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# The Insanity Defense — A Perplexing Problem of Criminal Justice

Dale E. Bennett\*

## A WORKABLE TEST OF CRIMINAL RESPONSIBILITY

There is general agreement today, although the early law was not so humanely disposed, that no criminal responsibility should attach for harm committed as a result of true mental disease or defect. Here, however, the agreement ends. No generally acceptable test of criminal responsibility has been developed, either by legislative enactment or judicial precedent. A legal formula, capable of practical application in drawing the line between those crimes resulting from mental defect and those resulting from innate meanness, involves a balancing of sometimes incompatible humanitarian, utilitarian, and scientific considerations. In evaluating or stating such a formula, two basic objectives must be kept in mind. On the one hand, the insanity defense is to be determined by a lay jury — for the insanity issue is a question of fact relating to guilt or innocence.<sup>1</sup> Therefore the test must be simple enough that the average juror can understand and apply it. At the same time, the test should be so phrased that it is capable of application in the light of modern psychiatric knowledge. A “stick our heads in the sand” attitude should not be taken, ignoring the fact that there have been tremendous developments in psychiatry during the last twenty years.

Any discussion of the insanity defense begins, and frequently ends, with a consideration of the “right and wrong” test of the celebrated *M’Naghten’s* case, decided by the House of Lords over a hundred years ago.<sup>2</sup> This rule is presently followed in much of the British Commonwealth and in thirty American states.<sup>3</sup> It is interesting to note the disposition of this problem by the two states which have most recently adopted comprehensive revisions of their substantive criminal law. The 1942 Louisiana Criminal Code expressly retained the basic *M’Naghten* test by providing exemption from criminal responsibility where “the circumstances

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1. *State v. Lange*, 168 La. 958, 123 So. 639 (1929).

2. 10 Clark & F. 200, 8 Eng. Rep. 718 (H.L. 1843).

3. MODEL PENAL CODE 161-463 (Tentative Draft No. 4, April 1955).

indicate that because of a mental disease or mental defect the offender was incapable of distinguishing between right and wrong with reference to the conduct in question."<sup>4</sup> The Wisconsin Legislative Council's 1953 recommended Criminal Code codified a similar "right and wrong" test.<sup>5</sup> When the Wisconsin Criminal Code was adopted in 1955, it contained no definition of insanity, with the result that the issue will still be determined in that state by the "right and wrong" test under its existing jurisprudence.<sup>6</sup> "Dissatisfaction with the M'Naghten's rules is widespread among American psychiatrists," and it has been variously characterized as a crystallization of "antiquated, outworn, archaic ways of thinking," and as a "hangover . . . from theological and moral ideas that have survived their period of usefulness in this twentieth century civilization."<sup>7</sup> One very prominent psychiatrist flatly declares that "knowledge of right and wrong is a problem for the theologian and not for a physician."<sup>8</sup>

The obvious question is *why* Louisiana and Wisconsin, with their modern and carefully drafted criminal codes, have not discarded the "right and wrong" test? Both states have abolished such common law anachronisms as the artificial distinctions between the stealing crimes, and the misleading "malice aforethought" concept in murder,<sup>9</sup> yet they have not provided a modern scientific insanity test. In this regard it is well to note that there has been much criticism, but scant constructive help from the writings of the psychiatrists. Most psychiatrists condemn the right and wrong test, but there is no general agreement as to what the proper test should be. Many psychiatrists and psychologists prefer an elastic rule that would put no limitation upon psychiatric testimony — and, at the same time, would provide little or no guide for jury decision. When they become more specific, each school of thinking suggests its own ultra-technical

4. LA. R.S. 14:14 (1950), originally enacted as La. Acts 1942, No. 43.

5. REPORT OF WISCONSIN LEGISLATIVE COUNCIL OF PROPOSED CRIMINAL CODE § 339.41 (1953). The accompanying note states that the insanity test "is a restatement of the old law in Wisconsin, a succinct statement of which may be found in the case of *Simecek v. State*, 243 Wis. 439 (1943) at page 448."

6. *Ibid.*

7. Quotations from WHITE, TWENTIETH CENTURY PSYCHIATRY 110 (1936), collected in HALL, PRINCIPLES OF CRIMINAL LAW 481 (1947).

8. The general dissatisfaction with the *M'Naghten* rule is clearly shown in a report by Manfred S. Guttmacher, M.D., in connection with MODEL PENAL CODE 170, 173 (Tentative Draft No. 4, April 1955).

9. LA. R.S. 14:67 (theft), 30 (murder) (1950); WIS. CRIM. CODE § 343.20 (stealing), § 340.01 (first degree murder) (1955).

standard.<sup>10</sup> As we approach the baffling problem of defining criminal insanity, we realize the perspicuity of Justice Moise's statement in the *Masino* case.<sup>11</sup> The case involved the effect of a restrictive bill of particulars. The Supreme Court's decision was eminently sound, but any explanation was sure to prove somewhat satisfactory. In announcing the rule of the case, Justice Moise aptly concluded, "It is easier to find fault with a remedy proposed than to propose a remedy that is faultless."<sup>12</sup>

Let us consider, then, the other remedies most frequently proposed. The "product" test, which was first announced by a New Hampshire case in 1871,<sup>13</sup> was given recent impetus by a decision of the Court of Appeals for the District of Columbia in *Durham v. United States*.<sup>14</sup> The *Durham* case "product" test has given rise to a flood of law review comments, pro and con,<sup>15</sup> and is rejoiced in by eminent psychiatrists.<sup>16</sup> It establishes a very simple test — was the criminal act "the product of mental disease or defect?" It is interesting to note that a similar test, conversely stated, was proposed in the original tentative draft of the insanity article of the Louisiana Criminal Code. This article stated, "If the circumstances indicate that a mental disease or a mental defect is *the direct cause of* the commission of the crime, the offender shall be exempt from criminal responsibility."<sup>17</sup> The proposal was almost unanimously rejected by an able advisory committee composed of judges, prosecuting attorneys, and experienced criminal lawyers, and the writer concurred in that decision. The test was believed to be too general — providing very little guidance for the jury. The existing "right and wrong" test, though having admitted inadequacies, did provide a measuring stick against which the conflicting testimony of the psy-

10. HALL, PRINCIPLES OF CRIMINAL LAW 483-85 (1947).

11. *State v. Masino*, 214 La. 744, 38 So.2d 622 (1949).

12. *Id.* at 748, 38 So.2d at 623.

13. *State v. Jones*, 50 N.H. 369 (1871), wherein Justice Ladd declared that it was for the jury to determine "whether the killing was the product of mental disease."

14. 214 F.2d 862 (D.C. Cir. 1954).

15. One excellent collection of such comments: *Insanity and the Criminal Law — A Critique of Durham v. United States*, 22 U. CHI. L. REV. 317-404 (1955).

16. *Id.* at 325, Dr. Manfred S. Guttmacher declares, "The voice of American psychiatry is certain to be raised in praise of the decision in *Durham v. United States*." Dr. Gregory Zilboorg, *id.* at 331, happily states, "One cannot help but feel that this historic decision is bound to become a point of departure for many an enlightened and creative decision on the part of both judges and juries who heretofore were manacled by a strange leftover of ancient prejudice couched in legalistic terms and meaning so little."

17. PROJET OF A CRIMINAL CODE FOR THE STATE OF LOUISIANA 10 (Tentative Draft, Sept. 1941).

chiatrists could be evaluated. It provided something tangible that the average juror could understand. The English Royal Commission's report in September 1953 carried the idea of the "product" test even further. A majority, but not unanimous, recommendation by the Commission would simply leave the jury "to determine whether at the time of the act the accused was suffering from disease of the mind [or mental deficiency] to such a degree that he ought not to be held responsible."<sup>18</sup> This formula virtually leaves the question of criminal responsibility up to the inherent sense of justice of the jury, providing it with even less guidance than the "product" test.

The so-called "irresistible impulse" test, which has been adopted by several states either by statute or jurisprudence,<sup>19</sup> is an extension of the "right and wrong" test. Even though the defendant realized the wrongness of his act, he is not responsible if, "by reason of mental disease or defect," he was "irresistibly impelled" to do the act. The basis of a general judicial fear of the test is expressed in a 1947 Washington decision where the court declared: "For myself I can not see how a person who rationally comprehends the nature and quality of an act, and knows that it is wrong and criminal, can act through irresistible innocent impulse. Knowing the nature of the act well enough to make him otherwise liable for it under the law, can we say that he acts from irresistible impulse and not criminal design and guilt? . . . How can knowledge of the nature and wrongness of the act exist along with such impulse as shall exonerate him?"<sup>20</sup> The same thought was aptly expressed in an English case, *Rex v. True*, where the court pointed out that men's minds are not divided into separate compartments and if a man's will power was destroyed by a mental defect it might well be that the disease would so affect his mental powers as to destroy his power of knowing what he was doing, or of knowing that it was wrong.<sup>21</sup> Another English jurist referred to "impulsive insanity" as "the last refuge of a hopeless defense."<sup>22</sup>

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18. ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953 REPORT, recommendation iii, at 116.

19. The defense is recognized in federal jurisdiction, United States Army, and fourteen states. MODEL PENAL CODE 161 (Tentative Draft No. 4, April 1955). For a recent application of the test, see *State v. White*, 270 P.2d 727, 737 (N.M. 1954).

20. *State v. Maish*, 29 Wash.2d 52, 185 P.2d 486 (1947), quoting from the leading West Virginia case of *State v. Harrison*, 36 W.Va. 729, 15 S.E. 982 (1892).

21. 16 Crim. App. Rep. 164, 167, 127 L.T. 561, 27 Cox C.C. 287 (1922).

22. *Darling, J.*, in *Rex v. Wright*, 7 Crim. App. Rep. 52 (1911).

Looking at the problem from a purely practical point of view, it is a dangerous doctrine to recognize a special defense that "I knew the act was wrong, but just couldn't resist the killing or the rape." The query immediately arises — was it that he *could not* or *just did not* resist? A Canadian court highlights this approach when it states, "The law says to the men who say they are afflicted with irresistible impulse, 'If you cannot resist an impulse in any other way, we will hang a rope in front of your eyes, and perhaps that will help.'"<sup>23</sup>

In a last analysis, the so-called "irresistible impulse" test has not received the whole-hearted approbation of any group. It is inadequate from the standpoint of the defense, since it is impliedly restricted to sudden and impulsive acts. It does not cover insane acts resulting from brooding and reflection. In a 1951 questionnaire addressed by Dr. Manfred S. Guttmacher to members of the American Psychiatric Association, one of the questions asked was, "Do you believe the concept of the irresistible impulse is psychiatrically and legally sound?" Of the 350 replies, sixty percent were in the negative. In analyzing this phase of his questionnaire, Dr. Guttmacher explains, "The problem is not primarily whether there are impulses and unconscious drives that overwhelm some mentally disordered individuals. Most psychiatrists would readily agree that they exist. . . . The real difficulty is to draw the nice line between those who can and those who cannot resist them. I am less pessimistic than many about our ability to be of help in this, but the task is exceedingly difficult and the percentage of error must admittedly be high. I do not myself feel that tinkering with the right and wrong rule in this way would be the answer."<sup>24</sup>

One of the most learned and vigorous opponents of the "irresistible impulse" test is Professor Jerome Hall, who maintains that in a real case of an irresistible killing the defense can marshal psychiatric testimony to prove that the offender was unable to comprehend the wrongness of his act at the time. The present tendency, according to Hall, is to interpret the *M'Naghten* rules "more soundly in reliance upon such valid psychiatry as has been available."<sup>25</sup> Assuming the general validity of this last state-

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23. *Rex v. Creighton*, 14 Can. Crim. Cas. 349 (1908).

24. Memorandum submitted in connection with the American Law Institute's tentative draft of an insanity test. MODEL PENAL CODE 170, 174 (Tentative Draft No. 4, April 1955).

25. HALL, PRINCIPLES OF CRIMINAL LAW 511 (1947).

ment, prominent and practical psychiatrists point out that there are frequent cases of real insanity where the psychiatric evidence cannot be logically channeled into the "right and wrong" test. Dr. Guttmacher, in a memorandum submitted in connection with the American Law Institute's consideration of the insanity issue, submits an actual case which could not be adequately handled under the traditional "right and wrong" test. A bright young soldier "became morbidly unhappy under frustrations imposed upon him while on maneuvers in Texas. He appealed to the chaplain because of his overpowering desire to kill some officer. He was referred to the divisional psychiatrist and had four interviews with him. He then fashioned a missile out of a blank and at four inches distance shot a lieutenant attached to his company, whom he did not know. Two M.P.s were within a few yards of him. He immediately threw his weapon down and stood at parade rest." He had killed his officer. Certainly the young soldier knew the wrongness of his action. He was found not to have been under the domination of an irresistible impulse "because the Army Manual says that the neurotic pattern should be repetitive and they are uncertain about his having had previous instances of an irresistible impulse."<sup>26</sup>

A similar non-conforming mental condition was presented in the pitiful New York case of *People v. Sherwood*,<sup>27</sup> where a mother was charged with murder as a result of the intentional drowning of her two-year old infant son. The defendant's life history presented a sad story of continued frustrations for a girl whose mother died when she was nine years of age and who served until she was sixteen as household drudge for her itinerant father and his successive wives. Her subsequent life as a chorus girl with traveling companies was equally insecure and discouraging. What might have been a happy, though modest, marriage ended in sadness when the husband and father of the infant son died of tuberculosis. After a period of hand to mouth existence as a waitress, fortune seemed to smile when a man offered to marry her and provide a home for her son. Came the

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26. Memorandum submitted in connection with the American Law Institute's tentative draft of an insanity test, by Guttmacher. MODEL PENAL CODE 175 (Tentative Draft No. 4, April 1955).

27. 271 N.Y. 427, 3 N.E.2d 581 (1936). Conviction of first degree murder reversed because of erroneous instructions to the jury. During the second trial Mrs. Sherwood pleaded guilty to manslaughter and was given an indeterminate sentence of six to fifteen years. After serving three years, she was released on parole. See HALL & GLUECK, CASES ON CRIMINAL LAW AND ENFORCEMENT 331, n. 4 (1951).

wedding day, but not the bridegroom. Defendant had given up her job, was subsequently evicted from her home, and her whole life seemed to collapse around her. In a befuddled mental state she carried her baby boy three and a half miles to a secluded spot where she allowed him to wade in a shallow brook until he tired. Then she held him under the water until he was drowned, dressed him in clean clothing she had brought along and carried him in her arms to the police station. There she reported that she had drowned him, with the laconic statement. "I couldn't take care of him any longer and I thought he would be better off dead." Again, as in the case of the frustrated soldier, the homicide had resulted from a mental crack-up, but the defendant realized the nature and wrongness of the act. Also, the circumstances negated any idea that the killing had resulted from a spontaneous and irresistible insane impulse.

The baffling problem raised by the multiple forms and manifestations of mental disease and defect in criminal cases has been recently considered at length by the American Law Institute in connection with the drafting of a Model Penal Code. The policies in this Code are considered, evaluated, and guided by an advisory committee which is specially qualified to view the problem from all of its sometimes contradictory practical, theoretical, scientific, and philosophical aspects. It is composed of prominent federal and state jurists, men experienced in the enforcement and administration of criminal law, criminal lawyers, prominent psychiatrists and psychologists, and law professors who specialize in the criminal law field.<sup>28</sup> Professor Herbert Wechsler, Chief Reporter for the Institute, hit the key note of the work when he declared that rethinking of this important insanity question "means going to the fundamentals." A review of Wechsler's comment accompanying the tentative draft of the insanity test<sup>29</sup> indicates that it is posited upon certain fundamental conclusions. The "right and wrong" test is inadequate today from the standpoints of both science and practicality. However, the correct avenue of reform is not the addition of an "irresistible impulse" alternative; nor is it the formulation of such nebulous criteria as the "product" test of the *Durham* case or the "sense of justice" test embodied in the Royal Commission

28. For a full list of the Advisory Committee, see MODEL PENAL CODE, v (Tentative Draft No. 4, April 1955).

29. MODEL PENAL CODE § 4.01, comments at 156-60 (Tentative Draft No. 4, April 1955).

proposal. The American Law Institute draft avoids the sometimes arbitrary limitations of the "right and wrong" test, so as to permit the jury's consideration of all relevant psychiatric testimony. At the same time, it provides a tangible and understandable criteria for jury determination of criminal responsibility. The Model Code rule, prepared by Weschler, favorably considered by the Advisory Committee, and tentatively approved by the American Law Institute in May 1955, reads as follows:

“§ 4.01 *Mental Disease or Defect Excluding Responsibility*

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

“(2) The terms ‘mental disease or defect’ do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.”

Two significant matters should be noted concerning the American Law Institute test. First, it meets the dual purposes of a workable definition of insanity. It provides a broad base, so that all relevant psychiatric testimony may be brought in. Yet, it is stated in language that the average lay juror can understand. It provides a tangible yardstick against which scientific testimony can be measured. Further, clause (2) will serve to prevent abuse of the broadened insanity definition by excluding the so-called “psychopathic personality” from the concept of criminally insane. It is in keeping with the wise admonition that we should “keep the expert on tap, but not on top.”<sup>30</sup>

#### INSANITY PROCEDURES

Equally important, but somewhat more susceptible of a generally agreeable solution, are the procedures for administering the insanity defense. Most states follow the rule that the defense of insanity at the time of the crime, like any other defense going to the basic issue of criminal liability, can be raised under

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30. HALL, PRINCIPLES OF CRIMINAL LAW 538 (1947). While the proposed rule goes beyond the “right and wrong” rule that Professor Hall has so eloquently defended, it is free from many of the objections which he and other writers have leveled at the “irresistible impulse” test. Further, it provides a tangible jury guide that is not found in the “product” test.

a general "not guilty" plea. A number of states require that the defense of mental irresponsibility be specially pleaded, and some of these further require that it be separately tried. Provisions for separate trial of the insanity defense are aimed at avoiding prejudicial confusion of insanity evidence and other sometimes contradictory claims, such as self-defense. They have, however, fallen short of that laudable objective. Where the insanity issue is tried first, as originally provided in the Louisiana 1928 Code of Criminal Procedure,<sup>31</sup> the result has been most unsatisfactory. If separate juries are impaneled, considerable delay and added expense results. Even more significant is the difficulty of securing an extra twelve-man jury in a small parish with limited jury lists. If a single jury hears the insanity evidence and then subsequently passes upon the other basic guilt issues, the contemplated advantage of the bifurcated trial is largely defeated. As a result of such difficulties, Louisiana soon amended its insanity trial procedures so as to delete the provision calling for a prior trial of the insanity issue.<sup>32</sup> Under present somewhat confusingly stated procedures a special insanity plea is required if insanity is to be urged as a defense,<sup>33</sup> but when the omnibus plea of "not guilty by reason of insanity"<sup>34</sup> is filed, the insanity issue is tried along with the other guilt issues<sup>35</sup> — thus nullifying the split-trial treatment intended by the 1928 Code of Criminal Procedure.

The California bifurcated trial procedure appears to be most nearly adapted to the use of a single jury, without a prejudicial confusion of the insanity evidence and the other basic guilt issues. The basic guilt issues are tried first. If the defendant is found otherwise guilty of the crime he is next separately tried, by the same jury, on his insanity plea.<sup>36</sup> While this procedure has proved reasonably workable, it has not resulted in as complete an actual isolation of the insanity evidence as had been hoped for. It is still possible to get such evidence before the jury under the theory that it has a bearing on the intent element of the crime. Also, it is arguable that a rigid separation of

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31. LA. CODE OF CRIM. PROC. art. 267 (1928).

32. La. Acts 1932, No. 136, p. 449.

33. State v. Gunter, 208 La. 694, 23 So.2d 305 (1945).

34. The procedure in some parishes is to file dual pleas of "insanity at the time of the crime" and "not guilty."

35. State v. Dowdy, 217 La. 773, 47 So.2d 496 (1950), discussed in *The Work of the Louisiana Supreme Court for the 1949-1950 Term — Criminal Procedure*, 11 LOUISIANA LAW REVIEW 246 (1951).

36. CAL. PEN. CODE § 1026 (Deering 1937).

the insanity evidence, from other evidence as to guilt or innocence, serves no significant purpose.

Probably one of the greatest abuses of the insanity defense is the surprise defense which is raised for the first time during the trial, frequently catching the state by surprise and necessitating a continuance of the trial until the next term of court. An increasing number of states are meeting this problem by requiring prior notice of the intention to rely on insanity as a defense.<sup>37</sup> In addition, several states achieve the same result by requiring that insanity must be specially pleaded if it is to be urged as a defense.<sup>38</sup> The tentatively approved draft of the American Law Institute's Model Penal Code includes a very sound provision, which will curb dilatory tactics without unduly hampering a valid insanity defense. Section 4.03 provides that:

"(2) Evidence of mental disease or defect excluding responsibility shall not be admissible unless the defendant at the time of entering his plea of not guilty or within ten days thereafter or at such later time as the Court may for good cause permit files a written notice of his purpose to rely on such defense."<sup>39</sup>

The composition of the lunacy commission, which examines the accused as to his mental condition at the time of the crime, is another matter upon which the law of some states is inadequate. A 1944 Louisiana statute,<sup>40</sup> for example, simply provides that the commission shall be composed of a disinterested physician whose sole qualification is that he has practiced medicine for three years, and of the coroner whose inclusion has added little to the prestige or capability of the commission. As a result the lunacy commission's report is sometimes entitled to very little weight and the "battle of experts" rages unabated.<sup>41</sup> The Louisiana statute was not prompted by a failure to appreciate the value of the testimony of trained psychiatrists, but rather

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37. ARIZ. CODE ANN. § 44-1031 (1939); FLA. STAT. ANN. § 909.17 (1943); IOWA CODE ANN. § 777.18 (1949); MICH. COMP. LAWS §§ 768.20, 768.21 (1948); ORE. REV. STAT. § 135.870 (1953); UTAH CODE ANN. § 77-22-16 (1953).

38. This is the present law in Louisiana under the holding in *State v. Gunter*, 208 La. 694, 23 So.2d 305 (1945).

39. MODEL PENAL CODE § 4.03(2) (Tentative Draft No. 4, April 1955); *accord*, MODEL CODE OF CRIMINAL PROCEDURE § 235 (1930).

40. LA. R.S. 15:269 (1950), originally enacted as La. Acts 1944, No. 261, p. 765.

41. It is encouraging to note that psychiatrists from the state mental hospital frequently serve on lunacy commissions in Louisiana.

by the heavy costs to the parish police juries of obtaining such professional services. A sound solution to the problem is found in the American Law Institute's Model Penal Code<sup>42</sup> and in the Massachusetts Briggs law.<sup>43</sup> These provide for a lunacy commission of trained psychiatrists, who are specialists in the characteristics of the criminal insane, and who may be requested from the state mental institution. The provision for requesting a trained psychiatrist from the state mental institution is most significant. It avoids the financial problem of the small parishes, which was inherent in Louisiana's original provision. It also insures a report by a competent psychiatrist who would be completely free from either prosecution or defense influence. It would probably necessitate the addition of one or two psychiatrists to the presently overworked staff of the state mental hospital, but that would be money well spent. Practical and prominent scholars have commended the practicability of the Massachusetts procedure in no uncertain terms. Professor Orfield, in his book on criminal procedure,<sup>44</sup> declares that the Briggs law "almost entirely eliminates the battle of experts," and cites Dr. Overholser for the statement that "the Briggs law represents the most significant step yet found towards a harmonious union of psychiatry with the criminal law." The writer would like to add a modest observation that one of the soundest moves that can be made in securing an adequate jury appreciation of the confusing insanity issue is to provide a lunacy commission report which the jury will respect—a report that will stand forth as an unbiased and competent analysis of the mental condition of the accused.

An important related problem is the scope of the lunacy commission's examination where the question of present insanity, as a bar to immediate trial, is raised. In such a situation the commission's report covers only the present mental condition of the defendant.<sup>45</sup> Where the defendant is found to be presently incapable of standing trial, he is committed to a mental institution. When he subsequently recovers his mental powers, the accused is released from the mental institution and brought to trial for his alleged crime. If insanity at the time of the crime is then pleaded as a defense, a separate lunacy examination and

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42. MODEL PENAL CODE § 4.05(1) (Tentative Draft No. 4, April 1955).

43. MASS. LAWS ANN. c. 123, §§ 99, 100, 100A (1949).

44. ORFIELD, CRIMINAL PROCEDURE 281 (1947).

45. LA. R.S. 15:267 (1950).

report is necessary.<sup>46</sup> The delayed second examination may be seriously hampered by the fact that the evidence will be sketchy and unreliable, especially if the accused has been held in the mental institution for a considerable period of time. This difficulty is avoided in the American Law Institute's Model Penal Code by providing for a single lunacy commission which may be directed to file a combination report with respect to (1) the effect of mental disease or defect on basic criminal responsibility, and (2) the fitness of accused to proceed with the trial.<sup>47</sup>

The disposition of a defendant who is acquitted by reason of insanity poses a problem where legislators have experienced great difficulty in synchronizing humanitarian considerations with practical justice and expediency. The laws of most states, including Louisiana,<sup>48</sup> provide that the district judge, after contradictory hearing, may commit the defendant to the state mental institution. The committed person, however, is subject to possible subsequent discharge upon order of court after the institution reports that he is no longer dangerous. The possible result of such an arrangement is shown by a 1945 Ohio case.<sup>49</sup> The defendant, acquitted of first degree murder on the ground of insanity, had been committed to the state mental hospital. Shortly thereafter he was released from the mental institution on the theory that he was not insane. In approving the discharge, the Ohio Court of Appeals indicated that the accused was weak-minded, but not crazy, and that the jury had probably made a mistake in acquitting him on the ground of insanity. As a result, he was turned loose.<sup>50</sup> This has been characterized as a "hunting license to commit murder." Such a result scarcely provides adequate protection for the public. In this regard, Professor Perkins suggests, "The English procedure is much to be preferred. Under the practice there one acquitted on the ground of insanity is confined in a mental institution 'during the king's pleasure.' And it has so seldom 'pleased' the king to release one so committed that this defense is rarely used."<sup>51</sup>

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46. *Id.* 15:268.

47. MODEL PENAL CODE § 4.05 (Tentative Draft No. 4, April 1955).

48. Governed in Louisiana by the Mental Health Law, LA. R.S. 28:59, 96 (1950).

49. *Yankulov v. Bushong*, 88 Ohio App. 497, 77 N.E.2d 88 (1945).

50. It is interesting to note that the defendant was subsequently tried and convicted of the armed robbery incidental to which the homicide had occurred.

51. Rollin M. Perkins, unpublished notes on criminal law and procedure.

Again, the American Law Institute's tentative draft of a Model Penal Code points the way to a very sound solution.<sup>52</sup> It provides for automatic commitment of a defendant who is acquitted on the ground of insanity. Release is to be ordered upon a clear finding by the court after a complete psychiatric examination and report that the person is no longer dangerous. Further safeguards are provided through continued probation and supervision. In approaching this problem it is well to remember that we are dealing with an offender who has been acquitted of a serious crime because it resulted from insane, or even maniacal, tendencies. Certainly it is not unfair to start with a presumption that the acquitted offender is still dangerous and to provide continuing safeguards for the public if he is later released.

It has been the purpose of this article to raise a number of problems concerning the insanity defense and the procedures for its handling. While there may be differences of opinion as to the suggested solutions, there should be general agreement that here is an area of the law, where a careful re-appraisal of basic principles and procedures is in order. In this regard the American Law Institute's Model Penal Code and the procedures presently in effect in Massachusetts and California have much to offer.

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52. MODEL PENAL CODE § 4.08 (Tentative Draft No. 4, April 1955).