The Right and Responsibility of a Court to Impose the Insanity Defense Over the Defendant's Objection

I. INTRODUCTION

Most defendants charged with serious crimes will assert all available claims, including the plea "not guilty by reason of insanity," to buttress their defense. Occasionally, however, even in a capital case, an accused who has substantial grounds to claim the insanity defense will not invoke it; instead, the accused will either admit guilt or deny the charges outright. When faced with a defendant who refuses to plead the insanity defense, a court must decide whether to accept this refusal or to impose the defense over the defendant's objections.

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1. Insanity is a legal, not a medical, term. The courts consider those who are found insane under the state's legal test of insanity, see notes 69-70 infra, not responsible for their criminal acts. See Haines & Ziedler, Not Guilty by Reason of Insanity, in CRIME AND INSANITY 104, 120 (R. Nice ed. 1958). Thus, a defendant technically pleads that he or she is not guilty because of insanity. If successful the defendant is acquitted of the crime, but is also routinely committed to a mental institution for an indeterminate length of time. See Beran & Toomey, Integration and Future Developments, in MENTALLY ILL OFFENDERS AND THE CRIMINAL JUSTICE SYSTEM 74, 80 (N. Beran & B. Toomey eds. 1979); text accompanying notes 122-23 infra.

2. In one study, judges and attorneys estimated that the insanity defense is raised in five percent of all criminal cases. Burton & Steadman, Legal Professionals' Perceptions of the Insanity Defense, 6 J. PSYCHIATRY & L. 173, 179 (1978). Its use, however, is confined to serious crimes, since the incentive for a defendant to escape responsibility by arguing the defense is increased in proportion to the severity of the defendant's potential sentence. In fact, except in capital cases, the defense is infrequently employed. A. Matthews, MENTAL DISABILITY AND THE CRIMINAL LAW 23 (1970). The reason for this is evident: few defendants are willing to risk indefinite commitment merely for the chance to evade the penalty for a misdemeanor or a less serious felony. Id. at 56.

3. See, e.g., United States v. Robertson, 430 F. Supp. 444, 445 (D.D.C. 1977). In Robertson, the defendant had been convicted of second-degree murder and assault with intent to kill. After vacillating on the decision of whether to raise the insanity defense in the second phase of his bifurcated trial, the defendant chose not to raise the defense. See id. His reasons for making this decision were "personal" and "quasi-political" in nature, arising from his protest as a "Black man." Id. at 448. For further discussion of the reasons a defendant might choose to forego the insanity defense, see text accompanying note 40 infra; notes 93-99 infra and accompanying text.

4. One commentator has recently addressed the question of whether to impose the insanity defense over the defendant's objection. See Singer, The Imposition of the Insanity Defense on an Unwilling Defendant, 41 OHIO ST. L.J.
In recent years, this issue has received its most extensive treatment in the District of Columbia courts. Under the traditional approach, articulated in *Whalem v. United States*, a trial judge must impose the insanity defense upon defendants—regardless of their well-considered rejection of the defense—if there is "a sufficient question as to [their] mental responsibility at the time of the crime." Until recently, the District of Columbia courts followed this approach and refused to defer to a defendant's decision not to plead this defense even when the defendant's sanity was strongly in doubt.

Two recent cases have created some confusion concerning the continued validity of the traditional *Whalem* approach. In *Frendak v. United States*, the District of Columbia Court of Appeals, relying upon significant, intervening decisions of the United States Supreme Court, disagreed with the *Whalem* approach and insisted that a trial judge accord absolute deference to a defendant's "voluntary and intelligent" decision not to plead the insanity defense. In *United States v. Wright*, how-

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637 (1980). For a discussion of the ethical, constitutional, and procedural difficulties confronting a defense attorney when a court imposes the defense on an unwilling client, see 53 Tex. L. Rev. 1065 (1975).

5. The District of Columbia is the only jurisdiction in which the insanity defense is widely used. Arthur Matthews forwards three explanations for this:
   a) There is a better chance of succeeding with it than in other jurisdictions.
   b) In comparison with other jurisdictions, the dispositional consequences of a successful defense of insanity in the District of Columbia have seemed to defendants and their counsel to be preferable to those of a criminal conviction.
   c) Certain peculiarities about the civil commitment procedures in the District appear to have inhibited use of civil hospitalization as a means of diverting mentally ill persons from the criminal process.

A. MATTHEWS, supra note 2, at 55. Although this Note focuses on opinions from the District of Columbia, these opinions reflect individual and social concerns involved in any court's decision to impose the insanity defense over a defendant's objection. Moreover, the three chosen cases present these individual and social concerns more clearly than do most cases from other jurisdictions. Although many state courts have decided the issue, most have addressed the question without presenting an analysis of the rationale behind their decisions. See notes 21-22 infra.


7. 346 F.2d at 818.


10. See notes 28-29 infra and accompanying text.

ever, the District of Columbia Circuit Court affirmed its decision in Whalem and rejected the Frendak court's analysis of two recent Supreme Court decisions. Thus, even in the jurisdiction with the most developed case law on the issue, there is no clear standard for determining whether a court should impose the insanity defense upon an unwilling defendant.

In attempting to eliminate the confusion surrounding this issue, this Note will first examine Whalem and its reasoning and then review the conflicting approaches of Frendak and Wright. After an analysis of the ways in which these approaches differ, the competing individual and social interests that these approaches protect will be identified. Finally, this Note concludes that courts could accommodate these competing interests more fully by adopting a detailed Frendak approach for determining whether to impose the insanity defense upon an unwilling defendant.

II. THE WHALEM APPROACH AND ITS APPLICATION IN THE DISTRICT OF COLUMBIA

A. WHALEM V. UNITED STATES

The District of Columbia Circuit Court stated its traditional approach to the issue of whether a court should impose the insanity defense over a defendant's objections in Whalem v. United States. In Whalem, the trial court had declined to im-


12. 627 F.2d 1300 (D.C. Cir. 1980).
13. Id. at 1309-13; see notes 27-39, 46-49 infra and accompanying text.
14. 346 F.2d 812 (D.C. Cir. 1965), cert. denied, 382 U.S. 862 (1965). In Whalem, the defendant faced charges of robbery and attempted rape. The defendant had previously been committed to a mental hospital, and had committed his alleged crimes while on convalescent leave from the hospital. 346 F.2d at 814.

On motions by the parties, the trial court ordered two psychiatric examinations of the defendant. The report from one examiner asserted that the defendant was not suffering from a mental disease. The report from the other examiner diagnosed the defendant as having a "schizophrenic reaction, catatonic type (in remission)," yet denied that the illness had produced his criminal actions. Id.

There are two subtypes of catatonic schizophrenia. The "excited" subtype "is marked by excessive and sometimes violent motor activity and excitement and the ["withdrawn" subtype] by generalized inhibition manifested by stupor, mutism, negativism, or waxy flexibility. In time, some cases deteriorate to a vegetative state." COMMITTEE ON NOMENCLATURE AND STATISTICS OF THE AMERI-
pose the insanity defense against the defendant's will. Although the circuit court affirmed this ruling, holding that the court had not abused its discretion in refusing to impose the defense, it held that "when there is sufficient question as to a defendant's mental responsibility at the time of the crime, that issue must become part of the case." In reaching this conclusion the Whalem court, relying upon its earlier decision in Overholser v. Lynch, emphasized society's interest in withholding punishment from those who are morally blameless. The court stated:

One of the major foundations for the structure of the criminal law is the concept of responsibility, and the law is clear that one whose acts would otherwise be criminal has committed no crime at all if because of incapacity due to age or mental condition he is not responsible for those acts.

The court, insisting that a trial court must uphold "this structural foundation" of the criminal law, reasoned that justice required the imposition of the unwanted insanity defense upon the defendant. Many state courts have adopted the reasoning

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15. 346 F.2d at 818.
16. Id. at 817.
In Lynch, the District of Columbia Circuit Court, affirming the trial court's imposition of the insanity defense over a defendant's objection, stated that the lower court had "almost a positive duty . . . not to impose a criminal sentence on a mentally ill person." 288 F.2d at 392. The circuit court based its decision upon three broad interests: society's interest in withholding punishment from those who are morally blameless, see id. at 393; society's interest in keeping a criminal committed until he or she is rehabilitated, see id.; and the defendant's interest in being cured of the illness, see id. at 392. The Whalem court ignored the second and third interests.

Although Whalem's holding is identical to the Lynch holding, the Whalem court felt compelled to affirm its conclusion in Lynch because the Supreme Court had reversed Lynch; the Court ruled that a trial court could not use automatic commitment statutes to hospitalize defendants acquitted by reason of insanity where the court had imposed the defense over the defendant's objections. See Whalem v. United States, 346 F.2d 812, 818 (D.C. Cir. 1965). See also Lynch v. Overholser, 369 U.S. 705, 719 (1961), rev'g Overholser v. Lynch, 288 F.2d 388 (D.C. Cir. 1961).

18. 346 F.2d at 818. The court also noted:

[T]he legal definition of insanity in a criminal case is a codification of the moral judgment of society as respects a man's criminal responsibility; and if a man is insane in the eyes of the law, he is blameless in the eyes of society and is not subject to punishment in the criminal courts.

Id. See generally authorities cited in note 106 infra.
19. 346 F.2d at 818.
20. The court stated: "We believe then that, in the pursuit of justice, a trial judge must have the discretion to impose an unwanted defense on a defendant
of *Lynch* and *Whalem*, though few have discussed the rationale as thoroughly.

**B. FRENDAK v. UNITED STATES**

Frendak v. United States was the first District of Columbia trial where the court explicitly cited *Whalem* and followed its precedent. The court held that even though the defendant had voluntarily and intelligently refused to raise the insanity defense, the court had discretion to impose the defense upon the defendant if the evidence impugning the defendant's sanity was sufficient under the *Whalem* test.

In *Frendak*, the jury, in the first phase of the District of Columbia's bifurcated trial procedure, found the defendant guilty of first-degree murder in the shooting death of a co-worker. The trial court determined the strength of the insanity defense and concluded that the evidence impugning the defendant's sanity was sufficient under the *Whalem* test to impose the insanity defense over the defendant's objections. The jury then found the defendant not guilty by reason of insanity.

In the District of Columbia, the defendant has the option of a bifurcated proceeding when sanity is at issue. The first phase of the trial determines whether the defendant committed the crime; the second phase determines the defendant's sanity and criminal responsibility. Other states also provide for bifurcated trials when sanity is at issue.
On the other hand, whether a court should impose the insanity defense over a defendant's objection. In Frendak, the District of Columbia Court of Appeals overruled the trial judge's decision to impose the insanity defense, holding that a trial court must necessarily defer to a defendant's wishes, regardless of the concerns delineated in Whalem and Lynch. If the defendant "voluntarily and intelligently" rejects the insanity defense. The "voluntary" portion of the Frendak approach requires that the defendant freely choose—in the absence of illegal coercion—to reject the insanity defense. The "intelligent" portion requires that the defendant be both fully informed of the alternatives available and able to comprehend the consequences of failing to assert the defense.

The Frendak court based its deference to a defendant's voluntary and intelligent rejection—and its general abandonment of Whalem—upon two recent Supreme Court decisions: North Carolina v. Alford and Faretta v. California.

Neither Alford nor Faretta involved a defendant's refusal to plead the insanity defense. In Alford, the Supreme Court held that a defendant's guilty plea to a lesser offense was made voluntarily and intelligently despite the defendant's protestations of innocence. Although the Court affirmed Alford's conviction and generally endorsed the notion of deferring to a defendant's voluntary and intelligent plea, it reserved the dis-

24. See notes 17-18 supra and accompanying text.
25. According to the Frendak court, this absolute deference to the defendant's wish prohibits consideration of the possible strength of the insanity defense. The trial court may focus only on whether "the individual intelligently and voluntarily decides to forego that defense." 408 A.2d at 367. The Frendak court, continuing to limit its use of Whalem, held that a trial court may impose the defense only if the evidence suggests that "the defendant is not capable of making, and has not made, an intelligent and voluntary decision." Id. at 379.
26. Id. at 380. The three criteria are generally accepted as defining a "voluntary and intelligent" decision. See N. Finkel, Therapy and Ethics 103 (1980).
27. The court did not abandon Whalem completely. See note 25 supra.
29. 422 U.S. 806 (1975).
30. The defendant in Alford, faced with a probable conviction on a first-degree murder charge, pleaded guilty to the lesser offense of second-degree murder. 400 U.S. at 27. The trial court did not reject this plea, although the defendant continued to deny that he had committed the crime. Id. at 28. The Supreme Court concluded that a defendant "may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime." Id. at 37. In addition, the Court held that "an express admission of guilt" was not constitutionally required for acceptance of a guilty plea. Id.
31. The Court noted: "The standard was and remains whether the [guilty]
cretion of the trial court to reject such pleas in some cases.\textsuperscript{32} In \textit{Faretta}, the Court held that defendants have a constitutional right to defend themselves \textit{pro se},\textsuperscript{33} as long as they voluntarily and intelligently waive their right to counsel.\textsuperscript{34} The Court also concluded that a defendant's ignorance of technical legal material does not bar the defendant from self-representation—even if that ignorance results in a poor trial performance\textsuperscript{35}—since a defendant’s lack of legal knowledge does not render his or her plea decision less voluntary or intelligent.\textsuperscript{36}

In applying \textit{Alford} and \textit{Faretta} to the issue of imposing the insanity defense over a defendant's objection, the \textit{Frendak} court emphasized the Supreme Court’s deference, in both opinions, to a defendant’s choice of defense strategy. The court noted that the “rationale underlying \textit{Alford} and \textit{Faretta}”\textsuperscript{37} militated against \textit{Whalem}’s disregard of the defendant’s wishes,\textsuperscript{38} and mandated that trial courts accord the defendant absolute

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plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.” \textit{Id.} at 31. For prior decisions endorsing this traditional standard, see note 87 \textit{infra}.
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32. The Court stated:

Our holding does not mean that a trial judge must accept every constitutionally valid guilty plea merely because a defendant wishes to so plead. A criminal defendant does not have an absolute right under the Constitution to have his guilty plea accepted by the court . . . although the States may by statute or otherwise confer such a right.

400 U.S. at 38 n.11.
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33. 422 U.S. at 836. The defendant in \textit{Faretta} had requested that the trial court allow him to defend himself since "he believed that the [public defender's] office was 'very loaded down with . . . a heavy case load.'" \textit{Id.} at 807. After initially acceding to the defendant's wishes, the trial judge denied the request, ruling first, that the defendant had no constitutional right to self-representation, and second, that he had not made an intelligent and knowing waiver of his right to counsel. \textit{Id.} at 808-10. The Supreme Court denied it had reached a novel result in establishing the right to represent oneself \textit{pro se}. \textit{Id.} at 812-34.
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34. \textit{Id.} at 835.
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35. The dissent in \textit{Faretta} argued strongly that the defendant should not be allowed to make such a potentially disadvantageous decision. \textit{See id.} at 838-40, 849 (Burger, C.J., dissenting); text accompanying note 134 \textit{infra}.
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36. The Court reasoned that a defendant's knowledge of trial procedure “was not relevant to an assessment of his knowing exercise of the right to defend himself.” 422 U.S. at 836. The Court ruled that a defendant need only know “the dangers and disadvantages of self-representation” to be capable of effecting a voluntary and intelligent waiver. \textit{Id.} at 835.
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37. 408 A.2d at 376.
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38. The court explained that:

\textit{Whalem} and succeeding cases have laid substantially more emphasis on the strength of the evidence supporting an insanity defense than on the defendant’s choice. In contrast, \textit{Alford} and \textit{Faretta} reason that respect for a defendant's freedom as a person mandates that he or she be permitted to make fundamental decisions about the course of the proceedings.
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\textit{Id.}
freedom to make a voluntary and intelligent rejection of the insanity defense. The Frendak court reasoned that, since defendants "must bear the ultimate consequences of any decision," they should have the right to make decisions central to their defense.

Just as the Supreme Court recognized valid reasons for defendant Alford to plead guilty and defendant Faretta to represent himself, the Frendak court found valid reasons for a defendant to reject the insanity plea. The court reasoned that a defendant might rationally prefer a finite prison term to an indeterminate commitment, a structured prison life to the often harsh and dangerous environment of a mental hospital, the stigma of the label "convict" to that of "ex-mental patient," the loss of few legal rights to the loss of many, and a deserved punishment to the denigration of the defendant's motives for committing the offense.40 The Frendak court reasoned that these concerns41 justified an absolute deference to a defendant's rejection of the insanity plea, and "substantially outweigh[ed] the express purpose of Whalem: to ensure that some abstract concept of justice is satisfied by protecting one who may be morally blameless from a conviction and punishment which he or she might choose to accept."42

C. United States v. Wright

In United States v. Wright,43 the District of Columbia Circuit Court retained the Whalem approach and strongly criti-

39. Id. at 378.
40. Id. at 376-78.
41. For a more detailed discussion of these and other concerns, see notes 93-99 infra and accompanying text.
42. 408 A.2d at 378.
43. 627 F.2d 1300 (D.C. Cir. 1980). In Wright, the defendant had destroyed a glass-encased replica of the United States Capitol building, claiming that God had chosen him as a prophet to the world. Id. at 1302. The trial court found the defendant competent to stand trial, and, upon learning that he would not raise the insanity defense because he feared it would denigrate the religious motivations for his actions, held hearings to determine if it should impose the defense despite the defendant's rejection. After listening to conflicting psychiatric testimony and reviewing a previous insanity acquittal of the defendant, id. at 1303-04, 1305 n.26, the trial court decided not to impose the defense. Id. at 1305.

The defendant was ultimately convicted of destroying government property and sentenced to three years imprisonment. Id. at 1302. The defendant appealed this conviction, contending that the trial court had abused its discretion in failing to raise the insanity defense despite the defendant's refusal to raise it himself. Id. The appellate record does not reveal whether the defendant changed his mind and no longer objected to pleading the defense, or whether the appeal was merely a strategic attempt to gain a new trial.
cized the *Frendak* court's analysis. The circuit court held that, although the trial court did not abuse its discretion in refusing to impose the insanity defense over the defendant's objections,\footnote{44. The circuit court admitted that the evidence cast doubt upon the defendant's sanity at the time of the crime, but claimed that the trial court had painstakingly explored the issue and that the trial court's decision was thus unassailable. *Id.* at 1306-09.} a court should impose the defense upon an unwilling defendant when there is a sufficient question as to whether the defendant was sane at the time of the commission of the offense.\footnote{45. The court noted, in wording similar to that in *Whalem*, that the issue is "whether there is sufficient question to require jury consideration of the defendant's ability to understand the law and conform his conduct to it . . . ." *Id.* at 1310; see text accompanying note 16 supra.}

The *Wright* court based its retention of *Whalem* on three arguments. First, the court contended that the *Alford* and *Faretta* decisions were irrelevant to the question of whether to impose the insanity defense over a defendant's objections.\footnote{46. "Neither case involved an insanity issue, and for that reason alone their relevance is *de minimus.*" 627 F.2d at 1310 (footnote omitted).} The court emphasized that society has an "obligation, through the insanity defense, to withhold punishment of someone not blameworthy."\footnote{47. *Id.* The court stressed the necessity of adhering to this societal duty. "A plainly nonfrivolous challenge to a defendant's mental responsibility required inquiry because it suggests that the free will presupposed by our criminal justice system cannot be presumed." *Id.*} This obligation creates a duty to impose the insanity defense despite a defendant's rejection. The *Wright* court argued that, because the Supreme Court had no occasion to consider this obligation when it decided *Alford* and *Faretta*, the two cases could not control the court's decision. In minimizing the relevance of *Alford* and *Faretta*,\footnote{48. The court further minimized the relevance of *Alford* by noting that it does not give a defendant the absolute right to have his or her guilty plea accepted. *Id.* at 1310 & n.74.} the court implicitly dismissed any consideration of the Supreme Court's emphasis on a defendant's rights, and instead deferred absolutely to a court's societal duty "not to impose punishment where it cannot impose blame."\footnote{49. *Id.* at 1310 n.76.}

The *Wright* court also argued that its approach, like the *Frendak* approach, both acknowledges and respects a defendant's choice. Although the court admitted that it could not "ab- dicate to the defendant the judicial duty to explore the issue [of sanity] once sufficient questions are raised,"\footnote{50. *Id.* at 1310-11.} it intimated...
that when "doubts about a defendant's mental condition remain after a full inquiry, the strength and reasons for the defendant's opposition . . . [might] tip the balance." 51

Finally, the Wright court suggested that a Frendak inquiry into a defendant's capacity to make a voluntary and intelligent choice essentially duplicates both the form and result of a Whalem investigation into the merits of the insanity defense.52 Given this alleged similarity between the two approaches, the Wright court, preferring the continued use of the Whalem approach, argued that the Frendak court merely recreated a Whalem inquiry under labels less candid and clear, and thus "obscured" and "distorted" society's obligation to withhold punishment from those not criminally responsible.53

III. AN ANALYSIS OF THE FRENDAK AND WRIGHT APPROACHES

A. THE DIFFERENCES BETWEEN THE APPROACHES

Although the Wright court argued that the Frendak and Wright approaches are similar54—and both do require a court to examine the defendant's sanity in a broad sense—the approaches differ in two critical respects. First, even though both require a court to assess the defendant's mental condition, each focuses on a different time at which that condition is manifested. A court applying the Frendak "voluntary and intelligent" approach considers only the quality of the defendant's pleading, and thus focuses on the defendant's mental condition at the time of trial.55 In contrast, a court applying the Wright

51. Id. at 1311.

52. Id. at 1311-12. The court noted that a Frendak analysis of the "voluntary" aspect of a defendant's plea must necessarily consider whether the defendant's mental condition coerced him or her into refusing the insanity plea. Id. Moreover, the court claimed that the "intelligent" criterion demands an examination of the "quality of the defendant's own reasoning and the circumstances under which the plea decision is made"—essentially an inquiry into the defendant's sanity. Id. at 1312.

53. Id.

54. See note 52 supra and accompanying text.

55. The Frendak court, minimizing the relevance of the defendant's past state of mind, stated: "The strength of the individual's potential insanity defense should not be a factor in the court's decision, except to the extent that
analysis considers primarily the strength of the insanity defense, and thus focuses on the defendant's condition at the time of the commission of the offense.

The different implications of adopting one or the other of the approaches can be illustrated by use of a hypothetical case. Imagine a case in which the defendant irrationally murders another under conditions that suggest the act was situational—that is, that the defendant responded abnormally to a series of coincidental circumstances, unlikely to recur. Although the defendant potentially could suffer a "relapse" of this "situational disturbance," the defendant behaves quite normally when not faced with the combination of relevant circumstances. Thus at the time of pleading, the accused is alert, calm, and intelligent—in most significant respects, a rational human being. For any of the reasons discussed in Frendak, however, the defendant refuses to raise the insanity defense, despite the judge's explanation of the consequences of this action.

Assume further two courts, one following the Frendak approach and the other the Wright approach. Even if both courts evaluated the defendant's mental condition by the same criteria, one court would impose the insanity defense while the

such evidence is useful in determining whether the defendant presently is capable of rationally deciding to reject the defense." 408 A.2d at 380-81.

56. For a discussion of the Wright court's inconsistency in allowing even a minimal deferral to a defendant's choice, see note 63 infra.

57. The American Psychiatric Association's Diagnostic Manual describes "situational disturbances" as

more or less transient disorders of any severity (including those of psychotic proportions) that occur in individuals without any apparent underlying disorders and that represent an acute reaction to overwhelming stress . . . . If the patient has good adaptive capacity his symptoms usually recede as the stress diminishes. If, however, the symptoms persist after the stress is removed, the diagnosis of another mental disorder is indicated.

DSM-II, supra note 14, at 48.

Although the incidence of situational disturbances among all psychiatric patients varies among different subgroups of the population—rarely exceeding one percent, see A. Freedman, H. Kaplan, & B. Sadock, Modern Synopsis of Comprehensive Textbook of Psychiatry II, at 787 (2d ed. 1976)—diagnoses of situational disorders have significantly increased in frequency since World War II. Looney & Gunderson, Transient Situational Disturbances: Course and Outcome, 135 Am. J. Psychiatry 660, 666 (1978). Moreover, in a recent New York county hospital study, thirty-five percent of the patients diagnosed as suffering from a situational disturbance exhibited "angry, hostile, and destructive behavior, often including assaultive violence. . . ."; for ten percent this behavior was "the most salient feature" of their reaction. A. Freedman, H. Kaplan, & B. Sadock, supra, at 787. Thus, the defendant in the hypothetical case suffers from a plausible, though somewhat uncommon, mental disease.

58. See text accompanying note 40 supra.

59. Although the timing issue discussed below, see text accompanying
other would not. The court using the Frendak approach would essentially ignore the defendant's situational disorder and instead would probe the quality of the defendant's decision to reject the insanity defense. Since the hypothetical defendant would satisfy the three criteria defining a "voluntary and intelligent" choice, the court would respect the defendant's decision and would not impose the defense. A court employing a Wright analysis, on the other hand, would inquire whether there was a "sufficient question" as to the defendant's sanity at the time he or she allegedly committed the offense. Because mental illness inspired the offense in the hypothetical case, a court following Wright would ignore the defendant's voluntary and intelligent decision, and would impose the insanity defense over the defendant's objections.

Even in a case in which the time factor discussed above was irrelevant, the two approaches might reach opposite conclusions because the two use different standards to assess the defendant's mental condition. For example, consider a hypothetical case in which a defendant murders another as the result of an incurable mental disorder accompanied by acute delusions. Despite the persistence of the defendant's delusional notes 60-62 infra, is arguably also a criterion, for the purpose of discussion this Note distinguishes this issue from the other criteria.

60. See note 111 supra.
61. See text accompanying note 26 supra.
62. The two tests' difference in timing will lead to opposite results in situations other than that in which a defendant suffers from a situational disorder. For example, a defendant afflicted with a mental disease that drugs can control might be irrational and legally insane at the time of the criminal act, yet at trial possess the capacity and knowledge to make an intelligent choice. A court following Wright would impose the defense over the defendant's objections; a court following Frendak would not.

63. Even the aspect of the defendant's mental condition that both approaches require a court to consider—the defendant's reasons to reject the insanity defense—receives dissimilar treatment. Under the Frendak approach a court gives these reasons great weight as the defendant's motives for controlling his or her own defense. See text accompanying notes 40-42 supra. Under the Wright approach a court uses them to determine, for example, the defendant's mental state at the time of his or her criminal acts. See note 51 supra.

To the extent that the Wright court deferred to the defendant's wishes out of regard for his interests, see note 51 supra, it abandoned its central goal of evaluating the strength of the defendant's insanity defense. The court undoubtedly felt it had to partially accede to the defendant's wishes because of the many District of Columbia Circuit Court cases after Whalem, that recognized the paramount importance of a defendant's wishes. See United States v. Bradley, 463 F.2d 808, 811-12 (D.C. Cir. 1972); Cross v. United States, 389 F.2d 957, 960 (D.C. Cir. 1968); Trest v. United States, 350 F.2d 794, 795 (D.C. Cir.) (per curiam), cert. denied, 382 U.S. 1018 (1965).

64. The defendant might suffer, for example, from schizophrenia, paranoid type.
sions, the court finds the defendant competent to stand trial. Refusing to plead the insanity defense, the defendant pleads not guilty. In the first hypothetical case, the time factor was crucial since the defendant regained his sanity before he pled. In this second case, however, the time factor is largely irrelevant since the defendant's condition at the time of trial is substantially the same as it was at the time of the crime's commission. If, as the Wright court asserted, the approaches

65. If it were true that a defendant competent to stand trial was also competent to make a voluntary and intelligent rejection of the insanity defense—that is, if the standards for the competency to stand trial test and the Frendak test were equivalent—one could prove, with ample precedent, that the Frendak and Wright approaches differ. See, e.g., Pate v. Robinson, 383 U.S. 375, 389 (1966) (test for competency to stand trial is not the same as that for criminal responsibility); Wolcott v. United States, 407 F.2d 1149, 1151 (10th Cir. 1969), cert. denied, 396 U.S. 879 (1969); James v. Boles, 339 F.2d 431, 433 (4th Cir. 1964); People v. Nichols, 70 Ill. App. 3d 748, 753-54, 388 N.E.2d 984, 988 (1979). Several courts, however, including those in the District of Columbia, wisely recognize that the competency standard established by the Supreme Court is not an adequate measure of the defendant's ability to make a voluntary and intelligent rejection of a fundamental right. See United States v. Masthers, 539 F.2d 721, 726 n.30 (D.C. Cir. 1976); Stirling v. Eyman, 478 F.2d 211, 214-15 (9th Cir. 1973); United States ex rel. Konigsberg v. Vincent, 386 F. Supp. 221, 225 (S.D.N.Y.), aff'd on other grounds, 526 F.2d 131 (2d Cir. 1975), cert. denied, 426 U.S. 937 (1976); Frendak v. United States, 408 A.2d 364, 379 (D.C. 1979); State v. Walton, 228 N.W.2d 21, 24 (iowa 1975). Competency to stand trial only requires that a defendant have a "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding . . . [and a] factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402, 402 (1960). Such a standard does not evaluate whether a defendant is capable of making intelligent decisions on important matters relating to his or her defense.


66. See note 52 supra and accompanying text. The Wright court not only asserted that the two approaches are similar as they are now formulated, but also implicitly intimated that a requirement mandated in Alford—that trial courts accept a defendant's voluntary and intelligent guilty plea only if the record evidences a factual basis for the plea—must be included in the application of the Frendak approach, thus making the two approaches even more similar. See United States v. Wright, 627 F.2d at 1310 n.74 (citing North Carolina v. Alford, 400 U.S. at 38 n.10). Although the Wright court did not develop the argument, the Supreme Court's mandate, on its face, would seem to require that courts employing the Frendak approach not allow a defendant to reject an insanity plea unless the record evidences the defendant's sanity at the time of the crime. This requirement would make Frendak's investigation essentially similar to Wright's investigation.
use equivalent criteria, a court deciding this second hypotheti-
cal case would reach the same result regardless of the ap-
proach it chose.

The approaches, however, do differ in their criteria. The Frendak approach directs a court to evaluate the three aspects of voluntary and intelligent decisions: the voluntariness of the defendant's plea, the defendant's knowledge of the available options, and the defendant's capacity to weigh those options ration-
ally. A court employing this approach thus questions whether the defendant is functioning rationally in the context of his or her plea decision. Specifically, the court asks whether the defendant voluntarily refused to raise the insanity de-
fense—that is, whether the prosecutor illegally threatened or coerced the defendant into refusing to raise the insanity de-
fense; whether the defendant knows the length of the sentence that might be imposed upon conviction; whether the defendant is informed of the time that might be spent in a mental hospital if he or she is acquitted upon the insanity defense; and whether the defendant has the mental capacity to choose be-
tween alternative pleas in accordance with his or her best in-
terests.

Under the Wright approach, on the other hand, a court ap-
plies its jurisdiction's criminal test of insanity: the court fo-
cuses on whether the defendant knew right from wrong, as
defined by the M'Naghten rule, or whether the defendant
could not conform his or her conduct to the requirements of the law, as defined by the Model Penal Code (ALI). A court em-

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67. See text accompanying note 26 supra.
68. Most American courts have endorsed one of two insanity tests. See notes 69-70 infra.
69. The M'Naghten rule states, "[A]t the time of the committing of the act, the party accused was labouring under such a defect of reason, from a disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." Queen v. M'Naghten, 8 Eng. Rep. 718, 722 (1843). For examples of its present application, see, e.g., McKinney v. State, 566 P.2d 653 (Alaska 1977); State v. Doss, 116 Ariz. 156, 568 P.2d 1054 (1977); People v. Rockamann, 79 Ill. App. 3d 575, 399 N.E.2d 162 (1979).
70. The Model Penal Code states:
   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 sub-
stantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the 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 anti-social conduct.

MODEL PENAL CODE § 4.01 (Official Draft 1962). For examples of courts that use this test, see, e.g., United States v. Chandler, 393 F.2d 920 (4th Cir. 1968); People
ploying this approach thus questions whether the defendant functioned rationally in the context of his or her criminal act. Specifically, the court asks whether the defendant knew, at the time the defendant committed the criminal offense, that the act was wrongful; whether the defendant's disease diminished his or her capability to reason so that the defendant thought the criminal act was acceptable to society and the law; and whether the defendant's delusions forced him or her to kill.

Because the Wright court implicitly assumed a different psychological model than did the Frendak court, it failed to see that the differences in the two approaches may produce different results. The Wright court assumed that if a defendant's "insanity" caused him or her to act irrationally in the context of the crime, the insanity would also prevent the defendant from rationally deciding whether to plead the insanity defense. The Wright court thus claimed that although the two approaches differ in the context in which they focus on the defendant's mental state, a court would conclude the same under either approach. The Frendak court, on the other hand, implicitly assumed that even a defendant whose "insanity" caused the commission of a crime could perhaps act rationally in the context of choosing whether to plead the insanity defense. This assumption was based on the more current and generally accepted view of a person's capacity to reason, a view that argues against dividing the mind into separable categories such as "emotion" or "reason," and suggests that a mental illness might impair one's ability to act rationally in a given social situation, yet allow one to reason rationally in other contexts.


71. Admittedly, the results are identical if a court applying the Frendak test finds that the defendant's decision is not voluntary and intelligent. See note 25 supra. A difference in results occurs when the defendant makes a voluntary and intelligent choice to reject the insanity defense, and thus triggers Frendak's injunction against disturbing that decision.

72. See 627 F.2d at 1311-12.

73. Contemporary psychiatrists generally do not divide the brain into all-inclusive compartments such as "reason" or "will." As the District of Columbia Circuit Court cautioned, "[t]he modern science of psychology ... does not conceive that there is a separate little man in the top of one's head called reason whose function it is to guide another unruly little man called instinct, emotion, or impulse in the way he should go." Holloway v. United States, 148 F.2d 665, 667 (D.C. Cir. 1945), cert. denied, 334 U.S. 852 (1948). Rather, psychiatrists now examine a patient's mind as a whole, and look specifically to the functions the mind must perform. See N. Fenkel, supra note 26, at 132; ROYAL COMMISSION ON CAPITAL PUNISHMENT, 1949-1953, REPORT, Cmd. No. 8932, at 79 (1953).

74. This tenet finds support in the numerous examples of mental patients who act irrationally in one situation, yet reason capably when they confront
Because the criteria of the approaches differ, the result in the second hypothetical case depends on which approach is applied. The defendant's severe delusions would probably lead a court applying the Wright approach to impose the insanity defense, since the defense would appear sufficiently strong. A court applying the Frendak approach, however, might defer to the defendant's decision to reject the defense since, under the psychological model that it assumes, the defendant's capacity to compare the prospect of commitment to that of a prison sentence need not relate to his or her knowledge of whether murder was right or wrong. Even if the defendant's delusions— which may have compelled the murder—persist at trial, the defendant might yet be capable of understanding the plea alternatives and of evaluating the potentially valid reasons to reject the insanity defense.

B. THE COMPETING INTERESTS PROTECTED BY THE APPROACHES

Further analysis of the Frendak and Wright approaches suggests that they reach different results not only because of their differences in criteria, underlying psychological models, and focus as to the time at which the defendant's mental condition is manifested, but also because of the differing weights they assign to the defendant's and society's interests.

1. The Defendant's Interests and the Frendak Approach

The Frendak court's primary emphasis on protecting the defendant's interests parallels increasing judicial protection of various general liberty interests of convicts and criminal defendants. For example, courts have recently extended to convicts a right to freedom from excessive punishment, a right to matters outside their delusional system. See B. Hart, The Psychology of Insanity 96-97 (5th ed. 1957); note 136 infra.

75. See text accompanying notes 64-66 supra.
76. See text accompanying notes 40-42 supra.
77. Prior to the 1960s, the Supreme Court refused to review prison administrative decisions affecting the constitutional rights of prisoners. See Calhoun, The Supreme Court and the Constitutional Rights of Prisoners: A Reappraisal, 4 Hastings Const. L.Q. 219, 220-21 (1977).
78. Courts have held that some punishments may be too severe in light of the crime committed, and thus may violate the eighth amendment's guarantee against cruel and unusual punishment. See, e.g., Coker v. Georgia, 433 U.S. 584, 589 (1977) (death penalty for rape); Gregg v. Georgia, 428 U.S. 153, 205-06 (1976) (dictum) (death penalty for armed robbery); Jackson v. Bishop, 404 F.2d 571, 576-77 (8th Cir. 1968) (excessive corporal punishment). The Supreme Court has subsequently held that it will not review the excessiveness of sentence of imprisonment. See Rummel v. Estelle, 445 U.S. 263, 274 (1980) (upholding
adequate conditions within prison, and a right to a hearing before revocation of parole. In addition, courts recognize the right of criminal defendants to form their defense strategy largely free from judicial encroachment. Thus, courts, refusing to overrule a defendant's strategic decision, have allowed defendants voluntarily and intelligently to waive various constitutional rights. In Alford, the Supreme Court permitted a defendant to waive the three constitutional rights forfeited by a guilty plea: the fifth amendment right against self-incrimination, the sixth amendment right to trial by jury, and the sixth amendment right to confront one's accusers. In Faretta, the mandatory life sentence imposed under a Texas statute where defendant had been convicted of three minor felony offenses. Nonetheless, states can still invalidate sentences they judge to be excessive under their state constitutional cruel or unusual punishment clauses. See, e.g., Faulkner v. State, 445 P.2d 815, 819 (Alaska 1968) (sentence violated both federal and state constitutional prohibitions against cruel and unusual punishment). See also Note, Disproportionality in Sentences of Imprisonment, 79 Colum. L. Rev. 1119, 1120 n.6 (1979).


Several Supreme Court decisions have extended to convicts the fourteenth amendment's due process guarantees when parole boards have sought to cancel their prior approval of parole. See, e.g., Gagnon v. Scarpelli, 411 U.S. 778, 780-91 (1973) (right to counsel at some revocation hearings); Morrissey v. Brewer, 408 U.S. 471, 485, 487-88 (1972) (revocation of parole requires both a preliminary hearing and a revocation hearing). Cf. Wolff v. McDonnell, 418 U.S. 539, 557 (1974) (due process extends to all disciplinary hearings where "good time" credits may be revoked).

Judicial respect for a defendant's trial strategy can be traced to the Anglo-American "adversary model, which provides substantial leeway for litigants to define their own self-interest [and] favors this free choice . . . ." Saltzburg, The Unnecessarily Expanding Role of the American Trial Judge, 64 Va. L. Rev. 1, 19 (1978).


See notes 30-32 supra and accompanying text.

See Boykin v. Alabama, 395 U.S. 238, 243 (1969). However, since these
Court permitted waiver of a defendant's right to counsel.85

These decisions, particularly Alford,86 are consistent with Frendak, and inconsistent with Wright.87 Like the Alford court, the Frendak court deferred to the defendant's strategic plea decision, even though the defendant "waived" a seemingly important claim of innocence.88 Because the Supreme Court's deferral in Alford involved waiver of fundamental, explicitly constitutional rights, the Court presumably would defer even more readily to waiver of the right to plead insanity—a right of lesser importance. The Supreme Court has refused to delineate a particular form of the insanity defense,89 and it is unlikely that the Court will become more insistent upon a strict protection of the right to plead insanity.90

Judicial deference to a defendant's strategy should also arguably apply to a defendant's decision not to plead insanity,91


85. See notes 33-36 supra and accompanying text.

86. Alford is more analogous to the context of a defendants rejection of the insanity defense because it, unlike Faretta, contained a plea decision. Moreover, the result in Faretta was based not only upon a defendant's ability to waive a right, but upon a finding that a defendant has an affirmative constitutional right to defend himself pro se. See notes 33-34 supra and accompanying text. For a discussion of the importance of Alford and Faretta in the context of imposing the insanity defense, see Singer, supra note 4, at 655-59.

87. In Alford, the Supreme Court read its decision in Lynch v. Overholser, 369 U.S. 705 (1962), discussed in note 17 supra, as intimating that it would not be unconstitutional for a court to accept a defendant's voluntary and intelligent guilty plea, even though the "evidence before the judge indicated that there was a valid [insanity] defense." North Carolina v. Alford, 400 U.S. at 35. A long line of decisions allow defendants to waive a guilty plea. See, e.g., Boykin v. Alabama, 395 U.S. 238, 242 (1969); Machibroda v. United States, 368 U.S. 487, 493 (1962); Kercheval v. United States, 274 U.S. 220, 223 (1927).

88. 408 A.2d at 378; see text accompanying notes 40-42 supra.

89. The doctrines of actus reus, mens rea, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States.


91. Admittedly, the Supreme Court's explicit refusal in Alford to bestow upon the defendant an absolute, unconditional right to a voluntary and intelligent guilty plea blunts this analysis. 400 U.S. at 38 n.11. One could argue that even if Alford allows courts discretion to impose pleas upon defendants, the Frendak approach goes too far in making a court's acceptance of a voluntary and intelligent plea mandatory. The Court in Alford, however, specifically
since the reasons for rejecting the insanity defense reveal sound, strategic considerations. Defendants may not wish to disparage or deny the validity of their motives for committing a crime by pleading insanity. They may prefer a limited prison term to the indefinite commitment likely to follow an insanity acquittal, or they may object to the quality of treatment in a mental hospital. They may want to avoid the stigma that typically accompanies an adjudication of insanity—a stigma that often surpasses that accompanying a criminal conviction. They may attempt to pressure the jury into acquitting them by not offering the jury the "compromise" verdict of insanity, or they may prefer to use the evidence of their lack of mental responsibility not to plead insanity, but only to achieve a conviction.
tion of a lesser offense than that with which they are charged.98

Finally, they may be opposed to psychiatric treatment.99

Courts have begun to recognize the validity of this last reason in an analogus area of the law by granting mental patients a right to refuse psychiatric treatment.100 Although few state statutes provide this protection for the hospitalized mentally ill,101 an increasing number of courts have turned to constitutional guarantees102 to shield these patients from unchecked, significant intrusions into their mental processes.103 As their

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98. Dr. Dennis Philander has observed that defendants in Minnesota often adopt this strategy. Telephone interview with Dr. Dennis Philander, M.D., doctor of psychiatry, Minneapolis Clinic of Psychiatry and Neurology Ltd. (February 1, 1981). Defendants will use this tactic most often when facing a homicide charge, to claim, for example, that their mental illness prevented them from premeditating or deliberating. See, e.g., People v. Wolff, 61 Cal. 2d 795, 818-19, 394 P.2d 959, 975-76, 40 Cal. Rptr. 271, 285 (1964); Commonwealth v. Walzack, 465 Pa. 210, 220-21, 360 A.2d 914, 919-20 (1976). This approach has been endorsed by many state courts. See, e.g., State v. Donahue, 141 Conn. 656, 665, 109 A.2d 364, 366 (1954), cert. denied, 349 U.S. 926 (1955); State v. Moeller, 50 Hawaii 110, 120, 433 P.2d 136, 143 (1967).

One commentator has equated this tactic to that of a claim of diminished responsibility—a claim unanimously rejected by American courts—and has disparaged its use. See Arenella, The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage, 77 Colum. L. Rev. 827, 831 (1977).

99. See cases cited in note 102 infra.

100. Plotkin notes that "there is a growing body of precedent from a diverse range of courts that reflects a solid trend toward ultimate judicial recognition of a constitutional 'right' to refuse treatment." Plotkin, Limiting the Therapeutic Orgy: Mental Patients' Right to Refuse Treatment, 72 Nw. U. L. Rev. 461, 491 (1977) (footnote omitted). See Winick, Legal Limitations on Correctional Therapy and Research, 65 Minn. L. Rev. 331, 345 (1981); cases cited in notes 102-103 infra.

101. Most states afford patients only limited statutory protection from unwanted psychiatric care. California is a notable exception. See Cal. Penal Code § 2670.5 (West Supp. 1970-1979) (competent persons can refuse organic therapies). For a list of the state statutes giving mental patients some form of a right to refuse treatment, see Plotkin, supra note 100, at 504-25.

102. Courts have based this right to refuse treatment on several constitutional guarantees: the eighth amendment, see, e.g., Knecht v. Gillman, 488 F.2d 1136, 1139 (8th Cir. 1973); Mackey v. Procunier, 477 F.2d 877, 878 (9th Cir. 1973), the thirteenth amendment, see, e.g., Jobson v. Henne, 355 F.2d 129, 132 (2d Cir. 1966) (refusal allowed if program is devoid of therapeutic purposes), the first amendment, Winters v. Miller, 446 F.2d 65, 70 (2d Cir.) (religious freedom), cert. denied, 404 U.S. 985 (1971); Rennie v. Klein, 462 F. Supp. 1131, 1144 (D.N.J. 1978) (right to privacy); Kaimowitz v. Department of Mental Health, Civ. No. 73-19434-AW (Cir. Ct., Wayne County, Mich., July 10, 1973) (right to privacy). The Kaimowitz court was the first court to expand the right of privacy to include the right of prisoners to refuse psychiatric treatment. For the full text of Kaimowitz, see A. Brooks, Law, Psychiatry and the Mental Health System 902 (1974); for a summary, see 42 U.S.L.W. 2063, 2063-64 (July 31, 1973).

103. Generally, the more intrusive the therapy, the less likely the court will allow hospitals to ignore patients' refusal of treatment. Stone, The Right of the Psychiatric Patient to Refuse Treatment, 4 J. Psychiatry & L. 515, 520 (1976).
standard for accepting a patient's refusal, these courts have established a voluntary and intelligent test identical to that of the Frendak approach. Thus, their decisions support the argument that courts should respect a defendant's refusal to plead insanity to the extent that the defendant's decision reflects a desire to maintain his or her mental integrity.

Perhaps the only valid argument against an unqualified use of the Frendak approach is its failure to require a court explicitly to consider broader social concerns. Although the Frendak court adequately examined the defendant's reasons for rejecting the insanity defense, it failed to inquire into the potential social interests favoring the trial judge's imposition of the defense, or to ask whether it could satisfy these social concerns within its framework. Therefore, the interests arguably protected by the Wright approach must be analyzed before a decision concerning the appropriate test can be made.

2. Societal Interests and the Wright Approach

The District of Columbia Circuit Court's suggestion in Lynch, Whalem, and Wright, that "[s]ociety has a stake in seeing to it that a defendant who needs hospital care does not go to prison," leaves undefined the interests that justify imposing the insanity defense over the defendant's objection. The


104. The courts that give patients a right to refuse treatment generally require the patient to be competent enough to waive this right knowingly and voluntarily. See, e.g., Knecht v. Gillman, 488 F.2d 1136, 1138-39 (8th Cir. 1973); Rogers v. Okin, 478 F. Supp. 1342, 1368 (D. Mass. 1979). See generally Winick, supra note 100, at 363-92. In the past, some courts did not recognize a right to refuse treatment for those involuntarily committed, on the assumption that such patients could not be competent enough to render an informed and intelligent choice. See, e.g., Price v. Sheppard, 307 Minn. 250, 259, 239 N.W.2d 905, 909 (1976). Now, some courts require hospitals to investigate whether involuntarily committed patients are able to make informed and intelligent decisions. See, e.g., Winters v. Miller, 446 F.2d 65, 68 (2d Cir. 1971), cert. denied, 404 U.S. 985 (1971). Cf. Rennie v. Klein, 462 F. Supp. 1131, 1145 (D.N.J. 1978) (patient must have "capacity" to understand situation and be "free from state coercion").

Imposition of the insanity defense promotes a societal interest specifically discussed in *Lynch*, *Whalem*, and *Wright*—the interest in withholding punishment from the morally blameless. This interest is founded upon the notions that the state should punish crimes instead of punishing acts alone, and that the state should limit its intrusion upon the individual to cases involving truly criminal actions. Under the *Wright* court's approach, our legal system would be undermined when morally blameless defendants reject a defense acknowledging their blamelessness and, instead, invite criminal sanction. If evidence exists that an act lacked a criminal component, as in a case involving an insane defendant, a *Wright* analysis suggests that the criminal sanction may be inappropriate and that, at most, the state should seek some noncriminal disposition through the imposition of the insanity defense.

In the context of deciding whether to impose the insanity defense, this societal interest is furthered most when the defendant's moral blameworthiness is an element of the crime—that is, when prosecution must establish moral blameworthi-
ness in order to establish its case. This rigorous "element" interpretation imposes upon the court a positive duty to raise the insanity defense if there is a sufficient question concerning the defendant's sanity. Under a less rigorous interpretation of the moral blameworthiness standard, the court merely possesses the discretion to raise the defense to prevent possible abuses of the criminal sanction. The Wright court's discretionary imposition of the insanity defense in cases involving a "sufficient question" as to a defendant's sanity represents this latter interpretation.

It is not clear, however, that either the "element" interpretation or the Wright interpretation justifies the imposition of the insanity defense over a defendant's objections. There have long been limitations on the legal relevance of moral blameworthiness. In the civil context, courts have often held defendants strictly liable for blameless conduct. In the criminal context, courts have often held defendants strictly liable for blameless conduct.

110. Although the federal courts have long recognized that sanity is an essential element of any crime, see Davis v. United States, 160 U.S. 469, 488 (1895); United States v. Eichberg, 439 F.2d 620, 624, 625 (D.C. Cir. 1971), the Supreme Court has held that a state can rationally conclude differently. See Leland v. Oregon, 343 U.S. 790, 799 (1952); Mullaney v. Wilbur, 421 U.S. 684, 706 (1975) ("the existence or nonexistence of legal insanity bears no necessary relationship to the existence or nonexistence of the required mental elements of the crime"). Although most states have not decided whether the insanity defense implicates an essential element of the crime, their assignment of the burden of proof indicates their attitude toward the defense. In states where the prosecution must prove the defendant's sanity beyond a reasonable doubt, see, e.g., Dolchok v. State, 519 P.2d 457, 460 (Alaska 1974); State v. Cooper, 111 Ariz. 332, 334, 529 P.2d 231, 233 (1974); Bradford v. State, 234 Md. 505, 510, 200 A.2d 150, 155 (1964), the law considers the defendant's sanity essential to the prosecutor's case. See H. Weihofen, Insanity as a Defense in Criminal Law 158 (1933). In states where the defendant must prove by the preponderance of the evidence that he or she was insane, see, e.g., People v. Monk, 56 Cal. 2d 288, 297, 363 P.2d 865, 869, 14 Cal. Rptr. 633, 637 (1961); State v. Buzynski, 330 A.2d 422, 429-30 (Me. 1974); State v. Finn, 257 Minn. 138, 144, 100 N.W.2d 508, 513 (1960), the law does not consider sanity an element of the crime. Comment, The Burden of Proof and the Insanity Defense After Mullaney v. Wilbur, 28 Me. L. Rev. 435, 453 (1976). The states are evenly divided between the two viewpoints. For a guide to the position of each state on the issue of whether insanity is an essential element of a crime, see 17 A.L.R.3d 146, 158-59, 195-96 (1968).

111. It is generally conceded that if the court realizes that the prosecutor has not established an essential element of the prosecutor's case, even if the defendant refuses to argue the issue, the court should direct a verdict or, at the very least, appoint an amicus counsel to argue the issue for the defendant so that the issue is presented to the jury. See Callahan v. LeFevre, 605 F.2d 70, 74 (2d Cir. 1979). This rigorous interpretation appears to be a potentially dispositional threshold question on the issue of whether to impose the insanity defense over a defendant's objections. If technical, legal principles require the imposition of the insanity defense whenever there is a substantial question of the defendant's sanity—in effect, the Wright approach—a balancing of policy interests is unnecessary.

112. For example, those who engage in extrahazardous occupations and ac-
the Supreme Court has recognized that moral blame is not a constitutional prerequisite to a conviction for a criminal offense, or for punishment.113

The current structure of the legal system also demonstrates that moral blameworthiness is not, in any meaningful way, an essential element of a crime. Although proponents of the "element" interpretation might argue that moral blameworthiness—evidenced by sanity—is a necessary component of the crime's "intent" or mens rea requirement,114 the Supreme Court has never demanded that states accept this interpretation.115 Moreover, the interpretation, if correct, would not explain the need for the insanity plea, since the defendant's sanity could be debated and decided within the general determination of intent.116 In addition, under this interpretation bifurcated trials would serve no useful purpose, since the sanity element would have been litigated in the first phase of the trial.117 Arguably, an investigation into mens rea assumes a responsible person and asks whether that person acted without guilty intent, while an investigation into insanity inquires whether the defendant was a responsible person in the first place.118 These considerations have led a number of courts to adopt the Frendak approach even though they technically consider sanity—or moral blameworthiness—an element of the crime.119

activities are often held strictly liable. See, e.g., E.I. Du Pont De Nemours & Co. v. Cudd, 176 F.2d 855, 860 (10th Cir. 1949) (dictum). Strict liability also extends to those who sell unreasonably dangerous or defective consumer products. See Restatement (Second) of Torts § 402A (1965).

113. See note 89 supra.
115. In Leland v. Oregon, 343 U.S. 790 (1952), the Court noted that it would not interfere with Oregon's policy of forcing the defendant to establish his or her insanity beyond a reasonable doubt, because it could not "say [that] that policy violates generally accepted concepts of basic standards of justice." Id. at 799.
116. See Note, Mens Rea and Insanity, 28 Me. L. Rev. 500, 509 (1976) ("If legal insanity is no more than an incapacity to possess the 'guilty mind' required for crime, then there is no reason to plead it as a special defense to criminal liability.").
117. For a discussion of the bifurcated format and its application by some courts, see note 23 supra.
Even assuming that courts should avoid denigrating the moral blameworthiness notion, it seems unlikely that a court's refusal to impose the insanity defense over a defendant's objections, as in Frendak, would have more than a marginal impact upon the vitality of that notion. A Frendak approach does not eliminate that concept of moral responsibility, since defendants may still argue the insanity defense at their option. Ultimately, the Frendak analysis expands defendants' freedom by insuring defendants the availability of the insanity defense and yet allowing them to refuse the defense when they wish to protect other interests.

Joseph Goldstein and Jay Katz suggest that this first societal interest in absolving the morally blameless of criminal responsibility is merely a screen behind which society hides a second and more tangible goal—the hospitalization and control of the criminally insane for the safety of society at large. Arguably, the Wright approach identifies potentially violently insane defendants and imposes the insanity defense over their objection. If the jury acquits a defendant on the ground of insanity, the court will likely commit the defendant to a mental hospital, either by means of an automatic commitment statute, or by civil commitment proceedings. The hospital will

120. It is doubtful that granting this one concession to defendants erodes the strength of the insanity defense. The defense has long been part of the American legal system. See note 106 supra. If the insanity defense were to be eliminated, it would likely be because of mounting social pressure against its use, see note 90 supra, not because of a procedural adjustment in a court's duty to impose the defense.

121. Goldstein and Katz, supra note 90, at 864-68. These commentators assert that this second concern is the result of "largely unconscious feelings of apprehension, awe, and anger toward the 'sick,' particularly if associated with 'criminality' . . . ." Id. at 868. Several courts and statutes have called for the hospitalization of the insane on the ground of reducing the insane defendant's danger to society. See, e.g., Williams v. United States, 250 F.2d 19, 25-26 (D.C. Cir. 1957) ("the community's security may be better protected by hospitalization . . . than by imprisonment); People v. Hurt, 90 Cal. App. 3d 974, 977, 153 Cal. Rptr. 755, 757 (1979) (primary purpose for committing a defendant under the statute is the protection of the public).

presumably not release the defendant into society until the defendant's disturbance has been treated and his or her dangerousness curtailed.

This second societal interest is also a weak justification for the adoption of the Wright approach. The assumption that a court applying the Wright test can adequately identify potentially dangerous defendants is inaccurate. Empirical evidence, such as the well-known study conducted upon the release of mental patients following Baxstrom v. Herold, has consistently indicated that courts tend to overpredict dangerousness. This inability to identify dangerous individuals has led courts not only to hospitalize defendants who should not have been committed, but to release those who, upon being freed, have engaged in further violent behavior. Moreover, the

and their injunction to continue civil commitment upon acquittal. If the defendant is not under civil commitment, the court must initiate civil commitment proceedings against the defendant and detain him or her in a state hospital until they are completed. Minn. R. Crim. P. 20.02(8)(1) (1979). The District of Columbia also has an automatic commitment statute, D.C. Code Ann. § 24.301(d) (1973). The Supreme Court ruled, however, that a court could not apply the statute to defendants on whom it imposed the defense. Lynch v. Overholser, 369 U.S. at 719; see Cameron v. Mullen, 387 F.2d 193, 196 (D.C. Cir. 1967); Cameron v. Fisher, 320 F.2d 731, 734 (D.C. Cir. 1963).

123. All states have a civil commitment statute authorizing courts to commit those deemed insane following hearings and psychiatric examinations of the prospective patient. See, e.g., Minn. Stat. § 253A (1980). Courts normally resort to civil commitment proceedings if their state does not have an automatic commitment statute. See, e.g., Allen v. Radack, 426 F. Supp. 1052, 1059 (D.S.D. 1977) (state must either initiate civil commitment proceedings or release individual acquitted of murder charge by reason of insanity); Novosel v. Helgemoe, 118 N.H. 115, 384 A.2d 124 (1978) (grand jury cannot certify defendant as insane; state must indict or release defendant within thirty days). Therefore, courts will commit virtually all defendants acquitted by reason of insanity. Invariably, evidence of the defendant's criminal act is admissible at the civil commitment hearing.

124. 383 U.S. 107 (1966). Baxstrom caused 969 prisoner patients in New York state, who had been thought to be too dangerous for civil hospitals, to be transferred to civil hospitals. Of 246 included in a survey, 232 of whom could be located 4½ years later, 65 had been released and were "being maintained" in the community (in after-care clinics, etc.), only 9 had been convicted of a crime, and only 5 had been transferred back to a facility for the criminally insane. The remainder were residing in civil hospitals. Steadman & Keveles, The Community Adjustment and Criminal Activity of the Baxstrom Patients: 1966-1970, 129 Am. J. Psychiatry 304, 305, 310 (1972).


126. See Zitrin, Crime and Violence Among Mental Patients, 133 Am. J. Psy-
Frendak approach can arguably protect society as well as the Wright approach through use of civil commitment proceedings instituted at the time of the defendant's release from prison if the released prisoner is considered dangerous. This interest can, therefore, be achieved without an intrusion upon the defendant's interests.

A third societal interest that the Wright approach promotes is the maintenance of order within prisons. Under the assumption that mental hospitals, unlike prisons, have the expertise and facilities to cope with the violently insane, a court employing the Wright analysis will send potentially disruptive defendants to mental hospitals. The goal of maintaining order within prisons does not, however, justify the imposition of the insanity defense upon a defendant; the Frendak approach should not contribute to prison disorder. Under the Frendak approach only a defendant with some degree of rationality can reject the insanity defense. This approach thus gives some assurance that such a defendant will be able to function normally in prison. In any event, prison officials have numerous means to control disruptive inmates, including the use of common statutory procedures to transfer prisoners to mental hospitals.

127. For civil commitment, most states require that prospective patients be dangerous to themselves or others. See Note, supra note 95, at 1202-07. Similarly, most civil commitment statutes require a patient's hospitalization until his or her dangerousness has been eliminated. See Peszke, Is Dangerousness an Issue for Physicians in Emergency Commitment?, 132 AM. J. PSYCHIATRY 825, 826 (1975).

128. Of course, the inability to predict accurately dangerousness limits the effectiveness of civil commitment proceedings under the Frendak approach to the same extent that it limits the effectiveness of hospitalization under the Wright approach.


130. "The possibility that a mentally disturbed prisoner may harm his fellow inmates is substantially minimized by prison security." Note, Transfer of Prisoners to Mental Institutions, 69 J. CRIM. L. & CRIMINOLOGY 337, 346 (1978).


One might object that prison officials could use a transfer statute to implement the Wright approach absent the safeguards of a criminal trial. The Supreme Court recently held, however, that procedural due process protections apply to transfers of convicts from prison to mental health facilities. Vitek v. Jones, 445 U.S. 480, 494 (1980) (right to a hearing, right to an independent deci-
A fourth interest arguably fostered by the *Wright* approach is the hybrid interest of the defendant and society in achieving the most satisfactory disposition for the defendant. The government has long used its *parens patriae* power to act in a citizen's best interest when that citizen fails to aid himself or herself. In promoting this interest, a court following the *Wright* approach would impose the insanity defense over the defendant's objections when it believed the defendant had erred in his or her assessment of self-interest. To the extent that the court's assessment is correct, the *Wright* approach protects the defendant better than the *Frendak* approach.

By minimizing the number of "bad" decisions made by defendants, the promotion of better dispositions for defendants also furthers the integrity and legitimacy of the system as a whole. Just as "the integrity of and public confidence in the system are undermined when an easy conviction is obtained due to the defendant's ill-advised decision to waive counsel," a similar loss of integrity and confidence occurs when a defendant makes an ill-advised decision to reject the insanity defense. A *Wright* approach attempts to minimize such "bad" decisions by taking them away from the defendant.

Underlying this hybrid interest is the assumption that the state, rather than the defendant, can most accurately identify the plea that best serves the defendant's interests. The validity of this assumption, however, is tenuous. If one assumes that the psychological model underlying *Frendak* is valid, even a "mentally ill" defendant can possibly make informed, rational
decisions concerning the conduct of his or her defense. In addition, since the Wright approach emphasizes the treatment or rehabilitation of the defendant and thus focuses only upon whether there is a "sufficient question" of the defendant's sanity, it ignores the substantial reasons for a defendant to reject the insanity defense. Ultimately, the Wright approach does not even inquire into the possible efficacy of hospitalization or the possibly harmful effects of incarceration. It seems improper that the state should be able to "interfere with individual autonomy . . . without any assurance that the state, as a substitute decisionmaker, would better ascertain the best interest of the individual."

Even assuming that the judicial system is more capable of acquiring information and making decisions than is a given defendant, it is questionable whether such superiority justifies the Wright approach's untrammeled intrusion upon the defendant's autonomy. The beneficial effect of "good" decisions on the legitimacy of the legal system must be balanced against the harmful effect of restricting the freedom of choice of defendants. The Supreme Court, in deciding whether to wrest decisions from defendants in criminal matters, has never required that a defendant be capable of making the best decision. Rather, the Court has required, as in Alford and Faretta, only that the defendant be able to make a voluntary and intelligent decision. The Frendak approach guarantees the defendant's

136. Many of those civilly committed are capable of making rational choices concerning treatment. See J. Page, Psychopathology 32-36 (1971); Dershowitz, Psychiatry in the Legal Process: A Knife That Cuts Both Ways, 4 Trial 29, 32 (Feb.-Mar. 1968); Plotkin, supra note 100, at 489 ("the psychiatric literature is unanimous in the conclusion that there is not necessarily any relationship between hospitalization and the ability to make rational decisions") (footnote omitted); Siegel, The Justifications for Medical Commitment—Real or Illusory, 16 Wake Forest Intra. L. Rev. 21, 31-33 (1969); note 74 supra and accompanying text.

137. See notes 93-99 supra and accompanying text.

138. For some mentally ill patients, no amount of psychiatric care will effect a cure. Moreover, some psychiatric therapy can be ineffective if the patient is unwilling to receive treatment. See note 143 infra.

139. Note, supra note 95, at 1213.

140. For example, in Faretta, the Court refused to overturn the defendant's decision to represent himself, even though that the decision may have resulted in an inadequate performance at trial. See notes 35-36 supra and accompanying text.

141. The quantity of information required by the Supreme Court for an acceptably "intelligent" choice is typically small. A defendant need only be "advised by competent counsel" and know "the nature of the charge," an accused need not "correctly assess every relevant factor" of the case. Brady v. United States, 397 U.S. 742, 756-57 (1970).
opportunity to make this decision.\textsuperscript{142}

A fifth societal interest that the \textit{Wright} approach arguably promotes is the defendant’s expeditious return to society as a productive member. By imposing the insanity defense, a court following \textit{Wright} arguably ensures that an insane defendant will receive psychiatric treatment designed to cure his or her illness. Since a mental hospital can release the defendant immediately following such a cure, the defendant can quickly return to society as a productive member.

This societal interest rests on three untenable assumptions, however, and is thus difficult to accept as a justification for imposing the insanity defense over a defendant’s objections. The first assumption is that an individual incarcerated under \textit{Frendak} must serve a long prison sentence. Such defendants, however, may have faced a misdemeanor charge and a relatively light penalty, or may be eligible for parole while serving a lengthy sentence. The second incorrect assumption is that psychiatric treatment is effective even when the patient does not desire such care,\textsuperscript{143} as may be the case when a defendant has rejected the insanity defense. The final assumption is that hospitals immediately release patients who are cured. Although the fairly strict release procedures\textsuperscript{144} used by some

\begin{footnotes}
\textsuperscript{142} See text accompanying notes 158-159 infra.
\textsuperscript{143} See J. Rappaport, Community Psychology 322 (1977) ("[I]f the aim is treatment, in the sense of preparing for a useful role in society, then it will be necessary for treatment to be voluntary rather than forced. . . ."). The failure of treatment in the face of patient opposition is especially pronounced in psychotherapy, see N. Morris, The Future of Imprisonment 5-6 (1974); Katz, The Right to Treatment—An Enchanting Legal Fiction?, 36 U. Chi. L. Rev. 755, 776-77 (1969), and behavior modification therapy, see E. Erwin, Behavior Therapy 180-81 (1978); Marks, The Current Status of Behavioral Psychotherapy: Theory and Practice, 133 Am. J. Psychiatry 253, 255 (1976).

In some cases, not even the best psychiatric care can cure the mental illness of a defendant who desires treatment. See Liss & Franes, Court Mandated Treatment: Dilemmas for Hospital Psychiatry, 132 Am. J. Psychiatry 924, 926 (1975); Twerski, Treating the Untreatable: A Critique of the Proposed Right to Treatment Law, 22 Hosp. & Community Psychiatry 261, 262 (1971). The lack of an effective cure in all cases is not an argument for choosing imprisonment over hospitalization for someone clearly insane, but it weakens the fifth justification for choosing hospitalization in a case involving someone only questionably insane.

mental hospitals help ensure that mental patients are released upon their rehabilitation, many patients, particularly those adjudged not guilty by reason of insanity, are held long after their dangerousness has passed.145

IV. A SUGGESTED APPROACH

The above analysis suggests that the Frendak approach is superior to the Wright approach in its ability to achieve both the defendant's interests and the significant interests of society. As noted above,146 the Frendak approach's "voluntary and intelligent" requirement focuses on whether the defendant's decision in regard to the insanity plea is freely given, reasonably well-informed, and indicative of a rational capacity to weigh alternatives. These elements must, however, be made more specific before courts can successfully apply the Frendak approach.

In evaluating the voluntariness147 of a defendant's plea, a trial court must first ascertain whether the plea was illegally coerced by the prosecutor.148 Such illegal coercion occurs


145. Commentators have noted that those acquitted by reason of insanity "are hospitalized for far longer periods than other civil patients, the duration more likely to be related to the seriousness of the criminal act, than to the patient's improvement." German & Singer, Punishing the Not Guilty: Hospitalization of Persons Acquitted by Reason of Insanity, 29 Rutgers L. Rev. 1011, 1037 (1976) (footnote omitted). June German and Anne Singer cite, as one fault of release procedures for the acquitted, the procedural difficulties that "usually ensnare the patient in such a quagmire that release is unduly delayed and sometimes prevented altogether." Id. at 1054.

Courts sometimes refuse to allow the release of one who has been committed due to a successful plea of insanity despite overwhelming evidence of the patient's return to health. See, e.g., State v. Montague, 510 S.W.2d 776 (Mo. Ct. App. 1974) (unanimous psychiatric testimony that patient is free from psychosis); Hefley v. State, 480 S.W.2d 810 (Tex. Ct. Civ. App. 1972) (testimony of three psychiatrists that patient is cured). At least one court has recognized that "once a patient has remained in a large mental hospital for two years or more, he is quite unlikely to leave except by death. He becomes one of the large mass of so-called 'chronic' patients." United States ex rel. Schuster v. Herold, 410 F.2d 1071, 1079 (2d Cir.) (quoting Bloomberg, A Proposal for a Community-based Hospital as a Branch of a State Hospital, 116 Am. J. Psychiatry 814 (1950), cited in J. Katz, J. Goldstein, & A. Dershowitz, Psychoanalysis, Psychiatry and Law 664 (1967)), cert. denied, 386 U.S. 847 (1969).

146. See text accompanying note 26 supra.

147. Although neither Frendak nor Wright specifically addressed the voluntariness issue, the Wright court contended that voluntariness was considered in its test and asserted that a defendant's insanity could make his or her plea involuntary. See note 52 supra.

148. Perhaps the most common source of prosecutorial coercion in the crim-
when, for example, the prosecutor threatens to bring an unfounded charge if the defendant asserts that he or she will raise the insanity defense. Standards used to identify illegal prosecutorial coercion in the context of the guilty plea can be adopted to aid courts in identifying prosecutorial misdeeds in the context of the insanity plea, but courts should recognize that the level of coercion acceptable in the context of the sane defendant may be greater than that in the context of the questionably sane defendant.

Although a trial court should revert to the Wright approach if it finds that the defendant's plea decision does not meet Frendak's "voluntary and intelligent" requirement, Frendak's goal of deference to the defendant's interests requires that the court attempt to eliminate illegal prosecutorial coercion before resorting to the Wright approach. If the court finds illegal coercion and can issue the necessary orders to restrain the prosecution it should do so and allow the defendant to make a voluntary choice. If the illegal coercion cannot readily be eliminated, the court ought to impose the insanity defense and force the prosecution to prove the defendant's sanity.
A court following the Frendak approach must also ensure that the defendant has sufficient information to make an intelligent decision. The court should advise the defendant of the nature of the charges brought against him or her, the implications of the various sentences that he or she faces, and the environment and treatment provided in both the mental hospital and the prison. Typically, the court determines the extent of the defendant's knowledge by conducting a colloquy with the defendant.

Finally, the court must ensure that the defendant has the capacity to weigh the alternatives and to choose the one that is in his or her best interest. Initially, the trial court must ascertain whether the defendant has understood the information he or she has received. The court can do this by questioning the defendant as to his or her motives for rejecting the insanity defense, and by determining whether these motives correspond to the facts. To the extent that the court is unable to make this determination alone, the court can consult psychiatrists for expert opinions. In addition, the court must ensure that the defendant's mental illness does not compel the defendant to reject the insanity defense. In a difficult case in which the line between a rational motive and mental illness is slight, psychiatrists can help the court distinguish between the two.

One indication of an unacceptable compulsion might be the defendant's refusal to plead insanity despite the existence of an obvious reason for making such a plea—for example, the virtual certainty that the defendant will be convicted of a capital crime if he or she does not raise the defense.

If the defendant satisfies the elements of this detailed
Frendak approach, he or she should be allowed to reject the insanity defense.\textsuperscript{161} If the defendant fails to satisfy the elements, the court should revert to the Wright approach.

V. CONCLUSION

The debate over the relative merits of the Frendak and Wright approaches must eventually focus on the policy considerations enumerated above. Detailed analysis reveals that defendants have significant interests in deciding whether to refuse to plead insanity. Although society has corresponding interests in imposing the plea over the defendants' objections, the Wright approach does not serve all of these interests, and those that it does serve can be addressed adequately by the Frendak "voluntary and intelligent" approach. A detailed Frendak approach—one that guides courts in detecting a truly voluntary and intelligent rejection of the insanity defense—is thus the superior alternative.

\textsuperscript{161} Anne Singer agrees that the Wright test is inadequate, but does not prefer an unaltered Frendak approach. Instead, she recommends that a court adopt a four-step approach. The court should hold a hearing on (1) whether the defendant really does have a strong insanity defense; (2) if so, whether the defendant's waiver of the defense is a knowing and voluntary one; (3) if not, whether he should not be tried until he gains the ability to knowingly and intelligently decide the issue of his defense; and (4) if not, whether, using the substituted judgment test the court should interpose the defense for him.

Singer, \textit{supra} note 4, at 663.

Assuming that Singer's requirement that the insanity defense be "strong" is identical to the Wright court's requirement that the defense be "sufficient," the first two steps of Singer's approach and the Frendak approach are identical in their primary effect: neither test imposes the defense upon a defendant who makes a voluntary and intelligent decision, regardless of whether the insanity defense is strong or weak. While the Frendak approach imposes the plea given a nonvoluntary and intelligent decision and a sufficiently strong defense, however, the Singer proposal demands two more prerequisites. First, the defendant must be unable to return to competence within a reasonable time. \textit{Id.} at 659. Second, the trial court must use a "substituted judgment test," and make the decision "it believes [the defendant] would make if he could." \textit{Id.}