capacity.

5. Charge to Jury. For an example of an excellent charge, see United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972); see also United States v. Iverson, 588 F.2d 194 (5th Cir. 1979).

IV. PSYCHIATRY AND LAW.

A. DIAGNOSTIC AND STATISTICAL MANUALS.

Whether we are talking about competency to stand trial as a bar to further proceedings or insanity as a complete defense to the crime charged, neither is available unless the state of mind in question stems from a mental disease or a mental defect. By necessity we must then be concerned with the jargon of psychiatry.

1. DSM I.

In 1952 the American Psychiatric Association published the first Diagnostic and Statistical Manual of Mental Disorders. It contained a glossary of descriptions of diagnostic categories and was prepared by the Committee on Nomenclature and Statistics after a lengthy study beginning in 1927. DSM I was adopted and utilized as a classification table by the armed forces and Veterans Administration hospitals. It soon was utilized by most hospitals treating mental disorders. Thus a common language developed in the field of psychiatry in this country.

2. DSM II.

In 1967, the Committee on Nomenclature and Statistics developed a revised Diagnostic and Statistical Manual, published in 1968, containing much of the same classification but with additional explanation.

3. DSM III.

The third edition of the Diagnostic and Statistical Manual of Mental Disorders, now known as DSM III, a product of the Task Force on Nomenclature and Statistics of the American Psychiatric Association, published in 1980 and effective January 1, 1981, differs extensively from the previous two DSMs in that it employs a multi-axial evaluation process requiring that every psychiatric problem be assessed on each of several axes, each of which refers to a different class of information.

a. The Axes.

(1) Axis I and II contain the entire classification of mental disorders plus conditions not attributable to a mental disorder that focus on treatment;

(2) Axis II, the personality disorders;

(3) Axis III, descriptions of physical disorders and conditions;

(4) Axis IV, the severity of psychosocial stressors; and,

(5) Axis V, the highest level of adaptive functioning for the past year.

b. Purpose of Axes. By using DSM III in the form of a multi-axial classification there is insurance that attention is given to the certain types of disorders, aspects of the environment and areas of functioning that might be overlooked if the focus were on assessing a single presenting problem.

c. Use by Psychiatrists. For the past year the psychiatrists in this country have been attempting to acquaint themselves with DSM III realizing that as of 1 January 1981 they will have to utilize it, in the codifications of mental disorders, at least when dealing with military installations and/or federal hospitals. All of the mental disorders are classified by code numbers, which are capable of being computerized for the sake of uniformity. The manual contains appendices, including a glossary of technical terms and an annotated comparative listing of DSM II and DSM III mental diseases and disorders.

B. MENTAL DISORDER V. MENTAL DISEASE AND/OR DEFECT.

1. Mental Disorder as Defined in DSM III.

With the above explanation, it should be understood that the term mental disorder as defined by DSM III at page 363 is conceptualized as a clinically significant behavioral or psychologic syndrome or pattern that occurs and that typically is associated with either a painful symptom (distress) or impairment in one or more important area of functioning (disability). There is an inference that when one suffers from a mental disorder there is a behavioral, psychologic, or biologic disfunction. However, when the disturbance is limited to a conflict between an individual and society, this may represent social deviance which is not by itself a mental disorder.

2. Application to Legal Requirement.

a. Since the law speaks in terms of mental disease and/or mental defect and the glossary does not contain a definition of either, the initial question should be, whether mental disease and/or mental defect falls within the definition of a mental disorder? Most psychiatrists or people in the field of psychiatry would have little difficulty stating that the term "mental disorder" is either a "mental disease" and/or "mental defect," "disease" applying to an impairment of the brain function, and the term "defect" applying to a syndrome that is chronic, congenital or produced in infancy or early childhood with a primary impairment in learning ability and intellectual development. This is consistent with the various medical dictionary definitions and is seen also in the charge recited by the court in United States v. Brauner, 471 F.2d 969 (D.C. Cir. 1972).

b. (caveat) For there to be either incompetency, insanity or diminished capacity, there must be a causal relationship between the disease and/or defect and the present conduct (incompetency) or the conduct charged (insanity, diminished capacity).

C. APPLICATION OF PSYCHIATRY TO LAW.

1. Common Misconception.

It is a common belief of many members of the bar that if a person is not psychotic he does not fit any of the legal tests

of insanity, that is that the term psychosis and insanity are congruent in meaning. Nothing could be further from the truth. The comparison of the definitions of the various mental disorders clearly establish that a psychotic condition is not necessary to establish legal insanity.

2. DSM III Definitions.

a. Psychosis. The term psychotic (psychosis) is defined at page 367 of DSM III as follows:

Psychotic. A term indicating gross impairment in reality testing. It may be used to describe the behavior of an individual at a given time, or a mental disorder in which at sometime during its course all individuals with the disorder have grossly impaired reality testing. When there is gross impairment in reality testing the individual incorrectly evaluates the accuracy of his/her perceptions and thoughts and makes incorrect inferences about external reality even in the face of contrary evidence. The term psychotic does not apply to minor distortions of reality that involve matters of relative judgment. For example, a depressed person who underestimated his achievements would not be described as psychotic, where one who believes he had caused a natural catastrophe would be so described.

Direct evidence of psychotic behavior is the presence of either delusions or hallucinations without insight into the pathological nature. The term psychotic is sometimes appropriate when an individual's behavior is so grossly disorganized that a reasonable inference can be made that reality testing is disturbed. Examples include markedly incoherent speech without apparent awareness by the person that the speech is not understandable and the agitated, inattentive, and disoriented behavior seen in substance withdrawal deliriums.

In DSM III the psychotic disorders include the pervasive developmental disorders, schizophrenic and paranoid disorders, psychotic disorders not elsewhere classified, some organic mental disorders and some affective disorders.

The principal psychosis defined in DSM III Axis I includes the organic mental disorders. Normally this type of psychotic condition can be objectively demonstrated through various objective tests that I shall address later in this paper.

b. Psychogenic Disorders. The psychogenic disorders, or those types of psychoses that are not attributed to physical conditions, include the numerous schizophrenic disorders such as schizophrenia catatonic type, schizophrenia paranoid type, schizophrenia disorganized type (hebephrenic) and others. Other psychogenic psychotic disorders are major depressive (melancholia), major depressive (manic-depressive illness), bipolar disorder (manic, depressed, mixed), paranoid disorders.

c. Disorders Formerly Classified as Neuroses. Neurosis defined in DSM II, is no longer defined in DSM III. However, that area which previously included the so called neuroses is now defined in terms of panic disorder, generalized anxiety disorder, conversion disorder, psychogenic pain disorder, psychogenic amnesia, psychogenic fugue, obsessive compulsive disorders, major depression (which include a single episode, recurrent episode,) and adjustment disorder with depressed mood, depersonalization disorder, hypochondriasis, somatization disorder, post traumatic stress disorder.

d. Personality Disorders. Axis II contains the personality disorders, i.e., paranoid personality, cyclothymic disorder, schizotypal personality disorder, schizoid personality disorder, avoidant personality disorder, intermittent explosive disorder, compulsive personality disorder, histrionic personality disorder, anti-social personality disorder, passive-aggressive personality disorder, narcissistic personality disorder, dependent personality

disorder, and paraphilias (sexual deviations). Also in Axis II are the so called alcoholic disorders as well as the fetishism and drug dependence disorders and the psychophysiological disorders.

e. Adjustment Disorders. What were codified as transient situational disorders are now codified under DSM III as adjustment disorders. Of particular interest is the adjustment reaction of adult life subclassified with depressed mood, with anxious mood, with mixed emotional features with disturbance of conduct, with mixed disturbance of emotions and conduct with work inhibition and with withdrawal. Quite often the adjustment reactions result in symptomatology indicative of an underlying psychotic condition. At page 299 of DSM III adjustment disorders are explained in detail and related to stressors as that term is explained in Axis IV. The severity of a specific stressor is affected by its duration, timing and context in a person's life. The severity of the reaction is not completely predictable from the severity of the stressor. Individuals who are particularly vulnerable may have a more severe form of the disorder following only a mild or moderate stressor whereas others may have only a mild form of the disorder in response to a marked and continuing stressor. As to predisposing factors a preexisting personality disorder or organic mental disorder may increase an individual's vulnerability to stress and predispose to the development of adjustment disorders.

3. Applying Legal Test to Adjustment Disorders, - Non-psychosis.

a. Diagnostic Criteria. At page 300 of DSM III the diagnostic criteria for adjustment disorder is set out as follows:

A) a maladaptive reaction to an identifiable psychosocial stressor that occurs within 3 months of the onset of the stressor,

B) the maladaptive nature of the reaction is indicated by either of the following:

1) impairment in social or occupational functioning

2) symptoms that are in excess of a normal and acceptable reaction to the stressor.

C) The stressor is not merely one instance of a pattern of over reaction to stress or exacerbation of one of the mental disorders previously described.

D) It is assumed that the disturbance will eventually remit after the stressor ceases or if the stressors persist when a new level adaptation is achieved.

E) The disturbance does not meet the criteria for any of the specific disorders listed or uncomplicated bereavement.

Within the above category is subclassified adjustment with mixed emotional features and adjustment disorders with disturbance of conduct. Both contain evidences of anxiety and depression.

b. Applying the Legal Test. Considering the legal test for insanity, particularly the second prong, "that because of mental disease or defect an individual could not conform his conduct to the right," an adjustment reaction disorder could very easily fit into such test by preventing conformation to the right. Thus a mental disease could be something other than a psychotic condition.

V. ORGANIC MENTAL DISORDERS.A. PSYCHIATRIC DEFINITIONS.1. Diagnostic Problems.

Axis I of DSM III also contains a categorization and listing of organic mental disorders. Differentiation of organic mental disorders as a separate class should not imply that non-organic (functional) mental disorders are somehow independent of brain processes. It is assumed that all psychological processes, normal and abnormal, depend on brain function. It is sometimes impossible to determine whether a given mental disorder in a given individual should be considered an organic mental disorder (because it is due to brain dysfunction of known organic etiology) or should be diagnosed other than an organic mental disorder because it is more adequately accounted for as a response to psychological or social factors (as in adjustment disorders) or because the presence of a specific factor has not been established (as in schizophrenia). The organic factor responsible for an organic mental disorder may be a primary disease of the brain or a systemic illness that secondarily affects the brain. It may also be a substance or toxic agent that either is currently disturbing brain function or has left some long lasting effect. Withdrawal of a substance on which an individual has become physiologically dependent is another cause of organic mental disorder.

2. Organic Brain Syndromes.

The organic brain syndromes are delirium, dementia, intoxication, and withdrawal. These syndromes display great variability among individuals and in the same individual over time. More than one organic brain syndrome may be present in an individual simultaneously (e.g., delirium superimposed upon dementia), and one organic brain syndrome may succeed another (e.g., thiamine-deficiency delirium followed by alcohol amnestic disorder (Korsakoff's disease)). DSM III page 102.

A wide variety of different emotional, motivational, and behavioral abnormalities are associated with organic mental disorders. It is often impossible to decide whether the symptoms are the direct result of damage to the brain or are a reaction to the cognitive deficits and other psychological changes that constitute the essential features of these disorders. Severe emotional disturbances may accompany cognitive impairment; compulsive individuals tend to be particularly intolerant of and disturbed by their reduced cognitive capacity or by perceptual abnormalities such as hallucinations. Paranoid attitudes and actual delusions may be exhibited by habitually suspicious individuals who feel threatened by their cognitive impairment. Decreased control over sexual, aggressive, and acquisitive impulses may accompany cognitive impairment.

The organic brain syndromes are defined as follows:

- 1) Delirium and Dementia in which cognitive impairment is relatively global;
- 2) Amnestic Syndrome and Organic Hallucinoses in which relatively selective areas of cognition are impaired;
- 3) Organic Delusional Syndrome and Organic Affective Syndrome which have features resembling schizophrenic or affective disorders;
- 4) Organic Personality Syndrome in which the personality is affected;
- 5) Intoxication and Withdrawal in which the disorder is associated with ingestion or reduction in use of a substance and does not meet the criteria for any of the previous syndromes;

6) Atypical or Mixed Organic Brain Syndrome which constitutes a residual category for any other organic brain syndrome not classifiable as one of the previous syndromes.

3. Substance Induced Mental Disorders.

Beginning at page 129 of DSM III, all of the substance-induced organic mental disorders are classified along with the diagnostic criteria for determining the diagnosis. These include alcohol, barbiturate, opioid, amphetamine, cocaine, phencyclidine (PCP), hallucinogen hallucinosis and cannabis intoxication and withdrawal.

B. DEFENSIVE ISSUES INVOLVING DRUGS.

F. Lee Bailey and Henry Rothblatt have expressed in their book, Handling Narcotic and Drug Cases, published by Lawyers Cooperative and Bancroft Whitney Publishing Companies, December 1980, that the so-called addiction defense might be available in drug possession cases. The authors are quick to point out that they have discovered no case holding that addiction to drugs is a complete defense to a charge of possession, but that there are judicial decisions in closely related areas of the law that might suggest such a defense is applicable. See page 103, pocket part, December 1980.

Robinson v. California, 370 U.S. 660 (1962) did hold that drug addiction is an illness and that it is cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States to convict someone simply because he is within the jurisdiction and is ill. The Supreme Court did distinguish addiction prosecution from statutes that punished use, purchase, possession and sale of narcotics however.

According to Bailey and Rothblatt the grounds for allowing the defense are as follows: 1) the criminal statute prohibiting possession is not meant to apply to addicts, 2) the United States Constitution prohibits punishing an addict for possession of the drug he is addicted to, both on grounds of cruel and unusual punishment and due process, 3) the particular addict must meet the requirements for the insanity defense and 4) the addict is not criminally responsible for his possession because his addiction causes him to have an irresistible compulsion to possess it. Page 104, pocket parts, December 1980, supra.

Where the crime requires a specific intent, that intent depending upon the depth of the pathology involved might be obviated in a case where the defendant is an addict and was high on drugs at the time of the offense, i.e., possession with intent to distribute. The same results where the defendant must knowingly possess the prohibited drug. This becomes a little more difficult since the addict presumably possesses the drug because he knows what it will do for him. (The danger in using psychiatric testimony dealing with this type of case of course is obvious since the psychiatrist, when he testifies, will be opening the doors to the commission of other crimes by the defendant.)

The most favorable grounds for addict defense is the narcotic compulsion defense, i.e., pharmacological duress. The drug addict who by reason of his use of drugs lacks substantial capacity to conform his conduct to the requirements of the law should not be held criminally responsible for mere possession of drugs for his own use.

Mr. Bailey and Mr. Rothblatt point out at page 117 of the update that there are three factors that you need to prove to make out an addiction defense for your client and they are as follows:

- 1) It is possible to be addicted to the particular drug;
- 2) The client is a member of the class that modern psychiatry considers addiction prone, and

3) The client was an addict at the time of his possession.

Although the ordinary defense of insanity is available as a defense to a possession charge there are limitations. The cases generally hold that there be some evidence of mental disease or defect apart from the addiction. Where the use of the substance has caused severe brain damage and disfunction the mere fact of addiction should not nullify the insanity defense or the diminished capacity defense anymore than organic brain damage caused by alcohol limits the insanity defense absent a showing that the person was simply suffering from the recent voluntary use of alcohol.

Other areas that should bear research in addition to diminished capacity, insanity, competency and addiction duress are entrapment, capacity to confess and/or make admissions voluntarily, coercion and of course the mens rea problem.

One of the major reasons for reluctance of courts to extend Robinson to possession crimes is that they fear that the defense of addiction will be applicable to other crimes such as burglary and assault. It could very well lead to immunity for addicts from control by the criminal law and would be a serious threat to public safety.

VI. USE OF THE INSANITY DEFENSE OR PLEA IN BAR.

A. INTRODUCTION.

Having discussed rather simplistically and basically the law and the DSM III classifications, how does one determine whether and when to utilize the insanity defense and/or to seek a competency hearing for immediate hospitalization of the defendant and bar to further proceedings. There are three basic considerations in all cases where such a bar or defensive theory potentially exists. They are:

- 1) the crime,
- 2) the individual defendant, and
- 3) the facts and means of proof.

B. THE CRIME.

Some crimes cry out for an insanity defense, i.e., matricide, crimes involving single episodes of violence without motive, crimes constituting bizarre conduct, but specifically those crimes that deal with some form of mens rea, be it intentionally, knowingly, or willfully. However, a multi-act crime such as multiple acts of thievery constituting embezzlement presents problems and is particularly difficult to defend on diminished capacity. Each crime has to be analyzed both in terms of common sense and terms of what psychiatric tools are available to render the insanity defense a positive mechanism. Of course if there is no mental disease or defect the insanity defense is unavailable. Superimposed over all of this is the caveat that juries inately suspect the insanity defense and, further, by using the insanity defense one can easily make out his client to be a monster subject only to annihilation for the safety of the general public.

C. THE INDIVIDUAL DEFENDANT: THE MENTAL STATUS EXAMINATION.

1. Generally. If there is any indication at all that the accused has any type of mental or emotional problem, the attorney should take particular note of the following:

- 1) the accused's general appearance and behavior;

- 2) characteristics of speech, spontaneous and coherent, answers questions with relevance;
- 3) his mood or his affect (affect deals with overall demeanor or tone and modulation of voice; mood refers to pervasive and sustained emotion). Affect is to mood as weather is to climate. (Common examples of affect are euphoria, anger and sadness.);
- 4) content of thought. Are there any hallucinations, i.e., faulty perceptions (is he seeing things that are nonexistent or hearing things that are not motivated from an outside source), delusions and misinterpretations (such as believing that someone is out to get him or that God told him to do something or that he had an uncontrollable desire because of the world wanting him to complete a certain project), obsessive and psychotic ideas (does he believe that there is a rat inside of his brain.);
- 5) sensorium functions (orientation, memory, learning, attention and concentration, fund of information and intelligence. Can he count up to ten, does he know how to divide ten by five.);
- 6) insight and judgment.

These matters are easily discernable by the attorney and should be noted.

2. Special Thoughts on Competency (Mental Status Examination). Concerning competency, the following are of primary concern:

- 1) Can the accused consult with you in a rational manner?
- 2) Does he have a factual as well as a rational understanding of the proceedings?
- 3) Can he communicate with you - not just talk but does he understand the defense or defenses?
- 4) Does he understand his options of pleading guilty, not guilty, nolo contendere?
- 5) Will he be able to help you in picking the jury?
- 6) Will he be able to realistically follow the evidence?
- 7) Will he be able to advise you during trial of anticipated adverse evidence?
- 8) Can he assist you in locating witnesses?
- 9) Does he understand he may take the stand?
- 10) Is he agreeable to testifying and, if so, could he do so coherently?

D. THE FACTS AND MEANS OF PROOF.

1. Mental History. One should necessarily take a history of past mental illness in the defendant, in his immediate family or remote family, including any sibling problems dealing with mental or emotional illnesses. Much of the information sought can be obtained through observation of, and interview with, the accused. However, there are outside sources that must be looked to. While marshalling the facts of the offense, one should obtain from the client a power of attorney and medical authorization signed and sworn to by him. Family members should be interviewed for past medical history. The entire medical history of the client, including diagnoses, treatments and prognoses, should be obtained from the client's doctor or doctors and/or hospital. School histories should be obtained from as far back as elementary school up to and including high school and any other institution that he may have attended. His employer and/or employers should be interviewed as well as his fellow workers. What you are seeking is not only an actual biography of this individual, but particular changes in him from childhood to adulthood and causation of that change particularly where the change produced bizarre conduct.

VII. SELECTING THE FORENSIC EXPERTS.A. INTRODUCTION.

Your experts not only will be tested on their knowledge of their particular discipline, but will also be tested and questioned on their knowledge of the law and the defendant's conduct as it relates to the law of competency and/or the law of insanity.

B. FORENSIC PSYCHIATRISTS.

Directory of Medical Specialists. The Directory of Medical Specialists published for the Advisory Board of Medical Specialities by the Marquis Company, located at Marquis Who's Who Building, Chicago, Illinois 60611, lists all of the people who are Board Certified in the field of psychiatry and neurology. Local doctors can tell you who are respected in the field of psychiatry in your community.

C. FORENSIC PSYCHOLOGIST.

Psychology is the scientific study of the behavioral adaptation patterns of organisms. The forensic psychologist is equally as necessary in providing the testimony needed to maintain a plea in bar or defense.

1. Clinical Psychologists.

The clinical psychologist studies abnormal behavior of humans. To qualify as a clinical psychologist one must spend four years beyond his bachelor degree obtaining a Ph.D. in Psychology and treatment work with the mentally disturbed. A final two years must be spent in residence.

2. Neuropsychologists.

If a neurological problem (organicity) might be involved, then certainly a neuropsychologist should be utilized, both in the examination of the defendant and possibly as a forensic expert.

D. TIME FOR OBTAINING EXPERTS.

Time is usually of the essence; the accused should be seen by the experts as close to the time of the alleged offense as possible.

VIII. PSYCHOLOGICAL TESTING.A. THE PSYCHOLOGISTS TECHNIQUE.

The psychologist's clinical technique requires that he interview the subject, observe him, take his case history and give him a battery of psychological tests which are designed to expose unconscious levels of the subject's personality.

B. PSYCHOLOGICAL TESTING DEVICES.

Psychological tests are diagnostic aids used in measuring the range of intellectual ability and emotional response. The tests are designed to measure intellectual ability, perception, behavior and personality as well as emotional response. The value of some of the various tests is no greater than the skill, training, and practical experience of the clinician who employs them.

1. Personality Tests.

Personality tests are designed to help identify abnormal tendencies in the individual personality. The tests are of two types: The two types of tests are complementary to one another; neither is used to the exclusion of the other.

a. Self-reporting Personality Inventories. The self-reporting personality inventories, also known as psychometric tests, are objective tests in which the subject is given a prepared list of answers to questions and asked to agree or disagree or pick the correct answer. His response is then measured by a previously established scale. The most common self-reporting personality inventory tests is the Minnesota Multiphasic Personality Inventory (MMPI). The subject is given 550 true/false questions. A "normal person" supposedly will answer 344 as false. Since it is a true/false test the MMPI does not require clinical observation of the subject during the test. The test is on a computer form that can be sent to Minnesota for processing based upon computerized norms. The results are returned in print-out form. The aim of the test is to identify psychopathological characteristics demonstrated by the subject's choices on the tests.

b. Projective Tests. The projective tests are subjective stimulus response tests in which the subject is given ambiguous stimulus material which by its very nature prevents the subject from knowing what a normal answer would be. He is then asked to relate its meaning and organization. The object is to encourage him to reveal the quality of his personality to the expert examiner.

(1) The Roschach Inkblot test developed in 1921 is perhaps the best known projective test. The subject is shown singularly ten distinctive bilaterally symmetric inkblots. He is then asked to relate what he sees in the inkblot pictures. Responses are scored on the basis of content, location, color, shading, motion, form, etc. The result depends on the subjective observations of the clinical examiner. An interesting finding concerning the results is that psychotics reportedly see blood. Schizophrenics reportedly show a drop in perception of form quality, use of the mathematical or geometric position of the blot form to interpret it, fragmentary perception of only part of the blot and/or the confusion of two different perceptions of the same area of the blot into a third unintelligible perception. (Confabulation)

(2) The Thematic Apperception Test (TAT) is a projective test which attempts to determine the interpersonal reactions of the subject through the narration of consecutive stories by the subject as he is shown a series of eight to ten out of twenty ambiguous pictures, most of which contain people. This test is thought to be appropriate in diagnosing fantasies, motive, drives, ambitions, preoccupations, attitudes and interpersonal relationships.

(3) There are other types of projective tests such as those involving word association or sentence completion.

2. Intelligence Tests.

Intelligence tests are utilized to determine IQ and are reliable enough to play a primary role in the assessment of minimal intelligence on the various issues of responsibility, competency and credibility. IQ scores are used to classify mentally deficient subjects according to the following nomenclature: Borderline -

71 to 85; Mild - 50 to 70; Moderate - 35 to 40; Severe - 20 to 34; Profound - below 20. Common tests are the Stanford-Bene Test and the Weschler IQ Test. The former is usually utilized in testing children. In most instances the psychologist will use the Wechsler IQ Test. This test has both a verbal and performance part. The verbal portion consists of oral subjects covering common sense, judgment, general information, mathematics, etc. The performance test consists of visual or visual manipulative tests of digit, symbol, paring, picture completion, block design, picture arrangement, object assembly.

3. Psychomotor Tests.

Psychomotor tests are tests of retention, memory and conceptual thinking. Although particularly prevalent as a tool for diagnosing organic brain damage, the tests are not confined to this sphere and are also used by psychologists to diagnose functional mental illness. The most common is the Bender-Gestalt Test. The subject copies designs which are exhibited to him. The evaluation of his linear design perception and visual motor function is then used to diagnose possible organic brain impairment.

4. Other Tests.

Where organicity is a possibility other more objective tests are also utilized such as the electroencephalogram, spinal tap, the brain scan. Obviously many of these tests particularly the latter three mentioned cannot be run in the county jail and therefore a court order may be necessary to transport the accused to the doctor's office. Particularly where amnesia might be present and might indicate an adult adjustment reaction, sodium amytol or sodium penatol tests should be utilized.

IX. PRESENTATION OF THE EVIDENCE.

A. LAY WITNESSES.

Beginning at the beginning, the lead off witness on the issue should be members of the family. Trace the family history, including prior family illnesses and the accused's illness, changes in the accused or bizarre conduct on his part if any. They should relate evidence of delusions and/or hallucinations if such evidence exists. People who lived with, worked with, or taught the accused should be called in the order of their relationship to him, beginning with the earliest and ending with testimony of events occurring immediately prior to and at the time of the conduct charged.

B. EXPERT TESTIMONY.

1. Psychologist.

The psychologist should be called following the testimony of the lay witnesses. After relating his qualifications, he should testify as to how he came in contact with the accused, the amount of time he spent with him, what examinations he did, what tests he used, with an explanation of the test, and the results of the tests. He should state his clinical opinion as to the state of mind of the accused, i.e., whether the accused was suffering from a mental disease or defect at the time of the conduct charged (or at the present time if the issue is incompetency) and the type of mental disease suffered, along with an explanation of his opinion as to whether the defendant met or meets the legal test, stating the legal test, be it insanity or incompetency.

2. Psychiatrist.

The psychiatrist should testify following the psychologist. He should be taken through the same type of examination as the psychologist but with more emphasis on his conversations with the accused and his observations of the accused. He should be asked his opinion regarding whether the accused suffered, or is suffering, from a mental disease and/or defect and the should be asked to

explain the disease and/or defect in lay terms. This testimony should be followed by an opinion on the ultimate question concerning whether the mental disease or defect caused the defendant to be insane or incompetent, stating the proper legal test for insanity or incompetency.

G. DEMEANOR OF DEFENDANT.

1. Generally.

The defendant's conduct is jail and during the trial play an extremely important part in either enhancing or nullifying the insanity defense. Quite often, absent hebephrenic or catatonic symptoms, an insane individual incarcerated in jail acts as normal as anybody else there. The reason for this is (despite the fact he is charged with commission of the crime) much of the stress or stressors that caused the original conduct disappear. The accused has his wants cared for, the pressures that were on him in the outside world, particularly those that caused his conduct have disappeared; although he is suffering from a mental disease still, in many instances, he will not present a picture of a psychotic, that is, the picture of a person who is not in touch with reality.

NOTE:

Much of the contents of the original paper have been deleted. I have attached this rather abbreviated outline of the original paper in hope that it will be of some help to the Committee - sort of a thumbnail sketch of the insanity defense in Federal Court.

EXHIBIT B


AMERICAN BAR ASSOCIATION

1800 M STREET, N.W., 2ND FL., SOUTH LOBBY, WASHINGTON, DC 20036-5886 TELEPHONE (202) 331-2287

July 21, 1982

Frank Maloney, Esquire
505 West 12th Street
Austin, TX 78701

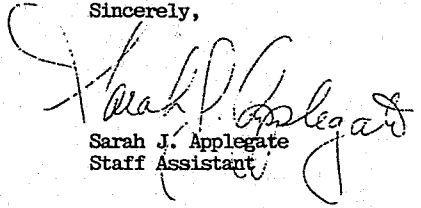
Dear Mr. Maloney:

Per your request, enclosed is a copy of the Executive Summary of the ABA Provisional Criminal Justice Mental Health Standards.

Please note that these Provisional Standards do not represent American Bar Association policy. They are, instead, the work products of six highly qualified Task Forces presently conducting a major ABA examination of all mental health issues involved in criminal law.

You you have any questions regarding these Provisional Standards in connection with your testimony before Congress next week, please feel free to call upon us.

Sincerely,



Sarah J. Applegate
Staff Assistant

/sja

Enclosure

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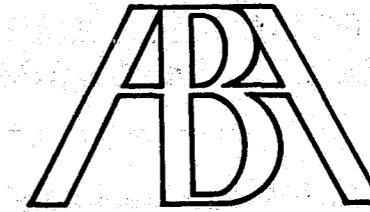
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PROVISIONAL CRIMINAL JUSTICE MENTAL HEALTH STANDARDS

April, 1982

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A SPECIAL CRIMINAL JUSTICE IMPROVEMENT PROJECT OF
THE AMERICAN BAR ASSOCIATION'S STANDING COMMITTEE
ON ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE

THIS DISCUSSION PAPER HAS NOT BEEN APPROVED BY THE
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UNTIL APPROVED, DOES NOT CONSTITUTE THE POLICY OF THE
AMERICAN BAR ASSOCIATION

PROVISIONAL CRIMINAL JUSTICE MENTAL HEALTH STANDARDS: EXECUTIVE SUMMARY

PART I. Role and Function of Mental Health Disciplines and Practitioners in the Criminal Process

Provisional Standard 7-1.1: Roles of Mental Health Professionals in the Criminal Process

Qualified mental health professionals can provide valuable assistance to the administration of criminal justice by evaluating the mental condition of defendants or witnesses, by providing consultation to the prosecution or defense and by providing treatment to persons charged with or convicted of crimes. These evaluative, consultative and therapeutic roles involve distinct functions and responsibilities that are sources of potential conflict.

(a) **Evaluation Role.** In evaluating the mental condition of a criminal defendant or witness for the purpose of forming an expert opinion, the mental health professional should function independently and objectively. That professional has an obligation to make a thorough assessment based on sound evaluative methods, and to reach an objective opinion on the issue(s) referred for evaluation. After performing an evaluation, the professional's role in the adversary process is governed by Provisional Standard 7-1.5. Disclosure of information obtained during the evaluation is governed by limitations set forth in Provisional Standards 7-1.2 (b) and (c) and 7-1.3 (e).

(b) **Consultative Role.** In providing consultation and advice to the prosecution or defense on the preparation or conduct of the case, the mental health professional has the same obligations and immunities as any member of the prosecution or defense team. It is unprofessional conduct for the prosecutor or defense counsel to suggest that mental health professionals compromise their ethical or professional standards and mental health professionals should not accede to such suggestions.

(c) **Therapeutic Role.** In providing treatment to a person charged with or convicted of a crime, the

mental health professional's obligations to the person and society derive from those arising in the therapist-patient relationship. Consistent with institutional security requirements, correctional and mental health facilities should not interfere with the traditional therapist-patient relationship. Any limitation upon the therapist-patient relationship arising as a result of the patient's or client's involvement in the criminal process or placement in an institutional setting should be precisely defined and explained to the patient at the time the therapeutic relationship is established.

In every case, the nature of the mental health professional's obligations and the relationship among the parties should be clarified at the outset to assure that the legal rights of the parties are not compromised and that the mental health professional is not required to perform tasks that the professional is not competent to perform or that the professional regards as ethically improper.

Provisional Standard 7-1.2: General Principles Governing Pre-Trial Mental Health Evaluations

(a) **Authority for Pre-Trial Evaluations.** Police and prosecution agencies may not seek or obtain pre-trial mental health evaluations or interviews of persons arrested for crime or of persons who are subjects of a criminal investigation unless such interviews or evaluations are:

- (i) authorized by that person's attorney;
- (ii) authorized by court order; or
- (iii) conducted on an emergency basis when police or prosecution authorities have reasonable, articulable grounds to believe that the person needs emergency mental health treatment.

In all cases the person's attorney should be informed of the interview or evaluation and should receive a copy of any report prepared on such interview or evaluation.

(b) **Uses of Disclosures or Opinions.** No disclosure made by a person during the course of any pre-trial

interview or evaluation, and no opinion of a mental health professional based on such interview or evaluation is admissible in any criminal proceeding against the defendant unless the disclosures or opinions are otherwise admissible under Provisional Standard 7-1.4 and relate solely to the defendant's mental condition at the time of the alleged crime that the defendant has put in issue.

(c) **Defense Access to Mental Health Professional Assistance and Evaluation.** The right to defend oneself against criminal charges includes an adequate opportunity to explore, through a defense-initiated mental evaluation, the availability of any defense to the existence or grade of criminal liability relating to the defendant's mental condition at the time of the alleged crime. Accordingly, a qualified mental health professional acceptable to the defendant and selected from a court-approved list should be appointed at state expense for a financially unable defendant if that defendant's attorney vouches a belief, including the basis for such belief, that the professional's evaluation could support a substantial avenue of defense.

Whenever a mental health professional conducts an evaluation of the defendant's mental or emotional condition upon the request or motion of the defendant, all disclosures made by the defendant or the attorney during the course of the evaluation are protected by the attorney-client privilege. The privilege is waived as to that evaluation only if:

(i) the defendant calls the mental health professional who performed the evaluation as a witness or gives notice of defendant's intention to call the mental health professional as a witness if such notice is required by statute or court rule; or,

(ii) the defendant puts in issue mental condition at the time of the alleged crime, calls another mental health professional as an expert witness, and the prosecution establishes, to the court's satisfaction, that the defendant secured evaluations by all available qualified mental health professionals in the area, and that the prosecution is thereby deprived of the opportunity to obtain an adequate evaluation.

(d) **Prosecution Access to Defendant for Evaluations of Mental Condition at Time of Alleged Offense.** Defense counsel should notify the prosecution within [forty-eight] hours after a mental health professional begins a defense-initiated evaluation interview with the defendant for the purpose of evaluating the defendant's mental condition at

the time of the alleged crime. The prosecution may then request and the court should require that defendant submit to an evaluation of defendant's mental condition to be performed by a qualified mental health professional acceptable to the prosecution and selected from a court-approved list. The consequences of a defendant's failure to cooperate in such evaluation are set forth in paragraph (e) of this Provisional Standard. The report of the mental health professional who performs the evaluation at the request of the prosecutor should be submitted directly to the court. The court should promptly forward a copy of the report to the defendant but should otherwise order the report sealed. The report should remain sealed until such time as defendant gives notice in accordance with statute or court rule, of an intention:

(i) to put in issue defendant's mental condition at the time of the crime charged; and,

(ii) to utilize the testimony of a mental health professional to support the defense claim on this issue. Upon the defendant's giving of the required notice, the court should promptly forward a copy of the mental health professional's report to the prosecutor.

(e) **Consequences of Defendant's Willful Failure to Cooperate in the Evaluation.** If the court determines that an adequate evaluation has been precluded because the defendant willfully has refused to cooperate with the mental health professional, the court, in its discretion, may exclude the introduction at trial of testimony by a mental health professional offered by the defendant concerning the defendant's mental condition at the time of the alleged crime. Other proof of the defendant's mental condition at the time of the alleged crime may be offered by the defendant and, if otherwise competent, such evidence should be admissible.

(f) **Duty of Evaluator to Disclose Information Concerning Defendant's Present Mental Condition That was not the Subject of the Evaluation.** If in the course of an evaluation, the mental health professional concludes that the defendant is imminently suicidal or otherwise needs emergency therapeutic intervention, the evaluator should notify the defendant's attorney and, if the court ordered the evaluation, the evaluator should also notify the court. If the evaluator determines that the defendant presents an imminent risk of serious danger to another person, the evaluator should notify the defendant's attorney.

Provisional Standard 7-1.3: Initiating and Conducting Mental Evaluations; Content and Discovery of Evaluation Reports

(a) Authority to Initiate Evaluations.

(i) The defense or the court may initiate evaluations of defendant's present mental competency at any stage of the proceedings pursuant to Part III of this Provisional Chapter.

(ii) The defense may initiate an evaluation of defendant's mental condition at the time of the alleged crime pursuant to Provisional Standard 7-1.2(c).

(iii) The prosecution may obtain an evaluation of defendant's mental condition at the time of the alleged crime under the conditions specified in Provisional Standard 7-1.2(d).

(iv) [Pre-sentence evaluations are not specifically addressed within this Part of Provisional Chapter VII. This is an important issue which must be addressed during Phase II of the Criminal Justice Mental Health Standards Project.]

(b) Initiating the Evaluation.

(i) Whoever requests an evaluation of defendant's mental condition should inform the mental health professional in writing of the specific issue(s) to be addressed in the evaluation.

(ii) The attorney requesting an evaluation should obtain and submit to the mental health professional conducting that examination any record or information:

(A) that the mental health professional regards as necessary for conducting a thorough evaluation on the referral issue(s). Ordinarily, such records and information will include relevant medical and psychological records, police and other law enforcement reports, confessions or statements made by defendant, investigative reports, autopsy reports, toxicological studies, and transcripts of pre-trial hearings; and,

(B) any other record or information that the attorney believes may be of assistance in facilitating a thorough evaluation on the referral issue(s).

(iii) When an evaluation is conducted pursuant to court order, that order should:

(A) identify the initiating party;

(B) identify the specific issue(s) to be addressed;

(C) describe the circumstances under which statements or other information obtained during the course of the evaluation, including any opinions of the mental health professional based on that evaluation, may be disclosed or used for any purpose in any criminal proceeding;

(D) specifically delineate the applicability of various evidentiary privileges; and,

(E) specify whether the evaluator is required to prepare a written report and, if so, specify the scope, content and disposition of such report.

(iv) Each jurisdiction should promulgate standard court orders designed to inform mental health professionals serving as evaluators of the laws and procedures within the jurisdiction applicable to such evaluations.

(c) Conducting the Evaluation.

(i) Whoever initiates the evaluation should assure that the mental health professional conducting the evaluation understands:

(A) the issue(s) to be addressed;

(B) the rules governing disclosure of statements or information obtained during the evaluation and governing disclosure of opinions based on such statements or information; and,

(C) the applicability of various evidentiary privileges.

(ii) When the mental health professional is evaluating the defendant's mental condition at the time of the alleged offense, the defense attorney should not be present unless the mental health professional consents to the attorney's presence. When the mental health professional is evaluating the defendant's present mental competency, the defense attorney may be present at and participate in the evaluation except for those portions of the evaluation, if any, at which the mental health professional prefers to examine the defendant alone. The defense attorney should be present and participate in the evaluation of the defendant's present mental competency to stand trial if the evaluator requests the attorney's presence.

(iii) A court-ordered evaluation of the defendant initiated by the prosecution should be recorded on audiotape or, if possible, on videotape, and a copy of the recording should be forwarded promptly to the defense attorney.

(iv) Whenever the prosecutor and the defense attorney agree, mental health professionals

requested by the respective parties may perform a joint evaluation of the defendant.

(v) The defendant's attorney and the mental health professional conducting the evaluation at the request of the prosecution each have independent obligations to explain to the defendant and to ensure that the defendant understands:

(A) the purpose of the evaluation and the rules governing confidentiality;

(B) the techniques to be used including observation of nonverbal behavior of the defendant;

(C) the uses of any disclosures made during the evaluation; and,

(D) the conditions under which the prosecutor will have access to information obtained and reports prepared.

(d) Contents of the Written Report.

(i) Promptly upon concluding the evaluation, the mental health professional should ordinarily prepare a complete, written report. However, at the specific request of the defense attorney, a mental health professional who conducted an evaluation at the request of the defense attorney, may make only an oral report.

(ii) The written evaluation report should ordinarily:

(A) identify the specific issues addressed in the evaluation;

(B) describe the procedures, tests and techniques used by the evaluator;

(C) state the evaluator's clinical findings and opinions on each issue addressed in the evaluation and indicate specifically those questions, if any, that could not be answered;

(D) identify the sources of information and present the factual basis for the evaluator's clinical findings and opinions; and,

(E) present the reasoning by which the evaluator utilized the information to reach the clinical findings and opinions. The evaluator should express an opinion on a specific legal criterion or standard only if the opinion is within the scope of the evaluator's specialized knowledge.

(iii) The evaluator should include in the written report any statements or information that serve as necessary factual predicates for the clinical findings or opinions, even if the statements or information are of a personal or potentially incriminating nature.

(iv) The attorney who requested the evaluation should not edit, modify, revise or otherwise compromise the integrity of the report. However, after the report has been completed and submitted, the attorney may correspond in writing with the mental health professional in order to clarify the meaning or implications of the evaluator's findings or opinions. The report and any clarifying correspondence should be disclosed at the time established for discovery of written reports.

(v) Each jurisdiction should promulgate written guidelines designed to inform mental health professionals serving as evaluators of the law and procedures within that jurisdiction governing the preparation of their written reports.

(e) Discovery of Written Reports.

(i) When the court has ordered a pre-trial evaluation of defendant's present mental competency, the court, upon request of either party or on its own motion, may order the evaluator to prepare a separate report on defendant's present mental competency even if other issues have also been referred for evaluation.

(ii) Reports prepared solely on defendant's present mental competency should not contain information or opinions concerning either:

(A) defendant's mental condition at the time of the alleged crime; or,

(B) any statements made by the defendant regarding the alleged crime or any prior crime. Upon satisfying itself that the report does not contain information or opinions that should have been excluded, the court should promptly send copies to the prosecutor and to defense counsel.

(iii) Defense counsel should be required to notify the court and the prosecution at the designated time before trial if defendant intends:

(A) to enter a special plea of not guilty by reason of nonresponsibility; or,

(B) otherwise to put in issue mental condition at the time of the crime charged, and to utilize the testimony of a mental health professional to support defendant's claim on that issue.

(iv) Upon giving the notice required by paragraph (e)(iii), the defense is entitled to prompt receipt of all written reports prepared by mental health professionals for the prosecution. When the defendant has given the notice required by paragraph (e)(iii), the prosecution is entitled to the timely receipt of any written report prepared by a mental health professional whom the defen-

dant intends to call as an expert witness on the defendant's mental condition at the time of the alleged crime. However, at the request of the defendant and for good cause shown, the court may delay the delivery of such reports until a time certain before trial. When the court grants such a delay, it may nonetheless order the defendant to promptly divulge to the prosecutor the fact sources relied upon in the report.

(v) Each jurisdiction should establish, by statute or court rule, detailed procedures governing discovery of written reports by mental health professionals.

(vi) Whenever a defendant gives notice under paragraph (e)(iii) and intends to call an expert who has not prepared a written report, the prosecution should be entitled to receive a list of sources of information upon which the expert relied in forming an opinion.

(vii) An attorney intending to call a mental health professional as an expert witness should make appropriate arrangements to adequately prepare the expert for trial.

Provisional Standard 7-1.4: Admissibility of Expert Opinion Testimony

(a) Standards for Expert Opinion Testimony.

(i) Relevant opinion testimony of qualified mental health professionals concerning a person's present mental competency or mental condition at some time in the past should be admissible whenever the testimony is based on the specialized knowledge of the witness and will assist the trier of fact.

(ii) Relevant opinion testimony of mental health professionals proffered on an issue relating to the defendant's future behavior should be admissible only if it is based on the specialized knowledge of the expert and is limited to a description of:

(A) psychological aspects of the defendant's proven past criminal act(s);

(B) scientific studies involving the relationship between specific behaviors and variables that are objectively measurable and verifiable; or,

(C) the possible behavior effects of proposed therapeutic interventions.

However, testimony of mental health professionals regarding the likelihood that a particular

individual will be dangerous or will engage in dangerous behavior in the future should not be admissible at the present time.

(b) Criteria for qualifying a mental health professional as an expert witness. A mental health professional should be qualified by the court to present expert opinion testimony only if the court finds that the mental health professional:

(i) has received the minimum professional training specified in Provisional Standard 7-1.4(c);

(ii) has received specialized training concerning performance of mental health evaluations for criminal courts and that such training encompasses the substantive law relating to the issue on which the expert opinion is being proffered; and,

(iii) has performed an adequate personal evaluation of the individual on the specific question upon which the evaluator is being called to testify.

(c) Minimum Educational and Training Requirements.

(i) An otherwise qualified mental health professional may testify as an expert on any issue concerning the defendant's present mental competency, including competency to stand trial, competency to waive any legal right, or competency to perform any other function related to the criminal proceeding, only if the professional meets one of the following minimum educational qualifications:

(A) a licensed physician who has successfully completed at least one year of post-doctoral specialty training in a residency program approved by the American Psychiatric Association;

(B) a clinical or counseling psychologist who has received a doctoral degree in psychology in a training program approved by the American Psychological Association, and who is licensed or certified as a psychologist if the state requires licensure or certification for that individual; or,

(C) a licensed psychologist who has received a masters degree in clinical psychology, a licensed psychiatric social worker, or a licensed registered nurse.

(ii) An otherwise qualified mental health professional may testify as an expert on any other issue concerning a person's mental condition that may arise in a criminal case, only if the profes-

sional meets one of the following minimum educational qualifications:

(A) a licensed physician who has completed the requirements for board eligibility in psychiatry established by the American Board of Psychiatry and Neurology; or

(B) a clinical or counseling psychologist who has received a doctoral degree in psychology from a training program approved by the American Psychological Association, and who is licensed or certified as a psychologist if the state requires licensure or certification.

(iii) A licensed physician who does not meet the requirements of specialty training in psychiatry established in this Provisional Standard, but who is board-eligible in another medical speciality, may perform an evaluation and testify as an expert about an organically-based mental disability within the scope of the professional's specialized knowledge.

Provisional Standard 7-1.5: Presentation of Expert Testimony by Mental Health Professionals

(a) Mental Health Professional as Proponent for Expert Opinion. As with other expert witnesses, mental health professionals testifying at trial serve as impartial witnesses called to assist the trier of fact. After forming an opinion based on an impartial and objective evaluation, the mental health professional should communicate that opinion persuasively to the trier of fact.

(b) Presentation of Data and Reasoning Upon Which Opinion is Based.

(i) A mental health professional offering an expert opinion should identify and explain the factual basis for that opinion and the reasoning process through which the opinion was formulated.

(ii) When the opinion is based in part on information that would not otherwise be admissible in evidence, the witness may testify about that information if the information is of a type that is customarily relied upon by other mental health professionals in formulating their opinions and the court determines that the probative value of this information outweighs its tendency to prejudice or confuse the trier of fact.

(c) Limitations on Prosecutor's Use of Mental Health Professional Expert Witnesses.

(i) The prosecutor may not call a mental health professional to testify as a witness as part of the prosecution's case in chief on the issues of guilt, penalty, or for any other prosecutorial purpose. Statements made by the defendant and any other information obtained in the course of a court-ordered evaluation of the defendant should not be disclosed at trial by the mental health professional or used by the prosecutor as a part of the prosecution's case in chief.

(ii) The prosecutor may call a mental health professional as an expert witness only for the purpose of negating or disproving a claim, by virtue of defendant's mental condition at the time of the alleged crime, that:

(A) the defendant's act was involuntary; or,

(B) the defendant lacked the requisite *mens rea*; or,

(C) the defendant was not criminally responsible.

The mental health professional called by the prosecution may testify about the defendant's statements and other information obtained during an evaluation whenever those statements or information are relevant to serve as the factual basis for the expert's opinion and the court determines that the probative value of the statements or information outweighs its tendency to prejudice or confuse the trier of fact.

(d) Every jurisdiction should promulgate written guidelines designed to inform and advise mental health professionals called to testify as expert witnesses about all aspects of the law and procedure within that jurisdiction applicable to the effective presentation of expert opinions.

Provisional Standard 7-1.6: Jury Instructions Concerning Expert Testimony by Mental Health Professionals

In any case involving expert testimony by mental health professionals the court should charge the jury concerning the functions and limitations of mental health professional expert testimony.

The jury should be informed that the purpose of such testimony is to identify for the factfinder clinically reasonable possibilities to reconstruct a person's past mental condition or to explain human behavior.

Jurors should be informed that they are not asked or expected to become experts in psychology or to

make scientific judgments, and that their task is to decide whether the explanation offered by a mental health professional is convincing. In evaluating the weight to be given an expert's opinion, the jury should consider the qualifications of the witness, the information that served as the factual basis for the expert's opinion, and the reasoning process by which the information was utilized by the expert to formulate an opinion. In reaching its decisions on the ultimate questions in the trial, the jury is not bound by the opinions of expert witnesses. The testimony of each witness should be considered in connection with the other evidence in the case and given such weight as the jury believes it is fairly entitled to receive.

Provisional Standard 7-1.7: Education and Training

(a) **Interdisciplinary Cooperation.** Judicial, legal and mental health professional associations, organizations and institutions at national, state and local levels should cooperate in promoting, designing and offering basic and advanced programs on the participation of mental health professionals in the criminal process to judges, attorneys, mental health professionals and to students within these disciplines.

(b) **Lawyers.** Law schools should provide the opportunity for all students, as a part of their formal legal education, to become familiar with the issues involved in mental health law and mental health professional participation in the criminal process. Law schools should also develop advanced courses on mental health law and mental health professional participation in the criminal process for students who desire to concentrate on criminal law practice.

Bar associations, law schools and other organizations having responsibility for providing continuing legal education should develop and regularly conduct programs offering advanced instruction on mental health law and mental health professional participation in the criminal process. All prosecutors and public defenders and all attorneys who specialize in, or regularly practice, criminal law should enroll in these programs.

(c) **Judges.** Each jurisdiction's highest appellate tribunal or its judicial supervisory authority with responsibility for continuing judicial education

should develop and regularly conduct programs on the participation of mental health professionals in the criminal process. Judges who preside over criminal trials should enroll in these programs.

(d) Mental Health Professionals.

(i) Professional and graduate schools should afford the opportunity for the students of mental health disciplines, as a part of their formal education, to become familiar with the issues concerning the participation of mental health professionals in the criminal process.

(ii) These professional and graduate schools should also provide advanced instruction for students of the mental health disciplines who desire to meet the minimum criteria for qualifying as mental health expert witnesses within the criminal process.

(iii) Professional and graduate schools and other appropriate organizations, including governmental agencies having responsibility for continuing education for mental health professionals, should develop and regularly conduct programs offering instruction on the participation of mental health professionals in the criminal process designed:

(A) to enable mental health professionals to meet the qualification criteria for expert witnesses; and,

(B) to inform all participants of significant new developments in law and criminal practice in order to improve the level of competence of mental health professionals who serve an evaluative, consultative or therapeutic role in the criminal process. Mental health professionals who participate in the criminal process should enroll in these programs.

Provisional Standard 7-1.8: Joint Professional Obligations for Improving the Administration of Justice in Criminal Cases Involving Mental Health Issues

(a) National, state and local legal and mental health agencies and professional organizations have an obligation to work cooperatively to monitor the interdependent performance within the criminal process of their members and constituents and to improve the overall quality of the administration of justice in criminal cases involving mental health issues.

(b) **Appropriate professional organizations and governmental agencies should establish programs, including peer review, for monitoring the performance of mental health professionals participating in the criminal process. Existing professional ethics boards and committees should develop specific criteria and special review procedures designed to address the unique ethical questions that arise when mental health professionals participate in the criminal process.**

(c) **Appropriate professional, scientific and governmental organizations should sponsor empirical research concerning:**

(i) the validity and reliability of mental evaluations as those evaluations relate to issues in criminal cases;

(ii) the development of standardized protocols for conducting mental evaluations in criminal cases;

(iii) the application and practical effect of substantive rules and procedures concerning mental disability in criminal law and procedure; and,

(iv) the quality and impact of participation by mental health professionals in the criminal process.

PART II. The Police Role

Provisional Standard 7-2.1: The Role of the Police

The capacity of the police to implement the standards in Part II of this chapter is largely dependent upon the availability of comprehensive community mental health programs. This dependence is an explicit recognition of the fact that the police role in dealing with mentally disturbed persons is a limited one.

Provisional Standard 7-2.2: Classes of Mentally Disturbed Persons Subject to Police Emergency Detention

Every jurisdiction should confer explicit statutory authority on police to take mentally disturbed persons into custody in emergency situations. Such legislation should authorize the emergency detention of two classes of mentally disturbed persons:

(a) those whose conduct represents a danger to themselves or others; and,

(b) those who are suffering such severe disabilities that they are apparently unable to care for themselves.

Police agencies should promulgate departmental guidelines which provide for police intervention in emergency mental health situations on behalf of mentally disabled persons who represent a danger to themselves or others and on behalf of mentally disturbed persons in need of emergency mental health care even though such persons may not represent a danger to themselves or others. Police intervention is warranted not only in situations involving danger but in cases where the disturbed person is severely disoriented and lacks the capacity to apply for or seek mental health assistance.

Provisional Standard 7-2.3: Policy Preference for Voluntary Police Disposition

In all emergency mental health situations where the law permits custodial intervention by the police, departmental guidelines should nonetheless stress a policy preference for voluntary dispositions. Such guidelines should require police officers, whenever feasible, to negotiate a voluntary disposition, particularly when a mentally disturbed person is living with others and does not appear to be dangerous. In some cases, police action to summon the assistance of the disturbed person's friends or relatives will be adequate. In others, referral to a mental health facility or other appropriate community facility may be required.

Provisional Standard 7-2.4: Custodial Processing of Mentally Disturbed Persons

When police custody is based exclusively on either non-criminal behavior or minor criminal behavior, the police should transport the person to an available medical or mental health facility for a mental health examination, or negotiate a voluntary disposition as provided for in Standard 7-2.3.

When a police officer has arrested a person for a felony or other serious crime, however, such person should be processed in the same manner as any other criminal suspect notwithstanding the fact that the arresting officer has reasonable grounds for believing that the person's behavior meets statutory and departmental guideline requirements for emergency detention for mental health examination. In those cases, and as soon as possible following arrest,

the police should arrange for a qualified physician or mental health professional to determine whether emergency mental health treatment is required.

Upon initial presentation to the prosecutor or the court, the arresting officer should reveal fully those facts which suggest that the arrestee is mentally ill and in need of treatment.

Provisional Standard 7-2.5: Post-Arrest Obligations of Police and Custodial Personnel

When arresting or custodial officers or other police personnel observe a detainee exhibiting symptoms of acute mental disturbance, disorientation or distress, they have a duty to report those observations to the official in charge of the police detention or holding facility. These observations should be reported although the detainee's behavior might not fall within the classifications for emergency detention described in Standard 7-2.2.

Whenever the police custodial official in charge believes that the detainee requires medical or mental health professional care or is uncertain whether such care is required, that official should arrange for a prompt determination by a qualified physician or mental health professional.

When the physician or mental health professional determines that a confined person requires medical or mental health care not available in the police detention or holding facility, the confined person should promptly be transferred to a medical or mental health facility capable of providing such care.

Provisional Standard 7-2.6: Police Use of Force in Mental Health Emergency Interventions

Police departmental guidelines should stipulate that when custodial disposition is appropriate police should use the minimal force necessary to effect such custody, taking into consideration the obligation of the police to protect the mentally disturbed person, themselves and others from bodily harm.

Provisional Standard 7-2.7: Specialized Police Training

All police agencies should provide specialized training to their personnel to assist them in identifying and responding to incidents arising from crim-

inal or aberrant acts of mentally disturbed persons. Mental health professionals should be routinely consulted regarding curriculum preparation and training material selection. To the extent feasible police administrators should obtain qualified mental health professionals to serve as instructors for recruit and in-service training programs.

As an adjunct to training, all police agencies should promulgate written policies, detailing department procedures for intervening in emergency situations involving the mentally disturbed. In addition, promotional examinations should test each candidate's knowledge concerning the characteristics of mentally disturbed persons and the resolution of emergency mental health situations.

Provisional Standard 7-2.8: Development of Joint Policy by Law Enforcement, Hospital and Community Authorities for Admitting Persons Detained by Police for Examination

In every jurisdiction police officials and administrators of medical and mental health facilities should cooperate in developing joint guidelines and policies regarding the admission of persons in police custody for mental examination, evaluation or treatment. These joint guidelines and policies should be practical and workable and should not be confined to a restatement of minimal requirements of the law. The joint guidelines and policies should be widely disseminated to police, hospital and mental health facility personnel. The guidelines should provide for routine reporting to police and other appropriate officials in cases where physicians or mental health officials or admissions agents of medical or mental health facilities declined to admit a person in police custody for mental examination, observation or treatment.

Police officials and administrators of medical and mental health facilities should periodically conduct a joint review of such guidelines and policies to evaluate performance and effect operational changes and improvements.

Provisional Standard 7-2.9: Police Records of Contacts With Mentally Disturbed Persons

Police records of contacts with mentally disturbed persons who are not charged with crime should be filed separately from arrest records, but should be subject to no lesser a degree of confiden-

tiality than restricts the dissemination of arrest records.

PART III. Incompetency to Stand Trial

Provisional Standard 7-3.1: Mental Incompetence to Stand Trial: Rules and Definition

(a) No defendant who is mentally incompetent to stand trial shall be tried while remaining incompetent to stand trial.

(b) The test for determining mental competence to stand trial should be whether the defendant has sufficient present ability to consult with defendant's lawyer with a reasonable degree of rational understanding and whether the defendant has a rational as well as factual understanding of the proceedings.

(c) A finding of mental incompetence to stand trial may arise from mental disease, disorder or defect, physical illness or disability, retardation or other etiology so long as it results in a defendant's inability to consult with defense counsel or to understand the proceedings. The terms "competence" and "incompetence" as used in Standard 7-3.1 to [7-3.13] refer to mental competence or mental incompetence.

Provisional Standard 7-3.2: Responsibility for Raising the Issue of Incompetence to Stand Trial

The trial court is primarily and ultimately responsible for the determination of the mental competence of the defendant. The responsibility for initially raising the issue of mental incompetence to stand trial also falls, in varying degrees, upon both the prosecuting attorney and the defense attorney.

(a) The court has a continuing obligation, separate and apart from that of counsel for each of the parties, to raise the issue of incompetence to stand trial at any time the court has a good faith doubt as to the defendant's competence, and may raise the issue at any stage of the proceedings on its own motion.

(b) The prosecutor should advise both the court and defense counsel of any information which has come to the prosecution's attention which the prosecutor believes sufficient to raise a good faith doubt of the defendant's competence to stand trial or

which the prosecutor believes may be sufficient to invalidate a conviction of the defendant on the basis of incompetence to stand trial. The prosecutor should further advise defense counsel of any information which has come to the prosecution's attention relative to defendant's incompetence to stand trial which would not reasonably be in the possession of defense counsel. The prosecuting attorney should have no right to request nor to make any motion for compulsory examination of a defendant whom the prosecutor believes to be incompetent to stand trial.

(c) Defense counsel should have available sufficient resources to have a defendant whom counsel suspects to be mentally incompetent to stand trial examined by a qualified mental health professional in order to assist defense counsel in determining whether to seek further evaluation of the defendant for purposes of determining present incompetence to stand trial. In the event that counsel for an indigent defendant does not have such services readily available, counsel should have the right to so inform the court and to have the court appoint an expert to examine the defendant in order to assist counsel in determining defendant's competence to stand trial. The experts should report only to defense counsel. Confidential communications related to the expert by defendant should be deemed protected by the attorney-client privilege.

(d) Defense counsel should move for evaluation of defendant's competence to stand trial whenever defense counsel has a good faith doubt as to the defendant's competence.

(i) If the client objects to such a motion being made, counsel may move for evaluation over the client's objection. In any event, counsel should make known to the court those facts known to counsel which raise the good faith doubt of competence.

(ii) A motion filed by defense counsel for evaluation should be in writing and contain a certificate of counsel indicating: that the motion is made in good faith and on reasonable grounds to believe that the defendant is incompetent to stand trial, and that it is not filed for purposes of delay. The motion should also set forth the specific facts which have formed the basis for the motion.

(e) In the absence of good faith belief that the defendant may be incompetent to stand trial, it is improper for the defense attorney to move for evaluation and improper for either party to use the

incompetency process for purposes unrelated to incompetence to stand trial such as to obtain information for mitigation of sentence, to obtain favorable plea negotiation or to delay the proceedings against the defendant.

(f) In making any motion for examination or, in the absence of motion in making known to the court information raising a good faith doubt of defendant's competence, the defense counsel should not divulge confidential communications or communications protected by the attorney-client privilege unless, in the opinion of the attorney, such disclosure is necessary to prevent miscarriage of justice or the invalid trial of a defendant whom counsel in good faith believes to be incompetent to stand trial. The disclosure of such information should be made *ex parte* and *in camera* and all records thereof should be sealed. The information so disclosed may be disclosed only to the court and then only for the purpose of determining whether to order evaluation.

Provisional Standard 7-3.3: Judicial Order For Competence Evaluation

Whenever, at any stage of the proceedings, a good faith doubt is raised as to the defendant's competence to stand trial, the court should order an evaluation and conduct a hearing into the competence of the defendant to stand trial. The court should follow this procedure whether the doubt arises from a motion of defense counsel, from information supplied by the prosecutor or defense counsel or from the court's own observation of the defendant.

(a) Probable cause should, if at all possible, be found before a competency examination is ordered by the court unless early examination is requested by defense counsel. If the court finds that requisite probable cause does not exist, it should not inquire further into the issue of competence.

(b) A defendant otherwise entitled to pre-trial release should not be involuntarily confined or taken into custody solely because the issue of his competence to stand trial has been raised and an evaluation has been ordered unless confinement is necessary for evaluation of competence.

(i) If a defendant has been released from custody under any pre-trial release provision, the court may order the defendant to appear at a designated time and place for out-patient exam-

ination and such appearance may be made a condition of pre-trial release.

(ii) If the court determines that a defendant will not submit to out-patient evaluation as a condition of pre-trial release, that the defendant refuses to appear for examination, or that involuntary confinement is necessary for the examination, the court may order the defendant taken into custody if defendant is not already in custody until the determination of such competence may be made. The term "necessary" does not mean simply "convenient."

(iii) If a defendant who is on pre-trial release is subsequently involuntarily confined or otherwise taken into custody for diagnostic evaluation, such confinement or custody should be in the least restrictive setting and for the minimum amount of time necessary to complete the diagnostic evaluation and upon completion the defendant should be returned to pre-trial release status.

(iv) A defendant otherwise entitled to a judicial determination of eligibility for pre-trial release should not have the determination postponed because of the pendency of proceedings to determine competence to stand trial.

(c) Where possible, the expert appointed to perform the examination of the defendant's competence to stand trial should be a person qualified by training and experience to offer testimony to the court on the issue of competence. The criteria for appointment of the expert should not depend on the type of academic degree held by such expert, but on the expert's professional knowledge, ability and experience.

(d) The judicial order for evaluation should specifically limit the examination to issues of competence to stand trial. The evaluation should include: a determination of the nature of the condition causing such incompetence, treatability of that condition, availability of appropriate treatment, probable duration of the treatment, and recommendations of least restrictive treatment alternatives.

(i) Except for good cause shown, the examination should not be joined with the matter of insanity at the time of the offense, civil commitment, or other matters collateral to the issues of competence to stand trial.

(ii) The order for evaluation should specify the nature of the examination to be conducted and should specify the legal criteria to be addressed by the examining expert. Any inquiries to be con-

ducted in addition to that of competence to stand trial should be separately set forth in the order together with the specific legal criteria for each.

(e) An examination to determine competence to stand trial should not be ordered prior to the defendant being represented by counsel who has had an opportunity to consult with the client and to be heard by the court.

(f) Each jurisdiction should establish time periods by which the examination must be concluded and a report returned to the court. Such periods normally should not exceed [seven] days in the case of a defendant in custody and [fourteen] days in the case of a defendant at liberty. For good cause, the time periods may be extended but should never exceed thirty days.

Provisional Standard 7-3.4: Evaluation and Report

(a) Before beginning an evaluation interview, the evaluating expert should inform the defendant of the specific purpose of the examination, and that information given by the defendant will not be confidential but may be used in any report later to be made to the court.

(b) The evaluating expert may offer the defendant such treatment as is appropriate but may not administer to any unwilling defendant treatment other than that which is necessary on an emergency basis to protect the patient or others from imminent substantial physical harm or that which has been specifically ordered by the court.

(c) The evaluation and report should address separately each of the issues ordered by the court and include the following with respect to each issue:

(i) A statement of the legal issue being addressed by the evaluator in that section of the report;

(ii) The legal criteria applied to determine the legal issue involved;

(iii) The clinical factual findings relied upon by the evaluator;

(iv) The application of the clinical findings to the legal criteria and the conclusion of the evaluating expert with regard to the legal issue.

(d) The first issue to be addressed by the evaluating expert should be the expert's opinion regarding the defendant's competence to stand trial. If the evaluating expert determines that defendant is incompetent to stand trial, or that defendant is com-

petent to stand trial but that such competence depends upon maintenance of medical treatment, the expert should secondly report on the treatment necessary for the defendant to attain or maintain competence. In reporting on treatment, the following should be specifically addressed:

(i) The condition causing incompetence;

(ii) The treatment required for the defendant to attain or maintain competence, together with an explanation of other appropriate treatment alternatives in order of choice;

(iii) The availability of the various types of acceptable treatment in the local geographical area. The evaluating expert should indicate the agencies or settings in which such treatment might be obtained. Whenever the treatment would be available in an out-patient setting as opposed to in-patient, the evaluating expert should make such fact clear in the report;

(iv) The likelihood of improvement under the treatment and the probable duration of the treatment.

(e) If the evaluating expert determines that the only appropriate treatment for a defendant who is mentally incompetent to stand trial would require that the defendant be taken into custody or involuntarily hospitalized, then the report should include the following:

(i) An analysis of whether the defendant, because of the condition causing mental incompetence, meets the criteria for involuntary civil hospitalization or placement set forth by law;

(ii) Whether there is a substantial probability that the defendant will attain competence to stand trial within the reasonably foreseeable future;

(iii) The nature of the care and treatment to be afforded the defendant and its probable duration;

(iv) Alternatives other than involuntary hospitalization which were considered by the expert and why there were deemed inappropriate.

(f) The report should clearly document the specific sources from which information relied upon in reaching the conclusion was obtained. Such documentation should include both an identification of the source and the nature of the information supplied by the source with sufficient specificity to permit follow-up investigation, if necessary, by either party.

(g) The examining expert should indicate to any person furnishing information that the information is sought for purposes of evaluation under court

order, that a report will be made to the court ordering the evaluation, and that both the information given and the source of that information will be disclosed to the court, the prosecutor and the defendant.

(h) The report should not contain information specifically relating or describing the events with which defendant has been charged which was elicited, inadvertently or otherwise, solely from the defendant during the course of the diagnostic examination.

Provisional Standard 7-3.5: Use of Reports, Evidence and Right to Counsel

(a) Any information or testimony elicited from the defendant at any hearing or examination or contained in any motion filed by the defendant or any information furnished by the defendant to any examining expert or to the court and any testimony of experts or others based upon information elicited from the defendant should be used only in a proceeding to determine the defendant's competence to stand trial or related treatment issues. The defendant may waive use of information by using the information or parts thereof for any other purpose. If any part of the report should be used by the defendant for another purpose, the state may request the production of and may use any additional portion of the report subject to applicable rules of evidence.

(b) The prosecutor has no right to be present during any evaluation of the defendant for competence to stand trial. Defense counsel or defense counsel's designee should have the right to attend an evaluation for competence to stand trial or any staff conference or interview at which the defendant is present, but no right to interfere in the conduct of such evaluation or conference. The presence of the defense counsel or the defense counsel's designee should be subject to control by the court to ensure that evaluation may be adequately performed without undue interference by defense counsel.

(c) The defendant has no right to refuse to undergo an evaluation ordered for the purpose of determining defendant's competence to stand trial. As part of the evaluation, the defendant can be required to converse with and to answer questions of the appointed examining expert whether the issue of competence to stand trial has been raised by the defendant or by the court either sua sponte or

because of information supplied through the prosecutor or the defense counsel.

(i) A defendant who stands mute and refuses to speak to the examining expert may as a consequence be confined involuntarily for observation to determine his competence to stand trial. The confinement may continue for such time as is necessary for the observing experts to determine competence, but no longer than fourteen days under the initial order, with such extensions as may be necessary to determine competence.

(ii) A defendant who stands mute during a court-ordered evaluation and who is later judicially determined to have been mentally competent at the time may be subjected to appropriate sanctions, including contempt of court, for willful failure to assist with the examination.

Provisional Standard 7-3.6: Hearing on Competence to Stand Trial

In every case in which a good faith doubt of the defendant's competence to stand trial has been raised and as soon as practicable after receipt of the reports of examining experts, the court should conduct a hearing on the issue of competence to stand trial unless all parties and the court agree that no hearing is necessary. If the defendant has been hospitalized or otherwise confined for the examination, the hearing should be held within seven days of the receipt of the report of the experts; if the defendant is at liberty it should be held within thirty days.

(a) If the parties agree on the issue of competence to stand trial or issues related to treatment, a stipulation containing the factual basis for the agreement may be accepted by the court and the court may enter its order on the basis of the stipulation without hearing. In the absence of stipulation by the parties and concurrence by the court, however, a hearing on the issues should be required in all cases.

(b) The hearing on the issues of competence to stand trial and issues related to treatment may be tried to the court alone provided that in those jurisdictions which authorize trial by jury for determination of issues of involuntary civil hospitalization, jury trial should be available to a defendant to determine issues of competence to stand trial and of involuntary hospitalization for treatment to restore a defendant to competence.

(c) Evidence presented at the hearing should conform to rules of evidence applicable to criminal cases within that jurisdiction. The examining experts, whether called by the court or by either party, should be considered court witnesses and be subject to examination as such by either party.

(i) Defense counsel may elect to be sworn and to testify at the hearing as to personal observations of and conversations with the defendant to the extent that counsel does not disclose confidential communications or violate the attorney-client privilege; provided that counsel electing to testify may be cross-examined to that extent. Because testimony by defense counsel should be avoided if possible, when counsel reasonably believes that such testimony will be necessary provision should be made to have the defendant observed by another, independent attorney who may then more freely testify to what was observed.

(ii) Because of the court's special responsibility to resolve promptly competence issues, and because those issues include an inquiry into the relationship between the defendant and defense counsel and defendant's ability to communicate with defense counsel, the court may properly inquire of defense counsel about the professional attorney-client relationship and the client's ability to communicate effectively with counsel. The defense counsel, however, should not be required to divulge the substance of confidential communications or communications which are protected by the attorney-client privilege. Defense counsel responding to inquiry by the court on its own motion should not be subject to cross-examination by the prosecutor.

(d) Fundamental constitutional rights afforded a defendant in criminal cases should apply to the hearing on competence to stand trial.

(i) In all cases, the defendant should have the right to be present at the hearing, to confront and fully cross-examine all witnesses against him, to have compulsory process for the attendance of witnesses and transcript of the proceedings. Any person designated as a source of information for the expert in preparation of the evaluative report may be called as a court witness by either party and be examined as such.

(ii) The defendant should have the right to adequate notice and time to prepare for the hearing including timely disclosure of the report of

the appointed experts and, if necessary, opportunity to interview or to depose the experts prior to the hearing.

(e) At the hearing, the court should consider separately each discrete issue raised, and should first consider the issue of the defendant's competence to stand trial.

(i) Since the defendant is presumed competent, the party raising the issue of incompetence should have the burden of going forward with the evidence to show incompetence. If the defendant moves for evaluation then the defense should have the burden of going forward; if the court on its own motion or on information supplied by the prosecutor has raised the issue, then the prosecutor should have the burden of going forward.

(ii) If the court, after hearing the evidence, finds by the greater weight of the evidence that the defendant is competent to stand trial the matter should proceed to trial.

(iii) If the court, after having heard the evidence, finds by the greater weight of the evidence that the defendant is not competent to stand trial or that the defendant is being treated, is competent to stand trial because of the treatment and will remain competent to stand trial only if the treatment is continued, the court should proceed to the issue of treatment necessary to effect competence.

(f) Once the court has found that the defendant is incompetent to stand trial or that competence depends on continuation of treatment, the court should consider issues relating to treatment to attain or to maintain competence, including the appropriateness of treatment, the availability of various treatment alternatives in the geographic area, the probable duration of treatment, the likelihood of restoration to competence in the reasonably foreseeable future, and the availability of the least restrictive treatment alternative.

(i) If the court finds that the defendant is in need of treatment and that appropriate treatment is available, the defendant may be ordered to undergo such treatment. If the defendant is not in custody, the court may make the treatment a condition of the defendant's pre-trial release; if the defendant is in custody the court may order that the treatment be administered at that institution or that the defendant be transferred to another institution for treatment, or direct out-

patient treatment if the defendant meets other pretrial release criteria.

(ii) A defendant who is at liberty on pre-trial release should not be involuntarily hospitalized for treatment to restore competence to stand trial unless the court determines by clear and convincing evidence that:

(A) There is substantial probability that defendant's incompetence will respond to treatment and defendant will attain or maintain competence in the reasonably foreseeable future;

(B) Treatment appropriate for the defendant's competence is available in an institutional setting;

(C) No appropriate treatment alternative is available less restrictive than that requiring involuntary hospitalization.

(g) At the conclusion of the hearing the court should enter its written order which should contain the following:

(i) Written findings of fact relating separately and distinctly the issues of competence, treatment and involuntary confinement;

(ii) Copies of supporting medical information sufficient for a treating professional later to ascertain: the charge against the defendant; the problem resulting in incompetence; and, the mode of treatment to be provided;

(iii) The nature of the treatment ordered by the court, its initial duration, and the time at which reports will be required from the treating professionals.

(h) An order adjudicating the defendant incompetent to stand trial should be an appealable order.

Provisional Standard 7-3.7: Right to Treatment and Right to Refuse Treatment

A person determined to be incompetent to stand trial and detained or committed for treatment has a right to prompt and adequate treatment to attain or maintain competence and a right to have such treatment administered by competent and qualified professionals and in facilities which are sufficiently secure, adequately staffed and equipped.

(a) The treating facility should develop and file with the court, copies being made available to both parties, an individualized plan of treatment within fourteen days after entry of an order detaining or committing a defendant for treatment or directing

that a defendant report for treatment on an out-patient basis. Each treatment plan should contain the following:

(i) A statement of the specific causes of defendant's incompetence including, where appropriate, diagnosis of any physical or mental illness, description of any physical or mental disability, and reference to other factors causing the incompetence;

(ii) A statement of the planned treatment, whether medical, educational or social, appropriate to effect the defendant's competence;

(iii) A statement setting forth any restrictions which must be placed on the defendant and the reasons for imposing such restrictions;

(iv) A statement of the expected duration of treatment required to effect the defendant's competence.

(b) Whenever possible, persons being treated for incompetence to stand trial should be treated in facilities established for that purpose or in sections of general treatment facilities which are specifically set apart and designated for treatment of persons under criminal charges.

(i) A defendant may be detained in jail for treatment only if adequate treatment to restore competence is provided in that setting;

(ii) The treatment facility should keep separate those under treatment for incompetence to stand trial from civilly committed patients who are not under criminal charges.

(c) A person determined to be incompetent to stand trial and detained or committed for treatment or ordered to appear for out-patient treatment should have no right to refuse ordinary and reasonable treatment designed to effect the defendant's competence; provided, however, that such person should have the right to refuse any treatment which is particularly hazardous, experimental or irreversible, which has an unreasonable risk of serious side effects or may impair the defendant's ability to prepare a defense to the charge.

Provisional Standard 7-3.8: Periodic Redetermination of Incompetence

(a) The issue of defendant's continuing incompetence to stand trial should be periodically redetermined by the court without the necessity of motion by either party. The treating facility or person responsible for treatment should therefore be

required periodically to file with the court a report on the defendant's current status, with copies to the prosecutor and defense counsel, and with notice to the defendant. The report should be filed:

(i) at any time when the treating facility or person responsible for treatment believes that the defendant has attained competence to stand trial;

(ii) at any time the treating facility or person responsible for treatment believes that there is not a substantial probability that the defendant will attain competence within the foreseeable future; or,

(iii) at intervals not to exceed ninety days.

(b) The report should specifically address the following:

(i) those issues set forth in Standard 7-3.4 for the initial report to the court;

(ii) those issues relating to the defendant's continued progress toward attaining competence within the reasonably foreseeable future;

(iii) issues relating to medication being administered to the defendant and the necessity of such medication for the defendant's attainment or maintenance of competence.

(c) Either party should have the right to contest the report or any issues addressed in the report within such time as set forth in that jurisdiction, and the right to have a hearing on the issues contested.

(i) Prior to the hearing, upon motion of either party and good cause shown, the court may order that the defendant be examined by independent experts and a report submitted by each such expert.

(ii) At the conclusion of the hearing the court must find by the greater weight of the evidence that the defendant is competent or incompetent to stand trial. Each party should have the right to present evidence.

(d) If neither party contests the report within the time set, the court should then independently review the report and:

(i) If the court concurs in the report's conclusions the court should enter an order accepting the report and continuing the defendant's treatment or setting the case for trial, as appropriate;

(ii) If the court does not concur in the report's conclusions the judge may order an independent re-evaluation of the defendant or hold a hearing on the issues addressed in the report.

(e) Notwithstanding the availability of periodic redeterminations by the court, either party should, upon good cause to believe that a defendant has attained competence to stand trial, be able to initiate a redetermination of the defendant's competence.

(i) The prosecutor or the defense counsel, upon a showing of good cause, should be able to make a motion for re-evaluation of a defendant by independent experts or for re-hearing by the court of the issue of the defendant's continuing incompetence. Upon good cause shown the court should be empowered to order such re-evaluation or re-hearing at any time.

(ii) Defense counsel should be permitted to have the defendant re-evaluated at defense expense at any time, and the treating institution should be mandated to make the defendant available to the evaluating expert for re-examination. All treatment records should be available to the prosecutor or defense counsel at any time.

Provisional Standard 7-3.9: Defense Motions; Proceedings While Defendant Remains Incompetent

(a) The fact that the defendant has been determined to be incompetent to stand trial should not preclude further judicial action, defense motions or discovery proceedings which may fairly be conducted without the personal participation of the defendant.

(b) The court, without jury, should hold a hearing to determine whether the prosecutor has sufficient admissible evidence to establish a prima facie case against the defendant at any time after the defendant has been judicially determined to be permanently incompetent unless the prosecutor has dismissed the charges or upon motion by the defense, at any time after [eighteen] months from the date the defendant was first judged incompetent.

Provisional Standard 7-3.10: Disposition of Permanently Incompetent Defendants

(a) A defendant may be adjudged permanently incompetent to stand trial if the defendant has previously been adjudged incompetent, and there is no substantial probability that the defendant will become mentally competent to stand trial within the foreseeable future. The court should hold a hearing

to determine permanent incompetence to stand trial whenever the issue has been raised by the report of the treating professional, at the expiration of the maximum time of sentence for the crime charged or five years from the date of adjudication of incompetence to stand trial, whichever first occurs.

(b) If the court should at any time determine that the defendant is permanently incompetent, the defendant shall be released from any detention or commitment or treatment to effect competence. If the defendant meets the criteria for involuntary civil commitment, the court may order such commitment.

Provisional Standard 7-3.11: Trial of Defendants on Medication

(a) A defendant should not be considered incompetent to stand trial because defendant's present mental competence is dependent upon continuation of treatment which may include medication, nor should a defendant be prohibited from standing trial or entering a plea solely because that defendant is being administered medication under medical supervision for a mental or emotional illness.

(b) If the defendant proceeds to trial with the aid of medication which may affect demeanor, either party should have the right to introduce evidence regarding the medication and its effects and the jury instructed accordingly.

Provisional Standard 7-3.12: Credit for Time Served

A defendant who has been detained or committed for treatment to effect competence to stand trial should receive credit against any sentence ultimately imposed for the time of such pre-trial detention or commitment.

Provisional Standard 7-3.13: Competence to Plead Guilty

[A Provisional Standard dealing with the issue of competence to plead guilty was not on the Task Force's Phase I agenda. Nonetheless, the Task Force feels that this issue should be explored during Phase II. To assist in the development of this new Provisional Standard the Task Force has prepared a Supporting Memorandum which sets forth the issues to be resolved during Phase II.]

PART IV. Nonresponsibility for Crime

Provisional Standard 7-4.1: Defense of Mental Disability and Evidence of Mental Impairment

(a) A defendant may rely upon the defense of mental disability which may result in a finding that the defendant is not responsible under the criminal law.

A person is not responsible under the criminal law if at the time of the offense charged, that person, as a result of mental disability, lacked substantial capacity either to appreciate the wrongfulness of that conduct or to conform that conduct to the requirements of the law.

(b) A defendant may introduce evidence of mental impairment which may affect the defendant's responsibility under the criminal law.

Provisional Standard 7-4.2: Notice of Defense Based on Mental Condition

(a) If a defendant intends to rely upon a defense of mental disability which may result in a finding that the defendant is not responsible, the defendant should, within the time provided for the filing of pre-trial motions or at such later time as the court may direct, notify the prosecuting attorney in writing of such intention and file a copy of such notice with the clerk. If notice is not given in compliance with the requirements of this standard, the defense may not be raised unless the court, for cause shown, should allow late filing of notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(b) If the defendant intends to introduce expert testimony relating to mental impairment, the defendant should, within the time provided for the filing of pre-trial motions or at such later time as the court may direct, notify the prosecuting attorney in writing of such intention and file a copy of such notice with the clerk. The court may, for cause shown, allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate. If the defendant fails to give the required notice, the court may exclude the testimony of any expert witness offered by the defendant.

Provisional Standard 7-4.3: The Examination to Determine Mental Condition

(a) On request of Defense:

In the case of the defendant who is financially unable to obtain such services, the jurisdiction should make available sufficient funds to pay for an examination by an expert selected by the defendant to determine the defendant's mental condition as it relates to an issue in the case other than the issue of competency to stand trial. The defendant may request such funds in an *ex parte* motion to the court.

(b) On request of the Prosecution:

Upon the defendant's filing of notice as provided in Provisional Standard 7-4.2(a), the court may, on motion of the prosecuting attorney, order the defendant to be examined by an examiner designated in the order, for the purpose of determining the mental condition which is being put in issue by the defendant. Should the court find that the defendant has refused to comply with such order, the court may prohibit the defendant from introducing expert testimony on the issue at trial.

(c) The mental examination provided herein should be conducted outside the presence of counsel for prosecution or defense.

(d) The court should not on its own motion order a mental examination of the defendant to determine mental condition at the time of the offense nor should it allow this issue to be combined in any examination ordered to determine competency to stand trial, unless the defendant should so request.

(e) [A statement made by a person during the course of a required mental examination should not be admissible in evidence against that person in any criminal proceeding on any issue other than mental condition.]

Provisional Standard 7-4.4: Limitation on Expert Witness Testimony

Expert witnesses should not be permitted to offer opinions on the ultimate legal issues before the trier of fact.

Provisional Standard 7-4.5: Notice of Rebuttal Evidence

Upon notice that the defendant intends to rely upon a mental disability defense or to introduce

expert testimony relating to mental impairment, the prosecutor should timely disclose to defense counsel all materials and information within the prosecutor's possession or control which bears on the defendant's mental condition at issue, including but not limited to:

(a) Any reports or statements made by experts, including the results of mental examinations and tests;

(b) Any written or recorded statements and the substance of any oral statements made by the defendant bearing on the issue;

(c) Any information that tends to rebut the factual data upon which the experts called by the defendant are relying; this should include documents, names and addresses of witnesses and their relevant written or recorded statements and the substance of any oral statements;

(d) The names, addresses and statements of any experts whom the prosecutor intends to call for the purpose of discrediting the mental disability defense or evidence of mental impairment.

Provisional Standard 7-4.6: Evidence of Mental Condition Heard in a Unitary Trial

The defense of mental disability and all other evidence pertaining to defendant's responsibility should be heard in a single trial by a single jury.

Provisional Standard 7-4.7: Instruction to the Jury

Upon request of defense counsel, the court should give an instruction to the jury explaining the effect of a verdict of not guilty by reason of mental disability.

Provisional Standard 7-4.8: Burdens of Going Forward and of Persuasion

When some evidence is introduced at trial that the defendant, at the time of the offense charged, was subject to a mental disability which rendered the defendant not responsible for the offense charged, the prosecution has the burden of proving beyond a reasonable doubt that the defendant was not subject to such a disability at the time of the offense charged.

Provisional Standard 7-4.9: Forms of Verdict

When the defense of mental disability has been properly raised, the verdict returned should be in the form of either guilty, not guilty, or not guilty by reason of mental disability.

PART V. Civil Commitment of Prosecuted Persons**Provisional Standard 7-5.1: Commitment Hearing Following Insanity Acquittal**

(a) Criminal defendants found not guilty by reason of insanity are referred to within Part V as insanity acquittees or acquittees.

(b) Insanity acquittees may be involuntarily confined following acquittal only if their commitment is sought in subsequent proceedings which satisfy the requirements of due process of law. Therefore, statutes authorizing automatic long-term commitment following a verdict of not guilty by reason of insanity should be repealed.

(c) The state may seek the commitment of an insanity acquittee. If such a commitment is not sought, or if the commitment is sought but the court declines to order such commitment, the acquittee should be entitled to release.

Provisional Standard 7-5.2: Evaluation

(a) Upon issuance of a verdict of not guilty by reason of insanity, the criminal trial court, upon motion by the prosecution, should order an evaluation of the acquittee's current mental condition. The evaluation should not exceed [thirty] calendar days and is for the sole purpose of assisting the court in determining whether the acquittee should be committed.

(b) The court may order that the evaluation be conducted while the insanity acquittee is an out-patient, in a mental health or developmental disabilities facility, in a general hospital, or, when security considerations so dictate, in a correctional facility. In choosing the location of the evaluation, the court should be guided by the least restrictive alternative principle and by concern for public safety. The evaluation must be conducted by qualified mental health or mental retardation professionals.

(c) Insanity acquittees should have the same rights regarding treatment as do ordinary civil patients during evaluation for possible involuntary civil commitment.

(d) The evaluation should be completed and an evaluation report should be submitted to the court and to all parties within [thirty] calendar days of the issuance of the verdict. Upon submission of the evaluation report the prosecutor may move for a commitment hearing. If the prosecutor decides to seek commitment, a motion for a hearing must be filed within [five] days. That hearing must be held within [fifteen] days from the court's receipt of the evaluation report.

If the prosecutor does not file a timely motion seeking commitment, an acquittee in custody must be released.

Provisional Standard 7-5.3: Commitment Procedures: General and Special

(a) Each state should adopt one of the following systems for committing insanity acquittees:

(b) The state may seek the commitment of insanity acquittees whom it wants confined by exclusively employing the same procedures (general commitment) used for the civil commitment of persons outside the criminal justice system, provided that these general commitment procedures meet the requirements of due process of law.

(c) In the alternative, the state may adopt a separate set of special procedures for those insanity acquittees tried for felonies involving acts or threats of serious bodily harm. Under this alternative, general commitment would be the available procedure to be employed for committing insanity acquittees who had been tried for crimes not involving acts or threats of serious bodily harm.

Provisional Standard 7-5.4: Special Procedures: Commitment Criteria

(a) If the state adopts special commitment procedures for insanity acquittees who have been tried for felonies involving acts or threats of serious bodily harm, it should afford to every such acquittee the right to a commitment hearing which meets the requirements set forth in Provisional Standard 7-5.5.

(b) At the conclusion of the commitment hearing, the court may order the defendant to be committed if it finds by clear and convincing evidence that the defendant is currently:

- (i) mentally ill or mentally retarded; and
- (ii) that as a result of the insanity acquittee's mental illness or mental retardation, the acquittee is likely to inflict serious bodily harm on another person or persons in the near future.

(c) The court may not commit the acquittee unless it finds, beyond a reasonable doubt, that the acquittee committed the criminal act for which he or she was acquitted by reason of insanity.

(d) If the court concludes that the only reason the acquittee does not meet the standard for commitment set forth in paragraph (b) is the effect of current treatment, the acquittee may be committed unless the court is persuaded by a preponderance of the evidence that the acquittee will continue to receive such treatment following release for as long as the treatment is required.

(d) *ALTERNATIVE.* If the court concludes that the only reason the acquittee does not meet the standard for commitment set forth in paragraph (b) is the effect of treatment currently being received, the acquittee may be committed unless the court is persuaded by a preponderance of the evidence that the acquittee will continue to receive such treatment following release for as long as the treatment is required. If the court is persuaded that acquittee will continue to receive the needed treatment, it may order either that acquittee be released or, in the alternative, that acquittee be released upon condition that acquittee continue to receive the treatment. If acquittee does not continue to receive the treatment, the conditional release may be revoked pursuant to Standard 7-5.11.

Provisional Standard 7-5.5: Special Commitment Hearings

(a) If a state adopts a special commitment system for insanity acquittees it must provide the procedural protections described in this Provisional Standard.

(b) The acquittee should be represented by counsel at the commitment hearing and is entitled to assistance of counsel during this period. If the acquittee is without counsel, the court should appoint counsel. If the acquittee is financially

unable to afford counsel, the cost should be borne by the state. Representation by counsel cannot be waived.

(c) At the hearing, acquittee is entitled to confront and cross-examine adverse witnesses. Acquittee is also entitled to present witnesses, including an independent expert witness or expert witnesses. For financially unable acquittees the reasonable cost of expert witnesses should be borne by the state.

(d) At the hearing, the rules of evidence should apply, including the prohibition against hearsay testimony.

(e) The acquittee cannot be required to testify at the hearing.

(f) A complete record of the hearing should be made and preserved.

(g) The acquittee may demand a jury trial on the issue of commitment if respondents in general commitment cases have the right to a jury trial; otherwise the case should be heard by a judge without a jury.

(h) Acquittee should have the right to appeal on the record an adverse ruling on the issue of commitment. The appeal should be heard on an expedited basis.

Provisional Standard 7-5.6: Special Commitment: Conditions of Confinement

Persons committed pursuant to special commitment statutes should be confined under conditions consistent with the provisions of Chapter 23 of these Standards, and, consistent with institutional and community safety requirements, they should have the rights of persons committed under general commitment statutes.

Provisional Standard 7-5.7: Special Commitment: Maximum Duration

Pursuant to a special commitment statute an insanity acquittee may be confined, but in no event may the cumulative period of such confinement exceed the maximum term provided by law for the crime for which the acquittee was tried. Upon expiration of that maximum term the acquittee may be confined further only if then committed under the general commitment procedures.

Provisional Standard 7-5.8: Special Commitment: Duration of Orders and Review Procedures

A state enacting a special commitment statute for insanity acquittees should adopt one of the following alternatives:

(a) Prosecution-initiated Judicial Review:

When a court decides to commit an acquittee pursuant to Provisional Standard 7-5.4, it should order that the acquittee be committed for a period not to exceed [two] years and, in the order the court should set the maximum duration of confinement as defined in Provisional Standard 7-5.7.

The state may initiate proceedings to recommit the acquittee by petitioning the court at least [thirty] days prior to the expiration of an existing order of special commitment or recommitment.

A recommitment hearing must be held within [fifteen] days of filing the petition and that hearing should be conducted in accordance with the procedures set forth in Provisional Standard 7-5.5. The state should have the burden of proving, by clear and convincing evidence, that the acquittee continues to meet the criteria for special commitment as set forth in Provisional Standard 7-5.4(b) and (d). Overt acts by the acquittee tending to prove dangerousness should be evaluated pursuant to the requirements of Provisional Standard 7-5.4(c), and any overt acts committed by the acquittee prior to institutionalization may be considered to the extent that they continue to support a prediction of future dangerous behavior. Such previous overt acts should be evaluated by the trier of fact in light of the amount of time which has passed since their occurrence, and the possibility that acquittee's confinement may have prevented the commission of other overt acts indicative of possible dangerousness.

(b) Acquittee-initiated Judicial Review:

Only states which provide legal assistance regularly available to acquittees at the facilities where they are confined may elect this alternative.

When a court decides to commit an acquittee pursuant to Provisional Standard 7-5.4, it should order that the acquittee be committed for a period not to exceed the maximum term provided by law for the crime for which the acquittee was tried.

An acquittee may petition for a hearing to determine whether the acquittee continues to meet the criteria for special commitment as set forth in Provisional Standard 7-5.4(b) and (d), but this petition

may be filed only if an acquittee-initiated hearing has not been held within the preceding [two] year period.

Upon filing of such petition the court must convene a hearing within [thirty] days and that hearing should be conducted in accordance with the procedures set forth in Provisional Standard 7-5.5. The state should have the burden of proving, by clear and convincing evidence, that the acquittee continues to meet the criteria for special commitment as set forth in Provisional Standard 7-5.4(b) and (d). Overt acts by the acquittee tending to prove dangerousness should be evaluated pursuant to the requirements of Provisional Standard 7-5.4(c), and any overt acts committed by the acquittee prior to institutionalization may be considered to the extent that they continue to support a prediction of future dangerous behavior. Such previous overt acts should be evaluated by the trier of fact in light of the amount of time which has passed since their occurrence, and the possibility that acquittee's confinement may have prevented the commission of other overt acts indicative of possible dangerousness.

Provisional Standard 7-5.9: Special Commitment: Superintendent's Petition for Acquittee's Release

When the superintendent of the facility in which an acquittee is confined determines that substantial clinical evidence indicates that the acquittee no longer meets the special commitment criteria, the superintendent may petition the court for the acquittee's release.

The petition should set forth the clinical findings supporting the conclusion in favor of release and should contain a summary of all pertinent clinical data.

A hearing should be held no later than [fifteen] days after filing the petition and the acquittee should remain confined pending the hearing.

The superintendent should have access to counsel for preparation and presentation of the petition to the court under this Provisional Standard. Following the hearing the court should order the acquittee's release if it finds, by a preponderance of the evidence, that the acquittee no longer meets the criteria for special commitment.

Provisional Standard 7-5.10: Special Commitment: Notification of Release

When the release of an acquittee is imminent, the prosecutor should have the authority to notify law enforcement agencies and relevant individuals.

Provisional Standard 7-5.11: Special Commitment: Authorized Leave

(a) Authorized leave means a temporary absence from the facility without staff supervision. Authorized leave for acquittees may be permitted only by court order.

(b) When the superintendent concludes that an acquittee may be granted authorized leave without posing a danger to the community and that such leave would benefit the acquittee's treatment regimen, the superintendent should petition for a court order permitting authorized leave and setting its specific conditions.

The petition should include a summary of all pertinent clinical data. A copy of the petition should be served on the prosecutor who should have the right to respond to the petition.

The court should order authorized leave if it finds, by a preponderance of the evidence, that the petition for leave constitutes treatment consistent with the least drastic means principle and that it is consistent with community safety. The court may set any conditions it believes necessary for community safety.

(c) If an acquittee violates any condition of an authorized leave order, or if the leave is no longer appropriate to the acquittee's treatment regimen or is no longer consistent with public safety, the leave may be terminated by the superintendent or the court. An acquittee who believes that authorized leave has been wrongfully terminated by the superintendent may petition the court for its reinstatement. The court should reinstate authorized leave if it finds, by a preponderance of the evidence, that the acquittee complied with the conditions of that leave and that reinstatement would be consistent with treatment needs and with community safety.

Provisional Standard 7-5.12: Commitment of Defendants Incompetent to Stand Trial

(a) Defendants whose competence to stand trial is questioned may be committed for observation and

evaluation or for treatment designed to restore their competence as provided in Part III of this Provisional Chapter.

(b) Defendants found permanently incompetent to stand trial pursuant to Provisional Standard 7-3.10 may be committed only if general commitment procedures and standards are employed.

PART VI. Special Dispositional Statutes

Provisional Standard 7-6.1: Repeal of Psychopath Statutes

Statutes which provide for special sentencing and treatment of sexual psychopaths, psychopaths, or defective delinquents should be repealed.

Provisional Standard 7-6.2: Convicted Offenders Who are Severely Mentally Disabled: Definitions

(a) Definition of Severely Mentally Disabled Offender

A severely mentally disabled offender is one who has been convicted of a crime and is severely mentally ill. Severely mentally ill means a substantial disorder of thought, mood, perception, orientation or memory which grossly impairs judgment, behavior, or capacity to recognize reality or ability to meet the demands of life.

(b) Definition of Mental Health Facility
Mental health facility refers to a mental health hospital setting preferably under the jurisdiction of the state department of mental health.

(c) Definition of Mental Health Professional
Mental health professionals are those who meet the qualification and experience requirements set forth in the jurisdiction's mental health code for persons qualified to certify individuals for civil commitment.

Provisional Standard 7-6.3: Sentencing of Mentally Disabled Offenders

Convicted offenders who have special needs because of mental disability should be sentenced in the same way as other offenders. Those who are severely mentally disabled should be treated in to a mental health facility in accordance with Standards 7-6.4 and 7-6.5.

Mental health services in the prison setting should be available for offenders whose mental disability is not severe enough to necessitate commitment to a mental health facility.

Provisional Standard 7-6.4: Commitment of Severely Mentally Disabled Offenders

(a) Initiation of Proceedings

Commitment proceedings may be initiated by the offender or prosecutor prior to or during the sentencing hearing. The party who raises the issue must present evidence showing that the offender meets the criteria for commitment. Copies of previous mental health examinations of the offender should also be submitted.

(b) Notice

The offender must receive notice that commitment as a severely mentally disabled offender is sought if the prosecutor initiates the proceedings. The prosecutor should receive notice if the offender is the initiating party. The notice should be provided sufficiently in advance to allow full preparation for the hearing.

(c) Mental Health Examinations

Offenders may not be committed as severely mentally disabled offenders unless they have been examined by a mental health professional within the last [sixty] days. The judge may order a mental health examination of the offenders which may be conducted in the setting where the offender is located, or the defendant may be committed for observation and diagnosis. Such commitment period should not exceed [thirty] days, and the prisoner's sentence should be credited with time spent while confined for observation.

(d) Evaluation Reports

Reports of a mental health examination of the offender, for both the prosecution and defense, should address the question of whether the offender is severely mentally disabled. In addition to the diagnosis, the report should include the specific behavior or other indicators which led to the conclusion that the offender is or is not severely mentally disabled. At least one report from a mental health professional must indicate that the offender suffers a severe mental disability before he or she may be committed.

Provisional Standard 7-6.5: Commitment Hearing Procedures

(a) Procedural Protections

The commitment hearing should afford the offender the following rights:

- (i) notice as provided in provisional standard 7-6.4(b);
- (ii) the right to counsel;
- (iii) the right to be present at the hearing and to call and cross-examine witnesses;
- (iv) a judicial hearing officer;
- (v) a decision based upon the record;
- (vi) a written statement by the fact finder; and
- (vii) the right to be informed of the foregoing rights.

(b) Procedures when Neither Party Objects

If neither the prosecutor nor the offender objects to the offender being committed as a severely mentally disabled offender, a hearing is not required. The judge must still find based on at least one report from a mental health professional that the offender suffers from a severe mental disability.

(c) Burdens of Proof

If either the offender or the prosecutor objects to commitment, the other party must then show by clear and convincing evidence that the offender meets the criteria for commitment.

(d) Criteria for Commitment

At the commitment hearing the court must find that the offender is severely mentally disabled and that the criteria for civil commitment have been met.

Provisional Standard 7-6.6: Disposition of Offenders

(a) Sentence

The judge should impose the sentence for the criminal offense whether or not the offender is placed in accordance with paragraph (b) of this provisional standard.

(b) Placement

The severely mentally disabled offender should be treated in a mental health facility. While the principle of least restrictive alternative should apply in the placement of severely mentally disabled offenders, such disposition should also take into consideration the offense, the sentence, institutional security requirements and the offender's current mental condition.

Provisional Standard 7-6.7: Conditions of Confinement

Once committed, a severely mentally disabled offender should have the rights enumerated within Chapter 23 of these standards; however, they should not be permitted access to the community by mental health officials.

Provisional Standard 7-6.8: Periodic Review

Committed severely mentally disabled offenders should be subject to the same kind of periodic mental health and judicial review provided for involuntary civil committees.

Provisional Standard 7-6.9: Transfer to Correctional Facility

The offender who no longer meets the criteria of Provisional Standard 7-6.5(d) should be transferred to a correctional facility. The offender should receive written notice of this decision at least [48] hours prior to transfer. The notice should include the factual basis for the transfer decision and the standard for reviewing the decision would be whether it reflected a deliberate indifference to the prisoner's mental health.

Provisional Standard 7-6.10: Parole Considerations

A severely mentally disabled offender's eligibility for parole consideration and good time credits should not be affected by the fact that the offender is receiving mental health care.

Provisional Standard 7-6.11: Procedure When Sentence Expires

A committed severely mentally disabled offender must either be released or civilly committed when the sentence expires.

PART VII. Treatment of Mentally Disabled Prisoners

Provisional Standard 7-7.1: Definitions

(a) Definition of Severely Mentally Disabled Offender

A mentally disabled offender is an offender who:

- (i) has been convicted of a crime;
- (ii) has been sentenced to a correctional facility; and,
- (iii) is severely mentally disabled.

Severely mentally disabled means a substantial disorder of thought, mood, perception, orientation or memory which grossly impairs judgment, behavior, or capacity to recognize reality or ability to meet the demands of life.

(b) Definition of Mental Health Facility

Mental health facility as used in this Part refers to a mental health hospital setting, preferably under the jurisdiction of a State Department of Mental Health.

(c) Definition of Mental Health Professionals

Mental health professionals are those who have the qualifications and experience equivalent to personnel performing similar functions in the community.

Provisional Standard 7-7.2: Mental Health Care

(a) Correctional facilities should provide a range of mental health services and should have adequately trained personnel readily available to provide such services.

(b) Prisoners who require mental health care not available in the correctional institution should be transferred to a hospital pursuant to procedures set forth in the following standards.

Provisional Standard 7-7.3: Transfer to Mental Health Facilities

(a) If a prisoner desires treatment in a mental health facility and if the correctional institution believes such treatment is warranted, the prisoner may make an application for voluntary admission to a mental health facility. The application should be endorsed by the superintendent of the correctional institution and accompanied by the report of an examination conducted by a mental health professional. The prisoner will be admitted to the mental health facility if that facility accepts the application.

When the prisoner and/or the mental health facility believe(s) that treatment in the facility is no longer warranted, the prisoner should be returned

to the correctional facility. If the prisoner believes that care is no longer necessary but the facility disagrees, the hospital should notify the correctional facility which may then proceed pursuant to paragraph (c) of this provisional standard.

(b) If an application for voluntary admission submitted in accordance with the procedures set forth in paragraph (a) is rejected by the mental health facility and the correction officials believe that the applicant is a severely mentally disabled offender, they may initiate an application for a court order to transfer the prisoner to a mental health facility.

(c) Civil commitment.

If correction officials believe a prisoner is a severely mentally disabled offender who requires treatment in a mental health facility and the offender disagrees with such placement, civil commitment proceedings should be instituted.

Provisional Standard 7-7.4: Procedures for Court Ordered Transfer

The chief executive officer of a correctional facility or a designee may file a petition for court ordered transfer. Such petition should be accompanied by the prisoner's voluntary application and the report of a mental health examination.

Notice of the petition should be sent to the mental health facility when the petition is filed. The court should set the matter for a prompt hearing.

If the court finds, by clear and convincing evidence, that the prisoner is a severely mentally disabled offender and requires care not available in the correctional facility, it should order the prisoner transferred to the mental health facility.

Provisional Standard 7-7.5: Procedures for Civil Commitment

(a) The civil commitment hearing at a minimum should have the following procedural protections:

(i) right to legal counsel, furnished by the state, if the prisoner is financially unable to secure counsel;

(ii) a right to be present, to be heard in person and to produce documentary evidence;

(iii) a right to call and cross-examine witnesses; and

(iv) the right to be notified of the foregoing rights.

(b) Criteria for Transfer

At the hearing the judge may find by clear and convincing evidence that the offender is severely mentally disabled, meets the criteria for civil commitment, and cannot be given proper treatment in prison.

Provisional Standard 7-7.6: Emergency Transfer

When a bona fide emergency exists with respect to an offender who is suspected of being mentally disabled, an official of the prison may authorize immediate transfer to a mental health facility provided that a civil commitment hearing is initiated within [forty-eight] hours after the transfer.

An emergency exists when the chief executive officer or a designee of the correctional facility reasonably believes that an immediate transfer is necessary to prevent permanent and serious damage to the offender or to protect the safety of other persons.

Provisional Standard 7-7.7: Rights of Offenders Transferred to a Mental Health Facility

Once transferred, a severely mentally disabled offender should have the rights enumerated within Chapter 23 of these standards; however, they should not be permitted access to the community by mental health officials.

Provisional Standard 7-7.8: Eligibility for Parole and Good Time Credits

A mentally disabled offender's eligibility for parole consideration and good time credits should not be affected by the fact of treatment in a mental health facility.

Provisional Standard 7-7.9: Transfer to Correctional Facility

When the criteria for court-ordered transfer or civil commitment, whichever is applicable, no longer exists the prisoner should be transferred to a correctional facility. The offender, the correctional facility and the court should receive written notice of this decision at least [forty-eight] hours prior to the transfer. The notice should include the factual basis for the transfer decision. The court may hold a hearing to review whether the transfer decision reflects a deliberate indifference to the prisoner's mental health.

Provisional Standard 7-7.10: Civil Commitment at Expiration of Sentence

If an offender's sentence expires while the offender is in a mental health facility, the offender must either be released or civilly committed.

EXHIBIT C

8675

VOLUME 83

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA **FILED**

JUL 16 1982

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,)

Plaintiff,)

v.)

JOHN W. HINCKLEY, JR.,)

Defendant.)

Criminal Case No. 81-306

Afternoon Session

Washington, D.C.

Friday, June 18, 1982

The above-entitled action came on for jury charge before the Honorable BARRINGTON D. PARKER, United States District Court Judge, and a jury duly sworn and empaneled, in Courtroom No. 19, commencing at approximately 2:10 p.m.

APPEARANCES:

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OFFICIAL REPORTER, U.S. DISTRICT COURT
UNITED STATES COURTHOUSE
WASHINGTON, D.C. 20001

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the guilt of a defendant beyond all doubt or guilt of a defendant to a mathematical or to a scientific certainty. Its burden is simply to establish guilt beyond a reasonable doubt.

Now, perhaps this will assist you to better understand what the Court has in mind by reasonable doubt.

If after an impartial comparison and consideration of all of the evidence you can candidly say that you have such a doubt as would cause you to hesitate to act in matters of importance to you yourself, then you have a reasonable doubt. But if after such an impartial comparison and consideration of all of the evidence and giving due consideration to the presumption of innocence which attaches to the defendant, you can truthfully say that you have an abiding conviction of the defendant's guilt such as would not cause you to hesitate to act upon in the more weighty and more serious and important matters relating to your personal affairs, then you do not have a reasonable doubt.

Now the concept of reasonable doubt, which I have just alluded to, which I have just instructed you on, not only refers and applies to the substantive counts of the indictment, but also apply to the issue of criminal responsibility which I will develop later on.

As to the word "intent," intent means that a person had the intent to do a thing. That he acted with the will to do the thing. It means that he acted consciously or voluntarily and not inadvertently or accidentally.

Some criminal offenses require only a general intent, where this is so and it is shown that a person has knowingly committed an act which the law makes a crime, intent may be inferred from the doing of the act, but here as far as this particular count is concerned, we are not concerned with general intent but rather with specific intent.

The intent which is an essential element of the offense to kill the President of the United States is the intent not merely to do the acts which constitute the offense, but the specific intent to cause death.

An attempt is an act done with the specific intent to commit the particular crime charged and is reasonably adapted to the accomplishment of that end. Specific intent requires more than a mere general intent to engage in certain conduct to do certain acts.

The person who knowingly does an act which the law forbids intending with bad purpose either to disobey or disregard the law may be found to act with specific intent.

You may infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly committed.

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If a person uses upon another an instrument or weapon of such nature and in such a way and under such circumstances that such use would naturally and probably result in the death of the other, you may infer that he did so with the specific intent to kill.

However, you are not required to do so and you should consider all of the circumstances and evidence that you deem relevant in determining whether the Government has proved beyond a reasonable doubt that the defendant acted with the required intent to kill.

It is not necessary nor is it required that at the time of the offense the defendant Hinckley actually knew that Ronald Reagan was the President of the United States.

The offense charged in Count One of the indictment applies to all of the acts of the President whether they are of professional, personal, public or private nature.

The second count of the indictment involves the District of Columbia Code offense and charges the defendant with assaulting Ronald Reagan with the intent to kill while armed with a dangerous weapon, a pistol.

The count reads in part that on March 30 of last year, the defendant while armed with a pistol, assaulted Ronald Reagan with the intent to kill Ronald Reagan. The essential elements of this offense, each of which the Government must prove beyond a reasonable doubt, are first

You are instructed again as a matter of law that a pistol is a firearm as provided under the Code section of this count.

The defendant is considered to have used a firearm if its presence in his possession has in any manner facilitated the carrying out of the felony of attempting to kill the President.

Now each of the 13 counts of the indictment charge a separate offense which you are to consider, and each of the 13 counts and offenses and the evidence which applies to it should be considered separately and you should return a separate verdict on each count.

The fact that you may find the defendant "guilty" or "not guilty" on any one of the counts should not control or influence your verdict with respect to any other count or counts of the indictment.

Now, in connection with the counts of the indictment alleging the offense of assault with intent to kill while armed upon the victims James Brady, Timothy McCarthy and Thomas Delahanty, you are instructed that a principle of law applies known as "transferred intent."

Under the principle of "transferred intent," if a person assaults another with the intent to kill him and during the course of assault injures bystanders or third parties, he is deemed to have assaulted those persons with

the intent to kill them.

If injury to the person of another is unintentionally done by one who is intentionally committing an unlawful act, he is not excused on the ground of accident.

The intent to kill the intended victim is transferred to the wounding of the bystanders or third parties. In that same context or in another context if a person unlawfully discharges a firearm and the bullet accidentally strikes a third-person bystander, the person discharging the firearm may be found guilty of assault even if he had no intention of hitting the bystander. In other words, he is not excused because it was an accident.

Thus, if you find beyond a reasonable doubt that the defendant intended to kill or assault President Reagan on March 30, '81, that intent would be transferred to the wounding and the assaulting of James Brady, Timothy McCarthy and Thomas Delahanty.

THE COURT: Now, ladies and gentlemen, what I've done so far is to give you the special instructions of law -- well, give you the general instruction of law and the special instructions as they apply to the 13-count indictment.

And now I will turn to the instruction of law as it applies to the defense presented on behalf of counsel for Mr. Hinckley.

And again I'll permit you to stand and perhaps relax just for a second.

(Jury stands.)

THE COURT: An issue is presented in this case concerning the mental condition of the defendant on March 30, 1981, the date of the several offenses alleged in the 13-count indictment.

Now, in addition to proving beyond a reasonable doubt the elements of the 13 offenses charged in the indictment, the prosecution also has a burden of proving the defendant's criminal responsibility beyond a reasonable doubt.

If you find that the Government has failed to prove beyond a reasonable doubt any one or more of the essential elements of the offense, you must find the defendant not guilty and you should not consider any possible verdict relating to the question of criminal responsibility or insanity.

If you find the Government has proved each essential element of the offense beyond a reasonable doubt, then you must consider whether to bring in a verdict of not guilty by reason of insanity.

And that leads me to instruct you as follows:

That, with respect to each count, each of the 13 counts, of the indictment, there are three possible verdicts: guilty, not guilty, not guilty by reason of insanity.

And in that connection, the Court will afford you a jury verdict form which will indicate the act, the charge in the indictment, explain it in a summary fashion what it is, and to the right will give you the possible verdicts which I've just indicated: guilty, not guilty, or not guilty by reason of insanity.

The law provides that a jury shall bring in a verdict of not guilty by reason of insanity if at the time of the criminal conduct the defendant, as a result of mental disease or defect, either lacked substantial capacity to conform his conduct to the requirements of the law or lacked substantial capacity to appreciate the wrongfulness of his conduct.

Every man is presumed to be sane. That is, to be without mental disease or defect, and to be responsible for his acts.

But that presumption no longer controls when

evidence is introduced that he may have a mental disease or defect.

The term "insanity" does not require a showing that the defendant was disoriented at the time or place.

"Mental disease or defect" includes any abnormal condition of the mind, regardless of its medical label, which substantially affects mental or emotional processes and substantially impairs his behavior controls.

The term "behavior controls" refers to the processes and capacity of a person to regulate and control his conduct and his actions.

In considering whether the defendant had a mental disease or defect at the time of the unlawful acts with which he is charged, you may consider testimony in this case concerning the development, adaptation, and functioning of these mental and emotional processes and behavior controls.

The term "mental disease" differs from "mental defect" in that the former is a condition which is either capable of improving or deteriorating, while the latter is a condition not capable of improving or deteriorating.

The burden is on the Government to prove beyond a reasonable doubt either that the defendant was not suffering from a mental disease or defect on March 30, 1981, or else that he nevertheless had substantial capacity on that date both to conform his conduct to the requirements of the law

and to appreciate the wrongfulness of his conduct.

If the Government has not established this to your satisfaction, beyond a reasonable doubt, then you shall bring a verdict of not guilty by reason of insanity.

In considering the issue of insanity, you may consider the evidence that has been admitted as to the defendant's mental condition before and after the several offenses charged, as well as the evidence as to the mental condition on that date, namely, March 30, 1981.

The evidence as to the defendant's mental condition before and after that date was admitted solely for the purpose of assisting you to determine the defendant's condition on the date of the alleged offense, March 30, 1981.

You have heard the evidence of psychiatrists and a psychologist who testified as an expert witness.

An expert in a particular field, as I indicated, is permitted to give his opinion in evidence, and in this connection you are instructed that you are not bound by medical labels, definitions or conclusions as to what is or is not a mental disease or defect.

What psychiatrists and psychologists may or may not 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 purposes of determining criminal responsibility.

Whether the defendant had a mental disease or defect must be determined by you under the explanation of those terms as it was given to you by the Court.

There was also testimony of lay witnesses with respect to their observations of the defendant's appearance, behavior, speech and actions. Such persons are permitted to testify as to their own observations and other facts known to them and may express an opinion based upon those observations and facts known to them.

In weighing the testimony of such lay witnesses you may consider the circumstances of each witness, his opportunity to observe the defendant and to know the facts to which he has testified, his willingness and capacity to

expound freely as to his observations and knowledge, the basis for his opinion and conclusions and the nearness or remoteness of his observations of the defendant in point of time to the commission of the offenses charged.

You may also consider whether the witness observed extraordinary or bizarre acts performed by the defendant or whether the witness observed the defendant's conduct to be free of such extraordinary or bizarre acts.

In evaluating such testimony you should take into account the extent of the witness' observations of the defendant and the nature and length of time of the witness' contact with the defendant.

You should bear in mind that an untrained person may not be readily able to detect mental disease or defect and that the failure of a lay witness to observe abnormal acts by the defendant may be significant only if the witness had prolonged and intimate contact with the defendant.

You are not bound by the opinions of either expert or lay witnesses and you should not arbitrarily or capriciously reject the testimony of any witness, but you should consider the testimony of each witness in connection with the other evidence in the case and give it such weight as you believe it is entitled to receive.

You may also consider that every man is presumed

to be sane, that is, to be without mental disease or defect and to be responsible for his acts. You should consider this principle in light of all of the evidence in the case and give it such weight as you believe it is fairly entitled to receive.

You should consider the evidence with respect to the insanity or responsibility issue separately as to each offense with which the defendant is charged.

If you find with reference to any offense that at the time of the criminal conduct with which the defendant is charged as a result of a mental disease or defect he either lacked substantial capacity to conform his conduct to the requirements of the law or lacked substantial capacity to appreciate the wrongfulness of his conduct, you must find the defendant "not guilty" of such offense "by reason of insanity."

In any event, this does not change the responsibility and burden placed upon the Government, namely, that it must prove beyond a reasonable doubt that the defendant was criminally responsible for his acts committed, allegedly committed on March 30, 1981.

If the defendant is found "not guilty by reason of insanity," it becomes the duty of the Court to commit him to St. Elizabeth's Hospital. There will be a hearing within 50 days to determine whether the defendant is entitled

to be released.

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 a mental disease.

Now that, ladies and gentlemen, concludes both the general and the specific instructions of law as they apply to this case, as they apply to the substantive offenses and also as they apply to the defense raised by counsel for Mr. Hinckley.

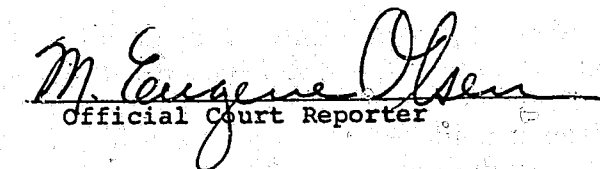
Now several other instructions and comments are required.

CERTIFICATE OF REPORTER

I, M. Eugene Olsen, C. S. R., an Official Court Reporter for the United States District Court for the District of Columbia, do hereby certify that I reported, by machine shorthand, in my official capacity, the proceedings had and the testimony adduced, in the case of United States of America v. John W. Hinckley, Jr., Criminal Case No. 81-306, in said Court, on the 18th day of June, 1982.

I further certify that the foregoing 169 pages constitute the official transcript of said proceedings as taken from my machine shorthand notes.

In Witness Whereof, I have hereunto subscribed my name, this the 18th day of June, 1982.


Official Court Reporter

[The committee recessed at 11:42 a.m. and reconvened at 11:55 a.m.]

Senator SPECTER. We will now resume the hearing. I regret the interruption, but when the bells ring and a vote is called, that is our obligation and requires the interruption.

I would like now to call on the attorney general of Indiana, Hon. Linley E. Pearson, representing the National Association of Attorneys General; the Hon. William J. Mertens, Chief of the Appellate Division, Public Defender Service for the District of Columbia, representing the National Legal Aid and Defender Association; and Hon. John Maynard, assistant attorney general from the State of Montana.

I think we had better proceed with you gentlemen in tandem, because there may be more votes, although I do not know of any specifically, but we are going to have to conclude before the luncheon break.

We very much appreciate your presence, gentlemen. We appreciate your having submitted the statements in advance, and they will be made a part of the record in full. And in accordance with our practice, which has already been referred to, of requesting that you summarize, leaving the maximum amount of time for questions and answers, we would appreciate it if you would follow that procedure.

We welcome you here, Attorney General Pearson, and we look forward to your testimony.

STATEMENT OF LINLEY E. PEARSON, ATTORNEY GENERAL OF INDIANA, REPRESENTING THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

Mr. PEARSON. Thank you, Senator Specter. Senator Specter, all I would like to do is to reiterate that the National Association of Attorneys General met at Mackinaw Island in Michigan, and at that time considered the various different possibilities as far as the insanity defense, whether that defense should be changed in any way. And it was suggested, and voted upon by those present, representing the association, that it should be changed.

And the change that was called for was the change that was similar to the law in the State of Indiana, that there would be a verdict of guilty but mentally ill, and, further, that there would be the burden of proof on proving insanity as an affirmative defense upon the defendant in a criminal case.

And this was the vote of by, I would say, 2 to 1 rejecting the total abolition of the insanity defense as it is the case in Idaho and Montana.

Senator SPECTER. How many members were present during that attorneys general meeting?

Mr. PEARSON. I counted approximately 25 or 26 attorneys general, which is about half.

Senator SPECTER. And you would put the burden of proof on the defendant to prove insanity?

Mr. PEARSON. The burden of proof, I think that is the most important thing; I think we realize that the most important thing is

putting the burden of proof on the defendant, even more so than the guilty but mentally ill, even though we think that is important.

Senator SPECTER. And the standard would be proof by a preponderance of the evidence?

Mr. PEARSON. Yes, it can be; that is what was voted upon. It can be greater than that, of course, by some of the case law.

Senator SPECTER. What would your preference be, proof beyond a reasonable doubt, clear and convincing evidence, or preponderance of the evidence?

Mr. PEARSON. Of the 23 States that have the burden of proof on the defendant, 90 percent I believe use preponderance of evidence.

Senator SPECTER. And what do the others use?

Mr. PEARSON. I don't know the total standard of some of the other States, but I do know that it has been held that it could even be beyond a reasonable doubt.

Senator SPECTER. Have you seen a survey which says that 23 of the States place the burden of proof on the defendant?

Mr. PEARSON. I have not seen that survey; I have seen our [inaudible], which are 23 States.

Senator SPECTER. And all the other 27 place it on the—

Mr. PEARSON. The 27, the burden of proof of proving insanity is upon the prosecution.

Senator SPECTER. What do you think of the criticism which has been levied on the verdict of guilty but mentally ill, that it is in effect a cop-out and an unrealistic, unreasonable compromise?

Mr. PEARSON. I don't think it's a cop-out; I think the key is understanding the difference in the definition, and I think there has been a—the understanding of the definition that fits best, guilty but mentally ill, with the psychiatric testimony, because it understands the shades of gray, it doesn't take everything as black and white. And if you use the Indiana definition, which is similar to Michigan's—we use the ALI modified test as far as insanity—it gives the various shades of gray, and it also then realizes that the juries can find somebody legally responsible but at the same time may be mentally ill. One-fourth of 1 percent of the people in the State of Indiana are still found to be not responsible by reason of insanity. We do not have the verdict of not guilty but not responsible, because there is—the person is guilty, they are simply found to be not responsible under the law.

But approximately 4 percent of those people in the State of Indiana go to institutions, go under guilty but mentally ill.

Senator SPECTER. Do you have any statistics on how many are found not guilty by reason of insanity as opposed to guilty but mentally ill?

Mr. PEARSON. Well, what I am indicating is that of the total people that are committed, I do not have how many people actually go in and interpose that plea, and the reason I don't is because in our system there are 92 prosecutors out throughout the State, it's handled on a local basis, and there are not statistics there that go in that show how many people use the defense.

Senator SPECTER. Ninety-two counties in Indiana?

Mr. PEARSON. Ninety-two different counties. But what I do know is that in those cases where a person is committed on a civil commitment, on a not responsible by reason of insanity, these people

are very seriously dangers to society or they wouldn't be committed civilly, and that is a very small percentage—as I say, one-fourth of 1 percent.

Senator SPECTER. I notice that you were the prosecuting attorney at Clinton County before you became attorney general. Which city?

Mr. PEARSON. Well, it's the city of Frankfort between Lafayette and Kokomo; it's only approximately—the county itself is only about 35,000. It's not a big county. But I have, of course, tried cases with insanity.

Senator SPECTER. Senator Dole was the county attorney for a county that only had 10,000. He and I are from Russell, Kans., so yours is a big county, by comparison. I don't know that Russell has had an insanity defense in modern times.

What was your experience when you prosecuted a case and had an insanity defense under the provisions you refer to, under Indiana law?

Mr. PEARSON. Indiana law was changed in 1979 and 1980, and I was prosecuting—I have been an AG now for approximately a year and a half. But I tried them under the old law, most of the cases under the old law. And during that period of time I found that most of the people that testified that were psychiatrists had either really not any more ability than the jury to determine whether a person was responsible or not for a crime; in fact, you had such a divergence of testimony that really it wasn't worth anything, and most of the time the juries disregarded it. And I think that happens most of the time.

What we did have, though, occasion to is have in Gary, Ind.—Lyman Bostock, who is a baseball player, killed, and who was then found not responsible by reason of insanity, only spent about a year in a mental institution thereafter. That was one tried that we had in the State of Indiana. And another was [inaudible] Tony Carezzis [phonetic] who was on national TV for 3 or 4 days by holding a wire around the neck of a mortgage executive in Indianapolis who was found not guilty by reason of insanity. And that caused a great outcry; it's not just simply from the standpoint that that only happens in just a few cases, but they are such serious cases the public sees them, they watch them on TV, then they feel that the criminal justice system in the United States is not performing its job. And I think that is what we are all here about and what we are talking about, and I think that is why it is important to consider changes.

Senator SPECTER. How long did people customarily serve when found guilty but mentally ill?

Mr. PEARSON. Guilty but mentally ill is very similar to the State of Michigan in the fact that a person is held to be still responsible, so therefore, they serve the same time as anybody else would who would have been found guilty of that crime.

Senator SPECTER. You don't think that the sentencing judge would customarily discount it because of a finding of—

Mr. PEARSON. Well, there are discounts in terms of aggravating and mitigating circumstances under sentencing law in the State of Indiana, but that still is given in the State a determinate sentence, because they thought that was better than an indeterminate sentence. But within Indiana a person does go to the Department of

Corrections; there is the requirement of a psychiatric examination there, and that person can either go to a mental facility within the penal institution, to a penal institution, or to a mental institution.

Senator SPECTER. How long do people customarily serve or stay in custody in Indiana when found not guilty by reason of insanity?

Mr. PEARSON. They would serve the same time normally as they have to under the law. They serve the same time as somebody that would have been found guilty—did you say guilty but—

Senator SPECTER. No; I said not guilty by reason of insanity.

Mr. PEARSON. I'm sorry. Well, I do not know the exact amount of time, except in the few cases that it has been shown that it has been approximately 1 year. I can't give you what the statistics show in the State of Indiana. Tony Carezzis is still serving in a penal institution, because he still refuses to take examinations in the State of Indiana. But I think he would have been out on the street a long time ago if he had taken those examinations.

Senator SPECTER. Do you think he is fit for release?

Mr. PEARSON. Oh, no, not at all.

Senator SPECTER. Then why do you think he would have been released?

Mr. PEARSON. Well, I think if he could have shown the fact that he would have been—you know, different testimony, and he had acted reasonable instead of the way that people would consider still that he had a mental condition and impress upon the psychiatrist that way, that he would have been released, because he had been released before, even though he had had some mental problems.

Senator SPECTER. Mr. Pearson, what is your reaction to a modification of the ALI standard in the way we have discussed earlier, to add the word "severe" before "mental disease," and substitute for "substantial capacity," "lacks entirely the capacity, et cetera"?

Mr. PEARSON. Well, understanding the fact in Indiana we still have the modified ALI rule, and it has worked successfully as well as it has in other States, that there could be modifications and changes as far as what type of mental state—or what type of insanity defense is offered. For example, the way the State of Wisconsin allows you to use—any defendant to choose whatever insanity defense he wishes to use, the *M'Naghten*, irresistible impulse, ALI modified, or anything else.

But no matter what that is, I think you are always going to see that that is not the major test, and what has worked best has been ALI in most of these States. I think—by history, I mean, what's happened developed by history, even California rejected *M'Naghten*, they have rejected in Wisconsin the diminished capacity defense, and most of the time now the current state of the law is, of course, cognition and volition parts of it. Indiana, by adopting in 1969 the modified ALI test rejected what was then *M'Naghten* and irresistible impulse combined; I don't think that that was bad at all, but what they did was then establish a little bit less than total incapacity. It's a gray area, and they recognize this, and this gives the leeway there that is necessary in this type of defense of guilty but mentally ill, because you are talking about a standard where the jury then determines that responsibility, just where that shade of gray is rather than psychiatric testimony.

Senator SPECTER. Do you think it would be useful to tighten up the ALI standard in the two respects that I just mentioned?

Mr. PEARSON. I think it would be difficult, from knowing the meaning of the standard, to do that. You could do that—can't suggest what is always the best, but, at the same time, as far as Indiana and guilty but mentally ill together, I think the two apply best, the ALI modified, because substantial capacity doesn't mean total capacity, in other words, the "wild beast" idea, the total incapacity—and it gives variations, the shades of gray, and as you go down the line toward guilty but mentally ill.

Senator SPECTER. Thank you very much, Attorney General Pearson.

[The prepared statement of Mr. Pearson follows:]

PREPARED STATEMENT OF LINLEY E. PEARSON

INSANITY DEFENSE

The National Association of Attorneys General has passed a resolution calling for a change in federal criminal law. The Association suggests that federal law relating to the insanity defense be modified along the lines of the law currently in effect in Indiana.

Indiana has made two significant changes in the law. First, Indiana has placed on the defendant the burden of proving his insanity; and second, Indiana allows a jury to find the defendant "Guilty but Mentally Ill."

The Indiana approach is a reasonable alternative to totally abolishing the defense of insanity.

The abolition of the insanity defense as an affirmative defense still will not eliminate the right of an accused in a criminal trial to call witnesses and produce evidence on his own behalf as to the question of his specific intent to commit the crime.

The defendant will still have the right to establish that he or she lacks the necessary mens rea to commit the crime. Therefore, this evidence of psychiatric testimony will still be placed before the jury.

Neither Idaho, Montana nor Hawaii have eliminated this testimony by the abolition of the plea of insanity. Psychiatric testimony still comes in under a defendant's right of due process of law on the question of intent present in every trial.

Worse yet, these states may not save themselves time in trying a case but end up with what happened in the state of California when they tried to bifurcate the insanity trial the way Idaho, Montana, and Hawaii now have done. Our legislative testimony indicated that when the state of California attempted to separate the phase of guilt from the phase of mental testimony at the time of sentencing; in fact, they found that there were numerous times that psychiatric testimony was heard both during the case and then again at sentencing. This testimony from California caused the Indiana legislature not to establish the bifurcated trial which actually lengthened the case since psychiatric testimony was not only allowed but now required at the time of sentence.

Criminal court juries in Indiana now have a fourth option which allows the criminal system to retain jurisdiction over individuals who commit crimes but who may be classified as mentally ill. These people in Indiana can serve the same sentence as anyone else who is convicted. They will serve that sentence either in a mental institution, a penal institution, or a mental facility within a penal institution. An

examination is required of all people who plead or who are found guilty but mentally ill, based on this examination at the diagnostic center they are placed in the appropriate facility.

If a person is placed in a mental facility within the Department of Mental Health, upon recovering the sentence is served within the Department of Corrections.

It would be my recommendation to this Committee that an independent review of the type of commitment and progress of the individual be given at least yearly by way of a judicial review by a federal magistrate based upon Bureau of Prison reports but without a testimonial hearing.

Although this is not required in Indiana, it would be preferable.

One problem with the Montana system is judges have the power to release a person without making the individual serve the term of sentence the legislature deemed appropriate. This does not happen with the verdict of guilty but mentally ill.

The final and most important recommendation of the National Association of Attorneys General is the shift of the burden of proof, both of production and persuasion, upon the defendant who raises the insanity defense. Some 23 other states also now place the burden of proof upon the defendant when insanity is used as an affirmative defense.

When insanity is in issue, generally the trial becomes a battle of so called experts with conflicting opinions as to whether the defendant was insane. When the burden of proof is upon the prosecution to prove the defendant sane beyond a reasonable doubt, juries often find reasonable doubt because of the conflicting expert evidence and because the government had the burden of proof. The government may fail in that burden and guilty defendants often "walk". By placing the burden of proof upon the defendant, the defendant must persuade the jury that he was insane as opposed to merely establishing some "doubt" as to whether he is sane or not. This is consistent with the presumption of sanity. This also eliminates the "dual role playing" of the government attorneys where the defense is successful. At the trial, prosecutors contend that the defendant is sane where after the trial those same prosecutors must then contend that the defendant is insane and dangerous and should be civilly committed to a mental institution.

In summary, both the verdict of guilty but mentally ill and the shift in the burden of proof of insanity to the defense will improve our criminal justice system.

ENCLOSURE.

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL
ANNUAL MEETING
July 15 - 18, 1982
Mackinac Island, Michigan

RESOLUTION

FEDERAL INSANITY DEFENSE

WHEREAS, the Congress of these United States is reviewing the legal insanity defense; and

WHEREAS, various legislative proposals have been introduced into each house that would amend Title 18 of the United States Code to create a new verdict for one who is guilty but mentally ill; and

WHEREAS, the burden of proving mental illness and the insanity defense, where asserted, should be on the defense;

NOW, THEREFORE, BE IT RESOLVED that the National Association of Attorneys General urges the United States Congress to approve legislation that would:

1. Require in federal cases that the burden of proof in mental illness and insanity plea cases shall be placed on the defendant asserting such defense; and
2. Establish an additional plea and verdict of guilty but mentally ill in which a guilty verdict would be followed by a sentence that could require treatment and/or incarceration; and

BE IT FURTHER RESOLVED that the General Counsel of the Association is authorized to transmit these views to the Congress, the Administration, and other interested individuals.

Attorney General J. D. MacFarlane of Colorado, Attorney General Steven F. Freudenthal of Wyoming, Attorney General David L. Wilkinson of Utah, and Attorney General David H. Leroy of Idaho dissent.

Senator SPECTER. I would like now to turn to the Chief of the Appellate Division, the Public Defender Service of the District of Columbia, William J. Mertens, who is representing the National Legal Aid and Defender Association.

STATEMENT OF WILLIAM J. MERTENS, CHIEF OF APPELLATE DIVISION, PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA, REPRESENTING THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION

Mr. MERTENS. Thank you, Senator Specter, and I appreciate this opportunity to speak.

Senator SPECTER. Your entire statement, Mr. Mertens, will be made a part of the record.

Mr. MERTENS. Yes, sir. And so I think I can be brief in what I say, and I am more than happy to answer questions. In that statement I primarily focus on the facts that I have sketched out on two or three of the cases that my office has had experience with where an insanity defense was raised in the District of Columbia, where, in the local courts, essentially the ALI standard does prevail, because I think it is an interesting question to ask and, to my mind, may be one of the most useful questions to ask: How will individual cases be decided differently under the ALI standard as opposed to the different standards that are under consideration by this committee?

One of the individuals who was mentioned in that statement is a client in my office that I have just spoken about as Mr. A, and essentially he shot and killed an individual in an alley off 14th Street, Northwest, here in Washington. He was sitting in a car with his wife and he shot an individual who was standing about 50 to 75 feet away. This individual was essentially a harmless alcoholic who would frequent the area and, so far as anyone could determine, had never posed a danger to anyone. Nonetheless, Mr. A was suffering from a very severe mental illness—it was called later “paranoid schizophrenia”—and he became convinced that this individual was a paid assassin in the hire of powerful drug organizations that Mr. A believed were out to get him. Mr. A’s belief was that these drug organizations were trying to retaliate against him because of his refusal to cooperate in a scheme that would require him, as a mechanic and a welder—and he was a skilled mechanic and welder—to assist in the duplication of tropical environments in warehouses throughout the city of Washington to grow narcotic plants. Because of these delusions, the individual, Mr. A, believed that the individual was preparing to attack him and his wife with a razor, and so Mr. A shot him.

Mr. A was found not guilty by reason of insanity, and he was so found by stipulation. He was examined at St. Elizabeths Hospital, and the unanimous opinion of the hospital doctors who saw him was that, under the ALI standard, he was not responsible for his conduct, and the U.S. attorney’s office here agreed with that disposition; it was not a contested trial. It was entered into, the verdict was, essentially by the Government’s consent.

It is quite a bit less clear to me, though, that—

Senator SPECTER. How long do you think he will stay in confinement?

Mr. MERTENS. Well, I can mention this—Mr. A, whose case I think was very exceptional, spent a number of years, I don’t remember the precise, at St. Elizabeths Hospital.

Senator SPECTER. How long ago did that killing occur?

Mr. MERTENS. The killing took place about 1972.

Senator SPECTER. Is he still in custody?

Mr. MERTENS. He is still in custody on an outpatient basis. Again, I would say this is essentially without the protestations of the prosecution in this given case. He is now about 60 years old, and, under the supervision of the hospital, he has been productively employed in the community, and the psychosis that caused him to commit this terrible, awful act is now very well under control, according to the unanimous agreement of doctors who have seen him. He is in that respect, though, I would stress, an exceptional case. My office is also representing individuals who have been committed to the hospital for 25 or 30 years, and who have so far been unable to obtain release.

He has, while under supervision in the community, I would also mention, committed absolutely no antisocial acts of which anyone is aware.

Senator SPECTER. How long has he been out on an outpatient basis?

Mr. MERTENS. I’m trying to remember the exact date, and I simply don’t recall, Senator. The process by which St. Elizabeths Hospital—

Senator SPECTER. About how long, a year or two?

Mr. MERTENS. I would guess in some form or another for about 2 years; he has been—

Senator SPECTER. When you say “outpatient,” does he sleep at home?

Mr. MERTENS. Yes, he does at this point; he has not done that—

Senator SPECTER. He goes back to the hospital for treatment?

Mr. MERTENS. Yes, he does. And the way St. Elizabeths works, the process of releasing people to the community—and I would stress that under District of Columbia law, all of this is with the judge’s approval, the judge must, on his election to do so, approve any plan, and the prosecution, under District law, can insist on a hearing before a judge before a patient receives even a minimal outpatient release into the community under very strict limits. If an individual is to go out into the community on one day for a job interview and return to the community 3 hours later, a judge must approve that under District law.

His case is exceptional in terms of, I would say, the success of the treatment that he has received while at the hospital. A large part of this, I believe, is because of medications which were developed fairly recently that are able to treat his disease better than some other diseases can be treated.

My own view of it is that Mr. A’s verdict of not guilty by reason of insanity is a manifestly just verdict, because I believe that his condition made him so different from the run of humanity, from the rest of us who live in the community, to mark him as someone

who truly was not responsible for his conduct, and someone who therefore should not be deemed guilty of his criminal offense, and someone who should not be punished for his criminal offense.

I believe that if there were to be an insanity defense that was limited solely to the presence of the mental elements, Mr. A very, very likely would have to be found guilty, because he understood at the time he committed his act that he was shooting a human.

Senator SPECTER. You are saying if the *M'Naghten* rule were applied, he would have been convicted?

Mr. MERTENS. No, sir, I believe he would have been acquitted under the *M'Naghten* rule.

Senator SPECTER. Under what rule would he have been convicted?

Mr. MERTENS. I believe that he would have been convicted under a rule that asked the question, and the only question, of whether the mental elements of the offense had been established.

Senator SPECTER. So under the Hatch mens rea standard, he would have been convicted?

Mr. MERTENS. I believe that he very likely would have, at least of a lesser degree of criminal homicide, such as armed voluntary—

Senator SPECTER. He had sufficient capacity to have the mens rea, in your judgment?

Mr. MERTENS. He clearly understood, I believe, at the time that he committed the shooting, that he was shooting another human being, yes.

Senator SPECTER. What is your reaction to the modifications of the ALI rule that have been suggested?

Mr. MERTENS. Specifically to limit it to severe mental illness and—

Senator SPECTER. Yes, severe mental illness and entire lack of capacity.

Mr. MERTENS. Well, the difference, obviously—there is a difference—is one of degree, and I honestly am unsure how it would work out in practice, which again, it seems to me, is the most important question to be answered. Again, looking at Mr. A's case, I don't know if I can say that he totally lacked a comprehension of the wrongfulness of what he did, and I don't know if a psychiatrist, if one were permitted to address himself to this issue, could say so. But he surely was so substantially lacking as to make him different from, as I said before, the run of humanity. I am not sure that we can say that anyone totally lacks the capacity. Psychiatrists, in my dealings with them, speak of different levels of understanding, and somebody can understand something simultaneously on two different levels, and perhaps partly Mr. A understood what he was doing, though in the total picture I think he so lacked in understanding that he should have been found not guilty, as he was.

I think it would be very difficult to say as to him or as to anyone that he totally lacked these capacities. Perhaps, though, this is a standard that would have to be fleshed out in later case law.

Senator SPECTER. I'm sorry, I didn't hear you.

Mr. MERTENS. Perhaps this is a standard that would have to be fleshed out in appellate decisions and later case law, construing the meaning of a total lack of capacity—I am just not sure. Maybe there would be cases that wouldn't reach the jury, a judge would

decide that I cannot submit the insanity defense to the jury because, even though this man maybe lacked substantial capacity, I am not satisfied that the evidence can show that he lacked total—

Senator SPECTER. Have you seen any cases where the judge did not submit an insanity defense which was raised? Any testimony offered?

Mr. MERTENS. There surely are some.

Senator SPECTER. Have you seen one?

Mr. MERTENS. I am aware of one, and I cannot really sketch out the details, because I am not—

Senator SPECTER. A District of Columbia case?

Mr. MERTENS. Yes, a District of Columbia case where a case was not submitted to the jury. In this particular case, it was later reversed on appeal because the judge was found to have misapplied the insanity standard. But it is the job of a judge in submitting the insanity defense to make sure that the evidence in light most favorable to the defense will support the verdict that defendant is seeking, because if he doesn't show that, the—

Senator SPECTER. Have you seen any case not submitted to the jury, Mr. Pearson?

Mr. PEARSON. No, sir, I haven't.

Senator SPECTER. Have you, Mr. Maynard?

Mr. MAYNARD. No, sir.

Mr. MERTENS. If I could comment on that, I certainly do know cases where the defense of insanity is contemplated and where it is rejected as a trial strategy just because the chances of success are—

Senator SPECTER. Well, I can see that, but there is so much of a tendency, as I see it, to give the defendant all the opportunities to assert a defense, that it would not be, say, the same standard that would be applied, say, to the prosecution of identification or in a negligence case, sufficient evidence to get to a jury.

Mr. Maloney, if we can ask you that question. Have you seen a case not submitted to the jury which has been raised by a defendant and offered some evidence?

Mr. MALONEY. No; as you point out, it never happens, or very seldom, very, very seldom.

Senator SPECTER. Proceed; I'm sorry for the interruption.

Mr. MERTENS. If I could comment also on one of the other proposals before the committee, which is a return to the *M'Naghten* standard—there may not be that great a difference in many ways, as has been brought out earlier in this session today, between the *M'Naghten* and the ALI formulations; there is a very strong resemblance, and the ALI, to some extent, is a refinement and updating of *M'Naghten*.

But I can see maybe some cases where it would make—where it would make a difference. The main difference between the two, between the ALI and *M'Naghten* that I perceive, is that the ALI standard more expressly recognizes that mental disease or defect affects only volition, the capacity to exercise meaningful freedom of choice and raise a valid insanity defense. This is less clear under the *M'Naghten*, at least in the pure *M'Naghten* combined with irresistible impulse test than both elements of the ALI test are most

clearly there; but *M'Naghten* in the pure form is not expressly, without the irresistible impulse test added on, does not expressly allow the insanity defense to be raised; but the only problem is one of volition, freedom of choice rather than understanding, the cognition.

I am reminded of another client our office represented, an individual who himself had been severely beaten during a robbery that he was the victim of. The left side of his head was actually crushed. The bone was crushed into the brain all along the left side of his head from the very front to the back, and substantial bleeding resulted also and both these causes, the force of the injury itself and the later bleeding did cause substantial damage to the left side of his brain. It is causing a number of severe physical problems in addition to that. In this case there was substantial medical evidence that these problems caused what would be a defect of his volition. They caused perhaps grossly impaired judgment, caused big problems with his ability to think coherently and rationally and abstractly.

All the same, on some levels, he was able to understand the wrongfulness of criminal conduct and also he was in some sense able to understand the nature of what he was doing. He was charged with a robbery which culminated in a shooting. He didn't shoot anyone himself that required a weapon. He was himself ultimately captured by the police. In fact, he committed the crime very ineptly, in a way that almost insured his capture right after commission of the offense.

I think his case is more difficult than Mr. A's. But in cases like this, at least when there is a real substantial capacity that is lost, to control one's conduct, because of the ordinary mental processes that most of us take for granted being absent, I think in cases like this, a jury should be allowed to consider insanity. And I am not sure that a jury would be able to under a pure *M'Naghten* test, at least without the irresistible impulse again being added on.

Lastly, just very briefly, I would comment on the question of the burden of going forward and the ultimate burden of persuasion.

In the local courts of the District, of course, we work under a statute that Congress enacted that does require us as defense attorneys to demonstrate insanity by a preponderance of the evidence. I don't have any direct experience myself, and I am unaware of any experience among attorneys in my office now with the Federal—

Senator SPECTER. You say the defendant has to assume that burden of proof—

Mr. MARTENS. Yes.

Senator SPECTER [continuing]. Under the District of Columbia law?

Mr. MARTENS. Yes, yes.

Which leads me to one—

Senator SPECTER. Were you surprised by the ruling by Judge Parker to not apply that in the *Hinckley* case?

Mr. MARTENS. I think it is interesting—I don't have any direct inside knowledge of what went on in that trial. I have looked at a little bit of the transcript of the judge's charge to the jury, and I have had a few discussions and I know what I read in the newspapers. And Judge Parker's reasons, as I understand them—well, to

place it in context, Mr. Hinckley was, of course, charged under both the District Code and the Federal Code. I believe the correct interpretation of the law would be that as to the District Code offenses, under the statute, he should have borne the burden. Judge Parker determined not to require him to do so, I think principally out of a concern to avoid confusing the jury.

Senator SPECTER. If he had been tried under the District Code, he would have had the burden of proof.

Mr. MARTENS. Yes; and he was tried again under District Code offenses as well as U.S. Code offenses because of the unique jurisdiction—

Senator SPECTER. But, if he had been tried solely under the District Code, he would have had the burden of proof?

Mr. MARTENS. Well, yes. And I think he would have been required to bear the burden even as to the District Code offenses, even at a joint trial.

Senator SPECTER. But it would have required a—it would have required dual instructions on insanity, on—

Mr. MARTENS. That is correct.

Senator SPECTER. Do you think that would have been constitutional, Mr. Maloney?

Mr. MALONEY. I think it would have created so much confusion that the jury would have been totally bombed out.

Senator SPECTER. Even more so than it was? [Laughter.]

Mr. MARTENS. One clear option would have been to sever charges and perhaps try them separately, perhaps even trying the District Code—

Senator SPECTER. Separate trials, two trials?

Mr. MARTENS. That would have been a possibility with—

Senator SPECTER. Constitutionally?

Mr. MARTENS. I'm sorry?

Senator SPECTER. Constitutionally.

Mr. MARTENS. I don't see any constitutional problem with that, Senator. Severance happens—severance happens—

Senator SPECTER. Separate trials in the District of Columbia equivalent to the State court and a separate trial in the Federal court on identical—on charges arising out of the same act?

Mr. MARTENS. It perhaps would have worked itself out that way; that's correct. But there are ways for that kind of thing to happen. I believe the situation is that the prosecution in the *Hinckley* case was unconvinced that there really was going to be any great impact in the verdict that depended in any way on the burden that the defense and the Government had to present. I believe, for example, the prosecution in the case had additional expert witnesses it could have presented but elected not to do so, in part because it did not believe that the jury would take a—would apply the way the jury did the reasonable doubt standard and perhaps hold the Government to ask for not putting on more evidence when they had it available.

One general comments about the *Hinckley* verdict is that I think maybe it should cause those of us who practice in the courts and who are concerned about insanity defense as practitioners to reassess how juries look at these cases. The conventional wisdom—I can speak as a practicing attorney from both the prosecution and

defense side—is that maybe the standards, the technicalities of the standards really are not very important to how juries come out, and maybe the burdens of proof are not—also not really important in how juries come out, and I think perhaps one lesson to be drawn from the *Hinckley* verdict—and I will say I was surprised at the verdict, and based on what I know about the case, I do not believe that I would have come out the same way, even under the ALI verdict, under the ALI standard, and even with the prosecution bearing the burden, on what I saw of the case. And again I cannot speak with any inside knowledge, any great understanding of the case beyond what I read in the newspapers.

But based on what I saw of it, I was not satisfied that Mr. Hinckley perhaps lacked volition to such an extent that he should have been found not guilty by reason of insanity. I think it might be the case that the prosecution focused its energies on the question of whether he was or was not mentally ill. Perhaps with the benefit of hindsight in cases like this, a greater focus on the more precise questions of whether this person does substantially lack a capacity to exercise volition would be a more appropriate way to try the case.

Senator SPECTER. Thank you very much, Mr. Mertens—we are just going to have to move on.

[The prepared statement of Mr. Mertens follows:]

PREPARED STATEMENT OF WILLIAM J. MERTENS

Mr. Chairman and members of the Committee:

My name is William J. Mertens. I am Chief of the Appellate Division of the Public Defender Service for the District of Columbia, and I am here to speak today on behalf of the National Legal Aid and Defender Association (NLADA). Thank you for this opportunity. The NLADA, which was founded in 1911, represents the interests of public defenders and legal service lawyers and their clients throughout the country. About 2,500 legal aid and defender organizations are members of the NLADA. The membership also includes about 1,000 individuals, many of them private attorneys and representatives of the client community. NLADA is dedicated to the improvement of the quality of justice available to poor people and the underprivileged in this nation.

The Public Defender Service represents indigent persons in the courts here in Washington, D.C. Our principal work is defending people charged with crimes in the Superior Court of the District of Columbia. In some small but significant number of these cases, an insanity defense is considered or actually raised. We also have a separate Mental Health Division, which represents people facing commitment to St. Elizabeths Hospital, as well as those who are already committed there, who cannot afford to retain private counsel. Some of these people have been committed under the District's civil commitment laws, and others after a finding of not guilty by reason of insanity in the Superior Court or the United States District Court. The Appellate Division undertakes the appeals of cases initially

handled in both the Trial Division and the Mental Health Division.

I have worked as an attorney with the Public Defender Service since 1975. I served first as a staff attorney in the Trial Division and later in the Appellate Division. After that, I was Deputy Chief of the Trial Division, and I have been Chief of the Appellate Division since last year. As a trial attorney, I represented a number of clients who defended on grounds of insanity, and I have prepared materials to assist other attorneys in our agency in raising that defense. On an appellate level, we have litigated several cases involving the insanity defense and its administration. We now have cases in the United States Court of Appeals for the District of Columbia Circuit and the United States Supreme Court raising questions concerning the procedures for hospitalizing persons found not guilty by reason of insanity in the District of Columbia. We also have cases before the District of Columbia Court of Appeals and the federal appeals court where we are seeking rulings on issues involving pre-trial examination of accused persons who raise the insanity defense.

I hope that our experience can provide some insights that will help the Committee in its consideration of the bills that are now before it. Rather than discuss these bills one at a time, I would like to comment on some of the issues that are common to many of them.

I. THE SUBSTANTIVE STANDARD

The standard that prevails in the federal courts, and in the District of Columbia, is that proposed by the American Law Institute in its Model Penal Code.

To paraphrase this standard, it requires, at the threshold, that the defendant suffered from a mental disease or defect at the time of the offense. Furthermore, this illness must have disabled the defendant from substantially understanding the wrongfulness or criminality of his actions or, alternatively, from controlling his conduct and obeying the law. Thus, to state it somewhat broadly, the A.L.I. test presupposes the commission of a criminal act with the mental state that is required in the elements of that offense. It nonetheless excuses the actor from criminal responsibility if a mental disease or defect has left him substantially incapable either of appreciating that what he has done is wrong or criminal, or of refraining from committing the criminal act.

Several of the provisions under consideration would not permit an insanity defense to be raised at all if the defendant committed a criminal act with the intent that is required as an element of the offense. Instead, a mental disease or defect would become relevant to the jury's verdict only if it precluded the formation of a state of mind or intent that is an element of the offense¹.

And then such a disease may lead to a finding of "guilty but mentally ill," rather than of not guilty or not guilty by reason of insanity.²

I am less concerned with the labels that will be used than I am with the practical impact of the proposed

¹S.818; S.1106; S.1558; S.2572; S.2669; S.2672

²S.1106; S.2672

changes. Cases with which I am familiar give concrete form to my concerns under this proposed standard.

One case that comes to mind involves a client of my office whom I will call A. A man of about 50 years of age, he was indicted for second degree murder while armed. He had never before even been charged with a significant criminal offense. One day he was seated in his car with his wife in an alley off 14th Street, N.W., in this city. He noticed a man, a harmless alcoholic who frequented, about 50 to 75 feet away. Mr. A became convinced that this man had a razor in his hand and that he was about to attack Mr. A and his wife, even though the man had done nothing whatsoever to justify this fear and was in fact unarmed. Mr. A, believing that his and his wife's lives depended on it, then shot the man to death. Mr. A, it turned out, was suffering from paranoid schizophrenia, a disease that was becoming progressively worse, and he sincerely believed that there was a plot against him involving powerful and ruthless drug dealers in the city. Mr. A was a skilled welder and mechanic, and he believed that these individuals wanted him to develop machinery that would duplicate tropical environments and permit the growing of narcotic-yielding plants in warehouses throughout Washington, D.C. Mr. A was convinced that these drug dealers knew that he would refuse on principle to participate in this scheme, and that they wanted to kill him in retaliation. When he saw the man in the alley, Mr. A believed that he was an assassin hired by his enemies, and Mr. A shot the man out of fear and rage.

Mr. A was found not guilty by reason of insanity

by stipulation. All of the experts who examined him supported this outcome, as did the United States Attorney's office. It was beyond dispute that he suffered from a severe mental illness, and that illness prevented him from perceiving that his attack was in fact unprovoked and unjustified. Further, his illness substantially impaired his ability to control himself.

I believe that this result squares with our every day sense of justice. Mr. A's disease left him grossly impaired in comparison with the rest of us in his ability to perceive reality and to exercise meaningful freedom of choice. It would have been fundamentally unjust, I think, to hold him criminally responsible for what he did.

But how would Mr. A have fared if the only question had been whether the mental elements of the offense were present? Mr. A, I think, would have to be convicted at least of manslaughter while armed (an offense carrying a possible penalty of life in prison under D.C. law) if not of murder. Mr. A deliberately shot and killed another human being -- the essential elements of criminal homicide. Further, he had no viable self-defense (or defense of others) claim under D.C. law, because it was totally unreasonable to think that the victim posed an imminent threat of death or serious bodily harm to anyone. Mr. A's unreasonable belief to the contrary would, at most, have negated malice, an essential element of murder, and reduced the charge to manslaughter.

Mr. A's case, I believe, reveals the central flaw of a provision that limits the issue to the presence

of the mental elements of the offense. Even if those elements are present, a defendant may so lack a meaningful comprehension of what he is doing that it is unjust to punish him. Mr. A's case also reveals how a test that is limited to the mental elements of the offense can yield capricious results. For if Mr. A's delusions had been somewhat different, he could have escaped conviction even under an insanity standard limited to the elements of the offense. If, for example, he had believed that the man in the alley was in fact a robot sent after him by his enemies -- rather than a paid assassin -- Mr. A would have lacked the intent to kill a human being. Hence, he could not have been convicted even of voluntary manslaughter. Is it sensible to make guilt hinge in this way on the specific content of a person's insane delusions? I do not think so.

A question would also remain whether Mr. A, in this hypothetical variation of the actual facts of his case, could be convicted of involuntary manslaughter, on the theory that the killing was reckless even if it was not deliberate. Should the law deem him reckless in his belief that the man he shot was actually a robot? How indeed should the recklessness of a person suffering from such insane delusions be assessed?

An insanity standard that turned on the presence or absence of the mental elements of the offense would also entangle the courts in metaphysical conundrums not unlike the medieval puzzle of how many angels can dance on the head of a pin. Suppose an insane defendant had shot and killed a person, thinking that the victim was an alien from another planet. Did this

defendant intend to kill a "human being?" What if the defendant thought his victim was a devil in human form? Or a human under demonic possession?

Instead of asking in all of these cases whether there was an intent to take "human" life, it is far more sensible I think to use the current test: whether the defendant's insane delusions substantially impaired his ability to recognize the quality of its act and its wrongfulness.

Other proposals before the Committee would work a less drastic change in the insanity standard. They would return to the old M'Naghten test and permit the defense of insanity only if the defendant's mental illness or defect rendered him unable to appreciate the nature and quality of his conduct, or to distinguish right from wrong with respect to it.³ The A.L.I. standard is the direct descendant of the M'Naghten test, and the family resemblance still shows. Nonetheless, there are differences. Most importantly, the A.L.I. test expressly recognizes that a disease or defect that impairs volition may preclude responsibility while the M'Naghten formulation does not. Under the A.L.I.'s proposal, a defendant may interpose the insanity defense if his ability to conform his conduct to the requirements of law was substantially enough impaired; M'Naghten, in contrast, focuses on his appreciation of the meaning of his act and its wrongfulness.

In some cases, despite a certain level of apprecia-

³S.2658; S.2678.

tion of what he has done and of the fact that it is wrong, a person might lack a substantial ability to control himself and to obey the dictates of criminal law on account of his illness. I think that the jury should be allowed to consider an insanity verdict.

I am reminded of another client of my office, whom I shall call Mr. B. Some years before we represented him, he was the victim of a robbery. His assailants beat him in the head with the butt of a gun and crushed his skull. The pieces of bone pressed in on his brain. The injury and resulting bleeding caused substantial damage to the left side of his brain, from the very front to the back. At the time of his release from the hospital a number of months later, certain manifestations of his brain damage were obvious. The right side of his body was partially paralyzed, and he walked with a noticeable gait. His speech was obviously defective. Except when properly medicated, he regularly suffered seizures. He also could become very excitable and often acted quite childish. There was in addition medical opinion that because the damaged areas of his brain included those that were responsible for his higher mental functions -- his ability to think abstractly and logically, his ability to exercise judgment, and so on -- his behavioral controls were substantially impaired.

We represented him in a prosecution for armed robbery and related offenses, stemming from a holdup of a fast-food restaurant. He fired several shots, hitting no one, and was caught after a policeman shot him. In the view of some doctors, he did what he did only because the injuries to his brain left him substantially incapable

of controlling what he did, at least under certain circumstances.

Mr. B's case is, I think, more difficult than Mr. A's, and I think that deficiencies like his would need to be very serious indeed before they could support an insanity defense under any standard. Yet I think that juries should be allowed in cases like his to consider the defense of insanity. They can do so under current law. It is less clear that they can under M'Naghten, for Mr. B understood that he was robbing the restaurant, and he also knew that this act was a crime. Yet, through no fault of his own, he may have lost substantial use of those mental faculties that keep most of us from committing law violations. Indeed, he may have been beyond the criminal law's deterrent reach: any reasonable person would have known that the way he went about committing his crime and attempting his escape was so inept as to assure his capture.

In such cases, the A.L.I. formulation permits the jury to consider whether the person's power of volition was so substantially impaired as to excuse him from criminal liability. I believe that it is right to do so, and that is why I would favor retention of the A.L.I. test over a return to M'Naghten.

II. BURDEN OF PROOF

In the local courts of the District, the defense already bears the burden of establishing insanity by a preponderance of the evidence.⁴ Consequently, I do not have any direct experience with the procedure now

⁴24 D.C. Code §301(j).

applied in federal court, which this Committee is considering changing, under which the prosecution must prove sanity beyond a reasonable doubt.⁵

I nonetheless have a few observations that may be useful.

It is, I believe, wrong to think that the defense inherently enjoys such an advantage when insanity is raised that the ordinary rule, placing the burden of proof on the prosecution, should be reversed. On the contrary, the prosecution already holds advantages when it tries to rebut a claim of insanity that it has in no other kind of case.

Whether or not a statute or rule specifically authorizes the practice, prosecutors have traditionally been able to secure court orders requiring defendants who raise insanity to speak at length with the government's own psychiatrists and psychologists. And the courts have consistently sustained this practice against the complaint that it violates the privilege against self-incrimination. I am aware of no comparable power the prosecution has to compel the defendant to cooperate in such a way with the government's efforts to secure his conviction. This practice is unheard of when, for example, the defense is alibi or self-defense.

Further, the prosecution frequently reaps the fruits of a court-ordered hospitalization and study of the defendant at a government-run facility. It is often able to call on the testimony of government employees who have

⁵S. 2658 would require the defendant to demonstrate his insanity by clear and convincing evidence. S. 2672 would place a preponderance of the evidence burden on the defense.

been observed, spoken with, and evaluated a defendant 24 hours a day at a hospital where the defendant has been placed, whether to evaluate his competency to stand trial or his responsibility for his acts.

I am aware of a case where the defendant was first ordered to St. Elizabeths Hospital, a government facility here in Washington, D.C., for study and evaluation. The prosecution was dissatisfied with the results -- the hospital's doctors supported the defendant's claim of insanity -- and so obtained a second order to place him for a month or two in another government hospital, the U.S. Bureau of Prisons facility in Springfield, Missouri. This second study finally yielded conclusions that supported the prosecution's cause. Nowhere else in the law, so far as I am aware, does one litigant enjoy a similar opportunity to examine and evaluate its party opponent. And it is very unlikely that the defendant, even if he has the financial means, will be able to conduct his own in-patient evaluation in a facility of his choosing to counter the government's.

But the government's advantage is the greatest in those cases that are of course the special concern of the NLADA - where the defendant is too poor to afford to pay for his own defense. Even with court-authorized expert services under the federal Criminal Justice Act, it is very doubtful that he can summon comparable resources to those available to the government. The defendant is unlikely to match the government in either the choice of experts available to him or in their number. In the state courts, where expert witness fees are sometimes unauthorized and are rarely adequate, this is, unfortunately, even more true.

Placing the burden on the defendant would be especially anomalous if combined with an amendment of the standard of insanity limiting it to cases where a mental disease or defect negates one of the mental elements of the offense.⁶ Ordinarily, the prosecution must establish all of the elements of the charged offense beyond a reasonable doubt. Yet, under some proposals now before the Committee, an exception to this rule would be carved out when the defendant's mental illness is responsible for an element's absence. Leaving constitutional problems aside, this would, I believe, create serious anomalies.

Let me describe the case of another Public Defender Service client, Mr. C. One evening, Mr. C was allowed to sleep in the living room of an apartment where an acquaintance lived. During the night he underwent what doctors later concluded was a psychotic episode stemming from the mental disease of schizophrenia, from which he had suffered for a number of years. He removed his clothes, began intoning a ritualistic chant, and behaved bizarrely in other ways as well. The woman who lived in the apartment awoke. Understandably alarmed, she attempted to reason with him, but he was uncommunicative. She left the apartment and went to a neighbor to telephone the police. A number of uniformed officers arrived and attempted to remove Mr. C from the apartment, but he reacted violently. In the ensuing melee, two officers were somewhat injured before Mr. C could be subdued; one of the policemen suffered a broken hand. Mr. C was charged with several felony counts of assault on a police officer.

Under the mental elements version of the insanity

⁶S.2672

defense, Mr. C could have avoided a guilty verdict if his mental illness kept him from realizing that he was assaulting police officers, since knowledge of an officer's status is an element of the offense. Yet I can think of no good reason why Mr. C should be required to bear the burden of showing that he lacked this knowledge when, under any other circumstances, the burden would fall to the government to demonstrate such knowledge beyond a reasonable doubt. If, for example, a defendant was charged with assaulting a police officer who was in plain clothes, and he sought to defend on the ground that he did not hear the officer identify himself before the assault occurred, he would only have to raise a reasonable doubt in the jurors' minds as to whether he knew that he was striking a policeman. Why this difference? In either case, the prosecution's legitimate interest in the same: to convict people who knowingly attack police officers. Further, the societal cost of an erroneous verdict of not guilty is greater in the case of a person who claims -- falsely -- not to have heard the officer identify himself. For that defendant would simply walk out the courtroom door (unless conviction on some lesser included offense was possible). In contrast, even if Mr. C would prevail and secure a verdict of not guilty by reason of insanity (or of guilty but insane) he would be subject to commitment to a hospital. I fail to see why he should be made to run a greater risk of erroneous conviction.

III. HOSPITALIZATION AFTER VERDICT

In part because my office is now engaged in litigation concerning such issues as the proper assignment of

burden of proof at proceedings to commit the defendant who successfully defends on grounds of insanity, I would like to refrain from commenting in detail on the various post-verdict commitment provisions in the bills before the Committee. But I would like to discuss briefly one general scheme that has been proposed, particularly in conjunction with the adoption of the label "guilty but mentally ill." This proposal would require an examination, followed by a hearing within a certain number of days of the verdict. Then if the judge determines, under a standard that may not be specified, that hospitalization is appropriate, the defendant is committed to a psychiatric facility. Otherwise, he may be sentenced to prison as though he had been found guilty.⁷

I find the possibility of imprisonment -- which is surely punishment -- incompatible with a finding that the defendant was not mentally responsible for his crime, whatever the standard by which his responsibility was assessed.

Further leaving the decision of hospitalization versus imprisonment to a standardless discretionary process runs counter to the growing recognition that sentencing without standards leads to unjust and capricious results.⁸ The disparities in sentences imposed by different

⁷ Similar proposals along these lines are set forth in S.2669 and S.2672. In the former bill, the commitment procedures would apply only to murder and attempted murder.

⁸ Under S.2669, the decision whether to send a mentally ill offender who has been found not guilty by reason of insanity to a hospital rather than prison is not guided by any standards. The judge is simply directed to order that disposition if he concludes that hospitalization instead of imprisonment should be the result.

judges for similar criminal conduct are already notorious. I do not believe that it is good policy to invite similar disparities when the issue is whether mentally ill offenders should be treated as psychiatric patients instead of punished as criminals.

Similarly, to allow a judge, as one of the bills before the Committee does, to send the defendant to prison at the end of the period of hospitalization conflicts with the basic notion that a person who is not responsible for his conduct should not be punished.⁹ It also invited uneven application. Furthermore, the possibility that the patient will be sent to prison rather than returned to the community upon his release from hospitalization would surely frustrate coherent efforts to prepare the hospitalized defendant for his eventual re-emergence into society. St. Elizabeths Hospital presently operates an extensive set of programs aimed at reintroducing persons committed after a finding of not guilty by reason of insanity to normal patterns of living. For those who can eventually be returned to the community, these programs are an integral part of the rehabilitative process. Such work would obviously be impossible -- or at least pointless -- if the patient would become a prisoner upon his release.

IV. CONCLUSION

There are surely areas where Congressional concern over the administration of the insanity defense is entirely appropriate. The creation of a special verdict of not guilty by reason of insanity (which has existed in the District of Columbia for some time), and provision of

⁹ S.2669

treatment for persons acquitted on grounds of insanity are two. Yet we do not believe that radical change of the fundamental standard for assessing insanity in criminal trials is called for. Despite the occasional case that we read about on the front page of the newspapers, in the great majority of cases where the insanity defense is likely to be raised, the existing standards have, we think, served well. We believe that the existing proposals for repealing the present standard would result in the conviction and punishment of persons who are simply not responsible for their criminal conduct. And just as the majority of criminal defendants are indigents, we would expect that the majority of those who would receive this undeserved punishment would also be poor. Instead of freezing the insanity standard through enactment of a single legislative definition, we would favor leaving the matter to further evolutionary development in the courts. Recent studies have indeed confirmed what the experience of my office also indicates: that insanity is rarely raised and it is still more rarely successful. Knowledgeable trial attorneys realize the great difficulty of successfully defending on grounds of insanity in serious cases.

We also are unpersuaded that existing procedures so tilt the balance of advantages toward the defendant that he can be fairly required to shoulder the burden of demonstrating his innocence by reason of insanity, instead of requiring the government to show his guilt. And we would oppose provisions that allow the imprisonment of persons found not responsible for their conduct, especially in the absence of articulated standards that can be uniformly applied.

Mr. Chairman, I thank you and the Committee again for this opportunity to state these views, and I hope that these comments prove useful to the Committee in its

Senator SPECTER. Our final witness is assistant attorney general John Maynard from the State of Montana. Mr. Maynard, Senator Baucus could not be present here today. He is my distinguished colleague on the Judiciary Committee, and he asked that I tell you that he could not be present, and he has a statement, which we will make a part of the record, welcoming you here, which I do on his behalf, expressing his concern about the importance of the insanity issue and of your testimony.

So we welcome you here and look forward to your testimony.

STATEMENT OF JOHN H. MAYNARD, ASSISTANT ATTORNEY GENERAL, STATE OF MONTANA

Mr. MAYNARD. Thank you very much, Mr. Chairman. I realize my time is limited, and so I will try to highlight just a couple of points and then answer any questions that you have. Montana abolished its insanity defense, at least that was the title of the bill that was enacted in 1979, in the legislature during that year. We were the first State to adopt this approach, and it is the approach whereby—I have to step back one step here in my chronology. In 1967 Montana enacted a modified version of the ALI standard—and I mention this because it goes directly to your prior question.

Our standard was not whether a person lacked substantial capacity, but it became whether a person was unable to appreciate the criminality of his conduct or conform his actions to the requirements of law.

Senator SPECTER. "Unable," that's almost like "entirely lacking"?

Mr. MAYNARD. Yes, I think so. It was meant to be a tougher standard, and it proved to be a tougher standard. I brought with me a transcript of a hearing, however, to determine competency that was conducted in 1979 just prior to the enactment of our law, in which this standard was used—unable to appreciate the criminality, or to conform. And the problem that is very apparent from this transcript is not the standard as you and I understand it, but the standard is the three psychiatrists and two psychologists who testified understood it, and they read in a great deal more to this standard than I believe the ALI—

Senator SPECTER. The standard that Montana had used different from the regular ALI standard?

Mr. MAYNARD. Yes. And so I think in terms of—and this was an attempt to get a pretrial acquittal based on mental disease or defect, an option that was eliminated in 1979.

Senator SPECTER. A pretrial proceeding on the insanity issue?

Mr. MAYNARD. Yes; to determine whether the person was fit to proceed or whether he could entertain a mental state and whether he could appreciate and conform. So while I believe that that is an improvement in the law, I also think that it doesn't get to the real heart of the problem in this instance, and that is the psychiatrists and psychologists testifying to ultimate issues before a jury. And I don't think there is any constitutional requirement that they should be allowed to express their opinions on that or draw those types of conclusions.

Senator SPECTER. Would you limit their right to testify is to—

Mr. MAYNARD. Absolutely, and that is the experience of the prosecutors in the State of Montana, it's the recommendation of the attorney general of the State of Montana.

Senator SPECTER. How has your law worked out? Has it been challenged on constitutional grounds?

Mr. MAYNARD. It hasn't been challenged on constitutional grounds. I would say that what our law does is it does not limit a psychiatrist or a psychologist testifying to the ultimate issue of whether a person had the requisite mental state. On page 7 of my testimony I have laid out what we have in Montana for a mental state, under "knowingly," and that is very significant in terms of understanding our law. In the case of John Hinckley, the fact that he was aware that he was pointing a gun at the President of the United States, the fact that he was aware that he was pulling the trigger, and what the possible consequences of that result were, would have been sufficient under Montana law to convict him.

Senator SPECTER. You think your statute—obviously you think it is constitutional.

Mr. MAYNARD. Yes.

Senator SPECTER. Have you examined the recent Supreme Court decision that Mr. Maloney referred to as it applies to this issue?

Mr. MAYNARD. The *Enmund v. Florida* case?

Senator SPECTER. Yes.

Mr. MAYNARD. I wanted to make a comment about that, as I have considered it. The language to which he refers is from a dissenting opinion; it is what I consider a statement by Justice O'Connor that there is this possibility that it could be interpreted this way, that it does inject into Federal constitutional law this element of intent. But the *Enmund* case—it's very important to understand the facts of that case. Basically there was a man who was sitting out in the car, the getaway car, while two people were being murdered behind the house across the road. And he was convicted under a felony murder rule, and that is what the *Enmund* case addresses, is whether or not you can impose the death penalty when you haven't shown that there was an actual, you know, that that person didn't intend, wasn't even aware, had no idea this was going to happen. And it questions the felony murder applications in capital cases.

So while the dicta in the dissenting opinion may act as fodder in future court proceedings, I don't believe that it raises the constitutional stature of any of the things we are talking about here.

Senator SPECTER. How many cases have you had under Montana law?

Mr. MAYNARD. I wasn't able to get an accurate count from the county attorneys.

Senator SPECTER. How many counties do you have in Montana?

Mr. MAYNARD. We have 56 counties, and the time was just too short to contact them all.

Senator SPECTER. We would be interested to know what the results have been, if you could find those figures; there is a lot of interest in—your law is essentially what Senator Hatch has introduced.

Mr. MAYNARD. Basically.

Senator SPECTER. Is there any difference?

Mr. MAYNARD. As I recall Senator Hatch's bill, it does limit psychiatrist's testimony to ultimate effects, is that correct, or am I thinking of 818—that's a different one.

Senator SPECTER. Well, the essential element that I am concerned about is that it eliminates the defense of insanity and permits issues about mental state which would come under the umbrella of insanity, to be raised only as it relates to intent or mens rea. That would be a defense to the requisite intent, if the mental state is so deranged as to be insane in effect.

Mr. MAYNARD. Yes.

Senator SPECTER. That is the essential thrust of the Montana statute?

Mr. MAYNARD. Yes. Now, in answer to your question, the statistics that I could gather may not be helpful to the committee because of the fact that oftentimes, if the person lacks the capacity to form the requisite mental state, those cases are disposed of by stipulation or by civil commitment; the person never makes it to trial if he is that out of control.

Senator SPECTER. Well, the statistics may not be helpful, but they won't be harmful. We would like to see what you have.

Mr. MAYNARD. I just wanted to add that caveat for what they proved.

I would also point out, in terms of *Sandstrom v. Montana*, *Sandstrom* is a case that you should consider, and, based on *Sandstrom*, the attorney general of Montana has serious concerns about whether it is constitutional to shift the burden on that intent element. Under Montana law, where we adopt this standard that he can only be acquitted by reason of mental disease or defect if he lacks the mental state, the required mental state—under that statute, we feel that to shift the burden of proof is an unconstitutional thing, based on our reading of *Sandstrom*. But I hasten to add that *Sandstrom*, the instructions that—the jury instructions that I have attached to my testimony are jury instructions that were developed in light of *Sandstrom v. Montana*; they talk about inferences and presumptions and the differences between the two. And we believe that it is certainly constitutional, as the U.S. Supreme Court decided at the same time that it decided *Sandstrom* in *County Court of Ulster County v. Allen*, that permissive inferences are something that a jury can be instructed in and can make, and these instructions do that and do it in terms of our law.

Ultimately, my testimony, or the thrust of it, is that a very hard look should be taken at psychiatric and psychological testimony and the part it plays, and, as in the case of a polygraph, which is mostly inadmissible in most States except by stipulation in some, that there is much more scientific basis for drawing conclusions from a polygraph examination by an expert and affording those to the jury than I believe there is for making the kinds of determinations that were made in the transcript here in Austin Metcalf's case. And that is something that is illuminated very well in a book by Jay Ziskin, "Coping with Psychiatric Testimony," and it points up some of the very difficult problems that arise because of that unholy marriage between law and psychiatry, and that, to me and to the county attorneys especially in Montana, is the area that should be given some very specific attention by this committee.

Senator SPECTER. Thank you very much, Mr. Maynard. We are very appreciative, gentlemen, for your coming and sharing the information with us. It's a very knotty problem, and your experiences are really very helpful.

[The prepared statement of Mr. Maynard follows:]

PREPARED STATEMENT OF JOHN H. MAYNARD

Mr. Chairman and Members of the Committee:

Thank you for giving me this opportunity to come before you on behalf of Mike Greely, the Attorney General of the State of Montana, to present testimony concerning the insanity defense. I would like to express the personal regrets of the Attorney General for not being able to be here in Washington today to deliver these comments in person, but I hasten to add my own thanks for allowing me to appear here in his place.

I have divided my testimony today into three parts. First, I will present a brief history of Montana's insanity defense as a prelude to discussing its current provisions. In doing so I will discuss how and why the new law emerged in 1979, and our experience with it at both the trial and appellate levels. Second, I will try to impart to you the benefit of Montana's experience, hoping that it might assist you as you consider the bills currently before the Committee. Finally, I will offer what the Attorney General believes are compelling reasons for taking a close and critical look at the usefulness and reliability of psychological and psychiatric testimony in criminal proceedings, using a recent Montana homicide to illustrate the most troublesome aspect of insanity defense law.

I. MONTANA LAW

Prior to 1967, Montana followed a combination of the "M'Naghten" rule and "irresistible impulse." In 1967, as part of a complete overhaul of our criminal procedure code, the Legislature adopted the standard contained in the Model Penal Code, with one revision. Instead of excusing a person from criminal responsibility because a mental disease or

defect deprived him of the "substantial capacity" to appreciate the criminality of his conduct or to conform his conduct to the requirements of law, the revision excused a person only if he were "unable" to appreciate or to conform. Montana law contained this provision until 1979, when the Legislature considered legislation to abolish Montana's insanity defense. The form in which this bill ultimately became law shifted a substantial portion of the inquiry concerning the defendant's mental state to the sentencing phase of the trial. During the guilt phase of the trial, the new law allowed admission of only one kind of evidence in support of an insanity defense--evidence that the defendant "did or did not have a state of mind which is an element of the offense." In other words, the State still bears the burden of proving every element of the crime beyond a reasonable doubt.

The bill's sponsor proposed the change in the law because of his concerns over "accountability" in the criminal justice system, and because of reading he had done while in law school. As I recall, Representative Keedy had read at least two books by Dr. Thomas Szasz: Law, Liberty and Psychiatry, and The Myth of Mental Illness. Another book that played a part in Montana's revision of its insanity defense was Coping With Psychiatric and Psychological Testimony by Jay Ziskin, Ph.D., LL.B.

Taking a closer look, the new Montana law essentially provides that a psychiatric examination of the defendant will be conducted if the defendant or his counsel files a notice of intent to rely on a defense of mental disease or defect, or raises the issue of the defendant's fitness to proceed. If the defendant lacks the fitness to proceed, the court suspends the proceeding and seeks treatment for the

defendant until his fitness is restored. Once fitness is determined, the defendant proceeds to trial to be found 1) "guilty;" 2) "not guilty;" 3) "not guilty by reason of mental state," i.e., that because of a mental disease or defect the defendant could not have had a particular state of mind that is an essential element of the offense charged.

If the defendant is found not guilty he is discharged. If he is found guilty he may present evidence at his sentencing hearing concerning his ability to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law. Taking this evidence into consideration the court may impose sentence, or it may commit him to the custody of the director of the Department of Institutions for placement in an appropriate institution. Under the third and final alternative, if the defendant is found not guilty by reason of lack of mental state, the court may: 1) release him unconditionally; 2) release him subject to conditions; 3) commit him to the custody of the superintendent of the state mental hospital for treatment until he may be released.

In Montana this law has reduced the number of cases in which defendants have employed the insanity defense; it has also reduced the number of acquittals due to mental disease or defect. Our state's chief of the County Prosecutor Services Bureau, Assistant Attorney General Marc Racicot, has told me that he knows of no instance in which the insanity defense has been successfully asserted in Montana since enactment of the law in 1979. Moreover, attempts to utilize psychological and psychiatric testimony at sentencing hearings have declined because persons incarcerated in the state prison can be transferred to the

state mental hospital in any event, if the treatment facilities at the prison prove inadequate.

On the appellate level, a few persons have raised the insanity defense, albeit unsuccessfully. All questioned the sufficiency of the evidence to support the jury's finding of intent beyond a reasonable doubt. In State v. Mercer, for example, Bryan Lantis Mercer had been convicted of second degree murder in 1972, and sentenced to fifty years in prison. Based on favorable reports from psychologists and prison officials he obtained a school furlough in March 1978, to attend Montana State University at Bozeman.

On July 15, 1979, Kennita Shaw, a school teacher from Salt Lake City, arrived in Bozeman to attend a workshop at the University. As she unloaded her belongings from her car, Bryan Mercer approached her from behind, stabbed her in the back, laughed aloud, and ran away. Three days later he was arrested for an alleged knife assault on another woman.

At trial, expert testimony established that Mercer suffered from an untreatable mental disorder that prevents his conforming to social norms. The same expert testimony, however, did not establish whether Mercer suffered from an episode of mental illness at the time of the assault on Ms. Shaw.

The State never conceded that the defendant had a mental disease or defect. Although Dr. Prunty, a psychiatrist, and Dr. Seitz, a psychologist, testified that the defendant was afflicted with paranoid schizophrenia, the State introduced evidence that the defendant could have gained knowledge of psychological testing during his study at MSU, that he could have lied, and that he may have been faking the test results. The State also showed that the

defendant had not sought counseling at the MSU campus. Further, the State established that the defendant's story about another being's possession of his body began only when the investigation of this case centered on him, although his mental disease had purportedly started many years before. The prosecution also showed that the defendant had the presence of mind to hide the knife used in the assault, and had attempted to construct an alibi defense. At trial, the defendant testified at length about events surrounding the attack, showing no loss of memory. The record supported a conclusion that there was substantial evidence on which the jury could have inferred Mercer's intent, and the conviction was upheld by the Montana Supreme Court.

II. EXPERIENCE

Where we draw the line of accountability for criminal behavior is as much a question of mores as a question of medicine. The lines drawn by Congress and by our state legislatures do not always translate well into the language of psychiatry. Montana's law attempted to redraw that line closer to the point at which, in our society's perception, justice would better be served. One method employed by the Legislature was to limit the admissibility of expert testimony concerning the defendant's intent.

The science of psychiatry embodies a complex set of ideas that seem to preclude a courtroom consensus on the issue of insanity. Psychiatrists and psychologists themselves are often affected in their findings by their personal philosophies as much as they are by measurable data. They often become advocates in a courtroom, disputing even the widely accepted fundamental principles upon which their science rests. Not long ago I discussed the insanity

defense with Mike Greely, the Attorney General, who remarked over the legal applications of the principles of psychiatry and psychology. Those applications, he observed, have become so inclusive and all encompassing that we all--including prosecutors, police and legislators--exhibit symptoms of psychological malfunction in the legal sense. We all experience moments of intense elation, depression and even paranoia from time to time, and we see evidence of these symptoms in those around us. Applying these symptoms to the roots and motivations of crimes through the use of psychology's complex and confusing vocabulary does not often assist the cause of justice.

For this reason, I believe, the 1979 Montana Legislative Assembly wisely placed in the hands of the jury the determination of whether a person should be excused for his conduct due to a mental disease or defect, and to a certain extent, took it out of the hands of psychiatric experts. The law stated that evidence showing 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. In Montana, this means that a defendant, in order to be acquitted, must prove that he did not purposely or knowingly commit his crime. The Montana Code defines "knowingly" in the following manner:

A person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense, when he is aware of his conduct or that the circumstance exists. A person acts knowingly with respect to the result of conduct described by a statute defining an offense when he is aware that it is highly probable that such result will be caused by his conduct when knowledge of the existence of a particular fact is an element of an offense. Such knowledge is established if a person is aware of a high probability of its existence.

Thus, if a person is aware of the fact that he is shooting someone, he is guilty of that crime. The question of whether he could appreciate the criminality of his conduct or conform his conduct to the requirements of law is a question asked only after a jury determines a defendant's culpability or accountability on the basis of "common sense."

Again and again in my conversations with various county attorneys throughout the State of Montana, in preparation for my testimony today, I was told that juries can determine the question of whether a defendant is insane enough to exempt him from punishment, a determination made possible by the opportunity to view him throughout the trial. Jurors can infer with reasonable accuracy what a person's mental state was when he committed a crime by listening to the testimony of the persons who know him, who watched him, and by listening to testimony regarding the circumstances of his crime. Montana law no longer has a provision that allows a defendant to present his defense before going to trial by seeking an acquittal based on his state of mind, his inability to appreciate the criminality of his conduct, or to conform his conduct to the requirements of law. Presently, if a defendant seeks to escape accountability for his actions, he must present his case to a jury, and the jury must decide.

The prosecution still bears the burden of proving that a defendant committed the act for which he is charged, either purposely or knowingly beyond a reasonable doubt. The Attorney General asked me to stress very strongly that, based on our experience before the United States Supreme Court in the case of Sandstrom v. Montana, we are convinced that shifting the burden of proof to the defendant on the

mental element of the crime (when he asserts the insanity defense) presents serious constitutional problems. Taking the other approach--limiting the admissibility of the evidence that can be presented at trial--makes much more sense. In view of the current state of public cynicism over the criminal justice system, a law that makes sense is worth looking at very closely.

III. EXPERT TESTIMONY

For several years the Attorney General has employed a special prosecutor, chief of the State County Prosecutor Services Bureau, Marc Racicot, whose job it is to assist prosecutors in many of the smaller counties in prosecuting major felonies. In 1979, just prior to the change in Montana's law, Mr. Racicot prosecuted a homicide in Malta, Montana. The defendant attempted to present evidence to the trial judge showing that due to a mental disease or defect he was not responsible when he shot three members of a family who owned a tavern. Three psychiatrists and two psychologists evaluated the defendant. All provided expert testimony to the effect that the defendant suffered from a mental disease or defect. Three of the five concluded that the defendant was unable to appreciate the criminality of his act or conform his conduct to the law; they listed a number of symptoms to support their conclusion. These experts did not know, however, that the prosecutors had discovered a note that the defendant had passed to a codefendant in jail, a note that listed detailed instructions on how to convince a psychiatrist that "they were crazy." Mr. Racicot asked one of the psychiatrists how he would diagnose a person who displayed those symptoms listed in the note. The psychiatrist concluded that those were symptoms of a mental disease. When the defendant's

charade was revealed, he pled guilty to the offense. The time was ripe to change the law.

Mr. Racicot also pointed out that in the ten years that he has been prosecuting he has encountered the insanity defense nearly fifty times. Interestingly, in not one of those fifty times has a defendant been found to have any organic brain damage or observable organic disease, diagnosable or objectively provable in a court of law.

Montana's law is based on the theory of accountability. It is also based on our fundamental notions and beliefs about justice. To modify the insanity defense is not to take a step backward, but rather to understand more about the limits of psychiatry. We know now that juries understand accountability; their determinations of accountability should not be undermined or confused by "experts" who do not share a consensus about the fundamental theories they employ.

ENCLOSURES.

INSTRUCTION NO. 1

The burden of proof rests upon the State throughout trial to establish the guilt of the accused beyond a reasonable doubt and a conviction is not warranted unless this burden is satisfied. The burden resting on the State is to prove beyond a reasonable doubt each and every fact which is an element of the offense charged or of any lesser included offense which you may consider pursuant to these instructions. The burden to prove all the elements of an offense is always upon the State.

You must not expect or require the defendant to prove or disprove anything with respect to any element of an offense.

INSTRUCTION NO. 2

You are instructed that the defendant's state of mind or mental state ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer the defendant's state of mind from the surrounding circumstances. You may consider any statement made and any act done or omitted by the defendant. You may consider the testimony of witnesses who have testified concerning their observations of defendant's appearance, behavior, speech and actions, and from the facts and circumstances which you find to be true you may draw such reasonable inferences and conclusions from such testimony as you feel are justified.

Devitt and Blackmar, section 14.13

Cramer v. United States, 325 U.S. 1, 31 (1944).

See County Court of Ulster County, New York v. Allen, 99 S.Ct. 2213 (1979)

INSTRUCTION NO. 3

In considering the evidence in this case, you are instructed that you may draw such reasonable inferences or conclusions from the testimony and exhibits as you feel are justified in light of common experience. Inferences are merely deductions or conclusions which reason and common sense lead the jury to draw from facts which have been established by the evidence in the case. The law, however, does not require you to draw any particular inference or conclusion - it merely permits or allows you to do so. Where you are instructed you may infer a particular fact based upon the

existence of some other fact, you are permitted to draw that inference, but are not required to do so. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established in the testimony and evidence in the case.

County Court of Ulster County New York v. Allen, 99 S.Ct. 2213 (1979)

Devitt and Blackmar, section 15.03

INSTRUCTION 4

In determining whether the state of mind which is an element of the offense has been proved beyond a reasonable doubt, you may also consider testimony concerning the presence and nature of any mental disease or defect from which defendant claims he suffered at the time of the offense. You may consider such evidence because the defendant asserts that due to mental disease or defect he did not have, or could not have had, the specific mental state which is an element of the offense.

Mental disease or defect is any abnormal condition of the mind, regardless of its particular medical label, which substantially affects and impairs mental or emotional processes. The term "mental disease" differs from "mental defect" in that mental disease is a condition which in the future could either improve or deteriorate, whereas mental defect is a condition which can neither improve nor deteriorate. [If the evidence at trial shows that defendant has engaged in repeated anti-social conduct, then the jury should also be instructed, "Mental disease or defect does not in-

clude an abnormality which is manifested solely by repeated criminal or antisocial conduct."]

With respect to defendant's claim concerning mental disease or defect you have heard the evidence of psychiatrists [and psychologists], who have testified as expert witnesses. An expert witness is permitted to testify as to his opinion concerning an issue to which his expertise relates. In this case psychiatrists [and psychologists] have been permitted to testify as to their opinions concerning whether or not the defendant suffered from a mental disease or defect at the time of the alleged offense and whether or not the defendant had or could have had the state of mind which is an element of the offense.

In considering their testimony, you are instructed that you are not bound by medical labels, definitions, or conclusions as to what is or is not a mental disease or defect. What psychiatrists [and psychologists] may or may not consider a mental disease or defect for clinical purposes, where their concern is treatment of a patient, may or may not be the same as mental disease or defect for the purpose of determining the defendant's mental state at the time the offense was committed. Whether the defendant suffered from a mental disease or defect and whether the defendant did or did not have the state of mind which is an element of an offense must be determined by you under the explanation of those terms as given to you by this Court.

In determining whether defendant had the state of mind which is an element of an offense, you are not bound by the opinions of psychiatrists [and psychologists]. You are also entitled to consider the testimony of lay witnesses, and their observations of defendant's appearance, behavior, speech, and actions.

In weighing the evidence of both expert and lay witnesses you may use your common sense and your knowledge of human nature and the ways of the world.

The evidence which has been admitted in this case with respect to defendant's mental condition [and his state of mind] relates not only to his mental condition and state of mind on the date of the offense charged but also to his mental condition [and state of mind] before and after that date. However, evidence of defendant's mental condition [and state of mind] before or after the alleged offense was admitted solely for the purposes of assisting you in determining the defendant's mental state at the time of the alleged offense.

In considering evidence of mental disease or defect as related to the defendant's state of mind, always remember that you must not expect or require the defendant to prove to your satisfaction that the acts you find he did were done without the state of mind which is an element of an offense. The defendant is not obliged -- he is not obligated -- to prove anything. It is always the prosecution's burden to prove defendant's guilt, including the state of mind which is an element of an offense, beyond a reasonable doubt. If the evidence in the case leaves you with a reasonable doubt whether the defendant, at the time of the commission of the offense, had the state of mind which is an element of the offense then you must find defendant not guilty of that offense.

Sections 46-14-101, 46-14-102, 46-14-201, MCA

State v. McKenzie, ___ Mont. ___, 581 P.2d 1203

Devitt and Blackmar, section 14.17

[Use this instruction where the defendant contends that he could not have had the state of mind associated with the substantive offense or any of the lesser included offenses and the evidence is such that the jury could so find]

INSTRUCTION 5

In determining whether the state of mind which is an element of the offense of deliberate homicide has been proved beyond a reasonable doubt, you may also consider testimony concerning the presence and nature of any mental disease or defect from which defendant claims he suffered at the time of the offense. You may consider such evidence because the defendant asserts that due to mental disease or defect he did not have, or could not have had, a conscious purpose to cause the death of another human being or an awareness that it was highly probable his acts would cause the death of another human being.

Mental disease or defect is any abnormal condition of the mind, regardless of its particular medical label, which substantially affects and impairs mental or emotional processes. The term "mental disease" differs from "mental defect" in that mental disease is a condition which in the future could either improve or deteriorate, whereas mental defect is a condition which can neither improve nor deteriorate. [If the evidence at trial shows that defendant has engaged in repeated anti-social conduct, then the jury should also be instructed, "Mental disease or defect does not include an abnormality which is manifested solely by repeated criminal or antisocial conduct."]

With respect to the defendant's claim concerning mental disease or defect you have heard the evidence of psychiatrists [and psychologists], who have testified as expert witnesses. An expert witness is permitted to testify as to his opinion concerning an issue to which his expertise relates. In this case psychiatrists [and psychologists] have been permitted to testify as to their opinions concerning whether or not the de-

fendant suffered from a mental disease or defect at the time of the alleged offense and whether or not the defendant had or could have had, a conscious object to cause the death of _____ or an awareness that it was highly probable his acts would cause the death of _____.

In considering their testimony, you are instructed that you are not bound by medical labels, definitions, or conclusions as to what is or is not a mental disease or defect. What psychiatrists [and psychologists] may or may not consider a mental disease or defect for clinical purposes, where their concern is treatment of a patient, may or may not be the same as mental disease or defect for the purpose of determining the defendant's mental state. Whether the defendant suffered from a mental disease or defect and whether the defendant did, or did not, have a conscious object to cause the death of _____ or an awareness that it was highly probable his acts would cause the death of _____, must be determined by you under the explanation of those terms as given to you by this Court.

In determining whether defendant had the conscious object to cause the death of _____ or was aware of the high probability that his actions would cause the death of _____, you are not bound by the opinions of psychiatrists [and psychologists]. You are also entitled to consider the testimony of lay witnesses, and their observations of defendant's appearance, behavior, speech, and actions. In weighing the evidence of both expert and lay witnesses you may use your common sense and your knowledge of human nature and the ways of the world.

The evidence which has been admitted in this case with respect to the defendant's mental condition [and his state of

mind]. relates not only to his mental condition [and state of mind] on the date of the offense charged, but also to his mental condition [and state of mind] before and after that date. However, evidence of defendant's mental condition [and state of mind] before or after the alleged offense was admitted solely for the purposes of assisting you in determining the defendant's mental state at the time of the alleged offense.

In considering evidence of mental disease or defect as related to the defendant's state of mind, always remember that you must not expect or require the defendant to prove to your satisfaction that the acts you find he did were done without the state of mind which is an element of an offense. The defendant is not obliged -- he is not obligated -- to prove anything. It is always the prosecution's burden to prove the defendant's guilt, including the state of mind which is an element of an offense, beyond a reasonable doubt. If the evidence in the case leaves you with a reasonable doubt whether the defendant, at the time of the commission of the offense, had the conscious object to cause the death of _____, or was aware of the high probability that his actions would cause the death of _____, then you must find the defendant not guilty of _____ and go on to consider the lesser included offense of _____.

Sections 46-14-101, 46-14-102, 46-14-201, MCA
 State v. McKenzie, Mont. _____, 581 P.2d 1203 (1978)
 Devitt and Blackmar, section 14.17

(This instruction is specifically tailored for use in a deliberate homicide case where the defendant contends that due to a mental disease or defect he is not guilty of the offense charged, but instead is guilty of a lesser included offense, i.e. aggravated assault. In such a case, it will be used in place of instruction 4.)

Senator SPECTER. Thank you all very much, and the hearing is adjourned.

[The hearing adjourned at 12:38 p.m.]

[The following statement was subsequently supplied for the record:]



Executive Offices:
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National Association of Chiefs of Police

STATEMENT OF COL. FRED PEARSON ON BEHALF OF THE
 NATIONAL ASSOCIATION OF CHIEFS OF POLICE TO THE
 COMMITTEE ON THE JUDICIARY IN WASHINGTON, D.C.

MR. CHAIRMAN AND MEMBERS OF THE
 COMMITTEE:

THE NATIONAL ASSOCIATION OF CHIEFS OF POLICE IS CONCERNED WITH RECENT EVENTS IN WHICH A YOUNG MAN, APPARENTLY MENTALLY ILL, WAS FOUND INNOCENT BY REASON OF INSANITY OF TRYING TO KILL THE PRESIDENT OF THE UNITED STATES. THAT ONLY BY PURE LUCK DID THREE OTHER VICTIMS SURVIVE THE BULLETS THAT WERE FIRED TO KILL PRESIDENT REAGAN.

WE HAVE HEARD TIME AND AGAIN THAT MEDICINE IS AN ART AND NOT A SCIENCE. YET WHEN IT COMES TO DETERMINING RATIONAL ACTS OR INSANE BEHAVIOR AT THE TIME THE TRIGGER IS PULLED...WHO IS REALLY TO KNOW? A JURY IS NOT GIVEN AT THIS TIME THE OPPORTUNITY TO SAY "GUILTY" BUT NOT RESPONSIBLE BY REASON OF INSANITY IN MOST STATES AND NOT IN FEDERAL COURTS.

WE CANNOT SPEAK FOR EVERY POLICE CHIEF OR SHERIFF BUT THOSE WE HAVE TALKED WITH FEEL THAT SENATE BILL 2672 MAKES COMMON SENSE.

IT PROTECT THE COMMUNITY BY RECOGNIZING A CRIME, YET, IT ALLOWS THE SYSTEM OF OUR NATION TO TAKE INTO CONSIDERATION THE MENTAL STATE OF THE PERSON ACCUSED OF A CRIME.

THE LARGEST FRATERNAL NON-PROFIT NATIONAL ASSOCIATION OF COMMAND OFFICERS IN THE UNITED STATES
 REPRESENTING THE INTERESTS OF MORE THAN 60,000 LAW ENFORCEMENT OFFICERS IN AMERICA

WE WOULD ENCOURAGE THE CONGRESS OF THE UNITED STATES TO ADOPT THIS LAW IN ORDER TO REFORM IN PRESENT INEQUITY AND DANGER THAT POLICE OFFICERS FACE TODAY UNDER RULES THAT ALLOW "HEALED" KILLERS TO WALK FREE FROM STATE MENTAL HOSPITALS AND WHO HAVE KILLED AGAIN.

IT IS UNFORTUNATE BUT TRUE THAT PERSONS WHO HAVE BEEN HELD IN A MENTAL HOSPITAL AND LATER RELEASED AS CURED HAVE KILLED OR INJURED INNOCENT PERSONS. WE NEED TO PROTECT SOCIETY AND TO LET THE WORLD KNOW THAT WHILE WE RECOGNIZE ACTS OF PERSONS WHO ARE MENTALLY DISTURBED THAT THEY ARE GUILTY OF A CRIME AGAINST THE COMMUNITY AND WILL BE PUNISHED FAIRLY.

THE PRESENT LAW INVITES ACTS OF TERRORISM AND VIOLENCE AND ENDANGERS EVERY PERSON IN THIS NATION. WE CAN NOT AFFORD THIS EXCUSE OR THE COST IN LIFE AND PROPERTY.

SEN. THURMOND AND MEMBERS OF THIS COMMITTEE I BELIEVE THAT THE VAST MAJORITY OF CITIZENS FEEL THAT YOUR BILL IS A STEP IN THE RIGHT DIRECTION AND THAT IT MERITS QUICK APPROVAL FROM THIS COMMITTEE AND THEN TO THE CONGRESS AS A LAW LONG OVERDUE IN THE CRIMINAL JUSTICE FIELD. THANK YOU.

COL. FRED PEARSON
LEGISLATIVE LIAISON
NATIONAL ASSOCIATION OF CHIEFS OF POLICE
1000 CONNECTICUT AVE N W SUITE 9
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THE INSANITY DEFENSE

MONDAY, AUGUST 2, 1982

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met at 10 a.m., in room 2228, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Present: Senator Hatch.

Staff present: Laurie McBride, counsel, and Paul Summitt, special counsel, full committee; Randy Rader, general counsel, and Steve Markman, chief counsel and staff director, Subcommittee on the Constitution.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. The committee will come to order.

Today the Committee on the Judiciary is continuing hearings on the insanity defense and the treatment of mentally ill offenders charged with violations of Federal law. Senator Hatch has graciously agreed to chair the hearing when I have to leave, and I thank him for taking the time from his busy schedule to explore this most important issue.

There are currently nine bills pending before the committee relative to the insanity defense. As I stated at the outset, I have an open mind on the subject. All of the pending legislative proposals have merit, and each should be given careful consideration by the committee.

I am looking forward to hearing the testimony from our many distinguished witnesses. The committee is fortunate to have three witnesses today who each have great knowledge and experience in this area. I sincerely appreciate the enormous effort our witnesses have made in preparing their testimony and in traveling to Washington to share their expertise with the committee. We need the practical insights and experience of these concerned individuals to assist us in considering this vital subject.

Before we begin with the first witness I wish to place a prepared statement from Senator Hatch in the record.

[Statement follows:]

OPENING STATEMENT OF SENATOR ORRIN G. HATCH

FOR WELL OVER A CENTURY, THE INSANITY DEFENSE HAS ATTRACTED MORE ATTENTION THAN ANY OTHER ISSUE IN CRIMINAL LAW. RECENTLY THE ACQUITTAL OF JOHN W. HINCKLEY, JR. PRODUCED A SUBSTANTIAL PUBLIC OUTCRY. WE MEET TODAY IN RESPONSE TO THIS OUTCRY TO HEAR TESTIMONY IN SEARCH OF THE MOST EFFECTIVE WAY TO REVISE THE FEDERAL INSANITY DEFENSE.

AS A BRIEF REVIEW, LET ME RECAP THE HISTORY OF THE INSANITY DEFENSE.

ONE OF THE FIRST TESTS USED IN RELATION TO ESTABLISHING ACCOUNTABILITY WAS USED IN ENGLAND DURING THE 1700'S. THIS TEST HELD RESPONSIBLE FOR THEIR ACTIONS ALL PEOPLE WHO HAD THE MENTAL CAPACITY OF, OR ABOVE, A 14 YEAR OLD.

(1 HALE P.C. 30)

LATER, "THE WILD BEAST TEST" WAS UTILIZED STATING THAT ANYONE WHO WAS DEPRIVED OF THEIR REASON AND MEMORY TO THE EXTENT OF AN INFANT OR A WILD BEAST WAS NOT RESPONSIBLE FOR HIS OR HER ACTIONS. (16 HOW ST. TR. 764)

THESE TESTS AND THOSE DEVELOPED IN YEARS TO FOLLOW EVOLVED PRINCIPALLY AS A MEANS BY WHICH ENGLISH JURISTS COULD AVOID--IN A LEGALLY RATIONAL MANNER-- THE DISCOMFORTURE OF CONDEMNING TO HANGING A FELON WHO WAS SO MENTALLY DERANGED THAT HIS EXECUTION WOULD AFFRONT ORDINARY MORAL SENSIBILITIES. AS LORD ERSKINE STATED IN THE EARLIEST YEARS OF THE 19TH CENTURY, "DELUSION... IS THE TRUE CHARACTER OF INSANITY". INDIVIDUALS SUFFERING IN THIS MANNER COULD NOT TRULY BE CONSIDERED "RESPONSIBLE" IN THE LEGAL SENSE.

IN THE UNITED STATES, THE CONGRESS HAS NEVER ENACTED LEGISLATION DEALING WITH INSANITY DEFENSE. ITS DEVELOPMENT HAS LARGELY BEEN LEFT TO THE COURTS, PARTICULARLY THE UNITED STATES COURTS OF APPEALS. THE FOUNDATION OF THE PRESENT DEFENSE WAS LAID DOWN IN A LEADING ENGLISH CASE CALLED M'NAGHTEN'S CASE (8 ENG. REP. 718 (HOUSE OF LORDS, 1843)).

THIS RULE WAS BROUGHT ABOUT BECAUSE OF THE ACQUITTAL OF DANIEL M'NAGHTEN, WHO KILLED EDWARD DRUMMOND IN AN ATTEMPT TO ASSASSINATE THE PRIME MINISTER OF ENGLAND, SIR ROBERT PEEL. AT HIS TRIAL THE DEFENDANT, DANIEL M'NAGHTEN, BROUGHT FORTH WITNESSES TO

TESTIFY THAT AT THE TIME OF THE ACT HE WAS NOT OF A SOUND STATE OF MIND. THE JURY FOUND M'NAGHTEN NOT GUILTY BY REASON OF INSANITY.

QUEEN VICTORIA, WHO HAD HAD THREE PREVIOUS ATTEMPTS ON HER LIFE, WAS OUTRAGED BY THE M'NAGHTEN DECISION, SHE ORDERED A SPECIAL INVESTIGATION BY THE HOUSE OF LORDS. THE HOUSE OF LORDS PRESENTED THE LAW LORDS WITH A LIST OF QUESTIONS TO BE RECONCILED. THE LAW LORDS RESPONSE TO THESE QUESTIONS BECAME WHAT IS KNOWN AS THE FAMOUS M'NAGHTEN RULE IN WHICH IT STATES--

TO 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 LABORING UNDER SUCH 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, HE DID NOT KNOW HE WAS DOING WHAT WAS WRONG.

THE SO-CALLED "RIGHT-WRONG" TEST INSANITY POSITED IN M'NAGHTEN HAS GRADUALLY, BUT STEADILY, BEEN BROADENED OVER THE YEARS.

MOST IMPORTANTLY, THE M'NAGHTEN TEST, A PURELY COGNITIVE TEST WAS SUPPLEMENTED BY A VOLITIONAL TEST STATING THAT AN INDIVIDUAL WHO COULD DISCERN RIGHT FROM WRONG, YETWHO, FOR REASONS OF MENTAL DISEASE, COULD NOT CONTROL HIS ACTIONS, COULD AVAIL HIMSELF OF THE INSANITY DEFENSE. AS IT CAME TO BE KNOWN, THE "IRRESISTIBLE IMPULSE" RIDER TO M'NAGHTEN, INQUIRED INTO WHETHER AN OFFENDER WAS ABLE TO RESTRAIN HIS ACTIONS ONCE HAVING BEEN SHOWN TO APPRECIATE THE WRONGNESS OF SUCH ACTIONS. SEE DAVIS V. UNITED STATES, 165 U.S. 373 (1897).

IN THAT CASE THE COURT HELD--

AN ACCUSED IS NOT CRIMINALLY RESPONSIBLE IF HIS UNLAWFUL ACT WAS THE PRODUCT OF MENTAL DISEASE OR DEFECT.

IN 1954, THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, IN THE CASE OF DURHAM V. UNITED STATES, 214 F. 2D 862 (1954), FEELING THAT PAST RULINGS ON THE INSANITY DEFENSE WERE ARCHAIC IN-LIEU OF MODERN PSYCHOLOGICAL THEORY PRODUCED THE DURHAM TEST. WHICH STATED--

AN ACCUSED IS NOT CRIMINALLY RESPONSIBLE IF HIS UNLAWFUL ACT IS THE PRODUCT OF A MENTAL DISEASE OR MENTAL DEFECT.

THE DURHAM TEST WAS IMMEDIATELY UNDER ATTACK BECAUSE OF ITS BROAD WORDING, AND FOR GOOD REASON.

AFTER NEARLY TWO DECADES OF INTERPRETING THE PROVISIONS OF THIS RULE, PROVISIONS WHOSE MEANINGS WERE BY NO MEANS WIDELY AGREED.

UPON, THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA IN 1972 ABANDONED THE DURHAM RULE AND ADOPTED A FORMULATION THAT HAD PREVIOUSLY BEEN ADOPTED BY OTHER CIRCUITS.

THIS WAS THE AMERICAN LAW INSTITUTE'S MODEL PENAL CODE FORMULATION:

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 TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM 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 ANTI-SOCIAL CONDUCT.

AS CAN BE SEEN, THE INSANITY DEFENSE HAS EVOLVED A LONG WAY FROM ITS ORIGINALLY INTENDED PURPOSE. THE INSANITY DEFENSE AS DEFINED IN ENGLISH LAW WAS A HUMANITARIAN CONCEPT TO AVOID PUBLICLY HANGING THOSE WHO WERE CLEARLY, WITHOUT QUESTION, SUFFERING FROM EXTREME MENTAL INCAPACITY, MAINLY ORGANIC MENTAL DISEASES. TODAY THE INSANITY DEFENSE HAS EVOLVED TO TESTS AND TERMINOLOGY THAT PRESENT INTERDISCIPLINARY ARGUMENTS AND CONFUSION. NO LONGER IS THE INSANITY DEFENSE A HUMANITARIAN ACT, BUT OFTEN A PLOY USED AS AN ESCAPE FROM CRIMINAL PROSECUTION.

WITH THIS HISTORICAL SKETCH AS BACKGROUND, LET ME SPELL OUT THE OBJECTIVES OF THIS COMMITTEE IN ITS EFFORTS TO REVISE THE INSANITY DEFENSE:

FIRST, WE MUST ABOLISH THE CURRENT "RICH MAN'S DEFENSE" AND ENACT CLEAR LEGAL GUIDELINES A JURY CAN UNDERSTAND AND IMPLEMENT.

SECOND, WE MUST DO AWAY WITH THE PSYCHIATRIC EXPERT ORDEAL WHICH PITS PAID DOCTOR AGAINST PAID DOCTOR IN A CONFUSING JUMBLE OF COSTLY COURT TESTIMONY THAT ONLY SERVES TO HIGHLIGHT DISPUTES WITHIN THE MEDICAL COMMUNITY OVER UNSETTLED THEORIES. AS CHIEF JUSTICE BERGER STATED WHILE STILL A CIRCUIT JUDGE: "NO RULE OF LAW CAN POSSIBLY BE SOUND OR WORKABLE WHICH IS DEPENDENT ON THE TERMS OF ANOTHER DISCIPLINE WHOSE MEMBERS ARE IN PROFOUND DISAGREEMENT ABOUT WHAT THOSE TERMS MEAN." CAMPBELL V. U.S. 307 F.2d 597, 612. (1962).

THIRD, ESTABLISH CRIMINAL COURT CONTROL OF THOSE WHO TRULY NEED PSYCHIATRIC TREATMENT SO THAT THEY WILL NOT BE RELEASED BEFORE THEY ARE SAFE TO SOCIETY AND THEMSELVES.

FOURTH, TO RESTORE FAITH OF THE AMERICAN PUBLIC THAT THERE IS TRUE JUSTICE IN THE CRIMINAL JUSTICE SYSTEM. THIS CAN BE DONE BY

ESTABLISHING A SYSTEM WHERE THE PUBLIC CAN BE PROTECTED BY PROSECUTING THOSE WHO ARE RESPONSIBLE FOR THEIR ACTIONS AND TREATING AND CURING THOSE WHO ARE NOT. THIS CAN ONLY COME ABOUT BY DEVELOPING CLEAR AND EFFECTIVE TESTS OF INSANITY AND ACCOUNTABILITY.

AS WE PROCEED IN THESE HEARINGS, I HOPE WE WILL WORK TOWARDS THESE OBJECTIVES AND EFFECTIVELY ILLUMINATE THE PROBLEM AT HAND. IT IS EASY TO LOSE OURSELVES IN TECHNICAL ARGUMENTS OVER TRIVIAL MATTERS. EACH OF US KNOWS THAT IMPORTANT OBJECTIVE OF REMEDYING THE INSANITY DEFENSE. LET US UNITE TOGETHER IN THIS COMMON CONCERN WORKING TOWARDS AN EFFECTIVE SOLUTION.

The CHAIRMAN. As is the practice of the committee, your written statement will be included in the record in its entirety. I would ask that you highlight and summarize your testimony so as to allow the maximum time for questioning.

Now, I believe we have the first witness, Mr. Richard Bonnie, professor of law, University of Virginia, and director of the institute of law, psychiatry and public policy. We are glad to have you, Professor Bonnie, and if you will have a seat you may begin your testimony.

Now, if you want to deliver your entire testimony, you can do it, or we can place that into the record and then let you summarize. Would you like to do that?

Mr. BONNIE. Senator, I have prepared a fairly lengthy statement which I would like to be placed in the record and I would like to just summarize my prepared testimony.

The CHAIRMAN. Without objection, your entire statement will be placed in the record and you may proceed to summarize it.

STATEMENT OF RICHARD J. BONNIE, PROFESSOR OF LAW AND DIRECTOR, INSTITUTE OF LAW, PSYCHIATRY AND PUBLIC POLICY, UNIVERSITY OF VIRGINIA

Mr. BONNIE. Of course, Mr. Chairman, it is a pleasure to appear before the committee to present my views on proposals to abolish or modify the insanity defense.

In presenting my views, I will be drawing on my experience as director of the institute of law, psychiatry and public policy at the University of Virginia, which is an interdisciplinary teaching and research center that has performed hundreds of forensic evaluations of criminal defendants, and which sponsors and conducts specialty fellowship programs for psychiatrists and lawyers in forensic psychiatry and mental health law. I will also be drawing on insights derived from several years of intensive research on the insanity defense associated with a recently published criminal law text.

Two fundamentally distinct questions are intertwined in discussions of the insanity defense, of course, in the previous testimony that this committee has heard. One issue concerns the moral issue of responsibility—a question which looks backward in time to the

offender's mental condition at the time of the offense. Among the most fundamental principles of criminal law are that criminal punishment should be imposed only on those offenders who are blameworthy and that even blameworthy offenders should not be subjected to punishment which is disproportionate to the degree of their culpability. The other issue is essentially dispositional and looks forward in time—what should be done with mentally disordered offenders, including those who are acquitted by reason of insanity, in order to minimize the risk of future recidivism and to protect society.

I want to address most of my prepared remarks to the question of responsibility. I will argue, in summary form as follows: I believe that this committee should reject the sweeping proposals to abolish the insanity defense in favor of proposals to narrow it and to shift the burden of proof to the defendant. The core of the insanity defense must be retained, in my opinion, because some defendants afflicted by severe mental disorder who are out of touch with reality and are unable to appreciate the wrongfulness of their acts cannot justly be blamed and therefore do not deserve to be punished. The insanity defense, in short, is essential to the moral integrity of the criminal law.

Before presenting my views on the question of responsibility in greater depth, I would like to make three observations about the dispositional issues which have been raised during the committee's previous hearings.

First, it is clear to us all, I believe, that present dissatisfaction with the insanity defense is largely rooted in public concern about the premature release of dangerous persons acquitted by reason of insanity. However, I hope to convince the committee that increased danger to the public is not a necessary consequence of the insanity defense. The public can be better protected than it is now in many States by a properly designed dispositional statute which, while providing due process for the acquittees, assures that violent offenders acquitted by reason of insanity are committed to secure hospitals for appropriate treatment, including a period of postdischarge supervision or "hospital parole." I hope Congress will lead the way by enacting such a dispositional statute. Surely the gap in Federal law needs to be filled and, as I have suggested, I believe that the Congress could adopt a model for the States in this area.

Second, proponents of many recent reforms, including the "guilty but mentally ill" concept, claim that their goal is to facilitate treatment of mentally disordered offenders. This is surely a worthy objective and calls attention to the fact that our jails and penitentiaries now hold many mentally ill—and I might add, many retarded—prisoners who are not adequately treated. However, the real issue here, I believe, is not a legal one but a fiscal one. It is a question of the adequacy of resources available to provide those special programs. This issue has little to do with the insanity defense, in my opinion, since most of the prisoners who need psychiatric treatment are those who become mentally ill while they are serving custodial sentences.

In any case, I believe a separate verdict of "guilty but mentally ill," which has now been enacted in seven States, is an ill-conceived way of identifying prisoners who are amenable to psychiatric treat-

ment. It surely makes no sense for commitment procedures to be triggered by a jury verdict based on evidence concerning the defendant's past mental condition rather than his present mental condition and potential problems. Moreover, decisions concerning the proper placement of incarcerated offenders should be made by correctional authorities and mental health authorities, not by juries or trial judges.

Third, it is often said that the participation of mental health professionals in criminal proceedings should be confined to the sentencing stage. I agree that clinical expertise is likely to be most useful on dispositional questions rather than on responsibility questions. Indeed, I hope the committee recognizes that most clinical participation in the criminal process now actually occurs at the sentencing stage rather than at the trial stage, contrary to the implications that might be drawn from celebrated cases like John Hinckley's.

However, I hope the committee also recognizes that expert witnesses cannot be excluded from the guilt stage so long as the defendant's mental condition is regarded as morally relevant to his criminal liability. Even under the abolitionist proposals before the committee, expert testimony would still be admissible on mens rea. My only disagreement then with the abolitionist view is a moral disagreement—I believe that a person's claim of inability to appreciate the wrongfulness of his conduct is morally relevant to his criminal responsibility. Let me now turn to this narrow but, I believe, critical dispute.

The committee has basically three options. One is to perpetuate the existing law, which in effect means the Model Penal Code formulation of the insanity defense now used in all of the Federal circuits. The distinguishing characteristic of the Model Penal Code test is that it is a broad version of the insanity defense, including what the scholars have called both cognitive and volitional prongs. That is to say, a person can be acquitted by reason of insanity if, by virtue of mental disease or defect, he lacks substantial capacity either to understand or appreciate the legal or moral significance of his actions or to conform his conduct to the requirements of the law.

The second option is to revive the *M'Naghten* test, although using modern terminology. Essentially this would eliminate the volitional prong of the defense and limit exculpation on grounds of insanity to individuals who lack the capacity to appreciate the wrongfulness of their behavior: This is now a distinctly minority position in this country. It is used in less than one-third of the States at the present time, but it is still the law of England. This is the position that I support.

The third option is what I have called the abolition approach or the mens rea approach. The reason that it is accurate to characterize this as abolition is that it would eliminate the mental disease or defect as an independent ground of exculpation and would treat mentally disordered offenders the same way other offenders are treated. That is to say, if they have the mens rea required for conviction, they will be convicted. If they lack it, they will be acquitted. As I think the Attorney General suggested in his testimony, he

believes that at least that much of the current defense is constitutionally required.

I would like to summarize the case against abolition of the insanity defense. In general, most of the bills before you would adopt this approach, and it has been recently enacted in Montana and Idaho. If the insanity defense were abolished, in my opinion, the law would not take adequate account of the incapacitating effects of severe mental illness. First, people who, in the Attorney General's words, who shoot people when they think they are shooting trees or squeeze a lemon when they think they are squeezing someone's neck do not really exist. And even if these conditions exist, individuals who make these perceptual mistakes might have the mens rea required for some criminal offenses because some criminal offenses actually require negligence or recklessness as the mens rea required in the rather than what we regard in a lay sense, as intentions or subjective beliefs.

Second, and this is the more serious problem, mens rea focuses only on conscious perceptions. It has no qualitative dimension. For this reason, the mens rea approach would ignore the realities of severe mental illness. Some mentally ill defendants, and by this I mean persons who were psychotic and grossly out of touch with reality, may very well be said to have intended to do what they did but, nonetheless, they may have been so severely disturbed that they were unable to appreciate the significance of their actions in any but a trivial way. These cases do not frequently arise—and I want to emphasize that—but when they do, a criminal conviction signifying a societal judgment that the defendant deserves to be punished for what he did would offend the basic moral intuitions of the community. Judges and juries would then be forced either to return a verdict of conviction in such cases which they regard as morally obtuse or to acquit the defendant in defiance of the law. They should be spared such moral embarrassment.

In the prepared statement that will be inserted in the record, I have tried to present a case which I think highlights the problem with the mens rea approach. In general terms, this case involved Joy Baker, a woman who was charged with killing her aunt. Her testimony, which was not doubted by anyone who ever heard it, was that she thought her aunt had been possessed by the devil and that she and all the other people in the community were part of some demonic conspiracy to annihilate her. She felt that she was immediately threatened at the time that her aunt suddenly appeared at her back porch. I will not present all the details of the testimony, but I do commend it to the members of the committee. The bottom line was that this woman was unable to appreciate the wrongfulness of her behavior because at the time she shot her aunt, she believed that she was imminently in danger of annihilation at the hands of the devil.

Joy Baker shot her aunt two times. At the time of the first shot, she believed that her aunt was possessed. However, when she shot her aunt, and her aunt fell backwards into the mud on the back porch of the house, she realized at that time in a more realistic way what she had done. Her aunt said "Why, Joy?" "Because you are the devil and you came to hurt me," Joy answered. Her aunt said, "Honey, no, I came here to help you." At this point, the de-

fendant said she saw that her aunt was hurting and became very confused. Then, according to her statement, she said "I took the gun and I shot her again just to relieve the pain she was having because she said she was hurt." Her aunt died after the second shot.

All of the psychiatrists who examined this woman concluded that she was acutely psychotic and out of touch with reality at the time she shot her aunt. The police who arrested her and others in the small rural community concluded that she must have been crazy because there was no other conceivable explanation for her conduct. After she was stabilized on antipsychotic medication, she was permitted to leave the State and to live with relatives in a neighboring State. Eventually, the case was dismissed against her by the court, with the consent of the prosecution, after a preliminary hearing at which the examining psychiatrists testified. She was never indicted or brought to trial.

It seems clear, even to a layman, that Ms. Baker was so delusional and regressed at the time of the shooting that she did not understand or appreciate the wrongfulness of her conduct. I believe it would be morally obtuse to condemn and punish her. And, of course, this was a judgment shared by every member of the community as well as the prosecution. Yet—and this is the key point—this woman had the state of mind required for some form of criminal homicide. If there were no insanity defense, she could be acquitted only in defiance of the law.

In my prepared statement, I have tried to indicate in technical terms why she had the mens rea required for homicide. At the time of the second shot, she would be guilty of premeditated murder since euthanasia is not a justification for homicide. At the time of the first shot, she was delusional and believed that in some sense that her aunt was possessed by the devil, and it might be said that it is not wrong to shoot a devil; however, as the law would normally be applied—both at common law and under the modern codes—this woman would at least be guilty of negligent homicide and probably of reckless homicide.

I believe that this case convincingly demonstrates why, in theoretical terms, the mens rea approach does not take sufficient account of the morally significant aberrations of mental functions which can be associated with severe mental disorder. I readily concede that these technical points may make little practical difference in the courtroom. If the expert testimony in her case, and others like it, were admitted to disprove the existence of mens rea, juries may behave, as many observers believe they do now—they may ignore the technical aspects of the law and decide, very bluntly, whether the defendant was too crazy to be convicted. However, I do not believe that rational criminal law reform is served by designing rules of law in the expectation that they will be ignored or nullified when they appear unjust in individual cases.

Also, another danger of the mens rea approach is that the courts will attempt to soften its impact by reinterpreting the concepts of intention, knowledge, and recklessness in order to give them qualitative meanings and thereby achieve exculpatory results in cases where criminal liability seems ethically offensive. This would be particularly unfortunate response because it would undermine the

modern trend toward greater precision and coherence in the definition of mens reea. Again, I believe the cause of criminal law reform, to which this committee has repeatedly demonstrated its commitment, is best served by retaining the insanity defense as a safety valve for qualitative claims of severe mental impairment rather than by trying to squeeze these claims into the generic states of mind defined in the penal law.

In the remaining portions of my prepared statement, I have tried to make the case for tightening the insanity defense by eliminating volitional prong.

In summary, I would propose that the defense of insanity adopted for the Federal courts in any legislation proposed by this committee read as follows: "A person charged with a criminal offense shall be found 'not guilty by reason of insanity'—or whatever other verdict form the committee chooses to use—if he proves, by the greater weight of the evidence, that as a result of mental disease or mental retardation, he was unable to appreciate the wrongfulness of his conduct at the time of the offense."

Second, the terms "mental disease or mental retardation" should be defined "to include only those severely abnormal mental conditions that grossly and demonstrably impair the person's perception or understanding of reality and that are not attributable primarily to the voluntary ingestion of alcohol or other psychoactive substances."

The point of that second provision, as I have proposed it, would be to narrow the definition of mental disease essentially to psychosis and profound mental retardation which would deprive a person of the capacity to perceive or understand reality in a normal way. It is designed mainly to eliminate personality disorders, character pathology and other types of abnormal mental conditions which are not severe enough, in my judgment, to rise to the level of morally exculpatory conditions.

That summarizes my views, Mr. Chairman, and I would be willing to answer whatever questions the committee has.

The CHAIRMAN. Thank you very much.

I believe you advocate shifting the burden of persuasion to the defendant.

Mr. BONNIE. That is correct.

The CHAIRMAN. If that approach were taken, how far can we go?

For example, would it be constitutionally permissible to require the defendant to prove insanity beyond a reasonable doubt or by clear and convincing evidence or by a preponderance of the evidence?

Mr. BONNIE. Well, first of all, I believe that it is constitutionally permissible to place the burden of persuasion on the defendant so long as evidence which is logically relevant to mens rea is admissible on that question, and so long as the prosecution continues to bear the burden of persuasion on mens rea.

Insofar as the committee were to accept my view that there should be some independent ground, although narrowly defined, for exculpation on grounds of mental disease—such as a qualitative cognitive impairment—I believe the burden of persuasion constitutionally may be placed on the defendant.

Now, the question then arises, as Mr. Chairman has indicated, as to how heavy that burden may be. I believe that the correct answer, as a matter of policy, is to place the burden on the defendant by a preponderance of the evidence or to the satisfaction of the jury or by the greater weight of the evidence—the particular formulation has varied from State to State. Judging from the Supreme Court's decision in *Leland versus Oregon* in 1952, which the Court reaffirmed in a 1977 case from Delaware, it probably would be constitutionally permissible to put the defendant's burden of persuasion at a higher level—by clear and convincing evidence, or even perhaps beyond a reasonable doubt. I do not believe that that is necessary as a matter of policy. It seems to me that the crucial question is whether the burden of persuasion should be on the defendant.

There are many other defenses in the substantive criminal law where the burden of persuasion is placed on the defendant. In many States, for example, the defendant must prove his claim and I think the majority of States require the defendant to prove the elements of intractment. In these situations the defendant bears the burden of persuasion by a preponderance of the evidence. The Oregon statute or that the Oregon provision that I mentioned earlier is probably an aberration. It is exceedingly rare to require the defendant to bear the burden of persuasion at any other higher level than by the preponderance of the evidence.

The CHAIRMAN. Now, do you think it would be appropriate to limit psychiatric or psychological testimony so that expert witnesses may not offer opinions on the ultimate legal issues?

Mr. BONNIE. Yes, I do believe it is appropriate to require that all expert witnesses who are permitted to offer opinion testimony limit their testimony to questions within their specialized knowledge. This is a general proposition of the rule of evidence.

Questions of law or of morality are not within the specialized knowledge of the expert witness. I believe that applying the ordinary standards of expert testimony under the rules of evidence now in operation in the Federal Courts, trial judges should preclude expert witnesses from answering questions such as, "Do you believe that the defendant was legally insane at the time of the offense?" or "Do you believe that the defendant lacked criminal responsibility at the time of the offense?" I think quite clearly these are legal conclusions that conflate issues of fact and value, and expert testimony should be barred. I believe that no statute is necessary to secure that result. It seems to me that that is required by the rules of evidence.

On the other hand, there are some issues in the administration of the insanity defense—as well as on mens rea issues—which present factual questions within the specialized knowledge of the witness. The expert should be permitted to answer them, so long as the jury is appropriately instructed that the ultimate issues in fact are for the jury's resolution.

Let me give an example. Under my formulation, the insanity defense would require a jury resolution of the question as to whether the defendant appreciated or was unable to appreciate the wrongfulness of his actions. It seems to me that expert testimony couched in those terms is appropriate. The concept of "appreciation" under

the Model Penal Code formulation was designed primarily because it was a more meaningful concept to clinicians, and I think it is also helpful to laymen. So I think expert testimony should be permissible on that question so long as the jury is properly instructed that the ultimate question is for the jury's resolution.

The CHAIRMAN. Now, do you have any statistics regarding the recidivist rate of mentally ill offenders?

Mr. BONNIE. Senator, I think that one of the unfortunate aspects of the current discussions about the insanity defense is that in many ways the observations about the empirical questions involved—the frequency of the insanity plea, for example, or the frequency of commitment, the timing of release of persons acquitted by reason of insanity, as well as the recidivism rate—are largely speculative. Many of the witnesses who have appeared before this committee are having to speculate about these questions.

I am in no position to provide definitive data about the recidivism rate. However, there have been some studies done. They are not national studies. Essentially they are localized according to the research in particular jurisdictions. Most of the research that is now available has been done in New York. The New York data suggest that the recidivism rate—at least the rearrest rate—of individuals who are acquitted by reason of insanity, essentially the same as for similarly situated offenders who have not been acquitted by reason of insanity but rather convicted for their offenses, holding various other factors constant. I say essentially the same. In an earlier study based on some data from the early seventies, as I recall, the researchers from the Department of Mental Hygiene in New York concluded that the recidivism rate was somewhat lower. In more recent work, it suggested that the recidivism rate was somewhat higher. But essentially we are dealing within a range of approximately 25, as I recall, to 33 percent. That study, if it has not been provided to the committee, is available, and Dr. Monahan will be discussing it later this week.

The CHAIRMAN. Do you know any statistics regarding the average time spent in institutions by persons found not guilty by reason of insanity?

Mr. BONNIE. Again, the data are inadequate. Studies that have been conducted, I think, do not present uniform results. Again, also, most of the data that are available are from New York, and you will be hearing from two witnesses from New York who are more familiar with that data than I am.

My understanding in general, however, is that earlier studies involving defendants who were acquitted by reason of insanity and committed as much as a decade ago suggested that individuals who were acquitted by reason of insanity spend as much, if not more, time in institutions for the criminally insane than would similarly situated offenders who had been convicted of felonies and were incarcerated.

However, more recent data suggests that these individuals spent somewhat less time, at least in New York, than similarly situated offenders would have spent.

Now, another aspect of this, however, concerns the studies in other States which suggest that the best predictor of when a person who is committed to an institution for the criminally insane—

having been acquitted by reason of insanity—will be released, is the offense he has committed. That is to say, even though the general question being addressed by the facility directors and the courts in deciding whether to release a person acquitted by reason of insanity is his future behavior, his present and future dangerousness, an individualized predictive judgment, a substantial role is being played by the offense for which the person is convicted.

It may be that it is appropriate because the best predictor of future behavior may well be past behavior. It also may be that a rough sense of proportionality influences these judgments.

Again I think that the committee should be very careful not to generalize from what may be unrepresentative studies. Much more research needs to be done on this question.

The CHAIRMAN. The distinguished Senator from Utah.

Senator HATCH. Thank you, Mr. Chairman.

Professor Bonnie, we are happy to have you here.

I am going to ask that my opening statement be placed in the record.

The CHAIRMAN. Without objection, the opening statement of Senator Hatch will be placed in the record following my opening statement.

Senator HATCH. The approach that you have mentioned, which appears to me to be a modified *M'Naghten* rule approach, has been basically used in New York State for a number of years. What has been the effect of your proposals in that State, and is it not true that acquittals on the basis of insanity in New York have risen to more than 50 per year, which is something like seven times the number in the late sixties?

Mr. BONNIE. Well, first of all, Senator Hatch, even though there may have been an increase in verdicts of not guilty by reason of insanity, 50 per year is still not a large number. In fact, in other States, the apparent increases in acquittals by reason of insanity are essentially on that order of magnitude. Even in Michigan, where I think the most substantial increases have occurred, we are still dealing with, as I recall, approximately 60 per year.

Second of all, there are other possible explanations for the recent increase in the verdicts of not guilty by reason of insanity. I think that apart from the possibility that the operational meaning of the insanity defense may have been broadened in the trial courts of New York and in other States, one of the most significant factors, I believe, has been the loosening of the criteria for the commitment of individuals acquitted by reason of insanity.

In New York, as well as in Michigan and many other States, the courts of those States, as well as the Federal courts, have suggested that the previous indeterminate commitment statutes in which essentially the defendant was presumed to be mentally ill and dangerous were unconstitutional. More libertarian reforms have been adopted by legislation as well as by these judicial rulings in many States tending to tighten the criteria for commitment and to loosen the criteria for release. These statutes generally apply the libertarian—recent libertarian reforms of the peer civil commitment process to the commitment process involving persons acquitted by reason of insanity. It was said, as recently as the early sixties, just to show you how recent this phenomenon is, that the real effect of

a not guilty by reason of insanity verdict was to consign an individual who was acquitted by reason of insanity to essentially lifelong confinement in a mental health institution and that the real underlying purpose of the insanity defense therefore was essentially punitive.

I think that it is interesting that in less than 20 years we are now having the situation which the New York data suggests, which Michigan data suggests, in which a lot of the witnesses before you have suggested that the not guilty by reason of insanity plea is essentially being manipulated by individuals who ought to be in prisons, who choose to plead not guilty by reason of insanity because essentially they think they can get off or spend less time in an institution for the criminally insane than they would have spent in prison. Whether or not this is true in the aggregate, and as I have said, the numbers are not all that high, to the extent that this is true, I believe that one of the influence is in fact the loosening of the criteria for persons committed by reason of insanity.

A third thing that I would like to point out about New York, too, since you are right, that the New York test is essentially the one that I would propose, is that it does not involve, at least by statute, a narrow definition of the term "mental disease." There are cases in New York which have involved acquittals by reason of insanity of individuals who would not be acquitted under the test that I have proposed. Because essentially the clinical testimony was not that they suffered from a severe disabling psychotic condition of the type that I have described but rather a severe personality disorder or some other clinical condition.

I would adopt a version similar to that of New York, but I would narrow the definition of mental disease to the extent that there are some moral mistakes, if you will, in the administration of the insanity defense in New York. I believe that they can be eliminated by narrow definition.

Senator HATCH. If I understand your concern about the mens rea approach, it is that individuals who may not fully appreciate the "wrongfulness" of their conduct could be convicted.

Would your concern be mitigated if the mental disease or defect were fully taken into account in the sentencing process and if truly sick individuals were given the length of sentence in the kind of a facility that would guarantee them the proper medical treatment?

Mr. BONNIE. No, Senator, it would not. For a very, I think, simple, morally simple reason. I have argued that individuals who lack the capacity to appreciate the wrongfulness of their conduct due to severe disabling psychotic conditions, like the case I have described, are not morally blamable and should not be punished because they do not deserve to be punished. This is a fundamental postulant of the criminal law.

I do not believe that it would be appropriate therefore to convict them with the condemnation that ought to be implicit in the criminal sanction and to sentence them for their crimes. I realize that it has been suggested that such individuals should be committed to a mental institution to receive treatment for their condition. I believe that that is desirable to the extent that they need treatment.

But the problem is that they would be sentenced under the various proposals that are existing in many other States. They would

be sentenced for that crime, presumably a term that is proportionate to the seriousness of the offense, and then after being treated in the various institutions that might be made available to them, they would then be transferred back to serve the remainder of their sentence. As I say, I believe that is morally objectionable because they should not be punished for their offenses.

A final objection that I have is that under the procedures for commitment of individuals who have been found not guilty by reason of insanity, who are then committed on the basis of civil commitment criteria, mental illness and dangerousness, they are entitled to be treated. The sole predicate for coercive intervention by the State is a determination that because of their mental illness they present an unacceptable danger to society and society is justified in imposing what I would call therapeutic restraint. That is a matter of right. Those individuals are entitled to be treated as a matter of constitutional law.

A problem with the guilty but mentally ill approach, such as the one that you have just suggested for individuals like this, is that they would be provided treatment as a matter of grace rather than a matter of entitlement. I think one of the unfortunate consequences of the guilty but mentally ill statutes could very well be that treatment would not be provided despite the fact that these statutes have been set up.

Senator HATCH. Characterize, if you will, the degree of consensus within the medical community about our medical ability to determine that certain behavioral patterns or disorders actually impair a person's ability to appreciate the wrongness of his conduct the cognitive insanity text.

Also to what degree can we expect doctors to testify in agreement about the volitional aspect of the current ALI standards?

Mr. BONNIE. You have given me a chance to answer two questions.

I think that one of the reasons, the primary reason that I favor the abolition of the volitional prong is that essentially judgments about whether or not an individual was able to control his behavior, to conform his conduct to the requirements of the law was substantially able to conform his conduct to the requirements of the law or had an irresistible impulse to use the various formulations that are now in existence, that essentially these questions are moral guesses. We do not now have the knowledge to grade an individual's capacity to control his behavior.

I think that if there are moral mistakes in the administration of the insanity defense, that it falls in this area; that to the extent that we have the specter of expert witnesses disagreeing about the ultimate issue involved, that it essentially focuses on the volitional question. That is the reason essentially that I recommend that we abolish it.

On the other hand, if we use this modified McNaghten formulation focusing on the person's ability to appreciate wrongfulness of his behavior, focusing on essentially fraught disorders, I believe that there is a greater consensus of expert opinion on the ability of clinically trained individuals to understand psychosis and disabling effect of psychoses on a person's behavior.

My experience, based on the supervision of the forensic clinic that we have in Charlottesville and the observation of the administration of the insanity defense across the country, as well as the review of the appellate opinions in this area, convinces me that in most cases involving the question as to whether an individual was able to appreciate the wrongfulness of his behavior or as to whether the individual had a mental disease or defect as I have described it, the experts do not disagree.

The area of disagreement will generally not be on the nature of the disability, although, of course, there are diagnostic disagreements from time to time, but mainly the question will be on the degree, if you will, of appreciation, the nature of the impairment. It seems to me that this is a disagreement that we cannot avoid. Ultimately, it is for the jury to determine whether the person should be exculpated on the ground of insanity, on the ground that he was not able to appreciate the wrongfulness of his conduct. There will be subtle disagreements, but I think in the large we will be drawing upon a reservoir of expertise that expert witnesses have in the understanding of severe mental illness.

Senator HATCH. Thank you, Mr. Chairman.

The CHAIRMAN. I want to thank you very much, Professor Bonnie, for your appearance here. I am sure it will be very helpful to the committee.

Mr. BONNIE. Thank you, Mr. Chairman.

The CHAIRMAN. You may retire now, if you wish.

[The following was received for the record:]

STATEMENT OF RICHARD J. BONNIE
Professor of Law
and
Director, Institute of
Law, Psychiatry and Public Policy
University of Virginia

Concerning

The Insanity Defense
and
Proposed Bills S. 2572, S. 1558, S. 818,
S. 1106, S. 2658, S. 2669, S. 2672 and S. 2678

Mr. Chairman and Members of the Committee:

It is, of course a privilege to appear before the Committee and present my views on various proposals to abolish or modify the insanity defense. In doing so, I will be drawing on my experience as Director of the Institute of Law, Psychiatry and Public Policy, an interdisciplinary teaching and research center which has performed hundreds of forensic evaluations of criminal defendants and which sponsors and conducts specialty fellowship programs for psychiatrists and lawyers in forensic psychiatry and mental health law. I also will be drawing on insights derived from several years of intensive research on the insanity defense associated with a recently published criminal law coursebook.*

Let me summarize my views at the outset. The effect of most of the proposals now before you would be to abolish the insanity defense as it has existed for centuries in Anglo-American criminal law. I urge you to reject these sweeping proposals. The insanity defense should be retained, in modified form, because some defendants afflicted by severe mental disorder cannot justly be blamed for their criminal conduct and do not, therefore, deserve to be punished. The defense, in short, is essential to the moral integrity of the criminal law.

I realize that the figure of John Hinckley looms before us today. Doubts about the moral accuracy of the jurors' verdict in this sad case have now been turned on the insanity defense itself. I do not want to second guess the verdict in the Hinckley case,

*Low, Jeffries and Bonnie, Criminal Law: Cases and Materials (Foundation Press, 1982).

but I do urge you to keep the case in proper perspective.

The highly visible insanity claim, pitting the experts in courtroom battle, is the aberrational case. The plea is raised in no more than 2% of felony cases and the defense is rarely successful when the question is contested in a jury trial. Most psychiatric dispositions in the criminal process are arranged without fanfare, without disagreement among the experts, and without dissent by the prosecution. In short, the exhaustive media coverage of cases like Hinckley's gives the public a distorted picture of the relative insignificance of the insanity defense in the day-to-day administration of justice.

In another way, however, the public debate about the aberrant case is highly to be desired because the trial of insanity claims keeps the community in touch with the moral premises of the criminal law. The legitimacy of the institution of punishment rests on the moral belief that we are all capable of rational choice and therefore deserve to be punished if we choose to do wrong. By acknowledging the exception, we reaffirm the rule. I have no doubt that the Hinckley trial and verdict have exposed the fundamental moral postulates of the criminal law to vigorous debate in every living room in the Nation. Thus, in a sense, whether John Hinckley was or was not legally insane may be less important than the fact that the question was asked at all.

These are the reasons I do not favor abolition of the insanity defense. However, I do not discount or dismiss the possibility that the defense occasionally may be successfully invoked in questionable cases. There is, in fact, some evidence that insanity acquittals have increased in recent years. However, I am persuaded that the possibility of moral mistakes in the administration of the insanity defense can be adequately reduced by narrowing the defense and by placing the burden of proof on the defendant.

The Options

You have basically three options before you.

1. The Existing (Model Penal Code) Law. One option is to

leave the law as it now stands, by judicial ruling, in all of the federal courts (and, parenthetically, as it now stands in a majority of the states). Apart from technical variations, this means the test proposed by the American Law Institute in its Model Penal Code. Under this approach, a person whose perceptual capacities were sufficiently intact that he had the criminal "intent" required in the definition of the offense can nonetheless be found "not guilty by reason of insanity" if, by virtue of mental disease or defect, he lacked substantial capacity either to understand or appreciate the legal or moral significance of his actions, or to conform his conduct to the requirements of law. In other words, a person may be excused if his thinking was severely disordered--this is the so-called cognitive prong of the defense--or if his ability to control his behavior was severely impaired--this is the so-called volitional prong of the defense.

2. Revival of M'Naghten. The second option is to retain the insanity defense as an independent exculpatory doctrine--independent, that is, of mens rea--but to restrict its scope by eliminating the volitional prong.* This is the approach that I favor, for reasons I will outline below. Basically, this option is to restore the M'Naghten test--although I do not think you should be bound by the language used by the House of Lords in 1843--as the sole basis for exculpation or ground of insanity. Although this is now distinctly the minority position in this country--it is used in less than one third of the states--it is still the law in England.

3. Abolition: The Mens Rea Approach. The third option is the one I have characterized as abolition of the defense. Technically, this characterization is accurate because the essential substantive effect of the so-called "mens rea" approach (or "elements" approach) would be to eliminate any criterion of exculpation, based on mental disease, which is independent of the elements of particular crimes. To put it another way, the bills taking this approach*

*See S. 2678, S. 2658.

would eliminate any separate exculpatory doctrine based on proof of mental disease; instead mentally ill (or retarded) defendants would be treated just like everyone else. A normal person cannot escape liability by proving that he did not know or appreciate the fact that his conduct was wrong, and--under the mens rea approach--neither could a psychotic person.**

The Case Against the Mens Rea Approach

Most of the bills now before you would adopt the mens rea option, the approach recently enacted in Montana and Idaho. As I have already noted, this change, abolishing the insanity defense, would constitute an abrupt and unfortunate departure from the Anglo-American legal tradition.

If the insanity defense were abolished, the law would not take adequate account of the incapacitating effects of severe mental illness. Some mentally ill defendants may be said to have "intended" to do what they did--that is, their technical guilt can be established--but they nonetheless may have been so severely disturbed that they were unable to appreciate the significance of their actions. These cases do not frequently arise, but when they do, a criminal conviction--signifying the societal judgment that the defendant deserves punishment--would offend the basic moral intuitions of the community. Judges and juries would then be forced either to return a verdict which they regard as morally

*S. 1558, S. 818, S. 2669 and S. 1106 would all adopt the mens rea approach, although they differ on the label for the verdict. Under S. 1558 and S. 2669, the defendant who lacks mens rea due to mental disease would be found "not guilty only by reason of insanity." Under S. 1106, the defendant who lacks mens rea due to mental disease would be found "guilty but insane"; however, because such an offender is not sentenced for the crime and is subject only to therapeutic restraint, the verdict label has only symbolic importance. Finally, S. 818 does not address the verdict form.

**Of course, a normal person can escape liability or reduce the grade of his offense by showing that he did not have the intention, awareness or belief required in the definition of the offense and, under these bills, so could a crazy person. A review of decisional law in the federal judicial circuits indicates that this is now the law: evidence concerning the defendant's abnormal mental condition is admissible whenever it is relevant to prove that the defendant did or did not have the "specific intent" required in the definition of the offense. Cf. § 4.02(1) of the Model Penal Code.

obtuse or to acquit the defendant in defiance of the law. They should be spared such moral embarrassment.

Let me illustrate this point with a real case evaluated at our Institute's Forensic Clinic in 1975. Ms. Joy Baker, a thirty-one-year-old woman, admitted killing her aunt. She had no previous history of mental illness, although her mother was mentally ill and had spent all of Ms. Baker's early years in mental hospitals. Ms. Baker was raised by her grandparents and her aunt in a rural area of the state. After high school graduation Ms. Baker married and had two children. The marriage ended in divorce six years later and Ms. Baker remarried. This second marriage was stressful from the outset. Mr. Baker was a heavy drinker and abusive to his wife. He also was extremely jealous and repeatedly accused his wife of seeing other men.

The night before the shooting Mr. Baker took his wife on a ride in his truck. He kept a gun on the seat between them and stopped repeatedly. At each place he told listeners that his wife was an adultress. He insisted his wife throw her wedding ring from the car, which she did because she was afraid of her husband's anger. The Bakers didn't return home until three in the morning. At that time Ms. Baker woke her children and fed them, then stayed up while her husband slept because she was afraid "something terrible would happen."

During this time and for the three days prior to the day of the shooting Ms. Baker had become increasingly agitated and fearful. Her condition rapidly deteriorated and she began to lose contact with reality. She felt that her dogs were going to attack her and she also believed her children and the neighbors had been possessed by the devil.

On the morning of the shooting, Ms. Baker asked her husband not to leave and told him that something horrible was about to happen. When he left anyway she locked the doors. She ran frantically around the house holding the gun. She made her children sit on the sofa and read the Twenty-Third Psalm over and over.

She was both afraid of what they might do and of what she might do but felt that reading the Bible would protect them. Shortly afterwards, Ms. Baker's aunt made an unexpected visit. Ms. Baker told her to go away but the aunt persisted and went to the back door. Ms. Baker was afraid of the dog which was out on the back porch and repeatedly urged her aunt to leave. At this time the aunt seemed to Ms. Baker to be sneering at her.

When her aunt suddenly reached through the screening to unlock the door Ms. Baker said, "I had my aunt over there and this black dog over here, and both of them were bothering me. . . . And then I had that black dog in front of me and she turned around and I was trying to kick the dog and my aunt was coming in the door and I just--took my hands I just went like this--right through the screen. . . . I shot her."

Ms. Baker's aunt fell backward into the mud behind the porch. Although she was bleeding profusely from her chest, she did not die immediately. "Why, Joy?" she asked. "Because you're the devil, and you came to hurt me," Joy answered. Her aunt said, "Honey, no I came to help you." At this point, Ms. Baker said, she saw that her aunt was hurting and became very confused. Then, according to her statement, "I took the gun and shot her again just to relieve the pain she was having because she said she was hurt." Her aunt died after the second shot.

All the psychiatrists who examined Ms. Baker concluded that she was acutely psychotic and out of touch with reality at the time she shot her aunt. The police who arrested her and others in the small rural community concluded that she must have been crazy because there was no other explanation for her conduct. After Ms. Baker was stabilized on anti-psychotic medication, she was permitted to leave the state to live with relatives in a neighboring state. Eventually the case against her was dismissed by the court, with the consent of the prosecution, after a preliminary hearing at which the examining psychiatrists testified. She was never indicted or brought to trial.

It seems clear, even to a layman, that Ms. Baker was so delusional and regressed at the time of the shooting that she did not understand or appreciate the wrongfulness of her conduct. It would be morally obtuse to condemn and punish her. Yet, Ms. Baker had the state of mind required for some form of criminal homicide. If there were no insanity defense, she could be acquitted only in defiance of the law.

Let me explain. The "states of mind" which are required for homicide and other criminal offenses refer to various aspects of conscious awareness. They do not have any qualitative dimension. There is good reason for this, of course. The exclusive focus on conscious perceptions and beliefs enhances predictability, precision and equality in the penal law. If the law tried to take into account degrees of psychological aberration in the definition of offenses, the result would be a debilitating individualization of the standards of criminal liability.

At the time of the first shot, it could be argued that Ms. Baker lacked the "state of mind" required for murder because she did not intend to shoot a "human being" but rather intended to shoot a person whom she believed to be possessed by the devil. At common law, this claim would probably be characterized as a mistake of fact. Since the mistake was, by definition, an unreasonable one--i.e., one that only a crazy person would make--she would most likely be guilty of some form of homicide (at least manslaughter) if ordinary mens rea principles were applied. Even under the modern criminal codes, such as S. 1630, she would be guilty of negligent homicide since an ordinary person in her situation would have been aware of the risk that her aunt was a human being. And she possibly could be found guilty of manslaughter since she was probably aware of the risk that her aunt was a human being even though she was so regressed that she disregarded the risk.

It might also be argued that Ms. Baker's first shot would have been justified if her delusional beliefs had been true since she would have been defending herself against imminent annihilation

at the hands of the devil. Again, however, the application of ordinary common-law principles of justification, which are carried forward in S. 1630, would indicate that she was unreasonably mistaken as to the existence of justificatory facts (the necessity for killing to protect oneself) and her defense would fail, although the grade of the offense would probably be reduced to manslaughter on the basis of her "imperfect" justification.

At the time of the second shot, Ms. Baker was in somewhat better contact with reality. At a very superficial level she "knew" that she was shooting her aunt and did so for the non-delusional purpose of relieving her aunt's pain. But euthanasia is no justification for homicide. Thus, if we look only at her legally relevant "state of mind" at the time of the second shot, and we do not take into account her highly regressed and disorganized emotional condition, she is technically guilty of murder.

I believe that Joy Baker's case convincingly demonstrates why, in theoretical terms, the mens rea approach does not take sufficient account of the morally significant aberrations of mental functioning associated with severe mental disorder. I readily concede, however, that these technical points may make little practical difference in the courtroom. If the expert testimony in Joy Baker's case and others like it were admitted to disprove the existence of mens rea, juries may behave as many observers believe they do now--they may ignore the technical aspects of the law and decide, very bluntly, whether the defendant was too crazy to be convicted. However, I do not believe that rational criminal law reform is served by designing rules of law in the expectation that they will be ignored or nullified when they appear unjust in individual cases.

Also, another danger of the mens rea approach is that courts will attempt to soften its impact by reinterpreting the concepts of intention, knowledge and recklessness in order to give them qualitative meanings and thereby achieve exculpatory results in cases where criminal liability seems ethically offensive. This would be a particularly unfortunate response because it would under-

mine the modern trend toward greater precision and coherence in the definition of mens rea. Again, I believe the cause of criminal law reform, to which this Committee has repeatedly demonstrated its commitment, is best served by retaining the insanity defense as a safety valve for qualitative claims of severe mental impairment rather than by squeezing these claims into the generic states of mind defined in the penal law.

Improving the Quality of Expert Testimony

I have tried to show that perpetuation of the insanity defense is essential to the moral integrity of the criminal law. Yet an abstract commitment to the moral relevance of claims of psychological aberration may have to bend to the need for reliability in the administration of the law.

I fully recognize that the litigation of insanity claims is occasionally imperfect. The defense is sometimes difficult to administer reliably and fairly. In particular, I recognize that we cannot calibrate the severity of a person's mental disability, and it is sometimes hard to know whether the disability was profound enough to establish irresponsibility. Nor can we be confident that every fabricated claim will be recognized. Yet these concerns are not unlike those presented by traditional defenses such as mistake, duress and other excuses which no one is seeking to abolish. Indeed, problems in sorting valid from invalid defensive claims are best seen as part of the price of a humane and just penal law. Thus, to the extent that the abolitionists would eradicate the insanity defense in response to imperfections in its administration, I would reply that a decent respect for the moral integrity of the criminal law sometimes requires us to ask questions that can be answered only by approximation. Rather than abolishing the defense we should focus our attention on ways in which its administration can be improved.

Some of the abolitionist sentiment among lawyers seems to be responsive to doubts about the competence--and, unfortunately, the

ethics--of expert witnesses. The cry for abolition is also raised by psychiatrists and psychologists who believe that the law forces experts to "take sides" and to offer opinions on issues outside their sphere of expertise. These are all legitimate concerns and I have no doubt that the current controversy about the insanity defense accurately reflects a rising level of mutual professional irritation about its administration. However, the correct solution is not to abolish the insanity defense but rather to clarify the roles and obligations of expert witnesses in the criminal process. Some assistance in this effort can be expected from the American Bar Association's Criminal Justice-Mental Health Standards now being drafted by interdisciplinary panels of experts in the field.

A properly trained expert can help the judge or jury to understand aberrations of the human mind. However, training in psychiatry or psychology does not, by itself, qualify a person to be an expert witness in criminal cases. Specialized training in forensic evaluation is necessary, and a major aim of such special training must be to assure that the expert is sensitive to the limits of his or her knowledge.

The Case for Tightening the Defense

I do not favor abolition of the "cognitive" prong of the insanity defense. However, I do agree with those critics who believe the risks of fabrication and "moral mistakes" in administering the defense are greatest when the experts and the jury are asked to speculate whether the defendant had the capacity to "control" himself or whether he could have "resisted" the criminal impulse.

Few would dispute the moral predicate for the control test--that a person who "cannot help" doing what he did is not blameworthy.

Unfortunately, however, there is no scientific basis for measuring a person's capacity for self-control or for calibrating the impairment of such capacity. There is, in short, no objective basis for distinguishing between offenders who were undeterrable and those who were merely undeterred, between the impulse that was irresistible

and the impulse not resisted, or between substantial impairment of capacity and some lesser impairment. Whatever the precise terms of the volitional test, the question is unanswerable--or can be answered only by "moral guesses." To ask it at all, in my opinion, invites fabricated claims, undermines equal administration of the penal law, and compromises its deterrent effect.

Professor Sheldon Glueck of the Harvard Law School observed (in *Mental Disorder and the Criminal Law* 233, 430, 433 (1925)) that the 19th-century effort to establish irresistible impulse as a defense met judicial resistance because "much less than we know today was known of mental disease." He predicted "that with the advent of a more scientific administration of the law--especially with the placing of expert testimony upon a neutral, unbiased basis and in the hands of well-qualified experts--much of the opposition to judicial recognition of the effect of disorders of the . . . impulses should disappear." Further, he said, "expert, unbiased study of the individual case will aid judge and jury to distinguish cases of pathological irresistible impulse from those in which the impulse was merely unresisted."

The opposition to the control test did not disappear in Professor Glueck's generation. But, a renewed clinical optimism did shape the thinking of those who drafted the Model Penal Code responsibility test thirty years later, and as I noted earlier, lack of control now constitutes an independent ground of exculpation in a majority of states and in the federal courts.

The Model Penal Code has had an extraordinary impact on American criminal law for which we should all be thankful. In this respect, however, I believe the Code approach should be rejected. Psychiatric concepts of mental abnormality remain fluid and imprecise, and most academic commentary within the last ten years continues to question the scientific basis for assessments of volitional incapacity.

The sole test of legal insanity should be whether the defendant, as a result of mental disease, lacked "substantial capacity to appreciate the wrongfulness of his conduct." This language, drawn from the Model Penal Code, uses clinically meaningful terms to ask the same question posed by the House of Lords in M'Naghten 150 years ago. During the past ten years, I have not seen a single case at our Clinic involving a claim of irresponsibility that I personally thought was morally compelling which would not be comprehended by this formulation. Thus, I am convinced that this test is fully compatible with the ethical premises of the penal law, and that results reached by judges and juries in particular cases ordinarily would be congruent with the community's moral sense.

In sum, then, I believe that the insanity defense, as I have defined it, should be narrowed, not abandoned, and that the burden of persuasion may properly be shifted to the defendant. Like the mens rea proposal, this approach adequately responds to public concern about possible misuse of the insanity defense. Unlike the mens rea proposal, however, I believe this approach is compatible with the basic doctrines and principles of Anglo-American penal law.

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September 1, 1982

The Honorable Strom Thurmond
Chairman, Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Thurmond:

Thank you for asking me to respond to the questions enclosed, at Senator Mathias' request, in your letter of August 13. My answers are set forth below.

1. Disposition of Insanity Acquittees. Mr. Carnahan's testimony and your questions on August 2 demonstrate that the primary cause of dissatisfaction with the insanity defense is concern about the premature release of insanity acquittees. As I noted in my opening statement, I believe that the insanity defense must be retained, in narrowed form, to preserve the moral integrity of the penal law. Mentally ill defendants who were unable to appreciate the wrongfulness of their conduct at the time of the offense cannot justly be blamed and therefore do not deserve to be punished. However, the public's legitimate interest in therapeutic restraint of such persons in the future is not compromised by a decision to retain the insanity defense.

Some courts have held that the criteria for commitment and release of insanity acquittees must be identical to those for "ordinary" civil commitment--i.e., "imminent" dangerousness to self or others or inability to care for oneself. The McQuillan decision in Michigan and the Torsney decision in New York are the most notable examples. I believe these decisions were constitutionally erroneous. The modern generation of "ordinary" civil commitment statutes properly err on the side of individual liberty, both in narrowing the substantive bases for involuntary hospitalization and in limiting the duration of commitment. However, the libertarian approach is not ethically or constitutionally required for insanity acquittees whose criminal conduct, proven beyond a reasonable doubt, involved bodily injury to others or serious damage to property. By virtue of the conduct, and its presumed association with severe mental illness, society is warranted in presuming continued dangerousness over a longer period of time and in designing discharge procedures to reflect this "shift" of the risk of error. My written statement includes some suggestions concerning the drafting of a "special" commitment statute.

I might also point out that I believe such a "special" commitment statute should also be triggered by acquittal of persons who, due to mental illness, lack the mens rea for all lesser included criminal offenses under the so-called mens rea approach. I do not agree with Dr. Halpern and Mr. Carnahan that mens rea acquittees must be subject only to "ordinary" civil commitment.

Finally, let me say that I might be inclined to put aside my moral preferences concerning the insanity defense if I thought that insanity acquittees could be confined only on the same terms

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to a vigorous protest by Jonas Robitscher,⁹ the A.P.A. on the recommendation of a majority of its Committee on Psychiatry and the Law,¹⁰ officially endorsed the retention of the insanity defense.¹¹ Interestingly, Robitscher himself had earlier, in 1968, spoken out against the spurious dichotomization of criminal offenders:

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.¹²

Finally, in 1976, Judge Bazelon, who 16 years earlier had been hailed by the A.P.A. for liberalizing the definition of insanity, wrote that he had come to be "increasingly attracted to the view that the insanity defense should be abolished..."¹³

The legislative branch of government and the judiciary have added to the contradictions and disparities in statutes and case law respectively over the past 25 years.

In 1800 when Lord Erskine decried the complexities of the insanity issue, there was one test for criminal non-responsibility on grounds of mental illness; namely, the inability to distinguish right from wrong. Today in the United States there are at least 18 differently worded standards.¹⁴ These can be classified under five broad categories as follows:

- a) The M'Naghten Rule: Every person is presumed to be sane, and to be found not guilty by reason of insanity, a defendant must establish that at the time of the act he suffered from such a defect of reason from disease of the mind as not to know the nature and quality of the act or that it was wrong.¹⁵
- b) M'Naghten plus Irresistible Impulse Rule: To be acquitted on grounds of insanity, a mentally diseased individual, although not suffering from the extreme defect of reason required by the

M'Naghten Rule, cannot refrain from doing the criminal act because of an irresistible impulse due to the mental disease.¹⁶

c) Durham Rule: The defendant cannot be held responsible for criminal conduct if his unlawful act is a product of mental disease or defect.¹⁷

d) American Law Institute Test: 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 wrongfulness of his conduct or to conform his conduct to the requirements of law.*¹⁸

The following paragraph is added to this test in some jurisdictions:

The terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.²⁰

e) American Law Institute alternative "Justly Responsible" Test: A person is not responsible for criminal conduct if at the time of such conduct, as a result of mental disease or defect, his capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law is so substantially impaired that he cannot justly be held responsible. The terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.^{21,22}

Regardless of the legal standard to be followed, actual practice occasionally demonstrated that the most liberal rule could be contracted (resulting in conviction) and the narrowest rule expanded (resulting in acquittal) depending on the whim or conscience or, as Justice William O. Douglas put it, the "common sense,"²³ of the fact-finder.

In 1800 legal insanity was restricted to cases of overt and easily demonstrable severe psychosis or mental retardation (total lack of understanding or discretion). Lord Erskine achieved a major coup when he persuaded the jury that "delusion, ... where there is no frenzy or raving madness, is the true character

*In Michigan an appellate court has ruled that the test of legal insanity is that the defendant must lack the capacity both to appreciate the wrongfulness of the conduct and to conform his conduct to the requirements of the law; it is not an "either/or" test.¹⁹

of insanity."²⁴ In recent years, a large variety of relatively minor mental disorders has led to acquittals by reason of insanity. These include emotionally unstable personality,²⁵ narcotics addiction,²⁶ depressive reaction,²⁷ psychoneurosis,²⁸ drug dependence,²⁹ kleptomania,³⁰ sociopathic personality,³¹ alcoholism,³² sociopathic personality with drug addiction,³³ pathological gambling,³⁴ and post-traumatic stress disorder.³⁵

In 1800 legal procedures were straightforward, a lawyer's responsibilities to his client simple and clear, and for the next century and a half laws concerning post-acquittal confinement understandable but harsh. Over the past two decades, we have witnessed massive disparities from jurisdiction to jurisdiction in every phase of proceedings relating to the insanity defense and its administration. The following, of special interest to psychiatrists, are illustrative:

Burden of proof. The Maine Supreme Judicial Court reaffirmed in 1979 that a defendant may constitutionally be required to prove lack of criminal responsibility.³⁶ In 1980 the Sixth Circuit Court of Appeals³⁷ concurred with this position, holding that "the state may properly place the burden of proving affirmative defences such as ... insanity upon the defendant." In New York the statute requires that once the insanity defense is interposed, the burden is on the prosecutor to prove sanity.³⁸ In the District of Columbia the rule placing on the prosecution the burden of proving sanity lasted until 1970 when Congress passed the District of Columbia Court Reform and Criminal Procedure Act which placed on the defendant asserting insanity as a defense the burden of proving this defense by a preponderance of the evidence.³⁹ Congress took this action in angry response to the 1968 decision of the United States Court of Appeals for the District of Columbia Circuit,⁴⁰ which permitted "dangerous criminals, particularly psychopaths, [to win] acquittals of serious criminal charges on grounds of insanity by raising a mere reasonable doubt as to their sanity and then to escape hospital commitment because the government is unable to prove their insanity following acquittal by a preponderance of the evidence."⁴¹ Interestingly, Congress did not change the U.S. Code, with the result that while

in the District of Columbia the burden of proof of insanity is on the defendant, in all eleven federal circuits the burden of proof of sanity is on the prosecutor. By legislative whim or judicial fiat, but not by dint of logic, the prosecution in insanity cases has to bear the burden of proving sanity in about half the states of this country, while the defendant is required to prove insanity in the remaining states. Judges,⁴² psychiatrists,⁴³ and lawyers⁴⁴ have criticized laws, such as those of New York State, which place the burden of proof of sanity on the prosecutor during the criminal trial, and later, in the post-acquittal phase, the burden of proving mental disorder also on the prosecutor when it is considered necessary to retain the acquittee in the hospital. One N.Y. Supreme Court Justice⁴⁵ was moved to comment:

"At trial, the People must prove that the defendant was sane at the time of his criminal acts in order to obtain a conviction. If the People fail, §330.20 CPL now forces the People to make a complete about face and prove that the defendant is not 'sane' but has a dangerous mental disorder or is mentally ill and should not be released. The prosecutor is thus cast into the position of high school debaters who must prepare and prove both their affirmative and negative cases. Even more, the law now expects the prosecutor to follow the legendary story of the lawyer who tried both sides of the same issue in two separate cases and won them both. Here the prosecutor must do it in the same case. Why the legislature adopted such a scheme escapes the logic of the Court."

Court-imposed insanity plea. In Whalem v. United States,⁴⁶ the United States Court of Appeals, District of Columbia Circuit, held that "a defendant may not keep the issue of insanity out of the case altogether. He may, if he wishes, refuse to raise the issue of insanity, but he may not, in a proper case, prevent the court from injecting it." This decision was meant to clarify the confusion caused by the U.S. Supreme Court's holding, limited to the 1962 Lynch v. Overholser case,⁴⁷ that if the defendant is found not guilty by reason of insanity, despite his own assertions of sanity, he cannot be subjected to automatic confinement but must be permitted the protections available under the civil commitment law.⁴⁸ In 1980 the D.C. Circuit⁴⁹ affirmed a federal district court decision not to impose the insanity defense over the objection of the defendant, but at the same time

upheld the principle enunciated in Whalem. On the other hand, an appellate court in New York State⁵⁰ held that a trial judge, in a case where the facts strongly suggest a defense of insanity, would not be required "to abandon its neutrality and to present to the jury a defense specifically omitted and rejected by presumably competent defense counsel." In 1979 the District of Columbia Court of Appeals,⁵¹ asserting its authority as "the highest court in the District of Columbia" under the 1971 Court Reorganization Act which eliminated the prior power of the United States Court of Appeals to review its judgments,⁵² modified the Whalem decision by holding that a judge may not interpose an insanity defense over the objection of a competent defendant if the defendant "intelligently and voluntarily" declines its use. In accord with this opinion, a New Jersey appellate court⁵³ would permit the interposition of an insanity defense only if waiver of the defense is not "knowing, intelligent and voluntary." Determination of the defendant's capacity to waive the insanity defense must be based on:

defendant's awareness of his rights and available alternatives, his comprehension of the consequences of failing to assert the defense and the freeness of the decision to waive the defense, and should avoid an incursion into the area of mental capacity which might develop into an irreconcilable conflict with the finding of competence to stand trial.

The trial judge's task here will be an extremely difficult one. There can be no doubt that there is a fragile dividing line between defendant's competency to stand trial and ... his ability to make a knowing, intelligent and voluntary waiver of the insanity defense.

Lawyer-client and psychiatrist-patient privilege. In 1976, the New York Court of Appeals⁵⁴ ruled that the defense may not challenge the prosecutor's use of testimony by a psychiatrist who initially examined the defendant on behalf of the defense, "because a plea of insanity in a criminal proceeding constitutes 'a complete and effective waiver' of the traditional privileges involving a defendant and attorney and physician." This decision runs counter to that of the United States Court of Appeals, Third Circuit,⁵⁵ which in 1975 held that "the effective assistance of counsel with respect to the preparation of an insanity defense demands recognition that a defendant be as free to communicate

with a psychiatric expert as with the attorney he is assisting," and that "pretrial communications by defendant to psychiatrist who was retained by defense counsel to aid in preparation of defense for trial and who was not called by defendant were privileged." Unlike the New York Court of Appeals, the Circuit Court rejected the contention that the assertion of insanity at the time of the offense waives the attorney-client privilege with respect to psychiatric consultations made in preparation for trial.

Right to have lawyer present at psychiatric examination.

In holding that a defendant does not have a right to counsel at a court-ordered psychiatric examination, the Illinois Supreme Court⁵⁶ "portrayed the examination as involving a doctor-patient relationship which might have its 'integrity' undermined by the presence of a third party." Similarly, an Ohio federal court⁵⁷ ruled that the presence of counsel at the pretrial mental examination of criminal defendants pleading insanity is generally not required. It was felt that "the integrity of the fact-finding process is adequately protected by counsel's access to psychiatric reports and capacity to confront and cross-examine the examining psychiatrist at the subsequent hearing." The Alaska Supreme Court,^{58,59} however, concluded that a trial court erred in refusing to allow the defendant's counsel to be present.

Instructions to jury as to consequences of insanity acquittal.

In Louisiana,⁶⁰ the Supreme Court ruled that the jury should be instructed as to the effects on a defendant's confinement if they return a verdict of not guilty by reason of insanity, and the New York Insanity Defense Reform Act of 1980⁶¹ requires that the jury be charged "that if the verdict of not responsible by reason of mental disease or defect is rendered by you, there will be hearings as to the defendant's present mental condition and, where appropriate, involuntary commitment proceedings."⁶² However, in New Mexico,⁶³ the Supreme Court held that due process does not require that the jury be instructed on the consequences of an insanity acquittal, while in Iowa⁶⁴ and Indiana,⁶⁵ appellate courts actually ruled it to be improper to instruct the jury as to the consequences of an insanity verdict. Kansas law⁶⁶

requires the court to instruct the jury as to the effect of insanity acquittal, but in Maine,⁶⁷ Hawaii,⁶⁸ and Illinois,⁶⁹ the defendant has no right to an instruction whether requested or not. In Florida,⁷⁰ an explanation is within the trial court's discretion, and in Massachusetts,⁷¹ a jury instruction is to be given only when requested by the defendant or when requested by the jury and the defendant does not object. In a recent case,⁷² the Georgia Supreme Court held that it was not error to fail to inform the jury that hospitalization would follow an insanity acquittal, even though the trial judge had told counsel the jury would be so informed. The defendant, said the Court, was not damaged by the lack and there is no legal requirement to inform the jury.

Mandatory post-acquittal confinement. In 1980, the Georgia Supreme Court upheld a temporary commitment statute which allows for the summary evaluation of insanity acquittees for no less than 30 days upon a showing of "good cause" by the prosecutor.⁷³ In an earlier case,⁷⁴ the Court had decided that the procedures for commitment after a finding of not guilty by reason of insanity need not be identical to the procedures used in civil commitment, and that allowing only one application for release per year and allowing release only upon court order is valid. In California, an appellate court ruled that a mandatory 90-day observation period, applied to individuals who are charged with violent crimes but who are found not guilty by reason of insanity, is constitutional.^{75,76} The Kansas Supreme Court ruled that mandatory confinement for one year following an insanity acquittal is valid.⁷⁷ The New Jersey Supreme Court⁷⁸ authorized the automatic temporary commitment of insanity acquittees for up to 60 days to determine present medical condition and propensity for future antisocial conduct. During the 60 days, the state was empowered to seek commitment on the basis of mental illness and dangerousness to self or society. On the other hand, a federal district court in South Dakota⁷⁹ held that a state violates the due process and equal protection rights of an insanity acquitted criminal defendant when it summarily commits

that individual for psychiatric care and treatment without a determination of his mental capacity at the time of commitment.

Right to a jury at a post-acquittal release hearing. A Maryland federal court ruled that insanity acquittees need not be afforded a right to a jury trial before confinement on the basis of insanity.⁸⁰ The New York Court of Appeals,⁸¹ on the other hand, held that an insanity-acquittee is entitled to a jury trial at a post-acquittal hearing to determine need for confinement. However, the New York State legislature chose not to provide for a jury when it passed the Insanity Defense Reform Act of 1980⁶¹ except that if the acquittee is dissatisfied with the commitment order emanating from the hearing, he can obtain a rehearing before a jury.⁸²

Burden and standard of proof for release from post-acquittal confinement. Jurisdictions vary as to whether the original prosecutor has the burden of proving continuing mental illness and dangerousness in order for the acquittee to remain in confinement or the patient has the burden of proving restoration of sanity in order for him to be released. For example, in New Jersey⁷⁸ and Hawaii⁸³ the state must demonstrate by a preponderance of the evidence that an acquittee has a mental illness and is dangerous to self or society, while in Illinois⁸⁴ the burden of proof is on the acquittee to establish his eligibility for conditional release by clear and convincing evidence. The Maryland Court of Special Appeals⁸⁵ has held that in commitments following an insanity acquittal, in order to establish that the acquittee has a mental disorder and needs hospitalization, the appropriate standard of proof must be clear and convincing evidence. The unevenness of the system in handling release matters is demonstrated by the wide disparities within the same jurisdiction in connection with the standard of proof required. In New York State, for example, where the new law⁶¹ provides that the district attorney has the burden of establishing to the satisfaction of the court that the acquittee has a dangerous mental disorder or is mentally ill,⁸⁶ "satisfaction of the court" has already been interpreted in significantly different ways by trial judges. One superior court judge⁴⁵ held the standard to

be "preponderance of the evidence," as did another,⁸⁷ while a third⁴² ruled that the standard must be "clear and convincing evidence."

Misuse of psychiatry in post-acquittal confinement. I have discussed elsewhere⁸⁸ the matter of the misuse of psychiatry in the confinement of insanity-acquittees. Although ostensibly pursuing the altruistic goals of treatment and rehabilitation when the acquittee is first hospitalized, the courts in many cases soon reveal their hidden agenda of retribution and preventive detention. A striking example of how, by means of a successful insanity defense, a hospital is made to function as a penal institution, is seen in the case of Charles Harris.⁸⁹ After repeated arrests for violent crimes against women over a 20-year period, Harris was acquitted by reason of insanity when experts testified that he had a personality disorder and the court found that, although the psychiatric testimony argued that he was not suffering from a mental disease or defect, he met the McDonald standard⁹⁰: an insanity acquittal may be based on "any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavioral controls." He was immediately confined in St. Elizabeths Hospital. At the release hearing some two months after his hospitalization, hospital staff testified that "Mr. Harris has no mental disease or defect, and is therefore 'recovered' and must be released. But, the Hospital has also taken the position in unmistakable terms that the mental disease or defect from which Mr. Harris has now 'recovered' never did exist--it was merely a personality disorder." "The court found that it could not accord great significance to evidence 'premised on a direct conflict with the jury verdict.' D.C. Code Sec. 24-301(e) 'contemplates a change of condition--from loss of sanity to recovery of sanity.'"

"Based on the length and chronicity of Defendant's mental problems, based on the fact that he has received little or no therapeutic treatment since he has been committed to St. Elizabeths, and based on the testimony that even if there had been such treatment Defendant could not have improved in such a short period of time, the Court can not accept Defendant's

argument that a man as mentally ill and as dangerous as he is has recovered in a brief 6-8 weeks when he was not even receiving treatment of any kind."

Moreover, the acquittee "offered nothing to show that he is no longer dangerous." It was ordered that he remain in the hospital.

CONSTITUTIONALITY OF ABOLITION

Legal and psychiatric authors⁹¹ favoring retention of the insanity defense have uniformly cited legislation enacted in the states of Washington, Louisiana and Mississippi which has been declared unconstitutional by their respective supreme courts.⁹²⁻⁹⁴ However, analysis of the court opinions reveals that the legislation was constitutionally defective with respect to issues incidental to the insanity defense rather than to issues specifically relating to abolition of the insanity plea. For example, the Washington law actually did not abolish the insanity defense but only changed "the time and mode of the trial of the issue of insanity"⁹⁵ and left the question of insanity not for the jury to decide but "entirely to the trial judge."⁹⁶ The Louisiana law vested absolute power in a lunacy commission to determine the question whether the accused was "presently insane or whether he was insane at the time of the commission of the offense charged against him."⁹⁷ The law thus delegated to a commission powers belonging exclusively to a judicial tribunal and also deprived the accused of his constitutional right to a trial by a jury on a question of fact directly pertaining to his guilt or innocence.⁹⁸ The Mississippi law violated constitutional requirements in various respects including the failure to permit a mentally disordered defendant charged with homicide to establish guilt of a lesser crime than murder--say, manslaughter, the maximum punishment for which was 20 years in the state penitentiary--and mandated that an insane person be sentenced "for his natural life regardless of how long that life may last."⁹⁹ The Mississippi Supreme Court also objected to the statute because it authorized a trial court "to put him on trial while he was so insane."¹⁰⁰

The United States Supreme Court has never articulated a constitutional doctrine of legal insanity. Indeed, in a plurality

opinion¹⁰¹ in 1968 it stated "Nothing could be less fruitful than for this Court to be impelled into defining some sort of insanity test in constitutional terms." Formulating a constitutional rule would "freeze the developing productive dialogue between law and psychiatry into a rigid constitutional mold. It is simply not yet the time to write into the Constitution formulas cast in terms whose meaning, let alone relevance, is not yet clear either to doctors or to lawyers."¹⁰² The opinion, in affirming a conviction for public intoxication, spoke approvingly of the imposition of "a criminal sanction [upon a chronic alcoholic] for public behavior which may create substantial health and safety hazards, both for [the defendant] and for members of the general public, and which offends the moral and esthetic sensibilities of a large segment of the community."¹⁰³ Would the Supreme Court not be even more inclined to approve a criminal sanction upon a mentally disordered individual for violent criminal conduct?

In a separate concurring opinion, Justice Black stated:

I could not, however, consider any findings that could be made with respect to "voluntariness" or "compulsion" controlling on the question whether a specific instance of human behavior should be immune from punishment as a constitutional matter. 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. Almost all of the traditional purposes of the criminal law can be significantly served by punishing the person who in fact committed the proscribed act, without regard to whether his action was "compelled" by some elusive "irresponsible" aspect of his personality. As I have already indicated, punishment of such a defendant can clearly be justified in terms of deterrence, isolation, and treatment. On the other hand, medical decisions concerning the use of a term such as "disease" or "volition," based as they are on the clinical problems of diagnosis and treatment, bear no necessary correspondence to the legal decision whether the overall objectives of the criminal law can be furthered by imposing punishment. For these reasons, much as I think that criminal sanctions should in many situations be applied only to those whose conduct is morally blameworthy, I cannot think the States should be held constitutionally required to make the inquiry as to what part of a defendant's personality is responsible for his actions and to excuse anyone whose action was, in some complex, psychological sense, the result of a "compulsion."¹⁰⁴

In addition, the 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.¹⁰⁵

PREMATURE RELEASE

Those who favor retention of the insanity defense equate premature release of acquttees which results in further harm to the community with errors in judgment on the part of parole boards when dangerous felons are inadvertently released from prison. Retentionists, however, overlook the fact that these situations are not analogous since, if conviction of the acquttees had occurred, had the insanity defense not been available, they would not have been eligible for early parole nor would some of them have been entitled to release at any time. The following case examples are cited not as emotional appeals for abolition on the basis of sensationalism but as instances of violence inflicted on the public which could have been specifically prevented in every case had exculpation on grounds of insanity not taken place.

In Michigan,¹⁰⁶ an ex-convict confessed in June, 1974, to seven killings and, after being acquitted of one of them by reason of insanity, was granted immunity from prosecution for the remainder and "automatically and indefinitely committed." After two months, however, the State Supreme Court gave him the right to a civil-commitment hearing to determine his sanity. A jury found him to be sane under the new Michigan standards, and he was released in March, 1975. One month later he was arrested and charged with murder in the fatal beating of his wife.

In Connecticut,¹⁰⁷ on June 25, 1974, Gregory Gillespie, then age 21, shot a man, nearly killing him. He was acquitted of first degree assault on insanity grounds and was committed to Norwich State Hospital in February 1975. Eighteen months later--after he had been released from hospital and taken off anti-psychotic medication--he shot and killed his 16-year old girlfriend. On October 23, 1978, he was acquitted of murder by reason of insanity.

In Pennsylvania,¹⁰⁸ a patient found not guilty of murder of his parents by reason of mental disease killed his aunt and uncle a few months after discharge from the Buffalo (New York) State Hospital.

In California,¹⁰⁹ E. E. Kemper III, charged with murdering his grandparents, spent five years in a hospital following acquittal by reason of insanity. Three years after his release he petitioned to have his psychiatric records sealed. He persuaded psychiatrists and a judge that he was cured by giving correct answers in a battery of psychological tests--answers he had earlier memorized. They did not know that in those three years he had murdered his mother and seven other women--one of them only three days before the decision.

Again, in Connecticut,¹⁰⁷ John Franklin, then age 23, was acquitted of criminal charges on grounds of insanity after he stabbed a man in April 1975. He was released from the state hospital three months later. His mother pleaded to have him re-committed because she feared he might do something again. Shortly afterwards, for no reason apparent to police, he repeatedly stabbed a man whose home he was burglarizing. He was acquitted of murder by reason of insanity.

In Illinois,¹¹⁰ whilst on probation and receiving psychiatric treatment following the stabbing of a teen-age girl as she lay asleep on her bed, a young defendant killed a 15-year old girl with a hunting knife and was found not guilty by reason of insanity. He was hospitalized for fifteen months and released as cured. Several months later, he was charged with stabbing another young woman to death and he again pleaded "Not guilty by reason of insanity." Whilst awaiting trial he is reported to have advised a fellow inmate on "how to beat a murder rap" by pleading insanity. He advised "acting crazy" in front of doctors, such as claiming to hear voices or openly performing indecent acts.

In Florida,¹¹¹ a patient who had been acquitted of a criminal offense by reason of insanity and was considered to be dangerous by court-appointed psychiatrists, told the staff of the state hospital to which he was admitted that when drunk he tried to kill people. He subsequently escaped when he was allowed to attend unaccompanied an Alcoholics Anonymous class outside the hospital. He returned to his home and apparently

lived without incident for about three months. He then killed a man while drunk.

Again in Florida,¹¹² another escaped patient, Thelma Atterbury, age 39, was arrested in November, 1981, on a charge of attempted murder after stabbing a young woman in the back. In five prior knife attacks during the previous nine years, she had on three separate occasions been acquitted by reason of insanity and committed to the South Florida State Hospital.

Insanity has been feigned in order to avoid a prison sentence. Garrett Trapnell, the skyjacker who was finally convicted in May, 1973, had been arrested at least 20 times for major crimes between 1957 and 1972 but had spent less than two years in jail. He claimed to have "made a point of trying to fool psychiatrists and psychologists in Florida, Texas, Maryland, New York, California and Canada, into believing that he was a genuine 'Dr. Jekyll and Mr. Hyde'--normally a sane, honest man, whose mind, every so often, was taken over by a sinister alter ego called 'Gregg Ross.'"^{113,114}

INCIDENCE OF ACQUITTALS

Retentionists frequently make reference to the extremely small percentage of successful insanity pleas compared to the total number of convicted felons. They insist that this is indeed a small price to pay for the preservation of a noble principle that holds that those who are blameless shall not be punished. Statistics show, however, that the issue is not one of identification and treatment of the blameless but of avoidance of extreme punishment of individuals for whom something can be said in mitigation, especially when the punishment is death. Data presented by the Royal Commission on Capital Punishment¹¹⁵ clearly demonstrate that blame can be imposed on wrongdoers without violating humanitarian principles by which a civilized society is governed: of 99,463 persons charged with felony crime in a five-year period, 19.8% of the 374 charged with murder were acquitted by reason of insanity, while only 0.7% of the 4312 charged with attempts or threats to murder, manslaughter, infanticide, child destruction, wounding and attempted suicide; and a mere 0.1% of the 94,777 charged with

other crimes; were so acquitted. Since there is no reason to expect that there are fewer "blameless" individuals amongst those offenders charged with lesser crimes than murder, it is evident that blame with resultant "punishment" can be justly imposed. It is also clear that in so doing, most mentally ill offenders are dealt with more appropriately than if they were adjudged not guilty by reason of insanity and subjected to statutorily mandated sanctions, in many cases far more repressive and severe than the dispositional consequences available to those found guilty.

The primary purpose of the insanity defense was to serve as an escape hatch so that offenders, severely mentally disordered when their crime was committed, might be spared the death sentence. As society resorted less and less to capital punishment as a means of dealing with major offenders, one would logically have expected to see a concomitant reduction in insanity pleas. However, a variety of factors came into play which had the very opposite effect: 1) liberalization of the insanity rule, so that judges, who mistakenly believed that highly curative psychiatric treatment opportunities were available in institutions for mentally disabled offenders, became more prone to decide a case in favor of acquittal on insanity grounds; 2) alterations in trial procedures which gave the psychiatrist much greater opportunity to express his views as an expert witness than in the past; 3) strong emphasis on patients' rights during the 1960's and 1970's encouraging involuntarily hospitalized persons who are no longer mentally ill to request their release; 4) the U.S. Supreme Court ruling¹¹⁶ that the non-dangerous patient can demand to be released if adequate treatment is not provided; 5) the Jackson decision¹¹⁷ which made it less easy to effect the indefinite hospitalization of defendants believed to be incompetent to stand trial, thus motivating prosecutors to push for trial of mentally ill felony offenders who were now determined to meet minimal standards for triability (offenders who prior to Jackson would have been confined to maximum security hospitals for the criminally insane for extremely long periods, sometimes for

life, and never brought to trial); and 6) the tendency of many defense attorneys to encourage mentally disordered clients facing a lengthy prison sentence to assert the insanity plea, anticipating a comparatively early release if found insane.

Statistics garnered in New York State are typical of the insanity pattern nationwide. There were one or two successful insanity cases per year between 1958 and 1965,¹¹⁸ and approximately nine cases per year between April 1, 1965, and August 30, 1971.¹¹⁹ Insanity acquittals rose to an average of 48 cases per year for the period 1971 to 1976 inclusive,¹²⁰ and, after holding steady for the next four years, again rose dramatically to 124 cases in the year after the Insanity Defense Reform Act of 1980 went into effect.¹²¹ If this trend continues, it is inevitable that facilities in which insanity acquittees are confined will become overcrowded. It is inevitable also that those who are empowered to authorize release of acquittees (that is to say, in most jurisdictions in this country, the judge before whom the original case was tried), will adopt more stringent release standards. Thus, for many insanity acquittees, the consequence must be a return to punitive confinement in a psychiatric hospital, unless the insanity defense itself is abolished.

ALTERNATIVES

Abolition of the insanity defense poses no serious danger that cruel and unusual punishment would be inflicted on the mentally disabled, or that mentally disordered offenders, on the other hand, would be free from government control. Abolition, in fact, would at last open the door to a rational approach to the problem of dealing with offenders whose mental illness was significantly associated with their criminal conduct. For example, instead of fostering a system whereby a defendant seeks exculpation because of a mental disability, adoption of an expanded diminished mental capacity doctrine "permits the gradation of offenses at the earliest stages of prosecution and certainly at the trial, and thus offers the opportunity to a defendant to allege or prove, if he can, the distinction between the offense charged and the mitigating circumstances which ameliorate the degree or kind of offense."¹²² Carahan¹²³ has shown that

practically all defendants who successfully used the insanity defense over a recent ten-year period in New York State would have been candidates for conviction under a diminished capacity rule had the insanity defense not been available to them. The insanity defense, with its exculpation sans freedom, forcing the psychiatrist "to assume the role of a post-acquittal custodian,"¹²³ would give way to convictions "for lesser included criminal offenses not requiring an accused to have acted either intentionally or knowingly."¹²³ The ensuing "clutchability" would enable the sentencing court to "take the present mental condition of the offender into account in determining an appropriate disposition, viz., conditional discharge, probation or penal confinement."¹²³

With elimination of the mechanism of exculpatory legal insanity from our criminal justice system, more meaningful and truly compassionate handling of cases of ordinarily law-abiding and non-dangerous persons charged with crime as a result of the commission of an unlawful act whilst severely mentally disturbed, would be facilitated.³ Aside from a clearcut "Not Guilty" verdict by means of a jury's power to nullify both the law and the factual evidence, deserving cases can also be given exculpatory consideration by means of prosecutorial discretion, grand jury refusal to indict, or, after conviction, gubernatorial pardon.*¹²⁴ Thus can eradication of the insanity defense lead to

*It may be of interest to note the case of John Pastano which occurred in New York prior to the state constitutional amendment which permitted gubernatorial pardons and long before the development of hospitals for the criminally insane in this country. Chapter 3 of the Laws of 1800¹²⁵ reads as follows:

AN ACT to pardon John Pastano for murder.
Passed the 14th of February, 1800.
Whereas John Pastano at a court of oyer and terminer held in and for the city and county of New York on the nineteenth day of November in the year one thousand seven hundred and ninety-nine, was convicted of the murder of Mary Ann De Castro, and sentenced to be executed accordingly, which execution has been suspended by his excellency the governor until the twenty-seventh day of February instant. And whereas it appears satisfactorily to the legislature from the testimony submitted at, and discovered since the trial of the said John Pastano, that at the time of the commission of the act aforesaid, he was insane, and is therefore a proper object of mercy. Therefore.

Be it enacted by the People of the State of New York represented in Senate and Assembly, That the said John Pastano be and he is hereby fully and absolutely pardoned and discharged from the felony and conviction aforesaid, and all execution and forfeitures thereon. Provided nevertheless that the said John Pastano shall continue confined in prison until the assurance which has been made of security's being given that he shall be immediately sent to Madeira where his connections reside, shall be complied with to the satisfaction of the mayor or recorder

the adoption of humanitarian dispositional rules for persons found culpable and at the same time enable the courts to discharge their public safety responsibilities by closer scrutiny and monitoring of those defendants considered dangerous.

CONCLUSION

Oliver Wendell Holmes, Jr.,¹²⁶ wrote in 1896:

"It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."

It has been amply demonstrated that there is no rule to which this statement is more applicable than that which governs the insanity plea against criminal charges. Exculpation by reason of insanity is inimical to the interests of the defendant and of society. Such "acquittal" stigmatizes the defendant forever as "criminally insane" and confronts society with the not infrequent danger of the prematurely released insanity acquittee. The "Not guilty by reason of insanity" plea, resorted to by only a small proportion of the criminal population but increasingly asserted in recent years, inevitably results in the misuse of psychiatry and does violence to the integrity of both the criminal justice system and the legal profession. It does much to foster loss of respect by the public for the courts and for the law itself. There are more humane, more ethical and more effective alternatives. Its abandonment is long overdue.

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August 20, 1982

Hon. Strom Thurmond
Chairman, Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Thurmond:

Thank you for your letter of August 13, 1982. My responses to Senator Mathias' questions are as follows:

Question 1: Your testimony includes several statistical assertions. Please provide the documentation for your statements that:

(a) "there are today approximately 4000 persons institutionalized in hospitals for the criminally insane."

(b) none of 255 men hospitalized at the John Howard Pavilion of St. Elizabeth's Hospital were found in a study to have a mental illness.

Answer: (a) In an article entitled "Why Insanity Defense is Breaking Down" in the National Law Journal, David Lauter, citing a study done by Professor Monahan and Henry Steadman, states "The total number of persons institutionalized after insanity pleas was only 3,140." This was for the year 1978. Mr. Lauter is undoubtedly referring to the following publication: "Mentally Disordered Offenders: A National Survey of Patients and Facilities," by H. J. Steadman, J. Monahan, E. Heartstone, S. Davis and P. Robbins, in Law and Human Behavior, Vol. 6, No. 1, (1982) pages 31-38. The figure of 3,140 appears in a table on page 33. For the year 1978, 1,625 acquttees were admitted to hospitals. Extrapolating from the 1978 data, and taking into consideration the fact that there was a substantial increase in insanity acquittals throughout the country, I concluded that there were "approximately 4,000 persons institutionalized in hospitals for the criminally insane." This is probably on the low side.

(b) The reference is: Robitscher, J. Psychiatric Labeling, Predicting, and Stigmatizing, J. of Psychiatry and Law, Fall 1977, 333-366, 349.

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Question 2: Please explain the basis for your estimate that "at least 25 percent of hospitalized acquittees are indistinguishable from the most serious criminals...." In what respect are these two groups indistinguishable?

Answer: I am referring to individuals with personality disorder who but for the successful insanity defense would have been convicted for homicide, rape, felonious assault, armed robbery, kidnapping, burglary, arson, etc. These were cases where either the prosecution was unable to prove sanity beyond a reasonable doubt or where the defendant was able to "prove" insanity by a preponderance of the evidence. Most of these individuals, confined in facilities for the criminally insane, are regarded by the staffs as not being mentally ill and not in need of treatment as such. The Director of the Bureau of Forensic Services of the New York State Office of Mental Health reports that between September 1980 and May 12, 1982, 148 insanity acquittees were admitted to the maximum security institution, the Mid-Hudson Psychiatric Center. Only 68% of these individuals were diagnosed as having a psychotic disorder. Many of these have been successfully treated and restored to their pre-psychotic personality disorder. Thus, my figure of 25% is probably quite low. My discussions with hospital personnel from facilities in Massachusetts, Ohio, Michigan, the District of Columbia, and Illinois, lead me to believe that my figure of 25% is a conservative estimate indeed. The data from Oregon parallels the New York experience. I refer you to the following report: "Characteristics of persons committed to Oregon's Psychiatric Security Review Board," by J. L. Rogers and J. D. Bloom, study supported in part by NIMH Psychiatry Education Grant No. 5 T01 MH 13462, presented at the Annual Meeting of the American Academy of Psychiatry and the Law, San Diego, California, October, 1981.

Question 3: Are there not measures other than complete abolition of the insanity defense which would "ensure that the government retains undisputed control of a defendant who has been convicted of an anti-social act and may still be dangerous to the community"? Couldn't this goal be accomplished through tightened commitment procedures for those found not guilty by reason of insanity?

Answer: The simple answer is "No." Very soon after post-acquittal confinement takes place, the control becomes "disputed." With recovery from "insanity," both the acquittee and his attorney seek to obtain the acquittee's release. The unconscionable, burdensome, time-consuming legal proceedings, proceed apace. "Tightened commitment procedures" have been of no avail in Florida, Illinois, Ohio, New York, Massachusetts,

and many other states, and it would be tragic if the Congress would convey the notion that the problem is resolved merely by passing a post-acquittal confinement law.

Question 4: As you point out, the conscience or common sense of the factfinder can find a way to circumvent even the narrowest of insanity defense rules. Won't this circumvention occur even if the defense is abolished, i.e., the jury will simply refuse to convict a defendant who it finds undeserving of punishment? Shouldn't the law continue to recognize this potential for a jury to refuse to convict, and provide a safety valve in the rare case in which the community feels it is wrong to punish an offender?

Answer: Use of the word "rare" reveals the loadedness of this question. I do not think 2,000 successful insanity acquittals per year is rare. (See answer to 1(a) above.) The jury can "refuse to convict" where there is no insanity defense. What is wrong with the jury refusing to convict a defendant "who it finds undeserving of punishment"? What should be of concern to you is whether, without an insanity defense, the jury will refuse to convict a defendant who is deserving of punishment. In this respect, I would like to draw your attention to the following comment in the enclosed article (Uncloseting the Conscience of the Jury: A Justly Acquitted Doctrine, *Psychiatric Quarterly*, Vol. 52, No. 2, Summer, 1980): "It is unlikely that the jury would let any manner of criminal run loose just for the thrill of defying the judge. People are more cautious and concerned than that. Also, the empirical studies that have been done show that the jurors are too restrained by the gravity of their role to unthinkingly release persons from criminal liability." (Page 146).

Thank you, Senator Thurmond, for the opportunity to respond to these questions. I wish you Godspeed in your work.

Respectfully yours,

Abraham L. Halpern

Abraham L. Halpern, M.D.

ALH:js

Senator HATCH. I would like you to stay, if you would, Dr. Halpern.

Professor Bonnie, would you join the other witness before we turn to Mr. William A. Carnahan, our final witness today, who also brings to the committee some of the Nation's finest credentials in the field of mental health law. Mr. William A. Carnahan is currently associated with the Washington, D.C., law firm of LeBoeuf, Lamb, Leiby & MacRae. He has over 18 years of direct involvement with the insanity defense as a criminal lawyer, in the military courts of Vietnam, as a lecturer and as an author. He has served as deputy commissioner and counsel for the New York State Department of Mental Hygiene. In addition, Mr. Carnahan has taught forensic psychiatry courses at New York University, and has authored several leading works in this field.

I am happy to welcome you to our committee, Mr. Carnahan, and I think we will take your statement. Then we can have a general discussion among the three of you. And we will give Mr. Bonnie a chance to respond to Dr. Halpern and you, if necessary, and vice versa.

STATEMENT OF WILLIAM A. CARNAHAN, ESQ., FIRM OF LEBOEUF, LAMB, LEIBY & MacRAE, WASHINGTON, D.C.

Mr. CARNAHAN. Thank you very much, Senator Hatch.

BACKGROUND

I am here this morning not as an advocate for a partisan cause, but as a very concerned American and as a lawyer who has seen the insanity defense over a period of 18 years as few other lawyers have seen it.

As you have indicated, Senator, I have seen it in the battlefields of Vietnam as a military trial lawyer; I have seen it in the courtrooms of the United States as a civilian trial lawyer; I have taught it in the classrooms of the State University of New York at Buffalo Law School as a lecturer in law and psychiatry, and I have witnessed it in the psychiatric hospitals of New York for over 3 years as the deputy commissioner and general counsel for the New York State Department of Mental Hygiene, an agency which is the largest mental health agency in the world with over 30,000 mental patients, over 20,000 mentally retarded residents, and over 100,000 psychiatric outpatients.

INTRODUCTION

My experience convinces me that the approach, Senator, that you took standing alone prior to the Hinckley trial in S. 818 is the way to go. The S. 818 approach is essentially to eliminate the insanity defense and to allow evidence of mental disease or defect insofar as it affects the state of mind of an accused when that is relevant to the crime charged.

In the State of New York, beginning in the early seventies, there was public outrage, not concern as Professor Bonnie would have us believe, but outrage over perceived insupportable verdicts and premature release.

Let me say this. The insanity defense is not a problem of the rule. The insanity defense is a problem of the consequences. Disposition is the cause for concern. Prior to the late sixties, the insanity defense was not a problem in the United States. Why? Because, as Professor Bonnie indicated, a strict insanity rule, coupled with a liberal civil commitment standard and the willingness of American psychiatry to serve as post-acquittal custodians of the acquittees, provided for in most cases lifelong social isolation of the mentally abnormal offender.

Now, problems emerged because of court decisions interpreting constitutional principles, legislative concerns resulting in strict post-acquittal retention statutes and American psychiatrists were no longer willing to serve as jailers. The insanity defense, as a result, became a problem, a problem by the way, which is peculiar to the United States. It is no problem in England, it is no problem in Canada. The reason is that the successful use of the insanity defense results in post-acquittal detention at the executive's pleasure with no judicial review. In England, you are confined at the pleasure of the Home Secretary; in Canada at the pleasure of the various provincial Lieutenant Governors. Here, the consequences became the problem and, by the late seventies, the public was justifiably outraged.

THE INSANITY DEFENSE REPORT

Against this background, New York's Governor requested that the New York State Department of Mental Hygiene survey the use of the defense in New York during the previous 10 years in terms of the offenders, the outcome and the release practices in New York State, and also consider the need for legal limits on the defense of insanity. The result, Senator Hatch, was the report, *The Insanity Defense in New York*, which I would be more than willing to submit into the record. As a result of these hearings, it has gone into a second printing.

Senator HATCH. Without objection, we will place that report in the record at this point.

[*"The Insanity Defense in New York,"* the report to Gov. Hugh J. Carey, is on file with the committee.]

Mr. CARNAHAN. This report was participated in by a number of individuals, including Lawrence C. Kolb, M.D., who is currently distinguished physician in psychiatry for the Veterans' Administration, former president of the American Psychiatric Association, former chairman, department of psychiatry, Columbia University, and author of *"Kolb, Modern Clinical Psychiatry"* in its 10th edition; Dr. Henry J. Steadman, who appeared earlier before this committee, one of the most distinguished social scientists researching criminal behavior in the United States; John B. Wright who is a physician currently running forensic services in the State of Arizona. Dr. Wright was the architect for prison mental health services in New York. And myself; my transcendental modesty precludes me from going into my credentials, but the four of us worked together to prepare *The Insanity Defense* report in New York.

Senator, we surveyed the successful use of that defense by every individual in the State within the past 10 years. The conclusions

were unanimous. The defense itself was not constitutionally required. The defense had increased markedly, it was not used uniformly throughout the State. It was a guilt avoidance device for certain segments of the population. And finally, the legal standards, were often not controlling in the successful use of the defense. In other words, the particular legal rule did not make that much difference.

We surveyed by a statistically significant survey device, the perceptions of judges, prosecutors and defense lawyers. We found that there was misunderstanding of the rules, vagueness, superficial psychiatric testimony, misunderstanding by juries. In other words, we found that the insanity defense for a variety of reasons was not working in New York State. The recommendation, Senator Hatch, was to eliminate the defense and to adopt the rule of diminished capacity which, in essence, is your approach in S. 818 and the current S. 2572 approach, without a special verdict or post-acquittal commitment, what we recommended was to look at the element of the offense to determine whether the individual had the proper mental state, if not, to go to a lesser included offense.

Now, we did a survey of the 278 acquittees and found that all but three would have been candidates for conviction under some lesser included offense. The only pure acquittals would have been for possession of burglary tools, menacing and forgery. The report was released in February of 1978 and provoked immediate controversy. It was attacked by the New York Times for relying on soft data and applauded by Science Magazine for uncovering hard data. Most lawyers thought it was untherapeutic. Many psychiatrists felt it was unconstitutional. The Governor referred it to the New York State Law Revision Commission, a body of esteemed academics who felt it was both unconstitutional and immoral.

The New York State Legislature, eager to disengage itself from the political controversy, passed the Insanity Defense Reform Act which tried to tighten up the post-acquittal commitment. Because of the judicial procedures requiring interminable hearings, involving many lawyers and many psychiatrists, we like to call it the Lawyers and Psychiatrists Work Relief Act of 1980. The problem is that it creates a very stringent standard for commitment, viz. dangerous mental disorder. It is harder to get in than it was before. It may be harder to get out, but it is also harder to get in. One State official confided to me that were it to have been rigorously exploited in 1980 for those who have been in, over two-thirds would have been eligible for immediate release. Our experience in New York convinced us that the insanity defense should go. The legislature was not willing to abolish it and the situation continues to get worse in New York.

MORAL CONTENTIONS AND THE INSANITY DEFENSE

Let me talk briefly about the moral contentions advanced by Professor Bonnie, similar to the moral contentions advanced by the Law Revision Commission.

The moral argument, as I see it, can be summarized by the phrase "Persons who cannot be deemed responsible for criminal acts because of mental disease or defect should not be treated as

criminals." That position as it relates to the insanity defense, I think, is wrong for four reasons.

First, it assumes that there is one insanity defense that can properly separate those individuals who can and cannot be deemed responsible. But there are varieties of rules, and procedural variations which produce diverse results in differing localities. Since there is not one defense, but several defenses, to say that you need an insanity defense implies any insanity defense will do, which at best, Senator, suggests moral relativism; and at worst, smacks of moral mysticism—of not hypocrisy.

Second, the insanity defense has become a medical ritual. The pervasive reliance upon medical testimony has detached the insanity defense from the moral sense of the community. People just do not understand what it is all about any more, and to the extent that it is a medical enterprise, it has as much claim to moral relevance as the physician-patient testimonial privilege which, by the way, is not allowed in Federal courts.

Third, you can accept the premise that mental abnormality should be considered as affecting blameworthiness without accepting an insanity defense. And, Senator, that is what you did in S. 818. Assuming that those who are mentally ill should not be blamed, where such mental illness affects the degree of crime charged, it would be a mitigating excuse. Furthermore, following current practices, mental illness can also be considered at sentencing or left to prosecutorial discretion—as in Professor Bonnie's example of Joy Baker. You do not need an insanity defense to take the moral high ground.

Finally, the insanity defense ignores the devastating practical consequences of a continuing dysfunctional mechanism of the criminal law. If this were England, if this were Canada, you could have any rule you wanted. It would not make any difference. This is the United States, and post-acquittal detention is becoming more and more difficult. The elements test—the state of mind test—provides a practical substitute which, in my view, is no less moral.

ABOLISHING THE INSANITY DEFENSE

In concluding, Senator, my professional experience in dealing with this subject for over 18 years has convinced me that, in part, the insanity defense persists often through the false assumption that mental abnormality associated with criminal activity can indeed be treated and cured. The reality is that many offenders are not treatable and must be confined for the protection of society. It is a sad reality but it is a reality and a fact which Dr. Halpern would not disagree with me on at all.

The difficulty with the insanity defense within this context of reality is that it often results in inappropriate hospitalization rather than in appropriate imprisonment, and while New York is rather a dramatic example, I think New York is illustrative of the national outrage. While the use of the insanity defense in Federal criminal trials is relatively rare, the outrage at the Hinckley trial indicates pervasive public opinion. As Dr. Halpern suggests, the Congress of the United States, in taking the lead, will provide an example to the States. And it was, by the way, the upper body of the English

Legislature, the House of Lords, that took the *M'Naghten* rule in hand in the mid-19th century as a result of the unsuccessful attempted assassination of the Prime Minister.

So I think the insanity defense is worthy of this body's consideration, and I would argue that it is now time to abolish it. I would join Dr. Halpern in cautioning against the retention of a special verdict and the creation of a post-acquittal commitment scheme.

Both S. 818 and 2572 are right on target to the extent that they would eliminate the traditional insanity rules in Federal criminal prosecution.

Thank you, Senator.

Senator HATCH. Thank you, Mr. Carnahan.
[The following was received for the record:]

STATEMENT

OF

WILLIAM A. CARNAHAN
LEBOEUF, LAMB, LEIBY & MACRAE
WASHINGTON, D.C.

BEFORE

THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

INSANITY DEFENSE LEGISLATION

ON

AUGUST 2, 1982

Mr. Chairman, Members of the Committee.

I am deeply honored to appear before this Committee to testify in favor of those provisions of S.2572 which in the words of our Attorney General "would effectively eliminate the insanity defense except in those rare cases in which the defendant lacked the state of mind required as an element of the offense."^{1/}

I do not appear here as an advocate arguing a partisan cause. Rather, I am here as a concerned American and as a practicing lawyer with 18 years of professional involvement with this defense.

I have seen this defense on the battlefields of Vietnam as a military trial lawyer, in courtrooms in the United States as a civilian trial lawyer, in the classrooms of SUNY at Buffalo Law School as a Lecturer in Law and Psychiatry, and finally in the psychiatric hospitals of New York as Deputy Commissioner and Counsel to the New York State Department of Mental Hygiene.

My purpose this morning is threefold:

- o To share with you the highly pertinent conclusions and recommendations on the need to retain an insanity defense undertaken by

^{1/} Statement of William French Smith Attorney General Before the Committee on The Judiciary, Concerning Insanity Defense Legislation, United States Senate, July 19, 1982.

the New York State Department of Mental Hygiene in 1978 at the request of New York's Governor.

- o To refute contentions advanced by some in legal academia that the insanity defense as it presently exists is somehow necessary to preserve the moral foundations of our federal criminal law.
- o To lend my voice to that of the Attorney General's in urging the adoption of a "mens rea", "elements" or "diminished capacity" approach to solving the continuing problems posed by retaining an anachronistic and outdated excusing condition of the criminal law.

The unfortunate consequences of the Hinckley trial should not cloud our awareness that abolishing the insanity defense has been on the American people's agenda since at least the early 1970's. During each instance of public outrage over a perceived unsupportable verdict or premature release of an acquittee, those in favor of retention argued that one abuse doesn't justify abolition. This is the so called "don't throw out the baby with the bath water argument". Such an argument became less and less tenable as abuse begat abuse. More liberalized insanity rules

coupled with more restrictive post-acquittal retention requirements and changing psychiatric practices continued to render the insanity defense unsuitable as a vehicle for socially isolating the mentally abnormal offender. It was against this background that on January 4, 1978, New York's Governor directed the Department of Mental Hygiene to prepare

"a report which will examine the types of cases in which the defense has been invoked, the outcome, and the subsequent treatment of the offenders. Specifically, I directed the Department to consider the need for limits on a legal defense of insanity."^{2/}

The Insanity Defense Report.

Under my direction, the Department of Mental Hygiene responded by surveying the use of the defense during the ten previous years focusing upon the types of crimes involved, the characteristics of the offenders and victims and the post-acquittal hospitalization and release patterns in New York State. Through the use of statistically significant surveys, we obtained a representative sampling of views of trial judges, prosecutors and defense attorneys. In what is the most exhaustive analysis of the insanity

^{2/} Governor Hugh L. Carey, Message to the Legislature of the State of New York, p. 13-14 (January 4, 1978) in L. Kolb, W. Carnahan, H. Steadman & J. Wright, The Insanity Defense in New York (N.Y.S. Dep't of Mental Hygiene 1978).

defense today, the following conclusions were unanimously drawn.^{3/}

Legal Perspectives on the Defense

- . An insanity defense is not required constitutionally to be maintained.
- . The state has "wide freedom to determine the extent to which moral culpability should be a prerequisite to conviction of a crime." Powell v. Texas, 392 U.S. 514, (1968) (Black, J., concurring).

Use of the Defense

- . During the last ten years, successful use of the defense has increased markedly from fifty-three (53) cases during the first five years to two hundred and twenty-five (225) cases during the last five years.
- . The defense is not uniformly applied throughout this state.
- . The defense has tended to be used as a guilt avoidance device for certain empathetic segments of the population.
- . The legal standards for use of the defense may not be deciding factors in its successful use.

Perceptions of the Defense

- . Legal professionals found problems with the defense in terms of poor statutory definitions, vagueness, uneven application, lack of understanding by juries and the public, and superficial and incompetent psychiatric testimony.

^{3/} L. Kolb, W. Carnahan, H. Steadman & J. Wright, The Insanity Defense in New York at 7-11 (N.Y.S. Dep't of Mental Hygiene 1978).

- Legal professionals felt that the defense should be modified by removing the ambiguity and vagueness of psychiatric testimony in the determination of guilt or innocence.
- Legal professionals felt that treatment of acquittees within a correctional setting was preferred to psychiatric hospitalization.

Reassessment of the Defense

- The defense rests upon the legally dubious premise that the medical specialty of psychiatry can answer the question of the capacity of the defendant to understand the nature of his act or to evaluate whether at the time of its commission he was capable of distinguishing "right" from "wrong".
- Harm may be done to the rule of law through the use of an insanity defense, with its implied permissiveness for violent and other crimes committed.
- Public determination of guilt may do much to sustain the faith of citizens at large in the rectitude and equity which should exist in all social bodies in their efforts to sustain justice under law.
- By abrogation of the defense, an individual would not be a candidate for automatic placement in a psychiatric hospital, a disposition which can be -- and often is -- inappropriate not only for custodial but also for therapeutic reasons.
- The use of the defense in highly publicized criminal cases can foster an impression that all mentally ill individuals are dangerous, thus significantly inhibiting community acceptance of a policy of providing care and treatment of persons suffering from mental illness -- who are neither violent nor dangerous -- in surroundings less restrictive than secure facilities.

Impact of the Defense

- Psychiatric participation in the determination of legal guilt or innocence is premised upon false assumptions of psychiatric expertise in what are essentially legal, moral and social judgments.
- Continued placement of individuals in psychiatric hospitals has become undesirable due to the changing nature of our psychiatric hospitals, the type of offenders being placed and the difficulties of articulating psychiatric standards for release.
- Capacity for treating such individuals within correctional settings renders continued placement within psychiatric hospitals not only undesirable, but unnecessary.

Having examined the need for continuing the insanity defense and having considered optional approaches, we recommended for adoption a rule of diminished capacity under which evidence of abnormal mental condition would be admissible to affect the degree of crime for which an accused could be convicted. Specifically, those offenses requiring intent or knowledge could be reduced to lesser included offenses requiring only recklessness or criminal negligence.

Additionally, a psychiatrist would be limited to testimonial and documentary evidence of an accused's capacity for culpable conduct. For example, where knowledge is a required culpable mental state, the psychiatrist would be permitted

to describe the defendant's mental condition and symptoms, his pathological beliefs and motivations, if he was thus afflicted, and to explain how these influenced or could have influenced his behavior, particularly his mental capacity knowingly to [commit the crime charged]

Rhodes v. United States,
282 F.2d 59, 62 (4th Cir.
1960)

No longer would he be permitted to address the issues of complete exculpation or forced to assume the role of post-acquittal custodian.

While abolishing mental disease or defect as a complete defense, recognition would still be given to higher degrees of culpability affected by the presence of an abnormal mental condition. The result would entail conviction and processing in the correctional system for serious offenders, and acquittal -- perhaps civil commitment -- for minor offenders. Convictions would be for lesser included criminal offenses not requiring an accused to have acted either intentionally or knowingly. The sentencing court would then take the present mental condition of the offender into account in determining an appropriate disposition, viz., conditional discharge, probation or penal confinement.

The effect of these recommendations would be to recognize the Department of Correctional Services as the primary control agency, to avoid dysfunctional psychiatric involvement in adjudicative and dispositional processes and

to ensure that the fate of those found dangerous to society be determined by the proper agencies and the judiciary.

Publicly released during February of 1978, the Report became a focus for an emerging national debate on continuing the defense. Upon written request, over 4,000 copies were distributed throughout North America, the United Kingdom, Germany and as far as distant Australia. Controversy was immediate. Simultaneously, the Report was attacked in the New York Times for resting on soft data and applauded in Science Magazine for uncovering hard data. Ironically, lawyers expressed concern that the recommendations were untherapeutic while psychiatrists felt they were unconstitutional. In New York, the continuing controversy prompted the Governor to refer the Report to an "expert" Committee on Sentencing -- and upon this Committee's failure to significantly respond -- to the New York Law Revision Commission.

Retreating into assumptions that an insanity defense was both constitutionally necessary and morally required, the Commission opted for "post-acquittal reforms" which would make post-acquittal release more difficult. Eager to disengage itself from a politically controversial conflict, the New York Legislature promptly passed The Insanity Defense Reform Act of 1980.^{4/} This legislation

^{4/} 1980 N.Y. Laws 548.

retained the insanity defense, rejected even the Commission's recommendation that diminished capacity be recognized as adjunctive to an insanity defense and required criminal commitment of individuals afflicted with a "dangerous mental disorder" -- with release, discharge or furlough to be determined by the judiciary.

Unfortunately, this legislation did nothing to deal with pervasive problems associated with the continued use of the defense. Due to its emphasis on elaborate post-acquittal adversarial judicial procedures, it should be more aptly entitled "the Lawyers' and Psychiatrists' Work Relief Act of 1980." More fundamentally, through adoption of the term "dangerous mental disorder" this legislation achieved exactly the opposite of its intention, *viz*, the containment of dangerous individuals. Under a rigorous standard, commitment and retention require mental illness plus judgmental impairment plus predictable dangerousness. At the time of its passage, one New York State official confided to me that approximately two-thirds of the over 200 post-acquittal detainees would have been eligible for immediate release should this legislation have been rigorously exploited.

Moral Contentions and the Insanity Defense

In rejecting the Department's recommendations, the Law Revision Commission concluded that

[t]he defense of insanity should be retained in its present form. Persons who cannot be deemed responsible for criminal acts because of mental disease or defect should not be treated as criminals."^{5/}

This statement is essentially the retentionist position.

I would submit that it is wrong for at least four reasons.

First, it assumes that the insanity defense properly defines who can and cannot be "deemed responsible". The New York rule is but one of several varieties of an insanity defense. To the extent that an individual may be found guilty or not guilty by reason of insanity depending upon non-uniform substantive rules or varying procedural burdens of persuasion, the insanity defense does not uniformly identify "[p]ersons who cannot be deemed responsible for criminal acts because of mental disease or defect." Since the substantive rules and procedural variations produce diverse results in differing localities, attempts to assert that an insanity defense is morally required at best suggests moral relativism and at worst smacks of moral mysticism -- if not hypocrisy.

Secondly, by pervasively relying upon esoteric medical testimony, the defense has lost touch with the moral sense of the community. As a peculiarly medical

^{5/} Report of the Law Revision Commission to the Honorable Hugh L. Carey, Governor on the Defense of Insanity In New York State, May 2, 1980 at 2.

ritual, the insanity defense has as much claim to moral necessity as the physician-patient testimonial privilege -- unrecognized in federal jurisprudence.

Third, to accept the premise that mental abnormality may be relevant to particular instances of culpability or blameworthiness under the criminal law does not require further accepting the need for an insanity defense. As Professor Morse correctly observes,

"The critics of abolition of the insanity defense correctly assert that craziness is relevant to culpability. . . . Despite the need to consider craziness when it is relevant to criminal behavior, however, the insanity defense in its present form might not need to be retained. Craziness can be considered in determinations of criminal responsibility by adopting, for example an 'elements' approach. . . ." "According to this view, no special defense is necessary; insanity (and other factors) would be relevant to the standard determination of whether or not an element of the crime such as a specific mens rea was present. Thus, to take an old example, a person who sincerely believed that he was squeezing a lemon, when he really was strangling his wife could not be guilty of criminal homicide on an intent to kill theory."^{6/} (footnotes omitted)

Fourth, to view the insanity defense as distinct from its post-acquittal results ignores the disastrous practical consequences of retaining an increasingly dysfunctional excusing condition of the criminal law when the no less moral substitute of diminished capacity exists.

^{6/} Morse, S. J. Crazy Behavior, Morals and Science: An Analysis of Mental Health Law 51 S. Cal. L. Rev. 642 at 642-643 (1978).

The problem of the insanity defense is not the rule, but the consequences. In both England and Canada, where release is essentially at executive discretion with no judicial involvement, there is no problem. In the United States where retention is conditioned upon complying with strict retention standards accompanied by constitutionally imposed judicial supervision, there is and will continue to be a problem.

Abolishing the Insanity Defense

In part, the insanity defense persists from an often false assumption that mental abnormality associated with criminal activity can be treated and cured. In reality, many mentally abnormal criminal offenders are not amenable to treatment and yet must be confined for the protection of society.

As the New York Report illustrates the use of the defense in increasing markedly, is not uniformly applied and tends to be used as a guilt avoidance device for certain groups in our society. Legal professionals continue to report problems with vague legal definitions, lack of understanding by juries and superficial psychiatric testimony.

In my view, the defense should not excuse criminal activity since it often results in inappropriate hospitalization rather than in appropriate imprisonment. While the incidence of its use in federal criminal trials is relatively rare, abolition is still necessary and hopefully will spur state legislators to follow. Thank You.

Senator HATCH. Basically the committee has before it four alternatives for changing the insanity defense: The mens rea approach—abolishing insanity as a special defense—a shift to the defendant the burden of proving that he was insane, an approach like the mens rea approach but which allows the jury to return a verdict of guilty but insane, and, finally, a modification to allow the jury to find the defendant guilty but mentally ill.

Taking these one at a time, I wonder if you would tell us what effect the burden shifting approach would have on the introduction of confusing psychiatric testimony about the defendant's moral or volitional capacity?

Mr. CARNAHAN. Senator, let us start with your bill introduced before the Hinckley trial, S. 818, which I think is the simplest and the most correct statement of where we should go.

S. 818 says, in effect, that mental disease or defect is not a defense unless that condition effects an element of a crime charged. For example, if one were going to try an individual, say, for a crime requiring intent or knowledge, acquittal would only occur if there were no lesser included offenses. If the jury could find a lesser included offense not requiring criminal intent or knowledge, as we found in New York State in all but three instances it would convict that individual for something of lesser gravity.

Now, what do you do in that rare case where there is no lesser included offense? For example, larceny can not be reduced to a lesser included offense. This is a specific intent, common law crime. Idaho has taken the position that you acquit the individual and if he is mentally ill, you go out and civilly commit him. The problem in the Federal context is that there is no civil commitment statute. What S. 2572 says is that there has got to be a way to hold these folks and put them into a psychiatric hospital. So what S. 2572 does is create a special verdict. It creates the special verdict not guilty by reason of insanity which, in effect, is not guilty by reason of successfully being acquitted because of not having the required mental state. It then calls upon the Attorney General to civilly commit.

So, to the extent that the special verdict is added on, it, in effect, creates an insanity defense industry within the Federal Government, as opposed to a mechanism whereby the Federal court could, by legislation, be empowered to order the U.S. attorney to seek civil commitment in a particular State. That is what I think Dr. Halpern is suggesting.

So, all of the proposed bills will eliminate the insanity defense by substituting the mens rea approach, exclusive of the guilty but mentally ill approach. But my concern is the special verdict and postacquittal commitment. Does the Federal Government want to get in the civil commitment game or under popular principles of federalism should they leave that to the various States? That is a public policy question which I think could go either way. I have my druthers, but I think it is my personal concern.

The guilty but mentally ill approach, though, we looked at that in New York, and to the extent that guilty but mentally ill is a semantic change of the label, it does not do anything. To the extent that guilty but mentally ill would provide a way to put someone in postacquittal commitment, you still have the incentive for those individuals to use law and psychiatry to get shorter time. And time

after time when I visited the psychiatric hospitals in New York for the criminally insane, all of them will tell you they would rather do time in Matteawan than at Green Haven. So I think that there is a practical consideration here and that S. 818 is the way to go. Many of the other bills recognize this, but as we start putting on these additions, we may run into problems with fashioning some kind of Federal civil commitment law.

Senator HATCH. With regard to the burden shifting approach, would a burden shifting approach still be a rich man's defense requiring extensive testimony?

Mr. CARNAHAN. Yes. If you were to shift the burden of proof to place the burden on the defendant by a "preponderance of the evidence," you would, of course, make it much more difficult. But you would still have all the problems with the insanity defense although you would bring the numbers down. If you place the burden on the defendant "beyond a reasonable doubt," you would bring the numbers down further. But it would be more of a rich man's defense because you would have to prepare that much more carefully and find that many more experts because it would be much more difficult for the defense to prevail.

I think, in fairness, if you are going to do little if anything changing the burden of proof is something. But I do not think it gets at the crux of the problem and I do not think it is going to solve the periodic public outrage that is going to continue as a consequence of these release practices and verdicts.

Senator HATCH. On the bills shifting burden of proof would people who have committed murder still be acquitted?

Mr. CARNAHAN. Absolutely. And there was a classic case in New York. The *Torsney*¹ case in which a white police officer coming out of a house call shot a black youth and rather than not prosecute him, the district attorney felt that he had to prosecute. A psychiatrist testified that the police officer was suffering from a rare form of psychomotor epilepsy. There was no evidence really to counter that. So, under whatever burden of proof, the Government had no evidence to counter this rare neurological condition. Consequently the defense prevailed. He came to the department of mental hygiene under automatic commitment procedures, and 12 psychiatrists could find nothing. The department moved for his release.

After days and days of court hearings, the trial judge ordered the release. However, the appellate division voted five to nothing to keep this man confined ordering the department to find a mental illness. Finally the New York Court of Appeals voted 4 to 3 to release him. The point of this narrative is that the burden of proof would not have made any difference because there was no evidence on the other side to counter the evidence that was in that courtroom.

Senator HATCH. I see.

In relation to a verdict of guilty but insane, an offshoot of the mens rea approach, would this perhaps permit a jury to convict a defendant even though he lacks the requisite state of mind? And I think the inevitable question that follows that is if he lacked the

¹ "In the Matter of Torsney," 47 N.Y. 2d 667 (1979).

inevitable—or the requisite state of mind, then how could he be found guilty?

Mr. CARNAHAN. Well, I would agree with that. If you look at a particular crime, let us say murder which requires an intent to kill, if the jury has a reasonable doubt as to whether the individual could intend to kill, then one drops down to the general intent crime of manslaughter. But I think the difficulty here is, as in California, when you have both insanity and diminished capacity or insanity and mens rea, you are further confusing the jury because you are adding one more psychiatric element into the case. My view is that the jury is confused enough and that ordinarily a defense counsel will choose that approach which, quite frankly, is going to be more successful. So he will, in effect, if the option is offered to him, use the mens rea approach if that is what his evidence supports.

Senator HATCH. The *Winship*¹ case would indicate that this approach has some constitutional problems because the Government is required to prove every element of the crime.

Mr. CARNAHAN. The *Winship*¹ case requires only that the prosecution "prove every ingredient in an offense beyond a reasonable doubt."² Since the insanity defense does not constitute an "ingredient in an offense," but rather is a statutorily or judicially created excuse to an otherwise provable crime, the Government may shift at will the burden of proof from the prosecution to an accused.³ Furthermore, the mens rea approach satisfies *Winship*, since the prosecution must prove the required state of mind beyond a reasonable doubt.

As of 1978, psychiatric testimony was admissible on the question of specific intent in 21 States and the District of Columbia. All we are recommending is cutting the psychiatrists back to psychiatric testimony on mental State, getting him out of the business of testifying as to the cognitive or volitional or delusional character of an accused as a basis for complete exculpation.

Senator HATCH. In relation to the verdict of "guilty but mentally ill," in conjunction with the mens rea approach, would this offer the juries an easy out between conviction and acquittal that they might seize upon if they have to make a tough choice?

Mr. CARNAHAN. I think so, Senator.

During my tenure in New York, there was some interest by the State legislature in the guilty but mentally ill approach which Michigan has adopted, and despite repeated efforts, I could not get any sense from Michigan how it was working there.

Our feeling in New York was that when you keep the insanity defense as well as add a verdict of guilty but mentally ill, it becomes complicated. It was not worth exploring in New York because we did not know whether it was working in Michigan.

Senator HATCH. Would the mentally ill case also get the courts back into the issues as varying and wide as the courts' search for a definition of this rather amorphous term?

¹ In re *Winship*, 397 U.S. 358 (1970) (holding unconstitutional juvenile court statute permitting prosecution to establish liability by a "preponderance of the evidence").

² *Patterson v. New York*, 432 U.S. 197 (1977).

³ See, e.g., *Leland v. Oregon*, 343 U.S. 790, 798-799 (1952); *Patterson v. New York*, supra, 432 U.S. at 204-207.

Mr. CARNAHAN. I do not think so. In *Rhodes v. U.S.*¹ which we did cite in our report, the psychiatrist's testimony is limited to the defendant's mental condition and how that condition affected the capacity of that individual to intend to do the act or to know what he was doing and leaves it at that and as Professor Bonnie indicated, this leaves the moral decision to the jury, as instructed by the judge. I think that is manageable. I think it is much more manageable than the situation that we have right now where the psychiatrist is, in effect, the 13th juror.

Senator HATCH. Once a person is found not guilty only by reason of insanity because he lacks a state of mind for the offense, what standards should apply to civil commitment of the acquitted individual?

Mr. CARNAHAN. I think the same standards that should apply for any other mentally ill individual. From a practical perspective, by the time an individual reaches the courtroom, there has been a determination that he is competent to stand trial. Accordingly, he knows the nature and consequences of the charges and can cooperate in his own defense. He obviously has gotten through the trial process itself and he is now acquitted. I think the civil commitment statutes of most States reflect the sense of the community as to those types of individuals they want off the streets.

In my view, it would make better sense to consider first authorizing the U.S. attorney to commence civil commitment proceedings in a particular State in which the court is sitting than to create an insanity defense industry and bureaucracy in the Department of Justice running their own commitment facilities.

As in most States that allow a plea of diminished capacity, ordinary civil commitment statutes should be sufficient to get these people off the streets.

Senator HATCH. I know that the Supreme Court requires clear and convincing evidence of mental defects and dangerousness for ordinary commitment.

Would the same standards apply to this procedure for the criminal courts?

Mr. CARNAHAN. You are correct Senator Hatch in that the Supreme Court does require "clear and convincing evidence" as the standard of proof in a civil proceeding brought under State law to commit an individual involuntarily for an indefinite period to a State mental hospital.² The standard of proof required for committing persons acquitted by reason of insanity will be considered by the Supreme Court in the pending *Jones*³ case.

Under the current mens rea approach should someone be acquitted, involuntary psychiatric hospitalization would be sought through prevailing State civil commitment statutes. However, I am not convinced that the Supreme Court will require "clear and convincing evidence" to involuntarily hospitalize initially those found not guilty by reason of insanity. For purposes of initial hospitalization, there are valid reasons to distinguish between a criminal de-

¹ *Rhodes v. U.S.*, 282 F. 2d 59, 62 (4th Cir. 1960).

² *Addington v. Texas*, 441 U.S. 418 (1979).

³ *Jones v. U.S.*, 432 A. 2d 364 (D.C. Ct. App. 1981) cert. granted 50 L.W. 3579 (U.S. Jan. 11, 1982) (No. 81-5195).

fendant who chooses to plead not guilty by reason of insanity and an individual who has not been involved in related criminal proceedings.

Senator HATCH. I have to leave here. Nonetheless, I wanted to give each of you an opportunity to reply.

Without objection, we will keep the record open so that other members can submit questions, if so desired, and we would like to have you respond as quickly as you can to these further questions.

Mr. BONNIE. Thank you for the opportunity, Senator. I have sketched out six points that I would like to make.

First, I think that contrary to what my colleagues have suggested, I do not think it is so easy to ridicule the moral argument for an independent ground of exculpation under the insanity defense.

I think it was suggested that since there were so many views as to the appropriate criterion for exculpation on the grounds of insanity, there is no moral consensus and that it is hypocritical to suggest that the defense is morally necessary. I think that argument is morally misleading.

The fact that there is no consensus on the test does not prove that there is not some core that is morally necessary. I have taken the view that there is a narrow component of the so-called cognitive prong of the insanity defense that is morally necessary; that is the moral core of the insanity defense. It has been recognized since the 16th century and was reaffirmed by the House of Lords in the *M'Naghten* case.

It was also suggested that the insanity defense is out of touch with the moral sentiment of the community. To some extent, I agree with this, and this is one of the reasons why I would suggest that the insanity defense be restricted.

However, I believe that the suggestion that I have made, the modified *M'Naghten* approach, would bring the insanity defense back into congruence with community sentiments.

Second, a related point concerns the *Joy Baker* case. Both of my colleagues have taken a position of confession and avoidance. They both seem to acknowledge that it might not be appropriate to punish Joy Baker in this situation, but they both suggested that you do not need the defense to reach that result. That is exactly the response that I anticipated. My view is that it is not just to convict her; one should not depend upon prosecutorial discretion or jury nullification to reach the morally correct result; and that the goal of sound criminal law reform should be to recognize, in the substantive law, the conditions of justification and excuse that the community regards as morally required.

In this case, I believe that acquittal is morally required, and the law must recognize a narrowly confined defense to reach that result. It is not good enough to say that we will depend on prosecutors and jurors to compensate for a gap in the law.

Third, the argument was made by Dr. Halpern, I thought it was quite clever, that all the arguments that I gave for abandoning the volitional prong are also applicable to the cognitive prong. I would say that these arguments are not equally applicable in the two contexts. After studying this matter for many of the years that he has been studying it, I have concluded that the chances of confusing, misleading psychiatric testimony and fabrication, as well as moral

guesses, are much, much greater in the connection with the volitional inquiry, and that an appropriately confined cognitive inquiry is well within our understanding to apply, and it also is congruent with the moral sentiment of the community. One cannot pretend that craziness does not exist, and I believe that the cognitive test is needed to take into account the morally relevant aspects of severe psychotic illness.

This is not a debate that we have begun anew here in 1982. The question of the irresistible impulse test or the volitional prong of the insanity defense was raised initially in the 19th century. It has been debated time and again over the years with proposals being made to adopt it, and those proposals being rejected because we did not know how to make the necessary distinctions.

I believe essentially that the law got somewhat ahead of psychiatric understanding under the Model Penal Code, and I think it is time to bring the law back into accord with psychiatric understanding.

I have on my side some of the leading commentators in this field, including Lady Wootten, the Baroness Wootten from England, who has written extensively on this subject, rejecting the volitional prong in favor of the cognitive prong, and suggesting that they do not ask the same question. One is answerable and one is unanswerable.

I might also suggest that even if it were true that the maintenance of the cognitive prong perpetuates an unacceptable risk of error and confusion, we would see it soon enough. That is at least a question that ought to be tested, and I would strongly urge the committee to adopt the approach of incremental reform. Give the moral claim that I have, raised, a narrower insanity defense should be tested in practice.

I believe that many States will be moving in this direction in response to the current reform movement, and I think we will begin to have some data on whether one is able to minimize the risk of mistakes by adopting the modified *M'Naghten* rule rather than going all the way toward abolition.

Given the momentum of history, it seems to me it is an appropriate response.

I realize, judging from the Senator's own views on the subject, that the train may already be out of the station, but I would hope that you would turn it around and bring it back.

Senator HATCH. I do not know about that, but I have been very intrigued by your argument. I think you represented yourself here very ably.

Dr. Halpern?

Dr. HALPERN. I do feel there is a moral purpose to the law and I subscribe to the sentiments that Professor Bonnie has expressed.

What is clear to me, and I hope to you, sir, and subsequently the majority of your colleagues, is that the insanity defense is not an appropriate mechanism for expression of the moral purpose of the law. There are other quite legal, not paralegal, mechanisms available. For Professor Bonnie to pooh-pooh prosecutorial discretion is completely ignoring what takes place in every jurisdiction in the country. Prosecutors have discretion, sometimes defense attorneys have discretion. Certainly police officers, as everybody in this room

knows, have discretion under certain circumstances. Judges certainly have discretion and judicial discretion is something that we all applaud and, therefore, to suggest that discretion by the officers of the court in deserving cases ought not to be the mechanism by which a blameless individual or someone toward whom we have compassion ought to be dealt with is, to me, just a view of somebody who has had no practical experience in the workings of the criminal justice system.

Senator HATCH. Can I interrupt you, Dr. Halpern? I appreciate your testimony. I did not interpret it quite that way. I understand Professor Bonnie to say that the insane deserve acquittal, not just an exercise of prosecutorial discretion.

Am I mistaking what you are saying? This is not the same as advocating an effort to eliminate prosecutorial discretion. I agree with you, however, Dr. Halpern, that this discretion indeed helps insure humane treatment of the insane.

Mr. BONNIE. No; of course not.

Senator HATCH. Because I do not see how any attorney could do that. As I understand it, in addition to that, where discretion is not exercised, you are saying under your theory of the insanity defense that there ought to be an acquittal.

Dr. HALPERN. Senator Hatch, we have not had an opportunity to test whether this prosecutorial—

Senator HATCH. I am not saying that I agree with him. But that is how I interpret it.

Dr. HALPERN. We have not had an opportunity to test whether prosecutorial discretion can amply consider the needs of those defendants who are not entirely blameworthy. And since we have not tested that, abolishing the insanity defense is a good way to start. This is very important because for every person that Professor Bonnie shows compassion, and you will recall that Joy Baker is not one of those because she was not found not guilty by reason of insanity; but if Joy Baker had been found not guilty by reason of insanity as Professor Bonnie suggests would be a desirable outcome, he would have subjected this individual, who apparently was handled in an appropriate way, he would have subjected her to postacquittal confinement. I must tell you, sir, this is not, in my mind, a very appropriate way for a compassionate individual to show his sympathy for a deserving accused person.

Mr. CARNAHAN. Senator Hatch, I want to summarize just briefly.

I think there are three issues. One is the rule; second is the morality; and the third is the consequences of the rule.

As far as cognitive test without the strain, I had an opportunity as a defense lawyer for 6 years in New York to use that rule and, believe me, the very fact that the rule did not apply to volitional testimony did not mean that volitional testimony did not get into the evidence.

The experience in New York is that the rule does not make too much difference. The judge usually lets everything in and lets the jury consider the entire record.

So I think the question of tampering with the rule does not get to the fundamental issue. The difference between Professor Bonnie and myself, he used the insanity defense as having a moral core. I view it as having a rotten core. I feel that the moral issue can be

dealt with in three ways: prosecutorial discretion, the mens rea approach, and sentencing. I say this because of the consequences. The business of the criminal law cannot be done with these kinds of consequences any longer.

My view is abolition. His view is reform. And Prof. Norval Morris, who also is of the view that you are taking, Senator, would reply reform, sir, do not talk to me of reform. The present situation is bad enough.

My view, Senator, is the time to act is now, and I think that abolition is what we should be thinking of.

Thank you.

Senator HATCH. Well, thank you.

I think that our job as a committee, at least as it seems to me, to abolish the current rich man's defense and establish clear legal guidelines that the jury can understand and implement. That is what we are trying to do.

Second, we have to do away with the psychiatric ordeal which pits paid doctor against paid doctor and only serves to highlight disputes in the medical community over unsettled theories.

Third, we have to have assurances that dangerous criminals will not be released before they are safe to themselves and the society.

Fourth, we need to restore the faith of the American public that there is true justice. This can be done by establishing a system where the people can be protected by prosecuting those who are responsible for their actions. This can only come about, it seems to me, by developing clear and effective test of insanity and accountability.

Now, I personally feel that you three have been excellent witnesses here today—different certainly but, nevertheless, experts. I think you have added a great deal to this debate and I think that each of your credentials has to be given high consideration by this committee.

I appreciate your testimony today. It is a tough problem that has been plaguing us for years, and we have to come up with an effective conclusion in this committee. I would like to see that happen.

Professor Bonnie, I think that we ought to abolish this defense and still have the compassion that ought to be shown in some of these cases. That is a difficult line to tread but, nevertheless, I think that it can be done by abolishing the defense. I am very impressed, Dr. Halpern, with the breadth of experience that you have had. I admire your articulate fight here today to try to get through an abolishment of the insanity defense so that we do not have more of these Hinckley cases and more of these charades that appear in criminal cases. And, Mr. Carnahan, I think your experience in New York and your experience in this field is very helpful today. I just hope that it turns out to be the very best in the evidence, and I am sure it will provoke a lot of comment and debate no matter what we do.

And with that, we will recess these hearings until further call of the Chair. Thank you.

[Whereupon, at 11:55 a.m., the committee adjourned, subject to the call of the Chair.]

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August 19, 1982

Honorable Strom Thurmond
Chairman
United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Dear Senator Thurmond:

Enclosed please find my answers in response to certain questions asked by Senator Mathias in connection with my testimony on August 2 before the Committee on the Judiciary.

Sincerely,


William A. Carnahan

Enclosure

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RESPONSE
TO
ADDITIONAL QUESTIONS

For Mr. Carnahan:

1. In view of your observation that "the problem of the insanity defense is not the rule, but the consequence," please comment on the post-acquittal procedure which should be followed in the federal courts, assuming that the insanity defense is not abolished. Should those acquitted by reason of insanity be subject to more stringent release standards than those applicable to ordinary civil commitments?

By Mr. Carnahan:

1. Assuming that the insanity defense is not abolished, §4243 of S.2572 would appear to satisfy existing constitutional requirements for post-acquittal hospitalization and release. Indeed, requiring "clear and convincing evidence" as a standard of proof for initial post-acquittal hospitalization may be in excess of federal constitutional requirements under the equal protection guarantee of the Fifth Amendment's Due Process Clause. Although this standard of proof

"is required by the Fourteenth Amendment to the Constitution in a civil proceeding brought under state law to commit an individual involuntarily for an indefinite period to a state mental hospital." Addington v. Texas, 441 U.S. 418, 419-420 (1979).

I am not convinced that the Supreme Court would require "clear and convincing evidence" to involuntarily hospitalize initially those found not guilty by reason of insanity. Under an equal protection analysis, one can rationally distinguish between an individual who benefits from an insanity defense and an individual who has not been involved in related criminal proceedings.

In response to your question of whether those acquitted by reason of insanity should be subject to more stringent release standards than those applied to ordinary civil commitments, the New York Court of Appeals has ruled in a similar context that

"Torsney has been charged with a crime, has stood trial, and has been acquitted by reason of mental disease or defect. That equal protection mandates that he be afforded the same procedural rights governing his release from custody as any other involuntarily committed person is settled. Similarly, in our view, appellants' petition for release must be measured by the same substantive standards governing involuntary civil commitment of any other individual." In the Matter of Torsney, 47 N.Y. 2d 667, 676 (1979).

I share this view. Thus, I would respond to your question by stating that the equal protection guarantee of the Fifth Amendment's Due Process Clause requires parity in both procedural requirements and substantive standards relating to release.

Psychological Issues & the Insanity Defense:
Legal, Moral & Psychological Considerations

Stanley I. Gochman, Ph.D.

What is needed first, in order to adequately develop legislation with respect to the insanity defense is clarity about the issues involved, legal, moral and psychological. Since the Durham Case in 1954, the insanity defense has implied lack of criminal responsibility if the unlawful act of the accused "was the product of mental disease or mental defect." The problem is that "mental disease or mental defect" refer to concepts so broad and ill-defined that the terms are essentially meaningless.

The legal and moral issues in the insanity defense are whether the defendant is to be held responsible for a criminal act. At the basis of criminal law is individual responsibility (Rubenstein, New York Times, August 5, 1982). Dr. Thomas Szasz has pointed out that: "you have a constitutional right to be schizophrenic," but likewise, "you have the constitutional right to be protected from murderers." In the case of the insanity defense, says Szasz, responsibility for a crime is removed, by "psychiatric exculpation." Dr. Willard Gaylin (Washington Post, June 20, 1982), in a similar vein, writes that insanity has gradually come to be considered the equivalent of psychosis. Yet, psychosis is a very broad, ill-defined term for severe personality disorder, which may involve minimal to maximal degrees of loss of contact with reality, usually, but not necessarily, be characterized by minimal to maximal degrees of thinking disorder, delusions and hallucinations, and require minimal to maximal outpatient treatment or hospitalization, whereas, insanity is a legal term used in connection with "crazy" behavior, implying a lack of responsibility for one's acts (as well as an inability to manage one's affairs or to deal with reality).

In general, Gaylin points out, the legal view needs to encompass the moral view. An individual's behaviors must conform to socially sanctioned models, or the individual "must be held accountable for his violation of the code." He advocates a return to the post-1843 M'Naghten rules, requiring proof that the "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 if he did know, that he did not know what he was doing was wrong." There would, he suggests, always be exceptional cases, which evidently and clearly call for exculpation and compassion, for example, if a murderer due to mental disorder, believed he was shooting at a melon instead of a person. And there would indeed always be "fuzzy cases at the borders," in which juries could express compassion yet also a sense of justice.

As stated by an English solicitor general in 1760: "My Lords, in some sense, every crime proceeds from insanity. All cruelty, brutality, all revenge, all injustice is insanity. There were philosophers in ancient times, who held this opinion... the opinion is right in philosophy but dangerous in judicature. It may have a noble and useful influence, to regulate the conduct of men... but not to extenuate crimes, not to excuse those punishments which the law adjudges to be their due" (cited by Gaylin).

The basic issue underlying the insanity defense however, and pertinent to the legal and moral issues raised above, is clarity with respect to the psychological issues involved.

For example, John Hinckley, would-be-assassin of President Reagan, was variously diagnosed in evaluations at Saint Elizabeths Hospital, as suffering from: "a severe, chronic mental disorder"; being a "danger to himself as well as to others"; a "pattern of fixed, grandiose, homicidal and suicidal ideas"; delusions about Jodie Foster acting as "organizing and guiding influences in his life"; "complicated and serious mental disorders -- including depression and detachment from reality"; "in addition to major depression... symptoms of four types of personality disorders, primarily schizotypal personality disorder characterized by 'magical thinking' and bizarre fantasies"; "symptoms of narcissism... a grandiose sense of self-importance and a constant desire for attention"; "features of schizoid and borderline personality disorders -- illnesses characterized by among other things, social isolation, impulsive behavior and manipulation, indifference and lack of emotion." In evaluations during his trial, he was variously diagnosed by the prosecution as suffering from: "various personality disorders... not severe enough to prevent him from abiding by the law or understanding that his attack on the President was wrong." In contrast, he was variously diagnosed by the defense as suffering from: "various

forms of schizophrenia... characterized by a severe break with reality, delusions and major depression"; "he had a distorted notion that his act would somehow accomplish a 'magical union' with Foster"; and "among other things, borderline or ambulatory schizophrenia" (schizophrenia being another broad, ill-defined term for one form of psychosis, characterized by disturbances in thought and behavior, breakdown of integrated personality functioning withdrawal from reality and blunting and distortion of emotions).

It is abundantly clear that there are different definitions of psychosis, of schizophrenia and of other severe psychological disorders among various mental health professionals, both individually and collectively.

It should also be abundantly clear that there are different underlying conceptions of psychosis, schizophrenia and other severe psychological disorders, among various mental health professionals both individually and collectively -- some adhering more to verifiable scientific data than others.

It should also be abundantly clear that diagnostic labels set out according to classifications in the Diagnostic and Statistical Manual of the American Psychiatric Association, 3rd Edition, the diagnostic bible or straitjacket, depending on one's view, that binds together all mental diagnostic classification in the United States, are inadequate in general, and as in the example of John Hinckley, grossly inadequate in the particular. The only diagnostic labels that Hinckley appears to have missed out on are enuresis, psychological hangnail and psychosomatic athlete's foot, and we can't even be sure of that.

Hypothetically, how would someone like Adolf Hitler be currently diagnosed by psychiatry, and fare with the insanity defense? Surely, Hitler would have been labeled as complexly as Hinckley: psychotic, schizophrenic; schizotypal personality disorder; suffering from depression and detachment from reality; and so on. Would he then be psychiatrically exculpated because the prosecution would not be able to prove that he was sane and that his behavior was not "the product of mental disease or mental defect"? Yet he carried on the business of government leadership, and maintained control of an entire nation, irrespective of how one might judge it. Can insane persons lead governments? A complex and perplexing question. Clearly,

however, psychiatric classification labels seem grossly inadequate for criminal exculpation in such cases.

In sum, the real issues with respect to insanity are psychological questions as to whether: the person is aware or not of what they are doing; or in control or not of what they are doing. The question is whether the person is so confused either by organic factors such as brain cell damage or disease processes or by psychological factors such as psychotic thinking confusion, that they either do not know or cannot control what they are doing. These issues arise only in a relatively small minority of cases of criminality or murder. Evidence showed that these issues did not arise in the case of Hinckley. Hinckley, as "crazy" as his behavior might be considered, seemed both aware and in control of what he was doing (as was likely also the case in the example of Adolf Hitler's violent behavior).

The view of some of the early commentators and journalists at the time of the shooting was that Hinckley had "normal written all over him." Everyone, ranging from mental health professionals to an educated public, ought to know better, if it were not for the inadequate teaching of psychological understanding at many American universities. It should have been clear from the beginning that a John Hinckley is not just the normal, average American boy -- mom and apple pie and all that. As some of the details of his life became known, his distancing from normality became more obvious and his behavior patterns more comprehensible for all to see. Does being an "abnormal" American boy, or suffering from serious psychological problems and fantasies as a "poor little rich boy", however, exculpate Hinckley from individual responsibility for criminal acts or attempted murder? That remains a separate and different question.

To clarify some of the psychological issues involved, equating the presence of severe psychological disturbance with the presence of violence and then offering exculpation by means of the insanity defense, is much too simple a framework.

It is a popular misconception that severely disturbed persons are violent. The fact of the matter is that most people suffering from severe psychological disturbance are not. Scientific data show that less than 1% of all patients released from mental hospitals or clinics are violent,

and those with no history of arrests before hospitalization, are less likely than the population in general to engage in violent criminal behaviors after release from hospitalization (National Institute of Mental Health, 1969). Schizophrenic patients, in particular, are less prone to violence than others. Their general behavior, is one of avoiding and withdrawing from interaction and violence.

Psychologically speaking, there are two distinct and separate phenomena to be considered therefore. Mental disturbance is a separate and distinct phenomena from behavior involving the acting out of violence. The two phenomena do not go hand in hand. In coming to grips with the insanity defense, it is necessary to come to the scientific understanding that two separate elements are involved. Some persons because of their developmental history grow up with severe psychological disturbance, others because of their developmental history grow up prone to violence, and some persons because of their developmental history grow up taking some of their behavior from Group A and some from Group B in varying proportions. In sum, a John Hinckley is not simply a psychologically disturbed person. He is a type of person who, because of his developmental history has grown up prone to act out in violence (also true in our other example of Adolf Hitler).

It is important to tie down these psychological issues to verifiable evidence and data. A major research study of a large sampling of criminals, reported at the Eastern Psychological Association meeting, April 1981 (Gochman, Grubler-Gochman & Fantasia), showed no significant linkage between violent criminality and socioeconomic or demographic factors. What it did show however, was a direct and significant linkage between prisoners' earliest recollections of parental influence and the causes of their criminality as perceived by themselves. The profile of the violent criminal murderer was clearly and significantly distinguishable from that of other prisoners by the pattern of their early recollections. The perception of the murderers was one of the world as having done violence to them. This central psychological theme ever-present in their world-view, culminated in a sense of hopelessness in which there was a lack of caring about oneself as demonstrated in suicidal ideation, and a lack of value put upon others, as demonstrated in the criminal history of having murdered.

The above cited study should help to clarify some of the underlying psychological issues involved in the insanity defense.

With respect to the insanity defense therefore, clarity with respect to psychological issues requires the recognition of two separate components: (a) mental disturbance; and (b) the acting out of violent behavior. The presence of one phenomena does not necessarily imply the presence of the other, and different developmental histories are involved for each. The psychological issue hinges on whether the person is aware or not, and in control or not, of what they are doing. Violence to the murderer, in one form or another, often represents acting or striking out against a world perceived as having done violence to them. This violence component found in the murderer, is not often present in the average mentally disturbed person, who in general tends to shun violence.

Clarity from the legal and moral point of view, and the maintenance of a sense of justice and equity, requires that persons be held individually responsible to the moral and legal code. They should not readily be subject to removal from social accountability by "psychiatric exculpation", or by the application of broad, ill-defined terms such as "mental disease" or "mental defect", a rubric under which violent acting out behavior does not fit very well.

Suitable legislation with respect to the insanity defense, based on the above brief, would seem to require the following sequence: (1) determination of individual guilt or innocence in the criminal act; (2) determination of punishment and sentencing for the crime; (3) determination of exculpation by virtue of alternate psychological treatment in those exceptional cases where there is sufficient proof that the person did not know what they were doing, or had no control over their violent behavior; (4) determination of an appropriate degree of compassion in sentencing when

the person's mental state is in serious question. Legislation that is based on too simple a concept of "guilty but mentally ill", may not meet these requirements very adequately, and may not fare much better over time than the current insanity defense.

Dr. Stanley I. Gochman is Professor of Psychology at Howard University and previously directed its Ph.D. program in Clinical-Community Psychology. He has been Professor of Psychology at the University of Puerto Rico, Clinical Administrator at the National Institute of Mental Health, on the staff of the Peace Corps, Director of the Institute for Analytic Psychotherapy and Bergen Center for Psychological Services, and affiliated with Rutgers University and the Menninger Foundation. A Diplomate in Clinical Psychology, he received his Ph.D. from New York University. He is author of a book, and has written numerous journal articles related to topics in clinical and community psychology, cross-cultural/ethnic psychology, primary prevention and intervention in mental health, and on social policy and world affairs issues. He is Chairman of the Social Issues and Public Policy Committee, Division of Psychoanalysis, American Psychological Association.

THE INSANITY DEFENSE

WEDNESDAY, AUGUST 4, 1982

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 10:07 a.m., in room 2228, Dirksen Senate Office Building, Hon. Howell Heflin presiding.

Also present: Senators Specter and Grassley.

Staff present: Laurie McBride and Paul Summitt, of Senator Thurmond's staff; Arthur Briskman and Paula Argento, of Senator Heflin's staff; Bruce Cohen, of Senator Specter's staff; and Lynda Nersesian, of Senator Grassley's staff.

OPENING STATEMENT OF SENATOR HOWELL HEFLIN

Senator HEFLIN. The hearing will come to order.

We are continuing the hearings pertaining to the issue of insanity under the criminal justice system.

The first witness this morning is Hon. Alexander Harvey, U.S. District Court Judge for the District of Maryland, who is chairman of the Committee on the Administration of the Criminal Law of the Judicial Conference of the United States.

I have a statement from Senator Edward Zorinsky that will be made a part of the record.

[The following was received for the record.]

TESTIMONY OF SENATOR EDWARD ZORINSKY

As an early advocate of revision of the insanity defense, I am very hopeful that these hearings by the Committee on the Judiciary will result in fruitful discussion of this issue. I am also hopeful that as a result of these hearings some meaningful legislation will be passed.

In my testimony before Senator Specter's subcommittee I outlined my proposed bill, S. 1106, and thus will not now go over it. I would, however, like to address some other issues being discussed before this committee.

In the bill that I introduced, the definition used to find a defendant "guilty but insane" is "if his actions constitute all necessary elements of the offense charge other than the requisite state of mind, and he lacked the requisite state of mind as a result of a mental disease or defect." There are some who say that to do this is to violate the Constitution because all elements must be present, including state of mind, for the conviction of a defendant. Now, I am not a lawyer, but it is my understanding that both the insanity defense and the elements necessary for a finding of guilty have developed through common law and statutory legislation. It is also my understanding that these standards can be changed through congressional amendment of the relevant Federal codes, and not through a constitutional amendment. I urge the committee to look at this issue very carefully.

As the jurors in the Hinckley trial testified, the current standard can be very confusing. The jurors stated that it was their feeling that Hinckley knew what he was doing was wrong, and could control his behavior to the extent of being able to go

forward with his plan or not, and thus even under today's more lenient standard he was not insane. But they stated that there was still the "mental thing" that had to be dealt with, and there was just no other verdict available except "not guilty by reason of insanity." They stated a need for a "guilty but mentally ill" finding.

There is a proposal before this committee to sentence a defendant found guilty but mentally ill to prison, and to then have that defendant begin the sentence in a mental hospital. If, at some later date, the defendant reaches a point where he or she is no longer considered mentally ill, then the defendant would serve the balance of the sentence in a federal prison. I am concerned that this procedure is unwise for several reasons. If the defendant was truly mentally ill at the time of the crime, then a punitive sentence is uncalled for; is it fair to punish a person if that person did not intend to commit the crime? I think not. Secondly, is there a deterrent factor with a prison sentence if a person does not have the intent to commit the crime? Is a mentally ill person going to stop to consider the repercussions of his or her actions? Again, I think not.

I know that the committee will also be looking at several other issues, including the burden of proof, due process, and expert testimony during a trial. There is a great need to strengthen what is in my opinion a faulty system of dealing with the needs of both the defendant and society.

Senator GRASSLEY. Judge Harvey, we are delighted to have you with us this morning.

STATEMENT OF HON. ALEXANDER HARVEY II, U.S. DISTRICT COURT JUDGE, DISTRICT OF MARYLAND, AND CHAIRMAN, COMMITTEE ON THE ADMINISTRATION OF THE CRIMINAL LAW, JUDICIAL CONFERENCE OF THE UNITED STATES

Judge HARVEY. Senator Heflin, and members of the committee, my name is Alexander Harvey II, and I am a U.S. District Judge for Maryland. I am chairman of the Judicial Conference Committee on the Administration of the Criminal Law, and I am appearing here today to present the views of the Judicial Conference and of its Criminal Law Committee on legislation before the Senate relating to the insanity defense.

Let me say at the outset that neither the Judicial Conference nor my committee has had an opportunity to study the bills introduced in June and July of this year. However, there are comparable provisions in earlier legislation which we have reviewed and which we would like to comment on.

The provisions of these bills which we heartily endorse are those which call for the Federal commitment of persons found not guilty by reason of insanity at a Federal trial. The Criminal Law Committee and the Judicial Conference have been studying this problem for a number of years, and much of our work has included a review of the provisions in the various versions of the Federal Criminal Code that have been before Congress in recent years. We feel that there is a real gap in the Federal law in this regard, and a number of circuit court opinions have referred to the problem. Back in 1976, the Judicial Conference sponsored legislation to amend Chapter 313 of title 18 to provide for the Federal civil commitment of a defendant acquitted after raising the defense of insanity. The legislation in question was introduced in both the 94th and the 95th Congresses, but it was never passed. Some of these provisions have been included in bills sponsored by the Senate and the House for revisions of the Federal Criminal Code, but the Conference bill has never been separately enacted in those years.

The Judicial Conference and its Criminal Law Committee are of the view that there is a very real need for legislation of this sort

providing for the Federal commitment of mentally incompetent persons. At the present time, as I think has been brought out at these hearings, there is simply no provision in Federal law, except in the District of Columbia, dealing with the disposition of a person found not guilty by reason of insanity. Thus, on acquittal of such persons, the Federal courts are powerless to provide for commitment and treatment of even the most dangerous criminal psychopath who has successfully asserted the mental incompetency defense in the criminal proceeding. Now, it is true that there are not a very large number of these acquittals in the Federal system each year. However, where it does occur, the Federal authorities must turn the acquitted defendant over to State authorities for civil commitment, and frequently, persons of this sort, who have been tried in a Federal court, have no roots in any particular community, and many States are reluctant to assume the financial burden of institutionalizing mentally ill persons who have no established residence. In many States, facilities are inadequate or overcrowded, and there are different standards for civil commitment in the various states. So there have been instances where state authorities have not acted to civilly commit the person found criminally insane at a Federal trial, with the result that that individual has been released to the streets shortly after being handed over to the State authorities. We believe that the Federal Government should take custody of these individuals to ensure that if he continues to present a danger to himself or to others, he will be committed to a Federal facility if a state refuses to take responsibility.

Now, one of the questions that arises in this is what agency or department of the Federal Government should be responsible for assuming custody of such a person. Since, under the present law, the individual in question has been found not guilty of a crime, we do not believe that the Bureau of Prisons should be the agency charged with that responsibility. Accordingly, the Conference bill proposes that the Secretary of the Department of Health and Human Resources—or, of course, his designee—should be responsible for custody of those individuals.

The bill sponsored by the Judicial Conference provides that following acquittal of an individual who has raised the insanity defense, the court, on motion of the U.S. attorney, shall order the person delivered to the Secretary, who shall then examine that person to determine whether, by reason of mental disease or defect, he is dangerous to himself or to others. The bill provides for similar treatment of a person who is serving his Federal sentence for a Federal crime and who becomes insane during the time of his Federal sentence.

In either of these occasions, when the individual has been delivered to the Secretary, if following examination, the Secretary concludes that the person is dangerous to himself or to others, a petition is then filed with the court, and the bill then provides for a hearing and various due process safeguards before the civil commitment of the individual in question.

Now, if, after a hearing, the court finds that the person is dangerous to himself or to others, it must order the person committed to the custody of the Secretary for care and treatment. However, the commitment and custody is to continue only during the time

that the Secretary is not able to have the person civilly committed pursuant to State law or to a State or local facility. The bill specifically authorizes the Secretary of the Department of Health and Human Resources to apply for the civil commitment pursuant to State law of persons committed to his custody. However, if a State refuses to assume responsibility for such a person, and it becomes necessary for the Secretary to commit the person, the Secretary is authorized to enter into contracts with the several States, or with private institutions within a State, for confinement of such a person.

Essentially, then, what this bill does is to establish Federal standards for the civil commitment of an individual acquitted on grounds of insanity. It provides a Federal follow-up for the civil commitment of such a person in a State. If the Secretary is not able to have the State take custody, then custody is continued in a Federal institution or in a State institution under a contract with the Federal agency.

Senator HEFLIN and members of the committee, we urge serious consideration of these revisions in the draft bill which is previously sponsored by the Judicial Conference.

Senator HEFLIN. If I might interrupt on that, you in effect authorize the Secretary to apply for civil commitment to States, and if the State refuses, it becomes necessary to enter into contract. Will that language bring about almost 100 percent contractual arrangement because if the States know that if they refuse, they have got a chance to get a contract?

Judge HARVEY. That might very well be true, Senator, and of course, there are institutions under the jurisdiction of the Secretary which he could apply to, but that certainly would, from a monetary point of view, create a problem if the States said, "We are not going to do it because we know the Federal Government will do it."

But the thrust of this is, there has to be some back-up procedure, which we just simply do not have now, and if it comes to a question of cost, I think that the Federal Government would have to assume that to be sure that these people do not go out on the streets.

Senator HEFLIN. What about the problem—suppose there are State institutions that have been found by Federal judges to be constitutionally infirm? What type of provision would prevent the acquittee being committed to such an institution? Do you have any thoughts on that?

Judge HARVEY. I think in that circumstance, the Secretary could decline to turn the individual over to the State and could then seek some other means of commitment, either with a private institution in the State or otherwise. And this, of course, is one of the problems we have today. Even where a State will take custody of one of these individuals, the individual may be put into an institution which is overcrowded, unconstitutional conditions, or whatever, and there are no Federal standards at all.

Senator HEFLIN. Should we attempt to put language in the bill to have the Secretary promulgate regulations and standards?

Judge HARVEY. Well, I think if you left it to the discretion of the Secretary, once you start down the line of regulations and standards, it gets to be a very complicated procedure, particularly with

the many Federal court decisions on what is or is not constitutional. But if it was left discretionary, and if the Secretary promulgated regulations, I think there is where it might be a feasible solution.

Senator HEFLIN. Just from my curiosity, and this is not really a question that you may have great knowledge about, but you might—are there other mental institutions other than St. Elizabeth's that are federally-operated?

Judge HARVEY. Well, I am not up on that. Of course, you have the V.A. institutions, but they come under the military. And there used to be the U.S. Public Health hospitals, but I believe that a lot of that has been discontinued, with some budget cutting. I am not sure at this time whether the Department has directly under its jurisdiction mental hospitals.

Senator HEFLIN. What about Veterans' Administration Hospitals? I am sure that there are a number of Veterans' Administration hospitals that are dealing with mental illness.

Judge HARVEY. There are indeed, yes, and that could be, certainly, a possibility for the commitment of these individuals in a Federal mental institution.

Senator HEFLIN. I am not sure whether the overall—we are probably dealing with a very few—but there is some advantage for a person who is in a mental institution to be in a location that is fairly close to his family. Would that have an effect upon his mental rehabilitation? I think this is something we ought to explore.

Judge HARVEY. All right, sir. Of course, you do have in many States very excellent private institutions, and perhaps some negotiation could be worked out on a contract basis for commitment to those institutions.

Now let me turn, if I might, to a different subject. Of course, many of the bills that are presently before the Senate call for the abolition or elimination of the defense of insanity in Federal criminal trials. The Criminal Law Committee takes no position on this subject. We feel that whether or not a defendant in a Federal criminal trial should be permitted to assert the defense of insanity is a policy question for the Congress to decide. The historical development of the insanity defense is well-known, beginning with the 1800 British decision in *Hadfield's* case, and then to the famous *McNaughten's* case in 1843, and then to the *Durham* case in the circuit court here in the District of Columbia, and finally, to the more recent American Law Institute, or ALLI, formulation, which is followed today in almost every Federal Circuit. The arguments relating to the merits and demerits of these various standards are well-known and have been debated for some time, and the Criminal Law Committee does not feel that it is appropriate for the Judiciary to take a position on a substantive question of this sort.

Several of the pending bills seek to codify the defense of insanity in terms of the *McNaughten* formulation or something very close to it, and as I have noted, the development of the defense has in this country been left to decisional law, and almost every circuit has adopted the ALLI formulation, either in whole or in substantial part. In its review of various drafts of a proposed new Federal Criminal Code, the Judicial Conference has opposed codification of

defenses, including codification of the insanity defense. The Conference has indicated, however, that if Congress does enact legislation codifying the insanity defense, the Conference would prefer the ALI formulation over any other. The Conference has further endorsed the alternative verdict of not guilty by reason of insanity. At the present time, the Federal Rules of Criminal Procedure in a Federal criminal case permit only verdicts of either guilty or not guilty. We believe—and this is, of course, under the present law, if present law is continued—that a third verdict should be authorized in those instances in which the jury has found that a defendant committed the criminal act but found him not guilty by reason of insanity. A verdict of this sort would permit the court to know the basis for the jury verdict in cases in which some other defense in addition to insanity was asserted.

Let me now comment briefly on specific provisions of the nine bills, I think, which are presently before the Senate on this subject. We note that several of these bills permit the defendant to raise the defense that as a result of mental disease or defect, he lacked the requisite state of mind for the offense charged. This has been referred to as the mens rea test. Now, in many jurisdictions, this is the law today, and it is recognized as a possible defense by rule 12.2(b) of the Federal Rules of Criminal Procedure. We take no position on provisions of this sort in these bills which would abolish the insanity defense in its present form, but would permit a similar defense in terms of the defendant's state of mind when it is an element of the offense charged.

Several of the bills would add to Rule 12 a verdict of guilty but insane or guilty but mentally ill. The effect of provisions of this sort, of course, would be to eliminate the defense of insanity, and as mentioned, we think this is a policy matter for the Congress to decide.

Senator HEFLIN. On that, I might say that there is some discussion—and I will merely say "discussion"—that we would have the verdict of not guilty by reason of insanity. Another version would have not guilty only by reason of insanity, and then, as an additional finding by the jury, guilty but mentally ill. You phrase it as being, somehow or another, as if the guilty but mentally ill would eliminate the defense of insanity. There is some discussion that that would be an additional finding that the jury could come forth with, rather than eliminating the not guilty by reason of insanity or not guilty only by reason of insanity. So I mean that is a possibility rather than just an elimination.

Judge HARVEY. Yes. When I say "eliminate," I really mean in terms of what we have today, where a person is not guilty of a crime. These bills say that the jury finds him guilty of the crime and then goes on to find if he is mentally ill, and that of course will affect disposition by the judge at sentencing.

Several of the bills permit the defendant to raise the defense of insanity, but make this an affirmative defense to be proved by the defendant either by a preponderance of the evidence or by clear and convincing evidence. The Criminal Law Committee has serious doubts concerning the constitutionality of these provisions, which would shift the burden of proof in a criminal case from the prosecution to the defendant, concerning an essential element of the of-

fense charged. Now, there is no Supreme Court decision directly on this, but we feel that the *Mulloney* decision and the *Winship* decision would throw a good deal of doubt on legislation which would put the burden on the defendant, whether or not it would be a preponderance of the evidence or clear and convincing evidence.

One question which we feel should be studied carefully—and this goes back to what I was saying about Federal commitment of acquitted persons—is the standard of proof which should apply when the court civilly commits a person found not guilty by reason of insanity. Several of the bills mandate a preponderance of the evidence standard while others require that the court make a finding of dangerousness on the basis of clear and convincing evidence.

We would refer the Committee to the opinion of the Chief Justice in *Addington v. Texas*, where the Supreme Court found that in situations such as this a clear and convincing standard is mandated. Quite frankly, when the Criminal Law Committee first studied this, we felt that a preponderance of the evidence standard was permissible as it is, of course, before a trial, in determining whether an individual is competent to stand trial. But then we were referred to the *Addington* case, and that indicates that on a finding of dangerousness where the individual will be committed, a higher test is necessary.

Senator, that concludes my prepared remarks. It has certainly been a pleasure for me to be here, and I stand ready to respond to any questions which you or your staff might have.

Senator HEFLIN. Do you see any constitutional problem with some type of language which would in effect allow for a temporary detention of a person found not guilty by reason of insanity for a limited period of time, until other proceedings could be held, which would follow your civil standard of proof of clear and convincing evidence, on whether to hold or to detain that person? That is, provided the language of the rule or the statute would indicate that such a trial carries with it a presumption of mental problems and would authorize the detention for a limited period of time until, in effect, a civil procedure could be followed under the standard of clear and convincing?

In other words, here our problem is this—and I reckon it is a societal evaluation. If Hinckley had walked out of the Court a free man, it might have taken a day or so to prepare the papers, starting from a preliminary basis the determination of whether he could be detained. There is some feeling if by appropriate language, you could provide that if a person in effect has been tried under a criminal offense and found not guilty by reason of insanity, that it raises a temporary presumption that authorizes the trial judge to issue an order to detain the defendant for a limited period of time until a hearing can be determined as to future detention.

Judge HARVEY. My personal opinion on that, Senator, is that there would be no constitutional problem. You start with the fact that the defendant has produced psychiatric evidence which has been believed by the jury to find him insane at the time the act was committed. I think with that in the record for a temporary period of detention during which there could be further mental examination of the defendant would meet constitutional standards. Of course, one of the questions would be how long a period of time

had elapsed between the committing of the act when the jury found that he was insane and the later trial. Our Speedy Trial Act, of course, moves things along pretty fast now. I would think that there would be no constitutional problem in detaining that individual for a reasonable period of time for further examination so that then you could have the civil commitment hearing and determine whether he should be held civilly because he is a danger to himself or to others.

Senator HEFLIN. I notice that, of course, your committee takes no stand on the standard, whether McNaghten or Durham or the American Law Institute's Model Penal Code or mens rea. There has been testimony before the committee that would raise the issue that instead of limiting the inquiry of the jury under the State of mind, or mens rea, approach, that it has the potential of broadening the injure inquiry into any issue of an element that involves state of mind.

There have been some State court decisions, primarily in California, that have allowed the issue of insanity as to a state of mind element to go into those various elements. I believe there is a California decision which says, for example, on murder that the issue of not guilty by reason of insanity is one, but further, the issue of insanity can go towards the element of determining premeditation, which could reduce it from first degree murder to second degree murder; that the element of a state of mind of malice could be allowed to enter into a determination of whether or not it is manslaughter or murder.

We recently passed in Congress a bill which is known as an "agent's identity bill", dealing with the identification and exposure of covert agents, primarily CIA. The language of the statute, in my analysis, has at least four state of mind elements in it. The statute in effect says whoever in the course of a pattern of activities intended to identify and expose covert agents, and with reason to believe that such activities would impair or impede the foreign intelligence activities of the United States, discloses any information that identifies an individual as a covert agent to any individual not authorized to receive classified information, knowing that the information disclosed so identifies such individual, and that the United States is taking affirmative measures to conceal such individual's classified intelligence relationship to the United States.

Now, I realize this is something you are not familiar with, but I point it out as being, as I see it, that "engaged in the course of a pattern of activities" is a possible state of mind element; "intended to identify and expose" as being another state of mind element; and "with reason to believe" being another state of mind; "discloses" and then the language,

* * * knowing that the information disclosed so identifies such individual, and knowing that the United States is taking affirmative measures to conceal such individual's classified intelligence relationship * * *

Now, I realize you are in a position where, from a Judicial Conference basis, you feel that the standard is a legislative function. But if those people who have brought out the fact that a state of mind standard could broaden this into many issues, it appears that

it could have a real effect upon the trial of these cases—not only problems with instructions, but other problems might be involved.

Now, I would be delighted to hear any opinion that you might have on it, but I suppose I am really bringing it to your attention to maybe request that your committee look into this and see if there are problems that would arise under a situation, and bring out that it would possibly lead to more plea-bargaining involved with this. And plea-bargaining, of course, is a controversial issue. There are those who advocate it and those who oppose it. It is an issue on which there are different opinions; it is a controversy.

Really, I reckon I am saying if your committee is going to meet any time soon, and if you feel that you could, within your general guidelines of considering it as to whether or not it is a legislative function and therefore we take no position, but on the other hand, if it presents some problems to the judiciary, we would like to have the expression of opinion pertaining to those and any suggestions that you might have in regards to this matter.

Judge HARVEY. Well, we certainly will, Senator, and I have some personal views which I can express—we have not studied this particular problem—and those are as follows, that it is a real problem because you may end up with more psychiatric testimony than you have if you only have the insanity defense. And you mentioned California, but in the Federal courts today, there are jurisdictions which permit psychiatric testimony going to a specific intent act in an ordinary case. There are other judges who do not permit that; they approach it under the Federal rules of evidence—the rule that says if expert testimony is of assistance to the trier of the fact—and depending on the exact situation and the exact charge, many judges will not permit psychiatric testimony going to an intent or knowledge element of the crime. One of the concerns is that you would have, in almost every one of those cases a case that ends up with a good deal of psychiatric testimony. There are some jurisdictions that permit it, and this is why the Federal rules of evidence say that in those jurisdictions—that is, the Federal Rules of Criminal Procedure say that in those jurisdictions where it is permitted, you have to state that you will assert such a defense within such-and-such a period of time.

So it really is a problem, and I would be delighted to have our committee take a look at that. We have not studied it. Today, it is handled more in terms of evidentiary rulings as to whether an expert would help, and there are many, many cases—and I know I have had cases in which I have refused to permit that type of expert testimony, and said it is up to the jury, from all the facts and circumstances, to determine the intent of the defendant in connection with this particular crime, rather than have somebody come in from the outside and say, "Well, because of these psychiatric problems the individual had, he was not able to form the specific intent." Now, it comes on a case-to-case basis, and it may be, depending on the evidence, that it would be permissible, but it has gone both ways on that. However, if the entire insanity defense were eliminated, and it was legislated that you could use it mens rea, you might open up to more, rather than less, psychiatric testimony; I do not know.

Senator HEFLIN. There have been some suggestions that expert witnesses, psychiatrists and others, should not be allowed to testify as to the ultimate fact as to whether or not the person did or did not, in his opinion—and it is all opinion, testimony, as we realize—meet the standard. Do you have any opinion on restriction of expert testimony in the field of insanity, as opposed to expert testimony being expressed in other fields?

Judge HARVEY. Well, my suggestion on that is to take a look at the Federal rules of evidence which were recently promulgated—and I think Congress took a very close look at it. Formerly, the expert did not testify on the ultimate issue—this was in all trials, civil, criminal, insanity defense, whatever—and the new Federal rules of evidence have permitted that, and there is a discussion in the Advisory Committee notes as to why they came up with that particular ruling or decision.

Now, if you were to carve out just insanity, I am not sure whether that would be feasible. Frankly, from the cases that I have tried, I have not had a problem with this. There are occasions when the expert may go too far, and then it is objectionable. But following the new Federal rules of evidence, I think it is permissible to ask the ultimate question, and that was not the law previously.

Senator HEFLIN. All right, sir. I will defer to Senator Specter, who is here now, and Senator Grassley. I am going to have to leave.

Gentlemen, would you like to go ahead and ask any questions and take over?

Senator SPECTER. Suppose I ask the questions and Senator Grassley take over?

Senator HEFLIN. All right.

[Whereupon, Senator Grassley assumed the Chair.]

Senator SPECTER. Judge Harvey, it is a pleasure to see you this morning. I want to thank you for some of the informal advice, which has been relayed through our mutual friend, Judge Becker. We appreciate your assistance.

Judge HARVEY. I am very glad to hear from him, and I am sorry I could not get to your subcommittee because it conflicted with our committee meetings and also with our judicial conference, but I am very happy to be here.

Senator SPECTER. Yes, I understood that it did, but it is nice to see you today.

Judge, you say on your statement that your Judicial Conference Committee concludes that it should take no position on the subject as to whether the defense of insanity should be abolished or limited, and you later say that the Criminal Law Committee is opposed to the provisions which would require that the defense of insanity be raised as an affirmative defense and proved. I would like to start with the basic question of why you feel the committee's role, or your Judicial Council's role, should be limited in any way as to giving your recommendations to the Senate Judiciary Committee on this important subject.

Judge HARVEY. Well, we feel that the legislating as to whether certain acts should be crimes or not is basically the congressional function, and eliminating a defense of this sort, in which you say that the act would be culpable whether or not it was committed by

someone with mental disease or defect, or whether or not the individual knew what he was doing, that that in essence is very similar to saying that a particular act—and there are many of them in the code today, which does not require any specific intent that the act should be a crime. And we do not feel the Judiciary should get into this debate. This is nothing new. Back in the 1800's, of course, in England, there was quite a checkered situation as far as the insanity defense was concerned. At one point, it was opened, and then McNaughten came down and closed it, and it is a topic that we do not feel the Judiciary should take a position on.

Senator SPECTER. But why not, Judge Harvey? The Congress has never legislated on the law of insanity.

The Judiciary has formulated these rules from *McNaughten* through many decisions—Durham—and the Judiciary has accepted the *ALI* standard in the various circuits. Why, when the Congress finally gets around to considering this issue in the wake of the *Hinckley* case, should we not have the benefit of the thinking of the Judicial Branch which has been so deeply involved in these questions over such a long period of time? We have this raging debate constantly as to whether the Judges legislate and what is the appropriate role of the Judiciary versus the Legislature. And here we have a subject where your branch has been in it very deeply, our branch has been in it relatively little except that some of us may have had some collateral experience with it. And we would like to call on you to really tell us what you think. We, of course, have the ultimate responsibility, but why shouldn't you give us your ultimate judgment?

Judge HARVEY. Well, I think the Judiciary has been in it in terms of formulation of the standards and the test. But I do not think the Judiciary has been in it to say there shall be no such defense at all, because it seems to us that that gets down to whether or not the Judiciary should say a certain act should be a Federal crime or a certain act should not be a Federal crime. I do not think that the Judiciary has ever taken positions on that. Maybe a Judge can express his personal views, but for the Judicial Conference as a whole, or the Criminal Law Committee to say, "This act should be a crime, and this act should not be a crime," that is where we feel that we would not want to get into the debate.

However, when we get into standards such as burdens of proof, questions such as what is to happen to an individual who has been tried, the commitment after trial, as to whether it should be *ALI* formulation or some other, that is where the Judiciary has been in it. And what we are talking about, of course, is these bills that would completely abolish it. And we think it is very close there to having Congress decide whether an act is or is not a crime.

Senator SPECTER. Well, your advice on the issue of the burden of proof is very helpful, and you can compartmentalize them and make the conceptual distinction which you just did. I think the reality is that if you deal with the burden of proof, you are having a major impact on the outcome of a case, whether you put it in the compartment of the definition of the law of insanity, or put it on the procedural ground of burden of proof, or put it on the evidentiary scope as to how much you are going to permit the psychiatrist to testify about.

You question in your prepared statement the constitutionality of shifting the burden of proof. Why do you do that in the face of what at least I understand to be the fairly clearcut decisions which uphold the constitutionality of placing that burden on the defendant?

Judge HARVEY. Well, we are not sure—and of course, the Supreme Court has not ruled on this—I am not sure you were here when we discussed this before—

Senator SPECTER. I was not.

Judge HARVEY [continuing]. But the two decisions, the *Mulloney* decision and the *Winship* decision—and of course, there is no ruling, and only the Supreme Court is going to decide this—we think would cast some doubt on a bill which would place the burden of proof, either by preponderance of the evidence or by clear and convincing evidence—it does not matter what the burden would be—on the defendant, because we read those decisions—and this came up in our meeting recently—as saying that you cannot do that in terms of particularly a question of specific intent. If it was a question of specific intent, mens rea test, and the bill said that the defendant had to bear the burden of proving, by psychiatric or other testimony, that he did not have the intent, we think that flies in the face of these two decisions.

Admittedly, there is no final opinion on this, and there is a view to the contrary which I have seen expressed, that would say that you can do this.

Senator SPECTER. I am inclined to agree with you that if we abolish the insanity defense and then make the evidence on mental state relevant on the issue of intent or mens rea, and say that the defendant has the burden of proof in that context, that it would be unconstitutional, because we are infringing upon a traditional element of proof which the prosecution has historically borne. But in the context where we start off with the traditional elements of proof, including mens rea, and the presumption that people are sane, and then say that the burden of proof is on the defendant to prove his insanity, if he uses that as a bar to conviction, it seems to me that that is on reasonably safe grounds, to the extent that there are any safe grounds, of the criminal law awaiting the next U.S. Supreme Court decision.

Judge HARVEY. Well, certainly, you can make a very strong argument to that effect. I am just reporting the views, and I think we were generally in agreement, and nobody is going to be able to tell until the issue reaches the Supreme Court. We think it would be unfortunate in a very critical area such as this to have a test like that and have it thrown out. And if the feeling were that there were defects in the defense, do away with it entirely which, of course, would be completely constitutional, I think.

There could be problems in the mens rea area if you said that the defendant could not put on any testimony at all going to the specific intent element. There could be constitutional problems there.

Senator SPECTER. Do you think it would be constitutional to totally eliminate the insanity defense—

Judge HARVEY. I think so.

Senator SPECTER [continuing]. As possibly unconstitutional, to make it the defendant's burden?

Judge HARVEY. I think so, just as in certain crimes, the general intent or no intent at all is a crime, bang, and I think that Congress could do that if it decided to do so.

Senator SPECTER. Judge Harvey, one of the considerations which we thought about after the suggestion was made by Dr. Stone would be to modify the *ALI* test to require that there be the result of "severe" mental disease or defect, and that the defendant lacked "entirely" the capacity to appreciate the wrongfulness of his conduct or to conform his conduct to requirements of law. The thinking which has evolved on that point is that it would be inappropriate to go back to 1843 to *McNaughten*, but to build upon the *ALI* standard which has evolved through the variety of factors which have led the *ALI* to it, and to make those two changes would be definable, reasonably well-identifiable modifications to an established definition. I would be interested in your thought on that.

Judge HARVEY. Well, I think that would certainly be possible. It might result in fewer acquittals. I think you still could have and might have, in a case as notorious as the most recent one, the same situation occurring. Any time you have a jury, and a jury is hearing expert testimony, the result can be inconsistent. In fact, I have had two cases in which the individual committed crimes in the District of Columbia and in Maryland. He was tried in the District of Columbia and found insane; he was tried before a jury, before me, and found sane. Of course, here is a man who is insane in the District of Columbia and sane in Maryland, two different juries.

Senator SPECTER. Two different judges, too.

Judge HARVEY. Two different judges, and at that time a different standard, because it was the *Durham* test as opposed to the *ALI* test, which we have in Maryland. Actually, the second case, the same lawyer decided to take the judge instead of a jury, which was me, and the same result.

Senator SPECTER. How close in time were the events?

Judge HARVEY. They were all within a period of months. He went on a crime spree. In fact, the opinion that I had, which is reported, the *McGir* case, was very much like *Hinckley*. He was a young man who came from a good family. They had psychiatrists, and he was able to be acquitted here. He came over and took non-jury, and we went through everything, and I thought as far as the substantial ability not to conform his acts to the law, that he did not meet that test. Now, if you want to make it a tougher test, I think you will certainly have fewer acquittals, but I do not think you are going to completely—if that is what you want to do—solve the problem of leaving it to a jury to understand the psychiatric testimony.

Senator SPECTER. Judge, we had communicated with Judge Parker immediately after the *Hinckley* verdict and were interested in his views on where we ought to be heading, and he wrote to us, and we made his letter a part of the record. He had considered at some length whether it would be appropriate for him to appear and share his views on this insanity issue, and in his letter he made a reference, as I recall it—and my counsel confirms my recollection.

tion—he made a reference to your group and deferred to your group.

Do you think it would be appropriate for Judge Parker to appear before this committee and give us the benefit of his thinking, albeit personal?

Judge HARVEY. Well, this is just a personal opinion, but I think his problem is that he is still very much wrapped up in the case, from reading the papers in the last few days. I think particularly when you have a situation where he has been making his ruling as the judge in a particular case, the case is continuing, at least the commitment end of it, I think it might be very difficult for him to come and testify. Years or months afterwards, that might be something else again. But I can see where he would be very reluctant to discuss it, as close in time as it has been to the actual events, and since a great many of those events are continuing on as far as the civil commitment proceedings are concerned.

Senator SPECTER. Well, that certainly is a very valid consideration. I have no disagreement with that. It may well be that he will be involved in the continuing issue as to Hinckley's confinement for years. There is a real separation between his roles as the presiding trial judge in the case, which is now over, the acquittal, contrasted with his responsibilities on the continuing issue as to whether Hinckley ought to continue to be confined. There are obvious connections, but there is also a pretty substantial difference.

Judge HARVEY. All I can say on that, Senator, is I think it is really his decision, and without being in the exact position and knowing all the rulings and so forth, and what went on, it would be very difficult for me to give an opinion on what his decision should be.

Senator SPECTER. One final question, Judge. Are you familiar with *Patterson v. New York*, which affirmed the placing of the burden of proving emotional distress on the defendant, which relied on the *Leland v. Oregon*, and *Patterson*, as I understand it, was decided after *Winship* and *Melaney*?

Judge HARVEY. Not directly. I have certainly seen discussions of that. I am not sure that that case deals precisely with what we would have here, where the burden would be placed entirely on the defendant. But my feeling is that that case does not finally decide the constitutional question.

Senator SPECTER. My understanding is it is very close. I would appreciate it, if you would be willing to do so, to take a look at that. We are very much interested in your judgment on the constitutional aspects here. If you would take a look at it—

Judge HARVEY. I will take that back to the committee, and we certainly will take a close look at it, in terms of that particular case.

Senator SPECTER. I very much appreciate it. Thank you very much, Judge.

Senator GRASSLEY. Judge, in the part of your proposal that deals with the Secretary of HHS applying to the States for a facility—and that is a contractual arrangement—does your proposal provide for reimbursement to the States for housing and caring for a person?

Judge HARVEY. Well, not in the cases where the individual is turned over to the State, and the State is willing to take the individual and civilly commit the individual under the State's budget. Now, where the State refuses, our bill suggests that the Secretary of the Department of Health and Human Services, if he does not have a Federal mental facility available, could then contract with private institutions to take this person and civilly commit the person so he will not be released out on the street.

Senator GRASSLEY. Is it very realistic to think in terms of the States taking the responsibility without some sort of reimbursement, especially considering the plight of the State treasuries?

Judge HARVEY. Well, of course, this is the situation we have today, and in most instances today, the State does take the individual. They do not want the individual out on the streets if he is a psychopath—

Senator GRASSLEY. So you are saying there is an adequate incentive there, without—

Judge HARVEY. There is incentive there. Now, I do not think you were here when I discussed this with Senator Heflin, but he pointed out that perhaps the States, knowing that there would be a provision for some remuneration, private arrangement, would then say, "We will not take him," under those circumstances. It does not say that the States' public funds will be reimbursed. It is turned over to the State. If the individual is a citizen of the State, the State should be responsible for seeing that he does not go out on the streets. That is the initial approach. If a State says, "No," then the Secretary has to follow up and see if some other means are available to keep this person committed.

Senator GRASSLEY. Would what you just said, though, be applicable to somebody who was as much of a transient as Hinckley was?

Judge HARVEY. Well, that is the problem in a Federal court trial. A person is a transient—and this is why today, we feel this gap really should be filled, whatever other legislation is enacted—and the State very often will say, "He has not lived here for years." So who is going to take responsibility? This happens in a lot of these cases where these people are rootless, and they do not have any fixed residence, and the State says, "No." At the present time, the individual has to go out on the street, everywhere except for the District of Columbia.

Senator GRASSLEY. I have no further questions.

I want to thank you, Judge, and especially the Judicial Conference, for your innovative approach, and we appreciate very much your testimony.

Judge HARVEY. It has been a real pleasure. Thank you.

[Whereupon, Senator Specter assumed the chair.]

[The prepared statement of Judge Harvey follows:]

PREPARED STATEMENT OF ALEXANDER HARVEY II

Mr. Chairman and Members of the Committee:

My name is Alexander Harvey, II and I am a United States District Judge from Maryland. I am Chairman of the Judicial Conference Committee on the Administration of the Criminal Law, and I am appearing here to present the views of the Judicial Conference and of its Criminal Law Committee on bills presently before the Senate relating to the insanity defense. Let me say at the outset that neither the Judicial Conference nor the Criminal Law Committee has had an opportunity to study the particular bills before you which were introduced in June of this year. However, comparable provisions contained in earlier proposed legislation have been reviewed.

I

The provisions of these bills which we heartily endorse are those which call for federal commitment of persons found not guilty by reason of insanity at a federal trial. The Criminal Law Committee and the Judicial Conference have for a number of years been studying proposed legislation dealing with the disposition of persons acquitted on grounds of insanity. Much of our work has involved a review of provisions concerning this subject contained in the various bills that have been before Congress in recent years to codify, revise and reform the Federal Criminal Code. There is a real gap in the federal law in this regard, and a number of Circuit Court opinions have noted the problem. In 1976, the Judicial Conference sponsored legislation to amend Chapter 313 of Title 18, United States Code, to provide for the ^{Federal} civil commitment of a defendant who was acquitted after raising the defense of insanity. The legislation in question was introduced in both the 94th and the 95th Congresses, but it was never passed. Some of the provisions contained in the bill sponsored by the Judicial Conference have been included in versions of the proposed Federal Criminal Code, but the Conference bill has never been separately enacted since it was first introduced. As recently as last September, the Judicial Conference

considered the matter again and reaffirmed its approval of the draft bill which had previously been approved.

The Judicial Conference and its Criminal Law Committee are of the view that there is a very real need for legislation of this sort providing for the federal commitment of mentally incompetent persons who have been found not guilty for reasons of insanity. At the present time, there is simply no provision in federal law (except in the District of Columbia) dealing with the disposition of a person found not guilty by reason of insanity. Thus, on acquittal of such persons, the federal courts are powerless to provide for commitment and treatment of even the most dangerous criminal psychopath who has successfully asserted the mental incompetency defense in the criminal proceedings. Although there would not appear to be a large number of these acquittals in the federal system each year, in every federal district in the nation except in the District of Columbia, federal authorities must turn the acquitted defendant over to state authorities for civil commitment. Frequently, persons of this sort, who have been tried in a federal court, have no roots in any particular community, and many states are reluctant to assume the financial burden of institutionalizing mentally ill persons who have no established residence. Moreover, different states have different standards for the civil commitment of and also for the release of insane persons. In many states, facilities are inadequate or overcrowded. There have been many instances where state authorities have not acted to civilly commit the person found insane at a federal trial, with the result that the individual has been released to the streets shortly after having been handed over to the state authorities. We believe that the federal government should take custody of these individuals to ensure that if the individual continues to present a danger to himself or to others, he or she will be committed to a federal facility if a state refuses to take responsibility for the person. This is the substantial change in the law included in the Judicial Conference bill and also in many of the new bills presently before you.

The question of course that arises is what agency or

department of the federal government should be responsible for assuming custody of an individual acquitted on grounds of insanity. Since under present law the individual in question has not been found guilty of a crime, we do not believe that the Bureau of Prisons should be charged with that responsibility. Accordingly, the Conference bill proposes that the Secretary of the Department of Health and Human Resources (including, of course, his designated representative) should be responsible for the custody of individuals found not guilty by reason of insanity. Thus, the Secretary of that Department is given a role in the civil commitment proceedings which follow the criminal trial. The bill provides that following acquittal of an individual who has raised the defense of lack of criminal responsibility, the Court, on motion of the United States Attorney, shall order the person delivered to the Secretary, who shall examine that person to determine whether, by reason of mental disease or defect, he is dangerous to himself or to the person or property of others. The bill provides for similar treatment of a person who is serving his federal sentence for a federal crime and who becomes insane during the time of his federal sentence. Under the draft bill, such a person would likewise be delivered to the Secretary for civil commitment in a federal institution, if it is found that he may be dangerous to himself or to others.

In either of these occasions when the individual has been delivered to the Secretary, if following examination the Secretary concludes that the person is dangerous to himself or to others, a petition is filed with the Court. The bill then provides for a hearing and for various due process safeguards before the civil commitment of the individual in question. However, no right to a jury trial is provided; the findings are to be made by the Court. If after a hearing, the Court finds that the person is dangerous to himself or to others, it must order the person committed to the custody of the Secretary for care and treatment. However, the commitment

and custody is to continue only during the time that the Secretary is not able to have the person civilly committed pursuant to state law or to a state or local facility. The bill specifically authorizes the Secretary of the Department of Health and Human Resources to apply for the civil commitment pursuant to state law of persons committed to his custody. If a state refuses to assume responsibility for such a person and it becomes necessary for the Secretary to commit the person, the Secretary is authorized to enter into contracts with the several states or with private institutions within a state for confinement of such a person.

Essentially, then, what this bill does is to establish federal standards for the civil commitment of an individual acquitted on grounds of insanity. It provides a federal follow-up for the civil commitment of such a person in a state. If the Secretary is not able to have a person civilly committed in a state, then custody is continued in a federal institution, or in a state institution under a contract with the federal agency. At least once each year, the Secretary files a report with the Court concerning the mental condition of the individual committed to his custody. The individual has the right to a hearing annually, if the individual wishes to challenge the Secretary's determination.

Mr. Chairman and Members of the Committee, we urge serious consideration of these provisions in this draft bill approved by the Judicial Conference. Similar provisions are contained in bills presently before you. We feel that this is a serious gap in the federal law, which should be corrected by appropriate legislation.

II

Let me now turn to a different subject. Many of the bills presently introduced in the Senate call for the abolition of or limitation of the defense of insanity in federal criminal trials. The Criminal Law Committee takes no position on this subject. We feel that whether or not a defendant in a federal

criminal trial should be permitted to assert the defense of insanity is a policy question for the Congress to decide. The historical development of the insanity defense is well known, beginning with the 1800 British decision in Hadfield's case to the famous McNaughten's case in 1843, to the Durham case and finally to the more recent American Law Institute (or ALI) formulation, followed today in almost every federal Circuit. The arguments relating to the merits and demerits of these various standards are well known, and the Criminal Law Committee does not feel that it is appropriate for the Judiciary to take a position on a substantive question of this sort.

Several of the pending bills seek to codify the defense of insanity in terms of the McNaughten formulation. As I have just noted, the development of the insanity defense has in this country been left to decisional law, and almost every Circuit has adopted the ALI formulation, in whole or in substantial part. In its review of the various drafts of a proposed new Federal Criminal Code, the Judicial Conference has opposed codification of defenses, including codification of the insanity defense. The Conference has indicated, however, that if Congress does enact legislation codifying the insanity defense, the Conference would prefer the ALI formulation over any other. The Conference has further endorsed the alternative verdict of "not guilty by reason of insanity." At the present time, the Federal Rules of Criminal Procedure in a criminal case permit only verdicts of either "guilty" or "not guilty." We believe that a third verdict should be authorized in those instances in which the jury has found that the defendant committed the criminal act but found him not guilty by reason of insanity. A verdict of this sort would permit the Court to know the basis for the jury verdict in cases in which some other defense in addition to insanity was asserted. An appropriate amendment to the Federal Rules of Criminal Procedure would accomplish this end.

III

Let me now comment briefly on specific provisions of the eight bills presently before the Senate. We note that several of

these bills permit the defendant to raise the defense that as a result of mental disease or defect, he lacked the requisite state of mind for the offense charged. This has been referred to as the mens rea test. In many jurisdictions, this is the law today, and it is recognized as a possible defense by Rule 12.2(b) of the Federal Rules of Criminal Procedure. We take no position on provisions of this sort in these bills which would abolish the insanity defense in its present form but would permit a similar defense in terms of the defendant's state of mind when it is an element of the offense charged.

Several bills would add to Rule 12 a verdict of "guilty but insane" or "guilty but mentally ill." The effect of such a provision, of course, would be to eliminate the defense of insanity. As mentioned, the Criminal Law Committee believes that this is a policy matter for the Congress to decide.

Several of the bills now before the Senate permit a defendant to raise the defense of insanity, but make this an affirmative defense to be proved by the defendant either by a preponderance of the evidence or by clear and convincing evidence. The Criminal Law Committee is opposed to these provisions. We have serious doubts concerning the constitutionality of these provisions which would shift the burden of proof in a criminal case from the prosecution to the defendant concerning an essential element of the offense charged.

One question which should be studied carefully by the Senate Judiciary Committee is the standard of proof which should apply when the court civilly commits a person found not guilty by reason of insanity. Several of the bills before the Senate mandate a preponderance of the evidence standard, while others require that the court make a finding of dangerousness on the basis of clear and convincing evidence. We would refer the Committee to the opinion of the Chief Justice in Addington v. Texas, 441 U.S. 418 (1979), where the Supreme Court found that in situations such as this a clear and convincing evidence standard is mandated.

It has been a distinct pleasure to appear before you this morning to present the views of the Judicial Conference concerning the important legislation which is before you. I stand ready to respond to any questions which the Committee may have.

Senator SPECTER. Our next witness is a distinguished physician and psychiatrist from the Commonwealth of Pennsylvania, Dr. Robert L. Sadoff, clinical professor of psychiatry from the University of Pennsylvania, School of Medicine; Lecturer in Law, Villanova University; a personal friend of mine, and a colleague on a great many cases. Dr. Sadoff is appearing here today on behalf of the American Psychiatric Association.

Dr. Sadoff, I should say to you that when Senator Grassley departed, it was not in anticipation of your testimony but in response to the buzzer which went off. There are going to be five bells that are going to go off in a few minutes, at which time I must go to the floor to vote, and Senator Grassley will return shortly thereafter. Our schedules around here are absolutely impossible. It is required that we be ubiquitous.

But welcome, and the committee appreciates your being here and looks forward to your testimony.

STATEMENT OF ROBERT L. SADOFF, M.D., CLINICAL PROFESSOR OF PSYCHIATRY, UNIVERSITY OF PENNSYLVANIA, SCHOOL OF MEDICINE, LECTURER IN LAW, VILLANOVA UNIVERSITY, APPEARING ON BEHALF OF AMERICAN PSYCHIATRIC ASSOCIATION

Dr. SADOFF. I am pleased to be here, Senator Specter, and it is good to see you again, sir. I will be brief and to the point, hopefully. I am here for the American Psychiatric Association. I will express some personal views, as well, but primarily, we want to talk about the matter of what do we do with someone who is found not guilty by reason of insanity or, alternatively, guilty but mentally ill.

I am in favor, we are in favor at the APA, of retaining the insanity defense. We think it is an important matter for people who do not appreciate the consequences of their acts or behavior and for whom treatment is necessary, not to be punished.

We do believe, I believe, that a person who does something wrong should be punished if he understands the nature and consequences of his acts, but if he is so mentally ill that he cannot appreciate them, then he should be treated.

The major problem I think we see is that people are being sent to hospitals where little or no treatment is available in the maximum security wards. One of the problems that we have seen with the bills that have been introduced in the Senate is that people would be found either insane, or guilty but mentally ill. I would like to say a couple of words about that.

First of all, I think guilty but mentally ill offers another alternative to the jury, to the judge, that they do not have if it is only guilty or not guilty by reason of insanity.

Senator SPECTER. You are in favor of that as an alternative?

Dr. SADOFF. I would be in favor of it under a couple of conditions. I think that there is a definition problem. Especially in Pennsylvania, we have a bill introduced where the definition of "mentally ill" is equivalent to that of the ALI model penal code for insanity. I think that would be a terrible problem. I think it would eliminate

mens rea, and one would be found guilty of an act, but not of a crime, which my understanding involves both an act and an intent.

The other major problem, as I see it, is that one cannot be mandated for treatment, which is in all of the bills, I believe, without some sort of implementing law that would allow for increased financial and institutional resources, which do not now exist.

The Inquirer in Philadelphia recently had a lead article on the plight of the mentally ill in our prisons, and now we want to put more people in prisons or jails who are mentally ill. The prisons cannot handle the severely mentally ill, because they do not really know what to do with them; they do not have the people properly to treat them. In the hospitals, the Farview State Hospital that we have, and our several regional hospitals, we do not have adequate financial or psychiatric resources to treat the people who are already there and then to mandate more treatment for people who will be sent there, I think GBMI will only overburden the staffs and the doctors and would not be fair to the patients.

So that if we are going to have a guilty but mentally ill doctrine, we really should have adequate resources to treat people.

Now, what I would propose, because I saw in none of the bills also a sophisticated—

Senator SPECTER. Well, we should have the resources to treat the people, but given the resources we have and the realities about changing them, there are many of us who are in favor of that, and there are some bills which a number of us are pushing in that direction, but it is not going to happen. So we have to work within the confines of what we do have.

Given that realistic situation, do you advocate a guilty but mentally ill standard?

Dr. SADOFF. Guilty but mentally ill, then, if we are going to treat the people in the prisons, we are going to have to put more psychiatrists in the prisons, more psychologists, more treatment resources—

Senator SPECTER. I think we would not treat them in prisons. I think if it were guilty but mentally ill, a person would be treated in a mental institution—not that those institutions are by any means adequate for the problem.

Dr. SADOFF. One of the questions that my students at the law school have always asked is, "Doctor, what good is it if you treat somebody in a hospital under GBMI, and then send them back to a prison for confinement? What good has the treatment done?" or, can you really treat somebody in anticipation of their spending the next 15 or 20 years in a prison. I think there are very real, practical questions in that line.

Senator SPECTER. Well, the issue is whether you take somebody who is guilty but mentally ill and put them in a prison, or whether you put them in a mental institution for a time and, assuming a recovery, then back in the prison.

It is not a very desirable situation either way. The question is not what is desirable; the question is what is least undesirable.

Dr. SADOFF. I do not think you can handle it in the way we are doing it. The major problem as I see it is that we do not want these people to go out into our streets and our communities and harm other people. One way is to eliminate insanity so they will not be

sent out so quickly. The other way, I think is a better way, is to do what they are doing in New Jersey and have a sophisticated release mechanism under the control of the judge, not the psychiatrist—we changed that in Pennsylvania, of course, in 1978—but there, there is a Vroom Building, a maximum security building. The judge has the option of keeping the person found insane in that hospital, either under maximum protection, or whether he is in the population of the Vroom Building. He has a hearing every 6 months, every year, and he can go from there to a moderate security, from there to an open hospital or a locked ward in a civil hospital. There are many different gradations, and a person can stay within that—

Senator SPECTER. That is on a finding of, what, guilty?

Dr. SADOFF. A finding of not guilty by reason of insanity. The reason that is so important, and I would opt for that more is because there really is greater control by the judge. Rather than putting him in a prison after he has had treatment, he will get out on probation or parole or whatever after he is through. But here, you have a chance for the judge, who knows the person that he sent away. You have the psychiatrist, who have been criticized, because we do not know how to predict dangerousness. Over the long term, we cannot.

So here, we are talking about a St. Elizabeth's Hospital for Mr. Hinckley, the psychiatrists who are seeing him there—should he get out; is he ready to get out. That really should not be the question, because we are not experts in saying that. We are examining somebody within a confined institution. We cannot make a prediction from that institution to the freedom of the street. What we need is to have a graded system. We can say, "Yes, I think he can do better if you gave him a little more freedom, but still keep him under lock and key. We will see how he does there." Then, examine him, observe him for 6 months or 1 year have another hearing, give him a little bit more freedom, and over a period of years while he is having time to go home on weekends or overnight, you can say, "Does he handle that stress very well?"

Senator SPECTER. I am sorry to interrupt, but I have less than 5 minutes now, and I must go. Senator Grassley will return shortly, and he will pick up.

[Short recess.]

Senator GRASSLEY. Dr. Sadoff, I think we should continue with your testimony.

Dr. SADOFF. Thank you, sir, I will. I was talking about the procedures in New Jersey wherein there is a graded and sophisticated means by which individuals who are found not guilty by reason of insanity may be released from the institution. It is not the all-or-none procedure as found in most places, where a person is hospitalized and then discharged.

My review of the bills before the Senate now indicated to me that there was no built-in graded system wherein a person could be sent from a maximum security to a moderate security to a civil hospital to a halfway house, have the options of out-patient treatment under mandate, so that the psychiatrists and psychologists who are treating the person and have the responsibility of testifying to the judge who maintains jurisdiction over the case, that they

would have the option of evaluating the person in various degrees of security, which is really more clearly their bent than trying to state whether a person would be dangerous in the community after they have examined him under maximum security facilities, because psychiatrists and psychologists cannot, in my opinion, give long-term predictions of dangerousness. We need clinical guidelines, and we need to do it on a short-term basis, or an imminent basis, rather than the long term.

The other aspect of all of this, of course, is the role the psychiatrist plays, both in the insanity defense in the courtroom and also in the treatment and management of the person found not guilty by reason of insanity.

I want to state that there are organizations in the country that are dedicated to the improvement of the quality of forensic application of psychiatry, first in the APA, the American Psychiatric Association; second, the American Academy of Psychiatry and the Law; and third, the American Board of Forensic Psychiatry, which would certify individuals who have shown not only experience but high quality in past examinations in the area of legal psychiatry. We are hoping to continue to upgrade the quality of our work within the law, because we feel it is extremely important and necessary. Also, when we work within the prisons and the hospitals where people are sent, found NGRI or GBMI, if that becomes the case, we need to know the issues more than psychiatry; we need to know the legal, administrative and security aspects of people, as well, so we can work more closely with the judges who have the ultimate responsibility for treating and releasing such patients.

That really is the basis of my testimony, Senator Grassley. I would be happy to answer any questions you have.

Senator GRASSLEY. In your testimony, you cite the procedure in New Jersey for the handling of these persons found not guilty by reason of insanity. Do you have any statistics on how many of these individuals are released and after what length of time?

Dr. SADOFF. I do not have them now, but they are formulating them now. Mr. Perlin, who is the mental health advocate for the State of New Jersey, talked to me yesterday about the statistics, which are early and preliminary, and he will, I am sure, have those available, and if I may, I could send them to the committee after they become more clearly available.

Senator GRASSLEY. Would you advise that it is beneficial to institutionalize persons like this near their own home or in familiar territory?

Dr. SADOFF. In a hospital in their own State, yes. As long as we can keep them as close to the facilities where they have support, backup, and they have the maximum security, as well as the proper treatment facilities, I would say yes, sir.

Senator GRASSLEY. Would the system of graded degrees of release be practical under the Federal system, where there is not presently a system of mental hospitals to which acquittees could be committed?

Dr. SADOFF. I think it is practical and it can be done, if we start off in St. Elizabeth's Hospital, which has a maximum security ward at John Howard. I think one can go from there to a moderate-security wing of the hospital, once it could be built or developed. From

there, they go to the more open part of that particular hospital, staying within the St. Elizabeth's complex, and then from there, they can transfer to their home State for more open or out-patient or halfway house facilities that would exist, when they are ready.

Senator GRASSLEY. I understand that Michigan became the first State in the Union to adopt the verdict of guilty but mentally ill. A prior witness, a prosecuting attorney by the name of William Callahan, testified that prior to the change in the Michigan law, there were approximately 300 persons found not guilty by reason of insanity and committed to the Center for Forensic Psychiatry. Eighty percent of them were subsequently released because it was determined that in fact they were not mentally ill. Is this how the statistics bear out in other States?

Dr. SADOFF. I do not know other statistics in other States. I know that in Michigan, there was a special Center of Forensic Psychiatry, and I know of the statistics that you read, and I am surprised that 80 percent is so high that they were not mentally ill.

What I think has happened is that people are determined to be insane at the time of an act or a crime, which may precede the time of their hospitalization by months or even years, and many of them are incompetent to stand trial for several months or years, so therefore they are sent to hospitals for treatment, and by the time they are tried, they are not mentally ill at that point, so they are sent to the center for evaluation and are then sent home, because at the time they are sent, they do not have the same degree of mental illness that they had at the time they committed the crime, which could have been months or years before.

Other statistics, I do not know, but I am sure we could find, and if we do, we will send them on to the committee.

Senator GRASSLEY. OK, the Senate is considering a proposal to abolish parole for persons found guilty of crimes—that is part of our Criminal Code revisions. Should persons found not guilty by reason of insanity be allowed a form of parole from confinement in mental institutions, as you suggest? Would this different treatment be justified?

Dr. SADOFF. I think it would be if they were found not guilty by reason of insanity, because then they would not fall under the aegis of the correctional system where parole exists. Here, they would be under the mental health system, and it would not be a form of parole, but it would be a wise, practical and useful technique for utilizing the best treatment we have available within the mental health system in a graded fashion. I would not see it as a parole. I would see it as optimal use of the facilities in our communities for mental health and for treatment, not for punishment.

Senator GRASSLEY. Dr. Sadoff, I thank you for your testimony and for the contribution of the American Psychiatric Association to this hearing and the consideration of this bill.

Thank you very much.

Dr. SADOFF. It was a pleasure. Thank you, Senator Grassley.

[The prepared statement of Dr. Sadoff follows.]

PREPARED STATEMENT OF ROBERT L. SADOFF

Mr. Chairman and Members of the Committee:

I am Robert L. Sadoff, M.D. and am currently Clinical Professor of Psychiatry at the University of Pennsylvania School of Medicine and am Lecturer in law at the Villanova University Law School. I am also a consultant at the Vroom Building of the Trenton Psychiatric Hospital, the maximum security hospital for the State of New Jersey.

Much has been written since the Hinckley decision on June 21, 1982. Even prior to the verdict there have been attempts at modifying or abolishing the insanity defense as we know it. One major modification has been the change to guilty but mentally ill while retaining the insanity defense. This has occurred in a number of states and is suggested in several others. The strength in the guilty but mentally ill doctrine lies in its retention of the insanity defense for those few people who deserve to be found legally insane at the time of the commission of an act since they had no mental ability to appreciate the consequences of their behavior. Guilty but mentally ill offers a third alternative to the jury for maintaining a person under the criminal justice system while treating him for his mental illness. There appears to be two major flaws with guilty but mentally ill that I shall only comment on briefly.

The first is the definition of mentally ill. In many states the definition equals that of insanity in the federal jurisdictions. In other states the recommendation is the elimination of mens rea as part of the definition of mentally ill. If mens rea is eliminated the second element to the definition of crime is also vitiated and the person will be found guilty of an act but not of a crime in the traditional sense.

The second major flaw in the guilty but mentally ill proposals involves the cavalier notion that a person may be treated within a prison or in a hospital until he or she is improved and then returned to the correctional system. There are thousands of persons in hospitals and prisons awaiting treatment where none exists. Guilty but mentally ill without an accompanying implementation of resources and finances will be meaningless and even more thousands of individuals found guilty but mentally ill will be sent to

hospitals and prisons and not receive treatment that is intended for them.

We must maintain the insanity defense in some viable form for those unfortunate individuals who are not able to appreciate the consequences of their behavior... We may add the modifications as long as they are realistic, practical and implemented.

The major concern by critics of the insanity defense following the Hinckley verdict is that people found not guilty by reason of insanity will be given a brief period of time in a hospital and then released to the community where they may do more damage. They are also concerned that such individuals will not have been properly punished for their violent behavior. Punishment is for the guilty - treatment is for the mentally ill. I am in favor of punishing those who do wrong if they are capable of knowing the nature and consequences of their behavior and of controlling themselves. I am in favor of similarly of treating those persons who have been found severely mentally ill and in need of psychiatric hospital treatment. We do no good for those people who are punished without treatment or those people who are sent for treatment but are punished because they are deprived of proper or adequate treatment.

Reform of the insanity defense must include a careful look at the institutions to which we send individuals who are either found: Guilty; Not guilty by reason of insanity, or Guilty but mentally ill. We must not overburden the facilities that now exist that are struggling to treat the burgeoning numbers of patients sent to them for care. We must also not overburden our prisons by sending them individuals who are severely mentally ill and disrupt the system of corrections where no appropriate treatment is available and the mentally ill prisoners suffer doubly. Other prisoners also suffer as do the correctional staff when an excessive number of severely mentally ill persons are sent to the prisons for care because their hospitals are overly taxed.

I have reviewed the proposals in Senate Bills 818, 1106, 1558, 2572, 2658, 2669, 2672, 2678, 2745. All of them are attempts at modifying the insanity defense or adding guilty but insane or guilty but mentally ill. None is particularly concerned with the treatment and management of those found not guilty by reason of insanity or guilty but mentally ill. All offer recommendations for discharge from the hospital by means of a psychiatric

evaluation by the hospital staff with recommendations to the court of jurisdiction. That court has the option of retaining the person in the hospital, discharging him to the community or releasing him for further correctional care. No where is there a sophisticated gradation of options open to the presiding judge for proper management of a person found not guilty by reason of insanity or guilty but mentally ill.

In the State of New Jersey under the case of State v. Krol and State v. Fields, the presiding judge has the option of deciding precisely under what conditions the person found not guilty by reason of insanity may be held. He has the option of keeping the person at the Vroom Building at Trenton Psychiatric Hospital, the maximum security hospital for the State of New Jersey. He may be kept in maximum security confinement within the Vroom Building or he may be let into population within that maximum security hospital.

Subsequently after a proper hearing the judge may allow the patient to have further privileges under proper supervision within the Vroom Building program. Following a six month or one year confinement in maximum security the patient has a hearing before that same judge who may opt to keep him in maximum security or lift some of the security measures but not all at once. The patient may then be sent to a moderate security unit where more active treatment in a secure environment is available and encouraged. The patient may stay in moderate security for several months or years depending upon the presiding judge and his review of the case at regular intervals of six to twelve months. The patient may then go from moderate security to more open privileges within the moderate security program but not yet released to a civil hospital in a locked ward. That option would come later after the patient has proven that he is able to handle the lesser degree of security provided in moderate security. He is then tried after a judicial hearing and upon court order (not by order of the psychiatrist but certainly with his recommendations) to a civil section of the hospital first with a locked ward and then with an open ward or a semi-open ward. The patient may then go from that degree of security to an open ward with grounds privileges and begin to participate in the many programs within the hospital campus outside of his

particular building. Home visits for several hours and then overnight or for weekends may begin to be encouraged as the patient is becoming more prepared to live in the community but is not quite ready to do so. Finally the patient may go to a halfway house where he may obtain employment and live within the supervised structure of the halfway house. He may then after several months or years in that environment be discharged to the community without patient supervision until he is finally discharged many years after his original confinement.

This is a typical program for many of the persons found not guilty by reason of insanity in New Jersey where the judge maintains strict supervisory control over each patient that he sends to the hospital under the NGRI ruling. Patients may spend several years in a gradual release program with intensive hearings at regular intervals. Outside psychiatric consultation may be requested by either the defense or the prosecution depending on the recommendations by the hospital staff. In this way the judge has the perspective of those treating psychiatrists as well as those examining psychiatrists who have gotten to know the patient over several years.

Any breach in security will automatically return the patient to maximum security where he starts all over again. Those people who are found to be extremely mentally ill and not able to live within an unstructured environment will remain in the Vroom Building sometimes for many years until they have learned how to comport themselves with other people.

It has been determined by many that psychiatrists and psychologists have great difficulty in predicting dangerousness or future violent behavior by psychiatric patients over the long term. Short term predictions are more accurate and imminent violence is readily predictable. In the sophisticated manner described above the clinicians are able to make clinical predictions under which various individuals will become violent under particular situations and not have to give a general statement about a person's "dangerousness" which they are unable to predict.

Thus, I recommend the Committee maintain the insanity defense with some modification and addition of guilty but mentally ill if the definition of mentally ill is not in conflict with the definition of insanity and maintains a degree of mens rea in order for the person to be found guilty of a crime and

not just an act. Also the guilty but mentally ill bill should include the authorization of appropriations that would provide adequate financial and institutional resources for the increased numbers of patients to be managed and treated. Finally, the important consideration is in the management and treatment of the mentally ill found either GBMI or NGRI with continuous judicial control over the security in order to protect society while allowing the most effective treatment and rehabilitation services available to the individuals committed under these provisions.

I am grateful for the opportunity to appear here today, and am pleased to respond to any questions that you may have.

Senator GRASSLEY. Our next witness is Dr. John Monahan, from the University of Virginia College of Law, who is appearing on behalf of the American Psychological Association and the Advancement of Psychology.

Prior to your testimony, I would like to state for the record that I have a statement that I am going to submit, rather than read, so without objection, my statement will be made a part of the record. [The statement of Senator Grassley follows:]

PREPARED STATEMENT OF SENATOR CHARLES GRASSLEY

Today we are examining a most integral component of the insanity defense—What do we do with those persons deemed not guilty by reason of insanity?

While I do have an idea as to some of the changes I wish to see in the insanity defense, I am still in the process of studying the many legislative alternatives that have been introduced on the Senate floor. Our jurisprudence dictates that we do not punish a person found mentally incapable of controlling his conduct. I have heard no one argue that compassion and mercy are not treasured values in American society and I think that most would agree that we do not want to put to death or severely punish a person who is so deranged that he does not understand the nature of his actions. But let us be fair to American society as well. Let us come up with a standard that more accurately defines the grounds of an insanity plea.

While the insanity defense has evolved over the centuries as an important concept in Western law, no one standard governs its use on the Federal level much less the fifty States. Aggravating the lack of standardization across this nation is the fact that law and psychiatry have intertwined to create nothing less than a muddled morass that is an open invitation to defendants to feign insanity.

In reforming the insanity defense, I believe at least three elements of the frequently utilized M'Naghten test must be replaced: First, we should prohibit psychiatric testimony on the ultimate issues to be decided by the trier of fact. One issue that is agreed upon by the psychiatric community is that psychiatry is an inexact science. Actually even that statement could be opposed by many who argue that psychiatry is not a science. Be that as it may, psychiatric testimony must, by its inexact nature, be limited to findings of fact and not conclusions that form the ultimate duty of the bench or jury.

Second, we call the insanity plea a defense, so let's use it like one. I see no logic in bidding the prosecution to prove that defendant was sane when he committed an offense. I think that most of my colleagues would agree that such a scheme of proof invites a different result than is envisaged by society. By placing the burden of proof upon the defendant, we will attain the just result of having the defendant prove to the factfinder that he was insane rather than merely establishing some "doubt" as to whether he is sane.

Third, I am convinced that the proper standard of evidence should be that the defendant has established by a "clear and convincing" standard that he lacked the

mental capacity to commit the offense. This median standard balances protection for defendants with that of protection for society.

But after we consider the insanity defense and possibly reform this legislation, how will we deal with those persons who are found criminally insane? Prior to this hearing, I read that during the 1970's in Michigan, 124 of 223 criminally insane defendants were released after a 60-day hospital stay. The irony of this statistic is that Michigan was particularly diligent in seeing that criminally insane patients received treatment. This sad fact bespeaks the state of treatment across the nation. It is with this knowledge that I welcome the witnesses today and the opportunity to create a record that may have lasting importance.

Senator GRASSLEY. Dr. Monahan, welcome to the committee and this hearing, and thank you for your testimony and your time, as well as the interest of the American Psychological Association.

Please proceed.

STATEMENT OF JOHN MONAHAN, Ph. D., UNIVERSITY OF VIRGINIA SCHOOL OF LAW, APPEARING ON BEHALF OF AMERICAN PSYCHOLOGICAL ASSOCIATION AND THE ASSOCIATION FOR THE ADVANCEMENT OF PSYCHOLOGY

Dr. MONAHAN. Thank you very much, Senator Grassley.

I just have two brief comments to make before summarizing the bottom line of my prepared testimony. The first comment is that it might be useful to provide the committee with a thumbnail sketch of the empirical research that has been done on describing exactly how many people, are acquitted as not guilty by reason of insanity and what happens to those people in terms of their dispositions. The information that I am giving here is from a chapter by Dr. Henry Steadman, in a book that he and I have edited, that will be published next year, entitled, "Mentally Disordered Offenders."

In a national survey that was published this month by Dr. Steadman and myself, that was conducted in 1978, we found that in that year, there were 1,625 people in the United States who were committed to mental hospitals as not guilty by reason of insanity. There were a great deal of variation among the states. Six States, including Iowa, had no people institutionalized as not guilty by reason of insanity in 1978. California was the highest, with 169. There was no way to tell how many of these insanity commitments were for acquittal of Federal crimes versus how many were for acquittal of state crimes. The data did not exist.

On any given day in 1978, there were 3,140 persons residing in State or Federal mental institutions as not guilty by reason of insanity. As to the crimes of which these people were acquitted, there is no national data. A study in New York and a study in Michigan concluded that half the people acquitted as not guilty by reason of insanity were acquitted of a crime of murder or attempted murder. In Missouri and Oregon, on the other hand, only about 5 percent of the NGRI cases were acquitted of murder, with assault and less serious crimes being the bulk of the cases.

In terms of how long these people are hospitalized, from the survey that Dr. Steadman and I did, we computed the average time hospitalized of NGRI acquittals to be slightly less than 2 years.

A study done by Dr. Steadman in New York found that in that State, the average time spent hospitalized was 3.6 years. This is much longer than people civilly committed. Another study that Dr. Steadman did in New York, comparing NGRI acquittals with

people convicted of the crimes of which the NGRI's were charged and sent to prison, found that the NGRI's spent in the hospital one-third less time than the prisoners spent in the prisons. The difficulty with this study, however, is that had the insanity defense not been available, in all likelihood the NGRI cases would have plea bargained for a verdict of guilty and would have received a reduced sentence. They therefore would not have been convicted of the act of which they were charged. So I think it is unclear whether or not people actually spend less time in the hospital than they would have spent in the prison, given that they probably would have plea bargained rather than been convicted at trial.

In terms of the recidivism of these people when they get out of the hospital, a study again done in New York found that 28 percent of the persons released from mental hospitals after an NGRI acquittal were re-arrested within 5 years after they were released. This was almost precisely the recidivism rate of a comparable group of felons released from State prisons.

That, I think, is in summary the existing body of research on NGRI acquittals. I find it amazing that on an issue of such great importance to the criminal law as the insanity defense, there is so little hard knowledge of which to inform the committee. Whatever the committee decides to do about the substance of the insanity defense, I urge you to fund a modest program of research to evaluate the effects of your changes in the law, so that the next time the insanity defense is reformed, you will have a better idea about just what needs changing, and perhaps some clues as to how to change it.

My second comment is that I am a psychologist and would like to make a brief comment on behalf of my profession. The bill that Senator Hatch introduced, 1558, speaks of a psychiatric examination and a psychiatric report to be done by a licensed or certified psychiatrist or a clinical psychologist and a medical doctor. This approach, one psychologist plus one physician of any type equals one psychiatrist, is at variance with the bill introduced by Senator Thurmond for himself and 32 other Senators, including both yourself, Senator Grassley, and Senator Hatch himself. That bill, 2562, refers to psychiatric or psychological examinations, and reports that are done by a licensed or certified psychiatrist or clinical psychologist.

The approach that you have taken, Senator Grassley, with Senator Thurmond and Senator Hatch in 2562, is preferable to the approach taken in the earlier bill. It is in accord with the growing trend among the States to equate the two disciplines in the context of forensic examinations, as Virginia did last month. It follows the provisional recommendations of the American Bar Association's Criminal Justice Mental Health Standards Project, released in April. It affords the prosecution, the defense, and the courts freedom of choice in the selection of the best mental health examiners they can find, without regard to what are, for these purposes, artificial distinctions.

A summary of my prepared testimony is that when people are acquitted as not guilty by reason of insanity, the question is what is to happen to these people in terms of their disposition. Inevitably, this question focuses on two concepts: mental disorder and dan-

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gerousness. We have heard a lot in these various hearings about mental disorder. I would just like to make a few brief remarks on dangerousness which I think are very much complementary to the remarks Dr. Sadoff just made.

There are two types of issues regarding prediction of dangerous or violent conduct: scientific issues and moral or political ones. In terms of the scientific issues, there were five research studies done in the mid-1970's to validate the ability of psychiatrists and psychologists to predict violent behavior in the future. People were predicted to be violent, and then because of some external event, the judge let the people go. This allowed research to follow up the people predicted to be violent to find out how many of them were in fact violent. The studies showed that in the best of circumstances, mental health professionals appear to be accurate about one-third of the time when they predict violent behavior over the long run. Of every three people predicted to be violent, one of those people is indeed arrested or hospitalized for a violent act within several years after their release. The other two are never discovered to have committed a violent act. I think that that one out of three figure is a fair representation of the state of the art of violence prediction, and I do not think that it is going to change very much in the near future.

That is not to say that mental health predictions are worthless. One out of three in these circumstances is indeed better than chance. One study found that of the people predicted to be violent by psychiatrists and psychologists, one out of three were; of the people predicted to be safe, 1 out of 12 were. That is a significant difference.

But the fact remains that most of the people predicted by mental health professionals to be violent do not go out to fulfill those expectations. Against that scientific background, it seems to me the committee has to confront the political or the value issue. Is a one out of three chance of committing a violent act sufficient to justify detaining and treating someone in a hospital when they have been acquitted as not guilty by reason of insanity? To my knowledge, all the procedures for the commitment of insanity acquittees focus upon future dangerousness or violence. I think that dangerousness has achieved this position of prominence by default as well as anything else. If you do not rely upon conviction of dangerousness as a touchstone for how long you commit someone, what do you rely on? The only two remotely feasible alternatives appear to be picking some arbitrary length of commitment—for example 1 year, 5 years or 10 years—but that will inevitably seem too high for some people, people acquitted of very minor crimes, for example, and it will seem much too low for people acquitted of committing other crimes, like multiple murders.

So that approach does not appear feasible, nor does the approach where you hook the length of time committed to the hospital with the length of time the person would have spent in the prison had he or she been convicted instead of acquitted by reason of insanity. That latter course appears transparently to be punishing the people the law has just determined do not deserve punishment.

So I think the question before the committee might not be so much whether to rely on predictions of violence, but how to rely

upon them. And here, it seems to me that the decision should not be fobbed off on psychiatrists and psychologists who rush in or who are dragged in where judges fear to tread. I think that psychologists and psychiatrists should be barred from testifying on the ultimate issue of whether a person is dangerous for the purpose of insanity commitment or not dangerous for the purpose of release from such commitment. Rather, they should be permitted to do two things—to offer their professional opinions about how likely they believe a person whom they have examined is to commit a violent act in the future, for example if the odds are 1 out of 100, or 1 out of 10, or 1 out of 3; and to give the reasons that underlie these opinions, that is to specify why they have arrived at one figure rather than another. But whether a given likelihood of violence is high enough to justify commitment or low enough to justify release entails the balancing of interests, the liberty interests of the insane offender on the one hand, and society's interest in protecting itself from further harm at his or her hands, on the other hand. It is that balancing of interests, it seems to me, that must be done by the judge, not by the mental health professional.

I have suggested in the prepared testimony some slight modifications to the bills before the committee that might make more clear that the role of the mental health professional should be to inform the judge as to the probability of violence and to justify that estimate given, but that it should be a judicial function to determine whether that probability is sufficiently substantial to justify commitment.

That concludes what I have to say.

Senator GRASSLEY. What did you think of Dr. Sadoff's gradation approach?

Dr. MONAHAN. I think that the approach of gradations in terms of security, gradations within an institution, is indeed the best way to get information on how a person will behave outside that institution. So I have no difficulty at all with Dr. Sadoff's approach.

Senator GRASSLEY. What about what the Judicial Conference said about HHS contracting with the States for the treatment of these people?

Dr. MONAHAN. Of the 1,625 people committed to mental hospitals in 1978, it is impossible to tell whether all of them were acquitted of Federal crimes or whether none of them were acquitted of Federal crimes.

I certainly agree with the statements that were made by the Senator before. Why would any State possibly take someone and pay for it themselves when the alternative is to say, "No", and then the Federal Government will pay for it? There is certainly no incentive for the States to take the people on their own.

The judge from the Judicial Conference Judge Harvey, said that in his opinion, the States do, in the majority of cases, take the people because they are residents of the State. What the funding mechanisms would have to be to insure that no one acquitted of a Federal crime by reason of insanity actually walks, I simply do not know.

I would personally doubt whether there are many cases in which that occurs.

Senator GRASSLEY. In your professional opinion, is there a prototype individual, perhaps a psychopath, who is simply untreatable?

Dr. MONAHAN. I am not sure I would say "a prototype individual." I believe many people have written that there are effective psychiatric and psychological techniques for some kinds of conditions. Things like psychopathy do not appear to be among the conditions for which mental health treatments are currently most effective. So the difficulty is that you commit dangerous people, who are precisely those people you are least able to treat.

Senator GRASSLEY. Is not your one-third rate for predicting future violence probably low, since it is based solely on a group released against the advice of doctors, because the decisionmakers disagreed with the prediction?

Dr. MONAHAN. I think that is an excellent point. In some cases, I think that might be. In other cases, though, I doubt it. For example, in New York, a Supreme Court decision in the *Baxtrom* case decided that all of about 1,000 people held in prisons after their sentences expired, because they were predicted dangerous, would have to be either released or civilly committed to a mental hospital. In that case, when all thousand were released or civilly committed, only 20 percent of those people were ever violent or threatened violence within 4 years after their release—and one verbal threat counted as a violent act.

Senator GRASSLEY. Dr. Monahan, I want to thank you for your testimony and that of the American Psychological Association and the Association for the Advancement of Psychology.

Thank you very much.

Dr. MONAHAN. Thank you very much, Senator.

[The prepared statement of Mr. Monahan follows:]

PREPARED STATEMENT OF JOHN MONAHAN

SENATOR HATCH AND MEMBERS OF THE COMMITTEE:

A national survey published this month by Henry Steadman, myself, and several colleagues¹ found that 1,625 persons in 1978 were committed to mental hospitals in the United States after having been acquitted of crime by reason of insanity. On an average day in that year, 3,140 persons committed after an insanity acquittal resided in state and federal mental hospitals and were awaiting decisions regarding their release.

The initial commitments of these persons and the continuations of these commitments were based largely on two concepts, "mental disorder" and "dangerousness." I will focus my remarks today on the second of these.

Two types of issues must be confronted in addressing "dangerousness" or the prediction of violence as a criterion for the commitment and release of insanity acquittees: scientific or empirical issues and political or moral ones. I will consider each in turn.

There were five empirical attempts in the 1970s to measure the validity or accuracy of predictions by psychiatrists and psychologists that a person "will" be violent in the future. The research studied populations of offenders and patients who had committed at least one crime in the past, who had been placed in institutions for periods ranging from several months to many years, who had been diagnosed as mentally disordered and who had been predicted by mental health professionals to be "too violent" to be released into the community. But for a variety of legal reasons these psychiatric and psychological predictions were overridden and the people were released anyway. This

¹Steadman, H., Monahan, J., Hartstone, E., Davis, S., and Robbins, P. Mentally disordered offenders: A national survey of patients and facilities. *Law & Human Behavior*, 1982, 6, 31-38. This project was supported by grant N01 79-NL-AX-0216 from the National Institute of Justice (Lawrence A. Greenfield, Project Monitor).

provided the opportunity to test the accuracy of the predictions that otherwise would have kept these people in a prison or a mental hospital.

The results of these studies were not comforting. Under the best of circumstances, the mental health professionals were accurate in only one out of every three predictions of violence they made. In other words, of every three people predicted to commit a violent act upon release, one was later arrested or hospitalized for such an act and two were not, over a period of up to five years in the community. While as in any area of social science a number of methodological criticisms can be leveled against these research studies, I believe that they can withstand critical scrutiny reasonably well.²

The state-of-the-art of the clinical prediction of violent behavior over a long-term period, I think it fair to say, is captured in this one out-of-three figure. To put this into context, one of the best-known studies in the area compared the violent crime rate of people predicted by mental health professional to be violent with the violent crime rate of people predicted to be safe. While about one out of three of the people predicted to be violent actually turned out to be such, only one out of twelve of the people predicted to be safe committed a violent act. So it is not that mental health predictions are worthless. In this study, the people predicted to be violent were actually four times more likely to be arrested for a violent crime than the people predicted to be safe--one out of three compared with one out of twelve.

But the fact remains that most of the people mental health professionals predict to be violent do not go on to fulfill these expectations. It is against this scientific background that com-

²This research is reviewed in J. Monahan, The Clinical Prediction of Violent Behavior. Washington, D.C.: Government Printing Office, 1981. DHHS Publication No. ADM-81-921. This monograph was supported by the Center for Studies of Crime & Delinquency National Institute of Mental Health (Dr. Saleem Shah, Chief).

mitment standards for people acquitted by reason of insanity must be framed.

Is a one-in-three chance of committing a violent act sufficient to justify detaining and treating in a mental hospital someone acquitted of crime by reason of insanity? It is at this point that science leaves off and moral considerations take over.

To my knowledge, all procedures for the commitment of insanity cquittees now in existence--as well as all the bills on this topic now before this Subcommittee--have found it necessary to rely upon a prediction of "dangerousness" or violence in determining who should be committed and when that commitment should end.

I believe that "dangerousness" has achieved this position of prominence by default as much as anything else. If the law of insanity commitment does not rely upon a prediction of violence as a triggering mechanism, upon what shall it rely? To commit everyone for life seems much too harsh; to release everyone immediately much too foolhardy. The only two remotely feasible alternatives are to choose a purely arbitrary length of commitment--1 year or 5 years or 10 years--which will inevitably seem "too high" for some insanity acquittees and "too low" for others, or somehow to link the length of commitment to the length that the prison sentence would have been had the offender been convicted rather than acquitted by reason of insanity of the crime with which he or she was charged. This latter course appears transparently to be "punishing" those people that the law has just determined do not, because of their mental status, "deserve" punishment.

So the law of commitment for those acquitted of crime by reason of insanity comes back to "dangerousness" because it has no place else to go.

The question before you, then, may not be so much whether to rely upon predictions of violence in insanity commitments,

but how to rely upon them. And here I reveal the one axe I have to grind before you: the decision of when a person is likely "enough" to be violent to justify commitment following an insanity acquittal must be a genuinely judicial one. It cannot, as seems to be so often the case, be fobbed off on mental health professionals who rush in--or who are dragged in--where judges fear to tread. In determinations of "dangerousness," the buck must stop at the judges' bench, not the witness' box.

It is my opinion that psychologists and psychiatrists should be barred from testifying on the "ultimate issue" of whether a person is "dangerous" for the purpose of insanity commitment or release from such commitment. Rather, they should be permitted to do two things: to offer their professional opinions about how likely they believe a person whom they have examined is to commit a violent act in the future--that the odds, for example, are one in a hundred, or one in ten, or one in three--and to explain the reasons that underlie these opinions, that is, the combination of dispositional and situational factors that lead them to offer one estimate rather than another. These are at least potentially scientific judgments. They can be challenged, if necessary, in the adversary system.

But whether a given likelihood of violence is high "enough" to justify commitment or low "enough" to justify release entails a balancing of interests--the liberty interest of the insane offender and the society's interest in protecting itself from further harm at his or her hands. That is a balancing that must be done on the scales of justice, by people who wear black robes rather than people who wear white coats.

Your own bill, Senator Hatch (S 1558) is compatible with this recommendation. It permits the institutionalization of an insanity acquittee when "his release will create significant risk of bodily injury for another person or serious damage to property." The bill supported by the Justice Department (S 2572)

is identical in this respect, except that it speaks of a "substantial" risk rather than a "significant" one.

But I urge you to make the judicial nature of this determination even more apparent. At the risk of appearing presumptuous, I suggest an alternate wording: a disordered person who has been acquitted by reason of insanity should be committed if "the likelihood that he will commit acts of serious bodily injury to another person or serious damage to property is sufficiently substantial to justify commitment."

Making explicit in the statute that the likelihood of future harm must be "sufficiently substantial to justify commitment" should make clear that the "ultimate issue" of "justifying" commitment is one to be decided by the informed judge and not one to be delegated to the mental health professional naive enough to confuse expertise with wisdom.

Senator GRASSLEY. Our next witness is Shirley Starr, president of the National Alliance for the Mentally Ill.

Do you have anybody else you would like to introduce from your association?

Ms. STARR. Senator Grassley, I am not appearing on behalf of the National Alliance.

Senator GRASSLEY. You are not?

Ms. STARR. I am not.

Senator GRASSLEY. Oh, I am sorry. Our testimony indicated that you were.

Ms. STARR. I am the president, but we are convening this weekend, and we will develop a policy statement. I am speaking as a private citizen now.

Senator GRASSLEY. OK.

STATEMENT OF SHIRLEY STARR, PRESIDENT, NATIONAL ALLIANCE FOR THE MENTALLY ILL, SPEAKING AS AN INDIVIDUAL

Ms. STARR. I would like to enter a disclaimer about my being a lawyer, but that fact will probably be self-evident. I am a social policy planner by profession.

I am the president of the National Alliance for the Mentally Ill, which is an organization of hundreds of family support advocacy groups in more than 45 States. Each and every family member of the Alliance has followed the events of the Hinckley trial with genuine interest and concern, understanding that the Hinckley family was enduring an agony that none of us could begin to imagine and recognizing that the outcome of that trial could affect the illness of every family who has a family member with mental illness.

I am the mother of a 35-year-old son who has had mental illness for more than 11 years, and it is as a mother that I testify before your committee today. My son has courageously endured a baffling illness which has robbed him of much of his talents and his expectations for himself. He has at times been victimized by the society. He has been robbed and beaten by those kinds of persons who prey upon the helpless and the defenseless. But he has also been ostracized and stigmatized by many of the good people in our society. And now, as a result of the notoriety accompanying the Hinckley verdict, he has been further burdened with the public perceptions which assign to the chronically mentally ill individual, the role of the dangerous and unpredictable element in our society. It does not seem very fair to me, but it is just another one of the inequities that mental illness gives to the individuals suffering from it.

My son is a gentle human being. He is also a frightened one. It is difficult for him to attend to the many activities which highly functional people do attend to. He is fearful sometimes of even attempting many of the ordinary things each of us perform daily—things such as taking public transportation, shopping for food and clothing, attending public functions. He is not, however, atypical. Ninety-eight percent of the chronically mentally ill individuals are similar to him. They do not commit acts of violence. That figure, I would like to mention, is far lower than the figures for crimes of violence committed by the so-called "normal" population.

In a rational society, one attempts to provide some predictability in order that life not be inchoate. The laws of probability dictate that fewer violent crimes will be committed by the chronic mentally ill. I ask only that others consider that statistic before judging and condemning the mentally ill. Public acceptance of the mentally ill would help them in their difficult task of trying to manage the illness and give some meaning and form to their lives.

I am aware that this committee has not convened to hear testimony about the stigmatization of the mentally ill. Rather, you are here in response to the public outcry which followed the not guilty by reason of insanity verdict rendered by the jury in the Hinckley trial. I maintain that the outcry is based to a great extent upon the same kind of misconception that governs other responses toward the mentally ill. I maintain further that the not guilty by reason of insanity verdict and the fears about that defense are false issues.

In my research into the NGRI defense, it appears that the defense is not widely used as a defense tactic in criminal trials. Indeed, there seems to be general agreement among prosecutors and defense lawyers that the insanity defense is rarely used and is even more rarely successful.

In my home State of Illinois, I sat, together with the distinguished forensic authority, Norville Morris, on a committee chaired by the Honorable Judge Joseph Schneider. This Governor's Blue Ribbon Committee investigated the NGRI and the guilty but mentally ill verdict, which the State of Illinois does have, as well as the unfit to stand trial verdict. It was the finding of our committee, just as it has been the finding of the American Bar Association's Committee on Association Standards for Criminal Justice, that the insanity plea in the United States is a negligible factor in our criminal justice system.

I am mindful, as all other members of the National Alliance for the Mentally Ill are, that a society must endeavor to assure public safety and that unjustifiable risks cannot be permitted. We believe, however, that there are means available to a rational and just society which would protect the safety of its members and the rights of the least of its member, the chronically mentally ill. In the quest for public safety, we cannot justify overthrowing the well-established principle of Anglo-American law that the community has held it to be unjust to convict of crime a person who is insane. This is a matter of fundamental principles of justice, humanity and morality. The fact that this plea has been available expresses the principle that one who has lost his reason may not be criminally condemned and that the criminal law is a law for those who can be held responsible for what they do.

The definition of "insanity" surely is a major problem in connection with the insanity plea, but it is not the sole problem, and it is one that reasonable men and women can begin to address. A more important question, I believe, is what is the most efficient way to protect society from those whose insanity leads them to do harm.

We believe that we cannot purchase public security at the price of injustice to a minority segment of our population. In a democratic society, it is the right of the minority which must most be protected. In two of the States of the Union, the insanity plea has already been eliminated and replaced with the guilty but mentally ill verdict. That verdict has the potential to punish the mentally ill to a far greater degree than we punish those who are not mentally ill. Its purpose, it seems to me, is only to placate those whose fears are highly irrational and to punish those whose fault lies in an illness not of their own making.

In States where the guilty but mentally ill verdict has been in existence for some time, many of the mentally ill are being placed into the criminal correction system, rather than into an effective, therapeutic system. Others could conceivably spend more time in restraint than they would have otherwise spent had they been merely declared guilty.

I am aware of the frustration of the Members of Congress and the legal and psychiatric professions experience in their attempts to address the entire issue of the insanity defense, but do not let that frustration result in precipitous action which could, in effect, eliminate the insanity defense.

Many have said that the psychiatric profession has appeared very foolish because of their seemingly conflicting opinions and testimony. Well, that is small wonder when they are asked to speak to the legal definition of insanity. I am not surprised that good men and women differ. If there were no differences, if there were nothing at issue, there would be no reason to have a trial.

I adjure the distinguished members of this committee to deliberate long and judiciously, and in an unemotional climate before making their recommendations about a Federal law. I would hope that your decisions will reflect a balance struck by this body politic between the goals of mercy and safety.

I would wish for the establishment of criteria under which the legal concept of being responsible is appropriately invoked. Further, I would wish for Federal legislation that would serve as a

model for just and therapeutic treatment of those deemed to be not responsible for the action for which they stand accused. Anything less than that would seem to me to be an injustice.

Thank you very much. I have looked at some of the bills that Senator Specter's subcommittee have suggested. I was asked to testify but because of a back injury was not able to come to Washington. I would welcome any questions that you might have.

Senator GRASSLEY. I am uncomfortable with the idea of rehabilitating a defendant only to send that person into our corrections system. Now, Dr. Sadoff voiced, in my opinion, a similar concern. What do you think of his gradation approach?

Ms. STARR. I think it is workable. I am opposed to the guilty but mentally ill verdict, so it has no advantages to me at all. It seems to me that using the NGRI, we have better control, better monitoring. And members of the National Alliance, I believe—although I am not here to speak for them yet—could possibly, in a private poll I have taken, live with the idea of a conditional release, which would assure public safety and protection of that individual from harm to himself and others.

But I see the guilty but mentally ill plea as having no value other than punitive, and there are no redeemable virtues in that bill for me.

Senator GRASSLEY. So, of all the various bills that we have before us, then, you do not really support any of them, or do you find any value in any of them?

Ms. STARR. There are two aspects of Senator Specter's bill, one which places the burden of proof of insanity upon the defendant. As I said before, I am not a lawyer. I have some questions about whether it would be unconstitutional if it were to come before the Supreme Court.

From my point of view as a layperson, it would seem to me that there is a distinction between proving insanity and presumption of innocence or guilt; that, while the innocence or guilt may rest upon that proof—but I am not an attorney—I think that the fear that nonmentally ill individuals will use the NGRI verdict—which is also not a realistic one—but the fear that someone might conceivably use the NGRI verdict and be acquitted and not really be mentally ill, or not mentally ill as they perceive by the individuals, is a real fear. I do not know that we can devise a system that would not let some guilty person off on an NGRI. Our system today, not even in terms of insanity, does not assure that kind of perfection.

It seems to me that the mentally ill individual—we could develop criteria based on not just expert evidence, but community testimony, by family, by friends, by acquaintances, by business associates, on how they perceive an individual to be. It seems to me that we could point to a record of chronic mental illness, of several hospitalizations, of acts of inappropriate behavior, to develop a profile of what is an insane person. I know that is a difficult concept, but it seems to me that psychiatrists and family and friends, and a jury, well-informed by a judge, could make a decision like that, based on establishing the criteria for insanity.

Senator GRASSLEY. Thank you very much for your testimony. I want to thank all the witnesses who have testified today.

This is the last hearing on the insanity defense, and I think we have formed a valuable contribution to the entire record here today, and hope that we can resolve this most important issue.

The meeting is adjourned.

[Whereupon, at 12 p.m., the committee was adjourned.]

APPENDIX

97TH CONGRESS
1ST SESSION**S. 818**

To amend title 18 to limit the insanity defense.

IN THE SENATE OF THE UNITED STATES

MARCH 26 (legislative day, FEBRUARY 16), 1981

Mr. HATCH introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend title 18 to limit the insanity defense.

- 1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That (a) chapter 1 of title 18, United States Code, is
4 amended by adding at the end thereof the following new
5 section:
6 **"§ 16. Insanity defense**
7 **"(a) It shall be a defense to a prosecution under any**
8 **Federal statute, that the defendant, as a result of mental dis-**
9 **ease or defect, lacked the state of mind required as an ele-**

1 ment of the offense charged. Mental disease or defect does
2 not otherwise constitute a defense.

3 “(b) This section applies to prosecutions under any Act
4 of Congress other than—

5 “(1) an Act of Congress applicable exclusively in
6 the District of Columbia;

7 “(2) the Canal Zone Code; or

8 “(3) the Uniform Code of Military Justice (10
9 U.S.C. 801 et seq.)”.

10 (b) The table of sections from chapter 1 of title 18,
11 United States Code, is amended by adding at the end thereof
12 the following new item:

“16. Insanity defense.”

S. 1106

To reform the insanity defense.

IN THE SENATE OF THE UNITED STATES

MAY 5 (legislative day, APRIL 27) 1981

Mr. ZORINSKY (for himself and Mr. THURMOND) introduced the following bill; which
was read twice and referred to the Committee on the Judiciary

A BILL

To reform the insanity defense.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That (a) the first sentence of paragraph (a) of rule 12 of the
4 Federal Rules of Criminal Procedure is amended by adding
5 after “guilty” the following: “, guilty but insane”.

6 (b) Rule 12 is amended by adding at the end thereof the
7 following new paragraph:

8 “(i) The plea of guilty but insane shall be entered pursu-
9 ant to rule 12.2.”

1 SEC. 2. Rule 12.2 of the Federal Rules of Criminal Pro-
2 cedure is amended to read as follows:

3 "Rule 12.2.—Notice of Plea of Guilty But Insane

4 "(a) If a defendant intends to rely upon the plea of
5 guilty but insane, he shall, within the time provided for the
6 filing of pretrial motions or at such later time as the court
7 may direct, notify the attorney for the government in writing
8 of such intention and file a copy of such notice with the clerk.
9 If there is a failure to comply with the requirements of this
10 paragraph, the plea of guilty but insane may not be entered.
11 The court may for cause shown allow late filing of the notice
12 or grant additional time to the parties to prepare for trial or
13 make such other order as may be appropriate.

14 "(b) If a defendant intends to introduce expert testimony
15 relating to a mental disease, defect, or other condition bear-
16 ing upon the issue of whether he had the state of mind re-
17 quired for the offense charged, he shall, within the time pro-
18 vided for the filing of pretrial motions or at such later time as
19 the court may direct, notify the attorney for the government
20 in writing of such intention and file a copy of such notice with
21 the clerk. The court may for cause shown allow late filing of
22 the notice or grant additional time to the parties to prepare
23 for trial or make such other order as may be appropriate.

24 "(c) In an appropriate case the court may, upon motion
25 of the attorney for the government, order the defendant to

1 submit to a psychiatric examination as provided by 18 U.S.C.
2 4242 by at least two qualified psychiatrists designated for
3 this purpose in the order of the court. No statement made by
4 the accused in the course of any examination provided for by
5 this rule, whether the examination shall be with or without
6 the consent of the accused, shall be admitted in evidence
7 against the accused on the issue of guilt in any criminal
8 proceeding.

9 "(d) If there is a failure to give notice when required by
10 paragraph (b) or to submit to an examination when ordered
11 under paragraph (c), the court may exclude the testimony of
12 any expert witness offered by the defendant on the issue of
13 his state of mind.

14 "(e) A defendant is guilty but insane if his actions con-
15 stitute all necessary elements of the offense charged other
16 than the requisite state of mind, and he lacked the requisite
17 state of mind as a result of mental disease or defect."

18 SEC. 3. Chapter 313 of title 18, United States Code, is
19 amended to read as follows:

20 "CHAPTER 313—OFFENDERS WITH MENTAL
21 DISEASE OR DEFECT

"Sec.

"4241. Determination of mental competency to stand trial.

"4242. Determination of the existence of insanity at the time of the offense.

"4243. Hospitalization of a person found guilty but insane.

"4244. Hospitalization of a convicted person suffering from mental disease or defect.

"4245. Hospitalization of an imprisoned person suffering from mental disease or defect.

"4246. Hospitalization of a person due for release but suffering from mental disease or defect.

"4247. General provisions for chapter 313.

1 **§ 4241. Determination of mental competency to stand**
2 **trial**

3 **"(a) MOTION TO DETERMINE COMPETENCY OF DE-**
4 **FENDANT.**—At any time after the commencement of a pros-
5 ecution for an offense and prior to the sentencing of the de-
6 fendant, the defendant or the attorney for the Government
7 may file a motion for a hearing to determine the mental com-
8 petency of the defendant. The court shall grant the motion,
9 or shall order such a hearing on its own motion, if there is
10 reasonable cause to believe that the defendant may presently
11 be suffering from a mental disease or defect rendering him
12 mentally incompetent to the extent that he is unable to un-
13 derstand the nature and consequences of the proceedings
14 against him or to assist properly in his defense.

15 **"(b) PSYCHIATRIC EXAMINATION AND REPORT.**—
16 Prior to the date of the hearing, the court may order that a
17 psychiatric examination of the defendant be conducted, and
18 that a psychiatric report be filed with the court, pursuant to
19 the provisions of section 4247 (b) and (c).

20 **"(c) HEARING.**—The hearing shall be conducted pursu-
21 ant to the provisions of section 4247(d).

22 **"(d) DETERMINATION AND DISPOSITION.**—If, after the
23 hearing, the court finds by a preponderance of the evidence
24 that the defendant is presently suffering from a mental dis-
25 ease or defect rendering him mentally incompetent to the

1 extent that he is unable to understand the nature and conse-
2 quences of the proceedings against him or to assist properly
3 in his defense, the court shall commit the defendant to the
4 custody of the Attorney General. The Attorney General shall
5 hospitalize the defendant for treatment in a suitable mental
6 hospital, or in another facility designated by the court as
7 suitable—

8 **"(1)** for such a reasonable period of time as is
9 necessary to determine whether there is a substantial
10 probability that in the foreseeable future he will attain
11 the capacity to permit the trial to proceed; and

12 **"(2)** for an additional reasonable period of time
13 until—

14 **"(A)** his mental condition is so improved that
15 trial may proceed; or

16 **"(B)** the pending charges against him are
17 disposed of according to law.

18 If a defendant's mental condition is determined to be such
19 that there is not substantial probability that in the foreseeable
20 future he will attain the capacity to permit the trial to pro-
21 ceed, the defendant is subject to the provisions of section
22 4246.

23 **"(e) DISCHARGE FROM MENTAL HOSPITAL.**—When
24 the director of the facility in which a defendant is hospitalized
25 pursuant to subsection (d) determines that the defendant has

1 recovered to such an extent that he is able to understand the
 2 nature and consequences of the proceedings against him and
 3 to assist properly in his defense, he shall promptly file a cer-
 4 tificate to that effect with the clerk of the court that ordered
 5 the commitment. The clerk shall send a copy of the certifi-
 6 cate to the defendant's counsel and to the attorney for the
 7 Government. The court shall hold a hearing, conducted pur-
 8 suant to the provisions of section 4247(d), to determine the
 9 competency of the defendant. If, after the hearing, the court
 10 finds by a preponderance of the evidence that the defendant
 11 has recovered to such an extent that he is able to understand
 12 the nature and consequences of the proceedings against him
 13 and to assist properly in his defense, the court shall order his
 14 immediate discharge from the facility in which he is hospital-
 15 ized and shall set the date for trial.

16 **"(f) ADMISSIBILITY OF FINDING OF COMPETENCY.—**A
 17 finding by the court that the defendant is mentally competent
 18 to stand trial shall not prejudice the defendant in raising the
 19 issue of his insanity as a defense to the offense charged, and
 20 shall not be admissible as evidence in a trial for the offense
 21 charged.

22 **"§ 4242. Determination of the existence of insanity at the**
 23 **time of the offense**

24 **"(a) MOTION FOR PRETRIAL PSYCHIATRIC EXAMINA-**
 25 **TION.—**Upon the filing of a notice, as provided in rule 12.2

1 of the Federal Rules of Criminal Procedure, the court, upon
 2 motion of the attorney for the Government, may order that a
 3 psychiatric examination of the defendant be conducted, and
 4 that a psychiatric report be filed with the court, pursuant to
 5 the provisions of section 4247 (b) and (c).

6 **"(b) SPECIAL VERDICT.—**If the issue of insanity is
 7 raised by notice as provided in rule 12.2 of the Federal Rules
 8 of Criminal Procedure on motion of the defendant or of the
 9 attorney for the Government, or on the court's own motion,
 10 the jury shall be instructed to find, or, in the event of a non-
 11 jury trial, the court shall find, the defendant—

12 **"(1) guilty;**

13 **"(2) not guilty; or**

14 **"(3) guilty but insane.**

15 **"§ 4243. Hospitalization of a person found guilty but**
 16 **insane**

17 **"(a) DETERMINATION OF PRESENT MENTAL CONDI-**
 18 **TION OF CONVICTED PERSON.—**If a person is found guilty
 19 but insane, the court shall order a hearing to determine
 20 whether the person is presently suffering from a mental dis-
 21 ease or defect as a result of which his release would create a
 22 substantial danger to himself or to the person or property of
 23 another. The court may make any order reasonably neces-
 24 sary to secure the appearance of the person at the hearing.

1 may, within ten days after the defendant is found guilty, file a
 2 motion for a hearing on the present mental condition of the
 3 defendant. The court shall grant the motion, or at any time
 4 prior to the sentencing of the defendant shall order such a
 5 hearing on its own motion, if there is reasonable cause to
 6 believe that the defendant may presently be suffering from a
 7 mental disease or defect for the treatment of which he is in
 8 need of custody, care, or treatment in a mental hospital.

9 “(b) PSYCHIATRIC EXAMINATION AND REPORT.—
 10 Prior to the date of the hearing, the court may order that a
 11 psychiatric examination of the defendant be conducted, and
 12 that a psychiatric report be filed with the court, pursuant to
 13 the provisions of section 4247 (b) and (c). In addition to the
 14 information required to be included in the psychiatric report
 15 pursuant to the provisions of section 4247(c), if the report
 16 includes an opinion by the psychiatrists that the defendant is
 17 presently suffering from a mental disease or defect but that it
 18 is not such as to require his custody, care, or treatment in a
 19 mental hospital, the report shall also include an opinion by
 20 the psychiatrists concerning the sentencing alternatives that
 21 could best accord the defendant the kind of treatment he does
 22 need.

23 “(c) HEARING.—The hearing shall be conducted pursu-
 24 ant to the provisions of section 4247(d).

1 “(d) DETERMINATION AND DISPOSITION.—If, after the
 2 hearing, the court is of the opinion that the defendant is pres-
 3 ently suffering from a mental disease or defect and that he
 4 should, in lieu of being sentenced to probation or imprison-
 5 ment, be committed to a mental hospital for custody, care, or
 6 treatment, the court shall commit the defendant to the
 7 custody of the Attorney General. The Attorney General shall
 8 hospitalize the defendant for treatment in a suitable mental
 9 hospital, or in another facility designated by the court as suit-
 10 able. Such a commitment constitutes a provisional sentence
 11 to the maximum term authorized for the offense of which the
 12 defendant was found guilty.

13 “(e) DISCHARGE FROM MENTAL HOSPITAL.—When
 14 the director of the facility in which the defendant is hospital-
 15 ized pursuant to subsection (d) determines that the defendant
 16 has recovered from his mental disease or defect to such an
 17 extent that he is no longer in need of custody, care, or treat-
 18 ment in a mental hospital, he shall promptly file a certificate
 19 to that effect with the clerk of the court that ordered the
 20 commitment. The clerk shall send a copy of the certificate to
 21 the defendant's counsel and to the attorney for the Govern-
 22 ment. If, at the time of the filing of the certificate, the provi-
 23 sional sentence imposed pursuant to subsection (d) has not
 24 expired, the court shall hold a hearing, conducted pursuant to
 25 the provisions of section 4247(d), to determine whether the

1 provisional sentence should be reduced. After the hearing,
2 the court may order that the defendant be released, be placed
3 on probation, or be imprisoned for the remainder of the sen-
4 tence or for any lesser term.

5 **“§ 4245. Hospitalization of an imprisoned person suffering**
6 **from mental disease or defect**

7 **“(a) MOTION TO DETERMINE PRESENT MENTAL CON-**
8 **DITION OF IMPRISONED DEFENDANT.**—A defendant serving
9 a sentence of imprisonment, or an attorney for the Govern-
10 ment at the request of the director of the facility in which the
11 defendant is imprisoned may file a motion with the court for
12 the district in which the facility is located for a hearing on
13 the present mental condition of the defendant. The court shall
14 grant the motion if there is reasonable cause to believe that
15 the defendant may presently be suffering from a mental dis-
16 ease or defect for the treatment of which he is in need of
17 custody, care, or treatment in a mental hospital. A motion
18 filed under this subsection shall stay the release of the de-
19 fendant pending completion of procedures contained in this
20 section.

21 **“(b) PSYCHIATRIC EXAMINATION AND REPORT.**—
22 Prior to the date of the hearing, the court may order that a
23 psychiatric examination of the defendant be conducted, and
24 that a psychiatric report be filed with the court, pursuant to
25 the provisions of section 4247 (b) and (c).

1 **“(c) HEARING.**—The hearing shall be conducted pursu-
2 ant to the provisions of section 4247(d).

3 **“(d) DETERMINATION AND DISPOSITION.**—If, after the
4 hearing, the court is of the opinion that the defendant is pres-
5 ently suffering from a mental disease or defect for the treat-
6 ment of which he is in need of custody, care, or treatment in
7 a mental hospital, the court shall commit the defendant to the
8 custody of the Attorney General. The Attorney General shall
9 hospitalize the defendant for treatment in a suitable mental
10 hospital, or in another facility designated by the court as suit-
11 able, until he is no longer in need of custody, care, or treat-
12 ment in a mental hospital or until the expiration of his sen-
13 tence of imprisonment.

14 **“(e) DISCHARGE MENTAL HOSPITAL.**—When the di-
15 rector of the facility in which the defendant is hospitalized
16 pursuant to subsection (d) determines that the defendant has
17 recovered from his mental disease or defect to such an extent
18 that he is no longer in need of custody, care, or treatment in
19 a mental hospital, he shall promptly file a certificate to that
20 effect with the clerk of the court that ordered the commit-
21 ment. The clerk shall send a copy of the certificate to the
22 defendant's counsel and to the attorney for the Government.
23 If, at the time of the filing of the certificate, the sentence
24 imposed upon the defendant has not expired, the court shall
25 order that the defendant be reimprisoned.

1 "§ 4246. Hospitalization of a person due for release but
2 suffering from mental disease or defect

3 "(a) INSTITUTION OF PROCEEDING.—If the director of
4 a facility in which a person is hospitalized pursuant to this
5 chapter certifies that a person whose sentence is about to
6 expire, or who has been committed to the custody of the
7 Attorney General pursuant to section 4241(d), or against
8 whom all criminal charges have been dropped, is presently
9 suffering from a mental disease or defect as a result of which
10 his release would create a substantial danger to himself or to
11 the person or property of another, and that suitable arrange-
12 ments for the custody and care of the person are not other-
13 wise available, he shall transmit the certificate to the clerk of
14 the court for the district in which the person is confined. The
15 clerk shall send a copy of the certificate to the person, and to
16 the attorney for the Government, and, if the person was com-
17 mitted pursuant to section 4241(d), to the clerk of the court
18 that ordered the commitment. The court shall order a hearing
19 to determine whether the person is presently suffering from a
20 mental disease or defect as a result of which his release
21 would create a substantial danger to himself or to the person
22 or property of another. A certificate filed under this subsec-
23 tion shall stay the release of the person pending completion
24 of procedures contained in this section.

25 "(b) PSYCHIATRIC EXAMINATION AND REPORT.—
26 Prior to the date of the hearing, the court may order that, a

1 psychiatric examination of the defendant be conducted, and
2 that a psychiatric report be filed with the court, pursuant to
3 the provisions of section 4247 (b) and (c).

4 "(c) HEARING.—The hearing shall be conducted pursu-
5 ant to the provisions of section 4247(d).

6 "(d) DETERMINATION AND DISPOSITION.—If, after the
7 hearing, the court finds by a preponderance of the evidence
8 that the person is presently suffering from a mental disease
9 or defect as a result of which his release would create a sub-
10 stantial danger to himself or to the person or property of
11 another, the court shall commit the person to the custody of
12 the Attorney General. The Attorney General shall release
13 the person to the appropriate official of the State in which
14 the person is domiciled if such State will assume responsibili-
15 ty for his care, custody, and treatment. If such State will not
16 then assume such responsibility, the Attorney General shall
17 hospitalize the person for treatment in a suitable mental hos-
18 pital, or in another facility designated by the court as suit-
19 able, until such State will assume such responsibility or until
20 the person's mental condition is so improved that his release
21 would not create a substantial danger to himself or to the
22 person or property of another.

23 "(e) DISCHARGE FROM MENTAL HOSPITAL.—When
24 the director of the facility in which a person is hospitalized
25 pursuant to subsection (d) determines that the person has re-

1 covered from his mental disease or defect to such an extent
 2 that his release would no longer create a substantial danger
 3 to himself or to the person or property of another, he shall
 4 promptly file a certificate to that effect with the clerk of the
 5 court that ordered the commitment. The clerk shall send a
 6 copy of the certificate to the person's counsel and to the at-
 7 torney for the Government. The court shall order the dis-
 8 charge of the person or, on the motion of the attorney for the
 9 Government or on its own motion, shall hold a hearing, con-
 10 ducted pursuant to the provisions of section 4247(d), to deter-
 11 mine whether he should be released. If, after the hearing, the
 12 court finds by the preponderance of the evidence that the
 13 person has recovered from his mental disease or defect to
 14 such an extent that his release would no longer create a sub-
 15 stantial danger to himself or to the person or property of
 16 another, the court shall order his immediate discharge.

17 **“§ 4247. General provisions for chapter 313**

18 **“(a) DEFINITION.—**As used in this chapter, ‘insanity’
 19 means a mental disease or defect as a result of which a
 20 person lacked the state of mind required as an element of the
 21 offense charged.

22 **“(b) PSYCHIATRIC EXAMINATIONS.—**A psychiatric ex-
 23 amination ordered pursuant to this chapter shall be conducted
 24 by at least two qualified psychiatrists. The psychiatrists shall
 25 be—

1 **“(1) designated by the court if the examination is**
 2 **ordered under section 4241, 4242, 4243, or 4244; or**

3 **“(2) designated by the court, and shall include**
 4 **one psychiatrist selected by the defendant, if the exam-**
 5 **ination is ordered under section 4245 or 4246.**

6 **For the purpose of an examination pursuant to an order**
 7 **under section 4241, 4242, 4243, or 4244, the court may**
 8 **commit the person to be examined for a reasonable period,**
 9 **but not more than sixty days, to the custody of the Attorney**
 10 **General for placement in a suitable mental hospital or an-**
 11 **other facility designated by the court as suitable.**

12 **“(c) PSYCHIATRIC REPORTS.—**A psychiatric report or-
 13 **dered pursuant to this chapter shall be prepared by the psy-**
 14 **chiatrists designated to conduct the psychiatric examination,**
 15 **shall be filed with the court with copies provided to the coun-**
 16 **sel for the person examined and to the attorney for the Gov-**
 17 **ernment, and shall include—**

18 **“(1) the person's history and present symptoms;**

19 **“(2) a description of the psychological and medical**
 20 **tests employed and their results;**

21 **“(3) the psychiatrists' findings; and**

22 **“(4) the psychiatrists' opinions as to diagnosis,**
 23 **prognosis, and—**

24 **“(A) if the examination is ordered under sec-**
 25 **tion 4241, whether the person is presently suffer-**

1 ing from a mental disease or defect rendering him
 2 mentally incompetent to the extent that he is
 3 unable to understand the nature and consequences
 4 of the proceedings against him or to assist proper-
 5 ly in his defense;

6 “(B) if the examination is ordered under sec-
 7 tion 4242, whether the person was insane at the
 8 time of the offense charged;

9 “(C) if the examination is ordered under sec-
 10 tion 4243 or 4246, whether the person is present-
 11 ly suffering from a mental disease or defect as a
 12 result of which his release would create a sub-
 13 stantial danger to himself or to the person or
 14 property of another; or

15 “(D) if the examination is ordered under sec-
 16 tion 4244 or 4245, whether the person is present-
 17 ly suffering from a mental disease or defect as a
 18 result of which he is in need of custody, care, or
 19 treatment in a mental hospital.

20 “(d) HEARING.—At a hearing ordered pursuant to this
 21 chapter the person whose mental condition is the subject of
 22 the hearing shall be represented by counsel and, if he is fi-
 23 nancially unable to obtain adequate representation, counsel
 24 shall be appointed for him. The person shall be afforded an
 25 opportunity to testify, to present evidence, to subpoena wit-

1 nesses on his behalf, and to confront and cross-examine wit-
 2 nesses who appear at the hearing.

3 “(e) PERIODIC REPORTS BY MENTAL HOSPITAL.—

4 The director of the facility in which a person is hospitalized
 5 pursuant to—

6 “(1) section 4241 shall prepare semiannual re-
 7 ports; or

8 “(2) section 4243, 4244, 4245, or 4246 shall pre-
 9 pare annual reports;

10 concerning the mental condition of the person and recommen-
 11 dations concerning his continued hospitalization. The reports
 12 shall be submitted to the court that ordered the person's com-
 13 mitment to the facility and copies of the reports shall be sub-
 14 mitted to such other persons as the court may direct.

15 “(f) ADMISSIBILITY OF A DEFENDANT'S STATEMENTS
 16 AT TRIAL.—A statement made by the defendant during the
 17 course of a psychiatric examination pursuant to section 4241
 18 or 4242 is not admissible as evidence against the accused on
 19 the issue of guilt in any criminal proceeding.

20 “(g) HABEAS CORPUS UNIMPAIRED.—Nothing con-
 21 tained in section 4243 or 4246 precludes a person who is
 22 committed under either of such sections from establishing by
 23 writ of habeas corpus his eligibility for release under such
 24 sections.

1 “(h) **AUTHORITY AND RESPONSIBILITY OF THE AT-**
2 **TORNEY GENERAL.—**The Attorney General—

3 “(1) may contract with a state, a locality, or a
4 private agency for the confinement, hospitalization,
5 care, or treatment of, or the provision of services to, a
6 person committed to his custody pursuant to this chap-
7 ter;

8 “(2) may apply for the civil commitment, pursuant
9 to State law, of a person committed to his custody pur-
10 suant to section 4243 or 4246; and

11 “(3) shall consult with the Secretary of the De-
12 partment of Health and Human Services in the general
13 implementation of the provisions of this chapter.”

○

To amend title 18 to limit the insanity defense and to establish a verdict of not guilty only by reason of insanity.

IN THE SENATE OF THE UNITED STATES

JULY 31 (legislative day, JULY 8), 1981

Mr. HATCH introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend title 18 to limit the insanity defense and to establish a verdict of not guilty only by reason of insanity.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 That (a) chapter 1 of title 18, United States Code, is
4 amended by adding at the end thereof the following:

5 **“§ 16. Insanity defense**

6 “(a) **STATE OF MIND.—**It shall be a defense to a pros-
7 ecution under any Federal statute, that the defendant, as a
8 result of mental disease or defect, lacked the state of mind

1 required as an element of the offense charged. Mental disease
2 or defect does not otherwise constitute a defense.

3 **“(b) APPLICATION OF THIS SECTION.—**This section
4 applies to prosecutions under any Act of Congress other
5 than—

6 **“(1) an Act of Congress applicable exclusively in**
7 **the District of Columbia;**

8 **“(2) the Canal Zone Code; or**

9 **“(3) the Uniform Code of Military Justice (10**
10 **U.S.C. 801 et seq.).**

11 **“§17. Determination of the existence of insanity at the**
12 **time of the offense**

13 **“(a) MOTION FOR PRETRIAL PSYCHIATRIC EXAMINA-**
14 **TION.—**Upon the filing of a notice, as provided in rule 12.2
15 of the Federal Rules of Criminal Procedure, the court, upon
16 motion of the attorney for the Government, may order that a
17 psychiatric examination of the defendant be conducted, and
18 that a psychiatric report be filed with the court pursuant to
19 the provisions of section 20 (b) and (c).

20 **“(b) SPECIAL VERDICT.—**If the issue of insanity is
21 raised by notice as provided in rule 12.2 of the Federal Rules
22 of Criminal Procedure on a motion by the defendant or by the
23 attorney for the Government, or on the court's own motion,
24 the jury shall be instructed to find, or, in the event of a non-
25 jury trial, the court shall find, the defendant—

1 **“(1) guilty;**

2 **“(2) not guilty; or**

3 **“(3) not guilty only by reason of insanity.**

4 **“§18. Hospitalization of a person acquitted by reason of**
5 **insanity**

6 **“(a) DETERMINATION OF PRESENT MENTAL CONDI-**
7 **TION OF ACQUITTED PERSON.—**If a person is found not
8 guilty only by reason of insanity at the time of the offense
9 charged, he shall be committed to a suitable facility until
10 such time as he is eligible for release pursuant to subsection
11 (d) of this section. The court shall order a hearing to deter-
12 mine whether the person is currently suffering from a mental
13 disease or defect and that his release would create a signifi-
14 cant risk of bodily injury to another person or serious damage
15 to property of another.

16 **“(b) PSYCHIATRIC EXAMINATION AND REPORT.—**
17 Prior to the date of the hearing, the court shall order that a
18 psychiatric examination of the defendant be conducted, and
19 that a psychiatric report be filed with the court, pursuant to
20 the provisions of section 20 (b) and (c).

21 **“(c) HEARING.—**The hearing shall be conducted pursu-
22 ant to the provisions of section 20(d), and shall be conducted
23 not later than forty days after the date of the finding of guilty
24 only by reason of insanity.

1 “(d) DETERMINATION AND DISPOSITION.—If, after the
2 hearing, the court finds by clear and convincing evidence that
3 the acquitted person is currently suffering from a mental dis-
4 ease or defect and that his release would create a significant
5 risk of bodily injury to another person or serious damage to
6 property of another, the court shall commit the person to the
7 custody of the Attorney General. The Attorney General shall
8 release the person to the appropriate official of the State in
9 which the person is domiciled or was tried if such State will
10 assume responsibility for his custody, care, and treatment.
11 The Attorney General shall make all reasonable efforts to
12 cause such a State to assume such responsibility. If, notwith-
13 standing such efforts, neither such State will assume such
14 responsibility, the Attorney General shall hospitalize the
15 person for treatment in a suitable facility until—

16 “(1) such a State will assume such responsibility;

17 or

18 “(2) the person’s mental condition is such that his
19 release would not create a significant risk of bodily
20 injury to another person or serious damage to property
21 of another;

22 whichever is earlier. The Attorney General shall continue
23 periodically to exert all reasonable efforts to cause such a
24 State to assume such responsibility for the person’s custody,
25 care, and treatment.

1 “(e) DISCHARGE FROM SUITABLE FACILITY.—When
2 the director of a facility determines that an acquitted person,
3 hospitalized pursuant to subsection (d), has recovered from
4 his mental disease or defect to such an extent that his release
5 would no longer create a significant risk of bodily injury to
6 another person or serious damage to property of another, he
7 shall promptly file a certificate to that effect with the clerk of
8 the court that ordered the commitment. The clerk shall send
9 a copy of the certificate to such person’s counsel and to the
10 attorney for the Government. The court shall order the dis-
11 charge of the acquitted person or, on the motion of the attor-
12 ney for the Government or on its own motion, shall hold a
13 hearing, conducted pursuant to the provisions of section
14 20(d), to determine whether he should be released. If, after
15 the hearing, the court finds by a preponderance of evidence
16 that the person has recovered from his mental disease or
17 defect to such an extent that his release would no longer
18 create a significant risk of bodily injury to another person or
19 serious damage to property of another, the court shall order
20 his immediate discharge.

21 “§19. Hospitalization of a convicted person suffering
22 from mental disease or defect

23 “(a) MOTION TO DETERMINE PRESENT MENTAL CON-
24 DITION OF CONVICTED DEFENDANT.—A defendant found
25 guilty of an offense, or the attorney for the Government,

1 may, within ten days after the defendant is found guilty, and
 2 prior to the time the defendant is sentenced, file a motion for
 3 a hearing on the present mental condition of the defendant.
 4 Such motion must be supported by substantial information
 5 indicating that the defendant may currently be suffering from
 6 a mental disease or defect and that he is in need of custody
 7 for care or treatment in a suitable facility for such disease or
 8 defect. The court shall grant the motion, or at any time prior
 9 to the sentencing of the defendant shall order a hearing on its
 10 own motion if the court deems that there is reasonable cause
 11 to believe that the defendant may currently be suffering from
 12 a mental disease or defect and that he is in need of custody
 13 for care or treatment in a suitable facility.

14 “(b) PSYCHIATRIC EXAMINATION AND REPORT.—
 15 Prior to the date of the hearing, the court may order that a
 16 psychiatric examination of the defendant be conducted, and
 17 that a psychiatric report be filed with the court, pursuant to
 18 the provisions of section 20 (b) and (c). In addition to the
 19 information required to be included in the psychiatric report
 20 pursuant to the provisions of section 20(c), if the report in-
 21 cludes an opinion by the examiners that the defendant is cur-
 22 rently suffering from a mental disease or defect but that such
 23 disease or defect does not require his custody for care or
 24 treatment, the report shall also include an opinion by the

1 examiner concerning the sentencing alternatives that could
 2 best provide the defendant with the kind of treatment needed.

3 “(c) HEARING.—The hearing shall be conducted pursu-
 4 ant to the provisions of section 20(d).

5 “(d) DETERMINATION AND DISPOSITION.—If, after the
 6 hearing, the court finds by a preponderance of evidence that
 7 the defendant is presently suffering from a mental disease or
 8 defect and that he should, in lieu of being sentenced to proba-
 9 tion or imprisonment, be committed to a suitable facility for
 10 care or treatment, the court shall commit the defendant to
 11 the custody of the Attorney General. The Attorney General
 12 shall hospitalize the defendant for care or treatment in a suit-
 13 able facility. Such a commitment constitutes a provisional
 14 sentence to the maximum term authorized by law for the
 15 offense of which the defendant was found guilty.

16 “(e) DISCHARGE FROM SUITABLE FACILITY.—When
 17 the director of the facility determines that the defendant, hos-
 18 pitalized pursuant to subsection (d), has recovered from his
 19 mental disease or defect to such an extent that he is no
 20 longer in need of custody for care or treatment in such a
 21 facility, he shall promptly file a certificate to that effect with
 22 the clerk of the court that ordered the commitment. The
 23 clerk shall send a copy of the certificate to the defendant's
 24 counsel and to the attorney for the Government. If, at the
 25 time of the filing of the certificate, the provisional sentence

1 imposed pursuant to subsection (d) has not expired, the court
2 shall proceed finally to sentencing, and may modify the provi-
3 sional sentence.

4 **“§ 20. General provisions**

5 **“(a) DEFINITIONS.—**As used in this title—

6 **“(1) ‘insanity’** means a mental disease or defect of
7 a nature constituting a defense to a Federal criminal
8 prosecution; and

9 **“(2) ‘suitable facility’** means a facility that is suit-
10 able to provide care or treatment given the nature of
11 the offense and the characteristics of the defendant.

12 **“(b) PSYCHIATRIC EXAMINATION.—**A psychiatric ex-
13 amination ordered pursuant to this title shall be conducted by
14 a licensed or certified psychiatrist, or a clinical psychologist
15 and a medical doctor, or, if the court finds it appropriate, by
16 additional examiners. Each examiner shall be designated by
17 the court if the examination is ordered under section 17, 18,
18 or 19. For the purposes of an examination pursuant to an
19 order under section 19, the court may commit the person for
20 a reasonable period not exceeding thirty days, in order to
21 conduct such examination, or pursuant to section 17 or 18,
22 the court may commit such person to the custody of the At-
23 torney General for placement in a suitable facility for a rea-
24 sonable period, but not to exceed forty days. Unless impracti-
25 cable, the psychiatric examination shall be conducted in the

1 suitable facility closest to the court. The director of the facili-
2 ty may apply for a reasonable extension not exceeding fifteen
3 days under section 19, or not exceeding twenty days under
4 section 17 or 18, upon a showing of good cause that addition-
5 al time is necessary to observe and evaluate the defendant.

6 **“(c) PSYCHIATRIC REPORTS.—**A psychiatric report or-
7 dered pursuant to this title shall be prepared by the examiner
8 designated to conduct the psychiatric examination, shall be
9 filed with the court with copies provided to the counsel for
10 the person examined and to the attorney for the Government,
11 and shall include—

12 **“(1) the person’s history and present symptoms;**

13 **“(2) a description of the psychological and medical**
14 **tests employed and their results;**

15 **“(3) the examiner’s findings; and**

16 **“(4) the examiner’s opinions as to diagnosis, prog-**
17 **nosis, and—**

18 **“(A) if the examination is ordered under sec-**
19 **tion 17, whether the person was insane at the**
20 **time of the offense charged;**

21 **“(B) if the examination is ordered under sec-**
22 **tion 18, whether the person is currently suffering**
23 **or in the reasonable future is likely to suffer from**
24 **a mental disease or defect which would create a**

1 significant risk of bodily injury to another person
2 or serious damage to property of another; or

3 “(C) if the examination is ordered under sec-
4 tion 19, whether the person is currently suffering
5 or in the reasonable future is likely to suffer from
6 a mental disease or defect for which he is in need
7 of custody in a suitable facility for care or treat-
8 ment.

9 “(d) HEARING.—At a hearing ordered pursuant to this
10 title the person whose mental condition is the subject of the
11 hearing shall be represented by counsel and, if he is financial-
12 ly unable to obtain adequate representation, counsel shall be
13 appointed for him pursuant to law. The person shall be af-
14 forded an opportunity to testify, to present evidence, to sub-
15 pena witnesses on his behalf, and to confront and cross-ex-
16 amine witnesses who appear at the hearing.

17 “(e) PERIODIC REPORT AND INFORMATION REQUIRE-
18 MENTS FOR SUITABLE FACILITIES.—(1) The director of the
19 facility in which a person is hospitalized pursuant to section
20 18 or 19, shall prepare annual reports concerning the mental
21 condition of such person, and shall make recommendations
22 concerning the need for his continued hospitalization. The re-
23 ports shall be submitted to the court that ordered the per-
24 son's commitment to the facility, and copies of the reports

1 shall be submitted to such other persons as the court may
2 direct.

3 “(2) The director of the facility in which a person is
4 hospitalized pursuant to section 18, 19, or 20, shall inform
5 such person of any rehabilitation programs that are available
6 for persons hospitalized in that facility.

7 “(f) ADMISSIBILITY OF A DEFENDANT'S STATEMENT
8 AT TRIAL.—A statement made by the defendant during the
9 course of a psychiatric examination pursuant to section 17 is
10 not admissible as evidence against the accused on the issue of
11 guilt in any criminal proceeding, but is admissible on the
12 issue of whether or not the defendant suffers from a mental
13 disease or defect.

14 “(g) HABEAS CORPUS UNIMPAIRED.—Nothing con-
15 tained in section 18 precludes a person who is committed
16 under such section from establishing by writ of habeas corpus
17 the illegality of his detention.

18 “(h) DISCHARGE FROM SUITABLE FACILITY.—Re-
19 gardless of whether the director of the facility in which a
20 person is hospitalized has filed a certificate pursuant to the
21 provisions of subsections (e) of either section 18 or 19, coun-
22 sel for the person or his legal guardian may, during such
23 person's hospitalization, file a motion with the court ordering
24 such commitment for a hearing to determine whether the
25 person should be discharged from such facility. Such motion

1 may be filed at any time except that no such motion may be
 2 filed within one hundred and eighty days after a court deter-
 3 mines that the person should continue to be hospitalized. A
 4 copy of the motion shall be sent to the director of the facility
 5 in which the person is hospitalized and to the attorney for the
 6 Government.

7 “(i) **AUTHORITY AND RESPONSIBILITY OF THE AT-**
 8 **TORNEY GENERAL.**—(1) Before a person is placed in a suit-
 9 able facility pursuant to section 18 or 19, the Attorney Gen-
 10 eral shall request the director of each facility under consider-
 11 ation to furnish information describing rehabilitation pro-
 12 grams that would be available to such person, and, in making
 13 a decision as to the placement of such person, shall consider
 14 the extent to which the available programs would meet the
 15 needs of such person.

16 “(2) The Attorney General may contract with a State, a
 17 locality, or a private agency for the confinement, hospitaliza-
 18 tion, care, or treatment of, or the provision of services to, a
 19 person committed to his custody pursuant to this title.”

20 “(b) The table of sections for chapter 1 of title 18, United
 21 States Code, is amended by adding at the end thereof the
 22 following:

“16. Insanity defense.

“17. Determination of the existence of insanity at the time of the offense.

“18. Hospitalization of a person acquitted by reason of insanity.

“19. Hospitalization of a convicted person suffering from mental disease or defect.

“20. General provisions.”

To amend title 18 to limit the defense of insanity.

IN THE SENATE OF THE UNITED STATES

JUNE 23 (legislative day, JUNE 8), 1982

Mr. PRESSLER introduced the following bill; which was read twice and referred to
 the Committee on the Judiciary

A BILL

To amend title 18 to limit the defense of insanity.

1 *Be it enacted by the Senate and House of Representa-*
 2 *tives of the United States of America in Congress assembled,*
 3 That (a) chapter 1 of title 18, United States Code, is amend-
 4 ed by adding at the end thereof the following:
 5 “§ 16. **Insanity defense**
 6 “(a) **STATE OF MIND.**—It shall be a defense to a pros-
 7 ecution under any Federal statute, that the defendant, as a
 8 result of mental disease or defect, lacked the state of mind
 9 required as an element of the offense charged. Mental disease
 10 or defect does not otherwise constitute a defense.

1 “(b) APPLICATION OF THIS SECTION.—This section
2 applies to prosecutions under any Act of Congress other
3 than—

4 “(1) an Act of Congress applicable exclusively in
5 the District of Columbia;

6 “(2) the Canal Zone Code; or

7 “(3) the Uniform Code of Military Justice (10
8 U.S.C. 801 et seq.).

9 “§ 17. Determination of the existence of insanity at the
10 time of the offense

11 “(a) MOTION FOR PRETRIAL PSYCHIATRIC EXAMINA-
12 TION.—Upon the filing of a notice, as provided in rule 12.2
13 of the Federal Rules of Criminal Procedure, that the defend-
14 ant intends to rely on the defense set forth in subsection (a),
15 the court, upon motion of the attorney for the Government,
16 may order that a psychiatric examination of the defendant be
17 conducted, and that a psychiatric report be filed with the
18 court, pursuant to the provisions of section 19 (b) and (c).

19 “(b) SPECIAL VERDICT.—If the issue of insanity is
20 raised by notice as provided in rule 12.2 of the Federal Rules
21 of Criminal Procedure on a motion by the defendant or by the
22 attorney for the Government, or on the court's own motion,
23 the jury shall be instructed to find, or, in the event of a non-
24 jury trial, the court shall find, the defendant—

25 “(1) guilty;

1 “(2) not guilty; or

2 “(3) not guilty only by reason of insanity.

3 “§ 18. Mandatory confinement of a person acquitted by
4 reason of insanity of the crimes of murder
5 and attempted murder

6 “(a) DETERMINATION OF PRESENT MENTAL CONDI-
7 TION OF ACQUITTED PERSON.—If a person is found not
8 guilty only by reason of insanity of the offenses provided in
9 sections 1111 and 1113 of title 18, United States Code, he
10 shall be committed to a suitable facility pursuant to the provi-
11 sions of subsection (d) of this section. The court shall order a
12 hearing to determine whether the person is currently suffer-
13 ing from a mental disease or defect.

14 “(b) PSYCHIATRIC EXAMINATION AND REPORT.—
15 Prior to the date of the hearing, the court shall order that a
16 psychiatric examination of the defendant be conducted, and
17 that a psychiatric report be filed with the court, pursuant to
18 the provisions of section 19 (b) and (c).

19 “(c) HEARING.—The hearing shall be conducted pursu-
20 ant to the provisions of section 19(d), and shall be conducted
21 not later than forty days after the date of the finding of not
22 guilty only by reason of insanity.

23 “(d) DETERMINATION AND DISPOSITION.—If after the
24 hearing, the court finds by a preponderance of evidence that
25 the defendant acquitted only by reason of insanity is present-

1 “(2) not guilty; or

2 “(3) not guilty only by reason of insanity.

3 “§ 18. Mandatory confinement of a person acquitted by
4 reason of insanity of the crimes of murder
5 and attempted murder

6 “(a) DETERMINATION OF PRESENT MENTAL CONDI-
7 TION OF ACQUITTED PERSON.—If a person is found not
8 guilty only by reason of insanity of the offenses provided in
9 sections 1111 and 1113 of title 18, United States Code, he
10 shall be committed to a suitable facility pursuant to the provi-
11 sions of subsection (d) of this section. The court shall order a
12 hearing to determine whether the person is currently suffer-
13 ing from a mental disease or defect.

14 “(b) PSYCHIATRIC EXAMINATION AND REPORT.—
15 Prior to the date of the hearing, the court shall order that a
16 psychiatric examination of the defendant be conducted, and
17 that a psychiatric report be filed with the court, pursuant to
18 the provisions of section 19 (b) and (c).

19 “(c) HEARING.—The hearing shall be conducted pursu-
20 ant to the provisions of section 19(d), and shall be conducted
21 not later than forty days after the date of the finding of not
22 guilty only by reason of insanity.

23 “(d) DETERMINATION AND DISPOSITION.—If after the
24 hearing; the court finds by a preponderance of evidence that
25 the defendant acquitted only by reason of insanity is present-

1 “(1) ‘insanity’ means a mental disease or defect of
2 a nature constituting a defense to a Federal criminal
3 prosecution; and

4 “(2) ‘suitable facility’ means a facility that is suit-
5 able to provide care or treatment given the nature of
6 the offense and the characteristics of the defendant.

7 “(b) PSYCHIATRIC EXAMINATION.—A psychiatric ex-
8 amination ordered pursuant to this title shall be conducted by
9 a licensed or certified psychiatrist, or a clinical psychologist
10 and a medical doctor, or if the court finds it appropriate, by
11 additional examiners. Each examiner shall be designated by
12 the court.

13 “(c) PSYCHIATRIC REPORTS.—A psychiatric report or-
14 dered pursuant to this title shall be prepared by the examiner
15 designated to conduct the psychiatric examination, shall be
16 filed with the court with copies provided to the counsel for
17 the person examined and to the attorney for the Government,
18 and shall include—

19 “(1) the person’s history and present symptoms;

20 “(2) a description of the psychological and medical
21 tests employed and their results;

22 “(3) the examiner’s findings; and

23 “(4) the examiner’s opinions as to diagnosis, prog-
24 nosis, and—

1 “(A) if the examination is ordered under sec-
2 tion 17, whether the person was insane at the
3 time of the offense charged;

4 “(B) if the examination is ordered under sec-
5 tion 18; whether the person is currently suffering
6 or in the reasonable future is likely to suffer from
7 a mental disease or defect.

8 “(d) HEARING.—At a hearing ordered pursuant to this
9 title the person whose mental condition is the subject of the
10 hearing shall be represented by counsel and, if he is financial-
11 ly unable to obtain adequate representation, counsel shall be
12 appointed for him pursuant to law. The person shall be af-
13 forded an opportunity to testify, to present evidence, to sub-
14 poena witnesses on his behalf, and to confront and cross-
15 examine witnesses who appear at the hearing.

16 “(e) PERIODIC REPORT AND INFORMATION REQUIRE-
17 MENTS FOR SUITABLE FACILITIES.—The director of the fa-
18 cility in which a person is hospitalized pursuant to section 18,
19 shall prepare annual reports concerning the mental condition
20 of such person, and shall make recommendations concerning
21 the need for his continued hospitalization. The reports shall
22 be submitted to the court that ordered the person's commit-
23 ment to the facility, and copies of the reports shall be submit-
24 ted to such other persons as the court may direct.”.

1 (b) The table of sections for chapter 1 of title 18, United
2 States Code, is amended by adding at the end thereof the
3 following:

“16 Insanity defense.

“17 Determination of the existence of insanity at the time of the offense.

“18 Mandatory confinement of a person acquitted by reason of insanity.

“19 General provisions.”.

97TH CONGRESS
2D SESSION

S. 2672

To reform the insanity defense and to establish a verdict of guilty but mentally ill.

IN THE SENATE OF THE UNITED STATES

JUNE 23 (legislative day, JUNE 8), 1982

Mr. QUAYLE introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To reform the insanity defense and to establish a verdict of guilty but mentally ill.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 That (a) chapter 1 of title 18, United States Code, is amend-
4 ed by adding at the end thereof the following:

5 "§ 16. Insanity defense

6 "(a) STATE OF MIND.—It shall be a defense to a pros-
7 ecution under any Federal statute, that the defendant, as a
8 result of mental disease or defect, lacked the state of mind
9 required as an element of the offense charged. Mental disease
10 or defect does not otherwise constitute a defense.

1 "(b) BURDEN OF PROOF.—The burden of proof is on
2 the defendant to establish the defense of insanity by a pre-
3 ponderance of the evidence.

4 "(c) APPLICATION OF THIS SECTION.—This section
5 applies to prosecutions under any Act of Congress other
6 than—

7 "(1) an Act of Congress applicable exclusively in
8 the District of Columbia;

9 "(2) the Canal Zone Code; or

10 "(3) the Uniform Code of Military Justice (10
11 U.S.C. 801 et seq.)."

12 SEC. 2. (a) The first sentence of paragraph (a) of rule 12
13 of the Federal Rules of Criminal Procedure is amended by
14 adding after "guilty" the following: ", guilty but mentally
15 ill".

16 (b) Rule 12 is amended by adding at the end thereof the
17 following new paragraph:

18 "(i) The plea of guilty but mentally ill shall be entered
19 pursuant to rule 12.2."

20 SEC. 3. Rule 12.2 of the Federal Rules of Criminal Pro-
21 cedure is amended to read as follows:

22 "Rule 12.2.—Notice of Plea of Guilty But Mentally Ill

23 "(a) If a defendant intends to rely upon the plea of
24 guilty but mentally ill, he shall, within the time provided for
25 the filing of pretrial motions or at such later time as the court

1 may direct, notify the attorney for the government in writing
 2 of such intention and file a copy of such notice with the clerk.
 3 If there is a failure to comply with the requirements of this
 4 paragraph, the plea of guilty but mentally ill may not be
 5 entered. The court may for cause shown allow late filing of
 6 the notice or grant additional time to the parties to prepare
 7 for trial or make such other order as may be appropriate.

8 “(b) If a defendant intends to introduce evidence relat-
 9 ing to a mental disease, defect, or other condition bearing
 10 upon the issue of whether he had the state of mind required
 11 for the offense charged, he shall, within the time provided for
 12 the filing of pretrial motions or at such later time as the court
 13 may direct, notify the attorney for the government in writing
 14 of such intention and file a copy of such notice with the clerk.
 15 The court may for cause shown allow late filing of the notice
 16 or grant additional time to the parties to prepare for trial or
 17 make such other order as may be appropriate.

18 “(c) Upon motion of the attorney for the government the
 19 court shall order the defendant to submit to a psychiatric
 20 examination by at least two qualified psychiatrists designated
 21 for this purpose in the order of the court. No statement made
 22 by the accused in the course of any examination provided for
 23 by this rule, whether the examination shall be with or with-
 24 out the consent of the accused, shall be admitted in evidence

1 against the accused on the issue of guilt in any criminal pro-
 2 ceeding.

3 “(d) If there is a failure to give notice when required by
 4 paragraph (b) or to submit to an examination when ordered
 5 under paragraph (c), the court may exclude the testimony of
 6 any expert witness offered by the defendant on the issue of
 7 his state of mind.

8 “(e) A defendant is guilty but mentally ill if his actions
 9 constitute all necessary elements of the offense charged other
 10 than the requisite state of mind, and he lacked the requisite
 11 state of mind as a result of mental disease or defect.”

12 SEC. 4. Chapter 313 of title 18, United States Code, is
 13 amended by adding the following sections:

14 “§ 4249. Determination of the existence of mental illness
 15 at the time of the offense

16 “(a) MOTION FOR PRETRIAL PSYCHIATRIC EXAMINA-
 17 TION.—Upon the filing of a notice, as provided in rule 12.2
 18 of the Federal Rules of Criminal Procedure, the court, upon
 19 motion of the attorney for the government, may order that a
 20 psychiatric examination of the defendant be conducted, and
 21 that a psychiatric report be filed with the court.

22 “(b) SPECIAL VERDICT.—If the issue of mental illness
 23 is raised by notice as provided in rule 12.2 of the Federal
 24 Rules of Criminal Procedure on motion of the defendant or of
 25 the attorney for the government, or on the court's own

1 motion, the jury shall be instructed to find, or, in the event of
2 a nonjury trial, the court shall find, the defendant—

3 “(1) guilty;

4 “(2) not guilty; or

5 “(3) guilty but mentally ill.

6 “§ 4250. Hospitalization of a person found guilty but men-
7 tally ill

8 “(a) DETERMINATION OF PRESENT MENTAL CONDI-
9 TION OF CONVICTED PERSON.—If a person is found guilty
10 but mentally ill, the court shall sentence him in the same
11 manner as a defendant found guilty of the offense. The court
12 shall then order a hearing to determine whether the person is
13 presently suffering from a mental disease or defect as a result
14 of which his release would create a substantial danger to
15 himself or to the person or property of another. The court
16 may make any order reasonably necessary to secure the ap-
17 pearance of the person at the hearing.

18 “(b) PSYCHIATRIC EXAMINATION AND REPORT.—
19 Prior to the date of the hearing, the court may order that a
20 psychiatric examination of the defendant be conducted, and
21 that a psychiatric report be filed with the court.

22 “(c) DETERMINATION AND DISPOSITION.—If, after the
23 hearing, the court finds by a preponderance of the evidence
24 that a person found guilty but insane is presently suffering
25 from a mental disease or defect as a result of which his re-

1 lease would create a substantial danger to himself or to the
2 person or property of another, the court shall commit the
3 person to the custody of the Attorney General. The Attorney
4 General shall release the person to the appropriate official of
5 the State in which the person is domiciled if such State will
6 assume responsibility for his care, custody, and treatment. If
7 such State will not then assume such responsibility, the At-
8 torney General shall hospitalize the person for treatment in a
9 suitable mental hospital, or in another facility designated by
10 the court as suitable, until such State will assume such re-
11 sponsibility.

12 “(d) DISCHARGE FROM MENTAL HOSPITAL.—When
13 the director of the facility in which a person found guilty but
14 mentally ill is hospitalized pursuant to subsection (c) deter-
15 mines that the person has recovered from his mental disease
16 or defect to such an extent that his release would no longer
17 create a substantial danger to himself or to the person or
18 property of another, he shall promptly file a certificate to that
19 effect with the clerk of the court that ordered the commit-
20 ment. The clerk shall send a copy of the certificate to the
21 person's counsel and to the attorney for the government. The
22 court shall order the discharge of the person or, on the
23 motion of the attorney for the government or on its own
24 motion, shall hold a hearing to determine whether he should
25 be released. If, after the hearing, the court finds by a prepon-

1 derance of the evidence that the person has recovered from
 2 his mental disease or defect to such an extent that his release
 3 would no longer create a substantial danger to himself or to
 4 the person or property of another, the court shall order his
 5 immediate discharge.”.

To amend title 18 to establish an insanity defense, to establish a verdict of not guilty only by reason of insanity and for other purposes.

IN THE SENATE OF THE UNITED STATES

JUNE 24 (legislative day, JUNE 8), 1982

Mr. NUNN (for himself, Mr. CHILES, and Mr. RANDOLPH) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend title 18 to establish an insanity defense, to establish a verdict of not guilty only by reason of insanity and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
 2 *tives of the United States of America in Congress assembled,*
 3 That this Act may be cited as the “Insanity Defense Act of
 4 1982”.

5 SECTION 1. Chapter 313 of title 18, United States
 6 Code, is amended by adding the following sections:

7 “§ 4249. **Insanity at the time of the offense**

8 “(a) **INSANITY DEFENSE.**—It is a defense to a criminal
 9 prosecution under any Federal statute that a defendant, as a

1 result of mental disease or defect, lacked (1) the ability to
2 understand the nature and quality of the Act, or (2) the abili-
3 ty to distinguish right and wrong in respect to the Act.

4 “(b) In any criminal prosecution, the burden of proving
5 insanity shall rest with the defendant.

6 “(c) SPECIAL VERDICT.—If the issue of insanity is
7 raised by notice as provided by rule 12.2 of the Federal
8 Rules of Criminal Procedure on motion of the defendant or
9 by the attorney for the government, or on the court’s own
10 motion, the jury shall be instructed to find, or, in the event of
11 a nonjury trial, the court shall find, the defendant:

12 “(1) guilty;

13 “(2) not guilty; or

14 “(3) not guilty only by reason of insanity.

15 “§ 4250. Determination of the existence of insanity at the
16 time of the offense

17 “(a) Upon the filing of a notice, as provided in rule 12.2
18 of the Federal Rules of Criminal Procedure, the court, upon
19 motion by the attorney for the government, may order that a
20 psychiatric examination of the defendant be conducted, and
21 that a psychiatric report be filed with the court pursuant to
22 section 4252 (a) and (b).

1 “§ 4251. Hospitalization of a person found not guilty only
2 by reason of insanity

3 “(a) If a person is found not guilty only by reason of
4 insanity, the court shall order a hearing to determine whether
5 the person is presently suffering from a mental disease or
6 defect as a result of which his release would create a substan-
7 tial danger to himself, to another person, or to the property of
8 another person. Prior to the date of the hearing, the court
9 may order that a psychiatric examination of the defendant be
10 conducted, and that a psychiatric report be filed with the
11 court, pursuant to the provisions of section 4252 (a) and (b).

12 “(b) HEARING.—The hearing shall be conducted pursu-
13 ant to the provisions of section 4252(c).

14 “(c) DETERMINATION AND DISPOSITION.—If, after the
15 hearing, the court finds by a preponderance of the evidence
16 that the defendant is presently suffering from a mental dis-
17 ease or defect as a result of which his release would create a
18 substantial danger to himself, another person, or the property
19 of another and that he should be committed to a mental hos-
20 pital for custody, care, or treatment, the court shall commit
21 the defendant to the custody of the Attorney General. The
22 Attorney General shall hospitalize the defendant for treat-
23 ment in a suitable mental hospital, or in another suitable fa-
24 cility designated by the court as suitable.

25 “(d) DISCHARGE FROM MENTAL HOSPITAL OR OTHER
26 SUITABLE FACILITY.—When the director of the facility to

1 which the defendant is committed pursuant to subsection (c)
 2 determines that the defendant has recovered from his mental
 3 disease or defect to such an extent that the defendant is no
 4 longer in need of custody, care or treatment, the director
 5 shall promptly file a certificate to that effect with the clerk of
 6 the court which ordered the commitment. The clerk shall
 7 send a copy of the certificate to the defendant's counsel and
 8 to the attorney for the government. If, after a hearing, the
 9 court determines by a preponderance of the evidence that the
 10 defendant has recovered from his mental disease or defect,
 11 and no longer poses a danger to himself, another person or
 12 the property of another, the defendant shall be ordered dis-
 13 charged from such facility.

14 "§ 4252. General Provisions

15 "(a) PSYCHIATRIC EXAMINATIONS.—A psychiatric ex-
 16 amination ordered pursuant to this chapter shall be conducted
 17 by at least two licensed or certified psychiatrists, clinical psy-
 18 chologists or medical doctors, or, if the court finds it appro-
 19 priate, by additional examiners. Such examiners shall be—

- 20 "(1) designated by the court if the examination is
 21 ordered under section 4244; or
 22 "(2) designated by the court, and shall include one
 23 examiner selected by the defendant, if the examination
 24 is ordered under section 4251.

1 "For the purposes of such examination, the court may
 2 commit the person for a reasonable period not to exceed sixty
 3 days, in order to conduct such examination, to the custody of
 4 the Attorney General for placement in a mental hospital or
 5 other suitable facility. Unless impracticable, the examination
 6 shall be conducted in a suitable facility closest to the court.
 7 The director of the facility may apply for a reasonable exten-
 8 sion not exceeding thirty days, upon a showing of good cause
 9 that additional time is needed to observe and evaluate the
 10 defendant.

11 "(b) PSYCHIATRIC REPORTS.—A psychiatric report or-
 12 dered pursuant to this title shall be prepared by the examin-
 13 ers designated, shall be filed with the court with copies pro-
 14 vided to the counsel for the defendant and to the attorney for
 15 the government, and shall include:

- 16 "(1) the person's history and present symptoms;
 17 "(2) a description of the psychological, medical or
 18 other tests employed and their results;
 19 "(3) the examiners' findings; and
 20 "(4) the examiners' opinions as to diagnosis, prog-
 21 nosis, and—
 22 "(A) if the examination was ordered under
 23 section 4250, whether the person was insane at
 24 the time of the offense charged;

1 “(B) if the examination was ordered under
2 section 4251(a), whether the person is currently
3 suffering from a mental disease or defect which
4 would create a danger to the person, to another
5 person, or to the property of another; or

6 “(C) if the examination was ordered under
7 section 4244, whether the person is currently suf-
8 fering from mental incompetency such that he is
9 unable to understand the proceedings against him
10 or properly assist in his own defense.

11 “(c) HEARING.—At a hearing ordered pursuant to this
12 chapter the person whose mental condition is the subject of
13 the hearing shall be represented by counsel and, if he is fi-
14 nancially unable to obtain adequate representation, counsel
15 shall be appointed for him. The person shall be afforded the
16 opportunity to testify, to present evidence, to subpoena wit-
17 nesses and to confront and cross-examine witnesses who
18 appear at the hearing.

19 “(d) ADMISSIBILITY OF A DEFENDANT'S STATEMENT
20 AT TRIAL.—A statement made by a defendant during the
21 course of an examination conducted pursuant to this chapter
22 is not admissible as evidence against him in any criminal pro-
23 ceeding, but is admissible on the issue of whether or not he
24 suffers from a mental disease or defect.

1 “(e) HABEAS CORPUS.—Nothing contained in this
2 chapter precludes a person committed under this chapter
3 from establishing by writ of habeas corpus the illegality of his
4 detention.

5 “(f) AUTHORITY OF THE ATTORNEY GENERAL.—The
6 Attorney General may contract with a State, a locality or a
7 private agency for the confinement, hospitalization, care or
8 treatment of, or the provision of services to, a person com-
9 mitted to his custody under this chapter.”.

10 SEC. 2. Section 4244 of title 18, United States Code, is
11 amended by deleting all after “his mental condition,” and
12 adding the following: “by at least two licensed or certified
13 psychiatrists, clinical psychologists or medical doctors, who
14 shall report to the court. For the purpose of the examination
15 the court may order the accused committed pursuant to sec-
16 tion 4251 of this chapter. If the report of the examiners indi-
17 cates a present insanity or such mental incompetency in the
18 accused, the court shall hold a hearing, upon due notice, pur-
19 suant to section 4252(c). A finding by the court that the ac-
20 cused is mentally competent to stand trial shall in no way
21 prejudice the accused in a plea of insanity as a defense to the
22 crime charged, and such finding shall not be introduced in
23 evidence or that issue nor otherwise be brought to the notice
24 of the jury.”.

1 **SEC. 3.** Chapter 313 of title 18, United States Code, is
 2 amended by redesignating sections 4251 through 4255 as
 3 sections 4261 through 4265, respectively.

○

S. 2745

To amend title 18 to limit the insanity defense.

IN THE SENATE OF THE UNITED STATES

JULY 16 (legislative day, JULY 12), 1982

Mr. SYMMS (for himself and Mr. McCLUBE) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend title 18 to limit the insanity defense.

1 *Be it enacted by the Senate and House of Representa-*
 2 *tives of the United States of America in Congress assembled,*
 3 That chapter 1 of title 18, United States Code, is amended
 4 by adding at the end thereof the following new section:
 5 "**§ 16. Insanity defense**
 6 "(a) Mental condition shall not be a defense to any
 7 charge of criminal conduct.
 8 "(b) Nothing in this section is intended to prevent the
 9 admission of expert evidence on the issues of mens rea or any
 10 state of mind which is an element of the offense, subject to
 11 the rules of evidence.

1 “(c) This section applies to prosecutions under any Act
2 of Congress other than—

3 “(1) an Act of Congress applicable exclusively in
4 the District of Columbia;

5 “(2) the Canal Zone Code; or

6 “(3) the Uniform Code of Military Justice (10
7 U.S.C. 801 et seq.).”

8 SEC. 2. Rule 12.2 of the Federal Rules of Criminal Pro-
9 cedure is repealed.

10 SEC. 3. (a) Chapter 313 of title 18, United States Code,
11 is amended by adding at the end thereof the following:

12 “§ 4249. Sentencing, treatment, and transfer of the men-
13 tally ill

14 “(a) PSYCHIATRIC EXAMINATION AND REPORT.—

15 Prior to the date of the sentencing of a defendant, if the court
16 determines that the defendant is currently suffering from a
17 mental disease or defect the court may order that a psychiat-
18 ric examination of the defendant be conducted, and that a
19 psychiatric report be filed with the court.

20 “(b) DISPOSITION.—After reviewing the report pre-
21 pared pursuant to subsection (a), the court may sentence the
22 defendant to serve all or a portion of a sentence in the custo-
23 dy of a suitable facility for appropriate treatment of his
24 mental condition.

1 “(c) TRANSFER TO FEDERAL IMPRISONMENT.—If the
2 facility director in which the defendant is committed pursuant
3 to subsection (b) determines that the defendant—

4 “(1) has recovered from his mental condition;

5 “(2) is no longer in need of custody, care, or
6 treatment in a mental hospital; or

7 “(3) will not benefit from further custody, care, or
8 treatment,

9 the director shall promptly file a certificate to that effect with
10 the court that ordered the commitment pursuant to subsec-
11 tion (b) and the Bureau of Prisons, and shall effectuate a
12 transfer to the Bureau of Prisons for the remainder of defend-
13 ant's sentence, if defendant is not presently committed to a
14 Bureau of Prisons facility.

15 “(d) TREATMENT OF PERSON FOUND NOT GUILTY
16 BUT WHO IS MENTALLY ILL.—If a person is found not
17 guilty but the court determines that the defendant is present-
18 ly suffering from a mental condition whereby his release
19 would create a substantial danger to himself or to the person
20 or property of another, the court may, prior to releasing the
21 person, order the defendant to submit to a psychiatric exami-
22 nation, and order that the report of such examination be filed
23 with the court. If the court finds that the defendant is pres-
24 ently suffering from a mental condition whereby his release
25 would create a substantial danger to himself or to the person

1 or property of another, the court may, after a hearing with
 2 notice to all parties, commit the defendant to the custody of
 3 the State in which the defendant is domiciled or was tried for
 4 the defendant's care, custody, and treatment. If such State
 5 will not assume such responsibility, the court may order the
 6 Attorney General to hospitalize the defendant for treatment
 7 in a suitable mental health facility, or in some other facility
 8 designated by the court, until such State will assume such
 9 responsibility or until the person's mental condition is im-
 10 proved so that the defendant's release will not create a sub-
 11 stantial danger to himself or to the person or property of
 12 another.

13 “(e) ADMISSIBILITY OF A DEFENDANT'S STATEMENT
 14 AT TRIAL.—Any statement made by the defendant during
 15 the course of a psychiatric examination for the purposes of
 16 this section shall not be admissible as direct evidence against
 17 the defendant on the issue of guilt.

18 “(f) DUTIES AND AUTHORITY OF THE ATTORNEY
 19 GENERAL.—The Attorney General—

20 “(1) may contract with a State, a locality, or a
 21 private agency for the confinement, hospitalization,
 22 care, or treatment of, or the provision of services to, a
 23 person committed to his custody pursuant to subsection
 24 (d); and

1 “(2) may apply for civil commitment, pursuant to
 2 State law, of a person committed to his custody pursu-
 3 ant to subsection (d).”.

4 (b) The table of sections for chapter 313 of title 18,
 5 United States Code is amended by adding at the end thereof
 6 the following:

“4249. Sentencing, treatment, and transfer of the mentally ill.”.

S. 2780

To limit the insanity defense and to provide a procedure for commitment of defendants found guilty who are mentally ill.

IN THE SENATE OF THE UNITED STATES

JULY 27 (legislative day, JULY 12), 1982

Mr. COCHRAN introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To limit the insanity defense and to provide a procedure for commitment of defendants found guilty who are mentally ill.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That chapter 1 of title 18, United States Code, is amended
4 by adding at the end thereof the following:

5 **“§ 16. Insanity defense**

6 **“(a) It shall be a defense to a prosecution under any**
7 **Federal statute that the defendant, as a result of a mental**
8 **disease, could not at the time the offense was committed—**

9 **“(1) understand the nature and quality of his ac-**
10 **tions constituting the offense; or**

1 **“(2) determine the wrongfulness of his actions**
2 **constituting the offense.**

3 **“(b) The defendant has the burden of proving the de-**
4 **fense of insanity by a preponderance of the evidence.**

5 **“(c) Expert witnesses shall not be permitted to offer**
6 **opinions on the ultimate legal issues presented to the trier of**
7 **fact.”**

8 **SEC. 2. (a) The first sentence of paragraph (a) of Rule**
9 **12 of the Federal Rules of Criminal Procedure is amended by**
10 **adding after “guilty” the following: “, not guilty by reason of**
11 **insanity”.**

12 **(b) Rule 12 is amended by adding at the end thereof the**
13 **following new paragraph:**

14 **“(i) The plea of not guilty by reason of insanity shall be**
15 **entered pursuant to Rule 12.2.”**

16 **SEC. 3. Rule 12.2 of the Federal Rules of Criminal Pro-**
17 **cedure is amended to read as follows:**

18 **“Rule 12.2.—Notice of Plea of Not Guilty by Reason of In-**
19 **sanity**

20 **“(a) If a defendant intends to rely upon the plea of not**
21 **guilty by reason of insanity based on section 16 of title 18, he**
22 **shall, within the time provided for the filing of pretrial mo-**
23 **tions or at such later time as the court may direct, notify the**
24 **attorney for the government in writing of such intention and**
25 **file a copy of such notice with the clerk. If there is a failure**

1 to comply with the requirements of this paragraph, the plea
2 of not guilty by reason of insanity may not be entered. The
3 court may for cause shown allow late filing of the notice or
4 grant additional time to the parties to prepare for trial or
5 make such other order as may be appropriate.

6 “(b) If a defendant intends to introduce expert testimony
7 relating to a mental disease, defect, or other condition bear-
8 ing upon the issue of whether he had the state of mind re-
9 quired for the offense charged, he shall, within the time pro-
10 vided for the filing of pretrial motions or at such later time as
11 the court may direct, notify the attorney for the government
12 in writing of such intention and file a copy of such notice with
13 the clerk. The court may for cause shown allow late filing of
14 the notice or grant additional time to the parties to prepare
15 for trial or make such other order as may be appropriate.

16 “(c) In an appropriate case the court may, upon motion
17 of the attorney for the government, order the defendant to
18 submit to a psychiatric examination as provided by 18 U.S.C.
19 4242 by at least two qualified psychiatrists designated for
20 this purpose in the order of the court. No statement made by
21 the accused in the course of any examination provided for by
22 this rule, whether the examination shall be with or without
23 the consent of the accused, shall be admitted in evidence
24 against the accused on the issue of guilt in any criminal pro-
25 ceeding.

1 “(d) If there is a failure to give notice when required by
2 paragraph (b) or to submit to an examination when ordered
3 under paragraph (c), the court may exclude the testimony of
4 any expert witness offered by the defendant on the issue of
5 his state of mind.”

6 SEC. 4. Chapter 313 of title 18, United States Code, is
7 amended to read as follows:

8 **“CHAPTER 313—OFFENDERS WITH MENTAL**
9 **DISEASE OR DEFECT**

“Sec.

“4241. Determination of mental competency to stand trial.

“4242. Determination of the existence of insanity at the time of the offense.

“4243. Hospitalization of a person found not guilty by reason of insanity.

“4244. Hospitalization of a convicted person suffering from mental disease or defect.

“4245. Hospitalization of an imprisoned person suffering from mental disease or
defect.

“4246. Hospitalization of a person due for release but suffering from mental disease
or defect.

“4247. General provisions for chapter 313.

10 **“§ 4241. Determination of mental competency to stand**
11 **trial**

12 **“(a) MOTION TO DETERMINE COMPETENCY OF DE-**
13 **FENDANT.—**At any time after the commencement of a pros-
14 ecution for an offense and prior to the sentencing of the de-
15 fendant, the defendant or the attorney for the government
16 may file a motion for a hearing to determine the mental com-
17 petency of the defendant. The court shall grant the motion,
18 or shall order such a hearing on its own motion, if there is
19 reasonable cause to believe that the defendant may presently
20 be suffering from a mental disease or defect rendering him

1 mentally incompetent to the extent that he is unable to un-
2 derstand the nature and consequences of the proceedings
3 against him or to assist properly in his defense.

4 “(b) PSYCHIATRIC EXAMINATION AND REPORT.—
5 Prior to the date of the hearing, the court may order that a
6 psychiatric examination of the defendant be conducted, and
7 that a psychiatric report be filed with the court, pursuant to
8 the provisions of section 4247 (b) and (c).

9 “(c) HEARING.—The hearing shall be conducted pursu-
10 ant to the provisions of section 4247(d).

11 “(d) DETERMINATION AND DISPOSITION.—If, after the
12 hearing, the court finds by a preponderance of the evidence
13 that the defendant is presently suffering from a mental dis-
14 ease or defect rendering him mentally incompetent to the
15 extent that he is unable to understand the nature and conse-
16 quences of the proceedings against him or to assist properly
17 in his defense, the court shall commit the defendant to the
18 custody of the Attorney General. The Attorney General shall
19 hospitalize the defendant for treatment in a suitable mental
20 hospital, or in another facility designated by the court as suit-
21 able—

22 “(1) for such a reasonable period of time as is
23 necessary to determine whether there is a substantial
24 probability that in the foreseeable future he will attain
25 the capacity to permit the trial to proceed; and

1 “(2) for an additional reasonable period of time
2 until—

3 “(A) his mental condition is so improved that
4 trial may proceed; or

5 “(B) the pending charges against him are
6 disposed of according to law.

7 If a defendant's mental condition is determined to be such
8 that there is not substantial probability that in the foreseeable
9 future he will attain the capacity to permit the trial to pro-
10 ceed, the defendant is subject to the provisions of section
11 4246.

12 “(e) DISCHARGE FROM MENTAL HOSPITAL.—When
13 the director of the facility in which a defendant is hospitalized
14 pursuant to subsection (d) determines that the defendant has
15 recovered to such an extent that he is able to understand the
16 nature and consequences of the proceedings against him and
17 to assist properly in his defense, he shall promptly file a cer-
18 tificate to that effect with the clerk of the court that ordered
19 the commitment. The clerk shall send a copy of the certifi-
20 cate to the defendant's counsel and to the attorney for the
21 government. The court shall hold a hearing, conducted pur-
22 suant to the provisions of section 4247(d), to determine the
23 competency of the defendant. If, after the hearing, the court
24 finds by a preponderance of the evidence that the defendant
25 has recovered to such an extent that he is able to understand

1 the nature and consequences of the proceedings against him
 2 and to assist properly in his defense, the court shall order his
 3 immediate discharge from the facility in which he is hospital-
 4 ized and shall set the date for trial.

5 “(f) **ADMISSIBILITY OF FINDING OF COMPETENCY.**—A
 6 finding by the court that the defendant is mentally competent
 7 to stand trial shall not prejudice the defendant in raising the
 8 issue of his insanity as a defense to the offense charged, and
 9 shall not be admissible as evidence in a trial for the offense
 10 charged.

11 “§ 4242. **Determination of the existence of insanity at the**
 12 **time of the offense**

13 “(a) **MOTION FOR PRETRIAL PSYCHIATRIC EXAMINA-**
 14 **TION.**—Upon the filing of a notice, as provided in Rule 12.2
 15 of the Federal Rules of Criminal Procedure, the court, upon
 16 motion of the attorney for the government, may order that a
 17 psychiatric examination of the defendant be conducted, and
 18 that a psychiatric report be filed with the court, pursuant to
 19 the provisions of section 4247 (b) and (c).

20 “(b) **SPECIAL VERDICT.**—If the issue of insanity is
 21 raised by notice as provided in Rule 12.2 of the Federal
 22 Rules of Criminal Procedure on motion of the defendant or of
 23 the attorney for the government, or on the court's own
 24 motion, the jury shall be instructed to find, or, in the event of
 25 a nonjury trial, the court shall find, the defendant—

1 “(1) guilty;

2 “(2) not guilty;

3 “(3) guilty but mentally ill; or

4 “(4) not guilty by reason of insanity.

5 The defendant shall be found guilty but mentally ill if the jury
 6 or court finds that the defendant is guilty but at the time of
 7 the commission of the offense was suffering from some mental
 8 disease or defect that impaired his ability to conform his ac-
 9 tions to the law.

10 “§ 4243. **Hospitalization of a person found not guilty by**
 11 **reason of insanity**

12 “(a) **DETERMINATION OF PRESENT MENTAL CONDI-**
 13 **TION OF CONVICTED PERSON.**—If a person is found not
 14 guilty by reason of insanity, the court shall order a hearing to
 15 determine whether the person is presently suffering from a
 16 mental disease or defect as a result of which his release
 17 would create a substantial danger to himself or to the person
 18 or property of another. The court may make any order rea-
 19 sonably necessary to secure the appearance of the person at
 20 the hearing.

21 “(b) **PSYCHIATRIC EXAMINATION AND REPORT.**—
 22 Prior to the date of the hearing, the court may order that a
 23 psychiatric examination of the defendant be conducted, and
 24 that a psychiatric report be filed with the court, pursuant to
 25 the provisions of section 4247 (b) and (c).

1 hearing on its own motion, if there is reasonable cause to
2 believe that the defendant may presently be suffering from a
3 mental disease or defect for the treatment of which he is in
4 need of custody, care, or treatment in a mental hospital.

5 “(b) PSYCHIATRIC EXAMINATION AND REPORT.—
6 Prior to the date of the hearing, the court may order that a
7 psychiatric examination of the defendant be conducted, and
8 that a psychiatric report be filed with the court, pursuant to
9 the provisions of section 4247 (b) and (c). In addition to the
10 information required to be included in the psychiatric report
11 pursuant to the provisions of section 4247(c), if the report
12 includes an opinion by the psychiatrists that the defendant is
13 presently suffering from a mental disease or defect but that it
14 is not such as to require his custody, care, or treatment in a
15 mental hospital, the report shall also include an opinion by
16 the psychiatrists concerning the sentencing alternatives that
17 could best accord the defendant the kind of treatment he does
18 need.

19 “(c) HEARING.—The hearing shall be conducted pursu-
20 ant to the provisions of section 4247(d).

21 “(d) DETERMINATION AND DISPOSITION.—If, after the
22 hearing, the court is of the opinion that the defendant is pres-
23 ently suffering from a mental disease or defect and that he
24 should, in lieu of being sentenced to probation or imprison-
25 ment, be committed to a mental hospital for custody, care, or

1 treatment, the court shall commit the defendant to the custo-
2 dy of the Attorney General. The Attorney General shall
3 hospitalize the defendant for treatment in a suitable mental
4 hospital, or in another facility designated by the court as suit-
5 able. Such a commitment constitutes a provisional sentence
6 to the maximum term authorized for the offense of which the
7 defendant was found guilty.

8 “(e) DISCHARGE FROM MENTAL HOSPITAL.—When
9 the director of the facility in which the defendant is hospital-
10 ized pursuant to subsection (d) determines that the defendant
11 has recovered from his mental disease or defect to such an
12 extent that he is no longer in need of custody, care, or treat-
13 ment in a mental hospital, he shall promptly file a certificate
14 to that effect with the clerk of the court that ordered the
15 commitment. The clerk shall send a copy of the certificate to
16 the defendant's counsel and to the attorney for the govern-
17 ment. If, at the time of the filing of the certificate, the provi-
18 sional sentence imposed pursuant to subsection (d) has not
19 expired, the court shall hold a hearing, conducted pursuant to
20 the provisions of section 4247(d), to determine whether the
21 provisional sentence should be reduced. After the hearing,
22 the court may order that the defendant be released, be placed
23 on probation, or be imprisoned for the remainder of the sen-
24 tence or for any lesser term.

1 "§ 4245. Hospitalization of an imprisoned person suffer-
2 ing from mental disease or defect

3 "(a) MOTION TO DETERMINE PRESENT MENTAL CON-
4 DITION OF IMPRISONED DEFENDANT.—A defendant serving
5 a sentence of imprisonment, or an attorney for the govern-
6 ment at the request of the director of the facility in which the
7 defendant is imprisoned may file a motion with the court for
8 the district in which the facility is located for a hearing on
9 the present mental condition of the defendant. The court shall
10 grant the motion if there is reasonable cause to believe that
11 the defendant may presently be suffering from a mental dis-
12 ease or defect for the treatment of which he is in need of
13 custody, care, or treatment in a mental hospital. A motion
14 filed under this subsection shall stay the release of the de-
15 fendant pending completion of procedures contained in this
16 section.

17 "(b) PSYCHIATRIC EXAMINATION AND REPORT.—
18 Prior to the date of the hearing, the court may order that a
19 psychiatric examination of the defendant be conducted, and
20 that a psychiatric report be filed with the court, pursuant to
21 the provisions of section 4247 (b) and (c).

22 "(c) HEARING.—The hearing shall be conducted pursu-
23 ant to the provisions of section 4247(d).

24 "(d) DETERMINATION AND DISPOSITION.—If, after the
25 hearing, the court is of the opinion that the defendant is pres-
26 ently suffering from a mental disease or defect for the treat-

1 ment of which he is in need of custody, care, or treatment in
2 a mental hospital, the court shall commit the defendant to the
3 custody of the Attorney General. The Attorney General shall
4 hospitalize the defendant for treatment in a suitable mental
5 hospital, or in another facility designated by the court as suit-
6 able, until he is no longer in need of custody, care, or treat-
7 ment in a mental hospital or until the expiration of his sen-
8 tence of imprisonment.

9 "(e) DISCHARGE MENTAL HOSPITAL.—When the di-
10 rector of the facility in which the defendant is hospitalized
11 pursuant to subsection (d) determines that the defendant has
12 recovered from his mental disease or defect to such an extent
13 that he is no longer in need of custody, care, or treatment in
14 a mental hospital, he shall promptly file a certificate to that
15 effect with the clerk of the court that ordered the commit-
16 ment. The clerk shall send a copy of the certificate to the
17 defendant's counsel and to the attorney for the government.
18 If, at the time of the filing of the certificate, the sentence
19 imposed upon the defendant has not expired, the court shall
20 order that the defendant be reimprisoned.

21 "§ 4246. Hospitalization of a person due for release but
22 suffering from mental disease or defect

23 "(a) INSTITUTION OF PROCEEDING.—If the director of
24 a facility in which a person is hospitalized pursuant to this
25 chapter certifies that a person whose sentence is about to

1 expire, or who has been committed to the custody of the
2 Attorney General pursuant to section 4241(d), or against
3 whom all criminal charges have been dropped, is presently
4 suffering from a mental disease or defect as a result of which
5 his release would create a substantial danger to himself or to
6 the person or property of another, and that suitable arrange-
7 ments for the custody and care of the person are not other-
8 wise available, he shall transmit the certificate to the clerk of
9 the court for the district in which the person is confined. The
10 clerk shall send a copy of the certificate to the person, and to
11 the attorney for the government, and, if the person was com-
12 mitted pursuant to section 4241(d), to the clerk of the court
13 that ordered the commitment. The court shall order a hearing
14 to determine whether the person is presently suffering from a
15 mental disease or defect as a result of which his release
16 would create a substantial danger to himself or to the person
17 or property of another. A certificate filed under this subsec-
18 tion shall stay the release of the person pending completion of
19 procedures contained in this section.

20 “(b) PSYCHIATRIC EXAMINATION AND REPORT.—
21 Prior to the date of the hearing, the court may order that, a
22 psychiatric examination of the defendant be conducted, and
23 that a psychiatric report be filed with the court, pursuant to
24 the provisions of section 4247 (b) and (c).

1 “(c) HEARING.—The hearing shall be conducted pursu-
2 ant to the provisions of section 4247(d).

3 “(d) DETERMINATION AND DISPOSITION.—If, after the
4 hearing, the court finds by a preponderance of the evidence
5 that the person is presently suffering from a mental disease
6 or defect as a result of which his release would create a sub-
7 stantial danger to himself or to the person or property of
8 another, the court shall commit the person to the custody of
9 the Attorney General. The Attorney General shall release
10 the person to the appropriate official of the State in which the
11 person is domiciled if such State will assume responsibility
12 for his care, custody, and treatment. If such State will not
13 then assume such responsibility, the Attorney General shall
14 hospitalize the person for treatment in a suitable mental hos-
15 pital, or in another facility designated by the court as suit-
16 able, until such State will assume such responsibility or until
17 the person's mental condition is so improved that his release
18 would not create a substantial danger to himself or to the
19 person or property of another.

20 “(e) DISCHARGE FROM MENTAL HOSPITAL.—When
21 the director of the facility in which a person is hospitalized
22 pursuant to subsection (d) determines that the person has re-
23 covered from his mental disease or defect to such an extent
24 that his release would no longer create a substantial danger
25 to himself or to the person or property of another, he shall

1 promptly file a certificate to that effect with the clerk of the
 2 court that ordered the commitment. The clerk shall send a
 3 copy of the certificate to the person's counsel and to the at-
 4 torney for the government. The court shall order the dis-
 5 charge of the person or, on the motion of the attorney for the
 6 government or on its own motion, shall hold a hearing, con-
 7 ducted pursuant to the provisions of section 4247(d), to deter-
 8 mine whether he should be released. If, after the hearing, the
 9 court finds by the preponderance of the evidence that the
 10 person has recovered from his mental disease or defect to
 11 such an extent that his release would no longer create a sub-
 12 stantial danger to himself or to the person or property of
 13 another, the court shall order his immediate discharge.

14 **§ 4247. General provisions for chapter 313**

15 **“(a) DEFINITION.**—As used in this chapter, ‘insanity’
 16 means a mental disease as a result of which a person could
 17 not at the time the offense was committed—

18 **“(1)** understand the nature and quality of his ac-
 19 tions constituting the offense; or

20 **“(2)** determine the wrongfulness of his actions
 21 constituting the offense.

22 **“(b) PSYCHIATRIC EXAMINATIONS.**—A psychiatric ex-
 23 amination ordered pursuant to this chapter shall be conducted
 24 by at least two qualified psychiatrists. The psychiatrists shall
 25 be—

1 **“(1)** designated by the court if the examination is
 2 ordered under section 4241, 4242, 4243, or 4244; or

3 **“(2)** designated by the court, and shall include one
 4 psychiatrist selected by the defendant, if the examina-
 5 tion is ordered under section 4245 or 4246.

6 For the purpose of an examination pursuant to an order
 7 under section 4241, 4242, 4243, or 4244, the court may
 8 commit the person to be examined for a reasonable period,
 9 but not more than sixty days, to the custody of the Attorney
 10 General for placement in a suitable mental hospital or an-
 11 other facility designated by the court as suitable.

12 **“(c) PSYCHIATRIC REPORTS.**—A psychiatric report or-
 13 dered pursuant to this chapter shall be prepared by the psy-
 14 chiatrists designated to conduct the psychiatric examination,
 15 shall be filed with the court with copies provided to the coun-
 16 sel for the person examined and to the attorney for the gov-
 17 ernment, and shall include—

18 **“(1)** the person's history and present symptoms;

19 **“(2)** a description of the psychological and medical
 20 tests employed and their results;

21 **“(3)** the psychiatrists' findings; and

22 **“(4)** the psychiatrists' opinions as to diagnosis,
 23 prognosis, and—

24 **“(A)** if the examination is ordered under sec-
 25 tion 4241, whether the person is presently suffer-

1 ing from a mental disease or defect rendering him
2 mentally incompetent to the extent that he is
3 unable to understand the nature and consequences
4 of the proceedings against him or to assist properly
5 in his defense;

6 “(B) if the examination is ordered under section
7 4242, whether the person was insane at the
8 time of the offense charged;

9 “(C) if the examination is ordered under section
10 4243 or 4246, whether the person is presently
11 suffering from a mental disease or defect as a
12 result of which his release would create a substantial
13 danger to himself or to the person or
14 property of another; or

15 “(D) if the examination is ordered under section
16 4244 or 4245, whether the person is presently
17 suffering from a mental disease or defect as a
18 result of which he is in need of custody, care, or
19 treatment in a mental hospital.

20 “(d) HEARING.—At a hearing ordered pursuant to this
21 chapter the person whose mental condition is the subject of
22 the hearing shall be represented by counsel and, if he is financially
23 unable to obtain adequate representation, counsel
24 shall be appointed for him. The person shall be afforded an
25 opportunity to testify, to present evidence, to subpoena wit-

1 nesses on his behalf, and to confront and cross-examine wit-
2 nesses who appear at the hearing.

3 “(e) PERIODIC REPORTS BY MENTAL HOSPITAL.—
4 The director of the facility in which a person is hospitalized
5 pursuant to—

6 “(1) section 4241 shall prepare semiannual re-
7 ports; or

8 “(2) section 4243, 4244, 4245, or 4246 shall pre-
9 pare annual reports;

10 concerning the mental condition of the person and recommen-
11 dations concerning his continued hospitalization. The reports
12 shall be submitted to the court that ordered the person's com-
13 mitment to the facility and copies of the reports shall be sub-
14 mitted to such other persons as the court may direct.

15 “(f) ADMISSIBILITY OF A DEFENDANT'S STATEMENTS
16 AT TRIAL.—A statement made by the defendant during the
17 course of a psychiatric examination pursuant to section 4241
18 or 4242 is not admissible as evidence against the accused on
19 the issue of guilt in any criminal proceeding.

20 “(g) HABEAS CORPUS UNIMPAIRED.—Nothing con-
21 tained in section 4243 or 4246 precludes a person who is
22 committed under either of such sections from establishing by
23 writ of habeas corpus his eligibility for release under such
24 sections.

1 “(h) AUTHORITY AND RESPONSIBILITY OF THE AT-
2 TORNEY GENERAL.—The Attorney General—

3 “(1) may contract with a state, a locality, or a
4 private agency for the confinement, hospitalization,
5 care, or treatment of, or the provision of services to, a
6 person committed to his custody pursuant to this chap-
7 ter;

8 “(2) may apply for the civil commitment, pursuant
9 to State law, of a person committed to his custody pur-
10 suant to section 4243 or 4246; and

11 “(3) shall consult with the Secretary of the De-
12 partment of Health and Human Services in the general
13 implementation of the provisions of this chapter.”

○

ADDITIONAL SUBMISSIONS FOR THE RECORD

THE MASK OF INSANITY

WAS THE HINCKLEY JURY DUPED?
by Joy Satterwhite Eymann, Ph.D.

The prosecution's psychiatric witnesses testified that John Hinckley, Jr. has a "character disorder". Did those 12 jurors understand the meaning of the terms, "character disorder"? In psychological terms, a person with this character disorder is called a psychopath. It is important to understand that the word, "psychopath," does not mean insane. The word for insanity is "psychotic". Psychopath denotes a person who has no conscience, who feels no guilt. The definitive criteria for the psychopath: "guiltlessness and lovelessness conspicuously mark the psychopath as different from other men," as found in McCord and McCord's book, PSYCHOPATHY AND DELINQUENCY. Empirical research on the psychopath was conducted by the renowned psychiatrist, Hervey Cleckley, M.D., whose book, THE MASK OF SANITY, is a worldwide classic in the field.

The psychopath often enters a plea of insanity at his trial to escape the indisputable consequences of his criminal acts. He often acts bizarrely in prison to effect a transfer to a mental hospital. He plea-bargains to be sent to a mental institution for "treatment" -- and consequent early release -- instead of to a prison for punishment. Because most people do not realize that such a character disorder as psychopathy even exists, they are only too anxious that this dangerous person be sent where he can be treated and cured. How can anyone commit horrible acts if he is not "sick", "crazy", "insane"?

In order to understand the unique character disorder of the psychopath, we might start with the personality traits with which most people are familiar. Professionals have classified the insane for us: they have agreed to call them psychotics. Experts define a psychotic as one who is out of touch with reality. There are several different types of psychotics: one, the schizophrenic -- a person commonly miscalled a "split personality". This was the defense in the John Hinckley trial. Two, the paranoid psychotic, who believes that everyone is against him. (We all feel this way at times but to a much lesser degree than does the true paranoid.) Three, the manic-depressive psychotic, who is sometimes supercharged and never seems to tire or need sleep and, at other

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6 OF 7

as "ordinary" civil patients. I say this for two reasons. First, as I have indicated, I do not think the libertarian civil commitment statutes afford adequate public protection in cases involving many (though not all) insanity acquittees. Second, a unified commitment statute would undermine the rights of mentally ill persons who have committed no violent crime: I fear that courts would stretch the commitment criteria to cover otherwise uncommitable insanity acquittees, and to preclude their early release, and would thereby increase the likelihood of unwarranted deprivation of liberty in cases involving mentally disturbed persons who have committed no serious act of personal violence.

In summary, then, I urge the Congress to enact a special commitment statute for insanity acquittees (such as S. 2572, §§ 4243). By doing so, the Congress can assure that the public safety is adequately protected without abolishing the insanity defense.

2. The Alternative of Nullification. One of the paramount values in the formulation and administration of the penal law is the pursuit of the ideal of equality. By aiming to define the elements of offenses and the criteria of exculpation with maximum possible precision, legislatures and courts promote the rule of law--the equal application of rules of general applicability. It is true, as I noted in my testimony, that one of the dangers of the insanity defense--especially its volitional prong--is that it will be inconsistently administered due to the lack of objectifiable criteria. For this very reason, I would abandon the volitional prong; yet I am confident that the cognitive test can be reliably and consistently administered if the test is formulated as I have suggested, especially by narrowing and objectifying the definition of mental illness. In short, by preserving a narrowed criterion of insanity, we can avoid unjust convictions while preserving the rule of law.

It seems to me indefensible to suggest that the drafters of the law should ignore morally compelling grounds of defense and rely instead on prosecutorial and judicial discretion--and jury nullification--to avoid unjust convictions. Such a view is wholly at odds with the rule of law. The basic criteria of penal liability should be formulated with the expectation that the law will be equally and generally applied. We do a disservice to judges, prosecutors and jurors if we purposely extend the penal law to cases in which we expect them to ignore it. Moreover, if they choose instead to obey the law, we obviously ignore the legitimate interests of mentally ill defendants who are justly entitled to acquittal (or, more accurately, entitled to a finding, by the trier of fact, on the morally proper criterion of responsibility).

Dr. Halpern suggested, in response to this contention, that it "is just the view of somebody who has had no practical experience in the workings of the criminal justice system," implying apparently, that I am unaware of the scope of discretionary decisionmaking in the administration of criminal justice. As I am sure the Committee knows, police, prosecutors and courts often decline to initiate or continue criminal proceedings in cases in which the evidence would be sufficient to support a conviction and in which conviction would not offend any fundamental moral principle reflected in the penal law. The need for such discretionary decisionmaking is often related to the volume of criminal cases and to institutional doubts about the suitability of criminal prosecution as a response to some forms of criminal conduct (e.g., domestic disputes, public order offenses, drug possession offenses). I do not question the legitimacy of such discretionary decision-making--although the Committee is undoubtedly aware of the efforts now being undertaken to control and regularize the exercise of discretion in such cases in order to preserve the ideal of equality implicit in the rule of law. Instead, I am

arguing that it is not proper to rely on institutionalized discretion in cases in which conviction would, by consensus, offend the moral premises of the criminal law.

3. Administration of the Insanity Defense. The insanity defense is a relatively easy target for exaggerated criticism. No one favors the "battle of the experts" or the "rich man's defense." However, the hyperbole sometimes gets a bit out of hand. I do not believe, as the Attorney General suggested, that the defense "impairs effective law enforcement." Nor can it be fairly analogized, as Mr. Carnahan suggested, to a "leaking nuclear power plant." As I have repeatedly acknowledged, however, the defense does present some risk of mistaken acquittals. So, too, of course, do all defenses of justification (e.g., self-defense) or situational excuse (e.g., duress, entrapment). One could, of course, eliminate the risk of mistake by repealing all defenses; yet, surely opponents of the insanity defense recognize that an occasional mistaken acquittal is the price of a just and humane penal law.

The question, rather, is whether a properly restricted insanity defense--limited to its "moral core" and eliminating the volitional inquiry--is subject to an intolerable risk of mistake. I do not think so, and I do not think the data in New York support such a conclusion. First, let me emphasize that the insanity acquittal is still a relatively infrequent event--in New York as well as elsewhere. The courts are not being flooded with insanity pleas. In Virginia, for example, insanity acquittals do not appear to exceed 15-25 in any given year, and the 60 cited in New York surely represent a minuscule proportion of criminal prosecutions. Second, while there does appear to have been a discernible increase in insanity pleas and acquittals in recent years, this increase (in New York as well as elsewhere) is probably attributable in large part to an increase in legitimate acquittals in cases involving less serious charges rather than to a substantial increase in mistaken acquittals.

Data on insanity-acquittes consistently demonstrate that the defense is most likely to be raised on behalf of defendants charged with the most serious crimes, especially homicide. The reasons for this are readily apparent. Conversely, the defense is relatively less likely to be invoked by defendants charged with misdemeanors or other less serious offenses. Several factors have traditionally accounted for the infrequency of insanity acquittals involving "minor" offenders. First, many such defendants who may have been "legally insane" at the time of the offense are not brought to trial at all. This is because many such persons are committed after findings that they are incompetent to stand trial which, until Jackson v. Indiana was decided in 1972, could mean indefinite confinement. Even after Jackson, persons restored to competency will have spent a significant period in an institution, and prosecutors often nolle prosequere these cases if the charges are relatively minor. Second, many defendants who are brought to trial, and might have been legitimately entitled to insanity acquittals, choose not to invoke the defense because of its dispositional consequences--they probably would spend far longer in "forensic" confinement than they do under any criminal sentence imposed for their offense.

These patterns still predominate. However, evidence in many states, including New York, indicates an apparent increase in the number of insanity pleas, and eventual acquittals, of persons charged with less serious offenses. This increase is probably attributable to several factors. One is the trend toward expedited restoration of competency, including outpatient treatment. Another is the tightening of the criteria for "ordinary" civil commitment: under the traditional criteria for involuntary psychiatric hospitalization, mentally ill persons apprehended after disordered conduct routinely would have been civilly committed rather than being arrested; now,

there is evidence that such persons may not be committable and that criminal charges are being filed as a means of securing involuntary hospitalization--initially through an incompetency commitment and, in some cases, through an insanity acquittal. Many observers have criticized this development as a "criminalization" of the mentally ill. Finally, another development tending to increase the number of insanity pleas/acquittals in cases involving minor charges (and offenses of intermediate severity) is the tightening of the criteria for commitment of insanity acquittees. In New York, as well as elsewhere, defendants who formerly may have chosen not to invoke a legitimate claim of insanity in order to avoid the undesirable dispositional consequences, may now choose to do so.

To the extent that these factors account for the recent increase in insanity pleas/acquittals in New York and elsewhere, they do not in any way indicate that the insanity defense is being abused or that there have been "moral mistakes" in its administration. By hypothesis, these are defendants who are entitled to acquittal but formerly either were not tried or chose not to invoke the defense. Thus, to the extent that these factors account for the increase in insanity pleas/acquittals, they do not indicate that the "modified M'Naghten" rule now in effect in New York has opened a loophole for guilty offenders who deserve to be punished.

Having said this, I am willing to acknowledge that courts and juries may have made occasional "moral mistakes" in administering the defense. The infamous Torsney acquittal may be such a case. I am also willing to acknowledge that the New York Court of Appeals' decision extending "ordinary" civil commitment criteria to the NGRI dispositional process may have given "guilty" defendants an incentive to plead insanity and may therefore have increased the risk of moral mistakes. However, as I said earlier, I believe that these risks can be properly reduced in two ways. First, judges in New York and elsewhere should apply a narrow definition of "mental disease" (such as the one I presented in my testimony*) and should refuse to instruct the jury on insanity if the defendant's evidence is legally insufficient to raise the defense. As I recall, Mr. Carnahan cited cases involving "personality disorders" as evidence of mistaken applications of the defense; to the extent that these cases have arisen, I think they can be avoided in the future through rulings of evidentiary insufficiency. Second, as I stated earlier, I believe the risks of abuse can be reduced through properly designed dispositional statutes which assure that insanity acquittees are subject to therapeutic restraint for a reasonable period of time.

Sincerely,

Richard J. Bonnie

Richard J. Bonnie
Professor of Law and Director

RJB:gk

*"[T]he terms mental disease or mental retardation include only those severely abnormal mental conditions that grossly and demonstrably impair a person's perception or understanding of reality and that are not attributable primarily to the voluntary ingestion of alcohol or other psychoactive substances."

The CHAIRMAN. Our second witness is Dr. Abraham Halpern, director of the Department of Psychiatry, United Hospital, Port Chester, N.Y.

Dr. Halpern, we are glad to have you here and you may proceed with your testimony.

I observed your testimony is rather brief, just six pages. If you wish to read that in full, feel free to do so.

STATEMENT OF ABRAHAM L. HALPERN, M.D., DIRECTOR OF
PSYCHIATRY, UNITED HOSPITAL, PORT CHESTER, N.Y.

Dr. HALPERN. Thank you, Senator Thurmond.

The CHAIRMAN. If you wish to put it in the record and just speak off the cuff, you are free to do that.

Dr. HALPERN. I will do a combination of that, sir, if I may.

I would like to first state that although I am the president-elect of the American Academy of Psychiatry in the Law, I am not here as a representative of the organization or in any way speaking for that group. I am here speaking for myself.

The CHAIRMAN. Are you a lawyer and a psychiatrist?

Dr. HALPERN. No, sir. I am a psychiatrist only.

The CHAIRMAN. You are a M.D. You are a psychiatrist.

Dr. HALPERN. Yes, sir.

I am grateful to you for the opportunity to appear before you to testify in favor of abolition of the insanity defense; that is, total elimination of the exculpatory insanity rule. I am, in other words, speaking in support of Senator Hatch's bill, S. 818. That particular bill is free of the criticism that some have directed against the eight or nine other bills which you are considering; namely, that they were hastily drawn in response to the emotionally charged atmosphere prevailing in the aftermath of the attempted assassination of the President and the serious wounding of four innocent persons. A great deal of work had gone into the preparation of S. 818 that is not reflected in the shortness, the brevity of the bill itself, but reading the bill gives it an eloquence that no words, no words could possibly elaborate on.

So, thank you for that, Senator Hatch.

Senator HATCH. Thank you.

Dr. HALPERN. Now, it may come as a surprise to some of you to see a psychiatrist presenting such an extreme view, but I can assure you that I have given years of thought and study to this issue and have concluded that abolition is in the best interests of all concerned—the public, the law-abiding mentally ill, the mentally disordered defendant, the criminal justice system, the legal profession and the psychiatric profession.

In summary, it is my contention that abolition of the insanity defense benefits the public because it insures that the government retains undisputed control of a defendant who has been convicted of an antisocial act and may still be dangerous to the community. Abolition benefits the law-abiding mentally ill—who comprise the vast majority of mentally disabled persons in this country—by eliminating the slander against them engendered by insanity laws in general and terms like "criminally insane" in particular which have encouraged in the public mind a totally fallacious associ-

ation—that of mental illness and criminal behavior of an especially repugnant and harmful kind—thereby perpetuating the centuries old stigmas attached to the mentally disturbed within our society. Abolition benefits the defendant because it protects him from the stigma, which lasts long after he has recovered from his insanity, of the label “criminally insane,” and relieves him of the heavy burden of proving his restoration to sanity in order that he might obtain his release from confinement following his acquittal.

Abolition benefits the criminal justice system because it relieves the prosecutor of having to prove sanity when the insanity defense is raised in jurisdictions where the burden of proof falls on the prosecution, and relieves the prosecution of the responsibility of counteracting the arguments of the defense when the burden of proof falls on the defendant. Abolition further benefits the criminal justice system by doing away with the requirement of court hearings, I might say interminable court hearings, and in some cases jury trials, when an insanity-acquittee, considered by some possibly to be still dangerous, seeks his release.

Abolition particularly benefits the criminal justice system because, by eliminating the illusion that all convicted inmates are “sane” and treatment services are warranted only for supposedly nonblameworthy and deserving “insane” acquittees, a rational approach becomes possible toward solving the disastrously inadequate mental health care delivery system in the prisons of America. Most of all, abolition benefits the criminal justice system by eradicating a significant cause of the loss of confidence on the part of the public in our courts and in our laws. Abolition benefits the legal profession because it frees it from the bizarre task of having to argue for “innocence” and “acquittal” which do not lead to liberty. Abolition benefits the psychiatric profession by forestalling the presence of the psychiatrist in an insanity trial as the 13th juror pronouncing on the responsibility or non-responsibility, that is, guilt or innocence, of the defendant.

Above all, it prevents once and for all the most serious form of misuse of psychiatry in this country, that is, the treating of an institutionalized patient who is found by the psychiatrist doing the treatment not to be mentally ill. It is this misuse, increasingly being recognized as a violation of medical ethics when wittingly engaged in by a psychiatrist, that will result in the further withdrawal of psychiatrists from the staffs of hospitals for the criminally insane.

I cannot emphasize too strongly, Mr. Chairman, that the use of psychiatric hospitals to imprison individuals whom the criminal justice system permits to escape confinement in a correctional facility by the device of an outmoded and unnecessary insanity defense will simply not be countenanced by an informed and enlightened psychiatric profession. In this respect, I understand that a psychiatrist will appear before you on Wednesday, August 4, on behalf of the American Psychiatric Association, with the recommendation that the sentencing court retain exclusive power to release insanity acquittees. This is short-sighted, countertherapeutic, and is regrettable. And I respectfully ask that you question the APA spokesman carefully. Why should our criminal court judges, already so hard-pressed that they cannot process with reasonable

speed the new defendants coming before them, be burdened with interminable hearings to decide questions of transfer, furlough and discharge of acquittees? This makes as much sense as giving judges the responsibility of deciding on parole or conditional release of prison inmates. How can the American Psychiatric Association tell you that judges, rather than doctors, should be authorized to make routine treatment decisions after telling the psychiatrists of America themselves that “An ethical psychiatrist may refuse to provide psychiatric treatment to a person who in the psychiatrist’s opinion cannot be diagnosed as having a mental illness amenable to such treatment.”

The CHAIRMAN. Excuse me just a minute. I have got to go over to the Senate and I have to leave at this time.

I am going to ask that the able Senator from Utah continue the hearings.

Dr. HALPERN. Thank you, Senator.

Senator HATCH [presiding]. Go ahead and proceed, Dr. Halpern.

Dr. HALPERN. I would like to touch briefly on some of what I regard as misleading testimony that has been presented before this committee by previous speakers.

You were told by one psychiatrist that “Very few defendants are found not guilty by reason of insanity and those so found are usually deserving.” In fact, there are today approximately 4,000 persons institutionalized in hospitals for the criminally insane. Many of these committed serious unlawful acts, such as homicide, rape, felonious assault, armed robbery, kidnaping, burglary, arson, airplane hijacking, and cocaine and marijuana smuggling, and I estimate that at least 25 percent of hospitalized acquittees are indistinguishable from the most serious criminals presently housed in maximum security prisons.

The late Prof. Jonas Robitscher, psychiatrist and lawyer, a few years ago told of a study of 255 men hospitalized at the John Howard Pavilion of St. Elizabeths Hospital on an indeterminate basis after successful pleas of not guilty by reason of insanity, not one of whom was actually found to be mentally ill.

You have been told that insanity acquittees usually are locked up longer and commit fewer future crimes than do defendants found guilty and sentenced to prison. This is simply not the case, as shown by researches recently reported by Henry J. Steadman and his colleagues in the July 1982 issue of the American Journal of Psychiatry.

You have been told how utterly unthinkable it is to impose blame on those mentally disordered offenders who, because of their mental illness, ought not to be held responsible. I would draw your attention instead to Chief Justice Warren Burger’s statement that “the arguments on the stigma of a guilty verdict are largely emotional nonsense.” It is well known how rapidly a defendant and his attorney choose to ignore the stigma when a guilty verdict leaves the defendant in what he regards as a less punitive and less oppressive position than would be the case were he to be acquitted by reason of insanity. No better example of this can be found than in the case of John Hickley, whose attorneys, according to newspaper reports last year, sought to have a guilty plea accepted under the Federal Young Adult Offenders Act in order to obtain a relatively

mild sentence. It was only after their offer was rejected by the U.S. attorney that the plea of not guilty by reason of insanity was asserted.

In his statement before your committee on July 19, 1982, the Attorney General, while urging that the insanity defense be severely narrowed, nevertheless recommended that the defense be retained for certain "rare cases in which the defendant lacked the state of mind required as an element of the offense." I urge you to be wary of this recommendation. If a defendant lacks the state of mind required as an element of the offense, he merits complete exculpation as a matter of law and logic. The hypothetical example the Attorney General gives of a defendant who would be entitled to a verdict of not guilty by reason of insanity, namely, the defendant who "did not even know he had a gun in his hand or thought, for example, that he was shooting at a tree," would be so severely mentally disordered that he would probably be found mentally incompetent to stand trial and would be satisfactorily dealt with under chapter 313 of title 18, United States Code. If he were fit for trial and were acquitted, he would in all likelihood be a candidate for involuntary hospitalization under the civil commitment laws. Such is the logic behind the recently enacted Idaho legislation which I commend to your consideration.

I would remind the Attorney General that his narrowly restricted insanity rule was tried in many jurisdictions in this country—I would remind Professor Bonnie of the same facts—particularly in the latter half of the 19th century and the first half of this century. It was no more satisfactory then than the various expanded insanity rules are today. Actual practice has demonstrated that the narrowest rule can be expanded, resulting in acquittal, depending on the whim or conscience or, as Supreme Court Justice William O. Douglas put it, the "commonsense" of the fact finder.

I urge you to recognize the inapplicability of the exculpatory insanity concept to our criminal law. There is no place to go in the quest for an insanity formulation, no matter how narrow. Every insanity definition is irrelevant and essentially meaningless. Abolition of the insanity defense is the only rational path.

I am submitting to your committee several of my articles concerning the insanity issue which have appeared in legal and psychiatric journals over the past 5 years.¹

Before concluding my formal statement, allow me to comment briefly on the statement presented by the previous speaker. Professor Bonnie is persuaded, and has attempted to persuade you, without offering one iota of supporting data that "the possibility of moral mistakes in the administration of the insanity defense can be adequately reduced by narrowing the defense and by placing the burden of proof on the defendant."

¹ Halpern, A. A.: "The Insanity Defense: A Juridical Anachronism." *Psychiatric Annals*, 7(8), 41-63, 1977.

Halpern, A. L.: "The Fiction of Legal Insanity and the Misuse of Psychiatry." *J. Legal Med.*, 2(1), 18-74, 1980.

Halpern, A. L.: "Uncloseting the Conscience of the Jury: A Justly Acquitted Doctrine." *Psychiatric Quarterly*, 52: 144-157, 1980.

Halpern, A. L.: "Elimination of the Exculpatory Insanity Rule: A Modern Societal Need." *Psychiatric Clinics of North America*, Special issue on Forensic Psychiatry (R. Sadoff, Ed.), Philadelphia: W. B. Saunders Co., 1983.

The fact is, as you have pointed out, Senator Hatch, that 16 years of experience in New York State, using precisely the insanity rule proposed by Professor Bonnie, have shown that moral mistakes in the administration of the insanity defense have not been reduced as can be seen from the large number of insanity acquittees who do not carry a diagnosis of psychosis. The fact is that 12 years of experience in the District of Columbia, where the burden of proof of insanity is placed on the defendant, have shown that moral mistakes have not been reduced.

Let me cite one recent example. Just the other day, 22-year-old John Crutchfield, a fellow inmate of John Hinckley at St. Elizabeths Hospital, was given, as part of his treatment, a one-hour pass to stroll around the grounds. He immediately strolled away into the American Security Bank on Georgia Avenue and robbed it. He then strolled into a card game and lost the money. The next day, he strolled back into the same bank and robbed it again. He was subsequently arrested and returned to the hospital for further psychiatric care. Need anyone ask about the moral mistake that caused him to be in St. Elizabeths Hospital in the first place? For the record, he had been acquitted by reason of insanity for bank robbery.

With regard to the terms of the volitional test—that is, did the defendant, as a result of mental disease or defect, lack substantial capacity to conform his conduct to the requirements of law? The question, says Professor Bonnie, is unanswerable. To ask it at all, in his opinion, invites fabricated claims, undermines equal administration of the penal law, and compromises its deterrent effect. He would therefore abolish the volitional test. But exactly the same objection can be raised to the cognitive test. It invites fabricated claims, undermines equal administration of the penal law and compromises its deterrent effect. Thus using Professor Bonnie's own argument, both tests and therefore the insanity defense in toto should be abolished.

Further, in support of his recommendation that the volitional test be abolished, Professor Bonnie states, "Psychiatric concepts of mental abnormality remain fluid and imprecise and most academic commentary within the last 10 years continues to question the scientific basis for assessments of volitional incapacity." But exactly the same thing can be said concerning the scientific basis for assessments of cognitive incapacity, the rule that he aspires to have the Senate accept; that is, the defendant's lack of substantial capacity to appreciate the wrongfulness of his unlawful conduct. Thus, again, using Professor Bonnie's argument, the insanity defense should be entirely abolished.

In almost 30 years of psychiatric practice, I have never seen a deserving case of acquittal by reason of insanity that could not have been dealt with in a more humane and compassionate manner by other means available to the jury and sentencing judge. The case of Joy Baker presented by Professor Bonnie as a justification for preserving the insanity defense could have been handled exactly the same way as described by Professor Bonnie if the insanity defense did not exist. You will recall that in her case the charges were dismissed, she was never indicted, there was no trial, insanity or otherwise. Thus, shorn of its platitudinous polemical

appeal that the insanity defense has existed for centuries and "is essential to the moral integrity of the criminal law," Professor Bonnie's argument is an admirably cogent and persuasive call for the abolition of the insanity defense. I wish to thank him for providing such strong support for the position I have held for so many years.

Thank you for your consideration.

Senator HATCH. Thank you, Dr. Halpern.

Professor Bonnie, I am afraid, is almost having conniptions over there.

Mr. BONNIE. Am I entitled to rebuttal?

Senator HATCH. I think so.

I have appreciated your testimony and your strong support of my particular bill.

On July 19, Attorney General William French Smith testified that:

Modification of the insanity defense will lead to different judicial results and only a small percentage of all Federal criminal cases. Taken together, however, the procedural reforms will effect nearly all criminal Federal prosecutions in terms of real-locating resources currently misspent.

Now, could you give the committee some estimate of how many verdicts would change if Congress adopts the mens rea approach, and eliminate insanity as a special defense. Would you also give the committee some estimate of the amount of judicial and medical resources now misspent that would be reallocated by the new mens rea approach?

Dr. HALPERN. I think one of the big problems, sir, is that in spite of the notoriety and the public outcry about the insanity defense over these many, many years, there has been an astonishing dearth of data such as you are requesting, but even if it were shown that the number, the actual number of cases is small, there is no question that the amount of professional time devoted to these few cases constitutes a great waste for this country, and even, however, if it did not, the fact remains that the kind of leadership that could be given to this country, to the States in particular that have to grapple with this problem far more than the Federal courts do, abolition of the insanity defense would be of inestimable value. And it is really for this reason that I strongly urge that the Congress do something, legislate something for the country as a whole. This is its value.

I think, if I may say one more thing, because you will be hearing over and over again, as you have heard from Professor Bonnie, that only 2 percent of felony cases or 1 percent of felony cases assert the insanity plea, why are we making such a big fuss, especially since most of those asserting the plea do not win anyway? This is one of the most misleading arguments of all. It is like saying we have only one leaking nuclear plant in the country, why is all the fuss created, what is the big deal? It is only one. Why do we need all these special regulations? One is not very much after all.

The impact of the insanity defense undermines the public's confidence in law, in order, in the courts, in the criminal justice system, and for anybody to sit here and tell you about the small number of cases, is appallingly misleading. I just hope nobody pays too much attention to that.

Senator HATCH. Characterize, if you will, the degree of consensus within the medical community about our medical ability to determine that certain behavioral patterns or disorders actually impel a person to act in a certain way.

To what degree can we expect doctors to testify to agreement with the current ALI insanity standards?

Dr. HALPERN. I would think that psychiatrists can contribute a great deal to the courts, to the prosecutor, to the defense attorney, and to the jury with respect to the nature of the offender and the conditions which produce some degree of excuse for his conduct. But when placed alongside the meaningless insanity rules, whether it is ALI or *M'Naghten* or modified *M'Naghten* or *M'Naghten* plus irresistible impulse, or *Durham* or *Currens* or *New Hampshire*, it is a lot of nonsense. And one of these days that fact will register in the mind of every legislator who has to consider this very serious topic.

Senator HATCH. Thank you.

Chief Justice Burger, while still a circuit judge, stated,

No rule of law can possibly be sound or workable which is dependent upon the terms of another discipline whose members are in profound disagreement about what those terms mean.

Would you comment on this statement in your view of the psychiatrist's role in criminal trials?

Dr. HALPERN. Well, again, I certainly agree with the Chief Justice in that comment. It could be applied equally to members of the legal profession.

The whole point is the psychiatrists come in and are asked to answer inappropriate questions. If they will confine themselves to the psychiatric, psychological state of the defendant and giving information which can be of considerable value to the officers of the court and the jury as well—the jury, the last bastion of democracy in this country—that is fine. But to the extent that they must relate psychiatric issues to social and moral and philosophical considerations such as responsibility or nonresponsibility, I feel that that is quite inappropriate. And I would agree with the Chief Justice.

Senator HATCH. Thank you.

Without objection, we will place in the record copies of your professional articles which you mentioned that you have brought with you today.

Dr. HALPERN. Thank you, sir.

[The following was received for the record:]

45688

The Insanity Defense: A Juridical Anachronism

By ABRAHAM L. HALPERN, M.D.

"Perhaps we should consider abolishing what is called the 'insanity defense'; the jury would decide within the traditional framework of drawing inferences as to intent from the accused's conduct only whether he committed the overt acts charged. I suggest this not as a new idea but to stimulate a serious debate on the subject." — Warren E. Burger¹

The insanity-defense issue has again surfaced in New York State as a result of recent developments that will be discussed in this article. Sen. Joseph Pisani has introduced legislation² calling for the establishment of a special commission to study the question — this time, one hopes, to consider not simply revision of the existing standard for exculpation of criminal responsibility but abolition of the insanity defense in toto.

The New York law states:

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:

- (a) The nature and consequence of such conduct; or
- (b) That such conduct was wrong.³

This will be readily recognized as a modification of the old M'Naghten rule. The irresistible-impulse doctrine was never adopted in New York, and the Legislature in 1964 rejected a proposal⁴ to have the rule follow the still popular American Law Institute Model Penal Code formulation that excuses conduct resulting from mental disease or defect of such degree as to

render a person lacking in substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law. This standard has proved to be of no value since it was adopted in the District of Columbia in 1972⁵ as a replacement for the utterly discredited Durham rule, which held that an accused is not criminally responsible if his unlawful act was the product of mental disease or defect.⁶

JUSTIFICATION FOR ABOLITION

"The true meaning of a term is to be found by observing what a man does with it, not by what he says about it." — Percy W. Bridgman⁷

I have for many years contended that the insanity defense should be abolished.⁸⁻¹³ It has degenerated to nothing more than a legalistic ploy in many cases, especially when the defense of justification is not possible. It does nothing to promote justice, damages respect for law, sustains the sham of the "battle of the experts" in our courtrooms, and needlessly increases the cost of trying and defending allegedly mentally disordered criminals.

Jeffery has graphically summarized the cynical utilization of the insanity issue:

continued

Most lawyers state that they use the insanity plea only in capital cases, or if the defendant faces a long period in prison. A lawyer who is faced with two alternatives will select the least aversive course of action. If the alternatives are probation or confinement to Saint Elizabeths, under these circumstances, probation is the obvious choice. If the alternatives are execution or life imprisonment, then confinement to Saint Elizabeths is a desirable alternative.¹⁴

Most lawyers stated they used psychiatric pools that consist of defense-minded psychiatrists. "If a man doesn't testify the right way he is not rehired," one attorney said. Although lawyers complain about government-biased psychiatrists, they readily admit to making use of defense-biased psychiatrists.¹⁵

The impression gained from project data . . . is that the decision to use an insanity defense is based on factors such as the economic position of the defendant, the nature of the criminal charges, the medical facilities in the community, the legal status of the insanity pleas in the local courts, etc. In other words the actual psychological state of the defendant may be a rather minor factor in determining whether a lawyer will use the insanity defense.¹⁶

German and Singer¹⁷ are even more explicit in dispelling the view that solicitude for the nonresponsible and unblameworthy insane patient is the guiding consideration in our criminal justice system:

Frequently, the insanity defense is the result of a plea bargain. Where prosecutors and judges know that a defendant will be incarcerated even if not convicted, they are more likely to tolerate, or even encourage, an insanity acquittal, thereby saving themselves both the time involved in a full trial, and the risk of the defendant's release if he is not convicted.¹⁸

It is interesting to note that in at least two jurisdictions which had the equivalent of automatic commitment following a successful insanity defense the prosecutors raised the defense more often than the defendant. Clearly prosecutors saw the "defense" as a means to lock defendants up without having their guilt proved beyond a reasonable doubt.¹⁹

The insanity defense is thus — in the opinion of many — a glaring example of the misuse of psychiatry. Furthermore, as Rachlin has noted,

because of the sensationalism generally surrounding a number of cases in which the in-

sanity defense is raised, the public conception of the mentally ill as being dangerous is fostered. Abolition of the insanity defense would therefore, in part, serve to separate in the public's mind antisocial behavior from psychotic behavior. I would think that this might go a long way toward decreasing community resistance toward discharge of hospitalized patients based on the misconception that mental illness and dangerousness are closely related.²⁰

The recent emphasis on patients' rights has encouraged involuntarily hospitalized persons who are no longer mentally ill to request their release. Likewise, the nondangerous patient can demand to be released if adequate treatment is not provided.²¹ One can therefore expect an increase in the number of cases where the insanity defense is asserted. Indeed, a dramatic increase in successful pleas of "not guilty by reason of mental disease" was noted during 1976 — a total of 69 cases was reported by the Assistant Commissioner for Forensic Services of the New York State Department of Mental Hygiene.²² This compares strikingly with the figures for 1958-65, when the insanity defense was used successfully only 11 times in New York State, or about once a year.²³ Foster reported, in fact, that during the administrations of district attorneys Thomas Dewey and Frank Hogan, there had never been a successful insanity defense in Manhattan.²³

It has been fashionable for psychiatrists writing in support of the insanity defense to invoke the Talmud ("It is an ill thing to knock against a deaf-mute, an imbecile, or a minor: He that wounds them is culpable, but if they wound others they are not culpable. . . . For with them only the act is of consequence while the intention is of no consequence"^{24,25}) and the Bible



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("Father, forgive them; for they know not what they do"²⁸). However, retributive justice has long been tempered in Anglo-American jurisprudence by due-process safeguards and the virtual abolition of the death penalty. Chief Justice Warren Burger has dismissed assertions that the Judeo-Christian heritage requires that the "insane" cannot be viewed as blameworthy: "To me the arguments on the stigma of a guilty verdict are largely emotional nonsense."²⁹

The comment by Sir William Blackstone (1723-80) — "A madman is punished by his madness alone; that affliction is severe enough

*"To me the arguments
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emotional nonsense"*

for any human purpose"²⁷ — has been quoted to support the retention of the insanity defense. Its relevance to modern jurisprudence, however, is meaningless in the light of the fact that persons diagnosed as having emotionally unstable personality,²⁸ narcotics addiction,²⁹ depressive reaction,³⁰ psychoneurosis,³¹ drug dependence,³² kleptomania,³³ sociopathic personality,³⁴⁻³⁶ alcoholism,³⁷⁻³⁸ and sociopathic personality with drug addiction³⁹ have been adjudged not guilty by reason of insanity.

What is to me the most ludicrous case of all, however, is *United States v. Kent*,⁴⁰ detailed by Jeffery,⁴¹ in which the defendant — who was charged with three counts of housebreaking, three counts of robbery, and two counts of rape — was found by the jury to be guilty on the counts of robbery and housebreaking and not guilty by reason of insanity on the counts of rape (committed on the same occasions as the other crimes). Following his mental hospitalization for "insanity," Kent would have been required to serve his sentence — a maximum of 90 years in prison, five to 15 each on six counts of robbery and housebreaking had the juvenile court's waiver and the subsequent criminal proceedings not been declared invalid.

An examination of the use of the insanity de-

fense in our system of criminal justice leads to two inescapable conclusions. 1. There is no morally sound basis to select a mental disease or defect as a justification for exculpability while excluding other behavioral determinants, such as heredity, poverty, family environment, and cultural deprivation.^{42,43} That is not to say that the latter should be used as a basis for nonresponsibility. As has been pointed out by Perr,⁴² it is simply that the differentiation of a group called "insane" is no longer a rational distinction. 2. There is neither a scientific nor an effective way in which the degree of mental disease or defect can be measured so that a defendant can be fairly and reasonably found to be lacking in criminal responsibility on that account. In this connection, Wootton asks:

Is it not inevitable that the complications which modern psychiatry has introduced into traditional notions of guilt, and the total failure of psychiatrists to produce any criteria for distinguishing between wickedness and weakness of mind which can be empirically validated — is it not inevitable that these trends must sooner or later take all the stuffing out of mens rea?⁴⁴

It is a fact that large numbers of abnormal persons have been sentenced to correctional institutions on conviction for a crime.⁴⁵ Many of them might have presented successful insanity defenses had skillful counsel and psychiatric experts been available to them. But the result, after all, is the incarceration of an offender, and "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."⁴⁵

The early discharge from hospital of insanity-acquitted persons who have gone on to commit further atrocious crimes is, on the other hand, a cause for major concern. A patient found not guilty of the murder of his parents by reason of mental disease killed his aunt and uncle a few months after discharge from the Buffalo (New York) State Hospital.⁴⁶ In Michigan, an ex-convict confessed in June, 1974, to seven killings and, after being acquitted of one of them by reason of insanity, was granted immunity from prosecution for the remainder and "automatically and indefinitely committed." After two

continued

months, however, the State Supreme Court gave him the right to a civil-commitment hearing to determine his sanity. A jury found him to be sane under the new Michigan standards, and he was released in March, 1975. One month later he was arrested and charged with murder in the fatal beating of his wife.⁴⁷

Insanity has been feigned in order to avoid a prison sentence; whether or not "such circumstances are not only quite infrequent but are actually rare,"⁴⁸ the fact is that dangerous criminals have been able to obtain premature release from confinement by the insanity-acquittal route. Garrett Trapnell, the skyjacker who was finally convicted in May, 1973, had been arrested at least 20 times for major crimes between 1957 and 1972 but had spent less than two years in jail. He claimed to have "made a point of trying to fool psychiatrists and psychologists in Florida, Texas, Maryland, New York, California and Canada into believing that he was a genuine 'Dr. Jekyll and Mr. Hyde' — normally a sane, honest man, whose mind, every so often, was taken over by a sinister alter ego called 'Gregg Ross.'"^{49,50}

In a particularly egregious case of feigned insanity,⁵¹ an insanity-acquitted "patient" was unconditionally released from St. Elizabeths Hospital on order of the United States District Court, District of Columbia, on the ground that he was "without mental disorder," having "bamboozled the U.S. Attorney and St. Elizabeths." In the words of District Judge Gerhard Gesell, he "simply had a tendency to rape." The opinion reads in part: "Obviously the appropriate thing to do would be to set aside the not-guilty finding and prosecute for the underlying offense. It is apparent, however, that the finding of not guilty by reason of insanity cannot be reopened or re-examined."⁵² The concluding portion of the report of the Medical Staff Conference held on November 18, 1975, at St. Elizabeths Hospital states:

Psychological testing shows a fairly consistent pattern throughout the period of time that he has been in the Hospital, but attention should be drawn to the final paragraph in the psychological test done by Ms. Judith Rumreich on November 1, 1974, where she states "it is likely that in a similarly highly structured setting, Mr. Carter would be able to function effectively, but

his capacity for assaultive outburst under conditions of stress should not be ignored in less structured settings." This statement does not really mean very much when taken generally because the same is true of almost anybody. Most people placed under sufficient stress in an unstructured situation are capable of assaultive outbursts. The significant thing is that under the same circumstances, Mr. Carter would not fail to act the same as anybody else as far as outbursts go. The only present evidence to support a diagnosis of Sexual Sadism comes from the patient himself. The patient is obviously an unreliable witness — he claims now that he fabricated the 300-rape story to get an insanity defense in 1969. Today he says it was only [sic] 12 rapes. Without more objective evidence the diagnosis of Sexual Sadism is meaningless. Available police reports show a history of general criminal activity such as burglary, auto theft, homicide, assault with intent to commit rape, etc., rather than a distinct pattern of torturing women for sexual gratification. Without more to go on the diagnosis of Sexual Sadism is dropped and the patient is without mental disorder.⁵³

Putting aside for a moment the travesty of justice evidenced in this case, the fact that a diagnosis of "sexual sadism" could actually lead to an acquittal by reason of insanity surely con-

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stitutes sufficient substantiation of the charge made by a former president that "the vagueness of past standards for criminal insanity and their varying application in different jurisdictions has led to unconscionable abuse by defendants."⁵⁴

IMPLICATIONS OF ABOLITION

"... I believe that the use of the current system has hampered the development of possibly more reasonable alternative systems and that, therefore, the maintenance of the insanity defense is unreasonable and harmful to our society." — Irwin N. Perr⁴²

The call for the elimination of the insanity defense is not new. As long ago as 1922, Curtis D. Wilbur, associate justice of the Supreme Court of California, proposed

that insanity be no longer treated as a defense to a criminal charge, and that evidence on that subject be excluded from the jury trying a criminal case; that after conviction the defendant, upon suggestion of insanity, be examined by a board of alienists with a view to determining whether the defendant should be committed to the state hospital, or prison, or be released under probationary supervision to private hospital or to other custody; that the judge be empowered to make such supervisory orders from time to time upon the advice of competent alienists as may be necessary, and that the state retain jurisdiction over the defendant even after an apparently complete cure for at least as long as the maximum term of imprisonment for the offense, resuming custody of the defendant during that period whenever symptoms of a relapse make further custody desirable for the protection of the public. If this seems chimerical, it should be remembered that it is more lenient to the defendant than the present English system and that we are drifting more and more towards probation and parole of the criminal class, with a right to resume actual custody of the offender under sentence already imposed without further trial for new crimes, and that eventually all habitual criminals will be under control of probation or parole officers, and that the expense of our administration of justice will gradually shift from the police and sheriff's departments to the probation and parole departments where, no doubt, most of our peace officers will ultimately find employment. When all the criminal class are under supervision, the officers of the state will be largely employed in watching them instead of watching houses and stores to prevent crime.⁵⁵

This is basically the position enunciated by the Committee on Federal Legislation of the New York State Bar Association.⁵⁶ It has been echoed by the Association of the Bar of the City of New York, the New York Lawyers Association, and other bar groups.⁵⁷

Both Chief Justice Burger^{58,59} and the late Joseph Weintraub,⁶⁰ chief justice of the Supreme Court of New Jersey, have strongly expressed support for this position over the years.

Karl Menninger has railed against the insanity defense:

They linked up all behavior good and bad with the mystical, metaphysical essence called responsibility. According to this solemn theory, it is not God or lack of God or sin or the Devil or witches or anything celestial or mundane that makes men saints or sinners. It is a single, solemn imponderable called *responsibility*. Millions of dollars are spent annually to determine who has it or who hasn't it. If one is found to have it, he is locked up; if he is found not to have it, he is also locked up. Thus is demonstrated the pragmatic beauty of the doctrine, which is neither fish nor fowl, but which is still the shibboleth and the fallacy of the lawyers just as the doctrine of original sin was the fallacy of the clergy.⁶¹

Lawrence Kolb, New York State Commissioner of Mental Hygiene, has publicly urged that the insanity defense be abolished.⁶² He believes that psychiatrists do not possess unique

"Lawrence Kolb, New York State Commissioner of Mental Hygiene, has publicly urged that the insanity defense be abolished"

ability to determine the state of mind of a defendant long after the crime was committed and feels that "questions of rightness or wrongness of an act or 'knowing' its nature"⁶³ are "largely unanswerable by our special knowledge,"⁶⁴ a view strongly supported by Menninger.⁶⁵

CONSTITUTIONALITY OF ABOLITION

"When I hear a man talk of unalterable law, the effect it produces upon me is to convince me that he is an unalterable fool."

— Sidney Smith⁶⁶

The insanity defense has been used in the District of Columbia more frequently than in any other jurisdiction — first, up to 1954, under the M'Naghten rule,⁶⁷ modified by the irresistible-impulse addition,⁶⁸ then, until 1972, by the Durham rule,⁶ and subsequently by the

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American Law Institute rule.⁵ Careful examination of the 70-page opinion of the United States Court of Appeals, District of Columbia Circuit, in *United States v. Brawner*,⁶ shows that the court believed that the time had arrived to conclude, as anticipated in *Washington v. United States*,⁶⁹ that "psychiatry and the other social and behavioral sciences cannot provide sufficient data relevant to a determination of a criminal responsibility no matter what our rules of evidence are." The Durham rule was abandoned, and because of its conviction that the abolition of the insanity defense "cannot properly be imposed by judicial fiat"⁷⁰ and should come from the legislative branch of government, the court adopted the American Law Institute formula-

"Elimination of the insanity defense was declared to be constitutional by the National District Attorneys Association"

tion. This change, as feared by Chief Judge David Bazelon, proved indeed to be "primarily one of form rather than of substance,"⁷¹ and since 1972 the insanity defense in the District of Columbia has been every bit the farce and failure it was under *Durham*.

Legislation⁷² introduced in Congress in 1975 abolishing the insanity defense was believed to meet constitutional standards by the United States Department of Justice and the Subcommittee on Criminal Laws and Procedures of the Senate Judiciary Committee. Elimination of the insanity defense was declared to be constitutional by the National District Attorneys Association.⁷³ The Committee on Federal Legislation of the New York State Bar Association⁶⁶ argues strongly that the United States Supreme Court would find abolition constitutional. The committee's position is based on the reasoning of *Powell v. Texas*,⁷⁴ in which the prevailing

opinion of 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."⁷⁵

Legislation enacted in the states of Washington,⁷⁶ Louisiana,⁷⁷ and Mississippi,⁷⁸ declared unconstitutional by their respective state supreme courts,⁷⁹⁻⁸¹ has been regularly cited by legal and psychiatric authors,⁸²⁻⁸⁸ especially those favoring retention of the insanity defense.

Aside from the insanity-defense issue, however, the legislation was constitutionally defective in a number of respects. The Washington law — in providing "that whenever in the judgment of the court any person convicted of a crime shall have been by reason of his insanity, unable to comprehend the nature of the act, the court may at its discretion direct such person to be confined to one of the state hospitals for treatment"⁸⁹ — actually did not abolish the insanity defense but only changed "the time and mode of the trial of the issue of insanity"⁹⁰ and left the question of insanity not for the jury to decide but "entirely to the trial judge."⁹¹

The Louisiana law vested absolute power in a lunacy commission to determine the question whether the accused was "presently insane or whether he was insane at the time of the commission of the offense charged against him."⁹² The law thus delegated to a commission powers belonging exclusively to a judicial tribunal and also deprived the accused of his constitutional right to a trial by jury on a question of fact directly pertaining to his guilt or innocence and of the right to compulsory process for the attendance of his witnesses to testify to matters directly pertaining to his guilt or innocence.⁹³

The Mississippi law did not permit a mentally disordered defendant to establish guilt of a lesser crime than murder — say, manslaughter,⁹⁴ the maximum punishment for which was 20 years in the state penitentiary — and required that an insane person be sentenced "for his natural life regardless of how long that life may last."⁹⁵ The statute also authorized a trial court "to put him on trial while he was so insane."⁹⁶ Furthermore:

If the judge decides, no matter for what reason, that the person ought not to be sent to the insane asylum, he goes to the penitentiary. There is no force that can change this arbitrary discretion of the judge; no hearing is provided and none can be had. If, on the contrary, he decided the person ought not to go to the penitentiary, he alone can set in motion the machinery, and he alone is the judge of whether the facts exist that warrant his being withheld from the penitentiary for treatment, or whether he shall go to the penitentiary regardless of his mental condition. If he is committed to the hospital for treatment he may be removed on the personal judgment of the Governor regardless of the proof; no hearing or proof is provided for under the statute, and none known to the law. It is entirely a proceeding unique in itself. If the Governor decides a person has recovered and wants him sent to the penitentiary, to the penitentiary he goes regardless of the actual facts; he has no chance to present them or to have any hearing or to institute any inquiry with reference to the true facts. This clearly violates the due process clause of the Constitution.⁹⁶

It is impossible to determine with certainty how the state supreme courts would have ruled on the matter of the elimination of the insanity defense *per se* had the other unconstitutional provisions been omitted from the law. However, assuming that they would have declared abolition to be unconstitutional, their decision would have to be evaluated in the light of their understanding of mental disease, completely out of tune, as it was, with prevailing psychiatric knowledge. For example, in a specially concurring opinion, one Mississippi Supreme Court judge wrote:

Under all sound modern conceptions, the affliction of insanity, so that a person is totally insane, is a visitation of Providence and is at the hand of God. The overwhelming and presently uncontrollable result of that visitation is such as to deprive the sufferer of the power of responsible reason, and this result, so long as the affliction lasts, is one pronounced by the decree of nature itself. And when, and so long as, deprived of the faculty of reason, the afflicted person is no more than a frame of bones and muscles, although in a physical sense he is still liv-

ing and subject to the sensation of pain, and other feelings of a purely physical character. In the light of nature and nature's laws, such a person is then no more capable of committing a crime than a five-year-old child, or an idiot, or

"There will be a tendency to effect the discharge into the community of potentially dangerous persons"

the insensate animal of the brute creation, and no more so than would a dead body found naked on the street be indictable for an indecent exposure. Then how can a legislative enactment, which runs counter to these determinative and overruling dispensations and ordinances of nature, be valid, and how can a Legislature make by its fiat a fact out of something which nature declares by its paramount power is not a fact — how can a Legislature change into guilt that which under the supreme law of nature is not guilt, or punish as a crime, that which nature proclaims is not a crime? This man-made statute would attempt by an arbitrary legislative declaration to insert into the equation the essential elements of volition, animus and intent, and thereby to make of a homicide by a lunatic a felonious crime, when nature, under the dictates of the Supreme Ruler of the Universe, has removed those elements in the particular case and has made it impossible for human power to insert them — has thereby made any legislative fiat a nugatory pronouncement — void because contrary to the immutable and paramount laws of nature.⁹⁷

ABOLITION ESPECIALLY WARRANTED IN NEW YORK

"If the blind lead the blind, both shall fall into the ditch." — St. Matthew 15:14

As the standards used in determination of criminal responsibility are more liberally construed by trial courts, it is natural that there will be an increase in insanity acquittals. Likewise, as rights accorded to civilly committed patients are extended to persons acquitted by reason of insanity who are confined to institutions, there

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will be a tendency to effect the discharge into the community of potentially dangerous persons. A proposal to facilitate the release of insanity-acquitted patients who cannot be proved dangerous has been introduced in the New York State Legislature.⁹⁸ Should such legislation be enacted, implementation of the law may be effectively hamstrung by judicial decisions of the state's highest court. Only elimination of the "not guilty by reason of insanity" plea can extricate the criminal-justice system from this cauldron of confusion and controversy.

Specifically, two recent decisions of the New York Court of Appeals necessitate consideration by the legislature of abolition of the insanity defense. In 1976 the court ruled, in *People v. Edney*,⁹⁹ that the defense may not challenge the prosecutor's use of testimony by a psychiatrist who initially examined the defendant on behalf of the defense, "because a plea of insanity in a criminal proceeding constitutes a complete and effective waiver of the traditional privileges involving a defendant and attorney and physician." This opinion clearly violates the lawyer-client privileged-communication statute.¹⁰⁰ Two and one-half years earlier the court held, in *People v. Al-Kanani*,¹⁰¹ that a defense of insanity is a lifting of the physician-patient privilege¹⁰² and held to be valid the damaging testimony (not related to the mental condition of the patient) of a psychiatrist who had treated the defendant before the assertion of the insanity defense and during a prolonged hospitalization while the defendant was believed to be incompetent to stand trial. This ruling completely ignored the then applicable law,¹⁰³ which provided in part that "the report of the psychiatrists . . . shall not be received in evidence upon the trial of the defendant . . ."¹⁰⁴ and which is even less restrictive than the language of the current statute¹⁰⁵ (" . . . any statement made by him for the purpose of the examination or treatment shall be inadmissible in evidence against him in any criminal action or any issue other than that of his mental condition . . ."). Thus, "the legislative expression of public policy regarding the confidentiality of matters communicated to court-appointed psychiatrists was abridged by the holding in *Al-Kanani*," and the attorney-client privilege was diminished by *Edney*, "ap-

parently on the ill-founded assumption that an insanity plea suspends policies rooted in fairness and due process."¹⁰⁴ This serious erosion in New York State of the centuries-old lawyer-client privilege can be reversed by statutory abolition of the insanity defense.

Presumably, it is now possible — theoretically at least — for an insanity plea to be asserted by the court "on behalf of the defendant" and, as a result of *Edney*, to invade the physician-patient and attorney-client privilege. The case of *People v. Baxter*¹⁰⁶ suggests that in New York a trial judge must interpose an insanity plea, in a proper case, unless defense counsel has good reason not to raise the insanity defense. This would be in accord with the Davis rule,¹⁰⁷ which permits the court or the prosecution to raise the issue of insanity, and the holding of the United States Court of Appeals, District of Columbia Circuit, in *Whalem v. United States*,¹⁰⁸ whereby a defendant who refused to raise the insanity issue could not prevent the court from injecting it.¹⁰⁹

The New York State Department of Mental Hygiene has prepared a new regulation¹¹⁰ outlining procedures for release of patients admitted under Section 330.20 of the Criminal Procedure Law after acquittal by reason of mental disease or defect. The procedures entail evaluations and reviews by numerous mental health professionals, culminating in referral to a special release committee "consisting of three psychiatrists who shall be . . . board certified [and] will review all information, clinical, social and criminal, pertaining to the case and will conduct a joint examination of the patient." Thereafter, the director of the hospital will conduct a personal examination of the patient. An extensive report is then forwarded to the commissioner of mental hygiene if the director is satisfied that the patient may be discharged or released on condition. Further, an independent review panel, which consists of three highly qualified experts, none of whom may be employed by the Department of Mental Hygiene, "will make a thorough review of the clinical record, including the circumstances surrounding the incident which occasioned the acquittal by reason of mental disease or defect, will examine the patient, collectively or individually, and will discuss the patient's condition, behavior and

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treatment with his or her treating psychiatrist and members of the treatment team, including ward staff." It will then submit a comprehensive report. The case will be reviewed subsequently by the Office of Forensic Services and a recommendation made to the commissioner, after which the attorney-general will be requested to make application to the committing court for the patient's discharge or release on condition.

However, neither the disposition of the case nor the cost to the state stops here. A judicial hearing must be held that will include testimony by one or more specially court-appointed psychiatrists. It is to be noted that the court does not need to accept the recommendations of the Department of Mental Hygiene. In *Application of Miller*,¹¹¹ the court ordered the continued hospitalization of a patient who was considered by the Rochester State Hospital staff to be no longer mentally ill. In *People v. Corrente*,¹¹² the "defendant" was found to be "without psychosis at the present time" and "not dangerous either to himself or to the community"; nevertheless, the court, after expressing its indebtedness "to all counsel and all physicians for their intelligent and even-handed assistance in these proceedings," denied the application for release of the patient. In *Application of Lublin*,¹¹³ the court held that the standard for release in New York "rests upon a finding that the patient is no longer a danger to himself or others, [but] the very concept of dangerousness is vague and elusive." Needless to say, Lublin was directed to be retained until it was "established" that he could be discharged or released upon conditions without danger to himself or others. This holding was reversed¹¹⁴ by the Appellate Division of the Supreme Court, which in a 3-to-2 decision ruled that "one's present deprivation of liberty cannot be sustained by medical and judicial doubts as to future dangerousness." However, the Appellate Court, too, ordered Lublin's return to the hospital.

Neither courts nor hospital staff will find it easy to facilitate the release of persons found not guilty by reason of mental disease or defect. Fear of subsequent accusation of negligent release¹¹⁵ understandably propels the decision makers to a judicial and psychiatric conservatism, ostensibly with the community's protection in mind but obviously self-serving.

It would be tragic if New York and other states where the insanity defense is increasingly used became embroiled in such court-hospital controversy as that characterizing the 1976 case of *People v. Adams*,¹¹⁶ in which an Illinois appellate court ruled that the trial court had no statutory authority to order that a patient who had been acquitted of murder by reason of insanity be returned to the court for a competency hearing before release from a state hospital, that the trial court lost jurisdiction over the patient after he was acquitted, and that the director of the State Department of Mental Health and the superintendent of a state hospital could not be held in contempt of court for disobeying an order that the trial court had no jurisdiction to enter.

For the present, the New York case of Martin Henig¹¹⁷ would seem to ensure that the principle enunciated by the United States District Court of Appeals, District of Columbia Circuit, in *Ragsdale v. Overholser*¹¹⁸ will prevail:

It is hardly asking too much to require that a defendant who is absolved from punishment by society because of his mental condition at the

*"Only elimination of the
'not guilty by reason
of insanity' plea can extricate
the criminal-justice system
from confusion and controversy"*

time of the criminal act should accept some restraint on his liberty by confinement in a hospital for such period as is required to determine whether he has recovered and whether he will be dangerous if released.¹¹⁹

Martin Henig fatally stabbed his girlfriend, nine months pregnant, in January, 1970. He was found mentally incompetent to stand trial and was placed in a mental institution. He was declared fit to proceed in March, 1973; was released on bail in June, 1973, pending trial; and subsequently underwent intensive psychotherapy. He was acquitted by reason of insanity after a trial in November, 1975. His treating psy-

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chiatrist certified not only that he was not dangerous to himself or anyone else, and not in need of hospitalization, but also that hospitalization or incarceration might endanger his recovery.¹²⁰ A trial was held to determine whether he was entitled to a hearing before his commitment under the Criminal Procedure Law. The court ruled that he was entitled to the same procedures used to determine committability of a person who is not otherwise before a court and that his examination be conducted on an outpatient basis.¹²¹ In a 4-to-1 decision, the Appellate Division of the Supreme Court reversed the trial judge's decision and ordered that Henig be committed for the purpose of examination to de-

If insanity is not to be a defense, let us say so frankly and even brutally, but let us not mock ourselves with a definition that palters with reality. Such a method is neither good morals nor good science nor good law.¹²²

After the failure of the M'Naghten rule, the American Law Institute rule, and the Durham rule, as well as their many variations and modifications, it is evident that no logical definition of legal insanity can be framed. It is time to acknowledge this futile pursuit and, in the interests of "good morals . . . good science . . . [and] good law," to abolish the insanity defense. ■

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*"Fear of subsequent accusation
of negligent release propels
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termine if he was dangerous. "After commitment, petitioner can seek release by presenting evidence supporting a claim that the period of confinement is excessive. . . . The burden will then be upon the State to prove petitioner is dangerous so as to require continued incarceration."¹²²

Thus, in New York, the status of a person acquitted by reason of insanity is similar to that in the District of Columbia, where in April, 1976, the United States District Court of Appeals held that the principle of equal protection does not prohibit more stringent procedural and substantive requirements for the release of persons who have been civilly committed.^{123,124} Insanity-acquitted patients are regarded by the court as "an exceptional class of people [who have] already unhappily manifested the reality of anti-social conduct"¹²⁵ and can be treated differently from civilly committed patients.

CONCLUSION

More than 50 years ago Judge Benjamin Cardozo wrote:

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31. *United States v. Strickland*, Crim. No. 255-61, United States District Court for the District of Columbia.
32. *United States v. Ashton*, 317 F. Supp. 860 (1970).
33. *State v. McCullough*, 87 N.W. 503 (1901).
34. *In re Rosenfeld*, 157 F. Supp. 18 (1957).
35. *United States v. Bell*, Crim. No. 969-61, United States District Court for the District of Columbia.
36. *United States v. Marocco*, Crim. No. 206-62, United States District Court for the District of Columbia.
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53. *Ibid.*, pp. 17-18.
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58. *Ibid.*, p. 6479.
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THE FICTION OF LEGAL INSANITY AND THE MISUSE OF PSYCHIATRY

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THE FICTION OF LEGAL INSANITY AND THE MISUSE OF PSYCHIATRY

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“When an erroneous hypothesis becomes entrenched and generally accepted, it is transformed into a kind of tenet that no one is allowed to question and investigate; and it then becomes an evil which endures for centuries.”
- - - Goethe¹

This paper concerns itself with the concept of legal insanity at the time of the commission of a criminal act. In this context the term insanity relates to a mental state presumably resulting from disease of the mind which renders the accused person incapable of meeting a certain standard of cognition or volition required for a person accused of crime to be held responsible, and therefore punishable. Such incapacity is sought to be proven when the insanity defense is raised. Formally labeling a defendant as legally insane by means of a trial with or without a jury has certain consequences very different from the freedom that usually follows acquittal, and this paper will deal also with the practice of automatic commitment employed in many jurisdictions and the serious misuse of psychiatry which such practice has engendered.

Legal insanity is considered a fiction because: (1) Unlike other defenses such as self-defense, entrapment or the statute of limitations, it does not lead, when successful, to liberation; (2) Since there is in fact exculpation without release of the defendant, its use is “designed to authorize the holding of persons who have committed no crime,”² and is “a device for triggering indeterminate restraint”³; (3) Its application in Anglo-American jurisprudence originated as one of the escape hatches to avoid rampant enforcement of the death penalty rather than as a manifestation of the moral and ethical principle that “our collective conscience does not allow punishment where it cannot impose blame”⁴; and (4) Mentally disabled persons who are conceived of as ineligible for the moral condemnation inherent in a criminal conviction cannot be clearly and measurably identified by any one of the numerous tests or definitions of legal insanity (or its opposite, criminal responsibility).

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An appreciation of the significance and purpose of the insanity defense is not possible without some understanding of the system of justice which prevailed over the centuries starting with the replacement of ecclesiastical courts by the secular royal and common law courts in the handling of persons accused of crime. One must not be misled by Biblical and Talmudic references by writers on the subject of insanity. “Father, forgive them; for they know not what they do”⁵ and “A deaf-mute, an Idiot, and a minor are awkward to deal with, and he who injures them is liable, whereas, if they injure others they are exempt”⁶ may have been relevant to the matter of gaining entry into Heaven, but have had precious little to do with the determination of guilt or innocence under the administration of criminal justice in the early secular courts. Nor was it likely that high-sounding legal principles, such as those enunciated by Sir Edward Coke in the Seventeenth Century to the effect that “no crime could exist without a felonious intent and that an insane person lacking in mind and reason could not form a felonious intent”⁷ and by Henry Bracton some 400 years earlier that children and the insane “lack sense, reason and no more do wrong than a brute animal,”⁸ would guide the work of the courts where life and death decisions were made. The forensic psychiatry literature contains reference to the various insanity tests proposed by legal scholars during the Renaissance and subsequently. For example, Judge Tracy’s charge in *Arnold’s Case*⁹ as cited by Glueck^{9a} is held to have been influential in the handling of cases by other judges in ensuing decades:

“If the man be deprived of his reason, and consequently of his intention, he cannot be guilty. . . It is not every kind of frantic humor or something unaccountable in a man’s actions, that points him out to be such a madman as is to be exempted from punishment; it must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or a wild beast, such a one is never the object of punishment.”

Thus did Judge Tracy elaborate what he understood to be the meaning of the defendant’s being “under the visitation of God” and thereby being unable to “distinguish between good and evil.” Two hundred years earlier Fitzherbert postulated what was referred to by Sayre as a doctrine which established insanity as a “well-recognized defense”¹⁰:

“He who is of unsound memory hath not any manner of discretion; for if he kill a man it shall not be felony, nor murder, nor he shall not forfeit his lands or goods for the same, because it appeareth that he hath not discretion; for if

he had discretion he should be hanged for the same, as an infant who is of the age of discretion, who committeth murder or felony shall be hanged for the same."

Sir Matthew Hale in the late Seventeenth Century wrote that "[t]he consent of the will is that which renders human actions either commendable or culpable;. . . [a]nd because the liberty or choice of the will presupposeth an act of the understanding to know the thing or action chosen by the will, it follows that, where there is a total defect of the understanding, there is no free act of the will in the choice of things or actions."¹¹ He was troubled by the fact that some persons, who are "under a partial dementia in respect of some particular discourses" are melancholy and "for the most part discover their defect in excessive fears and griefs," are "not yet wholly destitute of the use of reason" and may be entitled to some consideration on that account.¹² He arrived at a compromise standard for criminal responsibility: "Such a person as labouring under melancholy distempers 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."¹³

All these tests were laid down in intimate relation to the severest of criminal codes where capital punishment was prescribed for an enormous number of crimes. Seventeenth Century England, for example, had 350 capital crimes,¹⁴ and death was the prescribed punishment for more than 200 offenses in colonial New York.¹⁵ The ancient *lex talionis*, the law of an eye for an eye, a tooth for a tooth, a life for a life, can be considered as a system of coddling of criminals when compared to the draconian features of the laws of both England during the period of the Enlightenment and of colonial America. This was an era in which trials, condemnations and executions of animals were common, indeed there were many instances of the destruction of inanimate objects which had been the cause of injuries to persons; for example, the trial and condemnation of a cart wheel for having run over a man.¹⁶ However there evolved a general revulsion against the harsh laws of the land, and a variety of simple and sometimes ingenious mechanisms was developed to forestall their implementation. Jendwine reports that English juries, reluctant to send to the gallows women who were accused of infanticide, "would grasp at any suggestion that the baby had been stillborn, or had died in the course of birth, or had been accidentally killed."¹⁷ Colonial juries, by simply exercising their power to nullify both the instruction of the judge and the evidence against the accused, acquitted large numbers of defendants, or found them guilty of less serious offenses, in order to avoid the death penalty.¹⁸ Even the judges worked out methods to avoid pro-

nouncing sentences of death—for example, "benefit of clergy" permitted the release of a first offender convicted of some capital offense if he could recite one verse from the Bible.¹⁹

Modernization or revision of laws through the legislative process was no easier a task 300 years ago than it is today, and the justice system found it more convenient to develop procedures to mitigate the effects of the law than to try to have capital crimes changed to non-capital crimes. The notion of insanity as a defense against criminal responsibility lent itself readily to the goal of preserving the rule of law and preventing the execution of numerous individuals convicted of capital crimes. Insanity, based as it was on a sickness of the mind, required the participation in the trial process of the medical witness, and the availability of "scientific" proof or truth must have been greatly preferred by both judges and juries over the transparent subterfuges they would otherwise have to employ to forestall a legal killing.

Prior to 1800 "legal" insanity, as a special verdict of acquittal, did not exist. If an individual was acquitted because of the failure of the prosecution to prove its case or because the jury chose out of sympathy to find the defendant "Not guilty," he was immediately set free. The following report by Sir Matthew Hale is a vivid example of how such cases were handled:

"In the year 1668 at Aylesbury a married woman of good reputation being delivered of a child, and having not slept many nights fell into a temporary phrenzy, and kild her infant in the absence of any company; but, company coming in, she told them, she had kild her infant, and there it lay; she was brought to gaol presently, and after some sleep she recovered her understanding, but marvelled how or why she came thither; she was indicted for murder, and upon her trial the whole matter appearing it was left to the jury with this direction, that if it did appear, that she had any use of reason why she did it, they were to find her guilty; but if they found her under a phrenzy, tho by reason of her late delivery and want to sleep, they should acquit her; that had there been any occasion to move her to this fact, as to hide her shame, which is ordinarily the case of such as are delivered of bastard children and destroy them; or if there had been jealousy in her husband, that the child had been none of his, or if she had hid the infant, or denied the fact, these had been evidences, that the phrenzy was counterfeit; but none of these appearing, and the honesty and virtuous deportment of the woman in her health being known to the jury, and many circumstances of insanity appearing, the

jury found her not guilty to the satisfaction of all that heard it."²⁰

In other cases where the mental condition of the defendant was considered to be a significant factor in the commission of the crime, the mentally ill person (charged with a capital crime) was found guilty but a special report was made and he was subsequently pardoned by the king.²¹ There was the same need of the royal pardon for homicide by misadventure or in self-defense.²² It would be difficult to imagine a king, always in need of new sources of revenue, not using money payments for the pardon as a means of replenishing his coffers—thus, probably, more than humanitarian motives was involved in the granting of pardons. Judges and juries in 17th and 18th Century England could be expected to react to this by the expression of their own prerogatives such as the devising by judges of rules for criminal responsibility like those of Coke, Hale and Tracy, as noted above, and the exercising by the jury of their power to acquit with impunity any defendant who had sufficiently aroused their sympathy.²³

In 1800 a most dramatic trial took place which had the effect of codifying the law in connection with handling of defendants acquitted by reason of insanity. James Hadfield, believing that he had been ordained by God to undergo self-sacrifice for the salvation of the world, fired a shot at King George III in a London theater.²⁴ His lawyer was Thomas Erskine, an excellent extemporaneous speaker. Were it not for the fact that the charge was treason and that the King was shot at, and, in addition, that Hadfield was psychotic at the time of the trial, full acquittal might readily have resulted. The King, after all, had not been wounded (it was clearly not the intention of the defendant, an ex-soldier and expert shot, to kill the King, but simply to commit treason by shooting at him), and the numerous witnesses attested to Hadfield's deranged mind caused, it was established by physicians at the trial, by brain damage sustained in a battle in France six years earlier. His past patriotism and devotion to duty were impressed upon the jury by Erskine, who topped off his case by having the jury look closely at the extensive and deep scars about Hadfield's head and neck,²⁵ and, according to one writer,²⁶ feel his exposed brain. However, Erskine was not taking any chances: since Hadfield was able to distinguish between good and evil (that is, right and wrong), the insanity test then prevailing, it was necessary to invent a new test to ensure that a verdict of acquittal would not leave open the remote possibility that the jury looked favorably upon a treasonable act and to demonstrate that not merely sympathy for the accused but adherence to the rule of law guided the jury in its decision. Erskine developed a position based on the testimony of the physicians during the trial. Like the psychiatrist in

present-day insanity trials, they were "equipped to formulate a more sophisticated and necessarily more complicated theory than the layman"²⁷ and thus their explanation, given the stamp of acceptance because of its scientific flavor, became an important underpinning of the jury's verdict.

So Erskine, with hypnotic eloquence, proceeded to give the jury the legal and medical logic they were looking for:

"Delusion, ... where there is no frenzy or raving madness, is the true character of insanity; and where it cannot be predicated of a man standing for life or death of a crime, he ought not, in my opinion, to be acquitted ... I must convince you, not only that the unhappy prisoner was a lunatic, within my own definition of lunacy, but that the act was the immediate, unqualified offspring of the disease ... [T]o deliver a lunatic from responsibility to criminal justice, ... the relation between the disease and the act should be apparent. Where the connection is doubtful, the judgment should certainly be most indulgent, from the great difficulty of diving into the secret sources of a disordered mind."²⁸

The reader will notice that elements of what have been thought in modern times to be more liberalized formulations of legal insanity are contained in Erskine's definition. But the Hadfield case did not result in a modification of the right-wrong test. The jury was essentially directed to render a verdict of not guilty, but, at the special request of a member of the prosecution team, to have the words "the prisoner appearing to have been under the influence of insanity at the time the act was committed" added so that there would be "a legal and sufficient reason for his future commitment."²⁹ It is this special verdict that gives the Hadfield case its historic significance, since Parliament promptly enacted the Criminal Lunatics Act of 1800³⁰ which provided for the automatic confinement "until His Majesty's Pleasure be known" of any defendant found not guilty by reason of insanity. The change in the wording of the verdict to "Guilty but insane" effected by the Trial of Lunatics Act of 1883³¹ (to indulge Queen Victoria's demand for etymological accuracy) in no way altered the legal policies and procedures established by the 1800 Act. That "Guilty but insane" is exactly the same thing in English law as "Not guilty by reason of insanity" was settled by the case of *Felstead v. Rex*³² which also decided that the special verdict was not appealable. [This was finally semantically purified statutorily by the Criminal Procedure (Insanity) Act, 1964, c.84, sec. 1, which reads: "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."³³] Thus, in eliminating the emphasis

on pardoning a mentally ill person who was found guilty of a crime committed whilst under some "defect of reason" related to the mental illness, the Hadfield case caused legal scholars and psychiatric practitioners to focus on the term "insanity" and over the next two centuries to attempt to define precisely what degree of mental incapacity must exist in order to exculpate a defendant as legally insane. This effort has consistently obscured the reality of post-trial automatic commitment and, as will be shown below, its inevitable concomitant, the egregious misuse and abuse of psychiatry. Moreover, completely forgotten has been the fact that tests of insanity as a defense to criminal responsibility were originally devised to enable the criminal justice system to avoid the death penalty in cases of severely mentally disordered or retarded individuals charged with capital crime. The notion that responsibility was a medical issue, that mental illness per se rendered a person incapable of making elementary moral discriminations and adjusting behavior to the requirements of the law, and that mentally ill persons are not likely to be deterred from the commission of criminal offenses by the threat of penal sanctions, became strongly embedded in the thinking of the psychiatrist. The M'Naghten Rules of 1843, "conceived by disaster, born of excitement, and nourished in fear,"³⁴ were seen, not as a restatement of the extant legal view, but as in some way defining mental illness and thus invading the prerogatives of the men of science. Thus, the Rules were opposed by many members of the medical and psychiatric community, and libertarians generally, because too many seriously mentally disordered offenders were found guilty and imprisoned, rather than hospitalized. Also opposing the Rules, were many psychiatrists and judges who were primarily concerned about public safety and who saw great danger in confining "M'Naghten criminals" (those found responsible under the Rules) to prison with the "guarantee of release to [these] technically sane but criminally depraved men at the end of their pat sentences."³⁵ Compounding the confusion was the tendency of many of the protection-of-the-public advocates to support their position with arguments of compassion and treatment for the sick criminal and of the treatment-for-the-mentally-disabled group to support their stand with arguments of permanent custody for the dangerously deranged offender. Apparently, no thought was given to the possibility that the objectives of protection of society and treatment of the mentally ill offender were not always compatible or concurrently attainable to an equal degree.

Thus, we see William Alanson White, one of America's most distinguished psychiatrists and a president of the American

Psychiatric Association, writing in the early 1920's:

"The further apprehension that the criminal would frequently escape the consequences of his act by being sent to a hospital rather than to a prison is based wholly upon a misconception. The basic object of criminology is to cure the fault, or at least do the best that can be done and not wreak vengeance upon the offender. Society would be as adequately protected with the criminal in a hospital for the insane as if he were in a prison and there would, too, be a better chance that he might come out, in part at least, socially rehabilitated. In this connection it is interesting to note that a review of the criminal population of Saint Elizabeth's Hospital shows that the criminal who is sent here from prison stays in the hospital on an average of two and one-half times longer than he would have stayed in prison had he been discharged at the expiration of his sentence. This ought to help satisfy those who want the criminal punished. The principle is that the criminal by his own acts, so to speak, commits himself to the custody of the state there to stay, not for an arbitrarily predetermined time, but until he demonstrates by positive evidence, his ideas and his conduct, that there is reason to believe he might get on outside."³⁶

In his Isaac Ray Award lectures, John Biggs, Jr., Chief Judge of the United States Court of Appeals, Third Circuit, described case after case of mentally disordered offenders who were executed after they were found to be responsible under the M'Naghten Rules. In calling for elimination of the Rules rather than abolition of capital punishment to correct this evil, he pointed out that application of the Rules constituted a danger to the public because they stood in the way of having "the mental competency of recidivists . . . questioned by realistic means at the earliest possible stage."³⁷ In 1955 he wrote:

"So long as the courts judge criminal responsibility by the test of knowledge of right and wrong, psychotics who served prison terms or are granted probation are released to commit increasingly serious crimes, repeating crime and incarceration and release until murder is committed. Instead of being treated as ordinary criminals, they should be confined to institutions for the insane at the first offense and not be released until or unless cured."³⁸

Appellate courts have not concealed, although usually by means of small-print footnotes, their preference for indeterminate hospitalization for the "blameless" over a determinate prison sentence for the blameworthy as long as release from confinement was predicated on

the individual's not constituting a "danger to himself or others." The philosophy that for many years guided the United States Court of Appeals, District of Columbia Circuit, was expressed by Judge Fahey in a 1956 case:

"The remedy of treatment results in the accused returning to the life of the community only after disinterested experts think he may safely do so; whereas the person imprisoned enters again into the community when his sentence is served though he may not be ready for a law-abiding life. For these reasons, as well as because the criminal law does not punish in the absence of blame, we should guard against imprisonment where a reasonable doubt exists as to sanity in its relation to the crime charged."³⁹

No juridical body was more sympathetic to the cause of the mentally ill or more interested in protecting the insane from condemnation and punishment. Yet in the very heyday of the Durham Rule when the "medical model" was hailed by the court, and the jury was encouraged to accept the defense of insanity when "the facts on the record are such that the trier of the facts is enabled to draw a reasonable inference that the accused would not have committed the act he did commit if he had not been diseased as he was"⁴⁰; that is, "But for this disease the act would not have been committed"⁴¹; Judge Bazelon himself was able to pronounce:

"Under our criminal jurisprudence, mentally responsible law breakers are sent to prison; those who are not mentally responsible are sent to hospitals. To that end the District Code makes possible a verdict of not guilty by reason of insanity, and directs that under such a verdict the defendant is to be confined in a hospital for the mentally ill until it is determined that he 'has recovered his sanity ... [and] will not in the reasonable future be dangerous to himself or others.' Two policies underlie the distinction in treatment between the responsible and the non-responsible: (1) It is both wrong and foolish to punish where there is no blame and where punishment cannot correct. (2) The community's security may be better protected by hospitalization under D.C. Code, Sec. 24-301 than by imprisonment."⁴²

It is amazing that those who would most vociferously oppose a search for a Constitutionally acceptable method of effecting preventive detention have no difficulty in proposing that the same end be attained under the ostensibly compassionate altruism of the *parens patriae* doctrine.

The effort to devise a standard for criminal non-responsibility based

on the effects of mental illness has continued for almost 140 years, and juggling with legally undefinable terms such as "lack of substantial capacity," "appreciate criminality," "mental disease or defect," and "conform conduct" goes on apace. There is no reason to expect that the following words of the Royal Commission on Capital Punishment describing the M'Naghten Rules would not apply equally to any substitute formulation:

"[A]lthough judges, in trying a case that did not come within the original scope of the M'Naghten Rules, might sometimes direct juries in other terms, 'the much more usual course is for the judge to adhere strictly to the terms of the answers, and then to stretch the plain meaning of the language of those answers, until the ordinary non-legal user of the English language is aghast at the distortions and deformations and tortures to which the unfortunate words are subjected, and wonders whether it is worth while to have a language which can apparently be taken to mean anything the user pleases'. "⁴³

In the words of Guttmacher and Weihofen: "It takes rigorous legal training to develop a tolerance for this sort of word-magic."⁴⁴ Yet the fiction persists as one jurisdiction after another shifts from *M'Naghten* to *M'Naghten* plus the irresistible impulse rule to something else, and then sometimes back to *M'Naghten* in actual practice, for indeed the most liberal rule can be contracted and the narrowest rule expanded depending on the whim or conscience of the fact-finder. As pointed out by Mr. Justice Douglas: "There can be no doubt that [English] juries under this 'right or wrong' test sometimes did not follow it. When the M'Naghten rule indicated 'guilty' and common sense indicated 'guilty but insane,' the common sense of juries and judges usually prevailed."⁴⁵ But, as indicated above, the evil consequences of *M'Naghten* were not always obviated and the "common sense" of the jury occasionally led to "a verdict of 'guilty' and a sentence of death which might otherwise have been avoided."⁴⁶

The State of California is the most recent jurisdiction to discard *M'Naghten* in favor of the American Law Institute Rule⁴⁷: "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."⁴⁸ The Supreme Court of California majority indicated its "preference" for the term "criminality" over the term "wrongfulness".⁴⁹ The Court concluded that Subpart 2 of the ALI test ("The terms 'mental disease or defect'

do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.”), “designed to deny an insanity defense to psychopaths and sociopaths” was not relevant to the case.⁵⁰ In deferring to a later occasion the question whether to adopt Subpart 2, the Court ensures continued controversy in California over the ever-troublesome question of sociopathy as mental illness, especially since it quoted approvingly from the 1970 opinion of the United States Court of Appeals, Ninth Circuit, adopting the ALI Rule (*without* Subpart 2):

“The *M’Naghten* formulation also fails to attack the problem presented in a case wherein an accused may have understood his actions but was incapable of controlling his behavior. Such a person has been allowed to remain a danger to himself and to society, whenever, under *M’Naghten*, he is imprisoned without being afforded such treatment as may produce rehabilitation and is later, potentially recidivistic, released.”⁵¹

Again, a court is unwittingly engaged in what the author believes is the fiction of serving both the master of detention and the mistress of hospital treatment at one and the same time. Moreover, the death penalty, not yet completely abolished as a legal sentence in this country, hovers over, indeed underlies, the California Supreme Court decision to abandon *M’Naghten*: “... because of the grave, and often life and death consequences that follow from a decision as to the sanity of an offender, we are surely enjoined to spare no effort to frame the best standard that is currently extant.”⁵²

What must be recognized is that the death penalty *has* been eliminated in the United States for all practical purposes, and the utility of the insanity defense has been eliminated with it. Retention of the insanity defense can now only play havoc with the processes of the law and lead, as will be shown, to major psychiatric misuse. The few statistics that have been garnered on the use of the insanity defense show that until recent years the insanity defense was intertwined with the effort to prevent capital punishment. For example, as reported by the Royal Commission on Capital Punishment,⁵³ during the five years 1946-50, of 99,463 persons charged with a felony who came up for trial at Quarter Sessions or Assizes, (a) 374 were charged with murder; (b) 4,312 charged with attempts or threats to murder, manslaughter, infanticide, child destruction, wounding and attempted suicide; and (c) 94,777 charged with other crimes. Of those charged with murder, 19.8% were acquitted by reason of insanity—the corresponding

figures for groups (b) and (c) were 0.7% and 0.1% respectively. These data dramatically show that the insanity defense with very rare exception was used as a device to avoid carrying out the death penalty. When successful, it was a final disposition at the time of trial, while other devices, such as the “Prerogative of Mercy” and the “Statutory Medical Inquiry,” came long after trial. If the much-touted issue of exempting the mentally ill from moral condemnation and punishment was even remotely relevant, would we not see “compassion” extended to more than a mere 0.7% of the persons in group (b)? Surely the actual proportion of seriously mentally ill persons in this group would be no less than in group (a), nor would the degree of mental illness in this group (who were, fortunately for their victims, in the main less homicidally proficient) be any less than that in group (a).

That the insanity defense did supply some needed play in the joints of a criminal justice system which would otherwise have brought to the gallows a larger number of wretched criminals cannot be gainsaid, but its retention must be seen in the light of its susceptibility to misuse once capital punishment has been discontinued. An analogy can be seen in the Soviet Union’s use of the designation of “psychiatrically non-culpable,” once employed altruistically, as pointed out by Bukovsky,⁵⁴ by Russian forensic psychiatrists to divert political dissidents from almost certain death in the slave labor camps of Stalin to survival and relative freedom in psychiatric hospitals; and then, under the Krushchev and Brezhnev regimes, to incarcerate a new breed of political undesirables in special maximum security psychiatric institutions. Frank abolition of the death penalty in many states and a large variety of special interventions in the remaining ones virtually eliminate any justification for the retention of the insanity defense, if indeed the death penalty was a justification. (One can argue that the defense, while it saved some deserving souls, helped to keep capital punishment alive by making it appear less offensive since it caused only the “responsible” to be put to death.)

Because the insanity defense appeared to have a utilitarian purpose, it became fashionable to expound scientific explanations of insanity and scholarly moral and philosophic justifications for the defense. The scientific explanations led to efforts to formulate legal definitions of criminal non-responsibility—these will be discussed later. A major philosophic argument advanced is that the citizen needs the insanity defense. This has been enunciated by Abraham Goldstein⁵⁵ as follows:

“[E]liminating the insanity defense would remove from the criminal law and the public conscience the vitally important

distinction between illness and evil... [It] overlooks entirely the place of the concept of responsibility 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 an effort to patch and mend the tearing social fabric, the state is playing an increasingly paternal role, trying to help as many as possible to realize their expectations and to soothe and heal those who cannot. As this effort gains momentum, there is a very real risk it will bring with it a culture which will not make the individuals within it feel it is important to learn the discipline of moderation and conformity to communal norms.

"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 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."

The above position is endorsed and reinforced by Stone⁵⁶: "[W]hat is a court to do when it confronts a case so bizarre and so incongruous that all the premises of criminal law, including free will, seem inappropriate? Should the court simply grit its teeth and go on? The court is then in that ludicrous position of the American tourist who assumes that if he speaks English loud enough, the foreigners will understand him. If so, the criminal law risks demeaning itself, risks demonstrating that its language is not universal, its moral comprehension not encompassing. How much wiser for the criminal law instead to have an escape hatch, not only to avoid embarrassment, but also because by obverse implication every other defendant does have free will. Thus, the insanity defense is in every sense the exception that proves the rule. It allows the court to treat every other defendant as someone who chose 'between good and evil.'"

These authors offer no empirical evidence to support their speculations that the perception of personal responsibility by the citizen is almost extinct and its survival is dependent on the insanity defense, that the insanity defense can play a part in restraining revolutionary forces which seek to redistribute goods and services in our complex society, and that the insanity defense ennobles, rather than demeans, the criminal law. On the other hand, although there is also lacking

reliable data to refute them, Monahan⁵⁷ provides a cogent argument that the insanity defense may be contributing more to the removal of a sense of responsibility than to its restoration. In this connection, Halleck's observation that abolishing the insanity defense "would foster a greater sense of responsibility throughout our society..."⁵⁸ is noted. Goldstein and Stone have demonstrated that an erroneous hypothesis can be hardened in cement by spurious tautologies. Goethe will not smile down on them benignly.

* * *

There are now some eighteen "tests" of insanity in use in the eleven federal and fifty state jurisdictions of this country. While the language in some of the formulations is very similar to others, psychiatrists familiar with the niceties of legal expression and semantic nuances will know that, in the eyes of the strict constructionist, similarities do not negate differences in meaning. As reported by Morris,⁵⁹ 20 states still retain the *M'Naghten* test, three by legislative enactment and 17 by judicial decision. An additional ten states supplement *M'Naghten* with the "irresistible impulse" doctrine, each expressing the central idea of loss of control growing out of mental disease in a unique, sometimes quaint way: "incapable of choosing the right and refraining from doing the wrong," "overwhelming of reason, conscience and judgment," "inability to abjure the wrong and adhere to the right," and "dethroning of the governing power of the mind." Seven of the *M'Naghten* states with the irresistible impulse supplement have adopted it by judicial and three by statutory decree. One state (Maine) by statute holds to the Durham Rule with the added demurrer that the terms "mental disease" or "mental defect" do not include any abnormality manifested only by repeated criminal conduct or excessive use of drugs or alcohol. Variants of the ALI rule abound amongst the remaining jurisdictions. One federal circuit and four states adhere to the original ALI formulation, both Subparts (1) and (2), retaining the word "criminality." Five federal circuits and three states do likewise except that the word "wrongfulness" is used instead of "criminality." [Two of the latter federal jurisdictions are unclear as to the inclusion of Subpart (2).] Six states and two federal circuits use only Subpart (1) of the ALI formulation with the word "wrongfulness." The Third Circuit speaks only of lacking substantial capacity "to conform his conduct to the requirements of the law which he is alleged to have violated." California, as has been mentioned, abandoned *M'Naghten* for Subpart (1) of the ALI Rule using the word "criminality." The First Circuit, while not clearly discarding *M'Naghten*, "commends" the ALI Rule to its courts. One state uses the expression "does not have the capacity ... to know the wrongfulness of his conduct" rather than using the ALI's "lacks substantial capacity" to appreciate it.

Another state prefers "is unable ... to appreciate the criminality ..." and retains Subpart (2). Still another state (Texas) uses the expression "either did not know that his conduct was wrong or was incapable of conforming his conduct to the requirement of the law he allegedly violated." Vermont's rule contains the term "lacks adequate capacity ... to appreciate criminality" and adds the following sentence to Subpart (2): "The terms 'mental disease or defect' shall include congenital and traumatic mental conditions as well as disease."

In its *Browner* ruling, eliminating the Durham standard, the United States Court of Appeals, District of Columbia Circuit, adopted Subpart (1) of the ALI formulation (using the term "wrongfulness") supplemented by complicated provisos as follows:

a) "[A] mental disease or defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls."⁶¹

b) "In a particular case ... defendant may have reason to request omission [from judge's instruction on defense of insanity] of the phrase pertaining to lack of capacity to appreciate wrongfulness, if that particular matter is not involved on the facts, and defendant fears that a jury that does not attend rigorously to the details of the instruction may erroneously suppose that the defense is lost if defendant appreciates wrongfulness. ... [I]t is not enough to rely solely on logic, when a simple change will aid jury understanding. In such a case, if defendant requests, the judge should limit the instruction to the issue involved in that case, and charge that the jury shall bring a verdict of not guilty if as a result of mental illness defendant lacked substantial capacity to conform his conduct to the requirements of the law."⁶²

(c) "The introduction or proffer of past criminal and anti-social actions is not admissible as evidence of mental disease unless accompanied by expert testimony, supported by a showing of the concordance of a responsible segment of professional opinion, that the particular characteristics of these actions constitute convincing evidence of an underlying mental disease that substantially impairs behavioral controls."⁶³

Confusing as the *Browner* standard appears, it is obfuscated even more by the ruling of the District of Columbia Court of Appeals⁶⁴ (not the United States Court of Appeals, District of Columbia Circuit) which held that as of September 27, 1976, the insanity test in the District of Columbia courts under its jurisdiction is as follows: "A person is not responsible for criminal conduct if at the time of such con-

duct as a result of a mental disease or defect he lacked substantial capacity either to recognize the wrongfulness of his conduct or to conform his conduct to the requirements of law."⁶⁵ (Emphasis added.) Subpart (2) of the ALI formulation is included,⁶⁶ and the *McDonald* definition of mental disease or defect accepted.⁶⁷ The District of Columbia Court of Appeals insists that it is the "highest court in the District of Columbia" under the 1971 Court Reorganization Act which eliminated the prior power of the United States Court of Appeals to review its judgments.⁶⁸

New Hampshire holds that "The verdict should be 'not guilty by reason of insanity' if the killing [sic] was the offspring or product of mental disease in the defendant ..."⁶⁹

The Michigan rule states: "A person is legally insane if, as a result of mental illness ..., or as a result of mental retardation ..., that person lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law."⁷⁰ "A person who is under the influence of voluntarily consumed or injected alcohol or controlled substance at the time of the alleged offense shall not thereby be deemed to have been legally insane."⁷¹ Michigan law defines mental illness as: "A substantial disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life."⁷²

The New York rule states: "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: (a) The nature and consequence of such conduct; or (b) That such conduct was wrong."⁷³ This will be readily recognized as embracing the essence of *M'Naghten*, though presumably susceptible of a more liberal interpretation because of the replacing of "not to know" with "lacks substantial capacity to know or appreciate." The ALI volitional clause, "conform his conduct," is not included. It is of interest that for decades prior to the enactment of this rule, New York's standard made no mention of mental disease or defect. It was both more liberal and more conservative than *M'Naghten* depending on who was interpreting it and under what circumstances: "A person is not excused from criminal liability as an idiot, imbecile, lunatic or insane person, except upon proof that, at the time of committing the alleged criminal act, he was laboring under such a defect of reason as 1) Not to know the nature and quality of the act he was doing; or 2) Not to know the act was wrong."⁷⁴ In at least one case, that of a young widow who killed her two-year-old son because "I couldn't take care of him any

longer and I thought he would be better off dead," the New York Court of Appeals reversed a murder conviction partly on the grounds that the trial judge in his charge to the jury had made reference to " 'some mental disease,' that is, some pathological condition, instead of a 'defect of reason,' as the statute reads."⁷⁵

The compulsive reader will detect that the above summary refers to 52 state jurisdictions instead of 50. This apparent discrepancy is due to the fact that two states each have two different standards. Texas adopted the ALI Rule, Subpart (1), with the word "wrongfulness," for use in determining whether children were to be held non-responsible "for delinquent conduct or conduct indicating a need for supervision"⁷⁶ and enacted the standard referred to on Page 32 for adult defendants.⁷⁷ Wisconsin, adding absurdity to fiction, gives a defendant a choice between the M'Naghten test, with the burden of proof of sanity falling on the prosecutor, and the ALI Rule, with the burden of proof of insanity falling on the defendant.⁷⁸ Although this dichotomous approach may have been corrected by statute,⁷⁹ it is nevertheless highlighted at this point as an example of contradictory legal processes within a jurisdiction itself let alone between entirely separate and independent jurisdictions.

Those who look to retain the insanity defense will not be heartened by contributions from other disciplines. Philosophers have not done much better than jurists and legislators in evolving a workable definition of insanity. Herbert Fingarette,⁸⁰ for example, believes that "[w]ere the legal issues shifted to the inherent irrationality of the defendant's mind in leading him to conduct himself in a way forbidden by law, ... the jury member would feel much more readily justified in officially ascribing insanity in cases where its presence is intuitively evident."⁸¹ He offers the following formulation as "a complete definition of criminal insanity": "*The individual's mental makeup at the time of the offending act was such that, with respect to the criminality of his conduct, he substantially lacked capacity to act rationally (to respond relevantly to relevance so far as criminality is concerned).*"⁸² (Emphasis and parentheses in original.) Helpful as this definition might be to the judge in the handling of the defendant in the dispositional phase of criminal proceedings, it will be evident to even the reader least sophisticated in the processes of a jury trial in our adversarial system that such a definition is hardly likely to bring about a rational administration of the insanity defense. Nor indeed is any definition—because "legal insanity" is a fiction. In the words of Judge Bazelon:

"What should by now be clear is that the problems of the responsibility defense cannot be resolved by adopting for the standard or the jury instruction any new formulation of words. The practical operation of the defense is primarily controlled by other factors, including the quality of counsel, the attitude of the trial judge, the ability of the expert witnesses, and the adequacy of the pretrial mental examination."⁸³

BURDEN OF PROOF

For even the psychiatrist at ease with the contradictions and semantic somersaults of the law, it will be difficult to see the rationale in requiring the prosecution to bear the burden of proving sanity in fully half the states and ten federal jurisdictions while requiring the defendant to prove insanity in the remaining states and the District of Columbia. It is especially difficult for the psychiatrist to see anything but ineluctable logic in Joseph Goldstein's argument⁸⁴ that if in fact the jury is not to consider the insanity defense until it has first found that the prosecution has proved beyond a reasonable doubt each essential element of the offense, as the *Browner* court ruled,⁸⁵ and if, because of "insanity," the prosecution fails to establish the defendant "*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*,"⁸⁶ then the defendant must be acquitted; that is, "completely exonerated."⁸⁷ But let us assume that it makes sense for the person found not guilty (by reason of insanity) not to be completely exonerated in the sense of outright acquittal as in the case of a successful plea of self-defense. We can then try to follow the twists and turns of the burden of proof issue with which the criminal justice system has had to struggle because of the continuing fiction of legal insanity. It is common knowledge that the M'Naghten Rules asserted that "every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved..." and that the defendant has the burden of proving that he "was labouring under such a defect of reason, from disease of the mind, etc. ..."⁸⁸ The question did not reach the United States Supreme Court until 1895 when in the case of *Davis v. United States*,⁸⁹ where the charge was murder and the sentence was death by hanging, it was decided that if the prosecution by "the whole evidence, including that supplied by the presumption of sanity, does not exclude beyond reasonable doubt the hypothesis of insanity of which some proof is ad-

duced, the accused is entitled to an acquittal of the specific offense charged."⁹⁰ What has been ignored over the years as the insanity defense came to be invoked in non-capital cases is that the *Davis* rule was laid down by the Supreme Court not so much as a fundamental principle of justice in insanity cases, but as a device to reduce legal killing associated with the death penalty. A reading of the opinion of Justice Harlan, speaking for the entire Court, makes this abundantly clear, studded as it is with references to the death sentence and the miserable, mentally disabled defendant "whose life it is sought to take under the forms of law."⁹¹ The presumption of sanity; that is, that the accused is criminally responsible for his acts, states Harlan, is a "presumption that is liable to be overcome, or to be so far impaired, in a particular case that it cannot be safely or properly made the basis of action in that case, especially if the inquiry involves human life."⁹² (Emphasis added.) To reiterate, the proof of sanity requirement propounded by *Davis*, relating to cases in which the insanity defense is asserted, must be seen in the light of the Court's humanitarian belief that "No man should be deprived of his life under the forms of law unless the jurors who try him are able, upon their consciences, to say that the evidence before them, by whomsoever adduced, is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged."⁹³ (Emphasis added.) The Supreme Court has made it clear that the *Davis* decision "establishes no constitutional doctrine but only the rule to be followed in federal courts."⁹⁴

Jurisdictions requiring the prosecution to rebut "some" evidence produced by the defendant in order to fulfill the mandate of proving sanity beyond a reasonable doubt have varied in their definition of "some." According to Brooks,⁹⁵ different courts have given the following meanings to the term: "any," "slight," "scintilla," "sufficient," and "substantial." In the District of Columbia the United States Court of Appeals in 1951 reversed a conviction, and remanded for a new trial, in a case where the defendant, according to the dissenting judge, "offered not a scintilla of evidence in his own defense except to say that he could not remember what had occurred."⁹⁶ (The jury had returned a guilty verdict to which they had added "the words 'with the death penalty' in accordance with their authority under the statute."⁹⁷)

In the District of Columbia the rule placing on the prosecution the burden of proving sanity lasted until 1970 when Congress passed the District of Columbia Court Reform and Criminal Procedure Act

which placed on the defendant asserting insanity as a defense the burden of proving this defense by a preponderance of the evidence.⁹⁸ Congress took this action in irate response to the 1968 decision of the United States Court of Appeals, District of Columbia Circuit, in *Bolton v. Harris*⁹⁹ which permitted "dangerous criminals, particularly psychopaths [to win] acquittals of serious criminal charges on grounds of insanity by raising a mere reasonable doubt as to their sanity and then to escape hospital commitment because the government is unable to prove their insanity following acquittal by a preponderance of the evidence."¹⁰⁰ Interestingly, Congress did not change the U.S. Code, with the result that the *Davis* rule continued in force in all other federal jurisdictions. For purposes of the criminal law, at least, the District of Columbia can be regarded as a state with the Congress as its legislature, and its 1970 burden of proof rule would be sanctioned by the United States Supreme Court's 1952 *Leland v. Oregon* decision¹⁰¹ which held that requiring the defendant to prove his insanity does not violate "generally accepted concepts of basic standards of justice."¹⁰² At this juncture it would seem that the lawmakers in the District of Columbia are faced with the prospect of a defendant who, charged with both a federal crime (violation of the U.S. Code) and a District of Columbia crime (violation of the D.C. Code), pleads not guilty by reason of insanity—upon trial, the defendant, under the D.C. Code, will have the burden of proving insanity by a preponderance of the evidence, while the prosecutor, under the U.S. Code, will have the burden of proving sanity beyond a reasonable doubt! (It is submitted that the easiest way for Congress to solve the dilemma it has created is to abolish the insanity defense in all federal jurisdictions!)

Judge Bazelon, as might be expected, saw the requirement that a defendant have the burden of proof as offensive to the Constitution. In more than one strongly worded opinion¹⁰³ he predicted that the Supreme Court's ruling in *In re Winship*¹⁰⁴ that the Constitution requires that the prosecution must prove every element of a crime beyond a reasonable doubt would ultimately have to apply to cases in which the insanity defense is asserted. He was supported in this view by legal scholars: Minna Schrag, for example, insisted that *Winship* undercut *Leland* severely,¹⁰⁵ and her analysis of the congressional action in this regard led her to conclude "that it, and other schemes like it, cannot withstand constitutional scrutiny."¹⁰⁶ But, as the United States Court of Appeals, District of Columbia Circuit, pointed out, reliance on the proposition that *Winship* overruled *Leland* is misplaced, since *In re Winship* did not involve insanity as a defense. That view

appears to have prevailed. Bazelon's position was given strength when the United States Supreme Court in *Mullaney v. Wilbur*,¹⁰⁸ struck down a Maine statute which required a homicide defendant to prove, in order to reduce the crime of murder to manslaughter, that he acted in the heat of passion. But while the Court emphasized that the state must prove beyond a reasonable doubt every fact critical to the guilt of the defendant, it was clearly in the context that under the law of Maine the prosecution was permitted to rely upon a presumption of malice, to be drawn from the fact of a killing, requiring the individual charged with murder to prove that he acted in the heat of passion on sudden provocation in order to reduce the degree of the homicide to manslaughter.¹⁰⁹ When *Mullaney* was relied upon to challenge a New York Court of Appeals decision¹¹⁰ that the defendant has the burden of proving extreme emotional disturbance as a defense against the charge of murder (in order to reduce the charge to manslaughter), the United States Supreme Court had an opportunity to settle this vexing question once and for all. Its 1977 *Patterson v. New York* ruling¹¹¹ confirms that, notwithstanding *Winship* and *Mullaney*, it is "constitutional to burden the defendant with proving his insanity."¹¹² This does not resolve the problem facing the District of Columbia, of course, but it does leave state jurisdictions free to make it easier or more difficult for defendants pleading insanity to present their defense. At the same time there is the strong implication in *Patterson* that the Supreme Court would welcome action by Congress to amend the U.S. Code to conform with the D.C. Code in this respect: "Nor does the fact that a majority of the States have now assumed the burden of disproving affirmative defenses—for whatever reasons—mean that those States who strike a different balance are in violation of the Constitution."¹¹³ (Emphasis added.)

MENS REA

The concept of *mens rea* when mentioned in the forensic psychiatry literature has usually been given short shrift or discussed in casual or simplistic fashion. According to Davidson:

"Lacking the intent to do harm, there is no more crime than there is when a patient with chorea accidentally scalds you by dropping a pan of hot water on your head. The choreiform twitch was uncontrollable, the mechanical result of forces within the patient, and there was no intent to do harm. If a mentally sick person is driven to crime by such

a force, he has no more *mens rea* than the one with chorea. ... The whole fabric of the criminal law rests on the doctrine that... 'the offender is a free moral agent who, having before him the choice of whether to do right or to do wrong, intentionally chooses to do wrong.' This doctrine may sound quaint, but it protects the mentally ill defendant, since he is not a free moral agent."¹¹⁴

Sadoff states that "... without the act, there is no crime; but without criminal intent, also there is no crime, for the crime consists of the *actus reus* and the *mens rea*. Thus, determination of mental capacity to form the evil intent is material to every crime, though in practice it is overlooked or is assumed to be present."¹¹⁵ Similarly, Quen writes: "A common law crime consists of a criminal act and a criminal intent. In the absence of either, there is no common law crime. This contrasts with statutory crimes, which may consist only of a criminal act. Statutory rape is an example of a statutory crime in which the intent is completely irrelevant."¹¹⁶

Watson elucidates somewhat further:

"Using the concept of *mens rea*, there has been an attempt to establish the nature of the criminal's *guilty* intention. Although it varies from crime to crime, there has been an effort to establish a specifically defined state of mind in relation to specific acts."¹¹⁷

He does not make the sweeping generalization that severely mentally ill defendants are necessarily precluded from forming a guilty intent and he realistically points out that "The state of mind of the criminal makes little difference when savage and mutilating acts have been committed, and juries under these circumstances rarely pay much attention to the notion of *mens rea*."¹¹⁸

Because the legal issues surrounding the concepts of free will and *mens rea* are dealt with so sparsely in the psychiatric literature, some examination of the subject is in order. The following is meant to be illustrative of the issues, not an exhaustive analysis.

The relationship of *mens rea* to the insanity defense is obvious: a person acquitted by reason of insanity is deemed not to have possessed the intent or *mens rea* to commit the unlawful act. Generally, where accident and "infancy" are not involved, the expressions "lack of *mens rea*" and "insanity" have been used interchangeably, and for insanity to be accepted as grounds for exculpation, it has been necessary to avoid exploring the question of *mens rea* lest the defense of insanity be torn from its moorings—since an insane person having *mens rea* at once labels him sane and the entire notion of the insanity defense in our

system of justice collapses. As long as capital punishment was an ever-present possibility, it was dangerous to examine the issue of *mens rea* lest a major exculpatory mechanism be lost. The following comments are offered to place what is far from a simple concept in better perspective in relation to the insanity defense.

The United States Supreme Court in its *Morrisette* decision¹¹⁹ extensively reviewed the concept of *mens rea*. The Court pointed out that "The contention that an injury can amount to a crime only when inflicted by intention ... is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."¹²⁰ Although common-law commentators in the Eighteenth and Nineteenth Centuries expounded the same doctrine, exceptions gradually took firm root in the law:

"[They] came to include sex offenses, such as rape, in which the victim's actual age was determinative despite defendant's reasonable belief that the girl had reached age of consent. Absence of intent also involves such considerations as lack of understanding because of insanity, subnormal mentality, or infancy, lack of volition due to some actual compulsion, or that inferred from doctrines of coverage. Most extensive inroads upon the requirement of intention, however, are offenses of negligence, such as involuntary manslaughter or criminal negligence and the whole range of crimes arising from omission of duty."¹²¹

As the states codified the common law of crimes,

"The unanimity with which they have adhered to the central thought that wrongdoing must be conscious to be criminal is emphasized by the variety, disparity and confusion of their definitions of the requisite but elusive mental element. However, courts of various jurisdictions, and for the purposes of different offenses, have devised working formulae, if not scientific ones, for the instruction of juries around such terms as 'felonious intent,' 'criminal intent,' 'malice aforethought,' 'guilty knowledge,' 'fraudulent intent,' 'willfulness,' 'scienter,' to denote guilty knowledge, or '*mens rea*,' to signify an evil purpose or mental culpability. By use or combination of these various tokens, they have sought to protect those who were not blameworthy in mind from conviction of infamous common-law crimes."¹²²

As society became more complex, government found it necessary to develop "increasingly numerous, and detailed regulations which heighten the duties of those in control of particular industries, trades, properties or activities that affect public health, safety or welfare."¹²³

Public welfare offenses (which include, as well, illegal sales of intoxicating liquor, violations of antinarcotic Acts, criminal nuisances, violations of motor-vehicle laws¹²⁴), thus incorporated into the criminal law, "depend on no mental element but consist only of forbidden acts or omissions."¹²⁵ However, penalties are small and conviction ordinarily does no grave damage to an offender's reputation. It is with crimes which involve possible imprisonment that the Supreme Court would be inclined to insist on proof of *mens rea*. But there are Constitutionally permissible exceptions, according to the *Morrisette* decision, which will allow conviction on an indictment which makes no charge of criminal intent but alleges, for example, only making a sale of a narcotic forbidden by law.¹²⁶ The Court quotes with approval the opinion of Chief Justice Taft in a 1922 case:

"While the general rule at common law was that the *scienter* was a necessary element in the indictment and proof of every crime, and this was followed in regard to statutory crimes even where the statutory definition did not in terms include it..., there has been a modification of this view in respect to prosecutions under statutes the purpose of which would be obstructed by such a requirement. It is a question of legislative intent to be construed by the court ..."¹²⁷

Nor did *Morrisette* overrule the 1922 decision in another case¹²⁸ which held that "an offense under the Narcotic Drug Act does not require intent."¹²⁹ While approving of legislation whereby penalties serve as effective means of regulation, the Supreme Court nevertheless is less accepting of any exclusion of the requirement in cases involving stealing and larceny where "the penalty is high and ... the infamy is that of a felony."¹³⁰

In 1968 the Supreme Court made it clear that it "has never articulated a general doctrine of *mens rea*."¹³¹ In a concurring opinion, Justice Black wrote:

"[M]uch as I think that criminal sanctions should in many situations be applied only to those whose conduct is morally blameworthy, I cannot think the States should be held constitutionally required to make the inquiry as to what part of a defendant's personality is responsible for his actions and to excuse anyone whose action was in some complex, psychological sense, the result of a 'compulsion.'"¹³²

Further,

"Almost all of the traditional purposes of the criminal law can be significantly served by punishing the person who in fact committed the proscribed act, without regard to whether his action was 'compelled' by some elusive 'ir-

responsible' aspect of his personality... Punishment of such a defendant can clearly be justified in terms of deterrence, isolation and treatment."¹³³

These views substantially support the opinion of the Supreme Court in *Leland v. Oregon*,¹³⁴ rendered six months after *Morrisette*:

"The science of psychiatry has made tremendous strides since [the 'right and wrong'] test was laid down in *M'Naghten's Case*, but the progress of science has not reached a point where its learning would compel us to require the states to eliminate the right and wrong test from their criminal law. Moreover, choice of a test of legal sanity involves not only scientific knowledge but questions of basic policy as to the extent to which that knowledge should determine criminal responsibility."¹³⁵

A look at how the United States Court of Appeals, District of Columbia Circuit, confronted the subject of *mens rea* in its historic abandonment in 1954 of the *M'Naghten* plus irresistible impulse rule and its 1972 replacement of the *Durham* rule, may help the psychiatrist understand how complicated the *mens rea* question really is. The ultimate question of fact to be determined by the jury was *not* "simply whether the accused acted because of a mental disorder," as the Court in its confusion stated in the *Durham* decision, but whether the acts of the accused, committed in violation of the law, "stemmed from and were the product of a mental disease or defect..."¹³⁶ Now, either the Court was convinced that a mental disorder deprives mentally disordered persons of ability to act of "their own free will and with evil intent (sometimes called *mens rea*)," ¹³⁷ or the Court believed that the issue of *mens rea* was irrelevant in the case of mentally disordered persons whose acts stem from and are the product of a mental disease or defect, and that such individuals should not be morally blamed and hence not be held criminally responsible. Since the decision indicates that unless the act was a product of the disease, the accused would be held responsible, and therefore held to possess *mens rea*, the latter belief must have been espoused.

In this connection Chief Justice (then Circuit Judge) Warren E. Burger pointed out that "...when we adopted the 1869 product test, without a word in the jury charge as to any connection between the product test and the matter of intent or *mens rea*, we broke with all legal and moral tradition."¹³⁸ This appears to be confirmed by the footnote which, according to Judge Pine of the United States District Court, District of Columbia, was added "shortly afterward, by an amendment to its opinion,"¹³⁹ stating:

"An accused person who is acquitted by reason of insanity is presumed to be insane ... and may be committed for an indefinite period to a hospital for the insane under the D.C. Code ... We think that even where there has been a specific finding that the accused was competent to stand trial and to assist in his own defense, the court would be well advised to invoke this Code provision so that the accused may be confined as long as the public safety and the accused's welfare require."¹⁴⁰

This strong position in favor of indeterminate confinement of the insanity acquittee, if made in good faith, could only have flowed from a commonly held, although misguided, belief by judges during the early *Durham* days that "the most intelligent handling to achieve his rehabilitation, whether it be medical, psychiatric, educational, or vocational, as his needs may require, ... is exactly what he receives when detained for mental illness."¹⁴¹

Strident opposition to the view that *mens rea* was not relevant was voiced by Burger. He was incensed with what he believed was the following response most psychiatrists would give to the question "Doctor, is this act, this criminal act charged, the product of disease?":

"Why, of course, of necessity where a man with a mental disease commits an unlawful act, the unlawful act is the product of that disease."¹⁴²

He believed that the jury should be told: "The law governing your deliberations is that a person who, of his own free will and with a vicious intent, commits an act which violates the law, is criminally responsible for that act,"¹⁴³ and that "if he had substantial capacity to control his conduct and refrain from doing the act charged then you are free to find the act was not the product of disease."¹⁴⁴ In 1962, dismayed that his colleagues on the appellate court would uphold the decision that persons with the "disease" of "emotionally unstable personality" or of "psychopathic (sociopathic) personality disorder" could be found not guilty by reason of insanity, he declared himself in favor of making a fresh start by abandoning the *Durham* rule and adopting the ALI standard.¹⁴⁵ His position was increasingly supported over the next ten years and finally, when the *Browner* ALI modification was declared in 1972,¹⁴⁶ a *mens rea* concept in connection with the insanity defense was restated by the Court: "Defendant is exculpated if he lacks substantial capacity to appreciate the conduct is wrongful"¹⁴⁷ and "Exculpation is established not by mental disease alone but only if 'as a result' defendant lacks the substantial capacity

required for responsibility."¹⁴⁸

Judge Bazelon, without specifically singling out the deficiencies and superficialities of the concept of *mens rea*, pointed out that the change from *Durham* to ALI was "primarily one of form rather than of substance,"¹⁴⁹ and

"Instead of asking the jury whether the act was caused by the impairment, our new test asks the jury to wrestle with such unfamiliar, if not incomprehensible, concepts as the capacity to appreciate the wrongfulness of one's action, and the capacity to conform one's conduct to the requirements of the law. The best hope for our new test is that jurors will regularly conclude that no one—including the experts—can provide a meaningful answer to the questions posed by the ALI test."¹⁵⁰

Rejecting Bazelon's proposal that the instruction to the jury "should provide that 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,"¹⁵¹ his colleagues stated:

"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 under-cutting and evasion from over-concern 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 reinforcing relationships among its citizens, and its ideals of justice must safeguard the vast majority who responsibly shoulder the burdens implicit in its ordered liberty."¹⁵²

Perhaps it was to the good that the Court acted as it did, for within a few years Bazelon had come to be "increasingly attracted to the view that the insanity defense should be abolished and that the question of responsibility should be explored when the government seeks to discharge its burden of establishing, beyond a reasonable doubt, the existence of *mens rea* or intent—an essential element of almost all crimes. Thus, unlike some abolitionists who see abolition as a way of avoiding any inquiry into responsibility, I see abolition as a way of broadening the inquiry beyond the medical model. Admittedly, our concept of *mens rea* is as primitive now as our insanity concepts were over 20 years ago. But once freed from the 'insanity' label as framed by the medical model, *mens rea* offers the opportunity and hope of proving more hospitable to a broad inquiry into all forms of disabilities and motivations."¹⁵³ The danger here is that a limited view of *mens rea*, rather than a concept of *different degrees or levels of mens rea*, and a placing of the burden on the government to prove *mens rea* beyond a reasonable doubt rather than to disprove the mental disability advanced by the defendant as a cause of his impaired capacity to formulate the culpable mental state required to commit the offense, will throw the courts into the same paralysis and disarray that Bazelon himself acknowledged was the consequence of *Durham* and predicted would be the effect of the ALI rule.¹⁵⁴

The *Brawner* court made it clear that while it will adhere to past rulings admitting expert testimony of psychologists as well as psychiatrists "to assure a broad presentation to the jury concerning the condition of defendant's mind and its consequences,"¹⁵⁵ it will reject "a broad 'injustice' approach that would have opened the door to expositions of e.g., cultural deprivation, unrelated to any abnormal condition of the mind" and will not accept "suggestions to adopt a rule that disentangles the insanity defense from a medical model, and announce a standard exculpating anyone whose capacity for control is insubstantial, for whatever cause or reason."¹⁵⁶ Moreover, it held that diminished mental capacity, though insufficient to exonerate, may be relevant to a specific mental element of certain crimes or degrees of crime.¹⁵⁷

"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 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."¹⁵⁸

The *Browner* court's opinion on diminished mental capacity has received major support from Chief Judge Breitel of the New York Court of Appeals who in 1976 indicated that he saw as a mark of an advanced criminology "[the enlarging of] the ameliorative aspects of a statutory scheme for the punishment of crime" by the use of affirmative defenses based "on the nature of the offender and the conditions which produce some degree of excuse for his conduct."¹⁵⁹ This view was substantially endorsed by the United States Supreme Court in 1977¹⁶⁰ when it held that notwithstanding the fact that "the universal rule in this country was that the prosecution must prove guilt beyond reasonable doubt ... at the same time, the long-accepted rule was that it was constitutionally permissible to provide that various affirmative defenses were to be proved by the defendant."¹⁶¹ The Supreme Court rather strongly lauded Breitel's opinion that "The affirmative defense, intelligently used, permits the gradation of offenses at the earliest stages of prosecution and certainly at the trial, and thus offers the opportunity to a defendant to allege or prove, if he can, the distinction between the offense charged and the mitigating circumstances which should ameliorate the degree or kind of offense."¹⁶²

From the point of view of better understanding what *mens rea* is all about, it will be interesting to see how the New York Court of Appeals will react to a law passed by the Legislature in 1978¹⁶³ which permits 14 and 15-year-olds who are charged with murder in the second degree to plead guilty to a lesser crime for which they are criminally responsible while denying this option to 13-year-olds who cannot be held criminally responsible for any crime other than murder in the second degree.¹⁶⁴ Also, if an appeal is filed in the State of Washington in the case of Roycroft Patterson, what will the United States Supreme Court say about that State's Supreme Court's conclusion, in response to the argument that "mental illness precluded the requisite state of mind to commit a felony," that "the relevant issue was not state of mind nor blameworthiness, but rather the nature of the acts themselves as presenting a danger to society."¹⁶⁵?

Could it be that *mens rea*, whose absence in mentally disordered offenders supposedly determines legal insanity, is the greater fiction?

EFFECT OF INSANITY DEFENSE ON TRADITIONAL JURY ROLE

Since *mens rea* is a question to be determined by the trier of fact, some comment is in order on the erosion of the role of the jury resulting from recent appellate court treatment of the insanity issue.

Appeals courts, because of "the deference due to the jury in resolving factual issues,"¹⁶⁶ have regularly in the past proclaimed their strong hesitation to set aside jury verdicts even when, in the courts' opinion on review, they appeared to be unsupported by the evidence. In 1945, the United States Court of Appeals, District of Columbia Circuit, righteously announced: "We can reverse the jury only if its verdict shocks the conscience of the court."¹⁶⁷ The United States Supreme Court in 1952 in *Morrisette*¹⁶⁸ declared: "Where intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury." The Court quoted with strong approval a New York judicial holding of some sixty years earlier:

"However clear the proof may be, or however incontrovertible may seem to the judge to be the inference of a criminal intention, the question of intent can never be ruled as a question of law, but must always be submitted to the jury. Jurors may be perverse; the ends of justice may be defeated by unrighteous verdicts, but so long as the functions of the judge and jury are distinct, the one responding to the law, the other to the facts, neither can invade the province of the other without destroying the significance of trial by court and jury . . ."¹⁶⁹

In 1962 Chief Justice (then Circuit Judge) Burger wrote: "Jurors are the sole and final judges of the credibility of all witnesses including experts."¹⁷⁰ He pointed out that if they do not believe a witness, they are free to reject his testimony; however, they should be told by the judge that they cannot reject it arbitrarily or capriciously "but only for some reason such as you would act upon in the important affairs of your own daily life. In reaching your decision on the question of mental disease or defect you are to give such weight and credit as you consider appropriate to the testimony of the witnesses who testify on the subject, including both laymen and experts, bearing in mind as to the experts their special education, training and experience, which qualify them to make expert diagnoses, evaluations and express expert opinions. You are not required to accept any witness' classification of any particular condition as a mental disease or mental defect. You, as the triers of fact, must decide . . ."¹⁷¹

Speaking for the same court in this respect, Judge Bazelon in 1972 asserted: "In fact, we have been extremely reluctant to overturn a jury verdict even in the face of substantial evidence that the defendant's act was the product of a condition which impaired his mental or emotional processes and behavior controls."¹⁷² However, a review of several cases which came before Judge Bazelon's court, including Durham,¹⁷³ Douglas,¹⁷⁴ Fielding,¹⁷⁵ Satterwhite,¹⁷⁶ Isaac,¹⁷⁷ and Campbell,¹⁷⁸ in which the verdict was indeed overturned, fails to show such reluctance. As a matter of fact, the cases show a blatant rejection of the tradition to defer to the jury's and to the trial court's presumed advantage in having an opportunity to observe the defendant and gain a more intimate understanding of the facts and circumstances underlying the case. This display of judicial overreaching by an appellate court in insanity cases may already have encouraged other appellate bodies to move in the same direction. As an example, the California Supreme Court has declared that a defendant would be "entitled to an order directing the trial court to find him insane if the evidence at the sanity trial demonstrated that he was insane as a matter of law under the ALI test."¹⁷⁹ This should have more than a chilling effect on California trial judges and lawyers, threatening as it does to undermine the traditional role of the jury as the sole trier of the facts.

Clearly, the insanity defense has thrown the administration of criminal justice into confusion. The elimination of the "Not guilty by reason of insanity" plea is a good place to start to restore the jury to its fundamentally pre-eminent function in our adversarial system.

INCREASING FREQUENCY OF THE INSANITY DEFENSE

Statistics compiled by the New York State Department of Mental Hygiene¹⁸⁰ amply confirm that there has been a 500 percent increase in the number of successful insanity pleas during the period 1971-76 as compared to the period 1965-71. The rise is even more astronomical when one compares the figure of 11 successful insanity cases reported by Foster¹⁸¹ for 1958-65 with the 69 cases reported by the Assistant Commissioner for Forensic Services for 1976.¹⁸²

The reasons for this undisputed increase have not been determined. New York State, as has been pointed out (page 33), modified its *M'Naghten* standard in 1965 approximating the language of the ALI

rule minus the volitional conduct-control component. This broadened definition together with the alteration in trial procedures which gave the psychiatrist much greater opportunity to express his views as an expert witness than in the past may have been a factor in the "not guilty by reason of mental disease" verdicts. However, other related events may have played an even greater part. For example, the ruling by the United States Supreme Court in 1960¹⁸³ simplifying the requirements for mental competency to stand trial made it clear that mental illness, especially psychosis, per se in a defendant, would not preclude his fitness to participate in court proceedings. This may have curtailed to some degree the customary pre-trial shunting of persons accused of crime to the mental health system with the result that in many cases no trial was ever held. This incompetent-to-stand-trial route was given a major set-back in 1972 when the Supreme Court issued its landmark *Jackson* decision¹⁸⁴ that indefinite commitment of a criminal defendant solely on account of his competency to stand trial does not square with the Fourteenth Amendment's guarantee of due process.¹⁸⁵ The decision must have motivated at least some prosecutors to push for trial of felony offenders thought to be mentally ill, out of fear that their cases would otherwise have to be dismissed—offenders who prior to *Jackson* would have been confined to maximum security hospitals for the criminally insane for extremely long periods, sometimes for life, and never brought to trial.

Additionally, in the years following *Jackson* the recognition of patients' rights enabled many involuntarily hospitalized patients who were no longer mentally ill to obtain their release—when this practice was followed in institutions for the criminally insane, prosecutors may have become even more anxious to proceed with trial against mentally disabled offenders who could meet minimal standards of competency. By the same token, faced with a possible lengthy prison sentence and anticipating a comparatively early release if found insane, many defendants may have been persuaded by their lawyers to plead "Not guilty by reason of mental disease."

Misguided faith on the part of judges in psychiatric treatment opportunities in institutions for mentally disabled offenders, pressures on those responsible for the administration of criminal justice to divert criminals from already overcrowded prisons, and possibly an increase in the arrest rate of former mental hospital patients resulting from a precipitous deinstitutionalization program, may all have played a part in bringing about a very substantial increase in the use of the insanity defense.

There is no reason to believe that the New York experience was not encountered in many other states as well as federal jurisdictions. It is a national disgrace that in these days of computerized data processing, with vast stores of information amassed by state departments of correction, criminal justice, and mental hygiene, as well as court systems and law enforcement agencies, many of which are heavily funded by the Federal Government, there is such a dearth of statistical material in connection with insanity pleas and their outcome. What information is publicized is incomplete and easily misinterpreted and even more easily distorted. A recent report,¹⁸⁶ for example, compares 12 patients acquitted of first degree murder by reason of insanity who were discharged from a Florida state hospital between 7-1-74 and 6-1-78 with 22 inmates convicted on the same charge who were released from prison in 1976-77. No information is provided as to how many patients had had a jury trial or trial before a judge without a jury or merely a pro forma trial following plea-bargaining negotiations involving the defense lawyer, prosecutor and judge. The length of hospital stay of the insanity acquittees is reported to have averaged 2.8 years, and the length of imprisonment of the "comparison" group to have averaged 9.26 years.

The New York data are even more startling: During 1965-71 sixteen males, acquitted of murder by reason of mental disease, were released after a mean hospitalization period of 2.8 years (range 53 days to 8.5 years); six similarly charged insanity-acquitted females were released after a mean hospitalization period of 2.3 years (range 28 days to 4.7 years).¹⁸⁷ During 1971-75 twenty-three males, acquitted of murder by reason of mental disease, were released after a mean hospitalization period of 9 months (median 7 months, and range 1 day to 3.4 years); eight insanity-acquitted females similarly charged were released after a mean hospitalization period of 8 months (median 10 months, and range 56 days to 1.7 years).¹⁸⁸

Even when comprehensive statistical data are reported, glaring deficiencies can be noted. For example, a recent study¹⁸⁹ reported that whites are sharply over-represented in the insanity-acquittee group as compared to non-whites. Of the insanity-acquitted, 65% were white, 27% black and 5% Hispanic; in comparison, of the prison-admittants 31% were white, 53% black and 15% Hispanic. Racial discrimination favoring whites in successful insanity defenses is strongly suggested by these figures. Strangely, the authors of the report neglected to provide the data, which were unquestionably in their possession, relating to race of the insanity-acquitted patients who obtained their release from

hospital confinement. (If the information were to show that whites are further over-represented in the group of insanity-acquittedes who are released, as one suspects they are, direct violations of civil rights laws would be identifiable in the hospitals in which insanity-acquittedes are confined.)

It surely will not strain the imagination to conclude that concerned judges, responding to a frightened and aroused public, would attempt to tighten the procedures governing release of insanity-acquittedes, while criminal defendants, motivated by the widely publicized factual information regarding release of insanity-acquittedes, would hasten to assert whenever possible a plea of "Not guilty by reason of insanity."

The author has discussed elsewhere¹⁹⁰ the danger to the public due to premature discharge from hospital of insanity-acquitted persons. What he will attempt to show in this article is that in order to attain the objective of keeping in confinement for as long as possible many persons who have been acquitted by reason of insanity, a pattern of legislative enactment followed by judicial decision has resulted in the systematic misuse and abuse of psychiatry.

POST-ACQUITTAL CONFINEMENT AND MISUSE OF PSYCHIATRY

Practically all states have laws which spell out methods by which insanity-acquittedes are involuntarily hospitalized immediately following acquittal.¹⁹¹

While American practices seem to have been less harsh and arbitrary than the British requirement that the criminally insane be detained in close custody "until His Majesty's Pleasure be known," the differences have been more apparent than real. The Model Penal Code¹⁹² recommended by the American Law Institute in 1962 has been heralded as the most advanced and constitutionally sound proposed legislation ever developed, and many state legislatures have followed it in enacting their laws dealing with persons acquitted by reason of insanity. The Model Penal Code prescribes that "When a defendant is acquitted on the ground of mental disease or defect excluding responsibility, the Court shall order him to be committed to the custody of the Commissioner of Mental Hygiene (or Public Health) to be placed in an appropriate institution for custody, care and treatment."¹⁹³ Subsequent release would require that "the burden shall be upon the committed person to prove that he may safely be discharged or released" if

the Court is not satisfied with the reports and testimony of psychiatrists recommending release.¹⁹⁴

The American Law Institute was undoubtedly influenced by the psychiatric profession in developing its proposals. At the same time that recommendations concerning the insanity defense and the post-trial disposition of the insanity-acquittee were being formulated,¹⁹⁵ the Group for the Advancement of Psychiatry, Committee on Psychiatry and Law (whose chairman served as a consultant to the ALI in the preparation of its Model Penal Code), issued its report on "Criminal Responsibility and Psychiatric Expert Testimony."¹⁹⁶ GAP proposed a statute which provided that:

"No person may be convicted of any criminal charge when at the time he committed the act with which he is charged he was suffering with mental illness as defined by this Act, and in consequence thereof, he committed the act."¹⁹⁷

Mental illness is defined as "illness which so lessens the capacity of a person to use (maintain) his judgment, discretion, and control in the conduct of his affairs and social relations as to warrant his commitment to a mental institution."¹⁹⁸ Totally disregarding the fact that the mental illness referred to may have been present many months, if not years, prior to the trial, GAP recommended that:

"When ... a verdict [of acquittal on the defense of mental illness] is recorded, the Court shall immediately commit the defendant to a public institution for the custody, care and treatment of cases of the class to which the defendant belongs, and the defendant shall not be discharged therefrom unless and until the Court had adjudicated that he has regained his capacity for judgment, discretion and control of his affairs and social relations."¹⁹⁹

Such readiness on the part of a powerful and authoritative psychiatric organization to delegate to the court power to "adjudicate" clinical findings and make clinical decisions concerning a hospitalized patient's discharge, well-intentioned as it unquestionably was, gave the necessary professional medical support for subsequent anti-therapeutic court orders for patients, who had been recommended for release by the hospital's psychiatric staff, to be continued involuntarily in the institution.

It is incredible that these restrictive practices were so strongly urged, let alone countenanced, by the leaders of American psychiatry. At the same time, the psychiatric community itself was persuaded to look upon insanity as a factor leading to complete exculpation: Winfred

Overholser, former president of the American Psychiatric Association and a member of the Criminal Law Advisory Committee of the ALI, shutting his eyes to the fact that automatic confinement following acquittal by reason of insanity makes all the difference in the world, was somehow able to state that "Insanity is as much a defense as is an alibi."²⁰⁰

The misuse of psychiatry commences usually without fanfare when the defendant is found not guilty by reason of insanity. Defense and prosecution negotiation, rather than the open jury trial, is the more common method used to arrive at the verdict.

Sadoff²⁰¹ has described the procedure as follows:

"In a number of cases that are not highly celebrated, the prosecution and the defense psychiatrists all agreed that the defendant was legally insane at the time of the crime. As a result, the defendant may not be tried because of this agreement. The judge may accept the agreement, make a declaration of insanity and, upon proper testimony, commit the individual to a hospital for treatment of his mental illness. In this way, there is an agreement, an adjudication, and a sparing of the mentally ill individual from the difficulties of the adversary system; also, there is a proper legal disposition of the case."

Thus, treatment and rehabilitation are the stated altruistic goals as confinement is ordered when the verdict of "Not guilty by reason of insanity" is announced. However, retribution and preventive detention are the obvious objectives as the courts, suddenly showing none of the traditional judicial deference to the decisions made by an administrative agency, seek assiduously to identify or create reasons to keep the acquittee "under observation in the institution for a sufficiently long period, even after a cure appears, in order to make certain that the apparent cure is not merely temporary, or as is known in psychiatry, a period of remission."²⁰² Brooks has cogently pointed out that "Trial judges have been known to ignore and subvert, on a day-to-day basis the unpopular mandates of reviewing courts or legislatures, which they regard as unrealistic."²⁰³

However, even if judges were prone to bow to higher authority, they would be able to find any number of semantic maneuvers to keep the insanity-acquittee locked up. One federal district court judge ruled that a hospital superintendent's certificate stating that the petitioner had recovered sufficiently, "did not comply with the statute since a sufficient recovery may mean a partial and not a total recovery."²⁰⁴

The case involved a defendant who had made such remarkable improvement that the judge himself was moved to comment:

"The Court was indeed impressed with the fact that as a result of modern psychiatric treatment received at the hands of skilled psychiatrists in Saint Elizabeths Hospital, the petitioner made great progress toward reaching mental balance, a proper attitude toward society, and adjustment to the community. He is now steadily employed in a restaurant owned and operated by his sister. His own testimony discloses that he has acquired an insight into his own past shortcomings and has apparently changed his attitude toward his fellow man. There is no doubt that the progress made by this patient is a tribute to modern psychiatric methods, as well as a credit to the accomplishments of the splendid institution in which he was confined, and to the individual psychiatrists who treated him. The hospital psychiatrist testified unequivocally that the petitioner had recovered his sanity and that he would not be dangerous to himself or others within the reasonable future."²⁰⁵

Clinical psychiatrists will be interested to learn that in deciding that "the matter is not yet ripe for the granting of an unconditional release," the judge saw the meaning of the word "remission" as follows:

"The term 'remission' at best means a temporary, partial recovery. For example, Webster's New International Dictionary, 1949 Edition, defines remission as 'a temporary and incomplete subsidence of the force or violence of a disease or of pain'. The American Illustrated Medical Dictionary, 1941 Edition, defines the term as 'a diminution or abatement of the symptoms of a disease; also the period during which such diminution occurs'. "²⁰⁶

In another case²⁰⁷ decided by a lower court, the "defendant" was found to be "without psychosis at the present time" and "not dangerous either to himself or to the community"; nevertheless, the court, after expressing its indebtedness "to all counsel and all physicians for their intelligent and evenhanded assistance in these proceedings," denied the application for release of the patient. It was the court's position that "The ultimate determination must lie within the socio-legal discipline of the court after careful consideration of the evidence and opinions submitted by these expert physicians."

In a 1972 Monroe County (New York) case²⁰⁸ the trial judge, in rejecting the hospital staff recommendation for release, held that "It is not essential under the law that dangerousness be coupled with mental

illness, or that release necessarily follow upon recovery of sanity." Two years later, an appellate court ruled²⁰⁹ that because such a long time had elapsed since the first hearing and because "the only witnesses who testified at the hearing were four psychiatrists, all of whom concluded that petitioner should be released, for he was not suffering from mental disease or defect, was without psychosis and would not be a danger to himself or others," another hearing should take place. The extent to which the appellate court is willing to go to find some justification to order the continued confinement of the insanity-acquittee is shown by the following excerpt from the unanimous opinion:

"Without disparaging or denigrating the profession of psychiatry, we suggest that the witnesses summoned to the new hearing should include hospital employees such as nurses, orderlies, housekeepers and others who have had daily or frequent contact with petitioner. They will be able to relate to the court petitioner's actions and reactions to the stresses and strains which are experienced in the usual happenings of each day. One may put his best foot forward when interviewed or examined by one he knows will be consulted on the question of his release, whereas he would be more likely to give expression to his natural tendencies when dealing with non-professionals whom he would not expect to be directly involved in decision making. It is suggested that a display of ungovernable temper when one has been inconvenienced by a housekeeper having just washed the floor may be more revealing and indicative of future conduct than the impression one gives when he sits across the desk or lies on the couch of a psychiatrist. Qualified psychiatrists can render great assistance in assessing an individual's mental condition. . . However, the court should reach out for any available evidence which bears on petitioner's conduct while in the Hospital."²¹⁰

In 1962 Chief Justice (then Circuit Judge) Burger had this to say about dangerousness in a case where the insanity-acquittee was considered by psychiatrists on both sides to be non-committable:

"The suggestion that civil mental health commitment procedures, with their 'greater procedural safeguards,' are a more appropriate remedy seems to rest on the idea that O'Beirne committed a 'nondangerous offense.' But to describe the theft of watches and jewelry as 'non-dangerous' is to confuse danger with violence. Larceny is usually less violent than murder or assault but in terms of public policy the purpose of the statute is the same as to both. Larceny, assault, and murder all are dangerous; they

are simply different areas of prohibited conduct. Hence unless we are to ignore the objectives and policies of the statute in question, the release provisions must apply in the same way and with the same force to larceny without violence as to crime of violence until Congress speaks otherwise."²¹¹

In the 1976 case of *People v. Adams*²¹² an Illinois appellate court ruled that the trial court had no statutory authority to order that a patient who had been acquitted of murder by reason of insanity be returned to the court for a competency hearing before release from a state hospital, that the trial court lost jurisdiction over the patient after he was acquitted, and that the director of the State Department of Mental Health and the superintendent of a state hospital could not be held in contempt of court for disobeying an order that the trial court had no jurisdiction to enter. "A verdict of not guilty due to insanity," said the three-judge court, "constitutes a full acquittal, and a person acquitted is entitled to all the protection and constitutional rights as if acquitted on any other ground."²¹² However, the Illinois Legislature did not take long to react. The Criminal Law and Procedure was amended in 1977 so as to give the court undisputed authority "to order the superintendent not to release the defendant [sic]" if the court decides that he is in need of mental treatment.²¹⁴

In the case of *State v. Maik*²¹⁵ the Supreme Court of New Jersey in 1972 unanimously ruled that it is for the court, rather than the hospital, to decide the matter of the release of an insanity-acquitted patient. The Supreme Court followed a line of reasoning with respect to the standard for release that would make it possible for a hearing court never to permit the discharge of a patient from a maximum security hospital. Thus stated the N.J. Supreme Court:

"It is significant that the Legislature did not speak in terms of remission or freedom from symptoms in dealing with the release of a man acquitted from criminal accountability because of legal insanity. As to him, the Legislature required ... that he be held until 'restored to reason,' ... An offender is not 'restored to reason' unless he is so freed of the underlying illness that his 'reason' can be expected to prevail. Hence; the underlying or latent personality disorder, and not merely the psychotic episode which emerged from it, is the relevant illness, and the statutory requirement for restoration to reason as a precondition for release from custody is not met so long as the underlying illness continues."²¹⁶

Two years later, in a decision hailed as one which "provided some flexibility and set standards for conditional release,"²¹⁷ the Supreme Court of New Jersey softened the harshness of *Maik*:

"While the Court recognizes the overriding concern for public safety involved in commitments subsequent to an adjudication of insanity, we do not believe that the commission of an offense against the law of this state by one subsequently adjudicated insane and committed to a state hospital is a carte blanche justification for lifetime commitment where the underlying mental condition is incurable."²¹⁸

However, the Court soon showed that the benefit of the doubt concerning a patient's potential for dangerous conduct was not going to be given easily to the patient:

"Surely a psychiatrist would not allow a patient to come and go as he pleased when the doctor was convinced that his patient was bent on and capable of perpetrating a violent crime. Similarly, society and the courts cannot be asked to ignore the commission of an act in violation of the State's criminal laws. The actor shows by his behavior that he poses some threat. This demonstrated ability to cause harm distinguishes him from others who may very well be as abnormal or 'sick' but only possess a potential to harm others. We may not search out the deranged, sick or abnormal among us, but when they announce themselves to us with an otherwise criminal act, there is no reason to ignore them."²¹⁹

As in *Maik*, the *Carter* decision makes it clear that "[i]t is for the Court to determine when one has been restored to reason and is able to function in society without fear of harming others."²²⁰

Enough vagueness and hedging characterize the Supreme Court's position so that a hospital's recommendations for even conditional release of an insanity-acquittee are likely to run into very stiff resistance from a retention-minded judge:

"While noting that the goal of confinement is to remove the underlying condition, the Court indicated that something less than a 'cure' is acceptable for compliance with the 'restored to reason' standard of conditional release ... One's condition need only be 'effectively neutralized.' This neutralization is apparently something less than a cure which eliminates the underlying illness in its entirety. Neutralization, however, is clearly something more than remission. The mere abatement of symptoms, provides no

assurance that the public is safe from harm."²²¹
 "Dangerousness is not, however, the sole criterion for release. If the patient is in a state of remission and there are sufficient medical assurances that he will pose no threat to society, there may be no danger to be feared from his conditional release. There may, however, be a rehabilitative purpose in retaining the patient in the hospital if further progress can be made in 'curing' his underlying condition. Public protection may demand prolonged confinement in hopes of eventual recovery and release."²²²

"If the judge is not satisfied with the amount or quality of evidence presented, he is free to order further examination or appoint additional experts. In dealing with uncontroverted evidence, however, the judge must guard against a complete disregard of expert testimony absent any basis for disagreement."²²³

In 1978 the United States Court of Appeals, Fifth Circuit, reviewed a case²²⁴ which involved the granting of a writ of habeas corpus on the grounds that the petitioner's equal protection rights were violated since he, a person acquitted of a crime by reason of insanity, was not afforded the same procedural protections before commitment to a mental hospital that apply in other involuntary civil commitment cases. The Court ruled in favor of the State of Florida which had appealed the granting of the writ by a federal district court. The latter court had held that the insanity-acquittee had been denied equal protection because he had been committed notwithstanding the fact that the hospital administrator and the treating physicians had recommended that he be released. The Court of Appeals pointed out that while "equal protection prohibits the judicial commitment of an insanity-acquittee in Florida without an underlying medical judgment that he is mentally ill ... [and] a judge cannot reject unanimous medical opinion that the insanity acquittee is not mentally ill when the judge does not have such power in all other civil commitment cases,"²²⁵ nevertheless, since the trial judge had found that the final diagnosis of the patient, "Psychosis with Drug Intoxication (Cocaine), *in remission*," was sufficient to constitute mental illness within the meaning of Florida's commitment statute, the judge's finding of mental illness should be considered to be supported by medical opinion and therefore the commitment was proper. [Emphasis added.]

Furthermore, the Court of Appeals insisted that the matter of dangerousness "presents a mixed question involving both a legal and a social judgment as well as a medical opinion ... [and] [s]ince this determination does not lie solely within the realm of expert medical

knowledge, a state may reasonably allow the judge to play a greater role in making this determination about insanity-acquittees than he plays in other civil commitment cases."²²⁶ The Court concluded that Florida's system of allowing civilly committed patients to be released solely on the recommendation of the hospital administrator but requiring court approval before those committed after an insanity acquittal can be released is Constitutional.

The recent widely publicized New York case of Robert H. Torsney demonstrates many of the issues involved in the misuse of psychiatry in the period following acquittal by reason of insanity. Torsney, a white police officer, was charged with murder in the point-blank shooting of a 15-year old black youth on November 26, 1976. Following his arrest, his lawyer successfully resisted the recommendation by the district attorney's office that he be sent to a local medical center for psychiatric observation. According to newspaper reports, the lawyer, "reacting angrily, said that to jail a police officer who acted in the line of duty and to put him into a hospital with mental patients would be 'worse than putting him into the electric chair—it's an outrage.'"²²⁷ However, it was apparently concluded that an outright acquittal, such as had been obtained by two other police officers who had been similarly charged and had been tried before all-white juries in 1974 and 1977,²²⁸ would not be possible because of the strongly negative public reaction, and a plea of not guilty by reason of insanity was asserted. In a trial before an all-white jury in November, 1977, a defense psychiatrist testified that in giving a different version of the incident from that of other witnesses the officer had engaged in "involuntary retrospective falsification" and that because of an "organic psychomotor seizure," he suffered from "mental defect" at the time of the shooting.²²⁹

Torsney was acquitted by reason of insanity, taken into custody after having been free on bail from the date of his arrest, and immediately sent to a maximum security psychiatric hospital. After three months, he was transferred to a civil state hospital and a month later a recommendation was made by the clinical staff that he be released on the basis of his having shown no sign of a convulsive disorder or mental illness since the time he was first hospitalized. After extensive review by a Special Release Committee, an Independent Review Panel and various senior officials of the State Department of Mental Hygiene, a full evidentiary hearing was held from November 29 to December 13, 1978, at the conclusion of which the presiding judge ordered that Torsney be released on various conditions including outpatient treat-

ment at the state psychiatric hospital for a five-year period.²³⁰

An appeal by the district attorney of this decision before the Appellate Division of the Supreme Court, Second Department, was successful. Asserting in tongue-in-cheek fashion "We may not shirk our responsibility to the community by prematurely releasing Mr. Torsney while he continues to suffer from a dangerous personality disorder,"²³¹ the five-justice appellate bench, "selectively excerpting from the record in a manner that distorts not only the entire record, but also the testimony of virtually every witness,"²³² unanimously ruled that "the petitioner has failed to sustain his burden of proving he is ready for release upon condition without danger to himself or others."²³³

On appeal by the State Commissioner of Mental Hygiene of the appellate court's decision, a hearing was held before the Court of Appeals on April 23, 1979, at which Counsel for the Petitioner stated:

"It cannot be seriously argued that the record in this case establishes that Mr. Torsney is neither clinically mentally ill nor presently dangerous. At most, he may be said to have a personality flaw, which certainly does not distinguish him from the rest of society. The fact that a jury acquitted Mr. Torsney in November, 1977, because of a doubt as to his criminal responsibility cannot continue to be used as a basis for depriving him of his liberty. Neither dissatisfaction with the jury's verdict nor desire for public retribution of someone found by every psychiatrist, psychologist, nurse or social worker to be without mental illness or a propensity for dangerous behavior justifies continued involuntary retention. Nor is it sufficient to justify retention to question the Department's methods of evaluation and treatment. The fact is that Mr. Torsney has now been evaluated and observed over and over again, for a period of over two years, and the result remains the same, he is not clinically mentally ill and not presently dangerous."²³⁴

The decision by the New York Court of Appeals will have major impact extending far beyond the case of Officer Torsney. If the court decides, as it should, that Torsney, not punishable under the law because of his "acquittal," must be released, the Legislature might well become motivated to implement the recommendation of the Appellate Division of the State Supreme Court, Second Division, that "new legislation be adopted" in the light of "increasing disenchantment with the insanity defense."²³⁵ If the Court decides that Torsney must be retained in the hospital, notwithstanding the staff decision that hospitalization is clinically unwarranted, the state mental hospital

will have been judicially confirmed as a prison. In that event, the response of the psychiatric community declaring court-ordered "treatment" of non-mentally ill individuals to be a violation of medical ethics, should likewise lead to ameliorative legislative action abolishing the insanity defense.

VIOLATION OF THE CODE OF MEDICAL ETHICS

An objective evaluation of the positions expounded by many of the appellate courts as noted in the examples given above must indeed lead to the conclusion that psychiatrists who permit themselves to be used by the courts for the purpose of confining persons whom the courts, not the psychiatrists, declare to be in need of treatment, are contravening the ethical code of the American Psychiatric Association. The Principles of Medical Ethics adopted by the Association in 1973²³⁶ states in Section 6:

"A physician should not dispose of his services under terms or conditions which tend to interfere with or impair the free and complete exercise of his medical judgment and skill or tend to cause a deterioration of the quality of medical care."

The annotation states in part: "The ethical question is ... whether or not the physician is free of unnecessary non-medical interference. The ultimate issue is his freedom to offer good quality medical care."

Whether a judge wittingly or unwittingly seeks to subvert the purposes of hospitalization to achieve what he may consider desirable preventive detention in a specific case, or in fact to serve the ends of retribution and punishment, is irrelevant from an ethical standpoint once the psychiatrist has made his clinical decision. There is no issue here of the physician's failing to follow the ethical rule (Section 4) to "observe all laws." A law can permit or require the judge to commit an insanity-acquittee to a hospital, but no judge can legally require, nor does any law mandate, that a physician treat a person who has been found by the physician to need no treatment whatsoever.

Maurice Grossman,²³⁷ albeit in another context, has stated the issue succinctly in a recent commentary:

"What I and many of my colleagues would object to is a court electing treatment but then dictating the conditions of treatment that are destructive of effectiveness. The conditions of treatment are in the area of the therapist's expertise. If the security for society is thus threatened, the law

has to either assume that risk or elect a penal disposition. Society has to weigh what it loses either way and take the responsibility for the obvious fact there is no guaranteed trouble free outcome. I believe our profession has the right to object to the authority resting entirely in one area (whether judicial, legislative or societal), while the responsibility for the outcome of the decisions elected by others is relegated to us."

ABOLITION OF THE INSANITY DEFENSE: BENEFICIAL, TIMELY AND WORKABLE

Although it is not the primary purpose of this paper to consider the details of resolving the problems posed by the abolition of the insanity defense, some discussion of the subject is pertinent.

Firstly, it must be recognized that the issue of the Constitutionality of entirely abandoning this defense has not been brought before the United States Supreme Court. Analysis of the cases in which the supreme courts of Washington,²³⁸ Louisiana,²³⁹ and Mississippi²⁴⁰ have ruled on questions of Constitutionality involving modification of the insanity defense strongly suggests that so long as the right of criminal defendants to a public trial by jury is not infringed, capital punishment is eliminated and sentencing sanctions are judicially, not administratively, imposed, abolition of the insanity defense would pass Constitutional muster.²⁴¹

Secondly, it is important to give renewed and strengthened meaning to the power of the jury, representing the conscience of the community, to nullify both the factual evidence presented at trial and the instructions of the judge as to the law on the issues of the case. A "Justly Acquitted" doctrine²⁴² has been proposed as follows:

"A defendant is not criminally responsible if, in the circumstances surrounding his unlawful act, his mental or emotional processes or behavioral controls were functioning in such a manner that he should justly be acquitted."

This formulation is not based on the existence of demonstrable mental "disease" or "defect" or "impairment"; it does not confine its emphasis to the state of mind of the accused at precisely the time of the unlawful act; and, most importantly, acquittal occurring under this concept results in full exculpation without a moment's subsequent involuntary confinement.

Thirdly, with the stamp of approval given by the United States Supreme Court to the diminished capacity doctrine, it should now be

possible to work out an effective criminal code with varying degrees of *mens rea* to make allowance for a defendant's mental disability when it is asserted in a given case. A bill²⁴³ introduced in the New York State Senate, abolishing the insanity defense against criminal responsibility, provides that a defendant may offer evidence of mental disability to negate the culpable mental state required for the commission of the offense charged or any lesser offense. (The term "mental disability," as defined in the New York Mental Hygiene Law,²⁴⁴ includes mental illness, mental retardation, developmental disability, alcoholism, narcotic addiction or substance abuse.) In any case in which the issue of his mental disability is raised by the defendant, the court will be required to order that the defendant undergo a mental examination in a designated facility prior to sentencing. In a state such as New York where an elaborate mental health services program is in place for the delivery of treatment services to convicted persons at any dispositional level from probation to parole,²⁴⁵ the aim would be to apply to a mentally disabled individual, now under legitimate state control as a consequence of conviction for his crime, certain treatment efforts with a view to correcting the offender's criminal propensities. Abolition of the insanity defense, if it is to have humanitarian consequences, must be accompanied by a latitudinarian approach to sentencing.

Fourthly, recognizing that plea-bargaining practices account for the vast majority of convictions (91.5% of all convictions in New York State are currently obtained via guilty pleas²⁴⁶) and that plea-bargaining has long gone hand-in-hand with charge reduction, the prosecutor, defense attorney and judge should be seen as a "surrogate jury; by assessing the evidence in relation to the seriousness of the offense and the defendant's prior record, they arrive at a charge and sentence agreement which they deem to be appropriate in light of what they could reasonably expect to happen if the case proceeded to trial."²⁴⁷

The Executive Advisory Committee on Sentencing in its March, 1979, Report to the Governor of New York found little merit in attempts to abolish or severely restrict plea-bargaining ("In fact, we believe that such efforts are misguided and doomed to failure"²⁴⁸); and instead, recommended that "increasing visibility and accountability of prosecutorial decision-making should take place."²⁴⁹ The plea-bargaining issue is emphasized here because it is believed that most of the cases dealing with mentally disabled offenders would be handled by means of the plea-bargaining process.²⁵⁰ However, the main thrust of the report is the proposal that a system of "sentencing

guidelines" be adopted to replace the present system which, in addition to promoting the indeterminate sentence, allows judges to "exercise vast and unchannelled discretion in imposing sentence."²⁵¹ In the opinion of the Committee, the resultant widespread sentence disparity ("similar offenders committing similar crimes often receive substantially dissimilar sentences") undermines the ability of our sentencing laws to do justice or to control crime. In the case of mentally disordered offenders who are found "Not guilty by reason of insanity," it is submitted, the problem of dispositional disparity is even greater and cannot be resolved without the abolition of the insanity defense. The reason is that, unlike the judge's sentence, which is final and results in the judge's exclusion from subsequent decision-making respecting the prisoner's ultimate release, the post-insanity-acquittal automatic confinement keeps the judge very much involved in the release process in most jurisdictions. Moreover, in the case of the acquittee and not the convict, a number of other decision-makers, namely, various key staff members of the hospital to which the acquittee is sent, are involved. The personal predilections and viewpoints of these individuals have the direct effect of similar mentally ill offenders committing similar unlawful acts often receiving substantially dissimilar periods of confinement. Even worse, when the judges are confinement-minded and the staff hospitalization-minded, or the standards for release become more stringent, dissimilar mentally ill offenders committing dissimilar unlawful acts often receive substantially similar periods of confinement in maximum security hospitals, namely, a duration of time exceeding that which would have occurred had they been convicted as charged.

Finally, for the most serious offenders who would require institutionalization, it is well to bear in mind the words of Joseph Weintraub, a former Chief Justice of the Supreme Court of New Jersey:

"In terms of personal blameworthiness, there is no difference between the functional aberration called a disease or defect of the mind and what is inscrutably called a defect of character. However helpful such classifications may be in the treatment of the sick, they are irrelevant to the infliction of the stigma of criminal. The thrust of the psychiatric thesis must be to reject insanity as a defense and to deal with all transgressors as unfortunate mortals."²⁵²

To this end it is recommended that Jonas Robitscher's proposals of a decade ago be revived:

"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."²⁵³

The maintenance of a two-tier system of penal treatment for the "responsible" and hospital treatment for the "non-responsible" has perpetuated the artificial distinction between the "bad" and the "mad," the resultant confusion in the minds of the public and the legislative representatives leading to a failure to allocate the necessary resources to provide meaningful treatment. Certain events have occurred recently which may make the abolition of the insanity defense more palatable to psychiatrists who have heretofore advocated its retention.

According to Petrich²⁵⁴ the American Medical Association has been engaged since 1975 in the development of standards, the installation of pilot programs and the organization of an accreditation program for comprehensive care in correctional institutions. A Task Force specifically appointed to develop standards for psychiatric services completed its work in February, 1979, and a comprehensive, realistic set of standards recommended by the Task Force is currently under review by the National Advisory Committee for the Jail and Prison Health Project of the American Medical Association. That this development must be taken seriously is emphasized by the decision of the United States Supreme Court in 1976 that incarcerated persons have a Constitutional right to medical care.²⁵⁵ This judicial mandate supported by formal policy decisions by the American Medical Association, American Bar Association and the United States Department of Justice, makes it reasonable to anticipate that an array of services will at last become available to prisons and hospitals for the criminally insane. This country has seen enough of the diversion of mentally disabled offenders into the mental health system by

"liberalization" of the standard for criminal nonresponsibility (insanity) and pious suggestions for legislative action to appropriate necessary financing of treatment services. Such was the case when the United States Court of Appeals, Second Circuit, adopted the ALI rule in the 1966 case of *United States v. Freeman* and in a small-print footnote stated²⁵⁶:

"We recognize our inability to determine at this point whether society possesses sufficient hospital facilities and doctors to deal with criminals who are found to be incompetent. But our function as judges requires us to interpret the law in the best interest of society as a whole. We therefore suggest that if there are inadequate facilities and personnel in this area, Congress, the state legislature and federal and state executive departments should promptly consider bridging the gap."

Skeptics unimpressed by the vigor shown by the American Medical Association, courts and governments in working towards the establishment of medical services for prisoners, will be moved to optimism as a result of recent reports of damage awards running into hundreds of thousands of dollars for injuries suffered by prisoners because of inadequate medical and psychiatric care.²⁵⁷ Furthermore, they will be heartened by the proposal before Congress, already strongly supported by the House of Representatives, which would authorize the United States Attorney General to take legal action against states to correct widespread abuses in institutions involving neglect of and even brutality towards prisoners and patients.²⁵⁸

CONCLUSION

The insanity defense is a legal fiction devised to avoid the carrying out of the death penalty on seriously mentally disabled offenders. With the virtual abolition of capital punishment in this country, the use of the insanity defense is an anachronism. Many judges and prosecutors see it as a mechanism to trigger indeterminate detention; many defense attorneys see it as an alternative to a mandatory lengthy period of imprisonment holding out a possibility of earlier release from confinement. In either case, misuse of psychiatry is an inevitable consequence and does violence to the integrity of both the criminal justice system and the psychiatric profession. Originally intended to apply theoretically to the most seriously psychotic individuals charged with capital crime, it is now asserted mainly by defendants who are

mildly mentally ill, and sometimes not mentally ill at all, charged with crimes which do not carry the death penalty. There has been a dramatic increase in the use of the insanity defense. Given widespread publicity in the more egregious cases, insanity trials have the effect of confusing the public. The insanity defense constitutes a major weakness in the administration of criminal justice, and as a result breeds public cynicism, since some insanity acquittees, especially the well-to-do and those who are represented by competent counsel, do obtain their release, and a small number of these do again engage in serious criminal conduct soon afterwards.²⁵⁹ The insanity defense, although on the increase, will never be employed by more than a small proportion of the criminal population, but it does much to foster loss of respect by the public for the courts and for the law itself.

The elimination of the insanity defense will help greatly to bring about rational practices in our criminal justice system, and legislative action to this end is urged. Concurrently, there should be fully incorporated into our criminal code the diminished capacity concept, sanctioned and indeed recommended by the United States Supreme Court, so that by the stipulating of varying degrees of *mens rea* or culpable mental states, allowance can be made for a defendant's mental disability when it is asserted in a given case. In the alternative the psychiatric profession should take immediate steps to end the violations of medical ethics that are the odious accompaniments of automatic post-trial confinement of insanity-acquitted criminal defendants.

Forty years ago William Alanson White wrote²⁶⁰:

"The only thing to do ... is to wipe from the concept of anti-social conduct the whole idea of sin, which is a hang-over from our medieval theologies, and our concept of punishment ... and then treat all offenders with the sole point of view of trying to satisfy as far as possible two objectives: the interests of the community and the interests of the individual. Where they cross, the interests of the individual necessarily must give way."

This article has attempted to show that the insanity defense should not be the means by which society satisfies these objectives. There are other more effective, more humane and more ethical alternatives. This fictional defense, inimical as it is to the ends of justice and the honor of the psychiatric profession, should be promptly abandoned.

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ADDENDUM

In Maine, the Durham Rule, which was adopted in 1964, was supplanted by the American Law Institute test in 1976. The issue for the jury now is whether a mental disease or defect has resulted in lack of substantial capacity on the part of the accused to conform his conduct to the requirements of the law or to appreciate the wrongfulness of his conduct. Me. Rev. Stat. Ann., tit. 17-A, §58(1) (1976). See *State v. Ellingwood*, 409 A.2d 641 (1979).

Rhode Island, in 1979, by unanimous decision of the Supreme Court of Rhode Island, became the first jurisdiction in the United States to adopt the ALI alternative "justly responsible" test as follows: A person is not responsible for criminal conduct if at the time of such conduct, as a result of mental disease or defect, his capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law is so substantially impaired that he cannot justly be held responsible. The terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct. *State v. Johnson*, 399 A.2d 469 (1979).

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UNCLOSETING THE CONSCIENCE OF THE JURY—A JUSTLY ACQUITTED DOCTRINE

Abraham L. Halpern, M.D.

... it is the conscience of the jury, that must pronounce the prisoner *guilty* or *not guilty*.

—Sir Matthew Hale, 1665¹

INTRODUCTION

Acquittal of certain defendants who have aroused the sympathy of the jury has for centuries been a not uncommon event in the Anglo-American system of criminal justice. The power of the jury to acquit contrary to overwhelming evidence and clear-cut instructions of the judge was firmly established over 300 years ago in Bushell's Case.² This power has become embedded in our legal system under the doctrine of jury nullification which holds that jurors have the inherent right to set aside the instructions of the judge and to reach a verdict of acquittal based upon their own consciences.³ Because of this right, it has been argued strenuously that the defendant has the right to have the jury so instructed.⁴ Logically, if the jury has the legal power to nullify the instructions of the court and to acquit in the face of all the evidence against the accused, it has the right to an instruction to that effect. However, such an instruction has been resisted by many state and federal judges as an invitation to jury "lawlessness" which would lead to undermining of the processes of the law.

For example, a three-judge federal appeals court panel (Judge Bazelon dissenting) ruled in 1972 that "The fact that there is widespread existence of the jury's prerogative . . . does not establish as an imperative that the jury must be informed by the judge of that power."⁵ Although acknowledging a 1920 Supreme Court holding that "the jury has the power to bring in a verdict in the teeth of both law and facts,"⁶ and noting Dean Pound's comment on the positive aspects of jury lawlessness as "the greatest

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corrective of law in its actual administration,"⁷ the panel expressed the conviction that "its explicit avowal risks the ultimate logic of anarchy,"⁸ and "the simultaneous achievement of modest jury equity and avoidance of intolerable caprice depends on formal instructions that do not expressly delineate a jury charter to carve out its own rules of law."⁹

Judge Bazelon, on the other hand, argued strongly that "the jury should be told of its power to nullify the law in a particular case."¹⁰ In the face of wide judicial recognition that the jury has "an unreviewable and irreversible power to acquit in disregard of the instructions on the law given by the trial judge" and that the power of nullification is a "necessary counter to case-hardened judges and arbitrary prosecutors," he saw the denial of a requested instruction on nullification as a "deliberate lack of candor."¹¹ He related the need for such an instruction to the fundamental purposes and function of a jury as described in recent Supreme Court opinions:

[T]he essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence.¹²

Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the commonsense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.¹³

Bazelon insisted¹⁴ that "Nullification is not a 'defense' recognized by law, but rather a mechanism that permits a jury, as community conscience, to disregard the strict requirements of law where it finds that those requirements cannot justly be applied in a particular case." He pointed out¹⁵ that although it is "The legislative function . . . to define and proscribe certain behavior that is generally considered blameworthy, . . . the jury has the responsibility of deciding whether special factors present in the particular case compel the conclusion that the defendant's conduct was not blameworthy."

The doctrine permits the jury to bring to bear on the criminal process a sense of fairness and particularized justice. The drafters of legal rules cannot anticipate and take account of every case where a defendant's conduct is "unlawful" but not blameworthy, any more than they can draw a bold line to mark the boundary between an accident and negligence. It is the jury—as spokesman for the community's sense of values—that must explore that subtle and elusive boundary.¹⁶

In connection with the issue of unjust acquittal, Bazelon draws attention¹⁷ to the strong internal check that constrains the jury's willingness to acquit. "Where defendants seem dangerous, juries are unlikely to exercise their nullification power, whether or not an explicit instruction is offered." Moreover, as pointed out by Schefflin,¹⁸ "It is unlikely that the jury would let any manner of criminal run loose just for the thrill of defying the judge. People are more cautious and concerned than that. Also the empirical studies that have been done show that the jurors are too restrained by the gravity of their role to unthinkingly release persons from criminal liability."

The resolution of the vast majority of criminal cases by non-jury trial procedures, including the oft-maligned but constitutionally valid and administratively necessary plea-bargaining practice,¹⁹ has until recently facilitated the avoidance of the jury nullification issue. During the past decade with the liberalization of the standard for criminal responsibility, there has been a steady increase in pleas of not guilty by reason of insanity.^{19a} Testimony by psychiatrists and psychologists was virtually excluded in cases where the insanity defense or diminished capacity was not asserted, and the lack of such testimony in a case that would ordinarily evoke the sympathy of the jury made it very difficult to acquit when confronted by a rigid and conviction-oriented instruction by a judge. Thus, in order to be able to introduce testimony favorable to the defendant and to obtain an acquittal without having to risk the jury's reluctance to exercise its power under the nullification doctrine, the insanity defense has increasingly been invoked. An acquittal by reason of insanity was, after all, an acquittal and was consistent with the rules of the court and with the evidence presented. Cases such as the killing of a quadriplegic victim by his brother,²⁰ the aborting of a 24-week-old fetus by a 22-year-old college student who had found herself unable to obtain a legal abortion,²¹ and the killing by a woman of her sadistic, chronically tormenting, and physically abusive husband,²² lent themselves readily to an insanity defense and acquittal usually won community approval. However, the cost has been heavy in terms of widespread disrespect for law and ridiculing of the psychiatric profession for introducing a system of pseudo-scientific psychological acrobatics that postulates the existence of a mental disease at precisely the moment of the unlawful act, and only then, with never a hint of its presence before the act, and lost for all time after the act. In the interests of the acquittal, fully in accord with community standards of fairness and justice, this charade would probably be tolerated even with the resultant diminution of esteem for law and psychiatry.

However, new developments have been taking place which make "acquittal" by reason of insanity anything but acquittal, involving in many jurisdictions automatic hospitalization following acquittal, or sanity hearings at which the burden of proof of sanity falls on the acquittee. Particularly disturbing are those cases in which the acquittee, who had been free on bail for many months prior to trial, was automatically hospitalized on acquittal by reason of "mental disease" (at the time of the commission of the act) and cannot be released from confinement until he proves by a preponderance of evidence that this can be done without danger to self or others.

This trend toward automatic confinement and stringent release standards is a direct consequence of the liberalized insanity tests (for example, the Durham and ALI rules) that in at least one jurisdiction have led to acquittals where the prosecution was not able to prove *sanity* beyond a reasonable doubt. (Robitscher²³ describes a study of 255 men hospitalized at the John Howard Pavilion at St. Elizabeths Hospital on an indeterminate basis after successful pleas of not guilty by reason of insanity, not one of whom was found actually to be mentally ill.) In many other jurisdictions acquittals by reason of insanity have occurred in cases of narcotics addiction, emotionally unstable personality, depressive reaction, psychoneurosis, drug dependence, kleptomania, sociopathic personality with drug addiction, and sexual sadism, conditions which in the past have not in themselves led to acquittal.²⁴ By no stretch of the imagination could such individuals, many of them confined because of the commission of major criminal acts, fall under Sir William Blackstone's categorization of an insane person as "A madman who is punished by his madness alone; that affliction is severe enough for any human purpose."²⁵ In other words, were it not for automatic confinement and stricter standards for release, the verdict of "not guilty by reason of insanity" would leave open the serious possibility that persons considered dangerous would be freed soon after their so-called "acquittal."

A "JUSTLY ACQUITTED" DOCTRINE

It is therefore evident that a new exculpatory rule needs to be enunciated if those persons who merit compassion, forgiveness and full exculpation, according to community conscience, are to be acquitted *within the law* rather than in spite of it. The following standard entitled the "Justly Acquitted Doctrine," is proposed:

A defendant is not criminally responsible if, in the circumstances surrounding his unlawful act, his mental or emotional processes or behavioral controls were functioning in such a manner that he should justly be acquitted.

It is submitted that this doctrine is needed at the present time to supplement the insanity defense against criminal responsibility in order to protect from automatic confinement and the burden to prove, subsequently, their suitability for release, those who might, with the introduction of relevant testimony at trial, be believed by a jury to be entitled to outright acquittal. Were the insanity defense to be abolished, it would be needed even more to protect such individuals from the strong likelihood of a guilty verdict, constituting as it does moral condemnation and punishment whether or not accompanied by a term of imprisonment.

Before analyzing the merits of this proposed Justly Acquitted Doctrine and suggesting rules to facilitate its implementation in a trial, it may be instructive to review its historical antecedents culminating in the "justly responsible" test propounded by Judge David Bazelon in 1972, in his dissenting opinion in the case of *United States v. Brawner*.²⁶

EVOLUTION OF THE "JUSTLY RESPONSIBLE" CONCEPT

Experience has shown that until appellate courts, following the lead of the deterministic philosophy of modern psychiatry, influenced trial judges who in turn influenced jurors, acquittals by reason of insanity were rare although widely publicized occurrences. When juries felt that the defendant deserved to be convicted, conviction took place no matter how liberal the insanity rule was worded (for example, the New Hampshire and the Durham rules that declared the defendant not to be criminally responsible if his unlawful act was a product of mental disease or defect). When juries, reflecting community standards, believed in their hearts that the defendant deserved to be acquitted, acquitted he was, no matter how narrow and restricted was the insanity rule defined (for example, the M'Naghten rule, which was originally interpreted as requiring complete lack of knowledge of right or wrong, according to the law of the land, in order to justify acquittal).

In the words of Supreme Court Justice William O. Douglas,²⁷ "When the M'Naghten rule indicated 'guilty' and common sense indicated 'guilty but insane,' the common sense of juries and judges usually prevailed." Thus, on those infrequent occasions when acquittals did occur in cases where insanity was pleaded, it was recognized by some that it was the jury's sense of justice, or the conscience of the jury, presumably reflecting community standards and not the proven "disease" of the defendant, which led to the verdict of "not guilty by reason of insanity." This recognition found its way into the written opinions of appellate courts such as in *Holloway v. United States* (1945):

The application of these tests [M'Naghten and irresistible impulse rules], however they are phrased, to a borderline case can be nothing more than a moral judgment that it is just or unjust to blame the defendant for what he did. Legal tests of criminal insanity are not and cannot be the result of scientific analysis or objective judgment. There is no objective standard by which such a judgment of an admittedly abnormal offender can be measured.²⁸

"They must be based on the instinctive sense of justice of ordinary men. This sense of justice assumes that there is a faculty called reason which is separate and apart from instinct, emotion, and impulse, that enables an individual to distinguish between right and wrong and endows him with moral responsibility for his acts . . . Our collective conscience does not allow punishment where it cannot impose blame."²⁹

Formal acknowledgment of the jury's sense of justice in insanity cases was incorporated in a recommendation for an entirely new standard for criminal nonresponsibility, proposed by the Royal Commission on Capital Punishment in 1953.³⁰ Under that proposal a jury would be required to determine, without the aid of more specific guidelines, whether "at the time of the act the accused was suffering from disease of the mind (or

mental deficiency) to such a degree that he ought not to be held responsible."³¹ Three dissenting commission members considered it a nontest that exposes defendants to unlimited arbitrariness of jurors. They contended that juries would not be guided in deciding among opinions of expert witnesses and that uniformity in decision making would thus be sacrificed.³²

A minority of the Council of the American Law Institute (ALI) proposed the following formulation as an alternative to paragraph (1) of the ALI Rule³³ respecting mental disease or defect excluding responsibility*:

A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect his capacity either 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.³⁴

Although this minority agreed with the Royal Commission that mental disease or defect involves gradations of degree that should be recognized, it felt that the legal standard ought to focus on the *consequences* of disease or defect that have a bearing on the justice of conviction and of punishment. The Royal Commission proposal, it observed, failed in this respect.³⁵ Moreover, the proponents of the alternative contended "that since the jury normally will feel that it is only just to exculpate, if the disorder was extreme, that otherwise conviction is demanded, it is safer to invoke the jury's sense of justice than to rest entirely on the single word 'substantial,' imputing no specific measure of degree."³⁶

Prior to the rejection of the "justly responsible" alternative by the American Law Institute, Dr. Manfred Guttmacher, in a letter to Professor Herbert Wechsler, the chief reporter of the ALI, expressed his concern that the alternative formulation carried too great an emphasis on the matter of control and that "perhaps certain seriously psychotic cases might not easily fit into this formula."³⁷ Enamoured of the "product" concept of the Durham rule propounded a few months earlier by the United States Court of Appeals, District of Columbia Circuit,³⁸ Dr. Guttmacher recommended a modification of the alternative formulation by which a jury would be required to determine whether at the time of the criminal conduct, as a result of mental disease or defect, "the capacity of the accused to control his conduct in accordance with the law was impaired so greatly, or whether the criminal act was [so] clearly a product of his mental disease, that he justly could not be held criminally responsible."³⁹ Professor Wechsler felt that Guttmacher's concern was not justified since the alternative formulation

*Section 4.01

(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) The terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

(The 1962 Proposed Official Draft of the Model Penal Code added the word "wrongfulness" in parentheses following the word "criminality" in Para. 1.)

easily covers the psychotic individual whose "cognitive capacity is so impaired that he does not know and cannot be expected to find out that the circumstances are such that his act would be illegal."⁴⁰ He rejected the productivity notion insisting that "it is only when causality inheres in the substantial impairment of capacity that irresponsibility can be acknowledged to obtain."⁴¹

The American Law Institute adopted the rule (now accepted in many U.S. jurisdictions, most recently California⁴²) rejecting the "justly responsible" formulation because it was deemed "unwise to present questions of justice to the jury."⁴³ "A submission that in form, at least, confines the inquiry to fact,"⁴⁴ was preferred.

Judge Bazelon, although agreeing that the Durham rule should be abandoned, was strongly critical of his colleagues on the Court of Appeals for adopting the ALI Rule with the *McDonald*⁴⁵ definition of mental disease or defect.* He felt that the ALI test "asks the jury to wrestle with such unfamiliar, if not incomprehensible, concepts as the capacity to appreciate the wrongfulness of one's action, and the capacity to conform one's conduct to the requirements of law."⁴⁶ He observed⁴⁷ that

The best hope for our new test is that jurors will regularly conclude that no one—including the experts—can provide a meaningful answer to the questions posed by the ALI test. And, in their search for some semblance of an intelligible standard, they may be forced to consider whether it would be just to hold the defendant responsible for his action.

Some 18 months before *Brauner* was decided, Bazelon had clearly expressed his concern that although "we regularly defer to the jury's unique capacity to resolve the 'moral, legal, and medical' questions intertwined in the issue of responsibility . . . yet we do not make the special function of the jury explicit in the instructions."⁴⁸ Accordingly, he recommended⁴⁹ that in an insanity defense jury trial the instructions of the judge include "the comment that impairment is a question of degree, and that an impairment is 'substantial' for the purpose of the insanity defense if the jury finds that the defendant's processes and controls were impaired to such an extent that he cannot justly be held responsible for his act."

In his *Brauner* dissent he articulated his conclusion,⁵⁰ in its final form, that an instruction to the jury should provide that

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.

The "justly responsible" test would ask the psychiatric witness a single question:⁵¹ "What is the nature of the impairment of the defendant's mental and emotional processes and behavior controls? It would leave for the

*A mental disease or defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls."

jury the question whether the impairment is sufficient to relieve the defendant of responsibility for the particular act charged."

The majority rejected Bazelon's position and expressed⁵² "substantial concern that an instruction overtly cast in terms of 'justice' . . . will splash with unconfined and malign consequences." The government's brief⁵³ warned that "explicit appeals to 'justice' will result in litigation of extraneous issues and will encourage improper arguments to the jury phrased solely in terms of 'sympathy' and 'prejudice.'" Brawner's counsel cautioned⁵⁴ that "even though the jury is applying community concepts of blameworthiness, 'the jury should not be left at large, or asked to find out for itself what those concepts are.'" The amicus brief of the Public Defender Service expressed concern over a blameworthiness instruction without more, saying⁵⁵ "it may well be that the 'average' American condemns the mentally ill," and indicated a preference for the ALI alternative formulation under which the justice standard is coupled with a direction to consider the individual's capacity to control his behavior.⁵⁶ Mr. William H. Dempsey, Jr., a Washington, D.C., attorney, appointed by the court as amicus curiae, proposed⁵⁷ an instruction as follows:

It is up to you to decide whether defendant had such an abnormal mental condition, and if he did whether the impairment was substantial enough, and was so related to the commission of the crime, that he ought not be held responsible.

The District of Columbia Bar Association opposed the "justly responsible" formulation on the grounds that the test of insanity "would be largely swallowed up by this consideration"⁵⁸ and that there would be an undermining of the principle that "the function of giving to the jury the law to be applied to the facts is not only the duty of the court, . . . but is also a bedrock right of every citizen and, possibly, his only protection."⁵⁹ Bazelon's colleagues were strongly influenced by Goldstein's view⁶⁰ that

If the law provides no standard, members of the jury are placed in the difficult position of having to find a man responsible for no other reason than their personal feeling about him. Whether the psyches of individual jurors are strong enough to make that decision, or whether the 'law' should put that obligation on them, is open to serious question. It is far easier for them to perform the role assigned to them by legislature and courts if they know—or are able to rationalize—that their verdicts are 'required' by law.

Bazelon strongly objects to this denigration of the jury's intellectual capacity. He points out⁶¹ that "culpability and intent are not synonymous; even an individual who intentionally engages in unlawful conduct may be nonculpable when the law itself is deemed unjust by the community or when the reasons for the defendant's conduct serve as a justification or excuse." He views the jury's traditional power to nullify the law as an important means of maintaining fairness and justice in the criminal process. "We should not depend on sophisticated juries to intuit this power, but should be willing to instruct *all* juries as to its existence."⁶²

The majority concluded that Bazelon's "justly responsible" test would likely lead to unwarranted forgiveness of those who have committed crimes against society and must therefore be rejected because "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."⁶³ To this Bazelon protested⁶⁴ that he is not proposing that "the jury should be cast adrift to acquit or convict the defendant according to caprice. The jury would not be instructed to find a defendant responsible if that seems just, and to find him not responsible if that seems just. On the contrary, the instruction would incorporate the very requirements—impairment of mental or emotional processes and behavior controls—that *McDonald* established as prerequisites of the responsibility defense." He pointed out in his dissenting opinion that the ALI test adopted by the court does not, as a matter of law, draw a bright line between responsible and nonresponsible defendants. It does not, although presumably the "justly responsible" test does, offer the jury help "in making the 'intertwining moral, legal, and medical judgments' that all of us expect."⁶⁵

In a last move to win his colleagues over to the "justly responsible" formulation, Bazelon expressed willingness⁶⁶ to include the terms "mental disease or defect" or "abnormal condition of the mind" so that the test would then read as follows:

A defendant is not responsible if at the time of his unlawful conduct, as a result of mental disease or defect, or abnormal condition of the mind, his mental or emotional processes or behavior controls were impaired to such an extent that he cannot justly be held responsible for his act.

This was indeed a major concession for Bazelon who only one year earlier had expressed⁶⁷ views strongly disparaging of the term "mental illness" and insisted⁶⁸ that "there is no reason to tie the legal concept of responsibility to the medical model of mental illness." Nevertheless, his urgings fell on deaf ears and the Court adopted the ALI rule with the *McDonald* definition for mental disease or defect.

COMPARISON OF THE "JUSTLY RESPONSIBLE" TEST AND THE "JUSTLY ACQUITTED" DOCTRINE

The "justly responsible" test differs from the "justly acquitted" doctrine in several significant respects. All of the "justly responsible" formulations required proof of "mental disease or defect" in one form or another. Even Bazelon, although insisting⁶⁹ that "physiological, emotional, social, or cultural" factors may be responsible, spoke of the presence of *impairment of mental processes* with its inescapable medical implications. All of the "justly responsible" proposals referred to a condition of the mind *at the time of the act or conduct* which, if narrowly construed, would confine the analysis of the mental state of the defendant to an unrealistically brief time frame.

More importantly, all of the formulations were predicated on the *automatic confinement* of the acquttee. The Royal Commission would have the "patient" kept in strict custody "until the pleasure of the Queen is known." The American Law Institute's Model Penal Code prescribed⁷⁰ that

When a defendant is acquitted on the ground of mental disease or defect excluding responsibility, the Court shall order him to be committed to the custody of the Commissioner of Correction [sic] [Mental Hygiene or Public Health] to be placed in an appropriate institution for custody, care and treatment.

Subsequent release would require that "the burden shall be upon the committed person to prove that he may safely be discharged or released"⁷¹ if the Court is not satisfied with the reports and testimony of psychiatrists recommending release. In the event that the Commissioner of Correction (Mental Hygiene or Public Health) does not initiate the application for discharge or release on probation without danger to himself or others, the committed person may himself make application for release but not before a minimum of 6 months' confinement⁷² and, of course, with the burden of proving that he may be safely released. Judge Bazelon's proposal was in the context of the laws governing the District of Columbia which mandated a minimum of 50 days' involuntary hospitalization followed by a hearing at which the acquttee had the burden of proving that he was fit for release.⁷³ Indeed, Bazelon argued⁷⁴ for the retention of the "medical or disease model" precisely because it would facilitate confinement of the insanity-acquitted individual:

It does not necessarily follow, however, that we should push the responsibility defense to its logical limits and abandon all the trappings of the medical or disease model. However illogical and disingenuous, that model arguably serves important interests. Primarily, by offering a rationale for detention of persons who are found not guilty by reason of 'insanity,' it offers us shelter from a downpour of troublesome questions.

In contradistinction to the above, the justly acquitted doctrine does not speak of mental disease or defect, or impairment. Instead, it refers to the functioning of mental processes without requiring a showing of "disease." It eschews the notion of the mental state at the precise time of the unlawful act, choosing the term "in the circumstances surrounding the unlawful act" to take into account the entire gamut of relevant factors influencing the defendant in the matter of the commission of the act.

Since the psychiatrist testifying under the justly acquitted doctrine would not have to address the issue of mental disease or defect specifically nor whether the defendant possessed that degree of mental disease which would be sufficient to render him nonresponsible, he would be free to testify as he was intended to do, but could not, under *Durham*. In accordance with accepted procedure he would be able to meet the expectations for appropriate psychiatric testimony as outlined by Justice Douglas:⁷⁵

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... the psychiatrist gives any relevant testimony; and he speaks to the court and to the jury in the language of his discipline. He is... free to advise the court and the jury concerning the totality of the accused's personality... No longer is he forced to divide a person up into a rational being and an emotional one, to divorce his conscious from his unconscious state, or to separate the knowing part of the mind from the willing part or the feeling part... Examination [is invited] of all facets of the total personality—the cognitive, the volitional, and the emotional.

Unlike Bazelon's "justly responsible" concept, the "justly acquitted doctrine" speaks of the defendant's not being *criminally* responsible, implying that he is responsible but not criminally responsible, and, even though responsible, can, if the conscience of the jury dictates, be acquitted. Finally, in specifying that the defendant should justly be acquitted, it emphasizes acquittal and nothing less; that is, complete exculpation and freedom for the defendant, rather than the "justly responsible" test's "ought not justly to be held responsible" clause, with the unwritten but fully understood rider mandating automatic involuntary confinement.

SUGGESTED RULES FOR IMPLEMENTATION OF THE JUSTLY ACQUITTED DOCTRINE

It is submitted that rules can be devised which can make the justly acquitted doctrine a useful component of the administration of criminal justice. The following suggestions are recommended:

1. Timely notice to be given by defendant's counsel that the defense will invoke the justly acquitted doctrine at trial.
2. Strict limitation on the number of psychiatrists and psychologists called to testify. No more than one for each side is suggested. The interests of justice are hardly served by the appearance on the witness stand of psychiatric experts either needlessly reiterating previous testimony, or cancelling one another out.⁷⁶
3. Requirement that the defendant who wishes to proffer psychiatric evidence make himself available for psychiatric evaluation by the prosecution unless this is waived by the latter.
4. Requirement that the full written report of the data on which the psychiatric opinion was based be made available to the jury.
5. Development of guidelines, consistent with an efficient, orderly, and fair trial, for the jury to put questions to the expert witnesses, when clarification of some relevant matter cannot otherwise be obtained, and even, under specified circumstances, to summon its own witnesses. According to West⁷⁷ such powers have been given to American military juries.
6. Requirement that the judge include in his instructions to the jury an explanation of the justly acquitted doctrine.* Adoption of the "justice"

*This suggestion could most easily be implemented in the State of Maryland whose Constitution states that: "In the trial of all criminal cases, the jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a

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approach, according to Judge Bazelon,⁸⁰ would not "set the jury at large... to evolve its own legal rules and standards of justice," as feared by the *Brauner* majority, but "would still leave standing all of the traditional obstacles to the introduction of irrelevant evidence."⁸¹ It focuses the jury's attention not on mental disease or defect but on "the blameworthiness of the defendant's action measured by prevailing community standards."⁸²

CONCLUSION

Recognition of the "justly acquitted doctrine" and adoption of relevant rules for the presentation of expert psychiatric testimony in criminal cases would let the psychiatrist really talk "unfettered by arbitrary legal formulae"⁸³ based on "responsibility" and "mental disease." Thus, even though "a courtroom is not a laboratory for the scientific pursuit of truth,"⁸⁴ it would become possible, at least in some cases of ordinarily law-abiding and honest persons, for the jury "to confront the causes of criminal conduct in a way that might teach us all something about human behavior"⁸⁵ and to give such defendants "the kind of careful, individual study"⁸⁶ envisaged by Judge Bazelon, so that they might be spared condemnation, punishment, or inappropriate hospitalization.

FOOTNOTES

1. Hale, M. *History of the Pleas of the Crown*, Vol. 2 (W. Stokes & E. Ingersoll ed. 1847); p. 312, quoted in Schefflin, A. W. Jury nullification: The right to say no. *S. Cal. L. Rev.* 45 (1972), 168, 169.
2. 1 *Freeman* 2 (1670). In this case, "upon an inquest to try an indictment against one Pen and Mede, upon a tumult and unlawful assembly; and because the jurors did acquit contrary to the evidence, and the direction of the Court, they were fined forty marks a man, and committed till they paid the fine." Bushell, one of the jurors, "brought his *habeas corpus*." Various counsel argued the merits of the cause: "The Judges are to open the eyes of the jurors, but not to lead them by the nose." "[Although they went contrary to the evidence], they [the jurors] are judges and are to satisfy their own consciences." "[Although they did not pursue the direction of the Court in matter of law], it is possible the Court might mistake the law, or they might mistake the Court, and so no reason it should be so penal." King's counsel argued that "If they were not finable, here would be a failure of justice." Lord Vaughan speaking for the majority of the Judges with whom he conferred, ordered that the prisoners be discharged "for the reason given was, because the jury may know that of their own knowledge, which might guide them to give their verdict contrary to the sense of the Court."
3. Schefflin, *op. cit.* note 1, p. 168.
4. *Ibid.*

conviction"⁷⁸ (emphasis added), and where the following instruction is typically given pursuant to this section: "Members of the jury, this is a criminal case and under the Constitution and laws of the State of Maryland in a criminal case the jury are the judges of the law as well as of the facts in the case. So that whatever I tell you about the law, while it is intended to be helpful to you in reaching a just and proper verdict in the case, it is not binding upon you as members of the jury and you may accept the law as you apprehend it to be in the case."⁷⁹

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10. *Ibid.*, p. 1139.
11. *Ibid.*
12. *Williams v. Florida*, 399 U.S. 78, 100 (1970).
13. *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).
14. *United States v. Dougherty*, *op. cit.* note 5, p. 1140.
15. *Ibid.*, fn. 5.
16. *Ibid.*, p. 1142.
17. *Ibid.*, p. 1143.
18. Schefflin, *op. cit.* note 1, 211-212.
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32. Royal Commission, *op. cit.* note 30, pp. 286-287, referred to in Morris, G. H. *The Insanity Defense: A Blueprint for Legislative Reform*. Lexington, Mass., D. C. Heath and Co., 1975, p. 19.
33. Model Penal Code, *Tentative Draft No. 4*, Philadelphia: The American Law Institute, April 25, 1955, p. 27. See also Brooks, A. D. *Law, Psychiatry and the Mental Health System*. Boston: Little, Brown, and Company, 1974, p. 165.
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36. *Ibid.*, p. 159.
37. *Ibid.*, Appendix C, Letter, Guttmacher to Wechsler (Nov. 8, 1954), p. 187.
38. *Durham v. United States*, 214 F.2d 862 (1954).
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40. Model Penal Code, *Tentative Draft No. 4*, *op. cit.* note 33, Letter, Wechsler to Guttmacher (Nov. 11, 1954), p. 187.
41. Model Penal Code, *Tentative Draft No. 4*, *op. cit.* note 33, p. 188.
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ELIMINATION OF THE EXCULPATORY INSANITY RULE:
A MODERN SOCIETAL NEED

by

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ELIMINATION OF THE EXCULPATORY INSANITY RULE--A MODERN SOCIETAL NEED

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This paper is meant to supplement several articles¹⁻⁴ written by the author during the past five years, arguing that on rational, humanitarian, professional, societal and constitutional grounds, the insanity defense as currently employed in the United States should be abolished.

A CONFOUNDING CONCEPT

The famous defense attorney, Thomas Erskine, made the following comment as he addressed the jury in the trial of James Hadfield:

I may appeal to all who hear me, whether there are any causes more difficult, or which, indeed, so often confound the learning of the judges themselves, as when insanity, or the effects and consequences of insanity, become the subjects of legal consideration and judgment.⁵

Nothing has occurred in the 182 years since this statement was uttered to make the matter of insanity less perplexing.

Indeed, the manner in which both the psychiatric and legal professions have dealt with the subject over the past 25 years has managed more than ever before to confound the judges and everyone else.

In 1960 the American Psychiatric Association bestowed its coveted Isaac Ray Award on Chief Judge David L. Bazelon of the United States Court of Appeals, District of Columbia Circuit, honoring him for his 1954 Durham Rule. His decision in the Durham case⁶ spelled out an insanity test which theoretically could have exculpated any mentally disordered person accused of crime and which facilitated the presentation of psychiatric testimony in insanity trials. Nevertheless, by 1971, the A.P.A.⁷ recommended that the ostensibly more narrow American Law Institute formulation replace the Durham Rule in the District of Columbia, and at the same time indicated that it favored the abolition of the insanity defense.⁸ Subsequently, in response

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times, is in such a deep depression that he hardly functions. In this depressive state, he is often prone to suicide. These labels simply describe some of the different types of mental illnesses diagnosed as psychotic. Drug therapy is very useful in treating many psychotic illnesses.

How well psychotics can function makes the difference in whether or not they are allowed to walk around in the world free or are locked away in an institution. If they can take care of themselves, or have someone who will take care of them, and if they are not a danger to anyone or to themselves, they are allowed to live free. In fact, if psychotics are wealthy enough, they aren't even called crazy -- they're called "eccentric".

The great mass of "normal" people are also classified -- we're called neurotics. Some of us are more neurotic than others, and some of us are so neurotic that we fall across that fine dividing line between neurosis and psychosis, and lose contact with reality. Most of us, however, just have consciences that make us feel uncomfortable, maybe because we did something wrong or were ashamed for something we did or didn't do. Because we have a conscience, we can empathize with these people. We understand, as nearly as possible, how they feel.

It is this very conscience of ours, our feelings of guilt, that makes it so difficult for us to understand someone who feels no guilt at all. The two glaring personality deficiencies that distinguish the psychopath from all other types of deviant behavior are his guiltlessness and his lovelessness. As long as he is doing what he wants to do, that's all that matters to him. And if someone or something blocks his way, he will often explode in anger.

The psychopath is totally incapable of feeling empathy with anyone. The Indian prayer, "Let me not judge a man until I have walked a mile in his moccasins," is completely beyond the comprehension of the psychopath. This anti-social personality cannot put himself in anyone else's place or feel as they do. Nor does he care to do so.

The psychopath will cheat, steal, lie, rape, murder, kidnap, embezzle, and commit forgery, not feeling the least bit of guilt about his behavior. Caught in the act, he will accept no responsibility. He can explain how it was someone else's fault, or how someone else made him do it. The rapist will say, "She asked for it". The murderer will attack the murdered person's character and may say, "He tried to kill me. I had to defend myself." A psychopath is thoroughly irresponsible in all aspects of his life.

This, I believe, is where a "normal" person has the most difficulty in

understanding the personality of a psychopath. How can anyone do the things that psychopaths do unless they are crazy? They can do these things because they have no conscience to hurt them nor to slow them down.

Psychopaths can easily beat the polygraph (lie detector). The psychopath's unreliability as a subject for the polygraph examination is his guiltlessness -- without feelings of guilt, he builds no tension with which to measure incorrect answers.

We might draw an analogy between a psychopath and a man who has a few drinks to get up his "courage". The alcohol doesn't give a person "courage" or "make him mean". The alcohol takes away a person's inhibitions, dulls his conscience, masks his moral defenses, and releases the raw personality that his inhibitions, his conscience, has kept in check. And so, under the influence of alcohol, a person may act and react in a totally different manner than he will when he is cold sober, or in control of his senses. A psychopath, however, doesn't have to be under the influence of alcohol to lower or get rid of his inhibitions, his defenses, for he has few inhibitions to begin with. Without a conscience, he has none of this automatic self-checking apparatus that functions and controls us. Essentially, he has no conscience.

The psychopath can say that he is sorry, but he doesn't feel sorry. He's sorry he got caught, not sorry he committed the act. He can be a very convincing liar. He can say all the right things, and you may end up forgiving him or taking the blame yourself. This personality disorder is often not evident on short acquaintance, but if one has been around him for some time and analyzes his behavior, it will be apparent that everything he does -- if it makes trouble -- is someone else's fault.

Notice the psychopath as the defendant in a courtroom. It is as though he were not the man on trial. He can act, and often is, totally oblivious to the seriousness of the situation. It is as though he were a detached onlooker, completely devoid of any guilt in the proceedings. His behavior in the courtroom, his calm, cool, detached air is one of the giveaways to the psychopathic personality. His apparent normality, coupled with his abnormal career, is in itself an evidence of his pathological condition.

Which brings up the other unique trait of the psychopath. Besides his inability to feel guilt, he is also unable to love. We are not talking now of a person so inhibited that he is unable to express or show love. There are many people unable to outwardly display affection, but they are able to convey love in many different ways. The psychopath is unable to either give or receive

genuine love. His affectional relationships are always shallow and self-serving. However, he may be able to sound as though he truly loves. There is little stability in his relationships. Promiscuity is the rule. Close friendship and allegiance to anyone or anything is beyond a psychopath's capabilities.

Other unsavory characteristics of the psychopath include his callousness and insensitivity to other persons. Other persons are important to him only insofar as he can use them to his own selfish purposes. He is greedy and demanding. He seeks only his own pleasure. Standards of ordinary decency mean nothing to him. He is interested in immediate fulfillment of his own wishes and needs and will attempt to satisfy them without regard for others. Because of this irrational desire for immediate gratification, he rarely learns from experience. He will continue to behave in a manner that is destructive to both himself and to others because he has developed no self-control to modify his behavior and he has no pangs of conscience to bother him.

Rarely does the psychopath hold onto a job for long although he may be quite skilled in his work. He soon tires of a routine. As a result, he may quit a job, participate in flagrantly dishonest and unethical practices, abrogate responsibility, and behave in other ways that result in an unstable and shifting employment record.

Sex for a psychopath is just that. No love is involved, only physical contact, sometimes. For the psychopath can be heterosexual, homosexual, auto-sexual. In the words of that eminent criminologist, Dr. George G. Killinger, "A psychopath would have sex with a snake if he could hold it still!"

It is necessary to remember, as McCord and McCord cautions, that psychopathic characteristics exist in varying degrees in different individuals.

"Borderline" cases who combine certain psychopathic traits with other mental aberrations can, of course, be found. The psychopath lies at one extreme of the so-called "behavior" or "character" disorders. Similarly, the psychopathic disorder melds, at the borderline, into other forms of criminal or mentally disordered behavior. To be classified as a psychopath, the individual must exhibit the two critical psychopathic traits, guiltlessness and lovelessness, that set him apart from others.

Psychopaths can very cleverly display an exterior charm and manipulate people within their environment. It is truly amazing how many families of psychopaths band together to protect the psychopath from the criminal justice system. They will hire the most competent attorneys to negotiate plea bargains, such as committing the criminal to private psychiatric treatment instead of a

prison sentence, or these attorneys will defend the criminal at the trial and often, through legal technicalities or legal maneuvers, delay the defendant from serving time in prison or from being retried if he has already been found guilty by a jury.

Often, a psychopath's dangerous traits are not readily apparent. Research has shown that as a probation or parole risk, the psychopath's chances of failure are 100 percent.* In prisons, the psychopaths lead most of the riots, pass most of the drugs, and indoctrinate most of the young newcomers. The psychopaths commit the greatest number of prison offenses and spend the most time in solitary confinement.

IN PRISON AND OUT OF PRISON, THE PSYCHOPATH CONTAMINATES SOCIETY. So what can be done by society to protect itself against its most dangerous criminals?

1. We must learn to face the fact that psychopathy is untreatable.
2. Most of our hard-core criminals, including rapists, are psychopaths. Therefore, prison rehabilitation programs and programs for sex-offenders are a farce.
3. Most judges, lawyers, and parole board members are not aware that the psychopathic phenomenon exists. They must be made cognizant of the ramifications of their negligence.

Judge Joseph Ulman, in his book, *A JUDGE TAKES THE STAND*, states, "When an individual is attacked, his right of self-defense is absolute, and he need not stop to inquire whether his attacker is acting voluntarily or by reason of compulsions beyond his control. When society is subjected to attack, either actual or potential, and whether by one who is responsible or by one who is irresponsible, those charged with its protection must repel the attack, using such means as are available for the purpose."

Like so many others, Judge Ulman advocates execution for the hardened psychopath. Lifetime imprisonment, they believe, would be taking a risk: the psychopath endangers his wardens and fellow inmates.

George Bernard Shaw wrote that releasing hard-core criminals from prison is like releasing the tigers from the zoo to find their next meal in the nearest children's playground.

Shaw saw no greater cruelty in executing the "incurable criminal" than in incarcerating him for life. "Execution," Shaw declared, "would end the suffering of the convict, protect the lives of the guards, and offer true safety to society."

*McCord and McCord, *Psychopathy and Delinquency*, Gruene and Stratton

A footnote to "The Mask of Insanity" by Joy Satterwhite Eyman, Ph.D.

PERSONALITY OF THE PSYCHOPATH

The psychopath is so different from the psychotic and neurotic, that he must have a special name to distinguish him from these other two. Social scientist can't quite decide on a suitable name for this classification. The designation psychopath has lasted the longest and is a term immediately understood by psychiatrists. However, to the general public, a word with psycho in it immediately means insane. A psychopath is not insane.

In 1952, the American Psychiatric Association replaced "psychopathic" with "sociopathic." In terms of official psychiatric nomenclature, the term psychopath could be characterized as "sociopathic personality disturbance, antisocial reaction." With the term sociopathic the public does not immediately think of insanity.

Again, in 1968, the term used to designate a psychopath was changed by the American Psychiatric Association to that of "antisocial personality."

The two glaring personality deficiencies that distinguish the psychopath from all other types of deviant behavior are his guiltlessness and his lovelessness.

Dr. Robert D. Hare and Janice L. Frazelle of the Department of Psychology, University of British Columbia, Vancouver, Canada, have written "Some Preliminary Notes on the use of a Research Scale for the Assessment of Psychopathy in Criminal Populations", including the following.....

FURTHER TRAITS OF THE PSYCHOPATHIC SYNDROME

1. Glibness/superficial charm: The individual is loquacious and verbally fluent, often telling an excess of unlikely but almost convincing stories that place him in a good light, either as hero or victim. He is usually ready with a quick and clever comeback and is often an amusing and entertaining conversationalist. He is frequently very familiar with psychiatric jargon and may describe himself as 'frustrated', 'stymied', 'inhibited', 'unmotivated', etc., in spite of a low educational level. He generally succeeds in presenting himself well and is extremely likeable. He is very adept at controlling an interview and while appearing to be friendly and superficially cooperative, it is often difficult to elicit any real information from him, as he seldom answers straight questions with straight answers. He often manipulates sentences in such a way that he starts to answer a question and ends up talking about a totally different subject, giving the impression of having answered the question but in fact having said nothing of substance. This individual's superficial social poise cannot long hide his inner aggressiveness or guiltlessness, nor can they form deeper relations than can other psychopaths.
2. Egocentricity/grandiose sense of self-worth: The individual is self-assured and confident (even cocky) and does not perceive himself as a failure or social outcast even when he is in prison. His approach to an interviewer is that of an equal or even a superior who has agreed to give his valuable time. He is convinced that his present circumstances are the result of bad luck and that he will rise to the top eventually. He is definitely not a defeatist nor does he see his future as being drastically affected in any adverse way by his present circumstances. He often expresses his intention to pursue a career with status, most typically that of lawyer, and seems oblivious to the fact that this is totally unrealistic. He often expresses the view that the skilled trades which are taught in prison are worthless or beneath him and that he is capable of doing much more even though he has never pursued any occupational or career goals in the past. He has an exaggerated esteem for his own abilities even though he has never demonstrated them educationally or occupationally.
3. Proneness to boredom/low frustration tolerance: These individuals frequently mention that they find school boring, can't sit still, don't like the discipline and can't pay attention. They continue to make the same sort of complaints about jobs they have held. They frequently comment that they have itchy feet, like to be on the go, and can't imagine working at the same job for any length of time. They will often refuse to attempt (or will quit) any task which they find difficult, unpleasant, or tedious. This individual gives in to his whims continually. His life seems an erratic series of unconnected acts,

first leading one way then another. Determined progress toward a goal--unless it is a selfish one capable of immediate realization by a sharply accented spurt of activity--is lacking. His life is dominated by fleeting desires which leave no space for farsighted planning.

4. Pathological lying and deception: Prison files often comment on extravagant and compulsive lying, or if an inmate is an adept liar, there may be a number of completely divergent and fictitious "life histories" in his file, dutifully recorded by various interviewers in the past. Often, with full knowledge that his file will be read, very little if any factual information is given in the interview for no real reason other than "putting it over." An excess of conflicting information in the file regarding such items as marital status, occupation, drug use, age, education, etc., can be used as an indication of lying on the part of the inmate. Further indications of deception and pathological lying include: (1) lies a lot, often unnecessarily; (2) perpetrates elaborate hoaxes; (3) 3 or more convictions for fraud, forgery, false pretenses, impersonation, perjury, etc.; (4) many conflicts between the interview and the file information, or within the file; (5) uses aliases.
5. Conning/lack of sincerity: This individual is described as a conman, hustler or manipulator or as viewing others as objects and lacking empathy.
6. Short tempered/poor behavioral controls: This individual's file contains reports of irritability, explosiveness, spontaneous and excessive violence as an adult, and a tendency to take offense easily and to become enraged over trivialities.
7. Promiscuous sexual relations: This individual has a poorly integrated, trivial sex life indicated by promiscuity, bisexuality, performance of sex acts for money, frequent adultery, maintaining more than one sexual relationship at the same time, participation in unusual sexual liaisons (i.e., incest, friend's spouse, much younger or older partners, ect.), bizarre sexual acts or episodes, ect.
8. Early behavior problems: This evidence includes confirmed parental reports of disruptive behavior, diagnoses as a hyperactive child, behavioral problems in school, or contact with the judicial system.
9. Juvenile delinquency: Clear evidence that the individual had formal contact with the judicial system before the age of 15, even if he was not actually incarcerated.
10. Irresponsible behavior as a parent: Irresponsibility is defined as producing children through casual relationships, failure to pay child support or failure to maintain regular contact with children. Often this individual will claim to be concerned about his children, but when asked their birthdates and ages or grade in school he cannot say.
11. Impulsivity: This trait is present if he quits jobs suddenly with no new job in sight or for trivial reasons, provokes employers into firing him with little regard for maintaining employment, commits spontaneous offenses rather than planned ones, or moves from city to city on whim.
12. Lack of realistic, long term plans: When asked what sort of occupation he would like to pursue, he often responds that he doesn't know or hasn't given it much thought, or alternatively gives some highly unrealistic answer such as brain surgeon or airplane pilot, even though he may be a high school dropout with no interest in obtaining further education. He has usually acquired no occupational skills, employment has been sporadic, and he has a nomadic lifestyle with only very short-term goals and plans. He often speaks of making a lot of money but has no specific, realistic plans for doing so.
13. Poor probation or parole risk: These individuals have violated the conditions of any parole, probation, or temporary release, and have been charged with failing to appear, breach of recognizance, or jumping bail. As probation or parole risks the psychopath's chances of failure are 100 per cent.
14. Failure to accept responsibility for own actions: He persistently rationalizes his behavior or blames others (society, his family, partners, the system, ect.) for his actions.
15. Drug or alcohol abuse not direct cause of antisocial behavior: A comparison is made between the age of onset of deviant (not necessarily

criminal) behavior and alcohol/drug dependence or abuse. Alcohol/drug abuse did not precede the onset of deviant behavior.

16. Multiple types of offenses: Only file information can be used since information provided by the individual is usually unreliable. Ten basic types of offenses are considered:

1. Break & enter: break & enter with intent to commit theft: break & enter and commit theft: theft: loiter by night: possess house breaking instruments: Possess stolen property: auto theft: take auto without owners consent: burglary: larceny:
2. Robbery: armed robbery: robbery with violence:
3. Possess drug: possess drug for the purpose of trafficking: traffic in drugs: conspire to traffic in drugs:
4. Assault: assault causing bodily harm: cause a disturbance: forcibly seize: kidnap:
5. Wounding: attempt murder: murder: manslaughter (except in cases of traffic deaths or similar).
6. Possess weapon.
7. Sex offenses (i.e., rape, indecent assault, indecent act).
8. Impaired: speeding: dangerous driving: leave the scene of an accident: manslaughter (in case of traffic deaths).
9. False pretenses: fraud: uttering: theft by conversion: forgery: impersonation: counterfeiting.
10. Escape: unlawfully at large.

Four or more different types of offenses for which there are arrests or convictions is significant.

LET'S ABOLISH THE INSANITY PLEA NOW!

by

Marshall Houts, J.D.

Right after the Jack Ruby trial eighteen years ago, I wrote an editorial entitled, "The Real Lesson of Jack Ruby," saying "It is this mandlin script, all 663 pages of its medical, psychological and psychiatric testimony, that screams out the real lesson of Jack Ruby, the clarion message that psychiatric testimony should never be permitted in the courtroom in criminal cases."

The Ruby jury was a superior jury; its members well-educated; they held responsible jobs and positions; if any group of laymen could handle the issue of "insanity," this jury should have been it; but "they suddenly found themselves excluded from any real participation by a babble of foreign tongues not subject to intelligible translation. They viewed a play within a play, the dialogue flowing and submerged in such phrases as focal paroxysmal discharge, larval seizures, weak ego structure, paranoid flavor of thinking, inadequate personality, paroxysmal burst, serial Theta discharge, ego dyscontrol, crofts, impinging the ego, ictal abnormality, doming, fugue state, aggressive and emotionally unstable, hypercondrical trends, episodic dysrhythmia, retrospective falsification, cyclothymic personality, agitation triggered an epileptic equivalent, mitten pattern, ruptured ego...."

My editorial continued: "When this lost group of bored and exhausted jurors was finally rediscovered in the wee small hours of a Saturday morning and sent on its mission, the wonder is not that they were out for such a short time, rather what took them so long....."

"I have the haunting feeling that a miscarriage of justice could have occurred in the Ruby case (I don't think it did) and will occur countless times in the future if we preserve the system and routine under which we now operate. It is the format that is at fault and not the performers within its framework....The jury should never be saddled with the impossible onus of wrestling with the question of the defendant's mental status at the time the criminal act was committed."

"We delude ourselves in an aura of wishful thinking when we castigate the M'Naghten Rule as the culprit and sublimely bask in our own self-righteousness by alleging that we have cured the malignancy by a poultice of Irresistible Impulse or Durham, Vermont or Currens, Smith, Brown, Jones or Williams. No rule will work that brings the psychiatrist into the courtroom; and this remains the real legacy of Jack Ruby...

"We begin by abolishing the insanity defense in toto. This eliminates the need for the psychiatrist in the courtroom, for the only question before the jury will be one it can competently answer: Did the defendant commit the act complained of?.....

"We then rely heavily on the psychiatrist in two other phases of our procedure, both of which are out-of-court. If the defendant raises the question of his mental ability to stand trial, the court will order him examined by a panel of psychiatrists, who will have the authority to obtain psychological testing. We are interested only in his present mental status.....

"If the answer of the psychiatric panel is one of mental competence to stand trial, we proceed with the trial. If the jury finds the defendant not guilty, we are finished. If, on the other hand, the jury returns a guilty verdict, we then proceed to the psychiatrists once more; but again on an out-of-court basis. We are now at the punishment or treatment phase: What shall we do with our convicted criminal so that both his rights as an individual and those of society as a whole can best be served?

"Aye! That's the rub!

"It is here that the psychiatrists and psychologists can offer their greatest assistance to the judges who must ultimately evaluate the combined expert opinions and act upon them."

Sound familiar?

Something you read last week in Time, Newsweek, your morning paper, or watched on TV?

Only the names and numbers of the players have been changed. Today, we label it Hinckley instead of Ruby, Jones, Smith or French, repeat the same words, utter identical laments, and wait for public revulsion to cool off.

"The Real Lesson of John Hinckley" is exactly the

same as "The Real Lesson of Jack Ruby": Psychiatric testimony should never be permitted in the courtroom in criminal cases.

How do we accomplish that goal without impinging the fundamental, historical rights of the accused, while giving peaceful citizens reasonable assurance that they will not be attacked in the sanctity of their own homes, on the streets, at work, in play or in the pursuit of happiness which used to be thought of as an inalienable American right? I suggest the following model statute to do just that:

ACT TO ABOLISH DEFENSE OF INSANITY

Sec. 1. Plea of Insanity Abolished.

In all criminal trials, the defense of insanity, whether called M'Naghten Rule, right-wrong test, rule of irresistible impulse, Durham Rule, American Law Institute (ALI) Rule, rule of diminished capacity, rule of substantial capacity, emotional distraction rule, or by any other name or combination, is hereby abolished.

The fact-finder, whether judge or jury, shall be asked to determine only the fact of whether the accused committed the criminal act complained of. Motive, the reasons why the accused committed the criminal act, or what caused his inability to control his conduct shall not be relevant in this determination of guilt or innocence.

Sec. 2. Insanity Plea May Be Raised As Part of Sentencing Procedures.

If the fact-finder determines that the accused committed the criminal act complained of, the convicted defendant may raise the issue of his sanity as part of the sentencing procedures, before the proper sentencing authority. He may then allege that mental illness or defect prevented him from forming the necessary criminal intent to commit the criminal act, or that it created in him an uncontrollable impulse to commit the act, or that it prevented him from conforming his conduct to the legal standards of the community.

These questions of the defendant's mental status at the time he committed the criminal act shall be taken into account by the sentencing authority to determine how the convicted defendant shall be dealt with, whether by

medical treatment, imprisonment, or some combination of both, or otherwise.

The procedures followed by the sentencing authority shall be open, but may be formal or informal. It may call for and use any materials it thinks relevant; and it need not abide by the rules of evidence as required in a court trial.

Sec. 3. Minimum Sentence Must Be Served.

In any case where the defense of insanity is raised as part of the sentencing procedures, the defendant shall be held in some form of custodial care for at least the minimum sentence otherwise provided by law for the offense of which he stands convicted, so that a thorough, professional effort can be made to determine whether and when he can be returned safely to society.

Sec. 4. Determination of Mental Ability to Stand Trial Not Changed.

Nothing in this Act shall be construed to change in any way present law and procedures as they relate to the accused's mental ability to stand trial and participate effectively in his own defense.

Since Jack Ruby's trial in 1964, a number of states have changed their procedures for handling the insanity defense: "Guilty but mentally ill at the time of the crime" [Ind.]; "Guilty but mentally ill" [Mich.]; "Guilty but without the particular state of mind that is an essential element of the offense charged..." [Mont.]; "Guilty but insane" [some proposals]. A number of offerings are before the Congress, and are now the subject of Senator Arlen Specter's sub-committee hearings.

For the most part, they only play semantic games and do nothing to keep the psychiatrists out of the courtroom. Only outright abolition of the insanity plea will solve this bottom-line problem, and let us then use our psychiatrists affirmatively and where they can do real good: Helping us try to rehabilitate the convicted offender, mentally ill or otherwise, so that he has some chance of a future useful life within the framework of protection for society.

With those who will argue that this model statute does not deal adequately with the fundamental question of intent to commit the crime, I disagree. We take intent, or lack of it, into account in the sentencing phase rather than in the first

courtroom step of determining guilt or innocence. This is where the whole idea of intent becomes totally relevant.

To those so-called civil libertarians who argue that the abolition of the insanity plea is "uncivilized," I ask: Is it compassionate to the accused to let his guilt or innocence be determined by little more than a flip of the coin, as is now the case when we bring psychiatrists into the courtroom to assert conflicting, paid opinions on the defendant's "sanity" at the time the act was committed? Is it not more sensitive to the accused's unfortunate lot to try to restore him to normalcy by proper treatment, using our psychiatrists outside the hostile, adversary environment of the courtroom where they admit they cannot function properly?

I also have no truck with those who say that the insanity issue is but "a tiny loophole in the law" and that the highly publicized case (Ruby and Hinckley) blow it out of all proportion. It's no tiny loophole to any one caught up in the web of the legal madness of insanity, whether accused or victim; and even if it is a tiny loophole, it is one that shakes public confidence in our entire system of criminal justice in this country. Citizens are entitled to look at this whole mess and agree entirely with Dickens about the law being an ass.

The tumult and the shouting will likely die away before anything other than cosmetic changes in the insanity defense really take place. I hope my successor in title some eighteen years from now will remember Ruby and Hinckley when some other bizarre insanity verdict jars the nation.

[From the Reader's Digest, May 1978].

The Criminal Mind: A Startling New Look

A pioneering study throws fresh light on hard-core criminals—and suggests how some of them can be changed

BY EUGENE H. METHVIN

WHAT DO WE DO with a confirmed hard-core criminal like Charlie? His career fits none of the widely accepted social and psychological theories about the causes and cures of crime. He comes from a solid middle-class family. His parents are devoted to each other and their three sons. Indeed, Charlie's two younger brothers are college graduates, good citizens and jobholders.

Not Charlie. He became a professional criminal. As a child, he was a liar, thief and brawler who brandished knives and threatened his playmates, shoplifted, and committed burglaries, armed robberies, assaults and dozens of rapes before he was 15 years old. He spent nine months in a juvenile-detention home, but it did no good. By age 18, he had been responsible for thousands of felonies.

*Criminals' names in this article have been altered.

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Arrested for housebreaking, assault and rape at age 19, Charlie feigned insanity and was committed to a mental hospital. He spent ten years there, won release and found a good job as a real-estate salesman. But secretly he went right back to his old predatory ways: robbery, burglary, assaults. Caught after three years for an assault-rape attempt, Charlie got off with ten years' probation. Today, at 37, he roams loose, committing dozens of crimes every year, a ticking bomb who may well kill someone before he is put away for life or is himself killed.

Clearly, Charlie and his kind pose a stupendous problem for society. The evidence is mounting that a hugely disproportionate share of our crime is committed by a small number of hard-core criminals like Charlie; that our criminal-justice system is dismally failing to identify and isolate the Charlies; and that our correctional institutions fail either to

rehabilitate them or to identify and incarcerate them so law-abiding citizens are safe from their depredations.

Now, a 17-year, federally financed, three-volume study, *The Criminal Personality*, provides the most probing profile ever produced of career criminals like Charlie. The startling findings seem to point to a grim, distasteful conclusion: "nothing works" in rehabilitating most of these hard-core Charlies; for the immediate future we must be prepared to imprison them permanently.

But a more hopeful, exciting conclusion also emerges: we can make a huge reduction in crime by early identification and incarceration of a relatively small proportion of offenders, and a significant minority of even these seemingly "hopeless" cases can be rehabilitated.

The Predatory Mind. In 1960, Dr. Samuel Yochelson had an established psychiatric practice in Buffalo, N.Y., and a glittering reputation. Dr. Winfred Overholser, superintendent of St. Elizabeths Hospital, the federal mental hospital in Washington, D.C., asked Yochelson to direct a wide-ranging investigation of criminal behavior. Yochelson agreed, with one proviso: the criminals he interviewed should know that nothing they revealed could influence their treatment, prosecution or release; thus they would have small incentive to feign illness or improvement, or to conceal the truth.

During the next 15 years, Yochelson and his colleagues studied 252 male hard-core criminals, among

them 162 adults and 59 juveniles ages 13 to 21. In the early years, their subjects came exclusively from St. Elizabeths—inmates found not guilty on insanity pleas. Later, they interviewed other criminals from prisons, on probation and parole, and off the streets. They also interviewed families, girlfriends, employers and associates.

Yochelson initially went along with all of the accepted theories on the social and psychological causes of crime. He tried the conventional psychoanalytic and psychiatric techniques and ran batteries of blood, hormone and chromosome tests seeking physiological bases for abnormal behavior. But by 1965, he realized he was getting nowhere and reached this judgment: "Psychiatric concepts and techniques don't work with criminals, because most diagnoses of mental illness result from the criminals' fabrications."

Yochelson continued his probing, however, and in 1966 decided to try a major new technique: the "stream of thinking" or "phenomenologic" report. "Forget the past, concentrate on the here and now and report on your thoughts, every day," Yochelson told his subjects. "Imagine you have a closed-circuit-television camera plugged into your mind monitoring and taping what you think. Take notes in detail. And 'play back the tape' for me tomorrow."

This simple "TV camera" device proved a magic key that unlocked the closed chambers in the criminals' minds. For years they had been

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"gaming" with Yochelson, talking circles and trying a myriad of manipulative tricks. But, with its shift from the distant past to the present, this new type of reporting was hard to fake.

Portrait of Evil. As Yochelson listened to the criminals' "tapes," one of his most shocking discoveries was the sheer frequency and range of each criminal's depredations. By the time he was first arrested, he had committed hundreds or even thousands of offenses. Each of the 252 criminals admitted committing enough crimes to spend more than 1500 years in jail. Moreover, most had committed violations in all three categories of crime—property, sex, assault.

In 1970, Yochelson asked clinical psychologist Stanton Samenow to join his study, and together they discovered that in every case—street mugger or white-collar embezzler—the hard-core criminal's personality development was the same. From an early age the youngster was seen by his parents as "different." Hyperactive physically and mentally, usually with average or above-average intelligence, he was addicted to "excitement," which meant doing the forbidden. He was chronically restless, irritable, dissatisfied—traits that were to remain with him. As a pre-schooler, he was stealing from his mother's purse, lying, cheating, fighting.

Yet more than half these hard-core criminals came from stable families, and every home had some stabilizing,

caring influence. They came from families rich and poor, from urban ghettos and affluent suburbia. Early they learned to rationalize, to blame their parents, to see themselves as "victims of their environment," not mentioning the brothers and sisters who surmounted the same background to lead moral lives.

Always, the career criminal is shown to have shied from affection, neither giving nor receiving. Crime did not come to him; he deliberately went to it, often traveling far outside his neighborhood to find "action" and other delinquent youngsters to emulate and impress. He craved to be No. 1.

When caught, the criminal youngster enjoyed the excitement and challenge of escaping or mitigating punishment. As he encountered the criminal-justice system, he read law books, learned about mental illness and became an expert at faking insanity. Yochelson and Samenow studied more than 100 hard-core criminals who had been adjudicated "not guilty by reason of insanity," and concluded that not a single diagnosis stood up.

Behind the criminal big-man pose, Yochelson and Samenow discovered a weak, even cowardly individual. His parents may remember that in early life he was the one who needed the night light longest, was the least tolerant of pain, most afraid of the doctor, thunder, heights, goblins, of getting hurt in a fight. Yet most overcome their fears because of a greater fear of a put-

down by others. And each develops a "cutoff" mechanism by which he shuts out fear or conscience when he goes after the excitement of crime.

Perhaps the most surprising finding of Yochelson and Samenow is that every single one of their 252 con men, robbers and killers regarded himself as a decent, kind, good person. Typically, he and his colleagues will stop to help an old lady cross the street on their way to an armed robbery, and give their loot to needy friends. The good deed helps corrode internal deterrents and enables them to feel better about carrying out their crimes.

Program for Change. By 1972, Yochelson and Samenow had made one basic assumption that radically departs from conventional psychological and sociological thinking: *The criminal can and does choose his way of life freely in his quest for power, control and excitement. Moreover, he can choose to change if he musters courage or will to endure the consequences of responsible choices.*

To emphasize the rationality of their approach, Yochelson and Samenow quit thinking of themselves as "therapists" and began calling themselves "teachers." Their goal: to teach these hardened criminals the basic values and restraints most youngsters automatically acquire by the time they reach the third grade. "Our position is unapologetically moralistic," they proclaimed.

Changing a criminal's thought patterns is a long and tedious process. In the initial interview, his new

teacher wades right in with a detailed profile of the hard-core criminal, including the fearfulness, the lying, stealing and cheating from an early age. Striving hard to enhance the criminal's self-disgust, he describes the people the criminal has victimized. For most, it is the first time they feel flatly confronted with the accusation that they are *criminal*. They hear themselves described the way they know they are inside.

The teacher ends with a stern message: "You've got just three choices—jail, suicide or change. And we are your lifeline because we can show you how to change. Take it or leave it."

Most, in fact, leave it. In the first four years, only 30, fewer than half of those offered the opportunity, chose to participate. But from this minority came a hopeful conclusion: if a criminal adheres to the program's requirements, it is impossible for him *not* to achieve basic change. Indeed, by May 1976, 13 of the 30 hard-core criminals processed were living responsible lives as jobholders, husbands, parents, substantially meeting all 37 of the Yochelson-Samenow criteria of successful change. Many of the others would be judged successes by the traditional rehabilitation criteria of holding jobs and avoiding re-arrest. They fall short principally in such matters as mishandling money, using alcohol excessively, frequent job changes, irresponsible sex.

"I Feel Clean!" The reform program involves the criminal on proba-

tion or parole who, for a year, meets three hours a day, five days a week, with the teacher and two or three other participants. He must forgo alcohol and remain faithful to his wife or girlfriend. He must find himself a job—usually a menial job at night, since he must attend his half-day sessions—and he must tell his employer of his criminal background.

He records and reports the thoughts he has each day, and each report begins with a review of what the criminal learned the day before. If he backslides or cheats, the teacher soon becomes aware of it via his own checklist or talks with family or employer. Then the criminal's parole or probation is revoked.

When the criminal comes to the program, he has to wean himself from the high-voltage jolts he got out of crime to a steady current of satisfactions from self-respect and responsible living. Craving excitement, he creates withdrawal pains: dizziness, headaches, gastrointestinal upsets, palpitations, sweating, sleeplessness, crying. But he learns. One criminal went through a weekend of crying and insomnia but reported something new on Monday: "I feel refreshed; I feel a sense of cleanliness." As time goes on, the 37-point "checklist for change" enables the

teacher to tell when the criminal really reshapes his world.

THE PIONEERING WORK of Yochelson (who died in November 1976) and Samenow has stirred hot controversy, for it is scaldingly critical of the mental-health and psychiatric approaches to criminal behavior, and offends liberal social scientists who believe that crime comes from mistreatment and poverty. But it has won high praise as well. Says Robert B. Mills, psychology professor in the University of Cincinnati's criminal-justice programs: "*The Criminal Personality* gives correctional counselors a blueprint to begin the serious work of rehabilitation."

Samenow plans new research into the hard-core criminal's early phases. He proposes a series of pilot programs to further develop and test the change process—community clinics, with several teacher-and-aide teams each handling up to a dozen paroled criminals at once. But, he stresses, those who do not join the program or who try to con their teacher must have probation or parole revoked and be sent to prison—without lenience or sentimentality. For unless hard-core criminals are penned up and forced to face their alternatives, they will continue their predatory ways as long as they live.

THE NATIONAL ASSOCIATION
OF
FORMER UNITED STATES ATTORNEYS
1180-S MERCHANTS PLAZA
INDIANAPOLIS, INDIANA 46204
(317) 232-6907

September 1, 1982

Paul C. Summitt, Esquire
United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Dear Sir:

The National Association of Former United States Attorneys is a not-for-profit corporation concerned principally with maintaining the integrity and independence of the Office of the United States Attorney. We were organized in March of 1979 and presently have approximately 200 members. One hundred eighty six of these are former United States Attorneys and the remainder are associate members who either held that office under court appointment or are former officials of the Department of Justice who have held presidential commission. Our associate members include two former Attorney Generals of the United States and a number of former Assistant Attorney Generals of the United States.

Last month a questionnaire was circulated to all of our members soliciting their views regarding the insanity defense in federal criminal cases. The questionnaire was designed to touch upon substantive matters and the procedures necessary to implement those matters rather than asking their position on any particular bill before the Congress.

A summary of this survey is attached for your information, and I hope that it will be helpful to the committee.

In addition to the questionnaires that were returned, a number of comments were made by the members which I think are significant. They are as follows:

1. Definition - Probably the most often voiced comment in the survey was to develop a workable definition of "insanity." It was noted that it is difficult for medical experts to apply a legal standard so that a lay jury can understand the fine distinctions inherent in the "insanity" defense. While the courts have developed the definition in the past, it is probably time for Congress to make the public policy decision of what insanity is defined to be.

2. Another major concern demonstrated by the comments was the public apprehension about placement of a defendant found mentally ill. Some steps need to be taken to satisfy public apprehension regarding general safety from such persons; options might include a change of possible verdicts or mandatory commitment for treatment of a sufficient nature to resolve the problems of the defendant.

3. Often mentioned in the comments to the survey was a severance of the determination of whether the acts were committed from a determination of defendant's "insanity." This could

take several forms: one suggested by the survey was to make "insanity" a factor in sentencing once it has been determined the acts were committed. However, this raises several questions in my mind regarding the government's proof of all elements beyond a reasonable doubt. This might be resolved by a carefully drafted definition of insanity and how it relates to the intent required for criminal offense.

4. Other concerns mentioned by way of comment included:

- when a defendant refuses to cooperate and submit to a government mental exam not only should the defense be barred but the defendant should remain in custody until he does cooperate, or alternatively disallow his expert witnesses, or permit full discovery by government of his witnesses.

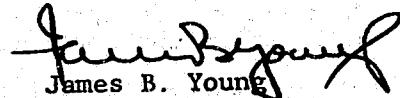
- the U. S. Supreme Court presently has pending before it the issue of whether a defendant found mentally ill may be held beyond his presumptive sentence or whether a "cured" mentally ill defendant must serve the remainder of any presumptive sentence.

It is obvious from both the comments made and the responses to the questionnaire that the overwhelming view of our members is that the current law should be amended. Likewise, the need for a substantive definition of the defense was strongly supported.

I hope this letter and its contents will be helpful to you and the committee.

If we can be of further assistance please do not hesitate to call us.

Very truly yours,


James B. Young

JB: b

Enclosure

cc: John Clark

SUMMARY OF QUESTIONNAIRE REGARDING
INSANITY DEFENSE

We received a response from 19.4% of those who were sent questionnaires in our survey on the insanity defense. While this response is not sufficient to be extremely accurate statistically, we are able to determine trends as a basis for legislative recommendations. As several responses noted, the federal system is not frequently involved with

the insanity defense, and therefore not much interest can be generated for change.

The responses received however do demonstrate the overwhelming view that the current law should be amended. (92.7%). A substantive definition amending and codifying the current common law was strongly supported. (86.1%). Of those favoring amendment, approximately one-half felt insanity should no longer be a defense. (45.9%). Presented as an alternative to use as a defense, a majority would permit insanity to be considered as a factor in sentencing. (61%). Those favoring retention of insanity as a defense generally felt the burden should be on the defendant to prove his insanity. (75.6%). The same number thought defendant should bear the burden of presenting evidence of insanity for sentencing purposes. (75.6%). The standard of proof most often selected was a preponderance of the evidence standard (40.6%), although choices of beyond a reasonable doubt (31.3%) and clear and convincing (28.1%) prevent any clear cut choice.

A significant number responded that a verdict or plea in the form of guilty but insane or mentally ill would be appropriate. Generally, it should be left to the trier of fact to decide issues of insanity. (72.5%). The remainder would permit the trial court to decide the issue.

If a defendant intends to interpose an insanity defense, the overwhelming view is to require notice, (92.7%), and psychiatric testing (92.7%). A defendant should be tested involuntarily (85.7%) and if he further refuses to cooperate, the majority generally believed the defense should be waived. (75.6%) Most would permit the report of any mental examination to be introduced into evidence (80%) by the written report or testimony of the examiner (73.2%) for the limited purpose of determining mental state. (90.6%).

Finally, most would require continued confinement of a mentally ill or insane defendant beyond whatever sentence he could have received (81.8%). On the other hand, the majority believed a defendant no longer found to be insane should be required to serve whatever would remain on the sentence he would have received if found guilty. (66.7%). More than half responded that a mentally ill defendant be assigned to a suitable mental facility (64.4%) while a significant number opted for a more flexible assignment to the custody of the Attorney General. (33.3%). The hospital should be federally controlled. (71.1%). Dischargeability should be determined by the court. (78.9%).

The survey questionnaire was designed to elicit the views of NAFUSA members on matters raised by proposed federal legislation. It is important to note that this survey did not attempt to resolve constitutional issues attendant to the matters raised. Also, a number of other significant statutory procedural additions will be necessary which were not considered by the survey.

MASK OF SANITY: Part I

By Dr. Hervey Cleckley

Illustrated by Andrea Eberbach

Part I of this penetrating analysis of psychopaths masquerading as our very own friends and relatives reveals the protective coloration by which they often successfully conduct themselves as normal people. We also see them as they really are—disrupting our lives and their own with never a wandering instinct toward self-discipline or responsibility. Part II, to appear in the January/February 1975 issue of the Post, will portray actual (anonymous) sociopaths in case histories from Dr. Cleckley's extensive studies into this fascinating facet of abnormal behavior.

Sociopathic personality disturbance, antisocial reaction, is thus defined: Chronically antisocial individuals who are always in trouble, profiting neither from experience nor punishment, and maintaining no real loyalties to any person, group, or code. They are frequently callous and hedonistic, showing marked emotional immaturity, with lack of sense of responsibility, lack of judgment, and an ability to rationalize their behavior so that it appears warranted, reasonable, and justified.

A millionaire notable for his eccentricity had an older and better-balanced brother who, on numerous fitting occasions, exercised strong persuasion to bring him under psychiatric care. On receiving word that this wiser brother had been deserted immediately after the nuptial night by a famous lady of the theater (on whom he had just settled a large fortune) and that the bride, furthermore, had, during the brief pseudoconnubial episode, remained stubbornly encased in tights, the younger hastened to dispatch this succinct and unanswerable telegram:

"Who's looney now?"

This, at any rate, is the story. I do not offer to answer for its authenticity. It may, however, be taken not precisely as an example but at least as a somewhat flippant and arresting commentary on the confusion which still exists concerning sanity. Although most patients suffering from one of the classified types of mental disorder are promptly recognized by the psychiatrist, many of them being even to the layman plainly deranged, there remains a large body of people who, everyone will admit, are by no means adapted for normal life in the community and who, yet, have no official standing in the ranks of the insane.

Many of these people, legally judged as competent, are more dangerous to themselves and to others than are some patients whose psychiatric disability will necessitate their spending their entire lives in the state hospital. Though certified automatically as sane by the verbal definitions of law and of medicine, their behavior demonstrates an irrationality and incompetence that are gross and obvious.

The psychopath shows a striking inability to follow any sort of life plan consistently, whether it be one regarded as good or evil. He does not maintain an effort toward any far goal at all. This is entirely applicable to the full psychopath. On the contrary, he seems to go out of his way to make a failure of life. By some incomprehensible and untempting piece of folly or buffoonery, he eventually cuts short any activity in which he is succeeding, no matter whether it is crime or honest endeavor. At the behest of trivial impulses he repeatedly addresses himself directly to folly. In well-marked cases, it is impossible for wealthy, influential, and devoted relatives to place the sociopath in any position, however ingeniously it may be chosen, where he will not succeed eventually in failing with spectacular and bizarre splendor. Considering a longitudinal section of his life, his behavior gives such an impression of gratuitous folly and nonsensical activity in such massive accumulation that it is hard to avoid the conclusion that here is true madness—madness in a sense quite as vivid as that conveyed to the imaginative layman by the terrible word *lunatic*.

From *The Mask of Sanity*, © 1964 by H.M. Cleckley, published by the C.V. Mosby Company.

It is difficult, however, for society to hold these people to account for their damaging conduct or to apply any control that will prevent its continuing. Those who commit serious crimes have a history that any clever lawyer can exploit in such a way as to make his client appear to the average jury the victim of such madness as would make Bedlam itself tame by comparison. Under such circumstances they escape the legal consequences of their acts, are sent to mental hospitals where they prove to be "sane" and are released. On the other hand, when their relatives and their neighbors seek relief from them and take action to have "lunacy warrants" drawn against them, not wanting to be restricted, they are able to convince the courts that they are as competent as any man.

When we consider these sociopathic personalities, we find not one in one hundred who spontaneously goes to his physician to seek help. If relatives, alarmed by his disastrous conduct, recognize that treatment, or at least supervision, is an urgent need, they meet enormous obstacles. The public institutions to which they would turn for the care of a schizophrenic or a manic patient present closed doors. If they are sufficiently wealthy, they often consider a private psychiatric hospital. It should also be noted here that such private hospitals are necessarily expensive and that perhaps not more than 2 or 3 percent of our population can afford such care for prolonged periods. No matter how wealthy his family may be, the psychopath, unlike all other serious psychiatric cases, can refuse to go to any hospital or to accept any other treatment or restraint. His refusal is regularly upheld by our courts of law, and grounds for this are consistent with the official appraisal of his condition by psychiatry.

Nearly always he does refuse and successfully oppose the efforts of his relatives to have him cared for. It is seldom that a psychopath accepts hospitalization or even outpatient treatment unless some strong means of coercion happens to be available. The threat of cutting off his financial support, of bringing legal action against him for forgery or theft, or of allowing him to remain in jail may move him to visit a physician's office or possibly to enter a hospital. Subsequent events often demonstrate that he is acting not seriously and with the understanding he professes but for the purpose of evasion, whether he himself realizes this or not. He usually breaks off treatment as soon as the evasion has been accomplished. He is distinguished by his ability to escape ordinary legal punishments and restraints.

Though he regularly makes trouble for society, as well as for himself, and frequently is handled by the police, his characteristic behavior does not usually include committing felonies which would bring about permanent or adequate restriction of his activities. He is often arrested, perhaps one hundred times or more. But he nearly always regains his freedom and returns to his old patterns of maladjustment.

Without suffering or enjoying in significant degree the integrated emotional consequences of experience, the psychopath will not learn from it to modify and direct his activities as other men whom we call sane modify and direct theirs. He will lack the real driving impulses which sustain and impel others toward their various widely differing but at least subjectively important goals. He will naturally lack insight into how he differs from other men, for of course he does not differ from other men as he sees them. It is entirely impossible for him to see another person from the aspect of major affective experience, since he is blind to this order of things or blind in this mode of awareness. He fails to know all those more serious and deeply moving experiences which make up the tragedy and triumph of ordinary life, of life as it is lived at the level of important human experience.

However intelligent, he only assumes that other persons are moved by and experience the ghostly facsimiles of emotion or pseudoemotion known to him. However quick and rational a person may be and however subtle and articulate his teacher, he cannot be taught awareness of significance which he fails to feel. He can learn to use the ordinary words and, if he is very clever, even extraordinarily vivid and eloquent words which signify these matters to other people. He will also learn to reproduce appropriately all the pantomime of feeling; but the feeling itself does not come to pass.

Even his splendid logical faculties will, in real life situations, produce not actual reasoning but that imitation of reasoning known as rationalization, for in the synthesis by which reasoning contributes to sound judgment, the sense of value, that is, the value of truth and feeling, cannot be missing. When this is missing, the process is only rationalization, something which, however technically brilliant, does not satisfactorily guide and shape action. And no difference between the two is more fundamental.

Let us attempt to say what the psychopath is in terms of his actions and his apparent intentions, so that we may recognize him readily and distinguish him from others.

More often than not, the typical psychopath will seem particularly agreeable and make a distinctly positive impression when he is first encountered. Alert and friendly in his attitude, he is easy to talk with and seems to have a good many genuine interests. There is nothing at all odd or queer about him, and in every respect he tends to embody the concept of a well-adjusted, happy person. Nor does he, on the other hand, seem to be artificially exerting himself like one who is covering up or who wants to sell you a bill of goods. He would seldom be confused with the professional backslapper or someone who is trying to ingratiate himself for a concealed purpose. Signs of affectation or excessive affability are not characteristic. He looks like the real thing. Everything about him is likely to suggest desirable and superior human qualities, a robust mental health.

The so-called psychopath is ordinarily free from signs or symptoms traditionally regarded as evidence of a psychosis. He does not hear voices. Genuine delusions cannot be demonstrated. There is no valid depression, consistent pathologic elevation of mood, or irresistible pressure of activity. Outer perceptual reality is accurately recognized; social values and generally accredited personal standards are accepted verbally. Excellent logical reasoning is maintained and, in theory, the patient can foresee the consequences of injudicious or antisocial acts, outline acceptable or admirable plans of life, and ably criticize in words his former mistakes. The results of direct psychiatric examination disclose nothing pathologic—nothing that would indicate incompetency or that would arouse suspicion that such a man could not lead a successful and happy life.

Not only is the psychopath rational and his thinking free of delusions, but he also appears to react with normal emotions. His ambitions are discussed with what appears to be healthy enthusiasm. His convictions impress even the skeptical observer as firm and binding. He seems to respond with adequate feelings to another's interest in him and, as he discusses his wife, his children, or his parents, he is likely to be judged a man of warm human responses, capable of full devotion and loyalty. Regularly we find in him extraordinary poise rather than jitteriness or worry, a smooth sense of physical well-being instead of uneasy preoccupation with bodily functions. Even under concrete circumstances that would for the ordinary person cause em-

barrassment, confusion, acute insecurity, or visible agitation, his relative serenity is likely to be noteworthy. Within himself he appears almost as incapable of anxiety as of profound remorse.

Although the psychopath is likely to give an early impression of being a thoroughly reliable person, it will soon be found that on many occasions he shows no sense of responsibility whatsoever. No matter how binding the obligation, how urgent the circumstances, or how important the matter, this holds true. Furthermore, the question of whether or not he is to be confronted with his failure or his disloyalty and called to account for it appears to have little effect on his attitude.

If such failures occurred uniformly and immediately, others would soon learn not to rely upon psychopaths or to be surprised at their conduct. It is, however, characteristic for them during some periods to show up regularly at work, to meet their financial obligations, to ignore an opportunity to steal. They may apply their excellent abilities in business or in study for a week, for months, or even for a year or more and thereby gain potential security, win a scholarship, be acclaimed top salesman or elected president of a social club or perhaps of a school honor society. Not all checks given by psychopaths bounce; not all promises are uniformly ignored. They do not necessarily land in jail every day (or every month) or seek to cheat someone else during every transaction. If so, it would be much simpler to deal with them.

The psychopath's unreliability and his disregard for obligations and for consequences are manifested in both trivial and serious matters, are

masked by demonstrations of conforming behavior, and cannot be accounted for by ordinary motives or incentives. Although it can be confidently predicted that his failures and disloyalties will continue, it is impossible to time them and to take satisfactory precautions against their effect. Here, it might be said, is not even a consistency in inconsistency but an inconsistency in inconsistency.

The psychopath shows a remarkable disregard for truth and is to be trusted no more in his accounts of the past than in his promises for the future or his statement of present intentions. He gives the impression that he is incapable of ever attaining realistic comprehension of an attitude in other people which causes them to value truth and cherish truthfulness in themselves.

Typically he is at ease and unpretentious in making a serious promise or in (falsely) exculpating himself from accusations, whether grave or trivial. His simplest statement in such matters carries special powers of conviction. Overemphasis, obvious glibness, and other traditional signs of the clever liar do not show in his words or in his manner. Whether there is reasonable chance for him to get away with the fraud or whether certain and easily foreseen detection is at hand, he is apparently unperturbed and does the same impressive job. Candor and trustworthiness seem implicit in him at such times. During the most solemn perjuries he has no difficulty at all in looking anyone tranquilly in the eyes. Although he will lie about any matter, under any circumstances, and often for no good reason, he may, on the contrary, sometimes own up to his errors (usually when detection is certain) and appear to be facing the consequences with singular honesty, fortitude, and manliness.

It is indeed difficult to express how thoroughly straightforward some typical psychopaths can appear. After being caught in shameful and gross falsehoods, after repeatedly violating his most earnest pledges, he finds it easy, when another occasion arises, to speak of his word of honor, his honor as a gentleman, and he shows surprise and vexation when commitments on such a basis do not immediately settle the issue. The conception of living up to his word seems, in fact, to be regarded as little more than a phrase sometimes useful to avoid unpleasantness or to gain other ends.

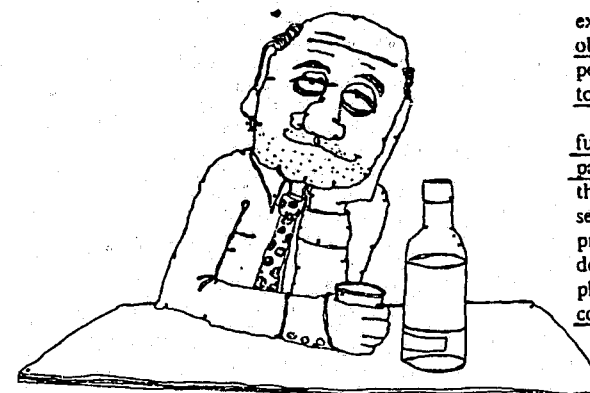
The psychopath apparently cannot accept substantial blame for the various misfortunes which befall him and which he brings down upon others. Usually he denies emphatically all responsibility and directly accuses others as responsible, but often he will go through an idle ritual of saying that much of his trouble is his own fault. When the latter course is adopted, subsequent events indicate that it is empty of sincerity—a hollow and casual form as little felt as the literal implications of "your humble and obedient servant" are actually felt by a person who closes a letter with such a phrase. Although his behavior shows reactions of this sort to be perfunctory, this is seldom apparent in his manner. This is exceedingly deceptive

and is very likely to promote confidence and deep trust. More detailed questioning about just what he blames himself for and why may show that a serious attitude is not only absent but altogether inconceivable to him. If this fails, his own actions will soon clarify the issue.

Whether judged in the light of his conduct, of his attitude, or of material elicited in psychiatric examination, he shows almost no sense of shame. His career is always full of exploits, any one of which would wither even a rather callous specimen of the ordinary man. Yet he does not, despite his able protestations, show the slightest evidence of major humiliation or regret. This is true of matters pertaining to his personal and selfish pride and to aesthetic standards that he avows as well as to moral or humanitarian matters. If Santayana is correct in saying that "perhaps the true dignity of man is his ability to despise himself," the psychopath is without a means to acquire true dignity.

Not only is the psychopath undependable, but also in more active ways he cheats, deserts, annoys, brawls, fails, and lies without any apparent compunction. He will commit theft, forgery, adultery, fraud, and other deeds for astonishingly small stakes and under much greater risks of being discovered than will the ordinary scoundrel. He will, in fact, commit such deeds in the absence of any apparent goal at all.

Despite the extraordinarily poor judgment demonstrated in behavior, in the actual living of his life, the psychopath characteristically demonstrates unimpaired (sometimes excellent) judgment in appraising theoretical situations. In complex matters of judgment involving ethical, emotional, and other evaluational factors, in contrast



with matters requiring only (or chiefly) intellectual reasoning ability, he also shows no evidence of a defect. So long as the test is verbal or otherwise abstract, so long as he is not a direct participant, he shows that he knows his way about. He can offer wise decisions not only for others in life situations but also for himself so long as he is asked what he would do (or should do, or is going to do). When the test of action comes to him we soon find ample evidence of his deficiency.

The psychopath is always distinguished by egocentricity. This is usually of a degree not seen in ordinary people and often is little short of astonishing. How obviously this quality will be expressed in vanity or self-esteem will vary with the shrewdness of the subject and with his other complexities. Deeper probing will always reveal a self-centeredness that is apparently unmodifiable and all but complete. This can perhaps be best

expressed by stating that it is an incapacity for object love and that this incapacity (in my experience with well-marked psychopaths) appears to be absolute.

True enough, psychopaths are sometimes skillful in pretending a love for women or simulating parental devotion to their children. What part of this is not pure (and perhaps in an important sense unconscious) simulation has always impressed this observer as that other type of pseudolove sometimes seen in very self-centered people who are not psychopaths, which consists in concern for the other person only (or primarily) insofar as he enhances or seems to enhance the self. Even this latter imitation of adult affectivity has been seldom seen in the full-blown psychopath, although it is seen frequently in those called here partial psychopaths.

In nonpsychopaths a familiar example is that of the parent who lavishes money and attention on a child chiefly to bask in the child's success and consciously or unconsciously to feel what an important person he is because of the child's triumphs. Although it is true that with ordinary people such motives are seldom, if ever, unmixed, and usually some object love and some self-love are integrated into such attitudes, in even the partial psychopath anything that could honestly be called object love approaches the imperceptible.

What positive feelings appear during the psychopath's interpersonal relations give a strong impression of being self-love. The psychopath seldom shows anything that, if the chief facts were known; would pass even in the eyes of lay observers as object love. His absolute indifference

to the financial, social, emotional, physical, and other hardships which he brings upon those for whom he professes love confirms the appraisal during psychiatric studies of his true attitude. We must judge a man by his actions, not by his words. This old saying is especially significant when it is the man's motivations and real feelings that we are to judge. This lack in the psychopath makes it all but impossible for an adequate transference or rapport to arise in his treatment and may be an important factor in the therapeutic failure that, in my experience, has been universal.

The psychopath cannot be depended upon to show the ordinary responsiveness to special consideration or kindness or trust. No matter how well he is treated, no matter how long-suffering his family, his friends, the police, hospital attendants, and others may be, he shows no consistent reaction of appreciation except superficial and transparent protestations. Such gestures are exhibited most frequently when he feels they will facilitate some personal aim. The ordinary axiom of human existence that one good turn deserves another, a principle sometimes honored by cannibals and uncommonly callous assassins, has only superficial validity for him although he can cite it with eloquent casuistry when trying to obtain parole, discharge from the hospital, or some other end.

As in attempting to delineate other aspects of the sociopath, we find ourselves again confronting paradox. Although he can be counted on not to be appreciably swayed in major issues by these basic rules, we often find him attentive in small courtesies and favors, perhaps even habitually generous or quasi-generous when the cost is not decisive. The sociopath who causes his parents hardship and humiliation by repeatedly forging checks and causes his wife anguish by sordid (and perhaps halfhearted) relations with the housemaid, may gain a considerable reputation in the community by so often volunteering to cut the grass for the frail old lady across the street, by bringing a bottle of sherry over now and then to bedridden Mr. Blank, or by leaving his work to take a neighbor's injured cat to the veterinarian.

Outward social graces come easy to most psychopaths, and many continue, throughout careers disastrous to themselves and for others, to conduct themselves in superficial relations, in handling the trivia of existence, so as to gain admiration and gratitude. In these surface aspects of functioning, the typical psychopath (unlike the classic hypocrite) often seems to act with undesigned spontaneity and to be prompted by motives of excellent quality though of marvelously attenuated substance.

Although some psychopaths do not drink at all and others drink rarely, considerable overindulgence in alcohol is very often prominent.

A major point about the psychopath and his relation to alcohol can be found in the shocking, fantastic,

uninviting, or relatively inexplicable behavior which emerges when he drinks—sometimes when he drinks only a little. It is very likely that the effects of alcohol facilitate such acts and other manifestations of the disorder. This does not mean, however, that alcohol is fundamentally causal. Good criteria for differentiation between psychopaths and others who drink, moderately or excessively, can be found in what tendencies emerge after similar amounts have been consumed.

A peculiar sort of vulgarity, domineering rudeness, petty bickering or buffoonish quasi-maulings of wife, mistress, or children, and quick shifts between maudlin and vainglorious moods, although sometimes found in ordinary alcoholics with other serious patterns of disorder, reach full and precocious flower in the psychopath. Even in the first stages of a spree, perhaps after taking only two or three highballs, he may show signs of petty truculence or sullenness but seldom of real gaiety or conviviality. Evidence of any pleasurable reaction is characteristically minimal, as are indications that he is seeking relief from anxiety, despair, worry, responsibility, or tension.

Alcohol, as a sort of catalyst, perhaps contributes a good deal to the long and varied series of outlandish pranks and inanely coarse scenes with which nearly every psychopath's story is starred. Free from alcohol, such a patient would scarcely sit under a house all night idly striking matches or, concealing himself behind book stacks, urinate from the window of a public library on passersby in the street below. Nor would he, like

the psychopathic son of a prominent family, suddenly, as a prank, decide to climb into a tree at a busy street corner, where he deliberately undressed, shouting wildly and puerilely to draw public attention. This man could not be persuaded to withdraw until the local fire department was called to remove him. The alcohol probably does not of itself create such behavior. Alcohol is not likely to bring out any impulse that is not already potential in a personality, nor is it likely to cast behavior into patterns for which there is not already significant subsurface predilection. The alcohol merely facilitates expression by narcotizing inhibitory processes. In cases of this sort very little narcotizing may be needed. The oil which lubricates the engine of an automobile neither furnishes the energy for its progress nor directs it.

Sociopaths often indulge in these strange performances after drinking relatively little. They know perfectly well what they have

done before when drinking and, with these facts squarely before their altogether clear and rational awareness, decide to drink again. It is difficult indeed for me to see any substantial grounds for placing the responsibility for the psychopath's deeds primarily on alcohol instead of on the disorder which, in ways no less serious even if less spectacular, he shows also when entirely sober. X

The sexual aims of psychopaths are consistently and parsimoniously limited to literal physical contact and relatively free of the enormous emotional concomitants and the complex potentialities that make adult love relations an experience so thrilling and indescribable. Consequently they regard sexual activity very casually, sometimes apparently finding it less shocking and enthralling than a sensitive normal man would find even the glance of his beloved.

None of the psychopaths personally observed have impressed me as having particularly strong sex cravings even in this uncomplicated and poverty-stricken sense. Indeed, they have nearly all seemed definitely less moved to obtain genital pleasure than the ordinary run of people. The impression one gets is that their amativeness is little more than a simple itch and that even the itch is seldom, if ever, particularly intense.

The male psychopath, despite his usual ability to complete the physical act successfully with a woman, never seems to find anything meaningful or personal in his relations or to enjoy significant pleasure beyond the localized and temporary sensations. The female, whether or not she has physiologic orgasm, behaves in such a way as to indicate similar evaluations of the experience. Even these sensations seem to wither precociously and leave the subject a somewhat desiccated response to local stimuli. Sensations so isolated are, no doubt, peculiarly vulnerable to routine and to its justly celebrated antidotes for excitement.

The familiar record of sexual promiscuity found in both male and female psychopaths seems much more closely related to their almost total lack of self-imposed restraint than to any particularly strong passions or drives. Psychopaths often seem by preference to seek sexual relations in sordid surroundings with persons of low intellectual or social status. Sometimes, however, the convenience by which what is little more than a whim can be gratified may play a greater part in this than specific preference. Another and more serious kind of sordidness also seems to constitute real inducement.

Beneath his outwardly gracious manner toward women and his general suavity and social charms, the male psychopath (or part psychopath) nearly always shows an underlying predilection for obscenity, an astonishingly ambivalent attitude in which the amorous and excretory functions seem to be confused. He sometimes gives the impression that an impulse to smear his partner symbolically, and even to wallow in sordidness himself, is more fundamental than a directly erotic aim, itself hardly more to him than a sort of concomitant and slightly glorified back-scratching.

The chief aim of this work is to help, in however small a way, to bring patients with this type of disorder into clearer focus so that psychiatric efforts to deal with their problems can eventually be implemented. It has of course been necessary and in every way desirable to eliminate all details that might lead to the personal identification of any patient whose disorder has been studied and recorded. All patients referred to have been carefully shielded from recognition. It is nevertheless true that the psychopath engages in behavior so unlike that of others and so typical of his disorder that no act can be reported of a patient from Oregon seen ten years ago without strongly suggesting similar acts by hundreds of psychopaths carried out in dozens of communities last Saturday night. I can only express regret to the scores of people whose sons, brothers, husbands, or daughters I have never seen or heard of but who have, no doubt, reproduced many or perhaps all of the symptoms discussed in these episodes. This disorder is so common that no one need feel that any specific act of a psychopath is likely to be distinguishable from acts carried out by hundreds of others.

In discussing the possible influence of environment on the development of this disability, I hope I will not promote unjustified regret or remorse in any parent. Hundreds of times fathers and mothers have discussed their fear that some error or inadequacy on their part caused a child to become a psychopath. Most parents of such patients personally studied impress me as having been conscientious and often very kind and discerning people. As will be brought out later, I do not believe obvious mistreatment or any simple egregious parental errors can justifiably be held as the regular cause of a child's developing this complex disorder. All parents, no doubt, make great as well as small mistakes in their role as parents. It has seemed at times that the very points about which some mothers and fathers feel most uneasiness are the opposite of those so regretted by others and assumed to be the crucial mistakes that have contributed to the maladjustment of a child. Less than in most other kinds of psychiatric disorder has it seemed to me that one could find and point out as causal influences gross failures on the part of the parents which people of ordinary wisdom and good will might have readily avoided.

During recent years it has become popular to blame parents in glib and sweeping terms for all, or nearly all, of the misconduct and inadequacy of their children. It has also become popular to insist that society and not the one who commits the crime should be held responsible for murder, rape, or armed robbery. Sometimes these claims are made without any appeal to evidence at all but merely by repetition of the familiar cliché. Some psychiatrists have even attempted to account for antisocial behavior by assuming that the parents unconsciously want their sons or daughters to commit criminal or immoral acts and that the progeny carry out these wishes while remaining unconscious of their motives. These conclusions, like many others that have been drawn in the attempt to give fundamental and dynamic explanations of things still unknown, rest chiefly on theoretical assumptions—assumptions made on the basis of analogy or arbitrarily interpreted symbolism about what is in the unconscious but what is never brought forth into consciousness or otherwise submitted or demonstrated. This, I maintain, does not constitute genuine evidence as it is known to science, law, or common sense. I hope that the great numbers of conscientious and honorable parents who to my knowledge have struggled courageously over the years, despite grief and frustration, to rehabilitate their sons and daughters (and to make restitution in their behalf to society) will not be led by such fanciful explanations to blame themselves unjustly.

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