Offensive Use of the Insanity Defense: Imposing the Insanity Defense Over the Defendant's Objection

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Introduction

Whether a trial judge[1] should be permitted to interpose an insanity defense[2] over the objection of a criminal defendant who is competent to stand trial[3] must be considered in light of two competing interests. On one hand, society has a legitimate interest in refusing to punish those whom it considers morally blameless by virtue of mental illness.[4] On the other hand, a defendant may have sound, pragmatic reasons for choosing to forego an insanity defense.[5] First, he may believe he is truly innocent

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1. In an attempt to balance simplicity and gender equality, this Article uses the pronoun "she" to refer to hypothetical trial judges and the pronoun "he" to refer to hypothetical criminal defendants.

2. For an overview of the different legal tests for insanity used in various American jurisdictions, see S. BRAKEL, J. PARRY & B. WEINER, AMERICAN BAR FOUNDATION, THE MENTALLY DISABLED AND THE LAW 707 & Table 12.5 at 769-73 (3d ed. 1985) [hereinafter S. BRAKEL] .

3. The legal standards employed to determine whether a criminal defendant is competent to stand trial differ substantially from the standards employed to determine whether he should be absolved of criminal responsibility. "In all jurisdictions, a criminal defendant is deemed incompetent to stand trial if mental illness renders him incapable of understanding the proceedings against him or assisting in his defense." Winick, *Restructuring Competency to Stand Trial*, 32 UCLA L. REV. 921, 923 (1985). This test for competency focuses only on the defendant's condition at the time of trial, whereas the various tests for insanity focus only on his condition at the time of the alleged offense. *See infra* notes 62 & 65-66 and accompanying text.

4. In Holloway v. United States, 148 F.2d 665, 666-67 (D.C. Cir. 1945), the court explained: "To punish a man who lacks the power to reason is as undignified and unworthy as punishing an inanimate object or an animal. A man who cannot reason cannot be subject to blame. Our collective conscience does not allow punishment where it cannot impose blame." *See also* S. BRAKEL, *supra* note 2, at 693.

5. For a consideration of the practical and ethical difficulties confronting defense counsel when the trial judge imposes the defense, see Note, CRIMINAL PROCEDURE—*Insanity Defense—In Determining Whether To Raise the Defense of Insanity Sua Sponte Over the Objection of a Certified Competent Defendant, the Trial Court Must Hear Evidence Supporting as Well as Opposing the Raising of the Defense and Must Articulate the Reasons Underlying Its Ultimate*

and entitled to an unqualified acquittal.[6] Second, he may prefer to risk imprisonment for a definite duration than to risk hospitalization for an indefinite duration.[7] Third, he may wish to avoid the stigma of mental illness and the risk of future discrimination.[8] Finally, he may view his crime as a political statement which a determination of insanity would denigrate.[9]

Beyond these practical considerations, however, a defendant has a fundamental interest in selecting personally each defense he wishes to marshall against the state's accusations, even if his selections are foolish

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Determination. United States v. Robertson, *507 F.2d 1148 (D.C. Cir. 1974)*, 53 TEX. L. REV. 1065 (1975).

6. In most American jurisdictions, a defendant who raises the insanity defense admits he committed the *actus reus*—the physical act of the offense. However, he asserts he is free of moral blame due to his mental illness. S. BRAKEL, *supra* note 2, at 719. In at least three jurisdictions, however, the defendant simultaneously can plead "not guilty" and "not guilty by reason of insanity." *See* CAL. PENAL CODE § 1016 (West 1985); LA. CODE CRIM. PROC. ANN. art. 650 (West 1983); ME. REV. STAT. ANN. tit. 17-A, § 40(1) (Supp. 1986); *see also infra* notes 75-79 and accompanying text.

7. The state often hospitalizes persons found not guilty by reason of insanity far longer than their civil patient counterparts. German & Singer, *Punishing the Not Guilty: Hospitalization of Persons Acquitted by Reason of Insanity*, 29 RUTGERS L. REV. 1011, 1037 (1976). The duration of hospitalization is "more likely to be related to the seriousness of the criminal act than to the patient's improvement within the hospital." *Id. See also* Morris, *The Confusion of Confinement Syndrome Extended: The Treatment of Mentally Ill "Non-Criminal Criminals" in New York*, 18 BUFFALO L. REV. 393, 394 (1969). More important, the hospitalization period is often longer than a criminal sentence. *See* Overholser, *Criminal Responsibility: A Psychiatrist's Viewpoint*, 48 A.B.A. J. 527, 531 (1962); S. RUBIN, PSYCHIATRY AND CRIMINAL LAW, ILLUSIONS, FICTIONS, AND MYTHS 46-51 (1965).

Although release of insanity acquittees is far more liberal today than in the past, the acquittees may still be subject to more burdensome release procedures than are involuntary civil patients. *See* S. BRAKEL, *supra* note 2, at 725. For example, in some jurisdictions, acquitted patients cannot avail themselves of administrative release procedures but must petition the court. *See, e.g.*, Powell v. State, 579 F.2d 324, 333-34 (5th Cir. 1978) (trial judge can refuse to follow administrator's release recommendation); United States v. Ecker, 543 F.2d 178, 186 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1063 (1977) (district court must make final decision on release). The United States Supreme Court has approved this differential treatment. Jones v. United States, 463 U.S. 354 (1983).

8. *See* Comment, *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1200 (1974). In addition to social stigma, the patient may even suffer various legal deprivations resulting from being adjudged mentally ill. *See, e.g., In re* Eugene W., 29 Cal. App. 3d 623, 105 Cal. Rptr. 736 (1972) (loss of child custody); OR. REV. STAT. § 677.225(1)(a) (1983) (automatic suspension of the right to practice medicine); *see also* Parham v. J.R., 442 U.S. 584, 626-27 (1979) (Brennan, J., concurring in part and dissenting in part) (persons confined to mental institutions are stigmatized as sick and abnormal both while confined and sometimes after release).

9. See, for example, United States v. Robertson, 507 F.2d 1148, 1158 (D.D.C. 1974), in which the defendant, a black man, attempted to kill a white man without apparent provocation, other than the fact that the victim was white. Despite evidence of mental illness, Robertson shunned the insanity defense because he believed it would undermine the credibility of his racial and political views. *See infra* note 38 and accompanying text.

or disastrous. This interest is grounded both in the defendant's personal independence and in the very nature of our criminal justice system,[10] an adversarial process that depends upon a defendant's autonomy.

This Article analyzes the competing interests of society and the criminal defendant in the context of two conflicting lines of case law. The first line permits the trial judge to impose the insanity defense on an unwilling defendant if "there is sufficient question as to . . . [the] defendant's mental responsibility at the time of the crime . . . ."[11] The second line prohibits the trial judge from interfering with a defendant's "intelligent and voluntary decision"[12] to waive the defense.

This Article concludes that the second view is not only preferable, but also is constitutionally required. Subject to the traditional limitation that waivers be intelligent and voluntary,[13] a competent defendant may waive a viable insanity defense just as he may enter a guilty plea[14] or waive his constitutional right to counsel.[15] This right to select one's defenses personally is not directly protected by any specific constitutional guarantee. It is, however, a fundamental and inherent right, implicit in the Anglo-American concept of criminal justice as embodied generally in the Bill of Rights.[16] Accordingly, courts should prohibit trial judges from substituting their judgment for the judgment of competent defendants on this issue, unless a defendant's competence is so marginal that his waiver of the insanity defense cannot be considered intelligent and voluntary.

I. Imposition of the Insanity Defense

A. Overview of the District of Columbia Cases

The two conflicting lines of case law have both developed in the

10. *See infra* notes 103-130 and accompanying text.

11. Whalem v. United States, 346 F.2d 812, 818 (D.C. Cir.) (en banc), *cert. denied*, 382 U.S. 862 (1965).

12. Frendak v. United States, 408 A.2d 364, 367 (D.C. 1979).

13. *See, e.g.*, Johnson v. United States, 333 U.S. 10 (1947); Johnson v. Zerbst, 304 U.S. 458 (1938) (waiver of right to counsel); Reyes v. Edmonds, 472 F. Supp. 1218, 1223 (D. Minn. 1979) (consent to police search).

14. In North Carolina v. Alford, 400 U.S. 25, 38 (1970), the Court held that a trial judge does not commit constitutional error by accepting the guilty plea of a defendant who proclaims his innocence. The Court explained, however, that its holding did not mean that the defendant has an absolute constitutional right to have his plea accepted.

15. In contrast to the qualified holding in *Alford*, the Court held in Faretta v. California, 422 U.S. 806 (1975), that a criminal defendant has an absolute right under the Sixth Amendment to waive his right to counsel and represent himself. *See infra* notes 53-54 & 109-112 and accompanying text.

16. *See infra* notes 103-130 and accompanying text.

District of Columbia.[17] The District of Columbia Circuit (which includes the United States District Court and the United States Court of Appeals for the District of Columbia) has adopted the first view,[18] permitting imposition of the defense. The District of Columbia Court of Appeals,[19] however, has adopted the second view,[20] prohibiting imposition of the defense. This Article criticizes the approach developed in the District of Columbia Circuit Courts (the *Whalem* view)[21] and supports and expands upon the approach developed in the District of Columbia Court of Appeals (the *Frendak* view).[22]

1. The Whalem *View*

The District of Columbia Circuit's first important case in this area was *Overholser v. Lynch*.[23] The trial judge in *Lynch* imposed the insanity defense over the defendant's objection, acquitted him on insanity grounds, and committed him to a psychiatric hospital pursuant to the District's mandatory commitment statute.[24] In a subsequent *habeas corpus* proceeding, the United States Court of Appeals upheld the com-

17. Because these decisions are representative of decisions in other jurisdictions, this Article largely restricts its analysis to the views set forth in the District of Columbia cases and in relevant United States Supreme Court cases.

18. The *Whalem* view, *supra* note 11.

19. Under the District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473 (codified as amended at D.C. CODE ANN. §§ 11-101 to 11-2504 (1981)), the District of Columbia Court of Appeals has authority analogous to that of a state supreme court. D.C. CODE ANN. § 11-721 (1981). Accordingly, the decisions of the United States Court of Appeals for the District of Columbia Circuit and the United States District Court for the District of Columbia (which together constitute the regular federal court system for the District) do not bind the District of Columbia Court of Appeals. *See* Bethea v. United States, 365 A.2d 64, 70-71 & n.12 (D.C. 1976), *cert. denied*, 433 U.S. 911 (1977) (decisions prior to Reform Act are binding but decisions subsequent thereto are not); M.A.P. v. Ryan, 285 A.2d 310, 312-13 (D.C. 1971) (court is not bound by decisions rendered after the Reform Act though those decisions are entitled to "great respect").

20. The *Frendak* view, *supra* note 12.

21. *See supra* note 11 and accompanying text.

22. *See supra* note 12 and accompanying text.

23. 288 F.2d 388 (D.C. Cir. 1961), *rev'd on other grounds sub. nom* Lynch v. Overholser, 369 U.S. 705 (1962). In *Lynch*, the defendant was charged with two violations of the District's "bad check law." *Id.* at 390. The trial judge ordered a mental evaluation, and the defendant was found incompetent to stand trial. Later, the hospital issued a report stating that the defendant suffered from a manic depressive psychosis which affected his financial judgment, but that he had improved and was competent. *Id.*

24. *Id.* When *Lynch* was decided, the mandatory commitment statute, D.C. CODE ANN. § 24-301(d) (1967), provided that *any* defendant tried and acquitted solely on the ground that he was insane must be confined in a mental hospital. The statute was amended in 1970, following *Lynch*, to apply only to defendants who raise the defense of insanity and are acquitted. D.C. CODE ANN. § 24-301 (1981). *See infra* note 28.

mitment.[25] The court held that a defendant does not have absolute discretion to waive the insanity defense because society has no interest in punishing those who are not responsible for their acts.[26] The United States Supreme Court reversed,[27] but based its decision exclusively on its interpretation of the mandatory commitment statute. The Court held that the statute did not apply to a defendant who had not raised the insanity defense.[28] Therefore the Court did not specifically address whether a trial judge could impose the defense on an *unwilling* defendant. One commentator has suggested, however, that the Court impliedly approved the practice.[29]

The United States Court of Appeals for the District of Columbia Circuit next decided the seminal case of *Whalem v. United States*.[30] Asserting society's interest in punishing only morally culpable individuals, the court in *Whalem* held that trial judges have discretion to raise the defense over the defendant's objection:[31]

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25. 288 F.2d at 394.

26. *Id.* at 393.

27. Lynch v. Overholser, 369 U.S. 705, 720 (1962).

28. The Court explained: "We find it unnecessary to consider [the] constitutional claims . . . since we read [the mandatory commitment statute] as applicable only to a defendant acquitted on the ground of insanity who has affirmatively relied upon a defense of insanity . . . ." *Id.* at 709-10. The Court suggested that a different construction might render the statute unconstitutional. *Id.* at 711.

By reversing the automatic commitment, the Court ultimately did not aid Mr. Lynch in his release. After the Court's decision, the prosecutor indicated that he would proceed with a civil commitment. Mr. Lynch then threw himself under the wheels of a slow-moving truck on the grounds of St. Elizabeth's Hospital. Arens, *Due Process and the Rights of the Mentally Ill: The Strange Case of Frederick Lynch*, 13 CATHOLIC U.L. REV. 3, 37-38 n.126 (1964) (Mr. Arens was counsel for Mr. Lynch).

The current statute, D.C. CODE ANN. § 24-301(d) (1981), was amended in 1970 to comply with the holding in *Lynch*. *See supra* note 24. H.R. Rep. No. 907, 91st Cong., 2d Sess. 74 (1970) states: "In accordance with *Lynch v. Overholser*, this automatic commitment applies only when the defendant himself has raised the defense of insanity. It does not apply when the court itself raises the defense . . . ." *See also* United States v. Henry, 600 F.2d 924, 927 (D.C. Cir. 1979); United States v. Wright, 511 F.2d 1311, 1313 (D.C. Cir. 1975).

29. Singer, *The Imposition of the Insanity Defense on an Unwilling Defendant*, 41 OHIO ST. L.J. 637, 645 (1980): "The Court did not comment on the question whether a trial judge may impose the insanity defense on an unwilling defendant, since it disposed of the case on the automatic commitment grounds. By implication, however, it can be argued that it sanctioned the practice."

30. 346 F.2d 812 (D.C. Cir. 1965) (en banc), *cert. denied*, 382 U.S. 862 (1965). In *Whalem*, the state convicted the defendant of robbery and attempted rape. *Id.* at 813. The defendant then challenged the sufficiency of evidence of his identification before a three-judge panel of the Court of Appeals. Before reaching a decision, the full court, sua sponte, ordered a rehearing en banc to consider whether the trial judge erred by not raising the insanity issue sua sponte despite the defendant's wishes to the contrary. *Id.*

31. *Id.* at 818-19. See Frendak v. United States, 408 A.2d 364, 373 n.13 (D.C. 1979), in which the court noted: "It appears that only a few jurisdictions have considered the issue.

> [A] defendant may not keep the issue of insanity out of the case altogether. He may, if he wishes, refuse to raise the issue of in-

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While most of the courts have accorded trial judges the discretion to impose an insanity defense on the accused [the *Whalem* view], they generally have not explained the rationale behind the decision, and by and large, their decisions are not very helpful."

Courts permitting the trial court to exercise such discretion, or recognizing in dicta the propriety of such discretion, include the following: Les v. Meredeth, 193 Colo. 3, 6, 561 P.2d 1256, 1259 (1977) (en banc) (holding that the trial judge may enter an insanity plea irrespective of the defendant's wishes to the contrary), *but see* Boyd v. People, 108 Colo. 289, 294, 116 P.2d 193, 194-95 (1941) (an opinion to the contrary, distinguished in *Les* because *Boyd* was decided under an earlier statute that did not specifically authorize the trial judge to interpose the defense sua sponte); State v. Fernald, 248 A.2d 754, 760-61 (Me. 1968) (upholding the trial judge's refusal to allow the defendant to withdraw an insanity plea); Walker v. State, 21 Md. App. 666, 671, 321 A.2d 170, 174 (1974) (also upholding the trial judge's refusal to allow withdrawal of the plea, and explaining that "it would be a manifest injustice to allow the withdrawal of a plea of insanity in the face of [uncontradicted, competent] evidence [that the accused was insane] . . . ."); List v. State, 18 Md. App. 578, 585-87, 308 A.2d 451, 455-56 (1973), *vacated on other grounds*, 271 Md. 367, 316 A.2d 824 (1974) (holding that defense counsel had authority to enter an insanity plea as a matter of trial strategy, irrespective of the defendant's objections, and upholding trial judge's refusal to allow withdrawal of plea); State v. Pautz, 299 Minn. 113, 117, 217 N.W.2d 190, 192 (1974) (recognizing in dicta the right of the trial judge to raise the defense and implying that mandatory commitment of the defendant after the trial judge raised the insanity defense would not violate due process), *but see* Lynch v. Overholser, 369 U.S. 705, 719-20 (1962) (discussed *supra* at note 23 and accompanying text, holding that the District of Columbia's mandatory commitment statute could not apply when the defendant had not raised the defense); State v. Hermann, 283 S.W.2d 617, 620 (Mo. 1955) (explaining in dicta that evidence of the defendant's insanity is admissible irrespective of the defendant's wishes "if his friends or counsel set up this defense"); State v. Hall, 176 Neb. 295, 307-08, 125 N.W.2d 918, 926 (1964) (upholding the trial judge's instruction to the jury regarding the legal test of insanity after the defendant, who had not specifically invoked the defense, proffered evidence of his low intelligence); State v. Khan, 175 N.J. Super. 72, 83, 417 A.2d 585, 592 (1980) (also recognizing the right of the trial judge to impose the defense); State v. Gadson, 148 N.J. Super. 457, 463, 372 A.2d 1143, 1144 (1973) (recognizing the trial judge's right to impose the defense sua sponte).

Courts holding or suggesting that imposition of the defense by the trial judge is improper include the following: United States v. Edwards, 488 F.2d 1154, 1164 (5th Cir. 1974) (recognizing defense counsel's authority to shun the defense on the basis of trial strategy); State v. Johnson, 116 Ariz. 561, 563, 570 P.2d 503, 505 (1977) (holding that the defendant is presumed sane and must introduce evidence raising doubts about his sanity before it becomes an issue for the trial judge to resolve); People v. Gauze, 15 Cal. 3d 709, 717-18, 542 P.2d 1365, 1370 (1975) (holding that the trial judge could not, sua sponte, compel the insanity defense), *but see* People v. Merkouris, 46 Cal. 2d 540, 553, 297 P.2d 999, 1008-09 (1956) (holding that the trial judge abused discretion by allowing the defendant to withdraw his insanity plea. The court in *Gauze* distinguished *Merkouris* on the ground there was doubt in *Merkouris* about the defendant's competency to withdraw his plea.); People v. Redmond, 16 Cal. App. 3d 931, 938-39, 94 Cal. Rptr. 543, 548 (1971) (holding that the trial judge erred by refusing to permit withdrawal of an insanity plea after the defendant was found guilty, so long as the defendant's choice was free and voluntary and based on adequate comprehension of the consequences); Hooks v. State, 266 Ind. 678, 682, 366 N.E.2d 645, 647 (1977) (recognizing that the insanity defense can be waived); White v. State, 17 Md. App. 58, 61-64, 299 A.2d 873, 874-76 (1973) (holding that withdrawal of the insanity defense is a matter of trial strategy not subject to review by the court); Anderson v. State, 493 S.W.2d 681, 684 (Mo. App. 1973) (recognizing that the right to plead the insanity defense is "personal to the accused" and can be waived); People v. Gonzales,

> sanity, but he may not, in a proper case, prevent the court from injecting it. . . .
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> One of the major foundations for the structure of the criminal law is the concept of responsibility, and the law is clear that one whose acts would otherwise be criminal has committed no crime at all if because of incapacity due to . . . mental condition he is not responsible for those acts. . . .
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> [T]he trial judge must uphold this structural foundation by refusing to allow the conviction of an obviously mentally irresponsible defendant, and when there is sufficient question as to a defendant's mental responsibility at the time of the crime, this issue must become part of the case.[32]

Specifically, the court in *Whalem* held that the particular trial judge had not abused his discretion by refusing to raise the defense.[33] This holding presents several problems.[34] First, the court did not address reasons why the defendant might wish to oppose the defense; presumably, it recognized none as persuasive. Second, the court did not adopt standards for trial judges to follow in determining whether there is "sufficient question" about the defendant's "mental responsibility;"[35] the court merely noted that "the question must be resolved on a case by case ba-

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20 N.Y.2d 289, 294-95, 229 N.E.2d 220, 223, 282 N.Y.S.2d 538, 542-43 (1967), *cert. denied*, 390 U.S. 971 (1968) (upholding the trial judge's failure to raise the insanity defense sua sponte when the defendant appeared *pro se* and did not raise the defense); People v. Baxter, 32 A.D.2d 840, 840-41, 302 N.Y.S.2d 456, 457 (1969) (holding that defense counsel's failure to interject the defense was not ineffective assistance of counsel because it was a proper matter of trial strategy, and that the trial judge did not err by refusing to override counsel's decision); State v. Jones, 99 Wash. 2d 735, 737, 744, 664 P.2d 1216, 1217, 1221 (1983) (as long as the defendant is competent to stand trial, "a court may rarely, if ever, [enter a plea of not guilty by reason of insanity] but . . . does have a duty to assure the defendant's waiver of an [insanity] plea is voluntary); State v. Johnston, 84 Wash. 2d 572, 577-78, 527 P.2d 1310, 1313 (1974) (holding that the trial judge did not abuse discretion by permitting the defendant to waive the defense); State v. Dodd, 70 Wash. 2d 513, 519-20, 424 P.2d 302, 306 (1967) (recognizing that the decision to plead insanity belongs to the defendant, not to his attorney); Mendenhall v. Hopper, 453 F. Supp. 977, 983 (S.D. Ga. 1978) (holding that a trial judge has no affirmative duty to impose the defense even when the evidence presents a bona fide doubt as to the defendant's responsibility for the crime); United States *ex rel.* Laudati v. Ternullo, 423 F. Supp. 1210, 1217 (S.D.N.Y. 1976) (holding it is not improper, under New York law, for the trial judge to defer to the wishes of a competent, adequately represented defendant who chooses to forego the defense. The court also announced its belief that the rules regarding the insanity defense were matters of state law only, and do not raise issues of constitutional magnitude.).

32. *Whalem*, 346 F.2d at 818.

33. *Id.* at 819.

34. A tangential problem with the language quoted above from *Whalem* is that the court seems to confuse the *mens rea* doctrine with the insanity defense. An "insane" defendant may well have committed the crime (having both *actus reus* and *mens rea*), but simply is held not responsible by virtue of his mental illness. *See* discussion *infra* notes 75-76 and accompanying text.

35. *Id.* at 818-19.

sis."[36] Most important, however, by stating that the trial judge "*must* . . . refus[e] to allow the conviction of an obviously mentally irresponsible defendant," the court effectively characterized society's interest in protecting those who are morally blameless as superior to the interest of the defendant in selecting his own defense.[37]

Later, in *United States v. Robertson*,[38] decided in the same jurisdiction, the court set forth various factors the trial judge might consider in deciding whether to impose the defense: (1) the bizarre nature of the crime; (2) whether defense counsel wishes to raise the defense; (3) the differing views of experts on the question of insanity; and (4) the defendant's behavior at trial.[39] *Robertson* did not substantially alter the *Whalem* approach, however, even though the court identified factors that may influence a trial judge's exercise of discretion, because the court also stated that the defendant's decision could not be controlling.[40]

2. *The* Frendak *View*

In sharp contrast to *Whalem*, the District of Columbia Court of Ap-

36. *Id.* at 819 n.10.

37. *Id.* at 818 (emphasis added).

It should be noted, however, that the United States Court of Appeals for the District of Columbia Circuit (the *Whalem* court) has consistently upheld the discretion of trial judges, whether exercised to interpose the defense or not. It is particularly enlightening to compare United States v. Wright, 511 F.2d 1311, 1312 (D.C. Cir. 1975) (*Wright I*) and United States v. Wright, 627 F.2d 1300, 1308 (D.C. Cir. 1980) (*Wright II*). *See infra* note 58. The two cases are unrelated except insofar as they both involve the same defendant, Beachey L. Wright, and his destruction of government property on separate occasions. In *Wright I*, the court upheld the trial judge's imposition of the insanity defense; in *Wright II*, the court upheld the trial judge's discretion not to impose the defense. *See also* United States v. Ashe, 478 F.2d 661, 664 (D.C. Cir. 1973) (upholding discretion to impose the defense); United States v. Simms, 463 F.2d 1273, 1278 (D.C. Cir. 1972) (upholding discretion not to impose the defense); Cross v. United States, 389 F.2d 957, 960 (D.C. Cir. 1968) (same); and Trest v. United States, 350 F.2d 794, 795 (D.C. Cir. 1965), *cert. denied*, 382 U.S. 1018 (1966) (same).

38. 507 F.2d 1148 (D.C. Cir. 1974). In *Robertson*, the defendant, a black man, shot a white man without any apparent provocation. After the shooting, the defendant ran down the street brandishing a pistol and shouting "white sons of bitches." *Id.* at 1150. Immediately after his arrest and at the preliminary hearing, he offered additional, incoherent racist commentary. *Id.* at 1150-51. He refused to rely on the insanity defense against the advice of his counsel, despite psychological evaluations which would have supported the defense. *Id.* at 1151. *See supra* note 9 and accompanying text.

39. 507 F.2d at 1158.

40. *Id.* at 1160. The *Whalem* approach has been criticized even among the members of the court. Chief Judge Bazelon, author of the court's opinion in *Robertson*, issued a separate statement expressing doubts about the *Whalem* approach and urging en banc reconsideration. *Id.* at 1161. Judge Wilkey, dissenting in *Robertson*, suggested that the majority opinion might violate due process and "the entire adversary concept of a criminal trial." *Id.* at 1165.

peals held in *Frendak v. United States*[41] that "the trial judge may not force an insanity defense on a defendant found competent to stand trial *if* the individual intelligently and voluntarily decides to forego that defense."[42] The court further held that the trial judge's "finding of competency to stand trial is not, in itself, sufficient to show that the defendant is capable of rejecting an insanity defense; the trial judge must make further inquiry into whether the defendant has made an intelligent and voluntary decision."[43]

The *Frendak* court's "intelligent and voluntary decision" limitation is wise. It requires the trial judge to conduct further inquiry after the defendant has been deemed "competent." Because the findings required to support a determination of competence are minimal,[44] a finding of competence alone does not resolve the issue of whether a defendant's waiver of the insanity defense is voluntary and intelligent.[45]

The further inquiry, however, should not be interpreted to permit substitution of the trial judge's judgment for the defendant's. Substitution would merely duplicate the *Whalem* approach while paying lip service to the defendant's automony. Rather, the inquiry should simply assess the validity of the defendant's waiver. It should be the same type of inquiry used to assess the validity of any criminal defendant's waiver of any constitutional right. The waiver must be "voluntary" in the sense that it must be free from duress or coercion,[46] and it must be "intelligent" in the sense that it must be rational, but not that it must be wise.[47]

41. 408 A.2d 364 (D.C. 1979). In *Frendak*, the defendant was convicted of first degree murder and of carrying a pistol without a license. *Id.* at 366. The trial judge, troubled by evidence introduced at the competency hearing, decided to impose the insanity defense over the defendant's objection. The jury then found the defendant not guilty by reason of insanity. *Id.* at 366-67.

42. *Id.* at 367 (emphasis in original). The court remanded in order for the trial judge to determine whether the defendant had made an intelligent and voluntary decision. *Id.* at 381.

43. *Id.*

44. *See infra* notes 65-70 and accompanying text.

45. This separate inquiry is analogous to the separate inquiry used by some courts to determine whether a competent defendant is also competent to plead guilty. *See infra* notes 47 & 70 and accompanying text.

46. Regarding the voluntariness of a confession, see Culombe v. Connecticut, 367 U.S. 568, 602 (1961), in which the Court stated:

> Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.

See also Schneckloth v. Bustamonte, 412 U.S. 218, 223-27 (1973) (regarding the voluntariness of consent to a search); Brady v. United States, 397 U.S. 742, 749-55 (1970) (regarding the voluntariness of a guilty plea).

47. In Johnson v. Zerbst, 304 U.S. 458, 464 (1938), the Court explained: "The determination of whether there has been an intelligent waiver of the right to counsel must depend, in

In reaching its holding, the court in *Frendak* relied upon two United States Supreme Court decisions. In *North Carolina v. Alford*,[48] a defendant who was charged with first degree murder claimed complete innocence, but nevertheless pleaded guilty to second degree murder.[49] The Court held that the trial judge did not violate the defendant's due process rights by accepting the guilty plea.[50] The Court emphasized that the defendant may have had legitimate reasons for pleading guilty, such as avoiding the risk of greater punishment.[51] The Court also observed in dicta, however, that a defendant does not have an absolute constitutional right to have his guilty plea accepted.[52]

The court in *Frendak* also relied on *Faretta v. California*,[53] in which the Supreme Court held that the Sixth Amendment guarantees "the right to self representation—to make one's own defense personally. . . ."[54] The

each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." Similarly, in Brady v. United States, 397 U.S. 742, 756 (1970), discussed *supra* note 46, the Court concluded that the defendant "intelligently made" a guilty plea because he "was advised by counsel, he was made aware of the nature of the charge against him, and there was nothing to indicate that he was incompetent or otherwise not in control of his faculties . . . ." Arguably, these Supreme Court opinions indicate trial judges should inquire deeply into the "intelligence" of a defendant's waiver, extending the inquiry beyond that of mere "competence." Indeed, some courts have held that the competencey standard does not adequately measure the ability of a defendant to make a voluntary and intelligent waiver. *See, e.g.*, United States v. Masthers, 539 F.2d. 721, 726 n.30 (D.C. Cir. 1976) (the awareness and necessity to waive constitutional rights differs from that necessary to stand trial); Sieling v. Eyman, 478 F.2d 211, 214-15 (9th Cir. 1973) (a pretrial determination of competency is an inadequate measure of competency to plead guilty).

On the other hand, other courts have held that the competency standard and the waiver standard are identical. *See, e.g.*, United States *ex rel.* McGough v. Hewitt, 528 F.2d 339, 342 n.2 (3d Cir. 1975) (specifically criticizing *Sieling*); Malinauskas v. United States, 505 F.2d 649, 654 (5th Cir. 1974) (holding that the standards are the same). None of these opinions, however, focus on the *wisdom* of the defendant's choice, but only on the defendant's *ability* to make that choice.

48. 400 U.S. 25 (1970).

49. *Id.* at 27. Alford's attorney recommended the guilty plea in light of strong evidence of Alford's guilt. Before accepting the plea, however, the trial judge required a summary presentation of the prosecution's case. Alford then took the stand and testified that he did not commit the murder but was pleading guilty to avoid the possibility of the death penalty. *Id.* at 27-28.

50. *Id.* at 38.

51. *Id.* at 37.

52. *Id.* at 38 n.11. This statement was merely dictum because the only question before the Court was whether the trial judge's *acceptance* of the guilty plea violated due process, not whether a *refusal* to accept the plea would violate due process.

53. 422 U.S. 806 (1975).

54. *Id.* at 819. Faretta was charged with grand theft. He requested permission to represent himself because he believed the public defender's office was overburdened. *Id.* at 807. Before trial, the judge "quizzed" Faretta on various legal points such as the rule against hearsay. Unimpressed with Faretta's performance, the judge denied the request, ruling that Faretta had not made an intelligent and knowing waiver of his right to the assistance of coun-

decision in *Faretta*, unlike *Alford*, rested on constitutional principles. Nonetheless, the court in *Frendak* emphasized that "*Alford* and *Faretta both* stressed the importance of permitting a defendant to make decisions central to the defense—a concern given little if any significance in *Whalem*."[55]

Interestingly, in *United States v. Robertson*,[56] decided two years before *Frendak*, the United States District Court for the District of Columbia (the trial court in the *Whalem* jurisdiction) purported to follow *Whalem*, but also noted the relevance of *Alford* and *Faretta*:

> The Court's decision to honor defendant's opposition to imposition of an insanity defense is supported by the language and implication of *Faretta v. California* and *North Carolina v. Alford*. Just as a defendant may elect to forego representation by counsel and just as a defendant may enter a plea of guilty for reasons other than his guilt, so too should a defendant who is competent and whose decision is made rationally and with awareness of its consequences be allowed to proceed to trial without introduction of the insanity defense, even though there may be evidence in the case which could support such a defense.[57]

This language is remarkably similar to that used in *Frendak*. Apparently, the essential difference between *Robertson* and *Frendak* is that the court in *Robertson* interpreted *Alford* and *Faretta* to require the trial judge to consider the defendant's autonomy as but one factor influencing the judge's discretion; the court in *Frendak*, however, interpreted *Alford* and *Faretta* as eliminating the trial judge's discretion altogether.

3. *The Response to* Frendak—Wright's *Reaffirmation of* Whalem

After *Frendak*, the United States Court of Appeals for the District of Columbia Circuit (the *Whalem* jurisdiction) reconsidered the issue and reaffirmed the *Whalem* approach in *United States v. Wright*.[58] First,

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sel and that he had no constitutional right to represent himself. *Id.* at 808-10. Faretta was convicted as charged. *Id.* at 811.

55. *Frendak*, 408 A.2d at 375 (emphasis added). In contrast to the conclusions of this Article, the court in *Frendak* found that "[n]either case [*Alford* nor *Faretta*] renders the *Whalem* rule unconstitutional." *Id.* The court justified this conclusion on the ground that *Alford* recognized that a defendant does not have an absolute right to have his guilty plea accepted, and *Faretta* was "limited to recognizing a sixth amendment right to appear *pro se*." *Id.* at 376. However, as discussed *infra* notes 109-114 and accompanying text, this Article concludes that *Faretta* should not be construed so narrowly. *Faretta*'s reasoning and significance are far broader than its precise holding.

56. 430 F. Supp. 444 (D.D.C. 1977). This case was heard on remand from the United States Court of Appeals, United States v. Robertson, 507 F.2d 1148 (D.C. Cir. 1974).

57. 430 F. Supp. at 447 n.4 (citations omitted).

58. 627 F.2d 1300 (D.C. Cir. 1980). In *Wright*, the defendant destroyed a replica of the United States Capitol Building which was on public display. He claimed he "was 'inspired' by

the court dismissed the relevance of *Alford* and *Faretta* as "de minimus" because neither case involved an insanity defense.[59] Second, the court asserted that the *Whalem* approach acknowledges and respects the defendant's wishes even though the trial judge could not "abdicate to the defendant the judicial duty to explore the issue once sufficient questions are raised."[60] Third, the court criticized *Frendak*'s "voluntary and intelligent decision" requirement as duplicative of the inquiry under *Whalem*:

> In a real sense, a defendant lacking mental responsibility cannot "voluntarily" waive the insanity defense. The "voluntariness" portion . . . thus inevitably turns to the strength of the possible insanity defense—and raises the matters covered in a *Whalem* inquiry. . . .
>
> Similarly, the proposed "intelligence" criterion introduces *Whalem* concerns because "intelligence" must involve more than evidence that a reasonable defendant would decline the defense. The stigma and risk of confinement associated with a successful insanity defense provide grounds for always finding opposition to the defense "intelligent" . . . . Thus the "intelligence" of the defendant's choice can be determined only by an inquiry into the *merits* of his choice—precisely the *Whalem* examination.[61]

But the court's dismissal of *Frendak* in *Wright* is ill-considered. First, even though neither *Alford* nor *Faretta* involved an insanity issue, both decisions were based upon the fundamental interest in personal freedom; the importance of this interest does not diminish merely because an insanity issue has arisen. Indeed, to dismiss the relevance of *Alford* and *Faretta* as de minimus blatantly discriminates against the mentally ill. Second, the court's supposed deference to the defendant's wishes is hollow: if the trial judge only defers when she agrees with the defendant, her "deference" is void of all real meaning. Third, the court's analysis of the "intelligent and voluntary decision" criteria of *Frendak* is specious. The *Frendak* approach does not duplicate the *Whalem* approach because the two inquiries focus on the defendant's condition at different times. Whether the defendant's decision to forego the defense is "voluntary" depends exclusively on his mental condition at the time of trial. The strength of the insanity defense, however, depends exclusively on the de-

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the Holy Spirit to commit a symbolic act, intended to warn people of God's impending judgment that the nation 'has deviated from his original designs.'" *Id.* at 1302. The defendant refused to rely on the insanity defense despite supportive psychiatric evaluations, believing it would compromise his religious beliefs. *Id.* at 1303-05. See *supra* note 37 for a discussion of Mr. Wright's involvement in a similar episode several years earlier.

59. 627 F.2d at 1310.

60. *Id.* at 1310-11.

61. *Id.* at 1311-12 (emphasis in original) (footnotes omitted).

fendant's mental condition at the time of the alleged offense.[62] Furthermore, the *Frendak* inquiry into "intelligence" should not involve a trial judge's determination of whether the defendant's decision is wise; rather, the inquiry should address only whether the decision is rational.[63]

B. Societal Interests and the *Whalem* View

1. Protecting the Morally Blameless

The primary justification advanced for the *Whalem* view is society's interest in protecting morally blameless individuals from criminal punishment.[64] Although this justification has superficial appeal, it is flawed in two fundamental respects. It assumes that the defendant's ability to raise the insanity defense himself is somehow insufficient protection against the danger of wrongful conviction, and it assumes a hospitalized insanity acquittee is not being "punished." As explained below, both assumptions are erroneous. First, a finding that the defendant is "competent" to stand trial assures he is sufficiently cognizant of the proceedings to invoke the defense if he wishes. Second, involuntary commitment to a psychiatric hospital is surely "punishment" because it goes against the defendant's wishes and has immense stigma attached.

a. The Danger of Wrongful Conviction

By the time the insanity issue arises, the trial judge typically has already held the defendant competent to stand trial. Of course, the insanity issue may not have been raised at all, in which case the trial will usually proceed on an unspoken assumption of competency.[65] However, in *Pate v. Robinson*,[66] the Supreme Court held that when a defendant fails to raise the incompetency issue, the trial judge must raise it sua sponte if "the evidence raises a 'bona fide doubt' as to a defendant's com-

62. *See* Comment, *The Right and Responsibility of a Court to Impose the Insanity Defense Over the Defendant's Objection*, 65 MINN. L. REV. 927, 936-37 (1981).

63. *See supra* notes 46-47 and accompanying text.

64. Whalem v. United States, 346 F.2d 812, 818 (D.C. Cir.) (en banc), *cert. denied*, 382 U.S. 862 (1965).

65. In all jurisdictions, a defendant is deemed incompetent to stand trial if mental illness renders him incapable of understanding the proceedings or assisting in his defense. Winick, *supra* note 3, at 923. The Supreme Court has held that a defendant is competent if "he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding . . . and . . . has a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402 (1960). Most states have codified the *Dusky* formulation of competency. *See* S. BRAKEL, *supra* note 2, at 695. Furthermore, conviction of a legally incompetent defendant violates due process. Drope v. Missouri, 420 U.S. 162 (1974); Porter v. Estelle, 709 F.2d 944, 949 (5th Cir. 1983); United States v. Voice, 627 F.2d 138 (8th Cir. 1980).

66. 383 U.S. 375 (1966).

petence to stand trial . . . ."[67] The rationale behind the *Pate* rule is obvious. If a defendant is indeed incompetent—if he has no rational or factual understanding of the proceedings[68]—clearly he cannot be expected to raise that very issue. The trial judge must raise it for him.

The *Pate* rule, however, has no bearing on the insanity defense. The question of insanity, in contrast to the question of competence, relates to the defendant's condition at the time of the alleged crime, not to his condition at the time of trial. A defendant who has been deemed competent to stand trial may have serious psychological problems, but by definition he has a "rational understanding" of the proceedings and is capable of assisting in his own defense.[69]

A defendant may be competent for some purposes, but not for others. For example, the Supreme Court has held that a defendant, although competent to stand trial, may still be incompetent to conduct his own defense.[70] This distinction is sensible. A marginally competent defendant cannot be expected to master the intricacies of trial procedure. But the complexities involved in actually trying a case differ greatly from making basic strategic decisions such as choosing a plea. Although the competency standard is not rigorous, it does require the defendant to have a fundamental appreciation of the general purpose and possible outcomes of the trial, sufficient to enable him to make broad strategic decisions about his defense.

The competency requirement stems from society's sense that it is simply wrong to subject an uncomprehending defendant to the rigors of criminal accusations and proceedings. But a competent criminal defendant by definition comprehends both the accusations and the proceedings.[71] Therefore, his ability to raise the insanity issue if he chooses is sufficient protection against wrongful conviction.

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67. *Id.* at 385.

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

69. *Id. See supra* note 65.

70. Westbrook v. Arizona, 384 U.S. 150 (1966). *See also* Massey v. Moore, 348 U.S. 105, 108 (1954) ("[O]ne might not be insane in the sense of being incapable of standing trial and yet lack the capacity to stand trial without benefit of counsel.").

Courts are divided on whether a finding that a defendant is competent to stand trial necessarily means that he is also competent to enter a guilty plea. In Sieling v. Eyman, 478 F.2d 211, 214 (9th Cir. 1973), the court held that a separate competency hearing is required to determine competency to plead guilty when "the question of a defendant's lack of mental capacity lurks in the background." *See also* United States v. Masthers, 539 F.2d 721 (D.C. Cir. 1976).

Other courts have rejected this dual inquiry and have held that the degree of competence necessary to plead guilty is the same as that necessary to stand trial. *See, e.g.,* Allard v. Helgemoe, 572 F.2d 1, 3 (1st Cir. 1978).

71. *Dusky*, 362 U.S. at 402. *See supra* note 65; *see also* Winick, *supra* note 3, at 923.

b. Punishment by Hospitalization

The insanity acquittee usually is subject to mandatory hospitalization.[72] This is true even if the particular jurisdiction requires a regular civil commitment proceeding prior to commitment.[73] But a defendant may find incarceration in a hospital more objectionable than incarceration in prison. As the court in *Frendak* observed: "[T]he defendant may object to the quality of treatment or the type of confinement to which he or she may be subject in an institution for the mentally ill. If in need of psychiatric care, the individual may prefer the prospect of receiving whatever treatment is available in the prison."[74] Therefore, the insanity acquittee is clearly being "punished" from his own perspective.

He is also being punished from society's perspective. Although the law distinguishes an insanity acquittee from an adjudicated felon or misdemeanant, the insanity acquittee is nonetheless found to have committed the *actus reus*,[75] and, generally, as having had the requisite *mens rea*.[76] The insanity defense alone does not contest the presence of the

72. *See* S. BRAKEL, *supra* note 2, at 725; S. RUBIN, THE LAW OF CRIMINAL CORRECTION 581 (2d ed. 1973).

73. S. BRAKEL, *supra* note 2, at 725. In the past, long term, perhaps even permanent, confinement typically followed an adjudication of "not guilty by reason of insanity." In recent years some liberalization has occured due to the availabilty of psychotropic medication. *Id.* Although the laws relating to the disposition of insanity defense acquittees are still in transition, the unfavorable public response to the proposed unsupervised Easter Holiday for John Hinckley in 1987 demonstrates a general reluctance by society to allow an early release of these individuals. *See* N.Y. Times, Apr. 14, 1987, at A-18, col. 3. Joseph E. diGenova, a United States Attorney in Washington D.C., when asked on the C.B.S. Network's television program, "Face the Nation," whether John Hinckley should ever be released, said, "I doubt it sincerely." Wash. Post, Apr. 20, 1987, at A-5, col. 1.

74. Frendak v. United States, 408 A.2d 364, 376 (D.C. 1979).

75. BLACK'S LAW DICTIONARY 34 (5th ed. 1979) defines "*actus reus*" as "[a] wrongful deed which renders the actor criminally liable if combined with *mens rea*; a guilty mind." *See* State v. Krol, 68 N.J. 236, 246, 344 A.2d 289, 295 (1975) ("[An insanity verdict] implies a finding that [the] defendant has committed the *actus reus* . . . .").

76. BLACK'S LAW DICTIONARY, *supra* note 75, at 889, defines "*mens rea*" as "[a] guilty mind; a guilty or wrongful purpose; a criminal intent."

Theoretically, the absence of *mens rea* should lead to a finding that no "crime" was even committed, and the defendant should be acquitted on that basis alone, separate and apart from his insanity defense. Some courts, however, seem to confuse the concepts of *mens rea* (criminal *intent*) and insanity (criminal *responsibility*). *See, e.g.*, State v. Krol, 68 N.J. at 246, 344 A.2d at 295 (citing State v. Carter, 64 N.J. 382, 401, 316 A.2d 449, 459 (1974)) (although a verdict of not guilty by reason of insanity "implies a finding that defendant has committed the *actus reus*, it also constitutes a finding that he did so *without a criminal state of mind.* There is, in effect, no crime to punish." (emphasis added)); *see also* State v. Stern, 40 N.J. Super. 291, 296, 123 A.2d 43, 45 (App. Div. 1956) ("[I]f the defendant was insane when the alleged crimes were committed, he is *just as innocent legally* as if they were perpetrated by some other person." (emphasis added)). This notion is questionable, however, as demonstrated by those jurisdictions that have abandoned the insanity defense entirely, while retaining the *mens rea*

actus reus and *mens rea;* instead it is typically raised as an affirmative defense or by special plea.[77] In jurisdictions permitting dual pleas of "not guilty" and "not guilty by reason of insanity," the prosecution has actually proved its case-in-chief before the insanity defense even comes into play.[78] In other jurisdictions, the defendant essentially admits the crime (*actus reus* and *mens rea*).[79] Nowhere is the insanity acquittee truly freed from moral blame. He is viewed as having committed the crime and as being insane; he is "twice cursed."[80] The hospitalized insanity acquittee is thus "punished" in two real ways: first, he is incarcerated under circumstances he may find more objectionable than prison; second, society still views him as having committed the crime, but as having "gotten off."[81]

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doctrine. *See infra* notes 82-94 and accompanying text; *see also supra* note 34, criticizing *Whalem*'s similar confusion of these concepts.

77. R. REISNER, LAW AND THE MENTAL HEALTH SYSTEM—CIVIL AND CRIMINAL ASPECTS 668 (1985); S. BRAKEL, *supra* note 2, Table 12.5, at 769-73. In some jurisdictions the defense is raised by providing written notice. *Id.*

78. *See* CAL. PENAL CODE § 1016 (West 1985); LA. CODE CRIM. PROC. ANN. art. 552 (West 1981); ME. REV. STAT. ANN. tit. 17-A, § 40(1) (Supp. 1986); *see also supra* note 6.

79. S. BRAKEL, *supra* note 2, at 719. *See supra* note 6 and accompanying text.

80. *Frendak*, 408 A.2d 364, 377 (D.C. 1979) (quoting United States *ex rel.* Schuster v. Herold, 410 F.2d 1071, 1073 (2d Cir. 1969), *cert. denied*, 396 U.S. 847 (1969), in turn quoting Morris, *The Confusion of Confinement Syndrome: An Analysis of the Confinement of Mentally Ill Criminals and Ex-Criminals by the Department of Correction of the State of New York*, 17 BUFFALO L. REV. 651, 651-52 (1968), relying upon an earlier commentator). *See* W. SHAKESPEARE, THE MERCHANT OF VENICE act IV, § 1, lines 182-185:

> The quality of mercy is not strain'd;
> It droppeth as the gentle rain from heaven
> Upon the place beneath. It is *twice blest*:
> It blesseth him that gives and him that takes.

(emphasis added); *see also* Matthews v. Hardy, 420 F.2d 607, 610-11 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1010 (1970).

81. The public view that an insanity acquittee has "gotten off" is demonstrated by the fact that, following John Hinckley's acquittal by reason of insanity for the attempted assassination of President Reagan in 1981, twenty-seven bills were introduced in Congress to abolish or redefine the insanity defense. S. BRAKEL, *supra* note 2, at 707 n.186.

The insanity defense also may be used to "punish" a particularly reprehensible defendant who stands accused of only a minor crime. The trial judge or the prosecutor may wish to ensure that he will be incarcerated for as long as possible. *See* Eizenstat, *Mental Competency to Stand Trial*, 4 HARV. C.R.-C.L. L. REV. 379, 384 (1968); Singer, *Insanity Acquittal in the Seventies: Observation and Empirical Analysis of One Jurisdiction*, 2 MENTAL DISABILITY L. REP. 406, 413-16 (1978); S. RUBIN, *supra* note 7, at 37-39. Furthermore, when presented with only two choices— conviction or acquittal—a jury with some suspicion that a defendant is guilty, but also with some residual "reasonable doubt," will likely follow its mandate to choose acquittal. But a jury with a third choice—not guilty by reason of insanity—may ignore its mandate and select the compromise. See Comment, *supra* note 62, at 945 & n.97, analogizing the "compromise" insanity verdict to a jury's guilty verdict on a lesser included offense in lieu of the more serious offense.

2. Legislative Abandonment of the Insanity Defense

Several jurisdictions have recently abandoned the insanity defense entirely.[82] In these jurisdictions, the *mens rea* doctrine prevents conviction of a truly mentally irresponsible defendant.[83] If the prosecution fails to prove the requisite mental state for a given offense, it fails to prove an essential element of the crime and the defendant is acquitted of that charge,[84] irrespective of whether he raises any defense.[85]

In *State v. Korell*,[86] the Montana Supreme Court upheld the constitutionality of a statute abolishing the defense.[87] Other recent attempts to abolish the defense have not been challenged. The United States Supreme Court has not ruled on whether the Constitution requires the availability of an insanity defense.

Three state supreme courts, however, have held prior legislative attempts to abolish the defense unconstitutional. In *State v. Strasburg*,[88] the Supreme Court of Washington struck down a statute on the ground that it relieved the prosecution of having to prove intent. The Supreme Court of Mississippi reached a similar result in *Sinclair v. State*.[89] And in *State v. Lange*,[90] the Supreme Court of Louisiana struck down a statute that bifurcated the guilt and insanity stages of trial and provided for a "lunacy commission" to make the final determination of a defendant's sanity.

At least two commentators have argued that these early decisions indicate the current attempts to abolish the insanity defense will also be held unconstitutional.[91] However, the current statutes do not abandon the concept of mental responsibility entirely, but substitute the *mens rea*

82. *See* IDAHO CODE § 18-207a (1986) ("Mental condition shall not be a defense to any charge of criminal conduct."); *see also* MONT. CODE ANN. §§ 46-14-102 to 46-14-103 (1985); UTAH CODE ANN. § 76-2-305(1) (1986). In Pouncey v. State, 297 Md. 264, 465 A.2d 475 (1983), the Supreme Court of Maryland, by judicial fiat, effectively abolished the insanity defense.

83. The Utah statute specifically preserves the *mens rea* doctrine with the following: "It is a defense to a prosecution . . . that the defendant, as a result of mental illness, lacked the mental state required as an element of the offense charged. Mental illness is not otherwise a defense." UTAH CODE ANN. § 76-2-305 (1986). *See also* MONT. CODE ANN. § 46-14-102 (1985).

84. Of course, the defendant may nevertheless be convicted of a different crime that requires a different mental state.

85. *See* R. REISNER, *supra* note 77, at 668.

86. 690 P.2d 992 (Mont. 1984).

87. *Id.* at 1002.

88. 60 Wash. 106, 110 P. 1020 (1910).

89. 161 Miss. 142, 132 So. 581 (1931) (per curiam).

90. 168 La. 958, 123 So. 639 (1929) (en banc).

91. Robitscher & Haynes, *In Defense of the Insanity Defense*, 31 EMORY L.J. 9, 56 (1982).

requirement. The statutes do not violate due process because the prosecution must still prove the requisite mental state as a substantive element of the crime, and the defense may introduce psychiatric evidence to rebut the prosecution's case.[92]

If legislative or judicial abrogation of the insanity defense does not violate due process, a trial judge's failure to interpose it sua sponte cannot. But even if the United States Supreme Court ultimately determines the insanity defense must be *available*, this still does not mean a trial judge must impose it on an unwilling defendant. The defendant still could waive his constitutional right to assert an insanity defense just as he may now waive his constitutional right against self incrimination[93] or his constitutional right to a jury trial.[94]

C. Individual Interests and the *Frendak* View

1. Pragmatic Reasons for Avoiding the Insanity Defense

The *Frendak* decision rested on the "underlying philosophy of *Alford* and *Faretta*."[95] As the court observed in *Frendak*:

> *Whalem* . . . laid substantially more emphasis on the strength of the evidence supporting an insanity defense than on the defendant's choice. In contrast, *Alford* and *Faretta* reason that respect for a defendant's freedom as a person mandates that he or she be permitted to make fundamental decisions about the course of the proceedings.[96]

The court found this reasoning persuasive and offered the following "reasons why defendants convicted of an offense may choose to accept the jury's verdict rather than raise a potentially successful insanity defense:"[97] (1) possibly longer confinement; (2) quality of treatment in a mental hospital; (3) stigma of insanity; (4) irrational fear of the mentally ill; (5) risk of future discrimination; (6) restriction of legal rights; (7) denigration of a political or religious protest; and (8) perception that an insanity defense is equivalent to an admission of guilt.[98]

But the court in *Frendak* ignored the fact that trial procedure in the *Whalem* jurisdiction eliminates many of these potential evils. First, the

92. *See generally* R. REISNER, *supra* note 77, at 685-90.

93. *See* Brown v. United States, 356 U.S. 148 (1958).

94. *See* Patton v. United States, 281 U.S. 276 (1930).

95. Frendak v. United States, 408 A.2d 364, 376 (D.C. 1979).

96. *Id.*

97. *Id.*

98. *Id.* at 376-78.

guilt and insanity stages of trial are bifurcated.[99] Bifurcation affords the defendant full and fair opportunity to contest his guilt and receive complete acquittal. Second, under *Lynch v. Overholser*,[100] a defendant who does not raise the insanity defense cannot be subjected to mandatory commitment; he can only be hospitalized pursuant to the standard civil commitment process.[101] He is thus afforded the full panoply of procedural protections afforded to any civil committee, thereby obviating any equal protection concerns.[102]

2. *The Fundamental Constitutional Right to Choose One's Own Defense to Criminal Prosecutions*

Despite the procedural protections afforded by the *Whalem* approach, the *Frendak* approach is still preferable, and, indeed, may be constitutionally required. The Constitution does not explicitly guarantee the right to select personally one's available defenses to criminal prosecution. However, the imposition of an unwanted defense contravenes the very nature of our criminal justice system. Even if the wresting of control from an accused does not violate due process per se,[103] it violates our basic notion of a fair trial. The enumerated rights of trial by jury, confrontation of witnesses, assistance of counsel, and the right against self-incrimination, as well as the vaguer notion of due process, are all simply accoutrements to the basic Anglo-American concept of a fair trial as it has developed over the centuries. The right to select personally one's defenses, though not an enumerated right, is central to this idea of a fair trial. Indeed, it is inherent in our constitutional framework of criminal jurisprudence.

Certainly, a primary objective in any criminal trial is to ascertain the truth—the guilt or innocence of the accused. But the search for truth, though primary, does not subordinate all other interests. The Constitution precludes several extremely effective truth-finding vehicles. For ex-

99. *See* United States v. Robertson, 430 F. Supp. 444 (D.D.C. 1977); *Frendak*, 408 A.2d at 366-67.

100. 369 U.S. 705 (1962). *See supra* notes 27-28.

101. 369 U.S. at 708.

102. The *Whalem* approach does not address, however, a defendant's wish to announce his crime as a political statement; nevertheless, if the conduct has been designated illegal because it violates public policy, this interest should never be recognized as legitimate. For a contrary view, however, see Resnick, *The Political Offender: Forensic Psychiatric Considerations*, 6 BULL OF AM. ACAD. OF PSYCH. & L. 388 (1978).

103. One court, however, has held that forcing any unwanted defense on a criminal defendant violates due process. Tremblay v. Overholser, 199 F. Supp. 569 (D.D.C. 1961).

ample, the fourth amendment search and seizure restrictions[104] and the fifth amendment self-incrimination restrictions[105] clearly inhibit the immediate truth-seeking function of the trial by suppressing illegally obtained evidence, but they further more fundamental goals. These constitutional restrictions, of course, are *protections*. Even if they conceal truth, they cannot backfire upon the accused;[106] they may prevent conviction of a guilty defendant, but they will not cause conviction of an innocent defendant.[107]

Punishment of an innocent defendant is also contrary to our concept of criminal justice. The failure of a trial judge to impose an insanity defense, unlike the fourth and fifth amendment protections, conceivably could result in the conviction of an "innocent" defendant—one who has committed the crime, but who is ostensibly morally blameless. But even though the defendant may thus avoid conviction, *he does not avoid punishment.* He is typically incarcerated in a hospital and is always stigmatized, both by the mark of insanity and by the mark of criminality.[108] Therefore, the larger interest in an individual's autonomy and freedom of choice must take precedence over the purported interest in refusing to punish the mentally ill.

In *Faretta v. California*,[109] the Supreme Court held that the sixth amendment right to the assistance of counsel also guarantees "the right to self-representation—to make one's own defense personally . . . ."[110] The Sixth Amendment does not explicitly provide for this guarantee. Rather, "when naturally read," the Amendment "implies a right of self-representation."[111] As the Court observed in *Faretta*, "[a]n unwanted counsel represents the defendant only through a tenuous and unaccept-

104. *See* Weeks v. United States, 232 U.S. 383 (1914) (establishing the exclusionary rule); Mapp v. Ohio, 367 U.S. 643 (1961) (holding the exclusionary rule applies to the states via the Fourteenth Amendment).

105. *See* Malloy v. Hogan, 378 U.S. 1 (1964) (holding the fifth amendment privilege against self-incrimination applies to the states via the Fourteenth Amendment).

106. *See* Griffin v. California, 380 U.S. 609 (1965) (holding that the prosecutor cannot comment upon the defendant's refusal to take the witness stand); *see also* Carter v. Kentucky, 450 U.S. 333 (1987) (requiring the trial court to instruct the jury, upon request by a defendant who has declined to testify, that it must disregard the defendant's silence).

107. As a practical matter, a jury is free to speculate about a defendant's failure to testify on his own behalf despite the trial judge's instruction to the contrary. *See* Lakeside v. Oregon, 435 U.S. 333 (1978) (holding that the court's instruction to the jury not to make inferences concerning the defendant's silence is permissible even when given over the defendant's objection).

108. *See supra* note 80 and accompanying text.

109. 422 U.S. 806 (1975).

110. *Id.* at 819.

111. *Id.* at 821.

able legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not *his* defense."[112]

This language applies even more forcibly to the right to choose one's own defenses. Contrary to the *Frendak* court's conclusion that *Faretta* was "limited to recognizing a Sixth Amendment right to appear *pro se*,"[113] it is clear that *Faretta* should not be so limited; its reasoning is much broader than its precise holding. "Unwanted counsel" may or may not pursue unflaggingly the defenses chosen by the defendant. Yet *Faretta* holds that imposition of unwanted counsel necessarily means that the defense presented is not the defense guaranteed by the Constitution because "it is not *his* [the defendant's] defense."[114] *A fortiori*, then, imposition of the unwanted defense itself, as opposed to imposition of its mere advocate, is not the defense guaranteed by the Constitution, because, even more surely, "it is not *his* defense." Indeed, the defendant has specifically rejected it.

Although the right to select personally one's defenses to criminal prosecution is not specifically protected by any single, enumerated constitutional guarantees such as the sixth amendment right to counsel as interpreted in *Faretta*, it is nevertheless a fundamental right, implied in the *schema* of the Bill of Rights.

The Supreme Court has indicated a willingness to recognize implied fundamental rights, despite their omission from the enumerated rights. In *Griswold v. Connecticut*,[115] for example, the Court held that a statute forbidding the use of contraceptives by married persons violated the right of marital privacy.[116] The Constitution does not superficially mention this right, but seven members of the Court recognized it as a right worthy of constitutional protection.[117] The seven justices, however, wrote

112. *Id.* (emphasis in original).

113. Frendak v. United States, 408 A.2d 364, 376 (D.C. 1979).

114. *Faretta*, 422 U.S. at 821 (emphasis in original).

115. 381 U.S. 479 (1965). For an in depth analysis of *Griswold* by various commentators of the day, see *Comments on the Griswold Case*, 64 MICH. L. REV. 197 (1965).

116. *Griswold*, 381 U.S. at 481-86. In *Griswold*, a Connecticut statute prohibited the use of contraceptive drugs and devices. The Executive Director and Medical Director of the Planned Parenthood League of Connecticut were convicted under this statute for furnishing birth control information and instruction to married couples. *Id.* at 480. As a threshold matter, the Court held that the defendants had standing to assert the constitutional rights of married couples with whom they had a professional relationship. *Id.* at 481.

117. The right to use birth control has since been extended to single individuals as well as married couples. *See* Eisenstadt v. Baird, 405 U.S. 438 (1972). Indeed, it is clear that *Griswold* applies far beyond the "sacred precincts of marital bedrooms." *See* Justice Douglas' opinion for the Court in *Griswold*, 381 U.S. at 485. The rationale of *Griswold* gradually has been extended such "that the Constitution protects individual decisions in matters of childbearing

four separate opinions and two dissenting justices each wrote an opinion, all of which indicate the widely divergent views on the precise theoretical underpinnings for the Court's decision.

Justice Douglas wrote the opinion for the Court,[118] in which he announced his belief "that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[119] He found that "[v]arious guarantees create zones of privacy,"[120] and that the right of marital privacy fell within one of these privacy zones, a "penumbra" emanating from other specific constitutional guarantees such as the freedom of expression and the right to be free of unreasonable searches and seizures.[121]

Justice Goldberg, however, believed that the concept of "liberty," embodied in the Due Process Clause, "protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights."[122] While he did not explicitly reject Justice Douglas's "penumbra" theory, Justice Goldberg chose to rely primarily on the Ninth Amendment.[123] He expressly disavowed, however, that the Ninth Amendment could constitute "an independent source of rights protected from infringement."[124] Rather, he simply found it lent strong support to his view that the "liberty" protected by the Due Process Clause was not restricted to those rights enumerated in the first eight amendments.[125] Justice Goldberg explained that a holding that the fundamental right of marital privacy was not protected simply because it was not specifically

from unjustified intrusion by the State." Carey v. Population Svcs. Int'l, 431 U.S. 678, 687 (1977). *See* Roe v. Wade, 410 U.S. 113 (1973) (holding that a criminal abortion law violated the right to an abortion during the first trimester of pregnancy); Doe v. Bolton, 410 U.S. 179 (1973), *reh'g denied*, 410 U.S. 959 (1973) (holding that state-mandated medical procedures for abortions violated the right to an abortion); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976) (holding that spousal and parental consent requirements for first trimester abortions violated the right to an abortion).

118. Justice Douglas' opinion represented the views of a five-member majority. Joining him in the Court's opinion were Justice Clark, who did not write separately, Justice Goldberg, Chief Justice Warren, and Justice Brennan. Justice Goldberg, however, also wrote a concurring opinion in which he set forth a different rationale for the decision. Nevertheless, the concurring justices expressly joined in the Court's judgment *and the opinion* written by Justice Douglas. 381 U.S. at 486 (Goldberg, J., concurring).

119. *Id.* at 484.

120. *Id.*

121. *Id.* at 484-85.

122. *Id.* at 486 (Goldberg, J., concurring).

123. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

124. 381 U.S. at 492 (Goldberg, J., concurring).

125. *Id.*

enumerated would render the Ninth Amendment meaningless.[126]

Justice Harlan concurred in the judgment,[127] stating that "the proper constitutional inquiry is whether [the] statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values 'implicit in the concept of ordered liberty.' "[128] Justice White also concurred, relying on the Due Process Clause.[129]

It seems that Justices Douglas, Goldberg, Harlan, and White based their opinions on essentially the same concept, although each differed as to its precise origin. They all maintained that certain rights are "fundamental" and worthy of constitutional protection even though they are not specifically enumerated by the Constitution.[130]

The analyses used by the various justices in *Griswold* can be combined to recognize a right to choose personally one's defenses to criminal prosecution. Although the right is not explicitly mentioned in the Constitution, it too is a fundamental and inherent right worthy of constitutional protection. It may be recognized via the "liberty" concept of the Due Process Clause, buttressed by the Ninth Amendment and even by an extrapolation from the more metaphysical notions of Justice Douglas—the penumbral emanations from the sixth amendment's right to counsel

126. *Id.* at 491 (Goldberg, J., concurring).

127. *Id.* at 499 (Harlan, J., concurring).

128. *Id.* at 500 (Harlan, J., concurring) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

129. *Id.* at 502 (White, J., concurring).

130. Justice Douglas believed in a penumbral zone of privacy created by "fundamental constitutional guarantees." *Id.* at 485. Only Justice Goldberg specifically referred to "fundamental" rights as such. *Id.* at 486 (Goldberg, J., concurring). Justice Harlan referred to "basic values 'implicit in the concept of ordered liberty.' " *Id.* at 500 (Harlan, J., concurring) (quoting *Palko*, 302 U.S. at 325). Justice White referred to "basic civil rights of man." *Id.* at 502 (White, J., concurring) (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).

Perhaps Justice Douglas eschewed using the Due Process Clause as a theoretical underpinning because he feared the specter of Lochner v. New York, 198 U.S. 45 (1905). *Lochner* typified the heyday of economic substantive due process, later discredited by the Court in decisions such as West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (upholding state minimum wage standards) and United States v. Carolene Products Co., 304 U.S. 144 (1938) (upholding federal regulation of milk products). In *Griswold*, Justice Douglas expressly declined to let *Lochner* be his guide. 381 U.S. at 481. However, it is important to remember that the Court never completely abandoned substantive due process in a non-economic context. Meyer v. Nebraska, 262 U.S. 390 (1923) (protecting the right to study German), and Pierce v. Society of Sisters, 268 U.S. 510 (1925) (protecting the right of parents to send their children to private schools), were never disapproved. Indeed, Justice Douglas relied on these cases in *Griswold*. Similarly, in Aptheker v. Secretary of State, 378 U.S. 500 (1964), the Court struck down a law that essentially denied passports to members of the Communist Party. The Court held that the right to travel abroad was a personal liberty implicit in the concept of due process. Therefore, *personal* substantive due process rights are readily distinguishable from *economic* substantive due process rights, and only the latter present any real difficulty for the Court.

as interpreted in *Faretta*. But, however theorized, the right is implicit in our concept of criminal justice as protected generally by the Bill of Rights. To ignore the right merely because it is not explicitly protected would be to ignore the spirit and purpose of the remaining express rights.

Conclusion

Although society has a legitimate interest in refusing to subject to criminal punishment those whom it considers morally blameless by virtue of their mental illness, that interest is not of constitutional dimension. In contrast, a competent defendant has a substantial interest and fundamental right to conduct his defense as he deems most appropriate. Though not explicit in the Bill of Rights, the right to choose one's manner of defense is implicit in our Anglo-American concept of criminal justice. Accordingly, a trial judge should not substitute her judgment for the judgment of a competent defendant on this basic trial decision unless the defendant's competence is so marginal that his decisions cannot be considered voluntary and intelligent. The defendant has the ultimate right to make those decisions, even if they are foolish or disastrous, and they should not be forced upon him, even in his supposed best interest.