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STUDENT NOTES

CRIMINAL LAW—CRIMINAL RESPONSIBILITY—A PRAGMATIC APPROACH TO THE FOURTH CIRCUIT

I. INTRODUCTION

The defense of "lack-of-criminal-responsibility," while occupying only a minor percentage of criminal jury trials,¹ is highly significant since an individual found not guilty by reason of insanity is essentially excused² of having committed the "heinous" crime with which he was charged.³ An initial, yet often overlooked, concern when contemplating the use of the "lack-of-criminal-responsibility" defense is the distinction between mental competency⁴ and criminal responsibility.⁵ Although a discussion of men-

¹ "[The] defense-of-insanity trials represent only about two per cent of all criminal jury trials . . ." R. SIMON, *THE JURY AND THE DEFENSE OF INSANITY* 213 (1967).

² The reason for exculpation due to insanity is stated in a variety of ways. One of the most familiar formulations is that there cannot be a crime if the actor did not have the requisite mental state, referred to also as "mens rea," or "guilty mind." The reasoning is that illness may cause a mental impairment analogous to that of the person who acts in ignorance of the facts. Such a person should not be considered blameworthy. If he is not blameworthy, then it is unfair to convict him of a crime. Some other disposition (such as hospitalization) may be appropriate, but not conviction of crime.

A. BROOKS, *LAW, PSYCHIATRY AND THE MENTAL HEALTH SYSTEM* 111 (1974).

³ There is voluminous literature on the insanity defense. The following is a partial list of some of the readings in this area of the law: R. ARENS, *INSANITY DEFENSE* (1974) (a good discussion of the Durham rule); J. BRIGGS, JR., *THE GUILTY MIND* (1955) (an excellent historical analysis of the development of the relationship between law and psychiatry); A. BROOKS, *LAW, PSYCHIATRY AND THE MENTAL HEALTH SYSTEM* 111-319 (1974) (a comprehensive analysis of the problems and issues that arise with the insanity defense); A. GOLDSTEIN, *THE INSANITY DEFENSE* (1967) (a good practical discussion of the insanity defense); H. GOULETT, *THE INSANITY DEFENSE IN CRIMINAL TRIALS* (1965) (the "how-to" book); I. RAY, *A TREATISE ON THE MEDICAL JURISPRUDENCE OF INSANITY* (1962) (an interesting discussion of the various types of insanity one may encounter); H. WEIHOFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* (1954) (although somewhat dated, a thorough analysis of the area).

⁴ To be competent to stand trial a defendant must have, at the time of his trial, "sufficient present ability to consult with his lawyer with a reasonable degree of understanding-and . . . a rational as well as factual understanding of the proceedings against him."

United States v. Taylor, 437 F.2d 371, 375 (4th Cir. 1971) (footnote omitted).

⁵ A claim that the defendant was not criminally responsible . . . is

tal competency is generally outside the scope of this article, a consideration of some of its more salient aspects is justified by its importance within the criminal justice system.⁶ Recognizing the significance of competency determinations, Congress has provided a specific mechanism that may be utilized by either the defense, the United States Attorney, or even the Court, *sua sponte*,⁷ to determine the competency of the accused.⁸ The Fourth Circuit has construed the parameters of this mechanism, 18 U.S.C.A. § 4244 (1969), on numerous occasions. When the motion is made raising the defense of competency,⁹ the district court is generally required to grant the motion,¹⁰ but is certainly not without discretion in the

unconcerned with the defendant's understanding of his situation at the time of the trial, but is directed entirely to his capacity to understand and to control his conduct at the time of the commission of the offense.

Id.

⁶ "For each defendant found not guilty by reason of insanity, at least a hundred defendants are found incompetent to stand trial and sent to institutions for the 'criminally insane.'" A. BROOKS, LAW, PSYCHIATRY AND THE MENTAL HEALTH SYSTEM 332 (1974). See M. GUTTMACHER, THE ROLE OF PSYCHIATRY IN LAW 97-103 (1968); Kaufman, *Evaluating Competency: Are Constitutional Deprivations Necessary?*, 10 AM. CRIM. L. REV. 465 (1972).

⁷ "Of his or its own will or motion; voluntarily; without prompting or suggestion." BLACK'S LAW DICTIONARY 1592 (4th ed. Rev. 1968).

⁸ 18 U.S.C.A. § 4244 (1969) provides in part:

Whenever after arrest and prior to the imposition of sentence or prior to the expiration of any period of probation the United States Attorney has reasonable cause to believe that a person charged with an offense against the United States may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly assist in his own defense, he shall file a motion for a judicial determination of such mental competency of the accused, setting forth the ground for such belief with the trial court in which proceedings are pending. Upon such a motion or upon a similar motion in behalf of the accused, or upon its own motion, the court shall cause the accused, whether or not previously admitted to bail, to be examined as to his mental condition by at least one qualified psychiatrist, who shall report to the court. For the purpose of the examination the court may order the accused committed for such reasonable period as the court may determine to a suitable hospital or other facility to be designated by the court. If the report of the psychiatrist indicates a state of present insanity or such mental incompetency in the accused, the court shall hold a hearing, upon due notice, at which evidence as to the mental condition of the accused may be submitted, including that of the reporting psychiatrist, and make a finding with respect thereto.

⁹ Although one might prefer to make this motion in writing, "[a]n oral motion is sufficient to invoke the provisions of § 4244." *United States v. Burgin*, 440 F.2d 1092, 1094 (4th Cir. 1971).

¹⁰ 18 U.S.C.A. § 4244 requires the court on proper motion to order a

matter.¹¹ Furthermore, the determination by the district court will not "be set aside on review unless it is clearly arbitrary or unwarranted."¹² Significantly, the motion must state the grounds supporting the defendant's contention that he is incompetent to be tried.¹³ If the district court grants the motion to have the defendant examined by a psychiatrist, the defendant does *not* have a right to choose the physician by whom he will be examined.¹⁴ If the motion is denied, one may appeal on the ground of an abuse of discretion by the district court. If the appellate court determines that the mental examination was erroneously denied, then "the only way to correct an erroneous § 4244 determination of competency to stand trial is to reverse the conviction and remand to the district court for a new trial if the accused should be found competent."¹⁵

psychiatric examination for a defendant when at any time after arrest and before imposition of sentence there is a reasonable cause to believe that he is insane or otherwise mentally incompetent.

Hall v. United States, 410 F.2d 653, 657 (4th Cir.), *cert. denied*, 396 U.S. 970 (1969).

A district court is required to grant a § 4244 motion for a mental examination unless the motion is not made in good faith or the grounds for the motion are frivolous.

United States v. Burgin, 440 F.2d 1092, 1094 (4th Cir. 1971).

"[I]t does not follow . . . that upon such a showing [pursuant to § 4244] the district court is stripped of discretion and must blindly and automatically implement the statutory machinery." Hall v. United States, 410 F.2d 653, 657 (4th Cir.), *cert. denied*, 396 U.S. 970 (1969).

¹² *Id.* at 658.

¹³ In *United States v. Taylor*, 437 F.2d 371 (4th Cir. 1971), the Fourth Circuit, in stating what a defendant's § 4244 motion did not contain, indirectly suggested what such a motion should allege:

The motions did not allege that his attorney had ever experienced any difficulty in communication or that Taylor had on any occasion exhibited an impaired understanding of the proceedings or of the charges against him. 437 F.2d at 376. [N]either the defendant's appearance nor his history as recited in the motion provided any reason to question whether he possessed a rational and factual understanding of the proceedings or could assist his attorney to the extent any untrained defendant could assist, in preparing a case. 437 F.2d at 376 n.7.

¹⁴ *United States v. Davis*, 481 F.2d 425 (4th Cir.), *cert. denied*, 414 U.S. 977 (1973).

¹⁵ *United States v. Burgin*, 440 F.2d 1092, 1095 (4th Cir. 1971). For additional discussions of the mental competency issue in the Fourth Circuit, *see United States v. Retolaza*, 398 F.2d 235 (4th Cir. 1968), *cert. denied*, 393 U.S. 1032 (1969); *United States v. McGinnis*, 384 F.2d 875 (4th Cir. 1967), *cert. denied*, 390 U.S. 990 (1968); *United States v. Schmidt*, 376 F.2d 751 (4th Cir.), *cert. denied*, 389 U.S. 884 (1967); *Kibert v. Peyton*, 383 F.2d 566 (4th Cir. 1967); *Hawks v. Peyton*, 370 F.2d 123 (4th Cir. 1966), *cert. denied*, 387 U.S. 925 (1967); *James v. Boles*, 339 F.2d 431 (4th Cir. 1964); *United States v. Kendrick*, 331 F.2d 110 (4th Cir. 1964).

If the defendant is determined to be incompetent to stand trial, he is not necessarily committed to the custody of a mental institution. In *United States v. Curry*,¹⁶ the Fourth Circuit held that a trial court should not commit a defendant into custody "unless and until the court shall also have determined that the defendant might, if released, be a public or private danger."¹⁷ In ascertaining whether the defendant is a danger, he may be detained for a reasonable period of time;¹⁸ unless the defendant is found to be dangerous, a finding of incompetency to stand trial does not compel commitment.¹⁹

The foregoing analysis clearly indicates the concern of the Fourth Circuit in providing the mentally incompetent defendant a maximum of constitutional protections.²⁰ The mechanism is available to provide justice to the mentally incompetent defendant and the burden is placed squarely upon the shoulders of counsel to insure its maximum utilization.²¹

II. TEST OF CRIMINAL RESPONSIBILITY

The most significant case decided by the Fourth Circuit in the area of criminal responsibility is *United States v. Chandler*.²² The import of *Chandler*²³ stems primarily from its adoption of the American Law Institute's²⁴ insanity formulation.²⁵ The Court in

¹⁶ 410 F.2d 1372 (4th Cir. 1969). One can find an interesting explanation of this case in *Jackson v. Indiana*, 406 U.S. 715, 733 (1972).

¹⁷ *Id.* at 1374.

¹⁸ *Id.*

¹⁹ "Collectively the statutes intend that a defendant, although found incompetent, cannot be unduly deprived of his liberty unless he will be dangerous to society." *Id.*

²⁰ The development of the law concerning the rights of the mentally incompetent insofar as the states are concerned may be found in *Drope v. Missouri*, 95 S.Ct. 896 (1975).

²¹ The burden is indeed heavy. See discussion of incompetency of counsel, notes 85-92 and accompanying text *infra*.

²² 393 F.2d 920 (4th Cir. 1968) (en banc).

²³ For a more thorough analyses of *Chandler*, see *Weiner, Judge Sobeloff's Influence Upon Criminal Reform*, 34 MD. L. REV. 532 (1974); Note, *Criminal Insanity—Another M'Naghten?*, 23 U. MIAMI L. REV. 644 (1969); 21 S.C. L. REV. 122 (1968).

²⁴ Hereinafter cited as A.L.I.

²⁵ The A.L.I. formulation of criminal responsibility adopted by the Fourth Circuit is as follows:

(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 capac-

Chandler was quick to point out that, although it approved of the A.L.I. formulation, it did not require rigid adherence to its language.²⁶

Notwithstanding the flexibility advocated by the Court in *Chandler*, the A.L.I. formulation²⁷ is unequivocally the standard for criminal responsibility in the Fourth Circuit and, as such, demands close scrutiny. In the first paragraph of the A.L.I. rule there are five relevant concepts: "(1) mental disease or defect, (2) lack of substantial capacity, (3) appreciation, (4) wrongfulness [in the Fourth Circuit the term "criminality" is substituted], (5) conformity of conduct to the requirements of law."²⁸

The first concept, "mental disease or defect", is considered more expansionary than previous rules because the term "defect" is added. This added term "broadens the test to include persons who are retarded, whose conditions might not be regarded as either 'disease' or illness."²⁹

The second concept, "lack of substantial capacity," is a concept that has occasioned much controversy. The term is so con-

ity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

(2) The term [sic] 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

393 F.2d at 926. See Model Penal Code § 4.01 (1962).

²⁶ We ought not fall into the egregious error of the last century, however. Approval of any standard or form of instruction need not, and should not, freeze the language or solidify thought . . . We should not prescribe for invariable use a form of words which may be less appropriate than another in the light of the testimony in a particular case and which might tend to live on long after more rational solutions have been uncovered.

393 F.2d at 926-27.

²⁷ The Fourth Circuit is not alone in its adoption of the A.L.I. formulation. The test has been almost universally adopted, in one form or another, by the United States Circuit Courts of Appeal. See *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972) (en banc); *United States v. Herrington*, 440 F.2d 1041 (8th Cir.), cert. denied, 404 U.S. 842, reh. denied, 404 U.S. 960 (1971); *Wade v. United States*, 426 F.2d 64 (9th Cir. 1970); *Blake v. United States*, 407 F.2d 908 (5th Cir. 1969) (en banc); *United States v. Smith*, 404 F.2d 720 (6th Cir. 1968); *United States v. Shapiro*, 383 F.2d 680 (7th Cir. 1967) (en banc); *United States v. Freeman*, 357 F.2d 606 (2d Cir. 1966); *Wion v. United States*, 325 F.2d 420 (10th Cir. 1963) (en banc), cert. denied, 377 U.S. 946 (1964); *United States v. Currens*, 290 F.2d 751 (3d Cir. 1961). But see *Beltran v. United States*, 302 F.2d 48 (1st Cir. 1962).

²⁸ A. BROOKS, *LAW, PSYCHIATRY AND THE MENTAL HEALTH SYSTEM* 168 (1974).

²⁹ *Id.*

structed as to eliminate "the occasional references in the older cases to 'complete' or 'total' destruction of the normal capacity of the defendant."³⁰ This phrase has been subject to the charge of being unduly vague,³¹ and such attack may not be entirely unjustified because the A.L.I. drafters were not entirely clear in their definition of the concept.³² The one conclusion reasonably certain from the concept of "lack of substantial capacity," is "that 'any' incapacity is not sufficient to justify avoidance of criminal responsibility but that 'total' incapacity is also unnecessary."³³

The third concept in the A.L.I. formulation, that of "appreciation," was adopted to liberalize the cognitive aspect of the test.³⁴ This portion of the test is subject to criticism because its liberality may not bear fruit without the concerted involvement of the judge in explaining the implications of this term to the jury.³⁵ It would certainly appear to be incumbent upon counsel to aid the judge in his explanation of the various elements of the A.L.I. formulation to the jury.³⁶ The fourth concept, "criminality," would seem to be the least difficult of the five elements of the A.L.I. formulation.

³⁰ A. GOLDSTEIN, *THE INSANITY DEFENSE* 87 (1967).

³¹ How substantial is "substantial?" We can all agree that substantial means something more than slight or than just a very little. But how much more? (And, incidentally, does not the provision that the accused's capacities must have been so substantially impaired that he cannot justly be held responsible amount to a non-illuminative circular statement?)

S. GLUECK, *LAW AND PSYCHIATRY* 22 (1962).

³² It is not entirely clear, however, what the drafters meant by the word "substantial." On one hand, they spoke of avoiding "total" impairment. On the other, they spoke of an impairment reflecting "the most severe afflictions of the mind."

A. BROOKS, *LAW, PSYCHIATRY AND THE MENTAL HEALTH SYSTEM* 168 (1974).

³³ *Id.*

³⁴ It substitutes "appreciate" for "know," thereby indicating a preference for the view that a sane offender must be emotionally as well as intellectually aware of the significance of his conduct.

A. GOLDSTEIN, *THE INSANITY DEFENSE* 87 (1967).

Mere intellectual awareness . . . when divorced from appreciation or understanding of the moral or legal import of behavior can have little significance.

A. BROOKS, *LAW, PSYCHIATRY AND THE MENTAL HEALTH SYSTEM* 169 (1974)

³⁵ To make the A.L.I. formulation operate as an improvement, it will be necessary for the judge to bring out the deeper and more comprehensive meanings of the concept "appreciate" to an extent that will counteract the average juryman's interpretation of it as equivalent to simple and superficial cognition

S. GLUECK, *LAW AND PSYCHIATRY* 69 (1962).

³⁶ See discussion of instructions notes 155-162 and accompanying text *infra*.

The requirement is injected into the test for the purpose of requiring that the accused appreciate that his conduct is of a criminal nature. The fifth concept embodied in Paragraph One of the A.L.I. formulation surrounds "conformity of conduct to the requirements of the law." The key to this last concept lies in the word "conformity," which is a major shift from the requirements of the M'Naghten Rule.³⁷ The use of the term "conformity" marks the A.L.I. drafters' departure from the term "control," thereby divorcing the formulation from the shackles of the "irresistible impulse" test.³⁸

The second paragraph³⁹ of the A.L.I. formulation, also adopted by the Fourth Circuit,⁴⁰ was added to the test "purportedly to exclude sociopaths from consideration."⁴¹ Critics of the second paragraph claim that it is ineffective because psychopathy is never really manifested *only* by repeated criminal or otherwise anti-social conduct.⁴²

The A.L.I. formulation is clearly designed to liberalize the standard for determining lack-of-criminal responsibility.⁴³ Although the A.L.I. formulation is not without fault, its adoption by the Fourth Circuit mandates a thorough grasp of its conceptual implications.⁴⁴

Subsequent to *Chandler*, the Fourth Circuit has reconsidered the implications of the A.L.I. formulation on numerous occasions.

³⁷ See A. BROOKS, LAW, PSYCHIATRY AND THE MENTAL HEALTH SYSTEM 169 (1974). But see Note, *Criminal Insanity—Another M'Naghten?* 23 U. MIAMI L. REV. 644, 650 n.46 (1969).

³⁸ See A. GOLDSTEIN, THE INSANITY DEFENSE 87 (1967).

³⁹ "(2) the terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal behavior or otherwise anti-social conduct." See note 25 *supra*.

⁴⁰ *United States v. Chandler*, 393 F.2d 920, 926 (4th Cir. 1968).

⁴¹ M. GUTTMACHER, THE ROLE OF PSYCHIATRY IN LAW 39 (1968).

⁴² A. GOLDSTEIN, THE INSANITY DEFENSE 88 (1967). See A. BROOKS, LAW, PSYCHIATRY AND THE MENTAL HEALTH SYSTEM 171-76 (1974).

⁴³ Higley, *Requirements of Uniformity and the Federal Formulation of Criminal Responsibility*, 21 BUFFALO L. REV. 421, 435 (1971-72).

⁴⁴ Additional works that may be consulted in analyzing the A.L.I. formulation are as follows: F. BAILEY & H. ROTHBLATT, CRIMES OF VIOLENCE: RAPE AND OTHER SEX CRIMES § 408 (1973); Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425 (1968); Note, *Criminal Law—The A.L.I. Model Penal Code Insanity Test*, 44 TUL. L. REV. 192 (1969); Annot., 1 A.L.R. Fed. 965 (1969). Additionally, the D.C. Circuit Court of Appeals extensively analyzed the A.L.I. formulation in *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972) (en banc).

In *United States v. Wilson*,⁴⁵ the Court commented on the necessity for the development of the factual basis of a psychiatrist's testimony on the issue of mental responsibility under the A.L.I. test.⁴⁶ The *Wilson* Court also discussed the "powers of control" aspect of the A.L.I. formulation⁴⁷ and excluded from the control aspect of the test those persons who possessed a "substantial capacity" to choose whether or not to control themselves.⁴⁸

Shortly after *Wilson* was decided, the Fourth Circuit again considered the implications of *Chandler* in the case of *United States v. Butler*.⁴⁹ In *Butler*, the Court reiterated its endorsement of the A.L.I. formulation⁵⁰ and discussed the effect of this insanity test upon examination of witnesses and instructions to the jury. In both categories, witness examination and instructions, the A.L.I. formulation was to permit a high degree of flexibility.⁵¹ The trial court should permit extensive examination of medical witnesses to allow "a full exposition before the jury of the defendant's personality and mental processes."⁵² In the area of instructions, as long as the charge on insanity substantially complied with the A.L.I. rule, it was not objectionable.⁵³ The Fourth Circuit undeniably advocated a position of maximum flexibility when the issue of insanity was raised.⁵⁴

⁴⁵ 399 F.2d 459 (4th Cir. 1968).

⁴⁶ *Id.* at 462. See Weiner, *Judge Sobeloff's Influence Upon Criminal Reform*, 34 Md. L. Rev. 532, 538 (1974).

⁴⁷ 399 F.2d at 463.

⁴⁸ Its references to powers of control, as emphasized by the caveat, do not encompass those who do not wish to control and restrain their conduct as contrasted with those whose controls are not governed by their wishes. As long as an individual has a substantial capacity for choice, he does not escape the law's criminal sanctions because he chooses imprudently or so prefers his immediate self-interests that he is prepared to commit deliberate transgressions whenever he thinks they will advantage him and he will not be caught.

Id.

⁴⁹ 409 F.2d 1261 (4th Cir. 1969).

⁵⁰ *Id.* at 1263.

⁵¹ *Id.* at 1262.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ In discussing both *Wilson*, *supra* note 46, and *Butler*, *supra* note 49, the comment has been made that "the Fourth Circuit, rather than adhere to legal formalism, has developed a workable test for criminal responsibility." Weiner, *Judge Sobeloff's Influence Upon Criminal Reform*, 34 Md. L. Rev. 532, 539 (1974).

⁵⁵ 434 F.2d 844 (4th Cir. 1970).

In *United States v. McGirr*,⁵⁵ the Fourth Circuit reversed the ruling of the trial court that denied Joseph James McGirr's request to withdraw his guilty plea. McGirr's request was premised upon the belief that he was not criminally responsible. The district court ruled that McGirr's claim was without merit, but the Fourth Circuit disagreed, suggesting that McGirr may have been criminally irresponsible,⁵⁶ and, as such, was a question to be presented to the jury.⁵⁷ *McGirr* is also significant because of the Court's extensive discussion of certain important factors revealed by the psychiatric evaluation of the defendant by the doctors at St. Elizabeth's Hospital in Washington, D.C.⁵⁸

In 1971, the Fourth Circuit again discussed its insanity formulation in *United States v. Taylor*.⁵⁹ In *Taylor*, the Court suggested that an individual, to be found criminally responsible, must not only be fully aware of what he was doing when he committed the act, but also "must have had sufficient internal controls over his actions to conform them to the requirements of the law."⁶⁰ The Court resolved any doubt about the mutual exclusivity of the two conditions, found in the first paragraph of the A.L.I. formulation, that remove criminal responsibility.⁶¹ Furthermore, in considering the concept of the defendant appreciating the criminality of his act, the Court apparently equated "appreciate" with "knowledge" and "awareness,"⁶² a concept consistent with the belief that the term "appreciate" not only requires intellectual knowledge but also necessitates a finding of emotional awareness. The Court in *Taylor* affirmed the expansive nature of the A.L.I. formulation by expressing its disfavor of a restrictive interpretation of the specific facets of the test.⁶³

⁵⁶ To us, the conclusion is inescapable that medical experts find that defendant suffered from a mental defect manifested by psychological tests and by his conduct during the testing and during interviews, as well as by antisocial conduct, and that this defect had deprived him of criminal responsibility as defined by the A.L.I. We do not decide that McGirr was insane under the A.L.I. test.

Id. at 849.

⁵⁷ *Id.*

⁵⁸ Certainly, an evaluation of what, in the defendant's psychiatric report, was significant to the Court will be helpful to counsel on either side of the litigation.

⁵⁹ 437 F.2d 371 (4th Cir. 1971).

⁶⁰ *Id.* at 378 n.11.

⁶¹ *Id.* See notes 22-38 and accompanying text *supra*.

⁶² See notes 34-36 and accompanying text *supra*.

⁶³ 437 F.2d at 378 n.11.

Finally, in *United States v. Smith*,⁶⁴ the Fourth Circuit stated that *Chandler* and the A.L.I. formulation essentially caused two issues to be raised when the insanity plea was made: "(1) the existence of mental disease or defect and (2) its meaningful relationship to the incident charged as an offense".⁶⁵ The Court referred to the District of Columbia Circuit case of *United States v. Browner*⁶⁶ for an evaluation of the distinction between mental disease and mental defect.⁶⁷ In *Smith*, the Court emphasized its desire for a very definitive analysis of the defendant's condition by the use of an extensive examination of his whole personality.⁶⁸ Most important, the trial court was cautioned that the right of the defendant to fully develop his insanity plea must take priority over the desire to expedite the trial.⁶⁹ Undeniably, the Fourth Circuit finds it unequivocally necessary to present to the jury an unabridged inquiry into all of the facts and circumstances that may shed light on the defendant's alleged mental infirmity.

Interestingly, the states composing the jurisdiction of the Fourth Circuit have not uniformly adopted the A.L.I. formulation of criminal responsibility. Only two states, Maryland and West Virginia, have followed the lead of the Fourth Circuit. In Maryland, a variation of the *Chandler* A.L.I. formulation was adopted by statute;⁷⁰ whereas in West Virginia, the *Chandler* version was

⁶⁴ 507 F.2d 710 (4th Cir. 1974).

⁶⁵ *Id.* at 711 n.2.

⁶⁶ 471 F.2d 969 (D.C. Cir. 1972) (en banc).

⁶⁷ The term "mental disease" differs from "mental defect" in that the former is a condition which is either capable of improving or deteriorating and the latter is a condition not capable of improving or deteriorating.

Id. at 1008 (Appendix B).

⁶⁸ To this end, the trial judge should permit "an unrestricted inquiry into the whole personality of a defendant" and should "be free in his admission of all possibly relevant evidence." Any evidence of aberrant conduct or action, whether before or after the act charged, is accordingly admissible under the plea.

507 F.2d at 711 (footnotes omitted).

⁶⁹ [W]here the plea is insanity, the goal of expediting the trial must not be allowed to interfere with the defendant's right to develop fully and completely the many complex and often tenuous circumstances that may shed light on his plea. This is the command of *Chandler*.

Id. at 712.

⁷⁰ MD. CODE ANN. art. 59, § 25 (1972) provides, in pertinent part, that: (a) A defendant is not responsible for criminal conduct and shall be found insane at the time of the commission of the alleged crime if, at the time of such conduct as a result of mental disorder, he lacks substantial

more closely followed by the West Virginia Supreme Court of Appeals.⁷¹ In both North Carolina⁷² and South Carolina,⁷³ the rule of law is that commonly known as the M'Naghten rule.⁷⁴ The Virginia⁷⁵ rule evidently allows for both the use of the M'Naghten rule

capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. As used in this section, the terms "mental disorder" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

See also *Love v. State*, 16 Md. App. 364, 297 A.2d 309 (1972); *Truesdale v. State*, 16 Md. App. 260, 295 A.2d 808 (1972); *Young v. State*, 14 Md. App. 538, 288 A.2d 198 (1972).

⁷¹ The West Virginia Court of Appeals stated:

We do not adopt any rigid language for the trial courts to use in instructing or charging the jury in such cases, but simply recommend that they adopt an approach based on the Model Penal Code referred to herein and dispense with the more limited test of right and wrong followed in the M'Naghten Rule. We would approve of an instruction to the effect that an accused is not responsible for his act if, at the time of the act, it was the result of a mental disease or defect causing the accused to lack the capacity either to appreciate the wrongfulness of his act, or to conform his act to the requirements of the law.

State v. Grimm, 195 S.E.2d 637, 647 (W. Va. 1973). See *State v. Myers*, 222 S.E.2d 300 (W. Va. 1976).

⁷² [T]he test of insanity as a defense to a criminal charge is the capacity to distinguish between right and wrong at the time of and in respect to the matter under investigation. . . . "North Carolina, as well as many other jurisdictions, has steadfastly refused to recognize the 'irresistible impulse doctrine' as a test of criminal responsibility."

State v. Cooper, 286 N.C. 549, 569, 213 S.E.2d 305, 318 (1975); *accord*, *State v. Westmore*, 287 N.C. 344, 215 S.E.2d 51 (1975).

⁷³ We are aware of the alternatives which some courts have adopted, but are not convinced that the other rules set forth a better formula for determining whether a person accused of crime should be excused because of his mental condition. It should be comforting to those who would attack the M'Naghten rule to realize that a layman jury, regardless of the rule recited, normally takes a common sense approach and determines whether the accused person is, first, guilty or not guilty, and if guilty, whether his mental condition is such that he ought to be excused of the crime because of his mental condition. We adhere to the M'Naghten rule.

State v. Cannon, 260 S.C. 537, 547, 197 S.E.2d 678, 682 (1973), *cert. denied*, 414 U.S. 1067 (1973).

⁷⁴ For a discussion of the M'Naghten rule, see A. BROOKS, *LAW, PSYCHIATRY AND THE MENTAL HEALTH SYSTEM* 135-49 (1974); A. GOLDSTEIN, *THE INSANITY DEFENSE* 45-66 (1967); J. BIGGS, JR., *THE GUILTY MIND* 95-117 (1955); Waelder, *Psychiatry and the Problem of Criminal Responsibility*, 101(W00)UN U. PA. L. REV. 378 (1952); Wingo, *Squaring M'Naghten with Precedent—An Historical Note*, 26 S.C. L. REV. 81 (1974).

⁷⁵ Since the "right or wrong" instruction is predicated on the incapacity of a defendant to distinguish right from wrong and the "irres-

and the "irresistible impulse" test.⁷⁶

The "lack-of-criminal-responsibility" defense, as it relates to drug addiction or alcoholism, would appear to be a significant defense only under limited circumstances in the Fourth Circuit. In *Driver v. Hinnant*,⁷⁷ the Fourth Circuit, while striking down the North Carolina public drunkenness statute, distinguished voluntary from involuntary intoxication, finding that only the chronic alcoholic may be excused for those crimes that are caused by the disease.⁷⁸ Although the Fourth Circuit has not specifically ruled upon whether drug addiction may cause insanity, in *United States v. McGough*,⁷⁹ the Court found no error where the district court instructed the jury according to *Chandler*⁸⁰ on this issue. This ruling does not constitute approval by the Court of the concept that drug dependence may create insanity, especially since the Court cited to authorities from other jurisdictions unfavorable to such an

istable impulse" instruction is predicated on the *capacity* to make such a distinction, different evidence is required to support each instruction.

Davis v. Commonwealth, 214 Va. 681, 682, 204 S.E.2d 272, 273 (1974) (emphasis by Court).

The irresistible impulse doctrine is applicable only to that class of cases where the accused is able to understand the nature and consequences of his act and knows it is wrong, but his mind has become so impaired by disease that he is totally deprived of the mental power to control or restrain his act.

Id.; *Thompson v. Commonwealth*, 193 Va. 704, 718, 70 S.E.2d 284, 292 (1952).

⁷⁶ For a discussion of the "irresistible impulse" test, see A. GOLDSTEIN, *THE INSANITY DEFENSE* 67-79 (1967). This outstanding work provides the Virginia practitioner with an excellent analysis of the elements of this test. Interestingly, Goldstein cites to *Thompson, supra* note 75, when discussing the "misnamed" irresistible impulse rule. GOLDSTEIN at 67 n.1. See also A. BROOKS, *LAW, PSYCHIATRY AND THE MENTAL HEALTH SYSTEM* 160-65 (1974).

⁷⁷ 356 F.2d 761 (4th Cir. 1966).

⁷⁸ [V]oluntary drunkenness is no excuse for crime. The chronic alcoholic has not drunk voluntarily, although undoubtedly he did so originally. His excess now derives from disease. However, our excusal of the chronic alcoholic from criminal prosecution is confined exclusively to those acts on his part which are compulsive as symptomatic of the disease. With respect to other behavior-not characteristic of confirmed chronic alcoholism-he would be judged as would any person not so affected.

Id. at 764. Brooks feels the case is significant to the extent that "the court also held that the compulsive alcoholic lacked the evil intent or consciousness of wrongdoing which is an essential of mens rea." A. BROOKS, *LAW, PSYCHIATRY AND THE MENTAL HEALTH SYSTEM* 253 (1974).

⁷⁹ 410 F.2d 458 (4th Cir. 1969).

⁸⁰ See note 22 *supra*.

interpretation.⁸¹ The states included within the Fourth Circuit are in substantial accord with these rulings in the federal arena.⁸² The possibility of drug or alcohol induced insanity should not be ignored.⁸³ The drug or alcohol induced insanity defense appears to be coming more acceptable to the various courts.⁸⁴

III. PRACTICAL IMPLICATIONS OF THE INSANITY DEFENSE

A. Competency of Counsel

The competency of counsel is perhaps a sour note upon which to begin a discussion of the practical implications of an insanity defense, but it is certainly an area counsel cannot ignore. If counsel neglects to raise the issue of the competency of the defendant to stand trial when the defense is justified by the facts and circumstances, such failure to act may be deemed ineffective assistance of counsel. In *Kibert v. Peyton*,⁸⁵ a defense counsel who had fifteen to sixteen years of experience failed to request a competency hearing to determine whether the defendant was competent to stand trial, even though the attorney "entertained substantial doubts as to his client's sanity."⁸⁶ On these facts the court stated that "[i]n similar circumstances, we held that the failure of the defendant's lawyer to explore the matter and adduce evidence in court where

⁸¹ [A] mere showing of narcotics addiction, without more, does not constitute "some evidence" of mental disease or insanity so as to raise the issue of criminal responsibility.

Bailey v. United States, 386 F.2d 1, 4 (5th Cir. 1967) quoting from *Heard v. United States*, 348 F.2d 43, 44 (D.C. Cir. 1965).

⁸² See *State v. McLaughlin*, 286 N.C. 597, 213 S.E.2d 238 (1975); *State v. Bellue*, 260 S.C. 39, 194 S.E.2d 193 (1973); *Chittum v. Commonwealth*, 211 Va. 12, 174 S.E.2d 779 (1970); *Parker v. State*, 7 Md. App. 167, 254 A.2d 381 (1969); *State v. Phillips*, 80 W. Va. 748, 93 S.E. 828 (1917).

⁸³ See *People v. Kelly*, 10 Cal. 3d 565, 516 P.2d 875, 111 Cal. Rptr. 171 (1973), finding that a continued use of drugs could create insanity. The case is discussed in A. BROOKS, LAW, PSYCHIATRY AND MENTAL HEALTH SYSTEM 251-52 (1974).

⁸⁴ Much has been written recently about the drug or alcohol induced insanity defense. See Bennett, *Drug Addiction and its Effect on Criminal Responsibility*, 9 WAKE FOREST L. REV. 179 (1973); Diamond, *Criminal Responsibility of the Addict: Conviction by Force of Habit*, 1 FORDHAM URBAN L.J. 395 (1973); Fingarett, *Addiction and Criminal Responsibilities*, 84 YALE L.J. 413 (1975); Lunter, *Effect of Drug-Induced Intoxication on the Issue of Criminal Responsibility*, 8 CRIM. L. BULL. 731 (1972); Smith, *Drink, Drugs and Criminal Responsibility*, 124 NEW L.J. 129 (1974); Wald, *Alcohol, Drugs and Criminal Responsibility*, 63 GEO. L.J. (1974). See also Annot., 8 A.L.R.3d 1236 (1966).

⁸⁵ 383 F.2d 566 (4th Cir. 1967).

⁸⁶ 383 F.2d at 569.

there was reason for doubt as to the mental condition of the accused constituted a denial of his right to effective assistance of counsel."⁸⁷ The court, in making the foregoing statement, relied upon *Owsley v. Peyton*⁸⁸ and *Caudill v. Peyton*,⁸⁹ both of which were decided by the Fourth Circuit. In *Owsley*, the court specifically held that the failure of the defendant's counsel to request a determination of the accused's mental capacity to understand the nature of the charge against him and to assist in his defense amounted to ineffective assistance of counsel when there was reasonable ground for questioning the defendant's competency.⁹⁰ In *Caudill*, the court did not specifically rule on the issue of the effectiveness of defendant's counsel, but did imply that the failure of the accused's counsel to inquire into both the sanity of the defendant at the time of the offense and his competence to stand trial raised serious questions as to the effective assistance of counsel.⁹¹

Undeniably, the Fourth Circuit is providing fair warning to defense counsel that a failure to inquire into the sanity of the defendant, both at the time of the offense and at the time of the trial, may lead to a reversal on the ground of ineffective assistance of counsel. The decision of whether to utilize the insanity defense is a difficult one at best,⁹² but the defense should never be ignored.

B. *Acquiring Expert Assistance*

By statute, an indigent defendant has been provided a means to obtain expert psychiatric assistance in the preparation of his insanity defense.⁹³ Although 18 U.S.C.A. § 30006A(e) (1975 Cum.

⁸⁷ *Id.*

⁸⁸ 368 F.2d 1002 (4th Cir. 1966).

⁸⁹ 368 F.2d 563 (4th Cir. 1966).

⁹⁰ "The lawyer's failure to adduce it in court, we think, rendered his representation of Owsley ineffective to the point of depriving him of his constitutional right to counsel." *Id.* at 1003.

⁹¹ *Id.* at 564-65.

⁹² See Chernoff & Schaffer, *Defending the Mentally Ill: Ethical Quicksand*, 10 AM. CRIM. L. REV. 505 (1972).

⁹³ 18 U.S.C.A. § 3006A (Cum. Supp. 1975) provides in part:

(e) Services other than counsel.-

(1) Upon request.-Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for an adequate defense may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the person is financially unable to obtain them, the court, or the United States magistrate if the services are required in connection

Supp.) does not specifically authorize the furnishing of psychiatric assistance, it has been so interpreted in the Fourth Circuit.⁹⁴ This statutory provision has been further interpreted by the Fourth Circuit to mean that the defense may be provided "expert medical assistance throughout the preparation and presentation of an insanity defense."⁹⁵ A condition precedent to the acquisition of these services is the requirement that the defense provide a showing of necessity.⁹⁶ The Fourth Circuit has never specifically delineated the quantum of necessity that would justify the implementation of the provisions of 18 U.S.C.A. § 3006A(e); presumably, the district court would decide in favor of providing the expert services in close cases because of the Fourth Circuit's desire to fully explore "the defendant's personality and mental processes"⁹⁷ when the issue of insanity is raised.

18 U.S.C.A. § 3006A(e) has been interpreted to mean that the district court should appoint the psychiatrist that the defendant wishes to employ.⁹⁸ The district court is *not* required to appoint the psychiatrist chosen by the defense but should do so in the ordinary case.⁹⁹ If the district court so chooses, it may require the defendant to pick "two or three doctors from whom the judge may then appoint one—assuming multiple availability of psychiatrists in a

with a matter over which he has jurisdiction, shall authorize counsel to obtain the services.

(2) Without prior request.—Counsel appointed under this section may obtain, subject to later review, investigative, expert, or other services without prior authorization if necessary for an adequate defense. The total cost of services obtained without prior authorization may not exceed \$150 and expenses reasonably incurred.

⁹⁴ "Where a defendant is indigent and claims reason to doubt his sanity, the government stands ready to supply him with the services of psychiatric experts necessary to his defense. 18 U.S.C.A. § 3006A(e)." *United States v. Albright*, 388 F.2d 719, 724 (4th Cir. 1968) (footnote omitted).

⁹⁵ *United States v. Taylor*, 437 F.2d 371, 377 (4th Cir. 1971) (footnote omitted).

⁹⁶ *Id.*

⁹⁷ *United States v. Butler*, 409 F.2d 1261, 1262 (4th Cir. 1969). *See also United States v. Chandler*, 393 F.2d 920 (4th Cir. 1968).

⁹⁸ By a way of guidance to the district judges, we suggest that ordinarily the appointment of a psychiatrist under 18 U.S.C.A. § 3006A should be with the advice and approval of counsel for the particular defendant. Unless some reason affirmatively appears, and is reflected in the record, we think that the psychiatrist preferred by the defendant should be selected by the court.

United States v. Matthews, 472 F.2d 1173, 1174 (4th Cir. 1973). *See United States v. Davis*, 481 F.2d 425, 428 (4th Cir.), *cert. denied*, 414 U.S. 977 (1973).

⁹⁹ 472 F.2d at 1174.

given division."¹⁰⁰ The optimum circumstance, according to the Fourth Circuit, is for the government and the defendant to agree upon one medical witness, thereby avoiding the multiplicity of expert witnesses.¹⁰¹

C. *Self-Incrimination and Government Psychiatric Examinations*

When the defendant raises the insanity defense, he must be prepared to be examined by a government psychiatrist. Ordering such an examination is clearly within the inherent power of the district court when the defendant has been examined by his own psychiatrist and is raising the defense.¹⁰² The requirement that the defendant be examined by a government psychiatrist stems from the belief that a fair state-individual balance cannot be achieved unless the government is allowed to examine a defendant who has raised the insanity defense.¹⁰³ This philosophy applies whether or not the government has provided the defendant with a psychiatrist at government expense.¹⁰⁴ Furthermore, the defendant has no right to have his "attorney present during a psychiatric examination conducted at the instance of the prosecutor."¹⁰⁵ The exclusion of the defendant's attorney is predicated upon the belief that a third party's presence would severely limit the effectiveness of the examination, and devices other than the presence of an attorney would protect the defendant's privilege against self-incrimination.¹⁰⁶

The Fourth Circuit firmly believes that compelling a defendant to submit to an examination by a government psychiatrist does not per se violate the defendant's right not to incriminate himself.¹⁰⁷ The Fourth Circuit's reasoning is that the purpose of the mental examination "in any criminal case where a defendant's sanity is in issue should be, to obtain knowledge not about facts concerning defendant's participation in the criminal acts charged,

¹⁰⁰ *Id.* at 1175.

¹⁰¹ *Id.*

¹⁰² *United States v. Albright*, 388 F.2d 719, 722 (4th Cir. 1969). See *United States v. Matthews*, 472 F.2d 1173, 1174 (4th Cir. 1973).

¹⁰³ "The maintenance of a 'fair state-individual balance' clearly required that the government be permitted to have defendant examined." 388 F.2d at 724.

¹⁰⁴ *Id.* at 724 n.8.

¹⁰⁵ *Id.* at 726.

¹⁰⁶ *Id.*; see note 109 *infra*.

¹⁰⁷ 388 F.2d at 723.

but about facts concerning a defendant which are themselves material to the case."¹⁰⁸ If the examination of the defendant is made pursuant to 18 U.S.C.A. § 4244 (1969), no inculpatory statement made by the defendant is admissible as evidence.¹⁰⁹

Undeniably, the requirement that a defendant be examined by a government psychiatrist is a burden upon the defense, but it is also an essential prerequisite to a fair trial.¹¹⁰

D. Burden of Proof

Once the decision has been made to raise the insanity defense, the issue initially devolves to what evidence is necessary to raise the defense and to whom does the burden shift when the requisite amount of evidence has been introduced. The initial burden is upon the defendant to raise the insanity defense¹¹¹ and the defense cannot be used if first raised in final argument.¹¹² Much to the advantage of the defendant, the quantum of evidence necessary to effectively raise the insanity defense is only slight.¹¹³ Obviously, it

¹⁰⁸ *Id.* (footnote omitted).

¹⁰⁹ 18 U.S.C.A. § 4244 (1969) provides in part:

No statement made by the accused in the course of any examination into his sanity or mental competency provided for by this section, whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding. A finding by the judge that the accused is mentally competent to stand trial shall in no way prejudice the accused in a plea of insanity as a defense to the crime charged; such finding shall not be introduced in evidence on that issue nor otherwise be brought to the notice of the jury.

But see Hall v. United States, 410 F.2d 653, 661 (4th Cir.), *cert. denied*, 396 U.S. 970 (1969), for questions the Fourth Circuit did not consider to be plain error under the prohibitions in 18 U.S.C.A. § 4244 (1969).

¹¹⁰ See C. McCORMICK, LAW OF EVIDENCE § 134 (2d ed. 1972); Note, *Requiring a Criminal Defendant to Submit to a Government Psychiatric Examination: An Invasion of the Privilege Against Self-Incrimination*, 83 HARV. L. REV. 648 (1970). *But see* Lefelt, *Pretrial Mental Examinations: Compelled Cooperation and the Fifth Amendment*, 10 AM. CRIM. L. REV. 431 (1972).

¹¹¹ "Insanity may be argued as a defense only if evidence supporting the assertion has been presented." United States v. Green, 468 F.2d 116, 118 (4th Cir. 1972).

¹¹² "When no testimony concerning insanity has been presented, the insanity defense cannot be advanced initially in final argument." *Id.*

¹¹³ Hall v. United States, 295 F.2d 26 (4th Cir. 1961). In cases subsequent to Hall, the Fourth Circuit has used the language "slight evidence" in United States v. McGirr, 434 F.2d 844, 849 (4th Cir. 1970) and in United States v. Green, 468 F.2d 116, 118 (4th Cir. 1972), but has suggested that only "some evidence" is necessary in United States v. Albright, 388 F.2d 719, 724 (4th Cir. 1968). Most recently, the

is critical for both the defense and the government that a determination be made as to whether the defense has been effectively raised. Such determination is a question of law for the trial court to decide.¹¹⁴ If the trial court decides that the insanity issue has been sufficiently raised by the defense, then the burden of proof shifts to the government¹¹⁵ to prove that the defendant is legally sane.¹¹⁶ The government must prove the legal sanity of the defendant by proof beyond a reasonable doubt,¹¹⁷ leaving final determination of the issue to the jury.¹¹⁸

The Fourth Circuit's system of burdens of proof allows the government to present a simple case-in-chief, relying upon the presumption that the defendant is sane.¹¹⁹ The government may ignore the issue of sanity and dwell upon the material elements of the crime with which the defendant is charged.¹²⁰ The defendant is then required to raise the issue of insanity in his case-in-chief. The government then, in rebuttal, must prove the defendant's sanity beyond a reasonable doubt.¹²¹

E. Witness Utilization

In the Fourth Circuit, both lay and expert witnesses are com-

Fourth Circuit has stated that "[w]henver insanity is asserted as a defense and is support by *any credible evidence . . .*" United States v. Smith, 507 F.2d 710, 711 (4th Cir. 1974) (emphasis added). Whatever language is used, clearly the amount of proof necessary for the defendant to carry his burden is minimal.

¹¹⁴ United States v. Green, 468 F.2d 116, 118 n.3 (4th Cir. 1972).

¹¹⁵ "[I]t is the function of the judge to determine whether the burden of proof has shifted." United States v. Retolaza, 398 F.2d 235, 241 (4th Cir. 1968), *cert. denied*, 393 U.S. 1032 (1969).

¹¹⁶ United States v. Albright, 388 F.2d 719, 724 (4th Cir. 1968).

¹¹⁷ Leland v. Oregon, 343 U.S. 790, 797 (1952); Davis v. United States, 160 U.S. 469 (1895).

¹¹⁸ It is the jury's duty to determine the issue of sanity. To permit a directed verdict would undercut this concept and turn the question of sanity at the time the crime was committed into a matter to be resolved by the judge and psychiatrist, eliminating the jury's role.

United States v. Riggs, 470 F.2d 505, 506 (4th Cir. 1972), *cert. denied*, 411 U.S. 908 (1973).

¹¹⁹ "[The defendant] must ultimately take the initiative in showing he was not sane because he is everywhere presumed to be sane." A. GOLDSTEIN, *THE INSANITY DEFENSE* 111 (1967) (footnote omitted).

¹²⁰ "The presumption of sanity serves the purpose of making it unnecessary for the prosecutor to prove sanity unless the defendant raises the issue." A. BROOKS, *LAW, PSYCHIATRY AND THE MENTAL HEALTH SYSTEM* 305 (1974).

¹²¹ For an excellent analysis of the burden of proof issue, see A. GOLDSTEIN, *THE INSANITY DEFENSE* 110-15 (1967).

petent to testify on the sanity or insanity of a defendant.¹²² The lay witness is an important element in advancing or attacking an insanity defense.¹²³ The Fourth Circuit has approved the use of lay witnesses, inferentially, as long as they describe only what they have witnessed and refrain from giving conclusions as to the sanity or insanity of the defendant.¹²⁴ No individual should be overlooked as a possible lay witness. "The least likely person may prove to be the best witness. Relatives, friends and other acquaintances of the accused should be interviewed. Employers and fellow workers are generally willing to disclose any abnormality that they have recognized, the value of which cannot be overemphasized."¹²⁵ Importantly, lay witnesses can describe, in terms easily understandable to the jury, those facets of the defendant's personality or actions that give rise to the inference of normalcy or abnormality.¹²⁶

In the area of expert witnesses, one may wish to consider the use of a psychologist,¹²⁷ as distinguished from a psychiatrist.¹²⁸ The

¹²² The term "expert witness" includes both psychologists and psychiatrists in the context of this article.

¹²³ Lay witnesses, testifying for the prosecution, will report that the defendant "looked normal" to them. Policemen and prison guards will report responsiveness to discipline. Employers will describe satisfactory work records. Acquaintances will speak of adequate performance in day-to-day living. The defendant will, in turn, try to demonstrate that however normal he may have appeared on these occasions, he was very different at the time of the crime. Alternatively the defendant or his attorney may urge that the appearance of normality is a deceptive thing and that he has not been normal at all. He will try to make this point by producing lay witnesses who will report on the times when he acted badly, or strangely, lost control of himself, flew into a rage, thought he was being poisoned, etc.

A. GOLDSTEIN, *THE INSANITY DEFENSE* 26 (1967).

¹²⁴ "[T]heir testimony merely described Kibert's behavior as they observed it. They gave no conclusory opinions as to sanity, but in layman's language these uneducated and unsophisticated persons told what they saw." *Kibert v. Peyton*, 383 F.2d 566, 570 (4th Cir. 1967). See *United States v. Albright*, 388 F.2d 719, 723 (4th Cir. 1968) wherein the court stated that "[s]anity, as defined by law, under many authorities can be determined by lay opinion." But see *United States v. Kendrick*, 331 F.2d 110 (4th Cir. 1964) for a criticism of the use of lay witnesses to review medical files.

¹²⁵ Shadoan, *Raising the Insanity Defense: The Practical Side*, 10 AM. CRIM. L. REV. 533, 547 n.47 (1972).

¹²⁶ *Id.*

¹²⁷ A "psychologist" may be defined as one specializing in psychology with "psychology" being basically defined as the study of mind and behavior in relation to a particular field of knowledge or activity. WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 689 (1965).

¹²⁸ A "psychiatrist" is "a physician specializing in psychiatry," with "psychia-

Fourth Circuit has specifically held that "a clinical psychologist may be permitted to testify as an expert and that each case must be decided upon its own facts."¹²⁹ The Court specifically suggested that the competency of a psychologist to testify was based, not upon the label of psychologist or psychiatrist but upon the nature and extent of the witness's knowledge.¹³⁰ The determination whether or not the testimony of the psychologist is admissible is left to the discretion of the trial court, which is subject to review for abuse of discretion.¹³¹ Presumably, since the Fourth Circuit considers a psychologist, under appropriate circumstances, to be an expert witness, the indigent defendant should be able to acquire such expert assistance pursuant to 18 U.S.C.A. § 3006A(e) (1975 Cum. Supp.).¹³² Certainly the psychologist, with his expertise in the field of testing and interpreting raw data about the defendant's mental condition, could be of immeasurable benefit to either side of a criminal trial.¹³³

One should consider the use of the psychiatrist as an expert witness in a case involving the insanity defense. Care should be taken in selecting a psychiatrist for use as an expert witness.¹³⁴ The Fourth Circuit has expressly encouraged the use of expert medical opinions,¹³⁵ finding that such testimony, assuming it has a bearing

try" being defined as "a branch of medicine that deals with mental, emotional, or behavioral disorders." WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 689 (1965).

¹²⁹ United States v. Riggleman, 411 F.2d 1190, 1191 (4th Cir. 1969).

¹³⁰ [T]he better rule is that the determination of a psychologist's competence to render an expert opinion based on his findings as to the presence or absence of mental disease or defect must depend upon the nature and extent of his knowledge; it does not depend upon his claim to the title of psychologist or psychiatrist.

Id.

¹³¹ *Id.*

¹³² See notes 93-101 and accompanying text *supra*.

¹³³ Notably, the Fourth Circuit also allows the introduction of a psychologist's expert testimony in the civil arena. See *Hidden v. Mutual Life Insurance Co. of New York*, 217 F.2d 818, 821 (4th Cir. 1954).

¹³⁴ One authority in the field has suggested that:

Psychiatrists employed in government mental hospitals are often organically oriented and conservative. They insist that there be some physical manifestation of abnormality before arriving at a diagnosis of mental disorder. Generally, the defense attorney will prefer a doctor with psychoanalytic training as he will be more inclined to emphasize personality development and the dynamics of human behavior rather than objective findings of physical abnormality.

Shadoan, *Raising the Insanity Defense: The Practical Side*, 10 AM. CRIM. L. REV. 533, 548 n.48 (1972).

¹³⁵ United States v. Albright, 388 F.2d 719, 723 (4th Cir. 1968).

upon the issue of insanity, "has a rightful place in the record."¹³⁶ Expert psychiatric assistance is found to be particularly useful in the guiding of the attorneys¹³⁷ and in the assisting of the jury.¹³⁸ The psychiatrist is allowed to consider the observations of others in making a determination as to the mental condition of the defendant,¹³⁹ but "if the facts were not what the doctors supposed, their opinions [are] baseless and of no evidentiary value."¹⁴⁰ Importantly, when the expert medical witness is testifying, he should avoid conclusions but be allowed to discuss in simple terms the facts and circumstances that surround his diagnosis.¹⁴¹ The Fourth Circuit, in evidencing its dislike of conclusions by expert witnesses, has even stated that mere conclusions cannot be found to be binding upon a jury.¹⁴² Counsel must be extremely thorough in direct examination of an expert medical witness. Care should be taken

¹³⁶ *Rhodes v. United States*, 282 F.2d 59 (4th Cir.), *cert. denied*, 364 U.S. 912 (1960) (footnote omitted).

¹³⁷ Consultation with counsel attunes the lay attorney to unfamiliar but central medical concepts and enables him, as an initial matter, to assess the soundness and advisability of offering the defense. The aid of a psychiatrist informs and guides the presentation of the defense, and perhaps most importantly, it permits a lawyer inexperienced in the science of psychiatry to probe intelligently the foundations of adverse testimony. *United States v. Taylor*, 437 F.2d 371, 377 n.9 (4th Cir. 1971).

¹³⁸ The purpose of such testimony is to enlarge the vision and understanding of the triers of fact. It does not take the decision out of the hands of the jury, but allows those with specialized knowledge to enlighten the jury an enable it to perform its function intelligently. *Rhodes v. United States*, 282 F.2d 59, 61 (4th Cir.), *cert. denied*, 364 U.S. 912 (1960).

¹³⁹ "It is elementary that an expert is permitted to take into account the testimony of others as to what they observed, and upon his interpretation to offer an informed professional opinion." *Kibert v. Peyton*, 383 F.2d 566, 570 (4th Cir. 1967).

¹⁴⁰ *Carpenter v. United States*, 264 F.2d 565, 570 (4th Cir.), *cert. denied*, 360 U.S. 936 (1959).

¹⁴¹ We may notice, however, the obvious importance of great care on the part of court and witnesses to see that [the use by expert witnesses of diagnostic labels and conclusionary medical terms], whenever they are used, are explained to the jury to the end that the jury is given a full picture of the defendant's personality in language which the jurors may understand.

United States v. Chandler, 393 F.2d 920, 926 n.17 (4th Cir. 1968) (en banc). *Accord*, *United States v. Butler*, 409 F.2d 1216, 1262 (4th Cir. 1969). See Note, *Criminal Law-Guidelines for Expert Testimony in the Insanity Defense-Making the "Product" Palpable*, 18 DE PAUL L. REV. 812, 822 n.45 (1969).

¹⁴² "Nor are unqualified and unexplained conclusions of a witness binding upon a jury when their factual bases are not probed or explained." *United States v. Wilson*, 399 F.2d 459, 463 (4th Cir. 1968).

to insure that a full, factual disclosure of the basis of the expert's testimony occurs. In this context, counsel *must* insure that the length of the examination of the defendant, by either the defense or the government expert, is of a sufficient length to justify the conclusions obtained.¹⁴³ The Fourth Circuit has specifically held that a "ten-minute" interview is insufficient time for an expert medical witness to determine what the mental state of a defendant was at the time of the commission of a crime.¹⁴⁴

The Fourth Circuit follows the general rule of restricting¹⁴⁵ cross-examination of an expert witness to matters brought out on direct examination and matters concerning the credibility of the witness.¹⁴⁶ When the insanity defense is raised, the scope of cross-examination may be somewhat more expansive than the general restrictive rule because the Fourth Circuit has found the cause and events related to the mental condition of the defendant to be material.¹⁴⁷ Therefore, if the trial court limits inquiry into these areas, reversal may be warranted on the basis of abuse of discretion.¹⁴⁸

¹⁴³ Jurors assume that the patient was thoroughly observed and adequately diagnosed. . . . The revelation, brought out by appropriate questioning, that the doctor saw the patient only for a brief period when the accused was interviewed in a staff conference just before reporting to the court, is often shocking to the jury.

Shadoan, *Raising the Insanity Defense: The Practical Side*, 10 AM. CRIM. L. REV. 533, 553 n.60 (1972).

¹⁴⁴ [A]n inquiry into possible lack of criminal responsibility at the time of commission of the offense involves a complex evaluation of his total personality at a previous point in time. It requires that the expert have a substantial opportunity to observe the defendant and his mental processes.

The ten minute interview was insufficient for such a determination. *United States v. Taylor*, 437 F.2d 371, 378 (4th Cir. 1971) (footnote omitted). See Annot., 23 A.L.R. Fed. 710 (1975).

¹⁴⁵ For a discussion of the restrictive rule of cross-examination, see MCCORMICK, *LAW OF EVIDENCE* § 21 at 47 (2d ed. 1972).

¹⁴⁶ *United States v. Williams*, 478 F.2d 369, 371 (4th Cir. 1973). The Fourth Circuit rule comports with the newer Rule 611 (b), of the Federal Rules of Evidence: Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

¹⁴⁷ "When a condition of temporary insanity is claimed to have existed, its cause and the events which created it seem obviously material to the inquiry into the existence of the claimed disability." *Carpenter v. United States*, 264 F.2d 565, 569 (4th Cir.), cert. denied, 360 U.S. 936 (1959). See *United States v. Smith*, 507 F.2d 710 (4th Cir. 1974).

¹⁴⁸ "We recognize that the District Judge has wide discretion in limiting cross-

The Fourth Circuit has limited the scope of cross-examination so that a prosecutor may not normally cross-examine an expert medical witness, who is testifying on mental competency, about criminal responsibility.¹⁴⁹ The converse of this proposition is equally true. However, if the defendant's counsel opens the door by inquiring of an expert medical witness about both mental competency and criminal responsibility, the government may then properly cross-examine concerning both inquiries.¹⁵⁰ Cross-examination of expert medical witnesses is a crucial aspect of the attempt to achieve a favorable verdict, and accordingly, should be carefully prepared.¹⁵¹

As a final note on the expert witness, counsel may wish to retain his expert witness with him in the courtroom. Two theories may be advanced to achieve this objective. First, suggest to the court that the expert witness should be allowed to remain in the courtroom so that he may formulate a more intelligent opinion concerning the mental condition of the defendant by hearing what other witnesses are saying about the defendant. The persuasive appeal of this argument stems from the fact that the Fourth Circuit permits an expert medical witness to formulate an opinion based upon the testimony of others.¹⁵² Second, counsel may analogize the attempt to keep an expert medical witness in the courtroom to the situation where an officer in charge of the investigation of a case is allowed to remain in the courtroom and advise the prosecution, a practice permitted by the Fourth Circuit.¹⁵³ The persuasive appeal of this argument is questionable, although there is ample

examination. . . . However, where the information sought to be elicited is highly relevant, even crucial to the case, it is clear abuse of judicial discretion to shut off inquiry." *United States v. Ketchum*, 420 F.2d 901, 903 (4th Cir. 1969).

¹⁴⁹ We have little doubt that the difference in standards governing a defendant's competence to stand trial from those which govern his mental capacity to commit crime ordinarily would preclude a prosecutor from cross-examining a psychiatrist who has expressed an opinion on one about the other. In the usual case, a prosecutor should not thus be permitted to confuse the two inquiries in his examination of a psychiatric witness.

United States v. Retolaza, 398 F.2d 235, 240 (4th Cir. 1968), *cert. denied*, 393 U.S. 1032 (1969).

¹⁵⁰ *Id.*

¹⁵¹ For excellent examples of cross-examination questions, see Shadoan, *Raising the Insanity Defense: The Practical Side*, 10 AM. CRIM. L. REV. 533, 550 n.54; 1 A.L.R. Fed. 965, 970 (1966).

¹⁵² *Kibert v. Peyton*, 383 F.2d 566, 570 (4th Cir. 1967).

¹⁵³ *Shoppel v. United States*, 270 F.2d 413, 417 (4th Cir. 1959).

authority for the proposition that the officer in charge of a case may be permitted, in the discretion of the court, to remain in the courtroom assisting the government's counsel.¹⁵⁴

F. Instructions

The position of the Fourth Circuit, in the area of instructions, is extremely flexible, taking into account variances that may arise from the factual circumstances of different cases.¹⁵⁵ The A.L.I. formulation of criminal responsibility is clearly adopted, but no specific form of words is required.¹⁵⁶ On one occasion, the Fourth Circuit has suggested that certain material elements should be included in the charge to the jury.¹⁵⁷ In *United States v. Wilson*,¹⁵⁸ the Fourth Circuit considered a specific charge given by a trial court:

The jury was told, in pertinent part, that even though Wilson knew the difference between right and wrong and knew that the act he was committing was wrong he should be acquitted if "his will, that is to say, the governing power of his mind, has been so impaired that his actions are not subject to it but are beyond his control."¹⁵⁹

¹⁵⁴ *United States v. Frazier*, 417 F.2d 1138 (4th Cir. 1969), *cert. denied*, 397 U.S. 1013, *reh. denied*, 398 U.S. 945 (1970); *United States v. Harris*, 409 F.2d 77 (4th Cir.), *cert. denied*, 396 U.S. 965 (1969); *United States v. Adams*, 376 F.2d 824 (4th Cir.), *cert. denied*, 389 U.S. 883 (1967); *United States v. Leggett*, 326 F.2d 613 (4th Cir.), *cert. denied*, 377 U.S. 955 (1964).

¹⁵⁵ In formulating specific instructions to a jury or the standards which control a court's findings, the particular circumstances of the case may not be disregarded, and the issue as framed by the testimony may require changes in the choice of words. We avoid the imposition of rigid formulas.

United States v. Chandler, 393 F.2d 920, 927 (4th Cir. 1968) (en banc).

¹⁵⁶ "[W]hile our approval of the American Law Institute's formulation is unequivocal and unreserved, we proscribe no other form of words which may appear more appropriate in a given case now or in cases generally in the future." *Id.*

¹⁵⁷ If the charge appropriately embraces and requires positive conclusions by the jury as to the defendant's cognition, his volition, and his capacity to control his behavior, and if these three elements of knowledge, will and choice are emphasized in the charge as essential and critical constituents of legal sanity, we shall usually regard the charge as legally sufficient.

United States v. Butler, 409 F.2d 1261, 1263 n.3 (4th Cir. 1969), *quoting Pope v. United States*, 372 F.2d 710, 736 (1967), *vacated on other grounds*, 392 U.S. 651 (1968).

¹⁵⁸ 399 F.2d 459 (4th Cir. 1968).

¹⁵⁹ 399 F.2d at 463.

The Fourth Circuit held, that although this instruction differed from the A.L.I. formulation, it essentially instructed the jury properly.¹⁶⁰

In drafting instructions, one should be careful to include all of the elements deemed necessary by the Fourth Circuit. Flexibility is not the equivalent of inaccuracy. The District of Columbia Circuit Court in *United States v. Brawner*,¹⁶¹ provided counsel with a suggested insanity instruction when a variation of the A.L.I. formulation was adopted.¹⁶² Although the instruction in *Brawner*

¹⁶⁰ The instruction . . . differs from the American Law Institute formulation but slightly. There is no direct reference to substantiality of capacity to control his conduct, but it suggested to the jury that if the act was beyond Wilson's impaired capacity, they should acquit. The American Law Institute does no more. Importantly, the instruction does not imply that the jury must find a general destruction of the defendant's will as Davis [Davis v. United States, 160 U.S. 469 (1895)] does; impairment is enough if the act is beyond the reach of the diminished capacity to control.

Id. (Note, the instruction here was affirmatively approved by the defense counsel and was not an issue on appeal.)

¹⁶¹ 471 F.2d 969 (D.C. Cir. 1972) (en banc).

¹⁶² SUGGESTION FOR INSTRUCTION IN INSANITY

The defendant in this case asserts the defense of insanity.

You are not to consider this defense unless you have first found that the Government has proved beyond a reasonable doubt each essential element of the offense. One of these elements is the requirement (of premeditation and deliberation for first degree murder or of specific intent for ____), on which you have already been instructed. In determining whether that requirement has been proven beyond a reasonable doubt, you may consider the testimony as to the defendant's normal mental condition.

If you find that the government has failed to prove beyond a reasonable doubt any one or more of the essential elements of the offense, you must find the defendant not guilty, and you should not consider any possible verdict relating to insanity.

If you find that the Government has proved each essential element of the offense beyond a reasonable doubt, then you must consider whether to bring in the verdict of not guilty by reason of insanity.

The law provides that a jury shall bring in a verdict of not guilty by reason of insanity if, at the time of the criminal conduct, the defendant, as a result of mental disease or defect, either lacked substantial capacity to conform his conduct to the requirements of the law, or lacked substantial capacity to appreciate the wrongfulness of his conduct. [In the Fourth Circuit, substitute "criminality" for "wrongfulness."]

Every man is presumed to be sane, that is to be without mental disease or defect, and to be responsible for his acts. But that presumption no longer controls when evidence is introduced that he may have a mental disease or defect.

The term insanity does not require a showing that the defendant was disoriented as to time or place.

Mental disease or defect includes any abnormal condition of the mind, regardless of its medical label, which substantially affects mental or emotional processes and substantially impairs behavior controls. The term "behavior controls" refers to the processes and capacity of a person to regulate and control his conduct and actions.

In considering whether the defendant had a mental disease or defect at the time of the unlawful act with which he is charged, you may consider testimony in this case concerning the development, adaption and functioning of these mental and emotional processes and behavior controls.

The term "mental disease" differs from "mental defect" in that the former is a condition which is either capable of improving or deteriorating and the latter is a condition not capable of improving or deteriorating.

Burden of proof—alternate versions:

(a) The burden of proof is on the defendant to establish by a preponderance of the evidence that, as a result of mental disease or defect, he either lacked substantial capacity to conform his conduct to the requirements of the law or lacked substantial capacity to appreciate the wrongfulness of his conduct. If defendant has met that burden you shall bring in a verdict of not guilty of the offenses you found proved beyond a reasonable doubt.

(b) The burden is on the Government to prove beyond a reasonable doubt either that the defendant was not suffering from a mental disease or defect, or else that he nevertheless had substantial capacity both to conform his conduct to the requirements of the law and to appreciate the wrongfulness of his conduct. If the Government has not established this beyond a reasonable doubt, you shall bring in a verdict of not guilty by reason of insanity.

Evaluation of Testimony

In considering the issue of insanity, you may consider the evidence that has been admitted as to the defendant's mental condition before and after the offense charged, as well as the evidence as to defendant's mental condition on that date. The evidence as to the defendant's mental condition before and after that date was admitted solely for the purpose of assisting you to determine the defendant's condition on the date of the alleged offense.

You have heard the evidence of psychiatrists and psychologists who testified as expert witnesses. An expert in a particular field is permitted to give his opinion in evidence. In this connection, you are instructed that you are not bound by medical labels, definitions, or conclusions as to what is or is not a mental disease (or defect). What psychiatrists (and psychologists) may or may not consider a mental disease (or defect) for clinical purposes, where their concern is treatment, may or may not be the same as mental disease (or defect) for the purpose of determining criminal responsibility. Whether the defendant had a mental disease (or defect) must be determined by you under the explanation of those terms as it has been given to you by the Court.

There was also testimony of lay witnesses, with respect to their observations of defendant's appearance, behavior, speech, and actions. Such persons are permitted to testify as to their own observations and other

would not be entirely useful since variations exist between the Fourth Circuit's and the D.C. Circuit's insanity formulation, reference to it would be useful as a guide to counsel in drafting instructions that would be appropriate in the Fourth Circuit.

G. *The Jury and the Insanity Defense*

Any decision surrounding whether or not to use the insanity defense must realistically be based, at least in part, upon a consideration of the jury, for it is they who must eventually decide the

facts known to them and may express an opinion based upon those observations and facts known to them. In weighing the testimony of such lay witnesses, you may consider the circumstances of each witness, his opportunity to observe the defendant and to know the facts to which he has testified, his willingness and capacity to expound freely as to his observations and knowledge, the basis for his opinion and conclusions, and the nearness or remoteness of his observations of the defendant in point of time to the commission of the offense charged.

You may also consider whether the witness observed extraordinary or bizarre acts performed by the defendant or whether the witness observed the defendant's conduct to be free of such extraordinary or bizarre acts. In evaluating such testimony, you should take into account the extent of the witness's observation of the defendant and the nature and length of time of the witness's contact with the defendant. You should bear in mind that an untrained person may not be readily able to detect mental disease (or defect) and that the failure of a lay witness to observe abnormal acts by the defendant may be significant only if the witness had prolonged and intimate contact with the defendant.

You are not bound by the opinions of either expert or lay witnesses. You should not arbitrarily or capriciously reject the testimony of any witness, but you should consider the testimony of each witness in connection with the other evidence in the case and give it such weight as you believe it is fairly entitled to receive.

You may also consider that every man is presumed to be sane, that is, to be without mental disease (or defect), and to be responsible for his acts. You should consider this principle in the light of all the evidence in the case and give it such weight as you believe it is fairly entitled to receive.

Effect of verdict of not guilty by reason of insanity

If the defendant is found not guilty by reason of insanity, it becomes the duty of the court to commit him to St. Elizabeth's Hospital. There will be a hearing within 50 days to determine whether defendant is entitled to release. In that hearing the defendant has the burden of proof. The defendant will remain in custody, and will be entitled to release from custody only if the Court finds by preponderance of the evidence that he is not likely to injure himself or other persons due to mental illness.

Note: If the defendant so requests, this instruction need not be given.

471 F.2d 1008 (Appendix B).

issue of the mental condition of the defendant.¹⁶³ To this end, "it is of critical importance that the defendant's entire relevant symptomatology be brought before the jury."¹⁶⁴ Unfortunately, juries are not generally favorably disposed to the insanity defense¹⁶⁵ and, accordingly, have been attacked as an inappropriate body to whom should be left the decision of sanity or insanity.¹⁶⁶

If the insanity defense is deemed to be the most appropriate defense for the accused, counsel should be aware of the fact that the success or failure of the defense may depend upon the ability of the defendant to persuade the jury that he is mentally ill.¹⁶⁷ Fortunately for the defense, "[t]he A.L.I. formulation requires less evidence to sustain a finding of insanity thereby assisting the defendant, and more accurately shifting the production and persuasion burdens to the prosecution."¹⁶⁸ Through the liberalized procedures allowed under the A.L.I. formulation, the defense should also attempt to have their expert witnesses explain why the defendant is actually abnormal even though he appears quite normal at the trial.

Counsel should also inquire into the background of the juror. Generally, those jurors with higher educational backgrounds have

¹⁶³ *United States v. Riggs*, 470 F.2d 505, 506 (4th Cir. 1972), *cert. denied*, 411 U.S. 908 (1973); *United States v. McGirr*, 434 F.2d 844, 849 (4th Cir. 1970).

¹⁶⁴ *United States v. Smith*, 507 F.2d 710, 711 (4th Cir. 1974) (footnote omitted).

¹⁶⁵ [J]uries do not, as a general rule, respond favorably to the insanity defense. Most jurors subscribe to the view prevalent in our society that an individual should be held accountable for what he does. Only with reluctance will they shield an offender from punishment for an admitted offense on the basis of some ephemeral psychological "disorder."

Shadoan, *Raising the Insanity Defense: The Practical Side*, 10 AM. CRIM. L. REV. 533, 535 (1972).

¹⁶⁶ See M. GUTTMACHER, *THE ROLE OF PSYCHIATRY IN LAW* 13-14 (1968); Harrington, *Is the Accused Insane? 12 Laymen Shouldn't Decide*, 2 TEX. SO. L. REV. 195 (1972-73). See also, *United States v. Chandler*, 393 F.2d 920, 928 (4th Cir. 1968) (en banc).

¹⁶⁷ Jurors find it difficult to accept the idea of serious mental disorder unless it is accompanied by visible and gross psychotic symptoms—either a breakdown in intellect or the loss of self-control. In this respect, they share the reluctance of most people to concede that persons who seem very much like themselves may be seriously ill. Under such circumstances, defense counsel is understandably reluctant to assert the defense unless his client is reasonably likely to persuade the jury he is insane.

A. GOLDSTEIN, *THE INSANITY DEFENSE* 63 (1967).

¹⁶⁸ Higley, *Requirements of Uniformity and the Federal Formulation of Criminal Responsibility*, 21 BUFFALO L. REV. 421, 436 (1971-72).

been found to be more favorable toward psychiatry.¹⁶⁹ Additionally, the juror with the higher occupational status will be more inclined to react favorably toward psychiatry,¹⁷⁰ as do those jurors who have previously served in criminal trials.¹⁷¹ The significance of a juror's feelings toward psychiatry is that "a bigger percentage of those unfavorable toward psychiatry feel that the defendant, as an individual, should be held fully responsible for his crime."¹⁷² Individuals favorable to psychiatry have a greater tendency to act impartially when considering an insanity plea, have a tendency to consider mitigating factors when confronted with the issue of criminal responsibility, and are more receptive to the use of psychiatrists in the criminal trial.¹⁷³ Undoubtedly, the careful selection of jurors may have a substantial impact upon the successful or unsuccessful attempt to employ the insanity defense.¹⁷⁴

IV. CONCLUSION

This article has been an attempt to provide those involved in criminal litigation with at least a foothold into the realm of legal insanity. The intricacies of a defense based upon the accused's lack-of-criminal-responsibility create a need for all to be well versed in the developments in the law so as to insure that the ends of justice are achieved. The Fourth Circuit has conceptualized a workable legal framework within which one may operate in asserting or opposing an insanity defense. The obligation is now upon counsel to utilize the law provided to its maximum potential.

Michael Frank Pezzulli

¹⁶⁹ "This table shows that 54.33 percent of those favorable toward psychiatry have at least a college level of education while only 30 percent of those unfavorable to psychiatry have a college level of education." Arafat & McCahery, *The Insanity Defense and the Juror*, 22 DRAKE L. REV. 538, 542 (1973).

¹⁷⁰ "This table shows that 57.7 percent of those with favorable attitudes toward psychiatry have higher status occupations, being professional or white collar workers whereas only 32 percent of those unfavorable toward psychiatry can be found in the same occupational levels." *Id.*

¹⁷¹ "Of the jurors with experience, 83.33 percent had a favorable attitude toward psychiatry while only 16.67 percent had an unfavorable attitude. Of the jurors without experience, 62.5 percent were favorable toward psychiatry while 37.5 percent were unfavorable." *Id.* at 543.

¹⁷² *Id.* at 544.

¹⁷³ *Id.* at 549.

¹⁷⁴ For additional information on the jury and its attitude toward the insanity defense, see R. SIMON, *THE JURY AND THE DEFENSE OF INSANITY* (1967); M. GUTTMACHER, *THE ROLE OF PSYCHIATRY IN LAW* 15-18 (1968); J. POLIER, *THE ROLE OF LAW AND THE ROLE OF PSYCHIATRY* 17 n.24 (1968); S. GLUECK, *LAW AND PSYCHIATRY*, 75-78 (1962).