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THE INSANITY PLEA IN MISSISSIPPI: A PRIMER AND A PROPOSAL

*Michael Clay Smith**

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I. INTRODUCTION

In the aftermath of Freud's insights and the emergence of modern psychiatry, psychology, and sociology, America's criminal justice system has struggled to accommodate crime and the criminal to science. As it has grown increasingly apparent that much human behavior is the product of antecedent conditions, rather than the pristine exercise of personal free will, there has been inexorable reposturing in a criminal justice system that is fundamentally grounded upon individual blameworthiness. Nowhere has this been more true than with the insanity defense.

The past three decades, especially, have witnessed turmoil and dissatisfaction, from many and varying quarters, with the insanity defense. The jurisprudence of Mississippi has been no exception. Indeed, Mississippi was nearly half a century

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ahead of most of the nation in grappling with the usefulness of the verdict of "not guilty by reason of insanity."

More recently, there has been significant recognition of problems with the present insanity defense: In some cases, juries are, perhaps unknowingly, facilitating an early return to the streets for some offenders. More commonly, juries are ignoring—"nullifying"—the law in order to imprison deranged offenders. At the same time, it appears to many that mentally ill offenders are being treated in less than humane fashion. This article offers suggestions for improvement in Mississippi practice.

II. THE UTILITY OF THE INSANITY DEFENSE

A. The Theory

Human conduct and misconduct are products of the central nervous system. From time immemorial, criminal law has reflected the notion that every individual is responsible to society for his or her own acts, so long as those acts are the products of an exercise of the will.[1] Modern Anglo-American views of criminal responsibility have been especially shaped by the utilitarian and economic views of human nature advanced by the philosophers Thomas Hobbes and Jeremy Bentham. Hobbes, in the seventeenth century, and Bentham, in the eighteenth, argued that the human is a rational, self-seeking creature who will not commit crimes if the costs outweigh the benefits.

In this view, criminal penalties exist not so much to punish wrongdoers as to induce citizens to obey the law because that will bring the greater reward. Under this economic theory of behavior, punishment for a crime must exceed the benefit that would derive from committing it, while any punishment which exceeds the benefit is unnecessary and despotic. "Nature has placed mankind under the governance of two sovereign masters, *pain* and *pleasure*."[2] With these words, Bentham opened his *Introduction to the Principles of Morals and Legislation,* first published in 1789. He postulated that the object of law was to enlarge the happiness of the community by increasing the pleasure and decreasing the pain of those persons who compose it.[3] Punishment, because it conferred pain, could be justified only to prevent some greater pain. Excessive punishment was wrong because it was wasteful and inefficient.[4]

This theory obviously, can achieve its purpose only with persons of rational mind. A person whose mind is demented or deficient cannot accurately calculate self-interest, and thus cannot be expected to be deterred by the threat of punish-

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1. There is, of course, a small category of offenses known as strict liability, or "no *mens rea*," crimes. In some applications, they do not strictly fit this definition. Those offenses are not treated in this article. Neither does this article address mental retardation, capacity to stand trial, or capacity to undergo execution of sentence in relation to mental ability and criminal responsibility. Nor does it address a defendant's right to psychiatric assistance for his or her defense.

2. J. BENTHAM, INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 1 (1789).

3. *Id.* at 2.

4. *Id.* at 1-7.

ment. The infliction of pain on such a person serves only vengeance, not social improvement. It was in this philosophical atmosphere, then, that the modern insanity defense had its birth.[5] Insanity could explain irrational acts. An insane person would not be guilty of a crime because he or she could not possess *mens rea*—the requisite criminal intent element of all crimes *mala in se*. An alternative theoretical model for the insanity defense recently has been suggested by University of Michigan philosopher R. B. Brandt. He urges that, rather than excusing an insane person because he or she is senseless and incapable of obeying the law, the focus should instead remain upon motivation. A person should be nonculpable only when the "sum" of the offender's moral/legal motivations remains at or above an "acceptable" level, but, because of mental state, the person commits the prohibited act anyway.[6] Brandt argues that a model based on this theory would be beneficial because it would retain concern with voluntary acts, thus affecting motivation and reinforcing deterrence.[7]

The array of mental health-related defenses available in American jurisdictions today offers the jury, as the trier of fact, alternative ways of doing its business. In most jurisdictions, a defendant may be found not guilty by reason of insanity, in which case he or she will be set free unless the mental health laws provide for involuntary hospitalization. This is possible only if the state shows by "clear and convincing evidence" that the person is mentally ill and presents a danger to himself or others.[8] The jury may also reduce the charge upon which guilt is found under the rubric of diminished capacity. In a few jurisdictions, the jury may find a defendant guilty but mentally ill, which carries a mandatory loss of liberty for a specified term. This time is spent in a hospital while the defendant is mentally ill and in prison during sanity.

What is the practical utility of the insanity defense? Psychiatrist Lee Coleman examined hundreds of cases while preparing his 1984 book *The Reign of Error*.[9] This widely acclaimed book was enormously critical of the deference by the courts given to psychiatric and psychological opinion.[10] Coleman concluded that jurors believe the insanity verdict will somehow ensure needed psychiatric help

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5. J. WILSON & R. HERRNSTEIN, CRIME AND HUMAN NATURE 516-17, 525 (1985). The author is mindful that two of America's most prominent commentators in the field of criminology, James Q. Wilson and Richard J. Herrnstein of Harvard, see the insanity defense as inconsistent with true utilitarian theory. They argue that utilitarianism does not take into account that people differ in their faculties: Some have far greater intellectual capacity to infer the consequences of their acts; some can defer gratification to achieve greater, long-range goals, while others demand immediate pleasures; some relish thrills, others security. Why does not everyone commit crime when it is advantageous? "We can only conclude that man is governed by something more than mere calculation," they write, further suggesting that the answer lies in something akin to Aristotelian virtue. *Id.*

6. Brandt, *The Insanity Defense and the Theory of Motivation*, 7 LAW AND PHILOSOPHY 123, 139-40 (1988).

7. *Id.* at 127-31.

8. Addington v. Texas, 441 U.S. 418 (1979).

9. L. COLEMAN, THE REIGN OF ERROR (1984).

10. *Id.* at 36-46.

for the accused.[11] Jurors, he said, seem to feel it gives "better protection from future crimes than an ordinary prison sentence offers."[12]

Such a view is terribly misplaced. One study showed that the mean detention period for murderers found insane in New York between 1965 and 1976 was approximately seventeen months in the hospital.[13] At least one murderer was released after just one day.[14] Those found not guilty because of insanity are, after all, not convicted criminals, and they can be detained against their will only so long as the psychiatrists conclude that they pose a danger to themselves or to others. Civil commitment procedures are circumscribed by the "least restrictive alternative" rule,[15] and, unless adjudicated dangerous, a sane person who has not been convicted cannot be held.[16] As Coleman points out, psychiatrists have no special method of predicting who will commit a criminal act or of determining when a criminal is cured of antisocial tendencies.[17]

Most often, however, the problem is perceived to be that juries ignore the law of insanity in order to convict dangerous, insane offenders and ensure that they will not make early returns to the streets. There are several prominent cases involving at least some evidence of insanity. Charles Guiteau, who assassinated President Garfield in 1881; Guisseppe Zangara, who attempted to kill President-elect Franklin Roosevelt (and did kill Chicago Mayor Anton Cermak) in 1933; Jack Ruby, the killer of Lee Harvey Oswald, and Sirhan Sirhan, the killer of Robert Kennedy, are among them. All pleaded not guilty by reason of insanity, but were found sane and guilty.[18]

Probably more to the point, however, are the everyday cases, not media sensations, in which clearly mentally ill persons are found sane and convicted. Three such recent cases in Mississippi are discussed later in this article.

Finally, let us turn to the world of literature for a possible insight into the most elemental utility of the insanity defense. It has been suggested that the real worth of the defense may be found in its symbolic value – as a means of separating a heinous criminal from the rest of us. If we can label a reprehensible offender as insane, and thus not really human, we distance ourselves – and the remainder of humanity – from any part in the awful act, from any share in the guilt because of our brotherhood in the species.

This is the suggestion made by P. D. James, the preeminent English mystery writer. In her latest novel, *Devices and Desires*,[19] one of her more insightful characters, Chief Inspector Rickards, is asked his feelings about imposition of the

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11. *Id.* at 52.
12. *Id.*
13. Steadman, *Insanity Acquittals in New York State*, 137 AM. J. OF PSYCHIATRY 321, 324-25 (1980).
14. *Id.* at 325.
15. O'Connor v. Donaldson, 422 U.S. 563 (1975).
16. Jackson v. Indiana, 406 U.S. 715 (1972); People v. McQuillan, 392 Mich. 511, 221 N.W.2d 569 (1974).
17. L. COLEMAN, *supra* note 9, at 53.
18. R. SIMON & D. AARONSON, THE INSANITY DEFENSE 114-17 (1988).
19. P. JAMES, DEVICES AND DESIRES (1989).

death penalty on a serial killer of innocent women. "I wouldn't hang anyone, I'd find a less barbaric method," Rickards responds.

> But they aren't mad, are they? Not until they're caught. Until then they cope with life like most other people. Then we discover that they're monsters and decide, surprise, surprise, to classify them as mad. Makes it seem more comprehensible. We don't have to think of them as human anymore. We don't have to use the word 'evil.' Everyone feels better.[20]

B. Jury Behavior

There has been one extensive study of jury behavior in insanity cases. Conducted in the 1950's and 1960's as part of the "Chicago Jury Project," Rita Simon and other researchers from the University of Chicago Law School utilized real jurors from Chicago, St. Louis, and Minneapolis,[21] let them hear edited recordings of real cases, then compiled their impressions and conclusions.[22] A total of 1176 jurors from current jury pools were used; thirty juries heard a housebreaking trial,[23] and sixty-eight juries heard an incest trial[24] (the several day trials had been reduced to sixty to ninety minute presentations).[25]

Not surprisingly, there were more convictions when juries were given the more narrow *M'Naghten* definition of insanity than the very broad *Durham* rule[26] (these rules are discussed later in this article), and jury deliberations lasted longer when the *Durham* rule was used.[27] Simon correctly interpreted this to mean that jury involvement was greater with *Durham* instructions. She went on to conclude, however, that this meant assumed "greater responsibility under *Durham.*"[28] It could just as easily mean that under the more vague and ambiguous *Durham* rule there was simply more confusion and less sense of purpose and direction.

The study also found that efforts to vary psychiatric testimony had little impact on juries.[29] As between the testimony actually given in the original trials and "model" testimony prepared with highly expert advice and substituted in the mock trials, outcomes were the same.[30] Simon concluded this meant jurors were not willing to relinquish their responsibilities to the psychiatrists.[31]

Jury knowledge of the consequences of the different verdicts was also examined. Some juries were given an instruction adopted in the District of Columbia in 1955 which told jurors that a defendant found not guilty by reason of insanity

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20. *Id.* at 176.
21. R. SIMON, THE JURY AND THE DEFENSE OF INSANITY 76 (1967).
22. *Id.* at 36.
23. *Id.* at 37.
24. *Id.* at 69.
25. *Id.* at 72.
26. *Id.* at 36.
27. *Id.* at 74.
28. *Id.* at 75.
29. *Id.* at 76.
30. *Id.*
31. *Id.* at 88.

would "be confined to a hospital for the mentally ill unless and until it is determined by the authorities of that hospital that he is of sound mind, at which time he will be released."[32] The researchers found that presence or absence of that instruction had no noticeable effect on verdicts; further, they found that most jurors made assumptions consistent with that instruction, even without being told.[33] Simon did recommend that juries be so instructed.

The study found that less educated jurors were more likely to return a not guilty by reason of insanity verdict than were those with a college education, laborers more likely to do so than businessmen, lower income more likely than higher, and blacks more likely than others.[34] Simon concluded: "It supported the expectations that trial lawyers have about jurors in traditional criminal cases: lower status jurors are more likely to favor the defendant."[35]

In the Hinckley aftermath, Simon and a colleague at American University, David Aaronson, conducted further research relating to the insanity defense. They polled 928 judges, lawyers, and mental health professionals on their views about which definition of insanity was preferable, how the burden of proof should be structured, how broad expert testimony should be, and similar issues.[36] The results were not surprising. Judges and lawyers tended to prefer the definition used in their jurisdictions.[37] Experts thought they should be selected by the court rather than by each side.[38] Psychiatrists thought they had more ability to detect insanity than did the other respondents.[39] There was little assurance that respondents were broadly familiar with the ramifications of all options presented and even less showing that these rather *ad hoc* opinions were of much value to policy makers.

Other useful jury-based research has been conducted in connection with the new option for a verdict of guilty but mentally ill. That research will be discussed later in this article.

C. The Application

Contrary to what one might believe, the insanity defense is not much used. Criminologist Norval Morris of the University of Chicago calls it an "ornate rar-

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32. This instruction was made mandatory in Taylor v. United States, 222 F.2d 398, 404 (D.C. Cir. 1955), and continues to be the law in the District of Columbia. A panel of the Eighth Circuit recently followed *Taylor* and held that a defendant pleading insanity was entitled to an instruction informing the jury, in detail, of the consequences of a verdict of not guilty by reason of insanity. United States v. Neavill, 868 F.2d 1000 (8th Cir. 1989). The opinion subsequently was vacated in order to consider the matter en banc. 877 F.2d 1394 (1989). The defendant later withdrew his appeal, with the result that the opinion remained permanently rescinded. 886 F.2d 220 (1989).

33. R. SIMON, *supra* note 21, at 46, 92-96. Other researchers have also concluded that which sort of insanity definition given the jury matters little in outcome. Finkel, *De Facto Departures from Jury Instructions*, 14 LAW AND HUMAN BEHAVIOR 105, 112-13 (1990).

34. *Id.* at 107-12.

35. *Id.* at 112.

36. R. SIMON & D. AARONSON, THE INSANITY DEFENSE 137-69 (1988).

37. *Id.* at 140-41.

38. *Id.* at 145.

39. *Id.* at 149.

ity" in our criminal justice system.[40] Moreover, it is widely recognized that few of those who plead insanity ever win such a verdict.[41]

In 1973, the insanity defense was described as resulting in fewer than 100 acquittals per year out of more than 50,000 federal criminal cases brought annually.[42] More recent American studies have shown that, in fiscal 1982, fifty-two of 32,500 defendants represented by the New Jersey public defender pleaded insanity, and only fifteen of those received such a verdict.[43] In Virginia, a 1983 report indicated that no more than fifteen defendants were acquitted by reason of insanity each year.[44] One study of a six-year period in Hawaii showed that about one-fourth of those who entered an insanity plea, 107 of 437, were eventually adjudicated insane.[45]

A study in Wyoming found that of 21,012 felony indictments during a three-year period in the early 1970's, only 102 defendants utilized an insanity plea and only one was actually adjudicated not guilty by reason of insanity.[46] The Wyoming study did note that pretrial dismissals were considerably more frequent for the group entering insanity pleas than for felony defendants in general.[47]

Criminologist Samuel Walker, responding to recent conservative attempts to limit or abolish the insanity defense, declared that the defense is so little used, and its significance in the system so small, that abolition of the defense altogether would have no effect on serious crime.[48] While he might be correct insofar as short-term crime statistics are concerned, his argument does not take into account the powerful symbolic effect of the defense, its relationship to public perceptions of justice, and the relationship this may have to deterrence and crime rates.

Studies indicate the public perception that the defense is widely used, frequently allowing vicious criminals to escape justice. In conjunction with the Wyoming study cited above, researchers asked samples of state legislators and college students to estimate how many of the 21,000-22,000 felony indictments were followed by insanity pleas, and what proportion of those would result in insanity findings for the defendants.[49] The college students guessed that insanity pleas were used in 8,151 (37%) of the cases, and that 3,599 (44% of those using the

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40. N. MORRIS, MADNESS AND THE CRIMINAL LAW 59 (1982).

41. S. WALKER, SENSE AND NONSENSE ABOUT CRIME 120 (1985).

42. Dershowitz, *Abolishing the Insanity Defense: The Most Significant Feature of the Administration's Proposed Criminal Code—An Essay*, 9 CRIM. L. BULL. 434, 436 (1973).

43. H.R. REP. NO. 577, 98th Cong., 1st Sess., at 5 n.7 (1983).

44. *Id.*

45. Pasewark, Bogenberger, Gudeman & Bieber, *Factors Associated with the Insanity Adjudication*, 3 J. OF POLICE & CRIM. PSYCHOLOGY 9 (1987).

46. Pasewark & Lanthorn, *Disposition of Persons Utilizing the Insanity Plea in a Rural State*, 5 J. OF HUMANICS 87 (1977).

47. *Id.* A study of murder trials in England and Wales during the period 1957-64 found that 6.3% of those brought to trial for murder were acquitted as insane. N. WALKER, CRIME AND INSANITY IN ENGLAND 86 (1968).

48. S. WALKER, *supra* note 41.

49. Pasewark & Pantle, *Insanity Plea: Legislators' View*, 136 AM. J. OF PSYCHIATRY 222 (1979); Pasewark & Seidenzahl, *Opinions Concerning the Insanity Plea and Criminality Among Mental Patients*, 7 BULL. OF THE AM. ACADEMY OF PSYCHIATRY & THE L. 199 (1979).

defense) were successful.[50] The legislators estimated the insanity defense was interposed in 4,458 (20%) of the cases, and was successful in 1,794 (8% of those using the plea).[51] A National Mental Health Association commission appointed to study the issue in 1983 found that public sentiment against the defense was based on myths generated by the disproportionate press coverage afforded the sensational cases of violent insanity acquittees.[52] The study argued that the defense is rarely used and that Attorney General William French Smith "misled" the Senate Judiciary Committee when he testified that abolition of the defense was needed to restore effective law enforcement.[53]

While the symbolic impact of these public perceptions about the insanity defense is incapable of empirical measurement, it certainly is arguable that widespread perceptions of impotence in the criminal justice system contribute to anomie and public despair and, because of the failure of deterrence, to lawlessness. If this be true, a delimiting of the insanity defense in public perception could in itself be a salutary social goal. Without a doubt, sympathies of this sort contributed to the reforms of the post-Hinckley era, described in the following section.

III. Insanity as a Defense: Law Ancient and Modern

We do not know a great deal about the legal treatment of persons accused of crime prior to the eighteenth century. Special treatment for insane offenders occurred in the early Norman period, and criminal jurisprudence in following centuries generally recognized the principle that lunatics were not criminally responsible for their acts. However, in the sixteenth and seventeenth centuries English courts administered whippings, mutilation, and imprisonment to clearly demented persons in criminal blasphemy prosecutions.[54]

It is often said that the modern insanity defense began with *M'Naghten's Case* in the mid-nineteenth century. This is incorrect. At least one reported case revealing a well-settled insanity defense predates *M'Naghten* by 119 years.[55] Edward Arnold, known to his neighbors as "Crazy Ned," attempted to murder Lord Onslow with a shotgun in 1723 because he believed Onslow had sent demons and "bolleroys" into his body to plague him.[56] Judge Tracy charged the jury with a "wild beast" test:

> It is not every kind of frantic humour, or something unaccountable in a man's actions, that points him out to be such a madman, as is exempted from punishment: it must be a man that is totally deprived of his understanding and memory, and doth

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50. Pasewark & Seidenzahl, *supra* note 49, at 201.

51. Pasewark & Pantle, *supra* note 49, at 201.

52. National Mental Health Ass'n, Myths and Realities: A Report of the National Commission on the Insanity Defense 1, 5 (1983).

53. *Id.* at 14-15.

54. N. Walker, *supra* note 47, at 19-31, 49-50.

55. Arnold's Case (1724), 16 State Tr. 695 (1812).

56. *Id.*

> not know what he is doing, no more than an infant, than a brute, or a wild beast, such a one is never the object of punishment.[57]

There was abundant evidence showing Arnold to be strange and many of his actions bizarre.[58] The jury, however, apparently did not believe him to be a "wild beast" or "totally deprived" of his mind.[59] Arnold was convicted and sentenced to hang.[60] Recovered from the wounding, Lord Onslow interceded, and Arnold's sentence was commuted to life imprisonment.[61] Judge Tracy's instruction, while more harsh in idiom, can be seen as a clear precursor to the *M'Naghten* rules.

Sir William Blackstone's *Commentaries on the Laws of England,*[62] first published in the 1760's, declared that "an idiot or a lunatic" would be excused from criminal guilt because of a deficiency in will:

> For the rule of law as to the latter, which may [be] adapted also to the former, is, that *furiosis furore solem punitur* (a madman is punished by his madness alone).' In criminal cases, therefore, idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities: no, not even for treason itself.[63]

A. M'Naghten Rules

Daniel M'Naghten suffered delusions that he was being persecuted by the Prime Minister of Great Britain, Sir Robert Peel.[64] On January 20, 1843, M'Naghten shot and killed Peel's assistant, Edward Drummond, believing him to be Peel.[65] He was acquitted on grounds of insanity,[66] and the resulting public uproar led the House of Lords to inquire of the fifteen judges of the Queen's Bench as to the proper test to be applied in such cases.[67]

The doctrine announced by Lord Chief Justice Tindal of Common Pleas had three important aspects, and thus the court's declaration is probably best labeled "M'Naghten's rules" in the plural. First, and most importantly, the general rule was set down that a jury should acquit a defendant if it is found that the accused "was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong."[68] This rule, then, involves cognitive function—the rational ability to know who you are and what you are doing, or to discern the wrongfulness of the act.

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57. *Id.* at 764-65.
58. *Id.* at 754-64.
59. *Id.* at 766.
60. *Id.*
61. *Id.*
62. W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765-69).
63. 4 W. BLACKSTONE, COMMENTARIES *24-5.
64. Coincidentally, it was Peel who turned Scotland Yard into the first modern, metropolitan police department; for this reason, London police continue to be called "Bobbies."
65. M'Naghten's Case, 1843-60 All E.R. 229 (H.L. 1843). For a fuller discussion of the M'Naghten case, see Diamond, *Isaac Ray and the Trial of Danial M'Naghten,* 112 AM. J. OF PSYCHIATRY 651 (1956).
66. M'Naghten's Case, 1843-60 All E.R. at 230.
67. *Id.*
68. *Id.* at 233.

Second, the judges also addressed the issue of partial insanity, the situation in which a person, otherwise sane, is laboring under some insane delusion involving the situation in question.[69] In such a case of "partial delusion," the judges declared, guilt would depend upon whether the act would have been right if the situation had actually been as the person believed it to be.[70] Tindal wrote:

> For example, if under the influence of his delusion he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment.[71]

Third, the judges opined that a "medical man" might, in some cases, give his opinion to the jury as to the state of the accused's mind at the time of the offense.[72] The judges said there was not a "right" to such testimony, but that a judge might allow it to be received where the facts of the offense were not in question and where sanity was the issue.[73]

The M'Naghten rules were quickly adopted throughout the Anglo-American jurisdictions,[74] and the so-called "right and wrong" test became the bedrock of the insanity defense. As recently as the mid-1960's, prominent liberal criminologist Anthony Platt and psychiatrist Bernard Diamond lauded the rule and argued that its origins could be traced to ancient Hebrew law, Greek moral philosophy, Roman law, the literature of the Christian church, and English common law:

> It is clear that the 'right and wrong' test of criminal responsibility did not arise in 1843, either in England or in the United States. The 'knowledge of right and wrong' test, in the form of its earlier synonym ('knowledge of good and evil') is traceable to the Book of Genesis. The famous M'Naghten trial of 1843 and the subsequent opinion of the judges provided only the name, 'M'Naghten Rule.' The essential concept and phraseology of the rule were already ancient and thoroughly embedded in the law.[75]

B. Irresistible Impulse

There was early criticism of the M'Naghten rules as being too narrow and of the insane delusion rule as too harsh.[76] As a result, some jurisdictions added a volitional consideration – the so-called "irresistible impulse" rule – to the M'Naghten

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69. *Id.* at 234.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. For a compendium of early cases adopting the rule in various jurisdictions, see Platt & Diamond, *Origins of the 'Right and Wrong' Test of Criminal Responsibility and Its Subsequent Development in the United States: An Historical Survey,* 54 CALIF. L. REV. 1227 (1966).

75. *Id.* at 1258.

76. See for instance, the comments of William Carey Jones in his edition of Blackstone. 2 W. BLACKSTONE, COMMENTARIES 2180-86 (Bancroft-Whitney ed. 1915).

test.[77] Under this rule, a person is legally insane if he cannot control his conduct.[78] Thus, a person could be found insane even if, cognitively, the person knew what he was doing, and knew it to be wrong, but could not resist the impulse. In such a case, the person did not choose or will the act; it was not volitional.

C. "Product" Test

Professional dissatisfaction with the M'Naghten Rules continued to grow. In *The Reign of Error,* Dr. Coleman describes it thus:

> Psychiatrists pointed out that the 'right-wrong' test for insanity was hopelessly out of date because the psychoanalytic revolution had deepened our understanding of how the mind works. Freud had demonstrated that behavior was not merely the result of conscious decisions based on rational thinking. The unconscious mind was a powerful, if hidden, influence on behavior. Furthermore, it was the ability to understand how the unconscious workings of the mind controlled a person's behavior, especially deviant behavior, that set the psychiatrist apart from everyone else . . . . If a psychiatrist's talents were wasted on merely determining whether a person knew right from wrong, both science and justice would suffer.[79]

In 1954, the door was opened wide. Judge David Bazelon, a highly respected jurist on the United States Court of Appeals for the District of Columbia Circuit, wrote the opinion in *Durham v. United States,*[80] which declared that "an accused is not criminally responsible if his criminal act was the product of mental disease or mental defect."[81] The court went on to define "disease" as a condition considered capable of either "improving or deteriorating," and "defect" as a condition "not considered capable of either improving or deteriorating and which may be either congenital, or the result of injury, or the residual effect of a physical or mental disease."[82]

The psychiatric profession lauded the decision. Judge Bazelon was awarded a certificate of commendation by the American Psychiatric Association. Nonetheless, the *Durham* decision was not widely accepted; judges in other jurisdictions feared psychiatric testimony would get out of hand. Indeed, in a 1962 case, the Court of Appeals for the District of Columbia Circuit held that an accused could be innocent by reason of insanity if the act, whatever it was, was simply the product of an "emotionally unstable personality."[83] Dr. Coleman comments:

> If *all* behavior was, as Freud taught, the result of predetermined unconscious forces, it was easy for any crime to be interpreted as the result of hidden mental forces and

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77. A leading case adopting irresistible impulse was Parsons v. State, 81 Ala. 577, 2 So. 854 (1887). For a collection of the early cases, see 29 C.J.S. *Homicide* § 14 (1922). For a discussion of the historical antecedents of the concept, see English, *The Light Between Twilight and Dusk: Federal Criminal Law and the Volitional Insanity Defense,* 40 HASTINGS L.J. 1, 12-18 (1988).

78. Parsons, 81 Ala. at 596-97, 2 So. at 866-67.

79. L. COLEMAN, *supra* note 9, at 48.

80. 214 F.2d 862 (D.C. Cir. 1954).

81. *Id.* at 874-75.

82. *Id.* at 875.

83. Campbell v. United States, 307 F.2d 597 (D.C. Cir. 1962).

thus the 'product' of mental disorder. The result of *Durham* was a huge increase in findings of legal insanity in the District of Columbia, something no one really desired.[84]

It does appear that *Durham* resulted in a large increase in insanity acquittal verdicts. A study of the six years following adoption of the rule found a fifteen-fold increase in the number of such verdicts over pre-*Durham* years. Rita Simon concluded that most of these new verdicts came from what would have been outright acquittals, as there was no decrease in the percentage of guilty pleas or verdicts.[85]

The point of *Durham,* of course, was that, in deciding upon disposition, the jury should be free to consider all information advanced by relevant scientific disciplines. Apparently the actual result was sometimes legal anarchy. After eighteen years of struggling with *Durham,* the Court of Appeals for the District of Columbia Circuit abandoned it and adopted the American Law Institute standard.[86]

D. ALI Test

The law needed a definition that was not so ambiguous as to result in absurdities and that would not be subject to caprice at the hands of psychiatrists, judges, and juries. As a result, in 1962 the American Law Institute formulated its definition of the insanity defense. It provides: "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."[87]

Commonly called either the ALI test or the "substantial capacity" test, it combines the cognitive test from M'Naghten with the volitional, irresistible impulse test, and qualifies both with a "substantial capacity" requirement. The cognitive portion may be seen as broader than *M'Naghten* in that it requires only lack of "substantial" mental capacity rather than total lack of capacity. It requires that the accused fail to "appreciate" the quality of the act rather than "know" it, a semantic distinction which the drafters of the Model Penal Code felt at least conveyed a broader sense of understanding than simple cognition.[88]

The ALI test was adopted in a number of jurisdictions.[89] While considerably narrower than the product test, it was subjected to much criticism in the aftermath of the Hinckley acquittal. Coleman argues that the ALI test is, in the last analysis, no different from the *Durham* rule.[90] It was, after all, under the ALI test that John Hinckley was acquitted.

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84. L. COLEMAN, *supra* note 9, at 49-50.

85. R. SIMON, *supra* note 21, at 203.

86. United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972).

87. MODEL PENAL CODE § 4.01(1) (1985).

88. 2 MODEL PENAL CODE AND COMMENTARIES 169 (1985).

89. At one time or another, it was the law in at least 15 states, the military courts, and all the federal circuits except the First. *See* People v. Drew, 22 Cal. 3d 333, 149 Cal. Rptr. 275, 583 P.2d 1318 (1978); English, *supra* note 77, at 28.

90. L. COLEMAN, *supra* note 9, at 50.

E. Diminished Capacity

Some states have adopted the so-called "diminished capacity" or "partial responsibility" doctrine as an additional device for softening the punishment of some mentally ill offenders.[91] While not a total defense, it allows the trier of fact to return a guilty verdict to a lesser charge. The doctrine can be used only with crimes that include some specific intent element, such as malice in murder. The theory of it is that the defendant's impaired mental state prevented him or her from forming the requisite specific intent but did allow the person to form the lesser general criminal intent necessary for a lower degree of crime. Thus, under the doctrine, a defendant may introduce evidence of mental infirmity less than legal insanity—something a defendant normally may not do—while urging that, at most, conviction should be for the lesser included offense.

Therefore, one accused of homicide might be found to have possessed the general intent necessary for manslaughter, but to have lacked the added specific intent element of malice, which would have been needed to elevate the homicide to murder.[92] Often the defense is asserted in cases where it is alleged that the ingestion of alcohol triggers a congenital condition which results in pathological intoxication.[93] Thus, while voluntary intoxication normally will not constitute a defense to a criminal charge, it can do so under the diminished capacity doctrine.

This defense is related to the so-called "heat of blood" defense which would limit a homicide committed in the heat of passion, upon provocation and before cooling, to manslaughter on the theory that the accused could not have formed the specific intent of malice. The California Supreme Court apparently took the lead in adopting the modern concept of diminished capacity in the 1954 case of *People v. Baker,*[94] and it is instructional to note that the California legislature recently abolished the defense *in toto.*[95]

It is interesting to note that, by act of Parliament, this sort of defense was provided in England in 1957.[96] Called "diminished responsibility," the defense is limited to homicide cases in which the accused was under "such abnormality of mind" resulting from retardation, disease or injury as to "substantially impair his mental responsibility for his acts . . . ."[97] When the defense applies, a person who

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91. State v. Padilla, 66 N.M. 289, 347 P.2d 312 (1959); State v. Sessions, 645 P.2d 643 (Utah 1982); State v. Smith, 136 Vt. 520, 396 A.2d 126 (1978). Other states have rejected it. State v. Wilcox, 70 Ohio St. 2d 182, 436 N.E.2d 523 (1982); *c.f.* Commonwealth v. Rightnour, 435 Pa. 104, 253 A.2d 644 (1969).

92. People v. Henderson, 60 Cal. 2d 482, 35 Cal. Rptr. 77, 386 P.2d 677 (1963).

93. People v. Castillo, 70 Cal. 2d 264, 74 Cal. Rptr. 385, 449 P.2d 449 (1969).

94. 42 Cal. 2d 550, 268 P.2d 705 (1954).

95. Cal. Penal Code § 28(b) (West 1988) provides: "As a matter of public policy there shall be no diminished capacity, diminished responsibility, or irresistible impulse in a California criminal action . . . ." Section 25(a) provides:

> The defense of diminished capacity is hereby abolished. In a criminal action . . . evidence concerning an accused person's intoxication, trauma, mental illness, disease or defect shall not be admissible to show or negate capacity to form the particular purpose, intent, motive, malice aforethought, knowledge or other mental state required for the commission of the crime charged.

96. Homicide Act, 1957, 5 & 6 Eliz. 2, ch. 11, § 2.

97. *Id.*

would otherwise be guilty of murder, either as a principal or as an accessory, is to be convicted of manslaughter.[98]

F. John Hinckley and his Aftermath

Only two months after his inauguration in 1981, President Reagan was shot from ambush on a Washington street in full view of television cameras. The assailant, as the nation soon learned, was a young man named John W. Hinckley, Jr. Fifteen months later, a District of Columbia jury found Hinckley not guilty of the shooting by reason of insanity. The shocked public perceived that an injustice had been done.[99] Demands mounted for reform of the system.[100] Even the Attorney General of the United States spoke out, calling for a drastic curtailment of the insanity defense.[101] An ABC news poll taken shortly after the verdict showed three out of four Americans felt that justice had not been done, and the presiding judge at the Hinckley trial received some 1500 letters of complaint from the public.[102]

Change did come. The American Bar Association recommended a cognitive insanity standard and withdrew its support for the volitional tests.[103] The American Psychiatric Association declared that, as a matter of "moral integrity," the defense should not be abolished altogether but suggested a return to an unvarnished M'Naghten rule. The Association endorsed this definition as one upon which relevant psychiatric testimony could be "brought to bear":

> A person charged with a criminal offense should be found not guilty by reason of insanity if it is shown that as a result of mental disease or mental retardation he was unable to appreciate the wrongfulness of his conduct at the time of the offense. As used in this standard, the terms mental disease or mental retardation include only those severely abnormal mental conditions that grossly and demonstrably impair a person's perception or understanding of reality and that are not attributable primarily to the voluntary ingestion of alcohol or other psychoactive substances.[104]

Congress took the federal courts back to M'Naghten. In no-nonsense language, the 1984 Insanity Defense Reform Act declared that a defendant could be entitled to an acquittal only if "as a result of a severe mental disease or defect, he was unable to appreciate the nature and quality or the wrongfulness of his acts." The Act went on to declare: "Mental disease or defect does not otherwise constitute a defense."[105] The Act designated insanity as an affirmative defense and gave the de-

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98. *Id.*

99. S. WALKER, *supra* note 41, at 119.

100. *Id.*

101. J. WILSON & R. HERRNSTEIN, *supra* note 5, at 502.

102. Reported in V. HANS & N. VIDMAR, JUDGING THE JURY 181-82 (1986).

103. Winter, *Insanity Test*, 69 A.B.A.J. 426 (1983).

104. *Am. Psychiatric Association, Issues in Forensic Psychiaty* 13, 17 (1984).

105. Pub. L. No. 98-473, 98 Stat. 2057 (1984) (codified at 18 U.S.C. § 20(a); recodified at 18 U.S.C. § 17 by Pub. L. No. 99-646, 100 Stat. 3599 (1986)).

fendant the burden of proving it by clear and convincing evidence.[106] It also amended Rule 704 of the Federal Rules of Evidence to bar an expert from giving any conclusory opinion or inference regarding the mental state of a defendant as it relates to an element of the crime; that ultimate issue was left to the trier of fact for resolution.[107]

Even before the Act, the courts were moving back to the M'Naghten principles. In 1984, in *United States v. Lyons*,[108] the United States Fifth Circuit Court of Appeals, sitting en banc, reversed its earlier approval of the ALI test and said the sole test for insanity should be whether a defendant could appreciate the wrongfulness of his conduct. Noting the American Psychiatric Association's new recommendation, the majority opinion rationalized the circuit's earlier choice[109] of the ALI standard as having been influenced by expert opinion of the behavioral sciences at that time. "Unfortunately, it now appears our conclusion (in *Blake*) was premature—that the brave new world that we foresaw has not arrived,"[110] the opinion declared. Noting that psychiatry now holds that there is no objective test to measure a person's capacity for self control, the court said the better legal policy is "to treat all criminal impulses—including those not resisted—as resistible."[111]

G. Guilty But Mentally Ill

Another new idea for reform to emerge in the aftermath of the Hinckley trial was the alternative verdict of "guilty but mentally ill." Illinois[112] and Michigan[113] adopted this concept, which preserves the traditional insanity defense but provides an alternative to it. A verdict of not guilty by reason of insanity results in acquittal, but a verdict of guilty but mentally ill will result in a sentence for the same term provided for a regular guilty verdict. The sentence, however, is to be served in a state mental hospital (or back in prison if psychiatrists determine the person has regained capacity).

Under the Michigan statute, the ALI test is used for insanity, while mental illness is defined as "a substantial disorder of thought or mood which significantly

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106. In Davis v. United States, 160 U.S. 469 (1896), the Supreme Court recognized the presumption of sanity and held that where an accused produces some evidence to rebut this presumption, the prosecution must prove the accused's sanity beyond a reasonable doubt. In Leland v. Oregon, 343 U.S. 790 (1952), the Court approved a scheme which viewed insanity as an affirmative defense, and thus separate from the essential elements of the crime, including *mens rea;* the Court concluded that no due process right was implicated by the Oregon requirement that an accused shoulder the burden of proving his or her insanity beyond a reasonable doubt. The *Leland* court said that *Davis* had not established constitutional doctrine, "only the rule to be followed in federal courts." *Leland,* 343 U.S. at 797. The burden allotted by the new federal statute has been ruled constitutional. United States v. Freeman, 804 F.2d 1574 (11th Cir. 1986).

107. It has been said that this change did not provide for less or different testimony from such an expert, but rather that it changed the style of question and answer that is to be used. United States v. Mest, 789 F.2d 1069, 1071 (4th Cir.), *cert. denied,* 479 U.S. 846 (1986).

108. 731 F.2d 243 (5th Cir.), *cert. denied,* 469 U.S. 930 (1984).

109. Blake v. United States, 407 F.2d 908 (5th Cir. 1969).

110. *Lyons,* 731 F.2d at 248.

111. *Id.* at 249.

112. ILL. REV. STAT. ch. 38, § 6-2 (1988).

113. MICH. COMP. LAWS § 768.36 (1980); MICH. COMP. LAWS § 768.21a (1980); MICH. COMP. LAWS § 330.1400a (1980).

impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life."[114] In order to find a defendant guilty but mentally ill, the finder of fact must specifically find that the defendant is not insane. The Michigan Supreme Court has held the statute constitutional.[115]

Several valuable studies have looked at the new verdict. Psychologists at the University of Illinois at Urbana-Champaign, using 181 psychology undergraduates in mock juries,[116] concluded that jurors who chose the guilty but mentally ill verdict were more confident of their decisions than those who chose verdicts of either guilty or not guilty by reason of insanity.[117] The mock jurors saw the new option as attractive; they were more than 2.5 times more likely to choose the verdict than either of the other traditional verdicts.[118]

Another study with mock jurors showed significant use of the verdict but contradicted any suggestion that jurors saw it as an "easy way out." This study indicated that jurors were making significant discriminations in their use of the verdict, and its use drew both from those which otherwise would have been guilty verdicts and those which would have been not guilty by reason of insanity.[119]

H. Abolition

The most drastic reform urged in the post-Hinckley period was abolition of the insanity defense itself. Renowned legal scholar and criminologist Norval Morris had already paved the way with his 1972 book *Madness and the Criminal Law.*[120] By abolition, Morris actually meant elimination of the special plea and verdict of not guilty by reason of insanity; under his proposal, an accused could still argue for a straight verdict of not guilty because of a lack of *mens rea*, and evidence of mental illness would be admissible to show it.[121] Morris would have the defendant's mental illness taken into account at sentencing, both in terms of shortening the sentence because of mitigated responsibility and in lengthening detention if the person presented a threat to the community.[122]

As noted, the Morris proposal is not true abolition of the defense; it is merely abolition of the plea and verdict. It is quite clear that a defendant cannot constitutionally be deprived of the right to show lack of *mens rea;* the prosecution has the burden of proving all the elements of the offense, including the *mens rea.*[123] Furthermore, the Morris scheme does not adequately deal with the perception that the mental health system cannot, or does not, adequately detain many insane per-

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114. MICH. COMP. LAWS § 330.1400a (1980).

115. People v. Ramsey, 422 Mich. 500, 375 N.W.2d 297 (1985).

116. C. Roberts, S. Golding & F. Fincham, *Implicit Theories of Criminal Responsibility: Decision Making and the Insanity Defense,* 11 LAW & HUM. BEHAV. 207, 212 (1987).

117. *Id.* at 217-18.

118. *Id.* at 218.

119. Finkel & Duff, *The Insanity Defense: Giving Jurors a Third Option,* 2 FORENSIC REP. 235 (1989).

120. N. MORRIS, MADNESS AND THE CRIMINAL LAW (1985).

121. *Id.* at 65, 75.

122. *Id.* at 64.

123. *In re* Winship, 397 U.S. 358 (1970); State in the Interest of Causey, 363 So. 472 (La. 1978); Sinclair v. State, 161 Miss. 142, 132 So. 2d 581 (1931).

sons who present a criminal danger. Indeed, Morris acknowledges that his suggestion for flexibility in sentencing runs contrary to many recent reforms calling for a return to determinate sentencing.[124]

Two states did abolish the defense while retaining the right of a defendant to show and argue lack of *mens rea*,[125] and bills were introduced in at least twenty other states to do the same.[126]

I. The Pendulum

Thus swung the pendulum. American criminal jurisprudence, like much else in American society, reflected the optimism of the early and mid-twentieth century. Reformers struggled with the relationship between moral guilt and criminal guilt and with the ability of psychiatrists and courts to fathom the former. In some jurisdictions, a volitional test was added to the "right and wrong" test; some eventually moved on to a broad "substantial capacity" test incorporating both cognitive and volitional considerations. One jurisdiction went so far as the extremely broad "product of mental disease or defect" standard. When these new standards came to be widely perceived as resulting in injustice, new reformers rediscovered old rules.

IV. MISSISSIPPI JURISPRUDENCE AND INSANITY

How has Mississippi jurisprudence been affected by these winds of reform? Fairly little, so far as the applied law is concerned; but this does not mean the issues have not been under debate.

The Mississippi courts adopted the M'Naghten "right and wrong" test early. Within thirteen years of M'Naghten, the Mississippi Supreme Court adopted the "right and wrong" rule,[127] and it has been the law ever since. The court has repeatedly rejected any attempt to base a defense upon partial insanity.[128] In its most recent reiteration, the Mississippi Supreme Court declared the rule to be:

> To establish a defense on the ground of insanity, it must be clearly proved that at the time of committing of the act the accused was laboring under such a defect of reason from disease of the mind as (1) not to know the nature and quality of the act he was doing, or (2) if he did know it that he did not know that he was doing what was wrong.[129]

Mississippi has repeatedly declined to adopt a volitional test for insanity. In a recent pronouncement on the topic, the Mississippi Supreme Court said a defense of irresistible or uncontrollable impulse is not available unless the impulse springs from mental disease existing to such a high degree as to overwhelm the reason,

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124. N. MORRIS, *supra* note 40, 144-46.

125. IDAHO CODE § 18-207 (1987) (1982 amendment abandoning ALI) (declared constitutional in State v. Beam, 109 Idaho 616, 710 P.2d 526 (1985), *cert. denied*, 106 S. Ct. 2260 (1986)); UTAH CODE ANN. § 76-2-305 (1988).

126. S. WALKER, *supra* note 41, at 119.

127. Bovard v. State, 30 Miss. 600 (1856).

128. Brummett v. State, 181 So. 323 (Miss. 1938); Ford v. State, 73 Miss. 734, 19 So. 665 (1896); *id.*

129. Laney v. State, 486 So. 2d 1242, 1255 (Miss. 1986).

judgment, and conscience, "in which case the accused would be unable to distinguish the right and wrong of the matter."[130]

The court has likewise repeatedly held that expert opinions are not conclusive on the issue of insanity; the question is one for the jury, regardless of the psychiatric diagnosis.[131] The supreme court will not overturn a jury's finding of sanity unless the finding is manifestly against the overwhelming weight of the evidence,[132] and it has never done so. A defendant's expressions of remorse are admissible against him because they are probative of whether he knew the difference between right and wrong.[133]

Mississippi follows the evidentiary procedure approved by the United States Supreme Court in *Davis* nearly a century ago: First, a presumption of sanity is recognized; second, the defendant is required to produce some evidence to overcome the presumption; third, the prosecution then is required to prove the defendant sane beyond a reasonable doubt.[134] If an accused is acquitted on grounds of insanity, a statutory procedure exists to refer the person for involuntary mental commitment.[135]

Mississippi may have been the nation's forerunner with the verdict of guilty but mentally ill.[136] In 1928 the legislature abolished the insanity defense for murder, but provided that when a jury found an accused guilty but insane, the person was to be committed to the mental hospital for life. In an ensuing test case, *Sinclair v. State*,[137] the Mississippi Supreme Court struck down the abolition statute and revived the defense on constitutional grounds. The court said the right to trial by jury guarantees an accused "the right to have the jury pass upon every substantive fact going to the question of his guilt or innocence."[138] In a concurring opinion, Justice Ethridge declared that there "could be no greater cruelty than trying, convicting, and punishing a person wholly unable to understand the nature and consequence of his act, and that such punishment is certainly both cruel and unusual in the constitutional sense."[139]

The same sort of concern about the morality of punishing an insane person as a criminal has led two other Mississippi Supreme Court justices in recent years to express much the same sentiments, but to reach an opposite conclusion about the remedy; their answer has been to abolish the defense.

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130. Billiot v. State, 454 So. 2d 445 (Miss. 1984), *cert. denied*, 469 U.S. 1230 (1985). *See also* Johnson v. State, 223 Miss. 56, 76 So. 2d 841, *cert. denied*, 349 U.S. 946 (1955).

131. White v. State, 542 So. 2d 250 (Miss. 1989); Edwards v. State, 441 So. 2d 84 (Miss. 1983); Lias v. State, 362 So. 2d 198 (Miss. 1978).

132. Gill v. State, 488 So. 2d 801 (Miss. 1986); Laney v. State, 486 So. 2d 1242 (1986).

133. Frost v. State, 453 So. 2d 695 (Miss. 1984).

134. Billiot v. State, 454 So. 2d 445 (Miss. 1984), *cert. denied*, 469 U.S. 1230 (1985). *See also* Edwards v. State, 441 So. 2d 84 (Miss. 1983); Bishop v. State, 96 Miss. 846, 52 So. 21 (1910).

135. MISS. CODE ANN. §§ 99-13-7, 41-21-21 (1972).

136. 1928 MISS. LAWS Ch. 75, §§ 1-2.

137. 161 Miss. 142, 132 So. 581 (1931).

138. *Id.* at 182, 132 So. at 592.

139. *Id.* at 164, 132 So. at 585.

In a concurring opinion in the 1983 decision of *Groseclose v. State*,[140] Justice Robertson urged revamping of the insanity defense and of the treatment of insane offenders.[141] Noting that in the case before the court, the jury apparently had concluded the defendant could not be placed back on the streets despite powerful evidence of his insanity, Robertson wrote:

> This case demonstrates more than anything else that law simply must remain in touch with moral beliefs prevailing in enlightened society. As is the case in so many contexts, the jury links the law to widely held societal values . . . . History teaches that this link is often maintained through jury nullification, a refusal to accept laws too far "out of touch". This is what happened here. The true verdict of the jury, I suspect, is that one should not be acquitted for murder even though he be severely mentally ill.
>
> This act of jury nullification, if in fact this is what has occurred, was not irrational. In most cases where the defendant is in fact severely mentally ill, a not guilty verdict by reason of insanity may nevertheless be wholly contrary to accepted societal ends and human values.
>
> For the security and protection of society, incapacitation of the defendant (via incarceration) may be necessary. An acquittal by reason of insanity may undermine the deterrent effect of the State's scheme of criminal penalties. The accused may be in need of mental treatment to which he will not voluntarily submit. This is particularly true where he needs drug therapy.[142]

Again concurring in the 1986 case of *Laney v. State*,[143] Justice Robertson declared that juries simply nullified the defense "in the overwhelming majority of the cases in which its elements are proved – the case of Waddell Laney being only the latest."[144] In both *Groseclose* and *Laney*, Robertson urged the court to consider modification or abolition of the insanity defense and to take into account at sentencing consideration of an accused's mental illness.

In an extremely poignant concurring opinion in *Gill v. State*,[145] Justice Hawkins declared that he had begun to question the adequacy of the M'Naghten defense:

> [I]t is too simplistic. What does 'not knowing the difference between right and wrong' mean? Sane people struggle with this. Is a state sponsored lottery right or wrong? A little over one hundred years ago this Nation endured a bitter four-year Civil War. In my reading of history I cannot recall any leader from either side ever acknowledging morality was not on his side.[146]

Hawkins went on to detail the pitiful circumstance of Ernest Gill, whose schizophrenia had been widely recognized in the small community where he lived for years before he bludgeoned to death the woman with whom he lived. The killing

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140. 440 So. 2d 297 (Miss. 1983).
141. *Id.* at 304.
142. *Id.*
143. 486 So. 2d 1242 (Miss. 1986).
144. *Id.* at 1247.
145. 488 So. 2d 801 (Miss. 1986).
146. *Id.* at 806.

apparently occurred because Gill believed, delusionally, that the woman had "hoo-dooed" him.[147] He repeatedly struck her head with a baseball bat. The blows were so powerful that the bat broke in two. Hawkins noted that Gill was illiterate; out of sixty-four words shown him by a psychologist at the Mississippi State Hospital, he could read "in" and "milk," but no others. "Such words as 'city,' 'tree,' 'animal,' 'chin,' 'split,' 'form,' were beyond him,"[148] Hawkins wrote.

During an earlier incarceration for his mental condition, Gill would sit in his cell on a warm day wrapped in a blanket and "staring off in space."[149] When he was taken to jail after the killing, he would bang on the bars and try to climb them, would frequently pull off his clothes, shred his bed clothing and stick it up his rectum, and stick his head into the toilet and flood the jail. One jailer had seen Gill walking around his cell naked, with coat hangers tied around his neck. He also had daily conversations with God.[150] Every expert who interviewed him concluded that Gill was a paranoid schizophrenic.[151]

> On October 25, 1983, he brutally and senselessly slew Sherry Slaughter, one of the few people in his short life who ever treated him kindly, and probably the only person on this earth who saved him from sleeping in barns and on ditch banks, begging food or eating out of garbage cans. He had been living with her for several years; she may very well have been the kindest person he ever knew.
>
> Was killing her the act of a criminal, a person who has the capacity to think, to make choices? Of course not . . . .
>
> God Almighty gave Gill the only mind he has ever had. He has no more control of the monsters in his brain than of the moon, or the earth's seasons . . . .
>
> To a creature thus cursed by fate, must we, calling ourselves civilized, add to his misfortune by condemning him as a cold-blooded murderer? To spend the rest of his life condemned and treated as a criminal rather than as a mentally disturbed person who should not be blamed for his condition?[152]

Hawkins lamented what he perceived as the jury nullification of the insanity defense in the case: "I have no doubt that the jury which tried Gill were [sic] as convinced as this Court that he is insane; yet they may have felt they had no choice. Unless Gill were sentenced to imprisonment, the people of Winston County would have no protection."[153] At the same time, Hawkins noted that Gill had been committed to the state hospital for the insane only four months before the killing, but had been released after a few weeks:

> How many Neals, Gills and Edwardses are there on the streets now, discharged from a mental institution without supervision or protection? How many more police officers must be killed . . . how many innocent people, before the message gets

147. *Id.*
148. *Id.* at 805.
149. This was the description given by a city policeman who had known Gill for years. *Id.*
150. *Id.*
151. *Id.*
152. *Id.* at 806.
153. *Id.* at 807-08.

> across that, aside from humanitarian it is a lot cheaper to prevent these homicides than to prosecute them?[154]

More recently, Justice Reuben Anderson in *Yarbrough v. State*[155] lamented the plight of a fifteen-year-old student who, less than two weeks after her return from Christmas vacation, stabbed a classmate to death in a fight at a rural school.[156] The court upheld the jury's finding of guilt, but Anderson suggested the youngster, and society, would be better served if she could be sent to the state mental hospital rather than to the state penitentiary:

> It is tragic that we are sending to Parchman a young girl, with an I.Q. of 65, whose mental age is 10, and one who has suffered from mental problems for most of her life. We know in a few years Yarbrough, who will then be only in her late-20's, will be eligible for parole. Will she be prepared to return to society? Would she be better prepared had she been sent to Whitfield instead of Parchman?[157]

In their calls for abolition, neither Robertson, Hawkins, nor Anderson has addressed the constitutional mandate for an insanity defense laid down sixty years ago by the Mississippi court in *Sinclair*. The gravamen of their objections to the present situation is, at its heart, moral. The justices perceive that juries are forced to be dishonest about their actions and that pitiful, deranged persons are condemned as reprehensible criminals. At the same time, if the jurists' perceptions of jury nullification are correct, jurors clearly see it to be their moral duty to do what they do—take deranged murderers off the streets.

V. CONCLUSION: A PROPOSAL

Behavioral science utilizes a relativist approach to human actions and tends to recognize gradations of conduct. Psychiatry is concerned primarily with therapy. The criminal law, on the other hand, must ultimately reduce the analysis of actions to black or white, guilty or innocent. Attempts to accommodate the two have led to much confusion and to results that are often widely perceived as unsatisfactory. To some, it has seemed that accommodation to science and intellectual respectability has resulted in ignoring society's needs.

The present situation is truly untenable. Recent years have seen geometric growth in crime, and murders by persons in deranged states of mind are commonplace. If jurors follow their duty under their oaths, under existing law, they will be acquitting these offenders and possibly giving them freedom at an early date. If, however, they answer a higher call and convict such persons, they must ignore the law.

It is the purpose of this article to urge that the goals sought by Justices Hawkins, Robertson and Anderson and the needs of Mississippi juries could best be met through adoption of a statutory and evidentiary arrangement along the lines of

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154. *Id.* at 808.
155. *Id.*
156. *Id.*
157. *Id.*

Michigan's "guilty but mentally ill" verdict. The key elements of such a plan would be:

(1) Leave in place the present M'Naghten-based defense of not guilty by reason of insanity. This should avoid constitutional complications.
(2) Add the alternative verdict of guilty but mentally ill, providing for a determinate sentence to be served in either the hospital or prison, depending upon sanity.[158]
(3) Amend Rule 704 of the Mississippi Rules of Evidence to match Federal Rule of Evidence 704(b), providing that mental health experts cannot give an opinion on the ultimate issue.
(4) Provide that juries be fully instructed as to the effect – in freeing or sentencing – of the alternative verdicts.

Such a change would, of course, require both legislative and judicial action. Even if the Mississippi Supreme Court were to abolish or alter the insanity defense or announce recognition of some other standard, it could not by judicial fiat construct the effective commitment system envisioned in the opinions of Justices Robertson and Hawkins. At the same time, some of the recommended changes would be evidentiary in nature and would, constitutionally, have to be adopted by the court.

There is much to commend such an arrangement. It would facilitate juries in following the law but removing dangerous, egregious offenders from society's midst. It would allow determinate periods of detention, thereby avoiding inappropriate early releases by mental health professionals. It would impose upon defendants a less odious designation. And, it should ensure professional psychiatric care for mentally ill offenders, a minimum of decency in a civilized society.

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158. Partial models for such procedures may be found in 18 U.S.C. §§ 4243-4245.