

A LOGICAL ANALYSIS OF CRIMINAL RESPONSIBILITY AND MANDATORY COMMITMENT*

FREDERICK LYNCH was charged with violating the District of Columbia bad check law which carries with it a maximum prison sentence of twelve months.¹ Lynch, however, has been under restraint for more than seventeen months as a result of this charge, although he was *not* found guilty.² More precisely, he was found not guilty by reason of insanity—a “defense” which was raised by the prosecutor over Lynch’s objection.³ Pursuant to statute, he was automatically committed to St. Elizabeths Hospital until found free

*Overholser v. Lynch, 288 F.2d 388 (D.C. Cir. 1961), *cert. granted*, 29 U.S.L. WEEK 3382 (U.S. June 20, 1961).

1. D.C. CODE § 22-1410 (1951).

It is by no means certain that Lynch would have received the maximum sentence; rather, “. . . it seems likely that, had the plea [of guilty] been accepted, in the light of the fact that the defendant had no previous record, he would have been placed on probation or given a suspended sentence.” Speiser, *Statement before the Subcommittee on Constitutional Rights in Hearings on Constitutional Rights of the Mentally Ill in Criminal Cases of the Senate Committee on the Judiciary*, 87th Cong., 1st Sess. 15 (May 2, 1961) (unpublished, on file in Yale Law Library).

2. Lynch was found not guilty by reason of insanity of violating the District of Columbia bad check law before the Municipal Court for the District of Columbia in December, 1959. Pursuant to D.C. CODE § 24-301(d) (Supp. VIII, 1960) he was committed to St. Elizabeths Hospital. No appeal was taken. On June 13, 1960, Lynch petitioned the District Court for the District of Columbia for a writ of habeas corpus. The District Court on June 27, 1960, ordered Lynch released, but the Court of Appeals for the District of Columbia Circuit reversed on January 26, 1961. In the interim Lynch had been conditionally released from St. Elizabeths pursuant to D.C. CODE § 24-301(e). A conditional release from a mental hospital is similar to a parole from prison, and “it cannot be doubted that the prisoner on parole is certainly subject to some personal restraints of liberty not ordinarily imposed on free citizens . . . he has circumscribed his freedom of choice and action—of going when and where he pleases.” Sellers v. Bridges, 153 Fla. 586, 589-90, 15 So. 2d 293, 295 (1943). The Court of Appeals was convinced that Lynch was “well on his way to unconditional release, without the probability of repeat offenses,” Overholser v. Lynch, 288 F.2d 388, 394 (D.C. Cir. 1961). Subsequently, however, “Mr. Lynch, who had been conditionally released by the hospital, entered upon a course of conduct spread across the continent to California and back, which resulted in a request from Dr. Overholser that steps be taken to revoke his conditional release status.” Gasch, *Statement before the Subcommittee on Constitutional Rights in Hearings on Constitutional Rights of the Mentally Ill in Criminal Cases of the Senate Committee on the Judiciary*, 87th Cong., 1st Sess. 3 (May 2, 1961) (unpublished, on file in Yale Law Library).

3. Neither the Municipal nor District Court opinions were reported. The relevant history is taken from the Court of Appeals opinion, Overholser v. Lynch, 288 F.2d 388, 389-90, 394 (D.C. Cir. 1961). While the Municipal Court had precedent for its action in allowing the prosecutor to raise the plea of not guilty by reason of insanity, United States v. Kloman, Criminal No. 383-58, D.D.C., February 15, 1960, such action has been severely criticized. See Halleck, *The Insanity Defense in the District of Columbia A Legal Lorelei*, 49 GEO. L.J. 294, 316-20 (1960); Krash, *The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia*, 70 YALE L.J. 905,

of such "abnormal mental conditions as would make him dangerous to the community."⁴ Because the insanity defense was introduced despite Lynch's repeated objections, the resulting mandatory commitment cannot be justified on the ground that by voluntarily raising the defense of insanity the defendant "acknowledges the right of the state" to confine him for psychiatric treatment.⁵ Thus *Lynch* is the first reported case of a mandatory commitment which was, in every sense, "involuntary." Although the Supreme Court⁶ may decide Lynch on procedural grounds by holding that only the defendant may raise the defense of insanity, the case—by exposing the full implications of the mandatory commitment statute—also invites examination of the broader questions of whether a defendant, found not guilty by reason of insanity, may constitutionally be committed to a mental hospital without any further proceedings and, if so, whether and under what conditions such commitment may constitutionally be continued beyond the period of the sentence which would have resulted from a verdict of guilty. Frederick Lynch's confinement was not restricted to a period measured by a criminal sentence because "by its very nature, hospitalization, to be effective, must be initially [sic] for an indeterminate period" and since "hospitalization is remedial" whereas "a jail sentence is punitive," "further consideration of the criminal penalty . . . becomes irrelevant, for any and all purposes."⁷ Hospitalization and imprisonment, in other words, are assumed by the court to be mutually exclusive sanctions, and it is further assumed that the criminal process can effectively separate those who should be punished for their illegal acts by imprisonment from those who should be treated by hospitalization. In order to analyze the validity of these assumptions, the concept of criminal responsibility and its relationship to involuntary confinement must be reexamined.

938-40 (1961). Furthermore, in an earlier case which was not cited by either the majority or the dissent in *Lynch*, the Supreme Court of Colorado had held that the "defendant had an absolute right to be tried on the plea of not guilty." *Boyd v. People*, 108 Colo. 289, 294, 116 P.2d 193, 195 (1941). See also REPORT OF ROYAL COMMISSION ON CAPITAL PUNISHMENT §§ 442-44 (1953). For a discussion of some of the policy issues involved, see Samuels, *Can the Prosecution Allege that the Accused is Insane?*, [1960] CRIM. L. REV. (ENG.) 435.

4. Although the mandatory commitment statute provides for release upon a finding "(1) that such person has recovered his sanity, (2) that, in the opinion of the superintendent, such person will not in the reasonable future be dangerous to himself or others, and (3) in the opinion of the superintendent, the person is entitled to his unconditional release. . . .", D.C. CODE § 24-301(e), the D.C. Court of Appeals has interpreted this as requiring that "[t]here must be freedom from *abnormal mental condition* as would make the individual dangerous to himself or the community in the reasonably foreseeable future." *Order, Overholser v. Leach*, No. 14480, D.C. Cir., Sept. 18, 1958; see generally, Krash, *The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia*, 70 YALE L.J. 905, 944 (1961).

5. See, e.g., Goldstein & Katz, *Dangerousness and Mental Illness: Some Observations on the Decision to Release Persons Acquitted By Reason of Insanity*, 70 YALE L.J. 225, 230 (1960).

6. *Cert. granted*, *Overholser v. Lynch*, 29 U.S.L. WEEK 3382 (June 20, 1961).

7. *Overholser v. Lynch*, 288 F.2d 388, 393, 394 (D.C. Cir. 1961).

The criminal law accepts, as a basic premise, the moral judgment that punishment may result only from a freely willed illegal act. But proponents of total determinism have for centuries denied the possibility that any act may be freely willed.⁸ The criminal law, however, by imposing punishment on at least some acts, has indicated its rejection of the posit of total determinism in favor of the posit of free will,⁹ and since the law—the manifestation of societies' collective moral judgments—is based essentially on the collective beliefs of society, the criminal law cannot meaningfully be subjected to criticism on the ground that its underlying beliefs are contradicted by some all pervasive but unknown truth (i.e. that ultimately all acts are wholly determined). Consequently, society must postulate (i.e. believe) that a given act might *not* have occurred before the criminal law could meaningfully designate such an act as having been freely chosen. If, on the other hand, society postulated that the illegal act must have occurred, it would be meaningless for the criminal law to designate such an act as having been willfully chosen even if the individual regarded himself as a free agent. But even where it is postulated that an illegal act *might* not have occurred, it is still possible for society to postulate the existence of a mathematical probability that such act would occur.¹⁰ And such a postulated probability must be taken as imposing limits on the capacity freely to choose a given act—limits which tend to eliminate free choice as the probability increases. Unless society is willing to hold a person criminally responsible for an illegal act even though his capacity for free choice is severely limited, it must establish an arbitrary maximum probability above which criminal responsibility will not attach. Criminal responsibility, then, is a conclusory term describing a maximum probability above which the correlation between defendant's relevant psychiatric characteristics and the illegal act is so great that "punishment" ought not result. The discussion which follows will examine the function of involuntary confinement in the light of this concept of criminal responsibility. In order to simplify this examination three increasingly complex models of society will be constructed. It is assumed that the society of model III has postulated the validity of a variety of beliefs but has also postulated the unverifiability of such beliefs. In order to assess the function of involuntary confinement in light of these postulates, models I and II

8. See, *e.g.*, J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 526-33 (1st ed. 1947).

9. See *People v. Gorshen*, 51 Cal. 2d 716, 724 n.4, 336 P.2d 492, 496-97 n.4 (1959).

10. In other words, even if society did not believe (postulate) that an act was determined by prior factors, it might nevertheless believe that prior factors created, within an individual, a kind of a priori probability that the act would occur in the same way that there is an a priori probability of 1 in 52 that the ace of spades can be cut from a bridge deck, or of 35 in 36 that "box cars" (two sixes) will not come up on a pair of dice. Instead of chaos, therefore, the alternate to determinism would be conceived of as an orderly randomness, similar to that in many electronic computers which incorporate "random elements," i.e. elements which in the long run, like a flipped coin, select equally between two possibilities. Such random elements eliminate the possibility that the computer will be unable to "make up its mind" when two answers are equally indicated. For an application of this principle see note 13 *infra*.

will be constructed. In these models it shall be assumed that the postulated beliefs of model III are, in fact, true, and additionally it shall be assumed that all the factors relevant to such beliefs are fully knowable. In all three societies a constitutional concept of due process is assumed.

MODEL SOCIETY I

In the first model society it shall be assumed that :

- 1) For purposes of the criminal law, "mental disease" exists when illegal behavior is totally determined by relevant psychiatric characteristics.
- 2) Any given act is either wholly determined or wholly undetermined.
- 3) All relevant psychiatric characteristics and the specific acts they portend are ascertainable.
- 4) Psychiatrists can cure some—but not all—mentally diseased persons.
- 5) Although treatment may require an extensive period of time, the change in characteristics will be instantaneous when it occurs and will be designated as cure.
- 6) Psychiatrists can differentiate between those having curable and incurable mental disease.
- 7) Psychiatrists can predict with certainty the amount of time required to accomplish cure.
- 8) Without psychiatric treatment, no mental disease can be cured.
- 9) All cure is permanent; no propensity to relapse exists.
- 10) Ample psychiatric facilities are available in hospitals; no such facilities are available in prisons.

Given a person with *curable* mental disease who has committed an illegal act, the salutary effect of psychiatric treatment in model I is evident. Were such a person imprisoned rather than hospitalized, he would serve his sentence without being cured; consequently, he would still be diseased when released, and he would therefore recommit the act. Although some deterrent effect might have been achieved by imprisonment,¹¹ society would have failed either to effect the cure or to prevent the second crime. Hospitalization, on the other hand, would fulfill the functions both of cure and isolation since, by hypothesis, the accused suffers from curable mental disease and will not, when cured, recommit the act. If, on the other hand, the person who has committed the

11. There is a possibility that imprisoning a defendant suffering from a mental disease will be an inefficient deterrent to others.

[D]eterrent examples [must] appear sufficiently similar to those to be deterred to elicit the degree of identification necessary for the conclusion that what happened to the deterrent examples might well happen to the observers, should they violate the law Conversely, the most inefficient deterrent examples are those who appear most unlike deterrables.

Board, *Operational Criteria for Determining Criminal Responsibility*, 61 COLUM. L. REV. 221, 222 (1961).

illegal act has an *incurable* mental disease, then, although confinement will fulfill the goal of isolation, cure will not be possible. In such cases, society may be willing, where repetitions of the illegal act involved are not intolerable, to compromise its interest in isolating the mentally diseased person with the individual's interest in his own liberty. Confinement of the person for an arbitrary period determined by the harmfulness of the act involved might effect such a compromise.

Furthermore, a psychiatrist in the model society could accurately know not only whether a mentally diseased person would recommit an illegal act, but also whether a mentally diseased person, whose past behavior had not included such acts, would in the future violate the law. If applied to all persons who would be certain to commit or recommit illegal acts, civil commitment¹² in the model society could be used to fulfill the societal goals of isolation and, in some cases, cure. If mental disease is curable, moreover, the model society might regard as irrelevant the fact that the period required for cure was longer than the sentence which a court might have imposed. Even in this society, however, in cases where repetitions of the illegal act are not considered intolerable, and where cure requires extended treatment, limiting confinement to the period of a reasonable sentence might accomplish a compromise similar to that indicated in cases of incurable disease.

Model I postulates that certain acts are not determined. Such acts are defined as freely chosen and, if they involve all the other elements of a crime, the persons committing them would be considered criminally responsible. Should society believe that "free agents" are less apt to "choose" to do a criminal act if such act is accompanied by the certainty of punishment, then a prison term (or any other punishment) might reasonably be imposed upon a free agent who has been convicted of a crime. Imprisonment would thereby serve the functions of rehabilitation, isolation and deterrence.

MODEL SOCIETY II

The second model society varies from model I in that :

- 1) For purposes of the criminal law, "mental disease" exists when illegal behavior is correlated with relevant psychiatric characteristics (i.e., totally determined or made mathematically probable by the existence of such characteristics).
- 2) Any given act may be partially determined and partially attributable to the exercise of free choice.
- 3) Psychiatric treatment may eventuate in the gradual change of relevant psychiatric characteristics, and a corresponding decrease in the probability of an act's occurrence; such a change will be designated as a partial cure.
- 4) Assumptions 3, 4, 6, 7, 8, 9 and 10 regarding model I are also made for model II and are repeated here for convenience :

12. See note 14 *infra*.

- 3) All relevant psychiatric characteristics and the specific acts they portend are ascertainable.
- 4) Psychiatrists can cure some—but not all—mentally diseased persons.
- 6) Psychiatrists can differentiate between those having curable and incurable mental disease.
- 7) Psychiatrists can predict with certainty the amount of time required to accomplish cure.
- 8) Without psychiatric treatment, no mental disease can be cured.
- 9) All cure is permanent; no propensity to relapse exists.
- 10) Ample psychiatric facilities are available in hospitals; no such facilities are available in prisons.

In model II a balance would have to be struck between the desirability of imprisonment to counteract the propensity freely to choose to recommit illegal acts, and the desirability of psychiatric treatment to alter characteristics so as to lower this correlation. Due process, in such a society would make it necessary to establish a minimum probability that the relevant characteristics would result in the commission of an illegal act; below this probability a person would be regarded as criminally responsible for his acts and therefore subject to imprisonment, and above this probability hospitalization would be permitted only after some sort of civil commitment proceeding.¹³ Civil commitment in this model would be based on the presence of a sufficiently high probability of illegal behavior to warrant hospitalization. But civil commitment need not be based on the same probability as criminal responsibility; it might require a higher probability. In that case a criminal defendant whose relevant psychiatric characteristics involve a probability too high to justify a finding of criminal responsibility but too low to justify civil commitment would be immune from confinement. But a society concerned with the safety of its inhabitants would probably eliminate this possibility by invoking civil commitment procedures for any correlation higher than that required for a finding of criminal responsibility, or by raising the correlation required for a finding of criminal responsibility to the level required for civil commitment.

Another difficult problem facing the society of model II is presented by the following case: a person commits an illegal act; although the act was to a substantial degree correlated with his relevant characteristics, he was held criminally responsible because the correlation was not high enough for exculpation; his relevant characteristics can be altered to reduce the correlation still further by psychiatric treatment. The choice between hospitalization and imprisonment in such a case must reflect a balancing of numerous factors including the

13. Civil commitment proceedings are defined as any form of hearing by which a mentally diseased person may be hospitalized solely on the basis of the fact that, and only as long as, the correlation between his relevant psychiatric characteristics and the future commission of an illegal or sufficiently dangerous act is above a stated minimum.

extent to which imprisonment would lower the propensity of the actor and others freely to choose to recommit illegal acts, the extent to which psychiatric treatment can change mental characteristics to result in a lower correlation with illegal behavior, and the amount of time required by either imprisonment or hospitalization to accomplish these goals. Furthermore, although psychiatry might be able accurately to ascertain the correlations between mental characteristics and illegal acts, and the time required to lower these correlations to any given point, it nevertheless seems unlikely that precise determinations could be made of the extent to which imprisonment counteracted the postulated propensity to recommit illegal acts. Society might, however, assign an arbitrary weight to the rehabilitative effect of a given period of imprisonment. An individual's overall propensity to commit an illegal act could thus be ascertained by adding this arbitrary figure to the known correlation between his relevant characteristics and the illegal act. In this way, minimum overall propensities necessary for release could be determined, albeit with a residual element of arbitrariness.¹⁴

14. The argument may be better understood by imagining a world in which each person is given a number of boxes each containing one hundred balls, some black and some white. Whenever the opportunity to do a particular act is presented, a person must reach blindly into the proper box and select a ball. If the ball selected is black, the act must be done; if the ball is white, the person is free to do or not to do the act, as he chooses. The correlation between relevant psychiatric characteristics and a particular illegal act, referred to in this Note, is represented by the number of black balls in the corresponding box. A correlation of 60 would mean that a particular box for a given act contained 60 black and 40 white balls. If every time a person having a correlation of 60 selected a white ball he freely chose not to commit the particular act, he would do that act 60 per cent of all times the opportunity to do it was presented (the times it was compelled by the selection of a black ball). If the same person freely chose to *do* the act each time he selected a white ball that act would be done 100 per cent of the times it was possible (the 60 per cent of the time it was compelled plus the 40 per cent of the time it was freely chosen). Assume psychiatric treatment is able to change black balls into white balls, and that imprisonment may influence the exercise of free choice against the commission of the act. Assume additionally that person *A* initially chooses *not* to commit a particular illegal act whenever he selects a white ball. Both his correlation (black balls) and his overall propensity to commit the illegal act (black balls plus white balls whose selection resulted in the commission of the act) are 60. One day *A* selects a black ball and commits the illegal act. One month later, realizing that no one has discovered his illegal act, it occurs to him that he may be able to repeat the act without incurring a criminal sanction. This may result in his decision freely to choose to do the act 25 per cent of the times a white ball is selected (10 times out of every 40 free choices). If so his overall propensity to recommit the illegal act would become 70 (60 black balls plus 10 white balls); his correlation, however, would remain at 60. Assume that *A* is now apprehended and imprisoned for one year. This may cause him to reconsider the advisability of recommitting the act: he may now decide freely to choose the act only 10 per cent of the times a white ball is selected (4 times out of 40); his overall propensity would now be 64 (60 plus 4). If, during that year, he was committed to a hospital for psychiatric treatment, half the black balls might be changed to white; moreover the involuntary hospital confinement for one year might cause him to reconsider the advisability of recommitting the act: he may now also decide freely to choose the act only 10 per cent of the times a white ball is selected. He would freely choose

MODEL SOCIETY III

A third model may now be assumed. The society of this model postulates that:

a. For purposes of the criminal law, "mental disease" exists when illegal behavior is correlated with relevant psychiatric characteristics (i.e. totally

the act 7 times out of 70 (free opportunities; his overall propensity would therefore be 37 (30+7)).

A quick partial cure might not lower his overall propensity. If a partial cure could be accomplished in one day (10 black balls changed to white) but if his initial decision freely to choose the act in 25 per cent of free opportunities rose to 40 per cent, because the illegal act was not severely enough punished, his overall propensity would remain at 70 (50 plus 40 per cent of 50) despite his one day cure.

A quick complete cure, however, might lower the overall propensity to a point sufficient to warrant release, since, even if release after one day tended to increase the inclination freely to choose the illegal act to 40 per cent, the overall propensity would nevertheless fall to 40 (0+40). Assuming that society decided to predicate release on the reduction of the overall propensity to below 50, it might reasonably refuse to release a person prior to the expiration of a reasonable sentence because his correlation had fallen below 50, but rather it might insist on the accomplishment of an almost complete cure as a prerequisite to such a premature release in order to counteract the anticipated but unpredictable effect of such a release on the inclination of such a person freely to choose the illegal act.

The following table summarizes this example :

1	2	3	4	5	6
<i>Time in A's case history</i>	<i>Correlations (Black Balls)</i>	<i>Total Number of Free Choices (White Balls)</i>	<i>Per Cent of Times Act Freely Chosen (when white ball is selected)</i>	<i>Number of Times Act freely Chosen (when white ball is selected) (Col. 3 x Col. 4)</i>	<i>Overall propensity (Col. 2 + col. 5)</i>
Prior to the commision of the illegal act	60	40	0%	0	60
At moment of apprehension one month after committing illegal act	60	40	25%	10	70
After one year of imprisonment	60	40	10%	4	64
After one year of hospitalization	30	70	10%	7	37*
After a one day partial cure in hospital	50	50	40%	20	70
After a one day total cure in hospital	0	100	40%	40	40*

*Can be released since overall propensity is less than 50.

determined or made mathematically probable by the existence of such characteristics).

b. Any given act may be partially determined and partially attributable to the exercise of free choice.

c. Psychiatrists can completely or partially cure (i.e. eliminate the correlation between relevant psychiatric characteristics and illegal acts) some, but not all mentally diseased persons.

d. Without psychiatric treatment no mental disease can be cured.

e. All cure is permanent; no propensity to relapse exists.

f. The fear of imprisonment deters "free agents" from choosing to commit an illegal act.

g. *Not* all relevant psychiatric characteristics are knowable.

h. Available empirical data *appears* to support these postulates; but the postulates *cannot* be absolutely verified.

The society of model III, like the society of model II, might recognize the undesirability of permitting some persons to be immune from confinement because the correlation between their relevant characteristics and their illegal acts was too high to warrant a finding of criminal responsibility but not high enough to justify civil commitment. In order to minimize this possibility, society III might attempt to make the correlation necessary for criminal exculpability the same as that which justifies civil commitment. But, given the postulated absence of knowledge of all relevant psychiatric characteristics, it is clearly possible, even after these correlations were conceptually equated, that some persons would be found neither criminally responsible nor civilly committable. Therefore, the society of model III, to achieve isolation and possible cure of such persons, might reasonably enact a mandatory commitment statute under which a person who received a verdict of not guilty by reason of insanity would automatically be committed to a mental hospital for treatment. Such a statute, to be effective, would necessarily establish standards for release which were higher than the standard for civil commitment, else a person mandatorily committed might immediately be released.

In model III the operation of such a mandatory commitment statute would present the following questions:

1) Can the verdict of not guilty by reason of insanity constitutionally justify mandatory commitment as defined above, and (assuming an affirmative answer),

2) Can such mandatory commitment constitutionally be continued beyond the period of the sentence which could have been imposed if the defendant had been found guilty.

In *model II*, where the presence of mental disease was positively determinable, the only jury question in any criminal trial would be: did the defendant

commit the act alleged? In such a society, the degree to which a given illegal act was correlated with the defendant's relevant characteristics could be known with certainty; and the moral decision concerning the degree of correlation necessary for exculpation would presumably be made by the legislature. Thus, in a case where the correlation warranted exculpation, the jury would be instructed that if the defendant did not commit the act alleged, they must find him not guilty; and if the defendant did commit the act alleged, they must find him not guilty by reason of insanity. The certain presence of a given correlation coupled with the legislative determination that such a correlation exculpates, would, in model II, preclude a verdict of guilty.

In *model III*, however, the degree to which a given illegal act was correlated with the defendant's relevant characteristics could only be approximated; in such a society the legislature would probably *not* attempt to define exculpability in terms of a stated correlation; more likely it would state a rule in general terms, placing the ultimate decision concerning criminal responsibility in the hands of the jury.

A verdict of not guilty by reason of insanity in model III represents a determination that an illegal act was committed, and that the correlation between the illegal act and defendant's relevant characteristics *may* have been high enough to exculpate him. Assuming traditional burdens of proof such a verdict does *not* represent a determination that the correlation between the illegal act and defendant's relevant characteristics *was*, in fact, high enough to exculpate him.¹⁵ Moreover society itself has postulated that the degree of correlation which would be necessary to make such a determination could never be established with certainty. Consequently, a verdict of not guilty by reason of insanity does not exclude the possibility that the correlation was low enough so that, if its true level could have been known, society would have held defendant criminally responsible.

Because the verdict of not guilty by reason of insanity is ambivalent, the application of more stringent release criteria in mandatory as opposed to civil commitment appears justified. If defendant's correlation were such that, if society could know it, he would have been held criminally responsible (i.e., the jury "erred"), then, undoubtedly, confinement for a reasonable period, whether in a hospital or a prison, would be justified. If, on the other hand, defendant's correlation were such that, if society could know it, he would have been held irresponsible (i.e. the jury did not "err"), his releasability should not be determined only by the reduction of his correlation below the level required for initiating civil commitment; the effect of early release upon defendant's free choice to recommit the act should also be considered since model III has postulated that any act may be partially attributable to the

15. The District of Columbia courts, for example, require the prosecutor to rebut, beyond reasonable doubt, the proposition that but for the defendant's mental disease the illegal act would not have occurred. See, *e.g.*, *Carter v. United States*, 252 F.2d 608, 616-17 (D.C. Cir. 1957).

exercise of free choice and that fear of punishment deters free agents from choosing to commit an illegal act. Release, as in model II, should therefore be ordered only if defendant's overall propensity to recommit the act—the extent of his free choice plus the likelihood that he will freely choose to recommit the act—falls below the level required for civil commitment.

Once the period of a reasonable sentence has ended, however, the application of these more stringent release criteria is no longer justified. Mandatory confinement as the result of a verdict of not guilty by reason of insanity was justified only because even if the jury "erred" (i.e. if defendant's correlation were such that, if society could know it, he would have been held criminally responsible) the defendant could not be heard to complain about hospitalization for a period equal to the prison sentence he should have received if the jury had not erred. But once that period is over, if the jury erred (as society postulates it may frequently do), there is absolutely no justification for continuing to confine the defendant as the result of his illegal act. If he is to be confined it must be because he is now civilly committable. At the expiration of a reasonable sentence, therefore, the criteria for release must be reduced to the level required for civil commitment at least in those cases in which society can not be reasonably certain that the defendant was irresponsible. Society's refusal, at the expiration of the period of a reasonable sentence, to release a non-committable defendant who, had his correlation been known, would have been held criminally responsible would violate due process as clearly as the refusal of a warden to release a prisoner at the expiration of his prescribed sentence.

The criminal process, however, has made no effort to separate those whose correlation justified a finding of responsibility, from those whose correlation did not since it set out only to determine who *might* have had, not who *did* have, a high enough correlation to warrant a finding of irresponsibility. And, even if the criminal process did seek to make this determination, it would be severely hampered since the society of model III has postulated that not all relevant psychiatric characteristics, and therefore not all correlations, are knowable; due process therefore requires that the release criteria be lowered for all. Moreover, even if the defendant were correctly held criminally irresponsible, society should assume that at the expiration of a reasonable sentence the likelihood that he will exercise whatever free choice he has so as to recommit an illegal act has been effectively negated by the rehabilitative effect of the sentence. Society should therefore be concerned only with the non-free choice elements of his behavior—the correlation between relevant characteristics and illegal acts. And civil commitment release standards (which depend solely on correlations), not mandatory commitment release standards (which depend on overall propensity), should therefore be employed after the reasonable period of a sentence.

In order to comply with this requirement courts in the model III would have to impose a "quasi" sentence representing the period of imprisonment which

would have been imposed¹⁶ had criminal responsibility been found;¹⁷ the court would thereby designate the day on which mandatory commitment release criteria would give way to civil standards for each defendant who received a verdict of not guilty by reason of insanity.

Frederick Lynch did not receive a "quasi" sentence. On the contrary, the Court of Appeals, which upheld the constitutionality of his confinement, explicitly refused to assess a sentence on the ground that the length of hospitalization must depend solely on cure, and that any consideration of criminal penalties was therefore irrelevant.¹⁸ Such reasoning is, of course, eminently justified in a society with the characteristics of model I. But since the society in which Frederick Lynch lives embodies generally the characteristics of model III, the continued application of the more stringent mandatory commitment release criteria beyond the period of the sentence that Lynch would have received had he been found guilty of violating the bad check law cannot be justified. In view of the disparities between the model in terms of which the court wrote its decision, and the society in which he lives, it is presumably scant consolation to Frederick Lynch that the road to St. Elizabeths, like that other famous thoroughfare, is paved with good intentions.

16. For a variety of reasons including the possibilities of suspended sentence, judicial discretion to impose less than maximum sentences, and reduction of the period of confinement as a result of good behavior during imprisonment, maximum sentences do not accurately reflect the period of confinement generally imposed on a criminally responsible person. Consequently, a procedure by which criteria for release reduced to civil standards on expiration of the maximum sentence rather than on expiration of a reasonable sentence might violate constitutional guarantees of equal protection, by systematically depriving some who should have been held criminally responsible, of the opportunity to be released before the term of a maximum sentence had expired. In instances where a statute imposing a high maximum sentence is generally not enforced, confinement until expiration of the maximum sentence might even constitute cruel and unusual punishment.

17. In order to impose a quasi-sentence, the judge would have to know *what* crime defendant had been found not guilty of by reason of insanity. Presently, when the jury may find more than one possible crime (*e.g.*, lesser included offenses) a general verdict of not guilty by reason of insanity does not reveal which of the crimes the jury found would have been committed but for the absence of criminal responsibility. A special verdict would reveal this fact. Of course, imposing a "quasi" sentence would involve all the problems involved in sentencing generally, where judges do not usually articulate the principles which guide them, in exercising their discretion. See generally Comment, 69 *YALE L.J.* 1453 (1960). *But see* *United States v. Wiley*, 184 F. Supp. 679 (N.D. Ill. 1960).

18. *Overholser v. Lynch*, 288 F.2d 388, 394 (D.C. Cir. 1961).