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COMMENTS

THE INSANITY DEFENSE IN VIRGINIA: AN EVALUATION

I. INTRODUCTION

On March 30, 1981, John W. Hinckley, Jr. attempted to assassinate Ronald Reagan, the thirty-ninth President of the United States. More than fifteen months after his arraignment Hinckley was found "not guilty by reason of insanity" to each of the thirteen counts with which he was charged.¹

Hinckley's successful use of the insanity defense² has rekindled a debate that has raged for centuries concerning the rationality and propriety of the insanity defense.³ The controversy stems not only from the fact that the insanity defense is seldom used except in grievous felonies, specifically homicide, or spectacular crimes such as Hinckley's,⁴ but also from the manner in which the defense assails society's notion of the individual's moral accountability for his actions.⁵ Indeed it was during a special session of the House of Lords following public outcry over the acquittal of Daniel M'Naghten in the murder of Edward Drummond,⁶ that the famous insanity test of *M'Naghten's Case*⁷ was articulated.

For all its notoriety the insanity defense remains a surprisingly nebulous concept, defined differently in each jurisdiction. A workable definition has been provided by Abraham S. Goldstein: "The insanity defense refers to that branch of the concept of insanity which defines the extent

1. Taylor, *Too Much Justice*, HARPER's, Sept. 1982, at 56.

2. Technically, the accused enters a plea of "not guilty by reason of insanity" to the crimes with which he is charged.

3. See A. GOLDSTEIN, *THE INSANITY DEFENSE* 4 (1967); see, e.g., Clanon, Shawner & Kurdys, *Less Insanity in the Courts*, 68 A.B.A. J. 824 (1982); Stanfel, *The Questionable Sanity of the Insanity Defense*, 8 BARRISTER Spring 1981, at 19. (These articles provide a good example of recent treatment of this area in current professional literature.)

4. A. GOLDSTEIN, *supra* note 3, at 24.

5. See H. FINGARETTE, *THE MEANING OF CRIMINAL INSANITY* 7 (1972).

6. Edward Drummond was actually the private secretary to Sir Robert Peel, Prime Minister of England at the time. It developed at his trial that M'Naghten intended to murder the Prime Minister whom he blamed for a whole system of persecution (a delusion) of which M'Naghten fancied himself a victim. M'Naghten was under the delusion that he was shooting Peel when he murdered Drummond. Lyons, *Responsibility Without Individual Responsibility: The Controversy Over Defining Legal Insanity*, 45 U. COLO. L. REV. 391, 393 (1974).

7. 10 Cl. & F. 200, 8 Eng. Rep. 718 (1843).

to which men accused of crime may be relieved of criminal responsibility by virtue of mental disease."⁸

The insanity defense, however defined, has become intimately associated with the fundamental safeguards of the due process clause of the Constitution. In *Palko v. Connecticut*,⁹ the United States Supreme Court held that criminal procedures which are deeply rooted in the traditions of Anglo-American justice are constitutionally required. In *Wolf v. Colorado*,¹⁰ the Court held the fact that a majority of states employ a particular procedure is strong evidence that the due process clause encompasses the procedure. This line of reasoning has led the state courts to void, as violative of due process safeguards, legislative attempts to abolish the insanity defense.¹¹

Given the historical controversy and the renewed interest since the Hinckley trial, this comment focuses upon the insanity defense as it currently is applied in Virginia. Since contemporary issues are often best understood in light of their historical antecedents, the comment first provides a review of the conceptual foundation of the insanity defense in America, culminating in a survey of the current tests. The focus then shifts to Virginia statutory and case law development of the defense. Virginia's approach is compared to the approaches taken by other jurisdictions in terms of current issues and questions surrounding the insanity defense. While placing emphasis on Virginia authority, the discussion digresses at times to analyze relevant federal authority addressing constitutional issues involving the insanity defense.

This comment does not discuss the issue of an accused's competency to stand trial. Although an issue clearly involving the accused's mental condition,¹² these are separable issues as recognized by the United States Supreme Court in *Jackson v. Indiana*.¹³

8. A. GOLDSTEIN, *supra* note 3, at 9.

9. 302 U.S. 319, 325 (1937), *overruled on other grounds*, *Benton v. Maryland*, 395 U.S. 784, 793 (1969).

10. 338 U.S. 25, 29 (1949), *overruled on other grounds*, *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

11. *State v. Strasburg*, 60 Wash. 106, 110 P. 1020 (1910); *Sinclair v. State*, 161 Miss. 142, 132 So. 581 (1931). The Idaho legislature recently abolished the insanity defense in that state. *See infra* note 59. The constitutionality of this statute is not yet under review. *See infra* note 60.

12. The law is well settled everywhere that an individual must be competent to stand trial. *See Drope v. Missouri*, 420 U.S. 162, 171 (1975) (quoting 4 W. BLACKSTONE, COMMENTARIES *24 to the effect that an incompetent accused should not be tried since he cannot adequately prepare his defense); *Pate v. Robinson*, 383 U.S. 375 (1966); VA. CODE ANN. § 19.2-167 (Repl. Vol. 1975).

13. 406 U.S. 715, 739 (1972).

II. A HISTORICAL PERSPECTIVE

A. *The Changing Focus of the Insanity Defense*

The rule articulated by Lord Chief Justice Tindall in *M'Naghten's Case*,¹⁴ that a man is not guilty by reason of insanity if, at the time of the offense, he could not distinguish right from wrong, is generally considered the watershed of the modern insanity defense.¹⁵ In reality, the concept predates *M'Naghten*¹⁶ by thousands of years.¹⁷ The ancient Hebrews acknowledged the distinction between the intentional and unintentional crime and absolved both children and the insane of criminal liability for their actions.¹⁸ Plato did not distinguish between voluntary and involuntary acts, but he did acknowledge that "calculated harms deserved severer sanction than those committed in passion."¹⁹ On the other hand, Aristotle felt that knowledge of right and wrong was the test of responsibility.²⁰ The similarity between Aristotle's formulation and the *M'Naghten* "right-wrong" test is striking.²¹ Justinian also recognized that the insane deserved privileged legal status. By the time of the codification of his work in the sixth century, this had become an established

14. 10 Cl. & F. 200, 8 Eng. Rep. 718 (1843).

15. For the literal text of the test and an expanded discussion of it, see *infra* notes 31-38 and accompanying text.

16. 10 Cl. & F. 200, 8 Eng. Rep. 718 (1843).

17. England had attempted to dispose of the matter by statute in The Criminal Lunatics Act of 1800, 40 Geo. 3, c.94, which was enacted in direct response to the public outcry following the acquittal of James Hadfield in *Regina v. Hadfield*, 27 Howell's St. Tr. 1281 (1800). The statute allowed juries to acquit on the basis of insanity but required that the person so acquitted be held in custody. Unfortunately, the juries of the day declined to declare the basis of their acquittal to be insanity thereby invoking the confinement provisions, preferring instead to move for simple acquittal which resulted in the defendant's release. Eule, *The Presumption of Sanity: Bursting the Bubble*, 25 U.C.L.A. L. REV. 637, 643 n.27, 646 n.50, 647 (1978). When, in 1843, Daniel M'Naghten was acquitted, the public outrage was so intense that a special session of the House of Lords was convened at which all fifteen common law judges of England were questioned as to the parameters of the insanity defense. Gerber, *Is the Insanity Defense Insane?*, 20 AM. J. JURIS. 111, 117 (1975). See *infra* note 33.

18. "A deaf mute, an idiot and a minor are awkward to deal with, as he who injures them is liable . . . whereas if they injure others they are exempt." THE BABYLONIAN TALMUD, BABA KAMA 501-2 (Epstein ed. 1935), quoted in Gerber, *supra* note 17, at 113 n.5. See also Weiner, *Not Guilty by Reason of Insanity: A Sane Approach*, 56 CHL.-]KENT L. REV. 1057, 1058 n.8 (1980).

19. Gerber, *supra* note 17, at 113 n.6.

20. *Id.* at 113 n.8.

21. The *M'Naghten* test is popularly known as the "right-wrong test" for its supposed emphasis on the accused's cognitive ability to distinguish right from wrong at the time of the offense. Indeed, it is this emphasis on cognition which has led many to criticize the *M'Naghten* test as too simplistic. See Gerber, *supra* note 17, at 121; accord Comment, *The Spirit of M'Naghten*, 9 GONZ. L. REV. 806, 813 (1974). But see A. GOLDSTEIN, *supra* note 3, at 49 (suggesting that *M'Naghten's* alleged focus solely on cognition is unsupported by a literal reading of the test).

concept.²²

Despite this long-standing tradition, insanity did not constitute a defense to criminal conduct at early English common law; rather, it served as a basis for pardon by the Crown.²³ This approach of treating insanity as a basis for mitigating punishment prevailed in some form into the early nineteenth century when English courts began to recognize insanity as a defense well before *M'Naghten*.²⁴

Viewed in this fashion, the history of the insanity defense more closely resembles a patchwork quilt than the systematic development of a modern criminal justice tenet. Two themes consistently are woven through the ancestral fabric of the defense, however, resulting in a virtual symbiosis today. The first theme is the requirement that certain acts may become crimes only when coupled with the proper *mens rea* on the part of the actor.²⁵ The United States Supreme Court, in *Dennis v. United States*,²⁶ noted that "[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence."²⁷ The second theme is that insanity destroys the defendant's capacity to form a *mens rea*, thereby preventing the prosecution from establishing that a "crime" actually occurred. Through the mechanism of the insanity defense, these two themes collide, sometimes with shattering force.

The insanity defense is a process in constant flux.²⁸ This perception is described by Goldstein:²⁹ "The insanity defense marks the transition from the adequate man the law demands to the inadequate man he may be."³⁰ Hence, the focus of the insanity defense should change, indeed,

22. Gerber, *supra* note 17, at 113 n.9.

23. *Id.* at 114 n.14.

24. *Id.* at 116 n.26.

25. See LAFAVE & SCOTT, CRIMINAL LAW § 28 (1972) (extensive treatment of the role of intent in criminal law). See also A. GOLDSTEIN, *supra* note 3, at 203 (suggesting that the law requires that a criminal act be more than a mere "muscle contraction" and pointing out that the Model Penal Code now defines a crime as a "voluntary" act).

Mens rea equals criminal intent according to Gerber, *supra* note 17, at 131. He points out that the Model Penal Code, and most states, identify three forms of *mens rea*: (1) intentionally acting towards a conscious criminal goal; (2) knowingly acting with an awareness of the circumstances of an act; and (3) recklessly acting with an awareness that some dangerous results are likely.

26. 341 U.S. 494 (1951).

27. *Id.* at 500.

28. The Supreme Court, in *Powell v. Texas*, 392 U.S. 514, 536 (1968), stated that "[t]he doctrines of *actus reus*, *mens reus*, insanity, mistake, justification and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man."

29. A. GOLDSTEIN, *supra* note 3.

30. *Id.* at 18.

must change over time if it is to continue to fulfill its essential purpose. Against the backdrop of historical perspective, the dominant tests for insanity are considered.

B. *M'Naghten's Case and Beyond: The Modern Tests*

*M'Naghten's Case*³¹ represented the first successful attempt at articulating a comprehensive judicial standard for the insanity defense.³² The response of Lord Chief Justice Tindal to the inquiries by the House of Lords³³ has become the accepted statement of the rule which states in pertinent part:

[T]o establish a defence on the ground of insanity, it must be clearly proved, that, at the time of the committing of the act, the party accused was labouring under such defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong.³⁴

*M'Naghten*³⁵ remains the standard in Great Britain³⁶ and continues to enjoy widespread application in the United States, although it is no

31. 10 Cl. & F. 200, 8 Eng. Rep. 718 (1843).

32. For a review of legislative efforts to develop a rational approach to the insanity defense, see *supra* note 17.

33. Recall that the special session of the House of Lords was convened due to public outrage at *M'Naghten's* acquittal. See *supra* note 17. At the session the judges were directed to respond to the following five questions:

1st. What is the law respecting alleged crimes committed by persons afflicted with insane delusion in respect of one or more particular subjects or persons; as, for instance, where, at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit? 2nd. What are the proper questions to be submitted to the jury when a person, alleged to be afflicted with insane delusion respecting one or more particular subjects or persons, is charged with the commission of a crime (murder, for example), and insanity is set up as a defence? 3rd. In what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when the act was committed? 4th. If a person under an insane delusion as to existing facts commits an offence in consequence thereof, is he thereby excused? 5th. Can a medical man, conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial, and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious at the time of doing the act that, he was acting contrary to law, or whether he was labouring under any and what delusion at the time?

10 Cl. & F. 200, 210-11, 8 Eng. Rep. 718, 722-23 (1843), quoted in Gerber, *supra* note 17, at 117, n.30.

34. 10 Cl. & F. 200, 210, 8 Eng. Rep. 718, 722 (1843), quoted in Gerber, *supra* note 17, at 117-18.

35. 10 Cl. & F. 200, 8 Eng. Rep. 718 (1843).

36. A. GOLDSTEIN, *supra* note 3, at 45.

longer the majority test.³⁷ However, it also has been the focus of intense criticism for its emphasis on the cognitive ability of the accused, which according to critics, limits its applicability.³⁸ As a result, some jurisdictions have developed other approaches to the insanity defense.

One alternative to *M'Naghten* can be found in the so called "irresistible impulse" test, which excuses wrongdoing by an individual, even though he knew it was "wrong," if he acted under an impulse which he could not resist.³⁹ The conceptual basis of this test encompasses circum-

37. The following fifteen states currently use the *M'Naghten* test only: Arizona—*State v. Heath*, 122 Ariz. 36, 592 P.2d 1302 (1979); Florida—*Wheeler v. State*, 362 So. 2d 377 (Fla. App. 1978), *cert. denied*, 440 U.S. 924 (1979); Kansas—*In re Jones*, 228 Kan. 90, 612 P.2d 1211 (1980); Louisiana—*State v. Ray*, 395 So. 2d 664 (La. 1981); Minnesota—*State v. Linder*, 304 N.W.2d 902 (Minn. 1981); Mississippi—*Hill v. State*, 339 So. 2d 1382 (Miss. 1976); Nebraska—*State v. Simants*, 197 Neb. 549, 250 N.W.2d 881, *cert. denied*, 434 U.S. 878 (1977); Nevada—*Poole v. State*, — Nev. —, 625 P.2d 1163 (1981); New Jersey—*State v. Trantino*, 44 N.J. 358, 209 A.2d 117 (1965), *cert. denied*, 382 U.S. 993 (1966); North Carolina—*State v. Jackson*, 302 N.C. 101, 273 S.E.2d 666 (1981); Oklahoma—*Eddings v. State*, 616 P.2d 1159 (Okla. Crim. App. 1980); Pennsylvania—*Commonwealth v. Hicks*, 483 Pa. 305, 396 A.2d 1183 (1979); South Carolina—*State v. Goolsby*, 275 S.C. 110, 268 S.E.2d 31, *cert. denied*, 449 U.S. 1037 (1980); South Dakota—*State v. Standing Soldier*, 299 N.W.2d 568 (S.D. 1980); Washington—*State v. Crenshaw*, 27 Wash. App. 326, 617 P.2d 1041 (1980).

38. Critics maintain that for a mental affliction to qualify as a "disease of the mind" under *M'Naghten* it must impair the cognitive function, i.e., the ability of the afflicted to "know" the difference between right and wrong. This was entirely rational when *M'Naghten* was decided since at that time cognition was considered the highest intellectual function. Gerber, *supra* note 17, at 120-21. However, some critics argue that *M'Naghten* violates the eighth amendment's guarantee against cruel and unusual punishment since an insane defendant could be imprisoned. Shadoan, *Raising the Insanity Defense: The Practical Side*, 10 AM. CRIM. L. REV. 533, 545 (1972). *But see* A. GOLDSTEIN, *supra* note 3, at 50 (very few jurisdictions interpret the requirement that the accused "know" the difference between right and wrong as limited to an inquiry into his cognitive ability alone but rather allow all evidence bearing on the accused's sanity); *accord* I WIGMORE, EVIDENCE § 228 (1940) (when insanity is in issue, any and all conduct of the person is admissible as evidence).

Critics respond that despite the fact that evidence of matters other than the accused's cognitive ability may be admissible, strict jury instructions on the question of the accused's sanity render the evidence irrelevant. Gerber, *supra* note 17, at 121. For example, in Virginia the jury instructions allow the jurors to consider all testimony, but they are not bound to accept the opinions of experts. II VIRGINIA MODEL JURY INSTRUCTIONS—CRIMINAL 319, 327 (Michie's 1979).

Goldstein argues that *M'Naghten* is not a narrow test by design, rather it has been made so by the preconceptions of the lawyers and psychiatrists who apply it. A. GOLDSTEIN, *supra* note 3, at 64-66.

39. This test is nearly as old as *M'Naghten*. Its most eloquent articulation in the early common law occurred in *Parsons v. State*, 81 Ala. 527, 2 So. 854 (1887), in which the court stated that even if the defendant knew right from wrong, he would not be held responsible if the following conditions were met:

- (1) If, by reason of the duress of such mental disease, he had so far lost the *power to choose* between the right and wrong, and to avoid doing the act in question as that his free agency was at the time destroyed; (2) and if, at the same time, the alleged crime was so connected with such mental disease, in the relation of cause and effect, as to have been the product of it *solely*.

stances in which the application of *M'Naghten* would not result in a finding of insanity even though such a finding may be proper.⁴⁰ The irresistible impulse test currently is employed by a few jurisdictions, including Virginia, as an adjunct to the *M'Naghten* test because it commonly is perceived to expand the inquiry beyond the cognitive scope utilized by *M'Naghten*.⁴¹

Dissatisfaction with *M'Naghten* prompted the United States Court of Appeals for the District of Columbia Circuit to advance another alternative in *Durham v. United States*.⁴² The so-called "Durham rule" was radical in its simplicity, stating simply that "an accused is not criminally responsible if his unlawful act was the product of a mental disease or mental defect."⁴³ However, if *M'Naghten* was susceptible to criticism for its narrow focus, then *Durham* failed by giving juries no guidance at all.⁴⁴ It was simply too broad. The United States Court of Appeals for the District of Columbia, in *United States v. Brawner*,⁴⁵ finally abandoned the "Durham rule" by adopting in its place a slightly modified version of the American Law Institute's (ALI) proposed rule of criminal responsibility.⁴⁶

The ALI test essentially exculpates an accused from criminal responsibility if he lacks the substantial capacity either to appreciate the wrongfulness of his act or to conform his conduct to the standards of law.⁴⁷

Id. at ___, 2 So. at 866-67. For an alternate definition see *Davis v. United States*, 165 U.S. 373, 378 (1897).

40. The test is based on four assumptions:

First, that there are mental diseases which impair volition or self-control, even while cognition remains relatively unimpaired; second, that the use of *M'Naghten* alone results in findings that persons suffering from such diseases are not insane; third, that the law should make the insanity defense available to persons who are unable to control their actions, just as it does to those who fit *M'Naghten*; fourth, no matter how broadly *M'Naghten* is construed, there will remain areas of serious disorder which it will not reach.

A. GOLDSTEIN, *supra* note 3, at 67.

41. Gerber, *supra* note 17, at 123. *But see* A. GOLDSTEIN, *supra* note 3, at 47 (The relevant inquiry under *M'Naghten* is not limited to merely cognitive ability, thus the additional focus supplied by irresistible impulse is superfluous). The following jurisdictions now use a combination *M'Naghten* and Irresistible Impulse standard: Colorado—*People v. Giles*, 192 Colo. 240, 557 P.2d 408 (1976); Georgia—*Clark v. State*, 245 Ga. 629, 266 S.E.2d 466 (1980); New Mexico—*State v. Marguez*, 96 N.M. 746, 634 P.2d 1298 (1981); Virginia—*DeJarnette v. Commonwealth*, 75 Va. 867 (1881); *accord* *Thompson v. Commonwealth*, 193 Va. 704, 70 S.E.2d 284 (1952).

42. 214 F.2d 862 (D.C. Cir. 1954).

43. *Id.* at 874-75.

44. A. GOLDSTEIN, *supra* note 3, at 84.

45. 471 F.2d 969 (D.C. Cir. 1972).

46. MODEL PENAL CODE § 4.01, at 66 (Proposed Official Draft 1962).

47. The test is stated in full as follows:

(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the re-

While the ALI test captures the essential spirit of *M'Naghten*, it contains some significant variances as well. Most notable is the substitution of the word "appreciate" for *M'Naghten's* use of the word "know."⁴⁸ Still, this test is not without its critics who allege that it tends to allow too many defendants to "escape" via the insanity defense.⁴⁹ Despite criticism, the ALI test is the formulation adopted by a majority of jurisdictions in America today, including the federal judiciary.⁵⁰

In addition to these alternatives to *M'Naghten*, a number of other tests have been adopted in jurisdictions across the nation. In 1975, the Michi-

quirements of law. (2) As used in this Article, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

Id.

48. The substitution of the word "appreciate" for the word "know" arguably expands the scope of inquiry beyond the defendant's cognitive abilities to include his "affect," or emotional state, as well. *But see* H. FINGARETTE, *supra* note 5, at 149 (arguing that no "knowledge criterion," including *M'Naghten* and ALI, can be an adequate measure of insanity).

The ALI test incorporates the irresistible impulse test into its framework. The test stops short, however, of including sociopathic conduct within the definition of mental disease, a move which radically would have expanded the applicability of the defense. *See generally* A. GOLDSTEIN, *supra* note 3, at 86-88.

49. Weiner, *supra* note 18, at 1063.

50. The ALI test is the approved rule in the following states: Alabama—Crawford v. State, 377 So. 2d 145 (Ala.), *aff'd*, 377 So. 2d 159 (Ala. 1977), *vacated on other grounds*, 448 U.S. 904 (1980); Alaska—Bordewick v. State, 569 P.2d 184 (Alaska 1977); Arkansas—Lipscomb v. State, 271 Ark. 334, 609 S.W.2d 15 (1980); California—People v. Nicholas, 112 Cal. App. 2d 249, 169 Cal. Rptr. 497 (1980); Connecticut—State v. Toste, 178 Conn. 626, 424 A.2d 293 (1979); Hawaii—HAWAII REV. STAT. § 704-400(1) (Repl. Vol. 1976); Illinois—People v. Uppole, 97 Ill. App. 3d 72, 422 N.E.2d 245 (1981); Indiana—Law v. State, — Ind. —, 406 N.E.2d 1185 (1980); Kentucky—Edwards v. Commonwealth, 554 S.W.2d 380 (Ky. 1977), *cert. denied*, 434 U.S. 999 (1977); Maine—State v. Bridge, 413 A.2d 937 (Me. 1980); Maryland—MD. CRIM. LAW CODE ANN. § 25(a) (Repl. Vol. 1972); Massachusetts—Commonwealth v. Mattson, 377 Mass. 638, 387 N.E.2d 546 (1979); Missouri—State v. Pennington, 618 S.W.2d 614 (Mo. 1981); Montana—State *ex rel.* Krutzfeldt v. District Court of the 13th Judicial Circuit, 163 Mont. 164, 515 P.2d 1312 (1973) (adopts ALI but substitutes "is unable" for "lacks substantial capacity" which makes this test stricter than ALI); North Dakota—State v. Jensen, 251 N.W.2d 182 (N.D. 1972); Ohio—State v. Staten, 25 Ohio St. 2d 107, 267 N.E.2d 122, *vacated in part*, 408 U.S. 938 (1971); Oregon—State v. Herrera, 286 Or. 349, 554 P.2d 184 (1979); Rhode Island—State v. Muir, — R.I. —, 432 A.2d 1173 (1981); Tennessee—Burns v. State, 591 S.W.2d 780 (Tenn. Crim. App. 1979); Texas—Graham v. State, 566 S.W.2d 941 (Tex. Crim. 1978); Utah—State v. Dominquez, 564 P.2d 768 (Utah 1977); Vermont—State v. Howe, 136 Vt. 53, 386 A.2d 1125 (1978); West Virginia—State v. Grim, 156 W. Va. 615, 195 S.E.2d 637 (1973), *overruled on other grounds*, State v. Nuckolls, 273 S.E.2d 87, 90 (W. Va. 1980); Wisconsin—Wis. STAT. ANN. § 971.75 (West 1971); Wyoming—State v. Kind, 595 P.2d 960 (Wyo. 1979).

The ALI test is also the rule followed by the federal courts. United States v. Gillis, 645 F.2d 1269 (8th Cir. 1981); United States v. Wright, 627 F.2d 1300 (D.C. Cir. 1980); United States v. Davis, 592 F.2d 1325 (5th Cir.), *cert. denied*, 442 U.S. 946 (1979); United States v. Bodey, 547 F.2d 1383 (9th Cir.), *cert. denied*, 431 U.S. 932 (1977); United States v. Freeman, 357 F.2d 606 (2d Cir. 1960).

gan legislature created a new verdict entitled "guilty but mentally ill."⁵¹ This legislation was enacted in reaction to a finding by the Michigan Supreme Court that Michigan's automatic commitment procedure, following a verdict of not guilty by reason of insanity, was unconstitutional.⁵² Though the constitutionality of this "guilty but mentally ill" verdict was widely challenged as violative of the accused's constitutional rights,⁵³ the statute's constitutionality recently has been upheld.⁵⁴

New York took a rather interesting approach when it recently enacted the Insanity Defense Reform Act of 1980.⁵⁵ While maintaining a modified *M'Naghten*⁵⁶ test as the standard,⁵⁷ the act makes sweeping changes in

51. MICH. COMP. LAWS ANN. § 768.36 (West Supp. 1981). The standard is defined by the statute as follows:

(1) If the defendant asserts a defense of insanity in compliance with section 20a, the defendant may be found 'guilty but mentally ill' if, after trial, the trier of fact finds all the following beyond a reasonable doubt:

(a) That the defendant is guilty of an offense.

(b) That the defendant was mentally ill at the time of the commission of that offense.

(c) That the defendant was not legally insane at the time of the commission of that offense.

Id. § 768.36(1) (West Supp. 1981).

52. *People v. McQuillan*, 392 Mich. 511, 221 N.W.2d 569 (1974). For a complete discussion of the constitutional issues surrounding automatic post-acquittal commitment statutes see *infra* notes 115-126 and accompanying text. Less than a year after the abrogation of the commitment procedure sixty-four inmates had been released from state hospitals following commitment hearings at which they had been found sane. Two of these inmates committed heinous crimes, one a rape and the other a murder, shortly after their release. The public outrage impelled the Michigan legislature to adopt the "guilty but mentally ill" verdict. This system allows a judge to sentence a defendant to a prison term which is served in a forensic unit so long as the defendant remains mentally ill. The individual may be kept confined in the mental institution after the expiration of his sentence if he is found dangerous at a civil commitment hearing. Comment, *Guilty But Mentally Ill: An Historical and Constitutional Analysis*, 53 J. URB. L. 471 (1976).

53. See Sherman, *Guilty But Mentally Ill: A Retreat from the Insanity Defense*, 7:2 AM. J. L. & MED. 238, 256-60 (1981) (maintaining that the legislation is constitutionally defective for denying those convicted a due process hearing prior to institutionalization and for abrogating the prisoner's eighth amendment rights, since without the statute he would be acquitted); see also Comment, *The Constitutionality of Michigan's Guilty But Mentally Ill Verdict*, 12:1 U. MICH. J.L. REF. 188, 199 (1978) (arguing that the verdict violates a defendant's "colorable constitutional right to acquittal" if insane, thereby running afoul of the due process clause of the United States Constitution). But see Comment, *supra* note 52, at 489-96 (supporting the statute's constitutionality in light of the strong public interests, e.g., protecting society from dangerous mentally ill persons, served by the law and the lack of any empirical support that prisoners suffer).

54. *People v. McLeod*, 407 Mich. 632, 288 N.W.2d 909 (1980).

55. Insanity Defense Reform Act of 1980, ch. 548, 1980 N.Y. Laws 941.

56. 10 Cl. & F. 200, 8 Eng. Rep. 718 (1843).

57. The *M'Naghten* standard was modified in 1965 so that the accused had only to "lack substantial capacity" to know or appreciate that his "conduct was wrong" in order to meet the test. N.Y. PENAL LAW § 30.05 (McKinney 1975).

the manner in which the trial proceeds and in post-acquittal disposition.⁵⁸

Finally, Idaho recently enacted a statute abolishing the insanity defense.⁵⁹ To date, the statute's constitutionality has not been challenged.⁶⁰

III. THE LAW IN VIRGINIA

A. *The Insanity Test Defined*

Relative to the confusion and turmoil characteristic of some jurisdictions, the Virginia law on the insanity defense is well settled.⁶¹ The seminal case in Virginia regarding the insanity defense is *DeJarnette v. Commonwealth*.⁶² Although Virginia cases exist that predate *DeJarnette*,⁶³ it was in this case that the supreme court first articulated the legal standard for Virginia as follows:

But in every case, although the accused may be laboring under partial insanity, if he still understands the nature and character of his act and its consequences, and has a knowledge that it is wrong and criminal, and a mental power sufficient to apply that knowledge to his own case, and to know that if he does the act he will do wrong and receive punishment, and possesses withal a will sufficient to restrain the impulse that may arise from a diseased mind, such partial insanity is not sufficient to exempt him from responsibility to the law for his crimes.⁶⁴

The court adopted the basic *M'Naghten*⁶⁵ test supplemented by an irresistible impulse test. Significantly, the rule in *M'Naghten's Case*⁶⁶

58. The new statute allows the accused to forego a jury trial but still plead "[n]ot responsible by reason of mental disease or defect." Halpern, Rachlin & Portnow, *New York's Insanity Defense Reform Act of 1980: A Forensic Psychiatric Perspective*, 45 Alb. L. Rev. 661, 663 (1981) (citing N.Y. MENTAL HYG. LAW § 1.03(20) (McKinney 1978)). The new statute also allows for automatic detention of the mentally ill offender for thirty days following acquittal to evaluate his condition prior to a disposition hearing. However, at the hearing the burden is on the state to prove the acquittee remains dangerous or ill. Comment, *Reforming Insanity Defense Procedures in New York: Balancing Societal Protection Against Individual Liberty*, 45 ALB. L. REV. 679, 696-699 (1981).

59. IDAHO CODE § 18-207 (Cum. Supp. 1982).

60. Confirmed in telephone conversation with Clerk of Idaho Supreme Court, Boise, Idaho on August 23, 1982.

61. While Virginia has followed the test for insanity stated in *DeJarnette v. Commonwealth*, 75 Va. 867 (1881), potential changes in the test are presently being considered by the Virginia Insanity Plea Task Force. See *infra* notes 82-84 and accompanying text.

62. 75 Va. 867 (1881).

63. *Id.* See *Boswell v. Commonwealth*, 61 Va. (20 Gratt.) 860 (1871) (in which the court held that the defendant, upon raising the insanity defense, carried the burden of proving his insanity to the jury. Further, the defendant must do more than create a rational doubt in the minds of the jury as to his sanity); accord *Baccigalupo v. Commonwealth*, 74 Va. (33 Gratt.) 807 (1880).

64. *DeJarnette*, 75 Va. at 878.

65. 10 Cl. & F. 200, 8 Eng. Rep. 718 (1843).

66. *Id.*

places the dual tests of understanding the nature and character of his act and of knowing the wrongfulness of his act in the disjunctive.⁶⁷ The statement of Virginia's test in *DeJarnette*⁶⁸ clearly places these two tests in the conjunctive, thus requiring that both tests be met before an accused may prevail on the insanity defense. To that extent Virginia's standard is more rigorous than *M'Naghten*.⁶⁹ But in a subsequent case, the court seems to have retreated from this stance in holding that "[t]he only degree of insanity which the law recognizes as an excuse for crime is . . . where the accused is unable to distinguish right from wrong . . ."⁷⁰ The court went on to limit the use of irresistible impulse, the second element of *DeJarnette*,⁷¹ to that class of cases in which the first element is not satisfied—where the accused is capable of understanding the nature and consequences of his act and knows the act is wrong.⁷²

The label "irresistible impulse" may actually be a misnomer since the test is never applied in such a restrictive light.⁷³ In Virginia, however, this argument is invalid. Beginning in 1908 with *Thurman v. Commonwealth*,⁷⁴ the Virginia courts consistently have interpreted the irresistible impulse test narrowly. In affirming the defendant's murder conviction the court noted that the "irresistible impulse to excuse crime must spring from the mind, in other words, must be an insane impulse."⁷⁵ The federal courts have reached a similar conclusion in applying Virginia law.⁷⁶ Ulti-

67. That is to say that these are alternative tests under *M'Naghten* the satisfaction of either being sufficient to meet the test. See Comment, *supra* note 21, at 809-10.

68. *DeJarnette*, 75 Va. at 878.

69. 10 Cl. & F. 200, 8 Eng. Rep. 718 (1843). See II VIRGINIA MODEL JURY INSTRUCTIONS CRIMINAL 319 (Michie's 1979).

70. *Thompson v. Commonwealth*, 193 Va. 704, 716, 70 S.E.2d 284, 291 (1952) (emphasis added).

71. 75 Va. at 878. The court defines irresistible impulse as follows:

[A] moral or homicidal insanity, consisting of an irresistible inclination to kill or commit some other offence—some unseen pressure on the mind, drawing it to consequences which it sees, but cannot avoid, and placing it under a coercion which, while its results are clearly perceived, it is incapable of resisting.

Id.

72. *Thompson*, 193 Va. at 717, 70 S.E.2d at 291. The court suggested another definition of irresistible impulse found in 14 AM. JUR. *Criminal Law* § 35 (1938):

[A]n impulse induced by, and growing out of some mental disease affecting the volitive, as distinguished from the perceptive, powers, so that the person afflicted, while able to understand the nature and consequences of the act charged against him and to perceive that it is wrong, is unable, because of such mental disease, to resist the impulse to do it. It is to be distinguished from mere passion or overwhelming emotion not growing out of, and connected with, a disease of the mind. Frenzy arising solely from the passion of anger and jealousy, regardless of how furious, is not insanity.

73. A. GOLDSTEIN, *supra* note 3, at 71. Goldstein suggests the term "impulse" in its jury instructions. II VIRGINIA MODEL JURY INSTRUCTIONS—CRIMINAL 319, 323 (Michie's 1979).

74. 107 Va. 912, 60 S.E. 99 (1908).

75. *Id.* at 917, 60 S.E. at 101.

76. *Snider v. Smith*, 187 F. Supp. 299, 302 (E.D. Va. 1960) (holding that if the defendant

mately the jury must decide whether the accused acted under an irresistible impulse and whether he meets the *M'Naghten*⁷⁷ standard of *DeJarnette*.⁷⁸ Further, the jury is not bound to accept as conclusive the testimony of the defendant's expert psychiatric witness where there was substantially conflicting evidence as to the defendant's actions, conduct and appearance around the time of the offense.⁷⁹

Virginia has remained steadfast in its definition of insanity despite the furious storm swirling about it. In the case of *Pamplin v. Commonwealth*,⁸⁰ the supreme court voided a jury instruction which was inconsistent with that of *DeJarnette* on the rationale that this would tend to confuse juries.⁸¹

The Virginia Insanity Plea Task Force⁸² is considering recommending the abolition of the irresistible impulse element of *DeJarnette* as well as enlarging the scope of the *M'Naghten* element.⁸³ However, the resulting test would not be so broad as ALI's.⁸⁴

planned his criminal act this would disallow the defense that he acted under "irresistible impulse," *aff'd sub nom.* *Snider v. Cunningham*, 292 F.2d 683 (4th Cir. 1961). *Accord* *Rollins v. Commonwealth*, 207 Va. 575, 151 S.E.2d 622 (1966), *cert. denied*, 386 U.S. 1026 (1967) (in which the Virginia court approved a jury instruction that a planned act by defendant could not be the product of irresistible impulse as a matter of law).

77. 10 Cl. & F. 200, 8 Eng. Rep. 718 (1843).

78. 75 Va. 867 (1881).

79. *McLane v. Commonwealth*, 202 Va. 197, 206, 116 S.E.2d 274, 281 (1960) (in which the court held that a jury is entitled to give an expert the same weight as any other witness taking into account his status as an expert); *accord* *Christian v. Commonwealth*, 202 Va. 311, 117 S.E.2d 72 (1960).

80. 167 Va. 468, 188 S.E. 147 (1936).

81. The alternative instruction read: "The court instructs the jury that if they believe from the evidence that at the time of the alleged offense charged in the indictment, the defendant was not of normal mind to know right from wrong, then you should acquit him." *Pamplin*, 167 Va. at 468, 188 S.E. at 147.

82. This is a special study group commissioned by the General Assembly to evaluate the state's criminal law relating to mental health, specifically insanity. The task force is composed of psychiatrists, psychologists, attorneys and judges from Virginia. In 1981, the Virginia General Assembly adopted the group's suggested changes in the law regarding competency to stand trial. The 1982 session of the legislature will undertake the task force's recommendations concerning the insanity defense.

83. Undated memorandum to all members of the task force from Chris Slobogin, Director, Forensic Evaluation, Training and Research Center, Institute of Law, Psychiatry and Public Policy, University of Virginia. The suggested language of the new test is as follows:

A person accused of a crime shall be found not guilty by reason of insanity if, at the time of the allegedly criminal conduct, his or her understanding of the wrongfulness of the conduct was substantially impaired by mental disease or defect.

(Memorandum available in files of the Virginia Attorney General pertaining to the task force.)

84. *Id.*

B. *The Presumption of Sanity and Burden of Persuasion*

In Virginia a defendant is presumed sane until proven insane.⁸⁵ The Virginia Supreme Court consistently has affirmed this presumption.⁸⁶ The federal courts, in applying Virginia law, specifically have endorsed the concept in numerous cases.⁸⁷

Despite its universal application, the presumption of sanity has encountered intense criticism as a concept which has outlived its utility.⁸⁸ Some suggest that the presumption has become so entrenched that it has attained evidentiary status, which may severely prejudice a criminal defendant attempting to assert an insanity defense.⁸⁹ Despite articulate, albeit emotional, assaults upon the presumption of sanity, it stands as one of the few concepts upon which every American jurisdiction agrees.⁹⁰

The corollary of the presumption of sanity is that the defendant must raise the issue of insanity at trial. As late as 1895, this requirement was satisfied by simply entering a plea of "not guilty" to the charge.⁹¹ The procedure is substantially more complex today.⁹²

85. *Honesty v. Commonwealth*, 81 Va. 283 (1886). This concept is derived directly from the language of *M'Naghten* which states that "every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes." Eule, *supra* note 17, at 637 quoting *M'Naghten*. Eule also points out that the presumption of sanity predates *M'Naghten*.

86. *E.g.*, *Thompson v. Commonwealth*, 193 Va. 704, 70 S.E.2d 284 (1952).

87. *E.g.*, *Thomas v. Cunningham*, 313 F.2d 934 (4th Cir. 1963).

88. Eule, *supra* note 17, at 637-38, advances three separate justifications for the presumption: first, the so-called "common sense" justification based upon a rule of probability that the defendant is sane; second, the "convenience" justification premised on the argument that the burden of proving sanity in every case is too onerous for the state; and third, the need to correct the imbalance created by the defendant's superior access to evidence regarding his sanity.

Eule then attacks each justification. First, he questions the assumption that an admitted murderer or rapist, for example, is sane, thereby undercutting the "common sense" justification. Second, he asserts that given the rarity with which the insanity defense is raised, the onerous burden placed on the state to prove the accused's sanity is largely mythical. See Eule, *supra* note 17, at 651-55 (quoting an oft cited statistic that the insanity defense is raised in only 2% of all criminal jury trials). *Accord* H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 300 (1966).

89. Specifically, Eule postulates two areas of danger to the defendant who raises the insanity defense. First, the presumption alone may carry the government's case; and second, in jurisdictions where the government maintains the burden of persuasion as to sanity, the jury may become confused upon receiving an instruction as to the presumption of sanity. Eule, *supra* note 17, at 697-98.

90. A. GOLDSTEIN, *supra* note 3, at 111.

91. *Stover v. Commonwealth*, 92 Va. 780, 22 S.E. 874 (1895).

92. Pursuant to VA. CODE ANN. § 19.2-168 (Cum. Supp. 1982) a defendant who intends to raise an insanity defense at trial must serve the Commonwealth with written notice of this fact at least 10 days prior to trial. Note this requirement only applies to a defense of insanity raised at trial. Pursuant to VA. CODE ANN. § 19.2-169.5(A) (Cum. Supp. 1982) the issue of the defendant's sanity may be raised at any time after the defense counsel has been

Once the defendant has raised the issue of his insanity, he is entitled to a jury instruction as to that issue. Refusal by the trial court to give such an instruction is reversible error.⁹³ The trial court may raise the issue at its own discretion if appropriate.⁹⁴

However, the real significance of the presumption of sanity is that the defendant upon raising the defense, sustains the burden of proving his insanity to the jury.⁹⁵ In Virginia the issue of insanity is, therefore, an affirmative defense⁹⁶ as opposed to a simple defense.⁹⁷ This approach

retained or appointed and before trial.

The Insanity Plea Task Force is considering the extension of the 10 day notice requirement to 30 days to assist the prosecution in obtaining expert rebuttal evidence. *See supra* note 83.

93. *Lucas v. Commonwealth*, 201 Va. 599, 607, 112 S.E.2d 915, 921 (1960).

94. *Elkins v. Commonwealth*, 208 Va. 336, 338, 157 S.E.2d 243, 244 (1967) (decided under former VA. CODE ANN. § 19.1-228 (1966) now VA. CODE ANN. § 19.2-168.5 (Cum. Supp. 1982)).

95. *Taylor v. Commonwealth*, 208 Va. 316, 157 S.E.2d 185 (1967).

96. The defendant bears the burden of proof. This is the rule in about one-half of the states, including Virginia, as follows: Alabama (ALA. CODE § 15-16-2 (1975)); Alaska (ALASKA STAT. § 12.45.083 (1972)); Arkansas (ARK. STAT. ANN. § 41-601 (1977)); California (CAL. PENAL CODE § 1369 (West 1980)); Delaware (DEL. CODE ANN. tit. 11, §§ 4702-4704 (1974)); Georgia (GA. CODE ANN. § 26-703 (1980)); Iowa (IOWA CODE ANN. § 701.4 (1979)); Kentucky (KY. REV. STAT. § 504.020 (1970)); Louisiana (*State v. Weber*, 364 So. 2d 952 (La. 1978)); Maine (*State v. Buzynski*, 330 A.2d 422 (Me. 1974)); Minnesota (*State v. Finn*, 257 Minn. 138, 100 N.W.2d 508 (1960)); Missouri (MO. ANN. STAT. § 552.030, subd. 5 (Vernon 1967)); Montana (MONT. REV. CODES ANN. § 95-503 (1947)); Nevada (*Phillips v. State*, 86 Nev. 720, 475 P.2d 671 (1970), *cert. denied*, 403 U.S. 940 (1971)); New Hampshire (N.H. REV. STAT. ANN. § 628:2 (1979)); New Jersey (N.J. STAT. ANN. § 2C:41 (West 1979)); North Carolina (*State v. Tillman*, 22 N.C. App. 688, 207 S.E.2d 316 (1974)); Ohio (OHIO REV. CODE ANN. § 2945.39 (Page 1975)); Oregon (OR. REV. STAT. § 161.305 (1979)); Pennsylvania (Commonwealth v. Demmitt, 456 Pa. 475, 321 A.2d 627 (1974)); Rhode Island (*State v. Page*, 104 R.I. 323, 244 A.2d 258 (1968)); South Carolina (*State v. Cain*, 246 S.C. 536, 144 S.E.2d 905 (1965)); Tennessee (*Sparkman v. State*, 4 Tenn. Cr. App. 189, 469 S.W.2d 692 (1970)); Texas (TEX. PENAL CODE ANN. tit. 2, § 8.01 (1974)); Utah (*State v. Holt*, 22 Utah 2d 109, 449 P.2d 119 (1969)); Virginia (*Taylor v. Commonwealth*, 208 Va. 316, 157 S.E.2d 185 (1967)); Washington (*State v. Canaday*, 79 Wash. 2d 647, 488 P.2d 1064 (1971), *vacated on other grounds*, 408 U.S. 940 (1972)); West Virginia (*State v. Pendry*, 227 S.E.2d 210 (W. Va. 1976)); Wisconsin (WIS. STAT. ANN. § 971.15 (1971)). *See also Note, Stopping the Revolving Door: Adopting a Rational System for the Insanity Defense*, 8 HOFFSTRA L. REV. 973, 987 n.62 (1980).

97. The prosecution bears the burden of proving the defendant's sanity after he raises the issue. Approximately one-half of the states follow this approach: Arizona (ARIZ. REV. STAT. ANN. § 11.1 (Supp. 1979)); Colorado (COLO. REV. STAT. § 16-8-103 (1978)); Connecticut (*State v. Vennard*, 159 Conn. 385, 270 A.2d 837 (1970), *cert. denied*, 400 U.S. 1011 (1971)); Florida (*Farrell v. State*, 101 So. 2d 130 (Fla. 1958)); Hawaii (*State v. Moeller*, 50 Hawaii 110, 433 P.2d 136 (1967)); Idaho (*State v. Myers*, 94 Idaho 570, 494 P.2d 574 (1972)); Illinois (*People v. Gold*, 38 Ill. 2d 510, 232 N.E.2d 702 (1967), *cert. denied*, 392 U.S. 940 (1968)); Indiana (*Sceifers v. State*, 267 Ind. 687, 373 N.E.2d 131 (1978), *cert. denied*, 439 U.S. 873, *reh'g denied*, 439 U.S. 960 (1978)); Kansas (223 Kan. 766, 576 P.2d 682 (1978)); Maryland (*Brown v. State*, 8 Md. App. 462, 260 A.2d 665 (1970)); Massachusetts (Commonwealth v. Smith, 357 Mass. 168, 258 N.E.2d 13 (1970)); Michigan (*People v. English*, 29 Mich. App.

places a greater burden on the defendant; some say an unconstitutionally onerous burden.⁹⁸ Nonetheless, it is interesting to speculate on how someone like John Hinckley would have fared in Virginia, faced with the burden of persuasion.⁹⁹

The defendant in Virginia must present evidence sufficient to satisfy the jury that he was insane at the time he committed the offense.¹⁰⁰ Presenting a mere scintilla of evidence is not enough,¹⁰¹ nor is evidence of partial insanity.¹⁰² At least one commentator has suggested that the standard of proof in Virginia is a preponderance of the evidence.¹⁰³

The defense of insanity may be argued only if the defendant presents evidence to support such a plea, it does not arise by operation of law.¹⁰⁴ However, failure of defense counsel to raise the issue of defendant's mental condition when a reasonable doubt exists as to his sanity does constitute a denial of the defendant's right to effective assistance of counsel.¹⁰⁵ On the other hand, an accused who maintains his innocence can certainly not be compelled to confess merely to assert an insanity defense.¹⁰⁶

The practice of placing the burden of proving insanity upon the defendant has been challenged as violative of the due process clause of the

36, 185 N.W.2d 139 (1970)); Mississippi (*Herron v. State*, 287 So. 2d 759 (Miss.), *cert. denied*, 417 U.S. 972 (1974)); Nebraska (*State v. Jacobs*, 190 Neb. 4, 205 N.W.2d 662, *cert. denied*, 414 U.S. 860 (1973)); New Mexico (*State v. Armstrong*, 82 N.M. 358, 482 P.2d 61 (1971)); New York (N.Y. PENAL LAW § 30.05 (McKinney 1977)); Oklahoma (*Whisenhunt v. State*, 279 P.2d 366 (Okla. 1954)); South Dakota (*State v. Waugh*, 80 S.D. 503, 127 N.W.2d 429 (1964)); Vermont (*State v. Bishop*, 128 Vt. 221, 260 A.2d 393 (1969)); Wyoming (Wyo STAT. § 7-242.5 [7-11-305] (1975)).

98. See *infra* notes 118-21 and accompanying text.

99. Hinckley's trial occurred in the District of Columbia, a jurisdiction in which the burden of proving the defendant's sanity rests with the prosecution.

100. *Holober v. Commonwealth*, 191 Va. 826, 62 S.E.2d 816 (1951); see also *Thomas v. Cunningham*, 313 F.2d 934 (4th Cir. 1963) (holding the state has the right to set the legal test and the quantum of proof for insanity within the bounds of due process).

101. *Gibson v. Commonwealth*, 216 Va. 412, 219 S.E.2d 845 (1975); accord *Longely v. Commonwealth*, 99 Va. 807, 37 S.E. 339 (1900); *Hite v. Commonwealth*, 96 Va. 489, 37 S.E. 895 (1898); *Honesty v. Commonwealth*, 81 Va. 283 (1886).

102. *DeJarnette v. Commonwealth*, 75 Va. 867, 875 (1881).

103. *Eule*, *supra* note 17, at 670 n.162. But see *United States v. Green*, 468 F.2d 116 (4th Cir. 1972) (in which the Fourth Circuit held, in a case arising in Virginia but applying federal law, that a defendant need only present slight evidence to raise the issue of his insanity as a defense).

104. *Green*, 468 F.2d at 118. See *supra* note 100 for Virginia authority to the same effect.

105. *Kibert v. Peyton*, 383 F.2d 566, 569 (4th Cir. 1967) (applying Virginia law); accord *Owsley v. Peyton*, 368 F.2d 1002 (4th Cir. 1966) (applying Virginia law). The Fourth Circuit recently affirmed this position. *Proffitt v. United States*, 582 F.2d 854 (4th Cir. 1978); *Wood v. Zahradnick*, 578 F.2d 980 (4th Cir. 1978).

106. *Snider v. Cunningham*, 292 F.2d 683, 685 (4th Cir. 1961) (applying Virginia law).

United States Constitution.¹⁰⁷ A series of apparently inconsistent decisions by the United States Supreme Court has significantly contributed to the confusion.¹⁰⁸ The Court, however, seems finally to have resolved the issue in *Patterson v. New York*,¹⁰⁹ wherein the Court upheld the constitutionality of a New York statute which requires a criminal defendant to prove extreme emotional disturbance by a preponderance of the evidence.¹¹⁰

Some commentators have lamented the seemingly irreconcilable positions advanced by the Court in this line of cases.¹¹¹ However, a close reading of Justice Marshall's opinion in *Powell v. Texas*¹¹² reveals that the Court, as early as 1967, foresaw this paradox and was committed to a conservative course.¹¹³

107. See, e.g., Eule, *supra* note 17; Note, *Due Process and the Insanity Defense: The Supreme Court's Retreat from Winship and Mullaney*, 54 IND. L.J. 95, 103 (1978).

108. In *Leland v. Oregon*, 343 U.S. 790, *reh'g denied*, 344 U.S. 848 (1952) the Supreme Court upheld an Oregon statute which required the criminal defendant to prove his asserted insanity beyond a reasonable doubt. The Court found that the statute did not offend any basic standards of justice. *Leland* effectively overruled *Davis v. United States*, 160 U.S. 469 (1895) which had held that the prosecution must prove, beyond a reasonable doubt, that the defendant was capable at law of having committed the crime. The Court in *Leland*, however, avoided this issue by holding that *Davis* was not a constitutional case; it merely created a procedural rule for the federal courts.

Nearly two decades later the Supreme Court appeared to overrule their holding in *Leland* through two cases decided only five years apart. The Court held in *In re Winship*, 397 U.S. 358, 368 (1970) that a New York delinquency statute was constitutionally defective for not requiring the state to prove insanity beyond a reasonable doubt in a delinquency adjudicatory action. This decision was followed by *Mullaney v. Wilbur*, 421 U.S. 684 (1975) in which the Court held void a Maine statute requiring a criminal defendant to prove "heat of passion" on the grounds that to so require compelled the defendant to negate malice aforethought, an element of the crime. The Court held that, based on *Winship*, the proper burden was on the prosecution to prove the absence of "heat of passion." 421 U.S. at 703-04.

In the wake of these two decisions, the next logical step could have been a constitutional mandate, based upon due process grounds, that a criminal defendant's sanity must be proven by the prosecution beyond a reasonable doubt. This specter led Justice Rehnquist, joined by Chief Justice Burger, to file a separate concurring opinion in *Mullaney*, 421 U.S. at 704, reaffirming *Leland*, 343 U.S. 790, by distinguishing the Oregon statute from the one at issue in *Mullaney*, 421 U.S. at 706. See Eule, *supra* note 17, at 677 n.209 and accompanying text.

One year later a majority of the Court followed Rehnquist in *Rivera v. Delaware*, 429 U.S. 877 (1977), by declining to hear a due process challenge to Delaware's criminal code which classified insanity as an affirmative defense.

109. 432 U.S. 197 (1977) (5-3 decision).

110. Where *Rivera*, 429 U.S. at 877 merely implied, *Patterson*, 432 U.S. at 197 made absolutely clear that it is constitutionally permissible to place the burden of proving insanity upon the defendant.

111. See Eule, *supra* note 17.

112. 392 U.S. 514 (1968).

113. Justice Marshall stated:

Nothing could be less fruitful than for this Court to be impelled into defining some sort of insanity defense in constitutional terms.

Finally, the Fourth Circuit, applying Virginia law in *Satterfield v. Zahradnick*,¹¹⁴ affirmed the constitutionality of allocating the burden of proof of insanity to the defendant. Thus it appears that Virginia's practice of placing upon the defendant the burden of satisfying the jury of his insanity is constitutional.

C. *Post-Acquittal Commitment*

The insanity defense is unique from other affirmative defenses in that the accused who is successful in asserting it can usually look forward to a lengthy institutionalization.¹¹⁵ This is not always true, however, and much of the historical hostility towards the defense on the part of the general public appears to be based upon the fear of dangerous persons being released.¹¹⁶

A number of states, including Virginia, engaged in the practice of automatically committing persons found not guilty by reason of insanity to institutions. This approach was based on a presumption that insanity, once proven at the time of the offense, continues until trial and beyond, until the defendant can prove otherwise.¹¹⁷

.....

[F]ormulating a constitutional rule would reduce, if not eliminate, that fruitful experimentation, and forego the developing productive dialogue between law and psychiatry into a rigid constitutional mold. It is simply not yet time to write into the Constitution formulas cast in terms whose meaning, let alone relevance, is not yet clear to doctors or to lawyers.

Id. at 536.

114. 572 F.2d 443 (4th Cir.), *cert. denied*, 436 U.S. 920 (1978). Technically the holding as to the burden of proof is dicta since the primary basis of the appeal was the state's failure to appoint a private psychiatrist of the defendant's choosing. However, the court noted that placing the burden of proof for insanity on the defendant is clearly constitutional in light of *Rivera and Patterson*.

115. It is for this reason that the defense is normally used only in cases where the accused is facing a lengthy prison term if convicted. See A. GOLDSTEIN, *supra* note 3, at 19. See also Comment, *Commitment Following an Insanity Acquittal*, 94 HARV. L. REV. 605 (1981).

116. The hostility to the insanity defense is due in large part to the perception that the insane offender is treated with greater leniency and is "back on the street" before his sane counterpart. Whatever may be the validity of this thinking today, it was well-founded in eighteenth and early nineteenth century England.

Eule, *supra* note 17, at 648-49. *Accord*, Gray, *The Insanity Defense: Historical Development and Contemporary Relevance*, 10 AM. CRIM. L. REV. 559, 577 (1972) (advancing the position that modern juries continue to distrust the ability of the state and hospitals to retain insanity acquittees until they no longer pose a danger to society); see Shadoan, *supra* note 38, at 536 (suggesting that, in serious felony cases juries are hesitant to acquit since they are unfamiliar with the post-acquittal procedure).

117. Note, *The Virginia Procedure for Commitment and Release of Persons Acquitted by Reason of Insanity*, 11 WM. & MARY L. REV. 185, 186-87 (1969). Predictably the states are split on whether this presumption is rational. In support of this presumption, see *In re Franklin*, 7 Cal. 3d 126, 496 P.2d 485, 101 Cal. Rptr. 553 (1972). Indiana on the other hand indulges in no such presumption. *Wilson v. State*, 259 Ind. 375, 287 N.E.2d 875 (1972)

Automatic commitment has been challenged vigorously on both due process and equal protection grounds.¹¹⁸ The analytical framework for evaluating the constitutionality of post-acquittal commitment statutes is now well settled, having been advanced in a trilogy of cases from the United States Supreme Court and the well respected United States Court of Appeals for the District of Columbia Circuit.¹¹⁹

This line of authority led the Fourth Circuit to void the automatic commitment statute for insanity acquttees employed by the state of Maryland in *Dorsey v. Solomon*.¹²⁰ The court found that it constitutionally was impermissible to commit an acquttee who merely had raised a reasonable doubt as to his sanity at trial, without affording him a hearing.¹²¹

The process in Virginia for commitment of insanity acquttees was scrutinized recently by the Fourth Circuit in *Harris v. Ballone*.¹²² The court noted that Virginia had modified its commitment scheme following

(holding that, since the state bears the burden of proving the defendant's sanity at trial, his acquittal by reason of insanity only shows that the state failed in its burden, but does not justify a presumption that the defendant is actually insane).

118. The due process argument is premised on the deprivation of liberty without a separate hearing. The equal protection argument focuses upon the different manner in which criminal committees are treated from civil committees.

119. The first of these cases was *Baxstrom v. Herold*, 383 U.S. 107 (1966) in which the Court voided the automatic post-acquittal commitment statute for the state of New York. The Court found that the statute's failure to provide for a proceeding which developed direct evidence of the defendant's insanity made the statute fatally defective. *Id.* Relying on *Baxstrom*, the United States Circuit Court of Appeals for the District of Columbia, in *Bolton v. Harris*, 395 F.2d 642 (D.C. Cir. 1968), held void an automatic commitment statute in that jurisdiction on equal protection grounds. The court noted that the commitment process was substantially dissimilar for civil committees and those acquitted by reason of insanity without any rational basis for the distinction. *Id.* at 649. *Accord* Comment, *supra* note 115, at 607 (arguing that a different standard for committing insanity acquttees than that used for civil committees is not justifiable on the basis of protecting the community). *But see* Note, *supra* note 96, at 1003 (advancing the proposition that persons acquitted by reason of insanity are readily distinguishable from civil committees on at least two bases: first, the insanity acquttee is not only insane but has committed crimes while insane; and second, the acquttee is adjudged insane only after a full trial by jury). The court in *Bolton*, 395 F.2d at 651, maintained that a person acquitted on the basis of insanity must be given a judicial hearing, prior to commitment, that is procedurally similar to those in civil commitment proceedings.

Finally, in *Jackson v. Indiana*, 406 U.S. 715 (1971), the Supreme Court voided an Indiana statute which authorized commitment upon a determination by the judge that the accused lacked the capacity to stand trial.

120. 604 F.2d 271 (4th Cir. 1979).

121. At the hearing the acquttee is entitled to be represented by counsel and the burden is upon the state to show that the person poses a present danger to himself or others. *Id.* at 275. It should be noted that the court found it proper for the state to place the burden of justifying release on the acquttee so long as he was committed in a constitutionally permissible manner. *Id.* at 274.

122. 681 F.2d 225 (4th Cir. 1982).

Dorsey.¹²³ The court held that the new Virginia standard requiring that the judge be "satisfied" as to the acquittee's continued insanity or dangerousness constitutionally was permissible.¹²⁴ The court also declined to find an equal protection violation where standards used for acquittees differed from those used for noncriminal committees.¹²⁵ Thus the current Virginia post-acquittal commitment statute clearly passes constitutional muster.¹²⁶

D. *Enlarging the Scope of Insanity*

Both *M'Naghten*¹²⁷ and ALI¹²⁸ speak of insanity in terms of a "disease of the mind." While there is virtually no case authority defining the term,¹²⁹ there has been a general belief that the tests were limited to psychoses.¹³⁰ In response to this perceived restriction, a movement has existed for some time to expand the scope of insanity to include drug and alcohol induced states as well as sociopathic behavior in general.¹³¹

The law is well settled in Virginia that voluntary drunkenness will not

123. *Id.* at 227. The new standard in Virginia is contained in VA. CODE ANN. § 19.2-181 (Cum. Supp. 1982) and provides that an acquittee shall be examined by a panel of three experts after which a judicial hearing is held. If the judge is satisfied that the acquittee is either insane or dangerous, he is committed to a mental hospital. He may apply for release once per year beginning six months after commitment.

124. 681 F.2d at 228. This is at least a preponderance of the evidence standard.

125. The standard for non-criminals is insane *and* dangerous, as opposed to insane *or* dangerous for insanity acquittees. However, the court accepted the argument that since prior criminal conduct on the part of the acquittee has been established, the lesser standard is justified. *Id.*

126. Nonetheless the Task Force on the Insanity Plea is currently considering changing the standard for criminal committees so as to be identical to that of non-criminals, i.e., insane *and* dangerous. Furthermore, the Task Force is considering the establishment of a "two-tier" commitment procedure. Committees would be deemed "serious" or "non-serious" offenders. "Serious" offenders would be subject to long-term commitment while "non-serious" offenders would be subject to commitment of one year. In both cases, after the commitment expires the state could institute civil commitment proceedings. Memorandum, *supra* note 83.

127. *M'Naghten's case*, 10 Cl. & F. 200, 8 Eng. Rep. 718 (1843).

128. *See supra* note 46.

129. A. GOLDSTEIN, *supra* note 3, at 47.

130. *See supra* note 38. For purposes of this discussion "psychosis" is defined as a "state of severe mental and emotional disorganization, characterized by, among other things, the replacement or distortion of reality by delusions and hallucinations." M. BLINDER, *PSYCHIATRY IN THE EVERYDAY PRACTICE OF LAW* § 7.4(a) (2d ed. 1982). *But see* A. GOLDSTEIN, *supra* note 3, at 48, for the proposition that the tests do not operate to limit the "diseases" to psychoses at all.

131. Sociopathy is defined as "chronic inability to conform one's behavior to social norms . . ." The difficulty with a sociopath is that he knows, cognitively speaking, when he is breaking the law. BLINDER, *supra* note 130, at 314. This has led the ALI expressly to exclude sociopathy from its definition of mental disease. *See supra* note 47.

excuse criminal conduct.¹³² This is consistent with the United States Supreme Court's finding in *Powell v. Texas*¹³³ that alcoholism is not a mental disease within the meaning of the insanity defense.¹³⁴ Nonetheless, Virginia has long recognized that chronic alcoholism might render an individual insane at which time he could avail himself of the insanity defense.¹³⁵

A more difficult case is presented by drug-induced insanity. This difficulty stems, in large measure, from the Supreme Court's decision in *Robinson v. California*,¹³⁶ in which the Court held void a statute making it a crime to be addicted to narcotics.¹³⁷ *Robinson* was interpreted broadly until the Court made clear in *Powell* that it did not intend to grant wholesale immunity based on drug addiction or alcoholism.¹³⁸ The modern rule was articulated by the Fourth Circuit in *United States v. McGough*,¹³⁹ a case arising from Virginia, in which the court stated that drug dependence might qualify as a mental disease which could be asserted as a defense.¹⁴⁰ Nonetheless, it remains a question for the jury.¹⁴¹

In *Proffitt v. United States*¹⁴² the Fourth Circuit affirmed its holding in *United States v. Chandler*¹⁴³ that a criminal defendant's mental capacity does not turn upon labels, such as sociopath or psychopath, and that these conditions do not defeat an insanity defense *per se*.¹⁴⁴

E. *Psychiatric Examination of the Defendant*

The Virginia Code sets forth a procedure for examination of an accused's mental state when there exists substantial question or when the defendant gives notice of his intent to raise the insanity defense.¹⁴⁵ In

132. *Brenan v. Commonwealth*, 183 Va. 846, 850, 33 S.E.2d 639, 640 (1945).

133. 392 U.S. 514 (1968).

134. *Id.* at 521-31, 535.

135. *Longley v. Commonwealth*, 99 Va. 807, 37 S.E. 339 (1900). This decision was later affirmed in *Aren v. Peyton*, 209 Va. 370, 375, 164 S.E.2d 691, 695 (1968) (the court noting that voluntary drunkenness must be distinguished from the "settled insanity produced by drink").

136. 370 U.S. 660 (1962).

137. The Court found this violative of the eighth amendment's prohibition against cruel and unusual punishment since the statute chose to punish a "status" as opposed to an act. *Id.*

138. *Powell*, 392 U.S. at 521, 531-36.

139. 410 F.2d 458 (4th Cir. 1969).

140. *Id.*

141. *Id.* at 458-59.

142. 582 F.2d 854 (4th Cir. 1978), *cert. denied*, 447 U.S. 910 (1980).

143. 393 F.2d 920 (4th Cir. 1968).

144. *Id.* at 927.

145. *See* VA. CODE ANN. § 19.2-168.1 (Cum. Supp. 1982) (evaluation on motion of the Commonwealth when defendant intends to raise insanity defense); *Id.* § 19.2-169.5 (evaluation upon substantial question of defendant's sanity at time of offense).

these cases the court will appoint the psychiatrists and/or psychologists who are paid by the Commonwealth.¹⁴⁶ The Virginia Supreme Court consistently has held that the defendant is not entitled to a private psychiatrist at public expense in addition to those supplied by the Commonwealth.¹⁴⁷ This result has been approved by the Fourth Circuit in *Satterfield v. Zahradnick*, which held that no constitutional duty exists to appoint a private psychiatrist of defendant's choosing at public expense.¹⁴⁸

The Commonwealth, as noted, may request that the defendant undergo a psychiatric examination once the defendant gives notice of his intent to assert an insanity defense.¹⁴⁹ If the trial defendant refuses to cooperate with the evaluation, the court may bar the defendant from presenting expert psychiatric or psychological evidence at trial.¹⁵⁰ This type of compelled psychiatric examination raises serious constitutional questions as noted recently by the United States Supreme Court in *Estelle v. Smith*.¹⁵¹ The Court held that the use of testimony based upon a compelled psychiatric examination at a capital sentencing proceeding violated the defendant's fifth and sixth amendment rights.¹⁵² Although the Court's holding dealt only with the use of such evidence at a sentencing hearing,¹⁵³ the holding might easily be applied to other settings in which de-

146. *Id.* § 19.2-175.

147. *Houghtaling v. Commonwealth*, 209 Va. 309, 163 S.E.2d 560, *cert. denied*, 394 U.S. 991 (1968). *Accord* *Jefferson v. Commonwealth*, 214 Va. 747, 753, 204 S.E.2d 258, 263 (1974); *Mason v. Commonwealth*, 219 Va. 1091, 1095, 254 S.E.2d 116, 119 (1979).

In *Mason* the Virginia Supreme Court relied on *United States ex rel. Smith v. Baldi*, 344 U.S. 561, 568 (1953), in which the United States Supreme Court held that states are not required by the Constitution to provide a defendant with technical pre-trial assistance. *But see* Note, *Criminal Procedure*, 66 VA. L. REV. 261, 264 (1980) (suggesting that the Virginia Supreme Court's reliance on *Baldi* may be mistaken since *Mason* was accused of a capital offense, unlike *Baldi*, which invokes a higher due process standard).

Nonetheless, defense counsel may deny his client's presentation of an insanity defense due to the client's inability to pay psychiatric and legal fees. *Proffitt v. United States*, 582 F.2d 854 (4th Cir. 1978), *cert. denied*, 447 U.S. 910 (1980). In this case *Proffitt* did not have the \$10,000 which his attorney said it would cost to mount an insanity defense using private counsel and a private psychiatrist. The court ruled this violated the defendant's right to adequate representation by counsel as guaranteed by the sixth amendment to the United States Constitution. 582 F.2d at 856-57.

148. 572 F.2d 443, 445 (4th Cir. 1978).

149. VA. CODE ANN. § 19.2-168.1A (Cum. Supp. 1982).

150. *Id.* § 19.2-168.1B.

151. 451 U.S. 454 (1981).

152. The fatal flaws were that the defendant was not advised prior to the examination of his right to remain silent and that he was not allowed counsel during the examination. Comment, *The Fifth Amendment and Compelled Psychiatric Examinations*, 50 GEO. WASH. L. REV. 275, 276 (1982) (discussing *Estelle*, 451 U.S. at 454).

153. The facts briefly stated are as follows: *Smith* was indicted for murder committed by his accomplice during an armed robbery. A competency for trial examination was ordered by the trial judge when the prosecution announced plans to pursue the death penalty. The

defendants are compelled to submit to psychiatric examinations.¹⁵⁴

In *Shifflett v. Commonwealth*,¹⁵⁵ the constitutionality of a compelled psychiatric examination was at issue before the Virginia Supreme Court. The defendant had been compelled to undergo a psychiatric evaluation to determine his sanity at the time of his alleged crime (murder).¹⁵⁶ His appeal principally was based upon the state's lack of authority to so compel him;¹⁵⁷ however, he also challenged the constitutionality of a compelled examination based on fifth and sixth amendment grounds.¹⁵⁸ Finding that the state had the power to compel examination, the court avoided the constitutional challenge on the grounds that it was a new issue on appeal.¹⁵⁹

Thus after *Shifflett*,¹⁶⁰ and especially in light of *Estelle v. Smith*,¹⁶¹ the constitutionality of Virginia's compelled psychiatric examination contained in section 19.2-168.1(b) of the Virginia Code must seriously be questioned.

IV. CONCLUSION

A criminal defendant, in Virginia, is presumed to be sane until proven otherwise.¹⁶² This has the effect of making insanity an affirmative defense, thus it is incumbent upon the defendant to raise the issue of his insanity¹⁶³ and to convince the jury that he was insane at the time of the offense.¹⁶⁴ The standard for insanity in Virginia as set forth in

defendant was found competent to stand trial and a jury convicted Smith of murder. Texas law requires the jury, in a separate sentencing hearing, to evaluate a three part test prior to imposing the death penalty in which the major element is whether the defendant poses a continuing threat to society. The jury relied upon the testimony of the psychiatrist who had examined Smith at the compelled competency hearing to find that Smith was a continuing threat and sentenced him to death. *Estelle*, 451 U.S. at 456-57.

154. Comment, *supra* note 152, at 284. The Court left the door wide open to apply its rationale to an assertion of the insanity defense. The Second Circuit had held several years ago that a defendant's disclosures in an examination were "non-testimonial" and thus not covered by the fifth amendment. *United States v. Baird*, 414 F.2d 700, 709 (2d Cir. 1969), *cert. denied*, 396 U.S. 1005 (1970). However, *Estelle*, 451 U.S. at 463 explicitly rejects this position, holding that since the state's only evidence in support of the death penalty was from the defendant's statements in the examination then the fifth amendment is implicated. Comment, *supra* note 152, at 284.

155. 221 Va. 760, 274 S.E.2d 305 (1981).

156. *Id.* at 765, 275 S.E.2d at 307.

157. *Id.*

158. *Id.* at 769, 275 S.E.2d at 311.

159. *Id.*

160. 221 Va. 760, 274 S.E.2d 305 (1981).

161. 451 U.S. at 454.

162. *See supra* note 85.

163. *See supra* note 91 and accompanying text.

164. *See supra* note 95 and accompanying text.

*DeJarnette v. Commonwealth*¹⁶⁵ is essentially a *M'Naghten*¹⁶⁶ "right-wrong" test modified by irresistible impulse.¹⁶⁷ If a defendant intends to assert an insanity defense, he must give the Commonwealth ten days written notice¹⁶⁸ and may be compelled to submit to a psychiatric evaluation.¹⁶⁹ If found not guilty by reason of insanity, the individual may be committed for one year, at least, if the judge is satisfied that the individual is dangerous and mentally ill.¹⁷⁰

Virginia's procedure for dealing with the insanity defense is, on balance, eminently reasonable. While some may disapprove of placing the burden of persuasion as to insanity on the defendant, the practice is clearly constitutional.¹⁷¹ The revised post-acquittal commitment procedure has recently been upheld as well.¹⁷² There exists serious doubt, however, as to the constitutionality of Virginia's compelled psychiatric examination provision¹⁷³ in light of the Supreme Court's holding in *Estelle v. Smith*.¹⁷⁴

The defense of not guilty by reason of insanity is but one tool which allows our society to adjust to those individuals who do not meet the criteria of the average citizen. It is entirely consistent with the "prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime."¹⁷⁵ As such, the insanity defense continues to occupy a very vital role in our criminal justice system. The insanity defense in Virginia probably will be revised in accordance with the suggestions made by the Insanity Plea Task Force, whose recommendations have been discussed. In addition to these modifications, it is urged that the procedure governing the compelled psychiatric examination of a defendant be reexamined closely in view of *Estelle v. Smith*.¹⁷⁶

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165. 75 Va. 867, 875 (1881).

166. 10 Cl. & F. 200, 8 Eng. Rep. 718 (1843).

167. See *supra* note 65.

168. VA. CODE ANN. § 19.2-168.1A (Cum. Supp. 1982).

169. *Id.* § 19.2-168.1B.

170. See *supra* notes 122-24 and accompanying text.

171. See *supra* notes 107-14 and accompanying text.

172. *Harms v. Ballone*, 681 F.2d 225 (4th Cir. 1982).

173. See *supra* note 169.

174. 451 U.S. at 454.

175. *Williams v. New York*, 337 U.S. 241, 247 (1949).

176. 451 U.S. at 454.

