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Till the Detail of Surface Is in Accord with the Root in Justice: Treason, Insanity, and the Trial of Ezra Pound

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"TILL THE DETAIL OF SURFACE IS IN ACCORD WITH THE ROOT IN JUSTICE":[1] TREASON, INSANITY, AND THE TRIAL OF EZRA POUND

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I. INTRODUCTION

Whether Ezra Pound was one of the best English-language poets of the twentieth century is open to debate.[2] Whether Ezra Pound was one of the most influential men of letters of the twentieth century is not. "[F]ew individuals . . . ha[ve] left such a strong mark on so many aspects of the twentieth century: from poetry to economics, from theater to philosophy, from politics to pedagogy, from Provencal to Chinese. If Pound was not always totally accepted, at least he was unavoidably there."[3] Unavoidably there, and unavoidably—no, intentionally, even enthusiastically—controversial.

For most of his adult life Ezra Loomis Pound, Idaho-born and Pennsylvania-reared, was an American abroad.[4] At various times he lived

1. EZRA POUND, *To James Laughlin*, *in* THE SELECTED LETTERS OF EZRA POUND, 1907-1941, 277 (D. D. Paige ed., New Directions Publishing 1971) (1950) ("The poet's job is to *define* and yet again define till the detail of surface is in accord with the root in justice.").

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2. *See, e.g.*, IRA B. NADEL, THE CAMBRIDGE INTRODUCTION TO EZRA POUND 106–07 (2007).

3. Robert H. Walker, *Series Foreword* to EZRA POUND, EZRA POUND SPEAKING: RADIO SPEECHES OF WORLD WAR II, at ix (Leonard W. Doob ed.) (1978) [hereinafter *EPS*]; *see also* CHARLES NORMAN, THE CASE OF EZRA POUND 20 (1968) [hereinafter *CEP*] ("His work inspired other poets and helped to shape their styles. He is not only inseparable from the history of modern British and American poetry; in large part he is that history."); Carl Sandburg, Editorial Comment, *The Work of Ezra Pound*, 7 POETRY 249, 250 (1916), *available at* http://www.poetryfoundation.org/poetrymagazine/browse/7/5#/20570706/1. In 1916, Carl Sandburg wrote in *Poetry*:

> All talk on modern poetry, by people who know, ends with dragging in Ezra Pound somewhere. He may be named only to be cursed as wanton and mocker, poseur, trifler, and vagrant. Or he may be classed as filling a niche today like that of Keats in a preceding epoch. The point is, he will be mentioned.

Sandburg, *supra*.

4. DONALD DAVIE, EZRA POUND, at ix–x (Frank Kermode ed.) (1975).

in Venice, London, Paris.[5] In 1928, he settled in Rapallo, in Italy.[6] When World War II broke out, he chose to remain there. Beginning in October of 1941, and through at least July of 1943, he made a series of English-language broadcasts from Rome for the Mussolini government, which were directed to English and American audiences.[7]

In 1945, Pound was taken into custody by American military authorities and held at the U.S. Army Disciplinary Training Center in Pisa.[8] In November of that year he was flown to Washington, D.C., to be tried on charges of treason arising out of his radio speeches.[9]

Section II of this article considers the case against Pound.[10] His was one of a small number of American treason prosecutions arising out of the Second World War. Unlike the other treason prosecutions of that era, however, the charge of treason against Pound was never tried on the merits. Pound was determined to be mentally incompetent to stand trial. He was then held at St. Elizabeth's Hospital for the Criminally Insane for nearly thirteen years—untried, unconvicted, and presumed innocent.[11] During that time he was visited by the great literati of the English-speaking world: by T. S. Eliot, Thornton Wilder, Marianne Moore, Robert Lowell, Katherine Anne Porter, Louis Zukofsky, Langston Hughes, Marshall McLuhan, and others.[12] During that time he completed *The Pisan Cantos*, in many ways his greatest poetic achievement.[13] He also produced important poetry translations from a variety of languages.

Section III of this article considers in detail the adjudicatory process by which Pound was determined to be incompetent to stand trial, and the aftermath of that determination.[14] A disclaimer is appropriate here: Neither section III in particular, nor this article in general, is intended as an authoritative treatment of Pound's complex life or more complex work. Such a treatment would be beyond the scope of this article, and far beyond

5. *Id.*

6. *Id.* at ix.

7. *EPS*, *supra* note 3, at xii; *see also CEP*, supra note 3, at 47 ("The broadcasts of record—those monitored by the Federal Communications Commission from December 7, 1941, to July 25, 1943, when the Department of Justice moved to indict Pound—total 125.").

8. NADEL, *supra* note 2, at 16.

9. *Id.*

10. *See* discussion *infra* Part II.

11. NADEL, *supra* note 2, at 16; *see also* THURMAN ARNOLD, FAIR FIGHTS AND FOUL: A DISSENTING LAWYER'S LIFE 237 (1965) ("To the increasing horror of the literary world here and abroad, Pound was detained in the criminal ward of St. Elizabeths for thirteen years.").

12. NADEL, *supra* note 2, at 16.

13. *See* EZRA POUND, THE CANTOS OF EZRA POUND (1950).

14. *See* discussion *infra* Part III.

the scholarship of its author. Pound's life and work, and more particularly that strangely fascinating part of his life and work that led to his indictment, culminated in his trial, and had as its denouement his incarceration in and then liberation from St. Elizabeth's, are discussed not in any attempt to offer a definitive critique of Pound the man or Pound the poet, but as a jumping-off point to consideration of the law of criminal incompetence.

That subject matter is considered in section IV, which poses a hypothetical question so thoroughly hypothetical it could be posed only in a law-review article: How would Pound's case be treated today?[15] That statute and case law more clearly define the procedural law governing, and the procedural rights afforded, the putatively incompetent criminal defendant today than was the case in Ezra Pound's era is a safe generalization. That said, it is far from clear that Pound was treated worse at the hands of the law than a defendant similarly situated would be treated today. Generalizations are no more applicable to Pound the litigant than they are to Pound the poet.

II. THE PUTATIVELY TREASONOUS SPEECHES

If the goal of Pound's radio speeches was to persuade American troops to lay down their arms, he was unlikely to have succeeded even if he had been widely heard. His speeches were wild, meandering rants about anything and everything[16]—so much so that the Italian government eventually began to suspect (incorrectly) that he was actually transmitting coded information to the allies.[17] His one consistent motif was an impassioned hatred of Jews—a hatred to which he gave vent in language that would have made Hitler blush.[18]

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15. *See infra* Part IV.

16. *Filibusters, Cuckoo Clocks, Liars*, LAPHAM'S QUARTERLY, Fall 2012, *available at* http://www.laphamsquarterly.org/miscellany/filibusters-cuckoo-clocks-liars.php?page=1. On November 26, 1941, Pound's friend and fellow poet William Carlos Williams wrote to him about his radio broadcasts asking, "Can't you see that every word you utter reveals to any intelligent and well-informed man that you know nothing at all? . . . You're a wonder. [P. T.] Barnum missed something when he missed you." *Id.* Postal delivery to Italy was halted at about that time, however, and the letter was ultimately returned to its sender. *Id.*

17. ARNOLD, *supra* note 11, at 236. "[S]o unintelligible were [Pound's radio broadcasts] that the Italians took him off the air because they were afraid that he was giving signals to the American troops in some sort of poetic code." *Id.*

18. Wendy Stallard Flory, *Pound and Antisemitism*, *in* THE CAMBRIDGE COMPANION TO EZRA POUND 284, 285 (Ira B. Nadel ed.) (1999). If this is hyperbole, it is not original hyperbole. The great American playwright Arthur Miller wrote, "In his wildest moments of human vilification Hitler never approached our Ezra." *Id.* at 285. Nothing would be gained by reproducing here the ugly language of Pound's anti-Semitic screeds. The reader who wishes to

Prior to World War II, a certain genteel anti-Semitism was the norm among the European clerisy in whose company Pound traveled.[19] Pound's friend, fellow poet, and fellow American expatriate, T. S. Eliot, for example, was unhesitating in his own use of anti-Semitic imagery.[20] When the Nazis made the scapegoating and elimination of the Jews their cynosure, however, and when the enormity of the Holocaust came to light during and after the war, anti-Semitism became temporarily indiscreet and, for those whose sons and brothers were fighting against the Third Reich, unpatriotic.[21]

Pound, however, had his own ideas of discretion, and of patriotism. Although he chose to remain in Italy during the war, he somehow saw nothing anomalous about his continuing to conceive of himself not only as an American, but also as a patriotic American.[22] Consistent with the aphorism that "the enemy of my enemy is my friend," many Americans were willing to suspend any feelings (or at least any expression of feelings)

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subject himself to that language will find it throughout Pound's speeches. *See, e.g.*, *EPS*, *supra* note 3, at 21–22 (speech of Dec. 7, 1941); *id.* at 25 (speech of Jan. 29, 1942); *id.* at 32–33 (speech of Feb. 10, 1942); *id.* at 42–43 (speech of Feb. 19, 1942); *id.* at 45–46 (speech of Feb. 26, 1942); *id.* at 48–49 (speech of Mar. 2, 1942); *id.* at 54 (speech of Mar. 6, 1942); *id.* at 56–57 (speech of Mar. 8, 1942); *id.* at 59–62 (speech of Mar. 15, 1942); *id.* at 80 (speech of Mar. 30, 1942); *id.* at 89 (speech of Apr. 12, 1942); *id.* at 93 (speech of Apr. 13, 1942); *id.* at 94 (speech of Apr. 16, 1942); *id.* at 113–16 (speech of Apr. 30, 1942); *id.* at 117–20 (speech of May 4, 1942); *id.* at 140 (speech of May 18, 1942); *id.* at 159 (speech of June 4, 1942); *id.* at 175 (speech of June 19, 1942); *id.* at 181 (speech of June 25, 1942); *id.* at 188–89 (speech of July 2, 1942); *id.* at 206–07 (speech of July 17, 1942); *id.* at 223 (speech of Feb. 18, 1943); *id.* at 225 (speech of Feb. 19, 1943); *id.* at 250 (speech of Mar. 16, 1943); *id.* at 253–54 (speech of Mar. 19, 1943); *id.* at 283 (speech of Apr. 20, 1943); *id.* at 329–31 (speech of June 1, 1943); *id.* at 333 (speech of June 5, 1943); *id.* at 345 (speech of June 19, 1943).

19. *See* JONATHAN FREEDMAN, THE TEMPLE OF CULTURE: ASSIMILATION AND ANTI-SEMITISM IN LITERARY ANGLO-AMERICA 11 (2000); Flory, *supra* note 18, at 288–89.

20. *See* ANTHONY JULIUS, T. S. ELIOT, ANTI-SEMITISM, AND LITERARY FORM 1 (1995) ("And the jew squats on the window sill, the owner, / Spawned in some estaminet of Antwerp, / Blistered in Brussels, patched and peeled in London.").

21. *See* Flory, *supra* note 18, at 299–300; William I. Brustein & Ryan D. King, *Anti-Semitism in Europe Before the Holocaust*, 25 INT'L POL. SCI. REV. 35–36 (2004).

22. *See EPS*, *supra* note 3, at 44; ARNOLD, *supra* note 11, at 236. At his request, Pound's speeches were prefaced with an announcement that he had not been asked to say anything inconsistent with his American citizenship. *EPS*, *supra* note 3, at 44. And on perhaps two isolated occasions—two remarks out of hundreds, perhaps thousands of remarks made during the course of some 125 or more speeches—he actually wished the American armed forces well. *See id.* (speech of Feb. 26, 1942: "I don't want, the last thing I want, is that any harm should come to Uncle Sam's Army or Navy"); *id.* at 252 (speech of Mar. 19, 1942: "Obviously no one can advocate America's losing a war"). Pound himself characterized his conduct as that of a patriotic American. *See* ARNOLD, *supra* note 11, at 236. Pound made his radio broadcasts believing "that it was his duty to defend the Constitution." *Id.* Pound "insisted . . . that America's entry into the war was a conspiracy between Roosevelt and the Jews and that in opposing such a war over the Italian broadcasting system he was saving our Constitution." *Id.* at 237.

of anti-Semitism during the war against Hitler and all that he stood for.[23] Many Americans—but not Pound.

Apart from his shameless racism and the erratic, meandering quality of his analysis of events, Pound's radio lectures were also characterized by his affectation of a mélange of speech-patterns, including the speech-pattern of a simple western frontiersman. When he was not drowning his listener with quotations from Latin, ancient Greek, and modern European languages, he made a point of dropping the "g" from participles, of rendering "well" as "waal" and "always" as "allus."[24] The effect must have been more bewildering than persuasive.

That America had no business in the war, or at least no business on the Allied side of the war, was something Pound was sure of. America's participation in the war he seemed to attribute entirely to President Franklin D. Roosevelt, who in turn was, in Pound's view, the stooge of an international Jewish/bankers/usurers conspiracy.[25] Thus, "the United States ha[s] been for months ILLEGALLY at war, through what I consider[] to be the criminal acts of [the] President. . . ."[26]

> The American nation will never win a war . . . as long as the Frankfurter, Lehman, Morgenthau, Roosevelt amalgamation is settin' on, the top of our government, not if the war goes on FORTY years. . . . A government worthy of the name from 1932 onward WOULD have made sure of the Caribbean defenses, instead of dragging Japan into war.[27]
>
> . . . .
>
> The first step toward a bright new world, so far as the rising American generation is concerned, is to get ONTO Roosevelt and all his works, and the second is to ELIMINATE him and his damn gang from public life in America. The alternative is annihilation for the youth of

23. *See* LEONARD DINNERSTEIN, ANTISEMITISM IN AMERICA 150 (1994) ("Hitler had made [anti-Semitism] disreputable . . . ."); Flory, *supra* note 18, at 286.

24. *CEP*, *supra* note 3, at 5. "In the midst of expositions in a flat, pedantic, and occasionally scolding tone, he would lapse into exaggerated Western drawls, Yankee twangings, feet-on-the-cracker-barrel pipings, and as suddenly switch to upper-class British sibilants and even Cockney growls." *Id.*

25. ARNOLD, *supra* note 11, at 236. Pound "became obsessed with the grandiose idea that the entry of the United States into the war was a conspiracy between President Roosevelt and the Jews." *Id.*

26. *EPS*, *supra* note 3, at 23 (speech of Jan. 29, 1942).

27. *Id.* at 85 (speech of Apr. 9, 1942). In the same speech, Pound took the position that "Roosevelt ought to be jailed, if a committee of doctors thinks him responsible for his actions, and I think he ought to be in a high walled gook [sic] [kook] house, or insane asylum if he is NOT." *Id.* at 84.

America, and the END of everything decent the U.S. ever stood for.[28]

For these and many like-kind remarks Pound was accused of treason.[29]

The crime of treason is the only one defined by the Constitution.[30] It consists either in waging war against the United States, or in "adhering to [America's] enemies, giving them aid and comfort."[31] This definition affords the citizen wide latitude of action, and even wider latitude of speech.

> A citizen intellectually or emotionally may favor the enemy and harbor sympathies or convictions disloyal to this country's policy or interest, but so long as he commits no act of aid and comfort to the enemy, there is no treason. On the other hand, a citizen may take actions, which do aid and comfort the enemy-making a speech critical of the government or opposing its measures, profiteering, striking in defense plants or essential work, and the hundred other things which impair our cohesion and diminish our strength-but if there is no adherence to the enemy in this, if there is no intent to betray, there is no treason.[32]

But this is not to say that conduct such as Pound's, which certainly consisted in "speech critical of the government or opposing its measures," could not be treasonous.[33] Such speech could be treasonous, and in cases litigated after the war such speech was found to be treasonous. The prosecution of Herbert Burgman was a pattern for that of Pound. Burgman was a member of the U.S. embassy staff in Berlin at the time when war broke out.[34] When the staff was evacuated, Burgman chose to remain in Germany as Pound had chosen to remain in Italy.[35] From and after

28. *Id.* at 105 (speech of Apr. 23, 1942); *see also id.* at 30 (speech of Feb. 3, 1942); *id.* at 39 (speech of Feb. 17, 1942); *id.* at 45 (speech of Feb. 26, 1942); *id.* at 94 (speech of Apr. 16, 1942); *id.* at 106 (speech of Apr. 23, 1942); *id.* at 202 (speech of July 13, 1942); *id.* at 221 (speech of Feb. 18, 1943); *id.* at 289 (speech of Apr. 27, 1943) ("[E]very American boy that gets drowned [in the war] owes it to Roosevelt and [Bernard] Baruch, and Roosevelt's VIOLATION of the duties of [his] office.").

29. *See CEP*, *supra* note 3, at 76; DAVIE, *supra* note 4, at x. Pound was initially indicted *in absentia* in 1943. DAVIE, *supra* note 4, at x. He was brought back to the United States on November 18, 1945, and a superseding indictment was returned on November 26. *CEP*, *supra* note 3, at 76.

30. *See* U.S. CONST. art. III, § 3, cl. 1.

31. *Id.*; 18 U.S.C. § 2381 (2012). The federal statute defining treason—now title 18 § 2381 of the United States Code, but 18 U.S.C. § 1 at all times material to Pound's conduct—is to the same effect. 18 U.S.C. § 2381.

32. Cramer v. United States, 325 U.S. 1, 29 (1945) (Jackson, J.). This generous and indulgent definition of treason "has made our government tolerant of opposition based on differences of opinion"—such, perhaps, as those expressed by Pound—"that in some parts of the world would have kept the hangman busy." *Id.* at 21.

33. *Id.*

34. United States v. Burgman, 87 F. Supp. 568, 569 (D.C. Cir. 1949) (Holtzoff, J.).

35. *Id.*

February 1942, Burgman

> prepared . . . manuscripts containing pro-German propaganda, and made recordings of this material, which was broadcast to the United States by means of short-wave radio. The aim of the broadcasts was to sow discontent with the Government of the United States, to impair morale of the armed forces, and to create dissension between the American people and the people of the allied countries.[36]

After the war, Burgman was tried and convicted for treason; he moved for a new trial on the grounds that "the preparation and making of speeches does not, in itself, constitute treason."[37] The court made short shrift of this contention. Although Burgman's conduct consisted entirely of speech, "[w]ords uttered with intent to betray one's country may well constitute treason."[38] Burgman had "accept[ed] employment from the enemy for the purpose of preparing speeches to be used in a program of psychological warfare designed by the enemy to weaken the power of the United States to wage war successfully . . . ."[39] Such speech was not protected by the First Amendment or any other provision of law. "Acting as a radio commentator, . . . for the purpose of spreading and disseminating pro-enemy propaganda, constitutes treason."[40]

To the same effect was *Chandler v. United States*.[41] Douglas Chandler was born in the United States prior to the turn of the twentieth century.[42] Along with his wife and children, he chose to live and travel in Europe from and after 1931.[43] In the course of his travels Chandler "developed an anti-Jewish outlook . . . . Naturally he found the anti-Jewish climate of Nazi Germany congenial."[44] He began making English-language broadcasts for the German Reich in April of 1941,[45] and, after war was declared in December of 1941, chose to stay in Germany.[46] During the war years he was paid 2,500 Reichsmarks per month by the government of Germany for his broadcasts.[47]

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36. *Id.*
37. *Id.* at 571.
38. *Id.*
39. *Id.*
40. *Burgman*, 87 F. Supp. at 571.
41. Chandler v. United States, 171 F.2d 921 (1st Cir. 1948).
42. *Id.* at 925.
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Chandler*, 171 F.2d at 925–26. *See generally CPI Inflation Calculator*, BUREAU OF LAB. STAT., http://www.bls.gov/data/inflation_calculator.htm (last visited Sept. 20, 2012) (comparing the buying power of the U.S. dollar for any two years between 1913 and 2012); Rob Medley,

Like Burgman, Chandler argued "that mere words, the expression of opinions and ideas for the purpose of influencing people, cannot constitute an overt act of treason."[48] The court acknowledged that there is some sense in which this is true:

> [A] citizen in the exercise of his ordinary political rights may-intemperately as he pleases-criticize the President for getting the country into war, hold up to ridicule the bungling and incompetence with which our civilian and military leaders are conducting the war, express the view that we cannot possibly win the war, and that the thing to do is to vote in a new administration which will negotiate a peace on the best terms obtainable and save the country from greater disaster. The speech may tend to weaken our country in its war effort by inducing divided counsels and a spirit of defeatism.[49]

But Chandler's words were not those of a well-intentioned dissident. Their purpose was not to persuade Americans to make choices that were in America's best interests, but to persuade Americans to make choices that were in Germany's best interests. "He trafficked with the enemy and as their paid agent collaborated in the execution of a program of psychological warfare designed by the enemy to weaken the power of the United States to wage war successfully."[50] Participation in such a program is an act of war. Participation in such a program by an American citizen is an act of treason. That the participation took the form of speech did not change its martial nature, or its treasonous nature. "That the enemy deemed Chandler's services to be of aid and comfort is attested by the high salary which they paid him."[51]

Yet another case in the same line of jurisprudence is that of Mildred Gillars.[52] Like Burgman and Chandler, Gillars was an American citizen

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Landser Pay & Reichonomics 101, DERERSTEZUGLIVINGHIST.ORG, http://www.dererstezug.com/landser_pay.htm (last visited Sept. 20, 2012) (examining the pay of German soldiers during World War II and providing a calculation for the conversion of the rates to 2010 figures). The equivalent in today's dollars would be approximately $6,250. Medley, *supra*.

48. *Chandler*, 171 F.2d at 937.

49. *Id.* at 938–39. The court quoted *Frohwerk v. United States*, 249 U.S. 204, 208 (1919), for the proposition that, "'[w]e do not lose our right to condemn either measures or men because the country is at war.'" *Id.* at 938 (citation omitted).

50. *Id.* at 939.

51. *Id.* at 941. This is not to suggest that conduct such as that engaged in by Burgman, or Chandler, or Pound is treasonous if compensated but not treasonous if volunteered. The *Chandler* court was certainly correct that the enemy's payment for Chandler's services demonstrated the aid and comfort that the enemy derived from those services. *See id.* But an argument could be made that had Chandler volunteered his services, refusing to accept any payment, such a refusal would have been greater evidence of his desire and intent to betray his country, and to aid and comfort his country's enemy. *See id.*

52. Gillars v. United States, 182 F.2d 962, 966 (D.C. Cir. 1950).

who made English-language radio broadcasts on behalf of the German Reich, which broadcasts were directed to the United States and to American troops in Europe and North Africa.[53] Like Burgman and Chandler, she sought to rebut the accusation of treason on the grounds that "treason may not be committed by [mere] words, that all vocal utterances are, by reason of their nature and regardless of all else, an exercise of freedom of thought, which may not be prohibited by condemning the expression of thought by words."[54] Like Burgman and Chandler, she had no success with this argument.

> While the crime [of treason] is not committed by mere expressions of opinion or criticism, words spoken as part of a program of propaganda warfare, in the course of employment by the enemy in its conduct of war against the United States, to which the accused owes allegiance, may be an integral part of the crime. . . . The use of speech to this end, as the evidence permitted the jury to believe, made acts of words. . . . [W]ords which reasonably viewed constitute acts in furtherance of a program of an enemy to which the speaker adheres and to which he gives aid with intent to betray his own country, are not rid of criminal character because they are words.[55]

In light of the *Burgman-Chandler-Gillars* line of cases,[56] it is difficult to imagine what defense Pound's lawyers could have asserted at a trial on the merits. Pound's indictment charged him with working for the Mussolini government as "a radio propagandist."[57] It cites the dates of a number of his speeches[58] and notes that on one occasion he was paid 700 lire for his services,[59] on another 350 lire,[60] and on still other occasions

53. *Id.* Gillars enjoyed the distinction of being "the highest paid performer on the [German] Overseas [Radio] Service with a record of a large number of live broadcasts and recorded programs with a salary more than double that of her superior." *Id.* at 968.

54. *Id.* at 970.

55. *Id.* at 971.

56. *See, e.g.*, United States v. Provoo, 215 F.2d 531 (2d Cir. 1954); United States v. Provoo, 17 F.R.D. 183 (D. Md. 1955); J. W. Hall, *William Joyce*, *in* FAMOUS TRIALS 346 (Harry Hodge & John Mortimer eds., 1984). Although the number of like-kind instances of treason was relatively small, the cited cases do not exhaust the list. In the Pacific theater of operations, for example, "Tokyo Rose" and John Provoo allegedly engaged in the same misconduct. *See Provoo*, 215 F.2d at 531; *Provoo*, 17 F.R.D. at 183. And the British dealt with their version of a Burgman, a Chandler, a Gillars, in William Joyce, famously referred to by the British press as "Lord Haw Haw." *See, e.g.*, Hall, *supra*. The case against Pound differed from these others in no material respect as a matter of law. It differed as a matter of fact only in that Pound was a world-renowned poet and author, which in some sense made his treason a greater triumph for the enemy.

57. JULIEN CORNELL, THE TRIAL OF EZRA POUND 146 app. § II, ¶ 3(a) (1966) [hereinafter *TEP*].

58. *Id.* app. at 147.

59. *Id.* app. § II, ¶ 16. The equivalent in today's dollars would be about $92.70.

60. *CEP*, *supra* note 3, at 9; *TEP*, *supra* note 57, app. § II, ¶ 18. According to another

amounts "to these Grand Jurors unknown."[61]

Payments or no payments, the fact and content of Pound's radio broadcasts would have been impossible to controvert. One motif of his remarks was the unwisdom, immorality, and illegality of America's involvement in the war. Thus on March 26, 1942, he asked his listeners:

> What are you fighting for? Fighting for the starvation of Europe? Fighting to spread famine in Asia? Fighting for vain boast proved false? . . . Are you fighting for the National Heritage? For the heritage of wisdom, the heritage of Washington, and of Monroe, of John Adams and Lincoln? I'll say you *are not*. You are fighting AGAINST what all these men stood for.[62]

A second theme was the duplicity of President Roosevelt and Winston Churchill, who on Pound's version of affairs had plunged the allies into war for hidden and selfish purposes.[63] Thus:

> There is not an ounce or atom of honesty in either Churchill or Roosevelt. Most of the reasons for England and America being in the war are unconfessable and indecent. Let us admit that some English and Americans disliked the reported touchiness or roughness of Nazi methods. That did NOT cause the war. The CONclusive reasons for both England and America being at war are dishonest, basically and fundamentally dishonest.[64]

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account, "it appears that he received an 'advance' of 300 lire from the Ministry of Popular Culture of the Kingdom of Italy—i.e., Mussolini's corporate state—and an additional 350 lire after registering his script. Whether he was paid for all the broadcasts he made is problematical." *CEP*, *supra* note 3, at 9.

61. *TEP*, *supra* note 57, at 147–48, ¶¶ 17, 19.

62. *EPS*, *supra* note 3, at 77 (speech of Mar. 26, 1942); *see also id.* at 150 (speech of May 28, 1942) ("And the first thing [America ought] to DO . . . is to pull OUT of this war—a war that you never ought to have flopped into. Every hour that you go on with it is an hour lost to you and your children."); *id.* at 161 (speech of June 4, 1942) ("You ought not to be in this war. The United States ought not to be IN this war."); *id.* at 165 (speech of June 8, 1942) ("Why did you get into this war? . . . You ought not to be in the war."); *id.* at 182 (speech of June 25, 1942) ("And of course, you ought NOT to be in this war. Even to cover up the gross failure of the Administration to govern the United States of America, let alone fixing up the affairs of Europe and Asia."); *id.* at 197 (speech of July 10, 1942) ("You ought NOT to be in this war."); *id.* at 344 (speech of June 19, 1943) ("You do not know WHAT you are fighting for. Europe considers you complete swine to be making war on Europe at all . . . And you lose your OWN liberties faster than you deprive Europe of hers . . . .").

63. *See id.* at 218 (speech of July 26, 1942). On July 26, 1942, Pound remarked:

> It is time . . . for the people of England and America to understand the war process. To understand that they have been edged into war NOT *pro patria*, not for their father's land or their nation, BUT for the profit of a few scoundrels . . . .

Id. at 218.

64. *Id.* at 298 (speech of May 8, 1943); *see also id.* at 80 (speech of Mar. 30, 1942) ("AND the bombardment of PARIS? As I have told you, NOT military, done to PREVENT the cessation of wars, done to so embitter French feeling that there can be NO peace between France and England. Oh yes, pullin' in more nations, hope of stealing Martinique, and Madagascar."); *id.* at

Yet a third theme was that America was on the wrong side in the war—that America ought to have been allied with Germany, and at war with Soviet Russia, rather than the other way around. (That this averment was entirely and inherently contradictory to the averment that America ought not to be in the war at all was, apparently, no impediment to Pound in the flow of his propaganda.). Thus, "England and the United States OUGHT to be on the Axis side AGAINST the Red terror. And every Englishman and American knows that."[65]

Of course the ubiquitous motif of Pound's radio speeches was his foaming-at-the-mouth hatred of all things Jewish. But such bigotry in itself, however inconsistent with Americanism and however offensive to the ears of an America at war against bigotry, was not treason.

Setting aside, then, an oft-expressed anti-Semitism, which by its tone and language allied itself with that of the Nazis, Pound had still given any would-be prosecutors plenty to work with. Considering the outcomes in *Burgman*, *Chandler*, and *Gillars*,[66] it is difficult to envision any defense at a trial on the merits that could have resulted in—could even have had a hope of resulting in—an acquittal.

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299 (speech of May 8, 1943) ("England went to war needlessly, the whole war was NEEDLESS. A scheme as far as Roosevelt is concerned to grab world monopolies."); *id.* at 332 (speech of June 5, 1943). No doubt any prosecutors charged with presenting the case against Pound to an American jury in the immediate aftermath of the war would have gotten plenty of mileage out of his characterization of the enslavement of Europe, the calculated near-extermination of European Jewry, and the blood-bath that began on the beaches of Normandy and ended only with the surrender of the German Reich, as "the reported touchiness . . . of Nazi methods." *Id.* at 298. On June 5, 1943, Pound told his listeners:

> Will you folks back in America NEVER realize that you are fightin' this war IN ORDER to get into debt? I mean just that, you have been dumped into the war IN ORDER to get into debt. To get in further, to get in up to the chin, the throat. To get into the morass up to your eyebrows and no man living can see WHEN you will get out of it.

Id. at 332.

65. *Id.* at 176 (speech of June 19, 1942); *see also id.* at 49 (speech of Mar. 2, 1942) ("HITLER stands for putting men over machines. . . . Stalin's regime considers humanity as NOTHING save raw material."); *id.* ("Roosevelt's gang have got you hitched up with Russia. Not a very good bet."); *id.* at 96 (speech of Apr. 16, 1942) ("As for the English, nine of 'em out of ten do NOT believe they ought to be fighting the Germans. And that goes a long way to explain why a lot of them don't seem anxious to do it."); *id.* at 138 (speech of May 18, 1942) ("And as to LYING I reckon Hitler has been lied about more than any man livin' except Mussolini. Now re Mussolini. I KNOW they are lyin'. I['v] been here 17 years and I have known for 17 years they were lyin'. Lies and threats against Italy . . . .") (alteration in original).

66. Gillars v. United States, 182 F.2d 962, 984 (D.C. Cir. 1950) (affirming the appellant's conviction of treason); Chandler v. United States, 171 F.2d 921, 945 (1st Cir. 1948) (affirming the appellant's conviction of treason); United States v. Burgman, 87 F. Supp. 568 (D.D.C. 1949) (denying the defendant's motion for a new trial).

III. INCOMPETENCE—THE TRIAL AND ITS AFTERMATH

Experienced trial lawyers and trial judges know that an attempt to assert a claim of insanity, diminished capacity, or incompetence,[67] will typically involve a threshold problem: obtaining the concurrence of the client, which concurrence may not be at all forthcoming. The problem is by no means of recent vintage. In March of 1854, for example, at the murder trial of James Patten in New Orleans, defense counsel was "proceeding to prove . . . the insanity of the" defendant when the defendant "arose and objected to, and repudiated the said defence, and insisted upon discharging his counsel and submitting his case to the jury without any further evidence or action of his counsel in his defence."[68] Defense counsel objected on the grounds that the defendant was in no position to represent himself or to make strategic decisions about his representation and that they—defense counsel—were entirely prepared to establish a defense of insanity "by clear and irresistible testimony."[69] But "the court overruled the objection of the said counsel, and permitted the prisoner to discharge his counsel."[70]

Pound's lead counsel, Julien Cornell,[71] first heard from Pound by

67. As discussed *infra* at notes 82–85 and accompanying text, these concepts differ very much from one another. At the time of Pound's trial, however, the law was less fastidious about such distinctions. *See infra* notes 82–85 and accompanying text.

68. State v. Patten, 10 La. Ann. 299 (La. 1855).

69. *Id.*

70. *Id.* The Louisiana Supreme Court did a very commendable job of resolving a "case . . . so extraordinary in its circumstances that we are left without the aid of precedents." *Id.* The court began by recognizing the anomaly at the core of all such cases: "If the [defendant] was insane at the time of the trial, as counsel offered to prove, he was incompetent to conduct his own defense unaided, to discharge his counsel, or to waive a right." *Id.* at 300. That being the case,

> [t]he overruling necessity of the case seems to demand that, whenever . . . [the] soundness of [the defendant's] mind and consequent accountability for [the defendant's] acts are in question, the rule that he may control or discharge his counsel, at pleasure, should be so far relaxed as to permit [defense counsel] to offer evidence on those points, even against his will. . . . [T]hat . . . would be more in accordance with sound legal principles and with the humane spirit which pervade[s even] the criminal law . . . .

Id.

71. *See generally Julien Davis Cornell*, AM. NAT'L BIOGRAPHY ONLINE, http://www.anb.org/articles/11/11-01218.html (last visited Sept. 20, 2012). Julien Cornell (1910-1994) was born in Brooklyn, New York. *Id.* Cornell attended Swarthmore College and Yale Law School after which he practiced corporate law in New York City until he became disenchanted with that practice in 1939. *Id.* Cornell was a pacifist who defended many conscientious objectors who refused to serve in World War II. *Id.* During the war he wrote two books on the subject of conscientious objection, *The Conscientious Objector and the Law* (1943) and *Conscience and the State* (1944). *Id.* After defending Ezra Pound, Cornell toured Europe organizing peace conferences with university students. *Id.* Upon returning to the United States, he moved his family to Central Valley, New York where he practiced law for his remaining years. *Id.*

second-hand: a letter, dated October 5, 1945, written by Pound to his literary agents in London, was passed along to Cornell.[72] Although Pound expresses some of the nonsensical ideas he had offered before and during the war, the letter could not possibly be characterized as the writing of a madman, much less of an incompetent. It bespeaks a very lucid, if thoroughly heterodox, mentation.

Cornell met Pound in Washington the following month. He claims to have "found the poor devil in a rather desperate condition. He is very wobbly in his mind and while his talk is entirely rational, he flits from one idea to another."[73] That Pound was in "a rather desperate condition" is entirely likely.[74] He had been incarcerated after his capture by the U.S. Army in Italy, initially in conditions of physical privation;[75] he had later been handcuffed, flown to Washington, D.C., and dumped in a facility for the criminally insane. He was sixty years old. In the circumstances, it would have been remarkable if he were not in a rather desperate condition when his lawyer first saw him.

Nor was it particularly noteworthy that Pound "flit[ed] [sic] from one idea to another."[76] His was an inspired and glittering poetic afflatus. He had been "flit[ting] from one idea to another" for most of his life.[77]

What is noteworthy is that Pound's lawyer found him to be "entirely rational."[78] This impression of rationality notwithstanding, at that very first meeting Pound's lawyer "discussed with him the possibility of pleading insanity as a defense[,] and he ha[d] no objection. *In fact he told me that the idea had already occurred to him.*"[79]

Noteworthy indeed—and in so many ways. Cornell was a very capable lawyer, but it would not have required a very capable lawyer to see that Pound had no defense on the merits. The charge was treason, the evidence was overwhelming, and the penalty could be death. What defense on the merits would give any hope of acquittal? The U.S. government had flown several Italian radio technicians to Washington to testify,[80] so there was no prospect of asserting, for example, a defense of mistaken identity,

72. *TEP*, *supra* note 57, at 7.
73. *Id.* at 13.
74. *Id.*; *see also* Harriet Staff, *Ezra Pound in Italy*, POETRY FOUND, http://www.poetryfoundation.org/harriet/2012/09/ezra-pound-in-italy (last visited Sept. 12, 2012).
75. Staff, *supra* note 74.
76. *TEP*, *supra* note 57, at 13 (alteration in original).
77. *Id.*
78. *Id.*
79. *Id.* at 14 (emphasis added).
80. *CEP*, *supra* note 3, at 74–75.

viz., that the offending broadcasts had been made by someone other than the Ezra Pound who would be seated at the defense table during trial. Apparently, then, Cornell went to his first meeting with his new client having already in mind the possibility of asserting a claim of incompetence—something from which he was not the least dissuaded upon finding his client to be "entirely rational."[81]

Also noteworthy is Pound's response: that the idea had already occurred to him. Given his very limited strategic options, Pound's willingness to assert a defense of insanity—indeed his suggestion that such a defense be asserted—can be viewed only as evidence of the lucidity and acuity of his thought-process.

Cornell seemed to draw no distinction between two concepts that are at present entirely distinct: those of insanity and incompetence.[82] Insanity is an affirmative defense, pursuant to which the defendant asserts that at the time of the crimes charged, he was unable to distinguish between right and wrong.[83] Incompetence is not a defense at all.[84] An incompetent defendant is one who, at the time of trial, is so limited in his mentation that he cannot understand the charges against him, cannot assist or communicate with his counsel, and cannot understand the nature of the criminal justice process.[85]

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81. *TEP*, *supra* note 57, at 13.

82. *Compare Id.*, *supra* note 57, at 14 ("I discussed with him the possibility of pleading insanity as a defense . . . ."), *and id.* at 16 ("I believe that he is still insane . . . ."), *and id.* at 25 ("I then went on to explain to the court the history of Mr. Pound's incarceration . . . and the insanity which resulted therefrom."), *and id.* at 29 (asking one of the examining psychiatrists to determine whether Pound "is sufficiently sane to stand trial"), *with id.* at 15 ("[H]e was in no state to stand trial or even plead to the indictment . . . ."), *and id.* at 25 ("Because of his lack of ability to exercise any judgment and also because of his mental exhaustion, I considered him unable to plead to the indictment . . . .").

83. *See* Cannady v. State, 620 So. 2d 165, 168 n.1 (Fla. 1993); Chestnut v. State, 538 So. 2d 820, 821 (Fla. 1989); Gurganus v. State, 451 So. 2d 817, 820 (Fla. 1984); Mines v. State, 390 So. 2d 332, 336 (Fla. 1980); Wheeler v. State, 344 So. 2d 244, 245 (Fla. 1977); Anderson v. State, 276 So. 2d 17, 18 (Fla. 1973); Piccott v. State, 116 So. 2d 626, 627 (Fla. 1960); Davis v. State, 32 So. 822, 826 (Fla. 1902). *But cf.* State v. Bias, 653 So. 2d 380, 382–83 (Fla. 1995). Florida applies a version of the "*M'Naghten* Rule." *Cannady*, 620 So. 2d at 168 n.1. Under Florida's M'Naghten Rule, "an accused is not criminally responsible if, at the time of the alleged crime, [he] was, by reason of mental infirmity, disease, or defect unable to understand the nature and quality of his act or its consequences or was incapable of distinguishing right from wrong." *Id.* Florida law does not, as a general rule, recognize defenses based upon "diminished capacity," *i.e.*, the notion that if, because of a mental disease or defect a defendant cannot form the specific intent required for a specific-intent crime, he may be convicted only of a lesser included offense not requiring that specific intent. *Chestnut*, 538 So. 2d at 824–25.

84. *See* 40 AM. JUR. 2D *Proof of Facts* § 171 (1984) ("A defendant . . . who may therefore be criminally liable for his action may still lack competency to stand trial. This capacity to know the difference between right and wrong, while relevant in determining a defendant's criminal liability, is totally irrelevant to the issue of his competency to stand trial.").

85. *See* FLA. R. CRIM. P. 3.211(a)(2)(A).

Such a defendant cannot even be brought to trial. Although Cornell seems to use the terms interchangeably, his thesis was not that Pound was insane (*i.e.*, not that Pound failed to appreciate the nature or the wrongness of his treasonous radio broadcasts at the time he made them), but that Pound was incompetent (*i.e.*, that at the time the government proposed to try Pound, Pound's mentation was so debilitated that he could not understand what was happening to him or assist his lawyers in defending him).[86]

It seems an astonishing proposition: One of the preeminent figures in the western world of arts and letters was asserting through his attorney (the very attorney who found his conversation "entirely rational") that he was so mentally incapacitated that he could not even be brought to trial. But astonishing or not, it was the litigation strategy employed on Pound's behalf.

Arrangements were made for four leading psychiatrists to examine Pound: Dr. Winfred Overholser, head of St. Elizabeth's (the facility at which Pound would be held for so many years); Dr. Marion R. King, chief psychiatrist of the U.S. Public Health Service; and Dr. Joseph L. Gilbert, chief psychiatrist at the Gallinger Municipal Hospital in Washington, D.C., were appointed by the court. Dr. Wendell Muncie of Johns Hopkins University was retained by the defense.[87] The four doctors, upon the suggestion of Dr. Overholser, submitted a single written report to the court. That report concluded as follows:

> At the present time [Pound] exhibits extremely poor judgment as to his situation, its seriousness and the manner in which the charges are to be met. He insists that his broadcasts were not treasonable, but that all of his radio activities have stemmed from his self-appointed mission to "save the Constitution." He is abnormally grandiose, is expansive and exuberant in manner, exhibiting pressure of speech, discursiveness, and distractibility. In our opinion, with advancing years his personality, for many years abnormal, has undergone further distortion to the extent that he is now suffering from a paranoid state which renders him mentally unfit to advise properly with counsel or to participate intelligently and reasonably in his own defense. He is, in other words, insane and mentally unfit for trial, and is in need of care in a mental hospital.[88]

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86. *TEP*, *supra* note 57, at 32–33.

87. *Id.* at 35.

88. *Id.* at 35–37. Even Cornell confessed that "[t]he result of the examination astonished me." *Id.* at 35. "I had expected that the government's doctors would find Pound fit for trial in view of the fact that Army doctors at the military detention center in Pisa had found him sane enough." *Id.* Cornell attributed this outcome to "Dr. Overholser's insistence that four experienced psychiatrists should be able to reach an agreement about the condition of their patient and should not allow a sanity trial to develop into the usual farce where eminent psychiatrists on

There was some suggestion in the press that Pound was simply dissembling very artfully and had succeeded in deceiving the doctors.[89] Another possible explanation for this wholly unexpected outcome was that the doctors, having special concern for so great a literary giant and recognizing that if he were tried he would certainly be convicted and likely executed, conspired to cheat the hangman for the benefit of the world of poetry.[90] The only other conceivable explanation is that the doctors meant what they said and said what they meant: that Ezra Pound, whatever else he was capable of, was not capable of "participat[ing] intelligently and reasonably in his own defense."

Under then-prevailing law, the parties were entitled to a jury trial on the issue of Pound's competence.[91] The trial was conducted on February 13, 1946, and concluded in one day.[92] The evidence consisted of the testimony of the four psychiatrists.[93]

Dr. Muncie testified first. He described Pound's condition as characterized by "disorder in the thinking process, vagueness, distractibility and confabulation, and . . . poor, not keen, memory. . . . [H]e definitely shows a very poor grasp of his present situation."[94] At some junctures in his conversations with Dr. Muncie, Pound claimed to be able to explain to a jury why his actions were not treasonous; but at other times he "state[d] categorically that he is not of sound mind and could not participate effectively in his own defense."[95] The trial transcript does not indicate whether Dr. Muncie intended to quote Pound or merely to paraphrase him. If in fact Pound stated that he was "not of sound mind"—the very wording of the verdict necessary to spare him the dangers of prosecution on the merits—and that he "could not participate effectively in his own defense"—a crucial, if not the crucial, element of incompetence—then Ezra Pound was certainly a rational and competent advocate for the position that Ezra Pound was irrational and incompetent.[96] In any event, Muncie concluded that Pound was unable "to understand the meaning of a trial under this indictment for treason, and particularly [unable] to consult with

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both sides of the case reach different results." *Id.* at 35–36. Query whether Cornell's alleged astonishment was feigned. Did he not suspect that Dr. Overholser and his colleagues had entered into a sort of conspiracy for Pound's benefit?

89. *Id.* at 38.
90. *See infra* text accompanying notes 185–87.
91. *TEP*, *supra* note 57, at 154.
92. *Id.*
93. *Id.* at 38.
94. *Id.* at 159.
95. *Id.* at 160.
96. *Id.*

counsel and formulate a defense to the indictment."[97] The doctor conceded that Pound understood the nature of the charge against him.[98] Like all of his colleagues, Muncie was satisfied that Pound was not feigning or malingering;[99] and, perhaps most importantly, that Pound could not meaningfully advise and counsel with his attorneys.[100]

This last conclusion on the part of the doctors—that Pound could not communicate meaningfully with his legal counsel—is belied by the facts. Geniuses, poets, and criminals are three classes of persons from whom the rest of the world often has difficulty getting a straight answer. Pound was concededly a genius and a poet, and allegedly a criminal. Cornell acknowledges some frustration in getting Pound to get to the point,[101] but the same frustration is expressed by every first-year public defender attempting to interview his new client charged with third-degree jaywalking. The doctors' impressions notwithstanding, Pound knew who Cornell was, knew that Cornell was there to help him, was generally in agreement with Cornell about how Cornell could best help him, never refused to speak to Cornell, and on several occasions wrote letters to Cornell.[102] Lawyers routinely make do with less.

Dr. King was next to testify. He conceded that a person could be, as he concluded that Pound was, paranoid, eccentric, and cynical, and yet still be able to stand trial.[103] He acknowledged that Pound knew what he was charged with.[104] But Dr. King opined that Pound's complete mental and emotional exhaustion[105] left him so debilitated that he could not advise and counsel with his lawyers.[106] Pound, Dr. King concluded, was "afflicted

97. *TEP*, *supra* note 57, at 161.

98. *Id.* at 166; *see also id.* at 168.

99. *Id.* at 167; *see also id.* at 183 (Dr. King concludes Pound not feigning); *id.* at 195 (Dr. Overholser concludes Pound not malingering); *id.* at 204 (Dr. Gilbert concludes Pound not malingering).

100. *Id.* at 168–69, 171; *see also id.* at 182 (testimony of Dr. King); *id.* at 189 (testimony of Dr. Overholser).

101. *See id.* app. § IV, 154–215.

102. *See id.* at 70–109 (reproducing handwritten and sometimes typed letters from Pound to Cornell). To be sure, much of the handwriting is illegible and much of the narrative irrelevant. *See id.* But that criticism of handwriting is routinely made about much of what appears in doctors' charts and prescriptions, and that criticism of narrative is routinely made about much of what appears in lawyers' motions and briefs. It is not *prima facie* evidence of mental incompetence.

103. *E.g.*, *TEP*, *supra* note 57, at 175.

104. *See id.* at 182.

105. *See id.* at 177.

106. *See id.* at 182. *But see supra* text accompanying notes 11–13. Dr. King's diagnosis appears to subsume Pound's representation to him that he—Pound—was so fatigued that he would not be able to write again, or at least for the foreseeable future. *TEP*, *supra* note 57, at

with a paranoid state of psychotic proportions which render[ed] him unfit for trial."[107]

The third witness was Dr. Overholser, the chief medical officer and superintendent of St. Elizabeth's, the facility in which Ezra Pound would spend so many years.[108] He was, and would continue to be, the doctor who had the greatest involvement in Pound's case; and he had in some sense constituted himself a sort of unofficial chairman of the medical witnesses. It was he, for example, who insisted that the psychiatrists produce a single, unanimous report to the court rather than—as was and is customarily the case—individual reports from each examining physician.[109]

Dr. Overholser stated that it was his opinion and that of his colleagues that Pound "was unfit mentally and unable to stand trial."[110] Regarding the defendant's ability to consult with his legal counsel, Dr. Overholser explained:

> From a practical view of his advising with his attorney, there would be the fact that you cannot keep him on a straight line of conversation; he rambles around, and has such a naive grasp of the situation in which he finds himself, it would not be fair to him or his attorney to put him on trial.[111]

The testimony of the final witness, Dr. Gilbert, was to the same effect as that of his colleagues. He diagnosed Pound as being "of unsound mind and suffering from a paranoid state."[112] On that basis, he concluded that "he is entirely incompetent to consult counsel and properly, rationally give information to prepare his defense in this case."[113]

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185. That prediction proved spectacularly wrong. Pound's literary output at St. Elizabeth's was arguably the finest of his career. *See supra* text accompanying notes 11–13.

107. *TEP*, *supra* note 57, at 175.

108. *Id.* at 186.

109. *See generally* Kamran Javadizadeh, Bedlam and Parnassus: Madness and Poetry in Postwar America 38 (May 2008) (unpublished Ph.D. dissertation, Yale University) (found at http://gradworks.umi.com/3317264.pdf) (discussing the single letter submitted to the court regarding Ezra Pound's mental state by four psychiatrists).

110. *TEP, supra* note 57, at 187.

111. *Id.* at 189. In attempting to clarify that answer on cross-examination, the prosecuting attorney brought out the distinction between insanity and incompetence (although in this context it could hardly have helped his case to do so):

> Q: I understand that what we are concerned with in this inquiry is not the question of the difference between right and wrong, that is, as to being able to distinguish between right and wrong, but whether he is able to consult with counsel and conduct a defense.
>
> A: That is correct.

Id. at 192.

112. *Id.* at 200, 202.

113. *Id.* at 211.

And with that the evidentiary portion of the trial ended. At sidebar, Mr. Cornell was asked, "You are not going to call Pound?" to which Cornell replied, "I am afraid he might blow up. He has been pretty nervous."[114] The judge then very pointedly asked both counsel if they were waiving closing argument. Both got the message and agreed that they were.[115]

Nor did the judge pull any punches in his instructions to the jurors. He concluded by reminding them that:

> [Y]ou have heard the testimony of all these physicians on the subject [of the defendant's competence to stand trial], and there is no testimony to the contrary and, of course, these are men who have given a large part of their professional careers to the study of matters of this sort, who have been brought here for your guidance.
>
> Under the state of the law you are not necessarily bound by what they say; you can disregard what they say and bring in a different verdict, but in a case of this type where the Government and the defense representatives have united in a clear and unequivocal view with regard to the situation, I presume you will have no difficulty in making up your mind.[116]

Thus instructed, the jury did indeed have no difficulty making up its collective mind; deliberations lasted all of three minutes[117] and resulted in a verdict that the defendant was of unsound mind.[118] Ezra Pound could not

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114. *Id.* at 212; *see also CEP*, *supra* note 3, at 29; *Ezra Pound*, FAMOUS PEOPLE, http://www.thefamouspeople.com/profiles/ezra-pound-161.php (last visited Sept. 18, 2012). Pound sat silently at the defense table throughout trial except for one outburst. *TEP*, *supra* note 57, at 212. When on cross-examination, Dr. Overholser was asked if Pound had provided any information "about his belief in Fascism," Pound leapt up and shouted, "I never did believe in Fascism, God damn it; I am opposed to Fascism." *Id.* at 192. Whether this was intended as a specimen of theater or had some other purpose is unknowable, but Pound was undeniably a devoted adherent of Mussolini's Fascism. *Id.* As early as the 1930s, for example, "Pound's letters, postcards, even his books, were . . . invariably dated Fascist style, from the 'March on Rome' in 1922." *CEP*, *supra* note 3, at 29. And as late as 1962, having returned to Italy, Pound made a point of attending a neo-Fascist May Day parade. *Ezra Pound*, *supra*.

115. *TEP*, *supra* note 57, at 212.

116. *Id.* at 214–15; *see, e.g.*, Simmons v. United States, 142 U.S. 148, 155 (1891); Lovejoy v. United States, 128 U.S. 171, 173 (1888); Rucker v. Wheeler, 127 U.S. 87, 93 (1888); United States v. England, 347 F.2d 425, 433–34 (7th Cir. 1965). The proposition "that a judge of a court of the United States, in submitting a case to the jury, may, in his discretion, express his opinion upon the facts," is one from which the federal courts have never receded. *Simmons*, 142 U.S. at 155; *Lovejoy*, 128 U.S. at 173; *Rucker*, 127 U.S. at 93. Although present-day federal jurists speak less openly of their authority to marshal the evidence and express their opinions upon it, they have never renounced that authority and have never entirely ceased to exercise it. *England*, 347 F.2d at 433–34. The general rule in state courts is the opposite. "The presiding judge shall instruct the jury only on the law." FLA. R. CRIM. P. 3.390(a).

117. *TEP*, *supra* note 57, at 215.

118. *Id.*

be brought to trial on the charge of treason pending against him.

Unfortunately, the then-existing law provided very little by way of an answer to the question, "What *can* be done with Pound?" He was remanded to St. Elizabeth's to be held indefinitely until such time, if any, as his competence should be sufficiently restored to enable him to be tried.[119] All doctors agreed that there was no prospect whatever that Pound would someday recover and stand trial.[120] With maddening consistency, then, the law concluded that Pound must continue to be held—untried, unconvicted, presumed innocent—and incarcerated in perpetuity.

Although he was deprived of his liberty and, by today's standards, of due process of law, Pound was not deprived of creature comforts. "He had a room to himself on the second floor of the main building [of Saint Elizabeth's]. Outside his door there were several tables and wicker chairs set up at the end of the corridor which Pound converted into a sort of sitting room where he received visitors."[121] Those visitors ranged from Pound's wife, to the great poets, authors, and playwrights of the time, to mere publicity-seekers (notably those seeking publicity for the cause of anti-Semitism).[122] Pound was permitted outside on the grounds of St. Elizabeth's, and even played tennis on its courts.[123]

Most importantly, Pound resumed writing—not only poetry, but also essays, and translations from Chinese and ancient Greek.[124] His *Pisan*

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119. *Id.* at 46.

120. *Id.*

121. *Id.* at 69.

122. *Id.* at 69, 112 (referring to "John Kasper, the notorious racist"); *see also* ARNOLD, *supra* note 11, at 238 ("He [Pound] was permitted to hold court for his admirers from all over the world. At such sessions people with a reputation for hating Jews were particularly welcome.").

123. *TEP*, *supra* note 57, at 69.

124. *See* EZRA POUND, *The Pisan Cantos LXXIV-LXXXIV*, *in* THE CANTOS OF EZRA POUND 443, 443–69 (1970) [hereinafter POUND, *The Pisan Cantos LXXIV-LXXXIV*]; OSCAR WILDE, *The Ballad of Reading Gaol*, *in* THE WORKS OF WILDE 1, 1–10 (1927). *See generally Letter from Birmingham Jail*, MARTIN LUTHER KING JR., RESEARCH & EDUC. INST., http://mlk-kpp01.stanford.edu/index.php/encyclopedia/encyclopedia/enc_letter_from_birmingham_jail_1963 (last visited Nov. 5, 2012) (relating King's incarceration to Pound's period of incarceration). An inventory of Pound's literary works from his "St. Elizabeth's Period" includes: *If This Be Treason* (1948); *The Pisan Cantos* (1948); *Elektra* (1949); *Patria Mia* (1950); *Confucius: The Great Digest* (1951); *Confucius: Analects* (1951); *The Classic Anthology Defined By Confucius* (1954); *Lavoro ed Usura, All'insegna del pesce d'oro* (1954); *Sophocles: The Women of Trachis* (1956). The *Pisan Cantos*, like much of the product of Pound's "St. Elizabeth's Period," are very lengthy. POUND, *supra*. Perhaps this is unsurprising. *The Ballad of Reading Gaol* is longer by far than most of the poems and other writings produced by Oscar Wilde when he was at liberty. WILDE, *supra*. As Dr. Martin Luther King said in his own famous "Letter from Birmingham Jail":

> Never before have I written so long a letter. I'm afraid it is much too long to take your precious time. I can assure you that it would have been much shorter if I had

Cantos resulted in his being awarded the Bollingen Prize by the Library of Congress.[125]

The Bollingen Foundation had been established by the Mellon Family of Pittsburgh.[126] The Foundation made a grant to the Library of Congress to fund an annual award for the best volume of poetry published in the preceding year.[127] The Library of Congress is, of course, an entity of the government of the United States.[128] Although Julian Cornell recalls that, "[t]he spectacle of a government institution awarding a prize to a man whom the same government had indicted for treason was a source of acute irritation to some people and rich amusement to others,"[129] it is likely that the number of those irritated considerably exceeded the number of those amused.[130] In any event, the paranoia and bigotry that smirked at the listener to Pound's radio speeches still leered at the reader of his poetry. Churchill's inspired and inspiring leadership during the war notwithstanding, he was not forgiven his secret machinations—known to, or suspected by, Pound alone—that pushed England into war:

> nor Charlie Sung's money on loan from anonimo
> that is, we suppose Charlie had some
> and in India the rate down to 18 per hundred
> but the local loan lice provided from imported bankers
> so the total interest sweated out of the Indian farmers
> rose in Churchillian grandeur
> as when, and plus when, he returned to the putrid gold standard
> as was about 1925. Oh my England
> that free speech without free radio speech is as zero
> and but one point needed for Stalin . . . .[131]

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been writing from a comfortable desk, but what else can one do when he is alone in a narrow jail cell, other than write long letters, think long thoughts and pray long prayers?

Letter from Birmingham Jail, *supra*.

125. *Bollingen Prize*, MUSIC, http://www.music.us/education/B/Bollingen-Prize.htm (last visited Nov. 5, 2012).

126. *The Mellon Family*, NYPHILANTHROPIST.COM, http://nyphilanthropist.com/philanthropists-families-mellon.htm (last visited Sept. 18, 2012).

127. *Bollingen Prize*, *supra* note 125.

128. *Library of Congress*, MUSIC, http://www.music.us/education/L/Library-of-Congress.htm (last visited Oct. 25, 2012).

129. *TEP*, *supra* note 57, at 116.

130. *See* DAVIE, *supra* note 4, at x ("[T]he award provoke[d] bitter controversy."); NADEL, *supra* note 2, at 17 ("A national outcry followed, the headline in the *New York Times* reminding readers, 'Pound, in Mental Clinic, Wins Prize for Poetry Penned in Treason Cell.'").

131. POUND, *The Pisan Cantos LXXIV-LXXXIV*, *supra* note 124, at 446; *see also id.* at 534 ("Oh to be in England now that Winston's out."); EZRA POUND, *Rock-Drill De Los Cantares LXXXV-XCV*, *in* THE CANTOS OF EZRA POUND 590 (1970) [hereinafter POUND, *Rock-Drill De Los Cantares LXXXV-XCV*] ("The total dirt that was Roosevelt, and the farce that was Churchill .

Turning the Holocaust on its head, Pound writes:

> from their seats the blond bastards, and cast 'em
> the yidd is a stimulant, and the goyim are cattle
> in gt/ proportion and go to saleable slaughter
> with the maximum of docility.[132]

And:

> and the goyim are undoubtedly in great numbers cattle
> whereas a jew will receive information
> he will gather up information[133]

Whether the Bollingen selection committee really considered the *Pisan Cantos* to be the best specimen of American poetry of its time, or the committee hoped by its choice to pressure or embarrass the government into releasing Pound, or both, is another on the list of unanswered and unanswerable questions about the life of Ezra Pound. Two members of the committee withheld their votes: Katherine Chapin and Karl Shapiro.[134] Ms. Chapin was Mrs. Francis Biddle, wife of the Attorney General responsible for Pound's indictment; her concurrence in awarding the Bollingen Prize to Pound would have put her, and certainly her husband, in an awkward position.[135] Shapiro's reticence, however, was a matter of principle. He was Jewish, and he would play no part in glorifying Pound. According to the statement Shapiro released, a "poet's political and moral philosophy ultimately vitiates his poetry and lowers its standards as literary work."[136]

Shapiro's criticism could have been expressed better. The proposition that a work of art—a poem, a painting, a play—is of lesser artistic merit if the person who created it—the poet, the painter, the playwright—is an immoral man, seeks to prove too much. All men are immoral to one degree or another, for one purpose or another, at one time or another. If the artistic and aesthetic value of a poem by Lord Byron, a painting by Picasso, a play by Shakespeare, cannot be fairly assessed without taking into account

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. . .").

132. POUND, *The Pisan Cantos LXXIV-LXXXIV*, *supra* note 124, at 459; *see Goyim Definition*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/goyim (last visited Nov. 15, 2012). "Goyim" is the Hebrew plural for "nation," but is also used, as here, to mean Gentiles. *Goyim Definition*, *supra*.

133. POUND, *The Pisan Cantos LXXIV-LXXXIV*, *supra* note 124, at 463; *see also* POUND, *Rock-Drill De Los Cantares LXXXV-XCV*, *supra* note 131, at 634 ("*[A]nd, in this, their kikery functioned, Marx, Freud, and the american beaneries Filth under filth* . . .").

134. *See CEP*, *supra* note 3, at 188; Israel Lewis, *Ezra Pound and the Bollingen Award*, ISRAEL LEWIS–POETRY AND SOME PROSE (1995), *available at* http://mysite.verizon.net/scribblew/ezra.htm.

135. *CEP*, *supra* note 3, at 187.

136. *Id.* at 188.

whether Byron, Picasso, or Shakespeare was a moral man, there is an end to art criticism.

But Shapiro's concern could have been narrowed in a way that would have made his dissent more telling. The Bollingen Prize, after all, was not awarded to Pound as a man so much as it was awarded to the *Pisan Cantos* as poetry. The question whether a work of art is of lesser merit if that particular work (as opposed to its creator's life in general) is immoral—if it expresses or extolls immoral views or purposes—is a fair question for art criticism in general, and would have been a fair consideration for the Bollingen committee in particular. An example favored by professors of philosophy of art is that of Leni Riefenstahl's film documentary of the 1934 Nazi rally in Nuremberg, *Triumph of the Will*.[137] From a standpoint of film-making, of cinematic technique, *Triumph of the Will* is a splendid movie. But it endorses, clearly and enthusiastically, Naziism and all that Naziism stood for. In that sense—in the sense that it is a work of art calculated to further an immoral agenda—it is an immoral work of art.[138] Does this demean its overall artistic or aesthetic value?

The artist is entitled, arguably obliged, to address all of human experience, including its most disheartening aspects. Immoral conduct of all kinds—rape, murder, perfidy—is important raw material for the artist. But to depict immorality is not the same as to advocate it. Bigotry exists in this world. The poet is entitled to dilate on its existence. Bigotry manifests itself in many ways, to many evil effects. The poet is entitled to explore them. Bigotry knows how to conceal and disguise itself. The poet is obliged to ferret it out. But this was not Pound's way. He did not depict bigotry; he employed and endorsed it. It was not the object of his poetry but the stock in trade of his poetry.

137. TRIUMPH OF THE WILL (Reichsparteitag-Film 1934).

138. Daniel Jacobson, *In Praise of Immoral Art*, 25 PHILOSOPHICAL TOPICS 155 (1997). This definition of an immoral work of art focuses on the intent of the artist. *Id.* Certainly other definitions could be offered. If, as a hypothetical matter, *Triumph of the Will* had *not* been intended to further the Nazi agenda, but had had that unanticipated effect on a few viewers, or some viewers, or the majority of viewers, would it be appropriate to label the film immoral? If the technique and message of the film did not bespeak an immoral agenda at the time the film was made, but cultural changes caused succeeding generations to see the film in that light, would the film be immoral? Fortunately these and like-kind questions need not be resolved in order to evaluate Pound's work in general, or the *Pisan Cantos* in particular. The *Cantos* were clearly intended to foster Pound's racist world-view, *viz.*, that Jews were and are responsible for all the world's evil. One hopes that few readers were won over to the cause of anti-Semitism, or racism, by the *Cantos*. But even if that is so, it is no defense of the morality of the poems. The burglar who breaks into a house that contains little or nothing of value may be an unlucky burglar or an incompetent burglar, but he is nonetheless a burglar.

Undoubtedly morality has its subjective element. Notions of morality that hold sway in one society at one time may not mirror those that hold sway in another society at another time. But objections to the racism of the *Pisan Cantos* cannot be rebutted on these grounds. At the very time that Pound wrote the *Pisan Cantos*, the western world had just fought a titanic war against the most systematically racist empire of our age.[139] It would be no more than a slight exaggeration to say that smoke was still rising from the ashes of the six million Jewish victims of the Holocaust. The horrors that anti-Semitism could produce had never been more evident, the immorality of anti-Semitism never more universally acclaimed. It was in that time, and in those circumstances, that Pound chose to make his hatred of Jews the topos of his most important literary work. The Bollingen committee would have been entitled—was perhaps obliged—to discount the belletristic value of the *Pisan Cantos* by their grossly immoral message.[140]

Perhaps the committee considered the *Cantos* to be of such unexampled merit that, even subtracting for immorality, they were the finest poetical work of the era and entitled to be acknowledged as such. Perhaps; but perhaps not. It is more likely that the committee members chose to manipulate the process and frustrate the intent of the Bollingen Prize in an effort to bring about a result that Ezra Pound probably did not want: the release of Ezra Pound from St. Elizabeth's. If so, they were not the only ones engaging in the manipulation of adjudicative processes.[141]

In any event, Pound remained at St. Elizabeth's until April, 1958.[142] The post-war furor over his treasonous misconduct had by that time long since been forgotten and, except among the literati, so had his imprisonment. Dr. Overholser, and the staff at St. Elizabeth's, "thought with dismay of the world-wide protest that would occur if [Pound, already seventy-two years of age,] died in confinement. In such a case a great poet accused of a serious crime would have served a life sentence simply because he was too insane to be tried."[143] Robert Frost, a distinguished and popular American man of letters whose politics and patriotism were as unimpeachable as his poetry, took the lead in seeking some form of relief

139. NADEL, *supra* note 2, at 16.

140. *Id.* at 17. Whether the converse is true, *viz.*, whether a work of art is improved or enhanced in its artistic and aesthetic value by its profoundly moral quality (pursuant to which reasoning *Uncle Tom's Cabin* would have to be considered the greatest novel of all time) is another question entirely. *Id.*

141. *See infra* text accompanying notes 131 and 132.

142. *TEP*, *supra* note 57, at 120.

143. ARNOLD, *supra* note 11, at 238.

for Pound.[144] Frost arranged for Thurman Arnold, of the prominent Washington, D.C. firm then known as Arnold, Fortas, and Porter, to represent Pound.[145]

What followed was almost anti-climactic. Arnold moved to dismiss the still-pending indictment, supporting his motion with an affidavit from Dr. Overholser and expressions of support from writers and poets.[146] Strictly speaking, neither Pound's continued mental problems, as evidenced by Dr. Overholser's affidavit, nor the value of his contributions to the world of arts and letters, as evidenced by the written statements of men of prominence in the literary field, formed a basis in law for dismissal of a facially-sufficient indictment.[147] But the government consented to the motion, and like the world in Pound's friend T. S. Eliot's poem "The Hollow Men," Pound's litigation ended, "not with a bang but a whimper."

Pound returned to Rapallo, living the rest of his life there and at his daughter's home in Merano.[148] It is part of the apocrypha of Pound that in 1968 Allen Ginsberg, the "Beat" generation poet best remembered for the poem "Howl," visited briefly with Pound in Italy; and that Pound told Ginsberg, "[T]he worst mistake I made was that stupid, suburban prejudice of anti-Semitism."[149] Whether Pound actually said this is another entry on the list of Pound questions that will never be answered. So too is the question whether, assuming Pound said it, he meant it. Perhaps Pound had truly experienced an epiphany; but perhaps not. He was, after all, within sight of his life's finish-line at the time he allegedly made this startling remark, and he may have had an increasing concern for his legacy as the shadows lengthened; a concern that he never particularly had while the sun was high.[150]

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144. *Id.*

145. *Id.* at 239.

146. *Id.* at 240–41; *see also TEP*, *supra* note 57, at 122. There was some sense that the attitude of the Italian government was, in effect, "If you don't want him, we'll take him." *See TEP*, *supra* note 57, at 122 (purporting to quote "[o]ne Italian deputy").

147. ARNOLD, *supra* note 11, at 241.

148. DAVIE, *supra* note 4, at x.

149. *See, e.g.*, Michael Reck, *A Conversation between Ezra Pound and Allen Ginsberg*, 12 EVERGREEN REV. 27, 29 (1968).

150. *Cf.* POUND, *The Pisan Cantos LXXIV-LXXXIV*, *supra* note 124, at 540–41.

> What thou lovest well remains,
> the rest is dross
> What thou lov'st well shall not be reft from thee
> What thou lov'st is thy true heritage.

Id. It cost Pound nothing to offer a *mea culpa* to Ginsberg and, through Ginsberg, to future generations of poetry-readers who might lack Pound's anti-Semitic passion. *Id.* Ginsberg even purported to forgive Pound. *Id.* What Ezra Pound "lovest" was, without doubt, Ezra Pound and

He returned to the United States briefly in 1969, where he was widely applauded for his work and encountered no repercussions from his former legal difficulties.[151] He died in Venice in 1972.[152]

IV. INCOMPETENCE AND RELATED TOPICS IN FLORIDA TODAY: HOW WOULD POUND BE TREATED?

> By the Anglo-American practice, a party is entitled to call on trial any expert he may select; and he is not likely to select any whose views will not promote his cause. It so happens that among the present large body of experts there is little trouble in discovering one or more by whom is maintained the particular psychological theory of which the party on trial stands in need. It is an old truth that there is nothing so absurd but that some philosopher may be found by whom it is affirmed.[153]

Ezra Pound's thirteen-year sojourn at St. Elizabeth's was a travesty of American justice: A world-renown poet, obviously suffering from far-reaching mental debilities, was held well into his old age, nearly to the end of his life, without a trial or any prospect of a trial. And Ezra Pound's thirteen year sojourn at St. Elizabeth's was a travesty of American justice: A malevolent and bigoted traitor went unwhipped of justice, laughing at the system while he published poems, hosted his friends, and played tennis. Like his literary output, Pound's litigation is open to interpretation.

Pound's poetry was famous, his treason infamous. In other factual respects he was not unlike many defendants who come before the criminal courts today. It is an article of faith among Florida trial judges that a grossly disproportionate share of the criminal defendants who appear before them are mentally ill.

Under present-day Florida law, if the judge, the prosecutor, or the defense attorney has reasonable grounds to believe that the defendant is not mentally competent to proceed, the judge may appoint up to three mental-health experts to examine the defendant, and set a hearing on the issue of competence within twenty days.[154] A defendant is competent to proceed if

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the poetry he authored. *Id.* A pragmatic concern for his "true heritage" may have counseled Pound to express a decent, if entirely mendacious, sentiment. *Id.*

151. Patrick Murfin, *National Poetry Month – Ezra Pound "Portrait d'unne Femme,"* HERETIC, REVEL, A THING TO FLOUT (Apr. 18, 2012, 3:45 PM), http://patrickmurfin.blogspot.com/2012/04/national-poetry-monthezra-pound.html.

152. DAVIE, *supra* note 4, at x.

153. I FRANCIS WHARTON, A TREATISE ON MENTAL UNSOUNDNESS, EMBRACING A GENERAL VIEW OF PSYCHOLOGICAL LAW xiii (4th ed. 1882).

154. FLA. R. CRIM. P. 3.210(b); *see infra* text and accompanying notes 162–66; *see, e.g.*, Maxwell v. State, 974 So. 2d 505, 510 (Fla. Dist. Ct. App. 2008) (quoting Brockman v. State, 852

he "has sufficient present ability to consult with counsel with a reasonable degree of rational understanding and . . . has a rational, as well as factual, understanding of the pending proceedings."[155] In evaluating competence, the examining mental-health experts are to consider the defendant's capacity to appreciate the charges or allegations against him, to appreciate the range and nature of possible penalties that he may face, to understand the adversary nature of the legal process, to disclose to counsel facts pertinent to the proceedings at issue, to manifest appropriate courtroom behavior, and to testify relevantly.[156] If the court finds the defendant incompetent, the court must consider whether there is treatment available that may restore the defendant's competence so that he may be tried at some point in the future.[157] If necessary, the defendant may be involuntarily committed so that he may be treated.[158] If involuntary commitment is ordered, the defendant's status is reviewed by the court at regular intervals to determine if his competence has been restored so that he may proceed to trial.[159]

The competency trial of Ezra Pound was scarcely a typical example of the adversary system of justice: all the doctors would testify that Pound was incompetent, all the lawyers knew that all the doctors would testify that Pound was incompetent, and the judge all but instructed the jury to

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So. 2d 330, 333 (Fla. Dist. Ct. App. 2003)); *see also* Carrion v. State, 859 So. 2d 563, 565 (Fla. Dist. Ct. App. 2003). As discussed earlier, defense counsel is often unwilling to raise the issue of competence, even when it cries out for examination, because the defendant objects to any inquiry into his mental competence and defense counsel feels himself duty-bound to honor his client's wishes. *See infra* text and accompanying notes 162–66. For this and other reasons, trial judges are repeatedly cautioned by the appellate courts to be vigilant and to order competency evaluations whenever the trial judge is reasonably concerned that competence is in issue. *Maxwell*, 974 So. 2d at 510. And this is so even when a defendant has previously been found to be competent. *Id.* "[T]he trial court must remain receptive to revisiting the issue if circumstances change." *Id.*

155. FLA. STAT. § 916.12(1) (2012); FLA. R. CRIM. P. 3.211(a)(1); *see* Dusky v. United States, 362 U.S. 402, 402 (1960); Arseneau v. State, 77 So. 3d 1280, 1282 (Fla. Dist. Ct. App. 2012); Reeves v. State, 987 So. 2d 103, 105–06 (Fla. Dist. Ct. App. 2008). The quoted language is taken directly from the watershed opinion of the Supreme Court in *Dusky*, a decision that post-dated, by a couple of years, Ezra Pound's release from custody. *See Dusky*, 362 U.S. at 402.

156. FLA. STAT. § 916.12(3)(a)–(f) (2012); FLA. R. CRIM. P. 3.211(a)(2)(A)(i)–(vi).

157. FLA. R. CRIM. P. 3.212(c); *see also* FLA. STAT. § 916.12(5); FLA. R. CRIM. P. 3.215(c); Washington v. Harper, 494 U.S. 210, 211 (1990). That a defendant requires psychotropic medication for his competence to be restored or maintained is no impediment to a finding of competence, so long as the defendant is receiving his medication. § 916.12(5); FLA. R. CRIM. P. 3.215(c). A defendant who is careless or recalcitrant about taking his psychotropic medication can be forcibly medicated against his will in order to render him competent for trial. *Washington*, 494 U.S. at 211.

158. FLA. R. CRIM. P. 3.212(c)(3).

159. *Id.* 3.212(c)(5).

find Pound incompetent.[160] In the circumstances, there was a sense that everyone was playing for the same side. Perhaps surprisingly, modern-day competency hearings in Florida often partake of the same quality. The prosecution has every incentive to persuade the trier of fact[161] that the defendant is competent and can therefore be tried and convicted. The defense, however, may also have a forcible incentive to try to persuade the trier of fact that the defendant is competent: the wishes of the defendant. As a general rule in a criminal case, the defendant decides the litigation goal.[162] The analogy favored by generations of trial lawyers is that of a taxicab: The client is the passenger who gets to choose where he wants to go. But the lawyer, like the cab-driver, gets to decide the route by which to get there. A criminal defense attorney may advise his client that the client is incompetent, that all doctors will likely agree that the client is incompetent, and that therefore the defense should stipulate to a finding of incompetence so that the defendant need never face the rigors of trial and the risks of conviction.[163] But if the defendant insists that his litigation goal is trial and acquittal on the merits then the lawyer is obliged to assert his client's competence so that the client may be tried.[164] Of course if the defendant is in fact incompetent, he is incompetent to decide his own litigation goal; but the fact of his incompetence will not be determined until the competency hearing—after which there may be nothing left for the client or his lawyer to decide.[165] As a result, many defense attorneys, perhaps against their better judgment, resolve doubts in favor of the client's insistence that he is competent and wishes his competency to be vigorously asserted.[166]

In such cases, the competency hearing may resemble nothing so much as a baseball game in which both teams have taken the field and no one comes up to bat. Some or all of the doctors may testify that the defendant is incompetent, but both lawyers urge the contrary. The judge's ruling is

160. *See supra* text accompanying notes 88, 97, 107, 110–13, and 116.

161. *See* FLA. R. CRIM. P. 3.210. Referring to a judge, not a jury. *Id.*

162. *See* R. REGULATING FLA. BAR 4-1.2(a) (explaining that the attorney has to follow the wishes of the client concerning the representation).

163. *See generally id.* 4-1.2(a), 4-1.14 (stating that the client makes the objective decisions regarding his representation).

164. *See id.* 4-1.2(a) ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation, and, as required by rule 4-1.4, shall reasonably consult with the client as to the means by which they are to be pursued.").

165. *See generally id.* 4-1.2, 4-1.14 (clarifying that an attorney has to follow his client's wishes but the attorney may seek to have a guardian appointed if the client is incompetent).

166. *See supra* notes 81–82 and accompanying text. Recall that this was not a problem for Pound's lawyer. *See id.* Pound agreed, indeed suggested, that an assertion of incompetence was the best defense strategy. *See id.*

no more the product of the adversary system of justice than the jury's verdict in the Pound case was the product of the adversary system of justice—arguably less so.

Never asked at the Pound trial was the question: If Ezra Pound is incompetent, when did he become incompetent? The first indictment of Pound was returned by the grand jury in late July of 1943, and its release was accompanied by remarks to the press by then-Attorney General Francis Biddle.[167] When Pound, then in Italy, learned of the indictment he promptly wrote to General Biddle, delivering the letter to the Swiss legation in Rome, which forwarded it.[168] In his letter, he offered a defense of his actions, which certainly by Pound's standards and probably by any standards, was reasoned and restrained. His letter included passages such as the following:

> I have not spoken with regard to *this* war, but in protest against a system which creates one war after another, in series and in system. I have not spoken to the troops, and have not suggested that the troops should mutiny or revolt. The whole basis of democratic or majority government assumes that the citizen shall be informed of the facts. I have not claimed to know all the facts, but I have claimed to know some of the facts which are an essential part of the total that should be known to the people. I have for years believed that the American people should be better informed as to Europe, and informed by men who are not tied to a special interest or under definite control.[169]

Whatever the merits of these and the other arguments put forward by Pound in his own defense in his letter to the attorney general, they were clearly not composed by an incompetent mind. Whenever Pound became incompetent—if he in fact became incompetent—it was after August of 1943. Were the trial to be conducted today, this would likely be brought out.

In early May of 1945, Pound was taken into custody by the American military.[170] Shortly thereafter, an enterprising reporter managed to arrange a brief interview with him. The reporter quoted Pound as saying:

> There is no doubt which I preferred between Mussolini and Roosevelt. In my radio broadcasts I spoke in favor of the economic construction of Fascism. Mussolini was a very human, imperfect character who lost his head. Winston [Churchill] believes in the maximum of injustice enforced with the maximum of brutality. Hitler was a martyr. Like

167. *CEP*, *supra* note 3, at 62–63.
168. *Id.* at 63.
169. *Id.* at 64.
170. *Id.* at 67.

many martyrs, he held extreme views.[171]

Whatever the merits of these positions taken by Pound, they were not expressed in language or syntax that was the product of an incompetent mind. Whenever Pound became incompetent—if he in fact became incompetent—it was after May of 1945. Were the trial to be conducted today, this would likely be brought out.

When Pound was first held in military custody, he was held in conditions of some privation.[172] How severe the privation was is unknowable. Julian Cornell, who took his client's word for it, concluded that the conditions of incarceration to which Pound was subjected were so extreme as to bring about the complete collapse of his physical and mental faculties.[173] He would no doubt have dated Pound's incompetence to this period, if he had been called upon to do so. In due course, however, the conditions of Pound's military confinement were ameliorated; he was, for example, permitted access to a typewriter in the dispensary, where he began the composition of parts of what would later constitute the magisterial *Pisan Cantos*.[174] Whatever the merit of that poetry as poetry, it was not the work of an incompetent mind. Whenever Pound became incompetent—if he in fact became incompetent—it was after he was removed from custody in Italy and transported to the United States in the autumn of 1945. Were the trial to be conducted today, this would likely be brought out.

As noted *supra*, when Pound's lawyer met with him in November of 1945, Pound impressed Cornell as "wobbly in his mind" but "entirely rational."[175] And it was at this first meeting that both Pound and Cornell proposed the notion of asserting a claim of incompetence (or, as it was sometimes carelessly termed, "insanity"). Were the trial to be conducted today, of course this would *not* be brought out; discussions between an attorney and his client as to litigation strategy are privileged. But surely present-day prosecutors would press the issue: When was Pound's incompetence first discovered? And how was it evidenced?

As it happens, Dr. Overholser provided an answer of sorts. When in 1958 Thurman Arnold moved to dismiss the indictment still pending against Pound, the motion was accompanied by an affidavit from the ever-obliging Dr. Overholser, in which he deponed that Pound had been

171. *Id.* at 68–69.
172. *Id.* at 71.
173. *CEP*, *supra* note 3, at 93.
174. *Id.* at 72.
175. *TEP*, *supra* note 57, at 13.

incompetent as a result of "a paranoid state" since he (Pound) arrived at St. Elizabeth's on December 4, 1945.[176] What precipitated this "paranoid state," and the resulting incompetence, is never stated. But in this affidavit Dr. Overholser goes further than he or any of his colleagues had ever gone before. He alleges the "strong probability that the commission of the crimes [for which Pound was] charged was the result of insanity, and . . . would therefore seriously doubt that [the] prosecution could show criminal responsibility even if it were hypothetically assumed that Ezra Pound could regain sufficient [competence] to be tried."[177] Fortunately for Overholser, and for Pound, this expression of opinion post-dated the competency trial by a dozen years.[178] Had Overholser testified at trial that Pound was insane at the time of the radio broadcasts—that Pound, in Overholser's view, did not even understand the nature of what he was saying and doing—he would have shredded his own claims to credibility and expertise.

As it was, Overholser and his colleagues got off easy on their cross-examinations—certainly easier than would be the case today. The elements of competence set out in Florida Rule of Criminal Procedure 3.211(a)(2)(A)[179] and section 916.12(3), Florida Statutes,[180] provide the present-day cross-examiner with a roadmap. Had they been pressed, Dr. Overholser and his colleagues would likely have been obliged to concede that Pound understood what the charge against him was, understood the possible penalty he faced, and, in a general way (which is all that can be expected of a layman), understood the adversarial nature of the judicial process. With the exception of one outburst, Pound succeeded in manifesting appropriate courtroom behavior at trial, although he certainly presented a less than attractive version of himself, oddly clad and seemingly distracted to the point of catatonia, as he sat at counsel table.[181] To the extent he was called upon to do so, he was willing and able to

176. *CEP*, *supra* note 3, at 193–94.

177. *Id.* at 194.

178. *Id.* at 191.

179. FLA. R. CRIM. P. 3.211(a)(2)(A). In considering the defendant's competency to proceed, the examining expert shall consider the defendant's capacity to:

> (i) appreciate the charges or allegations against the defendant; (ii) appreciate the range and nature of possible penalties . . . that may be imposed in the proceedings against the defendant; (iii) understand the adversary nature of the legal process; (iv) disclose facts pertinent to the proceedings at issue; (v) manifest appropriate courtroom behavior; (vi) testify relevantly . . . .

Id.

180. FLA. STAT. § 916.12(3) (2010) (listing the same factors as FLA. R. CRIM. P. 3.211(a)(2)(A)).

181. *See TEP*, *supra* note 57, at 38, 44–45 (discussing Pound's demeanor during his arraignment and trial).

disclose relevant facts to his attorney; although had he gone to trial, almost all the relevant facts would have been disclosed by the transcripts of the radio broadcasts.[182] Contemplation of the last factor listed in the rule and statute—Pound's ability to testify relevantly in his own defense—sends shivers up the spine of any trial lawyer or trial judge. Pound would undoubtedly have been a runaway witness. No effort on the part of his attorney, even if bolstered by admonitions from the judge, would have compelled Pound to answer in a pithy, responsive, and orderly fashion to the questions put to him. It might be the case that his mercurial demeanor, erratic speech patterns, and extremist views would lead jurors to conclude that he was, truly, incompetent. It would more likely be the case that jurors would conclude he was simply a malevolent bohemian or an outright goldbricker, and that he should be tried, convicted, and put safely away. This, however, bears not at all upon an appropriate cross-examination of the psychiatrists on the issue of competence. An effective cross-examiner would have obliged the doctors to concede that Pound was capable of functioning usefully as Julian Cornell's client and would have stayed far away from any questions about whether Pound was capable of functioning usefully as Julian Cornell's witness.

Later generations of Pound scholars have concluded that Dr. Overholser "decided that Pound should not stand trial for treason and then singlehandedly engineered the testimony that led to his hospital confinement. Overholser believed that Pound was a great American poet who, although he had made 'mistakes,' should not have to face the risk of execution."[183] In the words of another authority:

> Ezra Pound was not insane . . . . Pound elected to plead insanity and incompetency to avoid the kind of trial that had resulted in the conviction and disgrace of others similarly accused. Once institutionalized, he chose to remain until he could walk out totally free on his own terms. Pound was hardly the victim of a capricious use of psychiatry; if anything, psychiatric testimony blocked and then aborted the legal process in his favor. Furthermore, his "custodian," Dr. Winfred Overholser . . . protected him by arguing that Pound was insane, a position he maintained despite overwhelming evidence and professional opinion to the contrary. Overholser's cooperation, authority, and prestige . . . gave Pound the safe martyrdom and asylum

182. *See id.* at 3, 40 (discussing the availability of the transcripts).

183. Hibbert Mitgang, *Researchers Dispute Ezra Pound's 'Insanity'*, N.Y. TIMES, Oct. 31, 1981, http://www.nytimes.com/1981/10/31/books/researchers-dispute-ezra-pound-s-insanity.html (quoting E. Fuller Torrey, *The Protection of Ezra Pound*, PSYCHOLOGY TODAY, Nov. 1981, at 56–57).

he desperately needed.[184]

Did Dr. Overholser and his colleagues tailor, alter, color their testimony to insure that Ezra Pound would never be tried for treason? There is substantial circumstantial evidence to support the proposition that they did (although as every trial lawyer and trial judge knows, circumstantial evidence is always susceptible of more than one interpretation). If they did so, their motives are not difficult to interpolate. Pound's literary output during his "St. Elizabeth's Period" was prodigious.[185] Had he been tried and convicted that entire body of literary work might never have come into existence. Had he been executed it certainly would not have come into existence. In that sense, Dr. Overholser's compassion for his patient and concern for his patient's art were the cause, or at least the salvation, of some of the twentieth century's important poetry and translation.

That conceded, what Overholser and his colleagues did—if they did it—was wrong. It was something that should not have happened then, and in our hypothetical re-trial of Pound under present-day Florida procedures should not happen now. It is a *grundnorm* of the criminal justice process that the jury is the trier of fact, bound to determine the true facts of the case and the appropriate inferences to be drawn therefrom. This function the jurors will perform by listening to sworn and truthful testimony, receiving other relevant evidence, applying their common sense and the law as the judge instructs them on the law, and reaching a just and lawful verdict.[186] What Dr. Overholser did—if he did it—undermines every premise of the jury trial function. The psychiatrists determined what outcome *they* deemed desirable, moral, optimal; then worked backwards, inventing testimony that would lead irrefragably to that outcome.[187] If it was not perjury, it was the perpetration of a fraud upon the court—if they did it.

184. STANLEY I. KUTLER, THE AMERICAN INQUISITION: JUSTICE AND INJUSTICE IN THE COLD WAR 59–60 (1982). Professor Kutler had access, apparently by means of requests pursuant to the Freedom of Information Act, to government files not available while Pound's litigation was ongoing. *See id.* at 59.

185. *See id.* at 71–72, 79–80 (discussing how Pound wrote during his time at St. Elizabeth's and that Dr. Overholser was "glad to have contributed to Pound's literary efforts while at St. Elizabeth's").

186. *See The Function of the Jury at the Trial*, USLEGAL.COM, http://courts.uslegal.com/jury-system/the-function-of-the-jury-at-the-trial (last visited Oct. 30, 2012) (describing the functions of the jury).

187. *See* Mitgang, *supra* note 183 ("Dr. Overholser, decided that Pound should not stand trial for treason and then singlehandedly engineered the testimony that led to his hospital confinement.").

The most vexing feature of the Pound saga—the indefinite incarceration of someone who could never be tried on the charges for which he was incarcerated—is one which could not repeat itself today. It is proscribed by Florida Rule of Criminal Procedure 3.213, which provides:

> If at any time after 5 years following a determination that a person is incompetent to stand trial . . . when charged with a felony, or 1 year when charged with a misdemeanor, the court, after hearing, determines that the defendant remains incompetent to stand trial . . . that there is no substantial probability that the defendant will become mentally competent to stand trial . . . in the foreseeable future, and that the defendant does not meet the criteria for commitment, it shall dismiss the charges against the defendant without prejudice to the state to refile the charges should the defendant be declared competent to proceed in the future.[188]

If the defendant does meet the criteria for involuntary commitment, he is to be remanded to the custody of the Florida Department of Children and Family Services.[189] To order such a remand, the court would have to find by clear and convincing evidence that:

> The defendant has a mental illness and because of the mental illness:
>
> 1. The defendant is manifestly incapable of surviving alone or with the help of willing and responsible family or friends . . . and, without treatment, the defendant is likely to suffer from neglect or refuse to care for herself or himself and such neglect or refusal poses a real and present threat of substantial harm to the defendant's well-being; or
>
> 2. There is a substantial likelihood that in the near future the defendant will inflict serious bodily harm on herself or himself or another person, as evidenced by recent behavior causing, attempting, or threatening such harm;
>
> All available, less restrictive treatment alternatives . . . have been judged to be inappropriate; and [t]here is a substantial probability that the mental illness causing the defendant's incompetence will respond to treatment and the defendant will regain competency to proceed in the reasonably foreseeable future.[190]

188. FLA. R. CRIM. P. 3.213(a)(1); *see also* FLA. STAT. § 916.145 (2012) (restating FLA. R. CRIM. P. 3.213(a)(1)); Jackson v. Indiana, 406 U.S. 715, 730–31 (1972). *See generally* Gonzalez v. State, 15 So. 3d 37, 40–41 (Fla. Dist. Ct. App. 2009) (discussing the widely accepted rule that incompetent defendants must be released from commitment where their competency cannot be restored and ruling that the rule is also applicable to conditional release). A decade and a half after Pound's release, the United States Supreme Court ruled that the indefinite and unreviewed detention of an incompetent defendant was violative of both the equal protection and due process clauses of the Fourteenth Amendment. *Jackson*, 406 U.S. at 730–31.

189. FLA. R. CRIM. P. 3.213(b)(1).

190. § 916.13(1).

Pound, of course, met none of these criteria. Although, according to the doctors, he suffered from a mental illness, he was by no means "incapable of surviving . . . with the help of willing and responsible family or friends."[191] He survived very well indeed after his release from St. Elizabeth's, and would have survived equally well had he been released sooner. In no sense did he neglect to care for himself (except with respect to his heteroclite fashion choices,[192] which certainly isn't what the Florida Statute refers to), and he never posed a risk of danger to himself or others. As to the final criterion, all the doctors agreed from first to last that there was no prospect of Pound's infirmity responding to treatment such that he would regain competence.[193]

The elaborate body of Florida law regarding incompetence, as summarized *supra*, is separate and apart from the equally elaborate body of Florida law regarding insanity.[194] Although the lawyers, and even the psychiatrists, in the Pound case interchanged the two terms carelessly, they are, in modern law, two different things entirely. Incompetence refers to the mental state of the defendant at time of trial.[195] If a defendant has a minimally satisfactory understanding of the charges against him, the potential penalties he faces, the nature of the criminal justice process; and if he can communicate with his lawyer and behave himself in court; then he is competent and he may be tried.[196] If he is incompetent, he may not be tried.[197] Insanity refers to the mental state of the defendant at the time that

191. *Id.*

192. *See CEP*, *supra* note 3, at 3–4; Jamie James, *In the Gloom the Gold*, LAPHAM'S QUARTERLY, Spring 2010, *available at* http://www.laphamsquarterly.org/essays/in-the-gloom-the-gold.php?page'all. Among Pound's many eccentricities—before, during, and after his brush with the American criminal justice system—was his elaborately bizarre style of dress. *Id.* One biographer describes Pound as he appeared entering the Ente Italiano Audizione Radiofoniche, the government broadcast agency from which he made his infamous speeches:

> He wore a hat with a wide brim and a double-breasted overcoat with broad lapels scissoring downward to three rows of buttons, the top two rows of which were left unbuttoned. One side of his shirt collar was turned up, Regency style, but the other side—the left—was turned down and its point allowed, or made, to flap over the left overcoat lapel. In plain view a tie big as a sash, and casually looped, descended to the lower depths of a double-breasted jacket.

Id. Friend and fellow-poet Ford Madox Ford, describing Pound in his younger days in London, pictures him "wear[ing] trousers made of green billiard cloth, a pink coat, a blue shirt, a tie handpainted by a Japanese friend, an immense sombrero, a flaming beard cut to a point, and a single, large blue earring." James, *supra.*

193. *TEP*, *supra* note 57, at 46.

194. *Compare* § 916.13 (governing involuntary commitment of defendants adjudicated incompetent), *with* § 916.15 (governing involuntary commitment of defendants adjudicated not guilty by reason of insanity).

195. *See* FLA. R. CRIM. P. 3.211(a)(2)(A).

196. *See id.* 3.211(a)(1).

197. *See id.* 3.211(b).

the charged crimes were allegedly committed.[198] An insane defendant is one who was unable to appreciate the nature and consequences of his acts and to distinguish between right and wrong.[199] Insanity is an affirmative defense at trial;[200] a jury that finds a defendant to be insane returns a verdict of "not guilty by reason of insanity."[201] Understood in this proper sense, Ezra Pound's lawyers did *not* assert his insanity. They asserted his incompetence.

A defendant who intends to assert a defense of insanity must give timely notice to the prosecution, including a statement of "the nature of the insanity the defendant expects to prove and the names and addresses of the witnesses by whom the defendant expects to" prove it.[202] The trial court will then order the defendant to submit to examination by the prosecution's psychologists or psychiatrists of choice.[203]

If a defendant is found not guilty by reason of insanity, the court must then conduct a hearing to determine if the defendant should be civilly committed.[204] Six months after commitment, the facility at which the defendant is committed is obliged to submit a report to the court on the defendant's status; the court will then set a hearing within thirty days to determine the continuing need for commitment.[205] This process of report and review will be repeated at yearly intervals for as long as the defendant remains committed.[206] The jury at defendant's trial on the merits will have been instructed on these consequences of acquittal on the grounds of insanity.[207]

As with an assertion of incompetence, a defendant and his attorney may disagree over the wisdom of asserting a defense of insanity. At least one Florida court has held that this is a decision that must be made by the defendant.[208] An attorney, no matter how thoroughly convinced of his client's insanity, cannot enter a plea of "not guilty by reason of insanity" on his client's behalf without his client's concurrence.[209]

198. *See supra* note 83 and accompanying text.
199. *Id.*
200. FLA STAT. § 755.027(1) (2012); FLA. R. CRIM. P. 3.216(a).
201. FLA. R. CRIM. P. 3.217(a).
202. *Id.* 3.216(c).
203. *Id.* 3.216(d).
204. *Id.* 3.217(b). The court also has the option, in lieu of civil commitment, of ordering the defendant to submit to outpatient treatment. *Id.*
205. *Id.* 3.218(a)–(b).
206. *Id.* 3.218(b).
207. FLA. R. CRIM. P. 3.216(i).
208. Edwards v. State, 88 So. 3d 368, 373–74 (Fla. Dist. Ct. App. 2012).
209. *Id.* at 374–75; *see* R. REGULATING FLA. BAR 4-1.2(a). The *Edwards* court determined

In any event, a fair-minded reader of the Florida Statutes and Florida Rules of Criminal Procedure as they stand today would necessarily conclude that the injustices visited upon Ezra Pound—if injustices they were—could not be visited upon a present-day Florida defendant. A defendant who cannot be tried because of his mental incompetence, or who is acquitted on the grounds of his insanity, may be committed; but the need for his commitment is reviewed at regular and frequent intervals and must be justified at each review.[210] The prospect of a defendant presumed innocent of, but incarcerated indefinitely for, charges upon which he can never be tried, is foreclosed by the law.

All this, of course, assumes that the law is keeping the promises it makes in the Florida Statutes and Florida Rules of Criminal Procedure. It assumes, for example, that an incompetent defendant who has been institutionalized for five years and not restored to competence in that time will have his case dismissed—which in turn assumes that someone, somewhere, is paying enough attention to that incompetent defendant to note that five years have passed, and to bring the matter before the responsible trial judge. These assumptions are difficult to test. There are scarcely any reported opinions in which *habeas corpus* has been sought on behalf of an incompetent defendant wrongfully detained beyond the statutory five-year period. This absence of evidence is of course susceptible of two interpretations pointing in two opposite directions: It may be that the system functions so efficiently that no one is wrongfully detained and everyone receives all the process due to him. It may be that the system functions so inefficiently that many people are wrongfully detained and that this failure of process goes unnoticed and unremedied. Incompetent defendants are, by hypothesis, unable to assert their own rights; and precious few of them attract the support and attention lavished upon an internationally renowned poet.

V. CONCLUSION

Law review articles, like children's fairy-tales, are supposed to conclude with some lesson. Ezra Pound's litigation is a story, but there is no moral to the story. Icon and iconoclast, broad-minded scholar and narrow-minded bigot, reactionary in his politics and revolutionary in his poetics, Ezra Pound was brilliantly successful at being brilliantly

that although "insanity is an affirmative defense in Florida, the decision to raise the defense is akin to a plea decision," and thus one that could be made only by the defendant himself. R. REGULATING FLA. BAR 4-1.2(a).

210. FLA. R. CRIM. P. 3.217(b), 3.218(a)–(b).

contradictory. It is hard to find the moral, the lesson, in his life; why should there be one in his litigation?

His incarceration (or was it simply his retreat?) at St. Elizabeth's provided all the raw material for a romantic *cause celebre*. According to this view, an inspired if perhaps eccentric poet was locked away, a caged bird whose song could not be heard, by a government ashamed to confront the charges it had brought against him. He was no less a political prisoner than Alexander Solzhenitsyn, than Nelson Mandela, and no less heroic. The moral of the story was in the progress of American law, which now provides limits on how long and by what means a putatively incompetent criminal defendant may be held. The moral of the story was in Pound's eventual release, in his spending the evening of his days in Italy in the warm embrace of his family. According to this view, Pound was a victim, but a victim triumphant.

His retreat (or was it truly his incarceration?) at St. Elizabeth's has, with the passage of time, attracted another interpretation. Justice, said Benjamin Nathan Cardozo, "though due to the accused, is due to the accuser also."[211] The government of the United States accused a traitor of treason and was denied justice as to its accusation. According to this view, Pound used his intellect, his influence, his fame, his connections, and anything else at his disposal to procure a series of conspiracies and frauds. Dr. Overholser and his colleagues conspired to defraud the court. The Bollingen Committee conspired to defraud the art world and to embarrass the government. Pound and his fautors conspired to exploit St. Elizabeth's, to use it not as an asylum from the ravages of mental illness but as an asylum from justice, as a sanctuary from the law's process, as a refuge within which resources could be marshaled "[t]ill time lend friends and friends their helpful swords."[212] The moral of the story is in the realization that a sufficiently subdolous and powerful litigant can bend the system to his will. According to this view, Pound was a traitor twice over, betraying his country's arms in time of war and frustrating her justice in time of peace.

Let Pound have the last word; not because he deserves it—he does not—but because he has provided it, and because no mere law-review scribbler could:

> O helpless few in my country,
> O remnant enslaved!

211. Snyder v. Massachusetts, 291 U.S. 97, 122 (1934).

212. WILLIAM SHAKESPEARE, THE TRAGEDY OF KING RICHARD II, act 3, sc. 3 (William George Clark & William Aldis Wright eds., Running Press 1997).

Artists broken against her,
A-stray, lost in the villages,
Mistrusted, spoken against,
Lovers of beauty, starved,
Thwarted with systems,
Helpless against the control;
You who can not wear yourselves out
By persisting to successes,
You who can only speak,
Who can not steel yourselves into reiteration;
You of the finer sense,
Broken against false knowledge,
You who can know at first hand,
Hated, shut in, mistrusted:
Take thought:
I have weathered the storm,
I have beaten out my exile.[213]

213. Ezra Pound, *The Rest, in* LUSTRA OF EZRA POUND, WITH EARLIER POEMS 28 (Alfred A. Knopf ed., 1917).