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Federal Jury Instructions and the Consequences of a Successful Insanity Defense

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FEDERAL JURY INSTRUCTIONS AND THE CONSEQUENCES OF A SUCCESSFUL INSANITY DEFENSE

"I did not want a mad dog released."
— Anonymous Juror[1]

INTRODUCTION

The insanity defense has a peculiar resonance in the minds of most Americans. There is something oddly counterintuitive about it. A person commits a terrible crime, yet the courts say he is not to blame—they tell us that he is not guilty. The clear stamp of guilt or innocence that we expect from the courts is missing, and we are left with the sneaking suspicion that someone has just gotten away with murder.

This uneasiness is reinforced by our uncertainty about what happens after the verdict. Although most people know that guilty defendants go to jail and innocent defendants are set free, fewer people know what happens to the defendant found not guilty by reason of insanity. Is the person committed? If so, for how long? Is there a chance that she will be released? The possibility that criminally insane defendants may be walking the streets causes understandable concern.

In a criminal trial in which the defendant puts on an insanity defense, this concern is especially relevant for the jurors who must decide the case. Studies show that jurors, despite being admonished otherwise, sometimes consider the consequences of their verdicts when deliberating.[2] What effect might uncertainty about the consequences of an insanity verdict have on their decisionmaking processes? Does this uncertainty hurt the defendant? Would eliminating this uncertainty by instructing the jury give rise to additional problems?

Vigorous debate exists among the state courts about the propriety of instructing jurors about the consequences of a verdict of not guilty by reason of insanity (NGI).[3] Some state courts require judges to give an instruction, on the theory that most jurors do not know what hap-

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1. Response to a survey sent out to jurors who had participated in trials in which an insanity defense was raised. Grant H. Morris et al., Whither Thou Goest? An Inquiry Into Jurors' Perceptions of the Consequences of a Successful Insanity Defense, 14 San Diego L. Rev. 1058, 1074 (1977).

2. See, e.g., Henry Weihofen, Procedure for Determining Defendant's Mental Condition Under the American Law Institute's Model Penal Code, 29 Temp. L.Q. 235, 247 (1956) (commenting on preliminary results from the definitive study of juror behavior conducted at the University of Chicago by Harry Kalven and Hans Zeisel, eventually published as Harry Kalven, Jr. & Hans Zeisel, The American Jury (1966)).

3. See Thomas M. Fleming, Annotation, Instructions in State Criminal Case in Which Defendant Pleads Insanity as to Hospital Confinement in Event of Acquittal, 81 A.L.R. 4th 659, 664–75 (1991); see also Jennifer Fletcher, Comment, The Not Guilty by Reason of Insanity Verdict: Should Juries be Informed of its Consequences?, 72 Ky. L.J.

pens to the defendant after such a verdict, and that giving the instruction therefore prevents juror confusion.[4] Others explicitly forbid judges to give the instruction, maintaining that information about the consequences of their verdicts distracts jurors from their proper function as the finders of fact.[5] Still others hold that the instruction should be given only under particular circumstances.[6]

This Note explores the debate in the federal context. Prior to 1984, almost all federal circuit courts agreed that trial judges should not instruct jurors as to the consequences of an acquittal based on insanity. The enactment of the Insanity Defense Reform Act (the "Act") in 1984,[7] however, has led several circuit courts to reexamine this issue. The resulting opinions set forth three different approaches—one approach states that the instruction should *not* be given, another states that it *should* be given, and a third states that the issue should be left to the discretion of the trial judge.

This Note argues that trial judges should instruct jurors about the consequences of an insanity verdict, but that judges must strive to minimize the potentially prejudicial impact of such an instruction by explicitly instructing the jury not to consider this information in arriving at a verdict. Part I takes a brief historical look at the role of the jury, charts the general proscription against instructing jurors about the consequences of their verdicts, and explores the application of this proscription to the insanity defense prior to enactment of the Insanity Defense Reform Act. Part II considers the most significant changes the Act made in the federal insanity defense and examines the various approaches the circuit courts have taken on the issue of jury instruction since passage of the Act. Finally, Part III takes a critical look at the approaches to this issue adopted by the circuit courts, examines their conflicting rationales in light of the substantive changes made by the Insanity Defense Reform Act, and proposes an alternative approacb that takes into account both these changes and the justifications that supported the traditional ban against instructing jurors about the consequences of their verdicts.

207, 211–17 (1983) (discussing state law treatment of this issue). A thorough analysis of the debate in the state courts is beyond the scope of this Note.

4. See, e.g., People v. Moore, 166 Cal. App. 3d 540, 556 (Cal. Ct. App. 1985); People v. Thomson, 591 P.2d 1031, 1031–32 (Colo. 1979); Roberts v. State, 335 So. 2d 285, 287–88 (Fla. 1976).

5. See, e.g., Madison v. State, 697 S.W.2d 106, 107–08 (Ark. 1985); Hand v. State, 354 A.2d 140, 141 (Del. 1976); People v. Meeker, 407 N.E.2d 1058, 1065 (Ill. App. Ct. 1980).

6. See, e.g., Commonwealth v. Bannister, 443 N.E.2d 1325, 1332 (Mass. App. Ct. 1983) (instruction not required when defendant fails to request it); State v. Huiett, 246 S.E.2d 862, 864 (S.C. 1978) (instruction required when jury given inaccurate view of the law as to disposition of defendant acquitted on insanity).

7. Pub. L. No. 98-473, 98 Stat. 2057 (codified at 18 U.S.C. §§ 4241–4247 (1988)).

1. The Role of the Jury and the State of the Law Prior to the Insanity Defense Reform Act

An examination of the traditional role and function of the jury is critical to an understanding of the issues presented by the insanity instruction. The role of the jury has evolved such that juries decide issues of fact while judges decide issues of law. In order to preserve the jury's fact-finding role, courts today generally refrain from instructing jurors about the consequences of their verdicts. Prior to the passage of the Insanity Defense Reform Act of 1984, almost all federal circuits applied this policy to cases in which the defendant put forth an insanity defense.

A. *The History and Significance of the Jury's Role as Finder of Fact*

Trial by jury first appeared in England shortly after the Norman Conquest.[8] It developed as an alternative to then-existing methods of dispute resolution—trial by combat, trial by ordeal, and trial by wager of law. Gradually, as the limitations of these other means of resolving disputes became evident, trial by jury became increasingly popular, eventually replacing these methods altogether.[9]

The jury of that period bore only a vague resemblance to its modern counterpart. Originally, the jury consisted of a group of citizens chosen from the community in which the dispute arose. The judge or officer of the king would summon twelve such individuals to testify as to the facts or the parties involved in the dispute.[10] The judge would subsequently settle the dispute based on information provided by the jurors. These jurors thus served more like modern-day trial witnesses than modern-day jurors.

Gradually, however, the role of the jury changed. Judges began to ask jurors not only to supply the facts, but also to decide whether the facts warranted a given verdict, that is, whether the defendant was guilty or not guilty. Moreover, courts began informally to call witnesses, in addition to those who served on the jury, to testify as to the facts of the case. As this practice increased and became more formalized, jurors relied less and less on personal knowledge and more on evidence brought before them.[11] The role of the jury thus gradually evolved into one of evaluating the evidence presented before it, finding the facts, and applying the law to these facts.[12] It was largely in this form that trial by jury was brought to America by the colonists.

While juries were responsible for deciding issues of fact, judges

8. See Valerie P. Hans & Neil Vidmar, Judging the Jury 25 (1986).

9. See id. at 25–27.

10. See id. at 26; Arthur T. Vanderbilt, Judges and Jurors: Their Functions, Qualifications and Selection 51 (1956).

11. See Hans & Vidmar, supra note 8, at 27.

12. See Vanderbilt, supra note 10, at 52.

were responsible for deciding issues of law.[13] The rationale for this separation of functions rested on the different competences of the judge and jury. Judges, with their superior understanding of the law, were best able to decide the complex and sometimes technical issues raised by the law. Juries, on the other hand, were better equipped to make judgments about everyday facts. By drawing from the varied experiences of individuals within the group, the jury could best determine what had actually occurred in the case before it.[14] The Supreme Court recognized the jury's particular expertise as finder of fact in *Railroad Co. v. Stout*:[15]

> Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to tbe facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge.[16]

Modern trials continue to maintain this separation of functions between the judge and jury.[17]

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13. See, e.g., M. Hale, 2 Pleas of the Crown 312, 313 (1676) ("of such matter[s] of fact [juries] were the only competent judges . . . . [I]f the judge's opinion must rule the matter of fact, the trial by jury would be useless."), quoted in Sparf v. United States, 156 U.S. 51, 118–19 (1895) (Gray, J., dissenting).

14. The jury also serves several non-fact-finding functions. One of the primary purposes of trial by jury in a criminal case is to shield the individual from the coercive and potentially arbitrary power of the state. See Duncan v. Louisiana, 391 U.S. 145, 155 (1968) (finding that the "right to jury trial is granted to criminal defendants in order to prevent oppression by the Government") (citations omitted). Trial by jury interposes between the government and the individual the common sense and judgment of a group of citizens. It checks the power of the state in a particularly democratic manner. Trial by jury also protects the defendant against the possible prejudices of the judge. See Alfredo Garcia, The Sixth Amendment in Modern American Jurisprudence 185 (1992). In a group of citizens, individuals' prejudices are, in theory, balanced against the views of others, thus tending to soften radical views and to result in decisions that are consistent with the views of the general community. Finally, trial by jury serves an additional function of "promot[ing] community participation in the determination of guilt or innocence." Id. (citations omitted).

15. 84 U.S. (17 Wall.) 657 (1873).

16. Id. at 664.

17. Although this separation of functions was originally brought to America along with the idea of trial by jury, juries were given the power to decide issues of law as well as issues of fact for a brief period after adoption of the Constitution. This may have reflected both the high esteem with which juries were regarded at that time and the lack of a sufficient number of judges adequately versed in the law. In Georgia v. Brailsford, 3 U.S. (3 Dall.) 1 (1794), for example, a case under the original jurisdiction of the Supreme Court, Chief Justice Jay stated to the jury that, while the Court's opinion as to

B. *The General Rule Against Informing Jurors of the Consequences of Their Verdicts*

In keeping with the view that juries decide issues of fact and judges decide issues of law, courts in criminal cases have long held it inappropriate for the jury to be informed of the consequences of its verdicts.[18] In fact, judges often explicitly instruct jurors not to consider issues of sentencing or punishment. Standard jury instructions often incorporate a provision similar to the following:

> The punishment provided by law for the offense charged in the indictment is a matter exclusively within the province of the Court and should never be considered by the jury in any way in arriving at an impartial verdict as to the offense charged.[19]

In issuing this proscription, the court seeks to maintain the traditional separation between the roles of judge and jury in criminal cases. Issues of sentencing or subsequent treatment of the defendant are generally considered issues of law and, absent a contrary statutory provision, remain the exclusive province of the judge.[20] Since the jury only de-

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the law was unanimous, the jury was free to determine the law without regard to the Court's opinion. See id. at 4.

As the level of enthusiasm for trial by jury waned, however, and criticism of jury performance began to arise, the courts sharply curtailed the jury's power to decide issues of law. Moreover, the number of trained judges increased, reducing the need to rely on the common sense of jurors in deciding the law. The courts during this period developed a series of procedural devices (e.g., special verdicts, directed verdicts, jury interrogatories) which enabled the judge to limit the jury's role. See Hans & Vidmar, supra note 8, at 39. Eventually, the Supreme Court eliminated the jury's power to decide issues of law altogether, holding that juries were limited to deciding issues of fact. See *Sparf*, 156 U.S. at 51, 63–64, 101–03.

More recent debate about the proper role of the jury has centered around whether juries indeed function as only fact-finders, or whether trial by jury serves other, non-fact-finding goals. See, e.g., Mirjan R. Damaska, The Faces of Justice and State Authority 119 (1986); Charles Nesson, The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts, 98 Harv. L. Rev. 1357, 1363–66 (1985).

18. See Miller v. United States, 37 App. D.C. 138, 143 (1911); see also United States v. Greer, 620 F.2d 1383, 1384–85 (10th Cir. 1980); United States v. McCracken, 488 F.2d 406, 423–24 (5th Cir. 1974); United States v. Davidson, 367 F.2d 60, 63 (6th Cir. 1966); Pope v. United States, 298 F.2d 507, 508 (5th Cir. 1962).

19. 1 Edward J. Devitt et al., Federal Jury Practice and Instructions § 20.01, at 822 (4th ed. 1992); see also id. at 825, 827–28, 832 (Fifth Circuit, Sixth Circuit, and Eleventh Circuit pattern jury instructions).

20. See *Pope*, 298 F.2d at 508.

> Generally speaking, jurors decide the facts in accordance with the rules of law as stated in the instructions of the court. Unless otherwise provided by statute, it is the duty of the court to impose sentence, or make such other disposition of the case as required by law, after the facts have been decided by the jury.

Id.; see also Rogers v. United States, 422 U.S. 35, 40 (1975) (judge's response to a question from the jury "sbould have included the admonition that the jury had no sentencing function and should reach its verdict without regard to what sentence might be imposed").

cides issues of fact, any information about sentencing is irrelevant and can only distract the jury from its designated function.

In addition, the courts have expressed the particular fear that information concerning the potential consequences of a verdict will invite the jury to issue verdicts tainted by compromise.[21] For example, when a jury believes a defendant is gnilty of a particular crime, knows the sentence for that crime, and considers the punishment to be too harsh, the jury may find the defendant not guilty. Such a result would corrupt the jury's fact-finding role.[22] Moreover, the jury would be substituting its own judgment about the severity of the crime for that of the legislature. Refusing to instruct the jury about the consequences of its verdicts thus preserves the jury's ability to perform its proper function.

C. *Application of the General Rule to Acquittals Based on Insanity*

Prior to the enactment of the Insanity Defense Reform Act of 1984, almost all federal jurisdictions followed this policy of refusing to instruct juries about the consequences of their verdicts in cases in which the defendant presented an insanity defense.[23] In addition to preserving the separation between the functions of the judge and jury, this policy protected the defendant from a specific type of juror prejudice that could arise from the federal insanity law then in force. Before 1984, federal law did not recognize a verdict of "not guilty by reason of insanity" distinct from the verdict of "not gnilty." A criminal defendant who successfully presented an insanity defense was simply found not guilty. Subsequent treatment of the defendant depended on separate state civil commitment procedures. Indeed, there was no guarantee that the defendant would be institutionalized at all as a result of these state proceedings. To mount a successful insanity defense, the defendant was required only to demonstrate a reasonable doubt of her legal sanity;[24] affirmative proof of insanity was not required. Thus, an

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21. See, e.g., *Pope*, 298 F.2d at 508 (To inform jury about consequences of verdict will "tend to draw the attention of the jury away from their chief function as sole judges of the facts, open the door to compromise verdicts and to confuse the issue or issues to be decided.").

22. An analogous situation arises when a judge's comments about the subsequent disposition of the defendant serves to "unlock" a deadlocked jury. Several federal courts have held that a judge commits reversible error when she informs a jury that it can recommend leniency when it issues a verdict, and it is clear that the belief that the judge would give a lenient sentence "unlocked" the jury. See, e.g., *Rogers*, 422 U.S. at 40–41; *Davidson*, 367 F.2d at 63.

23. See United States v. Portis, 542 F.2d 414, 420–21 (7th Cir. 1976); United States v. Alvarez, 519 F.2d 1036, 1047–48 (3d Cir. 1975); United States v. McCracken, 488 F.2d 406, 424–25 (5th Cir. 1974); United States v. Borum, 464 F.2d 896, 900–01 (10th Cir. 1972); Evalt v. United States, 359 F.2d 534, 546–47 (9th Cir. 1966).

24. See Davis v. United States, 160 U.S. 469, 484 (1895); see also Henry T. Miller, Comment, Recent Changes in Criminal Law: The Federal Insanity Defense, 46 La. L. Rev. 337, 353–54 (1985) (discussing federal law prior to passage of the Insanity Defense Reform Act).

acquittal based on insanity did not automatically result in civil commitment. The possibility existed that a defendant could be acquitted, yet elude state commitment and be released.

Accordingly, the proscription against informing juries of the consequences of a successful insanity defense worked in the defendant's favor. It barred prosecutors from suggesting that the defendant would not face incarceration if found not guilty by reason of insanity.[25] Otherwise, by playing on the jury's understandable concern that such a person would be released into society, the prosecution could try to influence the jury to find the defendant guilty, even when the jury believed that the defendant was legally insane. In refusing to give jurors the instruction, courts protected the defendant against this particular form of prejudice.

Given the state of the law at the time, this refusal to give the instruction was entirely appropriate. Although some jurors might not have clearly understood the consequences of an acquittal based on insanity, the potential prejudice from such uncertainty was less than the potential prejudice from actual knowledge of the consequences. In the absence of the instruction, jurors would, at worst, correctly assume that the defendant would be released upon an acquittal based on insanity; at best, the jurors would refrain entirely from considering the implications of their judgment. Giving the instruction, however, would provide no clear benefit, and would serve only to focus the jury's attention on the consequences of the verdict, thereby inviting a compromise.

D. *An Exception to the General Rule*

In the face of the majority of federal courts' refusal to instruct juries of the consequences of a successful insanity defense, the D.C. Circuit alone expressly adopted a different approach to this issue. In *Lyles v. United States*,[26] the D.C. Circuit held that it was proper to instruct juries about the consequences of a successful insanity defense.[27] Although acknowledging the traditional proscription against informing the jury of the consequences of its verdict, the court based its contrary approach on the difference between the D.C. and other federal circuits in their treatment of the insanity defense.

Unlike other federal jurisdictions, the law of the District of Columbia allowed for a separate verdict of "not guilty by reason of insanity" (NGI).[28] Also unlike other jurisdictions, such a verdict trig-

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25. See, e.g., *Evalt*, 359 F.2d at 534, in which the court found error where the prosecutor stated in his closing argument, "If you find him not guilty, he walks out of this courtroom a free man, and I know, ladies and gentlemen, that you are not going to turn this man loose again on society." Id. at 545.

26. 254 F.2d 725 (D.C. Cir. 1957), cert. denied, 356 U.S. 961 (1958).

27. See id. at 728.

28. D.C. Code Ann. § 24-301 (1951 & Supp. V) (current version at D.C. Code Ann. § 24-301 (1981)).

gered automatic commitment of the defendant.[29] A defendant thus could not avoid commitment after being found NGI. This eliminated the concern that giving jurors the instruction would unduly influence them to convict, since they would be informed that the defendant, if found not guilty by reason of insanity, would be committed to a mental hospital.[30]

The court also pointed out that, while one could assume that most jurors commonly understood the consequences of guilty and not-guilty verdicts, no such assumption could be made about the verdict of not guilty by reason of insanity. In order to avoid confusion among the three verdicts, the court found that the jury had "a right to know the meaning of this possible verdict as accurately as it knows by common knowledge the meaning of the other two possible verdicts."[31]

The *Lyles* court's explanation of the grounds for its decision is puzzling. First, the court curiously phrases its decision in terms of the rights of the *juror*, rather than the rights of the defendant. There is surprisingly little discussion of the potential prejudice to the defendant that may be caused by failing to give the instruction.[32] Moreover, although the court establishes that a juror has a "right" to know what an NGI verdict means as accurately as she knows what the other verdicts mean, it never explains the source of this right. Perhaps the court believes a basic level of knowledge about the consequences of verdicts is necessary for a jury to understand what it is deciding. That is, a jury should at the very least know that guilty defendants go to jail, innocent defendants are set free, and defendants found NGI are committed. Yet this reasoning runs against the justification for the traditional bar against informing the jury of the consequences of its verdicts. If the proper function of the jury is solely the finding of facts, then any information about the consequences of its verdict, no matter how basic, is essentially irrelevant. Accordingly, informing jurors of the consequences of an NGI verdict would simply add more irrelevant knowl-

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29. See id.

30. Indeed, at the trial, the court gave the jury the following instruction:

> If a defendant is found not guilty on the ground of insanity, it then becomes the duty of the Court to commit him to St. Elizabeths Hospital, and this the Court would do. The defendant then would remain at St. Elizabeths Hospital until he is cured and it is deemed safe to release him; and when that time arrives he will be released and will suffer no further consequences from this offense.

Lyles, 254 F.2d at 728.

31. Id. The position taken by the *Lyles* court was by no means new. As early as 1800, English courts recoguized an exception to the general proscription against informing juries about the consequences of their verdicts when the law required that defendants acquitted on the grounds of insanity be committed. See United States v. Blume, 967 F.2d 45, 50 (2d Cir. 1992) (Newman, J., concurring in the result) (citing Hadfield's Case, 27 How. St. Tr. 1281, 1354–56 (1800)). Since the *Lyles* decision, courts of several states with mandatory commitment statutes have adopted the same approach. See Fleming, supra note 3, at 675–79.

32. See *Lyles*, 254 F.2d at 728–29.

edge to what jurors already know about the other verdicts. The *Lyles* court's justification of its departure from the approach adopted by the other circuits is, in the end, unsatisfying.

II. The Debate Since Passage of the Insanity Defense Reform Act

Changes in the federal law's substantive treatment of the insanity defense have led some circuit courts to reexamine the issue of informing juries about the consequences of a successful insanity defense. Although the changes made by the Insanity Defense Reform Act did not expressly address the issue of jury instructions, they did alter some of the rationales behind earlier decisions that refused to give the instruction. The circuit courts that have considered this issue since passage of the Act have adopted substantially different approaches. These differences are based primarily on disagreements as to which policies the original proscription against such jury instructions was intended to further.

A. *Changes in the Substantive Federal Insanity Law*

Prior to 1984, there existed no uniform federal definition of criminal insanity.[33] In the absence of a definitive declaration from either Congress or the Supreme Court, federal circuits enjoyed wide discretion in defining what constituted criminal insanity. Many circuits eventually adopted the definition set forth in the ALI Model Penal Code,[34] under which a defendant was not held criminally responsible if he lacked "substantial capacity" either (1) to appreciate the criminality of his conduct (the "cognitive" test) or (2) to conform his conduct to the requirement of law (the "volitional" test).[35] Once the defendant raised the insanity defense, the goverument bore the burden of proving the defendant sane beyond a reasonable doubt.[36] Furthermore, as noted

33. See S. Rep. No. 225, 98th Cong., 1st Sess. 233 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3405; Miller, supra note 24, at 349.

34. See S. Rep. No. 225, 98th Cong., 1st Sess. 223–24 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3405–06; Miller, supra note 24, at 345; see also United States v. Brawner, 471 F.2d 969, 979–81 (D.C. Cir. 1972) (surveying the various approaches adopted by the different circuits).

Model Penal Code § 4.01 (Proposed Official Draft 1962) reads:

> (1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.
>
> (2) As used in this Article, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

35. See id.

36. See Davis v. United States, 160 U.S. 469, 484 (1895); see also supra text accompanying note 24.

above,[37] federal law, with the exception of the law of the District of Columbia, did not explicitly provide for commitment of defendants acquitted on grounds of insanity.[38]

On the heels of the John Hinckley trial,[39] Congress enacted the Insanity Defense Reform Act of 1984[40] in response to perceived failings in the federal treatment of the insanity defense. The facts of the Hinckley case should be generally familiar. On March 30, 1981, John Hinckley, Jr. fired several shots at then-President Ronald Reagan as Reagan left a hotel in Washington, D.C. Hinckley wounded the President and several others who were nearby. At his trial, Hinckley successfully presented an insanity defense and was acquitted of all thirteen charges brought against him.[41]

Although legal scholars had criticized the ALI definition of insanity prior to the Hinckley trial,[42] Hinckley's acquittal triggered widespread public outrage about the status of the insanity defense.[43] This, in turn, prompted Congress to undertake a careful reexamination of the federal law.[44] The legislative history suggests that Congress wanted primarily to address four issues: (1) the definition of criminal insanity; (2) the burden of proof; (3) the use of expert testimony; and (4) the subsequent treatment of defendants deemed insane.[45]

In several respects, the Act marked a sharp departure from prior approaches to the insanity defense. First, the reform measure narrowed the definition of criminal insanity.[46] The new definition differs

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37. See supra text accompanying notes 28–29.

38. See S. Rep. No. 225, 98th Cong., 1st Sess. 241 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3423.

39. See United States v. Hinckley, 525 F. Supp. 1342 (D.D.C. 1981), aff'd, 672 F.2d 115 (D.C. Cir. 1982).

40. Pub. L. No. 98-473, 98 Stat. 2057 (codified at 18 U.S.C. §§ 4241–4247 (1988)).

41. See Laura A. Kiernan & Eric Pianin, Hinckley Found Not Guilty, Insane: Will Be Committed to St. Elizabeths, Wash. Post, June 22, 1982, at A1; Stuart Taylor, Jr., Hinckley Cleared But is Held Insane in Reagan Attack, N.Y. Times, June 22, 1982, at A1.

42. See, e.g., Wade v. United States, 426 F.2d 64, 77–78 (9th Cir. 1970) (Trask, J., dissenting); Donald H.J. Hermann, The Insanity Defense: Philosophical, Historical, and Legal Perspectives 142 (1983); Jerome Hall, Psychiatry and Criminal Responsibility, 65 Yale L.J. 761, 777 (1956).

43. See Hans & Vidmar, supra note 8, at 181–82; Valerie P. Hans & Dan Slater, John Hinckley, Jr. and the Insanity Defense: The Public's Verdict, 47 Pub. Opinion Q. 202, 207 (1983); The Insanity Plea on Trial, Newsweek, May 24, 1982, at 56; Kiernan & Pianin, supra note 41, at A12; Letters to Hinckley Judge Criticize Acquittal, N.Y. Times, Sept. 12, 1982, at 37.

44. See Limiting the Insanity Defense: Hearings on S. 818, S. 1106, S. 1558, S. 1995, S. 2572, S. 2658 and S. 2669 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. 1 (1982) (statement of Sen. Arlen Specter); Hans & Vidmar, supra note 8, at 182.

45. See S. Rep. No. 225, 98th Cong., 1st Sess. 222 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3404.

46. See 18 U.S.C. § 17(a) (1988).

from the ALI definition primarily in eliminating the clause that defines insanity as the lack of substantial capacity to conform one's conduct to the requirements of the law (the "volitional" test).[47] The new definition retains the clause defining insanity as the lack of substantial capacity to appreciate the wrongfulness of the act (the "cognitive" test). By eliminating one possible method for proving insanity, the Act considerably narrowed the scope of the defense.

Second, the Act shifted the burden of establishing insanity to the defendant, making insanity an affirmative defense. Under the Act, the defendant must now establish insanity by "clear and convincing evidence."[48] This represented a sharp departure from former practice, in which the government had been required to prove the defendant sane beyond a reasonable doubt. In shifting the burden of proof, Congress made it more difficult for a defendant to present a successful insanity defense.

Third, and most relevant to the issue of jury instrnctions, the Act explicitly recoguized a separate verdict of not guilty by reason of insanity and established a mandatory civil commitment procedure for every defendant found NGI.[49] Disposition of defendants found NGI thus no longer depended on the vagaries of state civil commitment proceedings. Instead, such defendants would automatically be committed to a mental hospital, and would be eligible for release only after they could demonstrate that they posed no substantial risk of bodily injury or harm to another.[50] The Act thus eliminated the possibility that a defendant could be acquitted based on insanity yet elude incarceration altogether.

Although the Act made these significant changes in the federal treatment of the insanity defense, it did not, on its face, address the issue of whether judges should give jurors an instruction as to the consequences of the newly defined NGI verdict. A report from the Senate Committee on the Judiciary, however, suggests that Congress considered the issue, despite its failure to pass a specific provision:

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47. The volitional test had been criticized for failing to reflect modern, more deterministic understandings of the nature of volitional action. As one witness before the Senate Judiciary Committee explained, "[m]odern psychiatry has tended to view man as controlled by antecedent hereditary and environmental factors." The Insanity Defense: Hearings on S. 818, S. 1106, S. 1558, S. 2669, S. 2678, S. 2745, and S. 2780 Before the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. (1982) (testimony of David Robinson of George Washington University), quoted in S. Rep. No. 225, 98th Cong., 1st Sess. 226 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3408. Under this view, all criminal activity is, to some extent, non-volitional. As a result, the volitional test fails to offer a clear standard by which to judge whether responsibility should attach to a given act.

48. 18 U.S.C. § 4243(d) (1988). Prior to the Act, a defendant needed only to show that there was a reasonable doubt about his sanity. See supra note 24.

49. See 18 U.S.C. § 4243 (1988).

50. See id. § 4243(f).

> The Committee endorses the procedure used in the District of Columbia whereby the jury, in a case in which the insanity defense has been raised, may be instructed on the effect of a verdict of not guilty by reason of insanity. If the defendant requests that the instruction not be given, it is within the discretion of the court whether to give it or not.[51]

This passage figures heavily in the decisions, handed down since passage of the Act, dealing with the issue of jury instructions.

B. *Jury Instructions Since Passage of the Act*

Following the enactment of the 1984 legislative reform, several federal circuit courts have considered whether juries should be informed of the consequences of an NGI verdict.[52] The opinions from these cases set forth roughly three different approaches to the issues.

In *United States v. Neavill*,[53] an Eighth Circuit panel departed from the majority of circuit court decisions made prior to the Act, and held that trial judges *should* instruct jurors as to the consequences of an NGI verdict.[54] Although this decision was subsequently vacated upon rehearing en banc[55] and then dismissed at tbe defendant's request,[56] the reasoning behind the Eighth Circuit's decision remains persuasive. The defendant, James Neavill, had been convicted at trial of threatening to take the life of the President.[57] On appeal, Neavill argued that the lower court had erred in refusing to instruct the jury about the consequences of an NGI verdict.

Largely adopting the reasoning of the D.C. Circuit in *Lyles*,[58] the court held that Neavill was entitled to the instruction.[59] Although the

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51. S. Rep. No. 225, 98th Cong., 1st Sess. 240 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3422 (footnotes omitted).

52. See United States v. Blume, 967 F.2d 45, 49 (2d Cir. 1992); United States v. Frank, 956 F.2d 872, 882 (9th Cir.), cert. denied, 113 S. Ct. 363 (1991); United States v. Neavill, 868 F.2d 1000, 1005 (8th Cir.), vacated upon grant of reh'g en banc, 877 F.2d 1394 (8th Cir.), *and* appeal dismissed at defendant's request, 886 F.2d 220 (8th Cir. 1989) (en banc).

53. 868 F.2d 1000 (8th Cir. 1989).

54. See id. at 1005.

55. United States v. Neavill, 877 F.2d 1394, 1394 (8th Cir. 1989).

56. United States v. Neavill, 886 F.2d 220, 220 (8th Cir. 1989) (en banc).

57. The federal statute involved was 18 U.S.C. § 871(a) (1988). Neavill had walked into a Missouri police station and claimed that a person named James Beckman was God and had hired him to assassinate the President. After being questioned by a Secret Service agent, Neavill repeated his statement and threatened that, if released, he would " 'put a bullet in the President's head.' " *Neavill*, 868 F.2d at 1001.

58. See supra text accompanying notes 26–31.

59. As of 1991, several state courts have generally adopted this approach, holding that the instruction should be given. These states include Alaska, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Kansas, Louisiana, Maryland, Massachusetts, Missouri, Nevada, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Tennessee, Utah, and West Virginia. See Fleming, supra note 3, at 675–79.

court acknowledged that in earlier decisions it had followed the common practice of refusing to instruct juries about the consequences of an insanity defense,[60] the court distinguished these decisions, holding that passage of the Insanity Defense Reform Act required a different result. The court explained that prior decisions were based, in part, "on the absence of a federal commitment statute."[61] Prior to the Act, an acquittal based upon a successful insanity defense resulted in the release of the defendant. Courts were concerned that such information might prejudice the jury against an insanity verdict, since the jury's concern that the defendant would be released would improperly influence its deliberations on the merits of the case. After passage of the Act, the court maintained, these considerations were no longer valid, since the jury would be told that defendants found NGI would be committed.[62]

In support of giving the instruction, the court cited the concern that, without such an instruction, jurors would be confused about the consequences of an NGI verdict. Indeed, jurors might wrongly believe that the defendant would be released. The *Neavill* court looked to the legislative history of the Act:[63] "[T]he legislative history of the new Act shows that Congress agreed with the D.C. Circuit['s decision in *Lyles*] that jurors are not sure what happens to defendants who successfully plead not guilty by reason of insanity . . . ."[64] To prevent confusion of the jury and the risk that such confusion might prejudice the defendant's trial, the court held that judges should instrnct juries about the consequences of an NGI verdict.

Two years later, and in direct contrast to the *Neavill* court's approach, the Ninth Circuit in *United States v. Frank*[65] adhered to the traditional proscription, holding that trial judges should not inform juries of the consequences of an NGI verdict.[66] The Ninth Circuit addressed an appeal very similar to that in *Neavill*. The defendant, Terrance Frank, was convicted of second degree murder, assault with intent to commit murder, and use of a firearm in the commission of a crime of violence.[67] Frank appealed, arguing, *inter alia*, that the district court erred in refusing to instruct the jury as to the consequences of an NGI

60. See *Neavill*, 868 F.2d at 1002, citing Pope v. United States, 372 F.2d 710 (8th Cir. 1967), vacated on other grounds, 392 U.S. 651 (1968).

61. *Neavill*, 868 F.2d at 1004; see supra note 24 and accompanying text.

62. See *Neavill*, 868 F.2d at 1004.

63. See S. Rep. No. 225, 98th Cong., 1st Sess. 240 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3422; supra text accompanying note 51.

64. *Neavill*, 868 F.2d at 1004.

65. 956 F.2d 872 (9th Cir.), cert. denied, 113 S. Ct. 363 (1991).

66. See id. at 878–82.

67. The crime occurred on the Navajo Indian Reservation in Arizona and was thus subject to federal law. Specifically, Frank was charged under 18 U.S.C. §§ 1111, 1153 (1988) (second degree murder); 18 U.S.C. §§ 113(a), 1153 (1988) (assault with intent to commit murder); and 18 U.S.C. §§ 924(c), 1153 (1988) (use of a firearm in commission of a crime of violence). See *Frank*, 956 F.2d at 873–74.

verdict.[68]

The Ninth Circuit held that the trial judge had properly refused to give the instruction.[69] In so doing, the appeals court relied on the traditional bar against instructing juries about the consequences of their verdicts. Citing numerous precedents, the court found that the bar was necessary to preserve the essential function of the jury as finder of fact.[70] According to the court, giving the jury an instruction as to the consequences of an NGI verdict would serve only to distract the jury from its appointed function.[71] Such information was irrelevant to the issue before the jury, claimed the court, and might improperly influence the jury when making its findings of fact.

Although the court mentioned the Insanity Defense Reform Act, it concluded that the Act had no impact on the decision to refuse the instruction since it contained no express provision requiring the instruction to be given.[72] The court examined the same legislative history that the *Neavill* court had considered, but its treatment of that legislative history stands in sharp contrast. Although the court conceded that Congress seemed to have intended courts to provide such an instruction,[73] it refused to give the legislative history any weight. The court stated that legislative history was relevant only when a statute contained ambiguous language. Since the statute did not mention jury instructions, there was no ambiguous language to interpret, and the legislative history was therefore not binding.[74] In essence, the court found that passage of the Act had no effect on the general proscription against informing juries of the consequences of an NGI verdict and that the original policies behind the proscription were still

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68. The instruction Frank requested read:

> If you find Mr. Frank not guilty by reason of insanity, the law requires that he be committed to a suitable facility until such time, if ever, that the Court finds he may safely be released back into the community.

Frank, 956 F.2d at 878.

69. See id. As of 1991, a majority of state courts (29) had adopted this approach, holding that the instruction should generally not be given. These states include Alabama, Arizona, Arkansas, Delaware, Idaho, Illinois, Indiana, Iowa, Kentucky, Maine, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Texas, Vermont, Virginia, Washington, and Wyoming. See Fleming, supra note 3, at 686–95.

70. See *Frank*, 956 F.2d at 879.

71. See id.

72. See id. at 881–82.

73. See supra text accompanying note 51.

74. See *Frank*, 956 F.2d at 881–82. The court adopted a "plain meaning" approach to statutory interpretation: "In interpreting the reach of a statute, we must look to the plain meaning of words used by Congress. If the statute is unambiguous our inquiry must stop." Id. at 881. Finding the language of the statute unambiguous, the court refused to give the legislative history any weight: " '[C]ourts have no authority to *enforce* principles gleaned *solely* from legislative history that has no statutory reference point.' " Id. at 882 (quoting IBEW Workers v. NLRB, 814 F.2d 697, 712 (D.C. Cir. 1987)).

relevant.[75]

Two additional circuits have agreed with the *Frank* result—the Eleventh Circuit in *United States v. Barnett*[76] and the Fifth Circuit in *United States v. Shannon*.[77] Both courts relied on pre-Act precedents that barred trial courts from informing juries of the consequences of an insanity verdict. Both considered the passage of the Act, but, as the Ninth Circuit did in *Frank*, found that it did not warrant a different result absent some explicit statutory directive.[78]

Between the *Frank* court's rejection and the *Neavill* court's endorsement of the instruction lies a recent decision by the Second Circuit. In *United States v. Blume*,[79] the defendant, David Bianchini, was convicted of conspiracy to produce marijuana, possession of marijuana with intent to distribute, and interstate travel in furtherance of illegal activity. Bianchini appealed the conviction, arguing that the trial judge erred in refusing to give the jury an instruction about the consequences of an NGI verdict.[80]

The Second Circuit held, in a summary fashion, that the decision whether to give the jury such an instruction should be left to the discretion of the trial judge.[81] The court noted that the Insanity Defense Reform Act, on its face, does not require such an instruction. The court, however, read the same legislative history considered in both *Frank* and *Neavill* to permit such an instruction, but not to require it.[82]

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75. The court considered, but explicitly rejected, the D.C. Circuit's decision in Lyles v. United States, 254 F.2d 725 (D.C. Cir. 1957), cert. denied, 356 U.S. 961 (1958), discussed supra notes 26–31 and accompanying text. See *Frank*, 956 F.2d at 879–80.

Frank subsequently filed an appeal of the Ninth Circuit's decision, but the Supreme Court denied certiorari. See Frank v. United States, 113 S. Ct. 363, 363 (1991). In an attached opinion "respecting the denial" of certiorari, Justice Stevens stated that he believed trial courts should give juries the instruction, unless the defendant explicitly requests that it not be given. See id. (Stevens, J.). Justice Stevens' reasoning largely echoed that of the *Neavill* court, finding that the Act had removed the need for the traditional bar. Justice Stevens also emphasized that the denial of certiorari was not a ruling on the merits of the case, since a square conflict between the circuits had not yet arisen (the *Neavill* decision having been vacated), and since it was the Court's practice to await such a conflict before ruling on new federal legislation. See id. (Stevens, J.).

76. 968 F.2d 1189, 1192 (11th Cir. 1992).

77. 981 F.2d 759, 765 (5th Cir. 1993).

78. See *Shannon*, 981 F.2d at 763; *Barnett*, 968 F.2d at 1192.

79. 967 F.2d 45 (2d Cir. 1992).

80. The trial judge instead gave a typical instruction:

> [T]he punishment provided by law for the offenses charged in the indictment or any resulting proceeding . . . [including the] result of the plea of not guilty by reason of insanity is a matter exclusively [within] the province of the judge and should never be considered by the jury in arriving at an impartial verdict as to the guilt or innocence of the accused.

Id. at 49.

81. At least one state court has also taken this view. See Montague v. State, 360 N.E.2d 181, 189 (Ind. 1977).

82. See *Blume*, 967 F.2d at 49.

Illustrating the unsettled status of the law in this area, the panel decision included two separate concurrences, one by Judge Newman, the other by Judge Winter. Judge Newman largely adopted the approach set forth in *Neavill*, focusing on the danger of jury verdicts influenced by a mistaken belief that an NGI verdict would result in release of the defendant: "It makes no sense now to *expose* the defendant to the risk of an undeserved guilty verdict by keeping the jurors ignorant of the fact that a successful insanity defense would result in his confinement."[83] For Judge Newman, then, an instruction served to eliminate this risk of an undeserved guilty verdict.

In contrast, Judge Winter's concurrence offered a variation on the approach taken by the Ninth Circuit in *Frank*. Although arguing that judges should generally refrain from instructing juries about the consequences of an NGI verdict, Judge Winter stated that he would allow such an instruction when the judge perceived a risk that the jury might, in a particular case, mistakenly assume that the defendant would avoid incarceration.[84]

III. An Evaluation of Existing Approaches and a Proposed Solution

The absence of specific statutory attention to the issue of jury instructions for an insanity verdict—and the conflicting jurisprudence that currently exists in the federal courts on the subject—exposes criminal defendants who raise insanity defenses in federal trials to the possibility of arbitrary results. Moreover, the various approaches developed thus far fail adequately to protect criminal defendants against all of the various risks of prejudice posed by information about the consequences of an NGI verdict. Some approaches protect only against the risk of compromise verdicts, while others protect only against the risk of juror error. This Note proposes an alternative approach, one that both safeguards the interests of the defendant and preserves the proper role of the jury: instructing juries as to the consequences of an NGI verdict, while at the same time taking steps to minimize the prejudicial effect of such an instruction.

A. *A Framework for the Analysis*

Prior to the enactment of the Insanity Defense Reform Act, the majority of federal courts, in refusing to give juries the instruction, were able to guard against both the risk that the information would distract the jury from its proper function and the risk that the information might prompt the jury to convict in order to keep the defendant incarcerated. Since passage of the Act, however, the calculus has changed. The general concern about distraction of the jury remains

83. Id. at 52 (Newman, J., concurring).

84. See id. at 54 (Winter, J., concurring in the judgment).

valid. However, the specific concern about improper conviction by the jury is no longer warranted, as the Act's mandatory commitment provision would remove the jury's apprehension that the defendant found NGI might be released. But while the Act put to rest one concern, it gave rise to another: namely, that jurors would not be aware of the new mandatory commitment procedures and would thus mistakenly believe that the defendant would still be released if found NGI. The decisions handed down after the Act thus reflect a desire to balance a new set of risks.

Essentially, two analytically different risks animate the decisions of the courts since passage of the Act. The first is the risk of mistake. In the absence of an instruction, jurors may incorrectly assume that an NGI verdict results in the release of the defendant. This mistake would not be unreasonable, given the variations in the laws among the states and the relatively recent changes in federal law. Such an assumption could influence jurors to convict, despite a belief that the defendant was legally insane, in order to ensure that the defendant would be incarcerated. This risk of mistake arose only after enactment of the statute (since prior to the statute, this belief would have accurately reflected the state of the law at that time) and is the concern that drives the Eighth Circuit's decision in *Neavill*.[85] The second risk is the original risk of compromise. By providing an instruction, the judge may distract the jury from its sole function as finder of fact and thereby encourage verdicts tainted by compromise. This concern animates the Ninth Circuit's decision in *Frank*.[86]

These two risks exist in tension. A decision to instruct the jury decreases the risk of mistake, but increases the risk of compromise. Conversely, a decision not to instruct decreases the risk of compromise, but increases the risk of mistake. The approaches taken by *Frank* and *Neavill* each guard against one of these risks, at the expense of the other.[87] *Blume* attempts to reconcile the tension between these two risks by leaving the decision to the discretion of the judge.[88] A more

85. See U.S. v. Neavill, 868 F.2d 1000, 1004 (8th Cir.), vacated upon grant of reh'g en banc, 877 F.2d 1394 (8th Cir.), *and* appeal dismissed at defendant's request, 886 F.2d 220 (8th Cir. 1989).

86. See U.S. v. Frank, 956 F.2d 872, 879 (9th Cir.), cert. denied, 113 S. Ct. 363 (1991).

87. In People v. Cole, 172 N.W.2d 354, 366 (Mich. 1969), the Michigan Supreme Court neatly framed this tension, viewing its decision as a choice between:

> 1) [T]he possible miscarriage of justice by imprisoning a defendant who should be hospitalized, due to refusal to [give the instruction to] the jury; and 2) the possible "invitation to the jury" to forget their oath to render a true verdict according to the evidence by advising them of the consequences of a verdict of not guilty by reason of insanity.

In the end, the court decided that the harm of the first outweighed the harm of the second, and accordingly required the instruction. See id.

88. See *Blume*, 967 F.2d at 49.

effective approach would guard against *both* of these risks, minimizing both types of prejudice to the defendant.

B. *An Evaluation of the Proposed Approaches*

The cases discussed above have adopted three different approaches to the issue. An evaluation of these three approaches, using the two-pronged framework set forth above, reveals that none of them adequately insulates the defendant from both the risk of mistake and the risk of compromise.

1. *Instruction Should Not Be Given.* — The Ninth Circuit's decision in *Frank* adheres to the traditional bar against informing the jury of the consequences of its verdicts. But in doing so, it largely ignores the manner in which the Act has altered the policy rationales supporting the application of the traditional bar to the insanity defense.[89]

The passage of the Act effectively eliminated the most persuasive argument in support of applying the proscription to the insanity defense—that informing the jury that the defendant might not be committed if deemed insane would influence a jury to convict despite believing the defendant legally insane. The Insanity Defense Reform Act explicitly provides for mandatory commitment of defendants found NGI. As a result, an instruction to the jury will not have the effect of improperly influencing it to convict, since the jury will no longer be motivated by a concern that an NGI verdict would result in the defendant's release.

Even after the elimination of this justification, the court is still left with the general rationale that informing jurors of the consequences of their verdicts distracts them from their appointed role as finder of fact. It is upon this rationale that the *Frank* court hangs its decision. For the Ninth Circuit in *Frank*, the distracting effect of sucb an instruction was sufficient basis for the court to refuse to give the instruction.[90]

Although this rationale may be persuasive in cases dealing with jury instructions in general, there are reasons to doubt the applicability of this rationale to cases in which the insanity defense has been raised. First, it is unclear to what extent a simple instruction, telling the jury that the defendant would be committed if found NGI, would actually distract the jury from its fact-finding role. Juries typically know what happens when a defendant is found guilty or innocent. Telling jurors what happens after an NGI verdict would be equivalent to informing them that guilty defendants go to jail and innocent defendants go

89. The comments in this section apply equally to the recent decisions by the Fifth Circuit in United States v. Shannon, 981 F.2d 759, 765 (5th Cir. 1993), and the Eleventh Circuit in United States v. Barnett, 968 F.2d 1189, 1192 (11th Cir. 1992), since both of these decisions largely adopt the *Frank* court's reasoning. See supra notes 76–78 and accompanying text.

90. See *Frank*, 956 F.2d at 822.

free.[91] That is, giving the instruction would simply be giving the jury as much knowledge about the consequences of verdicts as it already has in cases in which an insanity defense has not been raised.

Second, the degree to which such an instruction would increase the risk of compromise remains questionable. Concededly, in a close case, such an instruction may provide an avenue for a compromise among jurors with differing opinions. Clear instructions, however, forbidding the jury from using the information to strike such a compromise may adequately guard against the risk. Moreover, jurors are often given ample opportunity to strike such compromises when a case involves several lesser included crimes (for example, when a defendant is charged with both murder and manslaughter). Why should we be more concerned about compromise in the case of an NGI verdict?[92]

Third, the *Frank* court's approach assumes that jurors, in the absence of information, will not speculate as to the consequences of their verdict.[93] In fact, refusing to give the instruction may be *more* distracting than giving the instruction. At least one study has shown that jurors in cases in which insanity is raised as a defense are extremely interested in the consequences of the defense.[94] In fact, the study found that evaluating the possible consequences of the verdict was one of the most important factors in the jury deliberations.[95] Given the importance jurors place on this information, uncertainty about the conse-

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91. At least one study suggests that most jurors correctly assume that defendants found NGI will be committed. See Morris, supra note 1, at 1068. From this, it could be argued that there is no need to distract the jury with information that it already possesses. Some jurors, however, may still wrongly assume that defendants found NGI are released. See id. Moreover, those who correctly assume that defendants found NGI will be committed may still harbor some degree of uncertainty. Both of these situations may improperly influence juror decisionmaking processes.

92. See Bart R. Schwartz, Should Juries Be Informed of the Consequences of the Insanity Verdict?, 1980 J. Psychiatry & L. 167, 174–75.

> Jurors are already instructed on an array of "lesser included offenses" in most cases. The authors of the compromise-verdict argument have failed to explain why simply adding one more tier should increase the risk of compromise. With or without the instruction, the jurors have ample opportunity to find a middle ground between the extreme alternatives.

Id. (footnotes omitted).

93. This assumption finds support in the traditional view that a jury carefully follows instructions given to it by the judge. See Francis v. Franklin, 471 U.S. 307, 324 n.9 (1985); Government of V.I. v. Fredericks, 578 F.2d 927, 936 (3d Cir. 1978).

94. See Weihofen, supra note 2, at 247. Weihofen cites a study conducted by the University of Chicago Law School:

> Preliminary statistics . . . show that [the consequence of an NGI verdict] is indeed one of the most important factors in the jury deliberations. "If we acquit him on the ground of insanity," the jury wants to know, "will he be set at liberty to repeat his act?" Not a single jury studied in the jury project refrained from considering what would happen to the defendant as a precondition for arriving at a decision concerning his guilt or innocence, sanity or insanity.

Id.

95. See id.

quences of an NGI verdict is likely to cause the jury to speculate about what the consequences might be.[96] Such speculation would distract the jury from its appointed task, thus engendering precisely the harm sought to be avoided.

Still, the general concern about distracting the jury might be enough to justify refusing the instruction, were it not for a countervailing risk not considered by the court. Absent from the *Frank* court's calculus is any consideration of the possibility of mistake, that is, the possibility that jurors may mistakenly believe that the defendant will be released if found NGI. When a jury mistakenly believes that a defendant will be released if found NGI, it may be persuaded to find the defendant guilty in order to ensure that the defendant remain incarcerated.

The Ninth Circuit's decision in *Frank* can thus be viewed as a decision guarding against the risk of compromise, while iguoring the risk of speculation or mistake. In refusing to give the instruction, the court leaves open the possibility that, in some cases, a defendant may be convicted by a jury based on a false understanding that the defendant would be released if found NGI.[97]

2. *Instruction Should Be Given.* — In direct contrast to the *Frank* court's approach, the *Neavill* court adopted a general policy of giving the instruction to the jury. This approach enjoys support among commentators,[98] and primarily guards against the risk of mistake. Proponents of this argument assert that giving the instruction will help prevent possible misunderstandings among jurors as to the consequences of an NGI verdict. A close corollary to this proposition is the belief that giving the instruction will not unduly prejudice the

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96. Preliminary findings from the University of Chicago study indicated that, in the absence of an instruction, juries did speculate and sometimes erred in their conclusions to the detriment of the defendant.

> During the deliberations, many jurors who were somewhat disposed toward a verdict of insanity were brought over to a guilty verdict by the argument that if declared insane the defendant would go "scot free." They were won over because the court had not instructed them on what actually would happen on such a verdict.

Id. Recent studies suggest, however, that these findings may no longer be valid. See, e.g., Morris, supra note 1, at 1068 (study indicating that most jurors correctly assume defendants acquitted based on insanity will be committed).

97. This approach is also directly at odds with legislative intent on this issue. See supra text accompanying note 51. Although such intent admittedly has no binding force absent an explicit, or at least ambiguous, statutory directive, such intent should at least have some persuasive force. Moreover, the legislative intent may indicate that Congress, with its greater fact-finding ability, found that jurors generally did not understand the consequences of an NGI verdict. Thus, it could be argued, courts should defer to this finding and give the instruction.

98. See, e.g., ABA Standards for Criminal Justice § 7-6.8 (1984) (recommending that judges give the instruction); Rita Simon, The Jury and the Defense of Insanity 96 (1967) (same); Weihofen, supra note 2, at 247 (same); Fletcher, supra note 3, at 221 (discussing the insanity instruction in the state law context).

defendant.[99]

Although the first proposition is undoubtedly correct, the second proposition may be subject to question. Giving the instruction would certainly eliminate the risk of jurors mistakenly believing that an NGI verdict would result in the defendant's immediate release; but, on the other hand, the judge may, in so doing, invite a compromise verdict. That is, in a close case, in which the jury believes the defendant may be guilty but is not sure beyond a reasonable doubt, the instruction may influence the jury to find the defendant NGI rather than not guilty, secure in the knowledge that the defendant will neither be imprisoned nor released.[100] In concluding that giving the instruction will not unduly prejudice the defendant, the *Neavill* approach gives short shrift to the original concern underlying the general proscription against giving such an instruction: the risk of compromise.

Although this concern may only be relevant in a close case, it should at least be balanced against the usefulness of the jury instruction. Although an instruction may eliminate the risk of juror mistake, the precise maguitude of this risk remains uncertain. At least one study has suggested that most jurors correctly assume, in the absence of an instruction, that defendants found NGI are subsequently committed.[101] If these data are accurate, the risk of mistake may in fact be low, and an instruction may only serve to distract the jury without providing any offsetting benefits.

3. *Instruction Should Be Left to the Judge.* — In contrast to the categorical approaches taken in both *Neavill* and *Frank*, the Second Circuit in *Blume* adopts a flexible approach: leave the jury instruction to the judge's discretion.[102] Although the *Blume* court failed to offer any justification for its holding, beyond a brief reference to the legislative history, at least one commentator has set forth several persuasive justifications for this approach.[103]

This argument starts with the premise that in some cases it may be appropriate to give an instruction, while in others it may not.[104] Thus, any categorical rule requiring or forbidding an instruction will always be inappropriate in a given number of cases. Allowing the trial judge to determine when the instruction is appropriate provides the system with the flexibility to adapt to the specific circumstances of a given case.

Furthermore, the argument goes, a significant amount of uncer-

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99. See, e.g., Simon, supra note 98, at 96 ("On occasion it can do some good and it can never do any harm.").

100. This assumes that jurors will view incarceration in a mental hospital as less severe than incarceration in prison, an assumption that is certainly open to debate.

101. See Morris, supra note 1, at 1068; see also Simon, supra note 98, at 96 (study generally confirming the results found by Morris). But see Schwartz, supra note 92, at 173–74 (criticizing the methodology used in Simon study).

102. See supra text accompanying notes 79–84.

103. See Schwartz, supra note 92, at 176–78.

104. See id. at 176.

tainty limits our ability to know what the jury is considering.[105] The two categorical approaches taken in *Neavill* and *Frank* rest on unfounded generalized assumptions about jury behavior and the forces that influence the jury's decisionmaking process. These assumptions rely not on any firm empirical basis, but on the intuition of judges. Although researchers have conducted studies on the effect of informing juries of the consequences of insanity verdicts, the results have been equivocal at best and directly contradictory at worst.[106] Moreover, these studies are hampered by methodological difficulties stemming from the inability accurately to simulate true courtroom situations.[107] Recognizing this unavoidable uncertainty, the *Blume* approach leaves the decision to the particular judge, who can best determine from experience, intuition, and an assessment of the particular circumstances whether an instruction would be appropriate in a given case.

For example, statements by a prosecutor suggesting that the defendant would be released if found NGI would alert the trial judge to the possibility of a biased verdict.[108] Similarly, in an exceptionally close case, questions from the jury may indicate to the trial judge that the jury is deadlocked and searching for a compromise. A judge is best situated, the argument goes, to make these evaluations and can thus most accurately determine when an instruction would be appropriate.[109]

This approach thus attempts to reconcile the tension between the risk of mistake and the risk of compromise, leaving it to the judge to determine when one of these risks may be greater. It is certainly correct in recognizing the limited degree to which the courts can, in any categorical way, determine what juries are thinking. While acknowledging that we have only limited information about what goes on in jurors' minds, this approach gives the decisionmaking authority to the person who ostensibly has the best chance of accurately making this determination: the trial judge.

Giving discretion to the judge, however, is not without its draw-

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105. See id. at 175.

106. Compare, e.g., Simon, supra note 98, at 92–93 (study indicating that information about consequences of insanity acquittal has no effect on verdict) with Weihofen, supra note 2, at 247 (study indicating that information about consequences of insanity acquittal is a crucial factor in jury decisionmaking process).

107. See, e.g., Morris, supra note 1, at 1060–61 (criticizing methodology of Simon study); Schwartz, supra note 92, at 173–74 (same).

108. See, e.g., Dipert v. State, 286 N.E.2d 405, 406 (Ind. 1972) (prosecutor in murder case stated that defendant would go "scot free" if found not guilty by reason of insanity).

Some state courts have held that, while generally inappropriate, an instruction should categorically be given when the prosecution suggests to the jury an inaccurate view of what will happen to the defendant after an NGI verdict. See, e.g., *Dipert*, 286 N.E.2d at 407; State v. Huber, 361 N.W.2d 236, 238 (N.D.), cert. denied, 471 U.S. 1106 (1985); State v. Huiett, 246 S.E.2d 862, 864 (S.C. 1978).

109. See Schwartz, supra note 92, at 176–78.

backs. It still involves a tradeoff between the risk of mistake and the risk of compromise. Its main contribution rests in placing the determination of which risk is greater on the party ostensibly best situated to make that determination. There is no evidence, however, that the trial judge will be able to make that determination with any degree of accuracy. In many ways, the decision making processes of the jury can be just as opaque to the trial judge as they are to anyone else.

For example, what should the trial judge conclude if the jury asks her directly about the consequences of an NGI verdict?[110] On the one hand, it may indicate that the jury has doubts about the defendant's innocence, but does not have enough evidence to convict. The jury may be looking for a compromise. On the other hand, the question from the jury could indicate that the jury believes that the defendant is legally insane, but fears that the defendant may be released. In this case, refusing to give the instruction could improperly persuade the jury to convict, despite a belief that the defendant is legally insane. Although the trial judge can monitor the course of the trial and look for such clues, the decision still retains a significant amount of uncertainty.

This discretionary approach relies on the judge to steer a course between the risk of compromise and risk of mistake. Although one can argue that the trial judge will be less likely to err than would any other possible decision maker,[111] a better approach would seek to eliminate the chance of error altogether by minimizing both risks at the same time.

C. *A Proposed Solution*

Courts should instead instruct the jury of the consequences of an NGI verdict, and at the same time take steps to address the traditional concern that such an instruction may pose a risk of a compromise verdict. This can be accomplished by coupling the instruction with an explicit admonition to the jury not to consider the information in deciding the facts of the case.

Giving the instruction eliminates completely the risk of mistake.

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110. Some state courts have held that a defendant is not entitled to an instruction even if jurors ask what will happen in the event of an NGI verdict. See, e.g., Gray v. State, 482 So. 2d 1318, 1320–21 (Ala. 1985); Atkinson v. State, 391 N.E.2d 1170, 1176–77 (Ind. 1979).

111. Some courts have suggested that the decisionmaking power be vested in either the defendant (by allowing the defendant to choose whether or not the judge gives the instruction), see Schade v. State, 512 P.2d 907, 917–18 (Alaska 1973), or the jury (by giving the instruction when the jury requests it), see Commonwealth v. Mutina, 323 N.E.2d 294, 302 n.12 (Mass. 1975). These options are less attractive than the *Blume* result, in that they are less apt to result in accurate verdicts. Vesting the power solely in the hands of the defendant may result in the defendant exercising the power only when doing so would be to his advantage. Vesting the power in the jury may require that the instruction be given when the jury is looking for a compromise verdict. See Schwartz, supra note 92, at 175–76.

Even when jurors generally know that an NGI verdict results in commitment of the defendant, an explicit instruction may put to rest any lingering doubts or concerns about the possibility of the defendant's release.

Although giving the instruction may increase the risk of compromise, procedural safeguards can minimize this danger. For example, immediately following the NGI instruction, the judge can explain that the purpose of the information is solely to put to rest any speculation on the part of the jury, and admonish the jury not to consider the information as a factor in determining the defendant's guilt.[112] The instruction could take a form similar to the following:

> If you find [the defendant] not guilty by reason of insanity, the law requires that [he/she] be committed to a suitable facility until such time, if ever, that the Court finds [he/she] may safely be released back into the community.
>
> This information is given to you so that you will not speculate about what will happen to [the defendant] if found not guilty by reason of insanity. You are not to consider it in determining whether or not [the defendant] is guilty, not guilty, or not guilty by reason of insanity.

The traditional instruction informing the jury that issues of punishment are to be left to the court[113] would further reinforce this warning.

This proposed approach, like the *Blume* approach, recoguizes the inherent sociological uncertainty associated with generalized predictions of jury behavior. Studies of jury behavior do not give us a clear sense of the relative magnitude of the risks of mistake or compromise and are hampered by methodological limitations.[114] This approach deals with this uncertainty, however, in a manner different from that of the *Blume* court. Instead of relying on the discretion of the trial judge to choose between these two risks, this approach deals with the uncertainty by taking steps to minimize *both* risks simultaneously, recognizing the different natures of these two risks.

Some will object that informing the jury of the consequences of an NGI verdict, while at the same time instructing the jury to ignore this information in reaching its verdict, sends contradictory siguals to the jury and asks it to do the impossible. Given the information, the argument goes, jurors will not be able to avoid using it for an improper purpose. As Judge Jerome Frank commented, such a limiting instruction is like "the story, by Mark Twain, of the boy told to stand in the corner and not think of a white elephant."[115]

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112. This is, to a large extent, the approach adopted by the Colorado Supreme Court in People v. Thomson, 591 P.2d 1031 (Colo. 1979) (en banc).

113. See supra note 19 and accompanying text.

114. See supra notes 105–107 and accompanying text.

115. United States v. Antonelli Fireworks, 155 F.2d 631, 656 (2d Cir. 1946) (Frank, J., dissenting).

These arguments fail to recognize the distinct natures of the risks being guarded against. Juror mistake arises from the lack of a particular piece of information and is generally unconscious in nature. Simply providing this discrete piece of information is the best way of eliminating this risk. Juror compromise, in contrast, arises from a more complex set of circumstances and is generally a more conscious decision on the part of the juror. When a jury is deadlocked, information about a possible compromise may offer the jury an attractive middle option. Jurors must still, however, make a conscious decision to select the compromise option in the face of the evidence provided. The best way to prevent this from happening is to instruct the jury not to take this route. Since jury compromise is a conscious choice, an explicit instruction can serve to guide the jury's actions.

The instructions thus do not contradict, but rather complement one another in simultaneously reducing juror misperception and risk of abuse. The value of the instruction in eliminating the risk of mistake is in the simple provision of a fact. Once the jury is aware of the fact, the risk of mistake is eliminated. Any previous misconceptions or lingering concerns are put to rest. Subsequently instructing the jury not to use this fact in its deliberations does nothing to weaken this effect. Such an instruction will only reduce the risk that the jury will actively use this information to come to a compromise verdict.

Jurors are often asked to use information given them for only a particular purpose. For example, evidence that reflects badly on a defendant's character is generally inadmissible, since it may unfairly prejudice the jury against the defendant.[116] Yet this same evidence is often admissible if used for another purpose, for example, to prove motive.[117] Jurors are told to (and trusted to) keep such evidence analytically separate. Although some commentators have criticized the effectiveness of jury instructions and the degree to which juries understand and follow them, these criticisms focus primarily on the more complex instrnctions, such as instructions as to burden or standard of proof.[118] The instruction at issue is much clearer and more easily understood than these other calculations, and is more akin to instructions to disregard certain types of testimony. Studies have shown that such instructions are generally followed.[119]

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116. See Fed. R. Evid. 404(a).

117. See Fed. R. Evid. 404(b).

118. See Amiram Elwork et al., Making Jury Instructions Understandable 12–17 (1982); Laurence J. Severance & Elizabeth F. Loftus, Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions, 17 L. & Soc. Rev. 153, 153–97 (1982).

119. See, e.g., Reid Hastie et al., Inside the Jury 87 (1983) ("[A] clear finding emerges that the judge's instructions were extremely effective in stopping discussion that would ordinarily, without the instruction, have occurred during deliberation."). Hastie's findings, however, are subject to the same criticisms as other studies of jury behavior. See supra notes 105–107 and accompanying text.

Unlike the categorical approaches in *Neavill* and *Frank*, this approach does not choose one risk over the other, but tries to account for both. Moreover, this proposal offers an advantage over the approach in *Blume* in that it does not rely on the judge to balance the risks on an *ad hoc* basis. By addressing both risks, this approach eliminates the need for the trial judge to undertake the difficult task of reading the jury's collective mind.

CONCLUSION

The issue in the end turns on a question of how juries behave. Do they function better with more information? Or is it better to provide them with just enough information to perform their limited function properly? Our understanding of the way in which juries function is still very limited. Given such lack of information, the best approach seeks to account for, and to control, the various factors we believe affect the jury decisionmaking process with an eye toward ensuring that verdicts be as accurate and fair as possible. Because of the significance of the jury in American law, any proposal that simultaneously preserves the jury's role as fact-finder and prevents tainted verdicts should merit considerable attention.

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