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COMMITMENT AFTER ACQUITTAL ON GROUNDS OF INSANITY†

By M. Albert Figinski*

I. THE PROCEDURES OF CRIMINAL COMMITMENT GENERALLY

"Jurors, in common with people in general, are aware of the meanings of verdicts of guilty and not guilty. It is common knowledge that a verdict of not guilty means that the prisoner goes free and that a verdict of guilty means that he is subject to such punishment as the court may impose. But a verdict of not guilty by reason of insanity has no such commonly understood meaning."1

This lack of knowledge can logically result from two factors. One, the verdict is a rare one in our society, given the state of extreme dementation required by the "right and wrong test" to acquit. Second, unlike the verdicts of guilty and not guilty which have the same meaning and effect throughout Anglo-American jurisprudence, the meaning and effect of a verdict of not guilty by reason of insanity are dependent upon statutes and vary among the states.

Prior to the passage of the present statutes, it is doubtful whether the court had any power to commit to a mental institution any person found not guilty by reason of insanity.2 However, there are reported cases where such persons were in fact committed when special facts were present. One who had been civilly committed3 to the house of correction as a "dangerous person" after his arraignment for murder and who was subsequently tried4

† This article is based on a paper originally prepared for the seminar on Medico-Legal Problems at the University of Maryland School of Law under the supervision of Professor L. Whiting Farinholt, Jr.
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3 For a discussion of civil commitment procedures, see Chasanow, Civil and Criminal Commitment of the Mentally Ill in Maryland, 21 Md. L. Rev. 279 (1961).
4 How may one be tried when under commitment because of mental disorder? The answer lies in the varying tests for insanity used by the law. See Comment, Varying Tests for Insanity, 15 Md. L. Rev. 255 (1955) and Chasanow, op. cit. supra, n. 3.
and acquitted of the criminal charge on grounds of insanity, was returned to the institution upon his acquittal. This is some indication that courts had limited ability to commit one acquitted on ground of insanity. Furthermore, where one who believed himself to be the King of England attempted to assassinate President Andrew Jackson to erase the last obstacle to his reign over the United States, was found not guilty by reason of insanity, the court after the verdict remanded the prisoner to the custody of the law on grounds that it "would be extremely dangerous to permit him to be at large while under this mental delusion." That this procedure was not universally followed can be seen by a statement of the Supreme Court of Georgia:

"[If the plea of not guilty by reason of insanity is] satisfactorily made out [, it] would finally acquit the defendant of the charge preferred against him and entitle him to go without a day [of detention] absolutely freed and discharged of the offense for which he was indicted. * * *

Our Code makes no provision for the detention and disposal of prisoners acquitted on ground of insanity existing at the commission of the offense, but, . . . . they are at once discharged, and go free to commit a like act upon the recurrence of another attack, with like fatal results on some other unoffending citizen. That this omission should be supplied by legislation covering this case, we think is apparent; and at the same time, it might be well to provide a place for the safe keeping of such persons, and when thus confined, to prescribe how they shall be discharged."

Whether the Georgia Legislature responded to this judicial plea for remedial legislation or to the more usual sources of legislative influence, it is to be noted that Georgia now stands with nine other states and the District of Columbia and orders the defendant, who is acquitted because of insanity at the time of the commission

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5 Commonwealth v. Meriam, 7 Mass. 168 (1810).
6 U.S. v. Lawrence, 26 Fed. Cas. 887, 891 (Case No. 15,577) (D.C. Cir. 1835).
7 Danforth v. State, 75 Ga. 614, 623-625 (1885). Emphasis added. See also Ballard v. State, 19 Neb. 609, 28 N.W. 271, 275 (1886), a somewhat confusing opinion which seems to indicate that a not guilty by reason of insanity verdict results in the discharge of the prisoner.
of the acts charged, "to be confined" in a mental hospital, and only to be released in accord with other statutory provisions. This procedure is termed mandatory or automatic commitment because it leaves no room for judicial discretion or other means to avoid commitment of one adjudged not guilty by reason of insanity. In a state having an automatic commitment procedure, it has been held that the court must commit a defendant, acquitted on ground of insanity, to the state mental hospital even though shortly before the criminal trial defendant was declared restored to his right mind in probate court proceedings.

Other jurisdictions allow commitment in the court's discretion. Such procedure may provide no criteria for determination of the necessity for defendant's after-trial hospitalization, thus giving the court wide freedom of action to be exercised in the court's sound discretion.

Other states allow commitment if defendant would be dangerous to public peace or safety if given his freedom; other release procedures vary from a provision that such a patient be discharged as any other mental patient, to a procedure requiring judicial approval of all releases and requiring the hospital superintendent to certify that the patient has recovered his sanity and he will not in the future be dangerous to himself or others.

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but, some allow commitment only if the mental disorder, which rendered defendant irresponsible for his otherwise criminal act, persists at time of verdict. The court, not the jury, is required to make these determinations.

Some jurisdictions, notably the Federal, provide for no commitment after the "insanity verdict" but permit the person to leave the courtroom a free man.

Maryland and six other states do not adhere to any of the above procedures. The jury which has exonerated the prisoner from punishment because it found him to be insane at the time of the commission of the act is given the further task of determining the prisoner’s present mental condition. If the jury finds him sane, he is free; if insane, he is detained in a mental hospital. Whether the jury, in order to determine the prisoner’s sanity at the time of the verdict, is to apply the test of criminal responsibility, commonly the right and wrong test, or some other test, such as whether the prisoner, if given his freedom, would be dangerous to himself and others, has been given no appellate consideration in Maryland. Some writers would have the prisoner’s dangerousness be the guide, but the criminal courts seem to favor a determination of prisoner’s freedom in terms of criminal responsibility, i.e., the right and wrong test. Furthermore, the plea of not guilty by reason of insanity is seen in Maryland as an admission by the defendant that he committed the act alleged. The question of insanity is placed in issue first and the verdict of not guilty by reason of insanity

"results . . . in the automatic supposition that the defendant was guilty of the crime charged without a determination of whether or not a crime was com-

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13 Chasanow, Civil and Criminal Commitment of the Mentally Ill in Maryland, 21 Md. L. Rev. 279, 296-302 (1961).

12 Dr. Manfred Guttmacher, Chief Medical Officer of the Supreme Bench of Baltimore City, in lecture to Legal Medical Seminar.

mitted or if the defendant was the one who committed it."\(^{18}\)

California presents a unique procedure when the defense of insanity is raised in a criminal case. The trial is divided into two parts, the defendant being first tried to determine if he committed the act alleged. If the defendant is found guilty, either the same jury or a new one tries the issue of defendant's sanity at the time of the act proved.\(^{19}\) If found not guilty by reason of insanity, there is commitment unless the court concludes that defendant has "fully recovered his sanity." The separate trial procedure was devised by a "prosecution-minded" law revision commission to avoid the use of a claim of insanity as a means "to gull juries into verdicts of acquittal."\(^{20}\) The trial of guilt was to proceed devoid of sentimentality. However, since no evidence of defendant's mental condition was admissible in the first trial, and since some offenses requiring the proof of intent must be established by testimony on mental ability to reflect and deliberate, a problem of administration developed. The California Supreme Court attempted to strike a delicate balance by stating:

"[I]f the proffered evidence tends to show not merely that [defendant] did or did not, but rather that 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."\(^{21}\)

This tenuous distinction has proved very difficult to administer.\(^{22}\) On this basis and because subsequent decisions have tended to open the door in the first trial to all of the sympathy-provoking testimony which the separate trial procedure was designed to eliminate,\(^{23}\) the California pro-

\(^{18}\) Hearings on the Constitutional Rights of the Mentally Ill Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 87th Cong., 1st Sess. 638 (1961) (remarks of Charles E. Goshen, Director, Community Psychiatric Services, Department of Mental Hygiene, State of Maryland).

\(^{19}\) Cal. Penal Code § 1026 (1957).


procedure has been criticized as a mere duplication of time and effort, and change to the normal single trial method advocated.\footnote{Louisell and Hazard, op. cit. supra, n. 20, 821-824, 830. Colorado also maintains a separate trial procedure, but that procedure is not mandatory. The defendant may elect a single trial. Colo. Rev. Stat. Ann. §§ 39-8-1 to 39-8-4 (Perm. Supp. 1960).}

II.
RATIONALE AND PROBLEMS

Turning away from bare procedures, we seek to discover what is the rationale of the various commitment procedures, what society seeks to accomplish by commitment, and what other legal problems, rules and procedures bear upon the question of commitment to assist or hinder the attainment of the goals of the commitment procedure.

It will be noted that all of the various procedures are designed in some way to protect society from the premature release of one found not guilty by reason of insanity. Providing for the safety of its citizens is a legitimate concern of the state, yet the course chosen to effectuate this purpose must be guided by the compelling, and often competing, theme of a free society, i.e., individual liberty. Irrational societal fears will not be allowed to impair an individual's liberty. However, it is hardly irrational for society to demand assurance that one, who violated society's standard of action under the compulsion of a mental disturbance, and escaped society's wrath because of that compelling disturbance, is no longer dangerous to society and himself because of that compelling disturbance. But it would be irrational for society to confine in a mental hospital any person not considered insane for any period longer than absolutely necessary for observation to determine mental status.

Perhaps any commitment procedure lends itself to allegations of deprivation of liberty. But the commitment after a successful insanity defense is particularly susceptible for two reasons. First, the tendency of society to desire to punish\footnote{Weihofen, The Urge to Punish (1956) ch. 6, esp. pp. 138-140.} coupled with the widespread feeling that insanity is easily feigned may cause society to impose improper restraints on the "faker" who has avoided his "just desert." But punishment and commitment are antithetical. Punishment is a corollary of responsibility,\footnote{Hall, General Principles of Criminal Law (2d ed. 1960) 460.}
whereas commitment flows from irresponsibility, among other things, and is designed to protect and rehabilitate.

Second, the presentation of the insanity defense centers for consideration on a different time period than relates to the propriety of commitment and/or hospitalization. It has been said:

"The crucial question in a trial where insanity is pleaded as a defense is whether the accused suffered from a mental disease at the time of the offense. Since the defendant must be mentally competent to be tried, it is possible — indeed it is not uncommon — for a jury to conclude that the defendant is not guilty by reason of insanity as of the time of the offense, although he may be of sound mind at the time of the verdict."

To avoid placing this sound mind among unsound minds must be considered when committing after the successful insanity defense.

In short, what is desired is a balanced procedure providing safeguards to the society and the individual. We do not wish merely to provide the insanity defense as an accessible escape hatch for the criminal. Nor do we want our citizens stalked by men of proven criminal propensity and subnormal ability to restrain those antisocial urgings. However, we do not want a man not legally blamable for an act, punished, though that may be masked by a more subtle excuse for confinement.

In light of the foregoing discussion of the demands of society and the safeguards required for the protection of the individual, what may be said for the various types of procedures used to commit one found not guilty by reason of insanity? Because discretionary commitment, in all of its various forms, requires, before confinement to a mental hospital, some type of determination that the individual specially acquitted continues to be plagued by some form of mental illness, it has been said to "substantially lessen the possibility that a sane man may be sent to a mental institution because of an act for which he was not criminally responsible." This form of procedure certainly protects society in a more superior fashion than the Federal practice of allowing one not guilty by reason of insanity to walk out of the courtroom a free man without

any regard to his present state of mind. At least, the discretionary commitment places in mental hospitals those requiring treatment.

Yet, a highly regarded figure in the area of medicolegal problems, Professor of Law Henry Weihofen has been critical of allowing a jury (as in Maryland) to determine the propriety of commitment at the same time that it acquits the defendant due to insanity. He has written:

“This is surely the poorest and most cumbersome of all ways to handle the matter. When a person has just convinced a jury that he committed a criminal act under the influence of mental disorder, it is both fair and prudent to presume that that disorder continues to exist. If he has in fact recovered, the hospital to which he is sent can be relied upon to discover and report the fact. Or he can raise the question himself on application for habeas corpus or other procedure.

Asking the criminal trial jury to decide whether the defendant is presently sane is illogical as well as unfair and imprudent. * * * [T]he public is unfair to the public, for it empowers a jury to decide that a person charged with a serious crime was insane at the time of the act but now recovered, and so entitled to be set free. Even a psychiatrist would hesitate to certify to recovery so soon after the insane act. A jury is quite incompetent to make this determination on the basis of evidence introduced at the criminal trial.”

This statement is essentially a brief for the mandatory commitment procedure. It includes several arguments usually used to justify that procedure, foremost of which is the presumption of continued insanity from an act to verdict. This presumption rests on the assumptions that the trial occurs “soon” after the act and that freedom may be validly restricted if there exist remedial procedures, such as habeas corpus, to correct improper restraints.

The interval between the commission of the act and the rendition of the jury’s verdict of insanity at the time

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of the act may not, however, be short.\textsuperscript{31} Arrest of the defendant may not follow directly on the heels of the act. Perhaps a more likely and compassionate reason for a delay is treatment in a mental hospital after arraignment in order to render the defendant competent to stand trial, i.e., able to assist his counsel in the preparation of his defense.\textsuperscript{32} Reported cases evidence as much as two and three-quarter years treatment prior to trial.\textsuperscript{33} Logically, the longer the delay between act and verdict, the weaker the presumption of continued insanity becomes.

The availability of habeas corpus proceedings to challenge illegal detention can hardly stand alone to justify the mandatory commitment.\textsuperscript{34} It is true that courts have seized upon the availability of release procedures to justify the automatic dispensation of the defendant to a mental hospital. Statements to this effect are usually collateral to a finding or assumption by the court that the presumption of continued insanity has merit.\textsuperscript{35} The presumption provides the rational basis for the original confinement. The continuing validity of the detention is provided by the availability of procedures to test the legality of the continued confinement.

The presumption of continued insanity and the availability of habeas corpus to test the validity of the detention are not the only buttresses of the mandatory commitment procedure. Another justification is that by "voluntarily raising the defense of insanity," the defendant acknowledges and voluntarily submits to confinement for psychiatric observation after acquittal.\textsuperscript{36} The plea is

\textsuperscript{31} \textit{Supra}, n. 27; \textit{Hearings on the Constitutional Rights of the Mentally Ill Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 87th Cong., 1st Sess., 112 (remarks of Senator Hruska, R. Neb.).


\textsuperscript{33} Fielding v. United States, 251 F. 2d 878, 879 (D.C. Cir. 1957).


\textsuperscript{35} See two of most-cited cases for the proposition that availability of habeas corpus satisfies due process: People v. Dubina, 304 Mich. 363, 8 N.W. 2d 99 (1943) where there was no delay to reduce the weight of the presumption; Ex parte Slayback, 209 Cal. 450, 288 Pac. 769, 771 (1930) : "The insanity of [one acquitted by reason of insanity] is presumed to continue until the contrary is shown, and that it is not necessary to hold the inquisition generally required by statute in the case of persons alleged to be insane before their commitment."

\textsuperscript{36} \textit{Comment, A Logical Analysis of Criminal Responsibility and Mandatory Commitment}, 70 Yale L.J. 1254, 1355 (1961); \textit{Comment, Criminal Law—Defense of Insanity—Mandatory Commitment Statute under the
alleged to the application for voluntary civil commitment. This presupposes a recognition by the pleader of the defect or illness, plus a desire for assistance. This contention, of course, applies only where defendant asserts the plea himself; otherwise, there is no similarity to an application by a party for voluntary civil commitment.\(^7\)

In addition, because the defendant has breached a societal standard, it is felt that before release a psychiatrist should have a chance to work with him in a clinical environment to give society some assurance that the defendant will not repeat his actions.\(^8\)

Perhaps the most mundane justification for the automatic commitment procedure is the desire to add to "the public's peace of mind"\(^9\) and dispel the popular fear that any alteration of the test for criminal responsibility to bring the right and wrong standard in line with modern psychiatric knowledge will lead to the visitation of a plague of insane criminals on society.\(^10\) Whether the fear indicates an "inability of public opinion . . . to keep pace with the advances in the behavioral sciences,"\(^11\) or has a more subtle basis, it undoubtedly motivates legislators.\(^12\)

Thus, the automatic commitment procedure is made the bedfellow of any reform of the test of criminal responsibility. These two forces acting together give psychiatry a more prominent place in the criminal law than at any previous time by exonerating from punishment the mentally irresponsible actor and placing him in the hands of the hospital for custody\(^13\) and rehabilitation. It would then appear to follow that psychiatrists would welcome the bedfellow of reform. However, doubts have been voiced as to the efficacy of the mandatory commitment procedure by psychiatrists. Dr. Leon Salzman, Associate Professor of Clinical Psychiatry, Georgetown Medical School, has vehemently attacked the mandatory commitment procedure.

"Under the automatic commitment procedure, an individual who is acquitted by reason of insanity is

\(^{2}\)\(^{Supra, n. 28, 630.}\)
\(^{4}\)\(^{Supra, n. 28, 632; Note, Releasing Criminal Defendants Acquitted and Committed Because of Insanity: The Need for Balanced Administration, 68 Yale L.J. 293, 297 (1958).}\)
\(^{5}\)\(^{Supra, n. 28, 632.}\)
\(^{6}\)\(^{Supra, n. 89.}\)
\(^{7}\)\(^{Salinger v. Superintendent, 206 Md. 623, 628, 112 A. 2d 907 (1955).}\)
automatically sent to a mental hospital for study and treatment. Since he has stood trial, it is assumed that he was competent to do so. Yet, at the time of the sentencing, there has been no evidence presented to show that he is necessarily of unsound mind or that he requires treatment at the time.

“It has merely been established that, at the time the crime took place, the defendant was of unsound mind. Consequently, he is being sent for treatment at a time when it is not clear to defendant or the court that he is in need of such treatment.

“On what basis is treatment to take place? The presumption is that prisoner must be under the sway and influence of the distorted mental state which produced the crime. But he is told that he is competent to stand trial and also that he is mentally ill and requires treatment.

“Such contradictory claims, notwithstanding the complicated differences between competency to stand trial and still being of unsound mind, are not impressive to the defendant, particularly since he may have a low intelligence quotient. Thus, whatever treatment might have been possible, even when necessary, is jeopardized by the apparent contradictory claims of the court.

“The prisoner can only view the decision to send him to the mental hospital as a sentence in a hospital in lieu of a prison. He sees the action as a means of substitute punishment and not the benevolent action of a concerned community. Thus, the basis for treatment which may be desirable or necessary is complicated by the issue of punishment and forced hospitalization.

“Psychiatric therapy cannot even start, let alone develop, under such circumstances.”

III.

THE PILOT PROJECT—THE DISTRICT OF COLUMBIA

To this point we have been concerned primarily with the statement of the various types of commitment procedures and with a discussion of the theoretical justification

for and difficulties with discretionary and mandatory commitment. However, the problems raised by mandatory commitment arise not solely from the procedure itself. Other legal rules, problems and procedures, such as the burden of proving insanity at the criminal trial, the test of criminal responsibility, the right to assert the insanity defense and the procedure of release of those committed, are not isolated from the commitment procedure but rather work with it upon the subject of the criminal case. To see how these collateral standards have operated to hinder or assist the protection of society and the individual and to see how the commitment procedure has worked in practice, we focus on the District of Columbia, the only jurisdiction which has had extensive case law relating to the meaning of, and procedures under, the commitment statute.

The situation created by the interrelation of (1) the Durham rule which relieves more defendants of criminal responsibility than does the right and wrong test, (2) the mandatory commitment procedure following a verdict of not guilty by reason of insanity, (3) the release

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4 Id., 550 (remarks of Senator Keating):

"[The problem of commitment procedures for defendants acquitted by reason of insanity] cannot be wholly isolated . . . from consideration of the tests of criminal responsibility. The adequacy of any commitment procedures necessarily depends to some extent on the kind and number of individuals subject to commitment. * * * The test of responsibility, the burden of proof, the attitude of the courts toward expert and lay testimony — all of these factors and others determine whether the commitment problem is designed to cope with a few persons or with hundreds of persons, whether it is to function as a substantial counterpart to jail commitment or as a rare procedure for exceptional cases."

46 "[A]n accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." Durham v. United States, 214 F. 2d 862, 874-875 (D.C. Cir. 1954).


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<th>Fiscal Year</th>
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[Durham decided July 1, 1954]

Although the 1960 figure is ten times the 1952 figure, in 1960 only 2.1% of all criminal defendants were acquitted due to insanity.

procedure after commitment,\(^4^9\) (4) the burden on the prosecution of proving beyond a reasonable doubt defendant's sanity after some evidence of insanity has been introduced into the case,\(^5^0\) (5) the administrative decision to place "sociopaths"\(^5^1\) within the category of those having a mental disease or defect, (6) the ability of the prosecution to initiate evidence of insanity,\(^5^2\) and (7) the trial court's refusal to accept a guilty plea from one competent to stand trial where there is evidence of mental illness\(^5^3\) — has led to a challenge of the constitutionality of the total procedure,\(^5^4\) Senatorial inquiry\(^5^5\) and House of Representative action.\(^5^6\) None of these effects has affected the situation as yet.

In announcing the Durham rule, i.e., that an accused is not criminally responsible if this unlawful act was the product of mental disease or mental defect, the Court of Appeals for the District of Columbia noted that the District of Columbia Code gave the trial judge discretion to commit the accused found not guilty by reason of insanity, and said:

"We think that even where there has been a specific finding that the accused was competent to stand trial and to assist in his own defense, the court would be well advised to invoke this Code provision so that the accused may be confined as long as 'the public safety and * * * [his] welfare' require."\(^5^7\)

In spite of this appellate counsel and even though "no case could be found in which the acquitted defendant had not

\(^{4^9}\) D.C. Code (Supp. VIII, 1960) § 24-301 (e).
\(^{5^0}\) Tatum v. United States, 190 F. 2d 612, 615-616 (D.C. Cir. 1951); Davis v. United States, 165 U.S. 373 (1897); Davis v. United States, 160 U.S. 469 (1895).
\(^{5^1}\) Infra, n. 76.
\(^{5^3}\) See Overholser v. Lynch, 288 F. 2d 388, 393 (D.C. Cir. 1961).
\(^{5^5}\) Hearings on the Constitutional Rights of the Mentally Ill before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 87th Cong., 1st Sess. (1961).
\(^{5^7}\) Durham v. United States, 214 F. 2d 862, 876, fn. 57 (D.C. Cir. 1954). Emphasis added.
been committed," Congress, to allay public fears that insane criminals would be set free, enacted the mandatory commitment procedure. In order to enhance societal protection, the commitment was for an indefinite time and release was allowed only when the superintendent of the mental hospital to which the person was committed certified (1) that the person has recovered his sanity, and (2) that he will not "in the reasonable future be dangerous to himself or others." It has been held that release may be precluded if there is competent evidence that the person may commit any criminal act, not merely a violent crime. The court was given the authority to hold a hearing, on its own motion or upon objection to release by the prosecution, to hear evidence to determine the propriety of the superintendent's decision. The person committed has the prerogative of instituting habeas corpus proceedings and winning release if he can show, beyond a reasonable doubt, that he is no longer suffering from mental illness, that he will not be dangerous to himself and others in the reasonable future and that the superintendent acted arbitrarily in refusing to recommend release. This is a heavy burden to sustain, especially in view of the fact that the typical person faced with it is indigent or of modest means and thus unable to secure independent psychiatric examination and testimony. The dire need for beds in the psychiatric wards and the good faith of the medical authorities have been advanced as an argument that release will not be delayed longer than absolutely necessary. As a counterweight, there is a conservative attitude in regard to release desiring to retain the patient perhaps longer than necessary to establish the patient's recovery and thus save face for the program by establishing a low percentage of recidivism, perhaps at the cost of an overly long confinement.

If the District of Columbia procedure only included the above-mentioned Durham rule, mandatory commitment procedure and release provisions, it is doubtful whether

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59 Supra, n. 39.
60 Supra, n. 48.
61 Supra, n. 49.
63 Supra, n. 49.
65 Supra, n. 52, 573.
the storm of indignation which surrounds the District of Columbia procedure would have materialized. The above-mentioned indefinite confinement can be justified to the satisfaction of most observers on the basis of protecting society if the accused raises the insanity defense himself and if he is actually found to have been insane at some point. But this is not necessarily the case in the District.

Long before the Durham rule was propounded, the District of Columbia courts followed the Federal and perhaps the majority\(^6\) rule in regard to the burden of proof in insanity cases.\(^6\) If "some evidence," which need not amount to evidence sufficient to raise a reasonable doubt, is introduced in the case, it devolves upon the prosecution to establish defendant's sanity beyond a reasonable doubt.\(^6\) Because of the Durham rule the prosecution must show that the accused did not suffer from mental disease or defect at the time of the act, or that if he was mentally ill, it did not cause him to perpetrate the act.\(^6\) "In effect, to obtain a conviction the Government must carry the burden of proving a negative proposition."\(^7\)

Because of this rule as to the burden of proof, it has been argued that the District of Columbia jury never affirmatively finds the defendant to have been insane but rather merely returns a verdict of not guilty by reason of insanity, thus causing mandatory commitment, when the panel has "doubt" about his mental condition at the time of the act.\(^7\) The rationale of a presumption of continued insanity to justify commitment is thus impaired because there has never been a finding of insanity.\(^7\) When this argument is coupled with the District of Columbia rule that insanity is not merely an affirmative defense which may only be introduced into the case by the defendant\(^7\) and with the refusal to allow a defendant to change his plea to guilty so as to avoid indefinite confinement in a mental hospital and take a short prison sentence instead, a

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\(^7\) Davis v. United States, 160 U.S. 469, 486 (1895).
\(^7\) Tatum v. United States, 190 F. 2d 612, 615-616 (D.C. Cir. 1951).
\(^7\) Ibid.

\(^7\) See Fahy, concurring, Ragsdale v. Overholser, 281 F. 2d 943, 950 (D.C. Cir. 1960); Halleck, op. cit. supra, n. 69, 305.
\(^7\) Ibid. See also supra, n. 55, 107 (remarks of Halleck), 552 (remarks of Lawrence Speiser, Washington Director, American Civil Liberties Union).
conclusion is reached that the procedure leads to unjust results.  

Superimposed on this legal maze is the “administrative policy” of Saint Elizabeths Hospital. That policy includes sociopathy as a mental disease within the meaning of the Durham rule and the release provisions. Sociopathy designates an abnormal mental attitude toward one’s environment which does not hamper the person’s contact with reality, but which impairs, to varying extents, his ability to perceive his social and moral responsibilities and obligations. Furthermore, it is more or less a permanent way of life not susceptible to alteration through treatment. One product of the personality may be habitual criminality. There is conflict of opinion in medical circles as to whether this is a mental illness, but when accepted as such, it clearly broadens the ability to acquit and retain in custodial confinement in the District of Columbia. However, it is not such a state of mind which would subject a person to civil commitment.

Much of the current legal dissatisfaction with the District of Columbia situation is mirrored in O’Beirne v. Overholser, a case involving a petition for habeas corpus to compel release of one who was restrained in St. Elizabeths Hospital because he was classified as a “sociopath.” District Judge Holtzoff granted the petition, and ordered release of one who had spent four years in the hospital after acquittal of a petty larceny charge for which the maximum prison sentence is one year. The Court noted that, while the superintendent’s denial of release is not final and conclusive for all legal purposes, it could only reverse the administrative action if the action is “arbitrary and capricious.” However, because the petitioner had been committed to the hospital one month before the administrators decided to diagnose a sociopathic personality as a mental disease, and because this decision was a change in policy which had the effect of precluding a re-

\[74\] Supra, n. 72.

\[75\] Saint Elizabeths is the mental institution to which those found not guilty by reason of insanity are automatically sent.

\[76\] See “sociopathy” and “psychopathic personality” as defined in Hinsle & Shatsky, Psychiatric Dictionary (2d ed. 1953), and in Webster’s Third International Dictionary.

\[77\] Supra, n. 55, 649 (remarks of the Hon. Alexander Holtzoff, Judge, U.S. District Court for the District of Columbia).


\[79\] Supra, ns. 77 and 78.


\[81\] Id., 660.
lease which would have been possible prior to the change, the Court concluded:

"That personal liberty should depend on such an arbitrary circumstance is manifestly intolerable and contrary to the basic principles of freedom."\(^2\)

The Court distinguished denials of petitions brought by those acquitted as sociopaths who objected to their detention as sociopaths. Presenting a sort of estoppel argument, the Court wrote:

"[These men in the case where habeas corpus was denied] received the benefit of this tour de force and [were] acquitted on the ground of insanity — something that would not have happened if [they] had been tried a few days earlier. [They were] not in a position to complain when [they] found [themselves] in a mental institution as a result of receiving what seemed to [them] at the time the benefit of the new outlook."\(^3\)

Because of this distinction, the case has limited use as precedent, serving to aid release of not all sociopaths, but only those committed prior to the change in administrative policy.

However, the Court's dicta serves to indict the present District of Columbia procedure.

"It seems astounding that a person who is not subject to civil commitment to a mental institution can be confined in a locked criminal ward of a mental institution . . . . In this case the petitioner has been incarcerated in a criminal ward of a mental hospital for over three years because he committed a crime for which he could be punished by imprisonment for not more than one year, and this has occurred under circumstances under which he could not be committed as a civil patient because he is not insane. * * * The fact, however, that a person is an habitual petty criminal should not subject him to permanent incarceration in a criminal ward of a mental institution. Such a disposition may not be used as a substitute for laws that deal expressly with habitual criminals. It is inhumane to confine sane human beings in a lunatic asylum."\(^4\)

\(^2\) Supra, n. 80, 659.
\(^3\) Supra, n. 80, 661. Emphasis added.
\(^4\) Supra, n. 80, 659. Emphasis added.
Reflecting upon the *Durham* rule, Judge Holtzoff questioned whether it would have been adopted if it had been thought that sociopaths would be relieved from criminal liability.\(^8\) Finally, attorneys were admonished to reserve the defense of insanity for capital cases and those in which the defendant runs the risk of imprisonment for a long term, and leave it out of the case which threatens the defendant with at most a short prison term.\(^8\)

Judge Holtzoff continued as the scourge of the sociopathy classification in *Tremblay v. Overholser*.\(^7\) There, a "lady of refinement" was arrested on a charge of intoxication. Her assigned counsel requested a mental examination. Pursuant thereto, she was committed for an examination to a mental hospital, and was subsequently certified competent to stand trial. At the trial she tried to plead guilty, but the plea was denied by the Municipal Court, which found, on the basis of a medical report, the defendant not guilty by reason of insanity, even though the defendant did not raise the question of insanity and offered no evidence of it. The mandatory commitment statute dispatched the defendant to Saint Elizabeths. Eleven months later she petitioned for habeas corpus to gain release from the hospital.

Judge Holtzoff, in *Tremblay*, was unable to rely on his rationale of *O'Beirne* since the petitioner had been acquitted as a person with "sociopathic personality disturbance, alcoholism addiction." To the Judge this meant "she is an alcoholic who lacks sufficient will power to refrain from indulging in alcoholic beverages to excess." The Court then threw out the commitment as improper in the first instance because the verdict of insanity was the result of a deprivation of a constitutional right, i.e., that a person competent to stand trial may plead as he thinks best.

"[I]t is a deprivation of a constitutional right to force any defense on a defendant in a criminal case or to compel any defendant in a criminal case to present a particular defense which he does not desire to advance. This principle of law is accentuated when the successful advancement of the particular defense must end in disaster, because a person who successfully pleads insanity must be committed to a mental institution. * * * Here, the defendant did not want and

\(^8\) *Supra*, n. 80, 660.
\(^8\) *Supra*, n. 80, 660.
took no step to . . . advance a plea of insanity. The Court is of the opinion that this constitutes a violation of due process of law.

"It may be that petitioner needs hospitalization. Obviously, she should not be among insane people. There was a time when insane people were placed in jails, temporarily, at least. We looked upon this as a barbaric custom that has been pretty well eliminated. But we have reverted to it in reverse, we are placing sane people in insane institutions, which I think is even more barbaric."88

The Tremblay case personifies all that is wrong with the District procedure. A sociopath charged with an essentially harmless misdemeanor, usually punished by fine, was forced into a mental hospital by a not guilty by reason of insanity verdict which she did not seek but which was thrust upon her. The mandatory commitment procedure was not intended to rid society of its alcoholics but protect it from dangerous individuals who were prone to break society's laws without mental restraint.

Such a case as Tremblay may not be brought within the rationale of Ragsdale v. Overholser,89 which speaks forcefully in favor of mandatory commitment. There, a defendant was acquitted of a robbery charge due to insanity. After automatic commitment, he brought habeas corpus for release. Denying the petition, the Court of Appeals for the District of Columbia discussed the reasons for mandatory commitment. The procedure is said to have no penal purpose but rather seeks to protect "the public and the subject" and to "rehabilitate and restore" the subject not punishable for lack of accountability. In order to serve these purposes, commitment is not restricted to the term of the maximum sentence one could have received if accountable, but extends until the purposes of statute are satisfied.90 Finding a rational connection between the known evidence of the accused's mental disease and the statute's mandatory commitment provision, the Court said:

"Inherent in a verdict of not guilty by reason of insanity are two important elements, (a) that the defendant did in fact commit the criminal act charged, (b) that there exists some rational basis for belief that

88 Id., 570-571. Emphasis added.
89 281 F. 2d 943 (D.C. Cir. 1960).
90 Id., 947.
the defendant suffered from a mental disease or defect of which the criminal act is a product. Congress did not see fit to provide for a hearing following immediately upon the verdict to determine the defendant's then mental condition. Perhaps Congress took into account the inescapable fact that such a hearing would be meaningless until trained medical experts had a reasonable opportunity to observe and examine the subject and report their findings. Hence, some time gap between the verdict and appraisal of defendant's then existing mental condition is unavoidable under any scheme which would provide adequate safeguards. * * * [S]ince the persons confined . . . may judicially test the legality of the confinement by habeas corpus, we cannot say the means selected by Congress violated appellant's constitutional rights.

"In these circumstances the public interests sought to be protected outweigh appellant's claimed right to be set free the instant the verdict is returned. It is hardly asking too much to require that a defendant who is absolved from punishment by society because of his mental condition at the time of the criminal act should accept some restraint on his liberty by confinement in a hospital for such a period as is required to determine whether he has recovered and whether he will be dangerous if released."91

But in a case such as *Tremblay* there was a medical examination prior to trial. Thus, it would seem that a "time gap between verdict and appraisal of defendant's then existing mental condition" is NOT unavoidable. And is it "hardly asking too much" to force upon someone a defense they ignore after weighing the alternative of a fine or indefinite incarceration in a mental hospital?

Concurring, in *Ragsdale*, Circuit Judge Fahy had doubts about the constitutionality of the mandatory commitment procedure, saying commitment could be saved only because of continuing danger to society, not through the availability of habeas corpus, and suggesting that only acquittal of violent crimes due to insanity should cause mandatory commitment.92

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91 *Supra*, n. 89, 948-949.
92 *Supra*, n. 89, 950-951:
"It is by no means clear that society can continue to deprive a person of liberty by attributing to a jury's doubt about his mental condition, which led to his acquittal and mandatory commitment, any and all evil or criminal propensities he may be thought to have, and to keep
While Tremblay exposes most of the faults in the District system, and Ragsdale offered a doctrinal apology for it, the District case which will cause greatest change in the procedure is Lynch v. Overholser. This case was the vehicle whereby the constitutional attacks on the procedure were presented to the Supreme Court, which deftly avoided the constitutional issue and, by relying on "legislative intent," read compulsory commitment out of the District procedure in cases where the defendant did not raise the insanity defense.

As in Tremblay, a non-violent act, here a violation of the bad check law, brought the defendant, a former Army officer, without a prior criminal record, into court. A mental examination was ordered by the court, due to observation of the defendant during arraignment. Again like Tremblay, the medical report showed evidence of sociopathy, and the court refused to allow the defendant to plead guilty. At the trial, the defendant entered no evidence of insanity, but the report was sufficient to find him not guilty by reason of insanity and subject him to mandatory commitment. The Court of Appeals for the District of Columbia (6-3) upheld the commitment. The Court found the denial of a guilty plea within the discretion of the trial judge and said:

"[The decision to change the plea to guilty] was one which appellee and his counsel did not have an absolute right to make. * * * Society has a stake in seeing to it that a defendant who needs hospital care does not go to prison. * * * Once it is established that the defendant did in fact commit the act charged but he was insane at the time, then the problem is one of rehabilitation. * * * [Even though a prison sentence lasts for a set time while hospitalization is for an indeterminate period, the difference] is not fatal because of the overriding interest of the community in protecting itself and its interest in rehabilitating the

\footnote{369 U.S. 705 (1962).}
defendant himself. Certainly a man is not free if he has a sickness which results in his continual criminal activity, which, in turn, leads to a life-time in jail, with only short breaks between sentences. In the case before us, had [the accused] not been treated, he might have been in and out of jail for the rest of his life on bad check charges. Now that he has received treatment he is well on his way to unconditional release, without the probability of repeat offenses.94

Judges Fahy, Bazelon and Edgerton, dissented, saying that Congress sought only to prevent, by mandatory commitment, the immediate return to society of a person accused of "dangerous" conduct who was acquitted by reason of insanity. Furthermore,

"Our jurisprudence knows no such thing in times of peace as 'preventive' or 'protective' custody of persons not guilty of crime and not found to be of unsound mind."95

Although the courts below had read the statute as written, the Supreme Court, reasoning from and relying on the legislative history surrounding the enactment of the mandatory commitment procedure, drew a distinction between the defendant who pleads insanity and one who tries to avoid that defense. The Court, per Justice Harlan, wrote:

"[W]e read [the mandatory commitment procedure statute] as applicable only to a defendant acquitted on the ground of insanity who has affirmatively relied upon a defense of insanity, and not to one, like the petitioner who has maintained that he was mentally responsible when the alleged offense was committed."96

The Court noted that the safeguards that Congress had erected in the civil commitment procedure of the District of Columbia; that the trier of fact in the District must reach a verdict of not guilty by reason of insanity even if the evidence as to mental responsibility at the time of the offense raises no more than a reasonable doubt of sanity and that bare reasonable doubt as to past sanity would not be enough to civilly commit; and, finally, that, de-

95 Id., 397.
fined by House and Senate Reports, Congress seemed to intend to insure treatment only for those who plead insanity to avoid criminal punishment and who needed treatment and who would be dangerous if not confined. For these reasons, the criminal defendant who disclaimed reliance on the insanity defense is not to be subject to mandatory commitment.

The lone dissenter to this view was Mr. Justice Clark who accused the Court of dealing in unwarranted judicial legislation.

"I believe . . . that the Congress in adopting [the compulsory commitment procedure] said what it meant and that it meant what it said. I regret that the Court has seen fit to repeal the 'plain terms' of this statute and write its own policy into the District's law."

The dissent goes on to discuss the constitutional issues avoided by the Court, and argues that the District procedure is constitutional.

"Congress may reasonably prefer the safety of compulsory hospitalization subject to the release procedures offered by the statute and through habeas corpus. * * * The problem which faced Congress was the reconciliation of the opportunity for release of the accused through a judicial hearing with the vital public interest, deference to the views of institutional authorities and a decent regard for the hospitalization and cure of the accused. The balance struck by Congress in my view meets the essential requirements of due process."

As a result of the Lynch decision the defendant who refuses to assert the insanity defense will not be subject to automatic commitment if he is acquitted, through evidence offered by the prosecution, on grounds of insanity at the time of the act. Such defendant will pose a choice to the authorities: either they accept his guilty plea with the concomitant fixed sentence (in the Lynch and Tremblay type situations such sentences would indeed have been light), but with also the possibility of transfer to

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97 Id., 722. Also note these words of Justice Clark:

"I cannot believe Congress thought only people who claim to be crazy are dangerous enough to be confined without further findings."

(733).

97a Id., 733-34.
psychiatric care after incarceration for the term of the sentence, or, as in the past, they can introduce the evidence of insanity at the time of the act, which going unrebutted will acquit, and then institute civil commitment proceedings, with the concomitant hearing on the issue of present sanity or invoke another section of the criminal commitment procedure which permits the trial judge to commit "prior to the imposition of sentence or prior to the expiration of any period of probation" if he has reason to believe that the accused "is of unsound mind or is mentally incompetent so as to be unable to understand the proceeding against him." The procedure that the Court has engrafted on the District procedure when the insanity issue is raised from some source other than the defendant apparently will require some sort of determination of present mental incompetence before commitment.

The Army officer's demand for release was presented orally to the Supreme Court by Richard Arens who was also one of the dozen or more lawyers, psychiatrists and jurists intimately connected with the District procedure to give testimony before the Senate Subcommittee on Constitutional Rights of the Committee on the Judiciary in the Spring of 1961. Mr. Arens represented the American Civil Liberties Union and made a direct attack on the validity of mandatory commitment and suggested remedial legislation in the form of (1) preventing the "forcing" of an insanity plea on the defendant, (2) requiring a hearing to determine present dangerousness after acquittal, and (3) providing independent psychiatric examination for the defendant. On the other hand, Dr. Winfred Overholser, superintendent of St. Elizabeths, defended the system as "a practical one which has worked well" and suggested three considerations in favor of mandatory commitment:

"One, the offender .... If he needs treatment, he can get it. Item two — we want to reassure the public that these people are not being turned loose when they are potentially a menace to the public. And third .... to serve notice that there is something that is

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7b D.C. Code (Supp. VIII, 1960) § 24-301 (a) as quoted in Lynch v. Overholser, supra, n. 96, 718.
86 Hearings on the Constitutional Rights of the Mentally Ill before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 87th Cong., 1st Sess., 209, 215-216 (1961) (remarks of Richard Arens, counsel, American Civil Liberties Union). See also id., 676, 683 (remarks of Dr. Samuel Polsky, Professor of Law and Legal Medicine, Temple University Schools of Law and Medicine).
90 Id., 589 (remarks of Dr. Winfred Overholser, M.D., Superintendent, Saint Elizabeths Hospital, D.C.).
going to happen to [a] person . . . if he is acquitted by reason of insanity. I think that in itself tends to discourage the specious plea.”

Most other witnesses fell between these points of extreme dissatisfaction with and complete approval of the present system. Several witnesses were dubious about the worth of the District procedure as constituted, but did not feel repeal of the mandatory commitment procedure was the solution, and instead favored alteration of the mandatory procedure by establishing a time limit on the post-acquittal confinement, and allowing or requiring thereafter a hearing to determine the person’s present mental status. One form of alteration would commit a person found not guilty by reason of insanity for 90 days to allow for examination and observation; at the end of the 90 days, the person could be held only if civilly committed. A somewhat similar plan would provide, after verdict of not guilty by reason of insanity, for “prompt examination and prompt hearing” to determine whether the person acquitted was dangerous with the burden of proving that on the Government at the mental health hearing. The hearing date would be set by the judge authorizing the examination, thus leaving the length, but not the fact, of committal in the discretion of the trial judge. Another plan would leave the length of observation to the psychiatrist with a requirement that there be judicial review of mental status within six months after the trial. It was also stated, not by a person unsympathetic to the difficulties faced in diagnosing mental patients, but rather by a psychiatrist, that one day would be sufficient for the examination prior to the mental health hearing.

“[I]t is necessary and very feasible to have an immediate examination, and even 30 days is unnecessarily long.

It could be done in 1 day. * * * [A]n hour is enough time to make an estimate in 90 percent of the cases. . . .

100 Id., 600.
101 Supra, n. 98, 111, 121, 573-4, 716.
102 Supra, n. 98, 111 and 121 (remarks of Charles W. Halleck, attorney at law, Washington, D.C.).
103 Supra, n. 98, 716-717 (remarks of Kenneth A. Pye, Professor of Law, Georgetown University Law Center).
104 Supra, n. 98, 616, 618 (remarks of Abe Krash, an attorney who worked in the Durham case).
[The trouble with a long commitment is that] once a person has been put into [a mental hospital] for 90 days the whole picture is very likely to change. He is not likely to be the same person any more. * * *

Nobody behaves the same way there so we see a different picture, either better or worse. * * *105

The plans calling for mental health hearings grew out of a belief that in the District of Columbia, because of the burden of proof rule,106 an acquittal on grounds of insanity does not represent a finding that the defendant was presently or ever insane.107 Indeed, where insanity is an affirmative defense, it was said, by a critic of the District procedure, mandatory commitment was not without merit.108

Many of the witnesses pointed out the lack of treatment, due to lack of psychiatrists, received by anyone committed after an acquittal.109 But the societal utility of the procedure was pointed out by an attorney who helped establish the Durham rule:

"[T]his automatic hospitalization provision [is] wise legislation. Few things connected with criminal justice produce a greater sense of public skepticism and anxiety than the spectacle of an individual acquitted of a serious offense by reason of insanity walking out of the courtroom a free man. As Dr. Guttmacher . . . has so aptly put it: 'This seems socially impolitic and psychiatrically unsound. It completely discredits the pleas of insanity in the minds of the public.'"110

Perhaps these words influenced another witness, a psychiatrist, to advocate elimination of "mental illness" as a defense to crime and hold all persons "legally accountable for their actions."111 In such a procedure, the

105 Supra, n. 98, 645 (remarks of Dr. Charles E. Goshen, Director, Community Psychiatric Services, Department of Mental Hygiene, State of Maryland).
106 District Judge Holtzoff: "* * * I think most of our troubles would be at an end if we adopted a concrete definition of insanity and if we shifted the burden of proof [to the defendant]." Supra, n. 52, 651.
107 Supra, n. 98, 107, 113, 215, 554-555, 573, 605-606, 676.
108 Supra, n. 98, 109 (remarks of Halleck).
109 Supra, n. 98, 12, 117, 123-124, 639, 681, 718.
110 Supra, n. 98, 604 (remarks of Krash).
111 Supra, n. 98, 259-260 (remarks of Dr. Thomas S. Szasz, Professor of Psychiatry, Upstate Medical Center, Syracuse, N.Y.). Cf. Cardozo, What Medicine Can Do for Law In Law and Literature and Other Essays and Addresses (1931) 108.
court, before imposing sentence, would investigate the convict's past and impose either punishment or treatment, which ever gives best potential for rehabilitating the individual convicted. But accountability and responsibility for the acts would attach to the actor.

Throughout the Hearings, of course, the Senators interjected their thoughts. Two such comments are particularly revealing both of the nature of the problems thought to be involved and of the attitudes of the speakers to those problems.

Senator Roman Hruska (R. Neb.) expressed the concern of defense attorney for a client, who had been insane at the time of the act but who had recovered at the time of the verdict, where there operates a mandatory commitment procedure.

"What would you say . . . about a case in which a crime is committed, and the trial doesn't take place until 8 or 14 months later?

Such things have happened. * * *

And the defense is insanity at the time of the commission of the crime. Obviously with the passage of time it [the insanity] sometimes disappears . . . . It disappears, and he is held, [even though he may be] a perfectly normal person.

Now he is kind of caught in a bind, isn't he?

* * *

Under the present state of affairs, that is."112

Perhaps the Senator overlooked the availability of habeas corpus to relieve such a case. But this facet was not missed, but rather dismissed, by Subcommittee Chairman Sam Ervin (D. No. Car.).

"I have just some misgivings about an automatic commitment, because while the District of Columbia Code . . . provides for the writ of habeas corpus, I doubt whether a writ of habeas corpus . . . is sufficient to supplant a procedure which should be designed to see whether the detention should originally be initiated.

Of course, the mandatory commitment is based upon the theory that . . . insanity having been shown to exist at the time of the commission of the offense

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112 Supra, n. 98, 112 (remarks of Senator Hruska).
is presumed to continue. * * * But I wonder if that presumption really arises in all cases?

* * *

Certainly a presumption of continued insanity does not logically arise from the establishment that at the time of the commission of the offense the man was temporarily insane or suffered from insanity of a temporary type — that would not quite justify the presumption. . . .

I just wonder if there is not a middle ground here.

* * * I wonder if it would not be advisable to amend the statute to provide that the trial judge, on the basis of what he has learned during the trial, should have the discretionary power either to make an inquiry at that time, after the verdict of not guilty by reason of insanity is made, . . . or at his election do what this statute provides, commit a person temporarily . . . for a certain period of time.”

Although some testimony attacked the mandatory commitment procedure directly and there is some indication from Senatorial comment that the lawmakers favored a modification of the procedure, when the House passed a bill \(^ {114} \) to revamp the District system it left intact the mandatory commitment aspects but altered several collateral parts. The bill would have made insanity an affirmative defense, read sociopathy out of mental illness and altered the test of criminal responsibility, returning, it was charged by the dissenters, to the “long discredited M’Naghten” Rule. \(^ {115} \) The bill went to a Senate committee \(^ {116} \) and has not been heard of since.

This action of the House links tacit support to a conclusion that can be drawn from the District of Columbia experience. Contentions that individual freedom is being unwarrantedly abridged arise from the interplay within the total procedure regulating the insanity defense. While the mandatory commitment procedure may, theoretically at least, \(^ {117} \) send a sane man to a mental institution, this

\(^ {113} \) [*Supra*, n. 98, 573 (remarks of Senator Ervin)]. Emphasis added.


\(^ {116} \) Id., 10535 (daily ed. June 27, 1961).

\(^ {117} \) *Hearings, supra*, n. 52, 607 (remarks of Abe Krash): “It is true that it is theoretically possible for a sane man to be committed to a mental institution at present in the District. The accused may have suffered from
possible injustice is not caused only by the automatic commitment.

If the District experience proves anything, it is that in this largely unchartered (because of the little successful use of the insanity plea heretofore) area of the law, things are not what they seem. The uproar in the District after Durham grew out of a fear that insane criminals would be set free; the recent uproar resulted from an allegation that sane men are being forced into a locked mental hospital ward.

IV.

THE ENGLISH PROCEDURE

Since we, as a nation, owe many of our liberties and much of our legal procedure to our English heritage, it is never inappropriate to look for guidance or comparison to English methods when faced with a legal problem. In regard to the insanity plea and commitment after successful pleading, the English offer a unique procedure, in some ways more restrictive of individual freedom and, consequently, more responsive to society's demand for assured safety. Yet, the English hardly can be charged with insensitivity to individual liberty.

Prior to the 14th Century, insanity was not a defense to crime, but was ground for a special verdict, i.e., that the accused committed the act when mad, which entitled the prisoner to a pardon. The patent rolls of Henry III contain pardons of persons who had committed a homicide while "mad." Furthermore, "lunatics" were apparently not regarded as felons since a wife who, while insane, killed her husband did not lose dower or other inheritance rights as a sane murderer of a spouse would have. From the reign of Edward III (1327-1377) until 1883, insanity was an absolute defense to crime: the insane person was not punished as provided by law because *furosus furore solum punitur* (a madman is punished by his madness alone).
An accused held not criminally responsible due to insanity was subject to detention as a dangerous person at the discretion of the trial judges who acquitted him. However, in 1800 Parliament eliminated the judiciary's discretion and required the court to order anyone acquitted of a felony by reason of insanity “to be detained during His Majesty’s pleasure.”

The attempted assassination of Queen Victoria by one McLean led in 1883 to a change in the nature of the verdict when insanity was raised as a defense. The gracious Queen was unable to understand her advisors’ explanation of mens rea, or how a man she saw shoot at her could be found “not guilty. . . .” Therefore, at her urging, the jury was required thereafter to bring in, similar to the original English procedure, a special verdict that defendant was GUILTY of the act or omission charged BUT was INSANE at the time the act was done or omission made. However, the result of the verdict, i.e., that the defendant be kept in custody, remained.

English procedure does not require any formal “plea” of insanity. In England the defendant alone can assert the defense and initiate evidence of it, but Scotland and South Africa allow the Crown to “lead evidence of insanity.” The burden of proof rests on the accused but is no greater than that required of a party in a civil proceeding — establishing insanity by “the preponderance of probability.”

When a defendant is found guilty but insane, he is detained in a “special hospital” or in a mental hospital until discharged by the Crown. In practice, the Home Secretary orders the discharge. To be discharged, the medical authorities must believe “that the patient gives abundant evidence of stability” and the patient must

125 WILLIAMS, CRIMINAL LAW (2d ed. 1961) 456.
126 Criminal Lunatics Act, 1800. The provision subsequently was extended to misdemeanors. WILLIAMS, loc. cit. supra, n. 123.
127 Supra, n. 118, 98; STRACHEY, QUEEN VICTORIA (London, 1921) p. 278.
129 Supra, n. 123, 448.
130 Regina v. Dixon [1961] 1 W.L.R. 337. The prosecution cannot initiate the evidence even though the defendant consents.
131 Supra, n. 123, 448.
134 Supra, n. 123, 458.
have friends or relatives who will supervise his return to normal life, and thus provide further assurance that there will be no relapse.\textsuperscript{133} Apparently, it is not sufficient that the patient's psychotic symptoms have remitted and there are some sane people in a mental hospital because they have no one who will accept the role of supervising their return to society.\textsuperscript{134} Furthermore, there is apparently some tendency to retain one in the hospital for a term at least as long as he would have served in prison when subsequent mental observation determines that defendant feigned insanity.\textsuperscript{135}

The English automatic commitment procedure has been attacked and two changes proposed:\textsuperscript{136} (1) returning discretion to the court to release defendant at time of verdict if "the judge sees no reason to fear a repetition of the harm," and (2) taking the power to release away from a Ministerial Official.

It will be noted that, while the automatic commitment provision is similar to the District of Columbia, the release of a person found criminally insane is more restricted than the District of Columbia plan. Protection of society is given great weight in the English system. However, the defendant alone can raise the issue of insanity in England\textsuperscript{137} and the burden of proof shifts to the prosecution only after more evidence has been admitted than in the District. These two related considerations make less likely any claims of railroading in England.

V. THE MARYLAND FUTURE; SOME SUGGESTIONS

Maryland may shortly consider the alteration of its test of criminal responsibility, and may, if it adopts a broader test,\textsuperscript{138} be urged to also adopt a mandatory com-

\textsuperscript{133} Supra, n. 123, 458.
\textsuperscript{134} Supra, n. 123, 458, fn. 10.
\textsuperscript{135} Supra, n. 123, 458. A similar United States tendency is criticized in Note, Releasing Criminal Defendants Acquitted and Committed Because of Insanity: The Need for Balanced Administration, 69 Yale L.J. 293, 300 (1958).
\textsuperscript{136} Supra, n. 123, 460.
\textsuperscript{137} Supra, n. 123, 450: "It seems remarkable that a person who cannot make a valid will or contract can effectively prevent evidence of insanity being given at his trial."
\textsuperscript{138} The Maryland State Bar Association, at its 1962 Mid-Winter Meeting, approved the report of the Special Committee on Insanity which had recommended the following test of criminal responsibility:

"Where the defense of not guilty by reason of insanity shall be pleaded in any criminal case in this State, the person making such a defense shall not be responsible for criminal conduct if, as a result
mitment procedure as a "necessary concomitant" of the new test. If that is proposed, the Legislature should validly ask (1) why the present Maryland procedure is not adequate; (2) whether the altered procedure would lead to a situation such as prevails in the District of Columbia where cries of infringement of individual liberty abound; and (3) if the evils of the District are avoided, is mandatory commitment the optimum means of protecting society and the individual?

The present Maryland procedure allowing the jury to determine both the defendant's sanity at the time of the act and at the moment of the verdict allegedly has three strikes against it. First, it is said not to prohibit expressly a test of present sanity by the right and wrong yardstick. Second, an intelligent answer to the question of present insanity is allegedly impossible at the trial due to an

of mental disease or deficiency of intelligence at the time of such conduct, he lacks sufficient capacity either to understand and appreciate the criminality of his conduct or to conform his conduct to the requirement of law."

This test differs from the Durham rule, supra, n. 46. For an excellent and lengthy discussion of the Durham rule, the M'Naghten test and a new formula, see United States v. Currens, 290 F. 2d 751 (3d Cir. 1961).


On September 5, 1962 the Judiciary Committee of the Maryland Legislature made a favorable report to the Legislative Council of a proposal of the Maryland State Bar Association that persons acquitted of a crime because of insanity should be referred to the mental hospitals for a period of observation.

The Bar Association proposal adopted at its annual meeting in Atlantic City reads:

"A person who has been found not guilty by reason of insanity, may, within the discretion of the Court, be committed to one of the appropriate mental institutions of the State of Maryland for examination and evaluation to determine whether or not by reason of mental disease or defect he is a danger to himself, to his own safety or will be a menace to the safety of the person and/or the property of other people, with the right to such person to apply for release as provided by law."

This proposal is apparently a modification of a recommendation made by a Committee To Study The Laws For The Commitment of Mentally Ill Persons. This Committee was chaired by Dr. Manfred S. Guttmacher and was appointed by the Legislative Council of the Maryland Legislature. The proposal read:

"If the verdict or finding of the jury be that the defendant was insane at the time the offense was committed, the Court, unless it shall appear to the Court that the defendant has fully recovered his sanity, shall direct that the defendant be confined in the appropriate State mental hospital until released as provided by law. If, however, it shall appear to the Court that the defendant has fully recovered his sanity, such defendant shall be committed to the appropriate State mental hospital for observation, until it shall be determined by law that he has recovered his sanity and in no event shall he be released until the expiration of a period of one year from the date of the verdict or finding of the jury."

Supra, circa, ns. 14-18.
absence of psychiatric observation. Third, the question of insanity is beyond the comprehension of the jury.

Clearly, the test of insanity at the time of the verdict should not be the right and wrong criterion. This point has been argued from an analysis of the Maryland procedure and cases recently and elaboration here would not add light to that phase of the subject. It may be said, however, that the right and wrong test is inappropriate logically because the question after acquittal due to insanity is no longer one of criminal responsibility. Rather, the propriety of the defendant's return to society after being absolved of punishment for his act is to be determined. Dangerousness to self and others determines the re-entry into society of one civilly insane; logically, one who has breached society's standards while insane should not be returned on the basis of a different, and less restrictive, test.

If insanity "now" would be determined on the basis of dangerousness to self and others, do the other two alleged defects in the current system still destroy its worth and require a new procedure? Is a period of observation necessary after the verdict in order intelligently to determine the person's sanity or dangerousness due to insanity? It is to be noted that the trial judge may order a mental examination prior to trial. Such an examination is not required, but where it occurs, it would seem to provide the information which medical authorities might impart to the jury for determination of present sanity. Where such an examination is conducted in a mental hospital over a period of time, it would seem to have the same clinical advantages as a commitment for observation after trial. Where there has been no clinical examination prior to trial, there would seem to be a genuine obstacle to a credible determination of present mental status.

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141 Cf., Salinger v. Superintendent, 206 Md. 623, 628-9, 112 A. 2d 907 (1955): "The confinement is not punishment, it is custodial. The acts which preceded it merely served to bring about a judicial determination in a particular form of the need for custodial confinement."

142 Chasanow, Civil and Criminal Commitment of the Mentally Ill in Maryland, 21 Md. L. Rev. 279, 302 (1961).

143 Id., 297: "This test of insanity used in determining whether a person is responsible for his otherwise criminal acts is probably the strictest of all tests for insanity. A person could conceivably be insane under the civil test (danger to self or others), be too insane to stand trial (unable to conduct or assist in the conduct of his defense) and yet be able to distinguish between right and wrong and know the nature and consequences of his acts. . . ."

Regardless, to argue that the jury is not able to determine sanity at the time of the verdict, after it has judged sanity at the time of the act seems incongruous. If the present procedure recognized the dangerous-to-self-and-others criterion and if there has been clinical observation prior to the trial, the present procedure would safeguard society while clearly protecting the individual from commitment when really sane.

Yet, a period of observation after acquittal on insanity grounds may be deemed wise policy and an additional safeguard to society. If Maryland adopted the mandatory commitment procedure, much of the criticism that attends the District system might not develop since Maryland appears to make insanity an affirmative defense with the burden of proof on the defendant to establish by a preponderance of the evidence his insanity.146 The question of who has the burden is important. When the burden is on the prosecution to prove sanity beyond a reasonable doubt after some evidence of insanity is introduced, the argument arises that a verdict of not guilty by reason of insanity is not a determination that defendant was ever insane, but merely that there is a reasonable doubt as to defendant's sanity.146 Where defendant must prove insanity by a preponderance of the evidence,147 such a claim can not be made, for the jury actually must determine defendant to have been insane.

A hedge is necessary when discussing the Maryland rule in regard to burden of proof, because that is what the Court of Appeals did in Thomas v. State.148 There, the Court refused to find error in a jury charge which stated: "The burden is on the defendant to prove insanity by a preponderance of the evidence, not beyond a reasonable doubt."149 But the weight of this statement is diminished when the Court noted "there is no evidence here of any mental disorder to shift the burden of proof to the State."150 Furthermore, the Court said it was not deciding whether to follow the rule (accepted in the District) that some evidence shifts the burden of proving sanity beyond

147 See State v. Barton, 381 Mo. 750, 233 S.W. 2d 596 (1951); Ortwein v. Commonwealth, 76 Pa. 414, 425 (1874); Holober v. Commonwealth, 191 Va. 826, 62 S.E. 2d 816 (1951); State v. Clark, 34 Wash. 485, 76 Pac. 98 (1904).
149 Id., 587.
150 Supra, n. 148, 588. Emphasis added.
a reasonable doubt to the state. Of this decision it has been written:

"The Court of Appeals . . . apparently attempted to avoid taking . . . a decisive stand, thus leaving the question in a somewhat ambiguous state in Maryland. While it was obviously in favor of placing the burden on the defendant, it was reluctant to openly reject the position placing the burden upon the state. * * * So uncertain is the Court's language in this part of the opinion, that one cannot help wonder whether, if the defendant had introduced enough evidence to meet the requirements of the view placing the burden on the state, the Court might not have adopted that view..."¹⁵¹

The Thomas case then is a slender reed on which to base a distinction between Maryland and District of Columbia procedure.

No Maryland case has been found deciding whether the prosecution may initiate evidence of insanity. However, Article 59, Section 7, which states the procedure for presentation and determination of insanity in a criminal case, reads:

"When it is desired to interpose the defense of insanity . . . on behalf of one charged with a crime . . . the defendant, his or her counsel, or other person authorized by law to appear and act for him or her, shall . . . file a plea . . . alleging [insanity] . . . . Whenever the plea of insanity . . . shall be interposed by or on behalf of any defendant * * *"¹⁵²

This appears to prevent the prosecution or court from raising the question of insanity as occurred in the District in Lynch¹⁵³ and Tremblay.¹⁵⁴ "Other person authorized by law" appears to refer to a guardian or trustee of the person's affairs. Moreover, by the doctrine of ejusdem generis,¹⁵⁵ the phrase would be restricted to someone in a legal relationship with the defendant.

¹⁵² Supra, n. 144. Emphasis added.
¹⁵³ Supra, infra, ns. 93-97.
¹⁵⁴ Supra, infra, ns. 88-89.
¹⁵⁵ [(Where general words follow an enumeration . . . such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned.] Black's Law Dictionary (4th ed. 1951).
If the burden of proof were on the defendant and if only the defendant or his representative could initiate evidence of insanity, Maryland would eliminate two talking points used to discredit the District of Columbia procedure. It is also to be noted that Maryland would not need to manipulate its commitment provision to ensnare the habitual criminal in a mental hospital. Maryland makes particular provision for the disposition and care of the "defective delinquent" through the Patuxent Institution.\(^\text{156}\)

Thus, difference between the District and Maryland must be recognized. But would mandatory commitment be the optimum procedure in Maryland, or should some sort of hearing be required before committal? In this regard, Maryland is one of a small minority of states allowing civil commitment through ex parte proceedings. This means there is no trial of the insanity issue before commitment unless the patient appeals the commitment order. Given this procedure applied to one who is not charged with violation of law, would it not be anomalous to argue that, commitment of one who has breached society standards by an act for which normal men are punished must be preceded, to satisfy due process, by a hearing to determine sanity at time of the special verdict?\(^\text{157}\) Of course, the ex parte procedure has never been tested by the Supreme Court, but, until that tribunal declares its constitutional status, it stands as the legislative policy which must be considered.

Yet, it must not be overlooked that all of the arguments\(^\text{158}\) presented for avoiding the hearing in a civil case — (1) traumatic effects of a judicial trial, where the patient hears friends or relatives testifying as to why he should be "put away"; (2) the delays and loss of time involved in judicial proceedings; (3) the public record of the commitment proceeding; and (4) the reluctance of the patient and relatives to expose to a jury the "public shame" of insanity — are worthless when there has been a criminal trial. Where there has been a criminal trial at which defendant was acquitted by reason of insanity, there has been a trial, a public record has been established,

\(^{156}\) 3 Md. Code (1957) Art. 31-B, § 1 et seq.

\(^{157}\) Our question presenting the anomaly includes an anomaly. It appears that in Maryland once insanity is proved to have clouded the defendant's mind at the time of the act there is no actual determination that the defendant did commit the act. \textit{Supra}, n. 18. However, "a plea of 'not guilty by reason of insanity' essentially is a plea whereby the accused admits committing the act alleged...." \textit{Supra}, n. 151, 163.

\(^{158}\) \textit{Supra}, n. 142, 282.
and defendant's friends have probably testified as to his abnormal traits; there is no further delay beyond the trial for at that time there must be a determination of what to do with the defendant.

But for the presence of the ex parte procedure in Maryland, we would follow Senator Ervin's suggestion and allow the trial judge, after a verdict of not guilty by reason of insanity, either to (1) on the basis of the evidence presented in the criminal case release the prisoner if he would not be dangerous due to mental illness to self and others, or (2) hear further testimony on mental status “now” and, thereafter, release on the same basis as (1) or commit for observation. This sort of procedure would tend to avoid the theoretical possibility of a sane man being placed in a mental institution. It allows immediate release of one no longer dangerous due to mental illness. There is particular merit for such a procedure where there has been clinical observation prior to trial. However, it protects society by committing for an indefinite period (until there has been a change in mental condition) those still dangerous because of mental illness, and setting up a procedure for observation in a doubtful case.

However, feeling it would be anomalous to grant greater safeguards to one who has been found not guilty, of an otherwise punishable act, by reason of insanity than to one who has done nothing considered criminal, and recognizing the legislative approval of the ex parte procedure for civil commitment, a mandatory commitment procedure, for the purposes of observation and not as a means of indefinite incarceration, would not be inconsistent with Maryland legislative policy.

In regard to legislative policy, the procedure for placement of a person in a tuberculosis hospital is as illuminating as the above-mentioned civil commitment procedure. On report of a physician that a person has or is suspected of having tuberculosis in a communicable stage and is conducting himself in public so as to expose others to infection, or if a state health officer has such knowledge, the medical officer may cause an examination to determine if the person has tuberculosis in communicable stage. If the tests are positive, a state medical officer may order the person removed to a tuberculosis hospital for treatment. Danger to self and others is the rationale for hospitalization, but the examination is made before transfer into

1 Supra, n. 113.
2 4 MD. CODE (1957) Art. 43, § 98.
custody. Unlike a chest x-ray or other test for tuberculosis, an examination for mental illness requires, in the opinion of most observers, an extended period of time. Reasoning that an examination is necessary to safeguard society both where the patient may be insane or tubercular, the examination should be valid and extend as long as necessary to thoroughly examine.

In order to keep mandatory commitment merely a procedure for observation and examination, we would allow as long as 90 days for the testing. Thereafter, the patient may be subject to civil commitment, with no hearing necessary unless the patient appeals. Finally, any appeal should be handled in the same manner as an appeal from an ex parte civil commitment.