

The New York State Insanity Defense Reform Act of 1980: A Legislative Experiment

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Through a statistical analysis of major changes in postacquittal procedures of the Insanity Defense Reform Act of 1980 (IDRA 1980), the study reveals the Act's success in formalizing, regularizing, juridicizing, accelerating, and extending to all acquittees psychiatric examinations and review and release procedures. Although more persons are reviewed and released at postacquittal hearings than in the matched pre-1980 cohort, fewer enter nonsecure facilities at commitment or during first 18 months of hospitalization, and fewer are released at the six-month review. After 18 months more acquittees remain inmates in secure facilities. Interviews with leading figures in the formulation and enactment of IDRA provide retrospective and prospective judgments on insanity defense reform issues.

On September 1, 1980, the Insanity Defense Reform Act went into effect in New York State. The IDRA 1980 described itself as "an act to amend the criminal procedure law in relation to the defense of insanity in criminal cases." The act outlined detailed procedures governing both the defense of "lack of criminal responsibility by reason of mental disease or defect" and the post-acquittal commitment, confinement, and release of defendants.¹

The professional and public response to the new law ranged from praise and hope to skepticism and confusion. In New York, as elsewhere, political attention to the insanity defense has intensi-

fied in the wake of the acquittal of John Hinckley. Calls for abolition of the insanity defense, for a verdict of guilty but mentally ill, and for a shift in the burden of proof at pre- and postacquittal procedures were among the alternatives being considered (and in the case of the affirmative defense in New York State, acted on) there and across the country. What became clear to the public and professionals alike, however, was the paucity of data on the actual consequences of insanity defense laws. In the absence of such data, policymaking becomes more susceptible to emotionally driven political pressures.

The study reported here sets forth the goals and purposes that guided the formulation and enactment of IDRA 1980 and evaluates the success of the act in achieving them. A statistical analysis of

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the major postacquittal changes associated with the IDRA 1980 reveals its consequences for the courts, the Office of Mental Health, and the defendants. In short, the study addresses three questions:

1. What are the goals and purposes of the IDRA 1980?
2. What changes in the behavior of the Office of Mental Health, the courts, and the defendants are attributable to the passage of this legislation?
3. Do the changes effected by the legislation help or hinder the attainment of the goals and purposes which led to its enactment?

Methodology

This study was guided in a very general way by the null hypothesis, i.e., by the suspicion that, whatever the formal changes in the behavior of courts and the Office of Mental Health resulting from the IDRA 1980, the actual consequences for defendants would not be significantly changed by this legislation. This hypothesis was adopted, first, because such an approach is standard in social science research, but, second, because there were initial reasons to suspect that it would *not* be disconfirmed by the evidence. Studies of legislative attempts to limit or abolish the practice of plea bargaining have shown that the "work group" mentality often prevails

over legislative fiat.* Those charged by society with responsibility for dealing day-to-day with problems of social deviance develop collective habits and processes that *work* to handle those problems; the outcomes of such systemic behaviors do not always change significantly with the passage of new legislation.

In that same spirit, it was reasonable to suspect (1) that those who must decide whether to detain or release acquittees, in what type of facility, for what period of time, with how many and what kinds of reviews, with what treatment and under what conditions, etc., would, indeed, change their behavior as necessary to comply with the new law; but (2) that the actual consequences would not be significantly different from those that obtained prior to the change in legislation. The bulk of this study, the collection and analysis of data, has been devoted to testing that thesis.

With respect to our third research question of whether the changes effected by the legislation help or hinder the attainment of the goals and purposes which led to its enactment, the guiding hypothesis was that those changes (if any) validly attributable to the passage of the IDRA 1980 would be in the direction sought by those who effected and were affected by its enactment. Retrospective interviews were conducted with a number of the principals involved in the passage and implementation of that legislation. Interviews also sought views of the principals on post-IDRA legislation changing the insanity defense in New York State to an affirmative de-

*For a full discussion of "the ecology of courtroom workgroups," see Eisenstein, *et al.*² For an application of these principles to the problem of abolishing plea bargaining, see Rubenstein, *et al.*³

fense and the consequences of *Michael Jones v. United States*.

For statistical treatment, three cohorts were selected for comparison and analysis. Two cohorts of acquitted individuals, one under the old law holding just prior to the passage of IDRA 1980 and one under the IDRA 1980 following its implementation, are traced and compared.

The earliest cohort (Cohort 3) consists of 222 individuals acquitted "by reason of mental disease or defect" between September 1, 1971, and June 30, 1976. This cohort provides data on conditions of confinement (secure, nonsecure, or quasi-secure) over a three and one-half year period. The experiences of the cohort were compared with conditions of confinement data for Cohorts 1 and 2.

Cohort 1 (old law) includes the 107 individuals admitted to Office of Mental Health facilities between July 1, 1976, and June 30, 1978. Cohort 2 (new law) consists of the 110 individuals admitted between January 1 and December 31, 1981. Both groups are followed for 18 months. An eighth-month grace period intervenes between data collection and the effective data of the new law, preventing distortion in the data that might be created by widespread knowledge of forthcoming changes in the law.

Having established fundamental demographic similarity in the two cohorts, the study turns to an examination of the processing of defendants under the two laws: processes for transfer and conditional release or discharge and the conditions of confinement under which they were hospitalized.

Goals and Purposes of the IDRA 1980

In 1979 Governor Hugh Carey requested that the Law Revision Commission, "the oldest continuous agency in the common-law world devoted to law reform through legislation, created by Chapter 597 of New York's Laws of 1934," carry out a thorough review of New York's insanity defense.

His request, explained in a June 26, 1980, press release,

was based upon the need to examine the defense in light of recent judicial decisions and to determine if it was the best mechanism to protect the public and the rights of the offender. The Law Revision Commission and its consultants, together with a special advisory committee comprised of noted forensic psychiatrists, judges, professors and legal practitioners, conducted an exhaustive review of the present defense and considered alternatives that are either employed in other jurisdictions or proposed by commentators.

The commission's report served as the basis of the proposed IDRA 1980. The goals and purposes embodied in this report and in the legislation can be summarized as attempts (1) to accommodate the political pressure to prevent crimes perpetrated by mentally ill persons, thus "to ensure public safety," and (2) to address certain due process, equal protection issues that had arisen in state and federal courts.⁴

The fundamental intentions of the framers of the IDRA 1980 are clearly and forcefully revealed in the legislation itself. On the one hand, the elaborate procedural safeguards—including psychiatric examinations, applications and hearings for commitment, transfer, furlough, release, recommitment, and re-

tention; the addition of a plea of not responsible; the tightening and honing of language and procedure in relation to psychiatric evidence, instructions to the jury, definitions of terms, deadlines for application, rehearing, and review—all speak to the care with which the Law Revision Commission (and finally, the legislature) confronted the task of bringing the IDRA 1980 in line with the due process, equal protection issues that had so concerned state and federal courts during the previous two decades.

On the other hand, the repetition of the passage “consistent with the public safety and welfare of the community” in relation to furlough, transfer, release, and discharge; the full participation of the district attorney in all phases of commitment, confinement, and release; the attachment of orders of condition to all movement within and without the system; the requirement that the district attorney, the police and other designated persons be notified of release, discharge, or escape of acquittees; the greater specificity required in psychiatric determinations; and the vastly increased involvement of the court in all aspects of commitment, confinement, and release all point to the determination of the Law Revision Commission to deal with concern about possible crimes perpetrated by mentally ill persons and thus “to ensure public safety.”

Postacquittal Procedures under the Old Law

Under the old 330.20 statute, the defendant was acquitted and committed to the custody of the commissioner of men-

tal hygiene to be placed in an appropriate institution. When the commissioner of mental hygiene believed that a person in his custody could be “discharged or released on condition without danger to himself or others,” he submitted an application for discharge or release on condition and a report to the court, to the Mental Health Information Service, and to the district attorney of the county of commitment. If the court was satisfied with the commissioner’s request, it was to order the discharge or release of the acquittee under such conditions as the court determined necessary. If not in agreement, “it must promptly order a hearing,” in this instance a civil proceeding. The old statute permitted acquittees to apply to the court which committed them for discharge or release.

Before 1980 no official Office of Mental Health regulations governed the procedures for handling insanity acquittees. Instead, the director of forensic services issued administrative policy memoranda to clinical directors, establishing guidelines for institutional procedures. The only such memorandum currently retrievable is an undated draft prepared by Dr. John B. Wright, assistant commissioner of forensic services from 1971 to 1978, which sets out procedures to be followed by the hospital on applications for release. These procedures were adopted in the late 1970s in response to public pressure and concern over the possibility of crimes perpetrated by mentally ill persons.

Transfer and furlough were handled administratively, that is to say, without review by the courts. The clinical direc-

tor would forward his recommendation for a change of status, based on the treatment team's recommendation to the commissioner of mental hygiene via the Office of Forensic Services, who would act on the request. Furloughs were issued by the hospital itself. Discharge or release on condition required review by the court. A special hospital review committee and independent review panel were rather late and unwieldy additions to the release procedure.

Postacquittal Procedures under IDRA 1980

Postacquittal procedures under IDRA 1980 are detailed and precise. The revised section of the Criminal Procedure Law is composed of 19 subsections; it takes up 15 pages in McKinney's *Laws of New York State*, whereas its predecessor required only two.

After acquittal, persons found "not responsible by reason of mental disease or defect" must undergo examination by two psychiatrists designated by the commissioner of mental health to determine present mental condition. If in custody at the time of verdict or plea, acquittees must be committed to a secure facility for examination.

At the initial examination the examiners must determine whether the defendant is dangerously mentally ill, mentally ill, or neither mentally ill nor dangerous. Their reports must be submitted to the commissioner of mental health, who in turn submits them to the court. An initial hearing must be held within 10 days of the court's receipt of the examination reports. The district at-

torney carries the burden of proving that the defendant has a dangerous mental disorder or that he/she is mentally ill. The court then makes its final determination as to which of the three classifications apply.

If the acquittee is found to be mentally ill, he or she is committed to the commissioner's custody, placed in a nonsecure facility, and treated exactly like an involuntary civil patient. In addition to a six-month civil commitment order, the court issues an order of conditions to which the defendant will be subject for five years; if "good cause" is shown, "the court may extend the period for an additional five years." If the court finds the defendant neither mentally ill nor dangerous, the defendant's release must be ordered, subject to conditions the court may attach.

If the acquittee is adjudged dangerously mentally ill, he or she is committed to the custody of the commissioner of mental health and placed in a secure facility for a period of six months. Prior to the expiration of this six-month commitment order, the Office of Mental Health must apply for a retention order or for release. The court may, on its own motion or on demand of the district attorney, the defendant, counsel for the defendant, or the Mental Health Information Service (which represents the defendant), conduct a hearing. The commissioner, represented by the attorney general, carries the burden of proving the defendant dangerously mentally ill or mentally ill. (A 1982 amendment shifted this burden from overworked district attorneys to the commissioner.)

If the court finds the defendant mentally ill or dangerously mentally ill, it must issue a retention order, which authorizes continued custody for a period not to exceed one year; subsequent retention orders may authorize continued custody for up to two years. Defendants found to be mentally ill are transferred to a nonsecure facility. If found neither mentally ill nor dangerous, they must be released. Furloughs, transfers to nonsecure facilities, as well as release, require application to the court.

Findings

Descriptive Data Cohorts 1 and 2 are closely matched demographically. They are composed predominantly of white males, in their mid-30s, the majority of whom had less than a high school education and were never married. A large majority of them had experienced some form of prior mental hospitalization and were diagnosed at acquittal as being schizophrenic. Crimes of violence, potential violence, and crimes against persons represented the most frequent charges.†

Postacquittal Procedures: Establishing a Baseline

Reviews Under the old law, acquittees spent an average of six months in their first facility before being reviewed. For those who were reviewed twice, the second review took place, on the average, eight and one-half months after admission. As can be seen from Table 1,

during the first 18 months of their hospitalization, 90 percent of the individuals in Cohort 1 were reviewed once, and 32 percent twice, largely for the purpose of transfer. Only six persons were reviewed three times. Although old-law patients had the right to petition for release, and many did, very few were successful in their petitions.

Table 1 shows that of the 96 who had first reviews, in 76 (79%) cases, the hospital staff initiated the review. In the largest percentage of cases, 74 percent (56), the purpose of the hospital-initiated review was transfer to a nonsecure facility. Hospital-initiated requests for release accounted for 12 percent (9) of the requests. In only 20 cases (21%) did the defendant file a petition for release.

Of the 34 second reviews, 16 were initiated by the hospital, 18 by the defendant, the initiative for the second review having switched from the hospital to the defendant as majority petitioner for release. Fifty-four persons had one review for transfer to a nonsecure facility, five had two such reviews. In relation to release, 43 persons were reviewed once, five persons twice, and one person three times.

Level of Agreement As Table 2 reveals, principals in the review process agreed overwhelmingly in their judgments. The review process under the old law, both for release and transfer, seems to be one in which psychiatrists made their recommendations and the clinical director shared the recommendations of his staff with the commissioner, who in turn acted in large part on the recommendations of the director. The court, which acted when the commissioner re-

† Full statistical treatment of the supporting data cited in Dorothy Spektorov McClellan.⁵ (available from Rockefeller Institute, 411 State Street, Albany, New York 12203)

Table 1
Purpose of Review by Initiator of Review, 1976-1978

	Transfer to Nonsecure Facility		Transfer to Quasi-Secure Facility		Transfer to Secure Facility		Conditional Release or Discharge		Total
	N	%	N	%	N	%	N	%	
First review									(N = 96)
Patient	-	-	-	-	-	-	20	69.0	20
Hospital	56	100.0	10	100.0	1	100.0	9	31.0	76
Second review									(N = 34)
Patient	-	-	-	-	-	-	18	69.2	18
Hospital	6	100.0	-	-	2	100.0	8	30.7	16
Third review									(N = 5)
Patient	-	-	-	-	-	-	1	100.0	1
Hospital	2	100.0	-	-	2	100.0	-	-	4

Table 2
Agreement Between Principals at First Review and Second Review, 1976-1978

	Psychiatrist and Special Hospital Review Committee		Special Hospital Review Committee and Clinical Director		Psychiatrist and Clinical Director		Clinical Director and Commissioner		Independent Review Panel and Commissioner		Commissioner and Court	
	1st	2nd	1st	2nd	1st	2nd	1st	2nd	1st	2nd	1st	2nd
Transfer to nonsecure facility	-	-	-	-	98.4	100.0	98.4	85.7	-	-	-	-
Transfer to quasi-secure facility	-	-	-	-	100.0	-	100.0	-	-	-	-	-
Transfer to secure facility	-	-	-	-	100.0	-	100.0	100.0	-	-	-	-
Retention	-	100.0	-	100.0	87.5	100.0	100.0	100.0	100.0	66.7	-	-
Release	100.0	100.0	100.0	100.0	100.0	100.0	72.7	83.3	100.0	100.0	75.0	81.8

requested release, generally concurred, but was somewhat more conservative in its judgments.

Only 27 percent of the requests for release, both hospital and patient initiated, ended in release. The role of the court was minimal; most decisions were made *de facto* by the commissioner. The commissioner pushed for release in only 8 of the 28 cases where the purpose of review was release at the first review, and 11 of 26 at the second review. Only

15 persons were released by the court within 18 months of admission, two to the custody of the Department of Correctional Services.

Of the eight cases in which the commissioner recommended release at the first review, the court decided with the commissioner in six. At the second review, of 11 requests by the commissioner for release, the court agreed in nine. The screening process at work here guarantees that only those applications

that are viewed as having a chance of making it through the entire process are advanced favorably at each stage.

Of the 20 patient-initiated petitions for release at the first review, the commissioner recommended release in only two and transfer to a less secure facility in seven. Of the 18 patient-initiated petitions at the second review, the commissioner recommended release in three and transfer to a less secure facility in one.

Seventy percent of all first review proceedings and 24 percent of all second review proceedings were initiated for the purpose of transfer. There was almost full agreement between the psychiatric staff and the clinical director at both first and second reviews. The agreement of the clinical director and the commissioner on transfer to nonsecure, quasi-secure, and secure facilities was between 98 and 100 percent at the first review

and between 86 and 100 percent at the second.

Conditions of Confinement The old law (Cohort 1) data on the relationship between conditions of confinement at the first facility and the most serious offense of which they were acquitted reveal that 35 (88%) persons acquitted of murder were confined in secure facilities, as were all of those acquitted of rape, 91 percent of those acquitted of violent crimes, 84 percent of those acquitted of potentially violent crimes, and all of those acquitted of sexual offenses. The persons acquitted of these crimes and other crimes against persons constituted a large percentage of the acquittees; and most acquittees, 91 (85%), were confined in secure facilities at their first admission.

Table 3 shows that most old law acquittees [91 (85%)] were confined in secure facilities at their first admission,

Table 3
New York State Insanity Acquittals Conditions of Confinement Over Time, 1971-1976, 1976-1978, and 1981-1982

Movement from:	1971-1976 (N = 222)				1976-1978 (N = 107)				1981-1982 (N = 94)			
	Length of Stay in Facility Before Move				Length of Stay in Facility Before Move				Length of Stay in Facility Before Move			
	F	%	\bar{X}	Md	F	%	\bar{X}	Md	F	%	\bar{X}	Md
Secure to nonsecure												
Once	89	40.0	328	252	66	61.7	233	238	24	25.5	256	240
Twice	4	1.8			1	0.9			-	-	-	-
Secure to quasi-secure												
Once	8	3.6	537	413	13	12.1	275	287	-	-	-	-
Twice	1	0.5			-	-			-	-	-	-
Quasi to nonsecure												
Once	3	1.4	426	407	2	1.9	127	127	-	-	-	-
Twice	-	-			-	-			-	-	-	-
Nonsecure to quasi or secure												
Once	19	18.6	381	241	14	13.1	268	276	-	-	-	-
Twice	4	1.8			-	-			1	1.1	34	34

Table 4
New York State Acquittals, Length of Hospitalization by End Status, 1976–1978 and 1981–1982

End Status	1976–1978 (N = 107)		1981–1982 (N = 110)	
	N	Mean Number of Days	N	Mean Number of Days
330.20 Nonsecure facility	58	526	20	429
330.20 Quasi-secure facility	10	529	–	–
330.20 Secure facility	9	539	46	459
Discharged or released on condition	14	285	35	107
Conditional release pending	5	476	2	474
Dead	2	394	2	156
LWOC	9	382	–	–
New 330.20 hospitalization	–	–	–	–
New civil hospitalization	–	–	4	238
New 730 hospitalization	–	–	1	497

but 67 (74%) of these persons, after an average of 8 months, moved into non-secure environments. At the end of 18 months (Table 4), 77 percent of the cohort remained hospitalized, 63 (59%) in nonsecure facilities. The 14 remaining at liberty at their end date (18 months after admission) had spent an average of nine and one-half months in the hospital.

The large proportion of persons moving from secure to nonsecure facilities between 1976 and 1978 requires further comment. When we examine Cohort 3, consisting of persons acquitted between 1971 and 1976, we find that in contrast to Cohorts 1 and 2 (old law and new law), where most acquittees were confined in secure facilities at their first admission, the majority of acquittees in Cohort 3, 114 (51%), were initially confined in nonsecure facilities, with 102 (46%) confined in secure facilities, and six (3%) in quasi-secure facilities. Even though the majority of persons in Cohort 3 were initially confined in a non-secure facility, the movement from secure to nonsecure continued: 42 percent

of that cohort, 93 individuals, moved into nonsecure facilities after an average of 328 days in secure facilities. From 1976 to 1978 Cohort 1 saw movement from more secure to less secure facilities; in fact, an even higher *rate* of movement in that direction than was the case with Cohort 3, no doubt accounted for by the fact that a larger percentage of Cohort 3 was initially thus confined.

New Law and Old Law Compared

Reviews Unlike old law acquittees who waited, on the average, six months for their first review, new law acquittees were admitted to an examination facility for the purpose of review within approximately two weeks of acquittal, and *all* acquittees were reviewed. (Under the old law, 90 percent were reviewed at least once within the 18-month period.)

The result of the first new law review was that the court retained 69 (64%) persons in secure facilities, placed 24 (22%) persons in nonsecure facilities, and released 17 (13%) persons. The outcome of the first old law review reveals that the commissioner recommended

transfer to nonsecure facilities for 62 (66%), with transfer to a quasi-secure facility for another 11 (12%). While only six persons were released at the first review under the old law, the court released 17 persons at the initial hearing required by the new law.

The second review under the new law, the first retention order review, was initiated within approximately five months of the initial hearing and the signing of the commitment order—three and one-half months earlier than under the old law. The new law requires that only persons found dangerously mentally ill at the initial hearing be reviewed at this stage, and this category included 69 individuals. Under the old law only 32 percent of all the acquittees were reviewed twice. Although many more persons were reviewed twice under the new law, the court decided in favor of transfer to nonsecure facilities in only 25 percent of the cases, and no conditional releases were ordered. Under the old law nine persons were released at this stage. All of the 69 new law acquittees found to be dangerously mentally ill at the initial hearing remained hospitalized after the second review, 52 in secure facilities.

Level of Agreement As was true under the old law, the level of agreement among principals in the process was very high. As Table 5 shows, where there was disagreement it was usually in the direction of persons in positions of higher authority being somewhat less likely to opt for change of status.

Conditions of Confinement An examination of the relationship between the conditions of confinement at the first postcommitment facility and the most serious offense of which the defendant was acquitted reveals that 85 percent of the new law persons acquitted of murder were confined in a secure facility, as were all of those acquitted of rape, 82 percent of the persons acquitted of other violent crimes, 59% of those acquitted of potentially violent crimes, and all of those acquitted of other crimes against persons. These figures confirm the view that court and hospital were extremely cautious in their determinations under both the old and new laws.

As Table 3 shows, although 67 (63%) of the old law acquittees moved into nonsecure facilities after an average of 233 days, only 24 (22%) of the new law acquittees moved to nonsecure facilities after an average of 256 days. In sum,

Table 5
Agreement Between Principals at First Retention Order Review, 1981–1982

	Psychiatrist and Hospital Forensics Committee (%)	Hospital Forensics Committee and Clinical Director (%)	Psychiatrist and Clinical Director (%)	Clinical Director and Commissioner (Application Decision) (%)	Commissioner (Application Decision) and Court (%)
Mentally ill—transfer to nonsecure facility	100.0	100.0	73.9	94.4	88.9
Dangerously mentally ill—retention	50.0	100.0	100.0	100.0	98.0

new law acquittees had a higher rate of review, (and court review at that), but fewer persons moved from more secure to less secure facilities.

Although only 9 (8%) of the old law (Cohort I) acquittees remained in secure facilities at their end date, Table 4 reveals that 46 (42%) of the new law acquittees were so hospitalized. However, 40 (36%) of the new law cohort had been released (five returned with new hospitalizations), whereas after 49 old law acquittees had 56 formal reviews initiated for release, only 15 were, in fact, released within 18 months of their admission to the hospital, two to the custody of the Department of Correctional Services.

Although a larger percentage of persons were released under the new law, 17 of these 40 releases occurred at the initial hearing, soon after acquittal, and none occurred at the first retention order review. All the other new law releases (except one which occurred at the second retention order review) occurred at civil facilities for persons whose initial commitment orders were civil, i.e., persons who were found mentally ill but not dangerous at the initial hearing.

Escapes One of the major foci of "public pressure" influencing the legislature to amend the Criminal Procedure Law was concern over security issues. An examination of the number of escapes among acquittees during their first 18 months of hospitalization under the old law reveals that 12 persons had managed one escape, three persons two, one person four, and one person six, for a total of 28 escapes by 17 people. How-

ever, only two cases of escape appear on the computer records for new law acquittees, a significant drop from the figures for old law acquittees, perhaps a function of the fact that more people moved into nonsecure facilities at a faster rate under the old law, and as a result had greater opportunity to escape.

In sum, the new law procedures seem to have had the effect of increasing the number of reviews, of formalizing the procedures, and of providing court review for all individuals. At the same time, these procedures have also had the effect of putting tighter controls on persons who were designated early on as being dangerously mentally ill.

Evaluation

The goals and purposes of the IDRA 1980, as embodied in the *Report of the Law Revision Commission* and the legislation it inspired, were attempts (1) to address certain due process and equal protection issues that had arisen in state and federal courts, and (2) to prevent crimes perpetrated by mentally ill persons, thus "to ensure public safety." To what extent do the changes effected by the legislation help or hinder the attainment of the goals and purposes which led to its enactment?

According to the Data

In relation to the goal of addressing due process and equal protection issues, the data demonstrate that the IDRA 1980 has had the effect of formalizing, regularizing, juridicizing, accelerating, and extending to all acquittees, a procedure that was, to a certain extent, in place before passage of the legislation.

All acquittees are now afforded review immediately upon acquittal, all those who are found to be dangerously mentally ill at the initial hearing now have the benefit of court review of their status at regular intervals, and those found mentally ill but not dangerous at their initial hearing now share the rights of involuntarily committed civil patients.

Another effect of the IDRA 1980 has been to change, to some extent, the character of reviews. Before passage of the new legislation, reviews, whether initiated by the patient or the hospital, had as their purpose to assess requests for movement and change in status. If the patient initiated the process, the purpose of the review was release. If the hospital initiated the process, the purpose of the review was, in almost every instance, transfer to a less secure facility or release.

Under the IDRA 1980, the focus of the initial hearing and subsequent reviews is on establishing whether the defendant is presently mentally ill, dangerously mentally ill, or neither mentally ill nor dangerous. [There is legitimate and deep concern about "dangerousness": as a diagnosis it cannot be defined clinically; as a legal judgment, it can be sustained on the basis of a single act of shoplifting!⁶] The formula is: if defendants are mentally ill, they are transferred to a nonsecure facility; if dangerously mentally ill, they are retained in a secure facility; and if neither, they are released. In the IDRA 1980 the subsections on review are entitled, "Initial Hearing: Commitment Order," "First Retention Order," and "Second Retention Order." The titles reflect what is substantiated by the data, namely, these reviews are

initiated, not so much for the purpose of movement or change in status, but for the retention of individuals in the custody of the Office of Mental Health. (The 1982 amendment to the law, which shifts the burden at retention hearings from the district attorney to the attorney general representing the hospital, makes the hospital the central figure in the retention of individuals in its custody by placing the burden on the hospital to prove that the defendant is presently mentally ill or mentally ill and dangerous.)

The effect of the change in the character of reviews on the process is reflected in the fact that although more persons are reviewed, fewer enter nonsecure facilities at the commitment stage, fewer move from secure to nonsecure facilities during the first 18 months of their hospitalization, fewer are released at the retention order stage, and as a result, at the end of 18 months, more persons are housed in secure facilities. Forty-eight (67%) of the new law acquittees, committed to secure facilities at the initial hearing, did not move to nonsecure facilities within 18 months of their hospitalization. Under the old law, excluding even those persons who moved from secure to quasi-secure facilities, only 24 (26%) persons did not move to nonsecure facilities within 18 months of admission. The new law has set aside a group determined to be dangerously mentally ill at the initial hearing stage (1) whose due process, equal protection rights have been formalized, but (2) who are hospitalized for longer periods of time in secure facilities.

Those new law acquittees found *not*

dangerous at the initial hearing and confined in nonsecure facilities are fewer in number than those confined to nonsecure facilities at commitment under the old law, and they tend to be released at a faster rate. At the end of 18 months, 40 (36%) of the new law acquittees had achieved release, compared to only 15 (14%) of the old law acquittees. It is important to note that 16 percent (17) of the new law acquittees were released at the conclusion of their initial hearing. Only seven (6%) were released at the first and second retention order hearings. The other 16 (15%) were patients with nondangerous commitment orders being handled as civil patients.

James Yates, senior counsel to the Legislature's Codes Committee, points out, in relation to the 17 persons released at the initial hearing stage, that the relatively large number of persons released at the initial hearing stage is attributable to the fact that prosecutors had consented to significantly more acquittals in the first year or so after enactment of the IDRA 1980. The IDRA 1980 provided for pleas of not responsible, whereas the old law had not done so. The data show that as of 1981-1982, 95 (86%) of 110 acquittees were found not responsible by plea rather than verdict. Yates argues that this figure reflects the attitude of district attorneys in the year or so after passage of IDRA: it was easier to consent to the defendant's plea than to take the cases to court. Prosecutors 'knew that persons would be reviewed again at the initial hearing; therefore, they tended to consent. According to Yates, before passage of the IDRA, persons who were released at the initial

hearing stage would have been screened from further processing as insanity acquittees by contested actions in court. Yates goes on to say that the dramatic drop in acquittals from 113 in 1982 to 77 in 1983 is attributable to the fact that the prosecutors had begun to consent to fewer cases.‡ The continued drop in acquittals to 60 in 1986 and 58 in 1987 confirms Yates' explanation.

The Law Revision Commission assures us in its report⁷ that the procedural changes it recommended would "better ensure the protection of the public from future dangerous acts of defendants found not responsible while safeguarding the rights of such defendants." If ensuring public safety is measured by the retention in secure mental hospitals of individuals designated as dangerously mentally ill by psychiatrists and the court, and if providing the defendant due process, equal protection rights is measured by the formalization of a re-

‡ The principals in the formulation and implementation of the IDRA 1980 interviewed for this study include the following: Abraham L. Halpern, chairman, Department of Psychiatry, United Hospital, and Clinical Professor of Psychiatry, New York Medical College; Michael J. Hutter, executive director of the Law Revision Commission; Michael R. Juviler, New York Supreme Court Justice; Steven R. Kartagener, chief, Appeals Bureau, Office of the District Attorney, Bronx County; Paul Litwak, chief counsel, New York State, Office of Mental Health; Thomas Lynch, senior counsel, Mental Health Information Service, Mid-Hudson Psychiatric Center; Frank Padavan, New York State Senate; John P. Petrila, counsel, New York State, Office of Mental Health; David S. Ritter, Orange County Court Judge; Richard Rosso, senior counsel to Assemblyman Robin L. Schimming, New York State Assembly; Robin L. Schimming, Chairman of the Task Force on the Insanity Defense, New York State Assembly; Harold Smith, former assistant commissioner, Bureau of Forensic Services; Herbert Wechsler, professor, Columbia University School of Law; James A. Yates, senior counsel, New York State Assembly, Codes Committee; Arne J. Youngerman, senior attorney, Law Revision Commission. 47 N.Y. 2d 667, 420 N.Y. 2d 192, 394 N.E. 2d 262.

view process, the Law Revision Commission has kept its word.

How stands the null hypothesis? The suspicion was that those who decide whether to detain or release acquittees, with how many and what kinds of reviews, with what treatment, and under what conditions, would change their behavior, as necessary, to comply with the new law, but that irrespective of the formal changes in the behavior of courts and the Office of Mental Health, the actual consequences for defendants would not be significantly changed by the legislation. The principals in the process have, in fact, continued to act as a work group. The level of agreement down the line is as high as ever. The process, although it has been formalized and regularized, is not, in form, very different from that followed under the old law, with the exception of the distinctions made between mentally ill and dangerously mentally ill defendants, and the guaranteeing of the defendants' right to a hearing. Where required, the Office of Mental Health and the courts have conformed their behavior to the requirements of the law. The data show that there has been full compliance with the law.

But what does all this mean for the defendant, and what does it imply for our null hypothesis? In a curious way, the null hypothesis has been stood on its head. The data reveal that the work group has continued to work in close agreement on tasks that in certain important respects resemble those they carried out under the old law, and that, where necessary, they have changed

their practices to comply with the law. But the most significant feature of the change is not the new formal procedures, but the conclusions the psychiatrists, the hospitals, the commissioner, and the court are reaching in relation to the defendants. The consequences of the IDRA 1980 for the defendants have been different from those that obtained before the change in legislation. Individuals who in most descriptive respects resemble their counterparts in the old law cohort are now being retained in more secure facilities for longer periods of time.

According to the Principals

Interviews were held with persons who were principals either in the creation or the implementation of the reform legislation. In addition to describing their roles in relation to the insanity defense, they were asked to assess the degree to which the law had achieved its objectives. The questions asked were open-ended, and the answers were often far-reaching. Each principal shared his distinctive concerns and experiences. Principals were asked for an assessment of Bill 9353, making insanity an affirmative defense in New York State. (This bill was passed by the State Assembly on June 12, 1984, subsequently signed into law by Governor Mario Cuomo.) They were also asked for an appraisal of the implications of *Jones v. United States*⁶ for the insanity defense in New York in light of the assembly's passage of Bill 9353—the latter two questions to assess the prospects of the insanity defense in New York State.

In *Jones v. United States* the Court held: "that when a criminal defendant established by a preponderance of the evidence that he was not guilty of a crime by reason of insanity, the due process clause permitted the government, on the basis of the insanity judgment, to confine him to a mental institution until such time as he had regained his sanity or was no longer a danger to himself or society, and he could be confined to a mental hospital for a period longer than he could have been incarcerated had he been convicted."⁸

A summary of responses to these questions, including certain remarks made "not for attribution" to specific respondents is included.

Those persons who had been involved in the formulation of the legislation have all moved to other assignments, and the tone of the conversations was generally retrospective. Those involved in the legislative process or in the processing of individuals took a more prospective stance toward the questions.

Persons Involved in the Formulation of IDRA 1980 Several persons who had been directly involved with the Law Revision Commission in preparing its report were interviewed to provide some background on the process. They were invited to comment on the legislation and to assess whether or not it has achieved its objectives.

Michael J. Hutter, executive director of the Law Revision Commission, described the mood and climate that surrounded the work of the commission on the confined and delineated the goals and objectives of the commission's work

as he saw them. In relation to the goal of accommodating the political pressure to ensure public safety, Hutter recalls that when Governor Carey came to the Law Revision Commission to ask it to study the insanity defense, he assigned the group an open-ended agenda. The commission was charged "to consider what was best. The commission was never sounded out by the governor's office," as would have been done had the governor "wanted a particular viewpoint" to be reflected in their work. Hutter explains that the commission had felt free to follow the law where it took them and that "political concerns never entered into their consideration of the issues." The commission hired consultants to provide judicial experience and appointed a *pro bono* advisory committee. The commission attorneys and the executive and assistant directors put together their proposal and presented it to the commissioners. In the course of several work sessions, differences were resolved and a final document prepared.

The IDRA 1980 was, according to Hutter, designed to prevent abuses in the period following acquittal.

In the aftermath of Torsney, there was the need to scrap and tighten up. To prevent abuses, elaborate procedures were put in place. In view of the fact that many people being released prematurely would have come to our attention, that is, I'm sure we would have been informed, I'm sure the law is working quite well. §

§ In re Torsney (1979) decrees that "equal protection mandates that the insanity acquittee be afforded the same procedural rights governing his release from custody as any other civilly committed person" and that an acquittee's "petition for release must be measured by the same substantive standards governing involun-

Whereas Hutter's measure of the success of the IDRA 1980 focuses to a large extent on the concern of premature release of defendants, Arne J. Youngerman, senior attorney for the Law Revision Commission who wrote the *Report of the Law Revision Commission*, spoke more directly to the goal of providing equal protection, due process rights to defendants and the feeling that the IDRA 1980 has shown itself to be "a good faith attempt" to provide those constitutionally guaranteed rights. Youngerman recalled that a major concern guiding the commission was to provide for periodic, judicial review of defendants' detention. He felt that society does itself no service by detaining persons involuntarily in institutions that are restrictive beyond the level necessary for therapeutic progress.

Professor Herbert Wechsler of the Columbia School of Law, who served as chairperson of the advisory committee to the Law Revision Commission, explained that he was satisfied with the IDRA 1980, that "it was as much a matter of articulating things, of making them explicit in the written law, as it was of changing existing practices." He felt that the legislation impressed on the Office of Mental Health the seriousness of their responsibility, which some believed was in question after the release of the Department of Mental Hygiene's Report in 1978.¹⁰ That report, as Wechs-

ler recalled, tended to give some the impression that the Department of Mental Hygiene had been too much concerned with their own convenience and too little with the problems faced by the courts and defendants. Wechsler believes that although no empirical evidence is currently available or likely to become available, the IDRA 1980 has enhanced the safety of New York State citizens, and thus allayed the concerns it attempted to confront.

Michael R. Juviler, a New York Supreme Court Justice, served as a consultant to the Law Revision Commission for the report. He reiterated Hutter's recollection that the commission was not bowing to partisan political pressure. Instead, "some legitimate public concerns about risks taken with people who had been acquitted had to be dealt with. But the commission was not itself influenced by what might have been perceived to be political pressure."

The purpose of the commission's and the advisory committee's efforts was, according to Juviler, to apply the constitutional law; but it was in certain instances not clear from state and federal court decisions exactly what was required by law. The major areas of difficulty existed in relation to the placement of the burden and the standard of proof. The commission finally decided to place the burden on the prosecution, although the advisory committee preferred an affirmative defense, but they did not try to define the extent of the burden.

Juviler explained that in assessing the extent to which the objectives of the IDRA 1980 have been achieved, he was

tary civil commitment of any other individual." (at 676 p. 36) For a full account of the Torsney case from a forensic psychiatric perspective, see Halpern, *et al.*, 1981.⁹

hampered by not having enough knowledge or first-hand experience with the statewide administration of the law to make any serious judgment. But he inferred from "the absence of abuses of the sort that occurred before [the IDRA 1980]." that it has been successful.

Abraham L. Halpern, chairman of the Department of Psychiatry, United Hospital, and clinical professor of psychiatry, New York Medical College, was a member of the advisory committee to the Law Revision Commission. Halpern felt that the commission should have taken "a genuine look at the insanity defense *per se*, and whether or not it need play a role" in the adjudication of criminal charges. But Halpern explains that the commission never dealt with that question. Early on they adopted "the assumption that the insanity defense is essential to the moral integrity of the criminal law." As is known to those familiar with his writings on the subject, Professor Halpern disagreed with that assumption.^{9,11,12} The commission, he believes, wanted to liberalize the procedures as much as possible, and at the same time in a contradictory spirit, "to assure the public that the principle of retribution prevails." He felt the two had to go together to be accepted.

In relation to the achievement of the goals of the IDRA 1980, Halpern points out that psychiatrists are in fact finding more persons dangerous, that judges are agreeing in most cases, and that persons are, therefore, being incarcerated for longer periods of time. It is Halpern's belief that psychiatrists are making more conservative judgments reflecting

changes in their own views, as well as public pressure in a conservative direction. The data certainly support his position.

Principals in the Legislative Process

As James Yates points out, the legislature was under pressure to change the insanity defense law. They held hearings and concluded that postacquittal procedures needed to be the focus of the change. Two competing interests had to be dealt with—those of the psychiatrists and those of the community. The major concern was the due process requirements attending to release. The question before the legislature was not how long defendants should be detained, but rather who should decide on the issue of release. Should the detention period be measured by the community's values or by the psychiatrists? The legislature chose to resolve the question in favor of the community. The changes in the law made certain that final decisions lay in the hands of the court, not the psychiatric administrator. The question of release in the last analysis, according to Yates, is a legal, not a medical one.

Robin L. Schimminger, chairman of the Task Force on the Insanity Defense of the New York State Assembly, felt that the most favorable impact of the IDRA 1980 lies in the area of postacquittal safeguards. According to Schimminger, the IDRA 1980 did not go to the heart of the insanity defense, and the public's disapproval and disenchantment with the defense has remained. Although the IDRA 1980 is a significant piece of legislation and did establish safeguards, it also did not deal with the issue

of who should carry the burden of proof at the acquittal stage.

Frank Padavan of the New York State Senate reiterated Schimminger's point. He, too, believes that the IDRA 1980 "did not deal with the basis, underlying issues of the insanity defense." Although the procedural changes preclude inappropriate release of defendants into the community, and due process rights of defendants have been protected, thereby "making the defense more liveable," two fundamental issues need still be dealt with—the issue of the affirmative defense and that of providing alternatives to acquittal or guilty rulings.

Principals in the Processing of Acquittes Paul Litwak, chief counsel for the Office of Mental Health, spoke directly to the issue of the achievement of goals and purposes of the IDRA 1980, admitting that "certainly the law has accommodated the political, 'public' pressure to prevent crimes perpetrated by mentally ill persons [and has thus] made it possible for the public to perceive that their needs are being protected." The statute was, however, a redundancy of regulations of the Office of Mental Health that were already in place. The establishment of hospital forensics committees in 1979 by the Office of Mental Health "was an attempt to forestall any drastic steps on the part of the legislature, which would take clinical decision making away from the hospital staff and place it in the hands of the court." Litwak was as forthright and self-conscious of the conflict between the legal and medical professions in regard to this issue as was Yates.

David S. Ritter, Orange County Court Judge, presided over retention hearings at the Mid-Hudson Psychiatric Center between 1981 and 1982. Ritter felt that the IDRA 1980 was a response to the need for better screening of persons so as to protect the public from the demonstrated violent tendencies that had led the person to the offense for which he/she was tried and acquitted. The IDRA 1980 had also addressed the need to systematize procedures, so that persons who were not dangerous would not be held for inordinate periods of time. There can be no doubt, Ritter said, that the IDRA 1980 is preferable to the old statute. Yet in relation to actual practice, there has been a good deal of "blurring of roles" because of economic considerations. Ritter explained that since the district attorneys, as the people's advocate, were not budgeted by the legislature to hire psychiatric witnesses, they were not given the wherewithal to carry out their task at review hearings. Economic pressures forced them instead to attempt to get the court to hire psychiatric witnesses. The court, on the other hand, was required by law to provide this service for the defendants, and resisted the pressure whenever possible.

Steven R. Kartagener, chief of the Appeals Bureau of the Office of the District Attorney of Bronx County, spoke to the achievement of the goals of the legislation and expressed his belief that the statute has gone a long way toward dealing with the due process issues raised by state and federal courts, that is, toward protecting the defendant's rights. Kartagener added that in some respects the

law went further than necessary, for example, in placing the burden of proof at commitment and retention on the government, rather than on the defendant.

The Affirmative Defense

The principals were asked to assess a recent legislative action, specifically, the signing into law of

An Act to amend the penal law and the criminal procedure law, in relation to lack of criminal responsibility by reason of mental disease or defect and to repeal section 30.05 of the penal law relating thereto.

Section 40.15 Mental disease or defect. In any prosecution for an offense, it is an affirmative defense that when the defendant engaged in the proscribed conduct, he lacked criminal responsibility by reason of mental disease or defect. Such lack of criminal responsibility means that at the time of such conduct, as a result of mental disease or defect, he lacked substantial capacity to know or appreciate either:

1. The nature and consequences of such conduct; or
2. That such conduct was wrong.

As is explained in a "Governor's Program Bill Memorandum,"

The bill creates a new section . . . which converts the current defense to an affirmative defense. As an affirmative defense, lack of criminal responsibility by reason of mental disease or defect must be established by the defendant by a preponderance of the evidence . . . Additionally, Criminal Procedure Law section 250.10 . . . is amended to provide that before accepting a plea of not responsible by reason of mental disease or defect, the district attorney must state for the record his satisfaction that, and the court must find that, the affirmative defense would be proven by the defendant at trial by a preponderance of the evidence.

Judge Juviler, Mr. Hutter, and Professor Wechsler chose to comment on the

issue of the affirmative defense. Juviler explained that at the formulation stage of the IDRA 1980, there was a controversy as to who should have the burden of establishing the defendant's lack of criminal responsibility. The advisory committee recommended that the defendant bear the burden, both at the trial stage and at the postacquittal hearing. The *pro bono* consultants, however, persuaded the commission to leave the burden with the district attorney to insure "the integrity of the Commission," i.e., "to be sure the program would not be invalidated" by higher courts. In light of Juviler's remarks, the logic of the commission's decision to leave the burden of proof with the district attorney and to leave the standard of proof open to the satisfaction of the court is understandable. As Hutter explained, placing the burden on the district attorney "was more in keeping with due process rights and common law notions of decency. We saw no need for change. Any change would have been cosmetic."

Wechsler, on the other hand, argues that there is an inherent logic to the affirmative defense, for two fundamental reasons. First, on the theory that the final commitment of the criminal justice system is to public safety and that making insanity an affirmative defense would reduce the number of acquittals and thus protect public safety, it follows that the burden should be placed on the defendant. Second, from a strictly legal point of view, "commitment is better supported by a finding of fact, than by a doubt." At issue in any due process contest is the state's right to deprive a de-

fendant of his or her liberty. If this right rests solely on the inability of the state to have proved beyond reasonable doubt the defendant's sanity, according to Wechsler, the law is vulnerable.

Several of the respondents remarked that the change in the statute would have only a modest impact, because the majority of cases are not litigated in court. In any event, as more than one respondent remarked, the defense has always had to bear a certain burden in establishing a presumption of lack of responsibility, which the district attorney had to disprove beyond reasonable doubt. By setting the standard of proof for establishing such a presumption at preponderance of the evidence, the new legislation assures that "genuine claims of lack of responsibility will be fully and fairly litigated, and specious claims will be discouraged." (Governor's Program Bill Memorandum, unpublished document, p. 2) This position summarizes the views of Schimminger and Padavan, who sponsored the bill in the Assembly and the Senate.

The above conclusion is also supported by Kartagener in a memorandum to the Subcommittee on the Insanity Defense of the Executive Committee of the Criminal Justice Section of the New York State Bar Association and one to the New York District Attorney's Association. Mr. Kartagener's position, as delineated in these position papers, is that:

A verdict of 'not responsible by reason of mental disease or defect' is no real indication that a defendant has been found by the jury to have been insane at the time of the otherwise-criminal act. It merely reflects the jury's deter-

mination that the prosecution failed to prove sanity 'beyond a reasonable doubt,' a truly onerous burden when dealing with this type of defense.

As might be predicted, the District Attorney's Association was somewhat more responsive to the affirmative defense than was the New York State Bar Association, whose ranks include a sizeable proportion of public defenders.

Certain respondents commented not-for-attribution on the political climate and its influence on the legislation. By helping to create, in the minds of the public, the impression that the insanity defense is fair but tough in litigation, the new law "defines political reality" so as to preserve political support for the defense.

A dissent from the assembly's Legislative Codes Committee is voiced by Yates, who maintains that the argument for the affirmative defense constitutes "a fallacy built on a false premise and motivated by concerns that have no place in a legislative process." The false premise to which Yates refers is that an excessive number of persons have been unjustly acquitted under the IDRA 1980. And the fallacy is that shifting the burden of proof, which is of material import only in the small proportion of cases which are actually tried, would significantly affect the number of acquittals. Yates points to the miniscule number of acquittals, which amount to "only 340 out of 70,000 felony convictions between September 1, 1980, and December 31, 1983, in New York. Of that number, only 46 people accused of a violent crime were found not guilty at trial. The other acquittals resulted from

plea bargaining or did not involve violent crimes—much ado about nothing.”

**Michael Jones v. United States
102 S. Ct. 3043 (1983)**

The persons interviewed for this research were asked to comment on the implications for New York State of a recent and far-reaching decision of the Supreme Court.

Here is the case in brief:

Michael Jones was arrested on September 29, 1975, for attempting to steal a jacket from a department store. Arraigned the following day in the District of Columbia Superior Court on a charge of attempted larceny, a misdemeanor punishable by a maximum sentence of one year, Jones was eventually found competent to stand trial. He pled not guilty by reason of insanity, a plea uncontested by the government and equivalent, under the affirmative defense statutes of the District of Columbia, to having established his insanity by a preponderance of the evidence. At the fifty-day hearing required in the District of Columbia to determine the present mental condition of acquittees, Jones carried the burden of proving, by a preponderance of the evidence, that he is no longer mentally ill or dangerous. The court heard the testimony of the psychologist from St. Elizabeth's Hospital who stated that "because his illness is still quite active, he is still a danger to himself and to others." On that basis, the court found "the defendant-patient is mentally ill and as a result of his mental illness, at this time, he constitutes a danger to himself or others," and

returned Jones to St. Elizabeth's. At his second release hearing, held after the petitioner had been hospitalized for more than the maximum period he could have served in prison had he been convicted, a hearing at which he was given the opportunity to "establish by a preponderance of the evidence that he [was] entitled to release," Jones instead demanded either unconditional release or recommitment pursuant to civil commitment standards. It was that petition which eventually made its way to the Supreme Court, where it was denied by a 5-4 majority. The court held

that when a criminal defendant established by a preponderance of the evidence that he was not guilty of a crime by reason of insanity, the due process clause permitted the Government, on the basis of the insanity judgment, to confine him to a mental institution until such time as he had regained his sanity or was no longer a danger to himself or society, and he could be confined to a mental hospital for a period longer than he could have been incarcerated had he been convicted. (103 Supreme Court Reporter. 3043)¹³

Justice Powell, on the question of:

whether the finding of insanity at the criminal trial is sufficiently probative of mental illness and dangerousness to justify commitment [finds that] a verdict of not guilty by reason of insanity establishes two facts: (i) the defendant committed an act that constitutes a criminal offense, and (ii) he committed the act because of mental illness. Congress has determined that these findings constitute an adequate basis for hospitalizing the acquittee as a dangerous and mentally ill person. . . . The fact that a person has been found beyond a reasonable doubt, to have committed a criminal act certainly indicates dangerousness. (3049)¹⁴

The Supreme Court's decision in *Jones* opens the door to two major

changes in New York State's insanity defense procedures. As a result of *Jones*,

1. It is not constitutionally required that the state, through the district attorney or the attorney general, bear the burden of proof at postacquittal hearings.

2. Having once established, by an affirmative defense, that the acquittee's crime (violent or otherwise) was the result of mental illness, there is a presumption of continuing mental illness, and a presumption of dangerousness on the basis of having committed a criminal act. As a result, given the passage of the affirmative defense statute in New York State, all acquittees could be considered dangerous and confined in secure facilities.

Several of the respondents were not fully apprised of the *Jones* decision, nor, if apprised, were they concerned that the case could have serious repercussions for New York State. By far the most common response was that *Jones* reflected a changing attitude on the part of the Supreme Court toward the constitutional rights of insanity acquittees. Practically all the respondents recognized that *Jones* made possible the two changes mentioned above, but they had different appraisals of whether such changes would or should be forthcoming.

Kartagener welcomed the *Jones* decision because it enhances the prospects of a bill to shift the burden of proof to the defendant at postacquittal proceedings. Such a bill had been introduced earlier, but according to Kartagener "had gone nowhere." Since the Supreme Court has endorsed the assumption that

the legislature "went too far in protecting the defendants' rights," Kartagener sees hope for redressing the balance, so as to reduce the government's burden in protecting public safety.

Ritter believes that *Jones* makes it "permissible to enact a more restrictive piece of legislation." Once the legislature recognizes the constitutionality of a more restrictive procedure, there may be some movement toward shifting the burden at postacquittal hearings, if it appears that such a change would bring about increased protection of the public. Ritter goes on to say that, in his opinion, the numbers affected by any such change would be quite small, for "relatively few people are transferred or released over serious objections and medical opinion." The fact that Judge Ritter has extensive experience in conducting postacquittal hearings makes the judge's attitude toward permissible changes in legislation of considerable interest.

Yates argues that the likelihood of a change in postacquittal procedures as a result of *Jones* is an

open question. All the decision says is that we are not *required* to provide the procedures we do. We are not, however, required to provide Medicaid funded abortions, and we do. We are not required to provide housing for the homeless, and we do. We are not required to abjure the death penalty, and we do.

Acknowledging the points made by Kartagener and Ritter, i.e., that there may be movement to amend the statutes, Yates says that the burden of proof will be on the proponents of change to show that, under the present statutes, there are frequent, unjust or unwise re-

NY State Insanity Defense Reform Act of 1980

leases of persons found not responsible by reason of mental disease or defect.

In Conclusion

Although the IDRA 1980 was a landmark piece of legislation in New York State's attempts to deal with individuals who commit crimes because they suffer from mental disease or defect, it is clear from the events of the last six years that a final and definitive answer to the problem those individuals present for social policy has not yet been found. Since the IDRA 1980 we have seen the burden of proof at retention hearings shift from the district attorney to the attorney general; we have seen the burden of proof at acquittal shift from the state to the defendant; we have seen conflicting and contradictory positions on the insanity defense defended by the American Medical Association, the American Bar Association, and the American Psychiatric Association. In addition, the Supreme Court has handed down a decision with serious implications for postacquittal procedures in the State. These events point to the evolutionary character of legislative policy in practice. Nothing could be clearer from the overall nature of the responses provided by the principals interviewed for this study than that they understand precisely that ever-changing, resilient, politically responsive nature of the legislative process.

Insofar as this study is a contribution to understanding that process, it shows that the will of the legislature can determine the behavior of the state's institutions, and thus, that the aims and goals of social policy can be effected by carefully drawn legislation which mandates

the nature and character of procedures governing the behavior of agents of the state.

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