Recent Changes in Criminal Law: The Federal Insanity Defense

Henry T. Miller

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RECENT CHANGES IN CRIMINAL LAW: THE FEDERAL INSANITY DEFENSE

The verdict of "not-guilty-by-reason-of-insanity" has been the subject of controversy for many years among psychiatrists, legal scholars, and the general public. Following the not-guilty-by-reason-of-insanity verdict in United States v. Hinckley Congress substantially altered the insanity defense at the federal level.

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This comment will examine the changes made by Congress. Part one will examine the new definition of insanity, which provides:

It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts.7

Part one will be sub-divided into four areas, (a) the origins of the insanity defense; (b) alternative definitions of insanity; (c) an analysis of the new federal definition; and (d) a conclusion. Part two will examine the placement of the burden of proof. The new federal law provides: "[t]he defendant has the burden of proving the defense of insanity by clear and convincing evidence."8 Part two will be divided into four sections, (a) the constitutionality of placing the burden of proof on the defendant; (b) arguments for placement of the burden of proof; (c) an analysis of the new federal law; and (d) a conclusion.

I. DEFINING CRIMINAL INSANITY

A. The Origins of the Insanity Defense

The concept of mens rea has existed in most civilizations; Roman, Hebrew, Greek, and Canon law all distinguished between crimes or acts committed intentionally and those committed unintentionally.9 Prior to the twelfth century, however, English criminal law required neither a general mens rea nor a specific intent for the commission of a crime.10 In England, the Church and the medieval universities were the major source for, and advocates of, a mens rea element. The university scholars were introduced to the notion of mens rea through their studies of Roman law, which contributed the notion of moral guilt.11

7. Id.
8. Id.
10. Sayre, Mens Rea, 45 Harv. L. Rev. 974, 977 (1932); see also Platt & Diamond, supra note 9, at 1231; Gerber, supra note 2, at 8-12.
11. The earliest Roman legal sources such as the Twelve Tables (c. 450 B.C.), referred only briefly to the legal incapacities, of children and the insane. In the third century B.C. however, the Lex Aquilia, which dealt with delictual obligations arising from the wrongful damage to property, contained more specific references on accountability: "[A] man who, without negligence or malice, but by some accident, causes damage, goes unpunished."

Platt & Diamond, supra note 9, at 1230; see also Sayre, supra note 10, at 982-83 (Roman law was "resuscitated in the universities in the eleventh and twelfth centuries.").
had an even greater influence on the common law.\textsuperscript{12} Church scholars based their conceptualization of "wrong" upon the concept of "sin." In order to commit a sin an individual had to be "morally blameworthy." The Church, unlike early common law, distinguished the mental state—\textit{mens rea}—from the act committed—\textit{actus reus}.\textsuperscript{13}

The first [kind of freedom] is a free-will whereby he [man] can choose and freely do good or evil. . . . For if man did that sin against his will, it would not be a sin. . . . All men have freedom but it is restrained in children, in fools, and in the witless who do not have reason whereby they can choose the good or evil.\textsuperscript{14}

The Church had separated the \textit{actus reus} from the \textit{mens rea} quite early, and this distinction was integrated into the common law notion of crime over a period of several hundred years.\textsuperscript{15} The transition from a criminal system employing strict liability concepts to one based upon \textit{mens rea} was initially accomplished by the use of "criminal intent," which by the thirteenth century was an element of most felonies.\textsuperscript{16} As to crimes which did not have an intent element, however, moral blameworthiness was not a requisite for conviction since evidence of the statutory elements of the crime was sufficient to produce a guilty verdict.\textsuperscript{17}

With the passage of time the common law began to recognize a general \textit{mens rea} concept. In order to implement this concept the law began to formulate defenses for those situations in which the defendant had committed the statutory elements but did not have the requisite blameworthiness. One such defense was the plea of insanity. This defense was based on the belief that a mental defect or disease could preclude the element of moral blameworthiness.\textsuperscript{18} In the fourteenth century crim-
inal insanity was defined as the ability to tell good from evil, and the successful plea of insanity resulted in a royal pardon. In the nineteenth century the right-wrong and good-evil definition of insanity was affirmed in *Queen v. M'Naghten*, however, a successful plea of insanity thereafter resulted in a verdict of not-guilty-by-reason-of-insanity.

B. The Modern Definitions of Insanity

Since the *M'Naghten* decision, numerous tests for legal insanity have been formulated in an attempt to maintain a definition which comports with our "complex and sophisticated society." The definitions of criminal insanity which were traditionally based upon the cognitive element have been modified in many jurisdictions to include both the volitional and cognitive elements. The cognitive element examines the defendant's ability to distinguish or appreciate the nature of his actions, while the volitional element examines the defendant's ability to control his behavior.

The insanity definitions may also be categorized in terms of legal theories. The *M'Naghten* right-wrong standard, a cognitive test, relies

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19. *Id.* at 1233. An English court stated the general rule as it pertained to infants in the fourteenth century: "[a]n infant under the age of seven years, though he be convicted of felony, shall go free of judgment, because he knoweth not of good and evil . . ." *Year Book*, 6 & 7 Edward II (1313), in 24 Selden Society 109 (1909).
20. *Sayre*, supra note 9, at 1004-05.
22. *Sayre*, supra note 10, at 1006; *Mueller*, *M'Naghten* Remains Irreplaceable: Recent Events in the Law of Incapacity, 50 Geo. L.J. 105 (1961)("*M'Naghten's* case brought us the first complete formulation of the insanity test . . . .") But see Platt & Diamond, supra note 9, at 1236 ("In the eighteenth century, the 'good and evil' test was regularly used in both insanity and infancy cases.").
26. *Parsons v. State*, 81 Ala. 577, 597, 2 So. 854, 866-67 (1887) ("if, by reason of the duress of . . . mental disease, he has so far lost the power to choose between right and wrong . . . . that his free agency was at the time destroyed."). For a discussion of the volitional element see *Kuh*, supra note 25, at 786.
upon moral culpability, and requires the jury to find that the disease or defect was such that the defendant was not able to know that the act was wrong. The standards which are said to be based upon "scientific advances" or "scientific paradigms," such as the irresistible impulse test, the Durham rule, or the American Legal Institute (ALI) formulation are labeled "scientific" tests. These tests, which employ both the cognitive and volitional elements, rely upon experts to determine insanity. Finally, those that would abolish the insanity defense, the abolitionists, rely upon a theory of criminal law which does not require moral culpability. They only allow the defendant to introduce evidence of insanity to prove that he lacked the "specific intent" element and do not allow a finding of insanity which would preclude criminal culpability. The abolitionists advocate a criminal law which closely resembles thirteenth century common law, a law which does not require moral guilt as a requisite element for criminal behavior.

27. It is labeled the moral standard because it allows the jury to determine sanity, Kuh, supra note 25, at 784-85; W. Lafave & A. Scott, Criminal Law § 37, at 281 (1972); Bonnie, The Moral Basis of the Insanity Defense, 69 A.B.A.J. 194 (1983); Mueller, supra note 22, at 113. 
29. The Durham rule states "that 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, 874-75 (D.C. Cir. 1954), overruled, United States v. Brawner, 471 F.2d 969 (D.C. App. 1972)(court adopted the ALI test). 
30. See infra text accompanying note 57. 
31. The label "scientific" merely relates to the origin of the standard, such as the irresistible impulse test, which was formulated by scientists and doctors. J. Hall, General Principles of Criminal Law 450-53 (2d ed. 1960). This label is not, however, intended to recognize the validity of these standards. What may have been considered valid yesterday may today be superseded by some newer "scientific" concept. Id. at 487-89. Dr. Thomas Szasz, a noted psychiatrist, explains why: Emotional disorders, mental illnesses, or whatever terms psychiatrists choose, are not real, objectively demonstrable diseases. Instead mental illness are disease sounding names that refer to certain repertoires of human behavior, especially to behavior considered by psychiatrists (and others), to be undesirable or "sick." . . . What counts as "mental illness" is simply not the sort of thing people usually mean by an illness. This is so obvious that it is embarrassing to try to demonstrate it. . . . By accepting psychiatric disinformation as scientific research, the American people are making a terrible mistake. Szasz, supra note 3, at A10 col. 6. 
32. The Durham rule promoted the use of experts and was eventually rejected because the juries were overly influenced by that testimony. The expert testimony prevented the jury from making an ethical and legal judgment, and lead to the jury's adoption of "scientific" models of insanity. Brawner, 471 F.2d at 983. The irresistible impulse and ALI tests on the other hand offered a narrower "scientific" approach because they limit the scope of the expert's testimony to the volitional or cognitive elements. 
33. Morris, supra note 2, at 511; R. Gerber, supra note 2, at 81-82.
1. The Moral Approach

The moral definition of insanity is premised upon the belief that an accused who cannot comprehend the wrongfulness of his action cannot be held criminally responsible for his acts, since he is incapable of formulating a state of mind which allows him to distinguish good and evil; he lacks the requisite *mens rea* or "moral guilt." This standard "leave[s] the question to the jury, whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong." 34

The moral definitions of insanity, such as *M'Naghten* or the new federal standard, are narrow. Sanity is the ability to appreciate, know, or distinguish right from wrong. 35 It has been criticized by legal scholars and psychologists as vague, medically unsound, and a hindrance to expert testimony. 36 However, public, judicial, and the medical community's dissatisfaction with "scientific" tests which broadened the insanity defense, as evidenced by cases such as *United States v. Hinckley*, 37 has revived public and legislative interest in these formulations. 38 The moral standard is presently employed by twenty states 39 and the federal

34. *M'Naghten*, 10 Cl. & Fin. at 211, 8 Eng. Rep. at 723; see also Hall, supra note 31, at 479.

35. The *M'Naghten* test provides:

[T]o 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.

10 Cl. & Finn. at 210, 8 Eng. Rep. at 722.


Proponents of the moral definition argue that its advantages are numerous. They argue that it provides a narrower insanity defense because it does not use the volitional "control" element, and that it separates the criminal definition of insanity from the medical definition of insanity. Moreover, they argue that it links the insanity defense to the concept of moral guilt by excusing only those individuals who cannot appreciate the wrongfulness of their behavior. Additionally, the M'Naghten standard reduces the use of the insanity defense as a trial tactic by which the defendant can introduce evidence to soften up the jury in order to obtain a more lenient sentence.

2. The "Scientific" Approach

Twenty-five states and the District of Columbia have adopted expanded, "scientific" definitions of insanity. The shift from the traditional M'Naghten right-wrong formulation has effected a reliance upon the testimony of experts. This shift went through two phases. The first was the incorporation of the volitional element. This was initially accomplished when states adopted the irresistible impulse definition of insanity. The second phase, epitomized by the Durham definition of insanity, was the equating of the definition of criminal mental disease or defect, a medically recognized symptom which interfered with the
ability to know right from wrong, with medical definitions of mental
disease or defect, any curable or recognizable pattern of behavior. The
ALI definition, although narrower than Durham, incorporates the vol-
tional element and continues to rely on medical definitions of insanity.48

The irresistible impulse definition, the first to use a “scientific”
approach,49 is premised upon the belief that if an individual, although
knowing that his act is wrong, is not morally blameworthy if he is
unable to control his behavior because of a mental disease. The volitional
element as used in this definition is a narrow test because it requires
total impairment of either the cognitive-moral element or the volitional-
control element.50

The irresistible impulse test has been criticized as being too narrow
by those who advocate a more liberal insanity defense, because it requires
total impairment of the elements.51 It has also been criticized by those
who advocate an insanity defense consistent with the mens rea-culpability
theory of criminal law. First, they argue that this formulation broadens
the defense beyond a common sense conception of justice.52 As Livermore
and Meehl point out, the “important point is that from the standpoint
of the community’s sense of justice . . . we are understandably reluctant
to exculpate a criminal action on the ground that although the person
performed it knowing it was criminal he was impelled to do so by
strong criminal motives or emotions.”53 Second, they argue that the
volitional prong separates the insanity defense from the notion of “moral
guilt” since an impairment of the volitional element does not mean that
the ability of a defendant to perceive right from wrong was impaired.54

Under the irresistible impulse test, an individual may avoid criminal
responsibility even if he has the ability to know that he should not have
committed the act. Finally, even the proponents of the “scientific” tests
have began to criticize the use of the volitional element. Given present
technology they do not believe that irresistible impulses can be distin-
guished from those which are merely not resisted.55

48. See infra note 57.
49. See supra note 26. At present only two states use the irresistible impulse test.
State v. White, 58 N.M. 324, 270 P. 2d 727 (1954); Thompson v. Commonwealth, 193
Va. 704, 70 S.E. 2d 284 (1952).
51. Id.; see also R. Gerber, supra note 2, at 38-39.
53. Livermore & Meehl, supra note 41, at 823.
54. W. LaFave & A. Scott, supra note 27, at 285-86; J. Hall, supra note 31, at 495;
Livermore & Meehl, supra note 41, at 816.
55. Legislative History, supra note 45, at 228, 231; United States v. Lyons, 731 F.2d
at 248-50; American Psych. Assoc., supra note 1, at 11 (“The line between resistible
impulse and an impulse not resisted is probably no sharper than that between twilight
The American Law Institute's (ALI) definition of insanity is the most recent "scientific" test and presently is the most popular standard used by twenty-three states. The ALI definition, unlike either the irresistible impulse test which requires total impairment of either the cognitive element or the volitional element or the Durham rule which requires only that the unlawful act be a product of a mental disease, requires that the accused lack "substantial capacity." Critics of the ALI definition, in addition to restating those arguments originally directed at the irresistible impulse test, have attacked this standard for failing to provide the juror with sufficient guidance. In an opinion dissenting to the adoption of the ALI standard, Judge Trask of the Ninth Circuit Court of Appeal wrote: "[h]ow is the jury to know what 'substantial' means? How does anyone know except the user? . . . The jury could believe that a twenty-five percent lack of capacity is 'substantial' and acquit one who is otherwise morally responsible." On the other hand, those who advocate a "scientific" definition complain


57. Section 4.01 of the American Law Institute Penal Code provides:

(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 requirement 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 antisocial conduct.

58. Wade v. United States, 426 F.2d 64, 77 (9th Cir. 1970)(Trask, J., dissenting); Hall, Psychiatry and Criminal Responsibility, 65 Yale L.J. 761, 777 (1956) ("With due deference, I submit that these proposals [ALI tests] either amount to a merely verbal reformulation of the 'irresistible impulse' test, or else are so general and nebulous as to amount to the abolition of all rules.").
that the ALI formulation does not reflect the most current "scientific" paradigm. Although the ALI definition recognizes that total impairment is not necessary for an individual to be criminally insane, it still treats the cognitive and volitional elements as separate entities instead of employing the current medical approaches which support a holistic concept viewing the volitional and cognitive elements as indivisible.\textsuperscript{59} Most of these critics advocate an insanity test which is consonant with medical and psychiatric theories of responsibility.\textsuperscript{60} The ALI standard, which originated as a compromise,\textsuperscript{61} has not satisfied either those who prefer a broad "scientific" insanity defense or those who advocate a moral definition.

It is this author's opinion that the failure to align these "scientific-medical" definitions with the criminal law concept of \textit{mens rea} justifies their rejection. Criminal liability is imposed for the intentional or reckless commission of forbidden acts. An act is imputed to a person because he voluntarily brought it about. To say that he voluntarily brought it about is to say that normal intelligence was involved in the conduct. Under the moral definition the mental disease or defect must interfere with normal intelligence or common sense. A verdict of not-guilty-by-reason-of-insanity reflects the fact that the interference is such that the accused cannot distinguish right from wrong.\textsuperscript{62}

Under the "scientific-medical" definitions, on the other hand, the defendant may be found insane even though his common sense or normal intelligence remain intact. An accused, therefore, may be found innocent on grounds of insanity even though he understands that it is wrong to kill, rob, or rape, because the jury is told to find him insane if a mental disease or defect caused or was the substantial cause of his behavior. Under the "scientific" test the causation element is the disease, and that disease does not necessarily interfere with those elements which criminal law postulates as the requirements for voluntary behavior.\textsuperscript{63} The "scientific" definition rejects criminal law concepts of responsibility and the common sense notion that voluntary behavior stems from the ability to know the nature of the act.

The Anglo-American criminal law requires moral culpability. The notion of culpability presumes that man acts voluntarily. If the definition of insanity does not require the impairment of those elements which gives man the capacity to act in a voluntary manner the defense is expanded beyond the principle which justifies its existence. Congress'
formulation of criminal insanity realigns the defense with the concept of moral blameworthiness—mens rea.

3. The Abolitionist Approach

Three states have abolished insanity as a defense.64 There are two schools of thought as to how the law should go about abolishing the defense. The first argues that evidence of insanity should only be introduced to negate the specific intent element of the criminal statute under which the defendant is charged.65 The second would modify the defense of insanity so that instead of precluding criminal liability, it results in a "guilty but mentally ill" verdict.66 Abolitionists believe that a restructuring of the insanity defense will realign the defense with the mens rea element67 and reduce the use of expert testimony at trial.68 This restructuring, however, may instead make criminals out of those who are incapable of being morally blameworthy69 and still allow the defendant to use expert testimony to prove that he lacked the mental elements of the crime charged.70

Both of the abolitionists' approaches adopt a definition of mens rea which does not reflect the more rational and historically grounded approach which defines mens rea as moral culpability and require its presence for the commission of a criminal act whether the crime is one of specific


65. Morris, supra note 2, at 510-11.

66. diGenova & Toensing, supra note 2, at 731-32.

67. Id. at 500-02. Morris defines mens rea to mean only the specific mental state contained in the crime. See also R. Gerber, supra note 2, at 57.

68. Comment, supra note 63, 45 Mont. L. Rev. 134 at 137.

69. R. Gerber, supra note 2, at 57-58; Livermore and Meehl suggest: [Abolition] would either permit the assessment of moral blame where it is inappropriate or would cut loose the criminal law from its moorings of condemnation for moral failure. Once one has started down this road, there is no defensible stopping point short of strict liability with the question of culpability being raised at the stage of disposition. Livermore & Meehl, supra note 41, at 797.

70. Montana, which has abolished the insanity defense, still allows experts to testify on the accused's sanity to prove that he did not have the state of mind which is an element of the crime, Mont. Code Ann. § 46-14-102; see also State v. Doney, 636 P.2d 1377 (Mont. 1981).
intent, general intent, or criminal negligence. 71 Under the first approach *mens rea* is defined as the "specific intent" element enumerated in criminal statutes. Application of this theory makes crime morally neutral, referring not to a "morally guilty mind, but only to the specific mental state contained in the statutory definition of the crime committed." 72 The second approach also fails to define *mens rea* properly. 73 Although this approach retains a definition of insanity, such as *M'Naghten* or the ALI, the defendant, if found to be insane pursuant to these definitions, is still subject to criminal penalties. Under the later approach the defendant is sentenced as a criminal and the only distinction between the sane and insane criminal is that the later will receive some form of psychological treatment. 74 This approach may impose criminal sanctions upon individuals who are not morally blameworthy, since some of the individuals who are insane may be unable to distinguish right from wrong.

None of the recent statutes abolishing the insanity defense have been found unconstitutional, although three states have held that the Due Process Clause requires that some form of the insanity defense be available. 75 Judge Palmore, former Chief Justice for the Supreme Court of Kentucky, noted that abolition "may very well be unconstitutional unless it is supplemented by some kind of procedure . . . ." 76 The abolitionists' approaches should not be adopted even if it is constitutionally valid to abolish the insanity defense. Unlike the criticism which has been leveled against the volitional element for its overbreadth, abolition effectively discards any notion of "moral blameworthiness" in

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71. Pound, introduction to F. Sayre, Cases on Criminal Law xxxvi-xxxvii (1927); J. Hall, supra note 31, at 449.
72. R. Gerber, supra note 2, at 57.

74. diGenova & Toensing, supra note 2, at 731-32.
76. Palmore, supra note 2, at 14.
relation to those who suffer from a mental disease or defect. To the extent society defines crime as consisting of \textit{mens rea}—moral guilt—and an \textit{actus reus}—morally wrong act—insanity cannot and should not be abolished as a defense.\textsuperscript{77}

\section*{C. The New Federal Standard}

Until Public Law 98-473, Congress had never enacted legislation which defined criminal insanity,\textsuperscript{78} and the Supreme Court for the most part left development of the insanity definition to the federal courts of appeal.\textsuperscript{79} During this period the appellate courts used various definitions, and at the time this bill was enacted the ALI definition of insanity was the test employed by most federal courts.\textsuperscript{80}

The legislative history suggests that the new standard was adopted to rectify three problems: first, to reduce the scope of expert testimony;\textsuperscript{81} second, to require total impairment of the cognitive element so that diminished capacity would not constitute legal insanity;\textsuperscript{82} and finally, to exclude certain symptoms, which the medical community considers indicative of mental disease, from ever being considered as a mental disease for the purpose of legal insanity.\textsuperscript{83}

\begin{itemize}
  \item \textsuperscript{77} Pound, supra note 71, at xxxvi-xxxvii ("Historically our substantive criminal law is based upon a theory of punishing the vicious will. It postulates a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong."); but cf. O. Holmes, The Common Law 36 (M. Howe ed. 1963) ("The first requirement of a sound of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong."); see also Sayre, Public Welfare Offenses, 33 Col. L. Rev. 55, 78 (1933) ("No one charged with a police offense, is likely to try to prove himself insane in order to escape the payments of a light fine. Should it do so [raise the defense of insanity] the lunatic sufficiently sane to go at large should presumably be subject to a light fine if he violates police regulations.").
  \item \textsuperscript{78} Legislative History, supra note 45, at 225.
  \item \textsuperscript{79} Id.; United States v. Lyons, 731 F.2d at 247-48.
  \item \textsuperscript{80} United States v. Freeman, 357 F.2d 606 (2d Cir. 1966) (employs "wrongfulness" instead of "criminality"); United States v. Currens, 290 F.2d 751 (3d Cir. 1961) (does not use "to appreciate the criminality of his conduct"); United States v. Chandler, 393 F.2d 920 (4th Cir. 1968); Blake v. United States, 407 F.2d 908 (5th Cir. 1969); United States v. Smith, 404 F.2d 720 (6th Cir. 1968) (adopts ALI (1) only); United States v. Shapiro, 383 F.2d 680 (7th Cir. 1967) (uses "wrongfulness" instead of "criminality"); Wade v. United States, 426 F.2d 64 (9th Cir. 1970) (adopts ALI (1) only and replaces "criminality" with "wrongfulness"); Wion v. United States, 325 F.2d 420 (10th Cir. 1963) (adopts ALI (1) only and replaces "criminality" with "wrongfulness"); United States v. Brawner, 471 F.2d 969, 1008 (D.C. Cir. 1972) (adopts ALI (1) only); but see United States v. Lyons, 731 F.2d 243 in which the Fifth Circuit rejected ALI formulation in favor of the \textit{M'Naghten} test.
  \item \textsuperscript{81} Legislative History, supra note 45, at 227-228.
  \item \textsuperscript{82} Id. at 231.
  \item \textsuperscript{83} Id.
The new definition of insanity reduces the use of expert testimony by discarding the cognitive-volitional "scientific" definition in favor of the cognitive "moral" definition. The battle of experts was a major concern: "Indeed the disagreement of experts is so basic that it makes rational deliberation by the jury virtually impossible." Congress cited the volitional element as the source of confusing testimony. Although the volitional-control element is phrased in scientific terms, typically implying a degree of scientific accuracy, such accuracy does not exist in the field of psychiatry. Psychiatry is not an exact science, and both the irresistible impulse and the ALI definition, which rely upon psychiatric models of sanity, had generated a debate among experts. Richard J. Bonnie, Professor of Law and Director of the Institute of Law, Psychiatry, and Public Policy at the University of Virginia explained the fundamental difficulty involved: "Unfortunately, however, there is no scientific basis for measuring a person's capacity for self-control or for calibrating the impairment of such capacity. . . . Whatever the precise terms of the volitional test, the question is unanswerable—or can be answered only by moral guess." Essentially the courts have allowed psychiatrists to testify as experts on issues where no proven expertise exists, thus allowing them to espouse their own concepts of right and wrong. By rejecting the volitional element Congress has significantly reduced the role psychiatrists will play in criminal trials.

A second result desired by Congress was the elimination of an insanity verdict when the defendant suffers only from "diminished responsibility." The diminished capacity defense originated in California and is commonly referred to as the Wells-Gorshen rule, a reference to the cases which formulated the rule. Under this rule, "evidence of diminished mental capacity, whether caused by intoxication, trauma or

84. Id. at 225.
85. Congress has also amended the Federal Rules of Evidence to reduce the use of expert testimony in relation to the insanity defense. Federal Rule of Evidence 704 has been amended to read:

No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime of a defense thereto. Such ultimate issues are matters for the trier of facts alone.

Id. at 232 (quoting The Insanity Defense Hearings before the Committee on the Judiciary, United States Senate, 97th Cong., 2d Sess. pp. 276-77 (1982)).
86. Id. at 226-29.
87. Id. at 226-27 (quoting The Insanity Defense Hearings before the Committee on the Judiciary, United States Senate, 97th Cong., 2d Sess. pp. 276-77 (1982)).
88. Id. at 231. For a general discussion of the diminished capacity defense see also Morris, supra note 2, at 499-512.
disease, can be used to show that a defendant did not have a specific mental state essential to an offense." 90 The legislative history indicates that Congress does not want the federal courts to adopt the diminished capacity defense which evolved in California due to judicial dissatisfaction with the M'Naghten test. 91 The text of the new statute makes no reference to diminished capacity, but does require that the accused, in order to be found criminally insane, be "unable to appreciate the nature and quality or wrongfulness of his acts." 92 The new standard, because it requires the total impairment of the cognitive element, unlike the diminished capacity test which only requires partial impairment, should, even without an examination of Congressional intent, prevent the courts from adopting the diminished capacity defense. 93 The new standard allows expert testimony on the nature and character of a defendant’s symptoms and allocates to the jury the dispositive issue of legal insanity which should only be found if the accused is unable to distinguish between right and wrong.

Finally, the standard narrows the scope of "mental disease or defect" by prefacing that phrase with the word "severe." 94 Congress specifically intended to exclude certain mental diseases from the scope of judicial inquiry. "The concept of severity was added to emphasize that non-psychotic behavior, or neuroses such as 'inadequate personality,' 'immature personality,' or a pattern of 'anti-social tendencies' do not constitute the defense. The committee also intends that . . . the voluntary use of alcohol or drugs . . . does not constitute insanity . . . ." 95

This author suggests that the use of the term "severe" is unnecessary. The mental diseases cited to justify the addition of the term "severe" constitute legal insanity only under tests which employ the volitional element. 96 All the diseases cited by Congress can be traced to the defendant’s inability to control his behavior. Thus it seems that only

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92. Legislative History, supra note 45, at 227.
93. Id. at 231.
94. Id.
95. Id. For a discussion of drugs and criminal insanity see H. Fingarette & A. Hasse, Mental Disabilities and Criminal Responsibility 137-172 (1979).
those standards using the volitional element would label such acts a mental disease or defect, while definitions like the new federal statute, which require total impairment of the cognitive element, would automatically exclude such diseases.

Congress has replaced the M'Naghten phrase "know" with "appreciate." The legislative history does not indicate the rationale for this shift. However, the controversy and dispute regarding the proper definition of "Know," as used in M'Naghten, is one plausible explanation. "Know" can be interpreted to mean either an actual understanding that the act committed was a crime, or it can mean the inability to perceive that the act was morally wrong. Under the first definition, if the accused suffers from a disease which makes him believe he must kill, he would be considered insane even though he knew that killing is wrong. Under the second definition a disease which merely distorted the accused's own notion of right and wrong but does not interfere with the accused's ability to perceive what the law or general morality says is right or wrong would be considered criminally sane even though the medical community may deem him insane.

The term "appreciate," however, does not, by itself, indicate a preference for either definition. It is this author's opinion that the federal courts, when faced with this issue, should adopt the second definition. Since Congress intended to adopt a more restrictive definition of insanity, it would be logical to assume that they also intended to adopt the narrower definition of "Know." Moreover, an inability to perceive that an act, usually murder, is morally wrong is the definition of "Know" used by the M'Naghten court in its formulation of the test. Finally, it is the most reasonable definition. This definition rep-

97. See supra notes 95-96.
98. Jurisdictions using the broad formulation require that the accused actually understand that the act is wrong. See e.g., People v. Wolff, 61 Cal. 2d 195, 394 P.2d 959, 40 Cal. Rptr. 271 (1964). Those jurisdictions adopting the narrower approach simply give the term "know" to the jury without an explanation, leaving it to the jury to "find the 'common sense' meaning from their own backgrounds...." A. Goldstein, supra note 41, at 50.
99. W. LaFave & A. Scott, supra note 27, at 276.
100. State v. Essen, 16 Wis. 2d 567, 598-99, 115 N.W.2d 505, 521-22 (1962).
102. Judges have used the terms appreciate and know interchangeably, J. Hall, supra note 31, at 482; thus it would seem that the use of "appreciate" does not reflect a legislative choice on this issue of interpretation. But see A. Goldstein, supra note 41, at 49-50 (argues that the term "appreciate" conveys a broader definition of know).
103. The court in M'Naghten found that:
If the question were to be put as to the knowledge of the accused solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of
resents the "common sense notion of daily life." The mere fact that an individual honestly believes that it is right to kill and the medical community says that it was caused by a "disease," without more, cannot excuse such action. Criminal insanity should not recognize as insane a distorted perception of right or wrong, but should only recognize situations where the accused is unable to "know," "appreciate," "comprehend," or "perceive" the fact that his acts are contrary to the law or general morality.

D. Conclusion

The insanity defense rests upon the premise that punishment for wrongful deeds should be predicated on moral culpability. Thus the definition of criminal insanity should reflect the common sense as well as the rational conceptualization of moral culpability. Until the late nineteenth century, the right-wrong test was the standard. The courts, in order to formulate a standard which would reflect a "sophisticated and modern" civilization, attempted to meld current "scientific" concepts with the more traditional notions of moral culpability; this did not produce an acceptable test of insanity. Congress' adoption of the right-wrong test realigns the insanity defense with criminal theory, the historically proper definition of mens rea, and a common sense notion of moral culpability.

II. Burden of Proof in the Insanity Defense

Both federal and state courts place the initial burden of proof upon the accused but then differ as to who bears the burden of persuasion. Satisfying the burden of proof is a two-step process. First, the initial burden of going forward with evidence and second, the burden of persuasion. If an accused pleads insanity and fails to meet the initial burden of going forward with evidence, the factual matter will be resolved against him either by a directed verdict or by an instruction

the land was essential in order to lead to a conviction; whereas the law is administered upon the principle that everyone must be taken conclusively to Know it, without proof that he does Know it. If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable; and the usual course therefore has been to leave the question to the jury.

M'Naghten, 10 C1. & Fin. at 210-211, 8 Eng. Rep. at 723.

104. J. Hall, supra note 31, at 482.
105. Id; see also W. LaFave & A. Scott, supra note 27, at 276-77.
106. Platt & Diamond, supra note 9, at 1228.
The prevailing rule in the states requires that the accused, in order to satisfy the initial burden of production must introduce evidence which raises doubts as to his sanity. Federal courts place a lesser burden on the defendant and merely require the production of "slight evidence" of insanity. Once the accused has rebutted the initial presumption of sanity, the question is then which party, the accused or the prosecution, bears the burden of persuasion.

A. The Constitutional Issue

In a criminal case the prosecution bears the burden of persuasion and must prove all elements of the crime beyond a reasonable doubt. The issue of sanity is an exception to this general rule. At common law, the burden of proving insanity was on the defendant. In Davis v. United States, the Supreme Court changed the common law approach in federal prosecutions and required that the government prove sanity beyond a reasonable doubt. Later decisions by the Court made it clear that Davis was not of constitutional dimensions and, therefore, did not apply to the states. Some legal scholars, however, have argued that, as a result of more recent decisions, the result reached in Davis has obtained constitutional proportions. Nevertheless, the Court in a
series of decisions has indicated that it will reject these arguments. Thus, under the present interpretation of the Constitution, Congress may place upon the defendant the burden of proving insanity by clear and convincing evidence.

B. Arguments for Allocating the Burden of Persuasion

Who bears the burden of persuasion in a legal case is a matter of considerable practical importance. This is especially true in the case of the insanity defense because of the inherent uncertainties involved in determining sanity or insanity. The case of John Hinckley supports such a conclusion. In Hinckley where the federal prosecutor had to prove sanity beyond a reasonable doubt, the jury returned a verdict of insanity because they thought Hinckley "might not have been sane." Although it is believed that the effect of assigning the burden of persuasion to the defendant will decrease the number of successful defenses, this conclusion has not yet been tested.

Determining which party bears the burden of proving sanity also has a significant theoretical ramification. Society presumes that individuals who are free to come and go as they please are rational and act with some purpose. The criminal law reflects this notion and "postulates a free agent confronted with a choice between doing right and wrong . . . ." If the law places upon the prosecution the burden of persuasion after the accused has merely introduced some evidence of abnormality, this postulate is reversed.

The difficulties are compounded if the jurisdiction employs a "scientific" definition of insanity. Under the "scientific" definition insanity
is a pattern of behavior which when compared to normal behavior is so different that it may be classified as insanity. The prosecution under this standard must prove sanity by arguing that the accused's criminal actions and any other behavioral nuances are actually not abnormal. If the prosecutor is working in a jurisdiction which employs the M'Naghten-styled test, this anomaly would be somewhat lessened since the ability to distinguish right from wrong is not necessarily coterminous with normality. Some may argue that because the accused must rebut the initial presumption of sanity with some evidence, the basic premise that an individual who interacts in everyday society is sane remains intact. However, by meeting this initial burden the accused has only proven that his behavior evidences neither a lack of purpose nor abnormality sufficient to constitute insanity. His behavior is such that the issue of insanity should be given to the jury.

I. Jurisdictions Placing the Burden on the Prosecution

At present eleven states require the prosecution, once a defendant introduces evidence of insanity, to bear the burden of proving the defendant was sane beyond a reasonable doubt. Some jurisdictions adopting this approach give no evidentiary value to the initial presumption of sanity, and if the prosecutor fails to introduce sufficient evidence from which the jury could find the accused sane he will be acquitted. Other jurisdictions will give the issue of insanity to the jury even though the prosecution has not introduced any evidence which

125. J. Hall, supra note 31, at 450.
126. Id; see also Szasz, supra note 3, at A10, col. 6.

Prior to the passage of Public Law 98-473 the federal courts had placed the burden of proof upon the prosecutor. In Davis, 160 U.S. 469, 16 S. Ct. 353, the Supreme Court held that sanity was an element that the prosecution had the burden of proving, id. at 493. This rule has been uniformly followed in the federal courts. See e.g., Lynch v. Overholser, 369 U.S. 705, 82 S. Ct. 1063 (1962); United States v. Lyons, 731 F.2d 243, 126 F. Supp. 2d 249 (5th Cir. 1984)(en banc); United States v. White, 447 F.2d 796 (9th Cir. 1971); Mason v. United States, 402 F.2d 732 (8th Cir. 1968); Webber v. United States, 395 F.2d 397 (10th Cir. 1968); Keys v. United States, 346 F.2d 824 (D.C. Cir. 1965); Beltran v. United States, 302 F.2d 48 (1st Cir. 1962); Hall v. United States, 295 F.2d 26 (4th Cir. 1961); United States v. Currens, 290 F.2d 751 (3d Cir. 1961).

See also Note, 56 B.U.L. Rev., supra note 107, at 504; W. LaFave & A. Scott, supra note 27, at 313.
would tend to prove sanity. Jurisdictions placing the burden of persuasion on the prosecution view sanity as a requisite element for the formulation of a mental state necessary for criminal behavior; hence, they require the state to prove it. Professor Abraham Goldstein argues that this method is more equitable since indigent defendants may be unable to finance an insanity defense while the state has access to both funds and experts. Professor Goldstein's argument has been undercut by a recent supreme court decision. In *Ake v. Oklahoma* the Court held that when a defendant, charged with a capital offense, has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires government to ensure access to a competent psychiatrist.

2. Jurisdictions Placing the Burden on the Defendant

Thirty-six states, the District of Columbia, and all the federal courts assign the burden of persuasion to the defendant, who must prove

128. W. LaFave & A. Scott, supra note 27, at 313; see United States v. Bass, 490 F.2d at 851-52 (The Fifth Circuit had required the prosecutor to introduce evidence from which the jury could find sanity otherwise the judge would find the accused insane.).
131. 105 S. Ct. 1087 (1985). Although the court writes in terms broad enough to include all defendants, the facts and concurring opinion of Justice Burger, 105 S. Ct. at 1099, and the dissenting opinion by Justice Rehnquist indicate that the Constitutional right applies only to defendant's charged with a capital offense, 105 S. Ct. at 1099.
his insanity by a preponderance of the evidence\textsuperscript{134} or as adopted by Congress, by the higher standard of "clear and convincing evidence."\textsuperscript{135} Such an approach is based on the belief that if the rule were different it would be too easy for the sane defendant to avoid criminal responsibility by merely creating some doubt as to his sanity.\textsuperscript{136}

A better argument, however, has been made by Professor Bonnie. He has suggested that the general rule "disfavoring burden shifting" should not apply to the insanity defense. Other defenses, such as self-defense and duress, which place the burden of persuasion on the prosecution are "linked to external realities and can be tested against ordinary experience, thereby reducing the likelihood of successful fabrication or jury confusion."\textsuperscript{137} The plea of insanity, on the other hand, is a claim by the defendant that he suffers from a "mental disorder that disabled him from functioning as a normal person...[but which] is not linked to the external world and by definition cannot be tested against ordinary experience."\textsuperscript{138}

\textbf{C. Congressional Allocation of the Burden of Proof}

Congress has adopted an insanity defense which places the burden of persuasion on the defendant. The standard adopted is proof by clear and convincing evidence,\textsuperscript{139} a higher standard than that used by most

\textsuperscript{134} Three states, however, place a more difficult burden of proof upon the accused who pleads insanity, Ariz. Rev. Stat. Ann. § 13-502(b) (Supp. 1984) (by clear and convincing evidence); Edwards v. Commonwealth, 554 S.W.2d 380 (Ky. 1977) (to the satisfaction of the jury); State v. Ward, 301 N.C. 469, 272 S.E. 2d 84 (1980) (to the satisfaction of the jury).

\textsuperscript{135} Legislative History, supra note 45, at 230. ("[J]udges, prosecutors and defense counsel roundly denounce the Herculean task of requiring the Government to prove anyone is not insane beyond a reasonable doubt.") (statement by Edwin Miller of the National Dist. Att. Assoc.); Kuh, supra note 25, at 776 ("If the prosecution must prove that the disease was absent... and must do so by proof beyond a reasonable doubt, then—assuming that juries are able to and do follow instructions—the prosecution can seldom be successful.").

\textsuperscript{136} Legislative History, supra note 45, at 230.
states. The choice, of a "more rigorous" standard, was made to "assure that only those defendants who plainly satisfy the requirements of the defense are exonerated."\footnote{140}

The legislative history suggests two rationales for the shift, both of which reflect a practical approach to criminal law.\footnote{141} First it relieves the prosecutor of the difficulties associated with proving sanity.\footnote{142} As already noted, allocation of the burden on the prosecutor can preclude a conviction merely because the jury is "unsure." Congress found that of the two, prosecutor and defendant, the latter has access to evidence which would establish insanity while evidence of sanity is "frequently unavailable."\footnote{143} Second, Congress as a matter of public policy concluded that the defense of insanity, because it excuses an individual from all responsibility, is a defense which in all fairness to society should only be granted if society is absolutely sure that the defendant falls within the exception.\footnote{144}

D. Conclusion

In the words of Judge Bazelon, former Chief Judge of the United States Court of Appeals for the District of Columbia: "The so-called insanity defense reflects society's unwillingness to impose condemnation and punishment when it cannot impose blame."\footnote{145} Thus, when Congress changes the definition of criminal insanity it alters the threshold at which society finds that one can be deemed blameworthy or morally culpable for one's actions. However, as noted by Professor Goldstein, it is questionable whether juries pay much attention to standards such as \textit{M'Naghten},\footnote{146} because even if the jury understands psychiatric testimony which indicates that the defendant is insane, it is the jury's duty to determine the ultimate question of insanity. Thus, according to Professor Goldstein, the change of the definition may reduce the use of expert testimony, and it may alter criminal law in a theoretical manner, but its effect on a jury's decision to find that the accused is insane may be slight.\footnote{147} Shifting the burden of proof, however, although not as theoretically significant, should decrease the number of successful insanity pleas. Although the American Psychiatric Association suggests that em-

\begin{itemize}
\item \footnote{140}{Id.}
\item \footnote{141}{See e.g., United States v. Leon, 104 S. Ct. 3405, 3420 (1984) (adopting a good faith exception for fourth amendment exclusionary rule).}
\item \footnote{142}{Legislative History, supra note 45, at 230.}
\item \footnote{143}{Id. (statements by Edwin Miller).}
\item \footnote{144}{Id.}
\item \footnote{145}{Bazelon, Can Psychiatry Humanize the Law? 7 Psych. Annals 29, 30 (1977).}
\item \footnote{146}{A. Goldstein, supra note 41, at 62-63.}
\item \footnote{147}{Id.}
\end{itemize}
pirical studies be done before such a conclusion is made, this author suggests that common sense is a sufficient basis on which to conclude that Congress by placing the burden of proving insanity on the defendant will reduce the number of insanity pleas.

Henry T. Miller