Denver Law Review

Volume 39 | Issue 6 Article 1

April 2021

Insanity and the Law: Toward a Rational Development of Criminal Responsibility

Fred Cohen

INSANITY AND THE LAW:

TOWARD A RATIONAL DEVELOPMENT OF CRIMINAL RESPONSIBILITY

BY FRED COHEN*

I. INTRODUCTION**

> Statutes were framed and principles of law laid down regulating the legal relations of the Insane long before physicians had obtained any accurate notions respecting their malady; and, as might naturally be expected, error and injustice have been committed to an incalculable extent under the sacred name of law.
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> — Isaac Ray, 1838

What Isaac Ray said over one hundred and fourteen years ago could be said with equal validity today. Psychiatry has advanced far beyond its primitive state at the time Isaac Ray wrote. Yet criminal justice continues as an autonomous system of supernatural concepts which cannot be defined in terms of experience.

The defense of insanity is but a part of the overriding problems which the entire body of criminal law presents. It is, however, a dramatic focal point for those problems and thus merits separate attention in a nation which is sceptical of drastic changes in existing institutions.

The defense of insanity in criminal cases is dealt with here within the larger framework of the concept of criminal responsibility. It was also felt that the existing case law and legislation in the area should be articulated and analyzed. Colorado cases and statutes have been emphasized to provide comprehensive coverage for at least one state, although "the law" in other jurisdictions is frequently referred to when necessary. Colorado has long been a leader in enacting progressive rules and procedures for the mentally ill. It is hoped that a climate which is receptive to objective appraisal and enactment of needed revisions will continue to exist. Colorado, Denver in particular, has recently been subjected to a torrent of newspaper publicity concerning the defense of insanity. An objective statement of the existing situation appears to be needed.

Articulation of existing law and procedure serves as a framework for the more important task of proposing reforms. This dual purpose has, no doubt, contributed to the "unevenness" of the article. The legal idiom, so necessary to the summary and analysis of the law, is often inadequate when one attempts to go beyond its boundaries in search of methodology, data and solutions. When necessary, the language of the law has been discarded in favor of the language of the behavioral sciences. If verbal precision has been sharpened, then no apologies will be necessary.

There is no attempt to restrict the inquiry to the rules of criminal irresponsibility, *i.e.*, insanity. We consider procedural im-

* Assistant Professor of Law, University of Denver Law Center.

** The author gratefully acknowledges the assistance and cooperation of the faculty, staff and student assistant, Gary Norton, of the University of Texas Law School where most of the research was done.

plementation of the rules, the concept of partial responsibility, mental disorder as a cause of delay in the criminal process and an approach to the rational development of criminal responsibility. The problems are complex and the solutions are illusive.

II. TESTS OF CRIMINAL RESPONSIBILITY

A. The Irresponsibility Decision

Insanity, as used in the phrases, "defense of insanity," or "plea of insanity," is a legal term descriptive of persons demonstrating such a grossly disordered mental condition that they are not amenable, *i.e.*, responsible, to the ordinary processes of the law.[1] Insanity and irresponsibility will be used here interchangeably.

Insanity, as a concept, lacks scientific precision or sanction.[2] It is a legal, not a medical, term and serves as a barrier to meaningful communication between the doctor and the lawyer.[3] We begin to apprehend reality if insanity is regarded as a label which the criminal law utilizes for manipulative purposes. Implicit in the concepts of sanity and insanity are the policy goals of criminal law—responsibility or irresponsibility.

Responsibility for one's conduct presently depends on whether the actor was of normal competence, capable of having the requisite *mens rea*.[4] The legal tag for normal competence is "sane." Insanity expresses just the opposite and characterizes a person as "not responsible to the law."

Not every unsoundness of mind will result in criminal irresponsibility. Most of the current polemics center about the "legal tests" of insanity.[5] What type and degree of mental disturbance will qualify as insanity? What is the most appropriate standard to use in making this decision?

In 1954, the Court of Appeals for the District of Columbia announced the momentous Durham rule.[6] That case has served to focus even more attention on the "legal tests" of insanity. Colorado, along with other jurisdictions, has not remained immune from the mounting dissatisfaction with current rules and procedures ignited by *Durham*.[7]

Although the literature is replete with proposals for new tests of insanity, the current authoritative tests are few. These are the M'Naghten Rules,[8] the M'Naghten Rules accompanied by the ir-

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1 Brown v. People, 116 Colo. 93, 97, 178 P.2d 948, 950 (1947). "In a criminal case the question to be resolved is not in fact 'sane or insane?' As to what constitutes insanity the experts, as well as laymen, radically differ. The question is responsibility."

See also, The Mentally Disabled and the Law 347 (Lindman and McIntyre ed. 1961). Allen, *The Rule of the American Law Institute's Model Penal Code*, 45 Marq. L. Rev. 494 (1962).

The qualification "ordinary processes of the law" is used because a successful defense based on insanity, unlike any other defense, may still result in the individual's subjection to the restraining authority of the state.

2 Deutsch, The Mentally Ill in America 387 (2d ed. 1949).

3 Roche, The Criminal Mind 15 (Evergreen ed. 1959). Bauer, *Legal Responsibility and Mental Illness*, 37 Nw. U. L. Rev. 12 (1962).

4 Hall, General Principles of Criminal Law ch. XIII (2d ed. 1960). Biggs, The Guilty Mind (1955).

5 Weihofen, Mental Disorder as a Criminal Defense 50 (1954).

6 Durham v. U.S., 214 F.2d 862 (D.C.Cir. 1954).

7 See Castro v. People, 140 Colo. 493, 346 P.2d 1020 (1959); Early v. People, 142 Colo. 462, 352 P.2d 112 (1960).

8 10 Clark and Fin. 200, 8 Eng. Rep. 718 (1843).

"[T]he party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know what he was doing was wrong."

resistible impulse test (Colorado's position at least since 1915),[9] the New Hampshire or Durham "product" test,[10] the Currens test[11] and the American Law Institute's Model Penal Code.[12]

At the present time, the M'Naghten Rules alone, or supplemented by the irresistible impulse test, are the exclusive tests of criminal responsibility in the federal jurisdiction, except the Third Circuit and the District of Columbia, and in all states except Vermont, New Hampshire, Maine, Illinois and perhaps Montana.[13]

Not more than fourteen states have coupled irresistible impulse with M'Naghten.[14] Thus Colorado finds itself in rather limited company, especially when it is noted that Colorado's rule is statutory.[15] The M'Naghten Rules were created by the judiciary and the great majority of jurisdictions have adopted and maintained the rules through the judiciary. Colorado, having adopted the rules by legislation, is unique and presents different problems to those who seek change. It seems clear that any changes in the rule must come from the legislature. The Supreme Court of Colorado has flatly stated, "We hold that the test of criminal irresponsibility is for the General Assembly to determine and to change, if indeed it is to be changed."[16]

The irresistible impulse test has certainly not been above criticism. However, on this aspect of Colorado's present rules, we

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9 Ryan v. People, 60 Colo. 425, 153 Pac. 756 (1915).

"[I]ncapable of distinguishing right from wrong . . . incapable of choosing the right and refraining from doing the wrong. And this is true howsoever such insanity may be manifested by insane delusions . . . , by irresistible impulse, or otherwise."

10 State v. Pike, 49 N.H. 399, 6 Am. Rep. 533 (1869); State v. Jones, 50 N.H. 369, 9 Am. Rep. 242 (1871); Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).

"[I]f his unlawful act was the product of mental disease or mental defect."

See Reid, *Understanding the New Hampshire Doctrine*, 69 Yale L. J. 367 (1960) for a discussion of the distinction between the two rules.

11 United States v. Currens, 290 F.2d 751 (3d Cir. 1961). This test is similar to the Model Penal Code: "[T]he defendant as a result of mental disease or defect, lacked substantial capacity to conform his conduct to the requirements of the law which he is alleged to have violated."

12 §4.01 (Proposed official draft, 1962). [Hereinafter cited, Model Penal Code].

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

"(2) [T]he terms mental disease or defect do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct."

Adopted with revisions, in Vermont and Illinois. Vt. Stat. Ann. Tit. 13 §4801 (1959); Ill. Stat. Ann. ch. 38 §6-2 (1961 Supp.). Also see Me. Rev. Stat. Ann. ch. 149 §38-A (1961 Supp.).

13 See note 10 *supra* for the D.C. and New Hampshire tests. The Montana Supreme Court has wavered between the irresistible impulse test, State v. Peel, 23 Mont. 358, 59 Pac. 169 (1899), the product test, State v. Keerl, 29 Mont. 508, 75 Pac. 362 (1904) and a test of ability to form the requisite intent, State v. Narich, 92 Mont. 17, 9 P.2d 477 (1932). See Note, *Insanity as a Defense in the Criminal Law of Montana*, 1 Mont. L. Rev. 69 (1940).

See also Deutsch, The Mentally Ill In America 396 *et. seq.* (2d ed. 1949); The Mentally Disabled And The Law 332 (Lindman and McIntyre ed. 1961); Weihofen, Mental Disorder as a Criminal Defense 68 *et. seq.* (1954).

14 Alabama, Arkansas, Colorado, Connecticut, Delaware, Indiana, Kentucky, Massachusetts, Michgan, New Mexico, Utah, Virginia and Wyoming. Georgia has a delusional-impulse test.

See Perkins, Criminal Law 762 (1957).

15 Colo. Rev. Stat. § 39-8-1(2) (1953).

"The applicable test of insanity in such cases shall be, and the jury shall be so instructed: 'A person who is so diseased in mind at the time of the act as to be *incapable of distinguishing right from wrong* with respect to that act, or being able to so distinguish, has suffered such an impairment of mind by disease as to destroy the will power and render him incapable of choosing the right and refraining from doing the wrong, is not accountable; and this is true howsoever such insanity may be manifested, whether by *irresistible impulse* or otherwise. But care should be taken not to confuse such mental disease with moral obliquity, mental depravity, or passion growing out of anger, revenge, hatred or other motives, and kindred evil conditions, for when the act is induced by any of these causes the person is accountable to law." (Emphasis added.)

This has been the statutory test since 1927 and is identical to the *Ryan* formulation. See note 9 *supra*.

16 Castro v. People, 140 Colo. 493, 509, 346 P.2d 1020, 1029 (1959).

find most of the better criticism directed to a scepticism concerning reasons for *rejection* of the rule.[17]

"Very rarely, if ever, has any rule of law been so extravagantly and caustically censured as the 'right and wrong' test of M'Naghten's Case."[18] The most cogent criticism of the M'Naghten Rules is that they fail to effectuate a major policy goal of the criminal law. They fail to aid in identifying those who are so mentally disordered as not to be properly responsible to the ordinary criminal process.[19] Consequently, the criminal law finds itself punishing those whose punishment is of no positive aid to society. To demonstrate this is perhaps to prove the entire case against the M'Naghten "right or wrong" formulation.

For many reasons the criminal law, indeed society, is not ready to accept the view that all criminal behavior is a symptom of mental illness requiring custody, care and treatment for the actor rather than punishment.[20] However, the law early accepted the view that there are those who manifest such gross mental abnormality that this condition ought to be a complete defense to a criminal charge.[21] The problem then is not agreeing on whether a principle of criminal irresponsibility based on mental disorder exists. On this point everyone agrees. The problem is the utility of the M'Naghten formulation as an aid to decision-makers in selecting the proper persons under this principle.

Concepts of "right or wrong" are said to belong to ethics.[22] This criticism appears to have validity when we consider the experts' role in the courtroom. When the psychiatrist is asked if the accused knew the difference between right and wrong, it seems obvious that he is being asked to measure the accused by some ethical, rather than medical, standard. The doctor is no more professionally prepared to state ethical judgments than the other courtroom participants.

Weihofen criticizes the ethical component of M'Naghten because of the ephemeral nature of ethical beliefs and the difficulty of knowing right from wrong in the complex conflict-culture of our time.[23] This is a questionable basis for criticism. The entire body of criminal law bears some imperfect relation to the community's ethical beliefs. As such, it is subject to the problems of change in-

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17 Weihofen, note 13 *supra* at 94; Guttmacher and Weihofen, Psychiatry And The Law 408, 409 (1952).

"The view that certain impulses which result from mental disorder may be 'irresistible' has formidable medical support. Opinions contrary to this view are held by 'relatively few members of the profession.'" The Mentally Disabled and the Law 340 (Lindman and McIntyre ed. 1961) and authorities cited therein.

Keedy, *Irresistible Impulse as a Defense in the Criminal Law*, 100 U. Pa. L. Rev. 956 (1952). Wertham, The Show Of Violence 13-14 (1949) is the most outspoken *medical* critic of the rule.

18 Harno, *Some Significant Developments in Criminal Law and Procedure in the Last Century*, 42 J. Crim. L., C. & P.S. 427, 433 (1951).

See Weihofen, note 13 *supra* at 65, n.36 (1954) for "a few of the numberless books and articles discussing the M'Naghten case rules."

19 Guttmacher and Weihofen, *op. cit. supra* note 17, at 420. This same notion, stated in varying forms, may be found in many sources. But see Hall, General Principles of Criminal Law 481 (2d ed. 1960) and State v. White, 374 P.2d 942 (Wash. 1962) for an affirmation of the M'Naghten rules.

20 One reason is the great shortage of personnel in public mental hospitals throughout the country. The American Psychiatric Association's survey, in 1956, revealed a critical nationwide need for 63,344 employees including physicians, psychologists, registered nurses, other nurses, attendants and social workers. N.Y. Times, Dec. 27, 1957, p. 38, Col. 1 quoted in Donnelly, Goldstein and Schwartz, Criminal Law 59 (1962).

21 "By Edward III's reign, 1326 to 1327, complete *madness* was a defense to a criminal charge. Until then at least, the insane criminal's life could be saved only by the pardon of the king." Biggs, The Guilty Mind 83 (1955).

22 Weihofen, *op. cit. supra* note 13, at 65; Guttmacher and Weihofen, *op. cit. supra* note 17, at 406.

23 Weihofen, *op. cit. supra* note 13, at 65-66.

herent in any dynamic system. A major problem for criminal law is its failure to keep pace with changes in community sentiment and achieve a balance between this sentiment and objectively determined policy goals.[24] The M'Naghten Rules, as an ethical statement, must endure only that amount of criticism which is directed to the whole of criminal law.

When Daniel M'Naghten shot and killed Drummond, private secretary to Sir Robert Peel, he believed that he was killing Peel. M'Naghten had delusions of persecution and believed that Peel was one of his enemies. The excitement engendered upon his acquittal by reason of insanity led to debate in the House of Lords and ultimately to the now famous advisory opinion of the Judges of England.

M'Naghten is thought to have been a paranoiac who suffered from delusions.[25] Consequently, the questions that were framed and the Judges' responses were primarily concerned with "delusional insanity." There is good reason to believe that the Judges never intended their formulation to encompass cases of mental disorder other than those manifested by delusions.[26]

In amplification of the "right and wrong" test, the Judges stated further that,

> Where a person 'labours under partial delusions only and is not in other respects insane,' and commits an offense in consequence thereof, 'he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real.'[27]

The fallacy of determining the criminality of conduct by standards applicable to normal persons was early perceived in Colorado. The *Ryan*[28] case was the first to consider the partial delusion aspect of M'Naghten and it was firmly rejected. The jury had been instructed in almost the identical terms of M'Naghten and the defendant objected. The supreme court found that the jury could scarcely have failed to be misled since Ryan's delusions would not have been a justification for the killing if his apprehensions were based on fact.[29] Retreating somewhat, the court indicated that the instruction need not always constitute prejudicial error but "in such case it has no application, states a wrong principle of law, and should not be given."[30]

Any uncertainty about possible nonprejudicial situations was removed the next year. The *Oldham*[31] case involved the same instruction and the same delusional situation, the delusion not being a defense to a killing if real. The court conceded that nonprejudicial error was possible, "but as it embodies an incorrect legal principle, it ought not to be given at all."[32] Thus, from "should not be given" to "ought not be given at all," we read the short Colorado history of the M'Naghten Rules on partial delusion and their epitaph.

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24 Rose and Prell, *Does The Punishment Fit the Crime?* 61 Amer. J. of Soc. 247 (1955).
25 Weihofen, *op. cit. supra* note 13, at 64.
26 Glueck, Mental Disorder and the Criminal Law 166 (1925).
27 As set out in Weihofen, *op. cit. supra* note 13, at 62.
28 Ryan v. People, 60 Colo. 425, 153 Pac. 756 (1915).
29 *Id.* at 427-28, 153 Pac. at 757.
30 *Id.* at 428, 153 Pac. at 757.
31 Oldham v. People, 61 Colo. 413, 158 Pac. 148 (1916).
32 *Id.* at 415, 158 Pac. at 149.

In rejecting the "partial delusion test," however, Colorado did not necessarily free itself from criticism that the "right and wrong" formulation itself was to deal only with delusional insanity. The first question posed for the Judges asked for the law respecting crimes committed under insane delusions. The Judges replied that such a person was responsible, "if he knew at the time of committing such crime that he was acting contrary to law . . . the law of the land."[33]

How the partial and "complete" delusion rules were intended to operate is not clear. It is clear that Colorado has rejected the partial insanity test.[34] To the extent that the "right and wrong" test itself was intended to deal only with delusions and not other types of mental illness, Colorado perpetuates the error. The test is used to cover any symptomatic mental disorder.

> The M'Naghten test is based on an entirely obsolete and misleading conception of the nature of insanity, since insanity does not only, or primarily, affect the cognitive or intellectual faculties, but affects the whole personality of the patient, including both the will and the emotions. An insane person may therefore often know the nature and quality of his act and that it is wrong and forbidden by law, but yet commit it as a result of the mental disease.[35]

Underlying this statement are several separate, yet intimately related, criticisms of M'Naghten. The test is medically unsound by overvaluation of the intellectual factor. Modern psychology views the personality as an integrated whole. The M'Naghten test was formulated in the days of faculty psychology, which divided the mind into neat little autonomous compartments. A defect in one compartment was thought not to affect any other. This view has long since been abandoned in favor of the integration of the principal functions of personality. The M'Naghten test virtually ignores the emotions (affect) and volition.[36] This tends to freeze the law in a rigid, nondynamic mold incapable of adjusting to advances in psychological theory.[37]

The word *wrong* as used in the test is ambiguous. Does it mean legal wrong, or moral wrong? Not many cases actually discuss the

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33 M'Naghten's Case, 10 Clark and Fin. 200, 209, 8 Eng. Rep. 718, 722 (1843).

34 "In all such cases the controlling question is the sanity or insanity of the accused with respect to the act, and upon trial of this issue there is, in legal contemplation, no middle ground, the defendant is either sane or insane . . . . " Ryan v. People, 60 Colo. 425, 429, 153 Pac. 756, 758 (1915).

35 Royal Commission on Capital Punishment 1949-53, *Report*, Cmd., No. 8932 at 80 (1953).

36 "The M'Naghten rule has no medical or scientific application except as noted for the infrequent case of disturbed consciousness which is mere coincidence." Roche, The Criminal Mind 102 (Evergreen ed. 1959). Dr. Roche also points out that, "The determination of capacity for knowledge in one accused of crime is neither science nor art . . . . [I]t is a moral inquiry between the accused and a psychiatrist . . . . " *Id.* at 111.

The proponents of M'Naghten will concede the validity of the "integration of personality" thesis. See Cavanagh, *Problems of a Psychiatrist in Operating Under the M'Naghten, Durham and Model Penal Code Rules*, 45 Marq. L. Rev. 478 (1962). Dr. Cavanagh, however, believes that intelligence and ethical values are more easily measured than affect, imagination or will.

Hall, General Principles of Criminal Law 521 (2d ed. 1960). See Biggs, The Guilty Mind (1955) for an excellent historical background.

37 Mr. Justice Frankfurter, before the Royal Commission on Capital Punishment stated in part: "The M'Naghten Rules were rules which the Judges, in response to questions by the House of Lords, formulated in the light of the then existing psychological knowledge . . . . I do not see why the rules of law should be arrested at the state of psychological knowledge of the time when they were formulated . . . . " Quoted by Judge Biggs in United States v. Currens, 290 F.2d 751, 765 (3d Cir. 1961).

point.[38] Most courts use the word *wrong* without defining it. A few courts hold it to mean moral wrong; a larger number of cases decide it means legal and moral wrong; still others confine it to legal wrong.[39] To understate the matter, the definitional problem is in a state of hopeless confusion.

It is difficult to be certain how Colorado views the word *wrong*. The *DeRinzie* case involved an instruction which defined insanity in a general way (apparently "right from wrong") and also stated:

> That if the defendant was incapable of understanding, at the time the act was committed, that it was wrong, and that it was a violation of the law of God and society, he should be acquitted.[40]

The defendant complained that his trial for burglary and larceny was for a violation of a law of Colorado and no other law. The opinion, which reads more like a sermon, upheld the charge since "it was only equivalent to saying that if his poor mind could not understand that he was committing a wrong he should be allowed to go. . . ."[41]

The court, inferentially, found no difference between "the divine injunction thou shalt not steal" and the criminal code. Does this place Colorado among the jurisdictions holding *wrong* to mean legal and moral wrong? The answer is certainly not clear and perhaps not very important. The Colorado statute directs the court to instruct the jury in terms of the statute.[42] Thus the *DeRinzie* situation is unlikely to reoccur. The problem could arise where a person knew the act was a crime and would subject him to punishment but he committed it because he was under a delusion that he was divinely commanded to save society by sacrificing his own life. This person is responsible if *wrong* is confined to legal wrong and irresponsible if it is confined to moral wrong.[43]

Colorado's early acknowledgement of irresistible impulse as a defense deflects some of the criticism directed to the M'Naghten Rules. The defense takes *volition* into account. However, as Judge Bazelon points out in *Durham*, it is also inadequate "in that it gives no recognition to mental illness characterized by brooding and reflection and so relegates acts caused by such illness to the application of the inadequate right-wrong test."[44]

Even if it be conceded that the addition of irresistible impulse adds the concept of volition to cognition, the emotions are still neglected. But the simple expedient of adding another symptom to the legal test should not satisfy the thoughtful critic. The fundamental objection is not that criminal irresponsibility is made to rest upon an inadequate, invalid or indeterminable symptom or

38 People v. Schmidt, 216 N.Y. 324, 110 N.E. 945 (1915) is one of the few. Judge, later Justice, Cardozo concluded it meant moral wrong.
Weihofen, *op. cit. supra* note 13, at 77 states "The Opinion of the Judge [*sic*] is so confusing on this point it seems impossible to determine in what sense the word 'wrong' was there used."
39 See Weihofen, *op. cit. supra* note 13, at 78-79 for numerous citations.
40 De Rinzie v. People, 56 Colo. 249, 250, 138 Pac. 1009 (1914).
41 *Id.* at 250-51, 138 Pac. at 1010.
42 See note 15 *supra*.
43 Moral knowledge could be further refined to a "right knowledge" of moral precepts. This would render the situation even more hopeless. In London Guarantee & Acc. Co. v. Officer, 78 Colo. 441, 446, 242 Pac. 989, 991 (1926), the court said: "[N]evertheless he may not be held accountable if affected with a mental derangement which precludes any conception of the moral and legal aspects of the killing . . . . " This was a civil action and the above quotation would be merely *dictum* in a criminal case.
44 Durham v. United States, 214 F.2d 862, 874 (D.C. Cir. 1954).

manifestation, but that it is made to rest upon *any* particular symptom.[45]

Our fundamental question remains. Do the M'Naghten Rules, as supplemented by the irresistible impulse test, aid decision-makers in identifying those who are so mentally disordered that they ought not be responsible to the ordinary criminal processes?

The criminal law provides the state with an imposing arsenal of official sanctions. The state can deprive a *criminal* of liberty, life, property and respect. The unofficial sanctions which accompany a designation of *criminal* or *ex-convict* may be more devastating than the official sanctions. The moral condemnation which is an integral part of the designation "criminal" places a stigma on a person which may alter his relations with the community for all time.

Calling attention to these *possibilities* should silence those who maintain that an automatic commitment to a mental hospital as insane (irresponsible) is difficult to distinguish from a prison sentence as sane (responsible).

The inescapable fact is that our mental institutions contain many patients who suffer from serious mental illness and who know the difference between right and wrong.[46] It would be impossible to have order and control in a mental institution if the patients did not *know* and follow some minimal rules of conduct.

How can one determine whether the accused has knowledge of right and wrong? Dr. Roche states that the only direct way is to put the question to him. He points out that many psychotics have a hypertrophied sense of right and wrong which characterizes their illness. So, if a mentally-ill accused answers hypotheticals indicating he knows right from wrong, or states that his own crime was wrong, he invites his own undoing.[47] The only warranted conclusion, however, is that the accused can, or cannot, know right from wrong *on a verbal level.* This is not a clinical reality.

Whether viewed as an unsophisticated attempt to define psychotic, or isolate non-deterrables, our current rules fail of their purpose. Mental illness per se need not be synonymous with insanity to satisfy the law's manipulative purposes. Surely serious mental illness, *e.g.,* serious enough to require involuntary commitment in a mental hospital, should be sufficient to result in a finding of criminal irresponsibility. Since Colorado, along with most states, automatically commits an insane defendant, the issue is not total freedom *vs.* incarceration.[48] It is manipulation into a punitive, nonrehabilitative setting *vs.* manipulation into a nonpunitive, rehabilitative setting.

In stressing the cognitive and part of the volitional aspects of personality, over one hundred years of psychological advancement is in large measure excluded.[49] Persons suffering from serious

45 *Id.* at 872.
46 United States v. Currens, 290 F.2d 751, 765 (3d Cir. 1961).
47 Roche, The Criminal Mind 109 (Evergreen ed. 1959).
48 Colo. Rev. Stat. §39-8-4(2) (Supp. 1960). "If the verdict is that the defendant was insane at the time the alleged offense was committed the judge shall forthwith commit him to the State Hospital at Pueblo . . . . "
49 Judge Biggs points out that the substance of the M'Naghten Rules is not 119 years old but 375 years old. The right and wrong test is set out in a book by William Lombard of Lincolns Inn, Eirnarcha, 1582. See United States v. Currens, 290 F.2d 751, 764 (3d Cir. 1961).

mental illness may not come within the operation of the rules.[50] The verbal formulation of the tests suffers from ambiguities and leaves the trier hopelessly uninformed.[51] By stating the test of legal responsibility in terms of any symptom—and impaired intellect and volition are inadequate symptoms alone—the law rejects the universally accepted theory of the integration of personality.

Some commentators cite Colorado courts as being very liberal with the psychiatrist in allowing him to communicate the total psychological picture of the accused to the jury. This is said to avoid some of the rigors of M'Naghten. To a similar contention Mr. Justice Frankfurter said, "I think the M'Naghten Rules are very difficult for conscientious people and not difficult enough for people who say, 'We'll just juggle them'. . . ."[52]

Colorado, Denver in particular, has recently been the focus of a great deal of public debate concerning the defense of insanity. The newspapers have given widespread coverage to several dramatic cases and initiated a "campaign" to correct defects in the law. When the sensational aspects of the reporting are trimmed away, the complaint would seem to be that the plea is entered and successful too often.[53]

One of the most thoughtful public statements came from a woman juror who served on a case where the accused was found not guilty by reason of insanity. She decried the lack of dignity in the proceedings, the communication barriers and the jury's inability to reach a rational decision.[54] This is to be contrasted with a typically facile statement that this is, "one of the major problems facing our society."[55] Obviously, we have a problem. What are the true dimensions of the problem? How can we reach a rational solution?

A recent unpublished study casts some new light on part of Colorado's problem in this area. This study covered all the criminal indictments and informations for murder, burglary, larceny, forgery and rape filed in the District Criminal Court (Divisions 8, 9, and 10) for the City and County of Denver, for the years 1957 through 1961.[56] Statistics were collected to indicate the number of charges, the number of insanity pleas entered, how often the plea was withdrawn prior to trial, the frequency of insanity being submitted to the jury and the frequency of success.

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50 Several Denver psychiatrists recently stated that not more than one in a hundred patients at the State Hospital in Pueblo could meet the right and wrong test. Unreported testimony given in a hearing in the Denver District Court before Judge Neil Horan, People v. French (1962).

51 The problem of expert and non-exeprt testimony is taken up at p. 347 *infra*.

52 Testimony before The Royal Commission on Capital Punishment, quoted in United States v. Currens, 290 F.2d 751, 766 (3d Cir. 1961).

53 Denver Post, Aug. 5, 1962, §AA, p. 1, col. 1. The article refers to the cases of Daniel Lee French, Alfred Ratzloff, Joseph Scheer, Raymond Patton and others.

54 Rocky Mountain News, June 14, 1962, p. 47, col. 4. This appears in a column by Pasquale Marranzino who is to be commended for his reporting of this problem. The case involved Daniel Lee French who was accused of raping several Denver women. This writer served as co-counsel for French with Walter L. Gerash of the Denver Bar.

55 This phraseology is perhaps suitable in a political campaign but is obviously of no utility in formulating the issues.

56 Smeltzer, *Insanity as a Defense in Murder and Lesser Crimes* (1962). Unpublished manuscript on file at the University of Denver, College of Law Library. The writer is indebted to George Smeltzer, student at the University of Denver, College of Law, for his efforts and permission to use these figures. The actual data were compiled from the Docket Fee Book and Register, book numbers: 71 through 83. The figures are based on the number of indictments or informations and not the number of actual cases. For example, a single case may involve several defendants and several counts of larceny and larceny by bailee. This was counted as a single case of larcency. The study was completed Sept. 1, 1962.

The murder figures for the five year period indicate 121 charges, 41 insanity pleas, 14 withdrawals prior to trial, 27 cases of submission of the plea to the jury and 21 findings of insanity and commitment to the hospital. This means that approximately 78% of the cases reaching the jury result in a finding of insanity.

The withdrawals of the plea probably are largely determined by the results of the automatic commitment and observation aspect of the Colorado statute.[57] In addition, if an accused is not financially able to hire his own psychiatrists or hires psychiatrists who believe him to be sane, he is likely to withdraw the plea. Thus, as startling as the jury success figures appear, they must be modified by these factors which do not appear as part of the statistical study.

In relation to the number of charges filed, the plea was successful about 17% of the time. The plea was entered in about 34% of the cases although, as noted, frequently withdrawn.

Most commentators assume that the plea of insanity is almost exclusively confined to homicide cases.[58] This study tends to bear out the statement. The plea was entered about 34% of the time in murder cases and this far surpassed the other crimes studied.[59] Almost every case reaching the Supreme Court of Colorado, since 1915, involving a point about insanity was a murder case, and usually first-degree murder.

In relation to the number of charges filed, the insanity plea has been successful in 2.8% of the rape cases; larceny, 1.1%; burglary, 1.9%; and forgery, 1.4.% In every category there was a 50% chance or better of an insanity verdict if the case went to the jury.[60]

These figures would seem to completely invalidate the charges concerning the frequency and success of the plea.[61] Trial attorneys should not hastily conclude that they have an excellent chance of getting a verdict of insanity if they go to the jury. It is almost certain that success at that stage is, in large measure, related to available psychiatric opinion. To discredit the newspaper attack on the law is not also to state that the law is satisfactory. In fact, the relative infrequency of success lends credence to the thesis that the existing rules are not an effective aid in identifying the person with serious mental illness.

B. The Commitment-Treatment Decision

From a legal perspective, a finding of "not guilty by reason of insanity" means that the accused was and is not responsible for the conduct in question. Unlike any other successful defense to a criminal charge, a verdict of insanity will still subject the person to involuntary confinement.

The Colorado statute provides that the defendant shall be forthwith committed to the State Hospital at Pueblo.[62] Although the point never seems to have been articulated in Colorado, a verdict of insanity at the time of the commission of the act must

57 Colo. Rev. Stat. §39-8-2 (Supp. 1961). Subsections (1) and (4) amended by Colo. Sess. Laws 1962, ch. 45, §1.

58 See, e.g., Roche, The Criminal Mind 91 (Evergreen ed. 1959).

59 In relation to the total number of charges, the insanity plea was entered in 7.3% of the rape cases, 5.4% of the larceny cases, 6.8% of the burglary cases and 10.7% of the forgery cases.

60 100% for rape (4 cases in the 5 year period). 78% for burglary (23 cases). 88% for larceny (15 cases). 50% for forgery (5 cases).

61 The entire compilation of statistics from this study appears in the appendix.

62 Colo. Rev. Stat. §39-8-4(2) (Supp. 1960).

carry with it a presumption that the insanity continues. If it did not, the accused would seem to be entitled to a hearing on his present sanity.[63] There would be grave constitutional questions posed in institutionalizing, without a hearing, a now sane person who has been found criminally irresponsible.

In twenty-nine jurisdictions it is mandatory that hospitalization follow such acquittal. In twenty states hospitalization is discretionary, and three provide for a special procedure.[64]

It is entirely proper that a person who has committed a serious antisocial act, for which he is not criminally responsible, should be required to submit to custody, care and treatment. Sophisticated legal reasoning need not obscure the social fact of manifested danger to the community. The commission of socially harmful acts, regardless of mental condition, is a sufficient basis for confinement and treatment. Confinement without the availability and use of medical treatment, however, would be a perversion of the entire insanity defense.

Daniel Lee French was recently found not guilty of rape by reason of insanity. Denver District Judge Neil Horan requested the Governor to transfer him to the State Penitentiary "for security reasons."[65] The Governor complied with the request. Conceding the executive power to do this, one is still at a loss to explain the seemingly superfluous separate sanity trial. The availability of psychiatric help is extremely limited at the penitentiary. A verdict of irresponsibility is turned into prison confinement on the suggestion of a judge and the power of an executive order.[66]

The Supreme Court of Colorado has held that, "One who is insane when he commits an act prohibited by law cannot be held guilty of a crime. A statute providing that insanity shall be no defense to a criminal charge would be unconstitutional."[67] If some of the punitive aspects of criminal responsibility can be invoked on the *ex parte* decision of elected officials, the constitutional protection is little more than a slogan.

C. *The Criminal Process Delay Decision*

1. THE TESTS

a. Trial—The mental condition of an accused will result in criminal irresponsibility only if he was *insane* at the time of the commission of the act. Mental condition, however, is legally relevant for other decisions at four other time periods: (1) before or at trial, (2) sentencing, (3) execution of the death sentence, and (4) appeal.

The Colorado statute, in accordance with the common law rule, will not require an accused to stand trial if he is presently *insane*.[68]

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63 *In re* Dowdell, 169 Mass. 387, 47 N.E. 1033 (1897).

64 The Mentally Disabled and the Law, Table XI-A, at 373-82 (Lindman & McIntyre ed. 1961) provides a reference to the procedure in all the states. The figures quoted are from this source.

65 Rocky Mountain News, June 8, 1962, p. 10, col. 1.

66 The *French* case has other aspects which are difficult to grasp. The district attorney decided to prosecute the accused for a rape which occurred shortly before the rape at issue in the sanity trial. Apparently the prosecutor's office believes it has the power to continue going back in time, when a series of crimes are involved, and force the defendant into successive sanity trials. The presumption of continuing insanity would seem to preclude trial until the defendant has recovered. If this procedure is upheld, the constitutionality of the automatic commitment procedure becomes a very urgent question.

67 Ingles v. People, 92 Colo. 518, 522, 22 P.2d 1109, 1111 (1933).

68 Colo. Rev. Stat. §39-8-6(1) (1953). "A person charged with the commission of a felony or a misdemeanor who becomes insane after such commission shall not be tried for the offense while his insanity continues . . . ."

The statutory language seems broad enough to not require an accused to plead to an indictment or information if presently *insane.*

Several policy goals of the criminal law are furthered by requiring some minimal mental competence at the time of trial. The accused must be able to rationally assist counsel in the preparation and defense of his case. He should be able to comprehend the nature of the proceedings in order to play an intelligent part in this public drama involving the conflict between "good and evil."[69] Notions of humanitarianism dictate that we avoid the public spectacle of fixing guilt on a bewildered, disorganized defendant. We require him to be as mentally alert as his natural endowments permit in order to compete on equal terms with his accusers.

The test for determining sanity at the time of trial is:

> . . . The defendant is not to be considered as insane if he has sufficient intelligence to understand the nature and object of the proceeding against him and to rightly comprehend his own condition with reference to such proceeding . . . and has sufficient mind to conduct his defense in a rational and reasonable manner, although on some other subjects his mind may be deranged or unsound.[70]

Contrary to the tests for criminal irresponsibility, every state, except Washington which applies the common law, appears to legislatively define the test for delay of the criminal process.

In thirty-four jurisdictions the state of mind required is that of *insanity.*[71] In some of these states insanity is equated with the test for criminal irresponsibility, while in others, as in Colorado, insanity is descriptive of alternative mental conditions.[72] Seventeen states use the term "mentally defective" or its equivalent in the statutory definition.[73]

The Colorado test indicates a legislative awareness of the different role that mental condition plays throughout the criminal process. It is directed to an inquiry almost solely related to the cognitive aspect of the personality. The criticisms directed to the "right and wrong" formulation as a test for criminal irresponsibility are not as relevent here. The defendant, and society, have good reason to require an expeditious decision. If proper changes are made in disposing of the responsibility question, the medical and semantical problems at this point will vanish.

b. *Sentence*—If the accused becomes *insane* after a verdict of guilty but before sentence is pronounced the judge must delay imposition of sentence. This was the rule at common law and, with variations, is still universally accepted.[74]

The time between verdict and sentence is most important. Matters are being considered which may weigh heavily in the court's sentence. Since American jurisprudence rarely makes provision for sentence review, it is imperative that the accused have

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69 Roche, The Criminal Mind 67 (Evergreen ed. 1959).

70 Colo. Rev. Stat. §39-8-6(8) (1953).

71 The Mentally Disabled and the Law, Table XI-B, at 386-94 (Lindman & McIntyre ed. 1961).

72 *Ibid.*

73 *Ibid.*

74 Weihofen, Mental Disorder As A Criminal Defense 459 (1954).

an opportunity to intelligently and rationally assist in the presentation of data to the court.[75]

In Colorado, the defendant has a right to make a statement in his own behalf and to present information in mitigation of punishment.[76] The same is true in the federal jurisdiction.[77] The usual safeguards surrounding a trial are not constitutionally required after a verdict of guilty. There is no right of confrontation or cross-examination, and hearsay rules are unavailing.[78] This makes it very important that the defendant be able to explain some of the items offered against him and assist in presenting mitigating evidence.

The Colorado statute reads:

> . . . The defendant is not to be considered as insane if he has sufficient intelligence to understand the nature of the proceeding against him, the charge of which he has been convicted, and the nature and extent of the possible punishment that may be administered to him, and has sufficient mind to know of any facts which might tend to mitigate his offense and to communicate such facts to his atttorney or to the court.[79]

Colorado, with most jurisdictions, requires that the defendant be able to *appreciate* the potential punishment. The underlying reason is probably a belief that the deterrent value of punishment is minimized unless there is an appreciation of its nature. This represents a rather naive understanding of the psychological variations present in humans.[80] A complete psychological abstract of the defendant would have to be available before a judge would be certain of the deterrent value of any sentence.

c. *Execution*—In an exquisite display of compassion, the law will not permit an insane person to be executed. Thurmond Arnold uses this legal curiosity to illustrate "how conflicting rational and moral principles condition the behavior of civilized institutions, just as taboos condition the behavior of savage institutions."[81]

Whereas many authorities believe that constitutional protection surrounds the right not to be tried or sentenced while insane, delay of execution is held to be a matter of grace and not of right.[82] If suspension of execution is a matter of grace, then the condemned man has no argument about the procedural implementation of the rule.[83]

The common law made no provision for delaying execution of sentence because of insanity when the punishment was less than death.[84] This is the contemporary view and most jurisdictions will simply transfer a mentally ill person from a penal to a mental institution. The principle reason for the rule appears to be that

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75 United States v. Wiley, 184 F. Supp. 679 (N.D. Ill. 1960). Connecticut has a sentence review division of the Superior Court.

76 Colo. R. Crim. P. 32(b). See *Symposium*, 34 Rocky Mt. L. Rev. (1961).

77 Fed. R. Crim. P. 32(a).

78 See, e.g., Williams v. New York, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949).

79 Colo. Rev. Stat §39-9-6(8) (1953).

80 See Waelder, *Psychiatry and the Problem of Criminal Responsibility*, 101 U. Pa. L. Rev. 378 (1952).

81 Arnold, The Symbols of Government 10-13 (1935). Arnold relates the story of the condemned prisoner who attempted suicide and was kept alive until the execution by blood transfusions. The blood was donated by the prison guards!

82 The Mentally Disabled and the Law, op. *cit. supra* note 64, at 357-58 for numerous citations.

83 Nobles v. Georgia, 168 U.S. 398, 18 S.Ct. 87, 42 L.Ed. 515 (1897); Solesbee v. Balkcom, 339 U.S. 9, 70 S.Ct. 457, 94 L.Ed. 604 (1950); Berger v. People, 123 Colo. 403, 231 P.2d 799 (1951).

84 Weihofen, Mental Disorder As A Criminal Defense 464-65 (1954).

society is not served by executing an insane man. Further, the condemned man must be able to *appreciate* the reasons why the state is taking his life.

Whether society is ever served by capital punishment is questionable. Debate on that question is beyond the scope of this article. The illogic of finding a condemned man insane, subjecting him to extensive and expensive psychiatric care so that he goes into the gas chamber with the ability to *appreciate* seems clear.[85]

The Colorado statute provides that:

> . . . The defendant is not to be considered as insane if he has sufficient intelligence to understand the nature of the proceeding against him, the charge of which he was convicted, the purpose of his punishment, and the impending fate which awaits him, and has sufficient mind to know of any facts which would make his punishment unlawful and to communicate such facts to his attorney or to the court.[86]

Justice Traynor of the California Supreme Court has said, "Is it not an inverted humanitarianism that deplores as barbarous the capital punishment of those who have become insane after trial and conviction, but accepts the capital punishment of sane men."[87] The overriding consideration of disutility in executing anyone tends to make a horrible joke out of the consideration shown the mentally ill.[88]

d. *Appeal*—There is no provision in the Colorado statute, and no case appears to have arisen, concerning delay of an appeal pending restoration of sanity. Some few jurisdictions feel that meritorious grounds for appeal may be lost if the defendant cannot intelligently assist counsel.[89]

The defendant has a minimal role to play in perfecting, briefing and arguing an appeal. Unless questions of fact are involved he need not even be consulted since the grounds are probably the sole result of the attorney's appraisal of the case.[90] Under our present system, delay in making an appeal may be positively harmful to the defendant. A clearly unjustified conviction should be corrected at the earliest moment.[91]

2. PROCEDURE

a. *Raising the question*—The Colorado statute is somewhat vague on just how, and by whom, an allegation of present insanity may be made. The statute states that:

> [T]he judge of the court in which the criminal charge against such defendant is or has been pending, if he believes the defendant is insane or has a reasonable doubt thereto, *of his own motion* may impanel a jury to determine by its verdict

85 See Duffy and Jennings, The San Quentin Story 80-82 (1950). Weihofen, *A Question of Justice: Trial or Execution of an Insane Defendant*, 37 A.B.A.J. 651, 652 (1951).

86 Colo. Rev. Stat. §39-8-6(8) (1953).

87 Phyle v. Duffy, 34 Cal. 144, 159, 208 P.2d 668, 676-77 (1949). (Concurring opinion.)

88 The suggestion that new reasons or evidence might be forthcoming, as a basis for the rule, is unconvincing. Trial and appeals were had and counsel can convey factors which might influence a pardon. See Guttmacher and Weihofen, Psychiatry and the Law 434 (1952).

89 Williams v. State, 135 Tex. Crim. App. 585, 124 S.W.2d 990 (1938); People v. Skwirsky, 213 N.Y. 151, 107 N.E. 47 (1914).

90 The grounds for appeal may be only too well known to the lawyer if he is responsible for an inartistic trial.

91 See Note, *Appellate Proceedings Stayed During Insanity of Accused*, 56 Colum. L. Rev. 133 (1956).

> whether such defendant has thus become and then is insane. [S]uch allegation is made in a verified petition filed in the court where the criminal charge is or has been pending, supported by the affidavit of a physician who is a specialist in mental diseases, stating as his opinion that the defendant has thus become and is insane.[92] (Emphasis added.)

It is clear that the judge may raise the issue on his own motion and the defendant, or counsel, may do so by verified petition supported by a psychiatrist's affidavit. In the unlikely situation of the district attorney's wishing to urge the defendant's present insanity, the court would, no doubt, be persuaded to make this its own motion.

The common law procedure requires no special plea or formality and can be made orally, by affidavit or in any form sufficient to raise a doubt.[93] The question could be raised not only by the court, defendant or his counsel, but by any person.[94] The question in Colorado would be whether any interested party could present a properly supported verified affidavit. The question seems never to have come up.

The majority of the states have retained the substance of the common law rule.[95] Ohio is the only other state which requires the physician's affidavit.[96]

b. *Hearing*—When the issue of present insanity arises, many states distinguish the type of hearing available according to the time the insanity allegedly emerged. Pre-conviction and post-conviction insanity is handled in much the same fashion in Colorado.

If a verified petition and psychiatrist's affidavit are properly filed in the court where the criminal charge is, or has been pending:

> [T]he judge of the court may make such investigation as to the condition of the defendant's mind as *in his discretion* he deems advisable. If after such investigation the judge believes that the defendant has thus become and then is insane, or has a reasonable doubt thereto, with all convenient speed, he must inpanel a jury to determine by its verdict whether the defendant has thus become and then is insane.[97] (Emphasis added).

Thus, in Colorado, the ultimate decision whether a defendant has a hearing on the issue of present sanity rests with the trial judge. The defendant is given a statutory procedure for *raising the question* but this is obviously not a hearing on the merits. There is no provision for the presentation of evidence to the judge, without a jury, for the purpose of showing present insanity. The court is empowered to make an investigation, and this could include hearing defendant's evidence, but only to decide whether cause exists to impanel a jury.[97a]

No Colorado case has been found which deals with a possible abuse of discretion by the trial court in failing to impanel a jury

92 Colo. Rev. Stat. §39-8-6(3),(4) (1953).
93 Weihofen, Mental Disorder as a Defense 440-41 (1954).
94 *Id.* at 441.
95 Then Mentally Disabled and the Law, *op. cit. supra* note 64, at 360.
96 Ohio Rev. Code. Ann. §2945.35 (Baldwin 1958).
97 Colo. Rev. Stat. §39-8-6(4) (1953).
97a Evidence is not inadmissible at such a hearing solely because it antedates the entry of judgment and sentence. See Garrison v. People, 15 Colo. Bar Ass'n Adv. sh. 160 (1963).

on the issue of incompetency before trial, or after conviction and prior to sentencing. All the major cases in this area deal with insanity prior to execution of the death sentence. Other jurisdictions have been reluctant to find an abuse of discretion and reversals are rare.[98]

It may come as a surprise that there is apparently no constitutional right to a hearing; that a defendant may be precluded from being heard, presenting witnesses and cross-examining the court-appointed psychiatrist.[99] Three reasons are offered for this position: (1) This is merely a continuation of the common law rule, (2) The plea of present insanity does not affect guilt or innocence, and (3) An appellate court is available to order a hearing in the event that defendant made a proper showing in the trial court.[100]

If the reasons for not trying or sentencing a mentally ill defendant are valid, then a more satisfactory method for deciding that issue must be devised.

Defendants are probably reluctant to plead insanity in order to delay trial or sentencing. If they are mentally disturbed at, or near, the time of trial the effort will be made to escape criminal responsibility. A very different matter is at issue when the defendant seeks to avoid the death penalty.

The earlier disputes concerning the right to a jury on the issue of insanity at the time of execution of the death penalty have been positively resolved by statute.[101] As in the other cases of present insanity, the trial judge must entertain a "reasonable doubt" before he is required to impanel a jury. The statute which formerly governed this area stated: "In all . . . [cases of present insanity] it shall be the duty of the court to impanel a jury to try the question whether the accused be at the time of impaneling insane or lunatic."[102]

In *Bulgar v. People*,[103] although the point was not directly before the court, it was indicated that since the statute did not state the manner in which insanity should be ascertained at the outset, the common law should apply. This, of course, meant that the decision to impanel a jury was in the absolute discretion of the trial court. The earlier statute could, and probably should, have been interpreted as changing the common law.[104] All the cases following *Bulgar* are in accord with the dictum.[105]

Colorado follows the common law in holding that only the court where the trial was held has jurisdiction to make inquiry into the present mental condition of a condemned defendant.[106] The defendant remains in the technical custody of such court which has

98 See Weihofen, *op. cit. supra* note 93, at 444-45, 447.

99 See State v. Neu, 180 La. 545, 550-51, 157 So. 105, 106 (1934). *But cf.* Higgins v. United States, 205 F.2d 650 (9th Cir. 1953), *cert. denied* 346 U.S. 870, 74 S.Ct. 134, 98 L. Ed. 379 (1954).

100 While this question has received little attention, see Weihofen, *op. cit supra* note 93, at 446. State v. Neu, *supra* note 99.

101 Colo. Rev. Stat. §39-8-6(4) (1953).

102 Colo. Stat. Ann. ch. 48, §7 (1935).

103 61 Colo. 187, 193, 156 Pac. 800, 804 (1916).

104 Berger v. People, 123 Colo. 403, 417, 231 P.2d 799, 806 (1951). (Holland, J., dissenting.)

105 Shank v. People, 79 Colo. 576, 247 Pac. 559 (1926); People *ex rel.* Best v. Eldred, 103 Colo. 334, 86 P.2d 248 (1938); Berger v. People, 123 Colo. 403, 231 P.2d 799 (1951); Leick v. People, 140 Colo. 564, 345 P.2d 1054 (1959).

106 People *ex rel.* Best v. Eldred, *supra* note 105.

responsibility to see that the sentence is carried out. Thus, the condemned man is denied access to other judicial remedies for a determination of present sanity.

In addition to answering the jury trial question, *Bulgar* also stated that, "We are very certain, however, that it was intended by the common law and the statute that a collateral hearing of this character should not be subject to review by an appellate tribunal."[107] The court thus precluded review by writ of error or certiorari.

If the defendant convinces the trial judge that doubt exists concerning his present sanity then, by statute, the trial is deemed a civil proceeding. The jury is selected as in civil cases. The burden is on the defendant to prove, by a preponderance of the evidence, insanity at that time *and* as having occurred since the commission of the offense, or since the verdict of guilty, or since the judgment, as the case may be.[108]

This entire statutory scheme has been held constitutional.[109] The court relied on decisions by the Supreme Court of the United States which characterized these proceedings as analagous to reprieves. This power is usually vested in the executive, rarely subject to judicial review, and therefore none of the usual safeguards surrounding the trial of guilt are required.[110]

c. *Disposition if Found Incompetent*—Colorado, along with at least thirty-nine other jurisdictions, requires mandatory hospitalization if the defendant is found presently insane. The defendant is to be confined in the State Hospital at Pueblo until he is no longer insane.[111]

d. *Recovery*—In many states the certificate of the superintendent of the hospital where the defendant is confined is sufficient to warfant resumption of the criminal process.[112] The Colorado statute, however , treats the certificate of recovery as the first step in the process. The certificate is sent to the trial judge who must then notify the district attorney and then with all due speed impanel a jury. The court has no discretion as to a jury trial for this decision.[113] The burden is upon the defendant to prove by a preponderance of the evidence that he is insane.[114]

If the defendant is found sane then he is to be quickly tried, sentenced or executed as the case may be. If he is found insane, in spite of the hospital's opinion, he is recommitted on the same conditions as before.[115]

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107 Bulgar v. People, 61 Colo. 187, 198, 156 Pac. 800, 804 (1916).

108 Colo. Rev. Stat. §39-8-6(7) (1953).

109 Leick v. People, 140 Colo. 564, 345 P.2d 1054 (1959).

110 Nobles v. Georgia, 168 U.S. 398, 18 S.Ct. 87, 42 L.Ed. 515 (1897); Solesbee v. Balkcom, 339 U.S. 9, 70 S.Ct. 457, 94 L.Ed. 604 (1950); Williams v New York, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949).

111 Colo. Rev. Stat. §39-8-6(5) (1953). The defendant, in addition to present insanity, must prove that he has become insane *since* the time at issue.
The Mentally Disabled and the Law 361 (Lindman & McIntyre ed. 1961).

112 Weihofen, *op. cit. supra* note 93, at 458.

113 Colo. Rev. Stat. §39-8-6(5) (1953).

114 Colo. Rev. Stat. §39-8-6(7) (1953).

115 Colo. Rev. Stat. §39-8-6(5) (1953). The court has the power to, and must at the district attorney's request, order the defendant committed for observation and examination under the §39-8-2 (Supp. 1961) procedure in case of any of these hearings.

III. PROCEDURAL IMPLEMENTATION OF THE IRRESPONSIBILITY DECISION

A. Raising the Defense

In Colorado, and at least nine other states, the defense of insanity must be specially pleaded.[116] The defense must be pleaded orally at the arraignment in the form, "Not guilty by reason of insanity at the time of the alleged commission of the crime."[117] The court may, for good cause shown, permit the plea to be entered any time prior to the trial.

Failure to raise the defense at the proper time and in the proper form will result in the unavailability of insanity as a defense. Before 1927, the defendant could raise the question by a general plea of not guilty. The present procedure is said to have preserved the defendant's constitutional right to the defense and his right to a jury trial.[118] The statute is viewed as having affected a procedural change only.

There is no question about the propriety of requiring a special plea. In view of the technical nature of the proof involved, the prosecutor has a legitimate right to have adequate notice. So long as our present framework exists, the reason for the rule is clear and if the rule is not rigidly applied, it serves a useful purpose. Colorado's special plea requirement seems preferable to allowing the plea initially at the trial or allowing it under a general plea of not guilty.[119] This procedure would be harmonious with the suggestion that there should be a liberal pre-trial exchange of data and psychiatric evaluations.

B. Trial

The Colorado Legislature and Supreme Court have experienced grave difficulties in deciding whether the insanity issue must, or should, be tried separately. There have been at least four major changes on this point since 1927. The net result is that the present law is essentially the same as it was in 1927. If the defendant pleads the defense of insanity, and joins with it other pleas not involving insanity, the trial judge has the discretion to try the insanity issue alone or hold one trial upon all issues raised.[120]

In *Ingles*[121] the court commented on the constitutionality of the trial court's discretion in granting separate trials. Explicitly noting that it was not deciding the question, the court said any possible problem would be obviated by hearing all defenses in a single trial.[122] In *Wymer*[123] the defendant complained that it was error to deny him a separate trial on the insanity question since he was compelled to submit to observation and examination upon pleading insanity. The court cited *Ingles* as dispositive of the question.[124]

116 Weihofen, Mental Disorder as a Criminal Defense 357 (1954). Fourteen jurisdictions provide for prior notice of intent to rely on an *alibi* defense.
117 Colo. Rev. Stat. §39-8-1 (Supp. 1960). Colo. R. Crim. P. 11(b). See 34 Rocky Mt. L. Rev. 20 (1961).
118 Ingles v. People, 92 Colo. 518, 522-23, 22 P.2d 1109, 1111 (1933).
119 A plea of insanity may not be entered by the court on its own motion. See Mundy v. People, 105 Colo. 547, 100 P.2d 584 (1940); Boyd v. People, 108 Colo. 289, 116 P.2d 193 (1941). But see Overholser v. Lynch, 288 F.2d 388 (D.C. Cir. 1961).
120 Colo. Rev. Stat. §39-8-3(1) (Supp. 1960).
121 Ingles v. People, 92 Colo. 518, 22 P.2d 1109 (1933).
122 *Id.* at 530, 22 P.2d at 1114.
123 Wymer v. People, 114 Colo. 43, 160 P.2d 987 (1945).
124 *Id.* at 49, 160 P.2d at 990.

It is true that *Ingles* upheld the commitment and examination aspect of the statute but, as noted previously, it did not decide the single trial issue. Nevertheless, the court upheld the procedure, feebly adding that to hold otherwise would mean every conviction of crime involving an insanity defense prior to 1927 was unconstitutional.[125]

The legislative experiment in 1951 required that the defendant be first tried on the substantive offense if he entered pleas not limited to insanity.[126] Defendant was conclusively presumed to be sane at the first trial and he might, in the discretion of the court, be tried by the same jury.[127]

Having "decided" that the trial court was properly vested with discretion to have separate trials or one trial on all issues, the question remained whether the judge could properly order a single trial first on the issues raised by defenses other than insanity. The *Martin* case came as close as any to providing an answer.[128] The trial judge set the trial on the substantive crime first but without ordering commitment and observation of the defendant. This was held to be error since "the commitment must follow immediately after the entry of the plea."[129] The court went on to volunteer that,

> "While we have considerable doubt as to whether an accused person can be compelled by statute to first stand trial upon the issues framed by a plea of not guilty, and compel withholding of determination of his mental responsibility until after a verdict has been rendered on the not guilty plea, we are not called upon to determine." [*sic*].[130]

In 1955, the legislature reacted to the court's doubts by giving the defendant the right to demand a separate trial on the insanity issue before being tried on any other defense.[131] At the same time the troublesome portions of the statute dealing with the conclusive presumption of sanity and trial of both issues before the same jury were omitted. The *Leick*[132] case made it clear that the plea of insanity is an admission of the offense charged but only for the purposes of the plea.

The supreme court has made it abundantly clear that separate trials are but sections of a single trial. Thus the trial court is not required to enter a judgment of sanity when the first trial is concluded so that the defendant may appeal.[133]

Conducting a separate trial first on the sanity issue seems sensible. The testimony on sanity is often technical and difficult to follow. A much wider area of conduct is disclosed at such a trial and this is bound to confuse and prejudice the jury if it is also to decide guilt.[134] In the framework of our existing system, the separate trial with wide evidentiary latitude is of real merit.

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125 *Ibid.* See Martinez v. People, 124 Colo. 170, 235 P.2d 810 (1951).
126 Colo. Rev. Stat. §39-8-3 (Supp. 1960).
127 *Ibid.*
128 Martin v. District Court, 129 Colo. 27, 272 P.2d 648 (1954).
129 *Id.* at 29, 272 P.2d at 650.
130 *Id.* at 30, 272 P.2d at 650.
131 Colo. Rev. Stat. §39-8-3 (Supp. 1960).
132 Leick v. People, 136 Colo. 535, 322 P.2d 674 (1958).
133 *Ibid.*
134 See Trujillo v. People, 372 P.2d 86 (Colo. 1962).

C. Burden of Proof

Who has the burden of convincing the triers on sanity or insanity? Must the state first show that the defendant is sane or must the defendant offer proof of insanity?

All the states agree that every man is presumed sane until the contrary is demonstrated.[135] Thus the initial burden of going forward with some minimum amount of evidence of mental disorder rests with the defendant.[136] The first troublesome point in this process is deciding how much, and what kind of evidence will discharge this duty.

Nearly all the states agree that evidence sufficient to raise a *doubt* concerning defendant's responsibility must be produced.[137] Colorado has not definitely resolved this problem. Some cases speak in terms of "evidence tending to show insanity,"[138] while others use the less exacting "some evidence" phraseology.[139] The District of Columbia has long adhered to the "some evidence" rule and explains that defendant's obligation is met if he produces a "scintilla" of evidence.[140] Without being certain of the exact standard Colorado applies, it is safe to assume that the burden on defendants is minimal. Defense counsel's strategy often includes coming forward with a bare suggestion of mental disorder. The major defense evidence will be presented, in rebuttal, after the People present their case-in-chief.

After the judge is satisfied that there is a jury question, the problem remains as to who bears the "risk of non-persuasion," or less accurately, the "burden of proof." There are three major approaches to this problem.

The federal jurisdiction and about half the states, including Colorado,[141] require the state to establish *responsibility* beyond a reasonable doubt.[142] The remaining jurisdictions impose a duty on the defendant to establish *irresponsibility*, but only by the civil standard of a preponderance of the evidence.[143] Oregon formerly required the defendant to prove his irresponsibility beyond a reasonable doubt. This was held not to be a violation of the "due process clause" in *Leland v. Oregon*.[144] Oregon, however, has amended its statute to simply require of the defendant proof by a preponderance of the evidence.[145]

The proper form of verdict to be submitted to the jury is a problem which continues to plague Colorado courts. The 1927 statute required that when the defendant pleaded insanity, "the jury *shall be given* a form with the words 'not guilty by reason of

135 Jordan v. People, 19 Colo. 417, 36 Pac. 218 (1894). The presumption of sanity applies in civil and criminal actions. North American Acc. Ins. Co. v. Cavaleri, 98 Colo. 565, 58 P.2d 756 (1936); Hanks v. McNeil Coal Corp., 114 Colo. 578, 168 P.2d 256 (1946).

136 Weihofen states that there is virtual unanimity among the states in imposing the burden of going forward on the defendant. Weihofen, Mental Disorder as a Criminal Defense 227 (1954).

137 *Id.* at 227.

138 Graham v. People, 95 Colo. 544, 546, 38 P.2d 87 (1934); Arridy v. People, 103 Colo. 29, 33, 82 P.2d 757, 759 (1938).

139 Ingles v. People, 90 Colo. 51, 56, 6 P.2d 455, 457 (1931).

140 See *In re* Rosenfield, 157 F. Supp. 18 (D.C.D.C. 1957); Goforth v. United States, 269 F.2d 778 (D.C.Cir. 1959).

141 Nesbit v. People, 19 Colo. 441, 461, 36 Pac. 221, 228 (1894) (By implication); Pribble v. People, 49 Colo. 210, 215, 112 Pac. 220, 222 (1910).

142 The Mentally Disabled and the Law 350 (Lindman & McIntyre ed. 1961).

143 *Ibid.*

144 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 1302 (1952).

145 Ore. Rev. Stat. §136.390 (1961).

insanity.' "[146] (Emphasis added.) In *Mundy*,[147] questions of guilt and sanity were tried together before the same jury. The trial court concluded that there was no evidence of insanity and failed to give the jury the insanity form of verdict. The court held that while the presumption of sanity remained and the burden of proof was unchanged, "nevertheless, under the statute the *making* of the insanity plea and not the *state of the evidence*, call for the special form of verdict."[148] The court went on to explain that even if the defendant does not produce a single witness or testify himself, the plea must be submitted to the jury.[149] This would indicate that the entry of the plea was of sufficient weight to overcome the initial presumption of sanity. Yet the *Ingles* case unequivocally stated that "a plea that the defendant was insane is no more evidence tending to show insanity than is an information or indictment evidence tending to show guilt."[150]

In *Archina*[151] the court attempted, with little success, to explain *Mundy* as limited by the mandatory language in the statute and the fact that it involved a single trial of all issues. The *Archina* court was under the 1951 amendment which simply required that "the jury shall return a verdict either that the defendant was sane . . . or that he was insane. . . ."[152] Even if the statutory change was relevant, and it seems not to be, the problem of relating the statute to the presumption of sanity and defendant's initial burden of going forward remains. This is particularly true since *Ingles* held the plea of insanity entitled to no evidentiary weight. In 1955 the legislature returned to the mandatory language of the 1927 statute. "In a trial involving the plea of not guilty by reason of insanity, the jury *shall be given* a form of verdict . . . either that the defendant was sane at the time the alleged offense was committted or that he was insane at that time."[153] (Emphasis added.) Thus the illogic of *Mundy* remains and *Archina's* explanation is attenuated.

How can the trial judge be forced to submit an insanity verdict form if he decides that there is no evidence to overcome the presumption of sanity? The statute, to make any sense, must be read to mean that if the defendant meets the burden of going forward then, and only then, must the statutory verdict form be submitted to the jury.

D. Medical Examination

Upon making the plea of not guilty by reason of insanity, the judge must commit the defendant to a hospital for observation and examination by psychiatrists.[154] The period of commitment must not exceed thirty days.[155] The judge also has power to appoint impartial experts to examine the defendant during this period.[156]

146 Colo. Sess. Laws 1927, ch. 90, p. 297.
147 Mundy v. People, 105 Colo. 547, 100 P.2d 584 (1940).
148 *Id.* at 551, 100 P.2d at 586.
149 *Ibid.*
150 Ingles v. People, 90 Colo. 51, 56, 6 P.2d 455, 457 (1931).
151 Archina v. People, 135 Colo. 8, 41, 307 P.2d 1083, 1100 (1957).
152 Colo. Rev. Stat. §39-8-4 (1953).
153 Colo. Rev. Stat. §39-8-4(1) (Supp. 1960).
154 Colo. Rev. Stat. §39-8-2 (Supp. 1961). The statute specifies the Colorado Psychopathic Hospital or the State Hospital at Pueblo. A judge of the Denver District Court recently committed a defendant to first one, then the other hospital. He apparently was not satisfied by the opinion rendered after the first commitment.
155 *Ibid.*
156 *Ibid.*

The medical examination under this statute is subject to some specific regulations. The doctor may use confessions, admissions or any other available evidence for questioning the defendant and forming an opinion of his sanity.[157] He may administer certain drugs and use the polygraph to aid in forming an opinion and he may testify to their results at the sanity trial.[158]

The automatic commitment and observation procedure is required in at least twenty-three states and the District of Columbia.[159] It has the great merit of affording an indigent defendant the *possibility* of a speedy, thorough and impartial examination. There is a real need for current statistical data on the number of defendants found sane and insane by the staffs of Colorado hospitals. One suspects an unconscious, institutional bias toward sanity findings.[160]

Early experience under the statute, as reported by Weihofen, indicated that juries are very much persuaded by the hospital finding.[161] If this continues to be true then we must be clear about where the effective decision-making power lies, appraise the consequences and decide if this is to be encouraged. If the jury is a "rubber-stamp" for the hospital report, the time and expense of jury trials must be weighed against any sentimental value they may have. The results of the study reported here suggest that many defendants drop their insanity defense after an adverse finding by the hospital staff.

The commitment procedure has withstood all constitutional attacks. The statute was said to deprive a person of due process, to compel one to testify against himself and to unconstitutionally deprive a person of his liberty. The court has reasoned that a person accused of a crime, whose sanity is in question, could be confined at common law under conditions not as pleasant as those currently provided. There is no compulsion to testify against oneself since, as noted, any evidence first obtained at the examination is inadmissible on the issue of guilt. Since the legislature may constitutionally alter the procedures, the defendant must take the burdens with the benefits.[162]

The defendant is, of course, free to engage such experts as he desires and can afford.[162a] The district attorney may also engage psychiatrists to examine the defendant. The statutory procedure

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157 Cf. Ingles v. People, 90 Colo. 51, 60, 6 P.2d 455, 459 (1931).

158 Colo. Rev. Stat. §39-8-2 (Supp. 1961). No substantive evidence obtained for the first time may be offered on the issue of guilt except at a murder trial to rebut evidence of defendant's ability to form the requisite intent.

159 The Mentally Disabled and the Law, op. *cit. supra* note 142, at 351.

160 Weihofen reports that 26% of the Colorado defendants committed during the first twenty-two years of the procedure were found insane by hospital authorities. Weihofen, Mental Disorder as a Criminal Defense 338 (1954). See Weihofen, *An Alternative to the Battle of Experts: Hospital Examination of Criminal Defendants Before Trial*, 2 Law & Contemp. Prob. 419 (1935) for an outdated but thorough study of Colorado's experience under the statute.

161 *Ibid.*

162 See Ingles v. People, 90 Colo. 51, 6 P.2d 455 (1931); Ingles v. People, 92 Colo. 518, 22 P.2d 1109 (1933); Wymer v. People, 114 Colo. 43, 160 P.2d 987 (1945); Martin v. District Court, 129 Colo. 27, 272 P.2d 648 (1954). Weihofen, *Insanity as a Criminal Defense in Colorado*, 9 Rocky Mt. L. Rev. 213 (1942).

162a Goldstein and Fine, *The Indigent Accused, The Psychiatrist, and the Insanity Defense*, 110 U. Pa. L. Rev. 1061 (1962).

Bush v. Texas, 353 S.W.2d 855 (Tex. Crim. App. 1962), *cert. granted*, 31 U.S.L. Week 3128 (U.S. Oct. 16, 1962) (No. 75) raises the question whether an indigent accused has a constitutional right, in a state court, to the appointment of a psychiatrist when an insanity defense is raised.

has been held not to be exclusive as to the state or the defendant.[163] Under these circumstances, in order to avoid current abuses, the district attorney should be compelled to require his psychiatrists to reveal the source of their employment, the purpose of the examination and the consequences likely to result, *e.g.*, giving testimony based on the interview.

The adversary process is not well adapted to fostering rational decisions when highly technical issues and emotionally charged facts are involved. The spectacle of partisan experts, emotionally involved relatives and friends, and confused lawyers trying to determine a defendant's mental condition is often appalling. Conceding the difficulty, perhaps impossibility, of radical change, the law should attempt to approximate calm, dispassionate decisions within the present framework.

One suggestion, easily accomplished, is to require the district attorney and the defendant to share freely, in advance of trial, *all* the evidence available on the mental condition of the defendant. Ultimately, a panel of impartial psychiatrists and psychologists should be available. The district attorney and the defendant should, under court supervision, be required to utilize a limited number of experts from such panel to the exclusion of any other experts. The expenses involved can be shared if the defendant is financially able.

Until such time as we have a device which diminishes the "shopping for experts," there should be the freest possible pretrial exchange of data. The benefits of avoiding surprise, shabby and intimidating tactics, and creating an atmosphere of honest inquiry should be immediately obvious.

E. Testimony

In all states but three, the opinion of a layman on the sanity of the defendant is admissible in evidence.[164] There is some question as to who is an expert and who is a layman in this context. For example, is a qualified clinical psychologist an expert for this purpose? Must a medical doctor be a specialist in nervous and mental disorders?

There is no Colorado case directly on point concerning the psychologists. A judge of the Denver District Court recently refused to allow two clinical psychologists to testify as *experts*. They did testify as *laymen* because the court felt that giving an opinion, as an expert, on insanity constituted the practice of medicine and required a medical license.[165] The weight of authority elsewhere is clearly to the contrary.[166] When a clinical psychologist is properly qualified he should be able to testify as an expert on the question of sanity. He administers a battery of objective tests which are standardized, accepted and used by many psychiatrists. His entire training is devoted to evaluating human personality.

163 Early v. People, 142 Colo. 462, 352 P.2d 112 (1960). This case indicates real possibilities for abuse by the district attorney. Two doctors were hired and examined the defendant prior to arraignment. The entire procedure had an aura of deception and calculated abuse of defendant's civil rights. The dissent properly condemned this procedure.

164 New York, Maine and Massachusetts. The Mentally Disabled and the Law, *op. cit. supra* note 142, at 352.

165 This occured in the unreported case of People v. French, Denver District Court, Neil Horan, J., (1962). See Colo. Sess. Laws 1961, ch. 192, §108A-1-1 *et. seq.* for Psychologists Licensing and Regulation Act.

166 78 A.L.R.2d 919 (1961).

Two Colorado cases reveal that psychologists gave testimony at the trial. The court did not indicate any disapproval of this procedure.[167] If the trial judge carefully weighs the psychologist's qualifications and experience, there is no valid reason for not qualifying him as an expert.

The Colorado statute requires that the court-appointed doctor and those who perform the examination at the hospital be specialists in mental diseases.[168] A privately-retained doctor's ethics may permit him to express an expert opinion in a field in which he does not practice and has no special training. Only physicians with special training in mental disorders or considerable clinical experience should be qualified as experts on a sanity question.

Colorado, along with the great majority of states, permits a non-expert to give his opinion on the question of sanity. Such a witness must show some adequate means of becoming acquainted with the person involved, he must detail the facts and circumstances concerning his acquaintanceship and the acts, conduct and conversation upon which his conclusion concerning sanity is based.[169] A non-expert may never base his opinion on a purely hypothetical question. [170] His opinion is, in short, based on personal observation of such duration and kind that the trial court is satisfied with his basis of observation.

The trial court has great discretion in allowing non-expert opinion. There is, for example, no abuse of discretion, *in refusing* to permit a lay opinion where such a witness did not see or know defendant until immediately *after* the crime and the acquaintance was of short duration.[171] Proximity in time to the crime is an important condition precedent for a lay witness to establish.[172]

There are several instances where lay opinion has been more persuasive than expert opinion.[173] A shocking crime and a defendant who does not dramatically display his illness will combine to create jury receptivity for non-expert opinion. The expert's courtroom demeanor is also a significant factor.[174]

The practice of permitting a layman to express an opinion concerning a medical condition which vexes psychiatrists is highly questionable. The popular conception of mental illness includes a complete breakdown of intellect, a loss of reason, and a serious loss of self-control.[175] The mass media project an image of a wild-eyed, disheveled individual who is incoherent and completely out of touch with reality. This is likely to condition the public's image. Psychiatrists know that the manifestations of mental disorder are many

167 Early v. People, 142 Colo. 462, 352 P.2d 112 (1960); Hammil v. People, 145 Colo. 577, 361 P.2d 117 (1961).

168 Colo. Rev. Stat. §39-8-2 (Supp. 1961).

169 Turley v. People, 73 Colo. 518, 216 Pac. 536 (1923).

170 *Ibid.*

171 Smith v. People, 120 Colo. 39, 206 P.2d 826 (1949). Lay witnesses who met defendant more than three months after the crime were held properly excluded. See McGonigal v. People, 74 Colo. 270, 220 Pac. 1003 (1923).

172 Leick v. People, 136 Colo. 535, 322 P.2d 674 (1958).

173 Wymer v. People, 114 Colo. 43, 160 P.2d 987 (1945). In Graham v. People, 95 Colo. 544, 38 P.2d 87 (1934), the state produced no witnesses to rebut the experts testifying that defendant was insane. The case was reversed and remanded for a new trial.

174 "Prosecutors tend to select psychiatrists who are conservative, more or less rigid and who tend to identify themselves with authoritarian viewpoints and with ruling class ideology, and who never question their premises." Roche, The Criminal Mind 112-13 (Evergreen ed. 1959).

175 Star, Shirley, *The Public's Ideas About Mental Illness.* Paper presented to the National Association for Mental Health (1955). Reprinted in Donnelly, Goldstein and Schwartz, Criminal Law 818 (1962).

and varied. The behavior patterns include the hyper-active and bizzare; and the passive and conforming.[176]

The real danger relates to the seriously ill individual whose behavior patterns are contrary to the popular conception of "crazy." Most laymen are no more qualified to give an opinion on his condition than they are to lecture on quantum mechanics. If a proper foundation is laid, a layman might be qualified to recall his first-hand impressions about the observed behavior of the defendant. He should never go further. Ideally, providing data to the expert outside the courtroom is probably the outer limits of a layman's effectiveness.

The law places many obstacles in the path of the expert witness:

> A physician is permitted to express his opinion based upon facts personally observed by him, in connection with the defendant's history given by the defendant . . . , also to express his opinion based upon facts that are in evidence. In the latter case the opinion is stated in answer to a hypothetical question. . . . He cannot express an opinion based, in whole or in part, upon information obtained from third persons who have not testified to the facts. A defendant is entitled to test the reliability of such statements made by a third person . . . by cross-examining . . . .[177]

An expert witness may testify that he *referred* to blood tests, psychological testing, nurses' charts and the opinions of other doctors. He is safe so long as he positively states that he formed his opinion independently and did not *rely* upon the sources.[178] The doctor must be careful not to mention that several of his colleagues agreed with his opinion. This has been held, in effect, to multiply the number of doctors asserting the opinion.[179]

The doctor's opinion is rarely the product of his exclusive efforts and observations. It is recognized hospital procedure to make a diagnosis based, in part, on the efforts of other specialists, such as psychologists, neurologists, laboratory technicians and even nurses. Frequently the entire staff observes and passes on the mental condition of a patient and then the superintendent makes his report to the court.[180] Thus, it would seem that while the doctor has learned the correct verbal formula to avoid the strictures of the "hearsay rule," he is often being less than honest.

The doctor should be required to state fully the various tests which were administered, and by whom, the results and the regularity of such procedure. He should disclose whether or not there were staff consultations and the opinion, if any, of the staff. If there was free pre-trial exchange of this information, as previously suggested, the defendant would be free to evaluate and investigate any phase of the procedure. This preserves the function

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176 See generally, Guttmacher and Weihofen, Psychiatry and the Law ch. 3 (1952); Roche, The Criminal Mind (Evergreen ed. 1959); Strecker, Ebaugh, Ewalt, Practical Clinical Psychiatry (7th ed. 1955).

177 Ingles v. People, 90 Colo. 51, 60, 6 P.2d 455, 459 (1931). See Cook v. People, 60 Colo. 263, 153 Pac. 214 (1915) on hypothetical questions.

178 Silliman v. People, 114 Colo. 130, 162 P.2d 793 (1945); Skeels v. People, 145 Colo. 281, 358 P.2d 605 (1961).

179 Carter v. People, 119 Colo. 342, 204 P.2d 147 (1949); Bauman v. People, 130 Colo. 248, 274 P.2d 591 (1954).

180 For procedure in Colorado hospitals see Weihofen, *An Alternative to the Battle of Experts: Hospital Examination of Criminal Defendants Before Trial*, 2 Law & Contemp. Probs. 419, 422 (1935).

of the "hearsay rule" and allows the doctor to maintain his integrity as a witness.[181]

A standard treatise cannot be read into evidence, or referred to in cross-examination of an expert, unless the witness concedes that he is familiar with it and used it to form his opinion.[182] Counsel advise their experts to eschew any knowledge of, or reliance upon, such treatises.[183]

The heart of the testimonial problem is posed at the dramatic moment when counsel asks, "Now doctor will you tell us if, on the date in question, the defendant was capable of distinguishing right from wrong, or being able to so distinguish, was able to choose the right and refrain from doing the wrong." The jury can disregard the expert, and sometimes they do, but the doctor's answer to this question is in reality an answer to the ultimate question at issue. The defendant's *responsibility* is directly and inseparately related to the answer.[184]

The simple truth is that we ask the psychiatrist to make a moral judgment about the defendant. Dr. James Galvin has affirmed in open court that, "a psychiatrist is no more qualified to determine the capacity of an accused to recognize right and wrong than a plumber."[185] Dr. Philip Roche states that in making this moral decision, "the psychiatrist, the juryman, and the accused, have a common genealogy of morals."[186]

When a psychiatrist decides that the accused was, or was not, suffering from some type of mental illness, having a temporal connection with his unlawful act, he has gone as far as his training allows. This is a clinical function. If all the law requires of the doctor is a clear, clinical description of the defendant then we cannot ask the psychiatrist to morally evaluate the defendant. This, at the present time, is thought to be the jury's function.

Perhaps Dr. Szasz is correct when he observes that the law utilizes the psychiatrist as a functionary on whom the trier's guilt can be sympathetically displaced. Since "sane" and "insane" have little meaning except whether the defendant may be punished with a clear conscience, we probably use the doctor to dissipate the trier's guilt feelings.[187]

Unless lawmakers are absolutely certain that they wish to continue to require moral judgments from psychiatrists, modification is in order. The criminal law would be better served if the psychiatrist gave a clear, understandable, clinical evaluation of the defendant and his prognosis for the future including treatability and availability of treatment. The jury will then translate the clinical to the moral, sane or insane. Further translation by the

181 Counsel is given great latitude in his cross-examination of an expert to see what part a "hearsay" document played in his opinion. Adherence to the verbal formula of *independent opinion and no reliance* on other's work satisfies the court. See Archina v. People, 135 Colo. 8, 307 P.2d 1083 (1957); Wooley v. People, 367 P.2d 903 (Colo. 1961).

182 Baker v. People, 72 Colo. 68, 209 Pac. 791 (1922).

183 This may backfire when opposing counsel reads off an imposing number of books, some familiar to even the jury, and the expert denies any use or knowledge of them.

184 In upholding the propriety of the question, the Colorado Supreme Court distinguishes *responsibility* from *sane* or *insane*. Brown v. People, 116 Colo. 93, 178 P.2d 948 (1947).

185 Hammil v. People, 145 Colo. 577, 584, 361 P.2d 117, 120 (1961). This remark did not disqualify him from testifying.

186 Roche, The Criminal Mind 108 (Evergreen ed. 1959).

187 Szasz, *Some Observations on the Relationship of Law and Psychiatry*, 75 Arch. of Neurolog. and Psych. 1 (1956).

expert will not be required.[188] This suggestion is but part of the larger effort to place decision-making power in the most effective position. The value of a jury system lies in having a temporary body available which is capable of reflecting community sentiment. Let us be clear that we do not regard mental illness per se as an excuse for crime but that we weigh a defendant's mental illness along with the moral disapproval of his conduct. A jury is as qualified to perform that function as a psychiatrist.

F. Disposition After Verdict

In no state is a defendant simply set at liberty following an acquittal by reason of insanity. The states vary from automatic commitment, as in Colorado, to discretion of the trial judge and even a separate trial on the issue of present insanity.[189]

In Colorado, if the verdict is that the defendant was insane at the time of the offense, the judge must immediately commit the defendant to the State Hospital at Pueblo.[190] A full transcript of the evidence presented at trial must accompany the order of commitment.[191]

There is no constitutional objection to the automatic commitment based on a presumption of continuing insanity.[192] Indeed, it would be a highly questionable procedure which treated a finding of insanity exactly as any other acquittal. A defendant who successfully pleads insanity is, in effect, asking to be relieved of criminal responsibility in return for submitting to isolation from the public and undergoing treatment. The infliction of a past deprivation on the community is a sufficient basis for altering his present social relationships.

The courts are obviously not prepared to order a specific kind of treatment or decide its duration. These decisions are properly left to the hospital staff. The court, however, may play a pivotal role in deciding when an individual is ready to be returned to the community.

G. Discharge

The decision to return a person to society, after hospitalization, is at least as important as the commitment decision. Colorado has enacted a detailed release procedure. If the superintendent of the hospital believes the patient is no longer insane or eligible for probationary release, he must notify the committing judge who in turn notifies the district attorney.[193] The release decision is shared with the community in this fashion.

The judge must then order the patient committed to Colorado Psychopathic Hospital, for a term not to exceed thirty days, under the same terms as commitment following entry of the plea.[194] If the judge is satisfied with the reports following this observation period, he may then release the patient unconditionally or under a probationary release.[195] If the judge is unconvinced then he *must*

188 For a contrary view see, Cavanaugh, *Problems of a Psychiatrist in Operating Under the M'Naghten, Durham and Model Penal Code Rules*, 45 Marq. L. Rev. 478 (1962).
189 See Weihofen, Mental Disorder as a Criminal Defense 365 *et. seq.* (1954).
190 Colo. Rev. Stat. §39-8-4(2) (Supp. 1960).
191 *Ibid.*
192 See 145 A.L.R. 892 (1943).
193 Colo. Rev. Stat. §39-8-4(3) (Supp. 1960).
194 *Ibid.*
195 Colo. Rev. Stat. §39-8-4(4) (1953).

order a hearing with the defendant having the right to a jury. This is a civil hearing with the patient having to prove sanity by a preponderance of the evidence.[196] If the jury finds him sane the judge may still impose probationary conditions, but he must order his discharge. If the patient's insanity is found to continue, he is recommitted to Pueblo to await a similar release procedure in the future.[197]

The doctors by this procedure, must be certain they can defend their decision to release. Aside from the merit of not giving them the ultimate decision, this should induce careful and conservative decisions. The community has a legitimate interest in seeking to avoid future harm from one who has demonstrated his capacity for causing harm. One glaring defect in the Colorado procedure is the absence of any release standards. Must the patient now be able to distinguish right from wrong? Must he merely be improved? —or fully recovered?

The major considerations in this area should be the *dangerousness* of the person and the degree of certainty required of the prognosis *sufficiently recovered.*[198] No criteria for *dangerousness* have been clearly articulated. Dangerous behavior could, at least, include all crimes, the same crime, only "violent" crime or violence towards himself.[199]

"Reasonable foreseeability," not an absolute guarantee, is the most feasible standard of certainty for the prognosis. The medical profession is reluctant, and properly so, to guarantee any cure.

The desirability of requiring review of the doctor's release decision seems obvious. Psychiatrists are trained to work for early releases based on therapeutic indications. Many hospitals suffer from unmanageable patient populations and are forced to adopt an "in-and-out" philosophy.[200] With the patient clamoring for release and the judge and district attorney being institutionally skeptical, the psychiatrist will arrive at more precise, objective evaluations based on his expertise and community reaction. A case-by-case release procedure should provide the psychiatrists with a technique for integrating therapeutic indications and community tolerance.

IV. PARTIAL RESPONSIBILITY

A mental condition unable to meet the test for total criminal irresponsibility may result in a diminution, in grade, of the offense for which the defendant stands accused. If the offense charged requires a mental state, *e.g.*, specific intent, which the defendant is unable to achieve, he should not be held responsible for such offense. This is the doctrine of "partial responsibility," or less accurately, "partial insanity." In theory, it should be available in any crime requiring some specific intent. In practice, it is almost exclusively limited to reducing first-degree murder to second-degree murder. [201]

196 *Ibid.*
197 Colo. Rev. Stat. §39-8-4(5) (1953).
198 See Hough v. United States, 271 F.2d 458 (D.C.Cir. 1959).
199 See Goldstein and Katz, *Dangerousness and Mental Illness—Some Observations About the Decision to Release Persons Acquitted by Reason of Insanity*, 70 Yale L.J. 225 (1960).
200 Diamond, *From M'Naghten to Currens, and Beyond*, 50 Cal. L. Rev. 189, 202-03 (1962).
201 See Perkins, Criminal Law 767-71 (1957).

There is no logic in confining this concept to cases of homicide. A person entering another's dwelling may not be capable of forming the specific intent to commit a felony, yet be legally sane. For the most part, the law has been unable to accomodate itself to this situation.

There is nothing very startling about the doctrine of partial responsibility, although the bitter polemics and mechanical application of insanity rules have served to obscure its legal basis. Anglo-American criminal law requires a *concurrence* of *mens rea* (the internal fusion of thought and effort) with an *act* before conduct is designated as criminal.[202] This would suggest an "all or nothing" doctrine of responsibility. Indeed, most states continue to view responsibility in this fashion.

Colorado accepted the doctrine of partial responsibility in the *Brennan* case.[203] The court said that "in behalf of the defense, insanity, intoxication, or any other fact which tends to prove that the prisoner was *incapable of deliberation,* was competent evidence for the jury to weigh."[204] (Emphasis added.) This would suggest that the court did not prescribe the same dimensions for "ability to deliberate" and insanity. In *Shank,*[205] the defense of insanity was made to a charge of murder. The defendant requested that the jury be instructed to acquit if he was incapable, by reason of mental derangement, of forming an intent. This instruction was held to be properly refused. "One who knows right from wrong and has power to choose necessarily has power to form the intent to choose. One who does not or has not is, in law, insane."[206]

The *Shank* opinion does not refer to *Brennan* and seems to be at odds with it. The court equated the ability to form a specific intent with the test for insanity without appearing to realize the implications. Two subsequent cases offered the court an opportunity to clarify this problem.

The *Ingles*[207] case indicated that if a defendant did not avail himself of the statutory procedure for entering a plea of not guilty by reason of insanity, he was precluded from claiming irresponsibility on that ground. But such a defendant would be entitled to introduce evidence of mental derangement, short of insanity, to reduce the crime from murder in the first-degree to murder in the second-degree. In *Battalino*[208] the court modified the *Ingles* decision. It was made clear that evidence of insanity, when pleaded as a defense, may not be used to reduce the offense in grade unless the evidence is relevant to *willfulness* and *deliberation* in the killing. The court found that whether the evidence offered on the defense of insanity is relevant to the question of willfulness and deliberation is a question of law for the court to decide. An instruction on second-degree murder can therefore be properly refused if

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202 Hall, General Principles of Criminal Law 185-86 (2d ed. 1960).

203 Brennan v. People, 37 Colo. 256, 86 Pac. 79 (1906). "Partial responsibility" should be distinguished from the Continental concept of "diminished responsibility." See Stewart v. United States, 275 F.2d 617, 623 (D.C.Cir. 1960) and Weihofen, *op. cit. supra* note 189, at 176-77.

204 *Id.* at 263, 86 Pac. at 82 quoting State v. Johnson, 40 Conn. 136 (1873).

205 Shank v. People, 79 Colo. 576, 247 Pac. 559 (1926).

206 *Id.* at 583, 247 Pac. at 562.

207 Ingles v. People, 92 Colo. 518, 22 P.2d 1109 (1933).

208 Battalino v. People, 118 Colo. 587, 199 P.2d 897 (1948).

the trial judge feels the insanity evidence does not bear on the essential elements of first-degree murder.[209]

The Colorado cases, then, would indicate that partial responsibility is recognized. The defendant must be certain that his evidence is directed to a negation of the elements of first-degree murder rather than proof of insanity. If the statutory procedure for pleading insanity as a defense is not followed, then regardless of the mental disorder present, there can be no acquittal, only a reduction of the offense.

The Colorado statute expressly provides that in a proper case evidence of mental condition may be offered as bearing upon the capacity of the accused to form a specific intent essential to constitute a *crime*.[210] While the statutory language appears broad enough to include crimes other than homicide, the cases make it rather clear that partial responsibility is confined to homicide.

The statute gives the trial courts discretion whether there shall first be a separate trial on the insanity issue or one trial of all the issues.[211] The partial responsibility problem will arise if there is a single trial, or at the trial of the substantive offense following a verdict of sane.

Partial responsibility has a place in the theoretical framework of the law, if only to comfort those who try the issue of guilt by having several grades of culpability available. In the final analysis, a finding that the defendant is guilty of second-degree murder because he could not form the specific intent is indicative of the triers' relative moral disapproval.[212] Indeed, jury findings are comprehensible only on the basis of a moral decision.[213] The law's problem is to revise its theoretical framework to account for the various mental disorders and at the same time to facilitate communication between law and psychiatry. Partial responsibility is only a partial answer.

V. Toward A Rational Development of Criminal Responsibility

A.

First, what exactly is meant by the word *responsibility?* Previously, it has been used interchangeably with *insanity*.[214] Within the contours of the present inquiry, it means little more than what we intend to do with an offender. *Responsibility* is not a quality which resides in an offender, unless, perhaps, we make some metaphysical reference. It resembles a scale of values by which decision-makers reckon a proper *punishment*.[215] To decide *responsibility*, the offender, his conduct and the degree and extent of the disturbance are correlated with the decision-maker's scale of values.

Stated differently, *responsibility* means that a "normal" adult has "caused," in a teleological sense, a proscribed "harm" and he

209 For elaboration on this theme see Berger v. People, 122 Colo. 367, 224 P.2d 228 (1950); Leick v. People, 131 Colo. 353, 281 P.2d 806 (1955) and Becksted v. People, 133 Colo. 72, 292 P.2d 189 (1956).
210 Colo. Rev. Stat. §39-8-1 (Supp. 1960). See Colo. R. Crim. P. 11(b).
211 Colo. Rev. Stat. §39-8-3 (Supp. 1960).
212 See Roche, The Criminal Mind 84 (Evergreen ed. 1959).
213 See Repouille v. United States, 165 F.2d 152 (2d Cir. 1947).
214 See p. 326 *supra*.
215 See Roche, The Criminal Mind 170 (Evergreen ed. 1959).

is thus subject to "punishment."[216] Common to any approach to *responsibility* is the notion that the infliction of deprivations must be mutual. The conceptual bridge to the state's infliction of a deprivation on an individual offender is *responsibility.*

Underlying any approach to reform in the criminal law is the extent to which prevailing notions of responsibility are to be retained. We move on a graduated scale between the outer dimensions of responsibility—punishment, and care, custody and treatment. The further we move from responsibility—punishment, the less need there is to be concerned about revising any *particular* part of criminal law since the underlying notion will have been revised.[217]

A preference for movement in the direction of care, custody and treatment for all persons whose behavior and clinical apearance indicate the need is hereby acknowledged. The feasibility of attaining such an ultimate goal is, of course, quite another matter. For now, identification and articulation of the problem are sufficient.

In dealing with reform in any area one is always confronted with a choice between immediate expediency and ultimate ideals. The choice may be avoided, however, if reform *goals* are identified in terms of immediate, intermediate and ultimate attainments. The improbability of attaining ultimate ideals, or goals, should not preclude stating them. If nothing else, they provide direction and abstract policy for making contemporary decisions. Immediate and intermediate goals are a compromise to expediency. One must consider among other things, subjective elements, economics and political pressures.

Here we shall deal with a series of questions and proposed solutions based on what seems attainable now, in the near future and in the remote future—or never. Review of all the arguments about the relative merits of the Durham Rule, the Model Penal Code or the Currens Rule is sacrificed in order to deal with more abstract, and perhaps more fundamental questions.[218]

What do we wish to accomplish with the mentally ill offender? Who, with what qualifications, in what institutional setting, using what procedure, should make what decisions?

Ultimately, it may be superfluous to single out for identification the mentally ill offender. If the state's response to a deprivation caused by a mentally ill offender is custody, care and treatment, then it becomes sensible to create a *functional* classification which includes all offenders with similar needs. This could include the immature (youth and senility), transients, recent immigrants, persons with minority sub-group values and those with exceptional originality.[219] The emphasis would be on adaptive re-education

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216 Hall, General Principles of Criminal Law 296 (2d ed. 1961).

217 See Lewis, *The Humanitarian Theory of Punishment,* 6 Res Judicata 224 (1953).

218 For full citations and text of these decisions see notes 8, 9, 10, 11, and 12, *supra.*

The following should be particularly helpful to the reader who wishes to evaluate the several rules:

Allen, *The Rule of the A.L.I.'s Model Penal Code,* 45 Marq. L. Rev. 494 (1962); Raab, *A Moralist Looks at the Durham and M'Naghten Rules,* 46 Minn. L. Rev. 327 (1961); Slovenko and Super, *The Mentally Disabled, The Law, and The Report of the American Bar Foundation,* 47 Va. L. Rev. 1366, 1384 (1961); Cavanaugh, *Problems of a Psychiatrist in Operating Under the M'Naghten, Durham and Model Penal Code Rules,* 45 Marq. L. Rev. 478 (1962) and Dearman, *Criminal Responsibility and Insanity Tests, A Psychiatrist Looks at Three Cases,* 47 Va. L. Rev. 1388 (1961). See especially, Diamond, *From M'Naghten to Currens, and Beyond,* 50 Cal. L. Rev. 189 (1962).

219 See Dession's, *Final Draft of the Code of Correction for Puerto Rico,* 71 Yale L.J. 1050, 1092 (1962).

based on a manifested inability to assimilate and conform with community expectations.

For the present, however, we can restrict our task to the identification of persons with *serious* mental disorders who are brought into the criminal process. The word *serious* will vary with time and individual interpretations. At present, the criteria for serious mental disorder might be *an illness which so lessens an individual's capacity for control that he is unable to make responsible decisions about his ordinary affairs and is likely to cause injury to himself or others.*[220] The potential threat of harm to property could be a part of "responsible decisions about his ordinary affairs." Emphasis is placed on the individual's ability to form positive, or at least non-destructive (neutral) relationships with others.

Like all verbal formulations, this one has an inherent lack of precision. "Likely to," for example, should mean a "reasonable probability" based on an empirically validated, expected response. There is no pretense of originality in offering this formulation since it is typical of many involuntary civil commitment statutes.[221] There is a conscious preference stated for equating the test of criminal irresponsibility with the test for an involuntary civil commitment. Any person who would have been given "in-patient" treatment in a recognized hospital, without his consent, would seem to be sufficiently disordered to avoid the ordinary criminal processes.

B.

Criminal responsibility should not attach to persons who suffer from serious mental disorders. Enough has been said previously to indicate that the prevalent rules seem inadequate to the task of identification of such persons.[222] The present conceptual framework of the defense of insanity will allow the state to detain and treat a mentally ill offender. Existing facilities, however, are simply not prepared to provide custody and treatment for a large segment of our offender population.

The state must begin to expand and diversify its institutions to accommodate larger numbers and provide a variety of custody and treatment devices. Turning existing hospitals into prisons is hardly a solution. The movement must be toward expansion and diversification of facilities.[223]

If a totally non-punitive system of criminal law were adopted, we would not be concerned about the serious unofficial consequences of labeling a man "criminal."[224] The moral condemnation

220 See Group for the Advancement of Psychiatry, Report No. 26, p. 8 (1954). "Sec. 1 Mental Illness shall mean an illness which so lessens the capacity of a person to use (maintain) his judgment, discretion or control in the conduct of his affairs and social relations as to warrant his commitment to a mental institution." The GAP report concludes that the definition of mental illness should be the test for criminal responsibility. This, of course, is the purport of the recommendation made in this article. The Royal Commission on Capital Punishment 1949-53, *Report*, Cmd., No. 8932 at 275-76 makes a proposal very similar to GAP's.

221 See, e.g., Colo. Rev. Stat. §§71-1-1 to 71-1-5 (Supp. 1960).

222 Although the Durham Rule and the Currens Rule should ease the identification task, they continue to exclude many serious cases and present other problems. Durham, for example, stretches the integration of personality concept by requiring a causal connection between the act and the disorder. Currens does not deal adequately with criteria for mental illness and is so abstract that the transition to observational criteria is extremely difficult. Currens, however, seems far more acceptable than Durham. See Glueck, Law and Psychiatry, Cold War or *Entente Cordiale* 105-07 (1962) for an excellent test which meets these criticisms.

223 Until very recently Colorado had an able and far sighted public servant in Dr. James Galvin. His leadership in such efforts could have made them a reality.

224 See p. 332 *supra*.

bound up in the designation "criminal" has serious and prolonged effects.[225] Upon release, an "ex-convict" may pay for his offense on a never-ending installment plan.[226] The moral stigma becomes a focus for social and economic boycott, deprivation of civil liberties and continued police surveillance. While the immediate, visible results of a decision concerning criminal responsibility or irresponsibility may be the same—involuntary commitment—the unofficial consequences would be critically different.

The unofficial consequences of redefining a person as "mentally ill" are not really known. It seems safe to assume that since this label implies a "sick person," the consequences will be different in kind and degree.[227] Furthermore, it is reasonable to assume that the mentally ill person will receive more help in a medically staffed, non-punitive institution than in a penitentiary.

C.

Responsibility is currently decided by a jury. A verdict of sanity means that the jury has decided the defendant deserves punishment rather than help. Curiously enough, the jury is not permitted to know, before deciding, the consequences of their decision.[228] The dimensions of such punishment will be decided by the sentencing judge and the prison officials.[229]

Ideally, the law should identify and clearly articulate the kinds of decisions being made in the criminal process. Of immediate concern are the decisions relating to guilt-affixing and sentencing. It appears that radically different information and skills are needed for these decisions.

The legal process has proven to be reasonably well adapted to reconstructing past events through the adversary system and deciding whether a particular rule was violated. In deciding what to do with a man found guilty of such conduct, the law has been notoriously deficient.[230] There is little in the lawyer's background to prepare him for this decision. He may be sensitive to the moral opinion of the community or responsive to political pressures. Whatever his motivation, the judge will sentence in accordance with his "gut-reaction" to the offense and offender and his conscious or unconscious evaluation of his own potential gain or loss.

It is proposed, based on a separation of functions and skills, that a Sentence Imposition and Review Board be established. The Board might be composed of four members, appointed by the Governor, one of whom would be a lawyer, one with experience

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225 Mr. Justice Clark, dissenting in Robinson v. California, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed. 2d 758 (1962), depreciated the distinction between civil and criminal commitments for narcotics addiction.

226 Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 Yale L.J. 543, 590 (1960).

227 See Parsons, The Social System 436-37 (1951) on the institutionalized expectation system relative to the sick role.

228 Ingles v. People, 90 Colo. 51, 57, 6 P.2d 455, 457-58 (1931).

229 The judge must operate within the statutory limits of the offense. See Scott, *Post-Conviction Remedies in Colorado Criminal Cases*, 31 Rocky Mt. L. Rev. 249 (1959). Prison officials will decide on a cell-block, job, punishment for prison infractions, etc. Placing a prisoner in "the hole" for twenty-one days, without clothing, bedding, or other necessities and feeding him bread and water without a "trial" is permissible. See State v. Doolittle, 22 Conn. Supp. 32, 158 A.2d 858 (1960).

230 See *Seminar and Institute on Disparity of Sentencing*, 30 F.R.D. 401 (1962); *Pilot Institute on Sentencing*, 26 F.R.D. 231 (1959); *Sentencing Institute — Fifth Circuit*, 30 F.R.D. 185 (1962). Gaudet, *The Sentencing Behavior of the Judge*, Encyc. of Criminology 449-61 (1949).

in handling adult prisoners, an experienced sociologist and a psychiatrist.[231] The Board's responsibility should begin the moment that "guilt" is ascertained in a regular judicial proceeding. Their decisions would include the imposition of sentence, the proper institutional assignment, periodic review to ascertain progress, release prognosis and the release decision. Statutory minimum sentences should be retained to protect the non-disturbed deviate whose offense is relatively trivial.

Exhaustive information about an offender must be made available by thorough testing and investigation. A delicate balance must be achieved between the seriousness of the defendant's behavior and condition and the advisability of definite or indeterminate sentences. For example, a dangerous psychotic who is caught stealing a quart of milk is not in the same position as a neurotic murderer. The stated preference would be to increase the use of indeterminate sentences while protecting the rights of even seriously disturbed trivial offenders.

The essential idea is to separate the guilt-affixing decision from the treatment decision; to recognize clearly the need for different skills and information; to erect, maintain and constantly appraise institutions suited for the different functions and to achieve a balance between community sentiment and rational decision-making.

For the immediate and intermediate future, we must be concerned about operating within our present framework. It is proposed that in all cases where a finding of insanity is made, the defendant be given an indeterminate sentence to a mental institution. This, of course, is presently done. A Sentence Review Board should be established to periodically review the case and ultimately decide release, and the conditions of release. Specific criteria for release, missing from the present statute, should be part of the legislation creating such a Board.

The abstract release standards should be (1) the dangerousness of the patient and (2) a medical prognosis of sufficient recovery.[232] "Dangerousness" might be defined in terms of any conduct which would involve a threat of serious harm to property, other persons or himself. There would thus be a close parallel to the admission decision. Reference to felonies and serious misdemeanors could provide a more specific standard.

Greater precision in a release standard may not be desirable. The treating-releasing institution will utilize therapeutic indications and an evaluation of the future threat to community values involved. The Board can closely scrutinize the certifying doctor's basis of opinion and thereby create an exchange of data leading to greater precision.

The prognosis should be in terms of a reasonable probability of recovery and a substantial lessening of any threat of "dangerous" behavior in the future. The concern about repetition should go beyond repetition of the original behavior involved. It is impossible to predict, nor is it really desirable, whether a releasee will violate some regulatory ordinance. The healing arts cannot guarantee ideal,

231 This resembles the California Adult Authority, Cal. Penal Code §5075 (Deering 1949).
232 See Note, *Procedure for the Release of the Criminally Insane — A Suggested Approach*, Wash. U.L.Q. 120 (1962).

or even productive, citizens. They must, however, be certain that there is little chance of serious antisocial behavior by the releasee.

The make-up of this Board should approximate that of the Sentence Imposition and Review Board mentioned earlier.

One serious question which relates to both Boards is whether the judge or the district attorney should have any role in the release decision. From a medical standpoint, it seems illogical. As a practical expediency this would give the community representatives some control and offers assurance to the public.

For the present, to accommodate both interests, the Board's release decision should be final. The district attorney and trial judge should be notified in advance of any release hearing and be permitted to present evidence to the Board.[233] If the Board decides to release, the district attorney should have an unqualified right to appeal to the district court. A jury would be impaneled and the defendant awarded a presumption of sanity based on the Board's decision. The decision would be admissible in evidence. The district attorney would be required to show, by a preponderance of the evidence, that the patient is "dangerous" and the prognosis for recovery not sufficiently definite to justify release.

D.

Another major goal involves the fostering of meaningful communication between law and psychiatry. At present we do not properly use the psychiatrist; we ask the wrong questions and receive the wrong answers. We treat insanity as though it were a clinical reality instead of a manipulative label.

Reform need not, and indeed should not, mean the re-allocation of important decisions to the psychiatrist. If we prohibit the question whether the accused knew right from wrong, we diminish the area of his decision-making responsibility. This is the moral question which exactly parallels the ultimate issue involved and it should no longer be asked, irrespective of whether other changes are made.

It is not desirable to have the psychiatrist communicate exclusively in his clinical language. His specialized terminology has, no doubt, great value in the decision-making context of private therapy. It has doubtful value in other settings.

It is proposed that we revise the psychiatrist's function, the questions asked him and the language of his reply. Functionally, he should be *advisory* on the question of triability of the accused and on questions of release; he should be *informative and advisory* on the question of appropriate disposition of the accused; and he should be *instrumental* in creating and providing techniques for changing persons in the direction of self-awareness and reform.[234]

On the question of "appropriate disposition," the doctor should be questioned concerning diagnosis, prognosis, treatability and availability of treatment. In providing information here, and on any

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[233] The judge could, for example, write a letter expressing his views rather than appearing in person. The district attorney would be the more likely advocate in opposition to release.

[234] See Roche, The Criminal Mind 271 (Evergreen ed. 1959).

other issue, the doctor need not be asked whether the defendant is neurotic, paranoid, schizophrenic or an organic reaction type. Questions he might be asked include: (1) Describe all the symptoms involved. (2) What is the propensity for destructive behavior? (3) What is the relation between the illness and the behavior in question? (4) What is the probability of this person behaving in such-and-such a manner under specified conditions? (5) How probable is it that these conditions will occur? (6) On what do you base these estimates? (7) What have been your opportunities, as well as those of your colleagues whose views you take into account, to validate estimates of this sort?[235]

These questions are, of course, incomplete and merely offered as illustrative. The phraseology of the doctor's response would, in part, be controlled by the function being performed; the question itself and the questioner.

The doctor who is untrained or inexperienced in psychiatry should be precluded from playing an influential role in this area. If psychiatric specialists are available, they must always be preferred. If a physical evaluation is necessary then, of course, the matter is entirely different.

The lay witness, one who is untrained in psychiatry, psychology or physical medicine, should have an extremely limited participation. He should never be asked his opinion on sanity or insanity. If he has observational data available, then this might be communicated to the clinical specialist who desires it, and the jury.

Whatever system of selection of experts is used, there should be the freest exchange of data between *all* the participants. A doctor's data and opinion should not be the exclusive property of anyone. The doctor should be free to form his opinions and answers for a judicial or Board appearance in exactly the same way he would in his clinical environment. The hearsay objection about third-party reports, consultations and evaluations could be abandoned. Close questioning and free pre-trial exchange of data would afford all the protection necessary.

Several areas touched upon previously have not been specifically referred to in this section. Such problems as partial responsibility, conditions of compulsory examination, burdens of proof, and varying definitions of insanity would seem to be met by some of the more abstract proposals. In some instances, an earlier expression of opinion makes the writer's feelings clear.

There is no pretense at complete coverage of all the problems involved, nor is it believed that all the solutions are feasible or desirable. The current interest in the problems of criminal responsibility is a sufficient excuse for an attempt to deal with them in an objective, if not idealistic, fashion. Further research and legislative interest in the problems posed would be an adequate reward for this effort.

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235 Several of these questions are suggested by the late Professor Dession in his letter of transmission of his Code of Correction to the Puerto Rican authorities. See 71 Yale L.J. 1050, 1090 (1962).

APPENDIX

*Smeltzer, *Insanity as a Defense in Murder and Lesser Crimes*

MURDER

	1957	1958	1959	1960	1961
Charges	14	24	33	24	26
Insanity Plea	6	8	12	7	8
Defense withdrawn before trial	2	2	5	3	2
Insanity issue submitted to jury	4	6	7	4	6
Found insane and committed to hospital	3	4	6	3	5

RAPE[1]

	1957	1958	1959	1960	1961
Charges	28	35	26	34	15
Insanity Plea	1	3	1	3	2
Defense withdrawn before trial	1	1	0	2	2
Insanity issue submitted to jury	0	2	1	1	0
Found insane and committed to hospital	0	2	1	1	0

LARCENY[2]

	1957	1958	1959	1960	1961[3]
Charges	118	134	185	349	499
Insanity Plea	8	6	4	26	26
Defense withdrawn before trial	4	6	4	19	17
Insanity issue submitted to jury	4	0	0	7	6
Found insane and committed to hospital	3	0	0	6	6

* Third-year law student, University of Denver. This study grew out of a Seminar in Law and Behavioral Sciences conducted by the author. See the earlier discussion of this study at p. 333 and notes 56 and 61 *supra*.

1 Report included statutory rape. It did not include assault to rape, indecent liberties, or unnatural carnal copulation.

2 Report included larceny by bailee and larceny of mortgaged property. It did not include conspiracy to commit larceny or petty larceny.

3 This study was completed September 1, 1962. The defense of insanity was entered in three cases and trial was set for a date later than September 1, 1962.

BURGLARY[4]

	1957	1958	1959	1960	1961[5]
Charges	248	317	341	310	407
Insanity Plea	18	14	26	30	21
Defense withdrawn before trial	15	9	22	21	11
Insanity issue submitted to jury	3	5	4	9	9
Found insane and committed to hospital	3	3	4	6	7

FORGERY[6]

	1957	1958	1959	1960	1961[7]
Charges	33	58	74	76	101
Insanity plea	1	7	5	16	8
Defense withdrawn before trial	1	7	4	10	4
Insanity issue submitted to jury	0	0	1	6	3
Found insane and committed to hospital	0	0	0	3	2

4 The report did not include conspiracy to commit burglary, attempted burglary, or breaking and entering a motor vehicle.

5 See note 3 *supra*.

6 The report did not include "no account" check charge or conspiracy to commit forgery.

7 This study was completed September 1, 1962. The defense of insanity was entered in one case and trial was set for a date later than September 1, 1962.