The Imposition of the Insanity Defense on an Unwilling Defendant

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I. INTRODUCTION

A successful insanity defense, unlike any other legal defense, carries with it potentially onerous consequences[1] that may be less palatable to a defendant than a conviction itself. While freed of any criminal penalty, the defendant must suffer the stigma of "criminally insane,"[2] must generally acknowledge that he committed the act charged,[3] may have to sacrifice much in terms of trial tactics,[4] must usually be committed automatically to a mental hospital for at least a temporary period of examination,[5] must

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1. For a discussion of the consequences of a successful insanity defense *see generally* German & Singer, *Punishing the Not Guilty: Hospitalization of Persons Acquitted by Reason of Insanity*, 29 RUTGERS L. REV. 1011 (1976) [hereinafter cited as *Punishing the Not Guilty*]; Singer, *Insanity Acquittal in the Seventies: Observations and Empirical Analysis of One Jurisdiction*, 2 MENTAL DISABILITY L. REP. 406, 407-09 (1978). Among the onerous consequences discussed in these two articles are the heavy burden placed on defendants in securing their release because of procedural barriers, most importantly the unavailability to them of administrative discharge by the hospital. In addition to the likelihood of lengthy hospitalization, other consequences may include maximum security confinement, therapeutically unnecessary hospitalization and court-imposed restraints after release.

2. It has been said that an acquitted patient finds himself doubly cursed as both a "criminal" and a "mental patient." *See* Matthews v. Hardy, 420 F.2d 607, 610-11 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1010 (1970); United States *ex rel.* Schuster v. Herold, 410 F.2d 1071, 1073 (2d Cir. 1969), *cert. denied*, 396 U.S. 847 (1969); Chesney v. Adams, 377 F. Supp. 887, 893 (D. Conn. 1974), *aff'd*, 508 F.2d 836 (2d Cir. 1975); Morris, *The Confusion of Confinement Syndrome: An Analysis of the Confinement of Mentally Ill Criminals and Ex-Criminals by the Department of Correction of the State of New York*, 17 BUFFALO L. REV. 651, 652 (1968). One court has rather quaintly captured the degree of stigmatization that attaches to an acquitted patient by designating his class the "insane-insane." *See* Reynolds v. Neill, 381 F. Supp. 1374, 1380 (N.D. Tex. 1974), *vacated sub nom.* Sheldon v. Reynolds, 422 U.S. 1050 (1975).

3. *See, e.g.*, Lynch v. Overholser, 369 U.S. 705, 714 (1962); Ragsdale v. Overholser, 281 F.2d 943, 949 (D.C. Cir. 1960); Hill v. State, 358 So.2d 190, 199 (Fla. App. 1978); State v. Krol, 68 N.J. 236, 344 A.2d 289, (1975). The statement in *Krol* is typical of statements of this type to the effect that an insanity verdict "implies a finding that the defendant committed the *actus reus*." 68 N.J. at 246, 344 A.2d at 295.

4. Courts have often recognized that substantial prejudice may result from the simultaneous trial on the pleas of insanity and not guilty. Such prejudice can result from two sources: (1) evidence of past anti-social behavior and present anti-social propensities, and (2) testimony that the crime was a product of mental disease, (and therefore that the defendant performed the act charged). Holmes v. United States, 363 F.2d 281 (D.C. Cir. 1966). *See also* Trest v. United States, 350 F.2d 794, 795 (D.C. Cir. 1965), *cert. denied*, 382 U.S. 1018 (1966); People v. Gonzalez, 20 N.Y.2d 289, 296, 229 N.E.2d 220, 224 (1967) (Scileppi, J., dissenting); Springer v. Collins, 444 F. Supp. 1049, 1059 (D. Md. 1977), *rev'd*, 586 F.2d 329 (4th Cir. 1978), *cert. denied*, 440 U.S. 923 (1979).

5. Cases almost unanimously hold that a period of automatic commitment is constitutionally valid, either as an indefinite commitment, *e.g.*, Chase v. Kearns, 278 A.2d 132 (Me. 1971); State v. Kee, 510 S.W.2d 477 (Mo. 1974), or more often for a temporary period of examination pending a commitment hearing, *e.g.*, Bolton v. Harris, 395 F.2d 642, 651 (D.C. Cir. 1968); Allen v. Radack, 426 F.

overcome hurdles to his hospital discharge unknown to the regularly civilly committed patient[6]—which may keep him hospitalized longer than the time he would have spent incarcerated under sentence—and often, once released, he must regiment his life according to conditions of discharge imposed by the releasing court, conditions which may last indefinitely.[7] While barriers to release of acquitted patients are beginning to tumble,[8] release cannot be guaranteed even when a patient produces

Supp. 1052 (D.S.D. 1977); State v. Krol, 68 N.J. 236, 344 A.2d 289 (1975); People *ex rel.* Henig v. Commission of Mental Hygiene, 43 N.Y.2d 334, 372 N.E.2d 304 (1977). Only two cases are known which preclude even a temporary automatic commitment, Wilson v. State, 259 Ind. 375, 287 N.E.2d 875 (1972); State *ex rel.* Kovach v. Schubert, 64 Wis. 2d 612, 219 N.W.2d 341 (1974), *appeal dismissed*, 419 U.S. 1117 (1975).

Even though *Lynch v. Overholser*, 369 U.S. 705 (1962) held that a defendant who did not raise the insanity defense himself could only be committed civilly, the decision was based upon a construction of District of Columbia statutes and so is not binding as a constitutional mandate on other jurisdictions. Therefore, although a persuasive argument can be made that the "criminal commitment" of an insanity acquittee who has had the defense imposed upon him would be unconstitutional, no case has clearly reached this result, and in most jurisdictions such acquittees are probably still subjected to commitment and release procedures which are more burdensome than those applicable to regular civilly committed patients.

6. Insanity acquittees have historically been labelled as an "exceptional" class of patients and therefore subject to more stringent standards for release and more lenient standards for commitment than other civil patients. *See, e.g.*, the recent case of People *ex rel.* Henig v. Commissioner of Mental Hygiene, 43 N.Y.2d 334, 372 N.E.2d 304, 306 (1979) retaining that label. Although barriers to release are beginning to tumble, courts still generally hold that acquitted patients must obtain judicial approval before they are released, whereas other civil patients are generally eligible for release upon approval by the hospital staff. This requirement imposes the most serious release problems for these patients, even where the burden of proof is on the state. *See* discussion of the release of acquitted patients in *Punishing the Not Guilty*, *supra* note 1, at 1053-74. *See also* Dorsey v. Solomon, 435 F. Supp. 725 (D. Md. 1977) (holding that differences between commitment and release proceedings for acquitted patients and others, including different burdens of proof for commitment and release, are not unconstitutional); Powell v. Florida, 579 F.2d 324 (5th Cir. 1978) (upholding the requirement of judicial approval for release). Furthermore, courts will often admit evidence at release hearings that would be inadmissible elsewhere, such as prior arrest records, *e.g*, United States v. Snyder, 529 F.2d 871 (D.C. Cir. 1976); State v. Hesse, 117 N.H. 329, 373 A.2d 345 (1977). Thus, a petitioner's entire past may follow him into the courtroom when he seeks to leave the hospital. *See also* Singer, *Insanity Acquittal in the Seventies: Observations and Empirical Analysis of One Jurisdiction*, 2 MENTAL DIS. L. REP. 406, 409-10 (1978).

7. See list of states that incorporate conditional release provisions for acquitted patients and discussion of the use and abuse of conditional release for such patients in *Punishing the Not Guilty*, *supra* note 1, at 1068-73. *See also* State v. Carter, 64 N.J. 382, 391-98, 316 A.2d 449, 454-58 (1974); Hill v. State, 358 So. 2d 190, 209-11 (Fla. App. 1978).

8. Courts now generally hold that commitment procedures and standards for acquitted patients must be substantially like those for other civil patients. *E.g.*, Allen v. Radack, 426 F. Supp. 1052 (D.S.D. 1977); State v. Krol, 68 N.J. 236, 344 A.2d 289 (1975); *Matter of* Torsney, 47 N.Y.2d 667, 394 N.E.2d 262 (1979). More specifically, most courts to which the issue has been presented now hold that indefinite automatic commitment (*i.e.*, without a hearing) following an insanity acquittal is unconstitutional. *See, e.g.*, cases cited in note 5 *supra*; Lee v. Kolb, 449 F. Supp. 1368 (W.D.N.Y. 1978). Some hold that at the hearing, the burden must be on the state, *e.g.*, State v. Krol, 68 N.J. 236, 344 A.2d 289 (1975); *contra, In re* Franklin, 7 Cal. 3d 126, 496 P.2d 465, 101 Cal. Rptr. 553 (1972), and at least two have held that the burden must remain on the state in subsequent periodic review hearings. State v. Fields, 77 N.J. 282, 390 A.2d 574 (1978); Gibbs v. Helgemoe, 367 A.2d 1041 (N.H. 1977). Only four, however, have ruled that administrative release by the hospital must be available to acquitted patients if it is available to regular civil committees, Reynolds v. Neill, 381 F. Supp. 1374 (N.D. Tex. 1974), *vacated on other grounds sub nom.* Sheldon v. Reynolds, 422 U.S. 1050 (1975); Kanteles v. Wheelock, 439 F. Supp. 505 (D.N.H. 1977); People v. McQuillan, 392 Mich. 511, 221 N.W.2d 569 (1974); Wilson v. State, 259 Ind. 375, 287 N.E.2d 875 (1972), and most courts that have ruled on the issue have held that administrative release by hospital officials need not be available to acquitted patients even if it is available to other involuntary patients, *e.g.*, United States v. Ecker, 479 F.2d 1206 (D.C. Cir. 1973) and 543 F.2d 178 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1063 (1977); Powell v. Florida, 579 F.2d 324 (5th Cir. 1977); Lee v. Kolb, 449 F. Supp. 1368 (W.D.N.Y. 1978).

unanimous psychiatric testimony that he is mentally intact and fit for release as not dangerous.[9] Thus, while the general public perception of the insanity acquittee is that "he gets away with" the crime, in reality many persons in this category are penalized by using the insanity defense. It is not surprising, therefore, that many defendants refuse to rely on it or later wish that they had not permitted its use.

In addition to the consequences of a successful defense, other sound reasons may exist for a defendant's refusal to invoke it. These are the defendant's (1) belief that he is not guilty and therefore is entitled to a full acquittal; (2) belief that he is not mentally ill and his reluctance to be labelled as mentally ill; (3) preference to spend time in jail or prison rather than in a mental hospital; and (4) if his crime is one of political protest, a belief that an insanity defense will diminish its impact.

Despite the adverse consequences of the defense, which should indicate to defense attorneys that they should carefully question the efficacy of its use, courts, prosecutors[10] and defense attorneys are often eager to force the defense on an unwilling defendant or attempt to influence a naive or passive defendant to rely on it without warning him of the jeopardy in which it places him.[11] This too often occurs even when the crime is minor[12] or when the defendant has other viable defenses on which he would prefer to rely.[13]

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9. *See, e.g.*, United States v. Ecker, 543 F.2d 178 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1063 (1977); State v. Montague, 510 S.W.2d 776 (Mo. Ct. App. 1974); State v. Taylor, 158 Mont. 323, 491 P.2d 877 (1971), *cert. denied*, 406 U.S. 978 (1972); Hefley v. State, 480 S.W.2d 810 (Tex. Ct. Civ. App. 1972).

10. Frequently, the insanity defense is the result of a plea bargain. Since prosecutors and judges know that a defendant will probably be incarcerated even if not convicted, they are likely to tolerate, or even encourage, an insanity acquittal, thereby saving themselves both the time involved in a full trial and the risk of the defendant's release if he is not convicted. If both prosecution and defense agree to acquittal on insanity grounds, the jury is ordinarily waived and minimal psychiatric testimony is presented. It is interesting to note that in at least two jurisdictions that used to have the equivalent of automatic commitment following a successful insanity defense, the prosecutors raised the defense more often than the defendants. Prosecutors may have seen the "defense" as a means to lock defendants up without having their guilt proved beyond a reasonable doubt. *See* S. RUBIN, PSYCHIATRY AND CRIMINAL LAW 37-39 (1965); Reid, *The Working of the New Hampshire Doctrine of Criminal Insanity*, 15 U. MIAMI L. REV. 14, 16, 33-34 (1960).

11. Reasons why prosecutor, judge and defense counsel alike may wish a defendant to rely upon the insanity defense are (1) that it saves court time since a full trial is rarely required, the defendant having admitted that he performed the act charged; (2) the prosecutor's view that the defendant will almost certainly be incarcerated without his having to prove him guilty by beyond a reasonable doubt, and (3) the defense attorney's ability to count the case a "victory" since his client is not convicted. *See* discussion of this "conspiracy" in Singer, *Insanity Acquittal in the Seventies: Observation and Empirical Analysis of One Jurisdiction*, 2 MENTAL DISABILITY L. REP. 406, 413-16 (1978).

12. It is commonly believed that only defendants accused of serious violent crimes defend on insanity grounds. For example, the former Chief Justice of the New Jersey Supreme Court, Joseph Weintraub, believed that the insanity defense was invoked almost exclusively in cases of murder, State v. Lucas, 30 N.J. 37, 87, 152 A.2d 50, 77 (1959) (Weintraub, J., concurring). This is not true. As reported in one study of insanity acquittal cases in Essex County, New Jersey, only twelve of forty-six persons had been acquitted of murder. The study notes that:

> There were also 16 persons accused of atrocious assault and battery, 4 of arson, 3 of armed robbery, 4 of rape or assault with intent to rape, 2 of lewdness, 2 of larceny, 2 of possession of a concealed weapon, and 1 of a drug charge (sale of methadone). It should be noted that these were the crimes charged, not the crimes on which conviction would have been obtained had insanity not been interposed as a defense. Such charges would probably have been less serious

It is the purpose of this Article (1) to investigate the duty owed to a defendant by the court, prosecutor and defense counsel regarding the possible use of the insanity defense, (2) to answer the question of the defendant's right to have his wishes regarding the defense respected; and (3) to suggest the most appropriate (if not the ethically or constitutionally required) practical approach for defense counsel's handling the case of a criminal defendant who counsel believes may lack responsibility for the crime with which he is charged.

II. THE CONCEPT OF COMPETENCY TO STAND TRIAL

Inherent in the concept of competency to stand trial is the idea that a competent defendant is able and must be allowed to make certain decisions about his own defense.[14] Thus, he may select his own attorney or decide to represent himself,[15] decide whether to plead guilty, decide whether to waive a jury trial, decide whether to testify in his own behalf, and make or participate in making certain strategic decisions concerning his defense. It is precisely because of the due process demand that he be able to participate that his competency is required. In fact, the test of competency to stand trial is whether the defendant is able to cooperate with counsel, assist with his own defense, and understand the nature of the proceedings against him.[16] Thus, if he is not incompetent, it follows that his participation is expected. The ability of a defendant to participate in his own trial is considered "fundamental to an adversary system of justice."[17]

Prime among the decisions to be made by a criminal defendant, with the advice of his attorney, are the decisions whether to forego trial by pleading guilty and what defenses to rely on if the case is tried. Since these

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in many cases after the plea bargaining process was completed. Also, while such crimes as atrocious assault and battery sound serious, the actual dangerousness involved in each case depended upon the specific acts performed. For example, one "arsonist" caused slight charring to a couch in his apartment. One atrocious assault and battery was the result of a purse snatching during which the victim was knocked down. Thus, the crimes involved run the full gamut, and it is likely that many of the defendants would not have received custodial sentences if convicted.

Singer, *Insanity Acquittal in the Seventies: Observations and Empirical Analysis of One Jurisdiction*, 2 MENTAL DISABILITY L. REP. 406, 406-07 (1978). For reported cases concerning persons acquitted of minor crimes *see, e.g.*, Lynch v. Overholser, 369 U.S. 705 (1962) (writing two bad checks of fifty dollars each); Tremblay v. Overholser, 199 F. Supp. 569 (D.D.C. 1961) (intoxication). *See also* Overholser, *Criminal Responsibility: A Psychiatrist's Viewpoint*, 48 A.B.A.J. 527, 531 (1962).

13. None of this discussion is meant to suggest that there are not appropriate uses for the defense from the defendant's point of view or that some defendants do not reap substantial benefit from its use, especially where the crime is serious.

14. *See* Drope v. Missouri, 420 U.S. 162, 171 (1975); Silten & Tullis, *Mental Competency in Criminal Proceedings*, 28 HASTINGS L.J. 1053, 1058-59 (1977); Note, *Incompetency to Stand Trial*, 81 HARV. L. REV. 454, 457-58 (1967).

15. Note, however, that a defendant may be competent to stand trial but be incompetent to represent himself. Westbrook v. Arizona, 384 U.S. 150 (1966).

16. Dusky v. United States, 362 U.S. 402 (1960).

17. Drope v. Missouri, 420 U.S. 162, 172 (1975); United States v. Masthers, 539 F.2d 721, 725 (D.C. Cir. 1976).

decisions often involve complex and delicate considerations of trial strategy and are geared primarily to assure the least possible custodial time for the defendant, it is rare for trial courts to intrude on this attorney-client decision-making process by raising *sua sponte* a defense that has not been claimed and in support of which a defendant has put forth no evidence.[18] Imposition of defenses that the defendant himself has not invoked may even be unconstitutional,[19] and the preferable judicial approach is for the court quietly to ascertain from the defendant whether he has considered, and voluntarily relinquished, a defense, which may be apparent to the court but may have been overlooked by defense counsel.[20] Certainly, it is not unconstitutional for a court to refuse to impose a defense that a defendant does not desire.[21]

Only one defense, the insanity defense, is inserted over a defendant's objections with enough frequency to raise the question whether there are differences between this defense and others that justify this unusual approach by trial courts, defense counsel or prosecutors. The inquiry is begun by a brief examination into the usual role of the trial judge in a criminal trial.

III. DUTY OF THE COURT

A. *The Role of the Criminal Trial Judge*

The overriding themes in the role of a criminal trial judge seem to be that he must protect the essential rights of the accused[22] and see that there is a just determination of the case.[23] In carrying out this role, it is clear that he need not function as a "mere moderator" of the proceedings, but should be the "governor of the trial for purposes of assuring its proper conduct

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18. Judicial discussions of whether it is proper for a judge to force an unwanted defense on a defendant are rare. Among the more prominent of these is the discussion by the United States Supreme Court in *North Carolina v. Alford*, 400 U.S. 25, 33 (1970), where, in holding that a guilty plea could be accepted even though the defendant simultaneously proclaimed his innocence, the Court stated:

> [Some courts] have concluded that they should not "force any defense on a defendant in a criminal case," particularly when advancement of the defense might "end in disaster. . . ." They have argued that, since "guilt, or the degree of guilt, is at times uncertain and elusive, [a]n accused, though believing in or entertaining doubts respecting his innocence, might reasonably conclude a jury would be convinced of his guilt and that he would fare better in the sentence by pleading guilty. . . ." As one state court observed nearly a century ago, "[r]easons other than the fact that he is guilty may induce a defendant to so plead, . . . [and] [h]e must be permitted to judge for himself in this respect."

(citations omitted). *See also* Tremblay v. Overholser, 199 F. Supp. 569 (D.D.C. 1961), holding that forcing any defense on a defendant violates due process.

19. *See, e.g.*, Tremblay v. Overholser, 199 F. Supp. 569, 570 (D.D.C. 1961).

20. *See, e.g.*, People v. Sedeno, 10 Cal. 3d 703, 717 n.7, 518 P.2d 913, 922 n.7, 112 Cal. Rptr. 1, 10 n.7, (1974).

21. *See* North Carolina v. Alford, 400 U.S. 25, 35 (1970).

22. *See, e.g.*, Glasser v. United States, 315 U.S. 60, 71 (1942); Patton v. United States, 281 U.S. 276 (1930); Lollar v. United States, 376 F.2d 243 (D.C. Cir. 1967).

23. *See, e.g.*, Barba-Reyes v. United States, 387 F.2d 91, 93 (9th Cir. 1967); Gitelson & Gitelson, *A Trial Judge's Credo Must Include His Affirmative Duty to be an Instrumentality of Justice*, 7 SANTA CLARA LAW. 7 (1966-67) [hereinafter referred to as *A Trial Judge's Credo*].

and of determining questions of law."[24] In a criminal trial, this means that the judge must act with "solicitude for the essential rights of the accused."[25] In protecting these rights, it is generally conceded that he is not limited to an administrative role of keeping order in the courtroom and keeping the trial moving, but that he has broad and far-reaching discretion. For example, he may give jury instructions on issues of law relevant to the case, even though they are not requested by either party.[26] He may appoint expert witnesses for the court, when necessary to shed light on the truth of a matter.[27] He may question witnesses to elucidate a point that is unclear to himself or to the jury or to eliminate a misunderstanding.[28] And he may, on his own motion, strike inadmissable evidence to avoid a miscarriage of justice.[29] A trial judge oversteps his bounds, however, when he advocates the cause of either side, intrudes into the lawyer-client relationship, prejudices a case by overintervention, or abrogates the adversary system by trying the case for the attorneys.[30] Obviously, he also must take care not to tread on the constitutional rights of a party. In the following analysis, therefore, to determine whether a judge functions appropriately when he imposes the insanity defense on a defendant it will be necessary to examine whether rights of the defendant are abridged and whether the cause of justice is truly served by judicial intervention regarding the insanity defense.

There are several reasons why a trial judge may consider it "just" or even necessary to advance the defense of insanity, even though the defendant objects and even though decisions on defense, trial strategy and plea are at the heart of those that should be left to the defendant. First, a feeling may persist that even though a defendant is not incompetent to stand trial or to plead guilty according to strict legal definitions, he nevertheless is somehow not truly competent to function in his own best

24. Quercia v. United States, 289 U.S. 466, 469 (1933). The ABA Standards on the proper function of the trial judge permit some intervention by the judge into the conduct of the case. They state, in part:

> The Trial Judge has the responsibility for safeguarding both the rights of the accused and the interests of the public in the administration of criminal justice. The adversary nature of the proceedings does not relieve the trial judge of the obligation of raising on his own initiative, at all appropriate times and in an appropriate manner, matters which may significantly promote a just determination of the trial. . . .

ABA PROJECT ON MINIMAL STANDARDS FOR CRIMINAL JUSTICE; STANDARDS RELATING TO THE FUNCTION OF THE TRIAL JUDGE § 1.1 (Tent. draft 1972). [Hereinafter referred to as ABA STANDARDS]. But the commentary to this standard warns: "The Judge should be aware that there may be greater risk of prejudice from over-intervention than from under-intervention." *Id.* at 27. It may be that in the area of the insanity defense the caution expressed in the commentary should always be exercised.

25. Glasser v. United States, 315 U.S. 60, 71 (1942). *See also* Patton v. United States, 281 U.S. 276 (1930); Lollar v. United States, 376 F.2d 243, 245 (D.C. Cir. 1967).

26. *See, e.g.*, People v. Sedeno, 10 Cal. 3d 703, 716, 518 P.2d 913, 921, 112 Cal. Rptr. 1, 9, (1974).

27. *See, e.g., A Trial Judge's Credo, supra* note 23, at 10.

28. *See, e.g.*, Barba-Reyes v. United States, 387 F.2d 91 (9th Cir. 1967); ABA STANDARDS, *supra* note 24, Commentary to § 1.1(a) at 26.

29. *See A Trial Judge's Credo, supra* note 23, at 14.

30. *See, e.g.*, United States v. Marzano, 149 F.2d 923 (2d Cir. 1945); ABA STANDARDS, *supra* note 24, at 26-27, 71.

interests or to make appropriate decisions if he is mentally ill or has been mentally ill recently. Thus, the mere hint or presence of mental illness is likely to set a defendant apart as a special species. Second, a trial judge may believe that an insanity acquittal is the only way or the best way to obtain treatment for the defendant, either in his own interest or in the interest of society.[31] Third, the court may believe that hospitalization for mental illness after an insanity acquittal is the only way to incapacitate the defendant,[32] especially when the crime is minor and the defendant would not be imprisoned for a long time if convicted. Fourth, the court may believe that justice is better served if a mentally ill person is not convicted for a crime for which he is not responsible.[33] Fifth, in those cases in which the defendant wishes to plead guilty, trial courts may rely on the fact that they are not bound to accept guilty pleas to support imposition of an insanity defense.

This Article will examine whether any of these justifications are in fact valid. Initially, however, it is necessary to return to the concept of incompetency to put to rest any suggestion that mentally ill persons are necessarily a distinct class, not competent to make decisions in their own best interests. Even if the defendant is mentally ill at the time of trial, he may well be fully able to function to preserve his own interests. This concept has long been part of the common law, formulated as the "presumption of competency."[34]

It has also long been legal axiom that even if incompetent in one specific area, a person may be competent in all others. Thus, persons may be incompetent to make decisions concerning their property, but not incompetent to decide matters concerning their persons. They may be incompetent to make a will,[35] or to refuse medical treatment,[36] for example, but be competent for all other purposes. A criminal defendant may be competent to stand trial, but incompetent to represent himself[37] or to plead guilty.[38] Even if a person is so mentally ill as to require

31. *See* Krash, *The* Durham *Rule and Judicial Administration of the Insanity Defense in the District of Columbia*, 70 YALE L.J. 905, 938-39 (1961).

32. *See* Whalem v. United States, 346 F.2d 812, 818 (D.C. Cir. 1965), *cert. denied*, 382 U.S. 862 (1965); State v. Fernald, 248 A.2d 754, 761 (Me. 1968); State v. Smith, 88 Wash. 2d 639, 644, 564 P.2d 1154, 1156-57 (1977).

33. *See, e.g.*, Williams v. United States, 250 F.2d 19, 26 (D.C. Cir. 1957).

34. *See, e.g., In re* Davis, 14 N.J. 166, 101 A.2d 521 (1953); Silten & Tullis, *Mental Competency in Criminal Proceedings*, 28 HASTINGS L.J. 1053, 1054 (1977). At least one federal court has held that an irrebuttable presumption of incompetency violates due process, McAuliffe v. Carlson, 377 F. Supp. 896, 905 (D. Conn. 1974).

35. *See* Morgan v. Ivey, 222 Ga. 850, 152 S.E.2d 833 (1967); Hamill v. Brashear, 513 S.W.2d 602 (Tex. Civ. App. 1974); Cornia v. Cornia, 546 P.2d 890 (Utah 1976); *In re* O'Loughlin's Estate, 50 Wis. 2d 143, 183 N.W.2d 133 (1971).

36. *See, e.g., In re* Quackenbush, 156 N.J. Super. 282, 383 A.2d 785 (Morris Cty. Ct. 1978).

37. Westbrook v. Arizona, 384 U.S. 150 (1966).

38. United States v. Masthers, 539 F.2d 721 (D.C. Cir. 1976); Sieling v. Eyman, 478 F.2d 211 (9th Cir. 1973); *In re* Williams, 165 F. Supp. 879, 881 (D.D.C. 1958), *modified on other grounds*, 259 F.2d 175 (D.C. Cir. 1958), *cert. denied*, 379 U.S. 982 (1965); Note, *Competence to Plead and the Retarded Defendant:* United States v. Masthers, 9 CONN. L. REV. 176 (1976).

hospitalization, he may be capable of making autonomous decisions for himself.[39] Hospitalized mentally ill patients may retain their civil rights, such as the right to vote;[40] and they may be competent to refuse psychotropic medication,[41] shock treatment,[42] or medical procedures.[43] The concept of specific incompetency is based on the growing recognition of the abilities and autonomy of mentally ill persons and the growing realization that mentally ill persons should not be denigrated by not according respect to their clear, deeply felt desires. To the extent, therefore, that a court is motivated to impose an insanity defense on an unwilling defendant because the judge perceives him to be necessarily less autonomous or less able to protect his own interests, that reasoning is supported by neither legal nor psychiatric authority.

B. *The* Whalem *Rule in the District of Columbia*

Case law concerning the rights of a defendant who refuses to rely on an insanity defense that might be available to him is most fully developed in the District of Columbia, and remains largely undeveloped elsewhere. Therefore, this discussion begins with four District of Columbia cases, one of which reached the United States Supreme Court. The first three of these decisions were by the United States Court of Appeals for the District of Columbia, while the fourth and most recent case was decided by the Court of Appeals for the District of Columbia.

In 1961, the United States Circuit Court of Appeals for the District of Columbia decided *Overholser v. Lynch*.[44] The defendant, Lynch, had been charged with negotiating two bad checks of fifty dollars each. Believing his competency to stand trial to be questionable, the trial court sent him for a mental examination at St. Elizabeths Hospital. When he was returned to court for trial as competent, the hospital's report alerted the judge that the defendant probably was not responsible for his crime, since his propensity to spend more money than he had was a product of his manic depressive illness. The court therefore refused to allow Lynch to withdraw his not

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39. Many states provide by statute that hospitalization raises no presumption of incompetence, *e.g.*, CAL. WELF. & INST. CODE § 5331 (West Supp. 1972); HAWAII REV. STAT. § 334-57 (1976); N.J. STAT. ANN. § 30:4-24.2(c) (1964). *See also In re* Boyd, 403 A.2d 744, 747 n.5 (D.C. Ct. App. 1979); cases cited in notes 40-43 *infra*.

40. *See, e.g.*, Carroll v. Cobb, 139 N.J. Super. 439, 354 A.2d 355 (App. Div. 1976); N.J. STAT. ANN. § 30:4-24.2a (1975).

41. *E.g.*, Scott v. Plante, 532 F.2d 939, 946 (3d Cir. 1976); Rennie v. Klein, 462 F. Supp. 1131 (D.N.J. 1978), *supplemented*, 476 F. Supp. 1294, 481 F. Supp. 552 (D.N.J. 1979). *See* Brooks, *The Right to Refuse Treatment*, 4 ADMINISTRATION IN MENTAL H. 90 (1977).

42. *See, e.g.*, New York City Health & Hosp. Corp. v. Stein, 70 Misc. 2d 944, 335 N.Y.S.2d 461 (Sup. Ct., N.Y. Cty. 1972); N.J. STAT. ANN. § 30:4-24.2d(2). *See* Knecht v. Gillman, 488 F.2d 1136 (8th Cir. 1973).

43. *See generally* Annot., *Power of Courts or other public agencies, in the absence of statutory authority to order compulsory medical care for adult*, 9 A.L.R. 3d 1391 (1966).

44. 369 U.S. 705 (1962). For the detailed and interesting "back stage" story of the *Lynch* case by the lawyer who represented Lynch, *see* Arens, *Due Process and the Rights of the Mentally Ill: The Strange Case of Frederick Lynch*, 13 CATHOLIC U.L. REV. 3 (1964) [hereinafter referred to as Arens].

guilty plea and plead guilty. Over objection of the defendant's counsel, who made it clear to the court that neither he nor his client wished to rely upon the insanity defense, the court heard psychiatric testimony, acquitted Lynch on insanity grounds, and automatically committed him, under a District of Columbia statute, to St. Elizabeths.

Ruling on Lynch's subsequent petition for *habeas corpus*, the trial court held that the commitment was invalid. However, the United States Circuit Court of Appeals reversed, in a six to three decision, holding that a trial judge has discretion in refusing to allow a "not guilty" plea to be withdrawn and that in this case the court did not abuse that discretion.[45] Furthermore, the court held that neither the defendant nor his counsel has the absolute discretion to waive an insanity defense since society has no interest in punishing when there is no blame, and since both society and a mentally ill offender benefit more from indefinite hospitalization than from imprisonment. The district judge was correct, said the court of appeals, in refusing to allow such a person to be branded with a criminal record.

The United States Supreme Court reversed the decision of the court of appeals, holding Lynch's commitment invalid on the ground that the mandatory commitment provision in the District of Columbia statute was inapplicable to a defendant who had not invoked the insanity defense.[46] Such a defendant may be subject to commitment, if at all, only through regular civil commitment procedures.[47] While the decision was based on statutory interpretation, the Court also pointed out that the statute's constitutionality would be in doubt with any other interpretation.[48] The Court did not comment on the question whether a trial court may impose the insanity defense on an unwilling defendant, since it disposed of the case on the automatic commitment grounds. By implication, however, it can be argued that it sanctioned the practice.

The second significant District of Columbia case in this line came in 1962. In *Whalem v. United States*,[49] the defendant had been convicted of robbery and attempt to commit rape. At trial the insanity defense had not been raised, the defendant and his attorney having decided against it. Although the defendant had a background of prior hospitalizations for mental illness, psychiatric reports done at the time of trial did not support a probable insanity defense.

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45. 288 F.2d 388 (D.C. Cir. 1961), *rev'd*, 369 U.S. 705 (1962).

46. 369 U.S. at 719.

47. *Id.* at 720. *See also* Whalem v. United States, 346 F.2d 812, 818 (D.C. Cir. 1965), *cert. denied*, 382 U.S. 862 (1965); United States v. Wright, 511 F.2d 1311 (D.C. Cir. 1975); United States v. Henry, 600 F.2d 924 (D.C. Cir. 1979). *Henry* went further then *Lynch*, *Whalem* or *Wright*, holding that a defendant cannot be automatically committed if his own attorney raises the defense over his objection or, in the absence of any objection from him, without a showing that he agreed to interposition of the defense by counsel. 600 F.2d at 929.

48. 369 U.S. at 711.

49. 346 F.2d 812 (D.C. Cir. 1965), *cert. denied*, 382 U.S. 862, *reh. denied*, 382 U.S. 912 (1965).

On appeal, the defendant claimed that the trial judge erred in not imposing the insanity defense on him despite his objections. The United States Circuit Court rejected the claim, holding that on the facts of his case there was insufficient evidence to compel the trial judge to invoke the defense. However, the court seized the opportunity to reiterate its holding in *Lynch* that a defendant has no right to keep the defense out of the case in appropriate circumstances.[50] The trial court thus may impose the defense *sua sponte* even if neither party has raised it, if it deems it appropriate to do so after the court has held a hearing on the issue. Again, the court stated that "in the pursuit of justice" the trial judge has a duty to refuse "to allow the conviction of an obviously mentally irresponsible defendant."[51] The court set no standards to control when the trial judge should interpose the defense, saying only that the decision must be made on a case-by-case basis.[52]

In the third case, *United States v. Robertson*,[53] the United States District Court for the District of Columbia enunciated certain standards. In *Robertson*, the defendant, a black man, had killed a white man in a pool hall, a killing that seemed purposeless, but which Robertson asserted grew out of his racial and political feelings against white America. Robertson was examined by two defense psychiatrists, at least one of whom would have supported the insanity defense, but at trial he refused to raise it, against the advice of his attorney, because of his feeling that its use would dilute the political impact of the killing.[54] He had no other likely successful defense. Robertson's counsel accepted his decision after discussing the matter with him and did not call his psychiatrists to testify nor did he cross-examine the psychiatrists called by the prosecutor, who testified during a hearing called *sua sponte* by the court under the *Whalem* doctrine. The *Whalem* hearing was held after the first half of a bifurcated trial was already concluded and Robertson was found to have committed the murder. The court refused to impose the defense, Robertson was convicted, and on appeal one of his claims was that this refusal constituted an abuse of discretion. The court of appeals remanded the case for a supplemental *Whalem* hearing on the grounds that the district judge had not assured that he heard medical evidence in favor of, as well as opposed to, the defense.[55]

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50. *Id.* at 818.

51. *Id.*

52. *Id.* at 819 n.10.

53. 430 F. Supp. 444 (D.D.C. 1977).

54. *See* Resnick, *The Political Offender: Forensic Psychiatric Considerations*, 6 BULL. OF AM. ACAD. OF PSYCH. & L. 388 (1978), advocating that the choice whether to use the insanity defense be left to the defendant in the case of a "political crime."

55. United States v. Robertson, 507 F.2d 1148 (D.C. Cir. 1974). *See also* United States v. Snyder, 529 F.2d 871 (D.C. Cir. 1976), where the court also remanded for more evidence on the issue of criminal responsibility, despite the trial judge's statement that the defendant had good reason for rejecting the defense.

It was on remand, after the supplemental hearing,[56] that the district court laid out the criteria on which it relied in continuing to refuse to impose the defense. Primary among these was the fact that Robertson had been found competent to stand trial, and that he had strong wishes on the subject.[57]

The other factors listed as relevant by the district court were:[58] (1) the quality of the evidence supporting the defense; (2) the "quality" of the defendant's decision not to raise the defense, including the reasonableness of his motives in opposing the defense; and (3) the court's personal observations of the defendant. The court also considered the negative consequences of an insanity verdict on the defendant and found that Robertson's decision was rational and competently reached.[59]

Although the *Lynch-Whalem-Robertson* line of cases seems like strong authority for permitting imposition of the insanity defense by the court, it should be noted that none of these three cases grapple with the problems raised by the *Whalem* rule, but rather rely without analysis on the too-easy conclusion that insanity verdicts are necessary to do justice and to protect society. Perhaps for this reason the *Whalem* rule has not gone uncriticized by members of the District of Columbia Court of Appeals itself.

Former Chief Judge Bazelon has pointed out that the practice may be contrary to the Model Penal Code, which, in an earlier draft, had included a provision permitting a trial judge to *sua sponte* raise the insanity defense but which finally omitted this provision as "too great an interference with the conduct of the defense."[60] Although Judge Bazelon authored the majority opinion in *Robertson*, he also issued a separate statement, urging the court to reconsider the *Whalem* rule *en banc*,[61] and Judge Wilkey, dissenting in *Robertson*, suggested that the *Whalem* procedure may violate due process, the sixth amendment's requirement of effective assistance of counsel, and the entire adversary concept of a criminal trial.[62] Other judges on the District of Columbia Circuit have also indicated a

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56. The supplemental hearing continued to be necessary on remand, even though on appeal Robertson had argued that he then wished to rely on the insanity defense, because, once back before the trial court, Robertson changed his mind again and refused to assert the defense.

57. The court stated:

> [T]he desires of the defendant concerning presentation of the issue of insanity must be accorded some weight. While the *Whalem* opinion holds that a defendant may not in a proper case prevent the trial court from injecting the issue, the defendant's wishes in the matter "are highly relevant; and his active opposition renders especially delicate a decision by the court or counsel to override them."

430 F. Supp. at 447.

58. *Id.* at 446.

59. *Id.* at 447.

60. *See* United States v. Robertson, 507 F.2d 1148, 1160 (1974), *quoting* Comment to Model Penal Code § 4.03 (Tent. draft No. 4, 1955).

61. *Id.* at 1161.

62. *Id.* at 1165.

willingness to reconsider *Whalem* in any future cases that raise the question of the right of a competent defendant to direct his own defense.[63]

It is also interesting that despite the *Whalem* rule, courts in the District of Columbia seem reluctant to interpose the defense over a defendant's protest.[64] No reported District of Columbia decision directs the trial judge to impose the defense in any particular case. Nor is there any reported case in which the trial judge exercised his discretion to impose the defense over defense objections.[65]

The fourth case, this time from the District of Columbia Court of Appeals, adopts a standard narrower than *Whalem* but still allows imposition of the insanity defense in some circumstances. In *Frendak v. United States*,[66] the trial court had imposed an insanity defense over

63. United States v. Snyder, 529 F.2d 871, 876 n.1 (D.C. Cir. 1976).

Despite the past doubts about *Whalem* expressed by various members of the District of Columbia Circuit, that court, through Judge Bazelon, took the most recent opportunity offered it to strongly reaffirm that decision, refusing to adopt the *Frendak* modification as the approach of the District of Columbia Circuit. *See* text accompanying notes 66-70 *infra* for a discussion of *Frendak*. In United States v. Wright, ____ F.2d ____ (D.C. Cir. April 22, 1980), the defendant, Beachey Wright, had been sentenced to three years in prison for destruction of government property after he had refused to rely on an insanity defense.

In a two-day hearing, the trial judge had carefully examined the question whether the defense should be imposed, after he had obtained court-ordered psychiatric examinations of the defendant and after he had appointed amicus counsel to make recommendations concerning the insanity issue. All three psychiatrists had found Wright competent for trial, and two of them had found that he did not have a viable insanity defense. Wright, who had a past history of psychiatric hospitalizations, had refused to rely on the insanity defense because he felt that such a defense would dilute the import of his acts, which had been motivated by his strong religious beliefs, and because he preferred not to be sent to St. Elizabeth's Hospital, where he had been committed before. The trial court found these reasons to be rational.

The sole issue on appeal was whether the trial judge had abused his discretion in not imposing the defense over the defendant's objection. The court of appeals upheld the conviction, finding no such abuse. It found that the trial court's rationale in not imposing the defense was sound and that the court had followed the correct procedures in making its determination. Thus, the court of appeals relied upon the facts that (1) two experts had said the defendant had no substantial insanity defense; (2) the defendant had agreed with them, indicating that he knew he was breaking the law at the time of his criminal behavior; and (3) the defendant's reasons for rejecting the defense were rational and two experts had found that his rejection of the defense was not grounded in mental illness.

The court also indicated that a defendant's choice "may" deserve ultimate deference when the insanity defense is not strong and that when his reasons for his criminal conduct are political or religious, his wishes in rejecting the defense should receive special weight.

64. Typical of decisions in this area is another District of Columbia case upholding the trial court's refusal to override a defendant's wishes on the basis that his wishes are "highly relevant." Cross v. United States, 389 F.2d 957, 960 (D.C. Cir. 1968). *See also* Patton v. United States, 403 F.2d 923 (D.C. Cir. 1968); Trest v. United States, 350 F.2d 794 (D.C. Cir. 1965), *cert. denied*, 382 U.S. 1018 (1966) (holding that the trial judge did not abuse his discretion in refusing to impose the insanity defense where such imposition could have jeopardized the defendant's defense on the merits); State v. Johnston, 84 Wash. 2d 572, 527 P.2d 1310 (1974).

65. *But see* Frendak v. United States, 408 A.2d 364 (D.C. Ct. App. 1979), reversing and remanding for further hearing a decision (unreported) of the Superior Court of the District of Columbia which imposed the insanity defense over defense and prosecution objections.

66. 408 A.2d 364 (D.C. Ct. App. 1979).

The *Frendak* approach was rejected by the District of Columbia Circuit in the recent case of United States v. Wright, ____ F.2d ____ (D.C. Cir. April 22, 1980), in which the circuit court pointed out that *Frendak*'s "voluntary and intelligent" test was not very different from the more elaborate test of *Whalem* as interpreted by *Robertson*, because consideration of the question of the voluntariness and intelligence of a waiver implicitly requires consideration of the more detailed list of factors anyway. The more candid position, said the court, is to acknowledge that these factors are to be considered.

prosecution and defense objections, after the defendant, Paula Frendak, having been found competent to stand trial, had been found guilty of first degree murder and a lesser charge in the first half of a bifurcated trial and after court-appointed psychiatrists had testified during a court-called *Whalem* hearing. This psychiatric testimony had left it unclear whether an insanity defense would succeed but did raise considerable question as to Frendak's mental responsibility for the crime. The defendant was ultimately acquitted on insanity grounds but, under *Lynch*, ordered not to be committed except through civil commitment proceedings. Both defendant[67] and prosecution appealed from this result, challenging the present validity of *Whalem*.

Their challenge was based on two United States Supreme Court decisions, which together, according to *Frendak*, "stress the importance of permitting a defendant to make decisions central to the defense."[68] These cases, discussed in more detail later in this Article, are *North Carolina v. Alford*[69] and *Faretta v. California*,[70] holding, respectively, that a judge may constitutionally accept a guilty plea from a defendant who protests his innocence, and that a criminal defendant has a constitutional right to represent himself.

The *Frendak* court decided that while *Alford* and *Faretta* did not render the *Whalem* rule unconstitutional, *Whalem's* underlying philosophy was inconsistent with the philosophy espoused in *Alford* and *Faretta*, which stressed the importance of a defendant's choice. Listing the possible adverse consequences of an insanity acquittal to a defendant, the court held that it would not follow *Whalem* as written, but instead would modify and interpret it so that a defendant who was competent to stand trial would have the sole discretion to decide whether to rely on the insanity defense or whether to waive it so long as he had the specific capacity to reject the defense. Thus, in effect, the court applied the test of knowing, intelligent and voluntary waiver to the insanity defense situation, finding that ability to waive the defense might be something more specific and of a higher order than simple competency to stand trial.

Thus, *Frendak* held that a *Whalem* hearing should still be held when evidence indicates sufficient question as to the defendant's responsibility for the crime, but that the judge's discretion is limited so that he can only impose the defense over a defendant's objection if he finds that the defendant is incapable of intelligently and voluntarily waiving the defense. During the hearing the judge must assure himself that the defendant understands the consequences of his or her decision. The court of appeals remanded the case for a hearing whether Frendak was competent to make

67. It is not clear why the defendant appealed from this result since she was acquitted of the criminal charge and in addition was not to be hospitalized as a result of the acquittal.

68. 408 A.2d at 375.

69. 400 U.S. 25 (1970).

70. 422 U.S. 806 (1975).

that decision. It seems safe to say that *Frendak* conforms to the recent trend of courts to analyze competency of criminal defendants in terms of the specific decision that they must make, and probably predicts the future trend in court-imposed insanity defense cases.

C. *Other Jurisdictions*

While a few jurisdictions follow the District of Columbia approach set out in *Whalem*,[71] courts in other jurisdictions have been reluctant to adopt *Whalem*. In *United States* ex rel. *Laudati v. Ternullo*,[72] the federal District Court for the Southern District of New York carefully differentiated its duty to marshal evidence concerning incompetency from its duty concerning a defense of insanity. Noting the *Whalem* rule from the District of Columbia, the court instead decided that when a competent, adequately represented defendant chooses not to assert an insanity defense, it is not improper for the court to follow his wishes.

Still another court, the New York Court of Appeals, has upheld a trial court's failure to interject the insanity defense, saying: "If the trial court had charged insanity over the defendant's objection, this might seriously have jeopardized his case. The penalty for assault in the second degree is not so serious as to ordinarily risk incarceration in a state mental institution to avoid it."[73] Finally, the United States District Court for the Southern District of Georgia has ruled that it could find no affirmative

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71. State v. Pautz, 299 Minn. 113, 217 N.W.2d 190 (1974); State v. Smith, 88 Wash. 2d 639, 564 P.2d 1154 (1977). *See also* State v. Fernald, 248 A.2d 754 (Me. 1968) (refusing to allow the defendant to withdraw a plea of not guilty by reason of insanity after he had entered it); State v. Hall, 176 Neb. 295, 125 N.W.2d 918 (1964); State v. Johnston, 84 Wash. 2d 572, 527 P.2d 1310 (1974). In *Hall*, the conviction of a defendant for murder was sustained because the court could point to no way in which the court's raising the defense on its own had prejudiced the case, when the defendant himself had introduced evidence of low intelligence in order to try to show that the element of *mens rea* was missing.

Additionally, the modified approach of *Frendak v. United States*, 408 A.2d 364 (D.C. Ct. App. 1979) (discussed at notes 66-70 *supra*), has been substantially adopted by a New Jersey appeals court, which found the *Frendak* formulation "largely persuasive." New Jersey v. Khan, 175 N.J. Super. ———, ——— A.2d ——— (App. Div. 1980). In *Khan*, the defendant had been ordered tried on murder charges in a single trial in which evidence of both an involuntarily imposed insanity defense and self defense was to be presented. In reversing and remanding the case for a new competency determination as well as a hearing on the issue of imposition of the insanity defense, the court made clear that certain circumstances might exist, although they would be narrow ones, where a forced insanity defense would be appropriate. It could be appropriate, said the court, only in the rare case where a defendant who is competent for trial is not competent to make a knowing, intelligent and voluntary waiver of his right to assert the defense. However, the court did not elucidate what factors should guide a trial court in deciding whether to impose the defense on such a defendant. Another serious weakness in the court's decision was its unexplained holding that if the insanity defense were to be imposed, the trial should be bifurcated with the insanity defense tried before any substantive defenses. The reverse should be true; substantive defenses should be tried first so that a defendant has a chance to clear himself completely and to avoid the stigma and other adverse consequences of an insanity defense. This is the approach in other jurisdictions where bifurcation has been ordered. *See, e.g.*, Contee v. United States, 410 F.2d 249, 250 (D.C. Cir. 1969); United States v. Robertson, 430 F. Supp. 444 (D.D.C. 1977).

72. 423 F. Supp. 1210 (S.D.N.Y. 1976).

73. People v. Gonzalez, 20 N.Y.2d 289, 295, 229 N.E. 2d 220, 223 (1967), *cert. denied*, 390 U.S. 971 (1968).

duty on a judge to raise the defense, when the evidence raises a bona fide doubt as to the defendant's responsibility for the crime.[74]

Together the cases suggest that a court's duty is, at most, to explore in a hearing the possibility of an insanity defense when facts seem to warrant it. The court's discretion not to impose the defense on a reluctant defendant is broad and should be used to impose the defense with great caution. There is no case which holds that the court must impose the defense over the defendant's wishes even when evidence indicates that the defense would be successful. If the court does impose the defense, however, the defendant must be protected by being exposed only to civil commitment following the trial and by having proper measures taken to avoid prejudicing any of his substantive defenses.

In some jurisdictions, lack of responsibility for a crime is statutorily raised by plea rather than as an affirmative defense.[75] Case law in these jurisdictions lends strong support to the notion that reliance on a defense of non-responsibility must be the personal decision of the defendant.[76]

The same principles should apply whether or not non-responsibility is raised by plea or as an affirmative defense since the considerations of fairness, due process, and the resulting impact on the defendant are the same. Whether the defense is established under a general plea of "not guilty" or under the specific plea of "not guilty by reason of insanity" is irrelevant; "the Constitution is concerned with the practical consequences, not the formal categorizations of state law."[77]

The courts of those states that have addressed the issue whether a defendant must personally enter an insanity plea have unanimously held that the choice of the plea of "not guilty by reason of insanity," like any other plea, is a personal choice of the defendant and not of his counsel or the court.[78]

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74. Mendenhall v. Hopper, 453 F. Supp. 977, 983 (S.D. Ga. 1978).

75. *See, e.g.*, California, CAL. PENAL CODE § 1016 (Supp. 1979); Missouri, MO. REV. STAT. § 552.030 (1972).

76. *See* cases cited at notes 78-86 *infra*.

77. North Carolina v. Alford, 400 U.S. 25, 37 (1970). *See also* Lynch v. Overholser, 369 U.S. 705, 710 n.6 (1962), in which the Supreme Court indicated that its decision, refusing to impose compulsory hospitalization on one acquitted on insanity grounds, would be invalid regardless of whether insanity had been asserted through a plea or by means of an affirmative defense.

78. People v. Gauze, 15 Cal. 3d 709, 542 P.2d 1365, 125 Cal. Rptr. 733 (1975); People v. Gaines, 58 Cal. 2d 630, 375 P.2d 296, 25 Cal. Rptr. 448 (1962); People v. Hofferber, 70 Cal. App. 3d 265, 137 Cal. Rptr. 115 (1977); Boyd v. People, 108 Colo. 289, 116 P.2d 193 (1941); Anderson v. State, 493 S.W.2d 681 (Mo. App. 1973); State v. Johnston, 84 Wash. 2d 572, 527 P.2d 1310 (1974); State v. Dodd, 70 Wash. 2d 513, 424 P.2d 302, *cert. denied*, 387 U.S. 948 (1967). Only one reported case is known which may be read for a contrary conclusion. In People v. Merkouris, 46 Cal. 2d 540, 297 P.2d 999 (1956), the California Supreme Court held that the trial court had abused its discretion in allowing a defendant to withdraw his plea of not guilty by reason of insanity. He withdrew it after the issue of guilt had already been tried in a bifurcated trial so that defendant seemingly had nothing to lose by proceeding on the insanity issue. He was then convicted and the death penalty imposed. The case is distinguished by the later California Supreme Court opinion in *Gauze*, which says that in *Merkouris* there was doubt as to defendant's competence to withdraw the plea, justifying the decision reversing his conviction. 15 Cal. 3d at 718, 542 P.2d at 1370, 125 Cal. Rptr. at 778.

In one case, *People v. Vanley*,[79] the California Court of Appeals expanded upon the right of the defendant to enter a personal plea. In holding that a plea of "not guilty by reason of insanity" was invalid and in reversing the defendant's subsequent commitment to a state hospital, the court stated that not only must a defendant's plea be made personally in open court as required by statute in California,[80] but that the record must reflect that he was aware of the consequences of the plea, including the length of a possible resulting hospitalization. The court explained the importance of this understanding by the defendant:

> As a matter of common sense, any defendant who pleads guilty to a crime knows that some punishment will follow; similarly, a person charged with a prior conviction most likely knows that the purpose of the charge is to enhance the punishment in some fashion. By contrast, a person who pleads *not* guilty by reason of insanity may figure that the plea is simply another way to "beat the rap." We can hardly impute to the average defendant enough legal sophistication to realize that the very evidence which establishes the truth of the plea, can also confine him in a state hospital for a minimum period of 90 days and that he can remain involuntarily committed at such hospital for the rest of his life. . . .
>
> These observations are particularly true in the case of a defendant who has been returned to court as mentally fit to stand trial. He can hardly be expected to appreciate that a positive finding of fitness for trial in no way militates against an equally positive finding of unfitness to be returned to society. . . .[81]

Likewise, in *Labor v. Gibson*,[82] the Supreme Court of Colorado held that the trial court had no authority to enter an insanity plea over the objection of a competent defendant. Basing its decision on certain Colorado rules and statutory provisions,[83] the court recognized that there may be good reasons why a defendant and his counsel might not wish to utilize the defense, and that these reasons should be respected by the court. Among these would be (1) the possibility that the defendant would spend more time hospitalized than incarcerated under sentence, (2) the stigma which attaches to mental illness and (3) trial strategy.[84]

In another case, the Supreme Court of Colorado stated that a defendant has the "absolute right" to be tried on a plea of "not guilty." A plea of "not guilty by reason of insanity" is "in the nature of confession and avoidance" and may not be forced on a defendant. The court further

79. 41 Cal. App. 3d 846, 116 Cal. Rptr. 446 (1974).

80. CAL. PENAL CODE § 1018 (Supp. 1979).

81. 41 Cal. App. 3d at 857, 116 Cal. Rptr. at 453 (citations omitted) (emphasis in original).

82. 195 Colo. 416, 578 P.2d 1059 (1978). *See also* Boyd v. People, 108 Colo. 289, 116 P.2d 193 (1941); State v. Johnson, 91 N.J. Super. 426, 221 A.2d 23 (App. Div. 1966). *Johnson* held simply that the trial judge has no duty to hold a hearing to inquire into the defendant's sanity at the time of the crime where there is no indication that the McNaughton Rule would apply. It did not elaborate on whether such duty would ever arise.

83. COLO. REV. STAT. § 16-8-103 (1978); COLO. R. CRIM. PROC. 11(e).

84. *See also* United States v. Edwards, 488 F.2d 1154, 1164 (5th Cir. 1974), recognizing the validity of a defense attorney's refusal to employ the insanity defense based upon trial tactics.

pointed out that if a defendant is felt to be mentally ill, other statutory procedures are more appropriately used to see that he gets needed treatment.[85] And in still another case, the Supreme Court of Washington held that a defendant had the right, personal to himself, to enter a plea of guilty, despite advice of his attorney to the contrary.[86]

It has also been held that a defendant has the right to withdraw a plea of "not guilty by reason of insanity." In *People v. Redmond*,[87] the defendant, charged with assault with a deadly weapon, had been convicted in the first part of a bifurcated trial of simple assault, a misdemeanor and the lesser included offense. Since the maximum sentence for this crime was six months, the defendant tried to withdraw his insanity plea, preferring a definite short period of incarceration to indefinite hospitalization. The trial judge refused to allow this in light of the "very, very strong" evidence in the record of lack of responsibility. In reversing the trial court, the California Court of Appeals outlined the procedure to be used by a trial court when there is a genuine issue concerning a defendant's responsibility for the crime. (1) The trial court should assure itself that the defendant is competent at the time he seeks to withdraw his plea. (2) If he is found to be competent, the court should propound questions to him to make a record in conformance with the requirements of *Boykin v. Alabama*,[88] which held that the basis for findings of voluntary and knowing waiver of the constitutional rights that are sacrificed by a plea of "guilty" must be spread on the record. (3) If the court is satisfied that the defendant is making a free and voluntary choice and appreciates the consequences of his action, then he should be allowed to withdraw his plea.[89] If there does not seem to be a genuine issue concerning the defendant's responsibility, the plea should be permitted to be withdrawn freely.

The approach to insanity pleas taken by these cases appropriately

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85. Boyd v. People, 108 Colo. 289, 294, 116 P.2d 193, 195 (1941).

86. State v. Dodd, 70 Wash. 2d 513, 424 P.2d 302, *cert. denied*, 387 U.S. 948 (1967). The court stated:

> If a person is mentally competent to enter a plea, that is, if he understands his constitutional rights to process and counsel, confrontation of witnesses, freedom from compulsion to testify, right to trial by jury, knows the nature of the charge against him, and is capable of understanding the legal consequences of guilt, then he is free to enter a plea of guilty despite the advice of his attorney [to plead not guilty by reason of insanity].

Id. at 519, 424 P.2d at 306. For additional comments concerning competency to plead, as differentiated from competency to stand trial, *see* Sieling v. Eyman, 478 F.2d 211 (9th Cir. 1973); *In re* Williams, 165 F. Supp. 879 (D.D.C. 1958), *cert. denied*, 379 U.S. 982 (1965); A. BROOKS, LAW, PSYCHIATRY AND THE MENTAL HEALTH SYSTEM 333 (1974); Note, *Competence to Plead Guilty: A New Standard*, 1974 DUKE L.J. 149. *Sieling* states that the standard for competency to plead guilty is whether mental illness had substantially impaired the defendant's ability to make a reasonable choice among the alternatives presented to him and to understand the consequences of his plea. 478 F.2d at 214-15.

87. 16 Cal. App. 3d 931, 94 Cal. Rptr. 543 (1971).

88. 395 U.S. 238 (1969). It should be noted that *Boykin* does not insist that a record of probable guilt be put on the record.

89. This requirement conforms with that of Federal Rule of Criminal Procedure Rule 11, that the court may not accept a guilty plea unless it is made voluntarily and with an understanding of the charge. Furthermore, some state statutes require the court to explain the consequences of a plea to a defendant before asserting it, *see, e.g.*, COLO. REV. STAT. ANN. § 39-7-8.

parallels the practice in most trial courts concerning acceptance of any other plea. The ABA Standards on pleas of guilty require that the court should not accept pleas of guilty or nolo contendere without personally addressing the defendant, determining that he understands the nature of the charge and that his plea is voluntary, and informing him of its possible consequences.[90] As *Vanley* states, it is certainly of utmost importance for the court to inform a defendant of the serious consequences of an insanity plea. The court should have the same duty when insanity is interjected as a defense. The fact that the defendant had counsel should not raise a presumption that he informed his client of the consequences.[91]

D. *Weaknesses in the* Whalem *Approach*

None of the rationales generally suggested for imposition of the insanity defense by the trial court are convincing and there are good reasons that weigh against permitting the trial court to impose the defense. Imposition of the defense (1) is more likely to cause injustice than to "do justice"; (2) creates an exception to the usual rule on competency, which recognizes the autonomy of the individual and according to which competent persons can make decisions for themselves; (3) creates an exception to the usual concept of ability to waive constitutional rights; (4) violates a defendant's right to effective assistance of counsel; (5) is not necessary to the goal of obtaining treatment for mentally ill defendants; and (6) is probably not in keeping with a court's discretionary power to refuse to accept guilty pleas, and certainly is not supported by this concept when the defendant wishes to plead "not guilty."

1. *Imposition of the Defense Does Not "Do Justice"*

In the first place, unless the court has a duty to interject other defenses to protect other innocent defendants, the rationale for the *Whalem* rule is unpersuasive.[92] No reported case seems to hold that there is any judicial duty to raise any other defense when a defendant objects and certain cases suggest that imposition of an unwanted defense may be unconstitutional.

The California Supreme Court has stated that when a trial judge suspects that a defense is available but has been overlooked by defense counsel, he should question the attorney about it rather than interpose it himself.[93] The court warned that a decision to interpose it *sua sponte* might interfere with defense trial tactics. Furthermore, although courts do have the power to take certain actions on their own motion in the interest of justice and even if inserting other defenses were among those powers as

90. ABA PROJECT ON MINIMAL STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY § 1.4, 1.5 (App. draft 1968). The standards also require that the judge be satisfied that there is some factual basis for the plea. *Id.* § 1.6.

91. *See* People v. Vanley, 41 Cal. App. 3d 846, 858, 116 Cal. Rptr. 446, 454 (1974).

92. *See* A. GOLDSTEIN, THE INSANITY DEFENSE 188 (1973).

93. People v. Sedeno, 10 Cal. 3d 703, 518 P.2d 913, 112 Cal. Rptr. 1 (1974).

discussed above, it is suggested here that raising the insanity defense is in a different category because of its serious and unique consequences, as outlined in the introduction to this Article. Therefore, "justice" cannot include the concept that this choice, with its consequences, can be forced on a defendant against his will. Additionally, if the trial judge is convinced of a defendant's innocence, on any ground, and is concerned that an innocent person might be convicted, he can dismiss the case against him, a route that seems more direct, less meddlesome, and more just.

Finally, if "doing justice" by preventing an "improper" conviction were sufficient justification for imposition of the defense, the trial judge would not be given discretion to *refuse* to raise the insanity defense when facts point toward its possible viability. The fact that discretion is given trial judges under *Whalem* points to the recognition by *Whalem* itself that other important interests exist.

2. Faretta, Alford *and The Concept of Waiver*

It is axiomatic that persons can waive constitutional rights, if the waiver is knowing, intelligent and voluntary.[94] The right to waive the insanity defense, whether through a plea of "not guilty" or of "guilty" is consistent with the concept of waiver of constitutional rights generally.

Two recent United States Supreme Court cases, both relied on by the district court in *Robertson*,[95] are based on the waiver concept and suggest support for the right of a competent defendant to control the use of the insanity defense in his own case. In *Faretta v. California*,[96] the Court held that a criminal defendant has a constitutional right to represent himself if he voluntarily and intelligently elects to waive representation by counsel.[97] The Court cited the broad precedent for such a position flowing from the English common law,[98] as well as the many state cases, constitutions, and statutes[99] that create such a right. Finding that the right to make one's own defense personally is implied in the structure of the sixth amendment, the Court stated:

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94. *See, e.g.*, Brady v. United States, 397 U.S. 742 (1970) (guilty plea); Boykin v. Alabama, 395 U.S. 238 (1969) (guilty plea); Johnson v. Zerbst, 304 U.S. 458 (1938) (waiver of right to counsel). *Zerbst* has defined waiver as "an intentional relinquishment or abandonment of a known right or privilege." 304 U.S. at 464.

95. 430 F. Supp. at 447 n.4. Relating those cases, both of which dealt with the waiver of certain constitutional rights, to a decision to forego reliance on an insanity defense, *Robertson* stated:

> Just as a defendant may elect to forgo representation by counsel and just as a defendant may enter a plea of guilty for reasons other than his guilt, so too should a defendant who is competent and whose decision is made rationally and with an awareness of its consequences be allowed to proceed to trial without introduction of an insanity defense, even though there may be evidence in the case which could support such a defense.

96. 422 U.S. 806 (1975).

97. The constitutional right of a defendant to waive counsel in federal court had already been upheld. Johnson v. Zerbst, 304 U.S. 458 (1958). The same standard for waiver applies, namely that of knowing and voluntary waiver.

98. 422 U.S. at 821-32.

99. *Id.*

> What were contrived as protections for the accused should not be turned into fetters. . . .
>
> When the administration of the criminal law . . . is hedged about as it is by the Constitutional safeguards for the protection of an accused, to deny him in the exercise of his free choice the right to dispense with some of these safeguards . . . is to imprison a man in his privileges and call it the Constitution.[100]

Additionally, the Court pointed out that the sixth amendment speaks of "assistance of counsel" and interpreted these words literally, labelling counsel only an "assistant" to the defendant.[101] If a defendant is stripped of the right to represent himself, his "right to make a defense is stripped of the personal character upon which the Amendment insists."[102] The fact that law and tradition allocate to counsel the right to make binding decisions of trial strategy, said the Court,

> can only be justified by defendant's consent at the outset to accept counsel as his representative. . . . Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed by the Constitution, for in a very real case it is not *his* defense.[103]

The Court recognized that in most criminal cases the accused can better defend with counsel's guidance than without it, but also recognized "the inestimable worth of free choice"[104] and that the right to defend is personal since the "defendant and not his lawyer will bear the personal consequences of a conviction."[105] Thus, said the Court, "although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.' "[106]

It can logically be argued that if a defendant has the constitutional right under *Faretta* to represent himself, and under those circumstances can apparently refuse to interpose the insanity defense on his own behalf, he must also have the right to refuse to allow his attorney to rely upon it. Since the defenses on which he relies are "personal" and since it is he who must suffer the serious consequences of a successful insanity defense (just as he must suffer the consequences of waiving counsel), it does not seem reasonable that his counsel can undertake to force those consequences upon him. Since the seriousness of the deprivation of liberty has been well recognized in the civil commitment context[107] and since that liberty cannot

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100. *Id.* at 815, *quoting* Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279-80 (1942).

101. *Id.* at 820.

102. *Id.*

103. *Id.* at 820-21 (emphasis in original).

104. *Id.* at 834.

105. *Id.*

106. *Id.*, *quoting* Illinois v. Allen, 397 U.S. 337, 350-51 (1970) (Brennan, J., concurring).

107. *See, e.g.*, Addington v. Texas, 441 U.S. 418 (1979); O'Connor v. Donaldson, 422 U.S. 563 (1975); Heryford v. Parker, 396 F.2d 393 (10th Cir. 1968); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated on procedural grounds*, 414 U.S. 473, *modified and reinstated*, 379 F. Supp. 1376

be deprived without a full panoply of due process protections, it would be inconsistent to allow counsel for a criminal defendant to make a decision that amounts to seeking hospitalization for him, as well as imposing on him the stigma and hardship of an insanity acquittal.

The second Supreme Court case that supports a defendant's right to reject the insanity defense despite counsel's advice or the court's contrary feelings is *North Carolina v. Alford*,[108] holding that an accused may voluntarily, knowingly, and understandingly plead guilty for strategical reasons, despite his continuing assertions of innocence. Alford had pleaded guilty to a charge of second degree murder in exchange for reduction of the charge from first degree murder, for which he could have received the death sentence.

The standard for accepting a plea, said the Court, is whether it "represents a voluntary and intelligent choice among the alternative courses of action open to the defendant."[109] The Court pointed to the fact that there was strong evidence of guilt in Alford's case,[110] but additionally found persuasive the argument that a defense should not be forced upon a defendant in a criminal case when advancement of the defense "might end in disaster."[111]

The Court also pointed out that prison sentences are levied on persons who plead nolo contendere even though such a plea is recognized as not encompassing an admission of the defendant's guilt, and that such pleas are accepted by courts without inquiry into defendants' actual guilt.[112]

Perhaps most important is the *Alford* Court's discussion of *Lynch v. Overholser*.[113] The *Alford* Court interpreted that case as implying that "there would have been no constitutional error had [Lynch's guilty] plea been accepted even though evidence before the judge indicated that there

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(E.D. Wis. 1974), *vacated on procedural grounds*, 421 U.S. 957 (1975), *reinstated*, 413 F. Supp. 1318 (E.D. Wis. 1976); Davis v. Watkins, 384 F. Supp. 1196 (N.D. Ohio 1974); Suzuki v. Quisenberry, 411 F. Supp. 1113 (D. Hawaii 1976).

108. 400 U.S. 25 (1970).

109. *Id.* at 31.

110. *Id.* at 32, 38.

111. *Id.* at 33. The Court stated:

> [S]ince "guilt, or the degree of guilt, is at times uncertain and elusive, [a]n accused, though believing in or entertaining doubts respecting his innocence, might reasonably conclude a jury would be convinced of his guilt and that he would fare better in the sentence by pleading guilty. . . ." As one state court observed nearly a century ago, "[r]easons other than the fact that he is guilty may induce a defendant to so plead, . . . [and] [h]e must be permitted to judge for himself in this respect."

Id. (citations omitted), *quoting* McCoy v. United States, 363 F.2d 306, 308 (D.C. Cir. 1966) and State v. Kaufman, 51 Iowa 578, 580, 2 N.W. 275, 276 (1879).

In an earlier case the Court expressed the same sentiment. In Adams v. United States *ex rel.* McCann, 317 U.S. 269, 276 (1942), the Court said:

> It hardly occurred to the framers of the original Constitution and of the Bill of Rights that an accused, acting in obedience to the dictates of self-interest or the promptings of conscience, should be prevented from surrendering his liberty by admitting his guilt. The Constitution does not compel an accused who admits his guilt to stand trial against his own wishes.

112. 400 U.S. at 36.

113. 369 U.S. 705 (1962).

was a valid [insanity] defense."[114] The implication is that the principles of *Alford* are applicable to waiver-of-insanity-defense situations.

One of these principles is that the standard for accepting the defendant's decision on his plea is not whether he is in fact guilty, but whether the plea represents a voluntary and intelligent choice by him. Another is that trial strategy has a legitimate role to play in a defendant's determination of his plea and that when this is a basis for his decision, it is entitled to great respect by the court. A third principle to be gleaned from *Alford* is that as long as the plea is voluntarily and intelligently made, it is not unconstitutional for the judge to accept it. In fact, states may statutorily confer the absolute right to plead guilty under such circumstances.[115] The case can also be read for the proposition that there must be a factual basis for a guilty plea *only* when that plea is accompanied by claims of innocence. Thus, under even a restrictive reading of the case, a defendant wishing to waive a viable insanity defense would not have to demonstrate a factual basis for his sanity[116] to have a guilty plea accepted, unless at the same time that he pleaded guilty, he proclaimed his innocence. Finally, although *Alford* may possibly be read for the proposition that judges may under proper circumstances refuse to accept guilty pleas when strong evidence of guilt is absent, it cannot be read for the proposition that judges may prevent defendants from pleading "not guilty" (instead of "not guilty by reason of insanity").

Both *Faretta* and *Alford* are consistent with the prevailing law that persons, including criminal defendants, can waive their constitutional rights so long as the waiver is the result of the person's free and intelligent choice. As stated by one commentator: "This standard stresses the consensual, 'free choice' character of waiver and its ultimate reliance upon the individual's freedom to forego benefits or safeguards through the uncoerced exercise of his rational facilities."[117] Constitutional safeguards have, in fact, consistently been held to be subject to knowing and intelligent waiver. To permit the court to impose the insanity defense on an unwilling defendant is to carve out a special exception from the general

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114. 400 U.S. at 35.

115. *Id.* at 38 n.11.

116. The requirement that he has to prove his sanity simply because some evidence exists which shows that he might have a legitimate insanity defense is contrary to the common law presumption of sanity. *See* Davis v. United States, 160 U.S. 469 (1895). It is because of this presumption that defendants in many jurisdictions have to prove their insanity in order to be successful with the insanity defense, *see, e.g.*, LeLand v. Oregon, 343 U.S. 790 (1952) (Oregon); Duisen v. Wyrick, 566 F.2d 616 (8th Cir. 1977) (Missouri); State v. DiPaglia, 64 N.J. 288, 293-94, 315 A.2d 385 (1974), or at least submit evidence of his insanity in order to cast the burden of proving his sanity on the prosecution. Davis v. United States, 160 U.S. 469 (1895). Requiring the defendant to prove his sanity beyond all doubt in order to save him the undesired consequences of a successful insanity defense places an impossible burden upon him. It also reverses the usual role of defense and prosecution in the criminal trial, or if the parties refuse to accept this role reversal, casts upon the court the burden of gathering the evidence and entering it on the record, thereby disrupting the court's usual neutral role.

117. Tigar, *Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1, 8 (1970).

waiver concept, which heretofore has not been narrowed even when the right waived is critical, such as the right to appeal from a death sentence.[118]

While the most recent case of *Frendak v. United States*,[119] discussed above, represents a great advance over *Whalem* in its emphasis on the defendant's free and knowing choice as the pivotal element in a court's decision to interject the defense into a case, the *Frendak* solution is still not entirely satisfactory. It is not clear, for example, why a judge should have the discretion to force an insanity defense on a defendant whom he finds lacking the ability to waive it. When a decision is so basic in defense planning and goes so much to the core of trial strategy, it would be preferable to attempt to return the defendant to complete competence, just as attempts are made to return defendants to general trial competence, before making the insanity defense decision for him. Especially when this type of "complete competency" can be attained quickly or when the defendant is willing to accept the consequences of a reasonable trial delay, this approach should be used. Since the ability to make decisions concerning the insanity defense are so central to the defense case and because the consequences of an insanity acquittal are so personal to the defendant, incompetency specific to this area should be treated just like general incompetency to stand trial.

It is also not clear why, as implied by *Frendak*, the trial judge should always exercise his discretion to invoke the insanity defense for a defendant who is competent to stand trial but incompetent to waive the defense for himself. It seems preferable for the court to use a type of "substituted judgment" analysis, as used in other areas of incompetency,[120] if the trial is to go forward. Under this approach the court would attempt to place itself in the place of the defendant and make the decision that it believes he would make if he could. The court thus would consider factors such as (1) the seriousness of the crime; (2) the likely penalty if convicted; (3) the defendant's views of psychiatric hospitalization before he became incompetent, if known; (4) the rationality of any reasons he gives for declining the defense; as well as (5) the likely strength of the insanity defense and (6) availability of other defenses.

If defendants are not to have the absolute right to wait to become competent to waive the insanity defense and, once competent, the absolute right to then waive the defense, the strongest case for its imposition on an unwilling defendant would be the case of a defendant (1) who is competent to stand trial (2) but not competent to waive the defense, (3) when competency to waive is not likely to return in the foreseeable future, (4) when the crime is extremely serious, and (5) when no other defenses are realistically available. Under these specific circumstances, if any judicial

118. Gilmore v. Utah, 429 U.S. 1012 (1976).

119. 408 A.2d 364 (D. C. Ct. App. 1979).

120. *See, e.g., In re* Boyd, 403 A.2d 744 (D.C. Ct. App. 1979).

discretion is to be permitted, it may be that a court could reasonably strike a balance in favor of imposing the defense, since the defendant would be placed in minimal jeopardy, the state has a legitimate interest in bringing to trial a defendant otherwise competent to stand trial, and the defendant is not likely to be able to protect his own interests better in the foreseeable future. Absent these specific circumstances, however, the situation is not so compelling as to preclude a criminal defendant's usual right to waive rights available to him.

3. *The Right to Effective Assistance of Counsel*

The accused's right to enter a guilty plea or choose his own defenses is intimately connected with his sixth amendment right to counsel. His attorney may have advised him to sidestep an insanity plea or defense in order (1) to avoid a public trial; (2) to obtain a lighter sentence; (3) to avoid hospital confinement; or (4) for other tactical reasons. If the court refuses to accept this decision, it compromises the defendant's right to effective assistance of counsel[121] because it negates and overrides any expert advice counsel has given.

4. *Obtaining Treatment for the Mentally Ill Defendant*

This rationale for imposition of the insanity defense is not sound for several reasons. Since, under *Lynch*, hospitalization may not be imposed on an insanity acquittee unless he has raised the defense himself, its imposition by the trial judge is no longer a feasible mechanism to assure hospitalization for a mentally ill defendant in the jurisdictions that follow *Lynch*.[122] In addition, as the *Lynch* Court pointed out, if hospitalization is called for to protect the public and treat the defendant, other more appropriate routes are available, either through civil commitment if the defendant is acquitted, or by transfer from prison to mental hospital, if convicted.[123] The insanity defense should not be permitted to be turned

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121. In other contexts, courts, including the District of Columbia Court of Appeals which decided *Whalem*, have cautioned against intervention by the judge into the defense function. For example, in a recent inquiry into the competency of defense counsel in his investigation of a criminal case, the District of Columbia Court of Appeals stated that a court

> must be wary lest its inquiry and standards undercut the sensitive relationship between attorney and client and tear the fabric of the adversary system. . . . For the law to encourage a wide-ranging inquiry, even after trial, into the conduct of defense counsel would undercut the fundamental premises of the trial process and transform its essential nature. The resulting upheaval in the role of the trial judge, widely recognized as a serious difficulty, would in itself call into question any broad doctrine of ineffective assistance. . . . *An even more difficult problem would be posed by the supervision of defense counsel's development of the case before trial. Even if we had the authority it would be unwise to embark upon a doctrine that would open the door to a fundamental reordering of the adversary system into a system more inquisitorial in nature.* The adversary system, warts and all, has worked to provide salutary protection for the rights of the accused.

United States v. Decoster, 48 U.S.L.W. 2070, 2071 (D.C. Cir. July 10, 1979) (emphasis added). This statement seems at odds with the holding in *Whalem*.

122. *See* note 5 *supra*.

123. 369 U.S. at 718-19, 720.

into a tool of preventive detention.[124] Finally, it cannot be presumed that a defendant who was mentally ill at the time of the crime is still mentally ill and in need of treatment at the time of trial.[125]

5. *Discretionary Judicial Rejections of Guilty Pleas*

Courts sometimes justify imposing an insanity defense on a defendant who wishes to plead guilty by stating that courts have no duty to accept guilty pleas.[126] Obviously, this rationale is irrelevant if the defendant wishes to go to trial relying on a different defense, rather than to plead guilty.[127] But it must be questioned whether this rationale is even helpful in justifying refusals of guilty pleas, which are rejected simply because an insanity defense is possible.

Although it is true that the court may have "no obligation" to accept a guilty plea and that a defendant has no constitutional right to plead guilty,[128] the court's only real consideration in this regard should be whether the plea is knowingly and voluntarily entered.[129] All the requirements of rule 11 of the Federal Rules of Criminal Procedure[130] concerning acceptance of guilty pleas are included to allow the judge to evaluate one factor—voluntariness of the plea—and to establish a record upon which the plea is more likely to withstand collateral attack.[131] Even the rule 11 requirement that the judge assess whether there is a factual basis

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124. *See* note 182 *infra.*

125. *See* extended discussion of the reasons why the automatic commitment of a person acquitted on insanity grounds is poor policy, if not unconstitutional, in PUNISHING THE NOT GUILTY, *supra* note 1, at 1017-25.

126. *E.g.*, State v. Fernald, 248 A.2d 754, 760 (Me. 1968). *See also* Lynch v. Overholser, 369 U.S. 705, 719 (1962).

127. A defendant has a constitutional right not to plead guilty. United States v. Jackson, 390 U.S. 570, 581 (1968).

128. Santabello v. New York, 404 U.S. 257, 262 (1971); Visconti v. United States, 454 F. Supp. 417 (D. Mass. 1978).

129. North Carolina v. Alford, 400 U.S. 25, 31 (1970); McCarthy v. United States, 394 U.S. 459 (1969); Kercheval v. United States, 274 U.S. 220, 223 (1927). *Contra*, Lynch v. Overholser, 288 F.2d 388, 391 (D.C. Cir. 1961), *rev'd on other grounds*, 369 U.S. 705 (1962).

130. Rule 11 reads, as relevant:

> (d) Insuring That the Plea is Voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney.
>
> (e) Plea Agreement Procedure . . . .
>
> (f) Determining Accuracy of Plea. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.
>
> (g) Record of Proceedings. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.

131. McCarthy v. United States, 394 U.S. 459, 465 (1969); Halliday v. United States, 394 U.S. 831, 831 (1969).

for a guilty plea is designed solely to assure that the defendant understands the relationship of the law to the facts, an understanding without which the Supreme Court has said there can be no voluntary guilty plea.[132] Thus, although stated separately from the voluntariness requirement in rule 11,[133] the factual-basis requirement is not one apart from voluntariness; it is an inherent part of the voluntariness requirement. It is not set up to assure, as some courts have stated,[134] that an innocent person is not convicted, but rather is meant to assure that the waiver of the various rights that occurs when a guilty plea is entered[135] is done knowingly and voluntarily.

Thus, the requirement that a court ascertain if there is a factual basis for the plea does not mean that the court must be satisfied beyond a reasonable doubt that the defendant is guilty or would be convicted.[136] Nor does it mean that the defendant must have no possible legal defense upon which to rely,[137] since a guilty plea by its very nature necessarily is a waiver of all defenses.[138] It also does not mean that a defendant's voluntary and competent decision to plead guilty for tactical reasons should be overridden by a judge, since tactics are recognized as a valid reason for waiver.[139] It means simply that there must be a factual basis for believing that the defendant was implicated in the criminal act charged or, in other words, that his conduct was within the ambit of that defined as criminal.[140] The judge should also be sure that the defendant knows what the elements

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132. McCarthy v. United States, 394 U.S. at 466-67; *See also* Carreon v. United States, 578 F.2d 176, 179 (7th Cir. 1978); Sassoon v. United States, 561 F.2d 1154 (5th Cir. 1977); Rizzo v. United States, 516 F.2d 789 (2d Cir. 1975).

133. Since *McCarthy* was decided, rule 11 has been amended. However, the factual-basis requirement was stated separately under the old rule 11 also, and so the Supreme Court's standards in *McCarthy* are presumably still valid. For cases decided since the rule amendment, citing *McCarthy* for the fact that the factual-basis requirement goes to voluntariness, *see* cases cited in note 132 *supra*. For the text of the old rule 11, *see* McCarthy v. United States, 394 U.S. at 462 n.4.

134. *See, e.g.*, Overholser v. Lynch, 288 F.2d 388 (D.C. Cir. 1961), *rev'd on other grounds*, 369 U.S. 705 (1962); United States v. Romanello, 425 F. Supp. 304 (D. Conn. 1975).

135. The rights waived by entry of a guilty plea are the rights to a jury trial, to confront one's accusers, to present witnesses in one's defense, to remain silent, and to be convicted by proof beyond a reasonable doubt. Santobello v. New York, 404 U.S. 257, 264 (1971) (Douglas, J. concurring). *See also* Boykin v. Alabama, 395 U.S. 238 (1969); McCarthy v. United States, 394 U.S. 459, 466 (1969).

136. *See, e.g.*, United States v. Neel, 547 F.2d 95 (9th Cir. 1976); United States v. Webb, 433 F.2d 400 (1st Cir. 1970), *cert. denied*, 401 U.S. 958 (1971).

137. *See, e.g.*, United States v. Barker, 514 F.2d 208, 221 (D.C. Cir.), *cert. denied*, 421 U.S. 1013 (1975); Eaton v. United States, 458 F.2d 704 (7th Cir.), *cert. denied*, 409 U.S. 880 (1972).

138. Eaton v. United States, 458 F.2d 704 (7th Cir.), *cert. denied*, 409 U.S. 880 (1972); McDonald v. United States, 437 F.2d 1251, 1252 (5th Cir. 1971); United States v. Lucia, 416 F.2d 920, 923 (5th Cir. 1969), *opinion withdrawn in part on other grounds*, 423 F.2d 697 (5th Cir. 1970), *cert. denied*, 402 U.S. 943 (1971). It does not matter that a defense might be asserted successfully at trial; it is waived by a plea of guilty, Eaton v. United States, 458 F.2d at 707.

139. *See, e.g.*, United States v. Barker, 514 F.2d 208 (D.C. Cir.), *cert. denied*, 421 U.S. 1013 (1975). Recognizing that a defendant may plead guilty out of various motives other than guilt itself, courts have stated that a defendant "may elect to sacrifice himself" for such motives. United States v. Webb, 433 F.2d 400, 404 (1st Cir. 1970), *cert. denied*, 401 U.S. 958 (1971).

140. *See, e.g.*, United States v. Vera, 514 F.2d 102 (5th Cir. 1975).

of the charge are and, if a defense is evident that the defendant will waive by entering a guilty plea, that he knows he is waiving it.[141]

In addition, as numerous courts have made clear, a trial judge should accept a guilty plea unless there is good reason for rejecting it.[142] Presumably, this means that lack of voluntariness has been shown.

The requirement that a factual basis for the plea be apparent on the record is not a constitutional requirement.[143] It is not meant to create an exception to the usual rule that defendants may waive constitutional rights. It is only meant to provide additional assurance that a guilty plea is voluntary and will not be vulnerable to collateral attack.[144] Viewed in this light, a judge's discretionary power to reject a guilty plea does not support the ideas either that he may reject such a plea simply because an insanity defense is possible or that he may go further and impose the defense upon an unwilling defendant.

E. *A Proposal*

The above discussion leads to the following proposal for the approach to be adopted by a court which is faced with a defendant who refuses to rely upon a possibly viable insanity defense. If the defendant has been found incompetent to stand trial, the issue must be held in abeyance; no trial can be held and therefore no defense imposed. Therefore, the issue should only arise if the defendant is competent to stand trial.

If the defendant is competent to stand trial and refuses to rely upon a seemingly sound insanity defense, the court should hold a hearing on (1) whether the defendant really does have a strong insanity defense; (2) if so, whether the defendant's waiver of the defense is a knowing and voluntary one; (3) if not, whether he should not be tried until he gains the ability to knowingly and intelligently decide the issue of his defense; and (4) if not, whether, using the substituted judgment test the court should interpose the defense for him. Prior to the hearing, the court can and generally should appoint an amicus defense counsel to investigate the issues to be presented

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141. *See, e.g.*, Griffin v. United States, 405 F.2d 1378 (D.C. Cir. 1968); McCoy v. United States, 363 F.2d 306, 307 (D.C. Cir. 1966). Along these same lines, a trial judge always should consider seriously accepting a tendered plea of guilty, United States v. Bednarski, 445 F.2d 364 (1st Cir. 1971), and can abuse his discretion in not accepting it. *See, e.g.*, United States v. Navedo, 516 F.2d 293 (2d Cir. 1975); United States v. Martinez, 486 F.2d 15 (5th Cir. 1973); Griffin v. United States, 405 F.2d 1378 (D.C. Cir. 1968). Also, the caution to be exercised on the occasion of accepting a guilty plea bears direct proportion to the gravity of the charge, *see, e.g.*, United States *ex rel.* Miner v. Erickson, 428 F.2d 623 (8th Cir. 1970). This suggests that especially where the charge is relatively minor, and the defendant voluntarily admits his involvement in the act charged, the trial judge may abuse his discretion in not accepting a guilty plea tendered for tactical reasons, thereby forcing a possibly lengthy hospitalization upon the defendant.

142. *See, e.g.*, Carreon v. United States, 578 F.2d 176 (7th Cir. 1978); People v. Sedeno, 10 Cal. 3d 703, 518 P.2d 913, 112 Cal. Rptr. 1 (1974).

143. *See* McCarthy v. United States, 394 U.S. 459, 465 (1969). The factual-basis requirement was added to the Federal Rules of Criminal Procedure in 1966.

144. *See* note 131 and accompanying text *supra*.

in the hearing, and, if he deems it advisable, to present any arguments which there may be in favor of use of the insanity defense. Amicus counsel, as part of his investigation, may seek the appointment of a psychiatrist to examine the defendant, or the court may appoint a psychiatrist on its own initiative to report directly to the court.

If the court finds that in fact the insanity defense would be weak or insubstantial, it need go no further in considering the issue and should permit the case to go to trial absent an insanity issue. However, if the defense seems to be a strong one, the court must then decide if the defendant's refusal to rely on it is knowing and voluntary.

If the court reaches the opinion that the defendant's waiver is knowing and voluntary, no insanity defense may be imposed. Factors to be considered by the court in reaching this determination are (1) the rationality of the defendant's stated reasons for rejecting the defense and (2) any psychiatric opinion as to whether these reasons are the product of, or influenced by, a mental illness. Significantly bearing on the rationality of the decision are such other factors as the seriousness of the crime charged and consequent seriousness of the penalty to which the defendant would be exposed if convicted, the availability of other defenses to the defendant, any political or religious motivations for avoiding the defense which may exist, the defendant's feelings about psychiatric hospitalization versus his feelings about penal incarceration, and the presence or absence of past hospital experiences which may be determining these feelings, whether trial tactics of the defendant are likely to be impaired by the use of the defense, and other adverse consequences of an insanity acquittal to the defendant.

If the waiver by the defendant is found not to be knowing and voluntary, the court should in most cases postpone the trial of the matter until the defendant becomes competent to make the decision. Factors in this decision may include the length of time during which the defendant has been under psychiatric treatment and the length of time which is likely to be required to return him to full competency. It may be that he is considered unlikely ever to reach a condition in which he can make the decision knowingly and voluntarily, either because he refuses to take the necessary psychotropic medications, because his condition is not susceptible to improvement by more treatment, or for some other reason. His wishes on the subject of a delayed trial should also be considered as should any effect which a substantial delay will have on the state's ability to bring him to trial.

If the court decides that the trial should not be delayed because delay is not likely to improve the defendant's condition or for another reason, it must then decide the ultimate issue of whether to interpose the defense for the defendant. This decision should not have to be made often if the above procedure is followed. However, when it must be made, the court should use the "substituted judgment test," (discussed in Section III. D. of this

Article), which asks what the defendant himself would do, if he were competent to decide this question.

In making this decision, the key factor is whether the defendant has held strong opinions on the subject over a long period of time, including times when he was fully competent. In other words, if it is known what his competent decision would be, that decision must govern. If no such clear guideline exists, the court must perform the analysis which it feels the defendant, if competent, would perform and weigh the relevant factors to reach a rational decision for him. These include the seriousness of the crime, the availability of other defenses, and the consequences to the defendant both of a conviction and an insanity acquittal.

Finally, if the court decides to inject the defense into the case, it should continue the appointment of amicus defense counsel to present it, since the defendant's own attorney has no duty to interpose it under these circumstances. The court should also bifurcate the trial if other substantial defenses exist which may be prejudiced by the contemporary presentation of the insanity defense. The substantive defenses should be presented first, and only if these are unsuccessful should evidence of lack of responsibility for the crime be introduced. Doubts should be resolved in favor of bifurcation.

IV. DUTY OF DEFENSE COUNSEL

A. *Raising the Insanity Defense*

Few cases discuss the subject of defense counsel's duty or right to raise any specific defense, including that of insanity,[145] over the defendant's objections. Nevertheless, the issue is a critical one because defense lawyers commonly confuse the issues of incompetency to stand trial and responsibility for crime, assuming that when they are dealing with mentally ill defendants both issues automatically arise and both must be handled in a uniform manner.

The responsibility of the lawyer in raising the incompetency issue is clear. As an officer of the court, he has a duty to bring doubts of his client's competency to the court's attention with or without his client's permission.[146] Although there is no clear statement in the case law concerning the lawyer's duty to raise the defense of non-responsibility in the face of client opposition, no case holds or even states in dictum that he should do so. Nevertheless, attorneys are likely to be influenced by many of the same

145. *See* Chernoff & Schaeffer, *Defending the Mentally Ill: Ethical Quicksand*, 10 AM. CRIM. L. REV. 505, 524-27 (1972); *but see* Brunnig, *The Right of the Defendant to Refuse an Insanity Plea*, 3 BULL. OF AM. ACAD. OF PSYCHIAT. & LAW 238 (1975), tentatively reaching a contrary conclusion. For general discussions of the line of demarcation between a client's right to make decisions in his case and his lawyer's right to make decisions for him, *see* D. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE? (1974); Chused, Faretta *and the Personal Defense: The Role of a Represented Defendant in Trial Tactics*, 65 CAL. L. REV. 636 (1977); Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41 (1979).

146. *See* Pate v. Robinson, 383 U.S. 375 (1966).

considerations that influence trial courts to impose the defense.[147] To the extent that those reasons are invalid for trial courts, they are at least as invalid as justification of a defense attorney's like actions.

Of the relevant cases, *United States v. Robertson*[148] is illuminating, even though it does not specifically rule on the attorney's duty to raise the insanity defense. Implicit in its discussion is the lack of any such duty. The District of Columbia Court of Appeals stated that when, under the *Whalem* procedure, the trial court imposes the defense over the defendant's wishes, trial counsel is not bound, even then, to present the defense to the court. Rather, the court suggested that the appointment of amicus counsel would be one way of assuring presentation of the evidence on insanity[149] so that defense counsel could remain loyal to a client's wishes.

Other federal courts have affirmatively indicated that an attorney is not bound to invoke the defense over his client's objection. In the Third Circuit case of *Martin v. Brierley*,[150] the court refused to declare defense counsel's representation inadequate for not invoking or even considering the insanity defense when the defendant had over a period of time clearly and consistently disapproved its use. The court stated: "We think that it would have been a meaningless gesture for his trial counsel to have made the suggestion of an insanity defense to him merely in order to give him the opportunity to reject it."[151]

Likewise, in *James v. Boles*,[152] the court indicated that trial counsel was not bound to raise the defense even when the defendant had been recently hospitalized for mental illness, since the defendant did not want it raised and trial tactics may have dictated that it would prejudice a substantive defense. And in *Snider v. Cunningham*,[153] in which the defendant sought to establish an alibi defense, the court stated that "a prisoner who insists that he did not commit a crime can hardly be forced by his counsel to confess in order to support a tenuous defense of insanity."[154]

Similarly, the New York Court of Appeals has indicated in dictum that a defense attorney has no duty to raise the insanity defense if, as a matter of strategy, he or his client decides against it. In the case of a *pro se* defendant who challenged his conviction in part on the ground that the trial court had not *sua sponte* raised the insanity defense, the court stated:

> If [the defendant] had been represented by an attorney who failed to raise the defense of insanity, it would be simply assumed that he had consulted with his

147. *See* Part III *supra.*
148. 430 F. Supp. 444 (D.D.C. 1977).
149. United States v. Robertson, 507 F.2d 1148, 1158 (D.C. Cir. 1974).
150. 464 F.2d 529 (3rd Cir. 1972), *cert. denied*, 410 U.S. 943 (1973).
151. *Id.* at 530.
152. 339 F.2d 431 (4th Cir. 1964).
153. 292 F.2d 683 (4th Cir. 1961).
154. *Id.* at 685.

> client, who was unprepared to risk being confined to a State mental institution. Where a sane person similarly refuses to raise such a defense on his own behalf, it should ordinarily be assumed that he waived it.[155]

The thrust of this language is that a competent defendant's decision not to risk state hospital confinement should be honored by both the court and defense counsel, regardless of whether an insanity defense might be viable.

These decisions are consistent with general thinking on counsel's role in a criminal trial. Some decisions on the strategy of a criminal trial remain in the lawyer's domain, but certain basic decisions are the client's to make. While the boundary line between trial strategy and basic decision-making is often fuzzy, it is clear that decisions as to plea, whether to waive a jury trial and whether to testify in his own behalf, belong to the client after receiving advice from defense counsel.[156] The American Bar Association in its project on standards for criminal justice has stated: "A lawyer should take care to consult with his client to the extent feasible on all matters affecting substantial rights."[157] Two indicia regarding which area a defense decision falls in are: (1) does the decision require special skill, training or experience that the lawyer has and the client does not, as with evidentiary questions, for example?[158]—if so, it is more likely to be a "trial strategy" decision for the lawyer to make; (2) does it affect fundamental constitutional rights of the accused?—if so, it is within the range of decisions to be made by the client, since he must bear the brunt of the decision. The decision concerning the insanity defense should belong to the client according to both of these criteria.[159]

Since a decision on the insanity defense affects "substantial rights," in that success with the defense may result in a substantial period of incarceration, it can be persuasively argued that not only must the attorney consult carefully with his client concerning this issue, but that this decision is akin to the decision of how to plead and belongs to the client alone. This conclusion seems warranted since success with this defense will lead to incarceration, is stigmatizing, and, in any event, because it leads to serious consequences for the client, it is quite different from a "not guilty" finding based on any other defense. Certainly it has the practical effect of being

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155. People v. Gonzalez, 20 N.Y.2d 289, 294, 282 N.Y.S. 538, 542, 229 N.E.2d 220, 223, (1967).

156. ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE: THE DEFENSE FUNCTION. § 5.2(a) (Approved draft 1968).

157. *Id.* at 241 (Comment to § 5.2). The ABA Standards concerning the defense function also state that defense counsel may not conclude a plea agreement without the consent of the client and that it is counsel's role not to decide but rather to advise the client, after a thorough investigation, so that his decision will be well-informed. *Id.* § 3.2. Such information, states the commentary, should include that concerning collateral consequences of the conviction. *Id.* at 71.

158. *See id.* at 239-40.

159. Without analysis, however, the courts of at least one state, Maryland, have held that the question of whether an insanity defense should be raised is a matter of trial strategy to be determined by defense counsel after consultation with the client, White v. State, 17 Md. App. 58, 299 A.2d 873 (1973), and may be raised even over objections of the client, List v. State, 18 Md. App. 578, 308 A.2d 451 (1973), *vacated as moot*, 271 Md. 367, 316 A.2d 824 (1974). *See also* State v. Hermann, 283 S.W. 2d 617 (Mo. 1955).

tantamount to an admission by the defendant that he committed the crime Therefore, it has the added disadvantage of increasing the likelihood of conviction if unsuccessful. For these reasons, the decision on the insanity defense is one of the most critical to be made in the course of the case and rises above one encompassed in the term "trial tactics."[160]

Not only would defense counsel's imposition of the insanity defense over his client's objection intrude on his client's right to control critical aspects of his own case, but additional reasons militate in favor of placing the insanity defense decision in the defendant's hands. Placing the decision with the attorney is likely to lead to violating the attorney-client privilege. By necessity, the attorney who is arguing for an insanity defense must disclose information persuasive of mental instability that has been revealed by the client to him.[161] At its worst this information might include direct evidence of guilt, as, for example, details of the commission of the criminal act. The situation also is likely to necessitate production by the defense attorney of psychiatric testimony only available as the result of a defense-obtained psychiatric examination. Testimony by the defense's psychiatrist falls within the ambit of the confidential attorney-client relationship since the psychiatrist is an agent of defense counsel.[162]

Another factor in favor of placing the decision ultimately with the defendant is that a lawyer may not waive a constitutional right of a client.[163] Since it can be argued that the imposition of the insanity defense on an unwilling client is almost certain to result in at least some period of involuntary hospitalization, this decision by the attorney can be seen as a forbidden waiver of the defendant's right to liberty, characterized by the Supreme Court as "an interest of transcending value."[164]

The question can be asked whether the rationale of *Lynch v. Overholser*[165] in refusing to allow the "criminal commitment" of a defendant on whom the insanity defense has been judicially imposed should be extended to the defendant whose own lawyer has either disregarded his wishes or not solicited his opinion before invoking the defense. Recently, the District of Columbia Court of Appeals has extended the holding of *Lynch* to the case in which trial counsel raised the insanity defense either over a defendant's objection or without his knowledge of and acquiescence in its use.[166] In such cases, said the court, the defendant

160. Complete disregard of a client's wishes on this subject or failure to consult him could lead to legitimate claims of incompetency of counsel at a post-trial relief proceeding or on appeal.

161. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY E.C. 4-5 (1979).

162. *See, e.g.*, United States v. Alvarez, 519 F.2d 1036, 1046 (3d Cir. 1975); State v. Kociolek, 23 N.J. 400, 129 A.2d 417 (1957).

163. *See, e.g.*, Brockhart v. Janis, 384 U.S. 1, 8 (1966) (Harlan, J. concurring).

164. Speiser v. Randall, 357 U.S. 513, 525 (1958).

165. 369 U.S. 705 (1962).

166. United States v. Henry, 600 F.2d 924 (D.C. Cir. 1979). The issue whether defense counsel may impose the defense on a client was not raised or discussed in this case. The defendant was challenging his five year old commitment that followed an insanity acquittal on the ground that he had not agreed to use of the insanity defense. The record did not show whether his attorney had actually raised the defense and, if he did, whether the defendant realized that he was doing so.

cannot be automatically committed, but any hospitalization that he may undergo may only be obtained by the use of regular civil commitment procedures.

B. *Duty to Investigate the Insanity Defense*

Although defense counsel may have no duty to raise an insanity defense, a defense attorney does have a well-defined duty to investigate a possible insanity defense[167] and discuss it with his client when facts seem to point toward its possible use. His failure to perform the duty places the case in jeopardy if later challenged on grounds of incompetence of counsel.[168]

In one thorough discussion of this duty, the United States District Court for the District of Maryland granted a prisoner's petition for a writ of *habeas corpus* and reversed his conviction, finding incompetence of counsel when the defense attorney had been aware of facts that pointed toward presentation of an insanity defense but had failed to explore the defense with his client. Counsel's incompetence arose in his failure to move for a court-appointed psychiatrist to advise him regarding appropriateness of an insanity defense under section 3006A(e) of title 18 of the United States Code, which provides for appointment of experts by the court to assist in the defense of indigent federal defendants.[169] Stressing the "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel"[170] the court pointed out that the seriousness of the charges (carnal knowledge of a young girl and distribution of certain drugs), lack of tactical risk in raising the defense (the state's case was otherwise proved by clear evidence), evidence of mental problems of the defendant, and lack of any objection by the defendant to use of the defense highlighted counsel's incompetence in his failure to explore the issue. The case, however, nowhere holds that counsel was

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167. The American Bar Association has said that it is the lawyer's duty to advise the client fully after investigating a case. ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE: THE DEFENSE FUNCTION § 5.1 at 233 (Approved Draft 1971).

168. The generally accepted standard for judging whether the assistance rendered by counsel was incompetent is whether "the trial was a farce, or a mockery of justice, or was shocking to the conscience of the reviewing court, or the purported representation was only perfunctory, in bad faith, a sham, a pretense, or without adequate opportunity for conference or preparation." *See, e.g.*, Williams v. Beto, 354 F.2d 698, 704 (5th Cir. 1964); Bouchard v. United States, 344 F.2d 872 (9th Cir. 1965); United States *ex rel.* Cooper v. Reincke, 333 F.2d 608 (2d Cir. 1964); Tahl v. O'Connor, 336 F. Supp. 576, 581 (S.D. Cal. 1971). Other recent cases have stated the test to be whether "the claimed inadequacy [is] a serious incompetency that falls measurably below the performance ordinarily expected of fallible lawyers" and whether "counsel's inadequacy affected the outcome of the trial." United States v. Decoster, 48 U.S.L.W. 2070 (D.C. Cir. 1979) (en banc). *Decoster* focuses upon counsell's duty to investigate prior to trial. *See also* Commonwealth v. Saferian, 366 Mass. 89, 315 N.E.2d 878 (1974).

169. Springer v. Collins, 444 F. Supp. 1049 (D. Md. 1977) *rev'd*, 586 F.2d 329 (4th Cir. 1978), *cert. denied*, 440 U.S. 923 (1979). *See also* United States v. Fessel, 531 F.2d 1275 (5th Cir. 1976); United States v. Edwards, 488 F.2d 1154 (5th Cir. 1974); Brooks v. Texas, 381 F.2d 619 (5th Cir. 1967); Brubaker v. Dickson, 310 F.2d 30 (9th Cir. 1962), *cert. denied*, 372 U.S. 978 (1963); Wood v. Zahradnick, 430 F. Supp. 107 (E.D. Va. 1977), *aff'd*, 578 F.2d 980 (4th Cir. 1978.

170. Springer v. Collins, 444 F. Supp. 1049, 1057 (D. Md. 1977).

bound to actually raise the defense after exploring its possible use. In fact, it recognizes that trial tactics could dictate an attorney's ultimate decision not to advance the insanity defense.[171]

C. *The Appropriate Practical Approach for the Defense Attorney Who Disagrees with His Client on Use of the Insanity Defense*

The key to representing a criminal defendant who is or may be mentally ill is deciding whether the defendant is competent. While this decision may be complex and may necessitate reliance on expert advice, once it is made, either by counsel or, if brought to the court's attention, by the court, counsel's course regarding use of the insanity defense (or plea) is relatively simple. A competent defendant should be permitted to make this decision. Unless he retains this right, the concept of competency itself lacks meaning. As already discussed, no reported case holds that defense counsel has a duty to insert the insanity defense into the case against a client's wishes.

On the other hand, if the defendant is incompetent to stand trial, defense counsel should hold the insanity defense question in abeyance until the defendant is returned to competency, just as he would other defense decisions, and should make every effort to assure that the defendant is properly treated and returned to competency quickly.

Defense counsel's duty is to investigate the insanity defense as thoroughly as he believes the case warrants, as he would with any other possible defense. To some extent, the extent of his investigation may be governed by his client's early enthusiasm for or rejection of the defense. The result of the investigation, which may include a psychiatric examination, the consequences of a successful insanity defense, and the consequences of other defense approaches should then carefully be discussed with the defendant. Ultimately, it should be the defendant's choice.

When a defendant objects to the use of the insanity defense but his counsel advises it, there are a few courses of action that the attorney can take to protect both himself and his client from later problems that may flow from his client's decision. First, he should make a record of the fact that he fully informed the defendant of the possible results of his decision not to rely on the defense, namely that he risks conviction and sentence in the case of a not guilty plea, or that he risks a prison sentence, in the case of a guilty plea. This he can do either by a note in the file or a letter to his client.[172] He should also record that he investigated use of the defense so that he does not become labeled as having rendered incompetent assistance resulting from a petition for post-conviction relief.

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171. *Id.* at 1059.

172. *See* ABA STANDARDS, THE DEFENSE FUNCTION, *supra* note 167, at 241; Note, *Effective Assistance of Counsel for the Indigent Defendant*, 78 HARV. L. REV. 1434, 1446 (1965).

Another possible, although less satisfactory course, is for the attorney to raise the issue of insanity despite his client's wishes, but first to move for bifurcation of the trial so that the issue of guilt is submitted to the jury before any consideration of the defendant's sanity. Only if the defendant's other defenses fail and he is found to have performed the act charged would the issue of his non-responsibility for the crime thus be placed in issue. In this way, interference with trial tactics would be avoided. The District of Columbia Court of Appeals has said that even when no specific statutory provision exists for bifurcation, it is within the inherent power of the courts to control the order of a criminal trial. The court noted that this power has roots deep within the common law.[173] The court also pointed to Federal Rule of Criminal Procedure 42(b), which permits courts to order a separate trial on any issue to avoid prejudice to the defendant.

It should be clear that this second approach only answers a defendant's objections based on trial tactics. It does not cure other possible objections to the defense, such as a fear of hospitalization or a reluctance to concede "guilt" under any circumstances. Furthermore, it does not cure the problem that arises when the defendant desires to plead "guilty" instead of "not guilty," whether out of a desire for punishment[174] or a desire to avoid a long public trial, or for any other reason.

V. DUTY OF THE PROSECUTOR

There seem to be no reported decisions holding that the prosecutor must insist upon the interjection of the insanity defense when he finds evidence of mental illness, although it can be argued that the prosecutor has an ethical duty to come forward with such evidence of lack of guilt, as he should with any other exculpatory evidence.[175] The United States Supreme Court has declared that the prosecutor is not the "representative of an ordinary party . . . but of a sovereignty . . . whose interest in a criminal prosecution is not that it shall win a case but that justice shall be done."[176] Some state statutes do permit the prosecution to interject the insanity defense into the case.[177]

173. Holmes v. United States, 363 F.2d 281 (D.C. Cir. 1966). *See also* United States v. Bradley, 463 F.2d 808 (D.C. Cir. 1972); United States v. Ashe, 427 F.2d 626 (D.C. Cir. 1970); Springer v. Collins, 44 F. Supp. 1049, 1064 n.11 (D. Md. 1977), *rev'd on other grounds*, 586 F.2d 329 (4th Cir. 1978), *cert. denied*, 440 U.S. 923 (1979).

174. When this reason is given for wishing to plead guilty in any case, regardless of any insanity defense issue, defense counsel should be alerted that his client may not be competent to plead guilty.

175. *See* Napue v. Illinois, 360 U.S. 264 (1959); Pyle v. Kansas, 317 U.S. 213, 216 (1942); ABA PROJECT ON MINIMAL STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION: THE PROSECUTION FUNCTION § 3.11(a) (Approved draft 1971). The ABA Standards do not require the prosecutor to disclose exculpatory evidence to the court directly, but rather only to defense counsel. Hence, under these Standards, if the evidence suggested lack of responsibility, the defendant would have control of the decision whether to utilize it. Consistent with this, in Ashley v. Texas, 319 F.2d 80 (5th Cir. 1963), the court held that it was a violation of due process for the prosecution not to turn over to defense counsel results of a psychiatric examination showing that the defendants lacked responsibility for the crime.

176. Berger v. United States, 295 U.S. 78, 88 (1935).

177. *E.g.*, N.D. CENT. CODE § 29-20-01 (1974). *See* State v. Katsoulis, 148 N.W. 2d 269 (N.D. 1967) (applying the statute).

While an argument can be made that it is not improper for the prosecutor to introduce evidence of non-responsibility of the defendant,[178] the Supreme Court has made clear that if the defense is imposed upon an unwilling defendant and if an acquittal on insanity grounds ensues, the defendant may then be subject to commitment, if at all, only through regular civil commitment procedures.[179] This should be as true if the prosecution inserts the issue into the case as if the trial judge does so, since the analysis in *Lynch* is applicable in either case.

The better practice for the prosecutor who sees an issue of non-responsibility would be to bring the evidence to the attention of defense counsel rather than to the attention of the court.[180] This approach would leave the final decision to the defense. Having the issue forced on the defense by the prosecutor poses the same problems as occur when the court interjects it on its own motion.[181]

VI. CONCLUSION

The insanity defense, initiated as a humane option to save mentally ill persons from the otherwise likely penal consequences of their criminal acts,[182] should not, in the name of "justice," be converted by courts, prosecutors, and defendants' own attorneys into a bludgeon against the mentally ill. If competent, a defendant should not be forced to exercise constitutional rights that he would be better off without.[183] Just as a

178. *See* Lynch v. Overholser, 369 U.S. 705, 733 (1962) (Clark, J., dissenting).

179. Lynch v. Overholser, 369 U.S. 705 (1962).

180. *See* Ashley v. Texas, 319 F.2d 80 (5th Cir. 1963).

181. For a discussion of the British practice, which refuses to allow the insanity issue to be raised by the prosecution, *see* Arens, *supra* note 44, at 16-17.

As pointed out by one commentator, allowing the prosecution to make decisions regarding a defendant's defense could lead to major injustice:

> One is bound to add that the insanity defense is by no means the only defense which could be used by the prosecution to defeat the interests of the defendant. The prosecution, for example, could assert with equal ease the defense of alibi. Thus, a guilty plea to a traffic violation might be barred upon the representation by the prosecution that the defense of alibi should be submitted to the court. Following the procedure, condoned by the Court of Appeals in *Lynch*, the prosecution might then attempt to show that the defendant could not have been guilty of the violation in question because precisely at the time of the alleged violation he was engaged in sabotaging military installations, attending a meeting called by a Communist-infiltrated group, or keeping an illicit tryst with a neighbor's wife.
>
> While, of course, no conviction could be obtained under such circumstances, the deprivation inflicted upon the defendant by this "defense" would constitute punishment infinitely more severe than any that could be inflicted after conviction upon the charge in question. This is transformation of the accusatorial into the inquisitorial system of justice without even the safeguards of the latter.

Arens, *supra* note 44, at 17.

182. Some commentators suggest, however, that the insanity defense was actually designed to serve as a preventive, detention mechanism for those who could not be convicted because of the absence of *mens rea*. Such persons, without the insanity defense, would walk away free. With interposition of the defense, however, society could detain the defendant, despite an acquittal. Goldstein & Katz, *Abolish the "Insanity Defense"— Why Not?*, 72 YALE L.J. 853, 865, 868 (1963).

183. As Mr. Justice Brandeis once said:

> Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel

competent adult cannot, in our free society, be made to accept medical treatment that he does not desire, likewise this society should not sanction the paternalistic view that he can be forced to exercise legal rights that he judges will be detrimental to him.

As this Article has attempted to demonstrate, precedent, logic, and policy are weak for court, prosecutor or defense counsel to usurp a fully informed defendant's decision whether to claim non-responsibility for his crime.[184] In only the narrowest and most carefully defined circumstances should a court be permitted to impose an insanity defense on a defendant who is competent for trial but not competent to voluntarily and knowingly decide how to defend his case. The consequences of that decision are simply too personal, too serious, and perhaps life-long.

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invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J. dissenting).

184. It is interesting to note that in England it is entirely up to the defendant whether to raise the insanity defense. *See* G. WILLIAM, CRIMINAL LAW 448 (2d ed. 1961).