

WHAT'S COMPETENCE GOT TO DO WITH IT: THE RIGHT NOT TO BE ACQUITTED BY REASON OF INSANITY

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I. Introduction

Imagine the following scenario: Our fictional defendant Scarlett Snopes has been charged with a felony. Ms. Snopes is well-known to the community — lay and legal alike — as a person with a long history of mental illness and attendant legal problems. She has been civilly committed several times and has, on occasion, sought treatment

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voluntarily. When she is arrested and charged with threatening her community mental health center case manager, a mental status examination is sought without objection.¹ Ms. Snopes resides in a state in which this evaluation simultaneously addresses both issues of competence and responsibility.²

In a written report following the evaluation, the examiner concludes: (1) that Ms. Snopes is not presently competent to stand trial,³ and (2) that at the time of the crime, she lacked the capacity to appreciate the wrongfulness of her acts.⁴ After receiving this report, the trial court determines that it is in the interest of justice that Ms. Snopes be acquitted by reason of insanity⁵ and enters a judgment so stating. Although now acquitted, Ms. Snopes remains in the state hospital where she was remanded for her mental status evaluation; she will call the hospital home until she can prove either that she is no longer dangerous or that she is no longer mentally ill.⁶ Now everyone — save perhaps Ms. Snopes — can feel good because the poor town lunatic⁷ has had a

1. The presence of mental illness is not, of course, synonymous with incompetence to stand trial or the lack of criminal responsibility. Even moderate evidence of mental illness, however, may be enough to get an examination for competency and/or responsibility ordered. The Model Penal Code mandates an examination when "there is reason to doubt" the defendant's competence or "reason to believe" that mental illness will be an issue in the case, or if the defendant has indicated an intent to plead insanity. MODEL PENAL CODE § 4.05 (1980).

2. Competence addresses whether the defendant has the mental capacity to stand trial, e.g., whether or not she has a factual and rational understanding of the proceeding and can consult with her lawyer in the preparation of her defense. See *Dusky v. United States*, 362 U.S. 402, 402 (1960). Responsibility addresses whether the defendant, at the time of the crime, was able to appreciate the consequences of her acts or to conform her conduct to the requirements of the law. See MODEL PENAL CODE § 4.01 (1980). For a list of states that use the single evaluation process, see *infra* note 79.

3. It is unconstitutional to try an incompetent defendant. See *Pate v. Robinson*, 383 U.S. 375, 384 (1966). Responsibility and competence are terms often misunderstood and misused. A competency determination does not involve questions of guilt or innocence, but rather whether the defendant has a sufficient understanding of the proceedings as well as the ability to effectively consult with counsel. It thus involves the defendant's present mental state, not her mental state at the time of the crime. See *Drope v. Missouri*, 420 U.S. 162, 172 (1975). The confusion of the terms competence and responsibility is widespread. In *Pate*, the Supreme Court excused counsel's misuse of the concepts in view of the fact that the Illinois statute itself referred to competence and responsibility with only one term: insanity. See *Pate*, 383 U.S. at 384-35 & n.6. Nor is this misuse limited to the legal profession. The mental health professionals doing the evaluations, which in turn result in legal determinations, also demonstrate a profound misapprehension of the differences between the two concepts. See HARVARD MEDICAL SCHOOL LABORATORY OF COMMUNITY PSYCHIATRY FINAL REPORT, COMPETENCY TO STAND TRIAL AND MENTAL ILLNESS (1973).

4. This is commonly referred to as the cognitive prong of the insanity test, e.g., the defendant does not know her acts are wrong. The volitional prong contemplates whether the defendant is able to conform her acts to the requirements of the law. See MODEL PENAL CODE § 4.01 cmt. at 166-67 (1980).

5. The term "insanity" has been criticized and is now often replaced by "mental disease or defect." See MODEL PENAL CODE § 4.01 (1980). The Criminal Justice Mental Health Standards use the phrase "mental nonresponsibility." CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-6.1 (1989).

6. An acquittee may be held until she has regained her sanity or is no longer dangerous. This period of time may well exceed the period for which the defendant could have been incarcerated if convicted. See *Jones v. United States*, 463 U.S. 354, 370 (1983).

7. One would wish that such manifestly pejorative words were a thing of the far distant past. Consider, however, references to the word "lunatic" by the Hawaii Supreme Court, see *Hawaii v. Rodrigues*, 679 P.2d 615, 618 (Haw. 1984), and the Arkansas Legislature, which did not remove the

humane and proper disposition.⁸

Should not Ms. Snopes herself be pleased with the result? After all, she *has* been acquitted, hasn't she? Well, yes, but her acquittal by reason of insanity comes with strings attached. These strings — the adverse consequences addressed in Part III — may be far preferable to a conviction and a sentence for some but not for others.⁹ Because Ms. Snopes was acquitted while she was still incompetent, she was denied the chance to decide how she would cast her lot.¹⁰

To put the issue in Ms. Snopes' case another way: Does the right not to be tried or convicted while incompetent¹¹ extend to the right not to be subject to a pretrial acquittal by reason of insanity while incompetent? The answer to that question resides in the posing and answering of narrower questions. First, is there a need for such an extension: That is to say, can an acquittal by reason of insanity actually occur through a process short of a trial? Second, if a pretrial insanity acquittal may occur, is the constitutional violation inherent in trying or convicting an incompetent defendant also present for that pretrial insanity acquittal?

It is the premise of this article that the answer to these questions is a resounding yes. Yes, an acquittal by reason of insanity can occur without a trial,¹² thus mandating an extension of the constitutional principle to include acquittals that happen short of a trial. Yes, an acquittal by reason of insanity that is imposed upon an

word from its statutory nomenclature until 1997.

8. It was a similar factual setting that gave the Missouri Court of Appeals pause in *Briggs v. Missouri*, 509 S.W.2d 154 (Mo. Ct. App. 1974). Defense counsel, without the client's knowledge or consent, gave notice of intention to plead insanity. *See id.* at 155. The state's attorney "accepted" the notice of the plea, a procedure required under state law that consequently gave the court the authority to enter an acquittal and commit the defendant to the state hospital to be "held and treated." *Id.* at 156. This entire process, which occurred over a period of more than six months, happened without the defendant's presence, knowledge, or consent. *See id.* Moreover, the appellate court noted, it happened without the trial court making a finding that the defendant, whose competence had been questioned, was fit to proceed. *See id.* at 156-57.

9. There are several reasons why a defendant may choose to forego the use of the insanity defense. These reasons include: factual innocence, stigma, long periods of confinement, and collateral consequences. *See* David S. Cohn, *Offensive Use of the Insanity Defense: Imposing the Insanity Defense Over the Defendant's Objection*, 15 HASTINGS CONST. L.Q. 295, 296 (1988). Unabomber defendant Theodore Kaczynski's adamant opposition to the use of the insanity defense in his capital case is one high-profile illustration of a defendant wanting to forego the defense even in the face of severe consequences.

10. Of course, Ms. Snopes or any other defendant might voluntarily choose to pursue an insanity acquittal. It might be far preferable to a conviction, particularly under certain circumstances, e.g., when the offense charged is a capital crime. But, if the acquittal happens while she is incompetent, she has been denied the right to make that choice. That right of decision making is highly valued in our system and, indeed, the defendant's right to autonomous decision making is one of the reasons that incompetent defendants may not be tried. *See* Bruce J. Winick, *Reforming Incompetency to Stand Trial and Plead Guilty: A Restated Proposal and a Response to Professor Bonnie*, 85 J. CRIM. L. & CRIMINOLOGY 571, 576 (1995).

11. *See* *Drope v. Missouri*, 420 U.S. 162, 172 (1975); *Pate v. Robinson*, 383 U.S. 375, 384 (1966).

12. *See* MODEL PENAL CODE § 4.07 (1980). This section provides that a court may, on motion from the defendant, enter an acquittal based on the report of the examination without a hearing, if none is requested.

incompetent defendant is as constitutionally offensive as a trial and conviction of an incompetent defendant.¹³

An acquittal by reason of insanity is sufficiently adverse and is in many ways more akin to a conviction than to an outright acquittal.¹⁴ Although not technically punishment,¹⁵ it involves substantial infringement of rights. The legal literature has devoted significant space to the issue of a criminal defendant's competence to stand trial and to the issue of the insanity plea.¹⁶ The problem of a pretrial insanity acquittal of an incompetent defendant, on the other hand, has not been extensively examined. In undertaking that task, this article will, in Part II, review the law and practice of competency determinations. Part III will address the adverse consequences of an insanity acquittal. Part IV will examine the relevant provisions of the Model Penal Code and the ABA Criminal Justice Mental Health Standards. Part V considers various state court decisions in which this issue had arisen.

II. The Law of Competence

A. Core Principles

An incompetent defendant may not be tried and convicted in a criminal proceeding.¹⁷ This rule is grounded in common law¹⁸ and constitutional¹⁹ principles.

13. See *infra* text accompanying notes 27-28 for a discussion of the rationale behind preventing the trial and conviction of an incompetent defendant.

14. Prior to 1800, if the mental illness were extreme enough to warrant excuse from the crime, the defendant was acquitted outright; there were no post-acquittal proceedings or consequences. See Abraham L. Halpern, *The Insanity Verdict, The Psychopath, and Post-Acquittal Confinement*, 24 PAC. L.J. 1125, 1128 (1993).

15. See generally Eric Silver, *Punishment or Treatment? Comparing the Lengths of Confinement of Successful and Unsuccessful Insanity Defendants*, 19 LAW & HUM. BEHAV. 375 (1995) (discussing the punitive components of insanity acquittals).

16. The focus has been both practice-oriented and jurisprudential. See generally MARTIN BLINDER, *PSYCHIATRY IN THE EVERYDAY PRACTICE OF LAW: A LAWYER'S MANUAL FOR CASE PREPARATION*, (3d ed. 1992); ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER: PRACTICAL ANSWERS TO TOUGH QUESTIONS, (Rodney J. Uphoff ed., 1995); Richard J. Bonnie, *The Competence of Criminal Defendants: Beyond Dusky and Drope*, 47 U. MIAMI L. REV. 539 (1993); David S. Cohn, *Offensive Use of the Insanity Defense: Imposing the Insanity Defense over the Defendant's Objection*, 15 HASTINGS CONST. L.Q. 295 (1988).

17. This prohibition is often phrased as: an incompetent defendant may not be "tried and convicted." *Drope v. Missouri*, 420 U.S. 162, 172 (1975). However, there is some variation. Michigan provides that an incompetent defendant shall not be "proceeded against." MICH. COMP. LAWS ANN. § 330.2022 (West 1992). In Arizona, a defendant may not be tried, convicted, sentenced or punished while incompetent. See ARIZ. REV. STAT. ANN. § 13-4502 (West Supp. 1997). One commentator has stated that only "adverse adjudications" are prohibited. Bonnie, *supra*, note 16, at 542. See *infra* text accompanying notes 93-159 (discussing the adverse consequences of an insanity acquittal). Allowing non-adverse proceedings to occur with an incompetent defendant leaves the door open for innocence-only hearings. See *infra* text accompanying notes 223-41 (discussing innocence-only hearings). Innocence-only hearings are proceedings designed to protect the incompetent defendant's rights by ensuring that she is not being held indefinitely while being restored to competence unless there is some basis for the charge.

18. See 4 WILLIAM BLACKSTONE, COMMENTARIES *24.

19. See *Drope v. Missouri*, 420 U.S. 162, 172 (1975); *Pate v. Robinson*, 383 U.S. 375, 384 (1966).

The term competence²⁰ has many meanings in different legal contexts,²¹ but is used here in its classic criminal sense as set out by the United States Supreme Court in *Dusky v. United States*.²² The test enunciated in that case was whether the defendant has "sufficient present ability"²³ to consult with her lawyer with a "reasonable degree of rational understanding" and has "a rational as well as factual understanding of the proceedings" against her.²⁴ The absence of either of these factors renders a defendant incompetent and, accordingly, unavailable for trial.

This requirement is so fundamental that due process mandates that the trial court address it even if defense counsel fails to raise it. For example, if there is a bona fide issue as to the defendant's competence, the court must, sua sponte, order an examination.²⁵ Once a bona fide question as to competence has been raised, the criminal proceedings are suspended while the defendant's mental state is assessed.²⁶

The need for a defendant to be competent has been ascribed to at least four underlying principles.²⁷ First, accurate proceedings require the defendant's full cooperation. Second, constitutionally mandated procedural safeguards are only meaningful if there is a competent defendant to exercise them. Third, the integrity of the legal system necessitates proceedings that are instituted only against those who are

20. It has been suggested that competence is an outmoded term in the mental disability field. See Bonnie, *supra* note 16, at 540. It is certainly a term that can cause confusion and possess varied meanings, some of which are pejorative, others not. Synonyms are readily available. Often, for instance, the phrase "fitness to proceed" is used instead of "competence to stand trial." See MODEL PENAL CODE § 4.05 (1980). "Capacity" is another rough equivalent, though it can be used in other contexts as well, i.e., as a substitute for criminal responsibility. For years, some states used the term "insanity" for both competence and responsibility. Even today, Alabama continues to refer to competence as sanity. See ALA. CODE § 15-16-21 (1995).

21. According to Justice Thomas, when writing for the majority in *Godinez v. Moran*, 509 U.S. 389 (1993), the identification of multiple meanings of the word competence is of value only to scholars and psychiatrists and is not an undertaking required by the due process clause. *See id.* at 402. *But see id.* at 413 (Blackmun, J., dissenting) (suggesting that the Court has recognized the different ways in which a defendant's mental state may be at issue in a legal proceeding and has required assessments to be tailored accordingly); *see also* Bonnie, *supra* note 16 at 557 (describing different kinds of competence, e.g., competence for medical decision-making versus competence for financial affairs). *See generally* Bruce J. Winick, *Competency to Consent to Treatment: The Distinction Between Assent and Objection*, 28 Hous. L. Rev. 15 (1991) (discussing the different levels of competence in the area of informed consent).

22. 362 U.S. 402 (1960) (per curiam). This was a one-page decision, but its test for competence has remained unchanged over the years.

23. *Id.* Competency's focus on the defendant's present mental ability has led it to also be called "present insanity." *Pate*, 383 U.S. at 384.

24. *Dusky*, 362 U.S. at 402.

25. *See Drope v. Missouri*, 420 U.S. 162, 180 (1975).

26. *See* ARK. CODE ANN. § 5-2-305 (Michie 1995).

27. *See* Barbara A. Weiner, *Mental Disability and the Criminal Law*, in SAMUEL J. BRAKEL ET AL., *THE MENTALLY DISABLED AND THE LAW* 693, 694 (3d ed. 1985); Bonnie, *supra* note 16, at 551-54. The reliability and accuracy of the criminal justice system are at risk if an incompetent defendant is unable to comprehend the value of communicating exculpatory facts to her lawyer. *See id.* at 552. This is not just a protection of the defendant but rather serves the strong societal investment in a criminal justice system that is reliable.

competent to comprehend them. Fourth, the goals underpinning sentencing after conviction are contingent upon a competent defendant.²⁸

The first three of these factors apply with equal force to an acquittal by reason of insanity. The first two concerns, which focus on the fairness of the process from the vantage point of both the defendant and the system, would be undermined by acquitting an incompetent defendant. The dignity of the system, the third principle, would be equally discredited by an insanity acquittal of someone not even competent to enter a plea. Finally, the fourth factor is not relevant because punishment is not a permissible goal for a person who has been acquitted.²⁹

Six years after the United States Supreme Court set out the test for competency to stand trial in *Dusky v. United States*,³⁰ the Court revisited the competency question in *Pate v. Robinson*.³¹ In *Pate*, the government conceded that a defendant must be competent before being tried.³² It asserted, however, that the defendant had failed to request a competency hearing, and thus had waived his right not to be tried while incompetent. The government also contended that there was insufficient evidence for the court to sua sponte order a hearing to assess competence. The pertinent statutory provision required a hearing if there were a "bona fide" doubt³³ as to the defendant's competence to stand trial.³⁴

The Court first took issue with the government's waiver argument, highlighting the contradiction in suggesting that an incompetent defendant could "knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial."³⁵ Further, the Court stated, the defendant through counsel had consistently placed his "present sanity" at issue,³⁶ and thus the issue could not be considered waived.³⁷

28. Those goals include deterrence, rehabilitation, and retribution. See Weiner, *supra* note 27, at 694. To the extent that "punishment" is a goal when convicting and sentencing a defendant, that is not applicable for an acquittal. However, defendants who are acquitted by reason of insanity are usually confined and subjected to treatment after the acquittal. Thus, the goals of deterrence (at least specific deterrence) and rehabilitation are relevant even for insanity acquittees. Moreover, it has been suggested that the confinement of insanity acquittees does in fact reflect a societal need to punish. See Silver, *supra* note 15, at 385.

29. See *Foucha v. Louisiana*, 504 U.S. 71, 86 (1992) (holding that the State of Louisiana had no punitive interest and could not punish an insanity acquittee who had not been convicted of a crime). But see Silver, *supra* note 15, at 385-87 (discussing a study which suggests that insanity acquittees are punished according to the seriousness of offenses for which they were acquitted).

30. 362 U.S. 402 (1960).

31. 383 U.S. 375 (1966).

32. See *id.* at 378.

33. "Bona fide" doubt was the language used in *Pate*. See *id.* at 385. The issue is often cast in terms of reasonable cause or reason to doubt. See *Godinez v. Moran*, 509 U.S. 389, 402 n.13 (1993); WEINER, *supra* note 27, at 696. The level of doubt necessary to mandate court inquiry and mental health assessment of a defendant's competence has engendered much litigation.

34. See 725 ILL. COMP. STAT. ANN. § 5/104-11 (West 1992).

35. *Pate*, 383 U.S. at 384. The Court still has not decided conclusively whether a defendant may waive the right to be competent when tried. See *Riggins v. Nevada*, 504 U.S. 127, 138 (1992). But see Winick, *supra* note 10, at 858-86. Professor Winick continues to refine his argument that, in some cases, a marginally competent defendant should be able to proceed with her case, rather than endure the delay occasioned by a determination of incompetence. See *id.*

36. At that time, the Illinois statutes used the word "insanity" to describe both competence to stand

Next, the Court determined that there was sufficient evidence before the trial judge to raise a bona fide doubt as to the defendant's competence.³⁷ Accordingly, the trial judge's failure to have a hearing on competence violated the defendant's constitutional right to a fair trial.³⁹

Nine years later, in *Drope v. Missouri*,⁴⁰ the Court expanded on the right not to be tried while incompetent. *Drope*, like *Pate* before it, involved the question of whether the trial court had enough information about the defendant's mental state to require further inquiry into competence.⁴¹ *Drope's* counsel had obtained a psychiatric evaluation prior to trial and had sought a continuance for further psychiatric evaluation and treatment. No action was taken on the continuance motion and when the trial date arrived, defense counsel objected to going forward. The court overruled the objection and the trial began.⁴² During trial, *Drope's* counsel moved for a mistrial after his client attempted suicide. The mistrial motion was denied and *Drope* was convicted.

The United States Supreme Court held that there was evidence to create a "sufficient doubt" as to *Drope's* competence.⁴³ The Court recited three categories of evidence that bear upon a defendant's competence: (i) evidence of irrational behavior,⁴⁴ (ii) conduct during trial,⁴⁵ and (iii) prior medical testimony concerning competence.⁴⁶ Any combination of these factors or even one standing alone may provide sufficient evidence to mandate "further inquiry" into the defendant's competence.⁴⁷ Here, the Court stated that, although the exact basis for the defense continuance was unclear from the "inartfully drawn" motion, the issue of the defendant's incompetence had been raised pretrial.⁴⁸ Moreover, the Court said, even if there were not enough evidence at that stage,⁴⁹ the events at the trial, including the defendant's attempted suicide, were additional factors that required further inquiry into the competence of the defendant.⁵⁰

trial and criminal responsibility. See *Pate*, 383 U.S. at 384 n.6.

37. See *id.* at 384.

38. See *id.* at 385. This was true notwithstanding a colloquy between the trial court and an apparently lucid defendant. Relying on this interchange while ignoring "uncontradicted testimony" of a "history of pronounced irrational behavior" was not justifiable, the Court concluded. *Id.* at 385-86.

39. See *id.* at 385.

40. 420 U.S. 162 (1974).

41. See *id.* at 163-64.

42. See *id.* at 164-65.

43. See *id.* at 180.

44. See *id.*

45. See *id.* at 178. Bizarre behavior at trial is no guarantee, however, of a determination of incompetence. See *id.* at 179; see also *Addison v. Arkansas*, 765 S.W.2d 566, 572 (Ark. 1989) (providing that a defendant's increasingly psychotic behavior during his trial warranted an additional examination, but not a finding of incompetence). *Pate* and *Drope* may be seen then as requiring that the defendant's competence be addressed, not as setting forth the test for competence. That test was set forth in *Dusky*. See *Dusky v. United States*, 362 U.S. 402, 402 (1960).

46. See *Drope*, 420 U.S. at 180.

47. *Id.*

48. *Id.* at 177.

49. A determination it declined to make. See *id.* at 177-78.

50. See *id.* at 178-79. The sentencing judge concluded that the suicide attempt indicated that the

Thus, *Drope* expanded *Pate* by establishing that competence is an ongoing requirement that poses a continuing obligation on the trial court to make further inquiry and order an examination if the defendant's conduct *during* the trial raises a bona fide doubt as to her competence. Further, it clarified that trial courts have an obligation to "be alert" to any changes during trial that might render a defendant incompetent.⁵¹

Thus, the basic tenets of competence to stand trial are well-settled. A defendant must be competent, which means more than mere orientation as to time and place.⁵² To be competent, a defendant must possess the ability to assist counsel and have a functional and rational understanding of the proceedings.⁵³ Although a defendant's competence can and perhaps should be raised by defense counsel,⁵⁴ there is a discrete, independent requirement that the trial judge order an examination sua sponte if there is doubt as to the defendant's competence. Moreover, this obligation does not end when the trial commences; it continues throughout the proceeding and, indeed, into sentencing.⁵⁵

In more recent years, the Court has had the opportunity to refine the law of competency. In *Medina v. California*,⁵⁶ the Court upheld a California statute that placed upon the defendant the burden of proving incompetency, using the admittedly narrow test for assessing due process challenges in criminal cases.⁵⁷ The Court declared that to place the burden on the defendant neither violated historical precepts

defendant had shot himself in an effort to avoid trial and, therefore, had "an awareness of what was going on." *Id.* at 178-79.

51. *Id.* at 181.

52. See *Dusky v. United States*, 362 U.S. 402, 402 (1960).

53. See *id.* *Dusky* has provided the test for competence for almost 40 years, but there have been various attempts to amplify that test. See *Wieter v. Settle*, 193 F. Supp. 318, 321 (W.D. Mo. 1961) (listing eight factors to be examined in assessing competency). In addition, some states list factors in their statutes as well as decisional law. See N.J. STAT. ANN. § 2c:4-4 (West 1995); UTAH CODE ANN. § 77-15-5 (1995); *Nebraska v. Guatney*, 299 N.W.2d 538, 543 (Neb. 1980). Mental health professionals have developed their own assessment instruments as well. See HARVARD MEDICAL SCHOOL LABORATORY OF COMMUNITY PSYCHIATRY FINAL REPORT, COMPETENCY TO STAND TRIAL AND MENTAL ILLNESS (1973).

54. But see Rodney J. Uphoff, *The Role of the Criminal Defense Lawyer in Representing the Mentally Impaired Defendant: Zealous Advocate or Officer of the Court*, 1988 WIS. L. REV. 65 (1988). Professor Uphoff challenges the notion found, among elsewhere, in the CRIMINAL JUSTICE MENTAL HEALTH STANDARDS (1989), that defense counsel has an obligation to raise the issue of her client's competence. See *id.* at 67. Such a requirement, Uphoff asserts, compromises a defendant's right to zealous advocacy. See *id.* at 89. Instead, he proposes that defense counsel be given the discretion to raise the issue as she deems appropriate. See *id.* at 98.

55. See ARIZ. REV. STAT. ANN. § 13-4502 (West Supp. 1997); *Ford v. Wainwright*, 477 U.S. 399, 405 (1986) (prohibiting the execution of an insane defendant); MODEL PENAL CODE § 4.04 (1980).

56. 505 U.S. 437 (1992).

57. See *id.* at 446. In *Patterson v. New York*, 432 U.S. 197 (1977), the Court underscored the deference owed to states in the "administration of justice" and declared that state criminal laws would not be found in violation of the due process clause unless they offended "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 201-02. In using the *Patterson* test, the *Medina* Court declined to adopt the three-part balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), that has been used in assessing civil due process claims.

nor ran afoul of fundamental fairness.⁵⁸ In reaching this conclusion, Justice Kennedy, writing for the majority, observed that the entry of a plea of not guilty by reason of insanity "presupposes that the defendant is competent to stand trial and to enter a plea."⁵⁹ While this language is dicta, it is the Court's closest pronouncement on the issue of competence as it relates to the insanity plea.⁶⁰

In *Godinez v. Moran*,⁶¹ the Court tackled the issue of whether the standard of competence necessary to plead guilty or waive the right to assistance of counsel was the same as the standard of competence required to be tried. Before *Godinez*, several circuits had held that a higher competence standard was necessary to plead guilty because of the waiver of constitutional rights inherent in such a plea.⁶² In its *Godinez* opinion, the United States Court of Appeals for the Ninth Circuit had required what it believed to be a heightened standard: that the defendant have the ability to make a "reasoned choice" from the various alternatives.⁶³

The United States Supreme Court reversed, concluding that the standard for determining competence was identical in both circumstances.⁶⁴ A criminal defendant standing trial, the Court reasoned, is confronted with decisions similar in importance to those required in determining whether to plead guilty or waive the right to counsel.⁶⁵ Thus, it concluded, there was no need for a separate, higher standard for the latter two decisions.⁶⁶

While rejecting the need for a higher standard for competence, the *Godinez* Court stated that more than mere competence was required before a court may permit a defendant to plead guilty or waive the right to counsel.⁶⁷ A defendant's waiver must be knowing and voluntary.⁶⁸ The distinction drawn by the Court is that competence involves the *capacity* to understand whereas the knowing and voluntary requirement encompasses whether the defendant *actually does* understand.⁶⁹

58. See *Medina*, 505 U.S. at 446.

59. *Id.* at 449.

60. In *Lynch v. Overholser*, 369 U.S. 705 (1962), the Court ruled on the consequences of a forced insanity defense. See *id.* at 709-10; *infra* text accompanying notes 105-09.

61. 509 U.S. 389 (1992).

62. See *Allard v. Helgemoe*, 572 F.2d 1, 3-6 (1st Cir. 1978); *United States v. Masthers*, 539 F.2d 721, 726 (D.C. Cir. 1976).

63. See *Godinez*, 509 U.S. at 397.

64. See *id.* at 402.

65. See *id.* at 398.

66. See *id.* at 399. Before reaching this conclusion, the Court mused whether there was even a difference between a "rational understanding," the *Dusky* standard, and "reasoned choice," the standard mandated by the Ninth Circuit. See *id.* at 398.

67. See *id.* at 400.

68. See *id.* The requirement that the waiver of constitutional rights be knowing and voluntary appeared initially in *Johnson v. Zerbst*, 304 U.S. 458 (1938). In *Johnson*, the Court held that, in order to waive the Sixth Amendment right to counsel, the trial court must determine that a waiver of the Sixth Amendment right to counsel is "intelligent and competent." *Id.* at 465.

69. See *Godinez*, 509 U.S. at 401 n.12. Although the *Godinez* majority states that this knowing and voluntary requirement is not a higher standard of competence, but a separate requirement, the notion of "actual understanding" is not far from the multiple levels of decisional competence set forth by Professor Bonnie. See Bonnie, *supra* note 17, at 570-76.

Although *Godinez* did not mandate a higher degree of competence, the Court found that more than competence was necessary, thus highlighting the significance of a guilty plea. It affirms that not only must a defendant have the ability to understand the proceedings, e.g., be competent, but she must also actually understand the import of a particular decision and arrive at that decision in an atmosphere free of coercion.

Further, in a concurring opinion, Justice Kennedy emphasized a point that he believes underpins the law of competence: At common law there was a single standard of competence that adhered throughout all stages of a criminal trial — from arraignment through verdict.⁷⁰ Kennedy cited with favor a commentator's view that competence to stand trial has been traditionally presumed to include "competency to participate in all phases of the trial process, including such pretrial activities as deciding how to plead"⁷¹

Neither *Godinez* nor *Medina* directly address the issue at hand: the pretrial insanity acquittal of an incompetent defendant. But a reading of *Godinez* suggests that competence is required before any plea can be entered, presumably even a not guilty by reason of insanity plea [hereinafter NGRI]. When this is coupled with the language in the majority opinion in *Medina* "presupposing" that an NGRI plea can be entered only by a competent defendant, one could surmise that the Court would find it objectionable if an NGRI plea were interposed on behalf of a defendant who was incapable of entering such a plea herself.⁷²

B. Practical Application

There are two conditions that invite the improper acquittal⁷³ of an incompetent defendant. First, a single evaluation of the defendant's mental health that addresses both issues of competence and responsibility. Second, a process by which the conclusions of the evaluation are accepted without a trial.⁷⁴ The following section will set forth some of the practical components of the evaluation process.

In order to consider the defendant's mental state, a mental health evaluation may be necessary.⁷⁵ In some jurisdictions, an examination addressing the defendant's competence to stand trial is ordered first so that issue may be resolved.⁷⁶ Thereafter,

70. See *Godinez*, 509 U.S. at 403.

71. *Id.* at 407 (quoting Weiner, *supra* note 27, at 695-96).

72. See *Oregon v. Peterson*, 689 P.2d 985, 991 (1984) (holding that competence to stand trial includes competence to decide whether or not to plead the insanity defense). The issue of whether the insanity defense can be forced on a defendant is a matter of some debate. See *infra* text accompanying notes 105-20.

73. The term "improper acquittal" is used to denote those circumstances in which an incompetent defendant is acquitted by reason of insanity. It is the premise of this article that it is unconstitutional to render an acquittal in such a circumstance.

74. There are undoubtedly cases where an incompetent defendant is improperly taken to trial and acquitted by reason of insanity. Such an acquittal, however, is already prohibited by *Drope v. Missouri*, 420 U.S. 162, 181 (1975).

75. A mental examination to determine competence is one of several possible inquiries into the criminal defendant's mental state. Others include an assessment of the defendant's mental state at the time of the crime. The results of that latter evaluation can be used to determine the defendant's criminal responsibility, or can be used in a diminished capacity defense or as a mitigating factor at sentencing.

76. An evaluator's assessment as to competence is not dispositive. The court is required to make

if the insanity defense is raised, another examination will occur.⁷⁷ The Model Penal Code⁷⁸ and several states,⁷⁹ however, either require or permit that these issues be handled jointly in a single mental health examination and report.

The issue of who raises questions about the defendant's mental health is complicated in jurisdictions with a combined examination and report. All legal participants — judge, prosecutor, as well as defense counsel — share an obligation to raise the competency issue.⁸⁰ The insanity issue, on the other hand, is properly raised only by the defendant.⁸¹ Indeed, the Model Penal Code and several jurisdictions that provide for a unitary examination on competence and responsibility permit the latter to be evaluated as part of the examination only if the defense has raised an insanity plea.⁸²

If the defendant is found incompetent, the state then has several options. Most commonly, the defendant will be treated until she is "restored to competence," at which point the criminal proceedings could resume.⁸³ Unlike the question of competence, a court-ordered evaluation of the defendant's state of mind for the purpose of pleading the insanity defense is not constitutionally mandated.⁸⁴

the ultimate determination.

77. See IND. CODE ANN. § 35-36-3-1 (West 1986); TEX. CODE CRIM. P. ANN. art. 46.02(3), (4) & 46.03(3) (West 1979 & Supp. 1998). The Criminal Justice Mental Health Standards also provide for separate evaluations. See CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-3.4 (1989).

78. See MODEL PENAL CODE § 4.05 (1980).

79. See ALA. CODE § 15-16-22 (1995); ARK. CODE ANN. § 5-2-305 (Michie 1997); COLO. REV. STAT. § 16-8-106 (1997); FLA. R. CRIM. P. 3-210; HAW. REV. STAT. § 704-404 (1993); LA. CODE CRIM. PROC. ANN. art. 650 (West 1981); OHIO REV. CODE ANN. § 2945.37.1 (Anderson 1996); VT. STAT. ANN. tit. 13, § 4814 (Supp. 1997); WASH. REV. CODE ANN. § 10.77.060(3) (West 1990). New Hampshire authorized joint evaluations in *Novosel v. Helgemoe*, 384 A.2d 124, 128 (N.H. 1978).

80. See *Drope v. Missouri*, 420 U.S. 162, 182 (1975). It may, however, be most difficult for defense counsel to raise the competency issue consistent with other defense counsel responsibilities. See Uphoff, *supra* note 54, at 97-98.

81. While there is no dispositive United States Supreme Court case on point, it is the author's contention that the better position, supported by the weight of authority, is that the decision whether or not to interpose the insanity defense rests solely within the defendant's control. See *infra* text accompanying notes 105-20 (discussing the forced insanity defense).

82. See HAW. REV. STAT. § 704-404 (1993); WASH. REV. CODE ANN. § 10.77.060(3) (West 1990); MODEL PENAL CODE § 4.05 (1980). But see ARK. CODE ANN. § 5-2-305(a) (Michie 1997) (permitting an examination if there is reason to believe that mental disease or defect will become an issue in the case or there is reason to doubt defendant's fitness to proceed). The Criminal Justice Mental Health Standards also permit the prosecution to request an independent psychiatric examination after the defendant has given notice of her intent to use the defense. See CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-3.4 (1989).

83. Typically a finding of incompetence would result in a stay of the proceedings, pending the defendant's restoration to competency. If the defendant cannot be restored to competence within a reasonable period, then the state may keep her confined only if it can establish the grounds necessary for civil commitment. Otherwise, she must be released. See *Jackson v. Indiana*, 406 U.S. 715, 723-31 (1972). *Jackson*, however, does imply that, in the case of a permanently incompetent defendant, proceedings that do not require the personal involvement of the defendant, e.g., discovery or motions to dismiss, may go forward. See *id.* at 732-33. Numerous state statutes specifically provide for this option. See, e.g., WYO. STAT. ANN. § 7-11-303(j) (Michie 1997).

84. See *Godinez v. Moran*, 509 U.S. 389, 402 n.13 (1993). Indeed, Idaho, Kansas, Montana, and Utah have abolished the insanity defense. Other states have adopted a guilty but mentally ill verdict. See

Some jurisdictions,⁸⁵ however, follow the Model Penal Code⁸⁶ and address both competence and responsibility in one examination. Moreover, in some jurisdictions, a court may accept the findings of the report without a hearing.⁸⁷ This procedure is also permitted by the Model Penal Code.⁸⁸ It is in these jurisdictions that the problem faced by our fictional defendant Scarlett Snopes is presented most squarely. If, by statutory fiat, the evaluation may assess criminal responsibility as well as competence and the results may be accepted through a report, then the circumstances are ripe for an improper acquittal.

A trial of an incompetent defendant is constitutionally forbidden, even if an acquittal by reason of insanity were inevitable.⁸⁹ But in the jurisdictions where an acquittal may occur based exclusively on the report of the evaluation performed on the defendant, there may be a pretrial acquittal of an incompetent defendant.

It is not clear that the possibility of a pretrial acquittal by reason of insanity of an incompetent defendant was intended by either the drafters of the Model Penal Code or the various legislators who crafted statutes that create this outcome. More likely, it is an unanticipated consequence as courts, lawyers, and mental health professionals seek ways to handle these difficult cases.⁹⁰ Regardless of its origin, however, pretrial acquittals of incompetent defendants do occur in violation of the same precepts that render the trial of an incompetent defendant constitutionally infirm.

An acquittal by report heightens the possibilities for abuse. For instance, if the acquittal is entered by report, without a hearing if none has been requested, it could occur without the defendant being present. An acquittal without a hearing and in the defendant's absence could result in the defendant's confusion about the process.⁹¹

J. Thomas Sullivan, *Psychiatric Defenses in Arkansas Criminal Trials*, 48 ARK. L. REV. 439, 447 (1995).

85. See *supra* note 79.

86. See MODEL PENAL CODE § 4.05 (1980).

87. See ARK. CODE ANN. § 5-2-313 (Michie 1997); HAW. REV. STAT. § 704-408 (1993).

88. See MODEL PENAL CODE § 4.07 (1980). This section provides that a court may, on motion from the defendant, enter an acquittal based on the report by the court-ordered mental health professional without a hearing, if none is requested. See *id.*

89. In *Coolbroth v. District Court*, 766 P.2d 670 (Colo. 1988), the Colorado Supreme Court struck down a statute permitting a trial of an incompetent defendant on the issue of insanity only. See *id.* at 671-73. The court stated that, even if the proceeding were to result in an insanity acquittal, the adjudicatory process itself would be invalid. See *id.* at 671-72. Further, the court said that the statutory provision that allowed the continuation of proceedings that could fairly occur without the defendant's involvement "obviously" did not include insanity trials. *Id.* at 673. Note, however, that some jurisdictions proceed with innocence-only hearings. In those jurisdictions, only a determination of innocence counts. If the defendant is acquitted outright, or if the state cannot meet its burden, the criminal charges are dismissed. If, however, an innocence-only hearing results in a conviction, that result is ignored and the incompetent defendant is continued in treatment pending restoration of competency. See, e.g., DEL. CODE ANN. tit. 11, § 404 (Supp. 1996); 725 ILL. COMP. STAT. ANN. 5/104-25 (West Supp. 1997); see also Winick, *supra* note 10, at 576 (discussing when marginally competent defendants should be permitted to proceed.) See *infra* text accompanying notes 228-41 for discussion of innocence-only hearings.

90. A less benign motive might also be imagined. Acquittals by report, even of incompetent defendants, are an efficient way of disposing of these cases.

91. This would be particularly ironic in the case of an incompetent acquittee, since a component of assessing competence is evaluating the defendant's comprehension of the court system. Having hearings without the defendant present would understandably add to the defendant's confusion about the system.

Further, the defendant's absence raises the possibility that the plea was interposed without her knowledge or consent.⁹²

III. Is An Insanity Acquittal An Adverse Adjudication?

A. Adverse Consequences

"So what?" one might be inclined to ask, if our incompetent defendant Scarlett Snopes has been acquitted by reason of insanity. Doesn't an insanity acquittal work benefit rather than harm to an acquittee? Isn't Ms. Snopes better off with an insanity acquittal than with being required to go through the process of being restored to competence, being tried, and risking the possibility of conviction?

When the reality behind an acquittal by reason of insanity is exposed, it is clear that Ms. Snopes is not necessarily better off. There are multiple adverse consequences to a pretrial insanity acquittal.⁹³ These include: the waiver of the constitutional rights associated with a fair trial; the deprivation of liberty; the stigma of being found to be mentally ill; and the invasive regimen of mental health treatment. Each of these consequences will be examined in turn.

1. The Waiver of Constitutional Rights

a) General Considerations

The defendant who pleads not guilty by reason of insanity and has that plea accepted by a court waives constitutional rights associated with a fair trial. In some jurisdictions, an uncontested plea means that the defendant is waiving, at a minimum, her right to have the state prove its case beyond a reasonable doubt, and her right to confront witnesses. The defendant may also be waiving the right to remain silent and the right to a jury trial.⁹⁴

An NGRI plea may also mean an admission of factual guilt.⁹⁵ In some jurisdictions the defendant expressly relinquishes the right to challenge any detention following the acquittal on the basis that she did not commit the acts.⁹⁶ Moreover, the United States Supreme Court has said that an insanity acquittal includes a deter-

The author's experience in speaking to persons confined at a state hospital — who have either been acquitted by reason of insanity or who are being "restored to competency" so that they may be tried — is consistent with this supposition. When a client insists that she has never been to court, that may in fact be true, even though she has been acquitted.

92. See *Briggs v. Missouri*, 509 S.W.2d 154 (Mo. Ct. App. 1974), where the court reversed an insanity acquittal that occurred unbeknownst to the acquittee as he languished at a state hospital. See *id.* at 156-57.

93. See David S. Cohn, *Offensive Use of the Insanity Defense: Imposing the Insanity Defense Over the Defendant's Objection*, 15 HASTINGS CONST. L.Q. 295, 295-96 (1988).

94. See *Washington v. Brasel*, 623 P.2d 696, 701 (Wash. Ct. App. 1981).

95. In Wisconsin, for example, a defendant who pleads not guilty by reason of insanity without combining it with a not guilty plea admits that, but for the lack of mental capacity, she committed all the essential elements of the crime charged. See WIS. STAT. ANN. § 971.06(1)(d) (West 1985).

96. See WASH. REV. CODE ANN. § 10.77.080 (West 1990). In *Novosel v. Helgemoe*, 384 A.2d 124 (N.H. 1978), the New Hampshire Supreme Court stated that an insanity plea "is one of confession and avoidance and admits that the defendant committed the acts alleged." *Id.* at 128.

mination of factual guilt. In *Jones v. United States*,⁹⁷ the Court specifically said that an acquittal by reason of insanity establishes that the act actually occurred.⁹⁸ Indeed, it was exactly the defendant's committing of the criminal act — shoplifting in the case of Mr. Jones — that allowed the Court to find the element of dangerousness necessary to confine Mr. Jones to a mental institution.⁹⁹ The Court declared that "[a] verdict of not guilty by reason of insanity establishes two facts: (i) the defendant committed an act that constitutes a criminal offense, and (ii) he committed the act because of mental illness."¹⁰⁰

The *Jones* Court said that it was this difference — the commission of the offense — that distinguished *Jones* from *Jackson v. Indiana*,¹⁰¹ which precluded the long-term confinement in a mental institution of an incompetent accused.¹⁰² In *Jackson*, an indefinite pretrial commitment based solely on the need to restore an incompetent defendant to competency was held to be impermissible because the nature and duration of the commitment did not bear a reasonable relationship to its purpose.¹⁰³ In *Jones*, however, the possibly lifelong commitment was found to be consistent with due process principles because, after an insanity acquittal, a court could safely conclude that a criminal act had been committed and that, therefore, the acquittee was dangerous.¹⁰⁴

b) Forcing the Insanity Plea

There has not been a dispositive United States Supreme Court decision on the issue of whether a court or defense counsel has an obligation — or a right — to interpose the insanity defense against a defendant's wishes. The Court's contribution is found in *Lynch v. Overholser*,¹⁰⁵ where the Court interpreted a District of Columbia statute to mean that a defendant may not be automatically committed to an institution following an insanity acquittal if the insanity defense had been imposed upon that defendant.¹⁰⁶ Instead, the trial court is required to use civil commitment procedures to confine and treat an acquittee whose insanity acquittal was contrary to her wishes.¹⁰⁷

In order to reach its decision, the *Lynch* Court had to accept the premise that a forced insanity defense was possible.¹⁰⁸ But the import of *Lynch* should not be overstated; it is best read as a statutory case. Indeed, the Court explicitly said it did not have to reach the constitutional issue.¹⁰⁹

97. 463 U.S. 354 (1983).

98. *See id.* at 363.

99. *See id.* at 364.

100. *Id.* at 363.

101. 406 U.S. 715 (1972).

102. *See id.* at 720.

103. *See id.* at 730, 738.

104. *See Jones*, 463 U.S. at 364.

105. 369 U.S. 705 (1962).

106. *See id.* at 719.

107. *See id.* at 720.

108. *See id.* at 719.

109. *See id.* at 709-10. The dissent took issue with this view, accusing the majority of rendering

In *Freundak v. United States*,¹¹⁰ a case that has enjoyed wide influence,¹¹¹ the District of Columbia Court of Appeals declared that a competent defendant's decision to reject the insanity defense was binding, provided that the decision was made intelligently and voluntarily.¹¹² Further, the court stated that a declaration of a defendant's competence was not sufficient; the trial court must inquire further to gauge whether the decision was intelligent and voluntary.¹¹³

In explaining why a decision to plead insanity was so fundamental as to require deference to a defendant's choice, the *Freundak* court pointed to several factors: the imposition of a term of confinement exceeding that which could be imposed after a conviction; the invasive nature of psychiatric care and treatment that would occur following a criminal commitment; a legitimate desire to avoid the stigma of an insanity label; the admission of factual guilt that accompanies an insanity acquittal; and the potential for negative collateral consequences flowing from an insanity acquittal, e.g., the right to vote, to drive, or to carry a weapon.¹¹⁴ More recently, the United States Court of Appeals for the District of Columbia Circuit has come to the same conclusion. In *United States v. Marble*,¹¹⁵ the court reversed long-standing precedent by concluding that the decision to plead insanity is within the control of the defendant.¹¹⁶

Not all courts have followed this line of reasoning. Illinois courts, for instance, have determined that the insanity defense is simply a defense which, like other defenses, rests with the control of counsel.¹¹⁷ Courts have also wrestled with the intelligent and voluntary components added in *Freundak*. While finding *Freundak* "largely persuasive," one court cautioned against turning the inquiry of whether the waiver is intelligent and

a constitutional holding dressed up in statutory clothes. See *id.* at 733 (Clark, J., dissenting).

110. 408 A.2d 364 (D.C. 1979).

111. See Cohn, *supra* note 93, at 298.

112. See *Freundak*, 408 A.2d at 380.

113. See *id.*

114. See *id.* at 376-77. With the "reform" in the area of the rights of the mentally ill, there have been attempts to lessen the collateral consequences and/or legal stigma associated with a mental illness adjudication. Even if that effort has achieved some level of success, criminal acquittees are still treated quite differently from civil committees and that differential treatment has been sanctioned by courts on numerous occasions. See *Jones v. United States*, 463 U.S. 354, 370 (1983) (declaring that its ruling "accords with the widely and reasonably held view that insanity acquittees constitute a special class that should be treated differently from other candidates for commitment.").

115. 940 F.2d 1543 (D.C. Cir. 1991).

116. See *id.* at 1548; see also *Whalem v. United States*, 346 F.2d 812 (D.C. Cir. 1965), *overruled by United States v. Marble*, 940 F.2d 1543 (D.C. Cir. 1991). The *Marble* court reasoned that *Whalem* was in "tension" with the principles set forth in *North Carolina v. Alford*, 400 U.S. 25 (1970) and *Faretta v. California*, 422 U.S. 806 (1975), two cases that increased a competent defendant's right to set the course of his own defense. See *Marble*, 940 F.2d at 1546. Further, the court relied on congressional enactment of the Insanity Defense Reform Act of 1984, 18 U.S.C. § 17 (1994). The IDRA made the insanity plea an affirmative defense and, thus, according to the *Marble* court, the plea is now indistinguishable from the type of defense decisions that *Faretta* mandates be within a defendant's control. See *Marble*, 940 F.2d at 1547.

117. See *Illinois v. Anderson*, 641 N.E.2d 591, 600 (Ill. App. Ct. 1994).

voluntary into a second competency hearing.¹¹⁸ In that case, the court determined that although the defendant was delusional, his waiver of the insanity defense was valid.¹¹⁹ Similarly, the Vermont Supreme Court refused to adopt *Freundak's* reasoning to require a trial court inquiry into whether a defendant, who had initially interposed the insanity defense, later made a knowing and voluntary waiver.¹²⁰

The views expressed by the *Marble* and *Freundak* courts, that a competent defendant controls the decision of whether to plead insanity, are consistent with the premise that an incompetent defendant ought not be acquitted by reason of insanity. The consequences of such an acquittal are significant and should be borne only by a competent defendant who has sought such a result after a knowing and intelligent waiver of constitutional rights.

2. Deprivation of Liberty

An insanity acquittee may be constitutionally confined for a term far in excess of that which would have been meted out for criminal punishment.¹²¹ In *Jones v. United States*,¹²² Michael Jones was charged with the misdemeanor of petit larceny for shoplifting a jacket from a department store. The maximum punishment, if convicted, was a one-year sentence. He was acquitted by reason of insanity and was sent to St. Elizabeths Hospital, an institution for persons with mental illness in the District of Columbia. Mr. Jones sought release after he had been there more than one year.

After his application for discharge was denied, Mr. Jones challenged the statutory provisions, asserting that to keep him longer than he could have been imprisoned was to work a violation of his due process rights as specified in *Addington v. Texas*.¹²³ Jones argued that since the length of time for which he could have been sentenced was over, he could be involuntarily confined only if the standards for civil commitment, as articulated in *Addington*, were met.¹²⁴

First, the *Jones* Court found that an acquittal by reason of insanity established that the acquittee was both presently mentally ill and dangerous, the two elements

118. See *New Jersey v. Cecil*, 616 A.2d 1336, 1344 (N.J. 1992).

119. See *id.* at 1344.

120. See *Vermont v. Davignon*, 565 A.2d 1301, 1305-08 (Vt. 1989).

121. See *Jones v. United States*, 463 U.S. 354, 368 (1983). Studies juxtaposing hospital confinements for acquittees with prison sentences for those convicted of similar crimes have yielded conflicting results. Some have found acquittees remain confined longer, others find the period of deprivation of liberty to be relatively equal and others still show that acquittees spend less time confined. See *Silver*, *supra* note 15, at 377.

122. 463 U.S. 354 (1983).

123. 441 U.S. 418 (1979). In *Addington*, the Supreme Court held that, in order to civilly commit someone, the state must prove by clear and convincing evidence that a person is mentally ill and a danger to herself or others. See *id.* at 433. The substantive standard of danger to self or others was set forth in *O'Connor v. Donaldson*, 422 U.S. 563, 576 (1980). Although states have variations upon the theme, the basic standard is similar from state to state. There has, however, been a move in recent years to loosen the standard. Hawaii, for instance, permits commitment for persons who are "obviously ill." HAW. REV. STAT. ANN. § 334-59(a)(3)(b) (Michie 1993 & Supp. 1996).

124. A key benefit to the use of the *Addington* principles would be to switch the burden to the state.

necessary in *Addington* to support involuntary commitment.¹²⁵ Next, the Court rejected the argument that, because insanity only need be proven by a preponderance of the evidence, the burden of proof was wanting under *Addington*, which mandated a clear and convincing standard for civil commitment.¹²⁶ The Court cited to reasons why the higher *Addington* burden of proof was unnecessary. First, the acquittee could be automatically committed¹²⁷ only if she had raised the insanity defense.¹²⁸ Thus, the Court reasoned, if the defendant had raised the defense, then the risk of error that the defendant was not mentally ill was minimized.¹²⁹ Second, proof of the criminal act inherent in the acquittal obviated the concern of an individual being institutionalized for merely bizarre or idiosyncratic behavior, one reason why the *Addington* Court had mandated a higher burden in civil commitment cases.¹³⁰

The *Jones* Court further found "irrelevant" the length of the criminal sentence that would or could have been imposed were there a conviction.¹³¹ A criminal sentence, the Court said, is a means of punishment, which is not a valid concern for a criminal acquittee.¹³² The acquittee's confinement rests solely on her "continuing illness and dangerousness."¹³³ Thus, *Jones* clearly establishes that an acquittee may be held until she has "regained [her] sanity or is no longer a danger to [herself] or society," without any reference to what the criminal sentence would have been.¹³⁴ In view of this consequence, it seems axiomatic that to impose this potentially lifelong confinement upon an incompetent defendant is as constitutionally repugnant as is forcing an incompetent defendant to go to trial.

The deprivation of liberty is especially onerous because once one is confined in the post-acquittal system it is difficult to secure release. Unlike many prison sentences, an insanity acquittee's confinement is indefinite; it lasts until she is no longer mentally ill and dangerous. This is so because an acquittee is ostensibly confined for the protection of society and for her own treatment.¹³⁵ Even the involuntary civil commitment of a person, which is also for the dual purposes of protection and treatment, generally lasts only for a finite period.¹³⁶ Further, in a civil commitment,

125. See *Jones*, 463 U.S. at 362-63.

126. See *id.* at 366-68.

127. Automatic commitment means the acquitted defendant, now the "acquittee," is sent to a mental health institution automatically upon the acquittal, without any need for further findings by the court. This is one of several options at the time of an insanity acquittal. Others include a requirement of new findings by the court as to the acquittee's dangerousness and mental illness as a factual predicate to commitment, commencement of civil commitment or guardianship proceedings, and outright release.

128. See *id.* at 367; see also *Lynch v. Overholser*, 369 U.S. 705, 709-10 (1962) (holding that an automatic commitment was permissible only if the defendant had raised the insanity defense).

129. See *Jones*, 463 U.S. at 367.

130. See *id.* at 367.

131. *Id.* at 369.

132. See *id.*

133. *Id.*

134. *Id.* at 370.

135. See *Foucha v. Louisiana*, 504 U.S. 71, 75-76 (1992).

136. See, e.g., ARK. CODE ANN. §§ 20-47-214 & 20-47-215 (Michie 1991).

the state would have the burden of proving by clear and convincing evidence¹³⁷ that the defendant is mentally ill and not harmless.¹³⁸ Once the defendant is committed as a result of an insanity acquittal, however, the burden may permissibly shift to her to prove that she is no longer mentally ill or no longer dangerous.¹³⁹

This is a difficult burden to sustain where the acquittee is unlikely to have ready access to — or funds to retain — the kind of expert witnesses needed to counteract the hospital's testimony.¹⁴⁰ Nor will the acquittee necessarily have the right to counsel to assist in pursuing release.¹⁴¹ Although the acquittee may have a right to request a periodic release hearing,¹⁴² she may not have access to counsel or other knowledge of that right. Finally, even if the acquittee is released, the release may be a conditional discharge, resulting in continued restrictions on liberty that could extend throughout the acquittee's lifetime.¹⁴³

3. Stigma

The third adverse consequence to an insanity acquittal is the stigma of being labeled insane. The pernicious nature of the mental illness label is well established. The United States Supreme Court has addressed the issue of stigma on various occasions. In *Addington v. Texas*,¹⁴⁴ the Court said that "[a]n involuntary commitment . . . can engender adverse social consequences Whether we label this phenomenon 'stigma' or choose to call it something else is less important than that we recognize

137. See *Addington v. Texas*, 441 U.S. 418, 432-33 (1979).

138. See *O'Connor v. Donaldson*, 422 U.S. 563, 576 (1975) (requiring proof of these factors or some variation thereof).

139. Some states and the *Model Penal Code* shift the burden. See, e.g., ARK. CODE ANN. § 5-2-315 (Michie 1997); MO. STAT. ANN. § 522.040 (West Supp. 1998); see also MODEL PENAL CODE § 4.08(2). The two Supreme Court cases addressing post-acquittal issues, *Jones v. United States*, 463 U.S. 354 (1983), and *Foucha v. Louisiana*, 504 U.S. 71 (1992), do not specifically rule on whether a state may make an acquittee seeking release prove that she is neither dangerous nor mentally ill. In *Jones*, however, the Court stated that an acquittee was not entitled to the same constitutional protections as a civil committee. See *Jones*, 463 U.S. at 367-68.

140. It is a safe legal proposition that if an acquittee is filing for release, the hospital or institution will be opposing it. If the hospital believes that the acquittee can safely be released, then generally it has the obligation to seek discharge on behalf of the acquittee. See, e.g., ARK. CODE ANN. § 5-2-315 (Michie 1997); MODEL PENAL CODE § 4.08 (1980). Of course, it is quite possible that if the acquittee sought release, the institution might "suddenly" realize that the acquittee is either no longer dangerous or mentally ill or that she can be released at least conditionally.

141. While some states do provide the right to counsel, see ARK. CODE ANN. § 5-2-315 (Michie 1997); WASH. REV. CODE ANN. § 10-77-020 (West 1990 & Supp. 1997), it may not be a constitutional right. See *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973) (holding that there is not a per se right to counsel in a probation revocation hearing).

142. See, e.g., ARK. CODE ANN. § 5-2-315 (Michie 1997). In *Jones*, the Court sanctioned an indeterminate commitment but noted the periodic judicial hearing that allows a court to assess an acquittee's "suitability for release." *Jones*, 463 U.S. at 368.

143. Some jurisdictions limit the conditions of release to a specific term of years. See, e.g., ARK. CODE ANN. § 5-2-316 (Michie 1997). Others, however, consider conditions lifelong, a consequence sanctioned by the United States Supreme Court in *Jones v. United States*, 463 U.S. 354, 368-69 (1983).

144. 441 U.S. 418 (1979).

that it can occur and that it can have a very significant impact on the individual.¹⁴⁵ In identifying the prejudice and stigma attached to the mentally ill, the Court, in *O'Connor v. Donaldson*,¹⁴⁶ said:

May the State fence in the harmless mentally ill solely to save its citizens from exposure to those whose ways are different? One might as well ask if the State, to avoid public unease, could incarcerate all who are physically unattractive or socially eccentric. Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty.¹⁴⁷

Although *Addington* and *O'Connor* are civil commitment cases, the stigma issue applies with equal or greater force to the mentally ill involved in the criminal justice system. They will be subject to the collective opprobrium heaped upon two stigmatized groups: the criminal and the mentally ill. Of these two groups, it is hard to know who is vilified and marginalized more, but it is a fair guess that the combination is deadly; the Hollywood stereotype of the psychotic killer is pervasive and powerful.¹⁴⁸ The common perception of the criminal trying to beat the system by feigning mental illness is an additional stigma likely to be attached to the insanity acquittee.¹⁴⁹

Lest one doubt the potentially severe adverse consequences of involuntary placement in a mental health facility, the United States Supreme Court has declared that being placed in a mental health facility is worse than being placed in a prison.¹⁵⁰ In *Vitek v. Jones*,¹⁵¹ the Court held that even a prisoner has a protected liberty interest implicated by a forced transfer to a mental hospital.¹⁵² In so finding, the Court explicitly recognized the stigmatizing effects of a "mental illness" label even on one who already wears the moniker of "convict."¹⁵³

The *Vitek* Court declared that a prisoner's liberty interest is in neither freedom from confinement nor a change in the terms of confinement, even if substantially adverse.¹⁵⁴ Rather, it is the diagnosis of mental illness, followed by forced mental

145. *Id.* at 425-26.

146. 422 U.S. 563 (1975).

147. *Id.* at 575.

148. The character Hannibal Lecter in *Silence of the Lambs* is one example; Norman Bates of *Psycho* fame another. See generally John Kip Cornwell, *Confining the Mentally Disordered "Super Criminals": A Realignment of Rights for the Nineties*, 33 HOUS. L. REV. 651, 663-64 (1996) (positing that insanity acquittees are uniquely disadvantaged "super criminals" who, through the unfortunate fusion of prior mental illness and criminal activity, face a greater risk of long-term deprivation of liberty than their noncriminal or nonmentally disordered counterparts"). In *Frendak v. United States*, 408 A.2d 364, 377 (D.C. 1979), the court stated that insanity acquittees may well view themselves as "twice cursed."

149. See, e.g., *California v. Vanley*, 41 Cal. Rptr. 446, 453 (Cal. Ct. App. 1974) (discussing the possibility of defendants trying to "beat the rap").

150. See *Vitek v. Jones*, 445 U.S. 480, 492-93 (1980).

151. 445 U.S. 480 (1980).

152. See *id.* at 487-88.

153. See *id.* at 492-93.

154. See *id.* at 493.

health treatment, that constitutes additional infringement on liberty that require further due process protections for the prisoner.¹⁵⁵ The Court specifically cited the stigma and forced behavior modification programs as deprivations of liberty.¹⁵⁶

4. Invasion of Privacy and Loss of Autonomy

An insanity acquittal often leads to commitment to a state hospital. Although it is a mental institution, not a prison, ostensibly for the purpose of treatment rather than punishment, the difference between the two may not be so readily apparent to the confined individual. On the other hand, the differences might be quite obvious and the individual may prefer prison. The behavior modification system cited in *Vitek* and used in other states¹⁵⁷ certainly restricts more than the acquittee's liberty: her personal behavior and choices are also limited, scrutinized, and judged. Acknowledging this level of intrusion, the District of Columbia Court of Appeals, in *Frendak v. United States*,¹⁵⁸ cited the invasive nature of psychiatric treatment as one of the reasons why a defendant might decline to pursue an insanity defense.¹⁵⁹

B. Court Responses

Courts that have confronted the issue of the effects of an insanity acquittal have explicitly acknowledged the adverse consequences that attach and have tailored the manner in which they handle these cases accordingly.¹⁶⁰ The courts that have considered the issue have required some kind of conversation between the trial court and the defendant.¹⁶¹

155. See *id.* at 493-94.

156. See *id.* at 494.

157. Arkansas, for instance, has a program for insanity acquittees that involves an elaborate five-tiered behavior modification program. One must successfully complete one level before progressing to the next and must complete all five before being recommended for release. Woe to the acquittee who would rather not have her behavior modified. This is all done, of course, in the name of treatment and safety, as punishment is not a legitimate goal for an insanity acquittee. See *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (stating that an insanity acquittee has not been convicted and therefore may not be punished).

158. 408 A.2d 364 (D.C. 1979).

159. See *id.* at 376.

160. The fact that collateral attacks on acquittals by reason of insanity are filed by acquittees many years after their sentence would have been completed if they had been convicted is stark testimony to the adverse consequences of an insanity acquittal. See generally *Walls v. United States*, 601 A.2d 54 (D.C. 1991) (addressing acquittee's challenge of his 1974 acquittal for simple assault).

161. In some jurisdictions, even for uncontested pleas, the court hears a prosecutorial proffer or accepts stipulated facts that the act was committed by the defendant. See *Legrand v. United States*, 570 A.2d 786, 788 (D.C. 1990). Thereafter, the court conducts a colloquy with the defendant to ascertain that she understands the constitutional rights being waived by an insanity plea. See *Morrison v. United States*, 579 A.2d 686, 692 (D.C. 1990). In Colorado, the court must, pursuant to statute, advise the defendant as to the consequences of an insanity plea at the time the plea is entered. See COLO. REV. STAT. § 16-8-103(4) (1996). In jurisdictions where these colloquies occur, a defendant would obviously have to be competent before such a discussion is undertaken.

In *Legrand v. United States*,¹⁶² for instance, the District of Columbia Court of Appeals reversed a trial judge who had not adequately apprised a defendant of the consequences that could arise after an acquittal by reason of insanity.¹⁶³ To enter an insanity plea, the court said, is "not a trivial thing."¹⁶⁴ In *Legrand*, the defendant was still confined in an institution for the mentally ill some eleven years after he would have been eligible for parole had he been found guilty. The court, after acknowledging the difficulty in explaining the consequences of an acquittal by reason of insanity to a defendant qualified to plead it, nonetheless decreed that "since the defendant may lose his liberty for a very long time, thoroughness and meticulousness are essential if the uninformed relinquishment of constitutionally protected liberty interests is to be avoided."¹⁶⁵

The *Legrand* court declared that the judge-defendant colloquy that occurs pursuant to a guilty plea should occur in this instance as well.¹⁶⁶ Not only must the trial court address the defendant personally to ensure that she understands the maximum possible consequences, the judge must be confident that the defendant has a meaningful comprehension of them.¹⁶⁷ Under this approach, the defendant would not only need to be competent but would need more — something akin to the knowing and voluntariness that was deemed necessary to accompany a guilty plea or waiver of right to counsel in *Godinez v. Moran*.¹⁶⁸

Courts in Wisconsin, Washington, California, and Florida have imposed similar requirements on courts accepting insanity pleas. In *Wisconsin v. Shegrud*,¹⁶⁹ the Wisconsin Supreme Court analogized an NGRI plea to a plea of no contest, rather than a plea of guilty.¹⁷⁰ The court stated that a defendant who enters such a plea was admitting to committing the elements of the crime, though lacking the mental capacity.¹⁷¹ Further, the court explicitly stated that a defendant who entered such a plea was waiving constitutional rights and, accordingly, the waiver must be both

162. 570 A.2d 786 (D.C. 1990).

163. *See id.* at 794.

164. *Id.* at 792.

165. *Id.* The court's assertion that it would be difficult to have a colloquy with a defendant pleading insanity may suggest confusion between competence and responsibility. The defendant would have to be competent to enter the plea, but that would have no bearing on the defendant's mental state at the time of the crime.

166. *See id.* at 792-93. That colloquy generally consists of the judge, in open court, addressing the defendant to ascertain, inter alia, whether the defendant understands the nature of the charge, the possible penalties, the right to counsel, the right to plead or go to trial, and the right to confront and cross-examine witnesses. The judge must also be certain that the plea is being offered voluntarily and free of coercion. *See* FED. R. CRIM. P. 11d.

167. *See Legrand*, 570 A.2d at 792.

168. 509 U.S. 389, 396 (1993).

169. 389 N.W.2d 7 (Wis. 1986).

170. *See id.* at 9.

171. *See id.* Under Wisconsin's statutory scheme, a plea of not guilty by reason of mental disease or defect may be joined with a plea of not guilty. If it is not, a plea of not guilty by reason or mental disease or defect involves a direct confession of factual guilt. *See* WIS. STAT. ANN. § 971.06(1)(d) (West 1985).

knowing and voluntary to be constitutionally sound.¹⁷² In both *Legrand* and *Shegrud*, the courts concluded that the trial court must personally address the defendant to ensure that the plea is made knowingly and voluntarily.¹⁷³

In *Washington v. Brasel*,¹⁷⁴ the Washington Court of Appeals reasoned that, for due process purposes, an insanity plea was the substantive equivalent to a guilty plea.¹⁷⁵ The court relied on the United States Supreme Court decision in *Boykin v. Alabama*,¹⁷⁶ among other cases, to hold that in order for the plea to be valid, it must be shown that the defendant knew the nature of the charges against him, as well as their consequences, and knew that he was waiving a series of constitutional rights.¹⁷⁷ This is so, the court declared, because in pleading insanity, the defendant is admitting he committed the act and if his plea is accepted, he is waiving his right to a jury trial and to confront his accusers.¹⁷⁸

In *California v. Vanley*,¹⁷⁹ the California Court of Appeals reversed an acquittal by reason of insanity after finding that the plea had been entered by defense counsel, not by the defendant himself.¹⁸⁰ Further, the court continued, even if the defendant had properly made the plea himself, it was reversible error for the defendant not to be told by the court that a possible lifelong commitment could ensue.¹⁸¹ Indeed, the court found this information to be more critical here than after a guilty plea, where the defendant would expect a period of confinement as punishment.¹⁸² With a candid nod towards the use of the insanity defense as way to "beat the rap," the court said it was important that such a defendant know the possibilities that may await him after the successful insanity acquittal.¹⁸³

172. See *Shegrud*, 389 N.W.2d at 9.

173. See *Legrand*, 570 A.2d at 793; *Shegrud*, 389 N.W.2d at 9.

174. 623 P.2d 696 (Wash. Ct. App. 1981).

175. See *id.* at 701-02. The Court of Appeals of Washington has, in a subsequent case, highlighted some of the differences between a guilty plea and an insanity plea, citing prominently that it is a finding of not guilty and precludes the possibility of punishment by imprisonment. See *Washington v. Autrey*, 794 P.2d 81, 83 (Wash. Ct. App. 1990). Other jurisdictions, such as Washington D.C., have found that, for the purposes of a knowing and voluntary colloquy, an insanity plea parallels a guilty plea. See *Legrand*, 570 A.2d at 794.

176. 395 U.S. 238 (1969). In *Boykin*, the Court held that a guilty plea, which involves the waiver of at least three constitutional rights — the privilege against self-incrimination, the right to a jury trial, and the right to confront one's accusers — must be entered knowingly and voluntarily. See *id.* at 242-43. The Court refused to presume a waiver from a silent record, adding that a judge who ensures that a defendant has a full understanding of the consequences will do so in a way that leaves an adequate record for review. See *id.* at 244.

177. See *Brasel*, 623 P.2d at 701.

178. See *id.*

179. 116 Cal. Rptr. 446 (Ct. App. 1974).

180. See *id.* at 452.

181. See *id.*

182. See *id.* at 453.

183. See *id.* That view was reiterated in *California v. Lomboy*, 171 Cal. Rptr. 812 (Cal. Ct. App. 1981), where the court reversed an insanity acquittal because the defendant had not been advised of the possibility of a lifelong commitment. See *id.* at 813. After determining that the defendant had been properly advised of the potential of remaining in a mental institution for the rest of her life when initially pleading not guilty by reason of insanity, the court found reversible error in the failure to readvise the

In each of the above cases, the courts have required that a defendant enter an NGRI plea with the knowing and voluntariness required when constitutional rights are being waived. Moreover, the courts also cited the potentially lengthy confinement as a reason to mandate a colloquy with the defendant to ensure that she is aware of the adverse consequence of an insanity plea.¹⁸⁴ Although not explicitly addressed, each of the decisions has as a factual predicate a competent defendant, as an incompetent defendant could not knowingly and voluntarily waive rights or have a discussion with the court. Indeed, in each of these circumstances, a competent defendant would be a constitutional requirement.¹⁸⁵

In *Harringer v. Florida*,¹⁸⁶ the Florida District Court of Appeal directly addressed the need for a competent defendant for an acquittal by reason of insanity. In reversing a trial court's refusal to set aside an acquittal by reason of insanity, the appellate court first found fault with the lack of evidence that the defendant knowingly and voluntarily waived his right to a jury trial.¹⁸⁷ More importantly, however, the court found constitutional offense in the absence of evidence that the defendant was competent.¹⁸⁸ The record showed only that the state's attorney and the defense counsel stipulated to the entry of an NGRI plea. "Good intentions do not override constitutional rights," the court declared, finding that the defendant's due process rights were violated when the proceedings continued in light of reasonable grounds to suspect the defendant's incompetency.¹⁸⁹

IV. Model Code and ABA Standards

Neither the Model Penal Code nor the Criminal Justice Mental Health Standards explicitly address the issue of whether an incompetent defendant may be acquitted by reason of insanity in a pretrial procedure. Each of these sets of model provisions, however, contains sections that inform the discussion.

A. Model Penal Code

Section 4 of the Model Penal Code deals with the defendant's responsibility.¹⁹⁰ Section 4.03 provides that the defense of lack of capacity due to mental disease or defect¹⁹¹ is an affirmative defense.¹⁹² It bars the consideration of the defense if it

defendant after she had been convicted of factual guilt and was before the court in the sanity phase of the proceeding. See *id.* at 815-16.

184. See *Legrand v. United States*, 570 A.2d 786, 794 (D.C. 1990); *Vanley*, 116 Cal. Rptr. at 452.

185. See *Godinez v. Moran*, 509 U.S. 389, 398-403 (1993) (explaining the standard of competency required to plead guilty); *Boykin v. Alabama*, 395 U.S. 238, 243-44 (1969) (holding that a waiver of constitutional rights must be knowing and voluntary).

186. 566 So. 2d 893 (Fla. Dist. Ct. App. 1990).

187. See *id.* at 894.

188. See *id.*

189. *Id.* at 894.

190. See MODEL PENAL CODE § 4 (1980).

191. The MODEL PENAL CODE also refers to this as the defense of irresponsibility. See *id.* § 4.05(3).

192. See *id.* § 4.3.

is raised by the prosecution or on the court's own motion.¹⁹³ The rationale behind this prohibition, the comment suggests, is that despite the advantages of letting a trial court impose the insanity defense upon a defendant who forbids her lawyer to plead it, such a rule would interfere too significantly with the handling of the defense.¹⁹⁴ Thus, under the Model Penal Code, only a defendant can interpose this defense. It is reasonable, therefore, to conclude that the code drafters would require that a defendant must be competent to choose this defense.¹⁹⁵

Section 4.05 of the Model Penal Code specifies the procedures by which an examination is obtained when a defendant's mental health is at issue. By mandating that there be a single examination when "the defendant has filed a notice of intention to rely on the defense of mental disease or defect excluding responsibility, or there is reason to doubt his fitness to proceed . . . [.]"¹⁹⁶ it "avoids the duplication"¹⁹⁷ when separate examinations are ordered for competency and responsibility. This section provides that the examiner shall file a report addressing the defendant's capacity to understand the proceedings and to assist in his own defense and, after the appropriate notice has been tendered by the defendant, an opinion as to the defendant's responsibility.¹⁹⁸

This provision of the Model Penal Code — which combines the assessment of the defendant's present capacity to proceed with an assessment of whether the defendant meets the elements of the insanity defense — unwittingly creates the condition for an insanity acquittal of an incompetent defendant. If the assessments were kept separate, then an incompetent defendant's lack of fitness to stand trial would be addressed and resolved before an examination on the question of responsibility.¹⁹⁹ Although the Model Penal Code itself calls for a suspension of the proceedings if the defendant is found not fit to proceed,²⁰⁰ a report finding a defendant incompetent and not responsible could nonetheless be filed and accepted by the court, without the court taking the further step of suspending the proceedings and having the defendant restored to competence. The result would thus be an insanity acquittal before the defendant's competence is resolved.

A single report that addresses both competence and responsibility is usually only the first step in arriving at an improperly acquitted incompetent defendant. The next

193. See *id.* § 4.03(2) explanatory note at 222.

194. See *id.* § 4.03(2) cmt. at 229.

195. Prohibiting the court or the prosecution from raising the insanity defense is an effective shield against the wrongful acquittal of a defendant. If this provision of the Model Penal Code always accompanied the provision that allows responsibility and competency to be examined together, it would at least ensure that defense counsel, if not the defendant herself, favored an insanity acquittal.

196. *Id.* § 4.05(1).

197. *Id.* § 4.05 cmt. at 234.

198. See *id.* § 4.05(3).

199. This is so because, if the defendant were to be found incompetent or not fit to proceed, the issue of guilt or innocence would be set aside until such time that the defendant was restored to competency. See *Jackson v. Indiana*, 406 U.S. 715, 732 (1972). The exceptions to this general rule are the few jurisdictions that have prima facie or innocence-only hearings. See DEL. CODE ANN. tit. 11, § 404 (Supp. 1996); 725 ILL. COMP. STAT. 5/104-25 (West 1997).

200. See MODEL PENAL CODE § 4.06(2) (1980).

component may be a statutory provision that permits an insanity acquittal based on a report. Such a pretrial acquittal is not specifically addressed in the United States Supreme Court cases proscribing the trial and conviction of an incompetent defendant. Those cases, understandably, have focused on the trial and conviction of an incompetent defendant, not on her pretrial acquittal.²⁰¹ The statutory language permitting acquittal by report is found in sections 4.06 and 4.07 of the Model Penal Code and in several states.²⁰²

The language in the Model Penal Code is crafted in a way that, if adopted verbatim and followed precisely, would not permit a wrongful acquittal. Section 4.06 specifies that if a defendant is found not fit to proceed, either based on the report or after an evidentiary hearing if necessary, the proceedings are to be suspended.²⁰³ Accordingly, the ability of the court to acquit based on the report as allowed in section 4.07 would be limited to circumstances in which the defendant's competency was already resolved. Thus, the Model Penal Code drafters wisely separated a trial court's consideration of these distinct determinations even though they combined the psychiatric assessment thereof.

The Model Penal Code does permit certain legal activity to continue even in the face of an incompetent defendant.²⁰⁴ Section 4.06(3) permits defense counsel to raise legal objections that do not require the personal participation of defendant. The comment to Section 4.06(3) notes that "it seemed consonant with fairness to dismiss unwarranted charges against an unfit defendant."²⁰⁵

The Model Penal Code also has an alternate subsection that permits an incompetent defendant to seek a special post-commitment hearing at which the prosecution would be required to put forth a prima facie case, the absence of which would require dismissal.²⁰⁶ This procedure parallels the concept of an innocence-only hearing found in the Criminal Justice Standards.²⁰⁷

B. ABA Criminal Justice Mental Health Standards

1. Overview

The ABA Criminal Justice Mental Health Standards (hereinafter Mental Health Standards) are a relatively new contribution to the field. First appearing in 1986 as a chapter in the ABA Standards for Criminal Justice, the Mental Health Standards were subsequently expanded and are now a separate volume containing ninety-six standards.²⁰⁸

201. See *Drope v. Missouri*, 420 U.S. 162, 172 (1975); *Pate v. Robinson*, 383 U.S. 375, 384 (1966).

202. See ARK. CODE ANN. § 5-2-313 (Michie 1997); MO. ANN. STAT. § 552.020 (West Supp. 1997).

203. See MODEL PENAL CODE § 4.06 (1) (1980). There are exceptions to this suspension. See *supra* text accompanying notes 172-76, 188-91 (discussing those exceptions).

204. See *Jackson v. Indiana*, 406 U.S. 715, 740, 741 (1972) (discussing procedures that may go forward notwithstanding the defendant's incompetence).

205. MODEL PENAL CODE § 4.06(3) cmt. (1980).

206. See *id.*

207. See *infra* text accompanying notes 228-41.

208. See CRIMINAL JUSTICE MENTAL HEALTH STANDARDS xv (1989).

The Mental Health Standards contain many sections pertinent to this discussion. Sections 7-3.1 through 3.15 deal generally with pretrial evaluations and expert testimony. Of particular interest is section 7-3.5(c), which discourages combining evaluation of the defendant's competence to stand trial with an assessment of defendant's mental state at the time of the crime.²⁰⁹ This would be allowed, the section provides, only if requested by defendant or if ordered "for good cause shown."²¹⁰ The commentary to this rule suggests that its purpose is to prevent the professional misapprehension that occurs when evaluators and courts confuse the issues of competence and responsibility.²¹¹

The adoption of this standard would go a long way towards eliminating improper acquittals since a single report that recites findings on both of these issues creates the problem. Further, one might suspect that commentators are correct in suggesting that the root of the problem is professional confusion.²¹² By separating out the inquiries, the chances for confusion and resultant error would be reduced.

The possibility that a pretrial acquittal of an incompetent defendant is intentional rather than accidental cannot be overlooked. A judge may see a report that indicates that a defendant is both incompetent and not responsible and conclude that everyone profits by an acquittal at that point.²¹³ If the defendant's incompetence were resolved first, as it should be, then the defendant would not go to trial and will probably be committed until competence is restored. A judge could decide to simply skip that step and acquit the defendant, after which the defendant would usually be confined. Thus, the argument goes, everyone is saved the hassle of another proceeding and the defendant gets the help she needs.

Facially attractive though it may be, this argument is fundamentally flawed. First and foremost, the system may be wrongfully acquitting by reason of insanity a person who ought to be acquitted outright because she did not commit the crime. But as long as the defendant remains incompetent, she would not be able to assist in her defense and provide her attorney the very information needed to obtain an acquittal. So, the step of restoring competence is integral to assuring the accuracy of the criminal justice system.²¹⁴ Moreover, even if the defendant did in fact commit the acts that constitute the crime, then it still should be her choice whether or not to avail herself of the insanity defense. She should be able to decide whether she prefers the potential consequences of an insanity acquittal to those of a conviction.

209. See *id.* § 7-6.1 ("The defense of mental nonresponsibility [insanity]").

210. *Id.* § 7-3.5(c), at 97.

211. See CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-3.5 cmt. at 98.

212. See HARVARD MEDICAL SCHOOL LABORATORY OF COMMUNITY PSYCHIATRY FINAL REPORT, COMPETENCY TO STAND TRIAL AND MENTAL ILLNESS I (1974).

213. The prosecutor and defense counsel could also reach the same conclusion and suggest immediate acquittal to the court.

214. The integrity of the system is one of the reasons historically given for prohibiting the trial of an incompetent person. See *supra* notes 27-28 and accompanying text.

2. Competence to Stand Trial

Sections 7-4.1 through 7-4.15 of the Mental Health Standards address sundry issues regarding competence to stand trial.²¹⁵ These include explication of constitutional principles such as the proscription against trying an incompetent defendant²¹⁶ and the obligation of the court to raise the incompetence issue.²¹⁷ In addition, more controversial issues, such as credit for time served during the period of treatment against any subsequent sentence, are also covered.²¹⁸

Section 7-4.12²¹⁹ provides that proceedings that do not need the defendant's personal participation may continue during the period of the defendant's incompetence.²²⁰ This provision parallels section 4.06(3) of the Model Penal Code. Moreover, *Jackson v. Indiana*²²¹ suggests at least a modest version of this rule by stating that an incompetent defendant could assert "certain defenses such as insufficiency of the indictment, or make certain pretrial motions through counsel."²²² The types of proceedings envisioned by the commentary include suppression hearings, discovery, and motions involving legal issues.²²³ This kind of legal action, the commentary reasons, can be undertaken without detriment to the defendant and, in fact, the failure to do so may work affirmative harm.²²⁴ If, for instance, the charges may be dismissed on purely procedural grounds, without the need for the defendant's

215. For an overview of these standards, see Gerald Bennett, *A Guided Tour Through Selected ABA Standards Relating to Incompetence to Stand Trial*, 53 GEO. WASH. L. REV. 375 (1985). The standards have another section on competence that deals with more specialized issues such as competence at time of sentence, competence to waive counsel, and, most directly germane here, competence to plead guilty or nolo contendere. See CRIMINAL JUSTICE MENTAL HEALTH STANDARDS §§ 7-5.1 to 7-5.3 (1989).

216. See CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-4.1.

217. See *id.* § 7-4.2.

218. See *id.* § 7-4.15. The commentary to this standard indicates that such credit is the exception, rather than the norm. The theory against offering credit is that such confinement for treatment benefits the defendant and thus cannot be analogized to pretrial preventive detention. The commentary suggests, however, that the time spent in restoring one to competence so that she may stand trial benefits the system, not the defendant. See *id.* § 7-4.15 commentary at 257. Accordingly, the defendant should get credit for this period of confinement. See *id.*

219. The Model Penal Code contains a similar provision. See MODEL PENAL CODE § 4.06(3) (1980).

220. The full text of Standard § 7-4.12 reads: "The fact that the defendant has been determined to be incompetent to stand trial should not preclude further judicial action, defense motions, or discovery proceedings which may be fairly conducted without the personal participation of the defendant." CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-4.12 (1989).

221. 406 U.S. 715 (1972). In *Jackson*, the Court cited the MODEL PENAL CODE § 4.06(3) and its alternate favorably for the proposition that the Court's precedents did not preclude certain proceedings from going forward with an incompetent defendant. See *Jackson*, 406 U.S. at 740-41. The Court observed that the Model Penal Code alternate, which allows an evidentiary hearing at which certain defenses can be put forth, explicitly precludes an insanity defense from proceeding at this stage. See *id.*

222. *Jackson*, 406 U.S. at 741.

223. See CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-4.12 commentary at 236; see also Bennett, *supra* note 216, at 408 (pointing out that the standard, which does not specify the types of hearings that could proceed, is instead governed by the principle of fairness).

224. See CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-4.12 commentary at 236.

participation, then the defendant is spared the unjust and potentially lengthy confinement necessary to be restored to competency.

The advantage to proceeding with purely legal motions is obvious. One must then ask, however: does this provision extend to a plea of not guilty by reason of mental disease or defect? May that plea be entered "without the personal participation of the defendant[?]"²²⁵ Even if one takes the view that a plea of insanity can be imposed upon a *competent* defendant's will, that position does not necessarily extend to an incompetent defendant. The most troubling issue is that an insanity plea may be considered an admission of factual guilt.²²⁶ Accordingly, a decision to enter this plea is one that calls for the defendant's personal participation and thus cannot permissibly fall within the category of legal proceedings that would be sanctioned by standard section 7-4.12.²²⁷

3. Innocence-Only Hearings

Mental Health Standard section 7-4.13 and several states²²⁸ endorse the concept of an innocence-only hearing. The purpose of this hearing, also known as a discharge hearing²²⁹ or a *prima facie* hearing,²³⁰ is to protect the rights of defendants who are permanently incompetent.²³¹ The underlying premise of this proceeding is that, following a determination that a defendant could not be restored to competency in the foreseeable future,²³² either the defense²³³ or the state could move the court for a hearing on the factual guilt of the defendant. The state would have the burden of proving beyond a reasonable doubt that the defendant committed the factual offense.²³⁴ If the state failed at its proof, the defendant would be acquitted

225. *Id.* § 7-4.12.

226. See *Jones v. United States*, 463 U.S. 354, 363 (1983). Certainly, an insanity *verdict* includes a finding of factual guilt. In some jurisdictions the plea itself — or a motion for an insanity acquittal — may also be an admission that the defendant committed the act. This, of course, would be particularly true if the defendant does not combine an insanity plea with a not guilty plea. See, e.g., *supra* note 171.

227. In fairness to the standards' drafters, neither the standard nor its commentary suggests that an NGRI plea is contemplated by this standard.

228. See, e.g., DEL. CODE ANN. tit. 11, § 404 (Supp. 1996); 725 ILL. COMP. STAT. ANN. 5/104-25 (West Supp. 1997).

229. Illinois uses the term discharge hearings. See 725 ILL. COMP. STAT. ANN. 5/104-25 (West Supp. 1997). See Donald Paull, S.B. 133: *The Near Resolution of a Major Problem: Fitness in the Criminal Law*, 56 CHI.-KENT L. REV. 1107 (1980), for a discussion of what was then proposed legislation that created the Illinois innocence-only hearing.

230. See DEL. CODE ANN. tit. 11, § 404 (Supp. 1996).

231. See CRIMINAL JUSTICE MENTAL HEALTH STANDARD §7-4.13 cmt. at 241-52 (1989).

232. Standard §7-4.13(a) defines a permanently incompetent defendant to be one who has "previously been adjudged incompetent and there is no substantial probability that the defendant will become mentally competent to stand trial within the foreseeable future."

233. In Delaware, for example, the incompetent defendant is either confined and treated or, upon defense motion, the state must make out a *prima facie* case against the defendant. If the state fails, the charges are dismissed. See DEL. CODE ANN. tit. 11, § 404 (Supp. 1996).

234. Illinois requires proof beyond a reasonable doubt. See 725 ILL. COMP. STAT. ANN. 5/104-25 (West Supp. 1997). Delaware requires "sufficient evidence to constitute a *prima facie* case." DEL. CODE ANN. tit. 11, § 404 (Supp. 1996).

outright.²³⁵ If the state met its burden, the defendant would continue to be held pending either additional attempts at restoration of competency or civil commitment proceedings.²³⁶

Commentators have criticized innocence-only proceedings, suggesting that the benefit to the incompetent defendant is illusory.²³⁷ Often, a conviction would result in the defendant's earlier release.²³⁸ A more fundamental question remains: Is the trial of an incompetent defendant less constitutionally offensive if it is an innocence-only trial? In both circumstances, the government will undertake to prove the factual guilt of the defendant. And, in both cases, the defendant, by virtue of being incompetent, is unable to assist counsel in preparing a defense.²³⁹ Thus, the accuracy of the proceeding is inherently suspect and constitutionally infirm. Indeed, it more resembles a grand jury proceeding where the prosecutor puts on her case without any true adversary.²⁴⁰ In an innocence-only proceeding, there is, of course, defense counsel present. Defense counsel's effectiveness, however, is limited with an incompetent client who cannot assist in her own defense.²⁴¹

V. Incompetent and Acquitted

The Model Penal Code and some states authorize a joint evaluation of competence and responsibility.²⁴² Further, the Model Penal Code and some jurisdictions permit

235. Even in the face of an acquittal, the state or a private petitioner could seek an involuntary commitment based on the same set of facts. As the standard for commitment is clear and convincing, the petitioner might prevail notwithstanding the defeat in the innocence-only hearing. Thus, the defendant would not profit, as the result — civil commitment — would most likely be the same. Civil commitment is the procedure usually followed — in lieu of outright dismissal — following a determination of permanent incompetence in jurisdictions that do not have innocence-only hearings. See CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-4.13(a)(iii); ARK. CODE ANN. § 5-2-310(b)(2)(D).

236. See 725 ILL. COMP. STAT. ANN. 5/104-25 (West Supp. 1997).

237. See Robert A. Burt & Norval Morris, *A Proposal for the Abolition of the Incompetency Plea*, 40 U. CHI. L. REV. 66, 86-93 (1972). Burt and Morris suggest that an incompetent defendant — if not able to be restored to competency in six months — should be taken to trial with special procedural safeguards. See *id.*

238. See *id.* at 77-78.

239. In a study that measured attorneys' views of their own clients' competence, in cases where lawyers had doubt about their clients' competence, whether or not formally raised, those clients were significantly less helpful in fact development than were clients whose competence was not suspect. Norman G. Poythress et al., *Client Abilities to Assist Counsel and Make Decisions in Criminal Cases*, 18 LAW & HUM. BEHAV. 437, 442, 445, 447 (1994). Sixty percent of the clients whose competence was doubted were not helpful, as opposed to only 10% of clients whose competence was doubted. See *id.*

240. While this assertion tends toward the hyperbolic, the underlying point remains: an incompetent defendant cannot assist counsel and thus it may be impossible for the defense to refute the facts in any meaningful way. Arguably, an innocence-only hearing is justified because it can only result in a positive outcome for a defendant: an outright acquittal or the continuance of the status quo. But questions of the accuracy and integrity of the criminal justice system still remain, an issue of concern not just to the defendant but to society at large.

241. After all, if a competent defendant were not deemed indispensable to the enterprise of trial, then there would be no need for the constitutional holdings forbidding trying an incompetent defendant and their common law antecedents. See *supra* text accompanying notes 17-51.

242. See MODEL PENAL CODE § 4.05 (1980); ARK. CODE ANN. § 5-2-305 (Michie 1997); HAW.

a defendant to be acquitted by report.²⁴³ It is the presence of both of those possibilities that will most likely lead to an incompetent defendant being wrongfully acquitted by reason of insanity.²⁴⁴ In most cases, of course, an insanity plea is sought by the defendant and an acquittal by reason of insanity is a victory. But insanity acquittals occur that were never sought by the defendant,²⁴⁵ and the consequences of those acquittals are sufficiently adverse that the process by which they happen is constitutionally impermissible. The appellate courts of at least four jurisdictions have addressed the issue of acquitting an incompetent defendant by reason of insanity, with differing results.²⁴⁶ An examination of those cases follows.

The Arkansas Supreme Court has sanctioned the acquittal by report of an incompetent defendant. In *Stover v. Hamilton*,²⁴⁷ the court found that an insanity acquittal of an admittedly incompetent defendant did not violate the constitutional prohibition against trying and convicting an incompetent defendant²⁴⁸ as set out in *Drope v. Missouri*.²⁴⁹ The *Stover* court reasoned that because the defendant had been acquitted by report without a trial,²⁵⁰ the dictates of *Drope* were not violated. Such a resolution turns on an unacceptably cabined reading of *Drope*. Although an acquittal by report would obviate the need for a defendant to be competent to assist her attorney in preparing for trial and at trial itself, other core rationale of *Drope* remain.

REV. STAT. § 704-404 (1993); WASH. REV. CODE ANN. § 10.77.060(3) (West 1990).

243. This provision was added to allow for summary disposition by the trial court and may be used only upon motion of the defendant. See MODEL PENAL CODE § 4.07 (1980) commentary at x. The ABA standards do not appear to permit acquittal by report and are generally much more chary about access to the report. See also ARK. CODE ANN. § 5-2-313 (Michie 1997); MO. ANN. STAT. § 552.020 (West Supp. 1997). An acquittal of an incompetent defendant could also occur — even in the absence of a statutory provision allowing acquittal by report — if there is a process, informal or otherwise, by which the prosecutor and defense attorney can agree to the acquittal.

244. See, e.g., *Hawaii v. Lee*, 602 P.2d 944 (Haw. 1979) (defense counsel moved for an insanity acquittal based on a single report finding defendant both incompetent and mentally irresponsible); *Ex parte Kent*, 490 S.W.2d 649 (Mo. 1973) (incompetent defendant acquitted by reason of mental disease or defect after a single report found defendant both incompetent and not responsible).

245. Or, if sought, not properly explained. See *Novosel v. Helgemoe*, 384 A.2d 124, 128 (N.H. 1978) (holding that the defendant had to be apprised on the potentially lifelong consequences of an NGRI plea); *supra* text accompanying notes 161-89 (discussing court-defendant colloquies).

246. See *Stover v. Hamilton*, 604 S.W.2d 934 (Ark. 1980); *Hawaii v. Lee*, 602 P.2d 944 (Haw. 1979); *Washington v. Coville*, 558 P.2d 1346 (Wash. 1977); *Ex parte Kent*, 490 S.W.2d 649 (Mo. 1973).

247. 604 S.W.2d 934 (Ark. 1980).

248. See *id.* at 937.

249. 420 U.S. 162, 172 (1975).

250. An acquittal pursuant to a report is permitted pursuant to ARK. CODE ANN. § 5-2-313 (Michie 1997). Although the commentary to the Arkansas statute indicates that this section is patterned after MODEL PENAL CODE § 4.07 (1980), there is one significant difference. Under the Model Penal Code, an acquittal by report can occur only if requested by the defendant. The correlative Arkansas provision omits that limitation. This is significant because the entire process can occur without deference to or even consideration of the defendant's wishes. The evaluation, which looks at both competence and responsibility, can be initiated by someone other than the defendant. See ARK. CODE ANN. § 5-2-305 (Michie 1997). The court may accept the recommendations of the report and acquit the defendant without the defendant seeking the acquittal or ever indicating an intent to raise the insanity defense. See ARK. CODE ANN. § 5-2-313 (Michie 1997). Further, this could occur while the defendant is incompetent and/or without the court explaining to the defendant the consequences of an acquittal by reason of insanity.

First, an insanity acquittal is a finding of factual guilt.²⁵¹ An incompetent defendant cannot tell her lawyer whether or not she committed the offense, cannot assist in finding the witnesses who can confirm that she was nowhere near the scene, perhaps cannot even comprehend that she is charged with a crime. Equally troubling, an incompetent defendant lacks the wherewithal to assess the advantages and drawbacks of an insanity plea which, if successful, results in the waiver of fundamental constitutional rights.²⁵² This is particularly significant in view of the host of negative implications flowing from a successful insanity plea.²⁵³ In sum, the *Stover* rationale²⁵⁴ is not compelling.

Missouri has wrestled with this issue and come to a conclusion opposite that of the *Stover* court. In *Ex parte Kent*,²⁵⁵ the Missouri Supreme Court ruled en banc that the detention of an incompetent defendant following an acquittal based on mental disease or defect amounted to an illegal restraint on liberty.²⁵⁶ At the trial level, a psychiatric report had found the defendant not competent and not responsible. After the state stipulated to the accuracy of the report, the court ordered the defendant acquitted.²⁵⁷ The supreme court remanded the case, stating that, upon a finding of the defendant's incompetence, the only option was to commit the defendant to restore him to competence if possible and, if that option was unlikely, to undertake civil commitment procedures.²⁵⁸

Cognizant of the possibility that defense counsel might want to challenge the charges on the merits, the court offered up several options. First, it suggested that defense counsel could assert issues that could be decided without the defendant's personal participation.²⁵⁹ The court further stated that due process required that the trial judge, upon request, must determine that "there is substantial evidence available to support a conviction."²⁶⁰

The Washington Supreme Court, in *Washington v. Coville*,²⁶¹ found unacceptable the insanity acquittal of an incompetent person following defense counsel's motion to acquit.²⁶² The court cited several reasons. First, a treatment rationale: the treatment

251. See *Jones v. United States*, 463 U.S. 354, 363-64 (1983); see also WASH. REV. CODE ANN. § 10.77.080 (West 1990) (providing that a defendant who moves for a judgment of acquittal on the grounds of insanity may not later contest his detention on the ground he did not commit the offense).

252. See *supra* text accompanying notes 61-72 (discussing *Godinez* and the necessary predicates to waiving constitutional rights).

253. See *supra* text accompanying notes 93-159 (discussing the adverse consequences of an acquittal by reason of insanity).

254. It was, however, unfortunately repeated a year later in *Schock v. Thomas*, 625 S.W.2d 521, 524 (Ark. 1981).

255. 490 S.W.2d 649 (Mo. 1973) (en banc).

256. See *id.* at 651.

257. See *id.* at 650.

258. See *id.* at 651-52.

259. See *id.* at 652. For further discussion of reasons a lawyer may want to pursue options during her client's period of incompetence, see Caleb Foote, *A Comment on Pre-Trial Commitment of Criminal Defendants*, 108 U. PA. L. REV. 832, 845-46 (1960).

260. *Kent*, 490 S.W.2d at 653.

261. 558 P.2d 1346 (Wash. 1977) (en banc).

262. See *id.* at 1349. It appears that this acquittal occurred after defense counsel's motion to acquit

the defendant received as an insanity acquittee would possibly be inappropriate for the treatment he would need as an incompetent person.²⁶³

Second, the court focused on the defendant's right to self-determination. After acknowledging the fine intentions of counsel, the court cautioned that it was the defendant who had the right to decide which of the various options he wished to exercise.²⁶⁴ Ironically, after finding the acquittal inappropriate, the court refused to vacate the judgment of acquittal, declaring that the defendant was incompetent to give up the rights acquired by the acquittal.²⁶⁵

In *Hawaii v. Lee*,²⁶⁶ a mental examination was conducted on a defendant; the examination addressed both competence and responsibility and concluded that the defendant lacked each. Defense counsel moved for an acquittal based on mental disease, disorder, or defect but the court deferred action on the motion because of the defendant's incompetence. Defense counsel then appealed. The Hawaii Supreme Court held that "so long as defense alternatives of a substantive nature may be available," the proceedings must be suspended until the defendant regains the ability to assist counsel in choosing from among the options.²⁶⁷ Any prejudice resulting from the delay is "largely neutralized," the court said, by the statutory provision permitting dismissal of the charges if too much time has elapsed so that prosecution would be unjust.²⁶⁸

In each of the above cases, the defendant was acquitted by reason of insanity while incompetent.²⁶⁹ Such a result violates the same principles that prohibit the trial and conviction of an incompetent defendant, including the accuracy and integrity of the process, and the defendant's right to self-determination. In these cases, the result may have been occasioned by an agreement between the prosecutor and defense counsel.

and a "trial of the insanity issue raised by the motion." *Id.* at 1347. In its order, the court simultaneously found the defendant, a mentally retarded man with the mental capacity of a five- or six-year-old child, incompetent to stand trial and not guilty by reason of insanity. *See id.* This latter conclusion was made even in the absence of findings that the defendant had in fact committed the acts charged. *See id.* at 1347. If a trial did in fact occur, that would have constituted a facial violation of *Drope v. Missouri*, 420 U.S. 162, 172 (1975), which prohibits the trial of an incompetent defendant.

263. *See Coville*, 558 P.2d at 1349. This reasoning perhaps foreshadows the idea of therapeutic jurisprudence developed a decade later by Wexler and Winick. *See generally* DAVID WEXLER & BRUCE WINICK, *ESSAYS IN THERAPEUTIC JURISPRUDENCE* (1991). Further, this rationale begs the question: if the criminal case is resolved because of the acquittal, then the issue of the defendant's incompetence and the appropriate treatment necessary to restore him to competence becomes moot, at least to the extent of competence to stand trial. Competence can, of course, be relevant to other questions such as the right to refuse treatment.

264. *See Coville*, 558 P.2d at 1348. The court also noted that no guardian had been appointed to recommend whether the defendant "could or should" give consent to the filing of the acquittal motion by counsel. *Id.*

265. *See id.* at 1349. The court questioned the authority of counsel (new since the acquittal) to even file the motion challenging the legality of the acquittal. *See id.*

266. 602 P.2d 944 (Haw. 1979).

267. *Id.* at 946.

268. *Id.*

269. In *Lee*, the defendant was not actually acquitted, but defense counsel had sought the defendant's acquittal.

But as the Court of Appeals of Florida has said, "Good intentions do not override constitutional rights."²⁷⁰

VI. Conclusion

The pretrial acquittal of an incompetent defendant may arise in various ways. It may be at the behest of defense counsel who believes that an acquittal is in a defendant's interest. An insanity acquittal, however, is accompanied by adverse consequences and should be sought only by a competent defendant who has been explained the consequences and who desires to pursue such a course.

The pretrial insanity acquittal of incompetent defendants is very likely more pervasive than the cases would indicate for several reasons.²⁷¹ First, it is unlikely that an insanity acquittal will be seen as detrimental and worthy of challenge. Lawyers and judges alike may have benign motives of treatment that inform their actions. Second, if the defendant is incompetent, she is unlikely to be the catalyst for challenging an insanity acquittal.

The problem of wrongful insanity acquittals can be addressed in several ways. Most obviously, the United States Supreme Court could declare that a pretrial acquittal of an incompetent defendant violates due process. Until that occurs, there are other changes, through either legislative or decisional law, that would go a long way toward minimizing the problem. First, states should require that the competence question be evaluated separately, thus reducing the temptation for a court to acquit a defendant after it sees a report simultaneously finding that defendant incompetent and not responsible. This bifurcated inquiry, although contrary to the Model Penal Code, is recommended by the more recent ABA Criminal Justice Mental Health Standards.

Second, courts should be required to personally address the defendant to see if she understands the consequences involved in an insanity acquittal and understands that she is waiving fundamental constitutional rights. There is no justification for treating an insanity plea any differently from a guilty or no contest plea. This court-defendant colloquy would ensure that the plea is not being forced and that the defendant has been made aware of the negative consequences. Of course, such a colloquy would require a competent defendant.

Third and finally, defense lawyers and judges must start realizing that the consequences of an insanity acquittal can be quite severe. A defendant should be able to make the decision for herself, which can only happen if she is competent. Without judicial and defense counsel diligence on this issue, defendants like Scarlett Snopes will continue to be wrongfully acquitted.

270. *Harringer v. Florida*, 566 So. 2d 893, 894 (Fla. Dist. Ct. App. 1990).

271. In the author's clinical program's mental health clinic, orders of acquittals for incompetent defendants are no longer a source of surprise.