

**Report to the Executive Committee
of the
New York State Bar Association
on the Use and Efficacy of
Penal Law § 40.15 and Criminal Procedure Law § 330.20
and Recommendation to Establish a
Mental Health Task Force or Committee**

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“You have to be crazy to plead insanity.”

—*Charles P. Ewing, SUNY Distinguished Service Professor,
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Overview and Recommendation

This report will first undertake a brief historical overview of the “insanity defense”¹ in New York, highlighting how much it remains a child of *M’Naghten’s Case*. It will then explore how the insanity defense is used and the effects of its invocation, including the ever-more-restrictive post-acquittal confinement apparatus. Lastly, it will discuss the need for deeper inquiry into this and other questions related to mental health that affect society in general and the bar in particular. Such inquiry requires resources beyond the scope of the Committee on Mandated Representation and, to the knowledge of the authors of this report, any existing committee or section. Thus, this report ultimately recommends that the Executive Committee establish a permanent committee or task force to examine and recommend necessary action on the insanity defense and other issues related to mental health and the law.

M’Naghten’s Legacy in New York

New York’s “insanity defense” has its roots in ancient common law.² As in nearly every state, New York’s statutory provisions applicable to criminal defendants who lack criminal culpability due to a mental illness stem directly from the English common law *M’Naghten’s Case*. In that case, a woodturner who suffered from delusions of political persecution was acquitted of the murder of a civil servant and committed to a mental

1 The authors of this report use the term “insanity defense” with some discomfort. Although the term is obsolete and stigmatizing, it is the term most commonly used in both caselaw and research.

2 See *People v. Kohl*, 72 N.Y.2d 191, 203, 532 N.Y.S.2d 45 (1988) (Hancock, Jr., dissenting); Michael Perlin, *The Jurisprudence of the Insanity Defense* (1994).

institution.³ In 1843, following public outcry at the acquittal and inquiry from the House of Lords, the Court of Common Pleas announced the rule that criminal liability could be excused only if the accused “clearly proved that, at the time of committing the act, the accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong.”⁴

When the rule was imported to New York, the courts placed on the prosecution the burden of proving beyond a reasonable doubt that the defendant was not insane.⁵ The difficulty of carrying this burden was eased by a presumption of sanity that required the defendant to introduce substantial evidence of his insanity.⁶ Burden aside, in 1915, 70 years after *M’Naghten*, the rule remained essentially unchanged in form: “a person is not excused from criminal liability as an idiot, imbecile, lunatic or insane person, except upon proof that, at the time of committing the alleged criminal act, he was laboring under such a defect of reason as: (1) not to know the nature and quality of the act he was doing; or (2) not to know that the act was wrong.”⁷ Judge Cardozo expanded the breadth of the defense when he interpreted not knowing the act was wrong as referring to knowledge of both the act’s illegality and immorality.⁸

3 8 Eng. Rep 718 (1843).

4 *People v. Schmidt*, 216 N.Y. 324, 332-33 (1913).

5 *Kohl*, 72 N.Y.2d at 202-03 (“Our earliest statute on the subject declared that ‘[n]o act done by a person in a state of insanity can be punished as an offence’ (Rev Stat of 1828, part IV, ch 1, tit 7, § 2).” The dissenting opinion provides a further history of the prosecution’s burden in these matters.

6 *People v. Silver*, 33 N.Y.2d 475, 482, 354 N.Y.S.2d 915 (1974), defined substantial evidence as “the degree of proof required to rebut ‘most, but not all’ presumptions recognized in this State (Richardson, Evidence [10th ed.], § 58, p. 37).”

7 *People v. Schmidt*, 216 N.Y. 324, 329 (1915) (citing Penal Law § 1120).

8 *Id.* at 333-34. Cases that followed *Schmidt* further specified that an appreciation of moral wrongfulness refers to the standards of the community, as opposed to one’s own moral structure. See *People v. Wood*, 12 N.Y.2d 69, 236 N.Y.S.2d 44 (1962).

By 1964, the harshness of New York's strict adherence to *M'Naghten* led to legislative reform.⁹ The Legislature enacted Penal Law § 30.05,¹⁰ which provided: "A person is not criminally responsible for his conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity to know or appreciate either: (a) The nature and consequences of such conduct; or (b) That such conduct was wrong." The revision ameliorated the strict *M'Naghten* rule in that a defendant's lack of capacity to know or appreciate was not required to be total, but substantial.¹¹ It also changed "nature and quality" to "nature and consequences." The Legislature declined, however, to accept in full the recommendation of the Temporary Commission on Revision of the Penal Law and Criminal Code, which followed the Model Penal Code in providing that the defense applies to one who, due to a mental disease or defect, lacked substantial capacity "to conform his conduct to the requirements of law."¹²

By 1970, the Court of Appeals had restricted the defense by approving of a jury instruction that explained that to be held criminally responsible, "the defendant must have realized that the act was against the law and against the commonly accepted standards of morality."¹³ Thus, regardless of how pervasive a delusion, so long as a defendant

9 Note, Legislative Changes in New York Criminal Insanity Statutes, 40 St. John's L. Rev. 75, 80-81 (1965).

10 L. 1965, ch. 593, § 1.

11 Note, Legislative Changes in New York Criminal Insanity Statutes, 40 St. John's L. Rev. 75, 78-81 (1965).

12 *Id.* at 81. Under the Model Penal Code, a defendant is not guilty if a mental illness renders him unable to conform his conduct to the law. MPC § 4.01. The Model Penal Code has been adopted by a majority of states. See Henry Fradella, *From Insanity to Beyond Diminished Capacity: Mental Illness and Criminal Excuse in the Post-Clark Era*, 18 U. Fla. J.L. & Pub. Pol'y 7 (2007).

13 *People v. Adams*, 26 N.Y.2d 129, 135-36, 309 N.Y.S.2d 145 (1970).

understood that conduct was illegal and generally considered immoral, the insanity defense would fail as a matter of law.¹⁴

In 1984, following the attempted assassination of Ronald Reagan and the public furor at his would-be assassin John Hinckley's insanity acquittal,¹⁵ the federal government and multiple states, including New York, tightened insanity statutes.¹⁶ The New York Legislature did so by repealing Penal Law § 30.05 and replacing it with Penal Law § 40.15, thereby shifting the burden to the defendant, making insanity an affirmative defense to be proved by a preponderance of the evidence. The statements of agencies and stakeholders contained within the bill jacket for Penal Law § 40.15 overwhelmingly

14 The Pattern Jury Instructions describe lack of substantial capacity to know or appreciate that conduct is wrong as "either that the conduct was against the law or that it was against commonly held moral principles, or both." CJI2d[NY] Defenses: Insanity. Lack of substantial capacity to know or appreciate the wrongfulness of an act need not be so restricted. Arguably, a defendant acting on beliefs caused by mental illness may lack substantial capacity to appreciate the wrongfulness of an act despite being able to articulate that it is both illegal and against commonly accepted moral principles. For instance, a person who believes that he is being persecuted by the government and that nearly everyone he meets is either a dupe or conspirator may be able to articulate that an act he believes will stop the persecution is both illegal and contradictory to commonly accepted moral values. Yet, that person may nevertheless lack substantial capacity to appreciate the wrongfulness of his conduct because his delusions make commonly accepted moral values appear to him to be the products of wickedness, corruption, and conspiracy. A restrictive definition of substantial capacity to appreciate that an act is wrong also ignores the magical thinking attendant to some delusions, i.e., that everything will be fixed after the fact.

15 According to an ABC news poll taken the day after the verdict, 83% of Americans believed "justice was not done." Douglas O. Linder, *The Trial of John W. Hinckley, Jr.*, <http://www.famous-trials.com/johnhinckley/537-home> (last visited July 6, 2018).

16 *Id.* (The House and Senate began hearings regarding shifting the burden of the insanity defense within one month of the Hinckley verdict. Within three years, two-thirds of the states shifted the burden to the defense to prove insanity, eight states adopted the verdict of "guilty but mentally ill," and Utah abolished the insanity defense). See also Joe Palazzolo, *John Hinckley Case Led to Vast Narrowing of Insanity Defense*, WALL ST. J., July 27, 2016, <https://www.wsj.com/articles/john-hinckley-case-led-to-vast-narrowing-of-insanity-defense-1469663770>. (Following the Hinckley verdict, Kansas, Idaho, and Nevada also abolished the insanity defense, although Nevada later reinstated it.)

supported the change.¹⁷ Most echoed the arguments offered by the Governor’s statement in support: that insanity acquittals had risen in the decade prior and that placement of the burden of disproving insanity on the prosecution favored the defendant too heavily, thus creating a risk that defendants would “get away with murder.” Governor Mario Cuomo’s Criminal Justice Coordinator argued: “It makes the law fairer. You’ll no longer be able to hide behind this defense.”¹⁸

Whether the new law was fairer was a matter of debate at the State’s highest court. In *People v. Kohl*, the Court of Appeals upheld Penal Law § 40.15’s shifting to the defendant of the burden of proving insanity.¹⁹ Judge Stewart F. Hancock, Jr. dissented, arguing that the Court had abandoned fundamental and ancient principles of criminal responsibility: “the majority holds that legal sanity is not an essential element of the crime of murder, that sanity and murder may be defined as the Legislature chooses, and that mere ‘conscious objective’—without regard to the capacity to appreciate that one’s conduct is wrong—is all the mental culpability necessary to constitute the crime of murder.”²⁰

The statute has not been amended since 1984 and *Kohl* remains good law. Two cases, one from 1994 and one from 2018, illustrate the insanity defense’s continued narrowness in practice.

17 See, e.g., Memorandum from Linda J. Valenti, NYS Division of Probation General Counsel, to Gerald C. Crotty, Counsel to the Governor, et al. (June 25, 1984); Letter from Paul Litwak, N.Y.S. Office of Mental Health, to Gerald C. Crotty, Counsel to the Governor (June 21, 1984); Memorandum from Jay M. Cohen, N.Y.S. Division of Criminal Justice Services to Matthew T. Crosson (June 19, 1984) (included in N.Y. Laws 1984, ch. 668 legislative bill jacket).

18 Edward A. Gargan, *Limit on Insanity Defense Is Approved in Albany*, N.Y. TIMES, June 13, 1984, <http://www.nytimes.com/1984/06/13/nyregion/limit-on-insanity-defense-is-approved-in-albany.html>; cf. *People v. Kohl*, 72 N.Y.2d 191, 196, 532 N.Y.S.2d 45 (1988).

19 72 N.Y.2d 191, 197-98 (1988).

20 *Id.* at 200-01.

In 1994, brandishing a rifle, Ralph Tortorici took a classroom full of University of Albany students hostage. “He claimed that he was the victim of an experiment in which a microchip was implanted in his brain, and [he] wanted to expose the people responsible for victimizing him.”²¹ One of the student hostages, Jason McEnaney, charged Tortorici and managed to wrestle the rifle away from him, allowing other students to pin him to the ground. During the struggle, Tortorici shot and wounded McEnaney.²² Tortorici was indicted on 15 counts, including attempted murder, kidnapping, and first degree assault.

Once the trial began, Tortorici declined to attend, instead remaining in his holding cell.²³ The People did not present any psychiatric evidence, while the defense presented four psychiatric experts, all of whom agreed that Tortorici did not understand the nature and consequences of his conduct.²⁴ The jury, deliberating for an hour, convicted Tortorici of multiple felonies, including kidnapping and assault, but acquitted him of attempted murder. The court sentenced Tortorici to an aggregate term of 15½ to 40 years’ imprisonment.²⁵ The Appellate Division and Court of Appeals affirmed the verdict.²⁶

²¹ *People v. Tortorici*, 92 N.Y.2d 757, 759, 686 N.Y.S.2d 346 (1999).

²² Jacques Steinberg, *He Disarmed a Gunman But Insists He’s No Hero*, N.Y. TIMES, Dec. 28, 1994, <https://www.nytimes.com/1994/12/28/nyregion/he-disarmed-a-gunman-but-insists-he-s-no-hero.html>.
But see Paul Grondahl, *20 years after Ralph Tortorici took class hostage at UAlbany*, TIMES UNION, Dec. 17, 2014, <https://www.timesunion.com/local/article/Recalling-three-hours-of-terror-in-Lecture-Center-5961566.php> (according to this account, McEnaney grabbed and held onto the barrel of Tortorici’s gun, and another student, Jason Alexander, was the first to tackle Tortorici).

²³ *Tortorici*, 92 N.Y.2d at 762.

²⁴ A Crime of Insanity, *The Defense’s Summation*, FRONTLINE, <https://www.pbs.org/wgbh/pages/frontline/shows/crime/ralph/dsummation.html> (last visited July 6, 2018) (excerpts from the defense summation including discussion of Tortorici’s medical history and medical expert testimony).

²⁵ *Tortorici*, 249 A.D.2d 588, 589, 671 N.Y.S.2d 162 (3d Dep’t 1998), *aff’d*, 92 N.Y.2d 757, 686 N.Y.S.2d 346 (1999), *cert. denied*, 528 U.S. 834 (1999).

²⁶ *Id.*

Despite receiving Office of Mental Health services while in custody, Tortorici hanged himself in his cell in 1999.²⁷

A juror explained why they had rejected Tortorici's insanity defense: "if he had just grabbed a gun and run into a McDonald's, it would have been a different situation. We would have looked at it differently. The fact that [there] was so much planning weighed heavily on us."²⁸ The juror's interpretation of the insanity defense is consonant with the Pattern Jury Instructions for Penal Law § 40.15, which describe a lack of substantial capacity to know the nature and consequences of an act or that it was wrong in terms of children who "sometimes recite things that they cannot understand."²⁹ Although people with mental illnesses were once thought of as insensible wild animals or infants,³⁰ we have long known that even where a mental illness impairs reasoning in some areas

27 Press Release, N.Y.S. Dep't of Corr. Servs. Inmate Tortorici hangs self in prison cell (Aug. 10, 1999), <http://www.doccs.ny.gov/PressRel/1999/torthang.html>.

28 A Case of Insanity, *Interview: Norm LaMarche*, FRONTLINE, <https://www.pbs.org/wgbh/pages/frontline/shows/crime/interviews/lamarche.html> (last visited July 6, 2018); see also James C. McKinley Jr. & Jan Ransom, *Manhattan Nanny Is Convicted in Murders of Two Children*, N.Y. TIMES, April 18, 2018, <https://www.nytimes.com/2018/04/18/nyregion/nanny-trial-verdict.html> ("The prosecutors . . . also focused on evidence suggesting that Ms. Ortega had planned the murders.").

29 "Children can sometimes recite things that they cannot understand. In those circumstances, the children may be said to have surface knowledge of what they recited, but no true understanding. Thus, a lack of substantial capacity to know or appreciate either the nature and consequences of the prohibited conduct, or that such conduct was wrong, means a lack of substantial capacity to have some true understanding beyond surface knowledge. . . ." CJI2d[NY] Defenses: Insanity.

30 For a discussion of the origins of the idea of people with mental illness as wild animals or children, see Anthony M. Platt, *The Origins and Development of the "Wild Beast" Concept of Mental Illness and Its Relation to Theories of Criminal Responsibility*, Vol. 1, ISSUES IN CRIMINOLOGY, No.1, Criminal Responsibility (Fall 1965) at 1.

(i.e., so that a person believes that taking a college class hostage will stop the government from experimenting on him), it does not often destroy all rational thought.³¹

In 2013, Lakime Spratley, seemingly at random and without planning or provocation, shot a woman in a grocery store, killing her.³² The evidence at trial indicated that he suffered from schizoaffective disorder, heard voices, and suffered from delusions of persecution. In a police interview he offered as a partial explanation that he believed the victim had stolen his clothes and was wearing his shorts, and that she had made trigger gestures at him.³³ A jury convicted him of murder in the second degree and criminal possession of a weapon in the second degree. The Appellate Division, Second Department, reversed the verdict, explaining that “the rational inferences which can be drawn from the evidence presented at trial do not support the conviction,” finding as a matter of law that the defendant had established that he lacked substantial capacity to know or appreciate that his conduct was wrong.³⁴ One justice dissented.

More than 80 years before Tortorici’s conviction, and 100 years before Spratley’s, Judge Cardozo posited that a mother who, at what she believes to be God’s command, murders her child, is not guilty by reason of insanity.³⁵ To Cardozo, it would be a

31 See *People v. Jackson*, 60 A.D.3d 599, 877 N.Y.S.2d 244 (1st Dep’t 2009) (“Although two psychiatric examiners opined that defendant was not competent because he insisted on pursuing a defense of posthypnotic suggestion derived from his delusions, the ultimate determination of whether a defendant is an incapacitated person is a judicial, not a medical, one... Defendant expressed a rational understanding of the judicial proceedings, the charges against him, the choices available to him, and the consequences of his decision to pursue a hypnosis defense rather than an insanity defense.”) (citations omitted). For an examination of the decision making abilities of those diagnosed with mental illness as compared to those without, see Paul Appelbaum & Thomas Grisso, *The MacArthur Treatment Competence Study*, MACARTHUR RESEARCH NETWORK ON MENTAL HEALTH AND THE LAW (May 2004), <http://www.macarthur.virginia.edu/treatment.html> (last visited July 9, 2018).

32 *People v. Spratley*, 159 A.D.3d 725, 71 N.Y.S.3d 582 (2d Dep’t 2018).

33 *Id.*

34 *Id.* at 731.

35 *People v. Schmidt*, 216 N.Y. 324 (1915).

“mockery” and “abhorrent” to hold that she knew what she did was wrong, even if she did understand it to be illegal, because she could not comprehend its moral repugnance. Tortorici, like Judge Cardozo’s hypothetical mother and even *M’Naghten* himself, committed his crimes while under the influence of delusions that appear to have compromised his moral judgment.³⁶ He believed that government agents were following him by means of a microchip implanted in his body³⁷ and that holding the class hostage would alleviate the persecution.³⁸ It strains credulity to argue that he possessed substantial capacity to understand the nature and consequences of his conduct or that his conduct was wrong.³⁹ His reasoning and apparent motivations were so irrational as to appear comparable to a child’s magical thinking. For his part, Spratley appears to have not even possessed the understanding of a child at the time he committed the crime—he did not know what he was doing. Yet, both were convicted, and the Appellate Division’s reversal of Spratley’s conviction was not unanimous.

These cases highlight the narrowness of New York’s ostensibly evolved *M’Naghten* rule. Cardozo’s distinction between knowledge of legal right and wrong and moral right and wrong is illusory. For the defense to succeed, the defendant must have been insensible to the point that the line between lack of mens rea and the insanity defense disappears. But mental illness is not all or nothing; one need not conform to the

36 *People v. Tortorici*, 92 N.Y.2d 757, 696 N.Y.S.2d 346 (1999) (Smith, J., dissenting). Tortorici’s delusions bear more than a passing resemblance to *M’Naghten*’s delusions.

37 *Tortorici*, 92 N.Y.2d at 771.

38 *Id.* at 759.

39 *Id.* at 771; Vincent Bonventre, *Editor's Foreword, State Constitutional Commentary*, 68 Alb. L. Rev. 2 (2005) (referring to Tortorici’s conviction as “highly questionable”).

medieval notion of lunacy by howling at the moon to lack—or have diminished—criminal culpability.⁴⁰

In response to an inquiry sent by the Committee on Mandated Representation’s Mental Health Subcommittee to chief defenders, 18 of 19 respondents endorsed the belief that Penal Law § 40.15 is insufficient to ensure justice for criminal defendants who lack criminal culpability due to mental disease or defect. In addition, multiple respondents questioned the all-or-nothing nature of the defense, noting that culpability, ability to appreciate the nature of one’s conduct, and the ability to tell right from wrong are more appropriately viewed as matters of degree. Unfortunately, while societal and medical understanding of mental illness has evolved, the insanity defense has stood still.

The Insanity Defense in Practice

The comments in support of the enactment of Penal Law § 40.15 in 1984 would suggest that the insanity defense was being routinely abused.⁴¹ In the eyes of the public and legislators, it presented an unacceptable opportunity for murderers to walk free by faking a mental illness. Attorneys and the public alike “believe that the defense is invoked frequently and principally in cases involving murder.”⁴² Yet social science research suggests that the insanity defense may only be invoked in one percent of felony

40 *Rivers v. Katz*, 67 N.Y.2d 485, 494, 504 N.Y.S.2d 74 (1986) (regarding mentally ill patients’ ability to make decisions regarding their own care, “neither the fact that appellants are mentally ill nor that they have been involuntarily committed, without more, constitutes a sufficient basis to conclude that they lack the mental capacity to comprehend the consequences of their decision to refuse medication that poses a significant risk to their physical well-being”).

41 *E.g.*, Letter from Paul Litwak, N.Y.S. Office of Mental Health, to Gerald Crotty, Counsel to the Governor (June 21, 2018); Memorandum from Jay M. Cohen, N.Y.S. Division of Criminal Justice Services, to Matthew T. Crosson (June 19, 1984); Memorandum in Support, From Robert B. Tierney, City of New York Office of the Mayor (included in N.Y. Laws 1984, ch. 668 legislative bill jacket).

42 Bonita M. Veysey, Gender Role Incongruence and the Adjudication of Criminal Responsibility, 78 *Alb. L. Rev.* 1087, 1088 (2014-2015) (citing Eric Silver et al., *Demythologizing Inaccurate Perceptions of the Insanity Defense*, 18 *Law & Hum. Behav.* 63 (1994)).

cases, and that, when invoked, it is rarely successful.⁴³ While research varies widely, some studies conclude that the defense succeeds in only one out of four cases, while others have found a success rate as low as one in 1,000.⁴⁴ New York State does not track how often the defense is invoked, but the Department of Criminal Justice Statistics reports that over the five-year period from 2013-2017, only 11 defendants, out of 19,041 felony and misdemeanor trials statewide, were found not responsible by reason of mental disease or defect after a trial. During the same five-year period, 241 defendants entered a plea of not responsible, compared to 1,375,096 convictions for felonies and misdemeanors.⁴⁵ According to the Office of Mental Health, as of June 30, 2018, 260 insanity acquittees were in secure confinement and 452 were in the community subject to orders of conditions. Meanwhile, as of 2016, approximately 20 percent of sentence-serving inmates in New York State correctional facilities carried mental health diagnoses that required Office of Mental Health services.⁴⁶ In other words, based on a reported total

43 Lisa A. Callahan et al., *The Volume and Characteristics of Insanity Defense Pleas: An Eight-State Study*, 19 *Bull. Am. Acad. Psychiatry & L.* 331, 334-35 (1991); Jeffrey S. Janofsky, MD, et al., *Defendants Pleading Insanity: An Analysis of Outcome*, 19 *Bull. Am. Acad. Psychiatry & L.* 203, 205-07 (1989).

44 Henry F. Fradella, *From Insanity to Beyond Diminished Capacity: Mental Illness and Criminal Excuse in the Post-Clark Era*, 18 *U. Fla. J.L. & Pub. Pol'y* 7, 11-12 (2007) (citing a success rate of under 25 percent); Heather Leigh Stangle, *Murderous Madonna: Femininity, Violence, and the Myth of Postpartum Mental Disorder in Cases of Maternal Infanticide and Filicide*, 50 *Wm. & Mary L. Rev.* 699, 728 (2008) (citing a success rate of 1 in 1,000 criminal trials); Stephen G. Valdes, Comment, *Frequency and Success: An Empirical Study of Criminal Law Defenses, Federal Constitutional Evidentiary Claims, and Plea Negotiations*, 153 *U. Pa. L. Rev.* 1709, 1723 (2005) (citing success rates ranging from 0.87 percent to 26 percent).

45 Division of Criminal Justice Services, emails dated April 9, 2018 (on file with authors).

46 N.Y.S. Corrections and Community Supervision, *Under Custody Report: Profile of Under Custody Population as of January 1, 2016*, at 25, http://www.doccs.ny.gov/Research/Reports/2016/UnderCustody_Report_2016.pdf.

prison population of 51,000, over 10,000 inmates receive services from Office of Mental Health.⁴⁷

The insanity defense's low usage rates paired with the high incidence of mental illness in prisons raises a question: why are more defendants not invoking a defense that would send them to treatment instead of prison? First, the overall low success rate may deter defendants from interposing the defense. Second, defendants pay a penalty for arguing insanity and losing.⁴⁸ Defendants whose insanity defenses are unsuccessful—which, as noted above, represents the vast majority of those who raise it at trial—receive significantly longer sentences than those who are convicted without having argued insanity.⁴⁹ Third, defendants may be unwilling to assert the defense because they decline to accept a mental illness diagnosis. Fourth, as discussed in the next section, New York's civil commitment system may itself deter defendants with viable insanity defenses from raising them. For example, defendants acquitted based on insanity may remain confined for longer than the maximum term of the prison sentence they would have served if

47 *See id.*; Emily Masters, *By the Numbers: New York's Prison Population*, TIMES UNION, Sept. 21, 2017, <https://www.timesunion.com/news/article/By-the-numbers-New-York-s-prison-population-12216340.php>.

48 Fatma Marouf, *Assumed Sane*, 101 Cornell L. Rev. 25, 30 (2016).

49 Michael L. Perlin, *Myths, Realities, and the Political World: The Anthropology of Insanity Defense Attitudes*, 24 Bull. Am. Acad. Psychiatry & L. 5, 12 (1996); Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 Case W. Res. L. Rev. 599, 650 (1990); Joseph Rodriguez et al., *The Insanity Defense Under Siege: Legislative Assaults and Legal Rejoinders*, 14 Rutgers L.J. 397, 40102 (1983).

convicted.⁵⁰ In the words of Charles P. Ewing, forensic psychologist, lawyer and professor at Buffalo Law School, “You have to be crazy to plead insanity . . . and I say that because the consequences are so grave.”⁵¹

Get Out of Jail Free? Criminal Procedure Law § 330.20

Whether the insanity defense should be reformed cannot be considered absent an examination of what happens to an individual after an insanity acquittal. The retention, care, treatment, and release of persons found not responsible of crimes after successfully invoking the insanity defense is a complex process involving the balancing of individual liberties and the protection of society.⁵² In New York, the current procedures that follow a verdict or plea of not guilty by reason of mental disease or defect were enacted in 1980⁵³ following a study by the New York State Law Revision Committee and to comply with the constitutional mandates of *Matter of Torsney*.⁵⁴

In *Matter of Torsney*, the Court of Appeals held that, because insanity acquittees lack criminal culpability, “[b]eyond automatic commitment . . . for a reasonable period to

50 Mac McClelland, *When Not Guilty Is a Life Sentence*, N.Y. TIMES MAG., Sept. 27, 2017, <https://www.nytimes.com/2017/09/27/magazine/when-not-guilty-is-a-life-sentence.html>; *People v. D.D.G.*, 27 Misc. 3d 1224(A), 911 N.Y.S.2d 694 (Sup. Ct., Queens Co., 2010). In determining whether to release a defendant from custody following an adjudication of not guilty by reason of mental disease or defect, “a court may consider . . . the length of confinement and treatment [and] the lapse of time since the underlying criminal acts” (internal citations omitted). In this case, defendant was released after more than 20 years of confinement, but the length of confinement was not the only factor the court considered, and standing alone would have been insufficient to secure his release.

51 Russ Buettner, *Mentally Ill, but Insanity Plea Is a Long Shot*, N.Y. TIMES, April 3, 2013, <https://www.nytimes.com/2013/04/04/nyregion/mental-illness-is-no-guarantee-insanity-defense-will-work-for-tarloff.html>; see, e.g., Michael Perlin, *The Borderline Which Separated You from Me: The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment*, 82 Iowa L. Rev. 1375 (1997); Mac McClelland, *When ‘Not Guilty’ Is a Life Sentence*, N.Y. TIMES MAG., Sept. 27, 2017, <https://www.nytimes.com/2017/09/27/magazine/when-not-guilty-is-a-life-sentence.html>.

52 Barbara E. McDermott et al, *The Conditional Release of Insanity Acquittes: Three Decades of Decision-Making*, 36 J. Am. Acad. Psychiatry & L. 329 (2008).

53 In Defense of Insanity in New York State, 1980 Report of N.Y. Law Rev. Comm’n, Reprinted in 1961 McKinney’s Session Laws of N.Y.

54 47 N.Y.2d 667, 420 N.Y.S.2d 192 (1979).

determine [acquittees'] present sanity, justification for distinctions in treatment between persons involuntarily committed under the Mental Hygiene Law and persons committed under CPL § 330.20 draws impermissibly thin.”⁵⁵ Nevertheless, due to a judicially imposed presumption that the defendant acquitted by reason of mental disease or defect is perpetually dangerous, in practice the CPL § 330.20 commitment scheme has become “increasingly onerous, bearing little resemblance to [Mental Hygiene Law] article 9 (civil) commitments.”⁵⁶

Stages of the Proceeding

“Track status, as determined by the initial commitment order, governs the acquittee’s level of supervision in future proceedings and may be overturned only on appeal from that order, not by means of a rehearing and review.”⁵⁷ Following an insanity verdict or plea, the trial judge must immediately order a psychiatric examination of the defendant, to be followed by an initial hearing to determine the acquittee’s mental condition.⁵⁸ This hearing, in which the district attorney continues to participate, determines the level of judicial and prosecutorial involvement in future decisions concerning the acquittee’s confinement, transfer and release.⁵⁹ Based on its findings at the

⁵⁵ *Id.* at 674-75.

⁵⁶ Sheila E. Shea & Robert Goldman, *Ending Disparities and Achieving Justice for Individuals with Mental Disabilities*, 80 Alb. L. Rev. 1037, 1089 (2016/2017) (citing *In re Torsney*, 47 N.Y.2d 667, 420 N.Y.S.2d 667 (1979)).

⁵⁷ *In re Norman D.*, 3 N.Y.3d 150, 152, 785 N.Y.S.2d 1 (2004). As observed by the Court of Appeals in *In re Norman D.*, “track one status is significantly more restrictive than track two status.” *Id.* at 155.

⁵⁸ CPL § 330.20(2)-(6).

⁵⁹ *In re Brian HH*, 39 A.D.3d 1007, 1009, 833 N.Y.S.2d 718 (3d Dep’t 2007).

initial hearing the court then assigns the acquittee to one of the three “tracks.”⁶⁰ Track-one acquittees are those found by the trial judge to suffer from a dangerous mental disorder that makes them “a physical danger to [themselves] or others.”⁶¹ Track-two acquittees are mentally ill, but not dangerous,⁶² while track-three acquittees are neither dangerous nor mentally ill.⁶³

The trial judge must issue a commitment order consigning track-one defendants to the custody of the Commissioner for confinement in a secure facility for care and treatment for six months.⁶⁴ A court order is thereafter required for any transfer to a non-secure facility, off-ground furlough, release or discharge. The district attorney's office continues to be notified of, and may participate in, further court proceedings involving the defendant's retention, care and treatment.⁶⁵

Track-two defendants are ordered into the Commissioner's custody for detention in a non-secure (civil) facility, subject to an order of conditions.⁶⁶ The order committing a track-two defendant is deemed made pursuant to the Mental Hygiene Law rather than section 330.20; concomitantly, subsequent proceedings regarding retention, conditional release or discharge of a track-two defendant are generally governed by articles 9

60 *In re Norman D.*, 3 N.Y.3d at 154. The “track” nomenclature does not appear in CPL § 330.20 but is derived from the Law Revision Commission report that accompanied the proposed legislation, which states that “[t]he post-verdict scheme of proposed CPL § 330.20 provides for three alternative ‘tracks’ based upon the court’s determination of the defendant’s mental condition at the time of [the initial] hearing.” (1980 Report at 2265).

61 CPL § 330.20(1)(c), (6).

62 CPL § 330.20(1)(d), (6), (7).

63 CPL § 330.20(7); *People v. Stone*, 73 N.Y.2d 296, 539 N.Y.S.2d 718 (1989).

64 CPL § 330.20(1)(f), (6). The “Commissioner” taking custody of the acquittee may be the Commissioner of the Office of Mental Health or the Commissioner of the Office for People with Developmental Disabilities (OPWDD).

65 *Id.*

66 CPL § 330.20(1)(o), (7).

(mentally ill) or 15 (developmentally disabled) of the Mental Hygiene Law.⁶⁷ Track-three defendants are discharged either unconditionally or, in the judge's discretion, with an order of conditions.⁶⁸

Although the statute is silent as to the quantum of proof needed to satisfy the court in a post-insanity-acquittal commitment proceeding, in *People v. Escobar* the Court of Appeals declined to apply the clear and convincing evidentiary standard that governs other civil commitment proceedings, instead applying the preponderance of the evidence standard.⁶⁹

The most onerous aspect of the statutory scheme is the “recommitment” process, which is used to return outpatient acquittees to inpatient status in the event of psychiatric decompensation. As interpreted by the Court of Appeals, an acquittee on conditional release can be committed to secure confinement under the Criminal Procedure Law without the enhanced procedural due process protections afforded to people subject to civil hospitalization under section 9 of the Mental Hygiene Law even if at the initial hearing the defendant was found not dangerous and placed in track two or three.⁷⁰ In other words, a defendant who was not committed to begin with can nevertheless be

⁶⁷ CPL § 330.20(7); *People v. Flockhart*, 96 A.D.2d 843, 465 N.Y.S.2d 601 (2d Dep’t 1983); *In re Jill ZZ*, 83 N.Y.2d 133, 608 N.Y.S.2d 161 (1994). Notwithstanding the statutory requirement that the “conditional release or discharge” of the track two defendant shall be in accordance with the provisions of the Mental Hygiene Law, the Court of Appeals held in *In re Jill ZZ* that the conditional release of the track two defendant shall be subject to a CPL order of conditions.

⁶⁸ CPL § 330.20(1)(n). A discharge order is defined as an order terminating an order of conditions or unconditionally discharging a defendant from supervision under the provisions of section 330.20. An order of conditions is “an order directing a defendant to comply with [the] prescribed treatment plan, or any other condition which the court determines to be reasonably necessary or appropriate, and, in addition, where a defendant is in custody of the commissioner, not to leave the facility without authorization.” CPL § 330.20(1)(o). *See also* CPL § 330.20(12). Orders of conditions are valid for five years and may be extended for additional five-year periods indefinitely upon a mere finding of “good cause shown.” CPL § 330.20(1)(o); *In re Oswald N.*, 87 N.Y.2d 98, 637 N.Y.S.2d 949 (1995).

⁶⁹ 61 N.Y.2d 431, 440, 474 N.Y.S.2d 453 (1984).

⁷⁰ *People v. Stone*, 73 N.Y.2d 296, 539 N.Y.S.2d 718 (1989).

“recommitted” under CPL § 330.20. Appellate courts in New York have been completely unpersuaded that the initial findings of a criminal court placing defendants in one of the three available “tracks” have any constitutional significance.⁷¹ “All such persons have committed criminal acts, and this underlies the permissible distinction between them and all others.”⁷² Federal constitutional challenges to the New York statutory scheme have to date failed, albeit narrowly.⁷³

In 1995, in *In re George L.*,⁷⁴ the Court of Appeals determined that section 330.20 does not constrain a court to determining dangerousness as of the time when the hearing is conducted.⁷⁵ Instead, the Court held that the State was permitted to engage in a presumption that the causative mental illness continues beyond the date of the criminal conduct.⁷⁶ Stated another way, *George L.* adopted a presumption that the mental illness that led to the criminal act continues after the plea or verdict of not responsible and that assessments of dangerousness should not be limited to a point in time, but rather should be contextual and prospective in nature.⁷⁷ Further, the presumption of dangerousness continues, in fact, and is not extinguished by a subsequent finding that the defendant no longer suffers from a dangerous mental disorder.⁷⁸ Thus, despite the Court’s admonition in *In re Torsney* that the Constitution requires insanity acquittees to be treated like people involuntarily confined in

⁷¹ *In re Zamichow*, 176 A.D.2d 807, 575 N.Y.S.2d 327 (2d Dep’t 1991).

⁷² *Id.*, citing *Jones v. United States*, 463 U.S. 354, 364-65 (1982).

⁷³ See *Francis S. v. Stone*, 221 F.3d 100, 112 (2d Cir. 2000).

⁷⁴ *In re George L.*, 85 N.Y.2d 295, 624 N.Y.S.2d 99 (1995).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Francis S. v. Stone*, 221 F. 3d 100, 112 (2000). The Second Circuit observed that a track two defendant’s equal protection argument that following his release he could not be recommitted to a secure hospital under the provisions of the Criminal Procedure Law had “considerable force,” but denied habeas relief because of the restricted scope of review imposed on federal courts. His claim was premised upon two prior explicit state court findings in his case that he did not suffer from a dangerous mental disorder.

the civil context, the Court has since that time consistently advanced restrictive interpretations of section 330.20 that lead to longer stays and a low burden of proof on the state and district attorneys to keep insanity acquittees confined.

Length of Stay

In addition to the judicial interpretations of CPL § 330.20 discussed above, Office of Mental Health policy has led to an increase in length of stay for confined acquittees. Over time, OMH has become “increasingly risk averse.”⁷⁹ Lengths of stay have become longer for people committed under the CPL despite the fact that the length of hospitalization has little or no effect on re-arrest.⁸⁰ In fact, research indicates that insanity acquittees re-offend at a lower rate than prisoners.⁸¹ Further, statistical trends demonstrate that while the number of not responsible admissions to hospitals in New York State declined over the past three decades from a high of 77 in 1982 to a low of 22 in 2008, the length of hospitalization of these individuals has increased significantly.⁸² More than 40 percent of those admitted in the 1980s were released into the community within seven years of admission.⁸³ In the 1990s, only 21 percent of the admissions were released into the community within seven years.⁸⁴ By the year 2000, only eight percent of admissions were released within a seven-year period.⁸⁵ As of June 30, 2018, 452 insanity acquittees were

79 Richard Miraglia & Donna Hall, *The Effect of Length of Hospitalization on Re-arrest Among Insanity Plea Acquittes*, 39 *J. Am. Acad. Psychiatry & L.* 524, 526 (2011).

80 *Id.*

81 See Debbie Green et al., *Factors Associated with Recommitment of NGRI Acquittes to a Forensic Hospital*, 32 *Behav. Sci. & L.* 608, 608 (2014).

82 Richard Miraglia & Donna Hall, *The Effect of Length of Hospitalization on Re-arrest Among Insanity Plea Acquittes*, 39 *J. Am. Acad. Psychiatry & L.* 524, 524 (2011), *citing* Office of Mental Health: Legally Oriented Forensic Tracking System (LOFTS), Division of Forensics, Albany, NY: N.Y. State Office of Mental Health, 2007.

83 *Id.*

84 *Id.*

85 *Id.* at 524-25.

subject to orders of conditions. From 2015-2017, approximately 20 insanity acquittees per year were released from orders of conditions. And from 2015 to 2017, approximately 30 acquittees per year were released from secure confinement to an order of conditions.

Unlike in other states, the maximum term to which an acquittee could have been sentenced does not limit the time that an acquittee may be confined at a secure forensic facility or subject to an order of conditions. In other words, a defendant whose maximum sentence would have been five years can be confined and/or subject to an order of conditions for the rest of his life. As aptly noted by one commentator, if one asks the question what happens after a defendant successfully invokes the insanity defense, “often the answer is involuntary confinement in a state psychiatric hospital—with no end in sight.”⁸⁶

In sum, once a defendant has been acquitted based on insanity and thereby adjudged to lack criminal culpability, she faces indefinite detention that can exceed the maximum time for which she could have been imprisoned. She enters an increasingly risk averse milieu that has enforced an increasing length of confinement despite falling admissions.⁸⁷ Even if she is initially determined not to be dangerous and assigned to tracks two or three, she remains subject to re-classification and re-commitment. Once she is placed in secure confinement, even if her Office of Mental Health treatment team at the forensic psychiatric facility recommends her transfer to a civil hospital on an order of

86 Mac McClelland, *When ‘Not Guilty’ Is a Life Sentence*, *supra*, N.Y. TIMES MAG., Sept. 27, 2017.

87 *Id.* “The question ... ‘becomes one of risk tolerance. America has become—to an extreme level that’s almost impossible to exaggerate—a risk-intolerant society.’ Fears of people with mental illness persist, even though, according to the best estimates, only 4 percent of violent acts in the United States are uniquely attributable to serious mental illness.” *Id.*; Richard Miraglia & Donna Hall, *The Effect of Length of Hospitalization on Re-arrest Among Insanity Plea Acquittes*, 39 J. Am. Acad. Psychiatry & L. 526 (2011).

conditions, the district attorney can object and, if the trial or appellate court agrees with the district attorney, override the judgment of the treatment team.

Conclusion

Penal Law § 40.15 and the post-acquittal commitment scheme under Criminal Procedure Law § 330.20 deserve close examination with an eye toward reform. The insanity defense remains essentially unchanged since the reign of King George III and appears insufficient to address the prevalence of mental illness in the prison population or take account of the fact that mental illness is not an all-or-nothing condition. Meanwhile, the commitment scheme that follows an insanity acquittal appears to have compensated for a drop in the number of insanity acquittal admissions by moving consistently toward longer periods of confinement, in the face of evidence that longer confinement is not correlated with reduced risk of violent recidivism. A defendant who is acquitted based on insanity faces indefinite detention that may continue past the maximum criminal sentence, regardless of the opinions of his treatment team. It is little wonder the defense is so rarely invoked.

Given that approximately 10,000 state prisoners receive services from the Office of Mental Health, the question whether the insanity defense and attendant civil commitment scheme can be revised to better serve the goals of public safety, effective treatment of the mentally ill, efficient expenditure of public funds, and punishment of only morally culpable behavior is of paramount importance. Though New York's system is entrenched, some legislative action may be straightforward. For example, fairness and reason suggest that the length of time for which an acquittee can be confined or subject to an order of conditions should be limited to the maximum sentence that person could have served had he or she

been convicted.⁸⁸ After the expiration of the maximum sentence, the patient would be transferred to a civil hospital subject to the civil confinement regime of Mental Hygiene Law Article 9 that governs individuals said to present a risk of serious physical harm to themselves or others.⁸⁹

Nor is New York's restrictive approach to post-acquittal confinement the only model for insanity acquittees. In Tennessee, for example, 45 percent of insanity acquittees are never civilly committed; instead they are treated on an outpatient basis, and the average length of confinement is two years.⁹⁰ Its recidivism rates have not changed since it changed its approach to insanity acquittees.⁹¹

On the other hand, it is also possible that the large-scale incarceration of mentally ill individuals may be most effectively addressed through alternative means. In response to an inquiry from the authors of this report, multiple chief defenders stated that they often prefer to find alternative resolutions to the insanity plea for defendants with mental health issues, such as adjournments in contemplation of dismissal with mental health treatment requirements. And mental health courts have shown promise in diverting defendants with mental health issues to treatment.⁹² But only 27 such problem-solving courts operate in New York, and they are inconsistent in their diagnostic techniques and in matching the

88 See Warren J. Ingber, Note, Rules for an Exceptional Class: The Commitment and Release of Persons Acquitted of Violent Offenses by Reason of Insanity, 57 N.Y.U. L. Rev. 281, 295-96 (1982).

89 Cf. C.P.L. § 730.70 (upon expiration of incapacitated defendant's legal status under CPLR Article 730, MHL Article 9 may be invoked if the patient is alleged to require continued inpatient care and treatment).

90 Mac McClelland, *When 'Not Guilty' Is a Life Sentence*, *supra*, N.Y. TIMES MAG., Sept. 27, 2017.

91 *Id.*

92 See generally Carol Fisler, *Toward a New Understanding of Mental Health Courts*, *Judges J.* 54:2, 8-13 (Spring 2015).

intensity of the intervention to the intensity of the risk.⁹³ Alternatives to the insanity defense should therefore also be reviewed to identify successful models to serve as bases for statewide training efforts or legislative action.

It is, however, beyond the scope of this report or the resources of this subcommittee to undertake the inquiries or action outlined above. Such inquiries and action should include a diversity of views, including not only indigent defense counsel, but also prosecutors and advocates for persons with mental illnesses, among others.

This report addresses only one of the myriad issues at the intersection of law and mental health. For example, the root problems of pervasive stigmatizing language and bias suggest the necessity of efforts to examine the Mental Hygiene Law, as well as other bodies of law, to replace such terms as “mental hygiene” with less stigmatizing language, and to educate the courts and the bar on person-centered language.⁹⁴ Furthermore, issues like the funding of community-based treatment, the way mental health issues are addressed in schools and other social institutions, and the limitation of the constitutional rights of people with mental illnesses go to the very heart of our societal structure and deserve sustained focus.

Recommendation

93 *Problem Solving Courts: Mental Health Courts Overview*, New York State Unified Court System (January 26, 2017), https://www.nycourts.gov/courts/problem_solving/mh/home.shtml; *New York State Mental Health Courts: A Policy Study*, Josephine W. Hahn, Center for Court Innovation, Dec. 2015, at 11.

94 See Laws of 2007, Chapter 455, as amended by Laws of 2010, Chapter 168, § 48. *And see, e.g.*, Washington State Access to Justice Board Impediments Committee, ENSURING EQUAL ACCESS FOR PEOPLE WITH DISABILITIES: A GUIDE FOR WASHINGTON COURTS (2006), at 27, 40, available at <https://www.kingcounty.gov/~media/exec/civilrights/documents/WAcourtaccess.ashx> [last visited Oct. 3, 2018]; Center for Disease Control, “Communicating With and About People with Disabilities,” available at https://www.cdc.gov/ncbddd/disabilityandhealth/pdf/disabilityposter_photos.pdf (last visited Oct. 3, 2018).

The Committee on Mandated Representation therefore recommends that the New York State Bar Association form a standing Mental Health Committee or Task Force to address large-scale issues that do not fit within a single Section or Committee's purview. While it is true that other Sections and Committees, including the Committee on Disability Rights, the Mental Health Subcommittee of the Elder Law and Special Needs Section, and the Lawyer Assistance Committee focus on mental health issues as they relate to that Section or Committee's mandate, none of them is poised to address the broad range of issues raised here. So long as effective communication is established among the existing mental health Sections and Subcommittees and the proposed mental health Committee or task force, there is little risk of inefficiency. In the words of Professor Perlin:

Mental Disability is no longer—if it ever was—an obscure subspecialty of legal practice study. Each of its multiple strands forces us to make hard social policy choices about troubling social issues—psychiatry and social control, the use of institutions, informed consent, personal autonomy, the relationship between public perception and social reality, the many levels of “competency,” the role of free will in the criminal law system, the limits of confidentiality, the protection duty of mental health professionals, the role of power in forensic evaluations. These are all difficult and complex questions that are not susceptible to easy, formulistic answers.⁹⁵

Mental illness is often raised in the public consciousness only in association with tragedy, whether it be a person who takes their own life, a person who is killed by others due to illness-driven behavior, or a person whose illness-driven behavior leads to the death

⁹⁵ Michael L. Perlin, “*Half-Wracked Prejudice Leaped Forth: Sanism, Pretextuality, and Why and How Mental Disability Law Developed as It Did*,” 10 J. Contemp. Legal Issues 3, 31 (1999) (quoting Michael L. Perlin, *The Jurisprudence of the Insanity Defense* (1994)). For articles covering the dementia crisis, see the January 2017 issue of the New York State Bar *Journal*.

or injury of others. At the same time, the stigma that has long attached to mental illness is now breaking. High-profile athletes, celebrities, and attorneys have publicly acknowledged their struggles with mental illness, shining a welcome light on the issue.⁹⁶ That light has begun to eradicate the notion that mental illness is somehow “unclean” -- an archaic attitude enshrined in the name of the Mental Hygiene Law itself. New York has long been a leader in the care of its most vulnerable citizens. A Mental Health Committee or Task Force can help ensure that the law does not further stagnate and that the promise of the New York State Constitution to care for and support those in need is fulfilled.⁹⁷

96 See, e.g., Joseph Milowic III, *Quinn Emanuel Partner Suffers from Depression and He Wants Everyone to Know It*, N.Y. L.J., Mar. 28, 2018, <https://www.law.com/newyorklawjournal/2018/03/28/quinn-emanuel-partner-suffers-from-depression-and-he-wants-everyone-to-know/?slreturn=20180610150658>; Brian Windhorst, *Cavaliers Coach Tyronn Lue Says He's Being Treated for Anxiety*, ESPN.com, May 31, 2018, http://www.espn.com/nba/story/_/id/23659954/cleveland-cavaliers-coach-tyronn-lue-reveals-being-treated-anxiety; Ruth C. White, *No Stigma, No Shame: Breaking the Silence of Mental Illness*, PSYCHOL. TODAY, May 2, 2016, <https://www.psychologytoday.com/us/blog/culture-in-mind/201605/no-stigma-no-shame-breaking-the-silence-mental-illness>.

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