THE LEGAL STANDARD FOR DETERMINING CRIMINAL INSANITY: A NEED FOR REFORM

Although there is voluminous literature criticizing or defending the various legal tests of insanity, there is a paucity of literature which offers constructive substitutes. The purpose of this Note is not to add to the criticism or defense of any of the present tests of insanity, but rather to criticize the legal system in its management of all insanity defense. A further purpose is to propose a procedural change whereby the question of insanity would be determined by a panel of experts, rather than by laymen jurors.

I. Tests of Insanity

There are four major legal tests of insanity used by American courts. It is important to briefly study each test in order to place the need for reform in proper perspective. Furthermore, the law on insanity in Iowa will be emphasized.

A. *The M'Naghten Rule*

The M'Naghten Rule was formulated in 1843 in an advisory opinion from the English Common Law judges.[1] The judges ruled:

> The jurors ought to be told in all cases that . . . to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong.[2]

Psychiatrists have two criticisms of the M'Naghten Rule: (1) The rule is unsound because its sole emphasis is on cognition, that is, the ability to know right from wrong; and (2) there is no sufficient definition of the terms "defect of reason" or "disease of the mind."[3] The psychiatrists' criticisms have not found much legal support. The M'Naghten Rule, also known as the right and wrong test, continues as the law in twenty-nine states, and the rule is supplemented by the irresistible impulse test in thirteen others.[4]

B. *The Irresistible Impulse Test*

The irresistible impulse test was formulated in Ohio in *State v. Thompson*

---

[1] Platt, *Choosing a Test for Criminal Insanity*, 5 Willamette L.J. 553, 557 (1969) [hereinafter cited as Platt].

[2] Daniel M'Naghten's Case, 10 Cl. & Fin. 200, 202, 8 Eng. Rep. 718, 722 (1843).

[3] Platt, *supra* note 1, at 558.

[4] The M'Naghten Rule is the test of criminal insanity in Alaska, Arizona, California, Delaware, Florida, Georgia, Hawaii, Idaho, Iowa, Kansas, Louisiana, Minnesota, Mississippi, Nebraska, Nevada, New Jersey, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Washington, and West Virginia. The irresistible impulse tests supplements the M'Naghten Rule in Alabama, Arkansas, Colorado, Connecticut, Indiana, Kentucky, Michigan, Montana, New Mexico, Ohio, Utah, Virginia, and Wyoming. *See* A. Goldstein, The Insanity Defense 45, 241 (1967).

Court of Iowa to change the test. In *State v. Harkness*,[27] the defendant urged the Iowa court to adopt either the Durham Rule or the American Law Institute test in place of the M'Naghten Rule. In a well-written opinion, the Supreme Court of Iowa upheld the M'Naghten Rule as the test of insanity in Iowa. The court ruled that Iowa would adhere to the M'Naghten Rule until such time as it is "convinced by a firm foundation in scientific fact that a test for criminal responsibility other than M'Naghten will serve the basic end of our criminal jurisprudence, i.e., the protection of society from grievous antisocial acts . . . ."[28] The *Harkness* decision has not seemed to deter other defendants from asking the Supreme Court of Iowa to reconsider its use of the M'Naghten Rule.[29] However, it is unlikely that the court will change from the M'Naghten Rule to one of the other existing tests, at least in the near future.

II. The Need For Reform

Based on the widespread criticism of all of the present tests of insanity, it is likely that, for a number of reasons, the present tests are inadequate.

A. *Outmoded and Erroneous Rules*

A major criticism of the M'Naghten Rule is that it is outdated, and has been since its inception. The rule was formulated in light of the state of psychological knowledge in 1843, which was not well advanced.[30] Justice Felix Frankfurter has observed that he did "not see why the rules of law should be arrested at the state of psychological knowledge at the time when they were formulated."[31] Yet, courts continue to adhere to the M'Naghten Rule and, in so doing, refuse to acknowledge advances made by modern psychologists and psychiatrists. A strict adherence to the rule places a testifying psychiatrist in a compromising position. The court wishes to know whether the defendant had the ability to distinguish between right and wrong, and if he knew what he was doing was wrong. Thus, the M'Naughten Rule, as well as the Durham Rule and the American Law Institute test, are in reality *not* tests of mental illness, but are tests of responsibility in law for acts committed.[32] Moreover, the words "insane" and "insanity" are legal creations which exist only in penal codes and have no clinical meaning to psychiatrists.[33] Psychiatrists and psychologists are experts

---

27 160 N.W.2d 324 (Iowa 1968).

28 *Id.* at 337.

29 *See, e.g.*, State v. Carstens, Crim. No. 54211 (Iowa Sup. Ct., filed Oct. 21, 1969), which has not yet been heard by the court. The same arguments are presented in this case as were presented in *Harkness*.

30 As one writer observed, courts "today still cite Blackstone on the subject, and Blackstone in turn cites as his authority Lord Hale, who lived in the 1600's, and who shared the belief of his time that lunatics were affected by changes in the phases of the moon." H. Weihofen, Insanity as a Defense in Criminal Law 3 (1933) [hereinafter cited as Weihofen].

31 L. Kolb, Noyes' Modern Clinical Psychiatry 615 (7th ed. 1968). At the time of the statement, Justice Frankfurter was testifying before the British Royal Commission on Capital Punishment.

32 *Id.* at 614.

33 Archibald, *Criminal Responsibility and Mental Illness*, 20 Humanist 338, 343 (1960) [hereinafter cited as Archibald].

in the causation of conduct,[34] but they have no particular expertise in determining whether a defendant "knew" right from wrong. This latter question forces the expert into the "highly improper position of moralizing about the defendant."[35] Furthermore, it forces him " 'to violate the Hippocratic Oath, even to violate the oath he takes as a witness to tell the truth and nothing but the truth, to force him to perjure himself for the sake of justice.' "[36] It is not surprising, then, that the majority of psychiatrists disapprove of the M'Naghten test.[37]

The other legal tests of insanity also present problems. The American Law Institute test is criticized by psychiatrists as being merely a combination of the M'Naghten Rule and the irresistible impulse rule. It is interesting to note that, while this new test met with the approval of the majority of the committee which proposed the test, all three psychiatric consultants to the committee took exception to it.[38] The Durham Rule is the most favored test among psychiatrists,[39] but it has not been widely adopted by the courts. The judicial system is as critical of the Durham Rule as psychiatrists are of the M'Naghten Rule.

B. *Distrust Between Law and Psychiatry*

As a result of the dissatisfaction among psychiatrists and psychologists with the legal tests of insanity, a feeling of distrust has developed between the legal profession and these other professions.[40] In summarizing this feeling, one writer stated:

> [P]sychiatrists (indeed most physicians) generally view any contacts with courts with fear and disdain. The lawyer is looked down upon with repugnance as one who is really not interested in truth but who distorts the truth to suit his mercenary purposes. The physician commonly leaves the courtroom feeling soiled by his contacts with attorneys and judges, a victim of a system preventing him from expressing a scientific viewpoint that would be in the best interests of a given patient or client.[41]

The legal profession criticizes psychiatric and psychological testimony because there is little agreement as to when a defendant is insane. For every three psychiatrists that would testify that the defendant was insane, the prosecution could find three other psychiatrists that would testify that the defendant was sane. There are so many schools of thought among psychiatrists and

---

[34] Overholser, *Criminal Responsibility: A Psychiatrist's Viewpoint*, 48 A.B.A.J. 527, 529 (1962) [hereinafter cited as Overholser].

[35] Platt, *supra* note 1, at 558.

[36] Leifer, *The Psychiatrist and Tests of Criminal Responsibility*, 19 AM. PSYCHOLOGIST 825, 827 (1964) [hereinafter cited as Leifer], quoting from 12 SHINGLE 79 (1949).

[37] More than ninety per cent of the psychiatrists questioned in two polls disapproved of the M'Naghten Rule. M. GUTTMACHER & H. WEIHOFEN, PSYCHIATRY AND THE LAW 408 (1952).

[38] Overholser, *supra* note 34, at 530.

[39] Platt, *supra* note 1, at 566.

[40] "Lawyers tend to look upon psychiatrists as fuzzy apologists for criminals, while psychiatrists tend to regard lawyers as devious and cunning phrasemongers." S. GLUECK, LAW AND PSYCHIATRY 4-5 (1962) [hereinafter cited as GLUECK].

[41] Lessee, *A Dance Macabre—Psychiatry and the Law*, 18 AM. J. PSYCHOTHERAPY 183, 184 (1964).

psychologists that none of the testimony is reliable. Yet, they forget that "judges, also, belong to different schools of thought."[42] There are as many unsettled areas of law as there are in other professions, but we would not omit those areas merely because they are incomplete. The point is that psychiatry, like *all* other medical knowledge, will never be concise and exact in the sense that the answers may always be experimentally verified. However, psychiatry continues to advance and develop, and this should be "reason to encourage its contribution [to the courts] rather than to emphasize its limitations in the courts."[43]

Action is being taken to alleviate this problem of distrust. Law schools now offer a course in "Law and Psychiatry" to help acquaint the law student with the purposes and the problems of psychiatry. Committees, consisting of lawyers, psychologists, and psychiatrists, have been established to discuss the problems of mentally ill individuals and to propose more effective ways of dealing with them. The American Law Institute's test of insanity evolved from such a committee. The problem still exists, however, and a complete solution appears to be far removed.

C. *Battle of the Experts*

A general complaint leveled against all of the insanity tests is that they encourage the "battle of the experts." Since both the prosecution and defense may call psychiatric experts to aid their client,[44] each is prone to "shop around" for a psychiatrist who will testify favorably to his position.[45] This "battle," of course, is not limited to psychiatric testimony, but is found in other areas of expert testimony, for example, medical witnesses and handwriting witnesses. However, one problem which is consistent throughout all of these "battles" is that the testimony confuses rather than helps the jury. Consequently, the determination by a jury that a defendant is either sane or insane is as often a result of a favorable impression from one or the other expert witnesses as it is a result of the facts to which each testified.

One suggestion to solve this problem is that the court appoint an impartial expert witness.[46] The impartial expert would have no bias or prejudice toward either side, and thus would present a factual statement of his findings. This suggestion fails, however, to recognize two problems. First, since hypothetical questions can be asked of an expert witness,

---

[42] GLUECK, *supra* note 40, at 95.

[43] Freedman, Guttmacher & Overholser, *Mental Disease or Defect Excluding Responsibility*, 1961 WASH. U.L.Q. 250, 254.

[44] One writer has questioned whether the lawyer uses psychiatric testimony to help "the case" rather than to help the client. M. SELZER, PSYCHIATRY FOR LAWYERS HANDBOOK 28 (3d ed. 1966).

[45] Gambino, *Concepts of Mental Disorder and Criminal Responsibility in Law*, Unpublished Doctoral Dissertation 16-17 (1968) [hereinafter cited as Gambino].

[46] Goldstein, *The Psychiatrist and the Legal Process: The Proposals for an Impartial Expert and for Preventive Detention*, 33 AM. J. ORTHOPSYCHIATRY 123, 124 (1963). Mr. Goldstein does not share the view that an impartial witness would solve this problem.

> [t]he attorney for each side selects the most favorable items [from a report of defendant's condition] for his question. The result is the creation of two straw men in place of the real defendant; one who is emotionally unbalanced and the other who shows no deviation from normal mental balance. The psychiatrist is then forced to give a professional opinion about these hypothetical straw men.[47]

The jury hears testimony concerning two hypothetical "defendants," neither of which is the actual defendant. Secondly, as soon as the direction in which the expert's testimony is moving is discernible, the other side may employ their own expert, and the battle begins anew.[48] Although the jury might, in most cases, place more weight on the testimony of the court-appointed expert, the problem of the "battle" would continue to exist.

D. *Attack on Witnesses*

A further problem with the present system of determining insanity is the "treatment" given an expert witness in the courtroom. Psychiatrists and other expert witnesses are uneasy in contributing their knowledge because of "the contentious atmosphere of the courtroom."[49] In these situations, lawyers use cross-examination tactics not as much to learn the truth as to chastise the opposition's expert before the jury. The assault upon the opposing side's witness is not, of course, limited to expert witnesses. In fact, one writer has observed:

> [T]hat witnesses are variously subjected to verbal seduction; insult, or assault; that opposing attorneys are periodically at the edge of physical violence; that the judge seems less protective of the welfare of witnesses or concerned for the deportment of the contending parties than he is for strict adherence to protocol; and that the "twelve good men and true" can be swung or hung by a specious albeit adroit maneuver of one or the other counsel.[50]

The maneuvering by the lawyer becomes even more adroit in the case of an expert witness, since a great deal of the jury's decision may be dependent on the expert's testimony. It is not cross-examination *per se* that is condemned in this situation, but the fact that many lawyers "attempt to deprecate anyone who testifies for the opposition even if appointed by the court."[51]

---

[47] Archibald, *supra* note 33, at 342.

[48] If the psychiatrist has been appointed by the court there is a certain degree of deference to his position at the outset of the trial. As soon as it is determined to which side his testimony is inclined the opposing counsel becomes his opponent. If he has been called by either prosecution or defense the battle starts without any such preliminaries. Too often the psychiatrist on the witness stand attempts to tell his story to the jury under a barrage of questions and intimidation from hostile counsel. *Id.* at 344.

[49] Bromberg, *Psychiatrists in Court: The Psychiatrist's View*, 125 AM. J. PSYCHIATRY 1343 (1969) [hereinafter cited as Bromberg].

[50] Schofield, *Psychology, Law, and the Expert Witness*, 11 AM. PSYCHOLOGIST 1 (1956).

[51] Archibald, *supra* note 33, at 343. This writer also noted:

> It may be argued that it is essential that the defendant's lawyer be armed with basic knowledge of mental sciences so that he may use cross examination to expose extravagant claims. . . . However, anyone with experience knows that trial lawyers simply do not limit their tactics to incompetent unqualified wit-

Perhaps it would be wise for the law to modify some of its procedures in examining an expert witness.[52] It seems that the traditional adversary system may not provide either the defendant or the prosecution a fair trial, since either side can lose its case on the "strength" of the opposing counsel's cross-examination. An expert witness, at least the first few times he is called to testify, is not prepared for the insults and badgering which await him in the courtroom. He is there to testify as to the causation of defendant's conduct, and thereby aid the defendant in obtaining a fair trial, regardless of whether he testifies favorably to the defense or to the prosecution. He should at least be given the respect of being only asked pertinent questions relevant to the case.[53]

E. *Jury Not Qualified*

The most compelling reason for reforming the present system of testing insanity is that a jury of twelve laymen is not qualified to determine the sanity of a defendant. The law carefully protects a defendant's constitutional rights, but the law allows laymen to make the crucial decision regarding a defendant's sanity. This latter procedure is sharply criticized by psychiatrists,[54] and it is said that the competency of a jury in this situation is "little short of farcical."[55] One writer has concluded:

> It is erroneous policy to place twelve men, selected at random, in the position of independent judges of facts whose nature, legal significance, and psycho-biological effect they usually cannot comprehend. . . . The assumption that the jurors, because they are jurors, are capable of conceiving the intricate elements of psychic disorders—is an arbitrary inference and a legal atavism. The continued adherence to this backward theory is neither justified by science nor vindicated by the present-day confusion, arising from the whole problem of criminal responsibility in cases where insanity is pleaded.[56]

A psychiatrist's or psychologist's testimony concerning the mental stability of a defendant may be extremely complex.[57] It is sometimes difficult for a pro-

---

nesses . . . . For example, one of the best known neurosurgeons in the country was asked to name all of the tests for measuring bleeding time! *Id.* at 343-44.

[52] Writers frequently advocate this proposal. *See, e.g.*, Diamond & Louisell, *The Psychiatrist as an Expert Witness: Some Ruminations and Speculations*, 63 MICH. L. REV. 1335 (1965). The authors state:

> If the psychiatrist is to be useful to the law, not as an oracle, fortune-teller, or pseudo-exact scientist, but rather as a man possessed of a certain modicum of wisdom about human beings and their behavior, it might be desirable for the law to modify some of its procedures in order to facilitate this. Some of the traditional ways of doing business in a courtroom might not be the most appropriate or useful for communicating what the psychiatrist has to say to the trier of facts.

Id. at 1343.

[53] As one writer has noted, "if the stress were taken off the credibility issue in the expert's testimony and placed on the psychological complexities of the case in question, it might reduce one of the sources of psychiatric anxiety with its ensuing reactions." Bromberg, *supra* note 49, at 1345.

[54] Gambino, *supra* note 45, at 37.

[55] Lamb, *Commitment and Discharge of the Insane Criminal*, 32 N.Y. ST. B. ASS'N REP. 60, 63 (1909).

[56] B. BRASOL, ELEMENTS OF CRIME 330 (1927).

[57] Wiseman, *Psychiatry and Law: Use and Abuse of Psychiatry in a Murder Case*, 118 AM. J. PSYCHIATRY 289, 298 (1961) [hereinafter cited as Wiseman].

fessional trained in psychiatry or psychology to understand the testimony, and thus to believe that a jury is able to do so is a farce and a charade.[58] Yet, a jury determines the sanity of a defendant from testimony it possibly did not understand. Even assuming *arguendo* that the jury understands the testimony, there are further problems:

> [I]s there anyone who seriously thinks that the jurymen in even an appreciable minority of cases decide the question of sanity or insanity by a dispassionate and judicial application of the test given them by the judge? Whether a jury will return a verdict of "guilty" or "not guilty by reason of insanity" depends primarily upon the dramatic quality of the offense charged—whether it was a brutal and atrocious act arousing public indignation or repugnance, or an act arousing public sympathy or condonation . . . upon the nationality, religion, or color of the defendant and the jurymen; upon wholly extraneous matters, such as the existence of a recent "crime wave," and a resulting belief by the jury in the need for drastic punishments; upon a thousand and one legally irrelevant facts appealing to the jury's "common sense"; and—usually less important than any of these—upon the instructions of the court.[59]

However, it is not only the defendant that needs protection under these circumstances. Both the State and the defendant are entitled to a fair trial, and either may be deprived of that right by an unqualified, erroneous decision by a jury. An example of this is a case in which the defendant was convicted despite four psychiatrist's *uncontroverted* testimony that he was insane.[60] In another case, the testimony was controverted only by two policemen who stated that the defendant "looked all right."[61]

Although juries historically have decided the question of the sanity of a defendant, it has been suggested several times that the jury is not the proper forum to determine the highly technical issue of mental illness,[62] and, therefore, legal responsibility. However, it has also been suggested that, in reality, psychiatrists do determine criminal responsibility.[63] After listening to opposing psychiatrists testify, the jury must either agree or disagree with one of two theories, and, thus, it is one of the psychiatrists that subtly makes the moral decision.[64] In light of the "thousand and one" other factors which enter into a

---

[58] *Id.* at 292, 294. In discussing a murder case, the author stated of the jury's ability to assess psychiatric testimony and reach a decision: "This charade was built on the myth that the jury was capable of absorbing, understanding and acting on a complex psychiatric explanation of the murder as well as evaluating the differences in point of view revealed at trial." *Id.* at 292.

[59] WEIHOFEN, *supra* note 30, at 9. This opinion is shared by Watson, who said that "their [the jurors] fact-finding about sanity . . . surely was due to impulse and chance, as often as it was to reason." Watson, *supra* note 13, at 290.

[60] People v. Wolff, 61 Cal. 2d 795, 394 P.2d 959, 40 Cal. Rptr. 271 (1964).

[61] Wright v. United States, 250 F.2d 4, 9 (D.C. Cir. 1957).

[62] *See, e.g.*, Goldstein, *The Psychiatrist and the Legal Process: The Proposals for an Impartial Expert and for Preventive Detention*, 33 AM. J. ORTHOPSYCHIATRY 123 (1963). Goldstein states that "perhaps a lay judge and a lay jury are not the ideal instruments for deciding the kinds of issues to which the psychiatrist addresses himself in the courtroom." *Id.* at 128.

[63] Leifer, *supra* note 36, at 830.

[64] *Id.* at 828. The author stated:

> The absurdity of this euphemism is that it is the rare jurist or juror who can

jury's decision, it is questionable whether the psychiatrist actually makes the decision. I submit, however, that experts *should* make the decision.

A collateral problem in this area is the judge's attitude toward psychiatric testimony. While it may not be necessary that the judge understand the psychiatrist's testimony, he should at least appear interested in it. The trial of Jack Ruby for the murder of Lee Harvey Oswald has been condemned as a spectacle[65] because of this problem. At that trial, a great deal of complex psychiatric testimony was involved. During the testimony, the judge appeared bored, chewed tobacco, and thumbed magazines, which "behavior communicates attitudes about psychiatric testimony to a jury far better than words ever could."[66] Thus, both the complexities of the situation and the inexpertise of the decision makers weigh heavily on a just determination of a defendant's capacity to commit crime.

III. Type of Reform

Although it may be evident that reform is necessary, it is difficult to determine which reform would be best. However, it seems that both the legal profession and the psychiatric and psychological professions would welcome any system which offers an improvement over the present tests. A few states have made some advancement in this area.

A. *Independent Determination of Guilt or Innocence*

As an aid to the jury in keeping distinct the issue of mental illness from other irrelevant matters, it has been suggested that the question for the jury should be only whether or not the defendant committed the act. If they found that the defendant was guilty, that is, that he did commit the crime, only then would it be necessary to determine whether he did so in a sane or insane condition. For "whether he committed it as sane or insane, the result is . . . that the safety of society requires that he should be placed in seclusion for such a period as will promote the joint ends of personal reformation and the preservation of the well-

---

understand what the psychiatrist has to tell him. . . . This "technicalization" of psychiatric testimony has resulted in the paradox that although one of the purposes of the Durham Decision is to insure that the moral decision is made by the jury rather than the expert, the facts on which that decision is to be based are so technical that the jury must hear the psychiatrist's conclusion as to whether the act was a product of mental disease or not, which is equivalent to an opinion about responsibility. . . . Thus, it tends to be the psychiatrist, rather than the facts, that influences the jury; the effect is that the moral decision is placed more firmly in the hands of the psychiatrist, although more subtly.

[65] Lessee, *A Dance Macabre—Psychiatry and the Law*, 18 Am. J. Psychotherapy 183 (1964).

[66] Luby, *Murder with Malice*, 43 Mich. St. B.J. 39, (1964). It is not surprising that judges and juries have difficulty with the concept of mental illness. In a study done in 1969, four groups of people, all with a high degree of contact with mental illness, were interviewed. Forty-eight mental health professionals, 59 counselors, 43 welfare workers, and 69 police officers participated in the study. The conclusion of the author was that "[a]lthough the reported exposure to the mentally ill was high, there appeared to be no concensus about its definition." Mackey, *Personal Concepts of the Mentally Ill Among Caregiving Groups*, 53 Mental Hygiene 245, 252 (1969).

being of the community at large."[67] A well-known jurist recently urged that insanity should bear only upon the disposition of the offender after his conviction.[68] Thus, "the contest among *M'Naghten* and its competitors is a struggle over an irrelevancy."[69]

A few states have enacted legislation which adopts this theory in part. In California,[70] the issue of insanity is tried separately from the other issues of the case, but it is still tried by a jury. In Colorado,[71] it may be tried separately in the discretion of the court, again by a jury. It may or may not be the same jury which decided whether he committed the crime. The purpose of these statutes is to simplify the issues before the jury.[72] Many of the problems previously discussed (battle of experts and the jury not being qualified) are not solved by these statutes, but the progress is evident. The second trial, on the issue of insanity, presents fewer issues for the jury to consider, and helps to "decide what combination of treatment and/or punishment is appropriate to the individual offender."[73]

B. *Independent Expert Determination*

The most desirable system would provide for a pre-trial determination of present sanity and sanity at the time of the act by a competent, qualified panel of experts. Following a plea of not guilty by reason of insanity, a panel of experts would thoroughly test the defendant, interview him, and file a written report as to his sanity. If the panel found that the defendant was insane, he would be committed to a proper rehabilitative institution and the criminal charges would be dropped. If they found him sane, the defendant would proceed to trial on all issues of the case, including insanity, if he chose to raise it. The initital decision in each case would be whether the defendant "should be directed into the criminal process . . . or whether noncriminal alternatives should first be explored."[74] A panel of experts, consisting of psychiatrists, psychologists, and lawyers, would determine the degree of mental disorder. This procedure has two advantages over the two-trial system: (1) The cost in man-hours and money of two trials would be reduced immensely, for there would be no need for a trial if the defendant were found insane;[75] and (2) the

---

67 WHARTON & STILLE'S MEDICAL JURISPRUDENCE 670 (1882).

68 Weintraub, *Criminal Responsibility: Psychiatry Alone Cannot Determine It*, 49 A.B.A.J. 1075, 1078 (1963).

69 *Id.* at 1075.

70 CAL. PENAL CODE § 1026 (West 1970). *See* Louisell & Hazard, Jr., *Insanity as a Defense: The Bifurcated Trial*, 49 CAL. L. REV. 805 (1961).

71 COLO. REV. STAT. 39-8-3 (1963).

72 People v. Wells, 33 Cal. 2d 330, 202 P.2d 53, *cert. denied*, 338 U.S. 836 (1949).

73 Wiseman, *supra* note 57, at 299.

74 Goldstein, *Psychiatrists in Court: Some Perspectives on the Insanity Defense*, 125 AM. J. PSYCHIATRY 1348, 1350 (1969).

75 There would still be the cost of the psychiatric examination. Psychiatric consultation costs roughly $20-$35 per hour, and the estimate of time to properly evaluate an individual defendant ranges from three hours to six weeks. It depends on "the nature of the person being examined, the technical skill of the examiner, and *the use to which the data will be put*." A. WATSON, PSYCHIATRY FOR LAWYERS 303 (1968). Even if the expense of psychiatric examination is costly, the money is more wisely spent in this way than in the cost of trials.

determination is made by experts after thorough study, rather than by laymen jurors unqualified in the area.

For a short time this system was used in Louisiana, but it was declared unconstitutional following a critical statutory amendment. As originally enacted in 1928,[76] the law provided a lunacy commission to determine a defendant's sanity following a plea of not guilty by reason of insanity. If the commission found him presently insane and insane at the time of the commission of the crime, he was committed to a hospital for the insane. Whenever the commission found the defendant presently sane and sane at the time of the crime, a jury trial was held on all issues, including the sanity of the defendant. The statute was held to be constitutional by the Supreme Court of Louisiana,[77] since a jury was eliminated only in those cases in which the lunacy commission decided favorably on defendant's plea of insanity. Where the commission's decision was adadverse to defendant, he was allowed to proceed to a jury trial on all issues. There was no denial of the constitutional right to a trial by jury, since a trial could be had on defendant's request. The 1928 amendment,[78] which dealt the death blow to these statutes, empowered the lunacy commission to make a conclusive determination as to defendant's insanity, a procedure which clearly violated his right to trial by jury. That amendment was declared unconstitutional,[79] and the other parts of the act were repealed in 1932.

It appears from the Louisiana decisions that in order to prevent constitutional violations, the panel's report must not be made conclusive as to the defendant. However, as long as the defendant is given alternative avenues to have his sanity adjudged by a jury, there is no denial of a constitutional right. Moreover, a constitutional right may be waived if done intelligently and knowingly.[80] While a plea of not guilty by reason of insanity is not the same as a guilty plea,[81] it is a plea of confession and avoidance.[82] The defendant is not denied a constitutional right by having the commission determine his sanity, as long as there remains a right to a jury determination if the defendant so desires.

This system offers a solution to each problem which exists presently. There will be no outmoded rules which severely hamper an expert's testimony. It will help bridge the gap which exists between law and psychiatry. It will curtail the problems of witness intimidation, battle of the experts, and an unqualified jury, since many of the cases will never go to trial. In addition, it will save many defendants and their relatives the cost and embarrassment of a criminal trial.

One criticism of this system is that it encourages malingering. If a defendant who was in fact sane could convince the panel he was insane, and

---

76 La. Code of Crim. Proc. arts. 267-69 (1928) (repealed 1932).
77 State v. Burris, 169 La. 520, 125 So. 580 (1929).
78 La. Act 17, Ex. Sess. (1928).
79 State v. Lange, 168 La. 958, 123 So. 639 (1929).
80 Johnson v. Bennett, 414 F.2d 50 (8th Cir. 1969).
81 People v. Pincus, 131 Cal. App. 607, 21 P.2d 964 (1933).
82 People v. Troche, 206 Cal. 35, 273 P. 767 (1928).

shortly after he was committed he could prove he was sane, he could be released and thereby avoid criminal prosecution. The feigning of mental illness to avoid prosecution has received considerable attention in psychiatric literature. However, malingering is not a major problem from the viewpoint of experts. The consensus is that it "is extremely difficult to feign mental illness for more than a few days unless one is equipped with grim determination and an excellent knowledge of psychiatry. For these reasons malingering of mental illness is quite easily detected."[83]

Another possible criticism of this system is that psychiatrists are not capable of determining the legal question of criminal responsibility. It is true that a psychiatrist is no more competent to make a *moral* judgment than is anyone else. Furthermore, an individual may be mentally ill without being *legally* insane. However, these are merely procedural problems. The panel would necessarily have to know the requirements of the criminal law, and thus the lawyer who is an advisory member of the panel would assist in any legal problems which might arise. The panel's special qualification is its ability to test, discover, and describe the defendant's psychological activity and its relationship to the defendant's actions and his environment. Furthermore, it may, with some accuracy, predict how these matters relate to defendant's past and future behavior.[84] In examining a defendant, the panel "will take into consideration the entire body of symptoms and signs in an attempt to understand why the individual conducts himself and feels as he does."[85] It may be true that psychiatry and psychology will never be a precise, experimentally verified science "with substantially unanimous agreement of all behavioral scientists as to observation and theory."[86] However, the proposal is for an improvement on the

---

[83] S. HALLECK, PSYCHIATRY AND THE DILEMMAS OF CRIME 304 (1967).

[84] A. WATSON, PSYCHIATRY FOR LAWYERS 306 (1968).

[85] Overholser, *supra* note 34, at 529. The author illustrates the intensive character of the examination:

> Let us now turn to considering the nature of a mental examination. There may be a very few cases in which a glance even by an untrained person will satisfy the observer that the subject is mentally deranged, but these cases are rare indeed. A proper examination calls first of all for a physical examination and if possible an electroencephalogram to determine from what are colloqually known as "brain waves" whether or not there is a tendency toward epilepsy or some other gross abnormality of the brain. The presence or absence of gross neurological changes should be tested. A reasonably full history of the individual is essential, together with various psychological tests; the history should be obtained from the subject himself and from outside sources. No one is an entirely dependable source of information about his own conduct, particularly in criminal cases, where self-serving and self-exculpatory declarations are likely to be met. The psychiatric interview should include not only the history but the ascertaining of the presence or absence of delusions and hallucinations, evaluation of the judgment of the subject, his recognition of his relations with those about him or what we term orientation, his memory, his thought processes and his emotional reactions, such as undue elation or depression or indifference. There is hardly any one symptom which can be said to be pathognomonic of mental disorder and except in unusual instances there is hardly anything so clear cut and obvious as, let us say, an x-ray of a broken bone.

Id.

[86] Diamond & Louisell, *The Psychiatrist as an Expert Witness: Some Ruminations and Speculations*, 63 MICH. L. REV. 1335, 1342 (1965).

present system of determining insanity. The proposal that an expert panel make that decision offers an improvement.

IV. Disposition After Determination

Following a determination of insanity, the procedure in some states is mandatory confinement, while in others commitment is discretionary with the court.[87] In Iowa, if the defendant is acquitted by reason of his insanity, the jury must state that fact in its verdict.[88] The Iowa courts then may order him committed, if his discharge would be dangerous to the public peace and safety, until he demonstrates he is no longer considered dangerous.[89] The fear on the part of a jury that by returning a not guilty by reason of insanity verdict that the defendant will be completely discharged has had great effect on a jury's decision.[90] It has been suggested that an instruction be given to the effect that if the defendant is found not guilty by reason of insanity, he will be committed to an institution if he is considered dangerous to society.[91] That instruction has been upheld upon appeal by some courts,[92] and reversed by others.[93]

A major problem in raising the insanity defense is the possibility of an indeterminate sentence to a mental institution. For a defendant charged with a minor crime, the fear of receiving a much longer "sentence" in a mental institution than in a penal institution might deter him from using insanity as a defense.[94] The defendant, even if he could establish insanity at the time of the crime, pleads guilty to avoid the indeterminate detention of a mental institution.[95] The law should attempt to encourage a defendant to seek rehabilitation if he is mentally ill, but an indeterminate sentence is inconsistent with that encouragement. Perhaps a procedure should be instituted whereby a defendant committed to a mental institution can be forced to remain only during the maximum period he would have had to remain in prison. He could, of course, remain on a voluntary commitment basis. This sytem would be no more dangerous to society than the present system, since an "insane" defendant would be incarcerated at least as long as if he had gone through criminal procedures.

A study done in New York on arrest rates of 10,247 released mental patients over a period of 5.6 years showed that "the annual arrest rate for pa-

---

87 Weihofen, *supra* note 30, at 432-33.
88 Iowa Code § 785.19 (1966), as amended by Ch. 199, § 21 [1967] Iowa Acts 370.
89 *Id.*
90 Smith v. State, 220 So. 2d 313, 316 (Miss. 1969).
91 *See generally* Annot., 11 A.L.R.3d 737 (1967).
92 *See, e.g.,* Taylor v. United States, 222 F.2d 398, 404 (D.C. Cir. 1955).
93 *See, e.g.,* Smith v. State, 220 So. 2d 313 (Miss. 1969).
94 Goldstein, *Psychiatrist in Court: Some Perspectives on the Insanity Defense,* 125 Am. J. Psychiatry 1348, 1350 (1969).
95 *Id.* Another writer is in agreement:

> In spite of the trivial nature of the charge, some of these persons have been found to be seriously ill mentally and potentially dangerous. . . . [I]t would seem to be to society's advantage at least to keep him in custody until he can be released safely. I venture to suggest that the odds are in favor of a period of sequestration in the hospital that is longer than if a sentence were being served.

Overholser, *supra* note 34, at 531.

tients was far lower than that of the general population (122 per 10,000 as compared with 491)."[96] Released patients with prior arrest records had rates of rearrest approximately the same as people in the general population with prior records of arrest.[97] A significant factor was that rates of arrest "among patients were *inversely* related to severity of mental symptoms."[98] Thus, under a properly supervised discharge system, a released mental patient seems to be no greater risk than the average person. The determination of when a defendant should be discharged from commitment depends upon a number of factors. It has been suggested that a discharge would be acceptable:

> [I]f (1) it depended on an affirmative medical opinion that a recurrence of illness is strongly negatived; (2) there was parole supervision; (3) there was a firm grip on the man to the end that he could be returned to custody on signs of possible recurrence without awaiting the commission of another antisocial act; and (4) the heads of mental institutions were oriented to the added responsibility which would be theirs.[99]

Thus, reform must be advanced in the disposition aspect of insanity as well as in the determination thereof. Particularly, procedure must be instituted to allow an insanity plea to minor crimes without fear of an indeterminate sentence.

V. Conclusion

Although there are a variety of "tests" of insanity, none has been successful in achieving a knowledgeable determination of insanity. The present system of handling the insanity defense is antiquated and barely workable. The primary reason for its failure is that a jury of twelve laymen is not qualified to decipher complex medical testimony necessary for a proper determination of the sanity of a defendant. That critical determination should be left to a panel of experts, composed of psychiatrists, psychologists, and disinterested lawyers as legal advisors.

It would not be difficult to change from the present system. The following is a simple legislative proposal, patterned in part after the Louisiana statute which was repealed, which could be used.

A BILL FOR

An Act to allow an expert panel determine the criminal insanity of a defendant who pleads not guilty by reason of insanity.

Be It Enacted by the General Assembly of the State of _____:

Section 1. Whenever insanity *is* relied upon either as a defense or as a

---

96 Reading in Law and Psychiatry 358 (R. Allen, E. Ferster & J. Rubin, eds. 1968).

97 *Id.*

98 *Id.*

99 Weintraub, *Criminal Responsibility: Psychiatry Alone Cannot Determine It,* 49 A.B.A.J. 1075, 1078 (1963).

reason for defendant's not being presently tried, such insanity shall be set up as a separate *plea and a pre-trial determination thereon shall be made*

Section 2. Whenever any plea of insanity *has* been filed, the presiding judge shall *establish a panel of psychiatrists, psychologists, and lawyers to examine the defendant. The panel will be chosen from lists of available psychiatrists, psychologists,* and *lawyers in the same manner as an attorney is appointed to represent an indigent defendant. No permanent panel should be established, and no psychiatrist or psychologist connected with any state mental facility should serve on any panel.*[100]

Section 3. *The panel* shall proceed with the investigation into the insanity of the accused, and, for that purpose, shall have the right of free access to him at all reasonable times and shall have full power and authority to summon witnesses and to enforce their attendance.

Section 4. The findings of the *panel* or of a majority of its members *shall be filed in court.* If said report *states* that the accused is presently insane, or was insane at the time of the commission of the crime, he shall be committed to *a mental institution, and the criminal charges shall be dropped. The accused may not be compelled to remain at a mental institution for any length of time longer than he would have had to serve in a penal institution had he gone to trial on the charge.* If the report states that the accused is presently sane and was sane at the time of the commission of the crime, *the defendant will proceed to trial on all issues of the case, under the appropriate state statutory and case law regarding insanity as a defense at trial.*[101]

Other procedures that are presently used in the states would be continued, for example, the determination that a person who is in commitment in an institution is no longer considered insane. The above sample statute is simply a brief sketch of a proposal which might alleviate major problems in the present insanity defense. Some of those problems would be solved if an expert panel would be the first forum to determine a defendant's sanity.

J. RICHARD BLAND

---

[100] One of the inherent problems in the Louisiana statute was that its commission was composed of the Coroner of the Parish, the Superintendent of the Hospital for the Insane at Jackson, and the Superintendent of the Hospital for the Insane at Pineville. The members of the commission never changed, which eventually makes such a commission prosecution oriented, and it can hardly be said that the two superintendents were disinterested parties.

[101] The unitalicized portions of the bill are taken from the repealed Louisiana Criminal Code. The italicized portions are from the author.