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The Insanity Verdict, The Psychopath, And Post-Acquittal Confinement

Abraham L. Halpern*

INTRODUCTION

Over the past thirty years I have criticized the insanity defense on the grounds that, rather than uplifting the law's moral character, it makes a mockery of the criminal justice system; that its practical application is frequently harmful to the population it is intended to benefit; and that it undermines the processes of the law and tarnishes the public sense of justice.¹ In this paper, I shall focus on the successful use of the insanity defense by a defendant which results, in many instances, either in the hospitalization of the acquittee in overcrowded and chronically understaffed institutions or in his incarceration in prison. In the event that the acquittee following his institutionalization is found not to be mentally ill or

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1. See Abraham Halpern, *Statement Concerning Elimination of the Insanity Rule*, Remarks before the New York State Temporary Commission on Revision of the Penal Law and Criminal Code (Syracuse, N.Y. Nov. 18, 1964); Halpern, *The Insanity Defense: A Juridical Anachronism*, 7 PSYCHIATRIC ANNALS 41 (1977); Halpern, *The Fiction of Legal Insanity and the Misuse of Psychiatry*, 2 J. LEGAL MED. 18 (1980); Halpern, *Reconsideration of the Insanity Defense and Related Issues in the Aftermath of the Hinckley Trial*, 54 PSYCHIATRIC Q. 260 (1982); Halpern, *Statement on the Insanity Defense: Hearings Before the Senate Jud. Comm.*, 97th Cong., 1st Sess. 283-403, 427-28 (July 19, 28 & Aug. 2, 4, 1982); Halpern, *Elimination of the Exculpatory Insanity Rule: A Modern Societal Need*, in 6 PSYCHIATRIC CLINICS OF NORTH AMERICA: FORENSIC PSYCHIATRY 611 (Robert L. Sadoff ed. 1983); Halpern, *Further Comments on the Insanity Defense in the Aftermath of the Hinckley Trial*, 56 PSYCHIATRIC Q. 62 (1984); Halpern, *The AMA Report on the Insanity Defense in Criminal Trials*, 56 PSYCHIATRIC Q. 236 (1984); Halpern, *A Formula for Sane Procedures Following Acquittal By Reason of Insanity*, in CRITICAL ISSUES IN AMERICAN PSYCHIATRY AND THE LAW 93 (Richard Rosner et al. eds., 1989); Halpern, *Abolition of the Insanity Defense in Victoria*, in EMERGING ISSUES OF THE 1990S IN PSYCHIATRY, PSYCHOLOGY AND LAW, PROCEEDINGS OF THE 10TH ANNUAL CONGRESS OF THE AUSTRALIAN AND NEW ZEALAND ASSOCIATION OF PSYCHIATRY, PSYCHOLOGY AND LAW 29 (1989); Halpern, *The Insanity Defense in the 21st Century* 35 INT'L J. OFFENDER THERAPY COMP. CRIMINOLOGY 187, 187 (1991).

recovers sufficiently to warrant release on clinical grounds, time-consuming hearings (often delayed) are generally required to gain the acquittee's release. These proceedings frequently result in continued retention because of the reluctance of both psychiatric and judicial decisionmakers to approve a release.² This Article argues that the post-acquittal confinement process inevitably precipitates the misuse and abuse of psychiatry and psychology. Strangely, the ability of prosecutors and judges to abuse this process is, arguably, the reason for the continued vitality of the insanity defense in America.

As will be shown, legislators and judges, from the time that the "Not Guilty by Reason of Insanity" (hereinafter NGRI) verdict was specifically enacted into law, vested in nontreatment officials the power and authority to release acquittees from confinement.³ Believing that the NGRI verdict was a humanitarian disposition which permitted medical treatment of mentally ill offenders and thus saved them from severe punishment, including death for the more serious crimes, mental health professionals hailed the NGRI verdict as a mark of an advanced criminology. Astonishingly, this view persists in the minds of many, even after almost two centuries of misuse of psychiatric evidence. This misuse has transformed insanity, originally considered synonymous with mental illness, into a strictly legal term, not a medical one.⁴ Furthermore, the

2. A more rational handling of the mentally disordered offender, which does not invoke an exculpatory insanity rule is needed. See *infra* note 176 and accompanying text.

3. See *infra* notes 30-71 and accompanying text. As I have previously commented: The APA Statement proposed that release from confinement of acquittees who had committed a violent act should occur only if comprehensive (and necessarily expensive) aftercare community programs were in place, literally guaranteeing that few such individuals would, in fact, be released. The decision to release acquittees would rest in the hands of a board which, although including a psychiatrist, consisted mainly of other professionals representing the criminal justice system--akin to a parole board--an 'experienced body' that, presumably unlike psychiatrists, is 'not naive about the nature of violent behavior committed by mental patients and that allows a quasi-criminal approach for managing such persons.'

Abraham Halpern, *The Politics of the Insanity Defense*, 14 AM. J. FORENSIC PSYCHIATRY 3, 6 (1993).

4. See, e.g., *McDonald v. United States*, 312 F.2d 847, 851 (D.C. Cir. 1962) ("What psychiatrists may consider a 'mental disease or defect' for clinical purposes, where their concern is treatment, may or may not be the same for the jury's purpose in determining criminal

determination of acquittee dangerousness became a prerogative of judges, not mental health professionals, on the grounds that dangerousness was ultimately a legal, not a medical, decision.⁵ For decades courts were able to disguise the punitive nature of post-acquittal confinement by paying lip service to "the assistance which medical testimony may provide" in the determination of dangerousness.⁶

This Article will analyze the current status of post-acquittal confinement law in America as well as suggest much needed reforms in this area. Section I will trace the development of the insanity plea from its origins in early England. Section II describes the birth of the NGRI plea in the celebrated English case of *Rex v. Hadfield*.⁷ In Section III, this Article will explore post-acquittal confinement in the United States. Particular emphasis will be placed on evaluating the various tests employed by courts to assess an individual's "legal sanity." Section IV discusses the impact of recent developments, including federal legislation, on the current status of the insanity defense. The Article, in Section V, will review several examples of the misuse of psychiatry in the post-acquittal confinement process. The impact of the recent Supreme Court case of *State v. Foucha* on a state's ability to institutionalize a defendant subsequent to acquittal will be explained in Section VI. Section VII discusses the punitive rationale underlying the utilization of a split verdict, whereby an individual may be found guilty of one crime as well as not guilty by reason of insanity of another related offense. Based on the abuses and misuses of psychiatry inherent in the process, this Article will conclude by recommending the abolishment of the insanity plea as well as reforms to the post-acquittal confinement process.

responsibility.").

5. See, e.g., *State v. Krol*, 344 A.2d 289, 296 (N.J. 1975) (stating that the trier of fact will make the determination as to whether the defendant falls within the legal definition of insanity).

6. *Id.* at 302.

7. 27 Haw. St. Tr. 1281 (1800).

I. OUTRIGHT ACQUITTAL OF THE MENTALLY
ILL OFFENDER

Whence came automatic post-acquittal confinement? For about one and a half centuries prior to 1800, whenever insanity was considered serious enough to merit exculpation, the verdict was outright acquittal.⁸ Although compassion for the mentally ill or mentally retarded offender was recommended even in Talmudic times,⁹ and some commentators argue that the insanity defense has been in existence since at least the twelfth century,¹⁰ it was not, however, until the reign of Edward I (1272-1307), that the insanity defense was established as an excuse for crime.¹¹ During the reign of Edward II (1307-1321), a further shift towards recognizing insanity as a *complete* defense occurred, which was perfected by the time of the ascension of Edward III to the throne (1326-1327).¹² The first documented case of a "jury acquittal on grounds of unsound mind" is said to have occurred in 1505,¹³ and other examples of similar acquittals can be found up through the eighteenth century.¹⁴

8. SHELDON GLUECK, *MENTAL DISORDER AND THE CRIMINAL LAW* 392-93 (1925) (noting that: "[b]efore 1800, in England, and in most jurisdictions in this country, if an accused person was found to be irresponsible by reason of insanity he was forthwith acquitted, and no special order looking to his safety or that of society was made").

9. Jacques Quen, *An Historical View of the M'Naghten Trial*, 42 BULL. HIST. MED. 42, 43 (1968) (quoting the Babylonian Talmud: "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.").

10. See, e.g., MICHAEL PERLIN, 3 MENTAL DISABILITY LAW—CIVIL AND CRIMINAL 283 n.28 (1989) (discussing 2 HENRI DE BRACON, *DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE* 425 (Longman, Thorne trans. 1968)).

11. See, e.g., *State v. Searcy*, 798 P.2d 914, 928 (Idaho 1990) (McDevitt, J., dissenting) (citing 3 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 371 (1908)); SHELDON GLUECK, *MENTAL DISORDER AND THE CRIMINAL LAW* 125 (1927); JOHN BIGGS, *THE GUILTY MIND* 83 (1955).

12. *Searcy*, 798 P.2d at 928.

13. See, e.g., Jonas Robitscher & Andrew Haynes, *In Defense of the Insanity Defense*, 31 EMORY L.J. 9 (1982) (quoted in AMERICAN PSYCHIATRIC ASSOCIATION STATEMENT ON THE INSANITY DEFENSE 2 (1982)); RITA SIMON & DAVID AARONSON, *THE INSANITY DEFENSE* 10 (1988).

14. See generally MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 36 (1736). The 1668 acquittal of the defendant in one of Sir Matthew Hale's trials vividly portrays the sympathy shown by English juries in truly deserving cases:

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

Prior to the seventeenth century, however, insanity did not save the offender's property from being forfeited to the crown. "It was then the practice not to acquit an accused person on the ground of insanity but to render, together with a verdict of guilty, a special verdict of insanity, which was invariably followed by the king's pardon."¹⁵ Until 1800, mentally disordered offenders considered dangerous were not likely to be acquitted under the early insanity tests, which required an extreme degree of impairment to be demonstrated before exculpation could be considered.¹⁶ With the commencement of the eighteenth century, the ability of even non-

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 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.

Id.

15. ALBERT DEUTSCH, *THE MENTALLY ILL IN AMERICA* 390 (1937).

16. See, e.g., JOHN BIGGS, *THE GUILTY MIND* 83-84 (1955) (quoting WILLIAM LAMBARDE, *EIRENARCHA OR OF THE OFFICE OF THE JUSTICES OF THE PEACE* (1581) ("If a madman or a natural fool, or a lunatic in the time of his lunacy, or a child that apparently hath no knowledge of good nor evil do kill a man, this is no felonious act, nor anything forfeited by it . . . for they cannot be said to have an understanding will."); see also MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 14-15 (1736) ("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 not free act of the will in the choice of things or actions"). Hale 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. *Id.* at 30. 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." *Id.*; see also *Arnold's Case*, 16 How. St. Tr. 695, 764 (1724) ("If the man be deprived of his reason, and consequently of his intention, he cannot be guilty . . . It is not every kind of frantic humour or something accountable 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" (emphasis added)).

dangerous offenders to gain acquittal due to their mental condition began to erode.

II. NOT GUILTY BY REASON OF INSANITY

Outright acquittal went out the window in 1800 at the celebrated trial of James Hadfield.¹⁷ 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. His lawyer was Thomas Erskine, a brilliant extemporaneous speaker. Were it not for the fact that the charge was treason inasmuch as the shot was directed at the King, full acquittal might readily have resulted.¹⁸ Hadfield was clearly psychotic at the time of the trial, and numerous witnesses attested to Hadfield's deranged mind.¹⁹ Further, it was established by physicians at the trial that the derangement was caused by brain damage sustained in a battle in France six years earlier.²⁰ Erskine, however, 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 devise a new test to ensure that a verdict of acquittal would be rendered.²¹ Erskine, therefore, developed a position based on the testimony of the physicians during the trial.²² Erskine's new test moved away from

17. *Rex v. Hadfield*, 27 How. St. Tr. 1281, 1307 (1800).

18. *Id.* The King, after all, had not been wounded; it was apparently 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.

19. *Id.* See generally Jacques Quen, *James Hadfield and Medical Jurisprudence of Insanity*, 69 N.Y. ST. J. MED. 1221, 1223 (1969) (discussing the effects of the Hadfield case.)

20. *Hadfield*, 27 How. St. Tr. at 1307. 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. *Id.*; see NIGEL WALKER, 1 CRIME AND INSANITY IN ENGLAND 74 (1968) (discussing the Hadfield trial); ALAN STONE, MENTAL HEALTH & LAW: A SYSTEM IN TRANSITION 219 (1976) (according to one writer, Erskine also had the jury feel Hadfield's exposed brain).

21. See *supra* notes 6-14.

22. Quen, *supra* note 19, at 1223; see also LAURENCE TANCREDI ET AL., LEGAL ISSUES IN PSYCHIATRIC CARE 2 (1975) (discussing the history of psychology and the law); Thomas Szasz, *Psychiatry, Ethics and the Criminal Law*, 58 COLUM. L. REV. 183, 191 (1958) (Like the psychiatrists in present-day insanity trials, the physicians were "equipped to formulate a more sophisticated and

the traditional "wild beast" view of insanity. The defense counsel explained that the insane "have not only had the most perfect knowledge and recollection of all relations they have stood in towards others, and of the acts and circumstances of their lives, but have, in general, been remarkable for their subtlety and acuteness - delusion where there is no frenzy or raving madness, is the true character of insanity."²³ This new test would ensure that the jury would not appear to look favorably upon a treasonable act. It would also demonstrate that not merely sympathy for the accused, but adherence to the rule of law guided the jury in its decision. Thus, the physician's explanation, given the stamp of acceptance because of its scientific flavor, became an important underpinning of the jury's verdict.²⁴ At the request of a member of the prosecution team, the jury added the clause "he being under the influence of insanity at the time the act was committed" to its finding of "not guilty."²⁵ Thus was born the verdict of "not guilty by reason of insanity."

Within a month of Hadfield's trial, the Criminal Lunatics Act of 1800²⁶ was hurriedly passed, under which virtually all persons acquitted by the court on the ground of insanity (or found to be insane on arraignment) could be ordered to be detained in close

necessarily more complicated theory than the layman.").

23. *Hadfield*, 27 How. St. Tr. at 22.

24. *Quen*, *supra* note 19, at 1307. Erskine, thereupon, 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 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.

Id.

25. *Id.* at 1356.

26. Criminal Lunatics Act, 40 George 3, c.94 (1800), *quoted in*, Note, *Compulsory Commitment Following a Successful Insanity Defense*, 56 NW. U. L. REV. 409, 409 (1961) ("[U]pon the trial of any person charged with treason, murder or felony . . . if they shall find such person was insane at the time of committing such offence, the court before whom such trial shall be had, shall order such person to be kept in strict custody, until His Majesty's pleasure shall be known. . . .").

custody "until His Majesty's Pleasure be known."²⁷ The place of detention under strict custody was not specified, and, although Hadfield himself was confined in Bethlem Hospital (under conditions worse than prison), "most criminal lunatics remained in gaol"²⁸ in the early 1800's. It was not until 1814, that separate wards were built on to Bethlem Hospital for the confinement of persons found not guilty by reason of insanity under the Criminal Lunatics Acts.²⁹ American courts were influenced by their English counterpart's treatment of individuals found not guilty by reason of insanity. From its origin in *Rex v. Hadfield*,³⁰ post-acquittal confinement has evolved into a distinctly American creature.

III. POST-ACQUITTAL CONFINEMENT

In the United States, over subsequent decades, persons acquitted by reason of insanity were housed in maximum security institutions, frequently prisons.³¹ Currently, mandatory post-acquittal confinement continues to be accepted by judges and lawmakers as a reasonable step on the basis of the presumption of continuing insanity.³² The punitive aspects, however, of such a

27. RALPH PARTRIDGE, BROADMOOR 1 (1953). Partridge explained:

Ordinary lunatics at that time were sent to Bethlem Hospital, where the supervision was not particularly strict; and if Hadfield were to escape he would probably take another shot at the King. On the other hand, lunatics who had participated in crime were confined in gaol, but without any legal justification, for in the eye of the law the insane ought to be treated as innocent. It was high time to rectify this dubious method of detention.

Id.

28. ROGER SMITH, TRIAL BY MEDICINE: INSANITY AND RESPONSIBILITY IN VICTORIAN TRIALS 23 (1981). "Gaol" is an old English term for jail. BLACK'S LAW DICTIONARY 680 (6th ed. 1990).

29. PARTRIDGE, *supra* note 27, at 2.

30. See *supra* notes 17-26 and accompanying text (discussing *Rex v. Hadfield*).

31. See, e.g., *State v. Pike*, 49 N.H. 399, 402, 429 (1870) (defining the "product test" and allowing the defendant an acquittal by virtue of NGRI if "the killing was the . . . product of mental disease in the defendant"); *State v. Jones*, 50 N.H. 369, 381 (1871) (construing Gen. St. 494 and ruling that "[i]f the verdict be 'not guilty by reason of insanity,' the prisoner does not go free, but it is the duty of the court to commit him to the asylum or prison for safe keeping").

32. See, e.g., *Jones v. United States*, 103 S. Ct. 3043 (1983) (finding of insanity at criminal trial was sufficiently probative of mental illness and dangerousness to justify commitment of the accused on the grounds of insanity, in that it was not unreasonable for Congress to determine that person who has been found beyond a reasonable doubt to have committed a criminal act, indicates dangerousness and an insanity acquittal supported an inference of continuing mental illness).

presumption and the susceptibility to misuse of psychiatry can readily be seen when acquittees who have been on bail for extended periods, and who are no longer in the mental state which existed at the time of the criminal act that led to the finding of not guilty by reason of insanity, are automatically remanded to a maximum security psychiatric hospital.

An illustrative case is that of Martin Henig.³³ Here, the defendant, who fatally stabbed his girlfriend in January 1970, was found mentally incompetent to stand trial and was placed in a mental institution.³⁴ He was declared fit to proceed in March 1973, was released on bail in June 1973 pending trial, and subsequently underwent intensive psychotherapy.³⁵ He was acquitted by reason of insanity in November 1975.³⁶ His treating psychiatrist certified not only that Henig was not dangerous to himself or to anyone else, and not in need of hospitalization, but also that hospitalization or incarceration might endanger his recovery.³⁷ A trial was held to determine whether Henig was entitled to a hearing before his commitment.³⁸ 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.³⁹ In a 4-1 decision, the Appellate Division of the New York State Supreme Court reversed the trial judge's decision and ordered that Henig be committed for the purpose of examination to determine if he was dangerous.⁴⁰ It is clear that the appeals court viewed an insanity acquittee, necessarily found to have committed an unlawful (and in

33. *Henig v. Commissioner of Mental Hygiene*, 383 N.Y.S.2d 793 (1976).

34. *Id.* at 794.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 795.

40. 392 N.Y.S.2d 636, 638 (1977), *aff'd*, 401 N.Y.S.2d 462, 464 (1977); ("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.").

this case, violent) act, as not entitled to procedures ordinarily accorded to civilly committed patients.⁴¹

The New York law was changed in 1980 so that it is now possible for an acquittee who has been on bail to be evaluated for dangerousness on an outpatient basis.⁴² In reality, however, such evaluations are almost always performed with the acquittee in confinement. Furthermore, the rule in almost all other states requires that the acquittee be in confinement.⁴³

An even more obvious abuse of psychiatry is the retention in hospitals of individuals who have "recovered their sanity," but whose confinement is now based on their current mental condition, that is, their character disorder, not related to the mental disease or defect determined by the factfinder to have been present at the time of the commission of the crime. Once inmates have recovered from the mental illness, such individuals are indistinguishable from prison inmates, thus making the reasons for their continued confinement in mental hospitals mainly punitive. Legislators and judges alone cannot be blamed for this flagrant use of hospitals as psychiatric prisons. The psychiatric profession has, sad to say, a long history of advocating, however well-intentioned, the continued hospitalization of acquittees with personality disorders.⁴⁴

41. The view that insanity acquittees belong to a special class was acknowledged and endorsed by the Supreme Court in *Jones v. United States*: "This holding accords with the widely and reasonably held view that insanity acquittees constitute a special class that should be treated differently from other candidates for commitment." 463 U.S. 354 (1983).

42. Act of June 26, 1980, 1980 N.Y. Laws ch. 548, cited in Abraham Halpern et al., *New York's Insanity Defense Reform Act of 1980: A Forensic Psychiatric Perspective*, 45 ALB. L. REV. 661, 665 (1981).

43. GRANT MORRIS, *THE INSANITY DEFENSE: A BLUEPRINT FOR LEGISLATIVE REFORM* 61 (1975).

44. See, e.g., WILLIAM A. WHITE, *INSANITY AND THE CRIMINAL LAW* 224-25 (1923). Dr. White, one of America's most distinguished psychiatrists, later president of the American Psychiatric Association, wrote in the early 1920s:

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

For example, the Group for the Advancement of Psychiatry in its report on "Criminal Responsibility and Psychiatric Expert Testimony" 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 has adjudicated that he has regained his capacity for judgment, discretion and control of his affairs and social relations.⁴⁵

In 1955 the American Law Institute (ALI) proposed an insanity rule in its Model Penal Code,⁴⁶ designed to replace the more narrow and restrictive *M'Naghten Rule*,⁴⁷ then in use in almost all

prison stays in the hospital on the 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.

Id.

45. GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, CRIMINAL RESPONSIBILITY AND PSYCHIATRIC EXPERT TESTIMONY REPORT No. 26 (1954).

46. MODEL PENAL CODE § 4.01 (Tentative Draft No. 4, Apr. 25, 1955). This section, in part, provided:

(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 the conduct or to conform the 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 anti-social conduct.

Id. The 1962 Proposed Official Draft of the Model Penal Code added the word "wrongfulness" in parentheses following the word "criminality" in Paragraph one.

47. *M'Naghten's Case*, 8 Eng. Rep. 718, 722 (1843). In this case the court declared: The jurors ought to be told in all cases 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 to their satisfaction; and that, 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 labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong.

Id. at 722. The *M'Naghten* rule has been widely criticized by psychiatrists:

[T]he objections of doctors with experience of mental disease have remained in substance unchanged throughout the last hundred years. Briefly, they have contended that the *M'Naghten* test is based on an entirely obsolete and misleading conception of the nature

American jurisdictions. The ALI rule established two prongs for making the determination of criminal responsibility. Under the first prong, referred to as the cognitive prong, a defendant is not responsible if, at the time of the conduct, the defendant suffered from a mental disease that caused the defendant to lack subsequent capacity to appreciate the criminality of the conduct.⁴⁸ Under the second part, referred to as the volitional prong, the defendant may be absolved of responsibility if, as a result of the disease or defect, the defendant was unable to conform his behavior to the requirements of the law.⁴⁹ The second paragraph of the ALI rule specifies that repeated criminal or anti-social behavior was not to be considered a "mental disease or defect."⁵⁰ The ALI rule's

[T]he objections of doctors with experience of mental disease have remained in substance unchanged throughout the last hundred years. Briefly, they have contended that the *M'Naghten* test is based on an entirely obsolete and misleading conception of the nature of insanity, since insanity does not only, or primarily, affect the cognitive or intellectual faculties, but affects the whole personality of the patient, including both the will and the emotions. An insane person may therefore often know the nature and quality of his act and that it is wrong and forbidden by law, but yet commit it as a result of the mental disease.

ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953, REPORT 80 (1953). In *United States v. Freeman*, 357 F.2d 606 (2d Cir. 1996), the Second Circuit rejected the *M'Naghten* test, and instead opted for the ALI standard as "the soundest yet formulated." *Id.* at 624. The court explained that the *M'Naghten* rule was incompatible with modern psychiatric theory because it focused solely on the cognitive or intellectual component of the mind—the ability to distinguish between right and wrong. *Id.* In contrast, the ALI formulation "views the mind as a unified entity and recognizes that mental disease or defect may impair its functioning in numerous ways." *Id.* at 622-23. Another reason why the court adopted the ALI test is its explicit recognition of degrees of incapacity. *Id.* The *M'Naghten* rule required a complete and total lack of capacity to distinguish between right and wrong. *Id.* A primary virtue of the ALI test was its use of the adjective "substantial" to describe incapacity. *Id.* In the court's view, this modifying adjective broadened *M'Naghten* and, thus, while "'any' incapacity is not sufficient to justify avoidance of criminal responsibility . . . 'total' incapacity is also unnecessary." *Id.* The court also noted that the use of the term "appreciate" in the Model Penal Code test rather than "know" was a significant change from the *M'Naghten* rule. *Id.*; see Model Penal Code, § 4.01(1) (Proposed Official Draft explanatory note 1962). "[M]ere intellectual awareness that conduct is wrongful, when divorced from appreciation or understanding of the moral or legal import of behavior, can have little significance," the court explained. *Freeman*, 357 F.2d at 623. Thus, the ALI test further expanded the *M'Naghten* rule by requiring a failure to apprehend the significance of one's actions in some deeper sense involving "affect" or "emotional appreciation," rather than some surface understanding or verbalization of knowledge. RITA J. SIMON & DAVID E. AARONSON, *THE INSANITY DEFENSE: A CRITICAL ASSESSMENT OF LAW AND POLICY IN THE POST-HINCKLEY ERA* 39 (1988).

48. MODEL PENAL CODE § 4.01(1) (Tentative Draft No. 4, Apr. 25, 1955).

49. *Id.* § 4.01(2).

50. *Id.*

second prong contrasts significantly with the older *M'Naghten* test which determines criminal responsibility on the basis of whether or not the defendant labored under such a defect of reason because of mental disease that he did not know the quality and nature of his act, or if he did know, that he did not know that he was doing was wrong.

With the ALI "reform," however, came the strong recommendation that automatic post-acquittal confinement be mandated whenever an acquittal occurs.⁵¹ The ALI apparently saw nothing wrong with retaining custody of acquittees who were either no longer mentally ill or who were not treatable.⁵² Manfred Guttmacher, psychiatric consultant to the ALI, also endorsed mandatory post-acquittal commitment in part because "it tends to discourage insanity pleas with a frivolous foundation."⁵³ This is like saying that surgery should be performed with unsterilized instruments so that persons with Munchausen syndrome⁵⁴ would be dissuaded from seeking a medically unwarranted operation.

By 1975, sixteen states and almost all federal jurisdictions used some form of the ALI draft.⁵⁵ It was, however, recognized by a

51. *Id.* § 4.08 cmt. The drafters explain in their comment that: "The provision for automatic commitment . . . not only provides the public with the maximum immediate protection, but also works to the advantage of mentally disordered or defective defendants by making the defense of irresponsibility more acceptable to the public and to the jury." *Id.*

52. *Id.* The drafters further explained:

"It seems preferable to make dangerousness the criterion for continued custody, rather than to provide that the committed person may be discharged or released when restored to sanity as defined by the mental hygiene laws. Although his mental disease may have greatly improved, such a person may still be dangerous because of factors in his personality and background *other than mental disease*. Also, such a standard provides a possible means for the control of the occasional defendant who may be quite dangerous but who successfully feigned mental disease to gain an acquittal."

Id. (emphasis added).

53. *Id.* § 4.01 (app. B).

54. Munchausen syndrome is a not uncommon disorder characterized by the repeated, knowing simulation of disease for the sole purpose of obtaining medical attention.

55. ALASKA STAT. § 12.47.010 (1990); CONN. GEN. STAT. ANN. § 53a-13 (West 1985); IDAHO CODE § 18-207 (Michie 1987); ILL. ANN. STAT. ch. 38, § 6-2(a) (West 1989); MD. CODE ANN. CRIM. LAW § 25 (1972); MO. ANN. STAT. § 552-030 (Vernon 1969); MONT. CODE ANN. § 45-2-103(1) (1974); ORE. REV. STAT. § 161.295 (1973); T.P.C.A. § 8.01 (West Supp. 1993); VT. STAT. ANN. tit. 13, § 4801 (Supp. 1992); WIS. STAT. ANN. § 971.15 (West 1985); *United States v. Brawner*, 471 F.2d 969, 981 (D.C. Cir. 1972); *United States v. Frazier*, 458 F.2d 911, 917 (8th Cir. 1972); *Wade v. United States*, 426 F.2d 64, 70 (9th Cir. 1970); *Blake v. United States*, 407 F.2d 908, 913 (5th Cir.

few courts and legislatures that the characteristics of the "true psychopath" were not confined solely to "repeated criminal or otherwise antisocial conduct," and seven states and two federal circuits limited the test to the first paragraph of the ALI formulation.⁵⁶ Modifications in the insanity rule were for the most part in response to public outcries, when a particularly egregious crime resulted in an insanity acquittal, or to pressures from special interest groups, when a meritorious case resulted in conviction.⁵⁷

Chief Judge John Biggs, Jr., of the United States Court of Appeals, Third Circuit, the foremost proponent of the argument that psychopaths should not be excluded from the exculpatory insanity rule,⁵⁸ succeeded in persuading his colleagues on the court that the *M'Naghten* rules "are not only unfair to the individual but are dangerous to society" and should be discarded.⁵⁹ He was no doubt prompted to adopt this position by courts which saw great danger

1969); *United States v. Smith*, 404 F.2d 720, 727 (6th Cir. 1968); *United States v. Chandler*, 393 F.2d 920, 925 (4th Cir. 1968); *United States v. Shapiro*, 383 F.2d 680, 686 (7th Cir. 1967); *United States v. Freeman*, 357 F.2d 606, 624 (2d Cir. 1966); *Wion v. United States*, 325 F.2d 420, 427 (10th Cir. 1964); *United States v. Currens*, 290 F.2d 751, 758 (3d Cir. 1961); *Dragon v. State*, 316 N.E.2d 827 (Ind. 1974); *Terry v. Commonwealth*, 371 S.W.2d 862, 864-65 (Ky. 1963); *Commonwealth v. McHoul*, 226 N.E.2d 556, 563 (Mass. 1967); *State v. Staten*, 267 N.E.2d 122, 124 (Ohio 1971); *State v. Grimm*, 195 S.E.2d 637, 647 (W.Va. 1973); .

56. These jurisdictions are: Kentucky, Maryland, Montana, Oregon, Texas, Vermont, Wisconsin, the Sixth Circuit and the Ninth Circuit. (Their tests do not include Paragraph (2) which reads: "The terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.").

57. In 1984, Congress, with the strong support of the American Psychiatric Association, adopted a modified *M'Naghten* rule ("unable to appreciate" rather than "did not know" wrongfulness of the act). See The Insanity Defense Reform Act of 1984, Pub. L. No. 98-473 (1984); See, e.g., Loren Roth, *Tighten but Do Not Discard*, 251 JAMA 2949 (1984). California, after adopting the A.L.I. rule in 1978 in *People v. Drew*, 22 Cal. 3d 333, 339, 583 P.2d 1318, 1320, 149 Cal.Rptr. 275, 277 (1979), legislatively restored the *M'Naghten* rule (CAL. PENAL CODE § 25(b)) following a voter referendum in 1984. This legislation was subsequently upheld in *People v. Skinner*, 39 Cal. 3d 765, 704 P.2d 752, 217 Cal.Rptr. 685 (1985).

58. See JOHN BIGGS, JR., *THE GUILTY MIND: PSYCHIATRY AND THE LAW OF HOMICIDE* 145 (1955). Chief Judge Biggs wrote that:

So long as the courts judge criminal responsibility by the test of knowledge of right and wrong, psychotics who have 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.

Id.

59. *United States v. Currens*, 290 F.2d 751, 767 (3d Cir. 1961).

in confining “*M’Naghten* criminals”⁶⁰ to prison with the “guarantee of release to [these] technically sane but criminally depraved men at the end of their sentences.”⁶¹ In *United States v. Currens*, the Third Circuit eliminated the cognitive prong of the ALI test,⁶² and laid down the comprehensive volitional standard known as the *Currens* Rule.⁶³ The court, thus, adopted Robert W. White’s⁶⁴ view of Hervey Cleckley’s “true psychopathic personality.”⁶⁵ Concluding that the psychopath is to be seen as suffering from “a mental disease or defect,” which might even be classed as a psychosis, the *Currens* court instructed that “he must be found not to possess the guilty mind, the *mens rea*, necessary to constitute his prohibited act a crime.”⁶⁶ Research studies in psychopathy conducted over the past few years would appear to lend support for Judge Biggs’ view of the *M’Naghten* criminal,⁶⁷

60. See, e.g., *Commonwealth v. Woodhouse*, 164 A.2d 98, 111 (Pa. 1960).

61. *Id.* at 110.

62. 290 F.2d 751 (3d Cir. 1961).

63. *Id.* at 774. The court explained:

The jury must be satisfied that at the time of committing the prohibited act the defendant, as a result of mental disease or defect, lacked substantial capacity to conform his conduct to the requirements of the law which he is alleged to have violated.

Id. The Third Circuit, in fact, rejected most of the extant insanity tests, because:

They do not account for the fact that an ‘insane’ defendant commits the crime not because his mental illness causes him to do a certain prohibited act but because the totality of his personality is such, because of mental illness, that he has lost the capacity to control his acts in the way that the normal individual can and does control them.

Id.

64. See ROBERT WHITE, *THE ABNORMAL PERSONALITY* 401 (1948), quoted in *Currens*, 290 F.2d at 762. White explains his view of the “true psychopathic personality”:

It is clear that we are dealing with a fairly serious disorder. There are grave disturbances in the patient’s affective life as well as in foresight and the control and organization of behavior. Cleckley considers the condition serious enough to be classed as a psychosis. Although the patient outwardly presents a ‘convincing mask of sanity’ and a ‘mimicry of human life,’ he has lost contact with the deeper emotional accompaniments of experience and with its purposiveness. To this extent he may be said to have an incomplete contact with reality, and it is certainly very hard to approach him and influence him therapeutically.

Id.

65. HERVEY CLECKLEY, *THE MASK OF SANITY* 396 (5th ed. 1976).

66. *Currens*, 290 F.2d at 774.

67. Judge Biggs (who, it is interesting to note, had served as consultant to the Committee on Psychiatry and Law of the Group for the Advancement of Psychiatry) never equivocated in his view of the psychopath and what should be done with him. In a letter dated July 19, 1956, to the Chairman of the Advisory Committee on the Revision of the Virgin Islands Code, he re-emphasized his position

who should be given special attention by the criminal justice system.⁶⁸ While the federal courts were expanding the scope of the insanity defense to psychopaths, the drafters of the Model Penal Code made their punitive intent clear.

It is significant that the Model Penal Code required courts, following acquittal of a defendant on the ground of mental disease

that the psychopath's disorder rose to the level of psychosis and that psychiatric hospitalization was the preferred disposition for such an offender. *Gov't of Virgin Islands v. Fredericks*, 578 F.2d 927, 951-52 (3d Cir. 1978). Judge Biggs wrote:

The adherence by most of the courts in the United States and of the British Commonwealth to the out-worn *M'Naghten* formula presents great danger to the body politic. As you know, quite frequently the psychotic criminal works his way up the ladder of crime, commencing with the smaller offenses, such as larceny or simple assault. He is tried and condemned for these offenses as if he were an ordinary criminal simply because he knows the difference between "right" and "wrong" under the *M'Naghten* formula. He emerges from prison untreated and uncured and frequently goes on to more serious crimes such as rape or murder. The *M'Naghten* formula should be cast aside and psychotic criminals should be confined in institutions for the criminally insane for treatment and cure, if cure be possible. Otherwise, incarceration must be permanent. That is what the GAP statute, heretofore quoted, is intended to effect and what I think it would accomplish.

Id. Needless to say, Judge Biggs heartily endorsed the ALI provision that release from confinement subsequent to automatic post-acquittal commitment 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. *See* MODEL PENAL CODE § 4.01(3) (Proposed Official Draft 1962).

68. *See, e.g.,* Stephen Hart et al., *The Psychopathy Checklist-Revised (PCL-R): An Overview For Researchers and Clinicians*, in 8 *ADVANCES IN PSYCHOLOGICAL ASSESSMENT* 103 (James Rosen et al. eds., 1992). These researchers argue that:

Psychopathy can be differentiated from other personality disorders on the basis of its characteristic pattern of interpersonal, affective, and behavioral symptoms. Interpersonally, psychopaths are grandiose, egocentric, manipulative, dominant, forceful, and cold-hearted. Affectively, they display shallow and labile emotions, are unable to form long-lasting bonds to people, principles, or goals, and are lacking in empathy, anxiety, and genuine guilt or remorse. Behaviorally psychopaths are impulsive and sensation-seeking, and tend to violate social norms; the most obvious expressions of these predispositions involve criminality, substance abuse, and a failure to fulfill social obligations and responsibilities.

Id. at 105; *see also* Robert Hare, et al., *Psychopathy and the DSM-IV Criteria for Antisocial Personality Disorder*, 100 *J. ABNORMAL PSYCHOL.* 1-8 (1991). There is strong evidence to support a diagnostic category of Psychopathic Personality Disorder to be distinguished from Antisocial Personality Disorder in DSM-IV. The criteria for Antisocial Personality Disorder emphasize antisocial and criminal behavior whereas definitions of psychopathy typically include explicit reference to affective and interpersonal characteristics. That is to say, Antisocial Personality Disorder criteria do not distinguish the callous, remorseless, and manipulative psychopath from other antisocial individuals. Hare and his colleagues have shown that 75 to 80 percent of convicted felons warrant the diagnosis of Antisocial Personality Disorder, while only 15 to 25 percent of convicted felons are identified as psychopaths. *Id.* at 6. If validated, such findings would argue strongly for the establishment of special prison programs for the psychopathic criminal.

or defect excluding responsibility, to “order him to be committed to the custody of the *Commissioner of Correction* [Mental Hygiene or Public Health] to be placed in *an appropriate institution* for custody, care and treatment.”⁶⁹ Use of the words “Commissioner of Correction” and “appropriate institution” makes it clear that the ALI intended that an acquittee be placed in a prison, not a hospital, under certain circumstances. Deleting “Commissioner of Correction” in the 1962 Proposed Official Draft⁷⁰, designed to eliminate the obvious implication of these words, in no way lessened the punitive intent of the automatic post-acquittal confinement provision.⁷¹ Therefore, despite the availability of acquittal and treatment in a mental facility, the Model Penal Code language left a significant loophole for law makers to justify the confinement of the mentally ill in the general prison population. This loophole enabled the drafters to simultaneously espouse the

69. MODEL PENAL CODE § 4.08 cmt. (Tentative Draft No. 4., Apr. 25, 1955) (emphasis added).

70. *Id.* § 4.08(1) (Proposed Official Draft 1962).

71. *See, e.g., Durham v. United States*, 214 F.2d 862, 874-75 (D.C. Cir. 1954) (stating “that an accused is not criminally responsible if his unlawful act was the product of mental disease or defect”). The *Durham* rule, although rejected by the ALI, was “warmly supported by psychiatrists.” MODEL PENAL CODE § 4.01 cmt., at 173 (Proposed Official Draft 1962). This rule must be analyzed in conjunction with the District of Columbia law governing the matter of post-acquittal confinement. *See Douglas v. United States*, 239 F.2d 52, 60 n.12 (8th Cir. 1956). This court declared:

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.

Id. The court, in *Williams v. United States*, further explained the District of Columbia law:

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, § 24-301 than by imprisonment.

250 F.2d 19, 25 (D.C. Cir. 1957).

humanitarian goals of treatment and the punitive goals of the criminal justice system.

IV. RECENT DEVELOPMENTS

After the acquittal of John Hinckley, both the American Bar Association (ABA)⁷² and the American Psychiatric Association (APA)⁷³ abandoned their previous approval of the ALI insanity rule, and, instead, proposed a *M'Naghten*-type test.⁷⁴ The ABA placed great stress on the importance of court hearings in the post-acquittal period, ignoring the fact that hearings give but the appearance of fairness in many cases without changing the detention status of the acquittee.⁷⁵ The APA recommendations unwittingly set the stage for prolonged hospitalization of the acquittee.⁷⁶ This proposal has provided certain punitive judges

72. AMERICAN BAR ASSOCIATION, AMERICAN BAR ASSOCIATION POLICY ON THE INSANITY DEFENSE (approved by the ABA House of Delegates on February 9, 1983).

73. AMERICAN PSYCHIATRIC ASSOCIATION, AMERICAN PSYCHIATRIC ASSOCIATION STATEMENT ON THE INSANITY DEFENSE 12 (1982).

74. See AMERICAN BAR ASSOCIATION, *supra* note 72 ("RESOLVED, that the American Bar Association approves, in principle, a defense of nonresponsibility for a crime which focuses solely on whether the defendant, as a result of mental disease or defect, was unable to appreciate the wrongfulness of his or her conduct at the time of the offense charged."); AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 73 ("A person charged with a criminal offense should be found not guilty by reason of insanity if it is shown 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. As used in this standard, the 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.").

75. See CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 7-7.8 (A.B.A. Tentative Draft No. 1, 1983).

76. AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 73, at 12, 16 (1982). After indicating that "a long period of conditional release with careful supervision and outpatient treatment will be necessary to protect the public and to complete the appropriate treatment programs," the APA Statement on the Insanity Defense asserts:

Unfortunately, however, many jurisdictions have neither the trained personnel nor appropriate outpatient facilities and resources to provide for such close management of previously violent persons who are conditionally released. Where statutes provide for conditional release and judges allow it without these necessary resources, the public is subjected to great risk and the insanity acquittee is deprived of an opportunity for a necessary phase of treatment.

Id.

with a "medical" justification not to release acquittees from confinement.⁷⁷

The House of Delegates of the American Medical Association (AMA), on December 6, 1983, overwhelmingly voted to support, in principle, "the abolition of the special defense of insanity in criminal trials, and its replacement by statutes providing for acquittal when the defendant as a result of mental disease or defect, lacked the state of mind (*mens rea*) required as an element of the offense charged."⁷⁸ The AMA position, however, called for "presumption of continuing dangerousness," and for the requirement that absolute or conditional release be based on "concurring medical certification and *judicial determination*."⁷⁹ This ensured that ongoing confinement could be effected depending on the attitude of judges as described herein.

It may, however, be noted that the proposed AMA rule, rigidly and literally applied, would effectively lead to the conviction of almost all severely mentally disordered offenders (and certainly all mildly to moderately mentally disordered offenders) charged with violent crime. John W. Hinckley, Jr., for example, would have gained acquittal under the rule recommended by the ABA and the

77. See, e.g., *State v. Jacob*, 669 P.2d 865 (Utah 1983). The Supreme Court of Utah, basing its decision on the APA Statement, affirmed the District Court's conclusion that, "as defendant could not be relied upon to take the required medication, he still represented a danger to himself and others which justified continued confinement." *Id.* at 868. The Court held that conditional release was simply not available and the "trial court's determination of the question of defendant's release in terms of recovery from 'mental illness,' i.e. current condition, rather than recovery of 'sanity,' i.e. standard applying at time of crime, was not unconstitutional retroactive increase in punishment." *Id.* at 870. The majority of the court chose not to incorporate the following comment made by Judge Carnaby in a concurring opinion:

This court should not accept the proposition that a patient must be hospitalized for life because state statutes fail to provide for a release conditioned on participation in a mandatory court-ordered out-patient program wherein the patient will receive the required medication and counseling on a regular basis. The problem should be referred by this Court to the Legislature. The court should review this case after allowing sufficient time for legislative action and implementation, say 1987.

Id. at 871 (Carnaby, J., concurring).

78. *Insanity Defense in Criminal Trials and Limitations of Psychiatric Testimony: Report of the AMA Board of Trustees*, 251 JAMA 2967 (1984).

79. Abraham Halpern, *The AMA Report on the Insanity Defense in Criminal Trials*, 56 PSYCHIATRIC Q. 236, 237 (1984) (emphasis added).

APA as easily as under the ALI rule used in his trial.⁸⁰ The same defense expert witnesses would have testified that his mental condition was severely abnormal and grossly and demonstrably impaired his perception or understanding of reality, rendering him unable to appreciate the wrongfulness of his conduct at the time of the offense.⁸¹ Hinckley, however, would have been convicted under the AMA rule. The gunman, despite his mental disorder, would have been found to possess sufficient mental intent (*mens rea*) required as an element of the offense charged.

In the ambience of the hyperactive hysteria that followed the Hinckley NGRI acquittal, Congress enacted a bill dubbed, in classical Orwellian "doublespeak," "The Insanity Defense 'Reform' Act of 1984" (hereinafter IDRA).⁸² The bill was signed into law by President Reagan on October 12, 1984. The insanity standard as adopted by Congress, which was the first such statute to be enacted for all federal jurisdictions, is patterned after the formulation recommended by the APA and ABA.⁸³

It is my contention that the various definitions of legal insanity advanced by the several groups are distinctions without a difference, and the claimed narrowing of the insanity rule is without substance. The psychiatrist or psychologist who testifies on behalf of a patient-defendant, who is charged with serious crime, will invariably see the mental disorder as "severe," rendering the

80. The jury found that he "lacked substantial capacity to appreciate" the wrongfulness of his conduct. Likewise, had the jury followed the same reasoning used to arrive at that conclusion, the jury would have decided that he was "unable to appreciate" the wrongfulness of his conduct.

81. See, e.g., CHRISTOPHER CERF & VICTOR NAVASKY, *THE EXPERTS SPEAK* 69-70 (1984); THOMAS MAEDER, *CRIME AND MADNESS: THE ORIGINS AND EVOLUTION OF THE INSANITY DEFENSE* 141-51 (1985); PETER LOW ET AL., *THE TRIAL OF JOHN W. HINCKLEY, JR.: A CASE STUDY IN THE INSANITY DEFENSE* 22-82 (1986); RITA J. SIMON & DAVID E. AARONSON, *THE INSANITY DEFENSE: A CRITICAL ASSESSMENT OF LAW AND POLICY IN THE POST-HINCKLEY ERA* 87-89 (1988).

82. INSANITY DEFENSE REFORM ACT OF 1984, Pub. L. No. 98-473, 98 Stat. 2057 (codified as 18 U.S.C. § 20) (1984).

83. 18 U.S.C. § 20 (Supp. II 1982). The new rule, replacing the more "liberal" ALI standard used in most federal courts, reads in part:

It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

Id.

defendant not responsible, from a psychiatric standpoint, for his conduct. The words "unable to appreciate," "at the time of," and "as a result of" are no bar to the defense psychiatrist's seeking to explain the defendant's entitlement to exculpation.

The really significant portion of the IDRA lies in section 4243 which is entitled "Hospitalization of a person found not guilty only by reason of insanity."⁸⁴ This passage requires that an insanity acquittee, whose offense involved bodily injury or serious property damage, or a substantial risk thereof, bears the burden of proving his eligibility for release by clear and convincing evidence.⁸⁵ The acquittee must show that his mental disease or defect does not make him a substantial risk to persons or property upon release.⁸⁶ If the offense did not involve bodily injury, etc., the acquittee must still prove (although by a preponderance of the evidence) that his release would not create a substantial risk of bodily injury, etc., due to a present mental disease or defect.⁸⁷ Here, the mental disease or defect does not have to be of the degree of seriousness categorized as "severe," the standard laid down in the federal exculpatory insanity rule.⁸⁸ In other words, the standard for release is mental disease or defect, not "severe" mental disease or defect.⁸⁹ It is clear, then, that a person affected with a psychopathic personality disorder could continue to be hospitalized, even though he no longer suffers from the severe mental disease or defect which resulted in his acquittal. It should be noted that a person who poses a danger only to himself cannot be denied release under the federal IDRA.⁹⁰ Therefore, the federal IDRA

84. *Id.* § 4243 (1984).

85. *Id.* § 4243 (d).

86. *Id.*

87. *Id.*

88. *Id.*

89. The hallmarks of a disorder characterized as "severe" are delusions and/or hallucinations (e.g. schizophrenia), suicidal depression (e.g., major depressive disorder), and mania (e.g., bipolar disorder, manic). The psychopath does not ordinarily manifest such overt symptomatology.

90. *But see* D.C. CODE ANN. § 24-301(e) (1990) (requiring an acquittee to prove that he is no longer dangerous to himself or others). *See also* United States v. Crutchfield, 893 F.2d 376 (D.C. Cir. 1990). Here, the D.C. Circuit Court of Appeals, in ruling that the IDRA was intended to apply only to prospective acquittees, held that passage of the Act did not make application of the District of Columbia's "self-harm" provision unconstitutional. *Id.* at 380. That is, equal protection is not

provides government with a mechanism to prolong an inmate's confinement despite the fact that the inmate has been "cured" of the defect responsible for the crime. As will become evident in the next Section, the federal government is not alone in its imposition of rigorous prerequisites to an acquittee's release.

V. REPRESENTATIVE COURTS' POST-ACQUITTAL CONFINEMENT DECISIONS AND THE MISUSE OF PSYCHIATRY

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 trial, is the more common method used to arrive at the verdict.⁹¹

Thus, treatment and rehabilitation are the stated altruistic goals as confinement is ordered when the NGRI verdict is announced. However, retribution and preventative 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

violated by not releasing an acquittee (committed prior to enactment of the new law) who is dangerous to himself but not to others, even though the IDRA requires only that the acquittee prove he is not a danger to others. *Id.* at 379. One can imagine the confusion of patients and the consternation and demoralization of staff members at a Washington hospital when suicidal patients, who are not dangerous to others, admitted after October 12, 1984, must be released at their request, while suicidal acquittees admitted prior to that date can be retained for treatment!

91. See, e.g., Robert Sadoff, *The Insanity Defense: Why it Should be Retained*, 12 J. LEG. MED. 33 (June 1977). Sadoff 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.

Id. at 33.

the apparent cure is not merely temporary, or as is known in psychiatry, a period of remission."⁹²

State v. Maik,⁹³ decided by the Supreme Court of New Jersey, illustrates the attitude of many courts toward insanity acquittees. The court in this case propounded the view that confinement of an insanity acquittee could continue until a complete cure of the underlying illness or personality disorder was effected.⁹⁴ Former Chief Justice Weintraub wrote that:

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.⁹⁵

The *Maik* court's rationale seems to parallel the principles previously discussed in relation to the federal IDRA.⁹⁶

The Supreme Court of New Jersey in *State v. Carter*,⁹⁷ in a decision hailed as one which "provided some flexibility and set standards for conditional release,"⁹⁸ seemed to soften the harshness of the unanimous opinion in *Maik*.⁹⁹ The court,

92. *In re Rosenfeld*, 157 F. Supp. 18, 20 (1957); see also Alexander D. Brooks, *Notes on Defining the "Dangerousness" of the Mentally Ill*, in DANGEROUS BEHAVIOR: A PROBLEM IN LAW AND MENTAL HEALTH 37 (Calvin J. Frederick ed. 1978). 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." *Id.*

93. 287 A.2d 715 (N.J. 1972).

94. *Id.* at 723.

95. *Id.*

96. See *supra* notes 84-90 and accompanying text (discussing the federal IDRA's rules governing post-acquittal confinement).

97. 316 A.2d 449 (N.J. 1978).

98. Irwin N. Petr, *Problems Surrounding Release of Persons Found Not Guilty By Reason of Insanity* 20 J. FORENSIC SCI. 719, 725 (1975).

99. See *Carter*, 316 A.2d at 453. The court reasoned that:

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 laws 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.

however, also provided that the benefit of the doubt concerning a patient's potential for dangerous conduct was not going to be given easily to the patient.¹⁰⁰ As in *Maik*, the *Carter* decision makes it clear that courts retain the power to determine when one has been restored to reason and is able to function in society without fear of harming others.¹⁰¹ Enough vagueness and hedging characterize the New Jersey 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.¹⁰²

Subsequently, the Supreme Court of New Jersey held, in *State v. Krol*,¹⁰³ that, before recommitment is effected, a hearing must

Id.

100. *Id.* at 457-58. The court opined:

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.

Id.

101. *See Id.* at 458.

102. *See Id.* 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." *Id.* at 459. 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. As the court reasoned, the mere abatement of symptoms provides no assurance that the public is safe from harm:

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 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.

Id. at 461. The court further outlined the procedures which a judge must follow in making an assessment:

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.

Id. at 462.

103. 344 A.2d 289 (N.J. 1975).

take place at which the State would be required to prove by a preponderance of the evidence that the acquittee was dangerous to himself or to others.¹⁰⁴ What must be recognized, however, is that a mandated hearing does little to alter the power of a confinement-minded judge to order the continued detention of the acquittee. The New Jersey Supreme Court, itself, took pains to alert (and frighten) trial judges who are considering the conditional release of an insanity acquittee by cautioning that "even where the [patient's] condition shows marked improvement, only the most extraordinary case would justify modification in any manner other than by a gradual de-escalation of the restraints upon the [patient's] liberty."¹⁰⁵

The New York case of *In re Miller*,¹⁰⁶ is illustrative of the means which a trial judge can employ to prolong an acquittee's confinement. Here, the judge, in rejecting the hospital staff's recommendation that the acquittee be released, held that "[i]t is not essential under the law that dangerousness be coupled with mental illness, or that release necessarily follow upon recovery of sanity."¹⁰⁷ Two years later, on appeal, the court ruled that another hearing should take place.¹⁰⁸ This precaution was ordered because such a long time had elapsed since the first hearing.¹⁰⁹ The court gave little weight to the testimony of the "only" witnesses, four psychiatrists, who concluded that the acquittee should be released because "he was not suffering from mental disease or defect, was without psychosis and would not be a danger to himself or others."¹¹⁰

104. *Id.* at 300.

105. *State v. Fields*, 390 A.2d 574, 584 (N.J. 1978).

106. 342 N.Y.S.2d 315 (1972).

107. *Id.* at 322.

108. *In re Miller*, 362 N.Y.S.2d 628 (1974).

109. *Id.* at 633.

110. *Id.* at 630. 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

Therefore, it is clear that the "dangerousness" of each acquittee is not only difficult to ascertain, but that the standard itself is almost impossible to determine.¹¹¹ Even given the above, how can any reasonable person accept the approach taken in the case of *Overholser v. O'Beirne*,¹¹² a case where the insanity acquittee was considered by psychiatrists "on both sides" to be non-committable?¹¹³ Then Circuit Judge Warren Burger ruled that:

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 "non-dangerous 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.¹¹⁴

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 expression 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.

Id. at 633-34.

111. See, e.g., *State v. Krol*, 344 A.2d 289, 301 (N.J. 1975) (stating that dangerousness is "a concept which involves substantial elements of vagueness and ambiguity" and "[t]he practical application of a dangerousness standard is further impeded by the difficulty of making valid and meaningful predictions of the likelihood of future harmful conduct").

112. 302 F.2d 852 (D.C. Cir. 1961).

113. *Id.* at 861; see, e.g., JAY KATZ ET AL., *PSYCHOANALYSIS, PSYCHIATRY AND LAW* 615-17 (1967) (discussing *O'Beirne*).

114. *O'Beirne*, 302 F.2d at 861.

That is precisely the view, however, that the Supreme Court of the United States endorsed in *Jones v. United States*.¹¹⁵ Michael Jones had established eight years earlier by a preponderance of the evidence that he was not guilty by reason of insanity of the crime of petit larceny for attempting to steal a jacket from a department store.¹¹⁶ The Court ruled that he could be confined to a mental institution "until such time as he had regained his sanity or was no longer a danger to himself or society," and that the confinement could last "for a period longer than he could have been incarcerated had he been convicted."¹¹⁷ The Supreme Court went beyond *O'Beirne* by commenting: "It also may be noted that crimes of theft frequently may result in violence from the efforts of the criminal to escape or the victim to protect property or the police to apprehend the fleeing criminal."¹¹⁸ Clearly, if such reasoning were used in all misdemeanor cases in this country, custodial sentences would need to be meted out in the hundreds of thousands.

Examples of trial judge punitiveness, disguised as concern for public safety, abound.¹¹⁹ A more recent case, *Francois v.*

115. 463 U.S. 354 (1983).

116. *Id.* at 360.

117. *See id.* at 368-70.

118. *Id.* at 365 n.14.

119. *See, e.g., In re Rosenfeld*, 157 F. Supp. 18, 21 (D.C. 1957) (ruling 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"). This 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 Elizabeth's 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. *Id.* at 22. 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:

Henderson¹²⁰ graphically epitomizes the lengths to which trial judges will go to keep insanity-acquittes in confinement. In this case, six psychiatrists testified that the acquittee had for over five years exhibited no abnormal or psychotic symptoms and had received no psychotropic medication of any kind.¹²¹ He had been a model patient, demonstrating good demeanor and grooming, and normal responsible actions and reactions.¹²² Yet the judge, with unrelenting determination to have the hospitalization continue, asserted that the acquittee's exemplary conduct actually buttressed his conclusion that the acquittee was mentally ill and dangerous, because the acquittee was feigning sanity!¹²³ A court appointed psychiatrist, as he had "in innumerable other similar cases" (and, as a matter of fact, he was later to do in the *Foucha* case), declined to certify that the acquittee would not be dangerous to himself or others.¹²⁴ He later conceded that he had "hedged" in his testimony because he did not want to be criticized should the

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."

Id. at 22; see *People v. Corrente*, 311 N.Y.S.2d 711 (1970). The "defendant" in *Corrente* was found to be "without psychosis at the present time" and "not dangerous either to himself or to the community." *Id.* at 713-14. 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. *Id.* at 719. 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." *Id.* at 714; see also *Powell v. Florida*, 579 F.2d 324 (5th Cir. 1978). In *Powell*, the trial judge rejected the recommendation of a hospital administrator and the treating physicians that an insanity-acquittee be released and the judge's order to continue the commitment was upheld by the United States Court of Appeals, Fifth Circuit. *Id.* at 326. The appeals court reasoned that since the trial judge had found that the final diagnosis of the patient, "[P]sychosis 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." *Id.* at 332 (emphasis added).

120. 850 F.2d 231 (5th Cir. 1988).

121. *Id.* at 234.

122. *Id.* at 233.

123. *Id.* at 234.

124. *Id.*; see *infra* 131-160 notes and accompanying text (discussing the *Foucha* case).

acquittee be released and then commit a criminal act.¹²⁵ He nevertheless agreed with the other psychiatrists that, even if the acquittee were schizophrenic, he could not feign sanity for years on end.¹²⁶ After the judge ordered the commitment continued, the case was heard by a federal magistrate, who ordered the acquittee's release.¹²⁷ The state, opposed to the release, appealed to the United States Court of Appeals, Fifth Circuit, which finally concurred that the commitment should end.¹²⁸ The court of appeals, without ruling one way or the other on the constitutionality of the Louisiana law that provided for confinement of insanity-acquittees solely on a finding of dangerousness,¹²⁹ was strongly of the opinion that the statute violated the Constitution and made the mental institution the substitute for the prison.¹³⁰

VI. THE CASE OF STATE V. FOUCHA

For many years, state and lower federal courts were able to make post-acquittal confinement decisions with little fear of supervision from above. Recently, a divided United States Supreme Court has intervened and struck down post-acquittal release procedures that it found to be unconstitutional.

In *State v. Foucha*,¹³¹ Terry Foucha was found to have committed an illegal discharge of a firearm and aggravated burglary of an inhabited dwelling while armed with a revolver.¹³² At a hearing on October 12, 1984, two court appointed experts in forensic psychiatry testified that Foucha had a drug-induced psychosis.¹³³ The trial court rendered a verdict of not guilty by reason of insanity, finding that Foucha "is unable to appreciate the usual, natural and probable consequences of his acts; that he is

125. *Francois*, 850 F.2d at 234.

126. *Id.* at 235.

127. *Id.* at 234.

128. *Id.* at 236.

129. *Id.* (discussing LA. REV. STAT. ANN. § 28:59(A)).

130. *Id.*

131. 563 So.2d 1138 (La. 1990).

132. *Id.* at 1138-39.

133. *Id.* at 1139.

unable to distinguish right from wrong; that he is a menace to himself and others; and that he was insane at the time of the commission of the crimes and that he is presently insane.”¹³⁴ The court ordered that he be admitted to the Feliciana Forensic Facility, the maximum security Forensic Unit of the East Louisiana State Hospital at Jackson, Louisiana.¹³⁵ On June 11, 1987, the trial court was notified that Foucha had requested a hearing to obtain periodic passes with family supervision, and the same forensic psychiatrists were appointed to examine him to determine his present mental condition.¹³⁶ After a hearing, the court denied the pass and ordered that the “defendant be returned to the facility for further care, custody and treatment.”¹³⁷ Subsequently, a review panel was convened because the superintendent of the facility recommended that Foucha be discharged or released.¹³⁸ Foucha was found by the hospital staff to be not mentally ill.¹³⁹

The trial court found, in assessing release prospects, that Foucha was a danger to others and ordered him recommitted.¹⁴⁰

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 1140. On March 21, 1988, the panel issued a report recommending that Foucha be conditionally discharged with the following stipulations:

1. He be placed on probation, the length to be determined by the court.
2. He remain free from intoxicating and mind-altering substances.
3. He attend a Substance Abuse Clinic on a regular basis.
4. He submit to regular and random urine drug screens at the local mental health center.
5. He be actively employed, or seeking employment.

Id. at 1140 n.7.

The panel stated that Foucha’s diagnosis was Antisocial Personality Disorder and that he had not displayed any evidence of this mental illness or mental disease since admission. *Id.* at 1141. At a hearing on November 29, 1988, one of the forensic psychiatrists who had testified at Foucha’s initial sanity hearing stated that Foucha showed no evidence of psychosis or neurosis and that he was in “good shape” mentally. *Id.* He had two months earlier, however, been sent to the maximum security section because of an altercation with another patient. *Id.* The psychiatrist also testified that if Foucha were released, the (drug-induced) psychosis could reassert itself. *Id.* Therefore, the psychiatrist refused to say that Foucha would not be a danger to others or to himself. *Id.* It was stipulated that essentially the same testimony would be offered by the other forensic psychiatrist who had also testified at the initial hearing. *Id.*

140. *Id.* at 1140.

The court of appeal refused to review the correctness of the decision not to release him,¹⁴¹ and the Supreme Court of Louisiana decided that Foucha did not prove that he could be released without danger to others or to himself.¹⁴² The Supreme Court of Louisiana held that dangerousness, as determined by the trial court, and not non-dangerousness and mental illness, as determined by psychiatric personnel, to be the test for whether or not there will occur continued detention in a psychiatric hospital of a person found not guilty by reason of insanity.¹⁴³

On May 18, 1992, the Supreme Court of the United States reversed the judgment of the Louisiana Supreme Court, and held that the Louisiana law which allowed the continued confinement of an insanity acquittee who was found by a court to be dangerous, was unconstitutional.¹⁴⁴ The five to four decision concluded that the Louisiana statute violated the Due Process Clause because it allowed an insanity acquittee to be committed to a mental institution until he was able to demonstrate that he was not dangerous to himself and others, even though he did not suffer from any mental illness.¹⁴⁵

While the ruling appears to have sweeping implications for the handling of institutionalized insanity acquittees with antisocial personality disorders, it basically affects only a handful of states¹⁴⁶ that mandate continued retention of the acquittee solely

141. *Id.*

142. *Id.* at 1144.

143. *Id.*

144. *See* State v. Foucha, 112 S.Ct. 1780, 1787 (1992).

145. *Id.*

146. *See* CAL. PENAL CODE § 1026.2(e) (West Supp. 1992); DEL. CODE ANN., tit. 11, § 403(b) (1987); HAW. REV. STAT. § 704-415 (1985); IOWA CT. C.P.R. 21.8(e); KAN. STAT. ANN. § 22.3428(3) (Supp. 1990); MONT. CODE ANN. § 46-14-301(3) (1991); N.J. STAT. ANN. § 2C:4-9(a)-(b) (West 1982); N.C. GEN. STAT. § 122C-268.1(i) (Supp. 1992); VA. CODE § 19.2-182.6-182.7 (Supp. 1992); WASH. REV. CODE § 10.77.200(2) (West 1990); WIS. STAT. § 971-17(5) (West Supp. 1992). These laws must be amended to conform with the *Foucha* decision. Two states (California and Virginia) had, in fact, amended their laws prior to *Foucha* to provide for the release of acquittees who do not suffer from mental illness but may be dangerous. *See* CAL. PENAL CODE § 1026.2 (West Supp. 1992); VA. CODE § 19.2-182.6-182.7 (Supp. 1992). Three of the states (New Jersey, Washington and Wisconsin) limit the maximum duration of commitment to reflect the acquittee's specific crimes and require that acquittees be held in facilities appropriate to their mental condition. *See* N.J. STAT. ANN. §§ 2C:4-8(b)(3) (West 1982), 30:4-24.2 (West 1981); WASH. REV. CODE §§

on the grounds of dangerousness. It does not, nor is it intended to, prevent a state from defining mental illness, mental disease, or mental disorder, in such a way that an acquittee "suffering" from a psychopathic personality disorder could indeed be indefinitely confined.¹⁴⁷

Be that as it may, the views expressed by Justice O'Connor and the dissenters (Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas) make it likely that the Supreme Court would endorse the position espoused by the Council of Psychiatry and Law of the American Psychiatric Association. The Council recommended that the continued hospitalization of non-mentally-ill personality-disordered acquittees is justified on the grounds that "[t]hose who suffer from personality disorders may also benefit from the special management available only in a psychiatric institution where sensitive, comprehensive, unique and imaginative treatment programs can often be developed to assist them in overcoming their destructive behavior."¹⁴⁸ Justice O'Connor wrote: "I do not understand the Constitution to hold that Louisiana may never confine dangerous insanity acquittees after they regain mental health."¹⁴⁹ She argued that if there were, even in the absence of clear-cut mental illness, some "medical justification" for doing so, it would be permissible to confine such insanity acquittees since the necessary connection between the nature and purposes of confinement would be present.¹⁵⁰ Because the four dissenters strongly maintain that the State of Louisiana could keep

10.77-020(3), 10.77.110(1) (West 1990); WIS. STAT. § 971.17(1), (3)(c) (West Supp. 1992).

147. For example, nothing in the *Foucha* decision would have mandated the release of the same Terry Foucha had he been hospitalized as an insanity acquittee in New York state where the definition of "mental illness," as it relates to dangerous mental disorder, is defined as "an affliction with a mental disease or mental condition which is manifested by a disorder or disturbance in behavior, feeling, thinking, or judgment to such an extent that the person afflicted requires care, treatment and rehabilitation." Under this definition of mental illness, persons diagnosed with an antisocial personality disorder, thus having a condition manifested at the very least by a disorder in behavior, have remained involuntarily institutionalized in maximum security hospitals so long as, because of the condition, they currently constitute a physical danger to themselves or others.

148. COUNCIL OF PSYCHIATRY AND LAW, AMERICAN PSYCHIATRIC ASSOCIATION, FINAL REPORT OF THE SUB-COMMITTEE TO REVIEW THE INSANITY DEFENSE 3 (1988).

149. *Foucha*, 112 S.Ct. at 1789 (O'Connor, J., concurring).

150. *Id.* at 1789-90.

an insanity-acquittee hospitalized if he could not prove that he was not dangerous (an argument rejected by the majority),¹⁵¹ they would surely settle for the scheme outlined by Justice O'Connor that would permit continued institutionalization of a non-mentally-ill but dangerous acquittee provided that "the nature and duration of detention were tailored to reflect pressing public safety concerns related to the acquittee's continued dangerousness."¹⁵²

The majority assailed, even ridiculed, the argument of Justice Thomas (not surprisingly supported by Chief Justice Rehnquist and Justice Scalia) that "the State may indefinitely hold an insanity acquittee who is found by a court to have been cured of his mental illness and who is unable to prove that he would not be dangerous."¹⁵³ Thomas maintained that Foucha should not be released despite psychiatric opinion that he was not mentally ill "because such opinion is not sufficiently precise--because psychiatry is not an exact science and psychiatrists widely disagree on what constitutes a mental illness."¹⁵⁴ The majority sharply reminded Justice Thomas that psychiatric opinion was nevertheless "reliable enough to permit the courts to base civil commitment on clear and convincing medical evidence that a person is mentally ill and dangerous and to base release decisions on qualified testimony that the committee is no longer mentally ill or dangerous [and] . . . also reliable enough for the State not trying a person who is at the time found incompetent to understand the proceedings."¹⁵⁵ The majority caustically remarked that medical predictions of dangerousness seem to be reliable enough for Justice Thomas "to permit the State to continue to hold Foucha in a mental institution, even where the psychiatrist would say no more than that he would hesitate to certify that Foucha would not be dangerous to himself

151. *Id.* at 1808 (Thomas, J., dissenting).

152. *Id.* at 1789.

153. *Id.*

154. *See id.* at 1783 n.4.

155. *Id.*

or others.”¹⁵⁶ The majority further suggested an alternative to immediate release in the case of Terry Foucha specifically.¹⁵⁷

It may well be that what the majority opinion in *Foucha* says may, in the long run, not be as important as what it does not say. As Justice O'Connor made clear, the case of *Foucha v. Louisiana* does not require the Supreme Court “to pass judgment on more narrowly drawn laws that provide for detention of insanity acquittees, or on statutes that provide for punishment of persons who commit crimes while mentally ill.”¹⁵⁸ Furthermore, she pointed out that the Court’s holding “places no new restriction on the States’ freedom to determine whether and to what extent mental illness should excuse criminal behavior. *The Court does not indicate that States must make the insanity defense available.*”¹⁵⁹ Significantly, she observed: “If a State concludes that mental illness is best considered in the context of criminal sentencing, the holding in this case erects no bar to implementing that judgment.”¹⁶⁰

Many mental health professionals will be appalled that nowhere in the majority opinion, Justice O'Connor’s concurring opinion, or the separate dissenting opinions of Justices Kennedy and Thomas, is there any reference to the inappropriate and overwhelming burden imposed on hospital personnel by the court-ordered retention in psychiatric hospitals of acquittees who are not mentally ill. The Supreme Court, in general, while conveniently expressing deference to medical opinion, are obviously utterly insensitive to, if not contemptuous of, the time-honored ethical principle of the medical profession:

156. *Id.*

157. *See id.* at 1786-87. The Court explained:

[I]f Foucha committed criminal acts while at Feliciana, such as assault, the State does not explain why its interest would not be vindicated by the ordinary criminal processes involving charge and conviction, the use of enhanced sentences for recidivists, and other permissible ways of dealing with patterns of criminal conduct. These are the normal means of dealing with persistent criminal conduct. Had they been employed against Foucha when he assaulted other inmates, there is little doubt that if then sane he could have been convicted and incarcerated in the usual way.

Id.

158. *Id.* at 1789 (O'Connor, J., concurring).

159. *Id.* at 1790 (emphasis added).

160. *Id.*

A doctor must have complete clinical independence in deciding upon the care of a person for whom he or she is medically responsible. The doctor's fundamental role is to alleviate the distress of his or her fellow men, and no motive--whether personal, collective or political--shall prevail against this higher purpose.¹⁶¹

By forcing medical personnel to continue to treat "cured" patients, the ethical principle of clinical independence has surely been violated. As is often the case, the ethics of the medical profession and the interests of the acquittee have been overpowered by the punitive goals of the criminal justice system.

VII. "DUAL STATUS OFFENDERS"

The increasing utilization of the "split verdict" approach is yet another example of the punitive trend in the administration of criminal justice.¹⁶² This recently conceived mechanism pertains to cases in which the defendant is found guilty of one crime and "not guilty by reason of insanity" of another crime, the crimes having been committed during the same period of time. The defendant receives the worst of all alternatives, for now he is pronounced both insane and a criminal.¹⁶³ In such cases, the prosecution attempts to show that some of the crimes are not the result of mental disease or defect, at the same time allowing the insanity issue to stand for other crimes. The defendant, after he is released from a hospital for the criminally insane, is sent to prison to serve the sentence for the crime of which he was found guilty.

Recent cases of this nature include a defendant who was found not guilty by reason of insanity for killing his former wife, and guilty of murder for killing her male companion, her daughter and her mother.¹⁶⁴ Another case is that of a Maryland woman who was acquitted of murder by reason of insanity, but was found guilty

161. WORLD MEDICAL ASSOCIATION, DECLARATION OF TOKYO Principle 4 (Oct. 1975).

162. See Bill C-30, The House of Commons of Canada § 672.1 (2d reading Oct. 4, 1991); C.R. JEFFERY, CRIMINAL RESPONSIBILITY AND MENTAL DISEASE 89 (1967).

163. JEFFERY, *supra* note 162, at 89.

164. *Convicted Killer of 4 Faces Death Penalty*, DAILY TIMES, June 29, 1984, at A7 (Mamaroneck, N.Y.).

of involuntary manslaughter and child abuse.¹⁶⁵ Her sentence to ten-year terms in the custody of the Division of Correction was approved by the Court of Special Appeals of Maryland.¹⁶⁶ In Ohio, a jury found a defendant not guilty by reason of insanity of two rapes, but guilty of a third rape, gross sexual imposition, a kidnapping, and a robbery, all of which arose out of a continuum of events in the course of one night.¹⁶⁷ In Illinois, a defendant was found guilty of two counts of felonious assault, and not guilty by reason of insanity of three other counts of felonious assault and two counts of aggravated burglary.¹⁶⁸ The court of appeals rejected the defendant's argument that his conduct constituted one continuous series of actions and that his conduct failed to demonstrate that he was sane for one brief period and insane for the rest of his criminal activity.¹⁶⁹ The conviction and sentence were affirmed.¹⁷⁰

Mental health professionals necessarily see such dual status offenders as having been just as insane (mentally ill) at the time when they committed the crimes for which they were convicted as at the time when they committed the crimes for which they were found not guilty by reason of insanity (in every case within the same period of hours or minutes). The treating personnel in such instances often see their efforts as wasted, having succeeded only in converting their hospitalized innocent patients to imprisoned guilty convicts. This situation is analogous to that in which mental health professionals are required to treat severely mentally ill convicts who had been sentenced to death so that they can become mentally competent to be executed.

165. *Robey v. State*, 456 A.2d 953, 953 (Md. 1983).

166. *Id.* at 954.

167. *State v. Brown*, 465 N.E.2d 889, 889-890 (Ohio 1984).

168. *State v. Ware*, 542 N.E.2d 1115, 1115 (Ohio 1988).

169. *Id.* at 1117.

170. *Id.* at 1119.

VIII. CONCLUSION

The time has long since passed when we should have realized that abandonment of the insanity defense was required by logic and rationality. It is recognized by many that a variety of personality disorders, principally psychopathic personality disorder, warrant the designation of serious mental illness rising, in a significant proportion of lawbreakers, to the level of inability to appreciate the wrongfulness of their conduct at the time the offense was committed. Modern treatment of clear-cut psychotic illnesses has, to a marked degree, reduced the potential dangerousness of some affected individuals, and in others it has allowed an underlying personality disorder to come to the fore. The result has been an ever-increasing number of people inappropriately detained in mental hospitals, under court or special security review board orders, with the concomitant misuse and abuse of the mental health professions.

The insanity defense has thus far been legislatively abolished in three states.¹⁷¹ These statutes reject mental condition as a separate specific defense to a criminal charge, but expressly permitted expert evidence of mental illness or disability to be presented at trial.¹⁷² This evidence would not be in support of an independent insanity defense, but rather would permit the accused to rebut the state's evidence offered to prove that the defendant had the requisite criminal intent or *mens rea* required to commit the crime charged. The supreme courts of Montana and Idaho have both held that there is no independent constitutional right to plead insanity, and that abolition of the insanity defense neither deprives a defendant of his Fourth Amendment right to due process nor violates the Eighth Amendment proscription against cruel and unusual punishment.¹⁷³

171. 1979 MONTANA LAWS ch. 714; UTAH CODE ANN. § 76-2-305 (Supp. 1986); IDAHO CODE § 18-207 (Supp. 1986).

172. 1979 MONTANA LAWS ch. 714; UTAH CODE ANN. § 76-2-305 (Supp. 1986); IDAHO CODE § 18-207 (Supp. 1986).

173. *State v. Korell*, 690 P.2d 992, 1002 (Mont. 1984); *State v. Searcy*, 798 P.2d 914, 918 (Idaho 1990).

We must now actively challenge the oft-repeated platitudes of prominent legal scholars, jurists and psychiatrists, whose pronouncements have given an aura of professional sanction and encouragement to repressive and punitive state and federal legislation in recent years.¹⁷⁴ I have, elsewhere, suggested steps for the rational and humane handling of mentally disordered offenders¹⁷⁵ and of ordinarily law-abiding and honest persons who have committed unlawful acts in circumstances in which their mental and emotional processes or behavioral controls were

174. See, e.g., *Holloway v. United States*, 148 F.2d 665, 666-67 (1945). ("Our collective conscience does not allow punishment where it cannot impose blame."); *Sinclair v. State*, 132 So. 581, 589 (1931) (Griffith, J., concurring) ("[H]ow 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?"); *Hearings Before the Senate Comm. on the Judiciary*, 97th Cong., 2nd Sess. 255-66 (1982) (statement of Richard Bonnie); *Myths & Realities: Hearing Transcript of the National Commission on the Insanity Defense Before the National Association of Mental Health* 91-97 (1983) (statement of Loren H. Roth); David Bazelon, *The Insanity Defense: Symbol and Substance*, 9 NEWSL. AM. ACAD. PSYCHIATRY & L., 3, 5 (1984) ("The insanity defense is integral to the moral foundation of the criminal law. It is our nemesis, and it is our hope."); Richard Bonnie, *The Moral Basis of the Insanity Defense*, 69 A.B.A. J. 194, 194 (1983); Loren Roth, *Preserve But Limit the Insanity Defense*, 58 PSYCHIATRIC Q. 91, 95 (1986-87) (arguing that the insanity defense is essential to the moral integrity of the criminal law); John Keenan, *Commentary*, 24 N.Y. ST. B. ASS'N B. NEWS 5, 7 (1982) ("Abolishing the insanity defense flies directly in the face of our legal traditions and history. It is not a solution but rather is the approach that might better be taken in a police state. The approach would offend the community's sense of propriety."); Ralph Slovenko, *The Meaning of Mental Illness in Criminal Responsibility*, 5 J. LEGAL MED. 1, 60 (1984) (stating that it is textbook learning that the insanity defense is essential to the moral integrity of the criminal law); Alan Stone, *The Insanity Defense on Trial*, 33 HOSP. & COMMUNITY PSYCHIATRY 636, 640 (1982) ("The insanity defense is the exception that proves the rule of free will. It demonstrates that all other criminals have free will, the ability to choose between good and evil."); John Leo, *Is the System Guilty? A Stunning Verdict Puts the Insanity Defense On Trial*, TIME, July 5, 1982, at 26 (quoting psychologist Emanuel Tanay as stating "we need the insanity defense so we can say we are a civilized society and we don't execute sick people."); Stuart Taylor, Jr., *Insanity Laws Seen as Hurting Society*, NEW YORK TIMES, July 1, 1982, at A15 (quoting Jonas Rappeport as stating that "[t]he insanity plea is necessary to maintain our view of a moral justice. In one form or another, it has served mankind successfully for thousands of years. In a sense, it is the mark that separates us from the wild beasts. We cannot hold culpable those who were incapable of being morally wrong. Infants, the retarded and severely mentally ill defendants, deserve this protection from the harshness of the law"); see also *Hearings Before the Senate Comm. on the Judiciary*, 97th Cong., 2nd Sess. 255-66 (1982) (statement of Jonas Rappeport).

175. See *supra* note 1 and accompanying text.

functioning in such a manner that they should justly be acquitted.¹⁷⁶

In particular, it is high time that our society adopted procedures first recommended over sixty years ago by the American Medical Association, American Bar Association, American Psychiatric Association and American Institute of Criminal Law and Criminology.¹⁷⁷ These reform proposals include:

1. That there be available in every criminal and juvenile court a psychiatric service to assist the court in the disposition of offenders.
2. That the disposition and treatment (including punishment) be based on a study of the individual offender by properly qualified and impartial experts, cooperating with the courts.
3. That the indeterminate sentence system be extended to all types of criminal cases involving prison sentences, thus making more efficient the individualization of treatment.
4. That there be a psychiatric service available to every penal and correctional institution.

176. See Abraham Halpern, *Uncloseting the Conscience of the Jury: A Justly Acquitted Doctrine*, 52 *PSYCHIATRIC Q.* 144, 155 (1980); see also William Carnahan, *Changing the Insanity Defense*, in *THE INSANITY DEFENSE IN NEW YORK—A REPORT TO GOVERNOR HUGH L CAREY*, NEW YORK STATE DEPARTMENT OF MENTAL HYGIENE 131, 141 (Feb. 11, 1978). Likewise, Carnahan has shown that virtually all defendants who successfully used the insanity defense during a ten-year study 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. *Id.* The insanity defense, with its exculpation sans freedom, forcing the psychiatrist "to assume the role of post-acquittal custodian," would give way to conviction "for lesser included criminal offense not requiring an accused to have acted either intentionally or knowingly." *Id.* The ensuing "culpability" would enable the sentencing court to "take the present mental condition of the offender into account in determining an appropriate disposition, namely, conditional discharge, probation or penal confinement." *Id.*

177. See generally ALBERT DEUTSCH, *THE MENTALLY ILL IN AMERICA* 416-17 (1949); KARL MENNINGER, *THE CRIME OF PUNISHMENT* 122 (1966); Ralph Slovenko, *A History of Criminal Procedures as Related to Mental Disorders*, 55 *PSYCHOANALYTIC REV.* 223, 245 (1968).

5. That there be established in each state a complete system of administrative transfer and parole, and that there be no decision for or against any parole, or transfer from one institution to another, without a psychiatric report.

Automatic post-acquittal confinement, almost invariably associated with a verdict of not guilty or not responsible by reason of insanity, has for many acquittees been nothing more than punishment in disguise. Replacement of the insanity defense by statutes that provide for expert witness testimony to show that the defendant lacked the state of mind required as an element of the offense charged, has been found by two state supreme courts to be in accord with constitutional requirements. Procedures can be implemented, with due regard for public safety, so that all offenders, mentally disordered or otherwise, may be dealt with in an ethical, effective, and humane manner.