NOTES

Sanity in Alaska: A Constitutional Assessment of the Insanity Defense Statute

I. INTRODUCTION

In 1982, Alaska adopted a new statutory standard for its insanity defense. While many other states have done likewise, Alaska's new standard is the most stringent in the nation. This note will assess the constitutionality of Alaska's revised insanity defense standard. Part II of this note will review the history of Alaska's current insanity defense statute. Part III will examine the constitutionality of various insanity defense standards. Part IV will argue that Alaska's current insanity statute, with its restrictive insanity standard, violates due process[1] and should therefore be substantially amended or repealed.

1. Some scholars have argued that the Eighth Amendment's proscription against cruel and unusual punishment prohibits the elimination of all or part of the traditional insanity defense. However, because due process concerns bear directly upon the standard actually used to determine insanity, this note will focus solely on the argument that Alaska's insanity defense statute violates the due process clause of the Fourteenth Amendment.

II. ALASKA'S CURRENT INSANITY DEFENSE STANDARD

A. The Development of Alaska's Insanity Defense

When John Hinckley was found not guilty by reason of insanity in 1982 for the attempted assassination of President Ronald Reagan, many states reacted by narrowing their insanity defense statutes. While this event fueled calls for reform in Alaska, a second incident, occurring a year later, sparked additional demand for reform. Charles Meach, a patient on release from the Alaska Psychiatric Institute, murdered four teenagers. Meach had previously been found not guilty by reason of insanity and had been incarcerated for treatment at the institute.[2] The Alaska Legislature responded to these events by: (1) narrowing the definition of insanity used to exonerate defendants from criminal responsibility,[3] (2) placing the burden of proving insanity on the defendant,[4] and (3) creating the increasingly-popular "guilty but mentally ill" ("GBMI") verdict.[5]

Historically, states have adopted one of several different standards for their insanity defenses. The first and still the most common method arose from an early English case known as *M'Naghten's Case*.[6] *M'Naghten* established the insanity standard known as the "right-wrong" test. Under this test, no criminal responsibility can be assigned to a defendant who was "labouring

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2. *See generally* Suzan E. DeBusk, Note, *Alaska's Insanity Defense and the "Guilty But Mentally Ill" Verdict*, 4 ALASKA L. REV. 171, 171 n.2 (1987). DeBusk argued that the present insanity definition is constitutionally sound. *Id.* at 177-81. DeBusk's argument, however, is no longer persuasive because it preceded the Alaska Supreme Court's restrictive interpretation of the current insanity defense. *See infra* text accompanying notes 25-31. DeBusk also concluded, however, that Alaska's insanity defense would be constitutionally sound even under a narrow interpretation, DeBusk at 181, basing her argument on State v. Korell, 690 P.2d 992 (Mont. 1984), a Montana Supreme Court decision upholding the abolition of the insanity defense. *But see infra* text accompanying notes 99-106 (arguing that *Korell* is not persuasive).

3. *See* ALASKA STAT. § 12.47.010 (1990).

4. *Id.* § 12.47.010(a).

5. *See id.* § 12.47.030. Whereas under a "not guilty by reason of insanity" ("NGRI") verdict, the defendant is actually acquitted, a GBMI verdict has consequences similar to a "guilty" verdict. The defendant is subjected to the same jail sentence as a guilty defendant. The only difference is that the state is required to provide psychiatric treatment for the GBMI defendant. DeBusk, *supra* note 2, at 172.

6. 8 Eng. Rep. 718 (1843).

under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong."[7] This standard exonerates defendants who are cognitively impaired. A cognitive defect is "understood as a disorder that undermines a person's ability to perceive reality accurately."[8]

Developments in psychiatry prompted some states to supplement the *M'Naghten* test with an "irresistible impulse" test,[9] which exonerates those defendants who, because of a mental impairment, are unable to control their conduct.[10] Years later, the American Law Institute ("ALI") set forth its recommended definition of insanity in the Model Penal Code.[11] Under the ALI standard, a defendant is excused from criminal responsibility if "at the time of such conduct as a result of mental disease or defect [the defendant] lacks substantial capacity either to appreciate the criminality . . . of his conduct or to conform his conduct to the requirements of law."[12] The first prong of the ALI test is a variation of the *M'Naghten* standard; the second prong — commonly referred to as the "volitional" prong — is similar to the "irresistible impulse" test in that it exonerates defendants suffering from defects of control. Although different in form, these tests all reflect a fundamental tenet of the criminal justice system: that "a certain level of moral and rational thought is necessary to hold a person criminally responsible for a crime."[13]

Prior to the Alaska Legislature's reform of the insanity laws, Alaska had adopted the ALI insanity standard.[14] Under Alaska's version of the ALI standard, defendants who "lack[ed] substantial capacity either to appreciate the wrongfulness of [their] conduct or to conform [their] conduct to the requirements of law"[15] were to be found not guilty by reason of insanity.

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7. *Id.* at 722.

8. Jodie English, *The Light Between Twilight and Dusk: Federal Criminal Law and the Volitional Insanity Defense,* 40 HASTINGS L.J. 1, 2 (1988).

9. *See infra* note 86 and accompanying text.

10. Juliet L. Ream, *Capital Punishment for Mentally Retarded Offenders: Is it Morally and Constitutionally Impermissible?*, 19 SW. U. L. REV. 89, 119 (1990).

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

12. *Id.*

13. *See* People v. Bieber, 835 P.2d 542, 550 (Colo. Ct. App. 1992) (Dubofsky, J., dissenting).

14. *See* ALASKA STAT. § 12.45.083 (1972) (repealed 1982).

15. *Id.*

Under the current statute, however, a defendant meeting this prior definition would be found guilty but mentally ill rather than not guilty by reason of insanity.[16] To be deemed not guilty by reason of insanity, the defendant must now show that, at the time of the crime, he or she "was unable, as a result of mental disease or defect, *to appreciate the nature and quality of [the] conduct.*"[17]

This new definition of insanity does not exculpate a defendant for volitional impairment, but only for cognitive impairment. Yet the test is more than a mere retreat to the *M'Naghten* standard. Unlike *M'Naghten*, Alaska's standard does not provide for exoneration based on the defendant's ability to distinguish between right and wrong. Exculpation is based solely upon whether the defendant

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16. *See id.* § 12.47.030 (1990). The GBMI standard is identical to the old NGRI standard: "A defendant is guilty but mentally ill if . . . the defendant lacked . . . the substantial capacity either to appreciate the wrongfulness of that conduct or to conform that conduct to the requirements of law." *Id.* In other words, the level of insanity that previously resulted in an acquittal now results in a guilty verdict. The Alaska Court of Appeals explained the change as follows:

> In summary, if we assume that three distinct classes of individuals are exempted from criminal responsibility under the A.L.I. test — first, those who were unable as a result of mental disease or defect to appreciate the nature and quality of their conduct; second, those who by virtue of mental disease or defect were unable to appreciate that their acts were wrong; and third, those who knew what they were doing and knew that it was wrong, but nevertheless were irresistibly impelled to perform the act — only the first is now expressly exempt from criminal responsibility under Alaska law. The latter two categories are guilty but mentally ill.

Hart v. State, 702 P.2d 651, 658 (Alaska Ct. App. 1985). Under the old statute, all three categories of defendants would have been exempt from criminal responsibility. *See supra* text accompanying note 15.

17. ALASKA STAT. § 12.47.010(a) (1990) (emphasis added). The statute further provides that "[e]vidence of a mental disease or defect that is manifested only by repeated criminal or other antisocial conduct is not sufficient to establish the affirmative defense under (a) of this section." *Id.* § 12.47.010(c).

was able to "appreciate" the actual act committed.[18] The Alaska Court of Appeals has phrased the standard as follows:

> To "appreciate" the nature and quality of an act means to understand or comprehend the act. A person is "unable to appreciate the nature and quality of his conduct" for purposes of the insanity defense if, because of mental disease or defect, he did not understand that he was performing the acts which are part of the crime with which he is charged. . . . "[K]nowing" that you are engaging in conduct is apparently the same as understanding or appreciating the nature of that conduct.[19]

The legislative history of the statute is remarkably clear. The House Journal report on the enactment of this section states that the legislature intended to adopt only one element of the *M'Naghten* test.[20] The legislature rejected the "right-wrong" element of *M'Naghten* which required a defendant to appreciate the wrongfulness of his or her conduct in order to be held responsible for the crime.[21] The report recognized that the new definition of insanity would limit the defense "to persons suffering from the most extreme forms of mental illness."[22] The report even included examples of the types of defendants that may be able to successfully raise an insanity defense under the new standard:

> A person who could successfully establish the elements of the revised insanity defense is the defendant who, as a result of a mental disease or defect is unable to realize that he is shooting someone with a gun when he pulls the trigger on what he believes to be a water pistol, or a murder defendant who believes he is attacking the ghost of his mother rather than a

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18. The Alaska statute gauges the defendant's ability "to appreciate the nature and quality of that conduct." *Id.* § 12.47.010(a). This language is susceptible to varying interpretations: "[k]nowing the nature and quality of an act can refer to the physical aspects of an act — for example, whether the defendant knows he is firing a gun — or it can refer to all aspects of an act including its likely consequences to the actor and others." Hart v. State, 702 P.2d 651, 654 n.2 (Alaska Ct. App. 1985). The Alaska Supreme Court, in State v. Patterson, 740 P.2d 944 (Alaska 1987), adopted the more restrictive interpretation. *Id.* at 949 (holding "that AS 12.47.010(a) enacts only the first prong of the *M'Naghten* test"). In an earlier case, however, the Alaska Supreme Court had recognized that similar language could be interpreted to encompass a right-wrong assessment. *See* Chase v. State, 369 P.2d 997, 1002-03 (Alaska 1962).

19. Barrett v. State, 772 P.2d 559, 570-71 (Alaska Ct. App. 1989).

20. H. JOURNAL SUPP. NO. 64, at 7-8 (June 2, 1982).

21. *Id.*

22. *Id.*

> living human being. Conversely, this defense would *not* apply to a defendant who contends that he was instructed to kill by a hallucination, since [he] would still realize the nature and quality of his act . . . .[23]

A legislative report in the House Journal recognized that "[u]nder this new limited affirmative defense of insanity, many persons who would have been found not guilty by reason of insanity under former [Alaska Statutes section] 12.45.083 will now be found guilty and sentenced under the criminal law like any other defendant."[24]

B. Judicial Interpretation of Scope of Statute

The revised insanity defense statute has been reviewed only once by the Alaska Supreme Court. In *State v. Patterson*,[25] the court considered whether the statutory definition of insanity encompassed the *M'Naghten* test in its entirety (appreciation of the physical act and knowledge of wrongdoing), or whether the definition excluded the "right-wrong" determination.

Kimberly Patterson was charged with first-degree robbery for brandishing a loaded gun and demanding money from a man at the Anchorage International Airport.[26] Patterson raised the affirmative defense of insanity, but the jury found her guilty but mentally ill.[27] In the jury instruction, the superior court interpreted Alaska's insanity defense narrowly, finding that it incorporated only the first prong of the *M'Naghten* test.[28]

The court of appeals reversed the conviction and ruled that the statute should be read to include both prongs of the *M'Naghten* test.[29] Recognizing the inconsistency between the court of appeals' interpretation of Alaska Statutes section 12.47.010(a) and the legislative history, the Alaska Supreme Court stated that the "House Judiciary Committee report without doubt supports the . . . position that the legislature intended to adopt only the first prong of *M'Naghten*."[30] The *Patterson* court reversed the court of appeals'

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23. *Id.*
24. *Id.* at 6-7.
25. 740 P.2d 944 (Alaska 1987).
26. *Id.* at 945.
27. *Id.*
28. *Id.* at 946.
29. *Id.*
30. *Id.* at 947; *see supra* text accompanying notes 20-24.

broad interpretation of the insanity defense and remanded the case for a new trial.[31]

III. CONSTITUTIONAL BACKGROUND

The Alaska statute, with its narrow insanity defense standard, has been challenged as a violation of due process under the state and federal constitutions alternatively on the grounds that it (1) does not consider the defendant's ability to conform his conduct to the requirements of law and (2) does not consider the defendant's ability to distinguish right from wrong. The former issue has been tentatively resolved by the Alaska Court of Appeals, while the latter remains an open question.

A. Statute without Volitional Prong Upheld

The United States Supreme Court, in *Leland v. Oregon*,[32] determined that the "adoption of the irresistible impulse test was not 'implicit in the concept of ordered liberty'" and ruled that the absence of such a test did not render an insanity statute unconstitutional.[33] Some scholars cite the *Leland* decision as an indication that the United States Supreme Court will not offer constitutional protection for the insanity defense.[34] However, that decision is "properly read to hold that no one test of insanity has been proven so scientifically reliable as to amount to a constitutional prohibition of the use of any other test."[35]

When the issue came before the Alaska Court of Appeals in *Hart v. State*,[36] the court adopted the *Leland* position[37] and ruled

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31. *Patterson*, 740 P.2d at 949.

32. 343 U.S. 790 (1952).

33. *Id.* at 800-01 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)); *see infra* text accompanying note 57.

34. DeBusk, *supra* note 2, at 172. The United States Supreme Court has been hesitant to articulate a constitutionally mandated insanity standard for fear that such a rule "would reduce, if not eliminate . . . fruitful experimentation [with different standards], and freeze the developing productive dialogue between law and psychiatry into a rigid constitutional mold." Powell v. Texas, 392 U.S. 514, 536-37 (1968). The Court commented that "[n]othing could be less fruitful than for this Court to be impelled into defining some sort of insanity test in constitutional terms." *Id.* at 536.

35. State v. Searcy, 798 P.2d 914, 923 (Idaho 1990) (McDevitt, J., dissenting).

36. 702 P.2d 651 (Alaska Ct. App. 1985).

that the absence of a volitional prong does not violate the Alaska constitution.[38] In *Hart*, it was undisputed that the defendant could distinguish right from wrong.[39] The defendant argued, however, that his inability to conform his conduct to the requirements of law should excuse him from criminal responsibility.[40] Hart therefore challenged the Alaska statute on the ground that any statutory scheme not allowing irresistible impulse as an exemption from criminal responsibility was unconstitutional.[41]

The *Hart* court concluded that since the United States Supreme Court rejected a similar argument in *Leland v. Oregon*,[42] Hart had no claim under federal constitutional law.[43] The *Hart* court further ruled that there was no support for a different holding under Alaska constitutional law,[44] noting that the Alaska Supreme Court expressly rejected the "irresistible impulse" test in *Chase v. State*.[45] The *Hart* court held that Alaska was constitutionally permitted to eliminate the "irresistible impulse" component of the insanity defense.[46]

The insanity statutes in both *Leland* and *Hart* were understood to include a right-wrong assessment. The *Leland* and *Hart* holdings, therefore, addressed only the constitutionality of the volitional prong of the insanity defense; neither court ruled on whether the absence of a right-wrong assessment was constitutional. The statute at issue in *Leland*, according to the *Leland* Court, "amount[ed] to no more than a legislative adoption of the 'right and wrong' test of legal insanity in preference to the 'irresistible impulse' test."[47] And, although the dispute in *Hart* involved Alaska's current insanity

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37. *See id.* at 658-59.

38. *Id.* at 659. The *Hart* decision was never reviewed by the Alaska Supreme Court.

39. *Id.* at 658.

40. *Id.*

41. *Id.*

42. 343 U.S. 790, 801 (1952) (holding that adoption of the irresistible impulse test was not "implicit in the concept of ordered liberty").

43. Hart v. State, 702 P.2d 651, 658 (Alaska Ct. App. 1985).

44. *Id.* at 659.

45. *Id.* (citing Chase v. State, 369 P.2d 997, 999 (Alaska 1962)).

46. *Id.* at 659, 664. For further discussion of Alaska case law on the insanity defense and the guilty but mentally ill statute, see DeBusk, *supra* note 2, at 174-76.

47. Leland v. Oregon, 343 U.S. 790, 800 (1952).

defense statute (Alaska Statutes section 12.47.010), the *Hart* court rendered its decision prior to the Alaska Supreme Court's narrow interpretation of section 12.47.010.[48] Language similar to that found in section 12.47.010 had previously been interpreted by the Alaska Supreme Court to include a right-wrong assessment.[49] The *Hart* court decided the constitutional issue against the backdrop of this earlier interpretation.[50] Both the *Leland* and *Hart* decisions, therefore, bear only upon the constitutionality of the volitional component of the insanity defense; neither affects the validity of the right-wrong assessment.

B. Statute without Right-Wrong Assessment: An Open Issue

In *State v. Patterson,*[51] discussed in an earlier section, the defendant challenged the constitutionality of the Alaska insanity statute on the ground that it improperly "permits [a defendant] to be adjudged guilty in the absence of any conscious wrongdoing or criminal intent."[52] The Alaska Supreme Court declined to rule on the constitutionality of the statute, however, on the ground that the issue was not ripe for judicial review.[53] It therefore remains an

48. While *Hart* was decided in 1985, the decision in *State v. Patterson,* which determined that Alaska's current insanity statute excluded a right-wrong assessment, was rendered in 1987. *See supra* text accompanying notes 25-31.

49. *See* Chase v. State, 369 P.2d 907, 1002-03 (Alaska 1962). The *Chase* court recognized that the phrase "know the nature and quality of his act" (which is nearly identical to the language in Alaska's current insanity statute) could reasonably be understood to be synonymous with a test assessing a defendant's ability to "know whether the act was wrong." *Id.*; see *supra* note 18 and accompanying text.

50. *See* Hart v. State, 702 P.2d 651, 655, 659 (Alaska Ct. App. 1985). The *Hart* court observed that "[o]ur law is . . . predicated on the assumption that men and women are moral agents who have the power to choose between good and evil." *Id.* at 659.

51. 740 P.2d 944 (Alaska 1987); see *supra* text accompanying notes 25-31.

52. *Patterson,* 740 P.2d at 945. The defendant argued that the Alaska statute was unconstitutional as cruel and unusual punishment, as a violation of equal protection and as a violation of due process. *Id.*

53. *Id.* at 949 n.18. The court explained that since the case was remanded to the superior court for a new trial, the issue would not become ripe unless the jury found Patterson guilty but mentally ill at the new trial. The court stated, "[w]e consider it appropriate to pass only on the constitutionality of a statute that is essential to the determination of the case presented." *Id.*

open question whether an insanity defense standard must consider the defendant's ability to distinguish right from wrong.

IV. THE CONSTITUTIONALITY OF ALASKA'S INSANITY DEFENSE

A. Introduction

The English common law system of criminal justice has always recognized that "a certain level of moral and rational thought is necessary to hold a person criminally responsible."[54] Courts have noted that "[t]he common law proceeds upon an idea that before there can be a crime there must be an intelligence capable of comprehending the act prohibited . . . and that the act is wrong."[55] A plea of insanity exists as an affirmative defense[56] in order to ensure that this principle will not be violated — that those who are unable to distinguish right from wrong will not be criminally punished. The right-wrong component of the insanity defense, therefore, is "implicit in the concept of ordered liberty" and deserves recognition as a fundamental right.[57] The Alaska statute, however, has removed the right-wrong assessment from the insanity defense and has narrowed the definition of insanity to the point of excluding all but the most severely afflicted, allowing the historic beneficiaries of the defense — those who can't distinguish right from wrong — to be punished as criminals. This *de facto* elimination of

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54. People v. Bieber, 835 P.2d 542, 550 (Colo. Ct. App. 1992) (Dubofsky, J., dissenting).

55. Sinclair v. State, 132 So. 581, 583 (Miss. 1931) (per curiam) (Ethridge, J., concurring).

56. As an affirmative defense, a plea of insanity does not seek to negate *mens rea*, but offers, as a mitigating factor, the absence of criminal blameworthiness. While *mens rea* is generally satisfied by a showing of "minimal awareness and purposefulness," the insanity defense has traditionally focused on the defendant's ability to distinguish right from wrong and his ability to conform his conduct to the law. *See* State v. Searcy, 798 P.2d 914, 935 (Idaho 1990) (McDevitt, J., dissenting); *see infra* text accompanying notes 84-87. The insanity defense, therefore, "is generally viewed as separate and distinct from asserting the state's inability to prove *mens rea*." Barrett v. State, 772 P.2d 559, 563 (Alaska Ct. App. 1989).

57. Palko v. Connecticut, 302 U.S. 319, 325 (1937), *overruled on other grounds by* Benton v. Maryland, 395 U.S. 784 (1969) (stating the classic test for determining a fundamental right). The United States Supreme Court still utilizes the *Palko* test. *See, e.g.,* Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S. Ct. 2791, 2858 (1992).

the insanity defense under Alaska Statutes section 12.47.010 is therefore unconstitutional as a violation of due process.

B. Insanity Defense: A Fundamental Right

The Due Process Clause of the Fourteenth Amendment protects those rights that "have been found to be implicit in the concept of ordered liberty" such that "a fair and enlightened system of justice would be impossible without them."[58] To abolish such a right would "violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"[59] In determining whether a doctrine is implicit in the concept of ordered liberty, "the proper focus . . . is the pervasiveness of the doctrine in the history of the common law."[60] The "fact that a practice is followed by a large number of states" is also an indication of its fundamental character.[61] An insanity defense which assesses the defendant's ability to distinguish right from wrong meets these requirements and therefore deserves recognition as a fundamental right.

1. *Pervasiveness in the Common Law.* The insanity defense has been recognized as an excuse for criminal conduct as early as King Edward's use of pardons for insane criminals in the late 1200's.[62] The insanity defense can be traced through the

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58. *Palko,* 302 U.S. at 325.

59. *Id.* (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

60. State v. Searcy, 798 P.2d 914, 928 (Idaho 1990) (McDevitt, J., dissenting); *see also* Moore v. City of East Cleveland, 431 U.S. 494, 503 n.12 (1977) (Fundamental rights are those rights which "reflect[] a 'strong tradition' founded on 'the history and culture of Western civilization.'" (quoting Wisconsin v. Yoder, 406 U.S. 205, 232 (1972))) (Powell, J., plurality opinion); Bowers v. Hardwick, 478 U.S. 186, 192 (1986) (examining the common law treatment of sodomy to determine whether a fundamental right to engage in consensual sodomy exists under the Constitution). For the various inquiries made when searching for substantive due process rights, see LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 11-4 (2d ed. 1988).

61. *See* Leland v. Oregon, 343 U.S. 790, 798 (1952) (citing Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

62. *See generally Searcy,* 798 P.2d at 928-31 (McDevitt, J., dissenting) (detailing both the English and American common law history of the insanity defense and establishing that the defense has been firmly ingrained in both); Judith A. Northrup, *Guilty But Mentally Ill: Broadening the Scope of Criminal Responsibility,* 44 OHIO ST. L.J. 797, 801 (1983) (briefly tracing the early history of the defense

writings of many English commentators, including Bracton, Fitzherbert, Coke, Hale and Blackstone.[63] The earliest case of a jury acquittal on the basis of "unsound mind" was in 1505.[64] Scholars have identified several English decisions that were important in the development of the test for legal insanity.[65] These cases led up to the 1843 landmark *M'Naghten* case, which established the right-wrong test as the approach to the insanity defense in England and the United States.[66]

Yet, even before *M'Naghten*, American courts recognized as a defense the defendant's inability to distinguish good from evil.[67] In *re Clark*,[68] the court instructed the jury "'that no man could be held responsible for an act committed while deprived of his reason.'"[69] The ultimate question, the court stated, was "'whether the prisoner, at the time he committed [the] offence, had sufficient capacity to discern good from evil.'"[70] Similarly, in *In re Ball*,[71] the court charged the jury to find the existence of insanity only if "'at the time [the defendant] committed the offence, he was [not]

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and extensively tracing the modern American history).

63. *See* Northrup, *supra* note 62, at 802; Benjamin B. Sendor, *Crime as Communication: An Interpretive Theory of the Insanity Defense and the Mental Elements of Crime*, 74 GEO. L.J. 1371, 1372-73 (1986); DONALD H. J. HERMANN, THE INSANITY DEFENSE: PHILOSOPHICAL, HISTORICAL AND LEGAL PERSPECTIVES 19-20 (1983); Jonas Robitscher & Andrew Ky Haynes, *In Defense of the Insanity Defense*, 31 EMORY L.J. 9, 11-13 (1982); S. SHELDON GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW 123-38 (1925).

64. Robitscher & Haynes, *supra* note 63, at 11.

65. For a discussion of these cases, see HERMANN, *supra* note 63, at 28-34; Sendor, *supra* note 63, at 1376-80; GLUECK, *supra* note 63, at 139-53.

66. *See generally The Insanity Defense ABA and APA Proposals for Change*, 7 MENTAL DISABILITY L. REP. 136, 142 (1983) [hereinafter *Insanity Defense*]. "American courts did not begin to strike out independently of English law until after . . . *M'Naghten's Case*." GLUECK, *supra* note 63, at 156. Thus, *M'Naghten* is often the starting point scholars use to assess the American history of the insanity defense independently from the English history. *See* Northrup, *supra* note 62, at 802; Sendor, *supra* note 63, at 1380-81.

67. GLUECK, *supra* note 63, at 154.

68. 1 City Hall Recorder 176 (N.Y. 1816).

69. GLUECK, *supra* note 63, at 154 (quoting *Clark*, 1 City Hall Recorder at 176).

70. *Id.* (quoting *Clark*, 1 City Hall Recorder at 176).

71. 2 City Hall Recorder 85 (N.Y. 1817).

capable of distinguishing good from evil.'"[72] These two decisions provided the principles of law upon which American courts relied in the area of insanity until *M'Naghten*.[73]

Near the turn of the twentieth century, some states unsuccessfully attempted to abolish the insanity defense. These attempts all failed, in part, because the supreme courts of each state recognized that the insanity defense was a fundamental part of the criminal justice system.

In *State v. Strasburg*,[74] for example, the Washington Supreme Court overturned an assault conviction and struck down a statute that abolished the insanity defense, reasoning that:

> [T]he concurrence of the will, when it has its choice either to do or to avoid the fact in question, [is] the only thing that renders human actions either praiseworthy or culpable. Indeed, to make a complete crime cognizable by human laws, there must be both a will and an act.[75]

The court concluded that the insanity defense was "firmly fixed in our system of jurisprudence" and "at the time of the adoption of our Constitution . . . was in full force in the territory of Washington as a part of the common law."[76]

Mississippi also tried to abolish the insanity defense. In *Sinclair v. State*,[77] the Mississippi Supreme Court considered a statute that precluded a defendant from asserting insanity as a defense in a murder case, but allowed evidence proving insanity to be admitted

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72. GLUECK, *supra* note 63, at 155 (quoting *Ball*, 2 City Hall Recorder at 85).

73. *Id.* at 156.

74. 110 P. 1020 (Wash. 1910).

75. *Id.* at 1021-22 (invalidating statute providing that "[i]t shall be no defense . . . that . . . [a defendant] was unable, by reason of his insanity . . . to comprehend the nature and generality of the act committed, or to understand that it was wrong").

76. *Id.* at 1022. The court also grappled with the definition of the phrases "due process of law" and "right to trial by jury," and determined that the right to trial by jury meant the right to have the jury decide every substantive fact going to the issue of guilt or innocence. *Id.* at 1023. The sanity of the defendant had always been a substantive fact which entitled the defendant to a trial by jury on that fact. *Id.* at 1024. The court, therefore, determined that the statute deprived the defendant of liberty without due process of law, specifically, the right to trial by jury. *Id.* at 1025.

77. 132 So. 581 (Miss. 1931) (per curiam).

as a mitigating factor.[78] The court, in a per curiam opinion, concluded that the statute was unconstitutional as a violation of due process.[79] The court's reasoning was disclosed in the concurring opinions.[80] Justice Ethridge explained in his concurrence that "[i]nsanity to the extent that the reason is totally destroyed so as to prevent the insane person from knowing right from wrong . . . has always been a complete defense to all crimes from the earliest ages of the common law."[81] It has been "[s]o closely . . . woven into the criminal jurisprudence of English speaking countries," Justice Ethridge concluded, "that it has become a part of the fundamental laws thereof, to the extent that a statute which attempts to deprive a defendant of the right to plead it will be unconstitutional and void."[82]

2. *Current Use by the States.* The general use and acceptance of a practice is also an indication of its fundamental character. The United States Supreme Court has stated:

> [While] [t]he fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process, . . . it is plainly worth considering in determining whether the practice "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[83]

Currently, forty-seven states recognize insanity as an affirmative defense and forty-five of those states utilize an insanity defense standard that assesses a defendant's ability to distinguish right from

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78. *Id.* at 582.

79. *Id.*

80. *Id.*

81. *Id.* at 583 (Ethridge, J., concurring).

82. *Id.* at 584 (Ethridge, J., concurring). Louisiana also unsuccessfully attempted to abolish the insanity defense. In State v. Lange, 123 So. 639 (La. 1929), the Supreme Court of Louisiana addressed the constitutionality of a statute that vested absolute power in a "lunacy commission" to determine whether a defendant was insane at the time of the commission of a crime. As in *Strasburg*, see *supra* note 76, the statute precluded a defendant from having the issue of his or her sanity tried by a jury. *Lange*, 123 So. at 642. In a short decision, the court held that the statute violated the Louisiana Constitution because it deprived the defendant of his constitutional right to have the issue of his sanity tried before a jury. *Id.*

83. Leland v. Oregon, 343 U.S. 790, 798 (1952) (citing Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

wrong. Sixteen states employ the *M'Naghten* standard or some slight variation thereof.[84] Six states utilize a definition of insanity that exculpates those defendants who were unable to distinguish right from wrong or who did not understand that their conduct was wrong.[85] Seven states combine the *M'Naghten* standard and the "irresistible impulse" test,[86] adding a volitional element that exculpates a defendant who is unable to conform her conduct to the requirements of law. Sixteen states use a version of the ALI "substantial capacity" test.[87] Only New Hampshire has declined to

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84. *See, e.g.*, ALA. CODE § 13A-3-1 (Supp. 1992) ("was unable to appreciate the nature and quality or wrongfulness of his acts"); ARIZ. REV. STAT. ANN. § 13-502 (1989) ("not to know the nature and quality of the act or, if such person did know, that such person did not know that what he was doing was wrong"); CAL. PENAL CODE § 25(b) (West 1988) ("incapable of knowing or understanding the nature and quality of his or her act and of distinguishing right from wrong at the time of the commission of the offense"); *see also* Miller v. State, 532 So.2d 1290, 1292 (Fla. Dist. Ct. App. 1988); Wheeler v. State, 344 So.2d 244 (Fla. 1977); IOWA CODE ANN. § 701.4 (West Supp. 1992); State v. Baker, 819 P.2d 1173, 1187 (Kan. 1991); MINN. STAT. ANN. § 611.026 (West 1987); Roundtree v. State, 568 So. 2d 1173, 1181 (Miss. 1990); State v. Lesiak, 449 N.W.2d 550, 552 (Neb. 1989); Ford v. State, 717 P.2d 27 (Nev. 1986) (*M'Naghten*); N.J. STAT. ANN. § 2C:4-1 (West 1992); State v. Bonney, 405 S.E.2d 145 (N.C. 1991) (*M'Naghten*); Pugh v. State, 781 P.2d 843 (Okla. Crim. App. 1989) (*M'Naghten*); Commonwealth v. Heidnik, 587 A.2d 687, 690 (Pa. 1991) (citing Commonwealth v. Banks, 521 A.2d 1 (Pa.), *cert. denied*, 484 U.S. 873 (1987)) (*M'Naghten*); Price v. Commonwealth, 323 S.E.2d 106, 109 (Va. 1984) (*M'Naghten*); WASH. REV. CODE ANN. § 9A.12.010 (West 1988).

85. GA. CODE ANN. § 16-3-2 (1992); IND. CODE ANN. § 35-41-3-6 (Burns 1985); LA. REV. STAT. ANN. § 14:14 (West 1986); S.C. CODE ANN. § 17-24-10 (Law. Co-op. Supp. 1992); S.D. CODIFIED LAWS ANN. § 22-1-2(20) (1988); TEX. PENAL CODE ANN. § 8.01(a) (West Supp. 1993). The standard followed by these courts modifies the *M'Naghten* test by eliminating the language regarding the defendant's ability to appreciate the nature and quality of her conduct.

86. *See, e.g.*, ARK. CODE ANN. § 5-2-312 (Michie 1987) ("lacked capacity . . . to conform his conduct to the requirements of law or to appreciate the criminality of his conduct"); COLO. REV. STAT. § 16-8-101 (1986) ("incapable of distinguishing right from wrong with respect to that act"); *see also* Hendershott v. People, 653 P.2d 385 (Colo. 1982), *cert. denied*, 459 U.S. 1225 (1983); MO. ANN. STAT. § 562.086 (Vernon 1979); State v. Neely, 819 P.2d 249, 254 (N.M. 1991); State v. Werner 796 P.2d 610 (N.M. Ct. App. 1990); State v. Staten, 247 N.E.2d 293 (Ohio 1969); VT. STAT. ANN. tit. 13, § 4801(a)(1) (Supp. 1992); State v. Parsons, 381 S.E.2d 246, 251 (W. Va. 1989).

87. *See, e.g.*, CONN. GEN. STAT. ANN. § 53a-13 (West 1985) ("lacked substantial capacity . . . either to appreciate the wrongfulness of his conduct or to control his

establish any specific standard,[88] and only Alaska has enacted a standard that excludes a right-wrong assessment.[89]

Despite the general acceptance of the insanity defense by the majority of states, a few states insist that an insanity defense is not a fundamental right.[90] These states do not recognize insanity as an affirmative defense; they only allow evidence of mental disease to disprove the *mens rea* element.[91] Such an approach is commonly referred to as the "*mens rea* approach."[92] For example, in *State v. Korell,*[93] the Montana Supreme Court upheld a statutory scheme[94] which eliminated insanity as a separate defense but allowed

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conduct within the requirements of the law"); DEL. CODE ANN. tit. 11, § 401 (1987) ("lacked substantial capacity to appreciate the wrongfulness of his conduct"); HAW. REV. STAT. § 704-400 (1988) ("lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law"); *see also* ILL. REV. STAT. ch. 38, para. 1005-1-11 (1982); KY. REV. STAT. ANN. § 504.060(4) (Baldwin 1991); ME. REV. STAT. ANN. tit. 17-A, § 39 (West Supp. 1991); MD. CODE ANN., CRIM. LAW. § 12-108 (1990); Commonwealth v. Louraine, 453 N.E.2d 437, 444 n.11 (Mass. 1983); MICH. COMP. LAWS ANN. § 768.21a (West 1982); N.Y. PENAL LAW § 40.15 (McKinney 1987); N.D. CENT. CODE § 12.1-04.1-01 (1985); OR. REV. STAT. § 161.295 (1990); State v. Johnson, 399 A.2d 469, 476 (R.I. 1979); TENN. CODE ANN. § 39-11-501 (1991); WIS. STAT. ANN. § 971.15(1) (West 1985); WYO. STAT. § 7-11-304 (1987). The standard found in these jurisdictions differs from the hybrid *M'Naghten*-irresistible impulse test in that it requires only "substantial" rather than a complete inability to conform one's conduct to legal requirements.

88. State v. Plante, 594 A.2d 1279, 1283 (N.H. 1991) ("There is no specific test or criterion which determines the issue of mental illness. Rather, any test which measures the capacity of the defendant is a matter of evidence, which falls within the province of the jury to be considered like any other factual issue." (citations omitted)).

89. *See* State v. Patterson, 740 P.2d 944, 947 (Alaska 1987).

90. *See, e.g.,* State v. Korell, 690 P.2d 992, 999 (Mont. 1984).

91. The three states are Idaho, Montana and Utah. IDAHO CODE § 18-207 (1987) ("mental condition shall not be a defense to any charge of criminal conduct" but "expert evidence on the issues of *mens rea*" is admissible); *see* MONT. CODE ANN. § 46-14-102 (1989) (abolishing defense but allowing evidence of mental disease or defect to negate *mens rea*); UTAH CODE ANN. § 76-2-305 (Supp. 1992) (mental illness only a defense to *mens rea*).

92. *See Insanity Defense, supra* note 66, at 137.

93. 690 P.2d 992 (Mont. 1984). For a full discussion of the court's opinion, see James D. Green, State v. Korell, *Montana Sees No Insanity in the Constitution*, 21 WILLAMETTE L. REV. 944 (1985).

94. *See* MONT. CODE ANN. § 46-14-102 (1989); *id.* § 46-14-311.

evidence of "mental disease or defect" to negate *mens rea*[95] and influence sentencing considerations.[96] Because of these "safeguards," the court rejected the argument that the insanity defense was a fundamental right[97] and upheld the statutory scheme as constitutional.[98]

Statutory schemes such as Montana's, however, are inadequate substitutes for an insanity defense because they allow defendants who are unable to distinguish right from wrong to be punished as criminals. For instance, under the Montana statute, defendants who "act with a proven criminal state of mind" will be held accountable for their acts, "regardless of [their] motivation or mental condition."[99] Such defendants may be spared incarceration by the sentencing judge, but they will never escape the stigma of a guilty verdict — which by itself constitutes criminal punishment: "The accused during a criminal prosecution has at stake interest of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction."[100] As recognized by the *Korell* court, Montana's statutory scheme "does not further the criminal justice goals . . . in cases where an accused suffers from a mental disease that renders him incapable of appreciating the criminality of his conduct."[101] By allowing defendants who are

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95. *Korell,* 690 P.2d at 999-1000.

96. The *Korell* court pointed out that "a defendant can be sentenced to imprisonment only after the sentencing judge specifically finds that the defendant was *not* suffering, at the time he committed the offense, from a mental disease." *Id.* at 1000. If the judge concluded that the defendant was in fact suffering from a mental disease or defect, the mandatory minimum sentencing requirements would be waived, and the defendant could be placed in an "appropriate institution for custody, care and treatment." *Id.* at 997.

97. *See id.* at 999 (distinguishing *State v. Lange, Sinclair v. State, State v. Strasburg* on ground that the statutes involved in these case "precluded *any* trial testimony of mental condition"); *see supra* notes 74-82 and accompanying text.

98. *Korell,* 690 P.2d at 1001 (finding that the statute did not violate the 8th Amendment).

99. *Id.* at 1002.

100. *In re* Winship, 397 U.S. 358, 363 (1970).

101. *Korell,* 690 P.2d at 1002. This statement highlights a critical weakness with the Montana statutory scheme. Because the *mens rea* element is generally met by a minimal showing of mental ability, it will likely be satisfied despite evidence of severe mental disease. *See* State v. DePlonty, 749 P.2d 621, 627 (Utah 1987) ("[A]

unable to distinguish right from wrong to be criminally punished, the Montana statute violates a fundamental concept of the criminal justice system. "The issue of criminal blameworthiness merits deeper inquiry [than whether the defendant harbored the requisite *mens rea* for the offense] because it implies a certain quantity of knowledge and intent transcending a minimal awareness and purposefulness."[102]

The American Bar Association agrees that the *mens rea* approach should be "rejected out of hand."[103] The ABA states that "[s]uch a jarring reversal of hundreds of years of moral and legal history would constitute an unfortunate and unwarranted overreaction to the Hinckley verdict."[104] Narrowing the extent to which mental disease could be taken into account in this way would, according to the ABA, require those who administer the law to condemn as criminal the acts of defendants who were "uncontrovertibly psychotic and grossly out of touch with reality" such that they could not appreciate the wrongfulness of their conduct.[105] Such a result, the ABA concluded, offends the moral tenets of the criminal law.[106]

An insanity defense which assesses the defendant's ability to distinguish right from wrong has always been part of the common law.[107] "The idea that the insane should not be punished for otherwise criminal acts has been firmly entrenched in the law for at least one thousand years."[108] The American Psychiatric Associa-

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defendant can be found mentally ill even though his mental illness does not entirely negate the *mens rea* of the crime charged."). Under the Montana statute, therefore, the majority of mentally ill defendants will likely be found guilty. Indeed, the Montana statute seems to recognize the high probability of this result by requiring the judge to consider the defendant's mental condition before sentencing. *Korell,* 690 P.2d at 1000; *see also supra* note 96.

102. State v. Searcy, 798 P.2d 914, 935 (Idaho 1990) (McDevitt, J., dissenting).

103. *Insanity Defense, supra* note 66, at 137.

104. *Id.*

105. *Id.*

106. *Id.*

107. *See* People v. Bieber, 835 P.2d 542, 550 (Colo. Ct. App. 1992) ("Since the inception of the English common law system of criminal justice, insanity has been recognized as a defense to crimes.") (Dubofsky, J., dissenting).

108. Robitscher & Haynes, *supra* note 63, at 10; *see also* Sendor, *supra* note 63, at 1380 ("[F]or six centuries before *M'Naghten's Case*, commentators, judges, and attorneys identified a number of specific capacities as relevant to the exculpatory

tion notes that "[l]ong before there was psychiatry, there was the insanity defense."[109] A doctrine so widely recognized as fundamental to both English and American jurisprudence clearly represents a principle of justice deeply "rooted in the traditions and conscience of our people."[110] The concept of ordered liberty must therefore include a doctrine with such a concrete and long history.

C. The *De Facto* Elimination of the Insanity Defense Violates Due Process

Alaska's stringent insanity defense statute did not merely alter its predecessor. Although in theory the 1982 statute enacted a revised formulation of the insanity defense, in reality the scope of the statute is so narrow that a successful insanity defense is virtually impossible. The law "requires conviction of all but those who suffer from the most extreme forms of mental illness, such as the man who believes he is squeezing lemons when he strangles his wife."[111] This approach "narrows legal insanity almost to the point of nonexistence."[112]

Because the statute disadvantages those who unsuccessfully raise the insanity defense, the statute also deters those defendants on the margin (those who may meet the narrow test) from utilizing it. If a defendant fails to prove the insanity defense, the jury is free to find the defendant "guilty but mentally ill."[113] A defendant found "guilty but mentally ill" who continues to receive mental health treatment may not be released on furlough or parole,[114] while a "guilty" defendant is entitled to such privileges.

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character of the insanity defense.").

109. See *Insanity Defense, supra* note 66, at 136.

110. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

111. Northrup, *supra* note 62, at 811.

112. *Id.*

113. ALASKA STAT. § 12.47.040 (1990).

114. *Id.* § 12.47.050(d) ("[A] defendant receiving treatment under (b) of this section may not be released . . . on furlough . . . or . . . on parole."). Another section requires that mental health treatment continue until the defendant no longer suffers from a mental disease or defect that causes the defendant to be dangerous to the public peace or safety. *Id.* § 12.47.050(b). Although it is possible that the mental health treatment of a guilty but mentally ill offender would be discontinued, thus rendering that offender eligible for parole or furlough, the offender would still be better off never having raised the issue of mental illness.

Although the insanity defense in Alaska still exists as codified in the statute, it is not a viable option for any defendant except the most severely afflicted. Interviews with practicing attorneys in Alaska indicate that the new statute has all but eliminated the insanity defense.[115] Such a restriction is no less unconstitutional than a total denial of the defense.[116]

V. CONCLUSION

A. Constitutional Argument

The State of Alaska has instituted the most stringent insanity defense standard in the nation. The statute was adopted, not as a reasoned policy decision, but as a reaction to the Meach killings and the acquittal of John Hinckley. The statute eliminates any assessment of the defendant's ability to distinguish right from wrong — an assessment that has been inextricably tied to the insanity defense for centuries. Because of the statute's restrictiveness, any meaningful use of the insanity defense has been effectively eliminated. It removes the defense from those who were its traditional beneficiaries and allows them to be punished as criminals. This statutory construction ignores a fundamental principle of the criminal justice system: "that a certain level of moral and rational thought is necessary to hold a person criminally responsible for a crime."[117] Nearly every state in this country recognizes this principle; indeed, every current insanity defense standard, except that of Alaska, assesses the defendant's ability to distinguish between right and wrong.[118] Since such an assessment is recognized as fundamental both historically and currently, that portion of the insanity defense

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115. *E.g.*, Telephone Interview with Scott Taylor, Attorney, Rice, Volland, and Gleason, Anchorage, Alaska (Sept. 22, 1991).

116. Courts have recognized that a legislature may impose restrictions on a right which may make the right "'practically unavailing to a party for his protection . . . without denying it in express terms.'" *See, e.g.*, State v. Strasburg, 110 P. 1020, 1023 (Wash. 1910) (quoting BLACK, CONSTITUTIONAL LAW 519 (2d ed.)). However, because "this would be a palpable violation of the spirit and intent of the constitutional provision," such restrictions "are not less unconstitutional than the total denial of [the right]." *Id.* at 1023-24.

117. People v. Bieber, 835 P.2d 542, 550 (Colo. Ct. App. 1992) (Dubofsky, J., dissenting).

118. *See supra* notes 84-87.

must be afforded status as a fundamental right. Alaska, by eliminating that fundamental right, has violated the Due Process Clause of the Fourteenth Amendment.

B. Recommendations

Alaska is constitutionally required to revise its insanity defense statute to include an assessment of the defendant's ability to distinguish right from wrong. The "longstanding relationship between blameworthiness and free will,"[119] however, also requires that a volitional test be included in Alaska's insanity defense. The United States Supreme Court has recognized that "'[b]elief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil' is a contention that is 'universal and persistent in mature systems of law.'"[120] State court judges have also concluded that the "[c]riminal law has as a bedrock principle the notion that people who act criminally are responsible because they have the ability to act differently."[121] Only a combination of the right-wrong test and the volitional test will fully ensure that the principles of the criminal justice system are not violated when mentally ill defendants are placed on trial. As a matter of policy, therefore, Alaska should also revise its insanity defense to provide exculpation for defendants unable to conform their conduct to the law. Until the legislature adds both a right-wrong assessment and a volitional prong to its insanity defense, Alaska will continue to violate the constitutional rights of its mentally impaired citizens as well as the fundamental principles of the criminal justice system. Perhaps more tragically, it will place the lives of its mentally ill in the hands of a statute created out of misconception and fear.

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119. English, *supra* note 8, at 33.
120. *Id.* at 32 (quoting Morissette v. United States, 342 U.S. 246, 250 (1952)).
121. *Bieber*, 835 P.2d at 550-51 (citation omitted) (Dubofsky, J., dissenting).