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THE INSANITY DEFENSE

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THE INSANITY DEFENSE AND ITS ALTERNATIVES

A Guide for Policymakers

Ingo Keilitz
Junius P. Fulton

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FOREWORD

The "not guilty by reason of insanity" defense has been the subject of intense public debate since the recent acquittal of John Hinckley, Jr. Legal literature, the public media, and the nation's legislatures have all been avenues for the expression of dissatisfaction with the current operation of the insanity defense.

The initial emotional response has led to a concerted effort in many quarters to develop an acceptable alternative to the "not guilty by reason of insanity" defense. I am personally involved in one such effort with the Conference of Chief Justices. Our Committee on the Insanity Defense Program is undertaking a study of the insanity defense and ultimately hopes to develop for recommendation an alternative to the existing approaches to the insanity defense which will be acceptable to all jurisdictions and capable of uniform application.

In view of the proliferation of recent commentary on the subject, the task is monumental. Realizing the enormity of the task, the chairman of our predecessor committee, Chief Judge Theodore R. Newman, Jr., Court of Appeals of the District of Columbia, requested the aid of the National Center for State Courts in providing some baseline information for determining the directions the Conference of Chief Justices' Committee should take. That request inspired this monograph. In undertaking to fulfill the request, the National Center for State Courts became aware of the absence of a single source in which were compiled the literature and the various data on the insanity defense, and recognized the value such a source would have to policymakers across the nation. The proposal for this monograph was presented to the National Institute of Justice, which also recognized the need for such a monograph and agreed to fund its preparation. The

resources of the National Center for State Courts, its Institute on Mental Disability and the Law, the special efforts of the authors of this monograph, Ingo Keilitz and Junius Fulton, as well as the financial support of the National Institute of Justice, combined to produce *The Insanity Defense and Its Alternatives: A Guide for Policymakers*.

It is this type of forward-looking and cooperative response by the National Center for State Courts which is the substance of their value to the courts of this nation. Indeed, the Conference of Chief Justices' Committee has relied upon the National Center's assistance and resources throughout its endeavors. Its ability and foresight to coordinate projects like this with others across the nation assures that our individual efforts will be consolidated to serve the public and the judiciary.

While this monograph will not solve the dilemma posed to policymakers by the insanity defense, it does provide them with an organized body of material from which investigation, discussion, and ultimately, meaningful action, can develop.

FRANK D. CELEBREZZE
Chief Justice of Ohio
Chairman, Committee on the
Insanity Defense Program
Conference of Chief Justices

PREFACE

It is difficult to fathom how the criminal defense of insanity, which is used so infrequently, can engender the profusion of scholarly and popular literature that it has. The relative rarity of the defense, however, belies its symbolic role in our legal system and its great command of public attention. Indeed, this is a slim volume on a vast subject that deals with matters of law, social science, ethics, and morality. Thus, of necessity, we have been selective and have focused on those areas of the insanity defense—the definitions of insanity, burdens of proof, verdicts, the disposition of insanity acquittees, and the abolition of the insanity defense—that appear to form the core of the insanity defense debate today. Recognizing that this guidebook is meant to be useful, first and foremost, to policymakers, we have tried to balance concerns of scholarly purity and what we perceive to be practical considerations of policymakers. We hope that we have not compromised either concern.

The preparation of this guidebook was stimulated by the Conference of Chief Justices, particularly its Committee on the Insanity Defense Program. For their support and encouragement, we are indebted to the Conference, its Committee, the Committee's present and past chairmen, Chief Justice Frank D. Celebrezze of Ohio and Chief Judge Theodore R. Newman, Jr., of the District of Columbia. A contract with the National Institute of Justice made this guidebook possible. We are grateful to Maureen O'Connor and Cheryl Martorana of the National Institute of Justice who facilitated our work from its beginning and provided valuable advice.

Over two dozen individuals reviewed and commented on earlier drafts. We are indebted to them for their time and contributions, and to

all of them go our sincerest thanks. We are especially grateful to the following, who provided particularly detailed comments and suggestions: Phyllis Jo Baunach, Carl F. Bianchi, Richard J. Bonnie, Walter S. Felton, W. Lawrence Fitch, Donald H.J. Hermann, Richard P. Lynch, John MacMaster, Jonas R. Rapoport, Howard H. Sokolov, and David B. Wexler. Dick Van Duizend, Doug Dodge, and John Greacen, our colleagues at the National Center for State Courts, deserve our special thanks for their helpful suggestions, guidance, and encouragement. Finally, our thanks go to Carolyn McMurran, our editor, for her thorough and thoughtful editing. Although we have benefited from them all and they have greatly influenced our thinking, they should not be considered responsible for our views.

Williamsburg, Virginia
January 1984

INGO KEILITZ
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Chapter 1 **INTRODUCTION**

The insanity defense is rooted in a fundamental concept of Anglo-American jurisprudence that holds criminal behavior to be punishable only when it is blameworthy. According to the now-famous "M'Naghten Rule," first articulated in England in 1843 and still used in almost twenty states in this country,

... 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 defective 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.¹

When successfully used in criminal proceedings—an occurrence that is rarer than generally believed—the insanity defense results in the establishment of a defendant's non-responsibility for his or her criminal act, acquittal on the grounds of his or her unsound mind at the time of the act, and usually, confinement in a mental hospital.

Ever since the notorious trial of John W. Hinckley, Jr., and his acquittal of the shootings of President Ronald Reagan, James S. Brady, Timothy J. McCarthy, and Thomas K. Delahanty, the long-simmering controversy over the insanity defense among legal and mental health professionals has attracted unprecedented national attention. Public indignation over the "not guilty by reason of insanity" verdict reached by the District of Columbia jury fueled public, professional, and legislative debate.² This highly publicized case had an impact on the American public's perception of crime and justice that went far beyond opinions about one mentally disordered defendant and the defense that was successfully used in one extraordinary case. Indeed, the insanity

defense became the focus of the public's dissatisfaction with the criminal justice system's failure to protect society. Serious questions were raised, not only about what kinds of mental aberration should absolve a defendant of criminal responsibility but also about how our national leaders can be protected in a free society where gun control is almost nonexistent; how the media should cover controversial subjects; and even how much of what we are offered as entertainment leads to violent conduct.³ In the words of one prominent jurist:

[T]he problem is that acquittals by reason of insanity in highly publicized cases such as the Hinckley affair tend to undermine the public's faith in the courts' ability to respond to crime in a rational fashion. The current debate over the insanity defense will not be settled quickly or easily. It touches on deeply felt American attitudes toward crime, punishment, and personal responsibility, and raises some of the most complex questions in criminal jurisprudence.⁴

Are we correct in not assigning criminal responsibility to individuals whose behavior was influenced by an unsound mind? Is the insanity defense necessary at all? If it is, how are we to treat those individuals acquitted by reason of insanity? These fundamental questions of whether mental illness should play a part in the assignment of blame and what should be done with defendants after they have been found "not guilty by reason of insanity" are at the crux of the controversy over the insanity defense. Also, important questions have been raised about whether the prosecution or the defense should bear the burden of proof in insanity cases and what the necessary quantum of proof should be; whether psychiatric testimony should be restricted; what the legal standard or test for insanity should be; and, whether an alternative "guilty but mentally ill" verdict should be adopted either to supplement or to supplant the traditional insanity defense.

As its title indicates, this guidebook is intended to be a resource for policymakers who venture into the wide and often hazardous terrain encompassed by the current debate on the insanity defense. Although it forces the reader to follow a particular path, it does not necessarily prescribe a destination. Instead, it attempts to show the policymaker the general contours of the land and points of interest, as well as to highlight especially tortuous pathways and treacherous tracts. If this guidebook has a prescriptive message for policymakers, it is that they not make the trip hastily and that their choice of destination be based on valid information derived from experience and experiment.

In Chapter 2, the existing law on the insanity defense is described

as it is expressed in court rulings and statutes. It is presented with little evaluative commentary, but focuses on the issues that are central to the insanity defense debate today: abolition of the insanity defense, the definition of insanity, the allocation of the burden of proof, the limits of mental health expert testimony, the verdicts available to judges and juries, and the proper disposition of insanity acquittees.

Chapter 3 presents an organization and analysis of these issues from which policymakers, hopefully, will be able to derive at least some preliminary directions for public policy. We hope this chapter will serve not only to encourage cautious inquiry before legislative reform but also will provide a basis of information for policymakers in those jurisdictions where legislatures may have rushed prematurely toward reform.

In the concluding chapter, we suggest that the difficulties with the insanity defense cannot, lest we delude ourselves, be equated with the larger, and perhaps more vexing, problem of the many mentally ill offenders in our jails and prisons, most of whom never raise the insanity defense. Finally, we recommend that any changes in the insanity defense be based not on anecdotal or conjectural evidence but on direct experience and the result of experimentation with various alternatives.

THE RUSH TO REFORM

The June 21, 1982, verdict of "not guilty by reason of insanity" in the Hinckley case⁵ ignited swift and vociferous public outrage. Most Americans thought that the 12-member jury would find Hinckley guilty of all charges in the multiple-count indictment. After all, millions witnessed Hinckley's criminal actions repeatedly broadcast on television throughout the country before, during, and after the trial. The fact that the public spectacle, which the Hinckley affair had become, was taking place in our nation's capital had, perhaps, a symbolic effect on the public's anger and frustration with our legal system's apparent failure to deal satisfactorily with crime.

The legislative response to public indignation over the insanity defense was equally swift. Within a few months, dozens of bills were introduced in the United States Congress to abolish or reform the insanity defense.⁶ More than half of the states considered abolishing, reforming, or somehow circumventing it. Amid this legislative "rush to judgment,"⁷ scholars and professionals began to raise voices of concern—albeit weak in comparison with public outcry and the responding legislative call to action—about the sweeping changes that were being urged upon our legal system, seemingly without adequate insight into the workings of the insanity defense, its theoretical bases, and historic

role in Western jurisprudence.

After the first waves of reform, scholars and legal and mental health professionals began to call for balanced and systematic study of all aspects of the insanity defense and its alternatives. They pointed to public misconceptions about the insanity defense that seemed to have unduly influenced public policy. For example, they noted that even though empirical data are sparse, there is common agreement that the insanity defense is rarely used, is used only as a last resort, and is only infrequently successful. Contrary to popular opinion, very few dangerous criminals escape punishment through the mythical insanity defense loophole in the criminal justice system. Joseph H. Rodriguez, the Public Advocate of New Jersey, in testimony before the Criminal Justice Subcommittee of the House Judiciary Committee, reported that of all the cases handled by his office in one year, the insanity defense is successful in less than one-tenth of one percent. He expressed the consensus of most experts when he stated: "All empirical analyses, however, have been consistent: the public, the legal profession, and specifically legislators dramatically and grossly overestimate both the frequency and the success rate of the insanity plea."⁸

In their call for the fashioning of fair and workable rules governing the insanity defense, professionals and scholars also have begun to challenge other public myths and misperceptions. While they acknowledge that the insanity defense is philosophically and morally important, they caution that it plays only a minor role in the practical administration of criminal justice and that its reform cannot be seen as a panacea for reducing crime.⁹ Other public perceptions that were challenged included the following: (a) most crimes committed by defendants successfully interposing the insanity defense are violent; (b) the insanity defense is used primarily by the rich; (c) most successful insanity defenses result from highly publicized trials; (d) the majority of insanity acquittees spend only very short periods of time in mental hospitals; and (e) most of the evidence in mental health evaluation reports and trial testimony by mental health experts reflects disagreement and conflict.¹⁰

Unfortunately, empirical studies cannot be conducted and communicated overnight and myths are not easily dispelled. Despite increasing calls for balance and restraint, including strong recommendations that much more research on the use and consequences of the insanity defense is needed before changes in the law, seemingly hasty legislative responses to the public concern over the insanity defense continued.¹¹ This point is perhaps best illustrated by the adoption of the

"guilty but mentally ill" (GBMI) verdict by legislative enactment in twelve states, despite the fact that the experience of the first three states that adopted this verdict (Michigan in 1975; Indiana in 1980; and Illinois in 1981) has barely been registered, and what little has been reported is hardly supportive of widespread adoption.¹² Indeed, the verdict is widely criticized as ill-conceived, constitutionally unsound, and unnecessary.¹³

A BRIEF HISTORY

The insanity defense, in some form, has been part of the Anglo-American law for centuries. Indeed, the requirement of moral fault for punishment can be traced back to the origins of Western ethical and legal thought.¹⁴ The concept of blameworthiness or moral culpability is basic to our system of criminal justice. The criminal law is rooted in the general assumption that an individual has the ability to distinguish and choose between lawful and unlawful conduct. The moral capacity to know and choose must be present for a finding of criminal liability; the concept of morality itself demands it. An individual cannot be obliged by the law to behave in a manner not in the power of *any* individual to behave, nor to behave under the circumstances in ways beyond the power of him or her, *in particular*, to behave.¹⁵ As Judge David Bazelon of the United States Court of Appeals for the District of Columbia succinctly put it, "Our collective conscience does not allow punishment where it cannot impose blame."¹⁶

Punishing those who are blameless for their actions is not only morally unacceptable in our society but may also do very little to serve the basic objectives of criminal law—deterrence, rehabilitation, protection of the public, and retribution. At least at a conceptual level, the absence of the ability to distinguish right from wrong or the lack of free will renders the deterrence function of criminal sanctions practically useless. Unless punishment is viewed as part and parcel of prevention, no deterrence is achieved because the person lacking knowledge or free will is by definition "undeterrable," i.e., he or she cannot conform his or her behavior to the law, and imprisonment cannot serve as an example to others in the same position. No rehabilitative function is served by placing the mentally ill in jails or prisons, without the benefit of treatment and care, rather than in institutions designed to treat their illnesses. Finally, while public protection may be achieved by a finding of criminal liability, without the establishment of moral culpability, the resulting retribution hardly seems just.¹⁷

One important reason why we have an insanity defense may be to

serve as the "exception that proves the rule" of law requiring that convicted defendants (i.e., those not forgiven because of mental disease) possess the requisite free will—the ability to choose between good and evil. By choosing evil, they become deserving of punishment and, thus, the basic objectives of our system of criminal law are met.¹⁸

The modern history of the insanity defense has been primarily one of periodic calibration of the criteria, standards, or "tests" for insanity, highlighted by the celebrated case of Daniel M'Naghten, decided in England in 1843.¹⁹ M'Naghten attempted to assassinate the British Prime Minister, Sir Robert Peel, but mistakenly shot and killed the Prime Minister's secretary, Edward Drummond. M'Naghten believed that Peel was spreading rumors about him and besmirching his good name. During a lengthy trial, the evidence established that M'Naghten was suffering from what today might be described as paranoid schizophrenia. Defense counsel drew liberally from the theories of Isaac Ray who had published the first book on forensic psychiatry five years earlier.²⁰ The jury subsequently returned a verdict of "not guilty by reason of insanity."

The scope of the psychiatric evidence for M'Naghten's insanity presented by the defense during the trial became a subject of concern for the public and the British Crown. Queen Victoria herself addressed the House of Lords and urged them to enact rules to govern similar cases. Using the formulations developed by fourteen of the fifteen common-law judges, including Lord Chief Justice Tindal, who presided at M'Naghten's trial, the British House of Lords established what has become known as the "M'Naghten Rule," or the "right-wrong test," which is still employed in England and, with some variations, in sixteen states in the United States.

The M'Naghten Rule is distinguished by its emphasis on cognitive dysfunction as distinct from impairments of the control mechanisms of human behavior. Under the M'Naghten Rule, those who *knew* that their actions were wrong but who, as a result of "disease of the mind," were unable to exercise *control* over their actions could not be exculpated. Attempts to improve upon the M'Naghten Rule and broaden the standard of insanity to encompass impairments in control or "volition" led to the development of the "irresistible impulse test," first recognized in Pennsylvania in 1846, and still used to supplement the M'Naghten Rule in a number of states.²¹ The question of which "impulses" are irresistible and which are simply not resisted continues to be a topic of debate among legal and mental health scholars.²²

The recognition that one's exercise of free will and moral respons-

ibility, required for criminal liability, could be undermined by a wide range of mental disturbances beyond cognitive and volitional defects led, at least partially, to the adoption of the "product test," or Durham Standard, by the United States Court of Appeals for the District of Columbia Circuit in 1954. Though this standard was first enunciated by the Supreme Court of New Hampshire in the late nineteenth century,²³ it is most often associated with the case of *Durham v. United States*, in which Judge David Bazelon, dissatisfied with the M'Naghten Rule, announced the standard that "an accused is not criminally responsible if his unlawful act was the product of a mental disease or defect."²⁴ In time, the "product test" proved to be too all-encompassing, permitting unfettered psychiatric testimony on too broad a range of issues to be an effective guide to legal decisionmaking. In 1972, Judge Bazelon repudiated the "product test" in the case of *United States v. Brawner* and endorsed the use of the American Law Institute (ALI) standard in the District of Columbia.²⁵ Today, only New Hampshire has retained the "product test" as a standard for insanity.

In the 1960s, the American Law Institute (ALI) developed a standard that sought compromise among the previously developed standards that were considered to be either too narrowly or too broadly formulated. The ALI standard provides:

A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks *substantial capacity* either to *appreciate* the criminality (wrongfulness) of his conduct or to *conform his conduct* to the requirements of law.²⁶

The ALI standard is noteworthy in its use of the word "appreciate" instead of the cognitive understanding suggested by the use of the word "know" in the M'Naghten Rule; in its requirement that an insane defendant lack "substantial capacity," thereby withdrawing from the seemingly more stringent requirement of the M'Naghten Rule for a *total* lack of capacity to distinguish right from wrong; and finally, in its incorporation of an independent volitional or "irresistible impulse" component into the standard of insanity by the requirement that an insane person lack substantial capacity "to conform his conduct to the requirements of the law."

The ALI standard of insanity, as used in the Hinckley case, has been adopted through court rulings in all federal jurisdictions,²⁷ and adopted by legislation or court rulings in more than half of the states within the last twenty years. The American Bar Association has

recently endorsed a standard for insanity that is an amalgam of the M'Naghten Rule and the ALI Standard.²⁸

In the 1960s and 1970s, the evolution of the insanity defense took a turn from an almost exclusive preoccupation with the wording of the insanity standard to a broader context.

It is slowly becoming clear that the words of the test are a small part of a process which includes, in addition, the testimony of laymen and experts, examination and cross-examination, argument and counter-argument. The significance of any one of the competing formulae turns on whether one formula leads a trial judge to admit more evidence than another, or experts to testify more usefully, or juries to acquit or convict more persons.²⁹

This is not to suggest, however, that the long preoccupation with the calibration of the insanity standard has been without important consequences, or that the wording of the standard may not have had a significant bearing on important aspects of the criminal process in insanity cases (e.g., presentation of expert testimony and jury instructions). We mean simply to note that there are important trends within recent years that look beyond the formulations of a "test" of insanity in the attempts to reform the insanity defense. The next chapter surveys these current trends in legislation and court rulings.

Notes to Chapter 1

1. *M'Naghten's Case*, 8 Eng. Rep. 718, 722 (1843). This rule is discussed in its historical context later in this chapter and once again in a review of current law in Chapter 2.

2. See: *Limiting the insanity defense: Hearings before the Subcomm. on Criminal Law of the Comm. on the Judiciary*, 97th Cong., 2nd Sess., on S.818, S.1106, S.1558, S.1995, S.2658, and S.2669, June 24, 30, and July 14, 1982 (hereinafter cited as *Congressional Hearings*, Volume 1); and *The insanity defense: Hearings before the Comm. on the Judiciary*, 97th Cong., 2nd Sess., on S.818, S.1106, S.1558, S.2669, S.2672, S.2678, S.2745, and S.2780, July 19, 28, and August 2, 4, 1982 (hereinafter cited as *Congressional Hearings*, Volume 2).

3. See, e.g., *Myths & realities: A report of the National Commission on the Insanity Defense* (Arlington, Va.: National Mental Health Association, 1983), at 5-7 (hereinafter cited as *National Commission*). The National Commission is an independent group, chaired by former U.S. Senator Birch Bayh and established by the National Mental Health Association to "broaden the public debate on the insanity defense and to make recommendations on how the insanity defense should be changed, if change is warranted." *Id.* at 1.

4. I. R. Kaufman, "The insanity plea on trial," *New York Times Magazine*, August 8, 1982, at 16-19.

5. *United States v. Hinckley*, U.S. District Court for the District of Columbia, Criminal Case No. 81-306, 1982.

6. See: *Congressional Hearings*, Volume 1 and 2, *supra*, note 2.

7. *National Commission*, *supra*, note 3, at 5.

8. *Id.* at 15.

9. See the American Psychiatric Association's Statement on the Insanity Defense, December 1982, reprinted in "The insanity defense, ABA and APA

proposals for change," *Mental Disability Law Reporter* 136, at 141-47, 210-11 (1983) (hereinafter cited as *ABA and APA Positions*). However, the belief that the question of insanity defense is, indeed, central to the administration of justice has had the support of public officials in the past. For example, former President Richard Nixon termed the abolition of the insanity defense as "the most significant feature" of his Administration's crime bill; see A. Dershowitz, "Abolishing the insanity defense," 9 *Criminal Law Bulletin* 434 (1973); see also J. Robitscher and A. K. Haynes, 31 *Emory Law Journal* 9, at 36-38 (1982).

10. For a discussion of these and other public perceptions surrounding the insanity defense, see *National Commission*, *supra*, note 3.

11. *Id.* at 44.

12. Most of these states have embraced this alternative verdict within the last two years; see the discussions of this alternative verdict in Chapters 2 and 3. Connecticut, which adopted the alternative verdict in 1982, enacted legislation repealing the GBMI verdict effective October 1, 1983 (Public Act 83-486).

13. The American Bar Association, the American Psychiatric Association, and the National Mental Health Association have opposed the enactment of an alternative verdict of "guilty but mentally ill"; see: *ABA and APA Positions*, *supra*, note 9; and *National Commission*, *supra*, note 3. This alternative verdict is discussed at length in Chapters 2 and 3.

14. See generally D. H. J. Hermann, *The insanity defense: Philosophical, historical, and legal perspectives* (Springfield, Ill.: Charles C. Thomas, 1983).

15. *Id.* at 2-5 and 76-94; see also D. N. Robinson, *Psychology and law: Can justice survive the social sciences?* (New York: Oxford University Press, 1980), at 1-74.

16. *Durham v. United States*, 214 F.2d

862 (D.C. Cir. 1954) (Bazelon writing for the majority). *But cf.* N. Morris, *Madness and criminal law* (Chicago: University of Chicago Press, 1982).

17. See Kaufman, *supra*, note 4 at 17. For a unique view expressed on this point, see the reactions of the parents of John Hinckley, in J. and J. A. Hinckley, "Illness is the culprit," *Readers Digest*, March 1983.

18. See A. Stone, "The insanity defense on trial," 34 *Harvard Law School Bulletin*, 15 (1982); see also J. Monahan and H. J. Steadman (eds.), *Mentally disordered offenders: Perspectives from law and social science* xiii (New York: Plenum Press, 1983).

19. 8 Eng. Rep. 718 (1843). The *M'Naghten* case may not have been, as assumed by many authors, the watershed for legislation and court rulings in England and the United States. It is quite possible that its precedential value was simply assumed because the prominent "test" for insanity bears its name. "It should be clear from even so hasty a sketch of the trends in criminal insanity over the past two centuries that *M'Naghten* was not the landmark, for there has been no such single influence." Robinson, *supra*, note 15 at 52 (emphasis in original); see generally Hermann, *supra*, note 14.

20. I. Ray, *A treatise on the medical jurisprudence of insanity* (reprinted) (Cambridge: Harvard University Press, 1962).

21. *Commonwealth v. Mosler*, 4 Pa. 264 (1846). An Alabama decision, *Parsons v. State*, 81 Ala. 557, 2 So. 854 (1866), is considered the first unequivocal acceptance of this test in the United States.

22. At its midyear meeting in New Orleans in February 1983, the American Bar Association adopted the "appreciation" test, a modified version of the *M'Naghten* Rule, which rejects the "volitional prong" of the American Law Insti-

tute's "cognitive-volitional test" (which had had the endorsement of the ABA since 1975); see: *ABA and APA Positions, supra*, note 9.

23. *State v. Pike*, 49 N.H. 399 (1869); *State v. Jones*, 50 N.H. 369 (1871).

24. 214 F.2d 862 (D.C. Cir. 1954).

25. *United States v. Brawner*, 471 F.2d 969, 1011 (D.C. Cir. 1972) (Judge Bazelon concurring in part and dissenting in part).

26. American Law Institute, Model Penal Code (Proposed Official Draft, 1962), Section 4.01, at 74 (emphasis added).

27. *United States v. Freeman*, 357 F.2d 606 (2d Cir. 1966); *United States v. Currens*, 290 F.2d 751 (3d Cir. 1961); *United States v. Chandler*, 393 F.2d 920 (4th Cir. 1968); *Blake v. United States*, 407 F.2d 908 (5th Cir. 1969); *United States v. Smith*, 404 F.2d 720 (6th Cir. 1968); *United States v. Shapiro*, 383 F.2d 680 (7th Cir. 1967); *United States v. Frazier*, 458 F.2d 911 (8th Cir. 1972); *Wade v. United States*, 426 F.2d 64 (9th Cir. 1970); *Wion v. United States*, 325 F.2d 420 (10th Cir. 1964); and *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972). While there has been no clear adoption of the ALI standard in the First Circuit of the U.S. Court of Appeals, *Amador Beltran v. United States*, 302 F.2d 48 (1st Cir. 1962), is suggestive of a preference for the ALI test.

28. See American Bar Association Standing Committee on Association Standards for Criminal Justice, "Standard 7-6.1. The defense of insanity," *First tentative draft, criminal justice mental health standards* 260-73 (Washington, D.C.: American Bar Association, July 1983) (hereinafter cited as *ABA Standards*).

29. A. S. Goldstein, *The insanity defense* 213 (New Haven: Yale University Press, 1967).

Chapter 2 A SURVEY OF LEGISLATIVE PROVISIONS AND SELECTED COURT RULINGS

All state and federal jurisdictions, except Montana and Idaho, provide for an independent insanity defense in criminal proceedings either by legislative enactments or court rulings.¹ The United States Supreme Court has yet to rule whether the insanity defense is constitutionally required. Indeed, except for several Supreme Court cases that address the issue of allocation of the burden of proof in criminal cases, and other procedural matters,² neither the Supreme Court nor Congress has addressed the standard for insanity in federal cases, the verdicts to be used, or the limits on expert testimony in insanity cases.³

An understanding of existing law on the insanity defense seems to be a crucial first step to any appraisal of proposed reforms and the development of sound public policy options. Ideally, experience and experiment should guide change. Unfortunately, acrimony and confusing abstraction have often surrounded the insanity defense issue, and anecdote and notorious cases have often been accepted as the norm.⁴ Our purpose in this chapter is to survey the law governing the insanity defense in this country as it exists today in statutes and in court rulings interpreting statutory, constitutional, and common law.

Six overlapping issues make up the core of the insanity defense debate today: (1) the abolition or retention of the independent insanity defense; (2) the definition (standard) of insanity; (3) the allocation of the burden of proof; (4) the permissible limits of expert testimony; (5) the verdicts available to judges and juries; and (6) the disposition of insanity acquittees. The survey in this chapter is divided accordingly.

Here, a note of caution should be sounded. A brief survey of this type, especially in the rapidly changing area of mental health law, is subject

to methodological problems that preclude total inclusiveness, currency, and interpretative agreement. Although we have consulted many statutes, court rulings, and pending legislation dealing with the insanity defense, we have relied heavily on secondary sources, which are cited wherever possible. For purposes of guidance to policymakers, the overview of legislative provisions and court rulings contained in this chapter should be sufficient. For definitive legal analyses or exhaustive surveys, the reader should consult the sources identified by the citations in the text, the bibliography and its introduction, and, especially, the statutes and court rulings in specific jurisdictions.

ABOLITION OF THE INSANITY DEFENSE

Although there have been numerous federal and state legislative proposals to eliminate the insanity defense altogether,⁵ only two state legislatures, those of Montana in 1979 and Idaho in 1982, have actually abolished the independent, affirmative defense of insanity. Previous legislation removing insanity altogether as a ground for non-responsibility for crime has encountered constitutional objections.⁶ While eliminating insanity as an independent defense, the Montana and Idaho legislative enactments apparently avoid constitutional difficulties by providing that evidence of a defendant's mental condition is admissible to negate the state of mind, or *mens rea*, required as an element of the crime in question.

Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did not have a state of mind which is an element of the defense.⁷

* * *

Mental condition shall not be a defense to any charge of criminal conduct...[however], [n]othing herein is intended to prevent the admission of expert evidence on the issue of *mens rea* or any state of mind which is an element of the offense, subject to the rules of evidence.⁸

In order to convict a defendant who has introduced evidence that he or she was mentally disordered at the time of the alleged crime, prosecutors in Montana and Idaho must prove, beyond a reasonable doubt, that the defendant did have the mental capacity, or *mens rea*, to form the evil intent which is material to every crime. Mental disorder is not a defense unless it negates the *mens rea* required for criminal liability. For example, if Bill kills Harry, Bill cannot escape conviction

by pleading the defense of insanity and claiming that he was suffering from psychotic delusions at the time of the offense. Bill may attempt, however, to demonstrate by expert mental health testimony that he was so severely psychotic at the time of the offense that he could not have knowingly, purposefully, and intentionally killed Harry, i.e., that he did not have the requisite *mens rea* to commit the murder, largely because he thought Harry, his longtime friend, was a demon that had taken on the appearance of Harry. Even though the physical component of the murder, the *actus reus*, is indisputable, Bill *might* escape conviction if the prosecution fails to prove, beyond a reasonable doubt, his intent to commit murder, because both necessary components of the crime (i.e., the physical act and the guilty mind) have not been shown.⁹ As in most states, the Montana and Idaho laws also permit evidence of mental disorder to be raised at the time of sentencing as a mitigating factor.

The legislative intent of the 1979 Montana law, which was not related to loud public outcry over a single case, appears to have been to reinforce the "accountability" of criminal defendants claiming mental disorder¹⁰ and "to avoid some of the legal wrangles surrounding the insanity defense and to merely approach the 'insane' defendant's mental problems at the dispositional, rather than the trial, stage."¹¹ According to State Senator Thomas E. Towe, a chief sponsor of the Montana legislation, the insanity defense is not only difficult to administer but also contrary to good therapy insofar as it absolves mentally disturbed defendants of responsibility for their actions.¹² He noted that

[a]llowing a person who has committed a crime to go scot-free without any punishment for his crime makes treatment for his underlying mental illness more difficult. Instead of helping him to understand the seriousness of his actions, the insanity defense allows him to feel he is above the law and ignore the gravity of his actions. This makes his treatment more difficult.¹³

David H. Leroy, former Idaho attorney general, stated that the purpose of the more recent Idaho legislation abolishing the insanity defense

... was to eliminate the average citizen's frustration with the complicated, cumbersome, obstructive, and illogical process which the mental defense has become in the courtrooms of modern America. The spectacle of psychiatric battles, extended trial costs in time and dollars, questionable verdicts, and cynical comments by experts have highlighted the "insanity" of the

insanity defense. The result has been that millions of law-abiding citizens have acquired a disrespect for the practicality and results obtained in our legal system. . . .

Properly understood, the Idaho statute eliminates confusion, substitutes a simple and constitutional method of determining guilt or innocence, moves the issue of a defendant's need for mental treatment to the judge's discretion at sentencing, and better protects the rights of society, the victim, and the defendant.¹⁴

Given the recency of the Montana and Idaho enactments and the lack of readily available data on their consequences in criminal cases in which evidence of mental disorder is introduced, it is impossible to know whether the abolition of the independent defense of insanity has achieved or will achieve its intended purposes.¹⁵ Moreover, it is unclear what type and amount of evidence of mental condition will be considered on the issue of the requisite mental knowledge or intent, how broadly the Montana and Idaho courts will interpret *mens rea*, and even whether the abolition of an independent defense of insanity will ultimately overcome constitutional objections regarding fundamental fairness.¹⁶

STANDARDS OF INSANITY

Most state and federal jurisdictions have adopted by statute or court rulings some form of the M'Naghten Rule, the American Law Institute's Model Penal Code Standard, the "irresistible impulse test," or the Durham Rule or "product" test. The accompanying table summarizes the standards for insanity used in the various state and federal jurisdictions.

Sixteen states currently apply the M'Naghten Rule for insanity, as articulated in the 1843 case of Daniel M'Naghten.¹⁷ This classic right-wrong test is adopted by statute only in Louisiana, Minnesota, and South Dakota; in the remaining thirteen states, the rule is defined by case law.

No jurisdiction uses the irresistible impulse test as the sole standard of insanity. In Colorado, Georgia, New Mexico, and Virginia the test is used in conjunction with and supplementary to the M'Naghten Rule. Supplementing the M'Naghten Rule with the irresistible impulse test broadens the M'Naghten Rule's narrow emphasis on cognitive knowledge to include recognition of volitional capacity, emotions, and self-control. In Virginia, for example, irresistible impulse is defined as a "moral or homicidal insanity which consists of an

The Standards for Insanity Used by the States and the Circuits of the Federal Courts of Appeals

INSANITY STANDARD	JURISDICTION
M'Naghten	Arizona, Florida, Iowa, Kansas, Louisiana, Minnesota, Mississippi, Nebraska, Nevada, New Jersey, North Carolina, Oklahoma, Pennsylvania, South Carolina, South Dakota, and Washington
M'Naghten and Irresistible Impulse	Colorado, Georgia, New Mexico, and Virginia
ALI ^a	All Federal Circuits, Alabama, Alaska, Arkansas, California, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan, Missouri, Ohio, Oregon, Tennessee, Texas, Utah, Vermont, West Virginia, Wisconsin, and Wyoming
Product	New Hampshire
Other ^b	New York, North Dakota, and Rhode Island
No Standard ^c	Idaho and Montana

Source: This table was constructed in part from several sources: S. J. Brakel, *The mentally disabled and the law* (3rd ed.) (Chicago: American Bar Foundation, in press); G. H. Morris, *The insanity defense: a blueprint for legislative reform* (Lexington, Mass.: Heath, 1975), Appendix A, 89-91; and "The insanity defense, ABA and APA proposals for change," 7 *Mental Disability Law Reporter* 136, 141-47, 210-11. Discrepancies among these sources were reconciled by direct examination of particular statutes.

^aSome modification of the ALI standard has been made by most of the states that use this standard, e.g., omission of paragraph (2) of the standard, deletion of the word "substantial," exclusion of defense when disorder caused by voluntary ingestion of drugs, and favoring of either the word "criminality" or "wrongfulness" in the writing of the standard.

^bUnique standard.

^cNo affirmative defense of insanity; statutory standard repealed.

irresistible inclination to kill or commit some other offense." This condition arises in situations where, although "the accused is able to understand the nature and consequences of his act and knows it to be wrong, his mind has become so impaired by disease that he is totally deprived of the mental power to control or restrain the act."¹⁸

The American Law Institute's Model Penal Code Standard, which has been characterized as a modernized combination of M'Naghten and the irresistible impulse test, has been adopted in 24 states, the District of Columbia, and in all of the federal circuits.¹⁹ The ALI test reads:

- (1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect, he lacks substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of the law.
- (2) As used in this article, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.²⁰

Slight modifications of the ALI standard have been made in most of the states that have adopted this standard. For example, paragraph (2), above, has been omitted in the formulation adopted by Alaska; the phrase "mental disease or defect" in paragraph (2) has been modified by Hawaii, Maryland, and Michigan; the word "substantial" has been dropped from the Arkansas formulation; and, either the word "criminality" or "wrongfulness" (instead of the use of both words, with the latter in parentheses) has been favored by several states.²¹

Only six states do not employ either the M'Naghten Rule (as the sole standard or in combination with the irresistible impulse test) or the ALI standard. In New Hampshire, the Durham Rule, or "product test," as it was originally known when formulated in that state during the late nineteenth century, is still retained. As discussed in the previous chapter, the Durham Rule, first formulated in 1954 and later repudiated by Judge David Bazelon of the United States Court of Appeals for the District of Columbia Circuit, holds that "a defendant is not criminally responsible if his unlawful act was the product of mental disease or defect."²²

New York has drastically modified the ALI standard by eliminating the last two clauses of paragraph (1) referring to inability "to conform one's conduct to the requirements of law." Thus altered, it is a cognitive standard similar to M'Naghten.²³ The North Dakota standard is based on M'Naghten, requiring only a showing that the defendant lacked

substantial capacity to appreciate the criminality of his conduct, rather than a complete lack of knowledge as required under the traditional M'Naghten formulation.²⁴ In 1979, an alternative formulation of the ALI test was adopted in Rhode Island in the case of *State v. Johnson*.²⁵ The traditional ALI formulation was criticized as placing too much reliance on expert psychiatric testimony. The Rhode Island "justly responsible test" was considered by that state's highest court as focusing on the "legal and moral aspects of responsibility" emphasizing that the degree of substantial impairment required was a legal rather than a medical question to be decided by the jury according to "prevailing community standards." Finally, as we have seen, Idaho and Montana have no independent defense of insanity and, thus, no standard of insanity.

ALLOCATION OF THE BURDEN OF PROOF

Since the trial of John W. Hinckley, Jr., much has been said about the burden of proving insanity. The issue can be divided into two questions: (a) whether the burden of proof in insanity cases should rest with the defense or the prosecution; and (b) what quantum of evidence is required to satisfy the burden.

A criminal defendant who is competent to stand trial is generally regarded as also competent to decide which defense he or she wishes to raise. The criminal law generally presumes that such a defendant is sane unless and until he or she produces evidence of mental disorder and raises the issue of insanity.²⁶ Once the insanity issue has been raised, the burden of proof must be properly allocated. Under federal law, by which John W. Hinckley, Jr. was tried, once the defense makes the insanity plea, the prosecution must bear the burden of proving the defendant's sanity beyond a reasonable doubt.

In *Davis v. United States*, the U.S. Supreme Court reversed a conviction for murder because the trial judge had erred in instructing the jury that the burden of proof of insanity rests with the defendant. The court established the rule applicable in the federal courts that the prosecution must bear the burden of proof. The court held that sanity was an essential element of the crime and that the prosecution had to bear the burden of proving "the existence of every fact necessary to prove the crime charged beyond a reasonable doubt."²⁷ While this rule has been strictly followed in the federal courts, it is not based on constitutional grounds but on common law principles and is not binding on the states. Subsequent decisions of the U.S. Supreme Court have supported this interpretation.²⁸

No consensus exists among states on the issue of the allocation of

the burden of proof in insanity cases. Seventeen states follow the federal practice and place the burden of proving (beyond a reasonable doubt) a defendant's *sanity* on the prosecution, once the insanity defense has been raised by the defense; thirty-two states place the burden of proving insanity (by a preponderance of the evidence) on the defendant (Arizona requires that the defendant prove his or her insanity by "clear and convincing evidence");²⁹ Montana and Idaho have eliminated the affirmative defense of insanity and, thus, the issue of the burden of proving or disproving insanity, per se, does not arise.³⁰

THE PERMISSIBLE LIMITS OF EXPERT TESTIMONY

Questions about the permissible scope of mental health expert testimony are among the most controversial raised in the debate on the insanity defense, perhaps because they hit at the very heart of a much more fundamental issue, namely, that of the overall competence of psychiatrists and psychologists to assist the courts in addressing the questions about mental aberration that arise during criminal proceedings.³¹ The fundamental issue of competence, however, appears not to be particularly pressing on policymakers, though it has been the focus of considerable scholarly debate.³² Whether or not mental health experts ultimately ought to testify, it is probably safe to assume that they will generally be permitted to testify in criminal cases involving a defendant's possible mental aberration.³³

Criticism concerning the use of mental health expert testimony at insanity defense trials has focused on two major concerns: (1) the imprecision of the methods upon which such testimony is based; and (2) the tendency of mental health experts to dominate unduly or to usurp the function of the judge or jury by offering conclusory opinions.³⁴ Despite vigorous attacks from within and outside the mental health profession on the reliability of psychiatrists' and psychologists' methods and testimony in insanity cases,³⁵ the prevailing attitude of the courts seems to suggest a general reliance on professional authority and a presumption that the proffered testimony is useful. As Professor William J. Curran has noted, the mental health expert "is trusted to have screened out 'unreliable' techniques and to have come to court with an opinion strengthened by his or her overall experience and judgment."³⁶

In regard to the second concern, generally speaking, an expert witness is prohibited from giving his or her opinion on applicable law because the definition and interpretation of the law is considered the exclusive responsibility of the trier of fact.

[A] witness' legal opinion on the issue of insanity is both incompetent and irrelevant. It is incompetent because the opinion of a medical expert on the correct legal standards of criminal responsibility is outside the range of the witnesses' expertise in the field of mental diseases.

It is irrelevant because it is not "otherwise" admissible under our rules of evidence.³⁷

If, however, a mental health expert is precluded from using legal terms such as "sane" and "insane," for example, as part of trial testimony, it may be that he or she will simply paraphrase such terms and convey the same conclusory opinion. A psychiatrist requested to testify in a case using the ALI standard, for example, may first report his or her diagnosis of a defendant's mental condition in clear, descriptive, and explanatory language and finish the testimony with a statement incorporating the statutory language defining the legal meaning of the term "insane," e.g., the defendant "failed totally to appreciate the wrongfulness of his or her behavior at the time of the crime."

Legal restrictions on mental health expert testimony on ultimate legal issues concerning the insanity defense have been enunciated in court rulings and legislation. Judge David Bazelon of the United States Court of Appeals for the District of Columbia, well known for his attempts to improve mental health expert testimony, wrote what is perhaps the landmark opinion in this area in the case of *Washington v. United States*. Judge Bazelon's guidance to mental health experts is clearly set forth in the following quotation from that opinion.

Under ordinary rules, witnesses are allowed to testify about what they have seen and heard, but are not always allowed to express opinions and conclusions based on these observations. Due to your training and experience, you are allowed to draw conclusions and give opinions in the area of your special qualifications. However, you may not state conclusions or opinions as an expert witness unless you also tell the jury what investigations, observations, reasoning and medical theory led to your opinion. . . .

It must be emphasized that you are to give your expert diagnosis of the defendant's mental condition. This word of caution is especially important if you give an opinion as to whether or not the defendant suffered from a "mental disease or defect" because the clinical diagnostic meaning of this term may

be different from its legal meaning. You should not be concerned with its legal meaning. Neither should you consider whether you think this defendant should be found guilty or responsible for the alleged crime. These are questions for the court and jury. What is desired in this case is the kind of opinion you would give to a family which brought one of its members to your clinic and asked for your diagnosis of his mental condition and a description of how his condition would be likely to influence his conduct. Insofar as counsel's questions permit, you should testify in this manner.³⁸

Several states have attempted to address the question of the scope of permissible mental health expert testimony by legislative enactments. In Michigan, for example, written reports are required following a forensic mental health examination on the "issue of the defendant's insanity at the time the alleged offense was committed and whether the defendant was mentally ill or mentally retarded at the time the alleged offense was committed."³⁹ California's new penal code provides that mental health professionals must perform forensic mental health examinations of allegedly insane defendants and may give expert testimony, but the code

... does not presume that a psychiatrist or psychologist can determine whether a defendant was sane or insane at the time of the alleged offense. This section does limit a court's discretion to admit or exclude, pursuant to the Evidence Code, psychiatric or psychological evidence about a defendant's state of mind or mental or emotional condition at the time of the alleged offense.⁴⁰

THE VERDICTS AVAILABLE TO JUDGES AND JURIES

Traditionally, the verdict of "not guilty by reason of insanity" (NGRI) indicates that the basis of the verdict was the finding that the defendant was insane at the time that he or she committed the otherwise criminal act. Importantly, the verdict may provide, either explicitly or implicitly, that the defendant is rendered "not guilty" *only* on the basis of his or her insanity and furthermore that there was no reasonable doubt that the defendant in fact committed the act charged.⁴¹ This finding of nonresponsibility for crime, which includes the assumption that the defendant would have been found guilty of the crime had he or she not been found insane, provides the justification for a criminal court's continued jurisdiction over the defendant and provides the basis for "criminal" commitment or an order for further

inquiry into whether the defendant is *presently* dangerous and in need of treatment.

In most states, when the defense of insanity has been properly raised, the forms of verdict are limited to "guilty," "not guilty," or "not guilty by reason of insanity." Some states have made semantic alterations in verdict forms, presumably to place the essential issue of criminal responsibility in its proper focus. For example, although Wyoming and Wisconsin use the words "not guilty," they no longer use the phrase "by reason of insanity" but opt instead for the wording "by reason of mental illness or deficiency" (Wisconsin's verdict form varies slightly, using the wording "disease or defect").⁴² Indiana and Rhode Island provide another example of alternative wording; both states emphasize the issue of responsibility in their verdict forms. The Supreme Court of Rhode Island has repeatedly expressed its preference for the phrase "lack of criminal responsibility due to a mental illness" and, similarly, Indiana statutes provide for a verdict of "not responsible by reason of insanity."⁴³

Substituting "not responsible" for "not guilty" and "mental illness, disease, or defect" for "insanity" may clarify the judicial inquiry involved in insanity plea cases and also may influence public perceptions (or misperceptions) in these cases. However these subtle word variations may satisfy the public's sense of justice, they are not likely to have any measurable effects on the presentation of insanity claims or on trial outcomes.

Perhaps the most popular proposal for reforming the insanity defense is adoption of an alternative verdict of "guilty but mentally ill" (GBMI) which allows juries to find a defendant guilty yet acknowledge his or her mental illness and need for treatment. Twelve states have enacted versions of the GBMI verdict to be considered by the triers of fact alongside the traditional pleas of guilty, not guilty, and not guilty by reason of insanity.⁴⁴

Pursuant to a finding of GBMI, a defendant is convicted and sentenced much like other guilty defendants, but is then transferred to the supervision or custody of a corrections department or state mental health department where he or she receives, at least theoretically, mental health evaluation, care, and treatment. Once the defendant is determined to have recovered from mental illness, he or she serves the remainder of the sentence.

Michigan was the first state to establish a GBMI verdict, which has served as the prototype for other states.⁴⁵ The Michigan law provides that a defendant may be found GBMI only after asserting a defense of

not guilty by reason of insanity and only after the following factors are proven beyond a reasonable doubt:

- (a) the defendant is guilty of an offense;
- (b) the defendant was mentally ill at the time of the commission of that offense; and
- (c) the defendant was *not* legally insane at the time of the commission of that offense.

A criminal defendant in Michigan may plead GBMI at the outset. To do this, however, he or she must first raise the insanity defense and waive the right to a jury trial. Once a defendant is found GBMI, or enters a plea to that effect which is accepted by the court, the court may impose any sentence that may lawfully be imposed upon any defendant who is convicted of the same offense. The statute provides that upon commitment to the custody of the Michigan Department of Corrections, the defendant shall undergo mental health evaluation and receive treatment for his mental illness as deemed necessary. The State Parole Board maintains jurisdiction over the defendant regardless of whether the Department of Mental Health or the Department of Corrections has custody of the defendant. Thus, the Michigan law seeks to treat the mental illness of the defendant but does not absolve him or her of legal responsibility for the crime committed and the consequent punishment.⁴⁶

The Supreme Court of Michigan has upheld the constitutionality of Michigan's GBMI statute against equal protection and due process challenges in the case of *People v. McLeod*. The court found no "clear and inevitable conflict" in the GBMI verdict with either the United States or the Michigan constitution.⁴⁷

Between 1980 and 1983, eleven states joined Michigan and adopted statutes allowing GBMI as an alternative to the insanity plea and verdict.⁴⁸ Although statutory language varies, each state provides that a defendant may be found criminally responsible yet mentally ill. After a GBMI finding, the offender is remanded for mental health evaluation and treatment under the auspices of the state's department of corrections or department of mental health. At least ten more state legislatures have recently or are currently considering GBMI legislation.⁴⁹ Five bills were introduced in Congress in 1982 that included versions of a GBMI plea or verdict.⁵⁰

THE DISPOSITION OF INSANITY ACQUITTEES

Three general dispositional options suggest the approaches taken by the states for dealing with defendants found not guilty by reason of

insanity. These options, illustrative of the wide range of dispositional approaches available, can be placed along a continuum ranging from the least restrictive disposition, from the point of view of the insanity acquittee, to the most restrictive disposition and curtailment of liberty.

Under the least restrictive dispositional approach, the insanity acquittee is released, the criminal trial court loses its jurisdiction over the individual, and further involuntary confinement can be accomplished only by instituting separate involuntary civil commitment proceedings.⁵¹ Currently, in nineteen states insanity acquittees may be committed if—and only if—the state proves by clear and convincing evidence in a separate civil commitment proceeding that the acquittee meets the general civil commitment criteria.⁵² A number of state courts have held that equality of treatment for insanity acquittees and others committed by civil action is constitutionally compelled.⁵³

Federal law does not provide for involuntary civil commitment. Thus, outside of the District of Columbia, federal authorities must rely on state and local authorities to institute civil commitment proceedings after an insanity acquittal.⁵⁴

The next step on the continuum toward more restrictiveness in the disposition of insanity acquittees is represented by statutory schemes requiring mandatory and automatic post-acquittal commitment to a mental institution for purposes of evaluation. Under this approach, judicial control by the criminal trial court is retained and the insanity acquittee is *automatically* committed to a mental health institution for a period of time sufficient to conduct a mental health evaluation; then a hearing is held to determine whether involuntary *civil* commitment is appropriate.⁵⁵ If the evaluation results indicate, and the court agrees, that the acquittee is not a fit subject for commitment (i.e., he or she is not *presently* mentally ill and dangerous), he or she is released. On the other hand, if the acquittee is found to be a fit subject for civil commitment, the court can order that civil commitment proceedings be initiated. During these proceedings the insanity acquittee is accorded safeguards similar to those applicable to other civil commitment cases.⁵⁶

This general option includes such variations as different lengths of initial commitment, different allocations of responsibility for release decisions (e.g., the trial court, an appointed review board, the director of the hospital, or some combination), different provisions for conditional release, different frequencies of periodic review, various procedures for court-ordered outpatient treatment supervision following release, and different notification procedures. The full range of these variations, which may also apply in more restrictive options, has been examined

extensively elsewhere, and further discussion is beyond the scope of this guidebook.⁵⁷

The third dispositional option represents the most restrictive alternative insofar as the mandatory commitment is not for the purpose of mental health evaluation to determine whether sufficient grounds exist to pursue civil commitment, but instead constitutes a "criminal commitment" that continues the jurisdiction of the *criminal* court that "acquitted" the defendant. At least twelve states provide some type of mandatory commitment for insanity acquittees under the control of the criminal trial court. Some states limit the length of confinement to the maximum criminal sentence that may have been imposed had the insanity acquittee been found guilty; others, like the District of Columbia, allow indeterminate commitment.

A recent U.S. Supreme Court decision may signal a trend toward the restrictive end of the continuum for dealing with insanity acquittees. On June 29, 1983, the United States Supreme Court issued its decision in *Jones v. United States*, which addressed the question of whether an insanity acquittee who had been automatically committed to a mental hospital can be held there for a period of time longer than that to which he or she could have been sentenced upon conviction of the crime charged.⁵⁸ In the 5-to-4 decision, which is destined to become a landmark for future litigation and legislation, the Court ruled that an individual who successfully bears the burden of proving himself insane and is acquitted by reason of insanity cannot only be automatically committed under a less rigorous standard of proof and with different procedures than those used in involuntary civil commitment, but also can be held longer than the maximum time he or she might have been sentenced to prison if convicted.

The case involved Michael A. Jones, who was arrested on September 19, 1975, for attempting to steal a coat from a department store in the District of Columbia. Jones pleaded and was found "not guilty by reason of insanity" and has been, with the exception of a brief period of out-patient care, in St. Elizabeths Hospital or the Correctional Center in Washington, D.C., since March 12, 1976. Because attempted shoplifting is a misdemeanor punishable by a maximum prison sentence of one year, Jones would have been set free no later than a year after his trial if he had been convicted of the charge.

In the District of Columbia, a criminal defendant who successfully invokes the insanity defense is automatically committed to a mental hospital. Within fifty days of commitment, and every six months thereafter, the acquittee is entitled to a "release" hearing at which he or

she has the burden of proving, by a preponderance of the evidence, that he or she is no longer mentally ill or dangerous. Jones did not specifically contest the District of Columbia's authority to commit him automatically to a mental institution but argued that his criminal trial was "not a constitutionally adequate hearing to justify *indefinite* commitment."⁵⁹ The Supreme Court, however, recognized the interest of the government in such commitment of insanity acquittees and concluded that a "finding of not guilty by reason of insanity is a sufficient foundation for commitment of an insanity acquittee for the purposes of treatment and the protection of society."⁶⁰

The major contention of Jones was that the confinement of an insanity acquittee beyond the maximum period he or she could have been imprisoned if convicted of the offense, without the procedural protections available to civilly committed persons, constitutes a denial of due process. The majority of the court rejected this argument, ruling that the hypothetical maximum prison term is an irrelevant consideration in the disposition of an insanity acquittee. Significantly, the Court made no distinction between the commitment of those criminal defendants who were acquitted of felonies involving acts causing or threatening bodily harm and those who were acquitted of charges that pose relatively minimal threat to society (e.g., attempted shoplifting, deliberately overdrawing one's checking account, or cohabitation). The Court disagreed with the "petitioner's suggestion that the requisite dangerousness is not established by proof that a person committed a nonviolent crime against property."⁶¹

In part of his argument, Jones also contended that the prosecution should bear the burden of proving the need for his continued commitment by clear and convincing evidence. He argued that constitutional due process required that he either be set free after his hypothetical maximum sentence had elapsed or be considered a candidate for involuntary civil commitment.⁶² The Court rejected this argument, declaring that constitutional due process is not denied by distinguishing between civil commitments and insanity acquittees and by requiring the latter to bear the burden of proving that their release is justified.

Strongly disagreeing with the majority, Justice William Brennan wrote in his dissenting opinion that the Court began with the wrong question.

The issue . . . is not whether due process forbids treating insanity acquittees differently from other candidates for commitment The dispute before us, rather, concerns the question

whether the differences between insanity acquittees and other candidates for civil commitment justify committing insanity acquittees *indefinitely* . . . without the Government *ever* having to meet the procedural requirements of *Addington*.⁶³

Notwithstanding Justice Brennan's strong dissent, and notwithstanding the fear expressed by lawyers, psychologists, and psychiatrists that *Jones* will influence the lower courts to adopt restrictive procedures making it much easier to commit, and much harder to release insanity acquittees,⁶⁴ the Supreme Court's ruling in the case clearly authorizes automatic and indeterminate hospitalization of insanity acquittees who successfully bore the burden of proving their insanity at trial. However, while the Court authorizes a dramatically different treatment of insanity acquittees from that of candidates for involuntary civil commitment, it does not compel the states to follow such treatment. Indeed, a state may, if it so chooses, treat insanity commitments no differently from those of persons who are deemed mentally disturbed and dangerous but who have committed no crime. The impact of *Jones* on the lower courts and future legislation remains to be seen.

Notes to Chapter 2

1. Mont. Code Ann. § 46-14-102; Idaho Code § 18-207 (1982). In 1982, the Alabama legislature also abolished the insanity defense. Governor Fob James signed the bill abolishing the defense into law in August 1982, but Alabama's Court of Criminal Appeals held the legislation null and void on the basis of improper filing of the bill. The Governor's office reportedly kept the bill without giving it to the Secretary of State's office within the required 10 days after the Alabama legislative session ended, thereby accidentally pocket-vetoing the measure. It has not been reenacted at this writing. See "Crime Bill Signed on Time?" *National Law Journal*, September 27, 1982.

2. *Davis v. United States*, 160 U.S. 469 (1895); *Leland v. Oregon*, 343 U.S. 790 (1952); *Rivera v. Delaware*, appeal dismissed, 429 U.S. 877 (1976), (*Rivera v. State*, 351 A.2d 561 (Del. 1975)); accord, *Paterson v. New York*, 432 U.S. 197 (1977); *Mullaney v. Wilbur*, 421 U.S. 684 (1975); and *Fisher v. United States*, 328 U.S. 463 (1946).

3. The United States Supreme Court very recently broke its long silence on the insanity defense issue by ruling that individuals acquitted of an offense by reason of insanity may be automatically committed to a mental hospital and need not be discharged until they regain their sanity or are no longer a danger to themselves or society. Justice Lewis F. Powell, writing for the 5-4 majority in the case of *Jones v. United States*, stated that insanity acquittees "constitute a special class that should be treated differently" than persons not charged with criminal conduct. *Jones v. United States*, 463 U.S. —, 103 S.Ct. —, — L.Ed.2d —, 51 U.S.L.W. 5041 (1983). The law bearing on the highly charged question of what should be done with defendants following a "not guilty by reason of insanity" verdict will be discussed later in this chapter.

4. See: *Myths & realities: A report of the National Commission on the Insanity Defense* (Arlington, Va.: National Mental Health Association, 1983), at 44 (hereinafter cited as *National Commission*); A. S. Goldstein, *The insanity defense* (New Haven: Yale University Press, 1967), at 4-5 ("Unfortunately, the literature has been so polemical that it has not provided the raw materials for appraisal of claim and counterclaim.").

5. See generally: *Limiting the insanity defense: Hearings before the Subcomm. on Criminal Law of the Comm. on the Judiciary*, 97th Cong., 2nd Sess., on S.818, S.1106, S.1558, S.1995, S.2658, and S.2669, June 24, 30, and July 14, 1982 (hereinafter cited as *Congressional Hearings*, Volume 1); and *The insanity defense: Hearings before the Comm. on the Judiciary*, 97th Cong., 2nd Sess., on S.818, S.1106, S.1558, S.2669, S.2672, S.2678, S.2745, and S.2780, July 19, 28, and August 2, 4, 1982 (hereinafter cited as *Congressional Hearings*, Volume 2).

6. The Supreme Courts of three states (Washington, Mississippi, and Louisiana) declared unconstitutional provisions in their criminal codes that completely removed the issue of insanity from consideration at trial; *State v. Strasbourg*, 110 P. 1020 (Wash. 1910); *Sinclair v. State*, 132 So. 581 (Miss. 1931); *State v. Lange*, 123 So. 639 (La. 1929). One commentator, who favors abolition of the insanity defense, has argued, however, that these provisions in Washington, Mississippi, and Louisiana were found to be "constitutionally defective with respect to issues incidental to the insanity defense rather than to issues specifically relating to the abolition of the insanity plea"; A. L. Halpern, "Elimination of the exculpatory insanity rule: A modern societal need," in R. Sadoff (ed.), *Psychiatric clinics in North America: Special issue on forensic psychiatry*. Philadelphia: W.B. Saunders, 1983).

7. Mont. Code Ann. § 46-14-102.
8. Idaho Code § 18-207 (1982).
9. It may be more plausible, however, that if not convicted of homicide, Bill would be found guilty of a lesser crime, e.g., manslaughter.
10. J.H. Maynard, Assistant Attorney General of Montana. Prepared statement, *Congressional Hearings*, Volume 2, *supra* note 5, at 234.
11. Montana Criminal Law Information Research Center. Memorandum (no date), at 3.
12. "Guilt and responsibility" (editorial), *Wall Street Journal*, June 24, 1983 (quoting Towe).
13. T. E. Towe, letter dated November 30, 1981.
14. *Comment on Idaho's law abolishing the insanity defense*. Prepared for members of the Idaho legislature (no date); see also Leroy's and U.S. Senator Steven D. Symms' statements to the U.S. Senate Committee on the Judiciary, *Congressional Hearings*, Volume 1, *supra* note 5, at 306-20.
15. Since 1979, lack of *mens rea* has resulted in "five acquittals" in Montana. According to John MacMaster, staff attorney of the Montana Legislative Council, eight defendants would probably have been acquitted by reason of insanity in the same period had Montana not abolished the insanity defense. Information enclosed with letter to John Greacen, National Center for State Courts, August 3, 1983.
16. See generally American Bar Association Standing Committee on Association Standards for Criminal Justice, "Standard 7-6.1. The defense of insanity," *First tentative draft, criminal justice mental health standards* 260-73 (Washington, D.C.: American Bar Association, July 1983) (hereinafter cited as *ABA Standards*).
17. McNaghten's Case, 8 Eng. Rep. 718 (1843).
18. *Thompson v. Commonwealth*, 193 Va. 704, 717-18, 70 S.E.2d 284, 291-92 (1952).
19. See G. H. Morris, *The insanity defense: A blueprint for legislative reform* (Lexington, Mass.: Heath, 1975), at 20.
20. American Law Institute, Model Penal Code (Proposed Official Draft, 1962), Section 4.01, p. 74.
21. See S. J. Brakel, *The mentally disabled and the law* (3rd ed.) (Chicago: American Bar Foundation, in press).
22. *Durham v. United States*, 214 F.2d 874-75 (D.C. Cir. 1954).
23. N.Y. Penal Law § 30.05. One commentator has categorized the New York standard as a unique ALI-M'Naghten combination; Favole, R. J. "Mental disability in the American criminal process: A four issue survey," in J. Monahan and H. J. Steadman (eds.), *Mentally disordered offenders: Perspectives from law and social science* (New York: Plenum Press, 1983), at 264.
24. N.D. Cent. Code § 12-04-03 (1981); *State v. Jensen*, 251 N.W.2d 182 (N.D. 1977).
25. 399 A.2d 469, 476-77 (1979).
26. Several court decisions have discussed the practice of the prosecution's or the court's raising of the insanity defense, over the objections of defense counsel; see G. Morris, *supra*, note 19, at 41.
27. *Davis v. United States*, 160 U.S. 469, 493 (1895).
28. *Leland v. Oregon*, 343 U.S. 790, 797-798 (1952); and *Rivera v. Delaware*, appeal dismissed, 429 U.S. 877 (1976) (*Rivera v. State*, 351 A.2d 561 (Del. 1975)).
29. These data were acquired from a recent survey conducted by Professor Richard J. Bonnie of the University of Virginia and reported in an unpublished memorandum dated October 7, 1983.
30. Three states make references to the required burden of proof in their instructions to the jury. Customary expressions vary. For example, in Wisconsin: "reasonable certainty by greater weight of credible evidence"; Alabama: "reasonable satisfaction of jury"; and North Carolina: "satisfaction of jury." Wisc. Stat. Ann. § 971.15(3) (1971); Ala. Code § 15-16-2 (1981); N.C. Gen. Stat. § 15A-959(a) (1978). Although some condemn these expressions as equivalent to requirements of proof beyond a reason-

- able doubt, their purpose and convenience have been applauded by many scholars. See generally C. T. McCormick, *Handbook of the law of evidence* (St. Paul, Minn.: West Publishing Company, 1954).
31. For a lively exchange of viewpoints on the permissible limits of expert testimony, see R. J. Bonnie and C. Slobogin, "The role of mental health professionals in the criminal process: The case for informed speculation," 66 *Virginia Law Review* 427-522 (1980); N. G. Poythress, Jr., "Concerning reform in expert testimony: An open letter from a practicing psychologist," 6 *Law and Human Behavior* 1, 39-43 (1982); and S. J. Morse, "Reforming expert testimony: An open response from the tower (and the trenches)," 6 *Law and Human Behavior* 1, 45-47 (1982).
32. See, e.g., J. Ziskin, *Coping with psychiatric and psychological testimony* (Beverly Hills, Ca.: Law and Psychology Press, 1975); S. Morse, "Failed explanations and criminal responsibility: Experts and the unconscious," 68 *Virginia Law Review* 971 (1982).
33. The Supreme Court recently authorized the use of mental health expert testimony at sentencing hearings in capital offense cases, despite strong evidence that such testimony may be unreliable. *Barefoot v. Estelle*, ____ U.S. ____, S. Ct. ____, L.Ed. 2d ____, 51 U.S.L.W. 5189 (1983). This case focused on the issue of future dangerousness and its prediction by mental health experts. A discussion of this complex issue, which has long been a source of controversy, is far beyond the scope of this guidebook. See generally J. Monahan, *The clinical prediction of violent behavior* (U.S. Government Printing Office, 1981).
34. See C.A. Hagan, "The insanity defense: A review of recent statutory changes," 3 *Journal of Legal Medicine* 638 (1982).
35. See *supra*, note 32.
36. W.J. Curran, "Courtroom presentation of forensic scientific evidence." In W. J. Curran, A. P. McGarry, and C. S. Petty (eds.), *Modern legal medicine, psychiatry, and forensic science* (Philadelphia: F.A. Davis Co., 1980), 1279, at 1281; cf. V. Hiday, "Are lawyers enemies of psychiatrists? A survey of civil commitment counsel and judges," 140 *American Journal of Psychiatry* 323 (1983).
37. *People v. Drossart*, 297 N.W. 2d 863, 869 (Mich. 1979).
38. *Washington v. United States*, 390 F.2d 444 (D.D.C., 1967); see also D. L. Bazelon, "Psychiatrists and the adversary process," 230 *Scientific American* 6, pp. 18-23 (1974).
39. Michigan Public Act 180 (1975, § 20a (6)).
40. California Penal Code, § 1027 (1982).
41. "A verdict of not guilty by reason of insanity establishes two facts: (1) the defendant committed an act that constitutes a criminal offense, and (2) he committed the act because of mental illness." *Jones v. United States*, 463 U.S. ____, 103 S. Ct. ____, L. Ed. 2d ____, 51 U.S.L.W. 5041 (1983). Increased public awareness of the insanity defense has led many states to require express findings by the jury that the defendant did in fact commit a criminal act. The District of Columbia Code, § 24-301(d)(1), for example, allows automatic commitment of an insanity acquittee only if the defendant raised the insanity defense. This provision apparently assumes that if the defendant did not commit the criminal behavior for which he or she is seeking acquittal by reason of insanity, the insanity defense would not have been raised affirmatively. D.C. Code § 24-301(j)(1973); see also, Wyo. Stat. § 7-11-305(a)(1977); N.Y. § 220.15(5a).
42. Wyo. Stat. § 7-11-305(a)(1977); Wis. Stat. Ann. § 971.17(1), § 971.175 (West, 1971).
43. *State v. Johnson* 399 A.2d 469, 470 n.1, 478 n.11 (R.I. 1979); *State v. Nault*, 314 A.2d 627, 628 n.1 (R.I. 1974). Ind. Code Ann. § 35-36-2-3(3) (Burns 1981).
44. Michigan in 1975; Indiana in 1980; Illinois in 1981; Alaska, Connecticut, Delaware, Georgia, Kentucky, and New Mexico in 1982; Pennsylvania, South Dakota, and Utah in 1983. Maryland has a judicially developed verdict of "guilty but insane"; *Langworthy v. State*, 399 A.

2d 578 (Md. 1979).

45. 1975 Mich. Pub. Acts 180. See also G. A. Smith and J. A. Hall, "Evaluating Michigan's guilty but mentally ill verdict: An empirical study," 16 *University of Michigan Journal of Law Reform* 77 (1982).

46. Mich. Comp. Laws Ann., § 768.36 (1) (3) (1982); Mich. Stat. Ann. § 28.1059 (1975).

47. *People v. McLeod*, 288 N.W.2d 909 (Mich. 1980).

48. Alaska Stat. § 12.47.040; Conn. Gen. Stat. § 53a-47; Del. Code Ann. 11 § 3905; Ga. Code Ann. § 17-7-131; Ill. Rev. Stat. ch. 38, § 6-2(c); Ind. Code, § 35-36-2-3; Ky. Rev. Stat. Ann. § 504.120; N.M. Stat. Ann. § 31-9-3; 18 Pa. C.S.A. § 314; S.D. Comp. Laws Ann. § 23A-7-2; Utah Session Laws, ch. 49, § 77-35-21.

49. States that are considering GBMI legislation at this writing, or have done so in the past, include Colorado, Florida, Hawaii, Kansas, Maryland, New Hampshire, New Jersey, Ohio, Virginia, and Wisconsin. Courts in Maryland have developed the new verdict without legislative enactments.

50. H.R. 5395, H.R. 6702, H.R. 6709, H.R. 6716, and H.R. 6717.

51. Involuntary civil commitment is the legal and psychosocial process whereby an individual alleged to be mentally disabled and dangerous, but who has not been charged with a crime, is restrained, cared for, and treated against his or her will, usually in a hospital, presumably for his or her own well-being and the protection of others. See generally I. Keilitz and R. Van Duizend, "Current trends in the involuntary civil commitment of mentally disordered persons," *Rehabilitation Psychology* (in press).

52. See Note, "Commitment following insanity acquittal," 94 *Harvard Law Review* 605 (1981); see also S. J. Brakel, *The mentally disabled and the law* (3rd ed.) (Chicago: American Bar Foundation, in press).

53. *Bolton v. Harris*, 395 F.2d 642 (D.C. Cir. 1968) (relying on *Baxstrom v. Herold*, 383 U.S. 107 (1966) and *Specht v. Patterson*, 386 U.S. 605 (1967)). Similar reasoning as applied in *Bolton*, *id.*, was also

used by the highest appellate courts of a number of states in construing their insanity-acquittal commitment statutes; see: *People v. Lally*, 224 N.E. 2d 87 (New York 1966); *Wilson v. State*, 287 N.E. 2d 87 (Indiana 1972); *State v. Clemons*, 515 P.2d 324 (Arizona 1973); *State ex rel. Kovach v. Schubert*, 219 N.W. 2d 341 (Wisconsin 1974), *cert denied*, 419 U.S. 1130 (1975); *People v. McQuillan*, 221 N.W. 2d 569 (Michigan 1974); *State v. Krol*, 314 A.2d 289 (New Jersey 1975). These rulings led to the replacement of mandatory commitment with requirements of civil commitment procedures and criteria.

54. *United States v. Gay*, 522 F. 2d 429, 433 (6th Cir. 1979); *United States v. Alvarez*, 519 F. 2d 1036, 1048 (3d Cir. 1975).

55. States that provide for hearings at the time of acquittal differ as to whether such hearings are mandatory or discretionary. See D. H. J. Hermann and Y.J. Sor, "Convicting or confining: Alternative directions in insanity law reform," *Brigham Young Law Review* n. 446 and accompanying text (in press, 1983).

56. See generally Standard 7-7.1 and accompanying commentary, *ABA Standards*, *supra* note 16, at 301-4.

57. See generally Note, "Rules for an exceptional class: The commitment and release of persons acquitted of violent offenses by reason of insanity," 57 *New York University Law Review* 281 (1982); B. Kirschner, "Constitutional standards for release of the civilly committed and not guilty by reason of insanity: A strict scrutiny analysis," 20 *Arizona Law Review* 233 (1978); Herman and Sor, *supra* note 55; and *ABA Standards*, *supra* note 16, at 301-4.

58. *Jones v. United States*, 463 U.S. —, 103 S. Ct. —, — L. Ed. 2d —, 51 U.S.L.W. 5041 (1983).

59. *Id.* at 5043-4 (emphasis added).

60. *Id.* at 5044. It is important to note that the *Jones* decision applied to a case where the defendant first raised the insanity defense and then successfully carried the burden of proof of insanity by a preponderance of the evidence. The

Court found that his acquittal, under these circumstances, supports an inference of continued mental disorder and is sufficient reason for continued confinement. However, in those states where the prosecution bears the burden of proving a defendant's sanity beyond a reasonable doubt, the failure to prove a defendant's sanity may not be a sufficient foundation for the Court to have declared as constitutional an insanity acquittee's automatic commitment to an institution.

61. *Id.* at 5044. The Court went on to say that violence, however that term may be defined, "has never been held to be a prerequisite for a constitutional commitment." But compare Justice Brennan's dissent on this point: "[T]here is room for doubt whether a single attempt to shoplift and a string of brutal murders are equally accurate and equally permanent predictors of dangerousness." *Id.* at 5048. See also: *Benham v. Edwards*, 678 F.2d 511, 518 (5th Cir. 1982) ("The fact of

the crime is merely relevant to the dangerousness criteria; it is not a finding that the dangerousness criteria has been met.").

62. Were Jones considered subject to involuntary civil commitment, the government would have to justify continued hospitalization with clear and convincing evidence that he is presently mentally ill and dangerous.

63. *Supra* note 58, at 5046 n.3, 5048. Dissenting opinion by Justice Brennan, with whom Justices Marshall and Blackmun joined (footnotes deleted, emphasis in original). Justice Stevens issued a separate dissenting opinion. In *Addington v. Texas*, 441 U.S. 418 (1979), the Supreme Court ruled that involuntary civil commitment requires the Government to bear the burden of proof by clear and convincing evidence.

64. Cf. S. Cunningham, "High court distorts results of research on dangerousness," 14 *APA Monitor* 9 (1983).

Chapter 3

AN ANALYSIS OF REFORMS AND POLICY OPTIONS

The previous chapter surveyed the existing law on the insanity defense, focusing on six overlapping areas central to this issue. This chapter will consider in more detail the most recent changes in the insanity defense as well as current proposals for reform in the same six areas, i.e., abolition of the insanity defense, definitions and standards, burdens, expert testimony, verdicts, and dispositions.

Policymakers facing the insanity defense issue are confronted with at least three basic questions. Is the special defense of insanity necessary at all? If it is to be retained, should it be supplemented by an alternative plea and verdict? And, finally, should the special defense of insanity be retained but modified?

Our first consideration is the most drastic departure from the traditional insanity defense, namely, its total elimination as an independent, affirmative defense in criminal proceedings. Next, we will consider a statutory measure that does not eliminate the insanity defense but supplements it with an alternative plea and verdict: the "guilty but mentally ill" (GBMI) legislation enacted in twelve states. Finally, we will consider some of the more moderate approaches to reform. We must emphasize that recent legislation, court rulings, and reform proposals are discussed here more as an aid to understanding of available policy options than as a comprehensive picture of the reform movement in these areas.

ABOLITION OF THE INSANITY DEFENSE

Abolition of the insanity defense has received exhaustive attention in the literature, has been proposed by legislatures at both the federal and state level, and has been enacted into law in Idaho and Montana.

Three questions are central to the disagreements between proponents and opponents of abolition of the insanity defense: (1) Is an independent defense of insanity required as a matter of basic fairness? (Or, to put it in the negative, would abolition of the defense prevent the exercise of humane moral judgment in criminal cases?) (2) Is the *mens rea* approach,¹ proposed by abolitionists and enacted into law in Montana and Idaho, so very restrictive as to curtail legitimate claims of mental disorder and nonresponsibility for crime? (3) At a practical level, would the *mens rea* approach, when combined with close attention to the relevance of mental disorders at the dispositional stage, be any more efficient, equitable, and satisfactory to the public than the insanity defense?

A Question of Fairness

This question has expansive constitutional, theoretical, moral, and ethical dimensions, and the answers are perhaps the most difficult to fathom. Given the state supreme court rulings in *State v. Strasbourg* (Washington, 1910), *Sinclair v. State* (Mississippi, 1931), and *State v. Lange* (Louisiana, 1929),² it appears unlikely that provisions that completely disallow the issue of mental disturbance to be raised during a criminal trial would overcome constitutional objections, though at least one commentator has argued otherwise.³ Further, no one has seriously proposed the complete disallowance of mental health expert testimony in criminal proceedings. Hence, the *mens rea* limitation is, for all practical purposes, the approach advocated by proponents of abolition,⁴ and the relevant question is limited to whether the *mens rea* limitation, such as that provided in the Montana and Idaho laws, is fair.

In abolishing the insanity defense, Montana and Idaho have substituted an independent insanity defense with other procedures to deal with mentally disturbed individuals who have engaged in harmful conduct, i.e., the admission of evidence of mental aberration to negate *mens rea*, and further exploration of a defendant's mental health problems at the dispositional rather than the trial stage of the criminal proceedings. Arguments have been made that these procedures violate due process and the constitutional prohibition against cruel and unusual punishment. The preliminary commentary accompanying the tentative insanity defense standard⁵ of the American Bar Association's Criminal Justice Mental Health Standards Project presents such arguments.

The basis for the insanity defense is a moral one and this standard retains insanity as a defense to criminal responsibility

in order to preserve moral culpability as a fundamental premise for imputing guilt and imposing punishment. If culpability or blameworthiness is viewed as an implied element of *mens rea*, then insanity negates this element of the offense and no crime exists. As a defense to an element, it must be allowed. If blameworthiness is viewed as an issue distinguishable from *mens rea*, then the ultimate justification for the defense must be a moral one, a sense that basic fairness and decency require its retention. It affronts our moral instincts to brand as criminal one found to be blameless, despite the harmfulness of his act. This issue of basic fairness may be of constitutional dimension. Substantive due process is ultimately measured against just such sentiments as to what is fair and acceptable in a just and humane society. Again, punishment may be viewed as cruel and unusual, in violation of the eighth amendment, when visited upon those who, while harmful in their acts, have been found mentally incapable of blameworthy choices. . . . Unless the courts [in Montana and Idaho] interpret "knowledge or intent" to imply *sane* and *blameworthy* knowledge or intent, the constitutional infirmity [of the laws of these two states] would appear to remain.⁶

Countering the argument that the *mens rea* limitation may be constitutionally objectionable is the conclusion, supported by the arguments of Professor Norval Morris and other legal scholars, that abolition would "neither deprive a defendant of his Fourteenth Amendment right to due process nor impinge upon the Eighth Amendment proscription against cruel and unusual punishment."⁷

Although challenges to the constitutionality of the *mens rea* limitation have been unsuccessful in a few cases in the lower courts of Montana,⁸ the question of the constitutionality of abolition has yet to be addressed by the supreme courts of Montana, Idaho, or the United States. Thus, polemics aside, the issue of the constitutionality of the abolition of the insanity defense and the substitution of a *mens rea* approach of the type used in Idaho and Montana remains unsettled.

Apart from unsettled constitutional issues, is the insanity defense "essential to the moral integrity of the criminal law," as has been recently argued by Professor Richard J. Bonnie, an influential proponent of the retention of the insanity defense?⁹ He states: "The moral core of the defense must be retained, in my opinion, because some defendants afflicted by severe mental disorder who are out of touch with reality and are unable to appreciate the wrongfulness of their acts cannot justly be blamed and do not therefore deserve to be punished."¹⁰ The commentary

accompanying the insanity defense standard of the American Bar Association's Criminal Justice Mental Health Standards Project, quoted above, reflects Professor Bonnie's argument that retention of the insanity defense is required to uphold the moral fiber of the criminal law. As we shall discuss later in this chapter, this view appears to be dominant among legal scholars.

Not surprisingly, the contention that the insanity defense is essential to the moral integrity of the law is disputed by abolitionists.¹¹ Professor Norval Morris, for example, contends that the "moral issue sinks into the sands of reality."

[W]e are brought to the central issue—the question of fairness, the sense that it is unjust and unfair to stigmatize the mentally ill as criminals and to punish them for their crimes. The criminal law exists to deter and to punish those who would or who do choose to do wrong. If they cannot exercise choice, they cannot be deterred and it is a moral outrage to punish them. The argument sounds powerful but its premise is weak.

Choice is neither present nor absent in the typical case where the insanity defense is currently pleaded; what is at issue is the degree of freedom of choice on a continuum from the hypothetically entirely rational to the hypothetically pathologically determined—in states of consciousness neither polar condition exists.

... Certainly it is true that in a situation of total absence of choice it is outrageous to inflict punishment; but the frequency of such situations to the problems of criminal responsibility becomes an issue of fact in which tradition and clinical knowledge and practice are in conflict.¹²

Ultimately, policymakers and the public must determine whether the insanity defense is an appropriate and valuable expression of society's moral purpose or whether, as Professor Morris puts it, "ordinary *mens rea* principles can well carry the freight."¹³ This determination may rest less on legal theory and moral reasoning than on the answers to practical and empirical questions such as those addressed in the next two sections of this chapter.

A Question of Restrictiveness

Whether the *mens rea* approach constitutes a curtailment of claims of mental disorder and nonresponsibility for crime may be as much a question of actual practice as of legal theory, moral reasoning, and the

written rules of substance and procedure. The scant data from Montana may tell us a little. According to John MacMaster, staff attorney of the Montana Legislative Council, since 1979 five defendants have been found "not guilty by reason of lack of mental state," whereas eight defendants *may* have been expected to be acquitted by reason of insanity during this period had Montana retained the insanity defense.¹⁴ These are small numbers, indeed, but they suggest that the *mens rea* approach as applied in Montana has not precluded consideration of mental disturbance related to an offense. Presumably, those defendants in Montana who were unsuccessful in presenting evidence of mental disorder sufficient to negate *mens rea* during trial had another opportunity to raise such evidence at the dispositional stages following a verdict or plea of "guilty but unable to appreciate the criminality of conduct or conform conduct to requirements of law."¹⁵

Unfortunately, the facts of these cases are not readily available. Thus, the meaning of the raw data is unclear. Though it may be safe to assume that consideration of mental disorder was probably not altogether precluded, the question of the restrictiveness of the *mens rea* approach as a matter of law, if not practice, remains unanswered. It is altogether possible that in at least one or two of these cases, the Montana law was, in effect, nullified, i.e., the defendants were acquitted despite the law, not in compliance with it, as a result of prosecutorial and judicial discretion, or jury nullification. Professor Bonnie, and others who raise moral objections to the *mens rea* approach, are not convinced that unjust convictions will be avoided, and a morally acceptable result achieved, by such procedures. Though not questioning the general legitimacy of discretionary decision-making in criminal proceedings, Bonnie argues that if a defendant's acquittal is considered morally required, the law should provide a legal basis for exculpation—i.e., an independent insanity defense.¹⁶

Notwithstanding arguments in constitutional law and legal and moral theory, eloquently propounded by both proponents and opponents of abolition (often using hypothetical examples or cases from jurisdictions in states other than Montana and Idaho¹⁷), has the *mens rea* approach actually restricted consideration of mental disturbance in criminal trials in Montana and Idaho? Beyond the scant information available from Montana that considerations of mental disturbance are not precluded, we simply do not have the empirical data to answer this question. Policymakers in Montana and Idaho are encouraged to collect these data, and policymakers elsewhere would be prudent to keep a close watch on these two states' experience with abolition.

Related to the question of the restrictiveness of the *mens rea* approach is, of course, the broad and far more troubling question of whether the *mens rea* approach is really any "better" than the insanity defense. One might ask whether this approach, instead of limiting inappropriate claims of mental disorder (as probably intended by the drafters of the Montana and Idaho laws), may actually increase the opportunities for asserting the relevance of mental illness to criminal behavior. Concern over this possibility was raised by Senator Heflin in his questioning of Idaho Lieutenant Governor David H. Leroy, then the Idaho Attorney General, during the Senate hearings on the insanity defense.¹⁸ This possibility was also suggested by James Wickham, an attorney with the Idaho Attorney General's Office, when he asserted that the Idaho legislature

...did not abrogate the common law principle that the severely mentally ill are not responsible for otherwise criminal conduct. Indeed it broadened the cases in which the defendants will be acquitted, the experts who may testify, and conferred broad discretion to trial judges to formulate jury instructions on the questions.¹⁹

It may be that the Montana and Idaho courts (and courts in other states where legislatures are considering the *mens rea* approach) will have many more claims of mental disturbance to deal with than their legislatures bargained for when they embraced the *mens rea* approach, given the existence of several factors: (1) the increasing comfortableness of defendants and their lawyers with the *mens rea* approach over time and their increasing awareness of opportunities available to them under this approach,²⁰ (2) the difficulty of attaching a precise meaning to *mens rea*,²¹ and (3) a possibility that *mens rea* will be defined more broadly and generally in the absence of an independent, exculpatory doctrine of insanity. Indeed, the legislatures in Montana and Idaho may have encouraged the very devil they were trying to exorcise.

A Question of Efficiency, Effectiveness, and Public Satisfaction

One purpose of the abolition of the insanity defense, and the adoption of the *mens rea* approach, according to its advocates, is to streamline criminal trials and to eliminate the "complicated, cumbersome, and illogical process" which they see engendered by the insanity defense.²² Another important purpose cited is the restoration of the public confidence in our courts and in our criminal justice system which

was presumably eroded by the perceived abuses of the insanity defense.²³

But will the *mens rea* alternative prove to be any more efficient, effective, and satisfactory to the public? Will the *mens rea* doctrine, for example, prove as difficult to manage as the exculpatory doctrine of insanity once the former doctrine must, at a procedural and practical level, accommodate evidence of mental disturbance? Are such terms as "knowingly," "purposely," "recklessly," or "negligently," when applied to the non-physical element that combines with the act of the accused to make up a crime, any less elusive or confusing than the phrase "unable to appreciate the wrongfulness" when used to define insanity? What will be the impact of jury instructions regarding presumptions and inferences applicable to *mens rea*?²⁴ Absent an independent insanity defense, to what extent will evidence of mental disturbance be considered with regard to lesser included offenses, e.g., when first-degree murder is reduced to second-degree murder because mental disturbance negated premeditation?²⁵

Judging from the testimony presented during the Senate hearings on the insanity defense, these questions of procedure and practice may prove most troublesome to proponents of abolition. For example, Senator Heflin again questioned Idaho Attorney General Leroy (now Idaho Lieutenant Governor), this time about whether the *mens rea* approach adopted in Idaho would open up "more and more use of insanity as a defense tool for lawyers and for psychiatrists" especially in regard to consideration of mental illness in proving all elements of a crime and lesser included offenses.²⁶

Unfortunately, the case data were not available to Mr. Leroy to answer the question. At the level of practice, there simply seem to be too many unsettled issues to allow a determination of whether the *mens rea* approach is an improvement over the insanity defense.

However, as Supreme Court Justice Brandeis stated, "one of the happy incidents of the federal system [is] that a single courageous state may, if its citizens choose, serve as a laboratory and try novel social and economic experiments without risk to the rest of the country."²⁷ Legislators in Montana and Idaho were apparently willing to experiment. Clearly, one option available to policymakers is to await the results of the experiment in these two states.

An Emerging Consensus

The abolition of the special exculpatory defense of insanity and the restriction of admissible mental health evidence solely to the issue of

mens rea has not, with one notable exception, received the support of major professional groups. In what may have been a unique event, the National Mental Health Association, the American Psychiatric Association, and the American Bar Association agreed in their opposition to proposals to abolish the insanity defense.

The National Commission on the Insanity Defense, convened by the National Mental Health Association, recommended that the insanity defense be retained in all jurisdictions.

The Commission strongly believes that this virtual elimination of the insanity defense is unnecessary for the protection of the public, unwise as a matter of public policy and a radical departure from one of the basic precepts of our jurisprudence. . . . [T]he insanity defense, in some form, has been a part of our Anglo-American justice system for centuries.

Certainly proposals which seek to abolish this defense should bear a significant burden of proof in order to demonstrate the urgent need to simply eliminate this concept from our jurisprudence. The Commission does not believe that the proponents of abolition have demonstrated in any fashion that they have met that burden.²⁸

In a December 1982 statement on the insanity defense, the American Psychiatric Association also recommended that the insanity defense be retained in some form:

The insanity defense rests upon one of the fundamental premises of the criminal law, that punishment for wrongful deeds should be predicated upon moral culpability. However, within the framework of English and American law, defendants who lack the ability (the capacity) to rationally control their behavior do not possess free will. They cannot be said to have "chosen to do wrong." Therefore, they should not be punished or handled similarly to all other criminal defendants. Retention of the insanity defense is essential to the moral integrity of the criminal law.²⁹

In February, 1983, the American Bar Association approved a new substantive test for insanity as recommended by its Standing Committee on Association Standards for Criminal Justice and its Commission on the Mentally Disabled. The policy statement endorsed by the ABA's House of Delegates states:

RESOLVED, that the American Bar Association approves, in principle, a defense of nonresponsibility for 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.³⁰

After reviewing the American Bar Association policy positions and the position statement of the American Psychiatric Association, the Committee on Legal Issues of the American Psychological Association endorsed in principle the position of the American Bar Association that the insanity defense be retained.³¹

Swimming against the tide of this professional opinion, the American Medical Association at its interim meeting in Los Angeles on December 6, 1983, adopted a policy favoring the abolition of the insanity defense.³² The report upon which the AMA's policy was based concluded:

[The insanity defense] has outlived its principal utility, it invites continuing expansion and corresponding abuse, it requires juries to decide cases on the basis of criteria that defy intelligent resolution in the adversary forum of the courtroom, and it impedes efforts to provide needed treatment to mentally ill offenders. As a result, it inspires public cynicism and contributes to erosion of confidence in the law's rationality, fairness, and efficiency."³³

Under the AMA's proposal, the independent defense of insanity would be abolished and replaced by provisions "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." Civil commitment criteria would apply to confinement of those defendants "acquitted" under these provisions, with the presumption of continuing dangerousness for violent offenders. If a defendant is unsuccessful in attempts to negate *mens rea*, his or her mental impairments would still be "considered as a factor in mitigation of sentence, permitting hospitalization for treatment in lieu of imprisonment up to the maximum term prescribed by law for the offense of which he was convicted."³⁴

Some observers felt that the AMA's position could be interpreted as an emotional over-reaction to the Hinckley case. For example, a spokesman for the American Psychiatric Association asserted that AMA's call for the abolition of the insanity defense "could be perceived as a punitive strike against the mentally ill, inconsistent with several centuries of Anglo-American criminal law and, we believe, an unfair way to adjudicate the responsibility of severely mentally ill persons."³⁵

In response, an official of the AMA admitted some concern over the fact that the AMA's position conflicts with that of the other major professional groups but contended that the AMA's intention in taking its position favoring abolition was to "stimulate further debate" on a view that "has not been adequately considered."³⁶

In addition to the calls for abolition, opposition to the traditional insanity defense took two other major forms: (a) supplementing of the insanity defense by the provision of an alternative plea and verdict designed to undercut that defense and (b) retention of an affirmative defense of insanity in criminal proceedings with some modifications in the applicable standard for insanity and procedures by which the defense is administered. These forms of opposition, which appear to be more moderate responses to the insanity defense issue and from which flow other public policies that may be more or less palatable to different policymakers in different political climates, will be considered next.

SUPPLEMENTING THE INSANITY DEFENSE

Triers of fact in the twelve states that have enacted "guilty but mentally ill" (GBMI) statutes have four possible verdicts from which to choose: guilty, not guilty, not guilty by reason of insanity (NGRI), and guilty but mentally ill (GBMI). Supporters of the GBMI verdict contend that the supplemental verdict is desirable because jurors who are given the choice of a GBMI verdict are able to determine that a defendant, although not legally insane, needs mental health care and yet they need not absolve him or her of criminal responsibility. For example, proponents in Illinois claim that the verdict "may more quickly channel convicted defendants who need psychiatric help, and who might otherwise be in the prison system for a long period of time, into the Department of Corrections psychiatric facility. . . ."³⁷

The GBMI verdict appears to be preferred by those who view the use of the insanity defense in controversial cases like *Hinckley* as an abuse of the criminal justice system. Indeed, when questioned after their decision in the *Hinckley* case, several jurors stated that they would have preferred to reach a GBMI verdict had that option been available to them.³⁸ It appears that a major intent of GBMI legislation is to help prosecutors convict defendants who otherwise would have been acquitted by reason of insanity. That is, while the GBMI plea and verdict supplements rather than supplants the insanity defense in the states that have enacted GBMI legislation, it is often seen as having supplanted it in practice.³⁹

However, it is important to note that juries have traditionally been

reluctant to reach NGRI verdicts. Defense attorneys use the insanity defense only as a last resort. Contrary to clinical anecdote and media hyperbole, the insanity defense is infrequently asserted, and when asserted, is rarely successful.⁴⁰ Such findings support the contention of GBMI opponents that criminal defendants in large numbers are not in fact unjustly using the insanity defense to escape punishment.

Controversial and highly publicized cases aside, it is suggested that jurors—regardless of the availability of the GBMI verdict—will rely on their common sense and moral judgment in coming to an NGRI verdict only in those extreme and rare cases where a defendant clearly was unable to appreciate the unlawfulness of his or her conduct and was unable to conform that conduct to the requirements of the law. Hence, it is conceivable that GBMI verdicts may not curtail the successful insanity pleas, but simply add an option that unduly complicates disposition and creates a special subpopulation of mentally ill offenders for the already overburdened departments of mental health and corrections.

There is some empirical support for the above suggestion. The results of a recent empirical study of Michigan's GBMI verdict indicate that the additional verdict has not achieved its intended purposes, including that of reducing the number of defendants found NGRI.

Proponents and critics of the GBMI verdict anticipated that the verdict would cause a substantial decrease in the number of NGRI acquittals. An empirical analysis of the GBMI verdict indicates that the verdict is not functioning as expected. The NGRI verdict continues to be used in Michigan courts. Thus, to the extent the GBMI verdict was intended to decrease NGRI acquittals, it has failed.

Three additional conclusions can be drawn from this study. First, most defendants found GBMI would probably have received guilty verdicts in the absence of the GBMI statute. Second, although the verdict was designed for jury trials, over 60% of those defendants found GBMI have come through plea-bargains and another 20% have come from bench trials. Finally, the use of the state-operated Forensic Center is an influential factor in any case in which insanity is raised as a defense. For this reason, states that do not possess a facility like the Michigan Forensic Center may not have the same experience with the GBMI statute as Michigan.⁴¹

Although the verdict of "guilty but mentally ill" has been adopted in twelve states, this alternative, with only a few exceptions,⁴² has

received little support from scholars and professionals outside those states. Opponents of the verdict charge that it does little to rectify perceived problems with the insanity defense and simply pushes the problem of dealing with mentally disturbed individuals onto the states' corrections system. Although few data exist to counter this charge, the recently completed study in Michigan and preliminary reports from Illinois and Indiana suggest that the treatment promised to recipients of the GBMI verdict is seldom provided. Interestingly, a GBMI bill in the Kansas legislature was "shelved because of the significant capital costs which the state would incur in providing the mental facilities for this type of criminal defendant."⁴³ The Honorable Irving R. Kaufman, Judge of the United States Court of Appeals for the Second Circuit and author of the landmark opinion in *United States v. Freeman*, which established the standard for insanity pleas in the United States District Courts of New York, Connecticut, and Vermont, recently made the following observation on this point:

[P]roper application of a guilty but mentally ill verdict requires that the states commit the necessary resources to house and treat those recommended for psychiatric supervision. If we are serious about treating the ills of the insanity laws, we must be willing to pay the medical bills for the cures.⁴⁴

Professor Richard Bonnie, in a statement to the Committee on the Judiciary of the United States Senate, objected to the GBMI verdict on similar grounds. After suggesting that the primary dispositional objective of the GBMI verdict was to facilitate the treatment of mentally disordered offenders, he stated:

This is a worthy goal, but the separate verdict is an ill-conceived way of achieving it. It makes no sense for commitment procedures to be triggered by a jury verdict based on evidence which does not even relate to the defendant's present mental condition. Nor is this a proper currency for plea bargaining. Decisions about the proper *placement* of convicted offenders should be made after, and independent of the entry of the conviction, and should be based entirely on the offender's need for therapeutic restraint in a mental health facility.⁴⁵

The National Mental Health Association's National Commission on the Insanity Defense recommended that the GBMI verdict not be adopted in any jurisdiction.

The Commission finds that the "guilty but mentally ill" verdict is unnecessary for the appropriate disposition of defendants, and

that it is a misleading verdict which will not serve to simplify criminal trials. The Commission found no evidence to suggest that the supplemental "guilty but mentally ill" verdict substantially addresses the public concerns about the insanity defense or improves the criminal justice system.⁴⁶

The Commission exposed the possible misconception that the GBMI verdict guarantees that defendants who receive this verdict will receive mental health treatment. Findings of the Commission indicate that mental health services are no more readily available for those found "guilty but mentally ill" than for other convicted felons.⁴⁷ It noted:

[T]he "guilty but mentally ill" verdict does not ensure in any way that persons found guilty under it, as opposed to persons found simply guilty, will be treated any differently when the trial is over. If persons convicted under either statute are treated the same in terms of disposition, we have developed different verdicts without any distinction. This may further mislead juries into believing that a "guilty but mentally ill" verdict will somehow insure treatment and at the same time protect the community.⁴⁸

Both the American Psychiatric Association (APA) and the American Bar Association (ABA) opposed the GBMI formulation. The APA opposed adoption of a GBMI verdict in their December 1982 statement on the insanity defense approved by their Board of Trustees as official policy.

The "guilty but mentally ill" plea may cause important moral, legal, psychiatric, and pragmatic problems to receive a white wash without fundamental progress being made. We note that under conventional sentencing procedures already in place, judges may presently order treatment for mental health offenders in need of it. Furthermore, a jury verdict is an awkward device for making dispositional decisions concerning a person's need for mental health treatment.⁴⁹

At its midyear meeting in New Orleans in February 1983, the ABA adopted three recommendations on the insanity defense submitted jointly by the Standing Committee on Association Standards for Criminal Justice and the Commission on the Mentally Disabled. Recommendation 3 was that the ABA oppose the "enactment of statutes which supplant or supplement the verdict of 'Not Guilty by Reason of Insanity' with an alternative verdict of 'Guilty But Mentally Ill.'"

[T]he "guilty but mentally ill" verdict offers no help in the difficult question of assessing a defendant's criminal

responsibility. This determination in insanity cases is essentially a moral judgment. If in fact the defendant is so mentally diseased or defective as to be not criminally responsible for the offending act, it would be morally obtuse to assign criminal liability. . . . [T]he "guilty but mentally ill" verdict also lacks utility in the forward-looking determination regarding disposition. Guilty defendants should be found guilty. Disposition questions, including questions concerning appropriate form of correctional treatment, should be handled by the sentencing tribunal and by correctional authorities. Enlightened societal self-interest suggests that all felony convicts should receive professional mental health and mental retardation screening and that, whenever indicated, those convicts should receive mental health therapy. Identifying convicts in need of such treatment or habilitation and following up that identification process with actual treatment has nothing to do with the form of the verdict.⁵⁰

Unfortunately, except for the recently completed study in Michigan, data on the use and consequences of GBMI verdicts are not readily available. The fact that very little has been documented about the use and results of the GBMI plea and verdict, however, is hardly surprising in view of the dearth of empirical data about the insanity defense generally.⁵¹

Perhaps implicit in all the points of contention about the GBMI verdict is the question of whether the alternative verdict presents a real alternative to the insanity defense or whether it is a hasty reaction to bad publicity. In the final analysis, questions about the GBMI verdict can only be resolved by a comprehensive investigation of the pertinent issues, the careful collection of information, and complete data analysis.

MODIFICATIONS OF THE INSANITY DEFENSE

After nearly a year of heated debate, a consensus seems to be emerging among scholars and professionals alike that the more radical measures of rectifying the perceived difficulties with insanity defense laws—abolition of the insanity defense or the adoption of an alternative verdict—should be abandoned and a more moderate approach taken.⁵² The moderate approach involves retention of an affirmative defense of insanity with some substantive and procedural modifications limiting its scope. In this section, we will discuss those remaining issues central to the current insanity defense debate that are relevant to this approach—the standards for insanity, burden of proof, expert testimony, and dispositions.

We assume, as do other writers,⁵³ that the gulf between theory and practice in mental health law is both great and full of inconsistencies. Further, we suggest that too much emphasis has been placed on substantive changes in the law rather than practical changes. As has been argued by Professors Morris and Hawkins in their book, *The Honest Politician's Guide to Crime Control*, "[r]ivers of ink, mountains of printers' lead, and forests of paper have [already] been expended on an issue [insanity] that is surely marginal to the chaotic problems of effective, rational, and humane prevention and treatment of crime. We determinedly insulate ourselves from the realities we are facing."⁵⁴ Michael Perlin put it this way:

In the practice of law, just as in the practice of other professions or trades, it is often the mores and customs which deserve the attention usually paid to the written rules of substance and procedure. Although thousands of words are written about the subtle points of a significant court decision or statutory revision, usually limited analysis is given to what can be termed the "socialization of the law."⁵⁵

Despite evidence that major substantive changes in involuntary civil commitment laws have had little impact on actual practice, policymakers, at the insistence of legal and mental health scholars, are still focusing on effecting changes in substantive law.⁵⁶ Whether their energies would be more productively spent on the direct improvement of the practice, customs, and mores involved in the implementation of existing laws is debatable. Policymakers should at least be encouraged to fashion fair and workable rules and procedures in those aspects of the insanity defense most likely to yield actual improvements in the manner in which mentally disturbed offenders are handled.

Standards and Burdens

In February 1983, the American Bar Association (ABA) endorsed a standard for insanity which is acceptable, in principle, to several professional groups, including the American Psychiatric Association, the American Psychological Association, and the Mental Health Law Project,⁵⁷ and was approved by the United States Senate Judiciary Committee.⁵⁸ The ABA standard eliminates the "volitional" prong (capacity to conform conduct to the requirements of law) but retains and modifies the "cognitive" prong (appreciation of wrongfulness) of the American Law Institute (ALI) standard.⁵⁹

A person is not responsible for criminal conduct if, at the time of

such conduct, and as a result of mental disease or defect, that person was unable to appreciate the wrongfulness of such conduct.⁶⁰

The National Commission on the Insanity Defense, convened by the National Mental Health Association, acknowledged the ABA endorsement of a standard eliminating the volitional element but recommended instead that a standard include *both* volitional and cognitive elements as does the ALI standard. The Commission stated that "those who perceive practical difficulties in the volitional prong of the ALI test have misdirected their attack. The problem in the ALI Model Penal Code is not in the volitional element but in placing the burden on the prosecution."⁶¹

The American Psychiatric Association, although endorsing the ABA standard, expressed some doubts about the effect of legislative enactments on the standards for insanity.

While the American Psychiatric Association is not opposed to state legislatures (or the U.S. Congress) making statutory changes in the language of insanity, we also note that the exact wording of the insanity defense has never, through scientific studies or the case approach, been shown to be the major determinant of whether a defendant is acquitted by reason of insanity. Substantive standards for insanity provide instructions for the jury (or other legal decisionmakers) concerning the legal standard for insanity which a defendant must meet. There is no perfect correlation, however, between legal insanity standards and psychiatric or mental states that defendants exhibit and which psychiatrists describe.⁶²

Finally, the Committee on Legal Issues of the American Psychological Association has also endorsed the ABA standard in principle. It recommended, however, that the ABA change or define the phrase "mental disease and defect" in the standard to accommodate mental disorders that have a psychological as well as a physical etiology. Further, it recommended that

any future policy changes in this area be predicated upon the results of empirical research that provides a factual base for such decisions. For example, we note that the ABA policy deletes the phrase "substantial" from the "substantial capacity" component of the ALI test on the basis that jurors cannot make this judgmental discrimination (i.e., substantial versus non-substantial). It is also assumed that a yes-no decision on the issue of the existence of "capacity" is somehow easier for jurors to

make and will yield more accurate decisions. Yet no empirical data is cited in support of this part of their policy. Similarly no research studies are cited to support their deletion of the "irresistible impulse" concept from the ALI proposal. Yet the ABA policy argues that it is appropriate to take this action since mental health professionals cannot discriminate between an irresistible impulse and an impulse not resisted.⁶³

There are those who believe that modifications of the insanity standards or tests will have relatively modest results and that the words in which the defense is cast have received far more attention than deserved.⁶⁴ Clearly, the significance of any of the competing formulations turns on how the various standards are applied in the courtroom—whether one will allow more evidence to be presented, mental health expert testimony to be more useful, or juries to be less confused. As Professor Goldstein observed over fifteen years ago:

[T]he various tests do not seem very different. As matters now stand, identical evidence may be admitted under each of them and juries tend to assign much the same meaning to them. Even when the words themselves are regarded as different, they come to the jury as part of a process of proof and argument which shapes the words to the particular case.⁶⁵

However, the assumption that a change in the wording of the standard for insanity would have little or no effect is clearly no less conjectural than to assume the opposite. It may be that, for example, such a change would have subtle but significant effects on the formulation of the opinions of mental health experts during the pretrial mental health evaluations of defendants and, subsequently, the written reports and testimony presented by those experts. Or, a change in the wording of the standard may alter the arguments by counsel and judicial decisions regarding the sufficiency of evidence to raise a jury question. Perhaps the safest course for policymakers to take may be, as suggested by the American Psychological Association,⁶⁶ to predicate future policy changes on the results of empirical research.

Similarly, such a course can be suggested to policymakers in determining the proper allocation of the burden and quantum of proof in insanity cases. This issue received a great deal of attention during the trial of John Hinckley, during which the jurors had to decide whether the government had proven beyond a reasonable doubt that Hinckley was sane at the time of his criminal act. The instructions to the jurors defined only insanity, not sanity. Understandably, most observers

considered this an awesome task.⁶⁷ For example, Presidential Counselor Edwin Meese said, "You couldn't even prove the White House staff sane beyond a reasonable doubt."⁶⁸ Had the District of Columbia Code been used in the Hinckley case instead of the federal rule, Hinckley's attorneys would have had the burden of showing by a preponderance of the evidence that he was insane at the time of the attempted assassination.

As discussed in the previous chapter, seventeen states and all federal jurisdictions require the government to prove a defendant's *sanity* beyond a reasonable doubt, while thirty-two states place the burden on the defendant to prove *insanity* by a preponderance of the evidence. Absent constitutional difficulties with placing the burden of persuasion on either the government or the defendant once evidence of insanity has been introduced,⁶⁹ the allocation of the burden is a matter of public policy. Even though there have been calls for reform of the rules governing the allocation of the burden of proof and the proper quantum of proof in insanity cases, no clear consensus has emerged on this issue.

The lack of a clear consensus on the burden of proof issue is suggested by the conditional formula for allocating the burden of proof adopted by the American Bar Association. The formal resolution approved by the ABA's House of Delegates in February 1983 stated:

[I]n jurisdictions utilizing any tests for insanity which focus solely on the question of whether the defendant, as a result of mental disease or defect, was unable to know, understand, or appreciate the wrongfulness of his or her conduct at the time of the offense charged, the *prosecution should have the burden* of disproving the defendant's claim of insanity *beyond a reasonable doubt*; and, secondly, that in jurisdictions utilizing the ALI Model Penal Code test for insanity the *defendant should have the burden* of proof by a *preponderance of the evidence*.⁷⁰

This allocation formula is based upon the ABA's dissatisfaction with the "volitional prong" of the ALI standard, which they specifically reject, and a preference for a solely cognitive test for insanity. The commentary accompanying Standard 7-6.9 contained in the ABA's *First Tentative Draft, Criminal Justice Mental Health Standards*,⁷¹ which is the ABA's position on the burden of proof issue, states that the shift in burden depending on the insanity standard used "is based on the view that mistakes in the administration of the insanity defense occur primarily when the volitional prong . . . [is] employed . . . [and] that there is ample moral and public policy justification for shifting the burden of

such cases to the defendant."⁷² Thus, under a narrowed test for insanity *not* including volitional elements, the "risk of error" should remain with the prosecution. Shifting the burden to the defendant is allowed, however, when an expanded cognitive-volitional test is used.

While the American Psychiatric Association was "exceedingly reluctant" to take a position on the proper allocation of the burden of proof in insanity cases, it noted that it did not share the ABA's belief that the likely effect of shifting the burden of persuasion to defendants would make insanity acquittals more difficult to obtain.⁷³ Another group, the National Commission on the Insanity Defense, recommended that the defendant should bear the burden of proving insanity by a preponderance of the evidence, but presented no basis for this recommendation except that "shifting of the burden to the defendant seems to be constitutionally permissible."⁷⁴

In the absence of empirical data demonstrating that a shift in the burden of proof will result in positive changes in the presentation or outcome of insanity cases,⁷⁵ preoccupation with this substantive aspect of the law may be misplaced. Often, the practices and procedures not expressly provided for by the substantive law make the most difference. Such changes in the areas of expert testimony and disposition of insanity acquittees might have a far greater impact on the way the insanity defense operates than changes in the standards for insanity and the burden of persuasion.⁷⁶

Mental Health Expert Testimony

The American Bar Association, the American Psychiatric Association, the National Mental Health Association, and most professionals and scholars agree that, as a general principle, expert mental health witnesses should restrict their testimony to the area of their specialized knowledge and not offer testimony regarding the ultimate legal issue of whether the defendant was legally insane at the time of the alleged act. Regardless of the significance of this consensus, the crucial problem of how to apply this principle in practice remains. Whether a legislative statement affirming the principle, such as that provided in the California Penal Code (Section 1027 (c), 1982), will make any difference cannot yet be determined.⁷⁷

Given a virtual consensus on the general principle that mental health experts should be permitted to testify within limits, the proper definition of those permissible limits may best be achieved by direct improvements in (1) jury instructions; (2) the appointment and qualification of experts evaluating, and testifying about, a defendant's mental

condition; (3) judicial guidance of mental health experts testifying in particular cases; and, finally, (4) the education and training of mental health professionals involved in criminal proceedings. For example, it is generally acknowledged that jurors need to be informed about the nature and limitation of expert mental health testimony. A useful standard for such jury instructions has been developed by the Criminal Justice Mental Health Standards Project of the American Bar Association's Standing Committee on Association Standards for Criminal Justice:

The court should instruct the jury concerning the functions and limitations of mental health and mental retardation professional expert testimony . . . [T]hese instructions may be given prior to the introduction of the expert testimony. The jury should be informed that the purpose of such testimony is to identify for the trier of fact the clinical factors relevant to the issues of past, present, and future mental condition or behavior that are under consideration.

Jurors also should be informed that they are not asked or expected to become experts in psychology or other sciences, and that their task is to decide whether the explanation offered by a mental health or mental retardation professional is persuasive. In evaluating the weight to be given an expert's opinion, the jury should consider the qualifications of the witness, the theoretical and factual basis for the expert's opinion, and the reasoning process by which the information available to the expert was utilized to formulate the opinion. In reaching its decision on the ultimate questions in the trial, the jury is not bound by the opinions of expert witnesses. The testimony of each witness should be considered in connection with the other evidence in the case and given such weight as the jury believes it is fairly entitled to receive.⁷⁸

Jurors are not, as Professor Goldstein has noted, "blank slates—to be written on by witnesses and counsel, and then moved inevitably in one direction or another by the words of the judge's charge on the insanity issues." Jurors will be influenced in their decisions by the "manner of men [and women] they are, the attitudes toward crime and insanity which they bring with them from the popular culture, [and] the extent to which they know the consequences for the defendant and for society of the verdict of 'not guilty by reason of insanity.'"⁷⁹

With regard to the direct influence judges may exert to improve mental health expert testimony, Judge David L. Bazelon has provided

ample guidance to his colleagues who wish to clarify for psychiatrists and psychologists what is permissible testimony, including the requirement of linking specific behavioral observations to clinical diagnoses and explaining these links so that the bases of any conclusions by the mental health experts are understood by the court.⁸⁰ Finally, compliance with the general principle that mental health expert testimony should address questions only in areas of specialized knowledge and should not deal with ultimate legal issues can also be achieved by means other than legislative enactments. For example, training is provided to psychiatrists, psychologists, and social workers in Virginia in various areas of criminal law and practice, including expert testimony, by the Forensic Evaluation Training and Research Center of the Institute of Law, Psychiatry & Public Policy at the University of Virginia under a contract with the Virginia Department of Mental Health and Mental Retardation. The training program consists of six days of instruction at the Center's facilities and one day of supervised experience at Central State Hospital, in Petersburg, Virginia.⁸¹ A full discussion of such educational opportunities is beyond the scope of this chapter. The standards developed by the Criminal Justice Mental Health Standards Project should provide useful guidance to policymakers.⁸²

Disposition

The basis of much of the dissatisfaction with the insanity defense appears to be the fear that defendants who have been acquitted of violent acts by reason of insanity (e.g., murder, rape, or aggravated assault) will shortly be free to walk the streets and threaten public safety. Though this fear may be largely unfounded—the majority of insanity acquittees are confined in mental hospitals for significant periods of time⁸³—the question of the proper disposition of insanity acquittees seems to turn on the issue of public safety.⁸⁴

As discussed earlier, post-acquittal disposition schemes vary, at least in theory, along a continuum of increasing restrictiveness. In some states, and in the federal system, once the defendant is cleared of all criminal charges by reason of insanity, he or she is technically free of the criminal justice system. Separate civil commitment proceedings must be instituted to retain the insanity acquittee involuntarily. Hence, the insanity acquittee is accorded the same protection from further state action to deprive him or her of liberty as would be any individual who has not committed a crime but who may be seen as mentally ill and dangerous. During the decades of the sixties and seventies, when the humane and fair treatment of mentally ill persons was a civil rights

issue of the first order, this least restrictive scheme was viewed by many as the only fair and workable way of protecting the legitimate interests of liberty and privacy of insanity acquittees.

The recent Supreme Court decision in *Jones v. United States*⁸⁵ reflects a seemingly growing mood throughout the country that the government's interest in protecting its citizenry from mentally disturbed and dangerous individuals should have a much heavier weight in a balance against the insanity acquittee's interest in being left alone after acquittal. The Court held that post-acquittal disposition schemes that are close to the extreme end of the dimension of restrictiveness—automatic and indefinite “criminal” commitment of the insanity acquittee, no matter what the criminal charge—are not constitutionally objectionable. Although the decision of the Supreme Court in *Jones v. United States* does not compel states who have adopted less restrictive disposition schemes to do otherwise, the opinion suggests a preference for very restrictive disposition of insanity acquittees and is, at the very least, of symbolic value to those who would advocate such schemes.

In attempting to balance the constitutional liberty interest of the insanity acquittee and society's interests in protecting itself from potentially dangerous persons, policymakers would be wise to study statutory schemes in the middle ground between the least restrictive extreme (provisions for civil commitment of insanity acquittees) and the most restrictive extreme (the automatic, indefinite “criminal” commitment found constitutionally acceptable by the majority of the Supreme Court in *Jones v. United States*). Such a scheme was recommended by the American Bar Association's Criminal Justice Mental Health Project and endorsed by the National Mental Health Association:

(a) Each state should adopt a separate set of special procedures (“special commitment”) for seeking the civil commitment of those insanity acquittees who were acquitted by reason of insanity of felonies involving acts causing or seriously threatening serious bodily harm.

(b) States may seek the civil commitment of insanity acquittees who were acquitted of felonies which did not involve acts or threats of serious bodily harm, or of misdemeanors, only by using those procedures (“general commitment”) used for the civil commitment of persons outside the criminal justice system, provided that those procedures satisfy the requirements of due process of law.⁸⁶

This general statutory scheme, i.e., “special commitment” of those acquittees who were charged with serious, violent crimes, and “general commitment” of those acquitted of lesser crimes, balances the need for community protection with the acquittee's interest in due process. As a general dispositional framework, it overcomes the major difficulties inherent in alternative schemes lying on either extreme of the restrictiveness dimension.

However, this general scheme provides only the contours of a dispositional framework. Important questions remain to be addressed. For example, should *all* acquittees, regardless of the seriousness of the act committed by them, be automatically evaluated for *present* mental illness and dangerousness following acquittal? What should be the scope of the “special commitment?” What should be the substantive criteria, and the allocation and quantum of proof under the “special commitment” procedures? What should be the nature and timing of the commitment hearings? Should the criminal court, a civil court, or a quasi-judicial administrative board have jurisdiction over release or outpatient treatment procedures? Should there be any differences in the conditions of confinement between acquittees committed under the “general” and “special” procedures? How much discretion should mental health professionals have in release decisions? What should be the maximum duration of commitment orders?

Full exploration of these and other important questions is beyond the scope of this guidebook. They are addressed, however, within the general statutory framework outlined above, by Standards 7-7.1 through 7-7.11 and accompanying commentary drafted by the Task Force on Civil Commitment of Insanity Acquittees of the Criminal Justice Mental Health Standards Project.⁸⁷ These standards recognize that just and practical disposition procedures must (a) provide the public with reassurance that persons who have committed violent acts will not be automatically returned to the community; (b) afford the insanity acquittee due process of law; and (c) provide sufficient flexibility to fashion a variety of treatment and care programs for insanity acquittees. The standards and their accompanying commentary are recommended to policymakers.

Notes to Chapter 3

1. The *mens rea* approach or "mens rea limitation" theory would limit the significance of mental impairment to the specific mental state, or *mens rea*, which is an element of the offense. Mental disturbance would not be an independent defense. See Chapter 2 for a brief introduction to the *mens rea* approach.

2. *State v. Strasbourg*, 110 P. 1020 (Wash. 1910); *Sinclair v. State*, 132 So. 581 (Miss. 1931); *State v. Lange*, 123 So. 639 (La. 1929). See also Chapter 2, Abolition of the Insanity Defense.

3. A. L. Halpern, "Elimination of the exculpatory insanity rule: A modern societal need," in R. Sadoff (ed.), *Psychiatric clinics in North America: Special Issue on forensic psychiatry* (Philadelphia: W. B. Saunders, 1983).

4. The *mens rea* approach is an "abolition" of the insanity defense in the sense that it eliminates the special affirmative defense of insanity. Although insanity is not applied as an independent, exculpatory doctrine, evidence of mental disturbance to negate the mental component of the crime is permitted in Montana and Idaho, where the *mens rea* approach is a matter of law.

5. American Bar Association Standing Committee on Association Standards for Criminal Justice, "Standard 7-6.1. The defense of insanity." *First tentative draft, criminal justice mental health standards* 260-273 (Washington, D.C.: American Bar Association, July 1983) (hereinafter cited as *ABA Standards*). This standard reflects the American Bar Association's policy supporting retention of an independent insanity defense.

6. *Id.*, at 262-63 (emphasis in original; text in brackets added).

7. See N. Morris, *Madness and criminal law* 76 (Chicago: University of Chicago Press, 1982). See also the statements and supporting information provided during the Senate hearings on the insanity defense by William A. Carnahan, a

practicing criminal lawyer with over 18 years of practical experience with the insanity defense, and Abraham L. Halpern, a prominent forensic psychiatrist; *The insanity defense: Hearings before the Comm. on the Judiciary*, 97th Cong., 2nd Sess., on S.818, S.1106, S.1558, S.2669, S.2672, S.2678, S.2745, and S.2780, July 19, 28, and August 2, 4, 1982 (hereinafter cited as *Congressional Hearings*, Volume 2), 283-413.

8. See J.H. Maynard (Montana Assistant Attorney General), Testimony before the Criminal Justice Subcommittee, U.S. Senate Judiciary Committee, March 17, 1983.

9. See R. J. Bonnie, "The moral basis of the insanity defense." 69 *American Bar Association Journal* 194 (1983); R. J. Bonnie, *Congressional Hearings*, Volume 2, *supra* note 7 at 255-82; see also Goldstein, *The insanity defense* (New Haven: Yale University Press, 1967), at 213.

10. Bonnie, *American Bar Association Journal*, *id.*, at 194.

11. See generally Morris, Carnahan, and Halpern, *supra*, note 7.

12. Morris, *supra*, note 7, at 61 (footnote omitted).

13. *Id.*, at 65.

14. Letter to John Greacen, National Center for State Courts, August 23, 1983.

15. Mont. Code Ann. §§ 46-14-311 and 46-14-312.

16. See Bonnie, *Congressional Hearings*, Volume 2, *supra*, note 7, at 280-81; see also Bonnie, *American Bar Association Journal*, *supra*, note 9.

17. See, for example, Bonnie, *American Bar Association Journal*, *supra*, note 9, at 195-96, using the case of Joy Baker; N. Morris, "Psychiatry and the dangerous criminal," 41 *Southern California Law Review* 514, 521 (1968), using the *Hadfield* case heard in England in 1800 (27 Howell 1281); and the statement of State Senator Thomas E. Towe of Mon-

tana (see Chapter 2, note 13) using the "San Juan Hill" case which became quite famous in Montana during the legislative deliberations over the bill to abolish the insanity defense.

18. *Limiting the insanity defense: Hearings before the Subcomm. on Criminal Law of the Comm. on the Judiciary*, 97th Cong., 2nd Sess., on S.818, S.1106, S.1558, S.2658, and S.2669, June 24, 30, and July 14, 1982 (hereinafter cited as *Congressional Hearings*, Volume 1) at 309.

19. J. Wickham, "Insanity is alive and well in Idaho," 25 *The Advocate* (Idaho State Bar) 4, 16 (1982). It is likely that Wickham was referring to practice, and not necessarily the technical parameters of law, when he asserted that Idaho's *mens rea* approach would actually broaden the cases in which mentally ill defendants would be acquitted. Given the fact that *mens rea* and the terms that define this element of a crime have implications for the "mental" aspect of a wide variety of offenses, not only those involving claims of mental aberration, courts may be very reluctant to go beyond the technical parameters of *mens rea* as prescribed by law. This, of course, assumes that there is little ambiguity in ascertaining what, if any, state of mind is statutorily required for a particular crime—an assumption that cannot easily be made; see W. R. LaFave and A. W. Scott, *A handbook on criminal law* (St. Paul, Minn.: West Publishing Co., 1972), at 191-95.

20. Absent the availability of an independent defense of insanity, attorneys may also look for opportunities to introduce evidence of mental impairment that is relevant to aspects of an offense other than *mens rea*, e.g., "voluntariness" and "compulsion." In Montana, for example, it is conceivable that although mental disorder did not prevent a defendant from acting knowingly or purposefully, it did prevent him or her from acting voluntarily or caused a compulsion to commit an offense. J. MacMaster, staff attorney, Montana Legislative Council, letter dated October 5, 1983.

On the other hand, claims of mental

impairment may actually decrease in Montana and Idaho simply because the elimination of the insanity defense in those states removed the pressure on court-appointed counsel and public defenders to raise all credible defenses lest they be subject to malpractice suits. That is, since insanity is no longer a statutory defense, failure to raise it, except as an issue of intent, cannot be considered malpractice. Thus, at a pragmatic level, the opportunities for claims of mental impairment may be reduced under the *mens rea* approach. C. F. Bianchi, Administrative Director of Idaho Courts, memorandum dated October 3, 1983.

21. See D. H. J. Hermann, *The insanity defense: Philosophical, historical, and legal perspectives* (Springfield, Ill.: Charles C. Thomas, 1983) at 109; see also LaFave and Scott, *supra*, note 19.

22. David H. Leroy, former Idaho Attorney General, *Congressional Hearings*, Volume 1, *supra*, note 18, at 306-20.

23. See, for example, Halpern, *Congressional Hearings*, Volume 2, *supra*, note 7, at 283-84.

24. See: *Sandstrom v. Montana*, 442 U.S. 510 (1979). In this case the Supreme Court reversed a Montana conviction because of erroneous instructions to the jury regarding the presumption that a person intends the ordinary consequence of his actions.

25. A diminished capacity or diminished responsibility doctrine has been applied in a number of jurisdictions that have retained an independent defense of insanity. Diminished capacity is separate and distinct from insanity. This controversial doctrine has not been central to the current debate on the insanity defense and will not be discussed at length here. However, it should be noted that a finding of diminished capacity will not result in exculpation for crime but in the reduction of the severity of punishment, usually by reducing the type and severity of crime charged. For example, the charge of murder in the first degree may be reduced to second degree murder upon a showing of evidence that the defendant lacked the

capacity to premeditate—a required element of first degree murder in some states. Proponents of the doctrine argue that when criminal statutes require specific intent (i.e., premeditation), any evidence that disproves either the defendant's capacity to premeditate, or if capable, his or her actual premeditation of the criminal act, should be allowed for consideration by the jury. Importantly for our discussion here, the consequence of a finding of diminished capacity is not excuse of crime but conviction of a lesser offense.

The diminished capacity doctrine has not been universally embraced. The United States Supreme Court, in its decision in *Fisher v. United States*, 328 U.S. 463 (1945), addressed this issue on procedural, not constitutional, grounds, and found that "an accused in a criminal trial is not entitled to an instruction based on evidence of mental weakness short of legal insanity, which would reduce this crime...." The dissenting opinions by Justice Frankfurter and Justice Murphy suggest that the majority erred in its interpretation of the doctrine. Although the Court decided against the appeal from a death sentence, *Fisher* brought forth the issue of mental impairment not amounting to insanity and raised it to a valid legal doctrine.

The ALI Model Penal Code is in harmony with the dissent in *Fisher* and those states that allow the admission of psychiatric evidence in all crimes involving specific intent. It provides that "evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind which is an element of the offense." Model Penal Code § 4.02(1), at 67.

26. *Congressional Hearings*, Volume 1, *supra*, note 18, at 316.

27. *New State Ice Company v. Liebman*, 285 U.S. 263, 307-308 (1932).

28. *Myths and realities: A report of the National Commission on the Insanity Defense* 30 (Arlington, Va.: National Mental Health Association, 1983) (hereinafter cited as *National Commission*).

29. "The insanity defense, ABA and APA proposals for change," 7 *Mental Disability Law Reporter* 144 (1983) (hereinafter cited as *ABA and APA Positions*).

30. *Id.*, at 136.

31. Division of Psychology and Law, American Psychological Association, "More on insanity reform," 3 *Newsletter* 8 (1983) (hereinafter cited as American Psychological Association).

32. "AMA calls for abolition of insanity defense," 2 *Mental Health Law Reporter* 1 (January 1984) (hereinafter cited as *Reporter*); "American Medical Association urges abolition of insanity defense," 34 *Crim. L. Rep. (BNA)* 2228 (1983).

33. American Medical Association, "The insanity defense in criminal trials and limitations of psychiatric testimony" (Report of the Board of Trustees, 1983), at 32-33.

34. *Id.*, at 1-2.

35. J. McGrath, quoted in *Reporter*, *supra*, note 32, at 2.

36. W. Tabor, quoted in *Reporter*, *supra*, note 32, at 2.

37. Committee on the Criminal Justice and Mental Health Systems, *Report of the Department of Mental Health Committee on the Criminal Justice and Mental Health Systems* 18-19 (Illinois Department of Mental Health and Developmental Disabilities, March 1982).

38. See *Congressional Hearings*, *supra*, note 18, at 155-70.

39. See "Insanity defense under siege," 6 *Mental Disability Law Reporter* 342-44 (1982).

40. H.J. Steadman, *Congressional Hearings*, Volume 2, *supra*, note 7, at 367-73 ("[I]n 1978 there were 1,625 persons acquitted by reason of insanity... in the U.S.... [an] average of about 30 acquittals per state... Insanity pleas and acquittals are exceedingly infrequent."); see also H. J. Steadman, L. Keitner, J. Braff, and T. N. Arvanites, "Factors associated with a successful insanity defense," *American Journal of Psychiatry* (in press); H. J. Steadman, J. Monahan, E. Hartstone, S. K. Davis, and P. C. Robbins, "Mentally disordered offenders: A national survey of patients and facili-

ties," 6 *Law and Human Behavior* 1, 31-38 (1982); and R. A. Pasewark and B. W. Lanthorn, "Disposition of persons utilizing the insanity plea in a rural state," 5 *Journal of Humanics* 87-98 (1977).

41. G. A. Smith and J. A. Hall, "Evaluating Michigan's guilty but mentally ill verdict: An empirical study," 16 *University of Michigan Journal of Law Reform* 77, at 104 (1982).

42. In July 1982, the National Association of Attorneys General resolved to urge the approval of legislation that would "[e]stablish an additional plea and verdict of guilty but mentally ill in which a guilty verdict would be followed by a sentence that could require treatment and/or incarceration." National Association of Attorneys General, *Resolutions* (Annual Meeting, July 15-18, 1982), at 14.

43. D. J. Heineman, "Legislation 1982," 51 *Journal of the Kansas Bar Association* 106-107, at 106 (1982).

44. I. R. Kaufman, "The insanity plea on trial," *New York Times Magazine* (August 8, 1982), at 19.

45. *Congressional Hearings*, Volume 2, *supra*, note 7.

46. *National Commission*, *supra*, note 28, at 32-33.

47. This finding is supported by the recent Michigan study. See Smith and Hall, *supra*, note 41.

48. *National Commission*, *supra*, note 28, at 34.

49. *ABA and APA Positions*, *supra*, note 29, at 144.

50. *Id.*, at 141.

51. See *supra*, note 40. However, the dearth of empirical data is coming to the attention of scholars and policymakers. Consequently, this area of reform is being researched with increasing intensity. For example, The Institute on Mental Disability and the Law, National Center for State Courts, began a one-year empirical study of the GBMI plea and verdict in November 1983. The study is being supported by the National Institute of Justice.

52. See D. Lauter, "Consensus emerging: A reform of insanity plea likely," 5 *The National Law Journal* 39 (1983). But cf. American Medical Association, *supra*,

note 33.

53. See generally D. Wexler, *Mental health law: Major issues* (New York: Plenum, 1981); see also D. N. Robinson, *Psychology and law: Can justice survive the social sciences?* (New York: Oxford University Press, 1980).

54. N. Morris and G. Hawkins, *The honest politician's guide to crime control* (Chicago: University of Chicago Press, 1970), at 176.

55. M. Perlin, "The legal status of the psychologist in the courtroom," 4 *Mental Disability Law Reporter* 194 (1980).

56. A report of an evaluation of the Massachusetts Mental Health Reform Act of 1970 concluded that the "most profound statistical changes [associated with the implementation of the law] appear to have been associated largely with procedural, rather than substantive, changes in the law." See McGarry, A., Schwitzgebel, L., Kirland, R., Lipsitt, P., Lelos, D. *Civil commitment and social policy: An evaluation of the Massachusetts mental health reform act of 1970* (Rockville, Md.: National Institute of Mental Health, 1981) at 139-141; see also, Keilitz, I. and McGraw, B. *An evaluation of involuntary civil commitment in Milwaukee County*. Williamsburg, Virginia: National Center for State Courts, 1983.

57. See *supra*, notes 28, 29, and 31.

58. Senate Bill 1762, entitled the "Comprehensive Crime Control Act of 1983," introduced by Senator Strom Thurmond, chairman of the Senate Judiciary Committee, and endorsed by the Reagan Administration. 1 *Mental Health Law Reporter* 1-2 (September 1983).

59. See American Law Institute, Model Penal Code (Proposed Official Draft, 1962), Section 4.01.

60. See: *ABA Standards*, *supra*, note 5, at 260-73 ("The major significance of this approach lies in its rejection of 'volitional' incapacity due to mental disease as an independent basis of exculpation. This policy option is based on two underlying propositions: first, that the 'appreciation of wrongfulness' formula is sufficiently broad to take into account the morally significant effects of severe mental dis-

order; and second, that any independent volitional inquiry involves a significant risk of 'moral mistakes' in the adjudication of criminal responsibility.").

61. National Commission, *supra*, note 28, at 36.

62. ABA and APA Positions, *supra*, note 29, at 144.

63. American Psychological Association, *supra*, note 31, at 6-7.

64. See Goldstein, *The insanity defense* (New Haven: Yale University Press, 1967), at ch. 13; see also Carnahan, *Congressional Hearings*, Volume 2, *supra*, note 7, at 428 ("The experience in New York is that the rule does not make too much difference. The judge usually lets everything in and lets the jury consider the entire record."); N. Morris, *Madness and criminal law* (Chicago: University of Chicago Press, 1982); and Morris and Hawkins, *supra*, note 54.

65. Goldstein, *supra*, note 64, at 213-14.

66. American Psychological Association, *supra*, note 31.

67. See J. E. diGenova and V. Toensing, "Bringing sanity to the insanity defense," 69 *American Bar Association Journal* 648 (1983).

68. "For reasons requiring little amplification, it is always easier to find something wrong with someone than it is to establish that *nothing* is wrong. The evidentiary domain of 'something' is narrowly bounded; that of 'nothing,' effectively infinite. To put the state in the position, therefore, of having to establish sanity when there is any intimation of insanity is to require the state to do what is practically impossible." Robinson, *Psychology and law: Can justice survive the social sciences?* (New York: Oxford University Press, 1980) at 67-68. See also Kaufman, "The insanity plea on trial," *New York Times Magazine* (August 8, 1982) at 20.

69. This issue is discussed in the previous chapter.

70. ABA and APA Positions, *supra*, note 29, at 136-37 (emphasis added).

71. ABA Standards, *supra*, note 5, at 291-95.

72. *Id.*, at 293.

73. ABA and APA Positions, *supra*, note 29, at 145-46.

74. National Commission, *supra*, note 28, at 35.

75. For example, data showing that there is presentation of more or less expert testimony or "battle among experts" when the burden of proof is on the prosecution.

76. It can be argued, however, that shifting the burden of proving insanity to the defendant may clearly have significant effects on other legal aspects of the insanity defense. It may, for example, enable a state wishing to enact legislation providing for automatic, indeterminate commitment of insanity acquittees to overcome constitutional objections to a dispositional scheme.

77. See: National Commission, *supra*, note 28, at 35 ("If there is no assumption that other experts should be limited in either their testimony or their role in the adversary process of trial, then...there [should be] no artificial limitation set up particularly for mental health experts.").

78. Standard 7-3.13, ABA Standards, *supra*, note 5, at 134.

79. Goldstein, *supra*, note 64, at 5.

80. Judge Bazelon's suggestions guiding mental health testimony are discussed in the previous chapter.

81. See 2 *Developments in Mental Health and the Law*, 1982, at 16.

82. See Standards 7-1.1, 7-1.2, 7-1.3, Part I. "Mental Health, Mental Retardation and Criminal Justice: General Professional Obligations"; Standards 7-3.1 through 7-3.13, Part III. "Pretrial Evaluations and Expert Testimony"; and Standards 7-6.6 and 7-6.8, in Part VI. "Non-Responsibility for Crime," ABA Standards, *supra*, note 5.

83. The body of data available on the question of how long insanity acquittees are hospitalized is scant. What little there is, however, suggests that acquittees are not released a few days or even a few months after their acquittal by reason of insanity. A recent study of 225 defendants acquitted in New York between 1971 and 1976 found that the average length of hospitalization was 3.6 years.

Data from other studies in New York and New Jersey suggest that, not surprisingly, acquittees who have committed serious offenses (e.g., murder or rape) spend much longer times hospitalized than those who committed less serious offenses (e.g., auto theft). See H. J. Steadman, *Congressional Hearings*, Volume 1, *supra*, note 18, at 367-73. Data from the Clifton T. Perkins Hospital, in Maryland, reported by S.B. Silver, *id.*, at 378-83, indicate an average length of hospitalization of approximately 900 days (2.5 years) for insanity acquittees discharged between 1979 and 1982. A recent study of 212 insanity acquittees who were discharged from St. Elizabeths Hospital, District of Columbia, between 1974 and 1982 found that the average time from admission to discharge was 5.3 years and the median time was 4.0 years. Interestingly, when the length of confinement of serious offenders was compared across

the mental health system and the corrections system, it was found that insanity acquittees "averaged 5.4 years and offenders in the correctional system averaged 3 years." See P. Baridon, F. Seitz, and A. Echols, "A special report on the commitment of persons found not guilty by reason of insanity" (Division of Forensic Programs, St. Elizabeths Hospital, Washington, D.C., unpublished paper, June 1983). See also L. H. Roth, letter to Senator Arlen Specter, July 7, 1982, reprinted in *Congressional Hearings*, Volume 1, *supra*, note 18, at 264-67.

84. See National Commission, *supra*, note 28, at 24-25, 37-40.

85. 463 U.S. —, 103 S. Ct. —, L. Ed. 2d. —, 51 U.S.L.W. 5041 (1983). This case is discussed in some detail in ch. 2.

86. ABA Standards, *supra*, note 5, at 309.

87. *Id.*, at 301-41.

Chapter 4

CONCLUSIONS

Although the debate regarding how best to judge and care for mentally disturbed offenders is likely to continue, several tentative conclusions can be drawn as the tide of public indignation over the insanity defense slowly recedes from the crest it reached in the aftermath of the *Hinckley* trial.

First, insanity as an independent, exculpatory doctrine seems to have survived the latest attack. For the present, the insanity defense appears to be relatively safe from abolition in federal jurisdictions and in the forty-eight states that provide for the defense.

Second, early signals from Michigan, Indiana, Illinois, and Connecticut indicate that the "guilty but mentally ill" plea and verdict may not be living up to its promise as a viable alternative to the perceived difficulties with the administration and consequences of the insanity defense. Yet, ironically, this new verdict may have the beneficial side-effect of highlighting the inadequacies of the mental health treatment and care provided in our jails and prisons to all mentally disordered offenders, not just those who introduced insanity defenses.¹

Third, public policymakers, scholars, and the public at large seem to be in accord in their preference for special dispositional schemes that (a) assure society adequate protection from insanity acquittees' potential violent acts and (b) provide that treatment and care be given to these individuals in secure settings.

Fourth, the depiction of mental health expert testimony in insanity cases as "a three-ring circus in which the lawyers are the ringmasters and the psychiatric witnesses are the clowns"² appears to be an overblown caricature drawn from unusually complex and controversial cases highlighted by media hyperbole. Psychiatrists and psychologists

are not likely to be ousted from courtrooms, and the usefulness of their testimony promises to be improved by better-prepared mental health experts and better-informed juries.

Finally, the proper wording of the insanity defense is likely to continue to receive the attention of legal scholars, with no consensus in sight.

As a modern society we distinguish ourselves from our ancestors by deliberately conceiving, planning, and implementing projects designed to improve our social systems. At our best, we are an "experimenting society"³ wherein policy is tested by experience and guided by results, and social reform follows a course beginning with the identification of a social problem, which leads to innovation and experimentation, followed by demonstration of promising solutions, widespread implementation, and ultimately, the institutionalization of reform. Yet, public policymakers often make decisions unguided by past experience or without assurance that their actions will produce the desired solutions. The most important conclusion that clearly emerges from the foregoing analysis of the proposed reforms in the insanity defense is that public policies regarding the insanity defense have generally not been guided by experience and the results of experimentation.

No doubt, citizens will continue to press policymakers to decide how best to deal with social problems, and it is likely that policymakers will often feel compelled to take action unguided by experience and experiment. Sometimes, because the call to "do something" is urgent, it may do no good to urge restraint. However, although public concern about how best to handle mentally disturbed offenders certainly remains at a high level,⁴ the public pressure to do something about the insanity defense, in our view, is not what it was immediately after the *Hinckley* verdict. Today, in the area of mental health and the law, the perfect opportunity exists to realize the experimenting society envisioned by Justice Brandeis in 1932.

We strongly urge policymakers to encourage the creation of mechanisms whereby both the positive and negative consequences of the various policy actions taken in regard to the insanity defense (e.g., abolition in Montana and Idaho, enactments of a "guilty but mentally ill" verdict in at least twelve states, and a different dispositional scheme for insanity acquittees) can be unambiguously determined. Research is recommended in the following general areas:

- The nature (characteristics of the defendants, charge, jury trial vs. bench trial, plea bargain, etc.), frequency, and relative importance of the antecedents and consequences of the pleas or

verdicts of "not guilty by reason of insanity," "guilty and (or but) mentally ill," and "not guilty by reason of lack of mental state."

- The relative effects of various allocations of the burden of proof and of "tests" of insanity on pretrial preparations, trial presentation (including mental health expert testimony), and trial outcomes.
- The variables affecting the length of confinement in mental institutions of insanity acquittees as compared with length of confinement of convicted felons.
- The nature and rate of rehospitalization and recidivism of released insanity acquittees compared with those of ex-felons.
- The extent to which mental health treatment is available for insanity acquittees and those defendants receiving other verdicts (including "guilty" and "guilty but mentally ill").
- The effects of patterns, pressures, and interactions of the various parts of mental health laws (i.e., insanity, competency to stand trial, sentencing, and involuntary civil commitment) on their implementation by law enforcement agencies, the courts, corrections, and the mental health systems.

We echo the call by the National Commission on the Insanity Defense for the appropriation of funds for research on the use and operation of the insanity defense as it exists today, *before any further changes in the law*.⁵ Most of the proposed reforms in the insanity defense have been tried in some jurisdictions; it makes sense to evaluate the consequences of the actions others have taken before trying to take the same actions ourselves. One can only speculate whether Connecticut's brief experiment with the "guilty but not criminally responsible" verdict would have been initiated had the consequences of Michigan's, Indiana's and Illinois's experience with the new verdict been known.⁶

Developments other than research *per se* are also recommended. In our view, the Congressional hearings on the insanity defense made it painfully clear that social science research in this area must merge not only with the decision-making processes of policymakers but also with the ways in which the courts and law enforcement agencies normally monitor the operation and consequences of the criminal justice process. Sadly, the recent debate on abolition of the insanity defense took place in the almost total absence of empirical data from Montana and Idaho, the two states willing to experiment with abolition. Regardless of federal and state appropriations for research, we strongly recommend that the criminal justice and mental health systems, especially in those states

with particularly innovative insanity defenses or alternatives, develop the capability of collecting empirical data. Without such capability, research will most likely be prohibited by cost and be viewed by policymakers as an "extravagant option."⁷

If the current debate on the insanity defense has forced us to examine critically the soundness of the manner in which our criminal justice system deals with mentally disturbed offenders, and to be open to experimentation, it will have had some benefits. If it spurs the development of mechanisms to try possible solutions to sticky problems, to look at the intended outcomes of these solutions in a hard-headed fashion, and to learn from our mistakes, we will have mastered a valuable historical lesson.

Notes to Chapter 4

1. See G.A. Smith and J.A. Hall, "Evaluating Michigan's guilty but mentally ill verdict: an empirical study," 16 *University of Michigan Journal of Law Reform* 105-107 (1983).

2. A. Stone, statements in *Limiting the insanity defense: Hearings before the Subcomm. on Criminal Law of the Comm. on the Judiciary*, 97th Cong., 2nd Sess., on S.818, S.1106, S.1558, S.1995, S.2658, and S.2669, June 24, 30 and July 14, 1982, at 252.

3. See D. Campbell, "Reforms as exper-

iments," 24 *American Psychologist* 409-429 (1969).

4. See "Guilty and insane," (editorial), *Washington Post*, September 24, 1983.

5. See: *Myths & realities: A report of the National Commission on the Insanity Defense*. (Arlington, Virginia: National Mental Health Association, 1983), at 44.

6. Connecticut adopted a GBMI verdict in 1982 and repealed it one year later. Public Act 83-486.

7. *Supra* note 5, at 44.

BIBLIOGRAPHY

Introduction

We have been selective in the path followed in this guidebook. Obviously, there are many philosophical, historical, and legal perspectives on the insanity defense that are not illuminated by this slim volume. Even if it were possible to present a comprehensive picture, the guidebook would be many times its present size. The following discussion should aid those readers seeking a deeper inquiry into specific topics or a broader view of the insanity defense and its alternatives than is presented here.

This guidebook barely touches upon the burgeoning scholarly and popular literature developed on the insanity defense. A comprehensive bibliography would include both published decisions by the courts and state and federal statutes, in addition to literature in journals, law reviews, textbooks, monographs, and popular periodicals. Here we shall touch upon selected recent literature bearing on the topics covered in the guidebook and the insanity defense in general. Complete citations will be found in the Bibliography.

IN GENERAL

An excellent, although somewhat dated, review of selected cases and readings on the insanity defense can be found in Alexander D. Brooks's 1974 legal casebook, *Law, psychiatry and the mental health system*, and its 1980 Supplement. Walter Bromberg, a psychiatrist, provides a very helpful review of landmark cases of psychiatric interest as well as a bibliographic essay in *The uses of psychiatry in the law* (1979). A psychologist, Robert Buckhout, in a 1981 article in *Social Action & the Law*, provides an annotated bibliography of no fewer than thirty textbooks in the area of psychology and the law, most of which have

been published within the last five years. Donald Hermann's *The insanity defense* (1983) is one of the more recent works published in this area. It provides not only an extensive bibliography but also a thorough review of the significance of the defense, its theoretical basis, and an account of its historical origins from Judeo-Christian traditions to more recent developments in Anglo-American jurisprudence. No doubt, another bookshelf full of recent writings that bear upon the general topic of the insanity defense could be added to these sources.

The reader who wishes to work backwards from the most current writings on the insanity defense may do well to refer to recent volumes of the *Mental Disability Law Reporter*. The *Reporter*, published bimonthly by the American Bar Association's Commission on the Mentally Disabled, is widely considered to be a most useful and up-to-date reference tool in the rapidly changing area of mental health law. Its handy subject-key to current legislation and case law provides easy access to specific sub-areas of the insanity defense issue (e.g., the "guilty but mentally ill" verdict).

REFORM ISSUES

Increasing public debate has produced an excellent source of literature on key reform issues. For a general overview of the issues being debated, the current positions of the professional groups most likely to be affected by reform should be consulted. These may be found in "The Insanity Defense, ABA and APA Proposals for Change," in the *Mental Disability Law Reporter* (1983); "The Insanity Defense in Criminal Trials and Limitations of Psychiatric Testimony," Report of the Board of Trustees, American Medical Association (1983); and "More on Insanity Reform," 3 *Newsletter* 8, Division of Psychology and Law, American Psychological Association (1983). Also highly recommended are the *First Tentative Draft Criminal Justice Mental Health Standards*, completed in July 1983 by the American Bar Association's Standing Committee on Association Standards for Criminal Justice, Criminal Justice Mental Health Standards; and *Myths & realities: A report of the National Commission on the Insanity Defense* published by the National Mental Health Association (1983). The former represents a rich resource for those interested in exploring policy alternatives germane to the insanity defense and related dispositional issues; the latter is recommended for its readable, straightforward discussion of reform issues, its analyses and recommendations.

The extensive periodical literature dealing with the insanity defense reflects the growing public debate over its reform. Norval

Morris's "The Criminal Responsibility of the Mentally Ill," in the *Syracuse Law Review* (1982) and James Wickham's "Insanity is Alive and Well in Idaho," in *The Advocate* (1982) offer justification and support for the abolitionist position. The tenor of Wickham's article is aimed at policymakers, while Morris provides an excellent theoretical inquiry. On the other side, Richard J. Bonnie argues convincingly for the retention of the insanity defense in "The Moral Basis of the Insanity Defense," in the *American Bar Association Journal* (1983).

The growing popularity of the "guilty but mentally ill" verdict has spurred intense discussion about its merits. A recommended article is Scott Sherman's "Guilty But Mentally Ill: A Retreat from the Insanity Defense," in *American Journal of Law and Medicine* (1981). The *University of Michigan Journal of Law Reform* has published two informative articles describing Michigan's experience with the alternative verdict: Gare Smith's and James Hall's "Evaluating Michigan's Guilty But Mentally Ill Verdict: An Empirical Study" (1982); and Comment, "The Constitutionality of Michigan's Guilty But Mentally Ill Verdict" (1978).

A number of recent writings express views on the insanity defense from various perspectives. A prominent jurist, Irving Kaufman, author of the opinion in *United States v. Freeman* (1966), which established the ALI standard for the insanity defense in the United States Court of Appeals for the Second Circuit (New York, Connecticut, and Vermont), discusses the defense in a *New York Times Magazine* article (1982). The viewpoint of attorneys whose duty it is to prosecute insanity plea cases is expressed in the Spring 1982 issue of the National District Attorneys Association's *The Prosecutor*, which features a symposium on the insanity defense dealing with a variety of issues, such as the permissible limits of psychiatric testimony and the proper disposition of insanity acquittees. A recent edition of the *Reader's Digest* (March 1983) contains an article by Jack and Jo Ann Hinckley, parents of John W. Hinckley, Jr., which gives an intensely personal view of the insanity defense. A recent book by William J. Winslade and Judith Wilson Ross, *The insanity plea: The uses and abuses of the insanity defense* (1983), describes seven prominent cases in which psychiatric evidence was introduced, including the trial of John Hinckley. Based on trial transcripts and judicial opinions, it offers a unique analysis, through the eyes of a juror, of the need for insanity defense reform. Martin Lubin's book, *Good guys, bad guys* (1982), discloses the practical aspects of working in the mental health/criminal justice system through the eyes of a former forensic psychiatrist at New York's Bellevue Hospital. It includes his personal

account of the "Son of Sam" investigation and trial, in which he served as an expert consultant. Finally, *Madness and the criminal law* (1982), by Norval Morris, in addition to expressing one prominent scholar's recommendations for legislative reform, presents a unique fictionalized account of a "brothel boy" in Burma which dramatizes the relationship between moral and criminal guilt.

Perhaps the best source for a representative view of the wide range of opinions held by leading scholars and practitioners on the issue of insanity defense reform is available in the compiled testimonies presented to the U.S. Senate Judiciary Committee and Subcommittee on insanity defense reform: *Limiting the insanity defense: Hearings before the Subcommittee on Criminal Law of the Committee on the Judiciary*, 97th Cong., 2nd Sess.; and *The insanity defense: Hearings before the Committee on the Judiciary*, 97th Cong., 2nd Sess.

LEGISLATION

The most comprehensive survey of current legislation in the insanity defense area can be found in S. Jan Brakel's *The mentally disabled and the law* (3rd ed., in press). Brakel's survey contains helpful tables providing a state-by-state summary of legislative provisions for the various components of the insanity defense. Although somewhat dated, Grant H. Morris's *The insanity defense: A blueprint for legislative reform* (1975) contains a number of helpful appendices referencing legislation, court rulings, and literature, which are delineated by state and according to the various components of the insanity defense and the principle of diminished capacity. A more recent work, *Mentally disordered offenders*, edited by John Monahan and Henry Steadman, offers a comprehensive social science and legal analysis of a number of controversial topics in criminal justice, including the insanity defense. It includes an article, "A Compendium of United States Statutes on Mentally Disordered Offenders," by Robert J. Favole, which includes a survey of the statutes of the fifty state and federal jurisdictions highlighting their treatment of the various insanity defense topics. Finally, two recent statutory reviews may be helpful to the reader: Cynthia Hagan's 1982 review of recent statutory changes, appearing in the *Journal of Legal Medicine* (1982); and a Note in the *Harvard Law Review* (1982), which surveys statutes providing commitment following insanity acquittals.

The following bibliography lists literature in journals, law reviews, monographs, popular periodicals, textbooks, court rulings, and statutes; it includes but is not limited to sources referenced in the text and

consulted in the preparation of this monograph. With a few exceptions, most of the works cited were published after 1975. Because of the abundance of literature dealing with the insanity defense and the limited scope of this work, 1975 was selected as a convenient starting point.

Bibliography

Books and Monographs

- Brakel, Samuel J., & Rock, Ronald. *The mentally disabled and the law*. 3rd ed. Chicago: University of Chicago Press, in press.
- Bromberg, Walter. *The uses of psychiatry in the law*. Westport, Conn.: Greenwood Press, 1979.
- Brooks, Alexander, ed. *Law, psychiatry and the mental health system* (with 1980 supplement). Boston: Little, Brown, 1974.
- Cooper, G. Michael, ed. *Insanity defenses*. The National College for Criminal Defense (revised 1981).
- Curran, William J.; McGarry, A.P.; Petty, Charles S., eds. *Modern legal medicine, psychiatry, and forensic science*. Philadelphia: F.A. Davis Co., 1980.
- Fingarette, Herbert, & Hasse, Ann Fingarette. *Mental disabilities and criminal responsibility*. Berkeley: University of California Press, 1974.
- Goldstein, Abraham. *The insanity defense*. New Haven: Yale University Press, 1967.
- Hermann, Donald H.J. *The insanity defense: Philosophical, historical and legal perspectives*. Springfield, Ill.: Charles C. Thomas, 1983.
- Huckabee, Harlow M. *Lawyers, psychiatrists and criminal law*. Springfield, Ill.: Charles C. Thomas, 1980.
- Keilitz, Ingo, & McGraw, Bradley D. *An evaluation of involuntary civil commitment in Milwaukee County*. Williamsburg, Va.: National Center for State Courts, 1983.
- Low, Peter; Jefferies, John; Bonnie, Richard. *Criminal law cases and materials*. Mineola, N.Y.: Foundation Press, 1982.
- Lubin, Martin. *Good guys, bad guys*. New York: McGraw-Hill, 1982.
- McGarry, A.; Schwitzgebel, Louis; Kirkland, R.; Lipsitt, Paul; Lelos, David. *Civil commitment and social policy: An evaluation of the Massachusetts mental health reform act of 1970*. Rockville, Md.: National Institute of Mental Health, 1981.
- Monahan, John, & Steadman, Henry J., eds. *Mentally disordered offenders*. New York: Plenum, 1983.
- Morris, Grant H. *The insanity defense: A blueprint for legislative reform*. Lexington, Mass.: D. C. Heath, 1975.
- Morris, Norval. *Madness and the criminal law*. Chicago: University of Chicago Press, 1982.
- Morris, Norval, & Hawkins, Gordon. *The honest politician's guide to crime control*. Chicago: University of Chicago Press, 1970.
- Ray, Isaac. *A treatise on the medical jurisprudence of insanity*. ed. W. Overholser. Cambridge: Harvard University Press, 1962.
- Robinson, Daniel N. *Psychology and law: Can justice survive the social sciences?* New York: Oxford University Press, 1980.
- Robitscher, Jonas. *The powers of psychiatry*. Boston: Houghton Mifflin, 1980.
- Roesch, Ronald, & Golding, Stephen L. *Competency to stand trial*. Urbana: University of Illinois Press, 1980.
- Sadoff, Robert L., ed. *Psychiatric clinics in North America: Special issues in forensic psychiatry*. Philadelphia: W. B. Saunders, 1983.
- Stone, Alan. *Mental health and the law: A system in transition*. Rockville, Md.:

National Institute of Mental Health, 1978.
Wexler, David. *Mental health law: Major issues*. New York: Plenum, 1981.

Winslade, William J., & Ross, Judith W. *The insanity plea: The uses and abuses of the insanity defense*. New York: Scribner's, 1983.

Articles

Allen, Ronald J. "The restoration of *In Re Winship*: A comment on burdens of persuasion in criminal cases after *Patterson v. New York*." *Michigan Law Review* 76 (1977): 30-63.

Arenella, Peter. "The diminished capacity and diminished responsibility defenses." *Columbia Law Review* 77 (1977): 827-65.

Arenella, Peter. Book review, *Mental disabilities and criminal responsibilities*, by Fingarette and Hasse, 1979. *Columbia Law Review* 80 (no. 7, 1980): 420-34.

Arnold, Christine. "Defending the mad." *The Pennsylvania Lawyer* 4 (no. 5, 1982): 9-10.

Beasley, William R. "An overview of Michigan's guilty but mentally ill verdict." *Michigan Bar Journal* 62 (no. 3, 1983): 204-217.

Bonnie, Richard J., & Slobogin, Christopher. "The role of mental health professionals in the criminal process: The case for informed speculation." *Virginia Law Review* 66 (no. 3, 1980): 427-522.

Bonnie, Richard J. "The moral basis of the insanity defense." *American Bar Association Journal* 69 (1983): 194-97.

Bonnie, Richard J. "The insanity defense: Proposals for reform." *Developments in Mental Health Law* 2 (no. 3, 1982): 21-22.

Buckout, Robert. "The emerging field of psychology and the law." *Social Action and the Law* 7 (3/4), 47-56.

Calahan, William L. "The insanity defense—one prosecutor's view." *Michigan Bar Journal* 62 (no. 3, 1983): 202-13.

Ceasar, Berel. "The insanity defense: The new loophole." *The Prosecutor* 16 (no. 3, 1982): 19-26.

Campbell, Donald T. "Reforms as exper-

iments." *American Psychologist* 24 (1969): 409-29.

Clanon, T.L.; Shawyer, Lois; Kurdys, Douglas. "Less insanity in the courts." *American Bar Association Journal* 68 (1982): 824-27.

Cocozza, J., Steadman, H. J. "The failure of psychiatric predictions of dangerousness: Clear and convincing evidence." *Rutgers Law Review* 29 (no. 5, 1976): 1084-1101.

Collins, William H. "Insanity and presidential assassination." *The Prosecutor* 16 (no. 3, 1982): 31-34.

Crotty, Edward J. "Reconsidering the insanity defense and involuntary commitment in North Carolina." *Popular Government* 48 (no. 3, 1983): 7-34.

Cunningham, Susan. "High court distorts results of research on dangerousness." *APA Monitor* 14 (no. 9, 1983): 3.

Dershowitz, Alan M. "Abolishing the insanity defense: The most significant feature of the administration's proposed criminal code—An essay." *Criminal Law Bulletin* 9 (no. 5, 1973): 434-39.

Diamond, Bernard. "The psychiatric prediction of dangerousness." *University of Pennsylvania Law Review* 123 (no. 2, 1974): 434-52.

diGenova, Joseph E., & Toensing, Victoria. "Bringing sanity to the insanity defense." *American Bar Association Journal* 69 (1983): 466-70.

Dix, George E. "Clinical evaluation of the 'dangerousness' of 'normal' criminal defendants." *Virginia Law Review* 66 (no. 3, 1980): 523-81.

Editorial. "Guilty but insane." *Washington Post*, September 24, 1983.

Editorial. "Guilt and responsibility." *The Wall Street Journal*, June 24, 1983.

Fink, Neil, & LaRene, N.C. DeDay. "In defense of the insanity defense." *Michigan Bar Journal* 62 (no. 3, 1983): 199-214.

Gallivan, Gerald M. "Insanity, bifurcation and due process: Can values survive doctrine?" *Land and Water Law Review* 13 (no. 2, 1978): 515-54.

Gallo, Carol A. "The insanity of the insanity defense." *The Prosecutor* 16 (no. 3, 1982): 6-13.

Gerber, R.J. "Is the insanity test insane?" *American Journal of Jurisprudence* 20 (1975): 111-40.

German, June Resnick, & Singer, Anne C. "Punishing the not guilty: Hospitalization of persons acquitted by reason of insanity." *Rutgers Law Review* 29 (no. 5, 1976): 1011-83.

Hagan, Cynthia. "The insanity defense." *The Journal of Legal Medicine* 3 (no. 4, 1982): 617-41.

Halpren, Abraham. "The fiction of legal insanity and the misuse of psychiatry." *The Journal of Legal Medicine* 1 (no. 4, 1980): 18-74.

Halpren, Abraham. "The insanity defense: A judicial anachronism." *Psychiatric Annals* 7 (no. 8, 1977): 41-63.

Heinemann, David J. "Legislation 1982." *The Journal of the Kansas Bar Association* 51 (no. 2, 1982): 106-107.

Hermann, Donald H.J. Book Review, *The court of last resort: Mental illness and the law*. Warren, 1982. *Buffalo Law Review* 31 (no. 2, 1982): 611-33.

Hermann, Donald H. J. Book Review, *Madness and the criminal law*. Morris, 1982. *George Washington Law Review* 51 (no. 4, 1983): 701-24.

Hermann, Donald H.J. Book Review, *The insanity plea: The uses and abuses of the insanity defense*. Winslade and Ross, 1983. *Ohio State Law Journal* (in press).

Hermann, Donald H. J. "Assault on the insanity defense: Limitations on the effectiveness and effect of the defense of insanity." *Rutgers Law Journal* (in press).

Hermann, Donald H. J., & Sor, Yvonne J. "Convicting or confining: Alternative directions in insanity law

reform." *Brigham Young Law Review* (in press).

Hiday, Virginia. "Are lawyers enemies of psychiatrists? A survey of civil commitment counsel and judges." *American Journal of Psychiatry* 140 (no. 3, 1983): 323-26.

Hinckley, Jack & Jo Ann. "Illness is the culprit." *Reader's Digest* (March 1983): 77-81.

"The insanity defense. ABA and APA proposals for change." *Mental Disability Law Reporter* 7 (1983): 136-211.

Kaplan, Leonard V. "The mad and the bad: An inquiry into the disposition of the criminally insane." *The Journal of Medicine and Philosophy* 2 (no. 3, 1977): 244-304.

Kaufman, Irving. "The insanity plea on trial." *New York Times Magazine* (August 8, 1982): 16-20.

Keilitz, Ingo, & Van Duizend, Richard. "Current trends in the involuntary civil commitment of mentally disordered persons." *Rehabilitation Psychology* (in press).

Kirschner, Barry. "Constitutional standards for release of the civilly committed and not guilty by reason of insanity: A strict scrutiny analysis." *Arizona Law Review* 20 (1978): 233-78.

Lauter, David. "Consensus emerging: A reform of insanity plea likely." *National Law Journal* 5 (1983): 39.

Lauter, David. "Crime bill signed on time?" *The National Law Journal* 5 (September 27, 1982): 6.

Lewis, Donald E. "Meeting the insanity defense, Should you counter with your own expert?" *The Prosecutor* 16 (no. 3, 1982): 14-18.

Louisell, David W. & Hazard, Geoffrey C. "Insanity as a defense: The bifurcated trial." *California Law Review* 41 (no. 5, 1961): 805-30.

Loverude, Russell H. "The new Illinois provision for defendants found not guilty by reason of insanity." *Illinois Bar Journal* 68 (no. 8, 1980): 528-32.

Lykken, David T. "If a man be mad." *The Sciences* (August-September 1982): 11-13.

Lyons, Phillip B. "The insanity defense."

- Toledo Law Review* 9 (1977): 31-55.
- Mathews, Darryl B., & Coyne, Patrick J. " 'Arbeit macht frei': Vocational rehabilitation and the release of Virginia's criminally insane." *University of Richmond Law Review* 16 (1982): 543-82.
- Morris, Grant H.; Bozetti, Louis P.; Rusk, Thomas N.; Read, Randolph A. "Whither thou goest? An inquiry into jurors' perceptions of the consequences of a successful insanity defense." *San Diego Law Review* 14 (no. 5, 1977): 1058-82.
- Morris, Norval. "The criminal responsibility of the mentally ill." *Syracuse Law Review* 33 (1982): 477-531.
- Morris, Norval. "Psychiatry and the dangerous criminal." *Southern California Law Review* 41 (1968): 514-47.
- Morse, Stephen J. "Crazy behavior, morals and science: An analysis of mental health laws." *Southern California Law Review* 51 (no. 4, 1978): 527-654.
- Morse, Stephen J. "Failed explanations and criminal responsibility: Experts and the unconscious." *Virginia Law Review* 68 (1982): 871-1084.
- Morse, Stephen J. "Reforming expert testimony: An open response from the tower and the trenches." *Law and Human Behavior* 6 (no. 1, 1982): 45-47.
- Novak, Edward F. "Insanity and intoxication." *Arizona Bar Journal* 18 (no. 7, 1982): 20-24, 48-50.
- Pasewark, Richard A.; Pantle, Mark L.; Steadman, Henry J. "The insanity defense in New York state 'NGRI 1965-1976.'" *New York State Bar Journal* 51 (no. 3, 1979): 186-225.
- Pasewark, Richard A., & Lanthorn, B. "Disposition of persons utilizing the insanity plea in a rural state." *Journal of Humanics* 5 (1977): 87-98.
- Perlin, Michael. "The legal status of the psychologist in the courtroom." *Mental Disability Law Reporter* 4 (1980): 144.
- Poythress, Norman G. "Concerning reform in expert testimony: An open letter from a practicing psychologist." *Law and Human Behavior* 6 (no. 1, 1982): 39-43.
- Richardson, Robert E.L. "Should we allow the Hinckley backlash to cause bad law? The insanity defense." *Oklahoma Bar Journal* 53 (no. 34, 1982): 2180-95.
- Robinson, Mary. "The insanity defense: Does it serve justice? Does it protect the public?" *Illinois Bar Journal* 71 (no. 5, 1983): 306-12.
- Robitscher, Jonas & Haynes, Andrew. "In defense of the insanity defense." *Emory Law Review* 31 (no. 1, 1982): 9-60.
- Rogers, Jeffrey L.; Bloom, Joseph D; Manson, Spero D. "State's insanity defense." *Oregon State Bar Bulletin* 42 (no. 9, 1982): 4-8.
- Sherman, Scott L. "Guilty but mentally ill: A retreat from the insanity defense." *American Journal of Law and Medicine* 7 (no. 2, 1982): 237-64.
- Smith, Gare A. & Hall, James A. "Evaluating Michigan's guilty but mentally ill verdict: An empirical study." *University of Michigan Journal of Law Reform* 16 (no. 1, 1982): 77-114.
- Smith, William French. "Limiting the insanity defense: A rational approach to irrational crime." *Missouri Law Review* 47 (no. 4, 1982): 605-19.
- Spring, Raymond L. "The end of insanity." *Washburn Law Journal* 14 (1979): 23-37.
- Spring, Raymond L. "The insanity issue in a public needs perspective." *Detroit College of Law Review* 4 (1979): 603-22.
- Steadman, Henry J.; Keitner, Lydia; Braff, Jeraldine; Arvanites, Thomas M. "Factors associated with a successful insanity defense." *American Journal of Psychiatry* 140 (1983): 401-5.
- Steadman, Henry J.; Monahan, John; Hartstone, Eliot; Davis, Sandra K.; Robbins, Pamela C. "Mentally disordered offenders: A national survey of patients and facilities." *Law and Human Behavior* 6 (no. 1, 1982): 31-38.
- Stone, Alan. "The insanity defense on trial." *Harvard Law School Bulletin* 34 (no. 1, 1982): 15-21.

- Turner, Joseph R., & Hall, Donna. "What next for New York's insanity defense?" *The Defender* 4 (no. 2, 1982): 11-13.
- Tanay, Emanuel. "Forensic psychiatry and justice." *Michigan Bar Journal* 63 (no. 3, 1983): 206-12.
- Turner, William B. & Ornstein, Beverly. "Distinguishing the wicked from the mentally ill." *California Lawyer* 3 (no. 4, 1982): 40-45.
- Wales, Heathcote W. "An analysis of the proposal to abolish the insanity defense in S. 1: Squeezing a lemon." *University of Pennsylvania Law Review* 124 (no. 3, 1976): 687-712.
- Weiner, Barbara. "Not guilty by reason of insanity: A sane approach." *Chicago-Kent Law Review* 56 (no. 1, 1980): 1057-85.
- Weiner, Barbara. "The sane approach to protecting the public from the person found not guilty by reason of insanity." *Chicago Bar Record* 62 (no. 4, 1981): 196-206.
- Wickham, James. "Insanity is alive and well in Idaho." *The Advocate* 25 (no. 4, 1982): 15-16.
- Zagle, James B. Book Review, *Coping with psychiatric and psychological testimony*. Ziskin, 1981. *The Prosecutor* 16 (no. 3, 1982): 39-44.
- Ziskin, Jay. "Use of a consultant (non-examining) expert in insanity defense cases." *The Prosecutor* 16 (no. 3, 1982): 35-37.

Law Review Comments and Notes

- Comment. "Constitutional ramifications of the release from confinement for defendants acquitted by reason of insanity." *Albany Law Review* 40 (1976): 391-405.
- Comment. "Commitment and release of person found not guilty by reason of insanity: A Georgia perspective." *Georgia Law Review* 15 (1981): 1065-1103.
- Comment. "Commitment following an insanity acquittal." *Harvard Law Review* 94 (1981): 605-25.
- Comment. "Diminished capacity and California's new insanity test." *Pacific Law Journal* 10 (1979): 751-71.
- Comment. "Diminished capacity: The middle ground of criminal responsibility." *Santa Clara Lawyer* 15 (1975): 911-39.
- Comment. "Diminished capacity—recent decisions and an analytical approach." *Vanderbilt Law Review* 30 (1977): 213-37.
- Comment. "Guilty but mentally ill: a reasonable compromise for Pennsylvania." *Dickinson Law Review* 85 (1981): 289-319.
- Comment. "Guilty but mentally ill—an historical and constitutional analysis." *University of Michigan Journal of Urban Law* 53 (1976): 472-96.
- Comment. "Insanity—guilty but mentally ill—diminished capacity: An aggregate approach to madness." *John Marshall Journal* 12 (1979): 351-81.
- Comment. "Mens rea and insanity." *Maine Law Review* 28 (1976): 500-530.
- Comment. "People v. Drew—will California's new insanity test ensure a more accurate determination of insanity?" *San Diego Law Review* 17 (1980): 491-512.
- Comment. "Release from confinement of persons acquitted by reason of insanity in New Jersey." *Rutgers Law Review* 8 (1980): 973-1023.
- Comment. "Reforming insanity defense procedure in New York: Balancing societal protection against individual liberty." *Albany Law Review* 45 (1981): 679-716.
- Comment. "The psychologist as expert witness: Science in the courtroom?" *Maryland Law Review* 38 (1979): 539-621.
- Comment. "The burden of proof for extreme emotional disturbance and insanity: The deterioration of due

- process." *Temple Law Quarterly* 52 (1979): 79-101.
- Comment. "The bifurcated trial: Is it used more than it is useful?" *Emory Law Review* 31 (1982): 441-87.
- Comment. "Virginia's insanity defense: Reform is imperative." *University of Richmond Law Review* 13 (1979): 397-419.
- Note. "Constitutional limitations on allocating the burden of proof of insanity to the defendant in murder cases." *Boston University Law Review* 56 (1976): 499-521.
- Note. "Criminal law: Mental disease or defect reducing the degree of crime—Missouri changes to the rule." *Missouri Law Review* 45 (1981): 679-716.
- Note. "Criminal responsibility: Changes

- in the insanity defense and the guilty but mentally ill response." *Washburn Law Journal* 21 (1982): 515-54.
- Note. "Due process and the insanity defense: Examining shifts in the burden of persuasion." *Notre Dame Lawyer* 53 (1977): 123-40.
- Note. "Mens rea, due process and the burden of proving sanity or insanity." *Pepperdine Law Review* 5 (1977): 113-33.
- Note. "The insanity defense in North Carolina." *Wake Forest Law Review* 14 (1978): 1157-85.
- Note. "The insanity defense in criminal trials—burden of proof." *Suffolk University Law Review* 10 (1976): 1039-63.

Reports

- American Law Institute. Model Penal Code, Section 4.01—Proposed Official Draft. Philadelphia: American Law Institute, 1982.
- American Medical Association. *The insanity defense in criminal trials and limitations of psychiatric testimony*. Report of the Board of Trustees, 1983.
- American Psychiatric Association. *Statement on the insanity defense*. Insanity Defense Work Group, American Psychiatric Association, 1982.
- Baridon, Phillip; Seitz, Fred; Echols, Ara. *A special report on the commitment of persons found not guilty by reason of insanity*. Washington, D.C.: Division of Forensic Programs, Saint Elizabeths Hospital, 1983.
- Division of Psychology and Law, American Psychological Association. "More on insanity reform," 3 *Newsletter* 8 (1983).
- Illinois Department of Mental Health and Developmental Disabilities. *Report on the criminal justice and mental health systems*. Chicago: Committee on the Criminal Justice and Mental Health Systems, Illinois Department of Mental Health and Developmental Disabilities, 1982.
- National Association of Attorneys General. *Resolutions*. Annual Meeting, July 15-18, 1982.
- National Mental Health Association. *Myths and realities: A report of the National Commission on the Insanity Defense*. Arlington, Va.: National Mental Health Association, 1983.
- North Carolina Mental Health Study Commission. *Final report and recommendations*. Raleigh, N.C.: North Carolina Mental Health Study Commission, 1983.
- United States Senate. *Limiting the insanity defense: Hearings before the Subcomm. on Criminal Law of the Comm. on the Judiciary*, 97th Cong., 2nd Sess., on S.818, S.1106, S.1558, S.1995, S.2658, and S.2669, June 24, 30 and July 14, 1982; and *The insanity defense: Hearings before the Comm. on the Judiciary*, 97th Cong., 2nd Sess., on S.818, S.1106, S.1558, S.2669, S.2672, S. 2678, S.2745, and S.2780, July 19, 28 and August 2, 4, 1982.
- Virginia Task Force on the Insanity Plea. *Final Report*. Richmond, Va.: Insanity Defense Plea Task Force, 1982.

Cases Cited

- Addington v. Texas, 441 U.S. 418 (1979).
- Aguilar v. Texas, 378 U.S. 108 (1964).
- Barbour v. State, 78 So. 2d 328 (Ala. 1955).
- Barefoot v. Estelle, 51 U.S.L.W., 5189 (1983).
- Baxstrom v. Herold, 383 U.S. 107 (1966).
- Blake v. United States, 407 F.2d 908 (5th Cir. 1969).
- Bolton v. Harris 395 F.2d 642 (D.C. Cir. 1968).
- Commonwealth v. Mosler, 4 Pa. 264 (1846).
- Daniel McNaghten's Case, 8 Eng. Rep. 718 (1843).
- Davis v. United States, 160 U.S. 469 (1895).
- Estelle v. Smith, 451 U.S. 454 (1981).
- Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).
- Finnigan v. Fall River Gas Works, 159 Mass. 311, 34 N.E. 523 (1893).
- Fisher v. United States, 328 U.S. 463 (1946).
- Hopt v. People, 104 U.S. 631 (1881).
- In Re Winship, 397 U.S. 358 (1970).
- Jones v. United States, 51 U.S.L.W. 5041 (1983).
- Langworthy v. State 399 A.2d 578 (Md., 1978).
- Leland v. Oregon, 343 U.S. 790 (1952).
- Mullaney v. Wilbur, 421 U.S. 684 (1975).
- New State Ice Company v. Liebman, 285 U.S. 263 (1932).
- Parsons v. State, 81 Ala. 557.2 So. 854 (1866).
- Paterson v. New York, 432 U.S. 147 (1977).
- People v. Drossart, 297 N.W.2d 20 (Mich. 1979).
- People v. Lally, 224 N.E.2d 87 (N.Y. 1966).
- People v. McLeod, 288 N.W.2d 909 (Mich. 1980).
- People v. McQuillian, 221 N.W.2d 569 (Mich. 1974).
- Rivera v. Delaware, 429 U.S. 877 (1976).
- Rivera v. State, 351 A.2d 561 (Del. 1975).
- Sandstrom v. Montana, 442 U.S. 510 (1979).
- Sinclair v. State, 132 So. 581 (Miss. 1931).
- Specht v. Patterson, 386 U.S. 605 (1967).
- Spinelli v. United States, 393 U.S. 410 (1969).
- State v. Clemons, 515 P.2d 324 (Ariz. 1973).
- State ex rel Kovach v. Schubert, 219 N.W.2d 341 (Wis. 1974).
- State v. Jensen, 251 N.W.2d 182 (N.D. 1977).
- State v. Johnson, 399 A.2d 469 (R.I. 1979).
- State v. Jones, 50 N.H. 369 (1871).
- State v. Krol, 344 A.2d 289 (N.J. 1975).
- State v. Lange, 123 So. 639 (La. 1929).
- State v. Nault, 314 A.2d 627 (R.I. 1974).
- State v. Pike, 49 N.H. 399 (1869).
- State v. Strasbourg, 110 P. 1020 (Wash. 1910).
- Thompson v. Commonwealth, 70 S.E.2d 284 (1952).
- United States v. Alvarez, 519 F.2d 1036 (3rd Cir. 1975).
- United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972).
- United States v. Currens, 290 F.2d 751 (3rd Cir. 1961).
- United States v. Chandler, 393 F.2d 920 (4th Cir. 1968).
- United States v. Frazier, 458 F.2d 911 (8th Cir. 1972).
- United States v. Freeman, 357 F.2d 606 (2d Cir. 1966).
- United States v. Gay, 522 F.2d 424 (6th Cir. 1979).
- United States v. Shapiro, 383 F.2d 680 (7th Cir. 1967).
- United States v. Smith, 404 F.2d 720 (6th Cir. 1968).
- Vitek v. Jones, 445 U.S. 480 (1980).
- Wade v. United States, 426 F.2d 64 (9th Cir.)
- Washington v. United States, 390 F.2d 444 (D.D.C., 1967).
- Wilson v. State, 287 N.E.2d 87 (Ind. 1972).
- Wion v. United States, 325 F.2d 420 (10th Cir. 1964).
- Youngberg v. Romeo, 102 S.Ct. 2451 (1982).

Statutes Cited

- Alabama Code § 15-16-2 (1981)
 Alaska Stat. § 12.47.040
 California Penal Code, § 1027 (1982)
 Conn. Gen. Stat. § 53a-47 and 1983 Conn. Acts 486 (Reg. Sess.)
 Delaware Code Annotated 11 § 3905
 District of Columbia Code §§ 24-301, (d), (1) and (j) (1973)
 Federal Rule of Evidence 704
 Georgia Code Annotated § 17-7-131
 Idaho Code § 18-207 (1982)
 Indiana Code §§ 35-36-2-3 and 35-36-2-3(1) (3)
 Illinois Revised Statutes ch. 38 § 6-2 (c)
 Kentucky Revised Statutes Annotated § 504.120
 Michigan Public Act 180 (1975 § 20 a (6))
 Michigan Compiled Laws § 768.36 (1) (3)
 Michigan Statutes Annotated § 28.1059 (1975)
 Montana Code Annotated, Title 46, Ch. 14
 New York § 220-15 (5a) and New York Penal Law § 30.05
 New Mexico Statutes Annotated § 31-9-3
 North Carolina General Statutes § 15 A-959 (a) (1978)
 North Dakota Centennial Code § 12-04-03 (1981)
 Pennsylvania Statutes Annotated § 314
 South Dakota Compiled Laws Annotated § 23A-7-2
 Wisconsin Statutes Annotated § 977.17 (1), § 971.175, § 971.15 (30)
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