FROM M'NAGHTEN TO YATES – TRANSFORMATION OF THE INSANITY DEFENSE IN THE UNITED STATES – IS IT STILL VIABLE?

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Abstract

This paper will explore the historical progression and transformation of the insanity defense in the United States beginning with the M'Naghten rule imported from England in the mid-1800s and the changes made to that rule under the irresistible impulse standard by adding a volitional aspect. The paper will address the purpose of the defense and the tension between the medical and legal definitions of insanity, including a discussion of the Durham standard – the insanity defense closest to the medical definition, which is still applied in the state of New Hampshire. Historical court decisions and events have been catalytic in the transformation of the insanity defense in the United States over its more than 150 years of application. This paper will examine the predominant cases and events that substantially affected the defense, including the return to a stricter insanity defense after John Hinckley was found not guilty by reason of insanity in his attempt to kill President Reagan. Recent events, including the decision in the Andrea Yates case, continue to highlight the problems in applying the insanity defense. A few jurisdictions are beginning to recognize that a legal definition of insanity that might apply uniformly to every set of facts can never be developed and have opted for a more realistic approach of finding a person guilty but mentally ill, thus ensuring that those convicted will get the medical attention they need. This latest trend could be the beginning of the end of the insanity defense in the United States.

1 Definition

Defendants usually employ the insanity defense in federal and state jurisdictions to attack intent or *mens rea*, and some statutes phrase the defense in terms of negating criminal responsibility. The insanity defense is included in a class of defenses known as "excuse defenses," and is considered an affirmative defense in most states, in that it is a complete defense and must result in a not guilty finding if the defense is accepted by the trier of fact – judge or jury.[i] Since the *Hinckley* case, defendants usually have the burden of proving the insanity defense requirements.[ii] Some jurisdictions require proof based on a preponderance of the evidence, while others require that the defendant meet a higher burden by proving insanity by clear and convincing evidence.[iii] In that minority of states where the burden of proof still remains on the prosecution, the standard may be beyond a reasonable doubt.[iv]

Legal insanity is not the same as medical insanity. Legal insanity is based on statutes and court decisions, known as common law. Defendants must offer proof to show that at the time they committed the crime, they were legally insane. Most jurisdictions allow a defendant to offer proof of a mental disease or defect through an expert witness, and in some jurisdictions through lay witnesses. Moreover, the United States Supreme Court requires governments to provide indigent defendants with competent psychiatrists when they intend to raise the insanity defense at trial.[v] Some states, however, limit the testimony that can be provided by experts, as in the following Tennessee statute:

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"No expert witness may testify as to whether the defendant was or was not insane . . . . Such ultimate issue is a matter for the trier of fact alone" (Tenn. Code Ann. § 39-11-501(c)).

Thus, a person may be mentally psychotic at the time the crime is committed, but still be unable to carry his or her burden of proving the legal definition of insanity, such as the case of Jeffrey Dahmer. A Wisconsin jury convicted Mr. Dahmer, a sexually motivated serial killer of young boys, who was also involved in cannibalism, despite his plea of legal insanity.[vi] Finally, a plea of not guilty by reason of insanity should not be confused with a claim that a person is not competent to stand trial or be executed. Both are based on an offender's mental state, but only insanity is a defense to a crime.

2 History of the Insanity Defense in the United States

Modern insanity defenses derived from the case of Daniel M'Naghten of Glasgow, Scotland, who was one of the first people on record to successfully use the defense. The *M'Naghten*[vii] decision was handed down in 1843 under the English common law system – the basis for most of the early laws in the United States. Before the *M'Naghten* ruling, there is some evidence that as early as 1581 English kings were willing to forego execution of those deemed "mad," and by the 18th century some courts in England were allowing the so-called "wild beast" test (PBS. *From M'Naghten*). From these early beginnings, common law decisions and federal and state statutory definitions of legal insanity resulted in several variations of the insanity defense in the United States.

The *M'Naghten* rule predominated in about two-thirds of the states until the middle of the 20th century. Other early variations included the irresistible impulse test adopted by about one-third of the jurisdictions, and what has become known as the *Durham* test adopted in New Hampshire in 1871. The Model Penal Code was completed in 1962 and by 1980 about half of the state and federal jurisdictions had adopted its "substantial capacity" definition of the insanity defense. However, when John Hinckley was found not guilty by reason of insanity in 1982, after his attempted assassination of President Reagan, the public was outraged, and in 1984 the federal Insanity Defense Reform Act was passed and many jurisdictions reformed their insanity defense and returned to a stricter *M'Naghten*-type standard.

Today, a few jurisdictions view the insanity defense as no longer viable, because it does nothing to treat an offender's mental illness. In a handful of states, the legislative bodies have repealed the insanity defense. In addition, a number of states have adopted a new verdict of "guilty but mentally ill or insane." This new verdict fulfills two purposes: – those who are convicted of their crimes must still pay their debt to society, but these offenders are supposed to receive treatment for their mental illness.

Since its inception, the insanity defense has been heavily criticized, despite the fact that studies show it is used in only about 1% of all cases with a success rate of approximately 25%.[viii] Even with the small number of cases in which the insanity defense is invoked, some of them are celebrated cases of violent and heinous crimes that receive substantial media attention, thus making it appear as though the insanity defense is used quite often. However, the reality is that the insanity defense is claimed in cases involving serious, as well as nonviolent crimes, although the public is not likely to hear about the less serious offenses.[ix]

The lack of public support for the insanity defense is based on a sense that people with mental problems can get away without punishment for their crimes. Moreover, persons who are found not guilty by reason of insanity may still be a danger to society and should not be permitted to roam free simply because of their verdict.[x] Furthermore, critics argue, allowing offenders to plead insanity or even fake insanity weakens any deterrent effect that punishment might have on the behavior of potential offenders.

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The insanity defense is not yet dead in the United States, but the public is becoming aware that the legal-mental dichotomy of the insanity defense may be in need of reform to ensure that offenders, such as Andrea Yates, receive treatment and are not simply placed into general prison populations where they might cause harm to themselves or others.

3 The *M'Naghten* Rule

Daniel M'Naghten was a woodworker from Glasgow, Scotland. Mr. M'Naghten attempted to assassinate the British Prime Minister, Sir Robert Peel with his gun. Because of mistaken identity, Daniel shot and killed the Prime Minister's secretary, Edward Drummond, instead. Daniel's defense attorneys argued that Mr. M'Naghten believed the Tory political party was persecuting him. The Judge permitted medical experts to proffer medical testimony that showed Mr. M'Naghten was delusional. The medical experts argued that because of Mr. M'Naghten's delusions, he was unable to form the necessary *mens rea* for murder, as at the time he committed the crime he didn't know what he was doing. Some time after the jury rendered the *M'Naghten* decision, and due to public alarm, the leadership of the English House of Lords assembled a convocation of English judges, who Queen Victoria tasked with developing a legal definition of insanity. Not only did the convocation reverse the jury verdict in the *M'Naghten* case, but also they formulated what has become known as the *M'Naghten* rule as follows:

[E]very man is to be presumed to be same . . . . [T]o establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing something wrong (*M'Naghten's* rule).

The *M'Naghten* test is usually described as the inability to know the difference between *right* and *wrong*, which is the result of some mental defect or disability. Some states define what is meant by the term mental defect or disability, or what is excluded from such definition, and other states require that such defect or disability to be serious.[xi] The rule applies a knowledge-based cognitive standard – what did the person charged know at the time of committing the crime. The state of Texas still uses a *M'Naghten*-type test. The statutory definition of legal insanity in Texas, the state that tried Andrea Yates, is as follows:

"It is an affirmative defense to prosecution that, at the time of the conduct charged, the actor, as a result of severe mental disease or defect, did not know that his conduct was wrong" (Tex. Penal Code § 8.01(a)).

Although there is substantial overlap in the variations of the insanity defense in effect in state and federal jurisdictions, there are approximately 17 states still using an *M'Naghten*-type rule (PBS. *State Insanity Defense Laws*). Some of the other statutory definitions of the *M'Naghten* defense are as follows:

"In any criminal proceeding, . . . in which a plea of not guilty by reason of insanity is entered, this defense shall be found by the trier of fact only when the accused person proves by a preponderance of the evidence that he or she was incapable of knowing or understanding the nature and quality of his or

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her act and of distinguishing right from wrong at the time of the commission of the offense" (Cal. Penal Code § 25 (b)).

All persons are presumed to be sane. It is an affirmative defense to a criminal prosecution that, at the time of the commission of the acts constituting the offense, the defendant was insane. Insanity is established when:

- The defendant had a mental infirmity, disease, or defect; *and*
- Because of this condition, the defendant:
  - Did not know what he or she was doing or its consequences; *or*
  - Although the defendant knew what he or she was doing and its consequences, the defendant did not know that what he or she was doing was wrong (Fla. Stat. § 775.027(1)).

"A person shall not be found guilty of a crime if, at the time of the act, omission, or negligence constituting the crime, the person did not have mental capacity to distinguish between right and wrong in relation to such act, omission, or negligence" (Ga. Code. Ann. § 16-3-2).

"If the circumstances indicate that because of a mental disease or mental defect the offender was incapable of distinguishing between right and wrong with reference to the conduct in question, the offender shall be exempt from criminal responsibility" (La. Rev. Stats. § 14:14).

The *M'Naghten* rule can thus be described as having the following requirements, one of which may have two options:

- The offender was suffering from a mental disease or defect (usually based on testimony of medical experts)

and

- At the time of the crime, the offender didn't know what he or she was doing and did not understand the nature and quality of the act

or

- *2a.* At the time of the crime, the offender didn't know that what he or she was doing was wrong

and

- The reason the offender didn't know what he or she was doing or that it was wrong was because of the mental disease or defect.

From its inception the *M'Naghten* rule was criticized as being too rigid and confining, because it did not cover cases in which offenders may cognitively know right from wrong, but were unable to stop themselves from committing the crime charged. Based on this argument, jurisdictions began to develop other definitions for the insanity defense, such as the irresistible impulse defense. In addition, as psychiatry became more accepted and prominent in the United States, several critics argued that the insanity defense should focus on mental illness and not a cognitive test of knowing right from wrong.

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4 Irresistible Impulse

After *M'Naghten* the next insanity defense that developed was based on the inability of offenders to curb their criminal behavior, behavior they knew was wrong – a carryover from *M'Naghten*. These defendants argued that even with the knowledge that their acts were wrong, they were unable to prevent or control their criminal conduct because of a mental defect. This defense became known as the irresistible impulse defense – a defense concerned with volition and control.

One of the recent well-known cases in which this defense was employed was in the case of Lorena Bobbitt, who was charged in the state of Virginia with malicious wounding by cutting off her husband's penis with a kitchen knife while he slept. Lorena's attorneys argued that in her mind she had to escape from her husband's penis. Moreover, they claimed that Lorena's impulse to sever her husband's penis became irresistible, and although she knew that cutting off his sexual organ was wrong, she could not stop herself from doing it, because she was suffering from a battered wife-type syndrome due to the physical, sexual, and mental abuse her husband had subjected her to over the years of their marriage.

The insanity defense for the state of Virginia, which may be the only state still using a pure form of this defense, is the following:

"A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks adequate capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law" (13 Va. Stats. Ann. § 4801(a)(1)).

The state of Georgia has two separate insanity defenses. One of the defenses is a *M'Naghten*-type defense, and the other defense, based on an irresistible impulse test, is entitled "Delusional compulsion," and provides the following:

"A person shall not be found guilty of a crime when, at the time of the act, omission, or negligence constituting the crime, the person, because of mental disease, injury, or congenital deficiency, acted as he did because of a delusional compulsion as to such act which overmastered his will to resist committing the crime" (Ga. Code Ann. § 16-3-3).

Thus, in most jurisdictions, the irresistible impulse defense has the following requirements:

- The offender was suffering from a mental disease or defect (usually based on testimony of medical experts)

and

- At the time of the crime, the offender lacked adequate capacity to appreciate the criminality of his or her conduct (*M'Naghten* prong retained in some statutes)

or

- *2a*. At the time of the crime, the offender was unable to conform his or her conduct to the requirements of the law (irresistible impulse prong)

and

- The reason the offender was unable to appreciate the criminality of his or her conduct or conform his or her conduct to the legal requirements was because such person had a mental disease or defect.

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The irresistible impulse defense has been criticized as too lenient, because everyone suffers from some compulsions, but most people in society have learned to control them, and thus those who are unable to control their compulsions should suffer the legal consequences. Moreover, critics aver that medical experts who testify in cases raising this defense are unable to determine whether a person chose not to exercise control or was unable to make such choice because of a mental defect. The American Psychological Association tends to concur with this last argument. (APA: The Insanity Defense Position Statement).

5 Durham Test

New Hampshire is the only state that has adopted its own insanity defense – a defense clearly based on a criminal act that is the product of a mental disease or defect and not a knowledge-based or volitional standard. This defense was created originally as a common law defense in 1871 by the New Hampshire Supreme Court.[xii] The Court stated the rule as follows:

"No man shall be held accountable, criminally, for an act which was the offspring and product of mental disease. Of the soundness of this proposition there can be no doubt . . . . No argument is needed to show that to hold that a man may be punished for what is the offspring of disease would be to hold that he may be punished for disease. Any rule which makes that possible cannot be law" (*State v. Jones*).

Later, the defense got its name – the *Durham* test – in a 1954 U.S. Court of Appeals case in the District of Columbia known as *Durham v. U.S.*[xiii] The Court of Appeals determined that a person could not be held responsible for criminal behavior "if his unlawful act was the product of mental disease or mental defect" (*Durham v. U.S*). Many scholars deemed the *Durham* decision as revolutionary, because it was based on mental illness standards that were more reflective of the advances in modern psychology and psychiatry. The U.S. Court of Appeals' adoption of the *Durham* test, however, was short-lived, as the Court found it too vague and difficult to apply, so after 18 years it adopted a "substantial capacity" test in 1972 in the case of *United States v. Brawner.*[xiv]

The New Hampshire legislature still uses the *Durham* test and incorporated the common law rule into its statutory law as follows:

"A person who is insane at the time he acts is not criminally responsible for his conduct. Any distinction between a statutory and common law defense of insanity is hereby abolished and invocation of such defense waives no right an accused person would otherwise have" (N.H. Rev. Stats. Ann. § 628:2.I).

Proof under the *Durham* test requires the defendant to show that:

- At the time of the crime, the offender had a mental disease or defect (usually proved through testimony of medical experts)

and

- The intent to commit the criminal act was negated by such mental disease or defect, as the criminal act was caused by such mental disease or defect.

The *Durham* test is criticized because it is based on a mental health or scientific foundation, thus diminishing the responsibility that criminal offenders should accept if they commit crimes. Moreover, it

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is difficult to prove that a mental disease or defect was the cause of criminal behavior, especially with the many forms of mental disease and the varying affectations exhibited by those with a mental illness. The vagueness of the *Durham* test and the lack of a concrete definition for mental illness lead to its demise as a popular defense.[xv] Moreover, some commentators suggest that the defense never gained in popularity, because the legal community was unwilling to allow mental health experts to become more influential in the courtrooms.

6 ALI Substantial Capacity

The American Law Institute (ALI) developed its Model Penal Code, which was published in 1962, to provide state and federal jurisdictions with updated modern criminal provisions they could adopt. The ALI definition of insanity incorporated elements of both the *M'Naghten* knowledge of right and wrong and the irresistible impulse tests. The ALI definition was clearly focused on the defendant's capacity to form intent and allowed for introduction of medical evidence to prove "substantial capacity." A majority of state and federal jurisdictions discouraged by the rigidity of the *M'Naghten* rule adopted the ALI "substantial capacity" standard – a softer version of the *M'Naghten* right or wrong test.

Under the "substantial capacity" test defendants could still have cognitive knowledge that their acts were criminal, but a jury could find them not guilty by reason of insanity if, despite this knowledge, they lacked "substantial capacity" to "appreciate" that their acts were wrong. In other words, defendants might know their actions were wrong, but they believed, usually due to some type of psychosis or delusion, that the criminal act in their case was justified or necessary. The word "appreciate" denoted a further softening of the *M'Naghten* rule and took on importance in interpreting the "substantial capacity" test, because it added the dimension of emotions and how these emotions affected cognitive knowledge. The ALI substantial capacity defense provided the following:

"A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law" (ALI Model Penal Code § 4.01(1)).

There are approximately 22 states that still use the ALI substantial capacity definition of the insanity defense, albeit most have amended their statutes since the *Hinckley* case. In addition, the ALI definition was adopted by all of the federal courts of appeal, but has now been supplanted by the IDRA discussed next. Some state promulgations of this defense are as follows:

"A person is not criminally responsible for conduct if at the time of such conduct, as a result of mental disease or mental defect, he lacks substantial capacity to appreciate the criminality of his conduct" (720 Ill. Comp. Stats. Ann. § 5/6-2(a)).

"A person is guilty except for insanity if, as a result of mental disease or defect at the time of engaging in criminal conduct, the person lacks substantial capacity either to appreciate the criminality of the conduct or to conform the conduct to the requirements of the law" (Ore. Rev. Stats. § 161.295(1)).

"A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect the person lacked substantial capacity either to appreciate the wrongfulness of his or her conduct or conform his or her conduct to the requirements of the law" (Wis. Stat. § 971.15(1)).

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Jeffrey Dahmer invoked Wisconsin's substantial capacity insanity defense in his well-publicized criminal prosecution for the heinous murder, and in some cases dissection and cannibalism, of 17 young men. Although Dahmer's defense attorneys allowed the jury to hear the horrible details of his acts, the prosecution was able to rebut the defense and convince the jury that Dahmer not only knew his acts were criminal, but also had the capacity to appreciate the wrongfulness of his acts. Many serial and multiple killers have attempted to invoke the ALI substantial capacity definition of insanity and have failed, as this defense does not work when the only claim of mental illness or defect is that the offender killed more than one person or exhibited some type of antisocial behavior.[xvi] In fact, several state statutory provisions expressly exclude repeated offenses and antisocial behavior from the definition of mental illness or defect.[xvii] For example, Colorado's statutory language provides the following:

"The term 'diseased or defective in mind' . . . does not refer to an abnormality manifested only by repeated criminal or otherwise antisocial conduct" (Colo. Rev. Stats. § 16-8-101(2)).

Thus, an ALI substantial capacity defense usually includes the following requirements:

- The offender was suffering from a mental disease or defect (usually based on testimony of medical experts)

and

- At the time of the crime and because of the mental disease or defect, the offender lacked substantial capacity to:
  a. Appreciate the criminality or wrongfulness of the conduct (*M'Naghten* prong)

or

  b. Conform his or her conduct to the requirements of the law (Irresistible impulse prong).

One of the problems with the ALI standard is determining the meaning of "lack of substantial mental capacity." This language does not require total mental incompetence, but it is not always clear what behavior qualifies as a lack of "substantial capacity" under this definition. Moreover, the term "appreciate" has posed similar problems of interpretation. This difficulty in clearly interpreting the ALI standards is what led to revisions of the insanity defense in many jurisdictions after the *Hinckley* verdict.

7 Insanity Defense Reform Act – IDRA

Public criticism of the insanity defense after John Hinckley's acquittal on the basis of insanity in1982 resulted in federal reform of the ALI substantial capacity defense. John Hinckley Jr., like M'Naughten over 150 years before, was suffering from delusions. By 1982, these delusions had a name – paranoid schizophrenia. Because of his schizophrenia, argued Hinckley's defense attorneys, he could not control his behavior when he shot then President Reagan, a secret service agent, a Washington police officer, and James Brady, President Regan's press secretary. Hinckley was infatuated with actress Jodie Foster, and he wrote a letter to the *New York Times* justifying his conduct as a "love offering" in order to change his status from an "insignificant fan" to a person Foster would take notice of, because he intended to go down in history. Hinckley compared himself and Ms. Foster with Napoleon and Josephine and Romeo and Juliet. Hinckley was tried in a federal court in Washington, D.C., which was using the ALI substantial capacity insanity defense. The jury believed that although Hinckley may have known in some capacity that his acts were wrong, because of his delusions he lacked substantial capacity or ability

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to appreciate that his acts were wrong. Hinckley's jury accepted his insanity defense and found him not guilty of 13 criminal counts by reason of insanity. The public was outraged.

In response to the public outcry over the *Hinckley* verdict, some congressional members proposed to abolish the insanity defense. For once, the legal and mental health communities worked together and asked for modification, rather than a total ban of the insanity defense. Congress eventually passed a reform act known as the federal Insanity Defense Reform Act of 1984 (IDRA),[xviii] which was a stricter version of the ALI substantial capacity test. Approximately 30 states changed their insanity defense laws based on the IDRA and returned to a more restrictive *M'Naghten*-type test. Under the reformed insanity defense a defendant is usually required to show a "severe" mental defect or disease, and most jurisdictions retained the *M'Naghten* prong of the former ALI substantial capacity defense, but eliminated the irresistible impulse component. The federal act, which applies to federal courts, provides the following:

"It is an affirmative defense to a prosecution under any federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense" (18 U.S.C. § 12(a)).

Francisco Martin Duran, another paranoid schizophrenic who tried to assassinate a president, employed the reformed insanity defense in a federal court in 1995. Mr. Duran had attempted to kill President Bill Clinton by shooting at the White House – a place he viewed as a symbol of the government he hated. Duran's insanity plea under the reformed standard was rejected and he was found guilty of the numerous charges against him. The reforms, claimed its supporters, had prevented another *Hinckle* verdict.

8 Complete Ban of the Insanity Defense

Some jurisdictions were still not satisfied with the IDRA and voted to abolish the insanity defense altogether. One of the first states to adopt such a ban was the state of Montana, which abolished the defense in 1979. The Montana Supreme Court upheld the ban in the case of *State v. Cowan*[xix], and the U.S. Supreme Court refused to review the case. Nevada adopted a similar statute barring the defense, but its Supreme Court found the statute unconstitutional, and again the U.S. Supreme Court refused to review the case.[xx] Although the U.S. Supreme Court has not finally ruled on the constitutionality of a complete insanity defense ban, other states are continuing to abolish the defense. Idaho, Kansas, and Utah bar the insanity defense in the following statutes:

"Mental condition shall not be a defense to any charge of criminal conduct" (Idaho Code § 18-207(1)).

"It is a defense to a prosecution under any statute that the defendant, as a result of mental disease or defect, lacked the mental state required as an element of the offense charged. Mental disease or defect is not otherwise a defense" (Kan. Stat. Ann. § 22-3220).

"(1)(a) It is a defense to a prosecution under any statute or ordinance that the defendant, as a result of mental illness, lacked the mental state required as an element of the offense charged.

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(b) Mental illness is not otherwise a defense, but may be evidence in mitigation of the penalty in a capital felony . . . and may be evidence of special mitigation reducing the level of a criminal homicide or attempted criminal homicide offense . . . " (Utah Code Ann. § 76-2-305 (1)(a) & (b)).

In addition, although California still permits an *M'Naghten* type insanity defense, it has abolished diminished capacity as a defense, including mental illness or disease, under the following provision:

"The defense of diminished capacity is hereby abolished. In a criminal action, as well as any juvenile court proceeding, evidence concerning an accused person's intoxication, trauma, mental illness, disease, or defect shall not be admissible to show or negate capacity to form the particular purpose, intent, motive, malice aforethought, knowledge, or other mental state required for the commission of the crime charged" (Cal. Penal Code § 25 (a)).

9 Guilty But Mentally Ill or Insane

One of the most significant outcomes of the reforms after *Hinckley* has been recognition that some people, who are unable to satisfy the reformed legal definition of insanity and are found guilty, may still be mentally ill or insane under the medical definition and should receive treatment.[xxi] Many state legislatures that reformed the insanity defense after *Hinckley,* also adopted a new type of verdict known as "guilty but mentally ill or insane." South Carolina's laws provide a good example of such statutory reforms. In 1984, South Carolina adopted a *M'Naghten* type insanity defense as follows:

"It is an affirmative defense to a prosecution for a crime that, at the time of the commission of the act constituting the offense, the defendant, as a result of mental disease or defect, lacked the capacity to distinguish moral or legal right from moral or legal wrong or to recognize the particular act charged as morally or legally wrong" (S.C. Code Ann. § 17-24-10(A)).

Recognizing that most defendants would be unable to carry their burden of proving the insanity defense styled after the *M'Naghten* rule, the South Carolina legislature adopted another statute in 1984 that made the irresistible impulse prong of the ALI substantial capacity defense the test for a new verdict of "guilty but mentally ill." The statute provides the following:

"A defendant is guilty but mentally ill if, at the time of the commission of the act constituting the offense, he had the capacity to distinguish right from wrong or to recognize his act as being wrong . . ., but because of mental disease or defect he lacked sufficient capacity to conform his conduct to the requirements of the law" (S.C. Code Ann. § 17-24-20(A)).

The verdict of "guilty but mentally ill or insane" recognizes the right of society to have wrongdoers punished and be protected from crime, while protecting the rights of the mentally ill and insane to receive some type of treatment for their medical mental disease. For example, when John E. du Pont was convicted in Pennsylvania in 1997 of the shooting death of former Olympic gold medalist David Schultz, he was found "guilty but mentally ill." Du Pont suffered from several delusions and claimed he heard talking walls and saw Nazis in trees. He also cut off his own skin to remove bugs he believed were invading from outer space. The Pennsylvania statute that permitted the guilty by mentally insane verdict provided the following:

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"A person who timely offers a defense of insanity . . . may be found 'guilty but mentally ill' at trial if the trier of facts finds, beyond a reasonable doubt, that the person is guilty of an offense, was mentally ill at the time of the commission of the offense and was not legally insane at the time of the commission of the offense" (Pa. Con. Stats. § 314(b)).

There are approximately 20 states that permit a guilty but mentally ill or insane verdict (PBS. *From Daniel M'Naughten).* In arriving at this verdict the trier of fact is required to make the following three findings:

- The offender is guilty of the crime charged (legal finding),
- The offender has not provided sufficient proof to support the insanity defense (legal definition), and
- The offender is mentally ill or insane (medical definition usually based on testimony of medical experts).

10 Sentences

Defendants found guilty but mentally ill or insane will be sentenced in most cases to prison. However, such defendants are to receive mental health treatment before joining the general prison population, usually in separate facilities. The idea behind these verdicts is that defendants will not serve time in the correctional facility until they become sane, and then only when there is time left to serve on their sentence. Otherwise, upon a determination that the defendant is no longer mentally ill or insane, such person will be released.

On the other hand, a person who is found not guilty by reason of insanity does not receive a prison sentence, although such person may be subject to a civil commitment proceeding and institutionalization.[xxii] Defendants, such as John Hinckley Jr., may actually spend more time in a mental facility based on a civil commitment than they would in serving a prison term if they had been found guilty and sentenced to prison. However, the U.S. Supreme Court ruled in 1992 in the case of *Foucha v. Louisiana* that a person found not guilty by reason of insanity cannot be incarcerated in a mental institution indefinitely.[xxiii] There must be periodic reviews and some showing that the person is dangerous and remains mentally ill under the medical definition of insanity.

In addition, the U.S. Supreme Court ruled in *Ford v. Wainwright*[xxiv] that a defendant cannot be put to death, if that person becomes insane while incarcerated. Thus, defendants, who by medical standards are mentally ill or insane, may be found guilty and sentenced to death because of failed legal insanity defenses under the inflexible *M'Naghten* rule, but their sentence cannot be carried out because of the medical definition of mental illness or insanity. Moreover, if they are sentenced to death in jurisdictions that do not allow a verdict of guilty but mentally ill or insane, they are likely to be incarcerated on death row until they die, receiving little or no treatment for their disorder.

11 Temporary Insanity

Persons who plead temporary insanity are able to show they were legally insane at the time they committed the crime, but are no longer medically insane. Thus, these defendants are found not guilty by reason of insanity, but there is no reason to commit them to an institution for psychiatric treatment, as the insanity was temporary. This defense is rarely available today, and many state jurisdictions have legislated against its use because of pressure to punish wrongdoers, even those able to prove the legal

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defense of insanity. At a minimum, most people who are able to successfully prove the defense of insanity at the time of the crime are subjected to a psychiatric evaluation before they are permitted to return to society. Missouri has the following statute that includes such a mandate:

"When an accused is tried and acquitted on the ground of mental disease or defect excluding responsibility, the court shall order such person committed to the director of the department of mental health for custody. The court shall also order custody and care in a state mental health or retardation facility unless an immediate conditional release is granted . . ." (Mo. Ann. Stats. § 552.040.2).

Mississippi, however, still has the following fairly old statute in place that leaves the decision of whether a person's reason is restored to its juries:

"When any person shall be indicted for an offense and acquitted on the ground of insanity the jury rendering the verdict shall state therein such ground and whether the accused has since been restored to his reason, and whether he be dangerous to the community. And if the jury certify that such person is still insane and dangerous the judge shall order him to be conveyed to and confined in one of the state asylums for the insane" (Miss. Code Ann. §99-13-7).

12 The Andrea Yates Case and Appeal

In 2002, a jury in a Texas trial court convicted Andrea Yates of the capital murder of three of her children caused by drowning them in the bathtub of her home. Andrea had pled not guilty by reason of insanity under an *M'Naghten*-type of insanity defense in effect in Texas. The jury determined that Andrea was not legally insane, as she apparently knew that what she had done was wrong, because immediately after drowning her children she telephoned the police and confessed to her acts. Andrea, however, had a substantial history of medical insanity and both the prosecution and defense agreed on this fact. Ms. Yates had suffered from postpartum psychosis after the delivery of several of her children and had attempted suicide.

Andrea was sentenced to life in prison. In 2004, the Texas First Court of Appeals overturned Andrea Yate's conviction on the basis that one of the prosecution's key psychiatric experts had falsely testified during her trial.[xxv] The testimony concerned a television program that had allegedly aired on "Law and Order" with a story line of a woman who had drowned her children in a bathtub. The woman in the show, stated the state's expert, was then found not guilty by reason of insanity. Dr. Park Dietz, the expert witness in question, claimed that Ms. Yates, who was a fan of the show, was inspired to kill her children because of this episode. The episode, however, had not aired before Yates drowned her children. Thus, the testimony of Dietz may have been material in the jury's decision, and her convictions were overturned for this reason. Dietz also happened to be the only psychiatric expert to testify that Andrea knew right from wrong, and therefore was not legally insane under the Texas insanity defense.

Although the prosecution intends to appeal the matter further, the case of Andrea Yates is now in limbo until and if she is retried. No one believes Andrea should be set free at the present time because of her mental condition. Texas, however, does not have the guilty but mentally ill or insane verdict option, so if Andrea is retried the only outcomes could be: "guilty" – her original verdict – or "not guilty by reason of insanity." Ms. Yates admitted to drowning her children, so no one expects a "not guilty" verdict.

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If Andrea is again found guilty, she will continue to serve her life sentence in a Texas prison for women. Andrea has received some treatment in a separate mental health facility, because she has continued to have psychotic breakdowns. However, such treatment is not required under a "guilty" verdict, and is reactive treatment at best. Thus, Andrea Yates could spend the rest of her life shuttling back and forth between the general prison population and the treatment facility.

If, on the other hand, Andrea Yates is found "not guilty by reason of insanity," she will probably be civilly committed to a mental health facility and receive the proactive medical treatment she needs, but subject to periodic review of her mental condition. Should Andrea's mental condition remit, she could eventually be released back into society. Such an outcome, however, is likely to alarm the public, many of whom believe Andrea Yates should be punished for her crimes, just as they believed John Hinckley, Jr. should have received a different verdict and a severe sentence for his acts.

13 The Future of the Insanity Defense – Is It Still Viable?

At the turn of the 21st century it was estimated that there were over a quarter of a million people serving sentences in prisons and jails throughout the United States who were mentally ill under a medical definition. Some of these offenders had raised the insanity defense, but because it had failed they were found guilty. A verdict of guilty does not guarantee that offenders will receive treatment for mental problems during their incarceration (PBS. *The Jailed*). In fact, the Department of Justice released two reports in 1999, which estimated that approximately 16% of the people incarcerated in the nation's correctional facilities were mentally ill under the medical definition, but only about 60% of these people were receiving any treatment for their mental disorders. (PBS. *The Jailed*).

These statistics raise a number of concerns. First, some of these prisoners will serve their time and be released from prison to re-enter society with little or no improvement of their mental disorders. In addition, mentally ill prisoners are more likely to be convicted of violent crimes and have higher recidivism rates than other inmates (PBS. *The Jailed*). Although the current philosophy is to remove mentally ill offenders from society by incarcerating them, incarceration does not provide these people with the treatment they need to protect themselves as well as society. On the other hand, the verdict of guilty but mentally ill or insane (GBMI) is supposed to provide such treatment.

As states began to adopt and employ GBMI statutes, researchers commenced studies to determine if those receiving GBMI verdicts were being provided effective medical treatment for their mental illnesses and insanity. These studies showed that offenders convicted under a GBMI verdict were not ensured of receiving any treatment for their mental disorders, as little money was left for treatment after the government built additional prisons to keep more people incarcerated for longer periods of time (Perlin). In fact, Steadman found in his study conducted in Georgia in the early 1990s that only 3 of 150 defendants found GBMI were receiving treatment in a hospital facility (Steadman, 1993). Other studies have shown that mentally ill defendants are not given treatment different from that available to other prisoners (Slobogin).

There is no recent research that has studied the effectiveness of treatment provided to those found GBMI, despite the substantial number of jurisdictions that have recently adopted GBMI verdict statutes. The purposes served by GBMI verdicts, however, are still sound. The GBMI verdict is supposed to ensure that defendants receive some form of treatment for their mental illness, until such time as their disorders have abated. Once sane, defendants serve out the rest of their sentence in prison or are released. Thus, although these defendants receive treatment in a facility separate from the prison, they are not relieved of serving their full sentence if their disorder goes into remission, so punishment,

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retribution, and deterrence as purposes for incarceration are not diminished. The public is protected from these mentally ill offenders while they are still considered dangerous to themselves and others. In addition, these defendants will not endanger the general prison population, and a GBMI verdict may make it futile to sentence some of these defendants to death and pay the costs of subsequent appeals, unless it appears that they will be able to make a full recovery to sanity.

Assuming that effective and proactive treatment is presently or could in the future be provided the mentally ill defendants in states with the GBMI verdict, the real issue becomes whether these jurisdictions need to retain the insanity defense. If we look again at the case of Andrea Yates and assume that she is being retried in a jurisdiction that has both a *M'Naghten*-type insanity defense and a GBMI statute, there could be four possible verdicts. First, Andrea could be found not guilty. This is not likely as she confessed to her crimes. The fact is that any person found not guilty could be suffering from a mental illness or insanity, but the criminal justice system will not provide treatment for such medical problem.

Second, Andrea could be found guilty and sentenced to life in prison. This also would be unlikely in a jurisdiction with the GBMI verdict, as everyone agrees Ms. Yates has serious mental problems. Because Texas does not have the GBMI verdict, Andrea is very likely to receive another guilty verdict if she is retried, which means she will continue to receive sporadic treatment for her mental illness. Even mentally ill defendants found guilty of crimes less serious than those committed by Andrea Yates could serve their required time and be released without receiving any treatment for their mental illness. This is never a good result in light of the high rates of recidivism and violent crimes attributed to those with mental illnesses.

Third, Andrea could be found not guilty by reason of insanity. This is a possibility, assuming the same medical witnesses testify in her retrial and no one believes Dr. Dietz, the only witness who apparently testified that Andrea Yates appreciated the criminality of her acts and knew they were wrong. In the third scenario, Andrea would be released from prison. Civil commitment proceedings would surely take place immediately, and Andrea would most likely be committed to a mental health facility. However, because of civil liberty issues and due process rights there is no guarantee that she would be civilly committed. Judges don't like to take away people's freedoms and commit them to mental health facilities. Moreover, even if Andrea were committed, her condition would be subject to periodic review, and she would have to be released if she regained a stable state of sanity. Many members of the public would not be happy if Andrea avoided punishment because she was found not guilty by reason of insanity.

In the fourth scenario, Andrea would be found guilty but mentally ill. She admitted to her criminal acts, and her confession does seem voluntary. Ms. Yates seemed unable to control her behavior, even though she knew that drowning her children was wrong. She is clearly a candidate for the GBMI verdict. A jury should have little difficulty in finding Ms. Yates mentally ill based on testimony from medical experts, such as psychologists and psychiatrists. Under the GBMI verdict, however, Ms. Yates must receive a sentence, and in her case a prison sentence is highly likely and could be a mandated sentence because of the multiple murders she committed.

What most people agree upon is that Andrea Yates needs treatment for her mental problems. If the GBMI verdict were properly carried out by the state, Ms. Yates would receive effective treatment. She could spend the rest of her life in the treatment facility. However, if Andrea were to improve she would be punished for her acts that she knew were wrong. The public would be happy with the outcome, and Andrea's treatment needs would be met. The only verdict that provides for both treatment and punishment is the GBMI verdict.

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The insanity defense, therefore, seems to lack purpose in light of the reformed GBMI statutes and may no longer be a viable defense in those jurisdictions that have adopted this alternative verdict. Many of the insanity pretrial, trial, bifurcated, and separate hearing procedures are complex and time-consuming. In addition, paying for expert psychiatric testimony is expensive and many trials result in nothing more than a battle of the experts. The insanity defense has always been too complicated and difficult to apply and is subject to too much public criticism when a well-known defendant such as John Hinckley is found not guilty by reason of insanity.

In this age of strict crime control, the criminal justice system should no longer focus on whether incarceration or rehabilitation works – most studies show that neither one has shown much success in curbing crime. Instead, the limited resources should be used for effective treatment for those who are mentally ill and have committed crimes. The mentally ill defendants, as well as society, should demand more. Defendants such as Andrea Yates deserve appropriate treatment for their disorders and should not be placed in general prison populations simply because they are unable to prove a rigid legal test of insanity. The public outrage over the *Hinckley* verdict suggests there is strong public support for punishing all criminal offenders, who should not be relieved of criminal responsibility because they were suffering from a mental illness when they committed their crimes. The not guilty by reason of insanity verdict does not achieve this dual purpose of treatment and punishment. The guilty but mentally ill verdict does, thus making the insanity defense unnecessary.

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Notes

[i] Some states, such as North Carolina, require the judge to accept or reject the insanity defense before the trial begins. N.C. Gen. Stat. § 15A-959 (2005).
[ii] *But see* N.M. U.J.I. Cr. 14-5101 (2005) (Uniform Jury Instruction informing the jury that the "[t]he burden is on the state to prove beyond a reasonable doubt that the defendant was sane at the time the offense was committed.").
[iii] *Compare* N.J. Stat. § 2C:4-1 (2005) *and* 13 Va. Stats. Ann. § 4801(b) (2005) (preponderance of the evidence standard) *with* N.H. Rev. Stats. Ann. § 628:2.II *and* Utah Code Ann. § 77-16a-104(3) (2005) (clear and convincing evidence standard).
[iv] When the insanity defense was reformed after the *Hinckley* acquittal, many jurisdictions increased the standard of proof. Some states, such as Pennsylvania, require proof beyond a reasonable doubt. Pa. Con. Stats. § 314(b) (2005).
[v] *Ake v. Oklahoma*, 470 U.S. 68 (1985).
[vi] Dahmer was tried in Milwaukee, Wisconsin under its "substantial capacity" insanity defense. The jury believed that Dahmer knew what he was doing was wrong, despite the fact that his perverted acts clearly demonstrated psychotic behavior.
[vii] The name has been spelled in different ways over the years. For purposes of this paper the M'Naghten spelling will be used. Another popular way to spell the defendant's name is McNaughton.
[viii] Callahan, L.A. et al. (1991). The Volume and Characteristics of Insanity Defense Pleas: An Eight-State Study. *Bulletin of the American Academy of Psychiatry and the Law,* Vol. 19. No. 4, pp. 331-338. This study was funded by the National Institute of Mental Health, Inc, and was conducted in eight state county-level courts.
[ix] Research in 1994 by Silver, Cirincione, & Steadman showed that approximately one-third of the cases in which the insanity defense was employed involved nonviolent crimes. Silver, E., Cirincione, C., & Steadman, H.J. (1994). Demythologizing inaccurate perceptions of the insanity defense. *Law and Human Behavior,* Vol. 18, 63-70.
[x] Some offenders found not guilty by reason of insanity, such as John Hinckley, are subjected to a civil commitment procedure. These offenders are held in a mental health facility until it is determined they no longer pose a danger to society. People who are civilly committed must be granted the due process right of periodic review to determine if they are fit to return to life outside the facility.
[xi] A common definition of mental disease or defect is found in the Texas statutes, which provides the following: "The term 'mental disease or defect' does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct." (Tex. Penal Code § 8.01 (b)). Thus, many of these definitions attempt to exclude what the American Psychological Association and the Diagnostic and Statistical Manual of Mental Disorders – IV (DSM-IV) would deem personality disorders, such as antisocial personality disorder.
[xii] *State v. Jones,* 50 N.H. 369 (1871). The New Hampshire Supreme Court had earlier criticized the *M'Naghten* Rule in *State v. Pike*, 49 N.H. 399 (1870).
[xiii] *Durham v. U.S.,* 214 F.2d 862 (D.C. Cir. 1954).
[xiv] *United States v. Brawner,* 471 F.2d 969 (D.C. Cit. 1972).
[xv] Approximately 22 states expressly rejected the *Durham* Rule through common law or statutory references (PBS. *From M'Naghten).*
[xvi] Other multiple killers who have unsuccessfully claimed the ALI substantial capacity defense were Kip Kinkel, who at the age of 17 shot 29 people in an Oregon school in 1998 and John Wayne Gacy, who was tried and convicted in the state of Illinois of raping and murdering multiple young men and burying them under his house.
[xvii] *See, e.g.,* Ala. Code § 13A-3-1(b) (2005); Conn. Gen. Stat. § 53a-13 (2004); N.D. Cent. Code, § 12.1-04.1-01.2 (2005); Tex. Penal Code Colo. Rev. Stats. § 8.01(b) (2005).
[xviii] Insanity Defense Reform Act, 18 U.S.C. 17(a) (1988).
[xix] *State v. Cowan,* 861 P.2d 884 (Mont. 1993), *cert. denied,* 511 U.S. 1105 (1994) (holding that barring the insanity defense is not unconstitutional and does not violate the 8th amendment's strictures against cruel and unusual punishment).

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[xx] *Finger v. State,* 27 P.3d 66 (Nev. 2001), *cert. denied,* 534 U.S. 1127 (2002).
[xxi] *See People v. Sorna,* 276 N,W, 892 (Mich. App. 1979) (holding that where insanity is established, defendant should receive treatment in addition to incarceration).
[xxii] *Jones v. United States,* 463 U.S. 354 (1983) (upholding institutionalization of defendant found not guilty by reason of insanity in order to protect the public).
[xxiii] *Foucha v. Louisiana*, 504 U.S. 71 (1992).
[xxiv] *Ford v. Wainwright,* 477 U.S. 399 (1986).
[xxv] *Yates v. State*, nos. 01-02-00462-CR and 01-02-00463-CR (Jan. 6, 2005).

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