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SHOULD FLORIDA FOLLOW THE FEDERAL INSANITY DEFENSE?

CHET KAUFMAN

ON MARCH 30, 1981, outside of the Washington Hilton Hotel, John W. Hinckley, Jr. fired six bullets that seriously wounded President Ronald Reagan, Press Secretary James S. Brady, District of Columbia Police Officer Thomas K. Delahanty, and Secret Service Agent Timothy J. McCarthy.¹ Hinckley pled not guilty by reason of insanity and stood trial a year later.² Expert psychiatric testimony for the prosecution concluded that the defendant suffered from “‘depressive neurosis, and from three types of personality disorder—schizoid, narcissistic, and mixed—the last with borderline and passive-aggressive features.’”³ Hinckley’s expert testified that Hinckley suffered from “‘a major depressive disorder and from process schizophrenia’”⁴ The prosecution argued that jurors should convict the 27-year-old because the government had proved, beyond a reasonable doubt, that on the day of the shooting, Hinckley “‘was not suffering from a mental disease or defect, or else that he nevertheless had substantial capacity on that date both to conform his conduct to the requirements of the law and to appreciate the wrongfulness of his conduct.’”⁵ The defense argued that the prosecution had failed to prove Hinckley’s sanity beyond a reasonable doubt.⁶ The jury’s verdict: not guilty by reason of insanity on all charges.⁷

The Hinckley trial triggered a “cascade of public outrage.”⁸ Activists began pushing for federal⁹ and state¹⁰ legislation which

1. N.Y. Times, June 22, 1982, at A1, col. 6.

2. *Id.* News. News accounts after the trial reported that Hinckley was tried on 13 charges, but reported court opinions of pretrial rulings indicated that as of February 1982, Hinckley faced eight charges—three under federal law and five under District of Columbia law. See *United States v. Hinckley*, 672 F.2d 115, 117 (D.C. Cir. 1982).

3. Sallet, *After Hinckley: The Insanity Defense Reexamined*, 94 YALE L.J. 1545, (Book Review) 1545-48 (discussing L. CAPLAN, *THE INSANITY DEFENSE AND THE TRIAL OF JOHN W. HINCKLEY, JR.* (1984)).

4. *Id.*

5. N.Y. Times, *supra*, note 1, at D27, col. 1 (quoting from N.Y. District Judge Barrington D. Parker’s instruction to jurors).

6. *Id.*

7. *United States v. Hinckley*, Crim. No. 81-306 (D.D.C. June 21, 1982).

8. Taylor, *The Hinckley Riddle: Outrage on Acquittal Focuses on Confusion Created by Combining Psychiatry and Law*, N.Y. Times, June 24, 1982, at D21, col. 1.

9. See, e.g., N.Y. Times, June 23, 1982, at B6, col. 1; *Widespread Public Outrage: Hinckley Verdict Prompts Bills to Overhaul Insanity Defense*, 40 CONG. Q. WEEKLY REP. 1505 (1982).

would either drastically undercut the utility of the insanity defense or discard it.¹¹ Congress responded to the outcry by adopting, in 1984, the Insanity Defense Reform Act (the Act).¹² The Act significantly altered the federal legal landscape with respect to the insanity defense. In this Comment, the author discusses:

(1) The redefined legal test for insanity;¹³

(2) The burden of proving insanity by clear and convincing evidence being placed on the defendant;¹⁴ and

(3) A new evidentiary rule restricting expert testimony as to the "ultimate issue" of a defendant's mental state at the time he or she allegedly committed the crime.¹⁵

10. See, e.g., *Hinckley Acquittal Brings Moves to Change Insanity Defense*, N.Y. Times, June 24, 1982, at D21, col 1.

11. N.Y. Times, *supra* note 9. See also *United States v. Carmel*, 801 F.2d 997, 998 n.1 (7th Cir. 1986) ("In the aftermath of the John Hinckley case involving an attempt on President Reagan's life, Congress altered the standard for insanity in order to make it more difficult for a defendant to prevail on an insanity defense."); Wexler, *Redefining the Insanity Problem*, 53 GEO. WASH. L. REV. 528, 529 (1985) (The Hinckley verdict "galvanized national attention to the task of reforming the insanity defense.") (emphasis in original). The American Bar Association initiated its Criminal Justice Mental Health Standards Project before the Hinckley verdict, but because of position papers written by professional organizations after the trial, the Hinckley verdict "did play a substantial role in shaping the ultimate content of the ABA's standards." *Id.* For a thorough discussion of these standards, see *Symposium on the ABA Criminal Justice Mental Health Standards*, 53 GEO. WASH. L. REV. 338-607 (1985).

12. Insanity Defense Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 2057 (codified in scattered sections of 18 U.S.C.).

13. The Act defines insanity as follows:

It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

Pub. L. No. 98-473, § 402, 98 Stat. 2057 (1984) (codified as 18 U.S.C. § 20(a) (Supp. 1985), recodified as 18 U.S.C. § 17(a) by Pub. L. No. 99-646, 100 Stat. 3599 (1986)) [for consistency, hereinafter referred to as 18 U.S.C. section 20(a)].

14. Pub. L. No. 98-473, § 402, 98 Stat. 2057 (1984) (codified as 18 U.S.C. § 20(b) (Supp. 1985), recodified as 18 U.S.C. § 17(b) by Pub. L. No. 99-646, 100 Stat. 3599 (1986)) [for consistency, hereinafter referred to as 18 U.S.C. section 20(b)].

15. The new rule reads:

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

Pub. L. No. 98-473, § 406, 98 Stat. 2057, 2067-68 (1984) (codified as amended at FED. R. EVID. 704).

The public outrage that prodded Congress into action also spurred several state legislatures to act. While most of these made minor revisions, a few states abolished the insanity defense.¹⁶ Florida's legislature thus far has refrained from taking similar steps; Florida legislators, however, have not ignored the issue. Indeed, in the six years immediately following the 1981 assassination attempt, Florida lawmakers proposed twelve bills which would have reformed the state's insanity defense.¹⁷ Among the proposals were

16. Shortly after the Hinckley verdict, at least three states—Idaho, Montana and Utah—abolished the insanity defense and allowed evidence of mental state only when it applies to the requisite *mens rea* of a crime. Slobogin, *The Guilty But Mentally Ill Verdict: An Idea Whose Time Should Not Have Come*, 53 GEO. WASH. L. REV. 494 & n.2 (1985). Several other states have performed lesser alterations of their respective insanity defenses. *Id.* at 494-95.

17. The bills are as follows:

(1) Fla. SB 127 (1987) (proposed FLA. STAT. § 916.001). This bill would have made insanity an affirmative defense capable of being invoked when the defendant was unable to distinguish between right and wrong at the time the alleged criminal acts occurred. This bill also would have put the burden of proof with respect to insanity on the defendant. Finally, the bill would have precluded expert "opinion or inference" testimony as to the defendant's "mental state or condition constituting an element of the offense charged or of a defense thereto."

(2) Fla. HB 148 (1986) (proposed FLA. STAT. § 916.001) (identical to Fla. SB 127 (1987)).

(3) Fla. HB 831 (1985) (proposed FLA. STAT. § 916.001) (identical to Fla. SB 127 (1987)).

(4) Fla. HB 555 (1984) (proposed FLA. STAT. § 925.11) (would have mandated a finding of guilty but mentally ill in cases presenting an insanity defense).

(5) Fla. HB 17 (1983) (proposed FLA. STAT. § 925.11) (similar to Fla. HB 555 (1984)).

(6) Fla. HB 4 (1983) (proposed FLA. STAT. § 925.11) (similar to Fla. HB 555 (1984)).

(7) Fla. HB 20 (1983) (proposed FLA. STAT. § 925.11) (similar to Fla. HB 555 (1984)).

(8) Fla. HB 13 (1983) (proposed FLA. STAT. § 916.10) (would have eliminated mental condition defenses and would have authorized mental treatment for those convicts who required it).

(9) Fla. HB 27 (1983) (proposed FLA. STAT. § 916.10) (similar to Fla. HB 13 (1983)).

(10) Fla. HB 56 (1982) (proposed FLA. STAT. § 925.11) (similar to Fla. HB 555 (1984))

(11) Fla. SB 130 (1982) (proposed FLA. STAT. § 925.11) (similar to Fla. HB 555 (1984)).

(12) Fla. HB 834 (1982) (proposed FLA. STAT. § 921.135) (would have provided for a separate hearing on the issue of insanity, to follow proceeding on issue of guilt). Regarding Fla. HB 834 (1982), note that in *State ex rel. Boyd v. Green*, 355 So. 2d 789 (Fla. 1978), the court declared unconstitutional a statutory bifurcated trial procedure. The court wrote that it was a due process violation to try the defendant on the issue of guilt without allowing evidence as to mental state.

Sanity is, in effect, presumed, giving rise to an irrebuttable presumption of the existence of the requisite intent. Thus, the State is relieved of its burden of proving each element of the offense beyond a reasonable doubt because the defendant is precluded from offering evidence to negate the presumption of intent.

Id. at 793. *But cf.* *Muench v. Israel*, 715 F.2d 1124 (7th Cir. 1985), *cert. denied sub nom. Worthing v. Israel*, 467 U.S. 1228 (1984) (denial of a habeas corpus petition in a first-degree murder case tried under a Wisconsin statute that provided for bifurcated guilt/sanity proceedings).

three identical bills, each sponsored by Senator Dexter Lehtinen,¹⁸ which would have made changes in accord with the federal reforms.¹⁹ Each of the twelve bills died in committee.²⁰

Despite the Legislature's lack of interest in the proposed reforms, Senator Lehtinen said that he intends to continue introduc-

18. *Repub., Miami.*

19. Fla. SB 127 (1987); Fla. HB 148 (1986); and Fla. HB 831 (1985). Lehtinen also sponsored or co-sponsored related legislation: Fla. HB 555 (1984); Fla. HB 17 (1983); and Fla. HB 56 (1982). *See supra* note 17. Sen. Lehtinen said his sponsorship was not as much a reaction to the Hinckley cases as a "response to the lobbying and the efforts of victims groups, Parents of Murdered Children and Justice for Surviving Victims." Interview with Sen. Lehtinen (Aug. 12, 1987) (tape recording on file, *Florida State University Law Review*).

20. The fate of each bill is documented as follows:

(1) Fla. SB 127 (1987) died in Senate Judiciary-Criminal Committee, June 6, 1987. FLA. LEGIS., HISTORY OF LEGISLATION, 1987 REGULAR SESSION, HISTORY OF SENATE BILLS AT 34, SB 127.

(2) Fla. HB 148 (1986) died in House Committee on Criminal Justice, June 7, 1986. FLA. LEGIS., HISTORY OF LEGISLATION, 1986 REGULAR SESSION, HISTORY OF HOUSE BILLS AT 220, HB 148.

(3) Fla. HB 831 (1985) died in House Committee on Criminal Justice, May 31, 1985. FLA. LEGIS., HISTORY OF LEGISLATION, 1985 REGULAR SESSION, HISTORY OF HOUSE BILLS AT 117, HB 831.

(4) Fla. HB 555 (1984) died in House Committee on Criminal Justice, June 1, 1984. FLA. LEGIS., HISTORY OF LEGISLATION, 1984 REGULAR SESSION, HISTORY OF HOUSE BILLS AT 186-87, HB 555.

(5) Fla. HB 17 (1983) indefinitely postponed in House Committee on Criminal Justice, June 3, 1983. FLA. LEGIS., HISTORY OF LEGISLATION, 1983 REGULAR SESSION, HISTORY OF HOUSE BILLS AT 5, HB 17.

(6) Fla. HB 4 (1983) indefinitely postponed in House Committee on Criminal Justice, June 3, 1983. FLA. LEGIS., HISTORY OF LEGISLATION, 1983 REGULAR SESSION, HISTORY OF HOUSE BILLS AT 1, HB 4.

(7) Fla. HB 20 (1983) withdrawn from House committees on Criminal Justice and Appropriations, April 11, 1983. FLA. H.R. JOUR. 128 (Reg. Sess. 1983).

(8) Fla. HB 13 (1983) indefinitely postponed in House Committee on Criminal Justice, June 3, 1983. FLA. LEGIS., HISTORY OF LEGISLATION, 1983 REGULAR SESSION, HISTORY OF HOUSE BILLS AT 4, HB 13.

(9) Fla. HB 27 (1983) indefinitely postponed in House Committee on Criminal Justice, June 3, 1983. FLA. LEGIS., HISTORY OF LEGISLATION, 1983 REGULAR SESSION, HISTORY OF HOUSE BILLS AT 8, HB 27.

(10) Fla. HB 56 (1982) died in House Committee on Appropriations, March 25, 1982. FLA. LEGIS., HISTORY OF LEGISLATION, 1982 REGULAR SESSION, HISTORY OF HOUSE BILLS AT 19, HB 56.

(11) Fla. SB 130 (1982) died in Committee on Rules and Calendar, March 25, 1982. FLA. LEGIS., HISTORY OF LEGISLATION, 1982 REGULAR SESSION, HISTORY OF SENATE BILLS AT 46, SB 130.

(12) Fla. HB 834 (1982) died in House Committee on Criminal Justice, March 25, 1982. FLA. LEGIS., HISTORY OF LEGISLATION, 1982 REGULAR SESSION, HISTORY OF HOUSE BILLS AT 244, HB 834.

ing the measures until they pass.²¹ Because these reforms have not been thoroughly analyzed, either as applied in the federal courts or in terms of their potential impact on Florida law, the author will scrutinize the proposals that could redirect Florida law to follow the federal path regarding the legal definition of insanity, the defendant's burden of proof, and evidentiary limits on expert testimony.²² This discussion will begin with an overview of relevant legal issues to help explain fully the changes that have been made and proposed. Next the author will review the current status of the insanity defense in federal law, paying particular attention to legislative intent and judicial construction of the Insanity Defense Reform Act. Finally, the author will focus on how Florida law has applied the insanity defense, and how it might be affected if the Florida Legislature, in subsequent sessions, decides to follow the path marked by Congress. Throughout, the insanity defense will be distinguished from related concepts and the author will discuss how the distinction bears on certain constitutional rights in criminal prosecutions.

II. AN OVERVIEW

The insanity defense is a very complex and controversial area that touches upon many legal issues. These issues cannot be fully addressed in one Comment. Thus, the policies and practices that concern significant but tangential issues such as pretrial mental examination, competence to stand trial, commitment upon acquittal by reason of insanity, procedures for raising the insanity defense, the verdict of guilty but insane, and others are omitted.

A. *Purpose of the Insanity Defense*

Criminal law serves society in many ways. Ideally, it prevents criminal activity, both by keeping dangerous people safely confined and by rehabilitating them; it seeks to deter potential wrongdoers from doing wrong; it strives to inform the public that society will not tolerate certain kinds of behavior; and it exacts retribution to assuage the pain felt by the victims of criminal behavior—the state's expression of the anger felt by us all.²³

21. Interview with Sen. Lehtinen (Aug. 12, 1987) (tape recording on file, *Florida State University Law Review*). Senator Lehtinen has prefiled for the 1988 Regular Session Senate Bill 22, which parallels the three consecutive prior bills. See Fla. SB 22 (1988).

22. *Id.*

23. LAFAVE AND SCOTT, *CRIMINAL LAW* 306-07 (1986).

Underlying these goals is the notion of culpability, or criminal responsibility. Society will not *blame* a person for illegal action unless it believes that the person *chose* to act in a blameworthy fashion. "[T]he basic postulate of the criminal law is that of a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong."²⁴ The law's measure of blameworthiness is *mens rea*, an integral element of most crimes.²⁵

It follows, then, that one ought not be punished for wrongful behavior that is not the result of conscious desire, because blame generally is not attributed to such conduct.²⁶ When criminal activity is in some way caused by mental illness, the insanity defense is the vehicle by which the accused "may be relieved of criminal responsibility."²⁷ The defense does not confer a blanket pardon on social deviants, however; it "focuses on the kind of impairment that warrants exculpation, and necessarily assigns to the prison walls many men who have serious mental impairments or difficulties."²⁸

It is important to understand the subtle distinction between the element of *mens rea* and the defense of insanity. "Were the insanity defense eliminated, a person suffering from a mental disease would be excused if, and only if, [the defendant] lacked the state

24. 21 AM. JUR. 2D *Criminal Law* § 37 (1981). See, e.g., *United States v. Brawner*, 471 F.2d 969, 986 (D.C. Cir. 1972) (en banc) (citation omitted) (It is a "core concept" of the criminal law that a man should be held responsible for a criminal act only when his evil deed is the product of his free will.).

25. See, e.g., A. GOLDSTEIN, *THE INSANITY DEFENSE* 15-16 (1967); J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 70-104 (2d ed. 1960). The prosecution must prove beyond a reasonable doubt the existence of the defendant's *mens rea* if *mens rea* is an element of the crime. *In re Winship*, 397 U.S. 358 (1970). But some crimes, particularly those that threaten public safety, do not require proof of *mens rea* for a finding of guilt. See *Morissette v. United States*, 342 U.S. 246, 260 (1951).

26. "[T]he criminal law must ensure that the punishment an individual receives conforms to the choices that individual has made. Differential punishment of reckless and intentional actions is therefore essential if we are to retain 'the relation between criminal liability and moral culpability' on which criminal justice depends." *Tison v. Arizona*, 107 S. Ct. 1676, 1695 (1987) (Brennan, J., dissenting).

27. GOLDSTEIN, *supra* note 25, at 9. See also *United States v. Brawner*, 471 F.2d 969, 986 (D.C. Cir. 1972) ("The concept of lack of 'free will' is both the root of origin of the insanity defense and the line of its growth.").

28. *Brawner*, 471 F.2d at 986. See also GOLDSTEIN, *supra* note 25, at 90-91:

[T]he insanity test is merely the organizing principle of a process of decision which uses a 'political' solution to advance subtle social objectives. It is a normative standard applied to conflicting clusters of fact and opinion by a jury, an institution which is the traditional embodiment of community morality and, therefore, well suited to determining whether a particular defendant, and his act, warrant condemnation rather than compassion.

of mind required as an element of the crime charged.”²⁹ Thus, with no insanity defense, the prosecution could convict a defendant of murder if it could show that the defendant intended the victim’s death (assuming that proof of “intent” established the *mens rea* required for that crime)—even if the intent was the result of a schizophrenic delusion. The insanity defense creates an alternative to accommodate those defendants whose *mens rea* could be proved, but whose conviction and imprisonment would serve no purpose to society.³⁰

B. Distinguishing Insanity-Related Defenses

Some jurisdictions³¹ permit defenses related to, but distinguishable from, the insanity defense to reduce—not eliminate—the culpability of a criminal defendant. It is important when considering the insanity defense to recognize the insanity-like defenses and exclude them from the discussion. Keeping these cousins separate is not always easy, however, for this is a messy area of the law—“a quagmire”³²—because courts and commentators tend to blend similar yet discrete concepts, loosely labeling them.³³ Notwithstanding

29. MODEL PENAL CODE § 4.01 revised comments at 181 (1985).

30. Cf. Sendor, *Crime as Communication: An Interpretive Theory of the Insanity Defense and the Mental Elements of Crime*, 74 GEO. L.J. 1371 (1986). Sendor wrote that crimes are expressions of one’s disrespect for societal interests. *Mens rea*, together with the voluntariness component of *actus reus*, is society’s invention to interpret the acts of offenders. The insanity defense, then, can be viewed as a way to excuse actions that are not expressions of disrespect of society’s legally protected interests.

31. Fewer than 25 states and federal jurisdictions employed the reduced capacity doctrine as of 1975. Lewin, *Psychiatric Evidence in Criminal Cases for Purposes Other than the Defense of Insanity*, 26 SYRACUSE L. REV. 1051, 1055 (1975).

32. *United States v. White*, 766 F.2d 22, 24 (1st Cir. 1985).

33. Three commonly used—and confused—labels are: (1) “diminished capacity”; (2) “diminished responsibility”; and (3) “partial responsibility.” For example, in *United States v. Kepreos*, 759 F.2d 961, 964 (1st Cir. 1985), *cert. denied*, 106 S. Ct. 227 (1985), the court excluded expert testimony in a “diminished capacity” defense, and it cited for support *Campbell v. Wainwright*, 738 F.2d 1573 (11th Cir. 1984), *cert. denied*, 106 S. Ct. 1652 (1986). But in *Campbell*, the court had used the phrase “partial responsibility” to describe the same proposition. Another example appears in a commentary by Lewin, *supra* note 31. Lewin used the phrase “partial responsibility” in the same context as above, and he counterposed it with what he called “diminished responsibility.” Lewin wrote that under the theory of “partial responsibility,” “if because of mental disease or defect a defendant cannot form the specific state of mind required as an essential element of a crime, he may be convicted only of the lower grade of the offense not requiring that particular mental element.” *Id.* at 1054. Whereas “diminished responsibility,” as Lewin described it, applies only in homicide cases and “does not require proof that a particular mental element of the crime was substantially missing. It merely requires proof that the defendant suffered from a substantial defect of his mental processes. No causative connection between defect and a particular state of mind required for the crime need be shown.” *Id.* at 1059-60. See also *United*

the confusion, insanity-like defenses can be divided into two categories, "denial" and "avoidance."³⁴

A denial defense is one which directly challenges the prosecution's proof of the requisite *mens rea*. The defendant does not have to prove anything; he or she need only raise a reasonable doubt as to the existence of the appropriate mental state. In essence, the defendant says: "I deny that I had the mental capacity to form a specific intent to commit that crime at the time it occurred. Therefore, I should be acquitted of the offense charged because the prosecution cannot prove the essential element of *mens rea*." A successful denial, however, does not preclude the prosecution from getting a conviction on a lesser charge that requires a different mental element. For example, a defendant charged with first-degree murder who successfully denies premeditation (assuming that to be the requisite *mens rea*) might still be convicted of second-degree murder if, after failing to prove premeditation, the state proves the lesser degree of *mens rea*, such as "depraved mind," that may be required for a second-degree murder conviction.

An avoidance defense typically is used when the prosecution can prove the *mens rea* required to convict on the original charge. In his defense the accused argues: "I committed the crime, but I should avoid conviction for the offense charged because my mental capacity was impaired. The impairment was not enough to render me unable to distinguish right from wrong, but it was enough to render me less culpable, so that I should not be punished to the limits that the law allows."³⁵ For example, the state has enough proof to convict a defendant of first-degree murder, but evidence of impaired mental state convinces the judge or jury to convict the defendant of the less serious crime of second-degree murder or manslaughter.³⁶

States v. Brawner, 471 F.2d 969, 998 (D.C. Cir. 1972) (en banc) (noting confusion caused by the term "diminished responsibility," the court preferred to avoid the phrase).

34. For an excellent review of the subject, see generally Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. CRIM. L. & CRIMINOLOGY 1 (1984).

35. Query whether this should be a function of *sentencing* rather than part of the guilt phase of a trial.

36. The court in United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972) (en banc), observed a clear distinction between the two concepts involved in a "diminished capacity" analysis. After writing that attorneys should be free to submit expert evidence to attack the *mens rea* element of a crime, it wrote:

Without further study, however, we hesitate to rule as a matter of law concerning the possibility that there may be abnormal mental conditions falling short of legal insanity that would leave the defendant with capacity to appreciate the wrongful-

Avoidance defenses are more closely akin to the insanity defense than those which simply deny *mens rea*, and hence are more difficult to distinguish. Avoidance is in the nature of an affirmative defense because the defendant usually must raise the issue and support it with evidence. By way of contrast, a denial is a straightforward refutation of the charge; the defendant need not offer proof to attack the prosecution's evidence of *mens rea*. It is not an affirmative defense; rather it is simply a defense available to all defendants accused of crimes that have a *mens rea* element. Thus, the defendant's burden draws a visible line leaving denial on one side and avoidance and insanity on the other.

A crucial distinction is needed to separate insanity from avoidance and denial: the *consequences* of each defense. A defendant who successfully denies or avoids a murder conviction will not be treated in the same manner as the defendant who successfully pleads insanity to the same charge. The defendant who denies the crime might be acquitted and released, or, if there is proof of a less demanding mental state, the defendant could be convicted of a lesser offense and sentenced to imprisonment, probation, or both.³⁷ Likewise, the defendant who avoids one charge may be convicted of a less serious crime and receive a prison sentence or probation. On the other hand, the accused who is acquitted by reason of insanity is subject to an indeterminate period of confinement in a mental institution that could extend beyond any lawful sentence that a conviction might have brought.³⁸ This disparity between potential punishments decisively distinguishes insanity from related defenses. The insanity-like defenses (avoidance or denial) lead to "conventional" outcomes, such as acquittal, probation, or imprisonment. But the insanity defense presents alternatives. When it fails, and the accused is found guilty, the defendant faces one or more of the conventional outcomes. When it works, the defendant is exposed to potentially indefinite institutionalization with a view to curing his disease. That may not be bad from the defendant's perspective, because the duration of the treatment may be shorter than a prison sentence would be. Many critics of the insanity de-

ness of his acts, but without awareness of the danger of serious harm. The problem is remitted to future consideration, which we think will be aided by the availability of a specific factual context.

Id. at 1002-03 n.75.

37. The judge may also have discretion to order mental treatment.

38. See, e.g., *Jones v. United States*, 463 U.S. 354 (1983); *Roberts v. State*, 335 So. 2d 285 (Fla. 1976).

fense are disturbed by the prospect that criminals may receive not only shorter sentences but may benefit from their actions.

Much of the passion ostensibly aroused by the insanity defense may be attributed to insanity-related defenses, rather than the insanity defense itself. Often the related defenses are bunched together with the insanity defense, creating a monolithic object, the focus of undifferentiated discontent.

C. *The Tests to Determine Legal Insanity*

To evaluate sanity, courts and legislatures have devised various tests that are founded on the layperson's common sense view of the human thought process. This view can be characterized as a continuum which includes three conceptually separate but actually inseparable elements—cognition, emotion and control. At one end of the continuum is cognition, a person's intellect in the abstract, comprehension without feeling, understanding not yet passed through the prism of one's individuality that produces the rainbow of emotional responses which separates us as unique personalities. At the other end is control, contemplating physical expression free of the mind's direction. Somewhere in the middle lies emotion, the complex mix of feeling, intellect and action, reflecting experiences, ethics, morals, determining whether one laughs, cries, gets angry, or gets frightened. The various legal tests for insanity may rest upon any one of these elements exclusively, or on a combination of two or all three of the elements. The following discussion embraces the major tests in American jurisprudence.

1. *Cognition: M'Naghten's Case—Right or Wrong*

The earliest insanity test of lasting significance came about in a manner similar to that of the Insanity Defense Reform Act of 1984: it was triggered by a botched political assassination. In 1843, Daniel M'Naghten shot to death Edward Drummond, the secretary to Prime Minister Sir Robert Peel. M'Naghten had intended to kill Peel, not Drummond. At trial he argued that he was suffering from morbid delusions of persecution which caused him to kill Drummond, whom he had mistaken for the Prime Minister. A jury found M'Naghten not guilty by reason of insanity. The House of Lords debated the controversial verdict, hoping to fashion a judi-

cial rule to govern subsequent cases. In *M'Naghten's Case*,³⁹ Lord Tindal said:

[J]urors ought to be told that *every man is to be presumed to be sane* and to possess a sufficient degree of reason to be responsible for his crimes until the contrary be proved to their satisfaction, and that to establish a defense 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 a disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong.*

M'Naghten's Case fathered a narrow, cognitive test premised on a rigorous morality, a black and white view of right and wrong. It ignored control, and showed no sympathy to the accused who knew what he or she was doing and knew that it was wrong but could not control his or her actions. The Lords assumed that "powers of self control are strengthened by knowledge of sanctions; and that any injustices which might result—to those who were nevertheless unable to control their conduct—are less important than exerting the maximum possible pressure toward conformity with law."⁴⁰ Implicitly, *M'Naghten* recognized primarily defects in cognition.⁴¹

The *M'Naghten* test was out of step with psychological theories that emerged around the turn of the century. These theories advanced the view that the human personality is dynamically integrated, and that impairment of any of the three elements of personality could seriously diminish mental capacity.⁴² Nevertheless, *M'Naghten* became the majority rule in the United States.⁴³ In some jurisdictions today, the *M'Naghten* test is the sole basis for determining a defendant's sanity at the time the crime was committed. In others, *M'Naghten* co-exists with a control test commonly called "irresistible impulse."

39. 8 Eng. Rep. 718 (H.L. 1843).

40. GOLDSTEIN, *supra* note 25, at 45-46. See also *United States v. Brawner*, 471 F.2d 969, 976-79 (D.C. Cir. 1972) (en banc).

41. GOLDSTEIN, *supra* note 25, at 45-47.

42. *Id.*

43. See, e.g., LAFAYE, *supra* note 23, at 312. The Supreme Court accepted application of *M'Naghten* in dictum in *Davis v. United States*, 160 U.S. 469 (1895), and two years later in the holding of a related case, *Davis v. United States*, 165 U.S. 373 (1897).

2. Control: The "Irresistible Impulse" Test

When the Supreme Court in *Davis v. United States*⁴⁴ first accepted a jury instruction that applied *M'Naghten*, it also accepted a control test, approving a definition of insanity which included the involuntary inability of the "governing power of [the] mind" to control actions.⁴⁵

This test is widely known as "irresistible impulse" or "control"; Florida courts have referred to it as "moral insanity."⁴⁶ The test tells jurors to acquit a defendant by reason of insanity if: (1) the defendant had a mental disease, and (2) if that disease kept the defendant from controlling his or her conduct.⁴⁷

This doctrine has been in the law at least as long as *M'Naghten*,⁴⁸ although it has not been as widely accepted. Part of its relative unpopularity stems from the phrase "irresistible impulse," which strongly implies that only sudden acts of behavior will qualify as irresistibly impulsive. Some courts have construed the control test broadly, concluding that long periods of brooding behavior might lead to a loss of control sufficient to satisfy the standard.⁴⁹ At the other extreme, some argue that the control test is too broad, allowing defendants to escape the consequences of behavior that they knew to be wrong at the time. A related criticism of the test is that it presents serious problems of proof regarding whether one acted on an irresistible impulse.⁵⁰

Criticism of the *M'Naghten* (cognitive) and control tests meshed in the Report of the Royal Commission on Capital Punishment (1953), which suggested reforming the insanity defense. Apparently, United States Circuit Judge David L. Bazelon of the District of Columbia Circuit was a student of the Royal Commission's report, because he referred to it repeatedly when he authored the next significant chapter in this nation's insanity defense saga, *Durham v. United States*.⁵¹

44. 165 U.S. 373 (1897).

45. *Id.* at 378.

46. *E.g.*, *Crews v. State*, 143 Fla. 263, 196 So. 590 (1940); *Hall v. State*, 78 Fla. 420, 83 So. 513 (1919); *Cochran v. State*, 65 Fla. 41, 61 So. 187 (1913); *Copeland v. State*, 41 Fla. 320, 26 So. 319 (1899).

47. *See, e.g.*, GOLDSTEIN, *supra* note 25, at 67; LAFAYE, *supra* note 23, at 320.

48. GOLDSTEIN, *supra* note 25, at 67.

49. *See, e.g.*, *Durham v. United States*, 214 F.2d 862, 873-74 (D.C. Cir. 1954) (en banc).

50. *See, e.g.*, GOLDSTEIN, *supra* note 25, at 67-79; LAFAYE, *supra* note 23, at 320-23.

51. 214 F.2d 862 (D.C. Cir. 1954) (en banc).

3. Durham: The Product of Mental Disease

In *Durham*, the circuit court replaced the District of Columbia's combined cognitive-control definition of legal insanity with a very broad, and presumably progressive, one.⁵² Judge Bazelon faulted the cognitive test as unscientific and overly restrictive,⁵³ and assailed the control test as being blind to "mental illness characterized by brooding and reflection."⁵⁴ Bazelon's opinion smiled upon the Royal Commission's report as fresh and enlightened. The report proposed two alternatives: (1) discard all the rules and give the jury unfettered discretion to resolve the issue of the defendant's sanity; or (2) implement a tripartite test which would recognize as legal insanity any of three products of the defendant's diseased mind, namely, the inability to discern the nature and quality of the defendant's act, or the inability to distinguish right from wrong, or the inability to control one's own behavior to prevent the crime from occurring.⁵⁵

Judge Bazelon's new rule was the offspring of the Royal Commission's first option and an aged New Hampshire decision.⁵⁶ The test, as he articulated it, was this: "an accused is not criminally responsible if his unlawful act was the *product of mental disease or mental defect*."⁵⁷

Durham's "product" test was a social experiment that failed. It won praise, particularly from the psychiatric field, for expanding the inquiry into mental state by implicitly including cognition, emotion and control. But many courts and commentators agreed that the test's lack of guidelines made it a "non-rule"⁵⁸ which produced inconsistent results. *Durham*'s emphasis on mental disease all but ignored distinctions between different types of behavior that the disease might have produced.⁵⁹

Criticism soon brought change.⁶⁰ Shortly after *Durham* was decided, the American Law Institute (ALI) published its first draft of

52. R. ARENS, *THE INSANITY DEFENSE* 5 n.12 (1974).

53. *Durham*, 214 F.2d at 871-72.

54. *Id.* at 874.

55. GOLDSTEIN, *supra* note 25, at 81.

56. *State v. Pike*, 49 N.H. 399, 402 (1869), *rev'd on other grounds*, 56 N.H. 235 (1875).

57. *Durham*, 214 F.2d at 874-75 (emphasis added).

58. GOLDSTEIN, *supra* note 25, at 84.

59. R. ARENS, *MAKE THE MAD GUILTY* 6 (1969). *See also* GOLDSTEIN, *supra* note 25, at 84-86; LAFAYE, *supra* note 23, at 323-29.

60. *See, e.g., McDonald v. United States*, 312 F.2d 847 (D.C. Cir. 1962) (en banc) (For the purpose of determining criminal responsibility, "the jury should be told that a mental

the Model Penal Code.⁶¹ The ALI formulated a test that was intended to cure some of the ills of the *M'Naghten*, control and product tests. The ALI's test became known as the "substantial capacity" test.

4. *Substantial Capacity: Cognition, Emotion and Control*

Believing that a defense based on irresponsibility was necessary, the ALI devised the following 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 lacks *substantial capacity either to appreciate* the criminality [wrongfulness] of his conduct *or to conform his conduct* to the requirements of law.⁶²

Subsection (1) invokes both cognitive and control tests, but with subtle and significant changes from the *M'Naghten* and irresistible impulse doctrines. Whereas *M'Naghten* asks if a defendant *knew* he or she was doing what was wrong, the ALI test more broadly asks if the defendant could *appreciate* criminality or wrongfulness. That "indicates a preference for the view that a sane offender must be emotionally as well as intellectually aware of the significance of his conduct."⁶³ As for control, the phrase "substantial capacity . . . to conform his conduct" eliminates a defendant's need to prove *total* loss of control, as would be the necessary to sustain an irresistible impulse defense.⁶⁴ But the ALI warned that repeated acts of criminal or other antisocial behavior do not qualify as "mental disease or defect," ensuring that social deviants remain culpable under the law.⁶⁵

The ALI's substantial capacity test met with great approval and quickly began to supplant other tests in federal and state jurisdictions.⁶⁶ Perhaps the finest expression of that movement was the

disease or defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls.").

61. LAFAYE, *supra* note 23, at 329 n.52 and accompanying text (quoting MODEL PENAL CODE § 4.01 (Tent. Draft No. 4, 1955)).

62. MODEL PENAL CODE § 4.01(1) (official draft 1982) (emphasis added).

63. GOLDSTEIN, *supra* note 25, at 87. *See also* MODEL PENAL CODE § 4.01 revised comments at 169-70 (1985).

64. MODEL PENAL CODE § 4.01 revised comments at 170-72 (1985). *See also* GOLDSTEIN, *supra* note 25, at 87; LAFAYE, *supra* note 24, at 329-32.

65. MODEL PENAL CODE § 4.01.

66. *See* United States v. Brawner, 471 F.2d 969, 979-81 (D.C. Cir. 1972) (en banc); MODEL PENAL CODE § 4.01 revised comments at 175-80 (1985).

landmark opinion of *United States v. Brawner*.⁶⁷ In that case, the Circuit Court for the District of Columbia adopted, with slight modification, the substantial capacity test,⁶⁸ discarding *Durham* in the waste bin of jurisprudence. *Brawner* reflected the national trend, because until Congress acted in 1984, judicial acceptance of the ALI test was the country's primary exercise in the insanity defense arena.⁶⁹

D. *The Burden of Proof*

The burden of proving insanity in criminal cases has been the subject of some conflict. Two issues define the debate: (1) who must bear the burden of proof; and (2) how much proof is required to prove (or disprove) insanity. The Supreme Court presented its position before the turn of the century in *Davis v. United States*.⁷⁰ The Court wrote that while the accused is not required to prove or disprove facts in order to establish innocence, the state is always entitled to a presumption favoring sanity.⁷¹ Thus, the defendant's only burden is to cast a reasonable doubt on sanity, adducing evidence sufficient to rebut the presumption.

However, in *Leland v. Oregon*,⁷² the Court wrote that *Davis* did not set a constitutional standard; it merely set "the rule to be followed in federal courts," and was not binding on the states. In *Leland*, the Court upheld an Oregon law that required defendants raising the defense to prove their insanity beyond a reasonable doubt. In the Court's opinion, *Davis* and subsequent decisions established that pleading not guilty by reason of insanity constituted an affirmative defense, and therefore states *could* require the defendant to prove insanity. At the time *Leland* was decided, twenty states thrust upon the defendant the burden to prove insanity by a

67. 471 F.2d 969 (D.C. Cir. 1972).

68. The modification was to define "mental disease or defect as an abnormal condition of the mind, and a condition which substantially (a) affects mental or emotional processes and (b) impairs behavioral controls." *Id.* at 991 (adopting the definition from *McDonald v. United States*, 312 F.2d 847 (D.C. Cir. 1962)).

69. See, e.g., *United States v. Lyons*, 731 F.2d 243 (5th Cir. 1984), *cert. denied*, 465 U.S. 930 (1983); *United States v. Weeks*, 716 F.2d 830 (11th Cir. 1983); *United States v. Campbell*, 675 F.2d 815 (6th Cir. 1982); *United States v. Frazier*, 458 F.2d 911 (8th Cir. 1972); *United States v. Shapiro*, 383 F.2d 680 (7th Cir. 1967) (en banc); *United States v. Freeman*, 357 F.2d 606 (2d Cir. 1966).

70. 160 U.S. 469 (1895).

71. *Id.* at 487-88.

72. 343 U.S. 790, 797 (1952).

preponderance of the evidence. Only Oregon required the more demanding standard of beyond a reasonable doubt on that issue.⁷³

There are constitutional constraints on shifting burdens of proof to defendants, and shifting the burden on insanity pushes against the outer edge of constitutionality. The Supreme Court set the constitutional limit in *In re Winship*,⁷⁴ holding that due process demands that the state prove each essential element beyond a reasonable doubt, so that an accused cannot be required to disprove an essential element. By treating insanity as an affirmative defense, as the Court did in *Leland*, the Court in effect has applied a syllogism: (1) *mens rea* and insanity are separable, distinct mental phenomena; (2) having the necessary criminal intent is not inconsistent with insanity; and (3) proof of insanity does not necessarily negate proof of *mens rea*, so the state can shift to the defendant the burden to prove insanity.

In the last two decades, the Supreme Court has explored whether it is constitutional to shift the burden of proof to the defendant on mental conditions other than insanity.⁷⁵ In so doing, the Court has considered whether the proof of certain mental conditions disproves *mens rea*. The decisions point out the difficulty

73. *Id.* at 798-99.

74. 397 U.S. 358 (1970).

75. See *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *Patterson v. New York*, 432 U.S. 197 (1977). In *Mullaney*, Justice Rehnquist wrote a concurring opinion that commented significantly on *Leland*:

The Court noted in *Leland* that the issue of insanity as a defense to a criminal charge was considered by the jury only after it had found that all the elements of the offense, including the *mens rea*, if any, required by state law, had been proved beyond a reasonable doubt. Although as the state court's instructions in *Leland* recognized, evidence relevant to insanity as defined by state law may also be relevant to whether the required *mens rea* was present, the existence or nonexistence of legal insanity bears no necessary relationship to the existence or nonexistence of the required mental elements of the crime. For this reason, Oregon's placement of the burden of proof of insanity on *Leland*, unlike Maine's redefinition of homicide in the instant case, did not effect an unconstitutional shift in the State's traditional burden of proof beyond a reasonable doubt of all necessary elements of the offense.

421 U.S. at 705-06 (Rehnquist, J., concurring) (citations omitted). Cf. Note, *Constitutional Limitations on Allocating the Burden of Proof of Insanity to the Defendant in Murder Cases*, 56 B.U.L. REV. 499 (1976). But see *Rivera v. Delaware*, 429 U.S. 877, 880 (1976) (Brennan, J., dissenting):

Like the state rule invalidated in *Mullaney*, which implied malice unless the accused negated it, the plea of insanity, whether or not the State chooses to characterize it as an affirmative defense, relates to the accused's state of mind, an essential element of the crime, and bears upon the appropriate form of punishment.

in distinguishing between conditions which negate *mens rea*, and those which do not.

The latest example in this line of Supreme Court decisions was *Martin v. Ohio*,⁷⁶ in which the Court approved shifting the burden of proof to the affirmative defense of self-defense. The Court held that while there may be some overlap of evidence proving self-defense and disproving *mens rea*, Ohio did not shift to the defendant the burden of disproving an essential element. Furthermore, the state had no constitutional burden to prove the absence of self-defense, even though most states require prosecutors to do just that. Thus, the Court has reasoned that certain mental-type defenses, such as self-defense and insanity, do not necessarily require disproving the essential element of *mens rea*.

The Court in *Leland* left to the states the decision whether to shift the burden of proof of insanity; it also gave the states a license to set the level of proof with no apparent restrictions. The Court has since revisited the issue of level of proof as it relates to insanity in different contexts. In *Addington v. Texas*,⁷⁷ the Court held that the Constitution requires "clear and convincing evidence" before a state can involuntarily commit a person to a mental institution in a civil proceeding. The Court distinguished *Addington* in *Jones v. United States*,⁷⁸ holding that a "preponderance of evidence" is a constitutionally sufficient level of proof for the state to indefinitely institutionalize a person acquitted of a crime by reason of insanity. However, the Court has not strayed from its statement of the law in *Leland*: states are still free to foist the burden of proving insanity on criminal defendants by as great a margin as beyond a reasonable doubt.⁷⁹

E. Evidentiary Concerns and the Ultimate Issue of Mental State

An insanity defense is worthless unless the courts allow defendants the leeway to present evidence of insanity. Because of the complex nature of mental state evidence, insanity defenses usually involve expert testimony by psychiatrists or psychologists. In *Ake*

76. 107 S. Ct. 1098 (1987).

77. 441 U.S. 418 (1979).

78. 463 U.S. 354 (1983).

79. *But see Rivera*, 429 U.S. at 880 (Brennan, J., dissenting) (subsequent Court decisions have eroded *Leland*).

v. Oklahoma,⁸⁰ the Supreme Court recognized both the significance and problems of such testimony:

[A] reality that we recognize today [is] that when the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense. In this role, psychiatrists gather facts, both through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder on behavior; and they offer opinions about how the defendant's mental condition might have affected his behavior at the time in question. They know the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers. Unlike lay witnesses, who can merely describe symptoms they believe might be relevant to the defendant's mental state, psychiatrists can identify the 'elusive and often deceptive' symptoms of insanity and, tell the jury why their observations are relevant. Further, *where permitted by evidentiary rules*, psychiatrists can translate a medical diagnosis into language that will assist the trier of fact, and therefore offer evidence in a form that has meaning for the task at hand. Through this process of investigation, interpretation, and testimony, psychiatrists ideally assist lay jurors, who generally have no training in psychiatric matters, to make a sensible and educated determination about the mental condition of the defendant at the time of the offense.

Psychiatry is not, however, an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms, on cure and treatment, and on the likelihood of future dangerousness. Perhaps because there often is no single, accurate psychiatric conclusion on legal insanity in a given case, juries remain the primary factfinders on this issue, and they must resolve differences in opinion within the psychiatric profession on the basis of evidence offered by each party. When jurors make this determination about issues that inevitably are complex and foreign, the testimony of psychiatrists can be crucial and 'a virtual necessity if an insanity plea is to have any chance of success'. . . . In so saying, we neither approve nor disapprove of the widespread reli-

80. 470 U.S. 68 (1985).

ance on psychiatrists but instead recognize the unfairness of a contrary holding in light of the evolving practice.⁸¹

A court's concerns often are manifested when an expert is asked to give an opinion about whether a defendant was sane or insane when the crime occurred, opinions on the ultimate issue. How far can attorneys go in asking such questions, and to what extent is an expert witness allowed to respond? Until the 1940s, courts routinely blocked experts from giving their opinions regarding ultimate issues of fact (the resolution of which determines guilt or innocence), strictly applying the "ultimate issue rule"—a subset of the "opinion rule."⁸² The rationale for making witnesses keep their opinions to themselves that was such testimony usurped the jury's fact-finding function.⁸³ That rationale was ultimately discredited by Professor Wigmore, among others.⁸⁴ In the 1940s, a trend to relax the traditional rigid application of the opinion rule began. But the ultimate issue rule apparently did not have a great effect on the insanity defense. Because questions concerning psychological disorders fall "within the area of a psychiatrist's special competence,"⁸⁵ courts consistently have allowed expert opinion testimony on the ultimate issue of mental state which is arguably a question of law⁸⁶ in insanity defense cases.⁸⁷

81. *Id.* at 80-82 (emphasis added).

82. *See, e.g.*, MCCORMICK ON EVIDENCE § 12 (3rd. ed. 1984).

83. 7 WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 1920-21 (Chadbourne rev. 1978). *See also* MCCORMICK ON EVIDENCE § 12 (3rd. ed. 1984).

84. 7 WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1920 (Chadbourne rev. 1978):

The fallacy . . . is, of course, that, measured by the principle, it is both too narrow and too broad. It is too broad, because, even when the very point in issue is to be spoken to, the jury should have help if it is needed. It is too narrow, because opinion may be inadmissible even when it deals with something other than the point in issue. Furthermore, the rule if carried out strictly and invariably would exclude the most necessary testimony. When all is said, it remains simply one of those impracticable and misconceived utterances which lack any justification in principle.

Id. § 1921 (citation omitted).

85. GOLDSTEIN, *supra* note 25, at 97.

86. Questions of law are not the proper subject of the testimony of any witness, of course; they are for the judge, not the jury, to resolve.

87. For example, in *M'Naghten's Case*, 8 Eng. Rep. 718 (H.L. 1843), the Lords wrote that they would allow an expert to "be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime. . . ." In *Davis v. United States*, 165 U.S. 373, 376 (1897), the Court "permitted each [expert] . . . to give fully his opinion as to the mental condition of [the] defendant, and his belief as to the latter's knowledge of right and wrong and his ability to distinguish between them." The same type of evidence was admitted fifty-five years later in *Durham v. United States*, 214 F.2d 862, 867 (D.C. Cir. 1954) (en banc), and again in *United States v. Brawner*, 471 F.2d 969, 975 (D.C. Cir. 1972)

Allowing experts to testify about the ultimate issue in insanity cases created problems. Attorneys routinely asked conclusory questions to seek responses that bore directly on the ultimate issue of insanity; the more conclusory the question, the more the response resembled an opinion on a legal issue. Distinguished commentator Abraham S. Goldstein noted that "[u]nless an *extraordinary effort* is made, lawyers will probably continue to put only conclusory questions to experts, usually cast in words of the insanity test itself, and experts will come to believe 'the law' is not interested in a detailed description of the defendant's mental state but only in the answers to the test questions."⁸⁸ Congress addressed the matter in 1984 when it passed the Insanity Defense Reform Act.

II. THE INSANITY DEFENSE REFORM ACT OF 1984

The Act was the first federal legislation on the insanity defense.⁸⁹ Congress aimed to cure what it viewed as the defense's defects. As a Senate Report indicates, the committee that reviewed the proposed legislation had considerable concerns about: the inability of experts to agree as to the construction of legal tests to determine insanity; the confusing and frustrating job jurors face when they weigh directly conflicting expert testimony; the inflated role assumed by the procedural aspects of an insanity defense trial, particularly the allocation of the burden of proof on the insanity issue, that steadily escalates as jurors attempt to bring order to chaos.⁹⁰ Congress' treatment was straightforward: it adjusted the

(en banc), where the trial court allowed experts to testify to the "ultimate issue" of whether mental disease or defect caused the defendant's behavior. The court saw no harm in allowing an expert to testify as to a conclusion, provided that the conclusion was predicated on the experts' analysis of the defendant's condition:

The rule contemplating expert testimony as to the existence and consequence of a mental disease or defect is not to be construed as permission to testify *solely* in terms of expert conclusions. Our jurisprudence to the contrary is not undone, it is rather underscored. It is the responsibility of all concerned—expert, counsel and judge—to see to it that the jury in an insanity case is informed of the expert's underlying reasons and approach, and it is not confronted with ultimate opinions on a take-it-or-leave-it basis.

Id. at 1006 (emphasis added). *But see* LAFAYE, *supra* note 23, at 356.

88. GOLDSTEIN, *supra* note 25, at 94. *See also* LAFAYE, *supra* note 23, at 356-57.

89. Pub. L. No. 98-473, §§ 401-06, 98 Stat. 2057-68 (1984). *See* S. REP. NO. 98-225, 98th Cong., 2d Sess. 222, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3404.

90. S. REP. NO. 98-225, 98th Cong., 2d Sess. 222, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3404. Courts consistently have cited the report as legislative history to interpret provisions of the Act. *See, e.g.*, *United States v. Hillsberg*, 812 F.2d 328 (7th Cir. 1987), *cert. denied*, 107 S. Ct. 1981 (1987); *United States v. Amos*, 803 F.2d 419 (8th Cir. 1986); *United States v. Freeman*, 804 F.2d 1574 (11th Cir. 1986).

test, increased the defendant's burden, and silenced some expert testimony.

A. *The Test to Determine Legal Insanity*

The Act created an affirmative defense available in any federal criminal prosecution whereby a defendant may assert that at the time the crime occurred, the defendant was "unable to appreciate" the nature, quality or wrongfulness of the defendant's action due to "severe mental disease or defect."⁹¹ The Act also provided that "[m]ental disease or defect does not otherwise constitute a defense."⁹²

This test for insanity looks at cognition, considers emotion, and ignores control. The Senate committee concluded that irresistible impulse tests are impossible to enforce: "No test is available to distinguish between those who cannot and those who will not conform to legal requirements. The result is an invitation to semantic jousting, metaphysical speculation and intuitive moral judgments masked as factual determinations."⁹³

Congress' cognitive test, while not as rigid as the old *M'Naghten* rule, is not as expansive as the ALI's. Compare the ALI's phrase "lack of substantial capacity to appreciate"⁹⁴ to Congress' language "unable to appreciate." The use of "unable" signifies Congress' rejection of the ALI's position that total knowledge is an unrealistic restriction.⁹⁵ However, the Act's phrase, "appreciate the nature and quality or the wrongfulness of his acts," seems to contemplate emotional as well as intellectual awareness,⁹⁶ which the ALI con-

91. Pub. L. No. 98-473, § 402, 98 Stat. 2057 (1984) (codified as 18 U.S.C. § 20(a) (Supp. 1986), recodified as 18 U.S.C. § 17(a) by Pub. L. No. 99-646, § 34, 100 Stat. 3599 (1986)).

92. *Id.*

93. S. REP. No. 98-225, 98th Cong., 2d Sess. 227, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3409 (quoting Professor David Robinson of George Washington University).

94. MODEL PENAL CODE § 4.01(1) (official draft 1963).

95. The ALI defined "substantial capacity" as:

[A] capacity of some appreciable magnitude when measured by the standard of humanity in general, as opposed to the reduction of capacity to the vagrant and trivial dimensions characteristic of the most severe afflictions of the mind.

The adoption of the standard of substantial capacity may well be the Code's most significant alteration of the prevailing tests. It was recognized, of course, that 'substantial' is an open-ended concept, but its quantitative connotation was believed to be sufficiently precise for purposes of practical administration.

MODEL PENAL CODE § 4.01(1) revised comments at 172 (1985) (citation omitted).

96. *But see* Comment, *Recent Changes in Criminal Law: The Federal Insanity Defense*, 46 LA. L. REV. 337, 352-53 (1985):

cluded would "convey a broader sense of understanding."⁹⁷ If this reading is correct, then the Act's test is not a straight cognitive test, and the Act's concept of "normal" may be more understanding than that of *M'Naghten*. Thus, a defendant should be convicted if he or she appreciated—not just knew—that what he or she was doing was wrong, appreciation being an integrated complex of emotion and intellect. As of this writing, however, no reported cases have construed that section's language.

With its insanity test, Congress sought to plug up a loophole in the law that resulted from a definitional deficiency involving the terms "mental disease or defect." The deficiency, as Congress saw it, was that the terms went largely undefined, a situation made possible by misplaced reliance on expert testimony.⁹⁸ Congress apparently believed that the loophole was large enough to allow defendants with personality disorders less serious than full-blown insanity to assert the defense successfully.

To allay its concerns, Congress did two things. First, it used word "severe" to modify the phrase "mental disease or defect," attempting "to emphasize that non-psychotic behavior disorders or neuroses such as an 'inadequate personality,' 'immature personality,' or a pattern of 'antisocial tendencies' do not constitute the defense."⁹⁹ The lawmakers excluded from the definition's embrace behavior that results from the voluntary consumption of drugs or alcohol. In other words, intoxication is not an insanity defense to a crime.¹⁰⁰ Second, Congress provided that "[m]ental disease or defect does not otherwise constitute a defense,"¹⁰¹ an apparent attempt to poison the insanity-like defenses.

The scope of this provision is presently unsettled. Did Congress mean to exclude *all* other defenses grounded on mental diseases or defects? Such a construction certainly raises serious constitutional questions, implicating both due process and the sixth

Since Congress intended to adopt a more restrictive definition of insanity, it would be logical to assume that they also intended to adopt the narrower definition of 'Know.' Moreover, an inability to perceive that an act, usually murder, is morally wrong is the definition of 'Know' used by the *M'Naghten* court in its formulation of the test. Finally, it is the most reasonable definition. This definition represents the 'common sense notion of daily life.'

97. MODEL PENAL CODE § 4.01 revised comments at 169-70 (1985).

98. S. REP. NO. 98-225, 98th Cong. 2d Sess. 228 (1984), reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3410.

99. *Id.* at 229, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3411.

100. *Id.*

101. 18 U.S.C. § 20(a) (Supp. 1986).

amendment right to present a defense. Resolving the constitutional issues requires consideration of concepts addressed earlier in different contexts. It requires another look at the question whether proof of insanity negates *mens rea*, and whether the two are, at least in some cases, inseparable.¹⁰² It also requires focusing on the often-ignored distinction between avoidance and denial defenses.¹⁰³

Due process clearly does not tolerate a bar against a defense which rebuts an essential element of the crime charged. If there are defendants who, because of mental illness, were unable to formulate the specific intent required for conviction, these defendants should have a constitutional right to present a denial defense based on the mental illness. A direct challenge to the *mens rea* element would require a defendant merely to raise a reasonable doubt as to proof of the requisite *mens rea*. Such a defense would not be the same as the affirmative defenses contemplated by section 20 of the Act. Thus, section 20 must be construed narrowly to allow denial defenses based on mental impairment, prohibiting only those defenses heretofore described as avoidance defenses. Admittedly, that line is a fine one. But to deny its existence would be to deny defendants their fundamental rights to due process of law and to present a defense.

Not all federal courts have been sensitive to constitutional considerations when contemplating section 20's bar against other defenses that involve mental disease or defect. Some courts have cited to section 20 in excluding evidence of mental state when the insanity defense is *not* pled. In *United States v. White*,¹⁰⁴ the circuit court wrote, in dictum, that Congress intended to eliminate all psychiatric evidence of mental state unless it is part of a formally plead insanity defense. A district court in *United States v. Polhot*¹⁰⁵ agreed, blocking an instruction that would have allowed jurors to consider psychiatric evidence of a defendant's abnormal condition as part of a denial defense, which was pled in the alternative to insanity. However, in *United States v. Frisbee*,¹⁰⁶ the district court did a thorough analysis that interpreted the Act differently. It wrote that Congress intended to prohibit evidence of an affirmative defense that would "excuse" an offense—not to elimi-

102. See *supra* notes 76-78 and accompanying text.

103. See *supra* notes 31-38 and accompanying text.

104. 766 F.2d 22 (1st Cir. 1985).

105. Crim No. 85-00354-01 (E.D. Pa. Mar. 31, 1986) (WESTLAW, Allfeds library).

106. 623 F. Supp. 1217 (N.D. Cal. 1985).

nate mental state evidence that could attack the *mens rea* element of a charge.

[T]he Court finds that the legislative history shows that Congress did not intend [18 U.S.C.] section 20 to eliminate the use of expert testimony to negate specific intent. Section 20 deals with when criminal behavior will be excused, not with what types of evidence is admissible to show one's innocence That recognition leads this Court to conclude that Congress did not intend that section 20 change the law regarding what type of evidence may be admitted on the issue of specific intent.¹⁰⁷

The district court in *United States v. Gold*¹⁰⁸ adopted *Frisbee's* analysis, writing that "Congress clearly was concerned about affirmative defenses and excuse, not a defendant's attempt to negate specific intent." The court in *Gold* observed, as did the court in *Frisbee*, that there is a "distinction between the affirmative defense of insanity (which is justification or excuse for criminal conduct) and evidence negating intent (which is used to show innocence)" ¹⁰⁹ Thus, the court allowed expert testimony about mental state provided that the jury be told to consider it only on the issue of "specific intent."¹¹⁰

The approach of *Frisbee* and *Gold* appears much more sound and well reasoned than the approach taken in *White* and *Polhot*. The courts in *White* and *Polhot* fell into the quagmire of diminished capacity and muddled the issue as so many other courts have done; they failed to distinguish the avoidance type of defense, which excuses criminal behavior when *mens rea* can be established, from denial, which negates the essential element of *mens rea* and renders the prosecution unable to prove all the elements of the offense beyond a reasonable doubt.¹¹¹

Because the *Frisbee/Gold* rationale has the potential to completely gut section 20, courts must be careful, as the court in *Frisbee* warned, when allowing defendants to assert denial defenses based on mental illness. A defendant should be required to make a presentation of evidence to the court outside the presence of the

107. *Id.* at 1222. The court focused its attention on the legislative history of 18 U.S.C. section 20, in which the congressional committee described an affirmative defense in terms of an "excuse." *Id.* at 1220.

108. 661 F. Supp. 1127, 1131 (D.D.C. 1987).

109. *Id.* at 1130.

110. *Id.* at 1132.

111. See *Frisbee*, 623 F. Supp. at 1221 n.2.

jury, so that the court can determine whether the evidence establishes a threshold showing that the defendant was incapable of forming the intent required. The trial judge, using broad discretion under Rule 403 of the federal evidence code, can then decide whether to permit the defense to go forward, or to exclude the evidence and refuse to make a jury charge on the denial defense.

B. *The Burden of Proof*

Congress made three strong statements with respect to burden of proof when it wrote the Act. First, it defined the insanity defense as an affirmative defense, thereby distinguishing insanity from the *mens rea* element. That stamped with legislative approval the notion that proof of insanity does not negate the *mens rea* element of a crime, because having a specific intent (to kill, for example) is not inconsistent with having a mental disease or defect. Second, it shifted the burden of proof of insanity to the defendant. Third, Congress declared that the requisite level of proof would be "clear and convincing evidence."¹¹²

1. *Shifting the Burden*

Congress was resolute when it decided to make the defendant carry the burden of proof of insanity; the Senate Report called it "[a] most vital feature of [the] Act."¹¹³ A circuit court affirmed the constitutionality of shifting the burden in *United States v. Amos*.¹¹⁴ Amos asserted the insanity defense at trial, lost, and challenged on appeal the burden shifting provision. He argued that it violated his fifth amendment due process rights. The court relied on *Leland v. Oregon*¹¹⁵ to hold that the Act did not unconstitutionally shift from the state the burden of proving every element of the offense beyond a reasonable doubt. In *United States v. Freeman*,¹¹⁶ a circuit court also upheld as constitutional the burden shifting provision. *Freeman* rejected the defendant's contention that federal courts may "discover stricter constitutional require-

112. Pub. L. No. 98-473, § 402(a), 98 Stat. 2057 (1984) (codified as 18 U.S.C. § 20(b) (Supp. 1986), recodified as 18 U.S.C. § 17(b) by Pub. L. No. 99-646, § 34(a), 100 Stat. 3599 (1986)).

113. S. REP. No. 98-225, 98th Cong., 2d Sess. 229-30, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3411-12.

114. 803 F.2d 419 (8th Cir. 1986).

115. 343 U.S. 790 (1952).

116. 804 F.2d 1574 (11th Cir. 1986).

ments for federal criminal trials than state criminal trials."¹¹⁷ No courts to date have denied the constitutional validity of shifting the burden of proof.

2. *Clear and Convincing Evidence*

The Senate committee that reported the bill that became the Insanity Defense Reform Act endorsed the "clear and convincing evidence" standard after concluding that "a more rigorous requirement than proof by a preponderance of the evidence is necessary to assure that only those defendants who plainly satisfy the requirements of the defense are exonerated from what is otherwise culpable criminal behavior."¹¹⁸

The new standard has thus far withstood constitutional scrutiny on due process grounds in the circuit court cases of *Amos* and *Freeman*. The court in *Amos* observed that the Supreme Court in *Leland v. Oregon*¹¹⁹ had allowed Oregon to demand that a defendant prove insanity beyond a reasonable doubt. "It is axiomatic, therefore, that a lesser standard of proof, such as the clear and convincing standard, may be imposed."¹²⁰ *Freeman* employed similar logic. Both courts rejected the argument that *Leland* was distinguishable as a fourteenth amendment due process case, and agreed that the fifth amendment imposes no greater burdens on Congress than the fourteenth amendment imposes on the states.¹²¹

"Clear and convincing" is an ill-defined standard that courts are now trying to interpret. As the district court wrote in *United States v. Kowal*:¹²²

There is a substantial middle ground or 'grey area' between government proof of sanity (beyond a reasonable doubt) and clear and convincing proof of insanity. Prior to the Act, if the evidence raised a reasonable doubt as to defendant's sanity or showed him to be possibly insane, he should be acquitted. Under the Act, the same state of the evidence, where his sanity is in doubt or he is possibly but not clearly or convincingly insane, i.e. in the same middle ground, he would not be entitled to an acquittal. The Act

117. *Id.* at 1576.

118. S. REP. NO. 98-225, 98th Cong., 2d Sess. 230, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3412.

119. 343 U.S. 790 (1952).

120. *Amos*, 803 F.2d at 421. The court cited *Jones v. United States*, 463 U.S. 354 (1983), as additional support.

121. *Amos*, 803 F.2d at 422; *Freeman*, 804 F.2d at 1576.

122. 596 F. Supp. 375, 379 (D. Conn. 1984).

thus denies a defendant acquittal if he falls in the middle ground or grey area whereas pre-Act law would require acquittal in such circumstances.

It is too soon to judge the effectiveness of the clear and convincing standard because so few cases have construed this portion of Act. However, "clear and convincing" surely will be a difficult hurdle for defendants to leap over, just as Congress intended. The only reported case to tackle the "clear and convincing evidence" burden in this context is *Freeman*, in which the trial court ruled that the defendant failed to carry his burden despite powerful evidence of mental disease. Freeman had robbed a bank after he became obsessed with the "Save the Children" movement, which was raising money to feed starving children in drought-stricken Ethiopia. A psychiatric team had found that Freeman suffered from a "severe mental illness and was manic depressive or possibly schizophrenic. In addition, Freeman presented evidence "that he had been hearing noises and was experiencing severe depression prior to the robbery."¹²³ Nonetheless, the court found "[a]mple evidence . . . indicating that Freeman knew his conduct was wrongful":

Freeman changed his clothes after robbing the bank to avoid identification. Freeman employed a mask, handgun, and satchel to execute the robbery and avoid apprehension. He informed bank personnel that if the police were called, he would come back and kill everyone. When spotted by police, Freeman ran to avoid apprehension. Finally, Freeman's probation officer observed Freeman's demeanor as being entirely appropriate following his arrest. The district court's decision was not clearly erroneous.¹²⁴

C. *The Ultimate Issue*

In 1975, Congress wrote a rule of evidence which provided that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."¹²⁵ With that, Congress relaxed the "ultimate issue rule." This rule, Rule 704 in the federal evi-

123. 804 F.2d 1574, 1577 (11th Cir. 1986).

124. *Id.*

125. FED. R. EVID. 704.

dence code, was designed to admit both lay and expert opinions when they are "helpful to the trier of fact."¹²⁶

But in 1984, Congress backed away from that liberal evidentiary policy. The Act added to rule 704 subdivision (b) to curtail the introduction of expert opinion testimony on the ultimate issue of mental state:

No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the triers of fact alone.¹²⁷

Rule 704(b) has been the subject of more judicial opinions to date than any of the other Insanity Defense Reform Act provisions, staving off three attempts to invalidate it on constitutional grounds. In *United States v. Freeman*,¹²⁸ the circuit court rejected a fifth amendment due process challenge, reasoning that the rule applies equally to both the prosecution and defense, and that it does not prevent the defendant from putting forth evidence. In *United States v. Hillsberg*,¹²⁹ the circuit court rejected a sixth amendment argument which asserted that the defendant was denied a right to present a defense. The court wrote that Hillsberg freely presented evidence to support his claim of intoxication, and that the trial court "simply excluded a single question that called for an expert witness to give his opinion on an issue that the jury was able and obliged to decide."¹³⁰ In *United States v. Alexander*,¹³¹ the circuit court wrote that Rule 704(b) did not violate the defendant's equal protection rights. The defendant wanted the court to apply strict scrutiny to the statute and then to declare it void because "it ha[d] not been precisely tailored to further a com-

126. FED. R. EVID. 704 advisory committee's note.

127. Pub. L. No. 98-473, § 406, 98 Stat. 2057, 2067 (1984). Significantly, Congress also expressed its intent to carry this limitation to other affirmative defenses that involve evidence of mental state, "e.g., premeditation in a homicide case, or lack of predisposition in entrapment." S. REP. NO. 98-225, 98th Cong., 2d Sess. 231, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 3182, 3413. This Comment shall discuss the rule only in the context of the insanity defense.

128. 804 F.2d 1574, 1576 (11th Cir. 1986).

129. 812 F.2d 328 (7th Cir.), cert. denied, 107 S. Ct. 1981 (1987).

130. *Id.* at 333.

131. 805 F.2d 1458, 1462-64 (11th Cir. 1986).

elling government interest.”¹³² The court rejected that claim by referring to the rule’s legislative history. “Plainly, Rule 704(b) was rationally drawn to advance the compelling government interest of insuring that juries, as the ultimate finders of fact, should be left to make the insanity determination without having to be subjected to a confusing battle of the experts.”¹³³

Courts agree that Rule 704(b) does not restrict a defendant’s right to produce testimony. It should permit as free a flow of evidence as before, barring only a particular type of question and answer. The rule is supposed to allow experts to detail the clinical nature of their findings without telling the jurors that the defendant is sane or insane, or whether the defendant’s behavior met the particular criteria of the legal test for insanity, such as whether defendant had the ability to appreciate the wrongfulness of his or her conduct. Under such conditions, the rule may not eliminate much evidence at all. For example, the circuit court in *United States v. Aders*¹³⁴ refused to narrowly define the ultimate issue so as to bar only the question, “‘Was the defendant insane?’” The court pointed out that “[t]he ultimate issue is defined by the language of the statute setting out the defense, not by a shorthand expression.” The court then wrote that an expert could, “[i]n addition to expressing an opinion that the defendant suffer[ed] from a severe mental disease or defect . . . testify as to the characteristics of that disease or defect, if any.”¹³⁵

However, the rule also creates a big problem which *Aders* exemplified. The court acknowledged that an expert cannot offer an opinion as to whether the *defendant* was unable to appreciate the wrongfulness of his conduct. But “if an inability to appreciate the wrongfulness of one’s conduct [is] a legitimate characteristic of [the defendant’s] mental disease, [an expert can testify] as to that medical fact.”¹³⁶ In effect, that means that about the only thing an expert cannot say is that the *defendant* subjectively was unable to appreciate the wrongfulness of the act. Instead, the expert would have to testify that a person with the defendant’s mental disease

132. *Id.* at 1462.

133. *Id.* at 1463. *But see* McCORMICK ON EVIDENCE § 12 n.29 (3d. ed. Supp. 1987) (“Query: Will a minor variation in breadth of admissible opinion significantly ameliorate problems that arise when diametrically opposed expert witness opinions are rendered at trial?”).

134. 816 F.2d 673 (4th Cir. 1987) (unpublished opinion No. 86-5127 (4th Cir. Apr. 10, 1987) (WESTLAW, Allfeds library)).

135. *Id.*

136. *Id.*

and history (objectively) would be unable to appreciate the wrongfulness of the act.

The distinction between the permissible and impermissible lines of questioning is at best subtle and at worst completely artificial. Rule 704(b) is an extremely difficult rule to apply, and some courts appear to be misapplying it. Consider the following cases. In *United States v. Amos*,¹³⁷ the defense experts testified that Amos "suffered from a paranoid disorder with 'erotomania' and delusional thinking." But the prosecution's expert on rebuttal testified that Amos "was only depressed, and maintained that *Amos* did appreciate the wrongfulness of his conduct."¹³⁸ In *United States v. Windfelder*,¹³⁹ the trial court allowed an Internal Revenue Service expert to testify that *the defendant* "intentionally understated his income," and that *the defendant* "was well aware of what happened. . . ." The circuit court called those expert opinions harmless error. Perhaps these cases can be distinguished as failures of defense counsel to object, or as harmless error. Nonetheless, these decisions exemplify some of the pitfalls created by Rule 704(b). We must trust courts and attorneys to police the application of Rule 704(b) to ensure that it is applied equitably and evenhandedly. The results so far show that fairness may not be possible under the construction of Rule 704(b).

III. THE INSANITY DEFENSE IN FLORIDA

As a member of the Florida House of Representatives in 1985, Dexter Lehtinen proposed the first of three successive bills that would have codified the insanity defense in Florida to resemble the federal law.¹⁴⁰ His first attempt, House Bill 831 (1985), died without a committee hearing or staff report.¹⁴¹ House Bill 148 (1986) died the same way.¹⁴² After his election to the Florida Senate, Senator Lehtinen again proposed the identical measure, Senate Bill

137. 803 F.2d 419 (8th Cir. 1986).

138. *Id.* at 420 (emphasis added).

139. 790 F.2d 576, 582 (7th Cir. 1986) (emphasis added).

140. Senator Lehtinen said "absolutely" he tried to follow the Insanity Defense Reform Act. "As a matter of fact, we've tried to sell it that way." Interview with Sen. Lehtinen (Aug. 12, 1987) (tape recording on file, *Florida State University Law Review*).

141. FLA. LEGIS., HISTORY OF LEGISLATION, 1985 REGULAR SESSION, HISTORY OF HOUSE BILLS AT 117, HB 831.

142. FLA. LEGIS., HISTORY OF LEGISLATION, 1986 REGULAR SESSION, HISTORY OF HOUSE BILLS AT 220, HB 148.

127 (1987). That bill also died without a hearing or staff analysis.¹⁴³ Each of the bills provided the following:

(1) It is an affirmative defense to a prosecution under any Florida statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of mental disease, was unable to distinguish between right and wrong. The defendant has the burden of proving the defense of insanity by clear and convincing evidence.

(2)(a) Except as provided in paragraph (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable solely because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.¹⁴⁴

These proposed changes can best be evaluated after examining the evolution of Florida's insanity defense, and considering its current application.

A. *Florida's Test to Determine Legal Insanity*

The Florida Supreme Court first recognized the insanity defense conundrum in 1890 in *Hodge v. State*.¹⁴⁵ "The subject of insanity

143. FLA. LEGIS., HISTORY OF LEGISLATION, 1987 REGULAR SESSION, HISTORY OF SENATE BILLS AT 34, SB 127.

144. SB 127 (1987); HB 148 (1986); and HB 831 (1985). Of the three bills, Senator Lehtinen said: "They just didn't go anywhere. I didn't really recruit sponsors in the other chambers, and . . . I haven't ever made it my Number One Issue. But were they extremely popular, of course, they would have moved on their own. Bureaucratically, there is not a felt need to make that change. I believe, though, that it would be a substantial value to the public in helping create confidence in the criminal justice system."

Senator Lehtinen said that because Florida has been a traditional *M'Naghten* jurisdiction, the insanity defense has not been as great a problem in Florida as he believes it has been in other jurisdictions; therefore it has not stimulated much support for change. Nonetheless, he said, other parts of Florida's insanity law can be improved, for example, the burden of proof and ultimate issue testimony. Because there has been no support to change the status quo, Senator Lehtinen said he would consider breaking up his bill into separate proposals, perhaps only to propose reforms of the burden of proof and ultimate issue testimony. Interview with Sen. Lehtinen (Aug. 12, 1987) (tape recording on file, *Florida State University Law Review*). However, apparently he decided against breaking up the proposals when he prefiled Senate Bill 22. See Fla. SB 22 (1988).

145. 26 Fla. 11, 22, 7 So. 593, 596 (1890).

has given the Courts much trouble. . . . [S]cientific experts . . . differ widely in the conclusions they arrive at" Nine years later, in dictum, the court wrote disapprovingly of the irresistible impulse defense "the so-called 'moral insanity rule'" and favored the *M'Naghten* approach.¹⁴⁶ But it did not adopt *M'Naghten* until 1902, in *Davis v. State*.¹⁴⁷ The court there reasoned that since Florida had no statute or common law on point to establish criminal responsibility, it was obliged by statute to follow the existing common law of England.¹⁴⁸ The court also reaffirmed its rejection of the irresistible impulse defense,¹⁴⁹ thereby establishing that Florida will apply only one test for sanity—cognition.

Florida courts have remained loyal to *Davis*. The Florida Supreme Court showed a passing interest in reconsidering the *M'Naghten* doctrine in the post-*Durham* era, but determined that the cognitive test should stand for lack of a better alternative.¹⁵⁰ Some members of the court also drew a few striking dissents that favored the ALI test or some alternative combining cognition with control,¹⁵¹ and in one majority opinion the court wrote that "we feel that the jury had a sufficient basis to determine, either by the *M'Naghten* rule or some of the other standards currently prevailing in the United States, that Appellant was sufficiently sane to answer to the penalty imposed by law."¹⁵² But the court has not budged from the *M'Naghten* standard.¹⁵³

146. *Copeland v. State*, 41 Fla. 320, 326, 26 So. 319, 320 (1899).

147. 44 Fla. 32, 32 So. 822 (1902).

148. *Davis*, 44 Fla. at 48-50, 32 So. at 826-27 (adopting *M'Naghten's Case*, 10 Clark & F. 200 (H.L. 1843)).

149. *Davis*, 44 Fla. at 53, 32 So. at 828.

150. See, e.g., *Anderson v. State*, 276 So. 2d 17 (Fla. 1973); *Campbell v. State*, 227 So. 2d 873 (Fla. 1969), *petition dismissed*, 400 U.S. 801 (1970); *Piccot v. State*, 116 So. 2d 626 (Fla. 1959), *cert. denied*, 364 U.S. 293 (1960).

151. See, e.g., *Anderson v. State*, 276 So. 2d 17 (Fla. 1973) (Ervin, J., dissenting) (*M'Naghten* rule is "anathema to modern psychiatry"); *Piccot v. State*, 116 So. 2d 626 (Fla. 1960), *cert. denied*, 364 U.S. 293 (1960) (Hobson, J., dissenting in part) (*M'Naghten* should not be the only test applied).

152. *Jones v. State*, 332 So. 2d 615, 618 (Fla. 1976).

153. See *Patten v. State*, 467 So. 2d 975, 978 (Fla. 1985), *cert. denied*, 106 S. Ct. 198 (1985) (The court reaffirmed the continuing vitality of *M'Naghten* and its rejection of the ALI's "substantial capacity" test, and the "irresistible impulse" test.); see also *Yohn v. State*, 476 So. 2d 123 (Fla. 1985); *Preston v. State*, 444 So. 2d 939 (Fla. 1984); *Mines v. State*, 390 So. 2d 332 (Fla. 1980), *cert. denied*, 451 U.S. 916 (1981); *Wheeler v. State*, 344 So. 2d 244 (Fla. 1977); *Witt v. State*, 342 So. 2d 497 (Fla. 1977), *cert. denied*, 434 U.S. 935 (1977); *Campbell v. State*, 227 So. 2d 873 (Fla. 1969), *petition dismissed*, 400 U.S. 801 (1970); *Holston v. State*, 208 So. 2d 98 (Fla. 1968); *Van Eaton v. State*, 205 So. 2d 298 (Fla. 1967); *Piccott v. State*, 116 So. 2d 626 (Fla. 1959), *cert. denied*, 364 U.S. 293 (1960); *Stanton v. State*, 148 Fla. 732, 5 So. 2d 4 (1941); *Crews v. State*, 143 Fla. 263, 196 So. 590 (1940);

Senator Lehtinen's bill would have codified the cognitive test, leaving intact that aspect of Florida's common law. But Senator Lehtinen's proposal does differ in several ways from both existing Florida law and from the federal Insanity Defense Reform Act after which it was patterned.

First, the federal Act called for an inability to "appreciate,"¹⁵⁴ whereas the Florida law more conservatively requires an inability to "know."¹⁵⁵ Senator Lehtinen's proposal would have been consistent with Florida law by requiring that a defendant be "unable to distinguish,"¹⁵⁶ thereby rejecting Congress' decision that the law should take into consideration both emotional and intellectual awareness.

Second, the federal Act provided that the relevant lack of awareness be of the "nature and quality or the wrongfulness" of one's action.¹⁵⁷ Florida law, again more conservatively, requires that the person did not "know what he was doing or its consequences," or that "although he knew what he was doing and its consequences, he did not know that it was wrong."¹⁵⁸ Senator Lehtinen's proposal would have required that the defendant be "unable to distinguish between right and wrong" at the time of the criminal act.¹⁵⁹ Senator Lehtinen's phrasing is very similar, though not identical, to the Florida standard,¹⁶⁰ and probably would not have produced results different from those produced under the present law.

Third, the laws differ with respect to the recognized causes of insanity the defendant's lack of cognition. The federal Act required that the cause be a "severe mental disease or defect."¹⁶¹ Florida law requires that the cause be "a mental infirmity, disease

Collins v. State, 88 Fla. 578, 102 So. 880 (1925); *Hall v. State*, 78 Fla. 420, 83 So. 513 (1919); *Cochran v. State*, 65 Fla. 91, 61 So. 187 (1913). See generally *M'Naghten: Right or Wrong for Florida in the 1980s? It Flunks the Test*, 6 NOVA L.J. 125 (1981).

154. 18 U.S.C. § 20(a) (Supp. 1986).

155. FLORIDA STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 3.04(b) (1986).

156. Fla. SB 127 (1987).

157. 18 U.S.C. § 20(a) (Supp. 1986).

158. FLORIDA STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 3.04(b) (1986).

159. Fla. SB 127 (1987).

160. See FLORIDA STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 3.04(b) (1986):

A person is considered to be insane when:

1. He had a mental infirmity, disease or defect.

2. Because of this condition

a. he did not know what he was doing or its consequence or

b. although he knew what he was doing and its consequences, he did not know that it was wrong.

161. 18 U.S.C. § 20(a) (Supp. 1986).

or defect.”¹⁶² Senator Lehtinen’s bills used the sole criterion, “mental disease.”¹⁶³ Senator Lehtinen said he wants to employ a restrictive definition of the causes of insanity to contain the use of the insanity defense within the boundaries that Florida has already established. “Everything that Florida has recognized [as a cause of legal insanity] would also have been recognized as a disease,” he said. “That’s not true in all other jurisdictions.” Senator Lehtinen said that in other jurisdictions,

defect is the word that has caused a lot of expansions of the insanity defense in ways that I do not approve of, and it smacks of the more loose standards that I wanted to get rid of The act itself could indicate a defect in your mind because you wouldn’t commit that act [without a defect]. The very willingness to commit an horrendous act can be viewed by a juror as a defect. We want that act to result from a mental state rather than be evidence of a mental state.¹⁶⁴

Because he believes that Florida law has taken a narrow view of the causation element of insanity, Senator Lehtinen said he chose not to adopt the federal Act’s term “severe.”¹⁶⁵ His approach appears designed to maintain the status quo and to restrain courts from expanding the current Florida standard.

The significance of Senator Lehtinen’s proposal is difficult to judge because the phrase “mental infirmity, disease or defect” is ill-defined in Florida law, which brings into question his assumption that Florida law takes a restrictive approach. The definition of the cause of insanity began to evolve in Florida in *Davis v. State*,¹⁶⁶ where the Florida Supreme Court approved for use in jury instructions various phrases such as “diseased mind,” “defect of reason,” “mental disorder,” and “disease of his mental facilities” without defining them. Later decisions used those phrases without any straightforward attempt to give them substance. A standard jury instruction in 1970 used only the phrase “mental infirmity” to describe causation.¹⁶⁷ Seven years later, the supreme court approved a new instruction, adopted thereafter in *Wheeler v.*

162. FLORIDA STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 3.04(b) (1986).

163. Fla. SB 127 (1987).

164. Interview with Sen. Lehtinen (Aug. 12, 1987) (tape on file, *Florida State University Law Review*).

165. *Id.*

166. 44 Fla. 32, 36-38, 32 So. 822, 825-27 (1902).

167. FLORIDA STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 2.10(b)-1 (1970).

State,¹⁶⁸ to add the ALI's phrase, "disease or defect." That appeared to be the only major shift in Florida's insanity defense since 1902. However, the court offered no analysis or explanation for its action, and it failed to define "disease or defect." The court cited the ALI, implying that the ALI's definition would control. But that reasoning does not help much because the ALI declined to define "disease or defect." The ALI wrote merely that the phrase "mental disease or defect" does not include "an abnormality manifested only by repeated criminal or otherwise antisocial conduct" to ensure that psychopaths are punished for their crimes.¹⁶⁹ Then, in *Patten v. State*,¹⁷⁰ the Florida Supreme Court wrote in a footnote that its standard "is essentially identical to the newly adopted A.B.A. Criminal Justice Mental Health Standard 7-6.1." The American Bar Association (ABA) standard defines "mental disease or defect" as "either: [b](i) impairments of the mind, whether enduring or transitory; or, [(b)](ii) mental retardation[;] either of which substantially affected the mental or emotional processes of the defendant at the time of the alleged offense."¹⁷¹ However, the Florida Supreme Court has not explicitly adopted that definition or the ABA's analysis, and case law has not addressed the definition. Thus, the meaning of "disease or defect" in this context is still unclear.

B. *The Burden of Proof*

The Florida Supreme Court set out its rule about the burden of proof of insanity in *Hodge v. State*.¹⁷² The court held that there is a presumption of sanity which is overthrown "if upon the whole evidence the jury entertain a reasonable doubt of [the accused's] sanity, they must acquit, regardless of whether it be adduced by the prosecution or the defendant, and that the accused is not required to establish his insanity beyond a reasonable doubt . . ."¹⁷³

Hodge stood for three propositions. First, there is a presumption of sanity to which the state is entitled. Second, the defendant has a burden to overthrow the presumption by raising a reasonable doubt as to sanity, regardless whether that doubt is created by the state's evidence or by the defendant's evidence. Third, in the face

168. 344 So. 2d 244, 246 (Fla. 1977).

169. MODEL PENAL CODE § 4.01 (2) revised comments at 176-77 (1985).

170. 467 So. 2d 975, 978 n.1 (Fla.), *cert. denied*, 106 S. Ct. 198 (1985).

171. A.B.A. STANDARDS FOR CRIMINAL JUSTICE § 7-6.1 (2d ed. 1984).

172. 26 Fla. 11, 7 So. 593 (1890).

173. 26 Fla. at 21-22, 7 So. at 596.

of some evidence to the contrary, the prosecution must prove sanity beyond a reasonable doubt.¹⁷⁴

The Florida Supreme Court has followed *Hodge* since 1890. At no time in the past nine decades has the court shown any desire to shift the burden of proving insanity to the defendant.¹⁷⁵ While the court has acknowledged that evidence of insanity most appropriately is produced by the defendant,¹⁷⁶ it has not forced the defendant to prove insanity. Senator Lehtinen's bill would have reversed Florida law by requiring the defendant to prove insanity by clear and convincing evidence¹⁷⁷—a difficult standard to meet.¹⁷⁸

C. Evidentiary Concerns and the Ultimate Issue

Florida courts, like other courts, have maintained a distinction between admissible expert testimony relating to ultimate issues and inadmissible statements which "only tell the jury how to decide the case."¹⁷⁹ Generally, an expert witness is allowed to apply a legal standard to evidence, although Florida's evidentiary rule "was not intended to permit a witness to testify to legal conclusions or questions of law."¹⁸⁰

However, Florida courts have allowed experts to express opinions as to the defendant's sanity. For example, in *Jones v. State*,¹⁸¹ the Florida Supreme Court wrote that a "court-appointed psychiatrist found Appellant to be insane under the *M'Naghten* rule. A clinical psychologist specially selected by the prosecution con-

174. See also *Armstrong v. State*, 30 Fla. 170, 11 So. 618 (1892); *Armstrong v. State*, 27 Fla. 366, 9 So. 1 (1891).

175. See, e.g., *Preston v. State*, 444 So. 2d 939 (Fla. 1984); *Byrd v. State*, 297 So. 2d 22 (Fla. 1974); *Parkin v. State*, 238 So. 2d 817 (Fla. 1970), cert. denied, 401 U.S. 974 (1971); *Farrell v. State*, 101 So. 2d 130 (Fla. 1958); *Britts v. State*, 158 Fla. 839, 30 So. 2d 363 (Fla. 1947); *Corbin v. State*, 129 Fla. 421, 176 So. 435 (1937); *Blocker v. State*, 87 Fla. 128, 99 So. 250 (1924); *Thompson v. State*, 78 Fla. 400, 83 So. 291 (1919); *Johnson v. State*, 57 Fla. 18, 49 So. 40 (1909). But cf. *Everett v. State*, 97 So. 2d 241, 244, (Fla. 1957), cert. denied, 355 U.S. 941 (1958) ("The burden of proving insanity was on appellant.").

176. *Parkin v. State*, 238 So. 2d 817, 821 (Fla. 1970), cert. denied, 401 U.S. 974 (1971).

177. When asked why he chose the "clear and convincing" standard, Senator Lehtinen said, "That's just a judgment call." However, he opposed the approach approved in *Leland v. Oregon*, 343 U.S. 790 (1952), in which the Court approved a statute that imposed on the defendant the burden of proving insanity beyond a reasonable doubt. Senator Lehtinen objected to that harsh standard "as a matter of public policy." Interview with Sen. Lehtinen (Aug. 12, 1987) (tape recording on file, *Florida State University Law Review*).

178. See *supra* notes 123-25 and accompanying text.

179. C. EHRHARDT, *FLORIDA EVIDENCE* § 703.1 (2d ed. 1984).

180. *Id.*

181. 332 So. 2d 615, 617 (Fla. 1976).

curred." In *Byrd v. State*,¹⁸² the court wrote that "two psychiatrists testified that in their opinion the defendant was insane at the time the offense occurred . . ." In *McVeigh v. State*,¹⁸³ the court wrote that "[t]hree eminent psychiatrists said he was not insane." In *Mines v. State*,¹⁸⁴ the court wrote that "[t]wo of [the three psychiatrists who testified] . . . specifically concluded that [the defendant] was mentally competent at the time of the murder, and one stated that he had no opinion." Finally, in *Acree v. State*,¹⁸⁵ the court wrote that "Dr. Spires examined the appellant and expressed his opinion that he was sane"

The court further endorsed such expert opinion testimony on sanity when it wrote in *Parkin v. State*¹⁸⁶ that pretrial psychiatric evaluation "makes available to the psychiatrist such information as he needs to form an opinion as to the ability of the defendant to tell right from wrong . . ." In *Land v. State*¹⁸⁷ the court wrote that experts "must be allowed some latitude" in voicing their conclusions, reasoning that:

The conclusions are seldom positive and unquestionable and, weighed by the jury's impression of the expert's capability and professional integrity, are to be evaluated in the light of all attendant qualifying factors. Such an opinion touching the intangible state of the subject's mind must as of course be based upon such sources of information as are available, including the subject himself, his background, his behavior and the related facts and circumstances.¹⁸⁸

182. 297 So. 2d 22, 24 (Fla. 1974).

183. 73 So. 2d 694, 698 (Fla.) (en banc), *appeal dismissed*, 348 U.S. 885 (1954).

184. 390 So. 2d 332, 334 (Fla. 1980), *cert. denied*, 451 U.S. 916 (1981).

185. 153 Fla. 561, 15 So. 2d 262, 266 (1943) (en banc). *See also* *Young v. State*, 140 So. 2d 97 (Fla. 1962); *Warner v. State*, 84 So. 2d 314 (Fla. 1955); *Crews v. State*, 143 Fla. 263, 196 So. 590 (1940); *Southworth v. State*, 98 Fla. 1184, 125 So. 345 (1929); *Williams v. State*, 45 Fla. 128, 34 So. 279 (1903); *State v. McMahan*, 485 So. 2d 884, 885 (Fla. 2d DCA 1986), *review denied*, 492 So. 2d 1333 (Fla. 1986); *Sirianni v. State*, 411 So. 2d 198 (Fla. 5th DCA 1981), *review denied*, 417 So. 2d 259 (Fla. 1982); *Zamora v. State*, 361 So. 2d 776 (Fla. 3rd DCA 1978), *cert. denied*, 372 So. 2d 472 (Fla. 1979).

186. 238 So. 2d 817, 820 (Fla. 1970), *cert. denied*, 401 U.S. 974 (1971).

187. 156 So. 2d 81 (Fla. 1963), *cert. denied*, 377 U.S. 959 (1964). *See also* *Hellman v. State*, 492 So. 2d 1368, 1371 (Fla. 4th DCA 1986) ("It is important to bear in mind the great definitional gulf between clinical insanity and legal insanity at the time the crime is committed.").

188. *Land*, 156 So. 2d at 11.

In *Gurganus v. State*,¹⁸⁹ the Florida Supreme Court affirmed the exclusion of psychiatric testimony that had been offered both to establish a reasonable doubt of sanity, and to deny premeditation in a first-degree murder case. The court distinguished between expert opinions concerning insanity, which are admissible, and expert opinions concerning capacity to commit a crime, which are inadmissible legal conclusions that lay beyond an expert's domain.¹⁹⁰ The court's analysis invites experts to reach an opinion as to the ultimate issue of a defendant's mental state when a defendant has asserted an insanity defense.¹⁹¹

Florida's Rule of Evidence 703 is almost identical to Federal Rule of Evidence 704(a). The Florida rule is: "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it includes an ultimate issue to be decided by the trier of fact."¹⁹² Senator Lehtinen would make two changes—one substantial, one minor. First, Senator Lehtinen's proposal would have added a new section to Florida's Rule of Evidence 703 to eliminate expert opinion testimony bearing on the ultimate issue of the defendant's mental state.¹⁹³ In effect, it would reverse a long-standing policy in Florida law that recognizes the special character of the insanity defense and the type of expert testimony that courts accept to support it. The Senator explained:

My intent was that you do not have psychologists and psychiatrists testifying to legal conclusions. So it would be the intent that if the individual is trying to establish something about predisposition, if that's an issue, the psychologist could testify to all kinds

189. 451 So. 2d 817 (Fla. 1984).

190. *Id.* at 821-22 (citation omitted).

191. See *Kruse v. State*, 483 So. 2d 1383, 1387 (Fla. 4th DCA 1986), *cause dismissed*, 507 So. 2d 588 (Fla. 1987). Jurors decide the issue of sanity based on all the evidence—not just expert opinions. Laymen frequently testify regarding their observation of a defendant's behavior, and that evidence can weigh heavily on a juror's mind, especially if experts conflict to cancel out each other. In *Byrd v. State*, 297 So. 2d. 22, 24 (Fla. 1977) (emphasis in original), the court wrote: "We here must re-emphasize that a jury does not necessarily have to take expert testimony over non-expert testimony. They may disbelieve the expert and believe the non-expert if this is their inclination"

192. The evolution of FLA. R. EVID. 703 parallels that of FED. R. EVID. 704. See C. EHRHARDT, *FLORIDA EVIDENCE* § 703.1 (2d ed. 1984 & Supp. 1987).

193. Congress explicitly intended its analogous restriction, FED. R. EVID. 704(b), to apply to mental states in other affirmative defense contexts, for example, premeditation in homicide, or proof of a lack of predisposition in entrapment. Senator Lehtinen said that he was unaware of Congressional intent in that regard, so he "did not consider whether it would have that effect." Interview with Sen. Lehtinen (Aug. 12, 1987) (tape on file, *Florida State University Law Review*).

of mental states and so forth but not to the legal issue of whether the predisposition did or did not exist in the legal sense.¹⁹⁴

In addition, Senator Lehtinen's bill would have changed the phrase in Florida Rule of Evidence 703 "because it includes an ultimate issue" to "solely because it embraces an ultimate issue." Federal Rule of Evidence 704(a) uses the phrase "because it embraces an ultimate issue." Thus, the proposal would add the word "solely" and it would adopt from the federal proposal the word "embraces" to replace "includes." Senator Lehtinen said he substituted "embraces" for "includes" because "'includes' could signify a number of different relationships. 'Embraces' means that the testimony has . . . covered that subject, and I think 'embraces' is a better word It's clearer." He said he inserted the word "solely" because "you get judges who, when you say it is not objectionable because it does something, sometimes they think it is not objectionable, period I wanted it to be clear that the rest of the rules of evidence apply."¹⁹⁵ These changes apparently would have clarified the existing law, but whether they would have had any material substantive effect is arguable.

D. Avoidance and Denial Defenses in Florida

The subject of expert opinion evidence leads again to the distinction between denial and avoidance defenses, and a dichotomy in Florida law. Under current law, defendants are not allowed to present a mental state defense to deny the existence of *mens rea* unless the defendant pleads not guilty by reason of insanity to a crime that requires a "specific intent."¹⁹⁶ The courts have reasoned that any mental state defense that is less than insanity is a "diminished capacity" defense which Florida law does not recognize. Therefore, without making a distinction between denial and avoidance defenses, Florida courts consistently have barred experts from testifying that a defendant's mental state rendered the defendant unable to form a specific intent unless insanity is plead. However, if a defendant asserts a voluntary intoxication defense to a specific

194. *Id.*

195. *Id.*

196. See *Stephens v. State*, 12 Fla. L.W. 2107 (3rd DCA Sept. 11, 1987); *Kight v. State*, 12 Fla. L.W. 357 (Fla. July 9, 1987); *Zeigler v. State*, 402 So. 2d 365, 373 (Fla. 1981), *cert. denied*, 455 U.S. 1035 (1982); *Tremain v. State*, 336 So. 2d 705 (Fla. 4th DCA 1976), *cert. denied*, 348 So. 2d 954 (Fla. 1977); see also *Chestnut v. State*, 505 So. 2d 1352 (Fla. 1st DCA 1987) (Ervin J., dissenting), *review granted*, No. 70,628 (Fla. July 2, 1987).

intent crime, courts *do* allow experts to testify that alcohol or drug use rendered the defendant incapable of forming a specific intent.¹⁹⁷ This is an irrational and unfair distinction that well could violate defendants' rights to due process and to present a defense under both the state and federal constitutions.

The Florida Supreme Court appeared to recognize that flaw in *Gurganus v. State*.¹⁹⁸ Although the defendant's theory involved alcohol and drug use, the defense was insanity—not intoxication. The court wrote that the trial court erred when it stopped an expert from testifying that drug and alcohol abuse may have rendered a defendant incapable of forming specific intent.

When specific intent is an element of the crime charged, evidence of voluntary intoxication, or for that matter evidence of any condition relating to the accused's ability to form a specific intent, is relevant In this case, after having been told to presume that Gurganus ingested Fiorinal and alcohol the psychologists testified that Gurganus would have a lessened capability for making rational choices and directing his own behavior, he would not be in effective control of his behavior, and would have had a mental defect causing him to lose his ability to understand or reason accurately [W]e find the testimony to be relevant to the issue of Gurganus' mental capacity at the time of the offense, particularly to the element of premeditation.¹⁹⁹

The implication of *Gurganus* has taken on great significance, because the Florida Supreme Court recently decided to review a murder conviction that raised the avoidance/denial dichotomy. In *Chestnut v. State*,²⁰⁰ the First District Court of Appeal certified the following question:

IS EVIDENCE OF AN ABNORMAL MENTAL CONDITION NOT CONSTITUTING LEGAL INSANITY ADMISSIBLE FOR THE PURPOSE OF PROVING EITHER THAT THE ACCUSED COULD NOT OR DID NOT ENTERTAIN THE SPECIFIC INTENT OR STATE OF MIND ESSENTIAL TO PROOF OF THE OFFENSE, IN ORDER TO DETERMINE

197. *Cirack v. State*, 201 So. 2d 706 (Fla. 1967); *Garner v. State*, 28 Fla. 113, 9 So. 835 (Fla. 1891).

198. 451 So. 2d. 817, 820-21 (Fla. 1984).

199. *Id.* at 822-23 (emphasis added).

200. *Chestnut v. State*, 505 So. 2d 1352 (Fla. 1st DCA 1987), *review granted*, No. 70,628 (Fla. July 2, 1987).

WHETHER THE CRIME CHARGED, OR A LESSER DEGREE THEREOF, WAS IN FACT COMMITTED?²⁰¹

The defendant, Chestnut, alleged that his right to present a defense was denied when the trial court barred him from presenting expert evidence to show that brain damage rendered him incapable of forming a specific intent. He drew an analogy between his defense and the intoxication defense and argued that because expert testimony can be used to present an intoxication theory, such evidence should be admissible to advance the similar brain damage theory.²⁰² The state contended that “‘abnormal mental condition’ is too ill-defined to warrant the introduction of same into Florida law as a defense in specific intent crimes, by judicial fiat.”²⁰³

Senator Lehtinen’s proposal does not include the sentence of the federal Act that eliminated other defenses based on mental disease. He said that since Florida does not recognize other mental state defenses, there would be no shift in Florida law.²⁰⁴ However, the Florida Supreme Court’s forthcoming decision in *Chestnut v. State* could change, and perhaps clarify, the law in that area. But, because the federal Insanity Defense Reform Act raises an issue identical to the one raised in *Chestnut*,²⁰⁵ a future Supreme Court opinion construing the Act might see the matter as a constitutional one binding on the states rather than as a problem of statutory construction.

E. Florida’s Constitution: No Additional Protection

If the Florida Legislature considers these proposed revisions in subsequent sessions, it should consider potential constitutional ramifications. Provisions of the Insanity Defense Reform Act have been, and will continue to be, examined by federal courts for constitutional infirmities. The same issues likely will be reviewed by Florida courts pursuant to the Florida Constitution if Florida adopts Senator Lehtinen’s proposals. Two things must be noted. First, no Florida Supreme Court cases have regarded either the test of insanity, the burden of proof, or restrictions on ultimate issue evidence of insanity as guaranteed by the federal constitu-

201. *Id.* at 1357 (emphasis in original).

202. Brief for Petitioner at 19, *Chestnut v. State*, No. 70,628 (Fla. July 2, 1987).

203. Brief for Respondant at 3, *Chestnut v. State*, No. 70,628 (Fla. July 2, 1987).

204. Interview with Sen. Lehtinen (Aug. 12, 1987) (tape on file, *Florida State University Law Review*).

205. See *supra* notes 103-12 and accompanying text.

tion.²⁰⁶ Second, Florida courts have not used the Florida Constitution in this context.

The federal Act has been challenged unsuccessfully on the following constitutional grounds: due process,²⁰⁷ cruel and unusual punishment,²⁰⁸ and the rights to a fair trial and to present witnesses.²⁰⁹ Each of these federal constitutional provisions has an analogue in the Florida Constitution. While the supremacy clause forbids a construction of the state constitution which would undercut a federal constitutional right, state constitutional provisions which are similar, even identical, to federal constitutional provisions may be interpreted so as to provide greater protection of individual liberty. Thus, it is possible that federal constitutional challenges which have failed might be resurrected and argued under the Florida Constitution.

For example, federal due process challenges of the Insanity Defense Reform Act have failed to invalidate shifting the burden of proof of insanity,²¹⁰ the clear and convincing evidence standard,²¹¹ and the ultimate issue restriction.²¹² Article I, section 9 of the Florida Constitution also provides due process protection,²¹³ and an argument can be made that this state due process is more sympathetic to defendants than its federal counterpart when an insanity defense is raised. However, the state constitution's due process provision has been construed to conform to the federal constitution,²¹⁴ which would weaken that argument.

206. There is no constitutional right to plead the "insanity defense." *Patten v. State*, 467 So. 2d 975 (Fla. 1985), *cert. denied*, 474 U.S. 876 (1985) (The trial court had rejected defendant's motion to invalidate the *M'Naghten* test on grounds that it violated substantive due process, procedural due process and cruel and unusual punishment. On appeal, the Florida Supreme Court reaffirmed the continuing validity of the *M'Naghten* rule, but its analysis was not grounded on constitutional principles.); *Parkin v. State*, 238 So. 2d 817, 822 (Fla. 1970), *cert. denied*, 401 U.S. 974 (1971). *But see State ex rel Boyd v. Green*, 355 So. 2d 789 (Fla. 1978) (bifurcated procedures to determine guilt and sanity is a violation of due process).

207. *United States v. Amos*, 803 F.2d 419 (8th Cir. 1986); *United States v. Freeman*, 804 F.2d 1574 (11th Cir. 1986). *See also United States v. Alexander*, 805 F.2d 1458 (11th Cir. 1986).

208. *United States v. Freeman*, 804 F.2d 1574 (11th Cir. 1986).

209. *United States v. Hillsberg*, 812 F.2d 328 (7th Cir. 1987).

210. *United States v. Amos*, 803 F.2d 419 (8th Cir. 1986).

211. *Id.*; *United States v. Freeman*, 804 F.2d 1574 (11th Cir. 1986).

212. *Freeman*, 804 F.2d 1574.

213. "No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against himself." FLA. CONST. art. I, § 9.

214. *See, e.g., Kight v. State*, 12 Fla. L.W. 357 (Fla. July 9, 1987); *Patten v. State*, 467 So. 2d 975 (Fla. 1985), *cert. denied*, 106 S. Ct. 198 (1985); *Morgan v. State*, 453 So. 2d 394,

Cruel and unusual punishment is prohibited by both the eighth amendment of the United States Constitution,²¹⁵ and article I, section 17 of the Florida Constitution.²¹⁶ While the official commentary on the state constitution offers no guidance to distinguish the Florida provision from the federal provision,²¹⁷ case law indicates that they are treated as one. Again, no greater support for defendants on state constitutional grounds.²¹⁸

Likewise, the rights to a fair trial and to present witnesses are assured by the sixth amendment of the United States Constitution,²¹⁹ and by article I, section 16 of the Florida Constitution.²²⁰ The official commentary to the state constitution indicates that the framers intended the state and federal provisions to be similar.²²¹ Case law reveals that there has been a slight divergence between state and federal constitutional law construction. In *State v. Neil*,²²² the Florida Supreme Court chose not to follow a sixth amendment holding of the United States Supreme Court, and instead invoked article I, section 16 of the Florida Constitution to hold that a prosecutor may not use peremptory challenges to elimi-

397 (Fla. 1984); *State ex rel Boyd v. Green*, 355 So. 2d 789 (Fla. 1978); *Boatwright v. State*, 272 So. 2d 137 (Fla. 1973). *But cf. Haliburton v. State*, 12 Fla L.W. 506 (Fla. Oct. 2, 1987).

215. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

216. "Excessive fines, cruel or unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden." FLA. CONST. art. I, § 17.

217. FLA. CONST. art. I, § 17, official commentary.

218. *See, e.g., Patten*, 467 So. 2d at 975; *Gammill v. Wainwright*, 357 So. 2d 714 (Fla. 1978); *Williams v. State*, 441 So. 2d 1157 (Fla. 3rd DCA 1983).

219. U.S. CONST. amend. VI 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.

220. FLA. CONST. art. I, § 16 provides in part:

In all criminal prosecutions the accused shall, upon demand, be informed of the nature and cause of the accusation against him, and shall be furnished a copy of the charges, and shall have the right to have compulsory process for witnesses, to confront at trial adverse witnesses, to be heard in person, by counsel or both, and to have a speedy and public trial by impartial jury in the county where the crime was committed.

221. "The close relation of the contents of this provision and the requirements of the Sixth Amendment to the United States Constitution is apparent from the instructions to the states contained in the latter and the similarity of phrasing in both instances." FLA. CONST. art. I, § 16, official commentary.

222. 457 So. 2d 481 (Fla. 1984). *See also State v. Castillo*, 486 So. 2d 565 (Fla. 1986).

nate potential jurors solely on the basis of race.²²³ However, such divergence is uncharacteristic.²²⁴

The reliance of Florida courts on federal constitutional interpretation so infuriated former Justice Adkins of the Florida Supreme Court that he once wrote, in a blistering dissent to *Nowlin v. State*:²²⁵

It is time that we reaffirm the independent nature of the Florida Constitution and assume our responsibility to define and protect the rights of Florida citizens, despite the conflict in decisions of the United States Supreme Court interpreting the Federal Constitution. Reasonable men can and do differ about the balance to be struck between 'liberty' and 'order.'²²⁶

Unless the rest of the state's justices respond to Justice Adkins's rallying cry, neither Florida's current law, nor Senator Lehtinen's proposals, are likely to fall victim to the state constitution. This conclusion seems unavoidable since the Florida Constitution has not yet been interpreted to provide any greater protection than the federal constitution regarding shifting the burden of proof of insanity, the clear and convincing evidence standard, or the ultimate issue restriction.

IV. CONCLUSION

In 1984, Congress overreacted to a single astonishing incident, thereby altering the course of advances in society's attitude toward criminal defendants who may be mentally ill. The Florida Legislature should not repeat that mistake.

223. *Neil*, 457 So. 2d at 487.

224. *See, e.g.*, *Gurganus v. State*, 451 So. 2d 817, 823 (Fla. 1984) ("Since the improper exclusion of the psychologists' testimony deprived Gurganus of his sixth amendment and fourteenth amendment rights to provide witnesses on his own behalf, we must evaluate the exclusion according to the harmless constitutional-error rule articulated by the United States Supreme Court." The court did not mention any rights under the Florida Constitution.); *Nowlin v. State*, 346 So. 2d 1020, 1022 (Fla. 1977) (In an exclusionary rule case, the court allowed the prosecution to impeach a defendant's testimony with admissions that the defendant made before he had been advised of his *Miranda* rights. The court cited to the United States Constitution and the Florida Constitution without referring to any particular provisions therein, and without making any distinction between them.); *Rose v. State*, 506 So. 2d 467, 470 (Fla. 1st DCA 1987); *State v. Reeves*, 444 So. 2d 20 (Fla. 2d DCA 1983); *Ashley v. State*, 433 So. 2d 1263 (Fla. 1st DCA 1983).

225. 346 So. 2d 1020 (Fla. 1977) (Adkins, J., dissenting).

226. *Nowlin*, 346 So.2d at 1026.

Senator Lehtinen's proposals to have Florida follow the insanity defense "reforms" enacted by Congress are unwise and unnecessary. Codification would serve no purpose because for eighty-five years Florida courts unerringly have maintained a cognitive test to determine whether a defendant was insane when the alleged crime occurred. In fact, the proposal would reverse a national trend whereby society has recognized the inseparability of emotional and intellectual awareness.

Codifying insanity as an affirmative defense also is unnecessary because it is now recognized as an affirmative defense at common law. Defendants are in the best position to provide evidence of insanity, and under current Florida law, they must do so by establishing a reasonable doubt of sanity. The clear and convincing burden will be difficult for defendants to carry, given the inexact nature of psychological testimony. The current Florida standard has worked well, and unless it is shown that the standard has been abused, there is no reason to impose on defendants a crushing burden of proving insanity by clear and convincing evidence. Restricting expert ultimate issue testimony would reverse a near-century-old policy that acknowledges the special function that psychologists and psychiatrists necessarily serve when an insanity defense is asserted. Again there is no evidence that the system has been abused or that it has failed. As long as experts are permitted to testify freely about mental impairment, disease or defect, ultimate issue evidence will not stand in the way of justice, and it might help jurors to better understand highly technical testimony.

The time has come for Florida courts to help straighten out the constitutional infringement that may result from confusion over the family of insanity-like defenses. The distinction between avoidance and denial defenses goes to the heart of the right to a fair trial. Courts must recognize that distinction to allow defendants to challenge, with competent evidence, every element of an offense, including *mens rea*. No label such as "diminished capacity" should be used improperly to subvert that right. The Florida Supreme Court has a great opportunity to resolve that problem right now. It should do so for the good of the public.

