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BOOK REVIEW

THE INSANITY DEFENSE AND A "JURY" EXPERIMENT

ARVAL A. MORRIS*

The two books¹ under consideration deal with the functioning of the insanity defense. While not attempting to cover Professor Goldstein's book in its entirety, I shall extract certain ideas from it, and then by amplification or by illustration from Washington materials, I shall seek further implications. I then set forth a description of the major contents of Professor Simon's book and a few of my criticisms of its views.

The offender who is mentally ill presents the law with problems broader than those that usually fall within the restricted scope of the insanity defense.² The two sets of problems are not always distinguished. As Abraham Goldstein, Professor of Law at Yale, makes quite clear in his altogether worthy and highly recommended book, there are many legal processes that can be applied to the mentally ill, and they compete with the insanity defense in the sense that they offer alternative ways of dealing with a mentally ill offender.

The possibility of invoking legal alternatives begins at least when police officers become aware of some disturbing event in the community.³ Washington, like most states, statutorily authorizes its policemen to apprehend and detain for up to 72 hours "mentally ill persons" who are dangerous, or in need of "immediate care, treatment, or restraint."⁴ Additionally, Washington, like other states, allows "any person," including a peace officer, to make application for the involuntary civil commitment of one who is "mentally ill."⁵ Furthermore,

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¹ Goldstein, Abraham S., *THE INSANITY DEFENSE*. New Haven, Conn.: Yale U. Press (1967). Pp. vii, 289. \$1.95 (paper), and Simon, Rita James, *THE JURY AND THE DEFENSE OF INSANITY*. Boston, Mass.: Little Brown & Co. (1967). Pp. xiv, 269. \$10.00.

² For more discussion see F. LINDMAN & D. McINTYRE, *THE MENTALLY DISABLED AND THE LAW*, chs. 2 and 10 (1961).

³ Earlier, relatives, friends or neighbors may invoke civil commitment procedures, prior to any police having arrived on the scene.

⁴ WASH. REV. CODE § 71.03.020 (1959). In fact, such persons can be, and are, kept much longer than 72 hours. See *State v. Saffron*, 146 Wash. 202, 262 P. 970 (1927), and see Annot. 92 A.L.R.2d 570 (1963). After which, such persons can be proceeded against under the involuntary commitment procedures, see WASH. REV. CODE § 71.02, et seq. (1959).

⁵ WASH. REV. CODE § 71.02.090 (1959) but, before filing, the application must be endorsed by the prosecuting attorney. A committed person loses his rights to vote (WASH. CONST. art. 6, § 3), to practice certain professions (law—WASH. REV. CODE

anyone who is "addicted to the use of intoxicating liquors"⁶ can be adjudged a "common drunkard" and committed if it is determined that he is unsafe to be at large. Commitment for observation and treatment of mental illness is not penal; and does not preclude one from later being tried for a crime.⁷ Thus, the person who is most likely to be called to the scene of an event that disturbs the peace of another—the policeman—must, in a significant sense, decide whether that disturbing event should be classed as a crime invoking criminal law processes, as an action demonstrating the actor's need for "help" from one of our community's social agencies, as an event that justifies invoking temporary or long-term commitment procedures, or, simply, as an event to be ignored altogether.⁸ As Professor Goldstein points out, "the events themselves—acts of violence, thefts, sexual misconduct, drunkenness, or vagrancy—will not point him inevitably in one direction or another."⁹

If the policeman decides that an offender is not to be charged with assault or theft because he believes the offender insane, then the police officer is deciding at the outset the very question that the insanity defense has been designed to test at the much later trial-stage. Yet it is not at all clear that a sensible choice between invoking criminal law processes or civil commitment procedures can be made at this early stage. Nor is there much evidence available to tell us how the police actually respond to the choices open to them, or, indeed, whether they are aware of the range of available choices. Actual police choice is likely to be an amalgam of the police officer's personality, values and job conditioning. Furthermore police tend to see anti-social behavior

§ 2.48.220(11) (1956), and medicine—WASH. REV. CODE § 18.72.030(14) (1957)), to drive an automobile, (WASH. REV. CODE § 46.20.030(4) (1961)) and to possess firearms (WASH. REV. CODE § 9.41.080 (1956)). See generally 19 STAN. L. REV. 992 (1967). Obviously, a committed person, and his family, lose wages, and probably his job, plus acquiring the social stigma of having "been committed." If not otherwise requested, by an appropriate person, the hearing on commitment is closed. Compare Kutner, *The Illusion of Due Process in Commitment Proceedings*, 57 Nw. U.L. REV. 383 (1962), and Comment, *Civil Commitment of the Mentally Ill: Theories and Procedures*, 79 HARV. L. REV. 1288 (1966), with Weihofen, *Hospitalizing the Mentally Ill*, 50 MICH. L. REV. 837, 848 (1952).

⁶ WASH. REV. CODE §§ 71.08.030 and .040 (1959). But see *Seattle v. Hill*, 72 Wash. Dec. 2d 778 (1967).

⁷ *State v. Bonner*, 53 Wn. 2d 575, 335 P.2d 462 (1959). This can create confusion as to the role of counsel at the commitment hearing, and at trial. Compare Szasz, *Civil Liberties and the Mentally Ill*, 9 CLEV.-MAR. L. REV. 399 (1960), with Cohen, *The Function of the Attorney and the Commitment of the Mentally Ill*, 44 TEXAS L. REV. 424 (1966), and *State v. Super. Ct. King Co.*, 59 Wn. 2d 872, 371 P.2d 51 (1962).

⁸ See generally Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543 (1960).

⁹ GOLDSTEIN at 172.

criminally,¹⁰ not medically, thus erring in the direction of moving mentally ill offenders into criminal law processes. In final analysis police resolution of the competing choices available to them may affect the insanity defense by (1) removing mentally ill persons from the criminal law processes, thereby reducing the total number of persons available who might, at a later date, invoke the defense; (2) by keeping the mentally ill offender in the criminal law processes, but alerting the prosecutor to the offender's condition so that the prosecutor may prepare (a) evidence to rebut an anticipated insanity defense, or (b) papers to raise the question of competency to stand trial, or (c) civil commitment proceedings; and (3) affording police officers themselves an opportunity to institute civil commitment proceedings that may result in indeterminate detention.¹¹

The prosecutor, like the policeman, has virtually uncontrolled choice when selecting either civil commitment or criminal proceedings for a mentally ill offender. However, in Washington as in other states, the prosecutor's range of choice is broader than that of the police because, in addition to having the options open to the police, he is authorized to proceed against certain mentally ill offenders when he believes them to be either "sexual psychopaths"¹² or "psychopathic delinquents."¹³ These broadly defined categories genuinely compete with the insanity defense.¹⁴ Furthermore, after receiving a charge from the police, a prosecutor may choose not to prosecute at all, and his discretion is practically unreviewable in the courts.¹⁵ Thus, when confronted

¹⁰ See, J. SKOLNICK, JUSTICE WITHOUT TRIAL, ch. 3 "A Sketch of the Policeman's Working Personality," at 42-70 (1966); Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603, 633 et seq. (1956).

¹¹ As Goldstein points out at 175 and elsewhere, the police, or prosecutor, may prefer the indeterminate detention of civil commitment where (1) a criminal sentence appears too mild, or (2) where the defendant may not invoke the insanity defense but stands a high probability of being acquitted, and the police, or prosecutor, believe that the offender ought not be freed.

¹² WASH. REV. CODE §71.06.020 (1959); see generally di Furia and Mees, *Dangerous To Be At Large—A Constructive Critique of Washington's Sexual Psychopath Law*, 38 WASH. L. REV. 531 (1963).

¹³ WASH. REV. CODE §71.06.150 (1959). This petition may be filed by a parent, guardian, prosecuting attorney, any official of a public or private welfare agency, and by the superintendent of any state institution, among others.

¹⁴ See WASH. REV. CODE §71.06.010 (1959); e.g., "Psychopathic personality" means "the existence in any person of such hereditary, congenital or acquired condition affecting the emotional or volitional rather than the intellectual field and manifested by anomalies of such character as to render satisfactory social adjustment of such person difficult or impossible."

¹⁵ There must be a clear showing of corruption or bad faith before the courts will intercede; see, e.g., *United States v. Cox*, 342 F.2d 167 (5th Cir. 1965); *State v. Langley*, 214 Ore. 445, 323 P.2d 301 (1958); *Howell v. Brown*, 85 F. Supp. 537 (D. Neb. 1949); *United States v. Brokaw*, 60 F. Supp. 100 (D. Ill. 1945); *Brack v. Wells*, 184 Md. 86, 40 A.2d 319 (1944), and Note, *Prosecutor's Discretion*, 103 U. PA. L. REV. 1057 (1955).

with a mentally ill offender, a prosecutor may have the following options available: (1) to prosecute for the crime, leaving it to the accused to raise the insanity defense; (2) to initiate ordinary civil commitment proceedings; (3) to initiate "sexual psychopath" or "psychopathic delinquent" proceedings; or (4) to refuse all the above, leaving the matter for someone else. The result of this vast area of basically unreviewable prosecutorial discretion is that the great bulk of the decisions are made informally, perhaps for administrative or other reasons, which do not seem to be recorded or available for critical analysis. Thus, there is no direct way of assessing how well prosecutorial discretion is working.

Scholarly assessments are especially difficult in Washington. Unlike the great majority of other states,¹⁶ and the federal practice,¹⁷ Washington has no requirement that every person taken into custody without a warrant by the police be taken before a magistrate for a preliminary hearing to determine whether probable cause exists for charging that person with a criminal offense.¹⁸ In addition to putting an impartial screening tribunal between the accused and a possible criminal trial, thereby functioning as a check on possible abuse of police and prosecutorial discretion, a mandatory preliminary hearing could produce a record which yields insights into exercises of prosecutorial discretion, protects an accused from illegal detention, and deters illegal arrests.¹⁹ It could also provide an opportunity for Washington

¹⁶ A survey of statutes governing an accused's rights to a preliminary hearing in England, Scotland, France, Italy and the United States appears in the commentaries to ch. 2, ALI, CODE OF CRIM. PROC. 266 et seq. (1931).

¹⁷ FED. R. CRIM. P. 5(a).

¹⁸ Although aimed in the right direction, the recently adopted criminal rules for courts of limited jurisdiction, *see* Rules 1.01 et seq. in WASH. REV. CODE Vol. "O," do not meet this problem. Rule 2.03(b) provides that when a person is arrested without a warrant, he must be taken to jail; and "if the offense with which he is charged is subject to bail," and "if his physical condition warrants," and if it is "practicable" (presumably in the discretion of the police), then, "the person arrested . . . shall be permitted to deposit bail." It should be noted that there is no requirement that the person arrested actually be charged with a crime, but rather, the rule *assumes* that a charge will be made. Rule 2.03(c)(3) does not remedy the situation, for it, too, assumes a charge and an appearance before a judge. It provides that if "the offense charged is not bailable," then, the arrested person must be taken before "the nearest judge" "without unnecessary delay." Thus, the rules simply require that an arrested person be taken to jail where further proceedings can take place. Furthermore, there is no sanction in the rules, or elsewhere, for failure to take an arrested person to jail, or in the appropriate case, before the nearest judge "without unnecessary delay." Thus, the needed stimulus to assure compliance with the rules appears lacking.

¹⁹ "A person is arrested. It may very well be that even the most superficial look at the facts would at once show that he could not possibly be guilty of the offense charged. It is nothing more than obvious fairness to him, then, that he should be discharged at the soonest possible moment. Accordingly, promptly after an arrest the arrested person is entitled to be brought before a judge—in this phase of the work

magistrates to question the capacity of the mentally ill offender to stand trial. While Washington does provide for a preliminary hearing procedure, its use is optional at the discretion of law enforcement officials.²⁰ Thus, it should be clear that Washington's discretionary preliminary hearing procedures cannot be relied upon to protect an accused, to deter illegal arrests,²¹ to provide necessary opportunities for raising questions about a mentally ill offender's capacity to stand trial, or to provide records from which scholars might glean clues to the working adequacy of prosecutorial discretion.

After an information has been filed but prior to the beginning of a criminal trial, two procedures, competency to stand trial and plea bargaining, compete strongly as alternatives to the insanity defense. A basic notion in American criminal law is that no accused may be tried, sentenced or executed while insane.²² He must be competent to

we usually refer to him as a 'magistrate'—so that the latter may decide whether, if the state's evidence is true, it presents a strong enough case to warrant holding our man for further proceedings, or whether the showing is so weak that there is no chance of a conviction. If the former is the case then it is the magistrate's duty to set the bail. If the latter, then the accused is entitled to his immediate liberty and the case ends then and there. From this it will be plain that the preliminary examination is a stage in the entire proceedings which is almost wholly to the advantage of the accused..." Puttkammer, *Criminal Law Enforcement* 6 (U. of Chi. L. Sch. Papers, 1941) quoted in M. PAULSEN & S. KADISH, *CRIMINAL LAW AND ITS PROCESSES* 918 (1962).

Prosecutors use the procedure when they wish to test under oath some shaky testimony before filing an information, or as a discovery technique. It would seem that Washington's procedure, which seriously upsets the relatively equal balance of contending forces, and which favors the state, may well place undue discretion in the prosecutor, and place throttling controls on the proper functioning of the adversary system. See Dession, *From Indictment to Information—Implications of the Shift*, 42 *YALE L.J.* 163 (1932), and Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 *YALE L.J.* 1149 (1960).

²⁰ Pennington v. Smith, 35 Wn. 2d 267, 270, 212 P.2d 811, 812 (1949): "Where, however, the prosecutor elects to proceed independently, he... may file an information on his own authority."

Under WASH. REV. CODE § 10.16.010 (1956) there is no requirement that an arresting officer or prosecuting attorney must file a complaint without unnecessary delay upon the arrest of a person without a warrant, and, according to *Id.* at 270, 212 P.2d at 812: "A preliminary hearing is not necessary to due process."

²¹ The awesome extent of illegal arrests is little known. However, the FBI Uniform Crime Reports show that an arrest on suspicion is common police practice in this country. Obviously, since there is no such crime, these arrests are all illegal. For example, those arrested in 1956 on "suspicion" and then released without there being any prosecution whatsoever, ran at the rate of 280.4 people per 100,000 inhabitants. (FBI, Uniform Crime Reports, No. 1, Semiann. Bull. 65 (1957)). The figure for arrests on suspicion in 1958 was 96,740. (1958, *id.*, at 93), and in 1962, the figure climbed to 121,218. 1962, *id.*, at 93, table 19). See generally Fraenkel, *From Suspicion to Accusation*, 51 *YALE L.J.* 748 (1942), and Hall, *The Law of Arrest in Relation to Contemporary Social Problems*, 3 *U. CHI. L. REV.* 345 (1936).

²² Conviction of an accused while he is incompetent violates the "due process" clause, *Bishop v. United States*, 350 U.S. 961 (1956), and state procedures must be adequate to protect this right. "The trial, adjudication, sentence, or execution of a person charged with a criminal offense, while insane, is a violation of due process

appreciate and participate in the criminal processes. There are several interrelated reasons for this basic notion: assisting counsel develop the facts of the case and rationally participating in the defense,²³ understanding the nature and consequences of a criminal trial, and appreciating alternative choices available.²⁴ Since Washington appears to be the only state without a statutory provision defining the test of competency to stand trial,²⁵ it would seem that the common law would be applied.²⁶

The conviction of an accused while he is legally incompetent violates his constitutional right to a fair trial under the Fourteenth Amendment's "due process" clause.²⁷ Furthermore, the states are under an affirmative constitutional duty to devise procedures adequate to protect this right, and the trial judge must be assured that there is no bona fide doubt as to a defendant's competency to stand trial.²⁸ If there is reasonable doubt, a competency hearing must take place despite an accused's failure to request such a hearing. While an ac-

of law..." *People v. Burson*, 11 Ill. 2d 360, 143 N.E.2d 239 (1957), and *see Massey v. Moore*, 348 U.S. 105 (1954); *Smith v. Baldi*, 344 U.S. 561, 571 (1953) (dissent); *People v. Berling*, 115 Cal. App. 2d 255, 251 P.2d 1017 (2d Dist. Ct. App., Div. I, 1953), and *see State v. Henke*, 196 Wash. 185, 82 P.2d 544 (1938), and *State v. Strasburg*, 60 Wash. 106, 110 P. 1020 (1910).

²³ These themes run through the cases collected in 3 A.L.R. 94 (1919). Usually, a defendant can be tried if he is "capable of understanding the nature and object of the proceedings and can conduct his defense in a rational manner..." *State v. Severn*, 184 Kan. 213, 336 P.2d 447, 452 (1959); *see H. WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE* 428-75 (1954), and Comment, *Competency to Stand Trial*, 59 MICH. L. REV. 1078 (1961) for comparisons with American Law Institute's Model Penal Code.

²⁴ The rights to be exercised would include, at least, those of choosing and assisting counsel, confronting witnesses, and testifying in one's own behalf. If a defendant's mental state precludes the possibility of his exercising these rights, then, effectively, they do not exist. "Mere physical presence without mental realization of what was going on would be of no value to the accused—the accused person must be both physically and mentally present." Note, *Ability To Stand Trial—Amnesia*, 8 KAN. L. REV. 132, 134 (1959).

²⁵ F. LINDMAN & D. MCINTYRE, *THE MENTALLY DISABLED AND THE LAW* 359, and *see Table XI-B at 392 and n. 21 at 395* (1961).

²⁶ "This court has never been called upon to determine the test of the sanity or insanity of a defendant during the trial or at the time of judgment. Since there is no statute relating to the test of sanity or insanity of the defendant during the course of the trial, we must revert to the common law test."

"The general rule at common law is that the test of a defendant's present sanity during the trial and at the time of sentencing is not the right and wrong test, but the test is whether one is capable of properly appreciating his peril and of rationally assisting in his own defense. If he is not, then the defendant is of such unsound mind that he may not be tried, sentenced, or punished." *State v. Henke*, 196 Wash. 185, 192-93, 82 P.2d 544, 548 (1938), and *see State v. Callas*, 68 Wn. 2d 542, 413 P.2d 962 (1966); *Bonner v. Rhay*, 57 Wn. 2d 670, 359 P.2d 157 (1961); *State v. Bonner*, 53 Wn. 2d 575, 335 P.2d 462 (1959), and *Forthoffer v. Swope*, 103 F.2d 707 (9th Cir. 1939). *But see State v. Schafer*, 156 Wash. 240, 286 P. 833 (1930).

²⁷ *Bishop v. United States*, 350 U.S. 961 (1956) (per curiam).

²⁸ *Pate v. Robinson*, 383 U.S. 375 (1966), noted in 12 VILL. L. REV. 655 (1967).

cused's demeanor at trial might be relevant to the ultimate decision, if there is uncontradicted testimony on an accused's pronounced irrational behavior, then his demeanor at trial "cannot be relied upon to dispense with a hearing on that very issue."²⁹ A procedure like Washington's,³⁰ which provides that an accused waives his defense of competency to stand trial by failing to demand a sanity hearing, will not be held adequate.³¹ However, Washington's Supreme Court has long held that a trial "court is possessed of the inherent power and jurisdiction to conduct such inquiry [competency to stand trial] without regard to statutory authority therefor";³² thus, it should not be difficult for Washington's courts to comply with the requirements of fair trial under the Fourteenth Amendment's "due process" clause.

The requirement that a defendant be competent to stand trial may competitively affect the insanity defense in two ways. It may reduce further the number of persons who could later raise the insanity defense during trial because a mentally ill offender who successfully raises the competency question is usually removed from the criminal law processes. This is especially significant for the insanity defense if only a short time has passed between the alleged crime and the successful raising of the competency question; in this situation, there is a

²⁹ *Id.* at 385. Compare *State v. Wilks*, 70 Wash. Dec. 2d 603, 424 P. 2d 663 (1967), quoting *Pate v. Robinson*, *supra*.

³⁰ WASH. REV. CODE § 10.76.020 (1956), confusingly links the insanity defense and competency to stand trial, providing that if an accused desires to plead the insanity defense, or incompetency to stand trial, he must "at the time of pleading to the information or indictment file a plea in writing... setting up (1) his insanity... at the time of the commission of the crime charged, and (2) whether the insanity or mental irresponsibility still exists, or (3) whether the defendant has become sane..." Washington's Supreme Court early held that an accused's competency to stand trial may be inquired into only when an accused pleaded insanity at the time of commission of the act (and thereby confused the two tests of mental competency), *State v. Schrader*, 135 Wash. 650, 238 P. 617 (1925) (*see State v. Schneider*, 158 Wash. 504, 291 P. 1093 (1930)); that "the defense of insanity is not raised by a plea of not guilty." *State v. Bonner*, 53 Wn. 2d 575, 587, 335 P.2d 462, 469, (1959), and that if defendant does not plead insanity, then he will be held to have waived his defense of incompetency to stand trial. *Meacham v. Seattle*, 69 Wash. 235, 124 P. 1125 (1912). Recently, Washington's Supreme Court has started backing away from its prior position, *see State v. Dodd*, 70 Wash. Dec. 2d 491, 424 P.2d 302 (1967); *State v. Wilks*, 70 Wash. Dec. 2d 603, 424 P.2d 663 (1967), and *State v. Hawkins*, 70 Wash. Dec. 2d 673, 425 P.2d 390 (1967).

³¹ *But see Pate v. Robinson*, 383 U.S. 375 (1966). "But, it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." *Taylor v. United States*, 282 F.2d 16, 23 (8th Cir. 1960). *See Pate v. Robinson*, *supra*, at 384.

³² *State ex rel. Mackintosh v. Super. Court*, 45 Wash. 248, 251, 88 P. 207 (1907), and *see State v. Peterson*, 90 Wash. 479, 156 P. 542 (1916). The test of competency to stand trial is found in *State v. Henke*, *see note 27, supra*. Federal habeas corpus is available to an accused should the state courts fail to protect his right to a competency hearing. *See Rhay v. White* 385 F.2d 883 (9th Cir. 1967), and *Wright & Sofaer, Federal Habeas Corpus for State Prisoners*, 75 YALE L.J. 895 (1966).

greater likelihood that the accused could raise the insanity defense successfully.³³ Secondly, because the competency question can be raised by a prosecutor, it might be used to avoid an anticipated insanity defense and "to obtain an indeterminate commitment of the accused without proving a prima facie case against him, without showing that he is presently dangerous, and without showing that a restoration to competence is at all possible."³⁴ Thus, competency procedures can compete strongly with the insanity defense if prosecutors come to look upon trials involving the defense as "impracticable, time-consuming, expensive and largely irrelevant to the concerns of appropriate dispositions" while simultaneously favoring competency proceedings because they are an administrator's delight, being "relatively easy to invoke, providing expert yet inexpensive psychiatric evaluation [and] procedurally ambiguous enough to embrace conflicting and competing motivations and . . . flexible enough to permit a rich exercise of discretion."³⁵

The plea bargaining process is probably the most important competitor to the insanity defense. This process frequently ends with either a plea of guilty or with an agreement not to set forth an insanity defense in return for a prosecutor's promise of a reduced sentence which can be viewed by the mentally ill accused, or his counsel, as preferable to an indeterminate sentence in a maximum security section of a mental institution if the insanity defense succeeds. This last point gains significance as treatment possibilities become available to inmates of penal institutions. In such instances, the convicted offender who is mentally ill not only obtains the needed treatment but also obtains the advantages of a fixed and reduced sentence which may well prove shorter and more beneficial than the indeterminate commitment facing a defendant who successfully pleads the insanity defense. To the extent that treatment is made available in penal institutions, one can predict that defense counsel will become more reluctant to plead the insanity defense, or more willing to bargain it away for a lesser sentence. By combining this last consideration with the fact that more than 90 per cent of all formal charges of crime are resolved

³³ GOLDSTEIN at 268, reports that a study made by Smith *et al.*, *Mental Competency Proceedings In Federal Criminal Cases*, 75 PUB. HEALTH REP. 595 (1960) indicates "that 40 percent of the persons returned to court as competent, after a finding of incompetency to stand trial, are acquitted by reason of insanity." *But see* Bonner v. Rhay, 57 Wn. 2d 670, 359 P.2d 157 (1961), and State v. Bonner, 53 Wn. 2d 575, 335 P.2d 462 (1959).

³⁴ GOLDSTEIN at 185.

³⁵ MATTHEWS, MENTAL ILLNESS AND THE CRIMINAL LAW 3 (1967).

with a plea of guilty,³⁶ and that we cannot know what part of this 90 per cent might have had a bona fide insanity defense, we see another major process competing with the insanity defense.

Thus, the insanity defense fails to cope with the broader set of problems presented by mentally ill offenders. They are subject to competing alternatives at almost every step in the criminal process from arrest to trial. The competing choices that are legally available, whether those of police, prosecutor or defense counsel, show that the insanity defense is threatened with the danger of being absorbed by its alternative processes. These competitive alternatives reveal what Professor Goldstein believes to be the defense's most significant characteristic: "its almost accidental quality."³⁷ In fact, Kalven and Zeisel report that the number of insanity defenses pleaded by defendants in jury trials is only two for every 100 criminal trials, or a mere 2 per cent for the nation as a whole.³⁸ Statistically, at least, the insanity defense is not very significant.

Given the low statistical incidence of the insanity defense in criminal trials, a question arises: why has it fomented more discussion over the past century than any other issue in criminal law? The answer is not altogether clear. However, one consideration appears relevant. Each of us must develop and maintain personal control over our aggressive impulses, and this is no easy task. We tend to hold ourselves, and others, responsible for every act. From childhood, each of us is subjected to a system of rewards and punishments designed to make us feel obligations of responsibility to ourselves, our families, community and nation. We are taught to believe that the obligation of developing responsibility is ours, individually. Whenever a man loses his self-control, gives way to his aggressive impulses, commits a heinous crime and then asserts that he is not responsible for it, each of us is endangered to the extent that we look upon ourselves as a person capable of committing the same act. A man's plea of irresponsibility in such a situation threatens to weaken our personal controls over our aggressive impulses. In this situation, we find ourselves in conflict between our feelings of self-blame and a desire to blame others. In addition, there is the necessity of deciding whether the

³⁶ See J. SKOLNICK, *JUSTICE WITHOUT TRIAL* 13-14, and notes thereto, 113-115 (1966).

³⁷ GOLDSTEIN at 190.

³⁸ H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 18 and see 19-20, 25-27, 125, 314-15, 444 (1966), and Note, *Official Inducements To Plead Guilty*, 32 U. CHI. L. REV. 167 (1964).

offender should be condemned as a criminal or regarded generously and compassionately as mentally ill. Another complicating factor adds to the overall problem. The insanity defense tends to be asserted in trials involving serious crimes, and this factor intensifies the cross currents of conflicting considerations. Thus, the insanity trial seems to capture universal forces, bringing them dramatically to focus in a legal setting of extraordinary complexity. These notions account, in part, for the attention that the defense has received.

Most of the scholarly discussion about the insanity defense has related to the wording of the various tests of insanity. But, this can only be a beginning for a more profound consideration of the defense's procedural context, leading ultimately to fundamental questions about crime and responsibility. Professor Goldstein seeks to deal with each of these areas, devoting 52 pages to a discussion of the alternative tests of insanity—*M'Naughton*, *Irresistible Impulse*, *Durham*, and *The New Rules*, which cannot be reviewed here.³⁹ In addition, he includes 18 pages on problems of pleading, proof and presumptions, plus a stimulating 18-page discussion on some very interesting problems inherent in securing expert witnesses, primarily psychiatrists, for an indigent accused. If these witnesses are unobtainable, then, the insanity defense is effectively denied. In the final portion of his book, in addition to discussing the trend toward subjective liability, Professor Goldstein addresses himself to the serious problems posed by an acquittal by reason of insanity. Because commitment of an accused almost invariably follows a jury's verdict of not guilty for reason of insanity, and because it is extremely difficult to obtain a release from such commitment, Professor Goldstein points out that we have, in effect, created a situation of preventive detention. Indeterminate detention poses obvious threats to liberty, but also it obviously affects defense counsel's willingness to plead the insanity defense.

Interestingly, Professor Goldstein's ultimate conclusion is that the wording of the insanity defense is not of primary importance and has received more attention than it deserves. He believes that the words of the test are only a small part of the more important criminal process which includes testimony of experts and laymen, examination, cross-examination, instruction, argument and counterargument. For Professor Goldstein, the real significance of the competing insanity formulas lies in the ways in which they can be made to function: will

³⁹ The test of criminal insanity is the subject of another article in this issue of the law review, appearing at 583.

one of them admit more evidence, use expert testimony better, or encourage juries to acquit or convict more defendants? These are interesting questions, but, as he points out, "we cannot even say very much about how the competing formulations are, in fact, understood and applied by judge, jury, counsel and defendants."⁴⁰ Thus, we are in need of information about these legal processes.

In her book,⁴¹ Rita James Simon, Professor of Sociology at the University of Illinois, tries to supply some of the needed information. She seeks to understand the ways in which a jury actually behaves in the jury room when deciding a criminal case involving the insanity defense. The book is part of the total jury project being conducted at the University of Chicago.⁴²

Actual jury deliberations are, of course, closed to investigators, and there was no way for Professor Simon to record real jury deliberations. Thus, her conclusions do not rest on any direct evidence showing the actual way in which a jury behaves in the jury room during its deliberations in real cases. Instead, her book rests on evidence that was the result of a "jury experiment."⁴³

This experimental jury study rests essentially on a housebreaking case and an incest case.⁴⁴ Each turns solely on the jury's acceptance or rejection of the insanity defense. Transcripts of actual cases were obtained⁴⁵ and edited. The aim was to produce an "experimental

⁴⁰ GOLDSTEIN at 225.

⁴¹ R. SIMON, *THE JURY AND THE DEFENSE OF INSANITY* (1967).

⁴² The jury project at Chicago is the most elaborate and expensive foray into law and behavioral science. Some fifteen years ago the Ford Foundation handsomely financed it, and since then we have been beset with a sense of expectation as the project's staff members fed a steady flow of articles into the law reviews hinting at the secret, inner world of the jury soon to be revealed. Finally, in 1966, the first major book, *THE AMERICAN JURY*, was produced. But it is disappointing. It is not a book about the American jury, or the American jury in criminal cases, although the volume is restricted to a study of criminal juries. The book is actually a detailed report on the extent to which juries and judges disagree in criminal cases, commentary upon believed reasons for their disagreements, and the ways in which a skillfully developed research design might be important to these issues. It is a significant work, but not definitive, and much remains to be done. The volume under review here, on the jury and the insanity defense, is the second to appear; also, there will be a book on the civil jury.

⁴³ The technique of conducting jury experiments within the institutional context of courts is described by its originator in Strodbeck, *Social Process, The Law, and Jury Functioning*, in *LAW AND SOCIOLOGY* 149 (W. Evan ed. 1962). Professor Strodbeck was director from 1953 to 1960 of the Experimental Jury Section of the Jury Project at the University of Chicago.

⁴⁴ It appears that the incest case was selected because it afforded opportunities to examine reactions to a heinous offense without the bedeviling problem of capital punishment. SIMON at 50.

⁴⁵ The housebreaking case transcript was the famous *Durham v. United States*, 241 F.2d 862 (D.C. Cir. 1954), and the incest case transcript came from *United States v. King*, Dkt. No. 655-5 (D.C. Cir. 1956).

transcript" that could be recorded and played back in about 60 to 90 minutes; whereas, the original trial had lasted two or three days. Other than corroborative, factual testimony,⁴⁶ Simon does not tell us precisely what materials were omitted, and thus, evaluations of the experiment's realism on this point are not possible.

The "experimental transcripts" were changed in another way: certain "experimental" materials were added to them. The transcripts were first divided into three groups, each including a different instruction on the test of insanity: (1) the *M'Naughton* "right-wrong" instruction; (2) the *Durham* "product of mental disease" instruction, and (3) an instruction that omitted any reference to a test of insanity.⁴⁷ Secondly, changes were made in the testimony of psychiatric experts to fit the *M'Naughton* or *Durham* requirements. Furthermore, two versions of the psychiatric testimony were developed: a "model" version (fully developed case history, explanations, etc.) which was drafted in consultation with psychiatrists who had courtroom experience and were critical of existing procedures; and the "typical" version which was the actual testimony given in the incest trial. Thirdly, in half of each of the three divisions of the transcripts the jury was instructed that if they found the defendant not guilty by reason of insanity, then the defendant automatically would be committed to a hospital for the mentally ill. The other half of these transcripts carried no instruction on the procedure for committing or releasing the defendant should the jury find him insane. Once the transcripts had been prepared, they were recorded, with the parts of the principals in the two cases being portrayed largely by members of Chicago's law faculty.

Permission had been obtained from the courts and bar in Chicago, St. Louis and Minneapolis to play these recordings in a courtroom to people who had been selected for regular jury duty in those cities. The first twelve names that the clerk pulled out of the local jury pool were automatically assigned to the experiment. Thus, the "juries" were not subjected to any voir dire or pretrial examination. A judge then instructed the "jury" on its obligations, that the court was very interested in the experiment, and that their verdicts would have no immediate practical consequences. They were also told that their "de-

⁴⁶ SIMON at n. 9.

⁴⁷ It was: "If you believe the defendant was insane at the time he committed the act of which he is accused, then you must find the defendant not guilty by reason of insanity." SIMON at 46.

liberations" would be recorded. Before listening to one of the prepared tapes, each "juror" filled out a questionnaire that asked questions about age, job, marital status, ethnic background, religion, education, income, and so forth. The "jurors" then listened to the recorded experimental transcripts, but were interrupted for lunch.⁴⁸ After the tapes were played each "juror" filled out another questionnaire on which he stated how he would decide the case at that time; *i.e.*, prior to "jury deliberations." Deliberations ensued, and after reaching a conclusion, the "jury foreman" reported it to the experimenter. Then, each "juror" filled out another questionnaire regarding their reactions to the "trial," "deliberations," and whether each of them would have decided as the group did. Finally, they were taken back to a judge to report their verdict, thanked, and sent back into the regular jury pool.⁴⁹ Three hundred sixty "jurors" were exposed to the housebreaking transcript and 816 to the incest "trial."

Given the nature of the research design, it was believed that "juror" reactions could be obtained for the three experimental variables: the different insanity rules, expert psychiatric testimony, and commitment instruction. When polled individually, before "deliberations," the vote in the housebreaking experiment was two-thirds favoring insanity and one-third for guilty, regardless of the instructed rule of insanity. After "deliberations," the group decisions maintained the same general pattern: 56% favored insanity, 17% voted for guilt, and 27% hung. The "jurors" who received no instruction on the test of insanity returned the highest proportion of decisions not guilty by reason of insanity, while those exposed to the *M'Naughton* instruction returned the lowest proportion, and *Durham* "jurors" fell in between. Interestingly, while there was a significant difference between the decisions of the "jurors" instructed on *M'Naughton* and those who were *uninstructed*, there were no significant differences in the decisions of the "jurors" instructed on *M'Naughton* and *Durham*. The votes in the incest experiment followed a somewhat similar pattern, but in reverse. Before "deliberations," 71 percent voted for guilt, 13 percent for insanity, and 16 percent hung. After "deliberations" it was one-third for insanity and two-thirds for guilt. The most important consideration was

⁴⁸ The luncheon break was intentionally designed to give the "jurors" a chance to get to know each other before they "deliberated." SIMON at 37 n. 5.

⁴⁹ My description of the project is derived primarily from ch. 2, describing the method and research design which is not as clear and direct as one would expect, its pages being cluttered by argument, rather than restricted to description.

that this experiment produced a 12 percent difference between "juror" decisions, depending on whether the exposure was to a *M'Naughton* or *Durham* instruction, with the *Durham* "jurors" voting more frequently for insanity.⁵⁰

The "jurors" reviewed the psychiatric testimony during their "deliberations," seemed to understand it, and were unwilling to delegate their responsibility for decision to psychiatrists. This last point has been a common fear expressed by those who oppose loosening the tests of insanity. They fear that psychiatrists effectively will make the jurors' decisions for them, but this fear seems groundless. One of the most significant findings reported by Professor Simon is that the "model" and "typical" versions of expert testimony failed to produce differences in "jury" decision. Presented with a comprehensive picture of defendant's medical history, that is, a "model" version, the "jurors" were no more likely to find the defendant insane than they were after listening to the "typical" type of testimony. However, since jurors do go over the record carefully, it is probably more helpful to them to have access to the "model," rather than "typical," psychiatric testimony.

Surprisingly, the presence or absence of a commitment instruction had no noticeable effect on the decisions, whether made before or after "deliberations." Thus, the conclusion is that a commitment instruction lacks significance in "jury" decisions. But, this conclusion should be taken with a large grain of salt; even the uninstructed "juries" did discuss in their "deliberations" what the likely future of the defendant would be if he were found insane—and individual jurors, instead of an instructing judge, supplied bits of information.

While provocative, interesting and informational, Professor Simon's book suffers from three major limitations. First, the experimental study rests essentially on two cases. Thus, the study cannot tell us enough about other cases. The possibilities of generalizing from this work are severely limited. The next incest or housebreaking case might present new variables and complicating factors, not to mention the improbabilities of generalizing to other types of cases. For example, who would rely upon this study to predict the behavior of a jury in a capital punishment case that turned solely on the insanity de-

⁵⁰ For more recent study of the *Durham* rule, see Arens, *The Durham Rule in Action: Judicial Psychiatry and Psychiatric Justice*, 1 LAW AND SOCIETY REV. 41 (1967), and see Krash, *The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia*, 70 YALE L.J. 905 (1961).

fense? Secondly, the study suffers from the "jury" composition coming solely from three midwestern cities, Chicago, St. Louis and Minneapolis. To the extent that regional biases exist in the United States, they would be reflected in and affect the findings. Would the study have had the same results if the "jurors" were obtained from San Francisco, New York and Boston? Also, the "jurors" came from large cities; would the research findings have been different had the "jurors" come from communities of less than ten thousand? And, what would have been a Southern or Northern "jury" response if defendants had been Negro, Mexican-American or alien?

Finally, there is the problem of realism. No matter how favorably one looks on Professor Simon's experiments, they were just that—experiments, not real life situations. The "jurors" were told that their decisions would have no immediate practical consequences, and that their deliberations would be recorded. They saw no defendants, lawyers, trial judges or witnesses; they made no observations on demeanor, character, personality or the myriad of other subtle factors that influence an actual jury trial. They only listened to recordings, filled out questionnaires, and "deliberated." In short, as useful as the experiment is, it is still contrived. Unless the "jurors" were duped, or self-deceived, which they certainly were not, then, necessarily, they were asked to "pretend," and the situation was one in which the "jury" was asked to participate in Professor Simon's "make believe."⁵¹ The results, therefore, are valid with respect to a "juror's" willingness to play "make-believe," and not with respect to the real world. This factor, I think, further limits the findings of the study. I hold this book to be suggestive and valuable, but our information about actual jury behavior with the insanity defense remains woefully inadequate. We still cannot, as Professor Goldstein reminds us, "say very much about how the competing formulations are, in fact, understood and applied by judge, jury, counsel and defendants."⁵²

⁵¹ See Stern, *On Make-Believe*, 28 PHIL. & PHENOMENOLOGICAL RESEARCH 24 (1967).

⁵² GOLDSTEIN at 225.