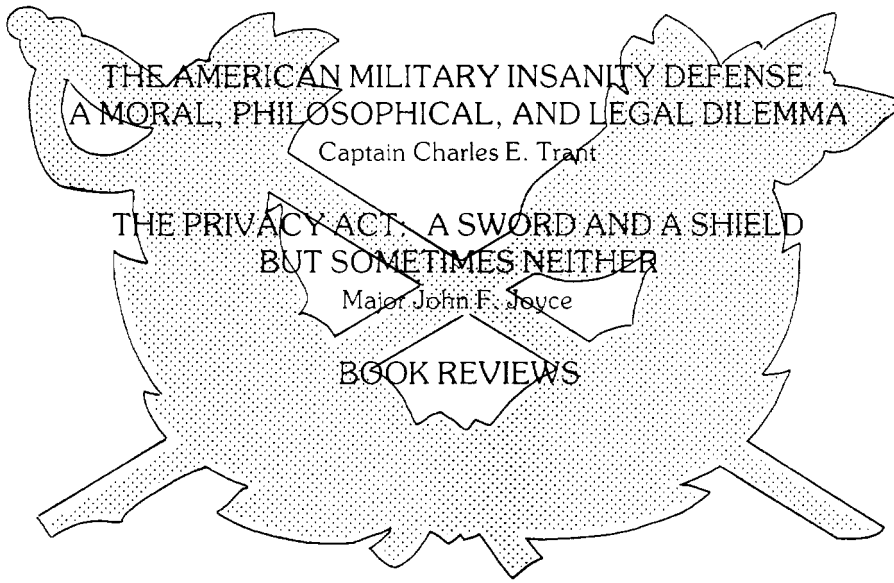
MILITARY LAW REVIEW



THE AMERICAN MILITARY INSANITY DEFENSE: A MORAL, PHILOSOPHICAL, AND LEGAL DILEMMA

Captain Charles E. Trant

THE PRIVACY ACT: A SWORD AND A SHIELD BUT SOMETIMES NEITHER

Major John F. Joyce

BOOK REVIEWS

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MILITARY LAW REVIEW

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THE AMERICAN MILITARY INSANITY DEFENSE: A MORAL, PHILOSOPHICAL, AND LEGAL DILEMMA*

By Captain Charles E. Trant**

This article examines the American military insanity defense and its potential for constructive alteration. The historical development of the insanity defense in general is reviewed. The various legal tests for insanity used in England and the United States are analyzed. The policies and procedures of the American military insanity defense from the early nineteenth century to the present are traced. Four potential modifications, the bifurcated trial, the "guilty but mentally ill" approach, shifting the burden of proof, and the mens rea approach are considered. The article concludes with a modification proposal similar to the "guilty but mentally ill" approach and a modified insanity test for the military.

I. INTRODUCTION

Non est reus nisi mens sit rea[1] is a deceptively simple little maxim which is at the center of a long and uneasy flirtation between law and insanity. In spite of its nearly deified legal status, it has, from its very inception, resisted precise elucidation. This is hardly surprising since whenever one delves into the inner mechanisms of the mind there is no matrix by which the contours of human thought can be deductively defined, Yet in a criminal justice system which seeks to establish moral and legal responsibility, the enigma of the human mind must be probed. When the defense of insanity is raised, this dilemma is crystallized.

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* The opinions and conclusions expressed in this article are those of the author and do not necessarily represent the views of The Judge Advocate General's School, the Department of the Army, or any governmental agency. This article is based upon a thesis submitted by the author in partial satisfaction of the requirements of the 31st Judge Advocate Officers Graduate Course.

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[1] "One is not guilty unless his intention be guilty." Black's Law Dictionary 950 (Rev. 5th ed. 1976).

The insanity defense evolved out of deeply entrenched human feelings that those of grossly unsound mind should not be criminally punished. These benevolent concerns are, however, intertwined and in conflict with an unconscious fear by society of the mentally ill. Whenever members of society perceive unconscionable abuses of the insanity defense, they are willing to suppress their humane considerations and surface their collective outrage. This is particularly obvious following cases of magnified notoriety, be it Daniel McNaughton murdering Edward Drummond, principal secretary to Prime Minister Robert Peel, Charles J. Guiteau assassinating President James Garfield, or John Hinkley attempting to assassinate President Ronald Reagan. The predictable manifestation of this outrage is the call for severe limitation or abolition of the insanity defense. Regardless of the ultimate merit of such proposals, the irrational urge to do something emotionally satisfying must be resisted. The danger is that frustration may overwhelm reflective efforts to do something constructive.

This article will examine the American military insanity defense and its potential for constructive alteration. Initially, the historical development of the insanity defense in general will be reviewed. This will shed necessary illumination on the moral and philosophical underpinnings of the insanity defense. Next, the legal tests for insanity used and abused in England and the United States for the last seven hundred years will be analyzed. These tests represent the dispiriting record of legislative, judicial, and scholarly attempts to cure the chronic imprecision and conceptual confusion that has perplexed the insanity defense. An appreciation for these tests is vital to a full understanding of the military insanity test, as many of the considerations and much of the terminology are derived therefrom. The policies and procedures of the American military insanity defense from the early nineteenth century to the present will then be traced. This will complete the foundation upon which the alternatives to the present insanity test will be examined. The four modifications selected for analysis are the bifurcated trial system, the "guilty but mentally ill" approach, a shifting of the burden of proof, and the ***mens rea*** approach. The adaptability and desireability of each of these alternatives will be separately considered. Finally, this article will consider a combination of these alternatives and propose a composite modification to the present military insanity test.

II. HISTORICAL PERSPECTIVE

A. *ANCIENTS*

For a prudent understanding of the present, a meaningful appreciation of the past is necessary. While it is beyond the scope of this work to

recreate the environment and distinctive events of primitive life,[2] a brief reference to primitive legal systems will illuminate man's basic concept of crime and punishment. These systems are more than mere legal relics; they are a legal legacy which affects our present attitude toward moral culpability in criminal law. While the status of the lunatic in the primitive criminal justice systems is uncertain, the existence of mental intent is sufficiently distinct to allow some conjecture on the relationship of law and insanity.

For primitive man, law was not the act of any sovereign; it was simply a manifestation of tribal life. Men grouped together for survival and their laws, customs, habits, and attitudes were inseparable parts of a single social and mental fabric. To bring order out of chaos, traditional tribal rules evolved which depended upon the consent and authority of the group for enforcement. The numerosity and fecundity of the tribe, not the protection of the individual, was vital. The loss of an individual through injury or death was a blow to tribal strength. Primitive man had no conscious recognition of *mens rea,* as it was the loss, not the attendant intent or circumstances, that was the focus of their concern. Thus, the sanction for the loss was compensation, through men or material, and not vengeance.

The role of a lunatic in such a system can only be assumed. Since he could cause a loss to the tribe just as a sane person could, he probably was held equally accountable. He, or whoever was responsible for him, would have to make the compensation. Such equal treatment in a system based on compensation and devoid of moral connotations is easy to justify.[3]

As ancient societies developed well-defined and organized bodies of legal ideas reaching the dignity of legal systems and reduced them to writing, the probabilities of accurately assessing the status of lunatics are enhanced. Although there are older or equally sophisticated systems such

[2] For a more complete discussion of primitive law and society, see A. Kocourek & J. Wigmore, Sources of Ancient and Primitive Law (1915); H. Maine, Ancient Law (2d ed. London 1863) (1st ed. London 1861); H. Maine, Early Law and Custom (1883).

[3] Primitive man, with all his superstitions, must have believed that an insane person was possessed by spirits. Indeed, there is archeological evidence that primitive man engaged in trephining skills to let the evil demons out. *See* J. Biggs, The Guilty Mind 9 (1955). Given what may have been a violent and unpredictable nature, the lunatic may actually have been the object of awe and respect, *i.e.* a man to be appeased.

as the Egyptian,[1] Chinese[5] or Hindu,[6] this thesis has elected to begin with an examination of the Semitic systems of the Babylonians, Assyrians, Hittites, and Hebrews.

Although the Babylonians had a legal system as far back as 4000 B.C., the earliest collection of cuneiform script tablets was from Bilalama, King of Esnunna around 2268-2259 B.C. and the most complete collection was of Hammu-rabi around 2100 B.C.[7] The king was the *fons justitiae* and could deal with the criminal offender personally or remit the matter to local governors or courts of law. These courts were originally royal priests, who sat collectively as a college, but later were composed of secular judges or elders of the city. There was no concept of a police force or public prosecutor, and the judges found the facts and applied the law.[8] Although capital punishment was the normal sanction, some lesser forms of corporal punishment existed for various offenses.[9] By requiring offenders to be brought before the courts, Babylonian law was attempting to restrict the primitive form of criminal procedure, the blood feud, which allowed the relatives of the victim to render summary execution.[10] The law initially sought to have the victim or his family voluntarily accept compensation, but later made such an acceptance man-

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[1] The Egyptian legal system is the oldest system, dating back to before 4,000 B.C. For an analysis of this system, see J. Wigmore, A Panorama of the World's Legal System 11-54 (1936). The Egyptians made no substantial progress in the treatment of mental illness and, like many ancient civilizations, believed that it was tied to sin and demons. The Egyptian Elbers Papyrus (approximately 1559 B.C.) specifically mentions mental illness and its dependency on evil spirits. Nevertheless, during the Ptolemaic dynasty (approximately 332 B.C.), a distinction between crimes and torts was recognized to be based upon intent. A tort was a *harm* done while a crime was a *wrong* done, the latter requiring intent. In the Ptolemaic Code, a guilty state of mind was important and there is even a faint suggestion that mental illness was a defense to homicide. *See* J. Biggs, *supra* note 3, at 25-26.

[5] The Chinese system is the third oldest, dating back to before 2500 B.C., and has the unique distinction of being the only ancient system that has survived continuously to date. *See* J. Wigmore, *supra* note 4, at 141-206.

[6] *See* J. Wigmore, *supra* note 4, at 207-80.

[7] *See* G. Driver & J. Miles, The Babylonian Laws (1952).

[8] *Id.* at 490-94.

[9] *Id.* at 495-500. The manner of execution was often determined by the nature of the offense, *e.g.*, drowning for adultery, burning (which purifies) for maternal incest, being thrown into a fire if caught looting at a fire, and impalement for a wife who procurs the death of her husband (aggravated by a lack of a burial for the offender). Among the lesser punishments was banishment for incest with a daughter. There was no punishment of imprisonment or forced labor, although the latter did exist in Assyria.

[10] *Id.* The restrictions included the execution of the offender only after a verdict by the court. **Also,** the victim's family had to carry out the execution under the supervision of some person in authority and later had only the right to be present. In addition the manner of execution was supervised so that instead of using the weapon closest at hand to wreak their vengeance, the victim's family had to use a simpler and **surer** method, such as decapitation.

datory. The state wanted to end these vendettas not for any moral purpose, but because it was losing fighting men."

The Middle Assyrian Laws, from around 1450-1250 B.C., are, not surprisingly, very similar to the Babylonian laws.[12] The Assyrian law required that the complainant bring the offender before the court. While there were religious trials for certain offenses, most trials were secular and held before a court of the king, a court of the judges, or a tribunal composed of neighbors or bystanders. The case could be proved by witnesses or by ordeal.[13] The punishment and laws were almost entirely secular without any religious origin.[14] They were very savage and often involved death or mutilation.[15] The Assyrian punishment moved through three stages from the blood feud with its indiscriminate vengeance, to the talion, which limited the vengeance to the injury caused,[16] and finally to compensation where the vengeance could be bought off.[17]

The requirement of *mens rea* in Assyrian law and, by analogy, in Babylonian law cannot be determined with precision. However, it is clear that at least to some extent a guilty intention was required.[18] In many offenses, the *mens rea* must be assumed, but in other offenses the absence of *mens rea* is stated in the text.[19] For example, in many sexual offenses, knowledge of the married status of the woman was necessary for an offense to be committed.[20] It is doubtful, however, that this recognition of guilty knowledge resulted in any deferential treatment for an insane defendant. The focus of the criminal justice system was still on the nature of the injury and the status of the victim. When this is coupled with an

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[11] For a more detailed discussion of Babylonian law, see *also,* Keeton, The Origins of Babylonian Law, **41** L. Q. Rev. **441 (1925);** J. Wigmore, *supra* note **4,** at **59-97.**

[12] Although evidence of the Old Assyrian Laws from about **2350-2100** B.C. exist (which would be roughly contemporary with Hammu-rabi's Code), it entails only three fragmentary tablets. The information to be gleaned is meagre, although there is a mention of courts and rules of courts, and any analysis would be precarious. *See G.* Driver & J. Miles, The Assyrian Laws **(1935).**

[13] *Id.* at **336-37.**

[14] *Id.* at **346,** where the authors note that the "[a]ssyrian theory of punishment has not a religious origin and there is no idea of divine vengeance or retribution . . ."

[15] *Id.* at **343.** Unlike the Babylonians, the Assyrians inflicted such punishments as scourging or forced labor.

[16] *Id.* at **346.** The significance of the talion in the concept of punishment is eloquently described by the authors as follows, "The Assyrian principle is talion, the child of the blood-feud of which it restricts the ferocity, and the parent of the doctrine that the punishment must fit the crime."

[17] *Id.* The actual price to pay off the vengeance was called the SIMU, which was similar to the Hebrew MOHAR, and as in the Babylonian system, it moved from being voluntary to mandatory.

[18] *Id.* at **373.** ". . . Assyrian law did not look at an offense purely objectively or from the point of view solely of the person injured thereby; it had regard to some slight extent to the mind of the criminal."

[19] *Id.* at **372.**

[20] *Id.* at **371.**

ignorance of the medical causes of insanity, one can only assume that insane defendants were subject to the same laws of compensation as the sane defendant.

The Hittite Laws were a milder version of the Babylonian and Assyrian laws and were based almost entirely on compensation.[21] Most offenses against the person were punished by a fixed fine and certain offenses against property, such as larceny, were treated as civil offenses.[22] While the status of the victim was the primary consideration in fixing the amount of the penalty, the distinction between guilty knowledge and ignorance of the offense was a recognized factor in determining the offense and the penalty. For example, the penalty for manslaughter was exactly one-half of the penalty for intentional homicide.[23] The impact of mental illness on this "guilty knowledge" is speculative. However, based upon the nature of their criminal justice system where the individual was merged into the group and joint and collective responsibility were predominant, it is probable that insanity did not relieve the individual, or more probably his family, of making the compensation.

The final Semitic system to be analyzed and the one with the greatest influence on our present perceptions of law and justice is the Hebrew legal system.[24] The particular stage of the system that will be examined is the Mosaic period, from approximately 1200 B.C. to 300 B.C.,[25] which is based upon the Pentateuch or Five Books.[26] The Hebrew government was a theocracy and the laws were firmly connected to religion, which made them somewhat inflexible and inhibited any alteration. Even though Hebrew law had a fairly organized hierarchy of local courts, there was no regular system of criminal jurisprudence.[27] The penal laws were based directly on the principles enunciated in the Pentateuch.

The leading principle was the sanctity of human life. The penalties for injuries to the person were based upon a tradition of vengeance. The vengeance of blood was a sacred duty of the nearest relatives of the deceased and to neglect it was a personal disgrace.[28] The avenger of blood was justified in inflicting summary execution and the acceptance of blood

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[21] *See E.* Newfield, The Hittite Laws 116 (1951). The blood feud did exist at some time among the Hittites, but it is not mentioned in their laws.

[22] *Id.* at 116-18. The penalty was usually based upon multiple restitution of 2 to 30 times the amount of the loss.

[23] *Id.* at 129-33.

[24] *See* J. Wigmore, *supra* note 4, at 103-36.

[25] *The* other four well-defined stages are: the Classic period (300 B.C.-100 A.D.); The Talmudic period (200 A.D.-500 A.D.); the Medieval period (700 A.D.-1500 A.D.); and, the Modern period (1600 A.D.-1900 A.D.) *Id.* at 104.

[26] The Five Books are Genesis, Exodus, Leviticus, Numbers, and Deuteronomy.

[27] See R. Cherry, Lectures on the Growth of Criminal Law in Ancient Communities 40 (1890).

[28] *See* Numbers 35:18, Exodus 21:12.

money as compensation was not permitted,[29] even for accidental killings. However, for totally accidental killings, the offender could seek sanctuary in a city of refuge.[30] The avenger could demand that the city of refuge turn the offender out and the elders would determine if the killing were accidental, If it was, the offender could stay; if not, the offender would be turned over to the avenger.[31] This procedure transformed a primitive system of revenge into a criminal trial, where the fate of the offender hinged upon the intentional or accidental nature of the offense.[32]

The Hebrews, like their Semitic bretheren, were not very knowledgeable in the causes or treatment of mental illness. They considered insanity to be a curse from God [33] and one of the few references to madness was when David feigned it to extricate himself from a difficult situation.[34] In offenses meriting compensation, such as property offenses, it is doubtful that insanity mitigated the requirement for compensation. In offenses against the person, the insane probably did not receive any special treatment. Even though guilty intent was considered, the ascendant influence of religion on the law coupled with the belief that the insane were cursed by *God* renders it doubtful that they would be the object of sympathy or consideration in assessing criminal penalties.[35]

All of these Semitic legal systems were based upon divine origin.[36] In its early stages, the Greek legal system retained some remnants of divinely revealed authority, but as it developed into its more mature stages it represented the first truely secular legal system, *i.e.*, not emanating from a divine source. The emphasis of the administration of law

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[29] *See* R. Cherry, *supra* note 27, at 44.

[30] Deuteronomy 19:4-6. The earliest Biblical account of outlawry and sanctuary involved Cain and Abel in Genesis 4:10-17.

[31] Deuteronomy 19:11-12; Numbers 35:24-25.

[32] Although the focus of the discussion is upon homicide, since that was the most egregious offense, retaliation was also permitted for lesser offenses. *See* R. Cherry, *supra* note 27, at 43. This is probably best illustrated by the principle of Lex Talionis of an "eye for eye, tooth for tooth, hand for hand, foot for foot." Leviticus 14:19-20. This principle was probably intended to set the maximum punishment and not the mandatory punishment, however, it has become to be recognized as a requirement for exact retributory equivalents. *See* J. Biggs, *supra* note 3, at 14. Property offenses, as in the Hittite system, were treated as civil offenses. *See* E. Newfeld, *supra* note 21, at 116.

[33] "The Lord shall smite thee with madness . . . ." Deuteronomy 28:28.

[34] 1 Samuel 21:12-15.

[35] To illustrate the speculative nature of this conclusion, however, one only need examine Mohammedan law, which is based on the Koran and is also heavily dominated by religion. Mohammedan law specifically recognized insanity as reducing murder to involuntary man. slaughter. *See* J. Biggs, *supra* note 3, at 39. Of course, one should also keep in mind that the Mohammedans also set up the first hospital to treat mental illness around the 7th Century A.D. *See* W. Lecky, History of European Morals 94 (London 1869).

[36] This explains the relative harshness with which even trivial transgressions were treated. The infraction was not just a neglect of man's law, but was an infraction of the unitary laws of God.

depended upon the particular justice of the case and not upon any strict rules of law. The Greeks, in spite of all their contributions to art and philosophy, constructed no legal codes, reported no reasoned decisions, wrote no doctrinal treatises, and developed no professional jurists or judges.[37] Prior to the reforms of Solon, the legislator of about 600 B.C., trial was by tribal assembly. However, under Solon and during the later periods of Pericles (450 B.C.) and Demosthenes (350 B.C.), trials were held before a multitudinous popular jury without any presiding judge.[38] There were no jury deliberations and each juror deposited his vote in a special verdict urn as he departed. The penalties were in some cases fixed by law and in other cases fixed by the jury, where a second hearing and vote was taken.

The importance of a guilty mind in such a system must have been paramount, since the outcome depended upon the jurors' general sense of justice. However, in the earlier days of the Greek civilization, it was far less important. The punishment of a wrongdoer was based upon the nature of the injury and status of the victim and there was no need to examine the offender's state of mind. By the Homeric Age (approximately 1200 B.C.), there was a need to bring an offender to trial before the vengeance of the victim's relatives could be wreaked upon the offender. This did not abolish the right of the relatives, and later the friends, to punish the offender, it only postponed such punishment until the facts justifying the punishment were authoritatively established. The assembly only found the facts, it did not pronounce the sentence.[39]

The need to punish all homicides, whether deliberate or unintentional, was based upon the concept that all shedding of blood resulted in the defilement of the killer and the pollution of the *polis*. The pollution of the *polis* was so dreadful, as it would result in the wrath of the gods, that even accidental killings resulted in the expulsion of the offender so not to involve the *polis* in the stain.[40] Killers, even intentional ones, were actually regarded more as unfortunates to be shunned rather than criminals to be punished. Nevertheless, since pollution was the ineluctable consequence of homicide, a primary aim of the Greek criminal law was

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[37] *See* J. Wigmore, *supra* note 4, at 358-59.

[38] In Athens, an annual jury list of six thousand names or more was constructed. The size of a panel for a particular case was based upon the nature of the case: ordinary cases may have a jury of two hundred and one (later expanded to five hundred and one) but special cases might have anywhere from one thousand to twenty-five hundred jurors. *See* J. Wigmore, *supra* note 4, at 291. Although there was no judge, there was a magistrate, who controlled the preliminary proceedings, but he was a nonprofessional, selected by lot and rendered no authoritative rulings.

[39] *See* J. Jones, The Law and Legal Theory of the Greeks 251-57 (1956).

[40] *Id.* at 254-55. For involuntary or justifiable killings, the offender was exiled for one year, had to be reconciled with the victim's kinsmen and had to perform sacrificial rites.

to attach severe penalties to trivial breaches of the peace to prevent quarrels from escalating into homicides."

By the end of the 7th Century B.C., however, the question of the state of mind was a relevant consideration. The early demarcation between guilty and innocent intents was based upon whether the act was "willingly" or "unwillingly" done, but this "must have soon proved too rough and imprecise to denote the different shades of mental attitudes accompanying an act."[42] Plato was unsatisfied with the willing/unwilling approach, as he believed all unjust acta to be unwilling.[43] His concept of responsibility was to separate the injustice element from the damage element and focus on the latter to determine responsibility. He attached responsibility to "voluntary" acta and not to "involuntary" acts, with an intermediate class for wrongs done in passion." Aristotle disagreed with Plato's concept of all unjust acta being unwilling, but did agree that the distinction between voluntary and involuntary was necessary because he felt that men, as a general rule, were accountable for their acts.[45] Aristotle also focused on the damage aspect of the offense and developed a threefold classification of injury: a "wrong" was when the damage can reasonably be expected and the act is knowingly done, though not necessarily deliberately; a "mischance" was when the damage was neither willed nor reasonably to be expected; and an "error" was somewhere in the middle when the damage, though not unexpected, was not due to wickedness, but to some sort of culpable negligence.[46] The distinction that these two philosophers drew between "voluntary" and "involuntary" was inextricably intertwined with the mental intent of crime.

In spite of the importance of guilty intent in the Greek legal system, there was no special study of the relationship of insanity to law. The great Greek physicians, Hippocrates, Celsus, and Galen, developed a scientific view of insanity as a disease of the brain totally unrelated to the supernatural.[47] Although the Greek physicians were far from perfect in their medical analyses, they were far advanced of earlier civilizations which had been chasing demons and devils. They believed that insanity was not a mere disorder of the intellect or emotions or a disease of the

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[41] *Id.* at 263, 268.
[42] *Id.* at 261.
[43] *Id.* at 269.
[44] *Id.* at 270. In this middle class, if there was immediate repentance, the act was nearer to involuntary while if there was some degree of calculation and no repentance, it was nearer to a voluntary act.
[45] *Id.* at 271.
[46] *Id.*
[47] See J. Bucknill & D. Tuke, Insanity 89-91 (London 1858). This was no small feat in light of the prevalent Greek beliefs in legends and superstitions.

soul, but was an affliction of the organic brain.[48] In spite of these medical advances, it is doubtful that insanity directly affected the treatment of criminal offenders. However, since intent was important and cases were decided on general principles of justice, it may have indirectly protected insane defendants from punishment.

In the early days of the Roman civilization, criminal procedure was not too dissimilar to that of the Greeks. The entire popular assembly may have sat in judgment of a case, but as that number became too unwieldy (*e.g.*, 60,000), smaller bodies were organized to hear cases. These lay courts were judges of law and fact, had no judicial direction, and there was no appeal.[49] Also, as in the Greek system, the demarcation between private suits for tort and public suits for crimes was somewhat blurred. However, as early as 366 B.C., public law was segregated from private law and a special magistrate, the *praetor*, replaced the popular assembly as the trier of criminal cases.[50] If the pmetor convicted and sentenced the offender, he could seek remission of that sentence from the assembly. However, the assembly usually confirmed the sentence pronounced by the *praetor*.[51] Only the most rudimentary aspects of jurisprudence, such as public nature of the hearing, notice to the offender, and facilities for the defense, were provided and thepmetor took the role of the prose cutor.

The authenticated foundation of Roman law was the Twelve Tables in which a commission of patricians in 450 B.C. reduced to writing the customary laws of Rome.[52] No formal distinction was drawn between crimes and torts and most crimes against the person or property are contained in Table VIII—Torts.[53] The punishments were based upon the status of the victim [54] or the offender [55] or upon the circumstances under which

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[48] *See* 1 F. Wharton & M. Stille, Medical Jurisprudence 470-71 (5th ed. London 1905). Their pathology separated insanity into: madness ("phrensy" or "frenitis") which was an inflammation of the brain; melancholia, which was an affair of the black bile; and, hysteria, which was a disease of the womb.

[49] *See* J. Wigmore, *supm* note 4, at 407-08.

[50] *See* 9 The Cambridge Ancient History, The Roman Empire 133-44 B.C. 873 (1932) [hereinafter cited as Cambridge Ancient History].

[51] *Id.* at 874. Death was the only penalty known to primitive Rome. Mutilation did not exist and scourging was only incidental to some capital punishments, as was some instances of confiscation. Self-exile appeared later when decadent public opinion opposed the execution of Roman citizens. However, someone returning from self-exile was subject to summary execution.

[52] *Seegenemlly* A. Watson, Rome of the XII Tables (1975).

[53] For a complete translation of all twelve tables *see* W. Hunter, Roman Law 17-22 (1885); J. Prichard & D. Nasmith, Roman Law 102-123 (1871).

[54] For example, if an offender breaks the bone of a freeman the fine was 300 asses, but if it was the bone of a slave, only 150 asses. Table VIII, Law 3.

[55] For example, if a daytime thief, caught in the act, who does not use a weapon, is a freeman he was scourged and bound into slavery to the victim. If he was a slave, he was hurled from The Tarpeian rock, presumably to his death. Table VIII, Law 14.

the crime was committed, *i.e.*, nighttime or daytime, or the manner in which the offender had been caught, *i.e.*, in the act or later.[56] While accidental damages had to be compensated:' the guilty intent of the offender could result in capital punishment rather than mere compensation or moderate punishment.[58] A minor who had not reached the age of puberty, apparently regardless of his ability to form any guilty intent, was still held liable for his offenses, but any punishment of him was discretionary with the *praetor*.[59] There is no specific mention of the mentally ill in Table VIII, in contrast to a specific provision in Table V dealing with guardianship.[60] While it is doubtful that the mentally ill were excused from any compensatory damages, one may speculate that they might have avoided the death penalty, as did minors who had not reached the age of puberty.[61]

The Twelve Tables were the foundation of Roman law for nearly one thousand years, although there were some procedural laws enacted throughout this period.[62] In the 6th Century A.D., the foundation became the great codifications of all earlier Roman law by the Emperor

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[56] For example, a thief in the nighttime or a thief in the daytime who uses a weapon could be killed if he were caught in the act. Table VIII, Laws 12 & 13. However, for a theft not discovered in the commission, the penalty was only double the value of the property stolen! Table VIII, Law 16. Thus, most thefts not discovered at the time of commission were probably settled by compromise as allowed by Table 11, Law 4.

[57] Table VIII, Law 5 provides that accidental damages must be compensated and Table VIII, Law 24, provides that if someone accidentally kills someone else, he shall atone for the deed by providing for a sacrificial ram.

[58] Table VIII, Law 10 provides that a man willfully setting fire to a house shall be bound, scourged and burned alive but if the fire was through accident or negligence, he shall make compensation or if too poor, shall undergo a moderate punishment.

[59] Table VIII, Law 9 provides that an adult who cuts down a neighbor's crops by stealth in the nighttime will be hanged but an offender under the age of puberty shall be scourged at the discretion of the praetor and made to pay double the value of the damage. Table VIII, Law 14 also made this distinction for thieves in the daytime caught in the act not using a weapon.

[60] Table V, Law 7 provides that "if anyone becomes mad, or prodigal, and has nobody to take care of him, let a relation, or, if he has none, a man of his own name, have care of his person and estate." 1 F. Wharton & M. Stille, *supra* note 48, at 471.

[61] However, to illustrate how tenuous this speculation is one need only consider that Table IV, Law 1, dealing with *Patria Potestas*, allows that "monstrous or deformed offspring may be put to death." Readings in Early Legal Institutions 76 (W. Carpenter & P. Stafford ed. 1932). If this is any indication of the humanity shown physically handicapped babies, then by analogy, mentally handicapped may not have received better treatment. However, as the latter's mental handicap would not reveal itself until later in life, it would not have been as expedient to just summarily kill them.

[62] Among the most notable was *Lex Calpurnia* passed by Sulla in 149 B.C. It defined criminal offenses, created by a jury court drawn from the upper class, and had a citizen volunteer prosecutor with the praetor presiding. The jury acted as the earlier assembly did, that is there was no summations, no laws of evidence and no deliberations, the jury just voted. The courts were permanent and fixed their own procedure, penalties, and jurisdiction. Its greatest effect was to substitute the accusatory form for the inquisitional. *See* Cambridge Ancient History, *supra* note 50, at 876-78. *See generally* A. Greenidge, The Legal Procedure of Cicero's Time 297-525 (1971); A. Jones, The Criminal Courts of the Roman Republic and Principate (1972).

Justinian. In 529 A.D., Justinian promulgated the *Codex Justinianus* (also called the *Codex Vertus),* which was a compilation of all imperial legislation. This was revised in 534 A.D. in the *Codex repetitae praelectionis*. In *533* A.D., he promulgated his Pandects or Digest, which was a culling from the most approved juristic writings, and his *Institutiones* (Institutes), which was a student handbook of the law. The laws of Justinian were immense in scope, covering all of the basic considerations of his society, such as domestic relations, real property, rights of succession, contractual obligations, and delicts and torts. It is the latter two subjects which are of particular interest to this article, since they encompass our concepts of crime and punishment. The general compensatory nature of the "criminal" law had not changed greatly from the Twelve Tables; however, the treatment of lunatics was drastically clarified.[63] In the area of private wrongs, the Digest specifically exempted lunatics and mentally disordered persons from punishment.[64] In the law of theft, both the Institutes [65] and the Digest [66] required an evil intent, and the Digest specifically recognized that such an intent could not be formed by someone such as an insane or mentally defective person.[67] The delict of *iniuriu,* which encompassed outrages or insults to the person, such as assault or defamation, required a wrongful intent.[68] The Digest states "that *iniuria* is dependent on the state of mind of the person committing it," [69] and by clear implication excludes insane persons.[70] However, the Digest also recognized the possibility of intermittant insanity and required in such cases that an inquiry be conducted to determine if the offense occurred during a lucid interval.[71] Also, insanity at the time of punishment resulted in the complete remission or reduction of the punishment as the insanity was considered to be punishment enough.[72] However, the insane person was still kept in custody so as not to harm himself or others.[73]

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[63] The sources of this drastic change are difficult to identify since not only did Justinian's laws come from many sources, but the original latin treatises from which the choice passages had been culled were, under heavy penalty, forbidden ever again to be cited. This has resulted in the extirpation of these sources, with the accidental exception of Gaius' Institutes.

[64] Dig. Just. 47.1.4.14.

[65] Inst. Just. 4.1.1.

[66] Dig. Just. 47.2.1.3.

[67] *Id.*

[68] For a fuller discussion of *iniuria*, see W. Buckland & A. McNair, Roman Law & Common Law 378-83 (1952).

[69] Dig. Just. 47.10.3.1.

[70] See 1 D. Van Der Keessel, Praelectiones Ad Just Criminale 257 (1969).

[71] Dig. Just. 48.19.6.

[72] Dig. Just. 48.19.5.6.

[73] *Id.* Another area where the insane person received special treatment was suicide. If he committed suicide while charged with a crime, his goods were not confiscated, unlike those of a sane person. Dig. Just. 48.21.1.2. Also, as to the general treatment of insanity affect-

Justinian had obviously been influenced by the Greek physicians' enlightened view of insanity. His treatment of the insane in the law was a profound improvement over earlier civilizations. Nevertheless, the practical difficulties of delving into the human mental state to distinguish various degrees of guilt must have been considerable. In order to draw inferences as to the nature and extent of mental illnesses, it must have been necessary to rely upon outward phenomena of the plainest sort. It is thus probable that only the most raving lunatics actually benefited from Justinian's benign treatment of the mentally ill.

B. ENGLAND

The prudent advancements of the Greek physicians and Justinian were almost totally obliterated during the Middle Ages. The understanding of mental illness regressed to a supernatural phenomena as courts and medieval church tried to stamp out diseases of the mind by reverting to torture and burning at the stake. It has been aptly stated that "[i]f civilization, as has been justly claimed, was set back a thousand years by the fall of the Roman Empire, one of the proofs of this fact is found in the treatment of the insane." [74] The popular crazes of the age were demonomania and epidemic witchcraft, which condemned lunatics for holding converse with the devil and were enforced by ecclesiastical law, which was cruel, bloody, ignorant, and fanatical.[75] This deplorable distemper of the human mind obscured any rational jurisprudence of insanity. Only when modern science forced the recession of this popular debasement could such a jurisprudence emerge.

The early laws of the British Isles were not dissimilar to other primitive civilizations; they were based upon strict liability and compensation.[76] The first written laws of England by Aethelbert of Kent *(552*

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ing contractual capacity, see Inst. Jus. 3.19.8; Dig. Just. 44.7.1.12; Dig. Just. 50.17.40; Inst. Gaius 3.106.

[74] F. Wharton & M. Stille, *supra* note 48, at 472.

[75] *Id.* at 470. It has also been suggested that parts of the Hebraic law were indirectly responsible for some of these later abuses of lunatics. In Leviticus 10:6 a man who turned from *God* to go and consult with sorcerers or magicians was condemned to death. Also, in Leviticus 10:27 it is stated that "a man also or woman that hath a familiar spirit, or that is a wizard, shall surely be put, to death; they shall stone them with stones, their blood shall be upon them." Thus the popular prejudice which relegated lunatics to evil spirits made the cruel and inhuman treatment of them possible.

[76] When discussing the British Isles, this thesis will only be concerned with England proper. Ireland had a Celtic legal system, however, that is at least worth mentioning. In the Heroic Age of Pagan Druidism (approx. 600 B.C.-400 A.D.), a professional class of Druids, call Brehons, acted as jurists. Substantially all crimes were commutable by money payments with the fine varying according to the victim, offender and nature of the act. Each person was assigned a value or "Eric". Acceptance of the fine was optional, arbitration was voluntary and it was preferred to retaliation. *Mens rea* was generally not relevant and mental illness did not seem to affect the judgments. The earliest manuscript of Brehon law (approx. 1100 A.D.) is a digest composed around 700 A.D. of the "wrong judgments of

A.D.) recognized the blood-feud and outlawry as the foundation of the criminal justice system.[77] However, by the eighth century, the church was grafting some of its religious concepts onto the secular codes. This was an easy task since the clerics were often the most learned men and wrote the laws for the kings. The priests were not as concerned with compensation, but were concerned with the culpability for sin and the need to do penance to atone for offenses. While the insane did not escape the compensation, they may not have had to do the penance and they apparently did receive some protective treatment as evidenced by a decree of Egbert, eighth century Archbishop of York and member of the Royal family of Northumbria that:

> If a man fall out of his senses or wits, and it come to pass that he kill someone, let his kinsmen pay for the victim, and preserve the slayer against aught else of that kind. If anyone kill him before it is made known whether his friends are willing to intercede for him, those who kill him must pay for him to his kin.[78]

While English law through the tenth century was still primarily based on strict liability, intent was beginning to have some relevance because of the Church's influence. However, the involuntary or unintentional misdeeds were not completely excused but were entitled to clemency and better terms.[79] It must have been easier in this pre-Norman Conquest system to deal with insane offenders since the system was based upon private compensation rather than deterrent punishments.

This compromise between a strict liability legal system and ecclesiastical insistence on the importance of *mens rea,* was perpetuated by the Norman kings who maintained some of the Anglo-Saxon customs.[80] King

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Caratnia the Scarred" a second century A.D. Brehon who served King Cormac. Decision 20 in this Digest states "I decided, Harm by a human is payable like harm by an animal" [i.e., compensation only]. "You decided wrongly" [said Cormac]. "I did it wisely, for harm by a minor or without intention calls for compensation, not fine also" [said Caratina]. The oldest Celtic criminal code was the Book of Aicill, which was attributed to King Cormac, but must have been written later because the Celtics had no writing or written records in 250 A.D. To illustrate the status of the mentally ill, there are two pages concerning the liability for damage done in an alehouse by a "fool." ***See generally*** J. Wigmore, supra note **4,** at **657-723;** J. Biggs, supra note **3,** at **16-18.**

[77] Compensation to buy off the blood feud was the "Bot" and was based on the "Wer" or "Wergeld," the price of compensation which was graduated according to the victim. J. Biggs, *supra* note **3,** at 19.

[78] ***See*** 3 A. Haddam & W. Stubbs. Councils and Ecclesiastical Documents Relating to Great Britian and Northern Ireland **413** (Oxford **1869);** ***See*** *also* 2 B. Thorpe, Ancient Laws and Institutes of England (London 1840).

[79] ***See*** 6 A. Robertson, Laws of the Kings of England, Aethelred **52 (1925).** Indicative of the church influence is that this law of Aethelred was drafted by Archbishop Wulfstan.

[80] ***See*** N. Walker, Crime and Insanity in England **(1968).**

Henry I (1100-1135) provided that "[i]f a person be deaf and dumb, so that he cannot put or answer questions, let his father pay his forfeitures. Insane persons and evildoers of a like sort should be guarded and treated leniently by their parents." [81] During the reigns of Edward I(1272-1307) and Edward II (1307-1327), insanity was beginning to be recognized as a defense to crime and, by Edward III (1327-1377), absolute madness had been recognized as a complete defense. The insane defendant was not acquitted outright; a special verdict was rendered that he was mad and the king would, but was not required to, pardon him.[82]

One of the most influential pieces of legislation concerning lunatics was the Statute ***De*** *Prerogativa Regis* during the reign of Edward III in **1342.** It established the king's jurisdiction over "idiots and lunatics." It was an early recognition that there was a difference between being mentally defective (idiot) and mentally diseased (lunatic). Idiots were legally presumed, without any medical foundation, to be born without reason and would always remain as idiots. Since idiots could never perform their feudal duties, the feudal lord had the right to seize their lands in payment for the unperformed feudal services. The lord could use the profits for himself, but had to take care of the idiot and the land passed to the idiot's heirs upon his death. Lunatics developed their madness from some time other than birth and it was possible that they may regain their sanity or have lucid intervals. Since they may be able to perform their feudal services in the future, their lands could not be seized, but they still needed a guardian. The king, through his Court of Chancery, acted as the guardian and had to use the proceeds of the land only for the support of the lunatic.[83] While this statute appears to render humane treatment to the insane, in practice it was probably only a prac-

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[81] 1F. Liebermann, Die Gesetze Der Angelsachsen 595 (1898).

[82] S. Glueck, Mental Disorder and the Criminal Law (1925).

[83] Collinson, Treatise on Law Concerning Idiots, Lunatics And Other Persons *Non Compos Mentis* (London 1812) provides a loose translation of the original latin text of the *Statute De Prerogativa Regis* as follows:

> CAP. XI. The King shall have the custody of the lands of natural fools, taking the profits of them, without waste or destruction, and shall find them their necessaries, of whose fee soever the lands be holden. And after their death he shall render them to the right heirs, so that nothing shall be alienated by these fools, nor their heirs be disinherited.
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> CAP XII. **Also** he shall provide, when any one who before time had his memory and intellect, shall become *non compos mentis (nonfuerit compos mentis)*, just as someone *lucida intervalla*, that their lands and tenements shall be safely kept without waste or destruction, and that they and their household shall live and be maintained competently with the profits of the same; and the residue, besides their support, shall be kept to their use, to be delivered unto them when they come to right mind; so that the aforesaid lands and tenements shall in no wise be alienated within the time aforesaid, and the King shall take nothing to his own use. And if the person dies in such state, then the residue shall be distributed for his soul by the advice of the ordinaries.

tical solution of the problem that was of major concern, that is the use of the real property. If the treatment of the insane was thereby improved, it was only ancillary to the primary purpose of the statute. Nevertheless, it was more benevolent than the treatment of certain physically "handicapped" persons, those born with more or less than the normal number of hands or feet, *i.e.*, three or none, who were regarded as monsters or animals who could not inherit.[84]

The role of insanity in criminal cases was not greatly influenced by legislation from the thirteenth to the eighteenth century. It was the commentators who shaped the jurisprudence of law and insanity during this time. The first of these great commentators was Henry de Bracton (d. 1268), who was Chief Justiciary in the *Aula Regis,* the highest court in the kingdom, around 1265.[85] He was a priest, which was the usual situation, but he was also a "civilian," that is a follower of the Roman law. He relied heavily upon the laws of Justinian, which had been resurrected about a century earlier in Italy by such Bologna jurists as Azzo and Vacarius.[86] Not only did Bracton's terse and crisp style strongly suggest the old Latin way, but he copied many passages of Justinian almost verbatim."[87] Bracton's primary contribution to the law of criminal insanity was the element of requisite knowledge and a comparison to the wild beasts. His singular statement that "*furiousus non intelligit quod agit, et animo et ratione caret, et non multum distat a brutis,*" that is, "an insane person is one who does not know what he is doing, and is not far removed from the brutes" [88] greatly affected the role of insanity in criminal law, in spite of the fact that Bracton was probably primarily dealing with the civil liability of the insane. His reference to the "brutis" was later transmuted into the "wild beast" test.[89]

The next commentator to discuss law and insanity was Sir Thomas Littleton (d. 1481), a famous judge and commentator, mostly, however, in the field of real property. Littleton articulated a doctrine of non-stultification, which was an old English principle of law, long since abandoned, that a man could not come into court and stultify himself and thus avoid his obligations. He therefore could not plead insanity to annul his obligations but his heirs could and still maintain their rights. Even at

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[84] *See F.* Wharton & M. Stille, *supm* note 48, at 511.

[85] *Id.* at 510.

[86] *See J.* Wigmore, *supra* note 4, at 1007-08.

[87] *Compare H.* Bracton, *De* Legibus Et Consuetudinibus Angliae [On The Laws and Customs of England] (T. Twiss 1878) Lib. III, fol. 100—"Furiosus autem stipularie non potest, nec aliquod negotium agere, quia non intelligit quid agit" [an insane person cannot trade, nor transact any business, because he does not know what he is doing] *with* Inst. Just. 3.20.8—"Furiosus nullum negotium gerere potest, quia non intelligit quod agit" [a madman can transact no business, because he does not know what he is doing].

[88] H. Bracton, *supra* note 87, at Lib. V, fol. 420b.

[89] *Arnold's Case, 16* How. St. Tr. 695 (1724).

this early date, there was considerable suspicion of possible abuses by feigning insanity, The courts lacked any scientific criteria to evaluate the mental condition of the person attempting to stultify himself and the courts were not going to gamble with rights as important as property rights, There was also some resentment in the law to the idea that a man could seek to avoid his obligations on the basis of an illness which they did not know much about.[90] These fears and resentments are still very basic to the unconscious conflict between law and insanity.

Sir Anthony Fitzherbert (1470-1538), a judge of "common pleas," was the first commentator to promulgate a specific test for idiocy. His "count twenty pence test" stated that an idiot was

> such a person who cannot account or number twenty pence, nor can tell who was his father or mother, nor how old he is, etc., so as it may appear he hath no understanding of reason what shall be his profit, or what his loss. But if he have such understanding that he know and understand his letters, and do read by teaching of another man, then it seems he is not a sot or natural fool.[91]

Although this test is known as the "count twenty pence" test, there are really two distinct parts of it. The first part concerning the counting and recognition of his parents and his own age must have been a very convenient method in Fitzherbert's day. These rudimentary items of knowledge, or at least memory, should be possessed by persons of normal intelligence and thus provided a test simple in its application. The second part of the test, that is the ability to understand the written word, is, however, a far more intricate accomplishment. If applied literally, given the widespread illiteracy of the sixteenth century, it surely would have relegated many normal, sane persons to the category of idiots. Fitzherbert could not have intended that this portion of the test be categorically exclusive. Instead, the ability to read must have been proof of lack of idiocy. Sir Matthew Hale (1609-1676), who was Lord Chief Justice of the King's Bench (1671-1676), was critical of Fitzherbert's test because it was inadequate to fully inform the jury, who had to decide idiocy as a question of fact. Hale stated of Fitzherbert's test that "[t]hese, though they may be evidences, yet they are too narrow, and conclude not always, for idiocy or not is a fact triable by jury, and sometimes by inspection."[92]

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[90] *See* F. Wharton & M. Stille, *supm* note 48, at 512.

[91] The New Natura Brevium 532 (8th ed. 1755); *also* cited *in* 1 Hawkins, Pleas of the Crown 2 (London 1716).

[92] F. Wharton & M. Stille, *supm* note 48, at 519. Hale's treatise on Fitzherbert in its American edition slightly misquotes Fitzherbert's test as counting twenty "shilling" rather than "pence" and thus Fitzherbert's test is often referred to as the "count twenty shilling test."

Another commentator, Sir William Staundeforde, while approving of Fitzherbert's test, stated that Fitzherbert also intended to include in his test for idiocy "that if hee bee able to beget eyther soone or daughter hee is no foole."[93] This additional element would appear to be even more vulnerable to Hale's criticism since the ability to sire a child is hardly conclusive evidence of lack of idiocy.

A significant, yet usually overlooked, feature of Fitzherbert's "twenty pence" test is that he never intended that it be a test for criminal insanity. It was solely a test for civil idiocy concerning the writ *De Ideota inquirendo.* The only reference that Fitzherbert ever made to the criminal liability of insane persons was

> [h]e who is of unsound Memory, hath not any Manner of Discretion; for if he kill a Man, it shall not be a Felony, nor Murder, nor he shall not forfeit his Lands or Goods for the same, because it appeareth that he hath not Discretion; for if he had Discretion he should be hanged for the same, as an Infant who is of the Age of Discretion, who committeth Murder or Felony, shall be hanged for the same.[94]

Thus, if Fitzherbert is to be credited with any contribution to the law of criminal insanity, it should be for introducing the salient element of discretion into the equation and not his more colorful "twenty pence" test.

Sir Edward Coke (1552-1634), an oft-quoted judge and commentator, was an admirer of Littleton and an adherent of his nonstultification principle. However, Coke noted that nonstultification

> holdeth only in civil causes; for in criminal causes as felonie, etc., the act and wrong of a madman shall not bee imputed to him, for that in those causes, *actus non facit reum, nisi mens sit rea,* and he is *amens (id est), sine mente,* without his minde or discretion; and *furiosus solo furore punitur,* a madman is only punished by his madnesse.[95]

This was the earliest attempt in English law to distinguish between civil and criminal insanity and is noteworthy for its greater leniency toward

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[93] S. Glueck, supra note 82, at 128 n.2 (citing W. Staundefore, Kings Prerog. 34-35 (1567)).

[94] The New Natural Brevium, supra note 91, at 466.

[95] Coke, Littleton, Bk III, Ch. 6, § 405 (London 6th ed. 1680). This "benevolent" attitude toward the insane person was, however, subject to a notable exception when the person of the king was involved. Regicide was outside the pale of the law and insanity was not a defense to attempts on the king's life. This spirit of undiscriminating vengeance in cases of high treason was not a recent phenomenom in Coke's time. Henry VIII enacted a law (later repealed by Phillip and Mary) that "if a person being 'of good, perfect and whole memory' should commit high treason, and afterwards fall into madness, he might be tried in his absence and executed as if he were sane." F. Wharton & M. Stille, *supm* note 48, at 515 n.36.

the criminally insane than the civilly insane. The fact that later commentators and jurists reversed this principle, that is showed greater leniency toward the civilly insane, "shows that the latter dogma was not inherent in the common law, but was an afterthought." [96]

Coke's principal contribution to the law of insanity was in his classification of the generic term *non compos mentis* into four parts.[97] This classification was the first scientific distinction drawn between types of insanity in the criminal law. Coke's broad generic "unsoundness of mind" correctly encompassed both mental disease and mental defect. His classification was as follows:

> *Non compos mentis* is of four sorts: 1. Ideota, which from his nativitie, by a perpetuall infirmitee, is *non compos mentis*. 2. Hee that by sicknesse, griefe, or other accident, wholly loseth his memorie and understanding. 3. A lunatique that hath sometime his understanding and sometime not, *aliquando guudet lucidis intervallis* and therefore he is called *non compos mentis so* long as he hath not understanding. 4. Lastly, hee that by his owne vitious act for a time depriveth himself of his memorie and understanding, as he that is drunken. But that kind of *non compos mentis* shall give no privilege or benefit to him or to his heirs.[98]

By using exceedingly simple terminology, Coke's classification avoided the confusion of later writers who used loose terminology and nice but impractical distinctions. Coke's classification was sufficiently comprehensive for all legal purposes of his day and displayed some rational insight into the causation of insanity. The only significant defect in his system was the separate classification of "lunatique" characterized by "lucid intervals." This purely artificial conception obfuscated the law of insanity for a considerable period of time.[99]

A landmark case in the medicial jurisprudence of insanity was *Beverley's Case*,[100] in which Coke condensed much of the prior insanity

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[96] *Id.* at 516.

[97] Coke was using the term *non compos mentis* in the manner of the Institutes of Justinian and early English Civilians, that is as a generic term. *See* S. Glueck, *supm* note 82, at 130; F. Wharton & M. Stille, *supm* note 48, at 515.

[98] *Id.* at 515-16.

[99] *Id.* at 517.

> There is no such thing in actual insanity as the "lunatic" of Coke, if by that term is meant a distinct clinical form, and if that "clinical form is always characterized by "lucid intervals." Science knows no such clinical form. Therefore, the separation of "lunatics" from patients who become insane from "sickness, grief, or other accident," is entirely arbitrary and unscientific. Moreover, the subject is of more than academic interest, because. . . the creation of this artificial "lunatic" with his "lucid intervals," led to great confusion among English and American jurists.

[100] 2 Coke's Rep. 571 (1603).

law. Although Coke was primarily detailing the civil rights and liabilities of insane persons, especially property rights, he did state an important concept of criminal law as follows:

> The punishment of a man who is deprived of reason and understanding can not be an example to others. . . . No felony or murder can be committed without a felonious intent and purpose; . . . but *furiosus non intelligit guid agit, et animo et ratione caret, et non multum distat a brutis,* as Bracton saith, and therefore he cannot have a felonious intent.[101]

This concept involves two distinct considerations, the deterrent purpose of punishment and the requirement of guilty intent. If an insane person is exempted from punishment because such punishment would not serve as an example to deter others from committing crimes, then such e x cusal is based upon a failure to fulfill a basic goal of criminal justice systems, deterrence. This would be a policy reason for deferential treatment of insane offenders totally unrelated to a legal lack of *mens rea* or an absence of moral culpability. However, the second aspect of Coke's statement is based upon the necessity for guilty intent in every crime and the negation of such intent by insanity. It is the attempts to reconcile *mens rea* and the impugning insanity with arbitrary tests for mental irresponsibility that have resulted in later confusion. Coke avoided this vortex by not promulgating any one test for mental irresponsibility and instead "let the law rest upon the general principle of the requirement of a guilty intent."[102] The Coke approach has been essentially resurrected in the recent *Mens Rea* approach of some American state jurisdictions.[103]

Lord Hale, as did Coke, recognized the intimate relationship between insanity and criminal intent. His logical approach to the law of criminal insanity began with an inquiry into the responsibility of sane persons based upon the psychological and ethical fundamentals of criminal law. Hale stated that criminal responsibility is based upon understanding and free will, which are in modern parlance, cognitive, and volitional capacity. He stated that

> [m]an is naturally endowed with these two faculties, understanding and liberty of will, and therefore is a subject properly

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[101] *Id.* at 572. It was also in *Beverley's Case* that Coke expounded the extraordinary exception for criminal liability of the insane in cases of high treason against the person of the King. ***See*** note 95 *supra.* However, Coke gave a fuller treatment of the relationship of insanity to high treason in **3** Coke's Inst. **4.** He stated that those who were *non compos mentis* could not commit high treason if they had "absolute madness" and a "total deprivation of memory." This was a more rational and consistent discussion of the problem. *See* F. Wharton & M. Stille, *supra* note 48, at **514.**

[102] S. Glueck, *supra* note 82, at 131.

[103] ***See*** Part V, D, *infra.*

> capable of a law properly so called, and consequently obnoxious to guilt and punishment for the violation of that law, which in respect of these two great faculties he hath a capacity to obey. The consent of the will is that which renders human actions either commendable or culpable; as where there is no law, there is no transgression, so regularly where there is no will to commit an offense, there can be no transgression, or just reason to incur the penalty or sanction of law instituted for the punishment of crimes or offenses. And because the liberty or choice of will presupposeth an act of the understanding to know the thing or action chosen by the will, it follows that, where there is a total defect of the understanding, there is no free act of the will in the choice of things or actions.[104]

While Hale correctly recognized that criminal responsibility involves cognitive and volitional capacities, he intermingled the two distinct concepts of the legal capacity to commit crime and the justification for punishment. He stated that, where there is no free will, there is "no transgression, or just reason to incur the penalty." If one believes that a lack of *mens rea* results in no crime, it is the innocence of the insane person that precludes the punishment. If, on the other hand, one believes that insanity is in the nature of confession and avoidance, that is he committed the act but society has elected not to punish him, it is the societal policy not the innocence of the insane person which precludes the punishment. Thus, there is a difference between "no transgression" and "no just reason to incur the penalty" which Hale does not clarify.[105] Nevertheless, Hale's discussion of responsibility based upon understanding and free will was a significant contribution to the medical jurisprudence of insanity.[106]

Hale divided mental incapacity into natural idiocy, accidental dementia, and drunkenness. Idiocy of fatuity *a nativitate vel dementia naturalis*, was similar to that described by Fitzherbert, although Hale decimated Fitzherbert's test for idiocy with a criticism that it does not always conclude for idiocy.[107] Drunkenness or *dementia affectata* was considered to be a voluntarily contracted madness rendering the person to the same liability as a sane or sober person.

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[104] 1 Hale, Pleas of the Crown 15.

[105] This comingling is apparent even from the title of the chapter which is "concerning the several incapacities of persons and their exemptions from penalties by reason thereof." 1 Hale, Pleas of the Crown 13.

[106] The only author to recognize this indebtedness that this author could find was Professor Glueck. *See* S. Glueck, *supra* note 82, at 132.

[107] *See* note 92 and accompanying text. It is interesting to note that Hale was the first commentator to give any prominence to the issue of tests for insanity. His criticism of Fitzherbert's test that it was too narrow and inconclusive "is practically a condemnation of all juridical tests for insanity." F. Wharton & M. Stille, *supra* note 48, at 519.

The category of *dementia accidentialis vel adventita* was far more complex than the other two categories and was, paradoxically, a significant contribution yet a source of perpetual confusion. Hale recognized several causes of accidental dementia, which were distemper of the humours of the body, violence of a disease, as a fever or palsy, and concussion or hurt of the brain, or its membranes or organs.[108] He also divided accidental dementia into two kinds, partial and total and the former was subdivided into partial as to certain subjects or things[109] and partial as to degree.[110] Hale did not believe that partial insanity was an excuse"' because "doubtless most persons that are felons of themselves, and others are under a degree of partial insanity when they commit these offenses."[112] Hale acknowledged the inherent difficulty of separating partial from total insanity and recognized that it was a matter for the judge and jury to determine.[113]

Hale's description of "partial insanity" is misleading and has had an injurious impact on subsequent jurisprudence. His definition seems to apply only to those with systematized and fixed delusions, such as melancholics and especially paranoiacs. This latter class is probably the classic criminally insane and "with one sweeping sentence, whose true import it may be doubted whether he understood, Hale excludes from all leniency the vast majority of the criminally insane."[114] Partial insanity is *too* broad a category since it can easily be read literally to include **all** insane persons because, except in the rare case, all insane persons have some use of the mind and reason.[115] It is also anomolous to describe someone as "partially insane" just as it would be to call a terminal cancer patient "partially sick," just because other organs of his body function perfect-

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[108] *Id.* at **518.**

[109] **1** Hale, Pleas of the Crown **30.** "Some persons, that have a competent use of reason in respect of some subjects are yet under a particular ***dementia*** in respect of some particular discourses, subjects, or applications."

[110] *Id.* Partial in degree "is the condition of very many, especially melancholy persons, who for the most part discover their defect in excessive fears and griefs, and yet are not wholly destitute of the use of reason."

[111] *Id.* ". . . this partial insanity seems not to excuse them in the committing of any offense for its matter capital."

[112] *Id.*

[113] *Id.*

> It is very difficult *to* define the indivisible line that divides perfect and insanity; but it must rest upon circumstances duly to be weighed and considered, both by judge and jury, lest on the one side there be a kind of inhumanity towards the defects of human nature, or on the other side too great an indulgence given to great crimes.

[114] F. Wharton & M. Stille, ***supm*** note 48, at **520.**

[115] *Id.* at **521.** "Only the most advanced dements or the most furious maniacs can be placed in a class of patients who have no glimmer of reason, no use of their senses, no power of memory, no play of emotion, however slight; and even of these extreme cases such absolute negation of all normal mentality can hardly be affirmed."

ly.[116] If a man is not of completely sound mind, he must perforce be of unsound mind.

Hale's description of "total insanity" as the "total alienation of mind, or perfect madness" is subject to the same criticisms as was "partial insanity." The problem with the descriptive term of "total insanity" has been eloquently stated as follows:

> Is there ever such a thing as a total insanity? Does the term not mean the absolute extinction of every mental function, every perception, every sensation, every impulse, every mental reflex whatsoever? Is such a form, such a complete blank or night of the mind, ever conceivable? The answer must be that such a total extinction of mentality occurs only in the most advanced dements; and such dements are never the objects of medico-legal inquiry, because they have not sufficient mental power to commit an act in its nature purposive.[117]

Since all diseases exist in degrees, Hale's distinction of "partial insanity" from "total insanity" is of little practical use to alienists, judges, or jurors.

Hale further distinguished both "total insanity" and "partial insanity" into either "permanent" or "interpolated." Permanent insanity, called *phrenesis* or madness, was a fixed condition. Interpolated insanity, which was called lunacy because of the perceived influence of the moon on diseases of the brain, was a condition marked by vicissitudes during different periods.[118] Hale agreed with and elaborated upon Coke's concept of lucid intervals and fixed that erroneous concept in Anglo-American jurisprudence.[119] Hale also classified accidental *dementia* on the basis of their symptoms,[120] "thus setting an unfortunate precedent for

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[116] *Id.*

[117] *Id.*

[118] 1 Hale, Pleas of the Crown 30. "the person that is absolutely mad for a day, killing a man in that distemper, is equally not guilty, as if he were mad without intermission."

[119] *Id.* ". . . such **persons** as have their lucid intervals (which ordinarily happens between the full and change of the moon) in such intervals have usually at least a competent use of reason, and crimes committed by them in these intervals are of the same nature, and subject to the same punishment, as if they had no deficiency." "Lucid intervals" has been criticized as being arbitrary and unscientific. The term leaves one with the impression of a temporary complete restoration of the reason. This is distinguishable from a remission which is a gradual process and is not, in a medical sense, a complete restoration of the mind. Abrupt lucid intervals accompanied by a complete restoration must be a rare phenomena and if there is no complete restoration, then the mind is still to some degree unsound and the person still insane. Another criticism of Hale's doctrine of "lucid intervals" is that it "is based upon the crudest superstition about insanity." F. Wharton & M. Stille, *supra* note 48, at 497.

[120] 1 Hale, Pleas of the Crown 30. His division was as follows

> the more dangerous and pernicious, commonly called *furor*, ***rabies***, *mania*, which commonly ariseth from adust choler, or the violent inflammation of the blood and

legal commentators and judges, who attempt to psychiatrize in their legal decisions."[121]

In spite of his criticism of Fitzherbert's "count twenty pence" test and his implied condemnation of all tests for insanity, Hale recognized the need for guidance in the criminal jurisprudence of the insane offender and proposed his own test as "the best measure that I can think of is this; such a person as labouring under melancholy distempers hath yet ordinarily as great understanding, as ordinarily a child of fourteen years hath, is such a person as may be guilty of treason or felony."[122] One commentator stated that, from a common sense and common experience viewpoint, Hale's "child of fourteen years" test has greater merit than earlier tests and many subsequent tests.[123] The same writer noted that, in view of the later development of psychological intelligence tests, Hale was justified in using a fourteen-year-old child's understanding as a standard of comparison.[124] Other commentators feel that Hale's test was equally trivial with earlier tests and indicative "of the loose thinking that prevailed in those days on the subject of mental disease."[125] It has been stated that "the understanding of a healthy child, fourteen years old, has no resemblance whatever to the various forms of insanity in adults, is a fact in mental pathology so obvious that it hardly needs to be inculcated today, even for the benefit of nonmedical readers."[126] A saving, yet overlooked, feature of Hale's test was that by using the word "may," he did not consider his test to be either exclusive or absolutely conclusive.

The final systematic commentator to be considered is William Hawkins, who made a singular yet significant contribution to the law of the criminally insane. His influential commentary commenced with the statement: "[t]he guilt of offending against any law whatsoever, necessarily supposing a wilful disobedience, can never justly be imputed to those who are either incapable of understanding it, or of conforming themselves to it."[127] Hawkins, as did Hale, thus recognized cognitive and volitional aspects of mental responsibility and his statement appears to be a precursor of both *McNaughton* and irresistible impulse. If this were

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spirits, which doth not only take away the use of reason, but also superadds to the unhappy state of the patient, rage, fury, and tempestuous violence; or else it is such as only takes away the use and exercise of reason, leaving the person otherwise rarely noxious, such as in a deep *delirium, stupor,* memory quite lost, and phantasy quite broken, or extremely disordered.

[121] S. Glueck, *supra* note 82, at **136.**
[122] 1 Hale, Pleas of the Crown **30.**
[123] S. Glueck, *supra* note 82, at 135.
[124] *Id.* at 137.
[125] F. Wharton & M. Stille, *supra* note **48,** at **520.**
[126] *Id.*
[127] **1** Hawkins, Pleas of the Crown **1** (8th ed. London **1824)**

all that Hawkins had to say, he would merely have been a conduit to carry forward established concepts. However, his commentary continued with the statement that "[t]hose who are under a natural disability of distinguishing between good and evil, as infants under the age of discretion, ideots, and lunaticks, are not punishable by any criminal prosecution whatsoever."[128] This ability to distinguish between good and evil evolved directly into the ability to distinguish between right and wrong test, which still is the most celebrated test for criminal insanity. It is not certain whether this concept was original with Hawkins. Due to the conviction with which he stated it, there is a strong probability that it was already an established concept, probably in case law. While the focus of earlier tests was on the mental abilities to understand and conform, Hawkins introduces a moral faculty in the jurisprudence. From the time of Hawkins to the present, the concept of right and wrong is an indelible ingredient in the criminal insanity controversy. It is also from Hawkin's time that the role of the commentators in shaping this branch of medical jurisprudence is replaced by the medium of judge-made case law.

Although the earliest case of an outright acquittal for insanity was in 1505,[129] it was not until the 18th century that case law was recorded in sufficient detail to give any insight into judicial philosophy of criminal insanity. In 1724, Edward Arnold was tried for shooting at Lord Onslow, apparently while under an insane delusion.[130] The case engendered considerable interest as it was believed, at least by Onslow, to be part of a conspiracy against King George 11. Justice Tracy charged the jury to determine if Arnold had the use of his reason in terms of "whether he was under the visitation of God and could not distinguish between good and evil and did not know what he was doing."[131] His charge was primarily that

> [i]f the man be deprived of his reason, and consequently of his intention, he cannot be guilty. . . . It is not every kind of a frantic humor 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.[132]

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[128] *Id.* at 1-2. Hawkins also states that the earlier rule that permitted the punishment of madmen for attempts on the King's life had been contradicted by later opinions.

[129] Yearbooks of Henry VII, 21 Michaelmas Term, plea 16 (1505). "A man was accused of the murder of an infant. It was found at the time of the murder the felon was of unsound mind *(de nons saine memoire)*. Wherefore it was decided that he shall go free *(qu'il ira quite)*. To be noted."

[130] **Rex** v. Arnold, 16 How. St. Tr. 695 (1724) [hereinafter cited as *Arnold's Case*].

[131] F. Wharton & M. Stille, *supra* note 48, at 523-24.

[132] *Arnold's Case*, 16 How. St. Tr., at 764.

His charge was a compilation of every test that had been proposed up to his time. Justice Tracy spoke of a failure of the defendant to know what he was doing which exhibited the Roman and civilian law influence. The charge also included a lack of criminal intention, a total deprivation of understanding and memory, and a lack of capacity to use reason. While all of these tests concentrated on intellectual capacity, the portion of the charge involving the ability to distinguish between good and evil interjected an element of moral discrimination. In spite of the multifaceted nature of the charge, however, it will always be remembered in an emasculated form as the "wild beast test."

The "wild beast test" was an exercise in primitive and crude psychology and did not define anything even remotely recognizable in mental pathology. The reference to the "infant" displayed the influence of Hale's "child of fourteen years" test while the use of "brute or wild beast" was obviously derived from Bracton. These were unfortunate and misleading comparisons, as the states of mind of infants and wild beasts are not fairly comparable with those of insane persons. The "wild beast test" recognized the need for criminal intent generally, but then erroneously equated knowledge as the only element of that criminal intent and, hence, of *mens rea.* This failure to recognize that ***men rea*** involves more than knowledge was transfused into later tests which focused exclusively on the knowledge of right or wrong or of the nature and quality or consequences of an act.[133]

Justice Tracy, as did Hale, considered it necessary to determine the quantum of insanity that would excuse a person from criminal responsibility. He required a total lack of understanding and memory and a total lack of knowledge. Such a dividing line was subject to all the same infirmities as was Hale's definition of "total insanity."[134] Only the most raving lunatics would be included and the bulk of the insane who suffer from psychosis or neurosis would be excluded. In fairness to Justice Tracy, his test has been interpreted literally and thus distorted beyond his original intention. He was attempting to use illustrations so that the jurors would have a rough measuring instrument by which to correlate mental unsoundness to criminal irresponsibility. He intended to give examples, not categorical exclusions. However, succeeding jurists seized upon the graphic term "wild beast" and converted it into an inflexible test.[135]

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[133] *See* S. Glueck, supra note **82,** at **140-42**

[134] *See* notes **117-121** and accompanying text supra.

[135] ***See*** F. Wharton & M. Stille, supra note **48,** at **524-25.** Justice Tracy also exhibited the influence of Coke when the charge stated, "The punishment of a madman, a person that hath no design, can have no example ***"Arnold's Case,*** 16 How. St. Tr. at **764.** ***See*** also **3** Coke, Inst **4.** The common idea is that there is no deterrent value in punishing an insane person.

The next significant case[136] was in 1760 when Earl Ferrer was tried and convicted of the murder of Mr. Johnson, his steward.[137] As he was an Earl, Lord Ferrer was tried before a jury of his peers, literally, in the House of Lords. According to the old common law then in existence, he had to act as his own counsel, although he was given one of the peers to act as his legal advisor. The trial was an extraordinary spectacle with the accused having to establish his own insanity through direct and cross-examination and argument. Paradoxically, the more coherent and insightful he appeared at conducting his own trial, the more compelling was the Crown's case for sanity. Indeed, the Solicitor-General seized upon the Earl's display of logic and legal acumen as one of the strongest proofs of the Earl's sanity. In spite of a family history of insanity and considerable evidence that he was suffering from chronic alcoholism, the one hundred seventeen peers, including his own legal advisor, unanimously convicted the Earl and sentenced him to be hanged.[138]

While the case had some legal points of interest, such as the first attempted use of an irresistible impulse defense[139] and the first recorded use and abuse of psychiatric testimony in a criminal trial,[140] ***Earl Ferrer's Case*** is most noteworthy for its permanent implantation of the "knowledge of right and wrong" test into the law of criminal insanity. The Solicitor-General cited with approval Hale's definition that only a total lack of reason was sufficient for an acquittal. He also gave his interpretation of Hawkin's "good and evil" test, which became the "right and wrong" test, the cardinal doctrine of Anglo-American jurisprudence of insanity. His address to the jury included the following comments:

> The result of the whole reasoning of this wise judge and great lawyer [Hale] (so far as it is immediately relative to the present purpose) stands thus. If there be a total permanent want of reason, it will acquit the prisoner. If there be a total temporary want of it, when the offense was committed, it will acquit the prisoner: but if there be only a partial degree of reason; not a full and complete use of reason, but (as Lord Hale carefully and

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[136] There was an interesting case, Stafford's Case, Old Bailey Sessions Papers, July 14-17, 1731, which resulted in an acquittal even though the defendant after having an argument with the victim went and got a sword and returned and killed the victim. The evidence showed a fairly rational series of actions by the defendant and his acquittal probably resulted from his noble status and the relatively unsavory character of the victim. *See* N. Walker, *supra* note 80, at 57-58.

[137] Earl Ferrer's Case, 19 How. St. Tr. 886 (1760).

[138] *See* S. Glueck, *supra* note 82, at 142 n.2; H. Weihofen, Mental Disorder as a Criminal Defense 56 (1954) F. Wharton & M. Stille, *supra* note 48, at 525.

[139] *See* N. Walker, *supra* note 80, at 62. Earl Ferrer stated that, "If I could have controlled my rage, I am answerable for the consequences of it. But if it was the mere effect of a distempered brain, I am not answerable for the consequences."

[140] *See* S. Glueck, *supra* note 82, at 143-44 n.1.

> emphatically expresses himself) a competent use of it, sufficient to have restrained those passions, which produced the crime; if there be thought and design; and faculty to distinguish the nature of actions; to discern the difference between moral good and evil; then, upon the fact of the offense proved, the judgment of the law must take place.
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> . . . The question therefore must be asked; is the noble prisoner at the bar to be acquitted from the guilt of murder, on account of insanity?. . . Was he under the power of it, at the time of the offense committed? Could he, did he, at the time, distinguish between good and evil?
>
> The same evidence, which establishes the fact, proves, at the same time, the capacity and intention of the noble prisoner. Did he weigh the motives? Did he proceed with deliberation? Did he know the consequences?[141]

The manner in which the Solicitor-General insisted that the "right and wrong" test was the appropriate one leads one to assume that it was the generally recognized test in English criminal law at that time. In spite of the "right and wrong" approach to insanity still being the most universally recognized test for criminal irresponsibility, it retained the same inherent defect that Hawkin's "good and evil" test did. The test erroneously considered ***knowledge*** of right and wrong to be tantamount to ***mens rea.*** The Solicitor-General's interjection of the notions of intention, capacity, motive, and deliberation indicated that he had at least a vague awareness that ***mens rea*** was composed of more than just knowledge of right and wrong. These other factors were not as well articulated as the knowledge requirement and are often unmentioned in later cases where "judges have conveniently and uncritically, on the whole, repeated the right-and-wrong ritual with cabalistic solemnity.''[142] Most of the cases of criminal insanity since the introduction of the "right and wrong" test have been repetitions of the test or attempts by courts to give varied expressions of it.

The next celebrated case in the annals of criminal insanity was the trial of James Hadfield in 1800 for shooting at King George III in the Drury Lane Theatre.[143] Hadfield was a former soldier who had been wounded in many battles, and had been discharged from the Army due to insanity. He was a paranoic and suffered systematized delusions. He

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[141] 19 How. St. Tr. at 947-48.

[142] S. Glueck, *supra* note 82, at 144. Professor Glueck also states that the test "constitutes an unwarranted judicial emasculation of the cardinal criminal law doctrine of *mens rea*, as well as an erroneous psychological notion." *Id.*

[143] Hadfield's Case, 27 How. St. Tr. 1282 (1800).

believed that he had been commanded by heaven to become a martyr, like Christ, for the salvation of mankind. He shot at King George III apparently aware that this was high treason for which he would be executed and thus fulfill his sacrificial duty.

Hadfield was represented by the brilliant criminal lawyer, Lord Erskine, who was faced with the unenviable task of rebutting the doctrines of Coke and Hale and the "right and wrong" test. Erskine rendered some deference to Coke and Hale and recognized that "[i]t is agreed .by all jurists, and is established by the law of this and every other country, that it is the reason of man which makes him accountable for his actions; and that the deprivation of reason acquits him of crime."[144] Erskine disagreed, however, with the literal interpretation that was given to the words of Coke and Hale in *Earl Ferrer's Case* which required a total deprivation of memory. He declared that

> —if it was meant, that, to protect a man from punishment, he must be in such a state of prostrated intellect, as not to know his name, nor his condition, nor his relation towards others—that if a husband, he should not know he was married; or, if a father, could not remember that he had children; nor know the road to his house; nor his property in it—then no such madness ever existed in the world.[145]

Erskine accurately and rather profoundly for his day, noted that most of the criminally insane "have not only had the most perfect knowledge and recollection of all the relations they stood in towards others, and of the acts and circumstances of their lives, but have, in general, been remarkable for subtlety and acuteness.''[146] Erskine eloquently noted that there are occasional extreme cases where "the human mind is stormed in its citadel, and laid prostrate under the stroke of frenzy,''but such cases are easily disposed of by the courts.[147] Erskine was more concerned with another class of cases involving delusions where "reason is not driven from her seat, but distraction sits down upon it along with her, holds her, trembling, upon it, and frightens her from her propriety."[148] If the delusions are so terrific that they "overpower the faculties, and usurp so firmly the place of realities, as not to be dislodged and shaken by the organs of perception and sense,"[149] then they also present a difficulty to judicial determinations. Yet Erskine stated that there was

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[144] *Id.* at 1312.
[145] *Id.*
[146] *Id.*
[147] *Id.* at 1313.
[148] *Id.*
[149] *Id.*

> [a]nother class, branching out into almost infinite subdivisions, under which, indeed, the former, and every case of insanity, may be classed, is where the delusions are not of that frightful character, but infinitely various, and often extremely circumscribed; yet where imagination (within the bounds of the malady) still holds the most uncontrollable dominion over reality and fact; and these are the cases which frequently mock the wisdom of the wisest in judicial trials; because such persons reason with a subtlety which puts in the shade the ordinary conceptions of mankind; their conclusions are just and frequently profound; but the premises from which they reason, when within the range of the malady, are uniformly false;—not false from any defect of knowledge or judgment: but, because of a delusive image, the inseparable companion of real insanity, is thrust upon the subjugated understanding, incapable of resistance, because unconscious of the attack.[150]

Erskine concluded that "[d]elusion, therefore, where there is no frenzy or raving madness, is the true character of insanity."[151] This placed Erskine diametrically opposed to Hale who had included delusional insanity in the partial insanity category which did not exempt a person from criminal responsibility. Erskine had no authority for his delusion test and apparently created it out of his own eloquence. He rejected the "right and wrong" test as "too general a description" and this rejection went unchallenged by the Crown counsel.[152] So compelling was the advocacy of Erskine for his delusion test that the judge, Lord Kenyon, did not wait to hear Hadfield's remaining twelve witnesses and all but directed an acquittal for Hadfield. It is unclear what test, if any, for irresponsibility the court used to acquit Hadfield, but, as Judge **Doe** stated in *State v. Pike*,[153] it "was not a judicial adoption of delusion as the test in the place of knowledge of right and wrong; it was probably an instance of the bewildering effect of Erskine's adroitness, rhetoric and eloquence."[154]

Erskine also considered the nexus between the delusion and the criminal act. He noted that in civil cases, all acts of a lunatic during a period of lunacy will be void regardless of any connection between lunacy and the act. To relieve someone of criminal responsibility, however,

> the relation between the disease and the act should be apparent. Where the connexion is doubtful, the judgment should cer-

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[150] *Id.* at **1314.**
[151] *Id.*
[152] *See* **F.** Wharton & M. Stille, ***supra*** note 48, at **528.** This is also a strong argument for questioning the degree to which this test was firmly established in 1800.
[153] **49 N. H. 399 (1869).**
[154] *Id.* at **434.**

> tainly be most indulgent, from the great difficulty of diving into the secret sources of a distorted mind; but still, I think, that, as a doctrine of law, the delusion and the act should be connected.[155]

While the requirement of a nexus seems quite rational, the qualification that it be "apparent," if that means "externally visible" is questionable. The most severe mental disorders may have very little externally visible manifestations and the connections may be difficult to perceive. A final point of interest in ***Hadfield's Case*** was that, in spite of his acquittal and no statute on point, Hadfield was retained in custody until other means could be devised to deal with him.[156] The result was the enactment of two statutes on the disposition of acquitted insane persons [157] and the continued confinement of Hadfield.

Twelve years after ***Hadfield's Case*** came ***Bellinghm's Case,*** which because of the "indecent haste" with which the defendant was "railroaded" to his doom, has been called "the most notorious in the medico-legal annals of England." [158] Bellingham, while suffering persecutory delusions, believed that the government owed him about $500,000.00 and sought to recover this amount from various cabinet ministers and from Parliament itself. He had not a shadow of a rational claim and his elaborate, delusive claim was clearly recognized as such by his family and friends. When his efforts to receive satisfaction from Mr. Spencer Perceval, First Lord of the Treasury, failed, he shot and killed **Mr.** Perceval in the lobby of the House of Commons. Although ***Hadfield's Case*** seemed to indicate that a fifteen-day period was allowed before trial, the pleas of Belling ham's attorney for a postponement were rejected and Bellingham was arraigned and tried four days after the killing. He was executed four days later.[159]

The doctrine of delusion enunciated by Erskine in ***Hadfield's Case*** was totally rejected by the presiding judge, Lord Chief Justice Sir James Mansfield,[160] who charged the jury that

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[155] 27 How. St. Tr. at **1314.**

[156] *Id.* at **1354-55.** Lord Keynon in ordering Hadfield's continued confinement *stated* that "itis absolutely necessary for the safety of society, that he should be properly disposed of, all mercy and humanity being shown to this most unfortunate creature. But for the sake of the community, undoubtedly, he must somehow or other be taken care of, with all the attention and of the relief that can be afforded him."

[157] **40** Geo. III, Chaps. **93** and **94.**

[158] F. Wharton & M. Stille, ***supm*** note **48,** at **531.**

[159] For a complete discussion of ***Bellingham's*** **Case, see 1** Collinson, Lunacy **636.**

[160] *Sir* James Mansfield was a judge of common pleas and not the great chief justice of the King's bench, William Murray, First Earl of Mansfield, **who** is well known as Lord Mansfield.

> [i]f a man were deprived of all power of reasoning, so as not to be able to distinguish whether it was right or wrong to commit the most wicked transaction, he could not certainly do an act against the law. Such a man so destitute of all power of judgment, could have no intention at all.[161]

Lord Mansfield also set a strict standard of proof for Bellingham by instructing the jury that the only proof which would acquit Bellingham was "the most distinct and unquestionable evidence that he was incapable of judging between right and wrong" which must be proved "beyond a reasonable doubt."[162] Although Lord Mansfield correctly perceived that criminal intention was the key to criminal responsibility, his standard required the total loss of all power of entertaining any intention whatsoever. If the defendant had the capacity to distinguish between right and wrong in other respects, the fact that his delusions prevented him from so distinguishing as to the actual offense would be irrelevant. While the "right and wrong" rule was definitively announced as the correct test, it was this improper application by the court which justifies much of the criticism of *Bellinghum's Case*.[163]

Lord Mansfield also sarcastically dismissed Erskine's delusion test with the charge:

> There was a . . . species of insanity, in which the patient fancied the existence of injury, and sought an opportunity of gratifying revenge by some hostile act. If such a person were capable, in other respects, of distinguishing right from wrong, there was no excuse for any act of atrocity which he might commit under this description of derangement. The witnesses who have been called to support this extraordinary defence, have given a very singular account, in order to shew that, at the time of the commission of the crime, the Prisoner was insane. What might have been the state of mind some time ago, is perfectly immaterial. The single question was whether, when he committed the offense charged upon him, he had sufficient understanding to distinguish good from evil, right from wrong, and that murder was a crime not only against the law of God, but against the law of his country.[164]

This was a totally unwarranted exclusion of delusion from the realm of insanity which would acquit a defendant and a shift from the real em-

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[161] 1 Collinson, *supm* note 159, at 671.
[162] *Id'*.
[163] ***See*** S. Glueck, *supra* note 82, at 149–51; F. Wharton & M. Stille, *supra* note 48, at 533–34.
[164] 1 Collinson, *supra* note 159, at 672-73.

phasis of criminal insanity law which is to determine if "the ***normal mental elements*** accompanying an act prohibited by the law, have been so disturbed as to deprive that act of one of its legally required constituents, and thus make it noncriminal."[165] Lord Mansfield's charge has also been justly criticized for including an element that "murder was a crime against the laws of God," since a moral judgment is not conclusive on the existence of a pathological mind. As one commentary noted: [T]here is no delusional lunatic who is ignorant of such an elementary principle of ethics. It would be as fair to insist that he must not know that two and two are four. Such tests do not touch the real question of his responsibility under the dominaton of an insane delusion."[166]

Two cases of lesser import, ***Parker's Case***[167] and ***Bowler's Case***,[168] both tried in 1812, further confirmed that the "right and wrong" test was the principal English test of the early nineteenth century. Parker was a weak-minded man who had been a prisoner of war in England's war with France. Rather than remain a prisoner, Parker fought on the side of the French. His counsel argued in vain that Parker lacked the requisite mental capacity to commit treason. On the basis of Parker's ability to distinguish right from wrong, he was convicted and hanged for treason. His was a difficult choice but seemed to display evidence of logic and reason. ***Bowler's Case,*** however, is much more difficult to justify. Bowler was a farmer who had been declared an epileptic imbecile by a civil commission of lunacy. In spite of strong evidence of his insanity, he was convicted of shooting a neighbor with intent to kill him and was executed.[169] While the test used was the "right and wrong" test, the charge of Sir Simon Le Blanc, the presiding judge, included a requirement that the jury determine if Bowler "was under the influence of any illusion . . . which rendered his mind at the moment insensible of the nature of the act."[170] Thus the "knowledge of the nature of the act" was grafted onto the "right and wrong" test.

The case of Offord[171] presents a striking contrast to ***Bellinghm's Case*** as the forms of delusional insanity were similar, the charges to the juries were almost identical, but Offord, unlike Bellingham, was acquitted. Offord was under a delusional belief that the inhabitants of Hadleigh, the

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[165] S. Glueck, supra note 82, at 151.
[166] F. Wharton & M. Stille, supra note 48, at 534.
[167] 1 Collison, supra note 159, at 477.
[168] *Id.* at 673.
[169] *Id.* Bowler's Case invoked the following comment from Baron Alderson in Regina v. **Oxford,** 9 Car & P. **525,** 533 (1840) that, "Bowler was executed, I believe; and very barbarous it was."
[170] 1 Collison, supra note 159, at 673. The "nature of the act" has been criticized as merely being a restatement of Lord Mansfield's "laws of God and nature" in *Bellingham's* Case with the same inconsistencies.
[171] 5 Car. and P. 168 (1831).

town he lived in, were in league together to kill him. He would abuse strangers in the street and carried a list of about fifty names entitled, "list of Hadleigh conspirators against my life." While under this delusional belief, he shot and killed a man named Chisnall, who was one of the believed conspirators on his list. Lord Lyndhurst instructed the jury that they must be satisfied that Offord "did not know, when he committed the act, what the effect of it, if fatal, would be, with reference to the crime of murder. The question was, did he know that he was committing an offense against the laws of God and nature." [172] Lord Lyndhurst referred specifically to ***Bellinghum's Case*** and cited with approval Lord Mansfield's opinion. The first part of the charge focused the knowledge of right and wrong on the legal consequences of the particular act, but the second part of the charge retained the general moral knowledge requirement of ***Bellinghum's cuse.*** Any attempt to reconcile the results of Offord and Bellingham is futile and both cases are mentioned mainly for their historic significance in the highly formative period of criminal insanity law.

The next case of importance was ***Regina v. Oxford***,[173] involving yet another "attempt" on the life of a monarch."' Oxford had purchased a pair of pistols more than a month before the attack and had practised firing them, On the day of the attack, he waylaid the royal carriage in a park and fired first one pistol, said "I have got another," and then fired the second pistol. It was doubtful that either pistol was loaded or that he actually intended to harm Queen Victoria.[175] Oxford suffered from hereditary insanity; his grandfather had died in an insane asylum and his father was also insane. Medical and other witnesses testified as to his insanity and the attack was apparently connected with "Young England," an imaginary secret society, of which notes were later found in his lodgings.

Lord Chief Justice Denman an exemplary yet simple rule for insanity that "[i]f some controlling disease was in truth, the acting power within him, which he could not resist, then he will not be responsible." [176] This test was complete within itself and actually foreshadowed the irrestible impulse test, The test was stillborn, however, when Lord Denman surrendered to the tendency of the legal mind to refine and elaborate. He attempted to make this generalization more explicit by adding:

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[172] *Id.*

[173] 9 Car. and P. 525 (1840).

[174] It is not surprising that many of the early cases involving criminal insanity were for treason by attempts on the lives of monarchs or high political figures. These cases engendered the greatest notoriety and were the most completely recorded cases. For a more complete discussion of the entire subject, *see* N. Walker, *supra* note 80, at 183-93.

[175] *See Id.* at 186-87; F. Wharton & M. Stille, *supra* note 48, at 536 n.82.

[176] 9 Car. and P. at 547.

> [t]he question is whether the prisoner was laboring under that species of insanity which satisfies you that he was quite unaware of the nature, character, and consequences of the act he was committing; or, in other words, whether he was under the influence of a diseased mind, and was really unconscious at the time he was committing the act, that it was a crime.'?'

In his attempt at further elucidation, Lord Denman also charged the jury to determine whether Oxford "was insane at the time when the act was done,—whether the evidence given proves a disease of the mind, as of a person quite incapable of distinguishing right from wrong.''[178]

Lord Denman's charge contained an element of general knowledge of the physical character of the act devoid of any moral connotation. He also seemed to require a specific knowledge of the particular act as in *Offord's* **Case.** He used the "right and wrong" test as a mere illustration and not as a conclusive test. Nevertheless, all of his specific comments still revolved around the general question of whether the defendant lacked criminal intent due to his insanity. It is obvious that this message was conveyed to the jury and they must have based their acquittal on the simple question of whether or not Oxford was insane. Their common sense would have told them that Oxford probably knew the difference between right and wrong and that it was a crime to shoot at the Queen. They merely found Oxford to have "a disease of the mind." Consequently, it would have been better for Lord Denman to limit his charge to the first general statement and avoid the confusion brought about by the attempt at refinement.[179]

The final case to be considered and the most significant in the entire medical jurisprudence of criminal insanity is that of Daniel McNaughton.[180] McNaughton was the illegitimate son of a Glasgow woodturner who was rebuffed by his father in favor of his legitimate siblings. He grew up with a gloomy and unsociable disposition and left home after being given a journeyman role rather than a partnership by his father. He set up shop on his own and took on a roommate, who at his trial told how McNaughton would pace in the middle of the night uttering incoherent statements. About this time he began to complain of being persecuted by the police and sometimes by the Church of Rome and also of pains in his head. His pleas for protection to his father, the Sheriff-Sub

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[177] *Id.*

[178] *Id.*

[179] Among the intangibles that probably helped Oxford be acquitted were his youth, the fact that the Queen was not wounded or killed, and an attempt by the judge to avoid the type of miscarriage of justice as occurred in *Bowler's* Case.

[180] **10** Clark & **Fin.** 200 **(1843).** This thesis has opted for the spelling of "McNaughton" based upon a facsimile of his signature. See Diamond, On the Spelling *of* Daniel M'Naghten's Name, **25** Ohio St. L.J. **84 (1964).**

stitute and the Lord Provost went unheeded. He moved to France but the believed persecution followed him and he returned to Glasgow. His delusions took a political turn and he began to believe that the Tories were persecuting him for voting against them in an election. The Sheriff-Substitute, to whom McNaughton began complaining again, told McNaughton's father that he was insane, but nothing was done about it.

In the summer of **1842,** McNaughton moved to London. His persecutory animosity began to focus on Sir Robert Peel, the Prime Minister, who was not only a Tory but also the creator of the police force. On January **20, 1843,** he shot and killed Mr. Edward Drummond, Peel's private secretary, mistaking him for Peel. McNaughton was apprehended before he could fire a second shot and was taken to Bow Street where he made the statement:

> The Tories in my native city have compelled me to do this. They follow and persecute me wherever I go, and have entirely destroyed my peace of mind. They followed me to France, into Scotland and all over England; in fact they follow me wherever I go. . . . They have accused me of crimes of which I am not guilty; in fact they wish to murder me. It can be proved by evidence. That is all I have to say.[181]

McNaughton was tried on March **3, 1843,** before Chief Justice Tindal and Judges Williams and Coleridge. The Solicitor-General, Sir William Webb-Follett, stressed the normal functions that McNaughton had performed, such as conducting his own business and studying philosophy and anatomy. He also called some witnesses, such as McNaughton's London landlady, who, while recognizing that McNaughton was sullen and reserved, did not believe him to be unsettled. However, the Solicitor-General did not call any medical experts, even though two doctors for the Crown conducted a joint examination of McNaughton with two doctors for the defendant. He relied upon the legal authority of Hale's partial insanity as no defense to criminal responsibility and dismissed Erskine's delusion test in *Hadfield's* ***Case*** as being incorrect. He stated that the only correct test was whether McNaughton could distinguish right from wrong and to be aware of the consequences of his act.

McNaughton had the very able counsel, Alexander Cockburn, QC, to represent him. The evidence for the defense was much more impressive than that of the Crown. Cockburn called McNaughton's father and friends, the Sheriff, and the Lord Provost to testify about McNaughton's delusions of persecution and eccentric conduct. He also called four medical witnesses: the two who had examined McNaughton, Dr. E.T. Monro of Bethlem and Sir Alexander Morison, and two doctors who had only

[181] **See N. Walker,** *supra* **note 80, at 91.**

observed McNaughton during the course of the trial, Dr. Forbes Winslow and Dr. Philips.

> The medical evidence was in substance this: That persons of otherwise unsound mind might be affected by morbid delusions; that the prisoner was in that condition; that a person so labouring under a morbid delusion, might have a moral perception of right and wrong, but that in the case of the prisoner it was a delusion which carried him away beyond the power of his own control, and left him no such perception; and that he was not capable of exercising any control over acts which had connexion with his delusion; that it was of the nature of the disease with which the prisoner was affected, to go on gradually until it had reached a climax, when it burst forth with irresistible intensity; that a man might go on for years quietly, though at the same time under the influence, but would all at once break out in the most extravagent and violent paroxysms.[182]

Cockburn relied heavily upon Erskine's delusion argument to convince the jury that partial insanity could exist in such a manner as to deprive the defendant of all power of self-control and thus the ability to distinguish right from wrong.[183]

Chief Justice Tindal did not believe that the case was one for conviction and practically withdrew the case from the jury. His charge was simple and brief

> The question to be determined is, whether at the time the act in question was committed, the prisoner had or had not the use of his understanding, so as to know that he was doing a wrong or wicked act. If the jurors should be of the opinion that the prisoner was not sensible at the time he committed it, that he was violating the laws both of God and man, then he would be entitled to a verdict in his favour: but if, on the contrary, they were of opinion that when he committed the act he was in a sound state of mind, then their verdict must be against him.[184]

The Chief Justice offered to recapitulate the medical evidence but felt it was unnecessary as it had only come from one side. The jury indicated that they had enough to reach a verdict and without hesitation announced a special verdict, '(not guilty, on the ground of insanity." [185]

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[182] J. Beale, Cases in Criminal Law 201-02 (1894).
[183] *See* N. Walker, *supra* note 80, at 90-95.
[184] S. Glueck, *supra* note 82, at 163.
[185] *Id*. *See also* N. Walker, *supra* note 80, at **95.**

McNaughton became a patient at Bethlem Hospital and later at Broadmore, where he died of tuberculosis.

The controversy over his acquittal, however, did not pass away. The prestige of the victim and the shock and outrage of the public [186] resulted in an extraordinary debate in the House of Lords.[187] The Lord Chancellor, Lord Lyndhurst, attempted to reassure the House that the law of insanity was "clear, distinct, defined,'' but if the House wished to legislate on the matter or if they were just in doubt as to the law, they could summon the fifteen judges of England before them to render an opinion. Although it was a procedure of doubtful validity, the judges appeared three months later to give the answers to the five questions asked of them.[188] The first and fourth questions refer to almost the same situation and were answered as follows:

> Question I. What is the law respecting alleged crimes committed by persons afflicted with insane delusion, in respect of one or more particular subjects or persons: as, for instance, where at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit?
>
> Answer I. Assuming that your Lordships' inquiries are confined to those persons who labour under such partial delusions only, and are not in other respects insane, we are of opinion that, notwithstanding the party accused did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary

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[186] A lead article in The Times (London) Mar. 6, 1843 at 1, noted that in spite of its admiration for the British judicial system.

> . . . still we would, not captiously nor querulously, but in a spirit of humble and honest earnestness, of hesitating and admiring uncertainty, and of almost painful dubitation, ask those learned and philosophic gentlemen to define, for the edification of common-place people like ourselves, where sanity ends and madness begins, and what are the outward and palpable signs of the one or the other. . . .

[187] The debates are contained in 67 Hansard, Debates 288, 714. Extensive extracts which capture the tenor of the debates can be found in S. Glueck, *supra* note 82, at 164–66 n.1.

[188] Fourteen of the fifteen judges joined in one set of answers. The remaining judge, Mr. Justice Maule had grave doubts about the propriety of the procedure. He also would have liked to have had argument on the issues and finally thought the answers might embarrass the judicial process if cited as authority since they clearly were not precedent. A summary of his reservations and answers can be found in N. Walker, *supra* note 80, at 98.

to law; by which expression we understand your Lordships to mean the law of the land.

Question IV. If a person under an insane delusion as to existing facts commits an offense in consequence thereof, is he thereby excused?

Answer IV. The answer must of course depend on the nature of the delusion: but, making the same assumption as we did before, namely, that he labours under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facta with respect to which the delusion exists were real. For example if under the influence of his delusion he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury on his character and fortune, and he killed him in revenge for such support injury, he would be liable to punishment.

The second and third questions were considered together by the judges:

Question II. What are the proper questions to be submitted to the jury, when a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons, is charged with the commission of a crime (murder, for example), and insanity is set up as a defence?

Question 111. In what terms ought the question to be left to the jury, as to the prisoner's state of mind at the time when the act was committed?

Answers II and 11. As these two questions appear to us to be more conveniently answered together, we have to submit our opinion to be that the jury ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that, to establish a defence on the ground of insanity, it must be clearly proved that, at the time of committing 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. The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused at the time of doing the act knew the dif-

> ference between right and wrong: which mode, though rarely, if ever, leading to any mistake with the jury, is not, as we conceive, so accurate when put generally and in the abstract, as when put with reference to the party's knowledge of right and wrong in respect to the very act with which he is charged. If the question were to be put as to the knowledge of the accused solely and exclusively with reference to the law of the land, it might tend to confound the jury by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction; whereas the law is administered on the principle that every one must be taken conclusively to know it, without proof that he does know it. If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable, and the usual course therefore has been to leave the question to the jury whether the accused had a sufficient degree of reason to know he was doing an act that was wrong: and this course we think is correct, accompanied with such observations and explanations as the circumstances of each case may require.

The fifth question concerned the use of medical testimony, such as Winslow's and Phillip's, where the psychiatrists had only observed the defendant at trial.[189]

Stripped of redundancy, the four questions as a whole simply desired to learn the English law regarding delusional lunatics who commit crimes. The answers to questions one and four basically stated, if the defendant's insanity is delusional, then he will be acquitted only if the delusion, if true, would have legally justified his act. The requirement

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[189] The question was an awkward one and the answer gave to the trial judge some discretion. It was as follows:

> Question V. Can a medical man conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious at the time of doing the act, that he was acting contrary to law, or whether he was labouring under any and what delusion at the time?
>
> Answer V. In answer thereto, we state to your Lordships, that we think the medical man, under the circumstances supposed, cannot in strictness be asked his opinion in the terms above stated, because each of those questions involves the determination of the truth of the facta deposed to, which it is for the jury to decide, and the questions are not mere questions upon a matter of science, in which case such evidence is admissible. But where the facts are admitted or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right.

for a connection between the delusion and the act was similar to *Hadfield's Case.* Excusing the defendant from responsibility only if the circumstances of his delusion, if true, would have excused him was similar to *Offord's Case.* The principal defect in these answers was that they equated insanity with a mistake of fact defense. To paraphrase the answers in mistake of fact language, it would approximately be that: an insane person who acts under a delusional mistake of fact, which if true would be lawful, will not be guilty. This focused on too narrow a basis and overlooked the real crux of the problem, the insane reasoning capacity. The solution was thus psychologically unsound and legally questionable.[190]

The combined answer to the second and third questions is really the heart of the *McNuughton* Rule. In addition to the statements on the presumption of sanity and the burden of persuasion, the answer has three basic points concerning the proper test for insanity: knowledge of the nature and quality of the act, knowledge that the act was against the law, and the ability to distinguish between right and wrong. *McNaughton's* "right and wrong" test has been extravagantly and caustically criticized [191] because "right and wrong" are ethical and moral concepts which are mutable. Criminal responsibility should not be dependent upon such indecisive standards. It also overvalued intellection while ignoring the emotions and the unconscious. Such a dismemberment of an indivisible mental process does not even remotely conform to present psychiatric conceptions. The last of the important criticisms, and the most frequent. ly voiced, is that *McNaughton's* Rule accounts for "only disorders of the cognitive or intellectual phase of the mind, and makes no allowance for disorders characterized by deficiency or destruction of volition." [192] The concepts of "integrated personality" [193] and "unity of mind" are very popular principles of modern psychology. They include three interrelated spheres: cognition which deals with the capacity to know or discern, volition which considers will, intention, purpose, motive, and desire, and affect which involves feelings, emotions, and moods. While the pathological interrelationship of these three spheres is complex, logic would seem to indicate that a defect in one sphere should have correlative effect on the other spheres. However, since all dimensions of the mind do not deteriorate uniformly in relation to each other, a gross defect in one

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[190] *See S.* Glueck, *supra* note 82, at 170-178.

[191] For a collection of critical appraisals of *McNaughton's* Rule, *see H.* Weihofen, *supra* note 138, at 65 n.36.

[192] *Id.* at 67.

[193] *See, e.g.,* Durham v. United States, 214 F.2d 862, 871-72 (D.C. Cir. 1954). "The science of psychiatry now recognizes that a man is an integrated personality and that reason, which is only one element in that personality, is not the sole determinant of his conduct. The right-wrong test, which considers knowledge or reason alone, is therefore an inadequate guide to mental responsibility for criminal behavior."

sphere may be accompanied by only a negligible defect in another sphere. This would seem to be a valid medical objection to relying on only a cognitive test since that may be the sphere with the negligible defect and allow a gross volitional or affective defect to go unaccounted.[194]

However, *McNuughton* was intended to provide a legal definition of criminal responsibility and not a medical definition of insanity. To the extent that *McNaughton* did not take into account modern psychiatric concepts, such as integrated personality, it may be properly criticized as inadequate psychology. The criticism, however, should more accurately be directed at the primary purpose of *McNaughton,* to delineate conditions of mental irresponsibility that will preclude the application of criminal sanctions.[195]

McNuughton represents the transition from the historical perspective to the modern experience. The entire body of criminal insanity Anglo-American jurisprudence of the last 140 years emanates from *McNaughton.* It demonstrated how the law of insanity crystallized out of random scraps of the classical commentator's opinions, which, in turn, had been influenced by fragmentary moral concepts of ancient civilizations. It also combined the conflicting and often confusing opinions of the early trial judges. *McNuughton* was the product of a general dissatisfaction with the inherent inconsistencies which plagued criminal insanity law. It hoped to bring some consistency to the law. It failed in the goal, but it did succeed in becoming an authoritative exposition of the law from which modern tests can develop and to which they can be compared and analyzed.

III. INSANITY TESTS

The fate of the antiquarian tests has been varied. The "wild beast" test of Bracton and *Arnold's Case* and the "count twenty pence" test of Fitzherbert are of historical interest only. The "child of fourteen years" test of Hale surfaced briefly in Connecticut in 1873,[196] but has been totally

[194] *Seegenemlly* H. Fingarette, The Meaning of Criminal Insanity (216-27 (1972).

[195] *See* Livermore & Meehl, *The Virtues of M'Naughten,* 51 Minn. L. Rev. 789, 800 (1967); *See also* A. Lindman & D. McIntyre, The Mentally Disabled and the Law 337 (1961).

[196] In State v. Richards, 39 Conn. 591 (1873), the judge was attempting to fashion an appropriate charge for a man who was apparently an imbecile. The judge recognized that the accused, charged with arson, probably had some knowledge that striking a match and throwing it into a haystack would probably cause a fire and some appreciation of the loss and damage involved. The judge vacillated throughout his charge, but did charge the jury that the accused had only the perception of a child of tender years and cited then Hale's "child of fourteen years" test. The jury acquitted for "want of mental capacity." Subsequent case law in Connecticut, such as People v. Saxon, 87 Conn. 5, 86 Atl. 590 (1913), declared that low mental age as such was not the criterion of mental irresponsibility, but the effect of such on the ability to distinguish right from wrong was important. *See genemlly* S. Glueck, *supm* note 82, at 191-93, 209-14.

abandoned as a test for criminal insanity. The concept of equating mental capacity to chronological age still lives in modern intelligence tests and is generally recognized in presumptions that a child under seven years of age is conclusively incapable of committing a crime and a child between the ages of seven and fourteen are rebuttably presumed incapable of committing a crime. The "delusion" concept of Erskine in *Hadfield's Case* does not constitute, in itself, a test for criminal irresponsibility. It is, however, an element that is often discussed as part of the "right and wrong" test or the "irrestible impulse" test.[197] The "good and evil" concept of Hawkins and the "right and wrong" test of cases from *Earl Ferrer's Case* to *Regina v. Oxford* have been absorbed into *McNaughton's* Rule. Whatever the individual fate of these antiquarian tests, their terminology and fundamental concepts have left an indelible imprint on the modern tests.

McNaughton, as previously noted, has one foot firmly planted in the past, but its other foot is equally placed in the present. It is basically a modern test in that it is still prevalent in either its original form or as modified by the "irresistible impulse" test. The "irresistible impulse" test actually predates *McNaughton* but the references to it were overlooked or disregarded. Commentators as early as Hale [198] and Hawkins [199] mentioned "liberty or choice of will" and "volition" as valid considerations in insanity inquiries. In *Earl Ferrer's Case*,[200] the first attempted use of an "irresistible impulse" defense occurred. The most prominent early reference was in *Regina v. Oxford*,[201] where the instruction stated that "[i]f some controlling disease was, in truth, the acting power within him which he could not resist, then he will not be responsible."[202] Writers in the field of medical jurisprudence also emphasized the necessity to consider volition in insanity tests.[203] Volition was, as previously noted, neglected in *McNaughton.* This is not surprising, since the judges of England were responding to specific questions concerning a delusional lunatic.[204] When the English courts did finally directly confront "irresistible impulse" in 1863, it was expressly rejected as "a most dangerous doctrine."[205]

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[197] *See id.* at 245–254.
[198] *See* note 104 and accompanying text *supra.*
[199] *See* note 127 and accompanying text *supra.*
[200] *See* note 139 and accompanying text *supra.*
[201] *See* note 176 and accompanying text *supm.*
[202] 175 Eng. Rep. 941, 950 (1840).
[203] *See, e.g.*, I. Ray, The Medical Jurisprudence of Insanity 263 (Boston 1838) (persons could be "irresistibly impelled to the commission of criminal acts); F. Winslow, The Plea of Insanity in Criminal Cases 74 (Philadelphia 1843) (persons could be "driven by an irresistible impulse.")
[204] *See* S. Glueck, *supm* note 82, at 236–37.
[205] Regina v. Burton, 176 Eng. Rep. 354, 357 (1863). *See generally* Keedy, *Irresistible Impulse as a Defense in the Criminal Law,* 100 U. Pa. L. Rev. 956 (1952).

"Irresistible impulse'' as an *accepted* test for criminal insanity is of American origin. The test broadly provided excuses from criminal responsibility for those who, even if they knew what they were doing and that it was wrong, had a mental disease or defect which prevented them from controlling their conduct. Two early Ohio cases in 1834 and 1843 are the earliest American cases that relied upon irresistible impulse. In *State* v. *Thompson*,[206] Judge Wright charged the jury that

> if his mind was such that he retained the power of discriminating, or to leave him conscious he was doing wrong, a state of mind in which at the time of the deed he was free to forbear, or to do the act, he is responsible as a sane man.[207]

In the second case, *Clark* v. *State*,[208] Judge Birchard asked the jury to decide

> [w]as the accused a free agent in forming the purpose to kill Cyrus Sells? Was he, at the time the act was committed, capable of judging whether the act was right or wrong? And did he know at the time that it was an offense against the laws of God and man? [209]

Even though both of these early cases combined "irresistible impulse" with *McNuughton,* the Ohio Supreme Court subsequently recognized the individual defense of "irresistible impulse."[210] The first case to use the phrase "irresistible impulse" was *Commonwealth v. Rogers* [211] in 1844, where Judge Shaw instructed the jury to determine if the defendant had a diseased or unsound mind in sufficient degree to overwhelm the reason, conscience and judgment and whether the defendant "acted from an irresistible and uncontrollable impulse: If so, then the act was not the act of a voluntary agent, but the involuntary act of the body without the concurrence of a mind directing it."[212] However, the remainder of Judge Shaw's charge was so inconsistent and contradictory that its value as a clear adoption of irresistible impulse as an independent test is at least

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[206] Wright's Ohio Rep. 617 (1834).
[207] *Id.* at 622.
[208] 12 Ohio Rep. 483 (1843).
[209] *Id.* at 494-95.
[210] Blackburn v. State, 23 Ohio St. 146 (1872).
[211] 48 Mass. 500 (1844).
[212] *Id.* at 501.

questionable.[213] For the next forty years, various courts began to accept irresistible impulse first cautiously,[214] but later without hesitancy.[215]

The leading case which specifically adopted "irresistible impulse'' was *Parsons v. State*,[216] in which Judge Somerville stated that "there must be two constituent elements of legal responsibility in the commission of every crime, and no rule can be just and reasonable which fails to recognize either of them: (1) capacity of intellectual discrimination; and (2) freedom of will."[217] The test which he laid down was:

> 1. Was the defendant at the time of the commission of the alleged crime, as a matter of fact, afflicted with a *disease of the mind*, so as to be either idiotic, or otherwise insane?
>
> 2. If such be the case, did he know right from wrong as applied to the particular act in question? If he did not have such knowledge, he is not legally responsible if the two following conditions concur:
>
> (1) If, by reason of the duress of such mental disease, he had so far lost the *power* to *choose* between the right and wrong, and to avoid doing the act in question, as that his free agency was at the time destroyed.
>
> (2) And if, at the same time, the alleged crime was so connected with such mental disease, in the relation of cause and effect, as to have been the product of it *solely*.[218]

The last point, which requires the irresistible impulse to be the sole cause of the act, has generally not been followed.[219]

Proponents of irresistible impulse have made it clear that the concept does not include the uncontrollable passion or fury of a sane man (emotional insanity), a persistent criminal nature, or moral insanity, such as a morbid propensity to commit crime.[220] The "irresistible impulse" test has been justly criticized as requiring the criminal act to "have been suddenly and impulsively committed after a sharp internal conflict"[221] and to

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[213] *See* Keedy, *Insanity and Criminal Responsibility*, 30 Harv. Law Rev. 724 (1917). For a collection of cases which have cited Judge Shaw's charge as support for or against irresistible impulse, see H. Weihofen, supra note 138, at 87 n.19-20.

[214] *See, e.g.*, Hopps v. People, 31 Ill. 385 (1863); Commonwealth v. Mosler, 4 Pa. St. 264 (1846).

[215] *See, e.g.*, Dejarnette v. Commonwealth, 75 Va. 867 (1881); People v. Finley, 38 Mich. 482 (1978); State v. Johnson, 40 Conn. 136 (1873).

[216] 81 Ala. 577, 2 So. 854 (1887).

[217] *Id.* at 596, 2 *So.* at 866.

[218] *Id.* at 596-97, 2 *So.* at 866-67.

[219] *See* H. Weihofen, *supra* note 138, at 91.

[220] *Id.* at 91-94.

[221] Royal Commission on Capital Punishment, 1949-53 Report 110 (1953).

give "no recognition to mental illness characterized by brooding and reflection." [222] As one commentary aptly noted, the language normally used is capacity for self-control or free choice without any requirement for sudden, unplanned action.[223] Also, as previously noted, since courts do not require an absolute inability to resist, the criticism that the test is too restrictive due to a total inability requirement is unfounded. Other criticisms of the "irresistible impulse" test, such as a failure to further the deterrent purpose of criminal law, the difficulty of proof, and the calamitous effect on public safety, are common to all insanity tests but are more directly attributable to the inherent nature of the subject of insanity itself.[224]

The next American test, or perhaps, more accurately, lack of a test, was the New Hampshire rule, which rejected all tests. The concept was first judicially recognized in a dissenting opinion by Judge Doe in 1866 in *Boardman v. Woodman*,[225] a case involving testamentary capacity rather than criminal responsibility. Judge Doe concluded that insanity was a question of fact to be determined by the jury upon evidence and not a question of law. This view was accepted by the New Hampshire court as a rule for criminal insanity three years later in *State v. Pike*,[226] where the court affirmed without discussion an instruction that "all symptoms and all tests of mental disease were purely matters of fact to be determined by the jury." [227] The New Hampshire rule is based upon the fundamental principles of ***mens rea.*** If the defendant had the requisite mental intent, he would be held criminally liable but if his state of mind factually precluded it, he would not be held responsible.[228] The majority opinion of *Pike* became the unanimous opinion of the court two years later in *State v. Jones,*[229] where Judge Ladd noted that "the real ultimate question to be determined seems to be, whether, at the time of the act, he had the mental capacity to entertain a criminal intent—whether, in point of fact, he did entertain such intent." [230] The instruction which was found to properly link insanity factually to ***mens rea*** was that "if the defendant killed his wife in a manner that would be criminal and unlawful if the defendant were sane, the verdict should be 'not guilty by reason of insanity,' if the killing was the offspring or product of

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[222] Durham v. United States, 214 F.3d 862, 873-74 (D.C. Cir. 1954).
[223] *See* W. La Fave & A. Scott, Jr., Criminal Law 284-85 (1972).
[224] *Id.* at 284-86. *See* also H. Weihofen, *supra* note 138, at 94-100.
[225] 47 N.H. 120 (1866).
[226] 49 N.H. 399 (1869).
[227] *Id.* at 429. Judge Doe was dissatisfied with the "striking and conspicuous want of success" of the general tests for insanity.
[228] This forms the basis for the more recent "*mens rea* approach" discussed *infra* at part V (D).
[229] 50 N.H. 369 (1871).
[230] *Id.* at 382.

mental disease in the defendant." [231] It was the exclusive province of the jury to factually determine this. Judge Ladd noted the utter failure of all attempts at a universal test for insanity and stated that

> the reason of the failure, as I think, is, that it was an attempt to lay down as law that which, from its very nature, is essentially matter of fact. It is a question of fact whether any universal test exists, and it is also a question of fact what the test is, if any there be.[232]

The New Hampshire rule has received some support from English [233] and American commentators,[234] but not from any other courts.[235] The criticisms of the New Hampshire rule, however, have been difficult to refute. While the existence of insanity may be a factual issue, the question of responsibility is a legal question. The judiciary cannot abdicate its obligation to give guidance to the jury on this critical issue. The question should not be left to the medical experts [236] and an unguided jury [237] be-

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[231] *Id.* at 388.

[232] *Id.*

[233] *See, e.g.*, J. Bishop, Criminal Law **268-69** (9th ed. **1923**); **2** J. Stephen, History of the Criminal Law of England **97 (1883)**; *See also* H. Weihofen, *supra* note 138, at **115-16** (discussion of support for New Hampshire type approach by British Medico-Psychological Association in **1923** and by a British Royal Commission on Capital Punishment in **1953**).

[234] See *e.g.*, 1 S. Clevenger, Medical Jurisprudence of Insanity **19 (1898)**; F. Wharton, A Treatise on Criminal Law § **45 (10thed.** rev. **1896)**.

[235] See *id.* **138** at **119.** It is interesting that the only court to cite the New Hampshire rule with approval, although they did not specifically adopt it, was Montana. *See, e.g.*, State v. Narich, **92** Mont. **17, 9** P. **477 (1932)**; State v. Keevl, **29** Mont. **508, 75** P. **362 (1904)**; State v. Peel, **23** Mont. 358, 59 P. **169 (1899)**. *See also* Note, *Insanity As A Defense In The Criminal Law of Montana*, 1 Mont. L. Rev. **69 (1940)**. Montana has recently gone to the "mens rea approach" of which the New Hampshire rule was a precurser; *infra* at part V (D).

[236] Professor Wharton adroitly dismisses the argument that insanity is a question for experts and not for the courts by stating

> (1) that the question in criminal issues is not insanity, but irresponsibility, which it is eminently important should be limited by positive definition by the highest judicial authority the state can constitute; and (2) that experts do not form such an authority, (a) because their sense, as a body, cannot be obtained by any process known to our courts; (b) because there is no independent court of experts, which, on notice to both sides, and after argument, if necessary, can, when the experts called in a particular case conflict, give a judicial opinion upon the issue; and (c) because, in many cases of criminal defense, only those eccentric and exceptional experts are selected, who believe in some wild theory which may help out the defendant's case.

F. Wharton & M. Stile, *supra* note **48,** at **178.**

[237] Professor Wharton also notes why juries as an institution are particularly unsuited to provide consistent and definite rules when he states that

> (1) [a jury] does not form a continuous body, prepared for its office, as are our courts of justice, by prior study. (2) The reasons of its decisions are not given, so that these decisions can form the basis of future decisions. Each decision stands by itself, not controlled by those which preceded it, and not controlling those

cause the results could be too arbitrary and inconsistent. The difficulty in defining criminal responsibility with complete scientific precision does not justify not defining it at all.[238]

The next significant venture into the responsibility test controversy was the "product" rule of Durham *v.* United *States*,[239] which is usually referred to as the Durham rule. Prior to Durham, the District of Columbia had relied upon the McNuughton test since 1886,[240] as modified by the irresistible impulse test in 1929.[241] By 1954, the Court of Appeals for the District of Columbia Circuit had come to believe that this modified McNuughton test did not accurately reflect modern psychiatric concepts and thus promulgated the following rule that the "accused is not criminally responsible if his unlawful act was theproduct of mental disease or mental defect." [242] The court hoped that this broader test would be flexible enough to encompass medical advances as they occurred and to give expert psychiatric witnesses greater leeway to testify in medically relevant terms. For these reasons, many commentators applauded the decision.[243] Although it did distinguish disease from defect,[244] the decision had some problematical omissions as it did not define either "product"or "mental disease or defect." This led to considerable criticism of *Durham*.[245] The Durham rule was also criticized because "product" may require a "but-for" causation requirement, that is, the accused would not have done the act but for the mental disease or defect. This was an answer which rarely could be given with any degree of certainty. It also

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which succeed. (3) There is no "supreme' jury, by whom the decisions of 'inferior' juries can be corrected by systematized.

Id. at **180.**

[238] For a more complete discussion of the New Hampshire rule, *see* Weihofen, *The Flowering of New Hampshire*, **22** U. Chi. L. Rev. **356 (1955).**

[239] **214** F.2d **862** (D.C. Cir. **1954).**

[240] In United States v. Lee, **15** D.C. (4 Mackey) **489, 496** (1886), the court in unequivocal language, albeit dictum, declared McNaughton to be the rule. United States v. Guiteau, **12** D.C. (1 Mackey) **498, 550 (1882)** had approved an instruction which incorporated M'Naughten.

[241] Smith v. United States, **36** F.2d **548, 549** (D.C. Cir. **1929).**

[242] **214** F.2d at **874-75** (emphasis added). As noted earlier, *Durham* did not consider irresistible impulse to be sufficient as it did not give any "recognition to mental illness characterized by brooding and reflection." *Id.* at **874.** *See* note **222** *supra.*

[243] *See, e.g.*, Guttmacher, *The Psychiatrist as an Expert Witness*, **22** U. Chi. L. Rev. **325 (1955);** Roche, *Criminality and Mental Illness—Two Faces of the Same Coin*, **22** U. Chi. L. Rev. **320 (1955);** Zilboorg, A *Step Toward Enlightened Justice*, **22** U. Chi. L. Rev. **331 (1955).**

[244] **214** F.2d at **875.** "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 cogenital, or the result of injury, or the residual effect of a physical or mental disease."

[245] *See, e.g.*, Szasz, *Psychiatry, Ethics, and the Criminal Law*, **58** Colum. L. Rev. **183 (1958);** Wechsler, *The Criteria* of *Criminal Responsibility*, **22** U. Chi. L. Rev. **367 (1955);** Wertham, *Psychoauthoritarianism and the Law*, **22** U. Chi. L. Rev. **336 (1955).**

would place an almost impossible burden on the government to prove the total lack of causation beyond a reasonable doubt. Due to many of these deficiencies, the Durham rule was never adopted by any appellate

In three critical areas, however, the Court of Appeals for the District of Columbia later refined the Durham rule to remove the inherent ambiguities. In *Carter v. United States*,[247] the court defined "product;" in *McDonald u. United States*,[248] it defined "mental disease **or** defect;" and in *Washington v. United States*,[249] it sharply restricted expert testimony which relied upon medical labels or conclusory terms. In *Carter*, the court found the trial judge's instruction of "product" in terms of "the consequence, or growth, natural result or substantive end of a mental a b normality" to be inadequate and inaccurate.[250] The court defined "product" as a "but-for" causal connection.[251] This was, however, the precise concept which had previously been criticized as an unanswerable question and an insurmountable burden. The *Curter* definition still seemed to allow "any" effective causation to relieve the accused of responsibility *m* without regard to how substantial the causal connection was.[253]

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[246] See Krash, The Durham Rule and Judicial Administration of the Insanity Defense in *the District of* Columbia, 70 Yale L.J. 905, 906 n.8 (1961).

[247] 252 F.2d 608 (D.C. Cir. 1956).

[248] 312 F.2d **847** (D.C. Cir. 1962).

[249] 390 F.2d **444** (D.C. Cir. 1967).

[250] 252 F.2d at 617.

[251] Id. The court stated that

> [w]hen we say the defense of insanity requires that the act be a 'product of a disease, we mean that the facts on the record are such that the trier of facts is enabled to draw a reasonable inference that the accused would not have committed the act he did commit if he had not been diseased as he was. There must be a relationship between the disease and the act, and that relationship, whatever it may be in degree, must be, as we have already said, critical in ita effect in respect to the act. By 'critical' we mean decisive, determinative, causal; we mean to convey the idea inherent in the phrases 'because of,' 'except for,' 'without which,' 'but for,' 'effect of,' 'result of,' 'causative factor;'. . .

[252] *Id.* The court stated that

> . . . the disease made the effective or decisive difference between doing and not doing the act. The short phrases 'product of and 'causal connection' are not intended to be precise, as though they were chemical formulae. They mean that the facta concerning the disease and the facts concerning the act are such as to justify reasonably the conclusion that 'but for this disease the act would not have been committed.'

[253] See Blocker v. United States, 288 F.2d 853, 862 (D.C. Cir. 1961) (Burger, J., concurring).

> Apart from all other objections the product aspect of Durham is a fallacy in this: assuming arguendo that a criminal aet can be the 'product' of a 'mental disease' that fact should not per se excuse the defendant; it should exculpate only if the condition described as a 'mental disease' affected him so substantially that he could not appreciate the nature of the illegal act or could his conduct.

The "but-for" definition of "product" was exasperated by nomenclature disputes among psychiatric experts.[254] The *McDonald* case recognized that medical clinical "mental disease or defect" is not necessarily synonomous with the definition of "mental disease or defect" and that the jury needs to make the determination of criminal responsibility.[255] So that the jury did not have to rely upon the *ad hoc* definitions of expert witnesses, the court defined "mental disease or defect" as including "any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls."[256] The addition of behavioral consequences into the equation greatly ameliorated the overbroad causal connection defect of the "but-for" test. In many respects, this modified Durham rule was not significantly different from the American Law Institute/Model Penal Code test which focuses on "substantial capacity."[257]

In *Washington,* the court was also concerned about the potential for expert domination of the jury's function to determine criminal responsibility. When experts were allowed to testify in conclusory terms concerning productivity, they went beyond their role of determining "the medical-clinical concept of illness" and encroached upon the jury's role to decide "the legal and moral question of culpability."[258] Psychiatric expert witnesses were therefore prohibited "from testifying whether the alleged offense was the product of mental illness, since this is part of the ultimate issue to be decided by the jury."[259] However, as the conclusory testimony prohibition of *Washington* proved difficult to enforce and abuses continued, the court's dissatisfaction with the Durham rule became apparent. In *United States v. Brawner,*[260] the court *en banc* rejected the Durham rule and adopted as the core of its new test the proposal of the American Law Institute, the "substantial capacity" test. The *Brawner* court jettisoned *Durham* for the same reasons that *Durham* had discarded *McNaughton,* that is, expert domination and rigid judicial interpretation which resulted in an inflexible test. The *Brawner* court, in adopting the American Law Institute proposal, also retained its *McDonald* definition of "mental disease or defect" and the expert witness instruction of *Washington,* and expanded the scope of expert testi-

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[254] Indicative of the dispute was Blocker v. United States, 288 F.2d 853 (D.C. Cir. 1961) where experts differed over whether a sociopathic personality disturbance was a mental disease or defect.

[255] 312 F.2d at 851.

[256] Id.

[257] *See* discussion of this test notes 262-94 and accompanying text *infra.*

[258] 390 F.2d at 452.

[259] Id. at 455.

[260] 471 F.2d 969 (D.C. Cir. 1972).

mony to include specific mental conditions other than disease or illness.[261]

In 1955, the American Law Institute's Model Penal Code project proposed a new insanity defense test, known generally as the A.L.I. test. The advisory committee had recommended the adoption of the Durham rule, However, since the judicial gloss of *Carter/McDonald/Washington* had not clarified *Durham* at that point, the Institute instead offered their own test. It is basically a refurbished *McNaughton*/irresistible impulse rule, which is as follows:

> Section 4.01 Mental Disease or Defect Excluding Responsibility
>
> (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 anti-social conduct.[262]

The above test is the official 1962 version and it differs from the 1955 Tentative Draft No. 4 by the insertion of the bracketed word "wrongfulness." This was a modification by outside groups between 1955 and 1962 which the Institute did not disapprove.[263] Additionally, the language "as used in this Article" was inserted to clarify that the Institute was dealing with legal not medical terminology.[264] Tentative Draft No. 4 also contained two alternate formulations of paragraph (1) which were deleted in the 1962 Proposed Official Draft.[265]

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[261] See Comment, United States v. Brawner: *The* District *of Columbia Abandons the Durham Insanity Test,* 25 Ala. L. Rev. 342, 358-62 (1973).

[262] Model Penal Code § 4.01 (Proposed Official Draft, 1962).

[263] *Id.* at 66. "The first change was designed to indicate that the Institute does not disapprove the modification of the formulation by a number of groups that have considered it, including the Governor's Committee on the Insanity Defense in New York State."

[264] *Id.* "The second modification was designed to avoid the misunderstanding, which has occasionally arisen that the Code seeks to legislate concerning medical terminology rather than merely to resolve a specific set of legal problems dealt with in this Article."

[265] Model Penal Code § 4.01 (Tentative Draft No. 4, 1955).

> (a) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect his capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law is so substantially impaired that he cannot justly be held responsible.
>
> (b) 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 to appreciate the criminality of his conduct or is in such state that the prospect of conviction and punishment cannot constitute a significant restraining influence upon him.

In proposing the new rule, the Institute noted that its difficult problem was "to discriminate between the cases where a punitive-correctional disposition is appropriate and those in which a medical-custodial disposition is the only kind that the law should allow."[266] The Institute recognized the validity of the basic *McNaughton* principle that cognition must be an element of responsibility, and that "[a]bsent these minimal elements of rationality, condemnation and punishment are obviously both unjust and futile."[267] Not only does lack of cognition render the person incapable of reasoning, but it also renders the potential offender nondeterrable. The Institute also recognized the basic rationale of "irresistible impulse" that volition and the capacity for self-control must be taken into account.[268] The Institute, however, specifically rejected limiting irresistible impulse to "sudden, spontaneous acts as distinguished from insane propulsions that are accompanied by brooding or reflection."[269]

The Institute rejected both *McNaughton's* requirement that the impairment of the cognitive capacity be complete and the irresistible impulse criterion of a complete impairment of capacity for self-control. The Institute's standard was lack of "substantial capacity" rather than total lack of capacity.[270] The Institute intentionally imputed no specific measure of degree to the term "substantial" as to "identify the degree of impairment with precision is, of course, impossible both verbally and logically."[271] It did note, however, that "if capacity is greatly impaired, that presumably should be sufficient."[272] In addition to the rejection of the Durham rule,[273] the Institute also rejected the majority proposal of the Royal Commission on Capital Punishment that it should be left "to the jury to determine whether at the time of the act the accused was suffering from disease of the mind (or mental deficiency) to such a degree that he ought not to be held responsible."[274] The Institute did not believe

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A substantial majority of the Institute's Council approved of the proposed paragraph (1) while a minority and the Reporter preferred alternative (a) and another minority preferred alternative (b). Both minorities, however, did not disapprove of the proposed paragraph (1). Model Penal Code § 4.01 Commentary 156 n.1 (Tentative Draft No. 4, 1955).

[266] Model Penal Code, § 4.01 Commentary 156 (Tentative Draft No. 4, 1955).

[267] *Id.*

[268] *Id.* at 157. The Institute recognized that *McNaughton's* "knowledge" has in some instances been broadly interpreted to include elements of volition, but this result should be achieved directly in their formulation by including volition language rather than depending upon an expanded definition of "knowledge."

[269] *Id.*

[270] *Id.* at 158.

[271] *Id.* at 159.

[272] *Id.*

[273] *Id.*

[274] *Id.* at 159-60 (citing Report of the Royal Commission on Capital Punishment 116 (1953).

that such a test adequately focused on the consequences of the disease or defect. Finally, paragraph (2) of the A.L.I. test was designed to exclude the "psychopathic personality" from the concept of mental disease or defect as a person with this disability differs from a normal person only quantitatively not qualitatively.[275]

The A.L.I. test, like every test that preceded it, has drawn mixed reviews. It has been criticized for not defining "mental disease or defect" any better than did Durham.[276] However, the latter refinement by *McDonald* has, to the extent that jurisdictions which have adopted the A.L.I. test use it, ameliorated this criticism. Indeed, one commentator believed that "mental disease" should remain "undefined, at least so long as it is modified by a statement of minimal conditions for being held to account under a system of criminal law."[277] The A.L.I. test has also been criticized for the word "result" which seems to retain the most objectionable aspects of the word "product" from *Durham*.[278] This has not, however, proven to be an accurate criticism.[279] While most critics will agree that a "substantial capacity" test is an improvement over the totality requirements of *McNaughton* and irresistible impulse, some critics have objected to the lack of definitions given to the term "substantial."[280] These critics felt that the lack of an absolute meaning will encourage differences among experts and jurors.[281] This criticism has overlooked the intent of the Institute to recognize varying degrees of mental disease without creating an inflexible deviation or incapacity standard to measure it.

The A.L.I. test uses the word "appreciate" rather than *McNaughton's* "know." The latter focused on cognitive or intellectual awareness, while the former expands that to include the emotional and affective aspects of the mind. The use of the word "conform" avoids the implication often attributed to irresistible impulse that only a loss of volitional capacity through a sudden, spontaneous act would suffice.[282] A final considera-

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[275] *Id.*

[276] *See* Corcoran & Lyons, *The New Military Standard for insanity: The Wild Beast Revisited,* 20 A.F.L. Rev. 182, 186 (1978).

[277] A. Goldstein, The Insanity Defense 87 (1967).

[278] *See* Comment, *Proposed Revision of the M'Naghten Rule,* 4 Cath. Law 297, 307 (1958).

[279] *See* Cutler, *Insanity as a Defense in Criminal* Law, 5 Cath. Law 44, 55 (1959).

[280] *See* Corcoran & Lyons, *supra* note 276, at 186-87. "The term is vague, vexatious, and highly subjective."

[281] *See* Kuh. *The Insanity Defense— An Effort to Combine Law and Reason.* 110 U. Pa. L. Rev. 771.797-99 (1962).

[282] *See* W. La. Fave & A. Scott, Jr., *supra* note 223, at 293. A criticism by Corcoran & Lyons, *supra* note 276, at 187, that the "fact that the crime was committed is, in itself, a statement that the conduct did not conform to the requirements of the law. In context, however, this term becomes a virtual equivalent of 'irresistible impulse,'" totally misses the significance of the context of "conform." The fact that one *did not* conform to the requirements of law is not synonymous with one *lacked the capacity* to conform.

tion in paragraph (1) of the A.L.I. test is whether to use "criminality" or "wrongfulness." The former focuses on "legally" wrong while the latter has a greater focus and includes "morally" wrong. While courts have adopted either alternative, only "wrongfulness" would seem to include the person who committed an act knowing it to be criminal, but because of an insane delusion that the act was morally justified.[283] Other courts actually reject "wrongfulness" in favor of "criminality" to avoid the moral connotation of the former. It was feared that someone could be excluded if his personal moral code was not violated.[284] Wrongfulness is a better term if it includes illegality and generally accepted moral connotations and is not restricted to a personal moral code.[285]

Paragraph (2) of the A.L.I. test has engendered greater criticism than paragraph (1). The intent of the former was to exclude the psychopathic personality. It has been objected to because it is doubtful that psychopaths constitute a valid psychiatric classification[286] and, in any event, they may be as nondeterrable as any other insane person.[287] It appears that the drafters intended to preclude the recidivist, whose actions were only quantitatively not qualitatively greater than the normal person, from the definition of mentally ill. Thus, a psychopath who displayed other symptoms of mental illness in addition to his recidivism could still be declared mentally ill. A psychiatrist in any event "is unlikely to base his diagnosis of the criminal psychopath solely upon this criminal or antisocial conduct."[288] To the extent that the mere recidivist is excluded, the paragraph is useful.

The A.L.I. test is a flexible test which has attempted to resolve the defects inherent in McNuughton, irresistible impulse and *Durham.* While the test had only one built-in variation, "wrongfulness" or "criminality," courts adopting the test have not hesitated to add their own variations. Most circuit courts of appeal have adopted the test without modification.[289] Some courts of appeal have eliminated the cognitive element be-

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[283] See, *e.g.*, Wade v. United States, 426 F.2d 64 (9th Cir. 1970); Blake v. United States, 407 F.2d 908 (5th Cir. 1969).

[284] United States v. Frederick, 3 M.J. 230, 237-38 (C.M.A. 1977); the Fourth Circuit also uses "criminality." *See, e.g.*, United States v. Taylor, 437 F.2d 371 (4th Cir. 1971); United States v. Butler, 409 F.2d 1261 (4th Cir. 1969); United States v. Chandler, 393 F.2d 920 (4th Cir. 1968).

[285] See Weihofen, Capacity to Appreciate "Wrongfulness" or "Criminality" Under *the A.L.I.—Model Penal* Code Test of Mental Responsibility, *58* J. Crim. L., Criminology & Police Sci. 27 (1967).

[286] See J. Biggs, supra note 3, at 160.

[287] *See* Weihofen, *The Definition of Mental Illness*, 21 Ohio St. L.J. 1, 7 (1960).

[288] Id.

[289] See Annot., **56** A.L.R. Fed 326, 329-332 for a listing of such cases in the second, fourth, fifth, seventh, eighth and tenth circuits. The first circuit has not had a recent case and the eleventh circuit will probably consider the fifth circuit's precedent controlling.

cause they felt that it emphasized that element of intellect too much.[290] Other courts have used only paragraph (1), deleting paragraph (2) in favor of an unrestricted category of "mental disease or defect."[291] The Circuit Court of Appeals for the District of Columbia Circuit has engrafted its *McDonald* definition of "mental disease or defect"[292] and the Ninth Circuit has added a definition of "wrongfulness."[293] On balance, the A.L.I. test, having had the benefit of assessing the experience of all prior tests, is the most adequate test currently in use.[294]

All of the tests analyzed had a common desire to create a unified and realistic basic doctrine for assessing the criminal responsibility of the mentally disabled. They attempted to be broad enough to encompass all of the mentally ill who merited exculpation from criminal responsibility, yet restrictive enough not to include those with sufficient mental capacity to merit the condemnation of criminal responsibility. This was a fine distinction and most tests have been criticized for coming down on both sides of the line. They have been criticized for vagueness, too narrow a focus, and dealing in terms irrelevant to medicine. The basic unfulfilled goal of all these tests is to describe a meaningful relationship between mental illness and the act charged in a form readily comprehensible and readily applicable by the average juryman to determine criminal responsibility.

IV. AMERICAN MILITARY INSANITY DEFENSE

A. *HISTORICAL DEVELOPMENT*

It is extremely difficult to accurately portray the status of the insanity defense in American military courts-martial prior to 1921. Except for some scanty information in the Manual for Courts-Martial, United States Army, 1917, there was no Manual guidance to determine either

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[290] *Id.* at 332. United States v. Currens, 290 F.2d 751 (3d Cir. 1961), is the leading case. United States v. Brawner, 471,969 (D.C. Cir. 1972), allows the defendant to request that the cognition phrase be omitted to avoid jury confusion if the particular matter is not involved in the facts.

[291] *See* Annot., 56 A.L.R. Fed at 333-35 for a listing of cases from the sixth and ninth circuits. United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972) allows the judge to use paragraph (2) to avoid a miscarriage of justice but it is not to be included in the jury instructions.

[292] *See* Annot., 56 A.L.R. Fed. at 335-36 for a listing of cases from the District of Columbia Circuit.

[293] *Id.* at 336-37 for a listing of Ninth Circuit cases,

[294] The concept of diminished capacity or diminished responsibility allows examination of any relevant mental disability which affects the elements of the alleged offense. It has generally been viewed as an extention of the specific intent doctrine which permits the defendant to use a mental disease or defect, not amounting to insanity sufficient for acquittal, to negate any special state of mind or specific intent necessary for the offense. It is not a "text" for insanity in the same manner as the tests previously discussed but must be considered as an adjunct to any proposed revision of the present procedures.

the substantive test or the procedures that were followed. Military criminal trials had no collective reporter system and the court-martial convening orders which were published contained such parsimonious language that they are not very illuminating. The commentators, of which there were few, made little mention of a military insanity defense, although it is clear that one did exist. Nevertheless, with the insight of commentators, it appears that the military insanity defense went through the same spasms of vacillation as did the insanity defense in general.

American military law was largely derived from the rules of discipline which prevailed in the British Army at the outbreak of the American Revolution. The Massachusetts Articles of War of April 1775, which were adopted as the American Articles of War of 1775 on June 30, 1775[295] and then replaced on September 20, 1776 as the Articles of War of 1776,[296] were based upon the British Articles of War of 1765 and the Mutiny Act.[297] In order to substantively interpret American military law, military tribunals resorted freely to English authors on English military law.[298] However, due to different forms of government and military systems, many important issues of American military law were not adequately answered by resort to the English precedent. Military tribunals were often unsure what principles were applicable, what precedential decisions had been rendered in similar cases, and what the rationale for those decisions might have been. In order to meet this challenge, American commentators on military law began to emerge.

Among the earliest of these commentators was Isaac Maltby in 1813,[299] who described a court-martial as "a legally organized body, to investigate, deliberate, decide, adjudge, and award sentence, concerning offenses committed against military law."[300] Maltby noted that the law which governed the proceedings, deliberations, judgment and sentence was *"the laws of land"*[301] which were comprised of the common law military and the statute law military. The latter was embodied in congressional enactments and regulations but the "common law" was

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[295] 1 Journal of Cong. 90 (1775).
[296] *Id.* at 435-82.
[297] *See* W. Winthrop, Military Law and Precedents (2d ed. 1920).
[298] J. OBrien, A Treatise on American Military Law 1 (Philadelphia 1846). The most commonly referred to authors were S. Adye, a Treatise on Courts-Martial (8th ed. London 1810); H. Bland, A Treatise on Military Discipline (5th ed. Dublin 1778); J. McArthur, Principles and Practice of Naval and Military Courts-Martial (4th ed. London 1813); E. Samuel, The Law Military (London 1816); A. Tyler, An Essay on Military Law (Dublin 1800).
[299] I. Maltby, A Treatise on Courts-Martial and Military Law (Boston 1813).
[300] *Id.* at 1.
[301] *Id.* (emphasis in original).

> derived from precedent and immemorial usage, which are partly military and partly civil.
>
> Military common law is such as is peculiar to military courts; and we may instance the manner of detailing and organizing the court.
>
> That which may be considered as derived from the common law, in the usual acceptation of the term is such as is estab lished by precedents and decisions in civil courts; and we may instance the law as to the admission of testimony in courts-martial. They are governed in this respect by the proceedings of the civil courts, and which are considered of such binding force, that a departure from the accustomed rules would render the members liable in a court of law.[302]

It is not surprising that, in its formative years, the American military criminal justice system would rely upon civilian criminal law precedent, Since most of the criminal trials occurred in state jurisdictions where a variety of decisions on the same subject was probable, military law must have relied upon the most generally accepted principles. The standing Army of the United States was small and one may surmise that the number of cases involving the insanity defense were few. Maltby did not mention insanity as a specific defense although it is probable that it was. He did, however, discuss insanity as it related to competency of witnesses:

> Those persons are excluded as incompetent witnesses who have no sufficient intellects. Such are ideots, insane persons, and infants who have not sufficient discernment to understand the nature of an oath.
> 'All persons who are examined as witnesses must be fully possessed of their understanding, that is, such an understanding as enables them to retain in memory the events of which they have been witnesses, and gives them a knowledge of right and wrong. Ideots, and lunatics, while under the influence of their malady, not possessing this share of understanding, are of so early an age as to be incapable of any sense of truth."
> [Peake's Evidence, p. 129]

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[302] *Id.* The last comment regarding the civil liability of court members is quite incongruous to our present perception of the independent judicial function of court members. However, in the early history of American military law, a defendant could bring a suit directly against individual court members for damages if the punishment inflicted or the proceedings of the court were illegal. Among the "illegal proceedings" were excluding competent witnesses, trying someone not amenable to courts-martial, or allowing improper persons to act as members. The court-martial as a body could also have its proceedings reviewed by a civil court or be subject to a writ of prohibition. *Id.* at 149-50.

> 'Ideots and children of tender age are excluded from giving testimony, on account of defect of understanding; but as the opening and growth of the understanding is very various in different individuals, the law has fixed no determined age for their admissibility as witnesses. A child of nine years of age has been allowed to give evidence; but the credit to be given to such testimony must always rest with the court and jury. Mere weakness of intellect does not render a witness incompetent, though it may discredit his evidence. . . .' [Tyler, p. 292].[303]

By analogy, many of these concepts must have been applied to an insanity defense. Insufficient intellect and defects of understanding appeared to be the focus of an insanity determination. There was also an element of "knowledge of right and wrong" which reflected the influence of Hawkins "good and evil" and the "right and wrong" test of ***Earl Ferrer's Case*** and *Bellingham's Case.*[304] Other concepts which are included are "partial insanity'' and "lunacy." The statement also rejected the notion that competency can be tied to any chronological age and at least indirectly rejects Hale's "child of fourteen years" analysis. If the "knowledge of right and wrong" was the test in the military in Maltby's time, which is uncertain, it would have come from the English commentators and cases as there were no comparable American commentators or cases on point in 1813.

The next American commentator to inquire into substantive military law,[305] was Lieutenant John O'Brien, United States Army, in 1846. His treatise was the first comprehensive analysis of American military criminal law. OBrien discussed the incompetency of witnesses **for** a "want of understanding" in a manner very similar to Maltby.[306] However, O'Brien also discussed the specific defense of insanity:

> When ***insanity*** is relied on for the defence, the following is the true principle on which it should be considered. To amount to a complete bar of punishment, either at the time of committing the offence, or of the trial, the insanity must have been of such a kind, as entirely to deprive the prisoner of the use of reason, as ***applied to the act in question,*** and the knowledge that he was doing wrong in committing it. If, though somewhat deranged, he is yet able to distinguish right from wrong, ***in his own case,*** and to know that he was doing wrong in the act which he com-

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[303] *Id.* at 50-51.

[304] ***See*** notes 128,141-42,161-63and accompanying text ***supra.***

[305] There was a book on procedure and forms by Major General Alexander Macomb in **the** interim which does not address substantive military law in any detail. A. Macomb, **The** Practice of Courts-Martial (New York 1841).

[306] J. O'Brien, *supra* note 298.

> mitted, he is liable to the full punishment of his criminal
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> . . .
>
> The *onus* of proving the defence of insanity, or, in the case of lunacy, of showing that the offence was committed when the prisoner was in a state of lunacy, lies upon the prisoner, and for the purpose of proving it, the opinion of a person possessing medical skills, is admissible. When the prisoner is acquitted on that ground, it must be so specially stated.[308]

The substantive test clearly reflected the *McNaughton* case which had been decided three years earlier. The focus was on the "use of reason" to "distinguish right from wrong" and the "knowledge" of wrong, not in general, but in relation to his specific case. The test maintained the same element of "lunacy" as did the early English commentators and cases. OBrien gave additional elucidation to the status of the insanity defense that was basically described by Maltby. OBrien added insanity at the time of trial as a bar to punishment, which should have been treated as a separate issue of capacity rather than responsibility at the time of the offense. He also placed the burden of proof on the defendant, but without specifying the degree of proof necessary to carry that burden. He further recognized the admissibility of medical expert witnesses and that a finding of not guilty by reason of insanity is a special verdict.

The concepts and terminology of the English commentators and cases had an obvious impact on the substantive test for insanity that was used in American military courts-martial at the beginning of the Civil War. De Hart, in his 1862 commentary,[309] stated that

> [a]mong the decided and indisputable pleas of excuse, is that of insanity; which, of course, by rendering the unfortunate person

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[307] *Id.* at 196-97.

> *Idiots and Lunatics.* Persons not possessing the use of their understanding, as idiots, madmen and lunatics, if they are either continually in that condition, or subject to such a frequent recurrence of it as to render it unsafe to trust to their testimony, are incompetent witnesses.
>
> An idiot is a person who had been *non compos mentis* from his birth, and who has never had any lucid intervals, and cannot be received as a witness.
>
> A lunatic is a person who enjoys intervals of sound mind, and may be admitted as a witness in *lucidis intervallis.* He must of course have been in possession of his intellect at the time of the event to which he testifies, as well as at the time of examination; and it has been justly observed, that it ought to appear that no serious fit of insanity has intervened, so as to cloud his recollection, and cause him to mistake the illusions of his imagination for the events he was witnessed.

[308] *Id.* at *266.*

[309] W. DeHart, Observations on Military Law (New York 1862).

> irresponsible, remits all punishment. But if the lunatic has intervals of reason, sufficient to permit him to distinguish the moral bearing of his actions, and such powers of intellect as to enable him to restrain his passions, by which he was excited to crime, he must be held to answer for his behavior during such intervals.[310]

The "decided and indisputable" status of the defense obviously indicates that the defense had been recognized for some time in the military prior to 1862. The description of the defense as a "plea of excuse" may have been noncommital language or it may have been precisely used to convey the notion that the defense was in the nature of confession and avoidance. This latter use would seem to be borne out by the "remitting of all punishment." Such a rationale would have excluded the insane defendant from criminal liability because of his insanity without any specific consideration of the effect on mens rea. The reference to "lunatics" and lucid intervals displays the influence of Coke,[311] and Hale,[312] and the early English cases which adhered to their theories. The ability to "distinguish the moral bearings'' and the "powers of intellect" reflect the cognitive analysis of McNaughton's "right and wrong" test and the knowledge of "moral" wrong from the "good and evil" test of Hawkins and Earl Ferrer's *Case.*[313] Also, the power to "restrain his passions" is reminiscent of the Solicitor-General's argument in Earl Ferrer's *Case* that the defendant has a competent use of his reason '(sufficientto have restrained those passions."[314] De Hart's collage of concepts seems to indicate that the American military insanity defense was going through the same post-*McNaughton* growing pains as the insanity defense in the civilian community. It was plagued with the same imprecise terminology and redundant phraseology.

Another commentator, Benet, in his 1863 treatise,[315] rendered a slightly clearer picture of what the substantive test was when he stated that

> [a]bsolute insanity, like total idiocy, excuses from the guilt, and of course from the punishment of a crime committed during this incapacity, but if the lunatic has lucid intervals, and reason sufficient to discern right from wrong, he must be held to answer for what he does in these intervals. So far the law is clear and explicit, but difficulties arise in the case of alleged crimes

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[310] *Id.* at 168.
[311] *See* notes 98-99 and accompanying text supra.
[312] *See* notes 119-121 and accompanying textsupra.
[313] *See* notes 128,141-42and accompanying textsupra.
[314] *See* note 141 and accompanying text supra.
[315] S. Benet, A Treatise on Military Law (New York 1863).

> committed by persons afflicted with insane delusions in respect to one or more particular subjects or persons but not insane in other respects.[316]

This test obviously reflected the prevalent civilian concepts as well as the same conflicts. It requires that the insanity be "absolute", just as Hale in his commentaries[317] and cases such as ***Earl Ferrer's Case***[318] did. The concept of lucid intervals was derived from Coke and Hale and early judicial acceptance of their philosophies.[319] The difficulty with insane delusions is directly attributable to the controversy in English law started by Erskine in *Hadfield's* ***Case.***[320] The gravamen of Benet's test was, as in O'Brien's treatise and De Hart's commentary, the *McNaughton's* "right and wrong" test.

The court-martial convening orders of the Civil War era offer no insight into whether the test expounded by O'Brien, De Hart, and Benet was either understood or even used by the court. It is clear, however, that at least the concept of "lucid interval'' was utilized. In 1868, a Private Andrew Overstreet was charged with quitting his guard, wrongfully disposing of government property and desertion and after

> [t]he charges and specifications against the prisoner were read to him, and upon being called upon to plead, his conduct, and replies to the questions asked him, were of such a character as to indicate that he was at the time insane.
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> The Court examined a number of witnesses who had known the prisoner for several years, and are satisfied that the prisoner has from childhood been subject to periodical insanity; that the offenses with which he is now charged were committed during one of these periods of incapacity, and that the prisoner is now insane.
>
> Further proceedings were therefore discontinued . . .[321]

This was a classic rendition of a person who apparently had periods of insanity and periods of lucidity. Since the offense occurred during a period of insanity, he was not held responsible. In addition, according to O'Brien's theory, Overstreet could have escaped liability since he was insane also at the time of trial.[322] There is difficulty in determining upon what basis many of the accused of this era were acquitted as the court-

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[316] *Id.* at 118.
[317] See notes 109-21 and accompanying text *supra.*
[318] See note 141 and accompanying text *supra.*
[319] See note 98-99, 119-21 and accompanying text *supra.*
[320] *See* notes 148-55 and accompanying text *supra.*
[321] G.O. 39, Dep't. of Missouri (1868).
[322] See note 308 and accompanying text *supra.*

martial orders use general terms such as "insane,"[323] "not in the exercise of sound discretion,"[324] or "while laboring under a temporary fit of insanity."[325]

There was no special plea for "not guilty by reason of insanity." The only pleas were guilty or not guilty "but [guilty pleas] must be made simply and unqualified, as nothing exculpatory can at this time be received. No *special* justification can be offered as a plea, as such would be an anticipation of the defence."[326] Yet at least one accused pled "Mental Imbecility." The plea was confirmed and the soldier discharged.[327] One manner in which the findings were often stated was to find the accused guilty "but attach no criminality thereto." This was a confusing finding and was used also in other than insanity cases.[328] In one case, Private Samuel A. Haney was charged with theft, disobedience of orders, and neglect of duty. The findings were not guilty of theft, "guilty but attaching no criminality thereto" of disobedience and "guilty with exceptions, but attaching no criminality thereto" of neglect of duty. The action approved the acquittal of theft and stated as to the other two charges that

> [t]he findings to the specifications of the second charge, although in a form often adopted, are not regarded as consistent.

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[323] G.O. 54, Dep't. of Pacific (1864). Private Simon Kennedy was charged with murder and assault with intent to kill, found guilty of manslaughter and assault with intent to kill and sentenced to life in prison. His charges were not sustained upon action of the convening authority "as there is abundant evidence to show that the acts were committed whilst the prisoner was insane; he will be held in confinement till he can be sent to the insane asylum."

[324] G.O. 5, Dep't. of Arkansas (1866) Private George T.S. Andrews was convicted of desertion and sentenced to a dishonorable discharge and five years confinement at hard labor. The proceedings and findings were approved but the sentence was disapproved as "the General Commanding having examined the man, finds that he is not in the exercise of sound discretion, and was probably not, at the time the offense was committed." Andrews was instead sent to an asylum.

[325] G.O. 49, Dep't. of Susquehanna (1864). Private Rodgers Coleman was charged with aggravated assault with intent to kill, he declined to plead and court proceeded as if a not guilty plea were entered. The finding was "while laboring under a temporary fit of insanity—Guilty." Coleman was sentenced to be confined in a Military Lunatic Asylum until a board of surgeons deemed it proper to release him. When the board released him from the asylum, he served the remainder of his enlistment in the field.

[326] W. DeHart, ***supra*** note 309, at 134-35.

[327] G.O. 22, H.Q., Dep't. of California (1866).

[328] ***See,*** *e.g.*, G.C.M.O. 69, H.Q., Dep't. of Missouri (1869). Corporal Frank Dixon was charged in one specification (dupliciously) with offering violence to First Sergeant Gratz and disobedience of his order to assist him in quelling a disorder. Dixon plead guilty but was found "Guilty except the words 'and did not obey the order of Sergeant Gratz to assist him in suppressing the disorder,' but attach no criminality thereto;" G.C.M.O. 9, Dep't. of Missouri (1890). Sergeant Harry Murray and Private Beirne Flamer were charged with introducing intoxicating liquors into the garrison without authority. They were "found guilty but attach no criminality thereto" as it was not forbidden by post orders. One can only surmise why such a finding would be entered. It may have been because the members felt that the accused were acting improperly but fortuitously were not violating a post order.

> A better way of expressing the conclusions of the court would have been that "the court finds the facts as set forth, but attaches no criminality thereto." [329]

The noted military law commentator, Colonel William Winthrop, stated that usage had given sanction to the "guilty without attaching criminality" finding and it "is principally resorted to where the accused is found to have committed the acts or done the things alleged in the specification, but without the guilty intent or knowledge essential to constitute the military offense charged. . . [but] this finding, however, is not one to be encouraged. It is virtually a form of acquittal." [330] Winthrop noted that this form of finding was sometimes used in cases where the defendant was insane but that it would "be more legally accurate, as well as more military and more just to the accused, to express and record the finding simply as 'Not Guilty.'" [331] Winthrop further stated that

> [w]here indeed the evidence quite clearly shows that the accused was insane at the time of the offense, whether or not the insanity is specially pleaded as a defence, there can of course properly be ***no conviction*** and therefore ***no sentence.*** Where the fact is shown in evidence, or developed upon the trial, that the accused has become insane since the commission of the offense, here also the court will most properly neither find nor sentence, but will communicate officially to the convening authority the testimony or circumstances and its action thereon, and adjourn to await orders. In some instances of this class the court had added a recommendation that the accused be discharged from the service, transcending however in so doing its strict function. [332]

If an accused is convicted and it is later determined that he was insane [56] or became insane after trial, [334] the convening authority should

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[329] G.C.M.O. No. 30. H.Q., Army (1886).
[330] W. Winthrop, ***supra*** note 297 at 579-80.
[331] ***Id.*** at 580.
[332] ***Id.*** at 393.
[333] ***G.O.*** 1, Div. of Pacific (1872). The proceedings, findings and sentence were approved but the enforcement of the sentence was suspended until a medical examination was made into the accused's mental condition; G.O. 62, H.Q., First Military District (1867). The members recommended that the execution of the sentence be suspended until a medical board could examine the accused, as they were "of the opinion (from common report regarding his action for some time past) that he is of unsound mind." The results of the board were "that he was of unsound mind—that is, of unsound judgment—expressed by the common term of 'cracked-brained,' without active insanity or mania." The finding and sentence were approved and the sentence remitted.
[334] G.O. 40, Dep't. of Virginia (1866). As the accused was declared insane after trial, his sentence was not carried into execution and he was instead "released from imprisonment and committed to the custody of his family—to be by them confined as an insane person."

disapprove the sentence if the insanity existed at the time of the offense,[335] or to approve and remit the sentence if the insanity developed after the commission of the offense.[336]

By the end of the nineteenth century, the military insanity test reflected the same considerations as those found in the federal courts. A strict McNaughton test was probably applied until, in 1895, the United States Supreme Court decided *Davis u.* United States[337] and modified McNaughton in federal cases by adding irresistible impulse to the test. The Court approved an instruction which stated that

> [t]he term insanity as used in this defense, means such a perverted and deranged condition of the mental and moral faculties as to render a person unconscious at the time of the nature of the act he is committing; or where, though conscious of the nature of the act and able to distinguish between right and wrong, and know that the act is wrong, yet his will, by which I mean the governing power of his mind, has been, otherwise then voluntary, so completely destroyed that his actions are not subject to it but are beyond his control.[338]

The Court also quoted with approval from Commonwealth *u.* Rogers[339] that an element of crime is that

> a person must have intelligence and capacity enough to have a criminal intent and purpose; and if his reason and mental powers are either so deficient that he has no will, or if, through the overwhelming violence of mental disease, his intellectual power is for the time obliterated, he is not a responsible moral agent, and is not punishable for criminal acts.[340]

While the Court did not expressly state that it would be reversible error not to include irresistible impulse in a test for insanity, the intent of the Court was sufficiently obvious that, for federal courts, such a test would be required. The "irresistible impulse" language was generally added onto the McNaughton test by asking whether the defendant "could ad-

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G.O. 81, H.Q., Middle Dept. **(1865)** "Although it appears from the report of a Board of Medical Officers, appointed to examine him, there is no present indication of an aberation of mind, yet in view of the fact. . . that he was discharged the service of the U S . as a soldier on Surgeon's Certificate for insanity, the sentence is remitted and the prisoner will be released."

[335] *See* W. Winthrop, *supra* note **297** at **454.**

[336] *Id.* at **455.**

[337] 160 U S . **469 (1895).**

[338] *Id.* at **476-77.** The same instruction was approved in Davis v. United States, **165** U.S. **373 (1897);** Hotema v. United States, 186 U.S. **413 (1901);** and, Matheson **v.** United States, **227** U.S. **540 (1912).**

[339] **48** Mass. **500 (1844).**

[340] 160 U.S. at **485** (quoting Commonwealth v. Rogers, **48** Mass. 500, at 501).

here to the right," that is, he had the volitional capacity. For the military, Brigadier General George B. Davis, The Judge Advocate General, United States Army, in his treatise, summed up the military test for insanity at the turn of the century:

> It has been seen that the test of responsibility for crime lies in the capacity or power of the person to commit the act; and the inquiry is whether the accused was capable of having and did have a criminal intent and the capacity to distinguish between right and wrong in reference to the particular act charged. The test of responsibility where insanity is asserted is as to the capacity of the accused to distinguish between right and wrong with respect to the act, and the absence of delusions respecting the same. If the accused knew what he was doing and that the act was forbidden by law, and had power of mind enough to be conscious of what he was doing, he was responsible; in other words, had the accused the power to distinguish right from wrong, and the power to adhere to the right and avoid the wrong? If so, he is responsible for the consequences of his act.[341]

Colonel Winthrop, in his classic treatise, also noted the *McNaughton* test as modified by irresistible impulse was the military test.[342] However, both Davis and Winthrop either overlooked a significant aspect of *Davis v. United States*, which placed the burden of proof on the government to prove sanity beyond a reasonable doubt or else the military system did not adopt that aspect of *Dauis* until later. The Court in *Davis* held that, in the absence of any proof of insanity, the government's burden of proof is met by the presumption of sanity. If, however, some proof is adduced, then, if the whole evidence, including that supplied by the presumption of sanity, does not exclude beyond a reasonable doubt the hypothesis of insanity, the accused is entitled to an acquittal.[343] The Court did place the burden of production, but not the burden of persuasion, on the accused. Nevertheless, Davis in his treatise acknowledged the presumption of criminal capacity, but further stated that "the burden of proving the existence of such a want of capacity as will serve to deprive the act of all criminality, or diminish it in character or degree rests upon the accused."[344] Winthrop, while stating that "the burden of maintaining insanity as a defence in a criminal case rests of course upon the

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[341] G. Davis, A Treatise on the Military Laws of the United States 124-25(2d ed. 1901).
[342] W. Winthrop, *supra* note 297, at 294.
[343] 160 U.S. 469,485-493.
[344] G. Davis, *supra* note 341, at 124. Davis further noted that "the presumption being in all cases that an accused person is mentally sound and therefore responsible for his acts, and the burden of proving the existence of mental unsoundness or other incapacity lies upon the defense and must be established by the testimony of witnesses." *Id.* at 125.

accused,''[345] inconsistently noted that "[i]f enough, however, is shown on 'the part of the accused, to induce—upon the whole evidence—a reasonable doubt of his sanity, he is entitled to an acquittal." [346] The confusion in Winthrop's statement was the use of the word "maintaining." If it meant "producing evidence," it would be consistent with *Davis;* if it meant "proving," it would be contrary to *Davis.* Winthrop probably intended the latter meaning since he did not cite *Davis* as support, but in the same paragraph cites *Guiteau's Case* [347] for general support. ***Guiteau's Case*** preceded *Davis* by thirteen years and held that "[e]very defendant is presumed in law [t]o be sane, and the burden of proof is on him to prove his insanity at the time of the commission of the acts, subject only to the benefit of a reasonable doubt." [348] The inconsistency of Davis, Winthrop, and *Guiteau's Case* is probably directly attributable to the loose language that is often used when discussing the burden of "proof." Often the word "proof," with the connotation of "persuasion," is used when the intent is only to indicate "production."

B. MILITARY TESTS 1921-1977

The substantive military test and procedures were greatly clarified when the military began producing manuals for courts-martial in 1921.[349] If a convening authority, prior to referral of charges, had any indication of mental defect, derangement, or abnormality on the part of an accused, a medical officer would examine the mental condition of the accused and

> such examination to concern itself solely with the mental capacity and condition of the accused, with a view to learning whether he suffers from any mental defect or derangement marking him either temporarily or permanently abnormal or

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[345] W. Winthrop, ***supra*** note 297, at 294.
[346] *Id.* at 294 n.78 (citations omitted).
[347] 10 F. 161 (1882).
[348] *Id.* at 202 (citations omitted).
[349] The Army did have a manual in 1917 which did not shed much light on the general area but did have a remarkable procedure which allowed the accused or his family to demand a trial when a convening authority accepted the findings of a medical board and withdrew the charges. Manual For Courts-Martial, United States Army, 1917, para. 219 provided that

> it would accord with modern ideas of justice, if any doubt whatsoever existed as to the accused having committed the wrongful act charged against him, to grant, upon request of counsel or a member of the accused's family, a trial upon the charges with a view to relieving him though insane, of the stigma attached to the accusation. In such instance the case should be proceeded with, and if the court determines that the accused committed the wrongful act charged but was insane at the time of its commission or at the time of trial the findings will be to that effect. And in any case where a finding by the court of "not guilty" would be based upon lack of criminal mind, the findings should be in accordance with those prescribed by the preceding sentence.

> peculiar from the medical point of view. In such medical examination no attempt will be made to define his legal responsibility for crime or to apply any legal tests or definitions, but the examination will be directed solely to ascertain whether in his mental condition there is any feature of abnormality which renders him not susceptible to ordinary human motives or appreciations of right or wrong, or to the normal control of his actions, and as to whether he is capable of conducting his defense intelligently. The medical examiner should, however, endeavor to ascertain, and should consider and weigh the accused's mental condition at the time of the act charged.[350]

This requirement attempted, commendably, to have the medical officer respond in medically relevant terms without regard to legal tests. It then went on, however, to describe these terms with "appreciate right or wrong" or "control his actions'' verbiage, which is, of course, the legal terminology which was to be avoided. The convening authority considered this report as well as the advice of his staff judge advocate before referring a case to trial.[351]

At trial, the insanity defense could be raised under a general plea of not guilty "at any time before sentence, without any special plea or other formality, either by any member of the court, by the trial judge advocate, the defense counsel or other counsel for the accused, or by the accused himself.''[352] A plea of "guilty without criminality'' was prohibited as irregular and contradictory.[353] If insanity became an issue at trial, "the burden of proof is upon the prosecution to establish, to the satisfaction of the court, the mental condition of the accused, both at the time of the illegal offense and at the time of trial. . . ." [354] The members could consider the report of a medical board convened under paragraph 76*c* and call at least one member of such board to testify, but could not consider the examination of the accused by the medical officer under paragraph 76*a* unless offered by the accused.[355] If no medical board had been convened, the court could order one.[356] The manner in which the court members decided the issue of insanity was to first ballot on the insanity

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[350] Manual for Courts-Martial, United States, 1921, para. 76*a*(8) [hereinafter cited as MCM, 1921].

[351] *Id.* at para. 76*b*.

[352] *Id.* at paras. 219(a), 154(g), 148.

[353] *Id.* at para. 154(f). "It is practically equivalent to a plea of 'not guilty,' and the court and trial judge advocate should proceed as if that plea were entered. Unless a plea of guilty is unqualified the prosecution must prove all allegations that are specifically not admitted by the accused." The court would also proceed under a plea of "not guilty" if the accused failed to plead as a result of insanity. *Id.* at para. 155.

[354] *Id.* at para. 219(b).

[355] *Id.* at para. 219(b) & (c).

[356] *Id.* at para. 219(d).

issue and then, if insanity was not found, ballot on the general issue of guilt.[357] The first question voted upon by the members was: ('Is the accused in proper mental condition at this time to undergo trial?" If fifty percent or more of the members voted "No," a finding that "the accused is not in proper mental condition at this time to undergo trial" was returned to the convening authority who could dispose of the case in any manner except trial.[358] If the accused was sane at the time of trial, the second question voted upon by the members was:

> Was the accused at the time of the commission of the alleged offense so far free from mental defect, mental disease, or mental derangement as to be able, concerning the particular acts charged, both (1) to distinguish right from wrong and (2) to adhere to the right? [359]

If fifty percent or more voted "No," the accused was acquitted. If not, then the court proceeded to ballot on the general issue of guilt "in the same manner as though no such question of mental defect or derangement had been raised or suggested." [360] The procedure thus utilized is curious since it would permit a conviction, apparently, if fifty-one percent voted for sanity, even if this number was not two-thirds majority for general conviction purposes. To illustrate, on a panel of five members, two members may believe the accused to be insane. The initial vote on the required questions would be three for "yes" and two for "no." The accused would be found sane by a sixty percent majority. When the court moved on to vote on general guilt, if the same two members could vote for "not guilty" on the basis of insanity, the sixty percent majority for guilt would be insufficient to convict. If this were possible, there would be no reason to only require a simple majority on the first vote. If the members who voted "no" on the first ballot were prohibited from voting "not guilty" solely because of insanity, then they may very well have to vote "guilty" upon someone who they believe to be insane! Nevertheless, the Manual for Courts-Martial, 1921 did at least clearly state the military test as *McNaughton* modified by irresistible impulse and that the burden of proof was on the government and not, as Winthrop and Davis had stated, on the defendant.

The Manual for Courts-Martial, United States, 1928 had a much more meager treatment of insanity. It retained the same requirement that the report of the medical officer or board be in "as nontechnical language as possible'' without making the mistake of the 1921 Manual to then

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[357] *Id.* at para. 219(g).
[358] *Id.*
[359] *Id.*
[360] *Id.* In determining these questions the court considered not only the medical evidence, but all the evidence in the case.

describe it in legal insanity test language.[361] The same general approach of the 1921 Manual was also retained. This included the nonreferral of cases where the accused is insane or was insane at the time of the offense,[362] the ability of the court members to request a sanity board and to examine witneses,[363] and the power of the convening authority to

> take appropriate action where it appears from the record or otherwise that the accused may have been insane at the time of the commission of the offense, or insane at the time of his trial, regardless of whether any such question was raised at the trial or how it was determined if raised.[364]

The "separate consideration" procedure of 1921 Manual, however, was not retained. Instead, the procedure was simply stated as

> [t]he court may, in its discretion, give priority to evidence on such issue and may determine as an interlocutory question whether or not the accused was mentally responsible at the time of the commission of the alleged offense. *See* 78a (Reasonable doubt). If the court determines that the accused was not mentally responsible it will forthwith enter a finding of not guilty as to the proper specification. Such priority should be given where the evidence on the matters set forth in the specification is voluminous or expensive to obtain and has little or no bearing on the issue of mental responsibility for such matter~.~~~

Allowing the members to vote on the issue as an interlocutory question under a "reasonable doubt" standard and requiring the same number of votes as would be required generally to convict, provided an expeditious means of deciding the issue without any reduction in the accused's right to have his guilt determined with due process. This interlocutory procedure makes reference to paragraph 78*a*, Reasonable Doubt, which provides that

> [w]here a reasonable doubt exists as to the mental responsibility of an accused for an offense charged, the accused can not legally be convicted of that offense. A person is not mentally responsible for an offense unless he was at the time so far free from mental defect, disease, or derangement as to be able concerning the particular act charged both to distingush right from wrong and to adhere to the right.[366]

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[361] MCM, 1928, para. 35*c*.
[362] *Id*. at para. 30*c*.
[363] *Id*. at para, 75.
[364] *Id*. at para. 87*b*.
[365] *Id*. at para. 75*a*.
[366] *Id*. at para. 78*a*.

This military test for insanity was specifically intended to reflect the United States Supreme Court's rationale in the Davis case.[367] It was also intended to adopt the Davis requirement that the burden of proof is on the government to prove beyond a reasonable doubt that the accused had the requisite mental responsibility.[368] Thus, the McNuughton test as modified by irresistible impulse was to be the principal military test throughout the Second World War.[369]

The next major revision of the manual was in 1949. There was no change in the substantive law of insanity but it was clarified by specific manual language which provided that

> b. *Lack of* mental responsibility.—If a reasonable doubt exists as to the mental responsibility of the accused for an offense charged, the accused can not legally be convicted of that offense. A person is not mentally responsible in a criminal sense for an offense unless he was, at the time, so far free from mental defect, disease, or derangement as to be able concerning the particular act charged both to distinguish right from wrong and to adhere to the right. The phrase "mental defect, disease, or derangement" comprehends those irrational states of mind which are the result of deterioration, destruction, or malfunction of the mental, as distinguished from moral, faculties. Thus a mere defect of character, will power, or behavior, as manifested by one or more offenses or otherwise does not necessarily indicate insanity, even though it may demonstrate a diminution or impairment in ability to adhere to the right in respect to the act charged. See 78*a*, 112.[370]

The presumption of sanity and the requirement that some evidence be produced which makes the accused's insanity an essential issue before the government must prove sanity remained the same.[371] The burden of proof remained on the government and the accused was entitled to an acquittal if a reasonable doubt remained.[372] If the matter was decided adversely to the accused as an interlocutory question, the accused was not precluded from offering further evidence and rearguing the issue as part

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[367] *See* United States v. Riesenman, 13 B.R. 389, 399-401 (1942); United States v. Lichtenberger, 4 B.R. 81, 130 (1933); See *also,* United States v. Hyre, 23 B.R. 115, 126 (1943).

[368] *See* United States v. Briggs, 4 B.R. 277, 290 (1933).

[369] For the most comprehensive discussion of the military insanity test during this time see United States v. Barbera, 46 B.R. 193 (1945).

[370] Manual for Courts-Martial, United States, 1949, paragraph 110*b* [hereinafter cited as MCM, 19491.

[371] Id. at 112*a*. See United States v. Missik, 3 B.R.—J.C. 243, 24-25 (1949).

[372] MCM, 1949 at 112*a*, 111. See United States v. Dominguez, 6 B.R.—J.C. 197, 204 (1950).

of the general findings of guilt or innocence.[373] The evidence could be from expert or lay witnesses.[374] The most significant feature of the *1949* Manual was the defining of "mental defect, disease, or derangement" and the recognition that an impaired or diminished ability to adhere to the right was insufficient to acquit as the loss of ability to adhere to the right must have been total.[375]

When the manual was revised in *1951* to reflect the passage of the Uniform Code of Military Justice,[376] no substantive changes in the law of insanity were added.[377] As in the *1949* Manual, the *1951* Manual simply added some clarifying language. The paragraph on "lack of mental responsibility" was identical to the *1949* version with the following highlighted additions:

> *b. Lack of mental responsibility.—If* a reasonable doubt exists as to the mental responsibility of the accused for an offense charged, the accused cannot legally be convicted of that offense (74*a*(3)). A person is not mentally responsible in a criminal sense for an offense unless he was, at the time, so far free from mental defect, disease, or derangement as to be able concerning the particular act charged both to distinguish right from wrong and to adhere to the right. The phrase "mental defect, disease, or derangement" comprehends those irrational states of mind which are the result of deterioration, destruction, or malfunction of the mental, as distinguished from moral, faculties. *To constitute lack of mental responsibility the impairment must not only be the result of mental defect, disease, or derangement but must also completely deprive the accused of his ability to distinguish right from wrong or to adhere to the right as the act charged.* Thus a mere defect of character, will power, or behavior, as manifested by one or more offenses, *ungovernable passion,* or otherwise, does not necessarily indicate insanity, even though it may demonstrate a diminution or impairment in ability to adhere to the right in respect to the act charged. *Similarly, mental disease, as such, does not always amount to mental irresponsibility. For example, if a person commits an assault under psychotic delusion with a view to redressing or revenging some supposed injury to his reputation, he is nevertheless mentally responsible if he knew at the time*

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[373] MCM, 1949 at 112*b*.
[374] *Id.* at 112*c*. *See* United States v. Gilbert, 9 B.R.—J.C. 183, 196–97 (1950).
[375] MCM, 1949 at 110*b*. *See* United States V. Batson, 11 B.R.—J.C. 67, 81 (1951); United States v. Gilbert, 9 B.R.—J.C. at 199; United States v. Diamond, 6 B.R.—J.C. 161, 174 (1950).
[376] 10 U.S.C. §§ 801, 940 (1976).
[377] Manual for Courts-Martial, United States, 1951 [hereinafter cited as MCM, 1951].

> *that the act was contrary to law, and if he was not acting under an irresistible impulse. On the other hand, an accused is not responsible for a particular homicide if, as a result of mental disease, he had an insane delusion that another person was in the act of attempting to kill him and he thereupon killed the supposed attacker under the delusion that it was necessary to kill the deceased topreserve his own life.*[378]

The military test remained a *McNaughton* test, as modified by irresistible impulse test for about another twenty-six years. Attempts to adopt the *Durham* rule were rejected by the United States Court of Military Appeals.[379] The court did not recognize the authority of the President to fix the standard for determining sanity in trials by court-martial.[380] The test required the total inability to distinguish right from wrong and to adhere to the right. The latter requirement was often phrased in terms of the "policeman at the elbow test" which was "if the accused would not have committed the act had there been a military or civilian policeman present, [he] can not be said to have acted under an irresistible impulse."[381] Such a test for irresistible impulse was subsequently rejected by the court.[382] The language of the military test from the 1951 Manual was adopted almost verbatim in the next manual revision in 1969,[383] which reflected the impact of the Military Justice Act of 1968.[384]

C. *FREDERICK AND BEYOND*

Until 1977, the military courts had simply interpreted the law of insanity as it had been promulgated in the various manuals. The role changed dramatically in *United States v. Frederick*,[385] wherein the court determined that the standard for mental responsibility was a matter of substantive law, was outside the scope of the President's rulemaking power, and, as Congress had not developed a standard, it was for the court to do so.[386] The court noted that in *United States v. Kunak* [387] and *United States v. Smith*,[388] they had accepted the 1951 Manual test for mental responsibility not because they were required to but "after assessment of competing judicial standards and a reasoned judgment as to

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[378] *Id.* at para. 120b (emphasis added).
[379] United States v. Kunak, 5 U.S.C.M.A. 346, 17 C.M.R. 345 (1954); United States v. Smith, 5 U.S.C.M.A. 314, 17 C.M.R. 314 (1954).
[380] *Id. But* see, United States v. Frederick, 3 M.J. 230, 236 (1977).
[381] United States v. Smith, 5 U.S.C.M.A. at 340, 17 C.M.R. at 340.
[382] United States v. Jensen, 14 U.S.C.M.A. 353, 34 C.M.R. 133 (1964).
[383] Manual for Courts-Martial, United States, 1969 (Revised edition) [hereinafter cited as MCM, 1969].
[384] Pub. L. 90-632, 82 Stat. 1335 (1968).
[385] 3 M.J. 230 (C.M.A. 1977).
[386] *Id.* at 236.
[387] 5 U.S.C.M.A. 346, 17 C.M.R. 346 (1954).
[388] 5 U.S.C.M.A. 314, 17 C.M.R. 314 (1954).

its continued usefulness in light of modern developments in the field of psychiatry,"[389] the court determined it should be binding law.[390] The court further noted that they have, on prior occasions, recognized advanced psychiatric concepts, such as partial mental responsibility,[391] in advance of the manual.[392] The court relied upon the rationale of *United States v. Currens*[393] that mental responsibility was "substantive law" and rejected the manual definition of mental responsibility in favor of the A.L.I. test.[394] The court believed that "the test is more compatible with modern medical science and it tends to lessen the influence of the experts on the nonmedical components of mental responsibility:"[395] The court then addressed the two principal variations in the **A.L.I.** test which were, first to use "criminality" or "wrongfulness" in paragraph **(1)** and second, to add or delete paragraph (2). **As** to the first variation, the court rejected the *Currens* rationale that "excluded the phrase 'to appreciate the criminality of his conduct' from the test because it believed it overemphasized the cognitive aspect of mental responsibility."[396] The court believed that the phrase was not mere surplusage and the members should be instructed on both the cognitive and volitional elements of mental responsibility.[397] The court also noted that in using the phrase, the term "criminality" was preferable to "wrongfulness." Courts, such as the Ninth Circuit,[398] had used "wrongfulness" to "exclude criminal responsibility in those cases where a defendant realizes his conduct is criminal but because of a delusion, believes his action is morally justified."[399] The court, in disagreeing with the Ninth Circuit, stated its rationale as

> [i]f a defendant possesses substantial capacity to both appreciate the criminality of his conduct and to conform his conduct to the law, he should not escape criminal responsibility because his personal moral code is not violated. Contrarily, if his delusion is of such a nature that he believes his otherwise criminal act is not criminal, he will not be held responsible.[400]

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[389] 3 M.J. at 235.
[390] *Id.*
[391] United States **v.** Kunak, **5** U.S.C.M.A. 346, 17 C.M.R. 346 (1954). ***see*** *also* United Statesv. Vaughn, 23 U.S.C.M.A. 343, 344, 49 C.M.R. 747, 748 (1975).
[392] This doctrine was later incorporated as paragraph 120c, MCM, 1969.
[393] 290 F.2d 751 (3d Cir. 1961).
[394] 3 M.J. at 238.
[395] *Id.* at 237.
[396] *Id,*
[397] *Id.*
[398] Wade **v.** United States, 426 F.2d 64, 71 n.9 (9th Cir. 1970).
[399] 3 M.J. at 237.
[400] *Id.* at 238.

The court also disagreed with the Ninth Circuit's rejection of paragraph (2) of the A.L.I. test. The court considered paragraph (2) to be "necessary to insure that mental responsibility is a distinct and separate concept from criminal and antisocial conduct."[401] The court concurred with the Second Circuit's rationale in *United States v. Freeman*,[402] that

> [t]here may be instances where recidivists will not be criminally responsible in each individual case depending upon other evidence of mental disease augmenting mere recidivism with the ultimate determination dependent upon the proper application of the standards we have adopted. But, we stress, repeated criminality cannot be the ***sole*** ground for a finding of mental disorder; a contrary holding would reduce to absurdity a test designed to encourage full analysis of all psychiatric data and would exculpate those who knowingly and deliberately seek a life of crime.[403]

The A.L.I. test, as adopted by ***Frederick,*** was incorporated into the 1969 Manual as follows:

> General lack of mental responsibility. If a reasonable doubt exists as to the mental responsibility of the accused for an offense charged, the accused cannot be legally convicted of that offense (74*a*(3)). A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect the person lacks substantial capacity to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of the law. As used in this paragraph, the terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise antisocial behavior.[404]

When ***Frederick*** declared that the A.L.I. test would be the new military test to be applied retroactively to all cases pending appeal as of the date of ***Frederick,*** one of the cases which was reversed and a rehearing authorized was ***United States v. Cortes-Crespo***,[405] where there was evidence that the accused's ability to adhere to the right was significantly but not totally impaired. On rehearing, the accused was again convicted and the case came back to the United States Army Court of Military Review for mandatory appeal in ***United States v. Cortes-Crespo*** [II].[406] The case was a classic perplexing task of sorting out "esoteric medical labels

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[401] *Id.*
[402] 357 F.2d 606 (2d Cir. 1966).
[403] *Id.* at 625 (emphasis in original).
[404] Para. 120*b*, MCM, 1969 (Rev. ed.) (C.3 12 Mar 1980).
[405] CM 434897 (A.C.M.R. 22 Aug. 1977) (unpublished).
[406] 9 M.J. 717 (A.C.M.R. 1980).

and widely conflicting nosological opinions of expert witnesses." [407] Two witnesses classified the appellant's condition as residual and latent schizophrenia, a mental disease or defect which precluded the accused from either appreciating the criminality of his conduct or conforming his conduct to the requirements of law. One witness classified appellant's condition as a hysterical personality disorder, refused to use the "legal" term ('mentaldisease or defect," instead labeling it a "mental disorder" which resulted in the accused understanding what he was doing, appreciating the wrongfulness of his act, but being "significantly impaired'' from preventing himself from doing it. Two other witnesses classified appellant's condition as hysterical personality disorder which was not a mental disease or defect and did not significantly impair the accused's ability to control his actions.[408]

The court concluded that the crux of the problem was that the *A.L.I./Frederick* standard, except for excluding criminal and antisocial conduct, gave no definition of "mental disease or defect." Since the United States Court of Military Appeals had not taken the prior invitation of the United States Army Court of Military Review in United States *v.* Chapman [409] to define "mental disease or defect," the court believed that Cortes-Crespo 11presented an "opportunity and responsibility to formulate a needed definition." [410] The court used five sources to form a composite definition of "mental disease or defect."

First, the court considered that portion of the 1969 Manual definition of "mental disease or defect" which was not in conflict with the A.L.I./*Frederick* test.[411] Specifically, the court retained that portion of the test which held that "a character and behavioral disorder was not generally regarded as a mental disease or defect that would exonerate an accused from criminal responsibility." [412] Second, the court adopted the portion of the Durham rule that distinguished mental "disease" from "defect" as the former was "a condition which is considered capable of either improving or deteriorating" while the latter is "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." [413] Third, the court approved the language of McDonald *v.* United States [414] which defined ('mental disease or de-

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[407] *Id.* at 721.
[408] *Id.* at 720–21.
[409] 5 M.J. 901 (A.C.M.R. 1977)(Jones, Sr. J., concurring, Mitchell, J., concurring in part and dissenting in part).
[410] 9 M.J. at 722.
[411] MCM, 1969, para. 1206.
[412] 9 M.J. at 722.
[413] *Id.* at 723 (citing United States v. Durham, 214 F.2d at 875).
[414] 312 F.2d 847 (D.C. Cir. 1962).

fect" as including "any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls." [415] Fourth, the court looked to *United States u. Brawner* [416] wherein the District of Columbia Court of Appeals replaced the *Durham* rule with the *A.L.I.* test but substituted the *McDonald* language for paragraph (2) of the *A.L.I.* test. The court in *Cortes-Crespo II* took the portion of the proposed instruction in *Brawner* which defined "behavior controls" of the *McDonald* definition as referring "to the processes and capacity of a person to regulate and control his actions." [417] Finally, the court included paragraph (2) of the *A.L.I.* test which was approved in *Frederick.*

The proposed definition of "mental disease or defect" of *Cortes-Crespo 11* was:

> The terms "mental disease or defect" include any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls and are the result of deterioration, destruction, malfunction, or nonexistence of the mental, as distinguished from moral faculties. The term "behavior controls" refers to the processes and capacity of a person to regulate and control his conduct and his actions. A "mental disease" is distinguished from a "mental defect" in that the former condition is considered capable of either improving or deteriorating, while a "mental defect" exists when there is present a condition not capable of either improving or deteriorating and which may be congenital, or the result of injury, or the residual effect of a physical or mental disease. The terms mental disease or defect do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct. [418]

The court believed that this definition would eliminate some of the A.L.I./*Frederick* uncertainties and "further limit the phrase 'any abnormal condition of the mind' contained in the *McDonald* definition to only the most serious mental disorders that result from one of the debilitating factors listed in the Manual and included herein." [419]

The painstaking and scholarly attempt by the *Cortes-Crespo 11* court to formulate a more precise definition of "mental disease or defect" to aid the court members in applying the A.L.I./*Frederick* test was greatly nullified by the Court of Military Appeals in *United States v. Cortes-*

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[415] *Id.* at 851.
[416] 471 F.2d 969 (D.C. Cir. 1972) (on rehearing en banc).
[417] *Id.* at 1008, proposed draft instruction.
[418] 9 M.J. at 725 (footnotes omitted).
[419] *Id,*

Crespo III.[420] The court in essence reiterated the A.L.I./*Frederick* test as it has originally been stated and rejected attempts to further define the terms of the test. The court held that:

> Turning to the ALI test under Frederick, we find that we can no better define the terms "mental disease or defect" than by the use of the terms themselves. In accepting the ALI definition, we appreciated the clarity of the phrase "mental disease or defect,'' and now believe that attempts at further definition will be confusing rather than clarifying.
>
> Instructions given to a lay jury regarding the insanity defense must be clear, concise, and unambiguous. First, they should set forth that the defendant has denied criminal responsibility because of a mental disease or defect. Second, they should reflect that "mental disease or defect" does not "include an abnormality manifested only by repeated criminal or otherwise antisocial conduct." We also conclude that we can no better define "repeated criminal or otherwise antisocial conduct" than by the use of the terms themselves. Third, if the finder of fact has a reasonable doubt as to the fact of whether the defendant was suffering from a mental disease or defect at the time of the alleged commission of the offense, there should then be a finding of not guilty by reason of insanity.[421]

The court apparently felt that the proposed language of Cortes-Crespo *II* was too complex to assist the trier of facts. The current military test is thus the A.L.I./*Frederick* test as enunciated in paragraph 120b of the 1969 Manual.

An additional interesting aspect of Cortes-Crespo *III* was that it became a vehicle to question the continued vitality of the insanity defense itself. At the initial oral argument of Cortes-Crespo *III*, the court expressed concern that the granted issue which questioned:

> WHETHER THE EVIDENCE IS INSUFFICIENT AS A MATTER OF LAW TO HAVE REBUTTED APPELLANT'S CLAIM OF MENTAL IRRESPONSIBILITY

was unduly generalized.[422] The court therefore specified seven supplemental issues as follows:

> 1. Is recognition of an insanity defense in courts-martial required by the Manual for Courts-Martial, United States, 1969 (Revised edition)?

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[420] 13 M.J. 420 (C.M.A. 1982).
[421] *Id.* at 422.
[422] *Id.* at 421.

2. Is recognition of an insanity defense in courts-martial required by the Uniform Code of Military Justice?

3. Is recognition of an insanity defense in courts-martial required by the Fifth Amendment or the Eighth Amendment to the United States Constitution?

4. (a) In courts-martial may court members be required or allowed to make special findings on the issue of mental responsibility?

(b) If so, what procedural provisions are appropriate for special findings on mental responsibility and would such special findings require the consent of all parties?

5. In light of any problems created by current military practice in connection with the insanity defense and in light of the handling of the insanity defense in other systems of justice, should insanity be viewed merely as a mitigating circumstance, rather than a defense to criminal liability?

6. Is there need for further judicial definition of *"mental disease or defect"* for purposes of determining mental responsibility?

7. Did the Army Court of Military Review provide an adequate definition of "mental disease or defect" for purposes of determining mental responsibility? [423]

After generating considerable interest in the military legal community that the court might of its own accord abolish or severely modify the insanity defense, the court cautiously refrained from doing anything drastic. It stated that

> Relying on *United States v. Frederick, supra,* we hold that insanity is a defense at courts-martial as authorized by the Uniform Code of Military Justice and the Manual for Courts-Martial, United States, 1969 (Revised edition). Article 51(b) and (c), UCMJ, 10 U.S.C. § 851(b) and (c); paras. 120–124, Manual, *supra; see also* Mil. R. Evid. 302; *Rostker v. Goldberg,* 448 U.S. 1306, 101 S.Ct. 1, 65 L.Ed.2d 1098 (1980).
>
> We further hold that if insanity is to be other than a full defense to an alleged offense, the obligation for change lies not with this Court but with the Congress of the United States. *See* U.S. Const. art. I, § 8, cl. 14.[424]

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[423] *Id.*

[424] *Id.* The court further noted in footnotes that

> 1. The legislative history likewise supports insanity as a complete defense at courts-martial. ***See*** Hearings on H.R. 2498 Before a Subcommittee of the House

The court, in a remarkable exercise, questioned whether there is anything inherent in our system of criminal jurisprudence which mandates an insanity defense. Having dropped one shoe, it now awaits to see if Congress will drop the other.

V. ALTERNATIVES

A. BIFURCATED TRIAL

The first alternative procedure to the present military system which this article will discuss is the bifurcated trial. This is a different bifurcation than that of guilt/innocence from punishment stages which the military has had for many years and which is now required in capital cases in the civilian community. It is a bifurcation of the insanity issue from all other issues in the case. It involves two separate segments of a single trial before either the same or different juries with the insanity issue being tried either in the first or second segment of the trial. Such a system has been in existence in California since **1927** and six other state jurisdictions have had a form of bifurcation since then. With the exception of Colorado, all of the bifurcation systems try the general issue of guilt or innocence at the first stage where a presumption of sanity is irrebuttable. No evidence of legal insanity is admissible at this stage. If the defendant is "conditionally" found guilty at this first stage, the same or a different jury will hear the second stage where the only issue is insanity and all legally relevant evidence is admissible.

The traditional justifications for such a system are varied. It is believed that such a separation presents a clear-cut delineation of the issues thus preventing jury confusion. The jury need only focus on the actual commission of the physical acts in one stage and mental responsibility in the other. This in turn will promote a truer understanding of the issues. It minimizes the confusion which is inherent in joining defenses such as alibi and insanity.[425] It prevents evidence relating to insanity from contaminating the guilt or innocence determination and eliminates appeals to the jury's sympathy. It helps to prevent compromise verdicts.

Committee on Armed Services, 81st Cong., 1st Sess. Index and Legislative History, Uniform Code of Military Justice, p. 1080(1949).

2. Recent cases have focused attention on and stimulated renewed interest in existing proposals to change or modify the insanity defense. ***See*** Department of Justice, Attorney General's Task Force on Violent Crime, *Final* ***Report 54*** (August 17,1981); **see** *also* S. 818,127 Cong. Rec. 52809 (March 26,1981). We would hope that any statutory changes which might be forthcoming would be specifically applicable to the military justice system.

[425] As one commentator noted

> Evidence of insanity is usually of a highly prejudicial nature. It involves a presentation of the defendant's entire life history, social environment, and emotional and psychological experiences with special emphasis on his past anti-social and

This highly emotional evidence may improperly influence the verdict in two ways. First, a jury impressed by the accused's "illness" may sympathetically resolve issues in his favor in spite of the factual predicate. Second, a jury, impressed by the accused's "dangerousness" may not fully respect the accused's right to have the state prove his guilt beyond a reasonable doubt and find him "not guilty by reason of insanity" to assure his commitment when they otherwise would have acquitted him.[426] A bifurcated procedure can save time if the accused is either acquitted at the first stage or alternatively if the accused waives the first stage and only contests the second stage. The latter would be the likely result in most cases where insanity is the only real issue litigated by the defense. Also, although it was probably not originally intended to provide this benefit, it may protect the accused's right against self-incrimination where he wishes to testify on the insanity issue but not on the actual commission of the act issue. Any admissions that the defendant made as part of a compulsory sanity inquiry would not be admissible at the first stage of trial. It would also reduce the number of cautionary instructions on the proper use of certain evidence which may be relevant to the insanity issue but inadmissible against the substantive guilt issue.[427] The state legislatures in enacting bifurcated procedures were attempting to balance society's right to judicial economy, lack of redundancy and a fair, unemotional hearing on guilt or innocence with the defendant's right to a fair hearing on his insanity defense.[428]

The inherent problem with a bifurcated system is the legal and logical inseparability of guilt and intent. When the system attempts to exclude evidence of insanity from that portion of the trial which deals with state of mind for intent purposes, it encounters significant due process prob

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criminal behavior. Thus the evidence necessary for a successful plea tends to be fatally prejudicial to all other defenses based upon a different and contradictory view of the defendant.

Comment, ***Due Process and Bifurcated Trial: A Double-Edged Sword,*** 66 N.W.U.L. Rev. 327,329-30 (1966).

[426] ***See*** Holmes v. United States, 363 F.2d 281,282 (D.C. Cir. 1966):

> Evidence that the defendant has a dangerous mental illness invites the jury to resolve doubts concerning commission of the act by finding him not guilty by reason of insanity, instead of acquitting him, so as to assure his confinement in a mental hospital.

See genemlly Note, ***The Bifurcated Trial Procedure and First Degree Murder,*** 3 Suffolk U.L. Rev. 628 (1969).

[427] ***See*** Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) "[T]he naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction."

[428] ***See generally*** Dix, ***Mental Illness, Criminal Intent and the Bifurcated Trial,*** 1970 Law & Social Order 559; Louisell & Hazard, ***Insanity*** as ***a Defense: The Bifurcated Trial,*** 49 Calif. L. Rev. 805 (1961); Schmidt, ***Is Bifurcation in the Insanity Defense Salvageable?*** 6 Nat. J. Crim. Def. 185 (1980).

lems.[429] The difficulty is that the government is entitled to an irrebuttable presumption of sanity, and thus intent, at the first stage and this adversely affects the accused's right to a fair trial.[430] Whether or not a system recognizes such a difficulty is inextricably tied to the relation between a person's mental condition and his criminal responsibility. If one feels that an insane person is incapable of having the requisite state of mind for criminality, then insanity is completely inseparable from the ascertainment of guilt.[431] If on the other hand one believes that insanity is in the nature of confession and avoidance, then there is no inconsistency in determining that the accused fully intended the results of his act but society has decided that he will not be held responsible for his act. In the latter situation, the insanity defense does not involve a determination of guilt.[432] The most traditional view of insanity is, however, the belief that crime involves the act and the intent and that insanity is incompatible with intent.

The problem with a bifurcated system is enhanced when a criminal justice system recognizes that certain mental conditions not amounting to insanity may still negate specific intent and reduce the degree of offenses. The problem then becomes to decide whether and in what circumstances the accused may adduce evidence of a mental condition not amounting to insanity during the stage of trial which is concerned with guilt. It may as a practical matter be impossible to separate evidence of "mental disease or defect" from evidence of "diminished capacity." The dilemma is acutely obvious in the California system as illustrated by *People v. Wills*,[433] which held that proof of insanity was inadmissible at the guilt stage, insanity is that condition of the mind as defined in *McNaughton*, any mental condition that is not within the *McNaughton* definition is not insanity, and, if this type of mental condition could result in no requisite state of mind, it was admissible at the guilt stage. The analytically unsound result was that evidence of partial mental responsibility was admissible to negate intent but total mental irresponsibility was not. This anomolous rule was stated:

> As a general rule, on the not guilty plea, evidence otherwise competent, tending to show that the defendant, who at this stage is conclusively presumed sane, either *did* or *did not*, in

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[429] *See* State *ex rel* Boyd v. Green, 335 So. 2d 789,792 (Fla. 1978).

[430] See State v. Shaw, 106 Ariz. 103,471 P.2d 715 (1970).

[431] See Louisell & Hazard, *supra* note 428, at 809. "If it is impossible to separate intent and insanity in any meaningful medical way it would be manifestly impossible to separate them in any meaningful legal way." *See also* People v. Troche, 273 P. 767,774 (Cal. 1928) (Preston, J., dissenting): "These provisions . . . undertake to subdivide an individual integer and therein lies their chief infirmity."

[432] *See* Schmidt, *supra* note 428, at 190 (citing Gallivan, *Insanity, Bifurcation and Due Process: Can Values Survive Doctrine?* 13 Land & Water L. Rev. 515,521 (1978)).

[433] 33 Cal. 2d 330,202 P.2d 53 (1949).

> committing the overt act, possess the specific essential mental state, is admissible, but evidence tending to show legal sanity or legal insanity is not admissible. Thus, if the proffered evidence tends to show not merely that he *did* or *did not*, but rather than because of legal insanity he *could* not, entertain the specific intent or other essential mental state, then that evidence is inadmissible under the not guilty plea and is admissible only on the trial on the plea of not guilty by reason of insanity.[434]

Justice Carter, in his dissent, pointed out the absurdity of such a result as it violated "the fundamental principle that 'the greater contains the less.'" [435] Proof that something *could* not exist is the best possible evidence that it *did* not exist. Stated in an evidentiary vein, any proof tending to show that a certain mental condition could not exist is relevant and should be admissible to show that it did not exist. As Justice Carter further noted, "[i]t is strange reasoning to say that you may prove a partial mental quirk or disability to refute the presence of intent but cannot give evidence of total mental aberration." [436] It is not hard to imagine the juggling of terms by expert witnesses to squeeze evidence of insanity into the guilt stage. Trying the insanity issue first where all evidence of the accused's mental condition would be admissible does not solve the evidentiary problem. If sanity is proved at the first stage and evidence of mental condition affecting intent is admissible at the guilt stage then the purpose of bifurcation is defeated and if the evidence is not admissible then the finding of sanity would create a presumption of intent. Since there is no way to deny full evidentiary significance to mental conditions affecting the state of mind and requisite intent, the same evidence is relevant at both stages of trial and the bifurcation procedure is emasculated through redundancy.

To avoid the due process problem created by the rationale of *Morrissette u. United States* [437] that, "where intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury," [438] state jurisdictions have either abolished bifurcation, modified the procedures or redefined insanity and its relation to guilt. Arizona, in *State u. Shaw*, [439] found the procedures and restrictions as absolute and struck down the bifurcation statute [440] for frustrating significant, if not constitutionally protected, interests. The *Shaw*

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[434] *Id.* at 350-51, 202 P.2d at 66.
[435] *Id.* at 360, 202 P.2d at 71.
[436] *Id.* at 360, 202 P.2d at 72.
[437] 342 U.S. 246 (1952).
[438] *Id.* at 274.
[439] 471 P.2d 715 (Ariz. 1970).
[440] Ariz. Rev. Stat. § 13-1621.01 (1968).

court held that the accused was denied a due process right to disprove an essential element of his robbery offense since at the first stage he was found guilty without any showing of intent. This created a presumption of intent which became irrebutable at the second stage since only insanity and not intent was at issue.[441] California in ***People*** v. ***Gorshen***[442] and ***People*** *v. Conley*[443] recognized the significant problems caused by diminished capacity and evidence of intent on the bifurcated statute.[444] Nevertheless, California maintained the skeleton of bifurcation by engrafting upon it a complex set of evidentiary rules which have significantly frustrated the purposes of bifurcation.[445] Wisconsin has preserved its bifurcation system by redefining insanity and its relation to guilt so as to avoid the principal constitutional difficulty.[446] Bifurcation was destined for problems because it formulated procedural choices without any conscious deliberation as to their effects upon the substantive issues.

In addition to contending with the due process infirmities, jurisdictions with a bifurcated system must attempt to resolve a conflict between a number of other competing values. The system must determine who has the burden of proof during the insanity stage of the trial and what that burden will be. While the government must under ***In re Winship***[447] prove all the elements of the offense, one must determine if sanity is an element. For federal and military cases, the burden of proof on insanity is upon the government beyond a reasonable doubt.[448] Yet, under ***Leland*** v. *Oregon*,[449] the states can even require the defendant to prove his insanity beyond a reasonable doubt. If the defendant were, for example, required to prove his insanity by a preponderance of the evidence at the second stage and the government proved specific intent beyond a reasonable doubt at the first stage, the defendant's chances of convincing the jury that he was insane at the second stage are slim. The

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[441] *See generally* Note, ***Bifurcated Criminal Trial Procedure, Where First*** *Trial* ***is*** *on* ***Guilt or Innocence and Second Trial is*** *on* ***Defense of Legal Insanity, is Held*** *Violative* ***of Due*** Process—State v. Shaw, 106 **Ariz.** 103, 471 P.2d 715 (1970), 22 Syracuse L. Rev. S823 (1971).

[442] 51 Cal. 2d 716, 336 P.2d 492 (1959).

[443] 64 Cal. 2d 310, 411 P.2d 911 (1966).

[444] Cal. Penal Code § 1026 (West's Ann. 1970).

[445] *See* Comment, ***The Gradual Decay of the Bifurcated Trial System in California and the Emergence of "Partial Insanity,"*** 13 Cal. W. L. Rev. 149 (1967).

[446] ***See generally*** Curl v. State, 40 Wis. 2d 474, 162 N.W.2d 77 (1968); State ***ex rel*** La Follette v. Raskin, 34 Wis. 2d 607, 150 N.W.2d 318 (1967): In Wisconsin, insanity is an excuse from the imposition of responsibility and is not related to the accused's incapacity to commit crime. Wis. Stat. § 971.175 (1970). Wisconsin has the emerging problem, however, which is created by the recognition of diminished capacity. ***See*** Hughes v. State, 68 Wis. 2d 159, 227 N.W.2d 911 (1975). ***See generally*** Note, ***First Degree Murder—Evidence of Diminished Capacity to Show Lack of Intent,*** 1976 Wis. L. Rev. 623.

[447] 397 U.S. 358 (1978).

[448] Davis **v.** United States, 160 U.S. 469 (1895).

[449] 343 U.S. 790 (1952).

bifurcated systems must also contend with the self-incrimination and doctor-patient privileges problems engendered by compulsory exams. Also the state interest in protecting society from the criminally insane could be frustrated if the defendant on the basis of his mental condition is acquitted at the first stage. Since the question of his insanity would then not be reached, the commitment proceedings following an acquittal by reason of insanity would not be invoked and the government would have to rely upon civil commitment proceedings.

A very practical problem is whether a single or multiple juries will be needed. It may be necessary to empanel a second jury to hear the second stage of the trial to eliminate the prejudicial effect of the first determination which was adverse to the accused. Ordinarily, this is left to judicial discretion as the judge is in the best position to evaluate the prejudicial impact of the first stage on the second stage. The jury's knowledge of the accused's unsuccessful plea at the first stage will clearly weigh in their determination on his credibility at the second stage. As Justice Holland, in his dissent in *Leick v. People*,[450] noted:

> [i]t is bad enough to have two separate trials before one and the same jury. If the jury first found that the defendant is sane, such finding, according to human nature, would have much to do with the question of guilt or innocence of the crime charged in a juror's mind.[451]

If the insanity issue is tried first, it virtually requires that a second jury be empanelled. If guilt is tried first, there is no real justification for having a second jury. It would be unduly repetitious if everything of relevance from the first stage were repeated and manifestly unfair to the defendant if relevant evidence were not allowed to be repeated. Another problem with trying guilt first is the possibility of a jury deadlock on the insanity issue. One response has been to let the guilty finding stand and just empanel a second jury for the insanity issue. The second jury of the second stage would presumably rely upon a stipulated record of the first stage without the benefit of personal observation. This was the situation in *People v. Farolan*,[452] where the defendant was found guilty at the guilt stage of first degree murder without a recommendation for clemency. The jury then deadlocked on the insanity issue and a mistrial as to the second stage was granted. A second jury was empanelled and they only retried the second stage and the defendant was found sane. If the bifurcated trial is a single trial, it is a logical infirmity to salvage one "part" of

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[450] 322 P.2d 674 (Colo. 1958).
[451] *Id.* at 688 (Holland, J., dissenting).
[452] 214 Cal. 396, 5 P.2d 893 **(1932).**

it in a mistrial and only retry the second "part." There is also considerable double jeopardy concerns in the use of multiple juries.[453]

Closely connected with the multiple jury question, is the determination of sequence of issues. Only Colorado tries insanity first; the advantages are that no artificial presumption of sanity need be utilized during the guilt stage, the evidence of lesser mental abnormalities does not have to be separated from evidence of insanity, and the finding on the sanity issue may eliminate the second stage if the accused is found insane or if found sane that may have been his only defense and he may plead guilty. The disadvantages of trying insanity first is that it virtually requires a second jury to overcome the prejudicial effect of the first stage and multiple juries are expensive, repetitious, and unworkable in many small jurisdictions. If a bifurcation system is to be used, both sequences could eliminate a second stage and minimize duplication but only the guilt stage first will permit the same jury without a prejudicial effect.

The incompleteness and inappropriateness of the solutions to the bifurcation system must be confronted before any attempt to adopt it should be made. In Louisiana[454] and Texas,[455] the bifurcated systems were repealed by the legislature and, in Arizona[456] and Wyoming,[457] the courts found it violative of due process. California has such a weakened theory that the bifurcated system no longer serves its primary pur-

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[453] *See* Comment, *Criminal Law: Plea of Not Guilty By Reason of Insanity; California Penal Code §§ 1016, 1026, 1027*, 19 Calif. L. Rev. 177 (1931).

[454] *See* Bennett, *The Insanity Defense—A Perplexing Problem of Criminal Justice,* 16 La. L. Rev. 484 (1956); Bennett, *Louisiana Criminal Procedure—A Critical Appraisal,* 14 La. L. Rev. 11 (1953). The Louisiana legislature was one of the first to adopt a bifurcated system as part of its Code revisions in 1928. Their system required a special plea of "not guilty by reason of insanity," the insanity stage was tried first and at the second stage there was a new jury and no evidence of insanity. The legislature repealed it just four years later in 1932. Their system then still required a special plea of "not guilty by reason of insanity" and all defenses could be entered. Under a general plea of "not guilty" no evidence of insanity could be entered.

[455] *See* Tex. Code Crim. P., art. 46.02 (Supp V 1970) (formerly ch. 722, art. 46.02 [1965], Texas Acts, 59th Leg. 532). Prior to the repeal, Texas had a strange procedure. With the consent of the prosecution and the approval of the presiding judge, the insanity issue could be tried first. Fuller v. State, 423 S.W.2d 924 (Tex. Ct. App. 1968). If the defendant contested capacity at the time of trial, he had a separate trial to determine that issue. If he also contested the mental responsibility at the time of the offense, the same jury would try that issue. If he was found sane at both times, he could still raise the mental responsibility at the time of the offense in the second stage of the trial! *See* Penna v. State, 320 S.W.2d 355 (Tex. Ct. 1959). *See also* Townsend v State, 427 S.W.2d 55 (Tex. Crim. App. 1968). It was the duplication and lack of orderly judicial administration raised by the system which resulted in its repeal. Now in Texas, insanity is an affirmative defense on the merits with no separate trial. *See* Cross v. State, 446 S.W.2d 314, 315 (Tex. Crim. App. 1969).

[456] *See* State v. Shaw, 106 Ariz. 103, 471 P.2d 715 (1970).

[457] *See* Sanchez v. State, 567 P.2d 270 (Wyo. 1977).

poses [458] and Colorado encountered continual problems with the system.[459] The military has long had a bifurcated trial of guilt and punishment but such is not constitutionally mandated nor suspect.[460] It would, however, be unwise to further bifurcate the trial on the merits when the insanity defense is raised. Such a system is inherently cumbersome and unwieldy, results in unnecessary duplication, is overly expensive as it will draw out the length of trial and the number of personnel to be tied up, and there is a significant risk of prejudice to the defendant. So long as the military recognizes diminished capacity, and it should continue to do so, a bifurcated system will be inherently repetitive, as evidenced by the California experience. When the guilt issue is tried first, there is the due process conflict between the conclusive presumption of sanity during the first stage and the presumption of innocence. Finally, any system which relegates all evidence of mental illness regarding intent to the insanity stage, will deprive the accused of his right to disprove an essential element of the offenses since by then the degree of the offense has already been set by the initial "conviction."

B. GUILTY BUT MENTALLY ILL

In 1975, Michigan became the first state to adopt a "guilty but mentally ill" verdict, which did not replace the 'hot guilty by reason of insanity" verdict, but was an adjunct to it.[461] The impetus to the Michigan legislature was *People v. McQuillan* [462] which dealt with the automatic commitment procedures for persons found "not guilty by reason of insanity." Prior to 1974, Michigan law required the automatic commitment of such persons.[463] This was believed to be a valid exercise of state police powers to protect the public from the criminally insane. However, there was a growing concern by some that these automatic commitment procedures were based upon an invalid presumption that because a person was insane at the time of an offense, that he continued to be insane and dangerous.[464] The *parens patriae* justification for automatic commit-

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[458] ***See*** Governor's Special Commission on Insanity and Criminal Offenders, First Report 30 (1962); Governor's Special Crime Study Commission Report on Criminal Law and Offenders 117 (1949).

[459] Colorado passed a statute identical to California's statute in 1927. It was upheld in Ingles v. People, 92 Colo. 518, 22 P.2d 1109 (1933). Up until the statute was revised in 1955, "every case presented to [the Colorado Supreme] Court . . . involving procedures under this statute since its adoption, has been reversed for one reason or another." Leick v. People, 131 Colo. at 361, 281 P.2d at 810.

[460] See Spencer v. Texas, 385 U.S. 554, 568 (1967) (dealing with an habitual offender statute).

[461] Mich. Comp. Laws Ann. § 768.36 (West Supp. 1977).

[462] 392 Mich. 511, 211 N.W.2d 569 (1974).

[463] Mich. Comp. Laws Ann. § 767.27(b) (1968) (repealed 1974).

[464] See Comment, The Rights to the Person Acquitted by Reason of Insanity: *Equal* Protection and Due Process, 24 Me. L. Rev. 135 (1972).

ment could not stand up to this due process logic. The *McQuillan* court agreed and declared that the commitment for insanity was unconstitutional if for longer than a short examination period to determine present insanity. The court further gave this a retroactive effect and required that all prior automatic commitments be reviewed. By March 24, 1975, less than a year after *McQuillan*, sixty-four inmates had been released from state hospitals pursuant to civil review prompted by *McQuillan*. One of these released acquittees, John Bernard McGee, murdered his wife after his release [465] and another acquittee, Ronald E. Marlin, raped two Detroit women.[466] The public outrage was predictable. The Michigan legislators shared the fears of their constituents that dangerous criminals were being released.[467] While automatic commitment procedures had always given society immediate maximum protection against such releases,[468] the inconsistency is logically obvious when one considers that this restraint follows an acquittal not a conviction. The acquittal may have been based upon a reasonable doubt as to his sanity at the time of the offense and a quantum leap in reasoning is necessary to conclude that this means he is presently insane. Any presumption of continuing insanity overlooks the fact that he was apparently sane enough to defend himself at trial.

The Michigan legislators resisted the popular call for abolition of the insanity defense which seems to follow all notorious insanity defense problems.[469] This would eliminate the special plea of "not guilty by reason of insanity'' and let the defense rely upon general principles of criminal law, such as *mens rea* or specific intent.[470] Instead, the legislators recognized that sanity is not an absolute fixed state but is a degree on a continuum with insanity. There are many grey areas between absolute sanity and absolute insanity. As one commentator noted "[i]t is now accepted that there is a borderland between sanity and insanity, where

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[465] Diebolt & Mitchell, *Killer, Freed as Sane, Held in Wife's Slaying,* Det. Free Press, Apr. 15, 1975, § A, at 1, cols. 3-4.

[466] Mitchell, *New Mental Health Code Has Court System In A Turmoil,* Det. Free Press, Mar. 24, 1975, § A, at 2, col. 1.

[467] Mich. House. Leg. Analysis Section, Third Analysis of Mich. H.B. 4363, 78th Leg. (July 15, 1975).

[468] *See* Comment, *Civil Commitment of the Mentally Ill,* 87 Harv. L. Rev. 1190 (1974); Comment, *Compulsory Commitment Following a Successful Insanity Defense,* 56 N.W.U.L. Rev. 409 (1961); Comment, *Commitment Following Acquittal By Reason of Insanity and the Equal Protection of the Laws,* 116 U. Pa. L. Rev. 924 (1968).

[469] *See* Morris, *Psychiatry and the Dangerous Criminal,* 41 S. Cal. L. Rev. 514, 518-19 (1968). Indeed some commentators even call for the abolision of the concept of insanity. *See* T. Szasz, Law, Liberty and Psychiatry 123-37 (1963). Both of these concerns are due to the lack of societal consensus on definitions of mental illness and its relationship to criminal behavior. *See* A. Brooks, Law, Psychiatry and the Mental Health System 21-88 (1974).

[470] *See* H. Hart, Punishment and Responsibility 205 (3d ed. 1973). Evidence of mental illness would be limited to influencing the disposition of the convicted offenders.

one shades off into the other, which is inhabited by some seriously disturbed personalities."[471]

The "guilty but mentally ill" response of the Michigan legislatures was a compromise which attempted to match degrees of criminal responsibility with degrees of mental abnormality.[472] An informal "guilty but mentally ill" probably exists in most criminal justice systems where the jury is concerned with the defendant's mental illness, but not enough to acquit him, so they convict him and in sentencing him they recommend medical treatment. The Michigan approach was much more direct,[473] and allows the jury to openly assign guilt and also indicate its belief in the value of mental health treatment for the defendant.

The Michigan procedures were simple and met all of the concerns of the *McQuillan* court. The finding of "not guilty by reason of insanity" was retained.[474] A person so acquitted was committed for sixty days for evaluation and then there was a judicial hearing to commit or release him.[475] The test for legal insanity was if "as a result of mental illness [as statutorily defined], or as a result of mental retardation [§ 330.1500(g) (1975)] that person lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law."[476] This is essentially the same as the A.L.I. test. Mental illness for purposes of the insanity test and the "guilty but mentally ill" finding was defined as a "substantial disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life."[477] The distinction between being "insane" and just "mentally ill" is the additional element in the former that he "lack substantial capacity." The defendant who wished to plead insanity or mental illness had to comply with procedural timetables. The court ordered him to submit to a psychiatric exam by the staff of the Center for Forensic Psychiatry. The defendant could also seek an independent examination. A failure to cooperate with the psychiatric examination could result in a denial to raise the defense.[478] The report on the clinical findings would address insanity and mental illness.

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[471] Williams, *The Act and The Criminal Law, in Symposium, The Mental Health Act, 1959*, 23 Mod. L. Rev. 410, 415 (1960).

[472] *See* Comment, *Gmdwted Responsibility as an Alternative to Current Tests* of *Determining Criminal Capacity*, 25 Me. L. Rev 343 (1973).

[473] The "guilty but mentally ill" approach should not be confused with the "guilty but insane" verdict in England which results in an acquittal. *See* R. Perkins, Criminal Law 886 (2d ed. 1969).

[474] Mich. Comp. Laws Ann. § 768.29a(2) (West Supp. 1977).

[475] *Id.* at § 330.2050.

[476] *Id.* at § 768.21a.

[477] *Id.* at § 330.1400a.

[478] *Id.* at § 768.20a(4).

Four possible verdicts could result: guilty, not guilty, not guilty by reason of insanity, and, guilty but mentally ill.

The dispositional result is, however, dramatically different since the "mentally ill" defendant has been convicted while the "insane" defendant has been acquitted. The convicted "mentally ill" defendant receives a sentence. If that sentence includes confinement, then the Department of Corrections gains custody of the defendant, who is further evaluated and given such medical treatment as is psychiatrically indicated.[479] If psychiatric treatment is necessary, the Department of Corrections can give it or turn the defendant over to the Department of Mental Health to render it. If the defendant is discharged from the mental health facility, he is returned to the Department of Corrections to serve the remainder of his sentence. Also, if the mentally ill defendant is placed on probation, the sentencing judge can make psychiatric treatment a condition of such probation; such probation shall be for five years; if shortened, it needs receipt and consideration of a forensic psychiatric report by the sentencing court.[480] The overall result was that the "guilty but mentally ill" result was similar to the "guilty" result, that is it controls disposition but it additionally insures treatment.

The "guilty but mentally ill" approach has been challenged on equal protection, due process and cruel and unusual punishment grounds and criticized for potential jury abuses. The general equal protection argument is that classification of defendants found to have committed criminal acts while mentally ill is an arbitrary classification and violates equal protection. Since there is no suspect class involved and there is no intrusion on any fundamental rights, the classification would not violate the equal protection clause if it "bears some rationale relationship to legitimate state purposes."[481] The Michigan Supreme Court, in ***People v. McLeod***,[482] found that the Michigan classification did "rationally further the object of the legislation."[483] The legitimate state purpose was to provide an alternate verdict providing for the disposition of criminals. Since both classes of criminals had been found guilty of a felony, neither had a right to personal freedom, and thus the classification met the reasonable relation test. The equal protection argument that mentally ill defendants are in the same position as insane defendants and thus it is irrational to treat them differently, was rejected by the court in ***People v.***

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[479] *Id.* at § 768.36(3).

[480] *Id.* at § 768.36(4). This provision has withstood an equal protection challenge that "guilty but mentally ill" convicted defendants were treated differently from general "guilty" convicted defendants. Since they were not similarly situated they may be treated differently. People v. McLeod, 77 Mich. App. 327, 258 N.W.2d 914 (1977).

[481] San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 40 (1973).

[482] 407 Mich. 632, 288 N.W.2d 909 (1980).

[483] *Id.* at 663, 288 N.W.2d at 919.

Sorra.[484] The argument that subjecting a defendant who pleads insanity to the "guilty but mentally ill" verdict without so subjecting the defendant who does not plead insanity, discriminates on the basis of the insanity defense was rejected in ***People v. Darwall***.[485] The argument that since a "guilty but mentally ill" defendant is sent to prison the same as a "guilty" defendant and the latter cannot be subjected to involuntary treatment without a hearing, it is violative of equal protection to so subject the former, was rejected in ***People v. Shurif***.[486] The argument that persons found "guilty but mentally ill" are in the same position as mentally ill persons not found guilty of an offense and should be treated similarly, is obviously flawed since they are not similarly situated and there are relevant differences since one was convicted of a crime and one was not.[487] The "guilty but mentally ill" verdict has withstood every equal protection argument because the

> purpose of the verdict is to impose criminal responsibility upon those who commit criminal acts with criminal intent while insuring that those who have been found mentally ill at the time of their offense receive treatment if an examination indicates treatment is needed."[488]

The "guilty but mentally ill" verdict has also been attacked on due process grounds. One such attack is grounded on the "guilty but mentally ill" defendant being subjected to involuntary psychiatric treatment if the required examination which he undergoes indicates that such treatment is necessary. Such a defendant alleges that he receives no procedural due process hearing prior to being forced to accept this treatment which entails a distinctive stigma and results in a grievous loss. The argument is based on *Vitek v. Jones*,[489] which found that the transfer of a correctional system prisoner to a mental health institution constituted a "grievous loss" and this required a due process hearing to determine the need for the commitment.[490] This hearing did not have to be before a judicial officer. The Court noted that a valid criminal conviction extinguishes a defendant's liberty interest and the state can confine him and "[i]t is also true that changes in the conditions of confinement having a substantial adverse impact on the prisoner are not alone sufficient

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[484] *88* Mich. App. 351,360,276N.W.2d 892, 896 (1979).

[485] 82 Mich. App. 652,267N.W.2d 472 (1978). *See also* People v. Jackson, 80 Mich. App. 244,263N.W.2d 44 (1977).

[486] 87 Mich. App. 196,274N.W.2d 17 (1978).

[487] *See* Comment, *Guilty but Mentally Ill: An Historical and Constitutional Analysis*, 53 J. Urb. L. 471 (1976).

[488] Note, *Criminal Responsibility: Changes in the Insanity Defense and the "Guilty But Mentally Ill" Response*, 21 Washburn L.J. 515 (1982).

[489] 445 US .480 (1980).

[490] *Id*. at 493.

to invoke the protection of the Due Process Clause '[a]s long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed on him.' Montanye v. Haymes, 427 U.S. [236] at 242 [1976]." [491] The Court rejected the state's argument that commitment to a mental hospital was "within the range of confinement justified by imposition of a prison sentence." [492] The Court held that commitment was qualitatively different and "that involuntary commitment to a mental hospital is not within the range of conditions of confinement to which a prison sentence subjects an individual." [493] The state could not classify the prisoner as mentally ill and subject him to involuntary psychiatric treatment without affording him additional due process protections of at least notice and a hearing.[494]

The "guilty but mentally ill" defendants are not similarly situated to prisoners in general. They have already had a judicial determination beyond a reasonable doubt that they were mentally ill. They are therefore not being arbitrarily classified as mentally ill without due process protections. Also, the possibility of their commitment to a mental health institution is clearly within the range of conditions of their confinement, unlike the general guilty defendant. Finally, the combination of the prior judicial determination and the required examination to determine present need for treatment, is sufficiently reasonable and rational and not arbitrary and capricious and thus not violative of due process. This same rationale distinguishes "guilty but mentally ill" defendants from "not guilty by reasons of insanity" defendants who have a right to a hearing for present insanity prior to commitment since to do otherwise would be an unconstitutional deprivation of liberty for a "not guilty" person.[495] As the court in *McLeod* noted:

> [g]uilty but mentally ill defendants are in a wholly different position than defendants found not guilty by reason of insanity. The former have been found beyond a reasonable doubt to have been (1) guilty of an offense (2) mentally ill at the time of the offense, and (3) not legally insane at the time of the offense.
>
> They no longer have a right to unfettered liberty. They have been convicted of a crime.[496]

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[491] *Id.*
[492] *Id.*
[493] *Id.* ***See also*** Jackson v. Indiana, 406 U.S. 715, 724-25 (1972); Specht v. Patterson, 386 U.S. 605 (1967); Baxstrom v. Herold, 383 U.S. 107 (1966).
[494] The Court recognized that in appropriate circumstances the prisoner's right to call witnesses and cross-examine witnesses may be limited. The independent decision maker could come from within the hospital or prison administration. Four Justices also believed that an attorney was required to represent indigent prisoners.
[495] ***See*** Bolton v. Harris, 395 F.2d 642 (D.C. Cir. 1968).
[496] 407 Mich. at 659, 288 N.W.2d at 917.

However, the reverse situation, that is a transfer from a mental health institution to a prison which would result in the termination of the right to treatment or in incarceration without adequate treatment, should require additional due process safeguards.[497] With the exception of this "reverse transfer" situation, all due process attacks on the Michigan statute have been rejected by the courts.[498]

The Michigan statute has also been attacked as cruel and unusual punishment. The argument contends that a "guilty but mentally ill" defendant is forced to accept psychiatric treatment without an adequate prior hearing to determine present insanity. As in the due process challenge, the combination of prior determination and required examination provide a sufficient basis to overcome a cruel and unusual punishment argument.[499] The reverse situation, that is the prisoner was being denied adequate psychiatric treatment in confinement, would violate the constitutional protection against cruel and unusual punishment.[500] This gave rise to an argument that the treatment in the Michigan prison was not as comprehensive as that rendered in the mental health institution and it was thus inadequate.[501] The court held that the noncompliance by the Department of Corrections of the treatment requirement would not render an otherwise constitutional statute unconstitutional. The proper remedy would be a writ of mandamus to compel the adequate treatment.[502]

While the constitutional attacks have not gained judicial acceptance, some practical jury related problems have caused some concern. These are primarily the possibility of encouraging compromise verdicts and jury confusion. The compromise verdict is potentially created by giving the jury an option of "not guilty by reason of insanity" and "guilty but mentally ill." The legislature did not want to risk the possible constitutional defect of an outright abolition of the insanity defense,[503] so it retained the "not guilty by reason of insanity" verdict. There is speculation that the jury may ignore substantial evidence that the requisite ***mens rea*** does not exist because they find the insanity defense distasteful and

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[497] ***See*** Donaldson **v.** O'Connor, 422 U.S. 563 (1975); Miller **v.** Vitek, 437 F. Supp. 569 (D. Neb. 1977). ***See generally*** Addington **v.** Texas, 441 U.S. 418 (1979).

[498] *See, e.g.*, People **v.** Giuchici, 118 Mich. App. 252, 324 N.W.2d 593 (1982); People **v.** Rone, 3109 Mich. App. 720, 311 N.W. 2d 835 (1981); People **v.** Long, 86 Mich. App. 244, 263 N.W.2d 44 (1977).

[499] ***See*** People **v.** Willsie, 96 Mich. App. 350, 292 N.W.2d 145 (1980).

[500] ***See*** Estelle **v.** Gamble, 429 U.S. 97, 104 (1976). ***See also*** Martarella **v.** Kelley, 349 F. Supp. 575 (S.D.N.Y. 1972).

[501] People **v.** McLeod, 407 Mich. 632, 288 N.W.2d 909 (1980).

[502] *Id.* at 652-55, 288 N.W.2d at 914-15.

[503] ***See*** Sinclair **v.** State, 161 Miss. 142, 132 So. 581 (1931); State **v.** Strasburg, 60 Wash. 106, 110 P. 1021 (1910).

unpalatable. The "guilty but mentally ill" verdict gives them a compromise alternative to circumvent a rigid application of an insanity acquittal. It is argued that this loophole presents a substantial erosion of the defendant's right to an insanity defense. This concern, however, is speculative and is counter to the general assumption that the "law assumes that the jury will impartially and competently evaluate testimony, accept and understand the law, and conscientiously apply the law to the facts.''[504] The potential abuse by the jury can to a certain extent be minimized by jury selection.[505] Also, the prosecution's argument can be restricted so that it does not capitalize on the jury's fears that a defendant will be set free if a "not guilty by reason of insanity" verdict is returned.[506] The courts have also ameliorated the possibility of jurors voting to acquit or convict on the basis of the resulting disposition of the defendant, by restricting the instructions on disposition. Absent a defense objection, the judge should *sua sponte* instruct on the disposition following either verdict."' Upon a jury or defendant request, the judge must instruct on an insanity verdict disposition [508] and it is error for the judge to instruct on an insanity verdict disposition over defense objection.[509] However, the judge should instruct on the mentally ill verdict disposition even if the defendant waives it.[510] This combination of restraints greatly reduces the potential for compromise verdicts.

The Michigan statute has also been criticized for the jury confusion engendered by attempting to distinguish between the mental illness and insanity definitions. As much as one hopes that the jury will not be overwhelmed or confused, the entire jurisprudence of insanity has that potential.[511] The statutory definitions do overlap and the jury may confuse the mentally ill standard with the insanity standard.[512] There is a possibility that as a result of this, mentally ill verdicts are being returned when insanity verdicts would be more appropriate. In *People v. Ram-*

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[504] Comment, *Insanity—Guilty But Mentally Ill—Diminished Capacity: An Aggregate Approach to Madness,* 12 J. Mar. J. Prac. & Proc. 351,374 (1979).

[505] *See* Arafat & McCahery, *The Insanity Defense and the Juror,* **22** Drake L. Rev. 538 (1973).

[506] *See* People v. Staggs, 85 Mich. App. 304,271 N.W.2d 211 (1978).

[507] People v. Linzey, 112 Mich. App. 374, 315 N.W.2d 550 (1981); People v. Tinbrink, 93 Mich. App. 326,287 N.W.2d 223 (1979).

[508] People v. Staggs, **85** Mich. App. 304,271 N.W.2d 211 (1978).

[509] People v. Thomas, 96 Mich. App. 210,292 N.W.2d 523 (1980).

[510] People v. Ritsena, 105 Mich. App. 602,307 N.W.2d 380 (1981). Since the defendant was not found insane, the court amended the sentence by calling for evaluation and treatment without ordering a rehearing.

[511] *See* R. Simon, The Jury and the Defense of Insanity 163-70 (1967).

[512] *See* People v. Sorna, 82 Mich. App. 652, 276 N.W.2d 892 (1979), where the court in rejecting an equal protection argument did note that the "fact that these distinctions may not appear clear-cut does not warrant a finding of no rational basis to make them."

sey,[513] the defendant asserts that the statute was unconstitutional because the mentally ill and insanity definitions "are so vague and overlapping as to confer upon the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed."[514] The court rejected this argument solely on a reading of the statute. The difficulty in distinguishing between the mentally ill verdict and the insanity defense is not solely attributable to some legal metamorphasis which changes mental illness into insanity. It is the inherent nature of the insanity continuum which creates this problem. Somewhere in the grey area, society should be able to distinguish between those deserving of criminal conviction and punishment and those deserving of acquittal and possible commitment. The Michigan approach of making this distinction by inserting a category of "mentally ill" rather than an absolute break between sanity and insanity reflects good common sense, modern psychiatric reality and commendable criminal jurisprudence. The military system should follow Michigan's lead and adopt such a system.[515] The value of such a system is eloquently summed up by Justice Fones of the Tennessee Supreme Court that:

> On the one hand, compelling consideration [sic] of compassion and basic instincts of human decency are revulsed at punishing an individual whose basic and beginning condition is insanity as opposed to criminality. On the other, the preservation and protection of society demand that irrespective of the unfortunate plight of an insane individual, one whose mental condition precludes his ability to conform his conduct to the demands of society should not be released.
>
> In a very real sense the confinement of the insane is the punishment of the innocent; the release of the insane is the punishment of society . . . .
>
> This procedure goes a long way in the direction of solving the dilemma we have discussed. Instead of Tennessee's all-or-nothing approach under which the insane may be confined in the penitentiary or "turned loose on the streets," Michigan juries

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[513] 280 N.W.2d 565 (Mich. App. 1979).

[514] *Id.* at 566–67.

[515] "'Other states have adopted a similar system. *See, e.g.*, Ill. Ann. Stat. ch. 38 §§ 1005-3-1 to 1005-3-2 (Smith-Hud Supp. 1981); Ind. Code Ann. § 35-36—2-3 (Burns Supp. 1981). Some states have introduced similar laws. *See, e.g.*, Kan. S. 502, 69th Leg., 1982 Regular Sess.; Mo. H.B. 1157, 81st Gen. Assembly, 2d Sess. (1981). Other states such as New York and Pennsylvania have attempted to do so. *See* Note, *supm* note 488, at 517.

> have a means, in proper cases, to assure the protection of society and simultaneously to provide treatment.[516]

C. SHIFTING THE BURDEN OF PROOF

The burden of proving the sanity of an accused in the military is clearly upon the government. This is based upon the general principle that *mens rea* is an essential element of crimes and insanity is inconsistent with *mens rea*. Since the government must prove all the elements of the crime and criminal responsibility is an essential ingredient of the proof, the burden of persuasion should rest upon the government. The government's burden of production, however, is assisted by the presumption of sanity. The government is not required to present any evidence on the sanity of an accused until his sanity becomes an issue in the trial. Until that time, the presumption is conclusive but after that time, the burden of proof becomes an important consideration.

One must, therefore, commence any inquiry into the burden of proof in insanity cases with an examination of the presumption of sanity. A legal presumption is merely a rule of law that attaches certain procedural consequences to the duty of the other party to produce evidence. In the absence of any evidence to the contrary, the side with the presumption will prevail on that issue. Such is true in the presumption of sanity. Since sanity is the normal condition of the human mind, until contrary evidence is adduced, the government should be allowed to proceed on the assumption that the accused was sane and responsible when the act was committed. As one commentator noted presumptions may be based upon

> (1) the necessity of making an arbitrary decision of an issue as to which no logical decision can be made, (2) determinations of the comparative convenience with which the parties can produce evidence of the fact in issue, (3) the normal balance of probability or (4) the desire of the courts to reach a socially desirable result. Most presumptions are probably supported by more than one of these considerations.[517]

The presumption of sanity is at least based upon the convenience of proof and probability. If sanity were a true legal presumption, however, it should remain in force only so long as there is no relevant evidence to the contrary. Logically, once evidence is introduced, the presumption

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[516] State v. Stacy, 601 S.W.2d 696, 704, 706 (Tenn. 1980) (Fones, J., dissenting, joining Henry, Jr.).

[517] Morgan, *Some Observations Concerning Presumptions*, 44 Harv. L. Rev. 906, 924-931 (1931).

should disappear.[518] Such is not the case, however, with the presumption of sanity because it continues to be a factor with evidentiary significance even after relevant evidence is introduced. In reality, it is a misdesignation to indicate that the presumption of sanity has a function more extensive than the mere determination of allocation of order of proof and has substantial evidentiary effect even in the face of evidence tending to contradict the matter presumed. What is really occurring is an application of a well-settled rule of presumptions that the underlying facts upon which the presumption is based continue to have their normal evidentiary effect even after the presumption is ousted by contrary evidence.[519] Although the line is difficult to draw between the presumption and the underlying inference, which is based upon a high probability of fact, there is a clear logical distinction between the two. Indeed, so strong is the underlying inference that it can in certain cases actually outweigh evidence to the contrary. This inference is based upon a statistical generalization and while logically, specific evidence on an individual's mental condition should outweigh a generalization, in the case of sanity often it does not. Nevertheless, the rule is in the military that the "presumption" has evidentiary significance. The jury should more accurately be instructed that the underlying inference is what they should consider in making their determination.[520] The quantum or quality of evidence necessary to oust the presumption or underlying inference should be left to the jury to determine.[521]

Although the presumption of sanity is relevant in every insanity defense case, there is another presumption, that of prior insanity continu-

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[518] See Lincoln v. French, 105 U.S. 614 (1882). "Presumptions are indulged to supply the place of facts; they are never allowed against ascertained and established facts. When these appear, presumptions disappear." See *also* Guaranty Trust Co. v. Minneapolis, St. Louis R. Co., 36 F.2d 747 (8th Cir. 1929). "Inferences or presumptions speak in the absence of evidence, but cannot be weighed in the balance as against evidence."

[519] See McBaine, Presumptions, Are They Evidence? 26 Calif. L. Rev. 519 (1938).

[520] *See* McCormick, *What Shall* the Trial Judge Tell The Jury About Presumptions?, 13 Wash. L. Rev. 185 (1938): See also Morgan, *Instructing* the Jury Upon Presumptions and Burdens *of* Proof, 47 Harv. L. Rev. 69 (1933); see generally Alexander, Presumptions: Their Use and Abuse, 17 Miss. L. J. 1 (1945); Morgan, Techniques in the Use *of Pre*sumptions, 24 Iowa L. Rev. 413 (1939).

[521] See J. Wigmore, Evidence § 2491 (3d ed. 1940). The quantum should be "evidence sufficient to satisfy the judge's requirement of some evidence." (emphasis added). A sampling of the degrees of evidence necessary is as follows: "substantial," New York L. Ins. Co. v. Gamer, 303 U.S. 161 (1938); "credible," Marie v. State, 319 S.W.2d 86 (Tenn. 1958); "positive," Empire Gas & Full Co. v. Muegges, 143 S.W.2d 763 (Tex. 1940); "satisfactory," Harvey v. Benson, 198 So. 183 (La. App. 1940); "prima facie," Henderick v. Uptown Safe Deposit Co., 159 N.E. 2d 58 (Ill. App. 1959); "sufficient to raise jury issue," Collahan v. Van Golder, 89 N.W.2d 210 (Wis. 1958); "to satisfy the jury," New York Life Ins. Co. v. Beason, 155 So. 530 (Ala. 1934); "to put the issue in equilibrium," Commercial Molasses Corp. v. New York Tank Barge Corp., 314 U.S. 104 (1941); "preponderance," *In* Re Dennis, 335 P.2d 657 (Cal. 1959).

ing, that may be a consideration, albeit infrequently. The presumption is that permanent, chronic or continuous insanity once proven to have previously existed is presumed to continue until the contrary is proved.[522] This is based upon the rationale that "when the existence of an object, condition, quality or tendency at a given time is in issue, the prior existence of it is in human experience some indication of its probable persistence of continuance at a later period."[523] This presumption would not apply to temporary insanity and in any event is a rebuttable presumption. The nature of the prior insanity should be a consideration as certain types of mental illness are less likely to disappear or improve. The remoteness of the prior insanity should affect the weight given to the "presumption." If the individual were discharged from a mental health facility that should at least affect the weight of the presumption and may even terminate the presumption and give rise to the opposite presumption, that of sanity. In systems where the defendant has the burden of persuasion on the insanity issue, it may shift the burden to the government. The amount of proof necessary to raise the presumption is unclear. It may vary from lay witness testimony all the way to a prior commitment or judicial adjudication. The primary reason why this presumption is infrequent in criminal cases is because even a presumption of insanity does not necessarily mean a presumption of criminal irresponsibility. Even if one assumes that the prior mental condition continues, it may not have been sufficient to meet the relevant legal test for criminal insanity. Insanity sufficient for a civil commitment is distinct from insanity sufficient to relieve one from criminal responsibility.

The existence of presumptions, principally that of sanity, is crucial to the burden of proof because as a procedural matter the side with the presumption prevails until the adversary carries his burden. The quantity or quality of evidence which will place sanity in issue has been variously determined to be "some,"[524] "slight,"[525] "any,"[526] "substantial"[527] or even "to raise a reasonable doubt."[528] However, the "merest shadow" of evidence has been held insufficient to place sanity in issue.[529] The issue

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[522] *See* Annot., 27 A.L.R.2d 121 (1953).

[523] J. Wipmore, *supm* note 521, at § 437. *See also* 1 F. Wharton, Criminal Evidence § 152 (11th ed. 1935).

[524] *See* Davis v. United States, 160 U.S. 469 (1895); United States v. Hall. 583 F.2d 1288 (5th Cir. 1978); United States v. Hendrix, 542 F. 2d 879 (2d Cir. 1976).

[525] *See* United States v. Hartfield, 513 F.2d 254 (9th Cir. 1975); United States v. Milne, 487 F.2d 1232 (5th Cir. 1973); Hall v. United States, 295 F.2d 26 (4th Cir. 1961).

[526] *See* United States v. Bass, 490 F.2d 846 (5th Cir. 1974).

[527] *See* Hartford v. United States, 362 F.2d 63 (9th Cir.), *cert. denied,* 385 U.S. 883 (1966).

[528] *See* State v. Nemechek, 576 P.2d 682 (Kan. 1978); Brady v. State, 190 So. 2d 607 (Fla. App. 1966).

[529] *See* Battle v. United States, 209 U.S. 36 (1908).

may be raised by the government's evidence as well as the defense evidence.[530] The trial judge makes the initial determination whether, as a matter of law, the evidence is adequate to place sanity in issue.[531] Once the issue is raised, regardless of which side has the burden of persuasion, there is no general prohibition against a conviction even where there is conflicting evidence.[532]

If the accused meets his burden of production, by whatever standard is required, the traditional rule is that the government has the ultimate burden of persuasion. This is based upon the *Davis* rationale that *mens rea* is an essential element of most crimes and insanity can not coexist with *mens rea.* The Court noted, however, that this was a supervisory rule of federal procedure and not constitutionally required for all jurisdictions. Indeed many state jurisdictions placed the burden of persuasion upon the defendant, usually by a preponderance of the evidence, to prove insanity.[533] The heaviest burden and one which the Court found to be constitutional was in *Leland v. Oregon* [534] which required the defendant to prove insanity beyond a reasonable doubt. Under the Oregon procedure,[535] insanity did not become an issue until after the prosecution proved beyond a reasonable doubt "every element of the crime charged."[536] The jury then considered the insanity issue in relation to the elements of premeditation, malice or intent. If the jury made an affirmative finding that insanity affected one of these elements, the court would consider such finding to determine if the defendant had avoided criminal responsibility. This set the insanity issue apart as only bearing on avoidance of criminal punishment and not on guilt of the crime charged.[537] The Court, in holding such a procedure constitutional, focused on the ability of the state to place the burden of persuasion on the defendant to prove insanity and the fact that this particular burden was the heavy "beyond a reasonable doubt" burden was of "no practical difference of such magnitude as to be significant in determining the Constitutional question."[538] The only state limit in placing the burden of persuasion on the defendant was "fundamental fairness."[539] One commen-

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[530] *See* United States v. Bettenhausen, 499 F.2d 1223 (10th Cir. 1974).

[531] *See* United States v. Sennett, 505 F.2d 774 (7th Cir. 1974); United States v. McCracken, 488 F.2d 406 (5th Cir. 1974).

[532] *See* United States v. Segna, 555 F.2d 226 (9th Cir. 1977): United States v. Phillips, 519 F.2d 48 (5th Cir. 1975).

[533] *Seegenemlly* Annot., 17 A.L.R.3d 146.

[534] 343 U.S. 790 (1952). This is not too dissimilar to *Bellingham's Case,* 1 Coll. 636,671 (1812) which required the defendant to establish his insanity beyond all doubt.

[535] *See* Ore. Rev. Stat. § 136.390 (1955). This was repealed in 1975 to require proof only by a preponderance of the evidence. Ore. Rev. Stat. § 161.055, 161.305 (1975).

[536] 343 U S . at 794.

[537] *Id.*

[538] *Id.* at 798.

[539] *Id. See also* Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

tator has suggested that the four possible degrees of burden that could be placed upon the defendant are to raise a reasonable doubt as to sanity, to convince the jury that he or she is probably insane or that he is highly probably insane, or that he or she is almost certainly insane.[540]

The placement of the burden of persuasion is linked to the presumption of sanity. It has been noted that the

> fundamental Thayerean thesis that a presumption shifts at most the burden of coming forward with evidence, and never shifts the burden of persuasion, has been criticized by some commentators who have argued that some presumptions, those drawn from facts having substantial independent probative value, should be treated as shifting the burden of persuasion as to the particular issue and so continuing to operate even in the face of evidence to the contrary.[541]

Since the presumption of sanity is based upon a strong probability with underlying facts of independent probative value, it is at least logical then that the defendant should have the burden of persuasion. Indeed, one commentator notes that "[p]urporting to give weight to the presumption or inference of sanity is merely an obfuscating way of increasing the burden placed on the defendants."[542]

If the military were to shift the burden of persuasion to the accused, it would have to be based upon policy considerations. As one commentator noted: "[t]he extent to which any presumption should shift the burden of proof must be decided upon considerations similar to those for fixing them initially, and this initial apportionment 'depends ultimately on broad policy considerations.' "[543] No legalistic theory ever required the presumption of sanity to be there in the first place. It was a policy decision based upon high probability and convenience of proof. The policy considerations involved in placing the burden of persuasion upon the defendant are similar.

Inherent in the military's governmental power to administrate justice is the right to regulate the procedures under which its laws are carried out, including burdens of proof. The Supreme Court, in *Morrison v. California*,[544] recognized that "within limits of reason and fairness the burden of proof may be lifted from the state and criminal prosecution and

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[540] See McBaine, *Burden of Proof:* Degrees *of Belief*, 32 Calif. L. Rev. 242 (1944).
[541] Annot., 5 A.L.R. 3d 19, 25.
[542] H. Weihofen, *supra* note 138, at 218.
[543] *Id.* at 220 (citing H. Wigmore, Evidence § 2488 (3d ed. 1940)). For a discussion of the fallacy involved in disguising policy decisions as logical applications of the burden of proof, see Stone, The Province and Function of Law 171 (1950).
[544] 291 U.S. 82 (1934).

cast on a defendant."[545] To further define what was fair and reasonable the Court noted the following limitation on the government's exercise of this power:

> The state shall have proved enough to make it just for the defendant to be required to repel what has been proven with excuse or explanation, or at least upon a balancing of convenience or of the opportunity for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression.[546]

The Court generally will not interfere with this shifting of the burden of proof unless "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[547] When specifically called upon to determine if it was fair and reasonable to place the burden of proof of insanity upon the defendant in Leland *v. Oregon*,[548] the Court found that, under the Oregon system, it was fair and reasonable. The Oregon system required the state to prove beyond a reasonable doubt all elements of the crime including premeditation and deliberation. The Oregon jury considered all the evidence including evidence going to the issue of insanity in deciding if the government met this burden. Only then was the jury "to consider separately the issue of legal sanity per se . . . ."[549] The clear impact of Leland was that mens rea and insanity could coexist. Rather than just casting doubt on an element of the offense, insanity in Leland was in the nature of an affirmative defense.

The distinction became important when the Court decided, in In re *Winship*,[550] that the due process clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[551] A fair interpretation of Winship is that "every fact necessary to constitute the crime" is synonomous with "elements of the offense." If sanity is an "element" of the offense, then the burden is clearly always upon the government. If, however, insanity is an affirmative defense which must be proved after the government proves all the elements including mens rea, then constitutionally the burden may be shifted to the defense. The obvi-

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[545] **Id. at** *88.*
[546] **Id. at 88-89.**
[547] **Patterson v. New York, 432** U.S. **197, 201-202** *(citing* **Speiser v. Randall, 357** US. **513,523 (1958)).**
[548] **343 U S. 790, 798 (1952).**
[549] **Id. at 795.**
[550] **397** U.S. **358 (1970)**
[551] *Id.* at **364.**

ous dilemma is that insanity overlaps with the absence of the mental state essential to a crime.

The government has the power in deciding what is criminal to distinguish between elements of an offense and affirmative defenses limited only by considerations of fundamental fairness. Even after *Winship,* one court noted that "there is no constitutional interdiction that would prevent a state from fashioning its own rule whereby sanity is not an ingredient of the crime, but is instead an affirmative defense designed to avoid punishment.''[552] Five years after *Winship,* the Court, in *Mullaney v. Wilbur,*[553] noted that the power of government to determine the elements of crimes was not limitless when it stated that

> if *Winship* were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect without effecting any substantive change in its law. It would only be necessary to redefine the elements that constitute different crimes characterizing them as factors that bear solely on the extent of punishment.[554]

The Maine statute involved in *Mullaney* drew a distinction between degrees of criminal responsibility for homicides.[555] One of the distinctions was between those who killed in the heat of passion and those who did not. Since those who did kill in the heat of passion are less "blameworthy," "they are subjected to substantially less severe penalties." [556] The Court struck down the Maine procedure which required the defendant to prove the heat of passion by a preponderance of the evidence. Since it was an element of the greater offense and not an affirmative defense to mitigate to the lower offense, the Due Process Clause required the government to carry the burden of persuasion.[557]

Mullaney was construed by some commentators to require that every fact critical to criminal culpability be proved beyond a reasonable doubt by the government.[558] This would seem to require that insanity as a fact "critical to criminal culpability''always be proved by the government be-

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[552] United *States ex rel* Tate v. Powell, 325 F. **Supp.** 333,335 (E.D. Pa. 1971).
[553] 421 U.S. 684 (1975).
[554] *Id. at* 698.
[555] *Id.* at 699.
[556] *Id,*
[557] *Id. at* 704.
[558] *See, e.g.,* Comment, *Unburdening the Criminal Defendant: Mullaney v. Wilbur and the Reasonable Doubt Standard,* 11 Harv. Civ. Rights—Civ. Lib. L. Rev. 390 (1976); **Note,** *Affirmative Defenses After Mullaney v. Wilbur: New York's Extreme Emotional Disturbance,* **43** Brooklyn L. Rev. 171 (1976); Note, *Affirmative Defenses in Ohio After Mullaney v. Wilbur,* 36 Ohio St. L.J. 828 (1975).

yond a reasonable doubt. The Court rejected such a far-reaching interpretation of *Mullaney* when it noted, in *Patterson v. New York*,[559] that

> *Mullaney's* holding, it is argued, is that the State may not permit the blameworthiness of an act or the severity of punishment authorized for its commission to depend on the presence or absence of an identified fact without assuming the burden of proving the presence or absence of that fact, as the case may be, beyond a reasonable doubt. In our view, the *Mullaney* holding should not be so broadly construed.[560]

The *Patterson* court upheld a New York statute which required the defendant in a murder trial to prove by a preponderance of the evidence that he acted under a severe emotional disturbance in order to reduce the offense to manslaughter. The Court stated that this "affirmative defense . . . does not serve to negate any facts of the crime which the State is to prove in order to convict of murder. It constitutes a separate issue on which the defendant is required to carry the burden of persuasion; . . . ." [561] The Court refused to reconsider its *Leland* holding as well as that of *Rivera v. Delaware*.[562] In *Rivera*, the Delaware Supreme Court had affirmed a conviction under a Delaware statute, which, in reliance upon *Leland*, required the defendant to prove his affirmative defense of insanity by a preponderance of the evidence. On appeal to the United States Supreme Court, the argument was that *Mullaney* and *Winship* had overruled *Leland*. The Court dismissed the appeal in *Rivera* as not presenting a substantial federal question. The *Patterson* court also relied upon the concurring opinion of Justice Rehnquist in *Mullaney*, which was joined in by the Chief Justice, wherein it was noted that there is no inconsistency between *Winship* and *Leland*. Justice Rehnquist also noted:

> in *Leland* that the issue of insanity as a defense to a criminal charge was considered by the jury only after it had found that all elements of the offense, including *mens rea*, if any, required by state law, had been proved beyond a reasonable doubt. . . . Although as the state court's instructions in *Leland* recognized . . . evidence relevant to insanity as defined by state law may also be relevant to whether the required *mens rea* was present, the existence or nonexistence of legal insanity bears no necessary relationship to the existence or nonexistence of the required mental elements of the crime. For this reason, Ore-

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[559] 432 U.S. 197 (1977).
[560] *Id.* at 214-15.
[561] *Id.* at 206-07
[562] 429 U.S. 877 (1976).

> gon's placement of the burden of proof of insanity in Leland, unlike Maine's redefinition of homicide in the instant case, did not effect an unconstitutional shift in the State's traditional burden of proof beyond a reasonable doubt of all necessary elements of the offense. ***Id.,*** at 795. Both the Court's opinion and the concurring opinion of **Mr.** Justice Harlan in ***In re Winship, supra,*** stress the importance of proof beyond a reasonable doubt in a criminal case as "bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." **397** U.S., at **372** (Harlan, J., concurring). Having once met that rigorous burden of proof that, for example, in a case such as this, the defendant not only killed a fellow human being, but did it with malice aforethought, the State could quite consistently with such a constitutional principle conclude that a defendant who sought to establish the defense of insanity, and thereby escape any punishment whatever for a heinous crime, should bear the laboring oar on such an issue.[563]

Finally, the Court in ***Patterson*** had no difficulty in distinguishing the affirmative defense presented from the element of the offense situation in ***Mullaney*** and held:

> In convicting Patterson under its murder statute, New **York** did no more than ***Leland*** and ***Rivera*** permitted it to do without violating the Due Process Clause. Under those cases, once the facts constituting a crime are established beyond a reasonable doubt, based on all the evidence including the evidence of the defendant's mental state, the State may refuse to sustain the affirmative defense of insanity unless demonstrated by a preponderance of the evidence.[564]

In spite of ***Davis,*** which placed the burden of proof upon the government to prove sanity as a matter of federal practice, it should be permissible for the military to shift the burden of persuasion to the defendant. ***Davis*** was premised upon the basic notion the ***mens rea*** and insanity cannot coexist. However, as evidenced by ***Leland, Rivera*** and ***Patterson,*** this may no longer be a basic premise of the Court. ***So*** long as the government is required to prove all elements of the offense, including ***mens rea,*** it should be allowed to define insanity as an affirmative defense and shift the burden to the defendant. If the military were to do so, a preponderance standard would seem to be the most reasonable. However, as

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[563] 421 U.S. at 706.
[564] 432 U.S. at 206.

a matter of policy, the military should not do so. The same evidence of mental condition which would be relevant to the *mens rea* determination would also be relevant to the insanity determination. To require the members to evaluate the evidence in relation to two "distinct" concepts and then apply two different burdens is probably too confusing a task. The mental gymnastics that a member is required to go through now just to determine concepts such as reasonable doubt is already considerable. Although appellate courts can draw fine distinctions between elements of offenses and affirmative defenses, to attempt to distinguish between lack of *mens rea* and proof of insanity in a manner understandable to the average juror is too difficult a task.

D. THE MENS REA APPROACH

As a direct result of the frustrations engendered by perceived unconscionable abuses of the insanity defense, states such as Montana and Idaho have recently adopted what is commonly referred to as the '*(mens rea"* approach or "element" approach. It has also been characterized as an abolition of the insanity defense. While it does extinguish insanity as a special affirmative defense, it does not prohibit the introduction of psychiatric testimony on insanity, but restricts it to relevant states of mind for particular offenses. It eliminates the exculpation of an offender based upon any mental illness which is independent of the particular elements of the offense. The Montana statute cites the rule as follows

> [e]vidence 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.[565]

"he statute further defines "mental disease or defect" only as "not includ[ing] an abnormality manifested only by repeated criminal or other antisocial conduct." [566]

The Montana procedures require that the defendant file a written notice at the time of entering his plea of not guilty or within ten days thereafter, that he intends "to rely on a mental disease or defect to prove that he did not have a particular state of mind which is an essential element of the offense charged." [567] The court shall then order a psychiatric examination and the report of that examination shall contain *inter alia* "a diagnosis of the mental condition of the accused" and "when directed by the court, an opinion as to the capacity of the defendant to have a par-

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[565] Mont Code **Ann.** § 46-14-102 (1981).
[566] *Id.* at § 46-14-101.
[567] *Id.* at § 46-14-201(1).

ticular state of mind which is an element of the offense charged." [568] The examining psychiatrist may testify at trial on these same matters.[569] If the defendant is found not guilty for these reasons, "the verdict and the judgment shall so state." [570] A defendant found not guilty for these reasons receives a predispositional hearing by the presiding judge to determine the defendant's present mental condition. If the judge finds that the defendant could not be discharged or released without danger to others, he commits the defendant to a state mental health facility.[571] Within 180 days, the defendant is entitled to a civil hearing to determine if he can be safely released. The court can place limitations on this release.[572] If the defendant is convicted and seeks to be committed rather than confined and claims that at the time of the offense "he was suffering from a mental disease or defect which rendered him *unable* to appreciate the criminality of his conduct or to conform his conduct to the requirement of law," the court has the authority to make this determination and if convinced that this was the case, can sentence him to a mental health institution.[573] This level of impairment is only relevant to sentencing and does not affect any findings of guilt.[574]

The Montana Criminal Law Commission which drafted the Montana *mens rea* approach believed that they were giving "a more positive test for separating 'criminals' from those persons who are mentally responsible." [575] The commission was concerned with the jury confusion under the existing Montana right and wrong, irresistible impulse test and the "abuse of the 'defense of insanity' that is inherent in the indefinite language of many tests for criminal responsibility." [576] The commission believed that the *mens rea* approach at the findings stage when combined with the dispositional power of the court to commit rather than confine "should prevent spurious insanity defenses." [577]

If one is to equate the *mens rea approach* to the abolition of the insanity defense, one must examine why our system has this special defense in the first place. If insanity is inextricably linked to *mens rea* than the defendant who lacks *mens rea* has committed no crime from which to relieve him of liability. If it were not for the preemptive defense of insan-

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[568] *Id.* at § 46-14-202, 203.
[569] *Id.* at § 46-14-213. Any psychiatrist or expert witness who has not examined the defendant cannot testify on these matters. *Id.*
[570] *Id.* at § 46-14-201(2).
[571] *Id.* at § 46-14-301.
[572] *Id.*
[573] *Id.* at § 46-14-311, 312.
[574] State v. Doney, 630 P.2d 743 (Mont. 1981).
[575] Mont. Code Ann. § 46-14-101 (1981)(commission comments).
[576] *Id.*
[577] *Id.*

ity, the defendant should logically be acquitted outright.[578] In effect, the purpose of the insanity defense is to trigger the mechanism that will divert the mentally ill offender from a punitive-correctional disposition to a medical-custodial disposition. Thus, there are commentators that make a compelling argument that the insanity defense has nothing to do with ***mens rea*** but is really a ***sui generis*** defense which for policy reasons overrides the fundamental principles on which the authority to impose criminal liability presently rests.[579]

The most commonly encountered "policy" reason for the insanity defense is that it is inappropriate to place the formal moral condemnation inherent in a criminal conviction upon one who did not have the capacity to make a free choice among **known** alternatives. That is the insane offender is not morally culpable. Indeed the ***Durham*** court went so far as to state that

> [o]ur 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 acta stem from and are the product of a mental disease or defect as those terms are used herein, moral blame shall not attach, and hence there will not be criminal responsibility.[580]

Without the insanity defense, the "morally" based justification proponents assert, would require the law to condemn persons who are psychologically considered not blameworthy and thus attach the moral stigma of a conviction. This, they assert, would be a morally intolerable situation.[581]

To accept the argument one must believe that ***mens rea*** cannot be viewed as morally neutral. ***Mens rea,*** however, denotes a specific state of mind or intent and intent is not always morally reprehensible. To the extent that one believes that ***mens rea*** always connotes moral culpability, one is really going beyond intent and searching for motive. The problem is that ***mens rea*** is the puzzle of the human mind wrapped in the enigma of the cognition and volition surrounded by the mystery of the moral, ethical and religious considerations. Indeed as one commentator noted,

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[578] *See* Kadish, *The Decline of Innocence,* 26 Camb. L.J. 273, 280 (1968).

[579] *See* H. Packer, The Limits of the Criminal Sanction 134-35 (1968); Goldstein & Katz, *Abolish the "Insanity Defense"—Why Not?,* 72 Yale L.J. 853 (1963).

[580] Durham v. United States, 214 F.2d at 876.

[581] *See, e.g.,* Brady, *Abolish The Insanity Defense—No!,* 8 Hous. L. Rev. 629, 640 (1971); Monahan, *Abolish The Insanity Defense—Not Yet,* 26 Rutgers L. Rev. 719 (1973).

abolishing the insanity defense would require coming to terms with such "emotionally-freightened" concepts as free will and determinism.[582] Such metaphysical concepts are submerged in the general feeling that conviction without moral blame is unjust.

The moral portion of the morality argument dealing with the stigma of a criminal conviction as a practical matter overlooks the greater stigma attached to the finding of insanity. The stigma of mental illness is at least as severe, and probably more so, than the stigma of criminality. It adversely affects his self-perception[583] and his interpersonal relationship~. As one commentator cryptically noted: "[f]ormer mental patients do not get jobs. In the job market, it is better to be an ex-felon than an ex-patient."[585] One should not get mired in questions of "moral stigma" when the real concern should be the proper disposition of the criminally insane. It is the supervision and treatment that is received that is important, not the title given to the verdict or the name of the institution that administers treatment. One must also consider the problem created for that treatment when the court finds the defendant not "responsible," but then the treatment attempts to persuade the patient to accept responsibility for his actions.

Another policy justification for maintaining an insanity defense is that a state of mind requirement is necessary to direct the deterrent threat of punishment to those who might reasonably be expected to respond to it. This group is the "average" citizens who perceive themselves to be responsible agents with a free will and not just objects of circumstances. As one commentator noted: "[t]he reason for inquiring into the offender's mental condition is not to prevent the injustice of punishing an insane person but to insure that his exculpation will not have detrimental effects on normal potential offenders."[586] By exculpating those who are not "responsible," it will by contrast impress upon the normal "responsible" person that he will be held ac'countable for his actions. It is presumed that emphasis on responsibility in law will inculcate moral responsibility in the average person.[587] If society were to convict those

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[582] Monahan, *supra* note 581, at 740.

[583] *See* Farina, Glika, Boudreau, Allen & Sherman, ***Mental Illness and the Impact of Believing Others Know About It,*** 77 J. Abnormal Psychology 1, 4 (1971).

[584] *See* Lamy, ***Social Consequences of Mental Illness, 30*** J. Consulting Psychology 450 (1966).

[585] Ennis, ***Civil Liberties and Mental Illness,*** 7 Crim. L. Bull. 101, 123 (1971). Indeed, the stigma is so much greater for mental illness that many persons do not avail themselves of the defense when only minor offenses are involved. They would rather suffer the inconvenience of the criminal adjudication and avoid the albatross of the "insanity" determination. They then end up back on the streets as uncured, untreated dangers to society. ***See generally*** H. Hart, The Morality of the Criminal Law (1964).

[586] Brady, *supm* note 581, at 636.

[587] *See* Monahan, *supm* note 581, at 723.

whom the average citizen perceives to be not responsible, then the threat of criminal conviction will lose its deterrent effect since it does not reflect societal condemnation. This deterrent threat engendered by the average citizen's belief in personal responsibility is an important determinant in his law-abiding behavior.[588] Since our entire legal system is premised upon personal responsibility, it is argued that the insanity defense could not "be abolished without adversely affecting the basic assumptions upon which the entire criminal law is built."[589]

If the average citizen actually believes that those who are found "not guilty by reason of insanity" are not "responsible" for their actions, then, in theory, this "emphasis by contrast" should fulfill its purpose. However, if persons are frequently not being held responsible for their actions and the average citizen perceives them to be "responsible" this will engender doubts in the citizen's belief in his own responsibility. This is reflected in the public outcry and popular call for abolition of the insanity defense following sensational acquittals for insanity such as the Hinkley case when the public perception is that a "responsible" person has not been held responsible for his actions. This marginally reduces the citizen's belief in his own responsibility because if the law is to promote responsibility it must impose responsibility.

Those who advocate the abolition of the insanity defense do so for a variety of reasons. H.L.A. Hart believes that sanity and *mens rea* need never be established to constitute a crime but that the insanity and the lack of *mens rea* must be shown to excuse one for his criminal behavior.[590] *Mens rea* is essentially then just a grounds for defeasibility.[591] Another commentator also believes that absence of *mens rea* is an excuse for crime, but that the existence of *mens rea* is not a positive requirement for criminal liability.[592] One of the most famous advocates **of** the abolition of the insanity defense, Lady B. Wooten, would abolish all notions of *mens rea* and insanity at the trial on the merits. The concepts would still be relevant on sentencing since the disposition of the offender is primarily what is at stake. Lady Wooten believes that the criminal justice system should be concerned with the prevention of future socially dangerous conduct and the treatment of insane persons who come to the law's attention through the criminal justice system.[593]

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[588] See generally G. Williams, Criminal Law, The General Part 346-47 (1953).
[589] Monahan, *supra* note 581, at 720.
[590] H. Hart, ***supra*** note 585, at 35.
[591] Hart, The Ascription of Responsibility *and* Rights, 49 Proc. Arist. Soc. 171, 179-80 (1949).
[592] P. Brett, An Inquiry into Criminal Guilt 40-41 (1963).
[593] B. Wooten, Crime and the Criminal Law: Reflections of a Magistrate and Social Scientist 51-57 (1963).

While there are those who would adopt a radical approach of allowing no evidence to negate *mens rea* at the trial,[594] the more common approach to "abolishing" the insanity defense is to simply give full evidentiary significance to mental illness in relation to the requisite state of mind.[595] This is precisely the approach of the Oregon *mens rea* system. It eliminates the artificial concept that the defendant must disprove *mens rea* through an affirmative defense when the system requires the government to prove it in the first instance. By controlling the disposition of the offender who is either found not guilty by reason of insanity or convicted but offering evidence of mental illness at the sentencing stage, the Oregon system prevents the state from being powerless to protect itself from dangerous persons. It also properly channels these individuals into the mental health system. It does so by in effect creating a jurisprudence of preventative confinement without warping the traditional criminal concepts of responsibility and accountability.[596]

The objections to the abolition of the insanity defense are as varied as the proposals in favor. There is arguably a due process right to an insanity defense since it has been such a fundamental part of our criminal law for a long time.[597] Intent is a substantial question of fact and must be submitted to the jury. Sanity and *mens rea* are inseparable from intent and to remove consideration of them would be akin to strict liability and as the Court, in *Smith v. California*,[598] noted, while states can create strict liability crimes by defining crimes without the element of *mens rea*, the power to do so is not unlimited. *Mens rea* is the rule not the exception.[599] There are also those who feel that the insanity defense is a moral issue and it serves a symbolic function.[600] The most practical problem is that the *mens rea* approach will still be subject to expert witness domination. While the psychiatrists will be able to testify in more medically relevant terms and avoid the intuitive moralizing which they view as anathema, their professional jargon will still be confusing and unintelligible to the average juror. The same evidence presently offered on the insanity defense will still be offered. They will "mingle vague medical terms unintelligible to lawyers with an unrelated moral-legal term,

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[594] S. Halleck, Psychiatry and the Dilemmas of Crime, 205–29, 341–42 (1967).

[595] Morris, *Psychiatry and the Dangerous Criminal*, **41** *S.* Cal. L. Rev. 514, 518–19 (1968).

[596] *See generally* Dershowitz, *Preventive Confinement: A Suggested Framework for Constitutional Analysis*, 51 Tex. L. Rev. 1277 (1973).

[597] *See* Comment, *The Constitutionality of Michigan's Guilty But Mentally Ill Verdict*, 12 U. Mich. J. Law Reform 188 (1978).

[598] 361 U.S. 147 (1959).

[599] *Id.* at 150. *See generally* Sayre, Mens *Rea*, 45 Harv. L. Rev. 974 (1932).

[600] See Dershowitz, *Abolishing the Insanity Defense: The Most Significant Feature of the Administration's Proposed Criminal Code—An Essay*, 9 Crim. L.B. 434 (1973).

mens rea." [601] As one commentator accurately notes the "battlefield may shift from the issue of right vs wrong to the equally troublesome issue of intent but the jurors will hear testimony not substantially different—or more informative—from what they hear today." [602]

The military should not adopt this *mens rea* approach because this medical testimony should not go to a jury without some structure being imposed on it. The law seeks to give greater precision to those actions and individuals which merit criminal condemnations. If juries were to decide these difficult medical-legal-moral issues without guidance the results would be unpredictable. There would be no review of the basis of the jury's finding. As difficult as it is to define terms such as "mental disease or defect" that is no excuse for giving no definition to insanity. To send a jury out to decide a legal issue of responsibility without legal guidance is an abdication of judicial responsibility.

VI. RECOMMENDATIONS AND CONCLUSION

The basic goal of the military justice system, as in any criminal justice system, is to protect society against the conduct which it deems undesirable and labels criminal. It does this through preventive measures. That is it punishes those who violate the law rather than rewarding, at least directly, those who engage in desirable conduct. The punishment that it inflicts serves a multifaceted purpose. It first seeks to deter the individual criminal by exposing him to the unpleasant consequences resulting from his undesirable conduct. This is through incarceration, fines or other penalties, the general stigma of conviction, and in the military through loss of rank, prestige, restraints on liberty which are less than confinement and ultimately to punitive discharge from the service. In spite of recidivism, it can be assumed that specific deterrence does not fulfill its goal. The military justice system also seeks to generally deter the public at large by allowing them to observe the fate of those who do commit crimes. The success of general deterrence, of course, depends largely upon the moral training, maturity and intelligence of the target population. The preventive effects of this generally threatened punishment must also, even in the absence of empirical support, be assumed to fulfill its goal. A criminal justice system also seeks to educate the public as to those actions which are socially acceptable and those which are not. It does this mainly by punishing the grossly unacceptable conduct, or what we term crimes. It is by contrast that the public comes to appreci-

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[601] Wales, *An Analysis of the Proposal to "Abolish" the Insanity Defense in S 1: Squeezing a Lemon*, 124 U. Pa. L. Rev. 687 (1976).
[602] Dershowitz, *supm* note 600, at 436.

ate what is acceptable. Concepts such as revenge or retribution are anathema to modern principles of crime and punishment.

Another principal goal of our criminal justice system is the rehabilitation of the offender so that he may become a productive, law-abiding member of society. The emphasis is upon inculcating in him a sense of personal responsibility and respect for the law. The goal is to identify the antecedent causes of his criminal conduct and then to therapeutically effect a behavioral change. It is based upon reward for socially acceptable behavior rather than just punishment for socially unacceptable behavior. Finally, the criminal justice system also seeks to protect society by restraining socially dangerous offenders. The insane offender, is difficult to dispose of because many of the goals of the criminal justice system do not apply to him. The insane offender for the most part, cannot be specifically or generally deterred or "educated." Retribution is clearly unjust. The two goals applicable to this individual are rehabilitation and restraint. The antecedent cause of the unacceptable conduct is insanity, and therapy should be available for rehabilitation. However, the offender may be too socially dangerous to be allowed to be at large and restraint may be required.

The "guilty but mentally ill" verdict directly helps to achieve these two goals in relation to the insane offender. It allows society to impose immediate maximum restraint on those who are mentally ill and in need of psychiatric treatment. In fact, it assures that they will receive such treatment. It separates those who, while mentally ill, are not so deranged that they could not intend their actions. The system must retain the "not guilty by reason of insanity" because there will always be those individuals who are so seriously deranged that it would offend our moral sensibilities to incarcerate them. The commitment procedures should be strengthened to insure that they will be properly channeled into the medical-custodial system. To acquit them and then not take care to see that they are properly treated is unfair to them and injurious to society.

Procedurally, the Michigan "guilty but mentally ill" approach should be adopted by the military criminal justice system. It has survived all of the constitutional attacks upon it and there are sufficient safeguards through jury instruction and limitations on arguments based upon the dispositional result of the two verdicts to control compromise verdicts, The jury confusion on the overlapping nature of insanity and mental illness may require a new substantive test for insanity. The test which this author would modestly propose is as follows:

> INSANITY: BASED UPON THE TOTALITY OF HIS MENTAL FACULTIES, WAS THE ACCUSED AT THE TIME OF

HIS ACTION SUBSTANTIALLY UNABLE TO ACT RATIONALLY?

MENTAL ILLNESS: BASED UPON THE TOTALITY OF HIS MENTAL FACULTIES AT THE TIME OF HIS ACTION, WAS THE ACCUSED'S CAPACITY TO ACT RATIONALLY IMPAIRED?

Both of these definitions look to the "totality of his mental faculties." This is broad enough to include the three spheres of the mind, the cognitive, volitional and affective. It is general enough to be flexible when new advances in psychiatry occur. It will allow the medical experts to testify in medically relevant terms without attempts to box them into legalistic terminology. Both definitions also focus on the ability "to act rationally." This again allows for medical evidence to clinically appraise his mental state. It avoids the problems of distinguishing between terms such as "criminality" and "wrongfulness" which are quasi-legal, moral, ethical terms. The focus is not whether the individual acted rationally as to a certain extent all criminal action is irrational. Instead the focus is upon his ability or capacity to act rationally. The key distinction in the two definitions is between "substantially unable" and "impaired capacity." In the former, "substantial" is intended to imply a very high degree of insanity and the jury should be so instructed. The word "totally" was not used for many of the reasons discussed in the section on *Insanity Tests*. It is doubtful that any person "totally" in the strict sense of the word could not act rationally. By requiring an extremely high degree of insanity, a policy decision is being made that society will only accept the acquittal of the most seriously deranged individuals. The definition of mental illness only requires some impairment to be involved. This allows society to impose the necessary restraint upon such persons, who probably make up the majority of those raising the insanity defense, while assuring their proper entitlement to treatment. The key to the success of a military "guilty but mentally ill" approach coupled with this proposed test will be the military judge who must limit the expert domination by restricting their testimony to medically relevant terms, by controlling both adversaries from playing upon the fears of the jurors based upon disposition and, finally, by making it clear to the members that their good common sense is necessary to distinguish between the grossly deranged who merit an insanity acquittal and the mentally ill who merit a conviction.

THE PRIVACY ACT: A SWORD AND A SHIELD BUT SOMETIMES NEITHER *

By Major John F. Joyce **

I. INTRODUCTION

The goal of defining and giving content to an individual's right to privacy has proven to be elusive. Efforts by judges, legislators, and commentators have met with varying success. The Privacy Act of **1974** was statutory attempt to protect an individual's personal privacy from various intrusions by the federal government.' To understand the scope and thrust of the Privacy Act and to assess its effectiveness in protecting personal privacy, it is essential to study the Act in context with other privacy safeguards. These safeguards include the common law tort for the invasion of privacy, the developing constitutional right to privacy, and several statutes which protect privacy interests in specific, functional areas.

A. SEVERAL DIMENSIONS OF THE RIGHT TO PRIVACY

The concept of an individual's right to privacy is not new, although it is a relative late-comer to the system of individual rights in the United States. Anglo-Saxon and German tribal law protected the peace that attached to every feeman's dwelling and provided compensation for damages to property, insulting words and trespass.[2] The right to privacy made its first appearance in American law as a civil suit for money dam-

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[1] The Privacy Act of 1974, 5 U.S.C. § 522a (1976).

[2] 1 Die Gesetze Der Angelsachsen Abt. 8, **15,** 17 H1.11, Af.40, Ine 6-6.3 (F. Lieberman ed. 1903); 1 F. Pollock & F. Maitland, The History of the English Law 45 (2d ed. 1968).

ages or for injunctive relief against an unwarranted invasion of the "right to be let alone."[3] Although Judge Cooley was the first to articulate the right to privacy in this context, Justice Brandeis in his classic dissent in the wiretapping case, ***Olmstead v. United States,*** described with unsurpassed eloquence the importance of the right to privacy and its constitutional underpinnings. His words do not go stale from repetition:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.[4]

Earlier, Justice Brandeis, with Samuel D. Warren, had argued for the existence of a privacy tort in their famous law review article.[5] The privacy tort was given further definition by Dean Prosser, who analyzed the existing body of case law and concluded that the privacy interests that had been protected fell into four categories: wrongful appropriation and use of a person's name, likeness or personality, physical intrusion into a person's solitude or seclusion, public disclosure of private facts that a reasonable person would find objectionable and publicity that places a person in a false light in the public eye.[6]

Several modern commentators have sought to further define the substantive content of the right to privacy. Professor Tom Gerety postulates that privacy is comprised of three distinct elements: autonomy, identity, and intimacy.[7] Professor Ruth Gavison suggested that a neutral concept of privacy is a complex of three independent and irreducible elements: secrecy, anonymity, and solitude.[8] Each of these formulations centers on the extent that an individual is accessible by others. Notwithstanding the labels given, most commentators agree, sometimes intui-

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[3] The right to personal privacy was first described as the "right to be let alone" by Judge Cooley in T. Cooley, Torts 29 (2d ed. 1888).

[4] 277 U.S. 438, 478 (1927) (Brandeis, J., dissenting).

[5] Warren & Brandeis, *The Right to* Privacy, 4 Harv. L. Rev. 193 (1890).

[6] Prosser, Privacy, 48 Calif. L. Rev. (1960). See also, W. Prosser, Handbook of the Law of Torts § 117 (4th ed. 1971).

[7] Gerety, *Redefining Privacy*, 12 Harv. C.R.—C.L.L. Rev. 233 (1977).

[8] Gavison, Privacy and *the* Limits of *Law*, 89 Yale L.J. 421 (1980). Professor Gavison states that secrecy, anonymity and solitude are shorthand for the extent to which an individual is known, the extent to when an individual is the subject of attention, and the extent to which others have access to an individual.

tively, on the factors that must be considered in analyzing an individual's privacy interest. There is, however, no unified acceptance of a right to privacy which embraces all three privacy areas: the privacy protected by tort action, the privacy granted by statute and the privacy guaranteed by the Constitution. A common feature of most privacy literature is that it leaves "essentially unspecified the substance of what is being protected." [9] However, this unsettled state of affairs should not be surprising. Privacy is a developing right, the contours of which will gradually emerge from the traditions, experience, and needs of society.[10] Law, as always, reflects societal concerns—albeit slowly—and privacy has progressed from general commentator doctrinaire to legal principles grounded in innovative constitutional moorings.

In 1965, the Supreme Court first announced a constitutional right to privacy." This newly articulated constitutional protection has been further defined in subsequent cases. The Court has generally characterized privacy interests as those relating to marriage, procreation, abortion, contraception, family relationships, and child rearing.[12] Due to its *ad hoc* development, the constitutional right to privacy has eluded an exact definition and remains analytically unclear. It is uncertain whether judges regard privacy as a single right or simply as a convenient expression for a cluster of related rights. The greatest uncertainty is whether courts will limit the constitutional right to privacy to the conventional interests of marriage and the family or expand the concept to encompass a notion of individual autonomy.[13]

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[9] L. Trible, American Constitutional Law § 15-1, at 887 (1978).

[10] Emerson, *The Right of Privacy and Freedom of the Press,* 14 Harv. C.R.—C.L.L. Rev. 329 (1979).

[11] Griswold v. Connecticut, 381 U.S. 479 (1965) (right to privacy in penumbras of first eight amendments protects interests of married persons in using contraceptives). Although the Court had alluded to a privacy right in prior cases such as Meyer v. Nebraska, 262 U.S. 390 (1923), in *Griswold* the Court for the first time grounded this right in the Constitution.

[12] Katz v United States, 389 U.S. 347 (1967) (right to privacy found in fourth amendment protects individuals against warrantless wiretap); Stanley v. Georgia, 394 U.S. 557 (1969) (right to privacy embodied in first amendment protects individual's interest in viewing pornography at home); Eisenstadt v. Baird, 405 U.S. 438 (1972) (right to privacy guarantees access to birth control devices by unmarried persons); Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976) (state law struck down requiring spousal, or in the case of an unmarried minor, parental consent, prior to securing an abortion); Carey v. Population Services International, 431 U.S. 678 (1977) (plurality decision struck down state law probititing distribution to and use of contraceptives by anyone under the age of sixteen); Doe v Commonwealth's Attorney for the City of Richmond, 425 U.S. 901 (1976), *aff'g mem.*, 403 F. Supp. 1199 (E.D. Va. 1975) (summarily affirming without opinion the lower court's ruling that homosexuals are not protected by the right of privacy in their chosen form of sexual expression).

[13] Eichbaum, *Towards an Autonomy-Based Theory of Constitutional Privacy: Beyond the Ideology of Familial Privacy,* 14 Harv. C.R.—C.L.L. Rev. 361 (1979). Ms. Eichbaum argues that only an autonomy-based right of privacy can be considered a civil right which

There are several statutory provisions in specific functional areas which protect privacy interests. The Consumer Credit Protection Act of 1968 was designed to insure fair credit billing and reporting procedures. Procedures were established to allow consumers to raise and resolve billing errors in periodic statements. Additionally, consumer reporting agencies were required to follow certain procedures designed to insure the accuracy, confidentiality, and proper use of credit reports. Consumers are entitled to access and have the right to rebut adverse information.[14] The various drug and alcohol treatment statutes prohibit the unconsented disclosure of information regarding an individual's participation in a rehabilitation program unless needed by the personnel administering the program, in response to a medical emergency, ordered by a court of competent jurisdiction, or in furtherance of scientific research.[15] The Right to Financial Privacy Act of 1978 limits the access of the federal government to the financial records of the customers of financial institutions.[16] There are also restrictions on the disclosure of information about individuals that is maintained by educational institutions.[17] The Privacy Protection Act of 1980 limits the authority of law enforcement officials to search for or seize the work product of members of the communications media.[18] The Intelligence Identities Protection Act proscribes the disclosure of the identity of American intelligence personnel.[19] Two statutory safeguards which apply to most individuals are the limitations on the disclosure of tax return information for purposes not related to tax administration [20] and the limitations on the disclosure and use of census information.[21] Although this discussion of specific statu-

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can genuinely vindicate the individual's privacy interest, particularly when the individual's interests conflict with majoritarian norms or the competing interests of other family members.

[14] The Consumer Credit Protection Act of 1968, 15 U.S.C. § 1601 (1976).

[15] The Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970, 42 U.S.C. § 4582 (1976); The Drug Abuse Office and Treatment Act of 1972, 21 U.S.C. § 1175 (1976). Implementing regulations by the Public Health Service are at 42 C.F.R. § 2.1 (1981).

[16] The Right to financial Privacy Act of 1978, 12 U.S.C. § 3401 (Supp. III 1979); Kirschner, *The Right Financial Privacy Act of 1978—The Congressional Response to U.S. v. Miller: A Procedural Right to Challenge Access to Financial Records*, 13 Mich. J.L. Ref. 10 (1979).

[17] Family Educational and Privacy Rights, 20 U.S.C. § 1232g (1976).

[18] The Privacy Protection Act of 1980, 42 U.S.C.A. § 2000aa (1980). This statute was enacted largely in response to Zurcher v. The Stanford Daily, 436 U.S. 547 (1978). Note, *The Privacy Portection Act of 1980: Curbing Unrestricted Third-party Searches in the Wake of Zurcher v. Stanford Daily Student*, 14 Mich. J.L. Ref. 519 (1981).

[19] The Intelligence Identities Protection Act, 50 U.S.C.A. § 421 (1982).

[20] IRC § 6103 (West Supp. 1982). The Tax Equity and Fiscal Responsibility Act of 1982 while retaining many privacy safeguards, expanded the disclosure provision relating to the tax returns to give law enforcement agencies more weapons in the battle against organized crime, narcotics trafficking and other non-tax crimes.

[21] 13 U.S.C. § 9(a)(2) (1976).

tory protections is not exhaustive, it illustrates a growing awareness by Congress of privacy related interests and an attempt to legislate specific protections in certain areas. In other situations involving the federal government's collection, maintenance, use or disclosure of personal information, the analysis of the protection of privacy must turn to the two statutes which govern federal information practices, the Freedom of Information Act [22] and the Privacy Act.[23]

B. THE FREEDOM OF INFORMATION ACT (FOIA)—THE OTHER MAJOR STATUTE GOVERNING INFORMATION PRACTICES

The FOIA, as the primary federal law on openness in government, is premised on the congressional stance that an informed citizenry provides a check against corruption and can more effectively hold the government accountable to the governed. It has served as a model for subsequent open government statutes.[24] The prior disclosure legislation, section 3 of the Administrative Procedures Act of 1946, had been criticized because it created a series of loopholes which virtually closed off all public access to government files.[25] Enacted in 1966, effective in 1967, and subsequently amended in 1974 and 1976, FOIA provides that any person has a judicially enforceable right of access to agency records except to the extent that all or part of a record falls within one of FOIA's exemptions. Subsection (a) of FOIA establishes three requirements to enhance public knowledge of and access to agency records, depending on their general nature and degree of importance to the public: publishing in the Federal Register descriptions of the agency's organization, functions, procedures, substantive rules and statements of general policy (Section (a)(1)); indexing and making available for public inspection and copying all final opinions and orders in the adjudication of cases, specific policy statements and administrative staff manuals and instructions that affect the public (Section (a)(2)); making the records available upon

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[22] The Freedom of Information Act, 5 U.S.C. § 552 (1976).

[23] *Id.* at § 552a.

[24] The basic purpose of FOIA was to provide an informed citizenry and thereby provide a check against corruption in government. Designed to insure accountability of government, FOIA has served as a model for two other open government statutes. The government in the Sunshine Act, 5 U.S.C. § 552b (1976), establishes the public's right to attend the meeting of certain governmental agencies. Meetings can be closed and the records thereof denied to the public only pursuant to statutory exceptions. The Federal Advisory Committee Act, 5 U.S.C. Appendix I (1976), reforms the management of advisory committees to federal agencies. In addition to providing the right to attend meetings, the record of any closed meeting can be requested pursuant to FOIA.

[25] Comment, *The Freedom of Information* Act's *Privacy Exemption and The Privacy Act of 1974*, 11 Harv. C.R.—C.L.L. Rev. 596 (1976).

a request made in accordance with agency rules (Section (a)(3)). The last access provision covers the vast majority of agency records. Subsection (b) of FOIA enumerates the nine exemptions which may be used to withhold all or part of an agency record. As a general rule, the FOIA exemptions are discretionary, allowing agencies to release otherwise exempt information when there is no legitimate governmental purpose for withholding. Most of the FOIA case law has dealt with the interpretation of the exemptions and their application in specific situations.[26]

C. FACTORS LEADING TO THE ENACTMENT OF THE PRIVACY ACT

The Privacy Act is the other major statute governing federal information practices. Prior to discussing the specific provisions of the Act and how they interface with FOIA, it would be helpful to examine the factors which led to its enactment. Congress recognized that the expanded use of computers by federal agencies to store and retrieve information about individuals not only increased the efficiency and responsiveness of government but also presented an increasing threat to personal privacy.[27] Concern over the increasing computerization of sensitive personal data, the continuing sophistication of technology, and the alarming tendency of the government to put information technology to uses detrimental to individual privacy was detailed by Professor Arthur Miller in his testimoney to the Senate in support of the Privacy Act. He stated:

> Americans today are scrutinized, measured, watched, and counted, and interrogated by more governmental agencies, law enforcement officials, social scientists and poll takers than at any other time in our history. Probably in no Nation on earth is as much individualized information collected, recorded and disseminated as in the United States.
>
> The information gathering and surveillance activities of the Federal Government have expanded to such an extent that they are becoming a threat to several of every American's basic rights, the rights of privacy, speech, assembly, association, and petition of the Government.
>
> * * * * * * *

[26] R. Bouchard & J.Franklin, Guidebook to the Freedom of Information and Privacy Act (1980)(reprinting Note, The Privacy Act *of 1974:* An Overview and Critique, 1976 Wash. U.L.Q. 667 (1976)).

[27] The Legislative history of the Privacy Act is exhaustively collected in *Legislative* History *of* the Privacy Act *of 1974, S.3418* (Pub. L. *93-579):* Source ***Book*** on Privacy, Joint Committee Print of Senate and House Committees on Government Operations, 94th Cong., 2d Sess. (1976)[hereinafter cited as Source Book].

> I think if one reads Orwell and Huxley carefully, one realizes that "1984" is a state of mind. In the past, dictatorships always have come with hobnailed boots and tanks and machineguns, but a dictatorship of dossiers, a dictatorship of data banks can be just as repressive, just as chilling and just as debilitating on our constitutional protections. I think it is this fear that presents the greatest challenge to Congress right now.[28]

A report by the Department of Health, Education and Welfare (HEW) quoted Alexander Solzyhenitsyn, the Russian Nobel Prize winner, who graphically described how an all-knowing government can dominate its citizens:

> As every man goes through life he fills in a number of forms for the record, each containing a number of questions. . . . There are thus hundreds of little threads radiating from every man, millions of threads in all. If these threads were suddenly to become visible, the whole sky would look like a spider's web, and if they materialized as rubber, banks, buses, trams and even people would all lose the ability to move, and the wind would be unable to carry torn-up newspapers or autumn leaves along the streets of the city. They are not visible, they are not material, but every man is constantly aware of their existence. . . . Each man, permanently aware of his own invisible threads, naturally develops a respect for the people who manipulate the threads.[29]

The HEW Report went on to recommend the enactment of a federal "Code of Fair Information Practices" for all automated personal data systems. The Code was based on five principles: there should be no records whose very existence is secret, an individual must be able to discover what information about him is in a record and how it is used, an individual must be able to prevent information collected for one purpose from being used for another purpose without his consent, an individual must be able to correct or amend erroneous information, and any organization creating, maintaining, using or disseminating records of identifiable personal data must assure the reliability of the data for their intended use and take precautions to prevent misuse of the data.[30] All of these principles, in one form or another, became a part of the Privacy Act.

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[28] S. Rep. No. 93-1183, 93d Cong., 2d Sess. 7 (1974) reprinted in Source Book, *supra* note 27, at 160.

[29] A. Solzhenitsyn, Cancer Ward (1968), *quoted in Records, Computers and the Rights of Citizens*, U.S. Department of Health, Educ. and Welfare, 31 (1973) [hereinafter cited as HEW Report].

[30] HEW Report, *supra* note 29, *reprinted in* Source Book, *supra* note 27, at 162.

Another report which had a significant impact on the enactment of the Privacy Act was produced by the National Academy of Sciences Project on Computer Databanks. This report, entitled *Databanks in a Free Society*, outlined the effect of the use of computers on recordkeeping processes in the United States, and what the continued growth of large-scale databanks, both manual and automated, implied for the individual's constitutional rights to privacy and due process.[31] Evidence of this continuing growth of data banks was a proposal to create a centralized computer system which would have the capability to link all of the federal agencies into a massive network. The contemplated system, which was to be the largest single governmental purchase of data processing equipment, was ominously known as FEDNET.[32]

In addition to concern over potential abuses that might result from the increased automation of federal record systems, congressional studies uncovered several actual abusive practices. The Census Bureau had sent a fifteen page questionnaire to citizens which asked:

> What have you been doing in the last 4 weeks to find work?
>
> Do you have any artificial dentures?
>
> Do you or your spouse see or telephone your parents as often as once a week?
>
> How many different newspapers do you receive regularly?
>
> How often do you go to barber shops or beauty salons?
>
> What were you doing most of last week?

Applicants for federal jobs in some agencies and employees in others were required to complete psychological testing forms which included such inquiries as these:

> I am very seldom troubled by constipation.
>
> My sex life is satisfactory.
>
> I have never been in trouble because of my sex behavior.
>
> I do not always tell the truth.
>
> I am very strongly attracted to members of my own sex.
>
> Many of my dreams are about sex matters.

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[31] Westin & Baker, *Databanks* in *a* Free Society, Project on Computer Databanks, Computer Science and Engineering Board, National Academy of Sciences (1972), cited in H. Rep. No. 93-1416, 93d Cong., 2d Sess. *6* (1974).

[32] S. Rep. No. 93-1183, *supra* note 28, reprinted in Source Book, *supra* note 27, at 163.

I like poetry.

I go to church almost every week.

I believe in the second coming of Christ.

I believe there is a God.

My mother was a good woman.

I have used alcohol excessively.[33]

One of the most pervasive of the intrusive information programs involved the Army's collection of information on civilians, through its own records and those of other federal agencies. The Army's original objective was to gather the information necessary to accomplish its important mission of quelling civil disturbances. However, due to the lack of effective safeguards on the collection, maintenance and use of the information, several abusive practices developed. The details of these practices were documented in congressional hearings and summarized as follows by Senator Ervin:

> Despite First Amendment rights of Americans, and despite the constitutional division of power between the federal and state governments, despite laws and decisions defining the legal role and duties of the Army, the Army was given the right to create an information system of data banks and computer programs which threatened to erode these restrictions on governmental power.
>
> Allegedly for the purpose of predicting and preventing civil disturbances which might develop beyond the control of state and local officials, Army agents were sent throughout the country to keep surveillance over the way the civilian population expressed their sentiments about government policies. In churches, on campuses, in classrooms, in public meetings, they took notes, taperecorded, and photographed people who dissented in thought, word or deed. This included clergymen, editors, public officials, and anyone who sympathized with the dissenters.
>
> With very few, if any, directives to guide their activities, they monitored the membership and policies of peaceful organizations who were concerned with the war in Southeast Asia, the draft, racial and labor problems, and community welfare. Out of this surveillance the Army created blacklists of organ-

[33] *Id.* at 13; Source Book, *supra* note 27, at 166.

> izations and personalities which were circulated to many federal, state and local agencies, who were all requested to supplement the data provided. Not only descriptions of the contents of speeches and political comments were included, but irrelevant entries about personal finances, such as the fact that a military leader's credit card was withdrawn. In some cases, a psychiatric diagnosis taken from Army or other medical records was included.
>
> This information on individuals was programmed into at least four computers according to their political beliefs, or their memberships, or their geographic residence.
>
> The Army did not just collect and share this information. Analysts were assigned the task of evaluating and labeling these people on the basis of reports on their attitudes, remarks and activities. They were then coded for entry into computers or microfilm data banks.[34]

The Watergate scandal which created a political crisis unparalleled in the history of this country also kindled a firestorm of interest in the protection of personal privacy from governmental intrusions. A representative of the American Civil Liberties Union, summarizing the impact of Watergate, stated:

> Watergate has thus been the symbolic catalyst of a tremendous upsurge of interest in securing the right of privacy: wiretapping and bugging political opponents, breaking and entering, enemies lists, the Huston plan, national security justifications for wiretapping and burglary, misuse of information compiled by government agencies for political purposes, access to hotel, telephone and bank records; all of these show what government can do if its actions are shrouded in secrecy and its vast information resources are applied and manipulated in a punitive, selective, or political fashion.[35]

Despite the wealth of information in the congressional hearings on actual abuses that had taken place and on the dangers inherent in the government's increased use of computers to store and retrieve personal information, the legislative history of the Privacy Act is a graphic demonstration of legislative chaos.[36] The House of Representatives and the Senate originally passed materially different bills.[37] Due to time pres-

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[34] *Id.* at 14; Source Book, supm note 27, at 167.
[35] *Id.* at 11; Source Book, *supra* note 27, at 164,
[36] R. Bouchard, supra note 26, at 45.
[37] H. R. 16373, 93d Cong., 2d Sess. (1974); S. 3418, 93d Cong., 2d Sess. (1974).

sures, the bills were not referred to a conference committee. Rather, House and Senate committee leaders held a series of informal meeting which resulted in a comprise bill which contained portions of the original bills from both the Senate and the House and some entirely new amendments.[38] As a result of this unusual legislative process, many important provisions are not explained by committee reports. The only record of the negotiations leading to the bill that was actually adopted is a brief staff analysis of the compromise amendments which was inserted into the record of both the House and Senate shortly before passage.[39] The bill was signed into law by President Ford on December 31,1974 [40] with an effective date of September 27,1975.

The Privacy Act as enacted did leave open two important avenues for additional development and refinement. The Act charged the Office of Management and Budget (OMB) with developing guidelines for the implementation of the Act throughout the federal agencies and providing continuing assistance and oversight." The OMB has published these guidelines in OMB Circular A-108.[42] Further, the Privacy Protection Study Commission, an advisory body created by the Act to study the issues raised by the Act and to recommend additional legislation, has completed a thorough and informative report.[43]

D. SCOPEOFTHEPRIVACYACT

Most of the privisions of the Act apply solely to records maintained within a system of records. A system of records is "a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol or other identifying particular assigned to the individual." [44] Consequently, the scope of the Privacy Act is much narrower than that of FOIA which applies to the broad spectrum of "agency records." [45] The

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[38] *See* Cong. Rec. S.21,811 (1974).

[39] ***Analysis of House and Senate Compromise Amendments to the Federal Privacy Act*** [hereinafter cited as Analysis of Compromise Amendments], ***reprinted in*** Source Book, ***supra*** note 27, at 858,

[40] Source Book, ***supra*** note 27, at 1001.

[41] Pub. L. No. 93-579, § 6; 88 Stat. 8897; 5 U.S.C. § 552a note (1976).

[42] Office of Management and Budget, Privacy Act Guidelines, 40 Fed. Reg. 28949 (amended at 40 Fed. Reg. 56741 (1975)) [hereinafter cited as OMB Guidelines]. The OMB Guidelines are to assist the agencies in their interpretation and application of the Act. They are not binding on the agencies or the courts. Zeller v. United States 467 F. Supp. 487 (E.D.N.Y. 1979).

[43] Personal Privacy in an Information Society: The Report of the Privacy Protection Study Commission (1977) [hereinafter cited as Commission Report].

[44] 5 U.S.C. § 552a(a)(5) (1976).

[45] A significant problem in applying FOIA is that the statute does not define the term "agency record."

Privacy Protection Study Commission was critical of the narrow scope of the Act because it excluded records that contained a great deal of personal information but were not retrieved by a personal identifier. Agencies can and have evaded the purposes of the Act by revamping their record-maintenance practices.[46]

In order to understand what constitutes a system of records several of the terms within the definition must be further defined or analyzed. The term record is broadly defined as:

> Any item, collection or grouping of information about an individual that is maintained by an agency, including but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to an individual, such as a finger or voice print or a photograph.[47]

A record must also reflect some quality or characteristic of the individual to come within the purview of the Act.[48]

A recurring issue is whether the personal notes of an agency official are considered to be records under the control of the agency. If so, the provisions of the Privacy Act may be applicable. As a general rule, the personal notes of a government employee are not records if they are kept voluntarily as a memory aid and are not circulated for use by other employees.[49] Conversely, in most situations, if personal notes were compiled at the behest of the agency or, once compiled, were utilized by other employees they would be considered as records under the control of the agency.

The Act's definition of "agency"[50] refers to the FOIA definition which states:

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[46] Commission Report, *supra* note 43.

[47] 5 U.S.C. § 552a(a)(4) (1976).

[48] Sheets where employees sign in and out to record work hours are not records as defined by the Privacy Act because they do not reflect a quality or characterisitic of the individual. American Fed'n of Gov't Employees v. Nat'l Aeronautics and Space Admin., 482 F. Supp. 281 (S.D. Tex. 1980).

[49] Porter County v. Atomic Energy Comm'n, 380 F. Supp. 630 (N.D. Ind. 1974); OMB Guidelines, *supra* note 42, at 28952. The personal notes of agency officials often involve the conduct and job performance of their subordinates. A problem arises when, in the course of taking an adverse action against a subordinate, these personal notes are incorporated into agency records. In resolving this issue, the courts have focused on the accuracy standards, see note 84 *infra*, which require that the incorporated information be accurate, relevant, timely and complete. *See* Chapman v. National Aeronautics and Space Admin., 682 F.2d 526 (5th Cir. 1982); Thompson v. Department of Transp., 547 F. Supp. 274 (S.D. Fla. 1982).

[50] 5 U.S.C. § 552a(a)(1) (1976).

> The term agency as defined in section 551(a) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of Government (including the Executive Office of the President), or any independent regulatory agency.

Section 551(1) of Title 5, U.S. Code, further defines the term agency as each authority of the Government of the United States, whether or not it is within or subject to the review of another agency. Congress, the federal judiciary, the governments of the territories or possessions, courts-martial, military commissions, and the government of the District of Columbia are expressly excluded. There are two significant factors to be considered in assessing whether an entity has agency status: whether it has substantial independent authority in the exercise of specific functions and whether it deals directly with those subject to its decisions.[51] The Act also applies to government contractors who, pursuant to a contract, operate a system of records on behalf of an agency.[52]

Individual is defined as "a citizen of the United States or an alien lawfully admitted for permanent residence."[53] Thus, unlike FOIA, the Act excludes foreign nationals,[54] corporations, and other business enterprise ~There is a split of opinion over whether information about an individual in his entrepeneurial capacity is within the ambit of the Act.[56] The better position is that the Act should be broadly construed to include entrepeneurial information. The Act is designed to protect the individual's fundamental right to informational privacy by controlling various governmental activities. Additionally, the Act does not specifically exclude business related information and in many instances such information not only reflects a quality or characteristic of the individual but is also highly personal.

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[51] Washington Research Project, Inc. v. Department of Health, Educ. and Welfare, 504 F. 2d 238 (D.C Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

[52] 5 U.S.C. 552a(m) (1976); OMB Guidelines, supm note 42, at 28976. The employees of government contractors are also subject to the criminal penalties of the Act, 5 U.S.C. § 552a(i) (1976).

[53] *Id.* at § 552a(a)(2).

[54] S. Rep. No. 93-1183, *supm* note 28, at 79, *reprinted in* Source Book, *supra* note 27, at 232; Raven v. Panama Canal Co., 583 F.2d 169 (5th Cir. 1978), *cert. denied* 440 U.S. 980 (1979).

[55] Dresser Indus., Inc. v. United States, 596 F.2d 1231 (5th Cir. 1979); OKC Corp. v. Williams, 461 F. Supp. 540 (N.D. Tex. 1978).

[56] *Compare* Zeller v. United States, 467 F. Supp. 487 (E.D.N.Y. 1979) *with* Shermco Indus., Inc. v. Secretary of the Air Force, 452 F. Supp. 306 (N.D. Tex. 1978), *rev'd on other grounds*, 613 F.2d 1314 (5th Cir. 1980); *and* OMB Guidelines, *supra* note 42, at 28951.

The Act broadly defines the term maintain. Maintain means to maintain, collect, use or disseminate.[57]

E. OVERVIEW OF THE ACT'S MAJOR PROVISIONS

The Privacy Act expressly recognizes that the right to privacy "is a personal and fundamental right protected by the Constitution,"[58] respect for which is essential to a democratic form of government.[59] The increasing use of computers and sophisticated information technology by the federal agencies, while essential to efficient operation of government, poses a grave threat to personal privacy. The Privacy Act seeks to effectuate the goal of informational privacy by allowing individuals to limit the federal government's collection, maintenance, use, and dissemination of certain personal information.

The Act has several interrelated provisions which grant affirmative rights to individuals and place restrictions on government information practices. It requires agencies to abide by fair information practices in the collection, maintenance and dissemination of records.[60] Agencies are required to establish procedures to insure that individuals are given access to their records and the opportunity to amend inaccurate information.[61] Due to competing policy considerations, the Act established certain exemptions, which allow agency heads to exempt certain systems of records from specified provisions of the Act.[62] Subject to several specific exceptions, disclosure to third parties of information from within a system of records is prohibited.[63] Further, even when the agency is permitted to disclose protected information, it is required to maintain an accounting of the disclosures. The Act also limits the use of an individual's social security number as a universal identifier.[64] Finally, criminal penalties and civil remedies were established for violations of the Act.[65] The remainder of this article will examine the major provisions of the Act to determine where the Act has been successful and where it has failed in achieving informational privacy in the federal sector. In areas where the Act has failed possible solutions will be offered.

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[57] 5 U.S.C.§ 552a(a)(3) (1976).
[58] Privacy Act, Pub. L. No. 93-579, § 2; 88 Stat. 1897; 5 U.S.C. § 552(a) note (1976); H.R. Rep. No. 93-1416, 93d Cong., 2d Sess. 9 (1974).
[59] S. Rep. No. 93-1183, *supra* note 28, at 14.
[60] 5 U.S.C.§ 552a(e) (1976).
[61] *Id.* at §§ 552a(d), (f).
[62] *Id.* at §§ 552a(j), (k).
[63] *Id.* at §§ 552a(b), (c).
[64] Pub. L. No. 93-579, § 7; 88 Stat. 8897; 5 U.S.C.§ 552a note (1976).
[65] 5 U.S.C.§§ 552a(g), (i)(1976).

II. FAIR INFORMATION PRACTICES

One method by which the Privacy Act seeks to insure informational privacy is by mandating fair information practices for federal agencies. As discussed earlier, these practices include both public notice provisions and substantive restrictions on the collection, maintenance, use, and dissemination of information. The public notice provisions are designed to educate the public as to what information the government is collecting and how it is using that information. The substantive restrictions implicitly recognize the individual's interest in limiting the government's acquisition and disclosure of personal information.

A. *PUBLIC NOTICE PROVISIONS*

As originally enacted, the Privacy Act required each agency to publish annually in the Federal Register notice of the existence of each system of records that it maintained.[66] The Act prescribes the content of the notice, to include the character, name and location of the system, the categories of individuals on whom records are maintained, the routine uses of the records contained in the system, the agency's policies and practices in storing, retrieving, retaining and disposing of the records, the title and address of the agency official responsible for the system, the procedures available to an individual to determine whether the system contains a record pertaining to him, the procedures for obtaining access and requesting amendment, and the sources of the information contained in the system.[67] One of the important functions of the public notice requirement is to prevent agencies from maintaining secret systems of records. It fosters agency compliance by providing for public scrutiny. Surreptitous recordkeeping, with its potential abuse, had been one of the major factors leading to the enactment of the Privacy Act.[68] The content of the public notice also assists an individual in determining whether an agency maintains a record about him and how he can exercise his access and amendment rights.

The Privacy Act was amended by the Congressional Reports Elimination Act of 1982, which requires public notice only "upon establishment or revision" of a system of records.[69] In addition to the public notice requirement, agencies must give advanced notice to Congress and OMB prior to establishing or altering a system of records. The notice provisions do not question the motivation or need for improving the informa-

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[66] Id. at § 552a(e)(4).
[67] *Id.* at §§ 552a(e)(4)(A)-(I).
[68] S. Rep. No. 93-1183, *supm* note 28, at 2; H.R. Rep. No. 93-1416 supra note 31, at 4; OMB Guidelines *supm* note 42, at 28997.
[69] Pub.L. No. 97-375, § 201; 96 Stat. 1821; 5 U.S.C§ 552a(e)(4) (1982).

tion gathering and handling capabilities of federal agencies. They do subject to public assessment the potential impact of government information practices on an individual's personal privacy." The term "alter" has been broadly defined in the OMB Guidelines." Presumably, the terms revision and alteration are used interchangeably.

The final public notice provision specifically provides that at least thirty days prior to establishing a new "routine use" for information within a system of records the agency will publish a notice in the Federal Register and provide an opportunity for public comment.[72] "The term routine use means, with respect to the disclosure of a record, the use of such record for a purpose compatible with the purpose for which it was collected.''[73] The application and importance of an established routine use will be discussed in conjunction with the nondisclosure provisions.

B. SUBSTANTIVE RESTRICTIONS ON THE COLLECTION, MAINTENANCE AND DISSEMINATION OF PERSONAL INFORMATION

Agencies must collect information to the greatest extent practicable directly from the individual when the information may result in an adverse determination about the individual's rights, benefits and privileges under federal programs." Since most information collected by an agency could result in an adverse determination, this provision is an important additional avenue for individuals to discover the existence of records concerning them. The provision also recognizes that the individual is the best source of accurate information and that information from third parties may be irrelevant, outdated, erroneous or biased. The Act does not define what practical considerations may dictate the use of a third party source. The OMB Guidelines provide a number of factors to be weighed by the agency in determining whether direct collection is practicable: whether the type of information can only be collected from a third party, such as an evaluation of part performance by a former supervisor, the relative cost of collecting from the individual as opposed to a third

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[70] 5 U.S.C. § 552a(o) (1976); OMB Guidelines, *supra* note 42, at 28977.

[71] *Id.* The term alter is any change which: increases the number or types of individuals on whom records are maintained; expands the type or amount of information maintained; increases the number of categories of agencies or other persons having access to the records; alters the manner in which the records are organized so as to change the nature or scope of the records, *e.g.* combining two or more existing systems; modifies the way in which the system operates or its location in such a manner as to alter the process by which individuals exercise their rights to access and amendment; and changes. in equipment configuration creating the potential for greater access.

[72] 5 U.S.C. § 552a(e)(11) (1976).

[73] *Id.* at § 552a(a)(7).

[74] *Id.* at § 552a(e)(2).

party, the risk of an adverse determination if the third party information is in error, whether resort to the third party is only to verify information previously provided by the subject, and the extent to which third party information can be verified prior to use by the individual.[75] Since virtually every record is used in making some determination about the individual's rights, benefits, and privileges, agencies should plan to collect information directly from the subject unless the OMB factors clearly dictate the use of a third party source.

When collecting information to be filed in a system of records, agencies must inform the individual of the authority and principal purposes for collection, the routine uses that will be made of the information, whether disclosure is voluntary or mandatory, and the effect of not providing the requested information.[76] Implicit in the warning requirement is the notion of implied consent. The agency must tell the individual why they are collecting the information, how it will be used and whether he has to provide it. Allthough it is not explicitly required by the Act, the warning should also be provided to third party sources of information. The notion of informed consent is applicable to third party sources and the potential damage to an individual's reputation is even greater when the government deals with third parties.[77] If an agency fails to comply with the warning requirement an exclusionary sanction should not be imposed. *An* exclusionary rule is not provided for in the remedial provisions and alternate remedies are available if the individual is adversely affected.[78] The warning should normally be included on any form that is used to collect information from an individual. If the information is collected orally the warning should be provided on a separate sheet that is retained by the individual. Prior to any collection of information the interviewer should orally summarize the warning to insure complete understanding.[79]

An agency can maintain in its records only that information which is relevant and necessary to the accomplishment of an agency purpose as defined by a statute or by an executive order of the President.[80] The thrust of this provision is to reduce the amount of information collected and maintained by federal agencies. *An* agency should not collect information that is not needed to perform a legitimate function. This also re-

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[75] OMB Guidelines, supra note 42, at 28961.
[76] 5 U.S.C. § 552a(e)(3) (1976).
[77] Compare OMB Guidelines, *supra* note 42, at 28961, *with* Saunders v. Schweiker, 508 F. Supp. 305 (W.D.N.Y. 1981).
[78] Houston v. Department of Treasury, 494 F. Supp 24 (D.D.C. 1979); OMB Guidelines, supra note 42, at 28961-62.
[79] OMB Guidelines, *supra* note 42, at 28951-52.
[80] 5 U.S.C. § 552a(e)(1) (1976).

duces the risk of subsequent misuse; information not collected cannot be accidently or purposefully used in a manner harmful to the individual.[81] Agencies can derive authority to collect information in two ways. The Constitution, a statute or executive order can explicitly direct the maintenance of a system of records, or can direct the performance of a function, the discharging of which requires the maintenance of a system of records.[82] The OMB Guidelines provide some factors for the agency to consider in determining whether the information is both necessary and relevant, While the decision is discretionary, agencies should consider how the information relates to the purpose for which the system is maintained, could the same purpose be satisfied by information which is not individually identifiable, what are the adverse effects of not collecting the information, must the information be collected on every individual or would a sampling suffice, and, at some point, could the information be purged.[83]

Agencies are required to maintain records which are used to make a determination about an individual with such accuracy, relevance, timeliness and completeness as is reasonably necessary to assure fairness in the determination.[84] Additionally, except for disclosures to other agencies or those required by FOIA, prior to disseminating any record the agency must make reasonable efforts to insure that the records are accurate, relevant, timely and complete.[85]

The objective of the accuracy standards is to minimize the risk of an adverse determination made on the basis of inaccurate, irrelevant, incomplete, or untimely information.[86] Since most records can be used to make a determination about the individual, the issue in most cases will be whether the agency has complied with the accuracy standards. In gauging compliance with the accuracy standard, the key factor is reasonableness. The Act does not require the agency's performance to be perfect, only reasonable. In determining reasonableness courts consider the agency's resources, the agency's ability to insure accuracy, the actual use of the information, and the likelihood that inaccurate information would produce injury to the individual.[87] The requirement for agencies to make

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[81] S. Rep. No. 93-1183, *supra* note 28, at 45.

[82] OMB Guidelines, supra note 42, at 28960.

[83] *Id.*

[84] 5 U.S.C. § 552a(e)(5) (1976). This provision is substantially less restrictive than that contained in the original Senate bill which applied the accuracy standards whenever the record was disclosed, used to make a determination about the individual, or altered. ***See*** S. Rep. 93-1183, supra note 28, at 50.

[85] 5 U.S.C. § 552a(e)(6) (1976).

[86] OMB Guidelines, supra note **5,** at 28964.

[87] Zeller v. United States, 467 F. Supp. 487 (E.D.N.Y. 1979); Smiertka v. Internal Revenue Serv., 447 F. Supp. 221 (D.D.C. 1978); Savarese v. Department of Health, Educ. and Welfare, 479 F. Supp. 304 (M.D. Fla. 1979).

reasonable efforts to insure compliance with the accuracy standards prior to dissemination is based on a notion similar to last clear chance. Since there is an exception for disclosures to other agencies who have a legitimate need for the record, the Act focuses on disclosures to third parties who are not subject to the Act. Therefore, before the information is released outside of the Act's protective ambit the releasing agency must make a reasonable effort to insure compliance with the accuracy standards. The exception for releases made pursuant to FOIA is presumably based on avoiding an undue administrative burden and allowing for speed in processing FOIA requests. This approach exalts administrative convenience and speed over accuracy. An alternate explanation for the exception is a legislative desire to make unpurged information available to the public. The power to edit is the power to withhold. While the original Senate bill required reasonable efforts to insure accuracy prior to any disclosure, this language did not survive.[88] Unfortunately, the Analysis of the Compromise Amendments sheds no light on the actual purpose for adopting the FOIA exception.[89]

An agency is generally prohibited from maintaining a record describing how an individual exercises rights guaranteed by the First Amendment. There are three exceptions: the subject of the record consents, a statute expressly authorizes maintenance of the record, or maintenance of the record is pertinent to and within the scope of an authorized law enforcement activity.[90] Due to the expansive definition of "maintain," the mere collection of a record regarding the exercise of a First Amendment right is prohibited regardless of whether it is ever incorporated into a system of records.[91] This protection afforded to the legitimate exercise of First Amendment rights is designed to preclude the reoccurrence of past governmental abuses.[92] In determining whether a particular activity is protected, agencies should broadly construe the panoply of rights guaranteed by the First Amendment.[93]

Particular attention must be paid to the scope of the law enforcement exception. This exception applies to civil and criminal law enforcement

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[88] *See* S. Rep. No. 93-1183, *supra* note 28, at 50.

[89] *See* note 39 *supra.*

[90] 5 U.S.C. § 552a(e)(7) (1976).

[91] *See* note 57 for the expansive definition of "maintain." For cases holding that the prohibition applies regardless of whether the record is incorporated into a system of record, *see* Clarkson v. Internal Revenue Serv., 678 F.2d 1368 (11th Cir. 1982) (IRS agents posing as insurance agents attended and reported on a tax protest meeting which featured the plaintiff as the principal speaker). Albright v. United States, 631 F.2d 915 (D.C. Cir. 1980) (a heated discussion regarding an adverse personnel action between hearing and appeal analysts and a personnel officer of the Social Security Administration was videotaped).

[92] *See* notes 33-35 *supra.*

[93] OMB Guidelines, *supra* note 42, at *28965.*

as well as intelligence activities. The intent of this exception is to insure that political and religious activities are not used as a cover for illegal or subversive activities.[94] Until recently, the case law applying the exception had concluded that an agency could create a record regarding an individual's exercise of First Amendment rights only when the investigation had focused on a specific past, present, or anticipated violation of the law, Under this interpretation, agencies could conduct a surveillance or otherwise monitor the activities of an individual suspected of violations but were prohibited from creating a record until the investigation focused on specific illegal activity.[95] A recent case broadly interpreted the law enforcement exception to allow any investigation of First Amendment rights which is relevant to an authorized criminal, civil, or intelligence investigation. Under this holding, a record of an individual's First Amendment activities can be created, maintained, used and disseminated if those activities are relevant to an authorized investigation.[96]

There is certainly a high societal interest in effective law enforcement and intelligence gathering activities. However, these activities are also potentially the most abusive to personal privacy. A balance must be struck which allows sufficient freedom of action but also curbs abusive potential. In the decisions noted above, there was an attempt to balance the competing interests of effective law enforcement and personal privacy. Law enforcement agencies could initiate an investigation of a subject and monitor his activities but the individual's exercise of First Amendment rights could not be made the subject of an agency record until a specific past, present or anticipated violation of the law was identified. Once illegal activity has been discovered, the governmental intrusion is justified, First Amendment activities cannot act as a screen for criminal or subversive activities. The Sixth Circuit has made no effort to balance or accommodate the competing interests. The privacy interest is subordinated and the exception threatens to swallow the rule. Even the legitimate exercise of First Amendment rights will be subjected to governmental intrusion if it is in some way relevant to an authorized investigation.

In most situations when an agency legitimately discloses an individual's record to a third party, there is no requirement to notify the individual. The sole exception is when the record is released pursuant to

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[94] *Id.*

[95] Clarkson v. Internal Revenue Serv., 678 F.2d 1368 (11th Cir. 1982); Jabara v. Kelly, 476 F. Supp. 561 (E.D. Mich. 1979) *rev'd sub. nom.* Jabara v. Webster, 691 F.2d 272 (6th Cir. 1982) (investigation of attorney of Arab extraction by the National Security Council and the FBI).

[96] Jabara v. Webster, 691 F.2d 272 (6th Cir. 1982).

compulsory legal process.[97] Compulsory legal process refers to a subpoena or a court order. The notification is required when the legal process becomes a matter of public record. Notification may be accomplished by mail to the last known address.[98]

Agencies are required to establish and implement rules of conduct for personnel involved in the design, development, operation or maintenance of a system of records.[99] This requirement envisions the establishment of viable procedures to carry out statutory provisions and a training program for the personnel who will implement the Act. The training program should be tailored to the role of the particular employee but all personnel should be apprised of the criminal penalties and civil remedies that are triggered by violation of the Act. In addition to establishing appropriate procedures, agencies are also charged with establishing administrative, technical and physical safeguards to insure the security and confidentiality of each system of records.[100]

III. ACCESS AND AMENDMENT RIGHTS

The most important provisions of the Privacy Act are those granting an individual the right to gain access and request amendment of records pertaining to him which are maintained within a system of records.[101] If an individual is seeking access to records which pertain to him but are not contained within a system of records—because they are not retrieved by his name or other individual identifier—then the Privacy Act's access provisions are inapplicable[102] and he must rely on the disclosure provisions of FOIA. The reason that the access and amendment provisions are so important is because the Act relies almost exclusively on individuals to enforce the Act, a private attorney general concept. Consequently, unless the individual has access to his records, he will be unable to discover and correct agency violations. One shortcoming of the right to access is that an agency is not required to notify an individual that a record about him is being maintained. The original Senate bill required an agency to notify all individuals about whom it maintained personal information. This requirement was abandoned due to prohibitive costs.[103] The Act does, however, require agencies to promulgate rules, pursuant to Section 553 of Title 5, U.S. Code, which establish procedures whereby an indi-

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[97] 5 U.S.C. § 552a(e)(8) (1976).
[98] OMB Guidelines, supra note 42, at 28965.
[99] 5 U.S.C. § 552a(e)(9) (1976).
[100] *Id.* at § 552a(e)(10).
[101] *Id.* at §§ 552a(d)(1), (2).
[102] Grachow v. U.S. Customs Serv., 504 F. Supp. 632 (D.D.C. 1980) (access provisions of the Privacy Act apply only to records contained within a system of records.)
[103] S. Rep. No. 93-1183, *supra* note 28, at 59.

vidual can determine whether a system of records contains a record pertaining to him."[104] Additionally, these procedures are to be used to verify the identity of the requester, to provide a method for granting access, to provide a method for requesting an amendment and appealing an initial denial, and to establish fees to be charged for copying the record. The Office of the Federal Register is required to compile and publish these procedural rules and the systems notices in a form available to the public at' low cost.[105]

A. ACCESS RIGHTS

When the individual's request for access is granted, he is permitted to review his records and make a copy. The individual is not required to provide a reason for requesting access.[106] There are no time limits set forth in the Act for a response but the OMB Guidelines indicate that the agency should acknowledge the request within ten business days, advising whether and to what extent access will be granted. Access should generally be provided within thirty business days; if there is good cause for additional delay the individual should be advised.[107] If access is denied, in whole or in part, the Act does not provide for an administrative appeal; however, most agencies voluntarily offer an administrative appeal.[108] The agency always has the burden of justifying the denial of access.

B. AMENDMENT RIGHTS

Once an individual has gained access to his record he may request amendment of information that is not accurate, relevant, timely or complete. The agency must acknowledge receipt of the request for amendment within ten working days.[109] The agency must promptly determine whether to make the requested amendment or refuse to do so. If the request is denied, the agency must provide the reasons for denial and the procedures for pursuing an administrative appeal to the head of the agency.[110] Absent good cause for a delay, the appeal must be decided within thirty working days. If the appeal is denied the individual has the

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[104] 5 U.S.C. § 552a(f)(1) (1976).

[105] *Id.* at §§ 552a(f)(2)-(5).

[106] Smiertka v. Internal Revenue Serv., 447 F. Supp. 221 (D.D.C. 1978); OMB Guidelines, *supra* note 42, at 28957.

[107] *Id.* at 28957-58.

[108] The Act does not grant a right to an administrative appeal for a denial of access, but many agencies voluntarily grant an appeal. Courts should exercise discretion in determining whether the administrative appeal should be exhausted prior to initiating a law suit. Marvin v. Bonfanti, 410 F. Supp. 1205 (D.D.C. 1976).

[109] 5 U.S.C. § 552a(d)(2)(A) (1976). The individual requesting amendment has the burden of proof. Mervin v. Federal Trade Comm'n, 591 F.2d 821 (D.D.C. 1978).

[110] 5 U.S.C. § 552a(d)(2)(B) (1976); Harper v. Kobelinski, 589 F.2d 721 (D.D.C. 1978).

right to file a concise statement setting forth the reasons for his disagreement with the agency's refusal to grant amendment.'[111] The agency is required to provide a copy of the statement of disagreement to the prior recipients of the record as reflected on the disclosure accounting and all future recipients.[112]

C. INFORMATION COMPILEDIN ANTICIPATION OF CIVIL LITIGATION

The Act denies an individual access to information prepared in reasonable anticipation of a civil action or proceeding even though it is maintained in a system of records.[113] This exclusion is not limited to attorney work product but pertains to any material as long as it is prepared in reasonable anticipation of a civil action.'[114] The OMB Guidelines indicate that this was not intended to preclude access under civil discovery procedures or FOIA.[115]

A FOIA request for disclosure of information prepared in anticipation of litigation would be analyzed under FOIA exemption (b)(5), which allows an agency to deny disclosure of matters that are inter-agency or intra-agency memorandums or letters which would not be available by law to a party in litigation with the agency.[116] The legislative history indicates that the exemption was intended to incorporate the government's common law privileges from discovery in litigation.'[117]

There are five governmental privileges which courts have recognized as falling within this FOIA exemption: the executive privilege which protects the advice, recommendations, and opinions which are part of the deliberative, consultative, decision-making processes of government,[118] the attorney work-product privilege which protects documents prepared by an attorney revealing his or her theory of the case or litiga-

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[111] 5 U.S.C. § 552a(d)(3) (1976).
[112] *Id.* at § 552a(d)(4).
[113] *Id.* at § 552a(d)(5).
[114] Smiertka v. Internal Revenue Serv., 447 F. Supp. 221 (D.D.C. 1978)(memosand other communications within the agency regarding the plaintiffs fitness for continued employment prepared prior to the time the plaintiff was fired were considered as materials prepared in anticipation of civil litigation).
[115] OMB Guidelines, ***supra*** note 42, at 28960.
[116] 5 U.S.C. § 552a(b)(5) (1976).
[117] ***See*** H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966); S. Rep. No. 813, 89th Cong., 1st Sess. 2, 9 (1965); S. Rep. No. 1219, 88th Cong., 2d Sess. 6-7, 13-14 (1964).
[118] NLRB v. Sears, Roebuck and Co., 421 U.S. 132, 150-54 (1975); **EPA** v. Mink 410 **U.S.** 73, 85-91 (1973).

tion strategy,[119] the attorney-client privilege,[120] a qualified privilege under Federal Rule of Civil Procedure 26(c)(7) pertaining to confidential commercial information to the extent it is generated by the government,[121] and a privilege under the Federal Rule of Civil Procedure 26(b)(4) for reports of an expert witness.[122] To the extent that the information prepared in reasonable anticipation of civil litigation falls within the scope of one of these privileges it is exempt from release under FOIA. Conversely, because of the rule of segregability which requires disclosure of any portion of a record to which an exemption does not apply, if any of the prepared material is not exempt it must be released.[123] This results in an anomolous situation. An individual's request under the Privacy Act, a statute designed to protect the individual's right to informational privacy, for litigation related documents could be completely denied whereas a request under FOIA, a statute designed to grant disclosure to the general public, offers the potential for at least partial disclosure. Not surprisingly, attorneys in litigation with the government have begun to use FOIA as an adjunct to civil discovery. The Privacy Act restriction on access to materials prepared in anticipation of litigation was not intended to block avenues of access which were previously open through civil discovery or FOIA. Accordingly, the individual should be denied access only if the materials were prepared in anticipation of litigation and are also exempt from release under FOIA and the applicable rules of civil discovery.

D. CURRENT ISSUES

There are several current controversies arising from the application of the access and amendment provisions. One of the most difficult issues is the extent to which an individual should be granted access to information in his file which pertains exclusively to a third party. An example is the case of a government employee being investigated for misconduct. During the course of the investigation, evidence involving private, sexually-deviant conduct by another employee is uncovered which is totally unrelated to the original subject of the investigation. Assuming that the evidence is filed in a record retrievable by the requester's name, should

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[119] NLRB v. Sears, Roebuck and Co., 421 U.S. 132, 154-5 (1975); Hickman v. Taylor 329 U.S. 495 (1947).

[120] NLRB v. Sears, Roebuck and Co., 421 U.S. 132, 154 (1975); Mead Data Central v. Department of the Air Force, 566 F.2d 242, 252-3 (D.C. Cir. 1977).

[121] Federal Open Market Comm. of the Fed. Reserve Bank v. Merrill, 443 U.S. 340, 360 (1979).

[122] Hoover v. Department of Interior, 611 F.2d 1132, 1138-42 (5th Cir. 1980). Accord Martin Marietta Aluminum Inc. v. General Serv. Admin. 444 F. Supp. 945 (C.D. Cal. 1977).

[123] 5 U.S.C. § 552(b) (1976). The rule of segregability was first articulated by the courts, EPA v. Mink, 410 U.S. 73 (1973), and later codified when FOIA was amended in 1974.

he be given access to the entire file upon request or should the information invading the third party's privacy be removed before access is granted? In one case, the Eighth Circuit applied a literal interpretation of the Act and granted access to the entire record. The court held that, since the Privacy Act applied and there was no applicable exemption, the individual was entitled to access.[124] This approach, while technically correct, can lead to abuses violating the spirit of the Act. Instead, the information pertaining to the third party should be considered a record within a record. If the third party information has any impact on the rights, privileges, or benefits of the requester, the record should be released in its entirety. If, on the other hand, the information has no effect on the requester, access should not be granted and the third party information should be permanently removed from the file because the information was irrelevant and should not have been filed there originally. In effect, it would be an amendment of the record to comply with the accuracy standards. The requester would still be entitled to access to the remainder of the file, notice of the removal, and the right to appeal the removal both administratively and judicially. The court could conduct an in camera inspection to determine the legality of removing the third party material. This approach protects the rights of all the parties.

The issue of the identity of a proper requester of information is particularly sensitive when family members are involved. The Act permits the parents of minor children to act in their behalf.[125] Some difficult issues arise when a parent seeks access to a minor's medical records which indicate ongoing treatment for drug or alcohol abuse, treatment for venereal

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[124] Voelker v. Internal Revenue Serv., 646 F.2d 332 (8th Cir. 1981)(request by an IRS attorney for an investigatory file, court held that the government could not withhold on the theory that the third party information did not "pertain" to the requester; if the information is maintained in a record retrievable by his name he is entitled to access unless an exemption applies). *But see* U.S. Dep't of the Army, Reg. No. 340-17, Office Management—Release of Information and Records From Army Files, No. 6, para. d (1 Oct. 1982), which permits the withholding of third party information if disclosure to the subject would constitute a clearly unwarranted invasion of personal privacy [hereinafter cited as AR 340-17]. In DePlanche v. Califano, 549 F. Supp. 685 (W.D. Mich. 1982), a father was denied access under both FOIA and the Privacy Act to the address of his two illegitimate minor children. The requester had been named as the father and required to pay child support but had not been given visitation rights. When he knew the children's whereabouts, law enforcement authorities had to prevent him from harrassing the mother and two children. Since the father was disabled the Social Security benefits paid to his dependent children constituted his child support payments. The address was contained in a record maintained by the Social Security Administration which was retrievable by the father's name. The court held that disclosure pursuant to FOIA would constitute a clearly unwarranted invasion of the children's privacy. The father was not entitled to access under the Privacy Act because the address, although physically located in his file did not pertain to him and was not information about him and therefore could not be considered as part of his record. See note 47 *infra* for the definition of a record.

[125] 5 U.S.C. § 552a(h) (1976).

disease, or receipt of birth control pills. Should the parents or guardian be given access? To what extent is the fulfillment of parental duties considered as acting on behalf of the child? The OMB Guidelines opine that minors are not precluded from exercising rights on their own behalf and that parents have no absolute right to access.[126] In situations where the minor has a legitimate privacy interest, parents should not routinely be given access. If parental consent was not required for the treatment or activity which gave rise to the information in question, the minor should be permitted to assert his right to privacy. The parent would not be considered as acting on behalf of the minor and would be given access only with the minor's consent. This result is consistent with the Act and the OMB Guidelines and it requires resolution of the problem within the parent-child relationship.

A final issue involves the interaction of FOIA and the Privacy Act when an individual requests access to his or her own record which is filed within a system of records. If the record is exempt from release under FOIA but accessible under the Privacy Act, the individual is clearly entitled to access. FOIA exemptions cannot be used to withhold information under the Privacy Act.[127] A more difficult case arises when the record is exempt from access under the Privacy Act but apparently releasable under FOIA. The Fifth and Seventh Circuits and several district courts have held that the information is not releasable.[128] The rationale supporting the denial of access was that the statutes must be read together. Congress could not have intended to deny access to the individual under the Privacy Act and yet release the same information to the general public under FOIA. To avoid this anomaly, the courts held that the Privacy Act falls within FOIA exemption (b)(3). This exemption states that FOIA does not require disclosure of matters that are specifically exempted by statute provided that the statute either requires that the matter be withheld in such a matter that leaves no discretion, or establishes particular criteria for withholding or refers to particular types of matters to be withheld.[129]

A split was created between the circuits when the District of Columbia and Eleventh Circuits held that the Privacy Act was not an exemption

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[126] OMB Guidelines, *supra* note 42, at 28970.

[127] 5 U.S.C. § 552a(g) (1976); Irons v. Bell, 596 F.2d 468 (1st Cir. 1979).

[128] Painter v. Federal Bureau of Investigation, 615 F.2d 689 (5th Cir. 1980); Terkel **v.** Kelly, 599 F.2d 214 (7th Cir. 1979), *cert. denied sub. nom.*, Terkel v. Webster, 444 U.S. 1013 (1980); Porter v. Department of Justice, 551 F. Supp. 595, 597-98 (E.D. Pa. 1982); Provenzano v. Department of Justice, 3 GDS 783,125 at 83,730 (D. N.J. 1982); Wentz v. Drug Enforcement Admin., 3 GDS 783,122 at 83,726 (W.D. Wis. 1982); Anderson **v.** Huff, 3 GDS 783,124 at 83,728 (D. Minn. 1982); Heinzl **v.** Immigration and Naturalization Serv., 3 GDS 783,121 at 83,724 (N.D. Cal. 1981).

[129] 5 U.S.C. § 552a(b)(3) (1976).

(b)(3) statute under FOIA.[130] The courts found that the respective exemptions under the two statutes differ in purpose and therefore in scope. Additionally, the courts did not believe that Congress intended for the Privacy Act to close existing avenues of access under FOIA but rather to give the individual the cumulative total of access rights under both statutes. The split between the circuits illustrates that this is one area where it is very difficult to develop an interface between the statutes. The better solution is to give the individual the cumulative access rights of the two statutes. THe FOIA mandates disclosure and the policy of the Privacy Act is to protect an individual's informational privacy. This protection can best be afforded by granting the individual access. The Privacy Act was not intended to restrict access that was otherwise available. This solution results in only the occasional subordination of the Privacy Act exemptions to the disclosure mandate of FOIA. In most cases, the exemptions under the two statutes will be coterminous.

An issue regarding the individual's amendment rights is whether an individual should be permitted to use the amendment rights is whether an individual should be permitted to use the amendment provisions to collaterally attack a determination that had been made by a judicial or quasi-judicial authority. Although innovative attorneys initially saw the Privacy Act as another means of correcting or modifying an adverse decision, this method has been effectively foreclosed. If an issue has been decided by a court, an individual should not be permitted to collaterally attack the judgment by requesting amendment under the Privacy Act. For instance, an individual who lost a law suit seeking to establish service-connected disability should not be permitted to seek amendment of his medical records to reflect that disability.[132] The same result should apply to a quasi-judicial administrative proceeding where the individual has been afforded due process.[133] In this regard, the OMB Guidelines state that the amendment provisions are not intended to permit the alteration of evidence presented at a judicial, quasi-judicial or quasi-legis-

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[130] Greentree v. United States Customs Serv., 674 F.2d 74 (D.C. Cir. 1982); Clarkson v. Internal Revenue Serv., 678 F.2d 1368 (11th Cir. 1982).

[131] C. Marson, Litigation Under the Federal Freedom of Information Act and Privacy Act, Part 11, The Privacy Act 150-51 (6th ed. 1981). *See also*, AR 340-17, paras. 1-301b, 1-503.

[132] Nolen v. Roudebush, 549 F.2d 341 (5th Cir. 1977).

[133] DeSha v. Secretary of the Navy, 3 GDS j 82,496 (C.D. Cal. Feb. 26, 1982); Kennedy v. Andrus. 459 F. Supp. 240 (D.D.C. 1978). A more difficult issue is presented if a quasi-judicial administrative remedy was available but not exercised by the plaintiff. A court would have discretion to require exhaustion if the administrative remedy is still available. If the remedy is not available at the time of the judicial action for amendment the case should normally proceed.

lative proceeding. Nor are the provisions intended to permit a collateral attack upon that which has already been subject to a judicial or quasi-judicial proceeding.[134]

A final issue is whether amendment requests are limited to factual portions of a record or whether judgmental portions can also be attacked. Although the Act is silent in this regard, agency regulations limiting amendment requests to factual matters have been upheld by the courts.[135] One case carved a limited exception, by holding that if all the facts underlying a judgment were discredited, the judgment could also be attacked.[136] It is reasonable for agencies to initially limit amendment requests to factual portions of the record. However, factual portions of a record often serve as the basis for a judgment. Once the individual is successful in amending the underlying factual portions of the record, the resulting judgments should be reviewed using a substantial evidence standard.

IV. EXEMPTIONS

There are two types of exemptions in the Privacy Act, general and specific. Both types allow an agency head to exempt a system of records from various provisions of the Act. Additionally, they are both discretionary in that they become applicable only when they have been claimed by the agency by the promulgation of rules in accordance with Section 553 of Title 5, U.S. Code. The rulemaking procedure requires that the agency not only claim the exemption but also state the reasons for so doing. This requirement is important because the reasons given for claiming the exemption will serve to limit the scope of the exemption if it is later applied. In a case illustrating the hazards of improperly claiming an exemption, an FBI agent sought a Department of Justice memorandum pertaining to him and monetary damages for wrongful disclosure of derogatory information to the *Washington Post.* The Department of Justice was clearly entitled to exempt the applicable system of records from the provisions granting the individual access to the memorandum and the provisions granting civil remedies for wrongful disclosure. The system had been properly exempted from the access provisions and the reasons given for claiming the exemption were consistent with the reasons given for denying access. Therefore, access was properly denied. However, the agency inadvertantly failed to claim the

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[134] OMB Guidelines, *supra* note 42, at 28958.

[135] Blevins v. Plummer, 613 F.2d 767 (9th Cir. 1980). DeSha v. Secretary of the Navy, 3 GDS ¶ 82,496 (C.D. Cal. Feb. 26, 1982). *See also* Russell, *The Effect of the Privacy Act on the Correction of Military Records*, 79 Mil. L. Rev. 135, 144 (1978).

[136] RR v. Department of the Army, 482 F. Supp. 770 (D.D.C. 1980).

exemption from the civil remedy provisions for wrongful disclosure and consequently was held liable.[137]

A. *GENERAL EXEMPTIONS*

The head of the agency can claim a general exemption if the record is:

> **(1)** maintained by the Central Intelligence Agency; or
>
> **(2)** maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.[138]

If a general exemption is claimed the system of records is exempt from compliance with all of the provisions of the Act except the limitations on disclosure (section (b)), some of the accounting for disclosure provisions (sections (c)(1), and (2)), some of the recordkeeping requirements (sections (e)(4)(A)-(F), (6), (7), (9)-(11)), and the criminal penalties (section (i)).[139] Therefore if a general exemption is properly claimed the system of records is exempt from virtually all of the major provisions of the Act. The provisions which remain effective will not substantially hinder the operations of the CIA or law enforcement agencies. Although the disclosure prohibition is still applicable, there is a broad exception permitting disclosure for law enforcement purposes.[140] The agency must account for disclosures made for law enforcement purposes, but the individual is not entitled to access to this disclosure accounting.[141] The agency must comply with an abbrieviated public notice of the existence of the system of records. Prior to disclosing the record, the agency must make a reasonable effort to insure accuracy. As previously discussed,

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[137] **Ryan v.** Department *of* Justice, 595 F.2d 934 (4th Cir. 1979).
[138] *5* U.S.C.§§ 552a(j)(1), (2)(1976).
[139] *Id.* at § 552a(j).
[140] *Id.* at § 552a(b)(7).

this requirement does not apply to disclosures made pursuant to FOIA or to other federal agencies. The prohibition on the collection of information regarding the exercise of First Amendment rights is applicable but there is a law enforcement exception. The provisions requiring rules of conduct and training programs for agency personnel remain applicable, as does the requirement to establish administrative, technical and physical safeguards to insure the security and confidentiality of the records. Prior to establishing a new routine use, the agency must comply with public notice and rule making provisions.[142] Finally, the criminal penalties remain in effect.[143] Since a system of records can be exempted from the civil remedy provisions, an issue arises as to how an individual enforces the few provisions of the Act which remain applicable. The best approach would be for the courts to order compliance with the specific provisions of the Act, although money damages could not be awarded.

Establishing exemptions within the Privacy Act was a recognition by Congress that other policy considerations, such as the overriding need for national security or the societal interest in the enfocement of the criminal laws, would occasionally outweigh the need for the protection of privacy. The Privacy Act has been criticized by one commentator for the failure to effectively balance the protection of privacy against other societal needs, particularly effective law enforcement.[144]

B. SPECIFIC EXEMPTIONS

The specific exemptions focus more on the nature of the records within a system of records than on the type of agency. They are much more limited and are available to any agency. If a specific exemption is claimed by the agency, a system of records can be exempted from the following provisions: access to the accounting for disclosures (Section (c)(3)); the access and amendment provisions (Section (d)); some of the recordkeeping provisions (Sections (e)(1), (4)(G), (H), (I));and some of the rules requiring publication of public notices.[145]

A specific exemption may be claimed by the head of the agency if the system of records is:

> (1) subject to the provisions of section 552(b)(1) of this title;
>
> (2) investigatory material complied for law enforcement purposes, other than material within the scope of subsection (j)(2)

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[141] *Id.* at § 552a(c)(3).
[142] See note 72.
[143] 5 U.S.C. § 552a(i) (1976).
[144] R. Bouchard, *supra* note 26, at 55-57
[145] 5 U.S.C. § 552a(k) (1976).

of this section: *Provided, however,* that if any individual is denied any right, privilege, or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(3) maintained in connection with providing protective services to the President of the United States or other individuals pursuant to section 3056 of title 18;

(4) required by statute to be maintained and used solely as statistical records;

(5) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence;

(6) testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service the disclosure of which would compromise the objectivity or fairness of the testing or examination process; or

(7) evaluation material used to determine potential for promotion in the armed services, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence.[146]

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[146] *Id.* at §§ 552a(k)(1)-(7).

The first specific exemption deals with information concerning national defense or foreign relations which has been properly classified under Executive Order 12356.[147] The standard for classifying information is whether its disclosure could reasonably be expected to cause damage to the national security. Information will remain classified as long as required by national security considerations. There will no longer be automatic declassification due to passage of time or inadvertant disclosure.

Three of the exemptions deal with the protection of the identity of a confidential source of information.[148] In order to qualify as a confidential source, the person must have been given an express promise of confidentiality. These promises should be made only under the most compelling circumstances. Agencies should establish procedures dictating who can make the promise and under what circumstances it can be made. For records compiled prior to the effective date of the Act a promise implied from the circumstances is sufficient. Under these exemptions, the agency must segregate and release any material which would not identify the source.[149] Conversely, the agency can withhold any information which would tend to identify the confidential source. This would include not only the source's name and other identifying data, but also any other information which could disclose the source's identity. There is case law holding that information identifying the source was exempt even though the individual requesting access actually knew the identity of the source.[150] The rationale for the holding was that the purpose of the exemption was to protect the identity of the source and facilitate governmental access to material that would not otherwise be available. Therefore, the information provided by the source which would reveal his identity remained protected even though the requester was able to determine the source's identity.

At some point, the statutory protection of the identity of a confidential source of information will give way to the constitutional right to due process. For instance, if the information provided by a confidential source is used by the agency to take a disciplinary action, due process requires greater disclosure of relevant information.[151] Thus, the agency must choose between revealing the source and allowing confrontation or not relying on the confidentially provided information in taking the adverse action. When faced with this choice, the agency should normally honor its promise of confidentiality. The integrity and credibility of the

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[147] 47 Fed. Reg. 14,847 (Apr. 6, 1982).

[148] 5 U.S.C. §§ 552a(k)(2), (5), (7) (1976).

[149] Nemetz v. Department of Treasury, 446 F. Supp. 102, 105 (N.D.N.Y. 1980); Analysis of Compromise Amendments, *supra* note 39, *reprinted* in Source Book, *supra* note 27, at 860.

[150] Volz v. Department of Justice, 619 F.2d 49 (10th Cir. 1980).

agency and the continued access to confidential information are systemic values that outweigh the need for the information in pursuing a single adverse action. Additionally, the agency may be able to use the confidential information to develop other independent evidence that will support the adverse action.

The President is required to make an annual report to the Speaker of the House and President of the Senate listing by agency the number of records contained in any system of records for which an exemption was claimed during the preceding year, the reasons given for claiming the exemption, and any other information which indicates an effort to fully administer the Privacy Act.[152]

V. DISCLOSURE PROHIBITION

Agencies are prohibited from disclosing by any means of communication to any person or another agency any record contained within a system of records unless the subject of the record submits a written request for disclosure in which case the access provisions apply, the subject consents in writing to the disclosure, or one of the eleven exemptions is applicable.[153] The term "by any means of communication" indicates that any form of disclosure is prohibited, to include oral disclosures, written disclosures, and electronic or mechanical transfers between computer.

A. *WHAT IS A DISCLOSURE?*

The threshold issue is determining whether there has been a disclosure from a system of records. Analysis of case law is required because there is no statutory definition. The actual release of a record, as will occur in most cases, is clearly disclosure. However, there are several cases which present some interesting variations. In one case, the Internal Revenue Service (IRS) sent letters to three individuals informing them that their cases had been referred to the Justice Department. The case caption on each letter contained all three individuals informing them that their cases had been referred to the Justice Department. The case caption on each letter contained all three names but said nothing about the nature or status of any of the cases. Each of the individuals was aware that the others were the subject of an ongoing IRS investigation. The court held that there was no disclosure because a disclosure under the Privacy Act is the imparting of information which in itself has meaning and was pre-

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[151] 120 Cong. Rec. 40406 (1974).
[152] 5 U.S.C. § 552a(p) (1976).
[153] Id. at § 552a(b).
[154] OMB Guidelines, supra note 42, at 28953.

viously unknown to the person to whom it was imparted.[155] A better result in this case would have been for the court to conclude that there had been a disclosure but that the plaintiff had not suffered any adverse effect and consequently was not entitled to a civil remedy.

There are a number of cases dealing with whether a disclosure results when an agency official states a personal opinion about an individual. In one situation a former employee of the Veterans Administration (VA) brought suit against the agency alleging that an official had disclosed confidential information without his consent. The information, which was imparted in a phone conversation between the VA official and the plaintiffs new employer, the Chief of Security of Great Lakes, was that the plaintiff had resigned pending termination for poor judgment in performing his duties. The court held that there was no disclosure from a system of records because there was no evidence that the agency official had referred to or used the plaintiffs record before imparting the information.[156] The personal opinion of an agency official stated from memory of past events is not a disclosure. In a similar case, a former officer of the Public Health Service (PHS) brought suit for wrongful disclosure. A PHS official had written a letter to the plaintiffs prospective employer which mentioned that the plaintiff often missed work without excuse and recommended against hiring him. The court held that in order for a disclosure to come within the statutory prohibition, there must be evidence that the information was retrieved at some point from a system of records. In this case the information had been derived from personal observation and not from reference to the plaintiffs records.[157] These decisions point out reasonable limitations on the Act's coverage. The Act prohibits disclosure from systems of records, it does not prohibit the expression of personal opinions. Before rendering an opinion, agency officials should not be forced to check several systems of records to determine whether the information to be imparted is coincidentally contained in a record. Whenever a plaintiff is dealing with the communication of a personal opinion by a agency official, he or she must use discovery techniques to trace that official's knowledge back to a system of records. If the plaintiff is unsuccessful, the nondisclosure provisions of the Privacy Act are inapplicable. This does not preclude a common law tort action such as slander, libel, or defamation.

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[155] Harper v. United States, 423 F. Supp. 192 (D.S.C. 1976).
[156] Jackson v. Veterans Admin., 503 F. Supp. 653 (N.D. Ill. 1980).
[157] Savarese v. Department of Health, Educ. and Welfare, 479 F. Supp. 304 (M.D. Fla. 1979). *See also* King v. Califano, 471 F. Supp. 180 (D.D.C. 1979).

B. WHAT CONSTITUTES CONSENT?

Consent is another term that is undefined by the Act, although it is clear that whenever an individual consents to disclosure he or she must do so in writing. In attempting to define the parameters of consent under the Privacy Act, a recent case turned to the criminal arena for a basis of comparison. There cannot be a valid consent to or waiver of the Sixth Amendment right to counsel in a criminal trial unless there has been an intentional relinquishment of a known right or privilege.[158] In contrast, knowledge of a right to refuse is not a prerequisite of a voluntary consent in connection with the relinquishment of certain rights protected by the Fourth Amendment.[159] The court held that consent under the Privacy Act did not rise to the level of the intentional relinquishment of a known right. Knowledge of the right to refuse consent is not required.[160] In processing a consensual release, an agency should require that the written consent specify the record or records to be released and to whom they are to be released. Blanket consent forms should not be honored.

C. THE EXCEPTIONS

The first of the eleven exceptions to the disclosure prohibition is a disclosure within the agency to those officers or employees having a need to know the information in performing their duties.[161] It is self-evident that agency employees regularly need access to agency records in order to perform their duties. The Privacy Act was not intended to impede the orderly conduct of government or delay the performance of governmental services.[162] The only restriction on the flow of information within the agency is that the receiving official must have a need to know the information in performing his or her duties. The need to know limitation was designed to stop such activities as office gossip, the internal blacklisting of agency personnel who do not comply with agency norms, such as participation in charitable campaigns or savings bond drives, and the publication of employment test scores.[163] In applying the need to know provision to an intra-agency release of records, the focus must be on the function which is being performed. The releasing official, normally the records custodian, should determine whether it is a valid agency function and whether the information is actually needed to perform the function.

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[158] Johnson v. Zerbst, 304 U.S. 458 (1938).
[159] Schneckloth v. Bustamonte, 412 U.S. 218 (1973).
[160] Doe v. General Services Admin., 544 F. Supp. 530 (D.Md. 1982).
[161] 5 U.S.C§ 552a(b)(1) (1976).
[162] OMB Guidelines, *supm* note 42, at 28954.
[163] Parks v. Internal Revenue Serv., 618 F.2d 677 (10th Cir. 1980) (disclosure of a list of agency employees, who had not purchased savings bonds through the payroll deduction plan, to other agency personnel for solicitation purposes was not a valid intra-agency disclosure, there was no valid need to know.)

The second exception deals with disclosures that are required by FOIA.[164] This exception was designed to preserve the status quo as interpreted by the courts regarding the disclosure of personal information to the general public pursuant to FOIA. The Act's perservation of the status quo was criticized by President Ford as providing inadequate protection against unnecessary disclosures of personal information.[165] Therefore the Privacy Act defers to the FOIA release provisions and the analysis turns to whether a FOIA exemption from release applies.

The volume and detail of personal information maintained by government agencies is enormous. While the personal information maintained by some agencies is limited to the personal records of their employees, many agencies maintain virtually "womb to tomb" information about large segments of the American public. For instance, the agencies within the Department of Defense maintain a vast array of records to include medical records on all service members and their families, detailed personnel and financial records on all service members and civilian employees, and records on school systems from kindergarten through the war college.[166] Unquestionably, the maintenance and use of personal information is essential to the effective functioning of the government. There does, however, exist a concomitant responsibility for federal agencies to protect the privacy interests of the individual. The FOIA, while promoting openness and accountability in government, also protects against unwarranted invasions of personal privacy through the application of exemption 6, which limits the disclosure of personnel and medical and similar files, and exemption 7 which limits the disclosure of investigatory records compiled for law enforcement purposes.[167] In most cases involving the interface of FOIA and the Privacy Act, the issue is the application of these personal privacy exemptions.

In applying FOIA exemption **6,** the initial inquiry is whether the record at issue falls within the term "personnel and medical files and similar files." The term "personnel and medical files" has not been difficult to apply, most of the controversy centering instead on the meaning of "similar files." For years, case law broadly defined a similar file as one containing information pertaining to an individual that is similar to that

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[164] *5* U.S.C. § 552a(b)(2) (1976).

[165] OMB Guidelines, *supm* note 42 at 28954; Source **Book,** *supra* note 27, at 1001.

[166] "*Privacy Protection Practices Examined,* Vol. III, No. *4,* FOIA Update (Sept. 1982). FOIA Update is a quarterly publication of the Office of Information and Privacy in the Department of Justice.

[167] *5* U.S.C. § 552a(b)(6) (1976) permits withholding under FOIA of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." *5* U.S.C. § 552a(b)(7)(C) (1976) permits withholding under FOIA of "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would. . . constitute an unwarranted invasion of personal privacy."

found in a standard personnel file.[168] Later, a line of cases developed a narrower interpretation; a similar file was limited to one containing information that was as intimate or highly personal as that contained in a personnel or medical file. This narrow definition resulted in the court-ordered disclosure of personal information based solely on the nature of the file in which it was maintained.[169] The Supreme Court resolved this conflict by holding that Congress intended a broad rather than a narrow meaning of the term similar file so that any information which applies to a particular individual qualifies for consideration under exemption 6.[170] This decision has the beneficial effect of requiring agencies and courts to focus on the nature of the information requested rather than the type of file in which the information was filed. The concept of a similar file is not now a substantive limitation on the extent of the protection of personal privacy under FOIA. Each case requires a balancing of the public interest in disclosure of the information against the privacy interest that would be invaded by disclosure.

In applying the balancing test, agencies must recognize that the presumption is tipped in favor of disclosing. Only when disclosure would constitute a clearly unwarranted invasion of personal privacy, may the record be withheld. This indicates that some invasions of privacy are warranted by the public's right to know, accordingly, when the privacy interests and disclosure interests are relatively equal, disclosure is mandated.

The initial inquiry in applying the balancing test is whether disclosure of the record would invade any protectable privacy interest. In some cases the privacy interest is apparant. Medical records containing the intimate details of an individual's life and personal records containing test scores or confidential performance evaluations by supervisors are clearly deserving of some degree of protection under the most minimal test for the protection of privacy. There are, however, several categories of information in which the privacy interest is so small that disclosure generally will not result in a clearly unwarranted invasion of personal privacy. For instance, the following information can normally be released from records maintained by military agencies: name, rank, date of rank, gross salary, present and past duty assignments, future assignments which have been finalized, duty telephone number and address, source of commission, military and civilian educational level and promotion sequence

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[168] Harbolt v. Department of State, 616 F.2d 772 (5th Cir. 1980); Pacific Molasses Co. v. NLRB, 577 F.2d 1172 (5th Cir. 1978).

[169] Kurzon v. Dep't of Health and Human Services, 649 F.2d 65 (1st Cir. 1981); Board of Trade v. Commodity Futures Trading Comm'n, 627 F.2d 392 (D.C. Cir. 1980); Sims v. Central Intelligence Agency, 642 F.2d 562 (D.C. Cir. 1980). *See also, Similar Files: A Concept In Peril,* FOIA Update (Winter 1981).

[170] Washington Post v. Department of State, ___ U.S. ___, 72 L.Ed.2d 358 (1982).

number.'"[171] Similarly, the Office of Personnel Management has promulgated regulations requiring disclosure of certain information on most federal employees, to include name, present and past position titles, grade level, salary, and duty station.[172] The Justice Department's policy is to release additional items of information pertaining to a federal official's professional qualifications to include graduate or technical education, prior employment in both the public and private sector, awards and honors received, membership in professional groups, letters of communication from professional colleagues, and appointment affidavits and oath of office.[173] In determining the existence of a protectable privacy interest agencies must consider not only the nature of the information but also to whom it pertains. Privacy rights generally belong only to a living person. Corporations and other business enterprises do not have protectable privacy interests.[174] The only exception is for a closely-held business that is generally associated with a particular individual.[175] Similarly, the general rule is that privacy rights do not survive an individual's death.[176] There may, however, be situations in which disclosure of information pertaining to a decedent may implicate the privacy interests of the next of kin or former associates.[177]

If a privacy interest worthy of protection is found, then a balance must be struck between the individual's privacy interest and the public's interest in disclosure. Intimate details about an individual's personal life and family status are weighed heavily in assessing the privacy interest. Similarly, matters, unrelated to the performance of governmental functions, which are capable of causing harassment or embarrassment are closely scrutinized.[178] Some examples of information in which an individual usually has a protectable privacy interest are place and date of birth, marital status, home address and phone number, medical records, religious preference, substance of promotion recommendations, specific as-

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[171] *Privacy Protection Practices Examined* at 2, Vol. III, No. 4, FOIA Update (Sept. 1982).

[172] *OIP Guidance: Privacy Protection Considerations* at 3, Vol. III, No. 4, FOIA Update (Sept. 1982); National Life Ins. Co. v. United States, 512 F. Supp. 454, 461 (N.D. Tex. 1980) (no privacy interest invaded by the disclosure of the names and duty stations of Postal Service employees).

[173] *OIP Guidance: Privacy Protection Considerations* at 3, Vol. III No. 4 FOIA Update (Sept. 1982).

[174] Sims v. Central Intelligence Agency, 642 F.2d 562, 572 n. 47 (D.C. Cir. 1980); National Parks and Conservation Ass'n v. Kleppe, 547 F.2d 673, 685 n.44 (D.C. Cir. 1976).

[175] Providence Journal Co. v. Federal Bureau of Investigation, 460 F. Supp. 778, 785 (D.R.I. 1978) *rev'd on other grounds*, 602 F.2d 1010 (1st Cir. 1979). *See also* Zeller v. United States, 467 F. Supp. 487, 496-99 (E.D.N.Y. 1979).

[176] Diamond v. Federal Bureau of Investigation, 532 F. Supp. 126, 227 (S.D.N.Y. 1981). *But see* Kiraly v. Federal Bureau of Investigation, 3 GDS 782,466 (N.D. Ohio 1982).

[177] Lesar v. Department of Justice, 636 F.2d 472, 486-88 (D.C. Cir. 1980).

[178] Rural Housing Alliance v. Department of Agriculture, 498 F.2d 73, 77 (D.C. Cir. 1974).

sessments of professional conduct and ability, information provided by or concerning relatives or personal references, allegations of misconduct or arrest, and social security number or military service number. In this regard, the Justice Department has taken the position that the public is entitled to information pertaining to the qualifications for and performance of federal duties, but that federal employees are as fundamentally entitled to the same degree of privacy protection as are members of the public.[179] In addition to the type of information involved, there are some other factors which are helpful in gauging the extent of an individual's privacy interest. The common law libel concept of a "public figure" is sometimes useful. Individuals who place themselves in the public eye have lessened their expectation of privacy and increased the public interest in disclosure.[180] A promise of confidentiality is relevant but not dispositive in assessing the degree of protection which should be afforded.'*' A final factor is whether the information requested from the agency is publicly available through an alternate source. If so, the privacy interest is diminished.

Balanced against the individual's privacy interest is the public interest in disclosure. The balancing test, while seeking to accommodate both interests, is tipped in favor of disclosure. The major purpose of FOIA is to insure greater accountability of government activities by opening agency records to public scrutiny. Accordingly, the public interest is greatest when the information deals with violation of the public trust or wrongdoing by government officials.[182]

In calculating the public interest the requester's interest in the information can be considered. In an early case, the court focused almost exclusively on the particular needs of two law professors who were seeking the names, addresses, and telephone numbers of employees eligible to vote in a union certification election. The professors wanted to contact the employees to ask for voluntary participation in a study of factors effecting the election. The purpose of the study was to determine whether certain election tactics which the NLRB prohibited as unfair really had an effect on election results. If not, the NLRB could remove the prohibitions and discontinue the expensive supervision of certification elec-

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[179] *OZP Guidance: Privacy Protection Considerations* at 3, Vol. III, No. 4, FOIA Update (Sept. 1982).

[180] FOIA *Counselor* at 5, Vol. III, No. 4, FOIA Update (Sept. 1982); C. Marson, *supra* note 131, at 88; Fund for Constitutional Gov't v. National Archives and Records Serv., 656 F.2d 856, 866 (D.C. Cir. 1981); Common Cause v. National Archives and Records Serv., 628 F.2d 179, 184 (D.C. Cir. 1980).

[181] C. Marson, supra note 131, at 89; Robles v. EPA, 484 F.2d 843, 846 (4th Cir. 1973).

[182] Columbia Packing Co., v. Department of Agriculture, 563 F.2d 495, 499 (1st Cir. 1977) (federal employees found guilty of accepting bribes); Congressional News Syndicate v. Department of Justice, 438 F. Supp. 538, 544 (D. D.C. 1977) (misconduct by staff personnel at the White House),

tions. The court required disclosure but stated that the result might have been different if the requesters were different or the study was more intrusive.[183] Thus while the general public interest is predominant, the requester's interest can be considered in framing the scope of the public interest. A significant problem with this approach is that in ordering disclosure the court cannot place restrictions on the subsequent use of the information. While there is clearly a public interest in the study of union elections to weigh the effectiveness of NLRB policies, once the information was released it could have been used for any purpose to include commercial solicitation.

Another factor that has arisen because of the permissible consideration of the requester's interests is whether disclosure will provide a benefit to the subject of the record. If the subject of the information will benefit, presumably there will usually be no unwarranted invasion of privacy. An intent to benefit the subject can also add weight to the public interest underlying the request. In one illustrative case using the benefit analysis, a nonprofit organization serving the needs of disabled personnel was granted disclosure of data on disabled personnel.[184] The consideration of altruistic motives is helpful in striking the balance but it also suffers from the shortcoming that, once disclosure is granted, the subsequent dissemination by the requester cannot be controlled. Often a requester's interest will add little or no weight to the public interest side of the equation, as when the requester's interest is purely commercial. Requests by individuals asserting that they would use the information as public watch dogs over governmental activities have been given little weight.[185] On the other hand, similar requests by the media are given greater weight because of the ability to reach the public. The important role played by the media in democracy has not gone unnoticed by the courts. In many cases, the citizenry must rely on the media to discover and disseminate information. In striking the balance between the media's need for access to information and the individual's right to privacy, Professor Thomas Emerson has suggested greater emphasis on developing the privacy side of the balance. He has proposed that the element of intimacy should be emplasized in articulating an individual's zone of privacy. He then carved out exceptions for formal law enforcement proceedings and people who have voluntarily put themselves in the public light.[186]

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[183] Getman v. NLRB, 450 F.2d 670, 675-6 (D.C. Cir. 1971).

[184] Disabled Officers Ass'n v. Rumsfeld, 428 F. Supp. 454, 458 (D.D.C. 1977).

[185] Factoring In The Public Interest at 6, Vol. III, No. 4., FOIA Update (Sept. 1982); Harbolt v. Department of State, 616 F.2d 772, 775 (5th Cir.), cert. denied, 449 U.S. 856 (1980), (federal prisoner's intention to contact and provide services to U.S. citizens imprisoned overseas furthers no public interest); Miller v. Bell, 661 F.2d 623, 630 (7th Cir. 1981).

[186] Emerson, supra note 10, at 343-4.

Another factor to be considered in determining the extent of the public interest is the effect of policies reflected in other statutes, such as the Federal Corrupt Practices Act's mandatory public reporting of campaign contributions, the requirement in the Ethics in Government Act of public disclosure of financial data by specific government personnel, and the provisions of the Omnibus Crime Control and Safe Streets Act of 1968 prohibiting the disclosure of the fruits of a wiretap.[187] In articulating the public interest in a given case, agencies must consider both the public interest factors favoring disclosure and those favoring nondisclosure. Several cases have recognized that public interest factors into both sides of the balance.[188]

A final consideration in applying any exemption under FOIA is the rule of segregability which mandates the release of all reasonably segregable portions of a record which are not exempt from release.[189] While easily stated, this rule causes a great deal of administrative work for agency personnel. Documents must not only be scrutinized for release, but must be read line-by-line to determine whether any segments should be provided. In many cases the deletion of personal identifying data will make the remainder of the record releasable. A recent refinement on the rule of segregability is the mosaic or jigsaw puzzle approach. The District Court for the District of Columbia held that the Navy need not release the aggregate quantities of drugs dispensed to Congress' Office of the Attending Physician even though the names of the recipients are deleted. The rationale was that the disclosure of the fact that a certain drug had been prescribed could be the missing link for a person with fragmented knowledge about a legislator's health.[190] A similar approach had previously been adopted for intelligence information cases.[191]

Some examples illustrate the practical application of exemption *6* and the importance of the status and purpose of the requester. In most situations, a commercial creditor will not be given an individual's home address or telephone number, although an agency can forward mail to the individual.[192] On the other hand, because of the heightened public inter-

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[187] Common Cause v. National Archives and Records Serv., 628 F.2d 179, 183-85 (D.C. Cir. 1980); Providence Journal v. Federal Bureau of Investigation, 602 F.2d 1010, 1013-14 (1st Cir. 1979).

[188] ***FOIA Counselor*** at 5, Vol. III, No. 4, FOIA UPdate (Sept. 1982). Fund for Constitutional Gov't v. National Archives and Records Serv., 656 F.2d 856, 865 n.22 (D.C. Cir. 1981).

[189] 5 U.S.C. § 552a(b) (1976); Department of the Air Force v. Rose, 425 U.S. 352, 373-76 (1976).

[190] Arieff v. Department of the Navy, 3 GDS 782,291 (D. D.C. Apr. 27, 1982) (appeal pending).

[191] Halperin v. Central Intelligence Agency, 629 F.2d 144 (D.C. Cir. 1980).

[192] DAJA-AL 197614062, 5 Apr. 1976, ***as digested*** *in* The **Army** Lawyer, Feb. 1977, at 15 (the home address of a former service member was withheld from a concessionaire who

est the home address and phone number will generally be released to enable a former spouse to enforce a court order for child support.[193] Several cases have dealt with third party access to an individual's personnel file. An employee sought access to his supervisor's personnel file to see whether any adverse action was taken against the supervisor because of a grievance filed by the employee against the supervisor. The request was denied because of the important privacy interests of the supervisor and the requester's purely personal interests.[194] In another case unsuccessful applicants for promotion who had filed a grievance were granted access to the personnel files of the successful applicants. The rationale for disclosure was to insure that the government was complying with merit promotion procedures and the minimal invasion of the privacy of the successful applicants.[195]

A recent case illustrating several of the factors previously discussed involved a FOIA request by the *Washington Post* concerning possible conflicts of interest of scientific consultants employed by the National Cancer Institute, an agency administered by the Department of Health and Human Services. Specifically, the *Post* sought disclosure of each consultant's nonfederal employment and the organizations in which the consultant has had a financial interest relating to the consulting duties. This information is found in an agency form which requires the consultant to list his employer, the kind of organization and his position. For financial interests the consultant must list the name and type of organization, the nature of the interest and in whose name it is held. The form does not require rates of pay or the dollar amounts of any interest. The government promised that the information would only be disclosed for good cause. The court held that disclosure of the employment information would constitute a minimal invasion of privacy. Disclosure of the organization in which the consultants have a financial interest, while constituting a greater invasion of privacy than the employment information, did not amount to a serious invasion. The government's pledge of confidentiality did heighten the expectation of privacy, but was not determinative. On the other side of the balance, the public has a strong interest in the disclosure of potential conflicts of interest. Scientific consultants receive one billion dollars per year in research grants from public funds. The court held that disclosure would not constitute a clearly unwarranted invasion. The court remanded for consideration of whether

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had rented the service member a television); DAJA-AL 1977/5197, 25 Aug. 1977, *as digested in* The Army Lawyer, Dec. 1977, at 34 (home address of a service member withheld from a banking facility).

[193] *OIP Guidance: Privacy Protection Considerations*, Vol. III, No. 4, FOIA Update (Sept. 1982).

[194] Schonberger v. National Transp. Safety Bd., 508 F. Supp. 941 (D.D.C. 1981).

[195] Clemins v. Department of Treasury, 457 F. Supp. 13 (D.D.C. 1977).

exemption 4 of FOIA was applicable. Exemption 4 authorized withholding of commercial and financial information that is privileged or confidential.[196]

Exemption 7, which was substantially amended in 1974, is applicable to investigatory records compiled for law enforcement purposes but only to the extent that disclosure would cause one of six specific types of harm. One of those harms is disclosure which would constitute an unwarranted invasion of personal privacy.[197] This exemption, like exemption 6, requires a balancing of the public interest in disclosure against the extent of the invasion of privacy which would result from disclosure.

The threshold issue is whether the record pertains to a specific civil or criminal law enforcement investigation. The agency conducting the investigation must have proper authority.[198] Information which falls withing the exemption retains its protection even when it is copied or summarized for a non-law enforcement purpose.[199] Additionally, information originally compiled for non-law enforcement purposes is protected by exemption 7 when it is used by a subsequent law enforcement investigation.[200]

The considerations previously discussed in applying the balancing test under exemption 6 are applicable in analyzing the scope of exemption 7(C). The absence of the word "clearly" makes the test under exemption 7(C) less stringent, although as a practical matter it is difficult to distinguish between an unwarranted invasion of privacy and one that is clearly so.[201] The best rationale for the difference is the inherent distinction between investigatory files and the files covered by exemption 6. Once an individual's name is connected with a law enforcement investigation he may become the subject of rumor and innuendo, hence the need for greater protection.

The case law in applying exemption 7(C) has focused on three distinct types of people: the subjects of an investigation, law enforcement officials involved in the investigation, and confidential sources of information. The exemption has frequently been used to withhold the identity of people who were of investigatory interest to a law enforcement agency. The FBI, as well as other law enforcement agencies, takes the position that even the mention of a person's name in connection with a law enforcement investigation should normally be protected. Consequently,

[196] Washington Post v. Department of Health and Human Services, 690 F.2d 252 (D.C. Cir. 1982).
[197] See note 167 supra.
[198] Weissman v. Central Intelligence Agency, 565 F.2d 692, 696 (D.C. Cir. 1977).
[199] Federal Bureau of Investigation v. Abramson, ___ U.S. ___, 72 L.Ed.2d. 376 (1982).
[200] Lesar v. Department of Justice, 636 F.2d 472, 487 (D.C. Cir. 1980).
[201] C. Marsons supra note 131, at 92-3.

the FBI will not even acknowledge the existence of an investigatory file on an individual without his consent.[202] The rationale for withholding the identity of law enforcement personnel is that they do not lose their interest in personal privacy because of their profession; public disclosure could subject them to harassment both publically and in their private lives.[203] The protection of informants and confidential sources of information is recognized under both exemptions 7(C) and (D). Recently, the exemption was applied to statements of employees in the course of an unfair labor practice investigation against the employer by the NLRB,[204] and the information communicated by citizens through their elected representatives to federal law enforcement agencies.[205] In each of these cases the fear of reprisals was a central issue.

Normally, the FOIA exemptions are not mandatory. Even if an exemption applied, the agency still had discretion to release the record if to do so would not jeopardize a governmental interest. The Privacy Act removes this discretion. If an exemption applies, then disclosure is not required under FOIA. The exception to the Privacy Act's disclosure prohibition only applies to disclosures required by FOIA. Therefore, although the Privacy Act maintains the status quo by permitting the release of information that is not exempted under FOIA, it does add some protection of personal privacy by prohibiting the discretionary disclosure of exempt information.[206]

There are some significant shortcomings in the protection of personal privacy which is afforded by the FOIA exemptions. Neither the FOIA nor the Privacy Act require an agency to notify the subject of a record that information has been requested about him pursuant to FOIA. Consequently, the assertion of an exemption protecting personal privacy must be made by the agency. In many cases the agency is the best party to assert a FOIA exemption; for instance, if the agency had properly classified information in the interest of national security or foreign policy it could be relied upon to claim and vigorously assert the FOIA exemption. The reliance may be misplaced in the area of personal privacy. The prospect of expending agency resources to claim and possibly litigate the existence of a privacy exemption may cause agencies to im-

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[202] ***Privacy Protection Practices Examined,*** Vol. III, No. **4,** FOIA Update (Sept. 1982); Fund for Constitutional Gov't v. National Archives and Records Serv., 656 F.2d 856, 861-66 (D.C.Cir. 1981).

[203] Miller v. Bell, 661 F.2d 623, 628-31 (7th Cir. 1981); Nix v. United States, 572 F.2d 998,1006 (4th Cir. 1978).***But see*** Ferguson v. Kelley, **448** F. Supp. 919,923-24 (N.D. Ill. 1977).

[204] Alirez v. NLRB, 676 F.2d 423 (10th Cir. 1982).

[205] Holy Spirit Ass'n v. Federal Bureau of Investigation, 683 F.2d 562 (D.C. Cir. 1982).

[206] Florida Medical Ass'n v. Department of Health, Educ. and Welfare, 479 F. Supp. 1291 (M.D. Fla. 1979).

properly disclose information. The balance would be increasingly tipped in favor of disclosure in close cases. One commentator claimed that, when an individual surrenders personal information to an agency, he or she has effectively appointed the agency as the guardian of his or her privacy. Unfortunately, all too often the agency is an incompetent guardian.[207] A possible solution to the incompetent guardian problem would be for the agencies to establish a procedure requiring notification of the subject of the record any time information is requested in which the subject has a protectable privacy interest. The subject could then submit information to the agency supporting withholding or could initiate a "reverse FOIA suit to enjoin disclosure.

The third exception to the disclosure prohibition is disclosure for a routine use. With respect to disclosure, a routine use is a use of the record for a purpose which is compatible with the purpose for which it was collected.[208] The notion of disclosure for a routine use was completely absent from the original Senate bill; it was adopted from the House bill. As previously discussed, other provisions of the Privacy Act require that each routine use be published annually in the public notice of the system of records,[209] that the agencies establish new routine uses by complying with public notice and comment provisions,[210] and that the warning required when information is collected must contain the routine use.[211] Each of these are procedural requirements designed to prevent abusive practices, the only substantive limitation is the test of compatibility. The analysis of the compromise amendments indicate that the routine use exception was intended to permit the nonconsensual intra- or interagency transfer of information where such transfer was for housekeeping or necessarily frequent.[212] The term includes all the proper and necessary uses even if they occur infrequently.[213] As seen from the definitions and legislative history the routine use exception does not substantially restrict interagency transfers, it just requires agencies to plan in advance and comply with procedural requirements. Consequently, this is potentially the broadest exception and poses the greatest threat to the protection of personal privacy.[214]

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[207] R. Bouchard, *supra* note *26,* at *61.*
[208] *See* note 73 *supm.*
[209] *See* note *61 supm.*
[210] *See* note *72 supm.*
[211] *See* note 76 *supra.*
[212] Analysis of Compromise Amendments, *supm* note *39, reprinted in* Source Book, *supm* note *27,* at 859-60.
[213] OMB Guidelines, *supra* note *42,* at *28953.*
[214] Agencies, after complying with the notice and comment provisions, can establish routine uses for information which are compatible with the original purpose for collection. These routine uses justify disclosure of the information. This broad power to establish routine uses presents a potential for abusive practices. *See* Commission Report, *supm* note *43;*

In establishing routine uses it is permissible to establish general routine uses which apply to all systems of records maintained by the agency.[215] For example, a general routine use would be to respond to a congressional inquiry which was initiated by the subject of the records. Agencies may also establish specific routine uses which are applicable only to a specific system of records. In establishing general and specific routine uses agencies should avoid any potential abuses by strictly complying with the compatability standard.

Exceptions four through six to the disclosure prohibition allow disclos; ures to the Bureau of Census, statistical researchers and the National Archives respectively.[216]

The seventh exception allows for the disclosure of information to another federal agency or to a state or local instrumentality for the purpose of civil or criminal law enforcement. The head of the agency or instrumentality or his delegated representative must make a written request for the information specifying the record and the law enforcement purpose for which the record is requested. Blanket requests for all records pertaining to an individual are not permitted.[217]

Exceptions eight through ten permit disclosures under compelling circumstances affecting the health and safety of an individual, to either House of Congress, or any committees or subcommittees, but not to members of Congress acting in their individual capacity, or to the Comptroller General.[218]

The eleventh exception allows for disclosures pursuant to the order of a court of competent jurisdiction. A subpoena ***duces tecum*** issued in blank by the clerk of court is not a court order for the purpose of this exception; judicial scrutiny is required.[219] The court issuing the order need not have personal jurisdiction over the custodian of the records. The custodian should comply with the order if the court has proper jurisdiction over the underlying litigation.[220]

A final exception was added by the "Debt Collection Act of 1982."[221] Subject to several conditions precedent, this exception allows the head

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Note, *Narrowing the "Routine Use" Exemption of the Privacy Act of 1974,* **14** U. **Mich. J.L. Ref. 126 (1980).**

[215] U.S. **Dep't** of **the Army, Reg. No. 340-21, Office Management—The Army Privacy Program, para. 3-1c (27 Aug. 1975).**

[216] 5 U.S.C. §§ 552a(b)(4)-(6) (1976).

[217] **OMB Guidelines,** *supm* **note 42, at 28955.**

[218] *Id.*

[219] **Stiles v. Atlanta Gas Light** Co. **453** F. **Supp. 798 (N.D.Ga. 1978).**

[220] DAJA/AL **197514685, 18 Sept. 75,** *as digested in* **76-6 Judge Advocate Legal Service 28 (1976).**

[221] Pub.L. No. **97-365; 96 Stat. 1749;** 5 U.S.C. § 552a(b)(12) **(1982).**

of an agency to disclose to a consumer reporting agency an individual's unsatisfied indebtedness to the United States.[222]

D. *ACCOUNTING FOR DISCLOSURES*

Agencies are required to maintain an accounting of disclosures made from a system of records. The accounting requirement has three major purposes: to inform the individual of what disclosures have been made, to facilitate the transmission of amended information to prior recipients of the record, and to provide an audit trial to check for agency compliance. The accounting must include the date, nature, and purpose of the disclosure, and the name and address of the recipient. It must be maintained for five years or the life of the file whichever is longer. There is no accounting required for intra-agency disclosures or disclosures required by FOIA. Although an accounting is required for disclosures made pursuant to a written request from the head of a law enforcement agency, the subject need not be given access.[223]

The exceptions from the accounting requirements for intra-agency disclosures and disclosures required by FOIA are based on the need for efficiency and the avoidance of undue administrative burdens. However, because of the interaction with other provisions, the lack of an accounting can cause severe problems for the individual. The Privacy Act permits disclosures of records that are required by FOIA under Section b. No accounting is required for these disclosures under section c. Even though the information is disclosed outside of the federal agencies there is no requirement to insure accuracy prior to disclosure, Section (e)(6). This creates the potential for the disclosure of inaccurate data outside of the federal government with no accounting for the disclosure. The FOIA goals of openness and accountability of government can be fulfilled without the systemic subordination of the Privacy Act. As previously suggested, when records are requested in which the individual has a protectable privacy interest he should be notified. The record of notification could satisfy the accounting requirement. The individual would then have the opportunity to assert a privacy interest and to correct any incorrect data. This allows individuals the right to protect their own privacy interests and to insure the accuracy of any information that is ultimately disclosed.

VI. LIMITATIONS ON THE USE OF SOCIAL SECURITY NUMBERS

The Privacy Act attempted to limit the use by federal, state and local agencies of an individual's social security account number (SSAN). The

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[222] 31 U.S.C. § 952(d)(1)(A)-(E), *amended by* Pub.L. No. 97-365 (1982).
[223] 5 U.S.C. § 552a(c) (1976).

Act made it unlawful for any of these agencies to deny an individual a right, privilege or benefit because of the refusal to disclose the SSAN. There were two exceptions to this provision: disclosure required by federal statute and disclosure to a federal, state or local agency maintaining a system of records in existence and operating before January 1, 1975, if such disclosure was required under statute or regulation adopted prior to such date to verify the individuals's identity.[224]

There are a number of federal statutes which require the disclosures of SSAN: all members of a family must disclose prior to receiving certain welfare benefits, tax preparers, and registrants for the draft.[225] The Tax Reform Act of 1976 allows a state or political subdivision to require disclosure of the SSAN to establish the identity of any person affected by any tax law, any general public assistance law, any drivers license law, and any motor vehicle registration law.[226]

The grandfathering provision, which was necessary to prevent chaos in existing systems, is applicable to most federal, state and local governmental agencies. Most of the federal agencies rely on President Franklin Roosevelt's Executive Order 9397 of 1943 to authorize the widespread use of the SSAN as an identifier. For the purpose of this exception, the Executive Order has been held to be a regulation.[227]

Any agency which requests an individual to disclose his SSAN must inform the individual whether disclosure is voluntary or mandatory, the statute or authority for soliciting it, and what uses will be made of it.[228]

VII. REMEDIAL PROVISIONS

A. CRIMINAL PENALTIES

The Privacy Act established criminal penalties for three specific offenses. In each case, the offense is considered a misdemeanor with the maximum punishment being a fine of not more than $5,000.[229] The first two criminal provisions are directed at agency employees and, in certain situations, the employees of government contractors who are operating a system of records pursuant to a government contract. The agencies are responsible for establishing rules of conduct for personnel involved in designing, developing, operating or maintaining a system of records and

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[224] Pub. L. No. 93-579 § 7; 88 Stat. 8897; 5 U.S.C. § 552a note (1976).

[225] Wolman v. United States, 542 F. Supp. 84 (D.D.C. 1982) (draft registrants); Doe v. Sharp, 491 F. Supp. 346 (D. Mass. 1980) (welfare benefits); Greater Cleveland Welfare Ass'n v. Bauer 462 F. Supp. 1313 (N.D. Ohio 1978) (welfare benefits); Crouch v. Commissioner, 447 F. Supp. 385 (N.D. Cal. 1978) (tax preparers).

Pub. L. 94-455, s 1211; 42 U.S.C. § 405(c)(2)(C) (Supp. III 1979).

[227] Brookens v. United States, 627 F.2d 494 (D.C. Cir. 1980).

Pub. L. No. 93-579, s 7(b); 88 Stat. 8897; 5 U.S.C. § 552a note (1976).

5 U.S.C. § 552a(i) (1976).

conducting periodic training to inform these personnel of the rules of conduct and the statutory requirements.[230] Any training program should include instruction on the criminal provisions of the statute.

The first criminal provision prohibits an agency employee from willfully making a disclosure which he or she knows is prohibited.[231] This provision adds some weight to the disclosure prohibition. The second provision prohibits an agency employee from maintaining a system of records without complying with the public notice requirement.[232] One of the objectives of the Act is to prevent secret systems of records. Even if an exemption applies, the agency must, at a minimum, publish an abbreviated notice. This provision provides a sanction for violating the public's right to know of the very existence of a system of records. The final criminal provision prohibits any person from knowingly or willfully requesting or obtaining personal information from an agency under false pretenses.[233] Since the Act expands the rights of individuals to access to their records and prohibits disclosure to third parties unless an exception applies, the most likely application of the provision is to prevent third parties from fraudently posing as the individual in order to gain access.

The criminal provisions are solely penal. They do not give rise to a civil cause of action, so that, if a third party wrongfully gains access to an individual's records, the third party could be prosecuted but the individual would not have a cause of action under the statute.[234] The only aternative then would be to pursue a common law action for invasion of privacy.

B. CIVIL REMEDIES

The Act provides civil remedies which permit an individual to enforce his rights against the agencies.[235] Since the Act relies almost exclusively on individuals for enforcement, the efficacy of the remedial provisions is crucial to the implementation of the statutory objectives. There are certain rules which are applicable to all civil actions brought pursuant to the Act. Only individuals have standing to sue and the agency or the agency head in his or her official capacity are the only proper defendants. Agency officials cannot be sued in their personal capacity. The suit may be brought in the fedeal district court in the district where the plaintiff resides or has his principal place of business, or where the rec-

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[230] See note 99 supra.
[231] Id. at § 552a(i)(1).
[232] Id. at § 552a(i)(2).
[233] *Id.* at § 552a(i)(3).
[234] Lapin v. Tayor, 475 F. Supp. 446 (D. Hawaii 1979).
[235] 5 U.S.C. § 552a(g) (1976).

ords are located or in the District of Columbia. The court will consider the matter *de novo*. The statute of limitations requires the action to be brought within two years from the time the case arose or within two years of discovery of a willful misrepresentation by an agency that is material to its liability.[236]

If a plaintiff is awarded damages he is entitled by statute to attorney fees and court costs. In actions seeking an injunction, the court has the discretion to award attorney fees and court costs to a plaintiff who substantially prevails in his claim against the government. The purpose of awarding attorney fees and costs is not to reward successful litigants or punish the government, but rather to insure that the costs are not a barrier to a citizen seeking to enforce his rights.[237] In determining whether a plaintiff substantially prevailed, the court will consider whether bringing the action was reasonably necessary to enforce the plaintiffs rights and substantially caused government compliance.[238] If the plaintiff substantially prevails, there are four factors to be weighed by the court in exercising its discretion in granting the remedy: public benefit from the case, commercial benefit to the plaintiff, nature of plaintiffs interest in the records, and whether the government's actions were reasonable.[239] Attorney fees and costs are only permitted for litigation, not for administrative actions.[240] Finally, most of the circuits deny attorney fees to a *pro se* litigant who is not an attorney, although costs are allowable.[241]

The Act has specific remedial provisions which are tailored to the particular agency violation. If an agency wrongfully refuses to grant an individual access to his records the court can enjoin the agency from withholding and order production. The court has the discretion to conduct an in camera inspection of the documents to determine whether the withholding was wrongful. The plaintiff cannot seek actual damages and need not prove actual injury.[242] If an agency wrongfully refuses to amend an individual's record the court can order amendment.[243]

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[236] *Id.* at § 552a(g)(5).

[237] Anderson v. Department of Treasurv. 648 F.2d 1(D.C. Cir. 1979).

[238] Vermont Low income Advocacy Council, Inc. v.' Usery, 506 F.2d 509, 513 (2d Cir. 1976);Cox v. Department of Justice, 601F.2d 1, 6(D.C. Cir. 1979).

[239] Lovell v. Alderete, 630 F.2d 428 (5th *Cir.* 1980);Blue v. Bureau of Prisons, 570 F.2d 523 (5th Cir. 1978).

[240] Kennedy v. Andrus, 459 F. Supp. 240 (D.D.C. 1978).

[241] Barrett v. United States Customs Serv., 482 F. Supp. 779 (E.D. La. 1980), *aff'd*, 651 F.2d 1087 (5th Cir. 1981). All of the circuits, except the District of Columbia Circuit, that have considered the issue have refused to allow attorney fees to a pro se litigant who was not an attorney. Presumably pro se representation by an attorney would qualify because of lost opportunity costs.

[242] 5 U.S.C. §§ 552a(g)(1)(B), (3)(A), (B) (1976).

[243] *Id.* at §§ 552a(g)(1)(A), (2)(A), (B).

The Act has two provisions which allow for the collection of actual damages. An individual can bring an action for damages if an agency fails to maintain his record with such accuracy, relevance, timeliness and completeness as is necessary to assure fairness in making a determination about the individual and consequently, an adverse determination is made. An individual can also bring suit if an agency fails to comply with any other provision of the Act thereby causing an adverse effect on the individual.[244] An adverse determination is one resulting in the denial of a right, benefit, entitlement or employment by the agency which the individual could reasonably have expected if the record had not been deficient. An adverse effect has been more broadly defined to include psychological harm caused by a violation.[245] If the individual can prove that the agency's violation of the Act resulted from intentional or willful conduct, he is entitled to recover his actual damages. Once the individual proves that he has suffered an injury he is entitled to his actual damages or $1,000, whichever is greater. The statutory floor on damages was designed to prevent a situation where an individual suffering an injury had no provable damages and, hence, no incentive to sue.[246]

The greatest limitation on the damage remedy is the requirement that the individual prove that the agency acted willfully or intentionally in violating the Act. In determining whether an agency action is willful or intentional, the courts apply a standard of care which is somewhat less than gross negligence. In a case involving the improper disclosure by the General Services Administration of psychiatric records to a prospective employer, the court found that the agency had only been grossly negligent and therefore recovery of damages was precluded.[247] In the original House bill, the standard for the recovery of damages was that the agency acted in a manner which was willful, arbitrary, or capricious. The Senate bill permitted recovery if the agency was negligent in handling the record. The Senate bill also allowed for punitive damages. The compromise resulted in the adoption of the willful or intentional standard.[248] In a majority of cases the failure to comply with accuracy standards or the violation of other statutory provisions results from carelessness, inadvertance or negligence by government employees, not willful or intentional misconduct. Very few plaintiffs will be able to satisfy the heavy burden of proving willful or intentional action by the agency.

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[244] *Id.* at §§ 552a(g)(1)(C), (D).

[245] OMB Guidelines, *supra* note 42, at 28969; Parks v. Internal Revenue Serv., 618 F.2d 677 (10th Cir. 1980)(psychological harm is an adverse effect).

[246] 5 U.S.C. § 552a(g)(4) (1976).

[247] Doe v. General Serv. Admin., 544 F. Supp. 530 (D. Md. 1982); South v. Federal Bureau of Investigation, 508 F. Supp. 1104 (N.D. Ill. 1980).

[248] Analysis of Compromise Amendments, *supra* note 39, *reprinted in* Source Book, *supra* note 27, at 861–62.

A further limitation on the effectiveness of the damage remedy is that it is limited to either the amount of actual damages or $1,000, whichever is greater. Actual damages are proven pecuniary losses and do not include generalized mental injuries, damage to reputation, and embarrassment.[249] Consequently, unless the individual is able to prove substantial actual damages, the financial incentive to bring suit is minimal and will often be outweighed by the hazards and financial risks of litigation. A final limitation on the damage remedy is that injunctive relief is limited to access and amendment actions and cannot be granted to remedy other violations.[250]

Thus the Act provides a viable remedy for an individual seeking access to or amendment of his records. However, the remedy available for all other violations of the Act provides little or no financial incentive for bringing suit and places an extremely high burden of proof on the individual. These remedial shortcomings are crucial because of the Act's reliance on individuals to enforce its provisions. With little or no hope for success and limited prospective recovery, individuals will be reluctant to force compliance by federal agencies. A simple remedy would be for a statutory amendment to require only a gross negligence standard of care. Alternatively, courts could award injunctive relief, attorney fees, and court costs in cases where actual statutory violations have occurred but the individual is not entitled to damages because he or she is unable to prove willful or intentional conduct.

An issue related to civil remedies is whether an individual should be permitted to bring suit against the agency to enjoin disclosure or to intervene in a suit between the third party requester and the agency. The practical problem in both cases is that an agency is not required to notify individuals who may be adversely affected by disclosure to a third party. Agencies should adopt procedures whereby an individual will be notified when information in which he has a protectable privacy interest is requested by a third party. This procedure would permit the individual to provide input to the agency's decision and bring suit to enjoin disclosure in appropriate cases. The suggested procedure is analogous to the procedures employed in implementing exemption **4** of FOIA which is designed to protect the interests of commercial enterprises that submit in-

[249] Fitzpatrick v. Immigration and Naturalization Serv., 665 F.2d 327 (11th Cir. 1981).

[250] Houston v. Department of Treasury, 494 F. Supp. 24 (D.D.C. 1979) (injunctive relief not available to prohibit use of information collected in violation of the Act). In an action for damages, there is no authority to enjoin the underlying violation. Injunctive relief is only available where specifically authorized by the Act. *See* Parks v. Internal Revenue Serv. 618 F.2d 677 (10th Cir. 1980); Cell Assoc. Inc. v. National Institute of Health, 579 F.2d 1155 (9th Cir. 1978).

formation to the government from third party requesters.[251] If a suit is brought to enjoin disclosure, the government could deliver the record to the court under seal and allow the court to balance the competing interests of the individual and the third party, any subsequent disclosure would be pursuant to a court order. An individual should be permitted to intervene in a suit between the third party requester and the agency if he or she can demonstrate that his or her interests might not be adequately represented by the agencies. This relates to the issue of whether an agency is a competent guardian of personal privacy.[252]

A final issue dealing with remedies available to an aggrieved individual is the application of a constitutional tort theory. One court has held that the remedial provisions of the Privacy Act are not the exclusive remedies for informational violations. The recording and disseminating of derogatory information without notice and the opportunity to be heard can violate the due process provisions of the Fifth Amendment.[253] Under a constitutional tort theory, the plaintiff can seek money damages, to include punitive damages, against agency officials in their personal capacities. Declaratory and injunctive relief can be sought against the agency. This remedy provides for a greater scope of relief and has a much greater deterrent effect on the conduct of agency officials. Due to shortcomings in the statutory remedies, plaintiffs will increasingly resort to a constitutional theory of informational privacy.

VIII. CONCLUSION

Congress, through the Privacy Act, has taken some valuable strides in the effort to protect personal privacy. Fair information practices have been established which govern the collection, maintenance, use, and dissemination of personal information by federal agencies. Individuals have been given enforceable rights of access to and amendment of their personal records. Agencies are prohibited from disclosing a record to a third party requester unless an exception applies.

Despite its successes, the Act does not have some shortcomings in the protection of personal privacy. In some cases the right to privacy had to be balanced against other societal interests such as the effective enforcement of criminal law, the preservation of national security, the effective operation of government and the public's right to know. In most instances the right to privacy was subordinated, sometimes needlessly so.

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[251] 5 U.S.C. § 552a(b)(4) (1976) permits withholding of "trade secrets and commercial or financial information obtained from a person and privileged or confidential." *See* Chrysler Corp. v. Brown, 441 U.S. 281 (1979); National **Parks** and Conservation Ass'n v. Morton, 498 F.2d **765** (D.C. Cir. 1974).

[252] *See* note 207 *supra.*

[253] Doe v. Civil Serv. Comm'n, 483 F. Supp. 539 (S.D.N.Y. 1980).

The national security and law enforcement interests are reflected primarily in the general exemptions. While these exemptions are necessarily broad, agencies should be circumspect in claiming and applying general exemptions.

Government efficiency is promoted by insuring the free flow of information. The fair information practices restrict the flow of information to the government to that relevant and necessary to accomplish a legitimate governmental purpose. The flow of information within the government is permitted within the agency to those officials who need to know the information in performing their duties. Disclosure to another federal agency is normally pursuant to a routine use. Any routine use of information must be compatible with the purpose for which it was originally collected. The compatibility test can be an effective check on the improper interagency transfer of information. The flow of information from the government is limited by the disclosure prohibition unless an exception applies.

The Privacy Act defers to the disclosure mandated of FOIA. Information must be disclosed unless a FOIA exemption applies. In most cases this determination involves balancing the right to privacy against the public interests in disclosure. In striking this balance agency officials should remember that the central purpose of FOIA is to provide for openness in government, thereby insuring accountability. If the requested information has little or no impact on honest and efficient government, the legitimate privacy interests of the individual should be protected. Protection of the individual's interest can best be accomplished by giving him notice when his records are requested. To this end, agencies should consider adopting procedures which allow for notification of the individual when certain categories of records are requested; such as, financial, medical and personnel records.

The Act's greatest shortcoming is that, in many cases, the remedial provisions are ineffective. This shortcoming is exacerbated by the fact that the Act relies almost exclusively on law suits by individuals to enforce its provisions. The Act does provide a viable remedy for individuals seeking to enforce access or amendment rights. However, for any other violation of the Act the individual must prove that the violation was a result of intentional or willful agency conduct. Agencies that are grossly negligent escape liability. Additionally, if the individual is able to establish liability, the recovery is limited to actual damages or $1,000, whichever is greater. Actual damages are limited to direct pecuniary losses. The high burden of proof and limited potential recovery will tend to limit the number of suits brought to enforce the Act. As a result, plaintiffs and possibly courts will resort to a constitutional tort theory for re-

covery. The preferable course would be for Congress to impose liability for gross negligence and increase the minimum amount of recovery.

BOOK REVIEWS:

OUTER SPACE—A NEW DIMENSION OF THE ARMS RACE*

Outer Space—A New Dimension of the *Arms* Race. Edited by Bhupendra Jasani. London, England: Taylor and Francis Ltd., 1982. Pp. xviii, **423,** index.

Reviewed by *Captain* ***Paul K.*** *Cascio***

Mr. Bhupendra Jasani, a research fellow at the Stockholm International Peace Research Institute, has taken a series of papers presented at the institute's symposium concerning "Outer Space—A New Dimension of the Arms Race" and developed the segments into a timely and readable text applicable to a broad range of professional interests including, law, science, and military warfare. He augments the work of the symposium members with introductory material which initiates the reader with a nontechnical background into the field of satellite operations.

The book is organized into two parts. The first, consisting of seven chapters, is **Mr.** Jasani's introductory treatise on the mechanics of space flight and satellite operations. Part two consists of fifteen papers which were presented at the symposium in November 1981 by international members of the scientific and legal community. To enhance the utility of the book **Mr.** Jasani has added appendicies which include a listing of satellite launches between **1977** and 1981, reprints of treaties directed at arms control in outer space; a comprehensive glossary of terms, and a dictionary of abbreviations used in the book.

Part one is a sequential development of orbital concepts, propulsion systems, and the applied military uses of satellites. Through the frequent application of diagrams, charts, and mathematical formula the reader is led through what otherwise might be a maze of scientific jargon to the understanding of the significant developments in the space pro-

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'The opinions and conclusions expressed in this book review, and in the **book** itself, are solely those of the authors and do not necessarily represent the views of The Judge Advocate General's School, the Department of the Army, or any other governmental agency.

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gram by the United States, Russia, and the other national participants in satellite applications. The focus of the book is on the military application of satellites although it is apparent that the desire by the symposium participants is to increase the use of outer space in a nonmilitary mode. **Mr.** Jasani categorizes military satellite activities into seven subsystems: reconnaissance, communications, navigation, meterological, geodetic, manned military, and anti-satellite. Each system is described and their application on future national activities is forecast. With a sound foundation in the scientific application of celestial devices the reader is drawn into the scientific community vicariously.

Mr. Jasani has taken care that the reader is aware of the mechanics of geosynchronous orbit, high level-high resolution photography, satellite navigational assistance, promises in the field of anti-satellite operations, and weather prediction. Knowledge that satellite enhancement allows the military user to pinpoint targets with an accuracy of thirty centimeters in diameter results in the realization that the same system may be employed to monitor the outgrowth of future disarmament agreements. Although the clear intent of the institute is peace, Mr. Jasani refrains from taking the opportunity to proselytize, rather he allows facts to present the argument that military application of satellites will have a substantial effect on future warfare if technological applications are fully implemented.

Mr. Jasani's talents as an editor are fully employed in the second portion of the book. It is unclear whether **Mr.** Jasani made editorial changes in the individual papers; however, the style of writing maintained throughout is readable and engrossing. The individual authors, representing differing national and scientific fields, present thematic positions which collectively argue for controls on the proliferation of satellite systems in the military context. The source information for the papers is unclassified, much has been assembled from readily available sources, yet in the format presented the reader develops an insider's view of the limitless capability of enhanced military satellite application. Concomitantly, the reader is faced with the realization that there has been a continuing escalation between the United States and Russia to maximize technology to the enhancement of military-political goals. Economic theory is not included in the subjects presented; however, the absence of the discipline does not detract from the overall effect because of the apparent result that infuses any nation that is committed to a space program that includes a high degree of military preparedness. The cost, from an economic standpoint, is clear from the author's presentations.

Navigation satellites, for example, are described in both their system configuration and military application. The US Navy Navigation Satel-

lite System (TRANSIT) is explicated from initial development through its deployed configuration and military performance. Through the application of between four to six TRANSIT satellites operating in a circular polar orbit, world-wide coverage allows the US Navy, in particular the Polaris submarine fleet, to acquire extremely reliable position fixes. Coupled with TRANSIT is another system which is still in the developmental stage. The NAVSTAR Global Positioning System (GPS) consists of an eighteen satellite constellation. Also providing world-wide coverage, the radio navigation system allows three dimensional position, velocity, and time information to be employed by an infinite number of properly equiped users. The military application of the GPS has been validated by United States elements of the Navy, Air Force, and Army. Using GPS, precision aerial rendezvous, bomb delivery, marine navigation, and static positioning was acquired with an accuracy range of between **3** to 30 meters. For the future, GPS, unaffected by external sources, will allow enhanced military operations so as to reduce minimum friendly-enemy target separation, increased first strike kill probability, and a corresponding increase in the efficiency of certain military operations.

The increase in military effectiveness causes a corresponding need by an adversary nation to block or eliminate the enhanced combat operation. The author of that particular paper does not expand on the adversarial needs; however, the subject is adequately developed in other segments of the book. The field of anti-satellite operations is discussed by Mr. Jasani and two other experts. This editing blend gives the book complementary balance.

The description of anti-satellite devices includes the current national efforts as well as the potential for various beam weapons. Although the authors indicate that laser and particle beam weapons are not presently deployable, one author forecasts application by the end of the 1980s.

The inter-relationship of various national and occupational perspectives through concise articles gives the reader a liberal understanding of the efficiency of satellite systems. The student of the history of warfare will conclude that the principles of war are changing. What may have made a significant difference in military operations during the last conventional conflict of major magnitude must be evaluated from the perspective of the space environment. The age of the surprise attack and well-planned tactical security is on the decline. Satellite sensors are able to provide the leaders of the military-political body with high resolution photographs of ground objects down to .2 meters, instantaneous communications, and precision three-dimensional navigation and target acquisition.

Mr. Jasani's goal is to educate and present a rational position for limitations on the arms race. He has presented, unemotionally, the effects of satellite operations of the future of military conflict. In an effort to make the arguments he has armed the advocates for both arms control and increased military space application. The reader who debates the need for disarmament will find support in the cost figures and raw statistical information on numbers and frequency of satellite launches. The advocate for the position that a strong national defense posture predicated on preparedness is the only alternative in the age of superpowers will also find support in **Mr.** Jasani's efforts. The efforts of the Stockholm International Peace Research Institute do not weaken the debate from either side. The institute, through the good offices of Mr. Jasani, does enlighten and suggest that the use of satellite operations by the national military structure of the world community may in some cases be not only efficient, for example in the field of crisis monitoring, but prudent in today's high-threat world.

THE MINNESOTA RAG: THE DRAMATICSTORY OF THE LANDMARK SUPREME COURT CASE THAT GAVE NEW MEANING TO FREEDOM OF THE PRESS*

Fred W. Friendly, *Minnesota Rag: The Dramatic Story of the Landmark Supreme Court Case That Gave New Meaning to Freedom of the Press.* New York, New York: Vintage Books, **1982.** Pages: **243.** Price: **$5.95.** Select bibliography, source notes, index, text: *Near v. Minnesota.* Publisher's address: Vintage Books, New York, NY.

*Reviewed by Captain Stephen J. Kaczynski***

Justice Felix Frankfurter once wrote: "It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people." In *Minnesota Rag: The Dramatic Story of the Landmark Supreme Court Case That Gave New Meaning to Freedom of the Press,* Fred W. Friendly, a monument himself in the annals of broadcast journalism, tells the reader of one such "not very nice" person, Jay M. Near, and his struggle to free his *The Saturday Press* from the strictures of Minnesota's "gag law." In the resultant case, *Near v. Minnesota,* the Supreme Court, in a **5-4** decision and through Chief Justice Charles Evans Hughes, declared its strong aversion to prior restraint of the press and planted in American constitutional jurisprudence a principle which would come to full fruition some forty years later in the Pentagon Papers case.

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*The opinions expressed in this book review, and in the book itself, are those of the authors and do not necessarily represent the views of The Judge Advocate General's School, the Department of the Army, or any other governmental agency.

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"Any person who. . . shall be engaged in the business of regularly . . . publishing . . . a malicious, scandalous and defamatory newspaper . . . is guilty of nuisance, and all persons guilty of such nuisance shall be enjoined." Thus read the Minnesota law, enacted in reaction to the exposks and excesses of the Duluth *Rip-Saw*, a paper published by a puritanical, prohibitionist mid-Westerner which regularly indicted the lascivious, corrupt, and surrepticiously "wet" portions of Minnesota's body politic. While the grim reaper spared the *Rip-Saw's* publisher from imposition of the "gag law," its full brunt was borne by Jay M. Near. **Mr.** Near, an objective, if not admitted, anti-Semite, antiblack, and anti-labor journalist, ruffled more than a few feathers with his sometimes-scandalous, sometimes-investigative *The Saturday Press.*

Mr. Friendly highlights that the road to victory at the Supreme Court was not an easy one. Mr. Near lost in the state courts but, as his appeals for assistance became known, drew unlikely allies in the liberal American Civil Liberties Union and the jingoistic Colonel Robert Rutherford "Bertie" McCormick, publisher of the Chicago *Tribune*. The unexpected deaths of Chief Justice William Howard Taft and Associate Justice Edward T. Sanford and their replacement by Chief Justice Charles Evans Hughes and Associate Justice Owen J. Roberts are described as playing indispensable and fortuitous roles in affecting the precarious tilt which resulted leaning in favor of freedom of the press by the most narrow of margins.

Too often, legal scholars and students view significant constitutional decisions in the vacuum of the casebook. Mr. Friendly has injected flesh, blood, and human emotion into the equation. As a non-legal study of a legal issue, Mr. Friendly's book deserves study.

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