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Legally Insane or Guilty but Mentally Ill: A Suggested Jury Instruction

Arthur A. Murphy*

About a year ago, the Pennsylvania Legislature made some adjustments in the insanity defense. Act No. 286¹ authorizes verdicts of "guilty but mentally ill" in criminal trials when an insanity defense is asserted but something short of legal insanity is proved.² Persons found "guilty but mentally ill" are both sentenced for their crimes and considered for possible therapeutic treatment.³ Act No. 286 also confirms *M'Naghten's Rule* as the sole test for legal insanity⁴ and returns the burden of proving insanity to the defendant.⁵

A verdict of "not guilty by reason of legal insanity" may trig-

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1. Act of Dec. 15, 1982, P.L. 1262, No. 286. The Act added new Sections 314 and 315 to Title 18, PA. CONS. STAT. (the Crimes Code) and new Section 9727 to Title 42, PA. CONS. STAT. (the Judicial Code).

2. 18 PA. CONS. STAT. §314(a)(1983). A "mentally ill" person is defined as one who at the time of the crime "as a result of mental disease or defect, lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law." 18 PA. CONS. STAT. §314(c)(1)(1983).

3. 42 PA. CONS. STAT. §9727(a)(Supp. 1983).

4. 18 PA. CONS. STAT. §315(1983) (Insanity) provides:

(a) General rule — The mental soundness of an actor engaged in conduct charged to constitute an offense shall only be a defense to a charged offense when the actor proves by a preponderance of the evidence that the actor was legally insane at the time of the commission of the offense.

(b) Definition — For purposes of this section, the phrase "legally insane" means that, at the time of the commission of the offense, the actor was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing or, if the actor did know the quality of the act, that he did not know that what he was doing was wrong.

18 Pa. Cons. Stat. §314(d)(1983) expressly preserves "the common law defense of insanity (*M'Naghten's Rule*)."

These provisions should lay to rest the defense of "homicidal mania" or "moral insanity," a kind of irresistible impulse supplement to *M'Naghten*, which was cautiously advanced in *Commonwealth v. Mosler*, 4 Pa. 264 (1846), the benchmark case on the insanity defense. The doctrine never had much practical significance and had become moribund. See Comment, *Guilty But Mentally Ill: A Reasonable Compromise for Pennsylvania*, 85 Dick. L. Rev. 289, 295-97 (1981); W. TRICKETT, *THE LAW OF CRIMES IN PENNSYLVANIA* 1099-1111 (1908).

5. The Pennsylvania Supreme Court in *Commonwealth v. Demmitt*, 456 Pa. 475, 321 A.2d 627 (1974), relieved the defendant of the traditional burden of persuasion on the insanity defense. After *Demmitt*, whenever the issue of insanity was raised by the evidence, the Commonwealth had the burden of proving sanity beyond a reasonable doubt.

ger, while a verdict of "guilty but mentally ill" will trigger, proceedings under the Mental Health Procedures Act.⁶ The court, after a hearing, determines whether the defendant is severely mentally disabled and in need of treatment at that present time. The defendant's potential dangerousness to other persons is highly relevant to this determination.⁷ When a person has been acquitted on the ground of legal insanity, the proceedings may result in an involuntary civil commitment to a mental health facility.⁸ In the case of an individual found guilty but mentally ill, the process may lead to involuntary treatment of the convict in a prison or in a hospital setting.⁹ The Mental Health Procedures Act also covers persons with mental problems who are convicted under ordinary verdicts. The Act provides for their treatment, including involuntary treatment, in mental institutions and for transfers between prisons and hospitals.¹⁰

The author, as reporter to the criminal instructions subcommittee of the Pennsylvania Supreme Court's Committee for Proposed Standard Jury Instructions, recently drafted an insanity instruction that incorporates changes wrought by Act No. 286. The instruction has been approved by the subcommittee and eventually will be added to the Committee's manual of suggested criminal charges.¹¹ This article makes the instruction available sooner than it would be otherwise.

One of the purposes in writing this article is to invite comment on the new insanity charge. Jury instructions are blue collar law. They are the tools and templates with which jurors work the raw material of the facts in their effort to fashion results that conform to law and do justice. Jury instructions must be true to the law as expressed in statutes and appellate decisions, yet manageable by laymen. The design of a good insanity charge is especially difficult because of the complexities inherent in legal concepts of mental responsibility, in medical-scientific concepts of mental disorder and

6. Act of July 9, 1976, P.L. 817, No. 143, codified at PA. STAT. ANN. tit. 50, §§7101-7503 (Purdon Supp. 1983). Following an insanity acquittal, any responsible party, including the Commonwealth's attorney, acting on his own initiative or at the court's direction, may petition the court for an involuntary treatment order. *Id.* § 7304(c)(1), 7406. After a verdict of guilty but mentally ill, the court is required to consider the appropriateness of involuntary treatment. 42 PA. CONS. STAT. §9727(a)(Supp. 1983).

7. PA. STAT. ANN. tit. 50, §7301 (Purdon Supp. 1983).

8. *Id.* §7304(a)(1).

9. 42 PA. CONS. STAT. §9727(b)(1)(Supp. 1983).

10. PA. STAT. ANN. tit. 50, §§7401(a)(b), 7405-7407(Purdon Supp. 1983). For a description of the Mental Health Procedures Act and its operation in criminal cases, see M.H. Belsky, *Pennsylvania's New Mental Health Law*, 48 PA. BAR. Q. 482 (1977) (caveat: article antedates amendments made by the Act of Nov. 26, 1978, P.L. 1362, No. 324).

11. Criminal Instructions Subcommittee on the Pennsylvania Supreme Court Committee for Proposed Standard Jury Instructions, *Pennsylvania Suggested Standard Jury Instructions—Criminal* (1979). This manual and its periodic supplements are published by the Pennsylvania Bar Institute.

in relating one to the other. More so than most instructions, a good insanity charge is aptly characterized as a tool, not a template. It equips the jurors with the proper implement for approaching their task, rather than with a gauge for mechanically sorting out the insane. The author and the subcommittee welcome ideas for improving their handiwork.

Taken together, Pennsylvania's *M'Naghten* defense—with the burden of persuasion on the defendant, the new category of guilty but mentally ill, and the dispositional alternatives offered by the Mental Health Procedures Act provide a fair and sensible legal framework for dealing with the intractable questions of who should be held mentally accountable for "criminal" conduct and what should be done with individuals who are not accountable.¹² The only change the author recommends at this time is in the standard for a finding of guilty but mentally ill. Act No. 286 requires that the trier of fact find beyond a reasonable doubt that the defendant committed the crime and was not legally insane, but, as a result of mental disease or defect, lacked "substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law."¹³ The legislature should modify these criteria to reduce the degree of proof needed and to simplify the definition of "mentally ill." For example, the verdict of guilty but mentally ill might be made to require, in addition to a finding of guilt beyond reasonable doubt, a finding by a preponderance of the evidence that the defendant "although not legally insane, was at the time of the crime substantially affected by a mental disease or defect." The legislature also should make whatever incidental amendments are needed in the Mental Health Procedures Act to conform to the suggested criteria.

There is a certain logic to the criteria of Act No. 286.¹⁴ The definition of "mentally ill" corresponds to the Model Penal Code test for insanity.¹⁵ That test is more generous to defendants than Pennsylvania's traditional *M'Naghten* standard; it encompasses a broader range of impairments including deficiencies in behavior controls. The jury's factual finding that "mental illness" of the Model Penal Code type existed at the time of the crime may be quite relevant to the issues of present mental condition and dangerousness that will be the subject of the ensuing judicial inquiry. However, because the Model

12. See Appendix B—*An Apologia for Pennsylvania's Insanity Defense*.

13. 18 PA. CONS. STAT. §§314(a), (c)(1)(1983).

14. For arguments in support of the verdict guilty but mentally ill, see Comment, *Guilty But Mentally Ill: A Reasonable Compromise for Pennsylvania*, 85 DICK. L. REV. 289 (1981); Comment, *Guilty But Mentally Ill: An Historical and Constitutional Analysis*, 53 J. URBAN L. 471 (1976).

15. MODEL PENAL CODE §4.01(1)(Proposed Official Draft 1982).

Penal Code standard is rather sophisticated and overlaps the *M'Naghten Rule*, it must be carefully explained to the jury. The primary functions of a finding of "guilty but mentally ill" are to avoid unwarranted insanity acquittals by allowing juries to express a conclusion that the defendant, although guilty, was impaired at the time of the crime and to set in motion a judicial inquiry into the accused's *present* condition. When these functions are considered, the possible value of the ALI test seems to be outweighed by the risks of confusing jurors. A simpler standard and a lesser degree of proof should suffice for a finding of guilty but mentally ill. While reviewing the suggested instruction, the reader might consider to what extent the existing criteria for a verdict of guilty but mentally ill complicate the charge.¹⁶

The Suggested Instruction

The text of the suggested charge is presented below. A subcommittee note, which will appear in the Committee's manual, is reprinted in Appendix A. The note is intended to furnish trial judges with guidance on the use of the charge and an explanation of its sources.

5.01A (Crim) Insanity (covers statutory amendments through Act No. 286 (1982)).

(1) Because the defendant has asserted an insanity defense, you will have to consider four possible verdicts. In addition to "guilty" and "not guilty" which are available verdicts in any criminal case, you will have to think about the special alternatives of "not guilty by reason of legal insanity" and of "guilty but mentally ill." (If you keep in mind why the law permits these two special verdicts it may help you understand my subsequent instructions. The verdict of not guilty by reason of legal insanity labels a defendant as sick rather than bad. It signifies that in the eyes of the law the person, because of mental abnormality at the time of the crime, does not deserve to be blamed and treated as a criminal for what he did. The

16. Judge Berel Caesar, Philadelphia Court of Common Pleas, predicted in a September 16, 1983 letter to the author "that ultimately Act 286-1982, in its present form, will be struck down because it states that a person may be guilty (though mentally ill) because of a mental state which is essentially the same as the mental state of one who is not guilty (by reason of insanity). It defines a mental state which will support guilt (lacking substantial capacity to appreciate wrongfulness) in essentially the same terms as the mental state which leads to non-guilt (incapable of appreciating wrongfulness)."

The concept of giving juries the alternatives of returning verdicts of insanity or guilt with mental illness has been variously criticized as pointless, mischievous and potentially unconstitutional. See N. MORRIS, *MADNESS AND THE CRIMINAL LAW* 83-87 (1982); Comment, *Guilty But Mentally Ill: An Historical and Constitutional Analysis*, 53 J. URBAN L. 471, 492-93 (1976).

verdict of guilty but mentally ill labels a defendant as both bad and sick. It means that in the law's eyes that person, at the time of the crime, was not so mentally abnormal as to be relieved from blame and criminal punishment for what he did but that he was abnormal enough to make him a prime candidate for special therapeutic treatment.)

(2) Legal insanity which exists at the time of an alleged crime is a complete defense to that crime. The defendant has the burden of proving an insanity defense by a preponderance of the evidence, that is, by the greater weight of the evidence. If the defense is proven, the defendant is entitled to a verdict of not guilty by reason of legal insanity.

(3) The term insanity has a special meaning in the criminal law. (Persons whom medical experts would diagnose as mentally disordered or whom laymen would call crazy may not be insane when judged by the legal test.) The test or definition of legal insanity is this: A person is legally insane if at the time of committing an alleged crime, he is laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he is doing or, if he does know the nature and quality of the act, he does not know that what he is doing is wrong. Stated more simply, a person is legally insane if at the time of committing an alleged crime he is, as the result of mental disease or defect, either incapable of knowing what he is doing, or if he does know what he is doing, is incapable of judging that it is wrong. The term "mental disease or defect" in this test means a disease of infirmity of the mind as distinguished from a mere fault of character, temperament or social adjustment.

[(4) If you find the defendant not guilty on the ground of legal insanity and all of you agree on that ground, your verdict should be, "We find the defendant not guilty by reasons of legal insanity." If you find the defendant not guilty but none of you, or only some of you, do so on the ground of legal insanity, then your verdict should be simply "We find the defendant not guilty."]

(5) "Guilty but mentally ill" becomes a possible verdict when a defendant offers but fails to prove a legal insanity defense. A jury may return such a verdict when it finds beyond a reasonable doubt that the defendant committed the crime alleged and that the defendant, although the jury did not find him legally insane, was mentally ill at the time of the crime.

(6) The term "mentally ill" is another term with a special meaning. The definition or test of mental illness for our purposes is this: A person is mentally ill if he, at the time of an alleged crime and as a result of mental disease or defect, lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform

his conduct to the requirements of the law.

[(7) Comparing the definitions of “legal insanity” and “mental illness” we can see that they both require a mental disease or defect which is something more than faulty character, temperament or social adjustment. Their definitions differ, however, with regard to the incapacitating effect necessary for legal insanity on the one hand or mental illness on the other. Legal insanity requires that the defendant be *incapable* either of knowing what he is doing or of judging its wrongfulness. Mental illness requires only that the defendant lack *substantial capacity* either to appreciate the wrongfulness of what he is doing or to *obey the law*. Loosely speaking, mental illness is the broader term. It covers a greater range of abnormal conditions than legal insanity. A final difference lies in the degree of proof. Legal insanity must be proven by a preponderance of the evidence, while mental illness must be proven beyond a reasonable doubt.]

(8) In determining the questions of legal insanity and mental illness you should consider all the relevant evidence including (the testimony of witnesses regarding the acts, words, conversations, behavior and appearance of the defendant at, and close to, the time of the alleged crime) (the testimony of the expert witnesses) (the testimony of ordinary witnesses concerning the defendant’s general mental condition) (_____). The critical time when legal insanity or mental illness must exist in order to affect the verdict is at the time when the alleged criminal act was committed. Although you may consider evidence of the defendant’s mental condition before and after that time you may consider it only to help you determine his mental condition (and state of mind) at the time of the alleged crime.

(9) In determining questions of legal insanity and guilt you really should not concern yourself with what will happen to the defendant if you find him not guilty—whether he will be set free or whether he will be confined to a mental hospital for treatment. You should apply the law that I give you to decide the case and assume that, whatever your verdict, the authorities will make a wise disposition of the defendant. I will tell you, however, that when a defendant is found not guilty by reason of legal insanity he may be subject to an immediate court proceeding to decide whether he should be committed to a mental treatment facility. If committed, his commitment should continue until he is no longer dangerous to others or to himself.

(10) I will tell you also that a defendant who is found guilty but mentally ill may be given any sentence which may lawfully be imposed on any person convicted of the same crime. However, before

imposing sentence, the court must hold a hearing and make findings concerning the defendant's current mental condition and need for treatment. The law provides that a defendant who is severely mentally disabled and in need of treatment at the time of sentencing shall, consistently with available resources, be furnished such treatment as is psychiatrically or psychologically indicated for his mental illness. The "Mental Health Procedures Act" dictates where and how treatment will be provided, for example, whether in prison or in a mental treatment facility.

(11) To sum up, you have four alternative verdicts to think about. Two are the ordinary verdicts of "guilty" and "not guilty"; the other two are the special verdicts of "not guilty by reason of legal insanity" and "guilty but mentally ill." In order to find the defendant not guilty by reason of legal insanity you must be satisfied by a preponderance of the evidence *first*, that at the time (of the killing) (—) the defendant had a mental disease or defect and *second*, that as a result of that disease or defect the defendant was either incapable of knowing what he was doing or, if he did know what he was doing, was incapable of judging that it was wrong. In order to find the defendant guilty but mentally ill you must be satisfied beyond a reasonable doubt *first* that the defendant committed the crime alleged, *second*, that, although you did not find him legally insane, the defendant at the time of the crime had a mental disease or defect and *third*, that as a result of that disease or defect the defendant lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.

APPENDIX A

Subcommittee Note to Instruction 5.01A (Crim) Insanity

This instruction is appropriate for use when the defendant's sanity at the time of an alleged offense is an issue at trial and when 18 Pa. C.S. §§314, 315 and 42 Pa. C.S. §9727 are applicable. These sections were added by the Act of December 15, 1982, P.L. 1262, No. 286 (effective in 90 days); they confirm M'Naghten's rule as the sole test for legal insanity, return the burden of proof to the defendant, provide for findings of guilty but mentally ill and provide for the disposition of persons who are found to be guilty but mentally ill. The instruction is likely to require tailoring to the evidence and contentions of the particular case. The parenthetical portions of subdivision (1) and subdivision (7) comprise optional explanatory matter which can be eliminated to shorten the instruction. With modifications, the instruction can be used when the issue of mental responsibility is tried before a separate jury in a bifurcated trial under Mental Health Procedures Act §404c, 50 P.S. §7404(c).

Much of the evidence relevant to a sanity issue is likely to consist of expert testimony. See Instructions 4.10A, 4.10B, and 4.11 for suitable instructions on expert testimony. It may be desirable to emphasize in proper cases that the jurors are not bound by expert testimony. They may convict or acquit, notwithstanding the opinions of the experts, in accordance with their own evaluation of the total evidence, see *Commonwealth v. Demmitt*, 456 Pa. 475, 321 A.2d 627 (1974). Over the years the Pennsylvania Supreme Court has been divided on the general reliability and value of expert testimony regarding sanity in criminal cases. Until rather recently, the prevailing members of the court held such evidence in relatively low esteem, see *Commonwealth v. Carluccetti*, 369 Pa. 190, 85 A.2d 391 (1952); *Commonwealth v. Tomlinson*, 446 Pa. 241, 284 A.2d 687 (1971). A majority of the court now looks more approvingly on psychiatric evidence, see *Commonwealth v. Weinstein*, ___ Pa. ___, 451 A.2d 1344 (1982); *Commonwealth v. Walzack*, 468 Pa. 210, 360 A.2d 914 (1976); *Commonwealth v. McCusker*, 448 Pa. 382, 292 A.2d 286 (1972).

This instruction embodies the M'Naghten right-wrong test which has been confirmed by new Crimes Code §§ 314(d) and 315 to be the sole test for legal insanity in Pennsylvania. Previous to the enactment of those sections, the Pennsylvania Supreme Court had, over repeated dissents, rejected other tests of full, legal insanity, including irresistible impulse and inability to adhere to the right, see e.g., *Commonwealth v. Tomlinson*, *supra*; *Commonwealth v. Ahearn*, 421 Pa. 311, 218 A.2d 561 (1966); *Commonwealth v.*

Woodhouse, 401 Pa. 242, 164 A.2d 98 (1960); *Commonwealth v. Vogel*, 440 Pa. 1, 268 A.2d 89 (1970); *Commonwealth v. Weinstein*, 442 Pa. 70, 274 A.2d 182, cert. den. 404 U.S. 846 (1971); and *Commonwealth v. Mosler*, 4 Pa. 264 (1846). New Crimes Code §§314(d), 315 seem to refute any possible contention that *Mosler* and *Commonwealth v. Thomas*, 444 Pa. 436, 282 A.2d 693 (1971) currently allow a narrow homicidal mania-irresistible impulse defense. In 1976, the Supreme Court in *Commonwealth v. Walzack*, *supra* recognized a “diminished capacity” defense to first degree murder and overruled prior cases, such as *Tomlinson*, *Ahearn* and the 1971 *Weinstein* case to the extent that they rejected that defense. It is assumed that new sections 314(d) and 315 do not overturn this diminished capacity defense which is in reality more a rule admitting expert evidence than a substantive law defense.

With respect to the content of subdivision (3), the first version of the *M’Naghten* test is taken from new Crimes Code §315(b) which follows the classic language of the original *M’Naghten* decision. The second simpler formulation is taken largely from *Woodhouse* 401 Pa. at 248, 281, 164 A.2d at 102-103 and *Vogel*, 440 Pa. at 10, 268 A.2d at 94. The point that legal insanity is synonymous with neither expert nor lay notions of mental soundness is made in *Commonwealth v. Carlucetti*, 369 Pa. 190, 200, 85 A.2d 391, 395 (1952) (legal versus medical); *Commonwealth v. Hicks*, 483 Pa. 305, 311, 396 A.2d 1183, 1185-6 (1979) (insanity is more than a layman’s approximation of the degree of mental soundness necessary to possess the requisite mental state; it is a societal judgment as to the minimal mental capacity necessary for criminal responsibility). The partial definition given to “mental disease or defect” in subdivision (3) is not taken from any Pennsylvania case. However, it seems desirable that some guidance be given the jury on the significance of the term. The definition chosen appears to be consistent with various conditions that the Supreme Court has said do not constitute insanity, see e.g., *Commonwealth v. Ahearn*, *supra*. In a proper case, the court may wish to point out that an acute episode of voluntary intoxication is not a mental disease or defect and hence cannot be the basis for an insanity defense, see *Commonwealth v. Hicks*, *supra*.

Subdivision (2) places the burden of both raising and proving insanity on the defendant as now required by Crimes Code §315(a). Section 315(a) overturns *Commonwealth v. Demmitt*, *supra*, which had placed the burden of proving sanity, when questioned, upon the Commonwealth beyond reasonable doubt. This instruction says nothing about any presumption of sanity. References in a jury instruction to the presumption are unnecessary and not very helpful, see *Dem-*

mitt, supra, 456 Pa. at 483, 321 A.2d at 632 (concurring opinion of Justice Nix).

Subdivision (2) and other parts of the instruction call for the jury to return a special verdict if it finds the defendant not guilty on the ground of insanity even though Section 502 of the Mental Health Procedures Act, 50 P.S. § 7502 appears to repeal the requirements of special verdicts imposed by previous law (Act of October 20, 1966, P.L. 96, Art. IV §413, 50 P.S. §4413; Act of March 31, 1860, P.L. 427 §66 as amended, 19 P.S. §1351) except as to persons who are mentally retarded. In the opinion of the Subcommittee the purported repeal was inadvertent. Other sections of the Mental Health Procedures Act contemplate the use of special verdicts. For instance, verdicts of not guilty by reason of insanity are a predicate to an initial involuntary commitment for a period in excess of 90 days. Mental Health Procedures Act §304(g)(1), 50 P.S. §7304 (g)(1). See also 50 P.S. §7301(b)(1); 50 P.S. §7406. The instruction also reminds the jury of its option to return a general acquittal. The jury must be told of this option even if the defendant relies exclusively on the insanity defense at the trial, *Commonwealth v. Edwards*, 394 Pa. 335, 147 A.2d 313 (1959).

Subdivision (9) complies with the requirement of *Commonwealth v. Mulgrew*, 475 Pa. 271, 380 A.2d 349 (1977) that, in order to alleviate jurors' fears that a dangerously insane defendant might be turned loose and to avert consequent unwarranted convictions, the jury must be instructed concerning possible psychiatric treatment and commitment of the defendant if he is acquitted on the ground of insanity. See also *Commonwealth v. McCann*, 302 Pa. Super. 442, 448 A.2d 1123 (1982); Mental Health Procedures Act §§ 301, 304, 305, and 406, 50 P.S. §§ 7301, 7304, 7305, 7406.

Subdivisions (5) and (6) apprise the jury of its option of returning a verdict of guilty but mentally ill. They are based on new Crimes Code §314. The test for mental illness in Section 314 is identical to the ALI-Model Penal Code test for insanity. For commentary on ALI insanity, see *Model Penal Code, Tentative Draft No. 4*, 156-60 (1955). If read literally, Section 314 appears to require the jury to find beyond reasonable doubt that the defendant was not insane as one of the predicates to a finding of guilty but mentally ill. The subcommittee believes that the language used in subdivision (5) is more likely to reflect the intent of the legislature than such a literal reading. The subcommittee's language is also more favorable to the defendant. Subdivision (10) is based on new Section 9727 of Title 42. It acquaints the jury generally with the consequences of a verdict of guilty but mentally ill.

Subdivision (8) points out to the jurors general kinds of evi-

dence they should consider on the issue of legal insanity and mental illness. The instruction lumps the two issues together because much of the evidence that is relevant to one issue will be relevant to the other. However, the court may wish to modify this section and discuss relevance with more specificity in some situations, for example, in a case where there is evidence of irresistible impulse relevant to mental illness (capacity to conform conduct) but not to legal insanity, *cf. Commonwealth v. Weinstein*, ____ Pa. ____, 451 A.2d 1344 (1982) (a diminished capacity case).

For a lucid general treatment of all aspects of the insanity defense, see A. Goldstein, *The Insanity Defense* (1967).

APPENDIX B

An Apologia for Pennsylvania's Insanity Defense

Designing an insanity defense involves addressing problems of justice and societal protection that should be dealt with by legislatures rather than by courts. Factors that should be considered include fundamental legal concepts and principles (for example, constitutional restrictions, *mens rea*, free will, rationale for punishment), psychiatry's and psychology's therapeutic goals and understanding of the human mind, and public opinion. The administrative difficulties and costs that go along with the several approaches to the insanity defense should also be weighed. With so many different and complex variables to accommodate, hard questions have to be answered and hard choices made. For instance, which of the purposes of punishment should be emphasized—retribution, deterrence, incapacitation or rehabilitation? Should inability to control behavior be a defense? On the one hand this disability negates free will, a traditional predicate for criminal responsibility, and recognizes that more than sound intellect is involved in mental health. On the other hand it forces expert witnesses and jurors to draw elusive distinctions between irresistible and unresisted impulses and compulsions. Ultimately two questions must be answered: What does the public really want with respect to the acquittal and disposition of mentally impaired, possibly dangerous, persons, and what due process and other strictures does the Constitution impose?

The Pennsylvania Legislature has provided a fair and sensible legal framework in Act No. 286 and the Mental Health Procedures Act. The *M'Naghten* standard, with the burden of persuasion on the defendant, occupies the middle ground in the current controversy over whether the insanity defense should be abolished or expanded. Only a relatively small number of demonstrably seriously impaired persons can avail themselves of the defense. It is limited to the kind of impairments—of cognition and intellectual functions—which can be identified with some confidence by experts and jurors. Persons who qualify for the defense, because they are incapable of knowing what they were doing or judging its wrongfulness, are persons who could not have been deterred by the threat of criminal sanctions. The defense is directed at the *mens rea* element of crimes—an actor's inability to know the nature and quality of his physical acts negates the actor's awareness of his acts and their consequences, the very essence of general criminal intent. By also excusing one who lacks capacity to know the wrongfulness of his conduct, the Pennsylvania defense adds an explicitly moral dimension to the *mens rea* requirement. The defense reinforces the claim that the criminal process is

more than a social tool for coping with troublesome people—a criminal conviction is the community's official condemnation of someone who truly deserves blame and punishment. Pennsylvania's guilty but mentally ill alternative is a humane supplement to the insanity defense. It helps to identify persons whose mental problems make them prime candidates for special treatment.

The Mental Health Procedures Act provides those persons found not guilty by reason of insanity with procedural guidelines similar to those that apply to involuntary civil commitments. One exception is that the normal requirement of proving assaultive conduct within the previous thirty days, as an element of dangerousness, may not apply.¹⁷ Another exception is that orders for involuntary commitment may be for periods of one year rather than ninety days.¹⁸ Successive new orders have to be sought if commitments are to continue. Compared with jurisdictions which preserve the tradition of making prolonged detention of the acquitted insane easy, Pennsylvania treats insanity acquittals as conferring a right to freedom. The right can only be overcome by a civil commitment based on current severe disability and need for treatment. The risk that some dangerous people will be released is the price paid for investing real meaning in the "acquittal" aspect of insanity verdicts. *Quaere* whether the risk is proving excessive in practice; has the Mental Health Procedures Act gone too far in applying rules for committing ordinary mental patients to the acquitted insane? People who have observed or studied the Act in operation are in a better position than the author to answer this question.

Of course, the mere existence within a state of a sound legal framework for dealing with the insane does not assure that justice will be done and society protected. Those ends are not approachable without judges, prosecutors, defense counsel, forensic experts and mental health personnel who understand their roles in the process and have the skill, determination and resources to play those roles well.¹⁹

17. PA. STAT. ANN. tit. 50, §7301(b)(Purdon Supp. 1983).

18. *Id.* §7304(g).

19. See generally A.S. GOLDSTEIN, *THE INSANITY DEFENSE* (1967); N. MORRIS, *MADNESS AND THE CRIMINAL LAW* (1982); American Bar Association, *Criminal Justice Mental Health Standards, First Tentative Draft* (1983); W.K. GAYLIN, M.D., *THE KILLING OF BONNIE GARLAND* (1982); M.H. Belsky, *Pennsylvania's New Mental Health Law*, 48 PA. BAR Q. 482 (1977).