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COMMENTS

THE INSANITY DEFENSE: SHOULD LOUISIANA CHANGE THE RULES?*

When John Hinkley, Jr. was found not guilty by reason of insanity in the attempted assassination of President Ronald Reagan, new fuel was added to an already heated debate over the social value of the insanity defense in criminal cases. The jury's verdict focused the nation's attention on the insanity defense, and public outrage spread from coast to coast.¹ Newspapers examined the value of the defense to society at large,² and public pressure induced state³ and national legislative bodies to undertake an evaluation of the current state of the law.

Sensational cases like this one inflame the public at large, which does not understand the reasons for permitting a defendant to avoid responsibility because he was mentally defective. The public perceives only unjust results—a guilty person is not punished because medical experts say he was insane at the time of the act. It is difficult for the average person, who perceives himself as sane, to comprehend a state of mind in which he cannot distinguish right from wrong. To such a person, insanity is nothing more than a "technicality" that permits a defendant the luxury of hospitalization and early release rather than the harshness of the penitentiary.

Since public sentiment has a profound impact upon legislative bodies, the temptation to react quickly is great. However, it would be both dangerous and foolish to modify our laws on insanity without an examination of the available alternatives.

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1. *NEWSWEEK* devoted its cover story in the May 24, 1982 issue to a discussion of the insanity defense and its future. *The Insanity Plea on Trial*, *NEWSWEEK*, May 24, 1982, at 56; see also Cohen, *Hinkley Verdict Will Force Change in Either-Or Laws*, *Sunday Advocate* (Baton Rouge), June 27, 1982, at 3-B, col. 1.

2. See, e.g., *Revamping the Insanity Defense*, *Wall St. J.*, January 21, 1983, at 22, col. 1; *Insanity Plea on Trial*, *N.Y. Times*, August 8, 1982, § 6, at 16, col. 1.

3. The 1982 Regular Session of the Louisiana legislature took the following action regarding the insanity defense:

- (a) memorialized the United States Congress to study federal law regarding the insanity defense. La. H.R. Con. Res. No. 225, 8th Reg. Sess. (1982).
- (b) Introduced and referred to committee three bills intended to provide a verdict of "guilty but insane." La. H.B. 1423, § 1, 8th Reg. Sess. (1982); La. S.B. 503, § 1 & S.B. 681, § 1, 8th Reg. Sess. (1982). All three bills died in committee.

Present Louisiana Law

Assuming that a defendant is mentally competent to stand trial,⁴ Louisiana puts the onus on the defendant to prove, by a preponderance of the evidence, his insanity at the time of the offense.⁵ The law is clear that insanity is an affirmative defense; it must be specially pleaded,⁶ and the defendant must give notice to the state of his intention to use evidence of insanity at trial.⁷ Only when the defendant specially pleads insanity is evidence of his mental condition at the time of the alleged offense admissible.⁸ In addition, a presumption of sanity relieves the state of any burden to prove initially the sanity of the defendant.⁹ To be found not guilty by reason of insanity, the defendant must overcome this presumption by a preponderance of the evidence.¹⁰

Constitutional Considerations

A threshold question in nearly all matters of criminal law and procedure is whether a proposed change is constitutional. The issue

4. LA. CODE CRIM. P. arts. 641-649. The test is whether, "as a result of mental disease or defect, a defendant presently lacks the capacity to understand the proceedings against him or to assist in his defense." LA. CODE CRIM. P. art. 641.

5. LA. CODE CRIM. P. art. 652 provides: "The defendant has the burden of establishing the defense of insanity at the time of the offense by a preponderance of the evidence."

6. LA. CODE CRIM. P. art. 552 provides:

"There are four kinds of pleas to the indictment at the arraignment:

- (1) Guilty;
- (2) Not guilty;
- (3) Not guilty and not guilty by reason of insanity; or
- (4) *Nolo contendere*"

7. LA. CODE CRIM. P. art. 726(A) provides:

A. If a defendant intends to introduce testimony relating to a mental disease, defect, or other condition bearing upon the issue of whether he had the mental state required for the offense charged, he shall not later than ten days prior to trial or such reasonable time as the court may permit, notify the district attorney in writing of such intention and file a copy of such notice with the clerk.

8. LA. CODE CRIM. P. art. 651 provides: "When a defendant is tried upon a plea of 'not guilty', evidence of insanity or mental defect at the time of the offense shall not be admissible."

9. "A legal presumption relieves him in whose favor it exists from the necessity of any proof; but may none the less be destroyed by rebutting evidence; such is the presumption attaching to the regularity of judicial proceedings; . . . that the defendant is sane and responsible for his actions." LA. R.S. 15:432 (1981).

10. For a discussion of these topics, see Note, *The Insanity Defense in Louisiana: Presumptions, Burden of Proof and Appellate Review*, 43 LA. L. REV. 1166 (1982).

is whether due process requires that the present system be maintained; if not, the question becomes how much change may be made without violating due process.

A tenet of constitutional law is that due process requires the prosecution to prove a criminal case beyond a reasonable doubt: Each and every element of the offense, as defined by the legislature and interpreted by the courts, must be proved to the trier of fact beyond a reasonable doubt.¹¹ Although intent is an essential element of many offenses,¹² sanity has been determined not to be such an element (except when so defined by the legislature).¹³ Therefore, the prosecution does not bear the burden of proving a defendant's sanity—at least such proof is not constitutionally mandated.

However, this conclusion is less than clear and requires further examination of the distinction between intent and sanity. Sanity describes a mental condition at a given point in time; intent can be similarly defined. Thus, the problem is whether one who is insane is able to form the intent required by law. If not, then sanity would be an element of any crime requiring intent, and the prosecution would be required to prove sanity, just as it must prove every other element, and to do so beyond a reasonable doubt. The conclusion follows logically since sanity becomes a prerequisite to the ability to form intent. Absent legal sanity, there could be no intent and, therefore, no crime. But, if sanity and intent are independent of one another, then intent could be formed regardless of the defendant's legal sanity. Since sanity is an elusive concept, the resolution of this issue is critically important to criminal prosecutions.

The United States Supreme Court has distinguished the concepts of sanity and intent.¹⁴ *Patterson v. New York*¹⁵ recognized this distinction; that doctrine remains valid today. Inherent in the Court's distinction is the finding that a person can act intentionally and yet not necessarily be sane.¹⁶ Consider the following illustration:

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

12. *See Mullaney v. Wilbur*, 421 U.S. 684 (1975).

13. *Patterson v. New York*, 432 U.S. 197 (1977); *State v. Lee*, 395 So. 2d 700 (La. 1981). "[S]anity is not an element of the Massachusetts crime of murder. . . . [Therefore the burden of proof . . . and the . . . 'presumption of sanity' . . . do not raise constitutional questions." *Walker v. Butterworth*, 599 F.2d 1074, 1080 (1st Cir. 1979) (citing *Patterson v. New York*, 432 U.S. 197 (1977); *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *In re Winship*, 397 U.S. 358 (1970)). The same is true of Louisiana law. *See infra* text accompanying notes 14-25.

14. *Patterson v. New York*, 432 U.S. 197 (1977).

15. *Id.*; *see also State v. Lee*, 395 So. 2d 700 (La. 1981).

16. *See infra* text accompanying note 66.

A defendant purchases a pistol and some ammunition. Late one evening, he drives to the residence of his victim, rings the doorbell and, when the victim answers, shoots five times at point blank range, killing the victim. The defendant departs, taking an indirect route home and stopping twice along the way—once to unload the weapon and later to abandon the pistol in a roadside ditch.¹⁷

Louisiana law would permit the trier of fact to infer specific intent from these facts.¹⁸ Assuming all other elements of the offense could be proven beyond a reasonable doubt, based upon these facts, the defendant would be guilty of second degree murder.¹⁹

Now, consider the same facts and add the following:

The defendant apparently "heard" voices which directed him to attack the Catholic Church. He made tape recordings and wrote to the President about a "Catholic conspiracy" to take over the world. He committed acts of vandalism against Church buildings and even physically attacked an employee of a Church agency. His victim was a Catholic priest. A psychiatrist diagnosed his condition as a form of schizophrenia, paranoid type.²⁰

Clearly, a trier of fact also could conclude that this defendant suffered from a mental disease or defect that prevented him from distinguishing between right and wrong at the time of the offense.²¹ Thus the question of whether legal sanity is a prerequisite to forming intent has been answered negatively, since this defendant apparently formed the requisite intent while he was not "legally sane."

Although both intent and sanity are issues which hinge on the

17. These facts are similar to those of *State v. Abercrombie*, 375 So. 2d 1170, 1172 (La. 1979), *cert. denied*, 446 U.S. 935 (1980).

18. "Criminal intent may be specific or general: (1) Specific criminal intent is that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act." CRIMINAL CODE: LA. R.S. 14:10(1) (1974).

19. "Second degree murder is the killing of a human being: (1) When the offender has a specific intent to kill or to inflict great bodily harm." CRIMINAL CODE: LA. R.S. 14:30.1(1) (Supp. 1983).

20. *State v. Abercrombie*, 375 So. 2d 1170, 1173-74 (La. 1979), *cert. denied*, 446 U.S. 935 (1980).

21. "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." CRIMINAL CODE: LA. R.S. 14:14 (1974).

"circumstances"²² of each case, insanity requires that there exist a mental disease or defect in the defendant. Moreover, the ultimate issue in an insanity defense case is not whether the defendant "actively desired the prescribed criminal consequences,"²³ but whether he could distinguish "between right and wrong"²⁴ at the time. Viewed in this light, the disparity between intent and sanity becomes clearer. Intent remains the burden of the prosecutor—a traditional burden which demands proof of the required state of mind to complete the offense; insanity is the burden of the defendant—a vehicle by which he is not held criminally responsible, despite having actually committed the act in question.²⁵

Sanity need not be an element of an offense unless a state chooses to make it one; constitutional due process guarantees are not violated if a state decides not to do so.²⁶ Sanity is usually not such an element, and insanity is normally an affirmative defense. The determination that sanity is not an essential element gives a state wide latitude to alter its insanity defense scheme.

Alternatives to the Present System

Abolish the Insanity Defense

Many critics of the insanity defense have advocated the outright abolition of it.²⁷ According to these critics, the defense exacts too high a societal cost. It is often founded on the inexact testimony of psychiatrists and other mental health professionals whose medical definitions of sanity do not always comport with the legal definition. The insanity defense also allows a defendant to win a relatively quick

22. See CRIMINAL CODE: LA. R.S. 14:10(1), :14 (1974), quoted *supra* notes 18, 21, respectively.

23. CRIMINAL CODE: LA. R.S. 14:10(1) (1974), quoted *supra* note 18.

24. CRIMINAL CODE: LA. R.S. 14:14 (1974), quoted *supra* note 21.

25. See *infra* text accompanying notes 35-46.

26. A state legislature is free to define crime as it pleases unless the definition chosen offends a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Patterson v. New York*, 432 U.S. 197, 202 (1977) (quoting *First Unitarian Church v. County of Los Angeles*, 375 U.S. 513 (1958) (cited as *Speiser v. Randall* in *Patterson*)).

27. See, e.g., W. WINSLADE & J. ROSS, *THE INSANITY PLEA: THE USES AND ABUSES OF THE INSANITY DEFENSE* (1983). The authors argue for the following changes: elimination of the insanity defense, elimination of most psychiatric testimony from the courtroom, universal adoption of the guilty but mentally ill plea and the separation of the guilt and penalty phases of a trial when the defendant pleads mental illness. For a similar point of view, see T. SZASZ, *PRIMARY VALUES AND MAJOR CONTENTIONS* 146-50 (R. Vatz & L. Weinberg ed. 1983).

release in most cases, without being punished for his deeds.

Idaho abolished the insanity defense in 1982,²⁸ perhaps in response to public sentiment. The mens rea²⁹ of the common law remains, but that is no departure from the traditional common law view that there are certain mental states required to complete certain crimes. Mens rea is, of course, the traditional common law notion that, in order to be held criminally responsible for certain behavior, there must be a "guilty mind" in addition to an unlawful act. The notion has been carried over into American criminal law and is stated in criminal statutes as intent, whether general or specific. For example, the mens rea requirement would preclude criminal punishment of a defendant for the truly accidental death of another. Idaho apparently would admit evidence of a mental condition that would negate the defendant's ability to form the mens rea, but would not permit an insanity defense short of that.

Since the prosecution must prove all the essential elements of an offense, including mens rea, the defendant should be allowed to introduce evidence to negate such proof.³⁰ In a state that permits no insanity defense, he could produce evidence of his "insanity" to negate the mens rea, and be acquitted—the only alternative available to the jury when the element of mens rea has been negated. Since there is no way for the jury to find him not guilty by reason of insanity (with subsequent treatment for the mental disease), he will be released into society without any further care or supervision. This is not an acceptable result.

Abolition of the insanity defense is analogous to increasing prison sentences as a means of reducing crime. It has a great deal of popular appeal, but would likely create more problems than it would solve.

Adopt Another Scheme

Eight states have adopted an alternative verdict in insanity cases: "guilty but mentally ill."³¹ This verdict does not permit a defendant to exonerate himself because of some mental disease or defect, but it does admit some mitigation of the kind of punishment to be imposed rather than turning on responsibility *vel non* for the offense.

28. ABA STANDING COMM. ON ASS'N STANDARDS FOR CRIMINAL JUSTICE AND COMM'N ON THE MENTALLY DISABLED, REPORT TO THE HOUSE OF DELEGATES, Midyear Meeting 1983, app. 1 (February 9, 1983) [hereinafter cited as ABA COMM. REPORT].

29. See *infra* text accompanying note 30; see also W. LA FAVE, PRINCIPLES OF CRIMINAL LAW 60 (1978).

30. Due process probably requires that an opportunity be afforded.

31. ABA COMM. REPORT, *supra* note 28, at 7.

There are two applications of such an alternative verdict which merit discussion.

When the guilty but mentally ill verdict *supplements* a verdict of not guilty by reason of insanity, a middle ground is established whereby the jury may find that the defendant was not so incapacitated by his mental condition as to exonerate him, but that he did labor under some mental disease short of such incapacity.³² The defendant is then treated for his mental condition prior to confinement in a correctional institution.

The process of determining appropriate punishment or treatment is best left to the judge and correctional personnel, who are more experienced in selecting individualized sentences and treatment. In these cases, when a jury returns a verdict of guilty but mentally ill, discretion in sentencing is removed from the judge. The result, that the defendant is treated for his illness and then incarcerated, may not be a bad one. But the judge, aided by other professionals, should make the final decision.

When the guilty but mentally ill verdict *supplants* the verdict of not guilty by reason of insanity, the result is about the same as if the defense were abolished.³³ Under this system, the jury is allowed to consider evidence of insanity presented by the defendant but, unless the jury concludes that the defendant could not form the required mens rea, the verdict means nothing more than that the defendant will be sentenced to special treatment before imprisonment.

At first blush, this verdict, in either form, attracts popular approval. It seems to allow the defendant to mitigate his punishment while also permitting society to extract punishment for the defendant's misdeed. Closer analysis reveals that the verdict is not all it appears to be. It does not solve the moral problem of nonresponsibility for crime;³⁴ it only affects the method of treatment and punishment. As noted by students of the Michigan system, the new scheme simply does not work.³⁵ "Guilty but mentally ill" is nothing more than a *de facto* rejection of the insanity defense.

32. "The verdict is available only where the defendant has asserted the insanity defense, and only if it is found beyond a reasonable doubt that defendant is guilty, he was mentally ill when he committed the offense, but was not 'legally insane' at that time." MICHIGAN SECOND REVISED CRIMINAL CODE § 705, committee commentary at 88 (Final Draft 1979).

33. See *supra* text accompanying note 30; see also ABA COMM. REPORT, *supra* note 28, at 8.

34. See *infra* text accompanying notes 66-72.

35. See *Guilty But Insane Just Means Guilty*, NEWSWEEK, April 4, 1983, at 78.

Change the Burden of Proof

One of the greatest problems in the Hinkley case was the government's burden of proof on the issue of sanity. Under federal law, the prosecution is required to prove the defendant's sanity beyond a reasonable doubt once the defendant has placed his sanity at issue.³⁶ The defendant will prevail if he can produce any evidence of his insanity, unless the prosecution proves the defendant's sanity just as it must prove every other element of the offense, *i.e.*, beyond a reasonable doubt. Twenty-four states have adopted similar schemes.³⁷ This system is constitutionally permissible because whether sanity is to be an essential element is a matter of legislative discretion.³⁸ Each of these states has consciously adopted this rule and has willingly accepted the burden of proof.

This system probably best highlights public discontent concerning the insanity defense. It is a logical, and in Louisiana, a statutory tenet that people are sane until proven otherwise.³⁹ Consequently, it seems far more proper to require someone to prove his *insanity* rather than to make the state prove his *sanity*.

The alternative to placing the burden of proof on the prosecution is to place it upon the defendant, but constitutional limitations on the state's ability to do so must be considered. Oregon formerly required that the defendant prove his insanity beyond a reasonable doubt,⁴⁰ and that scheme was validated by the United States Supreme Court.⁴¹ Although adopting such an extreme degree of proof and placing the burden upon a defendant is permissible, it seems today to offend traditional American notions of justice. Only the prosecution is believed to have to prove anything beyond a reasonable doubt; it seems drastic indeed to place such a burden upon the defendant. Apparently, no state is willing to do so now.⁴² Oregon amended its laws in 1971 to place a lesser burden of proof of insanity upon a defendant.⁴³ But, despite the trend away from placing such a strenuous burden upon

36. *Davis v. United States*, 160 U.S. 469 (1895); *see, e.g., United States v. Phillips*, 519 F.2d 48 (5th Cir. 1975); *see* FED. R. CRIM. P. 12.2.

37. ABA COMM. REPORT, *supra* note 28, at 6; *but see Patterson v. New York*, 432 U.S. 197, 207 n.10 (1977) (twenty-eight states). In *Patterson*, Justice White observed that the trend in insanity cases is for the prosecution to shoulder the burden of proof. *Id.*

38. *See supra* note 26.

39. LA. R.S. 15:432 (1981), quoted *supra* note 9.

40. OR. COMP. LAWS 1940, § 26-929 (repealed 1971).

41. *Leland v. Oregon*, 343 U.S. 790 (1952).

42. ABA COMM. REPORT, *supra* note 28, at app. 1.

43. OR. REV. STAT. § 161.055 (1971).

the defendant, it remains a plausible alternative for a legislature intent upon severely restricting the use of the insanity defense. Adoption of this alternative should be approached with caution as it, in effect, does away with the defense in all but the most severe cases.

The most accepted burden of proof in insanity cases is proof by a preponderance of the evidence, with the burden upon the defendant. Louisiana⁴⁴ and twenty-six other states⁴⁵ utilize this system. The American Bar Association recently has endorsed the scheme in certain circumstances.⁴⁶

Under Louisiana's present insanity defense system, a defendant must prove by a preponderance of the evidence that he labored under a mental disease or defect which prevented him from distinguishing between right and wrong. If he is successful, he should be found not guilty by reason of insanity. The state may counter the defendant's evidence, either on rebuttal or in its case in chief. If the state prevails on the issue of insanity, that is, if it produces evidence that preponderates over the defendant's, and all essential elements of the offense are proven beyond a reasonable doubt, the defendant should be convicted.⁴⁷

This system has a logical appeal. It combines the idea of non-responsibility for criminal acts committed by those who are mentally defective with a concern for removing from society those who violate its laws. Society retains the burden of proving the defendant's guilt and permits him to escape culpability without placing an undue burden upon him. Given the alternatives of abolishing the insanity defense *in toto* or adopting some other scheme, Louisiana's present system is the most favorable to the defendant in that it provides a method for complete exoneration. At the same time, Louisiana's system preserves, without too high a societal cost, society's interest in not punishing those who cannot be held morally accountable.

Change the Test of Legal Insanity

Since insanity is a legal concept, rather than a medical concept,⁴⁸

44. See *supra* note 5 and accompanying text.

45. ABA COMM. REPORT, *supra* note 28, at 6.

46. ABA *Delegates OK New Test for Insanity*, State Times (Baton Rouge), Feb. 10, 1983, at B8, col. 1. The American Bar Association endorsed placing the burden of proof on the defendant only when the test for insanity included a volitional as well as a cognitive test; otherwise the burden remains on the state. See *infra* note 52 and accompanying text.

47. Note, *supra* note 10, at 1179.

48. Only lawyers use the term "insanity" in a technical sense. Psychiatrists and

it must be defined in legal terms. Several tests have been advanced by which the defendant's sanity *vel non* can be judged;⁴⁹ these tests generally can be classified as those having only a cognitive element and those having both a cognitive and a volitional element. The cognitive aspect of a test addresses whether the defendant could discern that his conduct was contrary to society's expectations. The volitional aspect of a test concerns whether the defendant could adhere to the right or conform his conduct to the law.

A combined cognitive-volitional test was once thought to be a progressive view of the insanity defense; yet, it has caused numerous problems. As difficult as it might be for a jury to determine if a defendant labored under a mental disease which precluded him from distinguishing between right and wrong,⁵⁰ it is much more difficult to decide whether the same defendant was able to adhere to the right.

Louisiana adopted what has been called a "modified *M'Naghten*" rule, a cognitive test which is a paraphrased version of the traditional *M'Naghten* test.⁵¹ The "right from wrong" standard embodied in the *M'Naghten* rule provided for many years a relatively simple standard by which the defendant's insanity could be judged. Problems later developed when volitional tests were adopted. In a "right from wrong"

other mental health professionals would define various mental diseases and conditions but would be unable to provide a technical definition for "insanity." "[C]hoice of a test of legal sanity involves not only scientific knowledge but questions of basic policy as to the extent to which that knowledge should determine criminal responsibility." *Leland v. Oregon*, 343 U.S. 790, 801 (1952).

49. See for example the *M'Naghten* rule:

Every man is presumed to be sane . . . ; to 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 laboring 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.

M'Naghten's Case, 8 Eng. Rep. 718, 722 (1843). See the test in the MODEL PENAL CODE § 4.01(1) (Proposed Official Draft 1962): "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law." See the *Durham* test: "An accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." *Durham v. United States*, 214 F.2d 862, 874 (D.C. Cir. 1954).

50. ABA COMM. REPORT, *supra* note 28, at 4-5.

51. CRIMINAL CODE: LA. R.S. 14:14 (1974), quoted *supra* note 21. Louisiana deleted from the traditional rule the following language: "or, if he did know it, that he did not know he was doing what was wrong." The *M'Naghten* rule, *supra* note 49. The deleted language is also cognitive. There is no provision in the *M'Naghten* rule for consideration of the defendant's ability to conform to a certain standard of conduct.

case, the jury can rely on the behavior of the defendant and, perhaps, some testimonial evidence to decide whether the defendant suffered from a mental disease or defect. It is quite another matter for the jury to determine, under a volitional test, whether an individual was unable to conform his conduct to the requirements of the law or whether he acted under an irresistible impulse.

The problems caused by volitional tests have been recognized by the American Bar Association.⁵² The group recently has changed its policy on the insanity defense and conditionally adopted a cognitive test similar to the traditional *M'Naghten* rule.⁵³

Utilizing only this traditional cognitive test does no violence to the goals of the insanity defense—it still allows a defendant to be relieved of criminal responsibility when he cannot distinguish between right and wrong. Moreover, the test is less speculative than one which requires a jury to decide if a defendant could conform to a certain standard of conduct or whether his acts were the product of a mental disease. “[T]here is still no accurate scientific basis for measuring one’s capacity for self-control or for calibrating the impairment of such capacity.”⁵⁴ There is a great difference indeed between an irresistible impulse and an impulse that is not resisted. The abolition of volitional tests obviates the problems inherent in such distinctions.

Louisiana, with its modified *M'Naghten* rule, now appears to be at the forefront of modern thought as to the legal test for insanity. Permitting the trier of fact to decide whether the defendant could distinguish between right and wrong at the time of the alleged act, without regard for his ability to conform to the right, is a time-proven and effective method by which to test legal sanity. Louisiana’s courts are experienced in applying this test. It should not be changed without a compelling reason—one which, for the moment at least, does not exist.

Adopt a “Diminished Capacity” Rule

The present Louisiana scheme envisions an “all or nothing”⁵⁵ approach. The defendant must either plead “not guilty by reason of insanity” and attempt to introduce evidence of a mental disease or defect (to prove that he did not know right from wrong) or else abandon

52. ABA COMM. REPORT, *supra* note 28, at 4-5.

53. ABA, SUMMARY OF ACTION OF THE HOUSE OF DELEGATES, Midyear Meeting 1983, at 3 (Recommendation 1) [hereinafter cited as ABA, SUMMARY OF ACTION].

54. ABA COMM. REPORT, *supra* note 28, at 5.

55. LA. CODE CRIM. P. art. 651, comment (a).

the opportunity to produce evidence of his mental condition at the time of the alleged offense. The Code of Criminal Procedure is clear as to the legislature's intent: "When a defendant is tried upon a plea of 'not guilty,' evidence of insanity or mental defect at the time of the offense shall not be admissible."⁵⁶

Without totally abandoning the insanity defense scheme now in use, Louisiana could offer to certain defendants the chance to mitigate the degree of punishment or severity of the offense by permitting a "partial insanity" defense. In specific intent cases,⁵⁷ evidence of a mental condition which precluded the defendant from forming the requisite intent could be allowed in order to reduce the grade of the offense charged. The defendant would not be relieved from all responsibility, since lesser included offenses not requiring specific intent would be available as responsive verdicts. The jury's task would be to decide only if the defendant could form the needed specific intent and not whether the defendant knew right from wrong at the time of the offense. Since the defendant would not be required to plead "not guilty by reason of insanity," the affirmative defense of insanity would not be an issue and "not guilty by reason of insanity" would not be an available verdict in such cases; therefore, there is little danger of a jury confusing these issues.

There have been forceful arguments in both directions on whether Louisiana should adopt a "diminished capacity" rule. Some members of the bench have expressed the opinion that a defendant must be allowed an opportunity to prove lack of intent due to a mental condition if due process is to be satisfied.⁵⁸ Others, however, see a diminished responsibility test as risky; such a test might tend to infuse into every specific intent case expert testimony as to whether or not the defendant could form the intent required by law.⁵⁹ The drafters of the controlling Code of Criminal Procedure article voiced a fear of confusion. They doubted that a jury could differentiate between grades of mental disorders and were afraid a jury could be confused by the evidence and by the court's necessarily complex instructions.⁶⁰ Clearly, this concern would be well taken in diminished capacity cases when insanity is raised as an affirmative defense as well as proof of

56. LA. CODE CRIM. P. art. 651.

57. Specific intent crimes are those such as first and second degree murder, aggravated burglary and simple burglary. Attempts to commit crimes also require specific intent. *See, e.g.*, CRIMINAL CODE: LA. R.S. 14:30, :30.1, :60, :62, :27.

58. *State v. Lecompte*, 371 So. 2d 239, 244 (La. 1979) (Calogero, J., dissenting).

59. *State v. Lecompte*, 371 So. 2d 239, 245 (La. 1979) (on rehearing).

60. LA. CODE CRIM. P. art. 651, comment (a).

a lack of intent. In such cases, both issues (exoneration based upon insanity and inability to form the requisite intent) would be before the jury, and there would be a greater likelihood of confusion. The number of these cases is likely to be small, however, especially in view of the fact that insanity is raised as a defense in proportionately few criminal cases.

Despite the Louisiana legislature's refusal to include a partial responsibility doctrine in the criminal law of the state, there is some historical foundation for doing so. Since Louisiana criminal law is derived from the common law, it is proper to look to English tradition to determine the origin of diminished responsibility. The concept apparently was first described by Sir Matthew Hale in the seventeenth century. Hale distinguished "partial insanity of mind" from "a total insanity." While somewhat ahead of his time in this view, Hale also recognized the effects of the distinction: partial insanity, he thought, would excuse a crime but would be a "matter of great difficulty."⁶¹ Hale envisioned the same problems in application of these concepts by a jury that are anticipated today.

Another valid argument in favor of the adoption of such a provision is simply that, "[i]t is difficult to determine by what process of reasoning some courts can decide that self-produced intoxication is a proper matter for consideration by the jury in determining whether the mental elements [of specific intent crimes] are present but that mental disease cannot be considered."⁶² The merit of this argument lies in the source of the defenses of intoxication and insanity. Louisiana law permits voluntary intoxication to exempt an offender from criminal responsibility for a specific intent crime. A mental disease or defect, presumably a condition that is involuntary, does not exempt an offender from the same offense. The result is inconsistent, especially since the underlying rationale of the intoxication defense is that the condition precludes formation of intent. If one can voluntarily induce such a condition, it should follow that an involuntarily induced mental illness should produce the same results.⁶³

Although a diminished capacity rule would seem to clutter the court system in all specific intent cases, the rule is a middle ground between a hard-line insanity defense and none at all. Proof of dimin-

61. II H. VETTER & R. RIEBER, *THE PSYCHOLOGICAL FOUNDATIONS OF CRIMINAL JUSTICE* 146 (1980).

62. M. GUTTMACHER, *THE ROLE OF PSYCHIATRY IN LAW* 49 (1968) (quoting Edmund Keedy, an advocate of partial responsibility).

63. See the reporter's comment to LA. R.S. 14:15 for a less than satisfactory reason for the different treatments of voluntary intoxication and mental disease.

ished capacity does not always exonerate the defendant; only the degree of his crime is reduced. Upon conviction of the lesser offense, he may be confined in a correctional institution rather than hospitalized, as is often the case when a defendant successfully asserts a defense of "not guilty by reason of insanity."

Given that very few criminal trials involve insanity as an issue, it would not be unduly burdensome to permit evidence of a defendant's diminished capacity. Proof of diminished capacity is at least as reliable as proof of insanity; it may even be more reliable than proof of voluntary intoxication since expert testimony will nearly always be involved.

One other advantage to the defendant should be mentioned. If a diminished capacity rule is adopted, it would not replace the insanity defense. However, it would allow a defendant to introduce evidence of a mental condition which precludes the formation of specific intent without having to plead "not guilty by reason of insanity" (and, in effect, admitting the act with which he is charged, even if such a plea does not amount to an admission of guilt). He would still be required to give notice of intent to introduce such evidence,⁶⁴ but he would not labor under the burden of having "admitted" the act in an attempt to mitigate his culpability.

On balance, it is both logical and realistic to adopt such a rule, and the legislature should give serious consideration to amending the Code of Criminal Procedure to permit evidence of diminished capacity in specific intent cases.

The Dilemma of Moral Responsibility

Despite the number of choices available to the legislature in seeking the proper method of dealing with criminal insanity cases, the ultimate decisions must be founded upon society's desire to continue to attach moral culpability to crime. The issue is whether society wishes to continue to make moral responsibility a prerequisite for conviction and punishment. If so, then it is imperative that the law provide some way to identify those who should not be held criminally responsible for a prohibited act.

64. LA. CODE CRIM. P. art. 726. The language of this article, while not directly creating a rule of diminished capacity, is curious nonetheless. The defendant is required to file a notice of his intent to use evidence relating to an "other condition bearing upon the issue of whether he has the mental state required for the offense charged." Perhaps this is an inadvertent reference to diminished capacity, whereby proof to negate specific intent would be admitted, that specific intent being the "mental state required for the offense charged."

Rooted deep in legal history is the development of the concept of guilt as being more than simply having committed a socially condemned act. The law requires a "guilty mind," which presupposes a mind capable of entertaining the sort of disposition toward the act that offends society.⁶⁵ In order to foster the idea that a person can be held not responsible for his actions under certain circumstances, the criminal law has devised a number of defenses which alone do not prove the innocence of the defendant. On the contrary, these defenses serve merely to relieve the defendant of societal retribution when he has, in fact, done what the law proscribes. As Judge David Bazelon has stated, "culpability and intent are not synonymous; even an individual who intentionally engages in unlawful conduct may be non-culpable when the law itself is deemed unjust by the community or when the reasons for the defendant's conduct serve as a justification or excuse."⁶⁶ Chief Justice John Dixon of the Louisiana Supreme Court followed that thought when dissenting in an insanity case: "A civilized people should not ascribe legal responsibility to such an insane person even if he kills a Catholic priest. Our law does not permit it."⁶⁷

Well in advance of the trial of Daniel M'Naghten in 1843, civilized peoples had indeed recognized that there should be some occasions on which a defendant should not be held responsible. Early Mohammedan law provided punishments for certain crimes, but excluded from punishment those persons who were not in full possession of their faculties.⁶⁸ Even the Draconian Code differentiated between murder and involuntary homicide, reflecting a recognition of differences in state of mind of the perpetrator at the time of the act.⁶⁹ Later, Roman law also recognized a distinction between these same grades of homicide, providing a lesser punishment for the involuntary variety.⁷⁰ The distinction was clearly based upon the "guilty mind" of the perpetrator. Still later, beginning with the Renaissance, man's understanding of his own mind and the relationship of intent to society's interest in punishing crime became clearer until the common law formally recognized the insanity defense in *M'Naghten's Case*.⁷¹

Judeo-Christian development should be added to this historical

65. See *supra* text accompanying note 29.

66. Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385, 397 (1976).

67. *State v. Abercrombie*, 375 So. 2d 1170, 1179 (Dixon, C.J., dissenting).

68. J. BIGGS, *THE GUILTY MIND* 40 (1955).

69. *Id.* at 42.

70. *Id.* at 48-49.

71. 8 Eng. Rep. 718 (1843).

litany, especially development after the Roman Empire. Certainly there was a profound impact of ecclesiastical law upon the civil law, especially with regard to the concepts of free will and sin. Recognition of the necessity of free will to sin and to the actions of man generally was not inconsistent with the theory that nonspiritual actions should also be judged by some notion of voluntarism. Insanity, to our way of thinking, destroys free will, and, therefore, one who acts while insane will not be held morally accountable.

The relationship of free will to culpability for one's actions has become a cornerstone of our entire criminal justice system. Punishment as a deterrent for criminal acts is based upon this doctrine—one who is in control of his faculties and can choose freely is likely to be deterred by sure and swift punishment. An offender who commits a crime while laboring under a mental disease that affects his free exercise of will cannot be deterred by the threat of punishment.

In a recent article in the *American Bar Association Journal*, Richard J. Bonnie summarized the result of these many centuries of development:

The historical evolution of the insanity defense has been influenced by the ebb and flow of informed opinion concerning scientific understanding of mental illness and its relation to criminal behavior. But it is well to remember that, at bottom, the debate about the insanity defense and the idea of criminal responsibility raises fundamentally moral questions, not scientific ones. As Lord Hale observed three centuries ago, in *History of Pleas of the Crown*, the ethical foundations of the criminal law are rooted in beliefs about human rationality, deterrability and free will. But these are articles of moral faith rather than scientific fact.

Some critics of the insanity defense believe that mentally ill persons are not substantially less able to control their behavior than normal persons and that, in any case, a decent respect for the dignity of those persons requires that they be held accountable for their wrong doing on the same terms as everyone else. On the other hand, proponents of the defense . . . believe that it is fundamentally wrong to condemn and punish a person whose rational control over his or her behavior was impaired by the incapacitating effects of severe mental illness.⁷²

72. Bonnie, *The Moral Basis of the Insanity Defense*, 69 A.B.A. J. 194, 195 (Feb. 1983); see generally Fingarette, *Insanity and Responsibility*, in *PSYCHIATRY AND ETHICS: INSANITY, RATIONAL AUTONOMY, AND MENTAL HEALTH CARE* 499 (R. Edwards ed. 1982).

Conclusion

Given the broad permissible constitutional boundaries within which Louisiana could modify its insanity defense scheme and the intense public dissatisfaction with the defense in general, the temptation to make changes in the law is great. Yet, there is no need to change a system which now appears to be the most acceptable of the available alternatives. Each of the alternatives, with the exception of the notion of diminished capacity, suffers from one or more defects that makes it unacceptable and certainly less preferable than the present law.

Moreover, appellate courts are in a position to insure that the insanity defense is fairly applied. *Jackson v. Virginia*⁷³ pronounced a test for review of evidence in criminal appeals; that test was applied to the insanity defense in *Moore v. Duckworth*.⁷⁴ A reviewing court must examine the evidence of the defendant's insanity and determine whether a reasonable juror could conclude that the defendant was insane at the time of the offense. Applying this test to each case permits an appellate court to insure that the test for insanity and burden of proof are properly applied.⁷⁵

In the final analysis, Louisiana should resist the temptation to adopt other insanity defense schemes, particularly one that would exchange "not guilty by reason of insanity" for "guilty but mentally ill."⁷⁶ Study should be made of the possibility of adopting a diminished capacity rule, but only after care is taken to tailor it to the needs of the state. If adopted, the rule should be narrowly defined and written so as to meld with the other provisions of the Code of Criminal Procedure regarding insanity.

Moral responsibility⁷⁷ for crime is a matter of public policy. Louisiana's insanity defense scheme acknowledges and implements society's recognition that there are those among us who should not be punished

73. 443 U.S. 307 (1979).

74. 443 U.S. 713 (1979).

75. There is some authority for the appellate court to order a verdict of not guilty by reason of insanity when it finds that the evidence, under the *Jackson* standard, supports the defendant's plea. *State v. Byrd*, 385 So. 2d 248 (La. 1980), supports the rendering of a lesser included (responsive) verdict rather than another trial when the evidence falls short of the offense charged but satisfies the elements of a lesser included offense. Whether a court would be willing to use a similar procedure in insanity cases remains to be seen.

76. See ABA, SUMMARY OF ACTION, *supra* note 53, at 3 (adoption of Recommendation Three).

77. For an excellent article discussing some of the suggestions addressed herein, see Bonnie, *supra* note 72.

criminally for acts which violate the law. We have preserved a cornerstone of society—moral culpability—and we should be reluctant to abandon it.

Instead of changing the test for legal sanity or modifying the burden of proof, the legislature would be well advised to consider higher standards for release of those found “not guilty by reason of insanity”⁷⁸ and, perhaps, a system of post-release probation that would encourage further treatment and deter similar conduct in the future.⁷⁹

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78. LA. CODE CRIM. P. arts. 654-658.

79. By Act 689 of 1982, the Louisiana legislature mandated that, prior to release pursuant to LA. CODE CRIM. P. art. 657, the court file written findings of fact and conclusions of law. This article permits the court to release a defendant on probation. The burden of proof is on the defendant to show that he is no longer a danger to himself or to others, or that he is a suitable candidate for probation.