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THE CRIMINAL LAW OF MENTAL INCAPACITY

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In a previous article in this *Journal*, Professor Silving proposed a new test for exemption from punitive responsibility by reason of mental incapacity. With that test as a starting point, she presents in this article a highly significant proposal for a total revision of the criminal law pertaining to "insanity." Professor Silving calls for a complete reappraisal of the law's policies and procedures with respect to the defense of insanity and the bar of "unfitness to proceed," as well as the system of measures to be taken with respect to persons acquitted by reason of mental incapacity or found unfit to proceed in a criminal trial. The statutory scheme which the author proposes takes account of psychiatric learning pertaining to mental illness as well as constitutional limitations upon the measures the state may take in restricting the freedom of mentally ill persons who commit criminal acts.—EDITOR.

Redefining the mental incapacity exemption is but a partial problem of a much broader task, that of revising the total area of the criminal law of so-called "insanity." In the fields of procedure and of the measures to be applied to persons "acquitted by reason of insanity" conservatism, on the one hand, and lack of realism and consistency, on the other hand, have been as marked as in the field of the exemption criterion. The same is true of the law of "unfitness to proceed." All these segments of the "law of insanity" require systematic treatment. Such treatment ought to consist of a rational evaluation of our present disparate rules pertaining to the phenomenon of mental incapacity in all its criminal law phases and aspects, formulation of new realistic rules, and their concordance and consolidation into a consistent scheme oriented to a sound policy. It is the purpose of this paper to present such scheme of a "criminal law of mental incapacity."

In previous publications the writer has submitted a test of exemption from punitive responsibility by reason of mental incapacity at the time of, and for some time prior to, engagement in the criminal conduct charged.¹ That test reads thus:

*The opinions expressed in this article are solely those of the author; they are not meant to reflect the views of the Legislative Penal Reform Commission or of any Department of the Commonwealth of Puerto Rico.

¹Silving, *Psychoanalysis and the Criminal Law*, 51 J. CRIM. L., C. & P. S. 19, 29 (1960); on the revised version, quoted here in the text, see Silving, *Mental Incapacity in Criminal Law*, in CURRENT LAW AND SOCIAL PROBLEMS 3, 86 (Macdonald ed. 1961).

"No punishment shall be imposed upon a person if at the time of engaging in criminal conduct and for some time prior thereto his ego functioning was so impaired that he had a very considerably greater mental difficulty in complying with social demands and rules than does the majority of the members of the community."²

The writer believes that this test presents several advantages. It is not but a remnant of an ancient policy geared to the defense of error of law rather than to that of mental deviation, as is *McNaghten's* test, nor a reflection of a preconceived naively realistic notion of an immanent exempting quality of "mental disease" that "produces" crime, as is the *Durham* test.³ Nor does it incorporate, as do the Model Penal Code tests,⁴ a "free will" formula, which—however meritorious

²By "community" is meant the population of the district from which, in the event of jury trial, a jury is drawn, provided that in determining whether the actor's ego functioning was impaired special attention ought to be given to the comparative ego functioning of members of particular groups to which the actor belongs, such as his social, educational, professional, religious, or other groups.

³*McNaghten's Case*, 10 Clark & F. 200, 8 Eng. Rep. 718 (1843); *Durham v. United States*, 84 U. S. App. D.C. 228, 214 F.2d 862 (1954). For a critique of these tests, see Silving, *Mental Incapacity in Criminal Law*, *supra* note 1, at 30-43, 66-69.

⁴MODEL PENAL CODE §4.01 (Tent. Draft No. 4, 1955, and Proposed Final Draft No. 1, 1961). The reference in the text is to the principal test and alternative (a) of the Tentative Draft. The Final Draft adopted the principal test with some modifications. See Final Draft, at 4.

its metaphysical corollary may be—is not operational in practical context.⁵ The quoted test proceeds from fundamentals of criminal law, the doctrine of punishment. The assumption is made that exemption from punishment ought to be conceded in situations to which the policy of punishment is inapplicable. The general purpose of punishment, in the opinion of the writer, is documentation of community prohibitions of relative gravity.⁶ Application of punishment is justified by the actor's "guilt," which in a democratic society consists in imputation of responsibility for violation of the citizenship duty of abidance by community rules.⁷ Such imputation is not warranted unless the actor is an average community member, with a view to whom laws are made. Accordingly, an exemption ought to be granted to the non-average, that is, a person whose psychic organization deviates considerably from that of the majority of community members. This test is relative in a dual sense. It takes account of the fact that mental deviation is not an absolute category, but is a departure from the socially normal in mental life, making the individual concerned appear "insane" to others, so that he is "insane in relation to others."⁸ It also reflects the notion that mental incapacity is susceptible of gradation. Hence, the exemption criterion is formulated in comparative terms and indicates the degree of departure from the "normal" that qualifies for exemption. In this test psychiatry plays not a primary but only a derivative role. Its function within the operation of the test is appropriate to the needs of the de-

scribed criminal law policy. But the psychiatric reference terms used in the test have been chosen with a view to conveying meaning to psychiatrists. While disagreement over the scope of these terms is not excluded, the test reflects the chosen policy, which may help to specify its meaning.

Of course, the mental incapacity exemption as conceived in the recommended test is very broad, meaning that a large group of persons may be expected to qualify within it for exemption from punitive responsibility. This feature of the test may raise doubts in the minds of many criminal law students. Such doubts, however, ought to be evaluated not in isolation but rather in the light of the total criminal law scheme of which such exemption is a functional part. Whether an exemption from punitive responsibility ought to be formulated in broad or narrow terms should depend on the operational meaning of the exemption, the results which such exemption entails in a given legal system. For an exemption from responsibility cast in terms of a "definition" of mental incapacity is not merely a cognitive statement; it is, as any meaningful part of a statute or code, a dispositive and not merely a descriptive category, a norm rather than a scientific proposition, although the choice of such norm ought to be made in the light of scientific insight. A definition of mental incapacity is analytically reducible to a rule for the guidance of law enforcement agencies, a legal provision instructing courts what group of persons shall be selected by them for distinctive treatment. Obviously, such selection ought to be rationally determined by the nature of such treatment. Thus, how broadly a mental incapacity exemption or a definition of mental incapacity should be formulated ought to depend in a sound policy scheme on the nature and scope of the treatment of the mentally incapacitated. A narrow definition of mental incapacity carries the serious policy disadvantage of compelling legislators to deal punitively with the large group of persons falling within a border area of sanity, so-called "abnormal" persons, who are not comprised by the definition of the "insane" or "mentally diseased or defective." Thus, for example, the Model Penal Code imposes an "extended term," that is, aggravated punishment, on "abnormal" offenders.⁹ No explanation is offered why it has been found appro-

⁵ Lack of "substantial capacity to conform [one's] conduct to the requirements of law" means in the last analysis "could not, substantially, have acted otherwise than he did act." This posits the issue of "free will." Of course, it is one thing to assume a philosophical position of "free will" as justifying punitive state intervention in principle and an entirely different thing to attempt "proving" by legal methods that a given individual did or did not possess "free will." Such proof is as impossible as was proof that Ballard did not shake hands with Christ or take dictation from Him in *United States v. Ballard*, 322 U.S. 78 (1944). See Silving, *The Unknown and the Unknowable in Law*, 35 CALIF. L. REV. 352 (1947).

⁶ See Silving, "Rule of Law" in *Criminal Justice*, in *ESSAYS IN CRIMINAL SCIENCE* 77, 84-89 (Mueller ed. 1961).

⁷ See Silving, *Mental Incapacity in Criminal Law*, *supra* note 1, at 23-24.

⁸ "Mental disease" indicates alteration of an individual's internal status "vis à vis his external world as interpreted by others." ROCHE, *THE CRIMINAL MIND* 15 (1958). Robinson Crusoe could not conceivably be insane.

⁹ MODEL PENAL CODE §7.03 (3) (Tentative Draft No. 2, 1954; Tentative Draft No. 4, 1955; Proposed Final Draft No. 1, 1961).

priate to deal with such persons punitively—indeed with increased punitive severity, implying a judgment of greater blameworthiness—rather than curatively.

The suggested test of mental incapacity, however, as any test of exemption, calls for implementing institutions and rules of evidence and procedure adapted to the requirements of that particular test. As a realistic criterion of the mental incapacity exemption, it ought to be set within a general framework of rational rules as regards its allegation and proof. An important part of the law governing mental incapacity as related to the engagement in criminal conduct, i.e., the so-called "incapacity to commit a crime" or "incapacity at the time of the act," is the allegedly "procedural" notion of "unfitness to proceed," since, paradoxical as this may seem, effective assertion of the "mental incapacity exemption" is predicated upon actual, realistic "mental fitness" of the accused to assert and maintain against the prosecution's attacks his own former incapacity. Finally, perhaps the most significant aspect of the mental incapacity exemption from punishment in modern times is the scheme of "measures of security" to be applied to persons acquitted by reason of "mental incapacity." Similarly, a finding of "unfitness to proceed" calls for application of rational discriminatory "measures."

Before discussing the several enumerated topics it is necessary to emphasize certain basic assumptions made in this paper in accordance with policy demands submitted by the writer in previous publications.

A dual approach dividing criminal law state intervention into "punishment," on the one hand, and "measures," on the other hand, is advocated for the purpose of avoiding confusion of the ends pursued by law, with resulting injustice to the individual. It is wrong to punish a person or to extend his punishment beyond the degree adequate to his "guilt" on the ground that he is "dangerous"; likewise, it is irresponsible on the part of the State to let a "dangerous" person continue endangering the community. To guarantee individual freedom to the utmost possible extent, state reaction to "guilt" and state reaction to "danger" must be kept clearly distinct and separate, so that any state organ, whether legislative or judicial, may be able at any time to answer the broad habeas corpus query, funda-

mental in a democracy: "Why do you restrain this man's freedom?"¹⁰

The "law of measures," as the "law of punishment," is subject to principles of the "rule of law." Measures ought to be governed by general legal rules and administered by courts throughout the period of state intervention. They must not exceed in scope or duration "danger-adequate" intervention, just as punishment ought not to exceed "guilt-adequate" intervention. There ought to be uniformity and continuity of policy in criminal law administration from the initial step taken with regard to an individual until the ultimate termination of all criminal law state intervention into his life. Trial and sentence ought to constitute a continuous process governed by a clear and uniform policy. However, there ought to be inserted between the trial stage, concerned with the determination of "responsibility" in principle, whether punitive or in measures, and the sentencing stage, devoted to deciding upon the exact terms of punishment or measures, as the case may be, an investigative procedure purported to provide the court with the necessary scientific personality evaluation of the person concerned. Such a scientific evaluation should be made in a special Psychiatric and Sociological Examination Center, should be based on verifiable data rather than the gossip-type information often supplied in probation reports, and should be subject to legal scrutiny by the defense in an adversary "sentencing trial." It thus should afford a proper foundation for a just sentence in a democratic society.¹¹ But such evaluation cannot be taken as the sole determinant of disposition. Objective criteria are essential safeguards of personal liberty.

This paper is divided into two parts. The first deals with problems arising prior to the sentencing stage. One section thereof is devoted to discussion of the rules of procedure and evidence applicable in the process of determining mental incapacity relating to engagement in the criminal conduct

¹⁰ "The great writ" has been often interpreted somewhat narrowly. *McNally v. Hill*, 293 U.S. 131 (1934); *Eagles v. Samuels*, 329 U.S. 304, 307 (1946); *Parker v. Ellis*, 362 U.S. 574 (1960); in Puerto Rico, *Diaz v. Campos*, 81 D.P.R. 1009 (1960). It is nevertheless susceptible of a broader interpretation, expressing a philosophy of government that confers powers strictly limited to precisely such intervention as is clearly called for in the type of situation involved.

¹¹ For a critique of *Williams v. New York*, 337 U.S. 241 (1949), see Silving, "Rule of Law" in *Criminal Justice*, *supra* note 6, at 78-89.

charged; the second section is dedicated to evaluation of the law of so-called "unfitness to proceed" in its definitional and sanctioning aspects. The second main part deals with the scheme of "measures" to be applied to persons "acquitted by reason of mental incapacity."

I. PROBLEMS PERTAINING TO THE "TRIAL STAGE"

A. PROCEDURE TO DETERMINE MENTAL INCAPACITY RELATED TO ENGAGEMENT IN THE CRIMINAL CONDUCT

(1) *Who May Raise the Mental Incapacity Issue?*

The draftsmen of the Model Penal Code of the American Law Institute considered allowing the trial judge to raise the defense of incapacity, but rejected it on insufficient grounds. Section 4.03 declares "mental disease or defect excluding responsibility" to be "an affirmative defense." In a comment to this provision¹² the draftsmen explain that while giving the trial judge authority to raise the issue of incapacity at the time of crime was "considered desirable," "such provision was finally omitted as being too great an interference with the conduct of the defense." But a defendant's refusal to allow such issue to be raised might, in the draftsmen's opinion, be weighed as a factor in deciding whether he is mentally fit to proceed. Of course, no weight whatever can be attributed to such refusal in those, by no means rare, cases in which raising the issue of mental incapacity is undesirable in the objective self-interest of the defendant, though desirable from the standpoint of the community.¹³

¹² MODEL PENAL CODE §4.03, comment at 194 (Tent. Draft No. 4, 1955).

¹³ In *Overholser v. Lynch*, 288 F.2d 388, 392 (D.C. Cir.), *appeal pending*, 366 U.S. 958 (1961), the Court of Appeals for the District of Columbia, relied on the *Davis* rule, *Davis v. United States*, 160 U.S. 469 (1895), and held that "insanity is not strictly an affirmative defense and can be raised by either the court or the prosecution." The majority also inferred this rule from "almost a positive duty on the part of the trial judge not to impose a criminal sentence on a mentally ill person." *Id.* at 393. In answer to the appellee's contention that he had carefully considered entering a plea of guilty, with the advice of counsel, the majority pointed out that "this decision was one which appellee and his counsel did not have an absolute right to make," in the light of the above cited duty of the court. Judge Fahy, dissenting, *id.* 394, at 395, noticed that the case presented "a serious question . . . involving the right of a person accused of a misdemeanor, who is competent to plead guilty and is represented by counsel, not to be compelled by the court to enter a

It is an assumption based solely on historical grounds that the trial judge's authority to raise the issue of mental incapacity constitutes a greater "interference with the conduct of the defense" than does his power to inquire into the question of crime commission or intent under a general denial of guilt. The mental incapacity exemption is by no means coextensive with the absence of intent, since mental illness often releases rather than inhibits intent; nevertheless there may be sound policy reasons for treating mental incapacity and absence of intent in a

plea of not guilty." But he found it unnecessary to resolve "this most difficult question," since he considered "the commitment which eventuated from the trial . . . invalid for other reasons." It is instructive to read the decision of the majority in the light of the fact that for the purpose of a commitment in the District of Columbia after acquittal solely on the ground of insanity, D.C. CODE ANN. §24-301 (Supp. 8 1960), dangerousness of the defendant need not be proved, and according to the dominant opinion, the purpose of the commitment is treatment and not protection of the community from danger. One might query whether in a free society it is not better to impose punishment upon a person not "guilty" because of insanity at the time of the act, than to impose psychiatric treatment against his will and without positive showing of mental illness, where the charges against him were misdemeanors involving two checks of \$50 each cashed on a single day. For discussion of the impact of the automatic detention provision on the burden of proof, see *United States v. Naples*, 192 F. Supp. 23, 39-40 (D.D.C. 1961).

In civil law countries courts have the authority and the duty to raise the mental incapacity issue in appropriate cases. Among the countries of English legal tradition, Israel has introduced a rule permitting the court to raise such issue. Section 6 (b) of the Law Concerning the Mentally Ill 1955, SEFER CHUKIM 187 (of 6.7. 1955), P. 121, provides as follows:

"When a person is charged with crime and the court finds that the accused committed the criminal act with which he is charged but finds, either upon evidence adduced by one of the parties or upon evidence brought before it upon its own motion, that the accused is not subject to punishment because he was [mentally] ill at the time of the act and that he still is [mentally] ill, the court shall order that he be confined in a mental hospital."

Other pertinent provisions of the same law read thus:

"(c) An order of the court under subdivision (a) [order for confinement in a hospital of a defendant unfit to plead] or under subdivision (b) is for the purpose of appeal deemed a judgment of conviction.

"(d) In order to make it possible for the court to decide whether an order under this section is called for, the court may order, upon motion of one of the parties or upon its own motion, that the accused be medically examined and, if necessary for the purpose of examination, that he be confined in a hospital.

"(e) The order under this section shall be executed by the District Psychiatrist . . ." (Author's translation.)

Section 17(a) authorizes the Psychiatric Board to release a person confined by virtue of section 6.

similar manner procedurally. At law no factor can be said to possess an immanent "defense" status, as such status is conferred by law upon certain factors, often on policy grounds. Whether any given matter ought to be treated as an affirmative defense or as part of the crime elements should be determined functionally, in terms of the results of alternative solutions.

Where mental incapacity is treated as an affirmative defense, the accused alone decides whether the measures provided for those acquitted by reason of insanity can be applied to him, even though these measures presumably are primarily means of community protection. The crucial problem is hence to determine whether it is sound criminal law policy to confer such power of decision upon the accused. It may, of course, be proper in some situations but not in others. In such cases there is a conflict between the public interest in community protection and the individual interest in freedom to choose limited imprisonment in preference to a potentially longer detention in a mental hospital; a democratic solution is predicated upon comparison of the weight of the pertinent interests in differential situations.

Whether the court and prosecution should have the authority to raise the issue of mental incapacity should be viewed not in isolation but rather in the light of the scope of the definition of "mental incapacity," the bearing of such definition on the issue of "dangerousness," and the relation of the nature and gravity of the crime charged to that issue. The public interest in protection rises with increasing scope of the mental incapacity exemption, but not necessarily proportionately, since the added incapacity situations involve less serious mental deviations. And none of the known definitions of "mental incapacity" has a clear bearing on "dangerousness." However, the nature and gravity of the act charged may be assumed to be an indicium of the actor's "dangerousness." The type of crime in issue affords both an objective and a general standard of dangerousness and, for the purpose of determining the scope of court authority with a fair degree of precision, these features of objectivity and generality are significant enough to override the consideration that the gravity of the precipitating crime is not the only test of dangerousness.

It may not be desirable to expose a person who engaged in conduct which, given the required state of mind, would at most constitute a misdemeanor

and thus presumably does not present a grave social danger to the involved operation of the scheme of mental incapacity measures unless he himself chooses this alternative in preference to punishment. Moreover, the treatment of mental incapacity is usually lengthy and would be disproportionate to the seriousness of either the disease or the criminal act committed. The imposition of time limitations upon criminal law measures where the precipitating crime is minor might render effective functioning of the system of mental incapacity measures illusory. Thus, in cases involving misdemeanors "mental incapacity" should remain an "affirmative defense" which only the accused can raise. But in felony cases, in which by hypothesis a serious harm has been caused, so that there is some indication of danger of similar harm in the future, the state has the duty to take steps for the protection of the community. In felony cases the public interest in protection overrides the pertinent individual interest. Hence, in such cases courts and the prosecution should have the power to raise the issue of "mental incapacity."

An intricate problem may arise in a trial of a misdemeanor case when the evidence abundantly shows that the defendant suffered from a mental incapacity when he committed the act charged, but he refuses to raise the issue of such incapacity. To resolve this problem, it is necessary to consider the significance or purpose of requiring that an issue be "raised" by the accused in a criminal trial. The core of our philosophy of criminal procedure, the adversary nature of our criminal trial, would seem to be at stake. Yet, it is possible to argue even within this philosophy that the requirement that a party should "raise an issue," other than one involving a new offense, is simply a means of limiting the process of evidence and proof and a means of affording the parties an opportunity of controverting adverse evidence. Taking judicial notice of an obvious fact is hardly "inquisitorial." When evidence, indeed overwhelming proof of a fact, becomes available incidentally, it would be a distortion of justice and prejudicial to public faith in its administration were the court forced to render a judgment which it knows to be clearly inappropriate, in the sense of violating the avowed policy of the law. Of course, the defendant's civil liberties must be safeguarded; he must have an opportunity to controvert the evidence of mental incapacity,

and the measure to be imposed in the case of acquittal by reason of mental incapacity must be limited to the same maximum as is imposed upon the punishment for the criminal conduct in which he engaged.

Where the court and the prosecution are authorized to raise both the issue of "mental incapacity related to the criminal act" and that of "fitness to proceed"—they may raise the latter under conventional law—the question is posed: How does the court or the prosecutor come to suspect that the defendant may not be "fit to proceed" or may have committed the criminal act in a state of incapacity? This brings us to the second point of importance: At what stage and by whom should the mental state of a defendant be examined?

(2) *Bases of Doubt Regarding Mental Capacity or Fitness To Proceed*

The view that lay persons are as qualified as psychiatrists to testify to "mental incapacity" is no longer supported by anyone except certain of our legal authorities.¹⁴ Courts in foreign countries have emphatically rejected it.¹⁵ The behavior patterns from which laymen commonly infer absence of mental incapacity, particularly calmness after crime commission and rationality, have been shown not to constitute proof of mental health. The first mentioned phenomenon has been pointed out by psychiatrists to suggest an exactly opposite inference.¹⁶ In fact, not even a

¹⁴ On this see OVERHOLSER, *THE PSYCHIATRIST AND THE LAW* 111-12 (1953).

¹⁵ In Germany the Bundesgerichtshof (Supreme Court of the Federal Republic of Germany in Civil and Criminal Matters), implying that on any question of psychological evaluation experts are better qualified than laymen, reversed a conviction for a sex offense because the trial court found it unnecessary to hear experts concerning the trustworthiness of the testimony of a child seven years old. 7 *Entscheidungen des Bundesgerichtshofs in Strafsachen* 82 (V. Strafsenat), Dec. 14, 1954. The court said at 83-85: "There is general agreement concerning the fact that there are means of arriving at the truth that are available to the medical expert and, according to some authorities also to the psychological expert, but are not available to the court, at any event during trial . . ." The court did not refer to any special tests, such as narcoanalysis or lie-detectors, which are prohibited in Germany. It referred simply to psychiatric and psychological knowledge and experience, as contrasted with the crude psychology of lay interrogators.

¹⁶ Guttmacher, *Criminal Responsibility in Certain Homicide Cases Involving Family Members*, in *PSYCHIATRY AND THE LAW* 73, 91 (Hoch & Zubin ed. 1955), observed that of the 36 cases examined by him personally in the Medical Office of the Supreme Bench of

psychiatrist is qualified to testify to the mental state of a person unless he has adequately examined him.¹⁷ Only in certain situations is mental disease so obvious as to arouse immediate suspicion even in the mind of a layman. Since the court's superficial observations are not sufficient to insure the spotting of all defendants who may not be fit to proceed or who may have committed the felonious act charged in a state of incapacity, some other method must be adopted to assure

Baltimore, Md., "Most of the psychotic individuals showed little affective reaction to the homicides." But courts take no notice of such scientific findings.

Pueblo v. Sánchez, 79 D.P.R. 116 (1956), is an instructive case. The accused, when told that his cows which were illegally grazing on the campus of the University of Puerto Rico were seized by the guards, in a fit of blind rage purposely ran over with his jeep one of the guards and killed another by hitting him over the head with a tube. A few minutes later he was found by a policeman when, tube in hand, he tried to stop passing cars. When asked to explain his conduct, Sánchez immediately answered: "I killed two persons and wish to surrender." He then asked the policeman to take him to the police station at Hato Rey and not to that of Rio Piedras, because—he said—in Rio Piedras the police would kill him. On the way to the police station he said: "I killed these impudent fellows; they will no longer abuse me, abusing me is finished." The evidence submitted in support of the defense of insanity consisted of proof of (1) hereditary factors, (2) specific conduct pointing to insanity, (3) expert testimony, and (4) the manner in which the crime occurred. Proof was adduced that three brothers of the accused were confined in a mental institution, two of them suffering from schizophrenia and the third from oligophrenia; that three paternal uncles had committed suicide and that the accused's father had attempted a suicide. It was shown that both before and after commission of the crime the accused on various occasions engaged in soliloquy, cried without motive, unexpectedly left his work, bit the muzzle of a cow because she hit him with her tail, suddenly started running without reason, attacked his friends in the course of debates, and attempted suicide. Notwithstanding all this evidence, the Supreme Court held that the jury was justified in finding the accused sane, since his own wife had testified that he was well for periods of months; since his request that he be taken to the Hato Rey station for fear that they might kill him in Rio Piedras showed that he could reason rationally; and since the prosecutor who questioned him testified that he was calm and serene at the Hato Ray station, answered questions correctly, and showed no sign of incoherence, so that the prosecutor never doubted his sanity.

The writer and a group of law students spoke to Sánchez at the penitentiary where he is serving his life sentence. He was placed in the psychiatric wing of the institution. He answered a student's question as to the motive of his action saying that he was not responsible for this action; rather, it was all his brother's fault, since his brother was responsible for everything bad that ever happened in the world.

¹⁷ This has been recognized by the MODEL PENAL CODE §4.07 (3) (Tent. Draft No. 4, 1955; Proposed Final Draft No. 1, 1961).

that no injustice is done due to inadequate safeguards.

The Model Penal Code provides for psychiatric examination in advance of trial only in cases where either "the defendant has filed a notice of intention to rely on the defense of mental disease or defect excluding responsibility" or "there is reason to doubt his fitness to proceed, or reason to believe that mental disease or defect of the defendant will otherwise become an issue in the cause."¹⁸ In those situations in which the issue of "mental illness" may or, indeed, must be raised by the court,¹⁹ it is obviously pertinent to inquire: Whence comes the doubt that the defendant does not now or did not at the crucial time possess the required capacity? If doubt must arise before an examination is ordered, the principal source of protection of both the defendant and the community is unreliable lay hunches. Hence, there is a clear need for a procedure of advance examination of a defendant, at least in all felony cases, a procedure in the nature of that conducted under the Briggs Law of Massachusetts.²⁰

The Briggs Law provides for a preliminary examination of persons "indicted by a grand jury for a capital offense or . . . known to have been indicted for any other offense more than once or to have been previously convicted of a felony." The clerk of the court or the trial justice gives notice to the Department of Mental Health, and the Commissioner of Mental Health thereupon appoints two impartial experts to examine the person concerned. The practice is to appoint only diplomates of the American Board of Psychiatry and Neurology for such examinations.²¹ A report is filed and made available to the court, the prosecution, and the defense. The report itself is not admissible in evidence, but the psychiatrists who prepared it may be called as witnesses.²²

It is submitted that a preliminary examination should be limited to situations in which the precipitating crime is a felony. In misdemeanor cases

it should be ordered only if the defendant requests such examination. The practice of bringing to the attention of the court the presence of an issue of recidivism in advance of determination of the defendant's guilt of the precipitating crime is highly prejudicial to him. Treatment of a "repeated offense" as a procedural unit interferes with independent evaluation of the evidence regarding the precipitating crime, for there is a general tendency, not only of the jury but of the court as well, to assume guilt when it becomes known that the defendant has committed a crime before. It may not be possible to prevent knowledge of the court from being conveyed to the jury by various methods of unconscious communication in a trial. Still there is an undoubted interest that the defendant be given an opportunity to defend himself against the charge of recidivism; moreover, in recidivism cases there is a great likelihood of a mental incapacity background, so that it is most desirable that the defendant in such cases be psychiatrically examined. These conflicting interests can be reconciled. Recidivism should not be permitted to be mentioned at all until after conviction for the crime that gives rise to the proceedings. Only after conviction should the court be given information regarding prior convictions. Recidivism then becomes an issue for the purpose of sentencing, which, as suggested, should be the subject of a separate adversary hearing before court and jury. Prior to that hearing there ought to be a mandatory examination in the Psychiatric and Sociologic Examination Center to determine whether the crime repetition has a mental disease background.²³ If it does, the conviction based on the assumption that the accused was not mentally incapacitated at the time of crime commission should be revoked and an acquittal by reason of mental incapacity entered, so that measures rather than punishment become applicable.

As is well known, examination may often re-

²³ Compare Silving, "Rule of Law" in *Criminal Justice*, *supra* note 6, at 142, 150.

¹⁸ *Id.* §4.05 (1).
¹⁹ *People v. Burson*, 11 Ill. 2d 360, 143 N.E.2d 239 (1957); *State v. Lucas*, 30 N.J. 37, 152 A.2d 50, 69 (1959). For discussion of the virtually unlimited manner in which the present mental condition of the defendant may be introduced into a criminal trial, see Note, *Amnesia: A Case Study in the Limits of Particular Justice*, 71 YALE L. J. 109, 123 & nn. 76 & 77 (1961).

²⁰ MASS. ANN. LAWS c. 123, §100 A (Supp. 1955).

²¹ See Flower, *The Psychiatric Examination of Offenders in Massachusetts*, in *PSYCHIATRY AND THE LAW*, 97, 102 (Hoch & Zubin ed. 1955).

²² See OVERHOLSER, *op. cit. supra* note 14, at 120-25.

In our law there is at present a conflict of views in different jurisdictions on the question whether the interest in alleging prior convictions in indictments and informations, such allegations being a condition of the certainty of charges or dictated by treatment of recidivism as an independent crime type, overrides the need for protection of the defendant against the prejudicial effect of knowledge of prior convictions on the part of fact finders. On this conflict and the various methods of reconciling both interests see 42 C.J.S., *Indictments and Informations* §145, at 1057-1062 (1944 and Supp. 1961).

quire confinement in a mental hospital. Such detention of a person presumed innocent may raise constitutional questions,²⁴ and it should certainly not be prolonged beyond necessity. Hence, every effort should be made to avoid it unless clearly shown to be necessary, and where it is necessary, to reduce the time of detention to a minimum. In some cases there is no need for a protracted process of examination. And the period of examination should be extended only for reasons involving persons engaged in legal proceedings. It is hence suggested that a psychiatric clinic be made available in which criminal cases are given preference. Confinement in a mental hospital should be imposed only if the clinic psychiatrists find that ambulatory examination appears insufficient. Where confinement is necessary, the maximum period should be fixed at a low point, for example, ten days, with the proviso that the court may extend it for additional ten day periods, but not beyond a maximum of, e.g., 60 days. Bail should be granted only subject to conformance to examination requirements.

The court should have discretionary power to

²⁴ The issue of constitutionality of a court order for a psychiatric examination of the defendant has been argued for a long time, but the dominant view today is that such an officially imposed examination is constitutional. *Jessner v. State*, 22 Wis. 184, 231 N.W. 634 (1930); *State v. Myers*, 220 S.C. 309, 67 S.E.2d 506, 507, 32 A.L.R.2d 430 (1951), and cases cited by the court; *State v. Livingston*, 105 S.E.2d 73, 79 (S.C. Sup. Ct. 1958); *State v. Swinburne*, 324 S.W.2d 746, 750-51 (Mo. Sup. Ct. 1959). See also MODEL PENAL CODE §4.05, comment at 195-96 (Tent. Draft No. 4, 1955) (list of statutes providing for pre-trial examination of a defendant's mental capacity). For a recent case holding constitutional pre-arraignment mental examinations by the people without equal opportunity of the accused, not represented by counsel, see *Early v. Tinsley*, 265 F.2d 1 (10th Cir. 1960), *cert. denied* 364 U.S. 847 (1960).

Certain justifications and reservations advanced by courts in this context are clearly rationalizations. Thus, for example, waiver of the privilege against self-incrimination is inferred from a prospective plea of insanity. *State v. Myers*, *supra*, 67 S.E.2d at 507-08; *State v. Swinburne*, *supra* at 750-51; *Early v. Tinsley*, *supra*. There is a touch of Münchhausen argumentation in the court's contention in the last cited case, at 2-3, that a defendant whose mental incapacity is in issue can waive his privilege against self-incrimination by voluntarily and knowingly submitting to the examination, as well as in the contention that as regards such person the examination was not deceitful. If the defendant turns out to be mentally ill, he cannot validly waive any privilege and the examination as regards such person is necessarily "deceitful." The realistic ground on which such examination may be ordered is the necessity of determining whether the person concerned is fit to proceed and the great public

appoint two qualified psychiatrists to examine the defendant and report the results of such examination, as a substitute for referral to the clinic or hospital. Such an appointment should particularly be made in a misdemeanor case where the defendant asks for a preliminary examination.

Whether the official examination is made by clinic, hospital, or specially appointed psychiatrists, the defendant should have the right to be examined by one or two psychiatrists of his own choice, as well. Furthermore, he should have the right to request that a consultation be held between the official psychiatrists and the psychiatrist or psychiatrists of his choice. This is to avoid so far as feasible any differences in the reports that are not truly meaningful, such as mere diversity of terminology, which might confuse the trial participants. If, as a result of such consultation, an agreement can be reached upon a diagnosis, a joint report ought to be filed. In such case there is no need to expose the defendant to a cumbersome hearing on the issue of incapacity, unless he insists upon it. Hence, on the basis of a joint report, the court should have the power to find the defendant (a) either fit or unfit to proceed; (b) not guilty by reason of insanity, provided in this instance that commission of the criminal act is admitted. If no agreement is reached, separate reports ought to be filed with the court. If the disagreement concerns fitness to proceed, a hearing must be held, for which either party and/or the court may require any or all of the psychiatrists who filed reports to appear and submit to cross-examination. The court ought to have authority to call additional psychiatrists. If the disagreement concerns capacity at the crucial

interest in ascertaining impartially whether he should be subject to punishment or to measures, if it be found that he committed the act charged.

As will later be seen, the defendant should be given an opportunity from the very outset to be examined by a psychiatrist or psychiatrists of his choice. Other safeguards must be afforded, so that a device of necessity might not be extended beyond an unavoidable minimum intervention into human freedom.

As pointed out in *Jessner v. State*, *supra*, 231 N.W. at 636, if any violation of the constitutional rights of an accused is authorized by a statute providing for a pre-trial examination, "It must be ascribed to the provision which authorizes his commitment to a hospital of the insane for the purposes of observation. . . ." But, in the light of the intricacy of the issue of incapacity in certain cases, such commitment may be an indispensable condition of effective performance of the diagnostic task. Yet such commitment, being a necessity device, should not be prolonged beyond the limits imposed by necessity.

time, or if commission of the criminal act is not admitted, a trial must be held. At such trial any or all of the psychiatrists who submitted reports should be available to testify and to submit to cross-examination. Either party and/or the court should be able to call additional experts, subject to the court's power to limit their number. Clearly, all reports filed must be made available to both the prosecution and the defense.

(3) *Evidence of Mental Incapacity at the Trial Level*

The recommended test of "mental incapacity" related to engagement in the criminal conduct charged is complex and may call for presentation of a combination of evidentiary material. It is "culture oriented," meaning that the mental state of the accused must be evaluated in relation to that which is normal in a given community. A double proof must be adduced: that of the mental state of the accused, and that of the mental state of his environment, i.e., of the "community" to which he belongs, including the group or groups, within the district in which he lives, of which he is a member. Thus, psychiatrists alone may be unable to supply the necessary evidence. Other persons acquainted with the beliefs, customs, reactions, and expectations of the relevant "community" may be called upon to supply the necessary information. As to such sociological matters, sociologists may qualify as experts. Also, any persons belonging to the community may be permitted to testify as regards its beliefs, customs, and expected conduct.

As suggested before, however, laymen are not equipped to express opinions on the mental state of the accused. They should not be permitted to testify, for example, that the accused appeared to them to be of sound or of unsound mind, for they do not as a general rule possess the scientific knowledge necessary to evaluate or interpret conduct in terms of psychiatric categories. They should be permitted to testify in descriptive terms as to the manner in which the accused behaved before, during, or after the act, provided that a psychiatrist supplies information regarding the relevance and psychiatric import of such behavior under the circumstances. Should a layman testify to conduct or other matters the relevance of which has not been proved, the jury should

be instructed to ignore such testimony in reaching a decision as to the mental state in issue.²⁵

As regards the mental state of the accused, psychiatric and, in some types of cases, psychological testimony is of the essence. But a psychiatrist or psychologist should be permitted to give his opinion regarding the accused's state of mind only if he has examined the accused. A psychiatrist or a psychologist may also testify on general propositions of psychiatric or psychological science, and on the issue of the validity of the procedure followed, or the general scientific propositions stated, by another witness.²⁶

An expert should be allowed to testify freely, and so far as possible without interruption. He should be permitted to present, in the form of his choice, as comprehensive a picture of the accused's state of mind as possible, and to refer to episodes of the accused's life which do not necessarily on superficial observation appear pertinent to the state of mind relative to the act charged.²⁷

²⁵ In *United States v. Naples*, 192 F. Supp. 23, 40-41 (D.D.C. 1961), Judge Holtzoff cited cases in which the United States Supreme Court held that a layman may express an opinion based on his own observations as to whether a person is of sound or unsound mind, and cited the observation of the Judicial Committee of the Privy Council in *Attorney-General for the State of South Australia v. Brown*, [1960] A.C. 432, 452, that "The previous and contemporaneous acts of the accused may often be preferred to medical theory;" Judge Holtzoff then concluded that "lay testimony on the issue of insanity may be of two kinds: opinions of lay witnesses based on their own observations; and evidence of the previous and contemporaneous acts of the accused." The latter is adopted as acceptable in the text; however the authoritative views cited by Judge Holtzoff as well as his subsequent reliance on the rationality of the accused's conduct are submitted to be open to doubt.

In sum, my submission is that a layman may testify as to (1) what are the beliefs, customs and expectations prevailing in the community to which he belongs; (2) what he saw or heard the accused do or say prior to, during, or after the act. In testifying to beliefs, customs and expectations prevailing in the community, of course, a layman is interpreting the states of mind of community members. However, such interpretations differ from interpretation of the state of mind of an individual, in that they actually but reflect matters of common knowledge within the community. It is also true that every description of conduct implies an interpretation, and to this extent a lay testimony regarding the accused's conduct may include elements of psychiatric evaluation. However, certain limitations on the descriptiveness of testimony are implied in the nature of language as the medium of testimonial evidence.

²⁶ On the last point see MODEL PENAL CODE §4.07 (3), end of last sentence (Proposed Final Draft No. 1, 1961).

²⁷ The Socratic method of elucidation of truth by a process of question and answer directed to specific

The expert should be interrupted only if he testifies in an inadmissible manner or if it appears that he is about to reveal inadmissible matters, such as those bearing on commission of the act (if the act is not admitted) or prior criminal conduct of the accused.²⁸ Before testifying, he should be

points is not suitable as an initial method of inquiry where the "truth" consists of a comprehensive existential reality rather than of a composite of mosaic-like pieces. Questioning in such cases need not be dispensed with as a method of testing and checking upon the psychiatrist's testimony, although one might consider the possibility of calling upon another psychiatrist rather than upon a lawyer to function as interrogator. My submission is that the court should include an associate judge who is a trained psychiatrist, and such judge would be particularly qualified to pose any questions which a court might normally address to the expert. The presence of a psychiatrist member of the court ought to afford a safeguard against the kind of double-talk now frequently encountered when law and psychiatry clash on the forensic scene. On composition of courts see Silving, "Rule of Law" in *Criminal Justice*, *supra* note 6, at 149.

Chief Judge Biggs, in *United States v. Currens*, 290 F.2d 751, 771-73 (3d Cir. 1961), rejected the *Durham* formula, but expressed approval of its permitting the psychiatrist to "give a picture of the whole man to the court and jury" rather than restricting him to answer specific questions. *Id.* at 771. But since Judge Biggs did not question the present method of interrogating the expert in our law, his remarks must be taken to refer solely to the type of specific questions that may be posed to the expert; thus, he was approving interrogation directed not only to the "knowledge test" (*McNaghten*), but to consideration of other mental factors as well.

²⁸ While in many jurisdictions by statute information acquired by a physician in attending a patient in a professional capacity is privileged, see, for example, *Taylor v. United States*, 222 F.2d 398, 401 (D.C. Cir. 1955), doubt remains as to extension of a similar privilege to the event where the physician has been appointed by the court to examine the defendant. See GUTTMACHER & WEIHOFEN, *PSYCHIATRY AND THE LAW* 275-76 (1952). In England, according to these authors, it seems to be considered unethical for the examiner even to discuss the circumstances surrounding the crime with the suspect, let alone to reveal his statements to the authorities. It may be difficult to visualize a full psychiatric examination in which a particular topic is carefully avoided. But a rule barring disclosure of any knowledge regarding commission of the crime has been mentioned by the Supreme Court of South Carolina in *State v. Myers*, 220 S.C. 309, 67 S.E.2d 506, 508 (1951). In the District of Columbia, for example, the doctor-patient privilege bars disclosure of matters regarding *commission of the act* in question, but has been made specifically inapplicable "to evidence relating to the *mental competency or sanity* of the accused in criminal trials where the accused raises the defense of insanity." (Emphasis supplied.) D.C. CODE ANN. §14-308 (Supp. 8 1960). Under this provision, can the prosecution or court comment upon a defendant's refusal to cooperate in a court-ordered examination? Doubts have been expressed regarding the propriety of such comments in light of the privilege against self-incrimination where the issue is the defendant's sanity, which at common law is an essential

instructed by the court as regards the type of evidence that is inadmissible and admonished that he must not, under sanction of contempt, disclose any information he may possess that is protected by the rules on inadmissibility. After making a comprehensive statement, the expert may be questioned as to particular points and cross-examined.

(4) *Disposition and Remedies in Cases of Mental Incapacity*

Where a court or jury has rendered a verdict of "not guilty by reason of mental incapacity," the court should assign the defendant to the special Examination Center for a further examination and report to assist the court in determining whether any measures ought to be imposed and, if so, what type or types of measures may be appropriate to the case. As suggested before, such assignment should also be required in cases of conviction where upon a mandatory inquiry by the court it is shown that the accused has been convicted before.

component of mens rea. Krash, *The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia*, 70 YALE L. J. 905, 920 (1961).

The fact that sanity is a condition of mens rea for purposes of conviction does not necessarily mean that it must be treated in all respects in the same manner as intent, negligence, or other components of mens rea. Certainly, sanity has not been so treated for purposes of the burden of proof at common law, under the rule in *McNaghten's Case*, or under the law of several American jurisdictions. Nor need it, as a matter of logical necessity, be treated as is intent for the purpose of the privilege against self-incrimination. There is a difference between compelling a person to admit that he intended to kill and requiring him to submit to a psychiatric examination that might reveal that he was sane at the time of the alleged killing, especially when he cannot be compelled to utter words in the course of the examination. But, viewed from a practical standpoint, either the privilege or the full value of the expert testimony as to mental capacity must be jeopardized, for it is very difficult effectively to evaluate the accused's mental state without revealing or hinting at commission of an act that may have played an important role in his life.

The realistic justification for admission of disclosure of information regarding an accused's mental state by the physician appointed by the court to examine him lies in the overriding interest in the ascertainment of such mental state by experts at a time when lay observations on the subject have been discredited. Expert testimony on the issue of sanity is necessary, for without it there could be no evidence sufficient to support a verdict, either of conviction or of acquittal by reason of mental incapacity. It is important to bear in mind that in our times either course leads to state intervention, so that the operational meaning of many of our traditional legal principles, such as the presumption of innocence and the presumption of sanity, has changed.

Another adversary hearing ought to be held on the issue of sentencing. A judgment of "not guilty by reason of mental incapacity" and a sentence imposing measures should be appealable as are judgments of conviction and sentences imposing punishment.

B. DETERMINATION OF FITNESS TO PROCEED;
MEASURES IMPOSED UPON THE
UNFIT; REMEDIES

(1) *Selecting the Proper Test*

The test of "fitness to proceed" is generally thought to be different from that of "mental capacity relative to the commission of crime." The Model Penal Code follows the dominant view in providing that "no person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted or sentenced for the commission of an offense so long as such incapacity endures."²⁹ In the comment the draftsmen criticize the practice in some jurisdictions of declaring persons unfit to proceed on a mere showing that they are psychotic, with the result that such persons are committed; they cite with approval the practice followed in England, where "the inquiry appears to be genuinely focussed on the defendant's capacity to understand and to defend."³⁰ The desire to keep the test within narrow limits is motivated by consideration of the disadvantages attaching to a finding of unfitness. Such disadvantages, in the opinion of the Model Code draftsmen, are (1) that the defendant "is committed for custody and treatment under the shadow of a trial if he recovers, possibly on a capital charge," which is "hardly an aid to therapy"; (2) that many such persons have a sense of grievance that they had no trial; and (3) that there always remains the possibility of such person being innocent and deprived of the opportunity to clear himself.³¹

In our law the trial of a person unfit to proceed is absolutely void, even when he is represented by counsel.³² If constitutional provisions are to be

meaningful, they must be interpreted in the light of their spirit rather than by their mere letter. To be meaningful, the requirement of fitness to proceed cannot be deemed satisfied where the accused has but a superficial "under-

the trial if he is but bodily there; rather, he must be aware of the "meaning" of the things said and done in the course of procedure, and he must certainly be aware and in control of his own communications and dispositive actions. As will be later shown, he must be able to "conduct his defense." At this point, however, I should like to deal only with the accused's knowledge and control of his own communications and actions. There should be no need in our constitutional system to stress that an accused in a criminal case must be aware and in control of what he himself is "saying." "Saying" means communicating an intended meaning, and not some exceptional meaning not commonly attributed to such types of communication. If he is in fact "communicating" something other than what he thinks he is communicating or intends to communicate, it is as if he were speaking a language he did not understand. His "presence" is merely formal and there should be no doubt that a trial under such conditions fails to meet constitutional requirements.

Such is the situation, for example, when lie-detector tests are allowed to be used in criminal proceedings. The constitutional doubts regarding application of such tests are magnified where the subject, though "fit to proceed," belongs to a borderline class of those deemed "fit." For this reason it seems proper to warn again against use of such fascist methods of investigation in our criminal proceedings.

Professor Skolnik, *Scientific Theory and Scientific Evidence: An Analysis of Lie-Detection*, 70 YALE L. J. 694, 724-25 (1961), has misunderstood the nature of the legal, constitutional, and psychological "issue" when criticizing my argument against admission of lie-detector tests in criminal proceedings. He apparently believes to have met my contention that the lie-detector tests the "unconscious" by stating that "lie detection does not bring out repressed materials in the individual's life history," since "[w]hat the polygraph actually tests is 'conscious' conflict between the answer given to the interrogator and the facts as believed by the accused," and since the physiological responses recorded by the polygraph and thus serving as media of apprising the investigator that the subject is lying "arise out of emotions felt by the individual while lying," which emotions are consciously felt. "It is important to emphasize," says Mr. Skolnik, "that such feelings are always *consciously* felt. Freud makes this emphatically clear: 'It is surely of the essence of an emotion that we should feel it, i.e., that it should enter consciousness. So for emotions, feelings, and affects to be unconscious would be quite out of the question.' There is, thus, no interference by lie detection with 'freedom of the will' in the sense of unconscious probing. Of course, the subject's answers may be unconsciously motivated, but this is true of any testimony. In that sense, there is never any 'freedom of mind and will.'" For the stated reasons, Mr. Skolnik also denies the propriety of my joining the polygraph with so-called "truth serums" under the heading 'objective tests.' "

Before dealing with probing the "unconscious," in the psychoanalytical sense, by means of a lie-detector (of course, I hope that the "probing" itself is not "unconscious," as is suggested by Mr. Skolnik's use of

²⁹ §4.04 (Tent. Draft No. 4, 1955).

³⁰ *Id.*, comment at 195.

³¹ *Ibid.*

³² *Overholser v. Lynch*, 288 F.2d 388, 391 (D.C. Cir.), *appeal pending*, 366 U. S. 958 (1961); *Ashley v. Pescor*, 147 F.2d 318 (8th Cir. 1945). See also *Silving, Testing of the Unconscious in Criminal Cases*, 69 HARV. L. REV. 683, 697 (1956).

Of course, a person cannot be deemed "present" at

standing" of the proceedings or a verbal ability "to assist in his own defense." The mere fact that an accused talks rationally and is able to "tell his attorney of the events as he recalls them" has been held by the United States Supreme

language), it may be useful to inquire into the matter of probing the contents of the accused's mind by use of his own verbal utterances in such a manner as to make them potentially convey a social meaning different from their normal meaning. Verbally the accused communicates "I did not do it," but his autonomic responses "communicate" for him that he does not believe his verbal statement to be true; thus he actually "communicates" that he knows he did it. It is irrelevant that this unusual meaning of the verbal utterance is conveyed by use of a by-product of that utterance, rather than by attributing to the utterance an exceptional "code" meaning. The fact remains that such unusual meaning is not intended to be conveyed by the speaker, and that he may be unaware that he is conveying it. This method of probing is not comparable to compelling a person to speak so that he might be identified by the sound of his voice, for the lie-detector method actually probes the contents of the human mind. It compels him to reveal what he thinks, to admit when he does not wish to admit. It is an "objective" method of inquiry, in that the subject is "used as a medium of proof" (*Beweismittel*) against his will and thus in violation of his right to "conduct" his defense.

Even more significant is the fact that the autonomic response which serves as a medium of "communication" of the contents of the accused's mind is elicited by the emotion or feeling of "anxiety." Freud said in the very paper cited by Professor Skolnik, *On the Unconscious*, in 4 COLLECTED PAPERS 89, 112 (The International Psycho-Analytical Library 1948): "It is possible for affective development to proceed directly from the system Ucs [Unconscious]; in this case it always has the character of anxiety, the substitute for all 'repressed' affects." Even in the cited paper Freud's theory of the affects was by no means as simple as Professor Skolnik seems to assume on the basis of two sentences taken out of context. Moreover, this paper was first published in 1915. Since that time the psychoanalytic theory of the affects has undergone many changes; today it constitutes one of the most controversial topics of psychoanalysis. See E. Jacobson, *The Affects and their Pleasure-Unpleasure Qualities in Relation to the Psychic Discharge Processes*, in *DRIVES, AFFECTS, AND BEHAVIOR* 38 (Loewenstein ed. 1953).

For legal purposes it is most significant that the lie-detector response is produced by fear, for this is a typical means of inquisitorial questioning. In psychoanalytic theory "anxiety" occupies a distinctive place, in the sense indicated in the above quoted Freudian sentence. Professor Skolnik says that it is irrelevant how a response is "motivated," since any testimony may be "unconsciously motivated." He forgets that there is a decisive difference between eliciting an answer that may incidentally be "unconsciously motivated"—although even incidental motivation by fear may cast doubt on the propriety of using such answer as evidence—and utilizing such motivation, particularly the motivation of fear, as a specific means of eliciting an answer, apart from the fact that the answer itself in lie-detection is not an "answer" in the sense of purposeful communication.

As seen, lie-detection is an "objective" method of testing. It is thus properly joined with "truth sera" under the heading "objective tests." The fact that

Court insufficient to qualify him as capable to stand trial.³³ Clearly, he must be able to interpret the events meaningfully and not merely to relate them, particularly where a significant element of the offense charged is his mental relation to the events. But there is no precise notion in our law of the function which the accused must be mentally equipped to perform in order to qualify as "fit to proceed." The term generally used to describe this function is "assistance," the accused being expected to "assist" his attorney in the defense. Yet, this term does not properly reflect the otherwise prevailing notion of the attorney-client relationship, according to which the accused is the *dominus litis* and his attorney is but an agent. Crucial decisions are thus made by the accused and not by his attorney. Nor can an attorney commit the accused in any significant matters against his will; indeed, in some jurisdictions it is insufficient if the attorney makes such a commitment in the presence of the accused when the latter preserves silence.³⁴ Accordingly, "fitness to proceed" should be cast in terms of the defendant's "capacity to conduct the criminal proceedings against him in a meaningful manner" rather than in terms of "capacity to assist in the

there are also distinctions between these tests, of course, is not a bar against their being grouped together for purposes to which their similarity is relevant. In one respect the lie-detector test may be said to be more objectionable than the "truth serum" test: it utilizes anxiety as a medium of investigation. Mueller expressed this metaphorically by saying that "the polygraph chair... does not look unlike the electric chair!" See Mueller, *The Law Relating to Police Interrogation Privileges and Limitations*, 52 J. CRIM. L., C. & P. S. 1, 11 (1961). Quite clearly, when subjected to any of the "objective tests," the person concerned is "not fit to proceed."

It may be pertinent to note that the accused's unfitness to proceed renders his trial invalid also in civil law countries. See, for instance, the German Strafprozessordnung (Code of Criminal Procedure), §§205, 338 (5); on this see SCHWARZ, STRAFPROZESSORDNUNG, comment to §205 (22d rev. ed. 1961).

³³ In *Dusky v. United States*, 362 U.S. 402 (1960), the Supreme Court stated the test of a defendant's capacity to stand trial to be "whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him."

³⁴ Thus, in Puerto Rico, for example, by virtue of express provision of the Code of Criminal Procedure, art. 164; 34 L.P.R.A. §403, a confession to be valid must be made by the accused "personally." An allegation of culpability made in the presence of the accused by his attorney is null and void, and a sentence based on such allegation is subject to review by habeas corpus. *Jiménez v. Jones*, 74 D.P.R. 260, 263–64 (1953).

defense." This calls for a high degree of performance capacity.

One may well doubt the realism, in the light of present scientific insight, or the rationality, in the light of present conceptions of philosophy, of the disparate treatment of "mental capacity to commit crime" and "fitness to proceed." We have learned that the human mind does not lend itself to fragmentation into topographically distinctive compartments. But we continue to divide that mind historically, that is, to conceive of mental phenomena as distinctive and separable episodes, treating them as independent, fixed, and immutable entities. Not only is this treatment based on a lack of insight into the continuity of mental life—a continuity present even where it may appear disrupted—but also it proceeds from a questionable philosophical assumption of a distinctive fixed past mental reality that "existed" apart from its present symptoms or its present reflection in the mind of a person. It is unnecessary to delve into intricate problems of the philosophical struggle between realism and idealism or of the possibility of giving either of these positions a meaningful linguistic expression; for surely in law a past event is meaningful only when it is or can be proved. Leaving aside perjury, distortion, and bars imposed by the limitations of linguistic expression, for legal purposes a past event is but its present mental reflection—either a direct reflection, a recollection, or an indirect one; built upon some other symptom. The same is true of past psychological states. They exist to the extent that they are remembered. Since a person's mental experience is never truly conveyable to another, the subject who has a mental experience, for example, "intends" to commit a crime, would seem to be the approximately best qualified witness to that experience. While this may appear doubtful in the light of psychoanalytic insight, in law the testimony of the accused as to his "intent" to commit the crime charged—if he chooses to testify—is a significant, if not the most significant, item of evidence. Since such "intent" exists today only as a recollection, it is hardly possible to separate the intent from the recollection. That "intent," phenomenologically, *is* a recollection. Obviously, permitting, e.g., a psychotic person to testify to his past "intent" cuts deeply into the very substance of such intent.

Since a trial culminates in a disposition—and

in a rational legal system is emphatically not a ritual but a social institution which derives meaning from the fact that it thus results in a socially adequate disposition—, every procedural aspect of trial should be viewed in the light of the dispositive portion of law. One might query whether a sanction for a past conduct can be meaningfully applied to a defendant regardless of his present mental state relative to that conduct and its accompanying mental state. It seems unjust to punish a man who has no present insight into the conduct for which he is being punished or into the full meaning of such conduct. There is at stake the total doctrine of "guilt" as present imputability of a past event.³⁵

Perhaps the law of the future will succeed in integrating the test of mental incapacity and that of unfitness to proceed. But such integration is predicated upon a complete re-evaluation of our basic legal conceptions of the mental element, a total review of the notions of "intent," "recklessness," even "motive," as historically fixed phenomena. Until such re-evaluation is made, we must tentatively accept a distinctive notion of "fitness to proceed." Yet, even today we must not forget that such fitness is an integral part of essential elements of crime. In a sense, it is

³⁵ For an interesting treatment of the problem of amnesia and its bearing on fitness to proceed see Note, *Amnesia: A Case Study in the Limits of Particular Justice*, *supra* note 19. The problem of any man's capacity to defend himself in a criminal trial is always open to some doubt, for hardly any individual can preserve a proper balance of mind in the face of his own criminal trial. Should a mere neurotic wish for conviction constitute unfitness? As remarked by Judge Holtzoff in *United States v. Naples*, 192 F. Supp. 23, 41 (D.D.C. 1961), "The fact is that all criminals commit mistakes and it is generally their own errors that lead to their apprehension and conviction. A perfect crime is unknown." A long time ago, Mittermaier and Hans Gross puzzled about "the very extraordinary psychological problem" of confessions which are of no conceivable benefit to the person concerned. See GROSS, *CRIMINAL PSYCHOLOGY* 31-33 (Kallen transl., *Modern Criminal Science Series* 1918). Psychoanalytical writers explained this "extraordinary problem" when they discovered that an offender often unconsciously desires to be punished. Freud, *Der Verbrecher aus Schuldbewusstsein*, in *X GESAMMELTE SCHRIFTEN*, Internationaler Psychoanalytischer Verlag 312. The traces of crime left by the offender that lead to his capture are hardly attributable to accident. Should an accused be held "unfit to proceed" merely because he left such traces?

It would seem that, as in the case of mental incapacity relative to the act charged, so in the case of fitness to proceed, the test should be interpreted on a comparative basis, that is, taking into consideration the normal degree of fitness possessed by defendants in criminal cases.

itself an element of crime. Legality requires adoption of a broad notion of "unfitness to proceed."

However, methods are available to reduce and to modify the disadvantages incident to a finding of unfitness. One such method may help to put an end to the criminal proceedings in appropriate cases; another one pertains to the consequences attaching to a finding of unfitness.

(2) *Objective Trial*

The gravest injustice is inflicted upon a person by criminal law commitment upon a finding of unfitness to proceed, when it later turns out that he had not committed any criminal act. Moreover, the psychiatric opinion regarding a defendant's capacity to stand trial may often turn on the question whether he in fact committed the act with which he is charged.³⁶ On this question may also depend desirability of commitment even of the civil type, when the person concerned is otherwise found to be mentally ill,³⁷ for mental disease is not per se an indication of danger whereas commission of serious criminal violence may be such an indication.

The Royal Medico-Psychological Association of Great Britain and Ireland (1924) suggested the following solution of this important problem:³⁸

"When a person is found unfit to plead, we would suggest that a plea of not guilty should be recorded by the Court, and the trial on the facts allowed to proceed in his absence if he cannot properly be present in Court, arrangements being made for him to be represented by counsel and solicitor."

Such procedure, of course, would be unconstitutional in the United States.³⁹ But a modified form of the same idea may not be unconstitutional. Where a defendant is found unfit to proceed and it is further found that such unfitness is not likely to be of short duration, a "tentative trial" might be held, in which a Public Defender of the Rights of the Mentally Ill would appear in the defendant's behalf. On the basis of such trial, the defendant

might be found not to have committed the act charged or otherwise acquitted, provided however that he could not be thus acquitted on the ground of insanity, for he must not on the basis of such trial be subjected to any type of state intervention. Nor could he be found in such trial to have committed the criminal act or prejudiced in any other manner. A denial of a declaration that the defendant did not commit the act charged or a refusal to acquit in a tentative trial should not be admissible in evidence in any later trial of the defendant.

(3) *Measures Imposed Upon Persons Unfit To Proceed*

When the court finds that a person lacks fitness to proceed, the Model Penal Code provides that "the Court shall commit him to the custody of the Commissioner of Correction to be placed in an appropriate institution of the Department of Correction for so long as such unfitness shall endure."⁴⁰ This disposition seems harsh, especially since at this stage the defendant is presumed innocent; in functional terms this presumption means that he ought not be subject to any normal consequences of guilt. Nor is such commitment necessary in all cases for preventive or protective purposes. Though mentally ill, the defendant may be neither dangerous nor in need of treatment; he may be treatable as an outpatient; or the crime charged may be minor, indicating no particular danger to society even if it should be repeated. Where the crime charged is not minor, the danger of its repetition and the social loss such repetition would entail ought to be weighed against the restriction of a man's liberty when he has not been convicted of any crime and may well be innocent. The "objective trial" that has been recommended would afford some safeguard against abuse of detention in instances of this type. However, where such trial fails to result in a finding that the defendant did not commit the act charged, refusal of such finding must not be deemed even a *prima facie* showing of crime commission. The principle of *favor libertatis* requires limitation of automatic assignment to a mental institution to situations of grave social danger. The danger, at this stage, must be measured by the graveness of the act charged. Assignment to an appropriate institution should be ordered in all cases where the act charged falls within the category of crimes

³⁶ MacNiven, *Psychoses and Criminal Responsibility*, in *MENTAL ABNORMALITY AND CRIME* 8, 63 (Radzinowicz & Turner ed., II English Studies in Criminal Science 1949).

³⁷ Eaton, *Functions of the Psychiatrist in the Court and Prison*, in *CRIME AND INSANITY* 165, 170-71 (Nice ed. 1958).

³⁸ Quoted by MacNiven, *supra* note 36, at 63. See also MASS. JUDICIAL COUNCIL, THIRTY-SIXTH REPORT 22-24, 27-28 (1960), quoted in MODEL PENAL CODE §4.06, comment (Proposed Final Draft No. 1, 1961).

³⁹ Compare note 32, *supra*.

⁴⁰ MODEL PENAL CODE §4.06 (2), *supra*, note 4.

against life, bodily integrity, or health, that is, crimes against the person. In cases other than these, such assignment should be predicated upon a showing by the prosecution of danger of irreparable serious harm to the community.⁴¹

Of course, in instances where the trial is suspended due to the defendant's unfitness to proceed there obtains a social interest in the advancement of the trial. For this reason, the court ought to have power to order that the defendant be treated, if such treatment is psychiatrically indicated, even where he is not confined in a mental institution, and provided that he consents to such treatment. The court should also have power to order appropriate protective measures, such as to place the defendant under supervision of a social work agency, and to prohibit him from frequenting taverns or driving a car, as the circumstances may suggest. The court should order a periodic examination of the defendant, whether or not detained in a mental hospital, with a view to ascertaining whether he has recovered fitness to proceed.

For the purpose of appeal, any court order declaring a defendant unfit to proceed or assigning him to a mental hospital or imposing upon him any other measure should be deemed a conviction.⁴²

When the defendant recovers fitness to proceed after a long time has elapsed since suspension of proceedings, the court should have power to dismiss the charge unless prosecution and trial appear to be clearly in the public interest. The court should weigh the length of time that has elapsed

⁴¹ In the District of Columbia, United States v. Pound, Crim. No. 76028, D.D.C., Nov. 26, 1945, raised the issue whether a defendant unfit to stand trial can be detained indefinitely, when the probability of his recovery is very minute. But the issue within due process would seem to be whether such person may be detained at all unless he is shown to be dangerous. Krash, *supra* note 28, at 917, suggested that due process may be said to require that a defendant be released even though he may be dangerous if it appears that he will never recover sufficiently to stand trial. It would seem, however, that orderly procedure in such cases requires dismissal of the charge, rather than a discharge notwithstanding dangerousness, when the person concerned was detained in the first place on no rational basis other than the prospect of a future trial. It is submitted that a rational rather than doctrinaire approach requires that the court be given power in all cases of manifest and serious danger to order a temporary emergency measure of continued detention until civil commitment proceedings are instituted and terminated.

⁴² Compare §6(c) of the Israeli law cited *supra*, note 13.

against the seriousness of the charge in considering the advisability of dismissal.

II. THE SCHEME OF MEASURES APPLICABLE IN CASES OF ACQUITTAL BY REASON OF MENTAL INCAPACITY

As stated in the introduction, punishment ought to be confined to the distinctive purpose pursued by its means. It should never be imposed on the assumption that it might serve any one of a number of mutually interchangeable purposes, such as retribution, deterrence, reformation, or community protection. The prevailing uncertainty and flexibility of the so-called ends of punishment violate the dignity of man, who—if necessity dictates that he be used as a means to an end other than himself—should never be used as a means to some indefinite end. It is unjust to punish a man or to increase his punishment without some basis in his guilt, on the ground that he is dangerous. The proper reaction to "danger" is a "security measure," which bears no social stigma.

A planned, systematic diversification of punishment and measures is not merely a jurisprudential nicety, a requirement of legal aesthetics or of *elegantiae juris*, but is a significant safeguard against encroachment upon civil liberties. Lack of systematization in measures has resulted in this country, on the one hand, in a relative failure to appreciate that in measures, just as in punishment, a "legality" issue is posed, and on the other hand, in a haphazard assertion of civil liberties. Thus, according to the Model Penal Code, a person accused of committing a minor crime—for example, of stealing property of small value—, when found unfit to proceed would be assigned to the Department of Correction without possibility of trial or release until he recovered, although he may not have committed the act at all and, even if he had, may not require such detention on the basis of the nature of the disease from which he suffers. In contrast, the methods obtaining, for instance, in the District of Columbia for unconditional or conditional release from a mental hospital⁴³ to which a person "acquitted solely on the ground that he was insane at the time of . . . commission" is assigned, have become notorious.⁴⁴

⁴³ D.C. Code Ann. §24-301 (Supp. 8 1960).

⁴⁴ See Hakeem, *A Critique of the Psychiatric Approach to Crime and Correction*, 23 LAW & CONTEMP. PROB. 650, 661-62 (1958); Goldstein & Katz, *Dangerousness*

When the problem of such release is in issue, we find psychiatrists pleading for "civil liberties" of the person thus detained after an extremely brief period although that person had admittedly killed another human being and although no contention is made that the detainee has recovered from his disease.⁴⁵ This contrasts strangely with the lack of any evidence of humanitarian concern for the "civil liberties" of the petty thief confined for an indeterminate period as unfit to proceed, although there is certainly no sufficient warrant in psychiatric authority for assuming that such thief is particularly likely to turn into a killer.⁴⁶

As in the punitive scheme, so in the scheme of "measures," the "legality principle" must determine the direction and scope of the pursuit of protection in a democratic society. This principle affords the standards of the systematization of protective measures. Space limitations bar discussion of general rules of "legality" as applied to "measures," but for the specific purpose of recommending "measures" to be applied in "mental incapacity" cases, it is necessary to point out certain guides based upon the "legality principle."

(1) As there must be no punishment except where there is guilt (*nulla poena sine culpa*), so there must be "no measure except for protection

against danger." Furthermore, as punishment ought to be "guilt-adequate," so measures ought to be "danger-adequate," meaning that they must not exceed in scope and duration the danger which they are purported to avert. For this reason, except where a minimum period is prescribed by reason of a presumptive minimum duration of danger, a measure may be terminated at any time by the court either *ex officio* or on motion of the prosecution, the head of the institution in which the person concerned is detained, or that person himself. Where a measure is imposed for a time exceeding a certain minimum duration, mandatory review of continued dangerousness at stated intervals is of the essence of legality.

(2) The conflict between the social interest in community protection against danger emanating from a human being and the individual interest in freedom ought to be resolved in conformity to the "legality principle." As in all areas of civil liberties, the aim must be to establish a proper balance between the social and the individual interest.

In this context it is important to note that a certain coordination is necessary between the punitive and the protective scheme. Since, to meet the presumption favoring freedom in the punitive field, the recommended definition of mental incapacity exempting from punitive responsibility has been formulated in broad terms, the notion of "dangerousness" against which protection by measures may be afforded should not be too narrow. For example, the recommended definition has been extended to include conditions which in many countries come within the notions of "partial" and "diminished responsibility."⁴⁷ Persons of such reduced responsibility, while enjoying full exemption within the recommended definition, may be as dangerous as those who suffer from grave mental illness. They ought to be treated by measures. However, there should be no undue discrepancy between maxima of intervention by way of measures and punitive maxima.

(3) A significant "legality" safeguard is elimination of arbitrariness and inequality of treatment. Hence, the aim must be in measures, as in punishment, to afford whenever possible objective standards and tests.

(4) It is important to stress that the "criminal

and Mental Illness: Some Observations on the Decision To Release Persons Acquitted by Reason of Insanity, 70 YALE L. J. 225 (1960); Krash, *supra*, note 28 at 944-46.

⁴⁵ Miss Hough, whose case aroused much attention, killed a visitor who came to express his sympathy to her over the recent death of her father (a psychiatrist), because, as she later said, the victim became "psychologically aggressive." She committed this homicide in May 1957, but had been known to suffer from paranoid schizophrenia of the aggressive type at least as early as 1945. See *Hough v. United States*, 271 F.2d 458 (D.C. Cir. 1959); see particularly Judge Miller's dissenting opinion, *id.*, 463, 468.

⁴⁶ NORVEL MORRIS in his brilliant monograph on *THE HABITUAL CRIMINAL* (1951) found "specificity of recidivism" to prevail in the "preventive detainees" whose cases he examined, *id.* 317-22, whereas in "confirmed recidivists" the same writer found 38% showing variation in crime types, *id.* 360-66. In ALEXANDER & HEALY'S *ROOTS OF CRIME* (1935), the subjects of study showed no deviation from one crime pattern. The WOLFENDEN REPORT (REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION, Cmd. 247, H.M. Stationary Office 1957) stated, para. 57 at 23: "We are authoritatively informed that a man who has homosexual relations with an adult partner seldom turns to boys, and *vice-versa*, though it is apparent from the police reports we have seen and from other evidence submitted to us that such cases do happen." See also MACDONALD, *PSYCHIATRY AND THE CRIMINAL* 143 (1958).

⁴⁷ Compare Silving, *Mental Incapacity in Criminal Law*, *supra* note 1, at 74-78.

conduct" engaged in by the defendant, in addition to being a significant indicium of the actor's "dangerousness," performs a crucial "political" function in the law of measures as well as in the punitive scheme.

No criminal law state intervention should be permissible unless the person concerned has "done something" cognizable at criminal law. When it is necessary for the protection of the public or of the individual himself to detain an individual or to restrain his freedom in any other way though he has not committed any "criminal act," civil commitment or other civil or administrative measures are the proper forms of intervention. One might argue that insistence on a distinction between a civil and a criminal law commitment is a superfluous formalism, since in either type of commitment the person concerned is deemed "not guilty." "Not guilty," according to this interpretation, is a metaphysical quality, whereas in the phenomenological view of "guilt" adopted by the writer "not guilty" merely means that certain legal-political and social demands do not apply to the particular individual or case, with the result that he is not held punitively responsible.⁴⁸ Such individual may nevertheless be "responsible" in measures, provided that the proper demands of the protective province of criminal law are applicable in his case. One could express this by saying that there obtains within the protective scheme a distinctive concept of "guilt" possessing no moralistic connotations and not predicated upon the presence of technical *mens rea*, but presupposing the existence of "criminal conduct" as described by law.⁴⁹ Nor is absence of *mens rea* tantamount to a realistic lack of a mental element, be it intent or recklessness or consciousness of il-

⁴⁸ On the "penal," though not "punitive," nature of measures see Silving, "Rule of Law" in *Criminal Justice*, *supra* note 6, at 145. On the meaning of "guilt" see Silving, *Mental Incapacity in Criminal Law*, *supra* note 1, at 23-24.

⁴⁹ Such concept of "guilt" referring solely to engagement in criminal conduct or to production of a criminal harm prevails in large segments of the population. The question most commonly raised when the issue of "guilt" is posed is "Has he done it?"

I am using the term "criminal conduct" in the sense of a conduct engaged in under such circumstances and entailing such results as to amount to a crime as described by law, but for the absence of the required intent or recklessness, knowledge of illegality, or mental capacity. The GERMAN DRAFT OF A PENAL CODE, 1960 (ENTWURF EINES STRAFGESETZBUCHES (StGB) E 1960 (Bunderrat Drucksache 270/60, 1960), §11 (1) 2, adopts a similar concept called "illegal act" (*rechtswidrige Tat*).

legality,⁵⁰ although these mental factors are not punitively ascribable or imputable to the mentally incapacitated defendant. Still, one might query why it is necessary to differentiate between such non-moralistic protective "guilt" at criminal law and the corresponding factor that gives rise to administrative or civil measures, and why should "criminal conduct" be made a condition of criminal law intervention?

The answer to the first question is that differentiation between criminal law and administrative intervention is necessary because the proper aims of criminal law are distinctive from those of administrative law, so that distinctive types of limitations are applicable in the two fields. The protective function of criminal law is limited in a democratic society to the necessary minimum called for in criminal law context. Thus, for example, care for the mentally ill, which constitutes an important reason for a civil law commitment, is not a proper ground for criminal law commitment, though once committed at criminal law the person concerned ought to receive the necessary care. Nor is treatment and cure a direct goal of criminal law commitment. Treatment is a proper criminal law "measure" solely as a means of eliminating or reducing dangerousness,⁵¹ aimed at advancing release of the defendant and at protection of the community.⁵² The direct function of criminal law measures is the protection of others against the dangerousness of an individual who has done something cognizable at criminal law, as a law concerned with socially harmful acts.

The second question, as to why criminal conduct must be a condition of criminal law intervention, raises the highly controversial issue of "pre-delictual measures," that is, according to prevailing definition, measures applied preventively, in anticipation of criminal conduct. There has been a great deal of confusion regarding these measures, attributable to a large degree to a lack of proper analysis in the light of principles of political philosophy applicable to criminal law.

Adherents of pre-delictual measures claim that

⁵⁰ On the latter as part of *mens rea*, see Ryu & Silving, *Error Juris: A Comparative Study*, 24 U. CHI. L. REV. 421, 430, 440-42 (1957).

⁵¹ In the law of punishment it may be an imprisonment substitute or a means of abbreviating detention. On this see Silving, "Rule of Law" in *Criminal Justice*, *supra* note 6, at 139-40.

⁵² Once the individual has been committed, treatment may be called for as part of the care for the individual, which the state should afford to anyone in its custody.

no objections can be raised against them on legality grounds so long as these measures are administered strictly in accordance with statutes that describe each measure and the situations to which it may be applied, and so long as these measures are imposed by courts of ordinary criminal jurisdiction. Thus, the requirement that criminal law intervention be limited to situations in which the subject has done some definite anti-social "act," in the opinion of these scholars, is a dispensable formality. But this argument is based on misunderstanding of a most significant substantive aspect of legality which bars any type of criminal law state intervention unless there is present an actual, definite, clear, and identifiable harm to persons other than the person concerned. A man's existential situation, his objectionable general life conduct, his manner of being (*modo de ser*), his "being thus" (*So-Sein*), is not a proper basis for either punishment or measures. The so-called "criminal law of the actor," which purports to attach criminal sanctions to the type of personality which a man possesses rather than to a specific harmful act committed by him, has been discredited in the post-war era, particularly as a consequence of its having been carried *ad absurdum* by the National Socialist regime.⁵³

True, in the province of measures there is a marked tendency to stress qualities of the person concerned, his personality, and general life conduct. Indeed, the decisive factor in the law of measures is dangerousness, which is to a large degree a personality feature. Hence, this law is a "law of the actor," and its foremost function is precisely to relieve punitive law of its protective aspects and thus facilitate its functioning as a "law of guilt," in the sense of responsibility for a definite crime. But, as shown by the German experience with National Socialist criminal law philosophy, which focussed on "what a man is" in disregard of "what he does," there is a greater social danger in adopting a criminal law, even of measures, which is wholly oriented to personalities and requires no specific act to warrant state intervention, than there is in leaving potentially dangerous personalities at large. Emphatically, a "criminal act" is and must remain an essential requirement of legality in measures, as well as in punishment.

A caveat is necessary as regards the scope of the "act-requirement." It is possible to manipulate

this requirement by creating special types of "criminal conduct" which have the misleading appearance of valid statutory crime types, distinguishable from other crime types solely by being sanctioned by measures and not by punishment. Whether a provision creating a criminal conduct thus sanctioned is justifiable in a democratic society depends, as does the legality of any criminal law provision, on whether the conduct thus proscribed is sufficiently harmful to society, in the sense of violating essential legal interests of persons other than the offender, to warrant imposing upon such conduct highly limitative criminal law sanctions.⁵⁴

⁵⁴There are two opposing principal views on what is and what is not a proper subject of regulation and sanctioning by the criminal law. According to one of these, the criminal law may or indeed ought to enforce either Divine or popular notions of morality. For a recent exposition of the latter version see DEVLIN (Lord Justice Devlin), *THE ENFORCEMENT OF MORALS* (Maccabaeon Lecture in Jurisprudence of the British Academy 1959). According to the second view, the function of criminal law is confined to prohibiting and sanctioning conduct which is harmful to others, "harm" being understood to mean an injury other than a mere offensiveness to moral sensitivities. This view has been recently expressed in the WOLFENDEN REPORT, *supra* note 46, at 9-10. Some believe that the choice between these two positions is a matter of moral preference. It is submitted that such is not the case. The position adopted by the WOLFENDEN REPORT is a dictate of legality. A man's freedom from criminal law state intervention into his life is a civil liberty, immune against majority rule unless a clear and serious harm to the community or any member thereof exists or is obviously threatened. The mere fact that a popular majority or a representative group of the community, such as a jury or the famed "Clapham Bus" commuters, desires intervention into the life of a person because it is displeased with the general manner in which he conducts his life or with what he may be doing is not a sufficient ground in a democracy for prescribing or permitting state intervention, any more than such intervention into the affairs of a man's conscience, religion, or opinion is justifiable simply because the majority finds them non-conformist or obnoxious. This philosophy of government precludes enactment of any such legislation as the vagrants laws, common in both common and civil law countries. It may be noted parenthetically that there is no objection against creation of special "criminal conduct" types sanctioned solely by measures, such as is the Italian "agreement to commit a crime," ITALIAN PENAL CODE art. 115 (2) & arts. 215, 228. It may be argued that in cases of this nature there is "criminal law" state intervention without a "crime." But as in the case of measures applied to persons acquitted solely by reason of mental incapacity, there is present, while not a "crime," a "criminal conduct," as described by statute and sanctioned by measures in conformity to a statute. So long as such criminal conduct fulfills the requirement of creating a harm cognizable in criminal law, no objections can be raised. This requirement is not fulfilled in the Italian "putative crime," also sanctioned by measures. *Id.* art. 49 (1) & (4).

⁵³ On the history of the "law of the actor" see Silving, "Rule of Law" in *Criminal Justice*, *supra* note 6 at 98-104.

Having shown that the "criminal conduct" engaged in by a person found to have possessed no mental capacity is an important safeguard of the legality of any measures imposed upon him, we shall henceforth deal with such conduct solely as a potential indicium or symptom of such person's dangerousness. Our tasks in the following are to find the proper standards by which "dangerousness" and its degree might be judged; thereafter we must seek measures differing in stringency and scope depending on the degree of "danger" to be averted; and lastly, we must settle the proper procedure for the ascertainment of "dangerousness" and of its degree. The first mentioned tasks will be discussed in Section 1, and a separate section will be devoted to treatment of constitutional and procedural aspects.

A. SUBSTANTIVE PROVISIONS

This section deals in separate sub-divisions with (1) the test of "dangerousness"; (2) "danger-adequate" measures; and (3) special categories of the mentally incapacitated, "habitual offenders" and "offenders not susceptible to punishment."

(1) *Test of "Dangerousness"*

The question of the proper test of "dangerousness" is controversial. In doctrinal disputes waged in civil law countries views are divided between the "objectivists," who attribute a more or less decisive significance to the "act" committed by the defendant, and the "subjectivists," who believe the role of that act to be negligible.⁵⁵ As most doctrinal disputes among civil law scholars, this one is conducted on a metaphysical level. The contention is made that what is "dangerousness" must be determined independently from the protective need, since "dangerousness" is a condition and determinant of protection.⁵⁶ Within a functional view of "dangerousness," however, its definition is not merely the result of an objective finding of "danger," but also depends on the protective policy assumed, requiring a policy decision on how much danger society must tolerate. That policy in turn depends upon the important constitutional issues of the extent to which the defendant's civil liberties may be permitted to yield to the protective interest of the community

or of certain of its members,⁵⁷ and of the proper methods of ascertaining dangerousness. Similarly barren seem to be the debates waged in civil law countries on whether "dangerousness" is a "quality of the actor" or a "quality of the act." "Dangerousness" is simply a factor or a combination of factors raising a justifiable protective need, meaning that protection of that need is authorized in a democratic society. There need not be a single indicium of "dangerousness." "Danger" may evince from a combination of indicia, some personal, others situational, and among the former, the "act" committed by the defendant may play a more or less decisive role, as compared with other factors. But "legality" requires that so far as possible the indicia of "dangerousness" and their relative weight under varying circumstances be formulated.⁵⁸

Admission of prediction tables in aid of determining dangerousness does not dispense with the necessity of formulating statutory indicia of dangerousness. For no contention is made that such tables afford a full proof of the presence or absence of dangerousness in any given case. It is submitted that the appropriateness of using such tables should be first considered in each case by the Psychiatric and Sociological Examination Center, which may or may not recommend their use by the court in weighing the variety of factors that enter into a determination of the issue of dangerousness. As any recommendation of the center, this one ought to be considered, but need not be followed, by the court.

(a) *The Criminal "Act" as Indicium of "Dangerousness"*

As seen, the criminal "act" or that which we have chosen to call "criminal conduct" performs a dual function in the law of measures; it is a condition of legality and an indicium of "dangerousness." An incident of its latter function is a third role, to which attention has been drawn by civil law scholars. They have distinguished between "objective danger" and "subjective danger or

⁵⁷ The problem has been raised in civil law countries whether the danger against which criminal law protection may be afforded must be one to the community at large or whether it is sufficient if only certain individuals are endangered. This distinction is believed to be utterly barren.

⁵⁸ Article 133 of the Italian Penal Code, though in terms a sentencing guide for punitive purposes, is considered to be a catalogue of indicia of dangerousness, which is an important factor in punishment as well as in measures.

⁵⁵ On the variety of views on this subject see OLESA MUÑOZ, *LAS MEDIDAS DE SEGURIDAD* 55-81, (Publicaciones del Seminario de Derecho Penal y Criminología de la Universidad de Barcelona 1951).

⁵⁶ *Id.* at 73.

fear."⁵⁹ We may discard *a limine* as irrelevant at criminal law those fears that are wholly illusory. But a fear, perhaps a panic, aroused in the community by a serious crime, for example a homicide, though committed without punitively attributable *mens rea*, is a valid consideration in determining whether protection should be afforded, though this consideration may not be alone decisive.

The extent to which the nature and gravity of the act are symptomatic of the dangerousness of the actor is a most controversial subject. Does commission of a criminal act permit prediction of future criminality on the part of the actor? If so, is repetition of crime of the same nature and gravity to be expected, or is future variation from a previous pattern equally probable? In particular, is a petty or small offender likely to turn to serious crime? Is an offender against property likely to endanger the life and health of his fellow men?

Psychiatrists stress that we must treat "criminals instead of crimes,"⁶⁰ and that "criminals cannot be classified on the basis of the type of crime they commit."⁶¹ This approach no doubt finds support in the psychoanalytic finding that crimes of apparently and legally widely differing pattern may stem from similar profound motivations.⁶² But in the face of the psychological "pan-determinism" asserted by many psychiatrists, such "actor-orientation" can hardly be taken to imply that the type and gravity of the act committed by a defendant are not determined by his profound psychological motivations. Dr. MacNiven states that a person's "nature, his education, and his ethical and social training" in many instances modify his conduct even in mental illness.⁶³ In the light of psychoanalytic insight there is mostly a sufficient likelihood of a causal connec-

tion between unconscious motivations of the actor and the type and gravity of the act committed by him to justify assumption that such features of the act have a bearing on his crime potential and thus afford an indicium of what may be expected of him. True, we are all potentially dangerous; Goethe allegedly said that he could well imagine having committed any conceivable crime.⁶⁴ But when a person has committed a crime, particularly a serious one, surely the probability of his committing one in the future is greater than in the case of a generally law-abiding citizen.

While unspecificity of recidivism has not been proved, there is sufficient indication in experience for fearing that in the case of recidivence the individual will repeat the same type of criminal act as the one he has committed before.⁶⁵ Certainly, a person who in a state of mental incapacity has killed another may be assumed more likely to commit another homicide than a person who in a similar mental state has committed merely petty larceny. This assumption justifies diversification in treatment of persons acquitted on the ground of insanity depending on the nature and gravity of the crime committed by them.⁶⁶

In the process of determining the degree of a person's dangerousness and the scope of dangeradequate measures, the nature and gravity of the actor's conduct and hence of the anticipated harm ought to be the most significant items of consideration. Also, the required degree of probability that the harm will occur should be in inverse proportion to the seriousness of such harm.⁶⁷ When combined with the element of fear aroused within the community by an act of killing, the symptomatic value of such an act as regards objective probability of repetition of the same pattern should suffice to warrant certain minimum measures of protection. No one who in a state of mental incapacity has killed another ought to be released before the lapse of a minimum period of, for example, two years, during which the subject should be observed and treated. This time may also be used to study the environmental conditions in

⁵⁹ On this see OLESA MUÑOZ, *op. cit. supra* note 55, at 57-59. Garofalo, who originated the doctrine of "dangerousness," spoke of "*temibilità*," the quality of evoking fear. On this see *id.* at 64.

⁶⁰ KARL A. MENNINGER, *THE HUMAN MIND* 455 (3d enlarged ed. 1955).

⁶¹ ZILBOORG, *THE PSYCHOLOGY OF THE CRIMINAL ACT AND PUNISHMENT* 128 (1954).

⁶² Thus, for example, political crimes, in the light of psychoanalytical interpretation, may represent parricide. On this see the comprehensive treatment by JIMÉNEZ DE ASÚA, *PSICOANÁLISIS CRIMINAL* 97-104 (5th enlarged ed. 1958), and literature cited there. If, then, given different conditions, the stage is set for some other crime against authority, for example, a teacher, see MIRA Y LÓPEZ, *MANUAL DE PSICOLOGÍA JURÍDICA* 162-63, (4th ed. 1954) (describing the case of a boy stealing pencils from his teacher), it is conceivable that such crime will be committed.

⁶³ MacNiven, *supra* note 36, at 52.

⁶⁴ H. GRIMM, *GOETHE* 245 (7th ed.), quoted in WEIZEL, *DAS DEUTSCHE STRAFRECHT* 163 (6th ed. 1958).

⁶⁵ Compare note 46, *supra*.

⁶⁶ For diverse provisions as regards persons acquitted by reason of insanity depending on the nature of the criminal act they committed and diverse terms of confinement in a mental hospital depending on the same factor see *ITALIAN PENAL CODE* art. 222.

⁶⁷ On this see HURWITZ, *CRIMINOLOGÍA* 427 (Spanish transl. Haro-García 1956).

which he has lived as well as those to which he must "return" upon release and to make adequate plans for his future adjustment under conditions most favorable to it.⁶⁸ It is not necessary that he remain throughout the period of detention in a mental hospital; in appropriate cases or at appropriate stages he may be assigned, for example, to a special colony or a training center.

True, a disposition for such minimum detention period would raise a serious constitutional problem. But the alternative is delegation of authority to psychiatrists or courts, acting under psychiatric advice, to determine whether the individual concerned continues to be dangerous. It is submitted that a psychiatrist's evaluation of the issue of continued dangerousness, though entitled to considerable weight, is not in the present state of knowledge sufficiently supportable by readily verifiable objective data to justify risking the danger to the community incident to an early release, when the precipitating act was a homicide. Also, the community's freedom from fear deserves such minimum protection.

The community fear and the prognostic situation obtaining in cases where a homicide has been committed in a state of mental incapacity are applicable both to situations of chronic mental disease and to those of temporary mental disturbance, though there may be some difference in degree. The killing of another human being in a state of "mental black-out" can hardly be assumed psychologically "accidental," meaning, not rooted in the defendant's total personality. The community must be protected against recurrence of fatal "black-outs." Even those acting in so-called "states of automatism"—in whose case traditional doctrine assumes the absence of an "act," requires no plea of insanity for acquittal, and excludes application of measures⁶⁹—can hardly be deemed to produce death "accidentally."⁷⁰

⁶⁸ Mental illness, though "cured," leaves mental scars. Also, the impression it leaves in the community affects the subject's "acceptance" when he returns, rendering his adjustment more difficult by exposing him to unusual stress. Though there may be a therapeutic value in a return to normal life and the previous environment, see *Hough v. United States*, 271 F.2d 458, 462 (D.C. Cir. 1959), in some cases there might be considerations favoring choice of a new environment, less likely to contribute to the type of stress that precipitated the criminal act.

⁶⁹ "Automatism" is defined by HENDERSON & GILLESPIE, *A TEXT-BOOK OF PSYCHIATRY* 115 (8th ed. 1956), thus: "Automatic movements or automatisms occur in a pathological sense, without the subject's being aware of their meaning, and even without his

Where the act committed by the accused is less than homicide but would, except for his mental incapacity, constitute a felony against the person, an automatic minimum measure should also be

being aware of their happening at all." Various states are referred to under this term, such as states resulting from a discharging cerebral focus, see Mulder, *Psychoses with Brain Tumors and Other Chronic Neurologic Disorders*, in 2 *AMERICAN HANDBOOK OF PSYCHIATRY* 1144, 1146-47 (Arieti ed. 1959), and various psychogenic states of dissociation, such as somnambulism, automatic writing, and fugue states, see NOYES & KOLB, *MODERN CLINICAL PSYCHIATRY* 62-63 (5th ed. 1958). In law harm committed in such state is deemed not to constitute "an act" or a "voluntary act," so that the issue of intent or sanity does not arise at all. Thus, for example, in *R. v. Charlson*, [1955], 1 W.L.R. 317, the prisoner, without any apparent motive, called his ten year old son, telling him that there was a rat to be seen standing on a stone in the river adjoining the house. When the boy came, the prisoner picked up a wooden mallet from the floor and struck the boy twice on the head, causing blood to flow. He then picked up the boy and threw him out of the window into the river. The boy fell twenty-five feet into the river and suffered severe injuries. The prisoner could give no account of his motivation for acting as he did. He raised no plea of insanity, but medical evidence was given to the effect that his actions were consistent with his having a cerebral tumor, a condition in which a person is liable to an outburst of impulsive violence, "quite motiveless," and over which he has no control. He was acquitted even of the charge of inflicting grievous bodily harm, for which no specific intent needs to be proved. For further examples see GLANVILLE WILLIAMS, *CRIMINAL LAW, THE GENERAL PART* 11 (1953); see also *MODEL PENAL CODE* §2.01, comment at 121-22 (Tent. Draft No. 4, 1955).

⁷⁰ Williams, *Automatism*, in *ESSAYS IN CRIMINAL SCIENCE* 345 (Mueller ed. 1961), noticing that exclusion of the mental incapacity issue in such cases with consequent inability to assign the defendant to a mental hospital or otherwise to avert the danger which he represents is a wrong disposition from the standpoint of policy. The author says: "It seems that lawyers are prisoners of their own conceptual scheme." *Id.* at 346. The conceptual scheme itself is based on incorrect psychiatric assumptions. NOYES & KOLB, *op. cit. supra* note 69, at 62, explain dissociation thus: "...in a person in whom there is an active incompatibility between repressed elements in his mental life and the rest of his personality, the repressed components may escape from the forces that are repressing them, become separated from the usual consciousness, organize a personality of their own, as it were, and thus dictate behavior. This new, or *secondary personality*, has its own consciousness which has no recollection of the usual or *primary personality* and carries out acts independent of it.... The disposition and character possessed by the secondary personality may be quite different from that shown by the primary personality. This contrast should naturally be expected since the secondary personality is made up of material that has been repressed, that is, has been rejected by the primary personality because it was not of a nature to be consciously entertained or satisfied." This explanation disproves the apparent assumption of the law that an act committed in a state of automatism is not attributable to the actor even in the sense in which acts committed

applied, although it should be correspondingly less stringent than in the case of a homicide. In neither situation should the minimum detention provisions exclude further extension of measures upon a finding of continued dangerousness. When such extension beyond the minimum period is sought, the nature and gravity of the act committed should still be an important item of consideration in determining the issue of dangerousness. In all cases other than those in which minimum measures are applicable, dangerousness should be an object of proof, rather than automatically inferable from the act. Again, however, the nature and gravity of the act should be an important item in determining dangerousness.

The significance of the criminal conduct as an indicium of dangerousness is gaining increasing recognition in the District of Columbia when release of a person acquitted solely by reason of insanity and automatically assigned to a mental institution⁷¹ is in issue. In estimating "the safety of the community in case the defendant is released," courts realize that

"the type of crime which [the subject] committed must be considered in that connection. For example, there is less danger to the community if an embezzler should be released and repeats the crime of embezzlement than if a murderer is released and possibly repeats a crime of that type."⁷²

While thus in the recommended scheme the nature and gravity of the act committed by the defendant may justify certain minimum measures and also serve as an indicium of dangerousness whenever it must be proved, the same act should also, for constitutional reasons, afford a basis for the maximum of state intervention in measures, as well as in punishment. Since the punishment imposed upon a conduct presumably reflects its

gravity, the maximum of such punishment may be taken to afford a proper standard for the maximum in the area of measures. As mentioned before, regardless of "danger," the maximum length of detention by way of measures ought to bear a certain relationship to the maximum period of punishment that might be imposed upon the precipitating criminal conduct, if it were a crime. In felony cases, it is believed that the maximum detention period ought not exceed the maximum period of punishment. In instances of misdemeanors, a corresponding limitation would frustrate any treatment effort and thus the preventive purpose of detention. A relative increase of detention maxima may afford a solution, which might be constitutionally justified on the ground of the defendant's choice expressed in his plea of insanity, as required in misdemeanor cases,⁷³ although one may well argue that such justification is dispensable. In instances in which detention beyond the limits thus set is necessary, civil commitment proceedings should be instituted.

As seen, in the District of Columbia concern has been expressed about the problem of the potential bearing of the gravity of the act on the constitutionality of protracted detention.⁷⁴ But there has been no systematic consideration of either the scope of the relationship that must exist between crime gravity and the length of detention or, generally, between danger and detention.⁷⁵ The submission of the writer is that no man, however dangerous and whatever the gravity of his act, may be detained indefinitely at criminal law, and that crime gravity, as objective determinant, and as one of the indicia of dangerousness, should be taken as a standard of the scope of permissible detention or of any other measures.

(b) *The Mental Element in "Mental Incapacity" Cases*

In our law the state of mind of a person acquitted on the ground of insanity "at the time of the act" is not further diversified for the purpose of imposing "measures." Once thus acquitted, he is treated uniformly, except that in some jurisdic-

by an insane person are attributable to him. There is no conceivable reason to differentiate the two situations. An act committed in a dissociation state is not psychologically "accidental"; it is rather motivated by the repressed material of which the secondary personality is made up.

⁷¹ D.C. CODE ANN. §24-301(3) (Supp. 8 1960). The terms of unconditional release are "recovery of sanity" and prognosis that the subject "will not in the reasonable future be dangerous to himself or others." For construction of this section see *Overholser v. Leach*, 103 U.S. App. D.C. 289, 257 F.2d 667 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 1013 (1959); *Isaac v. United States*, 284 F.2d 168 (D.C. Cir. 1960).

⁷² Judge Holtzoff's opinion in *Hough v. United States*, quoted in Circuit Judge Miller's dissent in *Hough v. United States*, 271 F.2d 458, 463, 466 (D.C. Cir. 1959).

⁷³ If, as has been recommended earlier in the text, mental incapacity in misdemeanor cases remains an "affirmative defense," there is very little likelihood that it will be a frequent issue in crimes on which a small penalty is imposed.

⁷⁴ See particularly the thoughtful opinion of Judge Fahy in *Ragsdale v. Overholser*, 281 F.2d 943, 949 (D. C. Cir. 1960).

⁷⁵ *Id.* at 950.

tions his "insanity" at the time of acquittal may be relevant to the issue whether a measure may be imposed at all. The assumptions underlying this position are not realistic and should be re-examined.

Acquittal on the ground of insanity is deemed in our law to imply that the accused acted without "intent."⁷⁶ As interpreted in *Carter v. United States*,⁷⁷ he lacked the "vicious mind" or "vicious will" which "motivates a criminal act," and which it is the "basic import of criminal law" to punish. This interpretation is further explained in the light of "accepted philosophy"—which, it is alleged, "has never changed" even in *Durham v. United States*—to mean that the ultimate reason for not punishing a person suffering from a "mental disease or defect" is that "in doing the act he is not a free agent, or not making a choice, or unknowing of the difference between right and wrong, or not choosing freely, or not acting freely."⁷⁸

However theoretically valid, the metaphysical "free will doctrine," thus proclaimed to translate the meaning of the mental incapacity exemption, is functionally meaningless, since it does not lend itself to being administered in any specific context. To be legally meaningful, the "free will" thesis would have to be operational, that is, useful in solving practical legal issues, specifically, by affording a test whereby it might be possible to determine whether or not a person had acted "freely."⁷⁹ The assumption that the wording of the *Durham* formula is the practical corollary of that thesis is entirely gratuitous.

⁷⁶ This view, stressed in the New Hampshire cases, *State v. Pike*, 49 N. H. 399 (1870); *State v. Jones*, 50 N. H. 369 (1871), has also been accepted in *Durham v. United States*, 94 U.S. App. D.C. 228, 214 F.2d 862, 876 (1954).

⁷⁷ 252 F.2d 608, 616 (D.C. Cir. 1957).

⁷⁸ *Ibid.*

⁷⁹ Judge Burger, concurring in the result only in *Blocker v. United States*, 288 F.2d 853, 857, 869 (D.C. Cir. 1961), suggested that if the meaning of *Durham* can be actually translated into "acting knowingly and freely," the latter criterion should be placed "squarely before the jury" rather than hidden from it. Though this criticism is logically valid, the fact is that neither the jury nor anyone else could answer the question whether the defendant "acted freely," since this question means: "Could he have acted otherwise than he in fact acted?"

The "free will" test has also been recommended by Chief Judge Biggs in *United States v. Currens*, 290 F.2d 751, 774-75 (3d Cir. 1961). Judge Hastie, dissenting in part, *id.* at 776, aptly remarked that "psychiatrists may well reject talk of destroying the will as unscientific imagery." For a critique of the test of "capacity to conform" see Silving, *Mental Incapacity in Criminal Law*, *supra* note 1, at 47-51, 54-56.

On the other hand, if the phrase "vicious will" is taken to convey the notion of conduct deviating grossly from certain ethical standards,⁸⁰ one might query why the conduct of a mentally ill person ought not to be judged by these standards. Such person can act with as much intensity, brutality, and conscious disregard for the rights and feelings of others as a normal person. The answer given to this query in our law seems to be that a mentally ill person has no "mind" but is "*amens (id est) sine mente*,"⁸¹ "without a mind." Having no mind, he cannot possess a "vicious mind" or "vicious will," and for this reason he cannot be blamed for his conduct. The view of psychological reality expressed in this answer is obsolete, and the rationale of the mental incapacity exemption based upon this view is anachronistic.

Dynamic psychiatry has shown that, for example, schizophrenic patients "are by no means completely different from the rest of mankind. They share in the broad, basic psychodynamically important characteristics of human living—anticipatory striving at conscious and unconscious levels toward what is desired and against what is dreaded . . ."⁸² The thinking and acting of psychotic persons is not senseless but rather follows a logic which, however, operates within a frame of reference different from our own. Thus, even a psychotic person may possess an "intent" with regard to the precipitating act. The exemption from punitive responsibility of the mentally ill is based on grounds other than absence of "intent,"⁸³ if by "intent" we mean a psychological

⁸⁰ This, in fact, is the ancient meaning of *mens rea*. See 1 RUSSELL, *CRIME* 25 (10th ed. Turner 1950).

⁸¹ See *Carter v. United States*, 252 F.2d 608, 616 (D. C. Cir. 1957). There Judge Prettyman noticed, 252 F.2d at 616 n.13 that exculpation is not "only for the individual who is 'without mind', like a wild beast." In the text, however, he uses the term in the following connection: "If a man is '*amens (id est) sine mente*' in respect to an act to such an extent that in doing the act he is not a free agent . . ." This seems to mean (1) that the individual must be "without a mind with regard to the particular act he is committing" (query: does "without a mind" mean "without intent?"); (2) that this lack of intent or mind qualifies him as "unfree." If the first proposition were sustainable, it should be sufficient.

⁸² Whitehorn, *Psychodynamic Approach to the Study of Psychoses*, in *DYNAMIC PSYCHIATRY* 255, 274 (Alexander & Ross ed. 1952).

⁸³ Nor is the exemption based on ignorance of law or lack of consciousness of illegality (criminality), as is implied in *McNaghten's Case*, *supra*, note 3. There may be instances in which such ignorance is a feature of the mental impairment, but this is not always the case.

reality. The ground of exemption is not that such persons do not "reason" or "intend" or "feel" but rather that they "reason" or "intend" or "feel" in contexts divergent from those of the mental operations of the majority of the community members, and that this divergence of contexts affords a social-political ethical ground for not applying to them the rules adopted with a view to the average community members. Only in this sense is the "intent" of the mentally ill person not imputable to him punitively. The problem arising within the law of measures is whether such "intent," found not to be determinative in the punitive scheme, should be deemed relevant so far as imposition and choice of measures are concerned.

The subject's state of mind with regard to the precipitating act may be relevant in the law of measures in two ways: as bearing on the character of the act and as a symptom of "dangerousness." The qualification of external conduct as a crime or as a particular crime type mostly depends on the accompanying state of mind; apart from certain states of mind, such as intent or recklessness, a given outward behavior may not be criminal at all or may constitute but a minor misdemeanor. If the mental element were to be deemed wholly irrelevant for purposes of measures, it would be impossible to give within the law of measures any weight to the nature and gravity of the criminal conduct engaged in. For example, crimes of specific intent would have to be eliminated from consideration, so that burglary and trespass would be considered as equivalent. Secondly, mental illness often releases rather than excludes "intent," and this factor has a clear bearing on the actor's "dangerousness."

According to a doctrine prevailing in German and Italian law, in contrast to ours, a person suffering from mental incapacity may possess a so-called "natural intent" or act with a so-called "*de facto* negligence."⁸⁴ Such intent or negligence does not render him punitively responsible. But

⁸⁴ The intent of a mentally incapacitated person is called in Germany "natural intent" (*natürlicher Vorsatz*), in Italy "abnormal will" (*volontà abnorme*); "*de facto* negligence" is the author's free translation of the Italian term "*negligenza semplice*." For the doctrine of "natural intent" see MAURACH, DEUTSCHES STRAFRECHT, ALLGEMEINER TEIL 206, 288, 338 (2nd ed. 1958). For the Italian doctrine of "*volontà abnorme*" and "*negligenza semplice*" see REPORT ON THE DRAFT OF A NEW ITALIAN PENAL CODE 1949/40 (*Relazione I*, pages 56-58). The draft itself uses the phrase "*azione diretta alla produzione dell'evento*" (action directed to production of the event), art. 75, dealing with criminal conduct in a state of intoxication.

measures may be predicated upon its presence. Thus, assignment to a mental hospital of a person who committed a criminal act in a state of mental incapacity has been held to require presence of all crime elements, including the mental element of "natural intent"; that is, the actor must have known what he was doing, e.g., that he was killing a human being, lacking only an "inner relationship to the illegality content of the act."⁸⁵ But when such "intent to kill a human being" is present, for example, an erroneous assumption, produced by delusion, of a state of fact in the event of which the act would have been justified, for example, by self-defense, does not exclude application of measures.⁸⁶

This civil law concept of "natural intent" reflects—perhaps unwittingly—the modern psychiatric view that a mental patient is not "completely different from the rest of mankind" but possesses a relevant "mental life," though a distinctive one. The "natural intent" or "recklessness" with which the subject acted is a proper item of judicial consideration in establishing the nature and seriousness of the act, as a symptom of its "dangerousness," as well as for the direct purpose of evaluating the actor's "dangerousness." What bearing such "intent" has on the actor's dangerousness may be shown by psychiatric evidence. But contrary to the German rule, absence of a "natural intent" should not a priori disqualify an actor for subjection to measures, particularly assignment to a mental hospital. "Natural intent" and "*de facto* negligence" should be relevant items of consideration for the purpose of a finding of dangerousness but not a necessary condition of such finding.

(c) *Recurrence and Concurrence of Criminal Conduct*

Psychoanalytic writers, particularly Glover, have drawn attention to the high probability of mental disease evincing from the very fact of crime repetition.⁸⁷ Where the background of crime repetition is mental disease, the danger of further criminal activity is high. When the precipitating crime has been independently found to have been committed in a state of mental incapacity, former

⁸⁵ KOHLRAUSCH-LANGE, STRAFGESETZBUCH, comments to §59, German Penal Code, A. II.2 c, at 218; comments to §42 b, A I 2, at 123 (42d ed. 1959).

⁸⁶ Decision of the Bundesgerichtshof (V. Strafsenat), July 9, 1957, reported in 10 NEUE JURISTISCHE WOCHENSCHRIFT 1484 (1957).

⁸⁷ GLOVER, THE ROOTS OF CRIME 327-338 (1960).

crime, though it led to conviction, is also likely to have been committed in a state of incapacity. A former acquittal by reason of mental incapacity substantiates the probability of a pathological background of crime repetition and thus of danger. But it is necessary to stress at the outset that danger of future criminal activity does not per se justify protective detention, for the crime compulsively repeated may be minor, and it may be found that treatment with a view to prevention can be promoted if the person concerned remains at liberty. A finding of "habitual criminality"⁸⁸ should not by itself be taken to indicate the necessity or the length of detention. Whether detention is warranted and, if so, what its maximum should be depend on the nature and gravity of the anticipated criminal activity and on the effectiveness of detention to serve an ultimate protective purpose. In any event, "recurrence" of criminal conduct as a symptom of dangerousness and as a basis for imposition and choice of measures constitutes a major issue in the law of measures.

Another significant problem in the symptomatology of dangerousness is "conceptual crime concurrence," consisting in commission of several crimes by a single act.

Recurrence of Criminal Conduct. In an address delivered at the Third International Congress on Criminology Professor Manuel López-Rey y Arrojo drew attention to the problem whether in counting the number of crimes committed by an offender, those engaged in during minority should be included.⁸⁹ He pointed to the undesirability of preserving a criminal record of juvenile crimes, from the standpoint of the rehabilitation of the juvenile offender. Yet, crimes committed during minority have a special bearing on the actor's "dangerousness." Other problems arising in the treatment of crime recurrence are whether it is necessary to insist on previous conviction or, indeed, on execution of the previous sentence;⁹⁰ what importance is to be attributed to repetition of the same crime type (specificity) in evaluating

the probability of future crime; what is the significance of the relative degree of gravity of the pertinent crimes; what number of previous criminal activities should be required to warrant qualification as a special crime type; and, what symptomatic role is to be assigned to previous acquittal on the ground of mental incapacity.

It is submitted that all these issues ought to be treated differently in punitive context, that is, as relevant to the punishment for "recidivism," and in the context of measures. No one should be subject to aggravation of punishment on account of a crime committed by him during minority or in a state of mental incapacity or by reason of a crime for which he was not formally convicted. But within the scheme of measures distinctive policy considerations require adoption of different rules. That an offender repeated a pattern of behavior which he adopted before reaching majority should not be deemed an item of "guilt" aggravation. But, as indicated above, the earlier an offender has begun a criminal career, the more likely is he to persist in it; juvenile crime, indeed offenses committed during childhood, bear importantly on the probability of future repetition. For the purpose of administering measures, juvenile crimes ought to be considered indicia of "dangerousness." Neither as regards such crimes nor as regards crimes committed in adult life should proof in the law of measures be required to consist of submission of a record or of a showing of conviction or of sentence execution. But to avoid unfairness, there ought to be proof of previous criminal activity beyond a reasonable doubt. In this context, availability of a criminal record is significant. The argument favoring immediate destruction of records of juvenile crimes, though most persuasive in punitive context, does not apply within the protective scheme in which punitive "guilt" is not in issue. It may be desirable to render such records inadmissible at any time in punitive context but admissible as regards measures.

As regards "specificity" of the crime pattern, whatever may be the rule within the punitive scheme, in the scheme of measures repetition of the same crime pattern may be taken to bear importantly on "dangerousness." But the definition of "specificity" in this scheme must be cast in terms of similarity or relatedness of the profound "motives" that prompted the several acts, whereas similarity of outward conduct may be taken only to be evidence of such similarity or relatedness of

⁸⁸ I am using the term "habitual criminality" to designate repetition of criminal activity by a mentally ill person, to be treated by measures, as contrasted with "recidivism," which I am using in the sense of an exclusively punitive category. See Silving, "Rule of Law" in *Criminal Justice*, *supra* note 6, at 142. For further discussion of "habitual offenders" see *infra*, text at note 97, *et seq.*

⁸⁹ See SUMMARY OF PROCEEDINGS (September 12-18, 1955) 36-37 (British Organizing Committee 1957).

⁹⁰ Art. 67, SWISS FEDERAL PENAL CODE, requires the previous sentence to have been executed.

motivation. Yet, even within the protective scheme invoking a minor criminal activity in evidence of a particular dangerousness of a major crime is dubious. For there is at present no sufficient scientific evidence that a person who has committed a minor crime is generally likely to commit a major one in the future or that a person with a record of a minor and a major crime will in all probability repeat the latter; in the absence of such evidence, an inference to that effect would violate basic standards of "legality." Thus, where a person has successively committed a minor larceny and a homicide, it is unwarranted to infer from the mere presence of the larceny record an increased homicidal "dangerousness," in the sense of a greater probability that he will commit another homicide. But there would seem to be no objection on grounds of "legality" against assuming such person to present an increased danger of repeating the larceny, since crime repetition per se is a factor to be considered in evaluating dangerousness.

Prior acquittal solely on the ground of mental incapacity has a significant bearing on probability of future crime repetition. But in such cases also the probability of repetition inferred from such former acquittal alone should be taken to apply only to equally grave or lesser crimes under consideration.

(*Conceptual*) *Concurrence of Criminal Conduct.* In addition to successive crime or "recurrence" of criminal conduct, wrongly designated as an instance of "crime concurrence," namely, as "factual (substantive or material) crime concurrence" (*concorso materiale di reati, concorso real, concours matériel ou réel, Realkonkurrenz*), there is another multiple crime figure called "conceptual crime concurrence" (*concorso ideale, concorso ideal, concours formel ou idéal, Idealkonkurrenz*). It is a most intricate construct, which for present purposes may be briefly and not quite precisely defined as commission of several crimes by a single act.⁹¹ Where the precipitating act committed in a state of mental incapacity constitutes several crimes, e.g., consists in a single setting of a bomb which causes the death of several persons or in a single movement of putting a match to property which causes the burning of a house and the death

of a person therein, the question arises whether this multiplicity of criminal qualification ought to be taken to bear on the actor's dangerousness.

As stated before, the nature and gravity of the "criminal act" committed by the person concerned have an important bearing on his "dangerousness." These concern both the behavior proper and the ensuing consequences, even unintended ones. The consequences of a person's act are hardly ever accidental, so that even in the absence of foresight or in the case of inadvertent negligence grave consequences may warrant application of security measures. Multiple consequences fall within the category of gravity increase, so that even in the absence of mens rea, multiplicity of harm may be taken as a symptom of dangerousness. Of course, a "natural intent" to produce several consequences may be highly relevant to the issue of dangerousness. It follows that in evaluating the actor's dangerousness the court ought to take into account the fact that by his criminal conduct he fulfilled the external requisites of one criminal statute several times or of several criminal statutes, and that the court may take into consideration the "natural intent" with which he acted.

(d) *Miscellaneous Indicia of "Dangerousness": Personality Evaluation*

The described "indicia of dangerousness" should not be taken as "required conditions," in the sense of conditions which must be found to be cumulatively present to warrant a judgment of "dangerousness." The "act" requirement constitutes an exception, in the sense that a criminal "act" must be present in all cases in which a "measure" is imposed. But this requirement is a "legality safeguard," as are also the maxima imposed upon measures and expressed in terms of correspondence to maxima of punishment for the pertinent crime. To the extent that the above discussed factors are symptoms of "dangerousness" proper, the requirement of the presence of any one of them is governed by rules of scientific rationality. The complex of rules which makes it the duty of the court to consider some of these "symptoms" ("the court shall consider") and authorizes it to consider others ("the court may consider") is in the nature of a "sentencing guide" which, though obligatory in the sense of a comprehensive scheme, is not obligatory in detail. The court "must consider" certain factors and must find the presence or absence in the case of

⁹¹ The concept of "a single act" is most precarious, the term "act" being ambiguous. Adoption of a different basic notion for purposes of definition of "conceptual crime concurrence" is hence desirable. I am using the phrase "a single act" for reasons of space economy.

each; but it may adjudge the person concerned "dangerous" though one or more of these factors are not present, provided that it must state the reason why, notwithstanding such absence, it reached its conclusion. The facultative factors should function only exceptionally as sole, and as a rule as supplementary, grounds of judgment, but failure even to consider them should not constitute reversible error. Much depends on the nature of the particular case. E.g., in a situation of a neurosis or psychopathy "natural intent" may have a different bearing on dangerousness than it has in cases of schizophrenia or mental deficiency.

In the light of the unavoidable flexibility of any guides that may be adopted, expert opinion on "dangerousness" assumes a decisive importance. Such opinion should present an overall "personality evaluation" of the subject, setting forth the nature and etiology of the mental incapacity from which he suffers as well as a "prognosis" and a "recommendation" of appropriate measures. The "prognosis" ought to state the nature and degree of the "danger" which the case presents, if possible in terms of the type or types of crime which the subject is likely to commit. Alternative measures and their relative fitness to accomplish the aim of averting the danger of such crime ought to be suggested, so as to enable the court to weigh the degree of freedom deprivation incident to each alternative against its effectiveness.

(2) *Relativity of "Dangerousness"; "Danger-Adequate Measures"*

It is of the essence of democratic policy-making to weigh considerations of individual liberty against those of the efficiency of harm-preventive measures. This implies diversification of "danger" depending on the nature of the anticipated harm and the degree of probability of its occurrence, and diversification of measures in accordance with the degree of their relative interference with individual freedom. The measure to be imposed, though perhaps not the most effective means of averting the particular danger, should be appropriate, in the light of the balance of the interests in protection and in freedom, to the nature and probable degree of the harm that is being anticipated. Clearly, protracted confinement of a person for fear that he may pass checks without adequate funds may not be justified, whereas such confinement of a person likely to kill another may be fully warranted. The required degree of prob-

ability of harm ought to be in inverse proportion to the degree of the gravity of harm.

Where the precipitating act is homicide or a felony against the person, a danger of further homicide or serious bodily harm may be taken to be implied in the nature of the precipitating act. A minimum measure of confinement ought to be ordered automatically upon proof of such act, the order stating a finding of dangerousness to be based on an irrebuttable presumption.⁹² Confinement beyond such minimum period ought to be predicated upon a specific finding, after an adversary hearing, of a certain degree of probability that the subject will commit further acts of the type he committed. However, the protective need in such cases is so great that the required degree of probability should not be high and that the burden of proof should be shifted to the person concerned. While absolute certainty that such person will never again commit acts of the type in which he engaged can never be achieved,⁹³ it would seem proper to insist on convincing evidence that he is not substantially more likely to kill in the foreseeable future than are average community members.⁹⁴ Conditional release in such instances should be subject to a similar test, except where the terms of such release, e.g., strict supervision, are expressly found to afford an adequate substitute safeguard against harm. A therapeutic need must not be permitted to offset the interest in protecting human life.⁹⁵ The harshness of such

⁹² Such finding stating the facts of the "criminal conduct" and setting forth the presence of dangerousness is necessary as a protection of the subject against arbitrary disposition. There may be most exceptional grounds for dispensing with confinement even where dangerousness would be otherwise irrebuttably presumed, for example, if it can be shown that the person concerned is at the time of the order permanently incapacitated, so that he cannot conceivably repeat a crime of violence, e.g., that he is paralyzed. For further reasons for requiring a hearing, if requested, and an express finding of "dangerousness" even in cases where the latter is otherwise irrebuttably presumed see *infra*, text at note 134.

⁹³ In *Rosenfield v. Overholser*, 262 F.2d 34, 35 n.1 (D. C. Cir. 1958), it was held that the medical witness is not required to "give an absolute guarantee that the patient will never again be mentally ill or dangerous. Reasonable foreseeability, based on careful diagnosis and prognosis by competent persons, is the test."

⁹⁴ The phrase "convincing evidence" is used to denote more than a preponderance of the evidence.

⁹⁵ As to this see *Hough v. United States*, 271 F.2d 458, 462 (D. C. Cir. 1959). Unless adequately supervised, a person released conditionally can cause as much harm as one released unconditionally. If the purpose of confinement in a mental institution of a person acquitted solely by reason of insanity is treat-

requirements is modified by the presence of statutory maxima of criminal law detention.

Where, however, the precipitating act is the passing of bad checks, the protective scheme need not be stringent. Confinement of the person concerned in an institution should be permissible only on the basis of a positive showing by the prosecution either (a) that the likelihood of repetition is rather high and that no fair substitute measure is available which, though it might afford no similar assurance against relapse as does confinement, warrants a fair degree of community protection; or (b) that there is a fair likelihood of a relapse and that treatment with a view to prevention can be better secured in confinement.⁹⁶ Conditional release may be granted on a mere showing of therapeutic advantage. Risks may be taken in this instance, where the harm that may occur is not as irremediable as it is in cases involving a threat of grave bodily harm.

A personality evaluation may show that, though the precipitating crime was not violent, a great likelihood exists that the person concerned will in future turn to violence. To justify detention or more protracted detention than may be otherwise warranted by the nature of the crime committed, a finding of such likelihood ought to be based upon specific convincing evidence. In no event should such finding justify excess over the maximum period allowed in cases of crimes such as the crime charged.

The court should have power to order measures short of confinement, appropriate to the nature and degree of the harm to be averted. Upon a showing by the prosecution that the particular measure is rationally adapted to the type of incapacity from which the actor suffers, the court should be able to order that he submit to psychiatric treatment or to periodic psychiatric checks or to supervision by a psychiatric social worker; that his license to possess or carry arms, to engage in a given profession, occupation, or trade, or to drive a car be suspended; that he abstain from engaging in a certain profession,

ment and not prevention of harm to the community, or if the former purpose overrides the latter, then, by all means, there ought to be a procedure available to take the person concerned out of such detention and transfer him to a different type of detention serving protective needs.

⁹⁶ For examples of measures short of confinement that might be used to avert danger see *infra*. Measures of this type are common in penal codes of civil law countries. In this country they are often imposed as conditions of probation.

occupation, or trade; that he abstain from frequenting certain places or from maintaining certain professional or social contacts; that he change his place of residence; that he make an effort to secure and maintain a regular occupation; etc.

(3) *Special Categories of the Mentally Incapacitated: The "Habitual Offender" and the "Offender Not Susceptible to Punishment"*

(a) *The "Habitual Offender"*

In the foregoing discussion crime committed prior to that which gives rise to acquittal by reason of mental incapacity was viewed as an indicium of dangerousness. Previous acquittal on the ground of mental incapacity was said to be a particularly strong indication of such state. But neither factor alone ought to lead to a finding that the actor is a "habitual offender" subject to a special type of measure. The "habitual offender" has been suggested by the writer to designate an offender type *sui generis*, contrasted with the "recidivist."⁹⁷

"Recidivism" is used by the author as a punitive category, a special "crime type" upon which an aggravated punishment is imposed.⁹⁸ "Habitual criminality" is used in the sense of a pattern of crime repetition followed by a person suffering from a mental illness. As stated in a previous publication,⁹⁹ it is senseless to inquire whether a criminal act committed by a mentally ill person is or is not the "product" of his disease; for every act of any individual emanates from his total personality rather than from any single trait, such as mental disease. In a similar sense, the problem of habitual criminality should not be cast in terms of crime repetition "produced" by disease. Rather, such criminality ought to be defined as a state determined by commission of a series of criminal acts by a person who in all probability, as evidenced by the repeated conduct itself or other symptoms and by a psychiatric personality evaluation, when committing each or some of the acts within the series, suffered from a mental disease, and who is very likely to continue engaging in criminal conduct against which protection is needed. Neither the precipitating incident nor the prior criminal conduct need have led to an

⁹⁷ On this see Silving, "Rule of Law" in *Criminal Justice*, *supra* note 6, at 142.

⁹⁸ Discussion of "recidivism" as a punitive category and its appropriate treatment would exceed the scope of this paper.

⁹⁹ Silving, *Mental Incapacity in Criminal Law*, *supra* note 1, at 63-65, 67-69, 81-82.

acquittal by reason of mental incompetency; each or any of these acts may have resulted in a conviction. Though there has been a conviction for the precipitating act itself, this does not render imposition of a punitive sentence mandatory, since a finding of mental disease may still be made in the course of a post-conviction "pre-sentence investigation." In fact, when repetition of the crime pattern is disclosed after conviction—the issue of recidivism should not be permitted to be raised prior to this stage¹⁰⁰—, it may lead to a reconsideration of the prior finding of mental capacity reached without knowledge of the actor's previous criminal activities, for such repetition is itself an important indicium of mental illness.

Often the acts within the habitual criminality series follow a pattern of minor crime. Persons bent on commission of such acts, particularly petty thievery, are, in the words of Norval Morris, "nuisances rather than serious dangers to society."¹⁰¹ Yet, even in these cases, the constant repetition of the pattern, because of its impact on public morale, represents a danger that should be averted by appropriate measures. Of course, there is also reincidence in serious crime. There is hence a particular public interest in a special device for coping with a phenomenon that, were it not for the subject's mental incapacity, would constitute the special crime figure of "recidivism."

It is submitted that the court should declare the actor a "habitual criminal" where the circumstances of crime repetition, evidenced by either convictions or acquittals by reason of mental incapacity, would, had the actor been punitively responsible, constitute recidivism subject to punishment aggravation, where it is shown by competent psychiatric evidence that he suffers from a mental illness and probably suffered therefrom at the time of some or all of the previous acts, and where further he is found to be "dangerous." This declaration should render him amenable to a detention maximum corresponding to the punishment maximum that may be imposed upon recidivism. In the event of repeated petty crime, such limitation would frustrate any effort at con-

structive preventive rehabilitation. The court should hence be empowered to extend the measure beyond such maximum in order to make adequate treatment possible, but not beyond a certain additional maximum period. However, where the criminal activity habitually engaged in is minor, detention need not be imposed at all. Other measures, for instance ambulatory psychiatric treatment or supervised liberty, may be found more effective for producing a permanent cure and hence more likely to afford a long-range protection of society.

Detention in cases of "habitual criminality" ought to be utilized for treating the offenders. Release on probation should be available where it promotes therapy without endangering the community. Where toward the end of the ultimate maximum period the psychiatrists in charge of treatment certify that the person concerned has not recovered from his mental incapacity and is still "dangerous," in the sense of being likely to commit further criminal acts, he should nevertheless no longer be detained as a "habitual offender," except by way of an emergency measure which would enable the authorities to pursue and terminate civil commitment proceedings. Where within the maximum period such psychiatrists certify that the person concerned is not treatable and the court so finds, he should be assigned for the rest of the period to a workhouse or agricultural colony, with the proviso that toward the end of the maximum period the same type of proceedings are to be instituted as in the case of the "uncured."

It is extremely important that "criminal law measures," particularly those which deprive a subject of his personal freedom, not be unduly "indeterminate" or, indeed, extend to a period that bears no proportion whatever to the gravity of the crimes in issue. The aggravation provided for cases of "recidivism" permits extension of confinement proportionate to the gravity and number of the crimes committed by the offender. The maxima thus permissible and additional maxima for repeated misdemeanors should suffice even in cases of mentally ill persons to afford a reasonable period of treatment with a view to prevention of recurrence. Where a person's "dangerousness" cannot be averted by such "criminal law measures," considerations of public safety must be judged by general standards applicable to the mentally ill, whether of the criminal or the non-criminal type. Unless propor-

¹⁰⁰ Compare *supra*, text and note 23; see also Note, *Other Crimes Evidence at Trial: Of Balancing and Other Matters*, 70 YALE L. J. 763 (1961), on distinctive treatment of "recidivism" as a *sui generis* unit. The writer believes that recidivism constitutes such unit for substantive purposes, but this does not necessarily imply that it must be treated as such procedurally, where the accused might be prejudiced.

¹⁰¹ MORRIS, *op. cit.* *supra* note 46, at 296.

tionality to "crime" is safeguarded even in the scheme of measures, there is danger that crime definitions will lose their meaningfulness as guarantees of "legality."

(b) *The "Offender Not Susceptible to Punishment"*

This category, known in Danish law,¹⁰² designates there a wastebasket category comprising

¹⁰² The principal Danish provision on the mental incapacity exemption is §16, DANISH CRIMINAL CODE 1930, reading thus:

"Acts committed by persons being irresponsible owing to insanity or similar conditions or pronounced mental deficiency are not punishable."

There follows a supplementary provision, §17, reading as follows:

"(1) If, at the time of committing the punishable act, the more permanent condition of the perpetrator involved defective development, or impairment or disturbance of his mental faculties, including sexual abnormality, of a nature other than that indicated in sect. 16 of this Act, the court shall decide, on the basis of a medical report and all other available evidence, whether he may be considered susceptible to punishment.

"(2) If the court is satisfied that the accused is susceptible to punishment; it may decide that a penalty involving the deprivation of liberty inflicted on him shall be served in an institution or division of an institution intended for such persons. If appropriate, the Prison Commission may alter the decision as to where the penalty of imprisonment shall be served. If, during the term of imprisonment, it becomes evident that a continuation of such imprisonment will be useless or will be likely seriously to aggravate the condition of the convicted, then, at the request of the Director of the Prison Service, the case shall again be brought before the court which passed sentence in the last instance. This court shall decide, on the basis of a medical report, whether the penalty shall continue to be served or not.

"(3) If a person in respect of whom preventive measures are taken under sect. 70 of this Act (cf. subsect. (1) of this section) for an offence committed by him has committed another offence, and if he is considered susceptible to punishment for offences of that nature, then, where the latter offence is of minor importance in relation to the offence in respect of which preventive measures are applied, the court may decide that no penalty shall be imposed."

Section 70(1), referred to above, provides that

"Where an accused is acquitted under sect. 16 of this Act or where punishment is considered inapplicable under sect. 17 of this Act, while having regard to public safety it is deemed necessary that other measures be applied to him, the court shall decide on the nature of such measures."

DANISH CRIMINAL CODE 1930 (Giersing & Grünhut transl., Copenhagen: G. E. C. Gad 1958). Section 70 and following deal with pertinent measures.

In an answer given by Denmark to an "Inquiry on the Treatment of Abnormal Offenders in Europe" conducted by the United Nations, §17 of the Danish Criminal Code has been interpreted as follows: "Under section 17 certain abnormal conditions other than those mentioned in section 16 may justify a sentence to special treatment in lieu of punishment. It is stipulated, however, that the condition must be of a more per-

persons suffering from any borderline mental incapacity.¹⁰³ The terms used to define this category, "disturbance of mental faculties," "abnormality," are extremely vague and uncertain.¹⁰⁴ They are interpreted as intentionally formulated in this manner, so as to allow for judicial policy-making. This intention is inferred from an interesting additional provision¹⁰⁵ permitting imprisonment to be discontinued where it appears in its course "that a continuation of such imprisonment will be useless or will be likely seriously to aggravate the condition of the convicted person."¹⁰⁶ But contrary to appearances, in administering the pertinent provisions, courts are said to be guided more by considerations of public safety than by those of individual capacity for resocialization by means of punishment.¹⁰⁷ The advantage of the total scheme, including the cited terms, is said to lie in the indeterminateness and flexibility of measures applied to persons found to fall within the pertinent provisions.¹⁰⁸ But the same scheme has been criticized as failing to give adequate consideration to the need for a certain proportion between the precipitating crime or crimes and freedom deprivation, necessary "even in the case of abnormal offenders."¹⁰⁹

Subject to qualification imposed by the con-

manant nature. Section 17 covers in particular persons having a low degree of mental deficiency and psychopaths; it may also be applied to persons suffering from severe neurosis or being in a psychically abnormal condition, e.g., in connexion with the menopause or as a result of abuse of alcohol or narcotics." 12 *INTERNAT'L REV. OF CRIMINAL POLICY* 3, 4-5 (United Nations St/SOA/Ser. M/12 1957).

¹⁰³ Even as regards the principal incapacity provision, §16, the Danish court has a wide discretion. The basic term of this provision, "irresponsible," though historically associated with the notion of "free will," has been interpreted as at present conveying merely the idea that mental disease, even a psychosis, does not per se justify exemption and that applicability of the latter is ultimately a matter of judicial discretion reached on policy grounds. See HURWITZ, *op. cit. supra* note 67, at 435-36.

¹⁰⁴ On the various meanings of these concepts see *id.* at 163.

¹⁰⁵ DANISH CRIMINAL CODE 1930 §17(2), *supra* note 102.

¹⁰⁶ Flexibility of measures, particularly transfer from a penitentiary to a special institution and vice versa, however, applies only if the person concerned has been classified by the original sentence as falling within §17. On this see Denmark's answer to the United Nations "Inquiry," *supra* note 102, at 88.

¹⁰⁷ See HURWITZ, *op. cit. supra* note 67, at 438-39; Waaben, *Introduction to DANISH CRIMINAL CODE 1930*, *supra* note 102, at 13.

¹⁰⁸ Compare note 106, *supra*.

¹⁰⁹ See Denmark's answer to the United Nations "Inquiry," *supra* note 102, at 88.

siderations of this criticism and, generally, of "legality," the concept of "offenders not susceptible to punishment" is heuristic. Of course, in the writer's view, punishment serves ends other than deterrence and reformation, to which that concept is geared in Danish law. Within a "law-assertive" and "guilt-oriented" punishment scheme, an offender "not susceptible to punishment," that is, a person who shows considerable deviation in his response to punishment from the response to this sanction of the average community members, is very likely to satisfy the terms of the recommended mental incapacity exemption and thus to qualify for measures rather than for punishment. Within the protective scheme, such "non-susceptibility to punishment" may warrant application of special types of measures. Two groups are submitted to be comprised within the category of "offenders not susceptible to punishment": i. the so-called "non-deterrable offender" and ii. the offender whose mental condition is likely to deteriorate as a result of imprisonment.

"Non-Deterrable Offenders." Much energy has been wasted in the administration of the *Durham* rule in determining on a case to case basis whether or not "psychopaths" or "sociopaths" qualify as suffering from a "mental disease,"¹¹⁰ as if the name given to the mental condition of such persons—a condition itself most indeterminate¹¹¹—were a matter of scriptural hermeneutics. No such mental gymnastics are noticeable in Denmark, though the Danish definition of the pertinent concepts is just as vague as that of the *Durham* terms. This is because Danish courts are given the power to shape the sanctioning policy as regards persons initially deemed "susceptible to punishment," provided that the pertinent Code section¹¹² has

¹¹⁰ For criticism see Judge Burger's concurring opinion in *Blocker v. United States*, 288 F.2d 853, 857 (D. C. Cir. 1961); and see particularly the searching analysis of this problem by Chief Judge Biggs in *United States v. Currens*, 290 F.2d 751, 761-63 (3d Cir. 1961).

¹¹¹ *O'Beirne v. Overholser*, 193 F. Supp. 652 (D. C. Cir. 1961). "Neither the clinical characteristics nor the clinical limits of these personality maldevelopments are sharply defined." *Noves & Kolb, op. cit. supra* note 69, at 545. "The extent to which aggressive-destructive and other dynamic impulses may be acted out in sociopathic form before labeling the personality as pathological is a matter of individual opinion and not determined by definite criteria. Likewise there are no fixed types determined by cause, dynamic process or result so that any classification depends upon what manifestations one wishes to stress." *Id.* at 548.

¹¹² DANISH CRIMINAL CODE 1930 §17, *supra* note 102.

been found in the original sentence to be applicable to them. While in the light of "legality" demands the vagueness of the Danish operational terms is as dubious as is that of the *Durham* terms, there is considerable merit in the availability in Danish law of a variety of methods for dealing with the psychopathic offender. Such offender may be initially treated either punitively or by special measures, and even in the course of sentence execution it is possible to reevaluate his response to a given method and adjust his treatment in accordance with new findings. The Danish special institutions for psychopaths, in which new treatment techniques are being developed for this group of "untreatable" persons, are looked upon as models in other countries.¹¹³

It is possible to combine abidance by legality principles with provision for a distinctive treatment of particular offender groups. When a psychopath has qualified for exemption from punitive responsibility by reason of mental incapacity, he need not be assigned to a general mental institution. Evaluation in the Psychiatric and Sociologic Examination Center should include a treatment proposal. In the case of a psychopath such proposal may indicate the desirability of assignment to a special institution for psychopaths patterned after the Danish model. In the event that a person has been convicted and thus not adjudged to have committed the crime in a state of mental incapacity, it may still be possible to transfer him to such special institution upon a finding that he is not "susceptible to punishment," in the sense of not being susceptible to motivation by punishment or by imprisonment in institutions designed for the general class of offenders, for this feature may be taken to constitute "mental incapacity" for the purpose of execution. Such mental incapacity should be defined with a view to the purposes of execution.

Offenders Whose Mental Condition Is Likely To Deteriorate as a Result of Punishment. The second group of offenders "not susceptible to punishment" consists of persons whose illness, by contrast to that of the first group, lies in an excessive conscience. In psychoanalytic literature this group is designated as "criminals from a sense of guilt."¹¹⁴ Far from being deterred by a threat of punish-

¹¹³ See DRAFT OF A GERMAN PENAL CODE, 1960, *op. cit. supra* note 49, §82 (2), and comment at 200-201.

¹¹⁴ Freud, *Der Verbrecher aus Schuldbewusstsein*, *supra* note 35.

ment, such persons commit crime precisely because they unconsciously desire to be punished. Psychoanalysts have accordingly pointed out that punishing such persons aggravates rather than improves their condition. However, there is no need for a special provision for this group of persons, since within the definition of "mental incapacity" that has been recommended, they will probably qualify for measures rather than for punishment. The appropriate measure to be applied must depend on the seriousness of the crime in issue and, within the limits imposed by reason of the nature of such crime, on protective and therapeutic needs.

B. CONSTITUTIONAL AND PROCEDURAL PROBLEMS

In *Ragsdale v. Overholser*¹¹⁵ the petitioner contended that the District of Columbia provisions for automatic assignment of a person acquitted solely on the ground of insanity¹¹⁶ are unconstitutional, since such acquittal requires merely reasonable doubt as to sanity, whereas in a habeas corpus proceeding for release the petitioner is required to prove that he is not "dangerous to himself or to others." This contention raised an issue of considerable significance, but its disposition in decisional law is not satisfactory. In fact, the total area of our procedural "law of insanity" is marked by a lack of consistent policy orientation, which is bound to have serious constitutional law implications.

First, there is no agreement among the judges on the purpose of the mandatory automatic detention. Judge Burger has stated that such detention pursues two purposes: "(1) to protect the public and the subject; (2) to afford a place and a procedure to rehabilitate and restore the subject . . ."¹¹⁷ Judge Fahy has rather stressed "the necessity for treatment of the mental condition

which led to acquittal."¹¹⁸ In *Overholser v. Russell*¹¹⁹ Judge Bazelon pointed out that detention being "invoked only in connection with criminal proceedings, its reach must be limited to the purpose of criminal law. Clearly, the needs of such purpose do not encompass the confinement of those who are not dangerous."¹²⁰

Second, there is no clear notion of the type and degree of danger against which the protective measure of continued detention in a mental hospital may be used. In the per curiam opinion in *Russell* it was said that danger of commission of "any criminal act" is a sufficient ground for denying release;¹²¹ but, as pointed out by Judge Bazelon, this issue remains open since it was not raised by the record and need not have been considered. It is also uncertain that the "danger" must be one of crime commission, for apparently suicide, which is not a crime, is included in the term "dangerous to himself."¹²²

Third, there is no agreement on the degree of proof imposed upon the petitioner in habeas corpus proceedings for release. In *Ragsdale* Judge Burger thought that there must be proof "beyond a reasonable doubt,"¹²³ but Judge Fahy demands merely that "on the evidence and in the circumstances as a whole the District Court should be able to reach a sound judgment one way or the other on the question of release."¹²⁴

Fourth, no satisfactory explanation is offered of wherein exactly consists the "rational relationship between mandatory commitment . . . and acquittal by reason of insanity,"¹²⁵ upon which all the judges insist. This relationship apparently justifies classification of a person thus acquitted as a member of "an exceptional class of people,"¹²⁶ assumed to be

¹¹⁸ Judge Fahy's concurring opinion, *id.*, 949, 950.
¹¹⁹ 283 F.2d 195 (D. C. Cir. 1960).

¹²⁰ Judge Bazelon, concurring in the result only, *id.*, 198, 199.

¹²¹ The court said, *id.* at 198: "[T]he danger to the public need not be possible physical violence. It is enough if there is competent evidence that he may commit any criminal act, for any such act will injure others and will expose the person to arrest, trial and conviction."

¹²² This is not all. The court also pointed out that there "is always the additional possible danger not to be discounted even if remote—that a non-violent criminal act may expose the perpetrator to violent retaliatory acts by the victim of the crime." *Ibid.*

¹²³ 281 F.2d 943, 947 (D. C. Cir. 1960).

¹²⁴ Cited by Judge Bazelon in *Overholser v. Russell*, 283 F.2d 195, 199 (D. C. Cir. 1960).

¹²⁵ *Ragsdale v. Overholser*, 281 F.2d 943, 947-48, 950 (D. C. Cir. 1960).

¹²⁶ *Overholser v. Leach*, 257 F.2d 667, 669-70 (D. C. Cir. 1958).

¹¹⁵ 281 F.2d 943 (D. C. Cir. 1960).

¹¹⁶ *Supra* note 43. The wording of the majority view in *Starr v. United States*, 264 F.2d 377, 382-83 (D. C. Cir. 1958), may be taken to mean that the individual could be released if he showed that he no longer suffered from an "abnormal mental condition." For such reading of the majority view see Judge Bazelon's dissent, *id.*, 383, at 384; also Krash, *supra* note 28, at 946. The situation visualized in this instance, namely, that a person whose mental disease has "caused" the criminal act subsequently recovers his mental health and yet preserves his dangerousness, sheds doubt on the "but for" factor in the original causation.

¹¹⁷ *Ragsdale v. Overholser*, 281 F.2d 943, 947 (D. C. Cir. 1960).

at least *prima facie* mentally ill and dangerous, although "the standards and tests for (1) exculpation from criminal responsibility . . . and (3) release from hospital custody" are "separate and distinct."¹²⁷ Judges concerned with the constitutionality issue advance the view that in the area of constitutional doubt a reasonably prompt shifting to civil commitment proceedings affords the proper solution.¹²⁸ But it is rather dubious that the lack of proper legality safeguards in the original criminal law confinement, or failure to assure a realistic positive substantive relationship between the nature and degree of the danger and imposition of confinement, can be justified by the mere fact that such confinement may be soon replaced by commitment proceedings.

To afford a rational relationship between ends and means, systematization is necessary. This can be afforded only in a planned statutory scheme which reflects a consistent policy giving due comparative weight to public and individual interests. Such systematization must proceed from a diversified notion of "danger" and a discerning scheme of relative "danger-response," and must assign to each "danger-situation," depending on its nature and degree, a "danger-adequate" measure. Such coordination of measures and protective needs must be safeguarded by a strict scheme of procedural guarantees of due process.

As pointed out by Judge Fahy, the seriousness of the precipitating crime is an extremely significant item of consideration in determining whether a measure of freedom deprivation is constitutional.¹²⁹ Judge Fahy was concerned with continuation of a measure which he thought could be properly continued merely because of the acquittal by reason of insanity. But even the initial imposition of the measure may be highly dubious where the crime in issue is minor, though the same doubt can be readily dismissed where the person concerned has demonstrated his serious dangerousness by committing a felony against the person, though in a state of mental incapacity.¹³⁰

Even where the precipitating act is grave, the evidentiary situation is apt to arouse serious preoccupation. It has been stressed that "[i]nherent 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 the defendant suffered from a mental disease or defect of which the criminal act is a product."¹³¹ Presumably, then, the jury ought to be instructed that unless they find proof beyond a reasonable doubt that the defendant committed the act charged they cannot acquit solely by reason of insanity. But when presented with the alternative of acquittal on the ground of insanity, will the jury take the requirement of proof of commission of the act charged "beyond a reasonable doubt" as seriously as it would were such proof to result in a conviction?

Since "dangerousness" is not an element of the "insanity test," it would seem that acquittal by reason of insanity does not imply even *prima facie* a need for detention. "Dangerousness" rather evinces from the commission of the act charged. Such "dangerousness" varies in nature and degree depending on that act. Certain types of acts warrant detention, while others do not, either because measures short of detention may suffice to avert the danger or because the anticipated harm is small, so that the defendant's interest in liberty outweighs the public interest in protection. Moreover, the symptomatic value of the commission of a criminal act may be substantially affected by the surrounding circumstances. Given certain conditions, the inference that the actor is likely to commit a similar act in the future is not very strong. In such cases, it depends on the gravity of the harm feared whether or not taking a risk is constitutionally required. Detention of a person on the basis of a small probability of serious harm may be justified, whereas detention on the

were not intended by Congress to apply to "persons who have engaged in any kind of conduct, however minor, but only [to] persons who have engaged in unlawful conduct of a dangerous character," particularly crimes of violence. But it is somewhat puzzling that Judge Fahy does not at the same time object to the provision for the automatic assignment of such minor offenders to a mental institution, rather assuming that they are sufficiently protected by means of habeas corpus proceedings. The basis of the writ in such cases would seem to be the illegality of the original detention. Is a statute constitutional that provides for a detention that is *ab initio* illegal?

¹³¹ *Ragsdale v. Overholser*, 281 F.2d 943, 948 (D. C. Cir. 1960).

¹²⁷ *Id.* at 670 n.4.

¹²⁸ See Judge Fahy's opinion in *Ragsdale v. Overholser*, 281 F.2d 943, 950 (D. C. Cir. 1960); and see Judge Bazelon's opinion in *Overholser v. Russell*, 283 F.2d 195, 199 (D. C. Cir. 1960).

¹²⁹ *Ragsdale v. Overholser*, *supra* note 128, at 950-51.

¹³⁰ In *Overholser v. Lynch*, 288 F.2d 388, 394, 396-97 (D. C. Cir.), *appeal pending*, 366 U. S. 958 (1961), Judge Fahy, dissenting, expressed the view that the release procedures for persons acquitted solely on the ground of insanity in the District of Columbia

basis of a small probability of moderate harm may be constitutionally improper.

The injustice implicit in an initial imposition of detention subject to later release upon habeas corpus petition is magnified by the shifting of the burden of proof to the petitioner. Additionally, the degree of proof which some judges believe the petitioner must meet, namely, proof "beyond a reasonable doubt," is impossible to meet in matters involving mental life, and particularly where prognosis is in issue. Again, shifting the burden of proof to the petitioner may be justified in some situations but not in others. Where crimes endangering human life and health are involved, such shifting of the burden of proof may be warranted, but where crimes other than these are anticipated, it is extremely objectionable. Whoever has the burden of proof cannot be expected to adduce more than convincing proof.

If measures applied to persons acquitted by reason of mental incapacity are to be deemed constitutional, certain basic requirements must be fulfilled. It is important to keep in mind that, though not "punitive," such measures are "penal."¹³² No purpose other than protection against a danger of future crime commission by the defendant must be the ultimate object of such measures. This means that averting suicide or a threat of provocation of crime of third persons¹³³ is not a proper object of criminal law detention, except in the form of an emergency measure to be replaced without delay by appropriate means of civil protection.

Although the criminal act charged is of such nature and gravity as to give rise to an irrebuttable presumption of dangerousness justifying detention, a hearing should be granted upon defendant's request on the issue of the imposition of measures. In such hearing it should be possible to challenge the court's choice of the place of detention, or the finding of proof beyond a reasonable doubt of the commission of the criminal act adduced during trial. A formal finding of "dangerousness" should be required even where dangerousness is irrebuttably presumed by virtue of the act committed, the court stating the basis of the finding and its evaluation of the evidence at the hearing, if any. As mentioned before, an irrebuttable presumption of dangerousness should obtain where the precipitating act would but for the

defendant's mental incapacity be a felony against the person; commission of such act is believed to warrant detention for a minimum period, varying in length depending on whether the act is a homicide or another felony. The presumption of dangerousness in such cases ought to be rebuttable only if a very long time has elapsed since commission of the act,¹³⁴ and in such event a hearing should be required. Where a felony against the person is not involved, there ought to be a hearing in which the prosecution must prove dangerousness. If the prosecution succeeds in establishing, for example, on the basis of the defendant's antecedents, that he is likely to turn to crimes of violence, confinement may be warranted. It may likewise be warranted where the prosecution shows that there is danger of other serious crime commission and that no measure short of detention can avert it. Any measure other than detention must also be proved by the prosecution to be appropriate to avert the type of danger threatened. In no case should more than convincing proof be required where prediction of future human conduct is in issue. In all cases in which dangerousness or choice of an appropriate measure is in issue, psychiatric testimony ought to be mandatory.

Before lapse of the minimum period of detention in cases of felonies against the person an adversary hearing ought to be held regarding extension or termination of the measure. In this hearing the presumption of dangerousness ought to be rebuttable by appropriate evidence. Provisions ought to be made for mandatory periodic examinations of the issue of continued dangerousness, both in cases involving crimes against the person after lapse of the minimum detention period and in those involving other crimes as well as measures other than detention.

III. CONCLUSION

In legal fields other than the criminal law the method of "trial and error" characteristic of the common law has produced results which, on the whole, should not evoke particular concern. Although it is not always clear against what "truth" error is tested, different individuals may

¹³² See Silving, "Rule of Law" in *Criminal Justice*, *supra* note 6, at 145.

¹³³ See note 122, *supra*.

¹³⁴ In Italian law dangerousness is required to be specifically established by the judge in a formal finding even where it is presumed by law from frequent crime repetition, if the conviction or acquittal by reason of insanity is pronounced after ten years since the day of crime commission in cases involving mentally diseased defendants. ITALIAN PENAL CODE art. 204, para. 2, no. 1.

well find it possible to reconcile these results with their divergent "truth" concepts. But in the area of criminal law this method is highly objectionable, inasmuch as criminal law is authoritarian law *par excellence*, where "man rules over another to the latter's hurt."¹³⁵ "Error" is "tested" at the expense of the subject's most vital interest, his personal freedom. "Trial" at such cost is immoral. Rather, there ought to be a clear policy established in advance, setting forth the legitimate objectives of law in a differential discriminatory

¹³⁵ *Ecccl.* 8: 9.

manner. There must be no freedom deprivation at all unless it is warranted then and there by a legitimate purpose. Nor must there be deprivation in excess of that justified by the particular purpose and the social needs as pertaining to the type of situation involved. Abuse cannot be justified just because it is "remediable," particularly when the person concerned has been found to suffer or to have suffered from a mental incapacity, for such person can hardly be expected to possess those mental qualities upon which effective pursuit of available legal remedies is predicated.