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Before and After Hinckley: Legal Insanity in the United States

Stephen J. Morse

Introduction

This chapter first considers the direction of the affirmative defense of legal insanity in the United States before John Hinckley was acquitted by reason of insanity in 1982 for attempting to assassinate President Reagan and others and the immediate aftermath of that acquittal. Since the middle of the 20th Century, the tale is one of the rise and fall of the American Law Institute's Model Penal Code test for legal insanity.¹ Then it turns to the constitutional decisions of the United States Supreme Court concerning the status of legal insanity. Finally, it addresses the substantive and procedural changes that have occurred in the insanity defense since the wave of legal changes following the Hinckley decision.

Before and in the Wake of Hinckley

The affirmative defense of legal insanity has always been controversial, but every state had some form of the defense until the time of Hinckley. In the early part of the 20th C, a few states tried to abolish the defense legislatively,² but all such attempts were rejected by the states' appellate courts. After *M'Naghten*,³ virtually all United States jurisdictions adopted some form of the English cognitive test, although starting with the *Parsons*⁴ case in Alabama, a minority of jurisdictions also adopted a control⁵ test in addition to the *M'Naghten* standard. There were of course criticisms of *M'Naghten*. It was allegedly too inflexible because its test is expressed in all-or-none-terms, too unscientific, and unduly limited the scope of expert testimony. In practice, however, most of these alleged flaws were unproblematic. Experts were not unduly cabined, and there is no evidence that the test was applied narrowly as a result of its narrow language. It was of course open to the criticism that an independent control test was necessary. Nonetheless, *M'Naghten* remained the dominant test until the second half of the 20th Century. Jurisdictions were given great freedom to allocate the burden of persuasion at any level, including requiring the defendant to prove legal insanity beyond a reasonable doubt,⁶ thus increasing the risk of wrongful conviction. Jurisdictions were permitted to place the persuasion burden on the prosecution beyond a reasonable doubt once the defendant met the production burden, and most did so.

¹ The American Law Institute is a private, non-profit organization of lawyers, judges, law professors and others dedicated to reform of various areas of the law.

² See *State v. Lange*, 123 So. 639, 641-42 (La. 1929) (finding a violation of the state due process clause); *Sinclair v. State*, 132 So. 581, 584-87 (Miss. 1931) (finding a violation of the federal due process, equal protection, and cruel and unusual punishment clauses); *State v. Strasburg*, 110 P. 1020, 1023-24 (Wash. 1910) (finding a violation of the state due process clause).

³ Cl. & Fin. 718, 8 Eng. Rep. 718 (H.L. 1843).

⁴ *Parsons v. State*, 81 Ala. 577 (1887).

⁵ These tests are sometimes referred to as "irresistible impulse" or "volitional" tests, but both alternatives sow confusion for various reasons. "Control" is a preferable generic term that I shall use throughout this chapter.

⁶ *Leland v. Oregon*, 343 U.S. 790 (1952); re-aff'd, *Rivera v. Delaware*, 429 U.S. 877 (1976).

In 1952, the American Law Institute (ALI) began work in earnest on the Model Penal Code (MPC), an attempt to bring order, rigor and precision to the common law of crimes. After the publication of numerous preliminary drafts, a final official draft was published in 1962. Its insanity defense provision is as follows:

Section 4.01. Mental Disease or Defect Excluding Responsibility.

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

(2) As used in this Article, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.⁷

The drafters had consulted with mental health professionals and believed the new test was an improvement on both *M'Naghten* and control tests. It notably included a control prong. It required only lack of substantial capacity, not lack of all capacity to appreciate or to conform. Further, its cognitive prong gave law makers the choice between appreciation, not knowledge, of criminality (legal appreciation) or of wrongfulness (moral appreciation), and did not focus on "knowledge" narrowly conceived. State lawmakers and judges were convinced. After publication of the MPC test, every state that seriously considered insanity defense reform legislatively or judicially adopted the MPC test. There was no uniform federal insanity test extant at the time, but before Hinckley, all federal circuits but one had judicially adopted the MPC test. At the time of Hinckley, the MPC test was probably the majority rule.

In March, 1982, John W. Hinckley, the 25 year old son of prosperous Colorado family, attempted to assassinate President Reagan and others in the District of Columbia. He was charged with attempted murder under both federal and local District law.⁸ As is often the case, the prosecutions were consolidated in the federal district court. At the time, the MPC test was the applicable federal rule in the District of Columbia and the prosecution bore the burden of persuasion beyond a reasonable doubt once the production burden had been met. Both sides were represented by excellent attorneys and experts. There was not profound disagreement among the experts about the facts, including those pertaining to Hinckley's mental state. The crucial question was whether those facts amounted to delusional beliefs or evidence of a disturbed but non-delusional agent. I did not attend the trial, but I did read the complete transcript. In my experience, it is rare for the evidence to be in such exquisite equipoise. The prosecution's weighty burden of persuasion made it almost inevitable that a proper jury would acquit Hinckley by reason of insanity and in June, 1982, they did so.

The verdict caused a public uproar. President Reagan was popular and the insanity defense was not. Many thought that the control prong of the MPC test was the culprit, but there

⁷ American Law Institute, Model Penal Code & Commentaries, §4.01 (1962, 1985).

⁸ Under the dual sovereignty doctrine, the United States Constitution permits successive prosecution in federal and local courts for the same criminal acts without violating the double jeopardy clause. *Bartkus v. Illinois*, 359 U.S. 121 (1959), re-affirm'd, *Gamble v. United States*, 139 S. Ct. 1960 (2019).

is no convincing evidence for this allegation. There were the usual complaints that this was another example of the “circus atmosphere” of dueling experts that insanity cases too often produced. And so on. The result was a wave of legislative reform at the federal and state levels, much of it aimed at narrowing and even abolishing the defense.

The Justice Department and the Attorney General were both initially in favor of abolishing the insanity defense in federal criminal trials, but were ultimately convinced that this change was too extreme.⁹ In the event, Congress passed the Insanity Defense Reform Act in 1984, which for the first time established a uniform federal rule. The legislation adopted a *M’Naghten* variant that used “appreciation” of the nature and quality of one’s acts or wrongfulness, that contained no control test, that required the necessary mental disorder component to be “severe,” and that placed the burden of persuasion on the defendant by clear and convincing evidence.¹⁰ Many states followed suit, typically abolishing a control test, narrowing the cognitive substantive test, and allocating the burden or persuasion to the defendant by either a preponderance of the evidence or the more onerous clear and convincing standard.¹¹ Five states abolished the affirmative defense of legal insanity. Four of the state supreme courts upheld the legislation against constitutional attack, but one held the reform unconstitutional.¹²

The triumphal march of the MPC test had come to an end. The Hinckley verdict had done its work. In the ensuing decades, there were no major changes to the law of legal insanity nationwide, although criticism of a narrow cognitive test persisted. Cases like those of Andrea Yates,¹³ who had drowned her five children in a bathtub in response to the delusion that she needed to do so to save them from Satan, increased calls to once again adopt a control test. Such claims made little headway. Most important, a question the Supreme Court had never answered remained open: whether the constitution required some form of the affirmative defense of legal insanity. Three Supreme Court cases addressed the issue, to which we will now turn.

The Deconstitutionalization of the Affirmative Defense of Legal Insanity

⁹ I testified twice on behalf of the American Psychological Association concerning what the federal insanity rule ought to be. I know from staffers and some member of the House that abolition was considered too extreme by members of both parties in both the legislative and executive branches of government.

¹⁰ 18 USC § 17 (1984).

¹¹ There has been one good study in a sample of states of the naturalistic experiment abolition produced that found that narrowing the substantive defense made little difference in outcomes but allocating the burden of persuasion to the defendant produced fewer acquittals. H. J. Steadman et al, *Before and After Hinckley: Evaluating the Insanity Defense Reform* (1993).

¹² *State v. Searcy*, 118 Idaho 632, 798 P.2d 914 (1990); *State v. Bethel*, 66 P. 3d 840 (Kan. 2003); *State v. Korell*, 690 P. 2d 992 (Mont. 1984); *State v. Herrera*, 895 P.2d 359 (Ut. 1995). *Finger v. State*, 27 P. 3d 66 (Nev. 2001) ruled that abolition violated the due process clauses of the United States and Nevada Constitutions.

¹³ See Deborah W. Denno, *Who is Andrea Yates? A Short Story About Insanity*, 10 *Duke J. Gender L. & Pol’y* 1 (2003).

The United States Supreme Court is admirably reluctant to interfere with substantive criminal law. The definition of crimes and defenses is largely left to the states and Congress in deference to our federal system of government. The standard trope is that the individual jurisdictions are “laboratories” to test the validity of the will of the people expressed through legislative enactments, and the Supreme Court should not interfere except in extreme cases. Thus, any petitioner making a substantive due process claim that some state statute is unconstitutional faces a difficult task to show that the remedy is implicit in ordered liberty or that the law “offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”¹⁴ The historical record is a crucial part of this analysis. A frequently quoted opinion expressing the Court’s deference to the states in substantive criminal law is from Justice Marshall’s plurality opinion in *Powell v. Texas*,¹⁵ in which the Court was asked to constitutionalize an affirmative defense for behavior associated with an addiction which was allegedly a compulsion symptomatic of the disease.

We cannot cast aside the centuries-long evolution of the collection of interlocking and overlapping concepts which the common law has utilized to assess the moral accountability of an individual for his antisocial deeds. The doctrines of *actus reus*, *mens rea*, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. *This process of adjustment has always been thought to be the province of the States.*¹⁶

The Court thus refused to adopt such a one-size-fits-all constitutional defense as not fruitful and as something that should be left to the province of the states.

An unusual exception to the Court’s deference was *Robinson v. California*.¹⁷ Walter Lawrence Robinson was a needle-injecting drug addict who was convicted of a California statute that made it a crime to “be addicted to the use of narcotics” and he was sentenced to ninety days in jail. The only evidence that he was an addict was needle marks. Robinson appealed to the Supreme Court on the ground that punishing him for being an addict was a violation of the 8th and 14th Amendment’s prohibition of cruel and unusual punishment. There were many different opinions written in the case, but a majority agreed that punishing for addiction was unconstitutional. (As a sad footnote, Robinson died of an overdose before the case was decided.)

It is difficult to determine precisely what reasoning was the foundation for the Court’s constitutional conclusion, but for our purposes three stand out: it is unconstitutional to punish for status alone or because addiction is a disease or because addiction is “involuntary.” Herbert Fingarette and Anne Fingarette Hasse demonstrated conclusively decades ago that the disease rationale collapses into either the status rationale or the involuntariness rationale (1979), so let us examine what implications follow from each of these two. The status rationale is far more modest and simply builds on the foundational criminal law requirement that criminal liability generally requires action (or an intentional omission in appropriate cases). Robinson was not

¹⁴ *Leland v. Oregon*, 343 U.S. 790, 798 (1952).

¹⁵ *Powell v. Texas*, 392 U.S. 514 (1968).

¹⁶ *Ibid.* at 536-37 (emphasis added).

¹⁷ 370 U.S. 660 (1962).

charged with possession or use, but simply with the status of being an addict. In dissent, Justice White pointed out that if it was unfair to punish an addict for his status, why would it not be equally unfair to punish him for the actions that are signs of that status. It is a clever question, but it ignores the view of addiction as a chronic and relapsing disorder. On this view, one can be an addict even if one is not using at the moment so there is no action. Again, the status argument is modest because it betokens no genuine widening of non-responsibility conditions. Indeed, it is a narrowing holding because the older common law permitted punishment for prohibited statuses.

The “involuntariness” claim more extensively suggests that punishing people for conditions and their associated behaviors that they are helpless to prevent is also unconstitutional. Adopting the involuntariness position would be an invitation to undermining the choice model of addiction in light of some powerfully supported arguments that use by addicts is indeed a choice. More important, if the Court adopted an “involuntariness” defense, it could not be limited to addiction-related behavior.

Those who wanted to test the meaning of *Robinson* did not have long to wait because *Powell v. Texas* settled the issue just six years later. Leroy Powell was a chronic alcoholic who spent all his money on wine and who had been frequently arrested and convicted for public drunkenness. We have already seen that the Court rejected constitutionalizing a control test in *Powell*, but the *Powell* plurality made clear that *Robinson* should not be read extensively as based on an involuntariness rationale. Instead, it was simply based on the rationale that the Constitution does not permit punishment for status alone.¹⁸ Culpable action was required before the state could justifiably blame and punish. There have been attempts since then to claim that Justice White’s confusing concurrence,¹⁹ which envisioned some circumstances in which a constitutional excuse might be required, should be read as the holding of *Powell*.²⁰ These attempts have been fruitless to date, but claims based on accumulating scientific knowledge might motivate further such attempts. In short, as of 1968, there was no definitive statement from the high court about the constitutionality of some form of the insanity defense.

That status quo did not change in 2006 when the Court decided *Clark v. Arizona*.²¹ In the early morning of June 21, 2000, Eric Clark, a 17 year-old resident of Flagstaff, Arizona, was riding around in his pickup truck blaring loud music. Responding to complaints about the noise, Officer Jeffrey Moritz, who was in uniform, turned on the emergency lights and siren of his marked patrol car and pulled Clark over. Moritz left the patrol car and told Clark to remain where he was. Less than a minute later, Clark shot and killed Moritz. Clark was charged with intentionally killing a police officer knowing that the officer was acting in the line of duty.²²

Clark did not contest the shooting and death. But he did claim he was suffering from paranoid schizophrenia at the time of the crime. He claimed both that his mental disorder negated the required mens rea for the crime charged (because he lacked the intent to kill a person and the

¹⁸ *Powell v. Texas*, 392 U.S. 514, 532 (1968).

¹⁹ *Ibid.* at 548.

²⁰ *Manning v. Caldwell*, 930 F. 3d. 264 (4th Cir. 2019). The case ultimately settled, however, so there was no definitive opinion on the issue.

²¹ 548 U.S. 735 (2006).

²² All statements of the facts are taken from the Supreme Court opinion.

knowledge that the victim was a police officer) and that in any event disorder rendered him legally insane.

There was substantial evidence to suggest that Clark knew Moritz was a police officer and that he had planned just such a shooting, including Clark's statements to classmates a few weeks earlier that he wanted to shoot police officers. He had even arguably lured Officer Moritz by driving his truck with its radio blaring in a residential area. On the other hand, Clark presented testimony from family, classmates and school officials about his bizarre behavior during the preceding year, including rigging his bedroom with fishing line, beads and chimes to warn him of intruders, and keeping a bird in his car to warn him of airborne poison. These actions were plausibly a result of his paranoid delusions. Indeed, lay and expert testimony reported that Clark thought Flagstaff was populated with "aliens," including some that were impersonating police officers, that the aliens were trying to kill him, and that only bullets could stop the aliens. The defense expert also testified that Clark had turned the radio up to drown out auditory hallucinations.

The operative Arizona legal insanity test under which Clark was tried was limited to the cognitive right/wrong test: once the burden of production was met, the defendant had the burden of proving by clear and convincing evidence that "at the time of the commission of the criminal act [he] was afflicted with a mental disease or defect of such severity that [he] did not know the criminal act was wrong."²³

Clark argued that the full *M'Naghten* rule was the minimum test necessary to satisfy due process and that Arizona's truncated test was therefore unconstitutional. Writing for the five-Justice majority, Justice Souter rejected this claim, concluding that the full *M'Naghten* rule is not a fundamental principle of justice subsumed by the due process clause.²⁴

The Court correctly noted that the history of legal insanity defenses in this country demonstrates that there is substantial diversity of language and interpretation within the broad cognitive and control categories. As Justice Souter pointed out, insanity definitions vary widely across the United States, and four states had abolished the defense entirely. The Court also observed that the test for legal insanity is not a test for mental disorder. The tests for insanity and disorder have been devised for different purposes—assessing criminal responsibility and justifying mental health treatment—and there is controversy about both. This is inevitable because the test for legal insanity is a matter of policy. The Court concluded that because there is so much variation, "no particular formulation has evolved into a baseline for due process, and...the insanity rule, like the conceptualization of criminal offenses, is substantially open to state choice."²⁵

Although reasonable people might believe that Arizona's truncated insanity test is not optimally just, the Court's holding on this issue—that due process does not require "any single

²³ ARIZ. REV. STAT. ANN., Sec. 13-502(A) (West 2001).

²⁴ Clark v. Arizona, 548 U.S. 735 (2006). Chief Justice Roberts and Justices Scalia, Thomas, and Alito joined Justice Souter's majority opinion. Justice Breyer concurred in the majority's analysis.

²⁵ Ibid. at 752.

canonical formulation of legal insanity”²⁶—seems plainly right. But in the course of reaching this rather unremarkable conclusion, the Court may have confounded the two *M’Naghten* prongs.

In its original characterization of the disjunctive *M’Naghten* rule, as well as in its categorization of types of insanity rules, it referred to knowledge of the nature and quality of one’s act as a question of “cognitive capacity” and knowledge of right and wrong as a question of “moral capacity.”²⁷ But, in fact, both are cognitive questions, and indeed that is why both are usually alternative prongs of cognitive tests such as *M’Naghten*. They differ only in the object of the knowledge required. Moreover, mental disorder seldom disables a person’s moral compass. The person may be making a “moral mistake” because his or her perceptions and beliefs are distorted by disorder, but the moral sense generally remains intact. Andrea Yates might genuinely have thought her behavior was morally justified, but her moral capacity was hardly disabled. Indeed, one could view her act as an indication that her moral sense was perfectly intact, albeit driven by a delusional belief.

The Court also consistently referred to control tests as “volitional” and characterized them as asking “whether a person was so lacking in volition due to a mental defect or illness that he could not have controlled his actions.”²⁸ It is common to refer to control tests as volitional, but, this is a confused locution that should be abandoned. Whether Clark thought he was killing an alien to save himself or thought he was killing an officer because he was angry at the police, his volition or will perfectly and competently executed the intention he formed. Yates perfectly executed her intention to kill, motivated by her desire to save the children from Satan’s eternal torments. Both may have experienced grave difficulty conforming to the law because they suffered profound delusions about the nature of the world, but in neither case was a defect of the will the source of the problem.

The Court also decided that the narrow Arizona legal insanity rule was constitutionally acceptable because evidence of so-called cognitive incapacity—lack of knowledge of what one was doing—is relevant to the right/wrong test and has the same significance for both. The Court recognized that one might show lack of moral knowledge without showing lack of factual knowledge about what one was doing, but it correctly observed that lack of the latter was almost always sufficient to show lack of moral knowledge.²⁹ After all, if the agent does not know what he is doing, he cannot know that it is right or wrong. Indeed, the Court interpreted Arizona’s legislative narrowing of the rule as a “streamlining”³⁰ change rather than a genuinely substantive

²⁶ *Ibid.* at 753

²⁷ *Ibid.* at 747, 753-754.

²⁸ *Ibid.* at 749.

²⁹ Contrary to the Court’s assertion, it is quite possible that a defendant might not know what he or she was doing but would know that it was wrong. For example, suppose a defendant violently attacked a person with the belief that the person was a dog. See Joseph Livermore & Paul E. Meehl, *The Virtues of M’Naghten*, 51 MINN. L. REV. 769, 809 (1967). In such a case, the defendant would not know what he or she was doing, but would know that cruelty to animals was a moral and legal wrong. It is not clear from *Clark*’s reasoning if a rule like Arizona’s that produced such an outcome would be constitutional because the Court did not envisage this possibility. There is a serious question about whether such a rule would permit unjust blame and punishment. Nevertheless, although such cases are a theoretical possibility, they will be so rare that the Court’s analysis is reasonable. See *Clark v. Arizona*, 548 U.S. 735, 753-755 and n. 24.

³⁰ *Ibid.* at 755, 24

alteration. Even under the narrow rule, then, all evidence of lack of factual knowledge would apparently be relevant and admissible, as it was at trial.

Before we leave *Clark*, we should take note of the case's other important holding: a state was free to exclude all expert evidence of mental disorder to negate mens rea, as Arizona did. A state had to allow introduction of observational evidence of mental disorder, whether from lay people or experts on the mens rea issue, but expert evidence about mental disorder generally and the defendant's capacities could constitutionally be excluded. The Court noted that Arizona was free to "channel"³¹ all such expert evidence into the issue of legal insanity. In its discussion of the mens rea issue, the Court sometimes confused the mens rea issue with legal insanity. It is true that the same evidence may often support claims that mens rea is negated and that the defendant is legally insane, but they are nonetheless legally distinct with equally distinct consequences. Mens rea negation is a denial of the prima facie case that can lead to outright acquittal; legal insanity is an affirmative defense that leads to a form of involuntary civil commitment to a forensic facility. I raise this mens rea issue because the same confusion about the relation between mens rea and legal insanity bedeviled both the ancient authorities and the Supreme Court majority effectively upholding the complete abolition of the defense of legal insanity in *Kahler v. Kansas*,³² which will be discussed below.

Whether a jurisdiction could constitutionally both abolish the insanity defense and exclude expert testimony on mens rea was unclear because Arizona did have an insanity defense, even if it was the narrowest in the nation. Thus, the effect of mental disorder on culpability assessment was not completely forbidden. In holding that Arizona's very narrow legal insanity formulation was constitutional, the Court took no position on whether a jurisdiction had to have some form of an affirmative defense. The case did not present that question. But *Delling v. Idaho* did.

In late March and early April 2007, John Joseph Delling planned and committed the intentional homicide of two people he believed were stealing his "aura" and "powers." He further believed that he needed to kill the victims to prevent the victims from harming him. There was uniform agreement that Delling was psychotic and delusional. He was charged with first degree murder. Idaho was one of the first states to abolish the insanity defense in the wake of Hinckley. State law did permit the defendant to introduce evidence of mental disorder to negate mens rea, the so-called mens rea alternative to the insanity defense. In this case, however, there was no doubt that rather than negating the mens rea of intent, Delling's severe mental disorder gave him reason to form it. After all, his delusional beliefs led him to kill the victims on purpose to save his own life. In the event, Delling pleaded guilty to second degree murder, but the trial judge who accepted taking the plea and imposed sentence noted the following:

I don't believe that the defendant has the ability to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law. I do not believe it existed at the time he committed the offenses. I do think that

³¹ Ibid. at 770-71

³² 140 S. Ct. 1021 (2020).

he was in such a severe grip of his delusions that he would not have conformed his conduct to the law, and I do think the crimes do arise directly from his illness.³³

In other words, although Delling formed the mens rea and was fully guilty under Idaho law, in the judge's opinion, Delling was legally insane. The facts were perfect to test whether Idaho's abolition of legal insanity and adoption of only the mens rea alternative were unconstitutional. Delling appealed on that ground and asked the Supreme Court to grant *certiorari* (discretionary review).

In the United States Supreme Court, it takes the vote of only 4 of the 9 justices for the Court to grant review. The Court declined to hear the case, 6-3.³⁴ Although written dissents to denials of *cert.* are relatively infrequent, Justice Breyer filed one that was joined by Justices Ginsburg and Sotomayor.³⁵ In his argument that review should have been granted, Justice Breyer noted the long, virtually uniform acceptance of an affirmative defense of legal insanity and the criticisms that the mens rea alternative was not adequate because it would convict defendants who would otherwise be found insane and because mental disorder seldom negates mens rea. The constitutional status of the insanity defense remained an open question.

On the evening of November 28, 2009, James Kraig Kahler entered the home of his former grandmother-in-law and shot and killed his former wife, his two daughters, and the wife's grandmother. Kahler was charged with capital murder. Prior to the killings, the Kahlers had seemed to be a "perfect" family, but infidelity and other factors caused the marriage to disintegrate and to end in divorce. Kahler had been leading an exemplary personal life as a family man and a professional life as an engineer and city manager. As his personal life deteriorated, so did Kahler. He had been fired from his job and was living at his family's Kansas farm. On the evening of the homicides, Kahler was angry at his ex-wife. He had had custody of his son and they were having a good time. Kahler called his ex-wife and asked if he could extend the son's stay for a day. She refused, and while Kahler was doing an errand, she came by Kahler's residence and took the son away with her. Kahler then obtained the weapon, went to the homicide scene and shot his victims.

Like Idaho, Kansas had abolished the affirmative defense of legal insanity and adopted the mens rea rule. Like Delling, there was little doubt that Kahler planned the homicides and formed the intent to kill. Unlike Delling, however, for whom the evidence of gross loss of contact with reality was overwhelming, Kahler was not obviously crazy. Nevertheless, he had been examined by a psychiatrist who concluded that Kahler suffered from a number of mental disorders, including a major mental disorder, severe depression. As a result, the expert opined, Kahler's perception and judgment were so distorted that he may have become dissociated from reality at the time of the crime. The expert also testified that Kahler

³³ Brief for Respondent in the Supreme Court of Idaho, *Idaho v. John Joseph Delling*, Nos. 36920 & 36921, at 3-4 (2010).

³⁴ Full disclosure: Professor Richard J. Bonnie of the University of Virginia and I wrote an amicus brief urging the Court to grant review on behalf of a large number of criminal and mental health law professors. Such "friend of the court" briefs are meant to advise the Court's decision making.

³⁵ *Delling v. Idaho*, 133 S. Ct. 504 (2012).

could not refrain from his conduct. Severe depression can have psychotic features, but distorted perceptions and judgment do not necessarily rise to that level. Moreover, Delling's motivating reason for forming the intent to kill—the need to save his own life—might have been a justification if true, whereas Kahler's actions were arguably an anger-driven reaction that had no justification whatsoever. Nevertheless, if Kansas did have an insanity defense, Kahler's expert testimony would have been sufficient to raise a jury issue and to warrant an instruction.

Because an insanity defense was not available and Kahler's conduct met the criteria for capital murder, his conviction for the most serious crime in the criminal law was improperly a foregone conclusion. He had no realistic prospect of exculpation. Kahler was convicted of capital murder and appealed on the ground that the Kansas law abolishing the insanity defense was unconstitutional. The Supreme Court agreed to hear the case.³⁶ Justice Kagan wrote the majority opinion upholding the Kansas law 6-3, with Justice Breyer once again in dissent joined by Justices Ginsburg and Sotomayor.

Recall that the Court has repeatedly held that history is a prime guide to the analysis of whether a rule “offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” As a result, a large part of both opinions was devoted to consideration of the earlier cases and authoritative commentaries concerning the relation of mental disorder to culpability. Unsurprisingly each claimed the history supported their own opinion. I claim that analysis of the history is clouded by the authorities' loose language that often left unclear whether the mens rea required by the prima facie case or the affirmative defense of legal insanity was being referred to. The clear distinction between the two in legal writing did not emerge until recently, however, and even the Supreme Court conflates the two as it did in *Clark* and would do in *Kahler*. The more important observation about the history, however, is that everyone concedes that some form of an insanity defense has existed in English law since the 1300s and everywhere in American law since the founding until *Hinckley*. Even as of the year of the opinion, 2020, only 4 states have effectively abolished the defense. It is hard to imagine that anyone could characterize the ubiquity of legal insanity as anything other than a fundamental principle of justice rooted in our history and tradition. But the majority did just that, in part because a number of unclear historical sources were read as if they reasonably led to the contrary result.

The majority's traditional legal analysis began with the correct observation noted in *Clark* that there is much variation in the tests various jurisdictions use for legal insanity and no formulation is or ever has been “canonical.” As a result, the petitioner had a heavy burden to convince the Court that at a minimum, the Constitution compels adoption of some form of the moral capacity prong of *M'Naghten* (the knowing right from wrong prong). Although the dissent conceded that no particular test was required, the majority seems on firm ground when it claimed that the dissent's analysis in fact accepted the moral incapacity test as a minimum requirement.³⁷

³⁶ Full disclosure: Professor Bonnie and I again co-authored an amicus brief on behalf of 290 criminal and mental health law professors, arguing that the Kansas law was unconstitutional. Amicus briefs arguing against the law were also submitted by the American Bar Association and a group of philosophers.

³⁷ *Kahler v. Kansas*, 140 S. Ct. 1021, 1030, n.5

This was probably a strategic error on the dissent's part, but it is not clear that it would have made a difference because the majority claimed that Kansas' mens rea rule in fact adopted the "cognitive" prong of *M'Naghten* (nature and quality of the act).³⁸ The dissent argument about abolition is thus eviscerated because Kansas allegedly had not abolished the insanity defense and the Court did not need to address whether outright abolition was constitutional. That question was left open.³⁹ The Court further argued that Kansas had decided that moral culpability was captured by the "nature and quality" prong indirectly expressed through the mens rea rule. Consequently, Kansas' scheme was not untethered from judgments about moral culpability.⁴⁰ The Court noted that the Kansas moral judgement rule might differ from the dissent's or from many of the justices and other jurisdictions, but Kansas was constitutionally entitled to make that judgement without judicial interference. Further, the dissent was wrong to claim that jurisdictions retain leeway concerning the content of the standard because they are free to go beyond the minimum moral capacity standard. But again, why should that be the canonical minimum. Jurisdictional freedom is indeed abridged. If the defendant lacked moral capacity, that does not eliminate culpability in Kansas, it simply diminishes it, the majority argued. Such considerations can be addressed at sentencing, which is clearly permitted in the Kansas scheme. Indeed, if the reason for moral incapacity, such as major mental disorder, requires diversion to inpatient psychiatric care, Kansas also directly permits this outcome.

The majority's reasoning is facially attractive, but it is massively flawed. The Kansas rule is not the equivalent of the cognitive prong of *M'Naghten* because it is much narrower depending on how the "nature and quality" of one's actions is interpreted. A defendant may know what he or she is doing in a narrow sense. Consider Andrea Yates again. She knew the victims were her children and that she was causing their biological death by drowning them. Please recall that she delusionally believed that she was saving them from eternal torment by Satan in hell. That was her material motivation for her action. She clearly formed the mens rea for premeditated, intentional homicide, but did she know what she was doing in any sensible sense? Defendant's virtually never mistake their victim for a lemon or a dog, the silly examples used by the MPC and the *Kahler* dissent respectively. Few if any insanity claimants are acquitted by the factual cognitive prong. To the extent that any insanity rule is meant to express a moral judgment, the cognitive prong fails to do so. If the "nature and quality" is interpreted more broadly, as I just suggested, then the cognitive prong does become a genuine moral standard, but note that Ms. Yates would have been convicted under the Kansas mens rea rule because, unlike the "nature and quality" standard, the Kansas mens rea alternative does not permit a broad interpretation. Mens rea is defined narrowly. The defendant did or did not form it, and in almost all cases, even the most abnormal defendants will form it, as the dissent clearly recognized and powerfully argued. No jurisdiction has ever adopted solely the cognitive prong as its insanity rule because essentially no one would ever be acquitted under this standard. Kansas has effectively abolished the insanity defense despite the majority's slippery claim to the contrary.

The ability of the judge to consider moral incapacity at sentencing and to commit the convicted felon to psychiatric care do not cure the central moral defect of the Kansas scheme.

³⁸ Ibid. at 1026 . The majority claimed without support that everyone agreed to this, but as we shall see, it is an unjustified claim.

³⁹ Ibid. at 1031, n. 6.

⁴⁰ Ibid. at 1031, n. 7.

Conviction of a defendant who is morally innocent is legally and morally objectionable. A just criminal law would not permit this. The acquitted defendant is not stigmatized and blamed as a criminal, and the conditions of confinement should be required to be less onerous than prison. But Kansas judges are not required to take mental abnormality into account at sentencing or to order psychiatric care. Doing so is entirely discretionary, even in cases that seem to demand such actions.

For good measure, Kansas advanced the claim that the insanity defense is too hard and confusing for adequate jury assessment, but if the Court is correct that the mens rea rule is really a form of insanity defense, then mens rea evaluation faces the same difficulties. In addition to this logical flaw, the empirics of Kansas' claim were refuted by both the dissent and by the law professors' amicus brief. Of course it is difficult to reconstruct past mental states, but the insanity defense is adjudicated in 46 states and the federal jurisdiction without undue difficulty. Even those four states permit such reconstruction for purposes of sentencing. And there is no evidence whatsoever that it is more difficult to assess past mental disorder than past mens rea. In my experience as a practicing forensic psychologist, I would claim the opposite is true. The gross mental abnormality typically needed for a successful insanity claim is easier to evaluate than mens rea because it is so gross and obvious in most cases.

The majority opinion concluded by noting that psychiatry is an inexact science and thus courts should be reluctant to intrude in the fraught relation between mental disorder and criminal culpability.

Defining the precise relationship between criminal culpability and mental illness involves examining the workings of the brain, the purposes of the criminal law, the ideas of free will and responsibility. It is a project demanding hard choices among values, in a context replete with uncertainty, even at a single moment in time. And it is a project, if any is, that should be open to revision over time, as new medical knowledge emerges and as legal and moral norms evolve. Which is all to say that it is a project for state governance, not constitutional law.⁴¹

The Court is correct that the content of the test is a project for state governance, but wrong to imply that a state can constitutionally do without at least some affirmative defense of legal insanity. Moreover, at present, the working of the brain need not be examined to understand the behavior of defendants and to decide how the law should respond to particular behaviors, such as gross loss of contact with reality. Even if we could "read" the content of mental states from knowing the subject's brain states, which is entirely a fantasy, it would not entail how the law should respond because behavior, not the brain, is crucial to responsibility assessment. Finally, the metaphysical concept of free will is not a criterion in criminal law nor even foundational for it.⁴²

⁴¹ Ibid at 1037

⁴² Stephen J. Morse, The Non-Problem of Free Will in Forensic Psychiatry and Psychology, 25 Behav. Sci. Law 203 (2007)

In conclusion, it is now constitutional to effectively abolish the insanity defense. No state has done so, however, since the original four states did so decades ago.⁴³ One hopes that no further jurisdictions will follow these examples.

Substantive and Procedure Since Hinckley

This section of the paper first considers the substantive law of legal insanity since Hinckley. As we shall see there have been few changes since the changes immediately post-Hinckley. Then it turns to the procedures associated with legal insanity.

Substance

There have been few substantive changes since the general tightening of the tests in the wake of Hinckley. Some variant of *M’Naghten* is by far the dominant rule. There continue to be skirmishes over its interpretation, especially about whether “wrong” means legal or moral wrong. The states are split on this issue and some have given no definitive answer. The four abolitionist states have continued to reject the affirmative defense. A minority of states continue to include a control test. The unique New Hampshire doctrine simply acquits a defendant if he was “insane” at the time of the crime.⁴⁴

In the federal courts, most cases are on habeas corpus appeal from state convictions for very serious crimes, such as capital murder and murder. Most of the claims are for some variant of ineffective assistance of counsel or other non-substantive failures. Such claimants face a legal challenge because Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) in 1996,⁴⁵ which applies to all federal petitions for habeas corpus filed on or after its effective date. Title I of AEDPA substantially changed the way federal courts handle habeas corpus actions. A state prisoner may not obtain relief with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim,

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.⁴⁶

This provision makes it difficult to prevail, especially under subsection (2), and few claimants do so.

⁴³ Some believe that Alaska did so in 2018 because it adopted the mens rea alternative. AS §12.47.020. At the same time, however, it also adopted an affirmative defense of legal insanity. AS §12.47.010.

⁴⁴ N.H.S. A. §628.2. This test relies on common law precedents dating from the late 19th C. to determine if a defendant was insane. For example, if a defendant committed an act that would be criminal if he were sane, but the act was the product of mental disease, the defendant should be found insane. *State v. Pike*, 49 N.H. 399, 402 (1869). The federal court in *Durham* that adopted the much-discussed but later rejected “product” test, thought it was adopting New Hampshire’s rule, but in fact there were differences. John Reid, *Understanding the New Hampshire Doctrine of Legal Insanity*, 69 *Yale L. J.* 367 (1960).

⁴⁵ Pub. L. 104-132, 110 Stat. 1217.

⁴⁶ [28 U.S.C. § 2254\(d\)](#), as amended by AEDPA. A decision on the merits means a substantive and not procedural claim. AEDPA was not a response to Hinckley, to be sure. It was an attempt to make habeas corpus appeals more efficient. Nonetheless, since it was passed, it has had a large impact on appeals of convictions in insanity defense cases and related issues.

The state cases are similar to those in the federal courts. The dominant *M’Naghten* test has a surfeit of common law history, even in those jurisdictions that abandoned it in favor of the MPC rule in the middle of the 20th Century. Thus, there are few surprises concerning the interpretation of the content of the test. Most involve questions regarding sufficiency of the evidence, ineffective assistance of counsel and like claims. In short, there has been little substantive activity since the post-Hinckley legislative changes.

Every now and then, an unusual case comes along, but it is not representative of any trend. For example, in the wake of Hinckley, the State of California jettisoned the MPC test for legal insanity and opted for a traditional *M’Naghten* rule with the amendment that the two prongs were now conjunctive, separated by “and,” rather than traditionally disjunctive, separated by “or.” In other words, a defendant could be found legally insane only if the defendant both didn’t know the nature and quality of the act and did not know it was wrong. In *People v. Skinner*, the defendant challenged the constitutionality of the California legislation.⁴⁷ A number of the Court’s assumptions are noteworthy. Although conceding that the United States Supreme Court had never ruled that a state must adopt some insanity defense, the Court inferred from Supreme Court jurisprudence that it was probably required. Also, the California history of the insanity defense was complicated, but the traditional California *M’Naghten* rule before the MPC test was adopted was disjunctive, as was traditional everywhere. Finally, the conjunctive California test was massively narrow, indeed so narrow that few could succeed because few defendants would not know the nature and quality of their acts narrowly conceived. With these assumptions, the Court further assumed that the conjunctive test might be unconstitutional. To save its constitutionality, interpretation of the legislation was therefore required, and the Court opined the legislature must have made a simple drafting error, mistakenly using “and” instead of “or.” Consequently, the Court ruled the test must be interpreted to be disjunctive and found it constitutional. Now the California Supreme Court’s creativity is often remarked upon, but this is a remarkable example. Such cases are rare, however.

Starting in the State of Michigan in the middle 1970s, between 15 and 20 states have adopted the “Guilty But Mentally Ill Verdict” (GBMI) in addition to existing rules of legal insanity. It is an alternative, not a replacement. Although the first adoptions antedate Hinckley, the vast majority of jurisdictions have adopted GBMI since Hinckley and it is now a substantial minority rule.

A GBMI verdict does not indicate reduced culpability, it does not require lesser punishment, and it does not provide for hospitalization and treatment that would not otherwise be available to the convict. Essentially, the finder of fact is being asked to make a diagnosis in addition to a guilt determination. It is not different from “guilty but herpes.” In short, GBMI is a fraudulent verdict because it does not address any issue relevant to just criminal blame and punishment and it has the potential to deflect juries from proper insanity acquittals because they do not understand the insanity defense or fear that it will cause the release of a dangerous offender.⁴⁸ When GBMI is available, jurors may falsely believe that they are “taking account” of the defendant’s impairment and thus may improperly return the GBMI verdict when an acquittal of insanity was appropriate. Paradoxically, defendants who raise the verdict may receive even harsher sentences, so there is evidence that its use is declining.⁴⁹

⁴⁷ *People v. Skinner*, 704 P. 2d 752 (1985).

⁴⁸ STEADMAN ET AL., *supra* note 11 at 102–20 (describing the verdict as a compromise).

⁴⁹ *Ibid.*

Procedure

The standard rule in the United States is that an insanity defense cannot be imposed on a competent, unwilling defendant,⁵⁰ and, of course, all defendants must be competent to plead. Defendants who are incompetent to plead or to stand trial may not do so.⁵¹ This is as it should be because the decision may be momentous for the defendant's future. As we shall see when discussing post-insanity acquittal procedures below, in many jurisdictions, a successful insanity defense may result in incarceration in a secure forensic facility for longer than the prison term for the crime charged. In other jurisdictions, the defendant may be committed to a secure forensic facility that is little different from a prison for as long as the prison term permitted. Release in both cases depends largely on the discretion of the facility's professional staff because judges are inclined to trust their judgment about whether release is safe. A competent defendant might well want to forego a potential insanity defense and should be permitted to do so.

Although in general the "playing field" in criminal prosecutions is not "level" between the prosecution and the defense, it would be unfair to the prosecution to permit the defendant to raise an insanity defense only at trial and to prevent the prosecution from appointing its own expert to evaluate a defendant who will raise the insanity defense. As a result, defendants are required to give advance notice to the prosecution that an insanity defense will be raised and to make the defendant available for evaluation by a prosecution expert.⁵² Failure to do so will prevent the defendant from raising the insanity defense.⁵³ An issue rarely raised is what the remedy should be if the defendant refuses to cooperate with the prosecution's expert. There are so few cases that it is difficult to state a general rule, but the dominant view seems to be similar to the consequence of not giving advance notice: the defense is barred. Another approach, for example, is to permit raising the defense, but using only lay evidence, which all defendants are entitled to do if they wish. Such cases are very rare. Most defendants cooperate.

Experts are usually indispensable to help prepare the case and testify for defendants who wish to raise an insanity defense. Without such an expert, the playing field is exceedingly unlevel. Very many criminal defendants in the United States are indigent and cannot afford to retain an expert. Moreover, the budgets of public defenders are rarely sufficient to afford adequate expert assistance. Consequently, many jurisdictions provided indigent defendants with an expert, but the Supreme Court had never ruled that this was a necessity, unlike the provision of an attorney in serious cases. A few years after *Hinckley*, in *Ake v. Oklahoma*,⁵⁴ the Supreme Court held that such assistance was constitutionally required in insanity and death penalty cases. In *Ake v. Oklahoma*,⁵⁵ the Supreme Court finally recognized the unfairness of not providing the defendant with a mental health expert. It noted that fundamental fairness entitles indigent defendants to an adequate

⁵⁰ E.g., *US v. Marble*, 940 F. 2d 1543 (D.C. Cir. 1991) (basing the decision on the Insanity Defense Reform Act). The Court did note that if the defendant gave no clear indication about this issue, the Court might give an instruction on the insanity defense *sua sponte*, but I assume such cases would be rare. Most competent defendants can express a simple choice.

⁵¹ See, e.g., *Godinez v. Moran*, 509 U.S. 389 (1993) (defendant must be competent to plead guilty and to waive the right to counsel); *Drope v. Missouri*, 420 U.S. 162 (1975) (defendant must be competent to stand trial).

⁵² E.g., Federal Rules of Criminal Procedure, §12.2.

⁵³ *Ibid.*

⁵⁴ 470 U.S. 68 (1985). In practice, the decision has been extended to also obtain in *mens rea* cases.

⁵⁵ *Ake v. Oklahoma*, 470 U.S. 68 (1985).

opportunity to present their claims.⁵⁶ The Court further held that a mental health expert is necessary when the defendant needs expert assistance at capital sentencing hearings to rebut expert predictions of dangerousness.⁵⁷ As the Court held,

the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense. This is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own. Our concern is that the indigent defendant have access to a competent psychiatrist for the purpose we have discussed, and as in the case of the provision of counsel we leave to the States the decision on how to implement this right.⁵⁸

The decision is correct, but it left open important questions.

The problem is how the right has been implemented in many jurisdictions. *Ake* has not been interpreted to guarantee the defendant a mental health professional that the defense chooses.⁵⁹ If a defendant has resources, he can “shop around” to try to obtain a mental health professional who will support his claims, but indigent defendants do not have that ability.⁶⁰ If the professional consulted will not render a favorable opinion, the defendant’s mental health-based argument will almost certainly fail. In some jurisdictions with a sizeable number of forensic professionals, some experts may have a reputation for being favorable to the defense and the problem may be somewhat alleviated. There is no guarantee, however, that even a favorably inclined forensic professional will reach the expected conclusion, and the possibility of using a predisposed expert may not arise in jurisdictions with fewer forensic specialists. What is worse, in some jurisdictions an indigent defendant may be assigned a mental health professional who is an employee of the state and the prosecution may immediately have access to the report.⁶¹ A state employee inevitably has a conflict of interest. The indigent defendant should be entitled to an independent professional, as some jurisdictions, including a majority of the federal circuits, hold.⁶² Of course, an indigent defendant should not be entitled to shop around indefinitely for a genuine defense expert, but in my opinion at least a second opinion should be required given what is at stake.

The Supreme Court had a perfect opportunity to clarify the issue, but avoided doing so in *McWilliams v. Dunn*.⁶³ *McWilliams* held that the defense had not received the minimum assistance necessary under any interpretation of *Ake* because it had not had sufficient access to an available expert. Consequently, the Court overturned his conviction and noted that they had no need to decide the broader question of whether *Ake* required an expert who is not only independent of the prosecution, but also who would be part of the defense team. The Court should have ruled that the defendant is entitled to a genuinely independent evaluator, but that does not go far enough. The expert should not be an employee of the state. Further, the independent expert’s report should not be disclosed to the prosecution unless the defendant decides to go forward with a mental health-based argument. An independent expert’s report should be confidential work product unless the claim is raised. The fruits of an evaluation of a potential claim should not be of benefit to the prosecution

⁵⁶ *Ibid.* at 77.

⁵⁷ *Ibid.* at 83–84.

⁵⁸ *Ibid.* at 83.

⁵⁹ *E.g.*, *United States v. Osoba*, 213 F. 3d 913 (6th Cir. 2000).

⁶⁰ *Ake*, 470 U.S. at 83.

⁶¹ *Granviel v. Texas*, 495 U.S. 963, 963–64 (1990) (Marshall, J., dissenting from denial of certiorari).

⁶² JOHN PARRY, CRIMINAL MENTAL HEALTH AND DISABILITY LAW, EVIDENCE AND TESTIMONY, 131-132 (2009).

⁶³ 137 S. Ct. 1790 (2017).

Virtually all jurisdictions permit experts on both sides to offer an opinion about the ultimate legal issue—whether the defendant is legally sane or insane—but the federal jurisdiction is a notable exception. The expert cannot give an ultimate legal opinion in federal legal insanity cases.⁶⁴ This innovation was adopted by the Insanity Defense Reform Act in the wake of Hinckley. The thinking behind it is that the ultimate legal issue is just that, a legal issue to be decided by the trier of fact, and therefore beyond the expertise of mental health experts. When experts give such opinions, jurors may be misled into thinking that the issue is medical or psychological. Here is an example. After the Hinckley verdict, some jurors stated that if the experts couldn't agree on his legal sanity, how could the jurors.⁶⁵ I am a long-time proponent of this limitation on expert testimony, but proponents have had little success.

The traditional rule after the case is tried is that legal insanity is a jury question and the jury is free to credit or disregard any expert or lay testimony. As a result, jury verdicts are seldom overturned even if the defense experts are unanimous that the defendant was legally insane and the prosecution uses only lay testimony and cross-examination of the defence experts to defeat the insanity plea. In egregious cases, the trial judge or an appellate tribunal may decide that the verdict is so inconsistent with the weight of the evidence that the jury verdict will be overturned. Such cases are rare, however.

An interesting, oft-raised issue is whether the trial judge should instruct the jury concerning the consequences of finding the defendant legally insane, namely, some form of involuntary commitment to a secure forensic mental health facility, including indefinite confinement in some jurisdictions. In *Shannon v. United States*,⁶⁶ the Court held that federal trial courts need not instruct the jury about commitment unless the prosecution affirmatively misleads the jury about the consequences. Justice Thomas's majority opinion focused primarily on the traditional assumption that juries should decide whether the defendant is culpable and should not be concerned with the consequences of their verdict.⁶⁷ Although this assumption may make sense for the vast majority of cases in which the defendant will be imprisoned or freed depending on the verdict—a fact jurors know—the insanity defense is the only form of exculpation that does not result in the defendant being immediately freed. I recognize that jurors may not fully understand what sentence will follow a conviction, but the insanity defense is *sui generis* because the acquitted defendant is not freed. It would be understandable if a juror voted to convict a legally insane defendant because the juror feared that a disordered and dangerous person might be freed. Similarly, jurors may be far more inclined to reach the just result if they learn that the insanity acquittee will be preventively detained by post-acquittal commitment, which will be discussed presently. Thus, I conclude that the defendant should be entitled to a “consequences” instruction upon request. I would not make it mandatory because, as Justice Thomas recognized, there may be situations when the defendant would think it is not in his interest to have the jury learn of the consequences.

⁶⁴ Federal Rules of Evidence, §704(b).

⁶⁵ “Verdict was unjust: 2 jurors,” *Chicago Tribune*, Jun 23, 1982, pg. A1

⁶⁶ 512 U.S. 573 (1994). This was not a constitutional decision. It was issued under the Supreme Court's supervisory authority over the procedures used in federal cases.

⁶⁷ *Ibid.* at 579–80, 586–887. In fact, Justice Thomas' entire majority opinion relies on the validity of this assumption.

In all jurisdictions, a defendant acquitted by reason of insanity may be automatically civilly committed, either for an evaluation that will be followed by formal civil commitment, or by formal commitment itself without a prior evaluation.⁶⁸ Although not punishment for crime—the defendant has been acquitted after all—these civil commitments have been justified because the defendant is allegedly still dangerous and not responsible for the condition. The terms of such possible commitments vary across jurisdictions, but in some jurisdictions the term may be indefinite with periodic review. In *Jones v. United States*,⁶⁹ the Supreme Court upheld both an automatic commitment for evaluation and the potentially indefinite commitment of a defendant acquitted by reason of insanity for shoplifting a leather jacket. The Court argued that, based on an insanity acquittal, it is rational to presume that the subject was still mentally disordered and dangerous.⁷⁰ The Court was unwilling to equate “dangerousness” with violence. It claimed that the legislative purpose to confine was the same for violent and nonviolent offenses and that the former often led to the latter.⁷¹ Moreover, for this type of commitment, the Court was willing to accept a lesser burden of persuasion than the constitutionally-imposed standard civil commitment standard of clear and convincing evidence.⁷² Post-insanity commitments are different, the Court claimed, because the defendant himself raised the issue of mental disorder, and so the risk of error is decreased.⁷³

Finally, the Court approved potentially indefinite confinement on the ground that such confinement did bear a rational relation to the purpose of the commitment, which is to confine dangerous, non-responsible agents. The defendant was acquitted so the length of the confinement need not be limited by the deserved punishment. The subject is properly confined as long the defendant remains disordered *and* dangerous and need not be released until either condition is no longer met. This might happen at any time, or never.⁷⁴ In *Foucha v. Louisiana*,⁷⁵ the Court affirmed that a post-insanity commitment must end if the subject is no longer mentally ill, even if he is still dangerous.⁷⁶

⁶⁸ See JOHN PARRY, CRIMINAL MENTAL HEALTH AND DISABILITY LAW, EVIDENCE AND TESTIMONY, 168-170 (2009).

⁶⁹ 463 U.S. 354 (1983).

⁷⁰ *Ibid.* at 365.

⁷¹ See *id.* at 365 n.14.

⁷² *Ibid.* at 367–68; see also *Addington v. Texas*, 441 U.S. 418, 431–33 (1979) (holding that traditional civil commitment required a finding by clear and convincing evidence, a standard between a preponderance and beyond a reasonable doubt).

⁷³ *Jones*, 463 U.S. at 367.

⁷⁴ *Ibid.* at 368–69.

⁷⁵ 504 U.S. 71 (1992).

⁷⁶ *Ibid.* at 81. Justice O’Connor partially concurred. She noted that an insanity acquittee had been found to have committed the prima facie case beyond a reasonable doubt. She then wrote cryptically, as follows:

It might therefore be permissible for Louisiana to confine an insanity acquittee who has regained sanity [sic] if, unlike the situation in this case, the nature and duration of detention were tailored to reflect pressing public safety concerns related to the acquittee’s continuing dangerousness [A]cquittees could not be confined as mental patients absent some medical justification for doing so; in such a case the necessary connection between the nature and purposes of confinement would be absent.

Ibid. at 87–88 (O’Connor, J., concurring). Justice O’Connor also noted that the seriousness of the crime should also affect whether the state’s interest in continued confinement would be strong enough. See *id.* at 88.

If the subject is no longer mentally disordered and therefore no longer non-responsible, it is hard to imagine what possible “medical justification” there could be for continuing civil commitment to protect the public. It is not clear from the O’Connor concurrence if she would require some finding of mental abnormality, as did the statute upheld in *Kansas v. Hendricks*, to make the commitment analogous to traditional civil commitment. 521 U.S. 346, 355 (1997). If not, however, then five justices of the Supreme Court, the four *Foucha* dissenters and Justice O’Connor, would have been willing to countenance pure preventive detention, at least of a person who had committed a crime without being responsible and who continued to be dangerous.

I think that the Court was correct to decouple the potential length of the civil commitment from the sentence for the crime charged. The defendant has been acquitted and the usual justifications for a sentence length do not apply. Roughly, the legislature sets sentences that are proportionate to culpability and that reflect an ordinary, rational offender's dangerousness. The insanity acquittee is neither culpable nor dangerous in the ordinary manner, however. If the basis for the commitment is non-responsible dangerousness, the commitment can justifiably continue until these conditions are no longer met. Although this is true as a theoretical matter, it seems useless to have lengthy commitments for nonviolent offenders. They do not present much danger and the risk that they will be erroneously held longer than necessary is substantial. I would have limited terms of confinement for non-violent acquittees. These could be longer than ordinary involuntary civil commitment terms because the acquittee was prima facie guilty of a criminal offense, which is seldom the case in involuntary civil commitment and never required.⁷⁷ Nonetheless, the terms of post-insanity commitment for nonviolent offenders should be short. Even for those acquitted for crimes of violence, if the subject has a clean disciplinary record in the hospital for a substantial period of time, he should be released at the end of the period or the state can seek ordinary involuntary civil commitment. Another possibility is conditional or probationary release.⁷⁸ If the acquittee has an unproblematic probationary period in the community, the commitment should end.

The Court in *Jones* never noted that the mental disorder and dangerousness had to be linked to ensure that the subject was not responsible for his dangerousness.⁷⁹ After all, non-responsibility for the legally relevant behavior, in this case dangerousness, is necessary to justify involuntary commitment. It is possible for a person to be independently crazy and bad, with no link between them suggesting that the defendant's dangerousness is irrational. For example, a defendant may be wildly jealous because he delusionally believes that his partner has been unfaithful and might have some form of mitigation if he attacked the partner, but there will be no excuse if he robs a bank.⁸⁰ There probably will be such a link in most cases of insanity acquittal, but it cannot be taken for granted empirically.

More important, there is reason to doubt the Court's presumption of continuing mental disorder and dangerousness. By definition, the defendant must have been sufficiently rational to be competent to stand trial. If that state of rational capacity continues, then it is not clear that he continues to be mentally ill for the purpose of involuntary commitment. Moreover, to the extent that the mental disorder played a causal role in the practical reasoning that accompanied the offense, it is perfectly possible that the defendant is no longer dangerous either. This will be

For an attempt to apply Justice O'Connor's suggestion, see *State v. Randall*, 532 N.W.2d 94, 109 (Wis. 1995) (permitting continued confinement if there were a medical justification and the subject was still dangerous, but limiting the term to the maximum sentence for the crime charged). Needless to say, I believe that this practice is simply criminal punishment by other means. The "medical justification" criterion is a transparent and fraudulent attempt to bring this type of commitment within the disease justification for preemptive confinement. The limitation on the term of the commitment to the maximum term for the crime charged is simply a salve to the legislative conscience and a signal that the continued commitment is punitive.

⁷⁷ See JOHN PARRY, CRIMINAL MENTAL HEALTH AND DISABILITY LAW, EVIDENCE AND TESTIMONY 476-77 (2009) (discussing the criteria for commitments for dangerousness, which do not include a finding of prima facie guilt for a criminal offense or the equivalent thereof). In my experience, seriously violent conduct is virtually always processed through the criminal justice system. Moreover, traditional civil commitment requires only the lower, clear and convincing burden of persuasion. *Addington v Texas*, 441 U.S. 418, 431-33 (1979).

⁷⁸ See CAL. PENAL CODE § 1026.2(e)-(f) (West 2010).

⁷⁹ *Jones v. United States*, 463 U.S. 354, 363-65 (1983) (discussing the need for a showing of both mental disorder and dangerousness to justify these commitments and apparently assuming that the fact of an insanity acquittal supplies a link between the two criteria, but not explicitly requiring the causal link at the time of commitment).

⁸⁰ I recognize that a narrow interpretation of the standards for legal insanity would not excuse the person because he would neither be justified nor excused if the facts were as he believed them to be. On a broader reading, however, the defendant is not a rational agent and might have a plausible claim for legal insanity.

especially possible if the prosecution bears the burden of persuasion on legal insanity and the defendant only needs to cast a reasonable doubt about his sanity. Even if the defendant bears the burden of persuasion, as is commonly the case at present, the considerations just adduced apply.

My suggestion, therefore, is that all post-acquittal commitments should be for evaluation only and should not be for full commitment. There is little need to deprive the defendant of more liberty to protect the public. Preventive commitment should occur only if the evaluation indicates that the criteria for commitment are met at present. The evaluations need not last more than a few weeks. That is more than sufficient for the state's mental health professionals to reach a conclusion. I once again think that a subject facing potentially indefinite commitment and those facing substantial limited terms should be entitled to the services of an independent mental health professional to help defend against the commitment. Without such help, they have essentially no chance if the state's professional recommends commitment. These forms of commitment are more onerous than ordinary involuntary commitment and fairness requires that insanity acquittees should have a chance to avoid long-term incarceration in secure forensic facilities. For the same reason, the State should have to prove the commitment criteria by the higher, clear and convincing standard that *Addington* imposed for ordinary involuntary commitment to avoid imposing too much risk of error on the individual.⁸¹

Conclusion

Since the wave of changes to insanity tests and procedure in the wake of Hinckley there has been little substantive change in the test for legal insanity. Only the procedural change of shifting the burden of persuasion to the defendant seems to have been outcome determinative. In contrast, there have been considerable further procedural changes. The Supreme Court unjustifiably held that jurisdictions were constitutionally permitted to effectively abolish the insanity defense, but few have done so. The insanity defense continues to work reasonably well despite its critics.

⁸¹ *Addington v. Texas*, 441 U.S. 418, 425-433 (1979).