

*Summer 1996*

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### Recommended Citation

Rita D. Buitendorp, *A Statutory Lesson from "Big Sky Country" on Abolishing the Insanity Defense*, 30 Val. U. L. Rev. 965 (1996).

Available at: <https://scholar.valpo.edu/vulr/vol30/iss3/5>

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## A STATUTORY LESSON FROM "BIG SKY COUNTRY" ON ABOLISHING THE INSANITY DEFENSE

*"It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."*<sup>1</sup>

### I. INTRODUCTION

Justice Louis Brandeis envisioned a nation of states which advanced new theories and learned from each other.<sup>2</sup> Montana is one such state following a novel path. In 1979,<sup>3</sup> Montana passed a bill to eliminate its insanity defense.<sup>4</sup>

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1. *New State Ice Co. v. Liebemann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). See Donald T. Campbell, *Reforms as Experiments*, 24 AM. PSYCH. 409 (1969) (suggesting that a new program's effectiveness is often determined on a trial and error basis).

2. *New State*, 285 U.S. at 311.

3. Montana's 1979 reform occurred early compared to the majority of states which reformed their insanity defenses after the catalyst case *United States v. Hinckley*, 525 F. Supp. 1342 (D.D.C. 1981), *op. clarified, recons. denied*, 529 F. Supp. 520 (D.D.C.), *aff'd.*, 672 F.2d 115 (D.C. Cir. 1982) (finding the defendant who attempted to assassinate former President Ronald Reagan not guilty by reason of insanity). For representative media accounts of John W. Hinckley Jr.'s trial and its aftermath, see John Leo, *Is the System Guilty? A Stunning Verdict Puts the Insanity Defense on Trial*, TIME, July 5, 1982, at 26; *Hinckley's Acquittal Spurs Call to Curb Insanity Defense; Senate Might Act Soon*, WALL ST. J., June 23, 1982, at 7. See also Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. RES. L. REV. 599, 601-40 (1990) (advocating that shifts in insanity defense jurisprudence are frequently initiated by the public's negative reaction to infamous cases of defendants successfully employing the insanity defense). Professor Crowley stated that "Montana was tightening up the insanity defense when everyone else was loosening it." Telephone Interview with William F. Crowley, Professor of Criminal Law at the University of Montana School of Law and a former member of the Criminal Law Commission which conducted a ten-year probe of the Montana Code (Feb. 4, 1995) [hereinafter Crowley].

4. H.B. 877, 46th Leg., 1979 Mont. Laws (enacted). See *infra* notes 76-101 and accompanying text. Specifically, Montana eliminated the following portion from its statutes: "Mental disease or defect excluding responsibility is an affirmative defense which the defendant must establish by a preponderance of the evidence." MONT. CODE ANN. § 46-14-201 (1978).

Montana is not the first state in the United States to abolish its insanity defense. Louisiana, Mississippi, and Washington abolished their insanity defenses early in this century, only to have the abolition held unconstitutional by their state supreme courts because no *mens rea* defense remained. See *State v. Lange*, 123 So. 639 (La. 1929); *Sinclair v. State*, 132 So. 581 (Miss. 1931); *State v. Strasbourg*, 110 P. 1020 (Wash. 1910). The Supreme Court of Mississippi stated over 60 years ago:

It is true that there has been abuse of the defense of insanity throughout the country and

In spite of persistent interest in the insanity defense, few initially recognized the significance of Montana's elimination of the insanity defense.<sup>5</sup> Most scholars after 1979 neither researched the practical effects nor evaluated the constitutionality of Montana's scheme; instead, they merely cited Montana as an example of a state that had abolished its insanity defense.<sup>6</sup> Presumably,

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perhaps an undue public sentiment that the abuses of this defense should call for its utter abrogation. If there be such probable opinion, it is *temporary* and has not been expressed in this state in any cognizable way until the enactment of the statute under review.

*Sinclair*, 132 So. at 588 (Ethridge, J., concurring) (emphasis added).

Additionally, several authors advocated abolition of the insanity defense before Montana abolished its insanity defense in 1979. *See, e.g.*, Joseph Goldstein & Jay Katz, *Abolish the "Insanity Defense" - Why Not?*, 72 YALE L.J. 853 (1963); SEYMOUR L. HALLECK, *PSYCHIATRY AND THE DILEMMAS OF CRIME: A STUDY OF CAUSES, PUNISHMENT AND TREATMENT* (1967); Norval Morris, *Psychiatry and the Dangerous Criminal*, 41 S. CAL. L. REV. 514 (1968); THOMAS S. SZASZ, *LAW, LIBERTY & PSYCHIATRY: AN INQUIRY INTO THE SOCIAL USES OF MENTAL HEALTH PRACTICES* (1989); THOMAS S. SZASZ, *THE MYTH OF MENTAL ILLNESS; FOUNDATIONS OF A THEORY OF PERSONAL CONDUCT* (1961) [hereinafter MYTH]. The legislator who initiated the reformation of Montana's insanity defense, Michael H. Keedy, said that he conceived the idea after reading the work of Dr. Szasz, a psychiatrist who advances the theory that mental illness is a myth. Jay Mathews, *2 States Ban Mental Illness Defense*, WASH. POST, June 24, 1982, at A6. Professor Crowley agreed that "one of the things that fueled Montana's action was the decline in the acceptance of psychiatry as an exact science. The attitude has turned almost 180 degrees since the 1950s." Crowley, *supra* note 3.

5. Michael Perlin, Professor of Law at New York Law School, recently lamented the lack of research being done on abolitionist states, observing that "so little attention has been paid to the experiences in the *mens rea* states." MICHAEL L. PERLIN, *THE JURISPRUDENCE OF THE INSANITY DEFENSE* 140-41 (1994). Similarly, Thomas Maeder described Montana's abolition of its insanity defense as "quiet" and "unnoticed." THOMAS MAEDER, *CRIME AND MADNESS* 149 (1985). Perlin cites the political nature of the insanity debate as one reason for this lack of study: "The intellectual vacuity among politically-motivated abolitionists is illuminated by the striking lack of interest that has been shown in the empirical data in those jurisdictions where abolition has been attempted." PERLIN, *supra*, at 140. *But see* Ingo Keilitz, *Researching and Reforming the Insanity Defense*, 39 RUTGERS L. REV. 289, 306 (1987) (studying the ultimate outcome of the *mens rea* approaches in Montana, Idaho, and Utah).

6. Montana has become a popular state for insanity defense scholars to refer to in passing or to include in a footnote as an example of a state which has "abolished" its insanity defense. *See, e.g.*, Daniel B. Bartley, *State v. Field: Wisconsin Focuses on Public Protection by Reviving Automatic Commitment Following a Successful Insanity Defense*, 1986 WIS. L. REV. 781, 785 n.26 (1986); Anne Damante Brusca, *Postpartum Psychosis: A Way Out for Murderous Moms?*, 18 HOFSTRA L. REV. 1133, 1155 n.116 (1990); Michael J. Davidson, *Post-Traumatic Stress Disorder: A Controversial Defense for Veterans of a Controversial War*, 29 WM. & MARY L. REV. 415, 424 (1988); Jodie English, *The Light Between Twilight and Dusk: Federal Criminal Law and the Volitional Insanity Defense*, 40 HASTINGS L.J. 1, 20 (1988); Susan N. Herman, *The Tail that Wagged the Dog: Bifurcated Fact-Finding under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S. CAL. L. REV. 289, 328-29 n.161 (1992); Donald H. J. Hermann, 44 OHIO ST. L.J. 987, 990 (1983) (reviewing WILLIAM J. WINSLADE & JUDITH WILSON ROSS, *THE INSANITY PLEA* (1983)); Warren J. Ingber, *Rules for an Exceptional Class: The Commitment and Release of Persons Acquitted of Violent Offenses by Reason of Insanity*, 57 N.Y.U. L. REV. 281, 283 (1982); Chet Kaufman, *Should Florida Follow the Federal Insanity Defense?*, 15 FLA. ST. U. L. REV. 793,

Montana's experiment was given such cursory treatment because researchers assumed that the effects of abolition in such a sparsely populated state<sup>7</sup> would not apply in other states,<sup>8</sup> or that the constitutionality of abolition had been

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795 n.16 (1987); Keilitz, *supra* note 5, at 304-06; John Q. La Fond & Mary L. Durham, *Cognitive Dissonance: Have Insanity Defense and Civil Commitment Reforms Made a Difference?*, 39 VILL. L. REV. 71, 84 n.57 (1994); Ira Mickenberg, *A Pleasant Surprise: The Guilty but Mentally Ill Verdict Has Both Succeeded in Its Own Right and Successfully Preserved the Traditional Role of the Insanity Defense*, 55 U. CIN. L. REV. 943, 947 n.18 (1987); John B. Scherling, *Automatic and Indefinite Commitment of Insanity Acquittes: A Procedural Straitjacket*, 37 VAND. L. REV. 1233, 1234 n.8 (1984); Benjamin B. Sendor, *Crime as Communication: An Interpretative Theory of the Insanity Defense and the Mental Elements of Crime*, 74 GEO. L.J. 1371, 1432 (1986); Gare A. Smith & James A. Hall, *Evaluating Michigan's Guilty But Mentally Ill Verdict: An Empirical Study*, 16 U. MICH. J. L. REF. 77, 79 n.13 (1982); Ellen Hochstedler Steury, *Criminal Defendants with Psychiatric Impairment: Prevalence, Probabilities and Rates*, 84 J. CRIM. L. & CRIMINOLOGY 352, 357-58 n.21 (1993); David B. Wexler, *Redefining the Insanity Problem*, 53 GEO. WASH. L. REV. 528, 530 (1985); Elyce H. Zenoff, *Controlling the Dangers of Dangerousness: The ABA Standards and Beyond*, 53 GEO. WASH. L. REV. 562, 570 n.41 (1985). However, Montana's reform requires more than the hasty judgment that the insanity defense was indeed abolished. This note shows that the insanity defense survives in the evidence of mental disease or defect that can be introduced by a defendant in Montana in three ways. See *infra* section IV, notes 146-318 and accompanying text.

7. The stereotypical image of the people inhabiting "Big Sky Country" being rugged and lonely individualists is borne out by the numbers. In 1980, the total population of Montana was 786,690 in an area of 147,046 square miles. COLLIER'S ENCYCLOPEDIA 485 (1990). In comparison, the population of Indiana in 1980 was 5,490,260 in an area of 36,185 square miles. *Id.* at 617. Evidently, citizens of Montana "like their fellow men the best when they are scattered some." State v. Watson, 686 P.2d 879, 891 (Mont. 1984) (Sheehy, J., dissenting).

8. See, e.g., Constance Holden, *Insanity Defense Reexamined*, 222 SCIENCE 994, 995 (1983) ("Three states—Montana, Idaho, and Utah, have abolished the insanity defense, but their populations are too sparse for any significant effects to be observed."). Although the frequency in which insanity pleas and verdicts are entered varies among jurisdictions, a significant association exists between the number of insanity adjudications in a particular jurisdiction and that jurisdiction's population. Hugh McGinley & Richard A. Pasewark, *National Survey of the Frequency and Success of the Insanity Plea and Alternate Pleas*, 1989 J. OF PSYCH. & L. 205 (1989).

However, the abolition of the insanity defense proposed by Montana legislators was not motivated by concerns linked to the state's population or to the number of insanity adjudications. Telephone Interview with Michael H. Keedy, former representative who introduced the bill in 1979 to abolish Montana's insanity defense (Feb. 25, 1995) [hereinafter Keedy]. (Keedy subsequently became a judge in the Eleventh Judicial District of Montana and later a lobbyist for the Montana School Board Association. *Id.*) Former Representative Keedy stated that his motivation in drawing up the bill stemmed from the belief that the "insanity defense is a perversion of the basic tenet of the criminal justice system—holding people accountable for their actions." *Id.* Thus, what prompted Montana's reform was the legislators' and their constituents' negative impression of the insanity defense, an impression familiar to citizens of many states. *Id.* In this way, Montana's experiment is equally applicable to other states. In fact, two researchers stated that studying the effects of abolition in a sparsely populated western state may be beneficial because "it offers a manageable and circumscribed setting for close scrutiny of the career of a highly controversial social movement." Gilbert Geis & Robert F. Meier, *Abolition of the Insanity Plea in Idaho: A Case Study*, 477 ANNALS AM. ACAD. 72, 74 (1985).

sufficiently debated.<sup>9</sup> However, Montana's experiment warrants a more careful and exhaustive evaluation since other states are currently considering the similar abolition of their insanity defenses.<sup>10</sup>

The Supreme Court's denial of certiorari in a recent decision of the Montana Supreme Court, *State v. Cowan*,<sup>11</sup> may have prodded states to

9. *See infra* note 37. Specifically, two amendments to the Constitution of the United States are implicated in questioning the abolition's constitutionality. The Fifth Amendment states, "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. The Fourteenth Amendment states, "No state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV. Additionally, Montana's Constitution states that "No person shall be deprived of life, liberty, or property without due process of law." MONT. CONST. art. II, § 17 (1972). These due process clauses would be implicated in the abolition of the insanity defense because the defense acknowledges that due process of law for the insane criminal may involve a different set of circumstances.

10. Specifically, the 1995 legislatures of Oklahoma, Arkansas and Massachusetts are considering the abolition of their insanity defenses in a manner similar to Montana's reform. The synopsis of the Oklahoma bill stated that it:

Deletes language excluding insane persons from those capable of committing crimes; provides the fact a person did not know right from wrong shall not be a criminal defense; provides that any defendant who becomes insane after sentencing may be hospitalized in a state mental facility, but if he may be adequately treated by the Department of Corrections, he remain in the department's custody; provides the insanity defense shall not be available for any criminal act committed after the effective date of this law.

1995 Oklahoma S.B. 607. The Oklahoma bill was introduced by Senator Smith on January 31, 1995, and was submitted to the Senate Select Committee on Criminal Code Reform on February 2, 1995. *See* Jamie Talan, *Killer's Bid for Freedom Highlights Insanity Plea; Focus Is on Whether Defense is Fair*, PHOENIX GAZETTE, Nov. 18, 1994, at A28 ("Arkansas legislators, prompted by Rep. Pat Flanagan (D-Forrest City), are studying a Montana law that abolished the insanity defense. . . . A bill to abolish Arkansas' insanity defense could be filed in the 1995 legislature."). The Arkansas bill has yet to be filed. *Id.* Governor William Weld introduced a bill to abolish Massachusetts' insanity defense on September 28, 1995. 1995 Massachusetts H.B. 5501. It was submitted to the Joint Committees on Human Services and Elderly Affairs and Judiciary on that same date. *See Insanity and Punishment*, BOSTON GLOBE, Oct. 13, 1995, at 18. *See also* Paul Kamenar, *Insanity Defense is Crazy*, USA TODAY, Feb. 6, 1992, at 8A ("[States] should follow the lead of Idaho and Montana, which virtually abolished the defense by strictly limiting it to situations where, for example, the defendant was so deranged that he thought he was carving a watermelon instead of a person.").

11. 861 P.2d 884 (Mont. 1993), *cert. denied*, 62 U.S.L.W. 3640 (U.S. Mar. 28, 1994) (No. 93-1264). The defendant in *Cowan* broke into a Forest Service cabin in Montana and attacked the returning occupant with a tree-planting tool until she was unconscious. *Id.* at 885. The victim lived, but Cowan was charged with attempted deliberate homicide, a charge which required proof that Cowan had the requisite *mens rea* of "purposely or knowingly" attempting to cause the woman's death. *Id.* at 886. Cowan, a diagnosed schizophrenic, argued that he was in an acute psychotic episode at the time of the attack and that he was under the delusion that the victim was a robot, not a human being. *Id.* at 885. In a five-two decision, the Montana Supreme Court found Cowan guilty as charged and upheld his 60-year sentence. *Id.* at 889.

reconsider Montana's abolition of its insanity defense.<sup>12</sup> The defendant in *Cowan*, a diagnosed schizophrenic, appealed his conviction for deliberate homicide to the Supreme Court of the United States,<sup>13</sup> but the Supreme Court denied certiorari in March of 1994.<sup>14</sup> A denial of certiorari carries no precedent and gives little direction to other states evaluating the constitutionality of abolishing the insanity defense.<sup>15</sup> Nonetheless, several newspapers characterized this denial of certiorari to *Cowan* as a "green light" for state legislatures to abolish their insanity defenses.<sup>16</sup> Victims' rights advocates considered the denial of certiorari a victory.<sup>17</sup> Legal authorities interpreted the

12. See *infra* notes 18-19 and accompanying text.

13. *Cowan's* defense attorneys, William Boggs and Margaret Borg, Chief Public Defender for Missoula County, Montana, presented the following questions to the Supreme Court:

- (1) Does either the Due Process Clause or Eighth Amendment's Cruel and Unusual Punishment Clause, or both, protect an insane person from suffering criminal conviction and punishment for acts over which he has no moral control?
- (2) Does legal inference of purpose from conduct, combined with abolition of insanity defense, create burden-shifting or conclusive presumption of intent, in contravention of doctrine enunciated by this court in *Sandstrom v. Montana*?

*State v. Cowan*, 861 P.2d 884 (Mont. 1993), *petition for cert. filed*, 62 U.S.L.W. 3629 (U.S. Feb. 1, 1994) (No. 93-1264).

14. 62 U.S.L.W. 3640 (U.S. Mar. 28, 1994) (No. 93-1264).

15. The denial of a petition for certiorari from the Supreme Court carries no weight because the justices could have employed any number of reasons in denying *Cowan's* appeal. Consider the opinion of Justice Felix Frankfurter discussing the denial of a petition for writ of certiorari:

A variety of considerations underlie denial of the writ, and as to the same petition different reasons may lead different Justices to the same result. This is especially true of petitions for review on writ of certiorari to a State court. Narrowly technical reasons may lead to denials . . . . A decision may satisfy all these technical requirements and yet may commend itself for review to fewer than four members of the Court. Pertinent considerations of judicial policy here come into play. A case may raise an important question but the record may be cloudy. It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening.

*Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 917 (1950).

16. "The Supreme Court Monday gave states a green light to abolish the traditional insanity defense by declining to review the assault conviction of a schizophrenic Montana man." *High Court Action Could Aid Foes of Insanity Plea*, COMMERCIAL APPEAL (Memphis, Tenn.), Mar. 29, 1994, at A4. See also *Courts Seeking Balance in Use of Insanity Defense*, ATLANTA J. & CONST., Mar. 30, 1994, at A14; Joan Biskupic, *Insanity Defense: Not a Right; In Montana Case, Justices Give States Option to Prohibit Claim*, WASH. POST, Mar. 29, 1994, at A3; *Silence is Inducement to Rethink Insanity Plea*, NEWS & RECORD (Greensboro, N.C.), Mar. 31, 1994, at A14; David G. Savage, *High Court Puts Insanity Defense in Peril*, L.A. TIMES, Mar. 29, 1994, at A23.

17. "The U.S. Supreme Court, in a move that delighted victims' rights advocates and dismayed some defense lawyers, yesterday let stand a Montana law that bars suspects from pleading insanity to seek acquittal in a criminal trial." Bob Hohler, *Curb on Plea of Insanity is Let Stand; Supreme Court Action Retains Montana Law That Limits Use*, BOSTON GLOBE, Mar. 29, 1994, at 1.

Supreme Court's action as easing the way for abolition of the insanity defense.<sup>18</sup> Consequently, other states may repeat the problems of Montana's reform.<sup>19</sup>

This Note shows that Montana's reform only eliminated the insanity defense from its statutes and not from its courtrooms.<sup>20</sup> The evidence once offered to support an insanity defense has been redirected through the incompetency process, proof of *mens rea*, and sentencing.<sup>21</sup> As a result, insanity pleas and insanity acquittals still exist in Montana.<sup>22</sup> Not only did Montana's reform preserve the insanity defense, but the reform also spawned new difficulties in trying and sentencing the insane defendant. These difficulties include an abuse of the incompetency process,<sup>23</sup> the elevation of psychiatric testimony at trial,<sup>24</sup> and the prison sentencing of defendants with mental diseases or defects.<sup>25</sup> In short, Montana's experiment is not working. Consequently, the evidence of how the reform has failed and for whom the reform has failed holds lessons applicable to other states.<sup>26</sup>

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18. "The court, in bypassing the thorny issue without comment, may have eased the way for other states to follow Montana's lead in outlawing the controversial defense method, according to legal authorities on both sides of the debate." *Id.*

19. Within the parameters of the Constitution of the United States, state legislatures may write their own insanity laws. Consider the words of Justice Thurgood Marshall:

We cannot cast aside the centuries-long evolution of the collection of interlocking and overlapping concepts which the common law has utilized to assess the moral accountability of an individual for his antisocial deeds. The doctrines of *actus reus*, *mens rea*, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States.

*Powell v. Texas*, 392 U.S. 514, 535-36 (1968) (Marshall, J., writing for the majority).

20. As Alexander Brooks, professor at Rutgers Law School, points out, "use of the term 'abolition' to describe the *mens rea* position tends to obfuscate the issue because the language suggests that mental illness would no longer be a basis for a defense to a charge of crime." Alexander D. Brooks, *The Merits of Abolishing the Insanity Defense*, 477 ANNALS AM. ACAD. 125, 126 (1985).

21. *Id.*

22. HENRY J. STEADMAN ET AL., BEFORE AND AFTER HINCKLEY; EVALUATING INSANITY DEFENSE REFORM 125 (1993).

23. See *infra* section IV.A, notes 150-202 and accompanying text.

24. See *infra* notes 237-50 and accompanying text.

25. See *infra* section IV.C, notes 266-318 and accompanying text.

26. "[P]olicymakers elsewhere would be prudent to keep a close watch on these two states' experience with abolition." INGO KEILITZ & JUNIUS P. FULTON, THE INSANITY DEFENSE AND ITS ALTERNATIVES: A GUIDE FOR POLICYMAKERS 37 (1984). Professor Cotter stated that Montana's attempt at abolishing the insanity defense is instructive to other state legislatures that believe the insanity defense can be easily eliminated. Telephone Interview with Patrick Cotter, Professor of Criminal Law at the University of Montana School of Law (Jan. 26, 1995) [hereinafter Cotter]. Professor Cotter stressed the importance of addressing the issue of a defendant's *mens rea* for other

The purpose of this Note is not to join the debate over whether abolishing the insanity defense is constitutional. Instead, the purpose is to examine the ramifications of Montana's approach and to propose a bill that resolves the most troublesome problems of Montana's approach. In doing so, this Note will provide instruction to states considering abolition. After a brief review of the insanity defense in Section II,<sup>27</sup> Section III of this Note will show how Montana attempted to abolish its insanity defense and will explain Montana's current "*mens rea* approach" to prosecuting defendants who plead insanity.<sup>28</sup> Since this Note takes the position that Montana did not really abolish its insanity defense, Section IV will then examine the three existing avenues in the Montana statutes where evidence of a mental disease or defect is admissible.<sup>29</sup> The unique use of Montana's incompetency process will be discussed therein,<sup>30</sup> as well as the manner in which *mens rea* evidence is introduced at trial<sup>31</sup> and the disposition of defendants at sentencing.<sup>32</sup>

Finally, in light of the problems surrounding Montana's abolition of the insanity defense, Section V will propose a bill to amend the pertinent Montana statutes to reduce abuses of the incompetency process, narrow the role of psychiatrists at trial, and make sentences more consistent with Montana's *mens rea* approach.<sup>33</sup> This Note's analysis of Montana's abolition of the insanity defense and its proposed bill lay the groundwork for other legislatures to investigate, discuss, and possibly act on abolishing the insanity defense in a manner suitably tailored for their states. States effectively improve their social systems when they follow a course of identifying a problem, experimenting with solutions, and ultimately implementing the most promising solution.<sup>34</sup>

## II. A BRIEF REVIEW OF THE INSANITY DEFENSE

The insanity defense is rarely used in the United States,<sup>35</sup> but that rarity

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states considering abolition of the insanity defense. *Id.*

27. See *infra* notes 35-75 and accompanying text.

28. See *infra* notes 76-145 and accompanying text.

29. See *infra* notes 146-318 and accompanying text.

30. See *infra* notes 150-202 and accompanying text.

31. See *infra* notes 203-65 and accompanying text.

32. See *infra* notes 266-318 and accompanying text.

33. See *infra* notes 319-25 and accompanying text.

34. KEILITZ & FULTON, *supra* note 26, at 64.

35. In 1980, the most recent year for which a national statistic is available, only 2,542 defendants were found not guilty by reason of insanity and admitted to mental hospitals in the entire United States. STEADMAN ET AL., *supra* note 22, at 5. A recent study of eight states revealed that defendants who used the insanity defense constituted less than one percent of all criminal cases. Lincoln Caplan, *Not So Nutty: The Post-Dahmer Insanity Defense*, THE NEW REPUBLIC, Mar. 30, 1992, at 18. Further, the defendants raising the insanity defense were successful in only about one-quarter of their cases. *Id.* Thus, "the consensus of the experts in the field is that the insanity



believes the symbolic role of the insanity defense in the legal system and the interest it holds for legislators<sup>36</sup> and scholars.<sup>37</sup> Insanity has been an acknowledged ground for acquittal in Anglo-American law since at least 1505, three hundred years before psychiatry became a science.<sup>38</sup> To aid in deciding if acquittal is appropriate, scholars have formulated various tests for insanity to determine the capacity of a person to make a moral choice and to act on it.<sup>39</sup> The tests are designed to determine responsibility.<sup>40</sup> Over time, the legal meaning of insanity has evolved from early concepts of right and wrong to the modern position where different states use a variety of tests.<sup>41</sup>

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defense trial is an extremely rare event and a successful insanity defense is even more rare.<sup>2</sup> MYTHS & REALITIES: A REPORT OF THE NATIONAL COMMISSION ON THE INSANITY DEFENSE 15 (1983) [hereinafter MYTHS & REALITIES].

36. See *infra* section II, notes 35-75 and accompanying text.

37. Norval Morris, a leading abolitionist of the insanity defense, observed over 20 years ago that "[r]ivers of ink, mountains of printer's lead, forests of paper have been expended on this issue." Morris, *supra* note 4, at 516. The number of authors intrigued by the insanity defense has not decreased in the interim. An introductory bibliography of the leading articles and books on both sides of this debate includes: HERBERT FINGARETTE, *THE MEANING OF CRIMINAL INSANITY* (1972); ABRAHAM S. GOLDSTEIN, *THE INSANITY DEFENSE* (1967); Goldstein & Katz, *supra* note 4; NORVAL MORRIS, *MADNESS AND THE CRIMINAL LAW* (1982); MICHAEL S. MOORE, *LAW AND PSYCHIATRY; RETHINKING THE RELATIONSHIP* (1984); Stephen J. Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 S. CAL. L. REV. 777 (1985); MYTH, *supra* note 4; BARBARA WOOTTON, *CRIME AND THE CRIMINAL LAW* (1963).

38. MYTHS & REALITIES, *supra* note 35, at 10 (quoting Professor Richard Bonnie, professor at University of Virginia Law School).

39. DONALD H. J. HERMANN, *THE INSANITY DEFENSE* 6 (1983).

40. *Id.* at 7.

41. For an interesting empirical study of the four insanity tests, see Robert M. Wettstein et al., *A Prospective Comparison of Four Insanity Defense Standards*, 148 AM. J. PSYCHIATRY 21 (1991). The authors conclude that the logical division between volitional and cognitive standards is very powerful, but that the distinctions among cognitive standards are not as powerful. *Id.* at 26.

Another innovation affecting the insanity defense is the "guilty but mentally ill" verdict, which originated in Michigan. MYTHS & REALITIES, *supra* note 35, at 32-34. See Sharon M. Brown & Nicholas J. Wittner, *Criminal Law (1978 Annual Survey of Michigan Law)*, 25 WAYNE L. REV. 335 (1979). Several states have adopted this alternative verdict in their statutes: ALASKA STAT. §§ 12.47.020(c), 12.47.030, 12.47.050 (1995); DEL. CODE ANN. tit. 11, §§ 401(b), 408, 409, 3905 (1987); GA. CODE ANN. § 17-7-131 (1995); 720 ILCS 5/6-2, 5/6-4, 5/115-2, 5/5-2-6 (1995); IND. CODE ANN. §§ 35-36-1-1 to 35-36-2-5 (Burns 1995); KY. REV. STAT. ANN. §§ 504.120 to 504.130 (Michie/Bobbs-Merrill 1995); MICH. COMP. LAWS § 768.36 (1994); NEV. REV. STAT. ANN. § 174.035 (1995); N.M. STAT. ANN. §§ 31-9-3, 31-9-4 (1995); PA. CONS. STAT. § 314 (1995); S.D. CODIFIED LAWS ANN. §§ 23A-7-2, 23A-7-16, 23A-26-14, 23A-27-38 (1995); UTAH CODE ANN. §§ 77-13-1 (1995). See also Linda C. Fentiman, "Guilty But Mentally Ill": *The Real Verdict is Guilty*, 26 B.C. L. REV. 601 (1985).

The chief starting point for the formulation of the insanity defense derives from the famous nineteenth century case of the Englishman Daniel M'Naghten.<sup>42</sup> In *M'Naghten*, the defendant apparently intended to shoot the Prime Minister of England, whom M'Naghten believed was the leader of a Tory conspiracy to kill him.<sup>43</sup> M'Naghten mistakenly shot the Prime Minister's Secretary.<sup>44</sup> From this English case emerged the *M'Naghten* test:

[E]very man is presumed to be sane . . . . [T]o establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong.<sup>45</sup>

M'Naghten was found "not guilty by reason of insanity," but the test which evolved from his case came under criticism.<sup>46</sup> The primary criticism of the test is that it is overly narrow because it concentrates solely on the cognitive ability of a defendant, and omits a defendant's volitional ability or free will.<sup>47</sup> Also, since a court can only acquit a defendant if the defendant completely does not know the nature and quality of the act, a second criticism is that the test does not endorse varying degrees of incapacity.<sup>48</sup> Further, the test is unclear about whether wrongness refers to moral or legal wrongs.<sup>49</sup> Despite these criticisms, over one-third of the states continue to use some variation of the *M'Naghten* test.<sup>50</sup>

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42. *Queen v. M'Naghten*, 8 Eng. Rep. 718 (H. L. 1843). Earlier starting points for the legal meaning of insanity include the "good and evil" test and the "wild beast" test. PERLIN, *supra* note 3, at 631-35 (tracking the pre-*M'Naghten* history of the insanity defense).

43. *M'Naghten*, 8 Eng. Rep. at 719.

44. *Id.*

45. *Id.* at 720.

46. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 300 (1987).

47. *Id.*

48. *Id.* For a thorough treatment of M'Naghten's case, see S. SHELDON GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW; A STUDY IN MEDICO-SOCIOLOGICAL JURISPRUDENCE 161-86 (Bernard D. Reams, Jr., ed., William S. Hein & Co., Inc. 1993) (1925).

49. DRESSLER, *supra* note 46, at 300.

50. McGinley & Pasewark, *supra* note 8, at 208. The following state statutes employ some variation of the original M'Naghten test: ARIZ. REV. STAT. ANN. § 13-502 (1995); DEL. CODE ANN. tit. 11, § 401 (1982); IOWA CODE § 701.4 (1995); KAN. STAT. ANN. § 22-3219 (1994); LA. REV. STAT. ANN. § 14: 14 (West 1995); MINN. STAT. § 611.026 (1994); MISS. CODE ANN. § 99-13-3 (1995); NEB. REV. STAT. § 29-2203 (1994); N.J. REV. STAT. § 2C: 4-1 (1994); N.Y. PENAL LAW § 40.15 (Consol. 1994) (M'Naghten and MPC); N.D. CENT. CODE § 12.1-04.1-01 (1995); OHIO REV. CODE ANN. § 2901.01(N) (Anderson 1995); OKLA. STAT. tit. 22 § 1161 (1995); PA. CONS. STAT. ANN. § 314; S.C. CODE ANN. § 17-24-10 (Law. Co-op 1993); S.D. CODIFIED LAWS ANN. § 23A-26-12 (1995); TEXAS PENAL CODE ANN. § 8.01 (West 1995) (M'Naghten and MPC); WASH. REV. CODE § 9A.12-010 (1995).

The volitional aspect missing from the *M'Naghten* test eventually became known as the "irresistible impulse" test.<sup>51</sup> The irresistible impulse test provides that, although individuals might know that they are committing offenses and even be aware that the offenses are wrong, they may still be unable to control their behavior due to mental disease or defect.<sup>52</sup> The irresistible impulse test encompasses sudden and temporary impulses, but not mental illness characterized by brooding and reflection.<sup>53</sup> A few states currently use some combination of the irresistible impulse test and the *M'Naghten* test.<sup>54</sup>

Another formulation for the legal meaning of insanity, the "product" test, was first enunciated by the Supreme Court of New Hampshire,<sup>55</sup> but it is best known for its judicial enactment by Judge David Bazelon in *Durham v. United States*.<sup>56</sup> The product test simply says that if an act was a product of a mental disease or defect, then the accused is not criminally responsible for an otherwise unlawful act.<sup>57</sup> The product test attempted to bring modern psychology into the criminal trial,<sup>58</sup> but Judge Bazelon ultimately abandoned it in an opinion which cited the difficulties in defining and treating mental illness.<sup>59</sup> Only New Hampshire continues to use the product test.<sup>60</sup>

Within a few years of the product test, the American Law Institute formulated an insanity test that incorporated both cognitive and volitional aspects, the Model Penal Code (MPC) test.<sup>61</sup> The MPC test provides that a person is not responsible for criminal conduct if at the time of such conduct,

51. McGinley & Pasewark, *supra* note 8, at 208. Alabama is considered the first state to accept the irresistible impulse test in the United States. Keilitz, *supra* note 5, at 294 n.25; *see also* Parsons v. State, 2 So. 854, 859 (Ala. 1887).

52. MYTHS & REALITIES, *supra* note 35, at 11.

53. *Durham v. United States*, 214 F.2d 862, 874 (D.C. Cir. 1954) (concluding that a broader test should be adopted).

54. McGinley & Pasewark, *supra* note 8, at 208. Colorado, for example, supplements its statutory enactment of the *M'Naghten* test with the irresistible impulse test. COLO. REV. STAT. § 16-8-101 (1995). Of course, a state court can also apply the irresistible impulse test in cases before it. *See, e.g.*, *Thompson v. Commonwealth*, 70 S.E.2d 284 (Va. 1952).

55. KEILITZ & FULTON, *supra* note 26, at 7. *See State v. Pike*, 49 N.H. 399 (1869); and *State v. Jones*, 50 N.H. 369 (1871).

56. *See Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954) (Bazelon, J., writing for the majority). For a thoughtful reflection on Judge Bazelon's time on the bench and the product test, *see* Stephen J. Schulhofer, *Criminal Law: Just Punishment in an Imperfect World*, 87 MICH. L. REV. 1263 (reviewing DAVID L. BAZELON, *QUESTIONING AUTHORITY: JUSTICE AND CRIMINAL LAW* (1988)).

57. *Durham*, 214 F.2d at 876.

58. PERLIN, *supra* note 5, at 85-86.

59. *U.S. v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972).

60. MYTHS & REALITIES, *supra* note 35, at 11. *See also* N.H. REV. STAT. ANN. § 628: 2 (1994).

61. MODEL PENAL CODE § 4.01 (1962).

because of mental disease or defect, the person lacked substantial capacity either to appreciate the criminality or wrongfulness of the conduct or to conform the conduct to the requirements of law.<sup>62</sup> The majority of states currently use the MPC test,<sup>63</sup> the test after which Montana's former insanity test was also modeled.<sup>64</sup>

Insanity defense scholars have debated not only the determinations on which to base the legal meaning of insanity, but also whether the insanity defense should continue to be an acknowledged ground for acquittal.<sup>65</sup> Proponents of the insanity defense argue that the defense affirms the moral judgment that some criminal defendants do not deserve punishment where their mental incapacities have impaired their free will.<sup>66</sup> They also argue that the threat of punishment does not deter people who do not know what they are doing and cannot control their actions.<sup>67</sup> Thus, according to proponents of the insanity defense, society should forego the unjust punishment of insane people.<sup>68</sup>

In contrast, opponents of the insanity defense, also known as abolitionists, point out that a clear line cannot be drawn to distinguish between those defendants who are responsible for their actions and those who are not.<sup>69</sup>

62. *Id.*

63. McGinley & Pasewark, *supra* note 8, at 208.

64. See *infra* notes 82-90 and accompanying text. The Model Penal Code test has been adopted in the following state statutes: ALA. CODE § 13A-3-1 (1995); ALASKA STAT. § 12.47.020 (1995); ARK. CODE ANN. § 5-2-312 (Michie 1995); CAL. PENAL CODE § 1026 (West 1995); CONN. GEN. STAT. ANN. § 53a-13 (West 1994); D.C. CODE ANN. § 24-301 (1995); GA. CODE ANN. § 16-3-2 (1995); HAW. REV. STAT. § 704-401 (1995); 720 ILCS 5/6-2 (1995); IND. CODE ANN. § 35-41-3-6 (Burns 1995); KY. REV. STAT. ANN. § 504.020 (Michie/Bobbs-Merrill 1995); ME. REV. STAT. ANN. tit. 17A, § 39 (West 1994); MD. CODE ANN., HEALTH-GEN. § 12-108 (1995); MASS. ANN. LAWS ch. 279, § 69 (Law. Co-op. 1994); MICH. COMP. LAWS § 768.21a (1982); MO. REV. STAT. § 552.030 (1994); N.Y. PENAL LAW § 40.15 (Consol. 1994) (M'Naghten and MPC); OR. REV. STAT. § 161.295 (1994); R.I. GEN. LAWS § 40.1-5.3-4 (1994); TENN. CODE ANN. § 39-11-501 (1995); TEXAS PENAL CODE ANN. § 8.01 (West 1995) (M'Naghten and MPC); VT. STAT. ANN. tit. 13, § 4801 (1995); W.VA. CODE § 27-6A-2 (1995); WIS. STAT. ANN. § 971.15 (West 1994).

65. See *supra* note 37.

66. See, e.g., Lynnette S. Cobun, *The Insanity Defense: Effects of Abolition Unsupported by a Moral Consensus*, 9 AM. J. OF L. & MED. 471, 500 (1984); SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES* 217-18 (5th ed. 1989); MAEDER, *supra* note 5, at 168.

67. See, e.g., Steury, *supra* note 6, at 355.

68. Judge Bazelon stated the position succinctly: "Our collective conscience does not allow punishment where it cannot impose blame." *Durham v. United States*, 214 F.2d 862, 876 (D.C. Cir. 1954) (quoting *Holloway v. United States*, 148 F.2d 665, 666-67 (D.C. Cir. 1945)).

69. Professor Crowley stated that psychiatrists in Montana previously "ruled the roost." Crowley, *supra* note 3. See BARBARA WOOTTON, *CRIME AND PENAL POLICY; REFLECTIONS ON FIFTY YEARS' EXPERIENCE* (1978).

Are we really competent to draw the distinctions that the law requires? Are not most

Further, some abolitionists believe that such a line should not be drawn.<sup>70</sup> These abolitionists believe that the criminal justice system should preserve human dignity and regard all defendants as people who can appreciate and control their actions.<sup>71</sup> Thus, the central tension in the debate over abolishing the insanity defense is between making defendants responsible for their actions and acknowledging defendants' extenuating circumstances.<sup>72</sup> Most Americans believe that the insanity defense fosters irresponsibility,<sup>73</sup> so public distaste for

of us conscious through personal experience of a certain variability even in our own individual standards of responsibility? . . . . Acceptance of mental disorder as diminishing or eliminating criminal responsibility demands the ability to get inside someone else's skin so completely as to determine whether he acted wilfully or knowingly, and also to experience the strength of the temptations to which he is exposed. That, I submit, is beyond the capacity of even the most highly qualified psychiatrist.

*Id.* at 228.

70. According to Norval Morris, a leading abolitionist, the insanity defense results in a "double stigmatization." Morris, *supra* note 4, at 524. *But see* Ellen Hochstedler, *Twice Cursed? The Mentally Disordered Criminal Defendant*, 14 CRIM. JUST. & BEHAV. 251, 263 (1987) (concluding that "twice cursed" is a term not yet justified). According to Morris, stigmatization is compounded for the mentally ill criminal because society views the criminal as both "mad" and "bad." Morris, *supra* note 4, at 525. Morris argues that the existence of a special defense for insane persons, but not for those who suffer from an equal impairment, seems immoral. *Id.* at 518-20. Illustrating his position, Morris inquires as to why society does not consider a defense of "social adversity: "

Adverse social and subcultural background is statistically *more* criminogenic than is psychosis; like insanity, it also severely circumscribes the freedom of choice which a non-deterministic criminal law (all present criminal law systems) attributes to accused persons . . . . You argue that insanity destroys, undermines, diminishes man's capacity to reject what is wrong and to adhere to what is right. So does the ghetto—more so.

*Id.* at 520. Morris concludes that abolishing the insanity defense would equalize the situation for all offenders. *Id.* at 520-21. For a real-life twist on Morris' hypothetical defense, see *People v. Goetz*, 497 N.E.2d 41, 52 (N.Y. 1986) (finding that the circumstances of the defendant, who was acquitted of shooting four youths on a subway train in New York City, "encompass[ed] any prior experiences he had which could provide a reasonable basis for a belief that another person's intentions were to injure or rob him or that the use of deadly force was necessary under the circumstances").

71. *See supra* note 70.

72. Cobun, *supra* note 66, at 471. For an interesting primer on the insanity defense from two polar perspectives, see Norval Morris et al., *Should the Insanity Defense Be Abolished? An Introduction to the Debate*, 1 J.L. & HEALTH 113 (1986-87) (debate between Professors Norval Morris and Richard Bonnie).

73. *See, e.g.*, Valerie P. Hans, *An Analysis of Public Attitudes Toward the Insanity Defense*, 24 CRIMINOLOGY 393, 394 (1986) (finding that the collected evidence all points to an enduring pattern of public animosity to the insanity plea). Consider this cynical observation by a speech writer of former President Ronald Reagan:

If you commit a big crime then you are crazy, and the more heinous the crime the crazier you must be. Therefore you are not responsible, and nothing is your fault . . . you can wait like a jackal and shoot a man in the head and leave him for dead and buy your way out with clever lawyers and expensive psychiatrists.

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the defense is not unique to Montana.<sup>74</sup> In Montana, however, this attitude prompted state legislators to go as far as abolishing the insanity defense.<sup>75</sup>

### III. THE INSANITY DEFENSE IN MONTANA

No specific case is celebrated as the catalyst for Montana's abolition of the insanity defense.<sup>76</sup> Nor was the abolition hastened by a profusion of insanity acquittals.<sup>77</sup> Rather, a first-year legislator, Michael Keedy, filed a bill in 1979 to abolish the insanity defense.<sup>78</sup> Representative Keedy claimed that the

(1990). Michael Perlin identified four underlying notions that enable myths about the insanity defense to persist: one, an irrational fear that defendants will "beat the rap" through a fakery, a fear that has its roots in a general disbelief of mental illness and a deep-seated mistrust of manipulative criminal defense lawyers; two, a sense that while certain physiological disabilities may be seen as legitimately exculpatory, mere emotional handicaps will not; three, a demand that the defendant conform to popular images of extreme "craziness" in order to qualify as insane; four, a fear that psychiatry and psychology will thwart the criminal justice's crime-control component. Perlin, *supra* note 3, at 709-10.

74. Former Representative Keedy spoke about personal accountability for actions when he testified in hearings on his bill. *Abolition of Mental Disease as a Defense: Hearings on H.B. 877 Before the Executive Session of the House Judiciary Committee*, 46th Mont. Leg. 12 (Feb. 20, 1979) [hereinafter *House Hearings*].

I believe that criminal law should presume that each of us is capable of free choice of behavior. It must be passed upon the offense rather than the offender. My purpose with the bill is to hold people accountable for their criminal acts. If we were to start over, would you again want the system that is so obviously turned on its head?

*Id.* Similarly, Professor Crowley stated that "all of these things that happened in Montana are consistent with nationwide attitudes towards the insanity defense and are also consistent with the functions of the mind." Crowley, *supra* note 3.

75. See Hans, *supra* note 73, at 410-11 (recognizing the effect of public opinion as an impetus for legal change).

76. "There were no celebrated cases fresh in people's minds," Keedy said, but Montana was a small state with legislators receptive to anti-crime measures and willing to experiment." Mathews, *supra* note 4, at A6 (quoting the first year legislator who introduced the bill to abolish Montana's insanity defense). Montana's abolition of its insanity defense occurred even before *United States v. Hinckley* was decided, a case which spurred many states to reform their insanity defenses. *United State v. Hinkley*, 525 F. Supp. 1342 (D.D.C.), *op. clarified, recons. denied*, 529 F. Supp. 520 (D.D.C. 1981), *aff'd.*, 672 F.2d 115 (D.C. Cir. 1982). See *supra* note 3.

77. Prior to Montana's 1979 reform of the insanity defense, approximately seven defendants successfully used the insanity defense every six months. STEADMAN ET AL., *supra* note 22, at 125-26.

78. The Montana Legislature enacted House Bill 877 (46th Session 1979). The bill's chief sponsor was Representative Keedy. The synopsis of the bill states that it abolishes the insanity defense and provides an alternative sentencing procedure to be followed when a convicted defendant is found to have been suffering from a mental disease or defect at the time of the offense. *Id.* The bill amended MONT. CODE ANN. §§ 46-14-101 (mental disease or defect), 46-14-201 through 46-14-203 (examination of defendant), 46-14-212 (access to defendant), 46-14-213 (psychiatric or psychological testimony upon trial), 46-14-221 (determination of fitness to proceed), 46-14-222 (proceedings if fitness regained), 46-14-301 (proceedings if fitness regained), 46-14-401 (privileged communications), and 46-15-301 (commitment upon finding of not guilty by reason of lack of mental

defense was psychologically corrupting the state's justice system.<sup>79</sup> In spite of the infrequent use of the insanity defense in Montana,<sup>80</sup> most legislators regarded the defense as an exploitable way to avoid punishment.<sup>81</sup> Through Keedy's bill, the Montana Legislature attempted to abolish the insanity defense and implement a "*mens rea* approach" to prosecuting defendants who plead insanity.

#### A. How Montana's Former Statutory Scheme Was and Was Not Changed

At the time Representative Keedy proposed the changes, Montana's insanity defense operated as an affirmative defense.<sup>82</sup> This meant that even if the prosecution proved all the charges against a defendant beyond a reasonable doubt,<sup>83</sup> insanity could still operate as a defense to those charges.<sup>84</sup> Also, the defendant only had to prove his or her insanity by a "preponderance of the evidence," a lighter burden of proof than the prosecution's "beyond a reasonable

state) (1978). The bill enacted MONT. CODE ANN. §§ 46-14-311 through 46-14-313 (sentencing) and repealed § 46-14-211 (competency) (1978). After being signed by the governor on May 14, 1979, the bill became effective on July 1, 1979. According to Keedy, Montana's governor wanted to veto House Bill 877, but the governor did not feel that a veto was politically feasible due to a prior major bill which he had also vetoed. Keedy, *supra* note 8.

79. "We've eliminated a perversion of our criminal justice system," said Montana District Court Judge, Michael Keedy, who as a legislator filed the bill to abolish the insanity defense, and then went on to become a judge." Hohler, *supra* note 17, at 1. "The insanity defense precluded treating lawbreakers as responsible individuals and encouraged them to look for excuses for their behavior. It was psychologically corrupting our system," continued Keedy." *Id.*

80. *See supra* note 77.

81. For example, Professor Crowley stated that "by the mid-1960s, the Criminal Law Commission was almost unanimous that the insanity defense is fundamentally a fraud. I believed that then and I believe that now." Crowley, *supra* note 3. Nevertheless, according to Professor Crowley, the Commission did not abolish the insanity defense because it felt that simply eliminating the insanity defense would create such an uproar that the whole project would be condemned. *Id.* Instead, in response to the perceived deficiencies of the insanity defense, the Commission produced a "modified M'Naghten." *See supra* notes 42-50 and accompanying text.

82. MONT. CODE ANN. § 46-14-201(1) (1978) stated: "Mental disease or defect excluding responsibility is an affirmative defense which the defendant must prove by a preponderance of the evidence." Under this burden of proof, the defendant must prove that it was more likely than not (i.e., more than fifty percent likely) that the defendant was insane. *See* DRESSLER, *supra* note 46, at 54.

83. In *re* Winship, 397 U.S. 358, 364 (1970), and *Mullaney v. Wilbur*, 421 U.S. 684, 704 (1975), held that every fact necessary to the charges against an accused must be proved beyond a reasonable doubt. *See infra* note 106. *See generally* KADISH & SCHULHOFER, *supra* note 66, at 39-62 (addressing cases and materials on the standard of proof beyond a reasonable doubt); DRESSLER, *supra* note 46, at 45-55 (providing an overview of burdens of proof).

84. The prosecution is required to prove the elements of a crime beyond a reasonable doubt, but it is not required to carry this burden regarding an affirmative defense. *See infra* note 106 and accompanying text. Montana allocated the burden of persuasion to the defendant to prove the presence of insanity by a preponderance of the evidence. *See supra* note 82.

doubt" standard.<sup>85</sup> If the court decided that the defendant was insane at the time of the crime's commission, the defendant was not accountable for his or her conduct.<sup>86</sup>

Montana formerly defined insanity by a two-part test:

- (1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he is *unable* either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.
- (2) As used in this chapter, the term "mental disease or defect" does not include an abnormality manifested only by repeated criminal or other antisocial conduct.<sup>87</sup>

Section one of Montana's former insanity test incorporated both a cognitive aspect, that defendants could not understand or appreciate their actions, and a volitional aspect, that defendants lost control of their actions or could not conform their actions to the law.<sup>88</sup> Montana's two-part test was a revised version of the Model Penal Code (MPC) test from the American Law Institute.<sup>89</sup> Montana's test was a revised version because Montana required defendants' complete inability to appreciate or conform their conduct to the law, while the MPC test is slightly more lenient in requiring only that defendants be substantially unable to appreciate or conform their conduct.<sup>90</sup>

85. See *supra* notes 82-84.

86. See *supra* note 82. See also Steury, *supra* note 6, at 356.

87. MONT. CODE ANN. § 46-14-101 (1978) (emphasis added).

88. Both the cognitive and the volitional aspects of the Model Penal Code (MPC) insanity test have their source in earlier tests, the M'Naghten test, and the irresistible-impulse test, respectively. See *supra* notes 42-54 and accompanying text.

89. The MPC defines mental disease or defect as the following:

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

MODEL PENAL CODE § 4.01 (1962) (emphasis added).

90. *Id.* Montana's requirement that a defendant be completely unable to appreciate or conform his or her conduct echoes the strict requirements of the M'Naghten test for insanity. See *supra* notes 42-50 and accompanying text. The Criminal Law Commission included the following remarks on Montana's former insanity test:

It is felt that this section provides as simple and as positive a test as is possible at the present time for separating the truly mentally irresponsible from the "criminal" without the invitation to the abuse of the "defense of insanity" that is inherent in the indefinite language of many tests of criminal responsibility. While it recognizes the objective of the more modern tests that lack of understanding and lack of control need not be total



Representative Keedy's 1979 bill eliminated the statute which granted defendants the affirmative defense of insanity.<sup>91</sup> Additionally, the 1979 bill modified Montana's two-part meaning of insanity by eliminating the first and constructive section of the insanity test, the definition of mental disease or defect which stated that evidence of mental disease or defect should show that a defendant could not appreciate or conform his or her actions to the legal requirements.<sup>92</sup> The bill retained only the second section of Montana's former insanity test, the statement that repeated criminal or antisocial conduct by the defendant is not sufficient evidence of mental disease or defect to establish nonresponsibility.<sup>93</sup>

By itself section two appears to pose as a definition of mental disease or defect, but it is actually only a statement of what the legislature was not willing to define as a mental disease or defect.<sup>94</sup> Without section one, the remaining section reveals little about when defendants have sufficient evidence that they are not responsible for their conduct.<sup>95</sup> Since the legislature deleted the first section of Montana's former insanity test without replacing it,<sup>96</sup> no clear definition of "mental disease or defect" exists in Montana.<sup>97</sup> No courts have

in order to excuse, and that the question is one of degree, yet it does not excuse (as does the Model Penal Code rule for example), for a "substantial impairment" of either of these capacities. Rather in order to excuse, the impairment must be so great that the trier of fact can say that the accused was unable to appreciate the criminality of his conduct, or that he was unable to conform his conduct to the requirements of society.

MONT. CODE ANN. § 46-14-101(1) (1978) (Comments).

91. See *supra* note 78.

92. *Id.* See *supra* text accompanying note 87 for MONT. CODE ANN. § 46-14-101(1) (1978).

93. See *supra* text accompanying note 87 for MONT. CODE ANN. § 46-14-101(2) (1978).

94. See *supra* notes 87-90 and accompanying text.

95. In fact, the Attorney General's office in Montana initially opposed the *mens rea* bill for the very reason that, though juries were familiar with such concepts as "conforming" and "appreciating criminality," no guidelines or workable set of rules existed for the new type of law. MAEDER, *supra* note 5, at 162.

96. See *supra* note 78 and *supra* notes 91-93 and accompanying text.

97. "I wish somebody would explain it to me," one Montana district judge was quoted as saying about the concept of legal insanity under the new *mens rea* approach. MAEDER, *supra* note 5, at 162. *State v. Watson* was the first case in which the Montana Supreme Court faced the need to define "mental disease or defect" without the first part of the former test. 686 P.2d 879 (Mont. 1984). In *Watson*, the defendant stabbed two persons, claiming that a demon spirit possessed his body during the attacks. *Id.* at 881. The court delegated the task of interpreting the phrase "mental disease or defect" to the jury, stating:

You are to determine the meaning of the phrase 'mental disease or defect,' and in so doing you may apply the common meanings of these words in your experience in life, and you may be guided by the testimony you find credible and relevant. However, the term 'mental disease or defect' does not include an abnormality manifested only by repeated criminal or antisocial conduct.

*Id.* at 885.

In contrast to Montana's scheme, the American Bar Association includes a definition of mental

yet decided the precise quality of psychiatric evidence that constitutes mental disease or defect in Montana.<sup>98</sup>

By deleting the insanity defense from its statutes and modifying the definition of insanity, the Montana Legislature believed that it had effectively withdrawn the insanity defense from defendants.<sup>99</sup> Instead, the legislature left a difficult and ambiguous definition of mental disease or defect for courts to interpret. Legislatures of other states that modify their definitions of insanity should make modifications which are both fair and workable.<sup>100</sup> Additionally, since a defendant's state of mind must be considered in criminal trials, legislatures that eliminate the insanity defense will need to implement substitute procedures to consider *mens rea* issues.<sup>101</sup>

disease or defect in its defense of mental nonresponsibility (insanity defense):

(a) A person is not responsible for criminal conduct if, at the time of such conduct, and as a result of mental disease or defect, that person was unable to appreciate the wrongfulness of such conduct.

(b) When used as a legal term in this standard *mental disease or defect* refers to:

(i) impairments of mind, whether enduring or transitory; or (ii) mental retardation, either of which substantially affected the mental or emotional processes of the defendant at the time of the alleged offense.

ABA Criminal Justice Mental Health Standard 7-6.1 (1989). Commentary to the ABA Standard reveals that the "impairment of mind" referred to in subparagraph (b)(i) should "not be equated with any particular diagnostic category but must be attributable to a substantial process of functional or organic impairment." *Id.* at 345.

98. In ordering a new trial in *State v. Patterson*, 662 P.2d 291 (Mont. 1983), the Montana Supreme Court hinted that the defendant's problems with "smoking and the devil" may suggest a possible insanity defense. *Id.* at 293. However, the prospect of a successful insanity defense on those facts is dim in light of the cases where defendants with allegedly similar conditions were convicted. See *State v. Cowan*, 861 P.2d 884 (Mont. 1993) (paranoid schizophrenia); *State v. Byers*, 861 P.2d 860 (Mont. 1993) (borderline personality disorder); *State v. Korell*, 690 P.2d 992 (Mont. 1984) (Vietnam veterans syndrome); *State v. Raty*, 692 P.2d 17 (Mont. 1984) (psychomotor epilepsy); *State v. Watson*, 686 P.2d 879 (Mont. 1984) (demon spirit); *State v. Zampich*, 667 P.2d 955 (Mont. 1983) (paranoid schizophrenia); *State v. Doney*, 636 P.2d 1377 (Mont. 1981) (drugged, psychotic state of mind); *State v. Mercer*, 625 P.2d 44 (Mont. 1981) (episodic mental illness).

Since *State v. Watson*, 686 P.2d 879 (Mont. 1984), few Montana cases have dealt explicitly with the section retained from Montana's former insanity test. One case decided before Montana's reform of the insanity defense, *State v. Olson*, 593 P.2d 724, 729 (Mont. 1979), stated that the criminal/antisocial behavior provision means that the mere commission of a criminal act did not place the defendant in the "exceptional class" of people described in section one of Montana's former insanity test. See *supra* note 87 and accompanying text. Without section one, the only person who can belong in this "exceptional class" may be the person who does not act "knowingly" or "purposefully." See *infra* notes 125-29 and accompanying text.

99. For example, Representative Keedy said that the bill would "exclude the old insanity defense" and "bring about a great change." *House Hearings, supra* note 74, at 12.

100. According to two authors, experience and experiment should ideally guide reform of the insanity defense. KEILITZ & FULTON, *supra* note 26, at 11. Instead, confusing abstraction, resentment, and anecdote cases have often surrounded reform. *Id.*

101. See *infra* notes 102-45 and accompanying text.

### B. Montana's Current Mens Rea Approach

Criminal acts generally contain two elements, the illegal act (the *actus reus*) and the illegal state of mind (the *mens rea*).<sup>102</sup> The concept of *mens rea* has both broad and narrow uses.<sup>103</sup> The broad use of *mens rea* refers to a defendant's moral culpability or "evil mind."<sup>104</sup> The narrow use of *mens rea* refers only to the specific mental element contained in a criminal statute.<sup>105</sup> As part of its case against a defendant, the prosecution has the task of proving both *actus reus* and *mens rea* beyond a reasonable doubt.<sup>106</sup>

Since a defendant's capacity to form intent or *mens rea* is an indispensable element of many crimes, neither Montana nor any other state can entirely eliminate the use of evidence of a mental disease or defect in assessing a defendant's requisite state of mind.<sup>107</sup> Thus, Montana's reform, legislating

102. All criminal acts except those imposing strict liability contain both the elements of *actus reus* and *mens rea*, an act and a state of mind. For specific crimes, the *mens rea* is defined by statute. For example, a prosecutor may be required to prove both that a defendant committed a murder and that the defendant did so with the mental state of "malice aforethought." See generally KADISH & SCHULHOFER, *supra* note 66, at 187-363 (providing cases and materials on defining criminal conduct); DRESSLER, *supra* note 46, at 63-115 (presenting an overview of *actus reus* and *mens rea*). An authoritative work on a defendant's state of mind is Francis B. Sayre, *Mens Rea*, 45 HARV. L. REV. 974 (1931-32) (concluding that there is no single precise requisite state of mind common to all crime).

103. KADISH & SCHULHOFER, *supra* note 66, at 217.

104. See, e.g., United States v. Bishop, 412 U.S. 346, 360 (1973), where the Court stated that the mental element was a voluntary and intentional violation of a known legal duty, involving bad faith, evil intent, or evil motive.

105. KADISH & SCHULHOFER, *supra* note 66, at 217. Montana provides that a person is not guilty of an offense unless the person had the mental state of "purposely," "knowingly," or "negligently." MONT. CODE ANN. § 45-2-103(1) (1993).

106. In *Re Winship*, 397 U.S. 358, 364 (1970). The prosecution carries this high burden in criminal cases because "a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is a reasonable doubt about his guilt." *Id.* at 363-64. Accordingly, Montana provides that a "defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether the defendant's guilt is satisfactorily shown, the defendant must be found not guilty." MONT. CODE ANN. § 46-16-204 (1993).

107. The state supreme courts of Louisiana, Mississippi, and Washington all struck down their legislatures' early twentieth century attempts to abolish the insanity defense because they did not believe that a legislature could eliminate the *mens rea* component of a criminal act any more than a legislature could eliminate the *actus reus* component. See *supra* note 4. The Supreme Court of Washington stated:

From what has been said thus far, it seems too plain for argument that one accused of crime had the right prior to and at the time of the adoption of our Constitution to show as a fact in his defense that he was insane when he committed the act charged against him, the same as he had the right to prove any other fact tending to show that he was not responsible for the act. Indeed, his right to prove his insanity at the time of committing the act was as perfect even as his right to prove that his physical person did

that insanity alone is not a defense, could not completely ignore mental disorder.<sup>108</sup> In place of its former insanity defense, Montana launched the so-called "*mens rea* approach."<sup>109</sup> Montana's *mens rea* approach employs the

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not commit the act, or set in motion a chain of events resulting in the act. This consideration suggests the application to our inquiry of the maxim, 'An act done by me against my will is not my act.'

State v. Strasburg, 110 P. 1020, 1022 (Wash. 1910).

108. An unsuccessful Senate bill introduced in 1975 by the Nixon administration was quite similar to the *mens rea* approach adopted by the Montana Legislature four years later. See S. 1, 94th Cong., 1st Sess. (1975). The Senate bill stated: "It is a defense to a prosecution under any federal statute that the defendant, as a result of mental disease or defect, lacked the state of mind required as an element of the offense charged. Mental disease or defect does not otherwise constitute a defense." *Id.* Implementing Montana's *mens rea* approach did not entail the addition of a new statute, but merely the retention of the following provision: "Evidence that the defendant suffered from a mental disease or defect is admissible to prove that the defendant did or did not have a state of mind that is an element of the offense." MONT. CODE ANN. § 46-14-102 (1978).

In 1982, Idaho followed Montana's lead and eliminated the affirmative defense of insanity from its statutes. After stating that a defendant's evidence of mental disease or defect would no longer constitute an independent defense, Idaho added the following provision: "[N]othing herein is intended to prevent the admission of expert evidence on the issue of *mens rea* or any state of mind which is an element of the offense, subject to rules of evidence." IDAHO CODE § 18-207 (1982). See State v. Beam, 710 P.2d 526 (Idaho 1985); Recent Development, 104 HARV. L. REV. 1132 (1991) (analyzing State v. Searcy, 798 P.2d 914 (Idaho 1990), which held that Idaho's abolition of the insanity defense is constitutional). During the same year as Idaho's abolition of the insanity defense, Alabama's governor signed a bill to abolish its insanity defense. See *Crime Bill Signed on Time?*, NAT'L L.J., (Sept. 27, 1982). However, the state court declared the legislation null and void. State v. Eley, 423 So. 2d 303, 304 (Ala. Crim. App. 1992). Evidently, the governor did not give the bill to the Secretary of State's office within the required ten days after the Alabama legislature session ended, thereby pocket-vetoing the bill. *Id.* The bill has not been reenacted.

In 1983, Utah also followed suit and abolished its insanity defense. The new Utah law stated: "It is a defense to a prosecution under any statute or ordinance that the defendant, as a result of mental illness lacked the mental state required as an element of the offense charged. Mental illness is not otherwise a defense." UTAH CODE ANN. § 76-2-305(1) (1983). See Peter Heinbecker, *Two Year's Experience Under Utah's Mens Rea Insanity Law*, 14 BULL. AM. ACAD. PSYCH. & L. 185 (1986). The Idaho and Utah schemes are substantially similar to Montana's.

109. Although the single label "*mens rea* approach" is often used to encompass the alternative approach of those favoring the abolition of the insanity defense, abolitionists are divided into three general schools of thought. RITA J. SIMON & DAVID E. AARONSON, *THE INSANITY DEFENSE: A CRITICAL ASSESSMENT OF LAW AND POLICY IN THE POST-HINCKLEY ERA* 181 (1988). The first school of thought advocates a strict *mens rea* approach, an approach which would not allow evidence of mental disease or defect to mitigate the prosecution's evidence of the defendant's requisite state of mind. *Id.* Norval Morris, for example, is a leading proponent of this strict *mens rea* approach. *Id.*; see, e.g., Morris, *supra* note 4. The middle approach, taken by a second group and followed by Montana, allows evidence of mental disease or defect to constitute a factor in determining the *mens rea* of a defendant. SIMON & AARONSON, *supra*. The third approach taken by abolitionists is to abandon the legal concept of *mens rea*. *Id.* Lady Barbara Wootton, the leading advocate of the third school of thought, argues that by eliminating *mens rea*, legislatures would be eliminating the stigma and blame which a conviction represents. *Id.* at 186; see WOOTTON, *supra* note 69.

In using the label "*mens rea* approach," this note refers to the middle approach, the liberal interpretation of the *mens rea* doctrine used by Montana. Montana's *mens rea* approach may be

narrow use of the *mens rea* concept.<sup>110</sup> The approach provides that if a defendant produces evidence that the defendant did not have the *mens rea* contained in the criminal statute due to a mental disease or defect, then the defendant may be acquitted.<sup>111</sup>

The differences between Montana's *mens rea* approach and its former insanity defense are significant.<sup>112</sup> Under Montana's former insanity defense, a defendant could concede both the *actus reus* and *mens rea* of a crime and still possibly be acquitted because of a mental disease or defect.<sup>113</sup> For example, if D admits killing V, but D is under the delusion that D was hearing messages to kill V, D could escape conviction by pleading the insanity defense.<sup>114</sup> The particular mental state chosen by the legislature for this type of murder did not alter the outcome for a defendant who raised the insanity defense. The insanity defense essentially surpassed the concepts of *actus reus* and *mens rea* and allowed Montana courts to consider all evidence relevant to insanity.

In place of the affirmative defense of insanity, Montana currently relies only on the specific act and mental state contained in the statutory definition of the crime committed.<sup>115</sup> Montana's *mens rea* approach weighs the defendant's state of mind, an element of the offense that the prosecution is already required to prove.<sup>116</sup> Hence, under Montana's current approach, the voices that D heard before killing V would be irrelevant if the prosecution proved that D committed the murder and that D acted with the particular mental state required

interpreted as "liberal" among abolitionists, but among supporters of the insanity defense it is usually viewed as a very restrictive means by which to prosecute insane defendants. *See, e.g.,* MAEDER, *supra* note 5, at 148; Heinbecker, *supra* note 108, at 185.

110. Montana's *mens rea* approach provides that "[e]vidence that the defendant suffered from a mental disease or defect is admissible to prove that the defendant did or did not have a state of mind that is an element of the offense." MONT. CODE ANN. § 46-14-102 (1993). In Montana, a person is not guilty of an offense unless the person had the mental state of purposely, knowingly, or negligently. MONT. CODE ANN. § 45-2-103(1) (1993). Montana's former insanity defense encompassed the broader use of the *mens rea* concept like an "evil mind," but its current *mens rea* approach does not. One author states that this approach makes crime "morally neutral." Henry T. Miller, *Recent Changes in Criminal Law: The Federal Insanity Defense*, 46 LA. L. REV. 337, 348 (1985).

111. *See supra* note 110.

112. *See infra* notes 115-36 and accompanying text.

113. The traditional insanity defense operates as an excuse. *See generally* DRESSLER, *supra* note 46, at 179-90 (distinguishing between justifications and excuses). Rather than focussing on the offensive act and the requisite state of mind, excuse defenses focus upon the actor and recognize that a wrongdoer may not be morally blamed for committing an act. *Id.*

114. *See, e.g.,* State v. Green, 643 S.W.2d 902, 902 (Tenn. Crim. App. 1982) (finding the defendant's evidence of insanity sufficient where the defendant believed that persons in New York were sending messages to his brain to kill the victim-police officer).

115. *See supra* note 110.

116. *See supra* note 106 and accompanying text.

for the crime of murder.<sup>117</sup> The Montana Supreme Court held that the mere existence of a mental disease or defect in a defendant does not necessarily preclude the defendant from possessing the requisite intent.<sup>118</sup> Since insanity is a broader concept than *mens rea*, a defendant may be clearly insane and be capable of having the requisite state of mind.<sup>119</sup> In short, Montana's *mens rea* approach continues to employ the *actus reus* and *mens rea* elements, but it eliminated a separate, complete acquittal based on evidence of mental disease or defect.<sup>120</sup>

Under the *mens rea* approach, courts may only acquit defendants if the defendants can raise a reasonable doubt that they did not have the requisite *mens rea* while committing a crime.<sup>121</sup> Consequently, defendants may only bring in psychiatric witnesses or evidence to litigate the intent elements of a crime but not to litigate their mental conditions in general.<sup>122</sup> A defendant who raises a reasonable doubt about whether he or she had the requisite *mens rea* due to mental disease or defect must be found "not guilty by reason of mental disease or defect."<sup>123</sup> Conversely, where the prosecution is successful in proving both a defendant's *actus reus* and *mens rea* beyond a reasonable doubt, the defendant must be found guilty.<sup>124</sup>

117. Montana law provides that a person commits the offense of deliberate homicide if the person purposely or knowingly causes the death of another human being. MONT. CODE ANN. § 45-5-102(1)(a) (1993). Thus, even if D was hearing voices to kill V, D may still have acted "purposely" while committing the act. If the prosecution proves the *actus reus* (murdering V) and the *mens rea* (acting purposely or knowingly) beyond a reasonable doubt, then D would be convicted under Montana's *mens rea* approach. See Jeanne Matthews Bender, *After Abolition: The Present State of the Insanity Defense in Montana*, 45 MONT. L. REV. 133, 133 (1984) (stating that under Montana law, John Hinckley could very well have been found guilty, instead of not guilty by reason of insanity).

118. See, e.g., *State v. Byers*, 861 P.2d 860, 865 (Mont. 1993).

119. See, e.g., *State v. Korell*, 690 P.2d 992, 1000 (Mont. 1984).

120. See *supra* note 110 for the text of MONT. CODE ANN. § 46-14-102 (1993).

121. Montana law provides that a defendant may be acquitted if the person did not act purposely, knowingly, or negligently:

Except for deliberate homicide as defined in 45-5-101(1)(b) or an offense which involves absolute liability, a person is not guilty of an offense unless, with respect to each element described by the statute defining the offense, he acts while having one of the mental states described in subsections (33), (37), and (58) of 45-2-101.

MONT. CODE ANN. § 45-2-103(1) (1993).

122. In contrast, the insanity defense distinguishes among defendants on the basis of the severity of their illness. Cobun, *supra* note 66, at 482. Under Montana's approach, even a victim of severe mental illness will fail to create a reasonable doubt as to *mens rea* if the illness does not bear on *mens rea*. *Id.*

123. See *infra* note 271 for the text of MONT. CODE ANN. § 46-14-214 (1993).

124. See *infra* note 272 for the text of MONT. CODE ANN. § 46-14-311 (1993).

Montana's *mens rea* approach has an additional feature since Montana currently uses only a few terms to classify the various states of mind, compared to its former abundance of *mens rea* terms.<sup>125</sup> In 1973, the Montana Legislature narrowed its list of criminal *mens rea* terms to "purposely" and "knowingly."<sup>126</sup> Together, these terms replace the concepts of malice and

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125. Jeff Essman, *A Primer on the Element of Mental State in the Montana Criminal Code of 1973*, 37 MONT. L. REV. 401, 403 n.21 (1976) (providing a sampling of Montana's former *mens rea* terms). The former entanglement of *mens rea* terms in most jurisdictions led Justice Robert Jackson to comment:

The unanimity with which [courts] have adhered to the central thought that wrongdoing must be conscious to be criminal is emphasized by the variety, disparity, and confusion of their definitions of the requisite but elusive mental element. However, courts of various jurisdictions, and for the purposes of different offenses, have devised working formulae, if not scientific ones, for the instruction of juries around such terms as 'felonious intent,' 'criminal intent,' 'malice aforethought,' 'guilty knowledge,' 'fraudulent intent,' 'willfulness,' 'scienter,' to denote guilty knowledge, or 'mens rea,' to signify an evil purpose or mental culpability.

*Morrisette v. United States*, 342 U.S. 246, 252 (1952). Like Montana, the majority of jurisdictions eventually modeled their *mens rea* classification systems after the minimalist approach of the MPC. See *infra* note 143.

126. The Montana Legislature modeled its *mens rea* classification system after the MPC, the 1961 revision of the Illinois Criminal Code, and the 1965 revision of the New York Penal Law. Essman, *supra* note 125, at 402-03. Montana has three mental states which are defined in a hierarchy ranging from the two criminal mental states, "purposely," to "knowingly," and then the mental state in civil cases, "negligently." *Id.* at 403-04. Montana defines its most culpable state of mind as:

'Purposely'—a person acts purposely with respect to a result or to conduct described by a statute defining an offense if it is the person's conscious object to engage in that conduct or to cause that result. When a particular purpose is an element of an offense, the element is established although the purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense. Equivalent terms, such as 'purpose' and 'with the purpose,' have the same meaning.

MONT. CODE ANN. § 45-2-101(58) (1993).

In addition to "purposely," "knowingly" is the other criminal state of mind in Montana:

'Knowingly'—a person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when the person is aware of the person's own conduct or that the circumstances exists. A person acts knowingly with respect to the result of conduct described by a statute defining an offense when the person is aware that it is highly probable that the result will be caused by the person's conduct. When knowledge of the existence of a particular fact is an element of an offense, knowledge is established if a person is aware of a high probability of its existence. Equivalent terms, such as 'knowing' or 'with knowledge,' have the same meaning.

MONT. CODE ANN. § 45-2-101(33) (1993).

For civil cases, the following state of mind is generally employed:

'Negligently'—a person acts negligently with respect to a result or to a circumstance described by a statute defining an offense when the person consciously disregards a risk that the result will occur or that the circumstance exists or when the person disregards a risk of which the person should be aware that the result will occur or that the circumstance exists. The risk must be of a nature and degree that to disregard it involves a gross deviation from the standard of conduct that a reasonable person would

intent espoused by the broad concept of *mens rea*.<sup>127</sup> Since all testimony relevant to mental disease or defect must be channeled into these two *mens rea* terms,<sup>128</sup> consolidating evidence of mental illness under Montana's narrow concept of *mens rea* is a difficult task for both experts and juries.<sup>129</sup> Although

observe in the actor's situation. 'Gross deviation' means a deviation that is considerably greater than lack of ordinary care. Relevant terms such as 'negligent' and 'with negligence,' have the same meaning.

MONT. CODE ANN. §45-2-101(37) (1993). Montana's definitions of "purposely" and "knowingly" closely parallel the MPC provisions, but the definition of "negligently" incorporates both the MPC definitions of "negligently" and "recklessly." In comparison, the MPC definitions are as follows:

(c) *Recklessly*. A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

(d) *Negligently*. A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

MODEL PENAL CODE § 2.02(2) (1962). The significance of Montana's coupling of the two usually separate terms is that Montana's definition of "negligently" more closely resembles the MPC's definition of "reckless." The difference highlighted by the MPC between inattentiveness (negligence) and indifference (recklessness) is not recognized by Montana. See generally David M. Treiman, *Recklessness and the Model Penal Code*, 9 AM. J. CRIM. L. 281 (1981) (surveying the various state modifications to the MPC definitions).

127. *State v. Sigler*, 688 P.2d 749, 754 (Mont. 1984). Montana's new criminal code eliminated all references to malice, employing three more precisely-defined mental states instead. See MONT. CODE ANN. § 45-5-102 (1993) (Compiler's Comments). At least one defendant has challenged the conclusion that Montana's three mental states could constitutionally replace the broader usage of *mens rea*. *State v. Beach*, 705 P.2d 94 (Mont. 1985). The defendant in *Beach* argued that due process required that his deliberate homicide conviction be based on a specific finding of scienter. *Id.* at 107. The Montana Supreme Court held that the statutory elements of "purposely or knowingly" define the crime with sufficient specificity to obviate any claim of unconstitutional vagueness. *Id.*

128. *Essman*, *supra* note 125, at 403-05. The three mental states are defined in relation to four objectively measurable conditions: conduct, circumstances, facts and result. *Id.* at 404.

129. See *infra* section IV.B, notes 203-65 and accompanying text. See also Cobun, *supra* note 66, at 480. The difficulties primarily occur with defendants' claims of temporary or episodic insanity, rather than with claims of a general or persistent state of insanity. A defendant claiming temporary insanity may be especially incapable of disproving the requisite state of mind because the defendant appears sane at trial. Consider the sixteenth century observation of a noted Dutch humanist:

I hardly know whether anyone at all can be found from the whole sum of mortals who is always impeccably wise and who is not subject to some kind of madness. The real difference is only this: the man who sees a cucumber and thinks it is a woman is labeled mad because this happens very rarely.

DESIDERIUS ERASMUS, *THE PRAISE OF FOLLY* 59-60 (Clarence H. Miller trans., 1979). During the



the Montana Supreme Court claims that the *mens rea* approach actually lowers a defendant's burden because a defendant only has to cast a reasonable doubt as to his or her state of mind,<sup>130</sup> few defendants succeed in meeting this burden. In fact, since the bill was passed in 1979, only one percent of the defendants claiming a mental disease or defect have been successful with a *mens rea* defense.<sup>131</sup> Thus, compared to the former insanity defense which encompassed *mens rea*, Montana's *mens rea* approach alone is very restrictive in deciding the culpability of an insane defendant.<sup>132</sup>

To counter this restrictiveness, Keedy's 1979 bill also included sentencing provisions from another pending bill.<sup>133</sup> The sentencing provisions compel a judge to consider the evidence of a mental disease or defect presented during the trial, as well as any other evidence, in determining a defendant's sentence.<sup>134</sup> The standard which a judge uses in considering this evidence is the test for insanity which the legislature repealed in the same 1979 bill.<sup>135</sup> Thus, the judge will decide at sentencing whether a defendant could appreciate or conform his or her actions.<sup>136</sup>

In summary, Representative Keedy filed a bill over fifteen years ago to change some rules of the game<sup>137</sup> and to eradicate the perceived abuses of the

hearings on Representative Keedy's bill, Senator S. A. Olson questioned whether the courts recognize temporary insanity. *Abolition of Mental Disease as a Defense: Hearings on H.B. 877 Before the Senate Judiciary Committee*, 46th Mont. Leg. 5 (Mar. 19, 1979) [hereinafter *Senate Hearings*]. Senator Jean Turnage replied that "it is pretty much abrogated by the new criminal code." *Id.*

130. *State v. Korell*, 690 P.2d 992, 1000 (Mont. 1984). See Bender, *supra* note 117, at 141.

131. STEADMAN ET AL., *supra* note 22, at 129.

132. Cobun, *supra* note 66, at 480-82 (concluding that use of the *mens rea* element to identify defendants who merit special treatment due to mental illness is inadequate).

133. Senate Bill 495, sponsored by Senator Thomas E. Towe, contained sentencing provisions which were included in the passage of Keedy's bill. *Senate Hearings*, *supra* note 129, at 4.

134. See *infra* note 272 for the text of MONT. CODE ANN. § 46-14-311 (1993), enacted by H.B. 877, 46th Leg., 1979 Mont. Laws.

135. The sentencing judge employs the language of section one of Montana's former insanity test which stated that a person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect the person is unable either to appreciate the criminality of the person's conduct or to conform the person's conduct to the requirements of the law. MONT. CODE ANN. § 46-14-101 (1978). See *supra* note 87 and accompanying text.

136. See *infra* notes 272 and 279.

137. Thomas Szasz, a leading abolitionist, prefaced one of his books with the following quote:

The game must go on: that is Nature's command. But it is up to man to determine the ground rules and the teams. The determination of the rules is principally the responsibility of the specialist in ethics. The delineation of the teams — well, that is a task for which many disciples are needed.

MYTH, *supra* note 4 (quoting GARRETT HARDIN, NATURE AND MAN'S FATE 318 (1959)). Szasz uses the analogy of a game throughout his book.

insanity defense.<sup>138</sup> The 1979 bill eliminated the insanity defense, modified the insanity test, and implemented a new sentencing procedure.<sup>139</sup> The changes enacted by the 1979 bill also resulted in the alteration of several preexisting rules: namely, the remaining definition of "mental disease or defect"<sup>140</sup> and the use of *mens rea*.<sup>141</sup> Since half of the states employ both the two-part insanity test of the Model Penal Code<sup>142</sup> and the minimal classification system of *mens rea* terms,<sup>143</sup> the preceding analysis suggests to state legislatures that a more careful approach is necessary to effectively reform the insanity defense. Without such careful reconciliation of related statutes and issues, a state may merely recreate the insanity defense in a new, burdensome form.<sup>144</sup> However, such a recreation of the insanity defense is not an "abolition" because evidence of mental disease or defect continues to be a basis for acquittal to a crime.<sup>145</sup>

138. See *supra* notes 76-81 and accompanying text.

139. See *supra* note 78.

140. See *supra* notes 82-98 and accompanying text.

141. See *supra* notes 102-32 and accompanying text.

142. Steury, *supra* note 6, at 355 n.11. In 1985, 25 of the 50 states had some form of the MPC insanity test. McGinley & Pasewark, *supra* note 8, at 208.

143. The *mens rea* proposals of the MPC had considerable influence on criminal law reform. "Since the drafting of the Model Penal Code, nearly three-fourths of the states have revised their criminal codes. Recognizing the value of the Code's culpability structure, approximately seventy percent of those states . . . have adopted an essentially identical system." Paul H. Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 HASTINGS L.J. 815, 815-16 (1980). In addition to Montana, those states with a limited number of culpability terms include: ALA. CODE § 13A-2-2 (1994); ALASKA STAT. § 11.81.900(a) (1994); ARIZ. REV. STAT. ANN. § 13-203 (1994); ARK. CODE ANN. § 5-2-202 (MICHIE 1994); COLO. REV. STAT. § 18-1-501 (1994); CONN. GEN. STAT. ANN. § 53a-3(11)-(14) (WEST 1992); DEL. CODE ANN. tit. 11, § 231 (1994); HAW. REV. STAT. § 702-206 (1994); IDAHO CODE § 18-101 (1994); 720 ILCS 5/4-4 (1994); IND. CODE ANN. § 35-41-2-2 (Burns 1994); KAN. STAT. ANN. § 21-3201 (1994); KY. REV. STAT. ANN. § 501.020 (Baldwin 1994); LA. REV. STAT. ANN. §§ 14: 11-12 (West 1994); ME. REV. STAT. ANN. tit. 17-A, § 35 (West 1994); MINN. STAT. § 609.02 (subd. 9) (1994); MO. REV. STAT. § 562.016 (1994); NEV. REV. STAT. § 193.017-.018 (Michie 1993); N.H. REV. STAT. ANN. § 626: 2(II) (1994); N.J. STAT. ANN. § 2C: 2-2(b) (West 1994); N.Y. PENAL LAW § 15.05 (Consol. 1994); N.D. CENT. CODE § 12.1-02-02 (1993); OHIO REV. CODE ANN. § 2901.22 (Baldwin 1994); OR. REV. STAT. § 161.085(7)-(10) (1994); 18 PA. CONS. STAT. § 302(b) (1994); S.D. CODIFIED LAWS ANN. § 22-1-2(1)(a)-(e) (1994); TEX. PENAL CODE ANN. § 6.03 (West 1995); UTAH CODE ANN. § 76-2-101 (1994); WASH. REV. CODE ANN. § 9A.08.010(1) (West 1994); WIS. STAT. ANN. § 939.23 (West 1994); WYO. STAT. § 6-1-104(iii),(ix) (1994). See Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L.REV. 681, 705-19 (1983) (criticizing the MPC provisions on *mens rea* because they fail to make a sufficient number of distinctions).

144. KEILITZ & FULTON, *supra* note 26, at 47. However, the authors note that too much emphasis has been placed on substantive changes than on practical changes, such as prevention or treatment of crime. *Id.*

145. See *supra* note 20 and accompanying text.

#### IV. THREE OPPORTUNITIES TO INTRODUCE EVIDENCE OF MENTAL DISEASE OR DEFECT

The Montana Code presently contains three avenues by which a defendant may introduce evidence of a mental disease or defect: the incompetency process,<sup>146</sup> proof of *mens rea* at trial,<sup>147</sup> and sentencing.<sup>148</sup> Since without such opportunities the abolition would be unconstitutional, providing defendants with three opportunities to introduce evidence of mental disease or defect appears to demonstrate the success of abolishing the insanity defense.<sup>149</sup> However, the unique use of the incompetency process, the far-reaching role of psychiatrists at trial, and the sentencing of defendants with mental disease or defects to prison are not indicative of success.

##### A. *Introducing Evidence of Mental Disease or Defect Before Trial: The Loophole*<sup>150</sup>

The first opportunity where a defendant can introduce evidence of a mental disease or defect occurs before a trial even takes place. When a defendant is unable to understand the trial proceedings or assist in his or her defense because of a mental disease or defect, courts may not try, convict, or sentence the defendant for the commission of the offense while the incapacity endures.<sup>151</sup> To proceed to trial, the defendant must be able to consult with an attorney with a reasonable degree of rational understanding.<sup>152</sup> The defendant must also

146. See *infra* section IV.A, notes 150-202 and accompanying text.

147. See *infra* section IV.B, notes 203-65 and accompanying text.

148. See *infra* section IV.C, notes 266-318 and accompanying text.

149. Some would argue that by not providing defendants with opportunities to introduce evidence of mental disease or defect, the abolition would be unconstitutional. For example, Louisiana, Washington, and Mississippi's attempts to abolish the insanity defense were struck down because they did not offer defendants the opportunity to introduce evidence of mental disease or defect pertaining to *mens rea*. See *supra* notes 4 and 107. See also *State v. Byers*, 861 P.2d 860, 866 (Mont. 1993) (claiming that considering a defendant's condition three times is "progressive" and protects both the defendant and the public).

150. Former Representative Michael H. Keedy, who introduced the bill in 1979 to abolish Montana's insanity defense, stated that "[a]s defense counsel awakened to the fact that they could not raise the traditional insanity defense, they swung to the incompetency process as an 'escape hatch.'" Keedy, *supra* note 8.

151. MONT. CODE ANN. § 46-14-103 (1993) provides that a "person who, as a result of mental disease or defect, is unable to understand the proceedings against the person or to assist in the person's own defense may not be tried, convicted, or sentenced for the commission of an offense so long as the incapacity endures."

152. *State v. Austad*, 641 P.2d 1373, 1378 (Mont. 1982) (citing *Dusky v. United States*, 362 U.S. 402, 403 (1960)). In *Dusky*, the Supreme Court stated that the incompetency test must be whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding — and whether he has a rational as well as factual understanding of the proceedings against him." *Id.*

have a rational and factual understanding of the proceedings.<sup>153</sup> At this stage, evidence of a mental disease or defect which existed at the time of the defendant's crime is irrelevant since a defendant's competency is a question separate from a defendant's guilt.<sup>154</sup> Instead, the relevant issue is whether the defendant suffers from a mental disease or defect at the time of the trial.<sup>155</sup>

The incapacity to proceed to trial is decided either at a hearing in front of a judge<sup>156</sup> or by an examination of the defendant if one is requested.<sup>157</sup> For purposes of such an examination, a defendant may be committed to any suitable

153. *Austad*, 641 P.2d at 1378.

154. The former incompetency statute used the term "insanity," but case law interpreted "insanity" at this pre-trial stage as being unable to understand the proceedings or assist in the defense, the language currently used in the statute. MONT. CODE ANN. § 46-14-103 (1993) (Comments). A defendant's state of mind prior to trial and at the time of the crime are two different inquiries. See generally DRESSLER, *supra* note 46, at 289-93 (explaining the procedural context of the insanity defense).

155. See *supra* note 154.

156. There is no jury present to hear the evidence of incompetency. The Criminal Law Commission states that this competency process "adopts the growing minority proposition of excluding a jury trial on the issue of fitness to proceed," but the Commission does not supply its reasoning for meeting this proposition. MONT. CODE ANN. § 46-14-221 (1993) (Comments). Attacks on competency statutes on the ground that the right to a jury trial has been infringed have been unsuccessful nationwide. See generally Annotation, *Validity and Construction of Statutes Providing for Psychiatric Examination of Accused to Determine Mental Condition*, 32 A.L.R. 2d 434 (1971).

157. Examination of the defendant results in a report which may be used at the defendant's competency hearing and sentencing hearing:

- (1) A report of the examination must include the following:
  - (a) a description of the nature of the examination;
  - (b) a diagnosis of the mental condition of the defendant, including an opinion as to whether the defendant is seriously mentally ill, as defined in 53-21-102, or is seriously developmentally disabled, as defined in 53-20-102;
  - (c) if the defendant suffers from a mental disease or defect, an opinion as to the defendant's capacity to understand the proceedings against the defendant and to assist in the defendant's own defense;
  - (d) when directed by the court, an opinion as to the capacity of the defendant, because of a mental disease or defect, to have a particular state of mind that is an element of the offense charged; and
  - (e) when directed by the court, an opinion as to the capacity of the defendant to appreciate the criminality of the defendant's behavior or to conform the defendant's behavior to the requirement of the law.
- (2) If the examination cannot be conducted by reason of the unwillingness of the defendant to participate in the examination, the report must state that fact and must include, if possible, an opinion as to whether the unwillingness of the defendant was the result of mental disease or defect.

MONT. CODE ANN. § 46-14-206 (1993).

facility for a period not exceeding sixty days,<sup>158</sup> and the trial court must hold a competency hearing within ninety days.<sup>159</sup> If the court uses the examiner's report to determine a defendant's fitness to proceed to trial, the defendant may cross-examine the experts who conducted the examination.<sup>160</sup> Although the defendant may also offer any other evidence on the question of his or her competency, expert testimony is the crucial element of such hearings.<sup>161</sup> If the judge decides that the defendant is competent, then the defendant proceeds to trial. If the judge decides that the defendant is not able to regain competency within the reasonably foreseeable future, the judge may either dismiss or defer the charges against the defendant.<sup>162</sup> The judge may then either release such defendants to society or hospitalize them under Montana's civil commitment procedure.<sup>163</sup> If the judge hospitalizes a defendant and the incapacity cures within a reasonable time from the commitment, then the defendant proceeds to

158. Montana courts have judicially established that a suitable facility in which to examine the defendant includes the Montana State Prison. *See, e.g.*, *State v. Buckman*, 630 P.2d 743, 746 (Mont. 1981). The following procedures must be observed in the examination of a defendant:

- (1) If the defendant or the defendant's counsel files a written motion requesting an examination or if the issue of the defendant's fitness to proceed is raised by the district court, prosecution, or defense counsel, the district court shall appoint at least one qualified psychiatrist or licensed clinical psychologist or shall request the superintendent of the Montana state hospital to designate at least one qualified psychiatrist or licensed clinical psychologist, which designation may be or include the superintendent, to examine and report upon the defendant's mental condition.
- (2) The court may order the defendant to be committed to a hospital or other suitable facility for the purpose of the examination for a period not exceeding 60 days or a longer period as the court determines to be necessary for the purpose and may direct that a qualified psychiatrist or licensed clinical psychologist retained by the defendant be permitted to witness and participate in the examination.
- (3) In the examination, any method may be employed that is accepted by the medical or psychological profession for the examination of those alleged to be suffering from mental disease or defect.
- (4) If the defendant is indigent or the examination occurs at the request of the prosecution, the cost of the examination must be paid by the county or the state, or both, according to procedures under 3-5-902(1).

MONT. CODE ANN. § 46-14-202 (1993).

159. MONT. CODE ANN. § 46-14-221(2) (1993). *See Jackson v. Indiana*, 406 U.S. 715, 731 (1972) (holding that due process is violated when a criminal defendant is committed indefinitely solely on the basis of his or her incompetency to stand trial).

160. MONT. CODE ANN. § 46-14-221(1) (1993) states in part that "[i]f the report is received in evidence upon the hearing, the parties have the right to subpoena and cross-examine the psychiatrists or licensed clinical psychologists who joined in the report and to offer evidence upon the issue."

161. Michael L. Perlin, *Pretexts and Mental Disability Law: The Case of Competency*, 47 U. MIAMI L. REV. 625, 640 (1993).

162. MONT. CODE ANN. § 46-14-221(2) (1993). *See also* MONT. CODE ANN. § 46-14-222 (1993) (stating the proceedings to be followed if fitness is regained).

163. *See infra* note 172 and accompanying text. *See also* STEADMAN ET AL., *supra* note 22, at 134.

trial.<sup>164</sup> While this is a universally accepted process for determining fitness to proceed to trial,<sup>165</sup> the use of this process in Montana after 1979 may be surprising.<sup>166</sup>

Since Montana eliminated its insanity defense, more defendants claiming mental disease or defect are exiting the criminal justice system at this pretrial stage of the litigation process.<sup>167</sup> Before 1979, approximately twenty-four percent of those defendants whose incapacities were not cured had their cases dismissed.<sup>168</sup> After 1979, an overwhelming seventy-five percent of defendants with persistent incapacities had their cases dismissed.<sup>169</sup> Thus, the number of

164. The Montana Code frequently uses the term "cured" in reference to the mental state of a defendant. Specifically, the following statute governs how a court is to proceed if a defendant regains his or her fitness:

When the court, on its own motion or upon the application of the director of the department of corrections and human services, the prosecution, or the defendant or the defendant's legal representative, determines, after a hearing if a hearing is requested, that the defendant has regained fitness to proceed, the proceeding must be resumed. If, however, the court is of the view that so much time has elapsed since the commitment of the defendant that it would be unjust to resume the criminal proceedings, the court may dismiss the charge and may order the defendant to be discharged or, subject to the law governing the civil commitment of persons suffering from serious mental illness, order the defendant committed to an appropriate institution of the department of corrections and human services.

MONT. CODE ANN. § 46-14-222 (1993). Recovery from a mental disease or defect may seem like a bewildering prospect, but many mental disorders can go into remission or vanish altogether with the help of modern therapies and medications. MAEDER, *supra* note 5, at 169. Michael Perlin points out that:

[C]ompetency is not a 'fixed state.' A person may at the same time be competent for some legal purposes and incompetent for others. Incompetency and mental illness are not identical states. As the Supreme Court of Washington noted, 'the mere fact that an individual is mentally ill does not also mean that the person so affected is incapable of making a rational choice with respect to his or her need for treatment.' Even if a person is found incompetent to stand trial, it does not mean that she is incompetent to function in society.

Perlin, *supra* note 161, at 673.

165. MONT. CODE ANN. § 46-14-103 (1993) (Comments). The source of Montana's incompetency process is the MODEL PENAL CODE §§ 4.04-.06 (1962).

166. See, e.g., Stephanie C. Stimpson, Note, *State v. Cowan: The Consequences of Montana's Abolition of the Insanity Defense*, 55 MONT. L. REV. 503, 520-20 (1994) ("[D]eterminations of incompetence only rarely occur because the statutory language requires that the defendant cannot understand the charge against the defendant or assist in the defendant's own defense, not merely that the person suffers from a mental illness.").

167. Henry J. Steadman et al., *Maintenance of an Insanity Defense Under Montana's "Abolition" of the Insanity Defense*, 146 AM. J. PSYCH. 357, 360 (1989).

168. *Id.* at 359.

169. *Id.* Steadman's finding that 75% of defendants are found incompetent comports with Professor's Crowley's view that "usually the defendant is never found able to stand for trial," and that the "truly mentally-disturbed person is filtered out at the beginning." Crowley, *supra* note 3. Professor Crowley further stated that he had "a deep and basic mistrust of statistics." *Id.*

cases which were dismissed based on defendants' incompetency tripled since Montana's reform of the insanity defense. Before the legislative reform, most of these defendants would have proceeded to trial, gained acquittal under Montana's former insanity defense, and entered a hospital.<sup>170</sup> Thus, one result of reforming the insanity defense has been fewer hospitalizations and a greater number of releases of the same class of potentially dangerous people.<sup>171</sup>

Of course, not all defendants with dismissed charges avoid hospitalization because some of them may still be committed to the Montana State Hospital under the civil commitment procedure.<sup>172</sup> A post-1979 defendant with dismissed charges may be committed in the same manner as a pre-1979 defendant who went completely through the trial process under Montana's former insanity test.<sup>173</sup> Since Montana has only one state mental hospital, a defendant before Montana's 1979 reform and a defendant after the reform may actually reside in the same facility.<sup>174</sup> In summary, fewer defendants enter hospitals because fewer are found not guilty by reason of mental disease or defect. Those who are hospitalized stay as long as, and in the same facility as, those hospitalized before the reform.

Many reasons could account for these results since evidence of mental disease or defect is routinely subject to subversion in both the pretrial and trial setting.<sup>175</sup> For example, courts must consider fears of malingering,

170. Steadman et al., *supra* note 167, at 359. See *supra* notes 113-14 and accompanying text.

171. Steadman et al., *supra* note 167, at 359. One Idaho attorney supplied the following description of Idaho's incompetency process:

The new tactic of defense attorneys in our jurisdiction is to challenge an individual's ability to aid his attorney in the preparation of his own defense. If successful in that endeavor the defendant may never have to be tried under our statutory scheme. Thus, our 'abolition' has shifted the emphasis from asserting the defense during the trial to pre-trial. Although the standards are different, it doesn't appear to be as difficult to have an individual certified to not be able to assist his attorney in preparation of his own defense as it would be to challenge the intent aspect of a particular crime.

Geis & Meier, *supra* note 8, at 79-80.

172. Treatment of the seriously mentally ill who are civilly committed is governed by MONT. CODE ANN. §§ 53-21-101 through 53-21-603 (1993).

173. STEADMAN ET AL., *supra* note 22, at 130.

174. Since pre- and post-1979 defendants with different procedural postures could reside in Montana's one state mental hospital, formerly called Warm Springs Hospital, the legislators in 1979 questioned the burden which the law would likely impose on the system. *Senate Hearings, supra* note 129, at 4 (statement of Senator Jesse O'Hara). Senator Towe, whose bill provided the sentencing provisions for Keedy's bill, stated that "these people are going there now." *Id.* He further stated that he did not know whether the present situation works any better, but the new provisions give "a far better approach." *Id.*

175. See, e.g., Perlin, *supra* note 161, at 629 ("[E]xperts frequently testify according to their own self-referential concepts of 'morality,' and openly subvert statutory and case law criteria that impose rigorous behavioral standards as predicates for commitment or that articulate functional

misinformed, or prejudicial expert testimony, and the broadly-interpreted standard of incompetency.<sup>176</sup> However, the increase in the number of defendants whom courts found incompetent is uniquely tied to the year during which Montana's *mens rea* approach became effective.<sup>177</sup> The reason may be that post-1979 Montana judges have had an additional consideration: that the defendants before them will not have the insanity defense available if they proceed to trial.<sup>178</sup> Moreover, Montana's *mens rea* approach may influence other parties in the trial process. Defense counsel may use the incompetency process as leverage in plea bargaining sessions.<sup>179</sup> Conversely, prosecutors may use the process as a way to remove defendants from society in cases which are weak or in cases where defendants need to be detained.<sup>180</sup> Thus, Montana's increased number of defendants found incompetent may stem from its current statutory process of trying insane defendants.<sup>181</sup>

standards as prerequisites for an incompetent to stand trial finding.").

176. *Id.* at 643, 656.

177. Former Representative Michael H. Keedy stated that using the incompetency process to usher defendants out of the system earlier was "not a stated legislative objective, but one could certainly foretell that this approach to incompetency might be added to a defendant's arsenal in response to the insanity defense door closing." Keedy, *supra* note 8.

178. See *supra* notes 107-36 and accompanying text.

179. Perlin, *supra* note 161, at 656.

180. MAEDER, *supra* note 5, at 119.

181. See *supra* note 150. Both Professors Cotter and Crowley spoke of the use of the incompetency process as a loophole for insane defendants which was planned by the Montana Legislature. Crowley, *supra* note 3; Cotter, *supra* note 26. "If you're truly insane," said Professor Cotter, "you will be found incompetent to stand trial." Cotter, *supra* note 26. Similarly, Michael Perlin states that "there can be no doubt that insanity defense 'law reform agendas' have been animated by one and only one significant motivation: to lessen the number of criminal defendants—the non-'truly crazy'—who can avail themselves of a non-responsibility defense, and, simultaneously, to increase the number of convictions and insure longer and more punitive terms of imprisonment." PERLIN, *supra* note 5, at 138.

Using the incompetency process as a loophole for insane defendants is more than a temporary remedy since Montana's *mens rea* approach is over 15 years old. In fact, such a proposition was posited years ago:

Moreover, there are signs that [questions about insanity before indictment] are becoming more important than the tests of criminal irresponsibility themselves; for judges and district attorneys are beginning to agree with psychiatrists that it is more efficient, economical, and humane to sort out, *before trial*, those accused persons who are mentally abnormal, than to subject such persons to the ordeal of a trial only to be compelled to transfer them, early in their prison service, to some hospital for the mentally ill.

GLUECK, *supra* note 48, at 47. Glueck concludes his book by setting forth his proposal that "psychopathic clinics [be] attached to magistrates', district or municipal courts" for "sorting out the mentally unsound offender before trial." *Id.* at 472.



Other state legislatures cannot assume that after eliminating one portion of the state insanity laws, the remainder of the trial process will remain the same.<sup>182</sup> One reason Montana's particular incompetency process could be easily used as a loophole is that the functions which a defendant will need to perform at trial are ill-defined.<sup>183</sup> Parties may too easily manipulate whether the defendant possesses sufficient ability to consult with a lawyer or a rational and factual understanding of the proceedings.

For example, in *State v. Statczar*,<sup>184</sup> testimony at the defendant's competency hearing revealed that he had severe learning disabilities and additional brain damage from an earlier accident.<sup>185</sup> In the first competency hearing, the court found the defendant unfit to proceed to trial based on the testimony of two psychiatrists.<sup>186</sup> In a second competency hearing, the court found the defendant fit to proceed to trial.<sup>187</sup> Presumably, the defendant's condition had not changed since his disabilities were continuing disabilities.<sup>188</sup> The only item that changed between the first hearing and the second was the addition of a third psychiatrist who testified that the defendant was competent to stand trial.<sup>189</sup> Competency hearings performed in this manner discredit their underlying purpose, which is to avoid the injustice of an incompetent defendant proceeding to trial.<sup>190</sup> Moreover, competency hearings like the ones in the preceding case may result in the unnecessary commitments of defendants.<sup>191</sup>

182. MAEDER, *supra* note 5, at 152.

183. See *supra* note 157 for the text of MONT. CODE ANN. § 46-14-206(1)(c) (1993). See also Paul S. Appelbaum, M.D. & Thomas Grisso, Ph.D., *Assessing Patients' Capacities to Consent to Treatment*, 319 NEW ENG. J. MED. 1635 (1988) (providing a helpful discussion about the legal standards for competence from a clinical examiner's point of view).

184. 743 P.2d 606 (Mont. 1987).

185. *Id.* at 609-10.

186. *Id.* at 609. When asked what the judge's role is at trial, the defendant responded, "[t]he judge is to wear a black robe and sit in front of the courtroom." *Id.* Moreover, the defendant had offered three different and conflicting alibi statements for the charges against him. *Id.*

187. *Id.*

188. But see *supra* note 164.

189. *State v. Statczar*, 743 P.2d 606, 610 (Mont. 1987).

190. See *supra* notes 151-53 and accompanying text.

191. Perlin, *supra* note 161, at 657. For example, in *Curtis v. District Court*, 879 P.2d 1164 (Mont. 1994), the cases of two defendants were consolidated: the first defendant had been committed to the state hospital for a period twice as long as permitted by the statute without further court review; the second defendant had been committed for approximately six months since the court order. *Id.* at 1168. Recent studies have found that incompetent defendants remain hospitalized for an average length of two to three years, and in some instances considerably longer. Bruce J. Winick, *Incompetency to Stand Trial: An Assessment of Costs and Benefits, and a Proposal for Reform*, 39 RUTGERS L. REV. 243, 249 (1987) (proposing that defendants who wish to stand trial or plead guilty notwithstanding their impaired capacity may waive the competency process).

Some view this use of the incompetency process, planned or unplanned by a legislature, as entirely appropriate.<sup>192</sup> The underlying assumption of this position is that insane people will always exist, people who the system is unwilling to examine and sentence at trial because it would be unjust.<sup>193</sup> In cases where the insanity defense is unavailable, the moral impulse to consider mental illness in determining culpability occurs in the incompetency process instead.<sup>194</sup> In the event insane people could not escape a restrictive state statute through the incompetency process, then the system would devise another loophole through which mentally ill defendants could avoid trial.<sup>195</sup> Still, others take a practical view of this role for the incompetency process, finding that it is a positive consequence of the state's abolition of the insanity defense.<sup>196</sup> A pretrial determination is presumably a more appropriate forum for determining a defendant's mental disease or defect since it is less costly and less time-consuming than the trial process; plus, at least in Montana, the process evidently results in the same disposition of defendants.<sup>197</sup>

These two views of the incompetency process are not mutually exclusive. However, the counter-argument to ushering defendants out of the system through pretrial determinations is that the incompetency process may unjustly deprive a

192. See, e.g., Miller, *supra* note 110, at 342-43; Cobun, *supra* note 66, at 478.

193. See *supra* notes 151-53 and accompanying text. State v. Austad, 641 P.2d 1373 (Mont. 1982), is one example where a defendant with a mental disease or defect may have been unjustly allowed to stand trial. In *Austad*, the defendant suffered injuries from a car accident as a result of his high speed flight from police. *Id.* at 1376. After being comatose for weeks, the defendant suffered injuries including amnesia, some paralysis and muscle weakness, a speech impairment which made his speech slow and difficult to understand, *id.* at 1376, and cerebral palsy, *id.* at 1379, which confined the defendant to a wheelchair, *id.* at 1389. Several physicians agreed that the defendant was not feigning his amnesia, stating that the defendant did not remember the day of the crime and was not able to testify as to his state of mind on that day. *Id.* at 1378. The court did not question the defendant's impairments. *Id.* at 1379. However, the court found that the defendant met the requirements of the *Dusky* test. *Id.* at 1378; see *supra* note 152. Moreover, the court in *Austad* stated that the bulk of the prosecution's case against the defendant consisted of strong physical and circumstantial evidence. *Austad*, 641 P.2d at 1378-79. The defendant subsequently proceeded to trial and was given a life sentence plus 120 years in the Montana State Prison based on his status as a dangerous offender. *Id.* at 1390.

194. Cobun, *supra* note 66, at 478.

195. Thomas Maeder provides some examples of other ways a harsh law could be avoided: Alternatively, courts and attorneys will develop new procedural methods to achieve what is seen as a just result in spite of the law, whether by dismissing charges, negotiating pleas, or as has already been happening in Montana, by simply agreeing, without contest, that due to mental illness, the defendant lacked the requisite intent and was therefore legally insane.

MAEDER, *supra* note 5, at 164.

196. Steadman et al., *supra* note 167, at 360.

197. *Id.* See also GLUECK, *supra* note 48, at 47-53.

defendant of the constitutional right to a trial.<sup>198</sup> Therefore, compelling evidence is necessary to show that the incompetency process has operated in a defendant's best interests. At the very least, a test for incompetency should consider exactly what functions a particular trial will require a defendant to perform.<sup>199</sup> A broad standard like "ability to consult with a lawyer" may overlook, for instance, whether a particular defendant will be pleading guilty or testifying at trial.<sup>200</sup>

Since the defendants who are found incompetent may never proceed to trial, case law would not reveal this unique use of the incompetency process in Montana. Indeed, the outcome of Montana cases seem to indicate that due to the lack of acquittals by reason of mental disease or defect, courts are sending most defendants to prison.<sup>201</sup> Consequently, a state interested in relying on the *mens rea* approach should examine its statutes for similar pretrial loopholes which are easily overlooked or are inadequate to accommodate reform of the insanity defense.<sup>202</sup> Of course, states also need to consider the predicament of those defendants who will proceed to trial under a newly enacted approach.

#### *B. Introducing Evidence of Mental Disease or Defect at Trial: The Challenges*

The defendant who is found competent to stand trial, either initially or after an incapacity cures, may have a second opportunity to present evidence of a mental disease or defect at trial.<sup>203</sup> The defendant can attempt to prove that he or she suffered from a mental disease or defect at the time the crime was committed, mitigating the prosecution's evidence of the defendant's requisite

198. The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and the cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend VI.

199. Perlin, *supra* note 161, at 657-58. *See infra* note 283.

200. *See supra* notes 157 and 193.

201. *See supra* notes 167-71 and accompanying text.

202. For example, plea bargaining is the chief vehicle for disposing of most cases involving the insanity defense. MYTH, *supra* note 4, at 23. Plea bargaining could constitute a "loophole" through which defendants of other states slip through the system and never encounter newly-enacted insanity laws. *See, e.g.*, Smith & Hall, *supra* note 6, at 94 (finding that 90% of defendants found not guilty by reason of insanity were adjudicated in nonjury trials, often through a quasi-plea bargaining process).

203. "Evidence that the defendant suffered from a mental disease or defect is admissible to prove that the defendant did or did not have a state of mind that is an element of the offense." MONT. CODE ANN. § 46-14-102 (1993).

*mens rea*.<sup>204</sup> The defendant may not litigate his or her mental condition in general, but may only bring in psychiatric witnesses or evidence to produce a reasonable doubt as to the intent elements of the crime.<sup>205</sup> Moreover, defendants must channel all testimony or evidence which is relevant to the defendant's intent at the time of the crime into Montana's criminal *mens rea* terms, "purposely" or "knowingly."<sup>206</sup>

Since 1979, defendants have challenged the restrictiveness which Montana's *mens rea* approach imposes on the presentation of their evidence of mental disease or defect at trial. Primarily, defendants attempted four challenges based on the right to plead insanity,<sup>207</sup> the existence of an unconstitutional conclusive presumption,<sup>208</sup> the narrow interpretation of the "voluntary act" requirement,<sup>209</sup> and the right to a jury trial.<sup>210</sup> First, defendants tried to persuade the Montana Supreme Court that the legislature's abolition of the insanity defense violates a defendant's due process rights because the insanity defense is an essential part of the system of ordered liberty and should occupy status as a fundamental right.<sup>211</sup> Defendants argued that the existence of a mental disease or defect impacts more than the *mens rea* issue.<sup>212</sup>

204. The relevant time for the evidence of mental disease or defect is not the time of the trial, as in the incompetency process. A defendant's state of mind prior to trial and at the time of the crime are two different inquiries. See *supra* note 154.

205. See *supra* notes 121-24 and accompanying text.

206. See *supra* notes 125-29 and accompanying text.

207. See *infra* notes 211-15 and accompanying text.

208. See *infra* notes 216-26 and accompanying text.

209. See *infra* notes 227-36 and accompanying text.

210. See *infra* notes 237-50 and accompanying text.

211. See, e.g., *State v. Byers*, 861 P.2d 860, 866 (Mont. 1993); *State v. Korell*, 690 P.2d 992, 998-99 (Mont. 1984). See also *Palko v. Connecticut*, 302 U.S. 319, 324-25 (1937) (taking notice of those rights which "have been found to be implicit in the concept of ordered liberty [such that] a fair and enlightened system of justice would be impossible without them."); *Powell v. Alabama*, 287 U.S. 32, 45 (1932) (finding that the defendants had been denied their due process rights afforded to them under the principles of "natural justice" and "ordered liberty"). The Fourteenth Amendment states in part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, §1.

212. *Byers*, 861 P.2d at 866; *State v. Beach*, 705 P.2d 94, 107 (Mont. 1985); *State v. Lemmon*, 692 P.2d 455, 458 (Mont. 1984); *State v. Weinberger*, 665 P.2d 202, 207-08 (Mont. 1983); *State v. Powers*, 645 P.2d 1357, 1361-63 (Mont. 1982). The issue was also whether a defendant had the moral culpability for the particular crime since defendants referred to the broad use of the *mens rea* concept. See *supra* notes 102-05 and accompanying text.

The court routinely rejected this argument because the United States Supreme Court has never held that defendants have a constitutional right to plead an insanity defense as a matter of basic fairness.<sup>213</sup> Further, the court pointed out that the Supreme Court has left the particulars of the insanity defense to the state legislatures to decide.<sup>214</sup> In short, the Montana Supreme Court decided that although Montana will not punish a defendant who lacks the requisite criminal state of mind, defendants do not have a constitutional right to plead the insanity defense at trial.<sup>215</sup>

Second, defendants proposed that Montana's abolition of the insanity defense violated the Due Process Clause because it resulted in a conclusive presumption.<sup>216</sup> A conclusive presumption is an unconstitutional procedural device because it eases the burden of a party to prove some fact.<sup>217</sup> Defendants contended that their evidence of mental disease or defect was inextricably intertwined with the prosecution's evidence to prove mental state because the jury may infer a defendant's state of mind from the defendant's acts

213. *See, e.g.*, *Leland v. Oregon*, 343 U.S. 790, 800-01 (1952) (stating that the Due Process Clause does not require states to use a particular insanity test).

214. In *Powell v. Texas*, 392 U.S. 514 (1968), the Supreme Court provided that states may write their own insanity defense laws within the parameters of the Constitution. *Id.* at 535-36.

215. *See supra* note 212.

216. *See, e.g.*, *State v. Cowan*, 861 P.2d 884, 887-88 (Mont. 1993); *State v. Watson*, 686 P.2d 879, 884-86 (Mont. 1984); *State v. Gratzner*, 682 P.2d 141, 144-47 (Mont. 1984); *McKenzie v. Osborne*, 640 P.2d 368, 376-77 (Mont. 1981).

217. In effect, a presumption which requires an inference to be drawn regardless of the evidence offered to rebut the presumed fact is not a presumption at all. Instead, it establishes a substantive rule rendering the basic fact determinative and the presumed fact legally irrelevant. *See generally* KADISH & SCHULHOFER, *supra* note 66, at 57-62 (discussing presumptions) and DRESSLER, *supra* note 46, at 57-62 (explaining presumptions). *See also* *Sandstrom v. Montana*, 442 U.S. 510 (1979). In *Sandstrom*, the lower court instructed the jury that "the law presumes that a person intends the ordinary consequences of his voluntary acts." *Id.* at 512. The Supreme Court held that the instruction, given without further elaboration, prodded the jurors to one of two conclusions: (1) the jurors might have understood that intent was established regardless of the defendant's proof; or, (2) the jurors might have understood that the defendant was required to prove his lack of intent by a preponderance of the evidence. *Id.* at 517. Since the first conclusion would constitute a conclusive presumption and the second would constitute a shifting of the burden of persuasion, both possibilities were unconstitutional and the Supreme Court unanimously reversed. *Id.* at 524.

Montana courts have upheld the following jury instructions, finding that they were unlike those struck down in *Sandstrom*: *Spurlock v. Risley*, 520 F. Supp. 135, 136 (Mont. 1981) (instructing that the "law also presumes that a person intends the ordinary consequences of any voluntary act committed by him"); *State v. Charlo*, 735 P.2d 278, 281 (Mont. 1987) (instructing that the jury "may take into consideration" the defendant's intent); *State v. Woods*, 662 P.2d 579, 585 (Mont. 1983) (stating that the jury could infer that the homicide was committed knowingly or purposely); *State v. Goltz*, 642 P.2d 1079, 1084 (Mont. 1982) (instructing that intent "may be inferred"); *State v. Bad Horse*, 605 P.2d 1113, 1119-20 (Mont. 1980) (instructing the jury that it could reasonably infer the defendant's intent).

and the circumstances of the case.<sup>218</sup> Objective criteria may establish the subjective mental state of mind.<sup>219</sup> Since mental disease or defect does not constitute an affirmative defense to a criminal charge in Montana, the inference conclusively establishes a defendant's mental state.<sup>220</sup> Accordingly, the presumption would violate the Due Process Clause because it shifts the burden of proof on the *mens rea* issue from the prosecution to the defense.<sup>221</sup>

The court rejected the assertion that an unconstitutional inference arises from the *mens rea* approach,<sup>222</sup> reasoning that since Montana law uses the words "may infer" and not "must infer," the presumption is merely permissive

218. According to MONT. CODE ANN. § 45-2-103(3) (1995), the existence of a mental state may be inferred from the defendant's acts and the facts and circumstances connected with the crime. Moreover, in homicide cases, MONT. CODE ANN. § 45-5-112 (1995) provides that "knowledge or purpose may be inferred from the fact that the accused committed a homicide and no circumstances of mitigation, excuse, or justification appear." For example, see *State v. Cowan*, 861 P.2d 884, 888 (Mont. 1993) and *supra* note 11. Of course, defendants could use evidence of mental disease or defect to show circumstances of mitigation, excuse or justification. If they were successful, the prosecution would still have to prove the requisite *mens rea* beyond a reasonable doubt. However, this approach may lead to the same insurmountable barrier because mental disease or defect does not constitute an affirmative defense.

219. *See, e.g.*, *State v. Trask*, 764 P.2d 1264, 1267 (Mont. 1988) (finding that the defendant fleeing the scene of the crime and burying the rifle and ammunition is evidence that he acted purposely or knowingly). Montana seems to have raised an almost insurmountable barrier: defendants may only produce evidence of mental disease or defect if it attacks their relevant *mens rea*, yet *mens rea* may already be established through an inference drawn from their actions. Purely objective standards of culpability are difficult to justify because they ignore the premise that an injury is only a crime when intentionally inflicted. William S. Laufer, *Corporate Bodies and Guilty Minds*, 43 EMORY L.J. 647, 698 n.200 (1994). According to the defendant in *Cowan*, "no one who commits a criminal act can ever be acquitted on grounds of insanity because it would be impossible for anyone to cause harm without engaging in a minimal level of organized conduct." *State v. Cowan*, 861 P.2d 884, 888 (Mont. 1993).

220. *See, e.g.*, *State v. Byers*, 861 P.2d 860 (Mont. 1993). In *Byers*, the defendant shot and killed two fellow freshman students at Montana State University while they were asleep in their dormitory room. *Id.* at 864. *See* Kevin Twidell, *Guilty Verdict in Montana Dormitory Shooting*, GREAT FALLS TRIB., Jan. 11, 1991, at A1. At trial, Byers contended that he suffered from Borderline Personality Disorder and therefore could not have acted either knowingly or purposely. *Byers*, 861 P.2d at 864. Byers argued that since he was permitted to introduce evidence that he did not act knowingly or purposely, the burden of proof had been shifted from the prosecution to the defense. *Id.* The court, relying on the instructions which the jury had heard, rejected Byers' argument and upheld the Montana statute. *Id.* at 865-66.

221. *See supra* note 217.

222. *See supra* note 216. *See also* *State v. Albrecht*, 791 P.2d 760, 766 (Mont. 1990) (holding that a "defendant's mental state may be inferred from circumstantial evidence, including a defendant's actions and evidence found surrounding the alleged offense"); *State v. Trask*, 764 P.2d 1264, 1267 (Mont. 1988) (same); *State v. Smith*, 742 P.2d 451, 453-54 (Mont. 1987) (same); *State v. Hardy*, 604 P.2d 792, 796 (Mont. 1980) (same); *State v. Jackson*, 589 P.2d 1009, 1015 (Mont. 1979) (same).

and not conclusive.<sup>223</sup> Moreover, the court noted that the ultimate determination is left to the finder of fact.<sup>224</sup> Pointing to the text of jury instructions which outline the burdens of proof assigned to each party, Montana courts therefore concluded that the *mens rea* approach does not unconstitutionally shift the state's burden of proving all elements of an offense beyond a reasonable doubt.<sup>225</sup> Moreover, the Montana Supreme Court at least once expressed its belief that the 1979 amendments actually lower the amount of acquittal evidence needed because a defendant need only introduce enough evidence to produce a reasonable doubt as to state of mind.<sup>226</sup>

Defendants offered a third argument that courts were interpreting volitional capacity too narrowly.<sup>227</sup> In their view, a defendant's mental disease or defect may prevent the defendant from acting voluntarily. For example, the defendant who believes that her victim is someone or something else may not be acting voluntarily.<sup>228</sup> Since the legislature eliminated the distinct language "ability to conform" one's actions to the law, defendants asserted that Montana's *mens rea* approach permits the conviction of delusional defendants who act with the requisite mental state.<sup>229</sup> However, courts held that the statutory requirement that the commission of a criminal offense be a voluntary act sufficiently conveys to juries the volitional aspect of an act<sup>230</sup> and referred to instructions informing

223. See, e.g., *State v. Cowan*, 861 P.2d 884, 888 (Mont. 1993). Although the *Cowan* court denied the existence of an unconstitutional inference, the mere inference itself, whether permissive or conclusive, may be unconstitutional because it allows a jury to presume a material element of the offense, the *mens rea*. Allowing the jury to presume *mens rea* may unconstitutionally relieve the prosecution of its task to prove its case against a defendant beyond a reasonable doubt.

Further, such a "permissive" barrier could be raised or lowered depending on the circumstances a court is trying to guard against, a feigned mental disease or a misuse of the legal system, for example. In *Cowan*, the court determined that the defendant was malingering because he was lucid enough to listen in on the victim's 911 call and rational enough to slash the victim's tires. *Id.* at 887. Further, although *Cowan* allegedly called his victim a "robot bitch," the court noted that *Cowan's* belief that the victim was a robot and not a human being was not indicated in the defendant's previous comments to the mental health care workers. *Id.*

224. See *supra* note 216.

225. See *supra* note 106 and accompanying text.

226. *State v. Korell*, 690 P.2d 992, 1000 (Mont. 1984).

227. See, e.g., *State v. Cowan*, 861 P.2d 884, 887-88 (Mont. 1993); *State v. Byers*, 861 P.2d 860, 876-77 (Mont. 1993); *State v. Raty*, 692 P.2d 17, 18-19 (Mont. 1984); *State v. Korell*, 690 P.2d 992, 1000-03 (Mont. 1984); *State v. Zampich*, 667 P.2d 955, 957 (Mont. 1983).

228. See, e.g., *Cowan*, 861 P.2d at 884 (noting that the defendant believed the victim was a robot and not a human being).

229. See *supra* notes 87-98 and accompanying text.

230. The courts refer to the following language:

A material element of every offense is a voluntary act, which includes an omission to perform a duty which the law imposes on the offender and which he is physically capable of performing, except for deliberate homicide under 45-5-102(1)(b) for which there must be a voluntary act only as to the underlying felony. Possession is a voluntary act if the offender knowingly procured or received the thing possessed or was aware of

juries of this requirement.<sup>231</sup>

Although acting voluntarily is a required element of the commission of a crime, the legislature has not defined "voluntary act."<sup>232</sup> The Montana Supreme Court is clearly using the term "voluntary" in the physical sense of the word.<sup>233</sup> Accordingly, the statutory requirement of a "voluntary" act does not consider a defendant's psychological impairment or free will.<sup>234</sup> Montana would excuse actions committed by a defendant during physical impairment such as a seizure or hypnosis.<sup>235</sup> Montana would not excuse actions committed by a defendant during mental impairment such as a psychosis or delusion.<sup>236</sup>

Finally, the fourth argument that defendants made in challenging Montana's *mens rea* approach focused on their right to a jury trial.<sup>237</sup> Before the jury hears any evidence of the defendant's mental disease or defect, the defendant's

his control thereof for a sufficient time to have been able to terminate his control.

MONT. CODE ANN. § 45-2-202 (1995).

231. *See, e.g.*, *State v. Zampich*, 667 P.2d 955 (Mont. 1983). The defendant in *Zampich* proposed several jury instructions stating that the prosecution had the burden of proving that the defendant had acted "purposely, knowingly, and voluntarily" (emphasis in original). *Id.* at 957. The trial court gave essentially these instructions to the jury after deleting every use of the word "voluntarily." *Id.* The Montana Supreme Court affirmed the trial court's decision because the set of jury instructions included one reference to the statutory requirement that a voluntary act be a material element of every offense. *Id.* at 958; *see also* *State v. Raty*, 692 P.2d 17 (Mont. 1984) (finding that the omission of the word "voluntarily" in instructing the jury on the State's burden of proof was inconclusive since the set of jury instructions included references to a voluntary act).

232. In spite of the absence of a definition of "voluntary act," the legislature has provided a definition of an "involuntary act" as any act which is:

- (a) a reflex or convulsion;
- (b) a bodily movement during unconsciousness or sleep;
- (c) conduct during hypnosis or resulting from hypnotic suggestion; or
- (d) a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual.

MONT. CODE ANN. § 45-2-101(32) (1995).

233. *See, e.g.*, *State v. Byers*, 861 P.2d 860, 876 (Mont. 1993) or *State v. Korell*, 690 P.2d 992, 1003 (Mont. 1984).

234. *See supra* note 232.

235. *See* MONT. CODE ANN. § 45-2-202 (1993) (Compiler's Comments). For example, the court in *State v. Raty*, 692 P.2d 17, 19 (Mont. 1984), pointed out that the defendant's conduct was not the result of reflex.

236. In spite of the defendant's psychomotor epilepsy, the *Raty* court held that evidence that Raty possessed the rope used to strangle his victim and evidence that Raty intended harm to the person who owed him money demonstrated that he had acted purposefully. *Raty*, 692 P.2d at 19.

237. *See, e.g.*, *State v. Davidson*, 880 P.2d 1331, 1337 (Mont. 1994); *State v. Byers*, 861 P.2d 860, 867 (Mont. 1993); *State v. Baker*, 815 P.2d 587, 589 (Mont. 1991); *In Re K.M.H.*, 752 P.2d 162, 165-66 (Mont. 1988) (Sheehy, J., dissenting); *State v. Bingman*, 745 P.2d 342, 344-46 (Mont. 1987); *McKenzie v. Osborne*, 640 P.2d 368, 374-75 (Mont. 1981); *State v. Peavler*, 636 P.2d 270, 270-71 (Mont. 1981).



mental state is first evaluated by a court-appointed psychiatrist.<sup>238</sup> The psychiatrist has the power to decide if, in his or her opinion, the defendant had the capacity to have the particular state of mind required by law.<sup>239</sup> In fact, a bill in 1987 amended the statute which grants psychiatrists this power so that it now specifically includes the language of Montana's former insanity test which the legislature repealed in 1979.<sup>240</sup> Thus, the conclusion an examiner may draw is whether the defendant could have appreciated the criminality of the defendant's conduct or conformed the defendant's conduct to the requirements of the law at the time of the crime.<sup>241</sup> Although the psychiatrists' conclusions do not remove the issue of *mens rea* from the case, defendants have argued that their conclusions may unduly persuade the jury or devalue the jury's position as trier of fact.<sup>242</sup>

In the typical case, psychiatrists testify for the prosecution and other psychiatrists testify for the defense.<sup>243</sup> The psychiatrists usually split on whether the defendant had the capacity to act "purposely" or "knowingly,"

238. MONT. CODE ANN. § 46-14-206(d), (e) (1993).

239. *Id.* See *supra* note 157 for the requirements of the examination report. See Harlow M. Huckabee, *Evidence of Mental Disorder on Mens Rea: Constitutionality of Drawing the Line at the Insanity Defense*, 16 PEPP. L. REV. 573, 589-92 (1989) (questioning the expertise of psychiatrists on *mens rea* and other intricacies of criminal law).

240. See *supra* note 87 and accompanying text for the first section of Montana's former insanity test. See also *State v. Doney*, 636 P.2d 1377, 1385 (Mont. 1981); MAEDER, *supra* note 5, at 157 (considering the possibility raised by U.S. Senator Howell Heflin that the *mens rea* test could increase psychiatric testimony).

241. See *supra* note 87 and accompanying text. See also Morris, *supra* note 4, at 526-28 (advocating that the two questions about a defendant's state of mind, incompetency and *mens rea*, should not be answered in a single exam).

242. See *supra* note 237. Juries in states where the traditional insanity defense exists also decide the issue of a defendant's *mens rea* based on expert testimony. Huckabee, *supra* note 239, at 589-92. However, juries in Montana are in a unique position because they may not determine whether a defendant can appreciate or conform the defendant's conduct to the requirement of the law. See *supra* notes 82-98 and accompanying text. Additionally, a defendant's evidence of mental disease or defect may only be introduced to mitigate the prosecution's *mens rea* evidence. See *supra* notes 102-36 and accompanying text.

243. This battle of the experts is best illustrated by a discussion of *State v. Korell*, 690 P.2d 992, 994 (Mont. 1984). The defendant in *Korell* was twice admitted to hospitals for psychological problems and treated with anti-psychotic drugs. *Id.* Two doctors testified for the prosecution at trial and two testified for *Korell*. *Id.* at 995. Three doctors said that *Korell* had the capacity to act "purposely or knowingly." *Id.* The court subsequently instructed the jury that it could consider evidence of a mental disease or defect only insofar as the evidence negated *Korell*'s requisite state of mind. *Id.* at 996. Since the psychiatrists had testified that *Korell* could have had the state of mind required in the definition of the crime, the jury found the defendant guilty. *Id.* at 995-96. See also *McKenzie v. Osborne*, 640 P.2d 368, 374-75 (Mont. 1981) (holding that the trial court's refusal to appoint a psychiatric expert to assist the defense was not error absent a showing of prejudice); *State v. Dannels*, 734 P.2d 188, 192-93 (Mont. 1987) (same).

Montana's two criminal mental states.<sup>244</sup> The court must subsequently instruct the jury that it can consider evidence of a mental disease or defect only insofar as the evidence negated the defendant's requisite state of mind. The jury does not have an opportunity to determine whether the defendant either lacked the substantial capacity to appreciate the criminality of the conduct or to conform the conduct to the requirements of the law.<sup>245</sup> Only the psychiatrists have this opportunity under Montana law.<sup>246</sup>

Once a psychiatrist testifies as to a defendant's state of mind, the jury is left with no other task than to accept the psychiatrist's conclusion or to reject it for another psychiatrist's competing conclusion.<sup>247</sup> The jury's own estimate of a defendant's conduct is beside the point. Ironically, Montana legislators intended the *mens rea* approach to limit psychiatric inquiry into the narrow question of intent, without delving into the morass of psychological theories on why a defendant committed the offense.<sup>248</sup> Although Montana was attempting to

244. See Robert J. Homant & Daniel B. Kennedy, *Subjective Factors in the Judgment of Insanity*, 14 CRIM. JUST. & BEHAV. 38, 57-58 (1987) (finding that various sources of bias significantly affect psychiatrists' judgments of insanity in a particular case).

245. Questions of whether a defendant is blameworthy and punishable, or sick and in need of hospital care are fundamental trial questions. MAEDER, *supra* note 5, at 165. Where the jury does not get to decide for itself whether the defendant acted by force of mental aberration, the jury's domain is plundered and the Sixth Amendment right to trial by jury is violated. *Id.* at 165-66. The Sixth Amendment states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI.

246. See *supra* note 157. See also *supra* notes 87-98 and accompanying text.

247. See DRESSLER, *supra* note 46, at 303 (criticizing the product test). The psychiatrists' role in Montana is similar to the role prescribed in the product test. See *supra* notes 55-60 and accompanying text. See also *Washington v. United States*, 390 F.2d 444, 455-56 (D.C. Cir. 1967) (acknowledging the problem of the jury's authority being usurped by psychiatrists).

248. Representative Keedy stated:

I think we have been sold a bill of goods in this area . . . . We bring psychiatrists into these cases as expert witnesses, but psychiatrists are making godly and outrageous statements. Psychiatrists and social workers should be removed from the criminal justice process. Psychiatric determinations are not scientifically verifiable . . . I think if a defendant is charged and acquitted [because] on the ground of mental disease or defect he could not have a particular state of mind that is an essential element of the offense charged, the verdict and judgment shall so state. I think they are criminals and should be charged as such in our courts.

*House Hearings, supra* note 74, at 12.

limit the “battle of the experts” in insanity trials,<sup>249</sup> just the opposite resulted since the testimony offered by a psychiatrist appears to consume the one opportunity that a defendant has to offer evidence that he or she could not appreciate the conduct or conform the conduct to the law.<sup>250</sup>

As the preceding four arguments demonstrate, discrediting the prosecution’s *mens rea* evidence is a difficult task. *State v. Cowan*,<sup>251</sup> the recent Montana Supreme Court case prompting the belief that abolition of the insanity defense may be constitutional,<sup>252</sup> illustrates these difficulties. Cowan, who waived his right to a jury trial, asserted at his bench trial that he did not act deliberately in committing attempted deliberate homicide.<sup>253</sup> Cowan argued that he was in an acute psychotic episode at the time of the attack and under the delusion that his victim was a robot, not a human being.<sup>254</sup> Mental health professionals testified on both sides of the issue, drawing different conclusions about Cowan’s mental condition.<sup>255</sup> Even assuming the existence of Cowan’s mental disease or defect, the Montana Supreme Court held that the mental disease or defect did not necessarily preclude Cowan from acting purposely or knowingly.<sup>256</sup> The court’s holding relied on evidence that Cowan allegedly exaggerated a psychosis and that his condition often lapsed.<sup>257</sup> The court noted that Cowan talked coherently to a sheriff the day before the attack and that Cowan was lucid enough to both listen in on the victim’s 911 call and slash her car tires.<sup>258</sup>

In contrast, the dissent was concerned that while acting purposely and knowingly in defending himself against what he believed to be a robot, Cowan also could have been unable to understand the nature of his act and been unable to appreciate the criminality of it.<sup>259</sup> In essence, the dissent asserted that an

249. *House Hearings*, *supra* note 74, at 12 (statement of Tom Honzel of the Trial Lawyers Association) (“Trials involving insanity defenses always become ‘battles of the experts.’ The focus should be, ‘did the individual commit the crime.’”). Most abolitionists believe that a restructuring of the insanity defense will reduce the use of expert testimony at trial. Miller, *supra* note 110, at 347.

250. “In a case under present Montana law, therefore, when the defendant relies on insanity to explain the crime of deliberate homicide, the jury is led to the inevitable conclusion by *managed testimony* that he is indeed guilty of the crime.” *State v. Korell*, 690 P.2d 992, 1007 (Mont. 1984) (Sheehy, J., dissenting) (emphasis added).

251. 861 P.2d 884 (Mont. 1993). See *supra* notes 11-14 and accompanying text. See generally Simpson, *supra* note 166 (commenting on *State v. Cowan*).

252. See *supra* notes 11-19 and accompanying text.

253. *Cowan*, 861 P.2d at 885-87.

254. *Id.* at 886.

255. *State v. Cowan*, 861 P.2d 884, 886 (Mont. 1984).

256. *Id.* at 887.

257. *Id.* at 886.

258. *Id.* at 887.

259. *State v. Cowan*, 861 P.2d 884, 890 (Mont. 1984).

insane defendant can probably satisfy the "purposely" and "knowingly" language if the quality of the knowledge and intent is not considered.<sup>260</sup> According to the dissent, an insanity defense would have been appropriate in this case because everyone who examined Cowan diagnosed him as suffering from paranoid schizophrenia.<sup>261</sup> Even the state psychologist conceded that Cowan's schizophrenia may have precluded him from understanding and appreciating the criminality of his conduct.<sup>262</sup> The dissent found that under the *Cowan* court's reasoning, discrediting the prosecution's *mens rea* evidence with evidence of an acute episode of insanity is almost impossible since evidence of any integrated thought or conduct by a defendant will sufficiently establish the mental states of "purposely" and "knowingly."<sup>263</sup>

In summary, the challenges to the confined manner in which defendants may present evidence of mental disease or defect at trial have been unsuccessful in Montana. In light of the arguments over the right to plead insanity, unconstitutional conclusive presumptions, the requirement of a voluntary act, and the right to a jury trial, other states must decide whether the *mens rea* approach is too restrictive or whether it presents an option to make trials more efficient,

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260. The quality of a defendant's knowledge and intent was also the concern of the American Bar Association:

[M]ens rea terminology has come to refer to the specific state of mind required for the conviction of particular criminal offenses. Thus, today, if there were no independent nonresponsibility [insanity] defense, defendants could be convicted of crimes as long as they knew what they were doing at the time of an offense and possessed the intent to commit it. . . . [T]he *mens rea* limitation forces judges and juries confronted with defendants who are uncontrovertibly psychotic either to return morally obtuse convictions or to acquit in outright defiance of the law.

ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 337-38 (1989).

261. *Cowan*, 861 P.2d at 891.

262. *Id.*

263. The text of the Montana Supreme Court order in *State v. Cowan*, 861 P.2d 884 (Mont. 1993) states:

(1) Evidence of defendant's lucidity at time he attacked the victim was sufficient for jury to conclude beyond reasonable doubt that he acted knowingly and purposefully, and thus that he could be convicted of attempted murder and aggravated burglary, despite expert testimony of his paranoid schizophrenia; state statute that provides that *any organized or integrated conduct "may" suffice to establish requisite intent* beyond reasonable doubt does not operate as conclusive presumption that relieves state of its burden of proof in violation of Fourteenth Amendment's Due Process Clause as interpreted in *Sandstrom v. Montana*, 442 U.S. 510 (1979); state statute that provides that insanity of defendant may only reduce punishment and not prevent it, does not violate Eighth or Fourteenth Amendments.

62 U.S.L.W. 3629 (U.S. Mar. 22, 1994) (emphasis added).

effective, and satisfactory to the public.<sup>264</sup> However, the final disposition of mentally ill defendants may be a more vital decision than the debate over trial procedures.<sup>265</sup>

C. *Introducing Evidence of Mental Disease or Defect at Sentencing: Defendants "on Ice"*<sup>266</sup>

While attempting to tighten the criteria for an insanity acquittal with Representative Keedy's bill, Montana also attempted to soften its approach by including sentencing provisions from another pending bill.<sup>267</sup> These provisions granted defendants a third opportunity to introduce evidence of mental disease or defect and granted sentencing judges wide discretion in dealing with these defendants.<sup>268</sup> In fact, Representative Keedy's bill probably would not have passed without adding the other bill's sentencing provisions to his bill.<sup>269</sup> The combination of the two bills alleviated the fear that the *mens rea* approach would

264. KEILITZ & FULTON, *supra* note 26, at 38-39. Alexander Brooks, a professor at Rutgers Law School, argues that eliminating the insanity defense would result in restoring confidence in the criminal justice system and in psychiatry, eliminating "show trials," and providing a more rational allocation of scarce mental health resources. Brooks, *supra* note 20, at 125.

265. See MAEDER, *supra* note 5, at 169; Holden, *supra* note 8, at 995. Even the National Commission on the Insanity Defense, which strongly advocates retaining the insanity defense, believes that the dispositional phase would benefit from reform. MYTHS & REALITIES, *supra* note 35, at 32. Some insanity defense reformers have advocated that evidence of mental disease or defect be considered only at sentencing. See, e.g., WOOTTON, *supra* note 37, at 220-39. However, one Montana court frankly admitted that the final disposition of a defendant was not the most pressing problem in the eyes of the 1979 Montana Legislature:

The legislature has made a conscious decision to hold individuals who act with a proven criminal state of mind accountable for their acts, regardless of motivation or mental condition. Arguably, this policy does not further criminal justice goals of deterrence and prevention in cases where an accused suffers from a mental disease that renders him incapable of appreciating the criminality of his conduct. However, the policy does further goals of protection of society and education.

State v. Korell, 690 P.2d 992, 1002 (Mont. 1984).

266. "[The court had] decided to put the defendant 'on ice' for the remainder of his life. Worse, he will be preserved in his present state, without hope of treatment until death overtakes him." State v. Watson, 686 P.2d 879, 892 (Mont. 1984) (Sheehy, J., dissenting). As John Scherling points out, Daniel M'Naghten was sent to a mental hospital where he remained until his death 22 years later. Scherling, *supra* note 6, at 1233-34.

267. Senator Thomas E. Towe sponsored Senate Bill 495. Senate Hearings, *supra* note 129, at 4. Towe's bill was similar to Representative Keedy's bill, but it included an alternative sentencing procedure. *Id.*

268. See *infra* note 271 for the text of MONT. CODE ANN. § 46-14-214 (1993), *infra* note 272 for the text of MONT. CODE ANN. § 46-14-311 (1993), and *infra* note 300 for the text of MONT. CODE ANN. § 46-14-312(3) (1993).

269. Senator Towe stated that "he talked to Mr. Keedy and he told him that he would not be able to support his bill unless it had these amendments to it." Senate Hearings, *supra* note 129, at 5 (statement of Thomas E. Towe on adding provisions from his pending bill).

be so restrictive as to punish people society does not want to punish.<sup>270</sup> Montana provides two general verdicts for a defendant who produces evidence of a mental disease or defect at this stage: "not guilty by reason of mental disease or defect,"<sup>271</sup> and either a verdict or a plea of guilty.<sup>272</sup>

### 1. Defendants Found Not Guilty by Reason of Mental Disease or Defect

Since Montana claims to have abolished the insanity defense, its retention of a verdict of "not guilty by reason of mental disease or defect" appears counter-intuitive.<sup>273</sup> The statute granting defendants this verdict originally contained a companion section setting out the burden of proof required for the repealed insanity defense.<sup>274</sup> The 1979 bill deleted the language on the burden of proof, but retained the verdict.<sup>275</sup> Consequently, when a defendant's mental disease or defect casts a reasonable doubt about whether the defendant could maintain the requisite state of mind, the jury must find the defendant not guilty by reason of mental disease or defect.<sup>276</sup> Before Montana changed its insanity laws in 1979, almost thirty-two percent of defendants pleading insanity were

270. MAEDER, *supra* note 5, at 165. See *supra* notes 207-50 and accompanying text for the challenges which defendants have made to the restrictiveness of Montana's *mens rea* approach at trial.

271. The statute provides:

When the defendant is found not guilty of the charged offense or offenses or any lesser included offense for the reason that due to a mental disease or defect the defendant did not have a particular state of mind that is an essential element of the offense charged, the verdict and the judgment must state that reason.

MONT. CODE ANN. § 46-14-214 (1993).

272. The repealed language of Montana's insanity test is invoked when a defendant pleads or is found guilty:

Whenever a defendant is convicted on a verdict or a plea of guilty and claims that at the time of the commission of the offense of which convicted the defendant was suffering from a mental disease or defect that rendered the defendant unable to appreciate the criminality of the defendant's behavior or to conform the defendant's behavior to the requirements of the law, the sentencing court shall consider any relevant evidence presented at the trial and shall require additional evidence as it considers necessary for the determination of the issue, including examination of the defendant and a report of the examination as provided in 46-14-202 and 46-14-206.

MONT. CODE ANN. § 46-14-311 (1993) (emphasis added).

273. In contrast, the only possible trial verdicts in Idaho, an abolitionist state, are "guilty" and "not guilty." Geis & Meier, *supra* note 8, at 76. Utah, the other abolitionist state, retained the verdict of "not guilty by reason of insanity." Heinbecker, *supra* note 108, at 186.

274. MONT. CODE ANN. § 46-14-214(1) (1978). This former subsection of the statute provided that defendants must prove their insanity by a preponderance of the evidence. See *supra* note 271 for the current version of this statute.

275. See *supra* note 271 for the text of MONT. CODE ANN. § 46-14-214 (1993).

276. For example, Cowan tried to show that he had not acted deliberately since he thought his victim was a robot. See *supra* notes 251-63 and accompanying text.

found not guilty by reason of mental disease or defect.<sup>277</sup> After 1979, not even three percent of the defendants who relied on mitigating evidence of mental disease or defect were found not guilty by reason of mental disease or defect.<sup>278</sup>

After a verdict of not guilty by reason of mental disease or defect is rendered,<sup>279</sup> the judge's preliminary consideration is the nature of the defendant's offense.<sup>280</sup> If the offense did not involve serious bodily injury, death, or substantial property damage, the judge must release the defendant.<sup>281</sup> If the offense did involve a substantial risk of serious bodily injury or death, actual bodily injury or death, or substantial property damage, then the judge must consider whether the defendant presents a danger to either the defendant or others.<sup>282</sup> The judge may commit a dangerous defendant in an appropriate mental health facility for custody, care, and treatment.<sup>283</sup>

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277. See Steadman et al., *supra* note 167, at 359.

278. *Id.* Such empirical evidence seems to suggest that Montana effectively abolished its insanity defense, but Montana's unique use of the incompetency process contradicts that conclusion. Instead, the defendants who would have subsequently been found not guilty by reason of mental disease or defect were not making it beyond the pretrial incompetency process. See *supra* notes 150-202 and accompanying text.

279. The first in a series of Montana statutes determining the disposition of a defendant addresses a defendant's commitment upon a finding of not guilty by reason of lack of mental state. The statute states in part:

When a defendant is found not guilty for the reason that due to a mental disease or defect the defendant could not have a particular state of mind that is an essential element of the offense charged, the court shall order a predisposition investigation in accordance with 46-18-112 and 46-18-113, which must include an investigation of the present mental condition of the defendant. If the trial was by jury, the court shall hold a hearing to determine the appropriate disposition of the defendant. If the trial was by the court, the court may hold a hearing to obtain any additional testimony it considers necessary to determine the appropriate disposition of the defendant. In either case, the testimony and evidence presented at the trial must be considered by the court in making its determination.

MONT. CODE ANN. § 46-14-301(1) (1993).

280. *Id.* § 46-14-301(2).

281. *Id.* § 46-14-301(2)(b).

282. *Id.* § 46-14-301(2)(a).

283. *Id.* But see *State v. Raty*, 692 P.2d 17, 18-20 (Mont. 1984). See generally *Zenoff*, *supra* note 6 (addressing the standards for assessing the dangerousness of offenders who are mentally disabled).

We cannot forestall considering the degree to which we may justifiably intervene in the lives of people whom we fear will commit violent crimes until research demonstrates improvement in our ability to predict dangerousness . . . . We cannot defend deprivations of liberty and violations of bodily integrity simply on the basis of enhancing public safety. There should be some reasonable relationship between the past conduct of the person whose future dangerousness is questioned, the extent of the societal intervention contemplated, and the alternative actions available to protect the community.

A person who is committed to the state hospital must have a hearing within 180 days of the commitment to determine the present mental condition and the future disposition of the person, which is either release or extended commitment.<sup>284</sup> To extend commitment, the state must prove by clear and convincing evidence that the hospital cannot safely release the committed person because of a continuing substantial risk to society.<sup>285</sup> The status of a committed person is then reviewed once each year by a "professional person,"<sup>286</sup> but another hearing does not occur unless the director of the Department of Corrections and Human Services or the committed person petitions the court for discharge or release.<sup>287</sup> Since courts have not acquitted even three percent of defendants under Montana's *mens rea* approach,<sup>288</sup> other states should focus on the mentally-ill defendant who either pleads guilty or is found guilty.

## 2. Defendants Either Pleading or Found Guilty

Where a defendant introduces evidence of mental disease or defect which is insufficient to negate the requisite *mens rea*, the defendant may be found guilty.<sup>289</sup> Similarly, a defendant with insufficient evidence of mental disease or defect may decide to plead guilty. Whether a defendant pleads guilty or is

Zenoff, *supra* note 6, at 586.

284. Hearings are governed by the following procedures:

A person committed to the custody of the director of the department of corrections and human services must have a hearing within 180 days of confinement to determine the person's present mental condition and whether the person must be discharged or released or whether the commitment may be extended because the person continues to suffer from a mental disease or defect that renders the person a danger to the person or others. The hearing must be conducted by the court that ordered the commitment unless that court transfers jurisdiction to the district court in the district in which the person has been placed. The court shall cause notice of the hearing to be served upon the person, the person's counsel, the prosecutor, and the court that originally ordered the commitment. The hearing is a civil proceeding, and the burden is upon the state to prove by clear and convincing evidence that the person may not be safely released because the person continues to suffer from a mental disease or defect that caused the person to present a substantial risk of:

- (a) serious bodily injury or death to the person or others;
- (b) an imminent threat of physical injury to the person or others; or
- (c) substantial property damage.

MONT. CODE ANN. § 46-14-301(3) (1993).

285. *Id.*

286. No definition of "professional person" is provided in MONT. CODE ANN. § 46-14-301(5) (1993).

287. MONT. CODE ANN. § 46-14-301(5) (1993).

288. *See supra* note 278 and accompanying text.

289. Before 1979, almost 40% of defendants pleading insanity were found guilty. *See Steadman et al., supra* note 167, at 359. After 1979, 55% of defendants pleading insanity were found guilty. *Id.*



found guilty by the trier of fact,<sup>290</sup> the defendant's sentence automatically includes commitment to the state hospital if the sentencing judge finds that a mental disease or defect affected the defendant at the time of the offense.<sup>291</sup> If the court finds that the mental disease or defect did not affect the defendant at the time of the crime, then the court may sentence the defendant as any other defendant would be sentenced for that crime.<sup>292</sup>

According to the Montana Supreme Court, a finding of mental disease or defect alone does not warrant including commitment in a defendant's sentence.<sup>293</sup> In addition, the judge must invoke the repealed language of the former insanity test to decide the effect of the mental disease or defect upon the defendant's ability to appreciate the criminality of the conduct and upon the defendant's capacity to conform his conduct to the law.<sup>294</sup> Consequently, after a jury wrestles with the question of a defendant's mental disease or defect and state of mind under Montana's *mens rea* approach, the presiding judge then uses Montana's former insanity test to sentence the defendant.<sup>295</sup> Even at this late stage of the trial, the legislature implicitly puts some credence in its former

290. See *supra* note 272 for the text of MONT. CODE ANN. § 46-14-311 (1993).

291. The following statute sets out the sentencing judge's two options:

(1) If the court finds that the defendant at the time of the commission of the offense of which the defendant was convicted did not suffer from a mental disease or defect as described in 46-14-311, the court shall sentence the defendant as provided in Title 46, chapter 18.

(2) If the court finds that the defendant at the time of the commission of the offense suffered from a mental disease or defect as described in 46-14-311, any mandatory minimum sentence prescribed by law for the offense need not apply and the court shall sentence the defendant to be committed to the custody of the director of the department of corrections and human services to be placed in an appropriate institution for custody, care, and treatment for a definite period of time not to exceed the maximum term of imprisonment that could be imposed under subsection (1). The authority of the court with regard to sentencing is the same as authorized in Title 46, chapter 18, if the treatment of the individual and the protection of the public are provided for.

MONT. CODE ANN. § 46-14-312(1)-(2) (1993). Since the Montana Legislature meets every other year, its 1995 amendments to this statute were published shortly before this issue went to press. For the text of MONT. CODE ANN. § 46-14-312(1)-(2) as it was amended and the effect of the amendments on this note's analysis, see *infra* note 331.

292. *Id.* § 46-14-312(1).

293. See, e.g., *State v. Tibbitts*, 733 P.2d 1288, 1291-92 (Mont. 1987).

294. See *supra* note 272 for the text of MONT. CODE ANN. § 46-14-311 (1993). In *State v. Watson*, 686 P.2d 879 (Mont. 1984), the defendant was not found to be suffering from a mental disease or defect and was consequently sentenced for a term of 300 years in prison, without possibility of parole or furlough. *Id.* at 881. Thus, in spite of Watson's "psychotic-like behavior," he could be sent to prison for such a long time since the judge determined that he could appreciate and conform his conduct to the requirements of the law. *Id.*

295. MAEDER, *supra* note 5, at 165.

insanity test since it mandates that the sentencing judge employ the language of the test.<sup>296</sup>

Determining the effect of a mental disease or defect is entirely within the judge's discretion.<sup>297</sup> The sentencing judge is not limited to the evidence presented at trial, but may consider any additional evidence presented at the sentencing hearing, including hearsay evidence.<sup>298</sup> For instance, the court in *State v. Cowan*<sup>299</sup> rationalized that sentencing and confining Cowan to prison notwithstanding his mental condition violated neither the Eighth Amendment's prohibition against cruel and unusual punishment nor the Fourteenth Amendment's Equal Protection Clause since the court could transfer him to a different facility if necessary.<sup>300</sup> However, this rationalization is faulty since the occasion to find out whether a defendant needs treatment is at sentencing.<sup>301</sup> Psychiatrists should determine at sentencing whether treatment can improve a defendant's condition, what treatment would be appropriate, and where such treatment is available.<sup>302</sup>

Montana specifically provides in its state constitution and criminal code that its correctional policy is not only to protect society by preventing crime through

296. See *supra* notes 87-98 and accompanying text.

297. See *supra* note 272 for the text of MONT. CODE ANN. § 46-14-311 (1993).

298. *Id.* See *State v. D.B.S.*, 700 P.2d 630, 638-40 (Mont. 1985) (holding that hearsay evidence can be properly considered in sentencing).

299. 861 P.2d 884 (Mont. 1993).

300. *Id.* at 889. Judicial review of defendant's sentence is provided in the following statute:

Either the director or a defendant whose sentence has been imposed under subsection (2) may petition the sentencing court for review of the sentence if the professional person certifies that:

- (a) the defendant no longer suffers from a mental disease or defect;
- (b) the defendant's mental disease or defect no longer renders the defendant unable to appreciate the criminality of the defendant's conduct or to conform the defendant's conduct to the requirements of law;
- (c) the defendant suffers from a mental disease or defect but is not a danger to the defendant or others; or
- (d) the defendant suffers from a mental disease or defect that makes the defendant a danger to the defendant or others, but:
  - (i) there is no treatment available for the mental disease or defect;
  - (ii) the defendant refuses to cooperate with treatment; or
  - (iii) the defendant will no longer benefit from active inpatient treatment for the mental disease or defect.

MONT. CODE ANN. § 46-14-312(3) (1993).

301. Senator Thomas Towe, for example, stated that "a person who did something wrong intended to do it, but he may have thought that what he did was not criminal . . . they are going to take that into consideration when sentencing." *Senate Hearings, supra* note 129, at 5.

302. Brooks, *supra* note 20, at 133.

punishment, but also to rehabilitate the convicted.<sup>303</sup> Montana's state policy is to deal with convicts according to their individual characteristics, circumstances, needs, and potentialities.<sup>304</sup> Nevertheless, Montana courts routinely conclude that unless a defendant's mental disease or defect rises to meet the level of the former insanity test, the courts can sentence the defendant to the Montana State Prison.<sup>305</sup> If the court decides that a defendant is responsible for his or her actions, it should send the defendant to prison;<sup>306</sup> however, if the court decides that the defendant is mentally ill, it should send the defendant to a mental hospital.<sup>307</sup>

Even while incarcerated, defendants who are judicially found to have mental diseases or defects should receive treatment.<sup>308</sup> The Montana State Prison, like any prison, is an extremely stressful environment where a convict

303. "Rights of the Convicted" in Montana include that "laws for the punishment of crime shall be founded on the principles of prevention and reformation." MONT. CONST. art. II, § 28 (1972). The statute provides:

The correctional policy of the state of Montana is to protect society by preventing crime through punishment and rehabilitation of the convicted. The legislature finds that an individual is responsible for and must be held accountable for the individual's actions. Corrections laws and programs must be implemented to impress upon each individual the responsibility for obeying the law. To achieve this end, it is the policy of the state to assure that prosecution of criminal offenses occurs whenever probable cause exists and that punishment of the convicted is certain, timely, and consistent. Furthermore, it is the state's policy that persons convicted of a crime be dealt with in accordance with their individual characteristics, circumstances, needs, and potentialities.

MONT. CODE ANN. § 46-18-101(2) (1993).

304. See *supra* note 303 for the text of MONT. CODE ANN. § 46-18-101(2) (1993).

305. See, e.g., *State v. Cowan*, 861 P.2d 884, 887-89 (Mont. 1993) or *State v. Korell*, 690 P.2d 992, 1004-05 (Mont. 1984).

306. See C. RAY JEFFERY, *ATTACKS ON THE INSANITY DEFENSE* 177 (1985) (stating that a state's selection of appropriate mental institutions has been reduced to "hanging a sign reading 'hospital' over our jail houses").

307. Scherling, *supra* note 6, at 1261.

308. The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. See *California v. Robinson*, 370 U.S. 660 (holding that the defendant should not be punished for his status of drug addiction), *reh'g denied*, 371 U.S. 905 (1962). The Court stated that society does not punish disease, but treats it. *Id.* at 667. However, conduct caused by a disease is punished. *Powell v. Texas*, 392 U.S. 514 (holding that the state could punish the defendant for the act of being intoxicated in public), *reh'g denied*, 393 U.S. 898 (1968). Based on these two cases, punishing an insane defendant for murder would not violate the Eighth Amendment's prohibition against cruel and unusual punishment since the defendant was being punished for the act of murder. However, punishing an insane defendant as if he or she is sane may violate the Eighth Amendment. For example, three hundred years in prison may be a grossly disproportionate sentence where it ignores the defendant's mental condition. See *State v. Watson*, 686 P.2d 879, 886-91 (Mont. 1984).

with even a relatively stable state of mind might begin to lose balance.<sup>309</sup> Basic humanitarian concerns for safety and treatment of the mentally ill should include custodial personnel trained in managing persons with mental disorders, medical and mental services that adequately treat mental disorders, and appropriately designed and equipped facilities.<sup>310</sup> Unfortunately, psychiatric experts have advised courts that neither the Montana State Hospital nor the Montana State Prison is suitable for treating criminally insane defendants.<sup>311</sup>

Sentencing dilemmas about treating mentally ill criminals are not concerns as unique to Montana as are its incompetency process and *mens rea* approach. Other states confront sentencing dilemmas regardless of the type of insanity defense a state has.<sup>312</sup> Montana's sentencing statutes are nonetheless noteworthy because legislators assumed that the combination of the two pending bills would shield the mentally ill from being punished for their status as mentally ill.<sup>313</sup> However, the treatment which resulted from the sentencing provisions has stark consequences for potential defendants, prisoners, and victims.<sup>314</sup> A defendant's condition may require intensive, individual therapy, yet the defendant receives no assurance of adequate facilities or services.<sup>315</sup>

309. Steury, *supra* note 6, at 352. See MONTANA ADVISORY COMMITTEE TO THE UNITED STATES COMMISSION ON CIVIL RIGHTS, A CONSULTATION ON CORRECTIONS IN MONTANA 58 (1979) (recommending that the Montana Legislature increase funding for rehabilitative services because little or no funds are allocated for this purpose); John J. Gibbs, *Symptoms of Psychopathology Among Jail Prisoners: The Effects of Exposure to the Jail Environment*, 14 CRIM. JUST. & BEHAV. 288, 307 (1987) (finding that prison can substantially increase the severity of some symptoms of psychopathology).

310. Steury, *supra* note 6, at 352 n.1. See Hans Toch et al., *Ethnicity, Disruptiveness and Emotional Disorder Among Prison Inmates*, 14 CRIM. JUST. & BEHAV. 93, 93-94 (1987) (finding that inmates who need mental health care have higher rates of disciplinary violations than do other inmates).

311. The experts told the court that Montana institutions are not prepared to treat the criminally insane, but that institutions such as Atascadero or Vacaville in California are equipped in this respect. *State v. Watson*, 686 P.2d 879, 890 (Mont. 1984). Further, the experts advised the court that Watson's condition suggested the need for intensive, individual therapy, and perhaps abreactions to release the repressed rage. *Id.* Instead, Watson was sentenced to 300 years in prison. *Id.* The dissent in *Watson* strongly protested the defendant's 300 year prison term, calling its imposition "at once barbarous and excessive." *Id.* at 893.

312. The National Commission on the Insanity Defense, for example, found the availability and adequacy of mental health care and treatment in state prisons to be "woefully inadequate." MYTHS & REALITIES, *supra* note 35, at 42. The Commission further stated that "treatment cannot be held out as a reason for changing the law if such treatment is not available." *Id.* at 43.

313. See *supra* notes 267-70 and accompanying text.

314. See *supra* note 308. See, e.g., Marnie E. Rice et al., *An Evaluation of a Maximum Security Therapeutic Community for Psychopaths and Other Mentally Disordered Offenders*, 16 L. & HUMAN BEHAV. 399, 407-09 (1992) (finding that compared to no therapeutic program, treatment was associated with lower recidivism rates of nonpsychopaths).

315. See *supra* notes 308-11 and accompanying text.

The *mens rea* approach is only successful when legislatures couple it with a sophisticated dispositional system.<sup>316</sup> The sentencing provisions must reflect a balance between punishing or treating the mentally ill and protecting society.<sup>317</sup> Moreover, state legislatures which change their insanity laws should appropriate the necessary funds to insure adequate facilities and services for the mental health care of those committed in their system.<sup>318</sup> The value of the entire *mens rea* approach lies in the statutory framework in which it is established. Where a satisfactory framework does not exist, legislatures should create one.

#### V. PROPOSAL

Whether the *mens rea* approach is a viable means of reforming the insanity defense depends on how a state reconciles the issues of competency to stand trial, evidence of *mens rea* at trial, and sentencing the mentally ill. Reconciliation of these three issues provides the framework in which insanity defense reform may effectively operate with a state's pre-existing statutes, case law, and attitudes. Because it was without such a framework, Montana's *mens rea* approach resulted in an inordinate number of defendants found incompetent to stand trial<sup>319</sup> and a formidable task for defendants to mitigate the prosecution's *mens rea* evidence against them.<sup>320</sup> Furthermore, these harsh results were not balanced by sentencing provisions which recognized the need of some defendants for treatment and the availability of treatment.<sup>321</sup>

316. Alexander Brooks, who supports the abolition of the insanity defense, states that if "*mens rea* were to become a vehicle merely for convicting more mentally ill offenders, confining them in prison, and then forgetting them, it would indeed be both inhumane and hypocritical." Brooks, *supra* note 20, at 135. Without a sophisticated dispositional system, he concludes that "the *mens rea* approach might turn into a cruel hoax." *Id.*

317. *Id.*

318. See *supra* note 308. See generally James W. Ellis, *The Consequences of the Insanity Defense: Proposals to Reform Post-Acquittal Commitment Laws*, 35 CATH. U. L. REV. 961 (1986) (advocating that legislators focus more on the consequences of the insanity defense). At least one author is skeptical about the implementation of state dispositional objectives:

Criminal offenders have little political clout and mentally ill offenders are the very lowest on the totem pole. Our country is in a period of economic retrenchment, in which budgets must be cut. Facilities and services for the mentally ill are already suffering. Thus, the promise of better dispositions for the mentally ill offender might not be met.

Brooks, *supra* note 20, at 135.

319. See *supra* section IV.A, notes 150-202 and accompanying text.

320. See *supra* section IV.B, notes 203-65 and accompanying text.

321. See *supra* section IV.C, notes 266-318 and accompanying text.

The following proposed amendments do not attempt to remedy all of the problems of Montana's reform, but they remedy the most troublesome ones.<sup>322</sup> First, the bill provides a workable provision for courts to determine a defendant's competency to proceed to trial. Second, the bill eliminates the determination made by a psychiatrist as to the defendant's ability to have the requisite state of mind. Third, the bill requires that the defendant sent to prison with a mental disease or defect have access to treatment and that the likelihood of treatment be considered in the defendant's sentencing. In no way is this bill meant to address the constitutionality of abolishing the insanity defense; instead, it is designed to respect and incorporate the intent of Montana legislators to abolish such a defense in their state.<sup>323</sup>

*A. Proposed Amendments to Montana Statutes*

THE STATE OF MONTANA  
LEGISLATIVE BILL<sup>324</sup>

**BILL SYNOPSIS:** A bill to restructure the relevance of mental disease or defect in connection with the incompetency process, the role of psychiatrists at trial, and the treatment for defendants who are found at a post trial hearing to suffer from a mental disease or defect.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

**SECTION ONE.** Montana Code Annotated 46-14-103 (1993) is amended by the addition of a new section to read:

**46-14-103. Mental Disease or Defect Excluding Fitness to Proceed**

- (1) A person who, as a result of mental disease or defect, is unable to understand the proceeding against the person or to assist in the person's defense may not be tried, convicted, or sentenced for the commission of an offense so long as the incapacity endures.
- (2) *A person is unable to understand the proceedings against the*

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322. Noting that the decision to abolish the insanity defense is an issue that "seeks to probe and appraise the society's processes and values," one court stated that the decision was "for the legislative branch, assuming no constitutional bar." *United States v. Brawner*, 471 F.2d 969, 986 (D.C. Cir. 1972).

323. *But see* Stimpson, *supra* note 166, at 524 (advocating that the Montana legislature reinstate insanity as an affirmative defense).

324. Proposed amendments to the Montana statutes are indicated in italic typeface. For the original text of the statute amended in SECTION 1, see *supra* note 151. For the original text of the statute amended in SECTION 2, see *supra* note 157. For the original text of the statute amended in SECTION 3, see *supra* note 272.

*person or to assist in the person's defense when the evidence relevant to the particular proceeding against the person demonstrates that the person is without the capacity to:*

- (a) understand the charge(s) against the person;*
- (b) appreciate the potential sentence(s) or pleas;*
- (c) comprehend the evidence relevant to the particular proceeding or to the person's defense;*
- (d) make any foreseeable decisions about the person's defense; or*
- (e) perform any of the assigned functions of the person's role at trial.*

Notes to SECTION ONE:

The incompetency process serves to avoid the injustice of an incompetent defendant proceeding to trial. However, courts should not deem defendants who can participate in their defenses to the extent required at trial incompetent because they could not meet the broadly-interpreted language of section (1). Consequently, section (2) is added to this statute to elaborate on a defendant's abilities as section (1) generally outlines them. Recognizing that each defendant's competency hearing is unique, section (2) provides judges with malleable and working provisions. For example, when psychiatrists disagree on a defendant's ability to assist in his or her defense, the judge can look to subsections (a) through (e) to aid in deciding whether the individual can understand the murder charges or the ramifications of pleading guilty. Competent defendants incur serious losses when precluded from proceeding to trial, such as lengthy commitments and the loss of the right to a jury trial. By weighing the individual factors of subsections (a) through (e), judges help ensure that the incompetency process does not become the injustice.

SECTION TWO. Montana Code Annotated 46-14-206 (1993) is amended by deleting the following subsection:

46-14-206. Report of Examination

- (d) When directed by the court, an opinion as to the capacity of the defendant to have a particular state of mind that is an element of the offense charged;

Notes to SECTION TWO:

Under Montana's *mens rea* approach to prosecuting defendants claiming insanity, the sole opportunity that a defendant has to present evidence of a mental disease or defect at trial is to mitigate the prosecution's evidence of the defendant's state of mind. Subsection (d) allowed psychiatrists to consume this opportunity. By deleting subsection (d), this amendment properly returns

opinion about a defendant's state of mind to the jury's domain. In the remaining items of the examiner's report of a defendant, a psychiatrist may offer the court expert opinion on his or her diagnosis of the defendant's mental condition, the existence of a mental disease or defect, and the defendant's capacity to appreciate or conform the defendant's behavior to the requirement of the law. Thus, psychiatrists' testimony is limited to expert diagnoses of mental condition and does not extend to legal opinions as to *mens rea*. Drawing from this expert testimony and other evidence presented at trial, the jury must conclude whether the defendant had the capacity to act "purposely" or "knowingly." The deletion of subsection (d) should be especially effective when considering the conflicting psychiatric testimony juries hear.

SECTION THREE. Montana Code Annotated 46-14-311 (1993) is amended to read:

46-14-311. Consideration of Mental Disease or Defect in Sentencing

(1) *Whenever a defendant is convicted on a verdict or a plea of guilty and claims that at the time of the commission of the offense the defendant was suffering from a mental disease or defect, the sentencing court shall determine the extent to which a defendant's mental condition will be a factor in sentencing.*

(2) *The sentencing court shall consider any relevant evidence presented at trial and shall require additional evidence as it considers necessary for the determination of the issue, including:*

(a) *an examination of the defendant and a report of the examination;*  
 (b) *the defendant's capacity to appreciate the criminality of the defendant's behavior or to conform the defendant's behavior to the requirement of the law;*

(c) *the defendant's need for treatment at the time of sentencing;*

(d) *the treatment which would most benefit the defendant and its availability; and*

(e) *the defendant's prognosis for rehabilitation at the time of sentencing.*

Notes to SECTION THREE:

A medical diagnosis of mental illness that requires treatment is distinguishable from a legal finding of mental disease that relieves criminal responsibility. Montana's *mens rea* approach explicitly employs this distinction by limiting a defendant's evidence of mental disease or defect to the issue of the requisite state of mind. If a defendant's evidence of mental disease or defect is insufficient to negate the requisite *mens rea*, the defendant may be found guilty. However, courts should not restrict a defendant's evidence of mental disease or



defect at sentencing, where parties are more apt to concede the convicted defendant's need for treatment. The former language of this statute restricted the sentencing judge's determination to "whether the mental disease or defect rendered the defendant unable to appreciate the criminality of the defendant's behavior or to conform the defendant's behavior to the requirements of the law." This amendment instead balances the limited nature of introducing evidence of mental disease or defect at trial under Montana's *mens rea* approach with the meaningful consideration of mental disease or defect at sentencing. In addition to the former language, subsections (a) through (e) of section (2) require the sentencing judge to review a defendant's mental condition in light of outside factors as well. For example, the sentencing judge may consider the limitations or advantages of existing facilities, the personnel who are available at such facilities, and a defendant's access to services. Moreover, the defendant's present mental condition should be the focus, not the defendant's mental condition at the time of the offense, as the defendant has already been found guilty for the offense. Allocation of scarce state resources should be directed to the sentencing phase for those mentally ill criminals whose conditions may improve with treatment.

*B. Effect of the Proposed Bill for Other States*

While these amendments are directed to Montana's pre-existing statutory provisions, they lay the groundwork for other legislatures to follow in achieving a systematic reform suitably tailored to their states. Similarities to Montana's scheme may arise from the fact that the majority of states use the Model Penal Code test as their insanity test and the Model Penal Code's minimal *mens rea* classification system.<sup>325</sup> However, differences from Montana's scheme may arise from a state's pre-existing provisions for sentencing, the role of psychiatrists at trial, and the language and interpretation of the incompetency process. Moreover, a state's case law, mental health facilities, and its citizens' views of the insanity defense may be factors in how a particular legislature should abolish its insanity defense. In summary, Montana's approach to abolishing its insanity defense contains applicable, not identical, lessons for other states seeking a similar reform.

VI. CONCLUSION

Montana's reform of its insanity defense and adoption of the *mens rea* approach had subtle and unintended consequences. In eliminating the insanity defense and modifying the definition of insanity, the 1979 legislature intended

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325. See *supra* notes 142-43.

to eradicate the perceived abuses of the insanity defense in Montana.<sup>326</sup> However, Montana's pre-existing statutes, case law, and attitudes magnified the changes enacted by the bill. With varying degrees of success, the courts and parties have attempted to incorporate the *mens rea* approach into the competency process,<sup>327</sup> trials,<sup>328</sup> and sentencing.<sup>329</sup> The proposed amendments to these areas reconcile the most striking difficulties Montana experiences in accommodating the *mens rea* approach.<sup>330</sup>

As citizens of other states press for changes to the insanity defense, state legislatures have the opportunity to study both the positive and negative consequences of Montana's *mens rea* approach. Montana teaches that any action taken to reform the insanity defense necessitates a systematic approach. This Note provides a starting point for other state legislatures; however, the role which evidence of mental disease or defect claims in courtrooms across the United States will remain a continuing experiment.<sup>331</sup>

326. See *supra* notes 76-145 and accompanying text.

327. See *supra* notes 150-202 and accompanying text.

328. See *supra* notes 203-65 and accompanying text.

329. See *supra* notes 266-318 and accompanying text.

330. See *supra* notes 319-25 and accompanying text.

331. See *supra* note 1 and accompanying text. Montana's own reform remains a continuing experiment as well. Since the Montana Legislature meets every other year, its 1995 amendments to a sentencing statute addressed in this note, MONT. CODE ANN. § 46-14-312(1)-(2) (1993), were published shortly before this issue went to press. See *supra* note 292. With the newly amended portions indicated in italic typeface, the statute now provides as follows:

(1) If the court finds that the defendant at the time of the commission of the offense of which the defendant was convicted did not suffer from a mental disease or defect as described in 46-14-311, the court shall sentence the defendant as provided in Title 46, chapter 18.

(2) If the court finds that the defendant at the time of the commission of the offense suffered from a mental disease or defect as described in 46-14-311, any mandatory minimum sentence prescribed by law for the offense need not apply and the court shall sentence the defendant to be committed to the custody of the director of *public health* and human services to be placed, *after consideration of the recommendations of the professionals providing treatment to the defendant*, in an appropriate *correctional or mental health* facility for custody, care, and treatment for a definite period of time not to exceed the maximum term of imprisonment that could be imposed under subsection (1). *The director may, after considering the recommendations of the professionals providing treatment to the defendant, subsequently transfer the defendant to another correctional or mental health facility that will better serve the defendant's custody, care and treatment needs.* The authority of the court with regard to sentencing is the same as authorized in Title 46, chapter 18, if the treatment of the individual and the protection of the public are provided for.

MONT. CODE ANN § 46-14-312(1)-(2) (1995) (emphasis added).

On the one hand, the 1995 amendments by the Montana Legislature represent the position that this note takes regarding the sentencing problems of Montana. See *supra* notes 266-318 and accompanying text. For example, Montana's amendments require that a defendant sent to prison with a mental disease or defect have access to treatment based upon the professionals'

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recommendation either initially or at a later date. SECTION THREE of the bill proposed in this note similarly emphasizes the medical diagnosis of mental illness. See *supra* section V.A. for the text of the proposed bill. Specifically, SECTION THREE requires the sentencing judge to consider outside factors like the professionals' examination, the defendant's need for treatment, and the defendant's prognosis for rehabilitation. Additionally, Montana's new language authorizing a transfer to a facility "that will better serve the defendant's custody, care and treatment needs" reflects the text of the Notes to SECTION THREE encouraging the sentencing judge to consider the limitations or advantages of existing facilities, the personnel who are available at facilities, and a defendant's access to services.

However, the purpose of this note was not only to educate other states about the specifics of Montana's reform, but also to demonstrate the importance of a systematic approach to reform. In eliminating its insanity defense, Montana did more than affect the sentencing of defendants who assert a mental disease or defect. Montana's reform also had the dramatic result of redirecting evidence once offered to support an insanity defense through the incompetency process and through proof of *mens rea* at trial. Thus, Montana's 1995 amendments to one of its sentencing statutes suggest a step in the direction advocated by this note and possibly a remedy in part, but they do not remedy the whole. A state interested in Montana's reform must consider whether the *mens rea* approach renders trials more efficient and effective, whether its statutes are currently adequate to accommodate reform of the insanity defense, as well as whether its allocation of resources for prisoners would reflect a humane and genuine understanding of the *mens rea* approach.

In closing, consider the reflections of an Austrian philosopher: "You must always be puzzled by mental illness. The thing I would dread most, if I became mentally ill, would be your adopting a common sense attitude; that you could take it for granted that I was deluded." PERSONAL RECOLLECTIONS 166 (Rush Rhees ed., 1981) (conversations with Ludwig Wittgenstein from 1947-48).