

Fall 1982

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### Recommended Citation

William French Smith, *Limiting the Insanity Defense: A Rational Approach to Irrational Crimes*, 47 Mo. L. REV. (1982)

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# MISSOURI LAW REVIEW

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Volume 47

Fall 1982

Number 4

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## LIMITING THE INSANITY DEFENSE: A RATIONAL APPROACH TO IRRATIONAL CRIMES

WILLIAM FRENCH SMITH\*

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### I. INTRODUCTION

Although the insanity defense in one form or another has been a part of Anglo-American criminal justice systems for several centuries, it has long been surrounded by confusion, dissatisfaction, and controversy. That controversy has grown more widespread in recent years, to the point that, today, the issues involved are no longer of interest only to jurists and academicians but to the ordinary citizen as well. Increasingly, there seems to be a readiness to explore new approaches. Those who share an interest in law reform, including many members of Congress, believe that the time is now ripe for significant improvements in this troublesome area of federal law.

It is the purpose of this Article to suggest a direction that appears to offer the greatest promise of correcting existing irrationalities. Because the insanity defense debate has begun to concentrate on the specific proposals for change that are now pending in the Congress, the primary focus is on the principal legislative approaches under consideration. Accordingly, there follows a brief review of the history, current status, and major shortcomings of federal law in the area; an overview of three recent legislative pro-

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\* Attorney General of the United States. B.A., 1939, U.C.L.A.; LL.B., 1942, Harvard University. This article expands on Mr. Smith's testimony on July 19, 1982, before the Committee on the Judiciary of the United States Senate concerning legislative changes in the insanity defense.

posals for changing the law, each of which appears to present drawbacks; and finally, an outline of a pending legislative proposal that best seems to meet the necessary requisites of logic, fairness, and efficiency.

## II. EXISTING FEDERAL LAW AND THE NEED FOR REFORM

If one were to consider only the small number of federal cases in which the insanity defense is raised<sup>1</sup> and the even smaller number of occasions on which it is invoked successfully, it might seem that the current debate focuses far too much attention on a matter of little practical consequence. Such a conclusion would be erroneous, however, for the insanity defense raises issues of fundamental importance to our criminal justice system. It presents directly, and starkly, the question of the proper bounds of individual responsibility for intentional criminal acts.

Historically, the insanity defense has been viewed as a mechanism for absolving those persons whose conduct would otherwise make them proper subjects of imprisonment or other criminal sanctions, but whose mental condition at the time of the conduct was such that society, through its laws, elects to forego the imposition of punishment. Thus, the manner in which the defense is defined involves policy choices concerning both the essential nature of criminal responsibility and the degree to which society will tolerate deviations, for any reason, from prescribed standards of conduct.

Through the definition of offenses, the criminal law attempts to protect the values and interests of society by regulating the behavior of individuals. The commission of a defined offense ordinarily will subject the actor to criminal sanctions. To avoid the harshness that would result from a literal application of its prohibitions in all cases, the law also provides defenses against criminal liability in certain situations. Generally speaking, these are situations in which the balance of societal interests at stake is deemed to weigh against the imposition of criminal sanctions.

A significant question to be asked with respect to the insanity defense is whether—either in concept or as formulated and applied—it represents a fair balance of relevant societal interests. In assessing this balance, one must weigh the impact of the insanity defense on public perceptions of the law and general willingness to comply with the law. This is critical. Since the cases in which the defense is presented tend to receive intense public scrutiny, they have the capacity to influence far beyond their numbers the citizen's perception—and ultimately the citizen's acceptance—of the rationality, fairness, and efficiency of the entire criminal justice process.

Given these fundamentally important implications of the insanity defense

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1. Accurate statistics are not available concerning the frequency with which the insanity defense is raised in the federal courts, but it is generally agreed that employment of the defense is uncommon. See *Reform of the Federal Criminal Laws: Hearings on S. 1400 Before the Senate Committee on the Judiciary*, 93d Cong., 1st Sess. 7023 (1973) [hereinafter cited as *Hearings*].

for the federal criminal justice system, it is noteworthy that neither Congress<sup>2</sup> nor the United States Supreme Court<sup>3</sup> has yet played a major role in its development. The course of the defense both in England and in this country over several centuries has been haphazard and confusing.<sup>4</sup>

In England, prior to the nineteenth century, insanity seems to have been regarded as a general condition, akin to infancy, that prevented the afflicted person from forming any sort of criminal intent. Such thinking led to the exculpation of insane persons not because they were unable to distinguish between right and wrong or to control their conduct, but because—like small children and wild beasts—they were considered incapable of evil intent.<sup>5</sup> At a time when capital punishment was mandatory for all serious crimes, the insanity defense thus provided a means of avoiding the discomfiture of condemning to death a felon who was so mentally deranged that his execution would affront ordinary principles of morality.<sup>6</sup>

The foundation of the defense as it exists in this country today was, of course, *M'Naghten's Case*,<sup>7</sup> in which the "right-wrong test" was introduced and insanity was considered as an excuse for a particular act rather than a general incapacitating condition. The so-called "*M'Naghten Rule*" provides:

To establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong.<sup>8</sup>

Over a period of time, expanding concepts of mental illness prompted criticism of the *M'Naghten* test's limitation to defendants whose cognitive functions were impaired by mental illness and led to the next major change in the insanity defense. This was the widespread addition of a volitional test,

2. Congress has never enacted legislation defining the insanity defense, despite more than a decade of recent work on criminal code revision bills. *See, e.g.*, S. 1630, 97th Cong., 1st Sess. (1981); H.R. 1647, 97th Cong., 1st Sess. (1981); H.R. 6915, 96th Cong., 1st Sess. (1979); S. 1722, 96th Cong., 1st Sess. (1979); S. 1437, 95th Cong., 1st Sess. (1977); S. 1, 94th Cong., 1st Sess. (1975); S. 1400, 93d Cong., 1st Sess. (1973); S. 1, 93d Cong., 1st Sess. (1973).

3. The Supreme Court has generally left development of the defense to the various courts of appeals. *See text accompanying notes 10-15 infra.*

4. *See generally* S. REP. NO. 307, 97th Cong., 1st Sess. 95-101 (1981).

5. *See* G. FLETCHER, *RETHINKING THE CRIMINAL LAW* 836-37 (1978); Spring, *The End of Insanity*, 19 WASHBURN L.J. 23, 23-24 (1979).

6. *See* Robinson, *Consultant's Report on Criminal Responsibility—Mental Illness: Section 503*, in WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF THE FEDERAL CRIMINAL LAWS 251 (1970). *Cf.* K. MENNINGER, *THE CRIME OF PUNISHMENT* 113-14 (1968).

7. 8 Eng. Rep. 718 (H.L. 1843).

8. *Id.* at 722.

exculpating a defendant who knew what he was doing and that it was wrong, but whose actions were deemed, because of his mental disease, to be beyond his control.<sup>9</sup> Although this has sometimes been called the “irresistible impulse” addition to the *M’Naghten* test, a more appropriate term would be the “control” or “volitional” test, since the formulation of the defense frequently does not require that the abnormality be characterized by sudden impulse as opposed to brooding and reflection.

The next significant development in the insanity defense prompted more debate than change: the repudiation of both *M’Naghten* and its volitional supplement by the United States Court of Appeals for the District of Columbia Circuit in *Durham v. United States*.<sup>10</sup> In that case, the court stated: “[A]n accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect.”<sup>11</sup> The court did not then define the terms contained in the announced rule and, after numerous appellate decisions refining, clarifying, expanding, and limiting *Durham*, the District of Columbia Circuit overruled it eighteen years later.<sup>12</sup>

Meanwhile, the other federal courts of appeals were, with some modifications and hesitations, moving from *M’Naghten* and its volitional modification to the proposal of the American Law Institute’s Model Penal Code, which provides:

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

(2) As used in this article, the terms “mental disease or defect” do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.<sup>13</sup>

This standard combines the basic concept of the *M’Naghten* rule—lack of understanding that one’s conduct is wrong—with the essence of the volitional tests—inability to control one’s conduct. Beyond that, however, it expands the coverage of those tests by permitting exculpation upon a showing of only a “substantial” rather than a total incapacity and by substituting the broader term “appreciate” for “know,” thus excusing a person who “knows” in an intellectual sense that his conduct is criminal but who lacks a deeper comprehension of that fact.

General adoption of the A.L.I. formulation marks the current state of federal decisional law on the subject.<sup>14</sup> Nonetheless, even today the federal

9. See *Davis v. United States*, 165 U.S. 373, 378 (1897).

10. *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954).

11. *Id.* at 874.

12. See *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972).

13. MODEL PENAL CODE § 4.01 (Proposed Official Draft 1962).

14. In the *Brawner* case, the United States Court of Appeals for the District of Columbia Circuit joined the other federal courts of appeals in adopting a version of the A.L.I. approach. 471 F.2d at 986.

circuits do not apply a wholly uniform standard.<sup>15</sup> Lack of uniformity is not, however, the principal basis for dissatisfaction with the insanity defense as it now exists in federal law. Rather, criticism of the defense primarily reflects doubts concerning the continuing need for the defense, questions regarding its appropriate scope, and misgivings over the problems of application it presents.

On the question of need, it has been noted that the defense originally operated to mitigate the rigors of the imposition of capital punishment for all serious offenses.<sup>16</sup> However, the criminal law has over a period of time generally substituted imprisonment and other lesser sanctions for the routine imposition of capital punishment. The insanity defense, therefore, has outlived the former sentencing consequences that it had been designed to avoid and now stands as a questionable exception to the ordinary consequences of criminal conduct.

Observers of the criminal justice system have long questioned whether, in light of contemporary sentencing alternatives, mental disease or defect should continue to excuse a defendant from criminal responsibility.<sup>17</sup> Congress has by statute specified the elements of federal offenses, including required mental elements or states of mind. In the case of murder, for example, Congress has said in essence that it is a crime intentionally to take the life of another human being.<sup>18</sup> Ordinarily, under our law, the purpose or motivation for such an act is irrelevant and provides no basis for exculpation.<sup>19</sup> For instance, the fact that a killing is politically motivated—that the defendant genuinely believed his act was morally justified because the victim was a “bad” man whose death would end injustice, would be just recompense for past wrongs, or would lead to a better social order—is clearly, and properly, viewed as irrelevant to his guilt or innocence of the offense charged. Such an assassin would be found guilty. In all cases, a defendant’s purpose or motivation, if deemed to involve mitigating circumstances, is taken into account only by the judge at the time of sentencing.<sup>20</sup>

An obvious exception to the above approach is presented by cases involving self-defense, duress, or other circumstances in which the law is willing

15. The positions of the various circuits are surveyed in *Browner*, 471 F.2d at 979-81. The most notable departure from uniformity occurs in the Third Circuit, where the court has eliminated the cognitive aspect of the A.L.I. test. See *United States v. Currens*, 290 F.2d 751 (3d Cir. 1961). Cf. *Government of Virgin Islands v. Bellott*, 495 F.2d 1393 (3d Cir. 1974).

16. See text accompanying note 6 *supra*.

17. See *Hearings*, *supra* note 1, at 3490-91, 6364-67, 6381-6409. See also *Clanon, Shawver & Kurdys, Less Insanity in the Courts*, 68 A.B.A. J. 824 (1982); *Morris, Psychiatry and the Dangerous Criminal*, 41 S. CAL. L. REV. 514 (1968); *Spring*, *supra* note 5.

18. 18 U.S.C. § 1111 (1976).

19. See, e.g., *United States v. Lewis*, 628 F.2d 1276 (10th Cir. 1980); *United States v. Holmes*, 26 F. Cas. 360 (C.C.E.D. Pa. 1842) (No. 15,383).

20. See *Holmes*, 26 F. Cas. at 369.

to consider the impetus for a defendant's conduct before adjudicating his guilt. In such cases, however, the law's forbearance is predicated on the view that condoning rather than condemning the defendant's conduct under those circumstances is more consistent with the values society wishes to preserve.<sup>21</sup> One professor illustrates the point as follows:

A forest fire rages toward a town of 10,000 unsuspecting inhabitants. The actor burns a field of corn located between the fire and the town; the burned field then serves as a firebreak, saving 10,000 lives. The actor has satisfied all elements of the offense of arson by setting fire to the field with the purpose of destroying it. The immediate harm he has caused—the destruction of the field—is precisely the harm which the statute serves to prevent and punish. Yet the actor is likely to have a complete defense, because his conduct and its harmful consequences were justified. The conduct in this instance is tolerated, even encouraged, by society.<sup>22</sup>

This example points to one of the crucial questions concerning the prevailing insanity defense: is it the best available mechanism for balancing the competing interests that are at stake when a mentally ill person is accused of criminal conduct? To put the question somewhat differently, are not the general interests of society slighted by the acquittal of a person who intentionally kills another in the belief that, for example, God has ordered him to take the victim's life, when no clear countervailing benefit is thereby derived, and when a far less drastic alternative is available? It seems fair to suggest that such a person's impaired mental condition could more properly be treated in just the same manner as any other factor that similarly contributes to criminal activity. Under this approach, mental disease or defect—like the moral motivation of a Robin Hood, a Jean Valjean, or one who engages in a "mercy killing"—would be taken into account at the time of sentencing, if it was deemed relevant to the question of the appropriate disposition of the case, but would not lead to exculpation or acquittal.

Not only is the traditional insanity defense subject to criticism as a legal anachronism that has outlived its original purpose and as a clumsy, all-or-nothing device for mitigating criminal responsibility, it has also been challenged on practical grounds as an invitation to defendants to sift the pool of available psychiatrists for the purpose of avoiding punishment and as presenting issues that do not lend themselves to intelligent resolution in the adversary forum of the courtroom. It is exceedingly difficult for a conscientious juror to determine, under the formal requirements of the rules of evidence, whether a defendant could tell right from wrong, concepts that are generally agreed to have no meaning in the field of behavioral science.<sup>23</sup>

21. See Goldstein & Katz, *Abolish the "Insanity Defense"—Why Not?*, 72 YALE L.J. 853, 854-57 (1963); Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 213-16 (1982).

22. See Robinson, *supra* note 21, at 213-14.

23. Psychiatrists and psychologists have for years complained that the insanity defense compels them to testify as to matters that may appropriately be considered

It is even more difficult for one to distinguish between a defendant who was *unable* to control his conduct and a defendant who was *unwilling* to control his conduct. As a result, the insanity defense commonly causes confusion, and frequently invites it. Certainly it leads to a gross distortion of the trial process. More often than not, in a trial involving an insanity defense, the defendant's commission of the act in question is conceded,<sup>24</sup> and the trial focuses on the issue of insanity. Both sides present an array of expert psychiatric witnesses, usually pre-selected by defense counsel on the basis of their philosophical equation of criminal acts and illness and their persuasive flair, and by government counsel on the basis of their rejection of traditional behaviorist theory. The witnesses then proceed to offer conflicting opinions on the defendant's sanity. Unfortunately for the jury, and for society, the terms used in any statement of the scope of the defense—for example, the phrase "disease or defect"—are usually not defined and the experts themselves do not agree on their meaning.<sup>25</sup> Moreover, the experts often do not agree even on the extent to which certain behavior patterns or mental disorders that have been labeled "inadequate personality," "abnormal personality," and "schizophrenia" actually impel a person to act in a certain way.<sup>26</sup> In short, since insanity is a legal rather than a medical concept, psychiatric disagreement is implicit in the issue of whether a person is insane in the eyes of the law.<sup>27</sup> The selection of expert witnesses is inevitably made with the view of exploiting that disagreement.

Since the experts disagree about both the meaning of the terms used to discuss a defendant's mental state and the effect of a particular mental state on his actions, it is small wonder that trials involving an insanity plea are invitations to public cynicism about the general efficacy and fairness of the criminal justice system. Such trials are also arduous, expensive, and thoroughly confusing to the jury. Indeed, the disagreement of the supposed

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beyond their professional competence. For example, Dr. Gregory Zilboorg has stated:

To force a psychiatrist to talk in terms of the ability to distinguish between right and wrong and of legal responsibility is—let us admit it openly and frankly—to force him to violate the Hippocratic Oath, even to violate the oath he takes as a witness to tell the truth and nothing but the truth, to force him to perjure himself for the sake of justice. For what else is it if not perjury, if a clinician speaks of right and wrong, and criminal responsibility, and the understanding of the nature and quality of the criminal act committed, when he, the psychiatrist, really knows absolutely nothing about such things.

Address by Dr. Gregory Zilboorg (Apr. 1949), *reprinted in* M. GUTTMACHER & H. WEIHOFFEN, *PSYCHIATRY AND THE LAW* 406-07 (1952).

24. *See, e.g.,* United States v. Hinckley, Crim. No. 81-306 (D.D.C. June 21, 1982).

25. *See* S. REP. NO. 307, 97th Cong., 1st Sess. 100-01 (1981).

26. *See id.* at 98-100.

27. *See* G. FLETCHER, *supra* note 5, at 839-40.



experts is often so basic that it is difficult to see how a rational jury can arrive at a sound decision.<sup>28</sup>

### III. RECENT PROPOSALS FOR REFORM

Concern over the shortcomings of the insanity defense in federal law has led to the introduction in the 97th Congress of a number of bills designed to modify the defense.<sup>29</sup> In addition, the Department of Justice, which has sought legislative change in the insanity defense for nearly a decade,<sup>30</sup> has again reviewed the proper scope of the defense and has renewed its support for a new approach—one that has already undergone years of thoughtful consideration both within the Department and in congressional hearings on criminal code reform measures.<sup>31</sup>

The recently proposed legislative modifications of the insanity defense reflect several different approaches to the problem. The first such approach would simply shift to the defendant the burden of proving that he was insane.<sup>32</sup> Under present law, if the defendant raises the issue of insanity the government bears the burden of proving beyond a reasonable doubt that he was *not* insane at the time of the crime charged.<sup>33</sup> This burden was first

28. It appears that a rational jury's decision can be ordained, to a certain degree, by the procedural question of burden of proof. In the District of Columbia, the defendant bears the burden of establishing his insanity by a preponderance of the evidence. See D.C. CODE ANN. § 24-301(j) (1973 & Supp. VII 1980). Elsewhere in the federal system, once the insanity issue is raised, the government must prove beyond a reasonable doubt that the defendant was not insane. See, e.g., *Davis v. United States*, 160 U.S. 469, 486-87 (1895). As a matter of logic, it would seem less difficult to prove that it is more likely than not that an abnormal mental condition exists than to prove to a virtual certainty that it does not exist.

29. See, e.g., S. 2678, 97th Cong., 2d Sess. (1982); S. 2672, 97th Cong., 2d Sess. (1982); S. 2669, 97th Cong., 2d Sess. (1982); S. 2658, 97th Cong., 2d Sess. (1982); S. 2572, 97th Cong., 2d Sess. (1982).

30. See *Hearings*, *supra* note 1, at 5218 (testimony of Deputy Attorney General Sneed in support of S. 1400, 93d Cong., 1st Sess. (1973), which would have eliminated the separate insanity defense in the federal courts). See also *id.* at 6805-22 (testimony of Ronald L. Gainer, Department of Justice, and Professor David Robinson specifically supporting formulation of the insanity defense set forth in S. 1400).

31. See testimony of William French Smith, Attorney General of the United States, and Rudolph Giuliani, Associate Attorney General, before the Senate Committee on the Judiciary (July 19, 1982).

32. See S. 2658, 97th Cong., 2d Sess. (1982), which would require the defendant to prove his insanity by clear and convincing evidence, reject the A.L.I. definition of insanity in favor of the *M'Naghten* rule, and prohibit expert opinion testimony on "ultimate legal issues" such as insanity. See also S. 2672, 97th Cong., 2d Sess. (1982), which would require the defendant to establish his insanity by a preponderance of the evidence.

33. See, e.g., *United States v. Cooper*, 465 F.2d 451, 455 (9th Cir. 1972); *United States v. Currier*, 405 F.2d 1039, 1042 (2d Cir.), *cert. denied*, 395 U.S. 914 (1969).

placed on the prosecution by the Supreme Court in 1895,<sup>34</sup> in a departure from the common law rule under which the burden of proving all affirmative defenses, including insanity, rested with the defendant.<sup>35</sup>

Placing the burden of proof on the defendant could alter the result in some cases.<sup>36</sup> Certainly, this approach would be constitutionally permissible, so long as it did not operate to relieve the government of the obligation to prove every essential element of the crime charged, including any required state of mind.<sup>37</sup> This approach, though, implicitly assumes the continuing need for a blanket exemption from criminal liability and maintains the present conflict between traditional concepts of individual responsibility and the expansive concepts of mental illness. It would perpetuate the insanity defense in its present form and would continue to permit or require the acquittal of persons whose acts fell within the definition of the conduct prohibited by the criminal law. It would still permit the introduction of confusing psychiatric testimony concerning the defendant's capacity to make moral distinctions or his ability to conform his conduct to the requirements of law. Instructions to the jury regarding the location and weight of burdens of proof would further complicate the case for the jury. In short, this change would probably make little practical difference and would certainly fail to resolve the basic problems of assuring justice and promoting efficiency in the trial process.

A second recently proposed approach is to permit the jury to return a special verdict of "guilty but insane"<sup>38</sup> if the defendant's actions constitute all necessary elements of the offense charged other than the requisite state of mind, and the defendant lacked the requisite state of mind as a result of mental disease or defect.<sup>39</sup>

This approach would raise serious constitutional concerns. The due process clause requires the government to prove every element of an offense charged, including the requisite mental state.<sup>40</sup> Under this proposal, however, a jury would apparently be permitted to convict a defendant even though he lacked the statutorily required state of mind. To illustrate, a murder conviction requires proof that the defendant acted "knowingly" or "willfully," concepts embraced within the language of 18 U.S.C. § 1111,<sup>41</sup> which defines murder as "the unlawful killing of a human being with malice

34. *Davis v. United States*, 160 U.S. 469 (1895).

35. *See Leland v. Oregon*, 343 U.S. 790, 796-97 (1952).

36. *See* note 28 *supra*.

37. *See Patterson v. New York*, 432 U.S. 197, 203-04 (1977); *Leland v. Oregon*, 343 U.S. 790, 796-97 (1952).

38. *See* S. 1106, 97th Cong., 1st Sess. (1981); H.R. 5395, 97th Cong., 1st Sess. (1981).

39. *See* S. 1106, 97th Cong., 1st Sess. § 2 (1981) (proposed FED. R. CRIM. P. 12.2(e)).

40. *See In re Winship*, 397 U.S. 358, 364 (1970).

41. (1976).

aforethought." Under the proposed approach, a jury could find a defendant "guilty but insane" even if the defendant was so mentally deranged that he thought the gun in his hand was actually a fishing pole. An identical result could obtain if the defendant, because of mental disease or defect, shot a person believing he was shooting at a tree. In short, a verdict of "guilty but insane" would be permissible even in cases in which the statutory elements of knowledge or willfulness were not proved. As drafted, therefore, the proposals may conflict with the requirements of the fifth and fourteenth amendments to the United States Constitution. Certainly Congress has the authority to enact penal statutes without such mental elements being required for a finding of guilt, but, once it requires proof of certain mental elements, it is difficult to understand how those statutory elements of the offense may properly be ignored in the prosecution of some defendants but not in the prosecution of others.

A third recently suggested approach to modifying the insanity defense is to provide for a special verdict of "guilty but mentally ill." The Attorney General's Task Force on Violent Crime recommended this approach in its Final Report,<sup>42</sup> and several states have recently enacted legislation to this effect.<sup>43</sup> As usually proposed, it would leave the existing defense intact and would permit the return of a verdict of "guilty but mentally ill" only if the defendant's mental illness was not so serious as to render him legally insane.<sup>44</sup> It is, therefore, an addition to the existing alternatives.

Since this approach does not affect the requirement that the government prove every essential element of the offense charged including the necessary state of mind, it is not constitutionally infirm, and it offers an alternative to the stark choice between conviction and acquittal by permitting a jury to recognize that a defendant may be mentally ill even if his illness is not such as to deprive him of the capacity to appreciate and control his actions. It presents a middleground that may be seized by a jury as a point of compromise or as a means of providing recognition of responsibility while assuring some form of consideration of the defendant's mental state at the sentencing stage of the proceedings. The addition of this new form of verdict, however, would not eliminate the philosophically troublesome distinction between a defendant who commits a crime because of mental illness

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42. See ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME, FINAL REPORT 54 (1981) [hereinafter cited as TASK FORCE REPORT]. See also S. 2672, 97th Cong., 2d Sess. (1982).

43. See ILL. REV. STAT. ch. 38, §§ 6-2(c), 115-3(c), 115-4(j) (1981); IND. CODE § 35-36-2-3 (1981); MICH. STAT. ANN. § 28.1058 (1975).

44. See, e.g., ILL. REV. STAT. ch. 38, § 115-4(j) (1981). Under the state law cited, defendants found guilty but mentally ill are sentenced under the criminal laws. Those whose mental illness is confirmed during the Department of Corrections' intake process are sent to the State Department of Mental Health for treatment. If they are considered to have recovered their mental health before their sentence expires, they are returned to the Department of Corrections. *Id.* § 1005-2-5.

and one whose criminal conduct is the product of some other compelling influence. Also, a defendant's "insanity" would continue to be a major issue at trial. As a result, psychiatric testimony would continue to be admissible concerning a wide range of issues not directly related to the statutory definition of the offense, expert witnesses would continue to battle on as wide and varied a front as under current procedures, and the jurors would be no less confused.

#### IV. A RATIONAL APPROACH TO THE INSANITY ISSUE

As noted above,<sup>45</sup> the Department of Justice has long sought legislative changes in the law governing the issue of insanity in federal criminal trials. Having re-examined the matter in light of the recent public debate, we in the Department have again concluded that the soundest approach is: (1) to eliminate insanity as a special defense and to permit conviction of any defendant as long as both the conduct and the state of mind specified in the applicable penal statute are found to exist beyond a reasonable doubt; (2) to treat mental afflictions as proper matters for consideration in determining an appropriate sentence, like other mitigating circumstances; and (3) to provide commitment procedures to protect society from those dangerous offenders whose mental illness is so serious that it precludes conviction because of a failure to establish the statutorily specified mental element of the offense. This approach is embodied in Title VII of Senate Bill 2572, now pending in the United State Senate.<sup>46</sup> If enacted, it offers the best promise of encouraging a widespread perception of our system of justice as rational and fair, of promoting efficiency in the criminal justice system, and of protecting the public.<sup>47</sup>

Under the formulation proposed in Senate Bill 2572, mental disease or defect would be a defense to a prosecution under any federal statute only if, as a result of the disease or defect, the defendant "lacked the state of mind required as an element of the offense charged."<sup>48</sup> Mental disease or defect would not otherwise constitute a defense to a federal criminal charge.<sup>49</sup>

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45. See text accompanying note 30 *supra*.

46. See S. 2572, 97th Cong., 2d Sess. (1982). The bill has 61 sponsors. Other pending bills that take this approach are S. 1558, 97th Cong., 1st Sess. (1981) and S. 818, 97th Cong., 1st Sess. (1981). In addition to reforms in the law governing the insanity defense, S. 2572 incorporates a number of other criminal law reform measures that are necessary in the Justice Department's view to rectify the imbalance between the forces of law and the forces of lawlessness that has developed in recent years. See testimony of William French Smith, Attorney General of the United States, before the Senate Committee on the Judiciary (July 19, 1982).

47. The state of Idaho recently enacted a similar approach to the insanity defense. See IDAHO CODE § 18-207 (1982).

48. S. 2572, 97th Cong., 2d Sess. § 701 (1982) (proposed 18 U.S.C. § 4242(a)).

49. The bill would present the jury with three choices in a case involving a claim of insanity. It could find the defendant guilty, not guilty, or, if he would have

Adoption of these provisions would effectively eliminate the insanity defense from federal criminal trials except in those rare cases in which the defendant's mental illness precludes a finding that he formed the state of mind—intent, knowledge, or recklessness—required by the pertinent penal statute as an element of the offense. For example, in a murder trial the focus of the initial inquiry would be, "Did the defendant intend to kill the victim?" rather than, "Could he tell right from wrong and could he control his behavior?" If, despite his mental impairment, the defendant knew he was shooting at a human being and intended to kill him, he could be held criminally responsible for murder. Mental disease or defect would constitute a defense only if, for example, it prevented the defendant from realizing that he was firing a gun or made him believe he was shooting at a tree. Otherwise, the defendant's mental infirmity would be treated the same as any other potentially mitigating factor: it would be considered at the time of sentencing.

At that stage, a separate proceeding would be held at which psychiatrists could testify free of the constraints of the formal rules of evidence and at which they could inform the judge directly of the kind of treatment required by the defendant. The judge would then sentence the individual to treatment in a mental hospital, to probation on condition, for example, that he regularly visit a psychiatrist, or to some other program that the testimony indicated would be appropriate. If, however, on the basis of the psychiatric testimony the judge was convinced that the defendant was not suffering from a mental disease requiring special treatment, he could sentence him to a term of imprisonment, a fine, or a period of probation, just as he could any other convicted defendant.

The consequences of such an approach for the federal criminal justice system would be significant and beneficial. First, and foremost, the adoption of a consistent philosophy of criminal responsibility—according to which all individuals found to have committed forbidden acts with the requisite criminal intent would be held liable—would enhance the credibility and acceptance of the criminal justice system. Second, it would obviate jury consideration of such difficult and nebulous concepts as whether a defendant possessed substantial capacity to appreciate the moral wrongfulness of his conduct, or whether he was unable—as opposed to unwilling—to control his actions. The only relevant question, apart from whether the defendant committed the act charged, would be whether he acted with the statutorily prescribed knowledge or intent. Third, it would all but eliminate the presentation at trial of confusing psychiatric testimony on these issues<sup>50</sup> and relieve

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been found guilty except for the fact that his mental disease or defect precluded a finding of the existence of the knowledge or other mental element specified by the penal statute, not guilty only by reason of insanity. The latter verdict is designed to serve only as an automatic trigger for a civil commitment inquiry. *See* S. 2572, 97th Cong., 2d Sess. § 701 (1982).

50. The defendant could still rely on expert testimony to show that he was so deranged as to be incapable of the knowledge or intent required as an element of

federal judges of the burden of formulating comprehensible jury instructions on the legal consequences of psychiatric findings. In all cases the judge and jury would simply be dealing with ordinary concepts of knowledge and intent—concepts they would have to deal with whether or not a mental disease or defect is alleged—rather than with the murky and perplexing standards and terminology of the traditional insanity defense. Finally, the question of the appropriate disposition of convicted defendants suffering from mental illness could be explored more fairly and effectively at the time of sentencing, free from the constraints of the adversary process and the restrictive rules of evidence.<sup>51</sup>

The approach of Senate Bill 2572 will prevent certain defendants from inappropriately escaping justice and keep criminal trials from being diverted into confusing swearing contests between opposing psychiatrists. It bears re-emphasis that this approach is not an ad hoc response to a momentarily topical issue. To the contrary, it has been thoroughly considered;<sup>52</sup> it has been endorsed in the past by numerous legal scholars, bar associations, and psychiatrists,<sup>53</sup> and a similar approach has proved successful in Sweden.<sup>54</sup> Nothing arising in the course of the recent debate detracts from its soundness and superiority.

Finally, it should be noted that any comprehensive legislative response to the problems engendered by current law and practice regarding the insanity defense in the federal courts must take into account the need to provide for the civil commitment of dangerous defendants found not guilty because of insanity, however the concept of insanity is defined or circumscribed. At present, there is no federal statute, except for one applicable only in the District of Columbia,<sup>55</sup> authorizing or compelling the commitment of an acquitted but presently dangerous and insane individual. When faced with such a situation, federal prosecutors can do no more than call the matter to the attention of state or local authorities, urge them to institute appropriate commitment proceedings, and hope that they do so.<sup>56</sup> The absence

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the offense, but such extreme cases would probably continue to be as rare as they are today. Cf. FED. R. CRIM. P. 12.2(b). Since the scope of such an inquiry would be very limited, the opportunity for defendants to mislead examining psychiatrists and successfully contrive a defense would be comparatively small.

51. Cf. *United States v. Chandler*, 393 F.2d 920, 928 (4th Cir. 1968).

52. See *Hearings*, *supra* note 1, at 3490-91, 5406, 5933-34, 5947, 6363-6507, 6805-22, 7007-7119.

53. See S. REP. NO. 307, 97th Cong., 1st Sess. 106-07 (1981). See also Clanon, Shawver & Kurdys, *supra* note 17, at 826-27; Spring, *supra* note 5, at 32-34.

54. See Moyer, *The Mentally Abnormal Offender in Sweden: An Overview and Comparisons with American Law*, 22 AM. J. COMP. L. 71 (1974).

55. See D.C. CODE ANN. § 24-301(d) (1973 & Supp. VII 1980). One court of appeals has described the absence of federal legislation in this area as "a chasm" and a "gaping statutory hole." *United States v. McCracken*, 488 F.2d 406, 415-18 (5th Cir. 1974).

56. It is sometimes difficult to persuade state authorities to take responsibility for a person acquitted by reason of insanity in a federal court if the person is

of a federal commitment procedure creates the very real potential that the public will not be adequately protected from a dangerously insane defendant who is acquitted at trial. The Attorney General's Task Force on Violent Crime strongly recommended that legislation be enacted "to establish a federal commitment procedure for persons found incompetent to stand trial or not guilty by reason of insanity in federal court."<sup>57</sup> Such provisions were developed in connection with Senate Bill 1630, the criminal code revision bill,<sup>58</sup> and are also embodied in Title VII of Senate Bill 2572.<sup>59</sup>

Under the civil commitment provisions of Senate Bill 2572, a person who is not convicted only because of a mental disease or defect that is so severe as to preclude a finding of the intent or knowledge specified as an element of the offense would be committed immediately to a suitable facility for psychiatric or psychological examination.<sup>60</sup> Shortly thereafter, a hearing would be held by the court,<sup>61</sup> with appropriate safeguards for the rights of the acquitted person,<sup>62</sup> to determine whether he should be released or committed to a mental institution. If the court determined that the acquitted person was then suffering from a mental disease or defect as a result of which his release would create a substantial risk of serious bodily injury to another person or serious damage to property of another, it would commit the person to the custody of the Attorney General who would transfer the person to an appropriate state official or, if the state was unwilling to assume responsibility, hospitalize him for treatment.<sup>63</sup> The person would continue to be hospitalized until he recovered sufficiently that his release would no longer endanger the person or property of others.<sup>64</sup>

Civil commitment provisions along these lines are sorely needed in the federal system. In combination with the limited insanity defense proposed in Senate Bill 2572, they would enable the system, for the first time, to respond rationally to the dangers posed by the criminal acts of mentally unsound persons.

## V. CONCLUSION

The conventional insanity defense has been the subject of well-justified criticism. It has outlived its principal utility, it invites continuing expansion, it courts abuse, it produces considerable litigation in attempting to ac-

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not a resident of, or otherwise directly connected with, the state in which the trial takes place. See TASK FORCE REPORT, *supra* note 42, at 54.

57. *Id.*

58. See S. 1630, 97th Cong., 1st Sess. (1981) (proposed 18 U.S.C. § 3613).

59. See S. 2572, 97th Cong., 2d Sess. § 701 (1982) (proposed 18 U.S.C. § 4243).

60. *Id.* (proposed 18 U.S.C. § 4243(a), (b)).

61. *Id.* (proposed 18 U.S.C. § 4243(c)).

62. *Id.* (proposed 18 U.S.C. § 4247(d)).

63. *Id.* (proposed 18 U.S.C. § 4243(d)).

64. *Id.* (proposed 18 U.S.C. § 4243(e)).

commodate psychiatric considerations into a legal framework, and it forces an evaluation of subtle nuances to an all-or-nothing conclusion. In consequence, it provokes dismay and cynicism on the part of the public and contributes to the erosion of the respect that the law must prompt if it is to serve society effectively. Congress should act to concentrate the trial exploration of the defendant's mental state in the sole area in which it is legally meaningful—the evaluation of the mental element of the charged offense—while permitting a more even-handed disposition of the mentally borderline offender after a post-trial, presentence proceeding freed of technical evidentiary rules. This is the approach of Senate Bill 2572. It holds potential as a workable and humane approach to a very difficult national problem.



