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INSANITY—GUILTY BUT MENTALLY ILL—DIMINISHED CAPACITY: AN AGGREGATE APPROACH TO MADNESS

INTRODUCTION

The primary purpose of substantive criminal law is to list those types of activities the occurrence of which may entail a penalty.¹ Before criminal penalties can be imposed, the concurrence of the proscribed act, *actus reus*, and the specified accompanying mental state, *mens rea*,² must be shown.³ A person found to be insane during the commission of the act⁴ is held to be incapable of entertaining the requisite mental state.⁵ Therefore, the insane person cannot be held criminally responsible or

1. W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 21 (1972).

2. *Mens rea* is the state of mind required by substantive law in order to impose a criminal penalty. Dix, *Psychological Abnormality as a Factor in Grading Criminal Liability: Diminished Capacity, Diminished Responsibility, and the Like*, 62 J. CRIM. L. C. & P. S. 313, 316 n.19 (1971); see generally R. PERKINS, CRIMINAL LAW 739-45 (2d ed. 1972); Sayre, *Mens Rea*, 45 HARV. L. REV. 974 (1932) [hereinafter cited as Sayre].

3. See *United States v. Freed*, 401 U.S. 601, 613 (1971) (Brennan, J., concurring); *People v. District Court for Jefferson County*, 165 Colo. 253, 439 P.2d 741 (1968); *Commonwealth v. McHoul*, 352 Mass. 544, 226 N.E.2d 556 (1967); *State v. Reece*, 79 Wash. 2d 453, 486 P.2d 1088 (1971); Arenella, *The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage*, 77 COLUM. L. REV. 827, 836 (1977) [hereinafter cited as Arenella]; Gardner, *Criminal Responsibility and Exculpation by Medical Category—An Instance of Not Taking Hart to Heart*, 27 ALA. L. REV. 55, 62 (1975) [hereinafter cited as Gardner].

It is sometimes assumed that there cannot be such concurrence unless the requisite mental state and the act or omission exist at precisely the same moment of time. The better view, however, employing a metaphysical distinction, is that the concurrence exists when the actor's mental state accuates the physical conduct. 1 RUSSELL ON CRIME 54 (12th ed. 1964).

4. Compare *People v. Gillings*, 568 P.2d 92 (Col. App. 1977) (insanity at the time of the alleged offense is a complete defense) with *People v. Snow*, 72 Cal. App. 3d 950, 959-60, 140 Cal. Rptr. 427, 432 (1977) (fact that defendant was found to be insane subsequent to the commission of the alleged offense is not a bar to prosecution). See also *Chase v. United States*, 468 F.2d 141 (7th Cir. 1972); *People v. Count*, 106 Ill. App. 2d 258, 246 N.E.2d 91 (1969).

5. *Davis v. United States*, 160 U.S. 469 (1895); *United States v. Huff*, 409 F.2d 1225, (5th Cir.), cert. denied, 396 U.S. 857 (1969); *Chase v. State*, 369 P.2d 997 (Alaska 1962); *People v. Nance*, 25 Cal. App. 3d 925, 102 Cal. Rptr. 266 (1972); *People v. Gillings*, 568 P.2d 92 (Colo. App. 1977); *State v. Green*, 355 So. 2d 789 (Fla. 1978); *Avery v. State*, 138 Ga. App. 65, 225 S.E.2d 454 (1976); *State v. Jensen*, 209 Or. 239, 296 P.2d 618, appeal dismissed, 352 U.S. 948, rehearing denied, 352 U.S. 990 (1956).

punished,⁶ even though a sane person committing the same act would be punished.⁷

A noticeable fact about pleading insanity is that it is usually raised when no other course is open to the defendant.⁸ The defendant in effect admits to the commission of the act,⁹ but asserts that he should not be held responsible on the ground of his inability to entertain the requisite mens rea.¹⁰ Thus, "the prob-

6. *United States v. Collins*, 433 F.2d 550, 556 (D.C. Cir. 1970) (the central purpose of the insanity defense is to save from criminal conviction a person who lacks responsibility for his unlawful acts); *United States v. Chandler*, 393 F.2d 920 (4th Cir. 1968); *Hartford v. United States*, 362 F.2d 63 (9th Cir.), cert. denied, 385 U.S. 883, rehearing denied, 385 U.S. 954 (1966); *Wood v. Zahradnick*, 430 F. Supp. 107 (E.D. Va. 1977); *Alto v. State*, 565 P.2d 492 (Alaska 1977); *People v. Kelly*, 10 Cal. 3d 565, 111 Cal. Rptr. 171, 516 P.2d 875 (1973); *Rowe v. State*, 234 Md. 295, 199 A.2d 785, cert. denied, 379 U.S. 924 (1964); *Kun v. Zabotsky*, 9 Ohio St. 2d 129, 224 N.E.2d 137 (1967); *State v. Jones*, 278 N.C. 259, 179 S.E.2d 433 (1971); *State v. Maik*, 60 N.J. 203, 287 A.2d 715 (1972); *Curl v. State*, 40 Wis. 2d 414, 162 N.W.2d 77, cert. denied, 394 U.S. 1004 (1969).

The defense of insanity has also been viewed in terms of moral responsibility. This view relies on the premise that individuals are free to choose between good and evil. *Morissette v. United States*, 342 U.S. 246 (1952); accord, *United States v. Freed*, 401 U.S. 601 (1971) (the existence of mens rea or vicious will is a requirement of criminal responsibility). A person who is unable to freely exercise a choice between alternative modes of behavior by reason of insanity is not responsible for his act. *Carter v. United States*, 252 F.2d 608 (D.C. Cir. 1956).

7. *State v. Booth*, 169 N.W.2d 869 (Iowa 1969); *State v. Pinski*, 163 S.W.2d 785 (Mo. 1942); *State v. Pagano*, 242 S.E.2d 825 (N.C. 1978); *Curl v. State*, 40 Wis. 2d 414, 162 N.W.2d 77, cert. denied, 394 U.S. 1004 (1969). Cf. *Smith v. California*, 361 U.S. 147, 150 (1959) (the government may create strict liability crimes by defining criminal offenses without the element of mens rea, but "this power is not without limitations"). The situations in which strict liability may be imposed are where:

[A] federal criminal statute omits mention of intent and where it seems to involve what is basically a matter of policy, where the standard imposed is, under the circumstances, reasonable and adherence thereto properly expected of a person, where the penalty is relatively small, where conviction does not gravely besmirch, where the statutory crime is not one taken over from the common law, and where congressional purpose is supporting, the statute can be construed as one not requiring criminal intent.

Holdridge v. United States, 282 F.2d 302, 310 (8th Cir. 1960) (majority opinion by Blackmun, J.). Compare Keedy, *Insanity and Criminal Responsibility*, 30 HARV. L. REV. 535, 538-46 (1917) (raising the question whether insanity is a defense to crimes requiring no criminal intent) with Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 78-79 (1933) (insanity should not be a defense to speeding and other traffic violations in that the insane who commit these minor crimes ought to be restrained by the criminal law).

8. A. GOLDSTEIN, *THE INSANITY DEFENSE* 143 (1967) [hereinafter cited as GOLDSTEIN].

9. E.g., *State v. Sapp*, 356 Mo. 705, 203 S.W.2d 425 (1947).

10. See *Smith v. California*, 361 U.S. 147, 150 (1959) ("The existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.") quoting *Dennis v. United States*, 341 U.S. 494, 500 (1951); accord, *American Communications Ass'n v. Douds*, 339 U.S. 382, 411 (1950).

lem" under the insanity defense "is to discriminate between the cases where a punitive correctional disposition is appropriate and those in which a medical custodial disposition is the only kind the law should allow."¹¹ To put the matter differently, the defendant is either *mad* or *bad*. He should receive either treatment or punishment. This all-or-nothing approach, however, ignores the grey area between those who are sane and those who are insane. An individual may have been mentally ill at the time of the commission of the offense, yet not sufficiently ill as to be determined insane.¹²

The insanity defense has been the subject of increasingly heated debates. At present, it is the most controversial issue in the criminal law.¹³ Although there are those who rally in support of the insanity defense,¹⁴ a number of recognized authorities have called for its abolition.¹⁵ However, legislative attempts

11. MODEL PENAL CODE § 4.01, Comment (Tent. Draft No. 4, 1955).

12. Arenella, *supra* note 3, at 829.

13. H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 131 (1968); Monahan, *Abolish the Insanity Defense?—Not Yet*, 26 RUTGERS L. REV. 719 (1973); see Chicago Daily Law Bulletin, Oct. 19, 1978, at 1, col. 2.

14. See, e.g., H. FINGARETTE, *THE MEANING OF CRIMINAL INSANITY* 1-15 (1972); GOLDSTEIN, *supra* note 8, at 222-26; H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 131 (1968); Brady, *Abolish the Insanity Defense—No!*, 8 HOUSTON L. REV. 629 (1971); Cavanaugh, *The Responsibility of the Mentally Ill for Criminal Offenses*, 4 CATH. LAW. 317 (1958); Ehrenzweig, *A Psychoanalysis of the Insanity Plea—Clues to the Problem of Criminal Responsibility and Insanity in the Death Cell*, 73 YALE L.J. 425 (1964); Gray, *The Insanity Defense: Historical Development and Contemporary Relevance*, 10 AM. CRIM. L. REV. 559 (1972); Hall, *Responsibility and Law: In Defense of the McNaghten Rules*, 42 A.B.A.J. 917 (1956); Hall, *The M'Naghten Rule and Proposed Alternatives*, 49 A.B.A.J. 960 (1963); Livermore & Meehl, *The Virtues of M'Naghten*, 51 MINN. L. REV. 789 (1967); Monahan, *Abolish the Insanity Defense?—Not Yet*, 26 RUTGERS L. REV. 719 (1973); Robitscher, *Tests of Criminal Responsibility: New Rules and Old Problems*, 3 LAND AND WATER L. REV. 153 (1968).

15. See, e.g., B. WOOTON, *CRIME AND THE LAW* 52 (1963) (to assure community safety, some form of control must be applied to those who commit dangerous acts, regardless of their mental state; "an action does not be innocuous merely because whoever performed it meant no harm"); S. HALLECK, *PSYCHIATRY AND THE DILEMMAS OF CRIME* 341-42 (1967) (insanity defense is unfair because it is only available to the rich); T. SZASZ, *LAW, LIBERTY, AND PSYCHIATRY* 138-46 (1963) (it is only applied to the poor and minorities as a stigmatizing weapon of oppression); Weintraub, *Second Circuit Annual Judicial Conference, Panel Discussion: Insanity as a Defense* 37 F.R.D. 365 (1964) (the mad or bad distinction is too simplistic). See generally K. MENNINGER, *THE CRIME OF PUNISHMENT* (1968); H. HART, *THE MORALITY OF THE CRIMINAL LAW* (1964); Gerber, *Is the Insanity Test Insane?*, 20 AM. J. JURIS. 111 (1975) [hereinafter cited as Gerber]; Morris, *Psychiatry and the Dangerous Criminal*, 41 S. CAL. L. REV. 514 (1968).

Kadish summarized the major arguments against the insanity defense: The first is that the administration of the tests of insanity — all tests — have been a total failure

Secondly, it is argued that the defense of legal insanity is of little practical importance

to abolish the insanity defense have been held unconstitutional because the defendant is prevented from establishing the absence of mens rea at the time of the crime.¹⁶

In an effort to avoid this constitutional infirmity while modifying the all-or-nothing approach of the insanity defense, Michigan has enacted a provision which allows a finding of "guilty but mentally ill."¹⁷ Such a verdict results from a finding that the defendant committed the act with the requisite mental state but was suffering from a mental disease or defect at the time of the offense. If the trier of fact, on the other hand, finds the mental illness so extreme as to negate the requisite mental state, a finding of guilty by reason of insanity would still be appropriate. Guilty but mentally ill does not replace the insanity defense; it acts as an alternative to finding the defendant simply guilty. Where a defendant is found to be guilty of a crime but mentally ill, the court may impose the same sentence as would be imposed upon a defendant not mentally ill. The difference lies in

Finally, and of central importance, it is believed that the retention of the distinction between those to be punished and those only to be treated as unfortunate and invidious because in point of fact it is in all cases, not only in some, that persons who do harms should be treated and held in the interest of public protection.

Kadish, *The Decline of Innocence*, 26 *CAMB. L.J.* 273 (1968).

16. *State v. Lange*, 168 La. 958, 123 So. 639 (1929) (enactment which provided in substance for a "bifurcated trial in which the jury might pass on other matters, but the defendant's sanity or insanity was withdrawn from them and left to the determination of a lunacy commission"); *Sinclair v. State*, 161 Miss. 142, 132 So. 581 (1931) *State v. Strasburg*, 60 Wash. 106, 110 P. 1020 (1910) (statutes precluding insanity defense in murder indictment held violative of state due process clause); see *City of Seattle v. Ross*, 54 Wash. 2d 655, 344 P.2d 216 (1959) (ordinance which denied a fair opportunity to rebut presumption of criminal guilty held violative of fourteenth amendment due process clause). See also *Speidel v. State*, 460 P.2d 77 (Alaska 1969) (a "strict liability felony" held unconstitutional).

17. The Michigan guilty but mentally ill statute is in reality a series of amendments to existing Michigan laws. See notes 91-101 *infra*. Michigan's guilty but mentally ill statute should not be confused with Illinois' proposed legislation titled "guilty but mentally ill" which would replace the insanity defense. *Chicago Daily Law Bulletin*, Oct. 19, 1978, at 1, col. 2. In light of the constitutional barriers to the abolition of the insanity defense, enactment of Illinois' version of guilty but mentally ill appears to be dim. See note 16 and accompany text *supra*.

An informal guilty but mentally ill effect exists in most states. The trier of fact finds that, despite the defendant's mental illness, the defendant did not entertain the requisite intent. The judge then sentences him but recommends to the penal authorities that the defendant be placed in a treatment center rather than a general prison.

Thus, Michigan's guilty but mentally ill provision is not a radical concept, rather it is merely a statutory formalization of existing informal practices. It does, however, create two beneficial effects. First, it forces the trier of fact to consider degrees of mental abnormalities. See note 18 and accompanying text *infra*. Second, it creates a statutory right to treatment. See notes 115-29 and accompanying text *infra*.

the nature of the confinement. Those found guilty but mentally ill may be provided the necessary psychiatric treatment by the Department of Mental Health.

The guilty but mentally ill provision is a legislative attempt that recognizes the grey area of those who cannot be classified as insane but who are clearly suffering from some mental illness or defect at the time of the offense. This provision is consistent with modern psychiatric thought, which finds varying degrees of madness, rather than a clearcut distinction between sanity and insanity.¹⁸

Although guilty but mentally ill modifies the absolutist approach of the insanity defense by recognizing *degrees of mental abnormalities* and provides psychiatric treatment for those found guilty but mentally ill, its limited effect still does not adequately incorporate the psychiatric recognition "of a continuous scale of human responsibility."¹⁹ As an alternative to the insanity defense, the diminished capacity defense, a widely used and more consistent approach with psychiatric principles relating to responsibility, imposes criminal penalties proportionate to "*degrees of criminal responsibility*."²⁰ The thrust of dimin-

18. Gerber, *supra* note 15, at 116 (sanity is not an absolute "fixed state" but a degree on a continuum with insanity); Williams, *The Act and The Criminal Law, in Symposium, The Mental Health Act, 1959*, 23 MOD. L. REV. 410, 415 (1960) ("It is now accepted that there is a borderland between sanity and insanity where one shades off into the other, which is inhabited by some seriously disturbed personalities."); see Taylor, *Partial Insanity as Affecting the Degree of Crime—A Commentary on Fisher v. United States*, 34 CAL. L. REV. 625, 629, 632 (1946); Note, 40 MO. L. REV. 361, 368 (1975); Note, 18 WASH. & LEE L. REV. 118, 123 (1961).

19. Comment, *A Punishment Rationale for Diminished Capacity*, 18 U.C.L.A. L. REV. 561, 566 (1971) [hereinafter cited as *Diminished Capacity*]. See Diamond, *Criminal Responsibility of the Mentally Ill*, 14 STAN. L. REV. 59, 62, 65 (1961) [hereinafter cited as Diamond]; Comment, *Graduated Responsibility as an Alternative to Current Tests of Determining Criminal Capacity*, 25 ME. L. REV. 343, 344 (1973). See also MODEL PENAL CODE § 4.01, Comment (Tent. Draft No. 4, 1955).

The legal distinction that a defendant is either sane and totally responsible, or insane and totally nonresponsible is "foreign to modern psychiatric thinking." Diamond, *supra* at 62. Psychiatry considers an individual responsible only to the extent to which he is free to control his conduct. "If psychiatrists had to suggest a criterion for distinguishing free from unfree, they would say a person's freedom is present in inverse proportion to his neuroticism; in other words, the more his acts are determined by a malevolent conscious, the less free he is. Thus they would speak of *degrees of freedom*." *Diminished Capacity, supra* at 566 (quoting Hospers, *Free-Will and Psychoanalysis*, in READINGS IN ETHICAL THEORY 560, 574-75 (1952)) (emphasis added). See Louisell & Diamond, *Law and Psychiatry: Detente, Entente, or Concomitance?*, 50 CORNELL L. Q. 217 (1965). "Using legal terminology, the correct approach to criminal liability would ideally be in terms of degrees of responsibility." *Diminished Capacity, supra* at 566.

20. *Diminished Capacity, supra* note 19, at 566. The diminished capacity defense has been referred to by various names. It has been called the

ished capacity is to challenge the capacity of the defendant to possess the particular mental state which is an element of the offense charged, thereby reducing the degree, the kind of crime for which the defendant is held responsible.²¹

However, none of these approaches, by itself, accurately reflects the knowledge of psycho-legal experience. This comment recommends that the guilty but mentally ill and diminished capacity defenses should be used conjunctively with the insanity defense. Such an aggregate approach will lead to qualitative results.

A HISTORICAL PERSPECTIVE OF THE INSANITY TESTS

Before the thirteenth century insanity had no bearing upon the determination of criminal guilt.²² In the middle of the thirteenth century the mad were described as those who did not know what they were doing, who were lacking in mind and reason and were not far removed from brutes.²³ Although there was no change in the theory of guilt, by the latter part of the

doctrine of subjective liability, partial responsibility, partial insanity, limited capacity, mens rea defense, and diminished responsibility.

21. See notes 144-165 and accompanying text *infra*.

22. See R. PERKINS, CRIMINAL LAW 850 (2d ed. 1969). The earliest attempt to classify criminal responsibility in English criminal law was published in 1256 by Henry DeBracton, DE LEGIBUS ET CONSUENTUDINIBUS ANGLIAE. It contains numerous passages showing the necessity of a guilty mind for felony conviction. Sayre, *supra* note 2, at 983-87.

For comprehensive histories of the insanity defense see J. BIGGS, THE GUILTY MIND, 37-117 (1955); S. GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW 123-60 (1925) [hereinafter cited as GLUECK]; 1 F. WHARTON & M. STILLE, MEDICAL JURISPRUDENCE 504 *et seq.* (5th ed. 1905); Crotty, *The History of Insanity as a Defense to Crime in English Criminal Law*, 12 CALIF. L.REV. 105 (1924); Gray, *The Insanity Defense: Historical Development and Contemporary Relevance*, 10 AM. CRIM. L. REV. 559 (1972); Lewinstein, *The Historical Development of Insanity as a Defense in Criminal Sanctions*, 14 J. FOR. SCI. 275 (1969); Parker, *The Evolution of Criminal Responsibility*, 9 ALBERTA L. REV. 47 (1970); Platt & Diamond, *The 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); Comment, *Modern Insanity Tests — Alternatives*, 15 WASHBURN L.J. 88 (1976) [hereinafter cited as *Modern Insanity Tests*]. See generally E. COKE, THE THIRD PART OF THE INSTITUTES OF THE LAW OF ENGLAND 4-6, 54 (1817); W. HOLDSWORTH, 2 A HISTORY OF ENGLISH LAW 50-54 (5th ed. 1942); W. HOLDSWORTH, 3 A HISTORY OF ENGLISH LAW 371-75 (5th ed. 1942); 2 F. POLLACK & F. MATTLAND, HISTORY OF ENGLISH LAW 476-84 (2d ed. 1952); H. WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 52-64 (1954) [hereinafter cited as WEIHOFEN].

23. GLUECK, *supra* note 22, at 124; R. PERKINS, CRIMINAL LAW 851 (2d ed. 1969). These factors, knowledge of one's act and capacity to reason, were later incorporated in the *M'Naghten* test. GLUECK, *supra* note 22, at 127; *Modern Insanity Tests*, *supra* note 22, at 90. See notes 37-39 and accompanying text *infra*.

thirteenth century the mad were routinely granted a pardon.²⁴ It was not until the fourteenth century that insanity became a complete defense.²⁵ During this time a statute, enacted to give the monarch supervision of the mad, drew a distinction between mental disease and defect.²⁶

In the sixteenth century, madness was defined in terms of the ability to count, to recognize one's parents, and to understand profit and loss.²⁷ This test was significant because it furnished empirical factors to be considered in making a determination of insanity, and also because it focused on the cognitive faculty of the mind.²⁸ In 1603, types of mental illnesses were classified under the term *non compos mentis*.²⁹ This approach viewed insanity as negating the state of mind which was an element of the offense.³⁰ During this era, the concept of responsibility was also perceived as stemming from volitional capacity.³¹ By the early eighteenth century, the courts were considering the defendant's capacity to differentiate between good and evil.³²

These divergent approaches eventually evolved into an articulated legal principle: those who are unable to understand or

24. See J. BIGGS, *THE GUILTY MIND* 83 (1955); W. HOLDSWORTH, 3 *A HISTORY OF ENGLISH LAW* 371 (5th ed. 1942) ("a man who has killed another by misadventure, though he may deserve a pardon; is guilty of a crime, and the same rule applies . . . to a lunatic. . . ."); R. PERKINS, *CRIMINAL LAW* 851 (2d ed. 1969).

25. GLUECK, *supra* note 22, at 125; Sayre, *supra* note 2 at, 995-96 (1932); see W. HOLDSWORTH, 3 *A HISTORY OF ENGLISH LAW* 372 n.9 (5th ed. 1942).

26. This distinction has been retained in the current insanity tests. GLUECK, *supra* note 22, at 125-26.

27. *Id.* at 128, citing W. HAWKINS, 1 *PLEA OF THE CROWN* 2 (1st ed. 1716).

28. *Id.* at 128.

29. *Id.* at 129, quoting from Coke:

Non compos mentis is of foure sorts: 1. *Idiota*, which from his native, by a perpetuall infirmite is *non compose mentis*. 2. Hee that by sicknesse, grieffe, or other accident wholly loseth his memorie and understanding. 3. A lunatique, that hath sometimes his understanding and sometimes not *aliquando gaudet lucidis intervallis* . . . 4. . . he that is drunken.

This places the *idiot* and the *madman* in the same category, so far as criminal capacity is concerned.

30. *Id.* at 130-31.

31. *Id.* at 131-32. The volitional capacity approach to responsibility has been embraced by the irresistible impulse test. *Id.* *Modern Insanity Tests*, *supra* note 22, at 91. See notes 46-50 and accompanying text *infra*.

32. GLUECK, *supra* note 22, at 142-43 (similar to the right-wrong test incorporated in *M'Naghten*); Platt & Diamond, *The 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). But see Biggs, *Annual Judicial Conference*, 37 *F.R.D.* 365, 377 (1964) (claims that right-wrong and good-evil tests are not synonymous; the good-evil test originated from beliefs in witchcraft, and only a witch could not know the difference between good and evil).

conform themselves to the law should not be held criminally responsible.³³ Courts were then forced to delve into even more complex questions, such as whether a mental disease actuated the defendant's inability to resist.³⁴ These approaches illustrate the reactive nature of the early insanity tests. They were not the product of well developed judicial deliberation,³⁵ but were derived from judicial attempts to reduce complex concepts into simplistic rules and were the result of historical accident.³⁶ Nonetheless, the conceptual foundations of these tests have been rigidly adhered to and formulate the basis for the tests currently employed.

THE TRADITIONAL TESTS: "RIGHT-WRONG" AND "IRRESISTIBLE IMPULSE"

The first well known test of insanity was established in *M'Naghten's* case.³⁷ Although commonly called the right-wrong test, the *M'Naghten* rule actually comprises two components.³⁸ The first component relieves the defendant of criminal liability if a mental disease prevented him from knowing the nature and

33. GLUECK, *supra* note 22, at 138 (this concept of one's inability to conform to the requirements of the law is embraced in the A.L.I. test). See notes 77-80 and accompanying text *infra*.

34. See, e.g., *Regina v. Oxford*, 9 Car. and P. 525, 546 (1840). See GLUECK, *supra* note 22, at 152. (this test prefigured the irresistible impulse test). See notes 46-50 and accompanying text *infra*.

35. S. GLUECK, *supra* note 22, at 156-60.

36. *Id.*; *Modern Insanity Tests*, *supra* note 22, at 92-93.

37. 10 Clark & Fin 200, 8 Eng. Rep. 718 (1843).

Daniel M'Naghten mistakenly shot and killed the private secretary to the British Prime Minister. M'Naghten had intended to kill the Prime Minister because he believed the Prime Minister headed a conspiracy to kill him. At trial, M'Naghten raised the defense of insanity. He asserted that he could not be held responsible because his delusions caused the act. The jury returned a verdict of not guilty by reason of insanity. The importance of the deceased and the verdict of acquittal caused the House of Lords to put certain questions to the justices of the Queen's Bench concerning the standards for acquitting a defendant due to his insanity. See GLUECK, *supra* note 22, at 163. The response of the majority of the justices was:

[T]o establish a defense on the ground of insanity, it must be clearly proved that, at the time of committing of the Act, the party accused was laboring under such 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 not know it, he did not know he was doing what was wrong.

10 Clark & Fin. at 210, 8 Eng. Rep. at 722 (this advisory opinion became known as the *M'Naghten* insanity test).

38. The two components are applied disjunctively. See *State v. Shaw*, 106 Ariz. 103, 471 P.2d 715 (1970); *State v. Thomas*, 219 N.W.2d 3 (Iowa 1974); *State v. Benton*, 276 N.C. 641, 174 S.E.2d 793 (1970); *In re State in Interest of H. C.*, 106 N.J. Super, 583, 256 A.2d 322 (1969); *People v. Horton*, 308 N.Y. 1, 123 N.E.2d 609 (1954); *State v. Esser*, 16 Wis. 2d 567, 115 N.W.2d 505 (1962); Annot., 45 A.L.R. 1447, 1451 (1956). But see *People v. Corona*, 80 Cal. App. 3d 684, 145 Cal. Rptr. 894 (1978) (applying the conjunctive approach).

quality of his act. The second component excuses the defendant if he lacked the ability to distinguish between right and wrong with respect to the act. If the defendant satisfies the requirement of either component, criminal liability will not attach.³⁹

The *M'Naghten* test has been heavily attacked.⁴⁰ The most frequent criticism of *M'Naghten* is that it is based on an absolute and misleading conception of the nature of insanity because it emphasizes only the individual's cognition.⁴¹ Insanity does not only affect the cognitive or intellectual facilities, but also affects the whole personality of the individual, including the will and the emotions.⁴²

The application of *M'Naghten* thus exempts from criminal responsibility only those persons who are grossly mentally defi-

39. An instruction framing the test's two components in the conjunctive rather than the disjunctive has been held erroneous. See *Knights v. State*, 58 Neb. 225, 78 N.W. 508 (1899); *People v. Kelly*, 302 N.Y. 512, 99 N.E.2d 552 (1951). But see *Smotheran v. Beto*, 276 F. Supp. 579 (N.D. Tex. 1967) (states applying the conjunctive approach); *Chase v. State*, 369 P.2d 997 (Alaska 1962).

40. See, e.g., *Second Circuit Annual Judicial Conference, Panel Discussion: Insanity as a Defense*, 37 F.R.D. 365, 380, 382 (1964); Bernstein, *Criminal Responsibility: The Bar Must Lead in Law Reform*, 50 A.B.A.J. 341, 344 (1964); Brancale, *More on McNaughten: A Psychiatrist's View*, 65 DICK L. REV. 277, 278, 286 (1961); Carroll & Leopod, *The Current Influence of Psychiatric Concepts in Determining Criminal Responsibility in Pennsylvania*, 31 TEMP. L.Q. 254, 282 (1958); Clements, *Criminal Insanity: A Criticism of the New York Rule*, 20 ALB. L. REV. 155, 169 (1956); Dearman, *Criminal Responsibility and Insanity Tests: A Psychiatrist Looks at Three Cases*, 47 VA. L. REV. 1388, 1397 (1961); Gerber, *supra* note 15, at 122; Guttmacher, *The Psychiatrist as an Expert Witness*, 22 U. CHI. L. REV. 325, 326 (1955) [hereinafter cited as Guttmacher]; Halleck, *A Critique of Current Psychiatric Roles in the Legal Process*, 1966 WIS. L. REV. 379, 387; Roche, *Criminality and Mental Illness—Two Faces of the Same Coin*, 22 U. CHI. L. REV. 320, 321 (1955); Sobeloff, *Insanity and the Criminal Law: From McNaughten to Durham, and Beyond*, 41 A.B.A.J. 793, 877-78 (1955); Zilboorg, *A Step Toward Enlightened Justice*, 22 U. CHI. L. REV. 331, 334 (1955); Comment, *Criminal Responsibility and Proposed Revisions of the M'Naghten Rule*, 32 ST. JOHN'S L. REV. 247, 250-52, 262 (1958).

41. *Wade v. United States*, 426 F.2d 64, 67 (9th Cir. 1970); *United States v. Freeman*, 357 F.2d 606, 611-12 (2d Cir. 1966); *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954).

42. See *Durham v. United States*, 214 F.2d 862, 871-72 (D.C. Cir. 1954):

The science of psychiatry now recognizes that a man is an integrated personality and that reason, which is only one element in that personality, is not the sole determinant of his conduct. The right-wrong test, which considers knowledge or reason alone, is therefore an inadequate guide to mental responsibility for criminal behavior. . . .

By its misleading emphasis on the cognitive, the right-wrong test requires court and jury to rely upon what is, scientifically speaking, inadequate, and most often, invalid and irrelevant testimony in determining criminal responsibility.

See *United States v. Smith*, 404 F.2d 720 (6th Cir. 1968); *United States v. Chandler*, 393 F.2d 920 (4th Cir. 1968).

cient and psychotic.⁴³ Furthermore, *M'Naghten's* application requires a psychiatrist to respond to questions which he cannot answer, since they are directed to ethical and moral, rather than scientific concerns.⁴⁴ This requirement of psychiatric perjury is the most vehement objection to the test.⁴⁵

In response to the criticism that the *M'Naghten* rule is unduly harsh and psychiatrically infirm in its emphasis on cognition, some courts have supplemented it with a third component—the “irresistible impulse” test.⁴⁶ This component

43. See G. ZILBOURG, *MIND, MEDICINE AND MAN* 273 (1943) (only exonerates the “totally deteriorated, drooling, hopeless psychotics of long standing, and congenital idiots. . . .”); Waelder, *Psychiatry and the Problem of Criminal Responsibility*, 101 U. PA. L. REV. 378, 379 (1952) (applied to psychotics with blurred perceptions and consciousness and some paranoid schizophrenics).

This criticism has led to interpretation of key terms of the rule in such a manner to encompass volitional impairment. “Know” is thus expanded to include not only a substantial emotional component, but also the possibility of acting upon knowledge. Similarly, “wrong” may be expanded to include moral wrong, as well as violation of criminal law. See generally GOLDSTEIN, *supra* note 8, at 47-58.

However, such broad interpretation of these terms has been attacked as being linguistically unsound and inadequately minimizing the ill effects of *M'Naghten*. Gerber, *supra* note 15, at 122; see Diamond, *supra* note 19, at 62.

44. M. GOTTMACHER AND H. WEIHOFEN, *PSYCHIATRY AND THE LAW* 406 (1952). See P. ROCHE, *THE CRIMINAL MIND* 249 (1958) (“The psychiatrist cannot bring his science to the trial, but must act as a moral inquisitor, a role played in earlier times by the theologian.”).

45. For example, one psychiatrist has stated:

To force a psychiatrist to talk in terms of the ability to distinguish between right and wrong and of legal responsibility is—let us admit it openly and frankly—to force him to violate the Hippocratic Oath, even to violate the oath he takes as a witness to tell the truth and nothing but the truth, to force him to perjure himself for the sake of justice. For what else is it if not perjury, if a clinician speaks of right and wrong, and criminal responsibility, and the understanding of the nature and quality of the criminal act committed, when he, the psychiatrist, really knows absolutely nothing about such things.

Id. (quoting from an address by Dr. Gregory Zilboorg). Another psychiatrist has stated the issue:

Whenever a psychiatrist is called upon to testify, under the *M'Naghten* Rule . . . the psychiatrist must either renounce his own values with all their medical-humanistic implications, thereby becoming a puppet doctor, used by the law to further the punitive and vengeful goals demanded by our society; or *he must commit perjury* if he accepts a literal definition of the *M'Naghten* Rule. If he tells the truth—stating . . . that just about every defendant, no matter how mentally ill, no matter how far advanced his psychosis, knows the difference between right and wrong . . . —he becomes an expeditor to the gallows or gas chamber.

Diamond, *supra* note 19, at 60-61 [emphasis added]; accord, Wertham, *Psychoauthoritarianism and the Law*, 22 U. CHI. L. REV. 336, 341 (1956) (even the best psychiatrists are so frustrated with *M'Naghten* to the point of refusing to testify in all courts where it applies).

46. See, e.g., *Parsons v. State*, 81 Ala. 577, 2 So. 854 (1887); *Warren v. State*, 243 Ind. 508, 188 N.E.2d 108 (1963); *People v. White*, 40 Mich. App. 433,

requires a finding of not guilty by reason of insanity if the defendant had a mental disease or defect which kept him from controlling his conduct.⁴⁷ Thus, if the defendant cannot satisfy the two exculpatory components of *M'Naghten*, he may still be relieved of criminal responsibility if he satisfies the irresistible impulse test.⁴⁸

Nonetheless, the irresistible impulse test has been determined to be unsatisfactory on a variety of grounds.⁴⁹ It is difficult to apply with any degree of accuracy because the trier of fact must determine whether the defendant was incapable of controlling himself or simply refused to control himself.⁵⁰ It lacks a psychiatric foundation,⁵¹ compartmentalizes the mind,⁵²

198 N.W.2d 904 (1972); *Commonwealth v. Walzack*, 468 Pa. 210, 360 A.2d 914 (1976); *State v. Hartly*, 90 N.M. 488, 565 P.2d 658 (1977). See also Keedy, *Irresistible Impulse as a Defense in the Criminal Law*, 100 U. PA. L. REV. 956 (1952) [hereinafter cited as Keedy]; Annot., 173 A.L.R. 391 (1948); *Modern Insanity Tests*, *supra* note 22, at 95.

47. *State v. Goza*, 317 S.W.2d 609 (Mo. 1958); *State v. Moore*, 42 N.M. 135, 76 P.2d 19 (1938). Keedy, *supra* note 46. See WEIHOFEN, *supra* note 22 at 91 (most states that employ the test do not require proof that the impulse was the sole cause of the act).

The leading American case employing the irresistible impulse test is *Parsons v. State*, 81 Ala. 577, 2 So. 854 (1887). The court held that where the insanity defense arises in a criminal trial, the jury should be given the following instructions:

If he [defendant] did have such knowledge, he may nevertheless not be legally responsible if the following two conditions concur: (1) If, by reason of the duress of such mental disease, he had so far lost the *power to choose* between the right and wrong, and to avoid doing the act in question, as that his free agency was at the time destroyed; (2) and if, at the same time, the alleged crime was so connected with such mental disease, in the relation of cause and effect, as to have been the product of it *solely*.

Id. at 596-97, 2 So. at 866-67. The *Parsons* case is representative of the irresistible impulse test as it is used by the courts. The term "irresistible impulse," however, is rarely employed, and is really a misnomer. The rule is actually a test of the defendant's inability to resist doing wrong, since the central idea is loss of control. See GOLDSTEIN, *supra* note 8, at 68-70.

48. See, e.g., *State v. White*, 58 N.M. 324, 270 P.2d 727 (1954).

49. E.g., WEIHOFEN, *supra* note 22, at 85. (product of an out-of-date psychology); Gerber, *supra* note 15, at 124 (mentally abnormal offenders rarely commit crimes at the peak of their psychic disorganization but only after the psychotic impulse has passed); Hall, *Psychiatry and Criminal Responsibility*, 65 YALE L. J. 761, 775 (1956) [hereinafter cited as Hall] (irresistible impulse test not consistent with modern view that "man functions as a unitary being"); Kuhn, *The Insanity Defense—An Effort to Combine Law and Reason*, 110 U. PA. L. REV. 771, 787 (1962) [hereinafter cited as Kuhn] (psychiatrically unsound). See Board, *Operational Criteria for Determining Criminal Responsibility*, 61 COLUM. L. REV. 221 (1961); Guttmacher, *supra* note 40, at 325; *Modern Insanity Tests*, *supra* note 22, at 99.

50. See *Hill v. State*, 252 Ind. 601, 251 N.E.2d 429 (1969); *Sollars v. State*, 73 Nev. 248, 316 P.2d 917 (1957); *State v. White*, 60 Wash. 2d 551, 374 P.2d 942 (1962), *cert. denied*, 375 U.S. 883 (1963); Gerber, *supra* note 15, at 123.

51. See *Wade v. United States*, 426 F.2d 64, 69 (9th Cir. 1970); *United*

and emphasizes a single aspect of behavior.⁵³ Further, it is applicable only where the act was sudden and impulsive⁵⁴ and hence, it fails to recognize "mental illness characterized by brooding and reflection."⁵⁵ In contrast, the addition of a third component to *M'Naghten* has been criticized as socially dangerous because it expands the insanity defense.⁵⁶

THE MODERN TESTS: *DURHAM* AND A.L.I.

In 1954 the District of Columbia Circuit Court in *Durham v. United States*⁵⁷ concluded that the proper solution to the insanity defense was to discard the *M'Naghten* and irresistible impulse tests.⁵⁸ *Durham* sought a broader standard of responsibility which would allow the trier of fact to consider all relevant information. To obtain this goal, the court set no precise definition of criminal responsibility.⁵⁹ The *Durham* test requires the trier of fact to determine the following: (1) whether the defendant was insane at the time of the alleged offense, and, if so, (2) whether the harmful act was the product of his insanity. "The rule . . . is simply that an accused is not criminally responsible if his unlawful act was the product of mental disease or defect."⁶⁰

States v. Freeman, 357 F.2d 606, 621-23 (2d Cir. 1966); *Sollars v. State*, 73 Nev. 248, 316 P.2d 917 (1957); GOLDSTEIN, *supra* note 8, at 77-78; Kuhn, *supra* note 49, at 787.

52. *Sollars v. State*, 73 Nev. 248, 316 P.2d 917 (1957); Hall, *Responsibility and Law, In Defense of the McNaghten Rules*, 42 A.B.A.J. 917, 986 (1956) (compartmentalization notion of the personality is outdated and unscientific).

53. *State v. White*, 93 Idaho 153, 456 P.2d 797, 800 (1969).

54. *United States v. Freeman*, 357 F.2d 606 (2d Cir. 1966); *Hill v. State*, 252 Ind. 601, 251 N.E.2d 429 (1969).

55. *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954); Gerber, *supra* note 15, at 123.

56. See, e.g., *Sauer v. United States*, 241 F.2d 640 (9th Cir.), *cert. denied*, 354 U.S. 940 (1957); *Sollars v. State*, 73 Nev. 248, 316 P.2d 917 (1957); GOLDSTEIN, *supra* note 8, at 75; Waelder, *Psychiatry and the Problem of Criminal Responsibility*, 101 U. PA. L. REV. 378, 383 (1952).

57. 214 F.2d 862 (D.C. Cir. 1954).

58. The court noted that the *M'Naghten* test failed to acknowledge that "a man is an integrated personality and that reason [cognition], which is only one element in that personality, is not the sole determinant of his conduct." 214 F.2d at 871. The irresistible impulse test was rejected because it failed to recognize mental illness characterized by brooding and reflection. *Id.* at 874. See also *Wade v. United States*, 426 F.2d 64, 67 (9th Cir. 1970); *United States v. Freeman*, 357 F.2d 606, 620-21 (2d Cir. 1966); GOLDSTEIN, *supra* note 8, at 67-69.

59. *United States v. Brawner*, 471 F.2d 969, 1010 (D.C. Cir. 1972) (Bazelon, C.J., concurring in part and dissenting in part). Because the standard was left virtually undefined, it has been referred to as the "non—rule." GOLDSTEIN, *supra* note 8, at 84.

60. 214 F.2d at 874-75.

Eight years later, the District of Columbia Circuit Court acknowledged fundamental problems with the *Durham* test. Instead of broadening the scope of psychiatric testimony as originally contemplated, subsequent cases narrowed the scope of inquiry to a consideration of the magic words "disease" and "product."⁶¹ When attempts were made to alleviate this problem by redefining "mental disease or defect,"⁶² the court found that expert witnesses not only expressed moral and legal judgments through ad hoc psychiatric conclusory labels, thus invading the province of the jury,⁶³ but they also had the power to alter drastically the scope of *Durham* by changes in psychiatric nomenclature.⁶⁴ Accordingly, the District of Columbia abandoned *Durham* eighteen years after its conception.⁶⁵ The court conceded that *Durham* enhanced, rather than alleviated, the difficulties of the traditional tests.

About a year after the *Durham* decision, the American Law Institute formulated a new insanity test in its Model Penal Code.⁶⁶ The A.L.I. test includes *M'Naghten's* moral component and embraces the control component of the irresistible impulse test.⁶⁷ But unlike the irresistible impulse test, and like the *Durham* test, it allows for brooding and reflection.⁶⁸ By permitting a showing of less than total incapacity and by incorporating some modern advances in psychiatry, the A.L.I. test is broader

Durham did not announce a new rule. It is not unlike the rule followed by the New Hampshire courts since it was first laid down in a dissenting opinion involving testamentary capacity in *Boadman v. Woodman*, 47 N.H. 120 (1866), and later adopted as an insanity test in *State v. Pike*, 49 N.H. 399 (1870) (overruled on other grounds in *Hardy v. Merrill*, 56 N.H. 227 (1875)). *Durham* was also influenced by a rule announced in 1953 by the English Royal Commission on Capital Punishment. GOLDSTEIN, *supra* note 8, at 82. See Weihofen, *The Flowering of New Hampshire*, 22 U. CHI. L. REV. 356 (1955).

61. *Frigillana v. United States*, 307 F.2d 665, 670 (D.C. Cir. 1962).

62. *McDonald v. United States*, 312 F.2d 847, 850 (D.C. Cir. 1962). See Acheson, *McDonald v. United States: The Durham Rule Redefined*, 51 GEO. L.J. 580 (1963).

63. *Washington v. United States*, 390 F.2d 444, 446 (D.C. Cir. 1967).

64. *Blocker v. United States*, 288 F.2d 853, 860-61 (D.C. Cir. 1961).

65. *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972). Judge Bazelon noted that the *Durham* experiment has shown that the afflictions of the insanity tests cannot be cured by merely creating a new test. *Id.* at 1010.

66. MODEL PENAL CODE § 4.01(1) (Tent. Draft No. 3, 1955). See generally GOLDSTEIN, *supra* note 8, at 86-96; Gerber, *supra* note 15, at 128-30; *Modern Insanity Tests*, *supra* note 22, at 107-10.

67. *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972); *United States v. Smith*, 404 F.2d 720, 727 (6th Cir. 1968).

68. *Hill v. State*, 252 Ind. 601, 251 N.E.2d 429 (1969); W. LAFAYE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 293 (1972); *Modern Insanity Tests*, *supra* note 22, at 108.

than *M'Naghten*.⁶⁹ Under the A.L.I. test, a person is not responsible for criminal conduct if at the time of such conduct, as a result of mental disease or defect, he lacked substantial capacity either to appreciate the criminality (or wrongfulness) of his conduct or to conform his conduct to the requirements of the law.⁷⁰

The major criticism of the A.L.I. test is the vagueness of its language.⁷¹ For example, it has been attacked on the difficulty of "meaningfully defining a mental disease or defect."⁷² Rather than define such terms, courts such as Illinois have only been able to state what is not a mental disease or defect.⁷³ The test's requirement of less than total incapacity has been criticized for increasing the number of insanity acquittals, thus counteracting society's interest in reducing crime.⁷⁴ This has prompted critics to urge adoption of mandatory commitment upon a successful

69. See *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972); *United States v. Smith*, 404 F.2d 720 (6th Cir. 1968); *United States v. Shapiro*, 383 F.2d 680 (7th Cir. 1967); *State v. White*, 93 Idaho 153, 456 P.2d 797 (1969); *Hill v. State*, 252 Ind. 601, 251 N.E.2d 429 (1969).

70. MODEL PENAL CODE § 4.01(1) (Tent. Draft No. 3, 1955).

A caveat paragraph excludes mental abnormalities manifested only by repeated criminal or otherwise antisocial conduct. MODEL PENAL CODE § 4.01(2) (Tent. Draft No. 3, 1955). See *United States v. Holt*, 450 F.2d 868 (5th Cir. 1971); *United States v. Wells*, 446 F.2d 2 (2d Cir. 1971); *United States v. O'Neal*, 431 F.2d 695 (5th Cir. 1970); Allen, *The Rule of the American Institute's Model Penal Code*, 45 MARQ. L. REV. 494 (1962). Currently, almost all the circuit courts of appeal apply the proposed or modified version of the A.L.I. formulation. See *United States v. Lemon*, 550 F.2d 467 (9th Cir. 1977); *United States v. Jackson*, 553 F.2d 109 (D.C. Cir. 1976); *United States v. Fratus*, 530 F.2d 644 (5th Cir. 1976); *United States v. Sennett*, 505 F.2d 774 (7th Cir. 1974); *United States v. McCracken*, 488 F.2d 406 (5th Cir. 1974); *United States v. Kohlman*, 469 F.2d 247 (2d Cir. 1972); *United States v. Frazier*, 458 F.2d 911 (8th Cir. 1972); *United States v. Taylor*, 437 F.2d 371 (4th Cir. 1971); *Wion v. United States*, 325 F.2d 420 (10th Cir. 1963), *cert. denied*, 377 U.S. 946 (1964); *United States v. Currens*, 290 F.2d 751 (3d Cir. 1961). It has also been adopted by a number of state legislatures, see, e.g., ILL. REV. STAT. ch. 38, § 6-2 (1975), and courts, see, e.g., *Morgan v. State*, 512 P.2d 904 (Alaska 1973); *Hill v. State*, 252 Ind. 601, 251 N.E.2d 429 (1969); *Terry v. Commonwealth*, 371 S.W.2d 862 (Ky. 1963); *Commonwealth v. McHoul*, 352 Mass. 544, 226 N.E.2d 556 (1967).

71. See GOLDSTEIN, *supra* note 8, at 87; H. WEIHOFEN, *THE URGE TO PUNISH* 77, 85, 99-100 (1956); Kuhn, *supra* note 49, at 797; Hall, *supra* note 49, at 777; Thompson, *The Future of the Insanity Defense in Illinois*, 26 DEPAUL L. REV. 359, 360 (1977) [hereinafter cited as Thompson].

72. Thompson, *supra* note 71, at 360-61.

73. See *People v. Williams*, 38 Ill. 2d 115, 230 N.E.2d 224 (1967) (personality disorder alone does not constitute a mental defect); *People v. Miller*, 33 Ill. 2d 439, 211 N.E.2d 708 (1965) (personality disorders are not mental disease); *People v. Jackson*, 57 Ill. App. 3d 809, 373 N.E.2d 583 (1978) (bizarre crime does not compel a finding of disease or defect); *People v. Moore*, 19 Ill. App. 3d 334, 311 N.E.2d 401 (1974) (emotional distress is not mental disease).

74. *Wade v. United States*, 426 F.2d 64, 75 (9th Cir. 1970); *State v. White*, 60 Wash. 2d 551, 374 P.2d 942 (1962), *cert. denied*, 375 U.S. 883 (1963). See *Modern Insanity Tests*, *supra* note 22, at 109.

insanity defense.⁷⁵

AUTOMATIC COMMITMENT

Society is afraid of the mentally ill, and even more so of persons whose antisocial behavior is considered a danger to society.⁷⁶ The fear of acquitting these persons by reason of insanity is largely responsible for the enactment of automatic commitment statutes which provide for the mandatory commitment of defendants found not guilty by reason of insanity.⁷⁷

Proponents of automatic commitment statutes argue that such statutes are a valid exercise of the State's police power "to make laws and regulations for the protection of the public health, safety, welfare, and morals."⁷⁸ Mandatory commitment arguably provides the public with immediate maximum protection. The police power argument, however, assumes that a criminal act has been proven against the defendant, that he has been proven insane at the time of the offense, and that his insanity and dangerousness continued to the post-acquittal determination.⁷⁹

Examination of this assumption, however, reveals the flaw in its logic and its "fundamental" unfairness.⁸⁰ First, the trier of fact does not ordinarily find "that the defendant would have been guilty but for the insanity."⁸¹ Second, in those jurisdictions where the introduction of some evidence of insanity shifts the burden to the prosecution to prove the defendant's sanity

75. See *Wade v. United States*, 426 F.2d 64, 75 (9th Cir. 1970). See also MODEL PENAL CODE § 4.08(1) (Proposed Official Draft, 1962) (defendant acquitted by reason of insanity will, by court order, be placed in mental health institution for custody and treatment); GOLDSTEIN, *supra* note 8, at 143; *Modern Insanity Tests*, *supra* note 22, at 109.

76. See, e.g., *Lynch v. Overholser*, 369 U.S. 705, 731 (1962) (Clark, J., dissenting); Goldstein & Katz, *Abolish the "Insanity Defense" — Why Not?*, 72 YALE L.J. 853, 866-70 (1963).

77. For a list of mandatory and discretionary commitment statutes see Comment, *Commitment Following Acquittal by Reason of Insanity and the Equal Protection of the Laws*, 116 U. PA. L. REV. 924 nn.2 & 3 (1968) [hereinafter cited as *Acquittal by Reason of Insanity*]. See generally Weihofen, *Institutional Treatment of Prisoner Acquitted by Reason of Insanity*, 38 TEX. L. REV. 849 (1960); Comment, *Compulsory Commitment Following a Successful Insanity Defense*, 56 NW. U. L. REV. 409 (1961).

78. Comment, *Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1206 (1974); Comment, *Guilty But Mentally Ill: An Historical and Constitutional Analysis*, 53 J. URBAN L. 471, 474 (1976); [hereinafter cited as URBAN].

79. GOLDSTEIN, *supra* note 8, at 144.

80. Comment, *The Rights of the Person Acquitted by Reason of Insanity: Equal Protection and Due Process*, 24 ME. L. REV. 135, 144 (1972).

81. GOLDSTEIN, *supra* note 8, at 144. Cf. *Ragsdale v. Overholser*, 281 F.2d 943, 948 (D.C. Cir. 1960) (any acquittal by reason of insanity carries with it the implicit finding that the defendant was guilty as charged).

beyond a reasonable doubt, an acquittal by reason of insanity establishes only that there was a reasonable doubt on the issue of insanity. Even in jurisdictions which require the defendant to prove his insanity to obtain an acquittal, the assumption of continued insanity is used without considering whether the type of mental disease or defect is continuing in nature. "The inflexibility of the assumption is made dramatically evident by the fact that the defendant who has just won his acquittal is presumably competent to stand trial and, therefore at least superficially 'sane.'"⁸²

Proponents also argue that automatic commitment will deter spurious claims of insanity.⁸³ The legitimacy of this argument is highly questionable. First, it fails to address the problem of the possible commitment of those who are neither responsible for their past conduct nor presently mentally ill. Second, even if the fear of commitment does discourage counterfeit insanity defenses, it will also have a similar stifling effect on meritorious cases. On balance, the benefit of deterring false pleas does not outweigh the harm resulting from inhibiting valid defenses.⁸⁴

Automatic commitment has successfully been attacked in a few instances on the ground that it constitutes a denial of equal protection.⁸⁵ Support for this position is found in *Baxtrom v. Harold*,⁸⁶ where the Supreme Court held that before a state could commit a prisoner to a mental hospital at the termination

82. GOLDSTEIN, *supra* note 8, at 144. *Accord*, Long v. State, 38 Ga. 491 (1868). The logical infirmity of the assumption of continuing insanity is revealed by Hodison v. Rodgers, 137 Kan. 950, 22 P.2d 491 (1933). Defendant was accused of passing bad checks on August 20, 1932. Four days later, he was civilly committed as feeble-minded. On February 10, 1933, defendant was released because he was found to be of "sane mind." Two months after his release, he was indicted for the crime but found not guilty by reason of insanity and committed. The court held that its duty to commit was not changed by the intervening certification of sanity. For a discussion of similar cases see *Acquittal by Reason of Insanity*, *supra* note 77, at 936 n.76.

83. *See, e.g.*, Lynch v. Overholser, 369 U.S. 705, 715 (1962); *In re Rosenfield*, 157 F. Supp. 18, 21 (D.D.C. 1957).

84. *Acquittal by Reason of Insanity*, *supra* note 77, at 937 & n.83; Comment, *Compulsory Commitment Following A Successful Insanity Defense*, 56 NW. U. L. REV. 409, 428 (1961). *See* Krash, *The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia*, 70 YALE L.J. 905, 947-48 (1961).

85. The threshold issue is whether the state is constitutionally required to provide an insanity defense. If not, it could be argued that the state may attach conditions, such as compulsory commitment, to acquittal by reason of insanity. *Acquittal by Reason of Insanity*, *supra* note 77, at 929 n.34. On the few occasions where the issue has been addressed, the courts uniformly held that legislative attempts to abolish the insanity defense violate due process. *See* note 16 and accompanying text *supra*.

86. 383 U.S. 107, 114-15 (1966).

of his prison sentence, the prisoner was entitled to the same safeguards and procedures applicable to commitment of non-prisoners. The prisoner's prior commission of criminal acts leading to his conviction was not considered a rational basis for distinguishing him from others in this regard.

The *Baxtrom* principle was applied to invalidate the District of Columbia automatic commitment procedures in *Bolton v. Harris*.⁸⁷ The Court of Appeals for the District of Columbia held that a finding of not guilty by reason of insanity would justify mandatory commitment only for a brief period to permit examination, after which the acquitted defendant cannot be further confined except by procedures required in civil commitment proceedings.

The *Baxtrom-Bolton* rationale was subsequently adopted by the Supreme Court of Michigan in *People v. McQuillan*.⁸⁸ The court held that under Michigan's automatic commitment statute neither equal protection nor due process prohibits temporary detention for examination or observation of a defendant acquitted by reason of insanity. However, upon completion of the observation, due process and equal protection require that a defendant, found not guilty by reason of insanity, must similarly receive the benefit of commitment and release provisions available to those civilly committed.

GUILTY BUT MENTALLY ILL

Pursuant to the holding of *McQuillan*, sixty-four state hospital patients were discharged when found not to be in need of mental treatment. Shortly thereafter, two of those released committed violent crimes.⁸⁹ In direct response to the public outrage, the Michigan legislature enacted a guilty but mentally ill provision in order to modernize Michigan laws relating to the interaction of the criminal justice and mental health systems.⁹⁰ Under the new statutory scheme, a defendant who proposes to plead the insanity defense must comply with a procedural timetable.⁹¹ The court then orders the defendant to submit to a psychiatric examination by the staff of the center for forensic psychiatry. Both the defendant and the prosecution may obtain

87. 395 F.2d 642 (D.C. Cir. 1968).

88. 392 Mich. 511, 221 N.W.2d 569 (1974).

89. URBAN, *supra* note 78, at 471-72.

90. *Id.* at 483.

91. MICH. COMP. LAWS ANN. § 768.20a(1)-(3) (Supp. 1976). The defendant must file with the court and serve the prosecuting attorney a written notice of his intention to assert the insanity defense not less than 30 days prior to the trial date.

independent psychiatric evaluation.⁹² If the defendant's failure to fully cooperate in his examination is established at the pre-trial hearing, the defendant will be barred from presenting testimony relating to his insanity at trial.⁹³

The center, and any other independent examiner, must provide the prosecuting attorney and the defense a written report. The report must include the clinical findings,⁹⁴ the facts upon which the findings were based,⁹⁵ and the opinion of the examiner "on the issue of the defendant's *insanity* at the time the alleged offense was committed and whether the defendant was *mentally ill* . . . at the time the alleged offense was committed."⁹⁶ Thus, under Michigan's guilty but mentally ill provision, once the defendant is found fit to stand trial, his present mental illness is not an issue.

In all cases in which the insanity defense is interposed, the jury or the court determines whether the defendant is: (1) guilty; (2) not guilty; (3) not guilty by reason of insanity at the time of the offense; or (4) guilty but mentally ill at the time of the offense. Furthermore, the verdict of guilty but mentally ill requires, as a condition precedent, that the trier of fact make three findings of fact beyond a reasonable doubt: first, that the defendant is guilty of the crime charged;⁹⁷ second, that the defendant was mentally ill at the time of the commission of the offense;⁹⁸ and finally, that the defendant was not insane during commission of the offense.⁹⁹

Where the trier of fact finds the defendant guilty but mentally ill, the court must "impose any sentence which could be imposed pursuant to law upon a defendant who is convicted of the same offense."¹⁰⁰ Treatment may then be provided during the sentence by the Department of Mental Health or the Department of Corrections.¹⁰¹ When a defendant no longer needs mental treatment, he is transferred to a correctional facility for

92. *Id.* The examination period is not to exceed 30 days. The defendant must pay for the expense of an independent psychiatric evaluation, unless he is indigent in which case the county will pay the expense.

93. *Id.* § 768.20a(4).

94. *Id.* § 768.20a(6)(a).

95. *Id.* § 768.20a(6)(b).

96. *Id.* § 768.20a(6)(c) (emphasis added).

97. *Id.* § 768.36(1)(a).

98. *Id.* § 768.36(1)(b).

99. *Id.* § 768.36(1)(c). If the defendant raises the insanity defense in compliance with the procedural timetable and waives a jury trial, the court, with the concurrence of the prosecuting attorney, may accept a plea of guilty but mentally ill in lieu of a guilty plea or nolo contendere plea. *Id.* § 768.36(1)-(2).

100. *Id.* § 768.36(3).

101. *Id.*

the balance of his sentence. However, if at the end of his sentence the individual still needs psychiatric care, a new determination must be made as to whether the person is in need of mental treatment. He may then be civilly committed to a mental health facility. On the other hand, a person who has been transferred from a mental health facility to prison can be returned to the mental health hospital at a later time if he has degenerated and needs further clinical care. This in effect creates a revolving door policy. But rather than having the door revolve from a mental facility into the street, it revolves from one secured facility to another, thereby assuring the public protection.

POTENTIAL PROBLEMS

Constitutional Problems

Michigan's revolving door scheme does not explicitly provide adequate due process safeguards for the transfer of prisoners from the mental hospital to the prison and from the prison to the mental hospital. The provision fails to require a hearing prior to commitment in a mental institution. Unless minimum due process protections are afforded by either judicial interpretation or statutory amendment, the provision may be construed unconstitutional as applied.

Under the *Baxtrom-Bolton-McQuillan* rationale, persons found not guilty by reason of insanity at the time of the offense cannot be committed without the benefit of a hearing to determine *present* insanity.¹⁰² By analogy, a defendant found guilty but mentally ill could contend that he cannot be committed without a hearing to determine his *present* mental illness.¹⁰³ An argument has been made that a hearing to determine present mental illness is not necessary because *Bolton* depended upon an unconstitutional deprivation of liberty, whereas under the guilty but mentally ill provision the defendant has no right to freedom.¹⁰⁴

This argument would be compelling if the liberty interest is the sole interest involved. But this is not the case. Commitment to a mental institution attaches an additional "distinctive stigma" to the defendant and is "accompanied by techniques of behavior modification" not employed in a penal institution.¹⁰⁵ These consequences amount to a "grievous loss" sufficient to re-

102. See text accompanying notes 88-91 *supra*.

103. See URBAN, *supra* note 78, at 492.

104. *Id.*

105. *Miller v. Vitek*, 437 F. Supp. 569, 573 (D. Neb. 1977), *vacated and rem'd* on the issue of mootness, 436 U.S. 407 (1978).

quire the due process protection of a hearing to determine present mental illness.¹⁰⁶

Another challenge to the provision might arise when the state wishes to transfer the defendant from the mental hospital to the prison. A defendant who seeks to prevent the transfer could claim that since the state, pursuant to its provision, provides the defendant the right to treatment, the state cannot terminate this right without the benefit of a hearing.¹⁰⁷

A due process claim could also arise if the state failed to provide a hearing prior to the involuntary transfer of the prisoner from the penal institution to the mental institution. Such a challenge succeeded in *Miller v. Vitek*.¹⁰⁸ In *Miller* a prisoner brought an action challenging his involuntary transfer from the state prison to a mental hospital. The federal district court held that due process attached to his liberty interest¹⁰⁹ and that he was entitled to certain due process protections. The court listed seven procedural safeguards as minimal requirements of due process when a person is transferred from a penal institution to a mental institution:

- A. Written notice to the prisoner that a transfer to a mental hospital is being considered;
- B. A hearing, sufficiently after the notice to permit the prisoner to prepare, at which disclosure to the prisoner is made of the evidence being relied upon for the transfer and at which an opportunity to be heard in person and to present documentary evidence is given;
- C. An opportunity at the hearing to present testimony of witnesses by the defense and to confront and cross-examine witnesses called by the state, except upon a finding, not arbitrarily made, of good cause for not permitting such presentation, confrontation, or cross-examination;
- D. An independent decisionmaker;
- E. A written statement by the factfinder as to the evidence relied on and the reasons for transferring the inmate;
- F. Availability of legal counsel, furnished by the state, if the inmate is financially unable to furnish his own; and
- G. Effective and timely notice of all the foregoing rights.¹¹⁰

The state of Michigan would be well advised to incorporate these or similar safeguards into its guilty but mentally ill provision. Otherwise, the provision as it presently stands is susceptible to constitutional challenges. In fact, the constitutionality of the Michigan statute has already been challenged under the state's due process clause. In *People v. McLeod*,¹¹¹ the defendant was charged with arson. He waived a jury trial and filed no-

106. *Id.*

107. See text accompanying notes 115-129 *infra*.

108. 437 F. Supp. 569 (D. Neb. 1977).

109. See text accompanying notes 105-106 *supra*.

110. 437 F. Supp. at 575.

111. 77 Mich. App. 327, 258 N.W.2d 214 (1977).

tice of intention to assert the defense of not guilty by reason of insanity. The trial court found the defendant legally sane at the time of the commission of the act and guilty of arson but mentally ill.

The trial judge, however, *sua sponte*, heard the testimony of three psychiatrists regarding the treatment which the defendant might reasonably be anticipated to receive as a guilty but mentally ill felon. Thereafter, the trial court found the guilty but mentally ill provision to be "legally inert" and declared it unconstitutional.¹¹² The decision was based on the finding that judicial implementation in compliance with the provisions as to treatment was impossible, because the Department of Mental Health could not comply with the statute.

The appellate court, however, declined to hold the statute unconstitutional.¹¹³ It failed to find a "clear and inevitable" conflict between the guilty but mentally ill provision and Michigan's constitution, and found the trial judge's findings to be premature and speculative.¹¹⁴

Nonetheless, *McLeod* has raised a possible constitutional right-to-treatment challenge to the guilty but mentally ill provision. The argument would be that since the state has created a statute which labels a defendant guilty but mentally ill and requires him to be placed in a mental institution, the state must provide the defendant with adequate psychiatric care. The right

112. *Id.* at 329, 258 N.W.2d at 215.

113. *Id.* at 331, 258 N.W.2d at 216. In two subsequent cases the statute was upheld under Michigan's due process and equal protection clauses. In *People v. Jackson*, 80 Mich. App. 244, 263 N.W.2d 44 (1977), the defendant was found guilty of assault with intent to commit murder but mentally ill. On appeal, the defendant asserted that the statute's requirement of pleading the insanity defense before the trier of fact can consider a finding of guilty but mentally ill violated Michigan's equal protection clause. The court, however, failed to find the legislature's underinclusive classification to be arbitrary or unreasonable.

In *People v. Darwall*, 82 Mich. App. 652, 267 N.W.2d 472 (1978), the defendant was found guilty of second degree murder and assault with intent to commit murder. The appellate court rejected defendant's argument that the two verdict forms of guilty but mentally ill and not guilty by reason of insanity shift the burden of proof to defendant in violation of due process. Upholding the statute under the equal protection clause the court stated:

The state's interest in protecting society from insane defendants who exhibit dangerous tendencies and in securing proper treatment for such persons suffering from mental illness certainly bear a reasonable relation to this statute's provision for two special verdict types indicating the jury's findings as to insanity and mental illness.

82 Mich. App. at 661, 276 N.E.2d at 476.

114. *Id.*; see *Township of Dearborn v. Dearborn Township Clerk*, 334 Mich. 673, 680, 55 N.W.2d 201, 204 (1952); *People v. Guerrero*, 57 Mich. App. 316, 319, 225 N.W.2d 746, 748 (1975).

to treatment is a relatively recent principle¹¹⁵ which has evolved from dicta¹¹⁶ to decisive utterances¹¹⁷ within the span of eleven years. The growing number of jurisdictions that have addressed the issue have held that the incarceration of the mentally ill without effective psychiatric treatment violates the due process,¹¹⁸ equal protection,¹¹⁹ and cruel and unusual punishment¹²⁰ clauses of the United States Constitution.

Arguments in support of a right-to-treatment are based on numerous cases recognizing that prisoners do not lose their constitutional rights when they enter prison.¹²¹ The eighth amendment's prohibition against cruel and unusual punishment, incorporated into the due process clause of the fourteenth amendment, protects prisoners from unconstitutional condi-

115. Comment, *The Eighth Amendment Right to Treatment for Involuntarily Committed Mental Patients*, 61 IOWA L. REV. 1057 (1976); see Halpren, *A Practicing Lawyer Views the Right to Treatment*, 57 GEO. L.J. 782 (1969).

116. *Rouse v. Cameron*, 373 F.2d 451, 452-56 (D.C. Cir. 1967) (as amended) (a defendant who had been involuntarily committed after having been found not guilty by reason of insanity filed a writ of habeas corpus action challenging his confinement on the grounds that he had been denied treatment).

117. See, e.g., *Donaldson v. O'Connor*, 493 F.2d 507, 519-20 (5th Cir. 1974), *vacated*, 422 U.S. 563 (1975); *United States ex rel. Covington v. Harris*, 419 F.2d 617 (D.C. Cir. 1969); *Shuster v. Herold*, 410 F.2d 1071 (2d Cir.), *cert. denied*, 396 U.S. 847 (1969) (test of confinement should be whether defendant requires care and treatment); *Martarella v. Kelley*, 349 F. Supp. 575, 585 (S.D.N.Y. 1972); *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala.), *modified*, 334 F. Supp. 1341 (M.D. Ala. 1971), *further modified*, 344 F. Supp. 373 (M.D. Ala. 1972), *further modified*, 344 F. Supp. 387 (M.D. Ala. 1972) (lack of staff is no excuse for lack of treatment); *Vaughan v. Bower*, 313 F. Supp. 37 (D. Ariz.), *aff'd*, 400 U.S. 884 (1970) (right cannot be denied by reason of non-residency); *State in Interest of R.G.W.*, 145 N.J. Super. 167, 366 A.2d 1375 (1976). *But see* *Burham v. Department of Pub. Health*, 349 F. Supp. 1335, 1341-43 (N.D. Ga. 1972), *rev'd*, 503 F.2d 1319 (5th Cir. 1974), *cert. denied sub. nom.*, *Department of Human Resources of Georgia v. Burnham*, 422 U.S. 1057 (1975) (where the court claimed that there was no legal precedent, that the eleventh amendment prohibited a federal court from ordering a state to spend money on its institutions, and that the right to treatment did not create a justiciable question).

118. See, e.g., *Donaldson v. O'Connor*, 493 F.2d 507 (5th Cir. 1974), *vacated and remanded on punitive damages question*, 422 U.S. 563 (1975); *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1967) (dicta); *Nason v. Superintendent*, 353 Mass. 604, 233 N.E.2d 908 (1968).

119. *State in Interest of R.G.W.*, 145 N.J. Super. 167, 366 A.2d 1375 (1976); see *In re Anonymous*, 69 Misc. 2d 181, 329 N.Y.S.2d 542 (Sup. Ct. 1972).

120. See *Martarella v. Kelley*, 349 F. Supp. 575 (S.D.N.Y. 1972); *People v. Feagley*, 14 Cal. 3d 338, 535 P.2d 373, 121 Cal. Rptr. 509 (1975); *State in Interest of R.G.W.*, 145 N.J. Super. 167, 366 A.2d 1375 (1976).

121. *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974); *Courtney v. Bishop*, 409 F.2d 1185, 1187 (8th Cir.), *cert. denied*, 396 U.S. 915 (1969); *Jackson v. Bishop*, 404 F.2d 571, 576 (8th Cir. 1968); *Jones v. Wittenberg*, 323 F. Supp. 93, 98 (N.D. Ohio 1971), *aff'd*, *Jones v. Metzger*, 456 F.2d 854 (6th Cir. 1972); *Washington v. Lee*, 263 F. Supp. 327, 1187 (M.D. Ala. 1966), *aff'd per curiam*, 390 U.S. 333 (1968).

tions of treatment imposed by prison authorities under color of state law.¹²² The adequacy of the psychiatric treatment provided to prison inmates, for example, is one condition subject to eighth amendment scrutiny.¹²³ Conditions of confinement cannot "shock the conscience" or "offend evolving notions of decency."¹²⁴

The deference required under this standard has not resulted in judicial myopia. In *Newman v. State*¹²⁵ an Alabama district court held that the failure of the state to provide sufficient medical facilities and staff to afford adequate psychiatric care for inmates constituted a wilful and intentional violation of prisoners' rights protected by the eighth and fourteenth amendments. The failure to provide inmates access to medical personnel and to provide medication and other treatment was considered cruel and unusual punishment in violation of the Constitution.¹²⁶

The right to treatment has also been recognized through statutory interpretation. In *Burchett v. Bower*¹²⁷ a state prisoner committed to a state hospital pursuant to a state statute¹²⁸ brought an action seeking a declaratory judgment that he had a

122. See *Robinson v. California*, 370 U.S. 660 (1962).

123. *Newman v. Alabama*, 503 F.2d 1320 (5th Cir. 1974), *cert. denied*, 421 U.S. 948 (1975); see *Campbell v. Beto*, 460 F.2d 765 (5th Cir. 1972).

124. *Newman v. Alabama*, 503 F.2d at 1330, 1328-32; see *Robinson v. California*, 370 U.S. 660, 667-68 (1962) (Douglas, J., concurring); *Trop v. Dulles*, 356 U.S. 86 (1958); *O'Brien v. Moriarty*, 489 F.2d 941 (1st Cir. 1974).

125. 349 F. Supp. 278 (M.D. Ala. 1972), *aff'd*, 503 F.2d 1320 (5th Cir. 1974), *cert. denied*, 421 U.S. 948 (1975).

126. *Id.* at 285-86.

127. 355 F. Supp. 1278 (D. Ariz. 1973).

128. ARIZ. REV. STAT. § 31-224 (1968) (as amended) (repealed ARIZ. REV. STAT. § 31-224 (Supp. 1978)) provides in relevant part as follows:

A. When a prisoner confined in the state prison discloses symptoms of mental illness, the prison physician shall examine him, and if he is determined to be so afflicted, the physician shall report the fact in writing to the superintendent of the prison, describing the condition found, together with any recommendations he has. Upon receipt of the report, the superintendent shall file a petition as provided in § 36-509 and thereafter the proceeding shall conform to article 1 of chapter 5, title 36.

C. If the prisoner is determined to be mentally ill, the court shall order and direct that he be confined in the Arizona state hospital in the legal custody of the superintendent of the prison. The transfer of the prisoner to the state hospital shall be made by the superintendent of the prison.

D. The superintendent of the state hospital shall render to the superintendent of the prison, a quarterly report of the condition of the prisoner, and when it appears that the prisoner has sufficiently recovered that he may be returned to the prison without further risk, he shall be returned to serve the unexpired term, and the period he was confined in the state hospital shall be counted as though he served in prison. If the term of imprisonment expires during the time the men-

constitutionally protected right to mental treatment. The federal district court of Arizona found it unnecessary to address the constitutional issue and sustained the prisoner's claim on statutory grounds. The court held that because the state had determined that he was in need of mental treatment, the state had undertaken the corresponding duty to provide it.¹²⁹ The *Burchett* case can be utilized as authority for the proposition that once the state commits a defendant pursuant to a guilty but mentally ill provision, it has undertaken the responsibility to provide the prisoner with adequate mental treatment.

Jury Problems

The law assumes that the jury will impartially and competently evaluate testimony, accept and understand the law, and conscientiously apply the law to the facts. Because the insanity defense appears to be distasteful to jurors, however, they are often hesitant or unwilling to swallow a defendant's plea of insanity when he has physically committed a serious offense.¹³⁰ Research of jurors' attitudes has shown that many lay persons believe that "the plea of insanity is a loophole allowing too many guilty men to go free,"¹³¹ even among persons who might be expected to be more liberal in their attitudes toward insanity, such as those who oppose the death penalty.¹³²

It can logically be inferred that the unpalatability of the insanity defense to jurors could lead to the misuse of the guilty but mentally ill alternative. That is, the alternative finding could be employed as a loophole to circumvent the insanity defense.¹³³ Such a step would constitute a denial of due process and equal protection if it in fact "results in a substantial erosion

tally ill prisoner is confined in the state hospital, the superintendent of the prison shall forward to the prisoner his legal discharge from prison.

129. 355 F. Supp. at 1281.

130. See Bronson, *On the Conviction Proneness and Representativeness of the Death-Qualified Jury: An Empirical Study of Colorado Veniremen*, 42 U. COLO. L. REV. 1 (1970) [hereinafter cited as Bronson]; *United States v. Bennett*, 460 F.2d 872, 881 (D.C. Cir. 1972) (explicitly recognized jurors' reluctance to acquit defendants charged with serious crimes). Even in cases where the evidence clearly shows a history of mental illness, and the facts and circumstances are so bizarre that it could be caused by a severely abnormal mind, juries tend to reject insanity pleas. *E.g.*, *Parman v. United States*, 399 F.2d 559 (D.C. Cir.), *cert. denied*, 393 U.S. 858 (1968) (victim had been tied up, beaten severely and thoroughly bitten on all her sexual organs while alive, and then brutally murdered by strangulation).

131. Bronson, *supra* note 130, at 7.

132. *Id.* at 8. Among those who oppose the death penalty 76.6% felt that the insanity defense was a loophole. Even among those who strongly oppose the death penalty 60.6% believed that the insanity defense was a loophole.

133. See URBAN, *supra* note 78, at 492.

of the insanity right to a complete insanity defense."¹³⁴

Yet, the fear that jurors may ignore evidence that the requisite mental state did not exist has not yet been substantiated by Michigan's experience with the provision. There is no evidence that the provision has been misused or abused.¹³⁵ Mere speculation of jury abuse is not a sufficient ground to hold the provision unconstitutional.¹³⁶ Moreover, the possibility of jury abuse can be minimized, as with other unpopular issues, by the proper selection of jurors. Research on factors which influence jurors' decisions with respect to the insanity defense has shown that those jurors who have a negative attitude toward psychiatry reject an insanity plea, whereas those who possess a favorable attitude toward psychiatry are impartial.¹³⁷

Another possible major objection to the guilty but mentally ill provision is that jurors may not be able to draw the distinction between statutory standards of insanity and mental illness.¹³⁸ Although some possibility of jury confusion is unavoidable, definitions of insanity and mental illness are no more amorphous than the "reasonable man" standard. Although at times the concepts of insanity and mental illness may overlap, there is a vast difference between the two terms. Insanity, under any of the tests presently in use, basically requires that the defendant could not entertain the requisite criminal intent to commit a crime.¹³⁹ Mental illness, however legally defined, means that the defendant was able to possess the requisite criminal intent. Therefore, all persons found legally insane are also implicitly mentally ill, but not all persons who

134. *Id.* at 493.

135. *Id.*

136. *Id.*; see *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1885) (it must be clearly shown that the statute has been applied unconstitutionally).

137. Arafat & McCahery, *The Insanity Defense and the Juror*, 22 *DRAKE L. REV.* 538, 548-49 (1973). The study revealed that the majority of the jurors who had an unfavorable attitude toward psychiatry were primarily blue collar workers and unskilled laborers.

138. See text accompanying notes 77-79 *supra*. (Michigan's definition of insanity is a modification of the A.L.I. standard). *Cf.* *MICH. COMP. LAWS ANN.* § 768.21a(1) (Supp. 1976) (a defendant is legally insane if "as a result of mental illness . . . that person lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.") *with* *MICH. COMP. LAWS ANN.* § 330.1400a (1975) (Mental illness is "a substantial disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with ordinary demands of life").

This definition of mental illness is employed in both the Michigan Mental Health Code, *MICH. COMP. LAWS ANN.* § 330.1400a (1975), and the guilty but mentally ill provision. See *URBAN, supra* note 78, at 485-87. *Accord*, *People v. Darwall*, 82 Mich. App. 652, 267 N.W.2d 472 (1978).

139. See text accompanying notes 37-70 *supra*.

are mentally ill can satisfy the more stringent requirements of the insanity tests.¹⁴⁰

The determination of whether the defendant was legally insane has never been an easy question to resolve. The guilty but mentally ill alternative will in no way make the task less difficult. However, it does create a more educated approach to the resolution of the mentally abnormal offender. Jurisdictions which lack the guilty but mentally ill alternative are employing a dogmatic approach; the insanity defense is an all-or-nothing proposition which does not reflect the reality and complexity of mental illness. The addition of a guilty but mentally ill provision is one step toward recognizing that behavior is not easily categorized. But further recognition of different degrees of diminished capacity must still be acknowledged.

DIMINISHED CAPACITY

The insanity defense operates as an absolute defense or an excuse justifying acquittal.¹⁴¹ The defense of diminished capacity, however, will not result in exoneration. This defense admits psychiatric or psychological evidence¹⁴² for the sole purpose of determining whether the defendant in fact had the capacity to entertain the requisite mental state or specific intent, such as premeditation in first degree murder, for the crime charged.¹⁴³

140. It has also been argued that the difference between insanity and mental illness is qualitative. URBAN, *supra* note 78, at 488. At most, they are qualitatively different only by legal definition and legal consequences. The current psychiatric position is that there are varying degrees of mental abnormalities; that a continuum exists between sanity and insanity. See note 18 and accompanying text *supra*. Therefore, the insanity tests in effect determine the *degree* of the mental state required for the commission of an offense. Thus, in a metaphysical sense, the two concepts are only quantitatively different. Once an individual's mental disorder reaches the threshold level of severity, a legal metamorphosis occurs and the individual becomes legally insane.

141. See, e.g., cases cited in note 6 *supra*.

142. United States v. Brawner, 471 F.2d 969, 1002 (D.C. Cir. 1972) (provided such evidence is based on sufficient scientific support and would assist the trier of fact in reaching a decision on the ultimate issues).

143. *Id.* at 998, 1002; see, e.g., People v. Gorshen, 51 Cal. 2d 716, 336 P.2d 492 (1959); Long v. Brewer, 253 N.W.2d 549, 557 (Iowa 1977); State v. Nichols, 3 Ohio App. 2d 182, 209 N.E.2d 750 (1965); see generally Arenella, *supra* note 3; Diamond, *supra* note 19; Dix, *Psychological Abnormality as a Factor in Grading Criminal Liability: Diminished Capacity, Diminished Responsibility, and the Like*, 62 J. CRIM. L.C. & P.S. 313 (1971); Lewin, *Psychiatric Evidence in Criminal Cases for Purposes Other than the Defense of Insanity*, 26 SYRACUSE L. REV. 1051 (1975) [hereinafter cited as Lewin]; Taylor, *Partial Insanity as Affecting the Degree of Crime—A Commentary on Fisher v. United States*, 34 CALIF. L. REV. 625 (1946); Weihofen & Overholser, *Mental Disorder Affecting the Degree of a Crime*, 56 YALE L.J. 959 (1947) [hereinafter cited as Weihofen & Overholser]; *Diminished Capacity*, *supra* note 19; Comment, *Graduated Responsibility as an Alternative to Current Tests of*

Although such evidence would be insufficient to exculpate the defendant under the insanity defense, it is properly used with the diminished capacity defense to determine the degree of the offense for which the accused is to be convicted.¹⁴⁴

If successful on this defense, the defendant can be found guilty only of a lesser offense not requiring proof of the contested mental state.¹⁴⁵ "Simply stated, the theory is that 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 a lower grade of the offense not requiring that particular mental element."¹⁴⁶ This theory is consistent with the fundamental principle that the state of a defendant's mind is the key to whether he should be punished for a crime, and if so, how severely.¹⁴⁷

The diminished capacity defense is limited to crimes which require as an element of the offense the existence of a specific intent to commit the proscribed act,¹⁴⁸ "or in those jurisdictions which have abolished the common law distinction between specific and general intent, to any crime [that requires] proof of a particular mental state."¹⁴⁹ Although in theory the diminished capacity defense could be applied to any crime requiring evidence of intent to commit a criminal act, the courts have limited the scope of this defense to crimes that require specific intent as opposed to crimes requiring only general intent. Otherwise, an unlimited application of this defense could result in the complete exoneration of a defendant charged with a general intent crime which does not incorporate a lesser offense.¹⁵⁰ Thus, the courts will prevent a defendant from doing indirectly what he

Determining Criminal Capacity, 25 ME. L. REV. 343 (1973); *Note*, 40 MO. L. REV. 361 (1975).

144. *See, e.g.*, 471 F.2d 969 (D.C. Cir. 1972); *State v. Padilla*, 66 N.M. 289, 347 P.2d 312 (1959).

145. Lewin, *supra* note 143, at 1052.

146. *Id.* at 1054.

147. Weihofen & Overholser, *supra* note 143, at 962.

148. Lewin, *supra* note 143, *passim*; *see Diminished Capacity*, *supra* note 19, at 562.

149. Lewin, *supra* note 143, at 1064.

150. *See Arenella*, *supra* note 3, at 832 n.25. Where it is argued that the specific intent limitation is not consistent with the diminished capacity rationale, Arenella contends that a mental abnormality which diminishes defendant's capacity to entertain a specific intent would have the same effect on his capacity to entertain a general intent. Therefore, theoretical niceness requires the admissibility of such evidence in all crimes involving a mental element. Arenella, however, recognizes that this approach "would create the anomalous result of a 'partial defense' leading to outright acquittal. . . ." *Id. Accord*, *Bethea v. United States*, 365 A.2d 64, 91 (D.C. 1976). However, it should be noted that the court failed to draw a distinction between specific and general intent crimes.

cannot do directly under the insanity defense. The failure to recognize this limitation has caused at least one court to reject the diminished capacity defense.¹⁵¹ Even though at least twenty states¹⁵² have recognized the defense with its limitation, "the expansion might be greater were it not for an unfortunate tendency of some courts to confuse [diminished capacity] with other doctrines deemed more radical."¹⁵³

151. *Bethea v. United States*, 365 A.2d 64, 91 (D.C. 1976).

152. *Johnson v. State*, 511 P.2d 118 (Alaska 1973) (murder); *People v. Wetmore*, 583 P.2d 1308, 149 Cal. Rptr. 265 (1978) (burglary); *People v. Goshen*, 51 Cal. 2d 716, 336 P.2d 492 (1959) (murder); *People v. Wells*, 33 Cal. 2d 330, 202 P.2d 53, *cert. denied*, 338 U.S. 836 (1949) (assault with malice); *Ferrin v. People*, 164 Colo. 130, 433 P.2d 108 (1967) (murder); *Schwickrath v. People*, 159 Colo. 390, 411 P.2d 961 (1966) (felonious escape); *Becksted v. People*, 133 Colo. 72, 292 P.2d 189 (1956) (murder); *State v. Donahue*, 141 Conn. 656, 109 A.2d 364 (1954), *appeal dismissed*, 349 U.S. 926 (1955) (murder); *Andersen v. State*, 43 Conn. 514 (1876) (murder); *State v. Santiago*, 55 Haw. 162, 516 P.2d 1256 (1973) (murder); *State v. Clokey*, 83 Idaho 322, 364 P.2d 159 (1961) (murder); *Donahue v. State*, 165 Ind. 148, 74 N.E. 996 (1905) (murder); *Bimbow v. State*, 315 N.E.2d 738 (Ind. Ct. App. 1974) (assault and battery); *State v. Gramenz*, 256 Iowa 134, 126 N.W.2d 285 (1964) (murder); *Mangrum v. Commonwealth*, 39 S.W. 703 (Ky. 1897) (murder); *People v. Fields*, 64 Mich. App. 166, 235 N.W.2d 95 (1975) (murder, assault); *State v. Anderson*, 515 S.W.2d 534 (Mo. 1974) (murder); *Washington v. State*, 165 Neb. 275, 85 N.W.2d 509 (1957) (murder); *State v. Vigliano*, 43 N.J. 44, 202 A.2d 657 (1964) (murder); *State v. DePaolo*, 34 N.J. 279, 168 A.2d 401, *cert. denied*, 368 U.S. 880 (1961) (murder); *State v. Padilla*, 66 N.M. 289, 347 P.2d 312 (1959) (murder, rape, kidnapping); *State v. Cooper*, 286 N.C. 549, 213 S.E.2d 305 (1975) (murder); *State v. Nichols*, 3 Ohio App. 2d 182, 209 N.E.2d 750 (1965) (murder); *State v. Schleigh*, 210 Or. 155, 310 P.2d 341 (1957) (arson); *State v. Fenik*, 45 R.I. 309, 121 A. 218 (1923) (murder); *State v. Poulson*, 14 Utah 2d 213, 381 P.2d 93, *cert. denied*, 375 U.S. 898 (1963) (murder); *State v. Green*, 78 Utah 580, 6 P.2d 177 (1931) (murder); *State v. Ferrick*, 81 Wash. 2d 942, 506 P.2d 860, *cert. denied*, 414 U.S. 1094 (1973) (murder); *Hempton v. State*, 111 Wis. 127, 86 N.W. 596 (1901) (murder).

153. *Lewin, supra* note 143, at 1055. The diminished capacity defense has been frequently confused with the Scottish diminished responsibility defense. Unlike diminished capacity, diminished responsibility does not require proof that the mental disease actuated the absence of a particular mental element of the crime. It merely requires proof that the defendant was afflicted with a mental disease during the commission of the offense. Diminished responsibility only operates as a tool for *mitigating* capital murder to manslaughter. Thus, diminished capacity is a causative doctrine whereas diminished responsibility is an *ameliorative* doctrine. Because diminished responsibility provides amelioration for defendants upon whom society has imposed the harshest penalties, American courts have refused to adopt the defense. *See Lewin, supra* note 143, *passim*. A number of jurisdictions have expressly rejected the ameliorative diminished responsibility defense. *See, e.g., Lee v. State*, 265 Ala. 623, 93 So. 2d 757 (1957); *State v. Narten*, 99 Ariz. 116, 124, 407 P.2d 81, 86, *cert. denied*, 384 U.S. 1008 (1965) (Psychiatric testimony held to be "not relevant . . . for the purpose of *mitigating* the severity of the punishment.") (emphasis added); *Andrews v. Hand*, 190 Kan. 109, 372 P.2d 559 (1962); *State v. Gardner*, 219 S.C. 97, 64 S.E.2d 130 (1951).

Diminished responsibility must also be distinguished from guilty but mentally ill. Although both approaches allow proof of mental illness during the commission of the offense, two basic differences exist. First, diminished

All jurisdictions that have adopted the diminished capacity defense have done so for the purpose of negating the premeditation or deliberation requisite to first degree murder.¹⁵⁴ Where psychiatric evidence shows that the defendant was incapable of premeditation or deliberation as a result of a mental disease or defect, he cannot be convicted of a crime higher than second degree murder.¹⁵⁵ Moreover, some jurisdictions have allowed the defense to be used where the defendant can show his incapacity to entertain malice aforethought in order to reduce murder to manslaughter.¹⁵⁶ In these jurisdictions malice is considered to be a specific state of mind.¹⁵⁷ Accordingly, jurisdictions that do not consider malice as a specific mental state refuse to recognize diminished capacity as a defense to this issue.¹⁵⁸

responsibility is only applicable in capital offenses, whereas guilty but mentally ill can be applied to any felony. Second, unlike diminished responsibility, guilty but mentally ill is not an ameliorative concept designed to reduce the severity of a penalty. See note 100 and accompanying text *supra*.

154. See, e.g., *People v. Nicolaus*, 65 Cal. 2d 866, 423 P.2d 787, 56 Cal. Rptr. 635 (1967); *Becksted v. People*, 133 Colo. 72, 292 P.2d 189 (1956); *State v. Gramenz*, 256 Iowa 134, 126 N.W.2d 285 (1964); *Starkweather v. State*, 167 Neb. 477, 93 N.W.2d 619 (1958); *State v. Vigliano*, 43 N.J. 44, 202 A.2d 657 (1964).

155. Reversing a conviction of first degree murder because the lower court refused to admit psychiatric testimony on the issue of premeditation, the court in *Ingles v. People*, 92 Colo. 518, 22 P.2d 1109 (1933), adopted the reasoning used in cases involving voluntary intoxication. The court noted that because the state allowed a defendant to negate premeditation by showing extreme intoxication, it would be anomalous if evidence of an abnormal mental condition were excluded from the same issue. Addressing the same question, the court in *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972), stated:

Neither logic nor justice can tolerate a jurisprudence that defines the elements of an offense as requiring a mental state such that one defendant can properly argue that his voluntary drunkenness removed his capacity to form the specific intent but another defendant is inhibited from a submission of his contention than an abnormal mental condition, for which he was in no way responsible, negated his capacity to form a particular specific intent, even though the condition did not exonerate him from all criminal responsibility.

Id. at 999.

156. See, e.g., *Johnson v. State*, 511 P.2d 118 (Alaska 1973); *People v. Conley*, 64 Cal. 2d 310, 411 P.2d 911, 49 Cal. Rptr. 815 (1966); *State v. Nichols*, 3 Ohio App. 2d 182, 209 N.E.2d 750 (1965); *State v. Schleigh*, 210 Or. 155, 310 P.2d 341 (1957); *State v. Green*, 78 Utah 580, 6 P.2d 177 (1931).

157. See *People v. Conley*, 64 Cal. 2d 310, 411 P.2d 911, 49 Cal. Rptr. 815 (1966) where the court defined malice to mean the mental state which prevented the defendant from comprehending his social obligation to act within the law. *Id.* at 322, 411 P.2d at 918, 49 Cal. Rptr. at 822; Lewin, *supra* note 145, at 1066-69.

158. *State v. Gramenz*, 256 Iowa 134, 126 N.W.2d 285 (1964) (trial court properly instructed jury to consider mental abnormality on issue of premeditation, but refusal to instruct jury to consider such evidence on issue of malice aforethought was also proper.); *State v. Tapia*, 81 N.M. 274, 466 P.2d 551 (1970) (adopted diminished capacity but rejected the malice formula of

Those few courts that have clearly recognized the distinction between specific and general intent crimes have extended the use of the diminished capacity defense to non-capital offenses as well. The defense has thus been applied to defendants charged with assault with malice aforethought,¹⁵⁹ assault with intent to commit rape,¹⁶⁰ escape,¹⁶¹ burglary¹⁶² and larceny.¹⁶³

CONCLUSION

*Actus non facit reum, nisi mens sit rea.*¹⁶⁴ This maxim, long embedded in Anglo-American law, is the cornerstone of the concept of criminal responsibility.¹⁶⁵ But the peculiar mental state of the mentally ill offender has created difficult problems in applying the maxim. The law has created four tests of insanity in the last 135 years. Not one of them has been immune to severe criticism nor free from barriers to effective implementation. Moreover, the *Durham* experience demonstrates that simply devising another test will not cure the defects.

The inherent defect in all the insanity tests is their all-or-nothing approach. The trier of fact must dogmatically determine whether the defendant is mad or bad; whether he should receive treatment or punishment. On the other hand, abolition of the insanity tests is an unconstitutional solution. While the guilty but mentally ill alternative does not solve the question of who should be held criminally responsible, it does modify the absolutist approach by legally recognizing that there are de-

Conley); see *State v. Schantz*, 98 Ariz. 200, 403 P.2d 521 (1965), *cert. denied*, 382 U.S. 1015 (1966); *Fox v. State*, 73 Nev. 241, 316 P.2d 924 (1957); *State v. Anderson*, 51 Wis. 2d 557, 187 N.W.2d 335 (1971). See generally Lewin, *supra* note 143, at 1069-70 (contending that treatment of malice as a specific mental state has little precedent in the common law).

159. *People v. Wells*, 33 Cal. 2d 330, 202 P.2d 53, *cert. denied*, 338 U.S. 836 (1949) (psychiatric evidence admissible to show that a defendant was incapable of assaulting a prison guard with malice).

160. *People v. Glover*, 257 Cal. App. 2d 502, 65 Cal. Rptr. 219 (1967) (successful use of the defense in a prosecution for assault with intent to commit rape may result in conviction for general intent crime of simple assault).

161. *Schwickrath v. People*, 159 Colo. 390, 411 P.2d 961 (1966) (evidence concerning defendant's diminished capacity to commit felonious escape admissible on element of specific intent to escape).

162. *People v. Taylor*, 220 Cal. App. 2d 212, 33 Cal. Rptr. 654 (1963) (error to exclude psychiatric evidence showing defendant did not possess the specific intent to steal).

163. *People v. Colavecchio*, 11 App. Div. 2d 161, 202 N.Y.S.2d 119 (1960) (psychiatric testimony admissible for purposes of showing defendant did not possess the specific intent to deprive an owner of his automobile).

164. Sayre, *supra* note 2, at 974 n.2. "The general rule of English law is, that no crime can be committed unless there is *mens rea*." (quoting *Williamson v. Norris*, [1899] 1 Q.B. 7, 14, *per Lord Russell*, C. J.).

165. Gardner, *supra* note 3, at 55.

grees of madness. The ability to entertain the requisite mens rea is thereby recognized, but with the understanding that it is the product of a mentally ill mind. Thus, the appropriate disposition looks toward psychiatric treatment.

Although guilty but mentally ill has modified the disposition, it has not modified the all-or-nothing approach to the preliminary finding of criminal responsibility. Michigan's approach fails to correlate the defendant's mental state with criminal responsibility. Thus, the additional use of the diminished capacity defense for the determination of which crime the guilty but mentally ill defendant should be held responsible leads to a more consistent application of the concept of mens rea.

The logic for combining both approaches with the insanity defense creates a compelling proposal. The defendant will be held fully responsible for the crime matching the degree of mens rea he is found to actually have entertained, and he will undergo treatment instead of nonproductive punishment. Thus, the law will realistically be able to balance the interests of the mentally ill defendants and society's interest in institutionalizing offenders.

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