Stopping the Revolving Door: Adopting a Rational System for the Insanity Defense

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NOTES

STOPPING THE REVOLVING DOOR:
ADOPTING A RATIONAL SYSTEM FOR
THE INSANITY DEFENSE

The friction between the operation of a perhaps theoretically subjective rule permitting acquittals on something less than uniform notions of mental disease or defect and the cry of due process for objective criteria upon which to predicate continued institutionalization is amply illustrated in the case at bar. Perhaps resolution of this conflict lies in re-evaluation of the scope and applicability of the insanity defense.¹

The existence of an inadequate statutory framework in the majority of jurisdictions has left the insanity defense¹ open to abuse. A

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I. The traditional test for criminal insanity established in M'Naughten's Case, 8 Eng. Rep. 718, 10 C. & F. 200 (1843), focused upon the defendant's ability to distinguish between right and wrong. *Id. at 721, 10 C. & F. at 205. M'Naughten was prevailing law for over 100 years until then-Chief Judge Bazelon's seminal opinion in Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954), a decision which reflected a major shift in the legal definition of insanity. Durham discarded the "right and wrong test" and adopted instead the "product test," where the determinative issue is whether the defendant's actions were the product of a mental disease or defect. *Id. at 874-75.

In an effort to narrow the potentially vast scope of the Durham test in the D.C. Circuit the court, in Carter v. United States, 252 F.2d 608 (1957), noted that "[t]here must be a relationship between the disease and the criminal act; and the relationship must be such as to justify a reasonable inference that the act would not have been committed if the person had not been suffering from the disease." *Id. at 616.

The American Law Institute drafted a third rule which is embodied in its Model Penal Code. Seeking to modernize and modify M'Naughten, and at the same time avoid many of the difficulties which had plagued the courts following Durham, the Model Penal Code's test reads as follows: A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either "to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law." MODEL PENAL CODE § 4.01, at 74 (Proposed Official Draft 1962). The American Law Institute formulation is the prevailing test for insanity in courts throughout the country today. See, e.g., Wade v. United States, 426 F.2d 64 (9th Cir. 1970); United States v. Chandler, 393 F.2d 920 (4th Cir. 1968); United States v. Currens, 290 F.2d 751 (3d Cir. 1961). For an outstanding and comprehensive judicial examination of the issue of criminal insanity, see United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972).
defendant can earn an acquittal by reason of insanity on the basis of a broad, loosely defined spectrum of psychological and physical disorders. Yet, his or her initial and continued involuntary civil commitment is based on rigid psychiatric classifications that are far more restrictive. As a result of these differing substantive standards, insanity acquittees may qualify for release from mental-hygiene institutions while still suffering from the same conditions that led to their acquittals. For example, evidence of a severe personality disorder has in some circumstances been sufficient to convince a jury to acquit by reason of insanity. Yet, since the psychiatric community does not classify personality disorders as a form of mental disease, this same individual is released even though there

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2. Mental culpability may be negated by a variety of factors which remove from the actor the capability to entertain the requisite mental state necessary to render his or her conduct criminal. Thus, insanity pleas may be entered based upon a broad spectrum of mental, emotional, and physical illnesses. For a brief but helpful discussion of this interplay, see H. Goulett, THE INSANITY DEFENSE IN CRIMINAL TRIALS 53-56 (1965). See generally H. Fingarette, THE MEANING OF CRIMINAL INSANITY (1972).

When the issue of insanity is first raised at the criminal trial level, the breadth of permissible testimony is virtually limitless:

Wigmore states the rule to be that when insanity is in issue, "any and all conduct of the person is admissible in evidence." And the cases support Wigmore's view. The almost unvarying policy of the courts has been to admit any evidence of aberrational behavior so long as it is probative of the defendant's mental condition, without regard to the supposed restrictions of the test used to define insanity for the jury. A. Goldstein, THE INSANITY DEFENSE 54 (emphasis added) (footnote omitted) (quoting 2 J. Wigmore, EVIDENCE § 228, at 9 (3d ed. 1940)).

3. See notes 190-207 infra and accompanying text. In addition to dangerousness, release standards generally focus on the continuing existence of mental disease or defect. See generally W. LaFave & A. Scott, CRIMINAL LAW 321-24 (1972). The testimony invariably focuses upon the psychiatric definitions of mental illness with diagnostic labels often playing a role equal to that of actual clinical observations. See Overholser v. O'Bierne, 302 F.2d 852 (D.C. Cir. 1962); Blocker v. United States, 288 F.2d 853 (D.C. Cir. 1961); In re Torsney, 47 N.Y.2d 667, 394 N.E.2d 262, 420 N.Y.S.2d 192 (1979).


5. Mental disorders are defined as:

A group of related psychiatric disorders which are generally divided into two classes. In one class are the disorders marked by a basic or primary impairment or brain function, generally associated with organic (structural) brain disease. There is an impairment of intellectual functions as well as of judgement. The memory and the power of orientation are affected. And the mood is unstable. In addition, a behavioral disorder, a neurosis, or even a psychosis may supervene. In the other class, the disorders are more likely to be the result of the individual's inability to adapt to his environment. Any
is no evidence of any change in his or her condition.\textsuperscript{6}

The problem is exacerbated by a procedural trap\textsuperscript{7} that creates a catch-22 for the state. It is common for a prosecutor to be required to prove \textit{sanity} beyond a reasonable doubt at trial, but having failed, to have the burden of proving \textit{insanity}, albeit by a lesser standard, at later civil-commitment proceedings. Assuming, as is frequently the case, that the defendant cannot be proven sane beyond a reasonable doubt,\textsuperscript{8} the state is likely to fail in its burden at trial. This failure, however, merely represents a failure of proof; it does not establish an affirmative finding of insanity. There is thus no assurance that such a finding can be made at later civil-commitment proceedings. Such a defendant is thus acquitted by reason of insanity and subsequently released independent of any change in his or her mental or emotional condition. As the Alaska Supreme Court recently recognized,

\begin{quote}
The fact that the burden of proving insanity is now placed on the state beyond a reasonable doubt makes it important to require that one who is acquitted by reason of insanity prove that he is not a danger to the public peace and safety because of his mental condition. To require the state . . . to prove present insanity and dangerousness by clear and convincing evidence, would create a broad range of offenders beyond the reach of the law. They
\end{quote}

\begin{footnotes}
\item[6] \textit{See In re Torsney, 47 N.Y.2d 667, 394 N.E.2d 262, 420 N.Y.S.2d 192 (1979); notes 190-207 infra and accompanying text.}
\item[7] By this we refer to systems whereby the postacquittal burden of proof on the issue of mental illness differs from the burden that was carried at the criminal trial. This discrepancy can occur in one of two ways: (1) the burden may be allocated to different parties at each stage of the process, \textit{i.e.}, on the state to prove sanity at the criminal level but on the defendant to prove sanity in the postacquittal sphere, or (2) the burden, while remaining on the same party throughout, is measured by a different quantum of proof, \textit{i.e.}, the state has to prove sanity beyond a reasonable doubt at the criminal level, but, having failed, must then prove insanity by a preponderance of the evidence at the civil level in order to continue commitment.
\end{footnotes}
would be those who are neither sane beyond a reasonable doubt, and who therefore cannot be convicted, nor clearly insane, and therefore cannot be committed. The discipline of psychiatry is not so exact that we can with any degree of confidence suppose that the number of offenders who fall within this category will be inconsequential.  

A consequence of these substantive and procedural paradoxes is the creation of a revolving door through which individuals who have earned acquittals by reason of insanity may be prematurely returned to the community.

In recent years legislatures throughout the country have struggled with the social policy considerations underlying the insanity defense. Responding to public fears that the defense is extensively utilized as a "guilt avoidance mechanism" and that it frequently leads to premature release of dangerous individuals, a number of different schemes have been proposed and in some cases enacted. The various proposals will be examined in light of the underlying philosophical and social policy considerations of the criminal justice system. Judged in this light, no system yet proffered would serve as an adequate substitute for the insanity defense, since all violate one or more tenet of current criminal law jurisprudence.

The central thesis of this Note is that if the insanity defense is to be retained in a manner acceptable to the public as well as to the legal system, the revolving doors must be stopped. This can be accomplished if preacquittal and postacquittal procedures are

9. State v. Alto, 589 P.2d 402, 404-05 (Alas. 1979). New York has recently amended its laws in a manner that will lead to precisely the problem noted by the Alto court. In New York the prosecution has the burden of proving sanity beyond a reasonable doubt at the criminal trial. N.Y. PENAL LAW § 30.05 (McKinney 1978). Yet, if the state fails to carry its burden to prove sanity, then at the postacquittal commitment hearing "the district attorney must establish to the satisfaction of the court that the defendant has a dangerous mental disorder or is mentally ill." 1980 N.Y. Laws ch. 548, § 330.20.

10. This Note will discuss those alternatives that have received the greatest amount of support: Michigan's "Guilty But Mentally Ill" system, California's bifurcated trial alternative and, as proposed in New York, the diminished capacity defense. See notes 73-104 infra and accompanying text.


12. "The doctrines of actus reus, mens rea, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man." Powell v. Texas, 392 U.S. 514, 536 (1968).
viewed as a part of one system, with procedural and substantive standards tied together and made consistent throughout the process. This Note adopts the position that treating insanity as an affirmative defense is not only constitutional but essential to the workings of a fair and just criminal system. Treated in this manner, the system advocated by this Note would meet society's goal that criminal sanctions be imposed upon those who violate its codes of their own volition,13 while at the same time remaining sensitive to the need to avoid convicting as criminals those who do not—because of their mental condition—deserve the punishment and stigma attached to that label.

This Note also analyzes postacquittal procedures for dealing with the insanity acquittee. Acquittal by reason of insanity is unique in that it does not lead to absolute freedom for the defendant. Once found not guilty by reason of insanity (NGRI), the successful defendant is placed under the custody of the state's depart-

13. At common law the voluntary will of the defendant was the conceptual precondition to the attribution of guilt and comprised the underlying basis for all criminal sanctions:

An involuntary act, as it has no claim to merit, fo neither can it induce any guilt: the concurrence of the will, when it has it's choice either to do or to avoid the fact in question, being the only thing that renders human actions either praiseworthy or culpable. Indeed, to make a complete crime, cognizable by human laws, there must be both a will and an act. For though, in foro conscientiae, a fixed design or will to do an unlawful act is almost as heinous as the commiission of it, yet, as no temporal tribunal can search the heart, or fathom the intentions of the mind, otherwize than as they are demonstrated by outward actions, it therefore cannot punish for what it cannot know. For which reason in all temporal jurisdictions an overt act, or some open evidence of an intended crime, is necessary, in order to demonstrate the depravity of the will, before the man is liable to punishment. And, as a vitious will without a vitious act is no civil crime, fo, on the other hand, an unwarrantable act without a vitious will is no crime at all. So that to constitute a crime against human laws, there must be, firft, a vitious will; and, secondly, an unlawful act conseqrent upon such vitious will.

4 W. BLACKSTONE, COMMENTARIES *20-21 (emphasis in original); Laylin & Tuttle, Due Process and Punishment, 20 MICH. L. REV. 614, 642 (1922).

That Blackstone's notion of a "vitious will" retains its importance today is best illustrated by Mr. Justice Jackson's opinion in Morissette v. United States, 342 U.S. 246 (1952), in which he noted that:

In Williams v. New York, 337 U.S. 241, 248, we observed that "Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence." We also there referred to "... a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime." Id. at 247. Such ends would seem illusory if there were no mental element in crime.

342 U.S. at 251 n.5 (emphasis added).
ment of mental health, where he or she faces a series of procedures to determine commitment and release. Sensitive questions have arisen, especially in relation to fourteenth amendment guarantees, concerning the substantive and procedural safeguards afforded these individuals. A review of state and federal court cases analyzing these procedures reveals a panoply of constitutional interpretations and policy arguments that reflect confusion about the few Supreme Court rulings in this area. Close examination of these Supreme Court decisions reveals that they stand for far more limited propositions than those for which they are regularly cited. Although they have been interpreted expansively as holding that automatic commitment of NGRI patients is per se invalid, these decisions may be read in a more restrictive light as merely requiring that a rational, substantive basis be established prior to an individual’s commitment. Differing statutory schemes will be evaluated according to this standard, and we will propose a system of automatic commitment founded on and justified by this substantive factual basis.

Finally, this Note will address the appropriate standard for release. Presently, the applicable criminal and civil laws in this area are fraught with inconsistencies and widely differing standards. We contend that the revolving door that results from these procedural and substantive disparities can be stopped by placing the burdens of proof on the NGRI patient at every stage of the process. This Note will suggest that the burden at trial should be placed on the defendant to prove insanity by a preponderance of the evi-

14. See notes 105-170 infra and accompanying text.
17. See notes 4-8 supra and accompanying text.
dence. To maintain consistency, as well as to ensure that judicial
determinations rest upon a proper factual foundation, the defen-
dant should carry the burden of proof by a preponderance of the
evidence on all issues throughout the postacquittal process. Our
proposal thus equates the preacquittal and postacquittal burdens,
closing the procedural loophole.

Further, the substantive/factual loophole that exists may be
closed by similarly equating the substantive standards in each
sphere. For example, under the present system in New York\textsuperscript{18} a
defendant is capable of satisfying the evidentiary requirement of
the criminal law to earn an acquittal by reason of insanity, and yet,
without demonstrating any change in the condition that led to ac-
quittal, may assert that the state has insufficient grounds for con-
tinuing his or her commitment and, therefore, succeed in securing
release. Here, release remains merely a function of the rigid and
formalistic psychiatric standards employed in the civil sphere.\textsuperscript{19} By
enacting a scheme whereby release standards relate back to the ev-
identiary findings made at the criminal trial, such a paradox is
avoided.

**INSANITY AND THE CRIMINAL LAW**

*General Considerations*

Criminal responsibility is founded upon the principle that if an
individual is capable of distinguishing between right and wrong or
capable of understanding and controlling the nature and conse-
quences of his or her acts, then he or she should be held account-
able for any behavior that society, through its laws, has deemed
unacceptable.\textsuperscript{20} Historically, the law has measured an individual's
degree of culpability by examining the mental state he or she pos-
sessed at the time of the crime.\textsuperscript{21} Thus, for example, when one

\textsuperscript{18} See \textsc{N.Y. Crim. Proc. Law} § 330.20 (McKinney 1980); note 9 supra.

\textsuperscript{19} See \textit{In re} Torsney, 47 \textsc{N.Y.2d} 667, 394 \textsc{N.E.2d} 262, 420 \textsc{N.Y.S.2d} 192 (1979);
notes 190-207 \textit{infra} and accompanying text.

\textsuperscript{20} See United States v. Currens, 290 F.2d 751, 765-72 (3d Cir. 1961); Durham
v. United States, 214 F.2d 862, 876 (D.C. Cir. 1954); J. \textsc{Hall}, \textsc{General Principles
of Criminal Law} 18 (2d ed. 1960); O.W. \textsc{Holmes}, \textsc{The Common Law} 41-43
(1881); H. \textsc{Packer}, \textsc{The Limits of the Criminal Sanction} 261-62 (1968).

\textsuperscript{21} The insanity defense was firmly established in England, with the decision
in M'Naughten's Case, 8 \textsc{Eng. Rep.} 718, 10 C. & F. 200 (1843). In addition, Anglo-
American law has, from its inception, recognized defenses such as heat of passion,
self-defense, necessity, mistake, duress, and justification. \textit{See generally} W. \textsc{LaFave
& A. Scott}, \textsc{supra} note 4, at 356-97.
takes the life of another the force of the sanctions imposed by society bears a direct correlation to whether the killing was the result of an intentional, knowing, reckless, or negligent act; as the individual’s moral blameworthiness decreases the sanctions imposed upon him or her by society are lessened accordingly. The insanity defense embodies the logical extension of this principle: A finding of insanity is a finding that the defendant’s actions were essentially involuntary. He or she therefore deserves acquittal, not the stigma of a criminal conviction. Responding to this notion, Professor Goldstein has noted that “eliminating the insanity defense would remove from the criminal law and the public conscience the vitally important distinction between illness and evil, or would tuck it away in an administrative process.”

Thus, so long as the law speaks in terms of a person’s thoughts, an exculpatory defense of insanity must be available to the criminal defendant whose acts are related to a mental or emotional dysfunction. However, to protect the interests of society in insulating itself from antisocial activity, strong policy considerations mandate that this defense be affirmatively proven by the criminal defendant before liability can be avoided on these grounds.

Criminal sanctions are premised on four rationales: Retribution, deterrence, isolation, and rehabilitation. The first two re-

22. A. Goldstein, supra note 4, at 223.


24. Inherent in a finding of not guilty by reason of insanity (NGRI) is the jury’s determination that the defendant did in fact commit the crime charged; the sole caveat being that the defendant’s actions did not result from an exercise of free will. The acquittal, therefore, does not create a *tabula rasa* for the defendant as does the operation of other criminal acquittals since further action (i.e., commitment to a mental institution) may be taken by the state. This type of acquittal is based solely upon the defendant’s defective mental condition. See United States v. Brawner, 471 F.2d 969, 1008 (Appendix B) (1972); People ex rel. Henig v. Commissioner, 43 N.Y.2d 334, 338, 372 N.E.2d 304, 306, 401 N.Y.S.2d 465, 465 (1972); Alter v. Morris, 85 Wash. 2d 414, 419-21, 536 P.2d 630, 633 (1975) (en banc). But see The Association of the Bar of the City of New York, supra note 15, at 18. “[I]n some instances there may be reasonable doubt upon an insanity acquittal that the act charged was committed by the acquittee.” Id.

flect a focus on free will. Retribution is justified by the moral blameworthiness of an individual's actions. These actions cease to be reprehensible if they are involuntary, if they are the product of a mental disease or defect, if they are committed when the individual can not understand either the nature or consequences of his or her actions, or if the individual can not distinguish between right and wrong. Similarly, deterrence is premised on an individual's ability to make a conscious, voluntary choice. If that capacity is absent, the rationales of deterrence are no longer present. This is true both in the case of general deterrence and specific deterrence, although strongly in the latter and only weakly in the former. Deterrence seeks to influence an individual's choice. If positive and negative feedback from society would act as an effective deterrent and inhibitor of antisocial behavior, then the individual would be able to distinguish between right and wrong and therefore should be held responsible for his or her acts. However, the essential nature of the insanity acquittee is his or her demonstrated inability to distinguish between right and wrong, to understand the nature and consequences of his or her actions, or to choose whether or not to commit the crime. The ordinary behavior-modification tools of reward and punishment would therefore prove ineffective. The truly "insane" offender is, by definition, likely to be unresponsive to the stigma and incarceration that flow from a criminal conviction. This is precisely why an insanity-acquittal alternative was originally developed—to focus upon and treat the psychological being, in contrast with the penal alternative, which is effective, if at all, only upon the sociological being.

General deterrence arguably continues to support punishment
since it is usually viewed as resting on two factors: the severity of the punishment and the certainty of its imposition.\textsuperscript{28} Imposing criminal sanctions on those who are insane increases the probability of punishment since it reduces the likelihood of acquittal and removes the possibility that a noninsane person can win acquittal on insanity grounds through erroneous decisionmaking. Yet, imposing sanctions on insane individuals for committing antisocial acts does not provide an example to society of the consequences of criminal behavior since the case is distinguishable from those who are capable of making voluntary choices. Moreover, it offends our principles of fairness to impose sanctions on individuals who are not responsible for their actions merely to provide examples to the rest of society. The entire criminal justice system is premised on treating defendants as individuals and maintaining the integrity of that identity.\textsuperscript{29}

The two rationales of isolation and rehabilitation are both present in the case of an insane person who has committed a criminal act. That these currently justify only involuntary commitment in civil institutions and not the imposition of criminal sanctions indicates their secondary place in criminal law jurisprudence. Any abolition of the insanity defense must recognize that it is elevating one or both of these considerations to a principal place in the justifications of criminal law on a par with deterrence and retribution, and that it is imposing the stigma associated with being a criminal on an individual even though the two traditional primary justifications are not met.

\textit{Simple Defense or Affirmative Defense}

\textit{Constitutional Problems.}—Under traditional common law notions the defendant is required to clearly prove his or her insanity.\textsuperscript{30} However, at the close of the nineteenth century the Supreme Court in \textit{Davis v. United States}\textsuperscript{31} held that in federal

\begin{itemize}
    \item 31. 160 U.S. 469 (1895).
\end{itemize}
prosecutions the government carries the burden of proving the defendant's sanity beyond a reasonable doubt. In *Leland v. Oregon*, decided fifty-seven years later, the high court clarified the *Davis* ruling as it applied to state prosecutions, holding that *Davis* "obviously establishes no constitutional doctrine, but only the rule to be followed in federal courts." *Leland* firmly established the judicial acceptability of treating sanity as a separate issue from all other elements of a crime and the constitutionality of placing the burden of proof on the defendant.

The defendant in *Leland* was charged with murder in the first degree and pleaded not guilty by reason of insanity. Under Oregon law the defendant was required to prove his or her insanity beyond a reasonable doubt. *Leland* argued that by placing this burden on him, the state had avoided its burden of proving every element of the crime. The statute therefore violated the due process clause of the fourteenth amendment. A majority of the court disagreed, concluding that

> It is apparent that the jury might have found appellant to have been mentally incapable of the premeditation and deliberation required to support a first degree murder verdict or of the intent necessary to find him guilty of either first or second degree murder, and yet not have found him to have been legally insane. Although a plea of insanity was made, the prosecution was required to prove beyond a reasonable doubt every element of the crime charged, including, in the case of first degree murder, premeditation, deliberation, malice and intent.

The Court's analysis makes it clear that the issue of whether the defendant was insane is viewed as separate and distinct from

32. *Id.* at 488.
33. 343 U.S. 790 (1952).
34. *Id.* at 797.
35. OR. COMP. LAWS ANN. § 26-929 (1940) (repealed). "When the commission of the act charged . . . is proven, and the defense sought to be established is the insanity of the defendant, the same must be proven beyond a reasonable doubt." *Id.*
36. 343 U.S. at 794 (footnote omitted).
whether the state has proven the mental element of the crime charged.\textsuperscript{37} As such, due process is not offended by placing the burden of proof on the defendant.

It has been argued\textsuperscript{38} that the validity of \textit{Leland} was put into question by both \textit{Mullaney v. Wilbur}\textsuperscript{39} and \textit{In re Winship}.\textsuperscript{40} In 1970 the Supreme Court in \textit{Winship} held that due process requires that the state prove every element of the crime beyond a reasonable doubt.\textsuperscript{41} Five years later the Court in \textit{Mullaney} dealt with the constitutionality of a Maine murder statute\textsuperscript{42} that made malice

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  \item[37.] Under this structure of separate treatment of the insanity issue, the jury’s task is quite difficult and potentially confusing. The potential confusion stems from the subtle distinctions the jury must draw. The jury is being asked to weigh one unit of evidence concerning the defendant’s mental capacity and to determine from that one unit the extent to which those facts may negate the mental elements of the crime, thereby requiring a vote to acquit, or, on the other hand, may negate the presumption of sanity, thereby requiring a vote to exculpate via the NGRI verdict. Although the issues, as stated in the text, are separate, the facts from which they are determined are the same. The Court in \textit{Leland} was not insensitive to the concerns that critics have raised regarding this potential for confusion within the jury room. Addressing such concerns, the Court stated:

  Juries have for centuries made the basic decisions between guilt and innocence and between criminal responsibility and legal insanity upon the basis of the facts, as revealed by all the evidence, and the law, as explained by instructions detailing the legal distinctions, the placement and weight of the burden of proof, the effect of presumptions, the meaning of intent, etc. We think that to condemn the operation of this system here would be to condemn the system generally. We are not prepared to do so.

  \textit{Id.} at 800.


  \item[39.] 421 U.S. 684 (1975).

  \item[40.] 397 U.S. 358 (1970).

  \item[41.] \textit{Winship} dealt with the application of the criminal reasonable doubt standard to juvenile delinquency proceedings. Laying the foundation for its subsequent holding in \textit{Mullaney} the Court held: “Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” 397 U.S. at 364.

  The \textit{Mullaney} Court made clear that the \textit{Winship} doctrine was not to be limited by the states:

  [I]f \textit{Winship} were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect without effecting any substantive change in its law. It would only be necessary to redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment.

  421 U.S. at 698.

  \item[42.] ME. REV. STAT. ANN. tit. 17, § 2651 (1964) (repealed 1975).
\end{itemize}
aforethought an element of the crime of murder but not of manslaughter. The statute permitted malice aforethought "to be conclusively implied" once the prosecution established that an intentional and unlawful homicide had taken place. This presumption could only be rebutted if "the defendant proved by a fair preponderance of the evidence that he acted in the heat of passion on sudden provocation." The Court, citing the Winship requirement, held that "the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case."

The majority opinion in Mullaney seemed to spell the end for most affirmative defenses in the criminal law since it was clear that state legislatures would not be able to "define away" certain key elements of crime. Yet, in a concurring opinion Justice Rehnquist asserted that the decision was not to be interpreted as altering the potency of the Leland ruling. In his view insanity did not fall into the category of elements to be affected by Mullaney. The Court gave Justice Rehnquist's opinion the force of law only months later in Rivera v. Delaware. Rivera, who had been found guilty of murder after having failed to earn an acquittal by reason of insanity, asserted that Delaware's treatment of insanity as an affirmative defense was violative of the Mullaney doctrine. Faced with this clear opportunity to reevaluate Leland in light of Winship and Mullaney, the Court, joined by Justice Powell, the author of Mullaney, dismissed the appeal as not presenting a substantial fed-

43. Id.
44. 421 U.S. at 686 (footnote omitted).
45. Id. at 704.
47. See note 41 supra and accompanying text.
48. 421 U.S. at 705 (Rehnquist, J., concurring).
49. Id. at 705-06 (Rehnquist, J., concurring).
eral question, thereby according the dismissal the precedential weight of a decision on the merits.

Subsequently Leland was reaffirmed in Patterson v. New York, a case in which the Court exhibited a marked retreat if not complete reversal of its decision in Mullaney. In upholding New York's allocation of the burden of proof to the defendant on the issue of extreme emotional disturbance, the Court affirmatively stated that it was "unwilling to reconsider Leland and Rivera." Whatever may be said regarding the irreconcilability of Mullaney and Patterson, the consistent position adopted by the country's highest court regarding insanity firmly establishes the constitutional permissibility of treating it as an affirmative defense.

Considerations in Placing the Burden of Proof.—The constitutionality of treating insanity as an affirmative defense does not in and of itself dictate the adoption of such an approach. For any of a number of policy reasons, states may choose not to go to the constitutional limits in burdening the defendant or may decide to keep the burden of proving sanity on the prosecution. All states, as well as the federal system, presume that the defendant is sane.

52. Justice Brennan, joined by Justice Marshall, dissented from the Court's decision to dismiss, noting, "the question whether Leland has continuing validity surely merits full briefing and oral argument." 429 U.S. at 880 (Brennan, J., dissenting).
55. The Court today, without disavowing the unanimous holding of Mullaney, approves New York's requirement that the defendant prove extreme emotional disturbance. The Court manages to run a constitutional boundary line through the barely visible space that separates Maine's law from New York's. It does so on the basis of distinctions in language that are formalistic rather than substantive.
56. Id. at 207. The Court noted that a state, in choosing to recognize mitigating factors and exculpatory circumstances, may be willing to do so "only if the facts making out the defense [are] established by the defendant with sufficient certainty." Id. It concluded that "[t]o recognize at all a mitigating circumstance does not require the State to prove its nonexistence in each case in which the fact is put in issue, if in its judgment this would be too cumbersome, too expensive, and too inaccurate." Id. at 209 (footnote omitted).
57. See note 55 supra. "[The Patterson Court's] explanation of the Mullaney holding bears little resemblance to the basic rationale of that decision." 432 U.S. at 222-23 (Powell, J., dissenting) (footnote omitted).
58. "The essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold." Addington v. Texas, 441 U.S. 418, 431 (1979).
59. This presumption, a fundamental tenet of Anglo-Saxon law, was expressed by the court in M'Naughten as "every man is presumed to be sane and to possess a..."
sent any attempt by the defendant to rebut this presumption, the jury never entertains the question of the defendant's sanity and the state need not prove it as part of its prima facie case. Every defendant, however, has the opportunity to challenge this presumption by putting the question of his or her sanity in issue. The differences between the states arise as to what happens after the defendant places his or her sanity in issue. To date, almost half the states require the prosecution to prove beyond a reasonable doubt that the defendant was sane at the time in question, thus treating insanity in the same manner as any other simple defense to a criminal charge. The remaining states treat the issue of ins-

sufficient degree of reason to be responsible for his crime.” M'Naughten's Case, 8 Eng. Rep. at 722, 10 C. & F. at 210 (1843); Davis v. United States, 160 U.S. 469 (1895).

60. There is no clearly articulated standard governing the amount of evidence with which the defendant must come forward to place his or her sanity in issue. Nonetheless, “some” evidence of insanity appears to be sufficient. See Bolton v. Harris, 395 F.2d 692, 648 (D.C. Cir. 1968); Alto v. State, 565 P.2d 492, 497 (Alas. 1979). For a discussion of the "some evidence test," see McDonald v. United States, 312 F.2d 847, 849-50 (D.C. Cir. 1962) (en banc). Under the simple defense construct the defendant's burden is essentially limited to placing the question of his sanity into issue.


sanity as an affirmative defense, placing the burden upon the defendant\textsuperscript{63} to come forward and prove by a preponderance of the evidence the existence of some mental or emotional disorder at the time he or she committed the act.\textsuperscript{64}

Irrespective of which system is employed, every jury instruction on this issue makes clear that the state must carry its burden of proving each element of the crime, including intent, beyond a reasonable doubt before the jury can consider the issue of insanity.\textsuperscript{65} The rationality of this jury instruction has been questioned by a number of critics who argue that the very existence of a men-

\begin{itemize}
\item 185 (1967); State v. Canaday, 79 Wash. 2d 647, 488 P.2d 1064 (1971); State v. Pendry, 227 S.E.2d 210 (W. Va. 1976); WIS. STAT. ANN. \S\ 971.15 (1971).
\item 63. Burdens of proof often encompass two distinct burdens; one being the burden of going forward or producing the evidence and the second being the burden of persuasion. J. McCORMICK, EVIDENCE \S\ 336, at 783-84 (2d ed. 1972). Hereinafter, by saying that in the affirmative defense construct the “burden” is on the defendant we are referring to both of these burdens.
\item 64. While the prevailing standard for the affirmative defense of insanity is proof “by a preponderance of the evidence,” the \textit{Leland} decision affirmatively held that even the “proof beyond a reasonable doubt” standard was constitutionally acceptable. 343 U.S. at 798-99. For examples of the latitude the courts have in determining the standard, see Grace v. Hopper, 566 F.2d 507 (5th Cir. 1978) (proof to reasonable satisfaction of the jury); Duisen v. Wyrick, 566 F.2d 616 (8th Cir. 1977) (greater weight of evidence).
\item 65. The following portions of the \textit{Leland} jury instruction illustrate the delineation as drawn by the courts:
\begin{quote}
I instruct you that to constitute murder in the first degree, it is necessary that the State prove beyond a reasonable doubt, and to your moral certainty, that the defendant's design or plan to take life was formed and matured in cool blood and not hastily upon the occasion.
I instruct you that in determining whether or not the defendant acted purposely and with premeditated and deliberate malice, it is your duty to take into consideration defendant's mental condition and all factors relating thereto, and that even though you may not find him legally insane, if, in fact, his mentality was impaired, that evidence bears upon these factors, and it is your duty to consider this evidence along with all the other evidence in the case.
\end{quote}


In this case, evidence has been introduced relating to the mental capacity and condition of the defendant . . . at the time [the girl] is alleged to have been killed, and if you are satisfied beyond a reasonable doubt that the defendant killed her in the manner alleged in the indictment, or within the lesser degree included therein, \textit{then} you are to consider the mental capacity of the defendant at the time the homicide is alleged to have been committed.

Record at 327, Leland v. Oregon, 343 U.S. 790 (1952) (emphasis added).
tal or emotional dysfunction vitiates any finding of the requisite intent since both intent and sanity are established or negated by the same set of facts. The essence of Winship and Mullaney is that due process requires the state to prove every element justifying the imposition of criminal sanctions. If the individual's exercise of free will is a fundamental justification for imposing criminal sanctions, then there is no rational way of separating it from a definition of mens rea. While it is possible to define mens rea as the intent to cause a consequence, there has still been no proof of the free will that justifies imposing criminal sanctions. It is therefore difficult, if not impossible, to conceive of how a jury can find that the state has proven every element of its case beyond a reasonable doubt and still find a defendant not guilty by reason of insanity. Logic would dictate that, if the jury believes the defendant was sane, they should return a verdict of guilty; conversely, if they believe that the defendant was insane, he or she could not have entertained the necessary culpable mental state and they should find the defendant not guilty. In fact, no theory has ever been put forth that adequately and logically articulates the distinction between sanity and mens rea that would provide the rationale for exempting sanity from among the burdens the prosecution must constitutionally carry to earn a conviction.

Notwithstanding the validity of this criticism, a rational basis exists for placing the burden of proof on the defendant to prove his or her insanity. The failure of the state in a simple-defense system to prove a defendant's sanity beyond a reasonable doubt may say little about that defendant's actual mental condition since it is often the inherently speculative nature of psychiatric testimony that renders such proof so readily susceptible to reasonable doubts. Stating in Addington v. Texas that "[t]he subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most situations," the Supreme Court implied that the failure to prove sanity or insanity beyond a reasonable doubt may be little more than a function of the inherently speculative nature of psychiatric testimony itself. As such, the Court held that the state need

68. Id. at 430.
not prove its case beyond a reasonable doubt in civil-commitment proceedings.\textsuperscript{69} Although the use of psychiatric testimony at a criminal trial was not addressed specifically, the Court's reasoning applies with equal force in either forum. The \textit{Addington} Court was concerned in the civil sphere that a high standard of proof could force a jury to "reject commitment for many patients desperately in need of institutionalized psychiatric care."\textsuperscript{70} Likewise, placing a similarly high burden on the state to prove sanity in criminal cases could result in the acquittal of defendants who are justly deserving of penal sanctions.

One possible response to the dilemma raised by the Court in \textit{Addington} would be to place a lower burden of proof upon the state on the issue of sanity once that issue is raised by the defendant. \textit{Winship} and \textit{Mullaney} do not necessarily represent insurmountable barriers to this suggestion. If, as the Supreme Court has held, the burden of proof on the question of sanity can be placed on the defendant,\textsuperscript{71} then it seems that a fortiori the state can be made to carry the burden on the issue by less than a reasonable doubt. Constitutional and practical problems nonetheless remain. Instructing the jury that on all issues except sanity the state must prove its case beyond a reasonable doubt, but on the issue of sanity they may meet their burden by a lesser standard, leaves open the probability that the separateness of these issues will be blurred. Such a situation would lead to one of two unacceptable alternatives: Either the jury will equate the state's burden on the issue of sanity to its burden on all other elements, thus returning to the problem raised in \textit{Addington}, or the jury will apply the lower burden assigned to the sanity issue to other elements, thereby eroding the constitutional protections afforded by \textit{Winship} and \textit{Mullaney}. The only alternative that avoids the \textit{Addington} dilemma, while at the same time ensuring that the constitutional standards of \textit{Winship} and \textit{Mullaney} remain undiluted, is to treat sanity as a truly separate issue by placing the burden of proof on the defendant.

The second objection to placing the burden of proof on the state where the issue of the defendant's sanity has been raised is

\begin{itemize}
  \item \textsuperscript{69} Clear and convincing evidence, as interpreted by state law, is constitutionally adequate. \textit{Id.} at 433.
  \item \textsuperscript{70} \textit{Id.} at 430 (citation omitted).
\end{itemize}
founded upon the nature of the insanity defense itself. Only where an affirmative defense is utilized, requiring the defendant to prove that he or she was insane at the time the act was committed, does the evidence adduced at the criminal trial establish a substantive factual finding that the individual did indeed suffer from psychological abnormalities at the time he or she committed the crime. This finding provides the cornerstone for a rational postacquittal system for handling the insanity acquittee. A simple defense system, in which the defendant is merely required to raise a reasonable doubt as to his or her sanity, does not accomplish this since there is no affirmative finding of insanity, merely a negative inference as to the defendant's sanity created by the establishment of a reasonable doubt.

The problem remains then how to instruct the jury on the question of intent and insanity. Trifurcating the jury instruction preserves the requisite burdens on the state to prove every element of the crime beyond a reasonable doubt, while still requiring the defendant to prove that he or she was insane when the act was committed. Intent in this context can be viewed as a continuum.

(1) The jury is instructed that they must first determine whether the defendant meant to cause the consequence of his or her actions, irrespective of whether there was a free, voluntary choice to do so. Therefore, to use the McNaughten case as an illustration, McNaughten meant to kill Sir Robert Peel. He pointed the gun at Drummond, believing it was Peel, and pulled the trigger with the desire to cause Peel's death. The state must prove this primary form of intent beyond a reasonable doubt. Failure at this stage leads to automatic acquittal.

(2) If the state has proven this "intent" beyond a reasonable doubt, then the defendant must prove that he or she was insane at the time the act was committed. In McNaughten's case, the proof here is very different from that offered in the first tier. McNaughten's inability to differentiate between right and wrong or to understand the nature and consequences of his actions does not negate the narrow definition of intent set out in the first tier of the jury instruction above, but it does negate free will and therefore requires a verdict of NGRI. A similar analysis applies to the mother who kills her child believing that she is sending the child to heaven and sparing it the hell of life on earth. She "intended" to terminate the child's life, therefore satisfying the first tier definition of intent, but she did not understand the nature and consequences of her actions and would therefore be found NGRI. The
recent case of David Berkowitz, "Son of Sam," provides a useful final illustration. If the state could prove that Berkowitz fired a gun at his victims with the intent of killing them, it would meet its burden under the first tier. If the jury believed that Berkowitz killed because the devil told him that he must, then there has been no act of free will and he would be found NGRI. Occasionally the two levels will merge. For example, if the defendant pointed a gun at the victim thinking that it was a lemon, then the level of intent that the state must prove at the first level of analysis would be negated by the same evidence that proves insanity, in which case the defendant will be acquitted outright.

(3) If the jury does not find that the defendant was insane at the time he or she committed the crime, then they must determine, absent any question of sanity, whether the state has proven beyond a reasonable doubt that the defendant exercised the requisite level of intent, defined in its fullest sense to include free will. The third tier is a necessary completion of the analysis; otherwise the state has never affirmatively established that the defendant entertained the level of intent necessary to justify a conviction for the crime charged. The finding at this stage thus determines the level of specific intent—intentional, knowing, reckless, or negligent—and thus the specific crime of which the defendant will be convicted.

Alternatives

The inadequacies inherent in the structure of the insanity defense and its susceptibility to abuse have incited much criticism, spawning a number of proposals for dealing with individuals who engage in criminal conduct while laboring with mental or emotional abnormalities. These advocates generally focus their attack on one of three grounds. First, critics argue that the defense is both extensively utilized and too often perceived as a guilt-avoidance mechanism, corrupting the theoretical purity of the criminal justice system by allowing the resourceful defendant to win an unjustified acquittal. Second, a number of medical author-

73. This criticism retains its validity where acquittal rests solely upon the state's failure to prove a defendant's sanity beyond a reasonable doubt. However, where insanity is treated as an affirmative defense, the prospects for its utilization as a guilt-avoidance mechanism are greatly reduced. See text accompanying notes 66-71 supra.
ities argue that psychiatric experts are unable to comprehend the defendant’s capacity to define the rightness or wrongness of the criminal act when it was committed. Psychiatric testimony is further limited by the necessity of framing the analysis of an individual’s mental state in legal instead of psychiatric terms. Third, state mental health officials, most aware of the limited facilities at their disposal, suggest that the proper placement for insanity acquittees begins and ends in a correctional facility as opposed to a psychiatric hospital.

In discussing each alternative system it is essential that the analysis focus upon the underlying values of the criminal justice system to determine whether any alternative may be considered more desirable than the traditional insanity defense. Since the underlying premise is that criminal sanctions ought to be imposed only upon those individuals who have committed an intentional, knowing, reckless, or negligent criminal act while sane, and since restraint and rehabilitation of the mentally ill offender may be accomplished through postacquittal civil commitment, it will become apparent that no alternative thus far proffered satisfies society’s objectives better than the insanity defense.

74. This position has been adopted by the New York Department of Mental Hygiene. See New York Department of Mental Hygiene, The Insanity Defense in New York 107-13 (1978) (Report to Governor Hugh L. Carey) [hereinafter cited as Governor’s Report].

75. Id. at 101.

76. Dr. Laurence Kolb notes that:

[T]he terms and concepts used in the insanity defense are not psychiatric in nature at all. “Responsibility” is a legal, moral or social judgment not psychiatric. Similarly “right”, “wrong”, “good” and “evil” may be ethical, theological or even legal but they have no place in a psychiatric opinion. Asking such questions of the psychiatrist is made even less valid by the training which he undergoes where constant emphasis is placed on “understanding” the causes of behavior rather than sitting as some sort of surrogate conscience to his patients.

Secondly, by its very nature, psychiatry must be guided by an ideology based on the individual nature of human behavior with his evaluation made in terms of that individuality. The law on the other hand, with its thrust towards equality, strives for uniform and consistent standards for evaluating behavior.

Id. at 109-10.

77. See T. Szasz, supra note 23, at 144-45. In their report to the governor, the New York Department of Mental Hygiene makes the following observation: “The effect of these recommendations would be to recognize the Department of Correctional Services as the primary control agency, to avoid dysfunctional psychiatric involvement in adjudicative and dispositional processes.” Governor’s Report, supra note 74, at 11; see T. Szasz, supra, at 119-30.

78. See note 28, supra.
One of the most controversial alternative systems for handling those criminal defendants who wish to plead insanity presently exists in Michigan. Under the Michigan system, the jury has the option of finding the defendant NGRI or "guilty but mentally ill" (GBMI).\(^{79}\) The jury's decision as to whether to find a particular defendant NGRI or GBMI depends upon the statutorily defined distinction between mental illness and legal insanity. The Michigan statutes define mental illness, which triggers a verdict of GBMI, as "a substantial disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life."\(^{81}\) In contrast, legal insanity, the necessary prerequisite to an acquittal in Michigan, may only be found if "as a result of mental illness, or as a result of mental retardation, that person lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law."\(^{82}\)

In the face of these overlapping definitions and on the basis of extremely subtle psychiatric distinctions, juries are forced to choose between two verdicts with radically different consequences for the defendant.

When an individual is found GBMI the issue of mental illness becomes relevant only to the issue of disposition and sentencing. While treatment may be administered by the department of mental health,\(^{83}\) the department of corrections retains control over such individuals.\(^{84}\) Restraint is measured not by the period of time necessary to effectuate cure and treatment, but by a predetermined statutory period tailored to fit the crime committed. Thus, a defendant must serve his or her entire sentence even if cured, and conversely, an individual must be released once the sentence expires, regardless of his or her mental condition.\(^{85}\)

80.\hspace{1em}Id. § 768.36 (West Supp. 1979). The legislative action resulting in the creation of the GBMI verdict followed a Michigan Supreme Court decision which held that after a period of examination and observation following trial a hearing on the issue of present insanity is required before an insanity acquittee can be committed. Such a statutory construction led the legislators to fear the premature release of potentially dangerous individuals. People v. McQuillan, 392 Mich. 511, 536, 221 N.W.2d 569, 580 (1974); see Note, Guilty But Mentally Ill: An Historical and Constitutional Analysis, 53 J. Urb. L. 471 (1976).
82.\hspace{1em}Id. § 768.21(a).
85.\hspace{1em}Id. § 768.36(3).
The GBMI verdict, with its constituent factors of guilt and mental illness, provides the jury with a palatable compromise, the result of which could lead to findings of GBMI in precisely those cases where an NGRI verdict would be in order. As one commentator has noted,

Given the confusion engendered by the enormous overlap between the definitions of mental illness and legal insanity, the likelihood is strong that juries will return GBMI verdicts instead of NGRI verdicts. By convicting the defendant, the jury can condemn his behavior and keep a potentially dangerous individual in custody. However, by also finding the defendant mentally ill, the jury may believe that their verdict will insure special treatment for him and will carry a lesser stigma than a regular guilty verdict.86

Thus, whether GBMI is used in conjunction with a traditional insanity defense or in its place, it is certain that individuals will be convicted of crimes in many cases where there would have been findings of NGRI if the GBMI alternative were not available. As such, the traditional plea of insanity is more responsive to the underlying notions of fairness to all parties affected as well as to the societal goals of the criminal justice system.

A second alternative system has been adopted in California, which bifurcates trials when insanity is brought into issue.87 Under California law the criminal trial is divided into two parts: the first dealing with the question of whether or not the defendant committed the crime charged, including the required mental state defined in the traditional manner,88 and the second dealing exclusively with the issue of legal insanity.89 At first glance, it appears

86. Note, The Constitutionality of Michigan's Guilty but Mentally Ill Verdict, 12 U. Mich. J.L. Ref. 188, 196 (1978) (footnote omitted). From the defendant's standpoint, however, the "Guilty but Mentally Ill" alternative is in all practicality no alternative at all. Even if successful, he or she faces a finding of guilt and sentencing under the criminal law. These faults have prompted one commentator to remark:

A particular problem will be faced by defense counsel in advising the client on the relative benefits of pleading G[B]MI. Given the legal hollowness of the G[B]MI verdict, I suggest that the act of a defense counsel advising his client to plead G[B]MI would constitute ineffective assistance, and a breach of a canonized ethical duty.


89. Id.
that the bifurcated trial system makes no substantive changes in the functioning of the insanity defense and, therefore, is equally adept at meeting the underlying objectives of society.90 A defendant who pleads insanity in California may, if successful, earn an acquittal and face postacquittal commitment and release procedures that mirror those presently existing in states utilizing the traditional single-trial approach.91 It thus appears that California puts into practice the separateness notion that insanity and mens rea involve two different qualities of the mind. The fatal flaw in the system is its reliance on imperfectly articulated delineations of intent and insanity. Without an adequate distinction between the two, which California has not achieved, there is no rational way of separating the issues between the two proceedings. The result is either duplicative testimony92 and incomprehensible jury instructions or decisions about which testimony should be used where based on nonexistent distinctions and confused guidelines.93

An alternative receiving considerable support in New York94 is to replace the insanity defense with a system that allows mental illness to act only as a mitigating factor that reduces the severity of the offense to a lesser included crime but does not exculpate the defendant.95 As in Michigan's GBMI system, the diminished-capacity defendant is entitled to treatment within correctional facilities.96 A fundamental difficulty inherent in a system that relies ex-

90. See generally Louisell & Hazard, supra note 66.
93. See, e.g., People v. Troche, 206 Cal. 35, 373 P. 767 (1929). People v. Leong Fool, 206 Cal. 64, 273 P. 779 (1928). Louisell & Hazard note that "[t]he proof admissible to show defendant's mental state at the time of the crime is substantially the same as that admissible to show insanity. No workable rule has been formulated and probably none can be formulated that would effectively differentiate between the two types of evidence." Louisell & Hazard, supra note 66, at 829-30.
94. See GOVERNOR'S REPORT, supra note 74, at 9-10, 153-57.
95. Under the rule proposed by the New York Department of Mental Hygiene, Mental disease or defect is not, as such, a defence to a criminal charge, but in any prosecution for an offense, evidence of mental disease or defect of the defendant may be offered by the defendant whenever such evidence is relevant to negative an element of the crime charged requiring the defendant to have acted intentionally or knowingly. GOVERNOR'S REPORT, supra note 74, at 153; see Fingarette, Diminished Mental Capacity as a Criminal Law Defense, 37 MOD. L. REV. 264, 267 (1928).
96. In support of their proposal to replace the insanity defense with one of diminished capacity, the New York Department of Mental Hygiene stressed New York's "unique capacity to insure that all inmates of state correctional facilities re-
clusively upon diminished capacity\textsuperscript{97} is that it imposes criminal sanctions on an individual regardless of the degree of his or her mental or moral culpability.\textsuperscript{98} Once sufficient proof has been offered negating the specific mental element of the crime charged,\textsuperscript{99} there is a systematic placement of the defendant into the next class of lesser included crimes.\textsuperscript{100} This system is insensitive to whether the individual's mental illness may have so completely negated his or her mental capacity that he or she is no longer morally culpable.\textsuperscript{101} The system thus fails to account for defendants who suffer receive the treatment which their condition warrants and needs.” GOVERNOR’S REPORT, supra note 74, at 119.

\textsuperscript{97} When diminished capacity is part of a system that also includes the traditional insanity defense it performs a valuable function. It is a rational alternative for those individuals whose mental disease or defect, though insufficient to constitute legal insanity, ought nonetheless be considered as a factor which mitigates the degree of culpability. Such a situation exists when the illness affects one of the mental elements of crime, but not the underlying moral culpability. For a good discussion of the proper interplay of diminished capacity and the insanity defense, see United States v. Brawner, 471 F.2d 969, 998-99 (D.C. Cir. 1972) (en banc). However, diminished capacity standing alone is not a viable alternative since it would impose criminal sanctions on all criminal defendants with a mental illness regardless of how severe such illness may be.

\textsuperscript{98} The New York Department of Mental Hygiene concludes that “[t]he result would entail conviction and processing in the correctional system for serious offenders; and, acquittal—perhaps civil commitment—for minor offenders.” GOVERNOR’S REPORT, supra note 74, at 141. It is noteworthy, however, that this statement contradicts and apparently ignores the Department’s own statistics, which suggest that, except for three people, every individual who successfully asserted the insanity defense over the last ten years would have been found guilty under a rule of diminished capacity. See id. at 147-51 (Appendix A). It is quite probable, therefore, that replacing the insanity defense with the rule of diminished capacity would result in a finding of guilt in virtually every case where the defendant’s mental state at the time of the crime is at issue.

\textsuperscript{99} Since diminished capacity negates a specific intent element of the crime charged it operates as a simple defense with the burden on the state to prove the existence of the required mental state beyond a reasonable doubt.

\textsuperscript{100} See GOVERNOR’S REPORT, supra note 74, at 141.

\textsuperscript{101} See Fingarette, supra note 95, at 275. This is precisely why every jurisdiction which makes use of the rule of diminished capacity also has the traditional defense of insanity. Each points up the need for the other.

A claim of insanity cannot be used for the purpose of reducing the crime of murder in the first degree to murder in the second degree or from murder to manslaughter. If the perpetrator is responsible at all in this respect, he is responsible in the same degree as a sane man; and if he is not responsible at all, he is entitled to acquittal in both degrees. However, . . . evidence of the condition of the mind of the accused at the time of the crime, together with the surrounding circumstances, may be introduced, not for the purpose of establishing insanity, but to prove that the situation was such that a specific intent was not entertained—that is, to show absence of any deliberate or premeditated design.
from extreme mental illness and are therefore deserving of acquittal. While the diminished-capacity system all but eliminates the possibility of a defendant employing the insanity defense as a guilt-avoidance mechanism, it does so at an intolerable price. By imposing sanctions on all defendants, the system stigmatizes individuals who suffer from mental illness even though the justification for imposing criminal sanctions is no longer operative.

An examination of the proposed alternatives to the insanity defense reveals that they are short-sighted proposals that fail either to reflect the underlying principles and considerations of the insanity defense or to undertake a fresh examination and articulation of criminal law jurisprudence. Hastily enacted legislation, constructed along the paths that have been proffered to date, would only result in ineffective schemes since they neither account for the immutable values upon which our criminal law rests nor seek to erect a new structure on reconstructed jurisprudential foundations.

The efficacy of reformation must be gauged in accordance with far-reaching principles and objectives, not popularized sentiments which become the limelight of editorial comment. Legislators must be encouraged to retain the traditional insanity defense in order to sustain the time-honored concept that individuals ought be subjected to criminal sanctions only after their moral guilt has attached. An insanity defense is essential if we are going to continue to try the individual and not merely the naked act. However, when such an exculpatory device is provided, there must be reasonable

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Battalino v. People, 118 Colo. 587, 591, 199 P.2d 897, 901 (1948) (en banc) (emphasis in original) (quoting 26 AM. JUR. § 105, at 228 (1940)).

102. That the diminished capacity rule would cure the system of such abuse is clear since the existence of mental disease or defect would not function as a complete defense, and, in testifying under the rule of diminished capacity, “[n]o longer would a psychiatrist be permitted to address the [issue] of complete exculpation.” GOVERNOR’S REPORT, supra note 74, at 141.

103. See notes 24-29 supra and accompanying text. But see GOVERNOR’S REPORT, supra note 74, at 96.

The public presentation of a clear affirmation of guilt or non-guilt would do much to sustain the faith of citizens at large in the rectitude and equity which should exist in all social bodies in their efforts to sustain justice under the law. The public perception of the state’s superego would be strengthened. There would emerge a new respect for the operation of the criminal justice system, the courts, lawyers and the mental health profession as well.

Id. This position may be little more than a reflection of the New York Department of Mental Hygiene’s view of the insanity defense as “a device for diversion into the mental health treatment system.” Id.; accord, T. Szasz, supra note 23, at 144-45; Goldstein & Katz, supra note 25, at 858.
safeguards ensuring against its abuse. Thus, the opportunity for exculpation must be tempered by requiring the individual to come forward and affirmatively establish the factual predicate necessary to assure the jury that the act was committed at a time when he or she suffered from a mental illness. In the end, the appropriate use of the affirmative defense of insanity will truly be the “mark of an advanced criminology,” a law which reflects a progressive social consciousness.

THE CIVIL SPHERE: POSTACQUITTAL PROCEDURES

Acquittal is but the first step toward freedom for the defendant who successfully pleads insanity. This section will explore the various postacquittal procedures that states have imposed upon insanity acquittedes. While the individual crosses the line after ac-
_quitall from criminal law into civil law, neither stage should be viewed in a vacuum. If there is to be any rationality to the system, there must be a harmonization of the two spheres, with each stage of the process recognizing that which has preceded it as well as that which follows. States have ignored the interdependent nature of these civil and criminal proceedings and have continued to deal with each as an entity unto itself. This failure has led to discrepancies in the substantive standards applicable at different stages of the process. Thus, the same facts that produced a verdict of NGRI may be insufficient to civilly commit the defendant, irrespective of whether there has been any change in the defendant's condition. The inevitable consequence of such a system is a revolving door.

Because postacquittal commitment procedures for NGRI acquittees differ from ordinary civil commitment, and because such procedures may result in a deprivation of liberty, the totality of the postacquittal system must be examined in the context of the equal protection and due process clauses of the fourteenth amendment. The states' parens patriae interest in the care of the mentally ill, coupled with the prior finding of mental illness at the criminal trial, justifies drawing certain procedural and substantive distinctions between NGRI and civil commitment. By recognizing that distinctions must be drawn, the system for handling individuals who plead NGRI may be properly viewed as an indivisible continuum: Beginning with a plea of insanity at criminal trial and ending with release from a hospital when that individual no longer suffers from the causative mental condition.

discretionary jurisdictions, Professor Goldstein noted, "in most cases, [in discretionary states], commitment is ordered, almost certainly for diagnosis and usually for treatment as well. Operationally, therefore, commitment practice in the discretionary jurisdictions tends to assume a mandatory form." A. GOLDSTEIN, supra note 4, at 145.

106. See notes 171-207 infra and accompanying text.

107. This occurs as a result of substantive disparities in the standards of proof at the different stages. See notes 190-207 infra and accompanying text.


Presumption of Continued Insanity

In virtually every state, commitment to the department of mental hygiene follows an individual's successful assertion of the insanity defense. The theoretical foundation underlying this procedure has been the subject of much judicial debate. The issues, often obscured in a mass of psychiatric rhetoric, are: (1) to what extent should the courts recognize a legal presumption that the abnormal symptomatology that afflicted the individual on the date of the criminal act continues to exist at the end of the trial; (2) is there a factual basis for such a presumption; and (3) how can the insanity defense be structured to best provide that basis. The answers to all three questions are inextricably intertwined. Careful examination of the numerous cases discussing the weight to be accorded to this presumption reveals that the deference a court is willing to grant the presumption of continued insanity is often determined by the form of the insanity defense at trial: The stronger the factual basis provided at trial the more valid the presumption.

Reflecting both ends of the spectrum, California and Indiana are representative of the two judicial schools of thought on this issue. In California, where insanity is treated as an affirmative defense, the Supreme Court of California has held that the "[d]efendant's past insanity reasonably may be presumed to continue to the date of his acquittal, justifying immediate confinement." Conversely, Indiana's highest court, commenting on a simple defense of insanity, has noted that in its opinion an acquittal on such ground does not raise any presumption of insanity. Each court's comment concerning the appropriateness of the presumption...
tion is derivative of the form that the insanity defense takes at trial.

Despite New York's treatment of insanity as a simple defense, which provides little factual support for a presumption of continued insanity, the New York Court of Appeals in *Lublin v. Central Islip Psychiatric Center*117 upheld the constitutional validity of New York's former mandatory commitment statute,118 and in so doing expressed clear judicial support for a presumption of continued insanity.

It is beyond doubt that petitioner was both insane and dangerous at the time he [committed the crimes charged]; indeed, it is only because of his insanity that he is relieved of criminal liability. Given the clear existence of this condition, as evidenced by the admitted commission of a violent act, it is appropriate that the condition be presumed to continue until the contrary is proven.119

The New York Court of Appeals' decision in *Lublin*, while properly citing the facts that justify such a presumption, failed to recognize the inability of a simple defense to produce these facts since it rests solely upon the prosecution's failure to establish the defendant's sanity beyond a reasonable doubt.120 Where, however, acquittal has as its basis an affirmative finding of past insanity, a logical, factual, and legal foundation is established for the presumption.121 Commitment must rest on the strength of such a founda-

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119. 43 N.Y.2d at 344, 372 N.E.2d at 310, 401 N.Y.S.2d at 468 (emphasis added).
120. In *People v. McQuillan*, 392 Mich. 511, 221 N.W.2d 569 (1974), the Supreme Court of Michigan recognized the tenuous relationship between a reasonable doubt as to past insanity and a presumption of continuing insanity.

As Judge Gilmore correctly pointed out, in Michigan "[a]ll that an acquittal by reason of insanity establishes in law is that the People have failed to prove beyond a reasonable doubt that the defendant was competent at the time he committed the crime which might have been months before."

Thus, the use of a presumption of continuing insanity arising from a verdict of not guilty by reason of insanity is not justified where there never has been a finding of insanity.

*Id.* at 531, 221 N.W.2d at 578 (quoting commitment order of trial judge in this case); see Bolton v. Harris, 395 F.2d 642, 648 (D.C. Cir. 1968).

121. Where insanity is treated as an affirmative defense, the defendant earns his acquittal by establishing "proof positive" the existence of mental disease or defect. As such, the criticism often leveled at the presumption of continued insanity, which was echoed by *McQuillan*, no longer remains valid. See note 156 infra; Chase
tion and not on the visceral reaction that the commission of a crim-
inal act requires some affirmative response by society. In order
that the system maintain rationality and continuity,\textsuperscript{122} it is essential
that the criminal law treat insanity as an affirmative defense, thus
providing a credible base from which postacquittal procedures may
emanate.

\textit{The Triptych: Constitutionality of the Presumption}
A triptych composed of three cases\textsuperscript{123} has been regarded by state\textsuperscript{124} and lower federal courts\textsuperscript{125} as the authority governing the
constitutionality of postacquittal commitment procedures. The con-
fused interpretation of these cases has led to a flurry of judicial ac-
tivity and administrative chaos, thwarting the appropriate develop-
ment of the law in this area.

\textit{Baxstrom v. Herold,}\textsuperscript{126} the first panel of the triptych, was de-
cided by the Supreme Court in 1966 and dealt with the constitu-
tional validity of a New York statute\textsuperscript{127} under which Baxstrom, in
prison for second-degree assault, was automatically committed to a state-run correctional hospital at the expiration of his sentence.\textsuperscript{128} He maintained that as a result of the substantially different procedures governing the civil commitment of criminals nearing the end of their prison terms and those available to other individuals,\textsuperscript{129} the statute violated the equal protection guarantees of the fourteenth amendment. Specifically, Baxstrom contended that the ex-parte determination that mandated his commitment was unconstitutional since it lacked jury review, a protection afforded all other classes of civil committees.\textsuperscript{130} New York State argued that the statute, which differentiated on the basis of an individual's criminal status, established "a reasonable classification differentiating the civilly insane from the 'criminally insane,' defined as those with criminal propensities."\textsuperscript{131}
The Court, in a unanimous opinion, concluded that New York's distinction did not rest on any rational basis and thus violated the constitutional guarantees afforded the defendant by the fourteenth amendment. The Court held that for the purpose of determining whether or not an individual suffers from a mental disease or defect, whether he or she is presently in prison does not, in and of itself, provide a rational foundation for the deprivation of the right to jury review where that right has been accorded all other civil patients. For such a procedural distinction to be upheld it must have "some relevance to the purpose for which the classification is made." Baxstrom was undifferentiatable from a noncriminal facing civil commitment, since in neither case was there any prior judicial finding of mental illness. The only distinction between the two groups was Baxstrom's imprisonment, a fact the Court found irrelevant to the issue of commitment.

The Baxstrom Court's equal protection analysis was to a large extent reflective of a sensitivity for the liberty interest at stake. Starting with the proposition that the Constitution requires that certain fundamental safeguards be afforded individuals faced with a loss of liberty, the unconstitutionality of the New York statute may be seen to flow from the irrationality of the New York system, which provided for the fundamentally unfair procedures leading to Baxstrom's commitment. In this context, the logic of the Baxstrom doctrine rests upon the premise that litigation affording direct proof of insanity is required in order to provide a factual predicate upon which commitment may be based. It was the absence of this factual predicate that rendered Baxstrom's automatic commitment

The capriciousness of the classification employed by the State is thrown sharply into focus by the fact that the full benefit of a judicial hearing to determine dangerous tendencies is withheld only in the case of civil commitment of one awaiting expiration of penal sentence. A person with a past criminal record is presently entitled to a hearing on the question whether he is dangerously mentally ill so long as he is not in prison at the time civil commitment proceedings are instituted. Given this distinction, all semblance of rationality of the classification, purportedly based upon criminal propensities, disappears.

Id. at 115.
132. Id. at 114.
133. Id. at 115.
134. Id. at 111 (citing Walters v. City of St. Louis, 347 U.S. 231, 237 (1954)).
unconstitutional. Conversely, therefore, where there has been affirmative proof of insanity, the factual predicate established by this proof justifies the automatic commitment of the NGRI patient.

The Baxstrom decision is repeatedly cited as requiring states to provide insanity acquittees with the same procedural mechanisms afforded to others being civilly committed. By reading the holding so broadly, lower federal and state courts have failed to pay deference to the fundamental differences between the commitment of insanity acquittees and of individuals who, like Baxstrom, are subject to substantially inadequate procedures solely on the basis of their criminal status. Commitment of insanity acquittees is readily distinguishable from commitment of those individuals who come to suffer a mental disease while serving a prison term. First, insanity acquittees are subject to different commitment procedures and standards not merely because they


138. Regardless of the purpose for which the individual is placed in prison, the Baxstrom rationale has properly been held applicable if there has been no prior finding as to mental illness. See Specht v. Patterson, 386 U.S. 605, 610 (1967) (convicted sex offender entitled to hearing on mental illness before indefinite term could be imposed resulting from his being habitual offender); People v. Fuller, 24 N.Y.2d 292, 248 N.E.2d 17, 300 N.Y.S.2d 102 (1969) (substantially similar commitment procedures required for narcotics addicts presently imprisoned and those who are not); People ex rel. Goldfinger v. Johnston, 53 Misc. 2d 949, 280 N.Y.S.2d 304 (1967) (hearing required where youth being transferred from correction school to institution for defective delinquents). These courts have treated Baxstrom in a more limited light as simply denying "[w]hether a man should be committed for mental illness has no relevance to the place where he happens to be at the time he becomes ill." United States ex rel. Schuster v. Herold, 410 F.2d 1071, 1083-84 (2d Cir.), cert. denied, 396 U.S. 847 (1969).

have committed crimes, as was argued by the state in Baxstrom, but because there has been a previous factual determination that they committed crimes while suffering from a mental disease or defect. Second, whereas Baxstrom was committed on the basis of an ex parte determination by the Department of Mental Hygiene, insanity acquittees face automatic commitment only after a criminal trial during which the issue of mental illness has been litigated. Therefore, upon automatic commitment, an insanity acquittedee has been afforded the full panoply of rights granted civil committees. It warrants repetition that when mental disease or defect has been affirmatively proven by the defendant, a substantive predicate is provided warranting a presumption of continued insanity. No evidentiary counterpart existed in the proceeding to which Baxstrom was subject.

The Baxstrom decision was viewed by the Court of Appeals for the District of Columbia in Bolton v. Harris140 as indicative of the high court’s position on postacquittal procedures for insanity acquittedees. At issue in Bolton was the constitutionality of a District of Columbia statute providing for mandatory commitment of insanity acquittedees in a simple-defense system.141 The court held that the District of Columbia’s procedures for committing persons found NGRI violated the equal protection clause because it provided for commitment under substantially different procedures than those available to all others civilly committed.142 The court acknowledged that the legislative purpose underlying automatic commitment procedures “was to ‘achieve a balance of interest between the public and the person charged with the crime.’”143 However, the Bolton court concluded that the statute was constitutionally suspect in two principle areas: the denial of the right to a hearing before a jury on the question of present mental illness144 and the denial of the right to periodic review of the need for continued commit-

140. 395 F.2d 642 (D.C. Cir. 1968).
141. D.C. CODE § 24-301(d) (1967) read in part: “If any person tried... for an offense... is acquitted solely on the ground that he was insane at the time of its commission, the court shall order such person to be confined to a hospital for the mentally ill.” D.C. CODE § 24-301(d) (1967) (current version at D.C. CODE § 24-301(d) (1973)).
142. 395 F.2d at 649.
143. Id. at 648-49 (footnotes omitted) (quoting S. REP. No. 1170, 84th Cong., H.R. REP. No. 892, 84th Cong., 1st Sess. 2, 3, 16 (1956)).
144. “[P]ersons found not guilty by reason of insanity must be given a judicial hearing with procedures substantially similar to those in civil commitment proceedings.” Id. at 651 (footnote omitted).
ment. Both of these rights were granted all other civil committees under the relevant District of Columbia statutes. The

145. Id. at 652.
   (a) Upon the receipt by the court of a report referred to in section 21-544, the court shall promptly set the matter for hearing and shall cause a written notice of the time and place of the final hearing to be served personally upon the person with respect to whom the report was made and his attorney, together with notice that he has five days following the date on which he is so served within which to demand a jury trial. The demand may be made by the person or by anyone in his behalf. If a jury trial is demanded within the five-day period, it shall be accorded by the court with all reasonable speed. If a timely demand for jury trial is not made, the court shall determine the person’s mental condition on the basis of the report of the Commission, or on such further evidence in addition to the report as the court requires.
   (b) If the court or jury, as the case may be, finds that the person is not mentally ill, the court shall dismiss the petition and order his release. If the court or jury finds that the person is mentally ill and, because of that illness, is likely to injure himself or other persons if allowed to remain at liberty, the court may order his hospitalization for an indeterminate period, or order any other alternative course of treatment which the court believes will be in the best interests of the person or of the public. The Commission, or a member thereof, shall be competent and compellable witnesses at a hearing or jury trial held pursuant to this chapter. The jury to be used in any case where a jury trial is demanded under this chapter shall be impaneled, upon order of the court, from the jurors in attendance upon other branches of the court, who shall perform the services in addition to and as part of their duties in the court.

Id.

Under the provisions of § 21-546,
   (a) A patient hospitalized pursuant to a court order obtained under section 21-545, or his attorney, legal guardian, spouse, parent, or other nearest adult relative, may, upon the expiration of 90 days following the order and not more frequently than every 6 months thereafter, request, in writing, the chief of service of the hospital in which the patient is hospitalized, to have a current examination of his mental condition made by one or more physicians. If the request is timely it shall be granted. The patient may, at his own expense, have a duly qualified physician participate in the examination. In the case of such a patient who is indigent, the Department of Public Health shall, upon the written request of the patient, assist him in obtaining a duly qualified physician to participate in the examination in the patient’s behalf. A physician so obtained by an indigent patient shall be compensated for his services out of any unobligated funds of Department of Public Health in an amount determined by it to be fair and reasonable. If the chief of service, after considering the reports of the physicians conducting the examination, determines that the patient is no longer mentally ill to the extent that he is likely to injure himself or other persons if not hospitalized, the chief of service shall order the immediate release of the patient. However, if the chief of service, after considering the reports, determines that the patient continues to be mentally ill to the extent that he is likely to injure himself or
court held that no public interest was served by the denial of these rights to those found NGRI.\textsuperscript{147}

The court was cognizant that regardless of the door through which an individual enters the commitment process,\textsuperscript{148} the liberty interest at stake entitles the individual to certain fundamental safeguards. The court was concerned with the challenged statutory system's failure to provide for a judicial determination of mental illness, since an NGRI verdict was based merely on a finding of reasonable doubt as to a defendant's sanity.\textsuperscript{149} Further, the statute did not provide insanity acquittees with a jury trial on the issue of mental illness prior to commitment,\textsuperscript{150} nor did it provide for periodic review of whether continued commitment was justified.\textsuperscript{151}

The \textit{Bolton} court made the general statement that "persons found not guilty by reason of insanity must be given a judicial hearing with procedures substantially similar to those in civil commitment proceedings."\textsuperscript{152} The scope of the decision, however, is actually more narrow: The flaw in the automatic commitment procedure was the state's reliance on the tenuous factual basis for commitment provided by a simple defense of insanity. In \textit{Bolton}, as in \textit{Baxstrom}, the automatic commitment procedure was invalid because the statute resulted in an unconstitutional denial of liberty. Simply stated, all persons facing involuntary commitment are entitled to a full and fair hearing on the issue of mental illness, as well as to periodic review of the need for such commitment, the very rights that the \textit{Bolton} court sought to protect. The \textit{Bolton} court properly recognized that commitment following a simple defense of insanity deprived individuals of these rights. Thus, if the NGRI earned acquittal through an affirmative defense of insanity (rather than through a simple defense as in \textit{Bolton}), this proof positive of

other persons if not hospitalized, but one or more of the physicians participating in the examination reports that the patient is not mentally ill to that extent, the patient may petition the court for an order directing his release. The petition shall be accompanied by the reports of the physicians who conducted the examination of the patient.

\textit{Id.} § 21-546.

\begin{itemize}
\item \textsuperscript{147} 395 F.2d at 652.
\item \textsuperscript{148} E.g., O'Connor v. Donaldson, 422 U.S. 563 (1975) (as civil committee); Specht v. Patterson, 386 U.S. 605 (1967) (as sex offender); Baxstrom v. Herold, 383 U.S. 107 (1966) (as prisoner).
\item \textsuperscript{149} 395 F.2d at 648.
\item \textsuperscript{150} D.C. CODE § 24-301(c) (1973).
\item \textsuperscript{151} \textit{Id.}
\item \textsuperscript{152} 395 F.2d at 651 (footnote omitted).
\end{itemize}
mental illness provides the rational basis necessary to justify the automatic commitment of insanity acquittees.

Perhaps in acknowledgment of the parameters of its holding, the Bolton court went on to note that a reasonable application of the equal protection doctrine permits a state "to treat persons acquitted by reason of insanity differently from civilly committed persons to the extent that there are relevant differences between these two groups." The court reiterated the limited scope of Bolton five years later in United States v. Brown when it held that on the issue of burden of proof, as opposed to right to jury, equal protection would not be offended if differing standards applied. Thus it is apparent that reasonable distinctions between insanity acquittees and civil committees may be drawn.

The Supreme Court's decision in Jackson v. Indiana is the third case to which extensive reference has been made by courts in resolving the constitutionality of their state's commitment procedures. Jackson concerned the commitment of a young deaf and dumb boy who had been found incompetent to stand trial on charges of stealing nine dollars in two separate thefts. Doctors testified at the hearing on his capacity to stand trial that as a result of his physical handicaps it was doubtful that Jackson would ever be able to secure release under the applicable Indiana statutes. At issue was the constitutionality of an Indiana statute that pro-

153. Id.
155. Id. at 611.
158. Jackson, a mentally defective deaf mute who was unable to communicate was charged with two thefts totalling nine dollars. During the competency hearing the psychiatrists' testimony indicated that not only was Jackson presently incompetent, but that he lacked the capacity to ever learn to communicate and that overall his "prognosis appear[ed] rather dim." Jackson v. Indiana, 406 U.S. at 719. In addition, the Court opined that although it would have been difficult for Jackson to have been committed under Indiana's other civil commitment statutes, IND. ANN. STAT. § 22-1907 (commitment of feebleminded) currently found at IND. CODE § 16-15-1-3, or IND. ANN. STAT. § 22-1209 (commitment of mentally ill) currently found at IND. CODE § 16-14-9-9. His commitment as incompetent to stand trial under § 9-1706a could well have resulted in his being committed for life.
159. 1965 Ind. Acts Ch. 291 § 2 (repealed 1974). Currently, when a person is found not competent to stand trial, Indiana provides for: 1) civil commitment, 2) re-
vided more lenient commitment standards and more stringent release standards for defendants found incompetent to stand trial than those provided for other civil committees. The Court held that the Indiana statute was unconstitutional, noting that it was “clear that Jackson’s commitment rests on proceedings that did not purport to bring into play, indeed did not even consider relevant, any of the articulated bases for exercise of Indiana’s power of indefinite commitment.”

The Court’s conclusion in Jackson was the logical extension of its prior decision in Baxstrom. “If criminal conviction and imposition of sentence are insufficient to justify less procedural and substantive protection against indefinite commitment than that generally available to all others, the mere filing of criminal charges surely cannot suffice.” The considerations that limit the force of the Baxstrom rationale in the case of insanity acquittees are unchanged when placed in the context of an individual found incompetent to stand trial. The precedential value of these decisions ought to be limited to those cases where there has been no prior finding of mental illness.

Lurking behind the specific pronouncements in Baxstrom, Bolton, and Jackson lies a basic concern by the courts that under certain circumstances, and without a rational basis, the state was depriving individuals of their freedom without adequate procedures to determine that such an abridgment of rights was either warranted or necessary. Since personal liberty is a constitutionally protected right, the state carries the burden of proving the need for

lease within six months, or 3) a finding of competency to stand trial. IND. CODE § 35-5-3.1-3 (1979).

161. Id. at 737-38.
162. Id. at 724.
163. But see Deisinger v. Treffert, 85 Wis. 2d 257, 270 N.W.2d 402 (1978), where the court stated: “We find no factually distinguishing features between an incompetent to stand trial and an acquittee by reason of insanity, a convicted sex offender or one under observation as a mentally defective delinquent.” Id. at 261, 270 N.W.2d at 406.
164. The concepts underlying these cases were found applicable in analogous although not identical situations in Humphrey v. Cady, 405 U.S. 504 (1972), and cases cited at note 138 supra.
165. Addington v. Texas, 441 U.S. 418, 425 (1979). “This Court repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.” Id. (citations omitted). “There can be no doubt that involuntary commitment to a mental hospital, like involuntary confinement of an individual for any reason, is a deprivation of liberty which the
involuntary detention. In both *Baxstrom* and *Jackson*, the Supreme Court recognized that the state statutes being challenged allowed for the curtailment of these liberties without the factual determination of mental disease or defect that would warrant such action. As the Court noted, neither the finding of criminal guilt nor the tendency of criminal charges sheds any light on the question of mental illness. In these situations, a commitment hearing is essential to cure such constitutional infirmity by providing the means by which evidence of mental illness may be adduced.

A somewhat different situation was present in the *Bolton* case. While no affirmative finding of mental illness preceded Bolton's commitment, his successful use of the insanity defense did raise doubts in the minds of jurors concerning his mental state. But, as the *Bolton* decision implicitly pointed out, where the sole basis for automatic commitment rests upon nothing more than a reasonable doubt as to past sanity, constitutional requirements have not been met. Such a finding is not an adequate substitute for the findings made at an ordinary civil commitment hearing. In order for automatic commitment to be employed—and the NGRI patient burdened with proving that he or she is free "from such abnormal mental condition as would make [him] dangerous to himself or others in the foreseeable future" to secure release—there must first be a proof positive finding of mental disease or defect warranting the initial commitment.

This foundation is provided where insanity is treated as an affirmative defense. In light of the Court's rationale in *Baxstrom*...

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166. "Classification of mentally ill persons as either insane or dangerously insane... has no relevance whatever in the context of the opportunity to show whether a person is mentally ill at all." *Baxstrom v. Herold*, 383 U.S. at 111 (emphasis in original); *see Jackson v. Indiana*, 406 U.S. at 724.

167. "The plea is neither an express nor implied admission of present illness, and acquittal rests only on a reasonable doubt of past sanity; i.e., at the time of the offense. It follows that there is no reasonable basis for distinction for commitment purposes." 395 F.2d at 649 (emphasis in original).


and Jackson, automatic commitment is unconstitutional if it is not premised upon a factual finding of mental disease or defect. As such, automatic commitment following acquittal on a simple defense of insanity, where the sole finding by the jury is a reasonable doubt as to sanity, would be a violation of these principles. Only when insanity has been affirmatively proven at trial has there been a hearing functionally equivalent to a traditional civil commitment proceeding. Insanity must be treated as an affirmative defense if automatic commitment procedures are to be constitutionally upheld.

This principle has been borne out by many state and federal court decisions that have criticized and invalidated the particular automatic commitment scheme in question. These cases have relied implicitly on the absence of any affirmative proof of insanity—acquittal having been based on a simple defense. Such criticism loses its strength when insanity is an affirmative defense. The issue properly stated is as follows: Has there been a substantive factual foundation which provides a rational basis for automatic commitment? The issue is not who has the burden to establish such a foundation. So long as the facts are ultimately adduced and a substantive predicate established it is of little constitutional consequence whether they are brought forward by the state at a commitment hearing or by the defendant in an affirmative plea of insanity.

The Burden and Standard of Proof

In a system that provides for automatic commitment of NGRI’s as proposed in this Note, all postacquittal proceedings are, in a
sense, release hearings. The most severe pitfall in those systems that improperly employ the insanity defense is that they facilitate the creation of a loophole through which dangerous individuals may be prematurely returned to society. This "revolving door" may come about through procedural or substantive inconsistencies stemming from the burdens and standards of proof utilized at each stage of the process. Simply stated, where the procedures and burdens employed during the criminal trial differ from those utilized in the postacquittal sphere, the possibility arises for individuals to enter the commitment process by an NGRI plea and then almost immediately exit: Release thus becomes a function of inconsistencies in the system rather than cure of the underlying illness. Where, however, the criminal defendant must prove his or her insanity by a preponderance of the evidence to earn acquittal, and then, to earn release must prove the absence of this infirmity by the same quantum of proof, the procedural revolving door is closed and release becomes a function of treatment and cure of the underlying illness.

Policy considerations, highlighted by the need to avoid a revolving door situation, bring the necessity for a system that places postacquittal burdens on the defendant sharply into focus. In seeking to close this revolving door, we will first discuss procedural standards and burdens and then address the specific substantive standards that must be proven to secure release.

Procedural Burden—The Supreme Court, addressing in *Addington v. Texas*\(^{171}\) the issue of applicable standards of proof for civil commitment, held that in such proceedings the state must carry the burden of proof on the need for involuntary commitment by clear and convincing evidence.\(^{172}\) In reaching this decision the Court balanced the competing interests at stake, all the while cognizant of the need to allocate the risk of erroneous decisionmaking by the finder of fact. As noted earlier,\(^{173}\) the Court recognized the difficulty of meeting the burden of proof beyond a reasonable doubt when psychiatric testimony is involved\(^{174}\) and refused to impose such a standard upon the states.\(^{175}\) Turning its attention to the preponderance of the evidence standard, the Court held that it was constitutionally inadequate:

\(^{171}\) 441 U.S. 418 (1979).
\(^{172}\) Id. at 433.
\(^{173}\) See notes 67-71 *supra* and accompanying text.
\(^{174}\) 441 U.S. at 430.
\(^{175}\) Id.
In considering what standard should govern in a civil commitment proceeding, we must assess both the extent of the individual's interest in not being involuntarily confined indefinitely and the state's interest in committing the emotionally disturbed under a particular standard of proof.

Loss of liberty calls for a showing that the individual suffers from something more than is demonstrated by idiosyncratic behavior. Increasing the burden of proof is one way to impress the fact-finder with the importance of the decision and thereby perhaps to reduce the chances that inappropriate commitments will be ordered.

The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state.176

Utilizing the Addington Court's balancing test, there is a strong shift, both in the interests of the state and the individual, in favor of continued confinement of the NGRI patient until he or she has recovered from the mental condition that was proven at trial to have existed when he or she committed the act. As the Addington Court noted, one function of standards and burdens of proof is "to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision."177 The state's interest in confining the NGRI acquittee is stronger than its interest in confining the ordinary citizen in a civil commitment proceeding.178 Before rendering a verdict or decision of NGRI, the finder of fact must be convinced beyond a reasonable doubt that the defendant committed the crime with which he or she is charged.179 This affirmative finding that the individual committed an act dangerous to society differs from the usually speculative findings in civil commitment proceedings that the individual in question is dangerous to himself or others.180

176. Id. at 425-27 (citations omitted) (emphasis added).
177. Id. at 423.
179. See note 24 supra.
180. In re Franklin, 7 Cal. 3d 126, 496 P.2d 465, 101 Cal. Rptr. 553 (1972); State v. Kee, 510 S.W.2d 477 (Mo. 1974); People v. Lally, 19 N.Y.2d 27, 224 N.E.2d
In addition to these differences, which contribute to the state’s stronger interests, the liberty interest of the acquitted NGRI patient facing commitment is far weaker than the liberty interest of the ordinary citizen facing civil commitment. The NGRI patient has already come forward and proven the existence of mental disease at the criminal trial, thereby avoiding criminal sanction. Conversely, in the situation where an individual is resisting involuntary commitment there has been no prior finding on the issue of mental illness nor has such an individual necessarily committed an anti-social or criminal act. Thus the insanity acquittee’s liberty interests cannot be asserted with equal intensity.

If society is forced to be exposed to those found NGRI without the assurance that they will be cared for prior to their outright release, it is doubtful whether society will continue to tolerate its longstanding practice of exculpating insanity defendants.181 Just as prior to the release of ordinary criminals there is an assurance that they will serve an appropriate sentence—meeting society’s goals of deterrence, retribution, criminal rehabilitation, and restraint—so too must the public be assured that prior to the release of an NGRI patient, appropriate steps have been taken to effectuate treatment or cure—meeting society’s goals of restraint and rehabilitation of the NGRI patient until he or she is no longer dangerous or ill.182 While the actions taken in each case are distinguishable, in one case punishment and in the other treatment, society has the right to be assured that each will be fully carried out. The law would be perpetuating a fraud if it allowed the avoidance of one of these goals by virtue of differing burdens of proof at each stage of the insanity-defense process.

Justice Harlan, in his concurrence in In re Winship, noted that the assignment of a burden of proof operates “to instruct the

87, 277 N.Y.S.2d 654 (1966). As one authority has noted,

[I]t is precisely because “‘he did the act which caused him to be brought into court’ that society is justified in reaching the conclusion that ‘it is not safe for him or the community for him to be at large.’” While society can speculate that the non-offender might commit offenses, it can confidently assert that the offender has done so. This proven dangerousness is, in this writer’s opinion, sufficient grounds for treating persons acquitted by reason of insanity as a special class.

Hamann, supra note 15, at 57 (emphasis in original) (quoting Salinger v. Superintendent, Spring Grove State Hosp., 206 Md. 623, 628, 112 A.2d 907, 909 (1955)).

181. It is precisely this growing intolerance that has induced commentators and legislators to propose and enact alternatives to the insanity defense. See text accompanying notes 73-103 supra.

182. See notes 25-29 supra and accompanying text.
fact finder concerning the degree of confidence our society thinks he should have in the correctness of the factual conclusions [asserted].” Since the question of the individual’s sanity should logically remain consistent whether in criminal or civil proceedings, any system in which the postacquittal burden differs from the burden at the criminal trial would operate to undermine the “correctness of the factual conclusions” reached at that prior criminal trial.

The question remains concerning which consonant standards ought properly to be employed. Focusing first on the criminal trial stage, placing the burden of proof upon the state to establish sanity beyond a reasonable doubt would be inconsistent with the Addington Court’s conclusions concerning the speculative nature of psychiatric testimony. Moreover, an acquittal based upon the state’s failure to carry such a burden raises only a negative implication of the defendant’s abnormal symptomatology, rather than a proof positive finding upon which such an acquittal should rest. Placing a lower burden upon the prosecution, utilizing either the clear and convincing or preponderance of the evidence standards, would similarly provide for acquittal based upon inference rather than affirmative proof. In addition, assigning a lower burden upon the state on the sanity issue could result in jury confusion and the dilution of the Winship and Mullaney mandate that the state prove all elements of a crime beyond a reasonable doubt. In contrast, by shifting the burden on this issue to the defendant the system operates efficiently, logically, and constitutionally. By clearly delineating the question of sanity as a separate issue to be established by the defendant, the system avoids the possibility that the jury will dilute the high burden the state carries on all other elements. Yet, with a carefully constructed jury instruction, the jury is aided in reaching a proper verdict without undue overlap between proof of intent, sanity, and criminal mens rea. Most importantly, only where the burden of proof is placed upon the defendant at trial will the existence of an abnormal symptomatology ever be affirmatively established so as to warrant a finding of NGRI.

184. 441 U.S. at 423.
185. “[T]he state [should not] be required to employ a standard of proof that may completely undercut its efforts to further the legitimate interests of both the state and patient that are served by civil commitments.” Id. at 430.
186. See notes 66-73 supra and accompanying text.
187. See notes 64-71 supra and accompanying text.
A similar analysis must be applied to burdens at the post-acquittal stage. Here, placing the burden of proving insanity beyond a reasonable doubt on the state to justify continued confinement of the NGRI acquittee conflicts with the Court's holding in *Addington v. Texas*. While placing a lower burden of proof upon the state would conform to *Addington*, such a system would destroy the process' internal consistency, thus rendering the factual conclusions reached at the criminal trial virtually meaningless by allowing a defendant to win release without proving that he or she no longer suffers from the condition that led to his or her acquittal. The remaining alternative, placing the burden of proof at postacquittal hearings upon the NGRI patient is, in addition to being constitutional, the alternative most responsive to the need for logical consistency in the law.

The Substantive Standard—The fundamental dilemma of the insanity defense as it operates today is that it utilizes different and inconsistent standards of mental illness in the criminal and civil spheres. The existence of an inconsistency in the type of mental condition that earns an acquittal—a fact-based standard encompassing a broad spectrum of symptoms—and the type of mental condition that justifies commitment—a formal medical standard encompassing a limited number of recognized "diseases or defects"—might at first glance appear to be of only academic importance. Yet, as was evidenced in the recent New York case *In re Torsney*, this disparity in substantive standards is of extreme practical importance. In determining whether Robert Torsney was entitled to a conditional release after a finding of NGRI, the Court of Appeals struggled with the task of giving substantive meaning to the release provisions of the applicable New York statute. The decision produced a 3-1-3 split of the court.

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188. 441 U.S. at 433.
192. Judge Jasen wrote for the plurality, 47 N.Y.2d at 670, 394 N.E.2d at 263, 420 N.Y.S.2d at 193; Judge Meyer wrote a concurring opinion, id. at 684, 394 N.E.2d at 272, 420 N.Y.S.2d at 202; and Judge Wachtler wrote for the dissent, id. at 686, 394 N.E.2d at 273, 420 N.Y.S.2d at 204.
Torsney, a New York City policeman, had been charged with second degree murder in the Thanksgiving Day shooting of a fifteen-year old boy. He successfully interposed a defense of insanity claiming that his acts were the product of psychomotor epilepsy. On the date of his acquittal he was committed to the custody of the Commissioner of the Department of Mental Hygiene. Six months later a special release committee was convened to report on whether he should be released. The committee, in agreement with hospital staff findings, recommended that "inasmuch as Torsney was not dangerous or mentally ill, he should be released." On the basis of this report, the Commissioner sought a court order for Torsney's conditional release.

193. Psychomotor epilepsy affects an individual so as to "disturb awareness, perception, memory and interpretation of environmental cues. Ictal emotional experiences associated with psychomotor epilepsy are very difficult to differentiate from psychiatric disturbances of non-organic causes. A relatively high incidence of psychological abnormalities has been found in patients with diagnosed psychomotor epilepsy." W. LEVINSKY, MEDICINE: ESSENTIALS OF CLINICAL PRACTICE 859 (1978).

194. Torsney's automatic commitment was pursuant to N.Y. CRIM. PROC. LAW § 330.20(1) (McKinney 1971):

Upon rendition of a verdict of acquittal by reason of mental disease or defect, the court must order the defendant to be committed to the custody of the commissioner of mental hygiene to be placed in an appropriate institution in the state department of mental hygiene. The court must direct the sheriff to temporarily hold the defendant pending designation of an appropriate institution in which the defendant must be placed, and when notified by the commissioner of mental hygiene of the designated institution, the sheriff must forthwith cause the defendant to be delivered to the head of such institution. Such defendant is entitled to the assistance of the mental health information service.

Id. (current version at 1980 N.Y. LAWS ch. 548, § 330.20).

195. Torsney had originally been committed to Mid-Hudson Psychiatric Center. Within a short time, however, he was transferred to Creedmore Psychiatric Center where the recommendation was made to release Torsney. 47 N.Y.2d at 670, 394 N.E.2d at 263, 420 N.Y.S.2d at 193.

196. Id.

197. The Commissioner petitioned the court pursuant to N.Y. CRIM. PROC. LAW § 330.20(2) (McKinney Supp. 1979), which read:

If the commissioner of mental hygiene is of the opinion that a person committed to his custody, pursuant to subdivision one of this section, may be discharged or released on condition without danger to himself or to others, he must make application for the discharge or release of such person in a report to the court by which such person was committed and must transmit a copy of such application and report to the mental health information service of the judicial department in which the court is located and to the district attorney of the county from which the defendant was committed. The court may then appoint up to two qualified psychiatrists, as defined in subdivision five of section 730.10 of this chapter, to examine such person, to report within 60 days, or such longer period as the court determines to be nec-
the conclusion of a full evidentiary hearing, including the testimony of eighteen witnesses, the supreme court granted the petition. The appellate division reversed the lower court, and held, "It is clear that Torsney was at least suffering from a personality disorder which contributed to his actions on the date of the offense. . . . More importantly, he still suffers from that same condition today." The court of appeals was faced with two issues. First, what was the proper definitional standard for release of NGRI patients, and second, did the weight of the credible evidence in Torsney's case satisfy that standard. The plurality interpreted New York's release provisions as mandating the release of an NGRI patient if the psychiatric community found that he or she did not suffer from a mental disease or defect as it defines those terms. Their decision to release Torsney reflected a failure of the medical experts to

essay for the purpose, their opinion as to his mental condition. To facilitate such examination and the proceedings thereon, the court may cause such person to be confined in any institution located near the place where the court sits, which may hereafter be designated by the commissioner of mental hygiene as suitable for the temporary detention of irresponsible persons.

Id. (current version at 1980 N.Y. LAWS ch. 548, § 330.20).
198. 47 N.Y.2d at 670, 394 N.E.2d at 263, 420 N.Y.S.2d at 193. The Commissioner's petition was granted pursuant to N.Y. CRIM. PROC. LAW § 330.20(3) (McKinney Supp. 1979):

If the court is satisfied that the committed person may be discharged or released on condition without danger to himself or others, the court must order his discharge, or his release on such conditions as the court determines to be necessary. If the court is not so satisfied, it must promptly order a hearing to determine whether such person may safely be discharged or released. Any such hearing shall be deemed a civil proceeding. After such hearing, the committed person must be discharged, released on such conditions as the court determines to be necessary, or recommitted to the commissioner of mental hygiene. The commissioner of mental hygiene must make suitable provision for the care and supervision by the department of mental hygiene of persons released conditionally under this section.

Id. (current version at 1980 N.Y. LAWS ch. 548, § 330.20).
200. 47 N.Y.2d at 671, 394 N.E.2d at 264, 420 N.Y.S.2d at 194. The threshold issue is whether the Appellate Division properly construed the standard for release. Contingent upon resolution of this issue is the second issue: namely, whether evaluated under the proper standard for release the weight of the credible evidence presented at the hearing requires the detainee's continued confinement, discharge or release on condition.

Id.
201. 47 N.Y.2d at 676, 394 N.E.2d at 267, 420 N.Y.S.2d at 197. "[W]e interpret CPL 330.20 as requiring a detainee's release unless it is found that he is presently dangerous to himself or others by reason of mental disease or defect." Id.
pigeonhole Torsney’s condition into an identifiable category of mental disease or defect. \(^{202}\) This interpretation leaves the possibility of a revolving door wide open, since it is quite possible that a jury could acquit a defendant by reason of “mental disease or defect” when the defect is evidenced by symptoms not easily labeled as one of the “diseases” listed in the psychiatrist’s lexicon. \(^{203}\) The dilemma may be stated as follows: If the criminal standard at trial for mental disease is broader and more inclusive than the medical standards utilized at the civil level, then we are compelled to release individuals from postacquittal commitment solely because the terminology employed by the psychiatric community does not encompass the specific symptomatology NGRI patients may manifest. It is a frightful paradox that a detainee still manifesting the same symptoms that led to his or her acquittal could win release solely because his or her mental defect could not be labeled in psychiatric terms. \(^{204}\) The court was trapped by the differing definitional standards at work in each of the spheres; broad and fact-based legal standards in the criminal sphere versus rigid, categorized medical standards controlling the civil sphere. In his powerfully worded dis-

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\(^{202}\) Holding that Torsney was entitled to release, the court of appeals noted: “One thing is abundantly clear, every opinion offered at the hearing substantiated Torsney’s claim that he is neither suffering from mental disease or defect nor dangerous to himself or others.” Id. at 682, 394 N.E.2d at 270, 420 N.Y.S.2d at 201. The facts upon which the psychiatrists based their conclusions, however, were interpreted by the appellate division, as well as by the dissent in the court of appeal’s decision, as indicative of the need for continued commitment. Examining the testimony of Dr. Hollar, one of two court-appointed psychiatrists to examine Torsney, the appellate division noted:

Dr. Hollar also found Torsney to be explosive, volatile, sensitive to stress and impulsive. When questioned as to whether Torsney had the capacity to repeat the dangerous act, Dr. Hollar indicated that “there’s nothing in the record or . . . his examination that says that under a particular stress it might not happen again.”

In re Torsney, 66 A.D.2d 281, 291, 412 N.Y.S.2d 914, 920 (2d Dep’t 1979). And, as noted in the District Attorney’s brief, “Dr. Hollar stated that because of the character of the petitioner’s personality disorder, he was not sure that if he had interviewed Mr. Torsney a day before the Evans murder he could have anticipated that catastrophe.” Brief for Respondent at 58, In re Torsney, 47 N.Y.2d 667, 394 N.E.2d 262, 420 N.Y.S.2d 192 (1979).

\(^{203}\) Indeed, the appellate division noted that “[a]lthough in his written report Dr. Hollar recommended that Torsney be released, on cross-examination he explained that the recommendation was based solely on the fact that there was no psychiatric ground to continue Torsney’s confinement, i.e., no mental disease or defect.” 66 A.D.2d at 291-92, 412 N.Y.S.2d at 920.

\(^{204}\) 47 N.Y.2d at 690, 394 N.E.2d at 275, 420 N.Y.S.2d at 206 (Wachtler, J., dissenting).
sent, Judge Wachtler recognized that the plurality failed to extricate itself from this quagmire and was, by its opinion, "exalting this paradox to law." Judge Wachtler asserted, rather poignantly, that "to release such a person merely because his symptoms elude classification is indefensible."

To resolve this paradox, we propose the following. The substantive standards used for release at the civil level must relate back to the evidentiary findings proven at the criminal trial. Theoretically, the individual who raises the defense of insanity establishes his or her own private, fact-based substantive standard, which should be the one that must be refuted in order for him or her to secure release. Release must not be a function of a superimposed standard derived from strict medical terminology since such a standard both lacks the realistic dimension provided by an analysis of the underlying facts and any relation to the standard utilized at trial. Rather, "to secure his release the detainee should have to prove that he no longer suffers from the symptomology associated with the wrongful act."

To stop the revolving door there must be a more flexible application of the term mental disease or defect so that a rational continuum between the two spheres is maintained. If the defendant's mental condition was sufficiently identifiable to warrant an acquittal, it should be treated as an adequate basis upon which continued commitment may be predicated. In so doing, symptoms that substantially limited the defendant's appreciation of the "nature and consequence of the criminal conduct" or his or her ability to recognize "that such conduct was wrong" will remain legally cognizable in the posttrial stages, irrespective of whether they are able to be categorized in accordance with the psychiatric lexicon of the times. Thus, if on the basis of psychiatric testimony, a jury found that a generally accepted notion of mental disorder was sufficient for acquittal, then such notion must a fortiori come within the standard for continued confinement. If the burdens of proof and substantive standards utilized at each level are equated, then and only then will release aptly reflect the considerations that justify the existence of an exculpatory defense of insanity.

205. Id. (Wachtler, J., dissenting).
206. Id. at 689, 394 N.E.2d at 275, 420 N.Y.S.2d at 206 (Wachtler, J., dissenting) (citation omitted).
207. Id. (Wachtler, J., dissenting).
CONCLUSION

Present statutory schemes surrounding the insanity defense are inadequate. At the criminal level, no proffered alternative satisfies the various societal goals and competing interests to the degree achieved by utilizing the affirmative defense of insanity. At the postacquittal level, court decisions throughout the country represent a myriad of constitutional and social policy arguments. The result of this judicial confusion is that state legislatures have no clear direction to follow in their efforts to improve upon the contemporary state of the law. New York's system is merely symptomatic of the inconsistencies that have clouded preacquittal and postacquittal proceedings for many years.

Viewing procedures relating to the insanity defense as a continuum, a rational progression is brought sharply into focus. The criminal law must treat insanity as an affirmative defense to provide a substantive foundation for ensuing postacquittal proceedings. The successful defendant, having established "proof positive" the existence of mental illness, should undergo automatic commitment to a state mental hygiene facility for examination, observation, and treatment. Though the NGRI patient should be afforded all procedural protections to which other patients are entitled, he or she should nonetheless be required to carry the burden of proof at all stages of the postacquittal process. In this sense the proposed system alleviates the procedural dilemma of the revolving door. Further, to avoid the existence of a substantive revolving door, the evidentiary standard for releasing an NGRI patient should be interrelated with the evidentiary findings that led to his or her acquittal and initial commitment. The findings at the criminal hearing serve as the substantive predicate against which release must be measured. Only by treating the system as one unit can a proper statutory framework be formulated for the treatment of individuals whose criminal acts were related to a psychological dysfunction.

Andrew J. Nathan
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THE NECESSITY DOCTRINE:
A PROBLEMATIC REQUIREMENT FOR
CERTIFICATION OF RULE 23(b)(2) CLASS ACTIONS

The class action, traceable to feudal times,\(^1\) received its first contemporary codification in 1938, with the enactment of rule 23 of the Federal Rules of Civil Procedure.\(^2\) Although the statute expanded the theories upon which class actions could be maintained,\(^3\) it was encumbered with "common-law legalisms"\(^4\) that impeded the development of a class-action jurisprudence\(^5\) capable of meeting the "exigencies . . . of contemporary litigation."\(^6\) Thus, after a history of consistent criticism,\(^7\) rule 23 was completely revised in 1966.\(^8\)

Stripped of its feudal armor, the new rule promised "to rebuild the law on functional lines responsive to those recurrent life patterns which call for mass litigation through representative parties."\(^9\) While section 23(a) provided four prerequisites to the maintenance of a class suit that were either express or implicit in the

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2. FED. R. CIV. P. 23 (1938), reprinted in 39 F.R.D. 94-95 (1966). In a class action, a controversy exists which raises issues of fact or law common to a group of persons that is so numerous that joinder is impracticable. In granting a motion for class certification, the court is allowing a representative of the class to prosecute the litigation to a judgment or settlement that is binding on the entire class. See 1 H. Newberg, CLASS ACTIONS § 1000a (1977).
5. See Cohn, supra note 4, at 1212-15; Developments—Class Actions, supra note 3, at 1343.
former rule, section 23(b) replaced the rigid formalisms that led to
the original rule's demise. Nonetheless, the revision was greeted
with caution, and prompted then-District Judge Marvin Frankel
to observe that it "tends to ask more questions than it answers." Judge Frankel's comment, made more than a decade ago,
might be viewed as prescient in light of subsequent judicial divi-
sion concerning the proper interpretation of section (b)(2). To
warrant judicial certification, a class action brought for injunctive or
declaratory relief must meet not only the four prerequisites of section
23(a),

(b) Class Actions Maintainable. An action may be maintained
as a class action if . . . :

(2) the party opposing the class has acted or refused to act
on grounds generally applicable to the class, thereby making ap-
propriate final injunctive relief or corresponding declaratory re-

In determining whether to certify a rule 23(b)(2) class, some
courts first contrast the consequences of granting relief in favor of
the class with the consequences of limiting relief to the individual
litigant. This approach is primarily concerned with whether "the
adjudication of individual declaratory or injunctive relief . . . will
as a practical matter produce the same result as formal classwide
relief . . . ." If such a finding is made, certification will be denied
so that the court may avoid "the potential complexities of a class

10. See C. WRIGHT & A. MILLER, supra note 8.
11. "The amended rule is in jeopardy from those who embrace it too enthusias-
tically just as it is from those who approach it with distaste or undue restrictiveness." C. WRIGHT & A. MILLER, supra note 8, § 1753, at 541.
13. See text accompanying notes 55-89 infra.
14. Rule 23(a) states:

(a) Prerequisites to a Class Action. One or more members of a class may
sue or be sued as representative parties on behalf of all members only if (1)
the class is so numerous that joinder of all members is impracticable, (2)
there are questions of law or fact common to the class, (3) the claims or de-
defenses of the representative parties are typical of the claims or defenses of
the class, and (4) the representative parties will fairly and adequately protect
the interests of the class.

15. FED. R. CIV. P. 23(a).
17. 3B MOORE'S FEDERAL PRACTICE ¶ 23.40[3], at 23-292 (2d ed. 1980) [here-
after cited as 3B J. MOORE].
This benchmark has come to be known as the "necessity doctrine."\(^{19}\)

Other courts, led by the Seventh Circuit, have rejected this approach.\(^{20}\) In their view, "[i]f the prerequisites and conditions of [rule 23] are met, a court may not deny class status because there is no 'need' for it."\(^{21}\)

Section 23(b)(2) has been far the most popular vehicle for the maintenance of class suits;\(^{22}\) thus, continued controversy concerning certification holds the potential of curtailing utilization of a rule that "has provided access to the judicial process for those who need it most."\(^{23}\) Because this potential exists at a time when both the number and kind of class suits are increasing,\(^{24}\) it is important to explore the different approaches to certification of rule 23(b)(2) actions. After a brief overview of class actions, this Note will examine the conflicting (b)(2) approaches and review the uncertain derivation of the necessity doctrine. The expediency of the doctrine will then be discussed and, in conclusion, a proposal for its future offered.

**Overview**

The use of the class action as a litigation tool has had an extraordinary impact, both quantitatively and qualitatively, on the judicial system.\(^{25}\) While several thousand class suits may be pending

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\(^{18}\) Id.

\(^{19}\) Cf. id. (some courts require a "special need or necessity" for certification).

\(^{20}\) See text accompanying notes 55-89 infra.

\(^{21}\) Fujishima v. Board of Education, 460 F.2d 1355, 1360 (7th Cir. 1972).

\(^{22}\) 1 H. NEWBERG, supra note 2, § 1145.


\(^{24}\) See note 23 supra; 1 H. NEWBERG, supra note 2, § 1010.

\(^{25}\) See 1 H. NEWBERG, supra note 2, § 1010.
at any given time, the action has nonetheless proven to be an effective mechanism for the furtherance of judicial efficiency. As one circuit judge has observed, "Over the years it has promoted the convenience of courts and parties infinitely, reduced the expense of lawsuits incalculably, and . . . contributed immeasurably to efficient judicial administration."

In part as a result of its procedural efficacy, and in part because class suits are frequently brought pursuant to statutes that authorize payment of litigation costs, the action has paved the way for redress of rights previously left unvindicated. Even given its uncertain history,

[i]t is hardly necessary in this age to argue the worth of the class action in our ever-expanding system of jurisprudence . . . . It has been the refuge of the poor, the hope of the downtrodden, and the salvation of the many whom our social institutions all too frequently victimize, unwittingly or otherwise.

Of course, in order to pursue its substantive rights, a potential class must first satisfy the certification standards of Federal Rule of Civil Procedure 23. The rule prescribes alternative criteria dependent on the type of relief sought. A class seeking declaratory or

27. See Williams v. Mumford, 511 F.2d at 371 (Robinson, J., dissenting from denial of rehearing en banc, joined by Bazelon, Leventhal, and Wright, JJ.).
28. Id.
30. See, e.g., cases collected in note 23 supra.
31. 511 F.2d at 371 (Robinson, J., dissenting from denial of rehearing en banc, joined by Bazelon, Leventhal, and Wright, JJ.).
32. In addition to the (b)(2) class action, rule 23(b) provides:
   (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
   (1) the prosecution of separate actions by or against individual members of the class would create a risk of
       (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
       (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
   (2) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual
injunctive relief may be maintained if the prerequisites of both subsections (a) and (b)(2) are met. Because a 23(b)(2) action is often the only economically feasible form by which a class can seek judgment, failure to obtain such certification may make the redress of substantive rights impossible. It is precisely because 23(b)(2) can be either a catalyst or impediment that a uniform approach to its application is needed. Nearly fifteen years after the 1966 revision, the achievement of uniformity is long overdue.

Acceptance of the Necessity Doctrine

The necessity test, though not explicitly embraced by rule 23 as a separate requirement for the maintenance of a (b)(2) action, has become a well-settled rule employed by numerous district courts and several courts of appeals. The test has been interpreted as requiring that there be a “special need or necessity [for class-wide relief] which will not be satisfied by granting declaratory or injunctive relief in favor of the individual claimants.” Consequently, class status is deemed unnecessary where any relief that might be ordered on behalf of the named plaintiff as an individual would inure to the benefit of all those similarly situated (the would-be class) even in the absence of class certification.

Typically, the necessity doctrine is applied in cases involving claims of unconstitutional action and statutory civil rights violations. Those courts adopting the necessity approach have argued that should “the judgment run to the benefit not only of the named members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. . . .

33. See note 14 supra.
34. See text accompanying note 15 supra.
35. See text accompanying notes 25-31 supra.
38. 3B J. Moore, supra note 17, ¶ 23.40[3], at 23-292A. See also Craft v. Memphis Light, Gas & Water Div., 534 F.2d 684, 686 (6th Cir. 1976) (quoting unreported opinion, W.D. Tenn), aff'd, 436 U.S. 1 (1978) (without consideration of certification issue). The test has also been stated, in short form, as denying class certification where no “useful purpose” would be served by such certification. E.g., Ihrke v. Northern States Power Co., 459 F.2d 566, 572 (8th Cir. 1972), vacated and remanded to dismiss as moot, 409 U.S. 815 (1972).
plaintiffs but [also] of all others similarly situated," \(^{41}\) then the class form is superfluous and inefficient. \(^{42}\) Since in a 23(b)(2) suit the relief sought is prohibitory, the "determination of the constitutional [or statutory civil rights] question can be made by the Court . . . regardless of whether [the] action is treated as an individual action or as a class action." \(^{43}\) Thus, the defendant is bound by the judgment as to all similarly situated claimants, present or prospective.

The watershed case from which this analysis has developed is *Galvan v. Levine*, \(^{44}\) a 1973 Second Circuit decision. In *Galvan*, two Puerto Rican Americans brought suit on behalf of themselves and all others similarly situated, under rule 23(b)(2), against the Industrial Commissioner of New York State. They challenged the Commissioner's policy of denying unemployment benefits to a claimant who leaves a job in a given labor-market area and moves his residence to an area of persistent high unemployment (defined as having an unemployment rate of at least 12%). The complaint alleged that this policy was being applied exclusively to Puerto Rican Americans who returned to Puerto Rico (an area meeting the 12% rule) after being seasonally employed in New York. \(^{45}\) In denying the plaintiffs' motion for class certification under rule 23, Judge Friendly disclaimed any need for the class action form.

[Insofar as the relief sought is prohibitory, an action seeking declaratory or injunctive relief against state officials on the ground of unconstitutionality of a statute or administrative practice is the archetype of one where class action designation is largely a formality, at least for the plaintiffs. . . .] \(^{46}\) What is important . . . is that the judgment run to the benefit not only of the named plaintiffs but of all others similarly situated. \(^{46}\)

Thus, since the court found that the judgment would bind the de-

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42. See also *Moore v. Western Pa. Water Co.*, 73 F.R.D. 450, 454 (W.D. Pa. 1977); *Spirt v. Teachers Ins. & Annuity Ass'n*, 416 F. Supp. 1019, 1024 (S.D.N.Y. 1976). This position, however, has been criticized. "In foregoing class action analysis . . . courts hearing constitutional challenges may give up an opportunity to familiarize themselves with the facts of a case which may be relevant to its outcome." *Developments—Class Actions*, supra note 3, at 1370.
45. Id. at 1257.
46. Id. at 1261 (emphasis in original) (citations omitted).
fendant "with respect to all claimants,"\textsuperscript{47} it concluded that "class action designation was unnecessary."\textsuperscript{48}

While the preceding analysis may be internally consistent,\textsuperscript{49} the flaw exists not in its application but in its existence. Among the courts utilizing the necessity doctrine, none has grounded its decision on persuasive statutory authority.\textsuperscript{50} Instead, these courts have relied on notions of efficiency\textsuperscript{51} and "practical significance"\textsuperscript{52} which, no matter how appealing, may nonetheless be inappropriate. Nor have these courts hidden their aversion to a strict construction of rule 23(b)(2). As Judge Gasch said in District of Columbia Podiatry Society v. District of Columbia:

\begin{quote}
[T]otally apart from the question of whether the plaintiffs have met the requirements of Rule 23(a) and (b) for maintaining a class action, the Court concurs with a recent trend of cases in which applications for class actions have been denied when the declaratory and injunctive relief being sought can be shaped to have the same purpose and effect as a class action.\textsuperscript{53}
\end{quote}

This Note will discuss below\textsuperscript{54} the possible grounds of statutory support for the necessity doctrine, although it will conclude that none is convincing. What is important here, however, is that the necessity courts not only have failed to offer plausible statutory grounds for their decisions, but also have neglected to attempt such a justification.

\section*{Rejection and Confusion}

The necessity test has been explicitly rejected by several courts, attesting to the lack of uniformity on the federal level.\textsuperscript{55} Moreover, in the Second Circuit, which accepted the doctrine in

\begin{itemize}
\item \textsuperscript{47} \textit{Id.}
\item \textsuperscript{48} \textit{Id.} at 1262.
\item \textsuperscript{49} \textit{But see} text accompanying notes 76-81, 130-133 infra.
\item \textsuperscript{50} \textit{See} text accompanying notes 90-116 infra.
\item \textsuperscript{52} \textit{E.g.}, 490 F.2d at 1261.
\item \textsuperscript{53} 65 F.R.D. 113, 114 (D.D.C. 1974) (emphasis added).
\item \textsuperscript{54} \textit{See} text accompanying notes 90-116 infra.
\end{itemize}
several district court decisions have rejected its application without subsequent reversal. Thus, to the extent that reliance is an important factor in whether to bring a class suit, the disunity among the circuits and within the Second Circuit may discourage their maintenance.

The Seventh Circuit has been the major force opposing the necessity doctrine. The seminal decision, *Fujishima v. Board of Education*, involved a suit by three high school students suspended for violating a prohibition against the distribution of certain material without prior administrative approval. The class, made up of all high school students in Chicago, sought declaratory and injunctive relief as well as damages. The district court denied class certification, resting its decision entirely on the lack of "need for a class action." In reversing, the court of appeals unequivocally rejected the need requirement: "If the prerequisites and conditions of [rule] 23 are met, a court may not deny class status because there is no 'need' for it." With that statement, *Fujishima* has become the primary authority, both within and without the circuit, for subsequent disapproval of the necessity doctrine.

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56. 490 F.2d 1255 (2d Cir. 1973), cert. denied, 417 U.S. 936 (1974); see text accompanying notes 44-48 supra.
57. E.g., Mendoza v. Levine, 72 F.R.D. 520 (S.D.N.Y. 1976). In fact, the district court opinion in Bacon v. Toia, 437 F. Supp. 1371 (S.D.N.Y. 1977), which explicitly rejected the necessity doctrine, was subsequently affirmed (without opinion) on appeal. 580 F.2d 1044 (2d Cir. 1978). See text accompanying notes 82-89 infra.
58. But cf. discussion in note 63 infra (examining conflicting dicta).
59. 460 F.2d 1355 (7th Cir. 1972).
60. Id. at 1355.
61. Id. at 1360 (quoting unreported opinion, N.D. Ill.).
62. Id.
63. See, e.g., Brown v. Scott, 602 F.2d 791, 795 (7th Cir. 1979); Vergara v. Hampton, 581 F.2d 1281, 1284 (7th Cir. 1978); Vickers v. Trainor, 546 F.2d 739, 747 (7th Cir. 1977); Johnson v. Mississippi, 78 F.R.D. 37, 39 (N.D. Miss. 1977); Kornbluh v. Stearns & Foster Co., 73 F.R.D. 307, 310 (S.D. Ohio 1976); Sturdevant v. Deer, 73 F.R.D. 375, 378 (E.D. Wis. 1976). Although the Seventh Circuit has never applied the necessity doctrine, there is disturbing dicta in a 1977 opinion by Judge Sprecher who, remarkably, wrote the unequivocal statement quoted in the text accompanying note 62 supra. In a subsequent case, Alliance to End Repression v. Rochford, 565 F.2d 975 (7th Cir. 1977), the court, in an opinion written by Judge Sprecher, said, "It is our view that while there may be appropriate cases in which there is no 'need' to have suit brought as a class action, this is not one of them." Id. at 980. The court then mentioned cases involving attacks on "a statute or regulation as being facially unconstitutional," id., and those where failure to certify the class would not affect "the admissibility of evidence at trial," id., as situations that may not warrant class certification, even though all formal requirements have been met. Of course, the precedential value of such dicta is limited. Not surprisingly, however, the *Alliance* dicta subsequently appeared in Hernandez v. United Fire Ins. Co., 79
The proponents of the "no need" position strictly construe the language of rule 23. If declaratory or injunctive relief is warranted because "the party opposing the class has acted or refused to act on grounds generally applicable to the class," and the prerequisites of 23(a) are satisfied, certification is necessarily appropriate. The relative utility of class-wide versus individual relief is irrelevant. This position is clearly illustrated by Dixon v. Quern, where a (b)(2) action was brought to enjoin the Illinois Department of Public Aid from terminating financial assistance without a pre- or post-termination hearing. It was clear, and the court agreed, that any judgment in favor of the named plaintiffs would benefit all those similarly situated. Nonetheless, once it found that injunctive and declaratory relief was appropriate, the court went no further, notwithstanding the state's approach: "Although defendants' argument has a logical appeal, the court is constrained to reject it. In this circuit, it is clear that a court may not decline to certify a class simply because there is no 'need' for it, if the prerequisites and conditions of Rule 23 have been met." Thus Dixon, in the spirit of Fujishima, refused to consider need for class treatment as a criterion of rule 23(b)(2).

If litigants are the beneficiary of the Seventh Circuit's uniform approach, they are likely to be confused by the inconsistency in

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F.R.D. 419 (N.D. Ill. 1978). In Hernandez, the court made a preliminary determination that 23(b)(2) certification was inappropriate since the action was concerned "predominately, and from the outset, with money damages," id. at 430, and not with either injunctive or declaratory relief. Id. at 429-30. In a footnote, however, if went on to say that

... even if an injunction is otherwise appropriate here, there is no need to certify a class for purposes of injunctive relief. Any injunction entered . . . would be in the form of an order that . . . would necessarily inure to the benefit of the proposed class to the same extent as a class-adjudicated injunction. The scope of the appropriate remedy would best be defined without reference to the class. . . . There is, then, no need for class adjudication regarding an injunction. See Alliance to End Repression v. Rochford . . .

Id. at 429 n.8 (emphasis added).

It is clear that the preliminary holding in Hernandez was both primary and sufficient for the denial of the (b)(2) class certification. Nonetheless, the recognition of the necessity doctrine in both Hernandez and Alliance raises some doubt about the future of a strict (b)(2) construction in Seventh Circuit courts.


65. For a discussion of the term "appropriate," see text accompanying notes 92-103 infra.


67. Id. at 619.

68. Id. at 620.

69. Id. (emphasis added).
the Second Circuit. Even in the face of strong language in the Court of Appeals' Galvan decision, the principles of stare decisis, and the possibility of being overruled on appeal, the district court for the Southern District of New York has refused to be bound by the Galvan decision.

In Percy v. Brennan, for example, class status was granted in a 1974 civil rights action on behalf of minority persons seeking training and employment in the New York construction industry. It was clear, as the defendants argued, that a grant of declaratory and injunctive relief ordering abandonment of the affirmative action plan (challenged as insufficient) and promulgation of a new plan would necessarily benefit the entire class. The defendants reasoned, therefore, that plaintiffs' "pleadings [did] not establish a need for a class action." The court, however, rejected this argument, saying "[w]e know of no rule which requires the demonstration of such a need in a 23(b)(2) case."

The Percy court did not ignore Galvan entirely. Its distinction of that case, however, is unconvincing. Instead of citing the broad rule of Galvan (that a similar motion for declaratory or injunctive relief was "the archetype" situation for application of the necessity doctrine), the Percy court concentrated on separate evidence offered in Galvan. The evidence was a finding by the Galvan court that the "State had made it clear that it understands the judgment to bind it with respect to all claimants." The State had even taken preliminary steps to comply with the lower court's order. Thus, the State in Galvan had demonstrated in fact its willingness to comply regardless of plaintiffs' class status.

This "good faith" argument, however, is unconvincing. Once a determination is made that judgment will run to the benefit of all class members, the fact that a defendant is predisposed to compliance, or will do so only in response to the court's judicial authority, is irrelevant. The need for class certification is either a factor in both cases or neither. Thus, if the Percy decision is grounded on

70. See text accompanying notes 44-48 supra.
72. Id. at 803-04.
73. See id. at 804, 811.
74. Id. at 811 (citing Defendants' Memorandum at 25).
75. Id. (emphasis added).
76. Galvan v. Levine, 490 F.2d at 1261.
77. Id.
78. Id.
79. One could argue that in cases involving inconsistent applications of a chal-
its refusal to recognize the necessity doctrine, its distinction of *Galvan* is erroneous. On the other hand, if *Percy* relies on the defendant's failure to demonstrate a willingness to uniformly apply any subsequent court order, its disclaimer of any knowledge of a necessity doctrine is questionable.

A second Southern District case, *Bacon v. Toia*, was an action challenging the validity of certain sections of the New York Social Services Law. The questioned provisions stipulated uniform denial of emergency assistance payments in specified instances. The court recognized that its "final order . . . will thus have the effect 'of settling the legality of [defendants'] behavior with respect to the class as a whole,'" and concluded that "'[t]his is a classic case for treatment as a class action under Fed. R. Civ. P. 23(b)(2).'"

The defendants in *Bacon* argued "that class relief should be found unnecessary, despite compliance with Rule 23 requirements, because the prospective effect of injunctive relief granted to the named plaintiffs prohibits the enforcement of a state statute and thus inures to the benefit of all proposed class members." The court's rejection of this approach was unequivocal: "Since the requirements of Rule 23, Fed. R. Civ. P., are fully satisfied . . . plaintiffs may proceed as a class without further assuming the burdened administrative procedure, as opposed to those challenging the validity of a procedure itself, a good-faith requirement provides a sound basis for distinguishing between types of 23(b)(2) actions and their varying necessity. See, e.g., Alliance to End Repression v. Rochford, 565 F.2d 975, 980 (7th Cir. 1977) (dicta) and note 62 supra. There are, however, two problems with this analysis. First, insofar as *Percy* and *Galvan* are concerned, both cases dealt with the claimed invalidity of a procedure per se, as uniformly applied to members of the prospective class. See *Percy* v. Brennan, 384 F. Supp. at 803-04 (seeking abandonment of an affirmative action plan) and *Galvan* v. Levine, 490 F.2d at 1257 (challenging uniform application of a procedure to all Puerto Rican claimants). Thus, to the extent *Percy* allowed certification because there was no good-faith showing, the analysis was inappropriate. Second, even where the analysis would be appropriate, rule 23(b)(2) as promulgated in 1966 does not allow for such a distinction. Thus, even a sound policy analysis by the courts is unallowed for by the statute today. (As to the statute's deficiency, see text accompanying notes 117-142, 154-161 infra).

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80. See text accompanying notes 71-75 supra.
81. See text accompanying note 75 supra.
83. Id. at 1374.
84. Id. at 1381-82 (bracketed material in original) (quoting Advisory Comm. Note, 39 F.R.D. 102 (1966)).
86. Id. at 1383 n.11 (citation omitted).
den of proving its necessity." In spite of the Bacon court's plain rejection of the necessity doctrine, so enthusiastically embraced by the court of appeals in Galvan, the Second Circuit subsequently affirmed the Bacon decision without questioning the analysis therein.

**Derivation or Deviation?**

The foregoing analysis has concentrated on the relationship between the factual setting of (b)(2) claims and the concurrent acceptance or rejection of the necessity doctrine. While it is proper in case analysis to interpret a statute according to the words or legislative history of a statute, none of the decisions thus far cited has done so (with the exception, of course, of those rejecting the necessity doctrine because they found no "necessity language" to interpret). However, because the derivation of the necessity doctrine is subject to dispute, this section will examine the possible justifications for the doctrine.

At the outset, it is important to recognize the contention that the necessity test is at odds with the legislative intent of rule 23. Professor Newberg found that the notion "that a class action is superfluous . . . appears inconsistent with the specific intent of the 1966 Rule amendments that were designed to assure that parties whose interests are affected . . . by a controversy may join together in common litigation."

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87. *Id.* at 1383 (footnote omitted).
88. The court, in response to the defendants' citation to Galvan, repeated the arguments made by the Percy court as to evidence of good-faith compliance. *See id.* at 1384 n.11; text accompanying notes 76-81 *supra*; and note 79 *supra*. The arguments made in note 79 *supra* as to the illegitimacy of that distinction (given the text of the statute) are equally applicable to the Bacon court's attempt to distinguish Galvan. It is further worth noting that, even though the defendants in Bacon argued that "relief granted to the named plaintiffs prohibits the enforcement of a state statute and thus inures to the benefit of all proposed class members," *id.* at 1383 n.11, the court responded that "there has been no assurance by the state that its welfare officials will apply the court's judgment to all similarly situated persons . . . ." *Id.*

There seems to be an anomaly between the defendants' assertion that it would be bound by law to enforce the judgment uniformly, and the court's reply that there has been no showing. If a court must rely upon a party's agreement to comply by law with a decision, and if the court refuses to make an otherwise correct decision because it requires not only the force of law but also the force of a defendant's statement, then the force of law is apparently being given less weight. Nor is the court's misuse of the word "if" in a quoted sentence availing. *See id.*

89. 580 F.2d 1044 (2d Cir. 1978) (affirmation without opinion).
91. 1 H. Newberg, *supra* note 2, § 1010.1m, at 32 (footnotes omitted).
There are, however, four lines of potential support for the doctrine. One possible source is the phrase, in (b)(2), "thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." The 1966 Advisory Committee Note provides some support for the "necessity" interpretation. The Committee believed that

[this subdivision is intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate.]

Thus, the appropriateness of, or need for, granting relief with regard to the class as a whole would be the main thrust of subdivision (b)(2).

The Committee Note, however, contains other language providing a strong counterargument to the above interpretation. After explaining the meaning of declaratory and injunctive relief for the purposes of (b)(2), the Note continues:

Action or inaction is directed to a class within the meaning of this subdivision even if it . . . is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class.

Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration.

As discussed above, the class action described as "illustrative" by the Committee is, on policy grounds, the "archetype of one where class action designation is largely a formality . . . ." Yet, the Committee chose to cite this situation as representative of the case where "[a]ction or inaction is directed to a class within the meaning of this subdivision." Thus, even to the extent that the initial Advisory Committee comment is amenable to a necessity

92. Fed. R. Civ. P. 23(b)(2); the full text of the rule appears at text accompanying note 15 supra.
94. Id. (emphasis added).
95. See text accompanying notes 44-48 supra.
96. Galvan v. Levine, 490 F.2d at 1261.
98. See text accompanying note 93 supra.
interpretation, the subsequent language at least neutralizes its effect. More likely, the Committee Note taken as a whole is supportive of the no-need approach.

Professor Moore has argued that the “thereby making appropriate” clause is, on the face of the statute itself, evocative of a necessity approach. Based on this evidence, he concludes that in examining the appropriateness of class relief as opposed to individual relief, the pragmatic value of a class-wide decree becomes a prime consideration:

The function of the (b)(2) test is not merely to restate the analysis made under 23(a). When the words of the first clause of (b)(2) are considered in context with the second clause (“thereby making appropriate final injunctive or corresponding declaratory relief with respect to the class as a whole”), the intent is clear to focus the court and attorneys on an appraisal of the utility of shaping a class-wide equitable decree or declaratory judgment.99

It can be argued, however, that the phrase involved supports the opposite conclusion. The initial phrase, “the party opposing the class has acted or refused to act on grounds generally applicable to the class,”100 is logically the precedent requirement to the phrase “thereby making appropriate final injunctive or corresponding declaratory relief with respect to the class as a whole.”101 In short, once the precedent requirement is satisfied, (b)(2) certification is perforce appropriate and no separate inquiry into necessity should be made.

Professor Moore’s statement, that given the above conclusion (b)(2) must merely restate 23(a), is not persuasive. As the district court in Hernandez v. United Fire Insurance Co.102 recognized, the type of action taken by the party opposing the class may render

99. 3B J. MOORE, supra note 17, ¶ 23.40[2], at 23-290 (emphasis added). Similarly, Professor Moore criticized the “no need” approach as too lenient an interpretation of the (b)(2) requirements:

[Subparagraph (b)(2) provides that the propriety of injunctive or corresponding declaratory relief with respect to the class as a whole is the touchstone for the maintainance of this form of class action. When an injunction on behalf of an individual plaintiff would have the same purpose and effect, there seems to be no reason why the court should go through the class action rituals . . . .

Id. at 23.40[3], at 23-297 n.13.

100. FED. R. CIV. P. 23(b)(2).
101. Id. (emphasis added).
102. 79 F.R.D. 419 (N.D. Ill. 1978).
(b)(2) certification unnecessary, not because the form utilized by the plaintiffs is inappropriate, but because the nature of the relief sought is uncalled for. This was true, even though the 23(a) requirements had been satisfied.

A second possible origin of the "necessity doctrine" is the verb phrase "may be maintained" in the general statement in rule 23(b) that "An action may be maintained as a class action if . . . ." In Schneider v. Margossian, the court argued that "[a]s the use of the word 'may' in Rule 23(b) suggests, a court is not bound to let a case continue as a class action [solely] because the requirements of Rule 23 are met." While such discretion would certainly empower the court to adopt a necessity standard, the court's construction is most likely incorrect. As one commentator has noted, "it appears more probable that 'may be maintained' . . . means that the plaintiff may so maintain it, not that the matter is in the discretion of the court."

A third textual basis for imposing a necessity requirement has been found in the statutory language of rule 23(b)(3). A prerequisite to a (b)(3) action is superiority of the form "to other available methods for the fair and efficient adjudication of the controversy." Several courts have imputed the superiority requirement to (b)(2) actions, thus justifying denial of certification on necessity grounds. That is, if class relief is not superior to individual relief, class certification is unnecessary.

This analysis, however, has been appropriately rejected. As the court said in Wescott v. Califano: 111

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103. Id. at 432 n.11.
106. Id. at 746.
107. For example, in Drumwright v. Padzieski, 436 F. Supp. 310 (E.D. Mich. 1977), plaintiff brought an action on behalf of himself and all others similarly situated to enjoin the Michigan Employment Security Commission from using allegedly unconstitutional regulations that permitted the termination of unemployment benefits without a prior hearing. In response to plaintiff’s motion for class certification, defendant argued that (1) the language of Federal Rule 23(b) conferred discretion on the court to deny said motion and (2) since any declaratory or injunctive relief would inure to the benefit of all, class status was unnecessary. The court subsequently adopted the defendant’s view and denied certification. Id. at 324-25.
108. 3B J. MOORE, supra note 17, ¶ 23.40[3], at 23-296 to -297 n.12.
[t]here is no language in Rule 23(b)(2), as there is in Rule 23(b)(3), that requires the court to consider the necessity of a class action for adjudication of the case, and the Rule 23(b)(3) command that a class action be “superior . . .” should not be imported into Rule 23(b)(2).\footnote{112}

In fact, the omission of language in subdivision (b)(2) similar to that in (b)(3) is more likely indicative of an intent to create a lesser standard for bringing (b)(2) actions.

Finally, the foundation of the necessity doctrine might not lie in the language of rule 23 at all. It has been argued that “the rulemakers, although purporting to fix the measures which can be taken to assure the fair conduct of [class] actions, in fact did not. Almost invariably rule 23 prescribes discretion as the solution to the problems raised by the class action’s use of representative procedures to settle the rights of nonparties.”\footnote{113} While some have asserted that a court may take into account considerations not specifically dealt with in the rule,\footnote{114} the mere availability of discretion can not, of course, properly determine its scope. Justice Black, dissenting from the Court’s decision to transmit the 1966 amendments to Congress, was particularly wary regarding “the amendments relating to class suits.”\footnote{115} “It seems to me,” he said,

that they place too much power in the hands of the trial judges and that the rules might almost as well simply provide that “class suits can be maintained either for or against particular groups whenever in the discretion of a judge he thinks it is wise.” The power given to the judge to dismiss such suits or to divide them up into groups at will subjects members of classes to dangers that could not follow from carefully prescribed legal standards enacted to control class suits.\footnote{116}

Policy Considerations

Given the rejection of the purported statutory grounds for the necessity doctrine, and the criticism of the “justifiable discretion” argument, a conclusion that the courts have no authority under the

\footnotesize{112. Id. at 746.}

\footnotesize{113. Developments—Class Actions, supra note 3, at 1318, 1330 (bracketed material in original) (emphasis added) (footnotes omitted) (quoting Advisory Comm. Note, 39 F.R.D. 99 (1966)).}

\footnotesize{114. See C. WRIGHT & A. MILLER, supra note 8, § 1785 (1978 Supp. at 89).}

\footnotesize{115. Mr. Justice Black’s Statement, 39 F.R.D. 69, 274 (1966) (dissenting from the Court’s promulgation of the 1966 amendments).}

\footnotesize{116. Id. (emphasis added); see text accompanying notes 154-161 infra.
present statute to adopt a necessity approach seems warranted. There have been, however, several policy arguments made, both in support and derogation of the necessity doctrine, that need to be reviewed before a proposal for a uniform approach can be offered.

The basic assumption that there exist situations in which an individual adjudication produces the same result as formal class-wide relief has been challenged on several grounds. One area of concern is the possibility that a plaintiff's claim will be moot before its final resolution. It is conceivable that a defendant facing a class action will attempt to moot a case by voluntarily providing relief to the named party, thus negating the need for certification. In reality, however, this works little injustice. For whenever courts that adopt the necessity test are faced with a (b)(2) motion where the possibility of mootness is real, they conclude that the requisite test of necessity has been met and thus grant class certification.

A more cogent criticism of the necessity doctrine has been that class status inevitably achieves greater certainty of judicial protection than corresponding individual adjudication. In Rodriguez v. Percell, Judge Frankel (who had questioned the efficacy of the 1966 amendments) rejected a requested application of the doctrine. He held that 23(b)(2) status was not unnecessary even if "the City may be relied upon to obey any final decree in this case . . . ." By Judge Frankel's analysis, if "the rule plainly applies . . . plaintiffs are entitled to have the full scope of their decree made explicit and unmistakable."

Similarly, in Mendoza v. Lavine, the defendants cited Galvan as support for the necessity doctrine. The court, however, ignored the precedent, holding that "[n]evertheless, it seems advisable to cautiously safeguard the interests of the entire class by ensuring that any order runs to the class as a whole. . . . Were this unnecessary, class certification pursuant to Rule 23(b)(2) would, arguably, never be necessary."
In employing the necessity doctrine to deny class certification, courts are often compelled to trust that a losing defendant will in good faith apply the court's judgment to all persons similarly situated. Reliance on the good-faith standard is problematic, however, since the court's conclusion is necessarily fact sensitive, dependent upon the particular defendant.

In some cases, courts have simply assumed the defendant's willingness to comply. In *Tyson v. New York City Housing Authority,* 126 for example, the court found that a grant of relief to the named plaintiffs would adequately serve the interests of the prospective class. 127 However, the decision did not rely on an affirmative showing by the defendant that it intended to apply the court's judgment in the future as to all similarly situated individuals. Rather, the court held that it "can properly assume that an agency of government will not persist in taking actions which violate the rights of the" 128 prospective class.

The validity of this assumption in the absence of a factual foundation is certainly open to question. As the Seventh Circuit noted, "the notion that representative actions against state officials are not necessary because state officials always respect federal court judgments is belied by the large number of Rule 23 class actions maintained against state officials in the federal courts." 129 Further, an inappropriate assumption does a disservice to those most likely to benefit from class certification. As the same court said, "Only a representative proceeding avoids a multiplicity of lawsuits and guarantees a hearing for individuals, such as many of the class members here, who by reason of ignorance, poverty, illness or lack of counsel may not have been in a position to seek one on their own behalf." 130

Some courts have rejected the "proper-assumption" approach and instead have found no need for (b)(2) certification where the defendant concedes, either in a written memorandum or oral statement, that it will abide by the court's determination regardless of class designation. This approach was utilized by the *Galvan* court, which after a preliminary determination that class certification was superfluous, supported its conclusion with the defendant-State's

127. Id. at 516.
128. Id. (emphasis added).
130. Id.
guarantee of good faith.\textsuperscript{131} The court found that the "State has made clear that it understands the judgment to bind it with respect to all claimants; indeed even before entry of the [district court] judgment, it withdrew the challenged policy even more fully than the court ultimately directed and stated it did not intend to reinstate the policy."\textsuperscript{132}

The strength of the \textit{Galvan} approach is in its reliance, not on the defendant's statement, but on its actions. Since the defendant had withdrawn the challenged policy prior to judgment at trial, and had gone further than the trial court eventually ordered, the court's decision was based upon more than a mere assumption. Nonetheless, \textit{Galvan} can not be justified on present statutory language, and is thus grounded only in the court's self-allowed discretion.\textsuperscript{133}

It should be noted, however, that even disregarding the question of statutory authority, the \textit{Galvan} approach does not provide a uniform theory for application of the necessity doctrine. Because \textit{Galvan} involved withdrawal of a policy that was applied (or not applied) without respect to an individual claimant's personal circumstances, the court could be certain that no subsequent deviation would occur.\textsuperscript{134} However, as the court in \textit{Lucas v. Wasser}\textsuperscript{135} observed, class claims for redress of unconstitutional action are not necessarily satisfied by the mere amendment or withdrawal of a statutory policy.\textsuperscript{136} In \textit{Lucas}, "the subject of the constitutional attack [was] not a statute but a series of conditions in [a county] jail. Thus obedience of [the] court's order with respect to future detainees would not be as automatic or as simple as the non-enforcement of a statute."\textsuperscript{137}

Improper use of the necessity doctrine can result in gross judicial inefficiency. Should a defendant's good-faith statement be ultimately disregarded, whether due to a change in personnel or a perceived distinction between the original plaintiffs and present individuals, those similarly situated to the initially proposed class are forced to bring individual actions to establish the applicability of the previous decision.

\textsuperscript{131} 490 F.2d at 1261.
\textsuperscript{132} Id.
\textsuperscript{133} \textit{See} text accompanying notes 90-116 \textit{supra}.
\textsuperscript{134} \textit{See} text accompanying notes 44-48 \textit{supra}.
\textsuperscript{135} 73 F.R.D. 361 (S.D.N.Y. 1976).
\textsuperscript{136} Id. at 363.
\textsuperscript{137} Id.
The principles of stare decisis and collateral estoppel have been cited by some as ameliorating forces in cases of poorly estimated good faith.\(^{138}\) However, as one district judge admitted, "[p]recedent alone never has the effect of a judgment naming a particular class of which a person is a member."\(^{139}\) Further, reliance on these principles as a safeguard is not without substantial cost. Problems of time and expenditure of scarce resources in further litigation inevitably plague, or even discourage, potential claimants. Furthermore, class certification in combination with the contempt power is viewed by some courts as a far more effective method to assure the defendant's compliance:\(^{140}\) "[C]lass certification allows enforcement by class members through contempt proceedings rather than more costly, less effective individual law suits grounded on collateral estoppel."\(^{141}\) Thus, it has been contended that "class judgment possesses deterrence value of an obviously greater impact, when contrasted with a judgment in individual litigation under similar circumstances."\(^{142}\)

**Expediency of the Necessity Doctrine: Costs and Benefits**

The Supreme Court has observed that when confronted with varied interpretations of a federal rule courts should choose that construction which is consistent with the spirit of the rules as a whole.\(^{143}\) The object sought to be obtained is set out in rule 1, where it is stated that the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action."\(^{144}\) This mandate translates into a cost-benefit analysis when applied to rule 23(b)(2).

Whenever a court grants class certification, it risks transforming relatively simple litigation between named parties into an enormously complex lawsuit involving innumerable plaintiffs.\(^{145}\)

138. 3B J. Moore, supra note 17, § 23.40[3], at 23-292 & n.3.
139. Weinstein, Some Reflections on the Abusiveness of Class Actions, 58 F.R.D. 299, 304 (1973). Judge Weinstein has also argued that "[v]ery often, a class action permits the judge to get to the heart of an institutional problem." Id.
140. For examples of the use of the contempt power to enforce a class judgment, see Class v. Norton, 505 F.2d 123 (2d Cir. 1974); Jones v. Wittenberg, 73 F.R.D. 82 (N.D. Ohio 1976).
141. 3B J. Moore, supra note 17, § 23.40[3], at 23-296 n.9.
142. 1 H. Newberg, supra note 2, § 1010.1c.
The problems attendant to rule 23(b)(2) class actions are a function of the definition of the class, the claims made, and the specific relief sought. Potential complexities of class status include unwieldy size, burdensome notice requirements, uncertain impact of a judgment on future members of the class, and difficulty of determining the appropriate scope of relief to be afforded. Discovery problems as well have a propensity to complicate these actions.

Oftentimes, however, class certification produces many benefits that more than offset these detrimental consequences. One such benefit is the avoidance of a multiplicity of litigation. Another is the avoidance of inconsistent results where many individuals have claims arising out of the same matrix of facts. In addition, the availability of an exhaustive record may allow the court to tailor its judgment more precisely, and in this way foster each of the goals just mentioned. Thus, even given the inherent complexities, it is possible to achieve economies of time, money, and effort when instituting a class action.

In short, practical justification for class certification exists when the benefits outweigh the detriments. It follows that when class certification yields relatively few benefits, the practical justification for it evaporates. The rationale for the necessity doctrine is that the adjudication of an individual claim for declaratory or injunctive relief may produce the exact result that a certified class action would pursuant to rule 23(b)(2). A “no-need” finding, then, would be appropriate on expediency grounds where individual relief would result in the avoidance of future litigation on the same or similar issues, the furtherance of consistent treatment as to each member of the potential class, and the availability of a sufficient factual foundation for a precise, yet complete judgment.

146. See generally 3B J. MOORE, supra note 17, ¶ 23.40.
147. Id.
149. See 1 H. NEWBERG, supra note 2, § 1010.
150. Id.
151. See Developments-Class Actions, supra note 3, at 1327, 1353, 1366-71.
152. The Supreme Court has recently reiterated the rationales that led to the development of the class suit in United States Parole Comm’n v. Geraghty, 100 S. Ct. 1202 (1980). These justifications include “the protection of the defendant from inconsistent obligations, the protection of the interests of absentees, the provision of a convenient and economical means for disposing of similar lawsuits, and the facilitation of the spreading of litigation costs among numerous litigants with similar claims.” Id. at 1211.
153. See text accompanying notes 16-19, 37-54 supra.
Conclusion: A Proposal

The necessity doctrine embraces the notion that where adjudication of a named-party claim produces the result formal class-wide relief would, participants in the judicial process should not be burdened with the complexities of a class suit. This Note has questioned the validity of the doctrine on statutory and policy grounds, and has demonstrated the lack of a uniform approach in the federal system. At the same time, it has recognized that a statutorily based, narrowly drawn doctrine could provide an additional step forward in the long history of class-action jurisprudence. Thus, the present state of unbridled discretion in the determination of (b)(2) certification motions must yield to a more logical, judicious approach, by amendment of rule 23.

The proposal offered here starts with the assumption that class certification should be granted where a plaintiff satisfies the express requirements of the present sections 23(a) and (b)(2). The plaintiff will not have the further burden of proving the necessity of the class device. At this point, the defendant may move for a denial of class certification. The burden will then be on the defendant to prove by a preponderance of the evidence that class certification is indeed unnecessary. In order to carry the burden, each of the following four questions must be answered in the affirmative:

1. Does plaintiff’s suit seek invalidation of either a statute or the uniform application of a statute to a particular class, as opposed to judicial restructuring of an administrative procedure applied on a case-by-case basis to members of the proposed class?

2. Will denial of certification allow the court to have before it a record sufficient to anticipate and regulate the defendant’s future conduct as it relates to members of the proposed class?

3. If questions one and two are answered in the affirmative, has the defendant on its own motion made a good-faith showing that if substantive relief is granted to the named plaintiffs it is both willing and able to restructure its questioned policy to apply on a uniform basis the court’s judgment to all individuals similarly situated to the named plaintiffs?

154. See text accompanying notes 90-116 supra.
155. See text accompanying notes 117-153 supra.
156. See text accompanying notes 55-89 supra.
157. See text accompanying notes 130-137 supra.
(4) If class certification is denied, will the named plaintiffs' individual claim(s) remain viable?

By satisfying question one, the defendants will assure the court, as the defendants in Lucas v. Wasser\textsuperscript{158} were unable, that obedience to the court's judgment will not require discretionary, fact-sensitive judgments inevitably resulting in a multiplicity of litigation and the possibility of inconsistent determinations. If the second question is answered affirmatively, the court can be certain that its decision to alter a statute or uniform practice will be based on the necessary complete evidence. Thus, even though a discretionary procedure may not be at issue, the court will still allow certification if only evidence gained from a complete class will provide the information needed to understand the various applications of the statute and procedure in question.

In requiring the defendant's demonstrable assurances pursuant to question three, the proposal makes possible the availability of the contempt power as an effective remedy. Thus, the uncertain reliance on stare decisis will be made unnecessary, and protection will be afforded those individuals who otherwise would be required to bring individual actions in the hope of establishing the applicability of the initial decision to their benefit.

Finally, an affirmative answer to question four will eliminate the fear that a defendant will intentionally moot a plaintiff's individual claim, by providing individual settlement, in order to avoid the effect of a class-wide decree. In sum, an individual adjudication pursuant to the satisfaction of the proposed 23(b)(2) requirements will provide the same certainty of judicial protection that is presently offered by the more complex class suit.

Equally important, this proposal will provide a uniform approach to be utilized by all federal courts. Thus, the discouragement of class actions imputable to the present division\textsuperscript{159} will be eliminated. Federal rule 23 should be immediately amended so that 42 years after its initial codification it will provide "just, speedy, and inexpensive"\textsuperscript{160} "access to the judicial process for those who need it most."\textsuperscript{161}

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\textsuperscript{158} See text accompanying notes 135-137 supra.
\textsuperscript{159} See text accompanying notes 55-89 supra.
\textsuperscript{160} Fed. R. Civ. P. 1.
\textsuperscript{161} Williams v. Mumford, 511 F.2d at 371 (Robinson, J., dissenting from denial of rehearing en banc, joined by Bazelone, Leventhal, and Wright, JJ.).