NOTES

THE GUILTY BUT MENTALLY ILL ALTERNATIVE

The issue of insanity in criminal cases confronts the legal system with a dilemma: Should a defendant escape responsibility for criminal conduct because he was insane at the time he acted although he intended the act and its consequences? The guilty-but-mentally-ill verdict gives juries the opportunity to recognize a criminal defendant's psychological disorder and still assign him responsibility for his antisocial conduct. This Note reviews the evolution of the treatment of insanity in criminal cases and advocates use of the guilty-but-mentally-ill verdict as the most socially beneficial and humane means of dealing with the criminally insane.

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I. INTRODUCTION

At common law an unlawful act was not a crime unless it was committed with an evil intent.1 The legal maxim "actus non facit reum nisi mens sit rea,"2 known today as mens rea, embodied the idea that an act does not make one guilty unless the mind is guilty.3 The concept of mens rea

1. "So that to constitute a crime against human laws, there must be, first, a vitious will; and, secondly, an unlawful act consequent upon such vitious will." 4 W. BLACKSTONE, COMMENTARIES 21 (12th ed. 1795).
3. BLACK'S LAW DICTIONARY 29 (5th ed. 1979). The modern interpretation of the mens rea concept is more expansive than that under common law. Under the old interpretation of common law, "an unwarrantable act without a vitious will is no crime at all." 4 W. BLACKSTONE, supra note 1, at 21. Today, criminal intent, or mens rea, encompasses several states of mind rather than only the "vitious will." See infra note 5 and accompanying text.
reflects the popular belief that if a person commits a criminal act but does not possess a criminal state of mind, he is blameless and unaccountable for his action. Today, most statutory crimes by definition require that the offender commit a crime in a purposeful, knowledgeable, reckless, or negligent manner.

One offender who traditionally has been held blameless and unaccountable for his behavior is the insane person. The defense of insanity allows "blameless" persons to escape the legal consequences of otherwise illegal conduct. The insanity defense forces juries into an "all or nothing" situation. Although a defendant pleading the defense admits that


7. A juror who wishes to condemn the defendant's action, but also desires to help the defendant receive the proper medical treatment might believe that if the defendant is convicted he will go to prison rather than to a hospital because the juror is usually not instructed as to the significance of acquittal by reason of insanity. E.g., Apgar v. United States, 440 F.2d 733 (8th Cir. 1971); Pope v. United States, 372 F.2d 710 (8th Cir. 1967);
he committed the wrongful act, "[a]cquittal by reason of insanity sug-
gests no condemnation of the defendant's action." Nevertheless, con-
victing a defendant who was insane when he acted runs contrary to the
fundamental requisite of criminal law that the defendant intended the
results of his actions.

First this Note will briefly review the historical development of the
insanity defense. Alternatives to the insanity defense will then be dis-
cussed. Finally, a proposal that incorporates the guilty-but-mentally-ill
verdict is offered as the alternative that best meets the medical needs of
the insane offender while protecting the community from the offender's
dangerous propensities.

II. MODERN HISTORY OF THE INSANITY DEFENSE

A. The M'Naghten Standard

In 1843, in Daniel M'Naghten's Case, the English court stated the legal
standard of the insanity defense that still is used in many United States
jurisdictions. In M'Naghten, a criminal trial was held after Daniel
M'Naghten shot and killed Edward Drummong, the principal secretary to Prime Minister
as to the insanity of M'Naghten. Id. at 101. The jury acquitted the defendant with a
verdict of "[n]ot guilty, on the ground of insanity." Id. at 102. The jury was instructed to
apply what has become known as the "right-wrong test" which emphasizes the defend-
ant's knowledge of both the legal and moral nature of the act. See S. GLUECK, MENTAL
DISORDER AND THE CRIMINAL LAW 163 (1925). Although the M'Naghten rule is often
called the right-wrong test, the rule actually encompasses two tests. The defendant is
relieved of criminal responsibility if (1) he did not have the capacity to understand the
nature and quality of his act, or (2) he lacked the ability to distinguish between right and
wrong with respect to the act. See, e.g., Graham v. State, 547 S.W.2d 531, 539 (Tenn.
(1976). The M'Naghten rule is similar to the "wild beast test" set forth in the trial of
Edward Arnold nearly 120 years earlier. See infra note 13.

13. See infra notes 18-19 and accompanying text. The history of the legal treatment of
insanity prior to the thirteenth century is unclear. See generally S. GLUECK, supra note 12,
at 123-24. By the mid-thirteenth century pardons by the King of England were fairly
common for persons who committed homicides while of unsound mind. See J. BIGGS,
supra note 12, at 83. During the late 1200's, insanity was recognized as grounds for mitiga-
Every man is to be presumed sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence 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 what was wrong. 14

The M'Naghten rule became the popular standard to determine whether a defendant could invoke the insanity defense. 15 All of the existing United States, except New Hampshire, 16 have at some time used the


15. Glueck notes that the M'Naghten rule has been extended freely to cases of mental disorders which were not in the M'Naghten judges' philosophy. S. Glueck, supra note 12, at 163.

16. In New Hampshire, the question of insanity is purely one of fact. If the defendant's action were the product of a mental disease, the defendant is not guilty by reason of insanity. See State v. Jones, 50 N.H. 369, 398-99 (1871); State v. Pike, 49 N.H. 399, 442
M'Naghten rule or a variation thereof. Today, nine states have enacted the M'Naghten rule by statute. Nine other states follow the M'Naghten rule by judicial decision.

The Minnesota Supreme Court adopted the M'Naghten rule in 1865. In 1885, the Minnesota legislature included the M'Naghten rule in the state's penal code. State v. Scott was the first case to test the new statute. The court held that the language of the statute was plain and unambiguous, and provided the exclusive ground upon which the insanity defense was to be allowed. Minnesota's statutory version of M'Naghten has changed little since 1885. The current version provides

17. See S. Glueck, supra note 12, at 214. Most of the variations from the M'Naghten rule superimpose the "irresistible impulse" test. See infra notes 32-38 and accompanying text.


20. See State v. Shippey, 10 Minn. 223, 228-29, 10 Gil. 108-81 (1865). Since Shippey the court has consistently applied the M'Naghten rule. See, e.g., State v. Rawland, 294 Minn. 17, 46, 199 N.W.2d 774, 790 (1972); State v. Dhaemers, 276 Minn. 332, 339, 150 N.W.2d 61, 66 (1967); State v. Finn, 257 Minn. 138, 140-44, 100 N.W.2d 508, 510-13 (1960); State v. Simonsen, 195 Minn. 258, 261-64, 262 N.W. 638, 639-41 (1935); State v. Scott, 41 Minn. 365, 369-72, 43 N.W. 62, 63-64 (1889); State v. Gut, 13 Minn. 341, 358-59, 13 Gil. 315, 331-32 (1868), affd, 76 U.S. (9 Wall.) 35 (1869) (defendant not entitled to acquittal if he had capacity sufficient to enable him to distinguish right from wrong, to understand the nature and consequences of his acts, and mental ability sufficient to apply that knowledge to his own case).

A person is not excused from criminal liability as an idiot, imbecile, lunatic, or insane person, except upon proof that, at the time of committing the alleged criminal act, he was laboring under such a defect of reason, as either (1) not to know the nature and quality of the act he was doing; or (2) not to know that the act was wrong.

22. 41 Minn. 365, 43 N.W. 62 (1889).

23. Id. at 372, 43 N.W. at 64. The court concluded that the statutory language did not leave room to include the irresistible impulse test, because "its omission from the statute . . . has not been from mere inadvertence, but that it was intended to be excluded." Id. at 369, 43 N.W. at 63. The court has held consistently that the test cannot be superimposed upon the codification of the M'Naghten rule. See, e.g., State v. Eubanks, 277 Minn. 257, 264, 152 N.W.2d 453, 458 (1967), cert. denied, 390 U.S. 946 (1968); State v. Finn, 257 Minn. 138, 140-44, 100 N.W.2d 508, 510-13 (1960); State v.
that a person "shall not be excused from criminal liability except upon
proof that at the time of committing the alleged criminal act he was
labouring under such a defect of reason, from [mental illness or mental
deficiency], as not to know the nature or his act, or that it was wrong."24

Although historically the court has felt bound to adhere strictly to the
statutory language,25 in State v. Rawland26 the court suggested that the
statute be repealed and the M'Naghten rule "should have been discarded
with the horse and buggy... so that the courts could develop rules for
determining mental competency more in harmony with advances made

Simenson, 195 Minn. 258, 263, 262 N.W. 638, 640-41 (1935); State v. Scott, 41 Minn. 365,
371-72, 43 N.W. 62, 64 (1889).

24. MINN. STAT. § 611.026 (1980). In 1971 the statute was amended. "[M]entally ill
or mentally deficient" replaced the words "idiocy, imbecility, lunacy, or insanity." Act of
May 17, 1971, ch. 352, § 1, 1971 Minn. Laws 602. A "mentally ill person" is
any person who has a substantial psychiatric disorder of thought, mood, percep-
tion, orientation, or memory which grossly impairs judgment, behavior, capacity
to recognize reality, or to reason or understand, which (a) is manifested by in-
stances of grossly disturbed behavior or faulty perceptions; and (b) poses a sub-
stantial likelihood of physical harm to himself or others as demonstrated by (i) a
recent attempt or threaten to physically harm himself or others, or (ii) a failure
to provide necessary food, clothing, shelter or medical care for himself, as a result
of the impairment.

Minnesota Commitment Act of 1982, § 2, 1982 Minn. Sess. Law Serv. 1286, 1287-88 (to
be codified at MINN. STAT. § 253B.02(13)). A "mentally retarded person" replaced "men-
tally deficient person" in 1982 and is defined as

any person (a) who has been diagnosed as having significantly subaverage intel-
lectual functioning existing concurrently with demonstrated deficits in adaptive
behavior; and (b) whose recent conduct is a result of mental retardation and
poses a substantial likelihood of physical harm to himself or others in that there
has been (i) a recent attempt or threat to physically harm himself or others, or (ii) a failure and inability to provide necessary food, clothing, shelter, safety, or
medical care for himself.

Id., 1982 Minn. Sess. Law Serv. at 1288 (to be codified at MINN. STAT. § 253B.02(14)).

The defendant has the burden of proving by a preponderance of the evidence either that she did not know the nature of her act or that she did not know that the act was
wrong. See State v. Pautz, 299 Minn. 113, 118, 217 N.W.2d 190, 193 (1974); State v. Bott,
310 Minn. 331, 335, 246 N.W.2d 48, 52 (1976); State v. Mytych, 292 Minn. 248, 252-55,
194 N.W.2d 276, 279-81 (1972) (burden does not violate defendant's fourteenth amend-
ment right to due process of law). "[I]n every criminal proceeding, a person is presumed
to be responsible for his acts and the burden of rebutting such presumption is upon him." MINN. STAT. § 611.025 (1980). Expert testimony is neither necessary nor binding in a
determination of a defendant's sanity. See State v. Hoskins, 292 Minn. 111, 137-38, 193
N.W.2d 802, 818-19 (1972).

The Minnesota Supreme Court has stated that because MINN. STAT. § 611.026 is so
clear and unambiguous, it needs no judicial interpretation. See, e.g., State v. Finn, 257
Minn. 138, 142-44, 100 N.W.2d 508, 512-13 (1960); State v. Scott, 41 Minn. 365, 372-73,
43 N.W. 62, 64-65 (1889) (language of statute very clearly expresses its meaning). But see
State v. Rawland, 294 Minn. 17, 36, 199 N.W.2d 774, 785 (1972) (statute not as simple as
once assumed).

25. See, e.g., State v. Dhaemers, 276 Minn. 332, 339, 150 N.W.2d 61, 66 (1967). See
generally State v. Finn, 257 Minn. 138, 100 N.W.2d 508 (1960).
26. 294 Minn. 17, 199 N.W.2d 774 (1972).
in this scientific field." The court stated that the determination of insanity should focus on the defendant's mind as a whole rather than on just the cognitive capacities of the defendant as M'Naghten seemed to require. To properly determine the issue of insanity without severely straining the statutory language, the court allowed consideration of evidence relating to volition and the capacity to control behavior as well as cognition. Consideration of the defendant's mind as a whole by the factfinder was for evidentiary purposes only and was not to expand the insanity defense as stated by the statute. In Minnesota, when the insanity defense is raised, the issue remains whether or not the defendant was laboring under such a defect of reason that he did not know the nature of his act or that the act was wrong.

B. Departures from M'Naghten in the United States

1. The Irresistible Impulse Test

Some courts have coupled the M'Naghten rule with a test of the defendant's ability to resist the impulse to commit the act. Under the irresistible-
ble impulse test, although he knew that his act was wrong, a defendant will be exculpated if he proves that an irresistible impulse so affected his freedom of will that he was not responsible for his conduct. 33 The irresistible impulse test is premised on the belief that "freedom of will" and voluntary action are prerequisites to criminal responsibility. 34 The irresistible impulse must be the product of a mental disease, not merely the uncontrollable fury or passion of a sane individual. 35

Approximately half of the states have at some time applied a variation of the irresistible impulse test. 36 Some courts have rejected the test. 37 Today, only two states use the irresistible impulse test. 38

2. The Durham Rule

The first substantial departure from the M'Naghten rule was in the New Hampshire case of State v. Pike. 39 The Pike court held that whether
a defendant possessed the capacity to entertain criminal intent is a question of fact, not of law. In contrast, the M'Naghten rule characterizes the determination of criminal intent as one of law.

In 1954, the Federal District Court for the District of Columbia applied an expanded version of the Pike rule in Durham v. United States.

In all states the presence or absence of insanity is a question of fact determined by the jury, but the New Hampshire court's view, which is not very well understood by most writers, is that the trial court simply declines to give the jury a legal standard by which to measure the culpability of the defendant when insanity is asserted as a defense. See S. Glueck, supra note 12, at 254. Without a legal standard to apply, the New Hampshire juries will apply their own legal standard which will necessarily result in an inconsistent standard for the state.

In 1971 the New Hampshire legislature enacted a statute which relates a person's responsibility to his capacity to commit crime. See N.H. REV. STAT. ANN. § 628 (1974 & Supp. 1979). Section 628:2 provides, in pertinent part: "A person is not criminally responsible for his conduct if when he acted he lacked, because of mental disease or defect, substantial capacity to conform his conduct to the requirements of the law.

I. A person is not criminally responsible for his conduct if when he acted he lacked, because of mental disease or defect, substantial capacity to conform his conduct to the requirements of the law.

II. As used in this section, "mental disease or defect" means any abnormal condition of the mind which substantially impairs the capacity of a person to control his actions.

Id. § 1. The bill was referred to the Committee on Judiciary for interim study.

The Minnesota Supreme Court recently stated that intent is a factual issue and is determined by use of an objective standard that "people operate within the broad boundaries of what is deemed normal or sane" and presumes people "are responsible for their acts, i.e., that they have the capacity to intend what they do." State v. Bouwman, 328 N.W.2d 703, 705 (Minn. 1982). Thus, although Minnesota uses the M'Naghten standard, the issue of intent is one of fact.

214 F.2d 862 (D.C. Cir. 1954). The court summarized the instructions given to the jury as follows:

[An]y instruction should in some way convey to the jury the sense and substance of the following: If you the jury believe beyond a reasonable doubt that the accused was not suffering from a diseased or defective mental condition at the
The Durham court held that "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." The court reasoned that by leaving the ultimate question of the defendant's insanity to the jury, the jury could perform its traditional function of applying "[o]ur inherited ideas of moral responsibility to individuals prosecuted for crime." Only Maine has adopted the Durham rule. In contrast, in 1972 the Circuit Court of Appeals for the District of Columbia essentially overruled Durham by adopting the American Law Institute's test of insanity.

The Durham court rejected the previously accepted test which combined the M'Naghten rule with the irresistible impulse test, see, e.g., Smith v. United States, 36 F.2d 548 (D.C. Cir. 1929), because the prior test did not take sufficient account of psychic realities and scientific knowledge and was based upon one symptom, defective cognition (right versus wrong), which could not be validly applied in all circumstances. Id. at 874.

43. 214 F.2d 862, 871 (D.C. Cir. 1954). The Durham court defined disease as a "condition which is considered capable of either improving or deteriorating . . . . 'Defect' in the sense of a condition which is not considered capable of either improving or deteriorating and which may be either congenital or as a result of injury, or the residual effect of a physical or mental disease." Id. at 875.

44. Holloway v. United States, 143 F.2d 665, 666-67 (D.C. Cir. 1945) (quoted in Durham, 214 F.2d at 876).


More typical of the state courts' reactions to the Durham rule is that of the Indiana Supreme Court. That court specifically rejected the Durham rule because in the court's opinion the rule conflicted with well-founded tenets of criminal responsibility. The court opted for a test that recognized both cognition and volition as elements of criminal responsibility. See Hill v. State, 252 Ind. 601, 608, 251 N.E.2d 429, 436 (1963).

46. See United States v. Brawner, 471 F.2d 969, 977-78 (D.C. Cir. 1972). The Brawner court articulated the obvious: The Durham court failed to "explicate what abnormality of mind was an essential ingredient of [mental disease or defect]." By failing to define mental disease or defect, application of the Durham rule resulted in "trial by label" because medical expert witnesses defined the terms in their own way. Id. The Circuit Court of Appeals of the District of Columbia highlighted this problem by briefly reviewing the case of In re Rosenfeld, 147 F. Supp. 18 (D.C. Cir. 1957):

A St. Elizabeth psychiatrist [a psychiatrist for the hospital where defendant remained in custody] testified that a person with a sociopathic personality was not suffering from a mental disease. That was Friday afternoon. On Monday morn-
3. The American Law Institute Test

In 1963 the American Law Institute (ALI) adopted, as part of its Model Penal Code, a new standard to evaluate insanity:

(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law.

(2) As used in this Article, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.47

Twenty-six states have adopted the ALI test in whole or in part.48

ing, through a policy change at St. Elizabeth's Hospital, it was determined as an administrative matter that the state of a psychopathic or sociopathic personality did constitute a mental disease.

47 F.2d at 978.


47. See MODEL PENAL CODE § 4.01 (Proposed Official Draft 1962). The ALI test has received its greatest modification by the Third Circuit's decision in United States v. Currens, 290 F.2d 751 (3d Cir. 1961). The Currens test for determination of criminal responsibility is whether, at the time of committing the prohibited act, the defendant as a result of mental disease or defect lacked "substantial capacity to conform his conduct to the requirements of law." Id. at 774. The limitation that prevents the jury from giving too much weight to illegality of conduct restores the M'Naghten rule. See A. GOLDSTEIN, supra note 4, at 33.


The ALI test has been adopted in most federal circuits. See United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972); Wade v. United States, 426 F.2d 64 (9th Cir. 1970); Blake v. United States, 407 F.2d 908 (5th Cir. 1969); United States v. Smith, 404 F.2d 720 (6th Cir. 1968); United States v. Chandler, 393 F.2d 920 (4th Cir. 1968); United States v. Shapiro, 383 F.2d 680 (7th Cir. 1967); Pope v. United States, 372 F.2d 710, 736 (8th Cir. 1967) (jury charge usually will be legally sufficient if trial court freely admits all relevant evidence, charge appropriately embraces and requires positive conclusions by jury regarding defendant's cognition, volition, and capacity to control his behavior, and elements of knowledge, will and choice are emphasized in charge as essential and critical components of legal sanity); Wion v. United States, 325 F.2d 420 (10th Cir. 1963); United States v.
III. THE RATIONALE OF THE INSANITY DEFENSE

The insanity defense is regarded as a fundamental right of which the accused cannot be deprived. The Minnesota Supreme Court has approved the premise "that the basic postulate of our criminal law is a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong." The primary goal of the criminal law, however, is to protect members of society from unreasonable interference with their lives, liberty and property. Society punishes parties convicted of criminal offenses for reasons of retribution, deterrence, restraint and rehabilitation. These objectives are a means of obtaining the primary goal of protection. To permit a person, whether sane or insane, with "dangerous criminal tendencies to be in a position where he can give indulgence to such propensities would be a folly which no community should suffer itself to commit." Too often acquittal by reason of insanity allows a defendant to give free vent to his dangerous, criminal propensities. Unless the goal of protecting the community conflicts with the imposition of criminal sanctions against an insane person is there justification for allowing insanity as a defense?

Although the insanity defense can be raised as a defense for any crime, the defense usually is pled only in serious cases where long prison terms threaten the accused. Offenders charged with relatively minor offenses prefer to risk short sentences rather than the indeterminate civil confinement that may follow an insanity acquittal. Consequently, insane defendants charged with minor offenses often avoid needed psychiatric treatment. In addition, the insanity defense often is used only if a defendant has no other defense. The defendant pleads the insanity defense to avoid responsibility for his acts, rather than to obtain proper psychiatric treatment.

The legal system has failed to recognize the function of the insanity plea because the medical definition of insanity is unclear. Although

50. State v. Rawland, 294 Minn. 17, 32, 199 N.W.2d 774, 783 (1972).
51. See A. Goldstein, supra note 4, at 11-15; W. LaFave & A. Scott, supra note 4, at 22-23.
56. The term "insanity" either has not been defined or has been defined only in vague
"insanity" as used in the courtroom is a legal term and not a medical term, medical experts routinely are called as witnesses to testify about a defendant's sanity. Psychiatric testimony at trial usually is inconsistent because there is no medical definition of insanity. Typically, both the prosecution and the defense obtain psychiatric testimony that supports their positions. Some sane defendants who are acquitted by reason of insanity, should be convicted. Other defendants, who are insane, are convicted although they need the medical help that acquittal by reason of insanity could bring.

The rationale of the insanity defense has never been adequately stated. A multitude of court opinions and scholarly works cite tradition or collective conscience, the requirement of mens rea, or lack of freedom of choice as reasons for the defense. These reasons fail to address society's primary need for protection from the dangerous propensities of the insane criminal. The American Law Institute has stated that the purpose of the insanity defense is to "discriminate between cases where a punitive-correctional disposition is appropriate and those in which a medical-custodial disposition is the only kind law should allow." The ALI purpose addresses the disposition of the defendant after trial rather than justifying the use of the insanity defense to avoid culpability at trial. Allowing insanity to function as a defense that relieves defendants of responsibility for their acts frustrates society's goal of protecting its citizenry. Insanity should be relevant only to the disposition of the defendant after the defendant's guilt has been determined at trial.

generalizations. See MINN. STAT. § 611.026 (1980); Platt, supra note 54, at 455; see also BLACK'S LAW DICTIONARY 714 (5th ed. 1979).
59. See Goldstein & Katz, supra note 53, at 859.
60. See, e.g., Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954). The court stated "[o]ur traditions also require that where such acts stem from and are the product of a mental disease or defect . . . moral blame shall not attach, and hence there will not be criminal responsibility." Id. at 876. In Holloway v. United States, 148 F.2d 665 (D.C. Cir. 1945), cert. denied, 334 U.S. 852 (1948), the court stated "[o]ur collective conscience does not allow punishment where it can not impose blame." Id. at 666-67.
62. Carter v. United States, 252 F.2d 608, 616 (D.C. Cir. 1956); State v. Rawland, 294 Minn. 17, 37, 199 N.W.2d 774, 785 (1972).
63. John Monahan has stated that the average citizen needs the insanity defense as a "crucial prop in a 'public morality play.' One groups' exculpation from criminal responsibility shall inculcate moral responsibility in the rest of us." Monahan, Abolish the Insanity Defense?—Not Yet, 26 Rutgers L. Rev. 719, 721 (1973). Monahan's rationale is fallacious. If the insanity defense reinforces a sane individual's awareness of his responsibility to society, prohibiting an insane person from escaping responsibility for criminal conduct would make the sane person even more aware of his responsibility for his conduct.
64. MODEL PENAL CODE § 4.01, Comment 1, at 156 (Tent. draft No. 4 1953).
IV. ALTERNATIVES TO THE INSANITY DEFENSE

A. Constitutionality of Eliminating the Insanity Defense

The United States Supreme Court has never directly considered whether the insanity defense is required by the United States Constitution.65 Four state supreme courts, however, have considered the issue.66 In 1909 the Washington legislature enacted a law which provided that “[i]t shall be no defense to a person charged with the commission of a crime that at the time of its commission he was unable, by reason of his insanity, idiocy, or imbecility, to comprehend the nature and quality of the act committed.”67 The Washington Supreme Court declared that the statute unconstitutionally denied the defendant his right to trial by jury.68 The court reasoned that a defendant has a right to have his guilt determined by a jury and part of this determination involves the jury’s view of defendant’s responsibility for his act.69

In 1928 the Mississippi legislature abolished the insanity defense.70 The Mississippi Supreme Court held that abolition of the insanity defense violated the due process clauses of both the state and federal constitutions, constituted cruel and unusual punishment, violated the equal protection clause of the fourteenth amendment of the United States Constitution, and violated the state constitutional guarantee to a jury trial.71

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69. Id. at 121, 110 P. at 1024. Justice Morris concurred with the majority opinion.
70. See Act of Apr. 3, 1928, ch. 75, 1928 Miss. Laws 92. “[T]he insanity of the defendant at the time of the commission of the crime shall not be a defense against indictments for murder.”
71. Sinclair v. State, 161 Miss. 142, 132 So. 581 (1931). The court reasoned that it would be cruel and unusual punishment to convict a person and impose a life sentence when he was totally insane and incapable of knowing the nature of the act that he committed. The Mississippi court also found that the statute was violative of due process because of its vagueness. The court held that the statute must define with certainty the act and intent involved for a crime to comply with the requirements of due process. Id. at 583-86.
In 1929 the Louisiana Supreme Court evaluated the constitutionality of a statute that vested a lunacy commission with absolute power to determine whether an accused was then insane and whether he was insane at the time of the commission of the offense.\textsuperscript{72} The Louisiana court held that the statute was unconstitutional because the statute denied the accused's right to a jury trial and vested in the commission powers reserved to the court by the state constitution.\textsuperscript{73}

Recently the Minnesota Supreme Court in \textit{State v. Hoffman} \textsuperscript{74} held “that a defendant has a due process constitutional right to assert the defense of mental illness under both the state and federal constitutions.”\textsuperscript{75}

The constitutional objections stated in these three cases elevate the common-law mens rea requirement to constitutional stature. The courts assumed that mens rea, or evil intent, was an essential element of every crime. Judicial determination of the elements of criminal offenses, acceptable at common law,\textsuperscript{76} is inappropriate where crimes are defined statutorily.\textsuperscript{77}

Recently, three jurisdictions, Montana,\textsuperscript{78} Idaho,\textsuperscript{79} and Kansas,\textsuperscript{80} have eliminated insanity as a separate affirmative defense and have limited admission of evidence of the accused's psychological state at the time of the offense to the issue of intent. The constitutionality of this approach, referred to as the mens rea test,\textsuperscript{81} has yet to be challenged.\textsuperscript{82}

Only legislatures should have the power to define which acts constitute a crime; only legislatures should have the power to determine the sanctions to be imposed for the violation of a statute.\textsuperscript{83} The legislature has

\begin{itemize}
  \item \textsuperscript{72} See \textit{State v. Lange}, 168 La. 958, 123 So. 639 (1929).
  \item \textsuperscript{73} The court found that the operation of the statute vested exclusive power in the lunacy commission and precluded the plea of insanity from being presented before a judge or jury. Therefore, even the right of trying such pleas before courts sitting without juries, as existed before the adoption of the statute, was barred. \textit{Id.} at 963, 123 So. at 641. The court implied that the statute would be unconstitutional under the state's constitution as a denial of due process. \textit{Id.} at 966, 123 So. at 642.
  \item \textsuperscript{74} 328 N.W.2d 709 (Minn. 1982).
  \item \textsuperscript{75} \textit{Id.} at 715.
  \item \textsuperscript{76} See supra note 5.
  \item \textsuperscript{77} See, e.g., \textit{MINN. STAT.} § 609.015 (1963) which provided: “No act or omission is a crime unless made so by [statute].” See also infra notes 84-89 and accompanying text.
  \item \textsuperscript{78} Act of July 1, 1979, ch. 713, 1979 Mont. Laws 142 (current version at MONT. CODE ANN. §§ 46-14-210, -202, -203, -212, -213, -221, -222, -301, -311, -312, -313, -401, 46-15-301 (1981)).
  \item \textsuperscript{79} Act of Apr. 2, 1982, ch. 368, § 2, 1982 Idaho Sess. Laws 919, 919 (codified at IDAHO CODE § 18-207(a) (Supp. 1982)).
  \item \textsuperscript{80} Act of Apr. 9, 1980, ch. 105, 1980 Kansas Laws 483.
  \item \textsuperscript{81} 128 CONG. REC. § 11390-91 (daily ed. Sept. 14, 1982) (statement of Sen. Thurmond).
  \item \textsuperscript{82} See Rathke, \textit{Abolition of the Mental Illness Defense}, 8 WM. MITCHELL L. REV. 143, 161 (1982).
  \item \textsuperscript{83} See, e.g., \textit{People v. Wingo}, 14 Cal. 3d 169, 174, 534 P.2d 1001, 1006, 121 Cal. Rptr. 97, 102 (1975) (definition of crime uniquely in domain in legislature); \textit{People v.
the authority to replace the element of "intent" with that of "knowledge" to require an individual to adhere to the reasonable person standard, to define a crime without regard to the presence or absence of criminal intent, culpability, or knowledge, or to impose strict liability. The legislative authority to define crimes is subject to constitutional constraints. These constitutional constraints should not prohibit the legislatures from precluding the insanity defense. That a legislature has the authority to limit affirmative defenses to criminal charges necessarily follows from the authority the legislature has to define the elements of a crime. Consequently, a legislature has the constitutional authority to abolish the insanity defense or provide a different means of dealing with the insane offender.

Arellano, 185 Colo. 280, 283, 524 P.2d 305, 306-07 (1974) (legislature has inherent authority to define crime); State v. Watts, 186 N.W.2d 611, 614 (Iowa 1971) (only legislature has power to define and create crimes); State v. Forsman, 260 N.W.2d 160, 164 (Minn. 1977) (exclusive province of legislature to define by statute what acts constitute a crime); State v. Witt, 310 Minn. 211, 214-15, 245 N.W.2d 612, 615-16 (1976) (state legislature possesses broad discretion to define criminal offenses and prescribe penalties); Lapinski v. State, 84 Nev. 611, 613, 446 P.2d 645, 646 (1968) (power to define crime lies exclusively in legislature).

84. See Boyd v. State, — Ind. App. —, 396 N.E.2d 920, 923 (1979). This is also recognized by statute in Minnesota. See MINN. STAT. § 609.02(9) (1980).

85. See, e.g., Bennett v. State, 211 So. 2d 520, 525 (Miss. 1968), appeal dismissed, 383 U.S. 320 (1969) ("The appellant had every reasonable ground as a reasonable man to know that the property which he locked in the trunk of his car was stolen property . . . ."); State v. Van Antwerp, 22 Wash. App. 674, 678, 591 P.2d 844, 848 (1979).

86. See supra note 5 and accompanying text. The implication of the holdings in the strict liability cases is that an individual is not constitutionally guaranteed that intent or mens rea will be an element in all crimes. The idea that mens rea is not a constitutionally guaranteed element of criminal statutes is codified in Minnesota. MINN. STAT. § 609.015 (1980) provides that in Minnesota, common-law rules and concepts may be used only to aid the court in construing the terms of criminal statutes. See also State v. Hayes, 244 Minn. 296, 298, 70 N.W.2d 110, 112-13 (1955) ("resort may be made to common law concepts in aiding construction of such common law terms").


88. See supra note 5.


90. See Commonwealth v. Pickett, 244 Pa. Super. 433, 368 A.2d 799 (1976). In Pickett, the court analyzed whether evidence of intoxication could be introduced to negate the intent required for a finding of guilt. The court upheld the action of the legislature which barred intoxication from being a defense to criminal charges. Id. at 436-37, 368 A.2d at 800.
B. General Proposals

Consistent with the basic goal of criminal law—protection of the community—most alternatives to the traditional insanity defense require that the determination of a defendant's sanity be made at the dispositional stage rather than the guilt-finding stage. One proposal provides that a jury would first determine whether a defendant committed a criminal act. If the defendant is convicted, a panel of medical experts would decide whether the defendant should be incarcerated in a prison or sent to a mental health facility. Critics of this proposal claim that, like the outright abolition of the insanity defense, the proposal violates the constitutional guarantees of a jury trial and due process, deprives the jury of the determination of criminal intent, and constitutes a radical departure from substantive and procedural criminal law.

Another proposal also provides that a jury would first determine whether the defendant committed a criminal act. If the defendant is convicted, the jury makes findings regarding the defendant's danger to himself and the community. If the defendant is found to be presently dangerous, a panel of medical and penological experts decides on appropriate treatment and commit the defendant to the appropriate institution. This proposal is not subject to the problems posed by abolishing the insanity defense because the proposal operates independently from the insanity defense. By pleading insanity, the defendant might influence the jury's determination of the defendant's dangerousness, but the jury's determination would not automatically result in civil commitment proceedings. A problem with this proposal is that an insane defendant who is not found presently dangerous would not receive psychiatric treatment.

C. The Guilty-But-Mentally-Ill Alternative

Within the last decade several jurisdictions have experimented with a new verdict that allows the factfinder to find an insane defendant "guilty but mentally ill." In 1975 the Michigan legislature became the first to enact the guilty-but-mentally-ill verdict. The Indiana legislature fol-


92. See supra note 12, at 115.

93. Id.; see also supra notes 66-76 and accompanying text.

94. See supra note 12, at 115-16. The defendant's right to trial by jury is protected by the jury finding both the facts of the crime and the defendant's present danger to society or himself. In addition, due process standards are complied with because the jury periodically examines changes in the defendant's condition. Id. at 116.

95. Id. at 116.

ollowed suit in 1980\textsuperscript{97} as did the Illinois legislature in 1981.\textsuperscript{98} Currently, seven jurisdictions provide statutorily for the verdict.\textsuperscript{99}

Under the Michigan law,\textsuperscript{100} a defendant may be found guilty but mentally ill if he asserts a defense of legal insanity and the trier of fact finds three elements beyond a reasonable doubt: "(a) That the defendant is guilty of an offense, (b) That the defendant was mentally ill at the time of the commission of the offense and (c) That the defendant was not legally\textsuperscript{101} sane at the time of the commission of the offense."\textsuperscript{102} If the defendant is found guilty but mentally ill,\textsuperscript{103} the court must impose the same sentence that a sane defendant convicted of the same offense would receive.\textsuperscript{104} The defendant may be committed to the custody of the department of mental health to be evaluated and treated for his mental illness.\textsuperscript{105} After treatment has been provided, the defendant is returned
to the department of corrections to serve the remainder of his term. 106

The Michigan Appellate Court has held that this statutory procedure is constitutional. 107

Indiana’s version of the guilty-but-mentally-ill alternative 108 is similar to Michigan’s with one important difference. The Indiana statute does not require the defendant to return to the department of corrections after completion of psychiatric treatment. 109

Under the recently adopted Illinois law, 110 "guilty but mentally ill" can be pled by the defendant 111 or be an alternative verdict, 112 if insanity has been raised as a defense. The trial court may impose any sentence on a defendant who has pled or been adjudged guilty but mentally ill that it could impose on someone convicted of the same offense. 113 The defendant must serve his full term whether he is incarcerated in a state hospital for treatment, or in a prison. 114 In 1981 the United States Department of Justice recommended legislation modeled after the Illinois statute that would create a federal guilty-but-mentally-ill verdict. 115

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106. Id. The defendant, upon return to the department of corrections, is entitled to the same parole possibilities as other inmates.


108. See IND. CODE § 35-5-2-3 (Cum. Supp. 1980). The court or jury may choose between verdicts of guilty, not guilty by reason of insanity, or guilty but mentally ill. Id. § 35-5-2-3(a). The court is to sentence the defendant in the same manner as a defendant found guilty of the offense. Id. § 35-5-2-6(a). The defendant is then further evaluated by the department of corrections or the department of mental health. Id. § 35-5-2-6(b).


111. Id. § 1, 1981 Ill. Laws at 2782-83 (amending ILL. REV. STAT. ch. 38 § 6-4). The court cannot accept the plea of guilty but mentally ill until the defendant has undergone psychiatric treatment and the judge has 1) examined the treatment record, 2) held a hearing to determine the defendant’s mental condition, and 3) found that there is a factual basis to the defendant’s claim that he was mentally ill at the time of the offense. Id. § 2, 1981 Ill. Laws at 2783-87 (amending ILL. REV. STAT. ch. 38, §§ 113-4, 5, 115-1, -2, -3, -4, -5, -6). If the defendant’s plea of guilty but mentally ill is accepted by the court, only a presentence hearing is held. Id. § 3, 1981 Ill. Laws at 2787-88 (amending ILL. REV. STAT. ch. 38, § 115-1).

112. If the defense of insanity is raised at trial and evidence is provided sufficient to warrant the defense, the trial judge shall provide the jury with the special verdict form of guilty but mentally ill. If the jury finds that the defendant committed the offense charged and that he was not legally sane at the time he committed the offense, the verdict of guilty but mentally ill may be returned. Id. § 2, 1981 Ill. Laws at 2783, 2786.

113. Id. § 3, 1981 Ill. Laws at 2787-88.

114. Id.

In effect, the guilty-but-mentally-ill verdict will eliminate the insanity defense. A jury required to choose between the verdicts of not guilty by reason of insanity or guilty but mentally ill, will choose the latter verdict. A verdict of guilty but mentally ill allows a jury to condemn a defendant's behavior and keep a potentially dangerous person in custody. In addition, the jury will believe that by finding the defendant mentally ill, he will receive medical treatment.

The guilty-but-mentally-ill alternative satisfies the basic goal of criminal law—protection of the community—better than any of the insanity defenses and allows the community to condemn the defendant's actions while providing the defendant with psychiatric treatment.

V. CONCLUSION

Medical science has not progressed to the point where medical experts can testify accurately about a defendant's ability to conform his conduct to a legal standard at the time a crime was committed. More importantly, medical experts cannot conclude reliably whether a defendant will repeat his criminal conduct in the future. As long as medical experts are unable to reliably predict the behavior of the dangerously insane defendant, the insanity defense poses a threat to the community's safety. Society must protect itself from insane offenders and provide those offenders with psychiatric treatment. This dual objective can best be met by the guilty-but-mentally-ill verdict.

The Minnesota legislature should adopt a modified version of Michigan's guilty-but-mentally-ill statute. The definition of "mental illness" should include persons who are insane by the legal standards as well as persons with less serious mental problems. The defendant should be removed from the community for at least the minimum period required by the Minnesota Sentencing Guidelines and should not be released until a court formally determines beyond a reasonable doubt that the defendant is no longer dangerous.

117. See supra note 52 and accompanying text.
118. See Platt, supra note 54, at 457 (citing H.L.A. Hart, The Morality of the Criminal Law (1964)).
119. See Rathke, supra note 80, at notes 143-55 and accompanying text.
120. For the current definition of "mentally ill person" in Minnesota, see supra note 24.
121. Minnesota provides for greater scrutiny of the confinement and release of those individuals found to be mentally ill and dangerous, or not guilty by reason of insanity. See Minn. Stat. §§ 253A.15, .16, .23 (1980).
122. Under present law a defendant, acquitted by reason of insanity, will be incarcerated for less time than an equally guilty but sane defendant. Id.
Jurors confronted with a defense of insanity tend to ask “Was the defendant so crazy that he should be hospitalized rather than imprisoned?” The guilty-but-mentally-ill verdict allows the jury to avoid having to choose between the prison and the asylum. The guilty-but-mentally-ill verdict would profoundly affect the traditional concepts of criminal responsibility and the insanity defense because the defense would no longer provide the escape of last resort. More importantly, the guilty-but-mentally-ill verdict would restore the primary purpose of the criminal justice system—protecting the community from persons who threaten public safety—to its rightful place by having that purpose remain primary in all criminal cases without impinging on the constitutional rights of insane criminal defendants.

123. See Dershowitz, supra note 65, at 437-38.