

## ABOLISH THE "INSANITY DEFENSE"—WHY NOT?\*

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## PROLOGUE

THE criminal law is one of many mechanisms for the control of human behavior. It defines conduct that is thought to undermine or destroy community values. It seeks to protect the life, liberty, dignity, and property of the community and its members by threatening to deprive those who contemplate such conduct and by inflicting sanctions upon those who engage in proscribed activity. The sanctions authorized, whether intended to punish, restrain, reform, or deter, constitute a deprivation of life, liberty, dignity and property. Because of the inherent conflict between the values ultimately to be preferred and their deprivation by the sanctions authorized, the criminal law has sought to minimize the consequences of this paradox through rules of law which restrict the state's authority to sanction. One of these rules, a fundamental restriction, is that before the state can inflict sanctions it must overcome the presumption of innocence which favors all of us—by establishing beyond a reasonable doubt each element of the offense charged. By defining crimes in terms of such traditionally material elements as a *voluntary act purposely causing a specific result*, the laws seeks to exclude from criminal liability those who are not "appropriate" subjects for a given sanction or indeed for any sanction. Thus, if the state fails to produce evidence which establishes each element of the crime or, put another way, if the accused introduces evidence which leaves in doubt any material element, no sanction can be imposed for the crime charged. To illustrate, the state cannot hold a person criminally responsible for murder if there was no causal relationship between the shot fired and the death of the victim; or if the shot was fired without the intent (*mens rea*) to kill, even though death was caused by the shot; or if the victim did not die even though the shot was fired with intent to kill. Recognizing that the elements of a given offense may not be sufficiently precise to exclude all those who ought to be free of criminal liability, the state, in order to maximize preferred values, has formulated exceptions which are called defenses. Thus, to prevent the state from actually encouraging criminal activity, the defense of police entrapment, for example, will relieve an offender of liability even if each element of the crime is established beyond doubt. The evaluation of any device for sorting out who is and who is not an

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appropriate subject for criminal sanction requires identifying the values in issue. No device haunts the criminal law and clouds the values it seeks to reinforce more than "insanity" as a basis for relieving persons of criminal responsibility.

#### WHY BEFORE WHAT

Criminal responsibility results when each element of a crime charged against an accused has been established beyond a reasonable doubt. Only then is the state authorized to exercise its power to impose certain specified sanctions against the offender.<sup>1</sup> "Insanity at the time of the offense," we are told, relieves the offending actor of criminal responsibility.<sup>2</sup> This may mean either that "insanity" is to serve as *evidence* which precludes establishing a crime by leaving in doubt some material element of an offense, or that "insanity" is to serve as a *defense* to a crime, even though each of its elements can be established beyond doubt, in order to protect a preferred value threatened by the imposition of an authorized sanction.<sup>3</sup>

"Insanity," however formulated, has been considered a defense.<sup>4</sup> An evaluation of such a defense rests on first identifying a need for an exception to crim-

1. [T]he meaning of responsibility is liability to punishment; and if criminal law does not determine who are to be punished under given circumstances, it determines nothing.

2 STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 183 (1883).

Misleadingly simplified, the material elements of an offense are a *voluntary act* performed with *purpose, knowledge, recklessness or negligence causing with purpose, knowledge, recklessness or negligence a result*.

On proof beyond a reasonable doubt and the material elements of an offense see MODEL PENAL CODE §§ 1.12, 1.13 (Proposed Official Draft 1962) and MODEL PENAL CODE Comments at 108-35 (Tent. Draft No. 4, 1955).

Sanctions are imposed by the state presumably against, or at least without regard to, the wishes of the individual being deprived. Implicit in the word "sanction" . . . is involuntariness. In this context involuntariness is not treated as a psychological concept. Thus, for example, imprisonment is a sanction even if imposed on a person who commits a crime in order to be punished or in order to escape cold and hunger in the "warmth" of a jail.

Goldstein, J., *Police Discretion Not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543, 544 n.4 (1960).

2. Daniel M'Naghten's Case, 4 St. Tr. N.S. 847, 8 Eng. Rep. 718 (H.L. 1843). See generally DONNELLY, GOLDSTEIN, J., & SCHWARTZ, CRIMINAL LAW 733-844 (1962) (hereinafter cited as CRIMINAL LAW).

3. Louisell & Hazard, *Insanity as a Defense: The Bifurcated Trial*, 49 CALIF. L. REV. 805 (1961).

4. "Insanity is a defense to be asserted at the trial as any other defense; . . ." *People v. Heirens*, 4 Ill. 2d 131, 142, 122 N.E.2d 231, 238 (1954). *But see* note 20 *infra*. On sanity apparently perceived as a material element of each offense, possibly as *mens rea* itself, and on the burden of proving the defense of insanity, see *United States v. Currens*, 290 F.2d 751, 761 (3d Cir. 1961) and *Tatum v. United States*, 190 F.2d 612, 615 (D.C. Cir. 1951):

When lack of mental capacity is raised as a defense to a charge of crime, the law accepts the general experience of mankind and presumes that all people including the accused is sane. . . . [But] as soon as some evidence of mental disorder is introduced . . . sanity like any other fact, must be proved as part of the prosecution's case beyond a reasonable doubt.

inaliability. Unless a conflict can be discovered between some basic objective of the criminal law and its application to an "insane" person, there can be no purpose for "insanity" as a defense. Until a purpose is uncovered, debates about the appropriateness of any insanity-defense formula as well as efforts to evaluate various formulae with respect to the present state of psychiatric knowledge are destined to continue to be frustrating and fruitless.<sup>5</sup>

To demonstrate the kind of analysis we think essential to a meaningful examination of insanity as a defense, we first analyze the concept of the defense of self-defense.<sup>6</sup> If a person intentionally kills another human being, the criminal law, in support of a basic community objective—the protection of human life—defines such conduct as a crime and authorizes as the sanction life imprisonment of the offender.<sup>7</sup> Few would disagree about the ultimate objective of protecting life and about the elements of the crime,<sup>8</sup> but there may be little or no consensus about the sanction<sup>9</sup> or its purposes. The imposition of life imprisonment rests on a variety of oft-conflicting and mutually inclusive assumptions shared by legislature, court and community about deprivation of liberty and its psychological significance. As *punishment*, life imprisonment is assumed to satisfy and channel the community's need to express feelings of vengeance or desires to effect rehabilitation of the offender.<sup>10</sup> As *restraint*, it is assumed to remove from circulation a person who is believed likely to kill again, to provide a structure for satisfying community vengeance or to offer

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On proving insanity rather than sanity beyond reasonable doubt, see *Leland v. State*, 343 U.S. 790 (1952), and see note 33 *infra*.

5. The quantitative extent of such debate is suggested by the entries which appear under the heading "Insanity" in the INDEX TO LEGAL PERIODICALS. Since the *Durham* case (1954) over 150 articles have appeared whose titles indicate that they deal with some aspect of the insanity-defense controversy. The *Durham* case itself has provoked almost 50 law journal notes or extended discussions. As of Jan. 1963, according to SHEPARD'S FEDERAL REPORTER CITATIONS, *Durham* had been cited—both favorably and unfavorably—in approximately 140 cases.

6. The threat to self can, of course, be treated as evidence casting doubt on voluntariness as a requisite element of the crime of murder.

7. We exclude from our analysis of self-defense the death penalty which may accompany a finding of murder in the first degree, for feelings about that sanction are likely to distort the already complex issues to be unravelled. See SELLIN, THE DEATH PENALTY, A REPORT FOR THE MODEL PENAL CODE PROJECT OF THE AMERICAN LAW INSTITUTE (1959), and generally ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953, REPORT, CMD 8932 (1953), CRIMINAL LAW 304-48.

Moreover, we exclude consideration of certain lesser included or other offenses for which the defendant may be convicted if each of the elements of some other offense is established beyond doubt.

8. As one of the great objectives of all law, and particularly of criminal law, is the protection of life, it follows that homicide must, as a rule, be unlawful, so that it is necessary to consider only those cases in which it is lawful.

3 STEPHEN, *op. cit. supra* note 1, at 11.

9. On the dispute about the death penalty as an appropriate sanction see SELLIN, and ROYAL COMMISSION ON CAPITAL PUNISHMENT, *op. cit. supra* note 7.

10. Life imprisonment does not necessarily mean imprisonment for life. See, *e.g.*, CONN. GEN. STAT. ch. 961, § 54-125 (1958) making persons sentenced to life imprisonment eligible for parole on the expiration of a minimum of 20 years.

an institutional opportunity for care and rehabilitation. As *rehabilitation*, it is assumed to reduce the likelihood that he who has killed once will kill again, to increase the likelihood of returning a life to the community or to provide a basis for rationalizing community vengeance. As a *deterrent of others*, it is assumed to reinforce internal controls over the urge to kill through external threats of punishment, restraint, rehabilitation and the accompanying stigma.<sup>11</sup> Thus, via a variety of assumptions which may or may not be related to an actual impact on any one offender or on other members of the community, life imprisonment becomes the sanction for one who kills another intentionally.

Intentional killing in defense of self, however, is an exception which denies the state authority to impose the sanction authorized for intentional killings. This exception "rests upon the necessity of allowing a person to protect himself from . . . [lethal] harm in cases where there is no time to resort to the law for protection."<sup>12</sup> Thus under circumstances where, by definition, one of two must die, the law seeks a solution least incompatible with its overall objective of protecting life by preferring the life of the "law-abiding" citizen. He is the man whose inner controls reinforced by the threat of external sanction hold in check his urge to kill except when his own life is jeopardized by someone not so deterred. The law thereby recognizes that the sanction for intentional killings is drained of any deterrent strength when external reality's system for

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11. Psycho-analysts have drawn attention to three main motives in our attitude towards law-breakers and criminals that operate in addition to the conscious reasons that are more readily recognized. . . . In the first place, the criminal provides an outlet for our (moralized) aggression. In this respect he plays the same role as do our enemies in war and our political scapegoats in time of peace. That some very real satisfaction is to be found in this way is shown by the vast crowds that attended public executions. . . . In the second place, the criminal by his flouting of law and moral rule constitutes a temptation to the id; it is as though we said to ourselves, "if he does it, why should not we?" This stirring of criminal impulses within ourselves calls for an answering effort on the part of the super-ego, which can best achieve its object by showing that "crime doesn't pay." This in turn can be done most conveniently and completely by a demonstration on the person of the criminal. By punishing him we are not only showing him that he can't "get away with it" but holding him up as a terrifying example to our own tempted and rebellious selves. Thirdly . . . is the danger with which our whole notion of justice is threatened when we observe that a criminal has gone unpunished. The primitive foundation of this notion . . . lies in an equilibrium of pleasures and pains, of indulgence and punishment. This equilibrium is disturbed, either if the moral rewards of good conduct are not forthcoming . . . or if the normal punishments of crime are absent or uncertain . . . . It is to prevent disturbance of the latter kind that we insist that those who have broken the law shall be duly punished. Through their punishment the equilibrium is re-established, without it (so we dimly feel) the whole psychological and social structure on which morality depends is imperilled.

FLUGEL, *MAN, MORALS AND SOCIETY* 169-70 (1945).

On the oft-conflicting purposes reflected in authorized sanctions see, Goldstein, J., *Police Discretion Not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice*, 69 *YALE L.J.* 543, 544-50 (1960).

12. 5 *WIS. LEGISLATIVE COUNCIL, JUDICIARY COMMITTEE REPORT ON THE CRIMINAL CODE* 44 (1953).

protecting life fails and in turn releases internal reality's instinct for self-preservation.<sup>13</sup> Conceptualized another way, authorizing the potential victim to kill his assailant constitutes a sanction which may be assumed to fulfill punitive, restraining, and deterrent functions in the service of the community's objective to safeguard human life.<sup>14</sup> To generalize, when a situation is identified in which the application of the authorized sanction would conflict with basic criminal law objectives, a rational system of law would seek first to articulate why such an application is inappropriate and then to formulate the exception to accord with those objectives.

Having articulated the reasons for an exception to liability for intentional killings in defense of self, it becomes possible to evaluate such competing formulations as for example, (a) the actor's "right to stand his ground" and meet force with force,<sup>15</sup> or (b) the actor's duty to "do everything reasonably possible to escape [without resorting] to the use of deadly force."<sup>16</sup> Formulation (a) subordinates the value of safeguarding human life whenever possible to the values of safeguarding a threatened man's right to protect his interest in property as well as his right to be free from the stigma or uneasiness associated with cowardice. Formulation (b) prefers the value of safeguarding human life whenever possible. Conceptually, and probably in practice, the second formulation would best serve to protect both lives. Its application would restrict to a minimum the number of instances where reality leaves no choice and forces favoring one life over another.<sup>17</sup> The sanction authorized for intentional killings, therefore, remains operative except in those situations where the choice is between one of two lives, not between, for example, life and an interest in property, pride or reputation.<sup>18</sup>

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13. The law acknowledges that killings in defense of self are not motivated by aggressive instincts out of control but by the ego's self-preservative interests, *i.e.*, to keep itself alive and protect itself from external danger. The ego is moderator between id, superego and reality demands. Law and its implementation, as viewed by ego, is part of reality. Law is recognition that id out of control would destroy us as individuals and as a society. Law, then, as a social control device, rests on the assumption that man's ego and superego need assistance for the control of id.

14. The assailant is thus assumed not to be deterred by the authorized sanction of deadly force in self-defense which for some might have a deterrent potential.

15. *People v. Tomlins*, 213 N.Y. 240, 244, 107 N.E. 496, 498 (1914).

16. 5 WIS. LEGISLATIVE COUNCIL, *op. cit. supra* note 12, at 45. See *State v. Abbott*, 36 N.J. 63, 174 A.2d 881 (1961), for discussion of duty to retreat.

17. Application of such a formulation might contribute through time to a redefinition of courage—with running away rather than using deadly force being perceived as a courageous act. See HARTMANN, *PSYCHOANALYSIS AND MORAL VALUES* 31-32 (1960).

18. MODEL PENAL CODE § 3.04 (Proposed Official Draft 1962) provides in pertinent part:

(b) The use of deadly force is not justifiable . . . unless the actor believes that such force is necessary to protect himself against death, serious bodily harm, kidnapping or sexual intercourse compelled by force or threat; nor is it justifiable if:

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(ii) the actor knows that he can avoid the necessity of using such force with complete safety by retreating or by surrendering possession of a thing to a person

With this framework for identifying a need for an exception to criminal liability and for evaluating formulations to meet such a need, we turn to an examination of the "insanity defense."

Like self-defense, the insanity defense applies, theoretically at least, only to persons against whom each of the elements of the offense charged could be established.<sup>19</sup> Like defense of self, the defense of insanity, if successfully pleaded, results in "acquittal."<sup>20</sup> But unlike the acquittal of self-defense which means liberty, the acquittal of the insanity defense means deprivation of liberty for an indefinite term in a "mental institution."<sup>21</sup> And unlike the purpose of

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asserting a claim of right thereto or by complying with a demand that he abstain from any action which he has no duty to take, except that:

(1) the actor is not obliged to retreat from his dwelling or place of work, unless he was the initial aggressor or is assailed in his place of work by another person whose place of work the actor knows it to be; and . . .

(c) Except as required by paragraphs . . . (b), a person employing protective force may estimate the necessity thereof under the circumstances as he believes them to be when the force is used, without retreating, surrendering possession, doing any other act which he has no legal duty to do or abstaining from any lawful action.

. . . .

For another problem in evaluating the impact of a statute's self-defense formulation see, *e.g.*, WISC. STAT. ch. 940.05 (1955):

MANSLAUGHTER. Whoever causes the death of another human being under any of the following circumstances may be imprisoned not more than 10 years: . . .

(2) Unnecessarily, in the exercise of his privilege of self-defense . . .

19. See the proposed charge to the jury formulated in *Durham v. United States*, 214 F.2d 862, 875 (D.C. Cir. 1954); *People v. Gorshen*, 51 Cal. 2d 716, 726-34, 336 P.2d 492, 498-503 (1959); MODEL PENAL CODE § 4.01 (Proposed Official Draft 1962). *But see* note 39 *infra* and accompanying text.

20. STEPHEN has observed that:

[I]n very ancient times proof of madness appears not to have entitled a man to be acquitted, at least in case of murder, but to a special verdict that he committed the offense when mad. This gave him a right to a pardon. The same course was taken when the defence was killing by misadventure or in self-defence.

2 STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 151 (1883).

Francis Bacon observed that the Crown, in exercising its power to pardon, will spare those only whose case, could it be foreseen, the Law itself may be presumed willing to have excepted out of its general Rules which the Wisdom of Man cannot possibly make so perfect as to suit every particular Case.

3 BACON, A NEW ABRIDGEMENT OF THE LAW 802 (1736), reprinted in CRIMINAL LAW at 247.

21. Before 1800 in England, and in most jurisdictions in this country, if an accused person was found to be irresponsible by reason of insanity he was forthwith acquitted and no special order looking to his safety or that of society was made. But by the Criminal Lunatics Act of 1800, the jury, in acquitting such a defendant, accused of a felony, was required to find specially whether such a person was insane at the time of the commission of the act, and whether he was acquitted upon that ground. Upon such a finding, the defendant was committed and detained "during His Majesty's pleasure."

GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW 392-93 (1925).

Similar legislation was enacted by most of the American states soon afterward, although in some states not until a century later.

self-defense, the purpose of the insanity defense either has been assumed to be so obvious as not to require articulation or has been expressed in such vague generalizations as to afford no basis for evaluating the multitude of formulae.

Neither legislative report, nor judicial opinion, nor scholarly comment criticizing or proposing formulations of the insanity defense has faced the crucial questions: "What is the purpose of the defense in the criminal process?" or "What need for an exception to criminal liability is being met and what objectives of the criminal law are being reinforced by the defense?"

The Royal Commission on Capital Punishment (1953) disposed of this issue with apodictic assurance by asserting:

We make one fundamental assumption, which we should hardly have thought it necessary to state explicitly . . . It has for centuries been recognized that, if a person was, at the time of his unlawful act, mentally so disordered that it would be unreasonable to impute guilt to him, he ought not to be held liable to conviction and punishment under the criminal law. Views have changed and opinions have differed, as they differ now, about the standards to be applied in deciding whether an individual should be exempted from criminal responsibility for this reason; but the principle has been accepted without question . . .<sup>22</sup>

Thus the Royal Commission reiterated the well-rounded proposition that "if a person was . . . mentally so disordered that it would be unreasonable to impute guilt to him, he ought not to be held [guilty, *i.e.*] liable to conviction and punishment." The Commission neither sought to identify the purposes of not imputing guilt to "individuals whose conduct would otherwise be criminal,"<sup>23</sup> nor did it ask why and when does the imputation of guilt for being "mentally so disordered" become "unreasonable." The Commission had no basis for evaluating the changing views and opinions "about the standards to be applied," and the principle "accepted without question" remained without meaning.

A century earlier the pattern had been firmly set of accepting an insanity defense without asking: "Why an insanity defense?" or more appropriately, "What objective of the criminal law suggests the need for an exception to the law's general application—an exception which would require taking into account the mental health of the offender?" In *M'Naghten's Case* (1843), the House of Lords, acting in their judicial, not legislative capacity, asked only what is the law respecting alleged crimes committed by persons afflicted with

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WEIHOFFEN, INSANITY AS A DEFENSE IN CRIMINAL LAW 263. See also *id.* at 262-332 (1933).

For the current situation, see MODEL PENAL CODE § 4.03 (Proposed Official Draft 1962) and Comments to § 4.03 at 199-201 (Tent. Draft No. 4, 1956); *Lynch v. Overholser*, 369 U.S. 705, 714-20 (1962); D.C. CODE § 23-301 (1955); *Durham v. United States*, 214 F.2d 862, 876 n.57 (D.C. Cir. 1954); and Goldstein, J. & Katz, *Dangerousness and Mental Illness—Some Observations On the Decision to Release Persons Acquitted By Reason of Insanity*, 70 YALE L.J. 225 (1960); and see notes 45 & 48 *infra*.

22. ROYAL COMMISSION ON CAPITAL PUNISHMENT, 1949-1953 REPORT CMD. 8932, at 98 (1953).

23. MODEL PENAL CODE § 4.01, Comment at 156-60 (Tent. Draft No. 4, 1956).

"insane delusions."<sup>24</sup> And the innovating court in *Durham* (1954), after promulgating a new formulation gave no guide to evaluating its adequacy beyond noting:

Our collective conscience does not allow punishment where it cannot impose blame. . . .

The legal and moral traditions of the western world require that those who, of their own free will and with evil intent (sometimes called *mens rea*), commit acts which violate the law, shall be criminally responsible for those acts. Our traditions also require that where such acts stem from and are the product of a mental disease or defect . . . moral blame shall not attach, and hence there will not be criminal responsibility . . . .<sup>25</sup>

The court leaves without definition and without identification of purpose such ambiguous words as "punishment," and "blame,"<sup>26</sup> and thus in effect only says "he who is punishable is blameworthy and he who is blameworthy is punishable." Never established is the relevance of these words to a defense which would compel supposedly different dispositions of persons involved in activity labeled "criminal." Moreover, the court, though not blinded by precedent, left unasked and therefore unanswered: "What underlies the 'legal and moral traditions' in 'our collective conscience' which prevents us from inquiring why a rule is required?"

Likewise, the American Law Institute (1956-1962) provides no basis for evaluating its formula for a defense of insanity.<sup>27</sup> With focus on consequences,

24. [T]o 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.

Daniel M'Naghten's Case, 4 St. Tr. N.S. 847, 931, 8 Eng. Rep. 718, 722 (H.L. 1843).

25. *Durham v. United States*, 214 F.2d 862, 876 (D.C. Cir. 1954).

[A]n accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect.

We use "disease" in the sense of a condition which is considered capable of either improving or deteriorating. We use "defect" in the sense of a condition which is not considered capable of either improving or deteriorating and which may be either congenital, or the result of injury or the residual effect of a physical or mental disease.

*Id.* at 874-75.

26. In all civilized communities, ancient or modern, some forms of insanity have been regarded as exempting from the punishment of crime, and under some circumstances at least, as vitiating the civil acts of those who are affected with it. The only difficulty, or diversity of opinion consists in determining who are really insane, in the meaning of the law . . . .

RAY, A TREATISE ON THE MEDICAL JURISPRUDENCE OF INSANITY 2 (4th ed. 1860).

27. MODEL PENAL CODE § 4.01 (Proposed Official Draft 1962) provides:

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

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



it "explains," echoing the Royal Commission and *Durham*, that the purpose of the insanity defense is "to discriminate between the cases where a *punitiv-correctional* disposition is appropriate and those in which a *medical-custodial* disposition is the only kind that the law should allow."<sup>28</sup> Once "*punitiv*" is substituted for "*custodial*" and "*correctional*" for "*medical*," or however the terms are juxtaposed in the ALI statement, the "distinctions" seem to disappear.<sup>29</sup> Moreover, criteria for evaluating what constitutes an "appropriate" disposition for either category remain unarticulate. Thus those characteristics which determine who is to fit into which category remain unidentified. This may be because the distinctions between alternative responses are never clarified. Finally, a Committee of distinguished doctors, lawyers and religious leaders, appointed

In conflict with the exclusion in (2), the chief reporter of the Model Penal Code has said: [T]he category of the irresponsible must be defined in extreme terms. The problem is to differentiate between the wholly *non-deterrable* and persons who are more or less susceptible to influence by law. (Emphasis supplied.)

Wechsler, *The Criteria of Criminal Responsibility*, 22 U. CHI. L. REV. 367, 374 (1955). How to select from the non-deterrables who have committed a crime those non-deterrables who are to be relieved of criminal responsibility is not clarified by the Model Penal Code's exclusion from the term "mental disease or defect . . . an abnormality manifested only by repeated criminal or otherwise anti-social conduct."

In criticizing this exclusion in the Model Penal Code, the California's SPECIAL COMMISSIONS ON INSANITY AND CRIMINAL OFFENDERS, FIRST REPORT (July 7, 1962) has warned that:

The law, whether judicial or statutory, must avoid accepting a psychiatric label or classification as determinative of the question of responsibility for all future cases. In every case whether or not a defendant has a mental disorder and the manner in which the mental disorder affected his ability to control his conduct is, and properly should be, a question of fact. Furthermore, we find it difficult to conceive of a case involving a mentally disordered defendant where the "*only*" evidence of that mental disorder is the defendant's repeated criminal conduct. Moreover, the fact that a defendant is a repeated offender is sometimes the best evidence that he is unable to conform his conduct to the law and it seems paradoxical to say that this evidence is insufficient to justify such a finding.

*Id.* at 27. See also *Currens v. United States*, 290 F.2d 751, 761-63 (3d Cir. 1961).

28. MODEL PENAL CODE § 4.01, Comment at 156 (Tent. Draft No. 4, 1956).

29. Similar confusion in judicial reasoning is reflected in the following statement:

Two policies underly [sic] the distinction in treatment between the responsible and the non-responsible: (1) It is both wrong and foolish to *punish* where there is no blame and where *punishment* cannot correct. (2) The community's security may be better protected by hospitalization . . . than by imprisonment.

*Williams v. United States*, 250 F.2d 19, 25-26 (D.C. Cir. 1957). (Emphasis supplied.)

"Punish" and "punishment" are used in policy statement "(1)" to suggest different underlying meanings or concepts. The word is first used as a symbol of the vengeance or retribution function of the criminal law and then used as a symbol of the rehabilitation function. *Query*: If "punishment," however defined, were an effective rehabilitative device would the court find its use objectionable even if blameworthiness could not be established? Is involuntary confinement for an indefinite period in a mental hospital any less a deprivation, as the court seems to imply in policy statement "(2)," than involuntary confinement for a limited period in prison?

Goldstein, J., *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543, 546 (1960).

by the Governor of New York (1958) to improve the defense of insanity, pronounced before formulating their rule:

We are unanimously of the view that there are compelling practical, ethical and religious reasons for maintaining the insanity defense; . . . We believe . . . that it is entirely feasible to cast a formulation which . . . will sufficiently improve the statute to meet working standards of *good morals, good science, and good law*.<sup>30</sup>

Never identified are the reasons labeled "practical," "ethical," and "religious," or the standards labeled "good morals," "good science" and "good law."

In enunciating yet another formula for insanity, the Court of Appeals for the Third Circuit in *United States v. Currens* (1961) contaminates its thinking by confusing and merging the inherently incompatible concepts of "insanity" as a defense to a crime with "insanity" as evidence to cast doubt on a material element of an offense. It suggests, as did the court in *Durham*, that some relationship exists between the insanity defense and *mens rea*, a material element of every major crime. In *Currens*, *mens rea* (guilty mind) is used to mean that criminal liability rests

. . . on the assumption that a person has a capacity to control his behavior and to choose between alternative courses of conduct. . . . When a person possessing capacity for choice and control, nevertheless breaches a duty . . . he is subjected to . . . sanctions not because of the act alone, but because of his failure to exercise his capacity to control . . . . For example, an act of homicide will create no liability, only civil liability or varying criminal liability depending on the nature of the mental concomitant of the act. Generally the greater the defendant's capacity for control of his conduct and the more clearly it appears that he exercised his power of choice in acting, the more severe is the penalty imposed by society.<sup>31</sup>

And the court criticized the *Durham* and *M'Naghten* formulae because:

They do not take account of the fact that an "insane" defendant commits the *crime* not because his mental illness causes him to do a certain prohibited act but because the totality of his personality is such, because of mental illness, that he has lost the capacity to control his acts in the way that the normal individual can and does control them. If this effect has taken place he must be found not to possess the guilty mind, the *mens rea*, necessary to constitute his prohibited act *a crime*.<sup>32</sup>

30. REPORT OF THE GOVERNORS COMMITTEE ON THE DEFENSE OF INSANITY 140 N.Y.L.J. No. 88, p. 4 (Nov. 5, 1958), No. 89, p. 4 (Nov. 6, 1958) (emphasis supplied).

The Committee proposed:

(1) A person may not be convicted of a crime for which he is not responsible.

(2) 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:

- (a) to know or appreciate the wrongfulness of his conduct; or
- (b) to conform his conduct to the requirements of the law.

(3) The terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

Cf. note 27 *supra*.

31. *United States v. Currens*, 290 F.2d 751, 773 (3d Cir. 1961).

32. *Id.* at 774 (emphasis supplied).

At this point the court by the force of its own reasoning *should* have been led to say:

*Without the essential element of mens rea, there is no crime from which to relieve the defendant of liability and consequently, since no crime has been committed, there is no need for formulating an insanity defense.*<sup>33</sup>

But instead the court actually concludes:

We are of the opinion that the following [insanity] formula most nearly fulfills the objectives just discussed . . . .<sup>34</sup>

The court uses the word "crime" first to mean "dangerous conduct" and then, without alerting itself to the shift, to mean technically the establishment beyond doubt of each material element of an offense. With this sleight of thought the court shifts focus from "insanity" as a *defense* to conduct "otherwise criminal" to insanity as *evidence* to negate an element essential to categorizing the accused's conduct "criminal."

In announcing a new formula for the insanity defense, the court fails to recognize that there is no need for such a defense to remove criminal liability since it has concluded that no crime is established once mental illness (however defined) has cast doubt on *mens rea* (however defined). Conceptually, at least, outright acquittal would result and instructions to the jury would reflect a time, pre-*M'Naghten*, when evidence of mental condition, like any other relevant evidence, was used to cast doubt on a material element of the crime.<sup>35</sup>

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33: It is of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that, unless a statute, either clearly or by necessary implication, rules out *mens rea* as a constituent part of a crime the Court should not find a man guilty of an offense against the criminal law unless he has a guilty mind.

Lord Goddard, C.J. in *Brend v. Wood*, L 62 T.L.R. 462, 463 (1946), quoted with approval in *Lim Chin Aik v. Reginam*, 1 All. E.R. 223, 228 (1963).

34. 290 F.2d at 774. For its test the court proposed:

The jury must be satisfied that at the time of committing the prohibited act the 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.

*Ibid.*

35. As early as 1724, Justice Tracy, instructing the jury on "guilty mind" as a requisite element of murder in the Trial of Edward Arnold said:

[T]he shooting . . . for which prisoner is indicted, is proved beyond all manner of contradiction; but whether this shooting was malicious, that depends upon the sanity of the man. That he shot, and that wilfully [is proved]; but whether maliciously, that is the thing; that is the question; whether this man hath the use of his reason and sense? . . . [G]uilt arises from the mind, and the wicked will and intention of the man. If a man be deprived of his reason, and consequently of his intention, he cannot be guilty; and if that be the case, though he had actually killed . . . he is exempted from punishment: punishment is intended for example, and to deter other persons from wicked designs; but the punishment of a madman, a person that hath no design, can have no example.

16 State Trials 596, 764 (1724). The paragraph goes on to construe narrowly the kind of evidence which might negative "guilty mind."

On the other side, we must be very cautious; it is not every frantic and idle humour of a man, that will exempt him from justice, and the punishment of the law. When

In our efforts to understand the suggested relationship between "insanity" and "*mens rea*" there emerges a purpose for the "insanity defense" which, though there to be seen, has remained of extremely low visibility. That purpose seems to be obscured because thinking about such a relationship has generally been blocked by unquestioning and disarming references to our collective conscience and our religious and moral traditions. Assuming the existence of the suggested relationship between "insanity" and "*mens rea*," the defense is not to absolve of criminal responsibility "sick" persons who would otherwise be subject to criminal sanction. Rather, its real function is to authorize the state to hold those "who must be found not to possess the guilty mind *mens rea*,"<sup>36</sup> even though the criminal law demands that no person be held criminally responsible if doubt is cast on any material element of the offense charged.<sup>37</sup> This, in some jurisdictions, is found directly reflected in evidentiary rules making inadmissible testimony on mental health to disprove a state of mind necessary to constitute the crime charged.<sup>38</sup> A more dramatic expression of abandoning the rule of proof of each element beyond a reasonable doubt has slipped into those instructions to the jury which advise the ordering of deliberations:

If you find the defendant not guilty by reason of insanity, you will render a verdict of not guilty by reason of insanity.

If you do not so find, then you will proceed to determine whether he is guilty or innocent of one or both of the offenses charged on the basis of the same act.

[T]here are two principal issues for you to determine. The *first* is his mental condition and the *second* is whether he committed the offenses charged or whether he is innocent of them. . . .

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a man is guilty of a great offense, it must be very plain and clear, before a man is allowed such an exemption; therefore it is not every kind of frantic humour or something unaccountable in a man's actions, that points him out to be such a madman as is to be exempted from punishment: it must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or a wild beast, such a one is never the object of punishment; . . .

*Id.* at 764-65. See note 21 *supra* on such acquittals being accompanied by release not restraint and note 45 *infra* on the confusion over the consequences in the federal system.

36. The court comes close to acknowledging this in *United States v. Currens*, 290 F.2d 751, 767 (1961). "The throwing of the mentally ill individual from the jail back into the community, untreated and uncured, presents a great and immediate danger."

37. See the excellent article Silving, *Mental Incapacity in Criminal Law*, 2 CURRENT LAW AND SOCIAL PROBLEMS 1 (1961): "Were the assertion that insanity excludes intent taken seriously, no plea of insanity would be necessary. Yet it is required in our law." *Id.* at 13.

38. For differing views of this issue see *Fisher v. United States*, 328 U.S. 463, 473 n.12 (1946); *State v. Fuller*, 229 So. C. 439, 444, 93 S.E.2d 463, 466 (1956); *State v. Di Paolo*, 34 N.J. 279, 168 A.2d 401, 409-10 (1961); and MODEL PENAL CODE § 4.02 (Proposed Official Draft 1962) providing:

(1) Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind which is an element of the offense.

Now, on the issue of guilt or innocence of the offenses charged, the essential elements of the first count or the housebreaking count, *if you do not find the defendant not guilty by reason of insanity*, are as follows:

First, that the defendant broke and entered or entered without breaking . . . the place described in the indictment;

Second, that the place entered was occupied or belonged to the complaining witness; and,

Third, that he *intended* to steal or commit the offense of larceny . . .<sup>39</sup>

Yet, since a verdict of not guilty results in outright release and a verdict of not guilty by reason of insanity results in incarceration, jury instructions must require *first* a determination of innocence or guilt and *second* a consideration of the insanity issue *only* after a determination that guilt can be established.<sup>40</sup>

What this discussion indicates, then, is that the insanity defense is not designed, as is the defense of self-defense, to define an exception to criminal liability, but rather to define for sanction an exception from among those who would be free of liability. It is as if the insanity defense were prompted by an affirmative answer to the silently posed question: "Does *mens rea* or any essential element of an offense exclude from liability a group of persons whom the community wishes to restrain?" If the suggested relationship between *mens rea* and "insanity" means that "insanity" precludes proof beyond doubt of *mens rea* then the "defense" is designed to authorize the holding of persons who have committed no crime. So conceived, the problem really facing the criminal process has been how to obtain authority to sanction the "insane" who would be excluded from liability by an overall application of the general principles of the criminal law.

Furthermore, even if the relationship between insanity and "*mens rea*" is rejected, this same purpose re-emerges when we try to understand why the consequence of this defense, unlike other defenses, is restraint, not release. Even though each of the elements of an offense may be established, release will follow

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39. *Durham v. United States*, Record on Retrial under the new rule—reprinted in *CRIMINAL LAW* at 775-76 (emphasis supplied).

Reflecting the same confused view about insanity and its relationship to criminal intent is the concept of diminished responsibility which in capital cases provides:

[I]f the jury found (1) that the accused suffered from a mental disorder not amounting to insanity sufficient to excuse him from criminal responsibility . . . and (2) that such mental disorder deprived him of the requisite "sound memory and discretion" essential for conviction of first degree murder, it could convict him of the lesser crime of second degree murder.

In *Stewart v. United States*, 214 F.2d 879, 882 (D.C. Cir. 1954), the court rejected this concept.

If the mental elements of an offense must be proven beyond doubt there would be no need for a concept of diminished responsibility.

*But see* note 19 *supra* and accompanying text.

40. Under a bifurcated trial system an accused must be found guilty before the insanity defense can be invoked and evidence of mental health is admissible to prove or disprove elements of the offense charged. *People v. Gorshen*, 51 Cal. 2d 716, 336 P.2d 492 (1959).

acquittal or dismissal if, for example, entrapment,<sup>41</sup> self-defense,<sup>42</sup> or the statute of limitations<sup>43</sup> are successfully pleaded. Assuming, then, that all elements of an offense are to be established before the insanity defense becomes operative, the question remains: "Why restrain rather than release?" Restraint cannot be attributed to potential "dangerousness" associated with the crime charged, no matter how serious, for that kind of "dangerousness" is characteristic of defendants whose defenses prevail.<sup>44</sup> The crucial variable leading to restraint seems to be the "insanity at the time of the offense," *i.e.*, a fear of danger seen in the combination of "mental sickness" and "crime." This fear of freedom for those acquitted by reason of insanity comes sharply into focus at the close of the *Currens* decision. The court, uncertain of the consequences of such an acquittal for federal offenses outside of the District of Columbia, warns, in reversing the judgment of conviction: "[W]e are concerned with the disposition of *Currens* should he be found not guilty by reason of insanity . . . . In any event [in the light of doubt about the appropriate federal procedure for commitment] should *Currens* be acquitted at his new trial, the federal authorities should bring him and his condition to the attention of State authorities to the end that he may not remain in a position in which he may be a danger to himself or to the public."<sup>45</sup> That mandatory commitment, not release, general-

41. See *Sherman v. United States*, 356 U.S. 369 (1958)

. . . If [the defendant] is to be relieved from the usual punitive consequences, it is on no account because he is innocent of the offense described. . . .

The courts refuse to convict an entrapped defendant not because his conduct falls outside the proscription of the statute, but because, even if his guilt be admitted, the methods employed on behalf of the Government to bring about conviction cannot be countenanced.

*Id.* at 380. (Mr. Justice Frankfurter concurring.) And see *Donnelly, Judicial Control of Informants, Spies, Stool Pigeons and Agent Provocateurs*, 60 YALE L.J. 1091, 1098-1115 (1951).

42. See notes 7-18 *supra* and accompanying text.

43. See Note, *The Statute of Limitations in Criminal Law: A Penetrable Barrier to Prosecution*, 102 U. PA. L. REV. 630 (1954).

44. On the presumption of innocence and the maxim that it is better to let a guilty man escape than to condemn an innocent one see BENTHAM, *A TREATISE ON JUDICIAL EVIDENCE* 196-98 (1825). The other side of the presumption-of-innocence coin is proof beyond reasonable doubt as a requisite to criminal liability. See *Curley v. United States*, 160 F.2d 229 (D.C. Cir. 1947). On the duty of the police not to enforce the substantive law of crimes unless the criminal process can be invoked within bounds set by constitution, statute, and court decisions see Goldstein, J., *Police Discretion Not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543, 554-62 (1962).

45. *United States v. Currens*, 290 F.2d 757, 776 (3d Cir. 1961):

Courts of appeals have differed in their views as to available procedure in the event that a person is found not guilty of a federal criminal charge by reason of insanity. See *Pollard v. United States*, 6 Cir. 282, F.2d 450, 464, Order of Issuance of New Mandate, 6 Cir. 1960, 285 F.2d 81 . . . , but compare *Sauer v. United States*, 9 Cir. 1957, 241 F.2d 640, 651-52 n.32. . . .

Earlier in its opinion the court quotes with approval from BIGGS, *THE GUILTY MIND* 144-45 (1955):

[T]he mental competency of recidivists should be questioned by realistic means at the earliest possible stage. So long as courts judge criminal responsibility by the

ly follows the insanity defense becomes then particularly striking since, to the extent "insanity at the time of the offense" is related to "mental health at the time of acquittal," the state is authorized to select from the mentally ill those

test of knowledge of right and wrong, psychotics who have served prison terms or are granted probations are released to commit increasingly serious crimes, repeating crime and incarceration and release until murder is committed. Instead of being treated as ordinary criminals, they should be confined to institutions for the insane at the first offense and not be released until or unless cured.

*Id.* at 767.

Similarly this fear coupled with the possibility of an ironic twist prompts Judge Hastie in his dissent in *Currens* to note:

If we should affirm the judgment below, as I think we conscientiously can, the result of appellant's conviction and the consequent invocation of the Youth Correction Act would be his confinement for an appropriate period in a psychiatric institution for such treatment and supervision as are best calculated, in the light of our present medical knowledge, to accomplish his rehabilitation and cure. On the record this result would be good for the appellant and good for society. On the other hand, as the majority opinion recognizes, it is doubtful whether the federal authorities could require the restraint and psychiatric treatment of the appellant if he should be retried and, by reason of his mental illness, found not guilty. I think we need not and, therefore, should not thus risk the release of one found to be a criminal psychopath when restraint and treatment seem desirable both medically and socially.

For these reasons I would affirm the conviction and commitment of the appellant

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Also see dissent of Justice Clark in *Lynch v. Overholser*, 369 U.S. 705, 720, 735 (1961).

[A] person who has been shown to have committed an act resulting in serious harm to a member of the community, and who is also shown to be irresponsible by reason of mental disorder, ought to be the object of an even more thorough-going inquiry as to his risk to society than the responsible offender. This is so, of course, because by definition such a person lacks the capacity for individual self-control that is ultimately society's most secure protection.

State of California, SPECIAL COMMISSIONS ON INSANITY AND CRIMINAL OFFENDERS, FIRST REPORT 31 (July 7, 1962).

This report comes close to verbalizing the fears and concerns of the community and attempts to resolve or gives the appearance of resolving the conflict between relieving a person of criminal liability and compulsorily holding him for care and custody as a mentally ill person in a maximum security unit of the correctional system by separating, as if they were clearly separable, a finding of no criminal responsibility from its consequences, which is a special hearing for such acquittals, not all acquittals, to determine present dangerousness. It suggests

that the defendant alleged to be mentally ill presents two questions: First, whether he ought to be condemned by a criminal conviction, and second, whether he is such a substantial risk to the public safety that he must be securely confined.

*Id.* at 20.

Since the question of criminal responsibility is a legal question, the ultimate decision in a particular case is properly to be made by the judicial system and not by the medical profession.

*Id.* at 21.

Upon finding that a defendant is not criminally responsible for the act with which he is charged, an inquiry immediately ought to be made whether he is a substantial present risk to the safety of the public. The inquiry should be squarely directed to the question of whether the defendant is dangerous. This is a different question than whether he is "insane" within the meaning of the rules defining his account-

who require civil restraint for custody and care. Thus the insanity defense is not a defense, it is a device for triggering indeterminate restraint.

The real problem which continues to face legislators, judges, jurors, and commentators is how to restrain persons who are somehow feared as both crazed and criminal. This oft-unconscious fear has precluded thinking about "insanity" in terms of traditional principles of law, whether that "insanity" is conceptualized as doubt-casting evidence or as an independent defense. Though unpleasant to acknowledge, the insanity defense is an expression of uneasiness, conscious or unconscious, either about the adequacy of such material elements of an offense as "*mens rea*" and "voluntariness" as bases for singling out those who ought to be held criminally responsible, or it is an expression of concern about the adequacy of civil commitment procedures to single out from among the "not guilty by reason of insanity" those who are mentally ill and in need of restraint.

The problem of "whether there should be an insanity defense" or "how to formulate it" must continue unresolved as long as largely unconscious feelings of apprehension, awe, and anger toward the "sick," particularly if associated with "criminality," are hidden by the more acceptable conscious desire to protect the "sick from criminal liability." What must be recognized is the enormous ambivalence toward the "sick"<sup>46</sup> reflected in conflicting wishes to excul-

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ability under the criminal law. If he appears to be dangerous, he should be committed to secure custody. And he should be so committed without regard to whether he is "psychotic," whether he "knows right from wrong" or, indeed, whether he is effectively treatable by presently developed therapeutic techniques. The point is that he is dangerous and should not be let loose on society.

*Id.* at 31.

Similarly,

The only proper verdict is one which ensures that the person who suffers from the disease is kept secure in a hospital so as not to be a danger to himself or others. That is, a verdict of guilty but insane.

*Bratty v. Att'y-Gen. for N. Ireland*, [1961] 3 All E.R. 523, 533 (H.L.).

For the purposes of the criminal law there are two categories of mental irresponsibility, one where the disorder is due to disease and the other where it is not. The distinction is not an arbitrary one. If disease is not the cause, if there is some temporary loss of consciousness arising accidentally, it is reasonable to hope that it will not be repeated and that it is safe to let an acquitted man go entirely free. But if disease is present the same thing may happen again, and therefore, since 1800, the law has provided that persons acquitted on this ground should be subject to restraint. The acquittal is now given in the illogical and disagreeable form of the verdict, "Guilty but insane" . . . .

*Hill v. Baxter*, [1958] 1 Q.B. 277, 285-86 (1957) (CA). See note 48 *infra*.

46. For an idealized sociological perception of the sick, see PARSONS, *THE SOCIAL SYSTEM* 436-37 (1951). On the confusion between "sick" and "criminal" in literature and law, see CRIMINAL LAW 253-83; see also Goldstein, J. & Katz, *Dangerousness and Mental Illness: Some Observations on the Decision to Release Persons Acquitted by Reason of Insanity*, 70 YALE L.J. 225 (1960).

The writer [in 1945] heard state hospital doctors frankly admit that the animals of near-by piggeries were better fed, housed and treated than many of the patients in their wards. He saw hundreds of sick people shackled, strapped, strait-jacketed and bound to their beds; he saw mental patients forced to eat meals with their hands



pate and to blame; to sanction and not to sanction; to degrade and to elevate; to stigmatize and not to stigmatize; to care and to reject; to treat and to mistreat; to protect and to destroy.<sup>47</sup> Such ambivalence finds expression in legislative proposals that persons acquitted by reason of insanity be "committed to the custody of the commissioner of correction [not mental health] to be placed in an appropriate institution of the department of correction [not mental health] for custody, care, and treatment."<sup>48</sup> And such ambivalence has blinded<sup>49</sup> law-

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because there were not enough spoons and other tableware to go around—not because they could not be trusted to eat like humans. He saw them crawl into beds jammed close together, in dormitories filled to twice or three times their normal capacity. He saw, in institution after institution, cold unappetizing food placed before patients at mealtime—food that patients either wolfed down to get the ordeal over quickly or else left untouched.

He saw black eyes and bruises which were reported to the writer to have been received at the hands of fellow patients or attendants. He saw court records and hospital accident lists indicating that brutality against patients, while not as common as occasional newspaper exposés might suggest, was of shocking frequency. Occasional accounts of fatal beatings of mental patients attested to the end-results of some of this treatment.

DEUTSCH, *THE MENTALLY ILL IN AMERICA* 449 (2d ed. 1949).

47. [A]mbivalence: love and hatred directed toward the same person at the same time. Ambivalence, which is due to the dual orientation of man as an individual and as a member of society, is universal. In fact, the more one loves another, the more the narcissistic nucleus of the personality hates the loved object. Under normal conditions, however, one of these attitudes is deeply buried. This is intelligible, because there is perhaps no more perplexing situation than to hate whom you love or to love whom you hate. . . . In ordinary life the repressed hatred of a person one loves may break through when one feels betrayed by him.

ALEXANDER, *FUNDAMENTALS OF PSYCHOANALYSIS* 107-08 (1948).

48. *Report of the Governor's Committee on the Defense of Insanity*, 140 N.Y.L.J. 4 (Nov. 5, 6, 1958).

In extreme cases, such as that of the homicidal offender, the security required must exceed that required for even the most dangerous convict. . . . [W]e recommend that the dangerous offender who has been acquitted by reason of mental disorder should be placed in the custody of the Department of Corrections at one of its medical facilities.

State of California SPECIAL COMMISSION ON INSANITY AND CRIMINAL OFFENDERS, FIRST REPORT 34 (July 7, 1962). See also MODEL PENAL CODE § 4.08 (Tent. Draft No. 4) providing commitment of persons acquitted by reason of insanity "to the custody of the Commissioner of Correction" or alternatively to the Commissioner of Mental Hygiene or Public Health. The official draft eliminates commitment to the Commissioner of Correction. MODEL PENAL CODE § 4.08 (Proposed Official Draft 1962).

Label the judicial process as one will, no resort to subtlety can refute the fact that the power to imprison is a criminal sanction. To view otherwise is self-delusion. Courts should not, ostrichlike, bury their heads in the sand.

City of Canon City v. Merris, 137 Colo. 169, 174, 323 P.2d 614, 617 (1958).

Report of Commissioners Appointed Under a Resolve of the Legislature of Massachusetts, to Superintend the Erection of a Lunatic Hospital at Worcester and to Report a System of Discipline and Government for the Same. SEN. DOC. NO. 2, Jan. 4, 1832, pp. 22, 23:

[The insane] . . . should be treated, not with a sole regard to the security of others, but with special reference also to their own misfortunes, and in a manner to shorten their duration, or where that is impossible, at least to mitigate their severity.

makers to their tampering, via the insanity defense, with fundamental principles on which their authority to impose criminal liability presently rests. By obfuscating the function of the defense in terms of the ethical and religious values of Western civilization to care for the "sick," lawmakers have not only misled themselves but psychiatrists as well who, confused by their own ambivalence, have willingly, defiantly, unquestioningly, or with misgivings, joined in these deliberations. Psychiatrists have participated in the process without identifying the role they must play and without forcing the process to clarify that role.<sup>50</sup> The plea to care for the "sick" muffles the call to segregate the "dangerous" whom the criminal law can not hold. With the real problem so disguised, the fruitless and frequent searches for new formulae and the frustrating and fighting exchanges between law and psychiatry become somewhat understandable. Thus, another low visibility purpose of the insanity defense emerges. That purpose is to keep sufficiently ambiguous the consequences of the defense, whatever the formula, so as to prevent at least conscious recognition that the prerequisites of criminal liability have been abandoned.<sup>51</sup>

Lawmakers could decide to implement any or all of these now visible purposes. Provisions could be drafted to restrain: (1) persons *charged* with a crime who are feared to be dangerous and/or felt to need care and destigmati-

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In view of these facts and considerations, the Commissioners cannot hesitate to recommend, that as soon as the Hospital at Worcester shall be prepared for the reception of the insane . . . all orders, decrees and sentences for the confinement of any lunatic, made by any Court . . . shall be so far modified, that said lunatics shall be committed to the custody of the Superintendent of the Hospital at Worcester, instead of being committed to any Jail or House of Correction, as heretofore required: and, furthermore, that all lunatics, who at the time when such proclamation is made, shall be confined in any Jail or House of Correction, under any order, sentence or decree of any Court, or any judicial officers, shall as soon as convenient and practicable, be removed to said Hospital . . . .

reprinted in *CRIMINAL LAW* at 266.

On the situation in Massachusetts 125 years later so far as it concerns special custodial facilities for the "criminally insane" or the "insane criminal" who have been found incompetent to stand trial or who have been relieved of criminal liability see *COMMONWEALTH OF MASSACHUSETTS, GOVERNOR'S COMMITTEE TO STUDY THE MASSACHUSETTS CORRECTIONAL SYSTEM, SECOND REPORT 47 (1956)*:

The level of care is so low . . . that one is forced to conclude that Massachusetts is willing to abandon almost 1,000 persons who would, if not criminal or difficult to handle, be receiving the best medical care the Commonwealth can provide.

49. In psychoanalysis, this would be called denial.

"[D]enial" refers . . . to the blocking of certain sense impressions from the outside world. If they are not actually denied access to consciousness, they at least have as little attention paid to them as possible and the painful consequences of their presence are partly nullified.

*BRENNER, AN ELEMENTARY TEXTBOOK OF PSYCHOANALYSIS 100-01 (1955).*

50. See Goldstein, J. & Katz, *Dangerousness and Mental Illness: Some Observations on the Decision to Release Persons Acquitted by Reason of Insanity*, 70 *YALE L.J.* 225, 230-31 (1960).

51. *People v. Nash*, 52 Cal. App. 2d 36, 52, 53, 338 P.2d 416, 426-27 (1959).

. . . excepting only in cases where the death penalty may be imposed, it is relatively unimportant to society and to the accused whether the determination as to criminal

zation because of a suspicion of criminality coupled with a finding of mental sickness; (2) persons *acquitted outright* of a crime who are feared to be dangerous and/or felt to need care and destigmatization because of criminality coupled with a finding of mental sickness; and (3) persons who have *committed*<sup>52</sup> a crime and are feared to be dangerous and/or felt to need care and destigmatization because of criminality coupled with a finding of mental sickness. In promulgating such provisions, answers are required to a series of questions (set forth in the Epilogue) which must be consciously posed about *restraint*—restraint in what kind of an institution and for how long; restraint for what crimes and for what mental illnesses; and restraint at whose initiative and at what stage in the process.<sup>53</sup> In responding to these questions lawmakers will be pouring meaning into "the fear of dangerousness," "the need for care," and the "need for destigmatization." And if obfuscating developments are to be avoided, lawmakers not only must acknowledge wishes to neglect, stigmatize, punish and destroy, but they must also consider the extent to which these wishes are to be realized through *restraint*. Awareness that such wishes constantly press for satisfaction in conflict with preferred goals should stimulate the development of formulations and procedures designed to maximize consciously thought-through preferences and to deflect those conflicting and otherwise unconscious wishes which might gain satisfaction under cover of these preferences.<sup>54</sup> The operational significance of key phrases in any formulation will thus be shaped and joined by the values to be preferred.

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responsibility *insofar as it may rest on the issue of sanity* is made at the time of initial trial or later. The immediately important question for both the state and the defendant is this: Did the defendant commit the act charged? If he committed it, sane or insane, he should be held under restraints adequate and appropriate to the circumstances. If the circumstances require actual confinement it is not at the moment important what name be applied to the institution. The character of the supervision and study to be given the accused is important.

Similarly in relation to so-called sex psychopath statutes:

. . . The main purpose of the Act [though civil in nature] is to protect society against the activities of sexual psychopaths. The secondary purpose is to rehabilitate the sexual psychopath . . . .

The emphasis that appellant places on the fact that he . . . now finds himself in San Quentin, possibly for life, is misplaced. This argument would be sound only were his confinement punishment. As we have already seen, the purpose of the confinement is to protect society and to try and cure the accused.

The arguments of appellant are without merit. The order appealed from is affirmed. *People v. Levy*, 151 Cal. App. 2d 460, 311 P.2d 897 (1957). *But see In re Maddox*, 351 Mich. 358, 88 N.W.2d 470 (1957), and note 48 *supra*.

52. The word "committed" is used rather than convicted so as to leave open for decision the question of the stage or stages of the process at which the issue may be raised. See Epilogue.

53. In determining criteria for restraint, criteria for the release of persons so restrained would likewise have to be established. Any change of circumstance removing a crucial criterion of restraint would result in release. See Goldstein, J. & Katz, *supra* note 50.

54. The world about us is much richer in meanings than we consciously see. These meanings are continually cutting across our ostensible criteria of judgment, and

But such efforts by lawmakers to formulate an exception to criminal liability would be premature and may prove unnecessary. More appropriately they should consider abolition of the insanity defense,<sup>55</sup> and examine "voluntariness" and "*mens rea*" as requisites of criminal liability. Enormous confusion about the meanings of these concepts in the definition of offenses and their construction by the courts suggests that there will be great difficulty in establishing the purposes of these material elements as devices for sorting out those to be or not to be subject to criminal sanction.<sup>56</sup> The need for such concepts must be examined in terms of the overall objectives of a law of crimes. Furthermore, abolition of the "insanity defense" should force focus on the why and the adequacy of criteria for civil commitment and discharge of the "mentally ill." The question underlying each of these examinations must be: "Who are to remain free of state intervention; who ought to be restrained, and for what purposes?" Ultimately this requires coming to terms with such emotionally-freighted concepts as "blame," "choice," "free will," "capacity-to-control," and "determinism," all of which, in the criminal law, have remained slogans of exhortation beyond the reach of definition. Will such explorations lead to an insanity defense? If they do, we must know *why*.

#### EPILOGUE

To illustrate the kinds of questions that the legislator or judge would have to pose and answer in promulgating and implementing any or all of the purposes identified, the third statement of purpose is analyzed. It calls for:

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compulsively distorting the operations of the mind whose quest for an objective view of reality is consciously quite sincere. Good intentions are not enough to widen the sphere of self-mastery. There must be a special technique for the sake of exposing the hidden meanings which operate to bind and cripple the processes of logical thought. With practice one may wield the tool of free-fantasy with such ruthless honesty that relevant material comes very quickly to the focus of attention which we call "waking consciousness."

LASSWELL, *PSYCHOPATHOLOGY AND POLITICS* 36 (1960). See also FRANK, *LAW AND THE MODERN MIND* 22-31 (1949). Various defense mechanisms may interfere with awareness, for example, rationalization.

Rationalization means selecting the most acceptable from a complex of mixed motives to explain behavior. This permits the repression of other alien motives. Since the selected motives are suitable to the act, the unacceptable ones may be overlooked or denied. It is by no means correct to define rationalization as the invention of necessarily nonexistent motives; it is usually an arbitrary selection which passes speciously for the whole.

ALEXANDER, *FUNDAMENTALS OF PSYCHOANALYSIS* 109 (1948).

55. On abolishing the insanity defense as a violation of a state constitution because "the minimum requirements of *mens rea* have been held to compel it." See *State v. White*, — Wash. —, 374 P.2d 942, 965 (1962), construing *State v. Strasburg*, 60 Wash. 106, 110 Pac. 1020 (1910). Also see GLUECK, *MENTAL DISORDER AND THE CRIMINAL LAW* 466-70 (1925).

56. On "voluntariness" and *mens rea* and the accompanying confusion see cases and materials reprinted in *CRIMINAL LAW* 524-600. For an interesting examination of *mens rea* see Packer, *Mens Rea and the Supreme Court*, 1962 *Supreme Court Review* 107 (1962).

. . . the restraint of persons who have *committed* a crime and are feared to be dangerous and/or felt to need care and destigmatization because of criminality coupled with a finding of mental sickness.<sup>57</sup>

Any formulation and provision for its invocation and implementation would require answers to a series of questions which might be posed about restraint. In terms of *the fear of dangerousness*, of *the need for care*, and of *the need for destigmatization*, these questions focus on restraint in what kinds of institutions and for how long; restraint for what crimes and for what mental sicknesses; and restraint at whose initiative and at what stages in the process:

A. *Restraint in what kinds of institutions?*

1. If restraint is in response to the *fear of dangerousness*, are not institutions of the Department of Correction and of the Department of Mental Health equally satisfactory?

2. If restraint is in response to the *need for care* cannot correctional and mental health institutions be equally satisfactory if they are both oriented toward rehabilitation?<sup>58</sup> If the impact of the desire to neglect is to be minimized, should not restraint be conditioned on the availability of a therapeutic opportunity?<sup>59</sup>

3. If restraint is in response to the *need for destigmatization* are not correctional and mental health institutions equally unsatisfactory?<sup>60</sup>

4. If restraint in either the correctional or mental health systems are equally satisfactory, what values or policies should be weighed against the flexibility that might come with restraint in and easy transfer between both systems?<sup>61</sup>

B. *Restraint for what length of time?*

1. If length of restraint is in response to the *fear of dangerousness* should restraint be authorized for an indeterminate period? If the impact of the need to neglect is to be minimized, should there be provision, in addition to *habeas corpus*, for the automatic review, annually or semi-annually, of each person

57. See text accompanying note 52 *supra*.

58. "Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence." *Williams v. New York*, 337 U.S. 241, 248 (1949). On prisons outstripping hospitals as therapeutic communities see Diamond, *Criminal Responsibility of the Mentally Ill*, 14 STAN. L. REV. 59 (1961):

I do not hesitate to say that Vacaville [an integral part of California's correction system] provides a higher standard of psychiatric treatment than does the corresponding hospital for the *criminally insane* . . . which is operated by the Department of Mental Hygiene. [Emphasis supplied.]

*Id.* at 85.

59. See *Ragsdale v. Overholser*, 281 F.2d 943, 949 (D.C. Cir. 1960) (concurring opinion of Judge Fahy).

60. See *State v. Strasburg*, 60 Wash. 106, 110 Pac. 1020, 1025 (1910). Star, *The Public's Idea About Mental Illness*, reprinted in CRIMINAL LAW at 818.

61. See *In re Maddox*, 351 Mich. 358, 88 N.W.2d 470 (1957), holding "that incarceration in penitentiary designed and used for the confinement of convicted criminals is not a prescription available upon medical diagnosis and order to an administrative branch of government." *Id.* at 370, 88 N.W.2d at 476. See note 51 *supra*.

restrained in terms of his present state of dangerousness?<sup>62</sup> If the impact of the urge to punish is to be minimized, should length of restraint be limited to the maximum sentence authorized for the crime committed?<sup>63</sup>

2. If length of restraint is in response to the *need for care* should restraint be authorized for an indeterminate period? If the impact of the need for neglect is to be minimized should provision, in addition to *habeas corpus*, be made for the automatic annual review and report to all interested parties (judge, defense attorney, etc.,) of the continued availability and use of therapy? If the impact of the need for neglect is to be minimized should provision be made for establishing, reviewing and revising standards for therapeutic care?

3. If length of restraint is in response to the *need for destigmatization*, should there be any restraint? If the impact of the need to stigmatize is to be minimized can procedures be developed to create an expectation in the community that release means a person is ready to participate in the life of the community.<sup>64</sup>

### C. *Restraint for what crimes?*

1. If restraint is in response to the *fear of dangerousness*, should certain "less serious or less dangerous" offenses be excluded as a basis for such restraint?<sup>65</sup> If the impact of the urge to punish is to be minimized, should not all crimes be included as the basis for such restraint?

2. If restraint is in response to the *need for care*, should not all crimes be included as a basis for restraint? If the impact of the need to neglect is to be minimized, should not all crimes be included as a basis for restraint?

3. If restraint is in response to the *need for destigmatization* and if the label of criminality added to the label of mental sickness increases stigma, should not all crimes be excluded as a basis for restraint? If, on the other hand, stigma is decreased by such an association should not all crimes be a basis for such restraint?

### D. *Restraint for what mental sicknesses?*

1. If restraint is in response to the *fear of dangerousness* should certain "less dangerous" mental sicknesses as well as mental sicknesses currently unaccompanied by overt symptomatology be excluded as a basis for restraint?<sup>66</sup> If the impact of the urge to punish is to be minimized should restraint be limited to only those whose mental sickness could subject them to civil commitment?

62. See CONN. GEN. STAT. § 17-244 (1958).

63. *Ibid.* and *id.* at § 17-246. Also see Katz & Goldstein, J., *Dangerousness and Mental Illness*, 131 J. OF NERVOUS & MENTAL DISEASE 404, 410 (1960).

64. On status-elevation ceremonies see Goldstein, J., *Police Discretion Not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543, 590-92 (1960).

65. See Note, *Extent of Harm to Victim*, reprinted in CRIMINAL LAW at 30 (1962).

66. See Star, *supra* note 60; Katz & Goldstein, J., *supra* note 63, at 411.

2. If restraint is in response to the *need for care* should not all mental sicknesses be a basis for restraint?<sup>67</sup> If the impact of the need to neglect or to punish is to be minimized should all non-treatable mental sicknesses<sup>68</sup> as well as mental sicknesses currently unaccompanied by overt symptomatology be excluded as a basis for restraint?<sup>69</sup>

3. If restraint is in response to the *need for destigmatization* and if the label of mental sickness added to the label of criminality increases stigma, should not all mental sicknesses be a basis for restraint? If, on the other hand, stigma is decreased by such an association should not all crimes be a basis for such restraint?

E. *Restraint at whose initiative and at what stages in the criminal process?*

1. If restraint is in response to the *fear of dangerousness* should not the issue be subject to resolution at the initiative of any participant at any stage of the process? If the impact of the urge to punish as well as of the need for neglect, including that evidenced by the inertia of system maintenance,<sup>70</sup> is to be minimized should not restraint be authorized at the initiative of any participant but not before at least a finding by judge or jury that each of the material elements of the offense charged have been established? If the impact of the urge to punish is to be minimized must not evidence of mental sickness be admissible to cast doubt on such material elements as voluntariness (however defined) and *mens rea* (however defined)? If the impact of the need for neglect is to be minimized, must procedures be designed to encourage or force the review of the bases for continuing restraint?

2. If restraint is in response to the *need for care* should not the issue be raised on the initiative of any participant at any stage of the process? If the possibility of treatment is hindered by the absence of personal motivation, should invocation of the process for determining restraint be limited to the

67. See MODEL PENAL CODE § 4.01(2) (Proposed Official Draft 1962) defining mental disease to exclude an abnormality manifested only by repeated criminal or otherwise anti-social conduct, reprinted *supra* note 23, and ROYAL COMMISSION ON CAPITAL PUNISHMENT REPORT, CMD No. 8932, at 73 (1953) limiting mental disease to psychosis.

68. Is non-treatable to mean no known treatment or no treatment facilities available even if a known treatment? See note 45 *supra*. Concerning the infectious tubercular as a menace to society and provision for his commitment, see *Moore v. Draper*, 57 So. 2d 648 (Fla. 1952). "The real reason why no such law had been passed prior to that time [1949] was because there were not sufficient hospitals or sanitarium provided by the state to properly take care of these people." *Id.* at 648.

69. For example, "[s]chizophrenic symptoms are not necessarily present all the time. In no other mental disease is it so uncertain whether or not a specific symptom will be present at any given moment." BLEULER, *DEMENTIA PRAECOX OR THE GROUP OF SCHIZOPHRENIAS* 296 (1950). See also *Currens v. United States*, 290 F.2d 751, 761-63 (3d Cir. 1961) and *Knight, Borderline States*, 17 *MENNINGER CLINIC BULL.* 1 (1953), reprinted in KNIGHT & FRIEDMAN, *PSYCHOANALYTIC PSYCHIATRY AND PSYCHOLOGY* 97 (1954).

70. On the meaning of "system maintenance" in another context see Goldstein, J., *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 *YALE L.J.* 543, 574-75 nn.65-66 (1960).

defendant?<sup>71</sup> If the impact of the need for neglect is to be minimized should procedures be designed to permit and encourage interested participants to review and challenge on a regular basis the continuation of restraint in terms of current mental status, and the availability of treatment?

3. If restraint is in response to the *need for destigmatization* does it make any difference who invokes the process for restraint as long as the issue of restraint is resolved only after each of the material elements of the offense has been established? If the impact of the urge to stigmatize is to be minimized must not evidence of mental sickness be admissible to cast doubt on such material elements as voluntariness (however defined) and *mens rea* (however defined). If the impact of the urge to stigmatize is to be minimized should not the issue be subject to resolution without formally entering a verdict of guilty for the crime committed and procedures be designed to attribute to individuals released from such restraint the capacity to participate adequately in the life of the community?

In responding to these questions lawmakers will be pouring meaning into *the fear of dangerousness, the need for care, and the need for destigmatization*. Though we would neither endorse nor propose them, some of the possible meanings which might be given these factors are found for example in such a formulation as:

Defendant shall be restrained in a mental health institution, whether or not therapeutic opportunities exist, for a period not to exceed the maximum sentence that might be imposed for the crime committed upon a finding by judge or jury:

a. that the defendant has committed, in the light of all relevant evidence including evidence of mental health, murder, robbery, rape, assault, forgery or the use of narcotics; and

b. that he suffers from a mental sickness for which civil commitment is not available and which is manifested by current overt symptomatology.

This procedure may be invoked by judge, prosecutor or defense counsel.

Other formulations as well as the conclusion that there is no need for such a procedure in the criminal process might result depending not only upon the answers to the questions posed, but more fundamentally upon the results of a detailed examination of the function, meaning and desirability of *mens rea* and voluntariness as requisites of criminal liability.

As in music so in law, to recover lost passages it may be appropriate to suggest *da capo al fine*.

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71. See *Lynch v. Overholser*, 369 U.S. 705 (1961), *reversing* 288 F.2d 388 (D.C. Cir. 1961).