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A FEDERAL VERDICT OF NOT GUILTY BY REASON OF INSANITY AND A SUBSEQUENT COMMITMENT PROCEDURE

By JOSEPH D. TYDINGS*

THE PRESENT STATE OF THE LAW

Insanity as a defense to crime has a well-established place in federal law.¹ Some federal courts have been at the forefront of the effort to reshape the test of criminal responsibility to make modern psychiatric knowledge relevant to the ancient legal doctrine of *mens rea*.² However, in spite of the availability of the insanity defense, federal criminal procedure has no special provision for raising this defense and provides, outside the District of Columbia,³ no verdict that clearly delineates insanity as the basis for acquittal of criminal charges.

Federal procedure merely requires a criminal defendant to plead guilty or not guilty.⁴ He may, after pleading not guilty, raise insanity as a defense to the charge and present evidence of his mental condition at the time of the alleged act. If the defendant produces "some evidence" of insanity, the defense of insanity becomes an issue for the trier of fact, and the Government must then establish defendant's sanity beyond a reasonable doubt in order to obtain a conviction.⁵ If a guilty verdict is returned, it is clear that the defense of insanity was rejected. If, however, a not guilty verdict is returned, no such clarity exists. A not guilty verdict in a case where the insanity defense is an issue cannot on its face reflect whether the trier of fact believed the defendant not guilty (1) because the Government's evidence did not establish beyond a reasonable doubt that defendant did in fact commit the alleged act or (2) because defendant lacked the mental capacity to commit a crime.

Just as it fails to provide a verdict which clearly demonstrates the acquittal's rationale in a criminal case involving the insanity defense, federal criminal procedure also fails to provide any guaranty that one who has raised the successful insanity defense will be treated and his mental condition improved before he is returned to society. There is, in short, no federal commitment procedure available to restrain one who interposes a successful insanity defense.⁶ This void in federal

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1. Perhaps the earliest reported federal case in which the insanity defense was presented was *United States v. Clarke*, 25 Fed. Cas. 454 (No. 14,811) (C.C.D.C. 1818), where the court instructed the jury that a husband who had shot his wife with a musket must be acquitted if "the prisoner at the time of committing the act charged in the indictment was in such a state of mental insanity, not produced by the immediate effects of intoxicating drink, as not to have conscious moral turpitude of the act." See also *United States v. Schults*, 27 Fed. Cas. 1072 (No. 16,286) (C.C.D. Ohio 1854), where the court adopted the right and wrong test.

2. *United States v. Freeman*, 357 F.2d 606 (2d Cir. 1966); *United States v. Currens*, 290 F.2d 751, 761 (3d Cir. 1961).

3. See D.C. CODE ANN. § 24-301 (1961).

4. FED. R. CRIM. P. 11.

5. *Davis v. United States*, 160 U.S. 469, 486 (1895); *Fitts v. United States*, 284 F.2d 108 (10th Cir. 1960). See also *Leland v. Oregon*, 343 U.S. 790, 797 (1952).

6. The Sixth Circuit some years ago indicated that 11 Stat. 157 (1857), 24 U.S.C. § 211 (1966), gave all federal courts the authority to commit persons found not guilty after the introduction of evidence of insanity to Saint Elizabeth's Hospital

procedure is in contrast to the procedure of most states⁷ and to the detailed federal statutory provisions governing other stages of a criminal case where mental illness may be important. For example, federal law methodically spells out the means for determining a defendant's mental competence to stand trial and creates the mechanism for committing incompetents until they are able to assist in the defense of their case.⁸ Federal law also establishes procedures to regulate the transfer of federal prisoners to mental institutions in order that they may receive special treatment.⁹

The absence of provisions to test mental condition after acquittal is, of course, tied to the absence in federal practice of a special verdict of not guilty by reason of insanity. A number of bizarre cases have developed because of the absence of both of these elements of sound criminal procedure.

One noteworthy example of the problems posed by the void in federal procedure occurred during my tenure as United States Attorney for the District of Maryland. A young man, having neither a pilot's license nor a plane but possessed by an unquenchable urge to fly airplanes, managed with the guidance of a *Popular Mechanics* manual to pilot a stolen plane between two states. This was not this young man's first illegal flight; indeed, he had an irrepressible desire to fly planes whenever he passed an airport. Fortunately, he always landed the aircraft without inflicting injury to himself or innocent persons, but his landings usually inflicted some damage on the aircraft. When this young man was tried in the district court on the charge of wrongful interstate transportation of the aircraft, he won acquittal after psychiatric testimony disclosed that the theft occurred while the defendant was acting under an irresistible impulse. Upon the verdict of not guilty, the young man walked from the courtroom a free man, although the testifying psychiatrists were relatively certain that his penchant for flying would soon lead to another illegal flight in a stolen aircraft. In fact, the young man was again apprehended after stealing an aircraft several months later.¹⁰

This case clearly exposes the loophole in federal criminal procedure. It is not a solitary example. The possibility of such unregulated releases does not comport with a rational and well-developed system of judicial administration, designed to adequately safeguard society and provide rehabilitation to those who break the public order. The void in established federal procedure has led to the development of informal

in the District of Columbia. *Pollard v. United States*, 285 F.2d 81, 82 (6th Cir. 1960); *Pollard v. United States*, 282 F.2d 450, 464 (6th Cir. 1960). However, this statute was enacted as "An Act Supplementary to 'An Act to organize an Institution for the Insane of the Army and Navy, and of the District of Columbia, in said District.'" Given that scope, it does not appear that the Act was intended to apply to "insane" civilians residing outside the District of Columbia. The Attorney General of the United States has so ruled. 17 OPS. ATT'Y GEN. 211 (1881).

7. For a discussion of the various procedures used by the several states, see Figinski, *Commitment After Acquittal on Grounds of Insanity*, 22 Md. L. Rev. 293, 294-98 (1962).

8. 18 U.S.C. §§ 4244-46 (1951).

9. 18 U.S.C. §§ 4241-42 (1951).

10. *United States v. Woods*, Criminal Nos. 25700 and 26122 (D. Md.).

practices designed to protect society and provide assistance to the mentally-disturbed individual.

In absence of federal statutes establishing a commitment procedure, federal prosecutors and judges have taken upon themselves the responsibility for the individual.¹¹ If the United States Attorney becomes aware that an accused has a valid insanity defense, he often will attempt to have state authorities assume responsibility for the individual and have them institute civil commitment proceedings against the defendant after acquittal or in lieu of federal prosecution.¹² In many instances, the state willingly cooperates. However, where relations between the federal prosecutor and state authorities are not harmonious, or where the problem individual has no established residence in the state, the informal approach is inadequate, and the federal authorities are left without a means of restraining one acquitted of federal charges because of insanity. In the vast majority of such cases, the federal prosecutor will not proceed to trial.¹³

11. See *United States v. Freeman*, 357 F.2d 606, 626 (2d Cir. 1966); *United States v. Currens*, 290 F.2d 751, 776 (3d Cir. 1961).

12. Letter From The Honorable William J. Jamison, United States District Judge for District of Montana, to Senator Joseph D. Tydings, October 12, 1966:

This was brought forcibly to my attention during the past year through a case in which the defendant was charged with writing a letter threatening the life of the President of the United States. * * *

The accused at all times maintained that he was competent, although his court-appointed counsel did not agree with him. His counsel made a motion to dismiss the indictment on the basis of the report received from Springfield. This motion was continued from time to time to give the Department of Justice an opportunity to express its views. It was quite apparent that if the case proceeded to trial, a motion to acquit would be granted on the basis of the opinion of the psychiatrists at Springfield that the defendant was insane when the act was committed. There was no medical evidence to the contrary.

To complicate matters further, the offense was committed in Montana and the defendant was a resident of Ohio.

Fortunately a solution was found (after several months' delay) through the cooperation of the Department of Justice Medical Center and Ohio authorities. The United States Attorney consented to a dismissal of the indictment on condition that the defendant be returned to Ohio for such disposition as might be made by the Ohio authorities on any petition for commitment to an institution for further hospitalization and treatment. An order of dismissal on this condition was entered, and the accused was committed by Ohio authorities to an institution in that State.

Had the state authorities of Ohio and Montana refused to proceed pending the commission of some further overt act, it would no doubt have been necessary to release a defendant who, in my opinion, was potentially dangerous in the absence of continued and sustained medication.

13. Letter From The Honorable Ben C. Connally, Chief Judge, United States District Court for Southern District of Texas, to Senator Joseph D. Tydings, September 16, 1966:

There have . . . been a great many cases where the question of insanity has been called to the attention of the court by the district attorney or other officials, resulting in extensive inquiry and examination prior to trial; and in those cases where there is a real question, the district attorney usually has not desired to bring the case to trial. The question remains as to where such a person would be confined if, in fact, he is insane and is dangerous. While the state in many instances has been willing through its procedures to confine such persons, in many instances the accused is a transient, or is clearly domiciled in another state. In those instances the State of Texas frequently has been unwilling to assume the expense of long confinement for a person who simply happened to have been arrested and charged with a federal crime during a brief visit to this state. Likewise, in some instances those who have committed rather serious crimes, found to be insane and committed, have been released in short order by the psychiatrists

The problem arising from the failure of an offender to have an established residence was spelled out by a United States Attorney from the mid-west:

[M]any of the persons who are charged with crime in the Federal Courts . . . have no residence or domicile within any particular state. There have been instances where we have sought to divert the mentally incompetent to a state institution. Very often we cannot find a state that will take them.¹⁴

The residence problem¹⁵ was also the theme of remarks made by a district judge:

On more than one occasion I have had an accused acquitted in my court by a general "not guilty" verdict where the sole defense has been that of insanity and where it has appeared obvious that there should be an investigation made to see whether the defendant was presently insane so as to constitute a danger to himself or the public. While I have wondered whether it has been my duty to go this far, on occasion I have made informal representations to state authorities with the thought that some proceedings should be initiated to determine the problem under state law. These representations have been unsuccessful because the defendants happened to be non-residents and it was thought that their being committed to a state hospital might be irregular or impractical.¹⁶

Many of the cases of the type we are discussing are bizarre to the point of being hardly believable. An example of a specific case was provided by a United States Attorney located in one of the Rocky Mountain States:

[Defendant] was charged with first degree murder on an Indian reservation for the fatal shooting of an Indian police officer who had tried to arrest him for driving under the influence of alcohol. * * * [The Government] obtained an order for mental examination at the Medical Center for Federal prisoners at Springfield, Missouri. The defendant was found competent to stand trial but insane [at the time of the act]. . . .

About thirty years ago [defendant] . . . had been convicted of murder in the State of Oklahoma and received a life sentence. He had been released from the institution on leave and had not gone back. Instead he had gone to Wyoming, where he had actually run for Sheriff, but was not elected.

in the state institutions whose findings are not in accord with those upon which reliance earlier was had.

14. Letter From F. Russell Millin, United States Attorney, Western District of Missouri, to Senator Joseph D. Tydings, October 20, 1966.

15. See also *Clark v. Settle*, 206 F. Supp. 74 (W.D. Mo. 1962); *Kitchen v. Steele*, 112 F. Supp. 383, 385 (W.D. Mo. 1953).

16. Letter From The Honorable Thomas J. McBride, United States District Judge for Eastern District of California, to Senator Joseph D. Tydings, October 6, 1966.

We were able to resolve [this] . . . problem by letting Oklahoma take him back and then dismissing our charge. However, if there had been no detainer from Oklahoma, we would have had no solution and no doubt would have been unsuccessful in the murder trial.¹⁷

A system of federal justice that relies on such fortuitous circumstances to protect society and assure that persons suffering from mental diseases receive adequate care can hardly be worthy of great public esteem. The federal judicial system cannot continue to rely on fortune to solve the problems posed by a person being found not guilty of federal criminal charges after the introduction of insanity evidence. The gap presently existing in federal criminal procedure must be closed.

A LEGISLATIVE PROPOSAL

There is a need for a verdict of not guilty by reason of insanity in federal practice comparable to existing practice in the several states. When a verdict of not guilty by reason of insanity is returned,¹⁸ there should be a determination of the acquitted person's mental condition at the time of acquittal. Any person whose mental illness has not been sufficiently arrested to assure society that further dangerous behavior will not result from the illness should be committed to a mental institution, both for the protection of society and to assure that the individual will receive help in his quest for sanity.

In both the Eighty-ninth and Nintieth Congresses, I introduced legislation to achieve these objectives.¹⁹ My bill would establish the verdict of not guilty by reason of insanity as one possible verdict the trier of fact could return after the issue of insanity has been raised in a federal criminal trial. Upon the return of a verdict of not guilty by reason of insanity, commitment proceedings against the person so acquitted could be instituted by either the prosecuting United States Attorney or the district judge who heard the criminal case. If such proceedings are brought, a hearing would be held to determine whether the person, acquitted because of insanity at the time of the alleged act, is, at the time of the hearing, dangerous either to himself or others because of his mental condition.

17. Letter From Leroy V. Amen, Assistant United States Attorney, District of Wyoming, to Senator Joseph D. Tydings, September 19, 1966.

18. When the trier of fact returns a verdict of not guilty by reason of insanity, implicit in that verdict will be a finding that the defendant did, in fact, commit an indictable offense, but has been specially exonerated because of his mental condition. See *McDonald v. United States*, 312 F.2d 847, 851 (D.C. Cir. 1962); *State v. Swink*, 229 N.C. 123, 47 S.E.2d 852, 853 (1948) (Ervin, J.). Indeed, in formulating a test of criminal responsibility the Third Circuit wrote: "The Jury must be satisfied that at the time of committing the prohibited act the defendant, as a result of mental disease or defect, lacked substantial capacity to conform his conduct to the requirements of the law which he is alleged to have violated." *United States v. Currens*, 290 F.2d 751, 774 (3d Cir. 1961). (Emphasis supplied.) See also Dixon, *A Legacy of Hadfield, M'Naghten and McLean*, 31 *Ausrl. L.J.* 255, 260 (1957).

19. S. 1007, 90th Cong., 1st Sess. (1967); S. 3753, 89th Cong., 2d Sess. (1966). A similar bill was introduced by Senator Kennedy of New York, S. 3689, 89th Cong., 2d Sess. (1966).

Prior to the commitment hearing, the district court is given the discretionary power by the bill to commit the person for psychiatric observation for a period not to exceed sixty days. This pre-hearing commitment is framed in discretionary rather than mandatory terms because in most cases where the insanity defense has been raised the person's mental condition will have been subjected to a good deal of scrutiny at the trial of the criminal charges. In these cases, the criminal defendant may have undergone extensive examination and may even have been subjected to lengthy pretrial commitment either for examination or to ensure that he was competent to assist his counsel in the defense of his case and thus competent to stand trial. Reported cases show as much as thirty-three months treatment between arrest and trial.²⁰

The discretionary prehearing commitment will allow psychiatric observation where the court believes there has not been sufficient scrutiny of a person's present mental condition prior to and during the criminal trial. It will also allow the district judge to have the benefit of a thorough examination of the person's mental condition immediately before the hearing to determine present dangerousness.

The bill further provides that if, after a hearing at which the person shall have the assistance of counsel, the court determines that, because of his insanity, the person would constitute a present danger to himself or others²¹ if released from custody, the court shall commit the person to the custody of the Attorney General who shall hospitalize him for treatment in a suitable mental institution. Commitment, it could be argued, should be to the Surgeon General, but remission to the custody of the Attorney General is patterned after provisions of existing law. Today, the Attorney General is charged with the custody of persons subjected to pretrial commitment,²² as well as with the custody of those federal prisoners who suffer mental illness during the term of their sentences.²³ The Attorney General is authorized by the bill to contract with state and private institutions for the hospitalization and care of persons committed under the bill where federal institutionalization may not be desirable.

The bill also insures that a person committed under its provisions will not be held beyond the time when he is a threat to society or to himself because of mental illness. This is accomplished by preserving the right of habeas corpus and by requiring the mental institution in which the person is maintained to make an annual report on the condition of the person committed to the court that ordered the commitment. These reports will allow the court to observe the progress of the person and to order his release if it concludes that the danger to the community or to himself has been sufficiently arrested. The annual

20. *Fielding v. United States*, 251 F.2d 878 (D.C. Cir. 1957).

21. This is the traditional test to determine commitment. See *Salinger v. Superintendent*, 206 Md. 623, 112 A.2d 907 (1955); *Figginski*, *supra* note 7, at 325. Some have suggested that the criteria for federal commitment include, additionally, the notion of dangerousness to federal officers or interests. The difficulties with these additional criteria, now required in pre-trial commitment, are evident in *Royal v. United States*, 274 F.2d 846, 851-53 (10th Cir. 1960).

22. 18 U.S.C. § 4246 (1951).

23. 18 U.S.C. § 4242 (1951).

reports will make the committing court aware of the gravity of such commitment and provide a basis for future consideration of the need for and value of continued commitment.

The committed person may obtain release from the hospital only after obtaining a federal²⁴ judicial decree predicated upon a certification of the hospital superintendent that he will not constitute a danger to himself or others. If the superintendent believes that outright release is not in the best interests of society or the individual, the person may be conditionally released by the court under such partial restraints as are appropriate.²⁵ These restraints might include periodic examinations or day-time release.

The bill attempts to fill the void that now exists in federal criminal procedure and to strike an appropriate balance between the interests of society and the rights of the individual defendant.

POSSIBLE IMPACT ON TEST OF CRIMINAL RESPONSIBILITY

Some federal courts, like many state tribunals, have been slow to adapt the legal doctrine of criminal responsibility to modern psychiatric insights. The highly respected former Chief Judge of the Third Circuit, the Honorable John Biggs, a leader in the movement to bring law and psychiatry into greater harmony,²⁶ aptly characterized the present lag in judicial acceptance of psychiatric knowledge when he wrote:

In 1843, when the M'Naghten Rules were promulgated the foundations of sound forensic psychiatry were being laid. At M'Naghten's trial a textbook by Dr. Issac Ray was employed which stated advanced principles for determining the criminal responsibility for the mentally ill. Since the turn of the century great strides in the advancement of psychiatry have been made. And since the beginning of World War II the treatment and cure of the mentally ill, the insane, has progressed at an astounding pace. But the criminal law failed utterly to move forward with this achievement. In this country it has with . . . few exceptions . . . remained unchanged. It is as if those who sit cannot read.²⁷

24. The need for federal control of the committed person was well stated some years ago by Professor Dession of Yale Law School:

Where state commitment is both available and reliable, it may well be the most appropriate way of disposing of a troublesome mental case; but when one who has committed a federal offense is thus disposed of, the federal government loses control of the situation. An inmate who is a real hazard may be released in a relatively short time from some state institutions; for many of these hospitals are over-crowded, and some are unduly susceptible to local influences. There is, moreover, the problem . . . of the person without a determinable legal residence. Suppose the case of another Guiteau, with paranoid designs on the President of the United States. If such a person were acquitted as insane after one assassination attempt, should not the federal government be authorized to commit him to an appropriate federal institution . . . ?

Dession, *The Mentally Ill Offender in Federal Criminal Law and Administration*, 53 YALE L.J. 684, 696 (1944).

25. This provision follows the pattern of D.C. CODE ANN. § 24-301(e). See also MODEL PENAL CODE § 4.08(3) (Tent. Draft No. 4, 1955).

26. See BIGGS, *THE GUILTY MIND* (1955).

27. *United States v. Currens*, 290 F.2d 751, 770 (3d Cir. 1961).

One of the reasons federal jurists have been slow to modify the standard of criminal responsibility to conform to modern psychiatric achievements may be the loophole in federal criminal procedure under discussion. Reported decisions give evidence that the absence of adequate commitment procedures to protect society from the automatic release of a person acquitted after the interposition of the insanity defense has been a deterrent to a more liberal test of mental responsibility than the *M'Naghten* Rule.²⁸ Indeed, in *Sauer v. United States*,²⁹ the Ninth Circuit Court of Appeals candidly discussed the problem. In preserving the *M'Naghten* Rule as the test of criminal responsibility, the court forthrightly stated that, if federal civil commitment procedures were available to "confine" a person acquitted on insanity grounds, "this court might be disposed to alter its current views" on the proper insanity test.³⁰

Of course, some federal courts have moved to bring the legal test of insanity into greater harmony with modern psychiatric advances. As the circuits adopt more liberal rules relating to the insanity defense, as in *United States v. Currens*³¹ and *United States v. Freeman*,³² the need for adequate commitment procedures will become all the more pressing. Indeed, in the *Freeman* opinion, Judge Kaufman stated:

Effective procedures for institutionalization and treatment of the criminally irresponsible are vital as an implementation of today's decision. . . . [W]e have not viewed the choice as one between imprisonment and immediate release. Rather, we believe the true choice to be between different forms of institutionalization — between the prison and the mental hospital. Underlying [our] decision is our belief that treatment of the truly incompetent in mental institutions would better serve the interests of society as well as the defendant's.³³

CONSTITUTIONALITY OF THE PROPOSED FEDERAL COMMITMENT PROCEDURES

Although there is a need for effective commitment procedures to handle the individual found not guilty by reason of insanity, some observers have questioned the authority of the federal government to create and use such procedures.³⁴ Since Congress has not acted to close the existing loophole in federal criminal procedure, there is a dearth of controlling judicial decisions on its constitutional authority to do so. Congress has, however, created a procedure for the commitment of individuals who are charged with federal crimes but are unable to

28. See *Wion v. United States*, 325 F.2d 420, 428 (10th Cir. 1963).

29. 241 F.2d 640 (9th Cir. 1957).

30. *Id.* at 650.

31. 290 F.2d 751 (3d Cir. 1961).

32. 357 F.2d 606 (2d Cir. 1966).

33. *Id.* at 626.

34. See Foote, *A Comment on Pre-Trial Commitment of Criminal Defendants*, 108 U. PA. L. REV. 832, 837 (1960). Some have urged that the insanity defense be abolished altogether, and that the mental condition of the offender be considered only in designing the offender's rehabilitation. Goldstein and Katz, *Abolish the Insanity Defense — Why Not?*, 72 YALE L.J. 853, 872 (1963).

assist in their own defense.³⁵ This procedure has been upheld against constitutional attack on the ground that the power to commit such persons was "auxiliary to incontestable national power," *i.e.*, the power of the United States to prosecute for federal offenses, and as such "plainly within congressional power under the Necessary and Proper Clause."³⁶

Federally-sanctioned pre-trial commitment is an exception to the traditional approach respecting the care of the mentally ill. This generally has been viewed as peculiarly within the jurisdiction of the several states, acting as *parens patriae*.³⁷ One does not challenge the traditional role of the states in this area by advancing the proposed legislation discussed above.³⁸ That proposed legislation, like the existing exception covering pre-trial commitment, is designed to leave untouched the general responsibility of the states for the treatment of the mentally ill.³⁹

The person subject to commitment under the proposed legislation is not the typical individual who is subjected to state commitment. He is not merely suffering from mental illness which makes him dangerous to himself or others. He has committed an act indictable under federal law and has been prosecuted in a federal court. Furthermore, the person subject to federal commitment under the proposed legislation will have avoided a general verdict of guilty by the interposition of a successful insanity defense. And his acquittal will not have been based on a general verdict of not guilty which would terminate the federal power to prosecute and deal with offenders, but rather the acquittal will result from the special verdict of not guilty by reason of insanity.

If the Congress enacts legislation creating a verdict of not guilty by reason of insanity and a subsequent commitment procedure, it would

35. 18 U.S.C. §§ 4244-46 (1951).

36. *Greenwood v. United States*, 350 U.S. 366, 375 (1956).

37. *Wells v. Attorney General of the United States*, 201 F.2d 556, 559 (10th Cir. 1953); Foote, *supra* note 34, at 836-37.

38. See legislation creating National Institute of Mental Health, 63 Stat. 380 (1949), 42 U.S.C. § 232 (1964), and providing for federal grants to states for, among other things, "care, treatment and rehabilitation of the mentally ill." 70 Stat. 929 (1956), 42 U.S.C. § 242a (a) (2) (1964).

39. *Cf. Wells v. Attorney General of the United States*, 201 F.2d 556, 561 (10th Cir. 1953) (Huxman, J., dissenting):

Whether Congress has constitutional power to legislate generally in the field of lunacy and mental incompetency is not an issue in this case and need not be here considered because Congress has not attempted to so legislate. The power of the state to legislate with respect to lunacy and insanity is an exercise of the police power. The asserted right of the federal government to legislate with respect to mentally incompetent persons is not claimed under any specific grant of power. It rather arises as the necessary implied power in the exercise of duties conferred upon various governmental departments by the constitution and congressional enactments thereunder. As stated by Judge Ridge in *Higgins v. McGrath*, 98 F. Supp. 670, 674, "The right of a sovereign to proceed against an insane person charged with the commission of a felony is incidental to the power to define crimes and prescribe procedure under a criminal code." . . . Common principles of humanity would seem to dictate that when the federal government has taken one into lawful custody, under the exercise of valid power, charged with the responsibility of exhausting its jurisdiction over the subject matter as well as the person thus brought before it who thereafter is found to be insane, it then becomes its duty to adequately care and provide for such a one and that this may be done in an institution set up for that specific purpose.

not be creating a device unknown to American jurisprudence. The special verdict of not guilty by reason of insanity is well recognized in American jurisdictions. The procedures that such a verdict calls into play are diverse among the states.⁴⁰ Nevertheless, the states providing for such a verdict all accept one central notion — that the person so acquitted is not immediately discharged from custody. Rather, by one means or another, society is assured that the person so acquitted is no longer dangerous because of a mental illness before he is released. And, in light of the well-known state procedures, it may be argued that the federal prosecutorial power would not terminate at the moment the special verdict is returned.

The power to prosecute, as well as the sovereign governmental power of self-protection,⁴¹ creates the authority to punish, and, in modern context, rehabilitates a person who is found to have transgressed the laws governing society. The mode of punishment must, of course, be compatible with the commands of the Constitution, especially the eighth amendment, but, given that compatibility, it may take a variety of forms. Congress has given the federal courts special sentencing procedures applicable to youths⁴² and juveniles.⁴³ Legislation has also provided the means whereby the traditional straight-term sentence may be avoided, thus affording greater flexibility in the release of prisoners.⁴⁴ Commitment to a mental institution, after a verdict of not guilty by reason of insanity and a finding of present dangerousness, can be viewed as a specially designed form of rehabilitation which adequately safeguards society while providing treatment for the committed person. As the Second Circuit has written, the true choice facing the Government when a person interposes the insanity defense must be between "different forms of institutionalization — between the prison and the mental hospital."⁴⁵

The commitment need not be premised upon a finding that the person is dangerous to federal officers or property since the legitimate interests of the federal government extend further,⁴⁶ at least so far as to require assurance that one, who has been brought into court on charges of violating federal law and specially acquitted on grounds of insanity, has sufficiently overcome his mental condition to no longer pose a threat to society. Moreover, it may be argued that the person involved has already demonstrated his dangerousness to the federal government by commission of the act that caused the federal prosecution. To foist such a person upon the states for control and rehabilitation would merely transfer the problem and effectively preclude federal control over one who has already violated federal laws.

The federal government will not thereby become a general competitor with the states in the care and treatment of the mentally ill.

40. See Figinski, *supra* note 7, at 294-98.

41. See *Burroughs and Cannon v. United States*, 290 U.S. 534, 545 (1934).

42. 18 U.S.C. § 5010 (1951).

43. 18 U.S.C. § 5034 (1951).

44. 18 U.S.C. § 4208(a) (1951).

45. *United States v. Freeman*, 357 F.2d 606, 626 (2d Cir. 1966).

46. *Cf. Royal v. United States*, 274 F.2d 846, 851-52 (10th Cir. 1960).

Rather, it will be assuming control over a particular problem individual who, by his actions, has brought into play the federal prosecutorial power.⁴⁷

CONCLUSION

The problem of the insane criminal defendant in federal criminal practice may not be quantitatively great. Nevertheless, the loophole presently existing in federal procedure represents a serious deficiency. The informal procedures that have developed to handle the problem are hardly fool-proof and should be replaced by an effective statutory formula for dealing with the person who interposes a successful insanity defense. I intend to work for the enactment of such a procedure.

47. See Dession, *supra* note 24, at 696, 699.