

December 1980

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Recommended Citation

Barbara A. Weiner, *Not Guilty by Reason of Insanity: A Sane Approach*, 56 Chi.-Kent L. Rev. 1057 (1980).
Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol56/iss4/3>

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NOT GUILTY BY REASON OF INSANITY: A SANE APPROACH

BARBARA A. WEINER*

For more than two decades, the legal literature has been filled with articles on the insanity defense.¹ Discussion has centered around the standard used to excuse someone from criminal responsibility,² whether the defense should be abolished,³ and whether the defense is being overused.⁴ In recent years, a number of states have discussed changing their laws relating to the insanity defense. This article will review the historical background of the defense and will explore the present state of the defense in the United States. Problems with the procedures after being found not guilty by reason of insanity⁵ will be examined and model legislation will be presented to correct those problems. Finally, the article includes an analysis of why due process and equal protection are not violated by treating the NGRI individual differently than other civilly committed persons.

DEVELOPMENT OF THE INSANITY DEFENSE

Today in the United States, the insanity defense is recognized in every jurisdiction as an affirmative criminal defense.⁶ This defense can be raised whenever intent is an element of the crime. By pleading the insanity defense, the defendant is admitting that he has committed the act that he is accused of, but is stating that because of his "insanity" he

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1. See, e.g., Monahan, *Abolish the Insanity Test?—Not Yet*, 26 RUTGERS L. REV. 719 (1973) [hereinafter cited as Monahan]; Morris, *Psychiatry and the Dangerous Criminal*, 41 S. CAL. L. REV. 514 (1968) [hereinafter cited as Morris]; Goldstein & Katz, *Abolish the "Insanity Defense"—Why Not?*, 72 YALE L.J. 853 (1963) [hereinafter cited as Goldstein & Katz]; H. FINGARETTE & A. HASSE, *MENTAL DISABILITIES AND CRIMINAL RESPONSIBILITY* (1979); H. FINGARETTE, *THE MEANING OF CRIMINAL INSANITY* (1972).

2. See, e.g., A. BROOKS, *LAW, PSYCHIATRY, AND THE MENTAL HEALTH SYSTEM* (1974); A. GOLDSTEIN, *THE INSANITY DEFENSE* (1967) [hereinafter cited as GOLDSTEIN].

3. See, e.g., Monahan *supra* note 1; Goldstein & Katz *supra* note 1; Brady, *Abolish the Insanity Defense — No!*, 8 HOUS. L. REV. 629 (1971).

4. See, e.g., Morris *supra* note 1.

5. Hereinafter sometimes referred to as NGRI.

6. See Appendix A.

could not form the requisite mental state, the intent which is a crucial element of the crime.

The recognition that crimes are based on the existence of a mens rea/mental state, as well as an actus rea/physical act, goes back more than three thousand years.⁷ The Hebrews made a distinction between intentional and unintentional crimes, and neither children nor insane persons were held criminally responsible for their acts, nor did they have to compensate their victims.⁸ The Greek philosophers, beginning with Plato, recognized that individuals had a free will which made it possible for them to be responsible for the good and evil in their lives.⁹ Aristotle believed that an individual was morally responsible if, with knowledge of the circumstances and freedom from external compulsion, he deliberately chose to commit a specific act.¹⁰

In the sixth century, the Code of Justinian recognized the status of children and insane persons as not being responsible for their acts.¹¹ At that time, there also appeared the beginnings of a "heat of passion" test with the recognition that "punishment is mitigated" for one who commits homicide in a brawl.¹² By the time of Elizabeth I of England, the law had evolved to the point where insane persons and children were exempted from punishment for their acts because they could not comprehend the morality of what they had done.¹³

Thus, the concept evolved that, like children, insane persons had no free will and therefore could not avoid doing the criminal acts they did. The morality of society dictated that these insane persons not be punished because they could not control their behavior. However, although these individuals were not punished in the traditional sense by losing an arm for stealing or a life for killing, they were not set free but were restrained in some manner. This usually meant that they spent the rest of their lives institutionalized.

M'Naghten

These early laws relating to lack of criminal responsibility formed

7. See Gerber, *Is the Insanity Test Insane?*, 20 AM. J. JURIS. 111 (1975) [hereinafter cited as Gerber]. This article provides a good review of the insanity defense.

8. The Talmud provides: "It is an ill thing to knock against a deaf-mute, an imbecile, or a minor: He that wounds them is culpable, but if they wound others they are not culpable. . . . For with them only the act is of consequence while the intention is of no consequence." Quen, *Anglo-American Criminal Insanity—An Historical Perspective*, 10 J. HIST. BEHAV. SCI. 313 (1974).

9. PLATO, *THE REPUBLIC* 350 (Conford trans. 1945).

10. ARISTOTLE, *THE NICOMACHEAN ETHICS* 58 (Ross trans. 1975).

11. DIGEST 48. 8. 2.

12. *Id.*

13. See Gerber, *supra* note 7, at 114.

the foundations of our present insanity defenses which arose from the case of Daniel M'Naghten.¹⁴ In 1843, Daniel M'Naghten, a Glasgow wood turner, suffered from the delusion that the British Prime Minister, Sir Robert Peel, the Pope, and the Jesuits were all conspiring against him. In order to protect himself, M'Naghten decided to kill Peel. Upon arrival at the Prime Minister's home, M'Naghten shot Edward Drummond, Peel's secretary, believing him to be the Prime Minister.

M'Naghten's trial was the first to recognize the developing medical science of psychiatry. Nine medical witnesses testified that M'Naghten was totally insane. Dr. Isaac Ray's book on forensic psychiatry was widely quoted to the court.¹⁵ The jury found M'Naghten insane¹⁶ and he spent the remainder of his life in Broadmoor, a mental institution.

The case created such a furor that Parliament debated whether M'Naghten's acquittal would make it easier for criminals to be excused for their behavior.¹⁷ The Parliament asked the common law judges to respond to five questions.¹⁸ Their answers resulted in the adoption of the *M'Naghten* rule in Great Britain. The answer of Lord Chief Justice Tindal became the official statement of the rule:

[T]he jurors ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.¹⁹

14. M'Naghten's Case, 8 Eng. Rep. 718 (1843).

15. I. RAY, MEDICAL JURISPRUDENCE OF INSANITY (1838).

16. 8 Eng. Rep. 718, 720 (1843).

17. *Id.* at 720-24.

18. The five questions were as follows: What is the law respecting alleged crimes committed by persons afflicted with insane delusion with respect to one or more particular subjects or persons; as for instance, at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit? 2. What are the proper questions to be submitted to the jury when a person, alleged to be afflicted with an insane delusion respecting one or more particular subjects or persons, is charged with the commission of a crime, and insanity is set up as a defense? 3. In what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when the act was committed? 4. If the person under an insane delusion as to existing facts commits an offense in consequence thereof, is he thereby excused? 5. Can a medical man, conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial and the examination of all witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion as to whether the prisoner was conscious at the time of doing the act that he was acting contrary to law, and whether he was labouring under any and what delusion at that time? *Id.* at 720.

19. *Id.* at 722.

Frequently, a criminal law professor, to demonstrate lack of mens rea sufficient to meet the *M'Naghten* test, will give the example of the man who thinks he is squeezing an orange, when he is actually strangling his wife. Obviously in this case the man does not know what he is doing, is mentally ill, and cannot know that "squeezing an orange" is wrong. The *M'Naghten* rule, also known as the right or wrong test, became part of the law of the United States. This rule has been widely accepted with little modification in many states for the past 137 years, and is used by twenty states.²⁰ Under *M'Naghten*, the accused is not responsible for his actions if at the time of the act he had a mental disease which prevented him from knowing the nature and quality of the act, or that it was wrong.²¹

Until 1954, the *M'Naghten* rule was the standard test used in the United States to determine whether someone was criminally responsible. As the middle of the twentieth century approached, however, psychiatry became more widely accepted as a medical science possessing the ability to add knowledge to the determination of whether someone should be held criminally responsible. Criticism of *M'Naghten* grew because the rule did not consider modern advances in psychiatry, and critics argued that too few people were excused from criminal responsibility.²²

Durham

In 1954, the United States Court of Appeals for the District of Columbia reversed the conviction of Monte Durham for housebreaking and petit larceny.²³ Writing for the majority, Judge David Bazelon held that Durham had presented enough evidence to raise the issue of his insanity under the standard then used in the District of Columbia.²⁴ The court used the occasion to reject the *M'Naghten* rule as too narrow and espoused a broader test which became known as the *Durham* rule or the New Hampshire rule.²⁵ The rule provided that: "[A]n accused is

20. See Appendix A which lists the states that have adopted *M'Naghten*.

21. ARIZ. REV. STAT. § 13-502 (Supp. 1980) provides:

A person is not responsible for criminal conduct if at the time of such conduct the person was suffering from such a mental disease or defect as not to know the nature and quality of the act or, if such person did know, that such person did not know that what he was doing was wrong.

22. See, e.g., F. ALEXANDER, THE CRIMINAL, THE JUDGE, AND THE PUBLIC: A PSYCHOLOGICAL ANALYSIS 70 (1931); B. CARDERO, WHAT MEDICINE CAN DO FOR THE LAW 28 (1930); K. MENNINGER, THE HUMAN MIND 450 (3d ed. 1945).

23. *Durham v. United States*, 214 F.2d 862, 864 (D.C. Cir. 1954).

24. *Id.* at 866. The District of Columbia used *M'Naghten* with an irresistible impulse test. See *id.* at 869.

25. New Hampshire's test was described in *New Hampshire v. Pike*, 49 N.H. 399 (1869).

not criminally responsible if his unlawful act was the product of a mental disease or mental defect."²⁶

The *Durham* rule created much controversy, and resulted in many discussions in the legal literature about its potential impact.²⁷ The rule was adopted only by Maine,²⁸ New Hampshire,²⁹ and the United States District Court for the District of Columbia.³⁰ The purpose of the rule was to permit psychiatric testimony on a broad range of issues, with the definition of mental disease or defect purposely left vague. The implementation of the *Durham* rule in the District of Columbia resulted in a dramatic increase in the number of persons who were excused from criminal responsibility because of an insanity defense.³¹ In the four years before the *Durham* rule was implemented, there were thirty-four people acquitted based on insanity.³² In the four years after the rule, there were 150 acquittals.³³ By 1972, Judge Bazelon repudiated *Durham* in a case which accepted the American Law Institute standard³⁴ as the appropriate one for the District of Columbia.³⁵

The major impact of *Durham* was to spur discussion of what type of test would be appropriate to avoid the problems of *M'Naghten*, which was too narrow, and *Durham*, which was too broad.³⁶ *Durham* was repudiated in *United States v. Brawner*³⁷ because the D.C. Circuit felt that the psychiatric experts had been usurping the jury function by testifying about conclusions which should be drawn from the facts.³⁸

New Hampshire adopted this test in 1869, yet was given very little credit for being innovative. It was not until Judge Bazelon wrote the *Durham* decision that discussion began on the innovativeness of concepts which New Hampshire had accepted for eighty-five years.

26. *Durham v. United States*, 214 F.2d 862, 874-75 (D.C. Cir. 1954).

27. See, e.g., GOLDSTEIN *supra* note 2; Wechsler, *The Criteria of Criminal Responsibility*, 22 U. CHI. L. REV. 367 (1955); Note, *Century of Progress: The Durham Case*, INT'L J. FOR. SCI. 41 (1956); Note, *The Durham Rule*, 40 IOWA L. REV. 652 (1955); Note, *Criminal Law: A Significant Development in the Law Relating to Insanity as a Defense to Crime*, 1955 WIS. L. REV. 506.

28. ME. REV. STAT. tit. 15, § 102 (repealed 1976); see *id.* tit. 17-A, § 58 (1979) (new statute applies *Brawner* test).

29. New Hampshire did not codify its law, but stated it in *New Hampshire v. Pike*, 49 N.H. 399 (1869).

30. The District of Columbia's rule was stated in *Durham v. United States*, 214 F.2d 862, 869 (D.C. Cir. 1954).

31. PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA REPORT 535 (1966).

32. *Id.*

33. *Id.*

34. MODEL PENAL CODE § 4.01(1) (1962). See text accompanying note 45 *infra*.

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

36. See, e.g., Hall, *Mental Disease and Criminal Responsibility — M'Naghten Versus Durham and the American Law Institute's Tentative Draft*, 33 IND. L.J. 212 (1958) [hereinafter cited as *M'Naghten Versus Durham*].

37. 471 F.2d 969, 1000 (D.C. Cir. 1972).

38. *Id.* at 1006.

Irresistible Impulse

When *Durham* was adopted by the District of Columbia, the majority of states were still using *M'Naghten*.³⁹ Some states added to *M'Naghten* the concept of an irresistible impulse.⁴⁰ Although there does not appear to be a uniform standard for irresistible impulse, the concept is that the defendant was unable to control himself. The irresistible impulse test was stated by the United States Court of Appeals for the District of Columbia in *Smith v. United States*:⁴¹

The modern doctrine is that the degree of insanity which will relieve the accused of the consequences of a criminal act must be such as to create in his mind an uncontrollable impulse to commit the offense charged. This impulse must be such as to override the reason and judgment and obliterate the sense of right and wrong to the extent that the accused is deprived of the power to choose between right and wrong. The mere ability to distinguish right from wrong is no longer the correct test either in civil or criminal cases, where the defense of insanity is interposed. The accepted rule in this day and age, with the great advancement in medical science as an enlightening influence on this subject, is that the accused must be capable, not only of distinguishing between right and wrong, but that he was not impelled to do the act by an irresistible impulse, which means before it will justify a verdict of acquittal that his reasoning powers were so far dethroned by his diseased mental condition as to deprive him of the will power to resist the insane impulse to perpetrate the deed, though knowing it to be wrong.⁴²

A number of states still use *M'Naghten* plus some form of an irresistible impulse test.

The ALI Test

Beginning in the early 1960's, the American Law Institute⁴³ began to develop a test to end the strictness of *M'Naghten* and avoid the broadness of *Durham*. The ALI felt that *Durham* made it possible for a defendant to use any mental disease as an excuse for avoiding criminal responsibility.⁴⁴ The ALI test stated that:

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

39. GOLDSTEIN *supra* note 2.

40. *See* Appendix A.

41. 36 F.2d 548 (D.C. Cir. 1929).

42. *Id.* at 549.

43. Hereinafter referred to as ALI.

44. *See, e.g.,* United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972); *M'Naghten Versus Durham supra* note 36.

As used in this Article, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.⁴⁵

The ALI test is now used by twenty-eight states.⁴⁶

The ALI test is not without its critics. Some commentators feel that too many people are excused from responsibility under this test.⁴⁷ This has resulted in calls for the abolition of the insanity defense,⁴⁸ and for psychiatrists to get out of the courtroom.⁴⁹ Predictably, the controversy about the insanity defense arises each time it is successfully used in a bizarre murder case.

Diminished Capacity

Although *M'Naghten* was widely accepted, many states felt that in certain circumstances the test was too harsh. In 1949, the concept of diminished responsibility arose in California.⁵⁰ The California Supreme Court reasoned that when a specific mental state is required it cannot be presumed but must be proven.⁵¹ This concept can be used to reduce the gravity of a charge in a criminal case.⁵² For example, in a first degree murder case, where there was testimony that the defendant could not form the specific intent necessary, or could form the specific intent to some degree, but because of a mental illness he was thinking deficiently, this evidence might be sufficient to reduce the charge to second degree murder or manslaughter.⁵³ Some form of this concept has been used by approximately fifteen states.⁵⁴ Under this approach, diminished capacity does not serve to excuse criminal responsibility but to mitigate the punishment by reducing the offense with which the defendant is charged, thereby reducing the possible prison sentence.

Before closing this discussion of the background of the insanity defense, some additional items must be mentioned to give the reader a

45. MODEL PENAL CODE § 4.01 (1962).

46. See Appendix A.

47. See note 3 *supra*.

48. See, e.g., Goldstein & Katz, *supra* note 1, which was the first of many articles in both the legal and psychiatric literature to discuss abolition.

49. K. MENNINGER, *THE CRIME OF PUNISHMENT* (1968); T. SZASZ, *LAW, LIBERTY, AND PSYCHIATRY* (1963); Halpern, *The Insanity Defense: A Juridical Anachronism*, 7:8 *PSYCH. ANNALS* 41 (1977).

50. *California v. Wells*, 33 Cal. 2d 330, 202 P.2d 53 (1949).

51. *Id.* at 350, 202 P.2d at 65.

52. *Id.* at 347, 202 P.2d at 63.

53. H. FINGARETTE & A. HASSE, *MENTAL DISABILITIES AND CRIMINAL RESPONSIBILITY* 117-33 (1979). This book provides an excellent discussion of the concept of diminished responsibility.

54. *Id.* at 117 n.1.

complete understanding of the present situation in the United States. Today, throughout the United States, most of the states use either the *M'Naghten* rule,⁵⁵ the ALI rule,⁵⁶ or some modification of *M'Naghten* such as *M'Naghten* plus an irresistible impulse test.⁵⁷ In most states, the insanity defense is only raised when the defendant is charged with murder or attempted murder. It is seldom raised in cases of armed robbery, burglary, or rape. Although most felonies have an intent element, it is usually in the murder situation that it seems most plausible to raise an insanity defense. This defense is most likely to be raised in the case of killing a family member, or a murder which occurred in a bizarre way, such as dismembering the victim.

By pleading insanity, the defendant is admitting that he has committed the act which constitutes the crime, but he is stating that because of his mental state he could not form the mental intent necessary for there to be any legal culpability. A good defense attorney will not consider an insanity defense if he believes that the state does not have sufficient evidence to convict his client. This is because an insanity defense will usually result in some type of institutionalization, whereas an outright acquittal makes it possible for the defendant to be freed immediately.

WHAT HAPPENS TO THE PERSON WHO SUCCESSFULLY PLEADS NOT GUILTY BY REASON OF INSANITY?

Past Practices

Like Daniel M'Naghten, defendants who successfully pleaded the insanity defense knew that they would spend their lives not in a prison, but in a mental hospital or a hospital for the criminally insane. Because these individuals would be locked away from the public, prosecutors were often not as vigorous as they could have been in fighting an insanity defense. The public felt protected when, after daily headlines from these often bizarre murder cases, the defendant would be found not guilty by reason of insanity and sent to the state hospital for the criminally insane. There the individual would usually remain until he died. The public could feel that society was just because it did not punish this "sick" killer, but afforded him treatment.

Until the mid-1950's, an individual who was mentally ill would be sent to a state mental hospital, usually far removed from a population

55. See Appendix A.

56. *Id.*

57. *Id.*

center, and would remain there for many years, if not the rest of his life.⁵⁸ With the advent of psychotropic medication in the 1950's, however, the entire concept of how to treat the mentally ill changed radically. Drugs made it possible for patients with chronic illnesses to control their symptoms.⁵⁹ Manic depressive illness could be controlled by the use of lithium carbonate,⁶⁰ hallucinations and paranoid behavior which afflicted the schizophrenic also could be alleviated with drugs.⁶¹

The psychotropic drugs forced the public to readjust its thinking about mental patients. These drugs made it possible for the individual to enter the hospital, become stabilized, and then return to his community. This in turn led to the emptying of state institutions, greatly reducing the average length of stay in the hospital. For example, in Illinois in 1955, there were approximately 48,000 beds in the Illinois Department of Mental Health for mental patients.⁶² These patients would spend an average of ten years and eight months in the hospital.⁶³ Today, there are about 10,000 inpatient beds, half of which are for the severely or profoundly retarded.⁶⁴ The average length of stay for a mentally ill person in a state hospital is now twenty-two days.⁶⁵

Added to the success of psychotropic drugs, which started the move toward deinstitutionalization, came the class action suits of the late 1960's and early 1970's challenging the procedures whereby an individual was committed.⁶⁶ In addition, the courts recognized the fact that the patient should be treated in the least restrictive setting neces-

58. E. GOFFMAN, *ASYLUMS: ESSAYS ON THE SOCIAL SITUATIONS OF MENTAL PATIENTS AND OTHER INMATES* (1961) is the classic book on the plight of the mental patient in large state institutions. See also Bassuk & Gerson, *Deinstitutionalization and Mental Health Services*, 238 SCI. AM. No. 2 at 46-53 (1978); Etzioni, *No Place to Go*, THE WASHINGTON MONTHLY, Dec. 1976, at 42; Raphling & Lion, *Patients with Repeated Admissions to a Psychiatric Emergency Service*, 6 COMM. MENTAL HEALTH J. 313-18 (1970); Slovenko & Luby, *From Moral Treatment to Railroaded Out of the Mental Hospital*, 2 BULL. AM. ACAD. PSYCH. LAW 223-36 (1974).

59. D. GOODWIN & S. GUZE, *PSYCHIATRIC DIAGNOSIS* (2d ed. 1979); Anderson & Kuehnle, *Strategies for the Treatment of Acute Psychosis*, 229 JAMA 1884 (1974).

60. *The Lithium Ion Impact on Treatment and Research*, 36 ARCH. GEN. PSYCH. No. 8 at 829 (F. Goodwin ed. 1979).

61. L. GRINSPOON, *SCHIZOPHRENIA: PHARMACOTHERAPY AND PSYCHOTHERAPY* (1972).

62. Illinois Department of Mental Health, Research and Statistical Branch (on file with author).

63. *Id.*

64. ANNUAL REPORT OF THE ILLINOIS DEPARTMENT OF MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES (1979).

65. *Id.*

66. *Bartley v. Kremens*, 402 F. Supp. 1039 (E.D. Pa. 1975), *vacated*, 431 U.S. 119 (1977); *Lynch v. Baxley*, 386 F. Supp. 378 (M.D. Ala. 1974); *Bell v. Wayne County Hosp.*, 384 F. Supp. 1085 (E.D. Mich. 1974); *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated*, 414 U.S. 473 (1974).

sary to meet his needs.⁶⁷ The concept of treatment in the least restrictive environment has spread from the case law to recently enacted mental health codes.⁶⁸ It became accepted policy that mentally ill people would be kept in the hospital for only the time that would be necessary to stabilize them.

The success of these lawsuits in opening the doors of mental institutions raised questions about what was happening to the person found not guilty by reason of insanity and those found unfit to stand trial.⁶⁹ Public defenders and legal aid attorneys began to question the policies relating to the mentally ill offender. In *Jackson v. Indiana*,⁷⁰ the practice of automatically committing a person found unfit to stand trial to a state mental institution was challenged. The United States Supreme Court, in *Jackson*, held that the same standard of commitment had to be used for the person found unfit to stand trial as was used for other civilly committed individuals.⁷¹ In *Baxstrom v. Herold*,⁷² the Supreme Court reviewed the release procedures for persons who had been committed to hospitals for the criminally insane.⁷³

Present Reality

Today, in most states, once a defendant has been successful with his insanity defense plea, the options available to the criminal court judge are very limited. In a few states, commitment to a mental health facility for some period of time is automatic.⁷⁴ In most states, the court must hold a hearing or request the prosecutor to petition for a hearing using the same standard of civil commitment as is used in the mental health code.⁷⁵ Since most states require that the person who is subject to hospitalization be mentally ill and, because of that illness, be likely to be dangerous to himself or others in the near future, the court is often faced with a situation where the defendant's symptoms are sufficiently in remission so that he does not qualify for involuntary admission under the civil commitment standard. This means that the judge

67. *Lake v. Cameron*, 364 F.2d 657 (D.C. Cir.), *cert. denied*, 382 U.S. 863 (1966); *Welsch v. Likins*, 373 F. Supp. 487 (D. Minn. 1974); *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated*, 414 U.S. 473 (1974); *Dixon v. Attorney General*, 325 F. Supp. 966 (M.D. Pa. 1971).

68. *See, e.g.*, ILL. REV. STAT. ch. 91½, § 3-811 (Supp. 1978); N.Y. MENTAL HYG. LAW § 1.00 (McKinney 1978); WASH. REV. CODE ANN. § 71.05.230 (Supp. 1978).

69. *Jackson v. Indiana*, 406 U.S. 715 (1972); *United States v. Ecker*, 543 F.2d 178 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1063 (1977).

70. 406 U.S. 715 (1972).

71. *Id.* at 730.

72. 383 U.S. 107 (1966).

73. *Id.* at 111-13.

74. *See* Appendix B.

75. *See id.*

has no choice but to discharge the defendant. Only a few states give the judge the alternative of discharging the defendant under conditions the court deems appropriate.⁷⁶ Even fewer states have developed outpatient programs to help this sub-population of mentally ill people.⁷⁷ The present state of affairs is fraught with problems from both the courts' and the public's perspective.

PROBLEMS WITH THE PRESENT SYSTEM

In almost every state, the present system relating to the disposition of the individual found not guilty by reason of insanity is filled with barriers which make it difficult, if not impossible, for the criminal court judge to assure that the public's safety is being protected. This system has four major problems: (1) the NGRI individual must meet the civil commitment standard; (2) the court is limited to either civil commitment or discharge; (3) in most states there is no option for court imposed outpatient treatment; and (4) there are no provisions for review of the discharge decision in the majority of states.

Problems Surrounding Commitment

Once a defendant is found not guilty by reason of insanity, the criminal court is faced with the issue of how to get the individual committed into the mental health system. In some states, after a finding of NGRI, commitment is automatic.⁷⁸ In those states, the automatic commitment is usually for a brief period of time so that the mental health system can assess whether the defendant meets the civil commitment standard and warrants continued inpatient hospitalization. In the majority of states, the court must proceed with a hearing to determine whether the individual meets the civil commitment standard. In many states, this is accomplished by the prosecutor petitioning for commitment under the civil commitment statute.⁷⁹

The standard for civil commitment raises the first barrier to assuring the safety of the public. In most states, the standard for civil commitment is based upon the state's police power to remove dangerous people from the streets for the community's protection. This power has led to statutes which require that, before someone can be involuntarily confined in a mental hospital, the state must prove that the individual is

76. *See id.*

77. *See id.*

78. *See id.*

79. *See id.*

likely to be dangerous to himself or others in the near future.⁸⁰ To meet this burden in the average civil commitment case, the state must show that the individual is suicidal or homicidal at the present time.

Since most persons who have been found NGRI were excused from criminal responsibility because they were psychotic at the time, one would think it would be easy to commit them. However, by the time of the trial, the NGRI individual's psychosis has ended. He has probably received some form of psychiatric treatment which caused his symptoms to disappear sufficiently so that he could be found fit to stand trial. Even if the NGRI individual is not on medication, the cyclical nature of his illness would have caused his psychosis to disappear. Thus, from the outset, by using the civil commitment standard, it is very difficult to get the NGRI individual into involuntary treatment.

In addition to the standard which must be met in most states, the burden becomes particularly difficult because eleven states require that the dangerousness be manifested by a recent, overt act.⁸¹ This is usually defined to include threats that occurred within a specific time period. If the NGRI individual has been institutionalized, it is unlikely that he would have "acted out" because of his being situated in a jail. At the hearing on civil commitment, it is very likely that the rules of evidence will bar a description of the criminal conduct because it is too far removed from the commitment hearing. The state thus may have a very difficult time convincing the court that this individual is in need of civil commitment. Moreover, in about thirteen states, the situation is further complicated by requirements that, before an individual can be civilly committed, the state must prove beyond a reasonable doubt that he meets the civil commitment standard.⁸² When the criminal eviden-

80. *E.g.*, ILL. REV. STAT. ch. 91½, § 1-119 (Supp. 1978) provides: "Person subject to involuntary admission . . . means: (1) A person who is mentally ill and who because of his illness is reasonably expected to inflict serious physical harm upon himself or another in the near future. . . ."

81. ALA. CODE tit. 22, § 52-1 (Supp. 1979); CAL. WELF. & INST. CODE § 5150 (West Supp. 1980); MASS. GEN. LAWS ANN. ch. 123, § 1 (West Supp. 1979); MINN. STAT. ANN. § 253A.02 (West Supp. 1980); NEB. REV. STAT. § 83-1009 (1976); N.D. CENT. CODE § 25-01-01 (Supp. 1979); OHIO REV. CODE ANN. § 5122.01 (Page Supp. 1980); 50 PA. CONS. STAT. ANN. § 7301 (Purdon Supp. 1979); VT. STAT. ANN. tit. 18, § 7101 (Supp. 1979); WASH. REV. CODE § 71.05.020 (Supp. 1979).

82. *In re Hodges*, 325 A.2d 605 (D.C. Ct. Appeals 1974); Superintendent of Worcester State Hosp. v. Hagberg, 372 N.E.2d 242 (Mass. 1978); Lausche v. Commissioner of Public Welfare, 302 Minn. 65, 225 N.W.2d 366 (1974), *cert. denied*, 420 U.S. 993 (1975); Proctor v. Butler, 117 N.H. 927, 380 A.2d 673 (1977); HAWAII REV. STAT. § 334-60(4)(I) (Supp. 1979); IDAHO CODE § 66-329(i) (Supp. 1979); KAN. STAT. § 59-2917 (Supp. 1979); MONT. REV. CODES ANN. § 38-1305(7) (Supp. 1977); OKLA. STAT. tit. 43A, § 54.1(C) (Supp. 1980); OR. REV. STAT. § 426-130 (1979); UTAH CODE ANN. § 64-7-36(10) (Supp. 1979); WIS. STAT. § 51.20(13)(e) (Supp. 1979-80). *See also* Denton v. Kentucky, 383 S.W.2d 681 (Ky. 1964); *In re J.W.*, 44 N.J. Super. 216, 130 A.2d 64, *cert. denied*, 24 N.J. 465, 132 A.2d 558 (1957).

tiary standard of proof is applied to civil commitment cases, it becomes even more difficult for the state to succeed in getting the NGRI individual into involuntary treatment.

Recently, in *Addington v. Texas*,⁸³ the United States Supreme Court recognized the need to balance the deprivation of liberty imposed by an involuntary hospitalization for mental illness against the state's interest in protecting the public from danger. The Court stated: "We have concluded that the reasonable doubt standard is inappropriate in civil commitment proceedings because, given the uncertainties of psychiatric diagnosis, it may impose a burden the state cannot meet and thereby erect an unreasonable barrier to needed medical treatment."⁸⁴ Although the Supreme Court decision in *Addington* recognizes some of the problems the state faces in the area of civil commitment, for those states which use the beyond a reasonable doubt standard, it is very difficult to meet this burden of proof in the case of the NGRI individual.

Finally, when one reviews the problems surrounding the commitment of the NGRI individual, one cannot help but notice the absurd situation of the prosecutor. At the trial on the criminal charge, the prosecutor must argue that the defendant knew what he was doing and was not insane. Once the defendant is found not guilty by reason of insanity, the prosecutor must reverse his position and argue that the defendant is now insane enough to require involuntary hospitalization. When added to the fact that in many states the civil commitment hearing is held before a different judge who is probably not aware of the criminal charge or the specifics of the crime, one can understand why the present situation must be changed.

Options When Civil Commitment is Unsuccessful

If the NGRI individual cannot be civilly committed, the court in most states has no other option but to discharge the individual from custody.⁸⁵ This means that the individual who has manifested his mental illness by committing a criminal act is now free to return to the streets with no one to monitor whether his illness continues in remission. Since many mentally ill people can have their symptoms con-

83. 441 U.S. 418 (1979).

84. *Id.* at 432.

85. If not automatically committed, the individual could be discharged in Alabama, Arkansas, California, Florida, Hawaii, Iowa, Kentucky, Maryland, Illinois, Indiana, Montana, Nebraska, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Vermont, Wisconsin, and Wyoming.

trolled by the proper medication, it is essential that they receive this medication.⁸⁶ Not only must the medication be taken, but someone must be monitoring the person to be sure he is on the right dosage and has his illness under control.⁸⁷ One of the problems encountered by treatment professionals is that the chronically mentally ill person often refuses to take his medication when he feels he is doing well; then he deteriorates and returns to the hospital again. Once in the hospital, he is stabilized and the revolving door syndrome begins.⁸⁸ Because the court has no control over these individuals, and because many of them cannot be relied upon to take their medication or seek treatment as they deteriorate, the public's safety is placed in jeopardy.

There are a number of states that give the court the option of discharging the individual from custody under such conditions as the court deems best.⁸⁹ In most states which permit the option of a court supervised discharge, it is unclear whether there are any programs designed for the NGRI individual or whether anyone is actually monitoring the person to be sure he is following the court order. Additionally, it is unclear what options are available to the court if the individual ignores the court order.

Proceedings Upon Discharge from the Hospital

The final area of concern raised by the present system is that, in many states, once the individual has been committed to the state mental health facility, he is no longer under the jurisdiction of the criminal court.⁹⁰ Once the individual is committed to a mental health facility, the staff will often know little more than that he was found not guilty by reason of insanity. The criminal record will not follow the NGRI individual to the hospital. The treatment staff may not be aware of the crime the patient was charged with or the specifics of what occurred during the crime. The author is personally aware of cases where the treatment staff did not believe that the individual could have been a murderer, and was ready to discharge the patient within one week of his entering the hospital.⁹¹ The staff, unaware of the specifics of the

86. L. HOLLISTER, *CLINICAL USE OF PSYCHOTHERAPEUTIC DRUGS* (1973).

87. Davis, *Overview: Maintenance Therapy in Psychiatry: II. Affective Disorders*, 133 AM. J. PSYCH. 1-13 (1976).

88. S. GALANN, *HANDBOOK OF COMMUNITY MENTAL HEALTH* (1972).

89. *See* Appendix B.

90. *See id.*

91. The author was formally an attorney for the Illinois Department of Mental Health. In that capacity, she was consulted about releasing someone who had been found NGRI of murder the week before. The therapist stated "I know Mr. ——— didn't commit any violent act, he is ready to be discharged." When the therapist was asked if he knew Mr. ——— had been found not

past criminal conduct, will treat the NGRI individual the same as the other patients. By ignoring the violent behavior which led to the criminal charges, the staff has an incomplete picture of the patient's personality.

With the advent of psychotropic medications,⁹² the average length of stay in the hospital has decreased radically. Once the individual is stabilized, the staff begins to think of discharging him. With the economics of hospitalization, the emphasis is on returning the person to the community as soon as possible. Therefore, in its haste to save money, the staff will begin planning for discharge at the moment of admission.⁹³ This will probably result in the NGRI individual being returned to the community within a very short period of time after he has been found not guilty.

Twenty-nine states require that, before discharging a NGRI individual, the criminal court review the discharge.⁹⁴ By having the court review the discharge, the public can be assured that someone who is familiar with the criminal case and is not concerned with the economics of hospitalization will be reviewing whether discharge is appropriate, both from the perspective of the patient's treatment needs and the danger he may present to the community. The criminal court judge is acting to safeguard the interests of the community.

The present system leaves many people in the criminal justice system frustrated and concerned that the public is not being properly protected. This situation arises because the NGRI individual is treated the same as other civilly committed persons. Some would agree that this is appropriate because they have been found not guilty. However, this author believes that these people can be treated differently, based upon their past behavior, and that the law sanctions such differences in treatment.⁹⁵

In those states where there are problems with the present procedures when someone is found not guilty by reason of insanity, the author would like to suggest amending the present law to include some or all of the elements necessary to remedy these problems. These provisions are found in the "model legislation" presented below.

guilty of murder his rely was "Mr. ——— said it was a mistake and he didn't commit any violent act."

92. Brill, *The Impact of Modern Chemotherapy on Hospital Organization: Its Scope and Its Limits*, in PROCEEDINGS OF THE THIRD WORLD CONGRESS OF PSYCHIATRY (Vol. 3 1964).

93. See note 88 *supra*.

94. See Appendix B.

95. Due process and equal protection issues are discussed in the text accompanying notes 99-119 *infra*.

MODEL LEGISLATION FOR PROCEEDINGS AFTER BEING FOUND NOT GUILTY BY REASON OF INSANITY

Section 1: Definitions

- a. Acquittee—person found not guilty by reason of insanity.
- b. “In need of mental health services”—an acquittee who is mentally ill and needs either inpatient or outpatient mental health services.
- c. “Mentally ill”—includes any acquittee who has a mental disease or defect. This would include individuals whose illness is in a state of remission if there is a reasonable medical probability that the illness could become active again, and when active would render the individual dangerous to himself or others.
- d. “Person subject to involuntary hospitalization”—an acquittee who, because of a mental illness, is reasonably expected to be a danger to himself or others.
- e. “Person subject to conditional release”—an acquittee who no longer is subject to involuntary hospitalization but would benefit from mental health services.
- f. “Mental health services”—includes but is not limited to: outpatient services including drug and alcohol rehabilitation programs; community adjustment programs; individual, group, or family therapy; or chemotherapy.

Section 2: Court Ordered Evaluation

Immediately upon a finding of not guilty by reason of insanity, the court shall order the acquittee to the Department of Mental Health for a period of thirty days for an evaluation as to his need for mental health services. The Department shall provide the court within forty-five days of the acquittee's arrival a report stating whether the acquittee is in need of mental health services and detailing any services which the Department recommends.

The court may also order the acquittee to be evaluated by an independent expert upon the acquittee's motion, the motion of the state, or upon the court's own order. This report shall also determine whether the defendant is in need of mental health services, and make recommendations as to the specific services.

Section 3: Hearing as to Need for Mental Health Services

- a. Within sixty days from the finding of not guilty by reason of insanity, the court shall hold a hearing to determine if the acquittee is in need of mental health services. The court shall consider whatever reports and testimony it has received from mental health professionals, as well as the information presented at the criminal trial which related to the defendant's insanity, as evidenced by the crime he was charged with.
- b. The findings of the court shall be established by clear and convincing evidence. The burden of proof and the burden of going

forth with the evidence shall rest with the State. The acquittee shall be represented by counsel.

- c. The court may find:
1. The acquittee is not in need of mental health services, and he shall be discharged immediately from the custody of the court.
 2. The acquittee is subject to involuntary hospitalization, and he shall be admitted to the custody of the Department of Mental Health to be treated as provided for in the Mental Health Code except as provided hereinafter. This treatment shall include periodic review of his need for continued hospitalization.
 3. The acquittee is in need of mental health services. The court then shall determine how the defendant should receive these services. The court can order a conditional release of the defendant, if inpatient care is not required, under such conditions as will assure the acquittee's progress in treatment and the safety of the community. If the acquittee is conditionally released from the custody of the Department or the court, the court can order that the facility accepting the acquittee for outpatient treatment provide periodic reports to the court as to the acquittee's progress.

Section 4: Conditional Release

- a. When the court orders the acquittee released conditionally, upon conditions stated in the court order, the court shall determine how long the acquittee shall remain under the jurisdiction of the court. A conditional release shall not be for a period of more than five years from the time the conditional release is ordered.
- b. If the acquittee violates the conditions of his release, he shall be immediately hospitalized for an evaluation as to his need for mental health services. Within twenty days of his being rehospitalized, the court shall hold a hearing to make the same findings it can make under section 3.c. If the court finds that the acquittee is not in need of any mental health services, or can satisfactorily receive mental health services on an outpatient basis, it shall so rule. The court shall have the option of holding the acquittee in contempt of court for violating its initial court order.

Section 5: Procedures for Person in Custody of Department of Mental Health

- a. Any person in the custody of the Department of Mental Health pursuant to the provisions of this Act, shall be treated according to the Mental Health Code except that before he can be given overnight passes or other off-grounds passes which shall be for more than ten hours, the court shall be notified, and shall have an opportunity to object to such off-grounds passes on the basis that the public's safety will not be protected.
- b. Should any person in the custody of the Department of Mental Health escape from custody, the police and the court shall be

notified, and all procedures necessary to implement the acquit-tee's return to custody shall be followed.

Section 6: Procedures for Discharge from the Custody of the Department of Mental Health

- a. When the director of the hospital which is providing treatment to the acquittee determines that he is no longer in need of inpatient hospitalization, the director shall notify the court with a statement, including acquittee's mental status, and suggestions for outpatient care or whatever follow-up care the director deems in the best interest of the acquittee to protect him and to protect the public.
- b. Within thirty days of the notification, the court shall hold a hearing to determine whether the acquittee is ready to be discharged from the custody of the Department of Mental Health and under what conditions, if any.
- c. At the hearing, the acquittee shall be represented by an attorney. The State shall have the burden of proving by clear and convincing evidence that the acquittee is in need of continued hospitalization, if it disagrees with the recommendations of the director of the hospital.
- d. The court can dispense with a hearing if all parties agree to adopt the recommendations of the director of the hospital and the acquittee is accepted into an outpatient program that is willing to periodically report to the court on the acquittee's progress.
- e. The court shall make findings in accordance with section 3.c. and if the acquittee is conditionally released it shall be in accordance with section 4.

Section 7: Petition by Acquittee for Discharge from Custody or Custodial Release

- a. At any time after sixty days of being placed in the custody of the Department of Mental Health or on conditional release, the acquittee may petition the court for discharge from custody or a modification of the terms of conditional release or a discharge from conditional release. The acquittee shall have the burden of proving by clear and convincing evidence why the release sought in his petition should be granted. The court may then appoint independent experts to evaluate the acquittee to determine if his petition should be granted. Within sixty days from receiving the petition, the court shall hold a hearing to consider the petition. The court shall then make its findings.
- b. If the relief sought in the petition is denied, the acquittee shall not be permitted to file another petition for at least six months from the date of the court hearing.

Section 8: Remedy of Habeas Corpus

Any order under this Act shall not affect the remedy of habeas corpus.

Section 9: Applicability to Persons Presently in the System

This act sets forth procedures which apply to all persons found not guilty by reason of insanity. Before any person previously found not guilty by reason of insanity can be discharged from the Department of Mental Health, the provisions of this article must be complied with.

The above model legislation meets the problems encountered in the present system. Below is a brief review of how these problems are solved:

- a. **Proceedings Continue in the Criminal Court:** By continuing jurisdiction in the criminal court, rather than removing the commitment hearing to a civil court, the model legislation provides that the judge who is most familiar with the acquittee's criminal behavior and most aware of his illness will determine what is in the interest of the public and the acquittee. By keeping the proceedings in the criminal court and under the criminal code, you have distinguished the NGRI individual from other persons in need of mental health services. As explained in the next section of this article, this is legally permissible.
- b. **Broader Standard for Commitment:** The definition of need of involuntary hospitalization is broader than the commitment standard in most civil statutes because it does not require that the manifestation of dangerousness be *likely to occur in the near future*. Additionally, the state does not have to be concerned with proving a recent overt act or meeting the beyond a reasonable doubt standard of proof.
- c. **Provisions for Outpatient Care Under Supervision:** The conditional release provisions and the definition of in need of mental health services make it possible for the criminal court judge to assure that the acquittee is receiving the care he needs to keep his illness in remission and to protect the public. The provisions requiring periodic reports to the court and enforcement of the acquittee's conditional release terms assure a higher standard of compliance. This puts teeth into the conditional release provisions since there are known repercussions to the acquittee who does not follow those provisions.
- d. **Review of Discharge Decision:** Under the model statute, the pro-

tection of the public is assured by provision for review of the recommendations for discharge of the director of the mental health hospital. Not only is the time of discharge reviewed, but the court can require outpatient provisions which will help assure the acquittee's satisfactory progress once outside of the hospital setting.

- e. **Permit Mental Health Department to Treat with Broad Discretion:** Although there was no discussion in the previous section about the need for mental health professionals to be able to treat the patient without the court looking over their every move, the model legislation makes it clear that the department of mental health has discretion to treat the acquittee as it deems appropriate with the exception of giving the acquittee overnight off-grounds passes and discharging without the court's approval. With these two exceptions, the department of mental health is free to treat the patient in the way it deems best. This is an implicit recognition that the professionals in the mental health area should be free to perform their jobs without interference from the court, except when the public's safety must be protected.

A WORKING MODEL

A review of the statutes reveals that both Oregon⁹⁶ and Maryland⁹⁷ have workable laws that meet the goals of remedying the problems with the present system. The author had the opportunity to review the Maryland system and believes it provides an excellent example of how a state can meet the needs of the defendant while at the same time protecting the public's interest. Below is an operational overview of the Maryland system.

After a hearing has been held to determine that the defendant is in need of inpatient hospitalization, the defendant is sent to the Clifton T. Perkins Hospital in Baltimore, Maryland where he gradually is given more and more freedom, as it becomes apparent to the staff that he can handle this freedom. The hospital has vocational, educational, and recreational programs for its patients. Once the patient appears to be doing well, he is given a job within the hospital which requires that he work regular hours. If the patient handles these responsibilities well, the process of trying to find employment for the patient outside the hospital begins.

Perkins Hospital is located one-half hour from downtown Balti-

96. OR. REV. STAT. §§ 161.319-161.351 (1979).

97. MD. ANN. CODE art. 59, § 28 (1979).

more, making it possible to find employment opportunities. For a period of about three months, the patient will leave the hospital in the morning to work and return in the evening. Once the staff determines that the patient is able to handle these responsibilities, it begins planning for the discharge of the patient.

As the discharge process begins, the staff involves the patient's family and begins looking for a suitable living situation for the patient. The staff knows success in the community is likely to depend upon being employed and living in a stable situation. Perkins Hospital also runs its own halfway house, located in Baltimore. This assures that the patient has somewhere to go where he will receive supervision and support. Once the staff is ready to discharge the patient, it petitions the court for a conditional discharge.

The court then specifies the conditions of discharge. Under Maryland law, the conditional discharge can remain in effect for up to five years. At any point during the hospitalization or during the conditional discharge, the patient can petition the court for discharge or modification of the conditions.

Usually, the person continues under the supervision of the staff of Perkins Hospital after receiving a conditional discharge. He may be living in the halfway house. Even if he is not residing at the halfway house, the patient is still meeting on a regular basis with a therapist from Perkins. As the patient needs less supervision, he may meet with the therapist less frequently. It is possible that in the beginning the patient will be meeting with his therapist a few times a week, and by the end of five years may only be meeting with the therapist every month or every few months.

This system has the advantage of exposing the patient to more responsibilities and more freedom on a gradual basis. While the patient is being exposed to these responsibilities, a qualified staff is monitoring, evaluating, and supporting the patient. Before the patient is exposed to more freedom, the staff has determined what his needs are and has tried to meet them through educational or vocational programs. Only when a conditional discharge is requested does the court review the suggestions of the Maryland Department of Mental Health. Until that time, the department is free to proceed in the manner it feels is most appropriate.

The Maryland program appears to be working very successfully.⁹⁸

98. Clifton T. Perkins Outcome Study: A Review of 65 Patients Presently on Convalescent Leave (D. Madden, Consultant) (unpublished study on file with author).

The program contains most of the elements in the proposed model legislation and shows that it is possible to meet the needs of the patient while protecting the interests of the public.

LEGAL JUSTIFICATION FOR TREATING NGRI INDIVIDUALS DIFFERENTLY THAN OTHER CIVILLY COMMITTED PERSONS

This article has been based upon the premise that once an individual has been found NGRI, the state may treat him differently than other persons who are facing civil commitment proceedings. The model legislation suggested herein treats the NGRI individual differently at the time of commitment by using a broader standard of commitment. It also treats him differently in terms of off-grounds passes, review of the decision to discharge, and by permitting the court to impose court supervised outpatient care for up to five years after inpatient discharge.

The fourteenth amendment of the United States Constitution provides in part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . ." ⁹⁹ There are those who will argue that, once an individual has been found not guilty by reason of insanity, he is no longer under the jurisdiction of the criminal courts and must be treated the same as other individuals where civil commitment is the goal. This author believes that the law which permits treating the NGRI individual differently from other civilly committed persons is well-established. The arguments against differentials in treatment follow two predictable paths: denial of due process and denial of equal protection.

Due Process

The due process clause of the fourteenth amendment is recognized as the provision which assures that an individual is afforded certain rights at the time the state is trying to deprive him of his liberty or property. The amount of process which is due depends upon the circumstances. When the state tries to deprive an individual of his property, he is entitled to fewer protective procedures than if he were being deprived of his liberty. A civil commitment for mental illness is a deprivation of liberty which entitles the patient to certain rights.¹⁰⁰ These

99. U.S. CONST. amend. XIV.

100. *Bartley v. Kremens*, 402 F. Supp. 1039 (E.D. Pa. 1975); *Lynch v. Baxley*, 386 F. Supp. 378 (M.D. Ala. 1974); *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded*

rights include notice of the proceedings,¹⁰¹ the right to cross examination,¹⁰² and the right to be represented by an attorney.¹⁰³ In the proposed model legislation, the NGRI is given the same rights as the person who is being civilly committed. In addition, to assure the rights of this person, periodic review of his status and permission to petition for his discharge or modification of his conditions of release are provided. Thus, a due process argument would be unsuccessful.

Equal Protection

The equal protection argument presents the need for a more thoughtful legal analysis. It can be anticipated that the attorney for the NGRI individual will argue that his client is not being treated equally to other civilly committed patients in four ways: (1) he is committed under a broader standard; (2) he is treated differently when it comes to off-grounds passes; (3) the discharge of the NGRI individual is subject to court review, while that of other civilly committed persons is not; and (4) the NGRI individual can have a particular mode of outpatient care imposed upon him for up to five years, while the civilly committed individual cannot be required to participate in any outpatient program.

The attorney would then go on to cite two United States Supreme Court decisions to prove that his client must be treated equally and is being denied equal protection. The first case the attorney would cite would be *Baxstrom v. Herold*.¹⁰⁴ In *Baxstrom*, the Court struck down a New York statutory scheme which permitted convicted persons to be civilly committed at the end of their prison terms without being granted the same rights as others where civil commitment was sought. The Court stated: "We hold that petitioner was denied equal protection of the laws by the statutory procedure under which a person may be civilly committed at the expiration of his penal sentence without the jury review available to all other persons civilly committed in New York."¹⁰⁵

Baxstrom has been cited in numerous cases challenging provisions relating to persons found NGRI.¹⁰⁶ However, *Baxstrom* is different

on other grounds, 414 U.S. 473 (1974); *Dixon v. Attorney General*, 325 F. Supp. 966 (M.D. Pa. 1971).

101. *Lessard v. Schmidt*, 349 F. Supp. 1078, 1091 (E.D. Wis. 1972), *vacated and remanded on other grounds*, 414 U.S. 473 (1974).

102. 349 F. Supp. at 1097-1100.

103. *Id.* at 1097-98; *Bartley v. Kremens*, 402 F. Supp. 1039, 1050-51 (E.D. Pa. 1975).

104. 383 U.S. 107 (1966).

105. *Id.* at 110.

106. *E.g.*, *Powell v. Florida*, 579 F.2d 324, 330-32 (5th Cir. 1978); *Hill v. State*, 358 So. 2d 190, 200 (Fla. App. 1978); *Chase v. Kearns*, 278 A.2d 132, 138 (Me. 1971).

from the situation the author anticipates because all NGRI individuals will be treated the same, whereas in *Baxstrom* the statute only applied to persons who were completing their prison terms and did not apply to convicted felons who had finished their sentences or were out on bail. The *Baxstrom* Court also relied upon the fact that these individuals were denied a jury and were committed in a procedure which clearly denied them their due process rights. In the model legislation, the NGRI individual is given the same procedural protection as the civilly committed person.

The second case the attorney for the NGRI individual would cite would be *Jackson v. Indiana*.¹⁰⁷ In *Jackson*, a retarded deaf mute was found unfit to stand trial and because of his unfitness was committed to the Indiana Department of Mental Health "until such time as that Department should certify to the court that 'the defendant is sane.'"¹⁰⁸ Because of his retardation and his inability to communicate, it was clear that Jackson would never become fit to stand trial. Yet, under the Indiana statute, Jackson was effectively committed for life. The Court concluded:

[W]e hold that by subjecting Jackson to a more lenient commitment standard and to a more stringent standard of release than those generally applicable to all others not charged with offenses, and by thus condemning him in effect to permanent institutionalization without the showing required for commitment or the opportunity for release afforded by § 22-1209 or § 22-1907, Indiana deprived petitioner of equal protection of the laws under the Fourteenth Amendment.¹⁰⁹

Jackson is different from the NGRI individual in a number of respects. First, Jackson had never been through the criminal justice system; there had been no determination of whether he had committed a crime. Second, there was no requirement that the state show that Jackson was dangerous before being committed. Dangerousness is recognized as the criterion for utilizing the state's police power to civilly commit.¹¹⁰ Third, there were no provisions for periodic review of Jackson or for possible discharge until he recovered from his insanity. In the proposed legislation, the NGRI individual cannot be committed unless he is dangerous, and he has the right to review of his commitment and can petition for his discharge. Additionally, the NGRI individual is not in

107. 406 U.S. 715 (1972).

108. *Id.* at 719.

109. *Id.* at 730.

110. *E.g.*, *Suzuki v. Quisenberry*, 411 F. Supp. 1113 (D. Haw. 1976); *Bell v. Wayne County Gen. Hosp.*, 384 F. Supp. 1085 (E.D. Mich. 1974); *Logan v. Arafteh*, 346 F. Supp. 1265 (D. Conn. 1972), *aff'd*, 411 U.S. 911 (1973); see generally Ross, *Commitment of the Mentally Ill: Problems of Law and Policy*, 57 MICH. L. REV. 945, 954-60 (1959); Note, *Civil Commitment of the Mentally Ill: Theories and Procedure*, 79 HARV. L. REV. 1288, 1289-95 (1966).

legal limbo like Jackson. The NGRI individual has already completed his path through the criminal justice system.

The issue which would be raised in a challenge to a statute like the model one is: "Is the equal protection clause of the fourteenth amendment of the United States Constitution violated by treating the person found not guilty by reason of insanity differently from other civilly committed persons?" The author would obviously answer in the negative. The past criminal behavior of the NGRI individual demonstrates his dangerousness to society and thus justifies treating him differently than the civil committee who has not engaged in such behavior.

The equal protection clause does not require treating all persons alike. However, this clause will become the starting point in any lawsuit challenging differentials in treatment between two groups that appear similarly situated. The United States Supreme Court has explained the requirements of equal protection:

The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal. Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them.¹¹¹

The most notable case which analyzed treating the NGRI individual differently for purposes of discharge was *United States v. Ecker*.¹¹² In *Ecker*, an issue raised was whether a provision of the laws of the District of Columbia, which required court review of a proposal for conditional release or discharge, violated the equal protection rights of the patient because he was treated differently than other civilly committed persons who could be discharged on the authority of the chief of the hospital. *Ecker* also challenged the fact that the court had to find that the NGRI individual was not likely to endanger himself or others in the reasonably foreseeable future, while the civil committee only had to convince the chief of the hospital that he was not likely to injure himself or other persons.

The *Ecker* court determined that the dangerousness demonstrated by the commission of a crime and acquittal by reason of insanity was a rational basis for the disparity in release provisions.¹¹³ In further elaboration, the court held:

111. McDonald v. Board of Election Comm'rs, 394 U.S. 802, 809 (1968).

112. 543 F.2d 178 (D.C. Cir. 1976), cert. denied, 429 U.S. 1063 (1977).

113. 543 F.2d at 195.

"Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made," *i.e.*, "a reasonable justification." Subsection (d) patients are treated differently from other civil commitees [*sic*] because they are an "exceptional class of people" who have "already unhappily manifested the reality of anti-social conduct."¹¹⁴

The court then noted that it did not understand how independent judicial review of a discharge decision deprives the patient of any substantial right. Moreover, according to the *Ecker* court, that review is designed for the protection of the public against whom the acquittee already has been shown to have committed one or more criminal acts, thus differentiating himself from the civilly committed individual.¹¹⁵ *Ecker* makes it clear, through its well-reasoned opinion, that a review of the discharge decision and ordering of a conditional release is appropriate for the NGRI individual, even though this procedure is not applied to other civilly committed individuals.

The issue which was not addressed in *Ecker* is whether a broader standard of commitment can be used when involuntarily hospitalizing an NGRI individual. The model legislation proposed in this article requires that, to involuntarily hospitalize a person found NGRI, the state would have to show that he was reasonably expected to be a danger to himself or others. This is broader than the standard in many states which requires that the person be expected to harm himself or another in the *near future*. The proposed standard, however, has the two elements essential to justify civil commitment: (1) an identifiable mental illness and (2) a showing that, as a result of that illness, the NGRI individual is likely to injure himself or others. It is well-recognized that the police power permits the state to civilly commit those who present a danger.¹¹⁶ This author believes that a psychiatric evaluation which reveals that the NGRI individual might present a danger to himself or others, based in part upon his past behavior, is a standard sufficient to withstand constitutional attack on equal protection grounds.

Recently, the Supreme Court of Alaska was faced with a question of whether the state had to prove beyond a reasonable doubt that the defendant who was found not guilty by reason of insanity was suffering from a mental disease which rendered him a danger to society.¹¹⁷ The

114. *Id.* at 197 (citations omitted).

115. *Id.* at 198.

116. See note 110 and accompanying text *supra*.

117. *Alaska v. Alto*, 589 P.2d 402 (Alaska 1979).

court felt that equal protection did not require the state to use the same standard as that used for civil commitment when there was a rational basis for doing otherwise. The court stated:

The acquittee by reason of insanity has, by his affirmative defense, admitted that he was insane at the time of the act in question and he has presented evidentiary support for his admission. Such an admission distinguishes the acquittee by reason of insanity from one whose involuntary commitment is civilly sought and has consistently maintained that he is not mentally ill. Moreover, the acquittee by reason of insanity has committed a criminal act. He therefore differs from the civil committee who is confined because of his potential to commit dangerous acts, not because he has committed them.¹¹⁸

Equal protection only requires that differences in treatment between two groups have relevance to the purpose for which the classification was made.¹¹⁹ It is clear that the legislature can justify, based upon admitted past criminal behavior, different treatment for the NGRI individual when entering and being discharged from the mental health system.

CONCLUSION

The present state of the law relating to the insanity defense requires that most states adopt procedures to follow when someone has been found not guilty by reason of insanity. The procedures discussed in this article are aimed at providing treatment to the NGRI individual and assuring the public's safety. The procedures which are necessary would provide for a broader standard of commitment, review of a recommendation for discharge from the state department of mental health, and provisions for the court to order outpatient care under court supervision.

The differentials in treatment for the NGRI individuals can be justified based upon the past admitted criminal behavior of the acquittee. This behavior provides the legislature with the rationale for adopting different laws relating to the NGRI individual as compared with other civilly committed mental patients. This rationale will be sufficient to withstand challenges based upon denial of due process or equal protection.

118. *Id.* at 406.

119. *United States v. Ecker*, 543 F.2d 178, 197 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1063 (1977).

APPENDIX A

TEST USED TO DETERMINE CRIMINAL RESPONSIBILITY

	TEST		TEST
Alabama	Combination ALI & M'Naghten	Mississippi	M'Naghten
Alaska	ALI	Missouri	ALI
Arizona	M'Naghten	Montana	ALI
Arkansas	ALI	Nebraska	M'Naghten
California	M'Naghten with Diminished Responsibility	Nevada	M'Naghten
Colorado	M'Naghten & Irresistible Impulse	New Hampshire	Durham
Connecticut	ALI	New Jersey	M'Naghten
Delaware	ALI	New Mexico	M'Naghten
District of Columbia	ALI	New York	M'Naghten
Florida	M'Naghten	North Carolina	M'Naghten
Georgia	M'Naghten	North Dakota	ALI
Hawaii	ALI	Ohio	ALI
Idaho	ALI	Oklahoma	M'Naghten
Illinois	ALI	Oregon	ALI
Indiana	ALI	Pennsylvania	M'Naghten
Iowa	M'Naghten	Rhode Island	M'Naghten
Kansas	M'Naghten	South Carolina	M'Naghten
Kentucky	ALI	South Dakota	ALI
Louisiana	M'Naghten	Tennessee	ALI
Maine	ALI	Texas	ALI
Maryland	ALI	Utah	ALI
Massachusetts	ALI	Vermont	ALI
Michigan	ALI	Virginia	ALI
Minnesota	M'Naghten	Washington	M'Naghten
		West Virginia	ALI
		Wisconsin	ALI
		Wyoming	ALI

APPENDIX B
STATE PROCEDURES AFTER FINDING OF NOT GUILTY BY
REASON OF INSANITY

	AUTOMATIC COMMITMENT	IS OUTPATIENT CARE POSSIBLE	COURT APPROVAL FOR RELEASE
Alabama	If court deems necessary	No	No
Alaska	No - court must find dangerous to public	No	Yes
Arizona	Civil commitment hearing	No	No
Arkansas	No	Yes	Yes
California	No	Yes	Yes
Colorado	Yes	No	No
Connecticut	Yes	Yes	Yes
Delaware	Yes	No	Yes
District of Columbia	Yes	Yes	Yes
Florida	No	Yes	Yes
Georgia	Yes - 30 days	No	Yes
Hawaii	No	Yes	No
Idaho	Yes	Yes	Yes
Illinois	Hold hearing under MHC	Yes	Yes
Indiana	Hold hearing under MHC	No	No
Iowa	No - must find person dangerous	No	
Kansas	Yes	No	Yes
Kentucky	No	No	No
Louisiana	Yes	Yes	Yes
Maine	Yes	No	No
Maryland	Yes	Yes	Yes
Massachusetts	Yes	No	Yes
Michigan	Yes	No	No
Minnesota	Yes	Yes	Yes
Mississippi	Yes	Yes	Yes
Missouri	Yes	No	Yes
Montana	Civil hearing held	Yes	Yes
Nebraska	Civil commitment hearing	No	No
Nevada	Yes	No	No
New Hampshire	No	No	No
New Jersey	Yes - civil hearing held	Yes	Yes
New Mexico	No	No	No
New York	Yes	Yes	Yes
North Carolina	Civil commitment hearing	No	No
North Dakota	No	No	No
Ohio	Civil commitment hearing	No	Yes
Oklahoma	Civil commitment hearing	No	No
Oregon	No - hearing and at a minimum civil discharge	Yes	Yes
Pennsylvania	Civil commitment hearing	No	No
Rhode Island	Civil commitment hearing	No	Yes
South Carolina	Civil commitment hearing	No	No
South Dakota	No - civil commitment hearing	No	No
Tennessee	Yes - civil commitment hearing	Yes	No
Texas	No - hold hearing under MHC	No	No
Utah	Yes	No	Yes
Vermont	Civil commitment hearing	No	Yes
Virginia	Yes	No	Yes
Washington	Yes	No	No
West Virginia	Yes	No	Yes
Wisconsin	No - court holds hearing	Yes	Yes
Wyoming	No - court holds hearing	Yes	Yes

